

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 520 of 2018****IN THE MATTER OF:****O.A.A Ananthapadmanaban Chettiar** **...Appellant****Vs.****Sri Mahalakshmi Textiles** **...Respondent****Present: For Appellant: - Mr. Vivek Sibal and Mr. Yash Patel,  
Advocates.****ORDER**

**05.09.2018**— This appeal has been preferred by Shareholder of 'M/s. Annamalaiar Textiles Private Limited' – ('Corporate Debtor') against the order dated 7<sup>th</sup> August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai, whereby and whereunder, the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) preferred by the Respondent- 'M/s. Sri Mahalakshmi Textiles' has been admitted, order of 'Moratorium' has been passed and 'Interim Resolution Professional' has been appointed with certain directions.

2. Learned counsel appearing on behalf of the Appellant submitted that the Respondent do not come within the meaning of 'Financial Creditor' as defined under Section 5(7) read with Section 5(8) of the 'I&B Code'.

Reliance has been placed on 'Memorandum of Understanding' dated 3<sup>rd</sup> August, 2006 and 'Agreement for Conversion' dated 3<sup>rd</sup> August, 2006 as enclosed in the appeal.

3. Referring to the 'Memorandum of Understanding', it was submitted that the Second Part (Converter) agreed to pay a sum of Rs. 45,00,000/- (Rupees Forty-Five Lakh Only) to the 'Corporate Debtor' (MILLS) as an Interest Free Advance in the manner as mentioned and clause (1) of the 'Memorandum of Understanding'. It was completely Interest Free and, therefore, the Respondent cannot be treated to be a 'Financial Creditor'.

4. However, such submissions cannot be accepted in view of the terms and conditions of 'Memorandum of Understanding', relevant portion of which reads as follows:

*"1) The Party of Second Part (Converter) shall place a total sum of Rs. 45,00,000/- with the MILLS as on Interest Free Advance, in the following manner: -*

*a) A sum of Rs. 25,00,000/- at the time of signing this agreement, (The CONVERTER has this day paid Rs. 25,00,000/- to the MILL vide City Union*

*Bank Demand Draft No. 683987 dated 02-08-2006 and the MILL acknowledges receipt of the same this day.)*

- b) A sum of Rs. 15,50,000/- within six months from this day, and*
- c) A sum of Rs. 4,50,000/- to be adjusted from the total expenses to be incurred by the Party of Second Part (Converter) towards "Start-up" of Production.*

*This advance shall be repaid by the Party of First Part (Mills) to the Party of Second Part (Converter) on the expiry of the AGREEMENT FOR CONVERSION, being entered into this day.*

*2) The Party of Second Part (Converter) has agreed to incur all expenses for material, transport, labour, etc., to be made towards,*

- a) Overhauling of all Machineries/Ancillaries,*
- b) Overhauling of Gensets and Electricals,*
- c) New Connection of EB supply including deposits,*
- d) New Carding Metallic fillets, Tops, etc,*
- e) New Cots and Aprons for Spinning, Simplex and Draw Frames,*

- f) Missing live rolling stocks, spare parts, wheels, etc., in all departments including tools and change wheels,*
- g) Essential Civil works,*
- h) House keeping- Inside and Outside,*
- i) All that becomes necessary for proper and uninterrupted running of the factory to the best of standards.*

*The total expenses incurred as above shall be treated as an Interest Free Loan to the MILLS.*

*The said expenses, less Rs. 4,50,000/-, shall be deducted during a period of time and in mutually agreed manner, which shall be decided as and when the unit attains full productions.*

*3) The Conversion Rate for 30's to 42's Ne cotton carded yarn counts on cones, to be spun on completion of 'Start-up' work, shall be 84 (Eighty Four) paise per Kilogram per actual spinning count and an increase of 1 (one) paise per Kilogram per actual spinning count shall be made as and when the entire advance and loan*

has been repaid by the Party of First Part (Mills)  
to the Party of Second Part (Converter).....”

5. From the plain reading of ‘Memorandum of Understanding’, it will be evident that the total expenses incurred as above shall be treated to be as an **Interest Free Loan to the MILLS**.

6. The ‘Agreement for Conversion’ dated 3<sup>rd</sup> August, 2006 shows that the manner in which the conversion of cotton and or other fibers will be made by delivering the Converter from time to time on payment of conversion charges subject to the clauses mentioned therein.

7. The agreement between the parties shows that the said arrangement made to make the ‘Corporate Debtor’ a ‘Start-up’ w.e.f. 9<sup>th</sup> August, 2006. The Respondent- (Converter) in its term is entitled to receive and take delivery of the yarn by making their own arrangements for transport to any of their destinations. All those provisions show that there is ‘disbursement’ of money by the Respondent for which the ‘consideration is time value of money’ which the Respondent is entitled to as a Converter by receiving the yarn.

8. In view of the aforesaid specific provision, we hold that the Respondent comes within the meaning of ‘Financial Creditor’ and the

Adjudicating Authority has rightly admitted the application under Section 7.

9. Learned counsel for the Appellant submitted that pursuant to agreement dated 3<sup>rd</sup> August, 2006, a letter of exchange for appointment of Arbitrator of Respondent was issued on 5<sup>th</sup> February, 2008, but such ground cannot be taken in a defeating an application under Section 7 of the 'I&B Code' though it is permissible to take such ground to get an application under Section 9 of the 'I&B Code' rejected.

10. It is true that the 'Limitation Act' is applicable as far as it is practicable but for that only Part II of the Limitation Act i.e. Article 137 will be applicable. The 'I&B Code' having come into force since 1<sup>st</sup> June, 2016, we hold that the application under Section 7 is well within the time in terms of Article 137 and is not barred by limitation.

11. We find no merit in this appeal. It is accordingly dismissed. No cost.

(Justice S.J. Mukhopadhyaya)  
Chairperson

(Justice Bansi Lal Bhat)  
Member(Judicial)

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