NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)

PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 04.04.2022 AT 10.30 AM

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP(IB) No.78/7/AMR/2020		7 of IBC	Raghav Bhartia Vs Circar Jute Mills Pvt Ltd

Counsel for Petitioner(s):
Ries

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):
Ries

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

CP(IB) No.78/7/AMR/2020 is admitted, vide separate orders.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT HYDERABAD

CP (IB) No. 78/7/AMR/2020

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. CIRCAR JUTE MILLS PRIVATE LIMITED

BETWEEN:

Raghav Bhartia,
R/o. 2nd Floor, I-13,
Lapat Nagar, Part -3,
New Delhi -1100024

... Financial Creditor

AND

M/s. Circar Jute Mills Private Limited,
N.H.5, Bapulapadu Mandalam,
Kodurupadu Village,
Krishna District, AP -521110

... Corporate Debtor

Date of pronouncement of orders: 04.04.2022

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Operational Creditor : Mr.Sindhu Sinha, Advocate.

For Corporate Debtor : Mr.Vinod Kapur, Advocate

ORDER

1. This Application is filed by Mr.Raghav Bhartia ("hereinafter referred to as Financial Creditor") seeking this Tribunal to initiate Corporate Insolvency Resolution Process (CIRP) against M/s. **Circar Jute Mills Private Limited** ("hereinafter referred to as Corporate Debtor") on the ground that the Corporate Debtor has failed to discharge the debt which is due to the Financial Creditor.

2. The facts briefly, as per the synopsis submitted by the Financial Creditor, are as follows:

   a) The Corporate Debtor is a Company, whose shareholding is held by the Bhartia family members and the Financial Creditor. The mother and brother of the Financial Creditor are also Directors of the Corporate Debtor, apart from having its shareholdings.

   b) The Corporate Debtor had borrowed funds from Punjab National Bank (PNB) in the form of a short term loan, against which short term borrowing the Corporate Debtor had, amongst other security, provided guarantee from Save Prospers Ltd., which is also a Bhartia family Company. Against the aforesaid short term borrowing from PNB, Save & Prospers Ltd., had mortgaged one of its immovable properties which is a house in New Delhi.

c) In order to settle the debt of PNB on behalf of the Corporate Debtor, under a One Time Settlement (OTS), an initial amount of Rs.70,00,000/- was paid by the Corporate Debtor to PNB in early 2016. Subsequently, in 2017, to give effect to the said OTS of the Corporate Debtor with PNB, two documents were executed and acted upon by and between the shareholders of the Corporate Debtor and Save & Prospers Ltd. The first document created a right in favour of the Financial Creditor and the second document created a liability against the Financial Creditor on behalf of Corporate Debtor. The model adopted for the repayment of loan on behalf of the Corporate Debtor was to use a part of the sale proceeds (from the sale of shares of Save & Prospers Ltd.) for paying off PNB.

d) On the instructions of the aforesaid mother and brother of Financial Creditor and with a view to clear the books of Save & Prospers Ltd., the liability of Save & Prospers Ltd under the aforesaid model was assumed by the shareholders of Save & Prospers Ltd., to thereby repay the debt taken by the Corporate Debtor, the aforesaid first document being a Share Purchase Agreement dated 22.07.2017 was entered into by and between One Puran Associate Pvt. Ltd., i.e., the Purchaser of the shares of Save & Prospers Ltd. Save & Prospers Ltd., and the aforesaid mother and brother of the Financial Creditor and Financial Creditor. The total sale consideration paid by Puran

Associates Pvt Ltd., in lieu of purchase of 99.83% of shares of Save & Prospers Ltd under the said Share Purchase Agreement dated 22.07.2017 was INR 118 Crores. A copy of the share purchase agreement dated 22.07.2017 is annexed herewith as Annexure-I.

e) The shareholding of Save & Prospers Ltd., admittedly at the relevant time of sale of share of Save & Prospers Ltd., was as follows:

Sl.No.	Name of the Shareholder	No. of Shares	Shareholding (%)
1	Mr.Pratyush Bhartia (Deceased father of the FC)	15,100	3.755
2	Mrs.Manju Bhartia (Mother of the FC)	2,38,000	59.5
3	Mr.Gaurang Bhartia (Brother of the FC)	13,000	3.25
4	Mr.Raghav Bhartia (FC)	1,33,200	33.3
TOTAL		**3,99,300**	**99.805**

f) In view of the model adopted by the aforesaid parties for the repayment of the loan taken by the Corporate Debtor to PNB, the second document so executed was a Memorandum of Understanding (MoU) dated 24.07.2017 agreeing that out of the sale consideration amount of Rs.118 Crores to be paid by Puran Associates Pvt. Ltd., towards the shares of the Financial Creditor and the mother and brother of the Financial Creditor, a sum of Rs.14,78,82,769/- was agreed to be paid directly by

Puran Associates Pvt. Ltd., to PNB towards the OTS between the Corporate Debtor and PNB.

g) In terms of the Share Purchase Agreement Dated 22.07.2017, Puran Associates Pvt. Ltd., had to also pay Rs.39,36,29,000/- to the Financial Creditor towards purchase of his 33.3% shares in Save & Prospers Ltd.

h) Since the above named Financial Creditor held 33.3% shares in Save & Prospers Ltd., the sum of Rs.4,93,31,292/- became the Corporate Liability of the Financial Creditor on behalf of the Corporate Debtor under the guarantee given by Save & Prospers Ltd to PNB, which amount was paid by Puran Associates Pvt. Ltd., to PNB directly from the share value of the above mentioned Financial Creditor in lieu of the aforesaid OTS between the Corporate Debtor and PNB. Payments were made to the PNB and a letter was issued by the PNB dated 25.07.2017 stating that the account of the Corporate Debtor stands closed through a compromise under the equitable mortgaged properties.

i) After having paid the aforesaid proportionate value of the OTS from the share of the Financial Creditor to PNB for clearing the debt and dues of the Corporate Debtor, the Financial Creditor in terms of the said two documents has to recover the said sum of Rs.4,93,31,292/- from the Corporate Debtor and hence they became a debt due and payable by the Corporate Debtor to the Financial Creditor. Out of the total sales consideration they have paid a sum of Rs.14,78,82,769/- to PNB for clearing all dues of the Corporate Debtor and accordingly a payment of Rs.4,93,31,292/- was adjusted against the consideration of the Financial Creditor towards the money paid to PNB in proportion to their shareholding in Save & Prospers Ltd.

j) The Financial Creditor has earlier also demanded the payment of Rs.4,93,31,292/- but in vain. Hence a legal notice was issued on 19.02.2019.

k) Apart from the above said amount, the Financial Creditor also has to recover a sum of Rs.28,27,000/- from the Corporate Debtor. Mr.Pratyush Bhartia in the capacity of a Director of the Corporate Debtor, had in the year 2016, taken a debt of Rs.70,00,000/- on interest from his close friend Mr.Ravi Jhunjhunwala with a view to repay the debt of PNB taken by the Corporate Debtor, since none of the Directors had any money to pay at the relevant time. This was being planned by Mr.Pratyush Bhartia since at the relevant time the Corporate Debtor was receiving SARFAESI Notices in respect of Jor Bagh Property. Such amount was paid as an advance amount. The said loan of Rs.70,00,000/- was incurring interest as per the terms of the MoU and as such the Bhartia family members decided to pay off the additional interest to Mr.Ravi Jhunjhunwala. The loan of Rs.70,00,000/- along with interest totalled to Rs.84,82,000/-.

l) Bhartia family cumulatively decided to clear the additional loan on behalf of the Corporate Debtor. The Financial Creditor paid a sum of Rs.28,27,000/- to the Corporate Debtor on 01.08.2017 by RTGS transfer. The mother and brother of the Financial Creditor pooled the amount and paid to the Corporate Debtor. In furtherance of the understanding, the Corporate Debtor paid the additional loan of Rs.70,00,000/- with interest to ML Finlease Pvt Ltd vide RTGS transfer. The Financial Creditor vide demand notice dated 02.12.2019, requested the Corporate Debtor to repay the debt with interest. A reply notice is issued by the Corporate Debtor which is vague but has specific admissions of the liabilities. Hence this Petition, seeking to initiate CIRP.

3. The Corporate Debtor filed counter, contending that this Petition filed by the Financial Creditor is contrary to the terms of the family settlement arrived at, between Bhartia family members including the Financial Creditor. The Financial Creditor did not file the copy of Memorandum of Family Settlement (MoFS) and supressed the same. The terms of MoFS make it crystal clear that no amount is repayable by the Corporate Debtor on demand. The Corporate Debtor took loan amount from PNB securing the same with the

Ravi

property at New Delhi. Thereafter, Financial Creditor and Mr.Gaurang Bhartia, Mrs.Manju Bhartia and Late Mr.Pratyush Bhartia had entered into an oral family settlement on 03.04.2017, as the Financial Creditor was desirous of separating from his parents and the same was recorded in writing vide MoFS dated 18.07.2017, which was entered into after full discussion and consent of all the parties. It was specifically agreed that Financial Creditor wished to separate from the joint family and wanted to take his $1/3^{rd}$ share in the entire ancestral properties and balance $2/3^{rd}$ share would belong to the 2^{nd} and 3^{rd} party jointly along with assets and liabilities. By virtue of the MoFS, Financial Creditor who owned only 2.93% of the shares of Save & Prospers Ltd., was gifted 31% shares of the Company without any consideration. After MoFS, entire shareholding of Save & Prospers Ltd., a Bhartia Family Company and sister concern of the Corporate Debtor was agreed to be sold to one Puran Associates Pvt. Ltd., in terms of MoU, draft of which was part of the MoFS. It was mutually agreed in the MoFS that the parties would share the assets and liabilities of the Companies in the agreed proportions amongst each other and that the shares of Save & Prospers Ltd along with its assets will be sold to the purchaser who agreed to advance monies to pay off debts of PNB to get the release of equitable mortgage against the property in New Delhi owned by Save & Prospers Ltd. Pursuant to MoFS, MoU for sale of shares of Save & Prospers Ltd., to Puran Associates Pvt Ltd, was executed on 24.07.2017 and undated Share Purchase Agreement for the sale of shares of Save & Prospers Ltd., along with other documents were also executed and kept with Escrow Agent Mr.Rajiv Bhatnagar. In the MoFS, it was further agreed that the loan taken from Mr.Ravi Jhunjhunwala shall also be returned by the parties and that the parties shall receive the consideration in respect of their respective shareholding, after deduction of liabilities. Thus, it is clear from the terms of MoFS that the liabilities of the Corporate Debtor, shall be paid off first by late Mr.Pratyush Bhartia, Mrs.Manju Bhartia and Mr.Gaurang Bhartia jointly towards their $2/3^{rd}$ share and Mr.Raghav Bhartia towards his $1/3^{rd}$ share from the sale proceeds of the shares of Save & Prospers Ltd., and then only balance sale proceeds, after clearing the liabilities, will be divided amongst them. The parties to MoFS discharged their liability towards PNB from the sale proceeds of shares of Save & Prospers Ltd. In view of clear understanding of the terms of MoFS, the Financial Creditor is not entitled to any amount from the Corporate Debtor and would only be entitled to claim any amount from the sale proceeds of the Corporate Debtor after discharge of its liability in agreed proportion. The assets of the Corporate Debtor are admittedly still unsold due to various issues which are pending, which is to the knowledge of the Financial Creditor, who is intentionally not coming forward to share his liability towards his $1/3^{rd}$ share in the Corporate Debtor and on the contrary he has filed the present Application. Thereafter the contentions are mere replication of already stated facts. On the above grounds, the Corporate Debtor seeks to dismiss the petition.

4. Heard both sides and perused the written submissions. From the pleadings and the arguments, the points that emerge for consideration of this Tribunal are as follows:

   I. Whether there is any financial debt extended by the Financial Creditor to the Corporate Debtor.

   II. Whether the debt has become due and whether the Corporate Debtor has failed to discharge the debt due to the Financial Creditor.

   III. To what result.

I. Whether there is any financial debt extended by the Financial Creditor to the Corporate Debtor.

The amount which was given by the Financial Creditor is towards the discharge of the loan of the PNB. There was an MoUF executed between the parties on 18.07.2017. The Financial Creditor is shareholder in the Corporate Debtor and is also a shareholder in Save & Prospers Ltd which stood as guarantee to the loan taken by the Corporate Debtor from PNB. The Save & Prospers Ltd has mortgaged one of its properties towards the loan, which is a house in New Delhi.

The Save & Prospers Ltd wanted to sell the property in furtherance of a family settlement dated 18.07.2017 and entered into a Share Purchase Agreement dated 20.02.2017 with one Puran Associated Pvt Ltd., for sale of 99.83% of the total paid up capital of Save & Prospers Ltd for a consideration of Rs.118 Crores. An MoU was entered into dated 24.07.2017 and out of the sum of Rs.118 Crores payable by Puran Associates, a sum of Rs.14,78,82,769/- was agreed to be paid to PNB towards an OTS which was entered into between the Corporate Debtor and the PNB. An initial amount of Rs.70 Lakhs was to be paid by the Corporate Debtor to PNB and the same was borrowed from one Mr.Ravi Jhunjhunwala along with interest which grew to an amount of Rs.84,82,000/- which was admittedly returned by the Directors of the Corporate Debtor on behalf of the Corporate Debtor and the Financial Creditor as his part of the share has transferred Rs.28,27,000/- through RTGS. The sum of Rs.4,93,31,292/- paid by the Puran Associates out of the sale proceeds of the shares of Save & Prospers Ltd, which were to be received by the Financial Creditor from Puran Associates was paid on behalf of the Corporate Debtor and it became a loan to the Corporate Debtor. As such both the amounts of Rs.4,93,31,292/- and Rs.28,27,000/- became a debt from the Financial Creditor to the Corporate Debtor, this is the amount that is claimed in the claim petition.

The Counsel for the Corporate Debtor contends that the said amounts are agreed to be paid to the Financial Creditor by sale of the properties as mentioned in the MoUF and hence this Petition is not maintainable till the Corporate Debtor fails to pay the amount even after the sale of the properties and hence the claim amount does not qualify for a financial debt. In answer to the said contention, the Counsel for the Financial Creditor relies on a judgment of the ***NCLAT, New Delhi*** in ***CA (AT) (Insolvency) No.616 of 2018 between Shailesh Sangani vs. Joel Cardos & Anr.***, wherein the facts are that Respondent No.1 therein, claiming to be a shareholder of Respondent No.2 (Corporate Debtor) filed an Application under Section 7 of IBC, 2016 on the ground that Respondent No.1 had granted unsecured loan repayable on demand from time to time to the Corporate Debtor. Corporate Debtor raised a plea that there were crossholdings inter-se the Respondents in various companies and the amount so arrived at was a settlement amount which had not ended in compliance of mutual obligations between the parties and that the unsecured loan was a part of overall settlement and it was ready to settle the crossholding of shares and loans inter-se the Respondents. It was also contended that none of the loans under the quasi partnership arrangement inter-se the Respondents had any term for repayment or interest. The Adjudicating Authority found that the contention of the Corporate Debtor is not tenable as the factum of amount advanced as loan was admitted and reflected in the accounts and confirmed by the Corporate Debtor and that the amount was arrived at after the parties mutually agreed and the same was reflected in the books of the Corporate Debtor under the head 'long term borrowings' and that the amount of debt fell within the purview of financial debt, notwithstanding the fact that no interest was payable.

The argument of the Corporate Debtor therein was that there was no time value of the money in the transaction and no consideration for the time value of money was agreed between the parties. Respondent No.1 therein argued that he had provided monies to the Corporate Debtor by way of interest free unsecured loans, part of which stands repaid by the Corporate Debtor and the balance is reflected in the balance sheet of the Corporate Debtor as unsecured loan and by way of confirmation of accounts, the Corporate Debtor has admitted the outstanding loan amount. It is also argued that interest is not the mandatory factor to determine the nature of debt. The NCLAT after considering the submissions made by either side, held that the use of expression 'if any' as suffix to 'interest' as per Section 5 (8) of IBC 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 debt against the consideration for 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. It was observed that Clauses (a) to (i) of Section 5 (8) embody the nature of transactions which are included in the definition of 'financial debt'. Clause (f) of Section 5 (8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing, which also includes a forward sale or purchase agreement. It was held that the money advanced by a promoter, director or a shareholder of the Corporate Debtor as a stakeholder, to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the part of the Corporate Debtor, notwithstanding the fact that no provision is made for interest thereon. It was observed that 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 stakeholder 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 interest 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 ensures 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 obligation on the part of Company to discharge the same. It was held that viewed thus, it can be said without any amount of contradiction that in such cases, the amount taken by the Company is in the nature of a Financial Debt.

The facts in this case are also almost similar. It is in order to overcome the crisis of the Corporate Debtor, that the amounts were advanced by the Financial Creditor. There is no dispute raised in the reply notice with regard to the Corporate Debtor being due the claim amount to the Financial Creditor. The only contention is that unless the obligations under the MoUF are fulfilled, the Financial Creditor does not get a cause of action for filing this Petition. In the light of the above discussion, it can be concluded that the debt due to the Financial Creditor is a financial debt.

II. <u>Whether the debt has become due and whether the Corporate Debtor has failed to discharge the debt due to the Financial Creditor</u>.

As per the MoUF undisputedly, the amounts due to the Financial Creditor have to be paid by selling properties. As already observed, the MoUF was entered into as far back as on 18.07.2017. The Corporate Debtor failed in proving the efforts, if any, made by them to sell the properties. The contention is that the Financial Creditor is not cooperating for selling the properties. But there is no semblance of evidence brought before this Tribunal in that regard. In the first place, no evidence that the Corporate Debtor made efforts to sell the properties is brought forth and in the next place, no evidence that the Corporate Debtor has hurdled the said efforts is brought forth.

The Counsel for the Corporate Debtor submits that a case is pending before the DRT, which is filed by the lender banks of the Corporate Debtor and the same is under challenge before the High Court of AP and DRT, Vishakhapatnam. The Counsel submits that the properties are under attachment before the DRT and if the same are sold, the debt due to the Financial Creditor can also be discharged.

A statement with regard to the liabilities was filed. The value of the assets was orally stated to be Rs.40 Crores. The liabilities as on 31.03.2017 was stated to be Rs.28.96 Crores which can be taken as Rs.29 Crores approximately. Interest is not included in the said amount as the same is not yet finalized. Hence, the amount of Rs.29 Crores will be increased by addition of the interest which is not yet calculated. The debt due to the Financial Creditor herein is more than Rs.5 Crores. The assets of the Corporate Debtor were taken by the Bank of Baroda and were tried to be sold, at which point of time the Corporate Debtor approached the Debt Recovery Tribunal by way of S.I.No.158/2021. As to when the issues before the DRT would be resolved is not known. When it is proved that there is a debt due to the Financial Creditor and that the properties as agreed in the MoUF were not sold and no efforts were made to sell the same till Bank of Baroda has taken possession of the said assets, the Financial Creditor cannot be told to wait till the proceedings before the DRT get finalized. As to what would be the fate of the said proceedings and what would be the amount of debt by the date the proceedings would come to an end, is also not clear. From the fact that all the assets of the Corporate Debtor are attached by the Bank of Baroda and about to be brought to sale the financial position of the Corporate Debtor also can be understood.

The Counsel for the Corporate Debtor contends that since, there is no time limit mentioned in the MoUF no cause of action arises for the Financial Creditor to file this Application. The Counsel for the Financial Creditor opposes the said contention by relying on the judgement ***of High Court***

of Delhi in RFA No.153/2004 between S.H.Virender Kumar Jain Vs. M/s.Alumate (India) Private Limited, wherein it was held that the suit of the appellant therein cannot be barred by the limitation in as much as averments in the plaint show that the loan was given without fixing any date of repayment. It was held that once that is so, the loan would be a loan which would be payable on demand. Hence, in this case since demand is made, the loan becomes due from the date of demand and since the Corporate Debtor failed to discharge the loan, the cause of action for the Financial Creditor arises to file this application.

Since, the amount due to the Financial Creditor has qualified as a financial debt and as the Corporate Debtor failed to discharge the said debt inspite of a demand notice and as there is no dispute with regard to the debt due to the Financial Creditor and as the pendency of the application before the DRD does not amount to the pre-existing dispute between the parties, this Petition has to be admitted.

III. To what result:

In view of the findings under the point No. I to II the Petition is admitted. The Corporate Insolvency Resolution Process of the Corporate Debtor shall commence from this date and shall be completed within 180 days hence.

ORDER

i. Mr. Ajay Kumar Jain, **(Registration No. IBBI/IPA-002/IPN00415/2018/11188);** having office at E-15/209, Sector-8, Rohini, New Delhi -110085; e-mail: **ajayjain721@gmail.com**; Mobile: +91 9811045969 is appointed as the Interim Resolution Professional. No disciplinary proceeding is pending against him as per the IBBI website.

ii. He is directed to take charge of the Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of Code and Rules made thereunder.

iii. Moratorium in respect of the Corporate Debtor is hereby declared in terms of Section 14 of the Code.

iv. The Directors, Promoters or any other person(s) associated with the management of Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 of the Code for effectively discharging his functions under the Code.

v. The Registry shall communicate the order to the Operational Creditor and the Corporate Debtor forthwith.

vi. The Operational Creditor and the Registry shall send the copy of this order to IRP for necessary compliance.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu