

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

CP (IB) No.672/7/HDB/2019
Under section 7 of the IB Code, 2016,
R/w rule 4 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016.

In the matter of
M/s. PVK Engineers Private Limited

Between:-

Abhirama Steels Limited
Sy.No.272/1, Chityal (V),
Pargi (Mentioned), Vikarabad (Dist) – 501501,
Telangana State.
(Rep. by Shri Abhishek Palaparthi, Managing Director)

...Petitioner/
Financial Creditor

And

M/s. PVK Engineers Private Limited
Plot No.270E/A, Road No.10,
Jubilee Hills, Hyderabad – 500 033,
Telangana.

...Respondent/
Corporate Debtor

Date of Order: 21.09.2020.

**Coram: Shri. K. Anantha Padmanabha Swamy, Member Judicial.
Dr. Binod Kumar Sinha, Member Technical.**

Parties/Counsels present:-

For the Financial Creditor : Mr. Sourabh Agarwal, Counsel.

For the Corporate Debtor : Mr. G. Sridhar, Counsel.

Per: K. Anantha Padmanabha Swamy, Member Judicial.

ORDER

1. The present petition is filed by 'Abhirama Steels Limited' (hereinafter referred to as 'Petitioner/Financial Creditor') under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IB Code, 2016) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating

Authority) Rules, 2016 against M/s. PVK Engineers Private Limited (hereinafter referred to as 'Respondent/Corporate Debtor'), *inter - alia* seeking to initiate Corporate Insolvency Resolution Process against the Corporate Debtor herein.

2. Brief facts of the case are as follows:-

- a. That the Financial Creditor approached Corporate Debtor to erect a Cut and Bend plant at its site in Chityal, Telangana. After finalization of the commercial terms, Financial Creditor entered into a contract with the Corporate Debtor on 30th November 2015 for the execution of a turnkey project of setting up 60000 TPA capacity Cut and Bend plant at Chityal for a contract value of Rs.25,75,00,000/-.
- b. That the contract period was 3 months from the date of signing of the contract. Meanwhile Financial Creditor was successful in roping an investor who showed keen interest and agreed to invest in the project. That the period of 4 months expired and due to lot of pressure from Corporate Debtor to arrange the advance, Financial Creditor requested the foreign investor to invest the money for making payment to Corporate Debtor. Upon request of Financial Creditor, the investor transferred the funds which in turn were routed to Corporate Debtor. The series of events are given below:-

Sl.No.	Date	Event
1	16/11/2015	Quotation from PVK Engineers
2	23/11/2015	Acceptance of the quotation
3	25/11/2015	Purchase Order by Abhirama Steels
4	30/03/2016	Payment of Rs.1260.00 Lacs to PVK
5	11/04/2016	Payment of Rs.2.00 Lacs to PVK
6	13/04/2016	Payment of Rs.349.43 Lacs to PVK
7	25/04/2016	Payment of Rs.330.00Lacs to PVK
8	26/04/2016	Payment of Rs.2.66 Lacs to PVK
9	11/05/2016	Payment of Rs.275.92 Lacs to PVK

- c. That by 11.05.2016, the Financial Creditor had paid a cumulative advance of Rs.22,20,02,008/- to the Corporate

Debtor. However, the Corporate Debtor did not carry out even a single work till that date even after receiving the advance. Even after reminders from the Financial Creditor to start the work or repay the advance, there was no response from the Corporate Debtor.

- d. That finally, Corporate Debtor made a proposal to convert the advance into a loan which would be repaid in 12 EMI's and on 10.10.2017, both the parties entered into a loan agreement for repayment of said amount in 12 EMI's from November 2017 to October 2018. Corporate Debtor failed to honour the said loan agreement and also did not pay even a single installment during the agreed period.
- e. That Financial Creditor issued a final notice on 05.12.2018. The Corporate Debtor did not give any reply to that notice and did not pay even single installment as per the agreement.
- f. That the total amount in claim is Rs.25,64,12,319/- and the date of default is 01.09.2019.
- g. Reiterating the above, the counsel for the Financial Creditor prayed to admit the instant application.

3. Counsel for the Respondent filed counter and written submissions *inter-alia* stating as under:-

- a. That this Corporate Debtor had taken loan from Indian Bank for working capital limit to the tune of Rs.25 crores to 100 crores. However, the bank after releasing Rs.40 crore limit had stopped the operations of the accounts, due to which Corporate Debtor was not able to continue its production as committed in an appropriate way and suffered huge losses. Due to the said act of the Banks, the Corporate Debtor fell into huge financial crises and was not able to pay the amount of the Financial Creditor.
- b. That finally, Corporate Debtor made a proposal to convert the advance into a loan which would be repaid in 12 equated monthly installments and on 10.10.2017, entered into a loan agreement with Financial Creditor to return the amount in 12 equal monthly installments from November 2017 to October 2018. Corporate Debtor failed to honor this loan agreement

and also could not pay single installment during the agreed period. However, since the Loan agreement referred to by the Financial Creditor is not a registered one, as such it cannot be looked into by this Adjudicating Authority for deciding the present application.

- c. That the Corporate Debtor has always asked the Financial Creditor to close the books of account and reconcile the books of account, but the Financial Creditor always avoided the same, and now it is using this Adjudicating Authority as a recovery tool and extracting extra amount from the Corporate Debtor.
 - d. That the Financial Creditor cannot be termed as a Financial Creditor as he is an Operational Creditor whose dues are not paid by the Corporate Debtor, which is not a financial debt but purely a business transaction and as such the present application is liable to be dismissed on the said ground alone.
 - e. That as per the books of account, Corporate Debtor is liable to pay an amount of Rs.17,28,00,000/- and the claim made by the applicant is exaggerated.
 - f. Reiterating the above, the Ld. Counsel for the Corporate Debtor prayed to dismiss the instant application.
4. Heard both the sides and perused the record.
5. It is the case of the Financial Creditor that it has advanced some monies to the Corporate Debtor for carrying out certain works and upon failure of the Corporate Debtor in executing the said work, both the parties have entered into an Agreement dated 10.10.2017, for conversion of the trade advance into an unsecured loan and repayment of the entire amount in 12 equal instalments. In its counter affidavit, the Corporate Debtor has nowhere denied that the impugned amount was due and payable, but has raised the two points : (i) that the transaction between the parties was not a financial transaction but a purely business transaction and the amount due can, at best, be termed as an Operational Debt and not a Financial Debt and (ii) that the agreement between the parties was an unregistered one and therefore cannot be taken cognizance of.

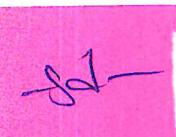
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6. With regard to the first contention of the Corporate Debtor that the transaction between the parties was not a financial transaction but a purely business transaction and the amount due can, at best, be termed as an Operational Debt and not a Financial Debt, we are of the considered view that the same does not form a valid ground for rejection of instant Application as both the parties have entered into an agreement dated 10.10.2017, which is not in dispute, for converting the very nature of the Debt into a Financial Debt. Further with regard to the second contention of the Corporate Debtor that the loan agreement cannot be taken cognizance of as it is not a registered document, this Adjudicating Authority observes that the same cannot be a valid ground for rejection of the instant application as the execution of the said document between both the parties, is duly admitted by the Corporate Debtor in its counter affidavit and copies of the Board Resolution dated 07.10.2017 recording consent of the Board for conversion of trade advance into unsecured loan and for execution of a loan agreement between the parties and authorising the Managing Director to enter into the said agreement as well as a copy of the loan agreement dated 10. 10. 2017 itself is placed on record. This agreement clearly stipulates as under:

“.....

1. *Both the parties viz., Abhirama and PVK have agreed to crystallise the amount due from PVK to Abhirama at Rs.22,20,02,008/- after reconciliation of their accounts.*
2. *Upon the request of PVK, Abhirama has agreed to convert the said due amount of Rs.22,20,02,008/- into an Unsecured Loan to be repaid in 12 equal monthly instalments commencing from November 30, 2017 and ending on October 31, 2018.*
3. *Abhirama has agreed that the said unsecured loan will not carry any interest.*
4. *Abhirama reserves the right to recall the entire unsecured loan and initiate legal action as it may deem fit, in the event of default in payment of even a single instalment by PVK.*



5. Both the parties agree that default interest at 12% per annum will be payable on the defaulted instalments from the due date to the date of payment.

.....”

7. From the above stipulations, there remains no doubt that by virtue of the Loan Agreement dated 10.10.2017 the advance of Rs.22,20,02,008/- was duly converted into an interest free unsecured loan. The question now arises as to whether an interest free unsecured loan can fall within the definition of 'financial debt' under section 5(8) of the Code and whether the same can be deemed to be having time value of money?
8. Dealing with the issue of treatment of interest free unsecured loan as 'financial debt' under IBC 2016, Hon'ble NCLAT held in the case of Shailesh Sangani v. Joel Cardoso & Anr.(Company Appeal (AT) (Insolvency) No. 616 of 2018,) that the use of the expression 'if any' as a suffix to 'interest' under Section 5(8) makes it clear that the component of interest is not a *sine qua non* for classifying a debt as a financial debt under the Code. Thus, the amount disbursed as debt against the consideration for time value of money may or may not be interest bearing.
9. Further, in G. Sreevidhya v. Karismaa Foundations Pvt. Ltd.Company (Appeal (AT)(Insolvency) No. 494 of 2018), the Financial Creditor and the Corporate Debtor had entered into an agreement for construction of a residential building on a turnkey basis at a cost of INR 4 Crores and the Financial Creditor released INR 1.5 Crores as advance under the agreement. However, as the agreement could not be performed, the Corporate Debtor retained the money as loan and started paying interest on the same. The Hon'ble NCLAT held that the money was disbursed in pursuance of an agreement in the nature of a financial transaction against consideration of time value of money as the building raised in pursuance of such agreement would fetch fortunes for the Financial Creditor. The Hon'ble NCLAT further held that the payment of interest on the outstanding amount merely supplemented the understanding that the debt of the Financial Creditor was a Financial Debt. The Hon'ble NCLAT thus held that the Applicant was a

Financial Creditor and directed the Adjudicating Authority to admit the Application.

10. Keeping the guidance available in the aforecited judgements of Hon'ble NCLAT and advertng to the facts of the instant case, this Adjudicating Authority observes that the Applicants had disbursed the sum of Rs.22,20,02,008/- in consideration of time value of money as the 60000 TPA capacity Cut and Bend plant raised in pursuance to the Agreement dated 30th November 2015 would have fetched substantial income to the applicant. The debt in the instant case, therefore, qualifies to be a 'financial debt' under the IBC 2016.

11. Further, the Hon'ble Supreme Court, while deciding the matter in the case of INNOVENTIVE INDUSTRIES LTD. Vs. ICICI BANK & ANR., in Civil Appeal Nos. 8337-8338 of 2017, held as under:

“.....The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”

12. In the present case, this Adjudicating Authority is satisfied with the submissions put forth by the Petitioner/Financial Creditor regarding existence of a 'financial debt' and occurrence of 'default'. Further, the Financial Creditor has fulfilled all the requirements as contemplated under IB Code in the present Company Petition and has also proposed the name of IRP after obtaining his written consent in Form-2. In view of the above, this Adjudicating Authority is inclined to admit the petition.

13. The instant petition is hereby admitted and this Adjudicating Authority Orders the commencement of the Corporate Insolvency Resolution Process which shall ordinarily get completed as per the time line stipulated in section 12 of the IB Code, 2016, reckoning from the day this order is passed.

Sd/

Sd/

14. This Adjudicating Authority hereby appoint Mr. K.Sri Vamsi having Regn. No. IBBI/IPA-001/IP-P00664/2017-18/11141 as Insolvency Resolution Professional (IRP) since his name is proposed by the Financial Creditor and his name is reflected in IBBI website. He has also filed his written consent in Form - 2. Authorisation of Assignment (AoA) to be filed within three days. The IRP is directed to take charge of the Respondent/Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under Section 15 of the I&B Code, 2016 within three days from the date of this order, and call for submissions of claim in the manner as prescribed.
15. This Adjudicating Authority hereby declares the moratorium which shall have effect from the date of this Order till the completion of corporate insolvency resolution process for the purposes referred to in Section 14 of the I&B Code, 2016. We order to prohibit all of the following, namely:
- 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 (54 of 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.*
 - e) *Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.*

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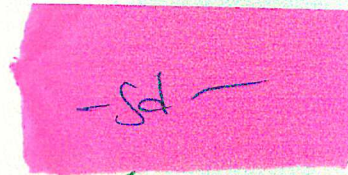
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16. However, the supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. Further, if the IRP considers supply of any goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period. Furthermore, the provisions of Sub-section (1) of Section 14 shall not apply to such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority.
17. The IRP shall comply with the provisions of Sections 13(2), 15, 17 & 18 of the Code. The directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I&B Code, 2016.
18. The Petitioner/Financial Creditor as well as the Registry is directed to send the copy of this Order to IRP so that he could take charge of the Corporate Debtor's assets etc. and make compliance with this Order as per the provisions of I&B Code, 2016.
19. The Registry is directed to communicate this Order to the Financial Creditor and the Corporate Debtor.
20. The Registry shall also communicate this Order to the ROC, Hyderabad for updating the status of the Corporate Debtor in the MCA website.
21. The address details of the IRP are as follows:-
Mr. K. Sri Vamsi
Rao & Rao Chartered Accountants,
Survey No.46/P, Plot No. 237 & 238,
R3 Zen, Level 3, Kavuri Hills Phase-2,
Jubilee Hills Post, West Marredpally,
Telangana - 500033,
Email ID: casrivamsi@gmail.com.

22. The present Petition bearing CP (IB) No.672/7/HDB/2019 is hereby admitted.



Dr. Binod Kumar Sinha
Member Technical



K. Anantha Padmanabha Swamy
Member Judicial

SKRathi /Alekhya