

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)-64/7/JPR/2019

(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:

NEIL INDUSTRIES LIMITED

CIN: L51109WB1983PLC036091

Registered Office: 88B, Ground Floor, Lake View Road,
 Kolkata-700029 (West Bengal)

Corporate Office: 402-403, Kan Chambers, 14/113, Civil Lines,
 Kanpur-208001 (Uttar Pradesh)

...Financial Creditor

VERSUS

JAWAN MINING AND CONSTRUCTION

EQUIPMENTS PRIVATE LIMITED

CIN: U29249RJ2007PTC025129

Registered Office: Katewa Sadan Road No. 3,
 Jhunjhunu-333001 (Rajasthan)

...Corporate Debtor

For Petitioner (s)	: Amol Vyas, Adv.
For Respondent (s)	: Vaibhav Kasliwal, Adv. Shashank Kasliwal, Adv. Anant Kasliwal, Adv.

ORDER PRONOUNCED ON: 24.06.2022**ORDER****Per: Shri Raghu Nayyar, Technical Member**

1. This Application is filed by Neil Industries Limited ('Applicant'), claiming to be a Financial Creditor, through its Managing Director, Mr. Arvind Kumar Mittal, who is duly authorised *vide* Board Resolution dated 07.02.2019 to file this Application against Jawan Mining and Construction Equipments Private Limited ('Respondent') under Section 7 of the Insolvency and Bankruptcy Code ('IBC'), 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.
2. The Applicant/ Financial Creditor is a Public Limited Company incorporated under the Companies Act, 1956 on 25.03.1983 and duly registered with the Registrar of Companies, Kolkata, bearing CIN: L51109WB1983PLC036091 and is registered with the Reserve Bank of India as Non-Banking Finance Company. The registered office of the Company is at 88B (Ground Floor), Lake View Road, Kolkata, West Bengal – 700029.

3. The Respondent is a Private Limited Company, incorporated under the Companies Act, 1956 on 08.10.2007 and duly registered with the Registrar of Companies, Jaipur bearing CIN: U29249RJ2007PTC025129. The Registered Office of the Company is at Katewa Sadan Road No. 3, Jhunjhunu, Rajasthan – 333001. The Authorised Share Capital of the Respondent is Rs. 1,80,00,000/- (One Crore Eighty Lakhs Only) and the Paid-up Share Capital is Rs. 1,75,50,000/- (One Crore Seventy-Five Lakhs Fifty Thousand Only).
4. It is submitted by the Applicant/ Financial Creditor that the Respondent/ Corporate Debtor availed financial assistance of Rs. 5,95,00,000/- for the purpose of Working Capital enhancement, as per the terms and conditions set out under the sanction letters. The details of the said loan are as follows:

Particulars	Loan 1	Loan 2	Loan 3
Amount (in Rs.)	25,00,000	4,70,00,000	1,00,00,000
Sanction Letter	20.05.2015	22.05.2017	15.02.2018
Rate of Interest	10% p. a.	12% p. a.	10% p.a.
Period of Loan	36 months	36 months	36 months
Repayment	On-demand	On-demand	On-demand

5. It is stated that the Respondent did not maintain financial discipline in repayment of the loan amount. Therefore, on account of continuous defaults committed by the Respondent, the Applicant issued a Demand

Notice dated 07.01.2019, calling upon the Respondent to repay the outstanding amount of Rs. 6,44,80,166/- due as of 31.12.2018, but the Respondent received no response. The Applicant stated that the Respondent has wilfully submitted its Confirmation of Accounts admitting the outstanding loan amount due to the Applicant and has annexed the same for the Financial Year 2017-18. Thereafter, on 18.02.2019, the Applicant deposited the cheque bearing no—0099171, which the Respondent issued at the time of loan disbursement as security. However, the cheque returned with the remark 'Funds Insufficient', attracting Section 138 of the Negotiable Instruments Act, 1881.

6. As a consequence, this Application was filed. As claimed by the Applicant, the Respondent is liable to pay an amount of Rs. 6,44,80,166/- as on the date of filing of this Application, as an outstanding amount along with interest, as reflected in Part IV of Form- 1, is filed.

Part IV

S. No.	Particulars of Financial Debt	
1.	Total amount of debt granted	<u>Amount of Debt Granted:</u> Principal Amount Rs. 5,95,00,000/-
	Date(s) of Disbursement	Amount of Rs. 25,00,000/- Date: 26.05.2015 Amount of Rs. 4,70,00,000/- Date: 26.05.2017 to 03.11.2017

		Amount of Rs. 1,00,00,000/- Date: 28.03.2018 (Copy of Bank statements reflecting disbursement of Loan is annexed and marked as Annexure-12)
2.	Amount claimed to be in default and the date on which the default occurred	<u>Amount Claimed:</u> Rs. 6,44,80,166/- (Six Crore Forty-Four Lakhs Eighty Thousand One Hundred and Sixty Six Only). <u>Bifurcation of Amount Claimed:</u> <u>Principal Amount Due:</u> Rs.5,95,00,000/- (Rupees Five Crore Ninety-Five Lakhs Only) <u>Amount due towards interest:</u> Rs.49,80,166/- (Rupees Forty-Nine Lakhs Eighty Thousand One Hundred and Sixty Six only) (Copy of the Detailed Working of the amount in Default is annexed and marked as Annexure-17)
3.	Date From which debt fell due	Date from Which Debt Fell Due: 30.06.2017

7. The Respondent has filed a reply on *vide* Diary No. 1067/2019 dated 10.06.2019 and has stated the following:
- a. Out of the total principal amount of Rs. 5,95,00,000/- disbursed through different loan transactions, the second loan of Rs.

4,70,00,000/- sanctioned on 22.05.2017 and the third loan of Rs. 1,00,00,000/- approved on 15.02.2018 had not become due and payable by the Respondent on the date of filing of this Application (12.03.2019) as the condition in the sanction letters stated the period of the loan to be 36 months. Even if 36 months period has passed, the loan amount does not automatically become repayable until and unless demand is made, as the loan amount shall become due only on demand.

- b. The Applicant served a demand notice dated 07.01.2019, requesting payment of Rs. 6,44,80,166/-, which contains all three loan amounts, made *vide* three separate sanction letters. Since the loans disbursed in 2017 and 2018 are not due before 2020 and 2021, respectively, the said demand notice does not specify the total amount and components thereof repayable by the Respondent, qua the sanction letter dated 20.05.2015. Therefore, no demand has been raised validly.
- c. One director of the Respondent, Mr. Himanshu Sharma, was hand in glove with the Applicant/ Financial Creditor. He would bring funds into the Respondent Company through different entities in exchange for 50% shares of the Respondent and also introduced the Applicant/ Financial Creditor to the Respondent for infusion of

funds. However, Mr. Himanshu Sharma started routing funds being received from the Applicant for making repayments to different entities from which he had himself brought in the funds. During this period, in January-February, 2018, Respondent handed over a cheque bearing no. 099171 to Mr. Vimal Sharma (father of Mr. Himanshu Sharma) for making some payments. But, Mr. Vimal Sharma gave the cheque to the Applicant in February 2019 purportedly to reclaim its entire principal amount along with interest, but the cheque got dishonoured. Consequently, a complaint to S.H.O. Police Station, Jhotwara, Jaipur, was made on 22.02.2019 against Mr. Himanshu Sharma and Mr. Vimal Sharma. Copy of FIR dated 09.05.2019 has been annexed in the sur-rejoinder as Annexure SR1.

- d. The Applicant in the Application stated that the aforesaid cheque was issued as a security for the loan, but it is apparent from the fact that a loan of Rs. 4,70,00,000/- was given in 2017, whereas the cheque itself is from a chequebook used in 2018 and the cheque was presented in February 2019. This shows that Mr. Vimal Sharma misused the cheque in collusion with the Applicant to recall the loan amounts which had not become due.

- e. Statement for the period from 01.04.2017 to 31.03.2018 was wrongly accepted by Mr. Himanshu Sharma, as the manner of confirmation of accounts does not match how the Respondent Company maintains its accounts. The Respondent deducts TDS on interest paid in March every year. However, the statement of Applicant shows quarterly TDS amounts being payable by the Respondent, which Mr. Himanshu Sharma has wrongly accepted.
- f. Interest on the loan of Rs. 25,00,000/- and Rs. 1,00,00,000/- has been calculated at 12%, whereas as per the sanction letters dated 20.05.2015 and 15.02.2018, interest was calculated at 10%. Moreover, the entire amount of Rs. 4,70,00,000/- has been shown to be paid on 22.05.2017 and accordingly, interest seems to have been charged. However, the loan amount has been released in tranches, spread over the entire year of 2017.
- g. The Hon'ble Supreme Court, in the matter of *Swiss Ribbons Pvt. Ltd. and Anr. vs. Union of India and others* Writ Petition (Civil) No. 99 of 2018, held that one of the basic principles which differentiate financial and operational creditors is that the financial creditors have a proper repayment schedule. An application under Section 7 of IBC, 2016 can only be made when a default in repayment has occurred, but in the instant case, the Respondent has

been paying interest on time and there has been no default by the Respondent, so to term, the Applicant as Financial Creditor would be bad in law.

8. The Applicant has filed a rejoinder *vide* Diary No. 1456/2019 dated 05.08.2019 stating that:

- a. Mr. Yash Katewa, Director of the Corporate Debtor, is not authorised to file a reply to the Application as the reply filed by him on the premise of Board Resolution could not be relied on because, in the said resolution, Mr. Yash Katewa has authorised himself as the Authorised Signatory. Therefore, the reply filed on invalid Board Resolution should not be taken on record.
- b. As per the sanction letters, the tenure of financial assistance was 36 months, but the same was subject to payment of interest on time and maintaining financial discipline as per sanction letters. If the same was not followed, the Applicant could invoke the third condition, i.e., ' repayable on demand' and recall the entire facility for which the condition of payable on demand was stipulated.
- c. With respect to the demand notice dated 07.01.2019, consolidation of loan amounts is the sole discretion of the lender in case the borrower defaults in repayment of financial assistance and fails to adhere to financial discipline.

- d. In providing unsecured loans as against security in hand, the Financial Creditor keeps undated cheques for the purpose of security and the same upon modification of terms and conditions be replaced from time to time. So, it is immaterial from which chequebook the cheques are being issued; if this is the case, the Respondent/ Corporate Debtor would need to provide the complete details of the entire cheque books used during the year.
9. The Corporate Debtor has filed a surrejoinder *vide* Diary No. 1703/2019 dated 29.08.2019 and stated as follows:
- a. Mr. Yash Singh Katewa has filed a reply to this Application only upon having been so directed by the Board of Directors and no member of the Respondent Company has objected to him defending the Company.
 - b. In the rejoinder, the Applicant has stated that the loan amount disbursed in 2017 and 2018 carried a tenure of 36 months; however, as there is a condition of repayment on demand, the aforementioned condition of 36 months is rendered meaningless. Thus, the Applicant has virtually stated that the said loan advancements carried no concept of disbursement of an amount for consideration for the time value of money. The Hon'ble National Company Law Appellate Tribunal in *Sanjay Kewalramani versus Sunil*

Parmanand Kewalramani & Ors Company Appeal (AT) (Insolvency) No. 57 of 2018 laid down a critical distinction between a 'debt' and a 'Financial Debt'. In accordance with Section 5(8) of the Insolvency and Bankruptcy Code, 2016, the essential requirement of a 'Financial Debt' is that it should have been disbursed against the consideration for the time value of money.

10. The Corporate Debtor has filed written arguments stating that:
 - a. The Applicant is a non-banking financial company; thus, their loan is a financial debt. It further stated that the Applicant had not followed RBI Guidelines for declaring Corporate Debtor as NPA and not given any notice that they are declaring Respondent as NPA.
 - b. Repayment of the amount granted *vide* sanction letter dated 20.05.2015 was never demanded by the Applicant. As the Applicant *vide* notice dated 07.01.2019 made a cumulative demand of Rs. 6,44,80,166/- which included all the three loan amounts.
 - c. Factually there was never any loan arrangement between the parties. One Mr. Himanshu Sharma was to infuse funds in the Respondent Company in exchange for equity shares and a threshold limit was orally agreed upon between the parties. However, Mr. Himanshu Sharma failed to meet the criteria. Subsequently, upon his request,

his obligation to meet the threshold was replaced by the Applicant and the Applicant also was unable to meet the said threshold and accordingly, no shares came to be issued to the Applicant by the Corporate Debtor.

- d. The Hon'ble NCLAT in the matter of *Nikhil Mehta & Sons V/s AMR Infrastructure Ltd.* Company Appeal (AT) (Insolvency) No. 07 of 2017, held that only when debt is disbursed against the consideration for the time value of money, can such debt be treated as financial debt under the meaning prescribed under Insolvency and Bankruptcy Code, 2016. The Applicant in the present scenario states that it has the right to demand the monies advanced as and when it deems it fit; the said averment would only go on to establish that the said monies cannot be treated as “financial debt”.

11. The Financial Creditor has filed written arguments stating the following:

- a. The Respondent/ Corporate Debtor has made a total payment of Rs. 43,68,204/- and the last payment received by the Applicant was for Rs. 27,00,617/- on 27.03.2018. Thereafter, the Respondent did not make any further payments.
- b. The Respondent was under a legal obligation to pay the interest quarterly as per the RBI guidelines and was also required to deduct TDS under Section 194A of the Income Tax Act, 1961. The

Respondent has deducted TDS quarterly. However, it has failed to pay interest as per the sanction letters and therefore defaulted on its obligations.

- c. As per the Master Direction - Non-Banking Financial Company – Non-Systemically Important Non- Deposit taking Company (Reserve Bank) Directions, 2016 (RBI guidelines) issued for NBFCs having an asset below Rs. 500 Crores, the interest on loans is payable either monthly or quarterly. Page no. 16 para 12(v)(h) of the guidelines defines a Non-Performing Asset as follows:

“(h) in respect of loans, advances and other credit facilities (including bills purchased and discounted), the balance outstanding under the credit facilities (including accrued interest) made available to the same borrower/ beneficiary when any of the above credit facilities becomes non-performing asset.”

Since the Respondent has defaulted in making payment of one loan amount, the said loan facility and all his other credit facilities will become NPA.

- d. The Applicant has relied on the following case laws:

- *L&T Infrastructure Finance Company Limited vs. Gwalior Bypass Project Ltd. & Ors. Company Appeal (AT) (Insolvency) Nos. 676 and 677 of 2019.*
- *Innoventive Industries Ltd. vs. ICICI Ltd. (2018) 1 SCC 407.*

- *Nishit B Patel vs. Good Value Financial Services Pvt. Ltd.*

Company Appeal (AT) (Insolvency) No. 198 of 2020.

12. This Adjudicating Authority perused all the relevant papers and found them in order. The Registered Office of Corporate Debtor is situated in Jhunjhunu and therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. The matter is within the limitation period as enunciated under the Law of Limitation.
13. In order to decide whether the debt is a Financial Debt, it is desirable to notice and refer to specific relevant provisions of IBC, 2016, which are set out below:

Section 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;

Section 5 (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–

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

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

[Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;

Section 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;

Section 3(12): “default” means non-payment of debt when whole or any part or 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;

14. As per Section 5(8), financial debt is a debt along with interest which is disbursed against the consideration for the time value of money and it

may include any of the events enumerated in sub-clauses (a) to (i). Therefore, the first essential requirement of financial debt is that the debt should be disbursed against the consideration for the time value of money, which may include situations enumerated in various sub-clauses. In the matter of **Mr. Rajnish Jain vs. (Manoj Kumar Singh – I.R.P.) & Ors.** Company Appeal (AT) (Insolvency) No. 519 of 2020, the Hon'ble NCLAT observed that-

“47. The Hon'ble Supreme Court, in the case of Pioneer Urban Land Infrastructure Vs. Union of India 2019 SCC Online Page 1055 has observed that; “The definition of ‘Financial Debt’ in Section 5(8) then goes on to state that a debt must be ‘disbursed’ against the consideration for the time value of money. In the present context, it is clear that the expression ‘disburse’ would refer to the fund transfer made by the Respondent No.3 to the Corporate Debtor for the particular purpose of funding, i.e. working capital. The expression ‘disburse’ refers to money, which has been paid against consideration for the time value of money. In short, the disbursement must be money and must be against Consideration for the time value of money, meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money for the working capital requirement or any other purpose of the company. Thus, it is clear that the Respondent No.3 disbursed money in the form of fund transfer made towards the purpose of working capital of funding.”

Therefore, it is essential that for any transaction to be a Financial Debt, an element of the consideration for the time in view of money is very critical. The

discussion involved in the present case does not fulfil the requirement of the consideration for trying time in view of the following manner:

- a. The demand notice was issued by the Financial Creditor has a cumulative demand of Rs. 6,44,80,166/- which included all the three loans. This demand notice fails to differentiate the interest of component of the various loans given under three tranches having different rate of interest and disbursed at the different intervals of time.
- b. Sanction letters annexed with the Application mention that interest will be charged @ 10% p.a. for the 1st and 3rd loan amount; and 12% p.a. for the 2nd loan amount. Also, in its reply, the Respondent has annexed Form 16A for F.Y. 2016-17 to 2017-18, showing deduction of TDS under Section 194A against the interest it was allegedly paid to the Applicant. However, the manner of calculating the interest does not correspond to the account maintain by the Respondent as the Respondent deducts TDS on the interest paid in March every year. However, the Applicant has deducted the TDS quarterly have been payable being the Respondent. It is alleged that one Mr. Himanshu Sharma has wrongly accepted such manner of calculating the interest.
- c. The purpose of this loan facility was for the working capital enhancement of the Corporate Debtor and the Respondent is under legal obligation to pay the interest. Though, upon examining the

documents produced before us. We find that the Respondent was paying interest regularly till March, 2018. The documents and pleading placed on record before us, we cannot determine whether the cause of action is sufficiently shown while filing this application against the Corporate Debtor. It is an established law that the Applicant is dominus litis by virtue of which it should have filed proper documentation substantiating its claims.

- d. Moreover, the burden of proof lies on the Financial Creditor to proof that the interest from March, 2018 till the filing of this application has also not been paid by the Corporate Debtor. There has been deficiency and discrepancy in filing of supporting documents and pleadings in this aspect.

- 15. The arguments of Financial Creditor that the loan is repayable on demand as per the terms & conditions signed by the Corporate Debtor. The arguments of Financial Creditor that a permanent loan of 36 months can be called before its maturity on the account of irregular financial discipline is not tenable under the law. Further, the Financial Creditor has accepted the interest on irregular basis and cannot avail this to his advantage to recall the loan facility after accepted the interest payment mechanism.

16. It is clear from the contract clause that if Respondent default in making payment of one loan amount does not necessarily mean that all his other loan facility would be treated as default and can be categorise as NPA. In view of this, the Applicant can recall the loan facility which is due and payable upon maturing of the loan.
17. In view of the forgoing discussion, it can be concluded that the claim of the Applicant as Financial Creditor does not establish on the account of premature cause of action and insufficient filing of documents to establish his claim. However, this Adjudicating Authority is inclined to grant a liberty to approach this Adjudicating Authority in respect of cases whose cause of action has been matured and file an application afresh to parties to this case with the all-necessary documents, evidence and records.
18. In view of the aforesaid, we have no option but to return the application of the Financial Creditor to initiate proceeding under Section 7 of IBC, 2016. Hence, this application is return as deficient with liberty to remove deficiency in respect of facts after March 2018 and particularly in respect the loan acoount. The order in the present matter is made bases on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceeding between the parties, if any, before any other Court, Tribunal or any judicial or any other authorities.
19. Let the copy of this Order be serve to all the parties and to the IBBI.

In the circumstances, CP No. (IB) 64/7/JPR/2019 is returned as deficient.

DEEP
CHANDR
A JOSHI

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by DEEP
CHANDRA JOSHI
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DEEP CHANDRA JOSHI
JUDICIAL MEMBER

RAGHU
NAYYAR

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RAGHU NAYYAR
Date: 2022.06.24
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RAGHU NAYYAR
TECHNICAL MEMBER