

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH**

**CP No. (IB) 604/ MB/ 2018**

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

*In the matter of*

**Gill International Limited**

**Through Punit Batra**

Having its Registered Office at: R-40,  
South Extension Part III, New Delhi-  
110 047.

..... **Financial Creditor**

Vs.

**Unimers India Limited**

Having its Registered Office at: 2/2  
TTC, Industrial Area (D Block),  
MIDC Thane- Belapur Road, Turbhe,  
Navi Mumbai- 400 705.

..... **Corporate Debtor**

**Order delivered on:- 18.11.2022**

***Coram:***

**Hon'ble Member (Judicial) : Justice P. N. Deshmukh (Retd.)**  
**Hon'ble Member (Technical) : Shri Shyam Babu Gautam**

***Appearances:***

**For the Financial Creditor : Mr. Shambhu Chaturvedi, Advocate**  
**For the Corporate Debtor : Mr. Shyam Kapadia, Advocate**

**ORDER**

***Per: Shyam Babu Gautam, Member Technical***

1. This Company Petition is filed by ***Gill International Limited*** (hereinafter called “Financial Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against ***Unimers India Limited*** (hereinafter called “Corporate Debtor”) alleging that the Corporate Debtor committed default in making payment to the Financial Creditor. This Petition has been filed by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called “IBC”) read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present Petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of an **aggregate amount of Rs. 13,47,19,402/-** (Rupees Thirteen Crores Forty-Seven Lakhs Nineteen Thousand Four Hundred and Two Only) as on 23<sup>rd</sup> March 2018 including the **Principal amount of Rs. 11,41,68,984/-** (Rupees Eleven Crores Forty-One Lakhs Sixty-Eight Thousand Nine Hundred and Eighty-Four Only) as on 31<sup>st</sup> March 2017 and **interest @18%** amounting to **Rs. 2,05,50,417/-** (Rupees Two Crores Five Lakhs Fifty Thousand Four Hundred and Seventeen Only) forming part of the Financial Debt.
3. The Financial Creditor submits that the Corporate Debtor and the Financial Creditor entered into a Financing Agreement dated **11<sup>th</sup> June 2007** (hereinafter referred to as “the said

Agreement”) for inter-corporate loan/ advances. It was agreed that the Financial Creditor will advance Rs. 195 Lakhs as advance and further Rs. 30 Lakhs as a loan towards payment of old outstanding transportation charges, aggregating to Rs.225 Lakhs payable within 6 months in equal instalments together with interest @ 18% per annum on reducing balance.

4. Soon after the amounts were advanced, various disputes and differences arose between the parties and both parties initiated legal proceedings against each other. Subsequently, the parties amicably resolved their differences and executed a **Memorandum of Understanding (MoU) dated 10<sup>th</sup> March 2010**. According to the terms of the said MoU, the Corporate Debtor was liable to pay a lump sum of Rs. 650 Lakhs to the Financial Creditor in one upfront payment of Rs. 1,25,00,000/- (Rupees One Crore Twenty-Five Lakhs Only) and 6 EMIs which carried interest @18% per annum. The Corporate Debtor made payments towards the debt in staggered installments and last paid a sum of Rs. 50,00,000/- (Rupees Fifty Lakhs Only) on 30<sup>th</sup> April 2012. No further repayments have been made ever since until the date of filing this Petition i.e. until **14<sup>th</sup> March 2018**. It is further submitted that the Corporate Debtor has stopped its operations since 2016. Copies of the said Agreement and the MoU are attached to this Petition.
5. Thereafter, a series of communications ensued between the parties via e-mail, wherein the Financial Creditor requested the repayments of the outstanding amounts. The Corporate Debtor, in their latest **e-mail dated 31<sup>st</sup> March 2015**, acknowledged their

obligation to repay the debt and undertook to clear the outstanding balance at the earliest. Copies of the relevant e-mail communications have been attached to this Petition.

6. The Corporate Debtor filed a **Reply to this Petition dated 17<sup>th</sup> September 2019** and contends that the Agreement dated 11<sup>th</sup> June 2007 is a Sale Purchase Agreement and not a Financing Agreement as alleged by the Financial Creditor and therefore this Petition is not maintainable under Section 7. It is submitted that the Financial Creditor failed to comply with the terms of the Sale Purchase Agreement because of which the Corporate Debtor suffered losses. Further, it is submitted that the MoU was signed to resolve disputes that had arisen between the parties however, since the Financial Creditor failed to fulfil their obligations under the MoU, some disputes are still pending. The Corporate Debtor points out that the Clause 5 of the said Agreement contains an Arbitration Agreement and that all disputes must be referred to arbitration according to what was initially agreed.

### **FINDINGS**

7. We have heard the submissions of the Counsel appearing for the Financial Creditor and the Counsel appearing for Corporate Debtor at length. On perusal of the Petition and the documents annexed, it is evident that the issue for consideration before us is whether the debt in question can be considered as a Financial debt or not.

8. The parties have relied on the **Agreement dated 14<sup>th</sup> June 2007** wherein the following clauses are relevant:

*“1. SALE/PURCHASE/MARKETING:*

- 1. The said G.I.L. hereby agrees and confirms as under:*
  - a) The said G.I.L. agrees to purchase/market the entire quantity of EPDM that will be produced by the said Company on a daily basis for onward sale by the said G.I.L. to various customers located elsewhere in India. All taxes including service tax, sales tax etc. in respect of the purchase by the said G.I.L. as also the sale by the said G.I.L. to its customers shall be the responsibility of and liability of the said G.I.L. and if required, shall be reimbursed to the said Company. The Company guarantees a minimum supply of 7200 M.T. of EPDM per annum.*
  - b) The said G.I.L. shall, on execution hereof, advance to the said Company an amount of Rs. 195 lakhs by way of loan and a further Rs. 30 lakhs as a loan towards payment of old outstanding transportation charges. The aggregate amount of the above loan namely Rs. 225 lakhs shall be advanced for a period of 6 months to be repaid in equal installments within the next 6 months together with interest at 18% per annum on reducing balance.”*

It is seen that after the Financial Creditor advanced the entire Principal amount as loan, the parties entered into an MoU to resolve their differences; the relevant portions of which have been reproduced hereinbelow:

*“1. The Parties declare that all their claims and counter claims and demands against each other and the disputes and differences arising out of or in relation to the said Agreement dated the 11th day of June 2007, or otherwise, stand fully and finally settled and resolved as and on the terms recorded in this Memorandum of Understanding (“MoU”).*

*2. It is agreed that UIL shall pay to GIL and GIL shall accept a lumpsum of Rs. 650 lakhs in full and final settlement of all the its claims and demands against UIL arising under or in relation to the said Agreement and in full and final adjustment of the demands and claims of UIL against GIL, thereunder.”*

9. To examine the issue at hand, it is pertinent to note the relevant portion of the definition of the term “financial debt” as given under Section 5(8) of the Code:

*5. In this Part, unless the context otherwise requires,—*

*(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;*

*.....*

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

10. A brief examination of the said Agreement and the MoU reveals that the entire debt amount of Rs. 225 Lakhs was advanced against payment of interest and forms the crux of the

transaction between the parties. The Principal amount was advanced with a clear agreement on the tenure of the loan, the manner in which it is to be repaid and at what rate of interest the repayments were to be made. This precisely indicates that the loan was advanced against consideration for the time value of money, which is the basic requirement to be classified as a Financial debt under Section 5(8)(a) as reproduced above.

11. Besides, in order to realise the true nature of a transaction, it is important to gather the essence of an Agreement from its terms as a whole instead of a cursory and superficial reading of the clauses in isolation. In the instant case, it is the argument of the Corporate Debtor that the said Agreement is a Sale/Purchase agreement as mentioned in Clause 1(a) of the said Agreement. But this contention cannot be sustained as the actual nature of transaction is discerned only after reading both Clause 1(a) and Clause 1(b) in conjunction which indicates that the overall transaction does, in fact, possess the character of “commercial effect of borrowing” as laid down in Section 5(8)(f) of the Code. In this regard, the Hon’ble National Company Law Appellate Tribunal (NCLAT) has observed the following in the matter of *Nikhil Mehta and Sons vs. AMR Infrastructure Ltd., Company Appeal (AT) (Insolvency) No. 07 of 2017*:

*“For every calendar month the Corporate Debtor was liable to pay committee return w.e.f. January 2009 till the date of handing over of the possession to the appellants. Therefore, it is clear that the amount disbursed by the appellants was “against the consideration*

*of the time value of the money” and “the Respondent-Corporate Debtor raised the amount by way of sale - purchase agreement, having a commercial effect of borrowing.”*

12. Therefore, on perusing Clause 1 (b) of the said Agreement, it is evident that the total amount of loan advanced is against the consideration of time value of money and such amount has been advanced by the Financial Creditor by way of the said Agreement having a commercial effect of borrowing. Clause 3 of the MoU lays down the tenure of debt, interest payable and the schedule of repayments and simply reinforces the nature of the debt and crystallizes the amount of debt owed. Further, we have perused the communications dated 26<sup>th</sup> March 2015 and **Letter dated 31<sup>st</sup> March 2015** written by the Corporate Debtor to the Financial Creditor. The admission of the Corporate Debtor regarding the default and the outstanding Principal amount is noted.

13. We are of the opinion that the Financial Creditor has satisfactorily established the existence of debt of Principal Loan Amount of **Rs. 11,41,68,984/-** and default of the outstanding dues aggregating to **Rs. 13,47,19,402/-** including interest. The date of acknowledgement of default and the liability to repay is **31<sup>st</sup> March 2015** and this Petition was filed on **14<sup>th</sup> March 2018** therefore it is noted that the Petition is not barred by Limitation.

14. The Financial Creditor has thus successfully demonstrated and proved the debt and default in this case. It is noted that the Corporate Debtor admits the said outstanding debt. Therefore,

this Bench is of the view that that this Petition satisfies all the necessary requirements for **admission** under Section 7 of the Code.

15. For the foregoing reasons, the instant Company Petition is liable to be admitted, and accordingly the same is admitted by passing the following:

- a. **The above Company Petition No. (IB) -604 (MB)/2018 is hereby allowed** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against Unimers India Limited.
- b. This Bench hereby appoints **Mr. Santanu T Ray**, Insolvency Professional, Registration No: IBBI/IPA-002/IP-N00360/2017-18/11055 as the Interim Resolution Professional having address at AAA Indolvency Professionals LLP, E-10A, Kailash Colony, New Delhi- 110 048 to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Financial Creditor shall deposit an amount of Rs.2 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any

court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub- section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be

made immediately as specified under section 13 of the Code.

- i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to the IRP immediately.

**Sd/-**

**SHYAM BABU GAUTAM**  
**(MEMBER TECHNICAL)**

**Sd/-**

**JUSTICE P. N. DESHMUKH**  
**(MEMBER JUDICIAL)**