

Dr. B.V.S. Lakshmi vs Geometrix Laser Solutions Private ... on 22 December, 2017

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

(Arising out of Order dated 13th March, 2017 passed by the
Adjudicating Authority (National Company Law Tribunal), Hyderabad
Bench, Hyderabad in CP (IB)/19/7/HBD/2017)

(Company Appeal (AT) (Insolvency) No. 38 of 2017)

IN THE MATTER OF:

Dr. B.V.S. Lakshmi

...Appellant

Vs

Geometrix Laser Solutions Private Limited

...Respondent

Present: For Appellant:- Shri Arun Kumar, Ms. Niveditha
Jhinnaiah and Ms. Bhabna Das, Advocates.

For Respondents:- Shri Alok Dhir, Ms. Varsha Banerjee
and Shri Kunal Godhwani, Advocates.

JUDGEMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant, claimed to be 'Financial Creditor' filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate 'Corporate Insolvency Resolution Process' against Geometrix Insolvency Solutions Private Limited (Respondent). Company Appeal (AT) (Insolvency) No. 38 of 2017 The Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad, by impugned order dated 13th March, 2017 in Company Petition (IB)/19/7/HBD/2017 held that the Appellant do not come within the meaning of 'Financial Creditor' and failed to satisfy the Adjudicating Authority about requisite ingredients of Section 7 of the "I&B Code" to claim any relief and thereby rejected the application.

2. The case of the Appellant is that loans totalling Rs. 91,47,864/- were advanced by the Appellant to the Respondent in fifty-two transactions between 26th April, 2013 and 9th March, 2015 for the purpose of (a) repaying interest/instalments on bank loans taken by the Respondent so that loans are not defaulted upon or rendered NPA; and

(b) ensuring payment of salaries and money due to suppliers/ vendors, so that business continues unabated.

3. Further, according to Appellant though the terms of the loan were not recorded in writing, it was agreed that money advanced would carry interest, as evidenced by the following:

(a) E-mail from the Managing Director of the Respondent directing that interest should be added for loans advanced by shareholders.

(b) The Auditor of the Respondent, in the auditor's report dated 31st August, 2016, states that interest has been credited for loans advanced.

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4. The stand of the Appellant is that the loans were repayable on demand and the Respondent has admitted its liability towards the Appellant in its books of accounts as follows: -

Financial Debt due Acknowledged in the Books Year of the Respondent 2012--13 Rs. 98,37,596 Pages 393, 355, 435 of Appeal papers 2013--14 Rs. 38,74,767 Pages 393, 351, 435, 406, 354, 439 of Appeal papers 2014--15 Rs. 89,85,792 Pages 406, 459, 95 of Appeal papers 2015--16 Rs. 85,20,548 Pages 99 & 163

5. Learned counsel for the Appellant submitted that the Respondent has not disputed the sums shown above, and the only defence raised by it, both before the Adjudicating Authority and this Appellate Tribunal, is that the amount has been set off.

6. The Appellant issued notice for repayment of the loans totalling Rs. 91,47,864/- by notice dated 7th September, 2016. The Respondents, in its reply dated 26th September, 2016 claimed that the money has been repaid thus: ".....the balance lying to your client's account as on 31st March, 2015 is history and it has been repaid and/or adjusted as desired by your client, and as on 3rd September 2016, your client ceased to be a creditor of my client."

7. Learned counsel for the Appellant submitted that the Tribunal wrongly held that the Appellant is not a 'Financial Creditor'. According to Company Appeal (AT) (Insolvency) No. 38 of 2017 learned counsel for the Appellant, she is 'Financial Creditor' within the meaning of sub-section (7) of Section 5 of the "I&B Code".

8. Learned counsel for the Appellant submitted that the debt owed by the Respondent to the Appellant is a 'Financial Debt' as per sub-section (8)(a) of Section 5 of the 'I&B Code' as the loans

carried interest. It was also submitted that the transaction is a 'Financial Debt' under sub-section (8) (f) of Section 5 of the 'I&B Code', as it has the commercial effect of a borrowing.

9. According to counsel for the Appellant, the Respondent has admitted in the books of accounts that the Appellant is an 'unsecured creditor', and the money advanced by her were loans to the Company. The money was disbursed against the consideration of time value of money as the Appellant was a shareholder of the Respondent, and had an interest in protecting and increasing the value of her investment in the Company. The loans were advanced by the Appellant so as to ensure that the Respondent remains a "going concern", and preventing it from going bankrupt, which evidenced that the loans were given for a commercial purpose. Thus, according to Appellant, the Time value of money to be calculated by expected future value of the Appellant's investment in the Respondent for allowing it to continue as a "on-going concern" and to make profits. This would include the profit she would make on a future sale of her shares in the Respondent, which would Company Appeal (AT) (Insolvency) No. 38 of 2017 increase in value, as well as dividends she would receive from the Respondent, in the event the Respondent made profits.

10. It was submitted that the definition of "Financial Debt", uses the words "means and includes", is inclusive, rather than an exhaustive definition. Hence, a loan advanced by the Appellant to the Respondent against the time value of money, as discussed hereinabove, would nevertheless fall within the ambit of "Financial debt", even if it does not specifically fall within sub-clauses (a) to (i) of sub-section (8) of Section 5.

11. It was contended that that finding of the Adjudicating Authority that the Appellant is not a 'Financial Creditor' under sub-section (7) of Section 5 of the "I&B Code" is devoid of merit.

12. According to Respondent, the Appellant is not a 'Financial Creditor' in absence of any 'Financial Debt' being disbursed by the Appellant in terms of sub-section (7) read with sub-section (8) of Section 5 of the 'I&B Code'. Reliance has been placed on decision of this Appellate Tribunal in "Nikhil Mehta and Sons (HUF) Vs. AMR Infrastructure Ltd.□Company Appeal (AT) (Insolvency) No. 07 of 2017".

13. In the light of the aforesaid decision of this Appellate Tribunal in "Nikhil Mehta and Sons (HUF)", the following essential criterians to be fulfilled for a Creditor to come within the meaning of the term 'Financial Creditor'.

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(i) A person to whom a 'Financial debt' is owed and includes a person whom such debt has been legally assigned or transferred to

(ii) 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 'I&B Code'.

Therefore, it is to be seen whether the amount paid by the Appellant fulfils the conditions of disbursement against consideration of time value and money. It is only pursuant to such satisfaction that the Appellant can plead that the amount allegedly disbursed by the Appellant has a commercial effect of borrowing under sub-section (8)(f) of Section 5 of the 'I&B Code'.

14. The term 'Creditor' has been defined in sub-section (10) of Section 3 of the 'I&B Code', wherein a 'Financial Creditor' as well as an 'unsecured creditor' have been independently mentioned. However, 'I&B Code' proceedings can be triggered only by either a 'Financial Creditor' or an 'Operational Creditor'. According to Respondent, the Appellant does not fall within the meaning of 'Financial Creditor' in absence of 'financial debt' being disbursed by the Appellant, therefore, the Appellant has no locus to initiate 'I&B Code' proceedings against the Respondent Company. It was also submitted that the Appellant at best can claim to be an 'unsecured creditor' of the Respondent Company, however no Company Appeal (AT) (Insolvency) No. 38 of 2017 proceedings can be triggered by an 'unsecured creditor', who fails to meet the criterias of Section 7 or Section 9 of the 'I&B Code'.

15. According to learned counsel for the Respondent, the Appellant in the present case has failed to establish that there has been disbursement against consideration of time value and money. The amounts as reflected in the earlier Balance Sheet of the Company merely describes certain 'unsecured loan' being payable to the Appellant as on 31st March, 2014. The Respondent Company has already placed on record the Auditor certificate, which categorically states that no amount is due and payable to the Appellant and further the Audited Balance Sheet of the Respondent Company as on 31st March, 2017 also nowhere reflects any amount being due and payable to the Appellant either as the 'financial debt' or as an 'unsecured loan'. The qualification of the Auditor in the Balance Sheet of the Respondent Company as on 31st March, 2016, also categorically states that in absence of any document pertaining to approval of any loan taken, interest erroneously paid on account of an alleged loan given by the Appellant herein is not to be provided and accounted for.

16. Learned counsel for the Respondent relied on decision of the Hon'ble Supreme Court in "M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. □2017 SCC OnLine SC 1025", and submitted that the Adjudicating Authority has to be satisfied as to existence of a default. The term 'default' has been defined in Section 3(12) of the 'I&B Code'. For the purpose of ascertainment of default, it is imperative to point out the date Company Appeal (AT) (Insolvency) No. 38 of 2017 and time when the alleged debt has become due and payable. A debt may not be due, if it is not payable in law or in fact. In the instant case, no debt is due as nothing is payable to the Appellant in law or in fact. Admittedly, the Appellant has not stated any date on which the alleged debt became due and payable.

17. It was further submitted that the Appellant moved before the Adjudicating Authority with unclean hands and placed on record false and fabricated documents. According to the Respondent, in the application under Section 7 of the 'I&B Code', the Appellant placed 'fabricated Memorandum and Articles of the Respondent-Corporate Debtor'. The Articles as placed on record by the Appellant, wrongfully mentions the name of P. Kedarnath and B. Kalyana Hyma as the first Directors of the Respondent - 'Corporate Debtor'. The correct Articles as placed by the Respondent-'Corporate Debtor' mentions the name of the first Directors as P. Kedarnath and Dr.

B.V.S. Lakshmi i.e. the Appellant herein. Further, according to the Respondent, the Balance Sheets as placed on record, were prepared at the time when the Appellant was exercising control over the Respondent Company.

18. It was further contended that the Appellant is guilty of siphoning funds which has been explained in detail by the Respondent Company in its additional affidavit. A criminal complaint and FIR being lodged against the Appellant in August, 2016 and therefore, according to the Respondents, the Appellant with a malafidely intent to arm-twist the Company Appeal (AT) (Insolvency) No. 38 of 2017 Respondent-'Corporate Debtor' tried to initiate the process for alleged recovery of amount due to the Appellant.

19. We have heard learned counsel for the parties and perused the records.

20. The Appellant has enclosed the copy of Form-32 and the annual ledger statement from the Respondent for the period from 2013-14 to 2015-16 evidencing the transfer of funds from the Appellant to the Respondent-'Corporate Debtor'. In the Annual ledger statement for the year ended 31st March, 2017 in Schedule-D 'unsecured loan', following amount has been shown against the name of the Appellant:

GEOMETRIX LASER SOLUTIONS PVT. LTD.

SCHEDULES TO BALANCE SHEET	SUB SCHEDULE	Year Ended 31.03.2014 Rs.	Year Ended 31.03.2013 Rs.
SCHEDULE-A SHARE CAPITAL			
AUTHORISED CAPITAL			
13,90,000 EQUITY SHARES OF RS.			
10/- EACH			
(Previous year 10,000 equity shares of Rs. 10 each		1,39,00,000	1,39,00,000
PAID UP CAPITAL			
10,000 EQUITY SHARES OF RS.10/- EACH		3,90,000	80,50,000
(Previous year 10,000 equity shares of Rs. 10 each)		3,90,000	80,50,000
SCHEDULE - B SHARE APPLICATION MONEY		-	58,50,000
		-	58,50,000
SCHEDULE - C SECURED LOAN			
INDIAN BANK OCC A/C		36,67,937	10,67,370
INDIAN BANK T/L 6106957536		67,04,081	3,77,845
INDIAN BANK T/L 899902028		2,10,74,989	1,97,63,812
		3,14,47,007	2,12,09,027
SCHEDULE - D UNSECURED LOAN			
-KALYANI		-	20,000

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-DR. B.V.S. LAKSHMI 38,74,767 98,37,596

-KARTHIK CONSULTANCY SERVICES - 8,00,000

-K JAGANNADHA RAO - 11,78,000

-B.S. RAMACHANDRA RAO - 4,00,000

-DIRECTORS THEIR RELATIVES - 20,00,000 38,74,767 1,42,55,596

21. In the ledger account against the name of the Appellant, the amount has been reflected as 'unsecured loan', which is as follows:

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22. Learned counsel appearing on behalf of the Respondent while brought to the notice of the Appellate Tribunal that the aforesaid document suggests that majority of the amount has been shown against journal or by bank receipt and whatever the amount shown therein has been shown to be 'unsecured loan'. In the ledger book, the loans and advances from related parties shown to be 'unsecured loan' and one of the them shows from Director's relatives (daughter of the Appellant is the Director), as Rs. 95,48,279/- for year ending 31st March, 2016 and Rs. 81,64,250/- for the year ending 31st March, 2015.

23. Similar is the position with regard to the other documents wherein the amount has been shown to be 'unsecured loan'.

24. Sub-section (11) of Section 3 defines 'debt' as:

"3(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"

25. Default has been defined in sub-section (12) of Section 3, which is as follows: -

"3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be"

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26. As per sub-section (7) of Section 5, 'Financial Creditor' means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

27. 'Financial Debt' has been defined under sub-section (8) of Section 5, which is as follows:-

"5(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 nonrecourse basis;

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

(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;"

28. In "Nikhil Mehta and Sons", this Appellate Tribunal while noticed sub-section (8) of Section 5 of the 'I&B Code' observed: -

"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 Company Appeal (AT) (Insolvency) No. 38 of 2017 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 Company Appeal (AT) (Insolvency) No. 38 of 2017 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 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 Company Appeal (AT) (Insolvency) No. 38 of 2017 nature and meaning of a transaction. It is pertinent to point out that the concept 'Financial Debt' as envisaged under Section 5(8) of the IBC is distinctly different than the one prevalent in England as provided in its Insolvency Act, 1986 and the 'Rules' 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 Company Appeal (AT) (Insolvency) No. 38 of 2017 financier. (See Taxman's Law Relating to IBC, 2016 by Vinod Kothari & Sikha Bansal)."

29. For coming within the definition of 'Financial Debt' as defined under sub-section (8) of Section 5, the Claimant is required to show that

(i) there is a debt alongwith interest, if any, which has been disbursed and (ii) such disbursement has been made against the 'consideration for the time value of money'. Thereby, if the Claimant claims to be 'Financial Creditor' he will have to show that debt is due which he has disbursed against the 'consideration for the time value of money' and that the borrower has raised the amount directly or through other modes like credit facility or its de-materialised equivalent, note purchase facility or the issue of bonds, notes, debentures, loan stock or any other similar instrument. 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 can also be referred to by the Creditor to claim that there is a 'financial debt' due to him which has been disbursed against the 'consideration for the time value of money'.

To show that there is a debt due which was disbursed against the 'consideration for the time value of money', it is not necessary to show that an amount has been disbursed to the 'Corporate Debtor'. A person can show that the disbursement has been made against the 'consideration for the time value of money' through any instrument. For Company Appeal (AT) (Insolvency) No. 38 of 2017 example, for 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 for which only the market value of such transaction shall be taken into account, it is not necessary to show that amount has been disbursed. The disbursement against the 'consideration for the time value of money' is the main factor.

30. In the present case, the Appellant has failed to bring on record any evidence to suggest that she disbursed the money has been made against 'consideration for the time value of money'. There is nothing on the record to suggest that the Respondents borrowed the money. In absence of such evidence, the Appellant cannot claim that the loan if any given by the Appellant comes within the meaning of 'financial debt' in terms of sub-section (8)(a) of Section 5 of the 'I&B Code'.

31. The Appellant has also failed to show that the amount has been raised by Respondent under any other transactions, such as sale or purchase agreement, having commercial effect of borrowing. In absence of any such evidence, the Appellant cannot claim that loan amount, if any given to the Respondent comes within the meaning of 'financial debt', as defined under sub-section (8)(f) of Section 5 of the 'I&B Code'. Company Appeal (AT) (Insolvency) No. 38 of 2017

32. In view of aforesaid findings, we hold that the Adjudicating Authority rightly held that the Appellant is not a 'Financial Creditor'.

33. In view of the aforesaid findings, no interference is called for in the impugned order. There is no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Balvinder Singh)
Member(Technical)

NEW DELHI

22nd December, 2017

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