

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT NO. V**

CP No. 1398/(IB)-MB-V/2020

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

Autade Sugar Private Limited

Plot No. 17, CTS No. 1620 Giriraj Co-
Operative Housing Society, Aundh
Pune- 411007, Maharashtra.

.... Petitioner

Vs.

Fabtech Sugar Limited

J 504, MIDC Bhosari Pune-411026
Maharashtra.

...Corporate Debtor

Order Pronounced On:13.05.2021

Coram:

Hon'ble Suchitra Kanuparthi, Member (J)

Hon'ble Chandra Bhan Singh, Member (T)

Appearances (Via Video Conference):

For the Petitioner : Adv. Rohit Gupta i/b. Adv. Avinash R.
Khanolkar a/w Adv. Savita Gaikar

For the Corporate Debtor : Adv. Rishabh Gandhi

Per: Chandra Bhan Singh, Member (T)

ORDER

1. The Petitioners/Applicant viz. 'Autade Sugars Private Limited' (hereinafter as Petitioner) has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as Rules) in the capacity of "Financial Creditor" by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as Code) against 'Fabtech Sugar Limited' (hereinafter as 'Corporate Debtor').
2. In the requisite Form-1, under the head "Particulars of Financial Debt" the total amount of Debt granted is stated to be Rs. 41,85,13,635.44/-, and the amount claimed to be in default is Rs. 39,56,96,676/-/- including interest@ 18% per annum. The date of default is stated to be 09.02.2020.

BRIEF HISTORY OF THE CASE

3. The Petitioner is a company incorporated under the Companies Act, 2003, Registration no. U15549PN2018PTC177071 and The Corporate Debtor is a company incorporated under the Companies Act, 2003, Registration no. U15424PN2010PLC137545.
4. The Corporate Debtor approached the Petitioner for the sale of assets of his Sugar Plant, Distillery and Co-Generation Plant and lands owned by various parties due to Financial Crunch.
5. Then the Petitioner issued the letter of intent dated 15.08.2018 and the Corporate Debtor accept the proposal of the Petitioner.

6. Thereafter the Petitioner and Corporate Debtor approached the Samarth Sahakari Bank Ltd. and informed them about the proposed takeover of assets of the Corporate Debtor by the Petitioner. The Petitioner requested the bank to disburse the Short-Term Loan amounting to Rs.8,00,00,000/- to the transport and harvesting contractors of the Corporate Debtor.
7. The Financial Creditor and the Corporate Debtor issued a Corporate Guarantee Bond dated 27.08.2018 in the favor of Samarth Sahakari Bank Ltd. Solapur for providing a guarantee for the repayment of the Short-Term advances amounting to Rs.8,00,00,000/-.
8. The Corporate Debtor informed the Petitioner that some or all of the assets proposed to be purchased by the Petitioner are mortgaged/charged to the lenders of the Corporate Debtor including the following members banks of consortium and other lenders:
 - i) State Bank of India
 - ii) Bank of India
 - iii) Canara Bank
 - iv) Syndicate Bank
 - v) Indian Overseas Bank
 - vi) Vijaya Bank
 - vii) Bank of Baroda
 - viii) IDBI Bank
 - ix) Andhra Bank
 - x) Sugar Development Fund (SDF)
9. Therefore, the mortgage/charges need to be released prior to the execution of the purchase transaction.
10. On 15.10.2018, the Petitioner requested the Corporate Debtor for getting one time settlement (OTS) approval from the lending banks of the Corporate Debtor.

11. Thereafter on 15.10.2018 the Corporate Debtor informed the Deputy General Manager of State Bank of India Stressed Asset Management Branch-II that the Petitioner is purchasing the assets of the Corporate Debtor and dues of the bank will be settled via one time settlement. The Corporate Debtor requested the bank to allow the Petitioner to operate the upcoming crushing season for 2018-2019.
12. The Petitioner again requested the Samarth Sahakari Bank Ltd. Solapur to disburse the Short-Term Loan amounting to Rs.1,75,00,000/- and on 03.11.2018, the Petitioner and the Corporate Debtor issued a Guarantee Bond in a Favor of Samarth Sahakari Bank Ltd. for the repayment of this loan.
13. On 27.11.2018 the Petitioner and Corporate Debtor entered into a lease agreement for leasing the sugar units of the Corporate Debtor. The Petitioner entered into various agreements to sell dated 29.11.2018 with the promoters and other related parties of the Corporate Debtor.
14. On 30.11.2018 the Corporate Debtor requested the Petitioner to arrange the amount of Rs. 9.15 Crores in order to make the payments to various bankers under the OTS.
15. The Corporate Debtor vide its letter dated 01.01.2019 to the Petitioner acknowledged the receipt of Rs.7,83,75,500/- from the Petitioner towards the settlement of loans with the various banks. The letter dated 02.01.2019 clearly mentions the fact that the said amount has to be refunded to the Petitioner in case of rejection of the OTS proposal of cancellation of such understanding.
16. The Petitioner vide email dated 08.01.2019 sent the demand letter received from the M/s Vasantdata Sugar Institute for payment of its outstanding dues to the Corporate Debtor then the Corporate Debtor requested the Petitioner to clear the dues amounting to Rs. 9,18,353/-.

17. On 11.01.2019 the Petitioner requested the Department of promotion of industry and internal trade secretariat for industrial assistance to amend the IEM issued to the Corporate Debtor by amending the name and address of the Corporate Debtor with the name and address of the Petitioner. On 22.02.2019 the Department of promotion of industry and internal trade secretariat for industrial assistance issued the memorandum regarding the said amendment to the dept. of food and public distribution.
18. The Corporate Debtor failed to get the No objection certificate from all the bankers till December 2019. Due to this Petitioner had to reconsider its decision of acquiring the assets of the Corporate Debtor and therefore, the Petitioner has no other option left but to terminate the said understanding, hence the Petitioner sent the Notice of termination dated 09.01.2020 to the Corporate Debtor due to non-receipt of NOCs and OTS letters from the bank.
19. The Petitioner requested the Corporate Debtor to repay the unsecured loan amounting to Rs.41,82,02,073.44/- issued to the Corporate Debtor and the Corporate Debtor acknowledged the unsecured loan given by the Petitioner in his ledger statements for FY 2018-19.
20. The total outstanding dues of the Petitioner from the Corporate Debtor are as mentioned below:

Sr. No	Purpose	Amount	Date of Default
1.	Andhra Bank-OTS	62,19,000	09.02.2020
2.	Bank of Baroda-OTS	15,00,000	09.02.2020
3.	Bank of India-TL-OTS	94,27,416	09.02.2020
4.	Canara Bank-TL-OTS	1,10,82,000	09.02.2020
5.	Canara Bank-ST-OTS	3,01,00,000	09.02.2020
6.	IDBI Bank-ST-OTS	5,80,80,341	09.02.2020
7.	IOB-TL-OTS	1,83,43,000	09.02.2020
8.	State Bank of India- TL-OTS	8,40,10,000	09.02.2020
9.	Syndicate Bank-TL- OTS	19,86,500	09.02.2020
10.	Vijaya Bank-TL-OTS	72,83,000	09.02.2020
	TOTAL OTS PAID	20,80,31,257	
11.	H & T & Working Capital payments	9,53,91,332	09.02.2020
	NET AMOUNT PAID/DISBURSED	30,34,22,589	

21. Hence, due to nonpayment of debts the Petitioner file this Petition u/s 7 of the IBC as a Financial Creditor for initiating the Corporate insolvency Resolution process (CIRP).

SUBMISSIONS BY THE CORPORATE DEBTOR:

22. The Corporate Debtor submits that the Petitioner approached the Corporate Debtor in the year 2018 and expressed his desire to purchase the assets of the Corporate Debtor and several agreements were signed and executed between the respective parties, the list of which is given below:

Sr. No	Date	Type of Agreement
1.	29.11.2018	Agreement to Sell for Rs. 5 Crore
2.	29.11.2018	Agreement to Sell for Rs. 35 Crore
3.	29.11.2018	Agreement to Sell Land and building for Rs. 140 Crore
4.	29.11.2018	Agreement to Sell Plant and Machinery for Rs. 70 Crore

23. The Corporate Debtor submits that Petitioner well knows that the Mortgage/Charge is there over the assets of the Corporate Debtor.

24. The Corporate Debtor and Petitioner entered into a lease agreement on 27.11.2018 for the period of 3 years i.e., from 01.07.2018 to 30.06.2021 or till the last day of crushing season from the signing of the agreement. As per the terms of the deed the Petitioner had agreed to share 30% of the profit with the Corporate Debtor and the termination deed clearly mentions that the termination will be made by mutual consent of both the parties and the Petitioner is liable to pay Rs. 50,00,000/- to the Corporate Debtor as a compensation for non-operation of the entire crushing season.

25. The above agreement was merely an Agreement of Sell and on fulfilling the obligations stated in the agreements a subsequent sale deed would have to be executed and registered.

26. The Payments which were made by the Petitioner were part of the agreement and made by the Petitioner on the instructions of the Corporate Debtor so these transactions are not a loan or debt. Hence the claim of the Petitioner does not amount to financial debt and does not cover under the Code.
27. The payment of Rs.7,83,75,500/- was deposited in the no-lien accounts of the respective banks and the payment of Rs.9,18,353/- payable to M/s Vasantdata Sugar Institute was part of the consideration.
28. The Corporate Debtor had every intention to complete the transaction and took every effort to do so, and the Corporate Debtor even revised the OTS offers that were put forth before the banks but due to the non-availability of funds, the Corporate Debtor requested banks for additional time so that the Petitioner would arrange the funds.
29. The amount claiming in the Petition was for the part payment towards the consideration for purchasing the assets of the Corporate Debtor and is not a loan as falsely claimed by the Petitioner.
30. The Corporate Debtor submits that the Petitioner has failed to prove that "Default" as stated in the Code and claim of Petitioner cannot be called as "Financial Debt". Therefore, in the light of the above it is submitted that there has not been any default on part of the Corporate Debtor and no dues are due and payable to the Petitioner by the Corporate Debtor.

FINDINGS: -

31. This Sec.7 Application has been filed by the Petitioner, M/s. Autade Sugar Pvt. Ltd. against the Corporate Debtor M/s. Febtech Sugar Ltd. for a principal amount of Rs. 30.34 crores and interest amount of Rs.9.22 crores, amounting to a total sum of Rs.39.56 crores. The rate

of interest is 18% per annum as per the agreement signed between the parties on 28.12.2018.

32. This Bench notes that this loan was payable back on demand consequent to cancellation/ termination by the Petitioner of the Agreement by way of a written communication. The Bench also notes that this is an unsecured loan, therefore, no charges are registered or required to be registered with RoC.

33. The Bench understands that the whole substratum of the Petition is based on an Agreement between the parties of 20.12.2018 which is broadly an Agreement for sale for which money has been given by the Petitioner by way of an inter corporate loan. This Agreement has a clear-cut clause that in the event of non-issuance of NOC by the Banks, to which the assets of the Corporate Debtor is hypothecated and the final asset purchase transaction not materializing between parties, the amount will be treated as Inter Corporate Loan carrying an interest of 18% per annum. This clause 3 of the terms and conditions of the Agreement is reproduced as under: -

"3. THAT during the pendency of the issuance of NOC by the banks and till the execution of the asset purchase transaction, the amount advanced by "Autade" to "Fabtech" will be treated as Inter Corporate Loan bearing interest at the rate of 18% per annum."

That it is an Inter Corporate Loan is also clear from para 4 of the agreement dated 20.12.2018 which reads as under: -

"4. THAT the said Inter Corporate Borrowing made by "Autade" to "Fabtech" will be treated as refundable financial debt advanced by "Autade" to "Fabtech" and it shall be repaid by "Fabtech" alongwith the interest on being called for, in the event of the understanding being cancelled or the said agreements being terminated by "Autade" by way of a written communication."

34. It is also clear to the Bench from the above that a NOC was required from the Bank to acquire the assets of the Corporate Debtor by the Petitioner and only thereafter an Agreement was to be executed for purchase of assets. The Bench also notes that it was abundantly clear that both the parties had agreed to treat the amount as a 'loan' with an agreed rate of interest to be paid.

35. The Bench further notes when all efforts to settle with Banks failed, as Banks were demanding a higher amount by way of settlement from the Corporate Debtor. Since the Corporate Debtor could not arrive at a settlement with the Bank, it could not obtain an NOC from the Banks. The obtaining of an NOC by the Corporate Debtor from the Banks to which the assets were hypothecated was the primary and only major condition before executing the sale transaction as per the Agreement arrived between the Parties. It is for the non-obtaining of NOC by the Corporate Debtor that the sale transaction could not be executed and, therefore, the agreement was terminated as per the relevant clause of the agreement and demand was raised vide letter dated 09.01.2020 for paying the default amount along with interest within 30 days. The Bench also notes that the Corporate Debtor in its financial statement has recorded and admitted that it to be a financial debt. In this regard, the balance sheet of the Corporate Debtor has been produced by the Petitioner which treats this loan as a short-term borrowing.

"Note No.6 SHORT TERM BORROWINGS

(1) Disclosure pursuant to Note no. 6(D)(a) of Part I of Schedule III to the Companies Act, 2013.

<i>Short Term Borrowings</i>	<i>As at 31 March 2019</i>	<i>As at 31 March 2018</i>
<i><u>Secured</u> (a) Loans repayable on demand from banks (Secured By</i>	<i>658,275,784.17</i>	<i>683,033,576.48</i>

<p>_____) from other parties (Secured By _____) of the above, _____ is guaranteed by Directors and/ or others)</p> <p><u>Unsecured</u> (a) Loans repayable on demand from banks from related party From Awatade Sugar Pvt.Ltd</p>	<p>966,783,990.08 208,850.00 348871249.21</p>	<p>981,392,013.65 208,850.00 -</p>
<i>Total</i>	1,974,139,873.46	1,664,634,440.13

The Bench further notes that even in the Annual Return for the year 2019 the Corporate Debtor has admitted it as 'financial' debt. The independent auditor report in the financial statement treats it as an Inter Corporate loan. The relevant portion of the financial statement of the independent auditor report treating this as an Inter Corporate loan is as under: -

"Independent Auditor Report

18. According to information and explanation given to us the company has accepted inter corporate loan from Autade Sugar Pvt. Ltd. of Rs. 162.53Crore and repayment of Rs. 127.65 Crore and the closing balance as on 31.03.2019 is Rs. 34.89 Crore"

36. The Annual Report incorporating the independent Auditor's report and the financial statement clearly shows that the Corporate Debtor has not only admitted the liability but also further treated it as an

Inter Corporate loan. Therefore, the Bench has not an doubt in its mind that the monies advanced to the Corporate Debtor is an interest bearing Inter-corporate Loan.

37. We also note that the Corporate Debtor has not disputed the loan disbursed and the execution of the agreement between the parties. There is no dispute as to receipt of the money or dispute regarding the transaction having taken place.

38. The Bench notes that in the written submission before the bench, the Corporate Debtor has contended that this debt is not a financial debt. The basis of this argument as per the Corporate Debtor is that, (a) the agreement signed between the parties is an agreement to sale. Therefore, it was a sale-purchase transaction and not a loan agreement; (b) the Corporate Debtor also contends that the money received was utilized for operation activity and, therefore, at best can be an operational debt and cannot be a financial debt.

39. The Bench notes that the argument that the money was utilized for operational purposes and, therefore, the loan taken is an operational loan, does not have any basis. In fact, any loan which is taken from a bank, whether a term Loan or a working capital loan, is towards capital expenditure, in case of term loan and for the purchase of raw material, salary payment and day to day running of the Company, all of which are operational activities. By no stretch of the imagination, it can be termed as an operational debt because the end use is of the operation of the Company. Therefore, this Bench negates the argument of the Corporate Debtor that the loan be treated as an operational debt.

40. The other point that it is not a financial debt in terms of sec.7 it is clear from the relevant paragraphs of the agreement that the parties

agreed to treat the amount as a loan and that at 18% interest would be payable on them.

41. The Bench has noted the fact that the Corporate Debtor himself has admitted that it is a short-term loan in its Balance sheet and as an Inter Corporate Loan by way of Independent Auditor's Report which constitutes an integral part of the Annual Report of the Corporate Debtor Company. This Bench has also dealt this matter in all details at Paras 33 and 34 above which conclusively proves that it is an Inter corporate Loan which has been admitted by the Corporate Debtor and has been reflected as such in the Balance Sheet and the Annual Report of the Corporate Debtor. Therefore, the Bench negates the contention of the Corporate Debtor that it is not a financial loan but an operational transaction or advance received for the sale of assets.

42. While on this, the Bench would like to refer to a similar case before the Hon'ble NCLAT in the matter of *Mr. KollaKoteshwara Rao Vs. S.K. Shrihari Raju (Appeal No.717/2020)*. This appeal was filed before the Hon'ble NCLAT and the relevant extract of the Judgment is reproduced below: -

"3. As per the key terms of the Agreement of Sale, it is stated that the "Corporate Debtor" shall obtain all the necessary permissions, including obtaining an NOC from TSIIC, the statutory authority, which had allotted the said land to the 'Corporate Debtor'. It is stated that in the event of not obtaining the NOC, (as per Clause 6-A of the Agreement) the 'Corporate Debtor' had to indemnify the first Corporate Debtor under Clause 11 of the Agreement by refunding the amount paid together with interest @ 24% per annum. It was averred that as the 'Corporate Debtor' had failed to commence the Project on time, TSIIC informed the 'Corporate Debtor' in February 2018 that the said allotment would be cancelled. As the time under the OTS offer letter dated 13.11.2017 had expired in the month of May, 2018 it was stated that the first Corporate Debtor had issued a notice to the 'Corporate Debtor' in October 2018 seeking repayment of the entire amount of Rs.2.35/- Crores paid to the Lender on behalf of

the 'Corporate Debtor' together with interest @ 24% per annum as agreed upon under the Agreement. It was stated that there was no response, an Application under Section 7 was filed by the first Corporate Debtor before the Learned Adjudicating Authority.

Thus, Hon'ble Supreme Court has held that the 'financial debt' under the Code is very wide and includes all such transactions that involves commercial effect of borrowing. In the instant case, the amounts were paid by the Petitioner to the Lender of the Corporate Debtor, on behalf of the Corporate Debtor. Pursuant to such payments only an Agreement of sale was executed between parties, which ultimately failed due to denial of permission by TSIIC to the Corporate Debtor to transfer the impugned land. Thus, as per the Agreement, the Corporate Debtor had to return the amount paid on its behalf by the Petitioner, with interest as agreed upon between the parties, indicating time value of money. Therefore, we are of the considered view that the Petitioner herein squarely falls within the definition of 'Financial Creditor' under Section 5(7) of the Code and the contention of the Corporate Debtor fails.

15.

16. *In view of the discussions in the foregoing paragraphs this Adjudicating Authority is satisfied that the Petitioner herein is a Financial Creditor to the Corporate Debtor. The Corporate Debtor has not disputed the receipt of the impugned amounts including interest, but has only taken a legal argument, which has found to be not acceptable by this Adjudicating Authority. On the other hand, the Petitioner has established the existence of a Financial Debt which the Corporate Debtor was liable to pay, but failed to do so. Considering these facts and circumstances, this Adjudicating Authority is inclined to admit the instant Petition."*

(Emphasis Supplied)

Before Hon'ble NCLAT in the matter the Corporate Debtor had *inter alia* contended that the First Corporate Debtor does not fall within the meaning and definition of the Financial Creditor as it did not disburse the money against the consideration of time value of money, that the

word 'disbursed' assumes importance which the Adjudicating Authority had failed to appreciate that at the time of disbursement amount was not paid for the time value of money because all the property eventually culminated into a sale, the money could not have accrued interest and could not have been payable. To the above contention the Hon'ble NCLAT at Para 16 had mentioned the following in its order: -

"It is evident that though money has been paid under an Agreement to Sell, it is seen that the same was paid by the first Corporate Debtor to the Lender Bank only on behalf of the 'Corporate Debtor' and furthermore in the event of the failure on the part of the 'Corporate Debtor' to adhere to the terms of the Agreement, the said consideration amount was to be repaid by the 'Corporate Debtor' alongwith interest in the event the transaction did not materialize. It is seen from the record that a Right to Payment accrued to the first Corporate Debtor in terms of Clause 11 of the Agreement."

(Emphasis supplied)

Finally, Hon'ble NCLAT has dismissed the Appeal and had upheld that the debt was a financial debt.

43. This Bench notes that the present Petition is almost similar. As in this case also the aim of the Agreement was to purchase the asset of the Corporate Debtor after obtaining necessary NOC by the Corporate Debtor from the Bank. However, it had saving clauses that in the event it doesn't happen, the agreement to sale would be terminated and the Applicant has the right to demand back the money which as per the Agreement itself is an inter corporate loan at the rate of interest of 18%. In view of the above, this Bench has no doubt that there is a financial debt as per Section 5(8) of IBC, 2016 and a default has u/s 3(12) of IBC, 2016.

44. As a consequence, keeping the aforesaid facts in mind, it is found that the Petitioner has not received the outstanding Debt from the Corporate Debtor and that the formalities as prescribed under the

Code have been completed by the Petitioner, we are of the conscientious view that this Petition deserves '**Admission**'.

45. Further that, we have also perused the Form - 2 i.e., written consent of the proposed Interim Resolution Professional submitted along with this application/petition by the Financial Creditor and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional.
46. The Financial Creditor has proposed the name of Insolvency Professional. The IRP proposed by the Financial Creditor, Mr. Ritesh R Mahajan, having registration No. IBBI/IPA-002/IP-N00048/2017-18/10132, Email id: riteshmahajancs@gmail.com, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.
47. Having admitted the Petition/Application, the provisions of Moratorium as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of order and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during the Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.
48. That as prescribed under Section 13 of the Code on the declaration of Moratorium the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on the appointment, as per the provisions of the Code.

49. That the Interim Resolution Professional shall perform the duties as assigned under Section 15 and Section 18 of the Code and inform the progress of the Resolution Process and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.

50. The Bench in terms of the above, "**Allows**" the Company Petition No. **1398/(IB)-MB-V/2020** u/s.7 initiating CIRP against the Corporate Debtor Fabtech Sugar Limited. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.

51. Ordered Accordingly.

Sd/-
Chandra Bhan Singh
Member (Technical)

Sd/-
Suchitra Kanuparthi
Member (Judicial)