NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 673 (ND)/2020

In the matter of:

PANKAJ PIYUSH TRADE AND INVESTMENT LIMITED.
(CIN L65990DL1982PLC256291)
314, 3RD FLOOR, OPPOISTE PLOT NO. 39,
R.G. MALL SECTOR-9, ROHINI
NEW DELHI- 110085 ...PETITIONER/ FINANCIAL CREDITOR

VERSUS

KAMAL IDEAL INFRATECH PRIVATE LIMITED,
(CIN. U70102DL2012PTC232348)
F-35, SHOP NO. 2 KIRTI NAGAR
NEW DELHI – 110015 ... RESPONDENT / CORPORATE DEBTOR

SECTION: U/S 7 of IBC, 2016

Order delivered on: 25.06.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)

MR. K.K. VOHRA, HON'BLE MEMBER (T)

For the Petitioner: Mr. Rishi Kumar Singhal

For the Respondent: None Present

ORDER

Per Mr. Abni Ranjan Kumar Sinha (Member Judicial)

1. The present petition has been filed under Section 7 of the Insolvency &Bankruptcy Code, 2016, (hereinafter referred to as the

"Code"), praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor on grounds of its inability to liquidate its financial debt.

2. As per averments made in the petition, the Financial Creditor on the specific request of Directors of the Corporate Debtor granted a loan of Rs 6,14,00,000/- during the Financial Year 2012-13 and another temporary loan of Rs 52,90,000/- in the Financial Year 2014-15 on various dates. Further, the amount was given by the Applicant on the specific request of the Directors of the Corporate Debtor, with an understanding that the Corporate debtor would pay the interest on regular basis and the said amount would be refunded by the Corporate debtor along with an interest accrued thereon, if the same remained unpaid for any reasons, within a period of 3 years or on demand by the Applicant. During the Financial Years 2012-13 to 2018-19 the Corporate Debtor had deducted the TDS on various interest payments on the financial debt and the same is duly reflected in the form 26AS of the Applicant downloaded from the Income tax site. The Corporate Debtor had defaulted in payment of interest on time and the Applicant Being in need of funds requested the corporate Debtor to refund the loan amount in the month of August, 2018. The Corporate Debtor however refunded only part amount along with interest in instalments and also avoided the request of the Applicant to refund the loan amount in full. The total amount due and payable by the Corporate Debtor to the Petitioner/Financial Creditor on 30.11.2019 is INR 4,51,02,485/- including principal amount of Rs.

4,14,00,000/- along with unpaid accumulated interest amounting to Rs. 37,02,485/-.

3. The Financial Creditor served Legal Notice dated 22.10.2019 to the Corporate Debtor and the same was delivered to the Corporate Debtor on 25.10.2019. The Corporate Debtor having the liability defaulted in repayment of the due and payable financial debt on demand i.e. upon lapse of period given in demand notice dated 22.10.2019 for repayment of the tendered amount along with accrued interest. Further, the Financial Creditor has annexed the true copy of the statement of account for the period from 01.04.2013 to 30.11.2019, copy of bank statement of Financial Creditor showing details of loan payments on various dates, and copy of confirmation of account for the period 01.04.2012 to 31.03.2013 issued by the Corporate Debtor confirming receipt of loan as well as TDS certificates.

4. We have heard the Ld. Counsel appearing for the applicant and perused the averments made in the application filed on behalf of the applicant. We find that the Petitioner has annexed the bank statement of the Petitioner showing the details of loan payments on various dates and lastly 06.12.2019, Copy of confirmation of account for the period from 01.04.2012 to 31.03.2013 issued by Corporate Debtor confirming receipt of loan of Rs. 6,48,79,350/- and Copy of statement of account of the Corporate Debtor in the books of the Petitioner for the period from 01.04.2013 to 30.11.2019 showing total of Rs. 4,51,02,485/-.

5. In course of hearing we find that the Ld. counsel appearing for the applicant fails to show us any agreement or document to show what would be the agreed rate of interest which the respondent is liable to pay in lieu of the amount received by the applicant. We also noticed that the applicant has not enclosed any board resolution to show that the amount was paid on the basis of the board resolution passed by the company or the board resolution of the respondent company to show that the respondent company resolved to take loan from the applicant company therefore before issuance of the notice, we would like to examine this aspect whether the Petitioner is a Financial Creditor or the amount given by the Petitioner to the Corporate Debtor is a financial debt or not?

6. At this juncture, we would like to refer the definition of Financial Debt, Financial Creditor, Debt and Claim as referred in Section 5 (7), 5(8), 3(6) and 3(11) and the same, respectively, are quoted below: -

> "***Section 5 (7)***
>
> *"financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to; "*
>
> "***Section 5 (8)***

(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;"

"Section 3(6)

"claim" means— (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured; (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"

"Section 3(11)

(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

7. From the plain reading of the definitions which we have referred above, we find that debt means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and

operational debt which means debt includes the financial debt and operational debt and definition of financial debt shows that a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes either of clause (a) to (i) and if the amount paid comes under the definition of Section 5 (8) of the IBC only in that case a person who gave the money comes under the definition of Financial Creditor.

8. At this juncture, we would like to refer the arguments of the Ld. Counsel for the Petitioner, who in course of arguments submitted that the Corporate Debtor had deducted TDS upon the interest accrued on the said advanced amount from the financial year 2012-2013 till the financial year 2018-19 and deposited the said TDS amount with the Income Tax Authority. The said TDS amount has been reflected in form 26-AS in the Petitioner's account. At this juncture, we would like to refer the decision of the Hon'ble High Court in the matter of ***Utility Powertech Limited Vs. Amit Traders, RFA No. 515/2015 decided on 15th May, 2018***wherein it was held that:

> ***"19. On the issue of TDS deduction, the Trial Court may have erred as the settled position is that deduction of TDS does not constitute an admission of liability. The Trial Court may be wrong in holding that the TDS certificate by itself constitutes an admission of liability. This is not so, inasmuch as the TDS can be deducted even on***

the expectation of estimated liability. Independently of the TDS certificate, the liability of the Defendant is quite clear. The Supreme Court in Commissioner of Income Tax v. Gujarat Fluoro Chemicals (2012) 13 SCC 731 categorically held that "both advance tax as well as TDS are based on estimation of income by the assessee." The Bombay High Court as well, in S.P. Brothers v. Biren Ramesh Kadakla (2009) 1 Bom CR 453 has held that "the issuance of TDS certificates does not amount to an acknowledgement of defendant within the meaning of Section 25 of the Indian Evidence Act.....The TDS certificate is primarily to acknowledge the deduction of tax at source." *The judgement dated 27th November, 2012 in Bigdot Advertising & Communications Pvt. Ltd. v. Union of India [CS(OS) No.226/2000] was dealing with the question of the person who is liable once the TDS certificate is issued. It is not a precedent on the proposition that if a TDS certificate is issued, it amounts to admission of liability. In light of this, though the deduction of TDS by itself cannot be sufficient to impose liability, but on a totality of facts it is clear that the defendant is liable."*

9. In the light of that provisions and decisions referred above as well as the submissions made on behalf of the Petitioner, when we shall consider the case in hand then we are of the view that in the case in hand, there is no dispute that certain amount has been advanced by the Petitioner to the Corporate Debtor through RTGS payments on different dates but the question is that can the amount be treated as a financial debt or not? We find that the Petitioner in his application, everywhere referred the word 'loan amount' and not the debt and against that loan amount, he was getting the interest from the Corporate Debtor, therefore, we are unable to accept the contention of the Petitioner that he is the Financial Creditor under Section 5(7) and the amount which he has advanced as a loan comes under the definition of Section 5 (8). Further, as per the decision Hon'ble Delhi High Court, the issuance of TDS certificates does not amount to an admission of liability and the TDS certificate is primarily to acknowledge the deduction of tax at source.

10. In the background of these facts, when we have gone through the case in hand, then we further find that there are no documents of loan agreement, which would show, what was the agreed rate of interest and as we have already referred the definition of financial debt in the aforementioned para and on the basis of the same we are of the considered view that the claim of the petitioner do not come under any of the clause (a) to (i) of Section 5 (8) of IBC.

11. At this juncture, we would like to refer Section 179 as well as Section 186 of the Companies Act, 2013 which relates to the case in hand and the relevant provision of the said Section is quoted below:-

> ***"179. Powers of Board***
>
> *(1) The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do:*
>
> *Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting:*
>
> *Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.*
>
> *(2) No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.*
>
> *(3) The Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:—*
>
> *(a) to make calls on shareholders in respect of money unpaid on their shares;*
>
> *(b) to authorise buy-back of securities under section 68;*
>
> *(c) to issue securities, including debentures, whether in or outside India;*

(d) to borrow monies;

(e) to invest the funds of the company;

(f) to grant loans or give guarantee or provide security in respect of loans;

(g) to approve financial statement and the Board's report;

(h) to diversify the business of the company;

(i) to approve amalgamation, merger or reconstruction;

(j) to take over a company or acquire a controlling or substantial stake in another company;

(k) any other matter which may be prescribed:

Provided that the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditions as it may specify:

Provided further that the acceptance by a banking company in the ordinary course of its business of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, or the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be deemed to be a borrowing of monies or, as the case may be, a making of loans by a banking company within the meaning of this section.

Explanation I.—Nothing in clause (d) shall apply to borrowings by a banking company from other banking

companies or from the Reserve Bank of India, the State Bank of India or any other banks established by or under any Act.

Explanation II.—In respect of dealings between a company and its bankers, the exercise by the company of the power specified in clause (d) shall mean the arrangement made by the company with its bankers for the borrowing of money by way of overdraft or cash credit or otherwise and not the actual day-to-day operation on overdraft, cash credit or other accounts by means of which the arrangement so made is actually availed of.

(4) Nothing in this section shall be deemed to affect the right of the company in general meeting to impose restrictions and conditions on the exercise by the Board of any of the powers specified in this section."

"186. Loan and investment by company

(1) Without prejudice to the provisions contained in this Act, a company shall unless otherwise prescribed, make investment through not more than two layers of investment companies:

Provided that the provisions of this sub-section shall not affect,—

(i) a company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country;

(ii) a subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

(2) No company shall directly or indirectly —
(a) give any loan to any person or other body corporate;
(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and
(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding sixty per cent. of its paid-up share capital, free reserves and securities premium account or one hundred per cent. of its free reserves and securities premium account, whichever is more.

(3) Where the giving of any loan or guarantee or providing any security or the acquisition under sub-section (2) exceeds the limits specified in that sub-section, prior approval by means of a special resolution passed at a general meeting shall be necessary.

(4) The company shall disclose to the members in the financial statement the full particulars of the loans given, investment made or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security.

(5) No investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained:
Provided that prior approval of a public financial institution shall not be required where the aggregate of the loans and

investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given does not exceed the limit as specified in sub-section (2), and there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

(6) No company, which is registered under section 12 of the Securities and Exchange Board of India Act, 1992 and covered under such class or classes of companies as may be prescribed, shall take inter-corporate loan or deposits exceeding the prescribed limit and such company shall furnish in its financial statement the details of the loan or deposits.

(7) No loan shall be given under this section at a rate of interest lower than the prevailing yield of one year, three year, five year or ten year Government Security closest to the tenor of the loan.

(8) No company which is in default in the repayment of any deposits accepted before or after the commencement of this Act or in payment of interest thereon, shall give any loan or give any guarantee or provide any security or make an acquisition till such default is subsisting.

(9) Every company giving loan or giving a guarantee or providing security or making an acquisition under this section shall keep a register which shall contain such particulars and shall be maintained in such manner as may be prescribed.

(10) The register referred to in sub-section (9) shall be kept at the registered office of the company and —

(a) shall be open to inspection at such office; and

(b) extracts may be taken therefrom by any member, and copies thereof may be furnished to any member of the company on payment of such fees as may be prescribed.

(11) Nothing contained in this section, except sub-section (1), shall apply—

(a) to a loan made, guarantee given or security provided by a banking company or an insurance company or a housing finance company in the ordinary course of its business or a company engaged in the business of financing of companies or of providing infrastructural facilities;

(b) to any acquisition—

(i) made by a non-banking financial company registered under Chapter IIIB of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities:

Provided that exemption to non-banking financial company shall be in respect of its investment and lending activities;

(ii) made by a company whose principal business is the acquisition of securities;

(iii) of shares allotted in pursuance of clause (a) of sub-section (1) of section 62.

(12) The Central Government may make rules for the purposes of this section.

(13) If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of

the company who is in default shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

Explanation—For the purposes of this section,—

(a) the expression "investment company" means a company whose principal business is the acquisition of shares, debentures or other securities;

(b) the expression "infrastructure facilities" means the facilities specified in Schedule VI."

12. In the light of the aforesaid provisions, when we shall consider the case of Petitioner then we find that the applicant has not enclosed the resolution passed by the Corporate Debtor company as required under Section 179 as well as under Section 186. In other words, the Petitioner has neither enclosed the resolution passed by the Board of Director of the Corporate Debtor Company nor enclosed the resolution passed by the Board of Director of his company by which the company was authorized to disburse the loan. We have already held that there is no written agreement.

13. For the reasons discussed above, we are of the considered view that the Petitioner has failed to convince us that the amount which he has paid comes under the definition of Financial Debt and the applicant is the Financial Creditor therefore, the present application is not maintainable. Accordingly, we have no other option but to reject the prayer of the applicant to initiate the CIRP against the respondent.

Accordingly, it is therefore, ordered that the present application stands **DISMISSED.**

Sd/-

K. K. VOHRA

Member (T)

Sd/-

25.06.2020

ABNI RANJAN KUMAR SINHA

Member (J)