



NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Company Petition No. (IB)-865(ND)/2022

IN THE MATTER OF:

Mr. Surendra Kanaiyalal Shah

(Proprietor of Shah Photo Film Company)

Office address:

2nd Floor, B J House,
Nr Mount Carmel School,
Bata Housing Building,
Ashram Road, Navrangpura,
Ahmedabad, Gujarat - 380009

... Applicant

VERSUS

Magicon Impex Private Limited

Registered office at:

B1/625, 2nd Floor, Main Road,
Janakpuri, New Delhi - 110058

... Respondent

Section: 7 of IBC, 2016

Order Delivered on: 03.07.2023

CORAM

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Gulshan Kr. Sachdeva, Adv. Rajat Srivastava

For the Respondent : Adv. Amit Dhall

(IB)-865(ND)2022

Mr. Surendra Kanaiyalal Shah (Proprietor of Shah Photo Film Company) vs. Magicon Impex Pvt. Ltd.



ORDER

PER: SH. L. N. GUPTA, MEMBER (T)

Mr. Surendra Kanaiyalal Shah, Proprietor of Shah Photo Film Company (for brevity, the '**Applicant/Financial Creditor**') has filed the present petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the '**IBC, 2016**') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate the Corporate Insolvency Resolution Process against M/s Magicon Impex Private Limited (for brevity, the '**Respondent**').

2. The Respondent namely M/s Magicon Impex Private Limited is a Company incorporated on 27.07.2004 with CIN U32201DL2004PTC 127870 under the provisions of the Companies Act 1956 having its Registered Office at B1/625, 2nd Floor, Main Road Janakpuri, New Delhi -110058, which comes within the jurisdiction of this Tribunal. The Authorized Share Capital of the Respondent Company is Rs.10,50,00,000/- and the Paid-up Share Capital of the Company is Rs.4,34,00,000/- as per Master Data.

3. It is stated by the Applicant that it owns a warehousing facility that was availed by the Respondent for the purpose of clearing, storing, handling, and forwarding its goods. For this purpose, the Respondent and the Applicant entered into an Agreement dated 25th March 2019 (commencement date 28th February 2019), whereby the Applicant was appointed as the "Consignment & Freight Agent" for the Gujarat region



for the entire product range of Mobile handset, accessories, spare parts etc. and any other products selected by the Respondent. The duration of the Agreement was decided to be one year from the date of commencement, i.e., 28.02.2019. It is further stated that -

3.1 As per Clause 8 of the said Agreement dated 25.03.2019, the Applicant was required to make a security deposit with the Respondent to cover the average inventory maintained by the Applicant. Initially, the amount of the security deposit was set to Rs.50,00,000/- which was later increased to Rs.70,00,000/- by the Respondent. The Applicant duly paid the security deposit of Rs.70,00,000/- vide bank transfer between 01.04.2019 and 15.06.2019. It was also agreed between both parties that the said deposit will be refundable and treated as an Investment on which the Respondent shall provide 1% return per month payable after receipt of the whole security amount. In addition, the Applicant shall also be entitled to a commission of 1% per month of monthly turnover.

3.2 As per clause 10(b) of the said Agreement, either of the party was entitled to terminate the agreement by giving the other 30 days' notice in advance without any liability to pay compensation, however, such termination would not affect the right of the other party to claim for its payment. Further, in terms of clause 10(e), if the said Agreement is terminated by the Agent, i.e., Applicant herein, then the Respondent was required to release the security deposit to the Applicant after deducting any amount recoverable from the Applicant, within 45 days from the date of termination. Due to dissatisfaction from the business with the



Respondent, the Applicant served notice of termination on the Respondent on 11.11.2019. Thus, the Agreement stood terminated on 11.12.2019 in terms of clause 10 (b) of the said Agreement.

3.3 The Respondent lost substratum and could not adhere to the terms of the Agreement dated 25.03.2019 and failed to return the security deposit amount along with interest to the Applicant, which at present stands outstanding to the tune of Rs.1,11,63,151/-.

4. On issuance of the notice, the Respondent filed its reply and stated that (i) There was no Demand notice, under Section 8 of IBC 2016, served to the Respondent by the Applicant, (ii) The present Application does not meet the minimum threshold requirement and is barred by *Res judicata*, (iii) The Applicant had claimed interest under the suspension period falling under Section 10A of IBC, 2016, and (iv) An amount of Rs. 20,00,000 was asked to be retained by the Applicant to the Respondent vide e-mail dated 17.12.2019.

5. The Applicant also filed its rejoinder stating that (i) There is no statutory requirement of issuing a Demand notice under Section 8 of IBC 2016, in a Section 7 proceeding, (ii) The earlier Application was not adjudicated on merits. Hence, *Res judicata* does not apply, (iii) The claim of the Applicant along with interest is above Rs. 1 Crore. Therefore, the petition is not barred by the threshold, and (iv) The date of default is prior to the Section 10A period. Hence, the petition is maintainable.



6. It is averred by the Applicant that earlier, it had filed another petition under Section 7 bearing no. CP-(IB) No. 88/ND/2021 against the same Respondent, which was dismissed vide order dated 27.05.2022 on the ground that the application did not satisfy the threshold limit of Rs.1 Crore, whereas the present application is filed for Rs.1,11,63,151/-.

7. Hence, before proceeding ahead, we would like to examine **Whether both Petitions were filed for the same transaction.** In this context, we first visit Part-IV of CP-(IB) No. 88/ND/2021 (which was dismissed vide order dated 27.05.2022) which reads thus:

PART – IV

PARTICULARS OF FINANCIAL DEBT		
1.	Total amount of debt granted date(s) of disbursement	Outstanding Principal : Rs. 70,00,000/- Default date : 25 th January, 2020 Interest : Rs. 10,05,672/- (Corporate Debtor defaulted in the payment of an interest amount totalling to Rs. 10,05,672/- (Rupees Ten Lakh Five Thousand Six Hundred And Seventy Two Only)) The copy of the computation showing the details of the outstanding amount and the date of default is hereby marked as Exhibit – F .
2.	Amount claimed to be on default and the date on which the default occurred (attach the working for computation of amount and days of default in tabular form)	Aggregate amount in default with interest : Rs. 80,05,672/- Date of Default : Due from 25 th January 2020 with respect to the date of termination i.e. 11 th December 2019 which is calculated after 30 days from intimation of termination i.e. 11 th November 2019.



Now, we also visit the Part-IV of the instant petition, which reads thus:

PART – IV

PARTICULARS OF FINANCIAL DEBT		
1.	Total amount of debt granted date(s) of disbursement	Outstanding Principal : Rs. 70,00,000/- Default date: 25th January, 2020 Interest: Rs. Rs. 41,63,151/- (The Respondent defaulted in the payment of refundable security deposit amount and interest calculated thereupon in terms of the Agreement dated 25.03.2019, aggregating to Rs. 1,11,63,151/- (Rupees One Crore Eleven Lakh Sixty Three Thousand One Hundred Fifty One Only) . The copy of the computation showing the details of the outstanding amount and the date of default is hereby marked as Exhibit – E .
2.	Amount claimed to be on default and the date on which the default occurred (attach the working for computation of amount and days of default in tabular form)	Aggregate amount in default with interest: Rs. Rs. 1,11,63,151/- Date of Default : Due from 25 th January 2020 (Calculated in terms of clause 10 of the said Agreement dated 25.03.2019, i.e., Due date of payment = date of notice for termination- 11.11.2019 + Termination date, i.e., 30 days from notice- 11.12.2019 + 45 days from termination date- 25.01.2020)

8. On a conjoint reading of Part-IV of CP-(IB) No. 88/ND/2021 and Part-IV of the instant petition, it is observed that the principal amount claimed in both the petitions remains the same i.e., Rs.70,00,000/- and even the date of default relied on i.e., 25.01.2020 is the same in both the petitions. **Evidently, both petitions are filed for the same transaction.**

9. Now, a question arises what is the change in the circumstances by which the claim amount of Rs.80,05,672/- under CP-(IB) No. 88/ND/2021 due on 25.01.2020, has increased to Rs.1,11,63,151/- in the present petition while the date of default remaining intact or unchanged.



10. We notice that the petitioner has provided the computation of the default amount in both the petitions, hence we would like to examine the same. Accordingly, first, we refer to the computation of default as provided in the earlier CP-(IB) No. 88/ND/2021, which reads thus:

MAGICON IMPEX PRIVATE LIMITED							
COMPUTATION OF AMOUNT OF DEBT DUE AND DATE OF DEFAULT							
Particulars	Date of intimation of termination	Date of termination (30 days from intimation)	Due date for payment (45 days from termination)	Amount (Rs.)	received amount & Tds credit	Outstanding Principal amount	Interest on outstanding amount as per agreement
Security deposit	11/11/2019	11-12-2019	25-01-2020	7,000,000	-	7,000,000	
Interest upto date of demand notice							1,788,303
Less: paid interest							782,631
Total (A)				7,000,000	-	7,000,000	1,005,672
Total (B)						7,000,000	1,005,672
Total Outstanding Amount (Principal Amount + Interest Amount)							8,005,672

Now, we refer to the computation of default as relied on in the present petition, which reads thus:

MAGICON IMPEX PRIVATE LIMITED							
COMPUTATION OF AMOUNT OF DEBT DUE AND DATE OF DEFAULT							
Particulars	Date of intimation of termination	Date of termination (30 days from intimation)	Due date for payment (45 days from termination)	Amount (Rs.)	received amount & Tds credit	Outstanding Principal amount	Interest on outstanding amount as per agreement
Security deposit	11/11/2019	11-12-2019	25-01-2020	7,000,000	-	7,000,000	
Interest upto date of demand notice							4,945,782
Less: paid interest							782,631
Total (A)				7,000,000	-	7,000,000	4,163,151
Total (B)						7,000,000	4,163,151
Total Outstanding Amount (Principal Amount + Interest Amount)							11,163,151



11. On a simultaneous reading of the “computation of the debt amount in default” in both the petitions, we observe that as per the column titled “Interest up to the date of Demand Notice” was Rs.17,88,303/- in the last CP-(IB) No. 88/ND/2021, which in the instant petition has been revised upwards to Rs.49,45,782/-. The difference between the two amounts claimed on account of Interest by the Petitioner comes to Rs.31,57,479/-. **However, on perusal of the instant petition, we observe that the Petitioner has not specified the period for which the said interest is calculated and claimed.**

12. However, in the interest of justice, we would still like to examine the transaction and find out **Whether there is any unpaid “Financial Debt” subsisting “of more than Rs. 1 Crore”?**

13. It is noticed that the Applicant has annexed the “Record of Financial Information-Form C” of Information Utility/NeSL to establish that there is an outstanding debt of Rs.1,11,63,151/-, which is in the nature of a Financial Debt. The said document of NESL is reproduced overleaf, for immediate reference:



Exhibit - 61 (3)

NeSL NATIONAL E-GOVERNANCE SERVICES LIMITED
India's First Information Utility राष्ट्रीय ई-गवर्नेंस सर्विसेज लिमिटेड

Record of Financial Information - Form C

Unique Debt Identifier: ACKPS8836L_SECURITY DEPOSIT
Submission ID: 3
Submitted by Shah Surendra kanaiyalal
Information as on 15/09/2022

Submitter Information			
Name	Shah Surendra kanaiyalal	UIN (PAN)	ACKPS8836L
Relationship	creditor	Comm. Address PIN	380009
DOI / DOB	03/07/1958	Mobile No.	9xxxxxxx5
Telephone No.	7xxxxxxx9	Billing / Comm. Address	2nd Floor, B J House, Nr Mount Carmel School, Bata House Building, Ashram Road, Navrangpura, Ahmedabad GJ
Email ID	*****@gmail.com	Email ID - Dispute Alert	*****@gmail.com

Other Party Details			
Debtor			
Name	MAGICON IMPEX PRIVATE LIMITED	Relationship	debtor
Regd. / Permanent Address	B1/625, 2nd Floor, Main Road, Janak Puri, New Delhi West Delhi DL	Regd. Address PIN	110058
Billing / Comm. Address	B1/625, 2nd Floor, Main Road, Janak Puri, New Delhi West Delhi DL	Comm. Address PIN	110058
Legal Constitution	PVTL	DOI / DOB	27/07/2004
CIN/LLPIN	U32201DL2004PTC127870	PAN	AAACU7019G
MSME Flag	N	Industry Category	G
Contact Person Name	GURUDEEP SINGH SUDDAN	Email ID	gurdeep@magicon.co.in
Alternative Email ID	monga.magicon@gmail.com		

Debt Information			
Type of debt	financial	Debt Reference No.	Security Deposit
Debt Contract Date	25/03/2019	Debt Start Date	28/02/2019
Debt Currency	INR	Sanction Currency	INR
Sub Type - Debt	OTHL	Funded Type	Funded
Security Flag	unsecured	Sanctioned Amount	7000000.00
Facility Name	Security Deposit	Repayment Frequency	monthly
Rate of Interest	24	Total Outstanding Amount	11163151.00
Amount Overdue	11163151.00	Principal Outstanding	7000000.00
Interest Outstanding	4163151.00	Days Overdue	895

Account Closed Flag	no	Tenure	12.00
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Default Details			
Date Of Default	25/01/2020	Days Past Due	895
Default Amount	11163151.00	Total Outstanding Amount	11163151.00



Thus, we find that though the “Record of Financial Information” of the Information Utility/NeSL reveals a default of a Financial Debt amounting to Rs.1,11,63,151/-, it does not indicate the basis of treating/classifying the default amount as “Financial Debt” and the basis of computation of the amount especially when we have observed that the Petitioner has preferred two petitions and revised the amount of Interest claimed upwards to Rs.49,45,782/- in the second petition, while the amount of principal remaining constant at Rs.70,00,000/-.

14. Therefore, we would still like to examine the transaction between the parties. As contended by the Petitioner, in terms of the Agreement dated 25.03.2019, it had made a Security Deposit of Rs.50,00,000/- with the Respondent. The relevant Clause of the Agreement dated 25.03.2019 is reproduced below:

8. Deposit - The Agent shall provide a refundable initial security deposit of Rs. 50,00,000/-(Rs. Fifty Lakhs only) to cover the average inventory to be maintained by him. This deposit amount may change from time to time as per the business of the area assigned to the Agent and agent will have to abide by the company's norms for the same. The MAGICON shall provide a return on this investment as per details provided in Annexure I.

It is also pleaded by the Applicant that the said amount of the Security Deposit was increased to Rs.70,00,000/-. Though the Petitioner has not annexed any proof of the disbursement, however, the disbursement of the security deposit amount has not been denied or disputed by the Respondent. Therefore, we assume that the said amount of Rs. 70,00,000 was disbursed by the Applicant to the Respondent.



15. At this juncture, we consider it appropriate to visit the relevant clauses of the Agreement dated 25.03.2019, prescribing the tenure/duration of the Agreement as well as the Remuneration structure. The Clause 2 of the Agreement regarding “duration” reads thus:

2. DURATION OF AGREEMENT:

Subject to the provisions of Clause 9 of this Agreement, this agreement shall commence w.e.f 28TH February'2019 and shall remain operational for a period of One Year until terminated earlier, whether with or without any reason, by either party by giving the other party thirty days notice in writing. Any such notice shall be valid and effective the date of service if served in person or the date it is dispatched by registered post. The accounts as between the parties to this agreement shall be settled within a month of the termination of the agreement.

The rates as mentioned in Annexure I shall be valid for a period of twelve months from the date of this agreement,

On perusal of the above, it is observed that the Agreement dated 25.03.2019 was valid only for a period of one year with effect from 28.02.2019 and could be terminated, with or without any reason, by either of the parties by giving 30 days' notice in writing.

16. Now, we visit the “Remuneration” Clause of the Agreement dated 25.03.2019 which specifies interest/commission payment/return on Security Deposit. The relevant Clause 9 along with Schedule – I of the Agreement reads thus:

9 REMUNERATION

In consideration of the performance by the agent of all his obligations hereunder, The MAGICON will remunerate the agent as per details mentioned in Annexure-I.

The AGENT shall not be entitled to receive any other payment whatsoever except the payments mentioned in annexure “I” (enclosed herewith and shall form part of this Agreement) and which shall be in consideration of or provided by it pursuant to this Agreement.

XXXX

XXXX

XXXX

XXXX

XXXX



REMUNERATION STRUCTURE

- a. The Agent shall be paid an interest @ 1% p.m. on Refundable Security Amount deposited which shall be paid after receipt of whole security amount.

In addition to that, the Agent shall be entitled for a Commission @ 1% p.m of the monthly turnover (net of discounts and taxes). This is applicable up to the monthly sale of 1.5 times of security amount once the sale exceeds the limit of 1.5 time of security to be reviewed and enhanced.

OR

The Agent is entitled to have minimum assurance of 24 % P.A. return on the security deposit amount (inclusive of 1% interest & 1% commission on sale) which will be applicable w.e.f. the date of receipt of whole security amount.

Whichever is higher.

- b. Agent is entitled to receive **Rs. 35,000/- (Rupees Thirty Five thousand Only)** per month to meet his running expense, if the cost of expenses is more than the above amount it will be borne by the Agent.
- c. The MAGICON will reimburse the actual cost of delivering consignment to distributor Location from the Agent location

FOR MAGICON IMPEX PVT. LTD.
DIRECTOR



For SHAH PHOTO FILM CO.
PROPRIETOR

On perusal of the above, it is observed that the Petitioner as an “agent” of the Respondent had a minimum assurance of 24% per annum return on the security deposit amount (inclusive of 1% interest and 1% commission on sale) applicable from the date of receipt of the whole security deposit.



17. Thus, it is observed that the “return on the security deposit” had two components i.e., (a) interest, and (b) commission on the sale. Undisputedly, “interest” can be claimed as a “Financial Debt”, however, we would like to examine, whether the “commission on sale” can be claimed as Financial Debt. Accordingly, we refer to the definition of “Financial Debt” as given under Section 5(8) of IBC 2016, which reads thus:

(8) “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 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 non-recourse basis;
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
 - [Explanation. -For the purposes of this sub-clause, -*
 - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
 - (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]
 - (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;



18. On a perusal of the definition (ibid), it is observed that “financial debt” has the following essential ingredients -

- a) Debt along with interest, if any,
- b) which is disbursed
- c) against the consideration for the time value of the money, and
- d) includes the type of transactions under sub-clause (a) to (i).

Thus, the portion of the unpaid debt claimed by the Petitioner herein towards the Security Deposit along with interest is undoubtedly a Financial Debt. However, the portion of unpaid debt claimed in respect of the “commission of sale” has neither the time value of money nor is covered under any type of transactions specified under sub-clauses 5(a) to 5(i). **Hence, in our considered view, the “commission on sale” is not a Financial Debt, and therefore, the Petitioner cannot claim the same as unpaid financial debt.**

19. Though normally this Adjudicating Authority does not indulge itself in computing the quantum of debt, however, in the interest of justice, we would like to find out Whether the Petitioner meets the minimum threshold requirement of having a “Financial Debt” of more than Rs. 1 Crore, especially in the backdrop of the first petition viz., CP-(IB) No. 88/ND/2021 of the Petitioner getting dismissed being barred under Section 4 of the IBC 2016.

20. As observed earlier, the petitioner disbursed an amount of Rs.70,00,000/- as Security Deposit in terms of the Agreement dated



25.03.2019, which was valid for a period of 01 year. This implies that the Petitioner was entitled to receive interest payment only for up to 1 year. Since the rate of Interest as per the aforesaid Agreement was agreed upon as 1% per month, therefore, we would like to calculate the amount of interest receivable @12% per annum by the Petitioner. Accordingly, the interest amount payable comes to the tune of (Rs.70,00,000 x 12 x1 / 100) Rs.8,40,000/-. When we add to this, the principal amount of the security deposit of Rs.70,00,000/- deposited by the Petitioner with the Respondent, the total amount of the unpaid Financial Debt i.e., principal + interest comes to Rs.78,40,000/- only, which is when we have not deducted the part payment on account of interest/commission made by the Respondent to the Petitioner.

21. In view of the above, the maximum financial debt entitlement of the Petitioner comes to Rs. 78,40,000/- only, which is less than the minimum threshold amount prescribed under Section 4 of IBC 2016, therefore, **we find that the present petition is not maintainable. Accordingly, the Petition is dismissed.**

22. Before parting with the Judgement, we would however like to observe that in such matters where the category and the quantum of debt are ambiguous, the Record of Default of Information Utility cannot be taken as gospel truth. Though the “Record of Financial Information” of the Information Utility revealed a default of a “Financial Debt” amounting to Rs.1,11,63,151/-, we could find that the amount of Financial Debt at



the most could be Rs 78,40,000/- only and the amount claimed as “commission on sale” is not a Financial Debt.

23. We further observe that the earlier Petition -(IB) No. 88/ND/2021 filed by the Petitioner for the same cause of action/transaction was dismissed on the ground of not meeting the threshold in terms of Section 4 of IBC, 2016 and the Petitioner has again filed the present petition by inflating its claim without any justification as noted in Para 11 above, we consider it appropriate to impose a cost of Rs 1,00,000/- (one lakh) only to be deposited by the Petitioner in the Prime Minister’s Relief Fund within 15 days of this order. The receipt of the deposit shall be uploaded on the DMS of this Tribunal under intimation to the Registrar/ Court Officer.

24. A copy of this order be supplied to the parties. A copy may also be sent by the Court officer to IBBI as well as NeSL – the Information Utility.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)