

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

C.P.(IB)-1712(MB)/2017

Under section 7 of the IBC, 2016

In the matter of
Vijay Rochlani

....Petitioner/
Financial Creditor

v/s.

Shantai Exim Ltd.

....Respondent/
Corporate Debtor

Heard on 09.01.2019

Order delivered on 14.01.2019

Coram: Hon'ble Shri. M.K. Shrawat, Member (Judicial)

For the Petitioner : 1. Ms. Madhavi Nalluri, Adv.
2. Ms. Deep Shridharani, Adv.

For the Respondent : 1. Mr. Zubin Behramkamdin, Adv.
2. Mr. Vyom Shah, Adv.
i/b Meghna Talwar Divya Shah Associates.

Per M.K. Shrawat, Member (Judicial)

ORDER

It is a Company Petition filed on 07.12.2017 by an individual Mr. Vijay Rochlani as **Financial Creditor**, u/s 7 of the Insolvency and Bankruptcy Code, 2016 against the **Corporate Debtor** viz. Shantai Exim Ltd., having its Regd. Office at '3&4, Kanaiya Building, 250-B Linking Road, Bandra, Mumbai' for a claimed '**financial debt**' of **₹50,00,000/-**. Since there is no payment received even after the legal notice sent to the Corporate Debtor on 11.10.2017, the Petitioner has filed this Petition to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor on the ground that this Corporate Debtor failed to pay the **total outstanding debt of ₹50,00,000/-** with interest as on 11.10.2017.

2. The Petitioner has submitted Form-5 along with the relevant documents such as computation of claim, Bank Account statements with ICICI Bank to demonstrate that the payments were made through RTGS directly transferred in the account of Shantai Exim, alleged to be a 'Corporate Debtor'. A Legal Notice sent on 11.10.2017 through Advocate. Also, proposed the name of Interim Resolution Professional.

Brief Facts of the Case:

3. The Petitioner states that during December 2016 the Corporate Debtor approached him for a short term financial assistance as the Corporate Debtor was in financial crunch and assured that the fund will be repaid by March 2017. On the assurance of the Corporate Debtor, the Petitioner provided financial assistance up to ₹55,00,000/- in December 2016. In the mid of March 2017, the Corporate Debtor repaid ₹5,00,000/- to the Petitioner assuring that the balance amount will be paid in December 2017. The Corporate Debtor further offered an interest of @12% p.a. for the remaining amount of ₹50,00,000/- till the time of repayment and further assured that the interest part will be paid on 1st day of each quarter. Accordingly, the Corporate Debtor paid interest for three quarters i.e. up to June 2017 after deducting the TDS. Thereafter, the Corporate Debtor neither paid the interest nor the balance of principal amount. A computation of the balance payment is given hereunder:

Balance Debt Claim – as on 01.07.2017(cut-off date)

Sr. No.	Date	Loan Amt. (₹)	Amt. Returned	Interest paid	Outstanding Amount.
1.	20.12.2016	8,00,000			
2.	21.12.2016	2,00,000			
3.	22.12.2016	7,00,000			
4.	26.12.2016	4,00,000			
5.	27.12.2016	10,00,000			
6.	29.12.2016	9,00,000			
7.	30.12.2016	10,00,000			
8.	31.12.2016	5,00,000			
9.	13.01.2017			7,663	
10.	15.03.2017		5,00,000		
11.	03.04.2017			1,43,803	
12.	28.08.2017			1,34,630	50,00,000

4. As there was no payment forthcoming, the Petitioner followed up with the Corporate Debtor continuously by way of SMS and email, but in vain. Therefore, on 11.10.2017, the Petitioner sent a legal notice to the Corporate Debtor demanding him to make the balance amount along with the interest for the quarter ended on 30.09.2017, however, the Corporate Debtor neither replied to the notice nor made any payment to the Petitioner.

5. In view of the above, the Petitioner felt that the Corporate Debtor become commercially insolvent and is not in a position to meet its liabilities. In the circumstances that the Corporate Debtor had claimed to have become insolvent and was not coming forward to settle the dues with the Petitioner, the Petitioner proceeded through this Petition with Insolvency action against the Corporate Debtor.

6. The Corporate Debtor filed its reply on 19.02.2018 which is on record. It is a company engaged in the business of export of synthetic textile items and finished garments with approximate yearly turnover of ₹30 crores. The Corporate Debtor states that the company is very much solvent and capable of repaying its all dues. In respect to the above claim amount of ₹50,00,000/-, the Corporate Debtor stated that there was no loan taken from the Petitioner, as alleged, and the amount transferred to the account of the Respondent/Debtor Company from the account of Petitioner and his wife (joint account) was only an internal arrangement as the Petitioner in this case is closely related to the family of the Directors of the Respondent/Debtor Company. **The Petitioner's wife; Mrs. Karishma Rochlani is the sister of Mr. Vasudev Sawlani and Mr. Harish Sawlani who are the directors of the Respondent/Debtor Company. It further states that Mrs. Karishma Rochlani has filed a divorce petition with the Family Court, Bombay.** Therefore, ₹50,00,000/- is retained by the Respondent/Debtor Company for the final decision on the Petition of their sister in the Family Court, Bombay. The said amount of ₹50 lakhs is thus retained by them as an escrow amount for the alimony

of their sister who is seeking divorce from the Petitioner. It is further pleaded that it is clear from the petition itself that no documentary evidence for the loan given is placed on record hence in this situation such an arrangement must not be treated as a loan liability on the on going Company, which is not an Insolvent under any law. Although it is **agreed that TDS was deducted but argued that when a payment was made on the request of the Petitioner, TDS deducted under compulsion as it is necessary as per the law.** Therefore, through other letters between them, it had been clearly informed to the Petitioner that the amount will not be released until the order of Family Court.

7. In the rejoinder the Petitioner has contested that the payment of **interest is evidenced by a handwritten workings of the accounts department of Corporate Debtor sent to him by email.** Further pleaded that in the absence of any Court Order the Company must return the amount. It is not legally permissible to retain the amount. Although not connected with Insolvency proceedings, but informed that due to unlawful business by the Directors at one instance a director was arrested in Jan 18 by EoW, proof attached i.e. newspaper cutting. On the issue of Financial Debt attention was drawn that it was confirmed in the accounts that the amount was received as **'Short Term Borrowing'.**

Findings:

8. Both the sides have been heard at length. Case record is perused carefully along with the evidences as well as the case laws referred. Certain facts as discussed above are not in dispute and summarised hereinbelow with the purpose of addressing the claim and counter claim of both the sides. A Petition is filed in the capacity of a 'Financial Creditor' for a 'Financial Debt' of ₹50,00,000/- recoverable from the Corporate Debtor M/s. Shantai Exim Ltd. The impugned amount was paid in several tranches starting from 20.12.2016 and closing on 28.08.2017. As per the computation of the claim of debt, it is evident that a sum of ₹55,00,000/- was

transferred up to 31.12.2016 to the account of the Debtor Company and thereafter ₹5,00,000/- were returned by the Debtor Company to the Petitioner on 15.03.2017. On one hand the Petitioner is claiming the impugned amount as 'financial debt', but on the other hand, the argument of the Corporate Debtor is that the impugned amount was not in the nature of loan but a family advance by the Petitioner in his individual capacity that too without interest. However, on the question of accruing of interest on the said amount, the Petitioner has demonstrated on the basis of few evidences that there was a mutual understanding and on the basis of the said understanding, this amount was initially transferred as a financial assistance which was nothing but a "temporary finance".

8.1 The Respondent has placed on record a reply, duly perused, wherein challenged the very nature of the transfer of the impugned money. The crux of the entire challenge is that the Petitioner had advanced the said amount for the welfare of his wife and children. Therefore, it was not a loan on which there was an agreement to pay the interest or to return the said amount within some specified period. The Respondent has informed that Petitioner's father had given a flat bearing No. 19 in the Building known as Prabhat Building to the Petitioner and out of the sales proceeds of the Flat deposited the said amount in the Company. It was therefore, not the individual money but belongs to the family hence, the wife had demanded her share. Thereafter, on arriving at a family arrangement, it was deposited with the Company to give financial security to Petitioner's wife. It is also necessary to mention that wife of the Petitioner belongs to the family of the Debtor Company. Undisputedly, brothers of his wife are managing this ongoing concern. It is also affirmed by both sides that there was a matrimonial dispute between husband and wife.

8.2 In the light of the above factual matrix, the issue to be decided is that whether the impugned amount falls under the definition of Financial Debt or not? The **Definition as prescribed u/s 5(8) of the Code** is that a 'Financial Debt' has a component of 'Interest' and in other words has a component of "Time Value of Money". In my

view, the present position of the transaction is thus coming within the definition of Financial Debt as defined u/s 5(8) of the Code, because of few reasons as below:

- i. That the transfer of money has the element of payment of interest.
- ii. That the records of the Debtor Company have recorded in its books of accounts as 'Short Terms Borrowings', thus showing as a financial liability.
- iii. That the TDS was deducted as and when interest was paid.

8.3 An important fact is that the Respondent Company had undisputedly recorded in its books of accounts the impugned transaction under the head 'Liability'. Generally, in the books of accounts such type of loan liability is recorded in the Books of Accounts of the company under the head "Loans from Friends & Relatives". During the course of hearing a particular question was raised from the Bench to the Ld. Counsel of the Respondent that how this transaction was recorded in the books of accounts of the company? Ld. Counsel has candidly informed that transaction in question was undisputedly shown as a liability in the Accounts of the company. However, he has added that the recording in the books of accounts do not change the very nature of the transaction which was received from the Petitioner with an understanding that the amount was having the character of maintenance of his wife against matrimonial responsibility. In my opinion, an entry recorded in the books of accounts is to be narrated in the light of the surrounding circumstances and the action taken either by the depositor or by the receiver. In this case, an important fact cannot be ignored that on receiving the amount in question the Debtor Company had treated the impugned amount as a loan and thereupon undisputedly deducted Tax at Source on payment/ accrual of Interest. Form 26AS is submitted as an evidence depicting clearly the payment was towards Interest. Under the provisions of the Income Tax Act either on payment or on accrual of interest it is the responsibility of the person to deduct TDS at the time of payment or on passing the credit

entry as interest in its books of accounts. Keeping this provision of Income Tax Act in mind, the Debtor Company had deducted the TDS and issued a certificate on Form 26-AS, already furnished by the Petitioner as a part of the evidence. Because of this reason a conclusion can be drawn that the Respondent Company has unequivocally recorded the transaction in question as a Financial Liability.

8.4 From the side of the Respondent Debtor it is pleaded that in the case of "**Engenious Engineering Pvt. v. Onaex Natura Pvt. Ltd.**" [Company Appeal (AT) (Insolvency) No. 249 of 2017 dtd. 01.11.2017], an investment was made towards allotment of shares which was not considered by the Respected NCLAT as a debt in the nature of Financial Debt, hence, rejected the claim. As against that, what we have noticed in the present case is that the transaction was made to overcome the financial problem of the debtor company. Also, it is an admitted fact that on 03.04.2017 and on 28.8.2017 interest was paid of ₹1,43,803/- and ₹1,34,630/- for each quarter. When there was a default of non-payment of interest a letter was issued through Counsel dated 11.10.2017 wherein it was reiterated that the transaction under consideration was an interest bearing liability of the Corporate Debtor:-

"3. That subsequently between January–March 2017, our client made requests to you on call to pay him back his money. You returned to him an amount of ₹5 lakhs and the rest is still pending till date.

4. That it was mutually agreed between you and our client that an interest @12% per annum would be paid by you to our client and the payment would be made on a quarterly basis. It was agreed that the payment of interest would be made on the 1st day of every quarter.

5. The payment of interest was made in the following manner:

a. For September–December 2016 : on 13.01.2017 – ₹7,633/-

b. For January–March 2017 : on 03.04.2017 – ₹1,43,803/-

c. For April–June 2017 : on 29.08.2017 – ₹1,34,630/-

d. For July–September 2017 – the payment of interest has not yet been received in spite of the due date being 01.10.2017.

6. *That the TDS amount was also deducted from the interest payments and it is also on record.*
7. *That for the first quarter of 2017, you had made the interest payment on time. However, for the second quarter (April-June), your cheque for payment of interest had returned uncleared when it was first deposited in the month of July because you had stopped the payment on the said cheque.*
8. *It was only on 28th August that the cheque was again deposited by our client and it got cleared and the payment was released.*
9. *That our client, vide e-mails & telephonic communications starting from June 2017, had intimated you time and again that he needs his money back and requested you to pay back the entire amount at the earliest."*

8.5 The issuance of this Notice-cum-Letter is a clear evidence that since inception the Petitioner was under the impression that the amount was advanced which was an interest bearing loan given to the Company. This letter therefore, is a potent evidence in support of the claim of the Petitioner.

8.6 One more position of settled law is that the NCLT is a legal forum to deal summarily the insolvency proceedings. This Tribunal cannot go into the complex question of dispute over a debt or a claim. According to Ld. Counsel, such type of disputes are within the domain of a Civil Court. In such precedents the Petitioner had resorted to several legal proceedings, therefore, it was held that the Tribunal cannot enter into the disputed question of fact which could be resolved only through formal proceedings of a Civil Court. As against that, the distinguishable feature is that the family dispute among husband and wife has nothing to do with the impugned transaction of a transfer of money from the Petitioner in the accounts of the Debtor company. In the present case, the **cause of action** had arisen when the Debtor company had refused to return the loan. However, in the Civil proceedings the **cause of action** is in operation when the litigating parties file a suit of divorce. Both the legal proceedings are independent having no nexus with each other, therefore, can be independently adjudicated by two different judicial forum.

8.7 Ld. Counsel of the Respondent has also placed a reliance on an order of NCLT Mumbai bench passed u/s 7 dated 07.07.2017 (TCP 411/IBC/NCLT/MB/MAH/2017) cited as 2017 SCC OnLine NCLT 7655 in the case of **"Mr. Vir Vikram Vaid v. M/s. Offshore Testing & Inspection Services (I) Pvt. Ltd."** for the legal proposition that a related party cannot file a Petition under Insolvency Code and that in the absence of any documentation to demonstrate that the money transaction was having the consideration of time value of money or it was an interest bearing transaction, therefore, out of the ambit of the provisions of section 7 of the Insolvency Code. Facts of the cited precedent are altogether different because the Petitioner in that case happened to be a "Director" of the Respondent Company. Because of this status of the Petitioner, a view was taken that in a situation even if his claim has accepted, the Petitioner shall be debarred to be a member of Committee of Creditors. In addition, the most important feature on the basis of which the application u/s 7 of the Code was dismissed, was that, quote *"A financial debt is to be examined in the light of the definition that a Financial Debt means a Debt along with interest which is disbursed against the consideration for the time value of money"* unquote. The law pronounced in that decision has a persuasive value hence to be applied on the facts of the present case to arrive at a correct decision. In my humble opinion, the condition requisite to declare a transaction as a financial debt has duly been accomplished in this case, therefore, without hesitation it is hereby declared that the transaction was within the definition of Section 5(8) "Financial Debt" of the Insolvency Code.

9. On the other hand, from the side of the Petitioner a reliance was placed on the decision of the respected NCLAT pronounced in the case of **"Nikhil Mehta and Sons v. AMR Infrastructure Ltd."** dated 21.07.2017 bearing No. Company Appeal (AT) (Insolvency) No. 7 of 2017, wherein an observation was made as under:-

"11. According to Appellants they are the "Financial Creditors" of the Respondent, and the Respondent was deducting TDS on the amount which it was paying to the Appellants as Committed returns/Assured Returns under Section 194(A) of the Income Tax Act, which is applicable to deduction of TDS on the amount which is paid

to some as "Interest, other than Interest on Securities". This therefore, makes it clear that the payment made by the Respondent to the Appellants in the form of Committed Returns/Assured Returns is nothing but a payment of "interest" to the Appellants by the Respondent thereby making the amount paid by the Appellants to the Respondent at the time of booking of their unit a Loan given by the Appellants to the Respondent for constructing the project. In support of the above claim the Appellants have placed on record, their Form 16A and 26AS which are at pages 5-33 of their paper book dated 17.04.2017, filed before tis Appellate tribunal".

9.1 Further it was also observed as under:-

"From the provisions of Law and discussion as made and quoted above, we find that following essential criteria's to be fulfilled for a Creditor to come within the meaning of 'Financial Creditor':-

- (i) A person to whom a 'Financial Debt' is owed and includes a person whom such debt has been legally assigned or transferred to*
- (ii) The debt along with interest, if any, is disbursed against the consideration for time value of money and include any one or more mode of disbursed as mentioned in clause (a) to (i) of sub-section (8) of Section 5".*

9.2 In the said decision, the claim of the Petitioner as a Financial Creditor was dismissed by the Adjudicating Authority, which was challenged by the Financial Creditor as Appellant before respected NCLAT. The Hon'ble Tribunal has taken into account the fact that on the impugned amount TDS was deducted, has also happened in the case in hand, and that the amount in question was disbursed against the consideration for time value of money, hence it was held that the rejection was incorrect, therefore, set aside the said order. The twin condition as discussed by the Hon'ble NCLAT stood satisfied in the case in hand, therefore, the transaction in question can safely be held as a "Financial Debt".

10. In the light of the detailed discussion, held hereinabove, and considering the facts and circumstances of the case in the light of the case laws discussed supra, this Bench is of the view that the transaction is within the definition of Financial Debt, hence the Petition u/s 7 deserves to be 'Admitted'. Ordered accordingly.

11. The Petitioner has submitted the consent of the IRP viz. Mr. Ajay Kumar, 103, A.S. Dia Building, 1st Floor, 268/272, Dr. Cawasji Hormasji Street, Marine Lines, Mumbai – 400 002, email: ajay_199@yahoo.com, Reg. No.: IBBI/IPA-002/IP-N00139/2017-2018/10377. His appointment is confirmed as Interim Resolution Professional to carry-out the functions as mentioned under Insolvency & Bankruptcy Code.

12. On perusal of the documents placed and the reasons given above, this Bench being satisfied that the Debtor company defaulted in paying its debt to the Operational Creditor, hereby admits this Petition by imposing 'Moratorium' as follows ;-

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

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESI Act);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(II) That supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(III) That the provisions of sub-section (1) Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(IV) That the order of moratorium shall have effect from 14.01.2019 till 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, as the case may be.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

14. Accordingly, this **CP(IB)-1712/(MB)2017** is hereby **admitted.**

15. The Registry is hereby directed to communicate this order to the concerned parties. The appointed IRP shall submit the Progress Report on or before next date of hearing, now listed for hearing on **20.02.2019.**

Sd/-

M.K. SHRAWAT
MEMBER(JUDICIAL)

Date: 14.01.2019
pvs