

IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH

C.P.(IB)No.9/BB/2017  
U/sec.7 of I & B Code, 2016

IN THE MATTER OF:

1.) **IDAC Solutions Private Limited** ..... **Applicant No.1**  
No.1, daffodils Regency, F-B, Kundaswamy  
Mudaliar Road, Richards Town, Bangalore,  
Karnataka-560 001

2.) **Nithin Shabbir s/o Mr. Mohammed Shabbir** ..... **Applicant No.2**  
C/004, Oberoi Springs CHS Limited  
Off Link New Road, Opp. City Mall  
Andheri West Mumbai- 400 053

**Versus**

**Liquid Space Entertainment Private Limited** ..... **Respondent**  
#4/1, Ground Floor, Alexander Street,  
Richmond Town, Bengaluru- 560 025

Order Delivered on: 29<sup>th</sup> November 2018

Coram: Hon'ble Shri Rajeshwara Rao Vittanala, Member (Judicial)  
Hon'ble Shri Ashok Kumar Mishra, Member (Technical)

For the Petitioner: Mr. S. Vivekanda Advocate & Mr. Vivek Hegde, PCS  
VGB Associates, #23/6, Vasupuram, 3<sup>rd</sup> Floor,  
Muniswamy Road, Shivajinagar,  
Bangalore-560 051

For the Respondent: Mr. Arjun K. Perikal & Ms. Nishta Paul, Advocates  
J. Sagar Associates, Advocates and Solicitors,  
Level 3, Prestige Obelisk No.3, Kasturba Road  
Bengaluru-560001

Per: **Hon'ble Shri Ashok Kumar Mishra, Member (Technical)**

**O R D E R**

A. This Company Application is jointly filed on behalf of the Applicants i.e. Financial Creditors under Section 7 of the Insolvency and Bankruptcy Code 2016, praying to initiate Corporate Insolvency Resolution process against the Respondent Company.

B. The Financial Creditors **IDAC Solutions Private Limited** and **Shri Nithin Shabbir** have filed the present Application. The Applicant No.1, i.e. the Company, IDAC



Solutions Private Limited was incorporated on 12<sup>th</sup> August, 2011 bearing CIN U74900KA2011PTC059973. The Registered Office of the Company is No.1, Daffodils Regency, F-B, Kundaswamy Mudaliar Road, Richards Town, Bangalore, Karnataka-560 005.

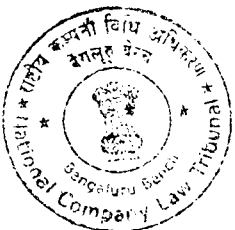
C. The Applicant No.2 i.e. Shri Nithin Shabbir, s/o Mohammed Shabbir aged about 46 years residing at C/004, Oberoi Springs CHS Limited Off Link New Road, Opp. City Mall, Andheri West Mumbai- 400 053.

D. The Corporate Debtor is **LIQUID SPACE ENTERTAINMENT LIMITED** incorporated on 4<sup>th</sup> June, 2009 bearing CIN No.U92100KA2009PTC050050. The Registered Office of the Corporate Debtor is #4/1, Ground Floor, Alexander Street, Richmond Town, Bengaluru- 560025. The Copy of Certificate of Incorporation, Memorandum and Articles of Association of the Respondent Company are shown as **Annexure C, D & E** to the Petition.

E. The Authorised Share Capital of the Corporate Debtor is Rs.78,00,000/- divided into 7,80,000 Equity Shares of Rs.10/-each and the paid up Share Capital is Rs.1,00,000/- divided into 10,000 Equity Shares of Rs.10/-each. The Copy of Balance Sheet and Profit & Loss Account as on 31<sup>st</sup> March, 2016 of the Corporate Debtor are shown as **Annexure F & G** to the Petition respectively. The Copy of Balance Sheet and Profit & Loss Account as on 31<sup>st</sup> March, 2015 of the Corporate Debtor are shown as **Annexure L & M** to the Petition respectively.

F. The Applicants i.e. Financial Creditors have proposed the name of Interim Resolution Professional Shri Thirupal Gorige, bearing Registration No. IBBI/IPA-002/IP-N00016/2016-17/10030. We have verified the details of the proposed Interim Resolution Professional from the website of Insolvency and Bankruptcy Board of India and it is seen that the details given above are correct, with regard to the Registration number allotted by the Board.

G. The Applicants/Financial Creditors has averred the details of Financial Debt against the Corporate Debtor as follows:



PARTICULARS OF FINANCIAL DEBT		
1	Total amount of Debt granted Date(s) of Disbursement	1.) Rs.67,00,000/- (Rupees Sixty Seven Lakhs Only) given by IDAC Solutions Private Limited, and 2.) Rs.3,25,80,000/- (Rupees Three Crores Twenty Five Lakhs Eighty Thousand Only) given by Shri Nithin Shabbir
2	Amount claimed to be in default and the date on which the default occurred. (attach the working for computation of amount and day s of default in Tabular Form)	1.) Rs.67,00,000/- (Rupees Sixty Seven Lakhs Only) + interest @ 18% pa from 01.04.2014 = Rs.1,02,17,500/- 2.) Rs.3,25,80,000/- (Rupees Three Crores Twenty Five Lakhs Eighty Thousand Only) + interest @ 18% pa from 01.04.2014 = Rs.4,96,84,500/-

H. The Financial Creditors have placed on record the List of other Documents in Order to prove the Existence of Financial Debt as under:

- Certificate of Incorporation of the Corporate Debtor;
- MOA & AOA of the Corporate Debtor
- Balance Sheet and Profit & Loss Account of the Corporate Debtor as on 31.03.2016;
- Cash Flow Statement for the Year ended 31.03.2016
- Director's Report of the Corporate debtor
- Form No. AOC-4 of the Corporate Debtor;
- Independent Auditor's Report of the Corporate Debtor
- Balance Sheet and Profit & Loss Account of the Corporate Debtor as on 31.03.2016;
- Notice of Extra-Ordinary General Meeting held by the Corporate Debtor;
- Extract of the Extra Ordinary General Meeting of the Corporate Debtor to sell its assets to raise funds to meet Statutory dues and Liabilities of the Company;
- Form MGT-14 of the Corporate Debtor;
- Legal Notices dated 29.12.2016 sent by the Financial Creditors to the Corporate Debtor;



CP (BB) No.9/BB/2017

(m)Postal Acknowledgements in respect of the Legal Notice;

I. The Counsel for the Respondent Company has filed its Preliminary Objections to this Application of the Petitioner Companies on 3<sup>rd</sup> July, 2017. The Respondent raised the following objections:

- 1) The Insolvency and Bankruptcy Code, 2016 ("IBC") clearly specifies the list of transactions that fall under the category of Financial Debt and has reproduced Section 5(8) of IBC
- 2) The Petitioners have not produced any documents or exhibits to show that they should be considered as financial creditors and that the application filed by the Petitioners should be dismissed in limine on the ground that the Petitioners have failed to establish that they are financial creditors who have advanced a financial debt to the respondent company in accordance to the IBC.
- 3) The case of *Nikhil Mehta and Sons Vs. AMR Infrastructures Limited*, C.P. No. (ISB)-03(PB)/2017 decided by the National Company Law Tribunal, Principal Bench, New Delhi, has been relied on for interpretation of the term financial debt.
- 4) It is submitted that only those transactions in which amounts are advanced to debtor and carry a rate of interest for the period of time the debt is being utilised, falls under the definition of financial debt. The nature of amount advanced to the Respondent Company by the Petitioners was not in the nature of a debt, let alone a financial debt. It has been stated that the Petitioners were interested in participating in the Respondent Company and holding equity shares in the Respondent Company. It is with this intention the Petitioners remitted amounts to the Respondent Company and sought for allotment of shares.
- 5) The Respondent Company has submitted brief facts of the present matter as follows:
  - a. In the year 2009 Mr. Nellamakkada Aiyappa Bopanna and Nellamakkada Aiyappa Uthappa ("Promoters") incorporated the Respondent Company with the objective of operating as event managers and providing the service of conducting, co-ordinating and managing entertainment events and carrying out such other ancillary activity. The Promoters were the initial directors and shareholders of the Respondent Company and have since 2009 successfully managed the Respondent Company.
  - b. In the year 2012, the Petitioner No.2 approached Mr. Nellamakkada Aiyappa Uthappa, one of the Promoters of the Respondent Company and expressed interest



in joining the promoters and participating in the business run by the Company. The Promoters accepted the request of Petitioner No.2 to join the company and the Petitioner No.2 was appointed as a Director of the Respondent Company on November 9, 2012. The documents reflecting Respondent No.2's directorship in the company have been produced.

- c. The Petitioner realising the benefit of being associated with Respondent Company with Respondent Company expressed interest in taking his association with the Respondent Company one step further and offered to invest an amount of Rs.30,00,000 (Thirty Lakhs) on 10.01.2012 and 11.01.2012 ("**First Tranche**"). However since there was no clarity on how this money could be utilised, the same was returned on 17.04.2012 and 06.06.2012.
- d. During this time the petitioner No.2, also showed interest in becoming a shareholder of the Respondent Company which was accepted by the promoters. The Petitioner No.2 in this regard paid amounts towards this in different lots from 26.05.2012 to 15.09.2012 totalling to Rs.1,05,00,000/- (One Crore Five Lakhs Only) towards issue of equity shares ("**Second Tranche**") out of which it was agreed that shares will be allotted for an amount of Rs.1,00,00,000/- (One Crore Only). Therefore, the amount of Rs.5,00,000/- (Five Lakh Only) was paid back to Petitioner No.2's associates on his instructions on June 1<sup>st</sup> 2012.
- e. The Promoters shared with the Petitioner No.2 that until the shares are allotted, the amounts received from the Petitioner No.2 will be accounted for as 'Share Application Money Pending allotment', which the Petitioner No.2 consented to. In this regard, the Petitioner No.2's email dated October 21,2012 with enclosures, wherein the Petitioner No.2 signed and sent the draft letter and draft board resolution relating to the allotment of shares in his favour, which were forwarded to him earlier, have been produced.
- f. Accordingly, the said amount of Rs.1,00,00,000/- (Rs. One Crore Only) was accounted for by the Respondent Company as share application money pending allotment. Due to certain practical difficulties faced by the Respondent Company, the Petitioner No.2's shares could not be allotted. However, the money paid by the Petitioner No.2 continued to be reflected as 'share application money pending allotment' in the Respondent Company's books. Draft Share certificates were provided to the Petitioner No. 2 until the allotment of final shares as per



Companies Act, 2013. On December 28, 2016 the Respondent Company allotted shares in accordance with the relevant statutory provisions to the Petitioner No.2.

- g. The Respondent Company runs a particular annual event titled as 'Storm Music Festival'. This event over the past years has become popular and has come to be considered as a renowned festival within the international and domestic music fraternity. The Petitioner No.2 also showed interest in partnering in this mega event, on realising that an event of that scale had the potential to increase the reputation and exposure of Petitioner No.1 Company, in which he is a Director. The Promoters agreed to feature the name of the Petitioner No.1 Company in the media, event posters and paraphernalia of the event between the years 2012 and 2014 against the payment of the sponsorship amounts.
- h. In furtherance to this understanding, the Petitioners paid various amounts during the period 10.10.2012 to 24.01.2014 totalling to Rs.2,57,80,000/- (Rupees Two Crore Fifty Seven Lakh Eighty Thousand) [**"Third Tranche"**]. Out of this amount though the standard partnering charges range anywhere between 1.5 Crore to 2 Crore, based on the personal relationship that the parties shared, it was agreed that a discount would be provided to the Petitioners and only an amount of Rs.95,50,000/- (Rupees Ninety Five Lakhs Fifty thousand Only) would be considered towards fee for partnering with the Respondent Company's Storm Music Festival and it was accounted as such in the books of accounts of the Respondent Company.
- i. The additional amounts were returned in various lots till the end of June 2016. As part of the on-going amounts returned to the Petitioners, the Respondent Company made another payment to the Petitioner No.2 even, Rs.1,50,00,000/- for which the Petitioner No.2 even provided a receipt stating that the same had been received by him. A copy of this receipt dated 19.05.2016 is attached herewith as Annexure G.
- j. The other amounts that were paid back to the Petitioners are clearly borne out in the books of accounts and the statement of accounts of the Respondent Company (Annexure C has the relevant extracts of the books of accounts in this respect),. Presently only an amount of Rs.40,000/- (Rupees Forty Thousand Only) has remained unpaid.
- k. In any circumstances these are amounts which are even in accordance to the Petitioners advanced in the year 2012 to 2014. These claims are therefore time



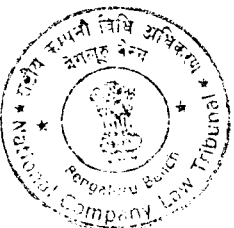
barred and are severely hit by limitation. The Petitioner now in the year 2017 cannot come before this tribunal put forth these claims.

1. When matters stood thus the Petitioner No.2 only to settle a personal score against the Promoters filed various complaints to the registrar of companies alleging that forged share certificates were issued to him and that his resignation was not taken on record etc. However all these issues have been settled and the complaint raised by the Petitioner No.2 has been closed. The Petitioners have also filed a false criminal complaint against Promoters on October 5, 2016 at a Police Station in Bangalore, alleging inter alia that the promoters have cheated the petitioner of amounts to the tune of Rs.4,00,00,000/-.
- J. Subsequent to the filing of the Objections raised by the Respondent, the Petitioners filed Rejoinder dated 18<sup>th</sup> August, 2017 making the following submissions:-
- a) the respondent's allegations are denied as baseless and false, and created specifically for the purpose of this case.
  - b) The averments made in Para 3 of the Preliminary objections stating that no documents have been produced for substantiation of claim as financial creditors are denied as false and baseless. The Petitioners have furnished documents to show that they are financial creditors.
  - c) The reliance on *Nikhil Mehta & Sons vs. AMR Infrastructure Ltd.* is misplaced, as the facts and circumstances of the case are entirely different from the instant case.
  - d) It is submitted that the averments made in paragraph 5, 6, and 7 of the preliminary objections are not correct.
  - e) The true facts of events have been stated by the Petitioners to be as follows:
    - i. The Petitioners loaned the said sums of money, i.e. Rs.67,00,000/- by the Petitioner No.1 and Rs.3,25,80,000/- by the Petitioner No.2. However, the Respondent requested the Petitioner No.2 that some shares to the extent of 25% shares in the Respondent Company would be issued for the amount given by the Petitioner No.2 and the balance would be refunded. Petitioner No.1 had given the amount by way of inter-corporate loan. But from 2014, the respondent did not even bother to issue shares to the Petitioner No.2 for a portion of the amount paid by him to the extent of 25% shares in the Respondent Company. Since the Respondent did not issue the shares and did not refund the balance amount, the Petitioners called upon the



respondent to return the amounts to the petitioner. Since the Respondent did not refund the amount, legal notice dated 29.12.2016 was issued calling upon the Respondent to pay the money back. No replies to the said notices were issued by the Respondent. However, the Respondent Company in order to avoid the repayment of the said loan allegedly allotted the shares for an amount to the extent of Rs.1,00,00,000/- (Rupees one crore only) to the extent of 98% shares of the respondent company, only after receipt of the legal notice. However, the Respondent back dated the allotment to show that it was done on 28.12.2016, while the stamp duty was paid only in February, 2017 as can be seen from the share certificate.

- ii. It is submitted that as per section 42(6) of the Companies Act, 2013, the allotment is required to be made within 60 days, failing which the amount has to be returned within 15 days and beyond a period of 15 days the amount has to be refunded with an interest of 12% p.a. As such the Respondent has lost the mandate to issue the shares to the Petitioner No.2 and as such the allotment and issuance of shares is not valid and not binding on the Petitioner No.2. Further, since the share application money ought to have been returned with interest @ 12% p.a. it would become a financial debt and the petitioner a financial creditor.
- iii. The Annexure C to the Preliminary Objections produced by the Respondent has been fabricated and created specifically for the purpose of this case to suit its convenience. If the said amounts were paid for the buying of equity shares, then such shares should have been allotted in the name of the Petitioner No.2 in accordance with the statutory provisions of the Companies Act, 2013. If the Respondent Company was not in a position to do so then the monies received as share application money should have been repaid within the specified statutory period. Whereas, the Respondent Company has failed to do so and is trying evade the repayment of the said monies given as loan by the petitioners. Further there are no provisions in the Companies Act for issue of draft share certificates as alleged. The respondent company's claims that money to the extent of Rs.95,50,000/- was given towards the partnering of music festival is baseless. If so, then the respondent company ought to have issued the receipts for the same. On the contrary, the Respondent has shown the name of the Petitioners as a

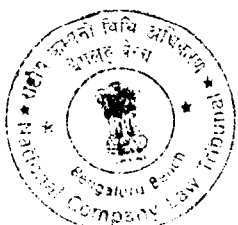


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creditor in its balance sheets, which clearly reveals that the objections of the Respondent are false.

- iv. The Petitioner No.1 had transferred the funds to the extent of Rs.67,00,000/- (Rupees Sixty-seven lakhs only) by way of inter-corporate loan to the Respondent Company. The allegations that the petitioners gave the amount of Rs.95,50,000/- (Rupees ninety five lakhs and fifty thousand only) towards the partnering for a music fest is false. Even if that would have been the case the Respondent out to have issued receipts for the same to the Petitioner No.1. Instead the Respondent has shown the said funds in the balance sheets as at 31.3.2015 and 31.3.2016 under the head Long-term Borrowings.
- v. The Petitioner No.2 had initially transferred the funds to the extent of Rs.3,25,80,000/- (Rupees three crores twenty five lakhs and eighty thousands only), since 2014. The Respondent Company did not allot the shares as per the provisions of S.42(6) of the Companies Act, 2013. Similarly, the notification issued by the Ministry of Corporate Affairs dated 14.12.2011 is also to the same effect. The above provision clearly makes the amount a debt repayable at the rate of 12% p.a. to the Petitioners. Such being the case it is clear that it is to be considered as a financial debt even by virtue of the provisions of the Companies Act, 2013.
- vi. The Petitioners issued a notice dated 29.12.2016 calling upon the Respondent Company to repay the amount. However, after the receipt of the notices marked as Annexure 'Q' and 'R' produced along with the Petition, the Respondent very cleverly claimed to have allotted the shares on 28.12.2016, but the stamp duty to the said share certificate was paid only on 04.02.2017. This clearly shows that the Respondent, in order to overcome the possibility of refunding the amount and to over reach the claims of the Petitioner, allegedly allotted and issued the shares. Further no reply to the said notice dated 29.12.2016 was given by the Respondent. Realising that the Respondent Company did not even have the funds to pay the statutory liabilities, it has allegedly allotted the shares to the extent of Rs.1,00,00,000/- (Rupees one crore only) and made the Petitioners the majority shareholder amounting to 98.72%. In view of the violations made



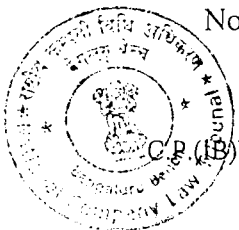
by the Respondent Company the shares issued and allotted are neither valid nor binding.

- vii. The facts in the present case are entirely different from the facts in *Nikhil Mehta and Sons vs. AMR infrastructures Limited*. The Respondent herein has wrongly tried to take shelter and refuge under the above case. In the above case, the Petitioners had paid money to acquire flats or apartments. The money paid was not in the form and nature of a debt or a loan, though an "assured return" was promised till the date of possession. Whereas, in the instant case, the money was lent as a loan to the Respondent Company and accordingly, the Respondent Company has made entries in the balance sheets of the company as at 31.03.2015 and 31.03.2016 under the had Long-term Borrowings. However, even if considered from the perspective in which the Respondent is relying on *Nikhil Mehta and sons vs. AMR infrastructures Limited* the Petitioner would be financial creditor. Since the amount considered by the Respondent as share application money is required to be refunded with interest @ 12% pa as per section 42(6) of the Companies Act, 2013, the Petitioner is a financial creditor.
- viii. As per the proviso to the Companies (Acceptance of Deposits) Amendment Rules, 2015 dated 31.03.2015 the Petitioner is eligible to get the refund of Rs.1,00,00,000 since the shares were not allotted to the Petitioner on or before 1<sup>st</sup> June 2015. Further, the allotment made after 1<sup>st</sup> June 2015 is an invalid allotment. It is important to note that all the amounts paid by the Petitioners after 10.10.2012 are in the form of unsecured loan and it was accounted in the same manner in the Books of Accounts of the Respondent Company. Since, there was a restriction under the Companies (Acceptance of Deposit) Rules, 1975 to accept unsecured loan from a person other than a Director, the Respondent Company made the Petitioner as a director.
- ix. The Petitioner No. 2 had given resignation letter to the Respondent Company several times which were not acted upon. Later, the Petitioner No.2 sent the resignation letter which was acknowledged by the Respondent Company and necessary filings dated 13.12.2016 has been made with the Registrar of Companies, Karnataka.



- x. The Respondent Company does not even have funds to pay the statutory liabilities and has sold the trademark "Storm" and the same can be seen through Annexure 'O' produced along with the Petition.
- xi. The copy of the relevant extracts submitted by the Respondent Company and the entries therein shows the cunningness of the Respondent as the said extracts show repetitive entries of alleged payments made to the Petitioner no.2, viz., 17.04.2012, 06.06.2012 and 01.06.2012 just to arrive at the total balance payable to the petitioners at Rs.40,000/-. However, it is noteworthy, that the extracts provided by the Respondent Company are not supported by any bank statements or cash vouchers. The said extracts does not amount to the total as stated by the Respondents to the amount of Rs.3,92,80,000/-. Thereby, the said extracts were fabricated for the very purpose of this case, in order to show that they have allegedly paid the total sums. A bare perusal of the Annexure 'C' filed along with the Respondent's preliminary objections is sufficient manifestation of the Respondents cunningness and mala fide intentions to defraud the Petitioners herein.
- xii. It is claimed by the Respondent Company that the claims are time barred and are severely hit by limitation. It is worthy to note that the claims are getting reflected in audited financial statements of the company for the Financial Years 2013-14, 2014-15, 2015-16. In the case of *S.C. Gupta vs Allied Beverages Co., Pvt. Ltd.*, it was held that the acknowledgement made by the company in the financial statements has the effect of extending the period of limitation for the purpose of Section 18 of the Limitation Act. Accordingly, the Petitioners submit that the claims made under the application are not time barred.

K. The Counsel for the Respondent Company vide Memo dated 13<sup>th</sup> September, 2017 has filed the relevant extracts of the statement of accounts of the Respondent Company, Balance Sheets of the Respondent Company for the Year 2011-2012, 2012-2013, 2013-2014, 2014-2015, True Copies of the Vouchers issued in respect of amounts paid to the representatives of Petitioner No.2, a copy of the Complaint dated 5<sup>th</sup> October, 2016 filed by the Petitioner Company No.2, Photos indicating that in all the hoardings of Storm, the name of Petitioner No.1 was featured, a copy of the Complaint filed by the Respondent No.2 and a copy of the email received by the ROC stating that the said complaint was



closed, and a copy of the receipts received from the MCA on filing SH-7 and MGT-14 - **Annexure P.**

L. On 13<sup>th</sup> November 2017, the Petitioners filed their Written Submissions in the said matter.

M. The Respondent Company has filed its Written Submissions dated 19.01.2018 making the following submissions:

- a) Presently, only a de minimis amount of Rs.40,000/- is due to the Petitioners, which is way below the limit of One Lakh set under Section 4(1) of the Insolvency and Bankruptcy Code, 2016. It is further clarified that this amount is due not as a matter of debt, but as a result of commercial and non-commercial transactions that have taken place between the parties.
- b) Petitioner No. 2, a long time friend of the Promoters of the Respondent Company, expressed interest to be more involved in the business of the Respondent and was appointed as a Director of the Respondent Company on 09.11.2012. The Petitioner No.2 offered to invest an amount of Rs.30,00,000/- (Rupees Thirty Lakhs only) in the Respondent Company and the amounts were given on 10.01.2012 and 11.01.2012. These amounts were returned by the Respondent Company within a period of three months on 17.04.2012 and 06.06.2012 and a small amount by way of cash.
- c) The Petitioner No.2 expressed interest in subscribing the shares of the respondent Company and paid an amount of Rs.1,05,00,000/- to the Respondent Company. It was agreed that shares in respect of Rs.1,05,00,000/- would be issued to Petitioner No.2. Emails between the parties in this respect are attached to the Preliminary Objections filed by the Respondent. The said amount of Rs.1,05,00,000/- has been shown under the head of "share application money pending allotment" in the Balance Sheet of the Respondent Company. In the Balance Sheet of the year 2014-15 an amount of Rs.1,00,00,000/- has been shown to be received towards share allotment money. In the Balance Sheet of 2015-16 also this amount of Rs.1,00,00,000/- which was received towards equity shares of the Respondent Company has been shown under the head "Loans and Advances from Related Parties" and described as "share allotment amount- previously shown under share capital".
- d) Equity shares towards the amount of Rs.1,00,00,000/- has been issued to Petitioner No. 2 on December 28, 2017. However, the Petitioner has contended that the shares



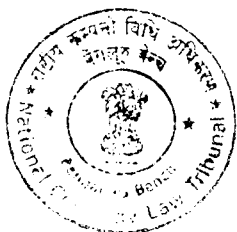
were allotted only after the Respondent received a legal notice from the Petitioner regarding alleged dues. The Respondent Company issued the shares only after the authorised share capital was increased.

- e) The Legal Notice issued by the Petitioners is dated December 29, 2016 and was received by the Respondent Company only on December 30, 2016 and hence it cannot be said that the allotment of shares to Petitioner No. 2 was an afterthought as the Respondent Company had clearly passed the resolution for allotting shares by increasing the authorised share capital. The Respondent Company had no reason to believe that a completely frivolous and malicious legal notice would be issued. In fact the Petitioners may have got the notice issued to the Respondent company after coming to know of the allotment of shares in order to prejudice the business interest of the Respondent Company.
- f) The Petitioners wanted to be a part of the Storm Music Festival organised by the Respondent Company and the Respondent Company agreed to feature the name of Petitioner No. 1 in all the posters, brochures and paraphernalia of the Storm Music Festival. In the Storm Music festival held in the years 2012 and 2014, Petitioner No.1 was featured on every brochure, poster and other paraphernalia for the events.
- g) The Petitioners advanced an amount of Rs.2,57,80,000/- during period 10.10.2012 to 24.01.2014. however, out of this amount, though the standard partnering charges range anywhere between Rupees 1.5 Crores to 2 Crores, based on the personal relationship that the parties shared, it was agreed that a discount would be provided to the Petitioners and only an amount of Rs.95,50,000/- (Rupees Ninety five lakhs fifty thousand only) would be considered as fee towards partnering with the Respondent Company's Storm Music Festival and was accounted as such in the books of account of the Respondent Company. The Balance Sheets for the year 2013-14, 2014-15 and 2015-16, though it is under the head long term borrowings, the same is specifically mentioned as "Nitin Shabbir- Storm Advances".
- h) The additional amounts were returned in various lots till the end of June 2016 all by way of cheques. As part of the on-going amounts returned to the Petitioners, the Promoters of the Respondent Company paid a sum of Rs.1,50,00,000/-, for which the Petitioner No. 2 has even provided a receipt stating that the same has been received by him. The Petitioner No. 2 has not denied that the signature on the receipt. The Petitioners have vaguely alleged that the receipt is fabricated but have failed to explain the basis of the allegation. It is therefore clear that the transactions between



the parties were not in the nature of a loan, but only a de minimis amount of Rs.40,000/- is due to the Petitioners.

- i) The case of *Nikhil Mehta and Sons Vs. AMR Infrastructures Limited*, C.P. No. (ISB)- 03(PB)/2017 decided by the National Company Law Tribunal, Principal Bench, New Delhi, has been relied on for interpretation of the term financial debt.
- j) The Respondent Company has produced documents to show that there were on-going business transactions between the Petitioners and Respondent Company and that some amounts had been returned to the Petitioners.
- k) The principles of ejusdem generis should be applied while interpreting Section 5(8)(f) and 5(8)(c) of the Insolvency and Bankruptcy Code, 2016. A discount given by the Respondent Company in respect of services rendered by it or delayed allotment of shares cannot be considered to be financial debt. The onus of establishing that transactions between the parties are in nature of not only debt but financial debt is on the Petitioners.
- l) So far as the allotment of shares as per section 42(6) of the Companies Act, 2013 is concerned, the respondent Company had made the offer under the Companies Act, 1956 as evidenced by the emails dated 21.10.2012 given in the preliminary objection. Hence the conditions laid out in Section 42(6) of the Companies Act, 2013 cannot be made applicable to this transaction.
- m) There are various disputed questions of fact which the present tribunal in summary proceedings contemplated under Insolvency and Bankruptcy Code, 2016 cannot go into. Even the basic and necessary facts like whether certain amounts were given to the Respondent Company as loan or debt has been disputed. Further, the Respondent Company has produced a receipt given by the Petitioners which itself has been disputed.
- n) The decision of NCLT Hyderabad Bench, *BVS Lakshmi v. Geomatrix Laser Solutions Private Limited*, CP(IB)/19/7/HDB/2017 and *IBA Health Private Limited v. Infodrive Systems Sdn, Bhd.*, MANU/SC/0772/2010 has been relied upon to state that in a case where the basic facts are disputed between the parties, the Tribunal should not go into the summary proceedings contemplated under the Insolvency and bankruptcy Act, 2016.



N. As per the orders of the Tribunal, on 26.09.2018 the Petitioners have filed consolidated Written Submissions wherein all the points in the previous Written Submissions dated 13.11.2017 were encompassed as follows:

- (a) The Petitioners lent an amount of Rs.3,92,80,000/-, i.e., Rs.67,00,000/- by the Petitioner No.1 and Rs. 3,25,80,000/- by Petitioner No. 2 which was transferred to the Respondent Company through Bank Transfer/NEFT. However, the Respondent requested Petitioner No. 2 that some shares to the extent of 25% shares in the Respondent Company would be issued for an amount of Rs.1,00,00,000/- to the Petitioner No. 2 and the balance would be repaid.
- (b) The Respondent Company has defaulted on payments, has gone into huge loss and is selling its assets to pay the statutory dues, the Petitioners had to file this petition and have also furnished the financial statements of the Respondent Company as on 31.03.2016.
- (c) In the Balance Sheet of the Respondent Company as of 31.03.2016 at Note 6 on page 48 shows an amount of Rs.1,98,60,000/- as Long Term Borrowing as against Petitioner No. 2 and Rs.54,71,340/- as against Petitioner No. 1. A reference to page 15 of the Memo dated 26.09.2018 shows that under Note No. 5- "Long term Borrowings", an amount of Rs.1,98,60,000/- is shown as against Petitioner No. 2 for the financial year that ended on 31.03.2016, while it is shown as Rs.35,48,845/- as at 31.03.2017. Further, an amount of Rs.54,21,340/- is shown as due and outstanding to the Petitioner No.1 as at 31.03.2016 and Nil as at 31.03.2017. But no amount whatsoever has been paid by the Respondents to the Petitioners in the year 2016-17. The acknowledgment in the balance sheet of the Respondent Company clearly shows that the Petition is not time barred.
- (d) The Respondent has produced statement of account of the Respondent Company along with Memo dated 13.09.2017 filed by them shows the fabrication of statement of accounts as can be seen by a comparison of the Balance Sheet Note No. 6 and the account extract at page No.2. The account extract shows that an amount of Rs.45,50,000/- and an amount of Rs.50,00,000/- has been appropriated to an event called "Storm" on 31.03.2013. The contention of the Respondent is that an amount of Rs.95,50,000/- has been appropriated to a promotional event for the Petitioners. However, the Balance Sheet as at 31.03.2016 at Note No.6



clearly states that there is an amount of Rs.2,53,31,340/- and the Balance Sheet as at 31.03.2017 Note No.5 clearly states that there is an amount of Rs.35,48,845/-, which is an unsecured loan due to the Petitioners. Though no amount whatsoever has been paid by the Respondent between 31.03.2016 and 31.03.2017, the Respondent has been manipulating the accounts to suit its convenience. The allegation of the Respondent that the Petitioners gave an amount of Rs.95,50,000/- towards the partnering for a music fest is false and baseless. Even if that were the case, the Respondent would have issued receipts to the Petitioner, but the Respondent has shown the said funds under the head of long term borrowings in the Balance Sheet as at 31.03.2015 and 31.03.2016. Further, Note No. 6 does not show reference to "partnering for a music fest" and appropriation of an amount of Rs.95,50,000/-. The Respondent has fabricated and created this specifically for the purpose.

(e) The Respondent claims that an amount of Rs.1,50,00,000/- has been paid to the Petitioner No.2 in cash and has produced a receipt, however, the Petitioner has not been paid the amount of Rs.1,50,00,000/- in cash as claimed by the Respondent. Further the Respondent Company has issued the shares in the Respondent Company for Rs.1,00,00,000/- to the extent of 98% after the receipt of the legal notice dated 29.12.2016, calling upon the Respondent to refund the amount due to the Petitioners. The Respondent has come up with fabricated receipts and statements of Rs.1,50,00,000/- and Rs.1,00,00,000/- with an intention to avoid payment of the claim amount. The Petitioners reserve their right to initiate appropriate action against the Respondent.

(f) For the purpose of arguments, even if the statement of accounts as per the Respondent, the calculation is as follows:

Total Amount Due as on 31.03.2016 as per the =Rs.3,53,31,340/-

I audited financial statement

Less:

Shares allegedly allotted and issued (28/12/2016) - Rs.1,00,00,000/-

Amount allegedly paid in cash (19/05/2016) - Rs.1,50,00,000/-

Remaining amount =Rs.1,03,31,340/-

e





In view of above, the claim of the Respondent that only an amount of Rs.40,000/- is due is false and even as per the Respondent's calculation, the Respondent is liable to the tune of Rs.1,03,31,341/-, while in fact the Respondent is actually due to the extent of Rs. 3.92 Crores.

(g) Provisions of Section 5(7) and 5(8) of IBC have been relied upon to refute the allegation of the Respondent to the effect that Petitioners herein are not financial creditors.

(h) An amount of Rs.67,00,000/- by the Petitioner No.1 and Rs. 3,92,80,000/- by Petitioner No. 2 was lent to the Respondent Company and the same is reflected under unsecured loans in the financial statements of the Company. As a result it will fall under clause (a) and (f) of Section 5(8) of the IBC which defines 'financial debt'. The case of *Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd*, NCLAT has been relied upon.

(i) The Respondent has shown in the Balance Sheets an amount of Rs.1,00,00,000/- as share application pending allotment to the Petitioner No.2. It is submitted that as per section 42(6) of the Companies Act, 2013, the allotment has to be made within 60 days, failing which the amount has to be returned within 15 days and beyond a period of 15 days, the amount has to be refunded with an interest of 12% per annum. As such, the Respondent has lost the mandate to issue shares to Petitioner No.2 and thus the allotment and issue of shares is not valid and not binding on Petitioner No.2. Further since the share application money ought to have been returned with 12% interest per annum, it is a financial debt.

(j) Further, following the proviso to the Companies (Acceptance of Deposits) Amendment Rules, 2015 dated 31.03.2015, the Respondent has no right to allot the shares against Rs.1,00,00,000/- after 01.06.2015. Further, the said Rs.1,00,00,000/- was conveniently being accounted every year as per their requirement which shows their intention to cheat the Petitioner. On 31.03.2015, the said amount of Rupees One Crore was shown under Unsecured Loans. On 31.03.2016, the Respondent Company has moved the said amount of Rupees One Crore to share application money pending allotment with a note stating "the share application money pending allotment was wrongly grouped under unsecured loan in the financial year 31<sup>st</sup> March 2015 and the same has been correctly grouped in



the current financial year". The change in the entries shows the intention of the Respondent to cheat the Petitioner.

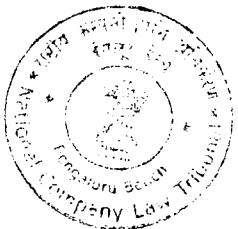
(k) Since 2014, the Respondent did not bother to allot shares to Petitioner No.2 and did not refund the balance amount. The Petitioner thus issued notice dated 29.12.2016 calling upon the Respondent to pay back the amount, but no reply was received. However, the Respondent Company in order to avoid repayment of loan allegedly allotted the shares for an amount of Rs.1,00,00,000/- to the extent of 98% of the shares in the Respondent Company, only after the receipt of the legal notice. However, the Respondent backdated the allotment to show that it was done on 28.12.2016, while the Stamp duty was paid only in February 2017 as can be seen from the Share Certificate produced. Further the number and percentage of shares allotted do not match with the agreed numbers as per the documents submitted by the Respondent.

(l) However, even if all the considerations of the Respondent are taken into consideration regarding appropriation and repayment, even then there is an outstanding amount of more than Rupees One Crore as can be seen from the Balance Sheet as at 31.03.2017.

O. On Perusal of the documents filed by the Applicant Company, it is evident that the Corporate Debtor has defaulted in repaying the Loan availed. Evidently, it is established by the Financial creditor that the nature of debt is "a financial debt" as defined under section 3(12) of the code on the part of the Corporate Debtor. On the basis of the material on record, the Applicants have established that the loan was sanctioned and duly disbursed to the Corporate Debtor but there is non-payment of Debt on part of the Corporate Debtor.

P. Accordingly, this Bench hereby admits this Application declaring Moratorium with the following directions as mentioned below:

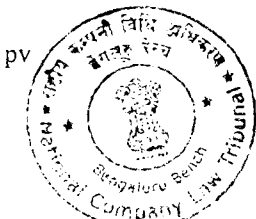
- 1) That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the



corporate debtor in respect of its property including any action under Securitisation and reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

- 2) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- 3) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- 4) That the order of moratorium shall have effect from 03<sup>rd</sup> December 2018 till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, whichever is earlier.
- 5) That the public announcement of the Corporate Insolvency Resolution Process shall be made immediately as specified under Section 13 of the Code.
- 6) The Applicants, i.e., Financial Creditor has named Shri Thirupal Gorige, bearing Registration No. IBBI/IPA-002/IP-N00016/2016-17/10030, who is appointed as Interim Resolution Professional to carry on the functions as mentioned under the Insolvency & Bankruptcy Code as Interim Resolution Professional and the Applicants certify that the above said Resolution Professional is fully qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016 and the associated rules and regulations.
- 7) Accordingly, petition is admitted.

(ASHOK KUMAR MISHRA)  
MEMBER, TECHNICAL



C.P.(IB)No.9/BB/2017

(RAJESHWARA RAO VITTANALA)  
MEMBER, JUDICIAL

CERTIFIED TO BE TRUE COPY  
OF THE ORIGINAL

*Manjiv* 30/7/18  
Deputy Registrar  
National Company Law Tribunal  
Bangalore Bench  
*Swapna C*



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