

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH, MUMBAI
TCP NO.411/IBC/NCLT/MB/MAH/2017

Under Section 7 of the Insolvency & Bankruptcy Code 2016

In the matter of

MR. VIR VIKRAM VAID, Financial Creditor, Bungalow No.2, Madhuban Deonar
Co-operative Housing Society Limited, B.S.D. MARG, Near U.S.V. Limited,
Govandi, Mumbai - 400088

Versus

M/S. OFFSHORE TESTING & INSPECTION SERVICES (I) PRIVATE LIMITED,
Ganesh Wadi, R/3, Opp: Shalimar Petrol Pump, Near Basant Cinema, Dr. C.G.
Road, Chembur, Mumbai-400074.

Judgment / Order delivered on 07.07.2017

CORAM:

(1) Hon'ble SHRI MUKUL KUMAR SHRAWAT, Member (Judicial)

(2) DR. ASHOK KUMAR MISHRA, Member (Technical).

For the Petitioner : Shri Rabindra Hazari, Advocate for the Financial
Creditor

For the Respondents : Dr. S.K. Jain, Authorised Representative of the
Respondent.

PER SHRI M.K. SHRAWAT, Member (Judicial)

Order/Judgment

1. Petitioner Financial Creditor Vir Vikram Vaid has submitted the Petition on 31st May 2017 on Form No.1 [Rule 4(1)] to initiate Insolvency Resolution Process by invoking the provisions of Section 7 of the Insolvency & Bankruptcy Code 2016 for claim of Financial Debt of ₹38,00,000 (Principal); from the alleged financial Corporate Debtor M/s. Offshore Testing & Inspection Services (I) Pvt. Ltd.
2. At the outset it is pertinent to record that the Petitioner Mr. Vir Vikram Vaid is one of the Director of the Respondent Company.
3. Particulars of alleged financial debt as stated in the petition are as follows:-
 - a) The alleged Financial Creditor issued the following cheques from his personal Savings Bank Account to the Corporate Debtor's Current Bank Account maintained in Punjab National Bank:-

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Date	Cheque No.	Amount
03.09.2012	659613	30,00,000
05.10.2012	659631	10,00,000
06.12.2012	659661	10,00,000
11.03.2014	790400	10,00,000
13.03.2014	790403	5,00,000
Total		<u>65,00,000</u>

- b) Out of the above amount of ₹65 lakhs, the Company repaid an aggregate amount of ₹27 lakhs by transferring the following amount on the following date from the Company's same Current Bank Account to the alleged Financial Creditor's Savings Bank Account, maintained in the said Punjab National Bank, as under:-

Date	Cheque No.	Amount
26.02.2013	186299	20,00,000
11.09.2014	Letter of Fund Transfer	7,00,000

- c) The aforesaid financial transactions are evidenced by Banker's Certificate dated 27th May, 2017 of Punjab National bank, Mumbai – 400071 certifying to the aforesaid transfer of funds as per the aforesaid dates, amounts and instruments of transfer, which is annexed to the Petition.
- d) Accordingly, out of the original total financial debt of ₹65 lakhs, a sum of ₹27 lakhs was repaid, thus the outstanding principal debt amount remained ₹38 lakhs (Thirty Eight Lakhs only). The Financial Creditor has further claimed 18% interest per annum on the outstanding principal debt amount of ₹38 lakhs from 27.04.2016 to 26.05.2017.
- e) The Annual Report of the Corporate Debtor for 2012-2013 and 2013-2014 containing the Balance Sheet of the Corporate Debtor acknowledged the "Long term borrowing of ₹30 lakhs from Mr. Vir Vikram Vaid"
- f) The audited Balance Sheet and Profit and Loss Account of the Corporate Debtor for the Financial Year ending 31st March 2015, was signed by Mr. Shaleen Vaid and by the Petitioner-Financial Creditor as the two Directors, acknowledged and admitted that an amount of Rs.38 lakhs is due and owing as a debt and liability by the Corporate

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Debtor to the Financial Creditor as "Long Term Borrowing from Mr. Vir Vikram Vaid."

- g) In the Petition it is alleged that Mr. Shaheen Vaid, the other Director of the Corporate Debtor, through his Advocate sent a reply dated 19th May 2016 to the Advocates of the Financial Creditor, wherein did not flatly deny the Corporate Debtor's liability to pay the said Financial Debt of ₹38 lakhs as on 31st March 2015, plus further interest thereon at the rate of 18% per annum, but referred to various false and fallacious matters to obscure the Corporate Debtor's undeniable liability to pay its said financial debt to the Financial Creditor.
 - h) Legal Notice in Rejoinder by the Financial Creditor dated 31st August 2016, denying all the false contentions of the said Reply Legal Notice of Mr. Shaleen Vaid dated 19th May 2016, and reiterating the contents of the earlier statutory demand notice of 27th April 2016 is also annexed to the Petition.
 - i) As per the Petitioner, it was clearly established that the Company had failed to pay the said Director the aforesaid financial debt of ₹38 lakhs. The Company also failed to secure or to compound the said debt to the Creditor's satisfaction.
 - j) The Financial Creditor Shri Vir Vikram Vaid has also executed a Special Power of Attorney appointing his son Mr. Abhishek Vaid, as his constituted Attorney.
 - k) The Petitioner has also confirmed that the IRP as suggested by him is fully competent to act as Interim Resolution Professional.
4. The Petitioner has placed reliance on the following documents in support of his dues:-
- a) Copies of Entries from Punjab National Bank, Chembur Main Branch, Mumbai-400071;
 - b) Annual Report of the Corporate Debtor for the year 2012-13 and 2013-14 containing Balance Sheet and Profit and Loss Account of the Corporate Debtor for the Financial Year as at 31st March 2013 and 31st March 2014.
 - c) Subsequent to the partial repayment by the Corporate Debtor of ₹7 lakhs to the Financial Creditor, the total Financial debt owed by the Corporate Debtor to the Financial Creditor is reduced from ₹45 lakhs to ₹38 lakhs for the financial year ending on 31st March 2014.
 - d) The Audited Balance Sheet and Profit and Loss Account of the Corporate Debtor for the Financial Year ending 31st March 2015, signed by Mr. Shaleen Vaid and by the Financial Creditor as the two Directors,

acknowledges and admits that an amount of ₹38 lakhs is due and owing as a debt and liability by the Corporate Debtor to the Financial Creditor as "Long Term Borrowing from Mr. Vir Vikram Vaid.

e) A copy of the Corporate Debtor's Annual Report for 2014-2015 containing the said Balance Sheet and Profit and Loss Account of the Corporate Debtor for the Financial year ending 31st March, 2015.

4. Learned Representative of the Respondent Company (Financial Debtor) has submitted that the Petitioner is hospitalised and his attorney holder has maliciously moved this Petition on his behalf. As a Director the Petitioner has advanced the money for ^{business} ~~baseless~~ purpose and not as an Investor, therefore, the Petitioner is not a Financial Creditor; hence Petition deserves to be dismissed. Reliance was placed on the Affidavit in Reply as under:-

"I Shaleen V Vaid, aged 37 years, residing at Bunglow No.04, Shamniwas, Dr. C.G. Road, Chembur, Mumbai 400 074, Maharashtra, India, am the Director of Respondent Company and being conversant with the facts of the Application filed by the Applicant above named, I am competent to file Reply to the Application filed by the Applicant on behalf of the Respondent Company. I hereby solemnly affirm and state as under:-

The Applicant above named has filed the present Application under Section 7 of the Insolvency and Bankruptcy Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against eh Respondent Company through Mr. Abhishek Vaid, his eldest son, in his purported capacity as Constituted Attorney of the Applicant.

I say and submit that the Applicant has been suffering from irreversible Parkinson Progressive Supranuclear Palsy Disease since November 2008 and his health has been continually deteriorating thereafter eventually leading to his being in complete vegetative condition and incoherent state of mind. I say and submit that recently on 06.06.2017 when I had an opportunity to meet the Applicant, I found him to be absolutely lost and in unsound state of mind and he was unable to recognize the people surrounding him.

The Applicant has filed the present Application through Mr. Abhishek Vaid in his purported capacity as constituted Attorney under Special Power of Attorney dated 17/08/2015. I say and submit that since the Applicant was not in sound state of mind and was in vegetative condition, he would not have been made to either understand or execute any Special Power of Attorney which is annexure '1q4' to the Application (Page 138 to 143 of the Application).

I say and submit that the Special Power of Attorney has been illegally and fraudulently Notarized by the Notary Greater Mumbai Mr. A.D. Shroff having address at Shop No.200, Dr. C.G. Road, Opp BJP office, Chembur Colony, Chembur Mumbai 400074 and Mr. Gregory D'souza having address at Kalpak Estate, Bldg No B-11, Shop No 40, Antop Hill, Mumbai-4000037. Since the Applicant was not in state of sound mind and his physical condition had deteriorated leading him to be in a vegetative condition, he would not have been able to understand or execute any Special Power of Attorney. Hence the Special Power of Attorney purportedly executed by the Applicant appointing Mr. Abhishek Vaid as his Constituted Attorney which has been purportedly Notarized by the above mentioned Notaries is a forged, fabricated and manipulated document.

I say and submit that the Hon'ble High Court, Bombay in Order dated 11/01/2016 in Misc. Petition No 73 of 2015 has made following observations:-

"The 1st Deponent of the Joint Affidavit of the consent is present in Court. He is Wheelchair bound. He was asked whether he has executed this Affidavit. He appears to be severally challenged in

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speech as well although he identified his signature on his affidavit of consent shown to him, when I asked him if he understood the contents, he was incoherent".

Annexed hereto and marked as Annexure "A" is the copy of Orders dated 11.01.2016 passed by Hon'ble High Court, Bombay

It is therefore, humbly prayed that this Hon'ble Tribunal be prayed to dismiss the Application filed by the Applicant with exemplary cost."

FINDINGS

5. As seen from the facts narrated hereinabove an interesting question had emerged that whether a Director who had invested money in his own Company can move a Petition seeking insolvency as "Financial Creditor"? Second question to be answered is whether **Father** as an investor has an alternate remedy under any other provisions of Law? Most of the facts are not in dispute that the Company (Respondent 1) is promoted by two Directors namely Mr. Vir Vikram Vaid (Father) having 1450 equity shares of Rs.100 each aggregating to 93.55%; and Mr. Shaleen Vaid (son) holding 100 equity shares of Rs.100 each aggregating to 6.5% shareholding. In addition to the two status viz-a-viz Company, **one** as a Shareholder and **two** as a Director, they have **third** status as a Depositor. Father had made an investment or advanced a sum of Rs.38 lakhs (outstanding balance) and Son had advanced a sum of ₹1,21,44,360/-, reflected in the Balance Sheet drawn as on 31st March, 2015.
6. Dispute had arisen when Father had demanded his money back from the Company on health ground. It is also noted by us that the father had given the entire management [letter dated 11th November 2014 written by Vir Vikram Vaid, (Director) to Shaleen Vaid, (Director)] his son, who is stated to be controlling the Company as on date. Health position of Father had also been discussed in the Court and it is informed that he is critically ill hence hospitalized. So in a situation when father is hospitalized and demanding his money back for treatment, which according to the argument is in the nature of a 'Financial Debt', whether can seek Insolvency & Bankruptcy of that very Company in which undisputedly he is a Shareholder as well as a Director?
7. Although the terminology used in the Books of Accounts is "Long Term Borrowing" but there is no evidence placed from the side of the Petitioner that there was documentation of any nature to demonstrate that it was in fact a debt along with interest against the consideration for the time value of money. Meaning of a "debt" in common parlance is a liability on a

claim, which is a specific sum of money due by agreement or otherwise. Commonly stated, the action of debt lies where a party claims the recovery of a debt; that is, a liquidated or certain sum of money due him. The action is based upon contract, but the contract may be implied, either in fact or in law, as well as express; and it may be either a simple contract or a specific contract. The most common instances of occurrence of debts is: (a) Upon unilateral contracts express or implied in fact, (b) Upon quasi-contractual obligations having the force and effect of simple contracts, (c) Upon bonds and covenants under seal, (d) Upon judgments or obligations of record, (e) Upon obligations imposed by statute. The obligation on the part of the creditor is therefore to demonstrate that the debt in question is falling within any one of the above referred four categories. Although in the books a nomenclature has been given but that nomenclature is required to be studied in the context of "financial debt" under the provisions of Insolvency & Bankruptcy Code. As a matter of fact, it is difficult to accept the legal proposition of the petitioner that since it was described under the head "long term borrowings" in the books of accounts hence it can be presumed that the debt in question was actually a "financial debt". It is worth to mention that this Code has serious consequences. A running concern is to be declared bankrupt or insolvent if insolvency process is commenced under this Code. Therefore, the judicial discipline requires to adopt a strict interpretation of the language used in the Code. As a result, there is no scope of any assumption or supposition. A financial assistance not having component of agreed rate of interest whether to be considered as a "financial debt" is to be examined in the light of the definition that a Financial Debt means a Debt along with interest which is disbursed against the consideration for the time value of money.

8. There is one more angle to examine the correctness of the claim. The Code prescribes appointment of Committee of Creditors under section 21 of The Code, relevant portion reproduced verbatim below:-

"Committee of Creditors

21. (1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

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Provided that 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 credits.”

9. On careful examination it is explicit that the Act itself is not allowing the related party to participate in the meeting of Committee of Creditors. This Proviso to sub-section (2) of Section 21 has drawn a line of distinction between Creditor and the related party as a Creditor. Naturally, it is very obvious that if the related parties are allowed to vote in a meeting of the Committee of Creditors then the democratic pattern of majority view shall make a mockery of the provision of This Code because the related parties shall not allow to proceed with the insolvency resolution. This distinction has, therefore, buttressed that a Director, although advanced money, is not a "Creditor" in the strict sense as conveyed in this Code. This case is a befitting examples that if presumably the Petition is allowed, then the consequential insolvency commencement shall not take place because the Committee of Creditors having only two Creditors i.e. Father and Son, shall not approve the commencement of the Insolvency Resolution. The exception as carved out in the First Proviso is therefore logical hence to be adhered strictly. In the given situation we are not inclined to expand the scope of this Proviso by holding that a Director can be treated as a "Financial Creditor" so as to be allowed to participate in Committee of Creditors in that capacity.
10. Without going into other allegation of the Respondent Company challenging the signatures of the Petitioner, authority given by the Petitioner to his younger Son, hospitalization of the Petitioner, etc., we are of the conscientious view that on technical ground itself the Petition is not allowed to be admitted. The legal proposition as laid down hereinabove thus warrant to dismiss this Petition being not admitted. Dismissed. No order as to Cost. To be consigned to Records.

Sd/-

DR. ASHOK KUMAR MISHRA
Member (Technical)
Date : **07.07.2017**

Sd/-

M.K. SHRAWAT
Member (Judicial)