IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2

ITEM No.304
CP(IB)/122(AHM)2022

Order under Section 7 IBC

IN THE MATTER OF:

Meck Pharmaceuticals & Chemicals Pvt Ltd ....**Applicant**
V/s
Accurate Infrabuild Pvt Ltd ....**Respondent**

Order delivered on 17 /01/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)
Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

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DR. V. G. VENKATA CHALAPATHY **CHITRA HANKARE**
MEMBER (TECHNICAL) **MEMBER (JUDICIAL)**

IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD (COURT - II)

CP(IB) No. 122 / NCLT / AHM / 2022

(Filed under Section 7 of the Insolvency & Bankruptcy Code, 2016 r.w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016)

IN THE MATTER BETWEEN

M/s. Meck Pharmaceuticals and Chemicals Private Limited ... Applicant

Versus

M/s. Accurate Infrabuild Private Limited ... Respondent

Order pronounced on 17.01.2024

Coram:
MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)

MR. VELAMUR G VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES

M/s. MECK PHARMACEUTICALS AND CHEMICALS PRIVATE LIMITED
Having registered office at:
606, Harikrupa Tower, B/h. Gujarat College,
S. M. Road, Ahmedabad, Gujarat – 380006.
E-mail: account@meckgroup.co.in ... Financial Creditor

Versus

M/s. ACCURATE INFRABUILD PRIVATE LIMITED
Having registered office at:
202, Cama Commercial Centre,
Opp. Mirzapur Court, Mirzapur,
Ahmedabad, Gujarat – 380001.
Also having address at:
Madina Heights,
Next to Rajiv Gandhi Bhavan (G.P.C.C.), Ellis Bridge,
Ahmedabad– 380006, Gujarat, India.
E-mail: sikandardosani@gmail.com ... Corporate Debtor

Appearance:

For the Applicant	: Mr. Jaimin Dave, Adv. a.w Ms. Hirva Dave, Adv.
For the Corporate Debtor	: Mr. Yuvraj Thakore, Adv.

JUDGEMENT

1. Under consideration, is an application filed by the Financial Creditor viz. M/s. Meck Pharmaceuticals and Chemicals Limited under Section 7 of Insolvency and Bankruptcy Code 2016 (hereinafter referred to as "IBC, 2016") against the Corporate Debtor viz. M/s. Accurate Infrabuild Private Limited seeking thereof to initiate Corporate Insolvency Resolution Process (CIRP) as against the Corporate Debtor.

2. In Part I of the application it is stated that the Financial Creditor is incorporated on 30.09.1992. In Part II of the application it is stated that the Corporate Debtor was

incorporated on 22.12.2009 with the Authorised Share capital of Rs.2,00,000/- (Rupees Two Lacs Only) and the paid up share capital of Rs.1,66,000/- (Rupees One Lac and Sixty-Six Thousand Only). In Part III of the Application the Financial Creditor has proposed a name of one Mr. Rajendra Jain as the Interim Resolution Professional, who has also filed his written consent in Form 2. In Part IV of the application the default amount is stated to be Rs.6,30,07,982/- (Rupees Six Crores Thirty Lacs Seven Thousand Nine Hundred and Eighty-Two Only), which is inclusive of principal amount of Rs.1,00,00,000/- (Rupees One Crore Only) and an interest amount of Rs.5,30,07,982/- (Rupees Five Crores Thirty Lacs Seven Thousand Nine Hundred and Eighty-Two Only) calculated at the rate of 18% per annum, however, exclusive of the agreed share in profit (earned by Corporate Debtor on project "Madina Heights", at the rate of 15%) and date of default is mentioned as 01.09.2019.

3. The applicant submitted that the Corporate Debtor is engaged in the business of development and construction. Somewhere in February 2010, Corporate Debtor launched a

construction project in the name and style of "Madina Heights". The Corporate Debtor was in dire need of project finance and hence through one Mr. Mohd. Parwez Abdulrasul Zazwala, Ex-Director of the Corporate Debtor, Corporate Debtor had approached Financial Creditor to advance a sum of Rs.1,00,00,000/- (Rupees One Crores) for completion of its construction project. The Corporate Debtor assured healthy return in terms of interest at the rate of "18% per annum along with 15% share in profits of Madina Heights. Accordingly, the Financial Creditor had financed an amount of Rs.1,00,00,000/- (Rupees One Crore Only) vide a Cheque bearing No."002273" dated 18.02.2010 drawn on ICICI Bank Limited to the Corporate Debtor which was deposited in the account of the Corporate Debtor on 19.02.2010. The said amount was financed with a mutual oral understanding and to be repaid upon completion of the construction project "Madina Heights". In view whereof, the Corporate Debtor has duly deducted TDS on the amount payable towards interest under Section 194A of the Income-tax Act, 1961 for the month of March, 2010. The loan given by the Financial Creditor is duly acknowledged by the

Corporate Debtor in its financial statements for the year ending on 31.03.2010 and 31.03.2011.

4. Applicant further submitted that during pendency of the project the said Mr. Mohd. Parwez Abdulrasul Zazwala expired on 29.04.2014. Thereafter, the Financial Creditor was in continuous follow-ups with the other Directors of the Corporate Debtor qua the stage of completion of the project "Madina Heights" as well as the account details with respect to the amount financed. However, no response and/ or information ever came forth from the side of the Corporate Debtor. The Financial Creditor acquired knowledge that the project "Madina Heights" had completed and the units/ flats/ offices were being sold by the Corporate Debtor. Immediately thereafter, the Financial Creditor had approached the Corporate Debtor, met and requested the concerned personnel of the Corporate Debtor to release the payments as per the agreed terms. However, the Corporate Debtor had turned a complete blind eye towards the representatives of the Financial Creditors.

5. Thereafter Financial Creditor issued legal notice dated 03.11.2020 (replied by CD on13.11.2020) along with

rejoinder notice dated 14.12.2020 claiming repayment of the amount financed to the Corporate Debtor. As the Financial Creditor erroneously issued a Demand Notice under Form - 3 and Form - 4 in accordance with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, so, again issued a Legal Notice mentioning that the Demand Notice dated 01.07.2021 was issued under wrong and erroneous legal advice but all the contents thereof are correct which the Corporate Debtor has failed to reply/respond. Furthermore, project "Madina Heights" is admittedly completed in as much as on 01.03.2022, Corporate Debtor has called for a board meeting to authorise a person/director of the Company for execution of sale deeds in favour of allottees of the project. Therefore, amount advances to the Corporate Debtor admittedly becomes due and payable.

6. The Respondent submitted that there is no Financial Debt having the commercial effect of borrowing and the Applicant is not a Financial Creditor, further the CD has not availed any financial debt which is due and payable and therefore the question of default would not arise in absence of any

Financial Debt. The applicant has not produced a single document evidencing the fact that default has occurred. It is submitted that for the purpose of limitation, the relevant date is the date on which the right to sue accrues which is the date when a default occurs. Also, the interest and profit sharing statements are bald and baseless and deserve to be outrightly rejected as the Company is not akin or party to such oral understanding. It is also submitted that the present petition is premature as the project is still not completed as no RERA Registration and Building Use Permission as mandatory under the Municipal Laws have been acceded to the CD. It is submitted that the present Petition is not maintainable as barred by limitation as Petitioner has not produced a single document after 2011 which establishes that the CD has acknowledged the liability of the Petitioner after the year 2011.

7. We have heard the Ld. Counsel appearing for the Applicant and the Respondent and perused the averments made in the application and reply filed on behalf of the party.

Observations:

8. There is no agreement or acknowledgment of debt by the borrower (corporate debtor – Respondent). There is no documentary evidence to show and prove that the amount disbursed on 18.02.2010 by cheque No.002273 through ICICI Bank to the respondent (debited on 18.03.2010) pertains to this debt which is defaulted. The repayment period is assumed based on the stated verbal discussions to commence after the stated Project "Madina Heights" launched by respondent is completed. TDS has been deducted by corporate debtor and paid for the interest due and payable for the financial year 2010-11 for the interest amount to be received. The amount of tax deducted was Rs.26,959/- but it is not clear whether this is the amount due on this debt. The balance sheet of 2009-10 provides information in Annexure for Loans from Directors & Shareholders as an amount of Rs.1,01,07,836/- due to the applicant. This is net of the interest payable and tax deducted by way of TDS which accounts for the due of Rs.1,00,00,000/-. The disclosure in the balance sheet as on 31.03.2021 of the respondent mentions unsecured loans

from Director and other related parties to be at Rs.4,97,20,760/- but does not specify their names. There were 3 demand notices issued by the applicant on 03.11.2020, 01.07.2021 and 25.03.2022 stating that the debt advanced of Rs. 1 crore along with the profit at 15% became due from the month of August 2019 (on completion of the project “Madina Heights”). The total amount of debt due as per the application amounts to Rs.6,30,07,982/-. The respondent vide his reply dated 13.11.2020 denied that any claim is due and the applicant is a share-holder of the company. It is also stated that the project has not been completed and not sold and the demand for 15% of profits from the company is a figment of imagination and no documents in support were produced. The applicant vide reply dated 14.12.2020 has stated that they do not hold any shares in the company and have been falsely allotted 100 shares to misappropriate the profits of the company.

Findings:

9. As regards Limitation of Debt, the debt as observed from balance sheet of the Respondent was as on 31.03.2010. There was no record furnished subsequent to the period

where the respondent has through balance sheet disclosure or by letter acknowledged the debt. If it is a loan it has to be specified by an agreement of the date of payment, and a loan would be up to specified period of its maturity which cannot be linked to a date of sharing of profit when a project is made operative for sale.

10. From the application, submissions and records it is observed that there is a financial transaction of Rs. 1 crore with no proof of the reason for the debt even though there is an acknowledgment of a loan from Directors/Other related parties in 2009-10 balance sheet. No evidence is provided of the existence of debt in the balance sheet of the respondent for subsequent years. Any oral agreement or decision to lend by sharing profits is an investment for joint benefit on a property wherein no records or documents have been provided to substantiate whether there was a debt, its interest and dues when and where to be paid. As per the balance sheet of the corporate debtor as on 31.032010 the applicant is defined under the term "Loan to Director/Related person". A loan cannot be for an indefinite term unless and until the terms are defined by way of

written contract or agreement. Investing on a return when the project materialises and is sold is speculative and does not have end tenure to decide either the date of default or the period of lapse of limitation. The corporate debtor has confirmed that the project is yet to take off/finished when the profit on the investment are to be shared and the applicant thus does not have any remedy under IBC 2016.

11. **Relevant Judgments:**

(a) Here it would be pertinent to refer to the judgment of Hon'ble NCLAT in the case of **Ankit Goyal vs. Sunita Agarwal** [Company Appeal (AT)(INS) No. 1020/2019] wherein it was held that "in a situation where the allottee seeks to benefit from a **"lucrative agreement"** when he is "securing" his money by way of the agreement which gives him a lien over the flat/s, he cannot be considered a financial creditor but is a speculative investor who cannot be given benefit as a financial creditor under section 5(8)(f) of the IBC.

(b) We would like to refer to the judgement by Hon'ble Supreme Court of India in the matter of **Anuj Jain Interim Resolution Professional for Jaypee Infratech**

Ltd. vs Axis Bank Ltd. & Ors [(2020) 8 SCC 401] wherein it was held that:

"…..what is intended by the expression "financial creditor" is a person who has direct engagement in the functioning of the corporate debtor ; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganization of corporate debtor's business when there is financial stress. Hence, a financial creditor is not only about in terrorem clauses for repayment of dues; it has the unique parental and nursing roles too. In short, the financial creditor is the one whose stakes are intrinsically interwoven with the well-being of the corporate debtor"

(c) Hon'ble NCLAT in **Sudha Sharma vs Mansi Brar and Anr.** [Company Appeal (AT) (INS) No. 83 of 2020] emphasized: *"that money deposited/invested for speculative purpose does not entitle a person to take advantage of clause (f) of section 5(8) and be considered a financial creditor by virtue of being an allottee of a housing unit/flat."*

(d) Also the subsequent order of Hon'ble Supreme Court in **Mansi Brar Fernandes versus Sudha Sharma and Anr.** [Civil Appeal No. 3826/2020] which affirms the order of appellate Tribunal in the matter of **Nidhi Rekhan vs M/s Samyak Projects Private Limited,** Company Appeal (AT) (Ins) no 1035 of 2020 stating that:

"the purported allottee Mrs. Nidhi Rekhan, is actually a speculative investor earning a high rate of interest on her investment and is by no means interested in the construction, completion and possession of the said flats no. A–1201 and E–1301. Therefore, we have no hesitation in holding that Mrs. Nidhi Rekhan/Appellant cannot claim to be a "financial creditor" as defined under explanation of section 5(8)(f) of the IBC."

We are of the view that the status of "Financial Creditor" cannot be accorded to a person who, in the garb of a lender comes in the project as a speculative investor and for mere recovery of monies files exorbitant claims. Therefore, the benefit of section 5(8)(f) of IBC will not enure in his favour and the amount claimed in Part IV of the *application doesn't amount to become Financial Debt as per code.*

12. In the light of above rulings the applicant cannot claim to be a financial creditor. Only a financial creditor can file an application under Section 7 of the IBC, 2016. Therefore, the present application filed under section 7 of the IB Code 2016 against the corporate debtor is not maintainable.

13. In the light of the above this Tribunal is passing the following order:

ORDER

This application **CP(IB) No. 122 of 2022** is hereby dismissed.

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DR.V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

CHITRA HANKARE
MEMBER (JUDICIAL)