

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 359 of 2019

[Arising out of order dated 14th February, 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Division Bench, Chennai in CP 1506/IB/2018]

IN THE MATTER OF:

M/s Saregama India Limited
33, Jessore Road, Dum Dum,
Kolkata- 700 028
West Bengal

.. **Appellant**

Versus

M/s Home Movie Makers Private Limited
No. 65, Santhome High Road,
Mylkapore,
Chennai – 600 004
Tamil Nadu

.. **Respondent.**

Present:

For Appellant: **Mr. Darpan Wadhwa, Sr. Advocate along with Mr. Aseem Chaturvedi, Ms. Wamika Trehan, and Mr. Millind Sharma, Advocates**

For Respondent: **Mr. Aditya Verma, Mr. Shrey Patnaik, Mr. Jayant K. Mehta, Advocates**

J U D G M E N T

KANTHI NARAHARI, MEMBER(TECHNICAL)

M/s Saregama India Limited – Appellant filed the present appeal aggrieved by the order of the Adjudicating Authority (National Company Law Tribunal, Division Bench, Chennai) dated 14th

February, 2019 whereby the Adjudicating Authority dismissed the application of the Appellant.

2. The Appellant filed application before the Adjudicating Authority (National Company Law Tribunal, Division Bench, Chennai) under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as '**IBC**') against the Corporate Debtor - M/s Home Movie Makers Private Limited (Respondent herein) for initiation of Corporate Insolvency Resolution Process.

3. The Adjudicating Authority, after hearing the parties, dismissed the Application holding that the claim made by the Appellant (Financial Creditor) is not a 'financial debt'. Paragraphs-9 & 10 of the impugned order is extracted hereunder:

....

“9. In view of the reasons aforementioned, we believe that it is not a financial debt and the petitioner tried to masquerade it as financial debt when reply came to section 8 Notice from the corporate debtor. Therefore, this Bench having felt that this petitioner should not have concealed the facts and tried to metamorphose this petition as petition u/s 7 of the Code, this Company Petition is hereby dismissed by imposing costs of ₹ 1,00,000 payable to the Corporate Debtor within 15 days hereof.

10. Accordingly this Company Petition is hereby dismissed”

.....

4. The Appellant in support of their grounds argued that the transaction between the parties clearly establishes it is a financial debt.

5. Per contra, the Respondent (Corporate Debtor) denied the stand of the Appellant and states that it is not a financial debt in terms of Section 5(8) of the IBC and there was no Time Value of Money as consideration therefore the application of the Appellant was rightly rejected by the Adjudicating Authority.

6. After hearing the learned Counsel for the respective parties, perused, the pleadings, documents filed in support of their case, the only point for consideration is whether the claim of the Appellant fall under the category of financial debt or not. Before adverting to the point narration of brief facts are essential to decide the point.

7. The Appellant Company is a marketing agency and in the business, inter alia, marketing television programmes and serials in the form of episodes for telecasting over various television channels and for distribution through various other media. The Respondent Company is a Producer inter alia producing a television programme/serial in Tamil titled as 'PASALMAR' and 'GANGA' being telecasted on SUN TV Channel as a daily serial.

8. The Appellant and the Respondent initially entered into an agreement dated 28.09.2013 (Page 56 of the Paper Book) whereby the Respondent (Producer) sold its rights exclusively to the Appellant i.e. (Marketing Agency), the entire “Free Commercial Time” (In short “**FCT**”) available of the programme and in consideration of the same, the Appellant has to pay amount as agreed for availing the FCT to the Respondent in telecasting the serial produced by the Respondent. While doing so, the Appellant and the Respondent entered into another marketing agreement dated 09.12.2016 (page 69 of the Paper Book) as per the terms and conditions as mentioned therein specifically sale of FCT to the Appellant which was available to the Respondent.

9. The Appellant contended that in pursuance of the understanding between them, the Appellant paid a sum of Rs. 30,00,000/- by way of advance to the Respondent and the same has been communicated vide its letter dated. 31.1.2017. It is also contended that the said written understanding failed due to various and new arrangement for repayment of advance given by the Appellant to the tune more than Rs. 1 crore. The parties have exchanged various correspondences including e-mails.

10. The fact is that the Appellant in its letter dated 31.01.2017 addressed to the Respondent stated that as per the request made by the Respondent, they will pay an amount of Rs. 30 lakhs by way of advance towards their (Respondent’s) entitlement from sale of FCT in

relation to telecasting of serial viz., PASALMAR/GANGA which will be telecasted during the period from 01.01.2017 to 31.01.2017 (Page 81 of Paper Book).

11. The Appellant issued notice in Form-3 under Section 8(1) of the IBC dated 15.11.2018 to the Respondent claiming an amount of Rs. 57,55,799/- shown as Operational Debt and relied on the marking agreement dated 09.12.2016 and in continuation thereof, relied on letters dated 31.01.2017, 29.05.2017 and 07.11.2017. The Appellant clearly stated that the claim is an Operational Debt. However, the Appellant having issued notice under Section 8(1) of the IBC filed a petition in Form-1 i.e., under Section 7 of the IBC whereby a Financial Creditor is entitled to file application under the said Section, claiming an amount of Rs. 57,55,799/- plus interest and shown as disbursed on 28.09.2013, 30.11.2016, 09.12.2016 and 31.01.2017.

12. The Respondent contended and not denied the agreement dated 09.12.2016 with respect to the marking of FCT in connection with telecasting of Tamil Commercial Serial titled Ganga on SUN TV channel. It is also stated that in terms of the said marking agreement, the Appellant were to market and sell 240 seconds of FCT in each half an hour episode of the Respondent's serial that was to telecast in the said television Channel. It is also stated that in terms of the marketing agreement, the Appellant was to pay the telecast fee of Rs. 1,80,000 per half an hour episode of the serial and the telecasting fee was to be

paid by the Appellant to the Respondent which in turn was to be paid to the Channel which would be telecasting. The entire marketing agreement was dependent on the Channel granting the time slot. A Security Deposit payment was provided under the clauses of the said agreement so as not to have any default in payment of telecast fee to the Channel. The Respondent in reply has categorically stated that non-selling of the FCT by the Appellant adversely impacted the production of the serial by the Respondent as the only payment was to be received by the Respondent under the marketing agreement from the Appellant was from their sale of FCT. However, the Respondent has stated that the FCT remains unsold by the Appellant and no amount was payable by the Respondent as indicated by them in their email dated 27.08.2018 (at page 107 of the Paper Book). Further the Respondent claimed that it reserved its right to recover the damages against the Appellant for flagrant breach of the marketing agreement for the abject failure to market the FCT's available, thereby causing loss to the Respondent's business and breach in failure to make payment of the telecasting fee.

13. From the perusal of the document and notice issued by the Appellant in Form -3 dated 15.11.2018, the Appellant relied upon the Marketing Agreement dated 09.12.2016 and corresponding letters as mentioned therein. However, in Form-1, i.e., Application under section 7 of IBC, the Appellant relied upon the Marketing Agreement dated

28.09.2013 and 09.12.2016 and claimed an amount of Rs. 57,55,799/- which was shown as default.

14. To determine the issue whether the claim of the Appellant falls under the category of 'financial debt' and whether the debt is due which has been disbursed against the consideration for Time Value of Money. As in depth perusal of the agreement dated 28.09.2013 entered between the Appellant and the Respondent wherefrom in Clause -5 of the said agreement, it is specifically mentioned "in consideration of the rights granted to the Marketing Agency under Clauses 3 & 4 hereinabove, the Marketing Agency (Appellant) agrees to pay the Producer (Respondent) as mentioned in Annexure-1 in detail. As per the Agreement the Appellant referred as 'Marketing Agency' and the Respondent referred as 'Producer'. In Annexure-1 of this Agreement it has been clearly mentioned that in consideration of the rights granted to the Appellant (Marketing Agency) under Clauses 3 & 4, the Appellant shall pay to the Respondent (Producer) in the manner as stated therein. However, from the clauses of the Annexure, an amount of Rs. 1,80,000/- per episode as telecast fee of the Programme, shall be paid in advance on a weekly basis. However, there is no clause with respect to payment of interest in case of default. Further clause-6 of the agreement dated 09.12.2016 entered between the Appellant and the Respondent, same amount i.e., Rs. 1,80,000/- as consideration and payment has been mentioned towards telecast fee. From the aforesaid agreement it is clear that the Appellant had not disbursed the money

against the consideration for the time value of money and the Respondent has not received the money as a financial debt. On the other hand, it is a contract between the Appellant and the Respondent for utilisation of FCT which was available to the Respondent (Producer) while telecasting their serials. However, it is the case of the Respondent that the Appellant has to pay the consideration for utilisation of FCT.

15. Under the IBC, the Adjudicating Authority or this Appellate Tribunal will not go into the aspects of the veracity of the agreement, its breach, void, voidable etc. The Adjudicating Authority is not a Civil Court to decide the breach of the contract between the parties. The IBC is a code by itself and will have to go strictly by the provisions of the Code, whether a claim is made under Section 9 by the Operational Creditor and under Section 7 by Financial Creditor and under Section 10 by a Corporate Applicant. The Appellant having issued notice under Section 8(1) of the IBC, however filed an Application under Section 7 of IBC for the reasons best known to the Appellant. Before initiation of an Application under Section 9 of the IBC by an Operational Creditor, there is a mandatory provision to issue notice under Section 8(1) of the IBC. After expiry of the period of 10 days after delivery of the notice or the invoice demanding payment under the above provision, if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Section 8(2), the Operational Creditor may file an Application before the Adjudicating Authority for initiating the 'Corporate Insolvency Resolution Process'. While Section

7 of the IBC entitles the Financial Creditor to initiate ‘Corporate Insolvency Resolution Process’.

16. Now, we deal with the relevant provisions of law.

Section 5(7) of the IBC defines as under:

..

“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”

...

Section 5(8) of the IBC is excerpted hereunder:

...

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

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(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 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;*
- (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;”

...

17. From the records and from Form-1, the Appellant claims to be a Financial Creditor which means Respondent owe a debt to the Appellant. Admittedly, the Appellant has not given any debt to the Respondent. Apart from the above, the terms and conditions and the clauses in the Marketing Agreement speaks ‘Self’ and no interpretation is required. Albeit, the payments as made under the terms of Agreements cannot be termed as Financial Debt. To define it as a Financial Debt, the criteria as required under law need to be fulfilled. As per Section 5(8) of IBC, supra, a Financial Debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes (a) to (i) supra.

18. This Appellate Tribunal in Company Appeal (AT)(Insolvency) No. 142 of 2017 in the matter **Sh. Neeraj Bhatia Vs. Davinder Ahluwalia and others** referred to Judgment of this Tribunal in the matter of **“Nikhil Mehta and Sons (HUF) Vs. AMR Infrastructure Ltd. – Company Appeal (AT) (Insolvency) No. 07 of 2017”** dealing with the similar issue held as under:

“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 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 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 and 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 financier. (See Taxman’s Law Relating to IBNC, 2016 by Vinod Kothari & Sikha Bansal).”

19. In **“Dr. B.V.S. Lakshmi vs. Geometrix Laser Solutions Private Limited”** - Company Appeal (AT) (Insolvency) No. 38 of 2017, this Appellate Tribunal having noticed the aforesaid provision by judgment dated 22nd December, 2017 held as follows:

“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 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.”

20. By relying on the aforesaid Judgment of this Appellate Tribunal, we are of the view that the Appellant, who claims to be a Financial Creditor, however, claims made by it, is not a Financial Debt. It is reiterated that in the marketing agreements and subsequent correspondence exchanged between the Appellant and the

Respondent, no way it is mentioned that the amount paid by the Appellant to be repayable along with interest over a period of time in a single or series of payments in future. However, we are of the firm opinion that the Appellant has not disbursed money against the consideration for the time value.

21. Accordingly, we hold that the claim of the Appellant is not a Financial Debt within the meaning of Section 5(8) of IBC.

22. For the aforesaid reasons, we are not inclined to interfere with the impugned order passed by the Adjudicating Authority dated 14.02.2019 and the appeal is dismissed. No order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

(Kanthi Narahari)
Member(Technical)

New Delhi
23rd October, 2019

AKC