



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER**

**SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER**

CP No. (IB)- 78/7/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 LUMINANT DISTRIBUTORS PRIVATE LIMITED

...Financial Creditor

Versus

M/S PRAYAG POLYTECH PRIVATE LIMITED

...Corporate Debtor

MEMO OF PARTIES

M/s Luminant Distributors Private Limited

CIN: U51909DL1994PTC257621

R/o: 409-410, 4th Floor, Laxmi Deep

Building, District Centre,

New Delhi-110092, India

...Financial Creditor/Applicant

VERSUS

M/s Prayag Polytech Pvt. Ltd.

CIN: U28994RJ1982PTC012328

R/O: C-587, Phase-1, Industrial Area,

Bhiwadi, Alwar-Rajasthan-301019

...Corporate Debtor/Respondent



For the Applicant : Ishwar Mohapatra, Adv.
For the Respondent : Virendra Ganda, Sr. Adv.
Sandeep Taneja, Adv.

Order Pronounced On: -02.03.2023

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This application is filed by M/s Luminant Distributors Private Limited ('Applicant'/'Financial Creditor') against the Corporate Debtor namely M/s Prayag Polytech 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 the default in repayment of loan amount by the Corporate Debtor to the Applicant.
2. The Applicant is a private company incorporated under the provisions of Companies Act, 1956 and duly registered with the Registrar of Companies, Delhi having CIN: U51909DL1994PTC257621. The registered office of the Applicant was situated at 409-410, 4th Floor, Laxmi Deep Building, District Centre, New Delhi-110092, India whereas it is seen on the Website of the Ministry of Corporate Affairs that the registered office of the Corporate Debtor is at Plot-167, 2nd Floor Block No. 2 Patparganj Delhi East Delhi, Delhi-110092. The present application has been filed through Mr.



Utsav Chhawchharia who has been duly authorised vide Board Resolution dated 25.02.2019 which is annexed as Annexure P-12 of the Application.

3. The Corporate Debtor is a private limited company, incorporated under the provisions of the Companies Act, 1956 on 16.08.1982 and duly registered with the Registrar of Companies, Jaipur having CIN: U28994RJ1982PTC012328. The registered office of the Corporate Debtor is situated at C-587, Phase-1, Industrial Area, Bhiwadi Alwar Rajasthan-301019 India. The Authorised share capital of the Company is Rs. 15,00,00,000/- and the Paid-up share capital of the Company is Rs. 7,94,93,700/-.
4. The details of the transactions leading to the filing of this Application as averred by the Applicant are as follows:
 - a. The Corporate Debtor approached the Applicant to provide financial assistance. The Applicant has provided an unsecured loan on the basis of mutual understanding for an amount of Rs. 75,00,000/- (Rupees Seventy-Five Lacs Only) on 27.06.2016.
 - b. Further it is contended by the Applicant that as per mutual understanding between the parties, the above-unsecured loan was granted to the Corporate Debtor for the interest rate of @9% per annum.
 - c. The Applicant submits that the Corporate Debtor had paid the interest component from the period starting from 27.06.2016 to 31.03.2018



and deposited the TDS amount under section 194A of the Income Tax Act, 1961.

- d. It is pertinent to note that the Respondent has issued two cheques for repayment of the loan and a remaining unpaid interest amount which were dishonoured with a remark from the bank as Payment stopped by Drawer. The details of the cheques are as below:

Sr. No.	Date of Cheque	Cheque No. & Bank Name	Amount of Cheque (Rs.)
1.	30.06.2018	001454, Andhra Bank	1,51,875/-
2.	06.07.2018	451772, Canara Bank	75,00,000/-

- e. Subsequently, the Applicant mailed to the Corporate Debtor about the return of the aforementioned cheques and requested to make the payment with respect to a principal amount and balance outstanding interest amount.
- f. The Applicant sent a legal notice dated 28.07.2018 under section 138 of the Negotiable Instrument Act, 1881 to initiate criminal proceedings. Copy of legal notice dated 28.07.2018 annexed as Annexure P-8 of the Petition.
- g. Hence this Application has been filed by the Financial Creditor. The total debt amount of Rs. 81,18,750 (Rupees Eighty-One Lakh Eighteen Thousand Seven Hundred Fifty Only) including interest



charged at the rate of 9% p.a. for the period 01.04.2018 to 28.02.2019
i.e. Rs. 6,18,750/- (Rupees Six Lakh Eighteen Thousand Seven
Hundred Fifty Only).

- h. The Applicant has stated the details of the amount due in Part IV of the Application which is as follows:

<u>PART IV</u> <u>PARTICULARS OF FINANCIAL DEBT</u>		
1.	Total Amount of Debt Granted Date(s) Of Disbursement	Rs. 75,00,000/- (Rupees Seventy-Five Lacs Only) The date of disbursement of debt was 26.06.2018
2.	Amount Claimed to be in Default and the date on which the default occurred (attach the workings for computation of amount and days of default in tabular form)	The amount claimed to be in default is Rs. 81,18,750/- (Rupees Eighty-One Lakh Eighteen Thousand Seven Hundred Fifty Only) which includes interest @ 9% per annum thereon amounting to Rs. 6,18,750/- (Rupees Six lacs Eighteen Thousand Seven Hundred Fifty Only) Date of Default- 30.06.2018

5. Consequent to the notice issued by this Adjudicating Authority, the Corporate Debtor filed its reply *vide* Diary No. 1269/2019 dated 12.07.2019 whereby the following is stated:
- a. The Corporate Debtor has submitted that the Financial Creditor has failed to establish default under the code. Further, it is submitted that the cheques which are produced by the Applicant are invalid cheques



as it bear the signature of only one director however as per the mandate of the board of directors recorded in the board resolution dated 18.04.2018 all the cheques shall be signed by at least two directors. Copy of the Board Resolution is annexed as Annexe-2 of the reply.

- b. Further it is stated that the cheques adduced as proof of default are not admissible as the said cheques were in unauthorized possession of Mr. Devendra Kumar Aggarwal one of the directors of the Corporate Debtor who has mis utilized his directorial position and siphoned off Rs. 8598.89 Cr. from the Corporate Debtor.
- c. The aforesaid cheque is in unauthorized possession of Mr. Devendra Kumar Aggarwal bearing no. 451772 is by all means fabricated and not admissible and submits that the said cheque cannot be construed as proof of default within the meaning of the Code.
- d. The debt claimed by the Applicant is not due and payable within the meaning of Section 3(12) of the Code. The Applicant approached Mr. Devendra Kumar Aggarwal and express the intention to invest the same into the business of the Corporate Debtor. Thereafter the Applicant remitted the amount of Rs. 75,00,000/- (Rupees Seventy-Five Lacs Only) into the account of the Corporate Debtor on 27.06.2016. Further, the said money was utilized for the business needs of the Corporate Debtor and it was also requested by the Financial Creditor that as an interim measure, some interest be shown as payable for the interregnum



period from June 2016 to December 2017 in the books of account of the Corporate Debtor. Therefore no borrowing was ever sought by the Corporate Debtor from the Financial Creditor at any time nor any financial debt was given by the Financial Creditor to the Corporate Debtor.

- e. The Corporate debtor submits that the Financial Creditor has failed to meet the requirements of Section 7 of the code, wherein the Financial Creditor has to furnish evidence of default in an Application to initiate the CIRP.
6. The Applicant filed Rejoinder *vide* Diary No. 1320/2019 dated 19.07.2019, submitting the following:
- a. The Applicant submits that the cheque was not signed by one Director, has no base in view of the doctrine of indoor management meaning thereby the outsider dealing with the company is bound by the doctrine of indoor management and has no right to inquire beyond a particular point to ensure whether internal affairs of the company are managed in a proper manner or not and relied on the judgment of Hon'ble Supreme Court in *N. Rangachari Vs Bharat Sanchar Nigam Limited (2007) 5 SCC 108*.
 - b. It is contended by the Applicant that the Corporate Debtor has issued cheques with respect to the principal amount and interest amount after the due date of the repayment of an unsecured loan which clearly



proves that the debt is due and payable with the meaning of Section 3(12) of the Code.

7. The Applicant has filed Written Submissions *vide* Diary No. 3018/2022 dated 12.10.2022 whereby the following has been submitted:

a. The Applicant has reiterated that an unsecured loan was granted to the Corporate Debtor @ 9% p.a. interest rate on the basis of mutual understanding the Corporate Debtor had paid the interest component from the period starting from 27.06.2016 to 31.03.2018 and deposited the TDS amount under Section 194A of the Income Tax Act, 1961.

b. Further the Applicant also relied on the following judgments:

I. BDH Industries Limited Vs Mars Remedies Private Limited in Company Appeal (AT) (Ins) 836/2020 on 07.02.2022

II. Jayanti Ravi Vs Chemizol Additives Pvt. Ltd. [TA No. 117/2021, Company Appeal (AT) (Insolvency) No. 553/2020]

8. The Corporate Debtor has filed written submissions *vide* Diary No. 142/2023 dated 17.01.2023 whereby the following has been submitted:

a. The Corporate Debtor submits that there is no financial contract as per the requirement of Clause 5 under Part V of Form-1 which specifies that a Financial Contract is to be annexed along with Form-1 under section 7 Petition.

b. Further the Corporate Debtor submits that it is admitted by the Applicant that there is no financial contract in the present matter.



Moreover, the Applicant is admittedly a NBFC and regulated by the RBI. The Applicant has violated various clauses of the master direction of NBFCs by not executing the financial contract.

- c. The Applicant states that TDS is not sufficient proof of the Financial Debt. Additionally, the Applicant has relied on the following judgments:

I. *Prayag Polytech Private Limited Vs Gem Batteries Private Limited, C.P (IB)-178/(ND)/2019*

II. *Prayag Polytech Private Limited Vs Gem Batteries Private Limited, C.A. (AT) (Ins.) No. 713/2019*

III. *Vidya Educare Pvt. Ltd. Vs Agroha Colourtec Pvt. Ltd. C.P (IB)-665/(ND)/2019*

9. This Adjudicating Authority has perused all the relevant papers and found them in order. The Registered Office of the Respondent is situated in the state of Rajasthan; therefore, this Adjudicating Authority has jurisdiction to entertain and try this application.

10. Before we delve into the matter at hand, it is important to refer the following definitions:

*“3(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;”*

*“3(12) **default** means non-payment of debt when whole or any part of instalment of the amount of debt has become due and payable*



and is not paid by the debtor or the corporate debtor, as the case may be;”

*“5(7) **financial creditor** means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;”*

*“5(8) **financial debt** means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes –*

- (a) money borrowed.....*
- (i)..... ”*

*“Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016- Rule 3(d) **financial contract** means a contract between a corporate debtor and a financial creditor setting out the terms of the financial debt, including the tenure of the debt interest payable and date of repayment;”*

11. From the documents produced before us, there is a transaction of Rs. 75 Lacs dated 27.06.2016. The Applicant has contended that as per mutual understanding, an unsecured loan has been given to the Corporate debtor and the Corporate Debtor will repay the loan amount within a period of two (2) years. The Corporate Debtor on the contrary has submitted that the debt claimed by the Financial Creditor is not due and payable within the meaning of section 3(12) of the Code. It is observed that books of accounts as filed by the Applicant can only be treated as corroborative evidence and such corroborative evidence must be supported by other evidence to establish the existence of a valid debt and default thereof.



12. The basic ingredients to be looked into while passing an order under Section 7 of the code is: (i) there must be a disbursal of loan amount, such dispersal should be made for a consideration of time value of money; (ii) when the debt (whole or any part of instalment) becomes due and payable and; (iii) the same is not paid by the Corporate Debtor i.e., default committed by the Corporate Debtor. Presently, in the case before us, there is a disbursal of Rs. 75,00,000/- (Rupees Seventy-Five Lacs Only) which is corroborated by bank entries filed by the Applicant. Thus, we observe that the amount of Rs. 75,00,000/- (Rupees Seventy-Five Lacs Only) was disbursed by the Applicant to the Corporate Debtor. However, there is no written financial contract placed by the parties on record before us. During the hearing of the matter, neither of the parties were able to prove through either corroborative evidence or in their oral understanding that there is a financial contract between the parties to set out the terms of the above transaction which has been alleged as a loan by the Applicant.
13. In *Prayag Polytech Private Limited v. I WORLD Digital Solution Private Limited, Company Appeal (AT) (Ins) No. 625 of 2019*, the Hon'ble NCLAT has held that in case where there is no Financial Loan Agreement and no Board Resolution is filed in regard to advance/loan to Corporate Debtor as per Section 186 of the Companies Act, 2013. The Adjudicating Authority is not required to admit the Application under Section 7 solely on the ground of acknowledgment under the Financial Statements of the Corporate Debtor.



14. Additionally, Section 186(9) of the Companies Act, 2013 provides for the maintenance of a register of loans containing such particulars and its manner of maintenance as prescribed under Rule 12 of Companies (Meetings of Board and its Powers) Rules, 2014 in Form No. MBP 2. The entries in the said Register are required to be duly authenticated. Thus, the production of a 'Financial Contract' prima facie establishes the essential agreement arrived at between the parties including its tenure and repayment period, the same can be corroborated by the production of Form No. MBP 2 for granting a loan duly passed by all the directors of the Financial Creditor and production of a register containing the essential terms of the loan.
15. In the present case there is no financial contract as envisaged under Rule 3(d) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to substantiate the claim of the Applicant. It is also seen that in absence of any written document indicating the purpose of the said transaction, it cannot be assumed to have been towards a loan as claimed by the Financial Creditor. The same transpires from the judgment of the Hon'ble NCLAT in *Prayag Polytech Pvt. Ltd. vs. Gem Batteries Pvt. Ltd. Company Appeal (AT)(Insolvency) No. 713 of 2019*.
16. It is an established rule of law that burden of proof lies on the party who asserts except when the law states otherwise. It has been observed by the Hon'ble Supreme Court in the matter of *Rajendra Narottamdas Sheth vs. Chandra Prakash Jain (2022) 5 SCC 600* that the primary obligation of



making out a prima facie case of default is on the financial creditor. There is no necessity for the corporate debtor to provide any information at the stage of admission of the application under Section 7 of the Code, as the burden of showing non-payment of a legally recoverable debt, which is not time-barred, is on the financial creditor. The Applicant herein has failed to provide any document to prove that the said transaction amounts to a loan.

17. To prove the existence of a debt, the Applicant has relied on the 2 dishonoured cheques amounting to Rs. 1,51,875/- (Rupees One Lakh Fifty One Thousand Eight Hundred Seventy-Five Only) and Rs. 75,00,000/- (Rupees Seventy-Five Lacs Only) but at the same time the Applicant has failed to provide a link between the said cheques being given for discharge of liability to the tune of Rs. 75,00,000/- (Rupees Seventy-Five Lacs Only).
18. Further, merely bringing it to the knowledge that TDS was deducted does not constitute a financial debt or loan in the present case. TDS can be deducted for various reasons and mere payment of TDS towards interest payable does not amount to an acknowledgment of debt. The same cannot be treated as an acknowledgment of debt, more so a default of the alleged loan.
19. A mere plain reading of the provisions under Section 7 of the IBC shows that to initiate CIRP under Section 7 of the Code, the Applicant must establish that there is a financial debt and a default has been committed in respect of that financial debt by the Corporate Debtor. All of these



aforementioned documents annexed by the Applicant are unable to prove any default of any debt which was owed by the Corporate Debtor to the Applicant.

20. The transaction of Rs. 75,00,000/- (Rupees Seventy-Five Lacs Only) effected between the Corporate Debtor and the Applicant but in absence of any Financial Contract, it cannot be categorised as a loan. Hence, we are not inclined to commence the CIRP of the Corporate Debtor.
21. The Order in the present matter is made in terms of Section 7 of IBC, 2016 based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority. This order shall not act as a bar to the Applicant in pursuing any other remedies available to it, under the prescribed provisions of law.
22. Accordingly, in the circumstances, CP No. (IB) 78/7/JPR/2019 is dismissed as rejected.

**DEEP
CHANDRA
JOSHI**
**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

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by DEEP
CHANDRA JOSHI
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**PRASANTA
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**PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER**