

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD
Court 2**

CP(IB) 268/NCLT/AHM/2020

**Coram: HON'BLE Ms. MANORAMA KUMARI, MEMBER JUDICIAL
HON'BLE Mr. CHOCKALINGAM THIRUNAVUKKARASU, MEMBER TECHNICAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH
OF THE NATIONAL COMPANY LAW TRIBUNAL ON 25.01.2021**

Name of the Company: Arrow Engineering Ltd
V/s
Golden Tobacco Ltd

Section 7 of the Insolvency and Bankruptcy Code,
2016.


<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.				
2.				

ORDER

(Through Video Conferencing)

None present.

The order is pronounced in the open court, vide separate sheet.



**CHOCKALINGAM THIRUNAVUKKARASU
MEMBER (TECHNICAL)**



**MANORAMA KUMARI
MEMBER (JUDICIAL)**

Dated this the 25th day of January 2021

**BEFORE ADJUDICATING AUTHORITY (NCLT)
AHMEDABAD BENCH**

C.P. No.(IB) 268/7/NCLT/AHM/2020

In the matter of:

Arrow Engineering Ltd.

Arrow House No.2
Arrow City, Manhattan Village
Kandlepada, Taluka Pen
Goa Highway N.H. -17
Raigad 402 107

:

Petitioner
[Financial Creditor]

Versus

Golden Tobacco Limited

Darjipura
Post Amaliyara
VADODARA 390 022
GUJARAT STATE

:

Respondent
[Corporate Debtor]

Order delivered on 25th January, 2021

**Coram: Hon'ble Ms. Manorama Kumari, Member (J)
Hon'ble Mr. Chockalingam Thirunavukkarasu, Member (T)**

Appearance:

Applicant : Mr. Robin Jaisinghani, Advocate
Ms. Natasha Dhruvan Shah, Advocate
Respondent : Mr. Dhaval Deshpande, Advocate

ORDER

Per se : Ms. Manorama Kumari (Member Judicial)

1. Arrow Engineering Limited, through authorised signatory Mr. Vineet Ramesh Malhotra, Managing Director, filed this petition on 26th June, 2020 under section 7 of The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 4 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "the Rules") seeking reliefs under Section 7(5)(a) and Section 13(1)(a)(b)(c) of the Code.





2. That, the applicant Arrow Engineering Limited, incorporated on 23.12.1998, having identification No. U29248MH1998PLC218509 is having its corporate office at Raigad, Maharashtra State.
3. The respondent M/s. Golden Tobacco Limited is a company incorporated under the Companies Act, 1956 on 28.06.1955 having identification No. L16000GJ155PLC067605 and having its registered office at Vadodara, Gujarat State. That Authorised share capital of the respondent company is Rs. 2,50,00,000/- and paid up share capital is Rs. 1,75,98,016/-.
4. The facts in brief of the case are as follows: -
5. Letter dated 01.02.2012 (page 239) addressed to the applicant by the respondent shows that, in accordance with the letter of understanding dated 10.10.2011 entered in to between the two parties, the respondent has received a sum of Rs. 25.00 crores towards financial and marketing assistance. The said letter further stated that "as mutually agreed, please advance a further sum of Rs. 2.00 crores"
6. Letter of the respondent dated 22nd July, 2011 addressed to the applicant, annexed to the application at page No. 226 (Ex. I) reveals that, consequent upon the alleged **Memorandum of Understanding (MoU) (page 218-225 – Ex. H) dated Nil** was entered into between the applicant and respondent, the applicant had disbursed total sum of Rs. 10.00 crores to the respondent, during the period between 03.06.2011 and 16.07.2011, as reflected in the letter dated 22.07.2011 (page 226 – Ex. I) on the following terms and conditions: -
 - the respondent will develop the property at S.V. Road, Vile Parle (West), Mumbai;
 - the applicant shall assist the respondent for marketing/financial requirement of the project;
 - the respondent is expected to get a clarification from local City Civil Court for the case filed by minority shareholders

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that by the preceding month the respondent can develop the property itself.

- in addition of Rs. 10.00 crores already paid by the applicant, a further payment of Rs. 15.00 crores shall be made within seven days from the date of such clarification (as per clause 3 above), after a certified copy of the order is given to the applicant;
- to enable the respondent to further progress in the project, a sum of Rs. 75.00 crores shall be arranged by the applicant to be paid to a joint account, within two months from the date of such an order, from pre-sales or otherwise the applicant will be responsible for this payment;
- a further sum of Rs. 150.00 crores shall be paid within four months from the date of such an order from sales or otherwise the applicant will be responsible for such payment;
- both the parties will mutually nominate 2 persons to operate a joint bank account which shall be operated for the purpose of this project;
- the applicant shall be responsible to provide the funds for the project for entire construction including approvals and all other costs till the project is finally completed by the respondent and occupation certificate is received;
- marketing of the project will be done by the applicant and the sale proceeds shall be deposited in the joint bank account;
- sales of the built-up units will be done jointly by both the parties at the best available price and the amount realised shall be deposited in the joint account;
- 50% of the sales realization shall be paid to the applicant in lieu of the financial/marketing services provided by the applicant;
- Once the clarification is received from the Court a detailed agreement shall be entered into between the applicant and respondent.

7. Page No. 228 (Ex. J) annexed to the application is letter dated 10.10.2011 addressed to the applicant by the respondent, inter alia stating that the respondent had entered into a MoU dated 26.12.2009 with M/s. Sheth Developers P. Ltd.(SDPL) and M/s. Suraksha Reality Ltd. (SRL) for development of the piece of land at Vile Parle, Mumbai. That, two minority shareholders filed a suit in the Bombay City Civil Court, Mumbai and moved an interim application, wherein, the Hon'ble Court passed an interim injunction restraining the company from giving effect to the

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resolution dated 18.01.2010 thereby restraining the company from going ahead with the said MoU dated 26.12.2009. In view of the said injunction and in view of the fact that getting the stay vacated will take a long time, the respondent company decided to develop the said property and for the purpose had entered into the alleged MoU dated nil (page 218-225 Ex. H) with the petitioner for financial assistance and marketing services and advice.

8. It is also found that in the letter dated 10.10.2011 (page 228-229 Ex. J) that...

"in consideration of the petitioner providing marketing services and marketing of the project as well as financing of costs to be incurred for development of the said property as mentioned above together with interest, petitioner shall pay 50% of the sale realisation to the respondent in full and final settlement pro rata basis of the finance provided by the applicant together with interest and for marketing services and marketing advice (sic). That, this will be in full and final settlement of the finance provided, interest and marketing services and marketing advice. That, the said letter further stipulates that the amount receivable by the respondent after deducting the payment already received from the applicant, the amount available to the respondent will be less than Rs. 1000.00 (Rupees thousand crores only) and in case, for any reason, if the amount receivable to the respondent is less than Rs. 1000.00 crores, in that event to cover the short fall, the amount payable to the applicant towards financing and services will be reduced by the amount of the shortage. That, in case the respondent terminates/defers this marketing arrangement, then the respondent shall pay back the amount advanced by the applicant with interest (sic).

9. Mr. Sunil Kumar Dhandhanian, authorised signatory of the respondent company filed affidavit in reply/objections inter alia raising the following objections: -

- that, the petitioner has suppressed material facts under the present petition and, in fact, the corporate debtor has a counter claim and is entitled to recover a sum of more than

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Rs. 8500.00 crores from the petitioner company along with additional expenses, loss of profits and interest;

- that the corporate debtor is the owner of several pieces and parcels of contiguous land admeasuring 31128 sq. meters situated at S.V. Road, Vile Parle West, Mumbai of which it was desirous of development;
- that, during the course of negotiations between the officers of the corporate debtor and petitioner, officers of the petitioner were informed about the **MoU** entered between the corporate debtor and two other parties on 26.12.2009 for joint development of the said land;
- that, certain facts were also put on record that the corporate debtor being a sick industrial company proceedings were pending against the corporate debtor before BIFR and the SDPL and SRL had failed to pay the entire consideration of Rs. 542.00 crores to the corporate debtor before the expiry of the rehabilitation scheme sanctioned by BIFR;
- that, it was further intimated that the above property was already attached by the Office of the Excise Department vide order dated 13.04.2011 and the order of the Income Tax Recovery Officer dated 13.07.2016 and that the corporate debtor was required to seek permission from both the Excise Department and the Income Tax Department before starting any development on the said land;
- that, the corporate debtor was compelled to file a modified draft rehabilitation scheme with BIFR;
- that, assuming the petitioner has a valid claim against the corporate debtor even then the said claim would be hopelessly barred by limitation inasmuch as the corporate debtor has relied upon order dated 04.10.2019 passed by the Hon'ble Bombay High Court in Notice of Motion No. 68 of 2018 in Commercial Suit No. 782 of 2017 and it is the date of this order that the corporate debtor alleges to be the date of default;
- that, petitioner filed Notice of Motion seeking injunction restraining the corporate debtor from disposing of, transferring, alienating, encumbering or parting with possession or creating any third party rights in the suit lands and a direction to the corporate debtor herein to furnish security in a sum of money;
- that, the terms on which the petitioner provided finance for the development of the said project and marketing and other assistance were broadly discussed between the officers of the petitioner and the corporate debtor;
- that, the petitioner had agreed and confirmed that a sum of Rs. 1000.00 crores would be provided to the corporate debtor and the same would be released in the manner as and when required by the corporate debtor;

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- that, it was further settled that an amount of Rs. 300.00 crores would be provided immediately by the petitioner to the corporate debtor so as to settle the dues of various creditors. That, the said condition was also highlighted in the letter issued by the corporate debtor on 02.04.2011 in response to the letter of Intent received from the petitioner;
- That, various negotiations took place between the corporate debtor and the petitioner and a rough draft of the **MoU** dated nil (page 218-225 Ex. H) was prepared for discussions and the petitioner had categorically agreed that if the petitioner is not able to provide financial support as assured and agreed, then the same may be retained by the corporate debtor and that the corporate debtor will also be liable to get compensation on account of the said default but were reluctant to put the same in the **MoU**;
- That, from the so called draft **MoU** it is clear that in consideration of the petitioner funding the development of the said property, the corporate debtor shall transfer 50% of the constructed area to the petitioner post the development of the property in full and final settlement of the amount advanced by the petitioner to the corporate debtor;
- That, inspite of negotiations between the corporate debtor and the petitioner no **MoU** could be entered into as the issues raised by the corporate debtor were not addressed to by the petitioner and the petitioner could only advance a sum of Rs. 40.75 crores in various tranches to the corporate debtor instead of an admitted commitment to the tune of Rs. 300.00 crores;
- That, the petitioner was proposed to be appointed only as the marketing and financial consultant in respect of the project and was not given any rights whatsoever to develop the land. That, the petitioner went ahead and published advertisement in the Times of India on 01.09.2012 misrepresenting that the said development project was undertaken by the petitioner and not by the corporate debtor. That, publishing advertisement without any authority resulted into huge loss of money and reputation of the corporate debtor and the entire development project was jeopardised;
- that, the petitioner was to siphon off and misappropriate the entire amount of money received from general public and investors by making false claims and advertisements in respect of the land which belong to the corporate debtor;
- that, the petitioner belatedly filed a commercial suit before the Hon'ble High Court based on the so called draft of the **MoU** dated nil. That, the corporate debtor has filed a counter claim of Rs. 8500.00 crores disputing the entire claim of the petitioner;
- that, the corporate debtor would have otherwise made profits to the tune of Rs. 3500.00 crores from the sale of the

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property and the corporate debtor would have discharged its entire liability towards all statutory dues;

- that, the claim is barred by limitation;
- that, affidavit verifying the petition is not in accordance with the NCLT Rules, 2016;
- that, no default under I & B Code, 2016;
- that, the petitioner is not a financial creditor under the Insolvency and Bankruptcy Code, 2016;
- that, the debt claimed is not a financial debt;
- that, the petitioner has produced order passed by the Hon'ble High Court of Bombay, however, intentionally not produced the Commercial Suit as well as the Counter Claim filed by the corporate debtor.

Findings

10. Heard both sides at length as also perused the documents annexed with application and the reply filed by the respondent.
11. It is the duty of the Adjudicating Authority to decide in conformity with the pleadings and the proofs i.e. to say "jus decere", and non "jus dare" to administer the justice and not to make the law.
12. It is pertinent to mention that the entire claim is based on a MoU dated nil (Ex. H page 218-225). It is a universally settled law that decisions are taken by the Adjudicating Authority on the basis of documents produced by both the sides. The so called **MoU** dated nil does not contain vital information like date of execution of the document, address of both the parties between whom the MoU has been entered into and number/date of the cheque claiming to have been given by the petitioner to the respondent. In absence of such information, the **MoU** becomes a piece of simple paper in the eye of law, having no evidentiary value.
13. **MoU** is generally a preliminary understanding between the parties to a contract, prior to the execution of a formal agreement. It is a document highlighting the intention of contracting parties and might also be known as 'Letter of Intent' (**LoI**). **MoU** is generally

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executed for creating consensus between the contracting parties in future contracts and is usually not intended to have created any obligation upon the parties. Primarily, it is understood that **MoU** is non-binding and legally non-enforceable and is only an "agreement to agree" and highlights business relationship, which are likely to result in some contract or any formal agreement between the parties. However, a **MoU** may create an obligation upon the parties, if a binding understanding is inferred from the clauses of the **MoU**.

14. It is well established rule of law that- "all contracts and agreement but all agreements are not contract". This is so because for a contract to be valid, it needs to fulfil all the essential ingredients mentioned under **Section 10 of the Indian Contract Act, 1872** (hereinafter referred to as Contract Act). Even if it is assumed that **MoU** fulfils all the ingredients of the Contract Act but in that case the MOU so relied upon by the petitioner is bad in the eye of law inasmuch as it does not fulfil the condition of Section 10 of the Contract Act, as the date is not given, and in number of places the vital information and details are blank as is apparent from page no 218 and 220 of the application (**Exhibit-H**). The enforceability of a **MoU** depends upon the principle governing legislation, i.e. the Contract Act. In the light of this, enforceability of **MoU** can be divided into 3 categories;

- a. In general
- b. International MOU
- c. MoU between two countries

In General

In the general sense, the enforceability of MoU can be divided in to two categories they are;

- i. When it fulfils the conditions laid down under Section 10 of the Contract Act, then the performance of such obligations laid down in the MOU can be enforced in the specific relief Act, 1963, **and**
- ii. When it does not fulfil the conditions of Contract as per the Contract Act, same cannot be enforced. However, even in the above situation, person has the right to approach to the Court on the basis of:
 - Principles of promising estoppel and

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- Equity (Motilal Padampat Sugar Mills Co Ltd. v/s State of Uttar Pradesh [1979 SC 621])
15. However, the MoU dated **nil Exhibit H**, so relied upon by the petitioner, lacks the basic ingredients/conditions as said above and laid down under Contract Act, as such not enforceable in the eyes of law.
16. Further, the petitioner claiming himself to be a financial Creditor and also relied upon the **Letter of Intent dated 03.06.2011, Annexure F**. Usually the 'letter of intent' outlines the chief terms of a prospective deal. A Letter of Intent is a document outlining the intentions of two or more parties to do business together; it is often non-binding unless the language in the documents specifies that the companies are legally bound to the terms.
17. While going through the **Letter of Intent** dated 03.06.2011, ANNEXURE F page 215, no where it is worded / speaks about disbursement of loan or the date of disbursement. For the sake of convenience, the contents of letter of intent dated 03.06.2011 is reproduced herein below:

"To,

Dated 3rd June, 2011

**M/s Arrow Engineering Ltd.
Building No. 7, J Block, Ploatform Level,
Belapur Commercial Complex,
CBD Navi Mumbai-400614,
Tel. 022-41127700**

Sub-Confirmed Intend to give market/financial assistance rights to M/s AEL.

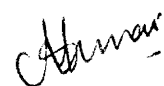
Dear Sir,

We are pleased to issue you a formal Letter of Intent for marketing/financial assistance of our property based on MoU enclosed. This LOI has validity of 30 days from the date of receipt of Amount Rs. 5 crores.

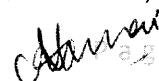
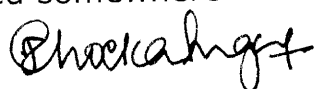
If the MoU is not formally Executed on revenue stamp paper within 30 days, then GTL will have full rights either to extend or cancel this LOI and return the Amount of Rs. 5 crores received immediately.

Thanking You

**Golden Tobacco Limited
Authorized Signatory
Enclosed photocopy of the Property documents"**


18. The letter of Intent dated 03.06.2011 is self-explanatory. While going through the 'letter of intent' which is a vital document relied upon by the applicant, it is important to note that the contents of letter of intent clearly shows that the financial assistance has been given for the purpose of marketing of the property of corporate debtor based on the MOU enclosed. The corporate debtor further stated, inter alia that, letter of intent has validity of 30 days from the date of receipt of amount of Rs. 5 crores. It is further stated inter alia that, if the MoU is not formally executed on a stamp paper within 30 days, corporate debtor will have full rights to cancel 'letter of intent' and return the amount of Rs. 5 crores.
19. Even if it is assumed that letter of intent is a bona fide document so relied upon by the petitioner, there is no MoU which would have been formally executed between the parties on non-judicial stamp paper within 30 days as agreed in the MoU dated nil (Exhibit H, page 218), which is incomplete and does not fulfil the conditions of section 10 of Contract Act, so as to enforce in law.
20. It is also important to note that the contents of 'Letter of Intent' further create a shadow of doubt, on the petitioner, claiming himself to be the 'Financial Creditor'. To be the Financial Creditor, Petitioner has to prove himself that he falls under definition of 'Financial Creditor'; Viz. (Section 5(7) which provides that, "Financial Creditor", means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to; and it may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. Further, being a Financial Creditor, has to prove that there is "default" on the basis of solid documents, or information in an "Information Utility", that is easily verifiable.
21. However, the Petitioner, admittedly has shown the date of default as the date of filing of the commercial suit number 782 of 2017 filed somewhere in July 2017 as reflected from Form I, part IV at



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page no 6 of the Application. It is to be mentioned herein that, the word "Creditor", "Debt", and "default" are used at many places in Insolvency Code and hence are very important. "Default" means non-payment of debt when whole or any part of instalment of the amount of debt has become due and payable and is not paid by the debtor or the Corporate Debtor, as the case may be, Section 3(12) of the IB Code. Therefore, the date of filing of the commercial suit i.e. dated 12.07.2017, cannot be, in any manner be called as date of default, as per IB Code. Thus, due to want of "date of default", the petition is bad in eye of law and not maintainable.

22. It is needless to mention herein that, the "date of default" and "due date" are complimentary to each other. In absence of any one of it, it will not attract the Corporate Insolvency Resolution Process, which is found absent in the instant application so filed under Section - 7 of the IB Code. In absence of date of default or due date, limitation cannot be calculated. However, if the letter of intent is taken as a bona fide document, then also, the application becomes time barred since the same is executed on 03.06.2011.
23. Further, to prove that the petitioner has paid the amount as loan to the Corporate Debtor, it must have reflected in the Balance Sheet. Since the Applicant has neither filed the Balance Sheet nor relied upon the same, in absence of any corroborative document, the very transaction claims to have been made by the Petitioner, creates a doubt in mind and in absence of proof like Income Tax Return, the amount paid cannot be considered as advance or loan. Admittedly, the amount so paid by the petitioner or acknowledged by the corporate debtor by way of cheque is/are of 2011 as reflected from letter dated 22.07.2011 (exhibit I page no 226), wherein, in para 9 and 10, it is categorically stated that, marketing shall be done by the petitioner and, the sale of build-up units will be done jointly by both the parties. For the sake of brevity, para 9 and 10 is reproduced herein below:





Para 9: Marketing of the project will be done by AEL and the sale proceeds shall be deposited in the Joint bank account.

Para 10: The sales of the built-up units will be done jointly by both the parties at the best available price and the amount realized shall be deposited in the joint account."

24. Incidentally, letter dated 22.07.2011 is a relied upon document by the petitioner itself and the petitioner has accepted that it is not a loan. That apart, had there been any loan advanced by the petitioner to the respondent, it must have been reflected in the balance sheet. Unfortunately, the petitioner has not kept on record any balance sheet or audited accounts in order to show that the amount is paid to the corporate debtor is against financial assistance/loan.
25. From the records and document filed by the applicant, it can be easily inferred that, applicant has admitted that the amount has been paid to the Corporate Debtor as advance for marketing/ financial requirements of the project so undertaken by the Corporate Debtor. Apart from other terms as reflected in letter dated 22.07.2011 (Exhibit I page no 226), it is to be remembered that the advance amount paid cannot be considered as 'Financial debt' or 'Operational debt'. On going through the records and documents produced by both the sides it is amply clear that, the arrangement between the parties are in the nature of business sharing and there is no 'financial debt'.
26. On perusal of the record it is found that, Commercial Suit No. 782 of 2017, filed somewhere in July, 2017, is pending for adjudication before Hon'ble High Court of Mumbai. It is also a matter of record and admitted fact that, a counter claim is filed by the respondent in Commercial Suit No. 782 in the Hon'ble High Court of Bombay on 18.05.2018 which prima facie shows that there is a pre-existing dispute between the parties. It is also a matter of record that the petitioner has sought injunction in the Commercial Suit restraining the corporate debtor from disposing of, transferring and alienating, encumbering or parting with possession or creating any third party rights in the suit land which is pending for adjudication.

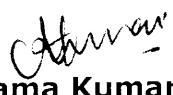
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It is also a matter of record that the petitioner has mentioned the date of 'default' as the date of filing of the suit, however, no other document is produced by the petitioner in support of such claim. The petitioner has also kept reliance on the so called MoU (page 218-225 Ex. H), claiming to have been entered into between the petitioner and respondent, is totally incomplete and devoid of important information like the day and date of the MoU is blank and at the top of the first page, year of execution of the agreement has been shown as 2011. Moreover, important information like address of the parties and cheque number of the advance payment of Rs. 5.00 crore have not been incorporated in the so called MoU though provisions are made but the relevant places are kept blank. Even if it is assumed and considered the date of the so called MoU as December 2011 and such document as real and valid, then also, claim of the petitioner will be barred by limitation.

27. The records show that even after receiving letter dated 03.06.2011(Letter of Intent), the petitioner has never raised any objection and has accepted and admitted the conditions drawn by the respondent. Under such circumstances, even if we assume and consider the petitioner as "financial creditor", then even the claim so filed by the petitioner stands time barred.
28. In view of the foregoing observations the Adjudicating Authority is of the considered view that the instant petition is not maintainable and deserves to be dismissed.
29. In the result, company petition No. CP (IB) 268 of 2020 stands dismissed and disposed of without cost. However, this will not stand in the way of the Petitioner approaching the appropriate forum seeking to enforce its claim against the Respondent, as this petition has been dismissed on the issue of maintainability taking into consideration the provisions of IB Code, 2016.


Chockalingam Thirunavukkarasu
 Adjudicating Authority
 Member (Technical)


Ms. Manorama Kumari
 Adjudicating Authority
 Member (Judicial)