

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

CP No. 4376/IBC/NCLT/MB/MAH/2018

Under Section 7 of the Insolvency and Bankruptcy Code, 2016.

In the matter of

Agarwal Associates & Agencies

... Operational Creditor/ Petitioner

vs.

Vinay Fabrics Private Limited

...Corporate Debtor

Order delivered on 02.08.2019

Coram: Hon'ble Member (Judicial): Mr V.P. Singh
Hon'ble Member (Technical): Mr. Rajesh Sharma

For the Petitioner: Adv. Rohit Gupta, Adv. Arpit Bhoot and Adv. Kunal Kanungo

For the Respondent: Adv. Almira Lasrado and Adv. Nishitha Nambiar

Per V.P. Singh, Member (Judicial)

ORDER

1. The present petition is filed by Agarwal Associates & Agencies, Petitioner, under section 7 of Insolvency and Bankruptcy Code, 2016 (**I&B Code**) for initiation of Corporate Insolvency Resolution Process (**CIRP**) against Vinay Fabrics Private Limited, Respondent for not repaying the loan amount of ₹7,37,24,467/-.
2. It is the case of the Petitioner that it had provided a loan of ₹6,34,40,000/- to the Respondent for development of a project named "Umed Heights". The money is said to be disbursed during the period between 06.08.2013 to 19.08.2014. It is also mentioned in the Form-1 filed by the Petitioner that an amount of ₹2,32,00,000/- has already been repaid by the Corporate Debtor and the date for last payment by the Corporate Debtor was 02.08.2016. An amount of ₹7,37,24,467/- is mentioned in the Form-1 as the amount in default. The Petitioner has annexed the ledger account of the Corporate Debtor as maintained by the

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Petitioner in its Books of Accounts to show the outstanding amount and its calculations.

3. The date of default is stated to be in April 2018 when even after issuance of the completion certificate of the project and admission of debt by the Corporate Debtor the repayment was not made.
4. It is noted by this bench and admitted by the Petitioner that there is no written agreement or financial contract between the Respondent and the Petitioner, by which the loan was extended. It was further admitted by the Petitioner that the loan was given without any agreement for payment of interest.
5. The Petitioner has relied upon the judgment of Hon'ble NCLAT in *Shailesh Sangani vs Joel Cardoso, Company Appeal (AT) (Insolvency) No. 616 of 2018* in an order dated 30.01.2019 to state that interest component is not a sine qua non for a debt to qualify as financial debt.
6. The case relied upon by the Petitioner is not applicable here as the Petitioner is not a promotor, director or shareholder of the Respondent Company. No interest of the Petitioner is reflected in the Respondent Company. The Hon'ble NCLAT has held that stakeholders like promotor, director or shareholder of the Corporate Debtor may infuse money into the Company without claiming an interest to save the company in times of crisis. The relevant portion of the said judgment is reproduced below:

"6. A plain look at the definition of 'financial debt' brings it to fore that the debt along with interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression 'if any' as a suffix to 'interest' leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of 'financial debt'. The amount disbursed as a debt against the consideration for the time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of Section 5(8) embody the nature of transactions which are included in the

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definition of 'financial debt'. It includes money borrowed against the payment of interest. Clause (f) of Section 5(8) specifically deals with the amount raised under any other transaction having the commercial effect of a borrowing, which also includes a forward sale or purchase agreement.

It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Corporate Debtor as a stakeholder to improve the financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the part of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. *Due to fluctuations in market and the risks to which it is exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interests be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such situation such funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the Company. Enhancement of assets, increase in production and the growth in profits, share value or equity enures to the benefit of such stakeholders, and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with an obligation on the part of Company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases, the amount taken by the Company is like a 'financial debt'. (Emphasis supplied)*

7. Since the petitioner is not a promotor, director or shareholder of the Company and no other interest of the Petitioner could be

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proved in the Respondent Company hence the money given by the Petitioner to the Respondent Company can not be said to be a transaction having commercial effect of borrowing and given against the time value of money ,hence cannot be said to be financial debt as defined under the I&B Code.

8. The ledger account in the books of the Petitioner company shows an entry for debiting interest of ₹2,75,07,481/- on 30.09.2018 and when asked why no interest was debited before 30.09.2018 since the year 2013, it was submitted by the counsel of the Petitioner that the interest was charged only after the certificate of completion of project was issued. This in our view, is not supported by any established accounting principal. Further, the interest entry is charged a week before the Petition under section 7 of the I&B Code is filed. We do not find any merit in the submission of the Petitioner, and therefore, the submission is rejected.
9. The Petitioner has stated that the balance sheet of the Corporate Debtor reflects ₹3,20,00,000/- as loan amount given by the Petitioner. This Bench, when asked why the amount has been classified under Unit-II, there was no satisfactory response from the Petitioner.
10. Therefore, in the circumstances, there is no financial contract, no agreement for charging interest on the amount, no evidence to show that interest was charged periodically as per any established accounting principle and without any supporting document to show that the money was transferred to the Respondent Company against time value of money. We at this moment hold that the claim by the Petitioner is not maintainable under section 7 of the I&B Code as it does not involve financial debt having a commercial effect of borrowing or time value of money.
11. As per the observations above, we at this moment reject this Petition filed under section 7 of the I&B Code.
12. We have not decided the merit of the Petitioner's claim but only held that it is not maintainable under section 7 of the I&B Code hence liable to be rejected.

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ORDER

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However, the Petitioner is at liberty to initiate action for recovery of its dues by law.

Sd/-

RAJESH SHARMA
Member (Technical)

2nd August, 2019

Sd/-

V.P. SINGH
Member (Judicial)