

**BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

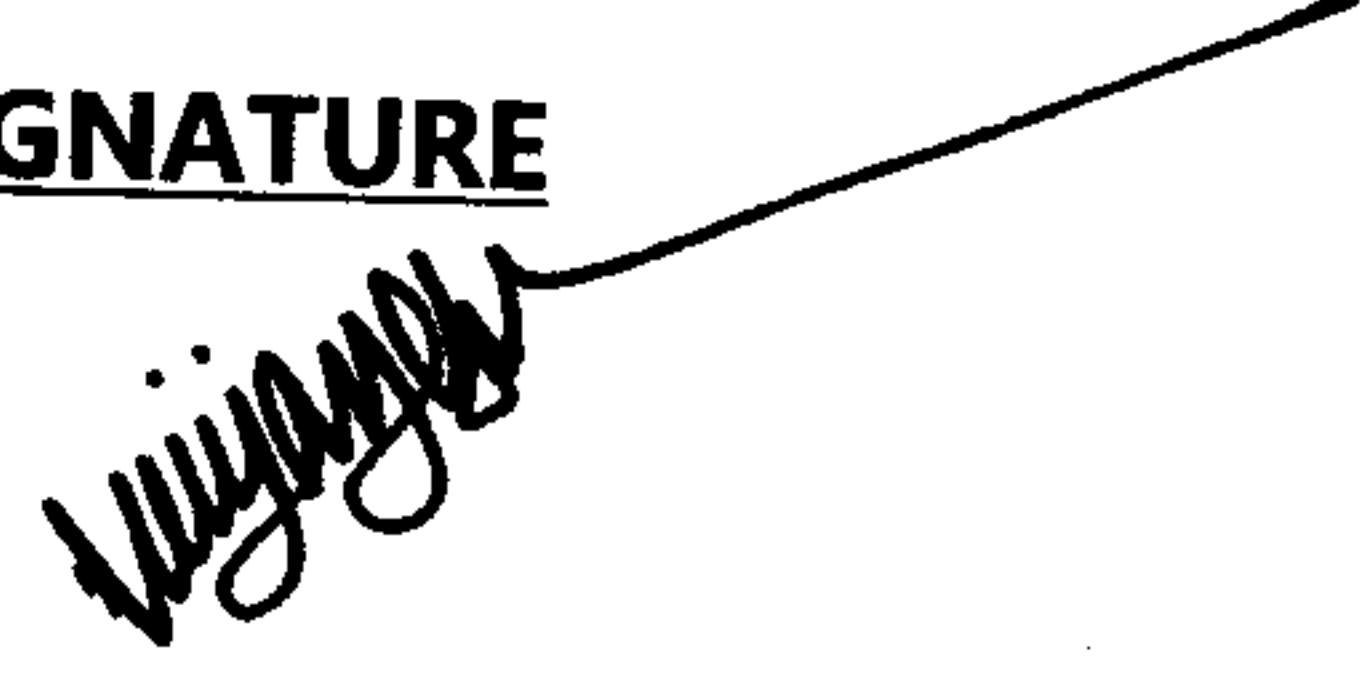
C.P. (I.B) No. 106/7/NCLT/AHM/2018

Coram: **Hon'ble Ms. MANORAMA KUMARI, MEMBER JUDICIAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH
OF THE NATIONAL COMPANY LAW TRIBUNAL ON 20.09.2018**

Name of the Company: Asha Goyal
V/s.
Pharma Trades Pvt Ltd.


Section of the Companies Act: Section 7 of the Insolvency and Bankruptcy Code

S.NO.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.	VIJAYESH ATRE	ADVOCATE	CORPORATE DEBTOR	
2.				

ORDER

Advocate Mr. Vijayesh Atre is present for the Corporate Debtor.

The Order is pronounced in the open court, vide separate sheet.


**MANORAMA KUMARI
(MEMBER JUDICIAL)**

Dated this the 20th day of September, 2018

**BEFORE ADJUDICATING AUTHORITY
(NCLT)
AMEDABAD BENCH
AHMEDABAD**

CP NO. (IB) 106/7/NCLT/AHM/2018

CORAM: Ms. MANORAMA KUMARI, MEMBER JUDICIAL

Date: 20th day of September, 2018

In the matter of:

1. Ms. Asha Goyal
C.R. Dass Farm
Gopalpura
Mod
Tonk Road
Jaipur
Rajasthan : Petitioner
: Financial Creditor

VERSUS

- M/s. Pharma Traders Private Ltd.
18/2 Lasudia Mori
Dewas Naka
A.B. Road
INDORE 452 001 (M.P) : Respondent
: Corporate Debtor

Appearance:

1. Learned advocate Mr. Aditya Mewara for Financial Creditor/Petitioner.
2. Learned Advocate Mr. Vijayesh Atre for Corporate Debtor/Respondent

ORDER

1. Ms. Asha Goyal filed this petition under section 7 of The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 4 of The Insolvency and Bankruptcy (Application to Adjudicating



Authority) Rules, 2016 (hereinafter referred to as "the Rules") seeking reliefs under Section 7(5)(a) and Section 13(1)(a)(b)(c) of the Code.

2. Pharma Traders Private Limited is a company incorporated under the Companies Act, 1956 having its registered office at 18/2 Lasudia Mori, Deewas Naka, A.B. Road, Indore 452 001 (M.P.) represented by one of its Directors.
3. This petition was filed on 28.02.2018 and listed for the first time before this Tribunal on 9th March, 2018 wherein petitioner filed proof of service of notice of hearing on the respondent. Mr. Rishabh Gupta i/b learned advocate Mr. Aditya Mewara represented the petitioner before this Tribunal but none remained present for respondent. Registry issued notice dated 12.03.2018 asking the respondent to cause appearance before this Tribunal on 05.04.2018. On 05.04.2018, learned advocate Mr. Vijayesh Atre remained present on behalf of the respondent and on the request from both the sides the matter was adjourned to 27.04.2018. On request of both the sides the matter was again adjourned to 05.06.2018, wherein rebuttal documents were filed by the petitioner. The matter was again listed on 09.07.2018 wherein learned advocates from both the sides remained present and the matter was adjourned to 10.08.2018 with directives that no further adjournment shall be granted.

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4. The petitioner has submitted copy of bank statements, certificate confirming the eligibility of the proposed insolvency professional for appointment as resolution professional in accordance with the Rule 9 (2) of the Insolvency and Bankruptcy Rules, 2016 and copy of notarised affidavit.
5. The respondent filed reply cum objections on 28.03.2018 inter alia denying any outstanding payable to the applicant. In the reply the respondent has raised the following objections: -
- (a) **the respondent denies to have any outstanding payable to the applicant;**
 - (b) **the present application is devoid of merits because no incontrovertible document showing lending of the alleged sum has been placed on record to satisfy this Tribunal that the alleged sum was ever borrowed by the respondent corporate debtor from the applicant financial creditor;**
 - (c) **In the application the applicant has not placed on record even a single document to show as to how and when the alleged sum was given by the applicant financial creditor to the respondent debtor;**
 - (d) **no record as to any financial contract has been placed on record to satisfy this Tribunal as to existence of any contract between the applicant and the respondent company;**
 - (e) **since there was no contract between the parties as to date of repayment, no default in repayment of the alleged sum can be alleged;**
 - (f) **respondent denies to have handed over the document at page No. 8 of the application as annexure 01 and says that the veracity of such document needs due examination through process of leading evidence before appropriate Civil Court;**
 - (g) **the applicant cannot be said to be a financial creditor in terms of the provisions of the Insolvency and Bankruptcy Code, 2016 since the financial creditor is not entitled to run the business of money lending in terms of Section 11-B of the M.P. Money Lenders Act, 1934 as no proof of her registration as money lender has been attached with the petition;**

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(h) there is no consent or written communication by the proposed resolution professional in form No. 2 as required under Rule 9 (1)

6. First plea of the respondent is that they do not have any outstanding payable to the appellant and the present application is devoid of merits because no incontrovertible document showing lending of the alleged sum has been placed on record.
7. Another objection raised by the respondent is that, the applicant cannot be said to be a financial creditor in terms of the provisions of the Insolvency and Bankruptcy Code, 2016 since the financial creditor is not entitled to run the business of money lending in terms of Section 11-B of the M.P. Money Lenders Act, 1934. According to the respondent, every person who carries on or intends to carry on the business of money lending shall get himself registered by an application made to the Registering Authority of that area. However, in the present case, though the applicant claims to be a financial creditor, no proof of her registration as money lender has been attached and, therefore, it cannot be said that the applicant is a financial creditor. Section 11-B of M.P. Money Lenders Act, 1934 provides as under: -

"11-B - Registration of money lenders and registration certificate -

- (1) Every person who carries on or intends to carry on the business of money lending shall get himself registered by an application made to the Registering Authority of that area in which he carries on or**

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intends to carry on such business and, on such registration, the Registering Authority shall grant a registration certificate to him in such form as may be prescribed;

Provided that no person being a firm or partner of a firm of moneylenders shall be so registered except upon production before the Registering Authority of a certified copy of an entry showing such person as the firm or partners, as the case may be, made in the register of firms under Section 59 of the Indian Partnership Act, 1932 (No. 9 of 1932):

Provided further that no registration certificate shall be granted to carry on the business of money lending in the Scheduled Areas referred to in clause (1) of Article 244 of the Constitution:

- (2) The application made under sub-section (1) shall be in writing and shall specify the area in which the applicant carries on or intends to carry on the business of money lending and such other particulars as may be prescribed."**

8. The respondent has further submitted that, as per M.P. Money Lenders Act, 1934, without there being a certificate of registration from the appropriate authority, business of money lending cannot be carried on by the applicant. It is submitted by the respondent that, in accordance with and due to non-compliance of the provisions of the MP Money Lenders Act of 1934, the present application is liable to be rejected.
9. The respondent has further submitted that, under Rule 9 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 it is a requirement that the application shall be accompanied by a certificate confirming the eligibility of the proposed insolvency professional for appointment as a Resolution Professional in accordance with the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)

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Regulations, 2016. The said mandatory requirement has not been fulfilled by the applicant and, therefore, the application is not complete as required under Section 7 (5) of the Code of 2016.

10. It is also submitted by the respondent that, in the instant case there is no consent or written communication by the proposed resolution professional in form No. 2 as required under Rule 9 (1) which is a mandatory requirement. In the instant case the proposed insolvency professional has given his consent under Rule 7, which is not applicable and, therefore, in the present application the proposed resolution professional cannot be said to have given his written communication in connection with the present application to carry out corporate insolvency resolution process in respect of the applicant.

11. The respondent has further submitted that, in the instant appeal, documents like financial contract, certificate under Rule 9 (2), document to evidence loan by applicant to respondent, document to show that the debt has become due and copies of the entries in the bankers' book in accordance with the Bankers' Books Evidence Act, 1891 are missing. Non-compliance of the mandatory requirements are of serious nature and, therefore, the present application is incomplete and must be dismissed.

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12. The respondent has further submitted that, affidavit placed at page No. 6 and 7 of the application and executed by the applicant is inadmissible for want of payment of stamp duty as per Article 5 of the Stamp act, 1958 as applicable in the State of Madhya Pradesh.
13. The respondent has further submitted that form No.1 under Part V of the application requires copies of the entries in a Bankers' Book in accordance with the Bankers' Books of Evidence Act, 1891, as exhibit to the application cannot be said to be a certified copy of statement of accounts in terms of requirements of the Code. Section 2 (8) of the Banker's Books Evidence Act, 1891, defines a certified copy as under:

"Section 2 (8) "Certified copy" means when the books of a bank –

- (a) are maintained in written form, a copy of any entry in such books together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book is still in the custody of the bank, and where the copy was obtained by a mechanical or other process which in itself ensured the accuracy of the copy, a further certificate to that effect but where the book from which such copy was prepared has been destroyed in the usual course of the bank's business after the date on which the copy had been so prepared, a further certificate to that effect, each such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title; and
- (b) consist of printouts of data stored in a floppy disc, tape or any other electro-magnetic data storage device, a printout of such entry or a

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copy of such printout together with such statements certified in accordance with the provisions of Section 2A.

- (c) a print out of any entry in the books of a bank stored in a micro film magnetic tape or in any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such printout as a copy of such entry and such print out contains the certificate in accordance with the provisions of section 2A.

14. The respondent has submitted that, the accounts statements and entries thereof in the instant case are not either in the form of a letter or in the form of a certificate. Section 2A of the Act, 1891 provides the conditions to issue a certificate, which reads as under: -

"2A. Conditions in the print out: - A print out of entry or a copy of print out referred to in sub-section (8) of Section 2 shall be accompanied by the following, namely: -

- (a) a certificate to the effect that it is a print out of such entry or a copy of such print out by the principal accountant or branch manager; and
- (b) a certificate by a person in-charge of computer system containing a brief description of the computer system and the particulars of -
- (i) the safeguards adopted by the system to ensure that data is entered or any other operation performed only by authorised persons;
- (ii) the safeguards adopted to prevent and detect unauthorised change of data;
- (iii) the safeguards available to retrieve data that is lost due to systemic failure or any other reasons;
- (iv) the manner in which data is transferred from the system to removable media like floppies, discs, tapes or other electro-magnetic data storage devices;

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- (v) the mode of verification in order to ensure that data has been accurately transferred to such removable media;
 - (vi) the mode of identification of such data storage devices;
 - (viii) the arrangements for the storage and custody of such storage devices;
 - (viii) the safeguards to prevent and detect any tampering with the system; and
 - (ix) any other factor which will vouch for the integrity and accuracy of the system.
- (c) A further certificate from the person in-charge of the computer system to the effect that, to the best of his knowledge and belief, such computer system operated properly at the material time, he was provided with all the relevant data and the print out in question represents correctly, or is appropriately derived from, the relevant data.
15. Heard arguments of advocates representing both the sides at length.
16. Learned advocate appearing on behalf of the respondent submitted that, affidavit executed by the applicant and placed at page No. 6 and 7 of the application is inadmissible for want of payment of stamp duty as per Article 5 of the Stamp act, 1958 as applicable in the State of Madhya Pradesh. In support of his contention, learned counsel appearing for the respondent placed reliance on the following decision given by Allahabad High Court on 9th September, 1998 in M/s. Tayal Potteries and Anr. Vs. Macroplast (P) Ltd.

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"The Punjab and Haryana High Court a (1986 60 company cases 402) while agreeing with the view of the Calcutta High Court has held that an affidavit which supports the company petition is treated as substantive evidence and where there is no affidavit in accordance with law accompanying the petition, it is no petition in the eyes of law. Learned advocate for the respondent further submitted that, even the Bombay High Court in the case of Suvaran Rojaram Bandelkar (supra) has observed while considering the question of verification that, the importance of verification is to test the genuineness and the authenticity of the allegations and also to make the deponent responsible for the allegations. In essence, the verification is required to enable the Court to find out whether it will be safe to act on such affidavit evidence."

17. During the course of arguments, the corporate debtor placed reliance on various case laws in respect of the mode of swearing of affidavit and the verification which are as follows: -

(i) **Para 15** in 1952 SCR 674 AIR 1952 SC317:1952 Cri LJ 1269 – *In the matter of State of Bombay v. Purshottam Jog Naik*

"We wish, however, to observe that the verification of the affidavits produced here is defective. The body of the affidavit discloses that certain matters were known to the Secretary who made the affidavit personally. The verification however states that everything was true to the best of his information and belief. We point this out as slipshod verifications of this type might well in a given case lead to a rejection of the affidavit. Verifications should invariably be modelled on the lines of Order 19 Rule 3 of the Civil Procedure Code, whether the Code applies in terms or not. And when the matter deposed to is not based on personal knowledge the sources of information should be clearly disclosed."

(ii) **Para 8** in 1969 (3) Supreme Court Cases 864 – *In the matter of A.K.K. Nambiar v. Union of India and Anr.*

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"The appellant made allegations against the Chief Minister of Andhra Pradesh and other persons some of whose names were disclosed and some of whose names were not disclosed. Neither the Chief Minister nor any other person was made a party. The appellant filed an affidavit in support of the petition. Neither the petition nor the affidavit was verified. The affidavits which were filed in answer to the appellant's petition were also not verified. The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to knowledge or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the present case, the affidavits of all the parties suffer from the mischief of lack of proper verification with the result that the affidavits should not be admissible in evidence."

- (iii) *Para 5 in AIR 1968 CALCUTTA 388 - in the matter of Gaya Textiles etc. and Star Textile Engineering Works Ltd.*

"It appears that the petition was not verified by an affidavit at all, but by a declaration. Secondly, this declaration appears to have been made before a notary public at Bombay on December 24, 1965. I shall now refer to the relevant rules for verification of petitions under the Companies (Court) Rules, 1959, (hereinafter referred to as the Company Rules) and also under the rules of this Court Rule 21 of the Company Rules requires that every petition shall be verified by an affidavit made by the petitioner or in the case of a petition by a body corporate, by a director, secretary or other principal officer. Such an affidavit has to be made in Form No. 3 which provides that the affidavit shall be made on solemn affirmation. Therefore, an affidavit verifying a petition must be made on a solemn affirmation as prescribed by Form No. 3. Under Rule 18(a) of the Company Rules the affidavit verifying the petition is to be signed by the deponent and sworn to in the manner prescribed by the Code or by Rules and practice of the Court. Under R. 5 of the Chapter XV of the Original Side Rules of this Court affidavit for use

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in any of the Jurisdiction of the Court may be taken in Calcutta or within five miles thereof before a Commissioner, generally or specially authorised by the Chief Justice for the purpose. In this case, this rule would not apply as the affidavit was made at Bombay. As the affidavit was purported to be made outside the five miles' limit, it has to be made according to S. 139 of the Code of Civil Procedure, which provides that an oath to a deponent may be administered by a Court or a Magistrate or any officer or person whom a High Court may appoint in this behalf, or any officer appointed by any other Court which the provincial Government has generally or specially empowered in this behalf. The affidavit, therefore, has to be affirmed according to the terms of S. 139 of the Code. A notary public is not a person competent to administer the oath to a document who is affirming affidavit and, therefore, the affidavit purported to be made before notary public is not an affidavit according to the Company Rules and the Code of Civil procedure. Besides, a mere declaration before a notary public is something entirely different from a solemn affirmation on which alone an affidavit can be made. For these reasons the declaration at the bottom of the petition does not comply with rules requiring verification of the petition and it must, therefore, be held that there is no verification of the winding up petition"

OBSERVATIONS:

18. Before passing any order, the Adjudicating Authority must satisfy that a default has occurred and the application filed by the financial creditor is complete in all respect.

19. The applicant has failed to place on record even a single document to show as to how and when the alleged sum was given by the applicant to the respondent and no record is made available to show the existence of any contract

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between the applicant and the respondent company. Furthermore, in the application in part "V" of Form 1, under the head "particulars of Financial Debt" no particulars of the financial debt have been provided. It is also stated that the respondent denies to have handed over the document placed at page No. 8 of the application – copy of letter of confirmation by the respondent regarding balance payment to the applicant and veracity of such document needs due examination through process of leading evidence before appropriate Civil Court.

20. On bare reading of the application, it is observed that the application is incomplete in many aspects. In Part –I of the application, the applicant has not mentioned the date of incorporation of financial creditor and identification number of financial creditor. In column IV, under the head "particulars of financial debt", date of disbursement has not been mentioned. In absence of any proof like agreement or contract to have been entered between the two parties, it is difficult to substantiate the claim of the applicant/financial creditor that the principal amount has fallen due on 20.05.2016 and an amount of Rs. 15,40,420/- is due towards interest, especially in absence of date of disbursement. That apart, the application is incomplete and no details are given about the record of default and even the fee paid for this application.



21. Financial creditor has placed on record T.D.S. form No. 26 as annual tax statement under section 203 AA of the Income Tax Act, ledger account maintained by the applicant herself, confirmation of account dated 01.04.2016, statement of account of Karnataka Bank Ltd. However, no such documentary evidence has been placed on record to show that, when the amount was paid to the corporate debtor and/or when it has fallen due. Further, no record is made available like any 'financial contract', ought to have been entered between the two parties.
22. On perusal of the documents, it is found that even the statement of account so filed by the applicant is/are not certified as per Section 2A of the Banker's Book Evidence Act, 1891.
23. During the course of argument, the corporate debtor has disputed the letter of confirmation of accounts, alleged to have been issued by the corporate debtor dated 1st April, 2016 as no other document has been produced by the applicant to authenticate veracity of such claim.
24. On perusal of the application it appears that all the figures are not supported and substantiated by any document as no documents are made available to this bench to support the claim.



25. Further, in the affidavit attached with the application, under the head "verification", date of verification is kept blank. In the affidavit, para No. 1 it is stated that "**I am the petitioner in the present matter and am duly authorised to make this affidavit on its behalf**". No authorisation letter is placed on record and there is no mention as to on whose behalf the deponent/operational creditor has sworn this affidavit.
26. In light of the above discussions, there are no grounds to admit this application in order to trigger Corporate Insolvency Process against the respondent company M/s. Pharma Traders Private Limited.
27. In the result, the application is dismissed. No order as to costs. The findings or observations, if any, made in this order may not come in the way of the applicant establishing its claim or for the Respondent to establish its defence in any other Forum.



**MS. MANORAMA KUMARI
ADJUDICATING AUTHORITY
MEMBER JUDICIAL**

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