

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

I.A. No. 3682/ND/2021
Connected with IB-908/(ND)/2020

Section: Under Section 60(5) read with section 7 of the Insolvency and Bankruptcy Code, Read with Rule 11 of NCLT Rules, 2016.

ORATOR MARKETING PVT. LTD.

... Financial Creditor

Versus

M/s SAMTEX DESINZ PVT. LTD.

... Corporate Debtor

In the matter of:

ORATOR MARKETING PVT. LTD.

Registered office at:
Shop No. 102-103, Plot No.4,
1st Floor, Aditya Complex,
DDA Community Centre, Sec-8,
Rohini, Delhi- 110085

... Applicant/ Financial Creditor

Versus

M/s SAMTEX DESINZ PVT. LTD.

Registered office at:
Unit No. 125, First Floor,
Block 11, Tribhuvan Complex,
Ishwar Nagar, New Delhi- 110065

... Respondent/ Corporate Debtor

Coram:

SH. P.S.N. PRASAD, Hon'ble Member (Judicial)

SH. HEMANT KUMAR SARANGI, Hon'ble Member (Technical)

I.A. No. 3682 of 2021

Connected with IB no. 908(ND)/2020

Orator Marketing Pvt. Ltd. vs. M/s Samtex Desinz Pvt. Ltd.



Counsel for Applicant: Mr. Lazafeer Ahmad B.F., Advocate
Counsel for Respondent: Mr. Aniruddha Deshmukh, Advocate

ORDER

Per P.S.N. PRASAD, MEMBER (JUDICIAL)

Date: 02.09.2021

1. This is an application filed by the Applicant, under section 60(5) of the IBC, 2016, read with Rule 11 of NCLT Rules, 2016 seeking a fresh decision in CP No. IB-908/ND/2020, wherein the Hon'ble Supreme Court of India has set aside the order of the Hon'ble NCLT and NCLAT. Thus, directing the Adjudicating Authority to decide the matter afresh in the light of findings given in the order by the Hon'ble Supreme Court of India, in Civil Appeal No. 2231/2021. The details leading to the filing of this application as averred by the Applicant are as follows:

- i. The applicant/ Financial Creditor i.e., Orator Marketing Pvt. Ltd., had filed an application under section 7 of IBC, 2016 bearing IB no. 908/(ND)/2020, seeking initiation of Corporate Insolvency Resolution Process, against the

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Respondent/Corporate Debtor i.e., M/s Samtex Desinz Pvt. Ltd., on account of default in repaying the Loan amount of Rs.1,56,89,740/-.

ii. The applicant submits that the Hon'ble Tribunal, vide order dated 23.10.2020, held that the Applicant/ Financial Creditor could not be classified as a Financial Creditor, hence the said application was dismissed. Further, it was also held in the said order dated 23.10.2020, that the Respondent / Corporate Debtor was in default and had failed to repay the Loan Amount. It is pertinent to mention here, that the Respondent/Corporate Debtor submitted before the Tribunal, at the time of hearing of main petition, that due to bad financial conditions they are unable to pay the Amount in default.

iii. That the Applicant carried the matter in appeal before the National Company Law Appellate Tribunal vide comp. App. (AT)(INS)No. 1064/2020 wherein, the Hon'ble NCLAT, vide its order dated 08.03.2021, was pleased to

confirm the order dated 23.10.2020, of the Hon'ble NCLT and dismissed the said appeal, citing that the Applicant/ Financial Creditor could not qualify under Section 7 of the IBC, 2016, as the requirement of the debt being a financial debt could not be satisfied.

iv. The Applicant further submitted that it carried the said matter in appeal before the Hon'ble Supreme Court of India, vide Civil Appeal No. 2231/2021, wherein, the Hon'ble Supreme Court of India, vide its judgement and order dated 26.07.2021, has set aside the orders of the Hon'ble NCLT and NCLAT. The Applicant further submitted that the Hon'ble Supreme Court vide its Judgement dated 26.07.2021 has held that:

- *The Corporate Resolution Process gets triggered moment there is a "default" and the Financial Creditor may file an application for initiation of the CIRP upon such default;*
- *That a loan/advance even if the same is interest free Qualifies as a financial debt;*

- *That a debt includes a claim which is due from any person and that the definition under section 5(8) is broad, expansive and cannot be construed narrowly;*
- *That the Assignee of the loan/advance is entitled to maintain an action under S. 7 of the IBC;*
- *That the judgments of the Hon'ble Court in Innoventive and Swiss Ribbons mandate that a petition under S. 7 of the IBC be admitted the moment there is a default and the petition must be admitted if such default is proved.*

v. It is further submitted that the Hon'ble Supreme Court directed the NCLT, that the present petition would stand revived and the Hon'ble Tribunal maybe pleased to admit the same.

2. This Tribunal has gone through the documents filed by the applicant and heard the arguments made by the counsel for the applicant. The applicant prayed to admit the IB no. 908/(ND)/2020 i.e., application under section 7 of IBC, 2016

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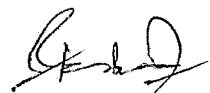
and to direct the Commencement of CIR Process against the Respondent.

3. From the perusal of the Application, it is clear that the Hon'ble NCLT, vide its order dated 23.10.2020 in IB no. 908/ND/2020, is of the view that neither the present claim of the Financial Creditor can be termed to be a 'Financial Debt' nor does the Financial Creditor comes within the meaning of 'Financial Creditor' thereby dismissing the petition. However, the Hon'ble Supreme Court of India vide its order dated 26.07.2021 in Civil Appeal No. 2231/2021 at para 31 and 32 held that:

31. At the cost of repetition, it is reiterated that the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor. 'Default' means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to construed to include interest free loans advanced to finance the business operations of a corporate body.

32. The appeal is, therefore, allowed. The judgment and order impugned is, accordingly, set aside. The order of the

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Adjudicating Authority, dismissing the petition of the Appellant under section 7 of the IBC is also set aside. The petition under section 7 stands revived and may be decided afresh, in accordance with law and in the light of the findings above.

4. Thus, in view of the above said judgement by the Hon'ble Supreme Court of India the main petition under section 7 of the IBC, 2016 need to be decided afresh in light of the findings in the above said judgement.
5. Orator Marketing Pvt. Ltd. has filed the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code'), read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules'), with a prayer to trigger Corporate Insolvency Resolution Process, in respect of respondent Company M/S Samtex Desinz Private Limited, referred to as the Corporate Debtor, on account of the default in payment of debt, by the Corporate Debtor, to the extent of Rs. 1,56,89340/- which had been extended to the Corporate Debtor.
6. The Respondent Company, M/S Samtex Desinz Private Limited, against whom initiation of Corporate Insolvency

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Resolution Process has been prayed for, was incorporated on 07.07.2017 having its registered office at Unit No 125. First Floor, Block Tribhuvan Complex, Ishwar Nagar, New Delhi.

7. The Applicant has filed the Application under section 7 of the Code in the Requisite Form-1, to initiate CIR Process against the Respondent under the code. The Applicant, as per Part- IV of the application, claimed that a sum of Rs. 1,56,89,470/- is due from the Respondent Company. it is pertinent to mention that as per order dated 28.09.2020 of the Hon'ble Tribunal, Mr. Sameer Bhardwaj, former representative and currently authorized signatory of the Respondent, has appeared along with the counsel and submitted that due to bad financial conditions they are unable to pay the amount.
8. The Applicant in the main petition has proposed the name of Mr. Rabindra Kumar Mintri to act as the Interim resolution Professional having Registration No. IBBI/IPA-001/IP-P00707/2017-18/11194 However, the Applicant vide IA no. 3682 of 2021 has prayed that, as Mr. Rabindra Kumar Mintri who had earlier given consent to act as the IRP, is now no

longer able to continue thus, the Applicant proposed the name of Mr. Vimal Kumar, IRP having Registration No. IBBI/IPA-002/IP-N00995/2020-2021/13236 to act as IRP as Form 2 has been duly annexed with the Application.

9. In the light of the aforesaid facts, we find that the documents submitted by the Financial Creditor and the Corporate Debtor clearly substantiate the Financial Creditor's claim that the Corporate Debtor has defaulted on repayment of the debt amount also, as the Corporate Debtor himself submitted that due to poor financial condition they are unable to pay the amount. The Judgement of Hon'ble Supreme Court of India in Civil Appeal No. 2231/2021 has also clearly stated the fact that *'The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to construed to include interest free loans advanced to finance the business operations of a corporate body.*

10. In light of the above Judgement, after giving careful consideration to the entire matter, hearing the arguments of the parties and upon appreciation of the documents placed on record to substantiate the claim, this Tribunal **admits** this petition and initiates CIRP on the Corporate Debtor with immediate effect.

11. Sub-section (3) (b) of Section 7 mandates the financial creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mr. Vimal Kumar, for appointment as Interim Resolution Professional having registration number IBBI/IPA-002/IP-N00995/2020-2021/13236 having address at V 1104, The Hyde Park, Sector-78, NOIDA-201301. Mr. Vimal Kumar has agreed to accept the appointment as the interim resolution professional and has signed a communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of



India or elsewhere. Accordingly, it is seen that the requirement of Section 7 (3) (b) of the Code has been satisfied.

12. It is thus seen that the *requirement of sub-section 5 (a) of Section 7 of the code* stands satisfied as default has occurred, the present application filed under Section 7 is complete, and as no disciplinary proceeding against the proposed IRP is pending.

13. It is pertinent to mention here that, the Code requires the Adjudicating Authority to only ascertain and record satisfaction in a summary adjudication, as to the occurrence of default before admitting the application. The material on record clearly goes to show that respondent had availed the credit facilities and has committed default in repayment of the outstanding loan amount.

14. We are satisfied that the present application is complete in all respect and the applicant financial creditor is entitled to claim its outstanding financial debt from the corporate debtor and that there has been default in payment of the financial debt.



15. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.
16. Mr. Vimal Kumar, having registration number IBBI / IPA-002 / IP-N00995/ 2020-21 / 13236, with address at V 1104, The Hyde Park, Sector-78, NOIDA-201301, is appointed as the Interim Resolution Professional.
17. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional, immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.
18. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

“(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including

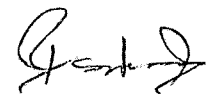
execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or 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;

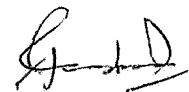
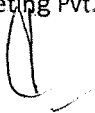
(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

19. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor, as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018, which has come into force w.e.f. 06.06.2018, the provisions of moratorium



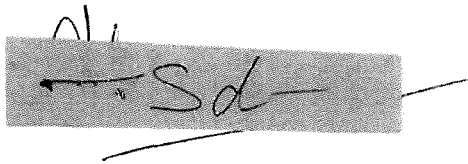
shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

20. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor, are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional, as may be required by him, in managing the day-to-day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer

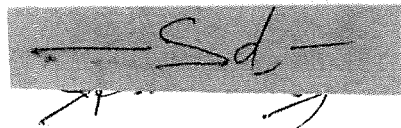


for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation, imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

21. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana, at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

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**(SH. HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)**

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**(SH. P.S.N. PRASAD)
MEMBER (JUDICIAL)**

Ramandeep