

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP (IB) 1580/MB/2017

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of

M/s. Corporate Finance & Investment Services
India Private Limited

..... 1st Financial Creditor
(1st Petitioner)

M/s. Corporate Finance & Legal Services
Private Limited

..... 2nd Financial Creditor
(2nd Petitioner)

M/s. Corporate Finance & Taxation Services
Private Limited

..... 3rd Financial Creditor
(3rd Petitioner)

v.

M/s. Maharashtra Aluminium & Alloys Private
Limited

..... Corporate Debtor
(Respondent)

Heard on : 05.10.2018

Order Pronounced on : 23.10.2018

Coram :

Hon'ble M. K. Shrawat, Member (J)

For the Petitioner :

Mr. Ajay Kumar, PCS – Authorised Representative for the Financial Creditors / Petitioners.

For the Respondent :

Mr. Vishal Thakar, Advocate a/w. Mr. Ashish Pyasi, Advocate, Ms. Anjali Trivedi, Advocate, Ms. Pragya Khaitan, Advocate and Mr. Umang Thakar, Advocate i/b. Dhir & Dhir Associates – Advocates for the Respondent/Corporate Debtor.

Per: M. K. Shrawat, Member (J)

ORDER

1. The Petitioners viz. 'M/s. Corporate Finance & Investment Services India Private Limited' (hereinafter as **1st Financial Creditor**), 'M/s. Corporate Finance & Legal Services Private Limited' (hereinafter as **2nd Financial Creditor**), and 'M/s. Corporate Finance & Taxation Services Private Limited' (hereinafter as **3rd Financial Creditor**) (Collectively as **Financial Creditors**) have jointly furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "Financial Creditor" on 10.11.2017 by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**).
2. Further under the head "Particulars of Corporate Debtor" the description of the debtor is stated as 'M/s. Maharashtra Aluminium & Alloys Private Limited' (hereinafter as **Debtor**) having Registered office at, 17 / C, Marine Chambers, 1st Marine Street, Shop No. 9, Marine Lines, Mumbai, Maharashtra – 400020.
3. In the requisite Form, under the head "Particulars of Financial Debt" the total amount of Debt in default is stated as ₹ 61,06,586/- which includes the Principal amount of ₹ 33,00,000/- plus Interest @ 18 % p.a. amounting to ₹ 28,06,586/- as on 01.04.2017. The date of default is stated as 01.04.2017. The bifurcation of the claimed amount is as follows :

Financial Creditor	Outstanding Amount / Claimed Amount (Principal)
1 st Financial Creditor	₹ 12,00,000/-
2 nd Financial Creditor	₹ 10,00,000/-
3 rd Financial Creditor	₹ 11,00,000/-
Total	₹ 33,00,000/-

4. Brief Background :

- 4.1. The 1st Financial Creditor has disbursed an Unsecured Loan amounting to ₹ 12,00,000/- in total during the Financial Year 2013-14. However, the Debtor has failed to repay the same.
- 4.2. The 2nd Financial Creditor has disbursed an Unsecured Loan amounting to ₹ 10,00,000/- during the Financial Years 2013-14 to 2014-15. And the Debtor has not repaid the availed amount.

- 4.3. The 3rd Financial Creditor has disbursed an Unsecured Loan amounting to ₹ 23,00,000/- during the Financial Years 2011-12 to 2013-14. And the Debtor has repaid the sum of ₹ 12,00,000/- towards the Principal amount and ₹ 12,856/- towards the Interest as on 31.08.2016.
- 4.4. It is case of the Financial Creditors that the Debtor has approached to the Financial Creditors for availing the above mentioned loans and therefore, on oral contract / agreement, the Financial Creditors have advanced the loans at the Interest rate of 18 % p.a. However, duly communicated on the day of disbursement of loan that it was a Short Term Loan to be repaid on demand at the rate of 18 % p.a.
- 4.5. As the Debtor, after 31.08.2016, has not further re-paid any amount availed; the Financial Creditors through their Advocate have issued Legal Notices dated 23.05.2017 to the Debtors, calling upon them to repay the remaining outstanding amount.
- 4.6. The Debtor has replied to the Notice through its letter dated 08.07.2017 wherein the Debtor has denied its liability towards any interest payment and also stated that the issue between the Financial Creditors and Debtor is pending for adjudication before the Hon'ble Bombay High Court in Civil Suit no. 227/2017.
- 4.7. It is case of the Financial Creditors that the Debtor is falsely questioning the Debt amount, rather the Debtor is in financial crunches and therefore the Debtor is unable to make any payment to the Financial Creditors. Hence, the Financial Creditors, jointly, have filed this Petition, invoking the provisions of S. 7 of the Code, for the commencement of the CIRP over the Debtor.

5. Submissions by the Financial Creditor :

- 5.1. The Learned Representative for the Financial Creditors has submitted that the 1st Financial Creditor has disbursed the amount as mentioned below :

Sr. No.	Amount Disbursed	Date	Cheque No. / Ref. No.
1	₹ 4,00,000/-	23.01.2014	000012161460
2	₹ 4,00,000/-	11.03.2014	000013170226
3	₹ 4,00,000/-	14.03.2014	00013250692
Total	₹ 12,00,000/-		

The Ledger Account of the Debtor in books of the Financial Creditors evidences the above mentioned transaction. The copies of Ledger Accounts are annexed with the Petition.

5.2. It is further stated that the 2nd Financial Creditor has disbursed the amount in following manner :

Sr. No.	Amount Disbursed	Date	Cheque No. / Ref. No.
1	₹ 5,00,000/-	24.03.2014	000013428621
2	₹ 4,00,000/-	24.03.2014	000013441576
3	₹ 1,00,000/-	19.05.2014	000014628807
Total	₹ 10,00,000/-		

The Ledger Account of the Debtor in books of the Financial Creditors evidences the above mentioned transaction. The copies of Ledger Accounts are annexed with the Petition.

5.3. It is further submitted that the 3rd Financial Creditor has disbursed the amount in following manner :

Sr. No.	Amount Disbursed	Date	Cheque No. / Ref. No.
1	₹ 10,00,000/-	14.02.2012	000040
2	₹ 5,00,000/-	10.03.2012	000042
3	₹ 8,00,000/- (₹ 2,00,000 each Transaction)	24.12.2013	000011556555 000011556645 000011556735 000011557023
Total	₹ 23,00,000/-		

The Ledger Account of the Debtor in books of the Financial Creditors evidences the above mentioned transaction. The copies of Ledger Accounts are annexed with the Petition.

5.4. It is further submitted that the Debtor had only repaid, to the 3rd Financial Creditor, an amount of ₹ 12,12,856/- in total which includes the amount of ₹ 12,856/- towards the Interest.

5.5. It is further submitted that the Debtor has issued a TDS Certificates i.e. Form – 26AS for the TDS deducted U/s. 194A of the Income Tax Act which is TDS for the payment of Interest, to the Financial Creditors. Copies of the TDS Certificates are annexed with the Petition. Hence, pleaded that deduction of TDS is an acknowledgement of Loan on Interest.

- 5.6. The Learned Representative for the Financial Creditors has drawn the attention of this Bench towards the Annual Report of the Debtor for the F.Y. 2016-17 wherein the Debtor has acknowledged the Principal amount claimed by the Financial Creditors under the head of 'Long Term Borrowings'. The copy of the Annual Report for the F. Y. 2016-17 of the Debtor is also placed on record.
- 5.7. In light of above submissions the Learned Representative for the Financial Creditors has vehemently argued that, since, the Debtor has paid the interest to the Financial Creditors, which is evident from the TDS Certificates, the claimed amount clearly falls under the definition of Financial Debt. The Debtor, both, in reply to Legal notice and in reply to this Petition has sought a defence of Dispute, which is irrelevant for adjudication of the Petition filed U/s. 7 of the Code.
- 5.8. It is further submitted that the Debtor has placed reliance over dispute involved in the Civil Suit filed before Hon'ble Bombay High Court bearing no. 227/2017. But, both, the Financial Creditors and the Debtor, are not party to the said Suit hence, it vehemently pleaded that, the Debtor is using delay tactics in representing this Petition.
- 5.9. It is also pleaded that, since, the Debtor is neither questioning the nature of Debt nor questioning the default but only raising the issue of dispute, which is irrelevant, this Petition deserves Admission and therefore the CIRP may be commenced over the Debtor.

6. Submissions by the Corporate Debtor :

- 6.1. The Learned Advocate for the Corporate Debtor firstly has raised the issue of the maintainability of this Application under provisions of the Code.
- 6.2. The Learned Advocate has submitted that claim of the Financial Creditors have advanced the amount to the Debtor as an investment in the Debtor Company. There was no written agreement / contract which was entered between the parties.
- 6.3. It is further submitted that the terms for payment of interest were never agreed upon between the parties. It is also stated that the Parties had agreed upon sharing of benefits / profits to the Debtor Company and therefore there is variable amounts were paid to the Financial Creditors.
- 6.4. It is also submitted that the Directors of the Financial Creditors, by fraud and with use of fabricated documents, have transferred Shares of various other companies controlled by the Directors of the Debtor. And when this fact had brought to the

notice of the Directors of the Debtor, the Directors have filed the Civil Suit bearing no. 227/2017 before the Hon'ble Bombay High Court, alleging the said fraud committed by the Directors of the Financial Creditors.

- 6.5. It is further submitted that in defence in the said Civil Suit the Directors of Financial Creditors have taken a stand that the Shares were transferred in favour of them in discharge of the Debt as recorded in the 'Exhibit – F' of the said Civil Suit. It has also brought to the notice that the 'Exhibit – F' to the said Civil Suit reflects the Principal Amounts claimed by the Financial Creditors.
- 6.6. In light of this Submission it is pleaded that the Hon'ble High Court of Bombay is now bound to adjudicate the issue whether the Debt got discharged or Debt continues and therefore this Bench does not have Jurisdiction to entertain this Petition.
- 6.7. The Learned Advocate has vehemently pleaded that the Financial Creditors cannot approbate and reprobate on the same time. It is stated that the Financial Creditors on one hand claiming for the Shares as well as on other hand claiming the outstanding amount. Hence, in light of these submissions, as there is serious dispute involved regards to the claimed amount, this Petition does not survives and therefore deserves to be dismissed.

7. Findings :

- 7.1. The Bench has gone through the submissions made by both the sides and also has also gone through the pleadings on record. And it is noticed that the Learned Advocate for the Debtor has vehemently challenged the Jurisdiction of this Bench in light of the pending Civil Suit before the Hon'ble Bombay High Court. This objection has no force due to the basic reason that the issues raised in that litigation do not relate to the debt in question; which was otherwise an admitted Financial Liability.
- 7.2. It is also noticed that, admittedly, the amounts claimed by the Financial Creditors are disbursed by them in the above mentioned manner.
- 7.3. To adjudicate this Petition it is necessary to frame certain questions as follows :
- a) Whether the amount claimed by the Financial Creditors is an Investment or it is an amount advanced as a Loan?
 - b) Whether the amount claimed by the Financial Creditors is discharged as on date or is still in continuance?

- 7.4. To answer the first question the Bench has examined the TDS Certificate i.e. Form – 26AS which is placed on record by the Financial Creditors. By going through the same it is noticed that the Debtor had deposited the TDS amount of ₹ 14,000/-, ₹ 10,500/- and ₹ 10,500/- respectively for 1st, 2nd and 3rd Financial Creditor. This TDS was deducted by the Debtor U/s. 194A of the Income Tax Act, 1961 and the same has been deposited also with the Income Tax Department. It is noticed that the S. 194A stands for the Tax on Interest other than the Interest on Securities. Since, the TDS is deducted U/s. 194A it cannot be towards the distribution of profits and therefore a conclusion can be drawn that the Debtor has paid the amount to the 1st to 3rd Financial Creditors towards the Interest Amount of Loan.
- 7.5. In light of above observation to answer the above framed first question it can be stated that **‘the amount advanced by the Financial Creditors is an amount advanced as Loan’**. Moreover the Debtor has not made out a case of disbursement of any ‘Dividend’ or ‘Profit’ so as to demonstrate the impugned transaction at all related to an Investment.
- 7.6. To answer the second question it is necessary to examine the position of the Civil Suit filed before the Hon’ble Bombay High Court. From the submissions by both sides it is noticed that the said Civil Suit is not yet decided by the Hon’ble Bombay High Court and it is presently under Adjudication on the issue un-related to the Financial Debt in question. It is further noticed that the Directors of the Debtor has alleged the ‘Fraud’ over the Directors of the Financial Creditors in the said Civil Suit.
- 7.7. It is also noticed that the Debtor, in this Petition, has took the defence that, the amount claimed by the Financial Creditors stands discharged, in light of Transferring of Shares in the names of the Directors of the Financial Creditors. However, it is noticed that the Learned Advocate for the Debtor has **failed to establish** this stand, as there is nothing on record which proves that the Shares has been transferred in the names of the Directors of the Financial Creditors.
- 7.8. It is also noticed that the Civil Suit is still to be adjudicated hence, the Fraud, as upon the Debtor committed by the Directors of Financial Creditors, is not yet established. The question of fraud is still sub-judice before the Hon’ble Bombay High Court.
- 7.9. In light of this observation a conclusion can be drawn that, since, neither the fraud is yet established nor there is evidence for the transfer of shares in names of the Directors of the Financial Creditors, the amount claimed in this Petition still

survives and therefore not discharged. Hence, to answer the above framed second question it can be stated that **‘the amount claimed is not discharged yet’**.

7.10. The Bench has also gone through the Ledger Account of the Debtor in the Books of the Financial Creditors and noticed that the Financial Creditors have advanced the amount as stated in their submissions. Rather there is no dispute with regard to amount advanced / disbursed.

7.11. It is also noticed that Annual Report for the F. Y. 2016-17, which is latest before filing of the Petition, of the Debtor reflects the amount claimed in this Petition as ‘Long Term Borrowings’ though the Note in Financial Statement to this entry reflects the amount is in litigation with respect to Civil Suit pending before the Hon’ble Bombay High Court.

7.12. It is also noticed that the ‘Date’ of institution of said Civil Suit remained un-commented by both the sides in their Arguments. Nevertheless, the pendency of prior dispute is not relevant fact to adjudicate the Petition U/s. 7 of the Code unlike it is material fact for the adjudication of the Petition U/s. 9 of the Code.

7.13. Further before going further, it is necessary to place a reliance on the provisions of the S. 7 of the Code. The relevant provisions are reproduced as below :

“S. 7 (5) : Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.”

7.14. The above provision makes it clear that the Adjudicating Authority can dismiss a S. 7 Petition when either the Debt is not due and payable or the default in repayment is not arrived. The factual matrix of this case reveals that, as the Debtor had paid interest in the past, the question that the Debt not became payable yet; does not

arises. Further, as the Financial Creditors did not received any amount after 31.08.2016 towards re-payment of the advanced loan, the Default, as defined U/s. 3 (12) of the Code, is clearly established. Further, despite the receipt of the notice, calling upon the loan, the Debtor had not made the payment is also evidence of Default.

7.15. It is also to be clarified that the Petition filed U/s. 7 if incomplete in procedural formalities then also the Adjudicating Authority can dismiss the Petition. However, by going through the Petition it is noticed that the Petition under consideration is complete in its all procedural aspects.

7.16. Further, it is worth to place a reliance on the judgement, as cited by the Learned Representative of the Financial Creditors, given by the Hon'ble Supreme Court in the case of '*Innovative Industries v. ICICI Bank*' dated 31.08.2017. The relevant portion is worth to be reproduced as follows :

“

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.” (Emphasis supplied).

7.17. By going through the above cited decision it is crystal clear that though there is pending dispute, prior to institution of the Petition U/s. 7 of the Code, the Adjudicating Authority need not to look into that dispute for the adjudication of the S. 7 Petition. In this case, the Bench has also perused the Orders of the Hon'ble Bombay High Court in the said Civil Suit and noticed that the Hon'ble Bombay High Court, in any way, has not restricted this Bench from proceeding in this case. At the cost of repetition, the issues in that Suit are altogether different and do not relate the question of default in repayment of an admitted Financial Debt.

7.18. As far as the question of the 'default' is concerned, it has already been established *supra*. Hence, to conclude the discussion it can be stated that the Petition under Adjudication deserves **Admission**.

- 7.19. The facts of the case have already established that the amount claimed is 'Financial Debt' as defined U/s. 5 (8) of the Code and there is a Default in the re-payment of the Debt as defined U/s. 3 (12) of the Code.
- 7.20. As a consequence, keeping admitted facts in mind that the Financial Creditor had not received the outstanding Debt from the Corporate Debtor and that the formalities as prescribed under the Code have been completed by the Financial Creditor the Bench is of the conscientious view that this Petition deserves '**Admission**'.
- 7.21. The Financial Creditors have proposed the name of Insolvency Professional. The Bench has perused the record the proposed IRP and noticed that, against him no disciplinary proceedings are pending. Consequently, the IRP proposed by the Financial Creditor, **Mr. Saket Shantilal Jain**, O/at. **Office No. 70, 2nd Floor, Empire Building, Above Macdonald, 134, D N Road, Mumbai, Maharashtra – 400001**, E-mail : **cajainsaket@gmail.com**, having Registration no. **IBBI/IPA-001/IP-P00065/2017-18/10151** is hereby appointed as Interim Resolution Professional to initiate the Insolvency Resolution Process.
- 7.22. Having admitted the Petition, the provisions of Moratorium as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of order and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.
- 7.23. That as prescribed under Section 13 of the Code on declaration of Moratorium the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.
- 7.24. That the Interim Resolution Professional shall perform the duties as assigned under Section 18 and Section 15 of the Code and inform the progress of the Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench. Liberty is granted to intimate even at an early date, if need be.

7.25. The Petition is hereby **“Admitted”**. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.

8. Ordered Accordingly.

Dated : 23.10.2018

SD/-
M. K. SHRAWAT
MEMBER (JUDICIAL)

Avinash