

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 342/KB/2022

*An Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read
with Rule 4 of the Insolvency and Bankruptcy (Adjudicating Authority) Rules,
2016.*

IN THE MATTER OF:

Desana Impex Limited
(CIN: U51226WB1984PLC037440) ... Applicant/ Financial Creditor.

Verses

Brick and Mortar Reality Pvt. Ltd.
(CIN: U70101WB2007PTC117693) ... Respondent/ Corporate Debtor.

Date of Hearing: November 10, 2023.

Date of Pronouncement: November 21, 2023.

CORAM:

**SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)
SHRI ARVIND DEVANATHAN, MEMBER (TECHNICAL)**

APPEARANCE:

**For the Financial Creditors: Ms. Tanvi Luhariwala, Adv. and Mr. Ritesh Goel,
Adv.**

**For the Corporate Debtor: Ms. Urmila Chakraborty, Adv., Mr. Arkodeb Sinha,
Adv. and Ms. Meenakshi Manot, Adv.**

ORDER

Per: Arvind Devanathan, Member (Technical)

1. This Court is congregated through hybrid mode.
2. Heard the Ld. Counsels for both parties.

Factual Background:

3. This application has been moved by **Desana Impex Limited** (hereinafter called the "Financial Creditor" or "FC") under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called the "IBC") to initiate Corporate Insolvency Resolution Process (hereinafter called the "CIRP") against **Brick and Mortar Reality Private Limited** (hereinafter called the "Corporate Debtor" or "CD").

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4. It is the submissions of the Financial Creditor that a total sum of Rs.1.50 Crores was disbursed in five tranches by the Financial Creditor to the Corporate Debtor with interest @ 12% per annum. The Financial Creditor submits that the Corporate Debtor has defaulted in making payment, consequently leading to an outstanding amount of Rs.2,31,44,999/- as on 12/03/2022 which includes the principal amount of Rs.1.50 Crores and the balance Rs. 81,44,999/- towards interest.
5. The Financial Creditor submits that a legal notice was issued on 26/05/2022 calling upon the Corporate Debtor to make the payment of the outstanding loan amount along with interest totalling Rs.2,31,44,999/-. It is stated that despite receipt of the said notice, no reply was made by the Corporate Debtor. The Financial Creditor submits that the loan taken from the Financial Creditor by the Corporate Debtor is shown under the heading "Other Liabilities" in the Balance Sheet of the Corporate Debtor. Therefore, the Corporate Debtor has clearly and unequivocally acknowledged its liabilities of the outstanding loan amount.
6. The Financial Creditor submits that in view of this petition u/s. 7 of the IBC is filed for initiation of CIRP against the Corporate Debtor.

Submissions of the Ld. Counsel for the applicant:

7. Ld. Counsel for the applicant submits that disbursement has been made in five tranches as given in the table below: -

Date	Amount in Rupees
24/05/2013	10,00,000.00
24/05/2013	10,00,000.00
28/06/2014	95,00,000.00
29/07/2015	10,00,000.00
05/09/2015	25,00,000.00
Total	1,50,00,000.00

8. Ld. Counsel for the applicant took us through the bank statements of the Financial Creditor to demonstrate the remittances on dates mentioned in the table above.

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He also took us through Form 26AS, which is Annual Tax Statement under section 203A of the Income Tax Act, to show that the TDS deducted by the Corporate Debtor under section 194A of the Income Tax Act, which deals with provision relating to TDS on interest. The very fact that the TDS has been on the interest portion which is reflected in Form 26AS statement is good to prove that what was advanced is only a financial accommodation and meets the definition of “financial debt” as defined under section 5(8) of the IBC.

9. Since the liability towards the loan is shown in the Balance Sheet of the Corporate Debtor as on 31/03/2021, this application has been filed within the time limit prescribed under the IBC.
10. Since the outstanding amount is in excess of the threshold limit, he submits that this is a fit case for admission under section 7 of the IBC.

Submissions of the Ld. Counsel for the Corporate Debtor:

11. Ld. Counsel for the Corporate Debtor submits that no loan agreement has been disclosed by the Financial Creditor to show that the loan was granted by the Financial Creditor to the Corporate Debtor. Ld. Counsel further submits that the Financial Creditor being a NBFC, is mandatorily required to disburse any loan only by entering into an agreement. Without the loan agreement neither interest alleged to have been accrued nor the tenure of the loan cannot be ascertained. According to the Ld. Counsel for the Financial Creditor has to firstly show that what has been advanced is ‘financial debt’ and secondly there has been a default. She has relied upon the judgment of the **Hon’ble NCLAT, Principal Bench dated March 22, 2023, in Company Appeal (AT) (Insolvency) No. 778 of 2020 (M/s. VRG Healthcare Pvt. Ltd. v. M/s. VRG Infrastructure Pvt. Ltd. reported in (2023) ibclaw.in 199 NCLAT)** wherein in paragraph 17, the Hon’ble NCLAT held –

“17. After hearing the parties and going through the pleadings made on behalf of the parties, we are of the considered view that we agree with the findings given by the Adjudicating Authority that the Appellant has not produced any agreement between the Appellant and the Respondent that

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any interest would be payable by the Respondent/Corporate Debtor against the alleged loan.”

(Emphasis Added)

12. Ld. Counsel for the Corporate Debtor further submits that no legal notice has been ever issued by the Financial Creditor. The confirmation of debt by the Corporate Debtor alleged to have been given through authorized e-mails contained in pages 7 to 19 of the Supplementary Affidavit are not given by any authorized person of the Corporate Debtor. In fact, e-mails alleged to have been sent by one Mr. Dilip Mohanty, are not associated with the Corporate Debtor or authorized to issue such e-mails on account confirmation. The Ld. Counsel further submits that as per the attachment at page 19 of the Supplementary Affidavit filed by the Financial Creditor, the loan amount shows as Rs.1.50 Crore and the interest amount is Rs.18 Lakhs with TDS of Rs.1,80,000/- net amount payable comes to Rs.16,20,000/-.

Analysis and Findings of this Adjudicating Authority:

13. We find that there was no written agreement between the parties. It was the contentions of the Corporate Debtor that the Financial Creditor is an NBFC bound by the Master Circular issued by the Reserve Bank of India (hereinafter called the “RBI”). It is an admitted fact that the Financial Creditor an NBFC registered with the Reserve Bank of India was not disputed by the Ld. Counsel arguing on behalf of the Financial Creditor during the course of hearing. If that being the case, the Financial Creditor is bound by the Master Circular issued by the RBI. The paragraph 2(A) (ii) of the RBI guidelines on “***Master Circular-Fair Practices Code for NBFCs, dated July 01, 2015,***” envisages that:

“(ii) Loan appraisal and terms/conditions:

The NBFCs should convey in writing to the borrower in the vernacular language as understood by the borrower by means of sanction letter or otherwise, the amount of loan sanctioned along with the terms and conditions including annualised rate of interest and method of application thereof and keep the acceptance of these terms and conditions by the borrower on its record. As complaints received against NBFCs generally pertain to charging of high interest / penal interest, NBFCs shall mention

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the penal interest charged for late repayment in bold in the loan agreement.”

14. Further, we are fortified in our views by the decision passed by this Adjudicating Authority in the matter of *Narendra Promtoers & Fincon Pvt. Ltd. v. Vinline Engineering Pvt. Ltd.* CP (IB) No.749/KB/2020 reported in (2022) ibclaw.in 219 NCLT that:

“10. ... The RBI’s circulars have statutory force, and this is well recognised in law. Hence, it is mandatory on the part of Financial Creditor, being a NBFCs to keep the terms and conditions recorded in writing.”

“11. Further, as opined by the Hon’ble Supreme Court in *Phoenix Arc Pvt. Ltd. Vs. Spade Financial Services Ltd. &Ors.*, for the implementation of a successful insolvency regime and to impede any person from taking undue benefit, the real nature of the transactions has to be unearthed, as per the Code....”

“12. In the light of the above noted facts and circumstances, we are of the view that the Financial Creditor has failed to establish the nature of transaction between the parties. Further, it is a settled law that the deduction of TDS is not sufficient to conclude that the transaction in question is a Financial Debt. Hence, the petition bearing CP (IB) No.749/KB/2020 is rejected...”

(Emphasis Added)

15. Thus, from the discussion supra, we are of the view that an explicit written agreement of loan is a mandatory instrument for the Financial Creditor, being a NBFC, to substantiate the nature of transactions between the lender and borrower. In the present case, the Financial Creditor has not been able to produce any loan agreement with the Corporate Debtor.
16. In the absence of any loan agreement, we are unable to determine whether the amount advanced was a financial debt and if yes, the rate of interest is 12% or the tenure of the loan agreement to determine the date of default.
17. We find that in the absence of signed documents, there is none to show that the said amount was to be repaid after a particular period. Therefore, the Financial Creditor is unable to clearly prove that the said loan amount is to be payable by the respondents/Corporate Debtor on a particular date. The case law referred by

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the Ld. Counsel for the applicant passed by the Hon'ble NCLAT in the case of *Narendra Kumar Agarwal v. Monotrone Leasing Private Limited (Company Appeal (AT)(Insolvency) No. 549 of 2020)*, in our view, will not come to rescue to the Financial Creditor. In that case, even though the contract was oral, the respondent therein was able to demonstrate with money receipt, bank statement, notice issued under section 138 of the Negotiable Instrument Act, 1881, by the respondent therein and the response of the applicant agreeing to pay with interest, etc. (as laid down in para 16 of *Narendra Kumar Agarwal (Supra)*) to prove beyond reasonable doubt that what was advanced was only a 'financial debt'.

18. In the given case even going by the entries made in the balance sheet of the Corporate Debtor which showed that the amount due to the applicant herein is shown under the heading "*Other Liabilities*" and not as a loan. The e-mails alleging confirmation claimed to have been received by the Financial Creditor from the Corporate Debtor cannot be relied upon as Ld. Counsel for the respondent is able to demonstrate that e-mails were sent by a person who is no way connected with the Corporate Debtor and the same cannot be treated as confirmation of debt.
19. Under the above facts and circumstances, we are of the view that the Financial Creditor has not been able to demonstrate categorically that what was advanced was a financial debt. Therefore, in the absence of a written agreement, we are unable to ascertain the loan terms, date of repayment, and rate of interest, if any agreed upon. In the absence of a proper confirmation by the Corporate Debtor acknowledging the debt as 'financial debt', we are unable to conclude the amount said to have been advanced as financial debt. We find that in view of the facts and circumstances mentioned above, the application filed by the Financial Creditor does not merit admission under section 7 of the IBC and consequently, we dismiss it as not maintainable.
20. In terms of the view above, **this Company Petition being C.P. (IB) No. 342/KB/2022 is dismissed.**

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21. No cost.
22. Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

Arvind Devanathan
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the _____th Day of November, 2023.

hb.
Bose, R. K. [LRA]