

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. No. 1125/I&BP/2017

Under section 7 of IBC, 2016

In the matter of
Bravo Builders Pvt. Ltd.
....Petitioner

v/s.

Cottstown Fashions Ltd.
....Corporate Debtor

Order delivered on 1.1.2018

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner : Mr. Dipesh U. Siroya, Adv.

For the Respondent : Mr. R.J. Ghag, Adv.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Oral Order dictated in the open court on 11.12.2017

It is Company Petition filed u/s 7 of Insolvency and Bankruptcy Code, by the Petitioner/Bravo Builders Pvt. Ltd. against the Corporate Debtor/Cottstown Fashions Ltd., on the ground that the Corporate Debtor borrowed a sum of ₹1,80,00,000 on 25.07.2014, thereafter this Corporate Debtor having failed to repay the same, the Petitioner filed this Petition to initiate insolvency resolution process against this debtor.

2. The brief facts of the Petitioner's case is that this Corporate Debtor in the year 2014 sought short-term financial support from the Financial Creditor for expansion of its business, on being agreed to the request made by the Corporate Debtor, the Petitioner provided a short-term loan of ₹1,80,00,000 by transferring the said amount in favour of the Corporate Debtor vide RTGS on 25.07.2014, but soon thereafter, on 13.09.2014, this Corporate Debtor executed Promissory Note in favour of the Financial Creditor through its director Mr. Saurabh Pradhan agreeing to repay total sum of

₹2,70,00,000 including a sum of ₹90,00,000 towards profit on or before 24.09.2014. It has also been mentioned that this ₹90,00,000 was included in the Promissory Note as money payable towards services rendered by the Financial Creditor to the Corporate Debtor over and above the principal sum of ₹1,80,00,000 given as loan. In addition to the Promissory Note executed on 13.09.2014, this Corporate Debtor, before executing the aforesaid Promissory Note, also issued a cheque bearing No. 298175 dated 28.08.2014 drawn on Yes Bank for an amount of ₹2,25,00,000.

3. The Petitioner added to the material facts that since Corporate Debtor specifically requested the Financial Creditor to await confirmation to present the cheque given for ₹2,785,00,000. As no confirmation had come immediately, the Financial Creditor kept on reminding the Corporate Debtor seeking confirmation for encashment of the aforesaid cheque. Finally, the Corporate Debtor instead of giving confirmation for encashment of the aforesaid cheque, again issued three cheques on 24.09.2014 for amounts as mentioned below:

Bank	Cheque No.	Amount (Rs.)
Yes Bank, Mittal Chambers, Nariman Point, Mumbai.	129991	1,80,00,000
Yes Bank, Mittal Chambers, Nariman Point, Mumbai.	129990	45,00,000
Yes Bank, Mittal Chambers, Nariman Point, Mumbai.	129986	45,00,000

4. Again this Corporate Debtor having put same condition to present those cheques after confirmation has come from the Debtor, these cheques have not been presented for encashment. Since neither payment has been made nor has confirmation come for presenting those cheques, the Financial Creditor issued default notice on 03.11.2016 calling upon the Corporate Debtor to repay the said amount of ₹2,75,00,000 along with interest @24% p.a. within 10 days of receipt of the said notice. When there was no reply to the said notice, the Petitioner had again issued winding up notice on 21.11.2016 u/s 434 of the Companies Act, 1956 calling upon the Debtor to pay ₹2,70,00,000 along with interest @ 24% p.a. For no payment has come even after winding up notice sent by the Financial

Creditor, finally this petitioner has filed this case u/s 7 of IBC for initiation of Insolvency Resolution Process.

5. In reply to it, the Counsel for the Corporate Debtor has filed written submission highlighting the lacunae subsisting in the Company Petition without making any explicit denial of taking this money from the Petitioner.

6. The Counsel says that the Petitioner has not provided any documentary evidence providing short-term loan to this Corporate Debtor, to prove that it is a short-term loan. The Petitioner has not filed any document showing that the Corporate Debtor executed loan document towards the short-term loan of ₹2,80,00,000. The Counsel further states that this Petitioner has mentioned in his Petition that this money given to the Debtor is short-term loan facility, but it has not been reflected in any of the documents filed by the Petitioner not even in the Promissory Note purported to have been executed by the Debtor. He further says the Promissory Note that has been relied upon by the Petitioner discloses that this ₹2,80,00,000 given to the Corporate Debtor is an advance for investment proposal, therefore, even if this payment has been agreed as made to the Corporate Debtor, it cannot be treated as credit provided to the Corporate Debtor because, in the Promissory Note itself, it has mentioned as advance for investment proposal by including ₹90,00,000 towards profit. Therefore, he says, this transaction will not fall under any of the categories mentioned u/s 5 (8) of IBC, whereby, he sought for dismissal of this Company Petition.

7. On perusal of this Company Petition, the point now for consideration before this Bench is as to ***whether this transaction falls within the definition of financial debt as mentioned u/s 5 (8) of the IBC or not.***

8. It is a fact that this Petitioner sent ₹1,80,00,000 to the debtor through RTGS on 24.07.2014, in support of this payment, he also obtained three cheques from the Corporate Debtor; one for an amount of ₹1,80,00,000 and two cheques for ₹45,00,000 each

towards the money given to the Corporate Debtor. What Petitioner has done in between is, he got a Promissory Note executed from the Corporate Debtor on 13.09.2014 i.e. subsequent to the payment made to the Corporate Debtor, disclosing execution of promissory note by one of the directors of the Debtor company i.e. Mr. Saurabh Pradhan promising to pay this Petitioner a sum of ₹2,70,00,000 including profit of ₹90,00,000 on or before 24.09.2014 acknowledging payment of ₹1,80,00,000 to the debtor company through RTGS on 24.07.2014 as advance for an investment proposal.

9. Looking at the Promissory Note dated 24.9.2014, it appears to us that it has not satisfied with the characteristics required to prove that it is Promissory Note, because there is no unconditional undertaking to pay this ₹1,80,00,000 on demand, indeed this is a promise for payment of ₹2,70,00,000 including profit of ₹90,00,000 on or before 24.09.2014, i.e., within 11 days from the date of execution. This money ₹1,80,00,000 is shown in the promissory note as advance for an investment proposal perhaps made by the Corporate Debtor.

10. Since the Petitioner's Counsel argued saying that this case is to be admitted treating it as transaction falling u/s 5(8) (f) of the definition of financial debt, it has to be a loan transaction having commercial effect of borrowing regardless of profit the debtor company earns. When a clause of profit comes in between, it all depends upon the profit the company gets, if no profit, the company will not be in a position to distribute profit, once profit clause is included, it will become equity funding, not debt funding. Since ₹90,00,000 has been included in the document towards profit, it is inconceivable to construe that this document falls within the ambit of Clause (f) of sub-section 8 of section 5 of this Code. For the Petitioner failed to prove that this money has been given as loan to the Corporate Debtor except making a pleading in his Company Petition, this Bench cannot consider this payment has been made to the company as loan to the Corporate Debtor to repay the same on demand with interest. Under IB Code, it is essential to prove that the transaction in between the petitioner and the company is a loan

transaction falling under one or other head given in subsection 8 of section 5 of the Code. When ambiguity appears on record in relation to the character of the transaction, this Bench shall not construe such transaction as a financial debt.

11. The Counsel for the Petitioner has relied upon citations to support his claim; (i) *Jagivandas Bhikhabhai v. Gumanbhai Narottamdas* on 25 March, in 1965 of Gujarat High Court, (ii) *Sankaran Namboodiripad v. Vijayan*, in 1987 of Kerala High Court, to say that the transaction in between the Petitioner and the Corporate Debtor falls within the ambit of the definition of the Promissory Note, but on perusal of these two citations, it has been ascertained that there is an unconditional undertaking in both the cases to pay a sum on demand. Here on the contra, a profit clause and investment proposal have been inserted in the so called promissory note taking away the basic characteristics of a promissory note, we are of the view that the facts of the present case are variable to the facts of the citations supra, henceforth, we hereby hold that the ratio decidendi applied in those two cases is not applicable to the present case.

12. Since it is a Code that deals with cases without taking evidence to get a proof whether it is financial debt or not, this Bench on face not being in a position to believe that this is a financial debt in between the Petitioner and Corporate Debtor, this Petition is hereby **dismissed** with liberty to the Petitioner to approach before appropriate Forum of law on exclusion of time lapsed in this proceeding from the limitation period available to the petitioner.



V. NALLASEENAPATHY
Member (Technical)



B. S.V. PRAKASH KUMAR
Member (Judicial)