

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 5, MUMBAI BENCH

CP (IB) 3444/MB/2019

Under Section 7 of the Insolvency
and Bankruptcy Code, 2016

In the matter of:

Piyush Patel,
Proprietor of Niyati Chemicals
702, Skyline Wealth Space, Wing C-2,
Premier Road, Vidyavihar (W), Mumbai
– 400 086

...Petitioner

V/s.

Minepro Minerals Private Limited
Suite 402, Bhaveshwar Complex, Kirol Road,
Vidyavihar (W), Mumbai – 400 086
... Corporate Debtor

Order delivered on: 28.07.2020

Coram:

Hon'ble Member (Judicial), Smt. Suchitra Kanuparthi

Hon'ble Member (Technical), Shri. V. Nallasenapathy

For the Petitioner: Dr. S. K. Jain, PCS a/w. Advocate Yahya
Batatawala

For the Respondent: Advocate Haresh Makwane.

ORDER

Per: V. Nallasenapathy, Member (Technical)

1. This Company Petition is filed by the proprietor of Niyati Chemicals, Mr Piyush Patel (hereinafter called "Petitioner") against Minepro Minerals Private Limited (hereinafter called "Corporate Debtor") for initiation of Corporate Insolvency Resolution Process ("CIRP") under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with Rule 4 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 ("Rules") alleging that the Corporate Debtor committed default in making payment of financial debt of Rs. 17,11,600/-.
2. The Petition reveals that as on 01.04.2017 a sum of Rs. 40,400/- is outstanding as due from the Corporate Debtor. This is as per the ledger account of the Corporate Debtor in the books of the Petitioner which is enclosed to the Petition at Page No. 14.
3. The Petitioner submits that he has advanced Rs. 20,00,000/- on 25.04.2017 and another sum of Rs. 2,50,000/- on 23.06.2017 as unsecured loan to the Corporate Debtor. The Petitioner submits that the Corporate Debtor made payments of Rs.2,88,400/- on 21.06.2017, Rs. 2,50,000/- on 28.06.2017

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and Rs. 40,400/- on 28.06.2017 towards purchase of goods by the Petitioner from the Corporate Debtor, the balance of Rs. 17,11,600/- is the net due of the unsecured loan amount. The following is the statement of account of the Corporate Debtor in the books of the petitioner.

Account Ledger of MINEPRO MINERALS PVT. LTD. for the period 1/4/2016 to 31/3/2017						
Date	Document No.	Particulars	Chq. No.	Debit Amount	Credit Amount	Balance
15/6/16	00300A	Bill No.: MMPLH-01/16-17		0	344400	344400
8/7/16	000680	Ag. Bill No.: MMPLH-01/16-17	001198	250000	0	94400
23/7/16	000806	Ag. Bill No.: MMPLH-01/16-17	001205	94400	0	0
6/8/16	004478	Bill No.: MMPLH-02/16-17		0	3124800	3124800
19/8/16	001015	Ag. Bill No.: MMPLH-02/16-17	021264	1500000	0	1624800
22/8/16	001031	Ag. Bill No.: MMPLH-02/16-17	021282	500000	0	1124800
29/8/16	001081	Ag. Bill No.: MMPLH-02/16-17	028338	800000	0	324800
23/9/16	001299	Ag. Bill No.: MMPLH-02/16-17	028492	324800	0	0
3/10/16	001468		001244	200000	0	200000
2/12/16	00767A	Bill No.: MMPL-04/16-17		0	159600	40400

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/2017	002741	Ag. Bill No.: MMPLH01/16- 17,MMPL-04/16-17	155 297	650000	0	690400
03/2017	001876		RTGS	0	650000	40400
		Closing Balance		4319200	4278800	40400

Account Ledger of MINEPRO MINERALS PVT. LTD for the Period 1/4/2017 to 31/3/2018							
Date	Docu ment No.	Particulars	Opening Balance:-	Chq. No.	Debit Amount	Credit Amount	Balance 40400
25/4/17	000 162			01478 0	2000000	0	2040400
21/6/17	002 08A	Bill No.: MMPLH - 03/17-18			0	288400	1752000
23/6/17	000 535			01728 5	250000	0	2002000
18/6/17	000 401			Rtgs	0	250000	1752000
28/6/17	000 402			Neft	0	40400	1711600
		Balance Closing			2250000	578800	1711600

4. The Petitioner further submits that three cheques issued by the Corporate Debtor for Rs. 6,00,000/-, Rs. 6,00,000/- and Rs. 5,11,600/- were returned with an endorsement "Account Blocked" on 11.07.2019 and a criminal complaint preferred by the Petitioner on 24.12.2019 on the file of the Second Metropolitan Magistrate Court at Vikhroli, under

Section 138, 141 and 142 of Negotiable Instrument Act, 1881,
is pending.

5. The Corporate Debtor filed reply raising the following contentions:
 - a. The payment made by the Petitioner is towards advance for the work that was to be carried out by the Corporate Debtor for supply of goods/material.
 - b. The Petition filed under Section 7 of the Code is not maintainable.
 - c. The Petitioner and the Corporate Debtor have business dealings since 2016. The Corporate Debtor has been delivering goods to the Petitioner as per their requirements.
 - d. The Petitioner in June 2017 approached the Corporate Debtor requesting supply of processed Bentonite Powder for Rs. 2,88,400/-. The Petitioner has paid Rs. 22,90,400/- in three stages as advance for the future transactions.
 - e. The Petitioner conveyed to the Corporate Debtor that if the goods are of proper quality, the Petitioner will further order 370 mts of Bentonite Powder which costs around Rs. 17,00,000/-.
 - f. Since the advance given by the Petitioner is more than the amount of goods to be supplied, the Corporate Debtor paid back Rs. 2,90,400/- to the Petitioner. The Corporate Debtor submits that they are required to supply 370 mts of processed bentonite powder for Rs. 17,11,600/, for which the Petitioner has given this advance. Further on demand from the Petitioner, the Corporate Debtor as security, issued

3 blank cheques for Rs. 6,00,000/-, Rs. 6,00,000/- and Rs. 5,11,600/-.

- g. The Petitioner approached one Earth Origins in order to mediate certain issues between the Petitioner and the Corporate Debtor.
 - h. An arrangement was made between the Petitioner and one M/s. Earth Origins, wherein the packaging materials shall be provided by the Petitioner to the Corporate Debtor through Earth Origins and the Corporate Debtor supplied the goods to Earth Origins, who in turn supplied the same to the Petitioner.
 - i. Since the materials to be supplied to the Petitioner through Earth Origins is available, the Corporate Debtor requested Earth Origins to inform the Petitioner to issue purchase orders so that the goods can be supplied to the Petitioner. However, the Petitioner failed and neglected to issue purchase orders and also refused to accept the finished packaged material from the said Earth Origins. The Corporate Debtor submitted that instead of taking the material, the Petitioner on 23.08.2019 issued a notice calling upon the Corporate Debtor to repay the alleged loan of Rs. 17,11,600/-.
6. The Petitioner in their rejoinder denied the contentions of the Corporate Debtor and submitted that the payments made were not advance payments but are only loans provided to the

Corporate Debtor. The Petitioner submits that a specific unsecured loan was given by the Petitioner to the Corporate Debtor on 24.01.2017 against which the supply of goods by the Corporate Debtor for Rs. 2,88,400/- was adjusted and the balance loan receivable is Rs. 17,11,600/-.

7. The Professional representing the Petitioner relied on the following judgments to buttress his points that the amount claimed is a financial debt:
 - a. Judgment of Hon'ble NCLAT in the case of *Shailesh Sangani vs. Joel Cardoso and Anr.*, MANU/NL/0051/2019, to say that it is not necessary that the financial debt should always carry interest, but the decision is distinguishable from the facts of case on hand. In *Shailesh Sangani's* case, the financial creditor is also a shareholder of the Corporate Debtor who advanced money to the Corporate Debtor, without any interest, which has been shown in the balance sheet as unsecured loan. When the Petition u/s 7 was admitted recognizing the debt as a financial debt and when the promoter/shareholder/director of the Corporate Debtor preferred an appeal before NCLAT, the appeal was dismissed holding that it is a financial debt even though the financial creditor is not entitled for interest, observing that the promoter/shareholder/director may infuse funds into the Corporate Debtor without interest. In a nutshell it was

effectively held that interest is not a *sine qua non* for classifying a debt as a financial debt.

- b. The Petitioner further relied on the decision of NCLT, Mumbai Bench in the case of *Anchor Leasing Pvt. Ltd. vs Euro Ceramics Ltd.* wherein it was held that even though there was no express agreement for the loan arrangement or the payment of interest, the acknowledgment of debt by the Corporate Debtor shows that the financial creditor and Corporate Debtor had a creditor debtor relationship, hence, the debt will come under the purview of financial debt. When the facts of this case are gone into, it is revealed that the financial creditor granted a loan of Rs. 5 crores and the Corporate Debtor paid interest @12% p.a. without any express agreement for interest for this loan arrangement. This is a case where the Corporate Debtor paid interest and the debt was treated as financial debt. So, this case law is also of no avail to the Petitioner.
8. The Hon'ble NCLAT in the case of - *Nikhil Mehta & Sons Vs. AMR Infrastructure Ltd. MANU/NL/0041/2017* and in the case of *B.V.S.Lakshmi Vs.Geometrix Laser Solutions Private Limited MANU/NL/0221/2017-* held that the key feature of financial transaction as postulated by section 5(8) is the consideration for time value of money.
9. The Hon'ble Supreme Court in the case of *Swiss Ribbons*

Pvt. Ltd. and Ors. Vs. Union of India (UOI) and Ors.

MANU/SC/0079/2019 held as below:

"23. A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority".

10. Section 5 (8) of the Code provides as below:

"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;*
- (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-clauses (a) to (h) of this clause.”

11. The ledger account produced by the Petitioner clearly shows that the Petitioner used to purchase goods from the Corporate Debtor and payments were made by the Petitioner. It is not even the case of the Petitioner that the amount paid to the Corporate Debtor is separately accounted by him as a loan and the same is shown in his balance sheet as an unsecured loan. The payment of money by the Petitioner to the Corporate Debtor, without executing any loan document by the Corporate Debtor, more particularly when there is a customer-supplier relationship between the parties, will not fall under the purview of Section 5 (8) of the code, to bring this debt under the umbrella of financial debt as defined in the Code.
12. To decide whether the debt is a financial debt or not, we have to see the intent of the parties. Further we have to look at the surrounding circumstances of the advancement of money and have to ascertain whether the money is advanced for financial return or for supply of goods and services. There are transactions where the Petitioner is the purchaser of goods from the Corporate Debtor. There are no documents to show the money is advanced purely as a financial transaction notwithstanding the fact that the Corporate Debtor is a supplier of goods to the petitioner.

13. The petitioner is the *dominus litis* and the *onus probandi* lies on the petitioner to establish the crucial ingredient of time value of money, as required under section 5(8) of the Code and the judicial pronouncements discussed above, in the transaction under consideration. But the petitioner failed on this count. Hence, we hold that the amount claimed is not a financial debt.
14. In the light of the above discussion, this Petition is dismissed. No costs.

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V. Nallasenapathy
Member (Technical)

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Suchitra Kanuparthi
Member (Judicial)