

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-V)



I.A. (CO. ACT) NO.: 49/ND/2024
IN
T.P. (CO. ACT) NO.: 53/PB/2022
Old CP No. 39/2016

IN THE MATTER OF:

MODERN SOLAR PRIVATE LIMITED

Registered Address at:
2/5, Sarat Bose Road, Sukhsagar,
2nd Floor, Kolkata, West Bengal-700020

...Applicant

VERSUS

CLARO ENERGY PRIVATE LIMITED

Registered Address at:
91, DSIDC Shed, 2nd Floor,
Scheme-I, Okhla Industrial Area, Phase-II, New Delhi-110020

...Respondent

IN THE MATTER OF:

Modern Solar Private Limited

...Financial Creditor

VERSUS

Claro Energy Private Limited

...Corporate Debtor

CORAM:

SHRI MAHENDRA KHANDELWAL
HON'BLE MEMBER (JUDICIAL)

SMT. ANU JAGMOHAN SINGH,
HON'BLE MEMBER (TECHINCAL)

Order delivered on: 07.11.2025

PRESENT:

For the Applicant	:	Siddhant Jaiswal and Abhishek Verma, Advs.
For the Respondent	:	Mr.Rohit Anil Rathi, Mr. Yashas RK, Ms. Nihiraka Singh, Advs.

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ORDER



1. The instant interlocutory Application has been filed in accordance with Rule 11 of National Company Law Tribunal Rules, 2016 seeking directions for treating the instant Application pari-materia to the Petition under Section 7 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as 'Code').
2. The prayers sought by the Applicant in the instant Application are mentioned hereinbelow—
 - a. *The present application under Rule 11 of the National Company Law Tribunal Rules, 2016 be allowed and that the instant I.A. be treated as an application under Section 7 of the Code;*
 - b. *Initiation of CIRP against the Corporate Debtor in lieu of the financial debt amounting to Rs.48,04,054.79/- inclusive of interest @18% p.a.*
3. The Applicant had initially filed Company Petition bearing no. Co. Pet. 39/2016 under Sections 433(e), 434 and 439 before Hon'ble Delhi High Court seeking winding-up of the Respondent/Corporate Debtor. Vide order dated 07.10.2022, the Hon'ble High Court transferred the said Petition to this Adjudicating Authority in terms of Section 39 of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. Thereafter, vide order dated 21.04.2023, Applicant was directed to file appropriate Application under Section 7 or Section 9 of the Code. In compliance with the said direction, the Applicant has filed the present Application under Rule 11 of the National Company Law Tribunal Rules, 2016, as Section 7 Application in transferred Company Petition.

Case of the Applicant/Financial Creditor

4. The relevant facts necessary for adjudication, as submitted by the Applicant are extracted below:
 - 4.1. Around February 2013, the Corporate Debtor/Respondent approached the Financial Creditor/Applicant for the supply of goods and products, as it was proposing to bid for a project of the Public Health Engineering Department (PHED), Government of Bihar, in the Sitamarhi District of Bihar. The Corporate

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Debtor subsequently won the bid and was awarded the contract for the said project. Accordingly, an implied agreement was entered into between the Financial Creditor and the Corporate Debtor for the supply of goods and services required for execution of the project and other related works.

- 4.2. On 02.03.2013 and 19.03.2013, the Financial Creditor, through two separate RTGS transfers, cumulatively paid a sum of INR 20,00,000.00 (Rupees Twenty Lakhs Only) to the Corporate Debtor as an advance loan to enable commencement of the project work. After prolonged delay and non-execution of the project, the Financial Creditor demanded refund of the said advance loan amount of INR 20,00,000.00 (Rupees Twenty Lakhs Only).
- 4.3. Vide email dated 03.10.2013, the Corporate Debtor admitted that it would try its best to repay the said “corporate loan” to the Financial Creditor at the earliest. Subsequently, vide another email dated 06.02.2014, the Corporate Debtor again admitted the outstanding amount and assured repayment of the same. The said email also enclosed a calculation sheet wherein the Corporate Debtor acknowledged the RTGS transfers dated 02.03.2013 and 19.03.2013, aggregating to INR 20,00,000.00, as a “loan” carrying interest @18% per annum, repayable by 01.03.2014. In furtherance of such acknowledgment, on 22.02.2014, the Corporate Debtor issued cheque bearing No. 092527 for INR 20,00,000.00 in favor of the Financial Creditor towards repayment of the said loan. Subsequently, on 20.05.2014, the said cheque was dishonored by the bank due to “insufficient funds” as per Return Memo No. I.D. 821.
- 4.4. On 21.09.2015, the Financial Creditor issued a statutory notice bearing No. JD/15-16/232 under Section 434 of the Companies Act, 1956, demanding repayment of the outstanding amount of INR 20,00,000.00 along with interest @18% p.a. further, the Financial Creditor approached the Hon’ble High Court of Delhi by filing Company Petition No. 39/2016 under Sections 433(e), 434, and 439 of the Companies Act, 1956, seeking winding up of the Corporate Debtor.
- 4.5. Pursuant to the notification dated 07.12.2016 issued by the Ministry of Corporate Affairs, the Financial Creditor filed an application being CO. APPL. 227/2019 on 18.02.2019 seeking transfer of CO. PET. 39/2016 to this Adjudicating Authority. The Hon’ble Delhi High Court, vide order dated

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07.10.2022, allowed the said application and transferred the matter to this Adjudicating Authority, where it was registered on 29.11.2022 as TP (Co. Act.) No. 53(PB)/2022.

- 4.6. This Adjudicating Authority, vide order dated 21.04.2023, observed that since it was a transferred matter, liberty was granted to the Applicant to file an appropriate application either under Section 7 or Section 9 of the Insolvency and Bankruptcy Code, 2016 (“the Code”). Consequently, on 24.07.2023, the Financial Creditor filed a separate application bearing CP (IB) 557/ND/2023 under Section 7 of the Code. During hearing on 22.09.2023, this Adjudicating Authority directed the Applicant to file the said application as an Interlocutory Application (I.A.) in TP (Co. Act.) No. 53(PB)/2022. Accordingly, CP (IB) 557/ND/2023 was dismissed as withdrawn with liberty to file a Section 7 application within the existing transferred petition for initiation of CIRP against the Corporate Debtor.
- 4.7. The amount advanced by the Financial Creditor was not an investment. No material or documentary evidence has been produced by the Corporate Debtor to show that the parties were engaged in any partnership or joint venture arrangement. On the contrary, the unequivocal admission of liability by the Director of the Corporate Debtor vide email dated 06.02.2014 clearly establishes that the outstanding amount was treated as a loan. Therefore, qualifies as a “financial debt” within the meaning of Section 5(8) of the Code.
- 4.8. The Corporate Debtor, in its email dated 06.02.2014, expressly acknowledged receipt of INR 20,00,000.00 vide RTGS transfers dated 02.03.2013 and 19.03.2013 as a “loan” carrying interest @18% per annum, repayable by 01.03.2014. Hence, the essential elements of financial debt i.e., the disbursement against the time value of money stand satisfied.
- 4.9. The Respondent’s contention regarding any profit-sharing arrangement is untenable, as no such ratio was ever determined between the parties. Moreover, no agreement has been executed evidencing that the amount in question was an investment.
- 4.10. Vide email dated 06.02.2014, the nature of the transaction stood crystallized as a corporate loan, with the Corporate Debtor itself acknowledging the same. The issuance of cheques towards repayment further reinforces that the amount

constituted a loan, thereby establishing the existence of a financial debt owed by the Corporate Debtor to the Financial Creditor.



Case of the Respondent/Corporate Debtor

5. The contentions asserted by the Learned Counsel on behalf of the Respondent/Corporate Debtor are briefly stated below:

- 5.1. The Applicant has suppressed material facts relating to the “Sitamarhi Project”. As per the understanding, the Applicant shall invest funds towards the working capital required in executing the said project in consideration of share in the profits upon. Accordingly, INR 10,00,000.00 was paid on 02.03.2013 and INR 10,00,000.00 on 19.03.2013 as investment towards profit share in the project.
- 5.2. The Corporate Debtor offered the Applicant a premature exit contingent upon the next payment from the client. The Applicant, vide email dated 04.10.2013, expressly acknowledged that the amount was an *investment based on profit sharing*. It clearly contradicts the applicant’s claim that alleged transaction was a loan transaction. Applicant contended earlier that the amount in dispute was an investment but now and only in order to misuse the IBC mechanism it has completely changed its stance in order to fit into the narrow ambit of IBC and hence is liable to be dismissed.
- 5.3. There is no agreement or basis which evidences that the transaction is a Loan Transaction. The Applicant at one stage states that there was an implied agreement that applicant would be supplying goods and services to the Corporate Debtor and at another alleging an “advance loan”. The Applicant was only a supplier of goods and has failed to demonstrate how a loan was extended being a supplier. A supplier cannot simultaneously act as a lender unless there is clear contractual evidence of such an arrangement, which is absent in the present case.
- 5.4. There is no time value of money, and the said amount was never received by the Corporate Debtor as a Loan but only as investment towards the Sitamarhi project. An investment does not qualify as a financial debt, as it lacks the essential characteristics of a loan, including a fixed repayment obligation and interest. Hence, there is no default on the part of the Corporate Debtors as

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no debt is or was due and the Applicants do not even fall in the category of Financial Creditor.

- 5.5. Possibility of treating this investment as a loan was considered at a later stage due to undue pressure exerted by the Applicant regarding pricing and supply issues relating to other projects between the parties. However, the Applicant itself rejected the proposal to restructure the investment as a loan. Email dated 06.02.2014 relied by the Applicant contains an Excel Sheet to explore how the investment could potentially be restructured as a loan to facilitate repayment. It was merely a contingent proposal, not an acknowledgement of any pre-existing financial debt. There was no clarity on whether the Applicant accepted this proposal or not.
- 5.6. Vide Email dated 08.03.2014, Respondent reiterated the original investment terms of the Sitamarhi Project and clarified that the new option of treating the investment as a fixed-return loan was contingent on incoming payments from the client. Applicant suppressed an email dated 18.04.2014, wherein it is expressly referred that cheque no. 092527 dated 22.02.2014 of Corporation Bank amounting to INR 20,00,000.00 as due against material supplied for Sitamarhi Project. However, in the present application, applicant mentions the same cheques towards repayment of amount transferred on 02.03.2013 and 19.03.2013. Respondent refuted the Applicant's false claim and vide email dated 18.04.2014 stated that INR 20,00,000.00 was never meant for 'material supply' but was purely an equity investment in the Sitamarhi Project
- 5.7. On the date the cheque of INR 20,00,000.00 deposited by the Applicant, the Applicant itself owed the Corporate Debtor to a sum of INR 22,09,582.75. In September 2013, Applicant wanted to exit from the Sitamarhi Project and asked the Corporate Debtor to refund INR 20,00,000.00. Further, Corporate Debtor clarified several times that the Applicant's investment was a "risk investment towards profit sharing in the project" and not a loan which could be returned any time.
- 5.8. The alleged transaction was merely an investment not a financial debt under Section 5(8) of the IBC. The email exchanged between the parties demonstrate that the alleged loan was merely a proposed restructuring of an investment



which was never materialized. Applicant suppressed their own email dated 18.04.2014, which directly contradicts its stand as they themselves referred to the Cheque No. 092527 dated 22.02.2014 as due for material supplied not as a loan

Analysis and Findings

6. We have heard the Learned Counsels for the Applicant and the Respondent and perused the averments made in the Application, reply and the rejoinder.
7. It is the case of the Applicant/Financial Creditor that an implied agreement was entered into between the Applicant and the Corporate Debtor for the supply of goods and services required for execution of the Sitamarhi Project. In pursuance thereof, the Applicant advanced a sum of INR 20,00,000.00 to the Corporate Debtor through two separate transactions dated 02.03.2013 and 19.03.2013, as a loan for working capital requirement for the said project. On Applicant's demand, due to delay or non-execution of project, the Corporate Debtor issued a cheque bearing No. 092527 for INR 20,00,000.00, which was subsequently dishonored. Consequently, on default on repayment, the Applicant initiated winding-up proceedings under Sections 433(e), 434 and 439 of the Companies Act, 1956, which were thereafter transferred to this Tribunal in terms of order dated 07.10.2022 passed by the Hon'ble High Court of Delhi.
8. Per contra, the Learned Counsel appearing on behalf of the Respondent/Corporate Debtor contended that the amount advanced by the Applicant was not a loan but an investment made towards the Sitamarhi Project, with the understanding that the Applicant would receive a share in the profits accrued from the project. It was further submitted by the Respondent that upon the Applicant's request only, it offered a premature exit to the Applicant, which was contingent upon payments received from the client. The Respondent further argued that the Applicant has failed to produce any documentary evidence substantiating the alleged loan transaction.

Issue Involved



9. The issue for consideration before us is whether the amount of INR 20,00,000.00 deposited by the Applicant/Financial Creditor through two separate transactions dated 02.03.2013 and 19.03.2013 falls within the ambit of 'Financial Debt' as defined under Section 5(8) of the Insolvency and Bankruptcy Code, 2016?
10. It is observed that the Applicant had initially filed winding-up proceedings against the Corporate Debtor under Section 433 of the Companies Act, 1956. The proceedings under Section 433 of the Companies Act, 1956, however, is distinguished from those under Section 7 of the Code. To initiate proceedings under Section 433, Applicant is only required to establish the existence of a debt. The primary object of winding-up proceedings is recovery of money and satisfaction of debt, whereas the I & B Code is enacted for insolvency resolution and maximization of the value of assets. Therefore, for maintaining an application under Section 7 of the Code, the alleged debt must satisfy the definition contained in Section 5(8) of the Code and necessarily carry the time value of money. Accordingly, to determine whether the amount claimed by the Applicant qualifies as financial debt, the nature of the transaction requires examination in light of Section 5(8) of the Code.
11. For determining the true nature of the transaction, reliance may be placed upon the documents placed on record and the email correspondence between the parties. The Corporate Debtor vide its email dated 03.10.2013 offered two options to the Applicant upon its request for premature exit from the project, either to treat the amount as an investment in terms of the original understanding or to consider it as a corporate loan. However, the Applicant, in its email dated 04.10.2013 stated that "*it was always understood that the investment is on the basis of profit sharing.*". It is, therefore, evident that no such arrangement as alleged by the Applicant was ever finalized, and email dated 04.10.2013, sent by the Applicant, explicitly records that the Applicant itself treated the transaction as an investment. Email dated 04.10.2013 sent by the Applicant in response of email dated 03.10.2013 is extracted below:



From: Jigar R Avalani <jigar.avalani@modernsolar.in>
Ser: 04 October 2013 12:40
To: kartik wahi; ketan.doshi@modernsolar.in
Cc: gaurav@claroenergy.in; soumitra@claroenergy.in
Subject: Re: Regarding Sithamarhi project
Importance: High

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Dear Kartik,

As discussed we are still awaiting all the cheques for the earlier supplies including the 60% of the PEDAs supplies as committed by you.
Kindly send the details of the cheques being sent by you.

For the Sithamarhi project as discussed earlier please send the financial details of the project. It was always understood that the investment is on the basis of profit sharing. However only getting the financial details we will be in position to make any comment on the same.

Regards,

Jigar R Avalani.

12. The Applicant further alleged that vide email dated 06.02.2014, the Respondent acknowledged receipt of INR 20,00,000.00 as a loan carrying interest at 18% per annum. However, upon careful perusal, the said email only indicates discussions regarding restructuring of the investment transaction, which did not materialize into a concluded arrangement. Subsequently, in its email dated 08.03.2014, the Corporate Debtor reiterated that the money was disbursed as investment for completion of project and the aforesaid restructuring was made only to facilitate pre-mature exit to Applicant, which was not finalized between the parties. Relevant extract of the email dated 08.03.2014 sent by the Corporate Debtor to the Applicant is reproduced as below:

"This money was an investment from Modern Solar, and the capital was committed till the completion of the project. However, on your insistence and as a goodwill gesture, we've agreed to let you exit pre-maturely from the project. But at no point would we be in a position to borrow money at higher cost, so as to not only give back your principal amount of Rs. 20 lakhs but also an interest @18%. This would defy all logic. Please appreciate this."

13. It was further contended by the Corporate Debtor that the Applicant had taken contradictory stands regarding cheque No. 092527 dated 22.02.2014. From the email dated 18.04.2014 placed on record as Annexure A-15 to Company Petition No. 39/2016, it appears that the Applicant had admitted that the said cheque was issued towards material supplied for the Sithamarhi Project. However, on the contrary, the Applicant has contended that the cheque was issued towards



repayment of the alleged loan of INR 20,00,000.00. However, upon perusal of the emails dated 04.10.2013, 08.03.2014, and 18.04.2014, it is evident that the amount in question was merely an investment made on a profit-sharing basis. In terms of Section 5(8), an amount must be disbursed against the time value of money, which is absent in the present case as transaction being Investment Transaction. Furthermore, the Applicant has failed to produce any documentary evidence to substantiate that the said amount qualifies as a financial debt within the meaning of Section 5(8) of the Insolvency and Bankruptcy Code, 2016.

14. The Hon'ble NCLAT in ***M/s Jagbasera Infratech Private Ltd. v. Rawal Variety Construction Ltd. CA (AT)(Ins) No. 150 of 2019*** held that

“9. Keeping in view the ratio of the aforementioned Judgement and having regard to the terms and conditions of the Memorandum of Understanding and the Joint Venture Agreement entered into between the parties, this Tribunal is of the considered view that the amount invested in the ‘Joint Venture Project’ by the Appellant herein in his capacity as a ‘Promotor’ and ‘Investor’ does not fall within the ambit of the definition of ‘Financial Debt’ as defined under Section 5(8) of the Code.”

The Hon'ble NCLAT in the aforesaid precedent observed that where a person invests a certain amount with the understanding that, in the event of success of the project would receive a residual gain, the amount so invested cannot be said to be a financial debt. Hon'ble Appellate Tribunal categorically held that any sum invested in the capacity of Promoter or Investor does not fall within the ambit of Section 5(8) of the Code. The said principle has been followed by the Coordinate Bench of this Tribunal in ***Chiragsala Sales Pvt. Ltd. Vs Vaishno Devi Traders Pvt. Ltd (CP (IB)/33/7/GB/2022)***, wherein the petition under Section 7 of the Code was dismissed on similar grounds. In the present case as well, the amount disbursed by the Applicant was in the nature of an investment made on profit sharing basis, therefore, in view of above precedent, cannot be termed a 'financial debt' within the meaning of Section 5(8) of the Code.

15. In view of the foregoing discussion, we are of the considered opinion that in view of the fact that the amount is an investment on profit sharing, it does not fall within the definition of financial debt under Section 5(8) of the Code. The Emails dated 04.10.2013, 08.03.2014 and 18.04.2014 demonstrates that the said sum was

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advanced as working capital towards an investment on a profit-sharing basis. In light of the aforesaid precedents, such an investment cannot be treated as financial debt so as to maintain proceedings under Section 7 of the Code. Accordingly, the present petition filed by Modern Solar Private Limited against Claro Energy Private Limited under Section 7 of the Code is held to be not maintainable and is hereby dismissed, with no order as to costs.

16. Accordingly, **I.A. No.: 49 of 2024** in **T.P. (Companies Act) No.: 53/PB/2022** stands **Dismissed**.
17. Let a copy of the order be served to the parties.

Sd/-
ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)

Sd/-
MAHENDRA KHANDELWAL
MEMBER (JUDICIAL)