

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

C.P. NO.IB-212(PB)/2018

IN THE MATTER OF:

M/s Cadillac Info- Tech Private Limited

.....Petitioner

vs.

M/s. Hallow Infrastructure Private Limited

.....Respondent

SECTION: Under Section 7 of the Insolvency and Bankruptcy Code, 2016

Order delivered on: 17.09.2018

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR
Hon'ble President

SHRI S.K. MOHAPATRA
Hon'ble Member (Technical)

PRESENTS:

For Petitioner : Mr. Pulkit Deora & Ms. Nandini Sinha,
Adv.

For Respondent : Mr. K. Datta, Mr. Kapil Gupta, Adv.

ORDER

M.M.KUMAR, PRESIDENT

The Petitioner claiming to be the 'financial creditor' has filed the instant Petition 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 M/s Hallow Infrastructures Private Limited (for brevity the 'corporate debtor').

2. The Respondent Company - Corporate Debtor – M/s Hallow Infrastructure Pvt. Ltd. was incorporated on 18.11.2005. The identification number of the Corporate Debtor given is CIN U45201DL2005PTC142691 and its registered office is situated at B-9, Ground Floor, Saket, New Delhi - 110017. The authorised share capital of the company is Rs. 21, 00,000/- (Rupees Twenty One Lacs only) and the Paid-up share capital is Rs. 13, 07,000/- (Rupees Thirteen Lacs Seven Thousand only), respectively.



3. It is appropriate to mention that the Petition is filed by Mr. Anil Mahindra on behalf of the Petitioner – M/s Cadillac Info-Tech Private Limited, being its Authorized Representative. The Petitioner is a company with the identification number CIN U72200DL2005PTC139095 and the date of incorporation as 27/07/2005. The Registered office of the company is situated at E-4, Defence Colony, New Delhi – 110024.

4. The Petitioner has proposed the name of Mr. Ajay Gulati as the Insolvency Professional with the address C – 66, Shivalik, 1st Floor, New Delhi – 110017 and email-id ajaygulati.ca@gmail.com. His registration number is IBBI/IPA-001/IP-P00943/2017-18/11547. He has filed his written communication as per the requirement of Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Mr Ajay Gulati has agreed to accept appointment as the Interim Resolution Professional if an order admitting the present application is passed. He has declared that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or

elsewhere. In addition, further necessary disclosure has been made as per the requirement of the IBBI Regulations.

5. The precise case of the Petitioners is that a short term loan amounting to Rs. 2,00,00,000/- (Rupees Two crores Only) for a period of one year was granted to the Respondent-Corporate Debtor. The said amount was disbursed by way of RTGS through Cheque bearing No. 136917 dated 20.07.2013 drawn on the HDFC Bank account No. 02712320001524, HDFC Bank Ltd., Kalkaji, New Delhi.

6. It is further submitted that on 03.03.2014 an amount of Rs. 60,00,000/- (Rupees Sixty Lakhs only) was repaid by the Respondent- Corporate Debtor leaving behind an amount of Rs. 1,40,00,000/- (Rupees One Crore Forty Lakhs only).

7. The details of the payments made to the corporate debtor along with the date of disbursement, the respective amount of disbursement and the total amount in default till the filing of the Petition have been specified in Part – IV of the petition.



Copy of the relevant Financial Statements supporting the amount of disbursement has also been placed on record.

8. The Petitioner has also placed on record the audited balance sheets of the Respondent – Corporate Debtor for the years ending on 31.03.2015 and 31.03.2016, which reveals the amount of Rs 1,40,00,000/- as a long term borrowing. The petitioner has also placed on record the Ledger Account of the Respondent at Annexure 11 of the petition to show the outstanding amount as Rs 1,40,00,000/- as per the account maintained by the respondent company.

9. In Part-IV of the petition, the petitioner has claimed that the total amount in default is Rs.3,02,09,534/- as on the date of filing the petition which is inclusive of interest @ of 24% p.a.

10. The Respondent – Corporate Debtor has filed its reply on 22.05.2018 and has raised various objections against the admission of the present petition.



11. First and foremost, the main objection raised by the respondent is that the petitioner has wrongly claimed itself to be a Financial Creditor and has also wrongly claimed that there is a financial debt due against the Respondent Company. It is further submitted that a transaction can be covered under financial debt only if it has the time value of money, inter alia, in other words there is element of "interest". In the present case, the factor of time value of money is absent, which is the essence of any transaction to fall under Section 5(7) read with Section 5(8) of the IBC, 2016.

12. Mr. Pulkit Deora, learned counsel for the petitioner has submitted that the petitioner had advanced a loan of Rs. 2,00,00,000/- crores to the Corporate Debtor on 20.07.2013 and the total amount of default as on 08.02.2018 is Rs. 3,02,09,534/- (Three crores two lacs nine thousand five hundred and thirty four only) inclusive of interest @ 24% per annum. According to the learned counsel default had occurred on 20.07.2014 when a period of one year was completed. Learned counsel has drawn our attention to the

statement of accounts maintained by the respondent for the year ended on 31.03.2015 and 31.03.2016. According to the learned counsel a perusal of item No. 5 under the sub heading 'long term borrowings' it is patently shown that a outstanding amount as on 31.03.2014 and 31.03.2015 was Rs. 1,40,00,000/- crores. According to the learned counsel the amount could not be paid at an interest lower than the one contemplated by Section 186 (7) of the Companies Act, 2013. Therefore, it must be presumed that the loan would bear the minimum rate of interest and the same shall be payable to the petitioner. He has maintained that the petitioner is covered by the expression 'financial debt' and he must be regarded as 'Financial Creditor'.

13. Mr. Pulkit Deora has then challenged the stand taken by the respondent in its reply by arguing that the theory of agreement to sell of agricultural immovable property would be false because no registration charges have been paid as per the requirements of the provisions of Stamp Act. According to the learned counsel such a document is compulsorily registerable by virtue of the provisions of



Section 17 of the Registration Act, 1949. Therefore, no reliance on the agreement to sell could be placed. Another submission made by learned counsel is that if the theory of agreement to sell as projected in the reply is accepted then the respondent was required to pay income tax on the amount forfeited for non performance of the agreement on the part of the petitioner. The aforesaid forfeited amount would be accessible to income tax as per the provisions of Section 56 of the Income Tax Act as it would be regarded as income. No such income tax has been paid by the respondent which is sufficient to assume that there was no forfeiture in lieu of the agreement to sale. According to the learned counsel as a matter of fact the agreement to sell dated 20.07.2013 (Annexure R/1) is a piece of fabricated document.

14. Mr. K. Datta, Learned Counsel for the Corporate Debtor-Respondent has resisted the admission of the petition on the ground that the transaction as alleged by the petitioner is a transaction which involves sale and purchase of immovable property based on agreement to sell dated 27.07.2013 which



is duly executed between the parties (Annexure R/1). According to the learned counsel a perusal of the agreement would show that agriculture land situated at Village Mahwa, Tehsil Shahabad, District Rampur (U.P.) was sought to be sold to the petitioner for specified amount of Rs. 8,50,00,000/- crores and a sum of Rs. 2,00,00,000/- crores as advance was paid through RTGS on 20.07.2013.

15. It has been further highlighted that the petitioner was not able to honour the agreement to sell by paying the balance amount and the parties agreed on 03.03.2014 to adjust the amount of Rs. 2,00,00,000/- crores. As a consequence, a sum of Rs. 1,40,00,000/- crores was forfeited and a sum of Rs. 60,00,000/- Lacs was paid back. It has been maintained that the aforesaid factual position is reflected in the statement of account filed by the respondent. For elaborating the aforesaid argument our attention has been drawn to the averments made in para 20 & 21 of the reply filed by the Corporate Debtor-Respondent.



16. Another submission made by Mr. K. Datta is that if the entries reflected by the respondent in its books of accounts as projected in the petition are taken to be correct no case is made out for triggering the Corporate Insolvency Resolution Process. According to the learned counsel, the loan cannot be regarded as financial debt within the meaning of Section 5 (8) of the Code and therefore, the petitioner would not be able to answer the description of 'Financial Creditor' as defined in Section 5 (7) of the Code.

17. It is contended that in order to be covered by the expression 'Financial Debt' a necessary element of interest or time value of money is required to be shown. According to the learned counsel all the statement of accounts attached by the petitioner along with the petition do not reflect any entry showing any interest paid. A mere reference to Section 186 (7) of the Companies Act, 2013, according to the learned counsel would not advance the case of the petitioner because the aforesaid provision imposes a limitation on rate of interest for which the loan could be advanced. It is maintained that the reliance of the petitioner on the

provisions of Section 186 (7) of the Companies Act, 2013 is wholly misplaced as it prohibits the advancement of loan at a rate of interest lower than the prevailing yield of one year, three years, five years or ten years Government Security closest to the tenor of the loan. There is no such question before the Court alleging that the loan has been advanced at a rate lower than the one prescribed by Section 186 (7) of the Companies Act, 2013. Therefore, it is wholly unwarranted for the petitioner to argue that payment of interest should be assumed on the basis of the mandate of Section 186 (7) of the Companies Act, 2013.

18. Learned counsel has also submitted that had it been a simple case of advancement of loan than a loan agreement was required to be in existence. The only agreement which is executed between the parties is agreement to sell dated 20.07.2013. In support of his submission learned counsel has placed reliance on para 24 of a judgment rendered in the case of **Nikhil Mehta & Sons v. AMR Infrastructure Limited (Company Appeal (AT) (Insolvency) No. 07 of**



2017) and argued that a 'Financial Debt' has to be a debt along with interest which is disbursed against the consideration for the time value of money and may include any of the events enumerated in sub-clauses (a) to (i) of Section 5 (8) of the Code. Therefore, it is urged that the petition be dismissed.

19. In connection with the maintainability of the petition, it is necessary to note the scheme of the Code which provides for triggering the insolvency resolution process by three categories namely:

- a)** Financial Creditor
- b)** Operational Creditor, and
- c)** Corporate Debtor itself.

20. The procedure in relation to the initiation of Corporate Insolvency Resolution Process by the "Financial Creditor" is delineated under Section 7 of the Code wherein only a "Financial Creditor"/ 'Financial Creditors" can file a petition. As per Section 7(1) of the Code a petition could be



maintained by a Financial Creditor either itself or jointly with other Financial Creditors.

21. 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 owed and includes a person to 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 Section 5(8)(a) to (i).

22. Mere disbursement of money debited from the said account of the Petitioner and credited to the account of the Respondent Company would not treat the petitioner as



'Financial Creditor' within the meaning of Section 5(8) of the Code.

23. However admittedly the petitioner has not produced any loan agreement nor there are details and particulars of any applicable interest mutually agreed between the parties.


24. Therefore, neither the present claim can be termed to be a 'financial debt' nor does the petitioner come within the meaning of 'financial creditor'. Once the petitioner fails to answer the description of a 'financial creditor' as defined under Section 5(7) and 'financial debt' as defined under Section 5(8) of the Code, it is ineligible to file a petition under Section 7 of the Code.

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

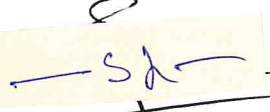


26. We make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy and the right of the Petitioners before any other forum shall not be prejudiced on account of dismissal of the instant petition.

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



**(M.M.KUMAR)
PRESIDENT**



**(S.K. MOHAPATRA)
MEMBER (TECHNICAL)**

17.09.2018
(VIDYA)