

THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

CP(IB) No. 1396/KB/2019

In the matter of

An application 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.

And

In the matter of

Vinod Distributors Private Limited, a company within the meaning of the Companies Act, 1956 and having its Registered Office at 50B, Orphangunj Market Road, Khidderpore, Kolkata-700 023

.....Financial Creditor

Versus

In the matter of:

Dulichand Auto Sales Private Limited, a company within the meaning of the Companies Act, 2013 and having its Registered Office at 53, Nalini Ranjan Avenue, 371 Block G, New Alipore, Kolkata- 700 053

.....Corporate Debtor

Date of hearing : 29/10/2021

Order Pronounced on : 18/11/2021

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Ms. Urmila Chakraborty, Adv.] For the Financial Creditor
2. Mr. Anurag Bagaria, Adv.

1. Mr. Ashok Kumar Dhandhaniya, Adv.] For the Corporate Debtor
2. Mr. Tapas Kumar Das, Adv.]

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition CP(IB) No. 1396/KB/2019 has been filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 by Vinod Distributors Private Limited, the corporate entity having identification no. U51109WB2003PTC095994, and registered office at 50B, Orphangunj Market Road, Khidderpore, Kolkata at 700 023, through its Director Vinod Agarwal Authorised by Financial Creditor vide Board Resolution passed in meeting held on 8th May, 2019, (hereinafter referred to as the Financial Creditor), is seeking Corporate Insolvency Resolution process. In respect of Dulichand Auto Sales Private Limited, another corporate entity having identification No. U50200WB2013PTC193048 and registered office at 53, Nalini Ranjan Avenue, 371 Block G, New Alipore, 700 053.
3. It is submitted by the Financial Creditor that the Financial Creditor had granted a financial accommodation of Rs. 10,00,000/ on the request of the Corporate Debtor.in the form of Inter Corporate Deposit for a period of 120 days bearing interest @ 11 % per annum. It is submitted that the Corporate Debtor had issued letter dated 2nd December, 2015 to the Financial Creditor confirming the terms and conditions relating to disbursement of such loan amount. The corporate debtor had also issued post dated cheque no. 842620 dated 1st April, 2016 in the sum of Rs. 10,00,000/ drawn on State Bank of India, Chowringhee Branch in Kolkata. This cheque was however not deposited because the corporate debtor had requested the Financial Creditor to extend the tenure for further period of 120 days which request was allowed by the Financial Creditor. The tenure of the loan was further extended from time to time, at the request of the Corporate Debtor and finally till 31st July, 2018. Although, the date of default is mentioned as 1st August, 2016, but since the new cheques were issued by the Corporate Debtor. The date of

default would shift to the dates of cheques or any later date on which the Corporate Debtor failed to make the payment. The Corporate Debtor also issued two post dated cheques no. 323076 dated 1st November, 2017, and Cheque No. 323107 dated 30th April, 2018 for a sum of Rs. 10,00,000/ each. However, on each of the due dates, the Corporate Debtor had requested the Financial Creditor not to deposit the cheques, due to financial constraints of the corporate Debtor.

4. It is submitted that sum of Rs.73,233/-was paid as interest after deduction of TDS of Rs. 7,324/-, calculated @ 11% per annum. And the said amount was paid by Cheque No. 233950 dated 31st March, 2016 for Rs. 32,819/- and cheque no. 246663 dated 10th August 2016 for Rs.33,090/-.
5. It is stated that the TDS amounting to Rs. 3,677/- has however not been deposited by the Corporate Debtor for the financial year 2016-17 with the Income-Tax Authorities. It is submitted that letter dated 1st December, 2018 was sent by the financial creditor to the corporate debtor, requesting them to refund the outstanding principal along with overdue interest amounting toRs.12,78,890/-along with unpaid TDS for Rs. 3,677/-, and reply letter dated 31st December, 2018 was received, the contents whereof are utterly false and having been issued with the dishonest intention to usurp the amount of Inter Corporate Loan advanced to the corporate debtor.
6. The Financial creditor sent another letter dated 8th May, 2019 replying to the letter dated 31.12.2018 of the corporate debtor reiterating its claim of refund of principal and overdue interest and TDS dues, and denied the dispute contained in the letter dated 31st December, 2018. It is submitted that no further payment either of the principal sum or interest has been paid by the corporate Debtor.
7. It is stated that the corporate debtor had admitted and acknowledged in writing its liability to repay the said loan amount together with interest thereon to the Financial Creditor by way of several post dated cheques.

However, no payment was made despite several assurances being given and the Corporate Debtor having defaulted in making payment of financial debt. The financial creditor has submitted that the date of default is 1st of August, 2016 and the total amount due from the corporate debtor is Rs.13,24,510/-

8. It is further submitted that since the date of repayment of principal sum was extended till 31st July, 2018, therefore, the date of default for repayment of principal sum is 1st August, 2018.
9. It is submitted that this is unsecured loan and no security document is thus annexed with the petition. The financial creditor has however, enclosed the following papers/document justifying its claim:-

“i. Bank Statement of the Financial Creditor for the period from 02.12.2015 to 08.12.2015, 30.03.2016 to 31.03.2016 & 17.08.2016 to 19.08.2016 under Banker’s Book of Evidence Act, 1891

ii. Letter dated December 2,2015, issued by Dulichand Auto Sales Private Limited to Vinod Distributors Private Limited.”

10. The Financial Creditor proposed the name of **Mr. Jai Narayan Gupta**, to act as an IRP having Registration No. **IBBI/IPA-001/IP-P00371/2017-18/10628**, who has consented vide his affidavit and Form-2 and submitted that he has agreed to accept the appointment as IRP if an order admitting the present application is passed by this Adjudicating Authority. He has further submitted that no disciplinary proceedings are pending against him with the Board or Institute of Insolvency Professionals of ICAI.
11. In reply affidavit, filed through its Director, the corporate debtor, however, submitted that the application is not maintainable in law and on facts. It is a ploy to extract money and its directors to take revenge against the Board of Directors of the company. It is submitted that the claim of the financial debt is disputed, including the same having not been crystallized and not admitted by the Corporate Debtor, the financial creditor has no evidence to establish the claim.

In the reply however, the corporate debtor further submits that “Due to huge business loss, the corporate debtor and its

promoters are facing problems. Several persons including some lenders are illegally threatening and for that purpose the promoters and /or the directors of the company could not take any steps including engaging any advocate to appear before this Hon'ble Tribunal to defend its case in the instant proceeding”.

Since there was huge loss in the company, all employees and staffs had left and as on date there are no staffs and employees in the company. As such it is left to the promoters and the directors to take and/or defend all cases and matters against the company whatever means they have. At the same time the said promoters and directors could not enter the registered office of the company due to physical restrain by some lenders and their henchmen”

12. It is submitted by the Corporate Debtor that the demand notice dated 8th May, 2019 was false and frivolous and the corporate Debtor did not respond to the same. It is submitted that the corporate debtor never approached the financial creditor for any amount of loan.

13. It is submitted that in the year 2015, the financial creditor approached the corporate Debtor through one Mr. Vinod Sharma expressing its willingness to purchase eight vehicles from the Corporate Debtor. However, when the Corporate Debtor asked the Financial Creditor shall make an advance payment for purchase of the vehicles that the Financial Creditor is interested to purchase and shall complete the deal within the period of 120 days from the date of advance. At this juncture, the Financial Creditor insisted that since the particulars of the vehicles to be purchased by the Financial Creditor have not yet been decided, the amount of Rs. 10 Lakhs be treated as loan for a period of 120 days only. The Corporate Debtor submitted that in view of the same, the Corporate Debtor issued a receipt and acknowledged the receipt of Rs. 10 Lakhs for 120 days only. The Financial Creditor agreed that the amount of Rs. 10 Lakhs as given to the Corporate Debtor shall be treated as loan for a period of 120 days only within which period the full consideration for eight vehicles will be paid. It is also submitted that it was agreed by the Financial Creditor that if the Financial Creditor fails, the said amount of advance shall be forfeited after 120 days. It is submitted that the financial creditor had failed and neglected to complete the process of purchasing vehicle or taking delivery of vehicle. Therefore, the Corporate

Debtor suffered huge amount of loss and the corporate debtor was forced to issue post dated cheque to the financial creditor. It is submitted that Mr. Vinod Agarwal who claimed himself to be a director of the applicant has not been authorised for the purpose of initiation of the CIRP and in the absence of any authorisation it is liable to be dismissed. It is submitted that the application is barred by limitation since the claim if any is due as on 31st March, 2016 whereas the instant application is filed in the month of July, 2019. It is denied and disputed by the corporate debtor that any amount was disbursed by the applicant against consideration for time value of money, including payment of interest. and that the financial Creditor has failed to prove and substantiate its claim of the dues. It is submitted that the corporate debtor had never issued any letter to the applicant confirming the terms and condition relating to disbursement of any amount of loan and that the letter dated 2nd December, 2015 is nothing but a receipt which was issued by the corporate debtor for ad-hoc purpose only. It is further denied by the corporate debtor that a request was made to the financial creditor not to deposit the post-dated cheques due to financial constraints and requested to extend the tenure of loan of further period of 120 days. It is denied that any of amount was paid after deduction of tax to the applicant as interest on the loan. It is stated that the corporate debtor has paid a minimum amount of interest of the applicant only at the request of Shri Vinod Sharma and it is submitted that TDS amount Rs.3677/- for the financial year to 2016-17, which is nothing but disputed claim, due to which the said amount TDS was not deposited. It is submitted that the applicant never presented any of the cheques of the payment because no amount was due to the financial creditor and thus there is no question of tax payable to the applicant by the corporate debtor. The judgments in the matter of **Ram Sarup Gupta (Dead) by LRs vs. Bishun Narain Inter College & others** passed in **Civil Appeal No. 638/1980** and **KIIC Investment Company Vs. DCIT (IT)-3(1)(2), in ITA Nos. 1381/MUM/2017 and 564/MUM/2018** do not help the Corporate Debtor as the facts of the judgements are quite distinguishable and cannot be applied to the present case.

14. In the rejoinder financial creditor has denied all the averments disputing the claim of principal amount and payment of interest. It is submitted that the claim has never been disputed by the corporate debtor and that the alleged business loans is nothing but deliberate malafide intention of the directors of the corporate debtor to usurp legitimate dues of the financial creditor. It is submitted that the financial creditor has no role to play in the alleged claim of several persons or their alleged threats as stated in the reply affidavit. It is submitted that the post-dated cheque had been handed over by the corporate debtor to the financial creditor, the corporate debtor paid the interest in accordance with the terms of the Inter Corporate Deposit.
15. It is submitted that the post-dated cheque was issued unconditionally and no terms were attached to it. The post-dated cheques were later replaced by the corporate debtor on its request for revival of tenure of inter corporate deposit on similar terms. However, on the due date mentioned in the cheques the corporate debtor requested the financial creditor not to present the cheques for payment. It is denied that the claim is time barred. The corporate debtor has paid Rs.33,090/- as interest thereby making the petition filed on 29th July, 2019 within period of limitation. The averment that no disbursement has been made is falsified. The disbursement of Rs. 10 lakh was made by RTGS on 2nd December 2015 by proper banking channel. The financial creditor submits that the act of issuance of receipt dated 2nd December 2015 by Corporate Debtor and payment of interest by it and deduction and payment of TDS along with issuance of post-dated cheques towards refund of principal amount are sufficient to substantiate the claim of the financial creditor. The financial creditor is still holding the original cheque of Rs. 10,00,000/- and the corporate debtor cannot deny that the same was issued towards repayment of principal amount. Non deposit of TDS is a default committed by the corporate debtor in accordance with Income Tax Act and cannot be termed as dispute in any sense.

16. We have heard the Ld. Counsel for the parties. It is seen from the record that annexure (ii) to the petition shows that a sum of Rs. 10 lakh was duly received and acknowledged by the corporate debtor vide receipt dated 2nd December, 2015, through RTGS dated 2nd December, 2015 by SBI Bank towards loan, bearing interest @11% per annum for 120 days. It has been signed by the director of the corporate debtor. Bank statement issued by the Axis Bank on page 16 of the petition indicates the entry dated 2nd December, 2015 transferring Rs. 10 lakhs by RTGS for which cheque no. 161405 was issued to the bank, and the accounts had been debited by Rs. 10 Lakh. Annexure (iv) on page 22 shows the sum of Rs. 36,466.00/- was paid by Dulichand Auto Sales Private Limited, the Corporate Debtor after deduction of TDS of Rs. 3647/-, which is shown to have been deposited. Letter dated 1st December, 2018 was written by the financial creditor to the corporate debtor. The corporate debtor however, vide letter dated 31st December, 2018 sent a very strange reply which is reproduced as under:-

*"To,
The Authorised Signatory/Director
M/S, Vinod Distributors Pvt. Ltd.
50B, Orphangunge Market Road,
Kidderpore
Kolkata- 700023*

*Dear Sir,
Re: Refund of Inter corporate Loan of Rs. 10,00000/- along with
overdue interest thereon and unpaid Tax Deduction at Source.
With reference to your letter dated 1st December, 2018, received by us
on 5th December, 2018, please note the following.
As claimed by you about the refund of the inter corporate loan of the
above amount we deny we have neither entered with you for any such
Inter Corporate Loan and interest thereon. We never had approached
you directly nor we know you. The above transaction was through one
Mr. Binod Sharma. It is in fact not loan but an arrangement through Mr.
Binod Sharma. There was not direct communication with your Director
at the time of transaction. The discussion was only through Mr. Binod
Sharma.
We deny that the said was a loan and also deny that there was any
specific request from our side to extend the tenure of the said loan as
we directly never approached you. Further, we deny the payment of
interest on the loan amount as claimed by you. We have never agreed
about payment of any interest on any loan amount. The statement
made by you is false.*

That we have never induced you to provide any loan and there are no outstanding dues of Rs. 10,00,000/- plus interest of Rs. 2,78,890/- as claimed by you.

That we never approached you and we have never agreed for the repayment of any loan. There was no such discussion between us at any time. There is no iota of evidence of knowing you.

The statement made by you are absolutely false and wrong.

*Thanking you,
Yours faithfully,
For Dulichand Auto Sales Pvt. Ltd”.*

17. It is very strange that the corporate debtor writes to the financial creditor that “we deny we have neither entered with you for any such Inter Corporate Loan and interest thereon. The corporate Debtor has denied everything including the receipt of payment also, in spite of fact that the said amount has being credited to their account and debited from the account of the Financial Creditor. The Financial Creditor has sent letter dated 08th May, 2019 to the reply of the Corporate Debtor which deals with each of the points raised by the Corporate Debtor in reply dated 31st December, 2018. It would be seen on the record that the receipt Annexure- (ii) itself is clear on the issue that the amount of Rs. 10,00,000/- (Rupees Ten Lacs Only) was sent to and received by the corporate debtor on 2nd December, 2015. This receipt also speaks about the rate of interest @ 11% per annum for 120 days. This has been signed and acknowledged by the Director of the Corporate Debtor. The Bank details also tally with both the accounts of the Financial Creditor and Corporate Debtor. Problem arose only because of the huge business loss stated to have been suffered by the Corporate Debtor and its promoters as has been mentioned in their reply affidavit. The corporate debtor has taken so many contradictory grounds to escape their liability, while on record it is admitting and acknowledging the liability. The corporate debtor cannot be allowed blow hot and cold at the same time. Corporate Debtor has not made the payment in spite of demand notice vide 1st December, 2018 and rather has replied to it in an irresponsible manner, and has denied everything which even otherwise is evident on the record.

18. We have gone through the petition, reply and rejoinder and the documents placed on record by the parties. After hearing both parties we are convinced and satisfied that the default has occurred because the corporate debtor refused to make payment demanded in letter dated 1st December, 2018 within 7 days from the receipt of the letter, the said date i.e. 9th December, 2018 will be taken as date of default on the part of the Corporate Debtor.

19. The petition is otherwise complete in all respects.

20. We are satisfied and have no option but to admit the petition with the following orders as under: -

O R D E R S

- 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 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;
- 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 Securitisation 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. Jai Narayan Gupta** registered with Insolvency and Bankruptcy Board of India, having Registration No. **IBBI/IPA-001/IP-**

P00371/2017-18/10628, Email cajainarpayangupta@gmail.com is hereby 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. 1,00,000/- (Rupees One 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.
- xii) 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.
- xiii) List the matter on 17/01/2022 for the filing of the progress report.
- xiv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on, this 18th day of November, 2021

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