

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)**

PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 20.01.2022 AT 10.30
AM**

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP(IB) No.6/7/AMR/2021		7 of IBC	Satya Sadasiva Basava Prasad Maley Vs Pattela Projects Pvt Ltd

Counsel for Petitioner(s):

<small>Ries</small> Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

<small>Ries</small> Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

CP(IB) No.6/7/AMR/2021 is dismissed, vide separate orders.

Justice
**JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL**

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH**

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CP (IB) No. 06/7/AMR/2021

**In the matter of a Petition 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
AND**

**In the matter of M/s. PATTELA PROJECTS PRIVATE
LIMITED**

Between

Mr. Satya Sadasiva Basava Prasad Maley,
Flat No.101, 8-2-293/82/F/A, Plot No.40,
Srirams Kaveri Apartments, Road No.2,
Film Nagar, Hyderabad -500096.

... Financial Creditor

AND

M/s. Pattela Projects Private Limited,
D.No.6-23-6/A, Jaya Towers,
5th Lane, 4th Cross Road, Arundalpet,
Guntur, Andhra Pradesh -522 002.
Debtor

... Corporate

Date of pronouncement of Orders: 20.01.2022

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Financial Creditor : Mr. Manoj Kumar Koyalkar,
PCS.

For Corporate Debtor : Mr. Y. Hema Chandra,
Advocate

ORDER

1. This Application is filed by Mr. Satya Sadasiva Basava Prasad Maley ("hereinafter referred to as Financial Creditor") seeking this Tribunal to initiate Corporate Insolvency Resolution Process (CIRP) against M/s. Pattela Projects Private Limited

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(“hereinafter referred to as Corporate Debtor”) for the default on the part of the Corporate Debtor to discharge the debt due to the Petitioner.

2. Briefly the facts as set out in the Petition are as follows:
 - i. The Corporate Debtor has received Rs.10 Lakhs from the Petitioner Mr. Satya Sadasiva Basava Prasad Maley towards share application money and failed to allot shares. The amount was transferred from the personal account of the Petitioner to the Corporate Debtor.
 - ii. The Corporate Debtor intentionally denied to allot shares to the Petitioner till date, inspite of the follow up by the Petitioner on regular basis.
 - iii. A joint meeting was scheduled and held on 20.10.2019 at the residence of one Mr. Kaikaala Satyanarayana, which was attended by one Mr. P.V.Narasimha who is the father of the Director of Corporate Debtor.
 - iv. The Corporate Debtor admitted and agreed to pay the amount of Rs.10 Lakhs in monthly instalments starting from 20.11.2019 by way of post-dated cheques and written agreement. But the Corporate Debtor failed to submit post-dated cheques and the agreement.
 - v. The Corporate Debtor is also liable to pay interest @12% for the delay period.
3. The Corporate Debtor filed counter contending as follows:
 - i. This case is filed without any document acknowledging the debt, agreement or negotiable instrument, cheque agreeing to repay the amount sent to the account of the Corporate Debtor. The Petitioner did not even take permission of

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Corporate Debtor before depositing the amount in the account of the Corporate Debtor on that ground the petition is liable to be dismissed. The Petitioner made a complaint to the Registrar of Companies (RoC) on similar lines and the same is rejected. Hence this petition is liable to be dismissed on that ground.

- ii. There is absolutely no document filed to prove the default. A legal notice was issued by the Petitioner on 27.06.2020. Amendment to Section 4 IBC increasing pecuniary jurisdiction is prospective in nature and it came into effect from 24.03.2020. Except the legal notice there is no other document to determine default date. Even the copy of the legal notice is not filed by the Petitioner.
- iii. The petitioner cannot be termed as Financial Creditor as the debt is not a financial debt. The debt needs to be disbursed against consideration for time value of money in order to constitute a Financial Debt. The amount sent by the Petitioner is not for the purpose of allotment of shares or as an investment mode. The Petitioner sent those amounts for the purpose of transfer to M/s.Lucky Automotives as an investment using the Corporate Debtor as intermediary. When the transaction could not succeed due to laches of the Petitioner, he is trying to collect that amount from the Corporate Debtor, taking advantage of close relationship with the wife of P.S.Gaurav namely Smt.K.Sirisha who is one of the Directors of the younger brother of Petitioner.
- iv. Even if the transfer of amount was for share allotment, an application for allotment of shares cannot be treated as

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Financial Creditor and the amount cannot be treated as financial debt.

- v. In 2017 and 2018, the Corporate Debtor did not have any necessity to increase or decrease share capital of the Company. If it intended to do so, it is bound to inform the Registrar of Companies (RoC) with reasons like expansion or diversification. No such application was filed with the RoC, for which reason, the RoC rejected the complaint of the Petitioner.
- vi. Mere WhatsApp chat cannot bind the Corporate Debtor which is a Private Company. It is not admissible under Section 65-A and 65-B of the Indian Evidence Act, unless it is accompanied by the certificate required as per the above provisions. Moreover, the said conversation was between two third parties. Mr. P.V.Narasimha Rao acted as Additional Director from 01.08.2008 to 02.06.2015 and he ceased to be shareholder w.e.f. 14.07.2017 and he resigned to the post of Additional Director. Hence his chats cannot bind the Corporate Debtor, since the amount transferred to the Corporate Debtor took place on 29.11.2017.
- vii. The Petitioner mentioned the date of default as 13.02.2018. While filling up Part-V from at page 6 of material papers, it was mentioned as "not applicable" against column No.3 to show record of default with the information utility if any. Against column No.8 of Part-V annexure it was mentioned as "Not Applicable". The Petitioner did not file any documents emanating from the office of Corporate Debtor containing admitted date of refund of the amount or admitted date of allotment of shares, in which case, no default can be triggered.

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- viii. It is false to contend that the Corporate Debtor agreed to issue post-dated cheques and written agreement to the Petitioner on 28.10.2019. The Creditor has to explain why he waited till May, 2021 if really default triggered on 13.02.2018 that too when the Corporate Debtor failed to issue any cheques on 28.10.2019. On the above grounds the Corporate Debtor seeks to dismiss the Petition.
4. The Petitioner filed his reply to the counter of the Corporate Debtor contending as follows:
- i. The Petitioner has served a legal notice dated 07.06.2020 with a hope that the Corporate Debtor would return the amount with interest.
 - ii. In the wake of Covid-19 pandemic, the Government of India issued a Notification dated 24.03.2020 raising the minimum threshold amount to Rs.1 Crore from Rs.1 Lakh.
 - iii. The NCLT, Chennai Bench in the matter of *Arrowline Organic Products Private Limited vs. Rockwell Industries Limited*, by relying on the judgment of Hon'ble Supreme Court in *Bakul Cashew co. Vs. Sales Tax Officer Quilon*, held that it is only the Legislature who has the power to make and amend laws and the said power is limited and cannot be exercised retrospectively.
 - iv. The Petitioner has entered into an oral agreement to allot equity shares to the Petitioner.
 - v. Mr.P.V.Narasimha Rao had direct influence on the Corporate Debtor. He holds 100% shares in the Corporate Debtor for the year 2017-2018.
 - vi. The Petitioner paid certain amounts to the other group companies of the Corporate Debtor, wherein

Mr.P.V.Narasimha Rao and his family members are the shareholders and Directors.

- vii. Mr.P.V.Narasimha Rao via WhatsApp text dated 13.06.2019 clearly admitted that he shall repay the amount.
 - viii. The WhatsApp message can be accepted, as Section 20 of Companies Act permits serving of a document on a Company or an officer by means of electronic mode.
5. Heard the arguments of both the counsel and perused the written submissions furnished by both the counsel. The points that arise for consideration are:
- I. **Whether this application is maintainable and whether it is within the pecuniary jurisdiction of this Tribunal.**
 - II. **Whether the WhatsApp conversation between the Parties can be admitted as evidence.**
 - III. **Whether the Petitioner can be termed as Financial Creditor and whether the amount i.e., admittedly received by the Corporate Debtor can be termed as financial debt within the meaning of Section 5 (8) of IBC.**
 - IV. **To what result.**
- I. **Whether this application is maintainable and whether it is within the pecuniary jurisdiction of this Tribunal.**

This Petition is filed before this Tribunal on 10.11.2020. The notification enhancing the pecuniary limits of this Tribunal is dated 24.03.2020. By virtue of the said notification issued by Ministry of Corporate Affairs, Government of India, the pecuniary limits are raised from Rs.1 Lakh to Rs.1 Crore w.e.f. 24.03.2020.

Handwritten signature

The contention of the counsel for the Petitioner is that he has filed the application before the NCLT, Hyderabad Bench and that the same was returned and presented here and hence it has to be considered that this application is filed on the date on which it is filed before the NCLT Hyderabad Bench which is prior to the notification admittedly. But after affording opportunity to the Petitioner to produce the evidence regarding the filing of the application before the NCLT Hyderabad Bench and its returned, the Petitioner failed to produce such evidence.

The judgements relied upon the Petitioner's counsel are in favour of the Corporate Debtor that the notification cannot be applied retrospectively. In the reply written submissions it is contended that the notification issued by the Central Government does not confer power upon the Tribunal to act retrospectively. But the Petitioner's Counsel fails to show that the Petition was filed before the NCLT, Hyderabad Bench prior to the notification.

Hence the disputed amount being less than the pecuniary jurisdiction of this Tribunal, the Application needs to be rejected on that count.

II. Whether the WhatsApp conversation between the Parties can be admitted as evidence.

In order to prove the acknowledgment of debt, the Petitioner relies on the WhatsApp message which is given by one Mr.P.V.Narasimha Rao. The Counsel for the

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Corporate Debtor raises a serious objection in admitting the said document into evidence on the basis of the judgment rendered by the Hon'ble Supreme Court in *Civil Appeal Nos.20825-20826 of 2017, dated 14.07.2020 between Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal and Ors., with Civil Appeal No. 2407 of 2018, Civil Appeal No.3696 of 2018*, which is rendered by three judges of the Hon'ble Supreme Court wherein it is held that Section 65-B (4) of the Evidence Act clearly states that secondary evidence is admissible only if led in manner stated and not otherwise. The Court also relied on the judgment of the Hon'ble Supreme Court in *Anvar P.V. vs. P.K.Basheer, 2014 (4) RCR (Civil) 504* and up held the same while overruling the judgments in *Tomaso Bruno vs. State of UP, 2015 (1) RCR (Criminal) 678* and *Shafhi Mohammad vs. State of Himachal Pradesh, (2018) 2 SCC 801* on the ground that they are *per incuriam*.

The Hon'ble Supreme Court held that oral evidence in place of such certificate cannot possibly suffice as Section 65 B (4) is mandatory requirement of law. That apart, the contention of Counsel for the Corporate Debtor is that the said P.V.Narasimha Rao is no more a shareholder or director of the Corporate Debtor as on the date of the alleged WhatsApp messages and hence the same cannot be considered as an acknowledgment of debt by the Corporate Debtor. The arguments of Counsel for the Corporate Debtor find favour with this Tribunal on the above grounds. The counsel for the Petitioner does not put forward any proof to say that the said P.V.Narasimha Rao

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is authorised to acknowledge the debt of the Corporate Debtor and whether he is shareholder or director as on the date of such acknowledgement. Except mentioning the name of P.V.Narasimha Rao in the list of shareholders in the Petition, there is no evidence in proof of the same. However, the counsel tries to interpret section 20 of the Companies Act, in a way to admit the electronic evidence without section 65B certificate. But the said argument does not at all impress this Tribunal. Section 20 is only with regard to the service of notice on the opposite party. The proof of service through electronic mode would not form part of a record as an evidence whereas the WhatsApp messages are filed to be admitted as evidence. Hence it cannot be said that Section 20 of the Companies Act permits a party to produce electronic evidence without it being accompanied by the section 65B certificate. Hence, on the 2nd ground also the petition fails.

III. Whether the Petitioner can be termed as Financial Creditor and whether the amount i.e., admittedly received by the Corporate Debtor can be termed as financial debt within the meaning of Section 5 (8) of IBC.

It is an admitted fact that the petitioner moved similar petitions before the NCLT, Hyderabad Bench and it is admitted that the facts and issues involved in those cases are the same as in this case. NCLT Hyderabad Bench has dismissed the Petition on the ground that the Petitioner failed to prove that the amount lent to the Corporate Debtor

is a financial debt and that the Petitioner is a Financial Creditor.

The definition of Financial Debt is incorporated in Section 5 (8) which is as follows:

“Section 5(8) "financial debt": means a debt along with 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 dematerialised 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 nonrecourse basis;
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

- (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;”*

Unless the Petitioner succeeds in proving that the amount given to the Corporate Debtor is against time value of money, it does not qualify for the financial debt. There is absolutely no evidence to prove that the amount was given for the time value of money. Hence for the same reasons for which the earlier Petitions were dismissed, this Petition is liable to be dismissed on the said ground.

As regards the binding nature of the judgment rendered by the NCLT Hyderabad Bench in the connected cases i.e., CP (IB) No.216/7/HDB/2020 the counsel for the Corporate Debtor relies on the judgment of the NCLAT, New Delhi in *Company Appeal (AT) (Insolvency) No.385/2020 between Bishal Jaiswal vs. Asset Reconstruction Company*

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(India) Ltd., & Anr., wherein by relying on the judgment of the Hon'ble Supreme Court, it was held that following of the judicial precedent of a Bench of equal strength and of a larger Bench as in the instant cases is a matter of judicial discipline. But however, this Tribunal has liberty to differ with the judgment of the coordinate Bench, but if it so chooses the matter has to be referred to a larger Bench. In this Case there is no difference of opinion expressed by this Tribunal with the opinion expressed by the NCLT Hyderabad Bench in CP (IB) No.216/7/HDB/2020.

IV. To what result.

In the result the Petition is dismissed.

T. Rajani
**JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL**

Swamy Naidu