

**In the National Company Law Tribunal,
Kolkata Bench,
Kolkata**

Coram: Shri Jinan K.R.
Hon'ble Member (J)

CP (IB) No.710/KB/2017

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:

Jaiprakash Overseas Finance Limited, having its registered Office at 12, Waterloo Street, Kolkata- 700 069 represented by its authorized signatory Mr. Sanjay Kumar Sharma

...**Financial Creditor**

-Versus-

Techno Fab Manufacturing Office at 12, Hemant Basu Sarani, 2nd floor, Kolkata – 700 069.

....**Corporate Debtor**

Counsels appeared:

For the Financial Creditor : 1. Mr. Pranay Agarwal, Advocate

For the Corporate Debtor : 2. Mr. Arush Sengupta, Advocate

Order pronounced on 16th February, 2018

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ORDER**Shri Jinan K.R., Member (J):**

Jaiprakash Overseas Finance Limited, the Financial Creditor has filed this application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (from now on referred to I & B Code, 2016) for initiating Corporate Insolvency Resolution Process read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against the Corporate Debtor, Techno Fab Manufacturing Limited. Financial Creditor has stated that the Corporate Debtor has committed default in making payment of Rs.5,20,219/-(Rupees five lakhs twenty thousand two hundred nineteen) only as on 31.10.2017.

2. The Financial Creditor, Jaiprakash Overseas Finance Limited, having Identification No. U74899WB1996PLC171590 is a company incorporated under the Companies Act, 1956 on 8th January, 1996. The registered office of the Company is situated at 12, Waterloo Street, Kolkata- 700 069.
3. The Corporate Debtor, Techno Fab Manufacturing Limited, having Identification No. U31909WB1995PLC069550 is a company incorporated under the Companies Act, 1956 on 20th March, 1995. The registered office of the Company is situated at 12, Hemant Basu Sarani, 2nd floor, Kolkata- 700 069. The authorized share capital of the company is Rs.5,00,00,000/- and paid up share capital of the company is Rs.3,52,00,000/-.
4. The brief facts of the case, as stated in the application, are cited as under:
 - a) The Corporate Debtor is engaged in the business of construction and fabrication sheds, roads, foundation for machinery, factory buildings, etc. on job work basis for its customers.
 - b) The Corporate Debtor approached the Financial Creditor for loan for the purpose of working capital. The Corporate Debtor was advanced an Inter Corporate Deposit / loan of Rs.20,00,000/- (Rupees twenty

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lakhs) bearing interest @ 12% p.a. by the Financial Creditor for a period of six months.

- c) The said loan was made by RTGS from Punjab National Bank, Princep Street branch, Kolkata vide reference no.70610009432/TEC dated 06.07.2015. A copy of the bank statement has been enclosed and marked as Annexure "D" at page 63 of the application.
- d) The receipt of the said amount was acknowledged by the Corporate Debtor by Money Receipt dated 06.07.2015, a copy of acknowledgment has been enclosed and marked as Annexure "E" at page 64 of the application.
- e) The said loan was granted initially for a period of six months and was renewed repeatedly on oral request on the part of the Corporate Debtor till 5th July, 2017.
- f) The Corporate Debtor never disputed its liability in respect of the said loan and repaid on 08.07.2016 a sum of Rs.5,00,000/- towards part refund of loan of Rs.20,00,000/-.
- g) On 27.09.2016, the Corporate Debtor repaid a further sum of Rs.5,00,000/- towards part refund of loan of Rs.20,00,000/-.
- h) On 04.04.2017, the Corporate Debtor repaid a further sum of Rs.5,00,000/- towards part refund of loan of Rs.20,00,000/-.
- i) The net loan remains to be repaid amounts to Rs.5,00,000/-
- j) The Corporate Debtor paid timely interest on the same till 30th June, 2017. A statement of interest amount received has been enclosed and marked as Annexure "F" at page 66 of the application.

5. The Financial Creditor has proposed the name and registration number of the interim resolution professional as Mr. Hrisikesh Dasgupta, an Insolvency Professional registered with the Agency of Institute of Cost Accountants of India having Registration No. IBBI/IPA-003/IP-N00082/2017-2018/10705 of Post-Sapuipara, Village- Santinagar, District- Howrah, Howrah-711227, Mob.

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9432207517, E-mail : hkdaspt@gmail.com. A written communication dated 15th November, 2017 in terms of Rule 9(1) of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed before this Tribunal. A declaration has also been made to the effect that no disciplinary proceedings is pending against him. Other disclosures and eligibility under rule 9(2) as required have also been made by him.

6. The Financial Creditor submits that the total amount of default as on 31/10/2017 is Rs.5,20,219/-. A copy of the statement of detailed computation of amount in default is annexed and marked as **Annexure "G" at page 68** of the application.

7. The Financial Creditor has again submitted the copy of Loan Confirmation dated 1st April, 2017 for the Financial Year 2016-17 as Annexure "I" at page 75 of the Application.

8. The Financial Creditor further submits that the Corporate Debtor availed of the loan of Rs.20 lakhs and utilized the same for the business purpose but started committing defaults in respect of all the loans and/or credit facilities from on or about 5th July, 2017 and consequently a sum of Rs.5,20,219/- became due and payable by the Corporate Debtor to the Financial Creditor. In spite of repeated requests and demands, the Corporate Debtor failed to repay the loan amount together with interest.

9. The Financial Creditor has submitted that the Chairman informed the Board of Directors of the Company that all efforts to realise the loans given to the Corporate Debtor have failed. Hence, the Board of Directors resolved that an application under appropriate provisions of the Insolvency & Bankruptcy Code, 2016 be filed for initiation of Insolvency Resolution Process in respect of Techno Fab Manufacturing Ltd. and Shri Sanjay Kumar Sharma, Director be and is hereby authorized to take all necessary steps in connection with filing of the

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said application. The Board of Directors of the Company also authorized Shri Sanjay Kumar Sharma to sign and verify the application on behalf of the company, appoint advocates and Interim Resolution Professional and to do all such act and things as may be required and advised by the advocates. The copy of the Extracts of the Minutes of the meeting of Board of Directors of the Company dated 6th November, 2017 has been annexed and marked as Annexure "B" at page 59 of the Application.

10. The Financial Creditor submits that the records of the default have been provided by way of bank statements in the application itself. The Applicant has further submitted that even after repeated verbal reminders by the Financial Creditor, the Corporate Debtor has failed to make payment of the due amount and that the Corporate Debtor never refuted the fact and has admitted its liability in relation therein by issuing and receiving confirmation of account from time to time.

11. The Corporate Debtor filed objections contending in brief is the following:

a) The I.B. Code is not applicable to the Corporate Debtor. Hence, the application is bad in law and liable to be set aside. The Corporate Debtor has also submitted that the term 'insolvency' has not been defined by the Code or by any other law for the time being in force. The Corporate Debtor has further submitted that the purported Corporate Debtor is not a willful defaulter and has a good reputation and has always unequivocally indicated its willingness to repay the remaining amount due to the Financial Creditor.

b) That the Corporate Debtor has made regular repayments. Admittedly, interest on the loan was paid up to 30.06.2017. It has been submitted that temporary setbacks arising out of fluctuations in the business cycle faced by a company have no bearing on its overall sustainability.

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- c) That the application filed by the Financial Creditor does not contain the record of the default as mandated by section 7(2) of the Code. Therefore, in absence of any record of default, the application does not fulfill the mandatory provisions of section 7 of the Code and is liable to be set aside.
- d) That Section 8(1) of the Code does not impose a mandatory obligation to give a notice to the Corporate Debtor in as much as it uses the word 'may' and not 'shall' with reference to the operational creditor's duty to give notice, the act of giving notice in order to intimate a proposed respondent of the charges sought to be leveled against him is a well-established component of the principles of natural justice. The Corporate Debtor, in this context, cited the judgment held by the Hon'ble Supreme Court in the case of Fazalbai -vs- Custodian (AIR 1961 SC 284), wherein it has been submitted that the application does not adhere to the said principles of natural justice for lack of a prior written notice served on the respondent and is liable to be set aside for the said reason.
- e) The Corporate Debtor has submitted that the purported Corporate Debtor is a revenue earning entity and that optimum financial rearrangement will earn its shareholders, employees as well as purported Financial Creditors higher value than shutting down the enterprise.
- f) The corporate debtor further contends that it does not defaulted the amount as alleged and that a major portion of the amount due to the applicant has been repaid and the remaining amount due to the applicant is to be paid in terms of the negotiations between them from time to time.
- g) The Corporate Debtor has again submitted that the agreements for renewal of the said loan as well as the demands for repayment thereof were made orally and therefore, in absence of any notice in writing, it is incorrect to state that the purported corporate debtor is in default. The Corporate Debtor has

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also submitted that there is a discrepancy in the accounts and that in any case the Financial Creditor is not a secured Creditor.

h) The Corporate Debtor further submitted that if this application of the Financial Creditor is admitted, then the Corporate Debtor, which is a running concern will be faced with financial and operational consequences which would put the respondent concern at the risk of losing clients, employees and shareholders. Hence, this application be rejected.

12. The Financial Creditor has filed the Rejoinder and in its Rejoinder, the Financial Creditor has reiterated the facts stated in the application. The Financial Creditor has denied that the Corporate Debtor is of sound financial health and that the irregularity in the repayment of the loan has occurred due to circumstances beyond the control of the Corporate Debtor and it is a willful defaulter.

13. The Financial Creditor has filed the following documents, in addition to the documents filed in the paragraphs mentioned above, in support of his claim:

Affidavit in support of the Application; Authorisation marked as Annexure "B"; Vakalatanama; Copy of the Certificate of Incorporation, Memorandum of Association & Articles of Association of the Financial Creditor as Annexure "A", copy of Form 2, IBBI Certificate of Registration and Request Letter from the Financial Creditor collectively marked as Annexure "C"

14. Heard the argument of Ld. Counsel of both parties and perused the case records.

15. The main contention of the corporate debtor is that financial creditor did not send any notice prior to filing this application and thereby violate principal of natural justice. This is an application filed under section 7 of the I & B Code and not under section 9 of the Code. Issuance of a demand notice in a case of this

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nature filed under section 7 of the Code is not at all a pre requisite to maintain this application . As held in **Innoventive Industries Ltd. v. ICICI Bank [2017] 139 CLA 335** by the Hon'ble NCLAT, *"this adjudicating authority if satisfied that there is occurrence of default and the application filed is complete the application filed under section 7 of the I & B Code is liable to be admitted"*.

16. The next contention of the corporate debtor is that it is not a willful defaulter, but due to certain inadvertent mistake repayment becomes irregular and therefore the default and that corporate debtor is ready to repay the remaining amount due to the financial creditor in terms of the negotiations between them from time to time. In fact the corporate debtor admitted its default in repaying the amount found due to the financial creditor. By the admission of the Corporate Debtor, it is undisputed that corporate debtor has taken Inter Corporate Loan from the petitioner/financial creditor and has utilized the money for its business purpose. Annexures along with the Balance Confirmation Account, Statement of Accounts and Money Receipts filed by the Financial Creditor clearly demonstrate and it is proved that the Corporate Debtor has committed default of Rs.5,20,219/- and the Corporate Debtor has failed to make repayment of the outstanding loan amount. From the copy of the statement of account from July, 2017 to October, 2017 of the Punjab National Bank, it is also evident that no payment has been received from the Corporate Debtor towards repayment of principal amount in between the period.

17. It reveals from the record that the application filed by the applicant/financial creditor is in the proper format as prescribed in I & B Code and Adjudicating Authority Rules which is complete. None of the objections raised by the corporate debtor in its reply are found not at all sustainable under law.

18. The Financial Creditor has proposed the name of Mr. Hrisikesh Dasgupta, Insolvency Professional registered with Insolvency Professional Agency of Institute of Cost Accountants of India who is competent to work as IRP. No

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disciplinary proceeding is pending against him. The details of the I.R.P. have already been mentioned above.

19. Section 7(5) provides where the Adjudicating Authority is satisfied that-

- a default has occurred and the application is complete and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
- default has not occurred or the application is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.

20. On the above basis, it is thus apparent that the application filed by the Financial Creditor under Section 7 of the I & B Code deserves to be allowed, as a default has occurred and the application is complete and there is no disciplinary proceedings pending against the proposed resolution professional.

ORDER

The petition filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process. Moratorium order is passed for a public announcement as stated in Sec.13 of the IBC, 2016.

The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

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- 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 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 possession of the corporate debtor.

The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

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.

The order of moratorium shall affect the date of such order till the completion of the Corporate Insolvency Resolution Process.

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 Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

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Necessary public announcement as per Sec.15 of the IBC, 2016 may be made.

Mr. Hrisikesh Dasgupta, an Insolvency Professional registered with the ICSI Insolvency Professionals Agency having Registration No. IBBI/IPA-003/IP-N00082/2017-2018/10705 of Post- Sapuipara, Village- Santinagar, District- Howrah, Howrah-711227, Mob. 9432207517, E-mail : hkdaspt@gmail.com is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

Registry is hereby directed under section 7(7) of the I.B. Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

Let the certified copy of the order be issued upon compliance with requisite formalities.

List the matter on 20th March, 2018 for the filing of the progress report.


(Jinan K.R.)
Member (J)

Signed on this, the 16th day of February, 2018