

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT III**

(IB)-718(ND)2021

In the matter of

An application under Section 7 of Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority Rules, 2016)

And

In the matter of:

1. Pawan Kumar Gupta
Resident of F-29, Hauz Khas,
New Delhi-110016

2. Kiran Gupta
Resident of F-29, Hauz Khas,
New Delhi-110016

...Financial Creditors

Versus

M/s ATS Housing Pvt. Ltd.
Having its Registered Office at:
711/92, Deepali, Nehru Place,
New Delhi-110019

...Corporate Debtor

Order pronounced on 27.05.2022

Coram:

Sh. Bachu Venkat Balaram Das : Member (Judicial)
Sh. Virendra Kumar Gupta : Member (Technical)

Appearances (via video conference):

For Financial Creditor : Ms. Aditi Sinha, Mr. Rajul Shrivastava, Adv.
For Corporate Debtor : Mr. Vijay Nair, Mr. Manorajan Sharma, Adv.

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ORDER

Per: Virendra Kumar Gupta., Member (Technical)

1. The present application has been filed by Financial Creditors, namely **Mr. Pawan Gupta and Ms. Kiran Gupta** under Section 7 of Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as “IBC, 2016”) for initiation of Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) against the Corporate Debtor, namely **M/s ATS Housing Pvt. Ltd.**

Facts of the case

2. The facts, in brief, are that on 21.01.2016, the Financial Creditors and corporate debtor entered into a loan agreement whereby the financial creditors agreed to give a loan of Rs.1,00,00,000/- to the Corporate Debtor for a period of 12 months initially. The corporate debtor agreed to pay the interest of 18% p.a. on quarterly basis. The said loan was remitted through two cheques:
 - i. Cheque No. 325107 drawn on Canara Bank, Hauz Khas Market Branch, New Delhi 110016 issued by Financial Creditor No.1 i.e. Pawan Kumar Gupta for Rs.50,00,000/- (Rupees Fifty Lakhs Only) dated 16.01.2016 and
 - ii. Cheque No. 693632 drawn on Canara Bank, Hauz Khas Market Branch, New Delhi 110016 issued by Financial Creditor No.2 i.e. Kiran Gupta for Rs.50,00,000/- (Rupees Fifty Lakhs Only) dated 16.01.2016.
3. The bank account statements of the financial creditors show that the said loan was encashed on 22.01.2016. In pursuance of the agreement dated 21.01.2016, entered into between the financial creditor and the corporate debtor, the corporate debtor also created a lien on two residential units which were located in a residential project namely “ATS Pristine” situated at Plot No. SC-01/A1, SECTOR 150, Noida, Uttar Pradesh. In pursuance of the same, an Allotment Letter dated 21.01.2016 was also issued by the corporate debtor. In pursuance of the loan agreement, the corporate debtor also issued two post-dated cheques to the financial creditors.

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4. The Loan Agreement was renewed *vide* separate Supplementary Loan Agreements (“Supplementary Loan Agreements”) as described below:
- a. Supplementary Loan Agreement dated 21.01.2017 whereby the tenure of the loan was extended for a period of 6 (six) months ending on 20.07.2017 (interest was to be charged 18% for the tenure of the loan agreement)
 - b. Supplementary Loan Agreement dated 21.07.2017 whereby the tenure of the loan was extended for a period of 12 months ending on 20.07.2018 (interest was to be charged 14% for the tenure of the loan agreement)
 - c. Supplementary Loan Agreement dated 21.07.2018 whereby the tenure of the loan was extended for a period of 12 months ending on 20.07.2019 (interest was to be charged 14% for the tenure of the loan agreement)
 - d. Supplementary Loan Agreement dated 21.07.2019 whereby the tenure of the loan was extended for a period of 12 months ending on 21.07.2020 (interest was to be charged 14% for the tenure of the loan agreement)

Arguments on behalf of Financial Creditor:

5. The learned counsel for financial creditor submits that the corporate debtor also executed a demand promissory note dated 21.01.2016 acknowledging receipt of the loan advanced by the financial creditors. In reference to this demand promissory note, the corporate debtor also issued a waiver letter through which corporate debtor waived its right to take advantage of any default on presentation of the promissory note for the payment thereof. Thereafter, the corporate debtor also requested the financial creditor not to encash the post-dated cheques and return the same as the corporate debtor was facing a shortage of funds. The financial creditor duly complied with the request of the corporate debtor.

6. It is further submitted that after execution of the Supplementary Loan Agreement dated 21.07.2019, no further supplementary loan agreement was executed. The Corporate Debtor had assured that the loan would be repaid and after various follow-ups, the Corporate Debtor issued two cheques both dated 21.07.2021 for Rs. 50,00,000/- (Rupees Fifty Lakhs Only). However, upon presentation on 13.10.2021, the said cheques were dishonoured due to the reason "Funds insufficient" and return memos for both such cheques dated 13.10.2021 were issued. Thus, the default occurred on 13.10.2021 and the default amount is Rs.1,83,00,000/- wherein Rs.1,00,00,000/- was the principal amount and Rs.83,00,000/- was the interest accrued.
7. Accordingly, it is prayed that a debt was outstanding and payable, and a default had occurred, the application was liable to be admitted. It was further submitted that the Financial Creditor has also proposed the name of the IRP to conduct CIRP.
8. The learned counsel appearing on behalf of the financial creditor submits that the respondent has failed to pay the loan and has admitted to the default in its reply. In support of its contention, the financial creditor has also placed the cheques and return memos annexed with Section 7 application.
9. It is further submitted that since the default occurred on 13.10.2021, the mandate of Section 10A of IBC, 2016 is not applicable in the present case. Since, respondent had admitted to payment of debt by issuing cheques towards the same, it is precluded from raising such a defence.
10. On the question of whether there is existence of financial debt, the learned counsel for financial creditor has relied on the judgement passed by Hon'ble Supreme Court in **Orator Marketing Pvt. Ltd. v Samtex Desinz Pvt. Ltd.** [2021 SCC Online SC 513, paragraphs 20-22] wherein the judgment purported to interpret the term 'financial debt' and brought out the legislative intent behind it and the Court overlooked the statutory requirement of 'time value of money'.



11. The learned counsel appearing on behalf of the financial creditor further submits that the defence taken by the corporate debtor that there is no interest due is not valid and has placed relied on the decision of the Hon'ble Supreme Court in **Innovative Industries Ltd. v ICICI Bank [2018 1 SCC 407, PARAGRAPH 30]** wherein it has been held that there is no dispute that debt is disputed so long as the debt is due and payable. Thus, there exists a debt which needs to be paid by the respondent.

Reply On Behalf of the Corporate Debtor

12. The learned counsel appearing on behalf of the Corporate Debtor submits that the tenure of the fourth supplementary loan ended on 21.07.2020, hence, the default occurred on 21.07.2020 and thus the present application is liable to be dismissed under the mandate of Section 10A of IBC, 2016 and the subsequent notifications issued by the Central Government respectively on 25.09.2020 and 22.12.2020 which exempted the corporate debtors from initiation of any insolvency resolution proceedings against them for a period of one year, i.e. from 25.3.2020 to 22.03.2021.
13. The learned counsel appearing on behalf of the Corporate Debtor further submits that the financial creditor has committed fraud by concealing the actual date of default and presenting another date before the Court, hence, the application is liable to be dismissed on grounds of fraud, misrepresentation and concealment.
14. It is further submitted that the default amount didn't constitute financial debt according to its definition given in Section 5(8) of IBC,2016 because for a debt to be considered a financial debt, it has to be disbursed against the consideration for the time value of money. In the present case, after the cessation of the loan agreement with interest clause on 21.07.2020, it was consented by the own act of financial creditors that they would not charge any interest. On the due date of loan payment i.e. 21.07.2020, two cheques were issued by the corporate debtor for the payment of the principal amount i.e. Rs.1,00,00,000/-.



Admittedly, no cheques were issued for payment of any interest nor any agreement was executed for the same. Hence, there exists no financial debt.

15. It is further submitted that no loan agreement was made for payment of the interest amount after 21.07.2020 and no claim or demand was made by the financial creditor for the same, it was considered to be waived by the financial creditor and hence there is no interest due.
16. The learned counsel appearing on behalf of the Corporate Debtor also submits that the present application defeats the purpose of IBC, 2016 and the said Code cannot be used as a mechanism for recovery proceedings.
17. It is further submitted that the corporate debtor is in a good financial state and, thus, this petition is false and frivolous as there exist no circumstances for initiating CIRP process against the corporate debtor.
18. The learned counsel appearing on behalf of the Corporate Debtor further submits that the application has been filed with malicious intent hence it is liable to be rejected. For the said contention, the corporate debtor relied on the judgement passed by Hon'ble National Company Appellate Tribunal (NCLAT) in its judgement dated 30.06.2021 in the matter of **Hytone Merchants Private Limited V. Satabadi Investment Consultants Private Limited [Company Appeal (AT) (Insolvency) No. 258 of 2021]** which relied on Section 65 of IBC, 2016 to hold that an application can be rejected on grounds of it being filed with a malicious intent, that is, not with an intention of resolution of insolvency of the corporate debtor (irrespective of the application complying with all requirements of Section 7(5) of the IBC, 2016.

Findings & Conclusion

19. In this case, a loan has been given initially in pursuance of agreement dated 21.01.2016 for a period of 12 months. The repayment period has subsequently been extended by a number of supplementary loan agreements executed by and between the parties. As per the last supplementary agreement, the payment of debt was to be made by 21.07.2020. Thereafter, there is no written agreement or any written communication between the parties. However, during the course of hearing, on behalf of financial creditor, it has been claimed that there were

oral communications and because of such persuasions/discussions between the parties, the corporate debtor issued two cheques of Rs.50,00,000/- each. The said cheques were presented by the financial creditor and got dishonoured on 13.10.2021. In the absence of any written agreement, the corporate debtor is claiming the benefit of the provisions of Section 10A of IBC, 2016. However, the corporate debtor has not been able to explain the reasons for issuing the cheques on 21.07.2021, which is exactly after one year of expiry of earlier supplementary agreement.

20. It is also a settled legal position that agreement can be oral i.e. it needs not to be in writing always. Thus, by its own conduct, the corporate debtor has accepted the liability to pay the outstanding debt, which has not been paid. Thus, the amount meets the threshold limit as prescribed U/s 4 of IBC, 2016 as amended from 24.03.2020.
21. As regard to no interest claim, now it has been settled by the Hon'ble Supreme Court in the case of *M/s Orator Marketing Pvt. Ltd. versus M/s Samtex Desinz Pvt. Ltd. in Civil Appeal No.2231 of 2021*, that for a debt to be classified as financial debt within the meaning of provisions of Section 7 read with Section 5(8) of IBC, 2016, interest is not a mandatory element. Thus, this claim made by the corporate debtor is also rejected.
22. In view of this, we do not find necessity to deal with other contentions raised on behalf of the corporate debtor as those have no bearing on admissibility of this application.
23. Thus, this application complies with all requirements of IBC, 2016 and Regulations made thereunder.
24. The Financial Creditor has proposed the name of Mr. **Gaurav Katiyar** [Reg. No. **IBBI/IPA-001/IP-P00209/2017-18/10409**] to be appointed as Interim Resolution Professional (IRP). There exists no material to show that any disciplinary proceedings are pending against such proposed IRP or such IRP is otherwise not ineligible to be appointed.

25. . There exists no material to show that any disciplinary proceedings are pending against such proposed IRP or such IRP is otherwise not ineligible to be appointed. The application filed under section 7 of the Code, is otherwise complete and meet all other procedural requirements of the Code and Regulations made thereunder. Hence, we admit the same and pass the following order.

ORDER

- i. The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor M/s ATS Housing Pvt. Ltd.Private Limited is hereby **admitted**.
- ii. We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.
- iii. Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following :-
 - a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

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- c) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
 - d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
 - v. The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
 - vi. The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
 - vii. The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
 - viii. Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
 - ix. **Mr. Gaurav Katiyar** having **Registration No.IBBI/IPA-001/IP-P00209/2017-2018/10409** be appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.
 - x. The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
 - xi. The Financial Creditor/Applicant is directed to deposit Rs.2,00,000/- (Rupees Two Lakh only) with the IRP appointed hereinabove within three days from this order. IRP can claim the preliminary expenses

and fees subject to the approval by the CoC and after constitution of CoC.

26. Registry is hereby directed to communicate the order to the Financial Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.
27. List the main CP on 15.06.2022 for the filing of the progress report.
28. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.




Bachu Venkat Balaram Das
Member (Judicial)



Virendra Kumar Gupta
Member (Technical)

The order is pronounced Under Rule 151 of National Company Law Tribunal Rules,
2016



Madhu Narula
(Court Officer)