

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH : C-IV**

CP(IB)-4432/MB/2019

Under Section 7 of the IBC, 2016

In the matter of

PPG Asian Paints Private Limited

...Financial Creditor

v/s.

Bhagwati Cars Private Limited

...Corporate Debtor

Order Pronounced on: **28.04.2023**

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner : Mr. Ashish Pyasi a/w Mr. Mukul Bhagtani i/b Dhir &
Dhir Associates, Advocates.

For the Respondent : Mr. Mahendra Doshi, Advocate.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is a Company Petition filed under Section 7 of the Insolvency & Bankruptcy Code, 2016 (**IBC**) by **PPG Asian Paints Private Limited**, ("the Financial Creditor") on 09.12.2019, seeking to initiate Corporate

Insolvency Resolution Process (CIRP) against **Bhagwati Cars Private Limited** (“the Corporate Debtor”).

2. The Corporate Debtor is a company incorporated on 13.07.2017 under the Companies Act, 2013, as a private company limited by shares with the Registrar of Companies, Maharashtra, Pune. Its Corporate Identity Number (CIN) is U50100PN2017PTC171419. Its registered office is at Sanskriti, Plot No. 2, City Park, S. No. 586 A/B/1, Bibewadi, Pune - 411037. Therefore, this Bench has jurisdiction to deal with the present petition.
3. The present petition is filed by the Financial Creditor before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a total sum of ₹47,65,950/- (Rupees Forty-seven lakh Sixty-five thousand Nine hundred and Fifty only). The date of default is 28.10.2018 as per the details given in Part-IV of the Petition.
4. The case of the Financial Creditor is as under:
 - a) The Financial Creditor submits that it is an organization engaged in the business of manufacturing, selling, distribution of automotive, industrial, marine paints and other related products in India. The Corporate Debtor is a private limited company engaged in the business of automotive sales, servicing and repair work, etc.
 - b) The Financial Creditor further submits that in the year 2017, the Corporate Debtor approached the Financial Creditor for financial contribution, for the purpose of sales promotions and procurement of

specialized painting equipment(s) for development and upgradation of automotive painting facilities. "A Body Shop Agreement" was executed between the Financial Creditor and the Corporate Debtor on 28.10.2017, however, it came into effect from 01.12.2017. As per the terms of the said agreement, the Financial Creditor made a financial contribution of ₹40,00,000/- (Rupees Forty Lakh only) to the Corporate Debtor on 18.01.2018 along with Service Tax. Against the payment of ₹40,00,000/-, the Corporate Debtor issued a Demand Promissory Note along with interest @12% p.a. as a collateral security to the Applicant.

- c) The Financial Creditor further submits that in Clause 3(b) of the aforesaid agreement, both parties have agreed that the Corporate Debtor will purchase/procure products of PPGAP for an amount of ₹35 lakhs in the first year and for ₹40 lakhs in the second year and for ₹45 lakhs in the third year i.e. for a total sum of ₹120 lakhs during three consecutive years. However, the Corporate Debtor failed to procure products from the Financial Creditor as per the procurement schedule in the agreement thereby defaulted in complying with the obligations of the Corporate Debtor.
- d) Upon default committed by the Corporate Debtor by non-compliance of the obligation of the terms of the agreement dated 28.10.2017, the Financial Creditor issued legal notices to the Corporate Debtor on 21.01.2019 and thereafter on 27.05.2019 seeking payment of amount of Rs.47,65,950/-. As the Corporate Debtor did not make payment even after legal notices on two occasions, the Financial Creditor filed

Petition under Section 7 of the IBC seeking initiation of Corporate Insolvency Resolution Process of the Corporate Debtor.

5. The Corporate Debtor filed its reply to the Petition wherein it denied any amount due and payable to the Financial Creditor as there is no loan availed by the Corporate Debtor from the Financial Creditor. The amount claimed by the Financial Creditor is a one-time expenditure incurred by the Financial Creditor for the promotion of its own business activity of manufacturing, selling distribution of automotive and other related products. Briefly, it is sales promotion expenditure by the Financial Creditor. Therefore, there is no amount payable to the Financial Creditor and no default committed by the Corporate Debtor. The Corporate Debtor further submits that the Financial Creditor has attached copy of invoice raised by the Corporate Debtor which also includes GST and the invoice was paid by the Financial Creditor. The invoice was raised towards expenses and not for loan.
- 5.1 The Corporate Debtor further submits that there was an agreement for the business with a target given to the Corporate Debtor. However, the Corporate Debtor could not purchase the materials as per the quantity stipulated in the agreement due to adverse market conditions and force majeure of closing the business.
- 5.2 The Corporate Debtor further submits that the Demand Promissory Note dated 28.10.2027 is not enforceable and maintainable in the eyes of law. It submits that the alleged default was for the non-performance of not purchasing materials by the Corporate Debtor from the Financial

Creditor and the same is not falling under the ambit of Section 7 of the IBC, hence the present petition to be dismissed.

Findings:

6. The Financial Creditor has claimed an amount of ₹47,65,950/- towards the outstanding financial debt for the amount given to the Corporate Debtor based on the Body Shop Agreement wherein the Financial Creditor stipulated certain business targets which are not fulfilled by the Corporate Debtor. This Bench notices that the Corporate Debtor had given a Demand Promissory Note pursuant to agreement dated 28.10.2017. Recital 5 of the agreement provides that the Financial Creditor is willing to consider financial contribution to the Body Shop and pursuant to this, it had given money to the Corporate Debtor. Clause 7(a) of the agreement clearly stipulates that the Corporate Debtor had agrees and understands that it has a firm obligation to the Financial Creditor to achieve the minimum purchase obligation during lock-in period and failure by it to do so negate the commercial viability of the financial commitments herein by the Corporate Debtor. It was submitted that the Corporate Debtor defaulted in compliance with its obligation as well as fulfilling the terms and conditions of the said agreement. Clause 7(d) of the Agreement provides consequences upon termination of the agreement on account of occurrence of default. It stipulates refund of entire amount invested by the Financial Creditor in case termination takes place within lock-in period and refund of the amount on pro-rata (in the ratio of goods purchased to total commitment under the

agreement) in case termination takes place after the lock-in period. It is not in dispute that the termination took place within the lock-in period.

7. It is noticed that that the Corporate Debtor had raised invoice upon the Financial Creditor for building Body Shop pursuant to the agreement for a sum of ₹40,00,000/- (exclusive of GST) and this fact is clear from the invoice annexed to the Petition. During the course of hearing, this Bench sought clarification from both Counsel as to who own the assets of Body Shop. It was clarified without dispute that Corporate Debtor is the owner of the said Body Shop. Accordingly, this Bench is of the considered view that the Corporate Debtor is liable to refund the amount in accordance with the clause 7(d) of the agreement. However, this Bench feels that the amount in question does not partake the character of financial debt as the amount was spent by the Applicant to promote sales of its products and payment of such money was in respect of provisions of goods or services by the applicant to the Corporate Debtor. This view is fortified by the method of adjustment of this amount provided in clause 7(d) in case termination takes place after lock-in period.
8. The Counsel for the Financial Creditor has relied upon the decision of Hon'ble Apex Court in the case of Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors. {WRIT PETITION (CIVIL) NO. 43 OF 2019}, the relevant para are reproduced hereinafter -

“65. And now to the precise language of Section 5(8)(f). First and foremost, the sub-clause does appear to be a residuary provision which is “catch all” in nature. This is clear from the words “any amount” and “any other transaction” which means that amounts that are “raised” under “transactions” not covered by any of the other

clauses, would amount to a financial debt if they had the commercial effect of a borrowing. The expression "transaction" is defined by Section 3(33) of the Code as follows: (33) "transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor; As correctly argued by the learned Additional Solicitor General, the expression "any other transaction" would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay instalments at various stages of construction, so that they themselves then fund the project either partially or completely.

67. A perusal of these definitions would show that even though the Petitioners may be right in stating that a "borrowing" is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression "borrow" is wide enough to include an advance given by the home buyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the home buyers. The "something equivalent" in these matters is obviously the flat/apartment. Also of importance is the expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have "commercial" interests in the same – the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the explanation introduced by the Amendment Act."

9. This Bench is of the considered view that the present transaction does not have the effect of commercial borrowing as the Body Shop, in relation to which the debt in question was paid, is customized to the specific requirement of the business of Financial Creditor and the said amount was not refundable in case the Corporate Debtor would have procured the specified quantity of goods from the Financial Creditor in terms of the agreement. On these facts, the ratio of decision in the case of *Pioneer Urban Land and Infrastructure Limited & Anr. (supra)* is not applicable to this case.
10. In view of the above findings, the amount claimed by the Financial Creditor is not a financial debt. Therefore, the present Petition is not maintainable under Section 7 of the IBC, 2016. Accordingly, CP(IB)-4432(MB)/2019 is hereby **dismissed** as not maintainable.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)

28.04.2023/pvs