

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-IV

Company Petition No. (IB)-127 (ND)/2021

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Shivam Agriols Private Limited

... APPLICANT/FINANCIAL CREDITOR

Vs.

Shree Krishna Vanaspati Industries Private Limited

...RESPONDENT/CORPORATE DEBTOR

Coram:

SHRI. DHARMINDER SINGH, Hon'ble Member (Judicial)

MS. SUMITA PURKAYASTHA, Hon'ble Member (Technical)

Order Delivered on: 20.06.2022

ORDER

PER: SHRI DHARMINDER SINGH, MEMBER (JUDICIAL)

The Shivam Agriols Private Limited has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent Company M/s. Shree Krishna Vanaspati Industries Private Limited, referred to as the corporate debtor.

- Sd -



2. Briefly stated that the applicant Shivam Agriols Private Limited is a company registered under the Companies Act, 1956 on 09.05.2012 with the registered office situated at 1/22, 2nd Floor Asaf Ali road, New Delhi-110002. Mr. Puneet Kumar Agarwal, duly authorized on behalf of applicant vide Resolution dated 12.01.2021 has preferred the present application on behalf of the applicant for initiation of insolvency resolution process against the respondent under the Code. The Respondent Company M/s. Shree Krishna Vanaspati Industries Private Limited (CIN No. U15141DL2004PTC126025) against whom initiation of Corporate Insolvency Resolution Process has been prayed for was incorporated on 23.04.2004 having its registered office situated at 221 2nd Floor, Munish Plaza 20, Anshari Road, Daryaganj, New Delhi-110002. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.
3. The case of the applicant precisely is that the corporate debtor had availed financial facility from the financial creditor, for its financial necessities and the corporate debtor has agreed to repay the amount, but the corporate debtor has defaulted in payment of the said loan. Therefore, as per part IV of the application it is claimed that a sum of

-sd-



Rs. 10,46,00,000 /- (Indian Rupees Ten Crores Forty-Six Lakhs only) is due and payable by the respondent company.

4. The applicant has placed following documents and submissions on record to prove its claim:-

- i. The financial Creditor stated that they have agreed to repay the loan that Corporate Debtor owned to SBI and to take the possession of the subject property.
- ii. Copy of agreement to sell dated 19.03.2016.
- iii. Copy of the bank statements of financial creditor and corporate debtor reflecting payment of Rs.2.50 Crores between 13.12.2014 and 22.12.2014.
- iv. Copy of the bank statements of financial creditor and corporate debtor reflecting payment of Rs.7.96 Crores between 21.01.2015 and 08.01.2016.

5. Notice by the Authority was issued to which the Corporate Debtor has filled his reply stating herein certain facts stated below:-

- i. The land in which the Corporate Debtor was carrying manufacturing activities was allotted by the State Industrial Development Corporation of Uttarakhand Limited (SIDCUL) on lease for periods of 90 years vide registered lease deed dated 11.02.2007.
- ii. The Corporate Debtor further states that they wished to sell the unit along with the leasehold




rights in the land with due permission from SIDCUL to which the applicant agreed to acquire the same by way of MoU executed on 25.11.2014. The MoU signed between the parties have clearly captured that the unit is under charge and mortgaged with the SBI.

- iii. Corporate Debtor states that they were under negotiations for the liquidation of its liabilities with the SBI by way of “one time settlement” proposal vide letter dated 11.12.2014 and the same was accepted by SBI vide letter dated 12.01.2015.
- iv. The Corporate Debtor and the Applicant again entered into a new MoU dated 02.03.2016. The Corporate Debtor submits that the MoU executed between them time and again but the dues of the SBI were not liquidated.
- v. The Corporate Debtor further submits that there are sets of litigation pending before the Competent Court of Law i.e. the Applicant has filed an application under Section 11 of Arbitration and Conciliation Act, 2016 for the appointment of the Arbitrator before the Hon’ble High Court of Uttrakhand and also a complaint is also preferred by the Applicant herein before the Economic Offence Wing, New Delhi against the Corporate Debtor.

-Sd-



- vi. The Corporate Debtor submits that the Amount was due to be paid in terms of the performance need to be adhered as stated in the MoU dated 25.11.2014 signed between the parties and not in respect of consideration as agreed under agreement to sale dated 19.03.2016. Further, the validity and implementation of the said MoU stands expired due to non-performance of the Condition as contained in clause 3 of the MoU.
- vii. The Corporate Debtor further states that the instant Application is barred by limitation as the default arising out of MoU dated 25.11.2014 and the payments were made from 2014 to 2016. The Ld. Counsel for the respondent has relied upon the Judgment of the Hon'ble Supreme Court in the case of "**Gaurav Hargovind Bhai DAVE V. Asset Reconstruction Compnay (India) Ltd. & Anr.**" In the Civil Appeal No. 4952 of 2019, wherein it was specifically held that the application under Section 7 of IBC would fall within the purview of Article 137 of the Limitation Act and the time of three years begins to run from the date of default and no new life would be given to the time-barred debts.
- viii. The Corporate debtor also alleges that the disputes raised by the petitioners are purely contractual



disputes and cannot be adjudicated by this Hon'ble Tribunal under Section 7 of the code in summary proceedings. Further, it's been stated that the disputed amount here cannot be treated as debt in the eyes of the laws and the applicant could have recourse to arbitration mechanism or remedies available in the civil law before the competent court for their alleged claims and to prove this contention the Ld. Counsel had relied on the Order passed by Hon'ble NCLT, Mumbai in the case of "**Sujata Shekhar Shah v. Mirador Construction Pvt. Ltd.**"

6. The financial creditor has filled rejoinder reiterating the facts of the Application and stating the following:-

- i. The Corporate Debtor has raised money from the Applicant for its financial necessities by entering into an agreement for forward sale dated 19.03.2016 of a factory situated at Plot No. 6A, Sector-1, Pant Nagar, Industrial Estate, Rudrapur, Udham Singh Nagar, Uttrakhand after the clearance of the loan from the SBI.
- ii. Applicant states that they were informed by the Corporate Debtor that due to non-payment of loan, the subject property had become a subject matter of proceedings under the SARFAESI Act and the said proceedings were initiated by the SBI.





- iii. Applicant further stated that the subject property was released from the SBI on 08.04.2019 and the charge of the same was given to the Corporate Debtor. Further, the Corporate Debtor had failed to conclude the sale/purchase transaction in favour of the Applicant.
- iv. The Applicant has relied on various case laws to support their contentions.

7. We have heard Ld. Counsels for both the parties and perused the averments made in their application, reply, rejoinder as well as written submissions. Needless to say, that an application under Section 7 of the Code is maintainable, if the debt is proved to be due and there is default. 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?

8. In order to decide the above issue, it is necessary to read the definition of financial debt, which is laid down under section 5(8) of the code , the same follows:

"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-materialized 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;

3[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;

9. It is the contention of Respondent that the Applicant Company herein is not a Financial Creditor as per the definition u/s 5(7) of the Code and also there is no financial debts owned by the Corporate Debtor, as herein Applicant has only failed to perform their part of the agreement by not paying the remaining balance sale consideration to the Corporate Debtor. In support of the above contention respondent has relied on Judgments passed by the Hon'ble Supreme Court, which are extracted below:-

-sd-



- **“Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. C. Appeal (AT)(INS) No. 1011 of 2019 (S.C)”** held as follow:

“Financial creditors are those creditors to whom a financial debt (i.e., a debt where the creditor is compensated for the time value of the money lent) is owed.”

- **“Transmission Corporation of A.P. Ltd. Vs. Equipment Conductors and Cables Ltd. Civil Appeal No. 9597 of 2018(S.C)”** held as follow:

“a debt can be known as an operational debt only when there is no dispute regarding the amount in question. It is only after the concluding adjudication in case of the disputed amount that a debt can be considered as an operational debt”.

10. It is also settled position that the amount to be constituted under ‘financial debt’ should be disbursed against time value of money and must have commercial effect 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.*** The definition of Financial Debt as laid down under the code 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. MoUs entered between the parties on two occasions i.e. 25.11.2014 and 02.03.2016 and various other documents and balance sheets relied upon by the Applicant makes it abundantly clear that there is no interest payable on the loan advanced by the Applicant. 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. Further, the applicant himself failed



to fulfil its own obligation and did not make the payment of the amount as settled.

11. No doubt, on 08.04.2019, the respondent paid the amount of the bank afterwards under 'Amnesty scheme' and got released his property, but the same was got done after lapse of approximately three years of the memorandum of understanding entered into between the applicant and respondent on 02.03.2016. The earlier agreement dated 25.11.2014 was purely to purchase the property, which was mortgaged with the bank. Apart that, there was no tri-pritate agreement, although, the amount of Rs 10.40 crores was deposited with the bank. Unless there is tri-pritate agreement entered into between the bank, the respondent & the applicant and the entire payment was made by the applicant, no such right would accrue to the applicant herein to enter into the shoes of State Bank of India (Financial creditor). There was long breach of obligation on the part of the applicant herein. Hence, the said amount Rs. 10.40 Crores advanced by the applicant and paid to the bank for the purchase of the mortgage property does not come under the purview of financial debt merely that the same was entered into the balance sheets of the respondent as other long-term liabilities.

12. In the light of the above discussion, we have no hesitation in holding that the aforesaid amount claimed in the present application does not fall under the definition of financial debt and the said Petition is liable to be dismissed. Since, the said Application is being dismissed on the very



nature of the claim, the other contentions raised by the Corporate Debtor with regard to the limitation are not dealt with.

13. Accordingly, the present Application under section 7 of the code stands dismissed, with no order to cost. However, the above order does not preclude the Petitioner from initiating necessary legal proceedings for recovery of the amount, if the law so permits.

Copy of the present order be served upon the parties concerned.

File be consigned to records.

-sd-

(SUMITA PURKAYASTHA)

MEMBER (T)

-sd-

(DHARMINDER SINGH)

MEMBER (J)

Pronounced today under Rule 151 of the NCLT Rules, 2016 as the Hon'ble Member (Technical) Ms. Sumita Purkayastha is not holding the court today.

Vishal Rana
20-06-2022
Court Officer