

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI**

Company Appeal (AT) (Insolvency) No. 318 of 2024

**[Arising out of the Order dated November 21, 2023, passed by
the 'Adjudicating Authority' (National Company Law Tribunal,
Kolkata Bench) in CP (IB) 342/KB/2022]**

IN THE MATTER OF:

Desana Impex Limited

Registered Office:

13, Pollock Street, 2nd Floor

Kolkata, West Bengal – 700001

Email: jalaramdmm@gmail.com

Through its Authorized Representative
Shri Shanti Kumar Dharewa

...Appellant

Versus

Brick and Mortar Realty Private Limited

Registered Office at:

53, Justice Chandra Madhav Road

Kolkata, West Bengal – 700020

Email: bricknmortar@supreme.in

CIN: U70101WB2007PTC117693

...Respondent

Present:

For Appellant : Mr. Vaibhav Mahajan and Ms. Harshita Aggarwal,
Advocates

For Respondent : None

JUDGMENT
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

The present Appeal is filed by the Appellant herein namely Desana Impex Limited under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC), against the Order dated 21.11.2023 by which the National Company Law Tribunal (Adjudicating Authority), Kolkata Bench, in Company

Petition (IB) No. 342/KB/2022 dismissed the Application under Section 7 of the Code.

2. The Appellant is a Non-banking Financial Corporation (NBFC) registered under the Companies Act, 2013, and is registered with the Reserve Bank of India in accordance with Section 45-IA of the RBI Act, 1934, and is recognised as a non-deposit vide certificate dated 20.04.1998. The Respondent Company, namely Brick and Mortar Realty Private Limited, is a real estate company.

3. It is contended by the Appellant that the Respondent approached the Appellant for seeking a loan of ₹1,50,00,000/- (rupees one crores and fifty lakhs only) to meet its business expansion and working capital requirement in its usual course of business. This loan was mutually agreed in the form of an Inter Corporate Loan. It was agreed to be disbursed by the Appellant as and when required / demanded by the Respondent at an agreed upon rate of interest of 12% per annum. It was also mutually decided by the parties that the Inter Corporate Loan would become due and payable on demand and, thus, the Respondent will be liable to refund the same.

4. The loan was disbursed in five instalments as per details given below:

Sl. No.	Date of Disbursement	Amount disbursed with (Rs.)
1.	24.05.2013	10,00,000
2.	24.05.2013	10,00,000
3.	28.06.2014	95,00,000
4.	29.07.2015	10,00,000
5.	05.09.2015	25,00,000
Total		1,50,00,000

5. Appellant also contends that the Respondent, vide a letter dated 01.04.2015, issued a Confirmation of Accounts to the Appellant for the FY 2014-15; thus, admitting its financial debt to the Appellant. In this confirmation of accounts there is a specific entry with respect to interest on the unsecured loan @ 12% per annum. In the light of the same and admitting the interest @ 12% per annum, the Respondent issued a cheque bearing number 076733 dated 31.03.2015 towards a payment of the said interest which is duly reflected in the Appellant's account statement on 27.06.2015. It is also contended by the Appellant that the Respondent once again issued a confirmation of accounts for the year 2016-17 thereby admitting its liability towards payment. The Respondent also paid an interest amount of ₹14,69,688/- (rupees fourteen lakhs, sixty-nine thousand, six hundred and eighty-eight only) on secured loan @ 12% per annum. This is on record wherein confirmation of accounts is done by one Mr Dilip Mohanty.

6. There are emails issued by the designated financial accountant, Mr Dilip Mohanty, who is the authorised accountant of the associate companies falling within the group of companies namely Supreme and Company Private Limited, of which the Respondent is a part, and vide email dated 16.10.2017 informed the Appellant of the Respondent's ledger account for the FY 2016-17, along with request to the Appellant to share its ledger account for their records and reference (page 51 of the appeal paper book). It is also contended by the Appellant that Mr Dilip Mohanty had time and again issued various confirmation of accounts to the Appellant for the FY 2017-18, 2018-19 and

2020-21 respectively, admitting its financial liability towards the Appellant (pages 54 to 64 of the appeal paper book).

7. Furthermore, the Respondent has duly deposited the TDS amount on the interest amount calculated @ 12% per annum starting from the FY 2014-15 till FY 2020-21 under Section 194A of the Income Tax Act, 1961, which is reflected in Form 26AS submitted by the Appellant (pages 65 to 73 of appeal paper book). However, after since 01.04.2017, the Respondent has failed to pay the accruing interest amount.

8. The Respondent has failed to pay the interest amount agreed upon the @ 12% per annum, despite various reminders verbally and also through other modes of communication. One such communication through WhatsApp is in the record (pages 74 to 78 of appeal paper book).

9. A demand notice was issued on 12.03.2022 by the Appellant to repay the entire loan amount along with interest @ 12% per annum totaling ₹2,31,44,999/- (rupees two crores, thirty-one lakhs, forty-four thousand, nine hundred and ninety-nine only), which includes Rs 1.5 crores as the principal amount and ₹81,44,999/- (rupees eighty-one lakhs, forty-four thousand, nine hundred and ninety-nine only) as the interest amount, within 15 days from the date of its receipt (page 79 of appeal paper book).

10. The Respondent failed to reply to the demand notice. Thereafter, a reminder was issued on 04.05.2022, which was also unanswered. Thereafter,

a legal notice was issued by the Appellant on 26.05.2022, which was also unanswered.

11. Thereafter, the Appellant, being a Financial Creditor, filed an Application under Section 7 of the Code before the NCLT, Kolkata Bench. The Adjudicating Authority dismissed the Application on the following grounds:

- “a) The Appellant Financial Creditor being an NBFC is bound by the Master Circular on Fair Practices Code dated 01.07.2015 and that in light of the Ld. Adjudicating Authority’s own decision in *Narendra Promoters & Fincon Pvt. Ltd. V. Vinline Engineering Pvt Ltd. Bearing CP (IB) 749/KB/2020* which held that RBI guidelines have statutory force which is well recognized by the law, therefore, an explicit written agreement of loan is a mandatory instrument for an NBFC to substantiate the nature of its transactions.
- b) Due to absence of a written loan agreement, it cannot be determined whether the amount advanced was a financial debt nor could the rate of interest and tenure of the loan could be ascertained to arrive at the date of default.
- c) The case of ***Narendra Kumar Aggarwal v. Monotrone Leasing Private Limited bearing CA (AT) (Insolvency) No. 549 of 2020*** would not come to the rescue of the Appellant Financial Creditor even though in the said case an oral agreement of loan was entered into between the parties.
- d) Since the Inter-Corporate Loan amount has been shown as "Other Liabilities" instead of a "loan" and that the Confirmation of Accounts was not sent by the authorized person thus the same cannot be treated as confirmation of debt.”

12. This Appeal now challenges the above dismissal of Section 7 under the Code. Despite several hearings on 23.02.2024, 27.02.2024, 18.04.2024, 15.05.2024, 22.07.2024, 21.08.2024 and 01.10.2024, the Respondent did not appear despite the substituted service and the matter was taken up ex-parte on 12.11.2024, being reserved for orders. Thereafter, the matter was once again taken up on 21.11.2024 for some clarifications.

13. The Appellant relies upon the judgment of this Tribunal in '**Agarwal Polysacks Ltd. v. K.K. Agro Foods and Storage Ltd. (2023 SCC OnLine NCLAT 624)**'.

14. The Appellant has also relied upon the judgment in '**Satish Balan Director of Balan and Chheda Developers Pvt. Ltd. Vs. Neeta Navin Nagda & Anr. (2023 SCC OnLine NCLAT 1999)**'.

15. Both the Adjudicating Authority and the Respondent had relied upon the judgment in '**Narendra Promoters & Fincon Pvt. Ltd. Vs. Vinline Engineering Pvt. Ltd. CP (IB) No.749 / KB / 2020**'.

16. Despite the fact that the Respondent has not appeared before this Tribunal, as noted by us earlier, we are noting the submissions of the Respondent/Corporate Debtor as placed before this Adjudicating Authority, which are part of the Appeal Paper Book.

17. The Respondent / Corporate Debtor had contended before the Adjudicating Authority that the Appellant has not disclosed any loan agreement executed between the parties. Further, there is no document that records the terms and conditions of the purported loan issued by the Appellant to the alleged Corporate Debtor. Therefore, the Petition before the Adjudicating Authority fails to satisfy the definition of a financial debt as per the Code. Therefore, no cognizance can be taken with respect to the purported bank statements disclosed in the Petition. Further, the bank statements do not indicate the nature of transactions between the parties. It

also claims that not a single document has been produced to demonstrate that there has been loan transaction or that the purported loan amount was to be repaid after a particular period. There are no averments with respect to the loan tenure or when the purported loan amount was due. Therefore, it cannot be said that the alleged amount became due and payable by the Respondent. The Alleged loan amount of Rs 1.5 crores was disbursed in 5 tranches from 2013-2015 and the interest was paid till 31.03.2017. Despite this, the Appellant had not issued any notice of demand from April, 2017, to 12.03.2022. Therefore, this is ex-facie barred by limitation.

18. The Respondent had also denied the confirmation of accounts which was annexed in the Petition before the Adjudicating Authority. It claims that one Mr Dilip Mohanty from one Supreme and Company had issued the account confirmation but the Respondent is not Supreme and Company and no person by the name of Mr Dilip Mohanty works for the Respondent.

19. The Respondent had also contended before the Adjudicating Authority that the purported confirmation of accounts cannot be relied upon as these documents are forged and manufactured by the Petitioner to show purported acknowledgment of the Respondent. Further, the purported account confirmation does not extend the period of limitation as the Petition was filed on 14.12.2022, much after the expiry of three years from the alleged confirmation. The Respondent also denies any admission and / or acknowledgement by the Respondent in its balance sheet for the FY

31.03.2021. It states that the name of the Petitioner is not even mentioned in the notes to the said balance sheet.

20. The Respondent had also contended before the Adjudicating Authority that the Petitioner's reliance on the chat history does not establish the nature of the transaction and the parties involved in the transaction. No admission has been made by the Respondent or any person on behalf of the Respondent at any point of time in these chats. There is no causal link between the chat history and the purported transaction which is the subject matter of the present Section 7 Petition.

21. The Respondent had also denied before the Adjudicating Authority about the TDS certificates as no document has been disclosed by the Appellant to show that there is any time value for money or any loan was advanced to the Respondent or there is any provision of interest in respect of such purported loan.

Appraisal

22. Heard the Learned Counsel for the Appellant and also carefully analysed the submissions, documents and applicable legal provisions. We have also gone through the submissions of the Respondent as made before the Adjudication Authority as it had not appeared before this Tribunal despite repeated adjournments and the matter was heard ex-parte.

23. Basis the material on record, the following issues arise in this case:

- I. Whether the amount advanced by the Appellant qualifies as a financial debt under Section 5(8) of the IBC with the confirmation of accounts, TDS deduction and other material on record?
- II. Whether the Appellant's Petition is barred by limitation?
- III. Whether the dismissal of the Section 7 Petition by the Adjudicating Authority is sustainable or not?

24. Issue (I) and (II) are examined together. With respect to the finding whether the amount advanced qualifies as a financial debt or not, it will be appropriate to look into the definition of debt under Section 5(8) of the IBC, which is reproduced as follows:

“5. In this Part, unless the context otherwise requires,—

.....

(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;

.....”

Section 5(8) defines financial debt as a debt i.e. disbursed against the consideration for time value of money including money borrowed against the payment of interest.

25. In the present case, we look into the materials on record to determine whether there is existence or otherwise of the financial debt:

- a) The loan was disbursed in 5 instalments from 24.05.2023 to 05.09.2015 aggregating to ₹1.5 crores. Each disbursement has

been supported by the Appellant's bank statements which are in the appeal paper book from pages 155 to 160.

- b) Even though there is no written agreement with respect to the payment of interest @ 12% per annum, yet the material on record suggest that the Respondent has paid interest amount of ₹14,69,688/- (rupees fourteen lakhs, sixty-nine thousand, six hundred and eighty-eight only) on 14.02.2017 (page 52 of Appeal Paper Book).
- c) The Respondent has also deducted TDS under Section 194A of the Income Tax Act. This is noted in the appeal paper book from pages 65 to 73, wherein Form 26AS of the Respondent / M/s Desana Impex Limited has been placed on record by the Appellant. This is sufficient material on record to conclude that interest was being paid by the Appellant.
- d) Respondent has acknowledged its liability through confirmation of accounts for FY 2014-15, 2016-17 and subsequent years as is noted from pages 54 to 64 of the appeal paper book. This is an acknowledgement of debt by the Respondent.

26. Under these conditions, when there is sufficient material on record to suggest that the disbursement has been made and interest is being paid by the Respondent, and also when there is acknowledgment of its liability through confirmation of accounts in several financial years, we find that the

loan transaction meets the test of time value of money through the agreed interest rate and is to be treated as a debt.

27. We also look into the claims of the Respondent on forgery of confirmation of accounts. The Respondent has claimed that the confirmation of accounts was forged or issued by unauthorised individuals. It is noticed that there are repeated emails issued to the Appellant from the accountant, namely Mr Dilip Mohanty, who is the Chief Accountant of the group company, namely Supreme and Company Private Limited. In fact, he has signed the documents in the confirmation of accounts which is material on record. He has been corresponding with the Appellant on the email address of dilip.accounts@supreme.in. It is to be noted that Respondent Company is one of the companies of the Group Company of Supreme. Thus, we find that claim of forgery of confirmation of accounts of the Respondent is unsubstantiated and cannot be accepted as an argument of defence.

28. With respect to the issue of limitation, it is noted that the Respondent has provided an acknowledgement through the confirmation of accounts and tax on interest with deductions as per Form 26AS, the latest of which being in FY 2020-21. This provides an acknowledgement of debt and provides a fresh starting point for the limitation period and extends the limitation. The demand notice was issued on 12.03.2022 and Section 7 Application was filed on 02.12.2022, which is well within three years from the date of last acknowledgment in FY 2020-21. We find that Respondent's argument that the Petition was barred by limitation is untenable and needs to be rejected.

29. It is noted that the Adjudicating Authority has dismissed the Section 7 Petition, primarily due to the absence of formal written loan agreement as noted below in its order:

“.....

10. As per the RBI guidelines on Fair Practices Code for NBFCs, dated 18 February 2013, the NBFCs should convey in writing to the borrower in the vernacular language as understood by the borrower by means of sanction letter or otherwise, the amount of loan sanctioned along with the terms and conditions including annualized rate of interest and method of application thereof and keep the acceptance of these terms and conditions by the borrower on its record. The RBI's circulars have statutory force, and this is well recognised in law. Hence, it is mandatory on the part of Financial Creditor, being a NBFCs to keep the terms and conditions recorded in writing.”

Basis the master circular of RBI dated 01.07.2015 which held that RBI guidelines have statutory force and that provides an explicit written agreement of loan, which is mandatory for NBFC to substantiate the nature of its transactions and due to the absence of a written loan agreement, it cannot be determined in this case whether the amount advanced was a financial debt nor could the interest and tenure of the loan be ascertained to arrive of the date of default. Adjudicating Authority has placed great reliance on RBI Master circular on Fair Practices Code, which makes written agreement mandatory. It is to be noted that this was issued on 01.07.2015. However, Corporate Debtor had approached the Financial Creditor in the year, 2013 and there was an oral agreement and furthermore three disbursements of the loan amount were made on 24.05.2013 and 28.06.2014 i.e. prior to RBI Circular, therefore making it inapplicable in the present case. Further, Insolvency and Bankruptcy Code ('IBC') does not prescribe/mandate that there should be a written agreement to establish financial debt. RBI

Circular is dated July, 2015 whereas the IBC was enacted in the year 2016 and therefore, IBC holds supremacy over the RBI Circular. In fact, Section 238 of the IBC has an over-riding effect on anything contained in any other law in force or any instrument having effect by virtue of such law. Notwithstanding non-maintenance of written records, it cannot be concluded that the debt and default cannot be established under the IBC. In any case, as per Section 238 of the Code, provisions of the IBC override other laws.

30. The Appellant also relies upon the judgment of this Tribunal, in '**Narendra Kumar Aggarwal & Anr. v. Monotrone Leasing Pvt. Ltd. (supra)**'. Even though the Adjudicating Authority has concluded that this would not come to the rescue of the Financial Creditor, yet it has been relied by the Appellant. The relevant extracts are as follows:

“...
11.

Thus, the contention of Financial Creditor is fully authenticated from the Money Receipt and bank transaction statement. The Appellant contends that the transaction may be treated as the 'Inter-Corporate Deposit', but it cannot be treated as the Financial Debt. In case the Inter-Corporate Deposit is made for a certain period, which was to be paid back with interest then such transaction will also fall in the definition of 'Financial Debt'. The interest is the product of instant transaction, which is undoubtedly the time value of money. Thus, such transaction of the inter-corporate deposit is fully covered by the definition of Financial debt as provided under Section 5(8) of the I&B Code. The written contract cannot be treated as an essential element to prove the Financial Debt if the transaction's nature is proved otherwise.”

Contrary to the conclusions of the Adjudicating Authority in the impugned order basis **Narendra Kumar Aggarwal (supra)**, we find that this

judgement comes to the support of the Appellant. In fact, this Tribunal has upheld that an oral agreement for inter-corporate loans could be considered valid for the purposes of the IBC, if the nature of the transaction is otherwise evident from the party's dealings. And in the facts of the case we notice that there is sufficient material otherwise which helps us to come to a conclusion that the Appellant had disbursed ₹1,50,00,000/- (rupees one crore and fifty lakhs only) and the interest is also paid by the Respondent and there is also acknowledgement.

31. The Appellant has also relied upon the judgment of this Tribunal in '**Agarwal Polysacks (supra)**'. The relevant extracts are:

“

21. When we look into the statutory scheme as reflected in the Application to Adjudicating Authority Rules, 2016 and CIRP Regulations, 2016, it is clear that financial debt can be proved from other relevant documents and it is not mandatory that written financial contract can be only basis for proving the financial debt. We, thus, answer Issue No. 1 holding that it is not necessary that written financial contract be the only material to prove the financial debt.

.....

31. The Adjudicating Authority, however, took a view that there should be financial contract between the parties which elucidate the rate of interest and date of repayment. The Adjudicating Authority took a view that there is no written agreement to establish the nature of transaction between the parties, hence, Appellant failed to prove the debt. We have already held that requirement of written financial contract is not a pre-condition for proving debt. When Adjudicating Authority itself given finding in Para 5-6 the disbursement was with interest and repayment was on demand, two essential conditions of financial debt were present with regard to time value of money. When the financial statement indicate amount with interest since the loan of Rs. 75,00,000 increased in the FY 2017-18 and amount due was shown as Rs. 79,70,250, which clearly was after adding the interest, disbursement has to be held for time value of money. We, thus, are satisfied that all preconditions for establishing financial debt are proved by the Financial Creditor and the order of the Adjudicating Authority rejecting Section 7 application is not sustainable.”

This Tribunal has categorically held in that case that a written financial contract is not a mandatory requirement to prove financial debt under the IBC and it is sufficient to establish the debt through other relevant documents. This judgment also supports the case of the Appellant.

32. The Appellant has also relied upon another judgment of this Tribunal in '**Satish Balan (supra)**'. The relevant extracts are:

“....
14. This 'Appellate Tribunal' observe that the Code nowhere prescribes that there should be a written agreement between the parties to prove the loan and its disbursement to be treated as financial debts. It is also observed that if there are acknowledgments by the 'Corporate Debtor' and where the statements of accounts of the 'Corporate Debtor' are in position to proof disbursement of loan and payment of interest, the absence of formal written agreement would not bar the 'Financial Creditor' (the Respondent No. 1 herein) from initiating the CIRP.”

Herein this Tribunal had clarified that a written agreement is not a condition precedent to proving the existence of a financial debt. Acknowledgments by the Corporate Debtor and supporting documents like ledger accounts can be sufficient to prove the debt. This also supports the case of the Appellant.

33. It is to be noted that the loan is also recorded in the balance sheet of the Appellant even though as “other liabilities” instead of “loan” and this does not negate the existence of a financial debt and therefore the conclusion of the Adjudicating Authority that this is not a financial debt cannot be sustained. Even if we don't rely on this material on record, there is sufficient other material on record to establish debt and default.

Conclusion and Order:

34. After going through the submissions and also materials on record, we find that the debt and default is established in the matter. In fact, the Respondent has not even bothered to appear before this Tribunal to defend its case. Under these conditions when the Appellant has been able to establish the debt and default, the finding of the Adjudicating Authority dismissing the Section 7 Petition cannot be sustained. Accordingly, the order of the Adjudicating Authority dated 21.11.2023 is set aside. The Corporate Debtor, namely Brick and Mortar Realty Private Limited, is ordered to be proceeded under Section 7 of the Code. The NCLT, Kolkata Bench, is to issue necessary order in this regard within 30 days of its presentation before the NCLT, Kolkata Bench.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

New Delhi.
December 18, 2024.
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