

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**Coram: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER
SHRI RAGHU NAYYAR,
HON'BLE TECHNICAL MEMBER**

CP No. (IB) – 313/7/JPR/2019

(Application Under Section 7 read with 60(5) of the Insolvency and Bankruptcy Code, 2016 & Rule 11 of the NCLT Rules, 2016)

IN THE MATTER OF:

M/S RECKON INDUSTRIES LIMITED & ORS.

..... FINANCIAL CREDITOR

VERSUS

M/S WARM FORGING PVT. LTD & ORS.

.....CORPORATE DEBTOR

MEMO OF PARTIES

M/s Reckon Industries Limited
CIN: U51909DL1985PL021408
Office: 111, Tribhuvan Complex
Ishwar Nagar, Mathura Road
New Delhi- 110065

..... Applicant No. 1

Mr. Jai Prakash Aggarwal
R/o C- 562, New Friends Colony,
New Delhi- 110025

..... Applicant No. 2

Mr. Sandeip Aggarwal
R/o C- 562, New Friends Colony,
New Delhi- 110025

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..... Applicant No. 3

Mr. Sumitra Aggarwal
R/o C- 562, New Friends Colony,
New Delhi- 110025

..... Applicant No. 4

VERSUS

M/s Warm Forging Pvt. Ltd.
CIN: U34300RJ1999PTC015907
Office: Plot No. SP 238 (B & C),
Industrial Area Kaharani (Bhiwadi Extension),
Bhiwadi Alwar, Rajasthan 301019.

.....Respondent No. 1

Union of India through Secretary,
Ministry of Corporate Affairs,
A Wing, Shastri Bhawan,
Rajendra Prasad Road,
New Delhi

.....Respondent No. 2/ Performa Respondent

For the Applicant : **Ravi Chirania, Adv.**

For the Respondent : **Anurag Bhatt, Adv.**

Order Pronounced On:07.02.2022

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This Application is filed by M/s Reckon Industries Ltd., Mr. Jai Prakash Aggarwal, Mr. Sandeep Aggarwal, Mrs. Sumitra Aggarwal ('Applicants'), claiming to be Financial Creditors. Mr. Jai Prakash Aggarwal is duly authorized *vide* Board Resolution dated 27.11.2019 to file this Application

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against M/s Warm Forging Private Limited ('Respondent' / 'Corporate Debtor') under Section 7 of the Insolvency and Bankruptcy Code ('IBC' / 'Code'), 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking initiation of Corporate Insolvency Resolution Process ('CIRP'), pursuant to default committed by the Respondent in repayment of the loan amount to the Applicant. It is seen that the Applicant had impleaded the Union of India, Ministry of Corporate Affairs as parties in this matter. As this is a Section 7 application under IBC, the Ministry of Corporate Affairs has no role to play and its inclusion in the array of parties is irrelevant and inconsequential. This matter is considered accordingly.

2. The Applicant / Financial Creditor is a Private Limited Company incorporated under the Companies Act, 1956 on 03.07.1985 and duly registered with the Registrar of Companies, Delhi, bearing CIN: U51909DL1985PLC021408. The registered office of the Applicant Company is at 111, Tribhuwan Complex, Ishwar Nagar, Mathura Road, New Delhi – 110065 (Delhi).
3. The Respondent is a Private Limited Company, incorporated under the Companies Act, 1956 on 30.09.1999 and duly registered with the Registrar of Companies, Jaipur bearing CIN: U34300RJ1999PTC015907. The Registered Office of the Company is at Plot No. SP 238 (B & C), Industrial Area, Kaharani (Bhiwadi Extension), Bhiwadi, Alwar - 301019 (Rajasthan).

The Authorised Share Capital of the Respondent is Rs. 3,00,00,000/- (Three Crore Only) and the Paid-up Share Capital is Rs. 1,97,50,100/- (One Crore Ninety-Seven Lakh Fifty Thousand One Hundred Only).

4. Applicant / Financial Creditor submitted that it entered into a settlement agreement ('Settlement') with the Respondent / Corporate Debtor on 14.07.2018 *vide* Annexure – A-10 by which the Respondent / Corporate Debtor accepted and acknowledged that the Applicant has advanced a loan of Rs. 3,50,00,000/- to the Corporate Debtor earlier. Accordingly, as per the Settlement, the Financial Creditor withdrew the Application IB-296 (PB)/2018 TA No. 76/2018 filed before NCLT Delhi, subsequently transferred to NCLT Jaipur.
5. The Applicant/ Financial Creditor submitted that initially, the Respondent/ Corporate Debtor approached the Financial Creditor through its directors representing that it had incorporated a US Company with a specific purpose to participate in the bidding process for the auction of a US-based firm, M/s Sona BLW Precision Forge Inc. ('SPF'). The Corporate Debtor conveyed that the SPF was under liquidation and acquiring it would be very beneficial as the assets were in good condition and the value of this company was much more than what is provided as the purchase price at the Auction.
6. A special-purpose entity, named M/s Selma Precision Technologies ('SPT') was formed with a specific purpose to participate in the bidding of SPF. However, this subsidiary did not have the required funds and needed

financial assistance from the Financial Creditor for the said acquisition to the extent of 50% of the total purchase price.

7. In the SPT, the Financial Creditor was assured of 50% equity for its financial assistance. However, the Financial Creditor did not have the necessary permission from the Reserve Bank of India ('RBI') to send money abroad. Thus, the Financial Creditor transferred the money to bank accounts of the Corporate Debtor in India which would be treated as a loan and would be returned once the Financial Creditor obtains the required permission from the RBI. Consequently, the Respondent was under obligation to repay the loan advanced by the Applicant upon the successful bidding and acquisition of the SPF. However, the same was not repaid.
8. The total expenses for the auction of SPF were specified as INR 7.00 crores. The applicant was asked to transfer INR 3.50 crores for its 50 per cent shares. Since the Financial Creditor did not have the necessary permission from the Reserve Bank of India to transfer the money abroad, the Corporate Debtor asked it to transfer the money to its account in India. On the request of the Corporate Debtor to transfer the said amount in his account in India, the Financial Creditor disbursed a total amount of Rs. 3.50 crores on different dates.
9. A sum of Rs. 1,40,00,000/- was disbursed on 02.12.2016 *vide* Cheque No. 000274 H.D.F.C. Bank, Rs. 25,00,000/- by way of RTGS on 08.12.2016, Rs. 1,75,00,000/- *vide* Cheque No. 000186 dated 13.12.2016 H.D.F.C. Bank

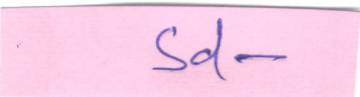
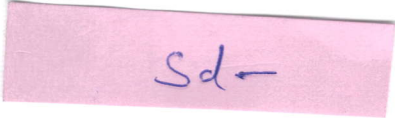
and the remaining Rs. 10,00,000/- were disbursed on 15.12.2016 *vide* Cheque No. 000191 H.D.F.C. Bank. As per the loan agreement dated 04.12.2016 at Annexure – A-3, the said loan amount was taken by the Corporate Debtor to fulfil the requirement of the Earnest Money Deposit ('EMD') and participation in the bidding process of M/s Sona BLW Precision Forge Inc. ('SPF'), 500 Oak Tree Drive, USA.

10. An agreement was signed by the Financial Creditor and the Corporate Debtor, wherein, Mr. Amit Rajput i.e., the Director of the Corporate Debtor accepted and acknowledged the debt of Rs. 3.50 crores of the Corporate Debtor and USD 1.50 million of its US Company and a cheque bearing No. 355925 dated 31.10.2017 amounting to Rs. 3.50 crores, in the name of Financial Creditor was issued by the Corporate Debtor to repay the acknowledged amount, which was never presented for encashment and was kept under the custody of the then director of the Corporate Debtor with mala fide intentions.
11. The default amount of Rs. 3.50 crores were also shown as a short-term loan and advances in the Balance Sheet of the year 2017-18 of the Corporate Debtor. The Authorised Signatory of the Corporate Debtor issued a cheque bearing No. 355925 dated 31.10.2017 amounting to Rs. 3.50 crores in the name of the Financial Creditor; however, the same was never deposited in the bank account of the Financial Creditor.

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12. In an e-mail dated 07.03.2017 and on various other occasions, the Corporate Debtor admitted its liability and agreed to refund the amount payable to the investors. Thereafter, only a part of the default amount was returned to the Applicant/ Financial Creditor. Vide e-mail dated 16.08.2017, 24.08.2017 and 25.08.2017, the Financial Creditor requested the Corporate Debtor to refund the outstanding amount of Rs. 3.50 crores which was owed to the Financial Creditor and USD 1.50 million which was owed to the Financial Creditor by the US Company. Despite repeated requests, the Corporate Debtor failed to make payment to the Financial Creditor. Hence, the present application is filed by the Financial Creditor to recover Rs. 3.50 crores with interest at the rate of 18%, which was given to the Corporate Debtor as a short-term loan.
13. In view of the agreement dated 14.07.2018, entered between Corporate Debtors and Mr. Amit Rajput i.e., the Authorised Signatory of the Corporate Debtor wherein it was categorically admitted that the Corporate Debtor owed the financial Creditor Rs. 3.50 crores, the Financial Creditor withdrew the application under Section 7 of the IBC being IB No. 296 (PB)/2018, TA No. 76/2018 filed before NCLT, New Delhi, which was further transferred to NCLT, Jaipur.
14. As claimed by the Applicant, the Respondent is liable to pay an amount of Rs. 3,50,00,000/- as reflected in Part IV of Form- 1 filed.

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Part IV

S. No.	Particulars of Financial Debt	
1.	The total amount of debt granted	<u>Amount of Debt Granted:</u> Principal Amount Rs. 3,50,00,000/-
	Date(s) of Disbursement	Amount of Rs. 1,40,00,000/- Date: 02.12.2016 Amount of Rs. 25,00,000/- Date: 08.12.2016 Amount of Rs. 1,75,00,000/- Date: 13.12.2016 Amount of Rs. 10,00,000/- Date: 15.12.2016
2.	Amount claimed to be in default and the date on which the default occurred	<u>Amount Claimed:</u> Rs. 3,50,00,000/- (Three Crore Fifty Lakhs Only) <u>Date from Which Debt Fell Due:</u> 07.03.2017

15. The Respondent/ Corporate Debtor in his reply submitted that the Applicant/ Financial creditor had filed a Company Petition bearing No. IB 296 (PB)/2018 and TA No. 76/2018 before filing the present application. The earlier application was dismissed as withdrawn for which the applicant has not sought any permission to file a fresh application. Hence, the subsequent application is barred by res-judicata.

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

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- i. M/s Suri Rajendra Rolling Mills Vs. Ms. Bengani Udyog Pvt. Limited in Company Appeal (AT)(Insolvency) No. 334 of 2020,
 - ii. Sarguja Transport Services Vs. State Transport Appellate Tribunal, M.P. Gwalior & Ors., (1987) 1 SCC 5,
 - iii. Bakhtawar Singh & Anr. Vs. Sada Kaur & Anr., (1996) 11 SCC 167,
 - iv. Brookfield Technologies Pvt. Ltd. Vs. Shylaja Iyer & Ors. in Company Appeal (AT) No. 110 of 2020.
17. The Respondent has also submitted that the amount provided was not a loan transaction and was just a share application money as per the agreement dated 04.12.2016. The amount which was advanced by the Applicant to the Respondent was to have equity investment for acquiring the SPF in the USA. The Respondent has placed reliance on Pioneer Urban Land and Infrastructure Ltd. v. UOI, Writ Petition (Civil) No. 43 of 2019 and argued that the money shall be disbursed against the consideration for the time value of money in favour of borrower who has to utilize it, however, in the present case, the money was provided to jointly participate in the bidding process of SPF and thus there is no financial debt.
18. Learned Counsel for the respondent also submitted that under Section 5(7) of the IBC, the financial creditor means a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. Financial Debt as defined in Section 5(8) of the IBC means a debt along with interest, if any, which is disbursed against the consideration

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for the time value of money. Section 5(8)(f) states that the debt must be having a commercial effect of borrowing.

19. It was also submitted that no agreement was entered upon between the Applicant and the Respondent, wherein, it is mentioned that any borrowing having commercial effect taken place between the parties. To fortify his arguments, reliance was placed on the judgement of the Hon'ble Supreme Court of India in the matter of Jaypee Infratech Ltd. Vs. Axis Bank Ltd. (2020) 8 SCC 401 and also on the judgement of Hon'ble NCLAT in the matter of Sanjay Kewalramani Vs. Sunil Parmanand Kewalramani & Ors. in Company Appeal (AT)(Insolvency) No. 57 of 2018.
20. Learned Counsel for the Respondent submitted in his arguments that there is no default on part of the Corporate Debtor, hence, the application is not maintainable. It was also submitted by the learned counsel for the Respondent that extracts of the Balance Sheet and other e-mails relied upon by the Applicant are inadmissible and cannot be considered in absence of a certificate under Section 65(b) of the Indian Evidence Act. Reliance was placed on the Judgement of Hon'ble Supreme Court of India delivered in the matter of Anvar P.V. Vs. P.K Basheer, (2014) 10 SCC 473 and in the matter of Padam Tea Co. Ltd., 1973 SCC Online Cal 93: AIR 1974 Cal 170.
21. In Assets Reconstruction Company Limited Vs. Bishal Jaiswal & Ors., the Hon'ble Supreme Court of India considered the applicability of Section 18 of the Limitation Act and held that Section 18 of the Limitation Act, which

extends the period of limitation depending upon an acknowledgement of debt made in writing and signed by the Corporate Debtor applies to proceedings under the IBC. Thus, the Hon'ble Supreme Court of India held that the entries in the Balance Sheet would amount to an acknowledgement of debt for extension of limitation under Section 18 of the Limitation Act.

22. Learned Counsel for the Petitioner/ Financial Creditor placed reliance on the following judgements; -

- i. Hon'ble Supreme Court of India delivered in the matter of Orator Marketing Pvt. Ltd. Vs. Samtex Desinz Pvt. Ltd. (2021 SCC Online SC 513),
- ii. Hon'ble NCLAT delivered in the matter of Sailesh Sangani Vs. Joel Cardoso & Anr. in Company Appeal (AT)(Insolvency) No. 616 of 2018,
- iii. Hon'ble Supreme Court of India delivered in the matter of H.P. Financial Corporation Vs. Anil Garg & Ors. (2017) 14 SCC 634.

23. In Orator Marketing (Supra) the Hon'ble Supreme Court of India has dealt with Section 5(8) of the Insolvency and Bankruptcy Code, 2016. It was held that the trigger for initiation of the Corporate Insolvency Resolution Process by the Financial Creditor under Section 7 of the IBC, 2016 is the occurrence of a default by the Corporate Debtor. 'Default means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of the claim which is due from any person and includes financial debt and operational debt'. The definition of debt is

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also expanding and the same includes inter-alia financial debt. The definition of financial debt in Section 5(8) of IBC does not expressly exclude any interest-free loan. Financial debt would have to be construed to include interest-free loans advanced to finance the business operations of the corporate body.

24. Learned counsel for the Respondent/ Corporate Debtor in his arguments raised the issue of filing the present application without seeking permission from the Adjudicating Authority to file a fresh application. We have gone through the judgement delivered by the Hon'ble NCLAT in Company Appeal (AT)(Ins.) 334 of 2020 in the matter of M/s Suri Rajendra Rolling Mills Vs. M/s Bengani Udyog Pvt. Limited. In the said matter, there was no incident of settlement, the petitioner withdraws the application under Section 9. Subsequently, in view of that there was no hope of CIRP and Hon'ble NCLAT observed that the earlier Reply Notice which was sent by the Corporate Debtor discloses pre-existing dispute. In the present case, the Adjudicating Authority while granting permission to withdraw IB-296(PB)/2018, TA No. 76/2018, in its order dated 07.09.2018 at Annexure A-11, has referred and considered Rule-8 of IBBI (Application to Adjudicating Authority Rules), 2016 and mentioned that learned counsel for the petitioner represents that in view of the settlement as arrived between the parties, permission to withdraw the application be given.

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25. Taking into consideration the above representation, permission to withdraw the aforesaid Company Petition was granted by order dated 07.09.2018. Hence, the judgement relied upon by the learned counsel for the respondent passed by the Hon'ble NCLAT is distinguishable.
26. The Judgment of Sarguja Transport Services Vs. State Transport Appellate Tribunal, M.P. Gwalior & Ors., (1987) 1 SCC 5 relied upon by the learned counsel for the respondent is concerning the withdrawal or abandonment of a writ petition under Article 226/227 without permission to file a fresh writ petition and is not relevant in the present matter. The Hon'ble Supreme Court of India also dealt with principles underlying Rule-1 of Order 23 Code of Civil Procedure Code ('CPC'), 1908 and Principle of Res Judicata under Section 11 CPC. In the case of Bakhtawar Singh & Anr. Vs. Sada Kaur & Anr., (1996) 11 SCC 167, the appellants failed to justify the permission to withdraw the case nor have they satisfied the ground of taking benefit of Section 14 of Limitation Act, however, in the instant case the withdrawal was in the lieu of the Settlement between the parties.
27. In the present case, withdrawal of the Company Petition was taken place only when the Adjudicating Authority after considering the fact of settlement permitted the petitioner to withdraw the petition in view of Rule-8 of IBBI (Application to Adjudicating Authority) Rules, 2016.
28. Other judicial pronouncements placed and relied upon by the learned counsel for the Respondent do not support his case. The Respondent further

stated that mere an agreement by one of the directors of the Corporate Debtor to pay interest at 12% per annum during a certain period cannot be the sole ground to hold that debt shall be deemed to be a Financial Debt, and has relied on the Sanjay Kewalramani v. Sunil Parmanand Kewalramani & Ors., Company Appeal (AT) (Insolvency) No. 57 of 2018.

29. The Financial Creditor, in his rejoinder, stated that it has agreed to the proposal of Corporate Debtor and disbursed a sum of Rs. 3,50,00,000/- which was recorded in the Balance Sheet under the head of unsecured loans and advances from other members and is annexed as Annexure – A-7. The default amount so extended by the Financial Creditor was used for acquiring SPF through its foreign subsidiary SPT and thus, has the effect of borrowing under Section 5(8)(f) of IBC.
30. It was further submitted that neither Financial Creditor has any equity participation in SPT nor any of the directors of the Financial Creditor held any key managerial position in SPT. However, the Financial Creditor did submit a share application along with the fee of \$1.5 million for acquiring equity in SPT, annexed as Annexure – 1 of the rejoinder, but the subsidiary of the Corporate Debtor failed to issue securities to the Financial Creditor. It further defaulted in the refund of the share application amount which the SPT was obligated to return under the securities laws of the USA. The said contention does not hold ground in the present scenario, and the parties are free to avail proper legal remedies as prescribed under the law.

31. The Corporate Debtor through its director Mr. Amit Rajput in their series of E-mail communication dated 30.01.2017, 31.10.2017, 12.05.2018, and is annexed at Annexure – A-9 (Colly) Page Number 36, Annexure – A-6 (Colly), Annexure – A-8 respectively of the application; Annexure – 2 and Annexure- 3 of the rejoinder, has admitted the liability of repaying the sum of Rs. 3,50,00,000/- loan to the directors of the Financial Creditor comprising of different time frames for repayment.
32. It is seen that the Corporate Debtor has taken an unsecured loan of Rs. 3,50,00,00/- and the same is shown in their balance sheet at Annexure – A-7. Further, the Corporate Debtor through its director Mr. Vinay Upadhyay has admitted and acknowledged Rs. 3,50,00,000/- as a short-term loan from the Financial Creditor with the interest of 12% per annum repayable within three months from the communication of E-mail dated 28.05.2018, annexed at Annexure – A -9 (Colly).
33. The loan advance must be disbursed against the consideration for the time value of money, however, there can be a mutual understanding between the parties to waive the right to receive interest for the possible growth of the value of shares, business expansion or to meet the business requirements, etc. Further, an interest-free loan also falls under the definition of Financial Debt.
34. Upon a detailed consideration of the application and documents filed by the Applicant, it is apparent that the payment of the claim amount has been

defaulted by the Corporate Debtor. Hence, this Adjudicating Authority is inclined to commence CIRP against the Corporate Debtor as envisaged under the provisions of IBC, 2016.

35. The Applicant has named one Mr. Deepak Arora with Registration No. IBBI/IPA-002/IP-N00122/2017-18/10291, duly registered with the Insolvency and Bankruptcy Board of India, to be appointed as the Interim Resolution Professional ('IRP'). The Applicant has filed his consent in Form 2 under Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016, stating therein that no disciplinary proceedings are pending against the named IRP.
36. Consequences of commencement of CIRP shall be inter-alia as follows:
- (i) The Insolvency Resolution Professional proposed by the Applicant Mr. Deepak Arora is hereby appointed as the IRP to take over the affairs of the Corporate Debtor and duties as required to be performed by him under the provisions of IBC, 2016 including the issue of the publication in widely circulated Newspapers as contemplated under the provisions of IBC, 2016 and calling for the claims from the creditors of Corporate Debtor and collation of the same shall be done.
 - (ii) Further, as a sequel of admission, moratorium as envisaged under Section 14 of IBC, 2016 is invoked in relation to the Corporate Debtor which will be in vogue during the Corporate Insolvency Resolution Process of the Corporate Debtor. The IRP shall carry out CIRP strictly

as per the timelines specified and as envisaged under the provisions of IBC, 2016 in relation to the Corporate Debtor.

- (iii) The said IRP shall act strictly with the provisions of IBC, 2016 and to defray his expenses to be incurred and fees on the account, the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Two Lakhs Only) to the account of IRP within three days from the date of this order. The IRP shall duly file a status report apprising this Adjudicating Authority about the progress of CIRP, as it unfolds, concerning the Corporate Debtor. In terms of Section 17 & 19 of IBC, 2016 all personnel of the Corporate Debtor including promoters and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.
- (iv) In terms of Section 7 of IBC, 2016, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor as well as the IRP appointed by this Adjudicating Authority to carry out the CIRP. A copy of this order shall also be communicated to IBBI for its records.

37. In the circumstances, CP No. (IB) 313/7/JPR/2019 is admitted.

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**SH. RAGHU NAYYAR,
TECHNICAL MEMBER**

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**SH. DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**