

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

IA No. 02/JPR/2018
IA No. 03/JPR/2018
Dy. No. 04/2018
CP No. IB/86/ND/2018
TA No. 83/2018

CORAM: SHRI R. VARADHANRAJAN, MEMBER (JUDICIAL)

IN THE MATTER OF SECTION 7 OF THE IBC CODE, 2016.

IN THE MATTER OF:

M/s Oriental Bank of Commerce and others

...Petitioners

VERSUS

Mount Shivalik Industries Ltd. And others

...Respondents

IB-86(ND)/2018
M/s Oriental Bank of Commerce and Others



**FOR THE APPLICANT IN
IA NO. 02/2018**

: MR. YASH SHARMA, ADV.

**FOR THE APPLICANT IN
IA NO. 03/2018**

: MR. YASH SHARMA, ADV.

**FOR THE APPLICANT
IN IN DIARY NO. 04/2018 IN
IB/86/ND/2018**

**: MR. AMOL VYAS, ADV.
MR. ABHISHEK ANAND FOR R.P**

**FOR THE RESPONDENT
IA NO. 02/2018**

**: S.K. SHARMA, ADV.
MRS.PRATHIBHA KHANDELWAL
FOR R.P.**

**FOR THE RESPONDENT IN
IA NO. 03/2018**

**: S.K. SHARMA,ADV.
MRS.PRATHIBHA KHANDELWAL
FOR R.P.**

**FOR THE RESPONDENT
IN DIARY NO. 04/2018 IN
IB/86/ND/2018**

**: S.K. SHARMA, ADV. FOR
M/S MAHALAXMI TRADERS

MRS.PRATHIBHA KHANDELWAL
FOR R.P.**



ORDER

1. This is an application filed vide Diary No. 04/2018 by M/s New View Consultant Pvt. Ltd. challenging the actions of Resolution Professional in classifying M/s Mahalaxmi Traders as a Financial Creditor under the provisions of Insolvency and Bankruptcy Code, 2016 (IBC, 2016) and thereby allowing the said M/s Mahalaxmi Traders to be a part of Committee of Creditors (CoC) constituted in relation to the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor. A similar challenge has been mounted in the other 2 applications as well. Before going into the facts of this application a summary of the circumstances under which the CIRP process was initiated against the Corporate Debtor will be appropriate. This Tribunal vide order dated 12.06.2018, based on an application filed by one of the Financial Creditor of the Corporate Debtor namely, Oriental Bank of Commerce, admitted the petition and as a consequence thereof appointed Ms. Prathibha Khandelwal registered with IBBI as a Resolution Professional to act as the Interim Resolution Professional (IRP) and also declared a moratorium in relation to the Corporate Debtor as envisaged under the provisions of IBC, 2016. Pursuant to the appointment as required of IRP under the provisions of IBC, 2016, read with attendant Rules and Regulations, public announcement calling for the claims seems to have been made by the said IRP. Upon causing public announcement and on receipt of claims from the Creditors of the Corporate



Debtor, five persons seems to have been classified as Financial Creditors and thereby eligible to be part of the CoC namely:

- a) Oriental Bank of Commerce
- b) Global Corporate Credit Ltd.
- c) Mahalaxmi Traders (Respondent herein)
- d) National Wines and spirits
- e) New View Consultants Pvt. Ltd. (Applicant herein)

2. Consequent to the formation of CoC by the IRP, it is seen that a meeting of the CoC had been convened on 12th July, 2018 and notice in this regard also seemed to have been issued by the IRP to the members of CoC namely the Financial Creditors. In the meanwhile, as stated in the earlier part of the order aggrieved with the action of IRP for classifying the respondent as a Financial Creditor this application has been filed vide Diary No. 04/2018 by the applicant herein on 11.07.2018 with the following prayers:

It is therefore, most humbly prayed that the application may kindly be allowed and this Hon'ble Adjudicating Authority may reconstitute the Committee of Creditors de hors the Respondent No. 2 and direct the IRP to treat the Respondent No. 2 as operational creditor and not as Financial Creditor and to further restrain the IRP from holding the first meeting of the Committee of Creditors with the Respondent No. 2 as Financial Creditor.

Any other order or direction which this Hon'ble Tribunal may deem fit in the facts and circumstances of the case may also be passed in favour of the application.



3. Upon notice, individual replies have been filed both by M/s Mahalaxmi Traders as well as by the learned IRP appointed by this Tribunal at the time of admission. Perusal of the reply of the Resolution Professional discloses that based on the application as filed by the respondent namely Mahalaxmi Traders in Form-C and claiming that a sum of Rs. 4.65 crores being a deposit bearing interest, and also based upon the perusal of the terms and conditions of the agreement between M/s Mahalaxmi Traders and the Corporate Debtor which is annexed as annexure A-1 along with the typed set as well as annexure A-2 (COLLY), the said Mahalaxmi Traders was classified as a Financial Creditor.

4. Further, it is also stated by learned IRP in the reply that TDS certificate of 25.09.2014, 08.05.2014 and 01.09.2014, annexed as annexure A-3(COLLY) along- with the typed set filed with the reply points out that TDS has been deducted in relation to interest amount paid and classified under Section 194-A of Income Tax Act, 1961. Taking into consideration the provisions of Section 5(8) of IBC, 2016 as well as other relevant provisions of IBC, 2016 and also the judgment of Hon'ble NCLAT passed in Nikhil Mehta and Sons (HUF) Vs. AMR Capital Infrastructure Ltd. in Company Appeal (AT)(Insolvency) 7 of 2017 for construing a "financial debt" and a "Financial Creditor" and other precedents of Hon'ble NCLAT in this regard, it is contended in the reply that the IRP was right in classifying M/s Mahalaxmi Traders as a Financial Creditor and that this



application which has been filed by the applicant is an abuse of process of law.

5. A reply has also been filed, as stated in the earlier portion of the order by M/s Mahalaxmi Traders and the said respondent seems to take exception to certain documents or facts averred in the application and assailed the sources from which it has been received. Further, the documents as are relied by the learned IRP for classifying it as a Financial Creditor is again reiterated in the reply of M/s Mahalaxmi Traders. It is also brought to the notice of this Tribunal that M/s Mahalaxmi Traders have disbursed money to the Corporate Debtor against which the Corporate Debtor has agreed to pay interest for a period of time, which is admittedly due from the Corporate Debtor and in the circumstances, the ingredients of Section 5(8) of IBC, 2016, in relation to disbursal of money against the time value of money is fully satisfied and that it is required to be classified as a Financial Creditor. Finally, it is contended by M/s Mahalaxmi Traders that the application is a gross misuse of the provision and process of the Court and in the circumstance the same is liable to be dismissed with heavy cost and in the interest of justice.

6. Individual re-joinder to the replies by the respondents have been duly filed by the applicant, wherein, the applicant seeks to assail the action of IRP in relying on a legal opinion which seems to have been given to the learned RP based on it is contended that the classification as the Financial Debt has been made by her and not on the basis of a formation of opinion by the IRP. It is also stated in the

rejoinder that the securities deposit which has been given by M/s Mahalaxmi Traders under the agreement dated 17.09.2013 and thereafter vide their letters dated 04.03.2014 and 06.03.2014 and again based on agreement dated 15.04.2014 are all in relation to carrying out the operations of the Corporate Debtor and in the circumstances, it cannot be considered as a Financial Debt falling within the provisions of Section 5 (8) of IBC, 2016. The applicant also relies on certain documents which it had obtained from learned RP based on requisition and it is averred in the rejoinder that even as per the said records made available, the amount received from M/s Mahalaxmi Traders along with twelve others, similarly, placed aggregate to Rs. 11,56,15,850/- as has been classified in the books of accounts of the Corporate Debtor under the head as "other long-term liabilities" and that while out of thirteen who constitute the aggregate amount of Rs. 11,56,15,850/- only two, namely, the respondent M/s Mahalaxmi Traders and one National Wines and Spirits has been construed as Financial Creditors and thereby as members of CoC and that others have been ignored.

7. It is also contended in the rejoinder that in order to fall within the definition of Section 5(8), it is necessary that the amount advanced should be having the nature of commercial effect of borrowing meaning, thereby, money advanced should be repayable on demand and should carry interest till such amount is repaid and that in the present instance M/s Mahalaxmi Traders going by the agreement does not have any authority to recall the amount given as security

deposit and that the amount has been placed by way of security deposit only to seek business from the Corporate Debtor and nothing more.

8. Certain allegations by the applicant has also been made against the RP based on certain E-mails which seems to have transpired between the IRP on the one hand and one of the parties figuring in the list of thirteen Creditors as noted in para supra on the other wherein the IRP has sought the claim to be bifurcated into two, one that as a financial Creditor and the other that of an Operational Creditor of the claimant and it is contended that the said action by the Resolution Professional is an after-thought subsequent to the objections raised by the applicant in relation to classifying M/s Mahalaxmi Traders as a financial Creditor.

9. Before going into the merits of the case as to whether the Learned RP was right in classifying portion of the claim of the respondent, namely M/s Mahalaxmi Traders as a “Financial Debt” and thereby a Financial Creditor vis-a-vis the Corporate Debtor the documents filed along with the claim form in “Form-C” enclosed as Annexure- “A” to the typed set are required to be looked into in order to ascertain the nature of transaction as transpired between the respondent, Mahalaxmi Traders on the one hand and the Corporate Debtor on the other for which purpose and as a ready reference the initial agreement and subsequent correspondence in this regard are extracted hereunder.



REF/MSIL/385

September 17, 2013
THE MAHALAXMI TRADERS
187, GOLF LINKS,
NEW DELHI-110003

Dear Sir,

We are pleased to appoint M/s Mahalaxmi Traders (Proprietor -Mr. Ashok Chawla) as our SALES PROMOTER for promotion of BEER Sales in State of Rajasthan on the following terms and conditions: -

- #1. The appointment shall be w.e.f. 18th September, 2013 to 31st March, 2014 and shall be renewable for further period as per mutual discussion.
- #2. You will be working in close co-ordination with company's Marketing Manager for the aforementioned area, who shall convey the instructions in writing to you.
- #3. The selling rates of our beer shall be decided by the company from time to time and you will not change them without prior confirmation from the company. Further, you shall not commit to any party about any sales promotional scheme etc. without prior authorization from us.
- #4. The company reserve the right to appoint any other party as Sales Promoter for area mentioned above.
- #5. You will be allowed a remuneration of Rs.4/- per case (plus service tax as applicable) of Primary sale of Beer in the State of Rajasthan for your promoter work.
- #6. The settlement of commission and interest on deposit amount as stated above in point no.5 shall be on monthly basis and shall be payable latest by 7th of the following month.
- #7. Notwithstanding anything provided above this appointment in terms hereof may be terminated by us during the term of appointment aforesaid by giving to you thirty days' notice in writing in this behalf from the date of dispatch of notice. However, any such Notice shall be effective subject to proper settlement of Financial claims with the company to the satisfaction of the Sales Promoter.
- #8. You shall not be entitled upon the termination of this agreement or appointment within the terms hereof to claim any damages or compensation from the company for such termination or consequent thereupon or otherwise relative thereto against the other.
- #9. Forthwith upon determination of this agreement/appointment you shall cease all dealings on behalf of the company and shall deliver custody of all papers and documents and other items and things of the company coming into the custody of these presents.
- #10. You shall have to deposit an amount of Rs.3,00,00,000/- (Rupees Three Crores Only) with the Company which will carry interest @ 10% p.a. out of

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Rs.3 crores a sum of Rs.2.40 crores shall be assigned towards State Excise Duty payments and balance Rs.0.60 crores shall be for disbursement of sales promotion schemes to Retailers from time to time as approved by the Company and communicated to you as per clause 3 above. The interest shall be calculated from the date of Bank transfer to our account.

#11. The company shall open a separate dedicated Current Account with OBC< Nehru Place, New Delhi which will be jointly operated by Chairman /Managing Director and one signatory of Sales Promotion Agents for the following purposes:

- i. Payment of Excise Duty
- ii. Payment of Sales Promotion Rebates
- iii. Payment of MSIL on account of cost of goods
- iv. Payment of Commission / Interest to the Agent

#12. All the collections from RSBCL on account of sale proceeds will be deposited in the above said account. Instruction shall be given to RSBCL accordingly.

Please acknowledge receipt and as a token of your acceptance of above terms and conditions. Please sign duplicate copy of this letter and return the same to use for our records.

Thanking you,

Yours faithfully,
For MOUNT SHIVALIK INDUSTRIES LTD.

10. From the above agreement as entered into between the Respondent, Mahalaxmi Traders on the one hand and the Corporate Debtor, on the other it is clear that the relationship as between the parties is that of a Sales Promotor appointed for the promotion of Beer Sales of the product of the Corporate Debtor and it is also evident that the sum of Rs. 3 crores as envisaged in the agreement is required to be placed in a running Bank Account to be operated jointly by the respondent and the Corporate Debtor in relation to certain expenditures as specified in the agreement, otherwise which would have to be incurred by the Corporate Debtor. However, one crucial aspect which is required to be noticed is



that the sale proceeds from RSBCL is also required to be deposited in the said bank account as noted above, which would have made the day to day balances in a state of constant fluctuation which could have gone either way (i.e.) in favour of either of the parties involved in the transaction. Subsequent to the letter of appointment/ agreement dated 17.09.2013, two other letters dated 04.03.2014 and 06.03.2014 had been issued by the Corporate Debtor to the respondent, Mahalaxmi Traders seeking for additional funds to be placed with it and for which a commitment to pay interest is also made and both the said letters are also reproduced hereunder for ready reference :-

MSI/MLT/1015
4th March, 2014

M/s. Mahalaxmi Traders,
187, Golf Links,
New Delhi-3

Dear Sir,

Reference discussion with your Mr. Ashok Chawla, we request you to provide additional funds of Rupees one crore towards payment of Excise Duty for supplies to RSBCL for a period of one month. On this amount company shall pay you interest in addition to your existing remuneration @ 24 % per annum.

Yours Faithfully,

For MOUNT SHIVALIK INDUSTRIES LTD.,

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M/s Oriental Bank of Commerce and Others



Date 06th March, 2014

To,
Mahalaxmi Traders
187, Golf Link,
New Delhi-110003

Sub. Additional Deposit for Excise Duty

Sir,
With reference to our discussion with you regarding the captioned matter. We request you for additional deposit for excise duty as follows.

Amount : Rs. One Crore Only
Rate of Interest : 24% p.a. (payable monthly basis)

Thanking You,

For MOUNT SHIVALIK INDUSTRIES LTD.

11. Both the above letters reproduced as above clearly points out to the fact that since the Corporate Debtor was in need of additional funds, that too on an emergent basis which can be gathered as it was prepared to pay interest at the rate of 24% p.a. as compared to 10% p.a. as agreed vide the initial letter of appointment dated 17.09.2013. On and from April 1, 2014 which is also reproduced below for ready reference:-



15-April-2014
M/s Mahalaxmi Trader
187, Gold Links
New Delhi

Dear Sir,

Reference discussions with Mr. Ashok Chawla regarding agency agreement for Rajasthan w.e.f. 1.4.2014.. Following decisions were taken.

1) The agent will undertake to invest the following amount

In season (March-July):

- | | | | |
|-----|--------------------------|----------|----------|
| i) | Against excise duty | 5:00 cr. | |
| ii) | Towards security deposit | 1.50 cr. | 6.50 cr. |

For off season period (Aug to Feb.)

- | | | | |
|-----|--------------------------|----------|----------|
| i) | Excise duty | 3.00 cr. | |
| ii) | Towards security deposit | 1.50 cr. | 4.50 cr. |

2) Presently agent has provided Rs. 1.88 cr. Towards rebate and security deposit against which the future agreement will provide an amount of Rs. 1.50 cr. as security deposit and balance 38 lacs will be refunded in June/July' 14.

3) Company will provide interest:

- On existing security deposit Rs. 60 lacs @ 10 % p.a.
- Amt. invested towards excise duty @ 10 %
- On additional security deposit Rs. 90 lacs for the year 2014-15 @ 24 %
- On credit balance of Rs. 38 lacs in agency a/c-@ 24 % p.a. (till the amount is refunded as provided in clause (2) above.

4) The commission shall be paid @ 4.30 per c/s + service charges on the actual dispatches from the company.

5) The company shall also pay additional commission @ Rs. 0.20 per c/s if the annual target of 18 lac c/s is achieved.

6) Notwithstanding the above, the company shall provide min. remuneration on annual basis @ 24 p.a. on actual investment by you.

Please sign one copy of this letter as confirmation of the above.

Thanking You,

Yours Faithfully
For MOUNT SHIVALIK INDUSTRIES LTD.

12. Compared to the earlier agreement/ letter of appointment dated 17.09.2013, the letter of appointment issued by the Corporate Debtor to the respondent,

Mahalaxmi Traders discloses that the amounts to be made available are to be utilized or kept as deposit only for two aspects, namely, deposit in relation to excise duty, depending on the season, namely in season and off season periods and the other in relation to security deposit to be furnished by an Agent in order to obtain the Agency Business from the Principal, which also carries an interest as agreed to be paid by the Principal as a compensation for locking up the funds with the principal and which primarily arises out of the relationship and its compulsions. Thus the appointment letter issued by the Corporate Debtor seems to have two elements to it in relation to the funds to be made available to the Corporate Debtor by the respondent. One in the nature of funding the Corporate Debtor and the other in relation to secure and maintain the agency. Similarly, in relation to the promised revenue to the respondent also seems to be two fold, one in the nature of commission arising out of sales agency and the other in relation to payment promised at a fixed rate of interest be it 10% p.a or 24% p.a in relation to the funds made available termed as "investor" in the letter of appointment issued in 2014 by the Corporate Debtor effective from 01.04.2014. The purpose for which the funds made available, other than the security deposit of Rs. 1.5 crores is also stated and the same to be used for the purpose of making payment towards excise duty, which in the normal course is payable by a manufacturer of the product before clearing the goods for release in the market and not by a sales agent. The cost of goods sold along with the excise duty and other manufacturing



costs relatable to the manufacturer of goods are required to be borne only by the manufacturer of which it can fund from its resources or borrow from any bankers or outside financiers to fund its working capital expenditure by way of obtaining, if it is from bankers by way of Open Cash Credit (OCC) or Key Cash Credit (KCC) or by way of Bill Discounting facilities and such other like facilities or from outside financiers at a fixed interest rate, repayable on demand or for a fixed term of short duration. Since the said finance, namely working capital finance is primarily need based, a limit is sanctioned up to which a drawl is permitted and normally it is operated on a running account basis with the withdrawals made by the constituent as and when required thereby increase the amount of borrowal within the sanctioned limits and offsetted by credits to the account upon sales realisation and the balance on a day to day basis keeps on fluctuating as between the parties depending on the transactions and for these type of account, no fixed time limit is specified until the arrangement is terminated by either of the parties in the manner contemplated in the agreement or in a manner known to law and effectively, even though the amounts would have become payable from time to time, crystalizes liability between the lender and the borrower on the said date.

13. In the instant case, we find that ~~the~~ in addition to the security deposit, the letter of appointment, seeks to canvass for additional funds to be placed with the corporate debtor by the Respondent in order to meet out its onus for payment of excise duty which can be construed as a borrowing for commercial purposes from

the respondent by the Corporate Debtor, which the respondent was not required to give as a Sales Agent for which a security deposit bearing interest is envisaged by the appointment letter.

14. However, a contention by the learned counsel for the applicant was taken during the course of arguments that the additional payment towards excise duty was made available only for its operations and in the circumstances cannot be treated as a debt in relation to financing. We are unable to agree with the said contention of the learned counsel for the applicant. We are also unable to agree with the contention of the learned counsel for the applicant that in the absence of no prescribed tenure fixed for repayment of these amounts it cannot be treated as a financial debt. In light of the illustration provided above by way of bank finance, normally given for working capital needs, where no fixed term is fixed can it be said that the same will not fall within the definition of “financial debt”. In the matter of Dr. B.V.S. Lakshmi vs. Geometrix Laser Solutions Private Limited at paragraphs 29 to 31 of the said judgment, Hon’ble NCLAT has elucidated as to the circumstances under which a ‘debt’ can be considered as a ‘financial debt’ under the provisions of IBC, 2016 which is to the following effect.

29) For coming within the definition of ‘Financial Debt’ as defined under sub-section (8) of Section 5, the Claimant is required to show that (i) there is a debt along with interest, if any, which has been disbursed and (ii) such disbursement has been made against the ‘consideration for the time value of money’. Thereby, if the claimant claims to be ‘Financial Creditor’ he will have to show that debt is due which he has disbursed against the consideration for the time value of money’ and that the borrower has raised the amount directly or through other modes like credit facility or its de-materialised



equivalent, note purchase facility or the issue of bonds, notes, debentures, loan stock or any other lease under the Indian Accounting Standards or such other accounting standards can also be referred to by the Creditor to claim that there is a 'Financial Debt' due to him which has disbursed against the 'consideration for the time value of money'.

To show that there is a debt due which was disbursed against the 'consideration for the time value of money', it is not necessary to show that an amount has been disbursed to the 'Corporate Debtor'. A person can show that the disbursement has been made against the 'consideration for the time value of money' through any instrument. For example, for 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 for which only the market value of such transaction shall be taken into account, it is not necessary to show that amount has been disbursed. The disbursement against the 'consideration for the time value of money' is the main factor.

30) In the present case, the Appellant has failed to bring on record any evidence to suggest that she disbursed the money has been made against 'consideration for the time value of money'. There is nothing on the record to suggest that the Respondents borrowed the money. In absence of such evidence, the Appellant cannot claim that the loan if any given by the Appellant comes within the meaning of 'Financial Debt' in terms of Sub-Section (8)(a) of Section 5 of the 'I & B Code'.

31) The Appellant has also failed to show that amount has been raised by Respondent under any other transactions, such as sale or purchase agreement, having commercial effect of borrowing. In absence of any such evidence, Appellant cannot claim that loan amount, if any given to the Respondent comes within the meaning of 'Financial Debt', as defined under sub-Section (8)(f) of Section 5 of 'I & B code'

15. As already seen in the instant case the letter of appointment dated 15.04.2014 clearly demarcates the amount payable as a security deposit to be placed for the agency. In addition, deposit of Rs. 5 crore / Rs. 3 crores based on the season is required to be made available by way of investment which entails interest payment on per annum basis and the non-payment of which had given rise to claim as a "financial debt". However, a contention in this regard was taken by learned counsel for the Applicant that in view of no tenure fixed nor the

respondent Mahalaxmi Traders does not have the right to terminate the agreement, no default has arisen in the first place to give rise to the claim of debt itself in the first place. We are unable to accept the said contention as the declaration of insolvency of the Corporate Debtor, puts an end to the appointment of agency as between the Corporate Debtor and the Respondent by virtue of the provision of Section 201 of the Indian Contract Act, 1872. Thus any amount paid by virtue of the agreement when it was in existence by an agent becomes payable by the Principal, not only in relation to commission but also amounts paid to finance the operations of the principal which obviously is for a commercial purpose and more so availed as a borrowing as evident from the letter of appointment which also fixes the interest payable. This Tribunal is also conscious of the fact that the claim has been preferred in Form 'C' as prescribed under the IBBI (IRP) Regulations, 2016 subsequent to the admission of CIR process against the Corporate Debtor before the IRP and not before this Tribunal under an Application under Section 7 of IBC, 2016. Further the amounts payable to the respondents as well as others similarly placed have been categorised in the books of the Corporate Debtor as 'outstanding long-term borrowings'. Taking into consideration, all the above this Tribunal is of the considered view that the learned RP was right in classifying that portion of 'debt' owed to the respondent in relation to deposit furnished to the Corporate Debtor for payment of excise duty



falls within the scope of 'financial debt' under Section 5 (8) of IBC, 2016 and in the circumstances this application stands dismissed.

16. However, sales agency commission and amounts due arising purely out of the agency relationship including the security deposit placed as between the Corporate Debtor and the respondent should be strictly excluded from the purview of 'financial debt' in order to compute extent of financial debt in CoC.

In the circumstances, all these applications stands dismissed, however, without costs.

Sd—

(R. Varadharajan)
Member (Judicial)

Shakti
28.09.2018

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M/s Oriental Bank of Commerce and Others