IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

CP (IB) 1806/MB/C-II/2019

Under section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of

1. **Dr. Vilas Pandurang Sabale**
   C/58, Pagariya Nelge Plaza, Pune – Nasik Highway, Bhosari, Pune – 411039, Maharashtra.

2. **Dr. Suhas Laxman Kamble**
   688/2D, Sachin Bungalow, Near Nelge Pagaria Plaza, Pune – 411039, Maharashtra.

3. **Dr. Vinayak Shivajirao Mane**
   A2/803, Hariganga Society, Opposite RTO, Yerwada, Pune – 411006, Maharashtra.

4. **Dr. Anu Nivrutti Gaikwad**
   Flat No. 203, S.No. 690/2A, Pune – Nasik Road, Hira Plaza, Bhosari, Pune – 411052, Maharashtra.

… Financial Creditors/Petitioners

Versus

Sant Dyaneshwar Hospital Private Limited
[CIN: U85110PN2003PTC017793]
H.No. 6/1, Purple Accord, Building, Baner Road, Pune – 411045, Maharashtra.

…Corporate Debtor/Respondent

Order Delivered on 08.10.2021

Coram:

Hon'ble Member (Judicial)	:	Mr. Ashok Kumar Borah
Hon'ble Member (Technical)	:	Mr. Shyam Babu Gautam

Appearances:

For the Financial Creditor	:	Mr. Amol Nehru, Advocate.
For the Corporate Debtor	:	Mr. P Sapte, Advocate.

<u>ORDER</u>

Per: Shyam Babu Gautam, Member (Technical)

1. This is a Company Petition filed under section 7 ("**the Petition"**) of the Insolvency and Bankruptcy Code, 2016 **(IBC)** by **Dr. Vilas Pandurang Sabale and Anr.** ("the Financial Creditors"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Sant Dyaneshwar Hospital Private Limited** ("the Corporate Debtor").

2. The Corporate Debtor is a Private company limited by shares and incorporated on 20.03.2003 under the Companies Act, 1956, with the Registrar of Companies, Maharashtra, Pune. Its Corporate Identity Number (CIN) is **U85110PN2003PTC017793**. Its registered office is at H.No. 6/1, Purple Accord, Building, Baner Road, Pune – 411045, Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.

Brief Background:

3. The Present application being CP no 1806 of 2019 (the "Applicant") under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code") has been filed by Dr. Vilas Pandurang Sable and Ors (hereinafter referred to as the "Applicants"), claiming, inter alia, alleged default of a purported financial debt of Rs.2,60,00,000/-. The brief factual conspectus in which the present appeal has arisen is set out here under in the following paragraphs.

4. The Financial Creditor being the former directors of the Corporate Debtor had given loan on various occasions to it to carry out its activities. The aggregate loan amount given by the Financial Creditors amounted to Rs.3,14,00,000/-. Thereafter the Corporate Debtor has paid an amount of Rs.54,00,000/-. Thus, the total amount of Financial Debt liable to be paid by the Corporate Debtor to the Financial Creditor amounts to Rs.2,62,00,000/-. Date on which Default occurred was 07.04.2017 as the Financial Creditors resigned from the directorship of the Corporate Debtor. The resignation letters were handed over to existing directors of the Corporate Debtor with understanding that the Corporate Debtor would clear the loan amount given by the Financial Creditors on the date of acknowledging the resignation letters of the Financial Creditors.

<u>Application u/s 7 of the Code</u>:

5. The total amount of Financial debt due is Rs.2,62,00,000/-. As reflected in Part IV of the Application titled "Particulars of Financial Debt". (Pg. No. 9). The details of Computation of financial debt are specified in Annexure 1-F (Pg. Nos. 64 to 69).

6. The balance sheet of the Corporate Debtor (For the year ending 2018) shows the loans advanced by the Financial Creditors under the heading "Current Liabilities – Short Term Borrowings". The same has been acknowledged by the directors of the Corporate Debtor. (**Refer Annexure A of the Affidavit in Reply of the Corporate Debtor**)

7. The Financial Creditor No 1, Dr. Vilas Pandurang Sable has advanced a loan amounting to Rs.80,00,000/- to the Corporate Debtor. The Corporate Debtor has made part payment of Rs.18,00,000/-, thus the amount payable by it to the Financial Creditor No. 1 is Rs.62,00,000/-. The details of payments are mentioned in the bank statements in **Annexure I – B Colly (Pg. Nos. 31 to 43).**

8. The Financial Creditor No 2, Dr. Suhas Laxman Kamble has advanced a loan amounting to Rs.1,11,00,000/- to the Corporate Debtor. The details of payments are mentioned in the bank statements in **Annexure I-C colly (Pg. Nos. 44 to 53)**.

9. The Financial Creditor No 3, Dr. Vinayak Mane has advanced a loan amounting to Rs.54,00,000/- to the Corporate Debtor. The Corporate Debtor has made part payment of Rs.18,00,000/-, thus the amount payable by it to the Financial Creditor No. 1 is Rs.36,00,000/-. The details of payments are mentioned in the bank statement in **Annexure I-D colly (Pg. Nos. 54 to 58)**.

10. The Financial Creditor No 4, Dr. Anu Gaikwad has advanced a loan amounting to Rs.69,00,000/- to the Corporate Debtor. The Corporate Debtor has made part payment of Rs.18,00,000/-, thus the amount payable by it to the Financial Creditor No. 1 is Rs.51,00,000/-. The details of payments are mentioned in the bank statement in **Annexure I-D colly (Pg. Nos. 59 to 63)**.

11. In the present matter, there are four application who are being represented through Applicant No. 1 through a power of attorney dated 19th December 2018 at **Annexure IV (Pg. Nos. 90-96)**.

Default by the Corporate Debtor:

12. 'Default' is defined in section 3(12) to mean non-payment of a debt when the whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the Corporate Debtor, as the case may be.

13. The amount of loan payable is found under the heading '**Current Liabilities**' in the financial statements files by the Corporate

Debtor along with their Affidavit in Reply (**Exhibit B at Pg. 16 at Para 4**).

14. **Current liabilities** are those that are required to be repaid by a Company in the same financial year. The Current Liabilities represent loans and financial obligations due within one year.

15. The Civil Suits (**refer Exhibit C and D of the Affidavit in Reply**) filed by the Corporate Debtor is nothing but an afterthought pursuant to the Financial Creditor (in the capacity of a Operational Creditors) filing an Application u/s 9 of the IBC, which is pending before this Tribunal. Further, the said suits have been incorrectly filed, in that, **the Civil Courts do not have jurisdiction** to hear matters involving deletion of entries made in the financial statements (the same rests solely with NCLT). The filing of Civil suit was as act done in a hurry so as to preempt the filing of a Section 7 Application. Which the Corporate Debtor anticipated in light of the filing of the Section 9 Application by the Financial Creditors (as Operational Creditors).

16. The counsel for the Corporate Debtor in the course of his arguments mentioned that at para 5 of the section titled "Notes to accounts" in the Audit Report of the Company, the Auditor has stated that in respect of the above Current Liabilities.

> *"it has been informed to us that, though they appear in the short-term borrowings schedule, the authenticity of this entry is unclear."*

It is pertinent to note that the "Notes" section of the Audit Report are only in the form of comments and that they do not reduce the credibility and authenticity of the entries made in a financial statement. This is more so in light of the statement of the Auditor at Pg. No. 2 of exhibit B under para 2 (c) where it has been stated that *"the Balance sheet, the statement of profit and loss and the cash flow statement dealtwith by this Report are in agreement with the books of account"* and 2 (d) where it is stated that *"in our opinion, the aforesaid financial statements comply with the accounting standards specified under section 133 of the Act read with Rule 7 of the (Companies Accounts) Rules, 2014".* In any case, the Auditor did not find any such inaccuracies but was only referring to the information having come from a source other than the auditor is unsubstantiated and devoid of any credibility. In fact Civil Suits filed by the Corporate Debtor do not disclose any factual information that would question the credibility if the entries made in the financial statements filed by the Financial Creditor. Not one single document has been filed along with the Civil Suits or in this Application that would put the credibility of these entries into question.

17. The Corporate Debtor has defaulted in payment of the Financial Debt which was due and payable as mentioned above, therefore it has committed a default within the meaning of S.3(12) of the Code.

In ***Innoventive Industries Ltd. v. ICICI Bank Ltd.*** *it was observed that:*

"The scheme of the code id to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide

terms as meaning non-payment of a deft once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount".

<u>The transaction between the parties is a 'financial debt' within the meaning of 5(7) of the code</u>:

18. As per S.5(7) of the Code, a Financial Creditor is a person to whom a financial debt is owed. A financial debt is defined under S.5(8) of the Code as a debt along with interest, if any, which is disbursed against the consideration for the time value for money and includes all components enlisted under S.5(8) from sub-clauses (a) to (i) of the Code.

19. In the present case the Financial Creditors have advanced **interest free unsecured loans** to finance the business of the Corporate Debtor. As held by the Hon'ble Supreme Court, the definition of financial debt under S.5(8) of the Code and the Applicants are Financial Creditors within the meaning of S.5(7) of the Code. The Applicant is competent to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

In ***Orator Marketing Pvt. Ltd. Vs Samtex Desinz Pvt. Ltd*** it was observed that: -
"22. The NCLT and NCLAT have overlooked the words "if any" which could not have been intended to be otiose. 'Financial debt' means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest

payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLT and NCLAT have failed to notice clause (f) of section 5(8), in terms whereof 'financial debt' includes any amount raised under any other transaction, having the commercial effect of borrowing."

"31. At the cost of repetition…The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly excludes an interest free loan. ***'Financial Debt' would have to be construed to include interest free loans advanced to finance the business operations of a corporate body."***

20. Therefore, contrary to what was argued by the counsel for the Corporate Debtor, as per the above Supreme Court case, the payment of ***'interest'*** on a loan is not an essential ingredient to constitute the said loan as a 'financial debt' as per Section 5 (8) of the IBC.

<u>Submissions of the Corporate Debtor</u>:

21. The Financial Creditors had not provided any loan to Corporate Debtor Company nor provided any credit facility to Corporate Debtor. The Financial Creditors have failed to attach single documentary proof to substantiate its claim except referring merely few bank entries and statements.

22. This petition filed by Financial Creditor against the Corporate Debtor is nothing but a pressure tactic and is an abuse of process of law as it is evident that these Financial Creditors first filed S. 9 petitions/application individually against same Corporate Debtor

earlier to the present petition/application. These S. 9 petitions are still pending for hearing. Once these Financial Creditors found that they have no chance to succeed in their S. 9 petitions, these Financial Creditors (Operational Creditors in S. 9 petition/application) filed S. 7 application to pressurize Corporate debtor. These Financial Creditors have also invoked arbitration proceedings against same Corporate Debtor before Arbitration Tribunal in Pune before filing present S. 7 application and same are also pending for hearing. **The Corporate Debtor had also filed various civil suits against present Financial Creditors for declaration for striking off impugned entries in balance sheets of Corporate Debtor in 2018, much prior to the filing of present application by Financial Creditors. The Corporate Debtor also filed criminal complaint against present Financial Creditors.** The said entries have been relied by Financial Creditors to move the present application. The Financial Creditors deliberately concealed all these facts in its application. The Financial Creditors were duty bound to disclose all material facts before this Hon'ble Tribunal which Financial Creditors have miserably failed to.

23. The Financial Creditors have completely failed to satisfy statutory requirements of Financial debt as defined u/s. 5 of IB Code. Merely referring to bank entries without submitting details of transaction does not fulfill statutory requirement of filing claim under S. 7 of IB Code. The Financial Creditors has moved S. 7

application to extract money from Corporate Debtor by abusing the process of law.

24. Financial Creditor have failed to show the amount of interest agreed upon between the parties, and the amount deposited comes under the financial debt and that the petitioner comes under the definition of financial creditor under section 5(7) of IBC. Petitioner failed to bring on record the default recorded with the information utility or such other record or evidence.

25. The Financial Creditor provided false assurances and misleading information to present stakeholders/management of Corporate Debtor while taking over of Corporate Debtor i.e. company, by the present stakeholders in order to induce and lure away to take over Corporate Debtor. During this business transaction, Financial Creditors misrepresented financial figures which were relied by present stakeholders/management Corporate Debtor. Based on misrepresentation, financial statements were prepared & finalized and present stakeholders relied on these financials while taking over.

26. However, during audit and inspection of books of accounts, present stakeholders and management of Corporate Debtor has found out that many entries in financial statements were untrue and were made at the behest of this Financial Creditor.

27. Moreover, Corporate Debtor was also constrained to file a separate suit for premediated fraud played by Financial Creditor under share purchase agreement which was executed by Financial Creditor with Corporate Debtor.

28. The Corporate Debtor states that, more over at no point of time, the Corporate Debtor admitted the outstanding due and payable amount. Hence, on the ground of dispute of the liability this Petition is not maintainable on this ground.

29. After taking over of company i.e. Sant Dnyaneshwar Hospital Pvt. Ltd., it was subsequently revealed that Financial Creditor had made few unsupported entries in the financial statement portraying Financial Creditor as unsecured creditor. **The Corporate Debtor conducted detailed accounting audit from external CA firm which observed that there was no real transaction behind these unsecured entries. These entries also found to have been spuriously made under the heading "Other Current Liabilities". It is also pertinent note that Financial Creditor has also mischievously concealed liability in the financial statement provided to Corporate Debtor.**

30. The Corporate Debtor also relied upon following authorities which also clearly laid down law in this regard.

1. **Hardeep Singh Sawhney Vs. Sawhney Builders Pvt. Ltd. - NATIONAL COMPANY LAW APPELLATE**

TRIBUNAL, NEW DELHI Company Appeal (AT) (Insolvency)No. 1147 of 2019

Relevant Paras – 27-32

To sustain an Application Under Section 7 of the 'I&B' Code, the Applicant is to establish the existence of a 'Debt', which is due from the 'Corporate Debtor'. Put it in precise term, his existence of undisputed 'Debt' is 'Sine Qua Non' for triggering the 'Corporate Insolvency Resolution Process'. Always, it is open to the 'Corporate Debtor' or its Directors to point out that the 'Debt' is not payable by the 'Corporate Debtor' in 'Law' and in fact.

…. As far as the present case is concerned, there exist serious dispute as to whether the Respondent / 'Corporate Debtor' owes any sum to the Petitioner / 'Financial Creditor' and the said dispute cannot be determined in a summary proceeding under the 'Insolvency & Bankruptcy Code' in the considered information of this Court.

Suffice it for this Tribunal to make a pertinent mention that the dispute between the parties requires to be thrashed out by adducing necessary documentary and oral evidence before the 'Competent Forum'. Admittedly, the Adjudicating Authority under the 'I&B' Code is not a 'Court of Law' and it does not decide money claim or 'Suit'. In any extent, the Appellant has failed to establish when there is any 'Debt' recoverable from the Respondent Company and the occurrence of default. 32. Be that as it may, in the light of detailed qualitative and quantitative discussions and also taking note of attendant facts and circumstances of the instant case in an encircling *manner this Tribunal comes to an inevitable and irresistible conclusion that the Impugned Order dated 17th September, 2019 in dismissing the Section 7 Application is free from any legal infirmities. Resultantly the present Appeal Sans merits and the same is accordingly dismissed but without Costs.*

2. **Mr. Pramender Kumar Mittal And Others V/s. Desiya Hotel & Resorts Privatc Limited NATIONAL COMPANY LAW TRIBUNAL ALLAHABAD BENCH Company Petition (IB)No.240/ALD/2019**
Relevant Para 22 to end

Mere plain reading of provisions shows that the financial debt means the debt alongwith interest, if any, which is disburse against the consideration for time value of money and includes the debt which has been referred in clause (a) to (i) and when I shall consider the amount which the applicants claim they have deposited as per annexure 1 then I find nowhere in the application the applicant has mentioned that fact that he has deposited the amount against the consideration for time value of money.

24.As I have already stated in the above-mentioned paragraph that the applicants failed to produce any document to show that what was the agreed interest in between the parties on the basis of which money was borrowed. Therefore, the case of the applicant in my opinion, does not comes under Section 5 (8) (a) of IB Code and1 further find *that it also does not come either under (b) or (c) or (d) or (e) or (f) or (g) or (h) or (i) of Section 5 (8) of the l&B Code.*

Therefore, I am unable to accept the contention of the applicant that these deposits annexed as annexure I comes under financial debt and they comes under the definition of financial creditor in view of Section 5 (7) of the IB Code.

25.For the reasons discussed ahove, this Adjudicationg Authority is of the considered view that in absence of any document, the contention of the applicant is not liable to accepted and the applicants fails to prove that there deposite as per annexure 1 comes under the definition of financial debt under Section 5(8) of IBC and deposited amount as claimed is not barred by law of limitation.

26.So for the reasons discussed above, in my opinion the application filed under Section 7 is not according to the provision of law and is not complete thus this application is not liable to be admitled.

27.Therefore, in my opinion, the applicant failed to bring on record the default recorded with the information utilitý or such other record or evidence as may be specified which is necessary to proceed for admitting the petition Under Section 7 of the 1&B Code.

Accordinlgy. it is therefore, ORDERED that the praycr to initiate proceedings U/S 7 IBC against the "Desiya Hotel & Resorts Pvt. Ltd." is hereby rejected and the application stands dismissed.

31. We have heard the arguments of Financial creditor and Corporate Debtor and perused the records.

32. We also consider the facts of the case in the lights of the Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors. [Writ Petition (Civil) No. 99 of 2018] upholding the Constitutional validity of IBC, the position is very clear that unlike Section 9, there is no scope of raising a 'dispute' as far as Section 7 petition is concerned. As soon as a 'debt' and 'default' is proved, the adjudicating authority is bound to admit the petition, In the present matter from Bank statement and Financial Statement it is clear that there is debt and resignation letters were handed over to existing directors of the Corporate Debtor with understanding that the Corporate Debtor would clear the loan amount given by the Financial Creditors on the date of acknowledging the resignation letters of the Financial Creditors form these submissions debt and default stand established.

33. The Financial Creditor has proposed the name of **Mr. Mandar Wagh,** Registration No. IBBI/IPA-002/IP-N00450/2017-2018/11276, as the Interim Resolution Professional of the Corporate Debtor. He has filed his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with a copy of his Certificate of Registration.

34. The application made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is

in excess of minimum amount stipulated under section 4(1) of the IBC. Therefore, the debt and default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.

35. It is, accordingly, hereby ordered as follows: -

(a) The petition bearing **CP (IB) 1806/MB/C-II/2019** filed by **Dr. Vilas Pandurang Sabale and Anr.** the Financial Creditors, under section 7 of the IBC read with rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Sant Dyaneshwar Hospital Private Limited [CIN: U85110PN2003PTC017793],** the Corporate Debtor, is **admitted**.

(b) There shall be a moratorium under section 14 of the IBC, in regard to the following:

(i) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

(iii) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Sarfaesi) Act, 2002;

(iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(c) Notwithstanding the above, during the period of moratorium:-

(i) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

(ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

(d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating

Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

(e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(f) **Mr. Mandar Wagh,** Registration No. IBBI/IPA-002/IP-N00450/2017-2018/11276, having address at A2/1102, Saarrthi Shilp, behind Ekalavya College, Kothrud, Pune - 411038, [Email: mandar.wagh@anandchaitanya.com] is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.

(g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

(h) The Financial Creditor shall deposit a sum of Rs.2,00,000/- (Rupees Three Lakhs only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

(i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

(j) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Dated 8th October, 2021

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

Sd/-

ASHOK KUMAR BORAH
Member (Judicial)

SAM