NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH

PRESENT: HON'BLE SHRI K ANANTHA PADMANABHA SWAMY– MEMBER JUDICIAL

PRESENT: HON'BLE SHRI BINOD KUMAR SHINA– MEMBER TECHNICAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 22.08.2019 AT 10.30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP(IB) NO. 30/7/HDB/2019
NAME OF THE COMPANY	Manasadevi Bakers Pvt Ltd
NAME OF THE PETITIONER(S)	Abhishek Agarwal & (02) Others
NAME OF THE RESPONDENT(S)	Mansadevi Bakers Pvt Ltd
UNDER SECTION	7 OF IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
M. Anil Kumar V. Shiva Kumar	Adv		

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
Shailesh Baheti	CS.	shaileshbahetics@gmail.com	Shailesh Baheti

ORDER

Order pronounced in open court. CP rejected vide separate order.

MEMBER TECHNICAL

MEMBER JUDICIAL

Rk

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD

CP(IB)No.30/7/HDB/2018
Under Section 7 of the Insolvency and Bankruptcy Code, 2016, Read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Between:-

1. Abhishek Agarwal,
   R/o.H.No.1-2-50, Domalguda,
   Opp: Gagan Mahal Nursing Home, Himayathnagar,
   Hyderabad – 500 029.

2. Ashish Kumar Agarwal,
   R/o. H.No.1-2-50, Domalguda,
   Opp: Gagan Mahal Nursing Home, Himayathnagar,
   Hyderabad – 500 029.

3. Neha Agarwal,
   R/o.H.no.1-2-50, Domalguda,
   Opp: Gagan Mahal Nursing Home, Himayathnagar,
   Hyderabad – 500 029.

... Financial Creditors

Vs

M/s. MANASADEVI BAKERS PRIVATE LIMITED,
H.No.16-2-705/1/7, Professors colony, New Malakpet,
Hyderabad – 500 036, Telangana, India.

...Corporate Debtor

Order pronounced on: 22.08.2019

Coram: Shri. K. ANANTHA PADMANABHA SWAMY, MEMBER JUDICIAL
Dr. BINOD KUMAR SINHA, MEMBER TECHNICAL

Parties/Counsel Present:

For the Petitioner/Financial Creditor:

Mr.M.Anil Kumar, Advocate

Mr.VVNK Sarath Saran, Advocate

For the Respondent:

For Vishnu Datt Gupta - Mr.Kishore Soni, PCA along with Ms.C.Shilpa

For Ajay Kumar Agarwal – Mr.Sailesh Baheti, PCS

For Canara Bank - Mr.Srinivas, Advocate

Per: K.ANANTHA PADMANABHA SWAMY, MEMBER JUDICIAL

ORDER

1. Under consideration is a Company Petition filed by Mr. Abhishek Agarwal and 2 others (in short Petitioners/Financial Creditors) against M/s. Manasadevi Bakers Private Limited having its registered office at Patwari Sadan, H. No. 16-2-705/1/7, Professors Colony, New Malakpet, Hyderabad – 500 036 (in short Respondent/Corporate Debtor) under section 7 of the Insolvency and Bankruptcy Code, 2016 (in short IB Code 2016) r/w Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short, IB Rules 2016)
2. Before proceeding with this matter, it would be appropriate to make a note of background facts for the purpose of determination of this petition.
3. The financial creditors are individual persons/business men and the father/father-in-law and brother/brother in-law of the financial creditors are directors of the Corporate Debtor and 50% shareholders. The Managing Director of the Company requested the financial creditors to provide unsecured loans and accordingly an amount of Rs. 66,75,000/- was disbursed on different dates. The

financial creditors had requested the Managing Director as well as the directors of the company to repay the said loan amount along with interest, but the corporate debtor kept on postponing the payment on the pretext of financial difficulties. The Corporate Debtor had also shown the amount of Rs. 66,75,000/- as unsecured loan amount in its annual financial statements filed with the Registrar of Companies from the year 2006-07 to 2015-16 and the corporate debtor has not filed the annual financial statements for the year 2016-17 and 2017-18. As on 10.12.2018, the Corporate Debtor owes an amount of Rs. 1,47,81,477/- including the principal and interest @12 % per annum. Even after repeated requests made to the Corporate Debtor, the loan amount has not been repaid to the financial creditors.

4. The learned Counsel for the petitioners while reiterating the above facts submitted that the Respondent/Corporate Debtor is unable to pay its debts and therefore they have no other option except approaching this Adjudicating Authority under I & B Code, 2016 seeking an order for commencing the Corporate Insolvency Resolution Process and prayed for appointment of an IRP to take over the affairs of the Respondent/Corporate Debtor.

5. The petitioner relied on the following judgements in support of their submissions:

- **NCLAT - Company Appeal No. 30 of 2017 and 37 of 2017 – In the matter of M/s. Palogix Infrastructure Private Limited Vs ICICI Bank Limited and ICICI Bank Limited vs Palogix Infrastructure Private Limited** wherein it is held that the POA holder is not competent to file an application on behalf of a financial creditor, or operational creditor or corporate applicant.

- **(2011) 11 SCC – in the matter of M/s State Bank of Travancore Vs Kingston Computers India Private Limited** wherein it is held that on mere authorisation a suit cannot be filed;
- **CS(COMM)513/2017 – High Court of Delhi – in the matter of M/s. Zest Systems Private Limited Vs Center for Vocational and Enterpreneurship Studies and another**- wherein it is held that the acknowledgement of the debt in the balance sheet extends the period of limitation.
- **NCLAT – Company Appeal (AT) (Insolvency) No. 436-437 of 2019 – in the matter of M/s. Damont Developers Private Limited Vs Bank of Baroda and another** – wherein it is held that the Adjudicating Authority is required to go through the record to find if there is a debt and default and while doing so it was open for the Corporate Debtor to show that there is no debt payable and no default, at the stage of admission of the petition. Except the Corporate Debtor, no other party has a right to intervene at the stage of admission of a petition under section 7 or 9. However, an aggrieved party may prefer an appeal, if the order of admission affects the person.

6. Mr. Vishnu Dutt Gupta, one of the Directors of the Corporate Debtor has filed a counter and the learned Practicing Chartered Accountant (PCA) stated that the petitioners have provided only interest free unsecured loan of Rs. 66,75,000/- to the Corporate Debtor in part compliance with the Memorandum of Understanding executed on 29.04.2007 between Mr. Vishnu Dutt Gupta and Mr. Suresh Chand

Agarwal. Since the project got inordinately delayed and due to the time and cost over-run, another agreement was entered into between these parties on 08.02.2012. The family members of Suresh Chand Agarwal were appointed as Managing Director and Director w.e.f 13.05.2013.

7. The learned Practicing Chartered Accountant further submitted that the Corporate Debtor had approached M/s. Canara Bank for a term loan of Rs. 950 lakhs which was duly sanctioned by the said banker. According to the sanction letter, the promoters and associates had to execute a Subordination Agreement in favour of the said banker. Accordingly, Promoters/co-promoters i.e., the petitioners group and the Respondents group executed a subordination agreement on 26.08.2014 in favour of M/s. Canara Bank. The said Subordination Agreement was executed by 12 members out of which the petitioners herein also are the executants of the said Subordination Agreement. It was undertaken in the subordination agreement and it is as follows:

> **"The creditor/s agrees/agree not to sue for, collect, assign or receive payment of any present claim/s or arising hereafter until all your (Bank's) claims are settled".**

8. He also submitted that the unsecured loan provided by the petitioners has not fallen due for payment. No loan agreements are entered into between the Corporate Debtor and the petitioners and the said unsecured loan is interest free. It was further submitted that the unsecured loan provided by the petitioners shall become due only after payment of the term loan to M/s. Canara Bank in view of the subordination agreement. The learned Chartered

Accountant submitted that the petitioners will not come under the category of Financial Creditors as defined under section 5(7) and 5(8) of the IB Code, 2016. According to the said provisions Financial Debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes money borrowed against the payment of interest. It is also stated that "default" means non-payment of debt when whole or any part or 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. In view of provisions of 5(7) and 5(8) of the IB Code, the petitioners could not be treated as Financial Creditor and the unsecured loan cannot be treated as financial debt. It is for the petitioners to establish that the loan was given against the consideration for time value of money.

- The learned Practicing Chartered Accountant has relied on the following judgement of the Principal Bench **(order dated 02.01.2019) In the matter of M/s. Carnoustie Management India Private Limited Vs CBS International Projects Private Limited** wherein it has been categorically and precisely held that 'Financial Debt' is a debt along with interest if any, which is disbursed against consideration for time value of money and mere grant of loan and admission of taking loan will ipso facto not treat the applicant as financial creditor within the meaning of section 5(8) of the Code.

9. The learned Chartered Accountant while reiterating the above averments submitted that the petitioners are not financial creditors and the debt has not become due and payable and the petitioners are signatories to the Subordination Agreement entered into with

M/s. Canara Bank. In view of the same, learned PCA submitted that the petition U/s 7 of IBC, 2016 cannot be maintained and it is liable to be dismissed and accordingly prayed for dismissal of the petition.

10. One Mr. Ajay Kumar Agarwal has also filed a counter statement on behalf of the Corporate Debtor and the learned Practicing Company Secretary appearing on behalf of Corporate Debtor inter-alia submitted that the unsecured loan of Rs. 66,75,000/- was brought in by the petitioners and Mr. Ajay Kumar Agarwal and Mrs. Karuna Agarwal became the Additional Directors of the company on 17.10.2012. He futher stated that the Company had availed term loan from M/s. Canara Bank and due to the fraudulent activities of Mr. Vishnu Dutt Gupta and his son the Company suffered financial losses. The CMU entered into between the Company and M/s. Parle Biscuits Private Limited on 12.03.2013 has not been renewed and it was terminated on 16.10.2018. The Company is negotiating with M/s. Parle Biscuits Private Limited to renew the CMU and it is also finding new opportunities for the revival of the Company. In view of the same, the learned Practicing Company Secretary prayed for the dismissal of the petition.

11. The petitioners have filed Rejoinder and inter-alia submitted that they are not the signatories to the subordination agreement entered into with M/s. Canara Bank and that Mr. Vishnu Dutt Gupta had himself violated the subordination agreement by paying Rs. 6 lakhs to Mr. Suresh Chand Agarwal and the Respondent never followed the subordination agreement. The petitioners have personally gone to the registered office and met Mr. Vishnu Dutt Gupta and requested him for repayment of loan amount and tried to serve the

notice on two occasions *Viz.* 10.06.2016 and 10.08.2017. However, he has refused to take the said letters. Therefore, the said letters were served to the other Managing Director Mr. Ajay Kumar Agarwal. It is also stated that Mr. Vishnu Dutt Gupta settled unsecured loans to some of the parties which is evident from the difference of unsecured loan mentioned during the financial year 2015-16 and Income Tax Return for the year 2016-17. It is also stated that the petitioners are the financial creditors who will fall under the provision of section 3(12) of the I & B Code, 2016.

12. Mr. Vishnu Dutt Gupta has filed an Application bearing IA No. 432 of 2019 wherein he has prayed this Adjudicating Authority to direct M/s. Canara Bank, Gulbarga Branch to submit a certified copy of the Subordination Agreement dated 26.08.2014 as the petitioners have contended that they have not signed the subordination agreement. The petitioners filed counter and inter-alia submitted that they have not singed the subordination agreement and their signatures have been forged as such directing M/s.Canara Bank to produce the subordination agreement is not necessary and it would totally derail the CIRP process. Therefore the petitioners prayed to dismiss the application bearing IA No. 432 of 2019.

13. Heard all the parties and perused the pleadings.

14. The questions that arise for consideration before this Adjudicating Authority are;

    (i) Whether the petitioners would fall under the category of Financial Creditors or not;

    (ii) Whether the unsecured loan would fall under the category of Financial debt; and

(iii) Whether the subordination agreement has to be taken into consideration or not to decide the matter?

15. It is a fact that the petitioners have provided unsecured loan to the Company and the Corporate Debtor has also not denied the same. In this regard, the MOU entered into on 29.04.2007 and other agreement entered into on 08.02.2012 are relevant to decide the present matter. Both the MOU and the agreement inter-alia deal with the interest free unsecured loan and the equity shares to be allotted to both the parties and both the MOU and the agreement never discussed about the time of repayment. Since, the unsecured loan is interest free, the submission of the Practicing Chartered Accountant appearing on behalf of the Corporate Debtor that claiming interest in the petition is not tenable is correct. The PCS appearing on behalf of Mr. Ajay Kumar Agarwal, Director the Corporate Debtor relied on the provision of Section 5(7) and 5(8) of the IB Code, and submitted that financial debt means a debt along with interest if any which is disbursed against the consideration for the time value of money. Further, the learned PCA has also explained "default" which 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. In the present case, the loan was provided as unsecured loan and there is no interest and no time is fixed to repay the same. Even in the Financial Statements for Financial Year 2015-16 and Financial Year 2016-17 of the Corporate Debtor, relied upon by the Petitioners to support their claim, do not reflect any provision for interest against unsecured loans given by the Petitioners

Therefore, the said loan does not have consideration for time value of money and will not come under the category of financial debt. Consequently, the petitioners will not fall under the category of financial creditors as defined in the IB Code, 2016. Further, there is no default as per the provisions of the I & B code, 2016, in absence of any agreement with regard to the repayment period of the said unsecured loans.

16. Further, M/s. Canara Bank has submitted the copy of the Subordination Agreement dated 26.08.2014 in CA No. 432 of 2019 and in the said agreement it is evident that the petitioners are also signatories to the agreement and in page 2 of the said agreement all the signatories including the petitioners have undertaken that they will not sue for, collect, assign or receive payment of any present claims or arsing hereafter until bank's claims are settled. It is unambiguous and it is binding on the petitioners also. It was the contention of the petitioners that they have not signed the said agreement and their signatures were forged whereas Mr. Ajay Kumar Agarwal, who is one of the family members of the petitioners, confirmed that the company had availed loan from M/s. Canara Bank and he is silent about the signatories of the agreement. When their own family member is silent about the signatories, the contention of the petitioner that the signatures were forged is not sustained.

17. In view of the above observations, we conclude that the unsecured loan provided by the petitioners in the present case will not fall under the category of financial debt. It is also proved that the debt has not become due and same is not payable at this point of time as

the petitioners are also parties to the subordination agreement and the clauses are binding on them. Therefore, the petitioners cannot be treated as financial creditors. The case laws cited by the petitioners are not applicable to facts of the present case.

18. In view of the above conclusions, we are not inclined to admit the petition. Consequently, the petition is dismissed.

22/08/19

Dr.BINOD KUMAR SINHA
MEMBER (TECHNICAL)

K.ANANTHA PADMANABAHA SWAMY
MEMBER (JUDICIAL)