

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT-III**

CP (IB) - 1420/I&BP/MB/2019

Under Section 7 of the I&B Code,
2016

In the matter of

Mr. Dinesh Changela

Windfield, Latimer Road, Barnet,
Hert, UK EN55NU

.... Petitioner/
Financial Creditor

Vs.

**Berkmann Wine Cellars India Pvt.
Ltd.**

601, Balaji Business Centre,
Subhash Road, Vile Parle (East),
Mumbai – 400021.

.... Respondent
Corporate Debtor

Order delivered on 09.02.2021

Coram:

Hon'ble Shri H. V. Subba Rao, Member (Judicial)

Hon'ble Shri Shyam Babu Gautam, Member (Technical)

Appearance (through video conferencing):

For the Petitioner: Mr. Rahul Lakhini, Advocate

For the Respondent: Ms. Madhavi Nalluri, Advocate

Per Shri H. V. Subba Rao, Member (Judicial)

ORDER

1. Mr. Dinesh Changela (hereinafter called 'Petitioner') has sought the Corporate Insolvency Resolution Process of Berkmann Wine Cellars India Pvt. Ltd. (hereinafter called the 'Corporate Debtor') on the ground, that the Corporate Debtor committed default in making payment to the extent of Rs. 2,70,00,000/-, under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called the 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The Petitioner had advanced a total sum of Rs. 2,70,00,000/- (Rupees Two Crores Seventy Lakhs only) to the Respondent as an unsecured,

short-term interest-free loan from his own fund to avoid shortfall in fund flow during crisis. The amount advanced as under:

Sr. No.	Date on which the amount was advanced	Amount advanced
1	16.02.2016	Rs. 30,00,000/-
2	26.02.2016	Rs. 60,00,000/-
3	01.03.2016	Rs. 20,00,000/-
4	02.03.2016	Rs. 40,00,000/-
5	09.03.2016	Rs. 25,00,000/-
6	14.03.2016	Rs. 45,00,000/-
7	29.03.2016	Rs. 50,00,000/-
Total		Rs. 2,70,00,000/-

3. The said loan was advanced by the Applicant to the Respondent on the specific understanding that upon the resignation of the Applicant from the board of directors of the Respondent and upon a demand thereafter being made for the same, the Respondent would immediately repay the said loan back to the Applicant without any demur or delay.
4. The said loan has been admitted and acknowledged by the Respondent by the same has being shown under the caption of unsecured loans for Directors in its Audited Annual Accounts of the Respondents for the year ended 31st March, 2016 and for the year ended 31st March, 2018. The loan is also reflected in the extract of the ledger account of the Respondent for the period from 16th February, 2016 to 29th March, 2016 i.e. when the said loan was received. Thereafter the confirmation of accounts was issued by the Respondent to the Applicant for the period from 1st April, 2017 to 30th June, 2018 under which the Respondent confirmed that the said loan is still due and to be repaid to the Applicant.
5. Since the Respondent failed to repay the outstanding dues, the Petitioner issued formal Notice in respect of repayment of the loan on 30.01.2019 demanding for repayment of ₹2,70,00,000/-. However, the Corporate Debtor failed to repay the aforesaid dues despite of receiving the said Demand Notice.
6. Thereafter, the Applicant issued another notice dated 27.02.2019 calling upon the Respondents to repay the dues along with interest at the rate of 21% per annum, in response to the above notice the Respondent has

issued reply dated 07.03.2019, no further reply was received from the Respondent.

7. Further it is submitted that the Counsel for the Petitioner that the loan amount is an admitted debt owing to the fact that the receipt of the amount of Rs. 2,70,00,000/- as an unsecured, interest free loan has never been disputed by the Corporate Debtor. Infact the same amount has been confirmed by the Corporate Debtor by issuing the confirmation of accounts for the period 01.04.2017 to 30.06.2018.
8. The Petitioner has enclosed the copies of audited annual accounts of the Corporate Debtor for the year ended 31.03.2016 to 31.03.2018 under which the said loan has been shown under the caption of “unsecured loans from directors” which is also describes the admission of debt.
9. The Corporate Debtor filed reply contending as below:
 - a. *The liability created is a mere book entry and not by infusion of any funds, provision of goods or services.*
 - b. *Liability created in favour of Mr. Dinesh Changela, is in violation of FEMA. As per Indian regulation, one cannot make payment of foreign supplier to another non-resident in Indian Currency.*
 - c. *Absence of disclosure of related party transactions as required by ICAI, questions the transaction entered in the accounts about creation of creditors.*
 - d. *Mr. Dinesh Changela without providing any goods or services, became creditor of the company by merely passing the journal voucher amounting Rs. 269,81,499.65/-.*
 - e. *Payments made to Mr. Dinesh Changela for clearing its creditor outstanding, is in violation of FEMA. As per Indian regulation, one cannot make payment of foreign supplier to another or person including non-resident in Indian currency.*
 - f. *Lending of unsecured loan by Mr. Dinesh Changela, was due to shifting of liability from creditor to unsecured loans. Money paid for repayment of creditor liability created by way of journal voucher in FY 2010-11 was received back as borrowing in form of unsecured loans. The said is clear from the table of payment and borrowing above. Under no circumstances, money lend by Mr. Dinesh Changela, was from free sources, nor the said money was used for*

any purposes of business, other than converting the sundry creditors liability to loan liability.

g. Also, as per foreign avoidance tax compliance Act, which is compulsory for every non-resident from 1st January 2016 onwards, money shown as loan should have been part of FATCA disclosure in UK Income Tax and also in Indian Income Tax. In absence of any information of Mr. Dinesh Changela we are not in position to comment on this matter.

h. Mr. Dinesh Changela is a U.K. Citizen and is having Tax identification No. in UK and would be filing his return of income in U.K. A request should be made through NCLT to collect Global statement of assets and liabilities wherein Mr. Dinesh Changela should have shown the above transaction of debit and credit of above referred parties, in his declaration in UK. This needs to be done to ensure the FACTA declaration given by Mr. Dinesh Changela is correct and any payment is not on account of siphoning of money or transfer of money in violation of FEMA.

i. Absence of disclosure of related party transaction as required by ICAI, questions the transaction entered in the accounts about repayment of creditors.

j. In nutshell, loans received from Mr. Dinesh Changela was against the payment entries made for creditors created by book entry in financial year 2010-11. Under no circumstances the money advance as loan were from free funds but the source of advances made were technically to convert the questionable sundry creditors created in 2010-11 into unsecured loans.

10. We have carefully gone through the pleadings on record and heard the submissions made by the counsels on both sides. In view of the above, the issue to be decided is;

Whether the amount claimed by the applicant falls under the definition of Financial Debt or not?

In order to decide the above issue, it is necessary to read the definition of financial debt. Defined under section 5(8) read as follow:

"a 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).....;*
- (e)*
- (f).....;*

11. It is the contention of Respondent that there is no stipulation of interest in the amount alleged to have been advanced by the Petitioner to the Corporate Debtor and in the absence of stipulation of payment of interest the loan will not fall under the definition of Financial debt. In support of the above contention, the Corporate Debtor relied upon the following orders passed by the Hon'ble NCLAT which are extracted below:

a) sanjay kewalramani vs. sunil parmanad kewalramani, MANU/NL/0150/2018 held as follow:

“12. There is nothing on the record to suggest that 2nd and 3rd Respondents had given the loan in favour of the ‘Corporate Debtor’ which can be termed to be ‘disbursement of an amount for consideration for the time value of money’ as required under Section 5(8). Merely grant of loan and admission of taking loan will ipso facto not treat the 2nd and 3rd Respondents as ‘Financial Creditors’, till they show that it complies with the substantive definition or any one or other clause of Section 5(8). 13. Mere fact that the company paid interest @ 12% per annum, during certain period cannot be the ground to hold that the ‘debt’ comes within the meaning of ‘Financial Debt’ to treat the 2nd and 3rd Respondents as ‘Financial Creditors’. As we find that 1st Respondent who signed and filed the application under Section 7 of the ‘I&B Code’ was not eligible to file the application not being a ‘Financial Creditor’, as held by the Adjudicating Authority, we hold that the petition at the instance of 2nd and 3rd Respondents were also not maintainable.”

b) The Hon'ble NCLAT in its decision in the Shreyans Realtors Private Limited & Anr. .Appellants Vs. Saroj Realtors & Developers Private Limited Company Appeal (AT) (Insolvency) No. 311 of 2018, held as follows:

“From the record, we find that though the Appellants by its resolution dated 16th May, 2013 decided to grant unsecured loan to ‘Saroj

Realtors and Developers Private Limited' with 24% interest payable annually and for return of the principal amount along with interest on or before 31st March, 2016, but the Board of Directors of the 'Corporate Debtor' in their meeting held on 29th March, 2014 decided to accept the amount as 'interest free unsecured loan'. From the aforesaid decision of the 'Corporate Debtor', we find that the 'Corporate Debtor' never accepted to take loan with 24% interest and given no undertaking to repay the amount with interest within specific period. On the basis of such evidence, the Appellants cannot claim to owe 'financial debt' from the 'Corporate Debtor' and thereby cannot be claimed to be a 'Financial Creditor' as defined under Section 5(7) & (8) of the Insolvency and Bankruptcy Code, 2016."

12. It is also settled position that the amount to be constituted under financial debt should be disbursed against time value of money as per the law laid by the Hon'ble Supreme Court in the matter of *Innoventive Industries Ltd. v/s. ICICI Bank and Another, AIR 2017 SC 4084*. In the present case the Petitioner has failed to produce on record any document to show that the amount which is actually given to the Corporate Debtor for interest i.e. loan disbursed against the time value of money.
13. From the careful perusal of the definition of Financial Debt and the above case laws relied upon by the Corporate Debtor makes it clear that a debt will not become financial debt if it was not advanced for time value money. The letter dated 03.04.2016 at annexure 'D' and the various balance sheets relied upon by the Petitioner makes it abundantly clear that there is no interest payable on the loan advanced by the Petitioner. Apart from the above, no time is fixed for repayment in the absence of which it cannot be said that the loan was lent for time value money. In the light of the above discussion we have no hesitation in holding that the above amount claimed in the above Petition does not fall under the definition of financial debt and the above Company Petition is liable to be dismissed. Since we are dismissing the above Company Petition on the very nature of the claim, the other contentions raised by the Corporate Debtor with regard to obtaining prior permission from RBI by the applicant for lending the above amount to the Corporate Debtor the applicant being NRI and the observations in the auditors report relied

upon by them to the effect that the amount is a mere book entry in the books of accounts of the Corporate Debtor are not dealt with.

14. Accordingly, we dismiss the above Company Petition without costs with the above observations and findings. However, the above order does not preclude the Petitioner from initiating necessary legal proceedings for recovery of the amount.

Sd/-
SHYAM BABU GAUTAM
MEMBER (TECHNICAL)

Sd/-
H. V. SUBBA RAO
MEMBER (JUDICIAL)