

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI BENCH, COURT -III  
IB-262/ND/2023**

Order under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

**IN THE MATTER OF:**

**M/s. DECCANS SAFETY GLASS WORKS PRIVATE LIMITED**

*Having its registered office at:*

2 St. George's Gate Road, Hastings,  
Kolkata-700022.

**.... Financial Creditor**

**Versus**

**M/s. ATS INFRASTRUCTURE LIMITED**

*Having its registered office at:*

711/92, Deepali, Nehru Place,  
New Delhi, Delhi-110019.

**.... Corporate Debtor**

**Order Delivered On: 22.03.2024**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)**

**SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)**

**APPEARANCES:**

For Applicant : Mr. Arjun Mukherjee, Mr. Arjun Narangi, Advs.

For Respondent : Mr. Krish Kalra, Adv.

**ORDER**

**PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)**

1. This Application has been filed by M/s. Deccans Safety Glass Works Private Limited, the Applicant/Financial Creditor before this

**IB-262/ND/2023**

**Date of Order: 22.03.2024**

Adjudicating Authority under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate Insolvency Resolution Process ("CIRP"), against M/s. ATS Infrastructure Limited, the Respondent/Corporate Debtor on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding principal amount of Rs. 1,00,00,000/- along with Interest amounting to Rs. 14,00,000/- totaling to Rs. 1,09,00,000/- (after subtracting the amount of Rs. 5,00,000/-). The date of default in the present matter is 18.08.2020.

## **2. Submissions of the Applicant/Financial Creditor:**

- i.** The Applicant advanced a loan of Rs. 1,00,00,000/- to the Corporate Debtor under a Loan Agreement dated 19.08.2016 ("Loan Agreement") and the tenure of the said loan was initially for a period of 12 months. The said loan was remitted through two cheques bearing No. 000454 and No. 000455 both drawn on HDFC Bank, issued by Financial Creditor for Rs. 49,50,000/- each and Rs. 1,00,000 as TDS was deducted.
- ii.** Under the terms of the Loan Agreement, the Corporate Debtor had agreed to repay the loan at an interest of 18% per annum payable quarterly against which the Corporate Debtor had issued 5 post-dated cheques to the Financial Creditor. Further, as security towards the Loan, the Corporate Debtor also created a lien on a residential unit which was located in a residential project being developed by the Corporate Debtor, namely, "Pristine" situated at Plot No. SC-01/A-1, Sector-150, Noida, Uttar Pradesh. Through the allotment letter dated 29.08.2016 ("Allotment Letter"), the Corporate Debtor allotted an apartment bearing no. P2181 in Tower P2, admeasuring 1750 sq. ft.
- iii.** The tenure of the Loan was for a period of 12 (twelve) months, the parties agreed to renew the same and subsequently, supplementary

- loan agreements dated 19.08.2017, 19.08.2018 and 19.08.2019 ("Supplementary Loan Agreements") were executed between the parties.
- iv.** Upon the expiry of the term of the Agreement dated 19.08.2019, the Corporate Debtor and the Financial Creditor did not enter into any further supplementary loan agreement or any other agreement. The Agreement dated 19.08.2019 had expired and the Financial Creditor had returned the cheques which were issued earlier by the Corporate Debtor. The Financial Creditor requested the Corporate Debtor to repay the loan amount as agreed upon in the Loan Agreement dated 19.08.2016 along with the interest agreed. However, the Corporate Debtor defaulted on repaying the principal amount and the interest promised.
  - v.** After constant requests by the Financial Creditor, the Corporate Debtor paid Rs. 5,00,000/- vide RTGS on 04.08.2022 as part payment towards interest and further promised that it would repay the remaining interest along with the principal amount as agreed. The Corporate Debtor failed to make the said payments as assured, the Financial Creditor presented the cheque bearing No. 004718 to its banker on 19.04.2023. However, to the utter shock and dismay of the Financial Creditor, the aforementioned cheque was dishonored upon presentation and was returned with the remark "PAYMENT STOPPED".
- Hence the present Application.

### **3. Submissions of the Respondent/Corporate Debtor:**

- i.** The Respondent has filed a reply affidavit denying the allegations made by the Applicant and stated that the Financial Creditor is merely a speculative investor and the transactions between the alleged Financial Creditor and the Respondent are not financial transactions. Thus, the amount alleged to be in default is not a

'Financial Debt'. Since the transaction between the parties is an investment and the alleged amounts are not a 'Financial Debt' the accompanying proceedings under Section 7 of the Insolvency & Bankruptcy Code, 2016 (the "Code") are not maintainable.

- ii.** It is submitted that the Applicant to maintain the present application and to fall outside the preview of Section 10A of the Code has perjured the records and has falsely submitted that the date of default is 20.04.2023, whereas, in terms of the Supplementary Loan Agreement dated 19.08.2019, the date of repayment was fixed on 18.08.2020, therefore, no default occurred on 20.04.2023. A bare reading of the clauses of the Supplementary Loan Agreement dated 19.08.2019 establishes that the amounts under the supplementary loan agreement dated 19.08.2019 were due and payable on or before 18.08.2020, which period falls within the suspended period under Section 10A of the Code. Pursuant to the expiry of the supplementary loan agreement dated 19.08.2019, no document/agreement was executed between the parties thereby making the date of repayment 20.04.2023.
- iii.** It is clear from the documents on record that the transaction between the alleged Financial Creditor and the Respondent is not a loan agreement and that the amounts were disbursed by the alleged Financial Creditor towards the purchase of apartments bearing No. P2181 & P2182 in Tower P2 in a project of the Respondent namely, "Pristine" situated at Plot No. SC01/A-1, Sector-150, Noida, Uttar Pradesh in terms of allotment letters dated 29.08.2016.
- iv.** It is to be noted that had it been a loan and not a payment for the two flats then the Allotment Letters would have not been signed. The alleged Financial Creditor is merely a homebuyer/investor in the project of the Respondent and as a sequitur, the alleged Financial Creditor cannot claim the status of a 'Lender' and that the alleged

defaulted amounts are classified as financial debt is only sale consideration.

- v. The cheques alleged to have been dishonored were not issued towards the liability that has been referred in the Application and were issued in good faith and not for the purpose as stated by the alleged Financial Creditor. In any event, there is no debt or liability due against Respondent as alleged by the alleged Financial Creditor. Rather, the alleged Financial Creditor is merely a speculative investor and cannot claim status and benefits as a Financial Creditor under Explanation (i) Section 5(8)(f) of the IBC, and is not interested in the financial well-being, growth, and vitality of the Respondent, but is just interested in his investment.

4. **Analysis and Findings:**

- i. We have heard the submissions of Ld. Counsel appearing for the Applicant as well as Ld. Counsel appearing for the Respondent. We have also perused the records.
- ii. We have to consider the following issues:
  - (a) Whether the Applicant falls in the category of Financial Creditor as per Section 5(7) of the Code or not?
  - (b) Whether the amount claimed by the Applicant as per Part IV of the Application is a Financial Debt under Section 5(8)(f) of the Code or not?
- iii. Admittedly, the Financial Creditor has crystalized the date of default of the Corporate Debtor as 18.08.2020.
- iv. It is an admitted fact that the Applicant/Financial Creditor sanctioned a loan of Rs. 1,00,00,000/- to the Corporate Debtor under a Loan Agreement dated 19.08.2016. Subsequently, supplementary loan agreements dated 19.08.2017, 19.08.2018 and 19.08.2019 were executed between the parties. From the perusal of the clauses of the Loan Agreement dated 19.08.2016 and supplementary loan

agreements dated 19.08.2017, 19.08.2018 and 19.08.2019, we find that the agreement between the parties is a financial facility and is not a 'financial debt' as defined under the Code. The said sum was not disbursed against the time value of money.

- v. At this stage, it is pertinent to refer to the definition of the expression "Financial Creditor" in sub-section 7 of Section 5 of the Code.

Section 5 of sub-section 7 reads as follows:

*"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;"*

- vi. From the perusal of the Loan Agreement dated 19.08.2016 and supplementary loan agreements dated 19.08.2017, 19.08.2018 and 19.08.2019, we do not find any clause which would show that any "Financial Debt" is owed to the present Applicant and therefore by no means the present Applicant can be called as a "Financial Creditor".

- vii. At this stage, it is also pertinent to refer to the definition of the expression "Financial Debt" in sub-section 8 of Section 5 of the Code.

Section 5 of sub-section 8 "Financial Debt" reads as follows: -

*"Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*

*(a) money borrowed against the payment of interest;*

*(b) \*\*\*\*\**

*(c) \*\*\*\*\**

*(d) \*\*\*\*\**

*(e) \*\*\*\*\**

*(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*(g) \*\*\*\*\**

*(h) \*\*\*\*\**

(i) \*\*\*\*\*”

- viii.** We have perused the Loan Agreement dated 19.08.2016 and supplementary loan agreements dated 19.08.2017, 19.08.2018 and 19.08.2019. We have not come across any clause which shows that the amount involved in the transaction has the commercial effect of borrowing.
- ix.** It is clear that a minimum threshold limit has been laid down for taking cognizance of an application under Section 7 of IBC, 2016 for triggering CIRP when such an application is relatable to a Real Estate Project. In the present application, it is seen from the records that no documents have been filed by the Applicant to satisfy that they have the minimum threshold limit as laid down in the second proviso to Section 7(1) of IBC, 2016.
- x.** Admittedly, the present application has been filed by the Applicant who was allotted flats/apartments bearing No. P2181 & P2182 in Tower P2 in a residential project being developed by the Corporate Debtor, namely, "Pristine" situated at Plot No. SC-01/A-1, Sector-150, Noida, Uttar Pradesh by way of entering into allotment letter dated 29.08.2016.
- xi.** On the analysis of the legal position, we are of the considered view that the Applicants have not made out a case of creditors of class belonging to any specific project to achieve the threshold limit of 10% or 100 numbers whichever is less, as required by law.
- xii.** While determining Issue (a) and (b), we are of the considered view that the amount involved in the present case cannot be considered as a Financial Debt within the definition of sub-section 8 of Section 5 of the Code. We are also of the opinion that the Applicant is not a Financial Creditor holding any financial debt which is in default of payment by the Corporate Debtor.
- xiii.** It is a settled law that the pre-requisites for an application under Section 7 of the Code are the existence of 'financial debt' and a

'default', and as evident from the facts in the preceding paragraphs, it cannot be said that there is any financial debt, much less any default and therefore the present application is not maintainable.

5. **Order**

In light of the above facts and circumstances, it is hereby ordered as follows: -

- i. The Application bearing **(IB)-262(ND)/2023** filed by the Applicant under section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent, is **dismissed**.
- ii. The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (“IBBI”) for their record.
- iii. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

No order as to costs.

Sd/-  
**(ATUL CHATURVEDI)**  
**MEMBER (TECHNICAL)**

Sd/-  
**(BACHU VENKAT BALARAM DAS)**  
**MEMBER (JUDICIAL)**