



**IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD (COURT – II)**

CP (IB) 158 / NCLT / AHM / 2020

WITH

IA No. 889 of 2022

[Application for initiation of Corporate Insolvency Resolution Process under Section 7 of the Insolvency & Bankruptcy Code, 2016]

In the Matter of:

Premjayanti Enterprises Private Limited

**Applicant/
Financial Creditor**

Versus

Shivam Water Treaters Private Limited

**Respondent/
Corporate Debtor**

Order Pronounced on: 06/12/2022

Coram:

**DR. DEEPTI MUKESH
MEMBER (JUDICIAL)**

**AJAI DAS MEHROTRA
MEMBER (TECHNICAL)**



MEMO OF PARTIES IN CP(IB) 158 of 2020

Premjayanti Enterprises Private Limited

Registered office at:

Monarch House, Nr. Ishwar Bhuwan Cross Road,
Nr. Commerce Six Road,
Navarangpura, Ahmedabad, GJ-380009

**....Applicant/
Financial Creditor**

Shivam Water Treaters Private Limited

Registered office at:

3, Kahankpura Sopping Centre,
Nr. Vasna Bus Stop, Vasna, Ahmedabad, GJ- 380007

...Respondent / Corporate Debtor

Appearance:

For Applicant: Mr. Arjun Sheth, Advocate

For the Respondent: Mr. Masoom Shah, Advocate

MEMO OF PARTIES IN IA No. 889 of 2022

Shivam Water Treaters Private Limited

Registered office at:

3, Kahankpura Sopping Centre,
Nr. Vasna Bus Stop, Vasna, Ahmedabad, GJ- 380007

...Applicant

Premjayanti Enterprises Private Limited

Registered office at:

Monarch House, Nr. Ishwar Bhuwan Cross Road,
Nr. Commerce Six Road,
Navarangpura, Ahmedabad, GJ-380009

....Respondent

Appearance:

For the Applicant: Mr. Navin Pahwa, Sr. Adv. a/w. Mr. Masoom Shah, Adv.

For the Respondent: Mr. Arjun Sheth, Adv.



ORDER

1. This application is filed on 13.02.2020 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by Mr. Bankim Jayantilal on behalf of **M/s. Premjayanti Enterprises Private Limited** (for brevity 'Applicant') without any authorized board resolution/authority letter with a prayer to initiate the Corporate Insolvency Resolution Process (for brevity 'CIRP') against **M/s. Shivam Water Treaters Private Limited** (for brevity 'Corporate Debtor').
 2. The Applicant is a private limited company incorporated under the provisions of the Companies Act, 1956, duly registered on 19.03.2004 with the Registrar of Companies, Ahmedabad, Gujarat State with CIN: U51909GJ2004PTC043818 and having registered office at Monarch House, Nr. Ishwar Bhuwan Cross Road, Nr. Commerce Six Road, Navarangpura, Ahmedabad, GJ-380009.
 3. The Corporate Debtor is a private limited company incorporated under the provisions of the Companies Act, 1956 on 14.08.2001 duly registered with Registrar of Companies, Ahmedabad, Gujarat State with CIN: U29197GJ2001PTC039888 and having registered office at 3, Kahankpura Sopping Centre, Nr. Vasna Bus Stop, Vasna, Ahmadabad, GJ- 380007.
- The authorised share capital of the corporate debtor is Rs. 7,50,00,000 /-



and the paid-up share capital is Rs. 6,42,41,470/-.The corporate debtor is engaged in the water cleansing business.

4. It is submitted by the applicant that in August 2016, it had provided the loans and advances to the corporate debtor aggregating to the tune of Rs. 2,66,81,094.00 at the rate of 16% p.a. repayable on demand. On-time to time, the corporate debtor has also made a part payment towards such loans and advances. The copies of the relevant pages of the bank statement of the applicant evidencing the loans and advances given and the part payments done by the corporate debtor are annexed with the application.
5. It is further submitted by the applicant that the total default amount is Rs. 1,00,46,246.17 (Rs. 58,30,077.00 towards principal and Rs. 42,16,169.17 towards interest). Further submitted that the corporate debtor had issued a cheque dated 10.09.2018 for the repayment of the said loan which came to be dishonoured. Thereafter, the applicant initiated proceedings under section 138 of the NI Act and the same are presently pending. A copy of the cheque with the return memo is annexed with the application.
6. The applicant also submitted that it has also declared interest income to the Income Tax Department with regard to the said loans and advances and the same is evidenced from the documents attached with the application.



7. It is further submitted that the recall/demand letter dated 08.01.2020 was sent by the applicant to the corporate debtor for repaying the said outstanding loans and advances along with interest within ten 10 days of receipt of the said letter. In response to the said recall/demand letter, the corporate debtor replied vide letter dated 27.01.2020 wherein they attempted to raise some other issues not related to the present loan, to wriggle out of its liabilities to repay the said loan amount. After that, the applicant vide letter dated 01.02.2020 further responded to the said reply and also informed the respondent that the applicant would initiate appropriate legal proceedings against him. The copies of all three letters are annexed with the application. Since there was no response from the corporate debtor, this application under section 7 of IBC, 2016 was filed by the applicant.

8. The corporate debtor filed its reply inter alia stating that:

- In 2019, the same creditor, i.e., Premjayanti Enterprises Pvt. Ltd. had filed a Section 9 application under IBC Code, 2016 for the same transactions before this Authority being CP(IB) No. 3 of 2019 against the present corporate debtor. However, as ARCIL had filed a Section 7 application and CIRP had commenced, vide order dated 15.10.2018 passed by the NCLT Mumbai Bench, against the present Corporate Debtor, i.e., Shivam Water Treaters Pvt. Ltd, therefore, on 01.01.2019 the NCLT Ahmedabad dismissed as



withdrawn the application filed by the present applicant under section 9 of the Code.

- There is no agreement in writing that the corporate debtor has to repay the amount to the applicant along with interest and there is no default. Thus, the present application is not maintainable.
- In the 2019 application, the applicant had placed on record the Joint Venture Agreement (hereinafter referred to as '**JV agreement**') dated 07.11.2016 which is suppressed in this application. Through the JV agreement, the infusion of funds was in the LLP known as "Water Cleanse Solutions LLP", and not in the present corporate debtor.
- As per arbitration clause 21 in the JV agreement, the instant application is not maintainable and parties have to be relegated to arbitration.
- The applicant had also issued a Notice for refund of Rs. 3,73,75,750/- to the corporate debtor on 10.09.2018 and it is not placed on record. Thereafter, the corporate debtor issued a letter dated 19.09.2018 to the applicant to invoke arbitration and the same was responded by the applicant on 18.10.2018. The copies of letters are annexed with the reply of the corporate debtor.



- There is no loan in realm of law given by the applicant to the corporate debtor and it does not attract the ingredients of the IB Code.
- The corporate debtor is a going concern and has many projects under execution.

9. The applicant filed a rebuttal in response to the reply filed by the corporate debtor stating that:

- the 2019 IB application was filed u/s 9 of the Code has not come to be decided/adjudicated upon merits and was withdrawn before that and the filing of the present application has no relevance to the history of the filing of the old application. Hence, the filing and withdrawal of the old IB application have no relation to the outcome of the present application and the present application stands on an independent footing.
- there is no requirement under law to execute loan agreement in writing.
- the transaction in question is clearly a loan since the corporate debtor has paid interest on the same and such interest has also been declared as income of the applicant in the Income Tax Returns filed by the applicant with the Tax Department, and documents to that effect are already placed on record with the application.



- with regard to the aspect of default and when the loan amount is due and payable, the Hon'ble Delhi High Court in the case of *Virendra Kumar Jain vs. Alumate (India) Pvt. Ltd.* MANU/DE/0885/2012 held that if the date of repayment is not fixed, then the loan would be repayable on demand. A copy of the judgement is annexed with a rebuttal document.
- the JV agreement dated 07.11.2016 was executed between the applicant and the corporate debtor pursuant to which it was agreed to jointly set up an LLP having name "Water Cleanse Solutions LLP", which is a separate legal entity in itself, and through such LLP the applicant and the corporate debtor were to jointly do business of water cleansing, wherein the applicant and the corporate debtor, both were required to invest money.
- the loan which is the subject matter of this application was given by the applicant to the corporate debtor on 12.08.2016 much before the JV agreement came to be executed between the applicant and the corporate debtor on 07.11.2016.
- the funds were also simultaneously invested in the LLP and are completely different from the transaction of loan between the applicant and the corporate debtor.
- the exchange of notices between the applicant and the corporate debtor is in connection with the JV agreement and the LLP



partnership deed which has no concern whatsoever with the present transaction of an independent loan given by the applicant to the corporate debtor.

- the corporate debtor is making a malafide attempt to mislead and confuse this Hon'ble AA by mixing two transactions, which are completely independent of each other and with different entities.
- the corporate debtor has been facing various legal proceedings for recovery and has not filed its financial statements with the ROC for the last three years. Till date, the dues of the bankers are not yet paid by the corporate debtor and hence the corporate debtor is a long-term and habitual defaulter of financial dues.
- ARCIL has filed a review petition before the Hon'ble SC against the order dated 18.09.2019 passed by the Hon'ble SC and the said review petition is presently pending.

10. The Corporate Debtor filed an Additional Affidavit to counter the allegations made by the Applicant in the Rebuttal and stating that:

- no loan agreement is produced in support of financial debt.
- Notice issued under Section 8 in the Section 9 application, filed prior to this application by the applicant clearly shows that the applicant has always claimed that the debt was operational debt and not financial debt. The applicant is not permitted to change his stand in successive petitions.



- Section 138 notice dated 24.09.2018, issued by the Applicant clearly shows that the figure of Rs. 58,30,077 claimed in the current petition matches with the claim therein and the total figure of Rs. 79,17,213 also matches with the claim therein.
- no authority letter is filed for filing application under Section 7 of the Code.
- As per para 29 of the Rebuttal Affidavit, this is a dispute falling within a partnership, and for that reason also the Section 7 application is not maintainable.
- As per para 23 of the Rebuttal Affidavit, which refers to para 2 of the JV agreement dated 07.11.2016, the reliance is misplaced because the same JV agreement at clause 14 clearly says that the Applicant would be liable for profit/loss/trade of the corporate debtor on or before 07.11.2016 (JV agreement), as regards the projects mentioned in Annexure-1. Thus, the clause makes it clear that even if the money is lost, there is no right of recovery hence it is not a financial debt and the Applicant is not a financial creditor under the provisions of Section 7 of the IB Code, 2016. The other relevant clauses and their relevance to the case are as below:-
 - a. As per clause no. 2 of the JV agreement for payment made in Water Cleanse LLP, they have the right to charge interest at the rate of 16% against both parties. As per clause 2 of



the said agreement, either party will charge interest @ 16 % on the capital invested to carry on business on a yearly product basis. Thus, the Applicant was a profit and loss sharing entity and not a financial creditor.

- b. Clause 12 clearly shows further how Applicant and corporate debtor are profit and loss sharing entities because even after the creation of “Water Cleanse Solutions LLP”, it would not have been possible to bid in the name of the same for whatsoever reasons, and it would be corporate debtor’s name that will be used, to take advantage of its goodwill and reputation in the market. This shows the connection between Water Cleanse Solutions LLP and the corporate debtor and again shows it is not a case of financial assistance.
- Clause 14 (which also refers to clause 12) is a direct answer as the Applicant has made multiple payments in the account of the corporate debtor so as to earn profit/loss out of the same and these are not financial assistance but profit/loss earning investments where one may succeed or fail.

11. In compliance with the order dated 29.03.2022, the Corporate Debtor filed an affidavit along with a copy of the chronology of the events of the present matter as well as other IBC proceedings and also stated that the



ARCIL has filed a review petition before the Hon'ble Supreme Court on 16.03.2020 against the order dated 18.09.2019, which is still pending for adjudication.

12. The Corporate debtor filed its written submissions inter alia stating that;

- no authority letter is filed by the applicant.
- the same debt for which an application earlier under section 9 was filed by the present applicant.
- suppression of facts by the applicant before the NCLT.
- earlier Section 138 and 141 notice referred to the creation of JV and investment of Rs. 58,30,077/- for profit and also disapproves the claim of the alleged FC of there being two distinct transactions
- non-existence of Loan Agreement.
- there is no Financial debt. The profit share owner is not covered.
- as per the JV agreement, investment by the Promoter as a joint shareholder with the corporate debtor.
- Post-dated cheque is not considered proof of financial debt.

Further, the corporate debtor relied upon the judgement of the *Ld. NCLAT in Dolphin Vintrade Private Ltd. vs. Ashray Vyapaar Private Ltd. and Ors. Company Appeal (AT)(Insolvency) No. 320 of 2020 on the point that when Section 7 application has the suppression of material facts, the same is required to be*



rejected.(Relevant Para 16,34 and 35). The Applicant/FC has not filed its written submissions.

13.In compliance with the order dated 13.07.2022 and 23.08.2022, the corporate debtor filed an additional affidavit along with the following documents such as:

- Copy of the financial statements of the Corporate Debtor from the year 2018 onwards.
- Copy of the Judgement in *Vidharbha Industries Power Ltd. vs. Axis Bank Ltd., Civil Appeal No. 4633 of 2021.*
- Copies of Work Order/Purchase Orders
- Copy of the Memo of Criminal Complaint No. 98795 of 2018 in the court of Hon'ble Chief Metropolitan Magistrate, Ahmedabad
- Copies of the Balance Sheets of the Corporate Debtor for the year ending 31.03.2016 and 31.03.2017

The corporate debtor filed an additional affidavit and stated that:

- the partnership deed of M/s. Water Cleanse Solutions LLP is produced by the applicant. There it can be clearly seen that the applicant is a partner while the Corporate Debtor is not a partner of M/s. Water Cleanse Solutions LLP. Hence, the applicant will be better suited to produce documents relating to M/s. Water Cleanse Solutions LLP.



- clause 6 of the JV agreement between the applicant and the Corporate Debtor clearly shows the accounts of Water Cleanse Solutions LLP shall be looked after and maintained by the applicant. Thus also, the Applicant will be better suited to produce documents relating to M/s. Water Cleanse Solutions LLP.
- the Hon'ble Supreme Court in the matter of *Vidarbha Industries Power Limited v. Axis Bank Limited, Civil Appeal No. 4633 of 2021*, on 12.06.2022, held in paragraph 77 that:

“Adjudicating Authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor.”

Further, differentiating between the Financial Creditor and the Operational Creditor, the Hon'ble Supreme Court in paragraph 78 held that:

“Financial credit is usually secured and of much longer duration. Such credits, which are often long-term credits, on which the operation of the Corporate Debtor depends, cannot be equated to operational debts which are usually unsecured, of a shorter duration and of lesser amount. The financial strength and nature of business of a Financial Creditor cannot be compared with that of an



Operational Creditor, engaged in supply of goods and services. The impact of the non-payment of admitted dues could be far more serious on an Operational Creditor than on a financial creditor.”

- Further, the Hon’ble Supreme Court in the same judgement also contemplated the scenarios when the Adjudicating Authority has to exercise discretion in favour of the Corporate Debtor with regard to the admission of Section 7 Application. Relevant observations of the Apex Court are as follows:

“88. The Adjudicating Authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits. For example when admission is opposed on the ground of existence of an award or a decree in favour of the Corporate Debtor, and the Awarded/decretal amount exceeds the amount of the debt, the Adjudicating Authority would have to exercise its discretion under Section 7(5)(a) of the IBC to keep the admission of the application of the Financial Creditor in abeyance, unless there is good reason not to do so. The Adjudicating Authority may, for example, admit the application of the Financial Creditor, notwithstanding any award or decree, if the Award/Decretal amount is incapable of realisation. The example is only illustrative.”

- the corporate debtor provides turnkey project solutions for water and wastewater treatment majorly to Government entities (Municipal



Corporations, ONGC, GIFT City Etc.) and private players. That there are many projects of Corporate Debtor wherein the recovery is more than 5 Cr. but for the purpose of this instance affidavit, reliance is placed on government projects, namely the Irrigation project at Himmatnagar, Surat Municipal Corporation, Ahmedabad Municipal Corporation, Gujarat International Financial Tech City (GIFT City) and ONGC Mehsana. Currently as per the work done by the Corporate Debtor, for the above-stated entities total payment of Rs. 242.61 Lakhs, will be receivable by the corporate debtor.

- the ratio of Vidarbha Industries (Supra) is squarely applicable to the present case as the bills/invoices exceeding the alleged outstanding debt by the Applicant/alleged Financial Creditor are pending for recovery. Further, bills/invoices are outstanding against Government/State entities and are capable of realization.
- the Corporate Debtor is an MSME and a going concern.
- the TDS deduction on the so-called interest amount of Rs. 4,90,363, it may be noted that there is no payment of interest hence there is no entry of TDS. It may be further noted as below:-

A payment of Rs. 5,00,000/- is made on 31.03.2017 (See page 13). The same is wrongly broken up and reflected as interest amount on Page 20 (also see page 41). The applicant alleged FC



has mischievously, converted routine transactions under the JV agreement into interest.

14. In compliance with the order dated 23.08.2022, the applicant filed a copy of Form 26 AS for the FY 2016-2017 of the financial creditor. No TDS is shown deducted by the Corporate Debtor, which supports the contention of the Corporate Debtor that it was not any interest-bearing debt.
15. In compliance with the clarification sought on 14.10.2022 by the bench, the corporate debtor filed an affidavit along with a copy of the order dated 30.09.2019 passed by the NCLT, Mumbai Bench, a Copy of the letter dated 12.12.2019 sent by the corporate debtor to ROC, Ahmedabad and the copies of Form No. INC-128 filed by the corporate debtor.
16. From the perusal of Form 1, Part IV of the application, it is observed that the total default of Rs. 1,00,46,246.17 /-, including interest, and the date of default is 20.01.2020.
17. The registered office of the corporate debtor is situated in Ahmedabad, Gujarat State and, therefore, this Tribunal has jurisdiction to entertain and try this application.

IA 889 of 2022

18. IA 889 of 2022 is filed by the corporate debtor seeking dismissal of the main IB application under section 7 filed by the original applicant/FC, on the ground that the principal amount as claimed in the application is fully paid and with respect to the claim of interest there is no agreement



between the parties for payment of interest. In view of the principal amount being paid fully, the application needs to be dismissed.

19. The original applicant/FC objects to this application and submits that after the matter is fully argued and the order reserved no such plea can be entertained.

20. The corporate debtor filed the proof of payment by way of pursis along with judgements relied upon the corporate debtor:

- *S.S. Polymers vs. Kanodia Technoplast Limited, Company Appeal (AT) (Insolvency) No. 1227 of 2019 passed by Hon'ble NCLAT.*
- *Saraf Chits Pvt. Ltd. and VKSS International Pvt. Ltd. vs. KAD Housing Pvt. Ltd. (IB) 255 of 2021 passed by NCLT New Delhi Bench.*

21. That the Original Applicant/FC has not filed its reply. However, written submission was filed beyond the time permitted by the Tribunal. The written submissions reiterate the arguments made earlier.

22. After hearing submissions of both the parties and taking note of the fact that before the admission of an application under section 7 of the Code, the principal amount of debt has been paid by the corporate debtor, the issue which emerges for our adjudication is “Whether the CIRP can be initiated on the basis of only unpaid amount of interest when the entire principal amount of debt has been discharged by the Corporate Debtor”.



23. On this point, we refer to the definition of the term “financial debt” as defined under Section 5(8) of IBC, 2016, which is reproduced below :

(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 –

.....

.....”

24. Further, we refer to the definition of the term “debt” as defined under Section 3(11) of IBC, 2016, which is reproduced below :

(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

25. Since the term debt means a liability or obligation in respect of a claim, therefore, we would like to refer to the definition of the term “claim” as defined under Section 3(6) of IBC, 2016, which is reproduced below :

“(6) “claim” means –

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether



or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

26. From the perusal of the aforesaid definitions, it is observed that the interest is not included in the term “debt” per se. Rather, the “interest” can be claimed as “financial debt” only if such debt exists and /or there is a separate agreement between parties to pay the interest.

27. At this juncture, we relied upon the Judgment of Hon’ble NCLAT in the matter of *S. S. Polymers v. Kanodia Technoplast Ltd. in Company Appeal (AT) (Insolvency) No. 1227 of 2019*, dated 13.11.2019. The relevant extracts are given below :

“5. Admittedly, before the admission of an application under Section 9 of the I&B Code, the ‘Corporate Debtor’ paid the total debt. The application was pursued for the realisation of the interest amount, which, according to us is against the principle of the I&B Code, as it should be treated to be an application pursued by the Applicant with malicious intent (to realise only Interest) for any purpose other than for the Resolution of Insolvency, or Liquidation of the ‘Corporate Debtor’ and which is barred in view of Section 65 of the I&B Code..”

We also rely upon the Order of Hon’ble NCLT, New Delhi Bench in the matter of *Saraf Chits Pvt. Ltd. and VKSS International Pvt. Ltd.*



vs. **KAD Housing Pvt. Ltd.(IB) 255 of 2021** dated 23.05.2022. The relevant extracts are given below :

“15. In view of the aforesaid discussion, it can be inferred that the “interest” component alone cannot be claimed or pursued, in absence of the debt, to trigger a CIR process against the corporate Debtor. Further, the application pursued for realization of the interest amount alone is against the intent of the IBC, 2016.

16. Hence, we conclude that the CIRP against a Corporate Debtor cannot be initiated/triggered solely on the basis of the unpaid amount of interest where the entire principal amount has already been discharged by the Corporate Debtor.

17. The Petition is accordingly Dismissed.”

28. Moreover, in absence of a ‘Financial Contract’ specifying what is the actual amount of disbursement, tenure of the debt, interest payable and date of repayment, the contentions of the Financial Creditor that it is an interest-bearing financial debt are not-tenable. We also considered that the present application is not supported by an authorized board resolution/authority letter on behalf of the applicant. For these reasons also, we find that the application is not eligible for admission for initiation of CIRP.



29. In view of the above, the present applicant/FC fails to justify to initiation of CIRP against the corporate debtor, hence the application CP(IB) 158 of 2020 is dismissed in terms of section 7(5)(b) of IBC, 2016 and accordingly IA 889 of 2022 filed by the corporate debtor is allowed and disposed of.

Let the copy of the Order be served to the parties and IBBI.

S/d-

AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

S/d-

DR. DEEPTI MUKESH
MEMBER (JUDICIAL)

RAHUL/LRA