

**IN THE NATIONAL COMPANY LAW TRIBUNAL,**

**KOLKT BENCH (Court-II)**

**KOLKATA**

C.P (IB) No. 340/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:**

**Thirdwave Fiscal & Investment Services Pvt. Limited** (CIN: U65100WB1990OPTC050396), having its registered office at 1<sup>st</sup> Floor, 24 Park Lane, Kolkata-700016

*... Financial Creditor*

Versus

**In the matter of:**

**Amit Vanijya Private Limited**, CIN U51909WB1995PTC072705, having its registered office at 236B, A.J.C Bose Road, 6<sup>th</sup> Floor, Kolkata, West Bengal, 700020.

*...Corporate Debtor*

Date of hearing : 07/02/2023

Order Pronounced on : 26/06/2023

**Coram:**

*Mrs. Bidisha Banerjee, Member (Judicial)*

*Mr. Balraj Joshi, Member (Technical)*

**Apperance:**

1. Mr. Tanmoy Sett, Adv. ] For the Corporate Debtor

**ORDER**

**Per: Bidisha Banerjee, Member (Technical)**

1. The Court is convened by video conference today.

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 **Thirdwave Fiscal & Investment Services Pvt. Limited**, (hereinafter referred to as the Financial Creditor) for initiation of Corporate Insolvency Resolution Process in respect of **Amit Vanijya Private Limited**, a corporate entity (hereinafter referred to as the Corporate Debtor).

3. The brief facts of the case are as under: -

- i. On 10/01/2013, Corporate Debtor approached the Financial Creditor for grant of inter-corporate loan of Rs.1,50,00,000/- for a period of 179 days @ 11% p.a. w.e.f. 10/01/2013 to 08/02/2013. The Financial Creditor agreed to such request.
- ii. On 1<sup>st</sup> April 2020, Corporate Debtor again approached the financial creditor for renewal of the aforesaid inter-corporate loan of Rs. 1,50,00,000/- for a further period of 183 days @ 14% p.a. w.e.f. 01/04/2020 to 30.06.2020 and 01.07.2020 to 30.09.2020.
- iii. The Financial Creditor agreed to renew such inter-corporate loan. But on 01/07/2020, when the cheque being no. 870409 for the sum of Rs.4,84,295/-, being the amount for interest for the period from 01/04/2020 to 30/06/2020 was presented to the bank the same was dishonoured, with the remarks "Funds Insufficient", and, on 2<sup>nd</sup> & 4<sup>th</sup> November, 2020, when Financial Creditor deposited the cheques both dated 01/10/2020 for Rs.1,50,00,000/- being the Principal sum and Rs.4,89,616/- towards interest for the 2<sup>nd</sup> quarter for clearance to its Banker-Karnataka Bank, the said cheques were dishonoured by the bank with the remark "Funds Insufficient".
- iv. As a result, on 25/11/2020, Financial Creditor, through its Advocate had send statutory notice under section 138 read with section 141 of the Negotiable Instruments Act, 1881.

4. In reply to the petition, the Corporate Debtor in its reply affidavit submitted that the application is not maintainable in law. The said application has been filed in abuse

of the process of law and the same is liable to be rejected in limine with exemplary costs. Further, there is no financial debt owed by the Corporate Debtor to the Financial Creditor thus no proceedings could have been instituted under the provisions of the Code against the Corporate Debtor.

5. It is alleged that the application is liable to be and should be summarily dismissed with heavy costs for the following reasons:

- i. The Corporate Debtor herein, inter alia, is engaged in the business of finance and investments and is a Non-Banking Financial Company registered with the Reserve Bank of India, registered on 05/09/2003 having Registration No. B-05.05435. The Corporate Debtor continues to be engaged in business as a NBFC. Therefore, the Corporate Debtor falls within the definition of “Financial Service Provider” under section 3(17) of the Code and is thus excluded from the definition of “Corporate Debtor”.
- ii. In terms of Section 3(7) of the Code, A “Financial Service Provider” is excluded from the definition of “Corporate Debtor”. Therefore, a Financial Service Provider is in turn not covered within the definition of a “Corporate Debtor” as provided under section 3(8) of the Code. Therefore, the Corporate Debtor, being a Financial Service Provider is excluded from the definition of Corporate Person and cannot be termed as such as a Corporate Debtor under the said Code. Thus, the provisions of the said Code cannot be invoked against the Corporate Debtor and the said application under Section 7 of the said Code, filed by the Financial Creditor is not maintainable.
- iii. That only the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudication Authority) Rules, 2019, is applicable to such Financial Service Providers, as notified by the Central Government under Section 227 and the Corporate Insolvency Resolution Process can be initiated against such Financial Service Provider only upon application made by the appropriate regulator. Therefore, the said rules are not applicable in the present circumstance.

- iv. That there is no financial debt or any debt owed by the Corporate Debtor to the applicant and therefore no proceedings could have been instituted under the provisions of the said Code as against the Corporate Debtor.
- v. The persons who had signed on behalf of the Financial Creditor is not authorised by a proper Board Resolution to initiate any action on behalf of the Financial Creditor, nor is he authorised to appoint any professional for any pleadings or hearings in order to file any application under section 7 of the Code against the Corporate Debtor.
- vi. Financial Creditor has also failed to show that it had the necessary Board approval before the disbursement of the alleged loan and hence the said application filed by the Financial Creditor is not maintainable and must be dismissed in limine.
- vii. The Financial Creditor has failed and/or neglected to prove the existence of any agreement with regard to the alleged Inter- Corporate Loan, allegedly had been disbursed to the Corporate Debtor.
- viii. In the absence of such documents, it cannot be established as to what was the manner of disbursement of the alleged Inter-Corporate Loan, the manner of repayment thereof and as to what was the alleged default, allegedly to have been committed by the Corporate Debtor. In the light of the same, the Financial Creditor has failed to produce any record of default by the Corporate Debtor and as such the instant insolvency application is not maintainable.
- ix. The alleged Inter-Corporate Loan is distinct from a loan and would not fall within the definition of financial debt under the said Code. Thus, only payment of TDS cannot be taken as proof of financial debt.
- x. That there is no agreement entered into by and between the Financial Creditor and the Corporate Debtor, for providing the said alleged loan or for providing any alleged interest thereon, as claimed by the Financial Creditor and hence the alleged loan cannot be classified as financial debt under the Code.
- xi. The Financial Creditor has not been able to provide or disclose the latest and complete copy of the Inter-Corporate Loan there reflecting all amendments and

- waivers to date as required under Form-1 of the said Code.
- xii. That no document evidencing the disbursement of the purported Inter-Corporate Loan has been provided by the Financial Creditor. As such, the claim of the Financial Creditor is without any documentary evidence and as such, should not and cannot be looked into by this Adjudicating Authority.
- xiii. That no date for repayment of the purported Inter-Corporate Loan were agreed to by and between the parties as would be evident from a perusal of the Form-1 along with all annexures therein and as such the said application is not maintainable as no date for repayment was agreed to and hence the question of occurrence of default does not and cannot arise.
- xiv. The Financial Creditor has failed to provide any record of default as available with an information utility or a credit information company which would substantiate its claim or justify initiation of Corporate Insolvency Resolution Process of the Corporate Debtor. The aforesaid defects are incurable in nature as Form-1 mandates that in respect of initiation of an application under Section 7 of the said Code, the same should be mandatorily provided with the Form-1.
- xv. The purported claim of the Financial Creditor is barred by the principles of waiver, estoppel, acquiescence and is barred by Limitation.
- xvi. The Financial Creditor has not provided any agreement with regard to payment of interest on the alleged loan of 14% per annum.
- xvii. The Financial Creditor has failed to make out a case of default. In the absence of default, no application under Section 7 can be admitted. The date of default is crucial to determine the date on which the cause of action accrued. Thus, the said application is liable to be dismissed in limine.
- xviii. A bare reading of Form-I shows that no date of default has been mentioned. An incomplete application, such as in the instant case, can not be admitted by the Adjudicating Authority.
- xix. The Financial Creditor has filed the purported application is suppression of material facts and by concealing the true nature of the transactions between the parties. The Financial Creditor has mislead and/or misrepresented this

Adjudicating Authority with a view to obtain orders. As such, the Financial Creditor has approached this Adjudicating Authority with unclean hands and on this ground alone, the said application is liable to be dismissed in limine with exemplary cost.

6. The records were perused. Ld. Counsel for the Corporate Debtor was heard, none appeared for the Financial Creditor. Hence, we proceed to consider the matter on the basis of records.

**Analysis and Findings:**

7. The applicant who claims to be Financial Creditor has failed to produce the following:

- (i) Evidence of any agreement entered into by the parties evincing any request for loan, repayment term, levying of interest on default, etc.
- (ii) Evidence of any disbursement of loan;
- (iii) The Advocates Letter at Annexure-13 is loud and clear that the cheques in question were not meant for deposit before 09/01/2023.
- (iv) The date of alleged default falls within 10A period under IBC.

8. **Legal Propositions:**

- i. In *Swiss Ribbons Private Limited and Another v. Union of India and Others*<sup>1</sup> Hon'ble Apex Court has succinctly pointed that 'a financial creditor has to prove "default" in payment as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due.'

(Paras 52 to 65)

- ii. We would note that in an Application under Section 7 of the Code, the *prima facie* case 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*

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<sup>1</sup> 2019 SCC OnLine SC 73

*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**;*

In ***B.V.S. Lakshmi v. Geometrix Laser Solutions Private Limited***<sup>2</sup>, Hon'ble NCLAT held as under;

*“29. For coming within the definition of 'Financial Debt' as defined under sub-section (8) of Section 5, the Claimant is required to show that (i) there is a debt along with interest, if any, which has been disbursed and (ii) such disbursement has been made against the 'consideration for the time value of money'. Thereby, if the Claimant claims to be 'Financial Creditor' he will have to show that debt is due which he has disbursed against the 'consideration for the time value of money and that the borrower has raised the amount directly or through other modes like credit facility or its de-materialised equivalent, note purchase facility or the issue of bonds, notes, debentures, loan stock or any other similar instrument.*

*(emphasis added)*

iii. Hon'ble NCLAT in ***Pawan Kumar v. Utsav Securities Private Limited & Anr.***<sup>3</sup>, reiterated;

*“13. Certain essential conditions are required to be satisfied by a Financial Creditor seeking to invoke the provisions of CIRP as against the Corporate Company Appeal (AT) (Ins) No. 251 of 2020 Debtor. We have taken into consideration [Section 5\(7\)](#), [Section 5](#) (8) read with Section 7 of IBC. Following essential conditions are required to be satisfied by a Financial Creditor.*

*(i) There must be disbursement of loan amount.*

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<sup>2</sup> Company Appeal (AT) (Insolvency) No.38 of 2017 decided on 22 December, 2017

<sup>3</sup>Company Appeal (AT) (Ins) No.251 of 2020.

(ii) Such disbursal should be made for a consideration for time value of money,  
and

(iii) When the debt (Whole or any part or instalment) become due and payable  
and is not paid by the Corporate Debtor means committed default.

iv. **To ascertain whether the alleged amount was disbursed for a consideration for time value of money**, we would note that in **Pawan Kumar (Supra)** Hon'ble Court has observed "Financial Contract as per the Rule 3(1) (d) of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, a financial contract is must between the corporate Debtor and the Financial Creditor for setting out the terms of a Financial Debt including the tenure of the Debt, interest payable and the date of repayment. In the absence of such Financial Contract, the Financial Creditor has failed to satisfy that when the debt and interest become due and payable."

(Emphasis Applied )

It is noted that no such financial contract has been produced here.

We would further note that in **Phoenix Arc (P.)Ltd. Vs. Ketulbhai Ramubhai Patel**<sup>4</sup> Apex Court noted the Paragraphs 46 to 50.2 of **Anuj Jain Vs. Axis Bank**, which expounds the essentials of "financial debt" and "financial creditor", in the following manner:

*'46. Applying the afore mentioned fundamental principles to the definition occurring in section 5(8) of the Code, we have not an iota of doubt that for a debt to become "financial debt" for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of section 5(8); it may also include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of section 5(8); it may also include any*

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<sup>4</sup> Civil Appeal No.5146 of 2019, decided on 03 February, 2021

*derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of section 5(8); and it may also be 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 section 5(8); and it may or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein.*

*48. It is also evident that what is being dealt with and described in section 5(7) and in section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person.*

9. In view of the above enumerations, the C.P.(IB) No. 340/KB/2021 is **rejected**.

10. Urgent Certified copy of this order, if applied for be issued upon compliance with all requisite formalities.

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

**(Bidisha Banerjee)**  
**Member (Judicial)**

Order signed on this, the 26<sup>th</sup> day of June , 2023

PJ.