

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 549 of 2020

[Arising out of Impugned Order dated 12th March 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition (IB) No.188/KB/2019]

IN THE MATTER OF:

- 1. Narendra Kumar Agarwal
391 Block-G
New Alipore
Kolkata – 700053** **Appellant No.1**
- 2. Suman Agarwal
391 Block-G
New Alipore
Kolkata – 700053** **Appellant No.2**

Versus

- 1. Monotrone Leasing Private Limited
Oriental House
6C, Elgin Road
Kolkata – 700020** **Respondent No.1**
- 2. Bimal Kanti Chowdhry IRP
77A/50 Raja S.C. Mullick Road
8, SPB Block
Kolkata – 700020** **Respondent No.2**

Present:

**For Appellant : Mr Abhijeet Sinha, Ms Suhita Mukhopadhyay and
Mr Abhirup Chatterjee, Advocates.**

**For Respondent : Mr Charu Tyagi, Advocate
Mr Bimal Kanti Choudhary, Advocate for (R-2 RP)
Mr Rishav Banerjee, Advocate for R-2.
Mr Sanjay Kapur, Mr. VM Kannan and
Ms Megha Karnwal, for SBI.**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal emanates from the Impugned Order dated 12th March 2020 passed by the Adjudicating Authority/National Company Law Tribunal,

Kolkata Bench, Kolkata in Company Petition (IB) No. 188/KB/2019, whereby the Adjudicating Authority has admitted the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**'). The Parties are represented by their original status in the Company Petition for the sake of convenience.

2. These brief facts of the case as per petitioner are as follows:

The Applicant/Respondent granted an inter-corporate loan of Rs.25 lacs for 90 days to the Corporate Debtor, which was repayable with 15% interest per annum. The Applicant remitted the said amount by transferring the fund to the corporate debtor acknowledged by the corporate debtor. The Corporate Debtor duly paid an aggregate of Rs.2,69,075/- from 14th June 2017 to 31st March 2018. Since 01st April 2018, the Corporate Debtor failed and neglected to pay the outstanding loan amount. Thereupon the Applicant/Financial Creditor raised the demand. In response to that, the Corporate Debtor issued two cheques bearing No.806211 drawn on HDFC Bank dated 11th June 2018 for Rs.25 lacs and Cheque No.806210 drawn on HDFC Bank. But the Bank dishonoured both the cheques. The Applicant contends that the Corporate Debtor has committed default as on 20th January 2018 for a sum of Rs.28,03,083/- which includes the principal and interest.

3. The Adjudicating Authority admitted the petition by its order dated 12th March 2020, which is under challenge in this Appeal. The Appeal is filed mainly on the ground that;

- *"the Financial Creditor has failed to show that it had necessary Board approval before the disbursement of the alleged loan.*
- *the Financial Creditor has failed to establish any financial contract between the parties. The oral agreement and payment of TDS cannot be taken as proof of financial debt.*
- *the alleged oral contract does not establish debt; the same would be like the inter-corporate deposit, which is distinct from a loan and would not fall within the definition of financial debt.*
- *the Financial Creditor has failed to make out a case of default. In the absence of default, no application under Section 7 can be admitted. The date of default is crucial to determine the date on which the cause of action accrued.*
- *A bare reading of Form-I shows that no date of default has been mentioned. An incomplete Application, such as in the instant case, could not have admitted by the Adjudicating Authority.*

4. We have heard the arguments of the Learned Counsel for the parties and perused the records.

5. Learned Counsel for the Appellant vehemently argued that Financial Creditor has failed to establish any financial contract between the parties. The

oral agreement and payment of TDS cannot be treated as sufficient to prove the transaction as financial debt.

6. The alleged transaction can be treated as financial debt, or not can be analysed from on the nature of the contract. Section 5(7) define Financial Creditor, which is as under:

"Section 5(7)

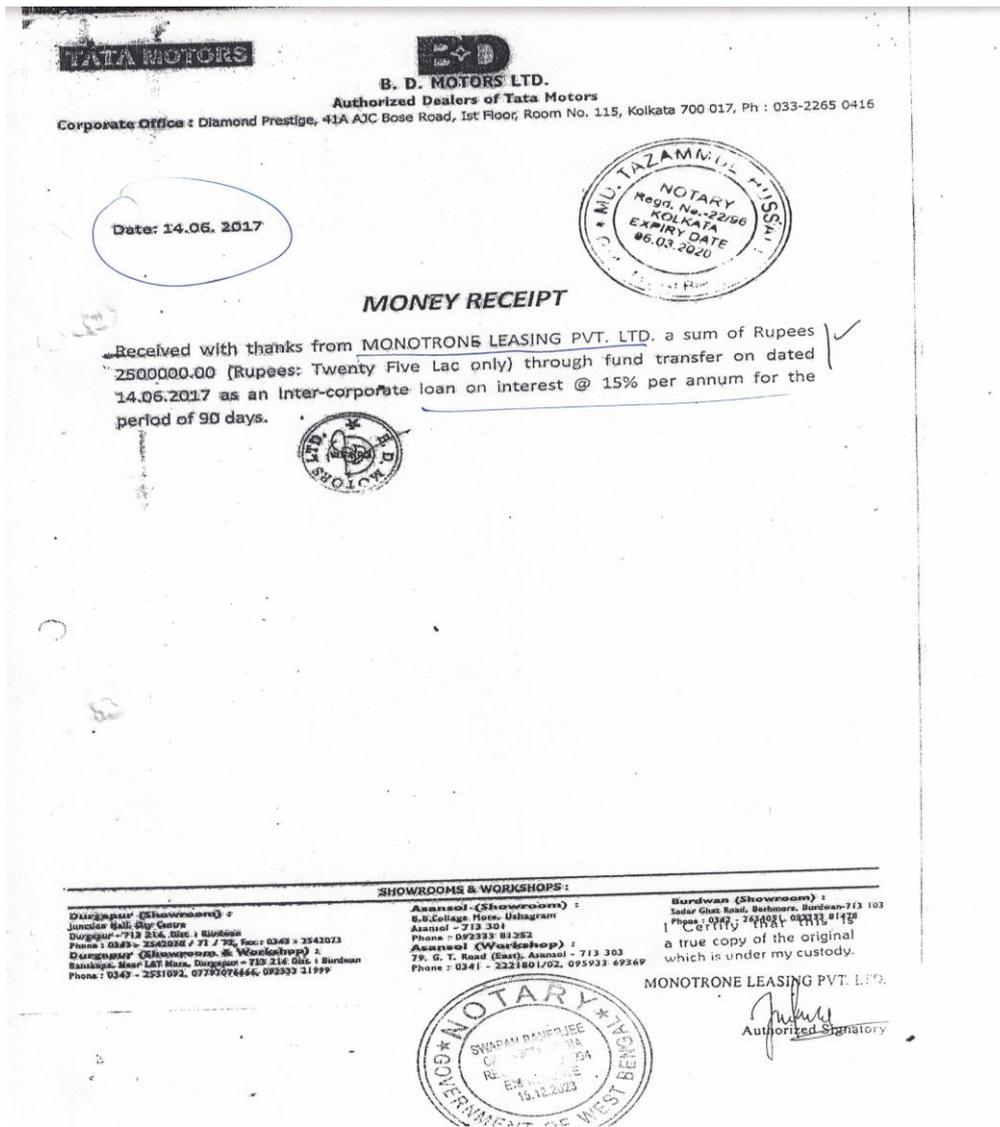
"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned are transferred to.

Section 5(8)

"Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

a) Money borrowed against the payment of interest."

7. The Financial Creditor contends that the alleged transaction was Inter-Corporate Loan extended for a short term of 90 days which was payable with interest @ 15% per annum. The transaction's nature is further proven by the copy of Money Receipt, filed along with the Appeal. Photocopy of the Money Receipt is as under for ready reference:



8. The Money receipt shows that the Corporate Debtor "BD Motors Limited" acknowledged taking a sum of Rs.25 lacs through fund transfer dated 14th June 2017 as an inter-corporate loan from the Financial Creditor 'Monotrone Leasing Private Limited'. It is also acknowledged in the receipt that Inter-Corporate Loan was extended with a condition of 15% interest per annum and for a short period of 90 days only.

9. The contents of Money Receipts above is further corroborated by the copy of the bank statement, which is annexed with the Appeal paper book. Photocopy of the same is given as under:



as of Tue, Jul 4, 17 14:11:34

HDFC BANK					
15:43:03		AGROTECH PVT LTD - CENTRALPLAZA-HDFCRS2017 051497890963 LTD-CENTRALPLAZA-HDFC RS2017061497890963	2,500,000.00	0.00	2,560,302.99
14/06/2017	14/06/2017000000000145	RTGS Di-SBIN0007406-P M			
15:46:57		COLD STORAGE PVT LTD CENTRALPLAZA-HDFCRS20 17061497892146 T LTD -CENTRALPLAZA-HD FCRS20170614978921			
		46	0.00	8,000,000.00	10,560,302.99
14/06/2017	14/06/2017191865074628	50200020067709-			
17:38:33		50200020067709-	8,000,000.00	0.00	2,560,302.99
14/06/2017	14/06/201707889074630				
17:47:32		FT - Cr -@1056640000179 - B D	2,500,000.00	0.00	60,302.99
14/06/2017	14/06/2017000000000146	MOTORS LIMITED			
19:11:37		MITED			

I Certify that this is a true copy of the original which is under my custody.

MONOTRONE LEASING PVT. LTD.

Authorized Signatory



10. The above bank statement shows that on 14th June 2017 at 19:11:37 hrs a sum of Rs.25 lacs was transferred to the corporate debtor BD Motor's account.

11. Thus, the contention of Financial Creditor is fully authenticated from the Money Receipt and bank transaction statement. The Appellant contends that the transaction may be treated as the 'Inter-Corporate Deposit', but it can not be treated as the Financial Debt. In case the Inter-Corporate Deposit is made for a certain period, which was to be paid back with interest then such transaction will also fall in the definition of 'Financial Debt'. The interest is the product of instant transaction, which is undoubtedly the time value of money. Thus, such transaction of the inter-corporate deposit is fully covered by the definition of Financial debt as provided under Section 5(8) of the I&B Code. The written contract can not be treated as an essential element to prove the Financial Debt if the transaction's nature is proved otherwise.

12. The Learned Counsel for the Appellant contends that a bare reading of the Form-I shows that no date of default has been mentioned; thus, Application cannot be treated as complete. After going through the record, we find that in the Application Form-I, under Part-4 placitum 11 it is mentioned explicitly that:

*"11. In the premises, **the Corporate debtor has committed default, as on 20th January 2018 for sum of Rs.28,03,083/- only and a copy of the Financial Ledger of the Applicant company, in the name of the debtor company, as on 20th January 2019 is annexed hereto marked with "Annexure 11."***

13. Thus, it is clear that the Appellants argument that the date of default is not mentioned in the Application is contrary to the fact of the case. Learned Counsel for the Appellant further emphasises that Financial Creditor has disbursed loan. But its certificate of registration does not authorise to accept

the public deposit. Appellant has filed the photocopy of registration certificate issued by the Reserve Bank of India.

14. On perusal of the above certificate, it appears that it is registered as a Non-Banking Financial Institution but is not authorised to accept public deposits. The alleged inter-corporate loan for a short period of 90 days repayable with a 15% per annum cannot be treated as a public deposit. Therefore, the objection of the Corporate Debtor in this regard is without any basis.

15. The Learned Counsel for the Corporate Debtor laid much emphasis on the question of default. It is contended that default has not taken place; therefore, petition U/S 7 could not be admitted.

16. In reply to the above, the Respondents/Financial Creditor submits that the Corporate Debtor has admitted its liability in the reply submitted against demand notice issued under the Negotiable Instrument Act. In response to the demand notice issued under Section 138 Negotiable Instrument Act, annexed with the Appeal paper book at Page No. 71, the Corporate Debtor stated that:

"In the year 2017, our client took a financial support from your client for the sum of Rs.25 lacs, which was received by my client, through account payee cheque on 14th June 2017. The said loan was agreed to be paid with interest and no period was decided for the further repayment of the same. Accordingly, our clients have repaid the sum of Rs.2,98,973/-. At the time of taking the financial assistance Our above said clients after taking the said financial assistance from your client have repaid a sum of

Rs.2,98,973/- till date, which includes the principal, as well as the interest, as it was agreed upon."

17. Thus, it is clear that the Corporate Debtor admits that up to 26th November 2018 he has paid only Rs.2,69,075/ against the loan of Rs.25 lacs, which was to be repaid with 15% interest per annum, within 90 days from the date of disbursement of loan. But the Corporate Debtor defaulted in repaying the amount. Therefore, it remains undisputed that the Corporate Debtor owes more than Rs.1 lacs and committed default in repaying the same.

18. Hon'ble Supreme Court in case of ***Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407: 2017 SCC OnLine SC 1025 : (2018) 1 SCC (Civ) 356 at page 437*** has held that:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is

owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the Application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the Applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the Applicant is to dispatch a copy of the Application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the Application. It is at the stage of Section 7(5), **where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also**

include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. **The moment the adjudicating authority is satisfied that a default has occurred, the Application must be admitted unless it is incomplete, in which case it may give notice to the Applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority.** Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such Application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that

the adjudicating authority may reject an application and not otherwise."

(emphasis in bold supplied)

19. Thus, it is clear that when a default takes place, and debt becomes due and is not paid, the Insolvency Resolution Process begins. Non-payment of debt, once it becomes due and payable, is considered a default under Section 3(12) of the Code.

20. It is further held that the Adjudicating Authority is satisfied that default occurs, the Application must be admitted unless it is incomplete. In the instant case, the amount of Rs.25 lacs was given as inter-corporate loan to the Corporate Debtor for 90 days which was repayable with interest @ 15% per annum. It is also clear that the Corporate Debtor has not paid the amount due and more than Rs.1 (one) lac. The Application is complete. Therefore, the Adjudicating Authority was justified in admitting the petition. We do not find any reason to interfere with the Adjudicating Authority's order in admitting the petition. Thus, Appeal is devoid of merit hence dismissed. No order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

[V. P. Singh]
Member (Technical)

NEW DELHI
19th JANUARY, 2021

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