

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
(Court– I)  
KOLKATA**

**C.P. (IB) No. 1171/KB/2019**

*A Petition 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:*

*Lupin Dealers Private Limited [CIN U51909WB2009PTC139072], a company incorporated under Companies Act, 1956 and having its registered office at 40, Stand Road, 2<sup>nd</sup> Floor, Room No - 64 Kolkata – 700 001.*

*...Financial Creditor*

*Versus*

*Ashish Vincom Private Limited [CIN U51109WB2007PTC115199], a company incorporated under Companies Act, 1956 and having its registered office at 64 Bentick Street, Kolkata – 700 069.*

*...Corporate Debtor*

**Date of Hearing: 06.12.2022**

**Date of pronouncing the order: 12.01.2023**

***Coram:***

***Shri Rohit Kapoor***

***: Member (Judicial)***

***Shri Balraj Joshi***

***: Member (Technical)***

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

For the Financial Creditor : Ms. Aparajita Rao, Adv.

Mr. Sanwal Tibrewal, Adv.

For the Corporate Debtor : Mr. Shaunak Mitra, Adv.

Mr. Ayan Dutta, Adv.

Mr. Abhishek Sikdar, Adv.

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**ORDER**

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

1. The Court is 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 Lupin Dealers Private Limited (*'Financial Creditor'*), represented by Mr. Anish Chowdhary, Director, duly authorized *vide* Board Resolution dated 05 July, 2019<sup>1</sup> for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Ashish Vincom Private Limited (*'Corporate Debtor'*).
3. The present Petition was filed on **22 July, 2019** before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted in a sum of Rs.67,74,256/- (Rupees Sixty Seven Lakh Seventy Four Thousand Two Hundred Fifty Six only), including interest, as on 30 June, 2021. The date of default is stated to be as on 31 March, 2018.
4. It is submitted in the Petition, Part – II that the authorized share capital of the Corporate Debtor is Rs.5,00,00,000/- (Rupees Five Crore only) with paid up Capital as Rs. 3,45,00,000/- (Rupees Three Crore Forty Five Lakh only). Part – IV of the Petition contains Particulars of the Financial Debt and Part – V contains the Particulars of Financial Debt (Documents, Records & Evidence on default).
5. ***Submissions by the Ld. Advocate on behalf of the Financial Creditor:***
  - 5.1 The Financial Creditor advanced a sum of Rs.45,00,000/- (Rupees Forty Five Lakh only) to the Corporate debtor as Inter Corporate Deposit (*'ICD'*) carrying interest @ 12% per annum in two instalments of Rs.40,00,000/- (Rupees Forty Lakh only) and Rs.5,00,000/- (Rupees Five Lakh only) on 24 July, 2015 and 27 July, 2015.

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<sup>1</sup>Page (ii) of the Petition.

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**5.2** TDS was also duly deducted and deposited by the Corporate Debtor. The Corporate Debtor kept on assuring that the refund will be made on demand and but failed to repay any amount.

**6. *Submissions by the Ld. Advocate on behalf of the Corporate Debtor:***

**6.1** The application has been filed in abuse of the process of law and is a mala fide and vexatious proceeding. There is no debt due and payable by the Corporate Debtor to the Financial Creditor and needless to say, there is no default committed by the Corporate Debtor.

**6.2** The application also does not comply with the mandatory provisions of Section 7 of the Code and the Financial Creditor does not have any cause of action against the Corporate Debtor and the application also does not disclose any cause of action. The application has been filed with fraudulent and malicious intent and for purposes other than to resolve any purported insolvency of the Corporate Debtor. The Applicant is misusing the provisions of the Code as a debt-recovery mechanism, which is impermissible in law.

**6.3** The application is ex-facie barred by the law of limitation. The Financial Creditor has also failed and neglected to show any acknowledgement of jural relationship of debtor by the Corporate Debtor within the meaning of Section 18 of the Limitation Act that would serve to extend the period of limitation.

**6.4** In the instant Case, the purported disbursal was in July, 2015 and any acknowledgment (even assuming without admitting that such acknowledgement is made) beyond July, 2018 is wholly irrelevant and cannot save the application from being barred by limitation. However, it is a matter of record that the Corporate Debtor has never paid any amount on account of interest or otherwise, since there was no requirement for the Corporate Debtor to make any such payment. The purported date of default mentioned in the application i.e. 31.3.2018 is imaginary, concocted and wholly without basis and has been wrongly mentioned with the

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ulterior motive of avoiding the bar of limitation. There is nothing disclosed to support the alleged date of default. It is further submitted that the Financial Creditor own case (which is disputed by the Corporate Debtor) is that the amount was repayable on demand.

- 6.5** Importantly, the Applicant has failed and neglected to plead or even disclose, let alone establish any financial contract between the parties containing the terms and conditions (i.e. tenure, repayment terms, rate of interest and similar terms) for the alleged loan/ advance. The Corporate Debtor does not admit any of the allegations made in the application. However, it is settled law that without there being a written financial contract on record, no proceeding under Section 7 of the Code will lie or be maintainable.
- 6.6** It is plainly evident even from the application that there was never any financial contract between the parties. Significantly, the Applicant has miserably failed to establish any default whatsoever on the part of the Corporate Debtor. There is not even a demand notice issued prior to filing of the present application and thus, in any view of the matter, there is no default that can be alleged to have been committed by the Corporate Debtor on any score. The applicant has also failed to establish that the purported disbursement was for the consideration of time value of money. In fact, the alleged claim is not a financial debt within the meaning of Section 5(8) of the Code and none of the ingredients of financial debt are attracted or satisfied in the instant case.
- 6.7** Furthermore, the Corporate Debtor is a solvent entity having a healthy commercial substratum and is not insolvent in any manner, shape or form. It is now well settled that the financial health of an alleged Corporate Debtor is a vital and important factor to be considered in adjudicating a petition under Section 7 and in the present case, the facts do no warrant the Section 7 application being admitted against the

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Corporate Debtor. The Financial Creditor has failed to show or demonstrate that the Corporate Debtor is insolvent or on verge of insolvency.

- 6.8** The Financial Creditor is misusing the proceeding under Insolvency and Bankruptcy Code, 2016 as recovery tool would be further evident from the fact that a group/related company of the Financial Creditor, namely one Seaview Merchants Private Limited had filed a similar application under Section 7 against the Corporate Debtor on nearly identical allegations and facts, which was rejected by this Adjudicating Authority. There is no appeal from the said judgment and the same has attained finality. The said judgment clearly and squarely applies even in the instant case and on the same grounds mentioned therein, the present application also deserves to be rejected.

**Analysis & Findings**

7. We have heard the Ld. Counsel appearing for the Financial Creditor and perused the records. It is pertinent to mention that this application was previously rejected by this Adjudicating Authority *vide* its order dated 12 December, 2019 on the following grounds;

*'The Applicant has failed to prove that the amount paid to the Corporate Debtor was in fact paid under some agreement at the rate of some agreed interest i.e., time value for money. The liability has not been admitted by the Corporate Debtor, no payment of interest has been agreed or shown to have been received in any bank account of the Corporate Debtor. The prayer of the Applicant in seeking initiation of CIRP against the Corporate Debtor is such a harsh step which cannot be allowed to be done without there being a fool-proof case of loan having been paid to the Corporate Debtor and the liability having been admitted and acknowledged by the Corporate Debtor. The Financial Creditor has not been able to prove its case and in the absence of any acknowledgement of debt on the part of the Corporate Debtor or any payment of interest paid to the Financial Creditor by the*

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*Corporate Debtor through any bank transaction, this application cannot be accepted and is accordingly dismissed.'*

8. Subsequent to the said order the Financial Creditor filed an appeal before the Hon'ble NCLAT. However, the appeal was allowed by the Hon'ble NCLAT *vide* its order dated 15 July, 2022, and the matter was remanded back to this Adjudicating Authority.
9. The Financial Creditor has also filed a Supplementary Affidavit, duly notarized on 25 August, 2022, where in they have submitted that after the filing of this instant Application, sometime in the end of November, 2019, the Corporate Debtor had uploaded its Balance Sheet for the year ending on 31 March, 2019. ***The only issue arises in this matter is that whether the transaction between the Financial Creditor and the Corporate Debtor is a Financial Debt?***
10. To answer the above issue, we would rely on the Judgment passed by the Hon'ble NCLAT in ***Pawan Kumar v. Utsav Securities Private Limited &Anr.***<sup>2</sup>, where in it has been held that;

*"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*

*(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.*

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<sup>2</sup>Company Appeal (AT) (Ins) No.251 of 2020.

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*14. The above all conditions are to be satisfied by the Financial Creditor then Adjudicating Authority **may** admit the Application under Section 7 of the IBC and initiate the CIRP against the Corporate Debtor.....”*

- 11.** Further, as opined by the Hon’ble NCLAT in *Prayag Polytech Pvt. Ltd. v. Gem Batteries Pvt. Ltd.*<sup>3</sup> ‘Merely pointing out that TDS was deducted would not be sufficient to conclude that there was a Financial Debt. TDS can be deducted for various reasons.’
- 12. Whether such amount was disbursed for a consideration for time value of money?** As per the judgment in *Pawan Kumar (Supra) the 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.
- 13.** In the present case, there is no document on record which shows that the disbursement of such amount is a loan transaction emanating out of a Financial Contract. We have also perused the Balance Sheet at page 55 of the Petition Notwithstanding, the fact that the Balance Sheet for the year ending on 31 March, 2019 acknowledges the loan given by the Financial Creditor to the Corporate Debtor under the heading ‘Details of Unsecured Loan at the end of the year’ but acknowledgment of loan in the Balance Sheet does not tantamount to default, per se. Entries into the balance sheets further extend the limitation period under Section 18[*Laxmi Pat Surana vs Union Bank Of India (2021 SCC OnLine SC 267)*].
- 14.** In the view of the above, application bearing CP (IB) No. 1171KB/2019 filed by Lupin Dealers Private Limited, the Financial Creditor, under section 7 of the Code

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<sup>3</sup>Company Appeal (AT) (Ins) No. 713 of 2019

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read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Ashish Vincom Private Limited, the Corporate Debtor, is *rejected*. However, the Petitioner is at liberty to pursue other remedy available under law, if any.

- 15.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

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

**Rohit Kapoor**  
**Member (Judicial)**

The order is pronounced on 12<sup>th</sup> day of January, 2023.

*SA/LRAJ*