

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.1064 of 2020

[Arising out of Order dated 23.10.2020 passed by National Company Law Tribunal, New Delhi Bench Court – VI in Company Petition No.(IB)-908(ND)/2020]

IN THE MATTER OF:

Before NCLT

Before NCLAT

M/s Orator Marketing
Pvt. Ltd.
Shop No.102-103,
1st Floor,
Aditya Complex,
DDA Community Centre,
Sector 8, Rohini
New Delhi – 110085

Applicant/
Financial Creditor

Appellant

Vs.

M/s Samtex Desinz Pvt.
Ltd.,
122 Tribhuwan Complex
Ishwar Nagar,
Mathura Road,
New Delhi

Respondent/
Corporate Debtor

Respondent

For Appellant:

**Mr. Abhijeet Sinha and Mr. Lzafeer Ahmed,
Advocates**

For Respondent:

Mr. Anirudh Deshmukh, Advocate

J U D G E M E N T

(08th March, 2021)

A.I.S. Cheema, J. :

1. This Appeal is filed by the Appellant – M/s. Orator Marketing Pvt. Ltd. claiming to be Financial Creditor against Impugned Order dated 23rd October, 2020 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench Court – VI) in Company Petition No.(IB)-908(ND)/2020. The Application was filed under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC - in short) seeking Corporate Insolvency Resolution Process against Respondent Company - M/s Samtex Desinz Pvt. Ltd. (Corporate Debtor). The Appellant claimed that there was default in payment of debt of Rs.1,56,89,740/- on the part of the Corporate Debtor. The Appellant claimed to be assignee of the original lender to the Corporate Debtor.

2. The Appeal claims and it is argued that the Respondent - M/s Samtex Desinz Pvt. Ltd. was incorporated in 2018 consequent to four individuals – 1) Sameer Bharadwaj, 2) P.K. Bharadwaj, 3) Sumeer Duggal and 4) Sharad Duggal purchasing the Respondent which was at that time a sole proprietor. The Respondent was then incorporated as a Company. To meet the business expenses, Respondent had raised a loan of Rs.14 Crores from M/s. Tata Capital Financial Services Ltd. That loan was a secured loan and the Respondent had mortgaged land, building, etc. in favour of M/s. Tata Capital Financial Services Ltd. Still the Respondent

– Corporate Debtor required more funds for day to day working and development of business. Respondent approached open market and financial lenders but could not get additional debt. It is stated that in such circumstances, to ensure continued development of the business of Corporate Debtor, Mr. Sameer Bhardwaj – then Director of the Respondent, through sister concern – M/s. Sameer Sales Pvt. Ltd. advanced Rs.1.60 Crores to the Respondent. In this regard, Agreement dated 20th January, 2019 (Annexure A-2 – Page 32) was executed. The amount was repayable in two years from date of Agreement i.e. on or after 1st February, 2020 upon demand by the lender. Appellant claims that the said loan reflected in the Balance Sheet of the Corporate Debtor. The Corporate Debtor made some payments but still Rs.1.56 Crores were due.

3. The Appeal states that subsequently M/s. Sameer Sales Pvt. Ltd. (the original lender) assigned the outstanding loan to the Appellant. The Respondent acknowledged the fact that the loan has been assigned. The Appellant claims that as the debt was due, Appellant on 3rd February, 2020 sent Notice (Annexure A-9 – Page 51) to the Respondent and demanded payment of the debt. Yet another Notice was sent on 14th February, 2020 (Annexure A-10 – Page 52) making demand of the outstanding debt. The Respondent replied on 18th February, 2020 (Annexure A-11 – Page 53) referring to market conditions and labour problem and sought time to make the payment in instalments.

4. The Appellant subsequently filed Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) and the Adjudicating Authority after hearing Counsel for both sides, rejected the Application under Section 7 holding that there was a mere grant of loan and it was not a financial debt. It noted that it was an admitted fact that the loan was interest free. It also found that there was no evidence that the amount was disbursed for time value of money. The Adjudicating Authority thus concluded that the Appellant could not be treated as a Financial Creditor. The Application thus came to be dismissed.

5. We have heard Counsel for both sides and perused the Appeal and the Reply filed by the Respondent. The fact that loan was advanced to the Respondent, is not in dispute. The narrow question involved is whether the transaction concerned can be treated as a transaction of Financial Debt as defined in Section 5(8) of IBC. The definition of “Financial Debt” under IBC Section 5(8) reads as under:-

“(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[Explanation.—For the purposes of this sub-clause,—

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”

IBC separately defines debt under Section 3(11) as under:-

“(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”

It is apparent that there can be debts which do not necessarily fall in the definition of financial debt or operational. Money borrowed against payment of interest comes within the definition financial debt. However, if the money borrowed is not against payment of interest, under the definition of financial debt, the core requirement is to find whether there is “consideration for the time value of money”. The facts of the matter disclose and the Appeal also records that when the Corporate Debtor was unable to get any further loan from the market after having taken loan from M/s. Tata Capital Financial Services Ltd., M/s. Sameer Sales which was related party to the Corporate Debtor, extended interest free unsecured loan to the Corporate Debtor payable on or after 1st February, 2020 and that too upon demand by the lenders. It would be appropriate to reproduce the Loan Agreement itself to understand the same. The Loan Agreement (Annexure A-2) reads as under:-

LOAN AGREEMENT

THE PRESENT LOAN AGREEMENT IS BEING EXECUTED BETWEEN M/S SAMEER SALES PVT. LTD AND M/S SAMTEX DESINZ PVT. LTD. AT NEW DELHI ON THIS 20th DAY OF January Two Thousand Eighteen.

BETWEEN:

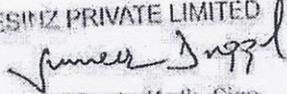
(1) M/S SAMEER SALES PRIVATE LIMITED, a company registered under the Companies Act, 1956 bearing CIN No. U51900DL1992PTC047363, having registered office at 122, Tribhuvan complex Ishwar Nagar Mathura Road New Delhi 110065, represented by its director Ms. Kamlesh Rani bhardwaj, hereinafter referred to the "Lender", which expression shall mean and include its nominees, assigns or successors, from time to time.

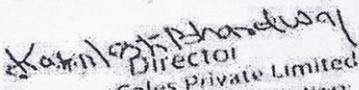
AND

(2) M/s Samtex Desinz Private Limited, a company registered under the Companies Act, 1956 bearing CIN No. U18209DL2017PTC320315, having registered office at A36 Hoisery Complex Phase 2 Noida U.P, represented by its director Mr Sumeer Duggal, hereinafter referred to the "Borrower", which expression shall mean and include its nominees, assigns or successors, from time to time.

BACKGROUND:

1. That whereas consequent to the purchase of the business (except liabilities) of M/s Samtex Desinz (Proprietorship Firm), the Borrower had availed of a term loan of Rs. 14,00,00,000.00 (Fourteen Crore Only) from M/s Tata Capital Financial Services Ltd., vide which all the assets of the Borrower have been mortgaged/assigned in favour of the aforesaid institutional lender. That the aforesaid term facility is insufficient to cover certain working capital requirements of the Borrower and is insufficient to meet certain other requirements relating to payments stamp duty etc. of

SAMTEX DESINZ PRIVATE LIMITED

Director/Auth. Sign.


Director
Sameer Sales Private Limited
122 Tribhuvan Complex Ishwar Nagar
Mathura Road, New Delhi 110 065
www.sameersalesprivate.com

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the Borrower and that therefore there is a shortfall of Rs. 2,00,00,000.00 (Two Crore Only)

2. That because of the aforesaid loan from the M/s Tata Capital no other institution is willing to extend unsecured loan to the Borrower, and therefore it is agreed that the lender is agreeable to extend a loan of Rs. 1,60,00,000.00 (One Crore Sixty Lakh Only) in favour of the Borrower.

TERMS AND CONDITIONS

1. The Lender agrees to extend to the Borrower a term loan of Rs. Rs. 1,60,00,000.00 (One Crore Sixty Lakh Only) for a period of two years commencing from the date of signing of this agreement.
2. The aforesaid amount shall become due and payable on 01/02/2020 or upon demand by the Lender.
3. That having regard to the status of the parties, the present loan is being extended without any charge on any of the assets at present or in the future.
4. Commencing of the date of this Agreement, the Loan shall bear NIL Interest.
5. Notwithstanding anything contained in this agreement, the loan amount shall become immediately due and payable at any time on or after the expiry of a period of two years i.e. on or after 01/02/2020 upon demand by the Lender.
6. The Borrower agrees that so long as the loan as is outstanding the Borrower will inform the Lender in any change in the constitution of the Borrower.
7. The Borrower shall repay the entire loan on or before 01/02/2020 and that till such a time the entire amount is not repaid the terms of the present agreement shall remain in force. The Borrower is entitled to pre-pay the loan amount at any time, without any penalty, after giving the lender notice in writing of its intention of the same.
8. The agreement shall remain in force of the term indicated in Clause 7 above unless terminated earlier in accordance with Clause 7.
9. All notices under this agreement shall be in writing and shall be either delivered via special messenger and hand and upon the addresses as may be advised from time to time by either party.
10. The agreement shall be governed by Indian Law and the Courts of Delhi shall have jurisdiction to settle any dispute arising out of or in connection with this agreement.

SAMEER SALES PRIVATE LIMITED
Sameer Duggal
Director/Manager Sign

Kamlesh P. Phadnis
Director
Sameer Sales Private Limited
111 Bibhovan Complex, 15th Cross, Nagar
Mathura Road, New Delhi 110 015 India
www.sameersalesprivate.com

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For the Borrower

SAMEER SALES PRIVATE LIMITED
Santex Deshiz Pvt Ltd
Director

For the Lender
Director

Sameer Sales Private Limited
122 Tribhuvan Complex, Lower Phase
Mathura Road, New Delhi 110 065 India
www.sameersalesgroup.com
Sameer Sales Pvt Ltd
Director

Witness:

[Handwritten signature]

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When we read the background as recorded in paragraphs – 1 and 2 of the above Loan Agreement, it is clear that the sister concern while extending the loan did not record anything other than the problem of the Corporate Debtor, for granting the loan. It is merely recorded that because of taking loan from M/s. Tata Capital Financial Services Ltd., no other institution is willing to extend unsecured loan to the Corporate Debtor “and therefore”, the lender had agreed to extend the loan of Rs.1,60,00,000/- to the borrower (i.e. Corporate Debtor). Then the above Agreement refers terms and conditions.

Appeal para – 7(d) states as under:-

“d. In these circumstances to ensure continued development of the business of the Corporate Debtor, Mr. Sameer Bharadwaj, the then Director and the Current Authorized Signatory of the Respondent, through the sister concern advanced a sum of Rs.1.60 Crore. It is submitted that in compliance with the law, the aforesaid sum was extended under a loan agreement, however the sum was advanced interest free, since the development of the business was enough consideration for time value of money.”

6. Synopsis states and it is argued that it being related party transaction, the money was to be utilized by the Respondent for day to day activities and to develop business, and that same was consideration of time value of money.

7. We are unable to accept this argument because the term “time value of money” has to be a consideration for the Financial Creditor. How the

Corporate Debtor will be using the money, cannot be stated to be the consideration for time value of money for the Financial Creditor.

8. The learned Counsel for the Appellant argued that the Adjudicating Authority wrongly recorded in Para – 17 of the Impugned Order that the Applicant has not produced any Loan Agreement nor there are details and particulars of any applicable interest mutually agreed between the parties. The learned Counsel referred to the Application filed to say that the Loan Agreement was on the record of the Adjudicating Authority. It appears that there is some confusion with regard to the intent of the observation of Adjudicating Authority as the same para – 17 in very next sentence records that “The loan agreement and the assignment agreement clearly show that no interest was charged on the loan amount”.

9. It has also been argued by the learned Counsel for the Appellant that after a period of two years when the loan still remained due, it must be thereafter treated as financial debt. We are not impressed by this submission also. A simple debt by default would continue to remain simple debt and only by default, nature of the debt would not change.

10. The learned Counsel for the Appellant relied on Judgement of this Tribunal in the matter of “**Mack Soft Tech Pvt Ltd. Versus Quinn Logistics India Ltd.**” in Company Appeal (AT) (Ins) No.143 of 2017 dated 21st May, 2018 to submit that when there is disbursement and default, it should be treated as financial debt. It is also argued that in that matter

also, there was loan given to the sister concern and the same was treated as financial debt. We have gone through the said Judgement, copy of which has been filed. What appears from that Judgement is that there was no document in support of the entries in the account and there was absence of any correspondence (see para – 13 of that Judgement). This Tribunal had, in the facts of that matter, considered the main object of the company (Financial Creditor) (see para – 35) and looked into the Memorandum of Association (which was reproduced) and observed (in para – 37 of the Judgement) that “Grant of loan and to get benefit of development is object of the Respondent – (Financial Creditor), as apparent from their ‘Memorandum of Association’.” With such facts, the provisions of law were examined for the finding of transaction in that matter to be a financial debt. Facts of the present matter are different and thus, we do not find that the Judgement is helpful to the Appellant.

11. Learned Counsel for Appellant further relied on Judgement in the matter of **“Pioneer Urban Land and Infrastructure Ltd. and Another vs. Union of India and Others”** (2019) 8 SCC 416 and referred to para – 71 and picked up portion where it is recorded that “when the money is disbursed, it is no longer with the allottee” and argued that the Hon’ble Supreme Court held that when money is disbursed and no longer with the person giving the money, it must be treated as financial debt. We do not find that picking up words in isolation would help the Appellant. The concerned sentence in the said Judgement reads as under:-

“That this is against consideration for the time value of money is also clear as the money that is “disbursed” is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money’s equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).”

12. It is quite clear that the observations are in the context of allottees and the portion of the Judgement reproduced above itself makes it clear that when: allottee disbursed the money and the money was no longer with the allottee, it was with the object of real estate developer giving back money’s equivalent, to the allottee. THAT is the consideration for the allottee. The Judgement is not of assistance to the Appellant in the facts of the matter.

13. It has been then argued that the Appellant after execution of the Assignment Agreement in its favour, not being related party and having taken the assignment for consideration, the loan extended would have to be treated as a Financial Debt. We are unable to accept such argument. The basic nature of the loan as witnessed from the Loan Agreement (Annexure A-2) will not change. If it was a simple debt extended to the sister concern, merely because the original lender has now assigned the debt to the Appellant will not change the nature of the transaction.

14. For the above reasons, we do not find any error in the findings recorded by the Adjudicating Authority where the Adjudicating Authority found that the transaction is not a transaction of financial debt and thus declined to admit the Application under Section 7 of IBC.

15. There is no substance in the Appeal. The Appeal is dismissed.

No Orders as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Mr. V.P. Singh]
Member (Technical)

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