S.No.1

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
30-05-2023 AT **10:30 AM**

IA(IBC) 874/2022 in CP (IB) No. 463/7/HDB/2019
u/s. 7 of IBC, 2016

IN THE MATTER OF:
Simplex Infrastructures Ltd **…Financial Creditor**

VS

Mahendra Investment Advisors Pvt Ltd **…Corporate Debtor**

C O R A M:-
DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

O R D E R

IA 874/2022

Order pronounced. Recorded vide separate sheets. In the result, this IA is dismissed.

Sd/- Sd/-
MEMBER (T) **MEMBER (J)**

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IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - I, HYDERABAD

I.A. No.874/2022 in
C.P. (IB) No. 463/7/HDB/2019

U/S 60(5) of the IB Code, 2016

In the matter of
M/S MAHENDRA INVESTMENT ADVISORS PRIVATE LIMITED

M/s.Assam Bengal Carriers Limited,
Registered Office at
P-10, New C.I.T.Road,
Kolkata -700 073,
West Bengal.

…Applicant

Versus

Mahendra Investment Advisors Private Limited
Represented by its Resolution Professional
Mr.K.Adinarayana Babji,
104/105, 4th Floor, Surya Towers,
Sardar Patel Road,
3-1-211, Upstairs, Somasundaram Street,
Secunderabad – 500 003

…Respondent 1

Mr.K.Adinarayana Babji,
104/105, 4th Floor, Surya Towers,
Sardar Patel Road,
3-1-211, Upstairs, Somasundaram Street,
Secunderabad – 500 003

…Respondent 2

Date of order:30.05.2023

<u>Coram:</u>

Dr.Venkata Ramakrishna Badarinath Nandula, Hon'ble Member (Judicial)
Sri Charan Singh, Hon'ble Member (Technical)

<u>Counsel present:</u>

For the Applicant : Mr.M.Vivekananda Reddy, Advocate

For the Respondent: Mr.K.Adinarayana Babji, RP.

<u>Per : Bench</u>

<u>O R D E R</u>

1. This IA is filed by Assam Bengal Carriers Limited/ Financial Creditor of the Corporate Debtor seeking directions to the Resolution Professional representing Respondent, to admit the claim of the Applicant as financial debt and consequentially include the Applicant in the Committee of Creditors.

2. Upon initiation of CIRP against the Corporate Debtor, the Interim Resolution Professional carried out public announcement in various newspapers on 05.02.2021 calling for claims before 17.05.2021. Accordingly, the Applicant filed claim in Form-C on 17.05.2021.

3. The Applicant avers that on 05.12.2011, the Applicant had given loan to the tune of Rs. 1,50,00,000/- to the Corporate Debtor by way of RTGS.

4. However, the Resolution Professional/Respondent No.2 herein vide communication dated 23.05.2021 rejected the Claim of the Applicant on the following grounds: -

   (i) The loan which was lent to the 1st Respondent was not the funds of the Applicant herein.

   (ii) The funds transfer was made on 05.12.2011 but no action seems to have taken by the Applicant for recovery as per Form-C submitted by the Applicant.

   (iii) The transferred amount on 05.12.2011 was Rs. 1.50 crore and the amount claimed as on the Insolvency Commencement Date of 28.04.2021 was also Rs. 1.50 crores and it appears from the ledgers that no interest was recovered and hence no interest component to transfer and that said transfer is not against the time value of money as defined under Section 5 (8) of the IBC, 2016.

   (iv) The RP alleges that it is a collusion transaction.

(v) That the Applicant is a related party of the Corporate Debtor

3. In response to the ground stated by the Resolution Professional that the funds lent are not the funds of the Applicant, the Applicant contends that the Resolution Professional is unaware of the nature and magnitude of the business of the Applicant and as such the decision of the Resolution Professional is without any basis.

4. In response to the RP's contention that the Applicant had not taken any steps for recovery of the amount, the Applicant states that it is only an assumption by the Resolution Professional as the business dealing between the parties are on long term basis and are inter-dependent and they did not intend to rush for legal remedies. The Applicant further states that it was always in touch with the 1st Respondent for recovery of its amounts.

5. In response to one of the reasons for rejecting the claim of the Applicant by the RP that the amount lent to R-1 by the Applicant, does not fall under the definition of financial debt as no interest component is involved, the Applicant has placed reliance on the Hon'ble Supreme Court in M/s Orator

Marketing Pvt. Ltd Vs. M/s Samtex Desinz Pvt. Ltd, wherein it was held that there is no need of any interest component for a debt to be construed as financial debt.

6. The Applicant states that the Resolution Professional without any evidence and based on some unrelated information has come to conclusion that there is a collusion between the Applicant and 1st Respondent Company.

7. It is further contended that the Resolution Professional failed to demonstrate how the Applicant Company can be considered as a "related party". It is contended that the RP has the powers to only collate and no adjudicatory powers and placed reliance on the Hon'ble Supreme Court order in re: Swiss Ribbons (P) Ltd vs Union of India (2019) 4 SCC 17 and in *re: Mr. S. Rajendaran, Resolution Professional of PRC International Hotels Private Limited V/s Jonathan Mouralidarane, in CA(AT)(Ins) 1018/2019 passed by the Hon'ble NCLAT.*

8. Counter is filed by the Resolution Professional, denying the averments made in the application and contending that the application is filed with inordinate delay. According to the Resolution Professional, though the course of action arose

to the Applicant on 23.05.2021 the application is filed in 2022 after an inordinate delay of 15 months and relied on Section 42 of the Code, wherein time limit of 14 days is specified for a creditor aggrieved by the decision of the Liquidator to approach the Adjudicating Authority.

9. The contention of the Resolution Professional is that the funds do not belong to the Applicant as is evident from the bank statement at page 18 of the IA. There is a receipt of Rs. 1.50 crores on 05.12.2011 from M/s Gati Infrastructure Bhasmey Power Pvt Ltd (GIBPPL) to the bank account of the Applicant which has been immediately transferred to the account of the Corporate Debtor. GIBPPL was listed as entry No.13 in the list of creditors as on 30.11.2013 for Rs. 1.50 crores and the nature of advance mentioned against the entry was "lorry hire advance". It is stated that GIBPPL is controlled by the Suspended Director of the Corporate Debtor and the Annual Report of GIBPPL for the financial year 2010-11 indicates that the CD finds a place in the "list of related parties". It is contended by the Resolution Professional that there were intricate business relationships and transactions between the Corporate Debtor, GIBPPL

and AJVPL which he has demonstrated in his counter at Para No. 9 (page 5 & 6)

10. The Resolution professional further stated that there is violation of Companies (Acceptance of Deposits) Rules, 2014 by the Applicant. The Resolution Professional states that as per Rule 2(c)(xii)(a) of the Deposit Rules, advance received for supply of goods or provision of services must be appropriated within 365 days of receipt of the advance. In the instant case, the advance was received by the Applicant from GIBPPL on 05.11.2011 purportedly for "Lorry Hire Charges" and since the advance not adjusted within one year as on 01.04.2015, the advance became deposit. Further as per Rule 3(3), the deposit cannot exceed 25% of the aggregate of the paid up capital and free reserves of the Company was negative to the tune of Rs. 76,92,979/- as on 31.03.2020. As such the Applicant ought not to have carried the advance of GIBPPL as 'other current liability' in the books of accounts but the same continued. The Resolution Professional further stated that the transaction in question was related to round-tripping or hand-to-hand transfer in which the Applicant has risked the deposit rules.

11. With regard to the claim of the Applicant that the fund transferred is a financial debt, it is contended that the Applicant has failed to adduce any evidence suggesting that he had at no time pursued for the repayment of the debt as is evident from Form-C submitted by the Applicant.

12. The Resolution Professional contends that there is violation of Section 186(7) of the Companies Act, 2013 as the said Section prohibits the Company from giving interest free loan to other body corporate exceeding 60% of its share capital and free reserves.

13. The Resolution Professional contends that the reliance placed by the Applicant in re Orator Marketing Private Ltd Vs Samtex Desinz Pvt Ltd is misconceived. There is no express provision in IBC to the effect that any interest free debt would be construed as “Financial Debt”.

14. It is further contended that the Orator Marketing Judgement does not aid the case of the Applicant as the said judgement was rendered without considering Section 186 of the Companies Act. It is further stated that the import of Section 186 was considered by the Hon’ble NCLT, Principal Bench, New Delhi in UKG Steel Pvt Ltd Vs Erotic Builcon Pvt. Ltd,

wherein at para 14 of the order, the Hon'ble Principal Bench opined that "Therefore, the material available on record suggest that the borrowing given by the Petitioner is contrary to the limit prescribed under Companies Act, 2013 which amounts to an *ultra vires* act committed by the Petitioner. Hence, the loan advanced by the Petitioner is not a legally enforceable debt". According to the Resolution Professional, the purported loan of the Applicant would not qualify as "financial debt".

15. With regard to related party status, it is stated that the Applicant is a Company controlled by the brother of the Suspended Director and thus is a related party to the CD by virtue of Section 5(24)(a) of IBC red with Section 5(24A)(i) qua Mr. Mahendra Kumar Agarwal. Further from the perspective Mr. Anand Kumar Agarwal, the Applicant is a related party to the CD within the meaning of Section 5(24)(a) and 5(24)(f) of IBC as he was the Director of the CD for a long period from 01.07.2007 to 26.03.2019.

16. It is further stated that the conclusions by the RP were based on the facts which were on record, not warranting any sort of enhanced verification.

17. Therefore, the point that arises for our consideration is:

Whether the communication by the Resolution Professional dated 23.05.2021 rejecting the claim of the petitioner on the grounds mentioned in the communication warrants/interference?.

18. We heard learned counsel for petitioner and resolution professional in person and also perused the written statements, documents and records submitted to us for our consideration. We observe as under:

(1) We observe that the claim as financial creditor in this case has been filed merely on the basis of an entry of transfer of Rs 1.50 crores to corporate debtor on 05.12.2011. The applicant has failed to submit any supporting document or agreement showing that this transfer entry pertains to a financial credit transaction between the parties. The applicant has not spelt out any repayment term for this alleged financial debt and also no interest has been charged on this amount. In our view, since no repayment plan is proposed for recovery of the alleged debt and also it carries no interest, it does not qualify to be a financial debt as defined under Section 5 (8) of the IBC, 2016 which clearly

says *"financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes— "*. Since, no repayment is stipulated in this transaction, in our view it lacks the characteristic of time value of money.

(2) Resolution Professional has raised a contention that the funds do not belong to the applicant but it belongs to M/s Gati Infrastructure Bhasmey Power Pvt Ltd (GIBPPL) because there is a receipt of Rs. 1.50 crores on 05.12.2011 from GIBPPL to the bank account of the applicant and the same money on the same day has been transferred to the account of the Corporate Debtor. We verified the account statement and found both credit and debit entries of Rs1.50 crores in the bank statement of applicant as contended by resolution professional. We also observe that CD is shown as related party as per the annual report of GIBPPL for the financial year 2010-11. The facts as mentioned above raise serious doubt about treating this transfer of funds to the CD from the applicant as "financial debt".

(3) The Resolution Professional has contended that there is violation of Section 186(7) of the Companies Act, 2013 as the said Section prohibits the Company from giving

interest free loan to other body corporate exceeding 60% of its share capital and free reserves.

(4) To prove his point, resolution professional has relied on a judgement by NCLT, Principal Bench, New Delhi in UKG Steel Pvt Ltd Vs Erotic Builcon Pvt. Ltd, wherein at para 14 of the order, the Hon'ble Principal Bench opined that *"Therefore, the material available on record suggest that the borrowing given by the Petitioner is contrary to the limit prescribed under Companies Act, 2013 which amounts to an ultra vires act committed by the Petitioner. Hence, the loan advanced by the Petitioner is not a legally enforceable debt"*.

19. In view of the above observations , we are of the opinion that this application deserve to be dismissed and dismissed with no costs.

-SD-	-SD-
Charan Singh Member Technical	Dr. Venkata Ramakrishna Badarinath Nandula Member Judicial