

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

Coram:

Madan B. Gosavi, Member (Judicial)

Virendra Kumar Gupta, Member (Technical)

CP(IB)No.184/KB/2018

CA(IB)No. 03/KB/2019

CA(IB)No.121/KB/2019

In the matter of:

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

~ And ~

In the matter of:

DUNCANS INDUSTRIES LIMITED, a company within the meaning of the Companies Act, 2013 and having its registered office at “Duncans House” , 2nd Floor, 31, N.S. Road, Kolkata-700 001;

... .. **Corporate Debtor**

~ And ~

In the matter of:

1. **SANGITA FISCAL SERVICES PRIVATE LIMITED**, a company within the meaning of the Companies Act, 2013 and having its registered office at 16, Bonfields Lane, Kolkata-700001;

2. **NAVNITA TRADEFIN PRIVATE LIMITED**, a company within the meaning of the Companies Act, 2013 and having its registered office at 16, Bonfields Lane, Kolkata-700001;

3. **SUDHIR CREDIT PRIVATE LIMITED**, a company within the meaning of the Companies Act, 2013 and having its registered office at 16, Bonfields Lane, Kolkata-700001;

4. **RUCHI TRADES AND HOLDINGS PRIVATE LIMITED**, a company within the meaning of the Companies Act, 2013 and having its registered office at 16, Bonfields Lane, Kolkata-700001.

... .. Applicants/Financial Creditors

~ Versus ~

DUNCANS INDUSTRIES LIMITED, a company within the meaning of the Companies Act, 2013 and having its registered office at “Duncans House” , 2nd Floor, 31, N.S. Road, Kolkata-700 001;

... .. Respondent/Corporate Debtor

Counsels on Record:

1. Mr. Rishav Banerjee, Advocate
2. Mr. Adheesh Agarwal, Advocate

} For Corporate Debtor

1. Mr. Utpal Bose, Advocate
2. Mr. P.K. Jhunjunwala, Advocate
3. Mr. S. Samit Rudra, Advocate

} For Financial Creditors

Date of Hearing: 02nd March 2020


Order delivered on: 05th March, 2020

ORDER

Per Virendra Kumar Gupta (T)

1. This application has been filed on behalf of four Financial Creditors jointly under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“IBC, 2016”) read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.


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2. **CA No.03/KB/2019** pertains to the maintainability of this application due to conflict between the provisions of the IBC, 2016 and the Tea Act, which, in our opinion, is infructuous in view of the decision of the Hon'ble Supreme Court, wherein it has been held that provisions of IBC, 2016 prevailed over the Tea Act and the application under Section 7 / 9 could be filed without permission of Central Government.

3. **CA No.121/KB/2019** raises an issue regarding the recording of the utilisation of compensation which could be received on acquisition of a part of land in its tea estate owned by the Corporate Debtor which, in our opinion, is premature, hence, dismissed as such.

CP (IB) No. 184/KB/2018 :

4. The facts, in brief, are that there are four Financial Creditors in the present case who are detailed as under:

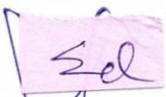
- (i) Sangita Fiscal Services Private Limited
- (ii) Navnita Tradefin Private Limited
- (iii) Sudhir Credit Private Limited
- (iv) Ruchi Trades And Holdings Private Limited

5. The particulars of all the Financial Creditors have been given in the Form-I. First Financial Creditor i.e., Sangita Fiscal Services Private Limited, gave a loan of Rs.4,70,00,000/- in the following manner:

16.08.2014	-	Rs. 20,00,000
23.12.2014	-	Rs.2,90,00,000
23.12.2014	-	Rs. 75,00,000
24.12.2014	-	Rs. 85,00,000

Second Financial Creditor i.e., Navnita Tradefin Private Limited, gave a loan of Rs.2,10,00,000/- in the following manner:

20.02.2015	-	Rs.1,00,00,000
24.02.2015	-	Rs. 50,00,000
25.02.2015	-	Rs. 50,00,000
17.04.2015	-	Rs. 10,00,000


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Third Financial Creditor i.e., Sudhir Credit Private Limited, gave a loan of Rs.3,00,00,000/- in the following manner:

27.01.2014	-	Rs. 50,00,000
28.01.2014	-	Rs.1,00,00,000
29.01.2014	-	Rs. 50,00,000
30.01.2014	-	Rs. 20,00,000
05.02.2014	-	Rs. 40,00,000
07.02.2014	-	Rs. 40,00,000

Fourth Financial Creditor i.e., Ruchi Trades And Holdings Private Limited, gave a loan of Rs.60,00,000/- on 25.09.2014; however, out of that, the Corporate Debtor repaid the principal amount of Rs.45,00,000/- and the balance remained outstanding.

6. The date of default, in case of First Financial Creditor, has been stated as 31st December 2015; in the case of Second Financial Creditor, it has been stated as 31st March 2016; in the case of Third Financial Creditor, it has been stated as 31st December 2014; which is also the same in the case of Fourth Financial Creditor.

7. The application has been signed by one Mr. Jitendra Sirohia, being a Director of Sangita Fiscal Services Private Limited. It has also been stated that the original letters of authorisation were attached along with Board Resolution and Vakalatnama of all Applicants.

8. The Ld. Counsel appeared on behalf of the Financial Creditors and submitted that First Applicant i.e., Sangita Fiscal Services Private Limited agreed to give temporary finance for tea season 2015-16 to the Corporate Debtor upto a maximum of Rs.4,50,00,000/- on Interest @ 21% per annum, payable at monthly rest. Deed of Agreement, in this regard, was executed on 22nd December 2014 between the First Applicant, Corporate Debtor and one M/s. Contemporary Brokers Private Limited, being the Tea Broker of the Corporate Debtor. It was contended that under the said Agreement, Corporate Debtor was required to repay the entire amount with interest by 31st December 2015. A Post-dated Cheque dated 31st March 2016 was also issued by the Corporate Debtor for a sum of Rs.4,50,00,000/- in favour of the Financial Creditor. However, the Corporate Debtor failed to pay the interest as well as repay the loan. It

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was pointed out that on 11th August 2017, Corporate Debtor confirmed its liability for a sum of Rs.4,70,00,000/-; however, it did not confirm the interest liability. It was also pointed out that the Corporate Debtor had also given a fresh Post-dated Cheque dated 30th September 2017 for Rs.4,50,00,000/- along with letter dated 27th June 2016. It was also submitted that proceedings under Section 138 of Negotiable Instruments Act, 1881 were also taken which were pending. Our attention was also drawn to the relevant clauses of the Agreement as well as copies of the aforesaid letters and Post-dated Cheques.

9. As regards the Second Financial Creditor, it was contended that similar Agreement dated 18th February 2015 had been executed whereby the Corporate Debtor was responsible to repay the entire loan by 31st March 2016. A post-dated cheque for Rs. 50,00,000/- was sent vide letter dated 20th February 2015; another post-dated cheque for Rs.2,50,00,000/- was also sent along with letter dated 26th February 2015. Two post-dated cheques of Rs. 50,00,000/- each were also given vide letter dated 18th February 2015. However, on failure to honour its commitment by Corporate Debtor, the Operational Creditor on 4th August 2017 and 11th August 2017 sought confirmation of balance outstanding from Corporate Debtor which was done, but interest liability was not confirmed. Fresh post-dated cheques were also given. Proceedings under Section 138 of the Negotiable Instruments Act, 1881 vide notice dated 21st October 2017 were initiated which were pending. Our attention was also drawn to the various clauses of the Deed of Agreement dated 18th February 2015 and Promissory Note given by the Corporate Debtor. Our attention was also drawn to the copies of the confirmation letters and post-dated cheques issued by the Corporate Debtor on all occasions.

10. As regards the Third Financial Creditor, the basic terms & conditions and other facts are same except the dates and the amounts, hence, not repeated again for the sake of brevity. Deed of Agreement in the case has been executed on 21st January 2014.

11. As far as the Fourth Financial Creditor is concerned, the amount has been given on the basis of oral arrangement on the similar conditions. In this case, payment of Rs.52,16,042/- against the disbursement of Rs.60,00,000/- have also been made. As on

31st December 2017, the outstanding amount had been claimed at Rs.24,60,048/-. The last payment had been made on 18th August 2015.

12. The Ld. Counsel finally contended that there was a debt which was due and payable in law and in fact and a default had occurred, hence, this application was liable to be admitted.

13. The Ld. Counsel for the Corporate Debtor appeared and made threefold arguments. First line of argument was that no time value of money was involved, hence, it was not a case of financial debt. Second line of argument was that there was no fixed schedule for repayment of loans, hence, debt was not due and payable. Third line of argument was that no proper authorisation was made by the Financial Creditor in favour of the applicant.

14. As regards the first argument, he referred to the Deed of Agreement and contended that it was a case of an advance for purchase of tea and, therefore, application filed under Section 7 of IBC, 2016 on the face of it was liable to be dismissed. In support of his claim, he drew our attention to various clauses of the agreement. He also drew support from the decision of the Hon'ble NCLAT in the case of *Sanjay Kewalramani vs. Sunil Parmanand Kewalremani & Ors. In Company Appeal (AT)(Insolvency) No.57 of 2018, order dated 12th July 2018* to contend that if no time value of money has involved, then, the transaction could not be held as of the nature of financial debt within the meaning of provisions of Section 5(8) of IBC, 2016.

15. He, thereafter, referred to page no.30 of the paper book which contained a letter written by the Corporate Debtor on 27th June 2016 to the First Financial Creditor wherein it was specifically stated that "as agreed, the repayment and other terms will be as mutually decided upon". Thus, on the basis of this understanding, the Ld. Counsel vehemently argued that the loan had not become due and payable and, therefore, the first ingredient itself was not complied with to file this application.

16. As regards the third objection, he drew our attention to page no.87 and contended that no Board resolution / power of attorney / authorisation was given to file application


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jointly. It was also contended that no seal of the company was affixed and, therefore, in the background of these facts, according to the Ld. Counsel, the application was defective and did not meet the filing requirements and consequently, the same was liable to be dismissed. In this regard, he placed reliance on the decision of the Hon'ble NCLAT in the case of Pologyit.

17. In the rejoinder, the Ld. Counsel for the Financial Creditor again emphasised on the basis of agreement and other documentary evidences submitted that it was a case of temporary finance and it carried interest, hence, it was a case of financial debt. It was also contended that the lenders were not in the business of buying and selling of tea and the broker of the Corporate Debtor was made a party for the purpose of securing the repayment, which could not alter the true nature of the arrangement. It was also pleaded that Board resolutions authorising the applicant to file application on behalf of all the Financial Creditors were also attached.

18. We have considered the submissions made by both sides and also perused the material on record. It is not in dispute that in case of three Financial Creditors, a written Deed of Agreement has been executed. In the said agreement, the Financial Creditors have been addressed as lender. In the preamble the term "finance" has been defined as "temporary finance" to be granted by the Lender to the Corporate debtor against their present / future stock of tea as per discharge schedule forwarded by the company. The term "finance account" has been defined as the account relating to the temporary finance granted by the lender to the Corporate Debtor. It has also been mentioned that a resolution under Section 293(1)(d) of the Companies Act, 1956 had been passed by the shareholders of the Corporate Debtor to enable the Company and its Directors to borrow loans not exceeding Rs. 1200 Crores and avail temporary finance within the limit of borrowing of the Corporate Debtor company. It is also mentioned that the Financial Creditors were approached by the Corporate Debtor. It is also mentioned that disbursement could be made in intervals/installments. The broker is also nominated by the Corporate Debtor. Interest element also exists. Further, the Financial Creditors are not in the business of purchase and sale of tea. When we see these terms and conditions, we are totally amused as to on what basis the Corporate Debtor could claim that this is a

transaction of sale and purchase of tea and not of financing. We further find no substance in the plea of the Corporate Debtor that it is not a financial debt within the meaning of Section 5(8) of the IBC, 2016 for the simple reason that it also carries interest, whereas, in our considered opinion, if the money is given even without interest, still it has time value of money as it results into an economic advantage to the borrower at free of cost over a period of time when the value of money decreases due to inflation. The transactions of loan / advance are specifically covered under clause 5(8)(a) as these have been borrowed against interest. Even, considering the fact of repayment of loan to one of the financial creditors and other surrounding circumstances as well, such claim made by the corporate debtor appears to be of no help particularly when no other material / documentary evidence has been brought on record to show that the tenure of the loan has been extended. Thus, in the background of the facts and circumstances and applicable legal position, as discussed herein above, we are of the considered view that the transaction is of the nature of financial debt within the meaning of provisions of Sections 5(8) and 5(8)(a) of IBC, 2016.

19. Although the nature of the transaction as of a financial debt based upon the interest element and other aspects has already been identified, yet we consider it pertinent to answer the contention raised by the Corporate Debtor that such transaction is in regard to the sale and purchase of tea. It is not in dispute that the amount has been given as advance, then, the effect in the hands of the Corporate Debtor is that it amounts to borrowing for commercial purpose. Therefore, as per clause 5(8)(f) of IBC, 2016, this transaction has got the trappings of commercial effect of borrowing, hence, for this reason also this is a financial debt.

20. As far as reliance placed by the Corporate Debtor on the decision of the Hon'ble NCLAT is concerned, we find that in a subsequent case of *Shailesh Sharma vide order dated 30.01.2019*, the decision relied on by the Corporate Debtor stands overruled by the order of Hon'ble NCLAT itself in the case of *Shailesh Sangani order dated 30.01.2019*. The relevant findings are reproduced as under:

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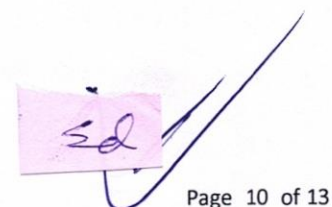
“the debt along with interest, if any, should have been disbursed against the consideration for the time value of money. However, the use of the expression ‘if any’ as suffix to ‘interest’ is clearly indicative of the fact that the component of interest is not a sine qua non from bringing the debt within the fold of ‘financial debt’. Hence, the amount that has been disbursed as debt against the consideration for time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of Section 5(8) embody the nature of transactions which are included in the definition of ‘financial debt’. It includes money borrowed against the payment of interest. Clause (f) of Section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement. It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Corpora the Debtor as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the part of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interest be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such situation such funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the Company. Enhancement of assets, increase in production and the growth in profits, share value or equity ensures to the benefit of such stakeholders and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with obligation on the part of Company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases the amount taken by the Company is in the nature of a ‘financial debt’.

21. We further hold that in view of the subsequent decision of the Hon'ble Supreme Court in the case of *Pioneer Urban Land Infrastructure Limited & Anr. Vs. Union of India as reported in (2019) 8 SCC 416*, the decision placed reliance on by the Corporate Debtor is not binding. In the said decision, the Hon'ble Supreme Court, while interpreting the concept of time value of money, has held that a transaction does not necessarily need to culminate into money being returned to the lender or interest being paid over the money borrowed as there may be a situation where something in kind equivalent to the money may be returned.

22. As far as the question of liability to pay in presentio is concerned, it is not in dispute that it is a case of a temporary finance. Even, the Corporate Debtor has given post-dated cheques for short tenures. It is also mentioned that it is for a particular tea season, hence, it may not, in our considered view, lose its character of short term loan. Further, both the parties have to agree and a decision cannot be taken by the Corporate Debtor on its own as it is based on mutual understanding as evident from the subject letter of Corporate Debtor relied on by Corporate Debtor. Once it is so, the Financial Creditors have shown their intent by initiating proceedings under Section 138 of Negotiable Instruments Act, 1881 due to non-encashment of cheques. Thus, this contention of the Corporate Debtor is also rejected.

23. As far as pleas regarding authorisation are concerned, we find that Board resolutions of each company are enclosed whereby authorisation has been given to the applicant to sign the application on its behalf and on their behalf. It is not in dispute that this can be done as Section 7 as well as Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 permits so. We also find that such technicalities cannot be allowed to come into the way of efficacy and implementation of an economic legislation which has got its object to promote credit culture and entrepreneurship particularly when no specific format has been prescribed and documents brought on record appear to be genuine. Accordingly, we reject this contention of the Corporate Debtor as well.


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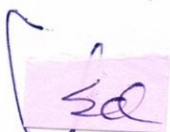

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24. The name of IRP has been proposed who has given his consent as well and as per records no disciplinary proceedings are pending against such IRP, hence, we approve his name to act as IRP.

25. The petition is complete and defect-free. Hence, we admit the same and order as under:

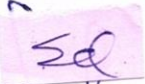
ORDER

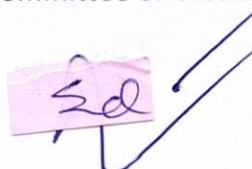
- i) The application filed by the Financial Creditors under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, Duncans Industries Limited, is hereby admitted.
- ii) We declare a moratorium and cause public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii) 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 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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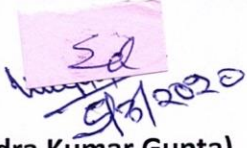

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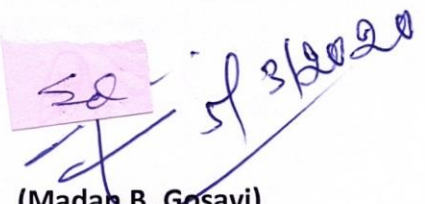
- c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d) The recovery of any 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 to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during 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 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) Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x) **Mr. Ram Ratan Modi**, IP Registration No.IBBI/IPA-001/IP-P00051/2017-18/10125, email: rrmodi@gmail.com, of "Narayani Building", 27, Brabourne Road, 5th Floor, Room No.503, Kolkata-700 001 is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.


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- xi) The Financial Creditor to pay a sum of Rs.3,00,000/- (Rupees Three Lacs only) to IRP as advance fees as per Regulation 33(3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 which shall be adjusted from final bill.
- xii) The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
- xiii) List the matter on 20th April, 2020 for the filing of the progress report.
- xiv) CA (IB) No. 03/KB/2019 and CA (IB) No.121/KB/2019 connected with CP (IB) No. 184/KB/2018 stand disposed of.
- xiv) Registry is hereby directed under section 7(7) of the I & B Code, 2016 to communicate the order to the Financial Creditors, the Corporate Debtor and to the IRP by Speed Post as well as through e-mail.
- xv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.


(Virendra Kumar Gupta)
Member (Technical)


(Madan B. Gosavi)
Member (Judicial)

Signed on this, the 5th day of March, 2020.