

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 986/MB-IV/2021

Under Section 7 of the I&B Code, 2016

In the matter of:

Kailash Motilal Kakrania & Ors.

...Financial Creditor/Financial Creditor

V/s

Apurva Oil and Industries Private Limited

[CIN: U17120MH1980PTC022719]

...Corporate Debtor/Corporate Debtor

Order Dated: 14.07.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Nausher Kohli a/w Mr. Harsh
Kesharia, Advocates.

For the Corporate Debtor(s) : Mr. Amit Tungare a/w Ms. Jill
Rodricks, Advocates.

Per - Kishore Vemulapalli, Member Judicial

1. This is an Application being C.P. (IB) No. 986/MB/C-IV/2021 filed on 04.09.2021 by Kailash Motilal Kakrania, the Financial Creditor/Financial Creditor, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B

Code) against Apurva Oil and Industries Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

1.1 The total amount claimed to be in default is Rs. 1,22,42,927/- (Rupees One Crore Twenty-Two Lakh Forty- Two Thousand Nine Hundred and Twenty-Seven only) which includes Rs. 1,01,50,009/- towards principal amount and Rs. 20,92,918/- (Rupees Twenty Lakh Ninety-Two Thousand Nine Hundred and Eighteen only) towards interest calculated at the rate of 09% per annum till 30-06-2021 as per the Balance Sheet of the Corporate Debtor.

1.2 The date of first default is 23.07.2021. The default on the part of the Corporate Debtor is recurring in nature as the monies advanced by the Financial Creditor as financial assistance to the Corporate Debtor are still outstanding.

2. The Operational Creditor states that Mr. Kailash Kakrania is a shareholder and erstwhile Director of Corporate Debtor (Hereinafter referred to as "Petitioner No.1"). Mrs. Manju Kailash Kakrania is wife of Petitioner No. 1 (hereinafter referred to as "Petitioner No.2") and also a Shareholder of the Corporate Debtor.

2.1 The Corporate Debtor is engaged in the business of dealing in Oil seeds, Oil Products and Agro Products. The amount in default is Rs. 1,01,50,009/- (Rupees One Crore One Lakh Fifty Thousand and Nine Only) along with interest at 9% p.a. of Rs. 20,92,918 / (Rupees Twenty Lakh Ninety-Two Thousand Nine-hundred and Eighteen Only).

2.2 The Financial Creditors provided financial assistance to the Corporate Debtor in form of fluctuating unsecured loan on interest at the rate of 9% p.a. However, after 2014 the Petitioner No.1 was

ousted from the management of the Corporate Debtor. Thereafter, the Financial Creditors repeatedly requested for the outstanding amount, interest, and other information. However, the Corporate Debtor has not paid the debts of the Petitioners. That as on date, the total outstanding amount due to Financial Creditors is Rs. 1,22,42,927/- (Rupees One Crore Twenty-Two Lakh Forty Two Thousand Nine Hundred and Twenty-Seven only) inclusive of interest.

- 2.3 The Operational Creditor states that the amount of financial assistance advanced by the Financial Creditor to the Corporate Debtor was in the form of interest bearing unsecured loan and as such, the same is covered under the definition of a "debt" as provided for under Section 3(11) of the Code. Further, upon the said loan, the Corporate Debtor is liable to pay interest to the Financial Creditor. The amounts advanced to the Corporate Debtor are in the form of amounts raised having the commercial effect of borrowing as provided for under Section 5(8) of the Insolvency & Bankruptcy Code, 2016 and hence, a "Financial Debt".
- 2.4 However, despite requests, the Corporate Debtor is yet to make the repayment of the monies due to the Petitioners / Financial Creditors. Thus, the Corporate Debtor has committed a "Default" in performance of its financial obligations as defined under Section 3 (12) of the Insolvency and Bankruptcy Code, 2016.
- 2.5 The Financial Creditor states that the interest on Unsecured Loan provided by the Financial Creditors was sanctioned vide Board Resolutions passed by the Board of the Corporate Debtor in every Financial Year. Despite undertaking payment of interest accrued upon the amount of financial assistance granted, the Corporate

Debtor has failed to make the payments of the said amounts due as agreed between the parties and hence, it appears to have become commercially insolvent i.e. unable to pay its debts and liabilities which have arisen in the ordinary course of business within the meaning, scope and ambit of Section 7 of the Code. The Corporate Debtor has also acknowledged the Unsecured Loan payable to the Petitioners in its Financial Statements for the Financial Year 2020-21 filed with the office of Registrar of Companies, Maharashtra at Mumbai, however, the Corporate Debtor has not filed Financial Statements for the Financial Years 2018-19 and Financial Year 2019-20.

- 2.6 The Petitioners submit that the Corporate Debtor in its Reply has denied the existence of any Board Resolution of the Corporate Debtor wherein the rate of Interest payable to the Petitioner was resolved by the Corporate Debtor. The Petitioners further submit that the Corporate Debtor in its board meeting convened on 15-01-1999 and 26-08-1999 has agreed to pay interest on loan from directors and members at 9% p.a. It is submitted that the Corporate Debtor in its Board Meeting every year used to pass resolutions for payment of Interest on loan to the Director/Members of the company.
- 2.7 The Corporate Debtor has even paid interest to the Petitioners on the unsecured loan provided by them. This is evident from the contents of Form 3CA filed by the Corporate Debtor with the Income Tax Department for Financial year 2008-09.
3. The Corporate Debtor filed its Reply dated 20.12.2021 praying for dismissal of the present petition on the following grounds-

- (i) No reference of filing of petition to IBBI as per Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 [Rule 7 (2) 4] as amended on 24-09-2020 requiring it mandatory for an applicant to provide a copy of the application for initiating corporate insolvency resolution process against a corporate debtor, to the IBBI, before filing the same with the NCLT.
- (ii) Record of Default not registered on NeSL website in accordance with section 7(3) of the Insolvency and Bankruptcy Code.
- (iii) The Petition is barred by the Law of Limitation. The Corporate Debtor states that, the last payment was made to Mr. Kailash Kakraniya on 31.12.2014 and to Mrs. Manju Kakraniya on 18.1.2012 (joint petitioners) by the Corporate Debtor. There has been no exchange of any communication between the parties since then. Therefore, the right of the Petitioners to seek any legal remedy extinguished on completion of 3 years from last payment made to the respective petitioners i.e. 31.12.2017 for Mr. Kailash Kakrania and 18.1.2015 for Mrs. Manju Kakrania.
- (iv) He also placed reliance on the decision of the Hon'ble Supreme Court in the matter of *"Innoventive Industries Ltd. vs. ICICI Bank Limited (2018) 1 SCC 407"* where it was held that "A debt may not be due if it is not payable in law or in fact, from which, one can imply indication towards applicability of limitation law for ascertaining the validity of an application filed under the Code."
- (v) As per the Petitioners, the amount outstanding was Rs. 1,01,50,009/- towards principal and interest of Rs. 20,92,918/- upto 30-06-2021, making aggregate default amount of Rs. 1,22,42,927/-

(Page 14 and 151 of the Petition). The ledger account of both petitioners are provided as an Exhibit - I on Page 268 to 274. According to them, the outstanding amount to Mr. Kailash Kakrania is Rs. 89,39,026/- and Ms. Manju Kakrania is Rs. 12,70,983/- amounting to a total of Rs. 1,02,10,009/-. The principal amount as per the ledgers provided by the Petitioners and as per the Form 1 filed are different.

- (vi) The Corporate Debtor states that there is no document which suggests that the debt was raised with interest term. The Petitioner arbitrarily charged interest @9% from 01.04.2019 without substantiating it by providing any document. If the debt was not having time value of money, it must fall into any of the transactions listed in section 5(8)(a) to (g) of the Code.
- (vii) The Petitioner has failed to prove that the debt was carrying any interest rate. Moreover, Manju Kakrania, the second petitioner, was never a part of the Board of the Petitioner and had never executed any document which signify the commercial effect of borrowing and therefore, squarely fails to be a Financial Debt. Therefore, if debt extended by Mrs. Manju Kakrania is excluded, the remaining amount would be Rs. 89,39,026/-; less than Rs. 100,00,000/- and therefore, clearly would not qualify the criteria of minimum amount of default, and accordingly, the petition is liable to be rejected.
- (viii) The Ledgers of Petitioner no.1 and that of Petitioner no.2 maintained in its books of accounts in respect of Corporate Debtor are separate. That since separate ledgers are maintained by the petitioner no.1 and petitioner no.2, the cause of action shall also be separate and distinct.

- (ix) The Petitioner mentioned that the date of first default for the purpose of the petition was 23 July 2021 (Synopsis Page 3 of the Petition) which is absurd and without any base. The Petitioner failed to provide any supporting document which indicates that the date of default was 23rd July 2021. No date of default has been mentioned in the Form 1 despite it is a mandatory field.
- (x) The Corporate Debtor states that no board resolution was passed in any year for interest purpose. The Petitioner is put to strict proof to provide copy of such board resolutions.
- (xi) Mr. Kailash Kakrania committed a fraud by misrepresenting himself as a Director of the Corporate Debtor. He ceased to be the director of the Corporate Debtor w.e.f. 16-08-2014 (DIR 12 filed and MCA Master Database is attached to the reply). Despite not holding position as a director of the Company since 16-08-2014, he misrepresented himself as a director and all Leave and License agreements were executed by him in the capacity as a director after 16.08.2014. He didn't have any authority of the Board to give company premises on leave and license basis but he committed a fraud with the company as well as the third party by third party and collected money from misrepresenting himself as a director. A police complaint was filed by the Corporate Debtor for cheating and fraud against Mr. Kailash Kakrania and a criminal application is also filed under section 156/3 for 420 of the IPC with the court vide nos. 1164/2021 which is sub judice.
4. The Petitioners vide **Additional affidavit dated 11.04.2022, 09.02.2023 & 14.03.2023** submitted that Demand Notice dated 16.07.2021 was

dispatched to the Corporate Debtor and its Directors vide Speed Post on 19.07.2021 and the same was received by the Corporate debtor and its Directors on 22-07-2021; an Additional Affidavit dated 11-04-2022 was submitted wherein the date of default was inadvertently and erroneously mentioned as 23-07-2021 instead of 31-07-2021 and prayed to consider the date of default as 31-07-2021 in the present Company Petition and thereby submitted a rectified Part IV of Form-1 dated 26-08-2021 mentioning therein the date of default as 31-07-2021; and the last audited financials for the year ending on 31st March 2022 and audit report of the Corporate Debtor states the exact amount owed by the Corporate Debtor to the Financial Creditor and Mrs. Manju Kailash Kakraniya, his wife.

5. The Corporate Debtor vide an **Additional Affidavit dated 09.06.2023** filed by the director of the Corporate Debtor brought on record that the Petitioner has been collecting rent in an unauthorized manner without any authority from the public by showing himself as the director of Corporate Debtor without any authority in that regard and the Corporate Debtor lodged a criminal complaint against the Petitioner immediately on 6th June, 2021 for the same and this petition filed by the Financial Creditor dated 28th August 2021, is an after-thought of the Financial Creditor and that it suppressed this material information from the Bench. The accounting of the rents collected by the Petitioner was accounted into the accounts prepared for FY 2021-22, immediately upon receipt of information of rent amount collected. The accounting is done as per Sec. 128 of the Companies Act, 2013 based on documents i.e., invoices, vouchers, lease and license agreement, etc. available on the record at the time of making of books of accounts on day-to-day basis. On the basis of the documents, the entries were posted and the books were finalized. The Books of accounts are maintained on accrual basis and double accounting system showing true and fair view of accounts.

6. We heard the Counsel and have carefully gone through the pleadings available on records.

6.1. This Bench's attention was drawn to the Financial Statement of the corporate debtor for the year ended 31.03.2022 which contains the corresponding amounts for the year ended 31.03.2021 also. This Bench finds that the Corporate debtor owed a sum of Rs. 1,01,50,009/- to the Applicant and his wife as on 31.03.2021 and 31.03.2022 as per Note No. 3(B) of the Financial Statement. Further, the Financial statement shows that the Applicant Mr. Kailash Kakrania owes a sum of Rs. 10,85,850/- as on 31.03.2022 to the Corporate Debtor. Accordingly, it was pleaded by the Corporate Debtor that even though the Corporate Debtor owed a sum of Rs. 1,01,50,009/- as on 31.03.2021, the said liability reduced to Rs. 90,64,159/- as on 31.03.2022, which is less than One Crore.

6.2. Hon'ble NCLAT in the matter of *Asset Reconstruction Company (India) Ltd. Vs. Uniworth Textiles Ltd. 2023) ibclaw.in 443 NCLAT*, held that *"It is therefore evident that mere entry in the Balance Sheet cannot be taken as unqualified acknowledgment of the debt. However, it may also not be correct to take every note or caveat regarding entries made in the Balance Sheet as ground to denying acknowledgement of debt in order not to extend the limitation period from such acknowledgment period. It is therefore desirable that while looking such entries of debt amounting to acknowledgment, one has to consider the overall scenario which may be evident from Director's Report, Auditor's Report, notes to the accounts etc. It may also be relevant to consider the entire series of events starting from such loans/ debts to the filing of application under section 7 of the Code, to gauge the true intent of such entries and caveats, if any, which impact the intended acknowledgements or genuine denial of liability on part of the Corporate Debtor. While doing this examination, it may be*

worthwhile to look into the overall eco system of such transactions which may help in understanding the impact on limitation period based on such acknowledgements.”

6.3. This Bench finds that the Financial Statement of the Corporate Debtor clearly shows that an amount is claimable from the Applicant, and its statutory Auditor has explained the reason for disclosing the amount receivable from and payable to the Applicant separately in the financial Statement. Accordingly, the admission of the amount as on 31.03.2021 is to be read in the light of developments taken place in the Financial year 2021-2022, in view of fact that the Demand notice was issued on 16.07.2021.

6.4. This Bench further notices that the Applicant Financial Creditor has claimed an interest @ 9% p.a. for the period from 01.04.2019 till 15.07.2021, and has submitted that the Corporate Debtor in its board meeting convened on 15.01.1999 and 26-08-1999 has agreed to pay interest on loan from directors and members at 9% p.a. However, the Corporate Debtor in its reply has denied any liability on that account. Though the Petitioner has filed the Board Resolution, but the said Resolution stipulated payment of interest only for the financial year 1998-1999 and 1999-2000. The Tax Audit Report evidences payment of interest in the year 2008-2009 only. This Bench could not find any authorisation or evidence suggesting that the Applicant Financial Creditor had right to claim any interest for the period form 01.04.2019 onwards. It appears more strange if this fact is looked in the light of no claim of interest for any period after 2008-2009 till 2018-2019. Accordingly, the claim of interest is not tenable.

- 6.5. In view of above discussion, this Bench finds that the Corporate Debtor cannot be said to owe more than Rs. 90,64,159/- as on 31.03.2022. Since this Application has been filed on 04.09.2021, when the threshold limit under Section 4 of the Code was Rs. 1 crore, this petition is not maintainable on this ground.
- 6.6. This Bench further finds that the Applicant holds 28.8% share capital of the Corporate Debtor and the Corporate Debtor has alleged him to be indulged into cheating and misappropriation of the property of the Corporate Debtor. This leads us to a conclusion that the present petition seems to be motivated by extraneous reasons than for resolution of the Corporate Debtor. This petition is not maintainable on this ground also.
- 6.7. Though, there exists a “financial debt” within the meaning of Sec. 5(8) of the Code, but for the reasons stated above, this Bench is of the view that this petition is therefore not maintainable under Section 7 of the Code for initiation of CIRP against the Corporate Debtor and deserves to be Dismissed.

ORDER

This Application being C.P. (IB) No. 986/NCLT/MB/C-IV/2021 filed under Section 7 of I&B Code, 2016, filed by Mr. Kailash Motilal Kakrania & Ors., Financial Creditor against Apurva Oil and Industries Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **Dismissed**.

We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

Prabhat Kumar
Member (Technical)
//LRA-Akshata Shah//

Sd/-

Kishore Vemulapalli
Member (Judicial)