
(2020) 03 NCLT CK 0017

In the National Company Law Tribunal

Case No : Company Petition No. (IB) 4186/MB Of 2019

VRG Healthcare Private Limited Financial

APPELLANT

Vs

Vrg Infrastructure Private Limited

RESPONDENT

Date of Decision : 20-03-2020

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 5(7), 5(8), 5(8)(a), 5(8)(b), 5(8)(c), 5(8)(d), 5(8)(e), 5(8)(f), 5(8)(g), 5(8)(h), 5(8)(i), 7

Insolvency And Bankruptcy (Application to Adjudicating Authority) Rules, 2016 — Rule 4

Citation : (2020) 03 NCLT CK 0017

Hon'ble Judges : Suchitra Kanuparthi, J;Chandra Bhan Singh, Member (Technical)

Bench : Division Bench

Advocate : Ninad Sahasrabuddhe, Heena Kapoor

Final Decision : Dismissed

Judgement

Chandra Bhan Singh, Member (T)

1. The Petitioner VRG Healthcare Private Limited (hereinafter as Petitioner) has furnished Form No. 1 under Rule 4 of the Insolvency and

Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as Rules) in the capacity of Financial Creditor on 25.07.2019 by

invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as Code) against VRG Infrastructure Private Limited

(hereinafter as Corporate Debtor). The registered address of the Corporate Debtor is stated to be 19, Great Nag Road, Nagpur - 440 018.

2. In the requisite Form, under the head Particulars of Financial Debt the total amount of Debt granted is stated to be Rs. 25,00,000/-, and the

amount claimed to be in default is Rs. 33,85,000/- including interest @18% p.a.

SUBMISSIONS BY THE FINANCIAL CREDITOR

3. The Petitioner extended an unsecured loan to the Corporate Debtor for Rs. 15,00,000/- on 21.07.2017 and Rs. 10,00,000/- on 05.08.2017.

4. On account of the said loan remaining unpaid for a period of more than 1 year, on 10.01.2019 the Petitioner sent a legal notice to the Corporate Debtor.

SUBMISSIONS BY THE CORPORATE DEBTOR IN REPLY

5. There is no any agreement between the Petitioner and the Corporate Debtor that any interest would be payable by the Corporate Debtor against the alleged loan.

6. In order to qualify the debt to be a financial debt, it is necessary that the amount advanced to the Corporate Debtor is against the time value of money, which is totally absent in the present matter.

7. The provisions of the Section 5(8) of the Code, which defines the term 'Financial Debt'. Following essential criterion are to be fulfilled for a creditor to come within the meaning of the term 'Financial Creditor'.

a. A person to whom a 'financial debt' is owed and includes a person whom such debt has been legally assigned or transferred to;

b. The debt along with interest, if any is disbursed against the consideration for time value of money and include any one or more mode of disbursed as mentioned in clause (a) to (i) of Sub-section (8) of Section 5 of the Code.

8. The Petitioner in the present case is not even coming up with the case that it has disbursed the money against 'consideration for time value of money'.

9. One of the Directors of the Corporate Debtor Shri. Gitesh Muttemwar, was the shareholder, promoter and Director in the Petitioner company. Shri.

Gitesh Muttemwar, had severed his ties from the Petitioner company on 03.08.2016, whereby he had resigned from the post of Director and had sold

his shares in favour of Dr. Sameer Paltewar. Out of the said transaction, said Shri. Gitesh Muttemwar and his brother Shri. Vishal Muttemwar have a

claim against Dr. Sameer Paltewar. A letter dated 15.01.2019 asking for the balance dues was sent by Shri. Gitesh Muttemwar and Shri. Vishal

Muttemwar to Dr. Sameer Paltewar. As said Shri. Gitesh Muttemwar and Shri. Vishal Muttemwar are pressing for their claim, as a response to the

same, present petition has been filed by the Petitioner.

10. With a view to pressurize the Corporate Debtor, wherein Shri Gitesh Muttemwar is one of the Director and majority shareholder, the present

proceeding is filed. In its attempt to exert pressure on Shri. Gitesh Muttemwar, to give up its claim, the Petitioner has stooped to the level that it has

resorted to falsehood by stating that the Petitioner had advanced an amount of Rs. 25,00,000/- towards loan.

11. It is necessary to point out that in fact loan was advanced by the Corporate Debtor to the Petitioner on 12.02.2011. the said amount was paid to

the Petitioner vide cheque no. 490804.

12. Subsequently the above said amount of Rs. 25,00,000/- was repaid by the Petitioner to the Corporate Debtor. The said repayment is being claimed

by the Petitioner as payment/disbursement of loan to the Corporate Debtor. The fact is that the Petitioner has repaid/discharged its liability towards

the Corporate Debtor.

13. The present petition is also an act of vengeance as against the other Director of the Corporate Debtor Shri. Ganesh Chakkarwar. It is pertinent to

mention here that the house of Petitioner itself is not in order, as there are ongoing disputes between the management of the Petitioner. At present

there are two fractions in the management of the Petitioner one is lead by Dr. Sameer Paltewar and another is led by Shri. Ganesh Muttemwar. It is

also learnt that for the misdeeds of Dr. Sameer Paltewar, FIR is lodged against him by Shri. Ganesh Chakkarwar. For the acts of oppression and

mismanagement, Shri. Ganesh Chakkarwar has also filed a petition before this Tribunal. In the said petition an order has been passed to conduct

forensic audit of the Corporate Debtor, as it was alleged amongst other things that the accounts are not being maintained properly.

14. The said order was challenged before the Hon'ble NCLAT, New Delhi by the Petitioner. However, the Petitioner had been unsuccessful in the

said challenge, as the said appeal has been dismissed vide order dated 11.12.2019.

FINDINGS

15. On going through the submissions made by the legal representatives for the both the sides and on perusing the documents produced on record, this

Bench without going into other aspects came across a contention made by the

Corporate Debtor, that there is no any agreement between the Petitioner and the Corporate Debtor that any interest would be payable by the Corporate Debtor against the alleged loan. In order to qualify the debt to be a financial debt, it is necessary that the amount advanced to the Corporate Debtor is against the time value of money, which is totally absent in the present matter.

16. The Hon'ble NCLAT in its order dated 23.10.2019 in the case of *Saregama India Limited Vs. Home Movie Makers Private Limited* in CA

No. 359 of 2019 held as below:

17. The first question arises for consideration is as to who is a Financial Creditor. Learned Adjudicating Authority, for determination of the aforesaid issue examined the definition provided in section 5(7) and 5(8) and in the impugned Judgement rightly observed:

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 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 earnedâ?. In both the cases, the inflows 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. It is true that there are complex financial instruments which may not provide a happy situation to decipher the true nature and meaning of a transaction. It is pertinent to point out that the concept â??Financial Debtâ?? as envisaged under Section 5(8) of the IBC is distinctly different than the one prevalent in England and provided in its Insolvency Act, 1986 and the â??rulesâ?? framed thereunder. It appears that in England there is no exclusive element of disbursement of debt laced with the consideration for the time value of money. However, forward sale or purchase agreement as contemplated by Section -5(8)(f) may or may not be regarded as a financial transaction. A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature an entity may require liquidity against an asset and the financier in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return to the financier. (See Taxman's Law Relating to IBNC, 2016 by Vinod Kothari & Sikha Bansal).

17. By relying on the aforesaid Judgment of this Appellate Tribunal, we are of the view that the Petitioner, who claims to be a Financial Creditor, however, claims made by it, is not a Financial Debt. However, we are of the firm opinion that the Petitioner has not disbursed money against the consideration for the time value.

18. Accordingly, this Bench hold that the claim of the Petitioner is not a Financial Debt within the meaning of Section 5(8) of IBC and the petition is dismissed.

19. The Registry is directed to communicate this order to both the parties.