

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
COURT-I
KOLKATA**

CP (IB) No. 323/KB/2021

I.A (I.B) No. 778/KB/2022

In the matter of:

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

Adhunik Corporation Limited
[CIN: U27106WB1996PLC076992]

...Financial Creditor

Versus

Shivam India Limited
[CIN: U23101WB1999PLC090748]

...Corporate Debtor

Date of pronouncement: 11/10/2023

Coram:

Rohit Kapoor : **Member (Judicial)**
Balraj Joshi : **Member (Technical)**

Appearances (through video conferencing):

For the Financial Creditor : Mr. Joy Saha, Senior Advocate
Mr. Ratnanko Banerji, Senior Advocate
Mr. D.N. Sharma, Advocate
Mr. Anoop Kumar, Advocate
Mr. Nilay Sengupta, Advocate
Mr. Sujit Banerjee, Advocate

For the Corporate Debtor : Mr. Rishav Banerjee, Advocate
Mr. Aishwarya Kumar Awasthi, Advocate
Mr. Rajarshi Banerjee, Advocate

ORDER

Per Rohit Kapoor, Member (Judicial)

1. This Court convened through hybrid mode.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 by Adhunik Corporation Limited, represented by **Shri Rama Shankar Gupta**, being the Chairman and Managing Director of the Financial Creditor authorized *vide* a Board Resolution dated 27.09.2021¹ seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against Shivam India Limited (“Corporate Debtor”).
3. It is submitted that Part –I of this petition contains particulars of the Financial Creditor. Part-II of this petition contains particulars of the Corporate Debtor.
4. Part –IV of the Petition contains details Financial debt for an amount of **Rs.42,47,32,067/- (Rupees Forty Two Crore Forty Seven Lakh Thirty Two Thousand and Sixty Seven only)** as on 30.09.2021.
5. The Corporate Debtor was incorporated on 13 December 1999, having CIN: U23101WB1999PLC090748, under the Companies Act, 1956. It’s registered office is at Govind Mahal, 2nd Floor, Wood Street, Flat No.1, Kolkata-700016. Therefore, this Bench has jurisdiction to deal with this petition.
6. The present petition was filed on 3rd November 2021 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make a payment of a sum of **Rs.42,47,32,067/- (Rupees Forty Two Crore Forty Seven Lakh Thirty Two Thousand and Sixty Seven only)** as on 30.09.2021. The date of default is 11.10.2021

¹ Annexure-A1 at Page 22 of the Company Petition

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i.e., the day on which the notice dated 11.10.2021 was received by the Corporate Debtor.

Brief facts of the case are summarized hereinbelow:

7. The Financial Creditor is a company limited by shares and is engaged in the business of manufacturing steel and iron products and providing corporate finance. The Corporate Debtor is also a limited company and is engaged in Steel and Iron bars, TMT Rod and other allied products.
8. In the year 2015, the representative of the Corporate Debtor approached the representative of the Financial Creditor for financial assistance required to run their factory/works, situated at Raturia, Angadpur Industrial area, District: Paschim Bardhaman, Durgapur, Pin-713217, West Bengal which was lying closed for 2 years for want of working capital. The Financial Creditor through one of its sister concerns i.e., Adhunik Industries Limited provided financial assistance upon execution of an agreement dated 18.05.2015 which was performed for 6 (six) months without any difficulties.
9. Later on, the Corporate Debtor once again approached the Corporate Debtor to enter into a fresh agreement for a further period of 5 (five) years and they entered into an agreement dated 23.06.2020² and agreed to abide by the terms as indicated therein. Under such agreement, the Financial Creditor provided finance to the Corporate Debtor in order to meet the financial requirements of the Corporate Debtor.
10. By way of the said agreement, the borrowed amount was secured by depositing 69.42% equity shares of the Corporate Debtor with one M/s Trans Scan Securities Private Limited, a Depository participant and signatories were Mr. Jugal Kishore Agarwal on behalf of the Financial

² Annexure A-4 at Pages 32 to 41 of the Petition

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Creditor and Mr. Pankaj Kumar Pandey on behalf of the Corporate Debtor. The said shares were kept as collateral and specific security towards the money and materials towards the financial assistance provided thereto.

11. The Financial Creditor duly financed a sum of Rs. 27.85 crores which includes a direct payment of Rs. 23.49 crores. Additionally raw materials for an aggregate sum of Rs. 4.36 crores were also provided. The Corporate Debtor made profits by utilizing the said sum and as per the terms of the loan agreement, the Financial Creditor raised monthly bills for sales commission amounting to a sum of Rs. 3.17 crores out of which Rs.11.55 Lakhs is still pending.
12. The Financial Creditors arranged various suppliers of raw materials and the Corporate Debtor accepted and consumed such raw materials in its ordinary course of business and there is an outstanding due of Rs. 11.78 Crores. If the Corporate Debtor refuses to pay the same, the Financial Creditor will be prosecuted by such suppliers in order to make such payment. It is submitted that the Corporate Debtor is entitled to claim interest @ 18% per annum as per the provisions of Interest Act over the outstanding financed w.e.f. March, 2021.
13. Besides the above, the Corporate Debtor did not deposit the TDS for the entire commission amounting to Rs. 10.07 Lakhs. A chart showing the computation of the dues owed to the Financial Creditor is as follows:

Particulars	Amount Financed (in Rs.)
Direct Financial Assistance by Fund Infusion	23,49,11,000/-
Direct Financial Assistance by supply of raw materials	4,35,58,197/-
Outstanding of raw materials supplied in credit from 3 rd parties	11,78,40,916/-
Outstanding sales commission	11,54,602/-

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Outstanding TDS	10,07,396/-
Interest @ 18% from 01.03.2021 to 30.09.2021 on direct financial assistance by fund infusion and by supply of raw materials	2,62,59,956/-
Total	42,47,32,067/-

14. The Corporate Debtor with the help of such financial assistance came out from their negative worth and since March 2021 started non co-operation with the Financial Creditor by stopping the payment of sales commissions and other statutory dues. It also removed the Supervisor of the Financial Creditor from the premises.

15. The Corporate Debtor on 23.09.2021³ had addressed a letter to the Financial Creditor seeking resile from its obligations to pay such debt. The Financial Creditor by a letter dated 11.10.2021⁴ had recalled the loan amount due to the Corporate Debtor seeking repayment of the debt due. The said letter was received by the Corporate Debtor on the same day.

A summary of the contents of the Reply Affidavit filed by the Corporate Debtor are mentioned below:

16. The Corporate Debtor has contended that the debt is not a financial debt and there has not been any default with respect to such debt. It is a settled proposition of law that the Financial Creditor is mandatorily required to furnish any evidence in default in support of its application under Section 7 IBC, 2016.

17. The manufacturing unit of the Corporate Debtor situated at Raturia, Angadpur Industrial Area, District Paschim Bardhaman, Durgapur-713215 has an approximate annual operational capacity of 225000MT

³ Annexure A-12 at Pages 173 to 184 of the Petition

⁴ Annexure A-13 at Pages 185 to 191 of the Petition

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but the Financial Creditor never tried to make available the required quantity of raw materials to utilize optimum production capacity of the said unit, thus the Corporate Debtor has suffered losses and damages for a sum of Rs.50,00,00,000/- over the period between June 2020 to March 2021 by reason of increased cost of production. The Financial Creditor also did not provide with the monthly production schedule of the said unit which is a violation and/or breach of the agreed terms of the agreement entered between the parties on 23.06.2020

18. The Corporate Debtor entered into a memorandum of agreement dated 23.06.2020 with the Financial Creditor for a term of 5 (five) years whereby the Financial Creditor agreed to supply raw materials and infuse sufficient funds for the purpose of managing the said unit. On 23.06.2020 the Financial Creditor infused a sum of Rs. 15,00,000/- towards first infusion of funds and the Corporate Debtor made the unit operational by 03.07.2020 i.e., within 15 days from the first infusion.
19. It is stated that 69.42% free and unencumbered shares belonging to promoters of the Corporate Debtor were kept in a separate joint Demat account of both the parties which were and are still held as specific security towards the money and materials provided by the Financial Creditor in terms of the said agreement. In para 6 of the Reply Affidavit, the Corporate Debtor contended that the abovementioned shares were secured in terms of the agreement dated 23.06.2020 and not to secure any loan amount.
20. Pursuant to entering into the said agreement and in order to keep full control over the funds so infused and to properly monitor the realization and utilization of funds in the existing Bank Account of the Corporate Debtor being account no. 36737087161 maintained with the State Bank of India, Jeevandeep Branch, the Financial Creditor prevailed upon the Corporate Debtor to allow the Financial Creditor to operate the said

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bank account exclusively through its authorised representative. The Corporate Debtor in good faith and to facilitate smooth functioning of the said unit agreed to the same and accordingly the said account was managed and operated by the Financial Creditor exclusively through its own authorised representative Mr. Jugal Kishore Agarwal.

21. The Corporate Debtor in para 3 (r) of its Reply Affidavit has contended that it was agreed and understood between the parties that the funds so infused by the Financial Creditor were never to be treated as a debt since the Financial Creditor was entitled to recover the same from the sale proceeds of the finished goods. Thereafter the said goods were removed by the Financial Creditor under its supervision for disposal by way of sale to various parties of its choice.
22. It is also stated that the raw materials provided by the Financial Creditor were through its own chosen suppliers for the purpose of production of finished goods such as billets and wire rods. Thereafter the said finished goods were removed under the supervision of the Financial Creditor for disposal by way of sale to various parties of the choice of the Financial Creditor. The Corporate Debtor also came to know that the Financial Creditor made wrongful gains/profits by supplying raw materials at a price higher than the then prevailing market price and selling the finished products at a price lower than the then prevailing market price. The Corporate Debtor had never contemplated such kind of malafide and illegal act and conduct on the part of the Financial Creditor while entering into the said agreement.
23. It is further stated that out of the sale proceeds from the disposal or sale of finished goods, the Financial Creditor deducted commission at the following rates:

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Particulars	Commission Charges (per ton)
Billets	Rs.300/-
Hot rolled finished products and coils	Rs.600/-

The Corporate Debtor therefore never received any payment from the Financial Creditor out of the said proceeds of the finished goods.

24. The Corporate Debtor suffered loss and damages reasonably assessed at Rs.50,00,00,000/- approximately on the basis of the limited papers and documents available with the Corporate Debtor consequent to such wrongful malafide and illegal act and conduct of the Financial Creditor. The Corporate Debtor is further enquiring into the actual loss and damages suffered by it which can only be ascertained upon receipt of further particulars, papers, documents by the Corporate Debtor.
25. It also came to the knowledge of the Corporate Debtor that the Financial Creditor had made advances to various person or persons out of the funds so infused in the bank account of the Corporate Debtor maintained with the State Bank of India. By doing the same, on one hand it increased the liability of the Corporate Debtor and on the other hand actually benefitted itself by syphoning such funds with malafide intent and motive aimed at usurping the said unit. The Financial Creditor always had complete control over the business of the Corporate Debtor which was the principal source of revenue for the Corporate Debtor.
26. The Corporate Debtor contends that even after repeated requests, the infusion of funds by the Financial Creditor on account of electricity consumption, labour payment, salary of the directors, costs of procurement of consumables and stores became and continued to be erratic affecting the normal and smooth functioning of the said unit. Owing to delayed infusion of funds by the Financial Creditor on

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account of electricity charges payable to DVC, the Corporate Debtor had to pay penal charges levied by DVC amounting to Rs. 59,89,207/- in the month of March 2021, in order to keep the said unit operational. Besides losing the rebate allowed by DVC for timely payment of its bills for the month of July 2020 to March 2021 amounting to Rs.62.48 lacs, the amount that remained unpaid towards electricity charges from January 2021 to March 2021 works out to be Rs.6.72 crore due to failure on the part of the Financial Creditor.

27. The period for such agreement was 5 (five) years from the date of the said unit becoming operative, but the Financial Creditor caused breach of its obligations to infuse sufficient funds especially towards the electricity dues and salary of workers employed in the said unit. Consequent to the failure to discharge such obligations, the electric supply of the said unit got disconnected in March 2021. The Corporate Debtor now has to pay a sum of Rs. 11 crores to DVC in order to restore the electric supply at the said unit. Besides this, on account of unpaid electricity charges, its restoration charges including interest and penal charges, the Corporate Debtor is entitled to claim and receive a sum of Rs.17.72 crore approximately from the Financial Creditor. The Corporate Debtor is also incurring the idle labour charges of Rs. 15,00,000/- per month due to such breach of terms of the agreement. Therefore, to make the said unit operational, the Corporate Debtor has to incur expenses in excess of Rs.19 crores approximately, for no fault on its part.
28. The Corporate Debtor states that as per the terms of the agreement, it was the duty of the Financial Creditor to keep the unit operative and it was also incumbent upon the Financial Creditor to infuse funds promptly so that the operation of the said unit is not in jeopardy for a period of at least 5 (five) years. The agreement was terminable only at

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the option of the Financial Creditor, but the Financial Creditor neither acted in terms of the agreement nor did it terminate the same and purposely kept the agreement alive by keeping the unit closed for want of further infusion of funds. Therefore, the Financial Creditor is bound to compensate the Corporate Debtor.

29. In para 4 (ii) of its Reply Affidavit, the Corporate Debtor has stated that it has incurred loss and damages approximately to the tune of Rs.121 crores as on April, 2022 which is likely to increase substantially once the Corporate Debtor completes enquiry into the same upon receipt of complete information.
30. The Corporate Debtor by a letter dated 23.09.2021 invoked clause 21 of the said agreement for resolution of the aforesaid disputes and differences and thereby nominated Piyush Kumar Pandey as its representative. In reply to the said letter, the Financial Creditor by a letter dated 11.10.2021 for the first time sought refund of Rs.27.85 crores and also raised false allegations that the Corporate Debtor by selling the finished goods and products has earned profit to the extent of Rs.46.22 crore.
31. The aforesaid letter of the Financial Creditor dated 11.10.2021 was replied by the Corporate Debtor vide a letter dated 09.12.2021 wherein the Corporate Debtor nominated its arbitrator and called upon the Financial Creditor to nominate its nominee arbitrator so that the two arbitrators could appoint a third and presiding arbitrator and accordingly constitute the arbitral tribunal for adjudication of disputes between the parties in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The said letter was received by the Financial Creditor and by a letter dated 22.12.2021; the Financial Creditor did not agree to the appointment of the arbitrator and did not appoint its nominee arbitrator.

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32. In the above premises, the Corporate Debtor was constrained to file an application under Section 11 of the Arbitration and Conciliation Act, 1996 being Arbitration Petition No. 360 of 2022⁵ before the Hon'ble High Court at Calcutta which is still pending adjudication.⁶
33. The Corporate Debtor also denies that Mr. Rama Shankar Gupta is not authorized to file the application under Section 7 of IBC, 2016
34. The Corporate Debtor in para 7 of the Reply Affidavit denies that since March 2021, the Corporate Debtor started non co-operation with the petitioner or forcefully removed the supervisor of the petitioner from the plant or stopped payment of Sales commissions or other statutory dues of the petitioner.
35. Further, in para 5 of the reply affidavit, the Corporate Debtor has denied that the Financial Creditor has provided it with a loan of Rs. 39,84,72,111/- or any part thereof. It has also denied the last disbursement date as provided by the Financial Creditor as also the fact that it gained 20% profit from the sale or manufacture of finished products.
36. It denies that the disbursement of considerations by the Financial Creditor was for time value of money or that the Corporate Debtor was under any liability or obligation to return such amount. By a letter dated 23.09.2021, the Corporate Debtor demanded its lawful dues and sought settlement of disputes. It is contended that a meaningful reading of the memorandum of agreement dated 23.06.2020 would make it clear that it was the responsibility of the Financial Creditor to adequately infuse funds, bring raw material, have it converted into finished products and sell the same and recover all costs charges and expenses incurred by the

⁵ Annexure A of the Reply Affidavit

⁶ Annexure B of the Reply Affidavit

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Financial Creditor including the sales commission out of the sale proceeds of the said finished products and pay surplus amount to the Corporate Debtor but surprisingly nothing ever came to be paid.

37. It is also contended that the Financial Creditor is neither acting in terms of the memorandum of agreement dated 23.06.2020 nor terminating the same. The present application has been filed as and by way of a counter blast to the initiation of the dispute resolution mechanism envisaged under clause 21 of the said agreement by the Corporate Debtor.

A summary of the contents of the Rejoinder Affidavit filed by the Financial Creditor are summarized as hereinafter:

38. The Rejoinder Affidavit has been filed by the Financial Creditor pursuant to the order dated 16.11.2022⁷ passed in I.A. No. 1413 of 2022.
39. The Financial Creditor in its Rejoinder Affidavit has shown that the debt as claimed in the Section 7 petition is a financial debt and the same is reflected from its financial statements for the Financial Years ending on March 31, 2022.⁸ In such financial statement, reference has been made to note 17 and 19 at internal page 14. Therefore, it would be incorrect to suggest that the claim arising out of the subject agreement was not considered a financial debt despite the default on the part of the Financial Creditor.
40. The Financial Creditor states in its Rejoinder Affidavit that the plea taken by the Corporate Debtor that it has filed an application under Section 11 of the Arbitration and Conciliation Act, before the Hon'ble High Court at Calcutta which is still pending is a pre-existing dispute is

⁷ Annexure-R/1 of the Rejoinder Affidavit

⁸ Annexure- R/2 of the Rejoinder Affidavit

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not maintainable as the existence of pre existing dispute is immaterial for considering an application under Section 7 of IBC, 2016.

Contents of Surrejoinder filed by the Corporate Debtor are summarized as hereinafter:

41. The Corporate Debtor in its Reply Affidavit denies the contents of the Rejoinder Affidavit filed by the Financial Creditor. It denies that the funds infused by the Financial Creditor is a financial debt as reflected in the financial statements for the Financial Years ended on 31.03.2022.
42. The Corporate Debtor also states that it is a settled proposition of law that the Adjudicating Authority can exercise discretion while admitting a petition under Section 7 of IBC, 2016. The Adjudicating Authority can even refuse to admit an application under Section 7 of the Code, even if the application is otherwise complete considering the facts and circumstances present in a particular case.
43. It states that the nature of transaction as entered between the Financial Creditor and Corporate Debtor does not give rise to any debt let alone a financial debt and reliance upon the application being A.P. No. 360 of 2022 filed by the Corporate Debtor pending adjudication before the Hon'ble High Court at Calcutta would bring forward the real nature of the transactions entered into between the Financial Creditor and Corporate Debtor and the facts and circumstances leading to the disputes and differences between the parties.
44. It further stated that the contentions of the Corporate Debtor in its Reply Affidavit be taken into consideration and the present application be dismissed in view of the facts and circumstances of the present case.

Submission of learned Senior Counsel appearing for the Financial Creditor

45. The Ld. Senior Counsel for the Financial Creditor submits that the sum of Rs.23,49,11,000 was in the form of cash advance/loan by the Financial Creditor to the Corporate Debtor which cannot under any circumstances be classified to be an operational debt arising out of a claim in respect of any “goods or services”.
46. He placed reliance upon the judgment of the Hon’ble Supreme Court in the matter of **Orator Marketing Pvt. Ltd. Versus Samtex Desinz Pvt. Ltd.**⁹ in which it was held as follows:-

“22. The NCLT and NCLAT have overlooked the words “if any” which could not have been intended to be otiose. ‘Financial debt’ means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause(f) of Section 5(8), in terms whereof ‘financial debt’ includes any amount raised under any other transaction, having the commercial effect of borrowing.

31The definition of ‘Financial Debt’ in Section 5(8) of IBC does not expressly exclude an interest free loan. ‘Financial Debt’ would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.”

Hence, the cash advance/cash infusion of Rs23,49,11,000 would not cease to be a ‘financial debt’ merely because the same did not provide for any interest.

⁹ 2023 3 SCC Online SC 753

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47. He also placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Pioneer Urban Land and Infrastructure Ltd. v. Union of India**¹⁰ in which it was held that the definition of financial debt is very wide and that sub-clause (f) of Section 5(8) of the IBC is a “catch all” provision in the nature of a residuary provision which would subsume within it the transactions which do not impact any other sub-clauses of section 5(8) of the Insolvency and Bankruptcy Code. In this regard particular reference made to paragraph 74, 75 and 76 of the said judgment.
48. The Ld. Counsel also submitted that it has been categorically stated in the Memorandum of Agreement that the infusion of funds by the Financial Creditor to the Corporate Debtor is clearly and fully returnable.¹¹
49. It was also submitted that other than the direct cash fusion or cash advance of Rs.23,49,11,000, the Financial Creditor from time to time made payment to Corporate Debtor which were utilized for purchase of raw materials and payment to business creditors of Corporate Debtor and in any event the direct cash infusion/cash advance of Rs.23,49,11,000 to the accounts of Corporate Debtor is far in excess of the threshold limit of Rs.1 Crore provided under section 4 of the IBC and independently invokes the provision of the IBC
50. The Ld. Counsel while answering the contention of the Corporate Debtor with regard to the termination of the Memorandum of Agreement has stated that the Corporate Debtor after issuing a notice dated 23.09.2021¹² under Section 21 of the Arbitration and Conciliation Act 1996 seeking invocation of arbitration and after receiving the letter

¹⁰2019 8 SCC 416, (paragraph 74, 75 and 76)

¹¹ Page 34 of the Petition

¹² Page 73 of the Petition

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dated 11th October 2021 by the Financial Creditor demanding repayment of its dues cannot contend that there is no termination of the MOA.

51. The Ld. Counsel also placed reliance on the judgment in **Mobilox Innovations Pvt. Ltd.-Versus-Kirusa Software Pvt.Ltd**¹³ in which it was held that a claim under section 7 of the IBC cannot be defeated by raising a dispute and that the court in a proceeding under section 7 requires satisfaction only with regard to the existence of a debt and existence of a default.
52. The Ld. Senior Counsel further submitted that it was provided in the Memorandum of Agreement that the goods manufactured by the Corporate Debtor would constitute properties of the Financial Creditor and an amount of Rs.600 per ton from the sale of hot rolled finished products and Rs. 300 per ton from the sale of Induction Furnace billets would be paid to the Financial Creditor which merely constitutes the component of “time value for money”/ interest on the financial debt of the Financial Creditor. It was also mentioned in the agreement that the amount of fund invested would be returnable on its expiry or after the agreement has ended.
53. The Ld. Counsel for the Financial Creditor also submitted that the judgments relied upon by the Corporate Debtor do not apply to the present case as the facts and circumstances in those judgments are completely different than that in the present case.

Analysis and Findings

54. Heard the learned Counsel appearing for the Financial Creditor and the Corporate Debtor and perused the records.

¹³ 2018 (1) SCC 353, Paragraph 37

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55. The Memorandum of Agreement (for brevity 'MoA') dated 23.06.2020 was entered between the parties wherein it was agreed that as the Corporate Debtor due to financial constraints was unable to operate the Unit, the Financial Creditor would infuse funds in the interim in order to make the said Unit operative. It was also agreed between the Financial Creditor and the Corporate Debtor that the funds so infused would be fully returnable. The terms and conditions relating to the above aspects as contained in the agreement are reproduced below:

“And Whereas the management of Shivam, represented by the Promoters herein, is not in a position to operate the said Unit due to financial constraints and the said Unit is now closed for over 6(six) months.

And Whereas the said management of Shivam has in deference to the desire expressed by Adhunik agreed to recommence the operations of the said Unit with funds in the interim to be provided by Adhunik since Shivam does not have the ability to infuse any further amount of funds mandatorily required to make the said Unit operative.

And Whereas Shivam has suggested that some amount of funding would be immediately required to recommence the operations of the said Unit.

And Whereas Adhunik has, on an interim basis, agreed to infuse the said funds and to facilitate operations of the said Unit by effecting supply of the raw-materials during the period of this MoA, all on the clear understanding of the Parties that the entire funds so infused by Adhunik is fully refundable.¹⁴”

¹⁴ Page 33-34 of the Petition

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56. We also refer to some relevant conditions of the said MoA which are reproduced as hereunder:

“4. The said Unit shall be run and operated in terms of this MoA by Shivam for such period(s) as may be decided by Adhunik subject to the maximum period of 5 (five) years envisaged under this MoA. It is hereby clarified and agreed between the Parties hereto that during the term of this MoA, the said Unit shall be run and operated by Shivam in accordance with the recommendations made by Adhunik.”

7. Adhunik shall supply raw materials to Shivam for its said Unit at the prevailing market prices for manufacturing Hot Rolled Finished Products as well as for Billets through Induction furnace route to be subsequently charged in rolling mill in hot charging process and the left-out billet not charged, will be sold. During the term of this MOA, Adhunik shall remove the entire finished products, coils and billets made out of the raw materials supplied by Adhunik, for disposal at the prevailing market prices and Adhunik shall be entitled to the following charges/commission out of the sale proceeds:--

(i) For Hot-rolled finished products and coils - Rs 600/- per ton; and

(ii) For Induction Furnace sale-able Billets-Rs. 300/- per ton.

(iii) Adhunik shall also be fully entitled to remove By-products like Mis-rolls and end-cutting etc.

Thus, while removing the billets and hot rolled finished products including coils as above from Shivam, Adhunik will deduct from the sale proceeds the above mentioned Rs 300/- (for Billets) and Rs 600/- (for hot rolled finished products and coils), as the case may be. In addition, Adhunik shall also deduct the raw-materials costs as stated hereinabove, the operational costs, the selling costs and all other associated expenses incurred by it in the course of such manufacture and the balance, if any, remaining representing the surplus after meeting all costs provided and/or infused by Adhunik, shall be made available to

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Promoters of Shivam for meetings costs of the further operations in the said unit.

8. Adhunik shall within the seventh day of each calendar month provide a statement of account to Shivam for the preceding calendar month which will reflect the total amount paid including the amount of raw materials, as well as details of all other materials supplied to Shivam for its operations as up to the date. Shivam undertakes to forthwith check and confirm the same in writing within maximum three days thereafter.

11. . Till such sums are fully repaid by Shivam to Adhunik, Adhunik shall be entitled to exercise lien over all raw-materials supplied by Adhunik to Shivam and also on all finished products manufactured at the said factory of Shivam including stores, and accordingly the parties do hereby agree and undertake that during the term of this MoA all goods, materials and inventory at all the factory of Shivam shall remain hypothecated to Adhunik and Shivam shall be under an obligation not to effect sale of any finished goods made at the factory of Shivam during the term of this MoA without specific written permission of Adhunik. The shares in Shivam held in separate Demat Account in terms of this MoA shall also be continued to be held as collateral by Adhunik till sum sums are fully repaid by Shivam to Adhunik.

19. This MoA shall remain valid for a perlod of 5(five) years from the date the said unit is operative. This period may, however, be extended on mutually agreed terms. Till the time Adhunik agrees to continue the MOA, Shivam shall not be entitled to terminate the MoA during its validity period.

21. Arbitration: The parties agree to negotiate in good faith to resolve any dispute between them regarding this Agreement. If the negotiation does not resolve the dispute to the reasonable satisfaction of the Parties, then each of the Parties shall nominate a person with respectable professional standing and unimpeachable conduct at, its representative. These representatives shall, within 30 (thirty) days of a written request by any party to call such a meeting, meet in person and alone

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(except for one assistant of each party) and shall attempt in good faith to resolve the dispute.

If the disputes cannot be resolved by such persons in such meeting, any of the parties. may invoke arbitration proceedings for the resolution of the disputes and differences which shall be finally settled under the Arbitration and Conciliation Act (as amended) , by two arbitrators appointed, one of whom shall be appointed by each party, within 30(thirty) days from the date any party invokes arbitration. The language of Arbitration proceedings shall be in English. As mutually agreed by both the parties the place of Arbitration shall be Kolkata.

The award of the arbitration shall be final and binding upon the parties, and the parties agree to be bound by the same.”

57. After having accorded consideration to the aforementioned conditions of the MoA, we are of the view, the MoA was a business agreement wherein admittedly, the Financial Creditor infused the funds. However, this infusion was not against any consideration for the time value of money. In **Swiss Ribbons Pvt Ltd & Anr. v. Union of India & Ors.**¹⁵ , the Supreme Court held as follows:

“23. A perusal of 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. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an —operational debt would include a claim in respect of the provision of goods or services, including employment, or a

¹⁵ (2019) 4 SCC 17

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*debt in respect of payment of dues arising under any law
and payable to the Government or any local authority.”*

58. In the present case, it was a business arrangement and somehow, this business arrangement could not fructify.
59. We are not inclined to accept the contention of the Financial Creditor with regard to debt or default within the meaning of Section 7 of the Insolvency and Bankruptcy Code, 2016 in view of the above position based on the terms of the agreement and the law.
60. Hence, **C.P.(I.B.) No. 323/KB/2021** stands **rejected**.
61. In view of the above observations, **I.A.(I.B.) No. 778/KB/2022** is accordingly **disposed of**.
62. A certified copy of this order may be issued, if applied for, upon compliance with all requisites.

(Balraj Joshi)
Member(Technical)

(Rohit Kapoor)
Member (Judicial)

This order is pronounced on the 11th day of October, 2023

FA_LRA