

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

C.P. No.1732/I&BP/2018

Under section 7 of the IBC, 2016

In the matter of

Joel Cardoso,
601, 6th Floor, Golden Ferns,
Opp. Supari Talao Rebello Road,
Bandra (West) Mumbai 400050.

....Petitioner

v/s.

Priority Marketing Private Limited.
Gala No. 423 – B, 4th Floor,
Shah & Nahar Industrial Premises,
Dhanraj Mills Compound,
S. J. Marg, Lower Parel (W),
Mumbai - 400013

....Respondent

Order delivered on: 31.08.2018

Coram: Hon'ble Bhaskara Pantula Mohan, Member (Judicial)

Hon'ble V. Nallasenapathy, Member (Technical)

For the Petitioner : Advocate Mihir Mekal a/w Adv. Aliff Fazelbhoy
and Adv. Mr. Ankit Parekh i/b ALMT Legal

For the Respondent: Advocate Srisabri Rajan a/w Adv. Cyrus Jal i/b
Vashi and Vashi, Advocates.

Per: Bhaskara Pantula Mohan, Member (Judicial)

ORDER

1. This Company Petition is filed by Joel Cardoso (hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Priority Marketing Private Limited (hereinafter called "Corporate Debtor") alleging that Corporate Debtor committed default on 08.02.2018 in making payment to the extent of Rs. 1,45,36,475/- by invoking the provisions of Sections 7 of I & B Code (hereinafter called "Code") read with Rule 4 of Insolvency & Bankruptcy (AAA) Rules, 2016.

2. The Petitioner submits that he is a Shareholder of the Corporate Debtor previously holding 50% of the Share Capital and presently the same has been reduced to 25%. Since the Corporate Debtor was in requirement of funds the Petitioner granted unsecured loan repayable on demand, from time to time to the Corporate Debtor in good faith. As on 31.03.2008 a sum of Rs. 3,23,46,475/- was advanced by the Petitioner as unsecured loan. The Corporate Debtor from the Year 2008 to 2010 repaid the major portion of the loan and as on this date the loan outstanding is Rs. 1,45,36,475/- and the same was reflected in the Financial statements of the Corporate Debtor. The Corporate Debtor issued balance confirmation on 01.04.2016 which confirms the balance of Rs. 1,45,36,475/-
3. The Petitioner further submits that since no balance confirmation was received for the year 2016-2017, the Petitioner approached the statutory auditor of the Corporate Debtor and the Statutory auditor by email dated 05.10.2017 confirmed the balance of Rs. 1,45,36,475/- which is shown as balance due to the Petitioner. Since the Corporate Debtor did not repay the loan, the Petitioner on 22.01.2018 sent a lawyer's notice calling upon the Corporate Debtor to repay the loan amount of Rs. 1,45,36,475/-.
4. The Director of the Corporate Debtor in reply to the said notice stated that the Petitioner and the Directors of the Corporate Debtor were Partners, Promoters and Associates in various ventures incorporated by both and they trusted each other and they had cross holdings in some companies which were more like glorified partnerships. Due to various inter se issues between the parties the Petitioner unilaterally decided to quit all the business ventures. The email sent by the Petitioner to the Director of the Corporate Debtor show that he is not interested to continue with the business ventures incorporated by the Director of the Respondent in any manner and 21.12.2010 be taken as an exit date. It is further stated in the reply though there were attempts to sort out the issues amicably including the loan of Rs. 1.45 crore, the same could not be fructified. It was in the month of August, 2006 the Petitioner had sent an E-mail stating that he was advised by his doctors not to meet, talk or conduct any business and stop all the communications from all quarters and hence the

allegations leveled against the Corporate Debtor through the notice are false, frivolous and malicious. The main contention of the Corporate Debtor that there were cross-holdings between both the parties in various companies and the amounts so arrived at is a settlement amount which has not ended in compliance of mutual obligations between the parties. However, it was stated that the demand notice raised various aspects of pending issues between the Operational Creditor and the Corporate Debtor and in the said lengthy reply at Para 21, they clearly admit as follows:

"My client further states that the unsecured loan of Rs. 1,45,36,475/- was and is part of the overall settlement as mentioned above and my client was and is ready and willing to settle the cross-holding of shares and loans between your client and my client... "

Hence, the Applicant prays that a total amount of Rs. 1,45,36,475/- is the admitted principal due and payable by the Corporate Debtor to the financial Creditor. Since, the said amount is not paid the applicant had invoked the provisions of Section 7 of the Insolvency and Bankruptcy Code, 2016 for the appropriate relief as per law.

5. The Corporate Debtor had filed a detailed reply dealing with various facts pertaining to the transactions between the Applicant and the Corporate Debtor. It is the case of the Respondent that none of the loans under the quasi-partnership arrangement between the Corporate Debtor and the Applicant had any term for repayment or interest. The various facts mentioned in the reply would become relevant in the event the amount defaulted by the corporate Debtor has not been admitted. Once the amount is admitted and is reflected in the accounts and confirmed by the Corporate Debtor, the facts as mentioned in the reply would completely become irrelevant and go behind the curtain and cannot or does not influence the outcome of this Application. Apart from that the main argument put forth on behalf of the Corporate Debtor is that there is no Financial Debt and the Applicant is not a Financial Creditor and in support of the same it is stated that:

(a) The Application must be filed by a Financial Creditor and

(b) There must be a default in paying the Financial Debt.

The important point to be noted that the Exhibit-D dated 01.04.2016 wherein the Corporate Debtor had clearly confirmed that an amount of Rs.1,45,36,475/- is the closing balance of the account which is the outstanding in favor of the applicant.

Exhibit-E is an E-mail dated 05.12.2017 from the Statutory Auditor of the Corporate Debtor, Mr. Ganesh Mehta of M/s. Ganesh and Rajendra Associates who had categorically stated that an amount of Rs. 1,45,36,475/- is the unsecured loan standing in the name of the Applicant in the books of the Corporate Debtor.

Viewing the case from the above angle as contained in the above exhibits, it is clear that the said amount is clearly reflected in the books of the Company as an Unsecured Loan.

6. Another interesting argument advanced by the Counsel for the Corporate Debtor is that since there is no consideration prescribed for the time value of the money and the amount was not borrowed by the Corporate Debtor against the payment of interest, the Applicant cannot be called as a 'Financial Creditor' and hence, there is no Financial Debt as defined u/s. 5 (8) of the Code. Further, the Corporate Debtor had relied upon the following cases decided by the Hon'ble NCLAT:

- i) ***Innoventive Industries Ltd. v/s ICICI Bank & Anr.***, AIR 2017 SC 4084 wherein it was stated that "A financial creditor has been define under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money."
- ii) ***Nikhil Mehta and Sons v. AMR Infrastructure Ltd.***, Company Appeal (AT) (Insolvency) No. 07 of 2017 wherein it was held that "...Therefore the first essential requirement of financial debt has to be met viz, that the debt is disbursed against the consideration for the time value of money and

which may include the events enumerated in various sub-clauses.

...The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money.

...In Black's Law – Dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money. It is significant to notice that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity has been implied by the opening words of Section 5(8) of the IBC"

- (iii) ***Vishwa Nath Singh v. Visa Drugs & Pharmaceuticals Pvt. Ltd.***, [2018] 145 SCL 304, in para 15, it was held that "In the present case, the respondent has failed to show that the amount of loan treated to have been given to the Corporate Debtor were disbursed against the consideration for the time value of money. In the absence of any such evidence on record to suggest that the amount was disbursed against the consideration for the time value of money and was borrowed by the Corporate Debtor against the payment of interest, we hold that the respondent – M/s. Visa Drugs and Pharmaceuticals do not come within the meaning of 'financial creditor'.

7. Heard both sides.

Section 3 (10) defines 'Creditor' means any person to whom a Debt is owed and includes a Financial Creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder.

Section 3 (11) defines 'Debt' means a liability or obligation in respect of a claim which is due from any person and includes a Financial Debt and Operational Debt

Section 5 (7) defines 'Financial Creditor' means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

Section 5 (8) defines 'Financial Debt' means a debt along with ***interest, if any***, which is disbursed against the consideration for the time value of money and includes.....

(f) Any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

The above reference to the provisions of the Code clearly brings about the following:

- i) Since the amount of default as shown in the Exhibit-D and E are admitted and constitute a debt as defined under the Code and hence the same is to be treated as a debt due to the financial Creditor to whom a debt is owed and admitted as per the books of accounts of the Corporate Debtor.
- ii) Further to say that the same is a financial Debt, the most important words that are required to be considered in the definition is '*interest, if any*' which means a loan or a liability which is required to be payable by the corporate Debtor to the Financial or Operational Creditor, need not bear any interest. That simply means a loan advanced even without interest is a Financial Debt.
- iii) Now, to call the same as loan advanced / disbursed against consideration for the time value of money, the point to be considered here is that there can be a mutual understanding between the parties to waive the right to receive interest and for the possible growth of the value of shares and to meet business requirement etc. It is a fact that there were certain business obligations between both the parties and the above said amount is arrived at after the parties mutually agreed and then the same is reflected in the books of the Corporate Debtor under the head 'Long Term Borrowings'. So, it cannot be said that the same is not a financial debt just because there is no interest payable nor there is any consideration for the time value of money. The decision of the NCLAT as relied upon by the Corporate Debtor in the case of ***Vishwa Nath Singh vs. Visa Drugs & Pharmaceuticals Pvt. Ltd.*** does not apply to the present case for the simple reason that the debt in

the above decision has not been admitted and is not reflected in any books of accounts of the corporate Debtor. Further, there is a dispute as regards the amounts paid which were required to be adjudicated on the issue whether the same are paid towards investment in shares or as loan. But here in the present case, the debt is admitted and is reflected in the books of accounts of the Corporate Debtor as loan which clearly clinches the case on hand.

- iv) Other decisions as quoted by the Corporate Debtor also are completely irrelevant for the just adjudication of this case.

8. Therefore, we hold from the above discussions which clearly shows that there is debt and default on side of the Corporate Debtor.

9. The Petitioner has mentioned Mr. Pranav Damania, Reg. No. IBBI/IPA-001/IP-P00079/2017-18/10164, having address at 407, Sanjar Enclave, Opp PVR/Milap Cinemas, Kandivali (W). Mumbai – 400 067 as an Interim Resolution Professional.

10. This Bench having been satisfied with the Petition filed by the Operational Creditor which is in compliance of provisions of section 8 & 9 of the Insolvency and Bankruptcy Code admits this Application declaring Moratorium with the directions as mentioned below:

- i) That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

ii) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

iii) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

iv) That the order of moratorium shall have effect from 31.08.2018 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

v) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

vi) Mr. Pranav Damania, Reg. No. IBBI/IPA-001/IP-P00079/2017-18/10164, having his address at 407, Sanjar Enclave, Opp PVR/Milap Cinemas, Kandivali (W). Mumbai - 400 067 as an Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

11. Accordingly, this Petition is admitted.

12. The Registry is hereby directed to communicate this order to both the parties.

SD/-

V. Nallasenapathy
Member (Technical)

SD/-

Bhaskara Pantula Mohan
Member (Judicial)