

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH,
Court-VI

Company Petition No. (IB)- 908(ND)/2020

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

ORATOR MARKETING PVT. LTD

Having its registered office at:

Shop No.102-103 Plot no 4,

1st Floor Aditya Complex,

DDA Community Center,

Sector 8 Rohini,

New Delhi- 110085.

.... Applicant/ Financial Creditor

VERSUS

M/S SAMTEX DESINZ PRIVATE LIMITED.

Having its registered office at:

Unit No 125, First Floor,

Block 11 Tribhuvan Complex

Ishwar Nagar, New Delhi-110065

.... Respondent/ Corporate Debtor

Judgment Delivered on: 23.10.2020

Coram:

SHRI. P.S.N. PRASAD

Hon'ble Member (Judicial)

DR. V.K. SUBBURAJ

Hon'ble Member (Technical)

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For the petitioner: Mr. Lzafeer Ahmad BF, Advocate.

For the Respondent: Mr. Aniruddha Deshmukh Advocate along with Mr. Sameer Bharadwaj, AR.

ORDER

SHRI. P.S.N. PRASAD, HON'BLE MEMBER (J)

1. Orator Marketing Pvt. Ltd has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent Company M/S Samtex Desinz Private Limited referred to as the Corporate Debtor on account of the default in payment of debt by the Corporate Debtor to the extent of Rs. 1,56,89,740/- which had been extended to the Corporate Debtor.

2. It is pertinent to mention here that the Financial Creditor is the assignee of the original lender to the Corporate Debtor, and has stepped into the shoes of the original lender consequent to the assignment of the debt to it by the original lender vide debt assignment agreement dated 01.10.2019 executed by M/S Sameer Sales Pvt. Ltd. and the Financial Creditor.

3. The Respondent Company M/S Samtex Desinz Private Limited against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 07.07.2017 having its registered office at Unit No 125, First Floor Block 11 Tribhuvan Complex, Ishwar Nagar, New Delhi. Since the

registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

4. Amit Kumar Gupta, resident of A-152, GD Colony, Delhi has preferred the present application on behalf of the applicant for initiation of corporate insolvency resolution process against the respondent corporate debtor in terms of the provisions of the Code.

5. The applicant has filed the present application under Section 7 of the Code in the requisite FORM-1 to initiate Corporate Insolvency Resolution Process against the respondent Corporate Debtor under the Code.

6. The applicant has proposed the name of Mr. Rabindra Kumar Mintri, Registration Number for appointment as Interim Resolution Professional having registration number IBBI/IPA-001/IP-P00707/2017-18/11194 resident of with email id mintri_ca@rediffmail.com. Mr. Rabindra Kumar Mintri agreed to accept the appointment as the interim resolution professional and has signed a communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

7. As per part IV of the application it is claimed that a sum of Rs.1,56,89,470/- along with nil interest is due from the respondent company.

8. The Pleaded case of the applicant is as:

- i. M/S Sameer Sales pvt. Ltd. advanced a sum of Rs. 1,6000,000/- to the Corporate Debtor to meet the shortfall in certain operating expenses. The said sum was acknowledged to be due and payable in the balance sheet of the Corporate Debtor.
- ii. On 01.10.2019 the Debt of M/S Sameer Sales Pvt. Ltd. was assigned to the Financial Creditor since there were several business transactions between M/S Sameer Sales Pvt. Ltd. and the Financial Creditor.
- iii. On 11.10.2019 the Financial Creditor wrote to the Corporate Debtor informing it as to the subrogation of the financial debt owed by the Corporate Debtor to M/S Sameer Sales Pvt. Ltd. in favour of the Financial Creditor.
- iv. On 15.10.2019 the Corporate Debtor acknowledged the subrogation of the debt of and also issued the appropriate accounting ledger to the Financial Creditor.
- v. On 01.02.2020 the outstanding amounts became due and payable in accordance with the agreement dated 20.01.2018.

- vi. On 03.02.2020 the Financial Creditor made the demand for the outstanding loan amount amounting to Rs. 1,56,89,470/- being the outstanding after reconciliation of amounts already paid.
- vii. On 14.02.2020 the Financial Creditor made a second demand of the financial debt to be repaid and on 18.02.2020 the Corporate Debtor acknowledged that the financial debt was outstanding, however pleaded certain adverse circumstances and stated its inability to pay back the amount.
9. It is noteworthy to mention that as per the order dated 28.09.2020 of this Tribunal that Mr. Sameer Bhardwaj former representative and currently authorised signatory of the Corporate Debtor has appeared along with the counsel and submitted that due to bad financial conditions they are unable to pay the amount.
10. On the ground that huge amounts are outstanding, it is claimed that the respondent has become commercially insolvent and accordingly it is prayed for initiation of corporate insolvency resolution process against the respondent company by admitting the present application.
11. Heard the parties and perused the case records.
12. There is no dispute that the applicant initially had disbursed the amount interest free to the respondent company. A perusal of the application is it clear that the loan was given interest free.

13. In order to allow any application under Section 7 of the Code, the applicant has to prove that the application is maintainable as the applicant is a '*financial creditor*', and the debts claimed in the application come within the purview of "*financial debt*" as defined under the Code.

14. The expressions "Financial Creditor" and "Financial debt" have been defined in Section 5 (7) and 5 (8) of the Code. In view of the definitions therefore a creditor in order to come within the meaning of "Financial Creditor" has to fulfil the following essential criteria:

- i. A person to whom a 'financial debt' is owned and includes a person whom such debt has been legally assigned or transferred;
- ii. The debt along with interest, if any, is disbursed against the consideration for time value of money and includes any one or more mode of disbursed as mentioned in clause (a) to Clause (i) of sub-section (8) of Section 5.

15. Mere grant of loan and admission of taking loan will *ipso facto* not treat the applicant as 'Financial Creditor' within the meaning of Section 5 (8) of the Code.

16. Precisely "*financial debt*" is a debt along with interest, if any, *which is disbursed against consideration for time value of money.*

17. In the application the applicant himself has submitted that the loan was interest free. However admittedly applicant has not produced any loan agreement nor there are details and particulars of any applicable interest mutually agreed between the parties. The loan agreement and the assignment agreement clearly show that no interest was charged on the loan amount.

18. Hon'ble NCLAT in the matter of Vishwanath Singh Vs. M/s Visa drugs and Pharmaceutical Private Limited 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 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'."

19. It has thus been made clear that in the absence of evidence that the amount was disbursed for time value of money, applicant does not come within the meaning of 'financial creditor'.

20. It is well settled that the onus lies on the applicant to establish that the loan was given against the consideration for time value of money. Onus to prove also lies on the applicant to establish that the debt claimed in the application comes within the purview of 'financial debt' and that the applicant is a

‘financial creditor’ in respect of the present claim in question. Applicant has miserably failed to substantiate with supporting documentary evidence that interest, as claimed at Part-IV of the application, is payable as per the agreed loan covenants.

21. Hon’ble NCLAT in the matter of Dr. B.V.S. Lakshmi Vs. Geometrix Laser Solutions Private Limited has observed that *“for coming within the definition of ‘Financial Debt’ as defined under sub-section (8) of Section 5, the Claimant is required to show that (i) there is a debt alongwith interest, if any, which has been disbursed and (ii) such disbursement has been made against the ‘consideration for the time value of money’.”*

22. It is reiterated that in the present case neither the loan agreement has any provision regarding the payment of interest nor there is any supporting evidence/document to establish applicable rate of interest to be paid on the said loan. The applicant has failed to prove that the loan was disbursed against consideration for time value of money, particularly when respondent company has affirmed that no interest has been paid nor payable at any point of time.

23. Similarly, in the matter of Shreyans Realtors Private Limited & Anr. Vs. Saroj Realtors & Developers Private Limited Company Appeal (AT) (Insolvency) No. 311 of 2018, vide its order dated 04.07.2018 Hon’ble NCLAT has observed that *when corporate debtor never accepted the component of interest and has given no undertaking to repay the loan with*

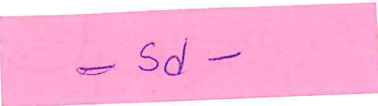
interest; the Appellants cannot claim to owe 'financial debt' from the 'Corporate Debtor' and thereby cannot be claimed to be a 'Financial Creditor' as defined under Section 5(7) & (8) of the Insolvency and Bankruptcy Code, 2016.

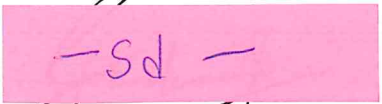
24. Therefore, neither the present claim can be termed to be a 'financial debt' nor does the applicant come within the meaning of 'financial creditor'. Once the applicant does not come within the meaning of 'financial creditor', he becomes ineligible to file the application under Section 7 of the Insolvency Code 2016.

25. For the reasons stated above this petition fails and the same stands dismissed as not maintainable.

26. We make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy and the right of the Applicants before any other forum shall not be prejudiced on account of dismissal of the instant application.

27. Let the copy of the order be served to the parties.


(DR. V.K. SUBBURAJ)
MEMBER (TECHNICAL)


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