

**THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH, JAIPUR
(through web-based video conferencing platform)**

IA No. 169/JPR/2019

IA No. 202/JPR/2019

IA No. 205/JPR/2019

IA No. 212/JPR/2019

In

CP (IB) No. 86(ND)/2017

T.A. No. 83(ND)/2018

(Admitted Matter)

**Under Section 60(5) of the Insolvency
and Bankruptcy Code, 2016**

In the matter of:-

Oriental Bank of Commerce

...Financial Creditor

Vs.

Mount Shivalik Industries Ltd.

...Corporate Debtor

And in the matter of IA No. 169/JPR/2019:-

M/s The Sakchi Stores

....Applicant

Vs.

Resolution Professional for
Mount Shivalik
Industries Limited

...Respondent

And in the matter of IA No. 202/JPR/2019:-

Sushila H. Mehta

....Applicant

Vs.

Resolution Professional for
Mount Shivalik
Industries Limited

...Respondent

IA No. 169/JPR/2019

IA No. 202/JPR/2019

IA No. 205/JPR/2019

IA No. 212/JPR/2019

In

CP (IB) No. 86(ND)/2017

T.A. No. 83(ND)/2018

(Admitted Matter)

And in the matter of IA No. 205/JPR/2019:-

Bishwanath Shaw & CompanyApplicant
Vs.	
The Interim Resolution Professional Ms. Pratibha Khandelwal for Mount Shivalik Industries Limited	...Respondent

And in the matter of IA No. 212/JPR/2019:-

Ajit Kumar GuptaApplicant
Vs.	
Resolution Professional for Mount Shivalik Industries Limited Ms. Pratibha Khandelwal	...Respondent

Order delivered on: 16.07.2021

**Coram: HON'BLE MR. AJAY KUMAR VATSAVAYI, MEMBER (JUDICIAL)
HON'BLE MR. RAGHU NAYYAR, MEMBER (TECHNICAL)**

Present through Video Conferencing:-

For the applicant in IA No. 169/JPR/2019	: Mr. NPS Chawla, Advocate
For the applicant in IA No. 202/JPR/2019	: Mr. Sandeep Taneja, Advocate
For the applicant in IA No. 205/JPR/2019	: Mr. Ankit Sethi, Advocate
For the applicant in IA No. 212/JPR/2019	: Mr. Amol Vyas, Advocate
For the respondent- Resolution Professional	: 1). Mr. Abhishek Anand, Advocate 2). Ms. Pratibha Khandelwal, Resolution Professional in person

Per: Ajay Kumar Vatsavayi, Member (Judicial)

ORDER

IA No. 169/JPR/2019

M/s The Sakchi Stores filed this application under Section 60(5) of the I&B Code, 2016 against the RP of the corporate debtor M/s Mount Shivalik Industries Limited seeking a direction to admit its claim as a financial debt and not as an operational debt.

2. The applicant submits that it is a financial creditor of the corporate debtor for a financial debt of ₹1,80,47,500/- and in respect of which it had filed its claim in Form C on 04.09.2018 before the RP however, the said claim for financial debt has incorrectly been treated as operational debt by the RP vide her impugned e-mail dated 06.04.2019 (Annexure A-1). Hence, the IA.

3. It is stated in the application that the corporate debtor, initially, had entered into an agreement with the applicant vide its letter dated 19.01.2005 whereunder it requested a financial debt of ₹25 lakhs from the applicant. However, the said financial assistance, at the behest of the corporate debtor, was termed/veiled as a deposit towards appointment as indenting agent and it was treated by the parties as a debt and carried interest of 18% per annum. The applicant vide letter dated 19.01.2005 agreed to provide the debt as deposit which would be repaid upon maturity of the agreement alongwith interest and issued demand draft for the said sum (Annexure A-3 Colly). Thereafter, the corporate debtor paid the interest amounts due on the said financial debt from time to time and also repaid the principal amount by cheque on 28.05.2007 (Annexure A-4 Colly).

4. Thereafter, the corporate debtor has availed further financial debt from the applicant in 2010. The corporate debtor issued letter dated 15.02.2020 seeking deposit of ₹1 crore, once again veiling the said transaction as a deposit. As the finances were required for urgent needs of the corporate debtor and were to be provided without securities, guarantees and the rigid structure accompanying finances from banking institutions, the corporate debtor agreed to a higher rate of interest of 15% for the funds provided by the applicant. The applicant provided the said financial debt of ₹1 crore to the corporate debtor vide RTGS on 10.02.2010 and the corporate debtor thereafter, continued to pay the interest till July 2012.

5. In July 2012, the corporate debtor issued letter dated 01.07.2012 which reiterated the contents of letter dated 15.02.2010 and in terms of the same an annual payment of ₹15 lakhs was to be made towards interest and ₹9 lakhs towards consultancy services resulting in combined quarterly payment of ₹6 lakhs to be made by the corporate debtor to the applicant. The corporate debtor initially made quarterly payment of ₹5,40,000/- (after deduction of TDS) and thereafter, started defaulting since June 2014. Though the corporate debtor has continued to book and deposit TDS on the amount payable to the applicant till March 2016, it has not paid any amount to the applicant. At the time of filing of the claim before the RP, an amount of ₹1,80,47,500/- was claimable as financial debt towards the principal amount and interest due.

6. The applicant though initially filed the claim under Form B dated 17.06.2018, on account of bonafide mistake and incorrect advice but thereafter, it withdrew the said form and filed the claim under Form C on 20.08.2018.

Thereafter, the RP issued an e-mail dated 02.09.2018 to the applicant stating that its claim pertained partially to an operational debt and majorly to financial debt and thus, two separate forms, in respect of operational debt and financial debt, would need to be submitted (Annexure 11). As per the said direction, the applicant filed its Form B dated 04.09.2018 for an amount of ₹10 lakhs and Form C dated 04.09.2018 for an amount of ₹1,80,47,500/-. The respondent-RP vide impugned e-mail dated 06.04.2019 stated that the claim filed by the applicant under Form C dated 04.09.2018 has been considered as an operational debt and hence, the applicant cannot be considered as a financial creditor. Hence, the IA.

7. Heard Mr. NPS Chawla, the learned counsel for applicant in IA No. 169/JPR/2019, Mr. Sandeep Taneja, the learned counsel for applicant in IA No. 202/JPR/2019, Mr. Ankit Sethi, the learned counsel for applicant in IA No. 205/JPR/2019, Mr. Amol Vyas, the learned counsel for the applicant in IA No. 212/JPR/2019 and Mr. Abhishek Anand, the learned counsel for the respondent-RP in all the IAs and perused the pleadings on record.

8. The learned counsel for the RP while reiterating the reply averments, submits that the issue involved in the instant IA is squarely covered by a decision of this Adjudicating Authority in IA No. 135/JPR/2019 dated 18.01.2021, also passed in this CP only.

9. On the other hand, the learned counsel for the applicant submits that the facts in the said IA and the facts in the instant IA and the issues involved are different and distinct and hence, the said decision has no application to this case.

10. In this view of the matter, it is relevant to refer to the order dated 18.01.2021 in IA No. 135/JPR/2019:-

"11. The RP submits that it is evident from Clause 10 of letter dated 01.04.2014 that the amount of Rs. 53,15,000/- have been transferred by the Applicant for the purpose of security deposit. Also the Applicant has never brought to the knowledge of RP, the C & F agreement dated 09.01 .2014 before filing of this Application. As per the RP, even a bare perusal of C & F Agreement demonstrates the debt of the Applicant as operational debt because the Applicant has been appointed as C & F agent to look after the operations of the Corporate Debtor's depot. However, the Applicant in its rejoinder has denied that the agreement dated 09.01 .2014 has any bearing on the nature of the financial debt given by the Applicant to the Corporate Debtor" which was not part of the funds previously provided under the said agreement but was / were rather interest bearing financial assistance lent for commercial purpose from time to time and recognised under the Agreement dated 01.04.2014 and 01.04.2015.

12. As per the RP, the Applicant has failed to place on record any evidence or document to Show that the security deposit was being used by the Corporate Debtor for funding of the business of Corporate Debtor. Thus, the RP has denied the fact that the amount deposited by the Applicant is a loan to the Corporate Debtor."

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"18. We have heard the submissions made by the parties and perused the record. It is an undisputed fact that the Applicant has provided the amount in terms of letter dated 01.04.2014 and 01.04.2015 and such amount along with interest is due from the Corporate Debtor. The documents filed by the Applicant show that in order to avail the services from the Applicant. the Corporate Debtor has appointed Applicant as sales promoter and accepted security deposit. Deposit is not the mainstay of the agreement for any funds in respect of business purposes. It is only an incidence of the agreement for services. Unlike as stated in order passed by a bench of this Adjudicating Authority in IA No. 02/JPN2018 dated 28.09.2018, it is not even related to agency agreement. It is evident that the agreement between the party is not for time value of money as the crux and essence of the agreement. Interest paid by the Corporate Debtor is incidental to the blocking of deposit amount and is a resultant consequence. Also, the claim of the Applicant to be considered a financial debt in terms of the code must fall under any of the category mentioned Section 5(8) (a) to (i) which as follows:

"Section 5 (8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

- (a) money borrowed against the payment of interest; (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

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(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

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

1[Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate, project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;”

19. For availing a loan / financial assistance the parties must enter into a financial contract setting out the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment as defined under clause (d) of sub rule (1) of Rule 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

20. Undoubtedly such security deposit is returnable and represents a future obligation. The treatment of said security deposit in the financial statement of the Corporate Debtor for period 01.07 .2014 to 30.06.2015 annexed by the Applicant in rejoinder is not evidently obvious so as to straight-away validate Applicant's contention of deducing by implication. The Corporate Debtor in its balance sheet for year ended 31.03 .2016 and 30.03.2017 has shown security deposits under the head non-current liabilities whereas in the balance sheet for year ended 31.03.2018, under the head current liabilities there are two items, one is unsecured borrowing through intercorporate deposit and the other is security deposit. However, from none of the financial statements is it lucidly and unequivocally clear that such security deposit and/ or intercorporate deposit includes the amount provided by the Applicant under the appointment letters dated 01.04.2014 and 01 .04.2015. In any case, classification of any sum of money under current or non-current liability is not indicative of its actual use/ purpose.

21. Further after analysing Form 26 AS annexed by the Applicant vide dairy no. 1967/2019, it is noted that the Corporate Debtor had deducted tax under Section 194A and 194H of the Income Tax Act, 1961 for FY 2013-14 and 2014-15 and for FY 2015-16 tax was deducted under Section 194A and 194J. Section 194A deals with interest other than interest on securities. Section 194H deals with income by way of commission or brokerage and Section 194 J deals with fees for professional or technical services. The above observation shows that the Corporate Debtor had deducted tax against the interest on the amount provided by the Applicant. On the other hand, the Applicant has failed to submit sufficient documents to establish that the amount was borrowed by the Corporate Debtor for commercial purpose, as it is nowhere mentioned in the letters dated 01.04.2014 and 01 .04.2015 that the corporate debtor is in need of money or the said deposit will be used for its business activities. [n effect the Applicant is saying that it was an agreement that was stretched beyond the textual narrative and normal literal understanding thereof and was camouflaged, perhaps wrongly or for any hidden motives, with or without complicity, of the Applicant. Such twisting of any actual or alleged understanding to avoid parameters of statute, rules, guidelines, etc. is an inherent admission of collusion. Applicant cannot take advantage of own wrongs.

22. The Hon'ble NCLAT in the matter of **Prayag Polytech Pvt. Ltd. Vs. Gem Batteries Pvt. in (Company Appeal (AT) (Insolvency) No. 713 of 2019)**, dated 24.09.2019 has observed as under:

"6. We have gone through the records and the impugned order. Merely pointing out that TDS was deducted would not be sufficient to conclude that there was financial debt. TDS can be deducted for various reasons.

7. As regard relying on Section 10 of the Contract Act, 1872, in our view IBC is a complete code in itself Section 238 of IBC has overriding effect on provisions inconsistent with IBC. The 'Financial contract' is defined in "Insolvency and Bankruptcy Application to Adjudicating Authority) Rules, 2016" Rule 3(1)(d) requires setting out the terms of the financial debt including tenure etc. We find that Appellant has failed to show any record showing financial debt to be there. As such, we are unable to find any fault in the impugned order while rejecting Section 7 application."

23. In the instant Application no detailed initial agreement is available. Also, there is no addendum or fresh documentation explaining changing nature of agreement/ engagement, from depot management to sales promotion. Within the facts narrated by the Applicant, it is difficult to ascertain the extent and type of services. These could be vastly different from what is stated in the letters of engagement or even as claimed by the Applicant.

24. *Scope and canvass of the agreement cannot be left to the imagination. There is no visibility into the nitty-gritty or character of the avowed agreement. The wording is rather flavourless. If the agreement reflected something else initially and then changed hue and colour, there is no explicit indication or documentation in this regard. There has to be legally valid supporting corroboration. Mere assertion about different character of understanding while referring to documents reflecting something else is itself suspicious. It cannot be that a flimsy document is created between parties to suit convenience of interpretation or twist implication altogether. In legal terms a person cannot approbate and reprobate at the same time.*

25. *Merely intercorporate deposit does not make it a financial debt, amidst the background and facts stated by the Applicant. Just because the interest component may have resulted in a larger income for the Applicant, or the Corporate Debtor may have acknowledged interest payable does not make it a core financial deal.*

26. *In view of the foregoing discussion, it can be concluded that the RP has rightly considered the claim of the Applicant as operational debt. The Application bearing IA No. 1351JPN2019 is dismissed and disposed of. Copy of the order be served to the parties.*

11. A careful examination of the decision in the above referred IA amplify clearly that the facts in the said IA and the facts in the instant IA and the issues involved and the submissions made are identical and the instant IA is squarely covered by the decision in IA No. 135/JPR/2019 dated 18.01.2021. In view of this finding, there is no need to delve upon the rival submissions made in the instant IA.

12. In the circumstances and for the aforesaid reasons, the instant IA No. 169/JPR/2019 is dismissed as being devoid of any merit.

IA No. 202/JPR/2019, IA No. 205/JPR/2019 & IA No. 212/JPR/2019

13. When these IAs are taken up for hearing, all the counsels broadly submitted that these IAs are also identical to that of IA No. 169/JPR/2019 and advanced identical submissions.

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14. In the circumstances, IA No. 202/JPR/2019, IA No. 205/JPR/2019 & IA No. 212/JPR/2019 are also dismissed in terms of the decision in IA No. 169/JPR/2019.

Sd/-
(Raghu Nayyar)
Member (Technical)

Sd/-
(Ajay Kumar Vatsavayi)
Member (Judicial)

July 16th, 2021
YP