

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
SPECIAL BENCH – I, CHENNAI**

CP/IB/113/CHE/2021

(filed under Section 7 of the Insolvency and Bankruptcy Code, 2016)

Along with

IA(IBC)/256(CHE)/2022 in CP/IB/113/CHE/2021

*(filed under Section 60(5) of the Insolvency and Bankruptcy Code,
2016 read with Rule 11 of NCLT Rules, 2016)*

In the matter of **APG Logistics Private Limited**

SANKEET KUMAR AGARWAL

SANCHIT KUMAR AGARWAL

Both Residing at

D-301, Clover Majestic Towers,

Beach Road, Visakhapatnam,

Andhra Pradesh – 530 003

... Financial Creditors

- Vs -

APG LOGISTICS PRIVATE LIMITED

"Parents Vision", New No.38, Old No.50,

2nd Floor, Rajaji Salai,

Chennai – 600 001

... Corporate Debtor

CORAM:

**Justice RAMALINGAM SUDHAKAR, Hon'ble PRESIDENT
SAMEER KAKAR, MEMBER (TECHNICAL)**

For Applicant : *Gaurav Mitra, Senior Advocate
For Sriram Venkatavardan, Advocate*
For Respondent : *Gaurav Kumar, PCS
Alpa Jain, FCS*

Order pronounced on 26 August, 2022



ORDER

Per: SAMEER KAKAR, MEMBER (TECHNICAL)

Under Adjudication is an Application that has been filed by **Sanket Kumar Agarwal and Sanchit Kumar Agarwal** (hereinafter referred to as '*Financial Creditors*') under Section 7 of the Insolvency & Bankruptcy Code 2016 (in short, 'IBC 2016') r/w Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **APG Logistics Private Limited** (hereinafter referred to as '*Corporate Debtor*'), to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare a moratorium and appoint Interim Resolution Professional.

2. Part-I of the Application sets out the details of the Applicant from which, it is evident that the Applicants are individuals. From Part-II of the Application it is seen that the Corporate Debtor is a Private Limited Company incorporated under the provisions of the Companies Act, 1956 and the registered office of the Corporate Debtor as per the Application is stated to be situated at "Parents Vision", New No.38, Old No.50, 2nd Floor, Rajaji Salai, Chennai – 600001. From Part III of the Application, it is seen that the



Financial Creditor has proposed the name of one Mr. Velli Paramasivam as the Insolvency Resolution Professional.

3. Part IV of the Application states that the total debt due and payable to the Financial Creditor is Rs.1,01,86,624/- (Rupees One Crore One Lakh Eighty-Six Thousand Six Hundred and Twenty-Four Only).

4. The Learned Counsel for the Applicant submitted that the Financial Creditors as prospective investors in the Corporate Debtor had entered into a Share Purchase Agreement dated 22.03.2019 with Mr. Rajesh Kannan and Mr. Rajesh Gunasekar Nagavalli, the Common Directors / Promoters of the Corporate Debtor and other group companies. i.e. the Corporate Debtor, APG Shipping Pvt. Ltd. and RSG Movers Pvt. Ltd.

5. It was submitted that a tripartite agreement was entered into between the parties pursuant to which the Financial Creditors were set to acquire 100% shareholding in the Group Companies. It was submitted that the Agreement was entered into based on the audited financial statements and reports filed by the Corporate Debtor and the Group Companies and various warranties and guarantees provided by the Common Directors / Promoters.






6. It was submitted that the Financial Creditors through means of the said Agreement was required to acquire 100% of the shareholding of the Group Companies (including the Corporate Debtor) by way of transfer of shares for a total share purchase consideration of Rs.1,00,00,000/- (Rupees One Crore Only) and that the said amount was paid by the Applicants directly to the personal accounts of the Common Directors / Promoters of the Group Companies.

7. It was submitted that as per the Agreement in addition to the above, an amount of Rs.1,50,00,000/- (Rupees One Crore and Fifty Lakh Only) was required to be made overtime and in furtherance of the same an amount of Rs.88,99,999/- (Rupees Eighty-Eight Lakh Ninety-Nine Thousand Nine Hundred and Ninety-Nine Only) was infused into the Corporate Debtor by the Financial Creditor and their family members on their behalf.


8. It was submitted that as per the terms of the Share Purchase Agreement, these infusions were made solely for the purpose of attending to the business expenses of APG Logistics Pvt. Ltd. only and that the rationale was to keep the company as a going concern until the take over by the acquirers. It was submitted that the





promoters / sellers were at liberty to withdraw the surplus, if any, which remained after satisfying all the outstanding debts / liabilities at the time of takeover i.e. before 31.03.2020. Thus, it was submitted that the Financial Creditors and their family members acting on their behalf had infused working capital to the tune of Rs.88,99,999/- between March – May 2019 and the amounts were transferred from the personal bank accounts to the Corporate Debtor's bank account directly.

9. It was submitted that while things stood thus, the Financial Creditor observed numerous materials discrepancies with respect to all the Group Companies' books of accounts, especially pertaining to the financial statements of the Corporate Debtor and flagged the same to the Common Directors of the Corporate Debtor. It was submitted that instead of addressing these concerns, the Managing Director had proposed certain amendments to the Agreement and even though the amendments proposed made certain sweeping changes to the Agreement, the Applicants were agreeable to signing the amendment agreement at that point. However, it was submitted that for the reasons best known to the Corporate Debtor, the Managing Director of the Corporate Debtor had failed to sign off the proposed amendment agreement and that instead vide email dated 24.07.2019, the Corporate Debtor undertook to repay the




monies infused as working capital by 31.12.2019. Thus, it was submitted that the act of repayment tantamounted to unilateral and unlawful cancellation of the Agreement at the instance of the Managing Director of the Corporate Debtor.

10. It was submitted that upon cancellation of the Agreement, the monies advanced to the Corporate Debtor were repayable immediately, however keeping the interest of the Corporate Debtor in mind and in the light of the undertaking given by the Managing Director, the Financial Creditors had without prejudice to their rights granted time until 31.12.2019 to repay the sums disbursed.

11. It was submitted that the Corporate Debtor vide email dated 02.10.2019 represented by its Managing Director intimated the Applicant that it was arranging for funds through investors and securing loans and assured repayment of the debts at the earliest. However, it was submitted that no payments were forthcoming from the Corporate Debtor until 31.12.2019 and hence it was submitted that the Corporate Debtor has committed default.


12. Further, it was submitted that, the Corporate Debtor vide email dated 27.01.2020 committed to repayment between April – July, 2020. It was submitted that upon breach of its commitment to



repay between April – July 2020, the Corporate Debtor vide email dated 15.09.2020 and 16.09.2020 represented by its Managing Director had once again reassured the repayment of debts at the earliest.

13. It was submitted that the Corporate Debtor through its email dated 28.09.2020 acknowledged that an amount of Rs.88,99,999/- was pending repayment from the Corporate Debtor to the Financial Creditor. It was submitted that pursuant to an in-person meeting between the Financial Creditor and the Managing Director of the Corporate Debtor in November 2020, the Managing Director of the Corporate Debtor vide email dated 23.11.2020 had acknowledged the dues repayable by the Group Companies and laid out an interim monthly repayment schedule. It was submitted that the principal dues owned by the Corporate Debtor was also forming part of the admission which was reduced in writing.


14. It was submitted that vide email dated 23.11.2020 the debt repayment stood extended without prejudice to the original date of default and the Managing Director of the Corporate Debtor undertook to repay the debt and a schedule to that effect was also shared. It was submitted that according to the schedule of repayment, a consolidated principal amount of Rs.10,00,000/- per month starting



from November 2020 in addition to payment of interest (at 13% p.a. with respect to the outstanding dues of Corporate Debtor from April 2020 till the date of repayment) was also assured.

15. It was submitted that despite admitting the debt repayable and undertaking to repay the outstanding amount on a monthly basis, the Corporate Debtor has not made any payments till date towards the discharge of the debt.

16. Hence, it was submitted that the Financial Creditors served a Demand Notice upon the Corporate Debtor on 10.05.2021 and sought repayment of monies due along with interest and the Corporate Debtor vide its email dated 23.05.2021 raised certain frivolous allegations in order to purely wriggle out of its payment obligations. It was submitted that the allegations raised by the Corporate Debtor in its response was being raised for the first time as a counter blast to the Financial Creditor's Demand Notice. Thus, it was submitted that the Corporate Debtor has committed default in repayment of the Financial Debt and in the said circumstances seeks initiation of Corporate Insolvency Resolution Process as against the Corporate Debtor.





17. The Respondent has filed counter and it was submitted by the Learned Authorized Representative for the Corporate Debtor that the present Applicant is required to be dismissed primarily on the ground of lack of pecuniary jurisdiction. It was submitted that the purported amount in default is Rs.20,00,000/- infused by the 2nd Applicant and for the said reason he alone constitutes an applicant in the present petition and that this amount falls way below the pecuniary jurisdiction of this Tribunal, which is Rs.1 Crore or more.

18. The Learned Authorized representative for the Corporate Debtor submitted that even assuming for a moment that the parties have contributed an amount of Rs.88,99,999/- still there is no interest which has ever been agreed upon by the Corporate Debtor and that the interest rate quoted by the Applicants have been arrived at without any foundation of any agreement arrived between the parties. Further, it was submitted that there is not even a single agreement, e-mail or TDS deduction to establish that an interest rate was ever agreed between the parties in respect of the Corporate Debtor.

19. The Learned Authorized Representative for the Corporate Debtor submitted that as per the Bank statement attached in the typed set from Page No. 64 to 72 it could be seen that the 2nd



Applicant alone has disbursed a sum of Rs.20,00,000/- to the Corporate Debtor. It was submitted that the disputed amount was infused under the name of four different people viz. Shyam Sundar Agarwal, Sweta Agarwal, Sneha Agarwal and Shyam Sundar Agarwal HUF who do not constitute the Applicants in the present petition. Thus, it was submitted that the Applicants in the present Application does not have *locus standi* to maintain the present Application.

20. It was submitted that, without prejudice to their stance, the Applicants were relying upon the emails of the Managing Director of the Corporate Debtor to establish the case that the emails from the said email id was from where the Corporate Debtor accepted the liability, and in the said case, the Corporate Debtor has also communicated to the Applicants that a sum of Rs.11,53,354/- is paid and in such case the amount is reduced from the purported outstanding amount of Rs.88,99,999/-, and as such it falls well below the threshold limit of Rs.1 Crore.

21. The Applicants have filed rejoinder and it was submitted that the amount due to the Applicant is Rs.88,99,999/- along with interest at 13% p.a. which is admitted vide Respondent email dated 23.11.2020 and till the date of filing the Application it amounts to



Rs.1,01,80,624/-. The Applicants refer to the email dated 23.11.2020 sent by the Corporate Debtor to the applicant;

"For the indivial funds of Rs.1,88,99,999/- we will pay you the interest of 13% per annum, against the pending amount start from April 2020 to till date, I repay the pending principal amount."

22. It was submitted that it is very clear from the aforementioned extract that the Respondent has agreed to pay interest at the rate of 13% p.a. towards the dues owned by the Corporate Debtor towards the Applicants. The Applicant submitted that although the Respondent has loosely used the words "indivial funds" vide its email dated 23.11.2020, the said amount (Rs.1,88,99,999/-) included the dues owned by the Respondent (Rs.88,99,999/-) towards the Applicants and it this regard another email confirming the same was referred to;

"Please find the below pending payments to you

RK + LOG : **Rs.1,88,99,999/-**

Shipping : Rs.65,64,147/-

Total pending : Rs.2,54,64,146/-

As on 28th September 2020/- accurate figure, all transactions via bank hence no change for dispute or variation of pending amount as on today paid Rs.1,40,85,853/-"

23. It was submitted that the bank statement produced along with the Application clearly indicate the disbursal of Rs.88,99,999/-

in favour of the Respondent and moreover the sums disbursed from the bank accounts of the family members were solely on behalf of the Applicants and under their express instructions. The Applicant in its rejoinder has given a consolidated tabulation of the outstanding principal amount, which is as follows;

DISBURSEMENT IN FAVOUR OF	AMOUNTS RECEIVED	AMOUNTS RETURNED	BALANCE AMOUNT REPAYABLE
APG Logistics Pvt. Ltd.	88,99,999	-	88,99,999
APG Shipping Pvt. Ltd.	2,06,50,000	1,46,44,207	60,05,793
Promoter 1 – Rajesh Kannan	51,00,000	-	51,00,000
Promoter 2 – Rajesh Nagavalli	49,00,000	8,00,000	41,00,000
TOTAL	3,95,49,999	1,54,44,207	2,41,05,792

24. It was submitted that while admitting that the Applicant has received a payment of Rs.11,53,354/- and the intimation of the same was from the Corporate Debtor's email id, that by itself cannot be construed that the payments ought to have been appropriated towards the dues owned by the Corporate Debtor. It was submitted that the payment of Rs.11,53,354/- was made from the bank accounts of APG Shipping Pvt. Ltd. and Ms. Nagavalli in discharge of their liabilities towards the Applicants and accordingly the payments made therein have been appropriated towards the dues owned by them respectively. Hence it was submitted that the Corporate Debtor has committed default in repayment of the



'financial debt' and sought initiation of CIRP as against the Corporate Debtor.

25. Heard the submissions made by the Learned Counsel for both the parties. From the facts narrated above, it is required to be seen that the principal claim of the Applicants in the present Application pertains to the Share Purchase Agreement for proper adjudication of the same, certain clauses of the Share Purchase Agreement is extracted hereunder;


"The parties have mutually agreed to the following consideration amount, payable upon closing Purchase price of INR 10 per share of APG SHIPPING PRIVATE LIMITED (total consideration of INR 1,00,000 Rupees One Lakh only)


Purchase price of INR 30 per share of APG LOGISTICS PRIVATE LIMITED (total consideration of INR 90,00,000 Rupees Ninety Lakhs only)

Purchase price of INR 9 per share of RSG MOVERS PRIVATE LIMITED (total consideration of INR 9,00,000 Rupees Nine Lakhs only)

For a total share purchase price consideration of INR 1,00,00,000/- (Rupees One Crore only),"

26. It could be seen that pursuant to the said arrangement, the Applicants had disbursed a sum of Rs.1,00,00,000/- to the personal accounts of the Common Promoters/Directors of the Group Companies. However, the same is not the subject matter of the present Application.






27. In addition to the share purchase consideration, an additional sum of Rs.1,50,00,000/- was set to be infused into the Corporate Debtor in order to keep the company as a going concern until its take-over by the Applicants, i.e. before 31.03.2020. The relevant portion from the SPA is extracted herein below:

"Additionally, the Acquirers/Buyers unconditionally undertake to infuse INR 1,50,00,000/- (Rupees One crore Fifty Lakhs only) into APG LOGISTICS PRIVATE LIMITED to be eventually withdrawn by the Promoters/Sellers before transferring the shares in favour of Acquirers/Buyers

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In return for this additional time sought by the Promoters/Sellers to transfer shares of APG LOGISTICS PVT LTD and RSG MOVERS PVT LTD, it has been agreed that all drawings made by the Promoters/Sellers from APG LOGISTICS PRIVATE LIMITED AND RSG MOVERS PRIVATE LIMITED shall be in the nature of business expense only, i.e. bonus/commission/royalty/gratuity, etc. Dividends shall not be paid out in any circumstance in order to preserve the book value of the shares."


28. Accordingly, it could be seen that out of a total sum of Rs.1,50,00,000/-, a sum of Rs. 88,99,999/- was infused into the Corporate Debtor between March-May, 2019. It could be seen that out of the above said amount of Rs.88,99,999/- only a sum of Rs.20,00,000/- has been infused by the 2nd Applicant herein and



the remaining amount of Rs.68,99,999/- were infused by (i) Shyam Sundar Agarwal, (ii) Sweta Agarwal, (iii) Sneha Agarwal, (iv) Shyam Sundar Agarwal (HUF). The said fact is not in not disputed by the parties.


29. It could be seen that the present Application under Section 7 of IBC, 2016 was filed before this Tribunal on 21.06.2021 and the 4 persons through whom a sum of Rs.68,99,999/- was disbursed to the Financial Creditors are not party to the present Application. However, it could be seen that the Corporate Debtor has filed IA(IBC)/256(CHE)/2022 challenging the maintainability of the present Application. It could be seen that the Applicants / Financial Creditor's have filed reply to the said IA and along with the IA, they have filed an Affidavit dated 29.03.2022 obtained from the above four persons viz. i) Shyam Sundar Agarwal, (ii) Sweta Agarwal, (iii) Sneha Agarwal, (iv) Shyam Sundar Agarwal (HUF) stating that the amount was transferred to the Corporate Debtor Bank account on behalf of the 2nd Applicant pursuant to the Share Purchase Agreement dated 22.03.2019 and that they do not stake any claim whatsoever in relation to the sums transferred in favour of the Corporate Debtor since the money solely belongs to the 2nd Applicant.






30. Next coming to the issue of as to whether the amount disbursed by the Applicant would qualify to be a 'financial debt' or not is required to be addressed. In the present case, there is no dispute between the parties that a sum of Rs.88,99,999/- was disbursed by the 2nd Applicant along with 4 other persons to the Corporate Debtor in pursuance of the Share Purchase Agreement dated 22.03.2019. As per the recitals made in the Share Purchase Agreement, it could be seen that the "*Acquirers/Buyers unconditionally undertake to infuse INR 1,50,00,000/- (Rupees One crore Fifty Lakhs only) into APG LOGISTICS PRIVATE LIMITED to be eventually withdrawn by the Promoters/Sellers before transferring the shares in favour of Acquirers/Buyers*". Further, it could be seen that it has been agreed that all the drawing made by the Promoters / Sellers from APG Logistics Private Limited shall be in the nature of business expenses only.

31. Thus, it becomes imperative for this Tribunal to ascertain whether the said disbursement made by the Applicant to the Corporate Debtor to the tune of Rs.88,99,999/- would qualify to be a 'financial debt' said in terms of the recitals made in the Share Purchase Agreement. Admittedly, there is no dispute in relation to the fact that the Share Purchase Agreement does not contemplate interest for the infusion being made by the Applicant. However, the






Corporate Debtor is relying upon the email which is sent by the Managing Director of the Corporate Debtor in which he has admitted that he is willing to pay interest at the rate of 13% p.a. starting from April 2020. The email sent by the Corporate Debtor stating that he is agreeing to pay interest at the rate of 13% p.a. would not *ipso facto* change the nature of transaction as a 'financial debt' under Section 5(8) of IBC, 2016.


32. It is seen that the instant petition has been filed under Section 7 of the IBC, 2016 r/w Rule 4 of the IBBI (Application to Adjudicating Authority) Rules, 2016. The Rule 4 of the said rule is extracted hereunder;

4. Application by financial creditor.— (1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

33. In this context it is relevant to refer to attendant Regulation 8 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

8. Claims by financial creditors. (1) A person claiming to be a financial creditor, other than a financial creditor belonging to a class of creditors, shall submit claim with proof to the interim resolution professional in electronic form in Form C of the Schedule;





Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(2) The existence of debt due to the financial creditor may be proved on the basis of –

(a) the records available with an information utility, if any; or

(b) other relevant documents, including –

(i) **a financial contract supported by financial statements as evidence of the debt;**

(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;


(iii) financial statements showing that the debt has not been paid; or

(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.

34. The term '*Financial contract*' is defined in clause (d) sub-section 1 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

(d) "**financial contract**" means a contract between a corporate debtor and a financial creditor setting out the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment;

35. Referring to the aforementioned Rule, it becomes clear that it is incumbent upon the Financial Creditor while filing this petition to place on record before this Authority, the '*Financial Contract*' and demonstrate without any ambiguity from the financial contract, the amount disbursed as per the loan/debt, the tenure of the loan/debt, the interest payable and the conditions of repayment. In the




present case, it is evident that the Financial Creditor has placed on record the Share Purchase Agreement, which does not set out any terms in relation to payment of interest or repayment, which is quintessence in order to qualify as a 'financial debt' . Also, it is pertinent to note here that the Clause 7.2 of Share Purchase Agreement contemplates as follows;

7.2. Amendments. *No amendment or variation of this Agreement shall be binding on any party unless such variation in writing and duly signed by all the parties.*

36. Further, it is pertinent to note here that a sum of Rs.11,53,354/- was paid by the Corporate Debtor to the 2nd Applicant and there is no dispute in relation to the same. However, the Financial Creditors state that the said amount was paid towards the account of M/s. APG Shipping Pvt. Ltd. and towards the discharge of liabilities of certain individual and the Respondent claim that the said amount has been paid towards the discharge of the dues of the Corporate Debtor. It is required to be noted that proceedings before this Tribunal are summary in nature and this Court unlike a Civil Court cannot indulge in the luxury of taking evidence as to the statement made by both the parties.

37. Further, in the present case it could be seen that the disbursement of amount flows from the Share Purchase Agreement



and it is seen from the table extracted *supra* at para 23 that the amount has been sent to the Corporate Debtor, to one M/s. APG Shipping Pvt. Ltd, to Promoter Mr. Rajesh Kannan and to another promoter Mrs. Rajesh Nagavalli. Thus, under these circumstances it is not possible to segregate the amounts paid by the Corporate Debtor and consequently the liability in respect of the Corporate Debtor cannot be drawn clearly. In this context, it is significant to refer to the Judgment of the Hon'ble Supreme Court in the matter of **M/s. Colorhome Developers Pvt. Ltd. -Vs- Vinayaka Exports & Anr.** in Civil Appeal No. 7996 of 2019, vide its order dated 04.11.2019 has held as follows;

Heard the learned counsel for the parties.


The National Company Law Tribunal (NCLT), in its order dated 25.10.2018, has recorded the following findings:

"...in the statements of accounts, M/S Colorhomes, the sole proprietorship concern and M/s Colorhome Developers Pvt. Ltd., the respondent herein is used interchangeably. There is no segregation of the amounts paid by both the undertakings from which the liability can be drawn clearly."

We have perused the details of the payments made to the respondents in the tabular form. The table is extracted below :

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It is apparent from the aforesaid table that as per the appellant, the amount paid in excess is Rs. 1,03, 56, 250/-. The amount cannot be segregated in the Statement of Account. The suit is also pending. As such, the NCLT was legally justified in not proceeding with the application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016. The NCLAT has illegally interfered with the order passed by the NCLT.



Consequently, in the facts and circumstances of the case, we set aside the order passed by the NCLAT and restore that of the NCLT.

The appeal is, accordingly, allowed.

38. The findings rendered above by the Hon'ble Supreme Court would square apply to the facts of the present case.

39. Under the said circumstances, this Tribunal comes to an irresistible conclusion that the 'debt' claimed by the Petitioners herein would not partake the character of a 'financial debt' and as such the Petitioners does not qualify to be a 'Financial Creditors' in respect of the Corporate Debtor and in the said circumstances, the present Petition filed by the Petitioners is required to be dismissed and accordingly stands **dismissed**. No costs. Connected IA(IBC)/256(CHE)/2022 also stands **closed**.



SAMEER KAKAR
MEMBER (TECHNICAL)



Justice RAMALINGAM SUDHAKAR
PRESIDENT

Dipak