

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
NEW DELHI
BENCH-III**

IB-1384/ND/2019 filed under Section 7 of the IBC, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of **M/s. ASP Sealing Products Limited**

Mr. Amrish Gupta

... *Financial Creditor*

Versus

M/s. ASP Sealing Products Limited

... *Corporate Debtor*

Order Delivered on 12th of February, 2020

CORAM :

CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)

SMT SAROJ RAJWARE, MEMBER (TECNICAL)

For FC: Mr. Ashutosh Gupta, Mr Gaurav Rana, Mr. Abhishek Aggrawal, Advocates.

For CD: Mr. Aditya Nayyar, Advocate.

ORDER

1. Under consideration is an Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IBC, 2016") with the prayers to initiate the Corporate Insolvency Resolution Process (hereinafter referred as "CIRP") against the Corporate Debtor, declare

moratorium and appoint Interim Resolution Process (hereinafter referred as "IRP").

2. The Ld. Counsel for the Financial Creditor has referred to the statement of his Account for the period i.e. 01.07.2016 to 31.07.2016 opened with Axis Bank. The statement of Account shows that on 05.07.2016, 12.07.2016 and 15.07.2016 an amount of Rs.20.00 lakhs, Rs.15.00 lakhs and Rs.15.00 lakhs was advanced to the Corporate Debtor as loan. The Financial Creditor has sent notice on 20.05.2017 to the Corporate Debtor giving the description of the amount advanced and the interest due, to which no reply has been given. The Ld. Counsel for the Financial Creditor submitted that there were cordial relations between the Financial Creditor and the Corporate Debtor due to which any agreement was not reduced in black and white with respect to the advancing of Rs.50.00 lakhs. It is stated that the said amount was due and payable by January, 2017,123 but in spite of repeated requests and notices sent, no response was given by the Corporate Debtor.

3. The corporate debtor has filed the reply, wherein under para 8, it has been stated that the Financial Creditor had provided short term loan to the Corporate Debtor amounting to Rs.50.00 lakhs for purchase of equity. The Board meeting was held on 16.07.2016 at the registered office of the Corporate Debtor/Respondent Company, whereby it was unanimously resolved to accept the proposal of the Petitioner/Financial Creditor and it was further decided in

the said Board meeting to allot shares to the Financial Creditor for the said amount. Thereafter, on 12.08.2016 the meeting of the shareholders was convened, wherein the proposal was unanimously accepted by all the shareholders.

4. In rebuttal, the Ld. Counsel for the Financial Creditor while referring to the contents of para 8 of the reply submitted that the Corporate Debtor after receiving the notice dated, 20.05.2017 for payment of the money advanced along with interest has created false documentary evidence to adduce in defence i.e., the money advanced was for the purchase of equity of the Corporate Debtor. He has referred to Form GNL-2 (which are two in Nos.), Form MGT-14, which discloses that a resolution was passed on 2.9.2016 and Form PS-3. All these forms were filed with the Registrar of Companies (hereinafter referred as "RoC") on the same date i.e., 30.05.2017 i.e., after receiving the notice from the Financial Creditor. The Ld. Counsel for Financial Creditor further submitted that Form MGT-7 placed on record gives detail of the activities of the Corporate Debtor for the financial year beginning i.e., 01.04.2016 to 13.03.2017 that shows the break-up of paid-up shares as 'NIL' against the entry: "Private placement/preferential allotment". Further, in order to support the arguments, the Ld. Counsel for the Financial Creditor has referred to pages 49 and 50 of the said Form, which discloses that the AGM was convened on 30.09.2016 and the total numbers of meetings held were eight. Thus, there is no record to establish that the Board and shareholders



meetings were convened on 16.07.2016 and 12.08.2016 respectively, as contended in Para 8 of the reply. In short, the documents in public domain did not support the contention of the Corporate Debtor.

5. The Ld. Counsel for the Corporate Debtor has referred to para 4 of the Application filed under Section 7 of the IBC, 2016 by the Financial Creditor, wherein under Part 'C' it has been noted that in terms of understanding the Corporate Debtor was supposed to repay the amount of loan within six months along with @ 1% interest per month. It is submitted that as per the averments made in the Application, it becomes clear that there was no document or agreement to support the contention of the Financial Creditor that the money was advanced as loan and was carrying on an element of the time value for money. It is further submitted by the Ld. Counsel for the Corporate Debtor that even, if it is assumed that the money was advanced with the condition that @ 1% per month interest will be charged, but prior to 20.05.2017 the date on which the notice for payment was given to the Corporate Debtor, there is no suggestion that any interest was claimed. It is also submitted by the Ld. Counsel for the Corporate Debtor that the Financial Creditor has to prove his case on his own for invoking the provisions of the IBC, 2016 against the Corporate Debtor. In support of his arguments, he has referred to the Judgment passed by Hon'ble NCLAT in the matter of **Sanjay Kewalramani Vs. Sunil Parmanand Kewalramani & Ors.**, wherein under para 12 and 13 it has been observed by their Lordships that 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) of IBC, 2016. It was further opined by their Lordships in the above noted case that the merely that the company paid interest @12% per Annum, during certain period it cannot be held that the 'debt' comes within the meaning of 'Financial Debt'. The Ld. Ld. Counsel for the Corporate Debtor also referred to the Judgment dated 13.12.2017 passed by the Hon'ble NCLAT in CA (AT)(Insolvency) No.234-235 of 2017 titled **Vishwa Nath Singh Vs. M/s Visa Drugs & Pharmaceuticals Pvt. Ltd.**, wherein it was observed that in the absence of any such evidence on record to suggest that the amount was disbursed against the consideration for the time value of money and was borrowed by the Corporate Debtor against the payment of interest, the claimant does not fall within the meaning of the 'Financial Creditor'. Besides this, the Ld. Counsel for the Corporate Debtor referred to the Judgment dated 25.9.2018 passed by the Principal Bench, New Delhi in CP No.IB.213(PB)/2018 titled **M/s. Cadillac Info-Tech Private Limited Vs. M/s. Navjeevan Associates Private Limited**, wherein the principle laid down in the above noted Judgments has been reiterated.

6. In reply arguments the Ld. Counsel for the Financial Creditor has submitted that the Judgments which are referred by the Ld. Counsel for the Corporate Debtor are distinguishable. Further, the Ld. Counsel for the Financial Creditor has referred to para 5 of the Application Form, wherein it



has been stated that loan is given for a period of six months along with @ 1% per month interest and it has nowhere been stated in the Petition that the monthly interest was to be paid by the Corporate Debtor. Further, he has referred to provisions of Section 73 of the Companies Act, 2013 wherein there is a prohibition for the Companies to take loan and if the Company has taken loan in violation of the provisions, for that the Corporate Debtor is responsible and not the Financial Creditor. The last limb of the arguments submitted by the Ld. Counsel for the Financial Creditor is that the Financial Creditor never agreed in writing for becoming the member of the Company and has never given any proposal for private placement, as contended by the Corporate Debtor.

7. We have heard the Ld. Counsels representing the rival parties and perused the record placed on case file. The statement of Account filed by the Financial Creditor for the period i.e. 01.07.2016 to 31.07.2016 is evidencing that on 05.07.2016, 12.07.2016 and 15.07.2016 an amount of Rs. 20.00 lakhs, Rs.15.00 lakhs and Rs.15.00 lakhs respectively, total amounting to Rs.50 lakhs was advanced to the Corporate Debtor, which was payable by January, 2017 along with interest @ 1% per month. However, there is no agreement to that effect. It is noted that the Financial Creditor vide dated, 20.05.2017 has sent notice to Corporate Debtor for payment of the money advanced along with interest. After receipt of notice dated 20.05.2017, the Corporate Debtor proceeded to file Form GNL-2 (which are two in Nos.), Form



MGT-14, which discloses that a resolution was passed on 02.09.2016 and Form PS-3. All these forms were filed with the RoC on the same date i.e., 30.05.2017. It is worthwhile to mention that Form MGT-7 placed on record gives detail of the activities of the Corporate Debtor for the financial year beginning i.e., 1.04.2016 to 13.03.2017 that shows the break-up of paid-up shares as 'NIL' against the entry: "Private placement/preferential allotment". Therefore, the defence taken by the Corporate Debtor stands demolished, as no Board and Shareholders meeting took place on 16.07.2016 and 12.08.2016 respectively. Moreover, a person is required to agree in writing to become a member of a company, and then his name is entered in the register of members of the company. For the sake of convenience, we may refer to the provisions of Section 2 (55) of the companies Act 2013, which are extracted below;

(55) "member" in relation to a company, means—

(i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;

(ii) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;

(iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;



8. As can be seen from the provisions quoted above, the present case falls under clause (ii) of Section 2 (55) and there is nothing on record to suggest that the Financial Creditor has agreed in writing to become member of the company. Therefore, the defence projected by the Corporate Debtor that the money advanced was for the purchase of equity of the Corporate Debtor stands rejected.

9. The second issue raised by the Ld. Counsel for the Corporate Debtor is that the claim made by the Financial Creditor is pertaining to unsecured debt that does not fall within the purview of the definition of the financial debt. He has referred to the case law but the matter on hand is distinguishable on the basis of the facts and circumstances involved. In the case on hand, the debt in question falls within the purview of the definition of the financial debt as defined under Section 5 (8) of the IBC, 2016. In this connection reliance is placed on the judgment of the Hon'ble NCLAT given in **Rajesh Gupta vs. Dinesh Chand Jain & 2 Ors.**, Company Appeal (AT) (Insolvency) No.317/2018 (Page -7) wherein the Appellate Tribunal has been laid down as follows;-

“It is in this factual background emerging from record that it can be said without any amount of ambiguity that the unsecured loan aforesaid represented the money borrowed against the payment of

interest and in terms of clause (a) sub-section (8) of Section 5 of the I&B Code same tantamount to a debt disbursed against the consideration for the time value of money, which falls within the ambit of "Financial Debt". It is apt to notice that the expression "debt" defined under Section 3(11) means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Non-payment of such debt which has become due and payable and is not repaid by the Debtor or Corporate Debtor falls within the mischief of 'default' defined under Section 3(12) of I&B Code. It would therefore be futile on the part of learned Counsel for the Appellant to contend that the unsecured loan aforesaid did not fall within the definition of "Financial Debt".

10. It is essential that the interpretation that gives effect to the provisions of the Code needs to be followed. This view is based on the well-established maxim of *interpretation* i.e. '*ut res magis valeat quam pereat*' which means that it is better for a thing to have effect than to be void. The definitions of "*Financial Creditor*" and "*Financial Debt*" given under Sections 5 (7) and 5 (8) of IBC, 2016 are unambiguous, to which ordinary and natural meaning has to be given. A reference may be made to the definition of '*creditor*' given under Section 3(10) of the IBC, 2016, which means any person to whom a debt is owed and includes a Financial Creditor, an Operational Creditor, a Secured Creditor, an Unsecured Creditor and a Decree-holder. Further reference could also be made to Clause (11) of Section 3, which defines the term '*debt*' which means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Therefore, the debt claimed by the Financial Creditor clearly falls within the purview of the definition of '*Financial Debt*' given under Section 5 (8) of IBC, 2016. The debt is due, payable and has not been paid.

11. The Financial Creditor has placed on record sufficient documentary evidence on the basis of which it is ascertained that the Corporate Debtor has committed default in making payment to the Financial Creditor. The Financial Creditor has fulfilled all the requirements under law and proposed the name of IRP after seeking his consent in Form-2, which is placed on record. Therefore, application is **admitted** and the commencement of the CIRP is ordered, which ordinarily shall get completed within 180 days, reckoning from the day this order is passed.

12. The moratorium is declared which shall have effect from the date of this Order till the completion of CIRP, for the purposes referred to in Section 14 of the IBC, 2016. It is ordered 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 Securitisation 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.




13. The supply of essential goods or services of the Corporate Debtor shall not be terminated, suspended, or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.

14. Mr. Ashish Singh is hereby appointed as IRP, as has been proposed by the Financial Creditor. There is no disciplinary proceeding pending against the IRP as is evidenced from Form-2. The IRP is directed to take charge of the Corporate Director's management immediately including the bank accounts. The IRP is also directed to cause public announcement as prescribed under Section 15 of IBC, 2016 within three days from the date the copy of this Order is received, and call for submissions of claim by the creditors in the manner as prescribed.

15. The IRP shall comply with the provisions of Sections 13 (2), 15, 17 & 18 of the Code. The Directors of the Corporate Debtor, its Promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under Section 19 for discharging his functions under Section 20 of the IBC, 2016.

16. The Financial Creditor and the Registry are directed to send the copy of this Order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this Order as per the provisions of IBC, 2016. The e-mail and other details of the IRP are as follows:

 IB-1384/ND/2019
Mr. Amrish Gupta Versus M/s. ASP Sealing Products Limited

Name: Mr. Ashish Singh

Registration Number: IBBI/IPA-002/IP-N00416/2017-2018/11230

Address: Flat No. 515, Baghban Apartment, Pocket Gh-2,
Sector - 28, Rohini, NewDelhi-1100042.

E-mail: ashishsinghcs@gmail.com

Contact No.: 9312680896

17. The Registry is also directed to communicate this Order to the Financial Creditor, the Corporate Debtor, and the concerned Registrar of Companies.

18. The Order is pronounced in the open court. There is no order as to cost.

-Sd-

(SMT SAROJ RAJWARE)
MEMBER (TECHNICAL)

-Sd-

(CH. MOHD. SHARIEF TARIQ)
MEMBER (JUDICIAL)