

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA  
C.P (IB) No. 2011/KB/2019**

**In the matter of:**

A 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.

And

**In the matter of:**

Seaview Merchants Private Limited (CIN U51909WB2010PTC145251), a Company incorporated under the Companies Act, 1956, having its registered office at 7B, Kiran Shankar Roy Road, 3<sup>rd</sup> Floor, Kolkata – 700001, West Bengal.

...Financial Creditor

Versus

**In the matter of:**

Ashish Vincom Private Limited (CIN U51109WB2007PTC115199), a Company incorporated under the Companies Act, 1956 having its registered office at 64, Bentick Street, Kolkata 700069, West Bengal.

...Corporate Debtor

**Coram:**

Shri Rajasekhar V.K.	:	Member (Judicial)
Shri Balraj Joshi	:	Member (Technical)

**Appearances (through Video Conferencing)**

1. Ms. A. Rao, Advocate	}	For Financial Creditor
2. Mr. Sanwal Tibrewal, Advocate	}	
1. Mr. Abhishek Sikdar, Advocate	}	For Corporate Debtor
2. Ms. Pallavi Ray, Advocate	}	

**Date of Hearing: 08.12.2021**

**Date of pronouncing the order: 15.12.2021**

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*Seaview Merchants Private Limited v. Ashish Vincom Private Limited*

**ORDER**

*Per Rajasekhar V.K., Member (Judicial)*

1. The Court is convened by video conference today.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (“the Code”) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Seaview Merchants Private Limited (“Financial Creditor”), a Company incorporated under the Companies Act, 1956, having its registered office at 7B, Kiran Shankar Roy Road, 3<sup>rd</sup> Floor, Kolkata – 700001, West Bengal, by Mr. Anish Chowdhary, Director, duly authorised *vide* board resolution dated 05.07.2019 for initiation of Corporate Insolvency Resolution Process (“CIRP”) against Ashish Vincom Private Limited (“Corporate Debtor”), a Company incorporated under the Companies Act, 1956 having its registered office at 64, Bentick Street, Kolkata 700069, West Bengal.
3. The present Petition was filed on 19.11.2019 before this Adjudicating Authority on the ground that a sum of Rs.20,00,000/- (Rupees Twenty Lakh only), carrying interest @ 12% per annum, as Inter Corporate Deposits (“ICD”) was advanced by the Financial Creditor to the Corporate Debtor on 16.07.2015. The total amount to be claimed in default by the Financial Creditor is Rs.30,17,691/- (Rupees Thirty Lakh Seventeen Thousand Six Hundred and Ninety only) including interest as on 30.06.2019. The date of default is stated to be 31.03.2018.
4. It is submitted in the Petition, Part – II that the authorised share capital of the Corporate Debtor is Rs.85,00,000/- (Rupees Eighty Five Lakh only) with paid up Capital as Rs.84,72,850/- (Rupees Eighty Four Lakh Seventy Two Thousand Eight Hundred Fifty only).

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5. A supplementary Affidavit has been also filed by the Financial Creditor on 06.11.2020 after leave was granted by this Afjudicating Authority to the Financial Creditor to bring on record the documents which came to the knowledge of the Financial Creditor after filing the present case.
6. Submissions by the Ld. Advocate on behalf of the Financial Creditor:
- a) The Financial Creditor paid Rs.20,00,000/- (Rupees Twenty Lakh only) towards unsecured loan to the Corporate Debtor on 16.07.2015 which was repayable on 31.03.2018 along with interest @ 12% per annum.
  - b) Tax Deducted at Source (“TDS”) under section 194A (Interest other than ‘Interest on Securities’) was duly made under the provision of Interest made by the Corporate Debtor in their books of accounts until 31.03.2018. Section 194A of Income Tax Act deals with the provisions relating to Tax Deducted at Source on interest other than on securities.
  - c) The Corporate Debtor duly acknowledged the loan by putting their signatures on the Confirmation of Accounts for the Financial Year ended on 31.03.2016 and 31.03.2017 but failed to refund the loan advance and interest to the Financial Creditor on and after 31.03.2018.
  - d) The loan advanced to the Corporate Debtor as on 31.03.2018 amounted to Rs. 26,44,221 (Rupees Twenty Six Lakh Forty Four Thousand Two Hundred Twenty One only) as on 31.03.2018.
  - e) The Financial Creditor accessed the Ministry of Corporate Affairs website and downloaded the Annual Returns of the Corporate Debtor for the year ended on 31.03.2018 and 31.03.2019<sup>1</sup>. It is submitted that on bare perusal of the Audited

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<sup>1</sup>Annexure H, Pages – 05 – 90 of the Supplementary Affidavit.

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Balance Sheet of the Corporate Debtor for the year ended on 31.03.2019, it can be seen that there is a voluntary admission of the debts due to the Financial Creditor and the same has been recorded under the head '*Unsecured Loan at the end of the Year*'<sup>2</sup>.

- f) The Financial Creditor in support of its claim has annexed the following documents to prove the existence of financial debt:-

<i>Sl. No.</i>	<i>Particulars</i>
1.	Ledger Statement of Corporate Debtor in the books of Financial Creditor.
2.	Banking Statement of the Financial Creditor showing the transaction of Rs. 20,00,000 (Rupees Twenty Lakh only).
3.	Confirmation of Accounts for Financial Year 2015-16 and 2016-17, from the Financial Creditor, addressed to the Corporate Debtor.
4.	Audited Balance Sheet of the Corporate Debtor for the Financial Year as on 2017-18 and 2018-2019

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<sup>2</sup>Pages 48, 55 &61 of the Supplementary Affidavit.

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7. The Corporate Debtor has filed its reply affidavit, wherein the Corporate Debtor submits as follows:

- a) The said Petition is *ex-facie* barred by limitation because the principal amount was disbursed by the Financial Creditor on 16.07.2015. The allegation by the Financial Creditor is not supported by any contemporaneous documents; neither there are any records to suggest that the Corporate Debtor borrowed the money. The Financial Creditor has failed to establish that the Corporate Debtor had raised the amount under any transaction having commercial effect of borrowing. Also, there was no Agreement nor any interest was disbursed by the Corporate Debtor to the Financial Creditor nor there was any agreed rate of interest between the parties or any repayment was involved. Further, The Financial Creditor had never demanded any amount from the Corporate Debtor in the last 3 (Three) years.
- b) The allegation made by the Financial Creditor against the Corporate Debtor is in violation of Section 186 (2) of the Companies Act, 2013, where it says that no Company shall directly or indirectly (a) give any loan to any person or other body corporate; (b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and (c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding sixty percent of its paid-up share capital, free reserves and securities premium account or one hundred percent of its free reserves and securities premium account, whichever is more.
- c) The documents relied by the Financial Creditor to substantiate its claim on the TDS Statement is not valid because the Financial Creditor has failed to show that the TDS is towards the interest. The Ld. Counsel appearing on behalf of Corporate Debtor also relied on *Prayag Polytech Private Limited v. Gem*

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*Batteries Private Limited*,<sup>3</sup> where the Hon'ble NCLAT held that deduction of TDS would not be a sufficient ground to conclude that there was a financial debt. TDS can be deducted for various reasons.

- d) The unilateral deposit of the money by the Financial Creditor and terming it as an unsecured loan and reflecting the same in their own book without any bank statement reflecting the interest payment would not make the Financial Creditor as "Financial Creditor" under section 5(7) of the Code.
  - e) Further, the Corporate Debtor denies that the Financial Creditor has ever raised or served any confirmation of accounts to the Corporate Debtor. The documents annexed by the Financial Creditor as 'ANNEXURE – G' in the application is false fabricated.
8. We have heard the Ld. Counsel appearing for the parties and perused the records and the concerned documents annexed to the Petition.
9. Albeit, it is well settled principle that the Inter-Corporate Deposits are financial debts but in a transaction of a deposit of money or a loan, a relationship between the parties must come into existence, mere transfer of money from one account to another would not constitute loan/deposits unless the intention of the parties are considered and substantiated with valid documents<sup>4</sup>.
10. Further, as envisaged under rule 3(d) of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, a "*financial contract*" would encompass setting of the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment.

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<sup>3</sup>Company Appeal(AT) (Insolvency) No. 713 of 2019 dated 24.04.2019.

<sup>4</sup> Durga Prasad Mandelia and Others v. ROC, Maharashtra, 1985 SCC OnLine Bom 340 : (1987) 61 Comp Cas 479

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11. The Financial Creditor has failed to satisfy the Adjudicating Authority of any existing ***financial contract/agreement*** between the parties, including the agreed rate of interest or any amount of interest credited or is being received by the Financial Creditor from the Corporate Debtor. Further, no documents were relied on by the Financial Creditor evidencing that there was any demand of ICD by the Corporate Debtor and that the same was acknowledged.
  
12. It would be relevant to refer to the preamble of the Code, 2016, which envisages that the rudimentary tenets of the code are maximisation of value of assets by Resolution Process and to promote entrepreneurship and to balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues. Further, the same has been reiterated by the Apex Court in *Swiss Ribbons Private Limited & Another v. Union of India and Others*, where the Hon'ble Supreme Court has explicitly opined that the primary focus of the legislation is to ensure ***revival and continuation of the corporate debtor***<sup>5</sup>.
  
13. The trend of granting unsolicited Inter Corporate Deposit by the Creditors and earning large slab of interest thereon, as compared to the normally charged interest rate and then taking the passage under the Code for recovering the interest and principal dues on default of payment of interest would make the Adjudicating Authority wear the hat of a debt-recovery mechanism.
  
14. Hence, initiating a Corporate Insolvency Resolution Process at the behest of the Creditor whose *prima facie* intention has always been to generate colossal interest would not only restrain the idea of promoting entrepreneurship but also do injustice to the fundamental objective of the Code.
  
15. In the view of the above, application bearing CP (IB) No. 1171/KB/2019 filed by Seaview Merchants Private Limited, the Financial Creditor, under section 7 of the

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<sup>5</sup> (2019) 4 SCC 17, dated 25.01.2019.

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Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Ashish Vincom Private Limited, the Corporate Debtor, is **rejected**. The Petitioner is, however, at liberty to pursue other available means under the law for recovery

16. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi  
Member (Technical)

Rajasekhar V.K.  
Member (Judicial)

Order dated December 15, 2021

SA, LRA