

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI**  
**CP (IB) No. 974/MB-VI/2020**

*[Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]*

IN THE MATTER OF:

**MEGHNA DEVANG JUTHANI**

Residing at: 302, Sharma Apartments

P.M. Road, Opp. High Life Mall

Santacruz (West), Mumbai- 400054

Maharashtra.

**...Financial Creditor**

V/s

**AMBE SECURITIES PRIVATE LIMITED**

[CIN- U67120mh1995PTC089669]

Registered Office: B/103, Oberoi Gardens

Thakur Village, Kandivali (East)

Mumbai, Maharashtra.

**...Corporate Debtor**

Reserved: 19.10.2023

Pronounced: 18.12.2023

**CORAM:**

**HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)**

**HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)**

**Appearances: Hybrid**

Financial Creditor: Adv Mayuri Thakkar

Corporate Debtor: PCS Lakshminnarayan Krishnamoorthy

**ORDER**

***[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]***

1. **Background**

1.1 This is an Application bearing C.P. (IB) No. 974/MB/C-VI/2020 filed by Smt. Meghna Devang Juthani, the Financial Creditor (FC), on 06.04.2020 under section 7 of Insolvency and Bankruptcy Code, 2016 (IBC) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Ambe Securities Private Limited, the Corporate Debtor (CD). In this matter, the debt arises from a loan extended to the CD by the FC. It is alleged that a total amount of Rs. 1,70,51,918/- (One Crore Seventy Lakh Fifty-One Thousand Nine Hundred Eighteen Rupees) fell due to the FC from the CD, inclusive of the principal amount of Rs. 1,15,00,000/- (One Crore Fifteen Lakh Rupees), with interest amounting to Rs. 53,51,918/- (Fifty-Three Lakh Fifty-One Thousand Nine Hundred Eighteen Rupees) as on 31.05.2020 and expenses towards recovery amounting to Rs. 2,00,000/- (Two Lakh Rupees).

## **2 Contentions of FC**

- 2.1 The FC in her application, identifies herself as the wife and legal heir of the Late Devang Juthani and submits that her Late husband extended an amount of Rs. 2,00,00,000/- to the CD as per mutually agreed terms and transferred the same to the CD through RTGS, Rs. 50,00,000/- on 07.03.2018 and the rest of the amount of claim of Rs. 2,00,00,000/- on 14.03.2018. She has filed this application in her capacity as the legal heir of her Late husband. She has produced documents suggesting filing of petition for testamentary succession and Letters of Administration before the Hon'ble Bombay High Court since her husband died intestate.
- 2.2 The FC contends that upon continuous follow-up by her Late husband, the CD repaid an amount of Rs. 85,00,000/- on 27.07.2018, 01.08.2018 and 18.12.2018. However, after 18.12.2018, the CD neither made any payment towards the interest nor refunded the principal amount, even after receiving notices and requests in several meetings with the CD despite giving false assurances.
- 2.3 The FC also contends that copy of this Application was not properly served upon the CD as the consignment was returned due to an insufficient address. Consequently, the copy was

- ultimately served on the CD's registered email ID on 13.09.2022, and the FC also provided notice of the Application through a newspaper publication on 30.09.2022.
- 2.4 The copy of the XBRL balance sheets of CD for the period of 31.03.2018 and 31.03.2019 showing loans and advances given to the CD for business purpose is annexed by the FC.
- 2.5 The FC has clarified *vide* its Rejoinder dated 15.08.2023 that with reference to the legal heir's validity, the same has been determined by the Order of the Hon'ble Bombay High Court dated 26.08.2021, granting Letters of Administration to the property and credits of her Late husband to her, being the widow of the deceased. Hence, according to her, an obligation arises for the CD to repay the principal amount along with interest to the Late husband, and after his death, to the legal heirs, including herself.
- 2.6 FC contends that nowhere in the CD's reply, it was stated that the received funds were invested through brokers and not by the CD. Moreover, if the CD were a registered stock broker or trading member, there would have been no necessity to invest through brokers, as it could have been done in-house. Hence, the funds were not used for many years.
- 2.7 Since the CD did not make any payment after 12.12.2018, the date of default identified by FC is 12.12.2018. On the basis of

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the above, the FC prays initiation of CIRP against the CD in the interest of justice, equity and good conscience.

2.8 The FC has stated in her Rejoinder that there is no written financial contract between her Late husband and the CD; she however, claims that the CD has accepted that money was received from her husband. She submits in her Rejoinder that being a housewife, she was unaware of the transactions between her Late husband and the CD and she filed the present Application after she came to know of the same to claim the amount due to her as legal heir. Hence, she prays that CIRP be initiated in respect of the CD.

### **3 Contentions of CD**

3.1 The CD states that it carries on, *inter alia*, the business of sub-brokers and franchiser of registered brokers in dealing in commodity, derivatives and contracts. It has questioned the locus of the FC and that the money given by the Late husband of the FC was not by way of loan within the meaning of Section 5(8) of the IBC. It has contested the maintainability of the Application on the following grounds that-

- a) The FC has not produced any financial contract or loan agreement between her or her Late husband, and with the CD and that no loan agreement was signed, stipulating details of any loan.

- b) The money given by Late husband of the FC to the CD was invested in Futures and Options of stocks and commodities through the CD, and the CD used funds for investments through brokers at the risk of her husband. Hence, no money was borrowed by it against payment of interest within the meaning of Section 5(8)(a) of the IBC. No financial contract/loan agreement was signed by the CD with the Late husband of the FC stipulating the amount of loan, purpose, rate of interest, tenure of loan and mode of payment. Any amount given to the CD does not qualify to be for time value of money.
- c) The bank account attached to the application is jointly held by the FC, her Late husband and Prerna Juthani, who is her mother-in law, and that there is no privity of contract between the parties.
- d) The FC has initiated a petition for Letters of Administration before the Hon'ble Bombay High Court regarding her Late husband's estate and is currently pending decision and the FC has failed to provide legal documents to establish her title. Hence, the CD submits that the applicant lacks locus standi.

3.2 Additionally, the CD submits that the petition before the Bombay High Court states that there are four legal heirs, including the FC

and her claim can only be determined by a decision of the Hon'ble High Court.

- 3.3 There is non-compliance with the requirements of Section 7 of the IBC in the current Application, as it lacks debt and default elements.
- 3.4 The CD contends that the Application is non-maintainable, and the Applicant appears to be using it as a means for recovery, rather than initiating CIRP under the IBC. The CD suggests the FC's remedy lies in a civil court.
- 3.5 The CD submits that the Late husband of the FC approached the CD in the beginning of 2018 for helping him to invest in Futures and Options of stocks, commodities, day trading of stocks, etc., as a speculator. The CD deployed the funds for the purpose of investments, through brokers entirely at the risk of her husband. The amount of Rs. 2,00,00,000/- received was not by way of loan. The CD used to advise him the market trends from time to time. Out of the amount received, Rs. 85,00,000/- was returned to him. Since the money was received only for investment purposes, no relationship as FC and CD between the parties.
- 3.6 The CD denies any allegations of misuse of funds by it and asserts that the Late husband of the FC disbursed the aforementioned amount for investment purposes.

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- 3.7 The CD emphasized in the reply to the rejoinder filed by FC dated 01.08.2023 that the debt in question is not a financial debt, and thus, the applicant is seeking a modification of the present Application to categorise it as an operational debt. However, there is no provision in the IBC to amend an application initially filed under Section 7 to be converted in to a Section 9 application. Additionally, Late husband of the FC neither supplied any goods nor provided services to the CD, and therefore, he does not meet the definition of an OC under Section 5(20) of the IBC. This underscores that the Applicant is neither a "financial creditor" nor an "operational creditor" as are distinctly defined in the IBC.
- 3.8 Consequently, the Applicant does not fall under any category as FC or OC to initiate an application under the IBC to commence CIRP.

#### **4 Analysis and Findings**

- 4.1 We have perused all the documents and pleadings and heard both the Ld. Counsel for the FC and the Ld. PCS for the CD. We do not find any written contract regarding loan sanctioned by the FC or any jural relationship between the Late husband of the FC and the CD. Written contract may not be necessary to prove a financial debt; however, the nature of the transaction is relevant

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to constitute financial debt within the meaning of section 5(8) of the IBC. The CD has stated that the amount of Rs. 2,00,00,000/- received by it was not by way of a loan. The CD used to provide financial advice as to investment options to the Late husband of the FC. Out of the said Rs. 2,00,00,000/-, the CD submits that, an amount of Rs. 85,00,000/- was returned to him. The amount received by the CD for arranging investment in Futures Contracts or Stocks cannot be regarded as a debt disbursed against the consideration for time value of money, that too when investment is done as a speculator through third party brokers. In order to constitute a “debt”, there must be a liability or obligation on the part of a person in respect of a claim which is due from any person. Otherwise, it cannot be regarded as a debt within the meaning of Section 3(11) of the IBC. Liability or obligation emanates from a written or oral agreement between the parties. In the instant case, there is nothing to indicate that there was any liability or obligation of the CD to return any money received by it from the Late husband of the FC. In the absence of any proof as to the nature of the transaction, mere admission of receipt of money by the CD does not qualify as a financial debt within the meaning of Section 5(8) of the IBC.

- 4.2 We find that the FC is attempting to make a claim to recover certain amount due to her Late husband from the CD on the

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grounds of being his legal heir. However, the CD contends that there was no contractual relationship between the FC and the CD and she is not in a position to assert a claim for the said amount. Furthermore, determination of question related to title or inheritance is beyond the purview of the Adjudicating Authority.

- 4.3 The FC submitted Rejoinder to the Reply filed by the CD, in an attempt of rebuttal of the contentions of the CD. However, we find that the FC has failed to provide any documentary evidence such as a loan agreement, promissory note, contract, or any other document to support the existence of a financial debt and default. We observe that the CD's annual reports, balance sheet and other relevant documents provided by the FC do not specifically indicate any outstanding debt to the FC.
- 4.4 Consequently, the question of the CD paying interest on the amount received from the Late husband of the FC and the matter of TDS do not arise. Therefore, the applicant does not qualify as a "financial creditor" within the meaning of Section 5(7) of the IBC and hence, is ineligible to file an application under Section 7 of the IBC.
- 4.5 The FC has relied on its bank statements and the CD's confirmation of accounts to support the existence of transactions between them. Nevertheless, in the absence of written

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documentation specifying the nature of these transactions, their classification as a loan, as asserted by the FC, cannot be assumed. The FC has submitted a certificate dated 14.02.2023 from the Information Utility, NeSL, showing CD's debt amounting to Rs. 1,70,51,918.00/- but in terms of regulation 21(4) of IBBI (Information Utility) Regulations 2017, the Record of Default will be issued by NSEL in form D. However, the record of default in form D has not been submitted by the FC.

4.6 In view of these facts, it is important to emphasize that while a written contract is not an absolute prerequisite for establishing the existence of a financial debt, the Adjudicating Authority must ascertain that the initiation of CIRP is not done in mala fide and is genuinely aimed at resolving insolvency. In the current case, there is insufficient evidence to support the acceptance or admission of the current application.

4.7 As discussed above, financial debt, as per the definition, encompasses debt, along with any applicable interest, provided in exchange for the time value of money. Going by the observations of the Principal Bench, NCLT in *Carnoustie Management India Pvt. Ltd. Vs. CBS International Projects Private Limited*, the FC herein has failed to explain as to how and under what circumstances and since when the loan document was executed. As laid down in *Swiss Ribbons Pvt.*

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*Ltd. & Anr vs. Union of India & Ors.* (2019), the definition of financial creditor and financial debt makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. There is nothing in this matter to show that any disbursement of amount took place. As observed in case of *Sanjay Kewalramani vs Sunil Parmanand Kewalramani & Ors.* (2018), there is no evidence indicating that a loan was extended in favour of CD.

4.8 Moreover, in *Pawan Kumar vs. Utsav Securities Pvt Ltd 2021*, it was emphasized that the presence of a loan agreement along with pertinent documents is imperative to substantiate the existence of a financial debt. We find that in present case, there was no acknowledgement of debt on record. There is neither any loan agreement nor proper explanation regarding the same is on record. We hold that it is the duty of the FC/Applicant to plead and produce evidence as to the existence of any debt, that is due and payable and not paid to constitute the requirements to file an application under Section 7 of the IBC. We are, therefore, constrained to draw adverse inference, and to conclude that the funds if at all extended by the FC to the CD were exclusively intended for investment purposes, which does not warrant initiation of CIRP in respect of the CD. The FC cannot use the Adjudicating Authority as a recovery forum.

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4.9 We therefore, find merit in the contentions and arguments advanced by the CD. The FC is unable to prove the existence of the debt and default. In view of the above, the present Application filed under Section 7 of the IBC to initiate CIRP in the matter of the CD deserves to be Rejected.

**ORDER**

This Application being C.P. (IB) No. 974/MB/2020 filed under Section 7 of the IBC by the Meghna Devang Juthani, the FC for initiating CIRP in the case of Ambe Securities Private Limited, the CD, is **rejected**. However, rejection of this Application shall not prejudice any remedy available to the FC before any other forum as per law.

**Sd/-**

**SANJIV DUTT  
MEMBER (TECHNICAL)**

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**Sd/-**

**K. R. SAJI KUMAR  
MEMBER (JUDICIAL)**