

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER**

**SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER**

IA No. 651/JPR/2022
& IA No. 652/JPR/2022
In CP No. (IB)- 92/7/JPR/2021

IN THE MATTER OF:

M/S SURYA TESTING SERVICES LIMITED

...FINANCIAL CREDITOR

VERSUS

M/S WARM FORGING PVT. LTD & ORS.

...CORPORATE DEBTOR

MEMO OF PARTIES

IA NO. 651/JPR/2022 & IA NO. 652/JPR/2022:

M/S WARM FORGING PVT. LTD.

Through its Authorized Signatory Mr. Amit Rajput

*Having Address at: #Plot No. SP 238 (B &
C) Industrial Area Kaharani (Bhiwadi
Extension) Bhiwadi Alwar, Rajasthan-
301019*

...Applicant/Corporate Debtor

VERSUS

M/S SURYA TESTING SERVICES LTD.

Through its Director Mr. Virat Jain

23/3 East Patel Nagar, New Delhi- 110008

...Respondent/Financial Creditor

Sd/-

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FOR THE APPLICANT : Ravi Chirania, Adv.
Gaurav Kumawat, Adv.
S. K. Panwar, Adv.

FOR THE RESPONDENT : R. B. Mathur, Sr. Adv.
Amol Vyas, Adv.
Varnit Jain, Adv.

Order Pronounced On: 19.01.2024

ORDER

Per: Shri

1. The main petition bearing *CP No. (IB)- 92/7/JPR/2021* has been filed by *M/s Surya Testing Services Ltd.* ('Financial Creditor') against *M/s Warm Forging Private Limited* ('Corporate Debtor') under Section 7 of the Insolvency and Bankruptcy Code ('IBC'/'Code'), 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking initiation of Corporate Insolvency Resolution Process ('CIRP'), pursuant to default committed by the Corporate Debtor in repayment of the loan amount.
2. The Interlocutory Application ('IA') bearing the *IA (IBC) No. 651/JPR/2022* is filed by the Corporate Debtor *M/s Warm Forging Private Limited* ('Applicant' / 'Corporate Debtor') against *M/s Surya Testing Services Ltd.* ('Financial Creditor/ Respondent') under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (the 'IBC'/'Code') read with Rule 11 of National Company Law Tribunal ('NCLT') Rules, 2016 for the prior

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hearing of rejection and dismissal of the Application filed under Section 7 of the IBC, 2016. Whereas the IA bearing *IA No. 652/JPR/2022* is also filed by the Corporate Debtor under Section 60(5) read with Section 7(5)(b) of IBC, 2016 read with Rule 11 of NCLT Rules, 2016 for rejection and dismissal of the Application filed under Section 7 of the Code, 2016 on ground that there is no debt due & default committed by the Corporate Debtor.

3. The abovesaid application numbered *IA No. 652/JPR/2022* as is being considered, in view of the directions to first decide the preliminary objections raised by the Corporate Debtor issued by the Hon'ble High Court of Judicature for Rajasthan, Jaipur Bench in the Order dated 05.10.2023 in *S.B. Civil Writ Petition No. 13633/2023*. Hence, the *IA No. 651/JPR/2022* filed for the prior hearing of rejection and dismissal of the Application filed under Section 7 of the IBC, 2016 hearing the matter on the preliminary objection stands infructuous.

4. The Corporate Debtor has relied on the following judgments to support its averments:

4.1. Judgement of Hon'ble Supreme Court in the matter of *M/s Innoventive Industries Ltd. vs ICICI Bank & Anr. [Civil Appeal No. 8337-8338 of 2017]* wherein it was held that:

"28.....It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the

corporate debtor is entitled to point out that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact.....’

4.2. Judgement of the Hon’ble NCLAT in *NUI Pulp and Paper Industries Pvt. Ltd. vs M/s Roxcel Trading GMBH, Company Appeal (AT)(Insolvency) No. 664 of 2019* wherein it was held that:

9. from the aforesaid Rule 11, it is clear that the Tribunal (Adjudicating Authority herein) can make any such order as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.’

5. The details of the transactions leading to the filing of *IA(IBC) No. 652/JPR/2022* as averred by the Applicant/Corporate Debtor *vide* Diary No.3796/2022 dated 21.12.2022 are as follows:

5.1. The Applicant/Corporate Debtor states that *M/s Selma Precision Technologies, NC, LLC* (‘SPT’) was formed on 22.11.2016 with the initial ownership percentages being held with *Mr. Amit Rajput* 30%, *Mrs. Anupam Chauhan* 30%, *Mr. Kartik Rajput* 10% and *Mr. Mayank Rajput* 30%, being Directors of the Corporate Debtor. Earlier, SPT acquired *M/s Sona BLW Precision Forge Inc.* (‘SPF’) on 14.12.2016 due to bankruptcy of the SPF. Thereafter, the Financial Creditor and the Corporate Debtor entered into Letter of Intent (‘LOI’) dated 23.12.2017 wherein it was mentioned that there shall be equal participation to restructure the exiting unit of SPT which is located at

500 Oak Tree Drive, Selma, NC 27576, USA. The said company was valued at 18.775 million on 11.07.2017, however, on the basis of mutual understanding the Company was valued at 7.5 USD million.

5.2. Further, it was proposed that a new company will be formed namely *M/s MV Forge, INC.* ('MVF') to take over the assets of the SPT. The Corporate Debtor, Financial Creditor and SPT entered into another agreement on 14.02.2018 wherein it was agreed that in order to acquire 50% ownership in SPT, the Financial Creditor shall invest 2.25 million USD in SPT. Copy of the Agreement dated 14.02.2018 is annexed as Annexure R-3 of the Reply.

5.3. It is submitted that the amount which was provided by the Financial Creditor to Corporate Debtor, was given to confirm 15% shareholding in SPT of *Mrs. Anamika Jain* w/o *Mr. Ajay Jain* Director of the Financial Creditor. The same was also accepted and duly acknowledged by the parties. The abovesaid has the corresponding effect in the financial statements of the Corporate Debtor where an amount of Rs. 1,60,00,000/- (Rupees One Crore Sixty Lakh Only) has been reflected under the head sundry debtors. However, the same amount has been reflected as an amount provided towards the advances to the suppliers against the material due to be received.

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- 5.4. Further a Legal Notice dated 22.09.2021 was issued by the Financial Creditor to the Corporate Debtor demanding payment of Rs. 1,60,00,000/- (Rupees One Crore Sixty Lakh Only) along with 18% interest per annum, however, the said demand notice has been made against the Corporate Debtor, without being accounted for in the books of account. Additionally, the Corporate Debtor has relied on the Judgement of Hon'ble Supreme Court in the matter of *Asset Reconstruction Company (India) Ltd. Vs Bishal Jaiswal, 2021 SCC OnLine SC 321*. Also, it is submitted that the Financial Creditor has committed the act of breach of fiduciary duty, constructive fraud and fraudulent transfer in the case falling under the jurisdiction of the United States Court. In the said matter, an inquiry is pending and a receiver has been appointed by the courts of US jurisdiction. Therefore, the main Application numbered as *CP No. (IB)- 92/7/JPR/2021* filed under Section 7 of the IBC, 2016 is required to be rejected.
6. The Corporate Debtor has filed written arguments vide Dairy No. 3072/2023 dated 26.12.2023 wherein it is stated the Financial Creditor has never described an amount of Rs. 1,85,00,000/- (Rupees One Crore Eighty-Five Lakh Only) as loan and there is no interest element to the aforesaid amount, therefore it is clear that there is no time value of money involved in the present transaction. Further as per Rule 3(1) (d) of Insolvency and

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Bankruptcy (Application to Adjudicating Authority) Rules, 2016 there is no financial contract between the parties. Therefore, the amount demanded by the Applicant is not a financial debt as per Section 5(8) of the IBC, 2016

7. Reliance in this regard is placed on the following judgements: -

- i. *M/s VRG Healthcare Pvt. Ltd. Vs VRG Infrastructure Pvt. Ltd. (2023) ibclaw.in 199 NCLAT*
- ii. *Utsav Securities Private Limited Vs Timeline Buildcon Private Limited in C.P. No. IB-1559(PB)/2019*
- iii. *Pawan Kumar, Ex-Director and Shareholder of Vouge Clothiers Pvt. Ltd. MANU/NL/0307/2021*
- iv. *Mrs. Rita Kapur Vs Invest Care Real Estate LLP (2020) ibclaw.in 68*
- v. *Anup Jhunjhunwala Vs ADEA Powerquips Private Limited MANU/NC/4697/2022*
- vi. *Transasia Private Capital Vs Gaurav Dhawan 2023: DHC:2336*

8. We have heard the Learned Counsels for the parties and perused the averments made in the Applications, submissions, and the documents enclosed with their respective application(s).

9. We have noticed the details of the payment made by the Financial Creditor to the Corporate as averred in the main Petition filed under Section 7 of the Code. The details as provided demonstrate that a total of Rs. 1,85,00,000/- (Rupees One Crore Eighty-Five Lakh) was disbursed to the Corporate Debtor by the Financial Creditor, against which Rs. 25,00,000/- (Rupees Twenty-Five Thousand Only) was repaid by the Corporate Debtor on

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22.05.2018. Hence, the net claim amount as alleged and reflected in PART IV of the main Application is Rs.1,60,00,000/- (Rupees One Crore Sixty Lakh). The details of the transactions are tabulated below for the ease of reference:

Sr. No.	Disbursal date	Disbursed vide Cheque No.	Disbursal Amount (In Rupees)
1.	27.12.2017	208458	35,00,000/-
2.	28.12.2017	208459	15,00,000/-
3.	29.12.2017	208460	15,00,000/-
4.	19.01.2018	208466	60,00,000/-
5.	30.01.2018	-----	40,00,000/-
6.	23.02.2018	208465	20,00,000/-
Total Amount Disbursed (A)			1,85,00,000/-
Total amount Repaid on 22.05.2018 (B)			(25,00,000/-)
Net Total Amount in Claim (A-B)			1,60,00,000/-

10. It has been submitted by the Financial Creditor that the amount as mentioned above was disbursed as loan whereas the Corporate Debtor submits that the amount has been paid for equity investment in M/s SPT. It is available on record that on 22.11.2016, the Directors of the Corporate Debtor namely *Mr. Amit Rajput, Mrs. Anupam Rajput Chauhan, Mr. Mayank Rajput* (S/o Mr. Amit Rajput) and *Kartik Rajput* (brother of Mrs. Anupam Rajput) incorporated a company in the USA by the name of M/s Selma Precision Technologies, NC, LLC (SPT). The holding of the SPT was to the following effect:

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<i>Sr. No.</i>	<i>Name of Shareholders</i>	<i>Shareholding SPT (in Percentage)</i>
1.	Mr. Amit Rajput	30
2.	Mrs. Anupam Rajput	30
3.	Mr. Kartik Rajput	10
4.	Mr. Mayank Rajput	30
<i>Total Shareholding</i>		<i>100%</i>

11. It is seen that the amount of Rs. 1,60,00,000/- (Rupees One Crores Sixty Lakhs) was disbursed by the Financial Creditor to the Corporate Debtor in the manner as indicated, credited in the Axis Bank Account of the Corporate Debtor. There is no dispute between the parties regarding receipt of the aforesaid amount in India but the Corporate Debtor has disputed the nature of the transaction.
12. It is an admitted fact that SPT had acquired SPF on 14.12.2016. To acquire the 50% shareholding in SPT, the Financial Creditor was asked to send the consideration amount directly to the US Company but the Financial Creditor did not have the necessary permission from Reserve Bank of India to transfer the money directly. Hence, the LOI dated 23.12.2017 was signed between the parties wherein the parties agreed to participate equally (50:50) to restructure the existing entity i.e., SPT. The Financial Creditor agreed to pay a token amount of \$100,0000/- to the Corporate Debtor as token money to explore, participate in the business activity in SPT. The main application filed under section 7 of the Code, 2016 has not claimed/dealt with the token amount, which is already subject matter of proceedings in the US Court and

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a Receiver has been appointed therein. The main application under Section 7 of the Code was filed only with regard to amount of Rs. 1,60,00,000/- (Rupees One Crore Sixty Lakh Only) which was given to the Corporate Debtor by the Financial Creditor.

13. This Adjudicating Authority had raised a query with the Ld. Counsel for the Corporate Debtor regarding the mode of transfer of the amount from India for investment in SPT along with the approvals/sanctions of the regulatory authority for investment outside India. The Corporate Debtor contended that an amount of Rs. 1,85,00,000/- (Rupees One Crore Eighty-Five Lakhs Only) was given by the Financial Creditor and the same was converted into foreign currency for investment in SPT. However, the Respondent failed to show any evidence in this regard, therefore, we are not in a position to accept a transaction executed outside India as a foreign investment stated to have been made out of the loan. Moreso, we are only confining to the transactions undertaken in India for which details are placed before us.
14. In order to understand the liability of the Applicant/Corporate Debtor, we need to confine to the transactions that were carried out in India and subjected to the laws of India. An Agreement dated 14.07.2018 was signed between SPT, *Mr. Amit Rajput* (Director of Corporate Debtor Company) and *Mr. Ajay Kumar Jain* (Director of Financial Creditor Company) acknowledging that the Corporate Debtor shall return Rs. 1,95,00,000/-



(Rupees One Crore Ninety-Five Lakh Only) to the Financial Creditor. The relevant portion of the Agreement dated 14.07.2018 is reiterated as below:

“The funds put in by the third party shall be used to pay off the following liabilities:

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|------|---|---------------------------------|
| i. | <i>Mr. Jai Prakash Aggarwal along with his family members Mr. Sandip and Mrs. Sumitra Aggarwal and his company M/s Reckon Industries Ltd.</i> | <i>1.40 million USD</i> |
| ii. | <i>UTICA Leaseco, LLC</i> | <i>2.5 million USD</i> |
| iii. | <i>Mr. Kartick Rajput</i> | <i>0.502866 million USD</i> |
| iv. | <i>Warm Forging Pvt. Ltd. Bhiwadi, India</i> | <i>0.80 million USD</i> |
| v. | <i>Other Current Liabilities of First Party</i> | <i>0.20 million USD</i> |
| | | <i>Total 5.4028 million USD</i> |

The Second Party has assured the Third Party there is no other loan/liability except as mentioned above.

On receipt of 0.80 million USD, Warm Forging shall return the amount of Rs. 3,50,00,000/- (Rupees Three Crore Fifty Lacs Only) to Reckon Industries Limited and Rs. 1,95,00,000/- (Rupees One Crore Ninety-Five Lakh Only) to Surya Testing Services Pvt. Ltd. The same is confirmed by the Second Party who is Director in Warm Forging Pvt. Ltd.”

15. The above Agreement has been relied by both the parties and unequivocally contains the acknowledgement of Corporate Debtor towards the liability to refund an amount of Rs. 1,95,00,000/- (Rupees One Crore Ninety-Five Lakh Only) to the Financial Creditor. The said agreement clearly enunciates the mechanism to return the amount to the Financial Creditor.
16. We have also referred to the Balance Sheet of the Corporate Debtor for the year 2017-18. In the Balance Sheet of the Corporate Debtor under the classification of ‘Borrowing’ as ‘Unsecured Borrowing’, the borrowings for

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the year ending on 31.03.2017 is Rs. 3,50,00,000/- (Rupees Three Crores Fifty Lakhs Only) and for the year ending on 31.03.2018 is Rs. 5,35,00,000/- (Rupees Five Crores Thirty-Five Lakhs Only). The increase in the borrowings as reflected in the balance sheet is directly proportional to the amount disbursed by the Financial Creditor in the account of the Corporate Debtor i.e. the amount of Rs. 1,85,00,000/- (Rupees One Crores Eighty-Five Lakhs Only). It is an admitted fact that later, the Corporate Debtor returned the amount of Rs. 25,00,000/- (Rupees Twenty-Five Lakhs Only) on 22.05.2018, hence, the same is not reflected in the Balance Sheet for the year ending on 31.03.2018. The said disbursement is corroborated by bank entries filed by the Financial Creditor. Moreover, the Corporate Debtor has not denied the receipt of the amount by the Financial Creditor.

17. Combined reading of the Agreement dated 14.07.2018, as well as Balance Sheet for the year 2017-18 and the Bank statements, make it clear that the net amount of Rs. 1,60,00,000/- (Rupees One Crore Sixty Lakh Only) which was disbursed by the Financial Creditor to the Corporate Debtor was a 'Financial Debt'. In this context, we may refer to Section 5(8) of the Code which reads as below:

'5(8) "financial debt" means a debt along with 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;*

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- 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;*
-;

18. Section 5(8) Sub-clause (f) covers any amount raised under any other transaction having the commercial effect of a borrowing. There cannot be any denial to the commercial effect of the transaction since it is on the record that the amount which was given by the Financial Creditor was credited in the Axis Bank account. Thus, the case of the Corporate Debtor that the alleged amount cannot be treated as debt does not hold any substantial ground. The aforesaid amount comes within the definition of 'financial debt' under section 5(8)(f) of the Code. Hence, we are of the view the amount of Rs. 1,60,00,000/- (Rupees One Crore Sixty Lakh) is a 'financial debt' and application filed under section 7 was fully maintainable by the Financial Creditor.

19. Therefore, with regard to the questions raised regarding the maintainability and tenability of the main petition, it is observed that the main Application filed under Section 7 of the Code bearing *CP No. (IB)92/7/JPR/2021* is

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maintainable. The Applications numbered as *IA No. 652/JPR/2022* filed by the Corporate Debtor are rejected and disposed off accordingly.

20. The parties shall appear on 24.01.2024 for final arguments in the matter.

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**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

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**RAJEEV MEHROTRA,
TECHNICAL MEMBER**