

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 309 of 2023

[Arising out of the Order dated 20th January, 2023 passed by the
Learned Adjudicating Authority (National Company Law Tribunal,
Mumbai Bench – IV), in C.P. (IB) No.4426/MB-IV/2019]

IN THE MATTER OF:

**Mascot Capital and Marketing Private Limited
(MCMPL)**

A Companies incorporated under Companies Act,
1956, having CIN No. U7420MH2012PTC235355
2nd Floor, Gangoti Glacier Annex,
Kevesar, Opp. Vijay Nagari,
Thane MH – 400607.

...Appellant.

Versus

Savair Energy Limited (SEL)

A Companies incorporated under Companies Act,
1956 having CIN No. U63011MH2001PLC130547
Plot No. A-564, PTC INDL.
Area, MIDC, Mahape, Navi Mumbai
MH400709

...Respondent.

Present

For Appellant: Ms. Manisha T. Karia, Ms. Nidhi Nagpal,
Mr. Rohan Trivedi, Ms. Riya Kharab & Ms.
Swapnil Bavdh, Advocates.

For Respondent: None.

J U D G E M E N T

[Per: Ajai Das Mehrotra, Member (T)]

1. The present Appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC, 2016') by Mascot Capital and Marketing Private Limited (MCMPL), (hereinafter called 'Financial Creditor') against the Order dated 20.01.2023, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench – IV), in C.P. (IB) No.4426/MB-IV/2019, wherein the Appellant's Application

under Section 7 of IBC, 2016 against 'Savair Energy Limited' (hereinafter referred to as the 'Corporate Debtor') for initiation of Corporate Insolvency Resolution Process ('CIRP'), was dismissed.

2. The Application before the Adjudicating Authority ('AA') was filed by the Financial Creditor on 06.12.2019 under Section 7 of the IBC, 2016, seeking initiation of CIRP against the Corporate Debtor. The Financial Creditor had filed the said Application for default amount of Rs.3,70,00,000/- comprising of principal amount of Rs.3,20,00,000/- and interest dues of Rs.50,00,000/- as per Part IV of Form – I. The AA had noted that no 'date of default' is mentioned in Part IV of Form – I but the 'date of default' as per Memorandum of Understanding ('MoU') dated 29.04.2017 works out to 28.06.2017.

3. The facts as noted by the AA are that the Financial Creditor had entered into an MoU with the Corporate Debtor on 04.03.2017 wherein it was agreed between the Financial Creditor and the Corporate Debtor to work jointly for execution of Orders received for Compressor Packaging and spares and also it was agreed to form a new division/entity for such Orders. It was agreed that the business of said division of Compressor Packaging and spares business shall be transferred to a new separate entity incorporated for this purpose. The MoU provided for sharing of profit for such division between the Financial Creditor and the Corporate Debtor. In pursuance of this MoU, the Financial Creditor had paid a sum of Rs.3.20Cr. to the Corporate Debtor during the period from 04.03.2017 to 29.04.2017. The Appellant had submitted copy of its Bank Account in Axis Bank wherein following entries regarding disbursement of payment to the Financial Creditor are made:

Transaction Date	Transaction Particulars	Cheque No.	Amount (INR)
10.03.2017	RTGS/SK/UTIBR52017031000 352690/571/SAVIER ENERGY	127440	1,80,00,000.00
11.04.2017	RTGS/SK/UTIBR52017041100 358023/571/SAVIER ENERGY	127468	30,00,000.00
15.04.2017	RTGS/SK/UTIBR52017041500 351013/1364/SAVIER ENERGY	127471	5,00,000.00
19.04.2017	RTGS/SK/UTIBR52017041900 352467/571/SAVIER ENERGY	127472	50,00,000.00
25.04.2017	RTGS/SK/UTIBR52017042500 351845/571/SAVIER ENERGY	127475	55,00,000.00
Total			3,20,00,000.00

4. The relevant portion of the Order of the AA dated 20.01.2023 is reproduced below for reference:

“e) We have heard the counsel and perused the pleadings available on record.

f) After perusal of the documents on record and arguments advanced by the Financial Creditor, this Bench is of the considered view that the MOU dated 04.03.2017 is a Joint Venture Agreement in substance and this clearly emerges from the recitals of the said MOU; Clause 6, 11 and 12 of the said MOU.

g) Further, it is observed that Mr. Saji Anthony had agreed to repay the amount in his personal capacity, which cannot bind the Corporate Debtor even though the said MOU was executed by Mr. Saji Antony for the Corporate Debtor. This is borne out from the clause 3 of this MOU {placed at Page 9 of the petition} which reads as under-

“3. Mr. Saji Antony, agrees to repay the unsecured loan as mentioned in paragraph hereinabove to Mascot Capital & Marketing Pvt. Ltd. within three months from the date of signing of the present HOU (sic – MoU) along with Rs.50 Lakhs as lumpsum interest amount.”

h) Section 5(8) of the Insolvency and Bankruptcy Code, 2016 defines financial debt as under-

“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 nonrecourse basis;

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

i) From the perusal of the above definition, it is clear that the transaction of Investment under a Joint Venture arrangement does not qualify as a financial debt under Sec. 5(8) of the Code. Nonetheless, even if it is admitted that this transaction took the character of loan in terms of MOU dated 29th April, 2017 as pleaded by the Financial Creditor, the same does not bind the Corporate Debtor in view of Mr. Saji Antony undertaking to pay the said amount in his personal capacity.

j) In view of the above observations, this Bench is of the considered view that this petition deserves to be dismissed.”

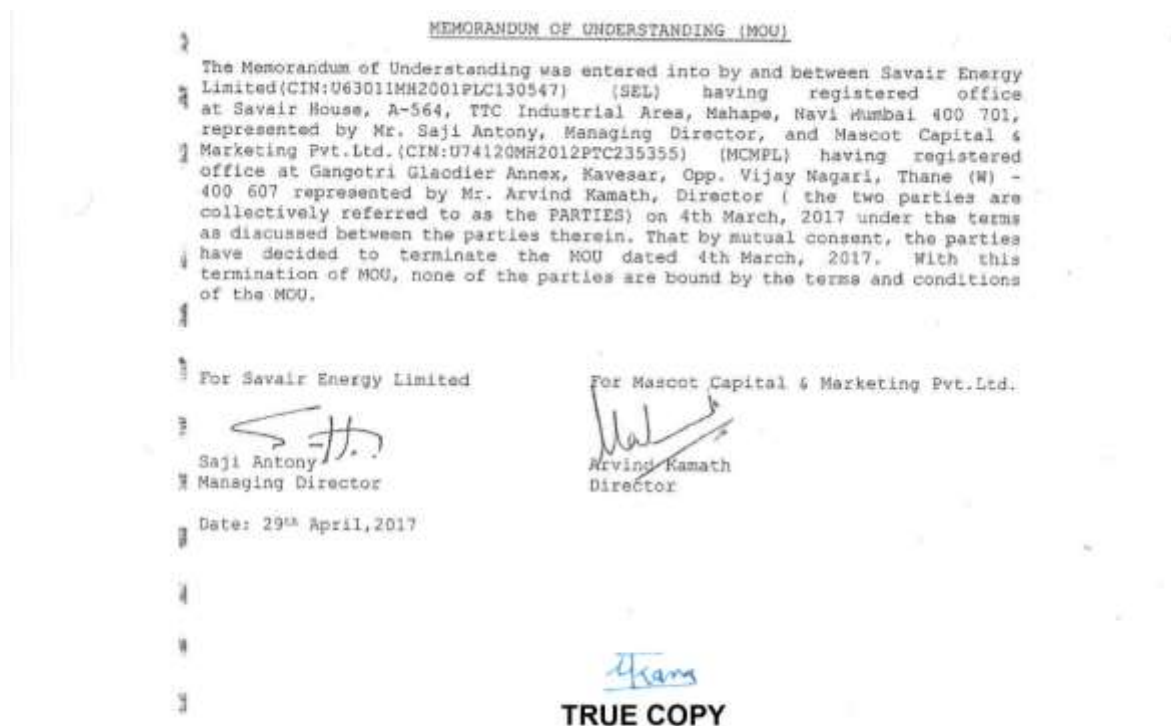
5. Despite service of Notice, none had appeared for the Corporate Debtor.

Vide daily Order dated 28.08.2023, it was decided to hear the matter Ex-Parte.

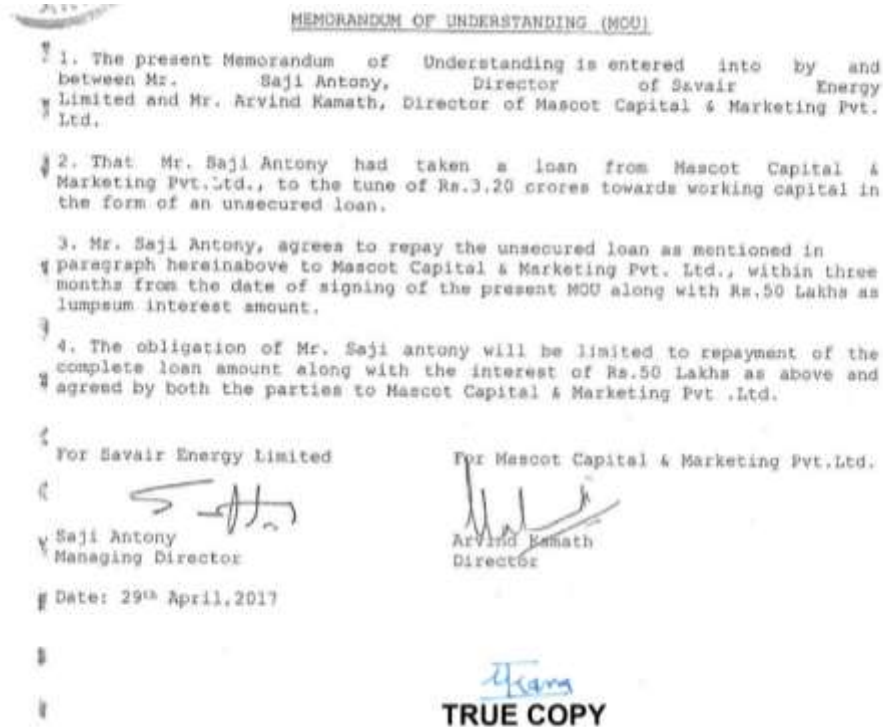
6. Learned Counsel for the Appellant submitted that the AA had erred in holding that the amounts were paid for the joint venture and that Mr. Saji Anthony had undertaken to re-pay the said amount in his personal capacity.

The Learned Counsel submitted that the MoU dated 04.03.2017, which envisaged the joint venture between the Financial Creditor and the Corporate

Debtor was terminated within short time by mutual consent vide MoU dated 29.04.2017 which appears at Page 55 of the Appeal Paper Book. The said MoU is scanned below:



7. The MoU dated 29.04.2017 is executed for termination of MoU dated 04.03.2017 and also records that *'with this termination of MoU, none of the parties are bound by the terms and conditions of the MoU dated 04.03.2017'*. The AA had failed to consider the impact of termination of MoU dated 04.03.2017. Another MoU, also dated 29.04.2017, was executed by the Financial Creditor and the Corporate Debtor, which was signed by Mr. Saji Anthony in his capacity as Managing Director of the Corporate Debtor, wherein he had acknowledged taking a loan of Rs.3.20Cr. towards working capital in the form of an unsecured loan. The said MoU is scanned below:



8. The AA had considered para 3 of the said MoU, wherein it is stated as under:

“3. Mr. Saji Antony, agrees to repay the unsecured loan as mentioned in paragraph hereinabove to Mascot Capital & Marketing Pvt. Ltd., within three months from the date of signing of the present MOU along with Rs.50 Lakhs as lumpsum interest amount.”

Learned Counsel for the Appellant stated that this paragraph may be understood as being worded on behalf of the Company as Mr. Saji Anthony was the Managing Director of the Company and was duly authorised by the Board of Directors to avail unsecured Loans from MCMPL, the Financial Creditor upto Rs.3.5Cr. in terms of the Board Resolution dated 27.02.2017. The Board Resolution dated 27.02.2017 authorising Mr. Saji Anthony to avail unsecured loan on behalf of the Corporate Debtor from the Appellant Financial Creditor is scanned below:



SAVAIR ENERGY LIMITED
SAVAIR House, A-564, TTC Ind. Area,
Mahape, Navi Mumbai - 400 710, India.
Tel. : +91 22 27781016/17/18/19
Fax : +91 22 27781035
Email : sales@savairenergy.co.in
Website : www.savairenergy.co.in
CIN No. : U63011MH2001PLC130547

ANNEXURE-A-4

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Extract of the Resolution Passed in Board Meeting held on 27.02.2017
at 5.00 PM at Savair House, A-564, TTC Industrial Area, Mahape, Navi
Mumbai


The Chairman of the Board, Mr Saji Antony, briefed the Board about the requirement to avail unsecured loan from Mascot Capital and Marketing Private Limited for executing new project and the necessary resolution for the same was passed as follows:

RESOLVED THAT, the company would avail unsecured loan up to INR 3,50,00,000 from Mascot Capital and Marketing Private Limited to execute project received from Megha Engineering and Infrastructure Limited for design, engineering, supply, and commissioning of Reciprocating Gas Compressor Package (CNG package).

RESOLVED FURTHER THAT, Mr Saji Antony, Director of the Company is hereby authorized to discuss/negotiate the terms and conditions to avail the loan facility and execute all relevant documents as required to avail the loan on behalf of the Company.

RESOLVED FURTHER THAT, a copy of the resolution be submitted wherever required for the above purpose.

For SAVAIR ENERGY LIMITED


Saji Antony
Managing Director
DIN No: 01680638



Date: 27.02.2017


TRUE COPY

9. The Learned Counsel for the Appellant submitted that Mr. Saji Anthony was duly authorised by the Board to avail unsecured loan from the Financial Creditor, the loans were disbursed to the Bank Accounts of the Corporate Debtor directly through R.T.G.S. and therefore the liability to repay the 'debt' was of the Corporate Debtor. Learned Counsel for the Appellant stated that a Notice of Demand dated 08.11.2019 for money 'due and payable' with interest was served on the Corporate Debtor through the Advocate and Legal Advisor of the Financial Creditor. The copy of the said Notice is available at Page 91 & 92 of the Appeal Paper Book. This Notice was not responded to by the Corporate Debtor. The Learned Counsel also submitted that the Managing

Director of the Corporate Debtor had appeared in person before the AA on 14.03.2022 and had submitted that the Company is not in a position to repay its `debt' as the turnover as well as the profitability of the Company has been reduced tremendously during the last two to three years, which was duly recorded in the daily Order dated 14.03.2022 of the AA [NCLT, Court IV, Mumbai] (Page 105 of the Appeal Paper Book). The Learned Counsel for the Appellant submitted that since the `debt' and `default' is established, the AA ought to have admitted the Application under Section 7 of the IBC, 2016.

10. The Appellant was given opportunity to file Written Submissions on or before Monday, 25.09.2023. However, the Registry has confirmed on 26.09.2023 that no Written Submission was filed by the Appellant in the time given.

11. We have heard the Learned Counsel for the Appellant and have perused the records. There is no dispute regarding disbursal of Rs.3.20Cr. from the account of the Financial Creditor to the account of the Corporate Debtor. There is also no dispute that Application under Section 7 of IBC, 2016 was filed within limitation. The AA has erred in relying on the Joint Venture Agreement dated 04.03.2017, which was terminated by consent by both the parties on 29.04.2017 also noting therein that with this termination of MoU, none of the parties are bound by the terms and conditions of the MoU dated 04.03.2017. Even if we assume that payments have come under the Joint Venture, the subsequent two Agreements dated 29.04.2017 clearly establish that Joint Venture MoU was terminated, and fresh MoU for unsecured loan was executed and that it was mutually agreed by Corporate Debtor and Financial Creditor that they will not be bound by the Joint Venture MoU. The amounts paid by the Financial Creditor to the Corporate Debtor took the

character of loan from Financial Creditor to Corporate Debtor. The Board of Directors had duly authorised Mr. Saji Anthony to avail unsecured loan from the Corporate Debtor. The liability to repay the loan primarily vested with the Corporate Debtor. The Corporate Debtor had accepted before the AA that it is not in a position to repay 'debt' because of financial distress. The AA ought to have admitted the Application of the Appellant under Section 7 of the IBC, 2016 as there is no dispute about the 'debt' or liability of the Corporate Debtor and the Corporate Debtor has admitted that it is defaulting in repayment of 'debt' due to its financial condition.

12. Hence, this Appeal is allowed and the Impugned Order of the AA (National Company Law Tribunal, Mumbai Bench – IV) is set aside. We remand the matter back to the AA for consideration of the Application of Financial Creditor under Section 7 of the IBC, 2016. The Appellant is directed to appear before the AA on 12.10.2023 for this purpose.

No order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Mr. Ajai Das Mehrotra]
Member (Technical)

**Principal Bench,
New Delhi
27th September, 2023**

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