

**NATIONAL COMPANY LAW TRIBUNAL,
COURT V, MUMBAI BENCH**

C.P.(IB) No. 992 of 2021

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 read with Rule 4 of
the Insolvency and Bankruptcy (Application to
Adjudication Authority) Rule 2016)

In the matter of

M/s Diamond Paints Nigeria Limited

No. 10 Tafawa Balewa Street, Jos Plateau,
State Nigeria

.....Financial Creditor/ Petitioner

Vs

M/s Sonal Adhesives Limited,

(CIN:L02004MH1991PLC064045)

Plot no. 28/1A Takai Adoshi Road at PO
Khopoli Tal Khalapur Dist Raigad Dist MH
410203

.....Corporate Debtor/ Respondent

Order pronounced on: 01.05.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

For the Financial Creditor: Ms. Prachi Wazalwar, Advocate

For the Corporate Debtor: Mr. Kunal Kanungo, Advocate a/w Adv.
Tanushree Sogani and Adv. Atishay Jain

Per: Anuradha Sanjay Bhatia, Member (Technical)

ORDER

1. This Company Petition is filed by Petitioner, namely M **M/s Diamond Paints Nigeria Limited**, (hereinafter called "**Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against **M/s Sonal Adhesives Limited** (hereinafter called "**Corporate Debtor**") alleging that the Corporate Debtor committed default as on 30.03.2021 to the extent of Rs. 1,00,52,437/- inclusive of interest @24% p.a. with regards to the outstanding payments to the Petitioner. This Petition has been filed by invoking the provisions of Section 7 Insolvency and Bankruptcy Code, 2016 (hereinafter called "**Code**") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The list of documents attached to this Petition in order to prove the existence of Financial Debt, the amount and date of default are as follows:
 - a. Copy of Incorporation Certificate of the Financial Creditor.
 - b. Copy of the Master Data of the Corporate Debtor as available on the MCA.
 - c. Copy of Board Resolution.
 - d. Copy of the Bank Certificates.
 - e. Copy of Deed of Assignment.
 - f. Copy of Proforma Invoice dated 01.10.2020 issued by the Corporate Debtor.
 - g. Copy of proof of correspondence of WhatsApp chat dated 23.02.2021.
 - h. Copy of Request Letter of Emmanuel Nnaemeka Ezekwueme dated 25.02.2021.
 - i. Copy of Request Letter of Edikko Nigeria Limited dated 01.03.2021.
 - j. Copy of Request Letter of Emee Plasic Industries Nigeria Limited dated 03.03.2021.

- k. Copies of WhatsApp correspondences.
 - l. Copy of notice demanding payment.
 - m. Copy of complaint Letter sent to Indian Embassy in Nigeria, Nigerian Embassy in India, Ministry of Corporate Affairs and Ministry of External Affairs along with proof of service.
3. The Petition reveals that the Petitioner herein is a Nigerian Company which deals in manufacturing and distribution of quality paints for houses and manufacture of fabricated metal products, except machinery and equipment. The Corporate Debtor herein is a Public Listed Company and are manufacturer and exporter of BOPP self-Adhesive Tapes colours and various types of Adhesives & Emulsion in India.
4. There is one individual and two other Nigerian Companies who have advanced huge sums to the Corporate Debtor by way of 'Deed of Assignment' dated 08.09.2021 against certain goods and services, the details of which are as under:

Sr.	Company Name	Advance amount paid	INR Conversion
1	M/s Diamond Paints Nigeria Limited	10,000 USD	Rs. 7,44,415/-
2	Mr. Emmanuel nnaemka Ezekwueme	20,000 USD	Rs. 14,89,420/-
3	M/s. Edikko Nigeria Limited	10,000 USD	Rs. 7,44,415/-
4	M/s. Emee Plastic Industries Nigeria Limited	20,000 USD	Rs. 13,89,420/-
	Total	60,000 USD	Rs. 44,68,620/-

5. Further, the Corporate Debtor issued the Proforma Invoice (Invoice No. Sal/1365/20-21) dated 01.10.2021 for an amount of \$156,000 USD i.e INR 1,16,10,612/-, wherein the terms were laid down that 30% of the total amount will be paid in advance and remaining 70% will be paid against bill of lading.

6. Accordingly, M/s. Edikko Nigeria Limited, M/s. Emee Plastic Industries Nigeria Limited, Mr. Emmanuel Nnaemka Ezekwueme along with Petitioner paid an advance of \$ 60,000 USD i.e. Rs, 44,68,620/- to the Corporate Debtor towards supplying 9 containers of acrylic and PVA. The advance payment was made to the Corporate Debtor in its Bank A/C No. 00192050001707 with HDFC BANK, VERSOVA, MUMBAI, INDIA.
7. Further, the Petitioner was informed that materials were ready to be shipped from the second week of December 2020 but due to shortage of container, the shipment could not take place. Till date the materials have never been received and the same has been brought to the knowledge of the M/s Sonal Adhesives Limited on various occasions.
8. Mr. Arora, one of the Directors of the Corporate Directors informed the Petitioner that Export License of the Corporate Debtor was only valid till 31.12.2020. Since the situation of shipping was out of control, the Corporate Debtor could not ship the materials as laid under the Proforma Invoice. In view of the same, Mr. Arora undertook to return the advance amount of \$60,000 USD i.e. INR 44,65,620/- and had assured the Petitioner that an application to the bank was already made in regards with the same. Corporate Debtor is also liable to pay interest @24% of Rs. 3,73,505/- (\$5000 USD) calculated from the date of default and damages claimed of Rs. 52,15,070/- (\$70,000) USD. Accordingly, Financial Creditor was asked to issue Debit Notes as required by Corporate Debtor's Bank. The details regarding Debit Notes/ Request Letter for refund is enumerated below:

SR. NO.	DATE	PARTICULARS
1.	25.02.2021	Mr. Emmanuel nnaemka Ezekwueme issued a request letter for refund of \$ 20,000 USD

2.	25.02.2021	M/s Diamond Paints Nigeria Limited issued a request letter for refund of \$ 10,000 USD
3.	01.03.2021	M/s. Edikko Nigeria Limited issued a request letter for refund of \$ 10,000 USD
4.	03.03.2021	M/s. Emee Plastic Industries Nigeria Limited issued a request letter for refund of \$ 20,000 USD

9. The Petitioner has sent numerous reminders time and again to Mr. Arora via messages, emails and phone calls to repay the advance money paid to them. However, Mr. Arora never returned phone calls. Further, the Financial Creditor suffered huge loss due to the Breach of Contract by the Corporate Debtor. Also, the Petitioner lost their valuable clients in the due course of time and also received a warning from their Bank pertaining to the closure of the credit facility granted.
10. Also, the contracts signed by the Petitioner with clients could not be completed as these contracts were entered into on the basis of the materials which were to be shipped by the Corporate Debtor.
11. Thus, the Petitioner issued the Legal notice to Corporate Debtor on 19.09.2021. the Total amount claimed in the Demand Notice is \$135,000 USD i.e. INR 1,00,52,437/- which includes interest @24% of Rs. 3,72,505/- (\$5,000 USD) calculated from the date of default and compensation of loss caused due to failure of Rs. 52,15,070/- (\$70,000 USD).
12. Therefore, the Petitioner has filed this present Petition.

Submissions made by the Corporate Debtor by way of Affidavit in reply:

13. The Corporate Debtor in the Affidavit-in-reply opposed the allegations made by the Petitioner on the ground of being false, misconceived and unsubstantial in nature.
14. The Corporate Debtor submits that the Deed of Assignment dated 08.09.2021 relied upon by the Petitioner is not enforceable in law as it is not properly stamped as per the Maharashtra Stamp Act, 1958. Further, it is clear from contents of the Deed of Assignment that it was executed for the purpose of assigning an alleged advance, for supply of materials and the debt arising out of the advance payment will be considered as operational debt.
15. In this regard, the Corporate Debtor has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of *Consolidated Construction Consortium Limited vs. Hitro Energy Solutions Private Limited* [2022 SCC OnLine SC 1421 wherein it is held as follows:
- "58.Indeed, the decision notes that "[e]xamples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees". **Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt**"*
16. Further, the Corporate Debtor submits that the claim amount reflected in Form 1 Part- IV of the Company Petition is Rs. 1,00,52,437/-. The alleged principal amount is merely Rs. 44,65,620/- and the interest @24% p.a., aggregates to Rs. 3,72,505/-. However, the Ld. counsel for the Corporate Debtor vehemently argued that there is no clause or provision for interest in the Deed of Assignment dated 08.09.2021.

17. Further, the Corporate Debtor submitted that the Petitioner has claimed an amount of Rs. 52,15,070/- towards "*Penalty/ Compensation of losses due to failure of supply*". the Ld. counsel for the Corporate Debtor vehemently argued that there is no clause for payment of any Penalty/Compensation of losses due to failure of supply.
18. The Corporate Debtor further submitted that the documents / exhibits annexed in the Petition manifests and substantiates that there is no financial debt and that the alleged transaction is in the nature of operational debt. The Petitioner's attempt by filing the present Petition shows that it is using the remedy under the Code for the sole purpose of recovering the alleged debt.
19. Further, the Petitioner's claim is for unadjudicated damages and further compensation on account of the alleged loss incurred by the Petitioner, however, the same is not covered under the definition of the 'Financial Debt' and not even under the definition of 'Operational Debt' as provided under the provisions of the Code.
20. Further, it is the pleaded case of the Petitioner that the alleged default has occurred on 30.03.2021 which falls under the period as specified under Section 10A of the Code. In this regard, the Corporate Debtor places reliance on an Order dated 13.06.2022 passed by the Hon'ble National Company Law Tribunal, Allahabad Bench passed in **C.P. (IB) No. 05/ALD/2022**, which held as follows:

"11. Thus, considering the fact that the default has occurred during the prohibited period between 25.03.2020 and 31.03.2021, for which no action under section 7 can be taken in terms of provisions of section 10A of IBC, 2016, we hold that this petition is not maintainable. Accordingly, the same shall stand dismissed."
21. The Corporate Debtor further contended that the present Petition suffers from *suppressio veri* and *suggestio falsi* as the Petitioner has willingly and knowingly concealed in the Petition that the Petitioner issued a

Demand Notice dated 26.07.2021 in FORM 3 under Section 8 of the Code for calling upon the alleged debt amount of Rs. 1,00,52,437/-. It is therefore evident that there is no prima facie case for financial debt and it is a case of extorting money from the Corporate Debtor and furthermore, the conduct of the Petitioner from the beginning has been such that it has been producing and disclosing the material facts that are favourable to its case and hiding the facts, information and documents that would bring in the actual facts of the matter in light.

22. Thus, the Corporate Debtor submits that the Petition is not-maintainable, incomplete and filed without complying with the essentials of the Code and prays for dismissal.

Finding:

23. We have heard both sides and perused the material available on record.

24. The core issue that falls for consideration in the above Company Petition is :-

- Whether the Petitioner qualifies as an “Financial Creditor” and
- whether the Advance towards the supply of goods/materials qualifies as an “Financial Debt” within the meaning of the Code.

25. In order to decide the above issue, it is important to extract the definitions of “Financial Creditor” and “Financial Debt” as defined under Section 5 sub-section 7 and 8 which reads as under:-

“(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on nonrecourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”*

26. This Bench is of the considered view that the documents produced by the Petitioner i.e. the Deed of Assignment dated 08.09.2021 was executed for the sole purpose of assigning an advance for the supply of goods/ material i.e. supplying 9 containers of acrylic and PVA and taking into consideration the contents of the Deed of Assignment it is clear that it falls under the definition of “Operational Debt” and not under the definition of “Financial Debt”.
27. Further, in a Section 7 company Petition filed under the Code, compensation on account of losses due to failure of supply of goods cannot be interpreted as “Financial Debt” without crystalizing the claim of damages. Hence, in our considered view, the claim of 70,000 USD (Rs. 52,15,070), which is yet not been crystallised and is not a part of the Deed of Assignment dated 08.09.2021, cannot be treated as “Financial Debt”. Thus, the Petition does not meet the required threshold as per the Government of India notification dated 24.03.2020. Hence, the Petition fails on this ground also.

28. In this regard, the Corporate Debtor has rightly relied on the judgment of the Hon'ble Supreme Court in the matter of **Consolidated Construction Consortium Limited vs. Hitro Energy Solutions Private Limited [2022 SCC OnLine SC 1421** wherein it is held as follows:

*"58.Indeed, the decision notes that "[e]xamples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees". **Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt**"*

29. We have also considered the facts of the case and noted that there was one individual and two other Nigerian Companies who have advanced huge sums to the Corporate Debtor by way of 'Deed of Assignment' against certain goods and services. However, this Bench finds that the alleged principal amount is merely Rs. 44,65,620/- and the interest amount is merely Rs. 3,72,505/- which is not meeting with the required threshold limit. The Petitioner has also claimed an amount of Rs. 52,15,070/- towards Penalty/ compensation of losses due to failure of supply of goods. From the bare perusal of the definition of Financial Debt under Section 5 (8) of the Code, it is clear that any damages cannot be interpreted as a "financial debt". It is a settled law that even if the damages are to be considered as a financial debt, then also the claim for damages does not become debt until the liability is adjudicated upon and damages are assessed. Therefore, in the present case, an amount of Rs. 52,15,070/- towards Penalty/ compensation of losses due to failure of supply of goods/ material would fall under the damages and cannot be treated as a "Financial Debt".

30. Accordingly, CP (IB) 992 of 2021 is **dismissed** with no cost. However, the above order does not preclude the Financial Creditor from recovering the same before an appropriate forum of course subject to limitation.

SD/-

Anuradha Sanjay Bhatia
Member (Technical)

SD/-

Kuldip Kumar Kareer
Member (Judicial)