

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO:II**

SPECIAL BENCH(Video Conference)

**CORAM: HON'BLE MADAN BHALCHANDRA GOSAVI – MEMBER JUDICIAL
HON'BLE DR.BINOD KUMAR SINHA-MEMBER TECHNICAL**

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 29.07.2021 AT 12:30 PM THROUGH VIDEO CONFERENCE

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP(IB) No.216/7/HDB/2020
NAME OF THE COMPANY	Shresht Industries Pvt Ltd
NAME OF THE PETITIONER(S)	SatyaSadasiva BasavaPrasad Maley & another
NAME OF THE RESPONDENT(S)	Shresht Industries Pvt Ltd
UNDER SECTION	7 of IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

Orders passed vide separate sheets. CP No.216/7/HDB/2020 is rejected.

- sdt -

Member (Technical)

- sdt -

Member (Judicial)

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**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

CP (IB) No.216/7/ HDB/ 2020

U/s 7 of IBC, 2016

R/w Rule 4 of I & B (AAA) Rules, 2016.

In the matter of:

1. Satya Sadasiva Basava Prasad Maley
Flat No.101, 8-2-293/82/ F/A
Plot No.40, Srirams Kaveri Apartments
Road No.2, Film Nagar
Hyderabad – 500096, Telangana India.
2. Mrs. Lakshmi Narasamma Maley
Flat No.101, 8-2-293/82/ F/A
Plot No.40, Srirams Kaveri Apartments
Road No.2, Film Nagar
Hyderabad – 500096, Telangana India.

**.. Petitioners/
Financial Creditors**

VERSUS

Shresht Industries Private Limited
8-2-293/82/A/727, Plot No.727
Road No.36, Jubilee Hills
Hyderabad – 500033.
Telangana, India.

**.. Respondent/
Corporate Debtor**

Date of order: 29.07.2021

**Coram: Madan Bhalchandra Gosavi, Member Judicial
Dr. Binod Kumar Sinha, Member Technical**

Parties / counsels present:

For the Petitioner : Mr. Manoj Kumar Koyalkar, PCS

For the Respondent : Mr. Y. Hema Chander, Advocate.

(Per Bench)

Heard on: 29.01.2021, 05.03.2021, 09.04.2021, 02.07.2021 and
15.07.2021.

The present application is filed by the applicants under section 7 of the Insolvency & Bankruptcy Code, 2016, alleging that petitioner no.1 had paid Rs.38,00,000/- and petitioner no.2 had paid Rs.10,00,000/- to

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the Corporate Debtor towards share application money. However, the Corporate Debtor has failed to allot shares. Hence this petition is filed under Section 7 of Insolvency and Bankruptcy Code, 2016, read with Rule 4 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, claiming an amount of default of **Rs.49,99,173/- as on 02.12.2017**, and seeking commencement of Corporate Insolvency Resolution Proceedings (CIRP) against the Corporate Debtor.

2. The averments of the petition filed by the Petitioner/Financial Creditor in brief are:
3. Petitioner no.1 transferred funds from their personal account to the Corporate Debtor on 18.09.2017 and 16.12.2017 amounting to Rs.38,00,000/- and petitioner no.2 transferred a sum of Rs.10,00,000/- on 24.10.2018. Transaction details are at **ANNEXURE 'C'**. The petitioners claimed that the aforesaid funds were transferred for investment in share capital of the Corporate Debtor. However, the Corporate Debtor has neither allotted shares to the petitioners within 60 days nor has repaid the amount within 15 days thereafter. After rigorous follow up, the Corporate Debtor has repaid Rs.5,00,000/- to petitioner no.1, by online transfer. Thereafter, a meeting was convened with intervention of a relative of the directors of the Corporate Debtor on 20.10.2019, where the Corporate Debtor had admitted the liability and agreed to repay the sum in monthly instalments of Rs.10,00,000/- commencing from 20.11.2019. However, the Corporate Debtor failed to submit post-dated cheques. Copies of WhatsApp and e-mail communications are at ANNEXURE 'D'.
4. The petitioners, therefore, claimed that the Corporate Debtor admitted **unsecured loan of Rs.43,00,000/-** from the Financial Creditors with interest as computed at ANNEXURE 'F'. Said computation is reproduced hereunder:

**“Statement of investments made by
Satya Sadasiva Basava Prasad Maley**

Sl. No.	Date	Particulars	Cheque details	Amount Rs.
1	18.09.2017	Investment made into Shresht Industries Ltd by Satya Sadasiva Basava Prasad Maley.	Andhra Bank Cheque No.314089	2,800,000
2	16.12.2017	Investment made into Shresht Industries	Andhra Bank Cheque No.403159	1,000,000

		Ltd by Satya Sadasiva Basava Prasad Maley.		
3	17.11.2018	Shresht Industries repaid to Satya Sadasiva Basava Prasad Maley.	On line transfer	-430,000
4	01.12.2018	Shresht Industries repaid to Satya Sadasiva Basava Prasad Maley.	On line transfer	-70,000
Total				3,300,000

Interest calculation

Sl. No.	Particulars	Particulars	Amount Rs.
1	For Rs.28,00,000 (Rs twenty eight lacs) interest period starts after expiry of 75 days, viz. 60 +15 days) i.e. from 02.12.2017 till 16.11.2018 (date of repayment of 1 st instalment) = 349 days.	Rs.28,00,000 * 12% * (349/365)	321,271
2	For Rs.23,70,000 (Rs.28,00,000 - Rs.4,30,000) interest for period 17.11.2018 till 30.11.2018 = 14 days.	Rs.23,70,000 * 12% * (14/365)	10,908
3	For Rs.23,00,000 (Rs.23,70,000 - Rs.70,000) interest for the period 01.12.2018 till 16.03.2020).	Rs.23,00,000 * 12% * (471/365)	366,993
Total			699,173

Statement of investments made by Mrs. Lakshmi Narasamma Maley

Sl. No.	Date	Particulars	Cheque details	Amount Rs.
1	24.10.2018	Investment made into Shresht Industries Ltd by Mrs. Lakshmi Narasamma Maley.	Andhra Bank Cheque No.312069.	1,000,000
Total				1,000,000

5. The respondent/ Corporate Debtor filed counter dated 03.11.2020, mainly alleging that:

- (i) The Corporate Debtor did not invite deposits under section 73 of the Companies Act.
- (ii) There is no proof of the Corporate Debtor requesting in writing to deposit money in the company after following procedure under section 76 of the Companies Act.
- (iii) Unsolicited deposits in company account by the petitioners cannot be termed as 'unsecured deposits'.

- (iv) Mere deposit of money in company account, without call for application money to allot shares, cannot be termed as deposit towards value of shares to be allotted.
 - (v) There is lapse of more than three years from the date of initial transfer of money.
 - (vi) WhatsApp conversation between petitioner no.1 and P.V. Narasimha Rao as relied on by the petitioners are of no help. Said P.V. Narasimha Rao is not a partner of the Corporate Debtor / company and he has never agreed to allot shares.
 - (vii) Petitioners no.1 and 2 did not disclose under what circumstances they transferred the amounts of Rs.38,00,000/- and Rs.10,00,000/- respectively.
 - (viii) The Corporate Debtor has relied on certain transactions between Lucky Automotives, Vijayawada and P. Gourav, Director of the Corporate Debtor / company and legal notice given by Corporate Debtor to said Lucky Automotives and reply thereto.
 - (ix) The Corporate Debtor also challenged the application by stating that petitioner no.1 transferred Rs.28 lacs on 18.09.2017 and Rs.10 lacs on 16.12.2017 to the account of the Corporate Debtor, whereas section 7 of the Conduct Rules of A.P. Government Employees bars depositing of amount in any private limited company.
6. The respondent/ Corporate Debtor has also filed Written Statement dated 08.03.2021, inter alia, raising the following additional grounds.
- (i) In view of amendment to section 4 of the I&B Code, 2016, made by Notification F. No.30/9/2020- Insolvency dated 24.03.2020 (page 13) issued by Ministry of Corporate Affairs, wherein minimum amount of default is specified at Rs.1 crore, this petition is not maintainable.
 - (ii) The Corporate Debtor has further relied on decision of the Hon'ble NCLAT in the case NEERAJ BHATIA Vs. DAVINDER AHLUWALIA & OTHERS in CP (AT) (Insolvency) No.142 of 2017 (page 24) and contended that by virtue of the said decision the petitioners are not financial creditors as the amount transferred had no commercial effect for want of

documents acknowledging the debt by the Corporate Debtor
Corporate Debtor.

7. The petitioners filed Rejoinder dated 15.03.2021 in reply to the counter filed by the Corporate Debtor on the following points:
- (i) The petitioners relied on Arrowline Organic Products Pvt Ltd Vs. Rockwell Industries Limited, to drive home that the power to make and amend laws and when any power is delegated by the Legislature to nay authority to notify any modification or alteration in a Statute, the same power is limited and cannot be exercised retrospectively.
 - (ii) After lapse of more than one year, petitioner no.1 had invested amounts in the Corporate Debtor / company on 18.09.2017 and 16.12.2017. Hence the question of seeking approval from the State Government under Conduct Rules of A.P. Government Employees does not arise.
8. In their Memo dated 27.04.2021, the petitioners further contended that:
- (i) There is no need for Financial Creditor to serve a notice of demand before filing a petition before NCLT under section 7 of the I&B Code.
 - (ii) Financial Creditor has sent repeated reminders via e-mail, WhatsApp and through phone conversation demanding due payment form the Corporate Debtor.
 - (iii) The Financial Creditor relied on decision of the Hon'ble NCLAT in the case of SHAKEBUDDIN IRTEBATUDDIN KHAN Vs. QUMRUDDIN FAIZI & ANOTHER, in Company Appeal (AT) (Insolvency) No.209 of 2019, wherein it is held that failure to allot shares by a company squarely amounts to financial debt and was well admitted under section 7 of I&B Code. It is also observed in the said order that under section 42(6) of the Companies Act, 2013, the company is liable to repay the money with interest 12%.
9. We have perused the documents on record, the authorities cited before us and heard the learned counsel for both the sides. Notification F. No.30/9/2020-Insolvency dated 24.03.2020 (page 13), issued by Ministry of Corporate Affairs, prescribes minimum amount of default at Rs.1 crore. The said Notification is 'prospective in nature' and not 'retrospective' as

held in the decision of the Hon'ble NCLAT in the case of **Madhusudan Tantia Vs. Amit Choraria & others**, in Company Appeal (AT) (Insolvency) No.557 of 2020 (para 56). Whereas, the present petition was affirmed on 21.03.2020 and filed on 24.03.2020, the transactions in question were dated 18.09.2017 and 16.12.2017 (in respect of petitioner no.1) and 24.10.2018 (in respect of petitioner no.2). Considering the dates of the impugned transactions the said notification has no applicability in the present case.

10. It is seen that the claim of the petitioners is based on Bank Certificates dated 07.11.2019 (Pages 33 and 34 of the petition) showing credit entries in favour of Shresht Industries Private Limited and Venkateswara Avenue Private Limited. According to these Certificates, petitioner no.1 transferred funds from his personal account to the Corporate Debtor on 18.09.2017 and 16.12.2017 amounting to Rs.38,00,000/- and petitioner no.2 transferred a sum of Rs.10,00,000/- on 24.10.2018.
11. Further, the applicants have filed copies of the Record of Financial Information – Form 'C' submitted by the applicants with National E-Governance Services Limited (NeSI) to substantiate their claim that the impugned amounts are unsecured loan and the dates of default are 20.11.2019 and 28.10.2019. However, there is no proof placed by the applicants reflecting acknowledgement/ acceptance of the same by the Corporate Debtor.
12. On consideration of the entire gamut of facts and the arguments advanced from both the sides, it appears to us that the main questions that arise for consideration before us are the following:
 - (i) Whether the petitioners, under the provisions of the Insolvency & Bankruptcy Code, 2016, would fall under the category of **'Financial Creditors'** or not?
 - (ii) Whether the impugned amounts claimed to be unsecured loans by the petitioners would fall under the category of **'financial debt'** as envisaged under the I&B Code?

13. **Analysis of said questions :**

Question No.1 :

13.1 Hon'ble Supreme Court, in the case of PHOENIX ARC PRIVATE LIMITED VS. SPADE FINANCIAL SERVICES LIMITED & OTHERS, in Civil

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Appeal No. 2842 of 2020, have clarified the nature of 'financial debt' and 'financial creditor' under the provisions of I&B Code as under:

"G.3.2 Financial Creditor and Financial Debt.

43. Under Section 5(7) of the IBC, a person can be categorised as a financial creditor if a financial debt is owed to it. Section 5(8) of the IBC stipulates that the essential ingredient of a financial debt is disbursement against consideration for the time value of money. This Court, speaking through Justice Rohinton F Nariman, in **Swiss Ribbons Pvt. Ltd. v. Union of India** has held:

"42. A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority."

(emphasis supplied).

44. In this context, it would be relevant to discuss the meaning of the terms "disburse" and "time value of money" used in the principal clause of Section 5(8) of the IBC. This Court has interpreted the term "disbursement" in **Pioneer Urban Land and Infrastructure Ltd vs. Union of India** in the following terms:

"70. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th Edn.) to mean:

"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose."

71. In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursement" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money...."

(emphasis supplied)

45. The report of the Insolvency Law Committee dated 26 March 2018 has discussed the interpretation of the term "time value of money" and stated:

“The current definition of ‘financial debt’ Under Section 5(8) of the Code uses the words “includes”, thus the kinds of financial debts illustrated are not exhaustive. The phrase “disbursed against the consideration for the time value of money” has been the subject of interpretation only in a handful of cases under the Code. The words “time value” have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money, or factoring of a discount in the payment.”

(emphasis supplied)

13.2 It is clear from the above guidelines available from the Hon’ble Supreme Court that under subsection (8) of the section 5 of the I&B Code, “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. In the instant case, the petitioners have not been able to produce any evidence to show that the impugned amounts were actually disbursed for any specific purpose against the consideration for the time value of money. The petitioners have not been able to show that any interest was payable on the amounts deposited in the accounts of the company or that any time was fixed for repayment of the same. Here it is pertinent to note that although payment of interest is not *sine qua non* for a debt to become financial debt, but time value of money must be there for a debt to become a financial debt under section 5(8) of the I&B Code, 2016.

13.3 Further, for initiation of CIRP proceedings under section 7 of the I&B Code, the applicants must establish that the Corporate Debtor owes a financial debt and default had occurred in respect of such financial debt. The concept of ‘default’ is directly linked with time period by which the financial debt was to be repaid. In the instant case, the petitioners have not been able to establish as to when the impugned amounts claimed to be disbursed as unsecured loan to the Corporate Debtor were to be repaid by the Corporate Debtor. Since there is no evidence to show that the impugned amounts had become due and payable and default had occurred, provisions of section 7 of the I&B Code would not come into play. In the present case, the only fact which is established by way of evidence in the form of certificates from the Bank is that the impugned amounts were transferred to the Bank account of the Corporate Debtor. There is no evidence that any interest was to be payable or that any time was fixed for repayment of the said amounts. Consequently, the said

amounts do not entail any consideration for time value of money. As such the said amounts will not come under the category of 'financial debt' as defined under section 5(8) of the Code. Therefore, we answer Question No.1 as formulated above in negative.

Question No.2 :

13.4 Consequently, the petitioners will also not fall under the category of 'financial creditors' as defined under section 5(7) of the Code. We, therefore, answer Question No.2 also in negative.

14. We are also not satisfied in terms of section 7(5)(a) of the Code that a default had occurred in absence of any agreement or written document with regard to repayment period of the impugned amounts.
15. In view of the above observations, we are not inclined to admit the petition as the petitioners have failed to establish that the transfer of the impugned amounts would fall under the category of 'financial debt' and that the same was due and payable and a default had occurred.
16. Consequently, the petition is dismissed.

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BINOD KUMAR SINHA
MEMBER TECHNICAL

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MADAN BHALCHANDRA GOSAVI
MEMBER JUDICIAL

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