

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 2, MUMBAI BENCH**

CP (IB) 1416/MB/2017

and

IA 08 of 2018

In CP (IB) 1416/MB/2017

Under Section 7 of the Insolvency
and Bankruptcy Code, 2016

In the matter of

Sunil Parmanand Kewalramani

2005/6, Stellar Tower,
LokhandwalaComplex,Andheri
(West), Mumbai – 400 053

...Petitioner

v/s.

Kestrel Import & Export Pvt. Ltd.

Unit No. 203, Raheja Plaza, Plot No.
15, CTS No. 844/15/b, Ambivali
Village, Andheri (West), Mumbai-
400 053

... Corporate Debtor

Order delivered on: 30.07.2020

Coram: Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)

Hon'ble Shri. Chandra Bhan Singh, Member (Technical)

Appearance:

For the Petitioner: Mr. Maulik Tanna, Advocate

For the Corporate Debtor: Mr. Pratik Tripathi, PCS

Per: Suchitra Kanuparthi, Member (Judicial)

ORDER

1. The Petitioner, **Mr. Sunil Parmanand Kewalramani** filed this Petition, seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against **Kestrel Import and Export Private Limited** alleging that Corporate Debtor committed default to the extent of Rs. 12,27,523/- as provided under Section 7 of the Insolvency & Bankruptcy Code (hereinafter called "Code") read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. Earlier, two more similar Petitions, i.e., CP (IB) 1414/MB/2017 and CP (IB) 1415/MB/2017, has been filed before this Bench by the same Petitioner(s) against other family owned Companies. It is to be noted that the facts, documents annexed and submissions made by both the parties are almost same/similar in all these Petitions.

Contentions made by the Petitioner:

3. The Counsel for the Petitioners contended that the Petitioner advanced a loan of Rs. 12,60,000/- on various dates to the Corporate Debtor, out of which an amount of Rs. 12,27,523/- is due to the Petitioner by the Corporate Debtor. The Counsel for the Petitioner mentions that the Corporate Debtor acknowledged the amount through the audited financial statements for the year ending 31.03.2016, duly audited by an independent. The Counsel for the Petitioner also submits that the Corporate Debtor has not disputed any part of the said Audited Financial Statements till date. The Petitioners have also annexed various documents such as Ledger Accounts, Bank Statements, Balance Sheet of the Corporate Debtor for the year 2015-16 etc. to prove the existence of financial debt.
4. The Counsel for the Petitioner submits that the Petitioner issued a letter dated 21.08.2017 calling upon the Corporate Debtor to repay the debt due to him. It is further stated that the Corporate Debtor

issued reply dated 04.09.2017 to the Petitioners wherein liability of repayment is not denied.

5. The Counsel for the Petitioner further submits that various other petitions have been filed by the Corporate Debtor against the Petitioner under Section 213, 241 & 242 of the Companies Act, 2013 after the filing of the present Petition under the Code which clearly shows the malafide intention of the Corporate Debtor to frustrate the admission of the present Petition.
6. The Counsel for the Petitioner submits that the Corporate Debtor has failed and neglected to repay the said loan amount to the Petitioner and on the contrary, the claim of the Petitioner is disputed by the Corporate Debtor with malafide intentions and ulterior motives.

Contentions made by the Corporate Debtor:

7. The Counsel for the Corporate Debtor submits that the Corporate Debtor is a family owned Company comprising of 3 brothers holding 1/3 shares of the Company themselves along with their immediate siblings. It is stated that the Petitioner is Promoter, Director and Shareholder of the Company. Control of affairs and management of the Company is lying with the Petitioner group since long but now, rest of the Directors are trying to take control of the affairs of the Company but still Petitioner, his father and brothers are having illegal possession of the statutory records, agreements, registries and cheque books of the Company and transferred the funds of the Corporate Debtor to Petitioner and his immediate relatives.
8. The Counsel for the Corporate Debtor submits that all Balance Sheets of financial year 2015-16, through which the Petitioner claims the acknowledgement of outstanding amount by the Corporate Debtor, are signed by Petitioner and his brother only.
9. It is submitted by the Counsel for the Corporate Debtor that there is no debt which is due and payable in terms of section 5(8) of I & B Code, 2016 and therefore there is no default. It is further submitted

that the contribution, made by the Petitioner, was in the form of share capital like other Directors and shareholders and amount was invested as quasi capital in the Company. For being a debt under section 5(8) of the I&B Code, 2016, this amount should be due and payable and further a default is required under section 3(12) of the I & B Code, 2016 by the Corporate Debtor. It is therefore submitted by the Counsel for the Corporate Debtor that there is no written terms & conditions for the repayment or interest on the alleged amount of loan lying in the Balance Sheet which has also been admitted by the Petitioner during the hearing. Therefore, there is no debt nor due date of repayment of the said amount.

10. The Counsel for the Corporate Debtor further submits that Form No. 1 and the demand notice were never issued to the Corporate Debtor. Instead, Form No. 1 and demand notice were issued, received and replied by the Petitioner and Mr. Manoj Kewalramani (Petitioner's real brother and director of the Corporate Debtor) amongst themselves only. So, effectively demand notice served and replied by the Petitioner on himself. The Form No. 1 and the Demand Notice show that there was no agreed date of repayment and therefore, there is no amount due and payable as per section 5(8) of the I& B Code, 2016. Hence, when the amount is not due, there is no case of default.
11. It is then submitted by the Corporate Debtor that amount brought in by promoters was as Quasi Capital but not as debt under I & B Code, 2016. The Counsel for the Corporate Debtor says that it is evident from the records that the alleged amount of debt was brought in by the Petitioner in the capacity of Promoter, Director and Shareholder and therefore, it cannot be considered as debt under the Code.
12. The Counsel for the Corporate Debtor submits that in present case, the Petitioner is holding cash of Rs. 1,02,120/- belonging to the Corporate Debtor and withdrawn further Rs. 1,35,047/- from the Company and in spite of categorically demand of the other Board of

Directors through notice demanding said amount, he has not deposited the money with the Corporate Debtor. The Petitioner also did some unexplained expenses to the extent of Rs. 9.52 lacs in Financial Year 2015-16 and Rs. 8.38 lacs in Financial Year 2014-15. This shows that to avoid deposition of cash with the Company, Petitioner has filed the present Petition. So, there exists no loan and therefore, no debt which is due and payable and no default.

13. The Counsel for the Corporate Debtor submitted that the Petitioner has initiated fraudulent and malicious proceedings against the Corporate Debtor to save themselves from the responsibility of various allegations which was subject matter of Board meeting dated 27.06.2017. Even, the Corporate Debtor has filed false Police Complaint against the Petitioner and Police has registered the FIR against him, who was also behind the bars for 4-5 days in this matter.
14. The Counsel for the Corporate Debtor further submits that there is a false police complaint filed by Petitioner. In this Police Complaint, the Petitioner claimed that the entire records of the Corporate Debtor have been taken away on 27.06.2017 by other Directors. But, the Petitioner, vide his reply dated 20.09.2017, claimed that records has been given to Auditor of the Company for Audit way back in August, 2017 but the Auditor denied the receipt of any such records/data in writing through his E-mail dated 01.09.2017. Further, the Auditor under the instructions of the Petitioner delivered Balance Sheet for Financial Year 2016-17 to the Corporate Debtor vide his E-mail dated 24.08.2019. This shows that there is big conspiracy against the Corporate Debtor and there is collusion between the Petitioner and Auditor of the Company to deprive it from its legitimate right of having statutory records in hand. The Petitioner along with his immediate family members is still illegally withholding the records of the Corporate Debtor. The conduct of the Petitioner also shows his malicious intent for filing the present proceedings under the Code.

15. It is then submitted by the Counsel for the Corporate Debtor that the aforesaid events, documents on record and conduct are enough to demonstrate the malicious intention of the Petitioners to file this Petition before the Tribunal. Accordingly, Petitioners made themselves liable under Section 65, 72 and 75 of the Code.

Findings:

16. This Bench noted that Corporate Debtor is a company owned by 3 brothers with the 33% shareholding each. Mr. Sunil Parmanand Kewalramani ("the Petitioner") is the Director, Promoter and Shareholder of the Corporate Debtor.
17. This Petition has been filed by the shareholder in the company under Section 7 of the Code. This Bench noted a very queer aspect in the demand notices in respect of the outstanding loan which was served on 21.08.2017 by the Petitioner to his real brother Mr. Manoj Kewalramani. The Petitioner sends the Demand Notice which is replied by his brother on behalf of the Corporate Debtor Company. Here, the Bench notes that both of them are Directors on the board of the Corporate Debtor Company.
18. The Reply has been filed by the Petitioner and his real brother, Mr. Manoj Kewalramani, themselves on September 2017 on behalf of the Corporate Debtor Company. This clearly shows that there is no effective service of demand notice as demand notice was sent, received and replied by the Petitioner and his brother among themselves. Therefore, this bench clearly finds unlawful collusion and misuse of the position by the Petitioner. This also brings out the fact that there is no difference between the Petitioner and the Corporate Debtor as the Petitioner is Promoter and in control of the day to day affairs of the Corporate Debtor Company. This Bench notes that even in his submissions, the Petitioner has not denied the fact that the demand notice have been issued, received and replied amongst him and his brother only.

19. This Bench also has come to a conclusion that the effective control of the Corporate Debtor Company has remained with the Petitioner only. This Bench also fairly concludes that the whole process of issuing, receiving and replying of the demand notice by the the Petitioner and his brother has been without any knowledge of the other Directors and therefore clearly shows malicious intention of the Petitioners. Therefore, the Bench concludes that there is not been any "Effective service of Demand notice".

20. The next question before this Bench is whether the amount being mentioned by the Petitioner in claim of Rs. 12,27,523/- can qualify as a financial debt or not? The definition of debt has been given under Section 3(11) of the IBC, which reads as below:

"3 (11): "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

Similarly, financial debt has been defined under Section 5(8) of the code, which reads as:

*"5 (8): "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-
....."*

21. In this case, the Bench takes note of the fact that there is no written terms and conditions for repayment of interest. Even the Petitioner in his submissions has mentioned that there was no interest chargeable on this account, nor there was any due date of payment. A perusal of the records also shows that no interest has been created in the Books of Accounts of the Company. Therefore, there is no time value of money in terms of Section 5(8) of the Code. Neither there is time value of money nor there is due date of repayment.

22. This Bench therefore has no hesitation in concluding that it does not fall under Section 5(8) of the Code and cannot be termed as financial

debt. In this background, this Bench tends to agree with the arguments submitted by the Corporate Debtor that what is being claimed as debt by the Petitioner is in fact infusion of funds as Promoter and Shareholder contributed for running its operations since it is a private business of the Kewalramani family. This Bench is of the view, after looking at the case, that it is a contribution to the capital structure of the Company as there is no any written or oral agreement or any fixed tenure for which money has been given to the Corporate Debtor Company and hence, by no stretch of imagination, the amount can qualify as financial debt.

23. I.A. No. 08 of 2018 has been filed by the Corporate Debtor /Respondent against the Petitioner stating that the proceedings have been initiated by the Petitioner fraudulently and falsely intended and not for resolution of Insolvency. The Corporate Debtor through this IA seeks that Adjudicating Authority may punish the Petitioners under Section 72 of the Code.
24. This Bench while dismissing the Petition CP (IB) 1416/MB/2017 does not feel that any further punishment against the Petitioner in terms of Section 72 of the Code is merited.
25. CP (IB) 1416/MB/2017 is "Dismissed" accordingly.

SD/-

Chandra Bhan Singh
Member (Technical)

SD/-

Suchitra Kanuparthi
Member (Judicial)