IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No.4426/MB-IV/2019
Under Section 7 of the I&B Code, 2016

In the matter of:
Mascot Capital And Marketing Private Limited (MCMPL)
[CIN: U74120MH2012PTC235355]
…Financial Creditor/Petitioner
V/s
Savair Energy Limited (SEL)
[CIN: U63011MH2001PLC130547]
...Corporate Debtor/Respondent

Order pronounced on : 20.01.2023

Coram:

Mr. Prabhat Kumar Hon'ble Member (Technical)	Mr. Kishore Vemulapalli Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Abhineet Sharma a/w Mr. Mitravinda Chunduru & Ms. Tanushri Kejriwal i/b Parinam Law Associates, Advocates.

For the Respondent(s) : None Present.

ORDER

Per: Kishore Vemulapalli, Member Judicial

1. This is a Company Petition bearing C.P. (IB) No. 4426/NCLT/MB/C-IV/2019 has been filed on 06/12/2019 by Mascot Capital And Marketing Private Limited (MCMPL), the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Savair Energy Limited (SEL), Corporate Debtor.

2. The Petition is filed by Mr. Arvind Kamath, Director, duly authorized by the Financial Creditor vide Board Resolution dated 06.03.2017, claiming total default amount of Rs.3,70,00,000/- (Rupees Three Crore Seventy Lakh Only) comprising of Principal Amount of Rs.3,20,00,000 and Interest Dues of Rs. 50,00,000/- as per Part IV of Form I. This amount is still due from the Corporate Debtor.

3. No date of default is mentioned by the Financial Creditor in the Part IV of the Company Petition as required under Section 7 of IBC, 2016. However, as per MOU dated 29.04.2017, between Mr. Saji Anthony, the Director of the Corporate Debtor and Mr. Arvind Kamath, Director of the Financial Creditor. The date of default works out to be 28.06.2017.

4. The case of the Financial Creditor is as under:

   a) The Financial Creditor/Petitioner is in the business of marketing of engineering products such as compressors, spares, etc and the Corporate Debtor is in the business of engineering procurement construction having other business verticals of making skids, packages and spare parts and is also in the business of distribution of Compressor Packaging & spares for GE Oil & Gas Compression Systems LLC in India since December,2014.

b) The Financial Creditor entered a MOU with the Corporate Debtor on 04.03.2017 whereby it was agreed between Finacial Creditor and the Corporate Debtor to work jointly for execution of orders received for compressor packaging and spares and also agreed to form A new division/entity for such orders. Clause 6 of the MOU dated 04.03.2017, it was agreed that the business of separate division of Compressor packaging and spare business shall be transferred to a new separate entity incorporated for this purpose. Clause 10 and 12 of the MOU provided for the remuneration of Mr. Saji Anthony and sharing of profit of such division between Financial Creditor and the Corporate Debtor. In pursuance of this MOU, the Financial Creditor paid a sum of Rs. 3.20 crores to the Corporate Debtor during the period from 04.03.2017 to 29.04.2017.

c) The Financial Creditor further submits that it entered another MOU on 29.04.2017 terminating the MOU dated 04.03.2017 with the Corporate Debtor.

d) The Corporate Debtor, despite several opportunities being granted by this Bench, failed to file reply in the present case. As per order dated 14.03.2022, the Corporate Debtor filed comparative P&L Account and Balance Sheet of the Corporate Debtor for the last 5 years showing its inability to pay the Corporate Debtor. The Corporate Debtor was set ex-parte on 21.07.2022.

Findings:

e) We have heard the counsel and perused the pleadings available on record.

f) After perusal of the documents on record and arguments advanced by the Financial Creditor, this Bench is of the considered view that the MOU dated 04.03.2017 is a Joint Venture Agreement in substance and this clearly emerges from the recitals of the said MOU; Clause 6, 11and 12 of the said MOU.

g) Further, it is observed that Mr. Saji Anthony had agreed to repay the amount in his personal capacity, which cannot bind the Corporate Debtor even though the said MOU was executed by Mr. Saji Antony for the Corporate Debtor. This is borne out from the clause 3 of this MOU {placed at Page 9 of the petition} which reads as under-

> *"3. Mr. Saji Antony, agrees to repay the unsecured loan as mentioned in paragraph hereinabove to Mascot Capital & Marketing Pvt. Ltd. within three months from the date of signing of the present HOU along with Rs.50 Lakhs as lumpsum interest amount."*

h) Section 5(8) of the Insolvency and Bankruptcy Code,2016 defines financial debt as under-

"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 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 nonrecourse basis;

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

i) From the perusal of the above definition, it is clear that the transaction of Investment under a Joint Venture arrangement does not qualify as a financial debt under Sec. 5(8) of the Code. Nonetheless, even if it is admitted that this transaction took the character of loan in terms of MOU dated 29th April, 2017 as pleaded by the Financial Creditor, the same does not bind the Corporate Debtor in view of Mr. Saji Antony undertaking to pay the said amount in his personal capacity.

j) In view of the above observations, this Bench is of the considered view that this petition deserves to be dismissed.

<u>ORDER</u>

This Application being C.P. (IB) No. 4426/NCLT/MB/C-IV/2019 filed by Mascot Capital And Marketing Private Limited, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Savair Energy Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP) is **DISMISSED**.

We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-
Prabhat Kumar
Member (Technical)
/Akshata/

Sd/-
Kishore Vemulapalli
Member (Judicial)