

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 350/KB/2022

And

I.A. (IB) No. 970/KB/2024

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.

And

Company Petition (IB) No. 350/KB/2022

IN THE MATTER OF:

Gokul Sai Udyog LLP

... Financial Creditor/ Applicant.

Versus

Katyayni Contractors Private Limited

... Corporate Debtor/ Respondent.

And

I.A. (IB) No. 970/KB/2024

IN THE MATTER OF:

Katyayni Contractors Private Limited

... Corporate Debtor.

Versus

Gokul Sai Udyog LLP

... Financial Creditor.

Date of Pronouncement: May 17, 2024.

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant:

Mr. Shaunak Mitra, Adv.

Mr. Avik Chaudhury, Adv.

Mr. Amandeep Singh, Adv.

Ms. S. Majumder, Adv.

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**For the Respondent: Mr. Gulshan Kr. Sachdev, Adv.
 Mr. Tushar Yadav, Adv.
 Mr. Ranjit Kumar, Adv.**

ORDER

Per: D. Arvind, Member (Technical):

1. The Court congregated through a hybrid mode.
2. Heard Ld. Counsels for the parties.
3. This company petition being **C.P. (IB) No. 350/KB/2022** has been preferred by **Gokul Sai Udyog LLP** (hereinafter referred to as “**Applicant/Financial Creditor/FC**”) seeking initiation of the Corporate Insolvency Resolution Process against **Katyayni Contractors Private Limited** (hereinafter referred to as “**Corporate Debtor/CD/Respondent**”) under Section 7 of IBC.

Factual Matrix:

4. The applicant claims to be a financial creditor relying on a resolution passed in the partner’s meeting of the LLP held on 11.5.2017 wherein, it has been resolved that the applicant will provide loans and advances to the corporate debtor to the tune of Rs. 6 crores with interest at the rate 12% per annum. The said resolution has been attached to the Application. Consequent to the said resolution the Applicant has considered the amount disbursed as loan to the respondent.
5. Based on the resolution, the applicant claims that they have disbursed Rs. 6 crores as per the details below:

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May, 2017 - October, 2017	An aggregate sum of Rs. 6 crores were disbursed by the Financial Creditor to the Corporate Debtor in the following tranches: 15/05/2017 – Rs. 1,00,00,000/- 26/29/2017 – Rs. 3,00,00,000/- 16/10/2017 – Rs. 1,00,00,000/- 20/10/2017 – Rs. 1,00,00,000/-
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6. The corporate debtor has paid an amount of Rs. 2 crores back by way of RTGS to the financial creditor and the balance remains unpaid claims the Applicant. On 14.04.2022, the financial creditor issued a legal notice to the corporate debtor and on 05.05.2022, the same was replied by the corporate debtor. The financial creditor issued another legal notice in Form-3 on 18.06.2022 and the same was replied by the corporate debtor on 01.08.2022 denying the due and default and hence this application has been filed in December 2022 under Section 7 of IBC.

Ld. Counsel for the Applicant:

7. Ld. Counsel for the applicant relying on the bank statements evidencing disbursement of such amount to the corporate debtor and the resolution passed by the financial creditor on 11-5-2017 authorising disbursement of loan submits that the said disbursement is towards loan and it was agreed and understood that the corporate debtor would be liable to re-pay the said loan together with interest at the rate of 12% per annum within six months.

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8. The entire loan was repayable within six months from the date of the first transfer of money which was on 15.05.2017, whereas the corporate debtor had only repaid a sum of Rs. 2 crores by way of RTGS on 23.10.2017, which is evidenced by the copy of the bank statement attached along with the application.

9. In this respect, the financial creditor claims that they were compelled to issue a legal notice dated 14.04.2022, to the corporate debtor demanding repayment of the outstanding principal of Rs. 4 crores along with 12% interest thereon till the payment of the amount.

10. In reply to the said demand notice, the corporate debtor contended that the Rs. 6 crores amount was received towards supply of construction material such as sand, beach stone etc. As per the reply filed by the corporate debtor, he has already supplied Rs. 4 crores worth of sand and beach stone and the balance Rs. 2 crores were repaid on 23-10-2017. To this, the Ld. Counsel for the Applicant submits that this is a factually baseless counter without producing any GST invoices for the supply of materials claimed to have been made.

Ld. Counsel for the Respondent:

11. Ld. Counsel for the respondent submits that there is no agreement between the parties on any loan. The so-called resolution passed by the financial creditor on 11.05.2017, is an internal document created to extract money from the corporate debtor. Neither this document was shared nor an acknowledgement of the contents of the resolution was ever obtained from the Respondent. The said

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resolution document is fabricated as clearly evident from the document itself. The document dated 11.05.2017 has GSTIN number of the applicant, whereas the law on GST in India came into force only 01.07.2017 and therefore, this document cannot be relied upon.

- 12.** Ld. Counsel further submits that the alleged loan is not actually a loan but an advance for the supply of goods. Therefore, the said advance will not fall under the ambit of financial debt. Ld. Counsel further submits that there is no record of default, if any, with the information utility against the respondent. Reliance is placed on the judgment rendered by the Hon'ble Apex Court in **S.P. Chengalvaraya Naidu v. Jagannath**, reported at **(1994) 1 SCC 1**, wherein it has been held that a person who approach to the Court with unclean hands and where the case of a person is based on the falsehood or if the person is guilty of withholding vital documents in order to gain advantage on the other side, then such party is guilty of fraud in the Court. The relevant portion of the judgment is reproduced in verbatim:

*“6. [...] Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. **A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side**”*

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**then he would be guilty of playing fraud on the court
as well as on the opposite party.”**

(Emphasis Added)

- 13.** Ld. Counsel further submits that the applicant had intentionally and deliberately not presented the true and correct facts before this Tribunal. The petitioner had approached the respondent with an offer to purchase construction materials from the respondent company and in pursuance of the aforesaid transaction paid a sum of Rs. 6 crores as advance. Against the said advance, the respondent has supplied materials worth Rs. 4 crores and the balance amount of Rs. 2 crores had refunded way back in 2017 and therefore no amount is due to the applicant.
- 14.** Thus, it is submitted that there is no debt as alleged and consequently, the question of initiating CIRP against a solvent company like the respondent does not arise.

Analysis and Findings:

- 15.** The main contention of the applicant is that they have lent loan by virtue of a purported resolution passed by the applicant, (Limited liability partnership firm) on 11.05.2017 wherein it has been claimed to have been resolved that approval be and is hereby granted to the LLP to provide loans and advance repayable of payment with interest at the rate of 12% per annum to the tune of Rs. 6 crores in four tranches to Katyayni Contractors Private Limited (the respondent herein).
- 16.** To substantiate disbursement of the alleged loan amount, bank statements have been attached. On perusal of bank statements, we

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find that on 15.05.2017, a sum of Rs. 1 crore has been made to Katyayni Contractors Private Limited. On 26.09.2017 a sum of Rs. 3 crores have been paid, on 16.10.2017 a sum of Rs. 1 crore has been paid and on 20.10.2017 another sum of Rs. 1 crore has been paid to Respondent. Thus, a total sum of Rs. 6 Cr has been paid to the Respondent. On 23.10.2017, the bank statements evidence that a sum of Rs. 2 crores have been returned by the respondent herein to the applicant.

- 17.** Since the purported resolution document dated 11.05.2017, contains a GSTIN number when GST was not in force, we cannot place reliance on this document. This is because the GST Acts came into effect only from 01.07.2017. Even otherwise, this being an internal document and not an MoU or agreement executed between the parties, no inference can be made favour of the Applicant.
- 18.** There are no written documents evidencing loan arrangement between the parties involved in this dispute. Therefore, we will have to go by the disbursements made and how it has been treated in the books of accounts of both the parties. Accordingly, an Order was passed directing both the parties to submit their financial statements for the Financial Year 2017-2018 and 2018-2019. The corporate debtor was further directed to produce evidence of the supply of goods including GST invoice and e-way bills to substantiate his claim of supply of materials worth Rs. 4 crores to the applicant herein.
- 19.** Accordingly, both the parties submitted their financials. However, the corporate debtor failed to submit proof of dispatch/GST

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invoice/e-way bills for supply of materials worth a sum of Rs. 4 crores as claimed by him. In fact, not even a single GST invoice claimed to have been raised by him was produced before us.

- 20.** We have perused the balance sheet of Katyayani Contractors the respondent herein for the year under 31 March 2021. In the said balance sheet, a sum of Rs. 4,11,60,010/- has been shown as payable to the Applicant under the head “**other payable**” and in the books of the Applicant for the financial year ended 31-3-2019, the same amount is shown as “**Short term loans and advances**”.
- 21.** If the Corporate debtor has already supplied the materials as claimed by him to the tune of Rs. 4 crores and refunded Rs. 2 crores to the applicant herein, the question of showing this as payable to the Applicant in the balance sheet for the financial year 2020-21 of the Respondent does not arise.
- 22.** However, it may be relevant to note that the Respondent, in its Balance sheet has shown it under the head “**other payable**” and not under “**Borrowings**”. Since we have decided not to rely on the purported resolution passed by the Limited Liability Partnership on 11.05.2017 in view of reasons stated in para 17, there is no other document to prove that what was advanced by the Applicant is a loan to the Respondent.
- 23.** To admit a petition under Section 7 of IBC there has to be a debt, the debt should be in excess of Rs. 1 crore as per section 4 of the code and there has to be a default of the debt. In this case, debt has been established. However, in the absence of any formal written

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agreement or any other evidence, we are unable to decide whether the debt owed by the Corporate Debtor is an operational debt or a financial debt particularly when the books of the corporate debtor deals with the debt in question as “**other payable**” and not as “**borrowings**”.

- 24.** We would rely on the judgment rendered by the Hon’ble Apex Court in ***Global Credit Capital Limited v. Sach Marketing Pvt. Ltd.*** reported at **2024 SCC OnLine SC 649: (2024) ibclaw.in 125 SC** that:

“20. Subject to what is held above, we summarize our legal conclusions:

a. There cannot be a debt within the meaning of subsection (11) of section 5 of the IB Code unless there is a claim within the meaning of sub-section (6) of section 5 of thereof;

b. The test to determine whether a debt is a financial debt within the meaning of sub-section (8) of section 5 is the existence of a debt along with interest, if any, which is disbursed against the consideration for the time value of money. The cases covered by categories (a) to (i) of sub-section (8) must satisfy the said test laid down by the earlier part of sub-section (8) of section 5;

While deciding the issue of whether a debt is a financial debt or an operational debt arising out of a transaction covered by an agreement or arrangement in writing, it is necessary to ascertain what is the real nature of the transaction reflected in the writing; and

d. Where one party owes a debt to another and when the creditor is claiming under a written agreement/arrangement providing for rendering ‘service’, the debt is an operational debt

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*only if the claim subject matter of the debt has some connection
or co-relation with the 'service' subject matter of the transaction."*

(Emphasis Added)

- 25.** Thus, from the enumerations of the Hon'ble Apex Court supra, we would infer that to quantify the nature of a debt arising out of monetary transactions, an agreement in explicit is required to determine the real nature of the transaction to classify whether it is a financial debt or an operational debt, more so to determine the date of default.
- 26.** Even assuming that a view could be taken based on the recording in the books of the Applicant as "Shor term loans and advances", in the absence of any agreement or document, the date of default cannot be ascertained/ determined. Unless it is made known by way of a written agreement or any other document duly signed by both the parties as to when the debt is due and becomes payable, the date of default of the debt cannot clearly established/ determined.
- 27.** In view of this finding, we feel it is not necessary to go into allegations/ claims and counter allegations/ counter-claims made by the parties. Therefore, we **dismiss this application as not maintainable.**

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- 28.** This interlocutory application has been preferred by Katyayni Contractors Private Limited, who is the Corporate Debtor herein against the Financial Creditor herein, Gokul Sai Udyog LLP seeking dismissal of the Company petition in limine with exemplary costs as per section 65 of the I&B Code, 2016 on the ground that the

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Respondent/ Financial Creditor produced a forged, manufactured and fabricated document with the petition.

- 29.** As the merits of this I.A. have already been dealt with in the order of the main C.P., accordingly, this I.A. is **disposed of**.
- 30.** The Registry of this Adjudicating Authority shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), to whom the company(ies) are registered with, by all available means. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
- 31.** The certified copy of this order, if applied for with the Registry, be supplied to the parties, subject to compliance with all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 17th Day of May, 2024

Bose, R. K. [LRA]/ PH(PS)