

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

CP (IB) No.1304/MB-IV/2022

Under Section 7 of the I&B Code, 2016

In the matter of:

Mr. Manish Jitendra Ajmera

...Financial Creditor/Applicant

V/s

Sabari Developers LLP

[LLPIN-AAE-4277]

...Corporate Debtor/Respondent

Order pronounced on : 10.08.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Upendra Mahadik, Advocate

For the Respondent(s) : Mr. Kunal Kanungo a/w Ms.
Tanushree Sogani i/b Kunal Kanungo
& Co.

ORDER

Per: Prabhat Kumar, Member (Judicial)

1. This is an application being C.P. (IB) No. 1304/NCLT/MB/C-IV/2022 filed by Mr. Manish Jitendra Ajmera, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the matter of Sabari Developers LLP, Corporate Debtor.

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2. The Application is filed by Mr. Manish Jitendra Ajmera, the Financial Creditor claiming amount in default amounting to Rs.1,09,60,000/- (Rupees One Crore, Nine Lakhs, Sixty Thousand Two only), which includes Principal of Rs.80,00,000/- (Rupees Eighty Lakh only) and interest of Rs. 29,60,000/- (Rupees Twenty-Nine Lakh Sixty Thousand Only). A chart showing computation of total debt due from Sabari Developers is marked at Annexure-A/3 of the Petition.
 3. The case of the Financial Creditor is as under:
 - 3.1 The Financial Creditor submits that upon the request of the promoters of the Corporate Debtor, the Financial Creditor has advanced an unsecured loan of Rs. 75,00,000/- on 02.02.2015 and Rs. 30,00,000/- on 21.01.2016.
 - 3.2 The Corporate Debtor has repaid a part of unsecured loan to the extent of Rs.25,00,000/- on 06.10.2015. The Petitioner further submits that the Corporate Debtor has paid interest to the Financial Creditor on the principal amount till 2017. Thereafter, on 19.12.2020, the Corporate Debtor repaid an amount of Rs.20,00,000/- towards the part payment of the outstanding interest due from 2017 onwards.
 - 3.3 The Financial Creditor further submits that the Corporate Debtor after December 2020 does not make any heed to repay the outstanding dues.

Reply by the Corporate Debtor

4. The Corporate Debtor filed reply dated 21.06.2023 submitting that the Corporate Debtor does not owe an Financial Debt or any kind of debt to the Petitioner as defined under the Code or under any law for time being in force and further contended that all the allegation, contentions contained in present company petition are false and baseless, therefore the Petition deserves to be dismissed on following grounds: -

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- a. Lack of written contract/agreement to prove that alleged claim is the Financial Debt;
 - b. No Evidence to prove disbursal of alleged claim amount;
 - c. Failure to attach the record of default issued by Information Utility;
 - d. Non-Compliance with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating) Rules, 2016

4.1 The Corporate Debtor submits that the Applicant does not rely on any loan agreement of any communication in the form of letters of emails etc. for the purpose of substantiating the claim and the purported Financial Creditor does not have the licence to operate as Non-Banking Finance Company. The Applicant in order to come within the meaning of the Financial Creditor has to fulfil the essential criteria i.e. the person to whom the Financial debt is owed and includes a person whom such debt has been illegally assigned or transferred; and the debt alongwith interest, if any, is disbursed against the consideration for time value of money and includes any one or more mode of disbursed as mentioned in clause (a) to (i) of 5(8) of the Code.

4.2 Further, the Applicant failed to produce any “Financial Contract” as defined under the Code. Financial Debt is a debt along with interest, if any, which is disbursed against consideration for time value of money and the deduction of TDS would not sufficient to conclude that there was financial debt.

Rejoinder by the Financial Creditor

5. The Financial Creditor filed rejoinder dated 10.07.2023 denying each and every allegation levelled by the Corporate Debtor in its reply and submits that reply is totally frivolous and baseless.

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- 5.1 The Corporate Debtor has approached the Financial Creditor for financial assistance for its ongoing project of Construction in Real Estate and as per the agreed terms between the Financial Creditor and the Corporate Debtor, the Financial Creditor have disbursed financial loan of Rs.75.00 lakhs with interest @12% p.a. with a repayment tenure of the 3 years.
- 5.2 The Corporate Debtor has paid interest @12% p.a. against the Financial Debt of Rs.80.00 Lakh as on April 2017. Thereafter, the Corporate Debtor have not paid any of the amount towards the principal and interest.
- 5.3 The money lent by the Applicant to the Corporate Debtor is a Financial Debt. The Contract Act 1872 makes it very clear that an oral contract is also a valid contract. Further, the Supreme Court too upheld the validity of oral agreements in *Alka Bose Vs. Parmatma Devi & Other (Civil Appeal No.6197 of 2000)*.
- 5.4 Further, the Coordinate Bench of this Tribunal also in the matter of Gateway Offshore Private Limited and Goodbye Software Private Limited (CP (IB)954/MB/C-1/2019) has held that the written contract is not a pre-requisite to prove the existence of financial debt.

Findings:

6. This Bench heard the Counsel and perused the material available on record.
- 6.1 The Corporate Debtor has challenged the present petition on the ground of (a) non-existence of any debt; (b) non-existence of any agreement supporting provision of such debt to the Corporate Debtor; (c) the Applicant is not a Non-Banking Financial Company to carry on the business of lending money; (d) non-compliance to Rule 4 of Application to Adjudicating Authority Rules, as the Applicant has failed to serve the copy of petition to the petitioner, which is a pre-requisite; and (e) Absence of record of default with Information utility.
- 6.2 During hearing, a submission was made by the Counsel for Corporate Debtor that a copy of petition has not been served to it. This Bench

directed the Applicant to file an affidavit again enclosing thereto proof of service of petition. On 10.5.2023, the Applicant filed the said affidavit and also confirmed that the petition has again been served to the Corporate Debtor on 5.5.2023.

- 6.3 As regards other grounds raised by the Corporate Debtor, this Bench is the considered view that a debt can come into existence through oral contract also, and the existence of debt does not necessarily depend on existence of a written contract between the parties, and the terms of contract can be proved by other means also, as is clear from the reading of Section 7(3), which requires the Applicant to furnish record of the default recorded with the information utility or such other record or evidence of default as may be specified. It is not in dispute that the Corporate Debtor received the amounts of Rs. 75,00,000/- on 02.02.2015 and Rs. 30,00,000/- on 21.01.2016 paid by the Applicant. Further, the Corporate Debtor paid back Rs. 25,00,000/- to the Applicant subsequently, and it paid the interest on such amounts till 31.3.2017. Accordingly, the fact of disbursement of amounts, claimed in this Petition, is proved. The payment of interest on such amounts till 31.3.2017 indicates that the payment of such amounts by the Applicant to the Corporate Debtor was to carry interest. The Applicant has placed on record ledger account in the name of the Applicant in the books of Corporate Debtor for the period from 1.1.2001 to 04.10.2020, which clearly shows that the Corporate debtor owes a sum of Rs. 80,00,000/-; the narration of transactions in such ledger account indicates that (i) the said amount is acknowledged as loan; (ii) the Corporate Debtor has booked interest @ 1% p.m. upto 31.3.2017 and @ 1.25% p.m. from 1.4.2017 till 30.6.2017; and (iii) thereafter, no interest has been booked. In view of these facts, this Bench feels that there is clear admission as regards the nature of debt in the books of Corporate Debtor.
- 6.4 As regards, non-registration of Applicant as NBFC, this Bench feels that this is irrelevant so long as there exists a debt, which is legally enforceable,

and such debt is in default. The contravention, if any, of the provisions of RBI Act in this relation attract penalty/fine, but such Act does not bar the recovery of the amounts lent by the lenders.

- 6.5 Further, as the provisions of Section 7(3) of the Code itself makes it clear that the Applicant is obligated to furnish either record of the default recorded with the information utility or such other record or evidence of default as may be specified. Hence, the relevant consideration is whether the default exists? The Applicant has not filed any document evidencing that tenor of loan was 3 years. Further, no evidence has been placed on record to indicate that the remaining amount of principal, which was to be paid within 3 years, was actually due and the Applicant had asked the Corporate Debtor to make it payable. In the absence of any document evidencing tenor of the loan, this Bench feels that the said loan only be characterised as loan repayable on demand. As no demand has been made by the Applicant to make the outstanding principal as due for payment, this bench feels that claim of principal as in default is premature. As regards interest on such amounts, it is undisputed that the Corporate had made payment of interest till 30.6.2017 on quarterly intervals regularly suggesting that the interest was payable on quarterly intervals, this Bench feels that claim of interest amounting to Rs. 28,00,000/- can be said to be in default. However, this petition is filed on 14.11.2022, and the Section 4 of the Code provided threshold limit of Rs. 1,00,00,000/- at that time, this petition is not maintainable even if interest of Rs. 28,00,000/- is considered in default.
- 6.6 In view of aforesaid discussion, this petition deserves to be dismissed, as premature. It is clarified that any subsequent application in relation to this debt shall be barred on ground of Res-judicata, as the present Application is dismissed as pre-mature.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Kishore Vemulapalli
Member (Judicial)