

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I**

CP (IB) 954/MB/C-I/2019

Under section 7 of the Insolvency and Bankruptcy
Code, 2016

In the matter of

1. Gateway Offshore Private Limited

[CIN: U61100WB1994PTC065277]

601, Diamond Prestige, 41A, AJC Bose Road, Kolkata-
700017.

AND

2. Goodhope Software Private Limited

[CIN: U72900WB2004PTC097864]

601, Diamond Prestige, 41A, AJC Bose Road, Kolkata-
700017.

... Financial Creditor /Petitioner

Versus

Runwal Realtors Private Limited

[CIN: U00111PN1993PTC072336]

1st Floor Runwal Roshni Plaza, 41/12 Karve Road,
Pune-411004.

... Corporate Debtor /Respondent

Order Delivered on 10.06.2022

Coram:

Hon'ble Member (Judicial) : Justice P. N. Deshmukh (Retd.)
Hon'ble Member (Technical) : Mr. Kapal Kumar Vohra

Appearances:

For the Financial Creditor : Mr. Umair A. Ansari, Counsel.
For the Corporate Debtor : Mr. Anit Soni, Counsel.

ORDER

Per: Justice P. N. Deshmukh, Member (Judicial)

1. This Company Petition is filed under section 7 (“**the Petition**”) of the Insolvency and Bankruptcy Code, 2016 (**IBC**) by **Gateway Offshore Private Limited and Anr.** ("the Financial Creditors or FC"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Runwal Realtors Private Limited** ("the Corporate Debtor or CD").
2. The present Petition was filed on 05.03.2019 before this Adjudicating Authority on the ground that a loan for a sum of Rs.4,43,00,000/- (Rupees Four Crore Forty-Three Lakh Only) was advanced by the Financial Creditors i.e. (Rs.1,50,00,000/- from Petitioner No.1 and Rs.2,93,00,000/- from Financial Creditor No.2) along with interest at the rate of 9 % p.a. to the Corporate Debtor and the Corporate Debtor has defaulted in repayment of the same.
3. The total amount claimed to be in default by the Financial Creditors is Rs.5,02,80,500/- (Rupees Five Crore Two Lakh Eighty Thousand and Five Hundred Only). The date of default stated to be is 3.07.2018.
4. The Corporate Debtor is a private company limited by shares incorporated on 10.06.1993 under the Companies Act, 1956, with the Registrar of Companies, Maharashtra, Pune. Its registered office is at 1st Floor, Runwal Roshni Plaza, 41/12 Karve Road,

Pune-411004. Therefore, this Bench has jurisdiction to deal with this petition.

Submissions made by the Financial Creditor:

5. The Financial Creditors submits that the Corporate Debtor approached around June 2017 for financial accommodation for a short period for business expansion. Since, the Corporate Debtor was acquainted with the Chartered Accountant of the Financial Creditors, the Financial Creditors decided to disburse the loan to the Corporate Debtor. Thereafter, the Financial Creditors by way of RTGS transferred a sum of Rs.4,43,00,000/- (Rupees Four Crore Forty-Three Lakh Only) in various tranches detailed as under:

i) Amount disbursed by Financial Creditor No.1

Sr. No.	Date	Amount (in Rs.)
1.	19.06.2017	50,00,000/-
2.	19.06.2017	50,00,000/-
3.	19.06.2017	50,00,000/-
	Total	1,50,00,000/-

ii) Amount disbursed by Financial Creditor No.2

Sr. No.	Date	Amount (in Rs.)
1.	14.06.2017	10,00,000/-
2.	14.06.2017	5,00,000/-
3.	15.06.2017	4,00,000/-
4.	15.06.2017	31,00,000/-

5.	17.06.2017	30,00,000/-
6.	19.06.2017	50,00,000/-
7.	20.06.2017	80,00,000/-
8.	20.06.2017	50,00,000/-
9.	21.06.2017	8,00,000/-
10.	05.07.2017	10,00,000/-
11.	07.07.2017	15,00,000/-
	Total	2,93,00,000/-

6. The copies of Statement of Accounts for the period of 01.06.2017 to 30.06.2017 of both the Financial Creditors are placed at “Exhibit B and B1” respectively. Further, the Corporate Debtor issued confirmation of accounts letters dated 01.10.2020 addressed to the Financial Creditors.
7. The Corporate Debtor was liable to repay the loan amount of Rs.4,43,00,000/- along with interest at the rate of 9% p.a. on or before June 2018. Therefore, the Financial Creditors addressed letters dated 03.07.2018 to the Corporate Debtor demanding repayment of the loan advanced cumulatively amounting to Rs.5,02,80,500/- [Rs.4,43,00,000/- (principal) + Rs.59,80,500/- (Interest @ 9% p.a.)]. **(Exhibit C and C1 at pages 24-25)**
8. Thereafter, the Financial Creditors addressed reminder letters dated 20.07.2017 to the Corporate Debtor seeking repayment of the amount advanced. However, the Corporate Debtor failed to repay the loan amount along with interest accrued within the stipulated period. **(Exhibit D and D1 at pages 26-27).**

9. Owing to the failure of the Corporate Debtor, the Financial Creditors addressed a legal notice dated 12.09.2018 inter alia calling upon the Corporate Debtor to repay the amount. **(Exhibit E and E1 at pages 28-29 and pages 30-31 respectively).**
10. The Corporate Debtor vide legal notice dated 05.10.2018 replied to the Legal Notice of the Financial Creditor's wherein the Corporate Debtor disputed the debt. The contents of the said notice are not elaborated herein for the sake of brevity. The Legal Notice addressed by the Corporate Debtor is placed as **"Exhibit F and F1 at pages 32-35 and pages 36-39 respectively"**.
11. The stand taken by the Financial Creditors is that they are not in the business of real estate. Hence, there is no question of entering into a Joint Venture Agreement with the Corporate Debtor, as alleged by the Corporate Debtor in the Legal Notice dated 05.10.2018.

Submissions made the Corporate Debtor:

12. The preliminary objection raised by the Corporate Debtor is on the issue of maintainability. The Corporate Debtor submits that the transaction between the parties does not classify as a Financial Debt.
13. Moreover, it is the case of the Corporate Debtor that Financial Creditors has disbursed the said amount for joint development of land owned by the Corporate Debtor. Further, the Financial Creditors were liable to contribute Rs.17 Crore out of which only Rs.4,43,00,000/- has been paid to the Corporate Debtor.

Accordingly, the Corporate Debtor has raised a counter claim for the remainder amount.

14. Further, the Corporate Debtor states that the Financial Creditors have not relied upon any loan agreement or any communication in the form of letters, emails etc. for the purpose of substantiating the claim. The Financial Creditors don't have license to operate as non-banking finance companies.
15. Reliance is placed by the Corporate Debtor on judgement of the Hon'ble Supreme Court in **Swiss Ribbons vs Union of India [Writ Petition (Civil) No. 99 of 2018]** to support the proposition that in the absence of documentary evidence or loan agreement the claim cannot lie.

“37. 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. First is predictability and certainty. 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. 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. Fourthly, the trigger that would lead to liquidation can only be upon failure of the resolution process.”

16. The Corporate Debtor placed reliance upon the Order of Principal Bench in the case of ***Carnoustie Management India Pvt. Ltd. vs CBS International Projects Private Limited Company Petition No.(IB) 792(PB)/2018*** :

“35. A Creditor in order to come within the meaning of Financial Creditor has to fulfill the following essential criteria:

- i. A person to whom a financial debt is owned and includes a person whom such debt has been legally assigned or transferred;*
- ii. The debt along with interest, if any, is disbursed against the consideration for time value of money and includes any one or more mode of disbursed as mentioned in clause (a) to clause (i) of sub-section (8) of section 5.”*

“36. Mere grant of loan and admission of taking loan will ispo facto not treat the applicant as ‘financial creditor’ within the meaning of Section 5(8) of the Code.”

“37. Precisely “financial debt” is debt along with interest, if any, which is disbursed against consideration for time value of money.”

17. The Corporate Debtor in light of the aforementioned Judgment submits that in the present case the debt is not a financial debt. The amount advanced by the Financial Creditors was for the purpose of Joint Venture. Moreover, it the case of the Corporate Debtor that since the debt itself is disputed, the Application shall lie before Civil Courts having appropriate jurisdiction.

Submissions made by the Financial Creditors by way of Affidavit in Rejoinder:

18. The arguments advanced by the Financial Creditors is that the Corporate Debtor has not submitted evidence supporting his contention that the claim amount was transferred for the purpose of Joint Venture Agreement. Moreover, the Corporate Debtor's financial statements for the Financial Year 2017-2018 disclose that there is no such joint venture. **(Exhibit A Page 80 of Rejoinder)**. The Agreement relied upon by the Corporate Debtor is of Arvinda Infrastructure Private Limited. Therefore, the Financial Creditors are not parties or concerned with the said transaction.

Findings:

19. Heard the Ld. Counsel for the Financial Creditors and the Ld. Counsel for the Corporate Debtor and perused the records.
20. It is the contention of the Corporate Debtor's that there is no written contract regarding any loan being sanctioned to the Corporate Debtor by the Financial Creditors. In this regard, we would like to rely on the stand taken by the NCLAT in **Narendra Kumar Agarwal and Ors. v Monotrone Leasing Private Limited**

and Ors. (Company Appeal (AT) (Insolvency) No. 549 of 2020 (NCLAT; Order dated 19.01.2021) wherein it was held that the written contract cannot be treated as an essential element or pre-requisite to prove the existence of Financial Debt (Para 11).

21. However, the Financial Creditor has failed to bring on record any other evidence in the form of a loan agreement, promissory note, contract or any document to substantiate its claim that there was a financial debt and a default of the same. The Financial Creditor has produced the Corporate Debtor's Annual reports for the Financial Years 2016-17 and 2017-18. However, the same do not reflect any debt due specifically to the Financial Creditor.
22. Further, the Financial Creditor has placed reliance on its bank statements and confirmation of accounts of the Corporate Debtor that reflect transactions between the parties. However, in absence of any written document indicating the purpose of the said transactions, it cannot be assumed to have been towards a loan as claimed by the Financial Creditor.
23. In light of the above facts and circumstances, we hold that while a written contract cannot be treated as a pre-requisite to proving the existence of financial debt, the Adjudicating Authority must be satisfied that the Corporate Debtor is not being dragged into Corporate Insolvency Resolution Process mala fide for any purpose other than the resolution of the Insolvency. In the present matter, there is no evidence to Allow or Admit present Application.

24. Hence, for the reasons stated above we reject the Company
Petition bearing C.P.(IB) No. 954/MB/2019.

Sd/-
KAPAL KUMAR VOHRA
Member (Technical)

10.06.2022
SAM

Sd/-
JUSTICE P. N. DESHMUKH
Member (Judicial)