IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-V

IB-1705/(ND)/2019

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

M/s Agarwal Polysacks Limited
E-649, M. I. A. IInd Phase,
Basni Jodhpur-342005 IN

...Financial Creditor

Versus

M/s K. K. Agro Foods and Storage Limited
2244, Gali Raghunandan, Naya Bazar,
New Delhi-110006 IN

....Corporate Debtor

Coram:

SHRI P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)
SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

PRESENT-

Counsel for Financial Creditor	:	Adv. Manish Paliwal and Adv. Vikas Kumar
Counsel for Corporate Debtor	:	Adv. Yash Sharma, Adv. Garima Dadhich

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ORDER

PER SHRI P.S.N. PRASAD, MEMBER (JUDICIAL)

Date: 29.07.2022

1. The present application is filed by M/s Agarwal Polysacks Limited (hereinafter referred to as 'Financial Creditor'), under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'the Code'), read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for initiation of Corporate Insolvency Resolution Process (hereinafter referred to as 'CIRP'), against M/s K. K. Agro Foods and Storage Limited (hereinafter referred to as 'Corporate Debtor'), for the alleged default on the part of the Corporate Debtor, for an amount of Rs. 91,80,854.55/-. The details of transactions leading to the filing of this application, as averred by the Operational Creditor, are as follows:

   i. That the Financial Creditor is specialized in manufacturing of different kind of Paper Bags and Plastic Packaging Rolls and the Corporate Debtor is engaged in providing warehouse for storage of Agri products.

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ii. That the Corporate Debtor sought financial assistance from the Financial Creditor and consequently, the Financial Creditor agreed to grant the Unsecured Term Loan for Rs. 75,00,000/- to the Corporate Debtor. Both the parties mutually agreed the terms and conditions and the interest rate at 12% per annum. The Financial Creditor disbursed the amount in three parts:-

a. Cheque No. 2140 RTGS Rs. 50,00,000/- dated 23.08.2017

b. Cheque No. 1986 RTGS Rs. 5,00,000/- dated 28.09.2017

c. Cheque No. 1988 RTGS Rs. 20,00,000/- dated 28.09.2017

iii. That it was agreed between the parties that the repayment of Unsecured Loan will be made on demand. The Corporate Debtor also deducted the tax on the Interest amount in the Financial Year of 2017-18. A total amount Rs. 5,22,500/- was incurred as interest on the principal amount, and the Corporate Debtor deducted the TDS of Rs. 52,250/- on 31.03.2018 but did not pay the same to the Financial

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Creditor. The deduction of tax at source is a clear admission of the liability of the Corporate Debtor.

iv. That the Financial Creditor sent a Letter of Demand dated 17.04.2019 to the Corporate Debtor to which no reply was sent by the Corporate Debtor.

v. That the total amount due from 01.04.2017 to 06.07.2019 is Rs. 91,80,854.55/- which includes the agreed interest @12% per annum.

2. Consequent to the notice issued by this Tribunal, the Corporate Debtor filed its reply in which the following contentions are made:

i. That the Financial Creditor is neither qualified to be termed as a creditor nor do the claim of the Financial Creditor falls under the provisions of Section 7 of the Code.

ii. That there is no financial debt and hence there arises no question of default by the Corporate Debtor.

iii. That there is no financial contract produced on record and there is no agreement for charging interest on the amount on record. Further, there is no evidence to show that the

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money was transferred to the Corporate Debtor against time value of money and thus the claim made by the Financial Creditor is not maintainable.

iv. That there are no documents for the borrowings and lending made between the parties. Further, the Financial Creditor has also not produced its income tax return filing which states and records accrual of revenue as interest based on the claim made by the Financial Creditor in the Application.

v. That there is no agreed "interest rate" or "time value of money" which is required for terming a debt/ obligation (if any) as a "Financial Debt" under the provisions of the Code. Without the debt being a Financial Debt the present Application under Section 7 is not maintainable and is therefore liable to be dismissed.

vi. That no document has been placed on record to show the existence of transaction of unsecured loan and that it was repayable on demand.

vii. That the Financial Creditor Company is not authorized or exempted under Section 186 of Companies Act, 2013 to provide an unsecured loan. The Financial Creditor has not

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produced any license or certificate to that effect, which entitles the Financial Creditor to give unsecured loans.

3. That the Financial Creditor has filed its rejoinder in which the facts of the case are reiterated and the following contentions are made:

   i. That the contract for grant of unsecured loan to the Corporate Debtor was an oral agreement and all the terms and conditions were discussed orally between the parties. The terms and conditions of the oral agreement can be established from the statutory records of the Corporate Debtor itself. It is reflected in the Balance Sheet of the Corporate Debtor for the financial year 2017-2018 that the Corporate Debtor has a Term Loan of Rs. 75,00,000/- from the Financial Creditor, repayable on demand and as on 31.03.2018 the total loan amount of Rs. 79,70,250/- was shown as borrowing from the Financial Creditor. The said amount is including the agreed interest of 12% and the Corporate Debtor has also deducted the TDS amount of Rs. 52,250/- on the total interest amount for the financial year

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2017-2018 and this clearly shows that the interest @12% per annum was agreed between the parties. Therefore, the fact of grant of loan and the charging of interest is clearly established from the statutory records of the Corporate Debtor.

ii. That the Hon'ble NCLAT in case of ***Nikhil Mehta and Sons (HUF) Versus AMR Infrastructure Ltd. (2017) 143 SCL 278*** has discussed the financial debt in detail and held that the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. Therefore, the loan facility availed by the Corporate Debtor was agreed at an interest rate of 12% per annum and the Corporate Debtor has also deducted the TDS on the interest amount payable to the Petitioner.

iii. That as per the Memorandum of Association of Financial Creditor, the Financial Creditor is duly authorised to

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receive, grant loans etc. on interest to the companies. The relevant object of the memorandum of association is mentioned as under:-

"(B) THE OBJECT INCIDENTAL OR ANCILLARY TO THE ATTAINMENT OF THE MAIN OBJECT ARE:- 16. Subject to the provision of Section 58A of the Companies Act, 1956 and the Rules framed there under and the direction issued by the Reserve Bank of India from time to time to receive, grants loans, advance or other money or deposits or otherwise from the State or Central Government, banks, companies, trusts or individuals with or without allowing interest thereon."

4. We have heard the Ld. Counsel's who appeared for the Financial Creditor as well as Corporate Debtor and perused the averments made in the application, reply and the documents enclosed with the application as well as the additional documents filed by the Financial Creditor.

5. In the case at hand, we have perused the Bank Statements for the period of 01.07.2017 to 29.09.2017 submitted by the Financial Creditor, we find that the Financial Creditor

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disbursed a total amount of Rs. 75,00,000/- to the Corporate Debtor at the interest rate of 12 % per annum and the said amount was credited in the account of the Corporate Debtor through RTGS and in support of that the Financial Creditor placed reliance upon Annexure-7 of the paper book which is the Bank Account Statement of the Financial Creditor. However, the same is not stamped or certified as per Regulation 2A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

6. Further, the Financial Creditor has also filed the Balance Sheets of the Corporate Debtor as on 31.03.2018, 31.03.2019 and 31.03.2020 wherein a term loan showing terms of repayment as 'repayment on demand' of Rs. 79,70,250/-, Rs. 88,42,993.0/- and Rs. 88,17,993/- respectfully is indicated. On perusal of the aforementioned documents, it is established that there was a long term borrowing. At this stage, Rule 3(1)(d) the IBBI (Application to Adjudicating Authority) Rules, 2016 can be referred, which is reproduced below:

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"financial contract means a contract between a corporate debtor and a financial creditor setting out the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment;"

Further, Section 5(8) of IBC can be referred to in the context of financial debt which has been reproduced below:

"financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes...."

7. In terms of the above provisions, it can be said that there should be a financial contract between the parties which elucidates the tenure of debt, interest to be charged on debt if any and the date of repayment. However, in the present case, there is no written agreement to establish the nature of transaction between the parties. No document has been submitted by the Financial Creditor showing the terms and conditions of the disbursement of the unsecured loan. It is also pertinent to mention that it is stated that there is only an oral agreement between the parties regarding the loaned amount.

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8. Further, the claim of the Financial Creditor is that the total amount Rs. 5,22,500/- was incurred as interest on the principal amount, and the Corporate Debtor deducted the TDS of Rs. 52,250/- which is against the interest amount.

9. We would like to refer to the submissions made on behalf of the Ld. Counsel appearing for the Financial Creditor that the 26AS of the Income Tax statement of the Financial Creditor shows that the Corporate Debtor has deducted TDS on 31.03.2018 therefore, that is the acknowledgment of the debt. At this juncture, we would like to refer to the decision of the Hon'ble Delhi High Court in the matter of ***Utility Powertech Limited Vs. Amit Traders, RFA No. 515/2015*** decided on 15th May, 2018 which is based upon the judgment of the Supreme Court in the matter of *Commissioner of Income Tax v. Gujarat Fluoro Chemicals (2012) 13 SCC 731* and the Hon'ble Bombay High Court in the matter of *S.P. Brothers v. Biren Ramesh Kadakla (2009) 1 Bom CR 453* in which the Hon'ble Delhi High Court held that:

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"19. On the issue of TDS deduction, the Trial Court may have erred as the settled position is that deduction of TDS does not constitute an admission of liability. The Trial Court may be wrong in holding that the TDS certificate by itself constitutes an admission of liability. This is not so, inasmuch as the TDS can be deducted even on the expectation of estimated liability. Independently of the TDS certificate, the liability of the Defendant is quite clear. The Supreme Court in Commissioner of Income Tax v. Gujarat Fluoro Chemicals (2012) 13 SCC 731 categorically held that "both advance tax as well as TDS are based on estimation of income by the assessee." The Bombay High Court as well, in S.P. Brothers v. Biren Ramesh Kadakla (2009) 1 Bom CR 453 has held that "the issuance of TDS certificates does not amount to an acknowledgement of defendant within the meaning of Section 25 of the Indian Evidence Act.......The TDS certificate is primarily to acknowledge the deduction of tax at source." The judgement dated 27th November, 2012 in Bigdot Advertising & Communications Pvt. Ltd. v. Union of India

[CS(OS) No.226/2000] was dealing with the question of the person who is liable once the TDS certificate is issued. It is not a precedent on the proposition that if a TDS certificate is issued, it amounts to admission of liability. In light of this, though the deduction of TDS by itself cannot be sufficient to impose liability, but on a totality of facts it is clear that the defendant is liable."

10. We would also like to refer the decision of Hon'ble NCLAT in the matter of ***Prayag Polytech Pvt. Ltd. vs. Gem Batteries Pvt. Ltd. [CA (AT) (Ins) No. 713 of 2019]*** wherein it was held that that the deduction of TDS is not sufficient to conclude that the transaction in question is a Financial Debt.

11. Considering the submissions of the Financial Creditor in the light of above decisions, we are of the considered view that the issuance of TDS certificate does not amount to an acknowledgement of debt by the Corporate Debtor.

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12. At this juncture, we would also like to refer Section 186 of the Companies Act, 2013 which relates to the case in hand and the relevant provision of the said Section is quoted below:-

"186. Loan and investment by company

(1) Without prejudice to the provisions contained in this Act, a company shall unless otherwise prescribed, make investment through not more than two layers of investment companies:

Provided that the provisions of this sub-section shall not affect,—

(i) a company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country;

(ii) a subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

(2) No company shall directly or indirectly —

(a) give any loan to any person or other body corporate;

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding sixty per cent. of its paid-up share capital, free reserves and securities premium account or one hundred per cent. of its free reserves and securities premium account, whichever is more.

(3) Where the giving of any loan or guarantee or providing any security or the acquisition under sub-section (2) exceeds the limits specified in that sub-section, prior approval by means of a special resolution passed at a general meeting shall be necessary.

.......”

13. In the light of the aforesaid provision, when we shall consider the case of the Financial Creditor then we find that the Financial Creditor has not enclosed the Special Resolution passed in the EGM of Shareholders for the purpose of compliance of Section 186(3) of Companies Act 2013.

14. In the light of the above noted facts and circumstances, when we consider the case in hand then we find that the Financial Creditor has failed to show the nature of the transaction

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between the parties and that the amount which he has paid comes under the definition of Financial Debt.

15. Thus, in view of the discussions made supra, the instant Application filed by the Financial Creditor under Section 7 of IBC, 2016 is not maintainable and accordingly the same stands dismissed.

16. Registry to send a copy of this order to the both parties.

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(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

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(P.S.N. PRASAD)
MEMBER (JUDICIAL)