

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 99 of 2020

[Arising out of Impugned Order dated 11th December 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition (IB) No. 142(KB)/2019]

IN THE MATTER OF:

**Monotrone Leasing Private Limited
R/o 'Oriental House', 6C, Elgin Road
P S Bhawanipore, Kolkata – 700020
Email – officemonotrone@gmail.com**

...Appellant

Versus

**PM Cold Storage Private Limited
R/o 1A, Madan Mohan Burman Street
Kolkata – 700007
Email – pmcold@pmpgroup.co.in**

...Respondent

Present:

For Appellant : Ms Charu Tyagi, Advocate

**For Respondent : Mr Kumar Anurag Singh, Mr Nishant Piyus and
Mr Zain A. Khan, Advocates**

J U D G M E N T

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

This Appeal emanates from the impugned order dated 11th December 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition (IB) No. 142(KB)/2019, whereby the Adjudicating Authority has rejected the Application filed 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. The brief facts of the case are as follows:

The Appellant/Petitioner Monotrone Leasing Private Limited filed an Application under Section 7 of the I&B Code against PM Cold Storage

Private Limited for initiation of Corporate Insolvency Resolution Process on the ground that the Corporate Debtor committed default in paying the financial debt of Rs.27,19,110/- (Rupees Twenty Seven Lakh Nineteen Thousand One Hundred Ten Only). Petitioner contends that it has lent a sum of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) to the Corporate Debtor for 90 days, which interest to be charged @ 15% per annum. The above amount was transferred through RTGS.

3. After receiving the demand from the Financial Creditor, the Corporate Debtor handed over the post-dated cheque of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) dated 09th October 2018, which was subsequently dishonoured. Thereafter notice under Section 138 of Negotiable Instrument Act, 1881 was served upon Corporate Debtor on 01st November 2018.

4. The Corporate Debtor has recorded its contentions as follows:

It contends that no debt is due and payable to the Financial Creditor; the Corporate Debtor did not commit any default as alleged by the Financial Creditor; that the amount borrowed from the Financial Creditor had been squared off by large no of transactions between the parties; the Civil Suit was between the parties for the alleged amount; Monotrone Leasing Private Limited cannot be treated as a Financial Creditor, given the nature of the transaction; the alleged transaction is not like inter-corporate deposit; the Corporate Debtor was not liable to pay interest @ 15% per annum; the cheque relied upon by the Financial Creditor is invalid because it was given as a security to the transaction.

5. The Adjudicating Authority has rejected the Application on the ground that the Adjudicating Authority cannot act as a Recovery Tribunal; the Financial Creditor could not produce the required documents to show that it received any Application from the Corporate Debtor for the loan; the Financial Creditor did not produce the certificate required from Information Utility as per provision of Section 7(3)(a) of the Code. The Adjudicating Authority further observed that the transaction by which the alleged loan was disbursed through RTGS was not in the name of Financial Creditor.

6. The Adjudicating Authority has further noted that the competent Civil Court having jurisdiction has found that there exists prima facie case in favour of Corporate Debtor and has issued interim prohibitory order against the Financial Creditor stating that they cannot recover the amount claimed therein. It is further observed by the Adjudicating Authority that the Financial Creditor could not produce adequate evidence to prove that the Corporate Debtor owed a “financial debt” to the Financial Creditor. It is further noted that the Corporate Debtor has filed a financial statement showing a balance of more than Rs.25,00,000/- (Rupees Twenty Five Lakh Only) which shows that the Corporate Debtor is a solvent company. Therefore, there is no question of any default by the Corporate Debtor.

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

8. Appellant contends that it lent sum of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) to the Corporate Debtor for 90 days which was payable with interest @ 15% per annum. It is further contended that a post-dated cheque

of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) was handed over to secure the loan.

9. The statement regarding disbursement of the loan, acknowledgement of the loan, balance confirmation letters, TDS certificate, documents about interest payment for the relevant periods has been filed along with the paper book. Appellant has submitted a copy of the bank transaction statement dated 14th June 2017, which is at page no.78 of the paper book. Scanned copy of the bank transaction statement submitted by the Appellant is as under:

78



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

HDFC BANK					
15:43:03		AGROTECH PVT LTD - CENTRALPLAZA-HDFCRS2017 061497890663 LTD -CENTRALPLAZA-HDFC RS2017061497890663	2,500,000.00	0.00	2,560,302.99
14/06/2017 14/06/201700000000145		RTGS Dr-SBIN0007406-F M			
15:46:57		COLD STORAGE PVT LTD CENTRALPLAZA-HDFCRS20 17061497892148 T LTD -CENTRALPLAZA-HD FCRS20170614978921 48			
14/06/2017 14/06/2017191655074628		50200020067709-	0.00	8,000,000.00	10,560,302.99
17:39:33		50200020067709-	8,000,000.00	0.00	2,560,302.99
14/06/2017 14/06/2017707889074630					
17:47:32		FT - Dr - 010586400001 79 - B D MOTORS LIMITED MOTORS LIMITED	2,500,000.00	0.00	60,302.99
14/06/2017 14/06/201700000000146					
19:11:37					

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

MONOTRONE LEASING PVT. LTD.


Authorized Signatory

MONOTRONE LEASING PVT. LTD.

Authorized Signatory

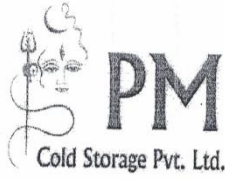
TRUE COPY

The above statement shows that on 14th June 2017 (15:46:57 pm) Rs.25,00,000/- (Rupees Twenty Five Lakh Only) was transferred through RTGS to the account of the Corporate Debtor "PM Cold Storage Private Limited". It is a transaction statement with HDFC Bank, containing details of different transactions made on 14th June 2017. In the said statement, there is another entry of transaction at 15:43:03 hours, which relates to Agrotech Private Limited. However, the Learned Adjudicating Authority has noted in the order that:

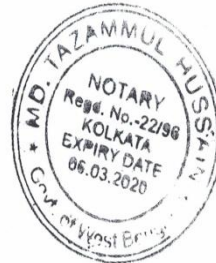
"The Financial Creditor has produced a bank statement to show transfer of amount by RTGS. But we have every doubt in our mind, whether that accounts stands in the Name of the financial Creditor or not because the title name appears as Agrotech Private Limited. That statement does not indicate Name of the financial Creditor anywhere."

10. The alleged bank statement contains only the transaction history of 14th June 2017, wherein there are entries of transactions recorded on the same day at 15:43:03 hrs. in the name of "Agrotech Private Limited" and at 15:46:57 hrs. in the name of "PM Cold Storage Pvt. Ltd." respectively. The latter transaction was made through RTGS amounting to Rs.25,00,000/- (Rupees Twenty Five Lakh Only) in the Name of Corporate Debtor, "PM Cold Storage Limited". However, the Adjudicating Authority has expressed doubt whether the statement stood in the name of Financial Creditor or not as the title name did not indicate the name of the Financial Creditor anywhere.

11. Appellant / Financial Creditor has also filed receipt of the inter-corporate loan which is at page No.79 of the paper book. Photostat copy of this receipt as under:



Cold Storage Pvt. Ltd.



To,
Monotrone Leasing Pvt Ltd
Oriental House, 6C Elgin Road,
2nd Floor, Kolkata – 700 020
PAN No. AABCM8117E

Dated: - 14.06.2017

Dear Sir,

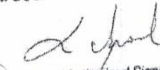
We acknowledge the receipt of Rs. 2500000.00 (Rupees Twenty Five Lakhs Only) towards inter corporate deposit for a period of 90 (Days) carrying interest @ 15% per annum and accordingly we enclose the following post dated cheque in your favour:

Cheque No. 242228 Dated 12.09.2017 for Rs. 2500000.00 (Rupees Twenty Five Lakhs Only) drawn on State Bank of India, C R Avenue Branch, Kolkata in discharge of your existing debt/liability towards the repayment of aforesaid loan.

Our Pan :- AAEC9576H

Thanking You

PM COLD STORAGE PVT. LTD.


Director / Authorized Signatory

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

MONOTRONE LEASING PVT. LTD.


Authorized Signatory

Regd. Off.: 1A, Madan Mohan Burman Street, Kolkata - 700 007 [O] +91 33 2269 5536/2268 3147/2271 1612 [F] +91 33 2272 9479
Admn. Off.: 8, Munshi Sadaruddin Lane, 3rd Floor, Kolkata - 700 007 [O] +91 33 2269 1235/2269 1236/2269 1237/2269 1238
Work. Hours: 11 AM to 5 PM

On perusal of the above document, it is clear that the Corporate Debtor acknowledged the receipt of Rs.25,00,000/- (Rupees Twenty Five

Lakh Only) as an intercorporate deposit for 90 days, carrying interest @ 15% per annum.

12. The Financial Creditor has filed the copy of the cheque No.242228 dated 12th September 2017 which was issued by the Corporate Debtor for Rs.25,00,000/- (Rupees Twenty Five Lakh Only) drawn on State Bank of India. It is seen that the alleged cheque was issued in the Name of "Monotrone Leasing Private Limited" dated 09th October 2018. The Adjudicating Authority has observed that;

"11. The financial creditor relied the second document i.e. Annexure 7 is a letter dated 14.06.2017 allegedly issued by the Corporate Debtor acknowledging the receipt of the loan and giving post-dated cheque. In that letter the Cheque number is mentioned as 24228 dated 12.09.2017 for Rs. 25 Lakh drawn on State Bank of India, CR Avenue Branch, Kolkata. It was shown to be issued towards discharge of existing debt. However, the financial creditor produced as Annexure 8, the Cheque bearing number 242294 dated 12.09.2018 for Rs. 25 Lakh allegedly drawn by the Corporate Debtor in its favour for repayment of loan saying that it was dishonoured. In view of above, the question now remains unanswered by the financial creditor as to what happened of earlier cheque issued by the corporate debtor in its favour bearing no. 24228? Whether that cheque was encashed by the financial creditor, if not, whether it was returned back of the Corporate Debtor? We require answers of this query because the Corporate Debtor has come out with the clear defense that they have paid the entire amount and nothing is due and payable. In such situation, it was expected from the financial creditor to explain as to what happened to earlier cheque of the Corporate Debtor. It is not in dispute that cheque no. 24229

dated 09.04.2018 issued by the corporate debtor was dishonoured and the financial creditor sent a notice under Section 138 of Negotiable Instrument Act etc. But that certainly does not mean that the Corporate Debtor admitted that it was a cheque issued by them towards repayment of the loan or inter-corporate advance as alleged by the financial creditor. At the most, it can be presumed that the Corporate Debtor has drawn this cheque for some consideration but it cannot be said with certainty that it was towards repayment of the financial debt as alleged.”

13. It is pertinent to mention that the Corporate Debtor is not claiming that the alleged amount was repaid to the Financial Creditor vide cheque no 24228 DT. 12.9.2017. In fact, the cheque issued at the time of disbursement of loan was never presented for encashment. It is apparent that cheque No.242294 dated 09.10.2018 amounting to Rs 25,00,000/- was issued by the Corporate Debtor, which was dishonoured by the Bank due to insufficient funds in the account. Thereafter, notice under Section 138 of N I Act was issued by the Financial Creditor. The Appellant contends that at the time of obtaining the loan, the respondent issued the post-dated cheque No.242228 dated 12.09.2017 for a sum of Rs.25 lakh drawn on State Bank of India in favour of the Appellant. But, even after 12.09.2017, the loan transaction between the parties was extended for a further period of one year and in order to secure the principal amount, the Respondent issued another post-dated cheque of the same bank being No.242294 dated 09th October, 2018. Further, in terms of such extension, the Respondent consented to pay the interest at an agreed rate on the principal amount. As such, the validity of cheque bearing No.242228 dated 12th September, 2017

expired. It is further submitted by the Appellant that no such dispute was referred by the Corporate Debtor in its pleading before the Adjudicating Authority. However, the Adjudicating Authority has failed to appreciate that issuance of cheque No.242294 dated 09th October, 2018 also gives an unconditional admission on behalf of the Respondent towards the debt of the Appellant/Financial Creditor. Thus, the adverse inference drawn by the Adjudicating Authority for not submitting any explanation regarding earlier cheque no.242228 dated 12th September, 2017 is without any basis. However, the Corporate Debtor had ample opportunity to prove that the loan amount had been repaid vide Cheque no 242228 dated 12th September, 2017.

14. The Appellant / Financial Creditor has further annexed the copy of the notice issued against the Corporate Debtor under Section 138 of the Negotiable Instrument Act, which is at page No.83 of the paper book. Appellant / Financial Creditor has also annexed the copy of its ledger account containing the details of the Corporate Debtor regarding the inter-corporate loan of Rs.25,00,000/- (Rupees Twenty Five Lakh Only), which is at page No.92 of the paper book. It is evident from the ledger statement that the Financial Creditor received interest of Rs.65,650/- on 10th June 2018, and further interest amount of Rs.27,19,110/- (Rupees Twenty Seven Lakh Nineteen Thousand One Hundred Ten Only) on 20th January, 2019. It is also stated that the TDS amount @ 10% had been deducted from the interest amount. The Appellant further annexed the balance confirmation

letter signed by the Corporate Debtor, which is at page No.110 of the paper book. Photostat copy of this balance confirmation is as under:

A

P M Cold Storage Pvt.Ltd.
1A, Madam Mohan Bhusman Street
Kolkata - 700002

From: Monotrone Leasing Pvt. Ltd.
6C, Oriental House
Elgin Road, Kolkata-700020
CIN: U67120WB1995PTC075219

Dear Sir/Madam,

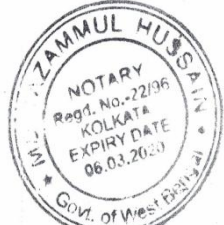
Date: 31-Mar-2018

Sub: Confirmation of Accounts
1-Apr-2017 to 31-Mar-2018


Given below is the details of your Accounts as standing in my/our Books of Accounts for the above mentioned period.

Kindly return 3 copies stating your I.T. Permanent A/c No., duly signed and sealed, in confirmation of the same. Please note that if no reply is received from you within a fortnight, it will be assumed that you have accepted the balance shown below.

Date	Particulars	Debit Amount	Date	Particulars	Credit Amount
14-Jun-2017	Bank	25,00,000.00			
14-Sep-2017	(as per details) Interest on Loan Received 92,466.00 Cr TDS Receivable AY 2018-19 9,247.00 Dr	83,219.00	14-Sep-2017	Bank	83,219.00
15-Jan-2018	(as per details) Interest on Loan Received 92,466.00 Cr TDS Receivable AY 2018-19 9,247.00 Dr	83,219.00	15-Jan-2018	Bank	83,219.00
16-Mar-2018	(as per details) Interest on Loan Received 93,493.00 Cr TDS Receivable AY 2018-19 9,349.00 Dr	84,144.00	16-Mar-2018	Bank	84,144.00
31-Mar-2018	(as per details) Interest on Loan Received 20,548.00 Cr TDS Receivable AY 2018-19 2,055.00 Dr	18,493.00	31-Mar-2018	Bank	18,493.00
		27,69,075.00		Closing Balance	27,69,075.00
		27,69,075.00			25,00,000.00
					27,69,075.00



I/We hereby confirm the above



TRUE COPY

Yours faithfully,
Monotrone Leasing Pvt. Ltd.
[Signature]
Authorized Signatory
Our I.T. PAN No.: AABCM8117E

Basis the balance confirmation letter, it is evident that the Corporate Debtor has acknowledged the loan amount of Rs.25,00,000/- (Rupees Twenty Five Lakh Only), with details of the interest paid and TDS deducted

from the interest amount. It also contains the PAN Number of the Financial Creditor as well as that of the Corporate Debtor.

15. The Appellant / Financial Creditor has also filed Form 26 issued by the Income Tax Department which is at page no.111 of the paper book. This statement shows that the Financial Creditor “Monotrone Leasing Private Limited” was paid Rs.72,945/- as interest amount during the Financial Year 2018-19 by the Corporate Debtor “PM Cold Storage Private Limited” and TDS of Rs. 7,295/- was deducted in the Financial Year 2018-19.

16. Based on the above document, there is not an iota of doubt that the Financial Creditor gave Rs.25,00,000/- (Rupees Twenty Five Lakh Only) as inter-corporate loan on 14th June 2017, for a period of 90days, payable with interest @ 15% per annum. The Corporate Debtor acknowledged the receipt of inter-corporate deposit and secured the same by giving a post-dated cheque being No.242228 dated 12th September 2017 of Rs.25,00,000/- (Rupees Twenty Five Lakh Only). In return, the Corporate Debtor issued a balance confirmation letter to acknowledge the receipt of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) and the payment of regular interest on the said loan. The Appellant filed a copy of Form 26AS, showing the payment of interest and deduction of TDS from the same.

17. However, the Adjudicating Authority has given a different finding and has observed that;

“8. Admittedly the financial Creditor is a Non-Banking Financial Company. Hence, the transaction in dispute cannot be

a transaction of simple corporate deposit in between two companies. Here in this case, Financial Creditor alleges to have given the loan to the Corporate Debtor. Obviously, when any NBFC gives loan to an individual or for that matter any corporate person, it may require to follow certain rules of business.

9. *In this case, financial Creditor did not disclose in its Application, more particular in Part V of the Application, by giving details as to when the Corporate Debtor made Application for loan, when it was granted. The Financial Creditor did not produce on record the document to show that loan was really granted as per the request of the Corporate Debtor. In Form V of the Application, he did not state all relevant facts more particularly relating to following:*

- (i) Whether any security held and any document thereof.*
- (ii) The latest complete copy of financial contract reflecting all advances and wavers?*
- (iii) Record of default.*
- (iv) Documents showing the entries relating to loan as per Bankers' Book of Evidence Act 1891 filed list of documents attached to the Application in order to prove existence of financial debt and the amount and date of default. “*

(Verbatim copy)

18. The above finding of the Adjudicating Authority shows that it has drawn adverse inference against the Financial Creditor on account of non-submission of documents required for obtaining a loan from an NBFC. However, the Adjudicating Authority is expected to admit or reject an

application for initiation of CIRP solely on the basis of parameters laid down under Sections 7, 9 or Sec 10 of IBC.

19. It is relevant to note that Hon'ble the Supreme Court of India in case of *Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407, has laid down the guiding principles to admit or reject an application filed under Section 7 of the IBC.

In the above case, Hon'ble the Supreme Court 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.

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."

In the above case, Hon'ble the Supreme Court of India has held that, to admit an application filed under Section 7 of IBC, 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.

20. Therefore, it is clear that financial debt of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) was owed by the Corporate Debtor, which was payable with interest @ 15% and the Corporate Debtor defaulted in making the payment. The application filed by the Appellant / Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, read with Rule 4 of the Adjudicating Authority Rules, is complete. In the circumstances, it is clear that the observation of the Adjudicating Authority is sans any evidence.

21. One of the grounds of rejection taken by the Adjudicating Authority is that the Corporate Debtor, being a solvent company, will not take risk to enter into insolvency proceedings under IBC as the financial statement of the Corporate Debtor in Financial Year ending March 2017 depicts revenue from operation, in the Corporate Debtors' account as Rs.34,13,351/- and a balance of more than Rs.25,00,000/- (Rupees Twenty Five Lakh Only).

22. We are bound to emphasize that a presumption cannot be drawn merely on the basis that a company, being solvent, cannot commit any default. As observed in financial and economic parlance, the inability to pay-off debts and committing default are two different aspects which are required to be adjudged on equally different parameters. Inability to pay debt has no relevance for admitting or rejecting an application for initiation of CIRP under the IBC.

23. As held by Hon'ble the Supreme Court of India in *Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17 : 2019 SCC OnLine SC 73;

“54. *It is clear from these sections that information in respect of debts incurred by financial debtors is easily available through information utilities which, under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 (Information Utilities Regulations), are to satisfy themselves that information provided as to the debt is accurate. This is done by giving notice to the corporate debtor who then has an opportunity to correct such information.*

55. *Apart from the record maintained by such utility, Form I appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, makes it clear that the following are other sources which evidence a financial debt:*

- (a) *Particulars of security held, if any, the date of its creation, its estimated value as per the Creditor;*
- (b) *Certificate of registration of charge issued by the Registrar of Companies (if the corporate debtor is a company);*
- (c) *Order of a court, tribunal or arbitral panel adjudicating on the default;*
- (d) *Record of default with the information utility;*
- (e) *Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925;*
- (f) *The latest and complete copy of the financial contract reflecting all amendments and waivers to date;*

(g) A record of default as available with any credit information company;

(h) Copies of entries in a bankers book in accordance with the Bankers Books Evidence Act, 1891.

64. The trigger for a financial creditor's Application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. **Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial Creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation.** Four policy reasons have been stated by the learned Solicitor General for this shift in legislative policy:

64.1. First is predictability and certainty.

64.2. Secondly, the paramount interest to be safeguarded is that of the corporate debtor and admission into the insolvency resolution process does not prejudice such interest but, in fact, protects it.

64.3. Thirdly, in a situation of financial stress, the cause of default is not relevant; protecting the economic interest of the corporate debtor is more relevant.

64.4. Fourthly, the trigger that would lead to liquidation can only be upon failure of the resolution process.

65. *In this context, it is important to differentiate between "claim", "debt" and "default". Each of these terms is separately defined as follows:*

"3. Definitions.—*In this Code, unless the context otherwise requires—*

(6) **"claim"** *means—*

(a) *a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*

(b) *right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;*

(11) **"debt"** *means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;*

(12) **"default"** *means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;"*

Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor. It is for this reason that a financial creditor has to prove "default" 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. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 and by operational creditors under Sections 8 and 9 of the Code becomes clear.

24. Given the law laid down in Swiss Ribbon case (supra), it becomes clear that rather than the "inability to pay debts", it is the "determination of default" that is relevant for allowing or disallowing an Application filed under Section 7, 9 or 10 of IBC. The said shift enables the Financial Creditor to prove by solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed to fulfill its obligation. Therefore, to allow the application under Section 7, it is not relevant to see the inability of the Corporate Debtor to pay the debt.

26. The Adjudicating Authority has also rejected the Application on the ground of pendency of Civil Suit between the parties. In this regard, the Adjudicating Authority has observed that:

"14. As against this, Corporate Debtor come out with clear defense that financial creditor owes nothing against them. They filed interpleader suit disclosing the nature of alleged transaction. We do not say that their contention in the suit may be correct but competent Civil Court having felt that there exists prima facie case in favour of the Corporate Debtor have issued and an interim prohibitory order against financial creditor and others stating they cannot recover the amount claimed herein."

It is observed by the Adjudicating Authority that the civil court has issued an interim prohibitory order against the Financial Creditor and others stating that they cannot recover the amount claimed herein. The Respondent has failed to file any such order of the civil court prohibiting realization of the said amount. However, it is to be clarified that Section 238 of the IBC has an overriding effect over any other law that is inconsistent with the provisions of IBC. Therefore, the Civil Court was not competent to issue an injunction order for a case pending before this Tribunal under IBC. The Adjudicating Authority has erred in rejecting the application based on the pendency of civil suit between the parties.

27 The Adjudicating Authority has also rejected the application on the ground that it is not a forum for recovery of amount. The Adjudicating Authority has observed that:

“15. We have clearly noted that this Authority is not a forum for a recovery of amount. We have to see whether corporate debtor committed default in paying the debt (financial or operational) and if yes, then to admit in CIRP. The Corporate Debtor has explained the nature of transaction and financial creditor did not produce adequate evidence to prove that it owns financial debt against the Corporate Debtor. In this summary enquiry, we cannot enter into correctness of assertion of financial creditor and defense of the financial creditor. We hold that evidence as produced by the Financial Creditor is not enough and cannot be safely relied on. The corporate debtor also produced on record the balance sheet for year ending March 2017 showing revenue from operations to the extent of Rs.34,13,351/- (Rupees Thirty-Four Lakh Thirteen Thousand Three Hundred Fifty-One Only). It has not recognized

the financial creditor to be one of its creditors in the balance sheet. It had balance more than Rs.25 lakh lying in the Bank (page no.68 and 75 of supplementary affidavit). It appears to us that Corporate Debtor is a solvent company. Generally, solvent company will not take a risk to go into CIRP for non-payment of Rs.25 Lakh. From evidence on record, we hold that Financial Creditor may not owe financial debt as claimed by them in their application. Hence, there is no question of any default by the Corporate Debtor.”

[Verbatim copy]

28 On perusal of the above order, it is apparent that the Adjudicating Authority has rejected the Application filed under Section 7 of the Code on the ground that CIRP cannot be initiated for recovery of dues as the Tribunal is not a recovery forum. It is contended by the Respondent that Section 65 of the IBC prohibits initiation of CIRP if the purpose of proceeding is other than resolution for insolvency. Section 65 of the Code is given as under:

“Section 65. Fraudulent or malicious initiation of proceedings

65. Fraudulent or malicious initiation of proceedings.— (1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.”

29 Section 65 of the Code provides for penal action for initiating Insolvency Resolution Process with a fraudulent or malicious intent or for any purpose other than the resolution. However, the same cannot be construed to mean that if a petition is filed under Section 7, 9 or 10 of the Code without any malicious or fraudulent intent, then also such a petition can be rejected by the Adjudicating Authority on the ground that the intent of the Applicant/Petitioner was not resolution for Corporate Insolvency Resolution Process. As the proceedings under IBC are summary in nature, it is difficult to determine the intent of the Applicant filing an application under Section 7, 9 or 10 of the Code unless shown explicitly by way of documentary evidence. This situation may arise in specific instances where a petition is filed under IBC specifically with a fraudulent or malicious intent.

30 In the circumstances, we are of the opinion that the Appeal deserves to be allowed. We are also satisfied that the Appellant/ Financial Creditor has proved that the Corporate Debtor has committed default of more than One lakh rupees, Application filed by the Appellant under Section 7 of the Code is complete and no disciplinary proceeding is pending against the proposed Resolution Professional. Therefore, the Application filed under Section 7 by the Appellant / Financial Creditor should have been admitted by the Adjudicating Authority.

ORDER

Appeal is allowed. Impugned order is set aside. The Adjudicating Authority is directed to pass the order of admission within 7 days from the date of this order.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

[Alok Srivastava]
Member (Technical)

NEW DELHI
16th JULY, 2020

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