

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH-III
NEW DELHI**

IB-219/(ND)/2019

**Section: Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 and Rule 4 of the Insolvency and
Bankruptcy (Application to Adjudicating Authority),
Rules, 2016.**

In the matter of:

Prayag Polytech Private Limited
Through Mr. Milan Aggarwal, Director
C-587, Industrial Area, Phase -I
Bhiwadi-301019
Rajasthan, India

.....Financial Creditor

VERSUS

M/s Good Marketing and Sales Private Limited
79, Paschimi Marg, Vasant Vihar
New Delhi-110057

.....Corporate Debtor

Coram:

R.VARADHARAJAN,
Hon'ble Member (Judicial)
K.K.VOHRA,
Hon'ble Member(Technical)

Counsel for the Petitioners:

Mr. Vipul Ganda,
Mr. Shreya Jain, Mr. Vishal Ganda,
(Advocates)

Q

Counsel for the Respondent:

Mr. Nikhil Kohli, Mr. Dipanshu Arora
(Advocates)

ORDER

Delivered on: 20.09.2019

1. The Petition has been filed by Petitioner in the capacity of a Financial Creditor (FC) against the Corporate Debtor (CD) seeking for initiation of Corporate Insolvency Resolution Process (CIRP) under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC,2016).
2. Part-I of the Petition discloses that the Petitioner is a Company incorporated on 16th August, 1982 and is being represented by one Mr. Milan Aggarwal who has been authorized to file this Petition vide Board Resolution dated 18.12.2018. Part-II of the Application details particulars of the CD, from which it is evident that CD was incorporated on 29.8.2012 and presently is having a nominal share capital of Rs.10,00,000/- and the paid up share capital of an Rs7,98,500/-The situation of the registered office is stated to be 79, Paschimi Marg

Q

Vasant Vihar, South West Delhi-110057 which address it is seen is reflected in the Master Data of the CD as maintained with the MCA website and marked as Annexure-2 to the Petition save South West Delhi which is not considered material Part-III of the Petition proposes one Mr. Abhishek Anand, as the Interim Resolution Professional (IRP) having registration No. IBBI/IPA-002/IP-N00038/2016-17/10077. In Part-IV of the Petition the financial debt disbursed to the CD in various tranches between March 10, 2014 till March 14, 2016 is stated to be in a sum of Rs.3,45,00,000/- and the total interest accrued is claimed to be in a sum of Rs.1,65,41,072/-. After deduction of TDS, a sum of Rs 11,83,133/- is claimed as the interest payable and the aggregate sum claimed is in a sum of Rs. 5,10,41,072/-. The transaction under which the above claim is stated to have arisen is claimed to be by way of loan transactions which are re-payable on demand along with interest as disclosed by way of tabulation in the Petition showing the amounts disbursed to the CD from time to time, repayments of which have also been made and after taking into consideration re-payments, a sum of Rs.3,45,00,000/- remains as the balance amount towards principal payable as on 14.3.2016. In support of the disbursal of the amounts as well as sums paid in part by the CD, it is stated to be evidenced by way of bank account statements along with the Auditors report as at March 31,2017 of the Financial creditor.

3. A recall notice, it is averred, dated 2.1.2019 was sent to the CD to repay the amount of loan advanced which was due and payable to the FC and as an after thought a frivolous notice dated January 18, 2019

has been sent to the FC for referral of a dispute to arbitration under the Arbitration and Conciliation Act, 1996 which is of no consequence.

4. In support of the claim, it is averred that Form 26 AS of the FC disclosing the payment/credit of interest and deduction of TDS to the account of the FC by the CD and the balance sheet for the years ended 2014-15, 2015-16 and 2016-17 of the CD to have been annexed. Since the amount disbursed to the CD being the loan amount which was repayable on demand and despite the recall notice dated 2.1.2019, the same has not been paid giving rise to a default in terms of Section 3(12) of the IBC, 2016 and in the circumstances, this Petition seeking for initiation of CIRP of the CD filed under Section 7 of IBC, 2016 as applicable to a 'financial debt' and a 'financial creditor'.

5. Upon notice, reply has been filed by the CD which is as follow:

- The applicant and the respondent have entered into affirmative agreements, whereby there remain no amounts due by the respondent to the applicant, to the contrary it is the applicant who is accountable to the respondent for damages.
- The applicant and respondent had entered into a loan agreement dated March 10, 2014 wherein the applicant agreed to provide credit facilities to the respondent company in form of unsecured loans, by the Applicant.
- The parties further agreed that in case any amount stands due under the loan agreement as on March 31, 2017, then

the parties would mutually decide on the future course of action and treatment of such outstanding amounts.

- The applicant and the respondent company entered into a Memorandum of Understanding (MOU), dated April 3, 2017, keeping in mind the applicant's desire to make equity investments in the Respondent company.
- No further interest or any other form of consideration for time value of money, was to accrue on the Outstanding amount from that day.
- It was agreed that the additional funds, in the sum of Rs 2.65 crores shall be infused within a period of 18 months from the date of the MOU, and in accordance therewith, the applicant provided cheques to the Respondent company with instructions for the respondent company to only encash the cheques on receipt of written consent from the applicant.
- The respondent company was further vested with the right to forfeit the outstanding amount and claim indemnity for any losses, in the event the applicant committed a breach of the terms of the MOU.
- The said period expired on September 30, 2018 and the applicant failed to infuse the amount of Rs 2,65,00,000/- in the respondent company thereby breaching the MOU. It is reiterated that the right to make equity investment had been exclusively offered to the applicant by the Respondent company. Furthermore, the applicant had been given the right to seek indemnification and claim interest from the



respondent company, if the respondent company issued equity shares to any third party.

- The respondent company also followed up repeatedly with the applicant in order to take written consent for encashment of cheques given by the applicant to the respondent company in respect of the equity investment, but all efforts made by the respondent company went in vain.
- As per the terms of MOU, the respondent company had the right to forfeit the outstanding amount in the event of a breach of the MOU by the application in light of the above facts, it is evident that the applicant has breached the terms of the MOU by not infusing the requisite amount of Rs 2.65 crores in the respondent company within the interest free period i.e. 18 months from the date of execution of the MOU. Due to such breach by the applicant, the respondent company has the right to forfeit the outstanding amount.
- The respondent company has informed the applicant vide letter dated 1 October, 2018 of its obligation to undertake Equity Investment in the respondent company as under the terms of MOU. No reply received from the applicant in respect of the Equity Investment, nor has the consent of the applicant been received for encashment of cheques, provided along with the MOU. The respondent company requested the applicant to provide written consent for encashment of the cheques within a period of 15 days from the receipt of the letter.



- The applicant, instead of adhering to the terms of MOU and the subsequent letter dated October 1,2018 sent a fictitious and an illegal recall notice dated January 2, 2019 to the respondent company, wrongly claiming an amount of Rs 5,10,41,072/- from the respondent company. It is submitted that the aforementioned recall notice is not only illegal but also in breach of the terms of the MOU.
- The applicant never demanded any sort of monies from the respondent from March 31,2017 till December 2018 as the applicant was well aware of the terms of the MOU and the applicant may be put to strict proof regarding the same. Further the applicant in order to sway away from its liabilities under the MOU, sent the aforementioned recall notice. Accordingly, it is clear that the recall notice was a mere after thought of the applicant to deny the respondent of its rightful monies.
- It is pertinent to mention that the applicant has also attended the arbitration proceedings before the Hon'ble Sole Arbitrator on March 12, 2019, thereby adhering to the terms of the MOU.
- In the entire application nowhere the FC had mentioned about the loan agreement or the MOU executed between the parties.

Q

6. The Petitioner has filed a rejoinder dated 29.03.2019 in which following things had been stated:

- The FC denies the existence of the purported loan agreement dated March 10, 2014 and the false and fabricated MOU dated April 3, 2017, the FC states that the said documents are antedated, false and fabricated made in collusion with Mr. D.K. Aggarwal, one of the directors of the FC.
- FC stated that CD had omitted to make reference to true and correct facts such as the FC disbursed an amount of Rs 3,45,00,000/- along with the interest amounting to Rs1,65,41,072/- as on December 25, 2018 and in relation to this loan, CD had paid interest and deposited the tax deducted at source in favour of the FC.
- The CD as an afterthought, in order to take a false alibi so as to create a frivolous defence to the CIRP, sent a notice dated January 18, 2019 to the FC for referral of dispute to arbitration.
- FC Counsel in response to the e-mail dated January 28, 2019 sent its letter of objections dated February 7, 2019 and February 14, 2019 to the Ld. Sole arbitrator, objecting to the existence of the purported MOU and the appointment of the Ld. Sole arbitrator in the arbitration proceedings.
- It was pointed out by FC that Mr. Devender Kumar Aggarwal who is the signatory to the purported MOU, purportedly on behalf of the FC along with other co-accused is facing criminal investigation in pursuance of a first information report registered with the Sector 40, Gurugram police station.

Q

11. The oral submissions of Ld. Counsels for the parties were heard in detail where Ld. Counsel for the Petitioner strenuously stressed on the aspect that in view of the disbursal of Rs.3,45,00,000/- plus the interest of Rs 2,17,47,036/- to the CD, this Tribunal should consider the same as loan disbursed repayable on demand in the absence of any document and taking into consideration Form 26AS produced before this Tribunal disclosing the payment of interest and TDS deducted thereon and also in view of the same being recognized as a 'loan' in the balance sheet of the CD. Further, it is pointed out that a notice recalling the loan has also been sent to the CD on 02.01.2019 and that default has occurred and since the loan amount is repayable on demand as per the notice dated 2.1.2019 not being paid even on demand, default has arisen in terms of Section 3(12) of IBC, 2016.

12. On the contrary, Ld. Counsel for the CD brings into play the documents as filed along with reply of the CD, particularly the averments in relation to the agreement dated March 10, 2014 and subsequent MOU dated 3.4.2017 wherein applicant shall invest an amount of Rs 2,65,00,000/- together with the amount already advanced by the applicant by the respondent, under the erstwhile loan agreement as on March 31,2017 was Rs 4,11,25,336/- towards equity investment in the respondent company. It was condition set by the MOU that the right to infuse money towards equity investment in the respondent Company shall be exclusively offered only and solely to the applicant by the respondent company. No further interest or any other form of consideration for time value of money,

A

was to accrue on the Outstanding amount from that day. It was agreed that the additional funds, in the sum of Rs 2.65 crores shall be infused within a period of 18 months from the date of the MOU, and in accordance therewith, the applicant provided cheques to the Respondent company with instructions for the respondent company to only encash the cheques on receipt of written consent from the applicant. The respondent company was further vested with the right to forfeit the outstanding amount and claim indemnity for any losses, in the event the applicant committed a breach of the terms of the MOU. The said period expired on September 30, 2018 and the applicant failed to infuse the amount of Rs 2,65,00,000/- in the respondent company thereby breaching the MOU. It is reiterated that the right to make equity Investment had been exclusively offered to the applicant by the Respondent company. Furthermore, the applicant had been given the right to seek indemnification and claim interest from the respondent company, if the respondent company issued equity shares to any third party. The respondent company also followed up repeatedly with the applicant in order to take written consent for encashment of cheques given by the applicant to the respondent company in respect of the equity investment, but all efforts made by the respondent company went in vain. As per the terms of MOU, the respondent company had the right to forfeit the outstanding amount in the event of a breach of the MOU by the application light of the above facts, it is evident that the applicant has breached the terms of the MOU by not infusing the requisite amount of Rs 2.65 crores in the respondent company within the interest free period i.e. 18 months from the date of execution of the MOU. Due to such breach by the applicant, the respondent company has the right to forfeit the outstanding



amount. The respondent company has informed the applicant vide letter dated 1 October, 2018 of its obligation to undertake Equity Investment in the respondent company as under the terms of MOU. No reply received from the applicant in respect of the Equity Investment, nor has the consent of the applicant been received for encashment of cheques, provided along with the MOU. The respondent company requested the applicant to provide written consent for encashment of the cheques within a period of 15 days from the receipt of the letter. The applicant, instead of adhering to the terms of MOU and the subsequent letter dated October 1, 2018 sent a fictitious and an illegal recall notice dated January 2, 2019 to the respondent company, wrongly claiming an amount of Rs 5,10,41,072/- from the respondent company. It is submitted that the aforementioned recall notice is not only illegal but also in breach of the terms of the MOU. The applicant never demanded any sort of monies from the respondent from March 31, 2017 till December 2018 as the applicant was well aware of the terms of the MOU and the applicant may be put to strict proof regarding the same. Further the applicant in order to sway away from its liabilities under the MOU, sent the aforementioned recall notice. Accordingly, it is clear that the recall notice was a mere after thought of the applicant to deny the respondent of its rightful monies.

The present position is that the Petitioner/FC is now required to pay to the CD and not otherwise contented by FC.

13. We have carefully taken note of the submissions of the respective Learned Counsels as well as the documents filed along with the Petition. This Bench of the Tribunal in the matter of Prayag Polytech Private Limited

Q

vs. Sivalik Enterprises Private Limited in IB-312/(ND)/2019 at paragraph No.8 has detailed certain essential conditions which are required to be satisfied by a FC seeking to invoke the provisions of Section 7 of IBC and for initiation of CIRP as against the CD, which are to the following effect:

- i) There must be disbursal of loan amount;
- ii) Such disbursal should be made against the consideration for time value of money; and
- iii) A default should have arisen either in the payment of interest or in the payment of principal amount or both on the part of the CD.

14. All the above conditions at the very least are required to be cumulatively satisfied, as it is to be seen that this Petition, prima facie, is initiated by the Petitioner as an FC and it is required to satisfy this Tribunal with the averments and documents backing such pleadings. Documents which are required to be submitted to substantiate a loan must be in the nature of a 'financial contract' as defined under clause (d) sub-section 1 Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016 demonstrating without ambiguity at least the amount disbursed as loan/debt, the tenure of debt, interest payable and conditions of repayment, essentially. In effect, the above aspect of the production of a 'financial contract' was also dealt with by this Tribunal vide para Nos. 10 and 11 in the order it pronounced in the matter of Prayag Polytech Private Limited vs. Gem Batteries Private Limited in IB-178(ND)/2019. Thus, in the present instance, divorcing from the documents which had been produced by the Corporate Debtor to negate the contention of the FC in relation to default,



whether the FC has backed its claim with any substantial documents discharging its primary onus in relation to the existence of 'Financial Contract' and providing without ambiguity the amount disbursed, tenure of debt, interest payable and conditions of repayment. Looking at the documents filed by the Petitioner, no doubt discloses the disbursement of the amount by way of bank statements to the CD but also the payments made by the CD, all of which dealt with in the earlier portion of this order. However, in the absence of a 'Financial Contract' what is the actual amount disbursable is in itself is in doubt. Next coming to the aspect of interest which is payable, to demonstrate in simplest terms that the amount claimed to have been disbursed by the FC to CD is against the consideration for the time value of money, in the absence of a 'Financial Contract' the FC seeks to rely on the balance sheets of the CD itself for the years ended 2014-15, 2015-16 and 2016-17 and its Form 26AS as available with the Income Tax Department website. The standalone balance sheet of the CD has only been produced, without any corresponding schedules being made available and even though certain amounts have been shown under the caption 'short term borrowings' however without any break up details and in its absence it is not evident prima facie the amount disbursed as loan or the interest payable and that which can also be correlated by way of reverse calculation from Form 26AS, the rate of interest. It is also a moot point, in view of the legislative mandate fixing 14 days for disposal of Section 7 Petitions filed under IBC, 2016, whether this Tribunal as an adjudicating authority is required to venture into such exercises in ascertaining the agreed rate of interest. Now coming to the crucial aspect of default, it is averred by the FC that in



view of the amount disbursed being repayable on demand, upon issue of notice seeking for the money advanced to be paid vide communication dated 02.01.2019 and the amount claimed not being paid by the CD, a default had arisen as contemplated under Section 3(12) of IBC,2016 which part also we are not in a position to accept in the absence of a 'Financial Contract'.

15. Reference to the provisions of the Companies Act, 2013 it is seen provides for certain essential procedure to be followed by the Company granting a loan under the provisions of Section 186 of the said Act. Particular reference to Section 186(5) of the Act which reads as follows:

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:

Provided that prior approval of a public financial institution shall not be required where the aggregate of the loans and investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given does not exceed the limit as specified in sub-section (2), and there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

Further Section 186(9) of the said Act of 2013 also provides for the maintenance of a register of loans containing such particulars and its manner of maintenance as may be prescribed. Rule 12 of Companies (Meetings of Board and its Powers) Rules, 2014 prescribes the manner of maintenance of the Register of loans in Form No.MBP 2 and the entries in the said Register are required to be duly authenticated. It is pertinent to note that Rule 12 of the aforementioned Rules reads as follows:

Rule 12:

Q

(1) Every company giving loan or giving guarantee or providing security or making an acquisition of securities shall, from the date of its incorporation, maintain a register in Form MBP 2 and enter therein separately, the particulars of loans and guarantees given, securities provided and acquisitions made as aforesaid.

(2) The entries in the register shall be made chronologically in respect of each such transaction within seven days of making such loan or giving guarantee or providing security or making acquisition.

(3) The register shall be kept at the registered office of the company and the register shall be preserved permanently and shall be kept in the custody of the company secretary of the company or any other person authorised by the Board for the purpose.

(4) The entries in the register (either manual or electronic) shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

(5) For the purpose of sub-rule (4), the register can be maintained either manually or in electronic mode.

(6) The extracts from the register maintained under sub-section (9) of section 186 may be furnished to any member of the company on payment of such fee as may be prescribed in the Articles of the company which shall not exceed ten rupees for each page.

The Register of loans to be maintained in Form MBP2 is required to contain the following details namely:

FORM MBP.2

Register of loans, guarantee, security and acquisition made by the company
[Pursuant to section 186(9) & rule 12(1)]

Nature of transaction (whether loan/guarantee/security/acquisition)	Date of making loan/acquisition/giving guarantee/providing security	Name and address of the person or body corporate to whom it is made or given or whose securities have been acquired (Listed/Unlisted entities)	Amount of loan/security/acquisition/guarantee	Time period for which it is made/given
(1)	(2)	(3)	(4)	(5)

Purpose of loan/acquisition/guarantee/security	% of loan/acquisition/exposure of guarantee/security provided to the paid up capital, free reserves and securities premium account and % of free reserves and securities premium	Date of passing Board resolution	Date of passing special resolution, if required	For loans	
				Rate of interest	Date of maturity
(6)	(7)	(8)	(9)	(10)	(11)
For acquisitions					

Number and kind of securities	Nominal value and paid up value	Cost of acquisition (in case of securities how the purchased price was arrived at)	Date of selling of investment	Selling price (how the price was arrived at)	Signatures and Remarks
(12)	(13)	(14)	(15)	(16)	(17)

Signature:
MD/Director/Secretary/Whole time Director

Place:
Date:

Thus while the production of "Financial Contract" prima facie establishes the essential agreement arrived at between the parties including its tenure and repayment period, the same can be corroborated by the production of the Board Resolution for granting loan duly passed by all the directors of the FC and as well as the production of register containing the essential terms of the loan. It is also required, in this regard to take into consideration correspondingly the provisions of Section 179 and Section 180 of the Companies Act, 2013 in relation to the power of the Board of the borrower company to borrow monies within certain limits and beyond its powers, to that of the general body of shareholders applicable to a Company availing the loan. No such resolution as passed by the CD has also been made available by the FC, which becomes particularly glaring in the absence of production of any "Financial Contract" by the FC to sustain its averments that the sums were disbursed repayable on demand. In fact, the FC assails the documents produced by the CD, namely the agreements not to be backed by any Board Resolution of FC. The averments of the FC, in the absence of any "Financial Contract" also suffers from the same infirmity and in the absence of the same, even though we are not upholding one



way or the other of the bona fides of the documents produced by the CD, however assailing the same by FC does not in any way further its cause and the default on the part of the CD remains unsubstantiated. The maintenance of statutory Register, it must be observed, as prescribed under the Companies Act, 2013 are not empty formalities and goes to the root of effective corporate Governance.

16. In view of the decisions rendered in both the Petitions namely, IB.312/ND/2019 and IB.178(ND)/2019 and the primary onus about the details of the 'Financial Contract' and default is required to be demonstrated of the 'financial debt' by the Petitioner itself and that this Tribunal in relation to the documents submitted by the CD cannot go into the aspect of fraud as it is within the purview of the Criminal Courts, more so, in view of the legislative mandate to dispose of the matters within a period of 14 days, which fact the Petitioner should have been well aware and further all the more, the shareholders/Directors of the Petitioner company are before this Tribunal in relation to inter se disputes and Petitions filed under Sections 241 and 242 of the Companies Act, 2013, this Tribunal is constrained to dismiss this Petition as the Petitioner has not been able to demonstrate on its own the existence of a 'financial debt' of which it is alleged to have been defaulted by the CD to the satisfaction of this Tribunal. In the circumstances, we do not find any prima facie case and are constrained to dismiss the Petition with a cost of Rs.1.00 lakh imposed upon the Petitioner to be remitted to the Prime Minister's National Relief Fund within a period of 3 weeks from the date of this order as the Petition has been filed frivolously based on conjectures and surmises without



proper documents being furnished consuming the valuable judicial time of this tribunal.

- Sol -
(K.K. VOHRA)
MEMBER (TECHNICAL)

0
- Sol -
20/09/2019
(R. VARADHARAJAN)
MEMBER (JUDICIAL)

U.D. Mehta/D