

**IN THE NATIONAL COMPANY LAW TRIBUNAL
 “CHANDIGARH BENCH, CHANDIGARH”
 (Exercising the powers of Adjudicating Authority
 Under the Insolvency & Bankruptcy Code, 2016)**

CP (IB) NO. 110/Chd/CHD/2017

**Under Section 7 of the
 Insolvency and
 Bankruptcy Code, 2016**

In the matter of:

Diamond Traexim Private Limited,
 House No. 302, Plot-12, Block B-1,
 Sector 9, Varun Apartment, Rohini,
 Delhi-110085.

... Applicant-Financial Creditor

Vs.

M/s. Idyllic Resorts Pvt. Ltd., SCO
 146-147-148, First Floor, Sector 43 B,
 Chandigarh-160043.

...Respondent-Corporate Debtor

Judgement delivered on : 24.11.2017

Coram: Hon’ble Mr. Justice R.P. Nagrath, Member (Judicial).

For the petitioner	:	Mr. R.K. Handa Advocate
For the respondent	:	1. Mr. Mast Ram, FCS in practice 2. Mr. Nitin Kumar, Practising Company Secretary.

JUDGEMENT

The petitioner company was incorporated under the Companies Act, 1956 on 04.12.2007 and has filed this petition as a “Financial Creditor” against the Corporate Debtor in terms of Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short, to be referred hereinafter as the ‘Code’) by filing application in Form 1 as prescribed in Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, the ‘Rules’). The application has been filed through Hemant Jindal who is

authorised by the petitioner-company vide letter dated 26.09.2017 (Annexure A) issued by Pankaj Kumar Jha, Director of the company to initiate insolvency resolution process against the respondent-Corporate Debtor under the provision of the Code and to do all the necessary acts in the progress of the case. The petitioner has also relied upon the resolution dated 05.06.2017 (Annexure B) of Board of Directors of the petitioner-company authorising Hemant Jindal to file criminal, civil, arbitration proceedings relating to any dispute of any nature, whatsoever, as well as to file cases before the Company Law Tribunal(s) of the country. It is stated that the original name of the company was changed vide certificate dated 22.04.2010 and then to the present name – Diamond Traexim Private Limited vide certificate dated 20.02.2015.

2. The respondent-Corporate Debtor was incorporated on 24.09.2007 and allotted CIN No. U70100CH2007PTC030956. Its registered office is located at Chandigarh and the matter, therefore, falls within the territorial jurisdiction of this Tribunal. The respondent-Corporate Debtor has the authorised and paid up share capital of ₹ 2 crores.

3. The facts of the case, briefly stated, are that in the last week of September, 2014, the respondent-Corporate Debtor approached the petitioner for financial assistance in the form of unsecured loan of ₹ 2 crores. The respondent had also assured and promised to refund the amount within a period of two years along with interest @ 12% per annum from the date of payment till the date of refund. It is further stated that in case the Corporate Debtor fails to refund the amount along with the interest, it will allot to the Financial Creditor equity shares in the Corporate Debtor at the Net Asset Value (NAV) as per the last audited balance sheet of the company.

4. The amount of ₹ 2 crores was disbursed on different dates i.e. (i) ₹ 55 lacs through RTGS transfer in the accounts of respondent on 07.10.2014 (ii) another ₹ 45 lacs by RTGS transfer on 7.10.2014 and (iii) ₹ 1 crore paid from the bank account of the Financial Creditor to the bank account of corporate debtor through RTGS on 16.03.2015. The bank statement in support of this contention issued by the Punjab National Bank is Annexure G. Entry of unsecured loan of ₹ 2 crores was also reflected in the balance sheet of the petitioner for the period ending 31.03.2016 (Annexure E). It is further stated that in the balance sheet of the Corporate Debtor as on 31.03.2016 under the head Sundry Creditors, the total amount of Sundry Creditors is shown as ₹ 6,65,55,521/- and that figure includes the amount of ₹ 2 crores which the respondent owes to the petitioner. The financials of the respondent-Corporate Debtor as on 31.03.2016 are at Annexure F.

5. It is further stated that the petitioner sent notice dated 08.06.2017 (Annexure H) to the Corporate Debtor raising demand of the outstanding amount or in the alternative allot 24,51,616 equity shares in the respondent-company at a Net Asset Value of ₹ 10.62 per equity share. Another notice dated 05.07.2017 (Annexure I) was sent by the petitioner demanding outstanding amount or to issue equity share at the same terms. The respondent-Corporate Debtor is stated to have not sent any reply to the notices. Therefore, a legal notice dated 31.07.2017 was sent through the law firm. Demand notice dated 07.09.2017 was also sent. Copy of the demand notice/invoices are at Annexure K.

6. The petitioner has also proposed the name of Insolvency Resolution Professional (IRP) to act as an Interim Resolution Professional by filing his written consent in Form 2 dated 26.09.2017 (Annexure C), the same

being mandatory for a Financial Creditor in terms of clause (b) of sub-section 3 of Section 7 of the Code.

7. When the matter was listed on 09.11.2017, the notice of petition was directed to be issued to the respondent-Corporate Debtor and the authorised representative of the respondent-company present accepted the notice. He also filed resolution dated 15.11.2017 (page 25 of reply to the application) of Board of Director of respondent-company authorising Mr. Mast Ram, FCS (Fellow Company Secretary) and/or Mr. Nitin Kumar, ACS (Associate Company Secretary) to represent the company in this case. It was also observed that the proposed Interim Resolution Professional stated in the consent form that he was appointed as IRP in another case but particulars of the case were not given.

8. As directed in the order dated 09.11.2017, Mr. Naresh Kumar Munjal the proposed Interim Resolution Professional has filed his affidavit dated 15.11.2017 clarifying that he has given consent in another cases namely ABW Infrastructure Ltd., Gurgaon and AHR City Project Pvt. Ltd., Delhi but he has not received any communication so far for his appointment as IRP. Having perused the particulars furnished by the IRP in Form 2 (Annexure C) coupled with the affidavit providing the clarification, the consent form is found to be in order. The IRP has declared that there are no disciplinary proceedings pending against him with the Insolvency and Bankruptcy Board of India or Indian Institute of Insolvency Professionals of ICAI.

9. The respondent in the reply stated that it is carrying on the business activities of real estate development under license No. 46 issued by the Department of Town and Country Planning, Haryana for developing a plotted colony in Sector 12, Panchkula Extension-II. The story propounded by

the respondent is that in the first week of September, 2014, one Mr. Pankaj Gupta who represented that he along with Mr. Hemant Jindal are doing certain projects jointly. Hemant Jindal aforesaid is the authorised representative of the petitioner in the instant case. Hemant Jindal initiated negotiations with the management of the Corporate Debtor and agreed to book a plot/site measuring 1968 sq. meters for ₹ 12 crores. Thereafter, Mr. Pankaj Gupta settled the terms and conditions and payment was agreed to be made in the letter of intent/allotment on payment of ₹ 3 crores i.e. 25% on or before 31.03.2015. The other details of the transactions as to how the rest of the payment was to be made, have also been stated. Pankaj Gupta is stated to have transferred different amounts through AHR City Projects Private Limited in the year 2014 to the tune of ₹ 1 crore as detailed in para 3 (i) of reply to the application and the Financial Creditor through Hemant Jindal transferred ₹ 1 crores in the name of respondent-Corporate Debtor on 07.10.2017.

10. However, as per understanding between Pankaj Gupta and Hemant Jindal, the latter further paid a sum of ₹ 1 crore through the petitioner for refunding ₹ 1 crore to AHR City Projects Pvt. Ltd. Accordingly the respondent-Corporate Debtor refunded ₹ 1 crores to Pankaj Gupta's company and retained ₹ 2 crores as booking advance from Hemant Jindal with a clear stipulation that this booking amount shall be kept only in the name of the petitioner and Hemant Jindal promised to pay balance of ₹ 1 crores on or before 31.03.2015 for enabling them to receive the letter of intent/allotment letter. Till that time, there was no dispute between Hemant Jindal and Pankaj Gupta. Therefore, the amount received from the petitioner on behalf of Hemant Jindal was entered as advance received for booking of plot/site. It

was denied that there was any request from the respondent for any loan or financial assistance either to AHR City Projects or the petitioner.

11. It is further stated that the petitioner-company was not eligible to lend inter corporate loan and even was required to maintain a register in terms of various provisions of Section 186 of the Companies Act, 1956. The amount of ₹ 2 crores standing in the book of accounts of the respondent is not a financial debt for which process under Section 7 can be initiated. The main objects of the petitioner-company have also been described and lending of money was none of its objects.

12. It is further averred that there was no specific authority by the petitioner-company to initiate the proceedings under the Code. The Financial Creditor had sent a demand notice in the performa meant for notice under Section 8 of the Code as if it was an operational debt.

13. I have heard the learned counsel for the petitioner, Fellow Company Secretary in practice for respondent-Corporate Debtor and carefully perused the record.

14. The fact that an amount of ₹ 1 crore was transferred in the accounts of the respondent-Corporate Debtor on two dates as mentioned in the version set up by the petitioner, is not in dispute. The basic question in the instant petition is whether this transfer of ₹ 2 crores in the accounts of respondent-Corporate Debtor would make the petitioner-company a "Financial Creditor".

15. The term "Financial Creditor" is defined in sub-section 7 of Section 5 of the code as meaning any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. Sub-section (8) defines the term "financial debt" as meaning a debt

along with 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;*

Learned counsel for the petitioner vehemently contended that the disputed transaction is a financial debt as covered under clauses (a) and (f) of Section 5 (8) of the Code.

16. Having given my thoughtful consideration to the above contention, I am unable to agree with the learned counsel because the basic requirement of sub-section (8) of Section 5 of the Code is that the debt should be an amount which is disbursed against consideration of time value of money. Admittedly there was no contract in writing for refund of amount within two years or payment of interest. It only seems to be a figment of imagination of the petitioner.

17. The petitioner has filed copy of its financials as on 31.03.2016 (Annexure E) which contains the details of loans/advances given/taken with interest in the financial year 2015-16. At page 41 of the paper book, there are 37 entries of loans and advances for the period ending 31.03.2016 and one of the entry is relating to the respondent to the tune of ₹ 2 crores but this is specifically for booking of a plot. The record relied upon by the petitioner would rather support the contention of the respondent. Against this entry of ₹ 2 crores, column of interest is lying blank. It would be seen rather that wherever in this list, the amount is transferred for booking of plots. There is no reference to the interest whereas in respect of other entries, amount of interest having accrued is mentioned.

18. Learned counsel for the petitioner, however, referred to the financials of the respondent for the year ending 31.03.2016 (Annexure F) and at page 64 of the paper book, the outstanding amount in respect of Sundry Creditors is entered as ₹ 66,55,521.00. The respondent-Corporate Debtor in its reply has attached its list of Sundry Creditors (Annexure R-3) and it shows the amount is exactly the same as per the list depicting financials (Annexure F) of the petitioner. However, in Annexure A-3 name of petitioner in this

sundry list, which is attested by the authorised representative of the respondent, is not found.

19. I am of the clear view that in the absence of any agreement showing that the amount was transferred by way of loan to the respondent-corporate debtor on payment of interest (which is shown as the amount paid towards the booking of plot), there is no scope of holding the nature of the advance as financial debt. If petitioner has some outstanding dues from the respondent-company because of non refund of the amount, the remedy lies elsewhere.

20. The authorised representative of the respondent also referred to sub-sections (2) and (3) of Section 186 of the Companies Act, 2013 which reads as under:-

*“(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.”*

21. Further as per sub-section (9) of Section 186 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. It was contended that this compliance is not shown to have been made.

22. The master data of the petitioner-company taken from the MCA portal on 21.11.2017 was referred during the course of arguments which shows that the petitioner-company has authorised capital of ₹ 2 crores and paid up capital of ₹ 1,05,00,000/-. Therefore, it is contended that the company could not have advanced loan of ₹ 2 cores in breach of the provisions of Section 186. This is, however, a question which may be relevant for the violation of the provisions of the Companies Act and not be of much significance for determining the issues before the Adjudicating Authority.

23. With regard to demand notice dated 07.09.2017 (Annexure K), which is only attracted in case of operational debt, that aspect is also not relevant issue as the term used in the said notice is unpaid financial debt relating to an amount of ₹ 2 crores.

24. The other prominent question is whether the company has given valid authority to Hemant Jindal to initiate insolvency resolution process under the code against the respondent-Corporate Debtor. For that, the petitioner basically relied upon the resolution of the company dated 05.06.2017 (Annexure B). On perusal of this resolution, it would be seen that this resolution does not give specific authority to Hemant Jindal to initiate insolvency resolution process against the Corporate Debtor under the Code. This is in the nature of general authority to institute, conduct, defend, compromise, settle, or abandon any kind of Criminal and/or Civil proceedings/Arbitration Proceedings relating to any dispute of any nature,

whatsoever, concerning any party before any Court of law of the Country/any Arbitrator as well as before the Company Law Tribunal(s) of the country.

25. Learned counsel for the petitioner vehemently contended that such resolutions of general nature are enough for initiating the resolution process under the Code. I find this contention to be untenable as there is the need to have specific authority for initiation of an action under the Code, which has very stringent consequences.

26. Learned counsel for petitioner also refers to the authority letter dated 26.09.2017 (Annexure A) given by Pankaj Kumar Jha the Director of the company in favour of Hemant Jindal to initiate corporate insolvency resolution process against the respondent-Corporate Debtor but this letter by a Director in the absence of any resolution of Board of Directors, has no meaning. Learned counsel for the petitioner did try to contend that the document Annexure 'A' was attested on 26.09.2017 and the same cannot be considered as the date of its exemption. This submission can also not be accepted as even on the index, the date of authorisation is mentioned as 26.09.2017.

27. In view of my foregoing findings, there is no merit in this petition and the same is rejected. Copy of this order be communicated to both the parties.

Sd/-
(Justice R.P.Nagrath)
Member (Judicial)

November 24, 2017
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