

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
CHANDIGARH BENCH, CHANDIGARH.**

**CP (IB) No.19/Chd/Hry/2017.
Date of Order: 09.05.2017.**

**Coram: HON'BLE MR. JUSTICE R.P.NAGRATH, MEMBER (JUDICIAL).
HON'BLE MS. DEEPA KRISHAN, MEMBER (TECHNICAL).**

In the matter of:

M/s Giridhar Infracon Private Limited,
239, First Floor, R/S Masjid Moth,
South Extn Part II, Near Durga Mandir,
New Delhi, India.

...Applicant/Financial Creditor.

Versus.

M/s Y.K Developers Private Limited
Having its Registered Office at:
4, SCF, Ashoka Enclave Part I, Sector 37,
Faridabad, Haryana.

....Respondent/Corporate Debtor

**Application by Financial Creditor(s) to initiate corporate
insolvency resolution process 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.**

Present: Mr.R.K.Gupta, Advocate with Mr.Swapnil Gupta, Advocate for
Applicant/Financial Creditor.
None for the Respondent/Corporate Debtor.

ORDER.

R.P.NAGRATH J. (MEMBER JUDICIAL)

This petition has been filed by M/s Giridhar Infracon Private
Limited stated to be the 'Financial Creditor' against the 'Corporate Debtor' under

Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred here-in-after as the 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for short 'the Rules') to initiate insolvency resolution process for the default committed by the 'Corporate Debtor' to return the amount of ₹2 crores advanced as loan on 15.04.2014, cleared to the account of Corporate Debtor on 17.04.2014.

2. It is alleged that the 'Financial Creditor' (for brevity the 'petitioner') is engaged in the business of Real Estate and Construction activities and having its Head Office in New Delhi. The 'Corporate Debtor' (for brevity the 'respondent') is also engaged in the business of inter-alia, Residential & Commercial Real Estate Development in NCR & other Regions. It is further averred that after various discussions, deliberations and meetings between the petitioner and the main Director of the respondent, Mr. Yogesh Sharma and Mr. Ishpal Bhardwaj, the petitioner agreed to grant and disburse a loan of ₹2.5 crores to the Corporate Debtor-respondent. It is alleged that the amount of ₹2 crores was disbursed as loan against the deposit of title deed and equitable mortgage of the immovable property was created in favour of the petitioner by virtue of the Memorandum of Entry Recording Deposit of Title Deeds dated 15.04.2014. The original sale deed dated 21.09.2007 is said to be in possession of the petitioner and its copy is attached as part of Annexure 2. The loan was repayable after two years along with interest.

3. It is further alleged that after receipt of ₹2 crores as loan, the respondent neither demanded disbursement of the balance amount of ₹50 lacs nor there was any occasion to disburse the same. The petitioner demanded the return of the amount after the expiry of a period of two years, but the

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respondent failed to repay the same. A legal notice dated 09.06.2016 was issued to the respondent, but no reply was sent.

4. The petitioner is said to have again issued a legal notice through its counsel on 17.02.2017 demanding the principal amount only. Copy of the said notice is Annexure 5. Reply dated 10.03.2017 (Annexure 6) was sent by the respondent through its Advocate denying having accepted any loan and claiming that the said amount was received from Mr. Ishpal Bhardwaj against the sale of land.

5. The instant petition has been filed in Form No.1 of the Rules mentioning all the necessary particulars as required therein. It was stated that the petitioner company was incorporated on 29.01.1996 and Annexure 1 is the copy of Resolution dated 11.04.2017 of the Board of Directors of the Company authorising Mr.Tarun Kumar Aggarwal for initiating the Corporate Insolvency Resolution Process under the Code and to do all the necessary acts in the progress of the case.

6. Respondent was incorporated on 02.06.2005 with an authorised share capital of ₹2 lacs and paid up share capital of ₹1 lac. Its registered office is at Faridabad and therefore, this Tribunal has the territorial jurisdiction to entertain and dispose of the instant petition.

7. The petitioner also named Mr.Vinay Talwar as the Interim Resolution Professional registered with the Insolvency and Bankruptcy Board of India (IBBI), who has given the written communication (Annexure 13).

8. It was further stated that the estimated value of the property mortgaged by the respondent with the petitioner is approximately ₹10 crores. The sale deed of the property of the respondent, which was deposited with the

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Respondent is dated 21.09.2007 suggesting that it was for a sale consideration of ₹2,57,92,800/-.

9. This matter was listed before the Bench for the first time on 01.05.2017. Having heard the learned counsel for the petitioner, some defects were noticed and following directions were issued for compliance by the petitioner:

- i) To file affidavit stating despatch of copy of this petition along with entire Paper Book to the Respondent/Corporate Debtor, receipt of despatch of postal article and the Track Report of the postal department;
- ii) To file certificate of incorporation of applicant-company along with list of its shareholders and Directors and the Memorandum and Articles of Association by way of affidavit;
- ii) To file latest financial statements of the applicant-company for the years ending 31.03.2015 and 31.03.2016 filed with the Registrar of Companies;
- iv) To submit affidavit disclosing that there is no Regulator(s) in respect of the applicant-company with regard to lending of the loan;
- v) To file fresh Resolution of the applicant-company naming the person authorised to accept the process of insolvency on behalf of the company; and
- vi) To file fresh written communication in Form No. 2 by the Insolvency Resolution Professional giving all the details as noted by the learned counsel for the applicant-company.

The petitioner has made the necessary compliances including the filing of proper nomination giving particulars of Interim Resolution Professional as required in Form No.2, which is attached as Annexure 7 with the additional documents.

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10. We have heard the learned counsel for the petitioner and carefully perused the records.

11. The learned counsel for the petitioner vehemently contended that the documents filed in support of petitioner's case would clinch the issue in its favour with regard to lending of the loan to respondent. Learned counsel mainly referred to the financial statements of the petitioner company and also the bank record, apart from the documents of creating equitable mortgage. The learned counsel further submitted that the factum of having the respondent received the amount of ₹2 crores on the date as represented by the petitioner is not even denied. The petitioner has placed on record its financial statements for the years ending 31.03.2015 and 31.03.2016 and there is entry of loans and advances against head 'Inter Corporate' to the tune of ₹2 crores.

12. There is also certificate Annexure 4 [(Colly) filed with the additional documents] issued by Sushiel Shandilya & Co., Chartered Accountant, who are the auditors of the petitioner company filed with the additional documents. It is certified that as per the audited Balance Sheets (Annexure 3), the corporate secured loan under the Head "Long Term Loans & Advances" in note No.9 of "Assets and Liabilities" to the tune of ₹2 crores has been given to M/s Y.K. Developers Private Limited. These two certificates relate to both the aforesaid financial years.

13. It was further contended that the aforesaid factum of the loan having been advanced is further established from the Bank record Annexure 3 (Colly) are the original documents in the paper book. At page 66 of the paper book is the statement of account of the petitioner company obtained from the Bank, which contains the entry dated 15.04.2014 about transfer of ₹2 crores in

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favour of the respondent by way of demand draft. Copy of the demand draft is at page 67 of the paper book and the name of remitter mentioned thereon is of the petitioner.

14. To fortify the petitioner's case, the learned counsel laid emphasis on the reply dated 10.03.2017 (Annexure 6) to the notice sent by the petitioner. In the reply, the receipt of ₹2 crores is admitted, but it is claimed that the said amount was received from Ishpal Bhardwaj and Mr. Puneet Sharma as earnest money for purchase of a piece of land in District Alwar, Rajasthan and this is so reflected in the books of account of the respondent company.

15. The learned counsel further contended that the respondent has not even bothered to put in appearance to contest the instant petition, despite service of notice of the application along with the entire paper book and thus it can be implied that the respondent has nothing to argue to oppose the instant petition along with the additional affidavit of Mr. Tarun Aggarwal. The track report of the postal department is also attached which shows that the envelope containing paper book was delivered to the Corporate Debtor on 27.04.2017.

16. The above arguments raised by the learned counsel for the petitioner seem to be attractive, but these do not withstand the test of scrutiny. The basic document on which the petitioner relies upon is the memorandum of entry dated 15.04.2014 regarding deposit of title deeds. This document purports to have been executed between the parties. The respondent has been described as the 'Mortgagor' and the petitioner as 'Investor or Mortgagee'. This is a document executed on behalf of the respondent company/corporate debtor, we are of the considered view that the settled principle of law is that a company which is a legal entity speaks through its resolutions. There is no indication in

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the document Annexure 2, as to how the person, who signed this mortgage deed on behalf of the respondent derived his authority. There is not even the remote reference to any resolution passed by the Company nor the date of such resolution authorising Ishpal Bhardwaj to execute the document of mortgage.

17. It would be significant to refer to paragraph 10 of the document at Annexure 2 to which specific reliance was also placed by the learned counsel for petitioner. It says that while making the deposit of the said property document, Dr. Ishpal Bhardwaj, who signed the document on behalf of the Corporate Debtor, declared that he has full powers and authority pursuant to the resolution passed by the Board of Directors of the Mortgagor dated 05.04.2014 to create an equitable mortgage over the mortgaged property and he further stated that the said resolution has not been and shall not be during the terms of Investment Agreement, rescinded, modified and superseded and the same shall remain in full force and effect.

18. It is pertinent to note that the petitioner is itself a Corporate Body and must have known, how a company functions. Without seeing the resolution or attaching copy thereof with the agreement, the contention of the petitioner that the respondent should not be believed about credentials of Dr. Ishpal Bhardwaj is unacceptable. It was not disputed during the course of arguments that Ishpal Bhardwaj was neither a shareholder nor a Director of the respondent company on 15.04.2014, the date of execution of this agreement. As per the Annual Return of the respondent company Annexure 12, Ishpal Bhardwaj was inducted as the Director of the Company on 29.04.2014 i.e. after the execution of this document and he ceased to be the Director of the company w.e.f. 02.09.2014, as per the columns of the Annual Return at page 159 of the paper

book. In this financial year, the Annual Return shows that the only shareholders of the company were Usha Sharma and Yogesh Sharma having 5000 shares each out of the total paid-up share capital of 10,000.

19. The learned counsel for the petitioner relied upon the judgment of Hon'ble Allahabad High Court reported in "**Lakshmi Ratan Cotton Mills Co. Ltd., Kanpur Vs. J.K.Jute Mills Co. Ltd., Kanpur, AIR 1957 All 311**", in which the following seriatim were made in paragraph 45 of the said judgment:

"It was held that even if the borrowing by the agent of a company is unauthorised, the company would be liable to pay, if it is shown that the money had gone into the coffers of the company. The lender having not advanced the money as a gift but as a loan, and the borrower having received the benefit of the money, the law implies a promise to repay. On the establishment of these facts, a claim on the footing of money had and received would be maintainable."

That matter arose before the Hon'ble Allahabad High Court in a suit for recovery, whereas we are dealing with a matter under the Code, the consequences are stringent and the provisions of the Code have to be strictly construed.

20. In our considered view, the most significant document was the Investment Agreement dated 05.04.2014 referred to in paragraph C of the document Annexure 2. This is in reference to the Investment Agreement dated 05.04.2014 in Annexure-2 describing the petitioner as 'Investor' as well as 'Mortgagee' and its significance could only be understood by producing the primary document called 'Investment-Agreement'. It was basically the Investment agreement from where it could be declared as to whether the petitioner is a 'Financial Creditor' entitling it to an order of admission under


Section 7 of the Code. In the absence of the said document, it cannot be inferred as to what exactly is meant by the term 'Investor'. The original or copy of the Investment Agreement has not been placed on record and that would be the clinching factor against the petitioner.

21. The learned counsel, however, referred to the DDR dated 10.04.2017 Annexure 8 to suggest that the document was not in possession of the petitioner at the time of filing the instant petition. This report is made by Tarun Kumar Aggarwal at Police Station Crime Branch, Delhi. It is reported to the police by Tarun Kumar Aggarwal that he lost his bag containing original documents of the Companies as well as personal documents, in Sanwal Nagar (Sadiq Nagar) market around 3.00 PM to 4.00 PM, when he had gone to buy grocery and vegetables. The details of the missing document are secretarial documents i.e. the minute's record, statutory registers, ROC files in the case of petitioner company and the loan documents other than the property documents for facilitating loan to the respondent etc. Just two days after lodging DDR the instant petition was prepared, which is dated 12.04.2017 and it was filed in the registry on 17.04.2017. So, non-production of even copy of this Investment Agreement coupled with the fact that there was no authority letter in favour of Dr. Ishpal Bhardwaj, while executing the document Annexure 2, the petition would be found without merit as, it can be safely inferred that the crucial document has been concealed from the Tribunal for obvious reasons. In any case, without prejudice to the merits of the claim of the petitioner regarding the outstanding amount, remedy with the petitioner would lie elsewhere, where he can apply for proving the Investment Agreement by way of secondary evidence, if the original is either lost or not traceable.

Dr. Ishpal Bhardwaj
Dr.

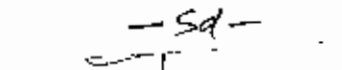
22. It may be further commented that the petitioner alleged in the petition that the loan was repayable after two years with interest, but in the agreement itself, there is no such term of the period of return of the loan or rate of interest chargeable thereon. The learned counsel for the petitioner rather submitted during arguments that no time was fixed for return of the loan and, therefore, it was payable on demand and default occurred, when demand was made by the petitioner by issuing the first legal notice dated 09.06.2016 Annexure 4.

23. In view of the above discussion, we find no merit in the instant petition, which is, therefore, rejected. Copy of the order be sent to the petitioner by speed post immediately.


(Deepa Krishan)
Member (Technical)

May 09, 2017.

Ashwani


(Justice R.P. Nagrath)
Member (Judicial)