

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1559(PB)/2019

IN THE MATTER OF:

**Utsav Securities Private LimitedFinancial Creditor/Petitioner
v.**

Timeline Buildcon Private Limited....Corporate Debtor/Respondent

**SECTION: Under Section 7 of The Insolvency and Bankruptcy
Code, 2016**

Judgment delivered on 04.01.2020

Coram:

**CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT**

**SHRI S.K. MOHAPATRA
HON'BLE MEMBER (T)**

PRESENT:

For the Petitioner: Mr. Ankur Dagar, Advocate with Ms.
Reema Jain, PCS

For the Respondent: Mr. Prashant Jain and Ms. Himanshi
Madan, Advocates

M.M. KUMAR, PRESIDENT

JUDGMENT

Utsav Securities Private Limited claiming to be 'financial creditor' has filed the instant petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of Timeline Buildcon Private Limited, who is claimed to be the corporate debtor.

2. The Corporate Debtor-Timeline Buildcon Private Limited (CIN U70102DL2015PTC278586) was incorporated on 30.03.2015 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at 2nd Floor, WZ-278, Inderpuri, New Delhi-110012.

3. Facts which are material to the controversy raised may first be noticed. The pleaded case of the Petitioner is that it is an RBI registered Non-Banking Financial Company and is engaged in the business of granting loans and financing facilities. In the month of May, 2016, the Respondent approached the Petitioner for seeking certain unsecured loans. After verifying the financial health of the Respondent, the Petitioner agreed to advance a loan. Thereafter on 17.05.2016, the Petitioner advanced a sum of Rs. 1,15,00,000/- as an unsecured loan to the Respondent on specific terms that the loan would be paid on demand along with interest @ 12% per annum.

4. It was then submitted that despite specific understanding that the interest payment was to be paid on time, the Respondent failed to pay interest over the said loan.

5. The Petitioner, through its counsel, sent a written demand notice dated 06.05.2019 at the registered office address of the

Respondent recalling the financial facility and called upon it to refund the monies paid by it along with interest @ 12% per annum. Despite receipt of the said notice, the Respondent failed to refund the amount advanced by the petitioner along with interest.

6. In support of its case, the Petitioner has placed reliance on a certificate of its registration as an NBFC, its statement of accounts maintained in the HDFC Bank demonstrating disbursal of amount to the Respondent, ledger maintained by it qua the Respondent, demand notice dated 06.05.2019, its statement of account maintained in the AU Bank from 10.05.2019 onwards till 31.05.2019 demonstrating no repayment of loans and overdue & unpaid interest by the Respondent (Annexure-1, 3 to 7).

7. The precise case of the Petitioner thus is that the total amount in default due and payable to the Petitioner by the Respondent-Corporate Debtor as on 31.03.2019 is Rs. 1,50,66,071/- coupled with interest @ 12% compounded annually pendent lite.

8. In response to notice to show cause the respondent has filed reply. Apart from other pleadings, in paras 4, 5 & 7 of the reply the assertions made are set out below for facility of reference:-



- “4. It is submitted that the Applicant failed to place on record an agreement to show that the amount as alleged has been given on loan which carries interest. It is submitted that the same Business Advance for future projects undertaken by the Corporate Debtor, and any benefit/profit from the same would have been shared based on investments.
5. It is submitted that the present application is not admissible as there is no financial debt as defined under section 5 (8) of the Insolvency and Bankruptcy Code, 2016. Section 5(8) of the IBC, 2016 defines ‘financial debt’ as a debt along with interest, if any, disbursed against the consideration for time value of money. However, in the present case, the alleged Business Advance was given without any interest on the same. Therefore, the applicant does not come within the ambit of financial creditor as there is no debt due and payable within the meaning of section 3 (11) of the Code.
7. As stated above that the amount given to the Corporate Debtor was in the investment arrangement drawn between the parties and no agreement was executed between the parties in respect of the Business Advance to the Corporate Debtor because of trust. Further, the Business Advance was given without any interest on the same and there was on



understanding between the parties to pay any interest on the amount given to the Corporate Debtor as it was profit sharing basis.”

9. Thereafter the Respondent placed on record a balance sheet for the financial year 2016-2017. As per the said balance sheet the principal amount of Rs. 1,15,00,000/- given by the Petitioner is depicted under the heading “long term borrowings” and classified as Business Development Loan. It has then placed reliance on a confirmation of accounts from 01.04.2017 to 31.03.2018 showing the aforesaid amount of Rs. 1,15,00,000/- as bed debts. The reason showing the said amount as bed debts is that as the present petition has been filed after more than 3 years i.e. beyond the limitation period as specified in the limitation act and due to said fact the same has been depicted as bad debt.

10. The Petitioner has filed rejoinder to controvert the aforesaid assertion of the respondent-Corporate Debtor. It has been highlighted that there has been an oral contract upon the Corporate Debtor having approached the Petitioner for seeking an unsecured loan, which was granted because of trust. The said loan was not just a business advance, it was a financial loan through proper banking channel as is evident from the Note-4 to the Balance Sheet

of the Corporate Debtor as at March 31, 2017 whereby they have classified the same as "Business Development Loan" under the head "Long Term Borrowings". The Corporate Debtor in the said balance sheet has failed to state the nature of loan, along with the terms of repayment of the loan, which is a requirement under schedule III of the Companies Act, 2013. It is then submitted that in the financial year 2016-17 the said financial loan was availed by the Corporate Debtor from the Petitioner. In the same year an amount of Rs. 1,00,00,000/- was transferred to one company namely AMS Agencies Private Limited, which is having same registered office address as that of the Respondent. The directors of the said company Ms. Seema Goel and Ms. Shashi Bala Goel are relatives of the director of the Corporate Debtor Mr. Aditya Goel. It has then submitted that it is a clear case of siphoning off, of the financial loan granted by the Petitioner, by transferring it to a related entity and reliance has been placed on extract of notice of ROC (Annexure A-2) & master data of AMS Agencies Private Limited (Annexure A-3).

11. Subsequently an additional affidavit has been filed by the Petitioner vide diary dated 13.11.2019 along with a declaration from the Petitioner as well as a certificate from the Statutory Auditor. As



per the said declaration, the Director of the Petitioner Company confirms that the major source of income of the Petitioner Company is interest on loan. The interest income which was offered to tax by the company in last three years have also been disclosed in the said declaration. The Statutory Auditor namely Mr. Anil Kumar, Chartered Accountant further confirms the abovesaid fact as disclosed in the declaration given by the Company which further supported by Income Tax Returns of the Petitioner Company for last three years.

12. We have heard Ld. Counsels at a considerable length.

13. In order to find out as to whether the petitioner would be covered by the expression 'Financial Creditor' and the expression 'Financial Debt' within the meaning of the term used in Section 7 and Section 5 (7) & (8) of the Insolvency & Bankruptcy Code, it would be profitable to read the provisions of Sections 5 (7) & (8) and Section 7 of IBC which are set out below:

5. Definitions: In this Part, unless the context otherwise requires-

7. "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debts has been legally assigned or transferred to;



(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;

(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;

.....

7. Initiation of Corporate Insolvency Resolution Process by financial creditor- (1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation – For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.



(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board

From a bare perusal of Section 7 of the IBC, it is patent that the insolvency process can be triggered at the instance of a “Financial Creditor” individually or jointly against a corporate debtor when default has occurred. The first question that arises for consideration is as to who is a ‘Financial Creditor’. The meaning of that expression has to be ascertained from the definition as provided by Section 5(7) & 5(8) (supra). Section 5 (7) of IBC defines the expression “Financial Creditor” and Section 5 (8) of IBC defines the expression “Financial Debt” which has been used in Section 5(7) of IBC.

14. 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 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 is to be 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 as 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



financer 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 financer. (See Taxman's Law Relating to IBC, 2016 by Vinod Kothari & Sikha Bansal) When we examine the nature of transactions in the present case, it is not possible to conclude that any loan was advanced with interest. Certainly, there was no element of time value for money.

15. In paras 4, 5 & 7 of the reply as quoted verbatim in preceding para No. 8, the respondent has made categorical assertion which goes unrebutted establishing that no element of time value for money is attracted and it is a simple friendly loan. There is no document on record to prove the element of interest.

Therefore, such a transaction would not acquire the status of a 'financial debt' as the transaction does not have consideration for the time value of money, which is a substantive ingredient to be satisfied for fulfilling requirements of the expression 'Financial Debt'.

16. It is also relevant to note that under Section 7 (3)(C) of the Code, 2016 at the time of filing an application by the Financial Creditor before this Tribunal, along with such application the



applicant is required to furnish any other information as may be specified by the IBBI. The Ministry of Corporate Affairs has framed Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 where under the form to be adopted by different categories of creditors have been specified and in relation to a Financial Creditor the form prescribed is form 1. A perusal of clause 5 of part V of form 1 shows that the Financial Creditor is required to place a latest and complete copy of the financial contract reflecting all amendments and waivers up to date and a copy is required to be attached. 'Financial Contract' has been defined under clause (d) of sub rule (1) of Rule 3 as follows:-

'Financial Contract' means a contract between a Corporate Debtor and a Financial Creditor setting out the terms of the financial debt, including the tenure of debt, interest payable and the date of repayment.

17. In the instant case no such financial contract has also been produced in compliance with the provisions of the Code or of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 either in the petition or additional affidavits.

18. As a sequel to the above discussions, we are unable to persuade ourselves to accept that the petitioner is covered by the



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expression "Financial Creditor" in terms. Therefore, the petitioner does not answer the description of Section 7 read with Section 5(7) & 5(8) of IBC. The petition is accordingly dismissed.

19. Before parting we make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy as we have refrained from admitting the petition at the initial stage itself and that too in summary proceeding. Therefore, the right of the petitioner before any other forum shall not be prejudiced on account of dismissal of instant petition.


(M.M.KUMAR)
PRESIDENT


(S.K. MOHAPATRA)
MEMBER (TECHNICAL)

04.01.2020
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