IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH [SPECIAL], COURT NO. II
KOLKATA

I.A. (I.B.C) No. 957/KB/2023
In
Company Petition (IB) No. 250/KB/2021

An Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016.

IN THE MATTER OF:

SRF Limited **… Operational Creditor.**

Verses

Birla Tyres Limited **… Corporate Debtor.**

AND

IN THE MATTER OF:

Kesoram Industries Limited **… Applicant.**

Verses

Pratim Bayal,

Resolution Professional

of Birla Tyres Limited (now in CIRP) **… Respondent.**

Date of Hearing: August 02, 2023

Date of Pronouncement: October 18, 2023

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI BALRAJ JOSHI, HON'BLE MEMBER (TECHNICAL)

Appearance:

For Applicant in I.A. (I.B.C.) No. 957/KB/2023:

1. **Mr. Tridib Bose, Adv.**
2. **Mr. Debargha Basu, Adv.**
3. **Mr. Shounak Mukherje, Adv.**
4. **Mr. Rahul Poddar, Adv.**

For Resolution Professional:

1. **Mr. Joy Saha, Sr. Adv.**
2. **Mr. Shanak Mitra, Adv.**
3. **Mr. Sayantak Das, Adv.**
4. **Mr. Amandeep Singh, Adv.**

ORDER

PER Bidisha Banerjee, Member (Judicial):

1. This Court is congregated through hybrid mode.

2. This instant Application has been filed by Kesoram Industries Limited, Applicant herein, under Section 60(5) of the Insolvency and Bankruptcy Code for brevity I&B Code read with other Rule 11 of the NCLT Rules, 2016 against Pratim Bayal, Resolution Professional (RP) of the Birla Tyres Limited (in CIRP), Respondent herein, seeking the following reliefs as:

a) *An Order be passed declaring the decision of the RP as contained in his email dated April 19, 2023, being Annexure "P-12" hereto, rejecting the claim of the Applicant as illegal, null and void;*

b) *An order be passed setting aside the decision of the RP contained in his email dated April 19, 2023;*

c) *Pass an Order directing the RP to restore the claim of the Application as a Financial Creditor;*

d) *Pending hearing of the present application, the RP be restrained from giving effect to and/or further effect to the email dated April 19, 2023, and further restraining the RP from altering the claim of the Applicant in the list of Creditors of the Corporate Debtor;*

e) *Ad-interim order or any other order, may deem fit and proper.*

3. <u>Submission made by the Applicant</u>:

3.1. The Ld. Counsel for the Applicant submits that vide an order dated May 05, 2022, the Corporate Resolution Insolvency Process (CIRP) was initiated in respect of the Corporate Debtor (Birla Tyres Limited) and Mr. Seikh Abdul Salam was appointed as IRP. On May 07, 2022, the RP, Mr. Seikh Abdul Salam made a public announcement in in Form A inviting the claims of the creditors of the Corporate Debtor duly submitted its proof of claim for a claim amount of Rs. 5,18,28,91,359/-. The said claim of the Applicant was duly admitted by the RP to the tune of Rs. 5,16,39,06,248/- as an unsecured financial creditor.

3.2. It is further submitted that vide an order dated October 31, 2022, Mr. Salam was replaced by Mr. Pritam Bayal (Respondent herein) as the RP of Birla Tyres Limited.

3.3. It is contended that on December 23, 2022, the Applicant received an email from the RP, annexed at Page 206 to this Applicant being Annexure "P-8", seeking additional information and/or documents in relation to the claim of the Applicant on the plea of a direction passed by this Adjudicating Authority in case of ***Seaview Merchants Pvt. Ltd.*** **v.** ***Ashish Vincom Pvt Ltd.*** **C.P (IB) No. 2011/KB/2019** reported in **(2021) ibclaw.in 276 NCLT.**

3.4. It is further contended that by an email dated December 27, 2022, **annexed at Page 215 being Annexure "P-10" to the Application,** the Applicant informed the RP that its claim has already been admitted and available on the website of ibbi.gov.in and no re-verification should be entertainable.

3.5. The Ld. Counsel for the Applicant further submits that in response, by email dated December 28, 2022, **annexed at Page 216 being Annexure "P-11" to the Application,** the RP reiterated the position contained in his previous email dated December 23, 2022, referring Section 25 of the I&B Code requiring him to preserve and protect the assets of the Corporate

Debtor. The Applicant on the same day i.e., on December 28, 2022, replied to the RP stating that the provisions of the Code do not authorize the RP to recheck and/or reverify and/or relook into an admitted claim and that the RP can merely revise the amount of admitted claim on the basis of additional information.

3.6. The Ld. Counsel for the Applicant further contends that the RP by an email dated April 19, 2023, sans dealing with the objections raised by the applicant stated that he is unable to verify and admit the claim of the Applicant and in justification referred to the provisions of Regulation 8 and 10 of the CIRP Regulations.

3.7. The Ld. Counsel for the Applicant claims that once the claim of the applicant herein was submitted and reflected in the list of creditors, the RP cannot embark upon the process of re-verification of an admitted claim.

4. Reply given by the Respondent (Resolution Professional):

4.1. The Ld. Counsel for the Respondent per contra submits that initially, the Applicant claiming to be a Financial Creditor of the Corporate Debtor, had filed a claim in Form C, dated May 16, 2022, amounting to Rs. 5,18,28,98,356/-. In Form C, it was mentioned, without any supporting documents or proof, that the claim pertained to an alleged **"Inter-Company Loan given from time to time along with accrued interest thereon". A copy of the "Form C" submitted by the Applicant is annexed at Page 15-16 to the Reply Affidavit.** Further, with Form C, no primary documents such as proof of disbursement of loan were provided.

4.2. The Ld. Counsel for the Respondent further claims that a purported Balance Confirmation from the Corporate Debtor as on April 30, 2022, was furnished on May 2, 2022, only three days prior to the commencement of the CIRP in respect to the Corporate Debtor. It is claimed that the balance confirmation was also vague and cryptic in nature, referring to "Inter-Company Loans" without any supporting documents.

4.3. The Ld. Counsel for the Respondent submits that it is a settled position of law that to qualify as a "financial debt" under the I&B Code, disbursement of money is essential and there was neither any money disbursement statement furnished by the Applicant to the Bank Account of the Corporate Debtor nor any loan agreement. Thus, the latter RP after re-verification of the claim has rejected the claim of the Applicant and classified the Applicant as a "Related Party".

5. Ld. Counsel for the Applicant submits through Rejoinder:

5.1. That, the allegation made by the Respondent (RP) is mala fide, misconceived and not maintainable by law at all. It is claimed that once a claim is admitted, cannot be rejected by the RP.

6. Analysis and Findings:

6.1. Heard the rival contention of both parties and perused the documents placed before us.

6.2. It is evident that the Applicant has furnished Form C dated May 16, 2022, in which it has claimed the debt incurred to the Corporate Debtor as an **"Inter-Company Loan given from time to time along with accrued interest thereon"** (at Point no. 7 of the Form C) and the Applicant is a Financial Creditor, having total claim of Rs. 518,28,98,356/-. The Form C filed by the Applicant, **annexed at Page 15-16 to the Reply Affidavit** is reproduced hereunder as:

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FORM C

SUBMISSION OF CLAIM BY FINANCIAL CREDITORS

(Under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

16th May, 2022

From
Kesoram Industries Limited
Birla Building,
9/1 R.N Mukherjee Road,
Kolkata- 700 001.

To
Mr. Seikh Abdul Salam [Interim Resolution Professional]
64J, Linton Street, Beniapukur,
Kolkata- 700 014.

NOTARY REGD. NO. 9330/2011

NOTARIAL NOTARIAL

Subject: Submission of claim and proof of claim.

Sir,

Kesoram Industries Limited, hereby submits this claim in respect of the corporate insolvency resolution process of Birla Tyres Limited. The details for the same are set out below:

Relevant Particulars		
(1)	(2)	(3)
1.	Name of the financial creditor	Kesoram Industries Limited
2.	Identification number of the financial creditor	CIN: L17119WB1919PLC003429
3.	Address and email address of the financial creditor for correspondence	Address: Birla Building, 9/1 R.N Mukherjee Road, Kolkata-700 001. Email: corporate@kesoram.net
4.	Details of claim, if it is made against corporate debtor as principal borrower: (i) Amount of claim (ii) Amount of claim covered by security interest, if any (Please provide details of security interest, the value of the security, and the date it was given) (iii) Amount of claim covered by guarantee, if any (Please provide details of guarantee held, the value of the guarantee, and the date it was given) (iv) Name and address of the guarantor(s)	(i) Total claim: Rs 518,28,98,356 Principal :Rs. 424,25,19,253 Interest: Rs 92,13,86,995 TDS Recoverable: Rs 1,89,92,111 (ii), (iii) (iv)-NIL
5.	Details of claim, if it is made against corporate debtor as guarantor: (i) Amount of claim (ii) Amount of claim covered by security interest, if any (Please provide details of security interest, the value of the security, and the date it was given) (iii) Amount of claim covered by guarantee, if any (Please provide details of guarantee held, the value of the guarantee, and the date it was given)	NIL

Certified to be true Copy

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	(iv) Name and address of the principal borrower	
6.	Details of claim, if it is made in respect of financial debt covered under clauses (h) and (i) of sub-section (8) of section 5 of the Code, extended by the creditor: (i) Amount of claim (ii) Name and address of the beneficiary	NIL
7.	Details of how and when debt incurred	Inter Company Loan given from time to time along with accrued interest thereon.
8.	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	NIL
9.	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	IndusInd Bank Savitri Towers, 3A, Upper Wood Street, Kolkata -700 017. A/c No: 200001871757 IFSC Code: INDB0000015

(Signature of financial creditor or person authorised to act on its behalf)
Gautam Ganguli
Company Secretary
Address: 49C, Block C, New Alipore, Off Diamond Harbour Road, Taratala Road crossing, Kolkata- 700053

DECLARATION

I, Gautam Ganguli, currently residing at 49C, Block C, New Alipore, Off Diamond Harbour Road, Taratala Road crossing, Kolkata- 700053, do hereby declare and state as follows: -

1. Birla Tyres Limited, the corporate debtor was, at the insolvency commencement date, being the 5th day of May 2022, actually indebted to Kesoram Industries Limited for a sum of **Rs. 518,28,98,356**.
2. In respect of the claim of the said sum or any part thereof, Kesoram Industries Limited has relied on the documents specified below:
   - Balance confirmation from Birla Tyres Limited as on 30th April, 2022.
   - Statement of Balance Outstanding
3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.
4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever.
5. I undertake to update the claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date.

KAMAL KUMAR PAUL
NOTARY GOVT. OF INDIA

1 6 MAY 2022

ABDUL HAMID MOLLA GOVT. OF INDIA NOTARY REGD. NO. 9380/2011 KOLKATA

Certified to be true Copy

6.3. Further, it is also evident that in the <u>"Balance Confirmation" as on April 30, 2022</u>, of the Corporate Debtor, <u>the outstanding payable</u> to Kesoram Industries Limited (Applicant herein) <u>is also classified</u>, as an **"<u>Inter-Company Loan</u>"**.

6.4. We would rely upon the judgment passed by this Adjudicating Authority in the case of ***Seaview Merchants Private Limited* v. *Ashish Vincom Private Limited*** reported in **MANU/NC/3611/2021**, where the ratio of the Hon'ble High Court of Bombay in ***Durga Prasad Mandelia* v. *Registrar of Companies, Maharashtra***, reported in **MANU/MH/0003/1985** was reiterated as under:

> **"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*."**
>
> **(Emphasis Added)**

6.5. It is also a settled position of law that to establish a "financial debt", the statement of the disbursement of money is essential. In this context, we would refer Section 5(8) of the I&B Code, reproduced verbatim as:

(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*

xxx xxx xxx xxx

6.6. Further, we would rely upon the judgment of the Hon'ble Apex Court is the case of ***Anuj Jain* v. *Axis Bank Limited*** reported in **(2020) 8 SCC 401: MANU/SC/0228/2020** that:

> **"*The essentials for financial debt and financial creditor*'**
>
> **"43.** *Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota* ***of doubt that for a debt to become 'financial debt' for the purpose***

of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money*. It may include any of the methods for raising money or incurring liability by the modes prescribed in Sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per Sub-clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in Sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in Sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein.* ***In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt.*** *In other words, any of the transactions stated in the said Sub-clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal Clause or at least has the features which could be traced to such essential elements in the principal clause.* ***In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code*****.'**

"*This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money*."

(Emphasis Added)

6.7. Further, we would also refer to the decision passed by the **Hon'ble NCLAT, New Delhi,** in the case of ***B.V.S. Lakshmi* v. *Geometrix Laser Solutions Private Limited,*** reported in **MANU/NL/0221/2017** that:

"**30.** *In the present case, the Appellant has failed to bring on record any evidence to suggest that she disbursed the money has been made against 'consideration for the time value of money'.* ***There is nothing on the record to suggest*** *that the Respondents borrowed the money. In absence of such evidence****, the Appellant cannot claim that the loan if any given by the Appellant comes within the meaning of 'financial debt' in terms of sub-section (8)(a) of Section 5 of the 'I & B Code'***."

(Emphasis Added)

6.8. Thus, from the statutory provisions and decisions supra, it is clear that to bring any existence of debt within the ambit of the definition of "Financial Debt", disbursement of money is *sine qua non* and in the instant application nothing in record substantiates that the money has been disbursed by the Applicant to Corporate Debtor. We are further of the view that though it is shown as an **"Inter-Company Debt",** the applicant has failed to prove the transaction as a deposit of money or a loan from the Applicant's account to the Corporate Debtor's Account before the initiation of CIRP as well as a relationship between the parties which proves that it is a mere transaction of money from one account to another account.

6.9. Further, we would refer to **Regulation 14** of **Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (in short "CIRP Regulations")** that:

14. *Determination of amount of claim*.

(1) *Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him***.**

(2) *The interim resolution professional or* ***the resolution professional****, as the case may be,* ***shall*** ***revise*** ***the amounts of claims admitted****, including the estimates of claims made under sub-regulation (1), as soon as may be practicable,* ***when he comes across additional information warranting such revision*****.**

6.10. Thus, we are of the view that the Respondent (Resolution Professional of the Corporate Debtor) has rightly revised the claim which was previously admitted by the latter RP on the basis of additional information and documents, when he came across the additional information warranting such revision.

6.11. We would rely upon the judgment of the Hon'ble Apex Court in ***Ram Kanai Jamini Ranjan Pal Pvt. Ltd.*** **v.** ***Member, Board of Revenue, W. Bengal*** reported in **(1976) 3 SCC 369: MANU/SC/0342/1976** that:

> **"***The word* ***'revise'*** *occurring therein (which in dictionary is described as* ***meaning to 're-examine, to review, to correct, or to amend the fault'****) is not hedged or qualified by any condition or limitation***."**

(Emphasis Added)

6.12. In this present case, the latter RP after re-verification of the claim has rejected the claim of the Applicant on grounds of no substantial evidence supporting the disbursement of amount claim furnished by the Applicant as well as no financial transaction recorded in Corporate Debtor's account that reflects any such transaction related to alleged inter-company loan was done. The same was informed by the RP to the Applicant by **Email dated April 19, 2023, annexed at Page 219 being Annexure "P-12" to the Application.** Hence, the claim of the applicant is rightly rejected by the Resolution Professional of the Corporate Debtor (Birla Tyres Limited). The **Email dated April 19, 2023**, is reproduced as under:

ANNEXURE "P-12"
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On Wed, Apr 19, 2023 at 10:54 PM Pratim Bayal <birlatyres.2022@gmail.com> wrote:

Dear Sir,

This is with reference to the appended mail and our previous communications dated 23rd December 2022 and 28th December 2022, wherein we had requested your good office to furnish additional information/documents in order to verify the total financial claim of INR 518,28,98,356/- (on account of Inter-Company Loan) submitted by your office in Form C dated 16th May 2022.

It is pertinent to note that as per the Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulation"), the financial creditor shall submit supplementary documents or clarifications in support of the claim and the existence of debt due to the financial creditor may be proved on the basis of records available with Information Utility, a financial contract supported by financial statements ; record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;financial statements showing that the debt has not been or an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.

Further, we would also like to highlight that as per the Regulation 10 of CIRP Regulations, in absence of substantial evidence the resolution professional may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

We are unable to comprehend the reason behind your unwillingness to share the requisite information with us. Since, no such records have been furnished by your good self despite repeated reminders nor any financial records of the Corporate Debtor reflect any such transaction related to the alleged inter-company loan, therefore, in absence of the above-mentioned, the undersigned is unable to verify and admit your claim at this stage.

Regards,
Pratim Bayal
RP – M/s Birla Tyres Limited (under CIRP)
E-mail ID for communication: birlatyres.2022gmail.com
Registered email ID : pratimbayal@gmail.com
Regn No. : IBBI/IPA-003/IP-N00213/2018-2019/12385
AFA Valid till 6th December 2023

KESORAM INDUSTRIES LTD
Authorised Representative

On Wed, Dec 28, 2022 at 3:13 PM Kesoram Corporate <corporate@kesoram.com> wrote:

Dear Sir,

https://mail.google.com/mail/u/1/?ik=67a20f6fd7&view=pt&search=all&permmsgid=msg-a:r-6793939042853654206&dsqt=1&simpl=msg-a:r-6793... 1/4

NOTARY
GOVT. OF INDIA

7. In terms of view above, this instant application being **I.A. (I.B.C) No. 957/KB/2023** is **dismissed.**

8. No Costs.

9. Urgent Certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

Balraj Joshi	**Bidisha Banerjee**
Member (Technical)	**Member (Judicial)**

This order is signed on the 18th Day of October, 2023

Bose, R. K. [LRA]