

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB)No.2083/ND/2019

In the matter of:

The Insolvency and Bankruptcy Code, 2016

AND

In the matter of:

Section 7 of the Insolvency and Bankruptcy Code, 2016 read with
Rule 6 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016

AND

In the matter of :

M/s Modern Credit Pvt. Ltd.
808, Manjusha Building
57, Nehru place,
New delhi-110019

....Financial Creditor/Applicant.

VERSUS

M/S KPG International Private limited
B-354, Block-B, MangolPuri Industrial
Area, Phase-I, New Delhi-110083
Email: mahendru1981@gmail.com

....Corporate Debtor/Respondent.

ORDER DELIVERED ON : 22.01.2020

CORAM:

Mr. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)

Ms. Sumita Purkayastha, Hon'ble Member (Technical)

For the Applicant/ Operational Creditor: Dhruv Khanna, A.R.

For the Respondent/ Corporate Debtor: None.

ORDER

Per Mr. Abni Ranjan Kumar Sinha, Member (Judicial)

1. The present petition has been filed under Section 7 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor on grounds of its inability to liquidate its financial debt.
2. Modern Credit Private Limited (hereafter referred to as "Modern Credit or 'Financial Creditor' or 'Applicant') is a non-banking financial company engaged *inter-alia* in the business of lending.
3. KPG International Private Limited (hereafter referred to as 'KPG International' or 'Corporate Debtor' or Respondent') is a manufacture of textiles/textile products.
4. KPG International through its promoters /shareholders /directors /representatives Mr. Gaurav Mahendru, Mr. Rameshwar Chander Mahendru and Mrs. Kanika Mahendru approached Modern Credit for the purpose of availing loan facilities for their business. Pursuant to

discussion between the parties and based on the representations made, information provided, documents submitted and assurances given regarding timely repayment of all money due along with interest by KPG International, Modern Credit agreed to sanction and disburse loan/financial facility of Rs. 35,00,000/- (Rupees Thirty Five Lakhs only) KPG International and other Co-Applicants i.e. Mr. Gaurav Mahendru, Mr. Rameshwar Chander Mahendru and Mrs. Kanika Mahendru, and accordingly Sanction Letter dated 12.12.2017 was issued by Intec Capital Limited.

5. The parties thereafter executed Business Loan Agreement bearing no. BL/17-18/0202 dated 13th December 2017, along with other transitional documents for availing above said loan/financial facilities. Subsequent to execution of aforesaid agreement, the loan amount of Rs. 35 Lakhs was sanctioned and an amount of Rs. 34,98,550/- was disbursed on 18th December 2017 through Cheque after deducting Rs. 84050 for processing fees and stamp & documentation charges.
6. As per the terms and conditions of the Business Loan Agreement dated 13.12.2017 numbered BL-17-18/0202 and sanction letter dated 12.12.2017, the loan of Rs. 35 Lakhs was granted for a period of 24 months @21.00% per annum interest on reducing basis. The Corporate Debtor was required to repay the said loan in twenty four equal monthly installments of Rs. 1,79,850/- (Rupees One Lakh Seventy Nine Thousand Eight Hundred Fifty Only) which fell due on the 15th day of each calendar month starting from January 2018. As per the terms agreed in between the parties, the Corporate Debtor duly handed over 24 post-dated cheques (PDCs) to the Applicant towards the repayment of loan.
7. That the Corporate Debtor made repayment of EMIs initially till September, 2018 and the first cheque was dishonored on 15.10.2019 and no payment was received till presentation of 11th EMI cheque

whereas the 11th EMI cheque was honoured. As per the averments made in the application, the Corporate Debtor failed to honour any of its EMI cheque and defaulted in repayment of the loan amount. The Corporate Debtor failed to maintain adequate amount in the bank account as the result of which the cheques were dishonoured by the banker and the payments were not made to the Applicant as per repayment schedule.

8. Demand Notice dated 22.02.2019 was issued by the financial creditor to the corporate debtor demanding the Corporate Debtor to make payment of overdue amount of Rs. 5,82,089/- within 7 days.
9. A Loan Recall Notice dated 17.05.2019 was also issued to the corporate debtor to recall the entire loan amount sanctioned to the corporate debtor, demanding payment of Rs. 21,50,794/- which is inclusive of delay interest and other charges.
10. The petition of dishonouring of cheques is also pending against the Corporate Debtor in Gurugram, Haryana.
11. The arbitration proceedings against Corporate debtor is also initiated by the Financial creditor under Clause 18 of Business loan Agreement.
12. The total amount of debt due to the corporate debtor is Rs. 22,75,389/- including principal outstanding, payments received, overdue instalment, interest on delayed payments and other charges as per the terms and conditions under various transitional documents as on 10th July 2019.
13. The Cause of Action arose on 09.05.2019 and the present petition being filed in 28.08.2019 is within the limitation, ²¹being within three years from the date of the cause of action.

14. After issuance of summons when none appear on behalf of the respondent then vide order dated 24.10.2019, the proceeding against the Corporate Debtor was proceeded for ex-parte hearing and on the same day, the Ld. Counsel appearing on behalf of the Financial Creditor suggested the name of the IRP, Mr. Sunil Kumar Agarwal IRP having its Registration No. IBBI/IPA-002/IP-N00081/2017-18/10222.
15. In course of argument, Ld. Counsel appearing for the petitioner submitted that since none appear on behalf of the Corporate Debtor to oppose averment made in the application filed on behalf of the Financial Creditor then the proceeding was listed for ex-parte hearing. He further submitted that of course, there is an arbitration proceeding between the parties but that would not debarred the petitioner to file the application under Section 7 of the IBC because while initiating proceeding under Section 7 of the IBC, the petitioner is to establish whether there is a financial debt and there is default in making payment of that debt except these two, there is no other thing which is required to be proved by the petitioner.
16. Before making any comment on the submissions made on behalf of the Petitioner, we would like to refer the decision of Hon'ble Supreme Court in **Innoventive Industries Limited Vs. ICICI Bank reported in 2018 (1) SCC 407:**

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1

is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the

information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise".

17. Now in light of submissions made on behalf of the petitioner and in light of the decision, we shall consider the case in hand. We have gone through the averment made in the application and we find that the petitioner has enclosed the documents including the Business Loan Agreement, Statement of accounts to show that under the agreement dated 13.12.2017 a loan of Rs. 35,98,550/- was disburse on 18th December, 2017 through cheques after deducting Rs. 84,050/- for processing fee and stamp and documentation charge which as per the agreement required to repay in 24 equal instalments i.e. Rs. 1,79,850/- per month, which would be evident from page no. 51-52 of the agreement. We further find the statement of account has also been enclosed by the applicant and as per the averment made in part 4 of application at page 13, the date of default is 9.05.2019, whereas the present application is filed on 28.08.2019 therefore, the application is within time and we further find it is complete.
18. So in view of the judgement referred in the aforementioned, when we shall consider the case in hand, then we are of the view that in order to trigger Section 7 of the IBC, the Adjudicating Authority is required to see whether a Corporate Debtor has committed default of Financial Debt and then in this case, we find that the Operational Creditor was required to repay the amount in 24 instalment and he was required to pay the instalment on every month since he fails to repay the amount, therefore, there is a default of more than Rs. 1 lakh, hence we have no option but to admit the application.

19. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the Insolvency & Bankruptcy Code, 2016 shall come into effect forthwith staying:-

(1) Subject to provisions of sub-sections (2) and (3), on insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all the following, namely:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debt or 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;

(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.

Further:

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) 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.

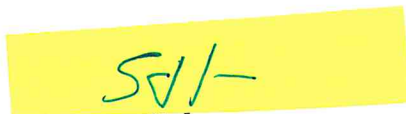
(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:



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 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."

20. The Operational Creditor has proposed the name of the IRP. Accordingly, we appoint Mr. Sunil Kumar Agrawal, an Insolvency Professional, registration no. IBBI/IPA-002/IP-N00081/2017-18/10222email-aggarwalsk21@yahoo.co.in duly empanelled with the IBBI as the IRP. The written consent letter of the proposed IRP is annexed at page no.77. He is directed to take such steps as are mandated under the Code, more specifically under Sections 15, 17, 18, 20 and 21 and shall file his report before the Adjudicating Authority.


SUMITA PURKAYASTHA
MEMBER (TECHNICAL)


ABNI RANJAN KUMAR SINHA
MEMBER (JUDICIAL)

Pronounced today under Rule 151 of the NCLT Rules 2016 as Mrs. Sumita Purkayastha, Hon'ble Member (T) is sitting in Principal Bench today.


(PRABHAT KUMAR SHARMA)

COURT OFFICER