

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 215-216 of 2022

(Arising out of Orders dated 07.02.2022 and 17.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench in C.P. (IB) No. 313/7/JPR/2019)

IN THE MATTER OF:

Amit Rajput

S/o Shri Bhupendra Singh,
R/o Villa E-8, Hibiscus Complex,
SS Group, Sector 50,
Gurgaon, Haryana -122009.

...Appellant

Versus

1. M/s Reckon Industries Limited

Resolution Professional
CIN: U51909DL1985PL021408
Office: 111, Tribhuwan Complex
Ishwar Nagar, Mathura Road
New Delhi – 110 065.

2. M/s Warm Forging Pvt. Ltd.

Through Interim Resolution Professional
CIN: U34300RJ1999PTC015907
Office: Plot No. SP 238 (B&C)
Industrial Area Kaharani (Bhiwadi Extension)
Bhiwadi, Alwar, Rajasthan – 301019.

...Respondents

Present:

For Appellant: Mr. Maninder Singh, Sr. Advocate alongwith Mr. Shiv Mangal Sharma, Mr. Shashank Khurana, Mr. Janamejaya Upadhyay, Mr. Santosh Kumar and Mr. Shrinjan Khosla, Advocates.

For Respondents: Mr. Mukul Rohatgi, Mr. Shahrukh Khan and Mr. Ravi Chirania, Advocates for Respondent No.1.
Mr. Pramod Dattaram Rassam, Advocate for Respondent No.2/IRP.

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 07.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench admitting an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') filed by the Respondent – Financial Creditor. A subsequent order dated 17.02.2022 passed in I.A. No. 88/JPR/2022 deleting the name of Applicants 2, 3 and 4 has also been challenged. The Appellant - Shareholder and Suspended Director of the Corporate Debtor aggrieved by the impugned orders has come up in this Appeal.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:-

(i) The Respondent No. 2 incorporated a company in USA being M/s Selma Precisions Technologies, NC, LLC (hereinafter referred to as 'US Company/ SPT') on 22.11.2016. The Respondent No. 2 incorporate the company in USA with object of taking over a US Company namely M/s Sona BLW Precision Forge. Inc. 500 Oak Tree Drive, Selma LC 27576 USA, which was under going Bankruptcy Proceedings in USA under Chapter 7 of Bankruptcy Laws of USA.

(ii) A discussion took place between the Corporate Debtor and the Respondent No. 1 – Financial Creditor for participating in the auction process of M/s Sona BLW Precision Forge Inc. Corporate Debtor approached the Financial Creditor for the purpose of acquisition of M/s Sona BLW Precision Forge Inc. Corporate Debtor asked the Financial Creditor to extend 50% of total purchase price. The Financial Creditor was assured 50% equity share in the US Company for its financial assistance. The Corporate Debtor informed the Financial Creditor that the total expenses would be USD 11 million and requested the Financial Creditor to immediately transfer INR 3.5 crores in his account in India for its 50% shares to meet the expenses of the amount of INR 7 crores to be deposited in the USA Court as the auction was fixed on 12.12.2016.

(iii) On 02.12.2016, an amount of Rs.1.4 crore was transferred by the Financial Creditor to the Corporate Debtor. On 04.12.2016, an agreement was entered between the Financial Creditor and the Corporate Debtor for equal equity participation to bid and acquisition of M/s Sona BLW Precision Forge Inc. The funds for the earnest money for the bidding purpose were to be transferred through the IDBI account of the Corporate Debtor, balance amount for final acquisition through the holding company to be formed between both the parties. The Financial Creditor on 08.12.2016 further transferred Rs.25 lakhs to the Corporate Debtor. On 13.12.2016 transferred Rs.1.75 crore to the Corporate Debtor and on 15.12.2016 transferred Rs.10 Lakhs. Total amount disbursed by the Financial Creditor to Corporate Debtor was Rs.3.5 crores.

(iv) The company M/s Selma Precision Technologies was declared highest bidder on 14.12.2016 at the auction of M/s Sona BLW Precision Forge Inc. After M/s SPT was declared highest bidder, the Corporate Debtor approached the Financial Creditor to send further an amount of 1.5 Million USD directly to the US Company account and assured that the US Company i.e. M/s SPT would issue equity shares for investment by the Financial Creditor. The Financial Creditor approached the Reserve Bank of India (RBI) for granting permission to transfer funds to the M/s SPT towards Share Application money and permission having been granted, an amount of USD 1.5 million was transferred to M/s SPT by the Financial Creditor on 23.12.2016. After transferring USD 1.5 million, the Financial Creditor asked the Corporate Debtor to return Rs.3.5 crores which was disbursed by the Financial Creditor to the Corporate Debtor between 02.12.2016 to 15.12.2016.

(v) US Company, M/s SPT failed to issue securities within period of 60 days and further defaulted in refund of the share application amount of USD 1.5 million. The Financial Creditor demanded entire money back both Rs.3.5 crores which was earlier disbursed and amount of USD 1.5 million directly transferred to the US Company – M/s SPT.

(vi) An agreement dated 21.10.2017 was signed by Mr. J. P. Aggarwal and Mr. Sandeip Aggarwal, Directors on behalf of the Financial Creditor and Mr. Amit Rajput and Mr. Vinay Upadhyay, Directors on behalf of the Corporate Debtor, wherein Appellant/ Corporate Debtor accepted and acknowledged debt of INR 3.5 crore and USD 1.5 million. Mr. Amit Rajput,

the Appellant in the agreement gave the manner of transfer of the entire fund of USD 1.5 million as well as Rs.3.5 crore. A cheque dated 31.10.2017 of Rs.3.5 crore was also prepared in the name of Respondent No.1 - Financial Creditor signed by the Appellant on behalf of the Corporate Debtor, however, only photocopy of the cheque was given to the Respondent No.1 and original cheque was kept under the custody of the Mr. Vinay Upadhyay. The cheque was never deposited in the account of Financial Creditor.

(vii) Financial Creditor filed an application under Section 7 on 20.03.2018 against the Corporate Debtor. Director of the Corporate Debtor by email dated 28.05.2018 stated that the Corporate Debtor is unable to pay interest @ 18% p.a. as demanded by the Financial Creditor on amount of Rs.3.5 crores, however, agreed to pay interest @ 12% p.a.

(viii) On 14.07.2018, an agreement was entered between the US Company of the Corporate Debtor (SPT), Mr. Amit Rajput (Appellant), Director of the Corporate Debtor and one Mr. Ajay Kr. Jain an investor who was ready to invest in the US Company of the Corporate Debtor, where it was admitted that the Corporate Debtor owe the Financial Creditor INR 3.5 crore. Shri Jai Prakash Aggarwal, Director of the Financial Creditor was witness to this Agreement. In view of the Agreement dated 14.07.2018, the Financial Creditor withdrew its Section 7 Application on 07.09.2018 which was not admitted by that time. The Appellant (Corporate) Debtor also vide email dated 12.03.2018 acknowledged return of the amount of Rs.3.5 crores to the Financial Creditor. The Corporate Debtor did not pay amount of Rs.3.5

crore with interest and has been utilizing the money for its business purpose and inspite of its commitment to return the money, the money was never returned to the Financial Creditor. Financial Creditor filed Section 7 Application before the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench in the month of November, 2019 being CP (IB) No. 317/7/JPR/2019 claiming the amount of Rs.3.5 crores with interest @ 18% till December, 2019, total being Rs.5.39 crores.

(ix) A Receiver was appointed for M/s SPT by the General Court of Justice, Superior Court Division, State of North Carolina, USA. The Receiver has submitted a Report on 21.09.2020 before the General Court of Justice, Superior Court Division in which Report all claims filed with regard to the US Company – M/s SPT were noticed.

(x) In Section 7 Application filed by the Financial Creditor, a Reply dated 06.04.2021 was filed by the Corporate Debtor opposing the Section 7 Application. In the Reply, the Corporate Debtor did not deny the receipt of amount of Rs.3.5 crores from the Financial Creditor, however, took the pleas that that amount was provided to jointly bid to acquire the foreign company. It was pleaded that the amount provided by the Financial Creditor was not a loan amount, it was just the share application money. Reference to dispute with regard to M/s SPT pending in the General Court of Justice, Superior Court Division, State of North Carolina, USA has been mentioned in the Reply as well as Report of Receiver dated 21.09.2020. With regard to email dated 28.05.2021 issued by Shri Vinay Upadhyay, Director of the Corporate Debtor it is submitted that he had no right to

Company Appeal (AT) (Insolvency) No. 215-216 of 2022

admit payments towards interest amount. Reference to Agreement dated 14.07.2018 has also been made in the Reply. It was submitted that earlier Section 7 Application was withdrawn by the Financial Creditor without taking any liberty to file the Application. Rejoinder Affidavit was also filed by the Financial Creditor to the Reply of the Corporate Debtor.

(xi) Adjudicating Authority by the impugned order dated 07.02.2022 admitted the Section 7 Application. Adjudicating Authority has returned the finding that the Corporate Debtor in series of emails has admitted the liability of repaying the sum of Rs.3.5 crores to the Financial Creditor. The Corporate Debtor through its Director – Mr. Vinay Upadhyay admitted and acknowledged that Rs.3.5 crore was taken as Short-Term Loan from the Financial Creditor with interest of 12% p.a. repayable within three months. The Adjudicating Authority has also referred to the Balance Sheet of the Corporate Debtor of 2017-2018 which recorded under the Head of ‘Unsecured Loans’ an amount of Rs.3.5 crores.

2. We have heard Shri Maninder Singh, learned senior advocate for the Appellant and Shri Ravi Chirania, learned counsel appearing for Respondent No. 1 – Financial Creditor.

3. Shri Maninder Singh, learned senior counsel for the Appellant contends that amount of Rs.3.5 crore which was paid by the Financial Creditor to the Corporate Debtor was not a financial debt within the meaning of Section 5 Sub-section (8) of the I&B Code, rather the amount was given by the Financial Creditor towards 50% equity shares in M/s SPT

and was investment only. Referring to the Agreement dated 14.07.2018, it is submitted that under the Agreement dated 14.07.2018 it was categorically mentioned that on receipt of USD 0.80 Million from Investor – Ajay Kumar Jain, amount of Rs.3.5 crores be returned within three days. Thus, return of Rs.3.5 crore was based on contingency of receipt of amount of UDS 0.80 Million from the Investor – Ajay Kumar Jain and its company. Ajay Kumar Jain – Investor never made payment of USD 0.80 Million, hence, no claim can be raised by the Financial Creditor for refund of Rs.3.5 crore. Shri Maninder Singh has placed reliance on Section 33 of the Indian Contract Act, 1872 and submitted that a contingent contract cannot be enforced by the Financial Creditor. Shri Maninder Singh further submitted that the amount of Rs.3.5 crore was given by the Financial Creditor to the Appellant as Deal Fee which Deal Fee is clearly mentioned in the Agreement dated 04.12.2016. The Appellant has no responsibility to return the Deal Fee of Rs.3.5 crores, however, the Appellant promised to return the Deal Fee of Rs.3.5 crores after amount is received from the Investor i.e. Ajay Kumar Jain.

4. Shri Ravi Chirania, learned counsel for the Respondent refuting the submissions of learned counsel for the Appellant submits that there is categorical acknowledgement of debt of Rs.3.5 crores by the Corporate Debtor which is apparent from the various agreements which were brought on the record as well as from the series of emails sent by the Appellant as well as the Director of the Corporate Debtor – Mr. Vinay Upadhyay. The Balance Sheet of the Corporate Debtor from the year 2017-18 also shows

that amount of Rs.3.5 crore was extended to the Corporate Debtor under the Head of 'Short-Term Loan and Advances'. Even, the Audit Report and duly audited Balance Sheet of the year 2017-18 shows that amount of Rs.3.5 crores was extended as 'unsecured loans from others'. Email dated 12.03.2018 issued by the Appellant has been relied by learned counsel for the Respondent to submit that the said email contains clear acknowledgment of debt. Even Agreement dated 14.07.2018 in which Financial Creditor was not a party there is clear acknowledgment of Rs.3.5 crores to the Financial Creditor owed by the Corporate Debtor. It is submitted that the contract dated 14.07.2018 was not contract entered between the Financial Creditor and the Corporate Debtor rather said agreement was between the US Company, the Appellant as Director of the Corporate Debtor and one Mr. Ajay Kumar Jain. The submission of learned counsel for the Appellant that the said Agreement was a contingent contract which cannot be enforced by the Financial Creditor is without any basis. The said agreement was between the third parties which is not binding on the Financial Creditor. The submission of learned counsel for the Appellant that the amount of Rs.3.5 crore was Deal Fee which was paid by the Financial Creditor to the Appellant has been vehemently refuted. It is submitted that there was no agreement between the parties to pay any Deal Fee to the Appellant. The theory of the deal fee has been invented by the Appellant in this Appeal only to misguide the Appellate Tribunal. It is submitted that before the Adjudicating Authority it was not even whispered by the Corporate Debtor that amount of Rs.3.5 crore paid to the Corporate Debtor by the Financial Creditor was towards Deal Fee. Appellant cannot

Company Appeal (AT) (Insolvency) No. 215-216 of 2022

be allowed to make submission which has no foundation in pleadings before the Adjudicating Authority. It is submitted that the amount of Rs.3.5 crore, which was disbursed by the Financial Creditor to the Appellant between 02.12.2016 to 15.12.2016 qualifies as financial debt which was disbursed for consideration for the time value of the money which had commercial effect of a borrowing. Rs.3.5 crore was utilized by the Corporate Debtor for carrying its commercial business by making payment towards acquiring the US Company which was in liquidation.

5. We have considered submissions of learned counsel for the parties and have perused the record.

6. From the submissions of learned counsel for the parties following are the questions which arises for consideration in the present Appeal:-

Question 1: Whether amount of Rs.3.5 crore disbursed by the Financial Creditor to the Corporate Debtor between 02.12.2016 to 15.12.2016 is a financial debt within the meaning of Section 5(8) of the I&B Code or the amount was advanced towards 50% equity share in M/s SPT – the US Company?

Question 2: Whether the liability of the Corporate Debtor to return Rs.3.5 crore received from the Financial Creditor could have arisen only when the Corporate Debtor received the amount of USD 0.80 Million from the Investor – Ajay Kumar Jain and the Agreement dated 14.07.2018 being a contingent contract in so far as payment of Rs.3.5 crores of Financial Creditor is not enforceable by virtue of Section 33 of the Contract Act?

Question 3: Whether the amount of Rs.3.5 crore paid by the Financial Creditor to the Corporate Debtor was towards Deal Fee payable to Appellant as per Agreement dated 04.12.2016?

Question No.1

7. The first question to be considered is as to whether the amount of Rs.3.5 crores paid by the Financial Creditor to the account of Corporate Debtor is a 'financial debt' within the meaning of Section 5(8) of the I&B Code or was investment/ payment for acquiring 50% equity share of M/s SPT – the US Company. We need to first notice the details of the payment made by the Financial Creditor to the Corporate Debtor totaling to Rs.3.5 crores. In Section 7 Application filed by the Financial Creditor details of payments totaling to Rs.3.5 crores have been given. Following details have been given in the Section 7 Application regarding the payment of Rs.3.5 crores:-

- (i) Date: 02.12.2016 - Rs.1.4 Crore vide cheque of HDFC Bank.
- (ii) Date: 08.12.2016 - Rs.25 Lakhs by RTGS by HDFC Bank in IDBI Bank account of the Corporate Debtor.
- (iii) Date: 13.12.2016 - Rs.1.5 Crore by cheque of HDFC Bank.
- (iv) Date: 15.12.2016 - Rs.10 Lakhs by cheque of HDFC Bank.

8. It is also on the record that on 22.11.2016 the Directors of the Corporate Debtor namely Mr. Amit Rajput, Mrs. Anupama Rajput Chauhan, their son Mayank Rajput and Kartik Rajput the brother of Mrs. Anupama Rajput incorporated a company in USA by the name of M/s

Selma Precision Technologies, NC, LLC (US Company). Holding of the US Company was to the following effect:-

- | | | | |
|-------|---------------------|---|-----|
| (i) | Mr. Amit Rajput | - | 30% |
| (ii) | Mrs. Anupama Rajput | - | 30% |
| (iii) | Mr. Mayank Rajput | - | 30% |
| (iv) | Mr. Kartik Rajput | - | 10% |

9. First Agreement which was entered between the parties was dated 04.12.2016. In the Agreement dated 04.12.2016 entered between the Financial Creditor and the Corporate Debtor, salient points of the agreement in clause 1 to 5 are as follows:-

- “1. Both parties agree for equal equity participation (50:50) to bid & acquire M/s Sona BLW Precision Forge Inc. 500 Oak Tree Drive, Selma, NC 27576, USA. Reference case 16-04336-5-DMW Doc 1 Filed 08/19/16 Entered 08/19/16 09:09:40, under Chapter 7 of Bankruptcy laws of U.S.A.*
- 2. Project cost & timing :*
 - 1) Total project cost: \$10M + \$1m (fee) = \$11.0M*
 - 2) 1st phase (latest by 05.12.2016) fund required: Bidding advance amount + deal fee = \$500,000 +50% of (\$1.0M) = \$1.0 M*
 - 3) 2nd phase Balance bid amount after 22 days (latest by 29.12.2016): \$4.7 M.*
 - 4) 3rd phase: growth fund / pre operating funds (latest by 30.03.2017): \$5.0 M.*

- 5) *4th phase: Modernization, Automation, balancing equipment, technology upgrade fund (after 30.09.2017, depending on business growth, orders etc.) (After 30.09.2017): \$5.0 M.*
3. *The new company formed for this acquisition process is M/s Selma Precision Technologies, NC, LLC as per the details attached herewith (Annexure 1).*
4. *The funds for the Earnest Money for the bidding process will be transferred through the IDBI account of M/s Warm Forgings Pvt. Ltd. as per the details of the account attached herewith (Annexure 2) to the Jason Hendren Sun Trust as per account details attached (Annexure 3).*
5. *The balance amount for the final acquisition (say approximately \$ 4.75 Million) will be transferred through a holding company in India to be formed between the 2 parties who are signatories of this agreement. Suggested name for the new holding company will be mutually agreed between the two parties.”*

10. The amount of Rs.3.5 crores was disbursed by the Financial Creditor to the Corporate Debtor in the manner as indicated above which was credited in the IDBI account of the Corporate Debtor. There is no dispute between the parties regarding receipt of amount of Rs.3.5 crores by the Corporate Debtor from the Financial Creditor. What is disputed is the nature of transaction only. Financial Creditor in Section 7 Application has

given details of disbursement to the Corporate Debtor. It is to be noted that M/s SPT – the US Company was declared as highest bidder on 14.12.2016 and thereafter Corporate Debtor approached the Financial Creditor to send the amount directly to the US Company. In Section 7 Application there are details with regard to payment of USD 1.5 Million which was transferred to the US Company by the Financial Creditor as share application money. We may also look into the Reply of the Corporate Debtor which was filed in the Section 7 Application to find out what was the case taken by the Corporate Debtor regarding payment of Rs.3.5 crores. In Para 5 of the Reply following has been stated:-

“5. That it is pertinent to mention that the Applicant and the corporate debtor entered into an agreement dated 04.12.2016, wherein both the parties agreed to bid for equal equity participation to acquire M/s Sona BLW Precision Forge Inc. It is amusing to note that the money disbursed for shared participation to acquire a foreign company is being called as a short term loan and eventually a financial debt to invoke the jurisdiction of this Hon’ble Tribunal to initiate false and frivolous insolvency proceedings against the Respondent. The amount provided was not a loan transaction and was just a share Application money as is evident from the Agreement dated 4.12.2016.”

11. In Section 7 Application it has been stated in detail by the Financial Creditor that amount of USD 1.5 Million was transferred to the US Company (M/s SPT) by the Financial Creditor on 23.12.2018 whereas

Rs.3.5 crore was given between 02.12.2016 to 15.12.2016. It is clear that the amount of USD 1.5 Million was towards share application money to the US Company – M/s SPT. Section 7 Application has nothing to do with regard to USD 1.5 Million which is subject matter of proceedings in the US Court regarding M/s SPT where Receiver has been appointed. Section 7 Application was filed only with regard to amount of Rs.3.5 crore which was given to the Corporate Debtor by the Financial Creditor.

12. We may also notice the acknowledgments by the Corporate Debtor with regard to amount of Rs.3.5 crore. We may first notice the Agreement dated 21.10.2017 which was entered between the Directors of the Financial Creditor and the Directors of the Corporate Debtor. The Agreement noted that the Appellant is committed to return the Principal Amount of USD 1.5 Million and Rs.3.5 crore. Para No. 3 of the Agreement relevant in this context is to the following effect:-

“3. AR committed that he will return the entire principle amount of \$ 1.5 Million & Rs.3.5 Crores by the following route:

3.1 \$1.5 Million will be refunded with 4 transactions, in the similar manner as it was transferred to SPT from HDFC Bank with RBI approval.

3.1.1 \$ 0.25 M : Shri JPA

3.1.2 \$ 0.25 M : Shrimati

Sumitra Aggarwal

3.1.3 \$ 0.25 M : SA

3.1.4 \$ 0.75 M : M/s Reckon

Industries Ltd.

3.2 Rs. 3.5 Crores will be refunded by sending approximately \$0.5 M through the Warm Group, IDBI Bank Account. AR has committed and agreed to make up any shortfall (due exchange rate etc.) in total amount of Rs.3.5 Crores by addition local funds from Warm Group.

3.3 As a collateral AR has agreed to give an IDBI cheque of Rs.3.5 Crores to M/s Reckon Industries Ltd. This cheque will be handed over for “escrow” safe custody to VU to ensure that no diversion of funds takes place from the IDBI account, post the closing transfers.

3.4 Similar AR has also committed and agreed that if there is any shortfall in \$1.5 M (item 3.1) he will make up any shortfall from his own internal sources of funds.”

13. The above Agreement which is agreement relied by both the parties unequivocally contains the acknowledgement of Corporate Debtor towards liability to refund the amount of Rs.3.5 crore to the Financial Creditor and the Agreement mentions the mechanism to return the amount. The Agreement Clause 3.3 also mentions giving an IDBI cheque of Rs.3.5 crore to the Financial Creditor which raise clear presumption of owing debt by the Corporate Debtor to the Financial Creditor. The above Agreement between the parties makes it clear that the Corporate Debtor has acknowledged the liability to refund aforesaid amount of Rs.3.5 crore. The

acknowledgement to refund the aforesaid amount of Rs.3.5 crore also proves that amount of Rs.3.5 crore was a financial debt.

14. We may also notice in this context the email dated 12.03.2018 which has been issued by the Appellant – Director of the Corporate Debtor to Mr. J. P. Aggarwal, Director of the Financial Creditor. The said email acknowledge payment of USD 1.5 Million as well as Rs.3.5 crore (0.5 million USD). The email has been filed alongwith the Section 7 Application, which reads as follows:-

“Sir

Good Morning,

*As signed the understanding to repay as total \$2M
(India money and usa money).*

*We are starting to transfer the money from this
week.*

*1st payment \$100k will be made this week from
SPT A/C.*

*Detailed payment plan will be given you after
sending this payment.*

*We hope. March and April – maximum money will
be paid... if any balance – will be paid in Mary 18.*

*We are trying to paid you, from disposal of this unit
(In part or full).*

This is for your information please.

With Warm Regards

*Amit Rajput
MD”*

15. Further an email dated 28.05.2018 written by the Mr. Vinay Upadhyay, Director of the Corporate Debtor was also part of Section 7 Application and was also relied by the Adjudicating Authority. By email dated 28.05.2018, the Director of the Corporate Debtor communicated following to Mr. J. P. Aggarwal, Director of the Financial Creditor:-

“Dear Shri J. P. Aggarwal Ji,

Trust you are doing fine!

As per our discussions and the attached signed agreement dated October 21, 2017 & our email of March 08, 2018, (which has email trails of past discussions), I can confirm the following:

- 1. As per point no. 5 of our agreement dated October 21, 2017, any “up-side or surplus” from the partial or complete sale of SPT equity will be taken care and covered while remitting money from USA, regarding gains made on SPT investments.*
- 2. Also regarding the Rs.3.5 Crs. Short term loan given to Warm Forgings (P) Ltd. from Reckon Industries Limited, it may not be possible to consider 18% p.a. interest. However, since the mutual understanding was to repay the money in 3 to 4 months initially agreed with 12% interest, as per Amit Ji’s email (point 6 of attached email), the maximum interest which may be considered is 12% p.a., as initially agreed, which we plan to repay in the next 3 months.*

We highly appreciate your positive consideration of the above, enabling us to resolve all matters amicably.

Many Thanks, Regards & Best Wishes,

Vinay

Vinay Upadhyay

Director: Warm Forgings Pvt. Ltd.

www.warmforging.com”

16. The aforesaid email also mentions that amount of Rs.3.5 crore was a ‘Short Term Loan’ given to Corporate Debtor by the Financial Creditor. In the email Director also conceded that maximum interest which can be considered is only 12%.

17. The Adjudicating Authority also referred to the Balance Sheet of the year 2017-18. In the Balance Sheet of the year 2017-18, the amount of Rs.3.5 crore was mentioned under the classification of ‘Borrowing’ as ‘Unsecured Borrowing’. The Respondent No.1 has also referred to the Independent Auditor’s Report which were part of the Balance Sheet 2017-

18. In the Independent Auditor’s Report under Note 2.6 – Short-Term Borrowing the amount of Rs.3.5 crore has been mentioned as on 31.03.2017. There being no dispute of disbursement of Rs.3.5 crore by the Financial Creditor to the Corporate Debtor, Short-Term Borrowing of Rs.3.5 crore mentioned in the Audited Balance Sheet fully relates with the amount received from the Financial Creditor. When we look into the Agreement dated 21.10.2017, the email dated 12.03.2018 and 28.05.2018 referred above as well as Balance Sheet for the year 2017-18, it becomes

clear that the amount of Rs.3.5 crore which was disbursed by the Financial Creditor to the Corporate Debtor was a 'Financial Debt'. In this context, we may refer to Section 5(8) of the I&B Code which provides as follows:-

*“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 against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised 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 nonrecourse 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);]

18. Section 5(8) Sub-clause (f) covers any amount raised under any other transaction having the commercial effect of a borrowing. There cannot be any denial to the commercial effect of the transaction since it is on the record that the amount which was given by the Financial Creditor was credited in the IDBI Bank account of the Corporate Debtor from which the EMD for participation in the auction of M/s Sona BLW Precision Forge. Inc was paid. The case of the Appellant that the said amount of Rs.3.5 crore given by the Financial Creditor was purchase price of the 50% equity share in M/s SPT is not supported by the materials on the record. The amount of USD 1.5 Million was sent by the Financial Creditor to the M/s SPT directly on 23.12.2018 as share application money which amount can be said to be amount sent for equity shares which equity shares was never given to the Financial Creditor. Thus, the case of the Appellant that amount of Rs.3.5 crore be treated as investment only towards purchase of equity share is not supported from the record rather materials including acknowledgement of the Corporate Debtor clearly prove that the aforesaid amount comes within the definition of ‘financial debt’ under Section 5(8)(f) of the I&B Code. We, thus, are satisfied that the amount of Rs.3.5 crore is

a 'financial debt' and application filed under Section 7 was fully maintainable by the Financial Creditor.

Question 2

19. Shri Maninder Singh, learned counsel for the Appellant has contended that the contingency for filing application under Section 7 has not arisen for the Financial Creditor under the Agreement dated 14.07.2018. The Corporate Debtor never received amount of USD 0.80 Million which was to be paid by the Investor – Ajay Kumar Jain, hence, the occasion for payment of Rs.3.5 crores has never arisen. He submits that payment of Rs.3.5 crores to the Financial Creditor as per Agreement dated 14.07.2018 which was a contingent contract being covered under Section 33 of the Contract Act, such contract cannot be enforced by the Financial Creditor.

20. We may first notice the Agreement dated 14.07.2018 which is foundation for raising the above submission. Agreement dated 14.07.2018 was entered between (i) M/s Selma Precisions Technologies, NC, LLC (US Company) (ii) Mr. Amit Rajput (Appellant) and Mr. Ajay Kumar Jain (Investor – third party). It will be useful to extract the agreement clause 1 and 5 which are relevant in the present case:-

“AGREEMENT

*This agreement is executed at Gurgaon on this 14th
day of July, 2018 between*

1. *Selma Precision Technologies NC, LLC 500 Oak Tree Dr. Selma, NC 27576, USA through its Manger Mr. Amit Rajput (Hereinafter referred to as First Party),*
2. *Amit Rajput S/o Shri Bhupinder Singh R/o Villa No. 8, Hibiscus Section 50, Gurgaon, Haryana – 122018 (Hereinafter referred to as Second Party) and*
3. *Ajay Kumar Jain S/o Shri Salek Chan Jain R/o C-13/55, Sector-3, Rohini, Delhi – 110085 (hereinafter referred to as the Third Party)*

Whereas parties above have entered into an agreement on 14th February 2018 in continuation of understanding entered on 23rd December, 2017.

Now all the three parties wish to change terms and conditions as well as certain theme of the agreement. Hence, now they entered into new agreement which is as under:-

WHEREAS the First Party has acquired through Bankruptcy Court, the assets of Sona BLW Precision Forge Inc. on 14.12.2016 at the sum of 4.575 million USD. The Second Party is one of promoter in First Party, holding 25% ownership in his own name and 30% ownership units in the name of Mrs. Anupam Chahan (wife of second party) and 30% ownership units in the name of Mayank Rajput (son of Second Party) and remaining 15% ownership is in the name of third party through his wife Mrs. Anamika Jain.

The Second Party has represented that the present venture is beneficial and has invited Third Party to buy additional 85% ownership of the same as the Second Party does not have adequate capital at this stage. After this agreement, the Third Party shall become 100% owner of the First Party.

Based on the representations of the Second Party, the third party has agreed to enter into this venture by having 100% total ownership including 15% already owned by third party.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. *That no acquire 85% additional ownership units in the first party, the third party or his relatives, associates or his companies has agreed to invest further 5.2 million USD in the First Party by July, 2019 through his own accounts/ family members accounts and through his partnership firm M/s Himani International (23/3 East Patel Nagar, New Delhi – 110008). The funds put in by the Third Party shall be used to pay off the following liabilities:*

- (i) Mr. Jai Prakash Aggarwal 1.40 Million
along with his family USD
members Mr. Sandip and
Mrs. Sumitra Aggarwal and
his company M/s Reckon
Industries Ltd.*
- (ii) UTICA Leaseco. LLC 2.5 Million
Address: 905, South USD
Boluevard East, Rochester
Hills, Michigan – 48307.*

(iii) Mr. Kartick Rajput	0.502866 million USD
(iv) Warm Forging Pvt. Ltd. Bhiwadi, India. Address: SPL 238 B&C, Kahrani Industrial Area, Bhiwadi, Rajasthan, 301019	0.80 Million USD
(v) Other Current Liability of First Party	0.20 million USD
<hr/>	
Total 5.4028 Million USD	

The Second Party has assured the Third Party that there is no other loan/liability except as mentioned above.

On receipt of 0.80 million USD Warm Forging shall return the amount of Rs.3,50,00,000/- (Rupees Three Crores Fifty Lacs only) to M/s Reckon Industries Limited and Rs.1,95,00,000/- (Rupees One Crore Ninety Five Lacs) to M/s Surya Testing Service Pvt. Ltd. The same is confirmed by the Second Party who is Director of Warm Forgings Pvt. Ltd.

x.....x.....x

5. *That further the Second party who is director of Warm Forgings Pvt. Ltd., undertakes to pay Rs. 3,50,00,000/- (Rupees Three Crores Fifty Lacs only) to M/s Reckon Industries Limited and Rs.1,95,00,000/- (Rupees One Crore Ninety Five Lacs Only) M/s Surya Testing Service Pvt. Ltd. within 3 days of receipt of the amount of 0.80 million UDS or any part thereof.”*

21. From the Agreement dated 14.07.2018, it is clear that the Financial Creditor is not a party to the Agreement. The Agreement is in between the US Company, the Appellant – Director of the Corporate Debtor and Ajay Kumar Jain – Investor. Clause 5 on which much reliance has been placed by Shri Maninder Singh contemplate that amount of Rs.3.5 crore shall be paid to the Financial Creditor by the Corporate Debtor within three days of receipt of USD 0.80 Million. USD 0.80 Million was to be received by the Corporate Debtor from the Investor – Ajay Kumar Jain who was to invest USD 5.2 Million. Section 33 of the Contract Act on which learned counsel for the Appellant placed reliance provides as follows:-

“S. 33. Enforcement of contracts contingent on an event not happening. — *Contingent contracts to do or not to do anything if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before.*

Illustration

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.”

22. As noticed above, the Financial Creditor being not part of the Agreement dated 14.07.2018, the submission that payment to the Financial Creditor was contingent contract is without any foundation. Agreement dated 14.07.2018 was agreement between third parties of which Financial Creditor was not part therefore the question of non-payment by

Corporate Debtor to the Financial Creditor on the basis of such agreement does not arise, nor by Agreement dated 14.07.2018 the liability to pay debt of the Financial Creditor can be diluted. Any Agreement by the Corporate Debtor with third parties cannot dilute the debt due to Financial Creditor. We, thus, do not find any substance in this submission of the Appellant.

Question 3

23. Shri Maninder Singh, learned counsel for the Appellant submitted that the amount of Rs.3.5 crore paid to the Appellant was towards Deal Fee which in fact the Appellant was not liable to refund but as a good will gesture he promised to repay the same provided he receive the same from Mr. Ajay Kumar Jain. The Appellant referred to agreement dated 04.12.2016 to submit that said agreement refers to Deal Fee of USD 1 Million. In the Agreement dated 04.12.2016, Deal Fee was referred to fee of USD 1 Million which was included in the total project cost which was the total project cost for acquiring M/s Sona BLW Precision Forge. Inc. M/s Sona BLW Precision Forge. Inc. was under Bankruptcy Laws of USA. The said company was to be acquired by bidding. There is no indication in the Agreement that any Deal Fee is to be paid to the Appellant who claims to be technocrat by the Financial Creditor. Learned counsel for the Respondent, Mr. Ravi Chirania has rightly in his submission stated that this argument has been raised in this Appeal only and before the Adjudicating Authority never such plea was raised nor any submission made regarding this. The Reply filed by the Corporate Debtor before the Adjudicating Authority clearly indicates that the submission regarding *Company Appeal (AT) (Insolvency) No. 215-216 of 2022*

Deal Fee payable to the Appellant was never taken. In the entire detailed Reply filed by the Corporate Debtor which runs into 41 pages at no place even indication have been given that any Deal Fee was to be paid to the Appellant by the Financial Creditor. We, thus, find this submission hollow and meritless.

24. In view of the foregoing discussion, we are of the considered opinion that the Adjudicating Authority did not commit any error in admitting the Application under Section 7. We do not find any merit in this Appeal. The Appeal is dismissed. Interim order stands discharged.

**[Justice Ashok Bhushan]
Chairperson**

**[Shreesha Merla]
Member (Technical)**

NEW DELHI

4th July, 2022

Archana