IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-IV

Company Petition No. (IB)-549(ND)/2020
Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:
Ms. Sandhya Sethi & Anr.

APPLICANT/FINANCIAL CREDITOR

Vs.

M/s. Inteco Special Melting Technologies India Pvt. Ltd.

RESPONDENT/CORPORATE DEBTOR

Order under Section 7 of IBC

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (J)

MS. SUMITA PURKAYASTHA, HON'BLE MEMBER (T)

Order delivered on: 20.05.2022

ORDER

Per: Ms. SUMITA PURKAYASTHA, MEMBER (TECHNICAL)

1. The present application is filed 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. Inteco Special Melting Technologies Pvt Ltd., referred to as the corporate debtor.

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2. It is appropriate to mention that the present application is filed jointly by the applicants named Ms. Sandhya Sethi W/o Mr. Vinay Krishna Sethi (Applicant 1) and Mr. Vinay Krishna Sethi (Applicant 2) having R/o at Flat No.1002, Sector 93A, Supertech Apartments, Towers Aster-7, Noida 201304

3. The Respondent Company M/s. Inteco Special Melting Technologies Pvt Ltd., (CIN No. U27100DL2012PTC234322) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 13.04.2012 having its registered office situated at C-7/194, 1ST floor, DDA Flats, Naveen Niketan, Safdarjung Development Area, New Delhi - 110016.

4. Applicant 1 and Applicant 2 are shareholders for 8.01% in the respondent company. Remaining 91.99% of shareholding is with Inteco Austria, the parent company of respondent company.

5. 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

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in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

6. The details of transactions leading to the filing of this petition as averred by the applicants are as follows: -

a) Applicant 1 was the director of the corporate debtor and one of the directors named Mr. Hrald Holzgruber made a request to her to grant a loan to the respondent company to ease the financial stress prevalent in the company. Applicant 1 arranged Rs. 15,00,000 /- from a third party and paid the amount of Rs. 15,00,000 /- (Rupees Fifteen Lacs) vide cheque no. 140046 dated 29.12.2018 to the corporate debtor. Further, Applicant 1 resigned from directorship on 08.02.2019 which was acknowledged by the respondent vide letter dated 23.09.2019. Thereafter, Applicant 1 made repeated follow-ups and sent demand notice dated 29.10.2019 in Form 3 under Rule 5. Respondent serviced notice of dispute u/s 8(2) of the Code on 08.11.2019.

b) Applicant 2 was also a director in the respondent company. He provided loan which was refunded from time to time as per availability of the fund with respondent company. Against the outstanding amount of Rs. 19,36,840 /- and amount of Rs. 5,00,000 /- was returned on 28.02.2019 by the respondent leaving an outstanding

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balance of Rs. 14,36,840 /-. Respondent Company supplied the ledger account of Applicant 2 which stated an outstanding balance of Rs. 14,36,840 /- as on 31.03.2019. Applicant 2 resigned from directorship on 08.04.2019 and sent a legal notice dated 06th February 2020 for recovery of the outstanding balance.

c) As per part IV of the application, it is claimed that a sum of Rs. 15,00,000 /- and Rs. 14,36,840 /- is due and payable by the respondent company along with interest @ 24% w.e.f. 28.01.2019 and 01.03.2019 towards dues of Applicant 1 and Applicant 2 respectively.

d) The applicants have placed the following documents on record to prove the claims –

   i. Bank statements
   ii. Statutory audit report of respondent company for FY 18-19
   iii. Ledger Statement of Applicant 2 in books of respondent company
   iv. Demand notice as per Rule 5, dated 29.10.2019 sent by Applicant 1 and Legal notices dated 19.10.2019, 03.02.2020, 06.02.2020 by Applicant 2
   v. Reply to Demand notice dated 08.11.2019

7. Sub-section (3) (b) of Section 7 mandates the financial creditor to furnish the name of an Interim Resolution Professional. In

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compliance thereof the applicant has proposed the name of Mr. Satish Kumar Mathur, for appointment as Interim Resolution Professional having registration number IBBI/IPA-002/IP-N00132/2017-18/10348 resident of 101, 1st Floor, Plot No 6, Pocket-7, Benhof Plaza, Sector 12, Dwarka, Delhi-110075 with email - id mathursk1255@gmail.com. Mr. Satish Kumar Mathur has agreed to accept the appointment as the interim resolution professional and has signed a communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mr. Satish Kumar Mathur per the requirement of the IBBI Regulations. Accordingly, it is seen that the requirement of Section 7 (3) (b) of the Code has been satisfied.

8. The Corporate Debtor has filed its reply and has raised objection against the petition stating averments, which are listed here: -

   i. The respondent is a fully solvent company and capable of meeting all its current liabilities.

   ii. The present petition is a mala fide attempt to extort money as a counter against legal proceedings initiated /

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to be initiated by respondent against the Petitioners for their misdeeds and fraud during their tenure as employee Directors of the respondent company.

iii. Debt claimed by both the applicants are not financial debt within meaning of section 5(8) of the Code as it has not been provided against time value of money. Further, the applicants have claimed only "penal interest" and not claimed any interest towards the cost of using the alleged loan.

iv. No interest has been recognized in the books of accounts of the respondent company and no TDS has been deducted in respect of the same.

v. There is no agreement on record illustrating the terms and conditions on which alleged debt was disbursed to the Corporate Debtor.

vi. Respondent company has to recover a sum of Rs. 9,63,47,870 /- from the applicants on account of misdeeds and frauds committed by applicants during their tenure as Directors of respondent company for which respondent has already initiated legal proceedings against the applicants.

vii. Applicant 1 is not sure about the exact nature of claim as it had initially served a demand notice dated 29.10.2019 u/s 8 of the IBC in the capacity of operational creditor and is now claiming as financial creditor

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viii. In 2018-19, Respondent company learnt about misuse of powers by applicants. Respondent conducted Forensic Audit by an Independent Chartered Accountant basis which it is understood that applicant 2 tried to defraud the respondent company by sub-contracting orders at inflated prices to his related party VIV Technometal Pvt Ltd. and demanding kickbacs therefrom. The other misdeeds included payment of salary to Petitioner 1 without any authorization of Inteco Austria.

ix. Legal notice dated 23.09.2019 was served by the respondent to the Petitioner to claim financial losses suffered due to fraudulent activities. Restraining Notice dated 05.11.2019 was issued by the respondent company to Applicant 2.

x. Respondent Company lodged police complaint at Safdarjung Police Station on 12.02.2020 and filed a petition (CP/57/2020) u/s 241 with the Hon'ble NCLT seeking recovery of undue gains of 9,64,47,870/-. It is therefore stated that the alleged claim does not meet the test of a financial debt being "Due and Payable" as per section 3(12) of the Code.

xi. It is stated that applicant have filed the present petition with motive to exert pressure on the respondent to not initiate civil and criminal proceedings against them and therefore it becomes fit and proper case for fraudulent

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and malicious initiation of proceedings u/s 65 of the Code.

9. It is submitted by the applicant in the rejoinder that-

i. Loan given to corporate debtor is admitted and clearly stated in balance sheet. It is stated that legal proceedings initiated or to be initiated by respondent against applicants are an attempt to defeat legitimate claims of applicants.

ii. Further, loan was advanced with an aim of earning returns by facilitating financial viability of respondent company and therefore creates time value of money. Loans by applicants were advanced for improving the financial viability of the respondent company and protecting the legitimate interest to the tune of collective shareholding of 8.01% of the applicants. Improvement in financial viability would result in enhancement of assets, increase in production and growth in profits which would ultimately lead to an increase in value of equity thereby causing time value of money as consideration for disbursement of such loan amount by the applicants.

Reliance was placed by the applicant on Judgement of Hon'ble Appellate Tribunal in "***Shailesh sangani Vs. Joel Cardoso, Company Appeal (AT)(Insolvency0No. 616 of***

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2018 decided on 30th January 2019" whereby it was observed –

"*6. A plain look at the definition of 'financial debt' brings it to fore that the debt alongwith interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression 'if any' as suffix to 'interest' 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. Clauses (a) to (i) of Section 5(8) embody the nature of transactions which are included in the definition of 'financial debt'. It includes money borrowed against the payment of interest. 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 is manifestly clear that 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 Corporate Debtor notwithstanding the fact that no provision is made for*

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interest thereon. 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 Shareholder 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 interests 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 enures 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. 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'.

iii. The applicants were directors and shareholders of 8.01% and did have a legitimate interest and claim to provide interest-free loan to the respondent company.

iv. Books of accounts dated 31/03/2019 specifically maintained a separate ledger account by name of "Vinay

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Krishna Sethi Loan A/c". Also, the Balance sheet of the respondent clearly indicated "unsecured loans from directors" to the tune of Rs. 19,36,840/-.

v. With regard to agreement between respondent and applicants, it is stated that Applicant 1, being a stakeholder was frequently involved in the financial transactions with respondent and used to provide loan when there was any financial crisis on standing instructions of Mr. Hrald Holzgruber. Mr Hrald Holzgruber assured the applicants that although loan was for one month, but the same could have been refunded earlier depending on the availability of funds with the respondent company.

vi. Attention was drawn to Para 5 of judgement of Appellant Tribunal (supra) –

"5. We have gone through the record and given our anxious consideration to the submissions made at the Bar. For determination of the issue whether the amount claimed by Respondent No. 1 from the Corporate Debtor, default in payment whereof culminated in initiation of Corporate Insolvency Resolution Process, falls within the purview of 'financial debt' as defined under Section 5(8) of the I&B Code, be it seen that the legal expression 'debt', defined under Section 3 (11) means a liability or obligation in respect of a claim which is due from any person and includes a

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financial debt and operational debt. It is manifestly clear that the liability or obligation to pay must arise out of a claim due from a debtor/ borrower. The nature of obligation and from where it springs is immaterial. The obligation may be contractual or otherwise. Since, the legal expression 'debt' includes a 'financial debt' across the ambit of I&B Code, it would be appropriate to refer to the definition of legal expression 'financial debt' as engrafted in Section 5(8) of I&B Code"

vii. It was due to typographical mistake that applicant 1 was mentioned as operational creditor in demand notice serviced u/s 8 of the Code and applicant is clear about the nature of debt.

viii. Respondent company, immediately after receipt of legal demand notice from applicants, applied for forensic report and got the same in their favour without any proper justification and initiation of legal proceedings u/s 241/248 of Companies Act, 2013 is without any legal basis of claim of Rs. 9,63,47,870/-.

ix. With regard to misusing the authority as directors, it is submitted that all board meetings were carried out in proper quorum in presence of Mr. Hrald Holzgruber who was the managing director of Company. There was always approval from Inteco Austria Management and meeting was held from time to time with Applicant 2 and the

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managing directors of Inteco Austria. The respondent company and management of Inteco Austria issued several appraisal letters praising efforts of applicant 2 from time to time and the same were placed on record.

x. Salary to Applicant 1 was declared to the management of the respondent company and the relevant copies of email and documents were placed on record.

xi. It is stated that Inteco Austria replaced the managing director of respondent company and appointed Mr. Erich Koestenberger who was responsible for bringing in Euro 91750 /- via shell company in Sharjah and also caused supply of inferior goods to Indian Clients. Considering the unlawful activites going in the company, the applicant 2 resigned from the directorship. It is only after resignation of Applicant 2 they have issued threatening letter demanding applicant 2 to work with the respondent company.

xii. Petition u/s 241 of the Companies Act, 2013 and police complaint were lodged by the respondent after default on repayment of loan of applicant and it was subtle attempt to defeat the legitimate right of petitioners.

xiii. It is stated that Inteco Austria is deliberately hiding minutes of meeting of board meetings where transactions with VIV Technometal Pvt Ltd were noted. Further disclosure about transactions with VIV Technometal Pvt

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Ltd is reflected in all Audit reports and balance sheets of FY 2015, 2016, 2017 and 2018.

10. Considering the documents on records and submissions made, it can be concluded that the books of accounts of corporate debtor for the year ending March 2019 acknowledge loan from the applicants to the extent of Rs. 19,36,840 /-. Further, the corporate debtor also issued a ledger account of applicant 2 which shows the outstanding amount payable to Applicant 2 is Rs. 14,36,840/-.

11. We are further strengthened by the judgement passed by the Appellate tribunal in **"Shailesh Sangani vs Joel Cardoso & Anr on 30 January, 2019"** which is also relied upon by the petitioner whereby it was observed that money advanced by a promoter, director or a shareholder of the corporate debtor as a stakeholder to improve the financial health of the company and boost its economic prospects, would have the commercial effect of borrowing on the part of corporate debtor notwithstanding the fact that no provision is made for interest thereon.

12. With reference to the issue of non-availability of agreement illustrating the terms and conditions on which alleged debt was disbursed to the Corporate Debtor, we are strengthened by the order passed by the Appellate Tribunal, in ***BDH Industries Ltd.***

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Vs. Mars Remedies Pvt Ltd. in Company Appeal (AT) (Ins) No. 936 of 2020 wherein it was observed and held that *"IBC nowhere prescribed the compulsory existence of an express agreement to prove the loan and its disbursement. The statement of accounts produced on record were held enough to prove the disbursement of loan amount."*

13. Further, the petitioners approached the corporate debtor on 29th October 2019 and 03 October 2020 for repayment of money advanced by them which still remains due and payable. The present application is filed on 08th February 2020. Hence, the application is within the period and is not barred by limitation.

14. It is worthwhile to state here that at this stage we are not required to go into the issue of the exact amount of debt at the stage of admission of section 7 application. It would suffice for the purpose of admission of section 7 application, if the debt is above threshold value of Rs. 1 lakh. Therefore, we find that the debt is in excess of Rs. 1 lakh of threshold value and also in default. Hence the debt owed to the Financial Creditor by the Corporate Debtor is above the threshold value and payable in default and it satisfies the definition under section 3(12) of the IBC regarding default.

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15. In view of the above, this application under Section 7 of the Code is hereby admitted.

16. Since the applicant has proposed the name of IRP, therefore, this bench appoints Mr. Satish Kumar Mathur as an IRP of the corporate debtor. The certificate of registration along with consent in Form-2 of the Insolvency & Bankruptcy Board of India (Application to Adjudicating Authority) Rule 2016 making disclosures as required under IBBI (Insolvency Resolution Process for Corporate Person) Regulation, 2016 has been annexed in the application by petitioner.

17. As a consequence of the application being admitted in terms of Section 7(5) of IBC, 2016 moratorium as envisaged under the provisions of Section 14(1) shall follow in relation to the Respondent prohibiting the respondent as per proviso (a) to (d) of section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come in force.

18. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional namely Mr. Satish Kumar Mathur to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process

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for Corporate Person) Regulations, 2016. The needful shall be done within three days for the date of receipt of this order by the applicant. The amount however is subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the applicant.

19. In terms of above order, the application stands admitted in terms of Section 7 of IBC, 2016. A copy of the order shall be communicated to the applicant as well as to the Corporate Debtor above named by the Registry.

20. Applicant is also directed to provide a copy of the complete paper book with copy of this order to the IRP. In addition, a copy of the order shall also be forwarded to IBBI for its records and to ROC for updating the master data. ROC shall send compliance report to the Registrar, NCLT.

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(SUMITA PURKAYASTHA)
MEMBER (T)

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(DHARMINDER SINGH)
MEMBER (J)