

IN THE NATIONAL COMPANY LAW TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

CP (IB) – 286(PB)/2019

Order Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/s Ananya Infraventures Private Limited

... Financial Creditor

Versus

M/s Tulsiani Constructions & Developers Private Limited

Registered Office:

Plot No. 3, Block N, Green Park (Main),

New Delhi- 110016

CIN No.: U70200DL1999PTC256694

... Corporate Debtor

Order Pronounced On: 08.02.2024

CORAM:

**CHIEF JUSTICE (RETD.) RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT**

**SHRI AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For the Financial Creditor : Mr. Ashish Kumar, Mr. Deepak Girdhar
Advocates

For the Corporate Debtor : Mr. P. Nagesh, Sr. Adv., Mr. Simran Jyot
Singh, Adv.

ORDER

1. The present application is filed by M/s Ananya Infraventures Private Limited, before this Adjudicating Authority on 18.01.2019 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“**Code**”), r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating the Corporate Insolvency Resolution Process (“**CIRP**”), declaring moratorium and for appointment of Interim Resolution Professional (“**IRP**”), against the Corporate Debtor (“**CD**”) viz. M/s Tulsiani Constructions and Developers Private Limited.

2. The total amount claimed to be in default as per Part-IV of the application is **INR 3,18,37,033/-** (Rupees Three Crores Eighteen Lacs Thirty-Seven Only), comprising of principal amount to the tune of INR 1,34,74,800/- (Rupees One Crore Thirty-Four Lacs Seventy-Four Thousand Eight Hundred Only) and interest @ 18% to the tune of INR 1,43,56,449/- (Rupees One Crore Forty-Three Lacs Fifty-Six Thousand Four Hundred and Forty-Nine Only), calculated for the period beginning from July 2012 till 31.03.2018 and INR 37,86,784/- (Rupees Thirty Seven Lacs Eighty Six Thousand Seven Hundred and Eighty Four Only) for period beginning from 01.04.2018 till 31.12.2018. It is relevant to mention that aforesaid total amount of INR 3,18,37,033/- claimed to be in default has been wrongly calculated and the sum of the alleged principal amount due along with alleged interest, as stated above makes total amount of **INR 3,16,18,033/-** as due and payable.

3. The CD was Incorporated on 07.06.1999, having CIN: U70200DL1999PTC256694, under the Companies Act, 1956. The registered address of the Corporate Debtor is at Plot No. 3,

Block N, Green Park (Main), New Delhi- 110016. Therefore, this Bench has jurisdiction to deal with this application. A copy of the master data of the Corporate Debtor is attached as Annexure-A at Page 16-17 of the Application.

4. Facts of the Case and Submissions made by Ld. Counsel for the Applicant

i.Applicant had extended an unsecured loan of Rs.1,89,12,800/- (One Crore Eighty-Nine Lacs Twelve Thousand Eight Hundred only) to the CD in year 2012 via RTGS, the details of which are as follows:

Date	In favor of	Amount
05.07.2012	Tulsiani Constructions and Developers Private Limited ("CD")	INR 50,00,000/-
05.07.2012	CD	INR 83,12,800/-
06.07.2012	CD	INR 50,00,000/-
30.08.2012	CD	INR 6,00,00/-
	Total	INR 1,89,12,800/-

ii.Due to earlier dealings with the CD, the Applicant owed a sum of Rs.50,00,000/- to the CD and therefore has adjusted the same against the debt of INR 1,89,12,800/-, thereby reducing the principal debt amount of CD to Rs.1,39,12,800/- as on 30.08.2012.

iii.It is submitted by the Applicant, that as verbally decided with the CD, interest @ 18 % p.a., shall be paid on deferred basis by the CD to the Applicant after expiry of 5 years. However, no payment has been made by the CD after expiry of 5 years.

- iv. It has been submitted that the Applicant has given the property bearing Plot No.3, Block N, Green Park (Main), New Delhi-110016 on lease for monthly rent of INR 30,000/- to the CD, who is occupying the said property in capacity of tenant for maintaining its registered office. The Applicant has submitted that the lease has expired on 30.11.2017 and thus Applicant is pursuing separate action under relevant provisions of Transfer of Property Act 1882 against the CD in this regard.
- v. On repeated demands CD finally furnished three cheques for INR 2,19,000/- each to the Applicant. Two Cheques were encashed on 26.03.2018 while third cheque was dishonored on 11.04.2018 for want of sufficient funds.
- vi. With the aforesaid payment through two cheques by the CD to the tune of Rs. 4,38,000/-, debt liability of the CD was reduced to Rs.1,34,74,800/- (Rs.1,39,12,800/- minus Rs. 4,38,000/-).
- vii. That the Applicant served a legal notice on 26.11.2018, demanding payment of principal amount and deferred interest. The said demand notice was not replied by the CD.
- viii. As per the Applicant total amount in default is INR 3,18,37,033/-, comprising INR 1,34,74,800/- as principal debt and interest component of INR 1,43,56,449/- for period from July 2012 till 31.03.2018 and INR 37,86,784/- for period from 01.04.2018 to 31.12.2018. It is relevant to mention that the said principal amount and interest makes total sum of INR 3,16,18,033/- in alleged default instead of INR 3,18,37,033/-, which is a wrong calculation put forth in the Application.

5. Facts of the Case and Submissions made by Ld. Counsel for the CD are as follows:

- i. CD has submitted that there does not exist any financial debt to be recovered from the CD by the Applicant.
- ii. The CD has denied that there was any verbal agreement / or written agreement for repayment of the loan with the deferred interest @18% after 5 years as alleged by the Applicant.
- iii. It is submitted by the CD that the sum of INR 1,89,12,800/- was received from the Applicant in 2012 as a token advance for purchasing an open agricultural land, situated in Mohabatganj, Naini, Allahabad, by CD. It was decided between the parties to bring a joint Infrastructure Project on said land, and further agreed that the Applicant shall invest at least Rs.10 Crore on or before 31st March 2013 in said project, and failure thereof shall ultimately result in forfeiture of Rs.1,89,12,800/-. Applicant failed to honor the said financial commitment and thus the entire sum of INR 1,89,12,800/- has stood forfeited as on 01.04.2013. Hence, there is no legally recoverable debt.
- iv. That CD has further submitted that the alleged adjustment of INR 50,00,000/- against alleged loan for sum of INR 1,89,12,800/- has been adjusted / set off by the Applicant against the total alleged due payable by the Applicant to one *Tulsiani Homes Pvt. Ltd.* which is sister concern of the CD herein. Thus the said set off has no relation with the transaction in question.
- v. That the CD submits that the Applicant has given on lease 'Ground floor of Plot No.3, Block N, Green Park (Main), New Delhi-110016' which is being used by CD *inter alia* for maintaining its Registered Office. Further CD has submitted

that the Applicant has instituted separate suit for recovery of possession and mesne profit in respect of the said property against the CD which is currently pending adjudication.

- vi. The Applicant had approached the CD for financial assistance of around Rs.6.57 Lacs, which shall be adjusted against the rents otherwise payable for the property by the CD as tenant. In lieu thereof, CD issued 3 cheques for INR 2.19 lacs each, upon an assurance for execution of the lease deed. One of those cheques got dishonored. Hence, the said three cheques was issued by the Corporate Debtor neither in discharge of any outstanding legal liability nor towards the part payment of alleged unsecured loan.
- vii. The story of Applicant that the alleged unsecured loan was given for a term of 5 years, to be returned with interest of 18% is concocted and sham.
- viii. CD has submitted that it is settled principle of accounting, that the income accrued and/or arised should be booked, whereas Applicant has not placed any document to show that the said interest income was ever booked and/or reflected in previous accounts and financial statements.
- ix. It is case of the CD that there is no existing “legally recoverable debt” by the Applicant. Even otherwise Application is heavily barred by limitation. That the story of verbal agreement with deferred interest of 18% & repayment after 5 years is just an afterthought to fit the case in limitation. That by showing the payment of rent as part payment of alleged loan is nothing but an attempt of Petitioner to confuse the court and get its otherwise dead claim alive and to exert pressure on CD to settle the dispute qua rented property in civil suit.

6. **Clarifications sought vide order dated 02.01.2024**

i. We also find it relevant to mention that in the interest of justice and to observe principles of natural justice, we vide order dated 02.01.2024 raised certain queries for the Applicant to provide clarifications, which are reproduced herein below:

a. INR 3,18,37,033/- claimed to be in default in row 2 of Part IV viz., "Particulars of Financial Debt" is wrongly calculated as the sum of INR 1,34,74,800/- (principal debt) and INR 1,43,56,449/- (interest) for period from July 2012 till 31.03.2018 and INR 37,86,784/- (interest) for period from 01.04.2018 to 31.12.2018, totals to INR 3,16,18,033/- as due and payable.

b. Applicant has submitted in pleading part that Three cheques were received from the Corporate Debtor towards partial payment of debt. However, we see that ledger maintained by the Applicant for the Respondent at Page 22 of the Application, shows entry dated 10.04.2018 and 11.04.2018 that a cheque to the tune of INR 2,19,000/- was received from the CD, as "Being rent recd from tulsian construction ch no. 40726" which was dishonored for the reasons of insufficient funds. Whereas for other two cheques which were admittedly encashed for an amount of INR 4,38,000/- the ledger entry dated 26.03.2018 only records "Being amt from tulsian construction".

c. The Applicant has alleged a set off of INR 50 lacs against the alleged debt payable by the Respondent/ Corporate Debtor to the Applicant whereas Auditors Report placed by the Applicant shows that INR 50,00,000/- was payable to Tulsiani Homes Private Limited and not to the CD.

ii. In a clarification dated 08.01.2024 furnished by the Applicant in response to aforesaid queries, The Applicant qua first query has admitted that total amount claimed to be in default in Row 2 of Part IV, ought to be INR

3,16,18,033/- and calculation as put forth in the Application has been wrongly calculated. As regards the query b is concerned, the Applicant has only provided that the error made by the accountant of the Applicant Company in stating the head as '*Being rent recd from tulsian construction*' wherein the actual head should have been same as '*Being amt from tulsian constructions*'. Further, qua query c, the Applicant has admitted that Tulsiani Homes Pvt. Ltd. is a separate legal entity from the Respondent herein and have separate transactions with the Applicant.

- iii. Respondent has filed Reply dated 22.01.2024 to the clarification so furnished by the Applicant, whereby the Respondent has denied the clarifications as false. Respondent has also annexed an email dated 13.06.2018 along with the ledger with respect to rent received by the Applicant.
- iv. We are not inclined to take on record any additional document(s) furnished by the parties at this stage of clarification.

7. The Financial Creditor has relied upon the following documents:

- i. Copy of three cheques, bearing no. 40727, 40728 and 40726 along with its return memo of dishonor for cheque bearing no. 40726 as Annexure-B (Colly).
- ii. Ledger account maintained by Ananya Infraventures Private Limited for CD as Annexure C.
- iii. Auditor's Report of the Applicant for FY ending on 31.03.2018 as Annexure D.
- iv. Legal Notice dated 26.11.2018 along with postal receipts and delivery report as Annexure E (Colly).

- v. The Bankers' Books of Evidence Act 1891 certificates along with bank statements of the Applicant as Annexure F (Colly).

7. **The CD has placed the following documents on record:**

- i. Ledger account maintained by CD for Applicant as Annexure A:1

8. **Analysis and Findings**

- i. We have heard the Ld. Counsel for the Applicant and Ld. Senior Counsel for the CD and perused the documents submitted by them.
- ii. First and foremost, the issue which needs to be determined is whether the Applicant has been able to prove the existence of "Financial Debt".
- iii. From perusal of records, we note that there is no formal agreement in place between the Applicant and the CD with respect to financial debt as claimed by the Applicant.
- iv. We however at the same time find that the CD has admitted the receipt of INR 1,89,12,800/- in 2012. CD has not provided even a single evidence in support of its case that there was an agreement to bring a joint Infrastructure Project on said land, and in relation thereto the Applicant was under an obligation to invest at least Rs.10 Crore on or before 31st March 2013 in said project, and failure thereof by the Applicant resulted in forfeiture of INR 1,89,12,800/-. Further, no communication or letter has been provided by the CD to support the case of forfeiture. Hence, there is no dispute that in 2012 the Applicant had given a sum of INR 1,89,12,800/- to the CD.

v.As regards adjustment of INR 50,00,000/-, no document has been produced by the Applicant in this regard to show that it was adjusted towards dues payable to the CD. However, submission of the CD that the said INR 50,00,000/-, was rather adjusted off against dues payable to one Tulsiani Homes Pvt. Ltd., is substantiated from bank statements for month of July 2012, placed by the Applicant at page 43 of the Application, which shows that the said sum has been received by the Applicant from Tulsiani Homes on 06.07.2012, making it dues payable to Tulsiani Homes by the Applicant. Auditor's Report of the Applicant also shows sum of INR 50,00,000/- payable to Tulsiani Homes Private Limited only and not to the CD. Hence, we find that INR 50,00,000/- payable to Tulsiani Homes Pvt. Ltd. by the Applicant could not be adjusted against INR 1,89,12,800/- given to CD in 2012. Further, in Clarification dated 08.01.2024, the Applicant has itself admitted that Tulsiani Homes Pvt. Ltd. is a separate entity and carries separate transaction with the Applicant.

vi.Now it is also not in dispute that the Applicant has let the property bearing Plot No.3, Block N, Green Park (Main), New Delhi-110016 on lease to the CD for a monthly rent of INR 30,000/-. The submission of the CD that cheques were issued towards rent payable and not towards discharge of any liability towards the alleged financial debt is partially substantiated from the ledger placed by the Applicant on page 22 of the Application, where it shows via entry dated 10.04.2018 and 11.04.2018 that a cheque to the tune of INR 2,19,000/- was received from the CD, as "*Being rent recd from tulsian construction ch no. 40726*" which was dishonored for the reasons of insufficient funds. Whereas for cheques encashed for an amount of INR 4,38,000/- the ledger only records "*Being amt from tulsian construction*". We see that

with respect to the said unidentified payment of INR 4,38,000/- as “*Being amt from tulsian construction*”, there is no reconciliation between the parties. Further, we are not convinced with the clarification furnished by the Applicant that mismatch has occurred on account of error made by accountant and ‘*Being rent recd from tulsian construction ch no. 40726*’ ought to be recorded by the accountant as ‘*Being amt from tulsian construction*’. We see that this fact has not been placed before us at any time before and thus we are not inclined to accept such additional information furnished at the stage of clarification.

vii. Perusal of Auditor’s Report for the FY 2017-18 placed by the Applicant, reflects short term loans and advances to the CD for an amount of INR 1,34,74,800/-, at page 30 of the Application. However, in absence of agreement and from very limited information and documents placed before us by the Applicant we are unable to infer the capacity in which and purpose of granting said sum by the Applicant to the CD.

viii. In view of the aforesaid, we find that the Applicant at its best has been able to only establish that it had given a sum of INR 1,89,12,800/- to the CD in 2012. The Applicant has even failed to establish that cheques for an amount of INR 4,38,000/- were issued towards partial discharge of liability.

ix. Applicant has omitted to plead “date of default” in Application. We further find that although the Auditor’s Report duly support the case of the Applicant qua principal amount of INR 1,34,74,800/- claimed to be pending, the same is not substantiated from any other document. The Bank Statement provided by the Applicant has been provided only for July 2012 and March 2018 and does not substantiate the claim of the Applicant for principal amount claimed to the tune of INR 1,34,74,800/-.

x.No Financial Contract, setting the terms of financial debt and tenure thereof has been placed. We find it appropriate to mention here that in Form 1, as given under IBBI (Application to Adjudicating Authority) Rules 2016 for filing Application under section 7 of the Code, requires the Applicant to provide a copy of “Financial Contract” with the Application. At this stage, it is relevant to mention that the Financial Contract is defined under Rule 3 (d) of the IBBI (Application to Adjudicating Authority) Rules 2016, which reads as follows:

“financial contract” means a contract between a corporate debtor and a financial creditor setting out the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment.

xi. Ld. Senior Counsel, Mr. P. Nagesh had during the course of arguments relied upon the case decided by The Hon’ble National Company Law Appellate Tribunal titled as **Prayag Polytech Pvt. Ltd. Vs Gem Batteries Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 713 of 2019**, where it was held that:

5. Learned Counsel for the Appellant further submits that “financial contract” as defined in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 does not debar oral contract and financial contract can be oral in terms of Section 10 of the Contract Act. According to him Section 7 application under IBC should not have been rejected.

6. We have gone through the records and the impugned order. Merely pointing out that TDS was deducted would not be sufficient to conclude that there was financial debt. TDS can be deducted for various reasons.

As regard relying on Section 10 of the Contract Act, 1872, in our view IBC is a complete code in itself. Section 238 of IBC has overriding effect on provisions inconsistent with IBC. The ‘Financial contract’ is defined in “Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016” Rule 3(1)(d) requires setting out the terms of the financial debt including tenure etc. We find that Appellant has failed to show any record showing financial debt to be there. As such, we are unable to find any fault in the impugned order while rejecting Section 7 application.

In context of the present case, we are inclined to agree with submissions made by the Ld. Senior Counsel, for the CD that Applicant has failed to show any record establishing “Financial Debt”

xii. Further, qua the interest amount claimed, we find that the Auditor’s report for the FY 2017-18 placed by the Applicant does not show accrual of any interest income. As such in absence of any formal agreement, we are unable to accept the submission of the Applicant that the parties had agreed upon deferred interest @18% after the expiry of five years as if it was true, the accrual of interest would be recorded as Income in the balance sheet as reproduced under the Auditor’s Report placed by the Applicant.

xiii. It is well settled law that it is for the Applicant invoking CIRP to prima facie show the existence in their favor, of a legally recoverable debt, however, in the present case, for the reasons aforesaid we find that the Applicant has failed to establish

sum of INR 1,89,12,800/- given to the CD to be a “Financial Debt” in terms of IBC.

- xiv. Apart from our finding detailed above that Applicant has failed to prove the existence of “financial debt” and as such the case does not survive on merits, we find even otherwise the Application to be barred by the law of limitation.
- xv. That as per section 238A of the Code, provisions of the Limitation Act, 1963 are applicable to the proceedings before the Adjudicating Authority. Further, as per law laid down by the Hon’ble Supreme Court, in the case of ***B.K. Educational Services Pvt Ltd versus Parag Gupta and Associates in Civil Appeal No. 23988 of 2017***, Article 137 of the Limitation Act 1963 is applicable to proceedings initiated under section 7 of the Code.
- xvi. As per Article 137 of the Limitation Act, an Application under Section 7 of the Code shall be filed within 3 (Three) years from the date when “Right to Apply” accrues, i.e., when a “default” occurs. If the default has occurred more than three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act.
- xvii. In the present case, no date of default has been mentioned in the Application. The debt claimed by the Applicant was extended via four different tranches way back in 2012, with last payment having disbursed on 30.08.2012. Whereas Application under section 7 has been filed on 18.01.2019 i.e., after lapse of more than 6 (Six) years.
- xviii. Further, it is not the case of the Applicant that the CD has acknowledged or made any payment towards discharge of the alleged outstanding debt in terms of section 18 and 19 of the Limitation Act 1963, within 3 years from the date of cause of action so as to claim the benefit of extension of Limitation under the said provisions.

- xix. Rather, Applicant with its submission that cheques were received from the CD towards partial discharge of liability has made only a failed attempt to claim the benefit of extension under section 19 of the Limitation Act. We repeat here that the Applicant has failed to prove that those cheques were issued by CD towards partial discharge of liability and also there is no reconciliation between the parties with respect to unidentified payment of INR 4,38,000/- made by the Respondent. Hence, in such scenario, the benefit of extension of limitation cannot be given to the Applicant.
- xx. We further here appreciate the observation of the Hon'ble Supreme Court made in the case of ***Radha Exports (India) (P) Ltd. v. K.P. Jayaram (2020) 10 SCC 538*** that it is for the applicant invoking the Corporate Insolvency Resolution Process, to prima facie show the existence in his favor, of a legally recoverable debt. In other words, the applicant had to show that the debt is not barred by limitation. In the present case, we note that the Applicant has miserably failed to prove that Application has been filed within the prescribed period of limitation.
- xxi. Further, it is no more *res integra* that intent of the IBC is not to give a new lease of life to debts which were already time barred. We are of the considered view that the Application under Section 7 of the IBC, having been filed in 2019 while limitation period of three years expired on 30.08.2015, and is therefore hopelessly barred by the law of Limitation.
- xxii. Even otherwise on merits, in absence of financial contract or other cogent evidence, we hold that Applicant has failed to prove its "financial debt" in terms of section 7 of the Code. The Application filed under section 7 of the case has no merit to survive. Thus, we are inclined to dismiss CP(IB)-286(PB)/2019.

9. **Order**

In light of the above facts and circumstances, it is, **hereby ordered** as follows:

i. The Application bearing **C.P. (IB) – 286(PB)/2019** filed by the **M/s Ananya Infraventures Private Limited**, the Applicant/(FC), under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **M/s Tulsiani Constructions and Developers Private Limited**, the Respondent/ (Corporate Debtor), is dismissed.

ii. No order as to cost.

iii. File be consigned to record storage (current).

iv. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-
RAMALINGAM SUDHAKAR
(PRESIDENT)

Sd/-
AVINASH K. SRIVASTAVA
MEMBER (TECHNICAL)