

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

CP (IB) No.1049/MB-IV/2021

Under Section 7 of the I&B Code, 2016

In the matter of

Advantagesai Projects Private Limited

[CIN: U45203MH2013PTC244291]

...Financial Creditor/Applicant

V/s.

Akshay Techforge Private Limited

[CIN: U28939MH1999PTC121366]

...Corporate Debtor/Respondent

Order pronounced on : 09.02.2023

Coram:

Mr. Manoj Kumar Dubey
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner : Mr. Harsh Kesharia, Advocate.

For the Respondent(s) : Mr. Avinash R. Khanolkar
a/w Ms. Surekha Yadav,
Advocates.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is a Company Petition being C.P. (IB) No. 1049/NCLT/MB/C-IV/2021 filed by Advantagesai Projects Private Limited, the Financial Creditor, under section 7 of Insolvency & Bankruptcy Code, 2016 (I & B Code) against Akshay Techforge Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution

Process (CIRP). The Financial Creditor claiming a sum of Rs.1,48,40,466/- in principal and Rs.90,77,003.66 as interest @ 18% p.a. aggregating to Rs. Rs.2,39,17,469.66 as on 30.09.2021.

2. The date of default as stated in the Petition is Rs.30.09.2021 and the Petition is filed on 20.10.2021.

Brief facts of the case: -

3. The Financial Creditor submits that Corporate Debtor had defaulted a loan from State Bank of India and needed funds for settling the outstanding dues.
4. The Corporate Debtor approached the Financial Creditor requesting for financial assistance to settle the dues of State Bank of India. Since, the Corporate Debtor and the Financial Creditor were very well known to each other and also have cordial relations from long time, the Financial Creditor had disbursed a sum of Rs.48,36,540/- to the Corporate Debtor up to 12.11.2018.
5. The Corporate Debtor again requested the Financial Creditor some more funds, the Financial Creditor agreed to lend Rs.1.00 Crore to the Corporate Debtor on or before 10.04.2019. The Corporate Debtor and the Financial Creditor have entered into an Agreement to Sale on 09.04.2019 wherein the earlier disbursement of Rs.48,36,540/- was also acknowledged by the Corporate Debtor.
6. By way of Agreement of Sale, the Corporate Debtor agreed and confirmed that they shall repay the aforesaid amount on or before 31.03.2020. Further, the Financial Creditor also submits in the event of default, the Corporate Debtor agreed and undertook to execute the sale deed for its plot of land.

7. The Corporate Debtor issued Ledger confirmation as on 22.08.2019 wherein it has acknowledged outstanding dues payable to the Financial Creditor.
8. Since, the Corporate Debtor were failed to repay the dues on time, the Financial Creditor and Corporate Debtor have entered into an Agreement to Sale on 01.04.2020, wherein the terms of repayment were extended up to 31.03.2021. It was also agreed between the parties, if the dues were not repaid with the time framed under the Agreement, Sale Deed for the Plot of Land shall be executed on or before 30.04.2021.
9. In Furtherance of terms and conditions of the Agreement dated 01.04.2020, both the parties executed Memorandum of Understanding (MoU) dated 09.04.2020 wherein the Corporate Debtor has agreed to pay interest at 18% per annum on monthly basis or 30% of profit. Further, the interest shall be payable by the Corporate Debtor on compounding basis on the balance outstanding as on 01.04.2020 and the calculation of interest shall be from 01.09.2018 till the date of total outstanding dues to the Financial Creditor.
10. The Financial Creditor submits that, the Plot has been mortgaged by the Corporate Debtor to Deogiri Nagari Sahakari Bank Limited vide Deed of Mortgage dated 31.03.2021. It is submitted that the Corporate Debtor has availed a term loan facility of Rs.2,40,00,000/-.

Reply by the Corporate Debtor: -

11. The Corporate Debtor filed affidavit in reply thereby denied each and every allegation, averments, submission and contention levelled in the Petition and also submits present Petition is not maintainable under the Code and hence it is liable to be dismissed.

12. The Corporate Debtor submits that the present petition is not maintainable as the Financial Creditor is not doing anything other than to seek an enforcement of an 'Agreement to Sale' dated 09.04.2019, which is not permissible under the Code.
13. The Petition is based on Agreement to Sale dated 09.04.2019 (the first Agreement). The said Agreement nowhere stipulates that the Corporate Debtor availed financial assistance from the Petitioner whereas the Agreement provides for a Sale of a land which is owned by the Corporate Debtor situated at Plot No. 17, 18, 19 Gat No. 53, Sajapur, Tal. Gangapur, District-Aurangabad (hereinafter referred as the Asset). The First Agreement is titled as 'Agreement to Sale' and not as Loan Agreement or any other Agreement which stipulates contract for financial assistance.
14. The Corporate Debtor submits that the First Agreement also stipulates that the Financial Creditor would pay an amount of Rs.1,65,00,000/- towards the consideration of the Asset.
15. The First Agreement further records that the Financial Creditor has paid an amount of Rs.48,00,000/- and further agreed that Rs.1,00,00,000/- will be paid on 10.04.2019.
16. The Corporate Debtor submits that, this fact clearly evidences that the Financial Creditor wanted to purchase the Asset and therefore, the alleged amount claimed in default has been paid by the Petitioner to the Respondent. Further, the Petitioner also relied upon two more Agreement entered inter-se viz. 'Agreement to Sale' dated 01.04.2020 (the Second Agreement) and 'Memorandum of Understanding dated 09.04.2020 (MoU).
17. The Second Agreement extended the date for completion of sale of the Asset till 31.03.2021.

18. Further, the Corporate Debtor submits that the debt claimed by the Financial Creditor is not come under the definition of “Financial Debt” as prescribed under Section 5(8) of the Code. For ready reference, provision reproduced hereunder: -

“Section 5(8): financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

I. Any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing: and

II. The expressions, ‘allottee’ and ‘real estate project’ shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or

price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

19. The ledger statements show various entries towards purchase/ sale of services on which GST is also charged and some entries which show payment to some third party which is added to the Respondent's account. This itself shows that the transactions between the Petitioner and the Respondent are not in the nature of financial/ debt transactions.
20. The Corporate Debtor submits that the Financial Creditor has alleged that default has occurred on 31.03.2021, however, it is interesting to note the First Agreement and Second Agreement which are relied upon by the Corporate Debtor to demonstrate the existence of alleged debt provide that the Corporate had to repay the amount paid by the Financial Creditor on or before 31.03.2021 and in absence of repayment the 'Agreement to Sale' shall be executed and the Financial will be entitled to purchase the property by paying the remaining balance amount. The Financial Creditor never approach the Corporate Debtor for execution of sale deed.

Findings

21. We have heard the Ld. Counsel for both the sides and prudently gone through pleadings available on record. The Corporate Debtor

was in a financial crunch and in needed of financial assistance. The Financial Creditor due to having cordial relations with the Corporate Debtor have extended Rs. 48,36,540/-. Hence, on 09.04.2019 an 'Agreement to Sale' was entered between the parties for Rs.1,00,00,000/- which has to be repaid on or before 31.03.2020 failing which the Sale Deed for the land to be executed between the parties.

22. Further, Second Agreement was entered into by Financial Creditor and Corporate Debtor on 01.04.2020 for extension of the due date upto 31.03.2021. All the clauses/ terms and conditions of the said Agreement were similar to the Agreement dated 09.04.2019 except the date of repayment. Subsequently, Third Agreement was entered into between the parties on 09.04.2020 in the form of Memorandum of Understanding (MoU). The said agreement was executed in continuation to Agreement of Sale dated 01.04.2020. The clause of MoU is reproduced hereunder: -

"The party of the first part Akshay Techforge Private Limited agreed to pay the interest on monthly basis @18% per annum or 30% profit which is higher, the interest shall be payable on compounding basis on the balance outstanding as on 1st April 2020 and the calculation of interest shall be from 1st September 2018 till date of payment to the party of second part Advantagesai Projects Private Limited".

23. The above agreement clearly shows that the Financial Creditor had given advance for the investment and not a loan/ debt. Hence, it is not covered under the definition of "Financial Debt" as it is merely an investment as the Financial Creditor is claiming 30% profit under MoU entered into both the parties.

24. In the instant case is a simple Agreement to Sale for sale/purchase of property. This is not even a case wherein there are any 'assured amount' of return which may be promised. Hence, this Bench observed that it is a sale-purchase transaction which allegedly stood breached and such transaction would not acquire the definition of 'financial debt'.
25. The Financial Creditor accepted in the Petition, if the Corporate Debtor failed to repay the outstanding dues on or before 31.03.2021, the Financial Creditor had a right to acquire the said Plot in terms of the Sale Agreement. Subsequently, the Financial Creditor came to know that the Corporate Debtor had already mortgaged the Plot in favour of Deogiri Nagari Sahakari Bank Limited vide Deed of Mortgage dated 31.03.2021. The same is evident from Form CHG-1 uploaded by the Corporate Debtor with the Registrar of Companies.
26. The Financial Creditor had given an advance to the Corporate Debtor for financial assistance and not in the form of commercial lending. The financial assistance was given to the Corporate Debtor on the condition that if he fails to repay the outstanding dues, the Corporate Debtor will execute the Sale Deed of land of the Financial Creditor, however, the Corporate Debtor had already mortgaged the said Plot to Third Party Bank. Hence, this Petition u/s 7 of the Code is not maintainable.
27. The section 186(2) and 186(5) of the Companies Act, 2013 states that no Company shall directly or indirectly to give any loan to any person or other body cooperate exceeding sixteen per cent of its paid share capital, free reserves and securities premium account or one hundred per cent of its free reserves and securities premium account, whichever is more. The same are reproduced hereunder: -

“186(2) No company shall directly or indirectly —

(a) give any loan to any person or other body corporate;
(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and
(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding sixty per cent. of its paid-up share capital, free reserves and securities premium account or one hundred per cent. of its free reserves and securities premium account, whichever is more”.

“**186(5)** No investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the Public financial institution concerned where any term loan is subsisting, is obtained.”

28. Accordingly, this Bench is of the considered view that the present Company Petition filed u/s 7 is not maintainable as per Law and stands rejected.

ORDER

29. This Company Petition being C.P. (IB) No. 1049/NCLT/MB/C-IV/2021 filed by M/s. Advantagesai Projects Private Limited, the Financial Creditor, under section 7 of Insolvency & Bankruptcy Code, 2016 (I & B Code) against M/s. Akshay Tech-forge Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP), is hereby **Dismissed** with no cost.

Sd/-

Manoj Kumar Dubey
Member (Technical)

Sd/-

Kishore Vemulapalli
Member (Judicial)

09.02.2023