



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court-II)  
KOLKATA**

**C.P. (IB) No. 100/KB/2022**

*An application under Section 7 of the Insolvency & Bankruptcy Code, 2016.*

*In the matter of:*

**SRI Enterprises**, a Partnership Firm having its office at G.T Road, Andul More,  
Andal – 713321, West Bengal

*....Financial Creditor*

-Versus-

**Sainath Autolinks Private Limited** [CIN U74900WB2010PTC145304] having  
its registered office at Bhirangee G.T.Road , Durgapur – 713 213, West Bengal;

*...Corporate Debtor*

**Date of hearing: 04 May, 2023**

**Order Pronounced on: 06 July, 2023**

**Coram:**

***Smt. Bidisha Banerjee, Member (Judicial)***

***Shri Balraj Joshi, Member (Technical)***

**Appearances (via video conferencing/physical)**

For the Financial Creditor : Mr. Shaunak Mitra, Adv.

: Mr. Saurav Jain, Adv.

For the Corporate Debtor : Mr. Ritoban Sarkar, Adv.

: Mr. Saurav Sharma, Adv.

: Ms. Ankita Agrahari, Adv.



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**ORDER**

***Per: Bidisha Banerjee, Member (Judicial)***

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Kapil Prasad Jaiswal, Partner, SRI Enterprises (*'Financial Creditor'*) duly authorised *vide* Authorization Letter dated 12 March, 2022<sup>1</sup> for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Sainath Autolinks Private Limited (*'Corporate Debtor'*).
3. The present Petition was filed on **16 March, 2022** before this Adjudicating Authority. The total amount claimed in default is Rs.1,22,75,000/- (Rupees One Crore Twenty Two Lakh Seventy Five Thousand only). The ***date of default*** is stated to be as on **18 June, 2020**;
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.7,00,00,000/- (Rupees Seven Crore only) with subscribed share capital of Rs.90,99,000/- (Rupees Ninety Lakh Ninety Thousand only). Part – IV of the Petition deals with the particulars of the Financial Debt.
5. ***Submissions by the Ld. Counsel appearing on behalf of the Financial Creditor.***
  - 5.1 It is claimed that the Financial Creditor had granted loan amounting to a total of 2,78,50,000/- (Rupees Two Crore Seventy Eight Lakhs and Fifty Thousand only), in several tranches to the Corporate Debtor. However the Corporate Debtor has paid a part payment of Rs.1,55,75,000/-.
  - 5.2 That, the Corporate Debtor has confirmed the financial transactions and remittance of the Debt granted by the Financial Creditor through the books of accounts of the Financial Creditor.
  - 5.3 The Corporate Debtor has also issued a post dated cheque dated 16 June, 2020 to the Financial Creditor. However the same was returned due to insufficient fund in the account of the Corporate Debtor.

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<sup>1</sup>Annexure –A, Page 20 of the Petition.



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- 5.4 In spite of several verbal follow-ups, the Financial Creditor or has not received the full payment of the remaining outstanding dues.
- 6. *Per contra, submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor would be as under:***
- 6.1 That, the Application is not maintainable on account of Section 10A of the Code, as the date of default has been mentioned in Part – IV as 18 June, 2020 which falls within the section 10A period.
- 6.2 No case has been made out by the Financial Creditor in terms Section 7 of the Code which would warrant any kind of interference by this Adjudicating Authority. The application has failed to meet any of the requirements needed to file an application of such nature. Not a scrap of paper has been placed on record by the applicant to prove the existence of any financial or any other debt owed by the Corporate Debtor in favor of the Financial Creditor.
- 6.3 There was never a loan or a financial transaction entered into between the parties. The Financial Creditor has tried to create a false and fabricated case based on two documents- the ledger and the statement of accounts to build a case under Section 7 of the Code. The ledger and the Bank account statement annexed by the applicant to the application to showcase amount due and payable by the respondent to the applicant is indicative of nothing apart from the fact that certain payments made by the parties to each other. Nowhere does it go on to prove the existence of any financial contract that might have been entered into between the parties.
- 6.4 First, the Financial Creditor in its application has mentioned the date of default as 18 June, 2020. Then in order to come outside the purview of Section 10A of the Code, they have filed a supplementary affidavit affirmed on 11 January, 2023 modifying the date to 06 March, 2020, after the Corporate Debtor had pointed out on 11 August, 2022 that the Application is hit by 10A of the Code.
- 6.5 In this regard it is to be submitted that the last payment was made by the applicant, i.e., the Financial Creditor on 02 Day of June, 2020 and not on 06



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March, 2020 as would be evident from the ledger annexed by the Financial Creditor.

- 6.6 Further, only because certain payments were last made by one entity to another on a particular date, does not necessarily make the date as the date, when amounts were due and payable to the applicant and were not paid.
- 6.7 The instant application is nothing but a concocted case only to harass and arm twist the Corporate Debtor for reasons best known to the Financial Creditor. It is therefore frivolous, malafide, abuse of the process of law and deserves to be dismissed with exemplary costs.

***Analysis and Findings***

7. We have heard the Learned Counsel appearing on behalf of the Financial Creditor and the Corporate Debtor and perused the documents on record.
8. The matter was filed on 16 March, 2022 by the Financial Creditor, and was first listed on 01 July, 2022 before this Adjudicating Authority.
9. The matter was again listed on 11 August, 2022, where the Ld. Counsel appearing for the Corporate Debtor submitted that the Application is not maintainable under Section 10 A of the Code. To counter such submission, the Ld. Counsel appearing for the Financial Creditor submitted that there was an error in mentioning the date of default and it shall be explained by virtue of a ledger account. No supplementary affidavit was allowed.
10. Thereafter, by virtue of the Order dated 25 November, 2022 of this Adjudicating Authority, a supplementary Affidavit was filed by the Financial Creditor. In the Supplementary Affidavit, the Financial Creditor has mentioned the date of default as 06 March, 2020 when the last payment was made by the Corporate Debtor [*Annexure – A of the Supplementary Affidavit filed by the Financial Creditor*].
11. Thereafter, on 06 February, 2023, the daily order indicated that as on earlier occasion the Financial Creditor wished to withdraw the Application.
12. The submission of the Financial Creditor in their Supplementary Affidavit is thus nothing, but an afterthought. It came only to their notice after the Ld. Counsels appearing for the Corporate Debtor took a preliminary objection



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on 11 August, 2022. Further, except ledger there are no bank statements on record which would substantiate the same. Now, the issue that arise for determination is *whether the transaction between the Financial Creditor and the Corporate Debtor is a Financial Debt?*

13. In *Swiss Ribbons Private Limited and Another v. Union of India and Others*<sup>2</sup> Hon'ble Apex Court has succinctly pointed that 'a financial creditor has to prove "default" in payment as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due.'

(Paras 52 to 65)

14. We would note that in an Application under Section 7 of the Code, the *prima facie* case that needs to be established is that the debt is a 'financial debt', as envisaged under Section 5 (8) of the Code - "*Financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*

...

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

15. Hon'ble NCLAT in *Pawan Kumar v. Utsav Securities Private Limited & Anr.*<sup>3</sup>, reiterated;

"13. Certain essential conditions are required to be satisfied by a Financial Creditor seeking to invoke the provisions of CIRP as against the Corporate Company Appeal (AT) (Ins) No. 251 of 2020 Debtor. We have taken into consideration [Section 5\(7\)](#), [Section 5](#) (8) read with Section 7 of IBC. Following essential conditions are required to be satisfied by a Financial Creditor.

(i) There must be disbursal of loan amount.

(ii) Such disbursal should be made for a consideration for time value of money, and

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<sup>2</sup> 2019 SCC OnLine SC 73

<sup>3</sup> Company Appeal (AT) (Ins) No.251 of 2020.



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(iii) When the debt (Whole or any part or instalment) become due and payable and is not paid by the Corporate Debtor means committed default.

16. To ascertain whether the alleged amount was disbursed for a consideration for time value of money. We would note that in *Pawan Kumar (Supra)* Hon'ble Court has observed "Financial Contract as per the Rule 3(1) (d) of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, a financial contract is must between the corporate Debtor and the Financial Creditor for setting out the terms of a Financial Debt including the tenure of the Debt, interest payable and the date of repayment. In the absence of such Financial Contract, the Financial Creditor has failed to satisfy that when the debt and interest become due and payable."

(Emphasis Implied)

17. It is noted that no such financial contract exists here. Further, with respect to the term *commercial effect of a borrowing*, Nariman J. in *Pioneer Urban Land and Infrastructure Ltd. v. Union of India* referred to *Collins English Dictionary & Thesaurus* (2nd edn., 2000) to borrow the expressions "borrow" and the meaning of the expression "commercial". Relying upon the aforesaid definition, the Hon'ble Supreme Court further stated that "Commercial would generally involve transactions having profit as their main aim."

*"borrow—vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To put the ball uphill of the direct path to the hole: make sure you borrow enough.*

\* \* \*

*commercial. —adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser: commercial television. 3. having profit as the main aim: commercial music. 4. (of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or*



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television.”

18. We would further note that in *Phoenix Arc (P.)Ltd. Vs. Ketulbhai Ramubhai Patel*<sup>4</sup> where Apex Court noted the Paragraphs 46 to 50.2 of *Anuj Jain Vs. Axis Bank*, which expounds the essentials of “financial debt” and “financial creditor” in the following manner:

*‘46. Applying the aforementioned fundamental principles to the definition occurring in section 5(8) of the Code, we have not an iota of doubt that for a debt to become “financial debt” for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of section 5(8); it may also include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of section 5(8); and it may or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein.’*

*48. It is also evident that what is being dealt with and described in section 5(7) and in section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person.*

\* \* \*

50. A conjoint reading of the statutory provisions with the enunciation of

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<sup>4</sup> Civil Appeal No.5146 of 2019, decided on 03 February, 2021



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*this court in Swiss Ribbons(supra), leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression “ financial creditor” is a person who has direct engagement in the functioning of the corporate debtor: who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganization of the corporate debtor’s business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth o the corporate debtor, akin to that of a guardian”.*

(emphasis added)

19. Further, in *B.V.S. Lakshmi (Supra)* the Hon’ble NCLAT held that ‘for coming within the definition of ‘Financial Debt’ as defined under sub-section (8) of Section 5, the Claimant is required to show that (i) there is a debt along with interest, if any, which has been disbursed and (ii) such disbursement has been made against the ‘consideration for the time value of money’. Thereby, if the Claimant claims to be ‘Financial Creditor’ he will have to show that debt is due which he has disbursed against the ‘consideration for the time value of money’ and that the borrower has raised the amount directly or through other modes like credit facility or the issue of bonds, notes, debentures, loan stock or any other similar instrument. 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 can also be referred to by the Creditor to claim that there is a ‘financial debt’ due to him which has been disbursed against the ‘consideration for the time value of money”.

xxx xxx xxx

*In the present case, the Appellant has failed to bring on record any evidence to suggest that the disbursed the money has been made against ‘consideration for the time value of money’. There is nothing on the record*



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*to suggest that the Respondents borrowed money. In the absence of such evidence, the Appellant cannot claim that the loan if any given by the Appellant comes within the meaning of 'financial debt' in terms of sub-section (8) (a) of Section 5 of the I & B Code”.*

*The Appellant has also failed to show that the amount has been raised by Respondent under any other transactions, such as sale or purchase agreement, having commercial effect of borrowing. In absence of any such evidence, the Appellant cannot claim that loan amount, if any given to the Respondent comes within the meaning of 'financial debt' as defined under sub-section (8)(f) of section 5 of the 'I & B Code. In view of aforesaid findings, we hold that the Adjudicating Authority rightly held that the Appellant is not a 'Financial Creditor'.*

- 20.** There is no document on record except the ledgers which would demonstrate that the disbursement of any such alleged amount was a loan transaction creating a Financial Relationship between the parties.
- 21.** The present case, the alleged transaction, if any, does not enumerate or establish any commercial effect of borrowing.
- 22.** Hence, in view of the legal position as explained above **C.P. (IB) No. 100/KB/2022** is **dismissed**. However, the Petitioner is at liberty to pursue other remedy available under law, if any.
- 23.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

**Balraj Joshi**  
**Member (Technical)**

**Bidisha Banerjee**  
**Member (Judicial)**

The order is pronounced on 06<sup>th</sup> day of July, 2023

SA [LRA]