IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

CP (IB) 3928/MB/C-II/2019

Under section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of

Surya Inns Limited
[CIN: U55101MH1992PLC068172]
103/A, Swiss Corner, Lokhandwala Complex, Andheri (West) Mumbai - 400053.

…Financial Creditor/Petitioner

Versus

Sahara Hospitality Limited
[CIN: U55101MH1989PLC140211]
Hotel Sahara Star, Opp Domestic Airport, Vile Parle (E), Mumbai – 400099.

…Corporate Debtor/Respondent

Order Delivered on 31.08.2021

Coram:

Hon'ble Member (Judicial)	:	Mr. Ashok Kumar Borah
Hon'ble Member (Technical)	:	Mr. Shyam Babu Gautam

Appearances:

For the Financial Creditor	:	Mr. Shyam Kapadia, Counsel a/w Ms. Diksha Shetty, Advocate i/b M. V. Kini Law Firm.
For the Corporate Debtor	:	Mr. Sandeep Bajaj, Advocate.

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. This is a Company Petition filed under section 7 (“**the Petition”**) of the Insolvency and Bankruptcy Code, 2016 **(IBC)** by **Surya Inns Limited** ("the Financial Creditor"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Sahara Hospitality Limited** ("the Corporate Debtor").

2. The Corporate Debtor is a Public company limited by shares and incorporated on 13.08.1992 under the Companies Act, 1956, with the Registrar of Companies, Maharashtra, Mumbai. Its Corporate Identity Number (CIN) is **U55101MH1992PLC068172**. Its registered office is at 103/A, Swiss Corner, Lokhandwala Complex, Andheri (West) Mumbai - 400053. Therefore, this Bench has jurisdiction to deal with this petition.

Submissions made by Financial Creditor by way of Application/Petition:

3. The Corporate Debtor approached the Financial Creditor for availing Unsecured Loan. Subsequently, after accepting the request of the Corporate Debtor, Loan Agreement was executed by and between the parties vide loan agreement dated 01.01.2016, wherein Financial Creditor has agreed to lend Rs.1,75,00,000/- (Rupees One Crore Seventy-Five Lakhs only) disbursed on

01.04.2016 to the Corporate Debtor for a tenor of 2 years under the terms and conditions set therein.

4. On 31.12.2017, the Corporate Debtor fails to repay the unsecured loan taken under the aforesaid loan agreement. Inspite of continuous follow up from the Financial Creditor for recovery of the loan amount along with interest thereon, no response received from the Corporate Debtor. Hence, a notice dated 31.05.2019 was issued to the Corporate Debtor requesting the Payment of Rs.1,93,43,777/- (Rupees One Crore Ninety-Three Lacs and Forty-Three Thousand Seven Hundred Seventy Seven Only) being the principal amount plus interest charged upto 15.02.2019.

5. The Corporate Debtor committed breach of the Loan Agreement dated 01.01.2016, by making default in payment. Date of default 31.12.2017.

6. The Financial Creditor stated that the total amount due under agreement dated 01.01.2016, as on 31.07.2019 is Rs.2,01,29,463/- (Rupees Two Crore One Lakh Twenty-Nine Thousand Four Hundred Sixty-Three Only) together with further interest thereon at 16.5% p.a. compounded at monthly rests from 01.08.2019 till the date of full and final payment.

7. The Financial Creditor in furtherance of his claim annexed following documents:

   i. Copy of Loan Agreement dated 01.01.2016

ii. Copy of Loan Recall Notice 31.05.2019

iii. Copy of the extract of the ledger account of Sahara Hospitality Limited drawn upto 31.07.2019 in the books of Surya Inns Limited.

iv. A copy of the Form 26AS of Surya Inns Limited for the Financial year 2017-2018 showing deduction of TDS on interest paid under Section 194A.

<u>Submissions made by the Advocate of Corporate Debtor by way of Affidavit in Reply:</u>

8. Counsel Adv. Sandeep Bajaj appeared from the side of the Corporate Debtor on the date of final hearing of this Petition. Submitted that the Corporate Debtor had not filed any formal reply in this matter but advance oral arguments. That the alleged Financial Creditor ("FC") has filed an Application under Section 7 of the Code, claiming a sum of Rs. 1,75,00,000/- ["said Amount"] along with interest @ 16.5% by relying on an unsecured loan agreement dated 1.01.2016 ["said Agreement"]. It is the case of the FC that an amount of Rs.1,75,00,000/- was borrowed by the Corporate Debtor ["CD"] in terms of the Loan Agreement on 01.04.2016 ["said Date"] (mentioned in Part IV at Page 4). However, the documents placed on record by the FC would reveal that no disbursement has taken place on the said date or after the date of execution of the agreement.

9. Unsecured Loan Agreement dated 1.01.2016 never acted upon: That the Lender has not acted in furtherance of the unsecured loan agreement and disbursed the alleged amount pursuant to the said Agreement. Since no monies have been disbursed by the FC pursuant to the Agreement, the question of repayment of debt does not arise. Also, the ledger sought to be relied upon by the Financial Creditor does not pertain to the transaction under question i.e., the said Agreement. It is conspicuous from the ledger on Page 25 that no amount has been disbursed on 1.04.2016 or any time after 1.01.2016.

10. The Counsel states that the FC has not supplemented its Application U/s 7 of the IBC with any proof (Bank Statements) whatsoever that the said Amount was disbursed to the CD pursuant to the said agreement. Even otherwise, no amount has been disbursed to the FC after the loan agreement dated 01.01.2016, much less an amount of Rs.1,75,00,000/- which is evident from the ledger account annexed with the said Application.

11. The Counsel for the states that no drawdown as per the Unsecured Loan Agreement dated 1.01.2016, It is the admitted case of the Financial Creditor that under Clause 1.1 of the Agreement @ page 15, the lender/CD was entitled to draw down the said Amount, however, there is neither any evidence which shows that the FC had disbursed, nor that the CD had received such an amount on

1.04.2016 or after the execution of the said Agreement. The transactions depicted by the ledger are completely different from the unsecured Loan Agreement which was never acted upon.

12. Without proof of disbursement, the said amount cannot be claimed as financial debt, as a disbursement is a sine qua non for any debt to fall within the ambit of the definition of financial debt. Reliance is placed on Judgment of the Hon'ble National Company Law Appellate Tribunal in ***Dr. B.V.S Laxmi Vs. Geometrix Laser Solution Private Limited [2018] 142CLA321:***

> *"30. In the present case, the Appellant has failed to bring on record any evidence to suggest that she disbursed the money has been made against 'consideration for the time value of money'. There is nothing on the record to suggest that the Respondents borrowed the money. In absence of such evidence, the Appellant cannot claim that the loan if any given by the Appellant comes within the meaning of 'financial debt' in terms of sub-section (8)(a) of Section 5 of the 'I & B Code".*

The abovementioned judgement of the Hon'ble National Company Law Appellate Tribunal has been upheld by it in its subsequent decision titled as ***K.S. Sreenivasan Vs. Landmark Housing Projects (India) Pvt. Ltd. Company Appeal (AT) (Ins) No. 97 of 2020*** wherein it upheld the findings of the Adjudicating Authority which had held that an amount that is not disbursed cannot be considered as financial debt. The judgement reads as under:

"4. After hearing Learned Counsel for the parties, the Adjudicating Authority held that the Financial Creditor has disbursed only a sum of Rs. 5 lacs as against the agreed sum to be disbursed under the buyback agreement i.e., Rs. 56,78,97,000/-. However, the Financial Creditor has claimed for a sum of Rs. 29,05,73,965/- which was never disbursed to the Corporate Debtor. The Financial Creditor has not fulfilled his obligation under the agreement to disburse a balance sum of Rs. 56,73,97,000/- to the Corporate Debtor, therefore, the Corporate Debtor is not obliged to perform his reciprocal promise of buying back the saleable area from the Financial Creditor. Thus, the Financial Creditor has failed to satisfy that a sum of Rs. 29,05,73,965/- can be considered as a financial debt. Being aggrieved with this order the Financial Creditor has filed this Appeal.

32. With the aforesaid, the Appellant is miserably failed to prove that any financial debt is due and payable in law or in fact and the Respondent committed the default. We agree with the findings of the Learned Adjudicating Authority and affirmed the impugned order.

13. We have heard the arguments of Financial creditor and Corporate Debtor and perused the records.

14. Upon perusal of records, this Bench is of the considered opinion that there is dispute regarding the Corporate Debtor having availed the Unsecured Loan from the Financial Creditor as per loan agreement CD supposed to draw down loan. As per Clause 1.1 of the Agreement @ page 15, the CD was entitled to draw down the said Amount, however, there is no evidence which shows that the FC had disbursed or that the CD had received such amount on 1.04.2016 or after the execution of the said Agreement.

15. We also consider the facts of the case in the lights of the Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors. [Writ Petition (Civil) No. 99 of 2018] upholding the Constitutional validity of IBC, the position is very clear that unlike Section 9, there is no scope of raising a 'dispute' as far as Section 7 petition is concerned. As soon as a 'debt' and 'default' is proved, the adjudicating authority is bound to admit the petition, but matter in the hand there is no proof to show that the loan was actually disbursed on 01.04.2016 by the Financial Creditor has established beyond doubt that the money was duly received by the Corporate Debtor and that there has been default in payment of the Debt by the Corporate Debtor as per Agreement 01.01.2016.

16. It is, accordingly, hereby ordered as follows: -

    (a) The petition bearing **CP (IB) 3928/MB/C-II/2019** filed by **Surya Inns Limited,** the Financial Creditor, under section 7 of the IBC read with rule 4(1) of the Insolvency and

Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Sahara Hospitality Limited [CIN: U55101MH1989PLC140211],** the Corporate Debtor, is **rejected**.

Dated the 31st day of August, 2021

Sd/-	**Sd/-**
(SHYAM BABU GAUTAM)	**(ASHOK KUMAR BORAH)**
Member (Technical)	**Member (Judicial)**

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