

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
KOLKATA BENCH  
(Court –I)  
KOLKATA**

**C.P (IB) No. 85 /KB/2021**

*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:

**Narayan Shaw Enterprises Private Limited**, CIN U36999WB2005PTC104883,  
having its registered office at 582, Diamond Harbor Road, Kolkata-700034

*... Financial Creditor*

*Versus*

**Vedic Realty Private Limited**, a company registered under the Companies Act, 1956, CIN: U45201WB1996PTC079333, having its registered office at 1/1B Upper Wood Street Kolkata-700017.

*...Corporate Debtor*

Date of hearing : 22/08/2022

Order Pronounced on : 19 /10/2022

**Coram:**

***Mr. Rohit Kapoor, Member (Judicial)***

***Mr. Balraj Joshi, Member (Technical)***

**Counsels appeared through Video Conference**

For Financial Creditor: Mr. Jishnu Chowdhury, Adv.

: Mr. Shaunak Mitra, Adv.

: Mr. Zeeshan Haque, Adv.

: Mr. Tanay Agarwal, Adv.

: Mr. Ram Maroo, Adv.

For Corporate Debtor : Mr. Abhrajit Mitra, Sr. Adv.

: Mr. Rachit Lakhmani, Adv.

: Mr. Siddhanth Makkar, Adv.

**ORDER**

***Per Balraj Joshi, Member (Technical)***

1. The Court is convened by hybrid mode
2. This petition 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 has been filed by Narayan Shaw Enterprises Private Limited, through its Director and authorised signatory namely Mr. Manoj Shaw authorised *vide* Board Resolution dated 15.02.2021 (Annexure-B) (***‘Financial Creditor’***) for initiation of Corporate Insolvency Resolution Process in respect of Vedic Realty Private Limited (***‘Corporate Debtor’***).
3. The present Petition was filed on **09 March, 2021** before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted in the payment of sum of Rs.11,63,92,329/- (Rupees Eleven Crore Sixty Three Lakh Ninety Two Thousand Three Hundred Twenty Nine only) as on **20 March, 2020**. The ***date of default*** is stated to be as on **06 June, 2018**. The details of transactions are mentioned in part – IV of the application along with documents.
4. ***Submissions on behalf of the Financial Creditor***
  - 4.1 It is submitted in the Petition, Part – II that the authorised share capital of the Corporate Debtor is Rs. 31,54,50,000/- (Rupees Thirty One Crore Fifty Four Lakh Fifty Thousand only) with paid up Capital as Rs. 19,89,95,500/- (Rupees Nineteen Crore Eighty Nine Lakh Ninety Five Thousand Five Hundred only).
  - 4.2 It is stated in paragraph 11 of this application that the Corporate Debtor failed and defaulted in making any further payment in respect of financial debt in question. As such there has been no payment made in respect of interest or principal amount since June, 2018. The last payment on account of interest was made on 5<sup>th</sup> June, 2018 as part payment of interest for 2017 -2018 and thus the date of default is stated to be 6<sup>th</sup> June, 2018.
  - 4.3 It is further stated that the Corporate Debtor has acknowledged his liability and default by sending balance confirmation statements for the years 2015-16,

2016-17,2017-2018. It is also claimed that the Financial Creditor had sent a Demand Notice dated **21<sup>st</sup> February, 2020** for an amount of Rs.9,50,00,000/- together with accrued interest thereon. However, no reply was received this notice. The total amount claimed, and the calculations thereof are mentioned at page 17 of the instant application.

- 4.4 The Financial Creditor transferred a sum of Rs.9,50,00,000/- in four tranches by RTGS dated 09.06.2015, 22.06.2015, 20.07.2015 and 30.07.2015 in favor of the Corporate Debtor *[Annexure G of the Petition]*.
5. On being served with the notice of the court, the Corporate Debtor has filed its reply affidavit through one of its Directors, namely, Mr. Raj Kishore Modi.
6. ***Reply affidavit has been filed by the Corporate Debtor*** and the stand taken by the Corporate Debtor is summarized as under:-
  - 6.1 It is stated in the reply affidavit there appears to be no Board Resolution authorizing disbursement of loan by Financial Creditor to the Corporate Debtor.
  - 6.2 There has to be a contract between the parties including the tenure, date interest payable and the date of repayment.
  - 6.3 In the present case there is no contract between the parties and therefore this application under Section 7 of IBC is not maintainable.
  - 6.4 There is no default on the part of the Corporate Debtor as alleged.
  - 6.5 The Financial Creditor has failed to make out a case of the loan or the alleged interest thereon.
  - 6.6 The amount referred were never transferred to the Corporate Debtor as a loan and were in stead in the form of investment in terms thereof, the Financial Creditor had partnered with the Corporate Debtor to boost the business of Corporate Debtor and mutually benefit the same. However, as the business could not take of as expected particularly owing to faults on the part of the Financial Creditor as a result whereof, the Corporate Debtor had suffered substantial decline in profit.
  - 6.7 The Corporate Debtor has denied the default as alleged in other paragraphs of the reply affidavit. The ledger referred to in the application is unilaterally

prepared by the Financial Creditor and hence has no credibility.

7. A *rejoinder affidavit* has been filed by the Financial Creditor wherein at page 81 an audit report under section 44 AB of Income Tax Act has been placed on record.
8. This report has been placed on record as Annexure-B from page 81 to 95 of the rejoinder. At page 97, there is a certificate issued by a Company Accountant on 8<sup>th</sup> April, 2022 whereby it has been certified that he has check the audit statement of the accounts for the year ending 31<sup>st</sup> March, 2015, 2016 and 2017 of the applicant and has certified that the Company had complied the provisions of Section 186 of the Companies Act. The statements for these years have been placed of record at page 98.

#### ***Analysis***

9. In an Application under Section 7 of the Code, the *prima facie* affair that needs to be established is that the debt is a ‘financial debt’, as envisaged under Section 5 (8) of the Code - “*Financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*  
...  
*(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*  
...”
10. The term ‘*time value of money*’ in simple words gives the idea that money is worth more today than it would be in the future, and if the debt is given with such intention it would fall under the purview of the definition ‘financial debt’. Further, in the Report of the Insolvency Law Committee, the word “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.”<sup>1</sup>

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<sup>1</sup> Page 16 of the Report of the Insolvency Law Committee, March, 2018, Para 1.4

11. Further, with respect to the term **commercial effect of a borrowing**, Justice Nariman in *Pioneer Urban Land and Infrastructure Ltd. v. Union of India* referred to *Collins English Dictionary & Thesaurus* (2nd edn., 2000) for the meaning of the expression “borrow” and the meaning of the expression “commercial”. Relying upon the aforesaid definition, the Hon’ble Supreme Court further stated that “*Commercial would generally involve transactions having profit as their main aim.*”

*“borrow—vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To put the ball uphill of the direct path to the hole: make sure you borrow enough.*

\* \* \*

*commercial. —adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser: commercial television. 3. having profit as the main aim: commercial music. 4. (of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television.”*

12. Last but not the least, as an Adjudicating Authority it is imperative to not forget the objective of the Code, i.e., effective and timely resolution of the insolvency and bankruptcy of a corporate entity, to attain maximization of value of assets of the company, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. The primary focus of the Code, is to ensure revival and continuation of the corporate debtors, by bringing it back on feet, and not being the mere recovery legislation for the creditors.
13. Further, if we look into the facts and circumstances of the instant case, it is apparent from the Audit Report of the Corporate Debtor in Form No.3CA under Section 44AB of the Income Tax Act, 1961 [at page 88-89 of the *Rejoinder*] that the heading itself mentions ‘31 a – particulars of each loan or deposit in an amount exceeding the limit specified in section 269SS taken or

accepted during the previous year'. There is no evidence on record to substantiate the fact that the amount disbursed by the Financial Creditor to the Corporate Debtor was loan, and not deposit. Thus, from the said records it is not very clear that there was a commercial effect to that borrowing or it was given against time value of money. Hence, the **CP (IB) No. 85/KB/2021** is **dismissed**

14. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities

**Balraj Joshi**  
**Member (Technical)**

**Rohit Kapoor**  
**Member (Judicial)**

The Order is pronounced on 19<sup>th</sup> day of October, 2022

SA[LRA]