

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No. 269/Chd/Pb/2021

**Under Section 7 of the
Insolvency & Bankruptcy
Code, 2016**

In the matter of:

Davinder Singh S/o Dalip Singh

having its Registered office at:

387, Model Town, Phase-I

Bathinda, Punjab-151001

Mobile No. 9872998726

....Petitioner-Financial Creditor

Vs.

Harman Rice Private Limited

387, Model Town, Phase-I

Bathinda, Punjab-151001

CIN: U15312PB2006PTC030477

Email Id:- harmanrice@yahoo.co.in

...Respondent-Corporate Debtor

Judgment delivered on: 16.04.2024

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. L. N. GUPTA , MEMBER (TECHNICAL)**

Present:

For the Petitioner : Mr. R.S. Randhawa, Advocate

For the Respondent : Mr. Umang Goyal, Advocate

**PER: HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
L. N. GUPTA , MEMBER (TECHNICAL)**

JUDGMENT

The present petition has been filed by **Davinder Singh** (hereinafter referred to as 'Petitioner/Financial Creditor') under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'Code') read with Rule 4 of the

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate the Corporate Insolvency Resolution Process ('CIRP') against **Harman Rice Private Limited** (hereinafter referred to as 'Respondent/Corporate Debtor'). The petition is signed by Mr. Davinder Singh with the affidavit verifying the contents of the application appended thereto.

2. The Corporate Debtor is stated to be incorporated on 12.07.2006. The company having its registered address at Bathinda, Punjab. Therefore, the jurisdiction lies with this Bench of the Tribunal. The master data of the corporate debtor is stated to be filed as Annexure-A2 of the petition.

3. It is averred that the Corporate Debtor through its Director Manpreet Kaur approached Financial Creditor to provide loan @ 24% P.A. An amount of Rs. 2,31,37,976/- was disbursed, however, amount of Rs. 1,15,69,000/- is reflected in financial statements of Corporate Debtor and the same was disbursed by taking loan from various institutions. It is acknowledged by Corporate Debtor in the financial statement for Financial Year 2019-20 and bank statement. However, despite reminders, the loan has not been paid.

4. It is stated in Part-IV of Form No.1 that the petitioner has provided a loan amount of Rs. 1,15,69,000/- (Rupees One Crore Fifteen Lakhs Sixty Nine Thousand Only) (principal) excluding interest @24% and date of default is 5.11.2021. Copies of the Balance sheet for FY 2019-20, period 01.01.2020 to 31.03.2020 (Annexure-A-4, A-7), Form NO. AOC4 (Annexure-A-5), Form No. AOC2 (Annexure-A-6), Bank Statement for the period 01.02.2021 to 31.08.2021 (Annexure-A-8), and Salary Certificate of Financial Creditor (Annexure-A-12), are attached with the main petition.

5. The notice of this petition was issued to the respondent corporate debtor to show cause as to why this petition be not admitted. The Reply is filed by the Corporate Debtor vide Diary No. 01439/3 dated 10.11.2022, wherein it is stated that the application is filed with the intention to blackmail the Corporate Debtor. The Financial Creditor has suppressed material facts and documents as the Corporate Debtor has partially repaid the personal loan availed by the Financial Creditor. The Financial Creditor and Mr. Bhupinder Singh one of the Directors of Corporate Debtor are real brothers, and the respondent is a family run company, therefore, no written agreement was executed by the parties. The loan was taken to infuse funds into respondent company that were to be utilised for business expansion. There are certain properties jointly owned and disputes arose in relation to save of said properties. There is no debt and disbursement made by the Financial Creditor classified as a loan transaction and the amount was not to be returned back. Further, the amount is below the threshold limit as Rs. 33,07,280/- only has already been paid. Moreover, the Financial Creditor is not registered as a money lender, therefore, an application under Section 7 is not maintainable. The Financial Creditor is a related party of the Corporate Debtor. The loan cannot be repaid during the subsistence of a cash credit facility extended by Oriental Bank of Commerce amounting to Rs. 10.80 crore.

6. The Rejoinder has been filed by learned counsel for the Petitioner vide Diary No. 01439/4 dated 25.04.2020, wherein it is stated that the corporate debtor has acknowledged the debt in the balance sheet of FY 2019-20 to a tune of Rs. 115.69 Lakhs. Forms No. AOC4 and AOC2 submitted by the Corporate Debtor show that the Corporate Debtor has received a loan from the Financial Creditor. The Financial Creditor has given money to Bhupinder Singh in a personal capacity

to the tune of Rs. 62,02,264/-. The assurance was given by the Corporate Debtor to the Financial Creditor that he will pay EMIs to the Bank. The corporate debtor has acknowledged that debt is due and Rs. 115.69 is payable to the Financial Creditor. In the absence of the loan agreement, other documents are to be seen. The amount of Rs. 33,07,280/- is repaid by Bhupinder Singh to whom the financial creditor has provided financial assistance in a personal capacity and hence the petition is above the threshold limit.

7. The short written submissions are filed by petitioner-financial creditor vide Dairy No. 01439/6 dated 15.09.2023 and by respondent-corporate debtor vide Dairy No. 01439/7 dated 6.11.2023, reiterating their respective stands in the petition and reply.

8. During the course of hearing, it is submitted by the financial creditor that he and Director, Bhupinder Singh of Corporate Debtor are real brothers, and the respondent is a family run company, therefore, no written agreement was executed by the parties. Further, the applicant has argued that the corporate debtor acknowledged the amount of Rs. 1,15,69,000/- in the financial statement of the year 2019-2020, Form AOC-2 and AOC-4. Once the corporate debtor has admitted and acknowledged the debt advanced by the Financial Creditor in the Financial Statement of the corporate debtor, the debt and default stand proved. The financial creditor has relied on the *Doctrine of Estoppel* as it defines that one cannot contradict, deny or declare a statement to be false when it is already made before the authorities. In support of his argument Ld. counsel for petitioner relied upon the judgment passed by the National Company Law Appellate Tribunal, New Delhi in the case of **Mr. Pradeep Tayal v. M/s Essbert Fashion Private**

Limited Company Appeal (AT)(Insolvency) No. 950 of 2022 wherein it was held that, “

22. We may refer to recent three-member Judgement of this Tribunal in Company Appeal (AT) Ins. No.183 of 2021 in the matter of “Arrow Engineering Ltd. Vs. Golden Tobacco Limited” in which case also there was correspondences and letters between the parties but no MoU was formerly executed containing the conditions of transaction between the parties and contention was raised that there being no written agreement, financial debt is not proved. The Adjudicating Authority took the view that no MoU having been formerly executed, conditions of Section 10 of Contract Act has not been fulfilled. We may refer to paragraph 20 and 21 of the Judgement which are to the following effect:

“20. The Adjudicating Authority after referring the Letter of Intent dated 03.06.2011 observed that MoU having not been formally executed is incomplete and does not fulfill the conditions of Section 10 of the Contract Act. The Adjudicating Authority has not adverted to the letter dated 10.10.2011 which was sent by the Respondent and confirmed by the Appellant which letter was treated as MoU by the Respondent themselves in the letter dated 01.02.2012. MoU dated 10.10.2011 having contained the agreement of both the parties, the said letter ought to have been looked into to find out the real nature of transaction between the parties. The Balance Sheet of the Respondent, as noted above, also clearly mentions the aforesaid acknowledgement of amount of Rs. 40.75 Crores as advance which debt is clearly acknowledged and as noticed above in Notes-25(7)(a) in the Balance Sheet of 2014-15, it was mentioned by the Corporate Debtor that in event BIFR directs after-sale of the property, the amount of Rs. 40.75 Crores shall also be refunded with interest to the Appellant. The Adjudicating Authority has not referred to the Balance Sheets which were also part of the Application filed under Section 7 by the Appellant in Part-V under the heading as ‘Particulars of Financial Debt (Documents, Records and Evidence of Default)’.

21. When we consider all the above documents and correspondences including the Balance Sheets, the conclusion is inescapable that the amount of Rs. 40.75 Crores advanced by the Appellant was nothing but was a financial debt within the meaning of ‘I&B Code’ and the Adjudicating Authority committed error in holding that the Appellant is not a ‘Financial Creditor’.”

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26. We may also notice that as per the provision of Section 5(8) of the Code amount raised from an allottee in Real Estate Projects is treated to be financial debt. If the submission of Learned Counsel for the Appellant is accepted then any amount raised from an allottee shall not be treated as a financial debt since they do not have any license under Section 22 of the Banking Regulation Act, 1949. The definition of Financial Debt as contained in Section 5(8) of the Code is expansive definition and use of

the expression “any other transaction” is a wide enough to cover the loan advanced by the Respondents to the Corporate Debtor and we are satisfied that loan advanced by Respondents cannot be disregarded relying on Section 22 of the Banking Regulation Act, 1949”.

Further, it is submitted by the Financial Creditor that it had given money to Bhupinder Singh in personal capacity to the tune of Rs. 62,02,264/- and he paid back the debt to clear the dues. If the loan amount was to be received by the corporate debtor, then the same should have been repaid from the account of the corporate debtor and not from the personal account of Bhupinder Singh.

On the other hand, it is contended by Ld. counsel for the respondent-corporate debtor that the Financial Creditor and Mr. Bhupinder Singh, one of the Directors of Corporate Debtor are real brothers, and it is a family run company. Since, the Financial Creditor, Davinder Singh is in Government Service so he could not be directly involved as a Director in the company, therefore, he invested his money like all other members of the family in the Respondent company and further to take share of his own profit. The financial creditor took a personal loan from the bank to infuse funds in the company and it was to be repaid in installments. Therefore, no written agreement was executed. There are certain properties jointly owned and disputes arose in relation to the said properties.

There is no financial debt according to the learned counsel for the respondent-corporate debtor. The disbursement made by the Financial Creditor-applicant was classified as a Loan transaction and the disbursed amount was not to be returned to the Financial Creditor. The amount disbursed by the Financial Creditor does not fall within the definition of debt under Section 5(8) of the Code. The essential elements of the transaction being a financial debt are

missing and hence, it cannot be categorised as the 'Financial Debt' under Section 5(8) of the Code. Further, disbursement of the loan amount is not proved.

9. We have heard the learned counsels for the petitioner as well as the respondent-corporate debtor and have also perused the record carefully.

10. Section 7(5)(a) of the Code is as follows:-

*“5) Where the Adjudicating Authority is satisfied that—
(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application.”*

11. The first issue for consideration is whether the present application is filed within limitation. The date of default is specified as 05.11.2021 by the Financial Creditor on the basis of email dated 03.11.2021. Moreover, the statement of Account of petitioner (Page 76 of the petition) shows that the last transaction was on 12.02.2020. The present petition is filed vide diary No. 01439 dated 29.11.2021 and was re-filed on 6.12.2021. Thus, it can be safely said that the petition is within a period of 3 years of limitation.

12. The records show that there is no agreement between the parties to prove the amount of the loan taken and the debt due. Although, it is not essential for parties to execute an agreement in writing to prove debt, yet other evidence is required to for coming to a conclusion that there was a financial debt or a transaction of the loan between the parties. No doubt there can be an oral or implied agreement between the parties yet the first and foremost ingredient of 'Financial Debt' is that amount advanced is for consideration of time value of money.

In the case in hand, the petitioner has failed to prove this essential ingredient of 'Financial Debt' with convincing evidence. Atleast, there must be an understanding

between the parties setting out the terms of financial debt including tenure of debt, interest payable and date of repayment as observed by Hon'ble National Company Law Appellate Tribunal, New Delhi in ***Prayag Plytech Pvt. Ltd. v. Gem Batteries Pvt. Ltd. Company Appeal (AT) (Ins.) No. 713 of 2019.***

13. Further, contradictory submissions are made on part of the applicant-financial creditor as it on the one hand says that the loan was disbursed to the respondent-corporate debtor company and on the other hand in rejoinder, it is stated by the petitioner that it was a personal loan advanced to his real brother, Bhupinder Singh. However, there is no cogent evidence present on the record to prove that some personal loan was advanced to Mr. Bhupinder Singh. It is pertinent to note that both the parties are ad idem that Financial Creditor and Mr. Bhupinder Singh, one of the Directors of Corporate Debtor are real brothers, and the respondent is a family run company. It is the argument of Respondent that since, the Financial Creditor, Davinder Singh was in Government Service so he could not be directly involved as a Director in the company, therefore, he invested his money like all other members of the family in the company. Further, the financial creditor took a personal loan from the bank to infuse funds in the company and it had to be repaid in installments. However, based on record and evidence placed before us, the purported financial debt is not proved to be for time value of money. Here, reliance can be placed upon the judgment passed by the ***Hon'ble Supreme Court in the case of Phoenix Arc Private Limited v. Spade Financial Services Limited and Ors.*** wherein it is stated that, "45. *The report of the Insolvency Law Committee dated 26 March 2018 has discussed the interpretation of the term "time value of money" and stated:*

The current definition of 'financial debt' Under Section 5(8) of the Code uses the words "includes", thus the kinds of financial debts illustrated are not exhaustive. The phrase "disbursed against the consideration for the time value of money" has been the subject of interpretation only in a handful of cases under the Code. The words "time value" have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money, or factoring of a discount in the payment".

(emphasis supplied)

14. It is worthwhile to mention that admittedly, there are certain properties jointly owned and disputes arose in relation to save of said properties. It is a closely related party matter. Petitioner is the real brother of Mr. Bhupinder Singh, one of the Directors of Corporate Debtor. It is also evident from Form AOC-2 submitted before the Registrar of Companies by the company for disclosure of particulars of contracts/arrangements entered into by the company with related parties referred to in sub-section (1) of Section 188 of the Companies Act,2013, the name of the petitioner is apparent at Sr. No. 4 of this form. Moreover, he is covered under the definition of 'relative' in Explanation (a) of Section 3(24A) of the Code. Even if, for the sake of argument the petitioner is not proved to be a related party under Section 3(24A) of the Code, then in the given circumstances he is proved to be an interested party having interest being an 'investor' instead of a 'Financial Creditor', as there was no intention to get back the said amount.

It may be noted that the execution of an Agreement or contract between the parties is not essential but there should be some evidence that loan was to be repaid with or without interest. In the case in hand, there is no evidence present on the record that loan was to be repaid and till today not even a single penny has been returned or repaid to the petitioner.

It is pleaded by the petitioner that an amount of Rs. 2,31,37,976/- was disbursed and now an amount of Rs. 1,15,69,000/- is pending. There is no cogent evidence

or statement of account produced by the Petitioner that the difference between the disbursed amount and the claimed amount was repaid by the corporate debtor to the petitioner.

Now, advertent to the count of loan reflected in the Balance Sheet of the Corporate Debtor for the Financial Statement for the Year 2019-2020, the same amount has been mentioned in the Financial Statement and no amount has been paid back. As already discussed above that petitioner is an investor instead of Financial Creditor then even the amount claimed is shown in the Financial Statement does not fall within the definition of 'Financial Debt'.

15. As a sequel to the above discussion and the reasons recorded herein before the amount claimed by the petitioner is not proved to be for 'time value of money', thus, the application under Section 7 of the Code is not maintainable. The petition consequently stands dismissed, however, with no order as to costs.

Sd/-

(L.N. GUPTA)
Member (Technical)

April 16, 2024

PKA/TBG

Sd/-

(HARNAM SINGH THAKUR)
Member (Judicial)