

In the National Company Law Tribunal
Mumbai Bench.

MA 470 of 2018 in TCP 870/I&BC/MB/MAH/2017

Under Section 7 of Insolvency & Bankruptcy Code, 2016

In the matter of

M/s. Milestone Real Estate Fund : Petitioner / Financial Creditor

V/s

M/s. Choubey Realities Pvt. Ltd. : Respondent / Corporate Debtor

AND

Dr. Ramakant Suryanath Pande : Applicant

yes to on 23.8.2018
Order delivered on: 24.08.2018 *ms,*

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)

For the Petitioner(s) : 1. Ms. Jasmine Upadhye, i/b M/s.
Parimal K. Shroff & Co.,
2. Mr. Arvinth Purushothaman,
Advocate, i/b. Mehta & Mehta for
Applicant

Resolution Professional : 1. Mr. Prakash K. Pandya.

Per M.K. Shrawat, Member (Judicial).

ORDER

1. This Application is submitted by an alleged Financial Creditor viz. Dr. Ramakant S. Pande on 08.5.2018 against a communication dated 26.02.2018 which was a rejection of the claim of this Applicant of ₹11,27,23,771/- by submitting requisite Form No. 'C' against the Corporate Debtor M/s. Choubey Realities Pvt. Ltd. The main Prayer of this Applicant is that the impugned communication of 26.02.2018 of the Resolution Professional rejecting the claim deserves to be set aside.

1.1. Background of the case is that a Petition was submitted by a Financial Creditor M/s. Milestone Real Estate Fund u/s. 7 of the Insolvency Code against Corporate Debtor M/s. Choubey Realities Pvt. Ltd., which was admitted vide an Order dated 10.11.2017 in CP No.870/I&BC/MB/MAH/2017 pertaining to a Financial Debt of ₹20 Crore as on

25.03.2013 and the defaulted amount as per the said Petition was stated to be ₹25,49,03,541/-. As per the said Order, Mr. Prakash K. Pandya was appointed as Resolution Professional.

1.2. Through email of 12.01.2018 this Applicant has submitted a claim on Form No. 'C', however, it was rejected vide communiqué dated 26.02.2018.

1.3. The Applicant is stated to be a shareholder of the Corporate Debtor holding 46% shares of the Company. Allegedly, the Applicant had extended a loan of ₹19,66,50,000/- in several tranches and the Interest was to be charged @ 2.06%. As per the Applicant there was an oral loan agreement of 08.05.2012. The Corporate Debtor had agreed to repay the loan on demand. It is stated that an amount of ₹6,14,50,000/- was repaid. The outstanding loan amount was admittedly ₹11,27,23,771/- and the date of default as per the Applicant is 27.07.2017. The calculation as per this Applicant is as under :-

S. NO.	PARTICULARS	CLAIM (INR)
1	Term Loan under Note 2.3(a) of the Balance Sheet of Choubey Realities Private Limited (Corporate Debtor) as on 31 st March 2016	10,87,58,720.00
2	Add : Interest @ 2.065% of one year from 1 st April 2016 to 31 st March 2017	22,45,868.00
3	Add: Interest @ 2.065% of nine months from 1 st April 2017 to 31 st Dec 2017	17,19,183.00
4	TOTAL	11,27,23,771.00

1.4. The Applicant was also appointed as Non-Executive Director on 11.05.2012 and involved in the management of the Company, however, he was removed from the Directorship by the Board of Directors.

1.5. According to the Applicant, the Debt in question is a Financial Debt within the definition of Section 5(8) of I&B Code. It is claimed that the Loan was disbursed against the consideration for time value of money. The Applicant has referred financial statements of past few years of the Corporate Debtor wherein the amount in question was disclosed under the head 'Non-Current Liability'. The Applicant has stated that the Corporate Debtor had admitted and acknowledge the Financial Debt as per the financial statements. The Applicant had demanded the outstanding claim vide a Notice dated 13.07.2017. It is concluded that direction be issued to the Resolution Professional to admit the claim of the Applicant.

2. Before we proceed to hear the arguments of the Resolution Professional it is appropriate to reproduce the reasons given by the Resolution Professional for rejecting the claim as under :-

"3. The amount was advanced by you as a director of the Corporate Debtor and was interest-free, i.e. without charging any interest. The interest claimed by you is a unilateral act without any supporting documents.

Further, the Corporate Debtor also does not have a record of having entered into any contract, understating or written record/confirmation that the amount is repayable to you with interest.

I also did not find any evidence from the said financial statements of the Corporate Debtor of payment of interest to you or a provision thereof or deduction of tax at source (TDS) therefor.

Also, there is no record of any assured returns to be provided by the Corporate Debtor to you.

An email of yours dated 13 July 2017 addressed to the Board of Directors of the Corporate Debtor and a reply thereto by Mr. Vijay Tripathi, a Director of the Corporate Debtor to you on 16 August 2017 creates a doubt as to whether the amount advanced by you to the Corporate Debtor was a pure loan or a quasi-capital. From the reply email of Mr. Vijay Tripathi, I find that there is no admission by the Corporate Debtor of interest payable to you.

4. There is no security provided by the Corporate Debtor to you for the amount advanced by you from time to time.

For the aforesaid reasons, your claim as a financial creditor of the Corporate Debtor is rejected."

2.1. Learned Representative of the Resolution Professional has pleaded that there was no loan agreement in writing hence the nature of the Debt cannot be ascertained as a "Financial Debt" as defined u/s. 5(8) of the I&B Code. According to the arguments, the amount in question was deposited as a running Current Account in the Books of the Debtor Company and not as a Financial Debt. Another objection raised is that the Applicant is an "interested" person being a shareholder of the Debtor Company, hence not eligible to lodge its claim. Shareholders are entitled for their share on liquidation at the end after settlement of other dues as prescribed under the Asset Distribution Mechanism of Section 53 of the Insolvency Code.

3. Both the sides have also cited few case laws respectively in their favour, discussed hereinbelow to assess the law pronounced therein.

a) Case Laws cited from the side of the Applicant:-

- 1) NCLT, Hyderabad Bench, Hyderabad in Quinn Logistics India Private Limited, Hyderabad-500029 (Applicant/Financial Creditor) Versus Mack Soft Tech Pvt. Ltd., Hyderabad, Telangana-500 032 (C.P.(IB) NO.97/7/HDB/2017 dated 11.08.2017)

- 2) NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 143 of 2017 dated 21.05.2018 in the matter of Mack Soft Tech Pvt. Ltd. (Appellant) Versus Quinn Logistics India Ltd. (Respondent) & Ors.

b) Case Law cited by the Respondent:-

- 1) NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 234 – 235 of 2017 Order dated 13.12.2017 in the matter of Vishwa Nath Singh, (Appellant) Vs. Visa Drugs & Pharmaceuticals Pvt. Ltd. (Respondent).
- 2) NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 38 of 2017 in the matter of Dr. B.V.S. Lakshmi, Appellant Vs. Geometrix Laser Solutions Private Limited (Respondent) Order dated 22.12.2017.

3.1. On hearing the Case Laws referred by the rival sides I am more convinced with the Orders referred from the side of the Respondent to this Application. In the case of Dr. B.V.S. Lakshmi (*supra*), the Hon'ble NCLAT has given a finding that in the absence of any Loan Agreement it cannot be claimed that the Loan in fact was a "Financial Debt". Likewise, in the case of Vishwa Nath Singh (*supra*) NCLAT is of the view that an unsecured Loan having been taken without any interest cannot be termed as a "Financial Debt". As far as the Case Laws submitted from the side of the Applicant are concerned, there is no two opinion that a shareholder can advance Loan to its Company. That Loan should be corroborated by a supporting evidence and on that basis the purpose and the nature of the Debt can only be ascertained. If a material or evidence in writing supporting the nature of the Debt, then the said Loan can be easily identified i.e. either a "Financial Debt" or an "Operational Debt". If an advance is handed over by a Petitioner for the purpose of a particular project, then such an advance may fall under the category of a Debt depending upon the facts and circumstances of the case. To sum up, I find myself more convincing with the Judgments submitted by the Respondent to the Application, therefore, in the following paragraphs conclude this issue based upon the veracity of the evidences.

4. Heard both the sides at length. Few interesting questions have cropped up to be adjudicated to streamline the provisions of the Insolvency Code. Questions to be answered are formulated as under :-

- (a) Whether a shareholder is entitled to lodge a claim before the Resolution Professional as a Financial Creditor in respect of an amount shown in the Books of Accounts of the Corporate Debtor as a 'Liability' ?
- (b) Whether the amount advanced now in question can be said to be a Financial Debt as defined u/s. 5(8) of the I&B Code, specially when only an oral agreement was among the parties ?
- (c) Whether in a situation the Debt in question is admitted, the claimant can be allowed to participate in the Committee of Creditors meeting ?
- (d) Whether in a situation the impugned Creditor if allowed as Financial Creditor is entitled to cast vote in Committee of Creditors meeting ?
- (e) Whether a claimant who is otherwise disqualified to vote in Committee of Creditors meeting as prescribed u/s. 21(2), First Proviso being a "related party" but qualified to be a part of the Resolution Plan, being a Financial Creditor as prescribed u/s. 38(1)(c) of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.)

5. In my opinion, a "related party" to whom a Corporate Debtor owes a Financial Debt can participate in the Committee of Creditors meeting but he cannot cast vote as prescribed u/s. 21(2) Proviso. This Sub-section says that the Committee of Creditors shall comprise all Financial Creditors of the Corporate Debtor, provided a "related party" to whom a Corporate Debtor owes a Financial Debt shall not have any right of representation, participation or voting in a meeting of the Committee of Creditors. Along with this Section a co-joined reading of Regulation 38 is worth reading according to which a Resolution Plan shall identify specific sources of Funds that will be used to pay the Liquidation Value to descending financial creditors and provide that such payment is made before any recoveries are made by the Financial Creditors who voted in favour of the Resolution Plan. An interesting law emerges that a Financial Creditor who is otherwise disqualified to vote in Committee of Creditors meeting but qualifies for his share in a Resolution Plan to the extent of the Liquidation Value of the Corporate Debtor {Refer Regulation 38 of Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016}. In any case, this Regulation can be applied

only if the Claimant is a "Financial Creditor". To answer this question whether the Claimant per se is a Financial Creditor certain questions have been raised above, one by one answered as under :-

- A) Answer to question (a) is inbuilt in the provisions of the Insolvency Code. A definition of "related party" is prescribed U/s. 5(24)(a) of The Code which means in a Private Company an individual is a Director and holds more than 2% of share capital. As far as the position of this Applicant is concerned, he has 46% shareholding in the Debtor Company. As a shareholder or Director he is entitled to lodge the claim but the mandatory condition is that the claim should fall within the definition of "Financial Debt". A discussion has already been made in above paragraphs about this definition. On the basis of the aforesaid discussion it transpires that the claim does not fall within the definition of "Financial Debt". In fact, it was in the nature of an "Investment" in the Company. An accepted factual position is that there was only an alleged oral agreement. It is also an accepted position that the amount in question is not in the list of Financial Creditors in the Balance Sheet of the Company. As a consequence, the answer to this question is that under the totality of the circumstances the claim of this shareholder does not fall in the category of Financial Debt.
- B) Answer to Question (b) is that under the totality of the circumstances it is not possible to hold that the claim in question can be treated as a "Financial Debt" as defined U/s. 5(8) of The Code. The claimant has not proved that the Company had paid interest in the past and deducted TDS thereupon. It has also not been established that a particular rate of Interest was agreeable among the parties. The claimant has also not placed on record any evidence such as Income Tax Return to demonstrate that Interest income has been shown in the Computation of Income on the alleged deposit. As a result, the claim amount cannot be held "Financial Debt" under the Insolvency Code.
- C) Answer to Question (c) is that the Committee of Creditors is constituted by Financial Creditors, Operational Creditors and members of the suspended Board. But as per section 24(4) of The Code, the Directors may attend the meeting of Committee of

Creditors but shall not have any right to vote. When the Debt in question held to be not admitted, therefore, there is no question of attending the meeting.

D) Answer to Question (d) is in negative.

E) Answer to Question (e) is confined to the present situation, hence in negative. Otherwise, if we talk about the Rules in general, it is prescribed in Regulation 38(1)(c) of Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 that a Resolution Plan will be used to pay Liquidation Value due to dissenting Financial Creditors and provide that such payment is made before any recoveries are made by the Financial Creditors who voted in favour of the Resolution. However, as far as the present situation is concerned, since a view has already been expressed that the claimant is not a "Financial Creditor", therefore, this beneficial clause shall not apply.

6. In the light of the above detailed discussion the Miscellaneous Application (MA 470 of 2018) is hereby dismissed.

Date : 24.08.2018
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SD/-
(M.K. SHRAWAT)
Member (Judicial)