(4)

IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH – I, CHENNAI

IA(IBC)/682/CHE/2021 in IBA/471/2020

(Filed under Section 60 (5)(c) of IBC, 2016)

In the matter of ***Harsha Exito Engineering Pvt Ltd***

Angel Corporate Services
Rep by its Partner Mr.Vijayakumar,
No.21, Thulsingham Street,
Sowcarpet, Chennai – 600 079

... Applicant

-Vs-

Harsha Exito Engineering Pvt Ltd,
Rep by Resolution Professional Mr.J.John Ohilvi
No.3/95A, East of Medical College,
Asaripallam, Nagercoil,
Kanyakumari District – 629 201

...Respondent

Order Pronounced on ***8th July 2022***

CORAM:

Justice (Retd) S. RAMATHILAGAM, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

For Applicant	:	*E. Om Prakash, Senior Advocate* *Harish Chowdary, Advocate*
For Respondent	:	*S R Raghunathan, Senior Advocate*

ORDER

***Per:* SAMEER KAKAR, MEMBER (TECHNICAL)**

This is an application filed under Section 60 (5)(c) of the Insolvency and Bankruptcy Code, 2016 seeking relief as follows:

(i) *To set-aside the rejection passed by the resolution professional dated 25.04.2021*

(ii)	*To direct the resolution professional to re-verify the books of the Corporate Debtor and admit the amount claimed Rs.2,17,50,000/- exclusive of interest as the same shall be as fixed by this Tribunal.*
(iii)	*To induct the Applicant as Financial Creditor in the Committee of Creditors.*
(iv)	*To pass any such order deem fit and proper in the interest of justice.*

2. It is averred in the Application that the Applicant is in the business of lending for micro, Small & Medium business enterprises having office at Chennai. It was submitted that during the year 2019 in the due course of business, the Corporate Debtor's managing director Mr. B. Dhanraj got acquainted with the Applicant through SMS Foundation & Investments LLP designated partner Mr. Sanjay Kumar P Shah.

3. It was further averred in the Application that Mr. Dhanraj was looking for funding for his company, Harsha Exito Engineering Pvt Ltd., as his business was reeling in debts lent by banks and other creditors and sought funds from the Applicant to a tune of Rs.2,50,00,000/- (Rupees Two Crore & Fifty Lakhs Only).

4. It was submitted that Mr.Dhanraj persisted that his company also facing cases before this Tribunal by one Operational Creditor namely, Kapil Agencies, Manali, and Chennai in IBA/981/2019. The

Suspended Director also insisted that upon receipt of the funds, he was ready and willing to pay interest on a quarterly basis and repay the entire amounts after successfully coming out of the litigations and NPA's.

5. It was submitted that on 03.10.2019, based on the discussion with Mr. B. Dhanraj, the Operational Creditor counsel was instructed to take time before this Tribunal and the same was accorded by this Tribunal and re-posted to 16.10.2019.

6. It was submitted that pursuant to the extension granted by this Bench, the first tranche of Rs.26,00,000/- was paid as on 03.10.2019 through the applicant's sister concern viz., Tulip Trade Link. The claim for which forms part in a separate application before this Tribunal. Further, the applicant company had lent the following amounts on loan:

S. No	Date	Amount in Rs.	Details
1	04.10.2019	1,19,00,000/-	Bank Transfer
2	05.10.2019	24,50,000/-	Bank Transfer
3	10.10.2019	29,00,000/-	Bank Transfer
4	11.10.2019	5,00,000/-	Bank Transfer

7. It was submitted that the above amounts have been paid to the Corporate Debtor as a consideration for the time value of money viz., interest for which the Corporate Debtor company acknowledged the same.

8. It was submitted that on 16.10.2019, it was informed to the applicant company that part amount had been paid to the Operational Creditor Kapil Agencies and it was informed to the operational creditor to take further time on account of filing settlement terms before this Tribunal. Accordingly, on 16.10.2019, this Tribunal was pleased to call the matter and again on 23.10.2019 for reporting settlement.

9. It was submitted that Mr. Dhanraj was insisting the Applicant to transfer balance funds, however it was submitted that the applicant has withheld and has stated that a Settlement is required to be arrived at between the parties and the matter is also required to be disposed of. Accordingly, on 23.10.2019 a memorandum was filed for withdrawal of the case from the file of this Tribunal and accordingly an order was passed with liberty to file fresh in the event the Corporate Debtor failed to pay in accordance with the settlement arrived between parties.

10. It was submitted that believing the words of Mr. B. Dhanraj the Proceedings was closed before this Tribunal and an amount to a tune of Rs.40,00,000/- was lent by way of bank transfer as on 24.10.2019 and thus totalling to Rs.2,17,50,000/- in principle on account of this applicant with interest as agreed between parties. It

was submitted that on 08.01.2020, an email was caused by the finance manager of Corporate Debtor with attachment on the confirmation of accounts from 01.08.2019 to 31.12.2019 which evidenced the amounts received from the applicant company and the Interest accrued as on 31.12.2019 which stated a closing balance of Rs.2,35,35,846/- being the principle as Rs. 2,17,50,000/- and interest on Loan as Rs.17,85,846/-.

11. It was further submitted that it was informed to the Applicant by SMS Foundation and Investments LLP partner Mr. Sanjay Kumar P Shah that Kapil Agencies had pursued the closed IBA against the Corporate Debtor for not honouring the settlement terms in IBA/471/2020 before this Tribunal and the order came to be passed on 24.03.2021.

12. Pursuant to the order, a claim in Form-C as financial creditor was sent to the Resolution professional as on 15.04.2021 for an amount of Rs.3,62,04,585/- being the principle of Rs.2,17,50,000/- and interest for 18 months viz Rs.1,44,54,585/- at the rate of 36% p.a.

13. That the resolution professional had replied to the claim form rejecting the claim by stating that "*Claim amount is not based on any valid loan agreement. No satisfactory evidence furnished to*

establish the intention to pay it as a financial debt". Aggrieved by the said decision, the Applicant has preferred the present Application before this Tribunal.

<u>COUNTER FILED BY THE RP:</u>

14. The Learned Counsel for the Respondent had filed a counter wherein it was stated that the Applicant is not a company as presented in the application. It is an unregistered partnership firm cannot file a suit in a court of law as per provisions of Section 69(3) of Indian Partnership Act, 1932.

15. It was submitted by the Learned counsel for the Respondent that the applicant's averment with regard to consideration for the time value of money is para (vii) of the application is not correct. It was submitted by the learned counsel for the Respondent that the claim submitted in Form C is not supported by proper documentary evidence required to accept the claim. The applicant failed to submit the documentary evidences as required under Regulations 8(2)(a) and 8(2)(b). He has not furnished any financial contract or loan agreement as evidence. Therefore, the claim filed by the applicant was not admitted. Further it is to be observed that no payment was received by the Corporate Debtor from the applicant. Therefore, the claim submitted by the applicant is a false claim.

16. It was further submitted by the learned counsel for the Respondent that the averment made by the applicant in para (ix) of the application is not correct. It represents that the suspended Managing Director Mr. B. Dhanraj's insistence for transfer of balance funds was not acceded to. As per Annexure R-I of the Respondent, the amount transferred to the Corporate Debtor's account is as given below:

S. No	Date	Amount Received (₹)
1	04.10.2019	1,19,00,000.00
2	05.10.2019	24,50,000.00
3	10.10.2019	29,00,000.00
4	11.10.2019	5,00,000.00
5	24.10.2019	40,00,000.00
	Total	**2,17,50,000.00**

17. It is stated in the counter that the above it is clear substantial amount was stated to have been paid between 04.10.2019 and 11.10.2019. However, the Corporate Debtor has remitted a sum of Rs.25,00,000/-(Rupees Twenty-Five Lakhs only) on 19.10.2019, thereby leaving the balance amount payable of Rs.57,10,587/- as on 19.10.2019. However, this Tribunal observes that the said amount is not matching with the above table.

18. It was further averred in the counter that the amount payable to the Operational Creditor was Rs.82,10,587/- (Rupees Eighty-Two Lakhs Ten Thousand Five Hundred and Eighty-Seven only) and a commercially prudent lender would have ensured that the entire claim amount of operational creditor was settled in full so that the

present CIRP proceedings could not have come into vogue. Therefore, the transaction was not intended to be a financial debt under sec. 5(8) but something different.

19. It was further averred in the counter that a sum of Rs.2,17,50,000/- (Rupees Two Crores Seventeen Lakhs Fifty Thousand only) is stated to have been paid by the applicant to the Corporate Debtor. However, the transaction is not in the nature of financial debt. The applicant has failed to justify the charging of interest at 36% p.a. as claimed in Form C, by any documentary evidence / loan covenants. Further, it is needless to mention that interest at 36% p.a. is exorbitant and amounts to extortionate transaction. Therefore, the whole transaction lacks the traits of financial debt and thereby making the applicant ineligible to be financial creditor.

20. It was further averred in the counter that the applicant represents that it came to know of the order of this Tribunal dated 24.03.2021 in IA/471/2020, through M.Sanjay Kumar P Shah of SMS Foundation and Investments LLP. This averment makes it clear that the transaction fails to satisfy the test of commercial borrowing by the Company. It is unbelievable, having provided such a huge amount to the Corporate Debtor, the applicant is unaware of the major happenings and developments taking place in the affairs of

the Corporate Debtor having direct implication to the applicant. Therefore, the transaction doesn't fall within the ambit of financial debt' and 'financial creditor'.

<u>FINDINGS OF THIS TRIBUNAL</u>:

21. We have heard the submissions made by the Learned Counsel for both the parties. From the submissions made it could be seen that the RP has rejected the claim of the Applicant in the capacity as the Financial Creditor in respect of the Corporate Debtor on the following ground;

> *"Claim amount is not based on any valid loan agreement. No satisfactory evidence furnished to establish the intention to pay it as a financial debt".*

22. It could be seen that the Applicant has not placed on record any financial contract in order to substantiate the claim filed before the RP. Also no Board Resolution of the Corporate Debtor was attached authorizing the Corporate Debtor to borrow loan from the Applicant. Further, from the submissions made it could be seen that there is no contract / agreement entered into between the parties for the disbursement of the said loan to the Corporate Debtor.

23. As per the definition of the expression 'financial debt' in sub-section 8 of Section 5 of IBC, 2016 which is as follows:-

(8) "financial debt" means a debt along with 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 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;

24. It could be seen that the term financial debt denotes a 'debt' along with interest, which is disbursed against the consideration for the time value of money. In the present case, the amount has been disbursed to the Corporate Debtor, however there is no document placed on record to show as to what is the interest which is agreed between the parties. At this juncture, the relief (b) as sought by the Applicant is extracted hereunder;

> *b. To direct the resolution professional to re-verify the books of the Corporate Debtor and admit the amount claimed Rs.2,17,50,000/-* ***exclusive of interest as the same shall be as fixed by this Tribunal***
>
> *(emphasis supplied)*

25. Thus, it could be seen that the Applicant himself has left it to the discretion of this Tribunal to fix the rate of interest, which itself shows that there is no rate of interest agreed between the parties. Further, the Applicant has also not attached the Form 26AS in order to prove that they have deducted TDS. It could be seen that the Applicant has placed on record the Bank Statement evidencing that an amount of Rs.2,17,50,000/- was transferred to the Corporate Debtor. Thus, the amount has been disbursed to the Corporate Debtor, however the Applicant has miserably failed to establish that the said debt would qualify as 'financial debt'.

26. It could be seen that there is no dispute between the parties that the amount was received through banking channel and that the

Ledge Account at page 20 of the Counter confirms the same and it could be seen that a sum of Rs.2,17,50,000/- was transferred only by way of Journal entry to Mr. P. Dhanaraj.

27. In the said circumstances, we hereby direct the Respondent to admit the claim of the Applicant to the tune of Rs.2,17,50,000/- without interest, under the category of '*other creditors*'.

28. With the above said directions, this Application stands **disposed of.**

- Sd -

SAMEER KAKAR
MEMBER (TECHNICAL)

Justice (Retd) S. RAMATHILAGAM
MEMBER (JUDICIAL)

Raymond