

**IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI**

**CP (IB) No. 4020/MB/2019**

*[Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]*

IN THE MATTER OF:

**VRG HEALTHCARE PRIVATE LIMITED**

[Presently Meditrina Institute of Medical Sciences]

[CIN: U55101MH2006PTC166304]

**Registered Office:** Plot No. 278

Central Bazaar Road, Ramdaspath

Nagpur, Maharashtra-440011.

**...Financial Creditor**

V/s

**POLYPET FLEXIBLE PACKAGING PRIVATE LIMITED**

[CIN: U25200MH2005PTC152894]

**Registered Office:** Plot No. M-4

MIDC Industrial Area, Hingna

Nagpur, Maharashtra-440016.

**...Corporate Debtor**

Pronounced: 05.03.2024

**CORAM:**

**HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)**

**HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)**

***Hearing: Hybrid***

**Appearances:**

Financial Creditor: Adv. Nitiraj Shirke, i/b Adv. Kunal R. Kumbhat

Corporate Debtor: Adv. Indrajeet Hingane

**ORDER****[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]****1. Background**

1.1. This Company Petition bearing C.P. (IB) No. 4020/MB/2019 (Application) was filed on 25.07.2019 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules) by VRG Healthcare Private Limited [now Meditrina Institute of Medical Sciences], the Financial Creditor (FC), through Mr. Samir Paltewar, Director of the FC, authorised *vide* Board Resolution dated 24.06.2019, for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Polypet Flexible Packaging Private Limited, the Corporate Debtor (CD).

1.2. The total amount of default involved is Rs. 10,17,500/- (Ten Lakhs Seventeen Thousand Five Hundred Rupees) comprising of the principal amount of Rs.5,00,000/- along with interest of Rs. 5,17,500/- calculated by the FC at the rate of 18% per annum from 14.10.2013 till 25.07.2019 (date of filing), which is based on unsecured loan given to the CD by the FC on 14.10.2013. This date is mentioned as the date of default in Part IV of the Application.

**2. Contentions of FC**

2.1. It is submitted that the FC is engaged in the business in healthcare sector while the CD is engaged in the business of manufacturing packaging materials. Incorporated in 2006, the FC had started operation of a hospital in

Nagpur by the name "Meditrina Institute of Medical Sciences" since 2012. Mr. Arun Amidwar was the FC's Director and shareholder till 19.07.2016, while his son, Mr. Nikhil Arun Amidwar hold the position as Director and shareholder in the CD from 29.05.2005 until today.

2.2. From 2006 to 2017, Mr. Ganesh Chakkarwar was the Chairman and Managing Director (CMD) of the FC. On 02.06.2011, an amount of Rs. 10,00,000/- (Ten Lakh Rupees) was advanced by the FC to the CD, in which Mr. Nikhil Amidwar, son of Mr. Arun Amidwar was a Director. Another amount of Rs. 5,00,000/- (Five Lakh Rupees) was advanced to the CD as unsecured loan by the FC on 14.10.2013, which is the subject matter of the present Application.

2.3. Mr. Arun Amidwar took advantage of his dominating position in both the FC and CD companies and influenced advancing the amount of Rs. 15,00,000/- without prior approval of FC's Board of Directors. Though the loan amount was never repaid to the FC by the CD, an amount of Rs. 10,00,000/- was subsequently adjusted against the accounts of Mrs. Mayuri Chakkarwar, daughter of the then CMD, Mr. Ganesh Chakkarwar. However, neither the loan disbursement of Rs. 15,00,000/- nor the subsequent adjustment was done with prior approval of Board of Directors of the FC.

2.4. The Ld. Counsel for the FC submitted that both Mr. Arun Amidwar and Mr. Ganesh Chakkarwar resigned from their respective positions in the FC as Director and CMD respectively on 24.11.2017. After Mr. Sameer Paltewar took over charge as new CMD of the FC, he found various discrepancies in the FC's balance sheets and accounts regarding unsecured loans advanced

to companies, including the CD, during the tenure of the former CMD, Mr. Ganesh Chakkarwar.

2.5. It was further submitted by the Ld. Counsel for the FC that *vide* letter dated 19.01.2019, the FC sought payment of Rs. 9,74,164/- from the CD, which includes the principal amount of Rs. 5,00,000/- along with the interest at the rate of 18% per annum up to 19.01.2019. However, the CD neither replied to the said letter nor repaid the amount to the FC.

2.6. The FC has produced the extract of statement of the its bank account where the amount of Rs. 5,00,000/- was claimed to be disbursed to the CD. The Ld. Counsel for the FC further submitted that the CD had confirmed the receipt of Rs. 5,00,000/- from the FC as unsecured loan and relied upon the audited financial statements of the CD for the financial years (FYs) 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18. He has also brought to our notice a certificate dated 17.07.2019 from Punjab National Bank, showing that the FC did not receive any payment from the CD during the period from 14.10.2013 to 30.06.2019.

### **3. Contentions of CD**

3.1. In its reply, the CD has contested the maintainability of the Application on the following grounds:

- a) The alleged debt cannot be considered as financial debt for the purpose of Section 5(8) of the IBC since the FC failed to prove that the amount advanced to the CD is against time value of money. To substantiate this, the CD relied upon the decision of Hon'ble NCLAT in *Saregama India Ltd. Vs. Home Movie Maker Pvt. Ltd.*, [(Company Appeal (AT)(INS) No.

359/2019, dated 23.10.2019)] as well as the decision of the NCLT Mumbai dated 20.03.2020 in *VRG Healthcare Private Limited Vs. VRG Infrastructure Private Limited*, [CP(IB) No. 4186/MB/2019].

- b) The Ld. Counsel for the CD submitted that the Application is barred on the count of limitation also since the alleged debt was given by the FC to the CD on 14.10.2013, while the FC made its demand for repayment only in 2019 by its letter dated 19.01.2019. During the period from 2013 to 2019, there was no communication from the FC to the CD, demanding any repayment of the alleged loan of Rs. 5,00,000/-. Under Article 137 of the Limitation Act, 1963, the limitation period for filing this Application would be three years from the date of default. The Ld. Counsel for the CD relied upon the Hon'ble Supreme Court's decision in *B.K. Educational Services Private Limited Vs. Parag Gupta and Associates*, [(Civil Appeal No. 23988/2017, dated 11.10.2018)] to buttress this argument.
- c) The FC has indulged in criminal activities and a First Information Report No. 77/2021 was lodged against Mr. Sameer Paltewar, Director of the FC, in Sitabuldi Police Station, Nagpur for allegedly misusing the funds of the FC for his personal use.

#### **4. Analysis and Findings**

4.1. We have perused all the documents and pleadings and heard both the Ld. Counsel for the FC and the CD. Upon perusal of documents, we find that there is no agreement between the FC and the CD relating to the alleged loan. As prayed for by the FC, amendment to Part IV of the Application has been allowed *vide* orders of this Bench in IA 343/2022 on 18.10.2023. However, the same has

not been physically carried out by the FC. On perusal of the prayer in the IA, except change of name of the FC from 'VRG Healthcare Private Limited'. to 'Meditrina Institute of Medical Sciences', the amendments proposed do not have any material or significant effect in Part IV of the Application. The bank statement of the FC shows that the amount as claimed by the FC was transferred to the CD by it. In the Advocate Notice dated 10.01.2019, issued by the FC to the CD, it was alleged that Mr. Ganesh Chakkarwar, the former CMD of the FC had on 14.10.2013, given five lakh rupees as loan to the CD. In the Advocate notice dated 10.01.2019, the FC has alleged that the former CMD of the FC, Mr. Chakkarwar had given the loan to the CD, as the Director of the CD was "*a closed/relative/friend*" of Mr. Chakkarwar and "*for reasons known to him*". It was further alleged that the FC had issued a letter dated 08.12.2018 through Mr. Chakkarwar requesting the CD to return the loan amount.

4.2. Now let us consider the issue as to what constitutes a 'financial debt' under Section 5(8) and who is a financial creditor under Section 5(7) of the IBC. The term "debt" is defined in Section 3(11) as a liability or obligation in respect of a claim which is due and payable from any person. "Claim" is a right to payment or a right to remedy for breach of contract under law, if such breach gives rise to right to payment under Section 3(6) of the IBC. We do not find any debt which is disbursed against the consideration for the time value of money in the instant case. As already settled, in order to qualify as a financial debt, it is necessary that the debt should be disbursed against the consideration for the time value of money under the first part of Section 5(8) of the IBC. The Hon'ble NCLAT in *Saregama India Limited Vs. Home Movie Makers Private Limited* (supra) clearly analysed the essential ingredients that constitute a "financial debt" within the

meaning of Section 5(8). It held that the first essential requirement of financial debt is that there has to be a debt which is disbursed against the consideration for the time value of money and which may include the events enumerated in various sub-clauses of clause (8). The key feature of financial transaction as postulated by section 5(8) is its consideration for the time value of money. The legislature has included such financial transactions in the definition of financial debt which are usually for a sum of money received 'today' to be paid for 'over a period of time' in a single or series of payments in 'future'. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. It is settled that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity has been implied by the opening words of Section 5(8) of the IBC.

4.3. In Part IV of the Application, as amendment allowed, the FC has stated an amount of Rs. 10,17,500/- as the amount of debt and the date of default as 14.10.2013. The audited financial statements of the CD for the FYs 2013-14; 2014 - 15; 2015 -16; 2016 -17; and 2017-18, show unsecured long term loan as received from the FC. It is interesting to note that all the audited financial statements of the CD and the FC for the above FYs have been prepared by the same Chartered Accountant's firm, viz., M/s A.S. Daga & Co. It is seen that the Board Resolution passed by the FC dated 24.06.2019, authorised Dr. Samir Paltewar, Director, to file application to initiate CIRP against the CD. The Resolution is drawn and signed by the same Director, Mr. Sameer Narayan Paltewar (DIN:01085867). This Application is filed by the said Dr. Samir (Sameer Narayan) Paltewar, which is evident from the signatures in the

Application and that of the Board Resolution. The Income-Tax Return of the FC for the FY 2018-19 shows that it is signed by the same Mr. Sameer Paltewar as the Director. In the Application, the stamp of the Chairman/Managing Director of the FC has been affixed. The General Affidavit verifying this Application has been sworn by the said Mr. Samir Paltewar in the capacity as Director of the FC.

4.4. The above clearly show that it is the same Director (Managing Director) who authorised himself by Board Resolution and drawn and signed the Resolution and filed the Application for and on behalf of the FC. The MCA Master Data of the FC shows that Mr. Sameer Narayan Paltewar is the Managing Director, Mr. Ganesh Ramchandra Chakkarwar, and Ms. Sonali Paltewar as the Directors. There is no evidence to show that any special resolution is passed by the FC in its general meeting for advancing any amount as loan to the CD, as mandated under Section 185(2)(a) of the Companies Act, 2013 (Companies Act). If at all any loan is advanced, it is in violation of the provisions of Section 185 of the Companies Act. As the maxim *nullus commodum capere potest de injuria sua propria* implies, no one can make gains from one's own wrong. The FC, who has violated the rights of the shareholders, should not be permitted to take advantage of its own wrong or manipulation. Therefore, we are not inclined to accept the case of the FC that the amount in question was given as a loan to the CD and is a financial debt. Hence, we hold that if at all there is any debt due by the CD to the FC, it cannot be treated as a financial debt within the meaning of Section 5(8) of the IBC, as there is nothing to show that the amount was disbursed against the consideration of the time value of money which is *sine qua non* for a debt to be qualified as a financial debt. The Hon'ble NCLAT

Principal Bench in *Sai Eswara Swamy Vs. Siti Vision Digital Media Pvt. Ltd.* (CA (INS) No. 706/2021) also upheld this position of law. Therefore, this issue is held against the FC.

4.5. As per Part IV of the Application, the amount of five lakh rupees was granted to the CD by the FC by way of loan on 14.10.2013. There is nothing to show that any demand was made by the FC to repay the amount within three years from 14.10.2013. The FC's Advocate's notice dated 10.01.2019, calling upon the CD to return the amount with interest was evidently issued much beyond the statutory period of limitation. Although the said notice refers to a letter issued by the FC dated 08.12.2018, through Mr. Ganesh Chakkarwar, former CMD of the FC requesting the CD to return the amount, no such letter has been produced by the FC. Even if the said letter was produced, the FC's claim would still be barred by limitation under Section 238A of the IBC read with Article 137 of the Limitation Act, 1963.

4.6. When financial debt is found absent and the Application is hit by limitation law, we feel that the FC should not be allowed to take advantage of its own wrong. Since we are of the considered view that remedy for the wrong committed by the FC lies elsewhere and not under the IBC, there is no need to further consider any other pleading or submission by the parties. We are not inclined to initiate CIRP in respect of the CD for the reasons discussed above. Initiation of CIRP has serious consequences for a company and its stakeholders. We are conscious that the NCLT is not a forum for recovery of any debt under the IBC. For debts other than financial debt, CIRP cannot be triggered.

**ORDER**

In the result, CP (IB) 4020/MB/2019 filed by VRG Healthcare Private Limited, the FC, under Section 7 of the IBC read with Rule 4 of the AA Rules, for initiating CIRP in respect of Polypet Flexible Packaging Private Limited, the CD fails and is **rejected**. Consequently, pending IAs/MAs also become infructuous and are accordingly disposed of.

We make it clear that any observation made in this order should not be construed as expressing opinion on merits. The right of the applicant before any other judicial forum shall not be prejudiced on the grounds of dismissal of this Application.

Ordered accordingly.

**Sd/-  
SANJIV DUTT  
MEMBER (TECHNICAL)**

**Sd/-  
K. R. SAJI KUMAR  
MEMBER (JUDICIAL)**

//Tanmay Jain//