

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

CP (IB) NO.33/ALD/2023

In the matter of

An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of:

RAJESH ALFRED

*Having its Registered Office at 57, The Domes,
Jaipur Road, Ajmer, Rajasthan-305001.*

..... Applicant/Financial Creditor

Versus

M/S KETSAAL RETAILS LLP

*Having its Registered Address at:
B-71, Sector-80, Noida, Gautam Buddha Nagar,
Uttar Pradesh -2013016*

.....Respondent/Corporate Debtor

Order pronounced on 06.10.2023

Coram:

Mr. Praveen Gupta.

: Member (Judicial)

Mr. Ashish Verma

: Member (Technical)

Appearances:

Sh. Sushant Singhal,
Sh. Ajit Singh Joher,
Ms. Anshita Agarwal,
& Sh. Mani Bhadra Jain, Advs.

: For the Financial Creditor

Sh. Divyanshu Sarswat with
Sh. Ajay Mishra, Advs.

*: For the Corporate Debtor
(Ex-parte v.o.d. 22.08.2023)*

ORDER

- 1.** The Present Application has been filed under Section 7 of the Insolvency and Bankruptcy Code,2016 (hereinafter referred as I&BCode,2016) by the Applicant namely, Rajesh Alfred who is a Sole Proprietor of M/s Anand Enterprises seeking initiation of the Corporate Insolvency Process (hereinafter referred as CIRP) against the Corporate Debtor i.e M/s Ketsaal Retail LLP read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 in Form 1 containing all the information as required in Part I, II, III, IV and V of the Form.
- 2.** The Applicant, i.e M/s Anand Enterprises is a sole proprietorship firm having its registered office situated at 57, The Domes, Jaipur Road, registered office of Ajmer, Rajasthan-305001.
- 3.** The Respondent i.e M/s Ketsaal Retail LLP is a LLP, having its registered office situated at B-71, Sector-80, Noida, Gautam Buddha Nagar, Uttar Pradesh -2013016.

4. It is stated in the application that both the parties entered into a “Reseller Agreement” dated 07.12.2020 wherein as per clause (4)(m) and (5), applicant invested a sum of Rs. 20,00,000 (Rupees Twenty Lakhs Only) with assured return/profit margin of 7% per month on the invested amount. Copy of Reseller Agreement has been annexed as **Annexure-3** with the Application.

5. It is also stated in the application that although the Financial Creditor's Proprietorship concern was granted authorization to act as the Reseller for the Corporate Debtor under the Agreement dated 07.12.2020, all the operational activities related to the actual sale of products on 'Amazon' were carried out by the Corporate Debtor itself. The Corporate Debtor had complete access to the 'Amazon' seller account of the Financial Creditor, overseeing daily sales, managing stock inventory, coordinating 'Amazon' orders, handling documentation associated with orders and packaging, dispatching orders, monitoring sales and returns, implementing strategies to enhance sales, and maintaining sales strategies as stated under clause (6) and (7) of the Agreement. In addition to this, the Corporate Debtor also

stored the goods/products intended for sale on Amazon in its own warehouse and ensured the safety of these products. The pith and substance of the agreement was to raise financial investments from the applicant and utilised that towards reselling the products on the Amazon.

6. It is further stated in the application that an addendum agreement dated 17.05.2021 (hereinafter the 'First Addendum') was executed between both the parties in nexus to the 'Reseller Agreement' dated 07.12.2020 wherein investment amount was increased from 20,00,000 to 50,00,000 with increased profit margin of 9% per month from August 2021 as stated under clause (1) and (3) of the First Addendum. Copy of First Agreement has been annexed as **Annexure-4** with the Application.

7. Subsequently, another Addendum Agreement dated 07.10.2021 was executed in nexus to the agreement dated 07.12.2020 between both the parties wherein investment amount was increased from 50,00,000 to 1,00,00,000 with increased profit margin to 12% per month from January 2022. It was clearly mentioned in the Second Addendum that

as stated in Clause (1), (3) and (6) of the 'Second Addendum', applicant would be paid 9% per month assured return/profit margins on the invested amount of Rs.50,00,000 from October 2021 to December 2021. Copy of 'Second Addendum' has been annexed as **Annexure-5** with the application.

- 8.** Furthermore, it is stated that Corporate Debtor/Respondent has committed default in payment of assured returns/profit margins on the invested amount on 01.12.2021 which is even continuing till date. The Corporate Debtor vide an email dated 14.7.2022 informed the applicant about the cancellation of GST by the government officials and requested to place the 'Exit Request' as per the agreement. In response to the email dated 14.07.2022 of the Corporate Debtor, the applicant vide an email dated 14.07.2022 requested for formal and final 'Exit Request' and reimbursement of the funds which are due. Copy of Email dated 14.07.2022 has been annexed as **Annexure-7** with the Application.
- 9.** Applicant contends in the application that Corporate Debtor has admitted its liabilities vide notice dated 20.8.2022, 05.11.2022 and also vide letter dated 25.11.2022. Copy of

Notice dated 20.8.2022 and 05.11.2022 and letter dated 25.11.2022 have been annexed as **Annexure-8, Annexure-9 and Annexure-10** respectively with the application.

- 10.** As per Part-IV of the application, the Corporate Debtor is allegedly liable to pay a sum of Rs.2,77,00,000/- (Rupees Two Crores Seventy Seven Lakhs Only) as on 01.03.2022 comprising of invested amount of Rs.1,00,00,000 and Assured Returns/Profit Margins of Rs.1,77,00,000/-.
- 11.** The Applicant has placed reliance on the judgement dated 21.07.2021 passed by the Hon'ble NCLAT, New Delhi in the matter of "**Nikhil Mehta and Sons vs. AMR Infrastructure Ltd.- Company Appeal (AT) (Insolvency) No. 07/2017**" for supporting his averment that the amount due to the Corporate Debtor is a Financial Debt as stipulated under Section 5(8) of the I & B Code, 2016.
- 12.** As per the records, the registry of this court as well as the Applicant issued notices to the Corporate Debtor but it failed to be present on various occasions. Moreover, the Corporate Debtor has not filed any reply to the petition. Therefore, this Tribunal vide order dated 22.08.2023 had set the respondent

as ex-parte. However, the Ld. Counsel on behalf of the Corporate Debtor were present and argued the matter on last day of hearing.

- 13.** Ld. Counsel appearing on behalf of the Corporate Debtor by referring to Reseller Agreement and its two Addendum, argued that the said agreement with the Applicant was made not for taking any finance/ loan from it but to enter into reseller agreement in which produce of the Corporate Debtor was being provided to the Applicant and the same was being sold by it on Amazon Site. Therefore, there is no relation of Financial Creditor and Corporate Debtor between them and the amount outstanding is not a financial debt, and hence this application filed U/s 7 is not maintainable. The Ld. Counsel of the applicant countered the agreement of the Corporate Debtor taking the plea as discussed in the application maintaining that the amount paid to the Corporate Debtor is the amount invested with them on which assured return was promised but the same was not paid and hence, the total outstanding amount of Rs.2,77,00,000/- is financial debt and the same should be considered in the application filed under Section 7 of the I & B Code, 2016 for

initiating CIRP against the Corporate Debtor as it has defaulted in the payment of this debt.

Findings and order

- 14.** We have heard the Ld. Counsels of both sides and perused the materials on record.
- 15.** The issue for consideration before us is whether the amount invested by the applicant would be classified as 'Financial Debt' as enumerated under section 5(8) of the I & B Code, 2016 and whether the applicant is Financial Creditor within the meaning of Section 5(7) of the I & B Code, 2016.
- 16.** To determine the question whether applicant would fall or not within the meaning of 'Financial Creditor', it is desirable to notice the relevant clause of one of the Reseller Agreement dated 07.12.2020 which are as under:-

“

2. Basis of the agreement

The relationship between the parties shall be that of seller and buyer and not that of principle and agent and the transaction is on principle to principle basis not withstanding anything to the contrary that may be contained in this agreement or any correspondence or letters between the parties

hereto. Accordingly the RESELLER shall at no point hold himself out as an agent of Ketsaal and Ketsaal shall not be responsible for any act omission or commission on the part of the RESELLER.

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m. Profit Margins- Notwithstanding anything contained herein, Ketsaal assures the profit margins of 7% of the invested amount. For the first three (3) months there will be no assured returns. However, post the period of stipulated three 03 months, assured return of 7 % shall be given u on the invested amount. The targeted time period will not include the days where exception scenarios occurred from Amazon's or Flipkart's side such as account suspension, BuyBox unavailability etc.

n. The reseller has agreed to re-invest the amount for first three months which he gets from the Amazon subject to amazon payment cycle, with Ketsaal under this agreement. Thereafter, the reseller can take out 7% profit amount and re-invest the remaining value.

o. The targeted time period to sell the stock worth Rs. 20,00,000 will be 30 - 45 days. However, the targeted time period may vary depending upon invested amount and shall commence once the total investment payment is made. Provided that, the said targeted time shall only commence once the total amount has been credited towards Ketsaal.

5. Payment

I. The reseller agrees to pay the consideration amount of Rs.20,00,000/-, at the time of signing this agreement the reseller paid Rs. 20,00,000/- via NEFT Rs. 9,00,000/- Ref. ID DCBLR52020120700007401, Rs. 9,00,000/- Ref.

ID DCBLH20342007347, Rs. 2,00,000/- Ref ID. DCBLH20342475023 in favor of company.

II. The sale of the goods by Ketsaal shall be on advance payment by RTGS/Demand Draft/cheque/NEFT/IMPS against supplies made as may be required by Ketsaal from time to time. The discretion of Ketsaal on choice of mode of payment shall be final and binding upon the RESELLER.

III. The reseller has to agree to re-invest the amount for first six months which he gets from the Amazon subject to amazon payment cycle, with Ketsaal under this agreement. Thereafter, the reseller can take out 7% profit amount. The capital investment can also be increased or decreased by the reseller.

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V. Invoices will be generated and floated to reseller against products allotted initially and reshuffling of products during business flow in case needed.

VI. Such payment against dispatch shall always be of essence to the transaction, which Ketsaal may accept to execute in whole or in part on receipt of the written or oral order of supply from the RESELLER.

.....”

- 17.** In the light of above relevant clauses of Reseller Agreement, the definition of Debt & Financial Debt, it is pertinent here to mention here the meaning of 'debt' and 'financial debt' as defined in Section 3(11) and 5(8) respectively of the I & B Code' which reads as follows:-

"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;"

5(8) Financial Debt-

***"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;

(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;

- 18.** As per the Reseller Agreement, we find that the amount invested by the applicant is a consideration which shall be received in advance by Corporate Debtor (Ketsaal) from time to time for the supply of goods within the periods of 15 days from the date of receipt of advance. This does not come within the meaning of debt as defined above. Even the return on the amount paid by the applicant is in form of the profit margin and not for paying any interest on the amount deposited.
- 19.** It is essential to mention here that the opening word of the definition clause of Financial Debt U/s 5(8) is that a 'financial debt' is a debt along with interest which is disbursed against the consideration for the time value of money and may include any of the events enumerated in sub-clause (a) to (i). Therefore, it is to be seen whether the amount paid by the applicant to the Corporate Debtor, fulfil the other condition of "disbursement against consideration of time value and money", to come within the definition of "Financial Creditor" having satisfied that the Corporate Debtor raised the amount through a transaction of forward sale and purchase under a Reseller Agreement having commercial effect of a borrowing [Section 5(8)(f)].

20. The agreement shows that the applicant and respondent were in the capacity of manufacturer and reseller for reselling the products on *Amazon*. The Applicant is entitled to receive the profit margin 7% and 9% as per the Agreement and Addendum Agreements entered into between both the parties out of the profit amount to be received and hence, for earning of such profit margin, no time value of money on the amount paid is provided, rather profit margin would be determined and shared on the sale price of the product as against the purchase price. The judgement of the Hon'ble NCLAT relied upon by the Financial Creditor does not come to the rescue of the applicant for maintainability of the present application as the issues involved in the said matter is pertaining to the **“loan disbursed by the appellants was against the consideration of time value of money”** which is not the issue in the instant application.

21. The nature of transactions of the present case do not come within the meaning of 'Financial Creditor', as in the case in hand "Assured Returns" is associated with the profit margin amount and this has nothing to do with the requirement of Section 5(8), the time value of money therefore, is grossly

missing in the transaction in hand. The agreement to resell the products on the e-commerce platform with some assured profit margins as promised in the Agreement would not confer the status of a 'financial debt' to the amount due to the Applicant as the transaction does not have a consideration for the time value of money, which is a substantive ingredient to be satisfied for fulfilling requirements of the expression 'Financial Debt'.

- 22.** For the reasons aforesaid, we are of the considered opinion that this application filed under section 7 of the I & B Code, 2016 is not maintainable. We find that the debt does not fall within the meaning of "financial debt" u/s. 5(8) of the IBC.
- 23.** Therefore, the petition CP (IB) No.33/ALD/2023 filed by the Applicant is hereby dismissed.
- 24.** Ordered Accordingly.

-Sd-

(Ashish Verma)
Member (Technical)

Dated : 6th October, 2023

Ankita Sharma
(LRA)

-Sd-

(Praveen Gupta)
Member (Judicial)