IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – II, CHENNAI

IA(IBC)/1108(CHE)/2021 in IBA/622/2019

(Filed under Sec. 60(5) of the Insolvency & Bankruptcy Code, 2016)

In the matter of M/s. The National Sewing Thread Company Limited

M/s. N.R.G. Tex,
Rep. by its Proprietor
Mr. T. Saravana,
74, Venkatachalam Street,
Erode – 638 001

... Applicant

-Vs-

M/s. The National Sewing Thread Company Limited
Represented by its
Resolution Professional,
No.397, Processional Plaza, Third Floor,
Anna Salai, Teynampet,
Chennai – 600 018

... Respondent

Order Pronounced on 6th December 2021

CORAM :

Justice (Retd.) S. RAMATHILAGAM, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Applicant	:	*Rohan Rajasekaran, Advocate*
For Respondent	:	*Arun Karthik Mohan, Advocate*

ORDER

***Per:* Justice (Retd.) S. RAMATHILAGAM, MEMBER (JUDICIAL)**

IA(IBC)/1108(CHE)/2021 is an Application which is moved by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 aggrieved against the rejection of claim made by the Respondent / RP, seeking relief as follows;

a. *To allow the claim of the Applicant herein to the tune of Rs.30,15,612/- together with interest at 12% on the principal amount of Rs.26,92,510/- from 01.04.2019 till the date of payment and*

b. *To pass such other orders or further orders in this regard as this Hon'ble Tribunal may deem fit and proper and thus render justice.*

2. The Learned Counsel for the Applicant submitted that he is carrying on business in cotton yarn and also acting as Del Credere agent for M/s. Rajapalayam Mill Limited, M/s. Sri Vishnu Shankar Mill Limited, M/s. Sandhya Spinning Mill Limited and M/s. Sundarasanam Spinning Mills vide agreements dated 01.04.2012. It was submitted that as per the terms of the agreement, the Applicant is required to procure order from the prospective customers for the seller and the seller supplies the orders quantity of yarn on the basis of the purchase orders confirmed by the Applicant. It was submitted that since the seller is not aware of the identity, financial position and the creditability of such prospective customer, it is the responsibility of the Applicant to collect the value of the goods from the purchasers towards such dispatched consignment and remit the sale proceeds with the seller.

3. The Learned Counsel for the Applicant submitted that the Applicant had procured purchase orders from the Corporate Debtor and arranged for the supply of yarn from M/s. Sri Vishnu Shankar

Mills Limited on 18.10.2016, 10.11.2016 and 12.11.2016 under various invoices for a total sum of Rs.14,77,919/-. Similarly, it was submitted that the Applicant has arranged for supply of cotton yarn to the Corporate Debtor from M/s. Sudharsanam Spinning Mills on 15.02.2017, 18.02.2017, 22.02.2017 and 28.02.2017 under various invoices for a total sum of Rs.12,14,591/-.

4. The Learned Counsel for the Applicant submitted that *de horse* the Applicants legal position as a Del Credere Agent, the Applicant has financed the Corporate Debtor to the tune of Rs.26,92,510/- towards purchase of cotton yarn from the above seller and based on the said understanding, on 03.05.2017, the Applicant had paid a sum of Rs.12,14,591/- on behalf of the Corporate Debtor to the account of M/s. Sudarsanam Spinning Mills and similarly a sum of Rs.14,77,919/- on behalf of the Corporate Debtor to the account of M/s. Sri Vishnu Shankar Mills on 11.01.2017 by way of RTGS. It was submitted that the above payment was made by the Applicant to the sellers for the benefit of the Corporate Debtor against the consideration for time value of money. It was further submitted that the Corporate Debtor has agreed to pay interest at the rate of 12% p.a. towards such money remitted and as such the Corporate Debtor has paid an interest amount of Rs.2,79,291/- on 05.04.2018 to the Applicant.

5. The Learned Counsel for the Applicant submitted that when the Applicant sought for settlement of the said loan amount with interest, the Corporate Debtor had issued 2 cheques for Rs.26,92,510/- and Rs.2,90,792/- dated 26.09.2019 drawn on ICICI Bank, Chidhambaram Branch and when the same was presented for collection, it was returned with an endorsement "account blocked", "payment stopped by the drawer". In the meantime, it was submitted that the Applicant came to know about the Corporate Insolvency Resolution Process which was initiated against the Corporate Debtor and the Applicant has filed his proof before the Respondent in Form – C on 02.11.2019. After receiving the claim, it was submitted that the Resolution Professional through his mail dated 06.11.2019 required the Applicant to substantiate his claim by documentary evidence to prove the payment on their behalf for the suppliers. In response to the said query, it was submitted that the Applicant by way of letter dated 09.11.2019 clarified that the Applicant being a booking commission agent for orders from the consumers for and on behalf of the sellers, the Applicant is responsible for consumer pending payments and hence they have to make the payments on behalf of the default customers.

6. The Learned Counsel for the Applicant submitted that after receiving the reply of the Applicant, the RP by way of an email dated 23.11.2019 informed the Applicant that he has failed to produce necessary evidence and hence stated that the claim of the Applicant could not be considered as a Financial Creditor and informed the Applicant to file its claim in Form – B. Aggrieved by the decision of the RP, the Applicant filed an IA/255/2020 before this Tribunal under Section 42 of IBC, 2016, however since the Application was wrongly filed under different section, liberty was granted to the Applicant to file a fresh Application and the said Application was dismissed. Hence the present Application.

7. The Respondent / RP has filed counter and the Learned Counsel for the Respondent submitted that the Applicant has miserably failed to produce any documentary evidence supporting his claim as a Financial Creditor and that the Applicant has only reproduced the agreements which had been entered into by and between the Applicant and third parties. Further, it was submitted that the CIRP in respect of the Corporate Debtor was initiated on 29.08.2019, however the post-dated cheques dated 26.09.2019 were issued after the initiation of the CIRP and hence the same creates no liability on the Corporate Debtor.

8. The Learned Counsel for the Respondent submitted that after the dismissal of IA/255/2020 with a liberty being granted to the Applicant to file afresh, the Applicant has moved the present Application after expiry of almost 15 months and when the Resolution Plan in respect of the Corporate Debtor is already approved by the Committee of Creditors and pending adjudication before this Tribunal. Under the said circumstances, the Learned Counsel for the Respondent sought dismissal of the present Application.

9. Heard the submissions made by the Learned Counsel for both the parties. The preliminary issue which is required to be adjudicated by this Adjudicating Authority is as to whether the RP was right in rejecting the claim of the Applicant on the ground that the Applicant does not qualify to be a 'financial creditor' in respect of the Corporate Debtor. In order to answer the said issue, it becomes imperative for this Adjudicating Authority first to examine the definition of a 'financial debt' as defined under Section 5(8) of IBC, 2016;

> **(8) "financial debt"** means a debt alongwith 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 dematerialised 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;

Explanation. -For the purposes of this sub-clause, -

(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 (16 of 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-clause (a) to (h) of this clause;

10. In order for the claim to satisfy as a 'financial debt' it has to fall within the definitions stipulated under Section 5(8)(a) to (i) of

IBC, 2016 as extracted *supra*. As to the present case, it is seen that the Applicant claims to be a Del Credere Agent for a third party / mill owners and for the supplies made by such third party / mill owners to the Corporate Debtor, the Applicant pays the money on behalf of the Corporate Debtor to such third party / mill owners. Firstly, it is required to be noted here that there is no explicit written agreement between the Corporate Debtor and the Applicant herein. The Applicant has not entered into any contract / agreement with the Corporate Debtor in order to advance any loans or for financing any money towards the supply of goods. Secondly, it is required to be noted that none of the clauses contained in the Del Credere Agreement as referred by the Learned Counsel for the Applicant authorize / entitle the Applicant to proceed against any person who has not paid the amount. The Learned Counsel for the Applicant stated that since the Applicant has paid money on behalf the Corporate Debtor for the goods supplied by the mill owners, it is implied that he is a financial creditor. The said contention of the Learned Counsel for the Applicant is required to be brushed aside in view of the fact that the claim of the Applicant, in the absence of any legally binding agreement between the parties, is not falling under any of the category stipulated under Section 5(8)(a) to (i) of IBC, 2016 in order to qualify as a 'financial creditor'.

11. Further, the contention of the Learned Counsel for the Applicant that the Corporate Debtor in order to discharge his liability has issued two cheques for an amount of Rs.26,92,510/- and Rs.2,90,792/- dated 26.09.2019 does not hold much water because the issuance of cheque in discharge of its liability by the Corporate Debtor does not confer the status of a 'financial creditor' upon the Applicant. The Learned Counsel for the Applicant also submitted that the Corporate Debtor has deducted TDS and has remitted the same to the account of the Applicant and hence claims to be a Financial Creditor in respect of the Corporate Debtor. However, at this juncture, it is significant to point out the Judgment of the Hon'ble NCLAT in the matter of **Prayag Polytech Pvt. Ltd. Vs. Gem Batteries Pvt. Ltd.** *CA (AT) (Ins) No. 713 of 2019*, wherein it has been held as follows;

> "Merely pointing out that TDS was deducted would not be sufficient to conclude that there was a Financial Debt. TDS can be deducted for various reasons."

12. The above said proposition is also reiterated by the Hon'ble NCLAT again vide its order dated 03.08.2021 in the matter of **Pawan Kumar –Vs- Utsav Securities Pvt. Ltd. & Anr.** in *Company Appeal (AT) (Ins) No. 251 of 2020.* Thus, the said contention of the Learned Counsel for the Applicant is also not

sustainable in view of the judgments rendered by the Hon'ble NCLAT.

13. Further it is seen that as against the rejection of the claim made by the RP on 23.11.2019, the Applicant has initially filed IA/255/IB/2020 before this Tribunal and this Tribunal vide its order dated 17.08.2020 has dismissed the said Application by passing the following order;

> Ld. Counsel A. Sivaji for the Applicant and Ld. Counsel Mr. S. Sathyanarayanan for the Respondent are present.
>
> IA/255/IB/2020 has been filed by the Applicant in IBA/622/2019 under Section 42 of IBC, 2016. The section of IBC is against the claim rejected by the Liquidator. The Corporate Debtor is still under CIRP process. Hence the Applicant is directed to file a fresh application under appropriate section.
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> Accordingly, this IA/255/IB/2020 is **dismissed.**

14. Thereafter, it is seen that the Applicant has preferred the present Application before this Tribunal only on 25.08.2021 and has also failed to explain such enormous delay of 12 months in filing the present application. Even though liberty was granted for the Applicant to file a fresh Application, the Applicant has been keeping silent and sleeping over a period of one year and only at the fag end of CIRP when the Resolution Plan in respect of the Corporate Debtor is in the offing and after the same was approved

by the CoC, the Applicant has preferred the present Application, which in any case, as discussed *supra* is devoid of any merits.

15. Thus, from the discussions made above we are of the considered view that order passed by the RP on 23.11.2019 in rejecting the claim of the Applicant is free from all legal infirmities and does not warrant interference of this Adjudicating Authority. As a consequence thereof, the IA(IBC)/1108(CHE)/2021 stands **dismissed**. No costs.

-Sd-
B. ANIL KUMAR
MEMBER (TECHNICAL)

-Sd-
Justice (Retd.) S. RAMATHILAGAM
MEMBER (JUDICIAL)

Raymond