

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 512 of 2019

IN THE MATTER OF:

Mr. K.N. Mahesh Prasad

...Appellant

Vs.

M/s. MedinnBelle Herbalcare Private Limited

...Respondent

Present: For Appellant: - Mr. Sumesh Dhawan, Ms. Vatsala Kak, Ms. Jasvin Dhama, Ms. Maithila Shubhangi and Ms. Geetika Sharma, Advocates.

For Respondent: - Mr. R.B. Trivedi, Advocate.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant- Mr. K.N. Mahesh Prasad claiming to be 'Financial Creditor' filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) for initiation of the 'Corporate Insolvency Resolution Process' against 'M/s. MedinnBelle Herbalcare Private Limited'- ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi dismissed the application taking into consideration the nature of transaction held that it is a pure and simple advancement of loan denuded of any element of time value for money. Therefore, such a transaction would not acquire the status of a 'financial debt'.

2. The case of the Appellant is that he is one of the promoters of 'Genesis Management Consultancy Services Private Limited', who is the M&A Advisory to 'M/s. MedinnBelle Herbalcare Private Limited'-'(Corporate Debtor)'. 'Genesis Management Consultancy Services Private Limited' and the 'Corporate Debtor' entered into agreement dated 6th December, 2016 whereby the 'Corporate Debtor' sought advisory and other services from the Appellant's Company. The said agreement was executed between Managing Director of the 'Corporate Debtor' and the C.E.O. of 'Genesis Management Consultancy Services Private Limited' where the Appellant represented and put his signature in the capacity of C.E.O. Relevant clause no.3 regarding the professional fees for the aforesaid advisory agreed between the parties reads as follows:

“3. PROFESSIONAL FEES

Medinn Belle or promoters of Medinn Belle will pay Genesis “Fees” which will be charged on success basis which is on signing & receiving of money of the deal/ transaction with the partner company in Medinn Belle’s account, in case the gross consideration is split due to any reasons, Genesis fees will be paid proportionately as per the money received by Medinn Belle. The success fees of 1.5% of the percentage of the total gross consideration will be paid to Genesis.

This fees excludes all expenses for legal or other counsels by Genesis.

The success fees will be payable within 30 days of signing the definitive and final agreement with the partner, delay in payment beyond 30 days will attract an interest of 12% p.a. on the fees payable.”

3. Subsequently, a deal was pursued by the ‘Corporate Debtor’ with one ‘Piramal Enterprises Limited’ wherein the ‘Corporate Debtor’ was advised by ‘Piramal Enterprises Limited’ to acquire an infringing trademark called “NPD Endure Mass”. As the ‘Corporate Debtor’ was falling short of the liquid funds required to pay for acquisition of “NPD Endure Mass” and also required some external funding support, it approached to the Appellant and requested him to lend them a sum of Rs.1.70 Crore (One Crore Seventy Lakh). Later an amount of Rs. 1.70 Crore (One Crore Seventy Lakh) was lent by the ‘Financial Creditor’ to the ‘Corporate Debtor’ vide Memorandum of Understanding dated 16th January, 2018.

It would be beneficial to read the said Memorandum of Understanding which reads as under:

“.....As a pre condition to the acquisition, Piramal requires Medinn to acquire an infringing trademark called “NPD Endura Mass”. In order to pay

for this consideration towards acquisition of NPD Endura Mass, Medinn is falling short of the liquid funds required and requires some external funding support.

Therefore, Medinn through its directors has requested Mahesh to lend them a sum of Rs.1.7 cr. (one crore seven lakhs only). Mahesh has agreed to lend to Medinn a sum of INR 1.7 cr. (one crore seven lakh only) for a very short term. These funds are agreed by Medinn to be returned at the earliest as soon as 1) either the deal is consummated with Piramal or 2) Medinn will generate other funds to return the money to Mahesh within 3 months.

.....It is further agreed that in case Mahesh requests for other executable securities the company or its promoters would provide satisfactory executable securities without delay.

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The company has issued a cheque bearing NO. 004178 on ICICI Bank, Punjabi Bagh Branch, 19 & 20, Central Market, Punjabi Bagh (West), New Delhi 110026 from its account number 015505006626 for INR 1,70,00,00 (Rupees One Crore and Seventy Lakhs Only).

This cheque is intended to be actually deposited and expected to be honoured when deposited at discretion of Mahesh”

4. The Adjudicating Authority noticed that the understanding aforesaid exposes that the loan was agreed to be returned by the 'Corporate Debtor' to the Appellant at the earliest as soon as either the deal is consummated with 'Piramal Enterprises Limited' or the 'Corporate Debtor' would itself generate funds to return the money to the Appellant within three months.

5. The 'Corporate Debtor' had issued a cheque for fulfilment of its liability with regard to entire loan amount of Rs.1.70 Crores in favour of the Appellant which was expected to be honoured when deposited.

However, upon presentation the said cheque with the banker on 12th March, 2018, the same was bounced back with the endorsement 'signature not as per the mandate'. Thereafter, the 'Corporate Debtor' issued a fresh cheque bearing No. 000725 dated 13th March, 2018 for the same amount which was also bounced back with the endorsement of 'exceeds arrangement'. Only thereafter a legal demand notice under Section 138 of Negotiable Instrument Act was issued by the Appellant on 28th April, 2018 which is pending in the Court of Metropolitan Magistrate at Esplande, Mumbai.

6. The stand of the 'Corporate Debtor' is that the manufacturer of famous brand "Endura Mass" since 1st February, 2001. In August, 2009, it came to its knowledge that there is one product with deceptively similar trade mark "NPD Endura Mass" being sold in the market and Mr. Sanjay Kumar Chetwani is a key person behind this mischief. The Respondent

had filed a police complaint to that effect against Mr. Sanjay Kumar Chetwani including two others.

7. The Respondent- 'Corporate Debtor' never knew for so many years that Mr. Sanjay Kumar Chetwani got his trade mark "NPD Endura Mass" registered and it could be known only when Mr. Chetwani filed a Civil Suit against the Respondent in May, 2017. In the said suit, relief prayed for by Mr. Chetwani was that to let him use his Trade Mark NPD Endura Mass and to restrain the 'Corporate Debtor' from interfering in his business interests.

8. In the year 2016, the process of strategic sale of Respondent Company started with one 'M/s. Sun Pharma Ltd.' and the Appellant representing himself as Director of 'M/s. Genesis Consultancy Services Pvt. Ltd.', Mumbai was negotiating on behalf of 'M/s. Sun Pharma Ltd.' but deal somehow could not be finalized. However, the Appellant offered that he can arrange still better deal with some other company and can also arrange investments from good investors or can arrange sale of the Respondent's Company Trade Marks at a good price to leading companies. In pursuance thereof the Appellate proposed to sign an agreement on pre-dated (6th December, 2016) which was a typed agreement and sent vide e-mail dated 7th December, 2016.

9. Subsequently, the Appellant offered that he can arrange good deal with 'Piramal Enterprises Limited' to sell the Respondent's brand 'Endura Mass' along with other brands. In the wake of said deal officials of

‘Piramal Enterprises Limited’ got search done about the Respondent’s brand and found that litigation was going on with Mr. Chetwani. For the purpose to clear said dispute with Mr. Chetwani, Piramal discussed with the Appellant. The Appellant with the collusion of Mr. Chetwani and Mrs. Sonia Sanjay Chetwani, who was indulged in a firm namely ‘M/s. NPD Health Care’ with a product ‘TM NPD Endura Mass’ in a pre-planned manner met with the Respondent. In said sitting they stated that Piramal wants that the Respondent should purchase trade mark ‘NPD Endura Mass’ which is a pre-condition of Piramal. As a part of said deal both the aforesaid cases i.e. Civil Suit filed by Mr. Chetwani and FIR lodged by the Respondent was to withdraw. In the said deal, the Respondent paid a handsome amount to purchase trade mark namely ‘NPD Endura Mass’ to Mr. Chetwani. In the entire deal with Mr. Chetwani and Mrs. Sonia Sanjay Chetwani, Appellant was a key person and the Respondent was never ever any occasion to talk with those persons as the Appellant.

10. Learned counsel for the Appellant submitted that the short term loan amounting to Rs.1.70 Crore was given to the ‘Corporate Debtor’ which was debited from the account of the Appellant through RTGS. It is also not disputed that the Memorandum of Understanding was entered between the Appellant and the Respondent on 8th January, 2018. Therefore, according to the Appellant, the present debt squarely falls under the definition of ‘financial debt’ defined under Section 5(8)(f) of the ‘I&B Code’.

11. Reliance has been placed on the decisions of this Appellate Tribunal in **“Shailesh Sangani V. Joel Cardoso— Company Appeal (AT) (Insolvency) No. 616 of 2018”** decided on 30th January, 2019 and **“G. Sreevidhya v. M/s. Karismaa Foundations Pvt. Ltd.— Company Appeal (AT) (Insolvency) No. 494 of 2018”**.

12. From the pleadings made by the parties, we find that the amount allegedly stated to be the ‘debt’ is:

- a) Was not borrowed against the payment of interest.
- b) It is not the amount accepted/ raised under any credit facility.
- c) The amount has not been raised pursuant to any ‘Note Purchase Facility’ or issue of Bonds, Debentures, loan stock etc.
- d) The amount does not arise of any liability in respect of hire purchase contract, or lease or any other instrument to suggest that the Appellant is deemed as finance or capital lease.
- e) The amount has not been raised under any other transaction including any forward sale or purchase agreement having the commercial effect of borrowing.
- f) It is not the amount of any derivatives transaction entered into.

- g) The amount is not against any counter indemnity.
- h) It is not the amount of any liability in respect of any guarantee.

13. In view of the aforesaid position of fact and there being a disputed question of fact relating to payment of amount for the purpose as discussed above, we find no ground to interfere with the decision of the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi.

In absence of any merit, the appeal is dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

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

[Kanthi Narahari]
Member (Technical)

NEW DELHI

22nd January, 2020

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