

NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

C.P NO.(IB)-09(PB)/2017
CA NO.

CORAM:

PRESENT: CHIEF JUSTICE M. M. KUMAR
Hon'ble President

SH. R.VARADHARAJAN
Hon'ble Member (J)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF PRINCIPAL BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 23.02.2017

NAME OF THE COMPANY:

Tomorrow Sales Agency Pvt.
V/S
Raipur Power and Steel Ltd. & Ors.

SECTION OF THE COMPANIES ACT: U/s 7 of Insolvency And Bankruptcy Code 2016

S.NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE
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	Mr. U.K. Chaudhary, Sr. Advocate for the Petitioner			
	Mr. Arun Kathpalai, Sr. Advocate for the Petitioner			
	Mr. Deepak Biswas, Advocate for the Petitioner			
	Mr. Mansumyer Singh, Advocate for the Petitioner			
	Mr. Arjun Minocha, Advocate for the Petitioner			
	Mr. Himanshu Vij, Advocate for the Petitioner			
	Mr. Abhinav Vashishat Sr. Advocate for the Respondent			
	Mr. Varun Jain, Advocate for the Respondent			
	Ms Priya Singh, Advocate for the Respondent			
	Mrt. Saurav Gupta Advocate for the Respondent			
	Mr. Abheshik Kumar Advocate for the Respondent			
	Ms Pallvi Advocate for the Respondent			

ORDER

1. The petitioner M/s Tomorrow Sales Agency Pvt. Ltd. is a non-banking financial company and is duly registered as such on 3.11.2009 by the RBI. A copy of the certificate of registration issued by RBI has been placed on record (P-5). It claims to be a 'Financial Creditor' within the meaning of section 7 of the Insolvency and Bankruptcy Code 2016 (for brevity IBC). It has also been claimed that when Respondent No.1 company approached it to avail temporary unsecured loan on account of its great financial difficulty. The petitioner advanced to it a loan of Rs.15 crores. The Respondent No.1 Company which is stated to be a 'Financial Debtor'

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had assured the petitioner that the loan would be repaid within 6 months. Accordingly the petitioner disbursed to the respondents an unsecured loan of Rs.15 crores @12% interest per annum which is much lower than the prevailing rate of interest in the market. It has been asserted by the petitioner that the loan was extended without even executing any formal agreement which was spread over a period of four months. The details of the disbursement is given in a table which reads as under:-

Date	Payment	Cheque No.	UTR No.
11.10.2014	Rs.1,00,00,000/- (Rs. One Crore Only)	00028	HDFCR520141011547772 42 Drawn on HDFC Bank, Stephen House Branch, Kolkata
14.10.2014	Rs.1,00,00,000/- (Rs. One Crore Only)	00029	HDFCR520141045487059 9 Drawn on HDFC Bank, Stephen House Branch, Kolkata
15.10.2014	Rs.1,00,00,000/- (Rs. One Crore Only)	00030	HDFCR250141015549069 97 Drawn on HDFC Bank, Stephen House Branch, Kolkata
16.10.2014	Rs.1,00,00,000/- (Rs. One Crore Only)	00033	HDFCR520141016549526 80 Drawn on HDFC Bank, Stephen House Branch, Kolkata
18.10.2014	Rs.1,00,00,000/- (Rs. One Crore Only)	00034	HDFCR520141018550325 43 Drawn on HDFC Bank, Stephen House Branch, Kolkata
05.11.2014	Rs.1,00,00,000/- (Rs. One Crore Only)	00038	HDFCR520141105556306 32 Drawn on HDFC Bank, Stephen House, Branch Kolkata
07.11.2014	Rs.6,00,00,000/- <u>(Rs.1,00,00,000/-?)</u> (Rs. One Crore Only)	00039	HDFCR520141107556976 11 Drawn on HDFC Bank, Stephen House Branch, Kolkata

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11.11.2014	Rs.1,00,00,000/- (Rs. One Crore Only)	00042	HDFCR520141111558465 84 Drawn on HDFC Bank, Stephen House Branch, Kolkata
20.01.2015	Rs.1,00,00,000/- (Rs. One Crore Only)	00055	HDFCR520150120585140 17 Drawn on HDFC Bank, Stephen House Branch, Kolkata
22.01.2015	Rs.1,00,00,000/- (Rs. One Crore Only)	00056	HDFCR520150122586024 42 Drawn on HDFC Bank, Stephen House Branch, Kolkata

2. A copy of the statement of account has also been placed on record. According to the averment made in the petition the loan amount of 15 crores and the accrued interest at the rate of 12 % has been duly admitted, acknowledged and confirmed by the Respondent No.1-Company through communication for confirmation of account dated 1.4.2016 for the financial year 2015-2016. The aforesaid confirmation was delivered to the petitioner by the Respondent No.1 Company after affixing its stamp and signature of one Mr. Neeraj Sharma. A copy of the same has been placed on record (P-9).The interest amount due from 31.3.2016 to 31.1.2017 has also been calculated and placed on record (p10).Thus the petitioner claims that Respondent No.1-Company is in default of total amount of Rs.17,37,00,000/- and the default is alleged to have occurred on 23.7.2015. It is further pertinent to mention that the 'Corporate Debtor' has been paying interest @ 12% as is evident from the perusal of averments made in para 5.2.9 with the help of following table

Date	Amount
February 23,2015	INR 36,71,754/- (Rs. Thirty Six Lakhs Seventy One Thousand Seven Hundred and Fifty Four only)
May 05,2015	INR 27,00,000/- (Rs. Twenty Seven Lakhs only)
March 16, 2016	INR 40,50,000/- (Rs. Forty Lakhs and Fifty Thousand)
May 03, 2016	INR 15,00,000/- (Rs. Fifteen Lakhs Only)
June 04, 2016	INR 15,00,000/- (Rs. Fifteen Lakhs Only)

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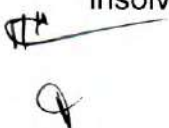
3. As per the record for the financial year 2015-16 the Respondent No.1 Company has defaulted in payment of monthly interest component for a period of 10 months. However the TDS on the payable monthly interest, amounting to Rs.15,00000 has been duly deducted by Respondent No.1 Company for the financial year 2014-15 and 2015-16 and also upto the month of June for Financial year 2016-17. Copies of form 26AS have been placed on record (P-11)

4. On 10.8.2016 the petitioner sent a demand notice to the Respondent claiming the aforesaid amount which was duly delivered to the respondent as is revealed by the postal receipts and the tracking report which have been placed on record. However no reply to the aforesaid notice has been received.

5. The petitioner has further pointed out that the Respondent No.1 Company had informed it that they were expecting disbursement of substantial amount of loan from its banker and then on such disbursement all outstanding debt was to be cleared. It has been found by the Petitioner that the Respondent 1 Company has availed fresh term loan of Rs. 160 crores in Sept 2015 through enhancement of financial facilities already availed by it from a consortium of bankers having IDBI Ltd as a lead banker. The financial facilities have been availed by the Respondent No.1 Company by creation of charge over two of its immovable properties.

6. Mr. U.K Chaudhary and Mr. Kathpalia learned senior counsel for the petitioner have vehemently argued that insolvency process must be initiated against Respondent No.1 Company as it has defaulted in making the re-payment of the huge loan amount of admitted liability. According to the learned counsel the petitioner is squarely covered by expression 'Financial Creditor' as used in section 7 read with section 5(7) of the IBC and likewise the loan advanced by it has to be regarded as a financial debt in terms of the provisions of Section 5(8) of the IBC. Learned counsel has placed reliance on the judgement of this Bench rendered in the case of Nikhil Mehta and Sons (HUF) & Ors. v. M/s AMR Infrastructure Ltd. (C.P. No.(ISB)-03(PB)/2017.) decided on 23.1.2017. Learned counsel has placed reliance on paras 11 & 12 of the judgment.

7. Mr. Abhinav Vasishat learned senior counsel has vehemently submitted that there is no written agreement between the parties so as to warrant triggering of any insolvency process. In that regard reliance has been placed on the various



advisories issued by the RBI. According to the learned counsel it was not a loan. In fact the amount was advanced payment made to the Respondent No.1 Company to purchase share. Accordingly shares have been purchased with the total sum of the advance paid to the R-1 Company. Mr. Vaisisth also submitted that there was no desperate need for any such loan for the Respondent No.1 Company as it had adequate liquidity. In that regard reliance has been placed on the statement of accounts filed with the compilation of document.

8. Having heard the learned counsel and on perusal of the paper book with their able assistance we are prima-facie of the view that the petitioner is a financial creditor and the respondent is a 'Financial Debtor'. In that regard we are fortified by the observations made by this Bench in paras 11 & 12 of the judgment rendered in the case of Nikhil Mehta (supra) which reads as under:

"11. From a bare perusal of Section 7 of the IBC, it is patent that the insolvency process can be triggered by a "Financial Creditor" individually or jointly against a corporate debtor when default has occurred. The first question arises for consideration is as to who a 'Financial Creditor'. In order to ascertain the meaning of the expression we have to examine its definition as provided by Section 5 which is application to Part II. We have already extracted the provisions of Section 5(7) and 5(8) of the IBC which are relevant to the issue raised. Section 5(7) of IBC defines the expression "Financial Creditor" and Section 5(8) of IBC defines the expression 'Financial debt' which has been used in Section 5(7) of IBC.

12. A perusal of definition of expression 'Financial Creditor' would show that it refers to a person to whom a Financial debt is owed and includes even a person to whom such debt has been legally assigned or transferred to. In order to understand the expression 'Financial Creditor' the requirements of expression 'financial debt' have to be satisfied which is defined in Section 5(8) of the IBC. The opening words of the definition clause would indicate that a financial debt is a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the events enumerated in sub clauses (a) to (i). Therefore the first essential requirement of financial debt has to be met viz. that the debt is disbursed against the

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consideration for the time value of money and which may include the events enumerated in various sub-clauses. A financial creditor is a person who has right to a financial debt. The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law Dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned." In both the cases, the inflow and outflows are distanced by time and there is a compensation for time value of money. It is significant to notice that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity has been implied by the opening words of Section 5(8) of the IBC....."

9. We are also satisfied that Respondent No.1- Company has committed default in respect of financial debt owed to the petitioner/ financial creditor. The reasons for our satisfaction are that the factum of advance has not been disputed. The payment of interest @12% per annum was being made. It satisfies the requirement of time value of money in such like transaction as is required by Section 5(8) to constitute it as a 'Financial Debt'. The Respondent No.1 Company has acknowledged the receipt of advance by confirming the same on 1.4.2016 (p9) It is also evident that no reply to the demand notice dated 10.8.2016 (P13 colly) has been entered by the Respondent No.1-Company. Therefore we are of the view that the present petition warrants admission.

10. The arguments advanced on behalf of R-1 company have failed to impress us because the theory of advance money for purchase of shares cannot be accepted because the shares were purchased in the year 2015 and no intimation of the purchase of share has been sent to the petitioner. On the contrary the Respondent No.1-Company have been paying interest @ 12 % to the petitioner company. The argument with regard to written agreement for advancing loan is also devoid of merit

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once it is accepted that the amount has been received and interest thereon has been paid at the rate of 12 %. We are also unable to appreciate that the confirmation of accounts on 1.4.2016 by one Mr. Neeraj Sharma under the seal of R-1 Company is liable to be ignored on the ground that he was not authorised to issue such certificate. The defence of the Respondent No.1 Company is wholly illusory and we have no hesitation to reject the same.

11. For the reason stated above this petition is admitted.

12. As a Sequel to the above discussion the following directions are issued pending the completion of Insolvency Resolution Process:-

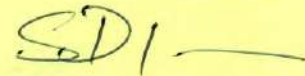
- a) The petition is admitted.
- b) Mr. Sanjay Grover, Company Secretary as named by the petitioners, is appointed as an interim Insolvency Resolution Professional to conduct the corporate insolvency process and manage the operation of the Respondent No.1 Company. The professional shall remain bound by all ethical norms and shall follow rules of his professional conduct strictly so as to lend sanctity to the whole process apart from credibility to all his action and report.
- c) The powers of the Board of Director of Respondent No.1 Company shall remain suspended and those powers are to be exercised by the interim resolution professional.
- d) There shall be interim order prohibiting Respondent No.1 Company from transferring, encumbering, alienating or disposing of any of its assets or legal right or beneficial interest therein.
- e) Respondent No.1-Company is restrained from instituting any suit or continuing with any pending suits or/and any proceedings against the Respondent No.1 Company. The execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority shall remain stayed. It shall be the duty of the interim insolvency professional to carry out these directions at the earliest;
- f) There shall be prohibition of any action to foreclose, recover or enforce any security interest created by Respondent No.1 Company in respect of its property, including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;



g) There shall be restrained order for recovery of any property by an owner or lessor where such property is occupied by, or in the possession of the Respondent No.1- company.

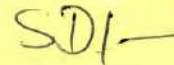
13. We wish to make it clear that supply of goods and services to the Respondent No.1 Company shall not be terminated or suspended during moratorium period and the interim directions shall not apply to those transactions as may be notified by Central Govt. in consultation with any financial sector regulator. The insolvency professional shall at liberty to file any application to facilitate him to prepare the resolution plan. By the adjourned date the insolvency professional shall file his interim report.

14. List for further consideration on 25.4.2017.



(CHIEF JUSTICE M.M. KUMAR)

PRESIDENT



(R. VARADHARAJAN)

MEMBER (J)

Dated: 23.2.2017

(Vidya)