

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No.1126 of 2022

[Arising out of order dated 29.07.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Bench-V in IB-1705/(ND)/2019]

IN THE MATTER OF:

M/s Agarwal Polysacks Limited

E-649, M.I.A IInd Phase,
Basni, Jodhpur – 342005 IN.

...Appellant

Vs.

M/s K. K. Agro Foods and Storage Limited

2244, Gali Raghunandan, Naya Bazar,
New Delhi – 110006 IN.

...Respondent

Present:

For Appellant: Mr. Manish Paliwal and Ms. Megha Yadav, Advocates.

For Respondent: Mr. Abhijeet Sinha and Mr. Aman Lodha, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed challenging the order dated 29.07.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Bench-V by which order Section 7 application filed by the Appellant has been rejected holding that Financial Creditor failed to show the nature of transaction between the parties and the amount which has been paid comes under definition of Financial Debt. The Appellant aggrieved by the order has come up in this Appeal. Brief facts of the case necessary to be noticed for deciding the Appeal are:

Cont'd.../

- (i) The Corporate Debtor – M/s K. K. Agro Food and Storage Ltd. approached the Appellant seeking financial assistance. The Appellant agreed to grant Unsecured Term Loan of Rs.75 Lakhs to the Corporate Debtor. The Appellant by RTGS payment disbursed amount of Rs.50 Lakhs on 23.08.2017, Rs.5 Lakhs and Rs.20 Lakhs on 28.09.2017. It was agreed between the parties that the repayment of the Unsecured Term Loan will be made on demand.
- (ii) The Corporate Debtor deducted tax on the Interest amount in the FY 2017-18. The Corporate Debtor deducted the total Tax Deduction at Source of Rs.52,250 on the accrued interest till 31.03.2018.
- (iii) Appellant asked the Corporate Debtor to send Statement of Account from 01.04.2018 to 21.03.2019 by email dated 12.04.2019.
- (iv) Appellant sent a letter dated 17.04.2019 to the Corporate Debtor for repayment of Unsecured Loan alongwith interest within two months.
- (v) The Board of Directors of the Appellant have passed resolution on 05.07.2019 to file case against the Corporate Debtor in NCLT.
- (vi) An application under Section 7 was filed on 12.07.2019 by the Appellant claimed an amount of Rs.91,80,854. The Corporate Debtor filed its reply in the Section 7 application to which rejoinder was also filed by the Appellant.
- (vii) On 16.01.2020, the Adjudicating Authority directed the Applicant to demonstrate that income tax for the Assessment Year 2018-19

has taken in to account the TDS deducted was adjusted and credited.

- (viii) Appellant filed various documents including Auditor's report as on 31.03.2018 and 31.03.2019 as well as copy of Section 194A of the Income Tax Act on 20.01.2020.
- (ix) On 10.02.2020, the Adjudicating Authority directed Corporate Debtor to file the documents based on which it has deducted the TDS. The Corporate Debtor did not file any document as directed by the Adjudicating Authority.
- (x) The Adjudicating Authority heard the parties and by impugned order rejected the application. The Adjudicating Authority making following observations in Para 14 and 15 rejected the application:

"14. In the light of the above noted facts and circumstances, when we consider the case in hand then we find that the Financial Creditor has failed to show the nature of the transaction between the parties and that the amount which he has paid comes under the definition of Financial Debt.

15. Thus, in view of the discussions made supra, the instant Application filed by the Financial Creditor under Section 7 of IBC, 2016 is not maintainable and accordingly the same stands dismissed."

2. Learned counsel for the Appellant challenging the order of the Adjudicating Authority contends that Unsecured Loan was advanced to the Corporate Debtor which was disbursed by RTGS. The Corporate Debtor deducted TDS towards payment of interest which is reflected in Form 26 AS

of the Financial Creditor. In Balance Sheet of 2018-19, Short Term Loan is reflected. The Balance Sheet also indicate that in the Unsecured Loan of Rs.75 Lakhs interest was added, hence, amount of Rs.79,72,250 was shown as due. It is submitted that the Adjudicating Authority committed error in holding that the Appellant had not been able to prove financial debt, however, the documents brought on the record by the Appellant including the Balance Sheets and bank transactions clearly prove the financial debt and the Adjudicating Authority committed error in rejecting the application.

3. Shri Abhijeet Sinha, learned counsel appearing for the Respondent refuting the submissions of learned counsel for the Appellant contends that there being no financial contract between the parties, Appellant failed to prove the financial debt. Shri Sinha referring to the Balance Sheet of the Appellant of FY 2017-18 submitted that under the 'Short Term Loan and Advances', there is no entry with regard to the Corporate Debtor of the Amount, which is claimed by the Appellant. It is submitted that the disbursement should have been made for time value of the money. It is submitted that no oral contract, if any, can be enforced. Shri Sinha has also relied on judgments of this Tribunal in ***"Company Appeal (AT) (Ins.) No. 713 of 2019, Prayag Polytech Pvt. Ltd. vs. Gem Batteries Pvt. Ltd."***, ***"Company Appeal (AT) (Ins.) No. 468 of 2019, Jagdambey International vs. Visa Powertech Pvt. Ltd."***, ***"Company Appeal (AT) (CH) (Ins.) No. 108 of 2023, M/s IFCI Ltd. vs. Sutanu Sinha & Anr."*** and judgment of this Tribunal in ***"Company Appeal (AT) (Ins.) No. 251 of 2020, Pawan Kumar vs. Utsav Securities Pvt. Ltd. & Anr."***

4. We have considered the submissions of learned counsel for the parties and perused the record.

5. From the submissions of the parties and the material on record following two questions arise for consideration:

- (i) Whether to prove a financial debt a Financial Creditor has to enter into a written financial contract?
- (ii) Whether the Appellant from the materials brought on the record was unable to prove that the Corporate Debtor owes a financial debt?

6. Both the questions being interconnected; we proceed to examine the questions together. We may first notice the relevant statutory provisions governing filing of Section 7 application and the relevant documents which are to be filed alongwith Section 7 application. Section 7 of the I&B Code empowers a Financial Creditor to initiate CIPR against the Corporate Debtor before the Adjudicating Authority when a default has occurred. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 are the rules which regulates filing of application by the Financial Creditors. Section 3(1)(d) defines 'Financial Contract' in following words:

“(d) “financial contract” means a contract between a corporate debtor and a financial creditor setting out the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment;”

7. Rule 4 provides for “Application by Financial Creditor”. Rule 4 Sub-Rule (1) provides:

“4. *Application by Financial Creditor. – (1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*”

8. Rule 4(1) provides that application for initiating the Corporate Insolvency Resolution Process against a Corporate Debtor is to be in Form 1, accompanied with documents and records required therein and as specified in Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. We may also notice Form 1 of Rule 2016, where Part IV deals with ‘Particulars of Financial Debt’ and Part V deals with ‘Particulars of Financial Debt [Documents, Records and Evidence of Default]’. Part V of the Form 1 is as follows:

“Part-V

***PARTICULARS OF FINANCIAL DEBT [DOCUMENTS,
RECORDS AND EVIDENCE OF DEFAULT]***

1. PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)

2. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)

3. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)

4. 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 (10 OF 1925) (ATTACH A COPY)

5. THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)

6. A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)

7. COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891) (ATTACH A COPY)

8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND DATE OF DEFAULT

I, hereby certify that, to the best of my knowledge, [name of proposed insolvency professional], is fully qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016 and the associated rules and regulations.

[Name of the financial creditor] has paid the requisite fee for this application through [state means of payment] on [date and served a copy of this application by registered post/speed post/by hand/electronic means to the registered office of the corporate debtor and to the Board.]

Yours sincerely,

Signature of person authorised to act on behalf of the financial creditor

Name in block letters

Position with or in relation to the financial creditor

Address of person signing

Instructions

Please attach the following to this application:

Annex I Copies of all documents referred to in this application.

Annex II Written communication by the proposed interim resolution professional as set out in Form 2.

Annex III Proof that the specified application fee has been paid.

Annex IV Where the application is made jointly, the particulars specified in this form shall be furnished in respect of all the joint applicants along with a copy of authorisation to the financial creditor to file and act on this application on behalf of all the applicants.

[Annex V Proofs of serving a copy of the application (a) to the corporate debtor, and (b) to the Board.]”

9. A bare perusal of Part V indicates that particulars of financial debt, several documents, records and evidence of default has been referred to which documents are contemplated to be particulars of financial debt. Rule 4(1), Application to Adjudicating Authority Rule, 2016 refers to Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, hence, we need to notice CIRP Regulations. Regulation 8 deals with claim by Financial Creditor. Rule 8(2) provides:

“8(2) The existence of debt due to the financial creditor may be proved on the basis of –

(a) the records available with an information utility, if any; or

(b) other relevant documents, including –

(i) a financial contract supported by financial statements as evidence of the debt;

(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;

(iii) financial statements showing that the debt has not been [paid]; or

(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.”

10. When we look into Regulation 8 Sub-regulation (2), it is clear that Regulation do not contemplate existence of all documents. Use of word “or” in Regulation 8(2)(a) indicate by any of the document referred to in Sub-regulation (2) existence of debt can be proved.

11. We need to test the submission of learned counsel for the Respondent that the written financial contract is necessary for proving debt. A financial contract supported by financial statements as evidence of the debt is one of the documents contemplated in Regulation 8(2) but that is not exclusive requirement for proving existence of debt. Financial contract thus can very well be furnished to prove the financial debt but a plain reading of Regulation 8(2) indicate that it is not mandatory that existence of financial debt has to be proved by a financial contract. For example: records available with an information utility can very well be used as proof for existence of financial debt. Further, financial statements showing that the debt has not been paid is also one of the clauses in Regulation 8(2) by which existence of debt can be proved.

12. Learned counsel for the Respondent has relied on judgment of this Tribunal in **“Company Appeal (AT) (Ins.) No. 251 of 2020, Pawan Kumar vs. Utsav Securities Pvt. Ltd. & Anr.”** To support his submission that it is obligatory on part of the Financial Creditor that there should be a Loan Agreement in writing only. This Tribunal in the above case considered the issue as to whether a transaction in question is a financial debt. This Tribunal

has referred to RBI Guidelines dated 18.08.2023 which was issued for Non-Banking Financial Corporation (NBFC). In Para 20 of the judgment following was stated:

“20. On the other hand, as per the Corporate Debtor in absence of a Financial Contract defined in Rule 3 (1) (d) the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 between the Corporate Debtor and Financial Creditor, the transaction cannot be termed as Financial Debt. RBI on 18.02.2013 issued guidelines to Non-Banking Finances Companies for fair practices which states that the Non-Banking Finances Company should convey in writing to the borrower in vernacular language as understood by the borrower by means sanctioned letter or otherwise, the amount of loan sanctioned alongwith the terms and conditions including annualised rate of interest. Thus, it is obligatory on the part of the Financial Creditor that there should be a loan agreement in writing only.”

13. The above observations made by this Tribunal were in reference to Non-Banking Financial Corporation which had claimed financial debt in the above case. The observation in Para 20 that it is obligatory on part of the Financial Creditor that there should be a Loan Agreement in writing is in context of a Non-Banking Financial Corporation. Although this Tribunal has referred to Rule 3(1)(d) of Application to Adjudicating Authority Rules, 2016 but Tribunal has not referred to Regulation 8 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which are clearly referred to in Rule 4 of Application to

Adjudicating Authority Rules, 2016, as noted above. After referring to Rule 3(1)(d) of the Application to Adjudicating Authority Rules, 2016, following has been observed in Paras 21 and 22 of the judgment:

“21. We have considered the submissions, the Financial Creditor has not furnished any document to show that the transaction in question is a loan transaction. So far as the section 10 of Indian Contract Act and Rule 3 (1) (d) of the Rules is concerned we again refer the Prayag Polytech (Supra) in which this Tribunal held that:

“7. As regard relying on Section 10 of the Contract Act, 1872, in our view IBC is a complete code in itself. Section 238 of IBC has overriding effect on provisions inconsistent with IBC. The ‘Financial contract’ is defined in “Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016” Rule 3(1)(d) requires setting out the terms of the financial debt including tenure etc. We find that Appellant has failed to show any record showing financial debt to be there. As such, we are unable to find any fault in the impugned order while rejecting Section 7 application.”

22. With the aforesaid, we are of the view that the Financial Contract as per the Rule 3(1) (d) 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.”

14. After making aforesaid observations, this Tribunal in Para 33 has laid down following in Para 33:

“33. With the aforesaid discussion, we are of the considered view that Ld. Adjudicating Authority has erroneously admitted the Application under Section 7 of the IBC, whereas, the Financial Creditor has failed to establish that the transaction in question is a Financial Debt and due and payable and the Corporate Debtor has committed default. Thus, we have no other option but to set aside the impugned order.”

15. This Tribunal has held in Para 33 that the Financial Creditor has failed to establish that the transaction in question is a Financial Debt and due and payable and the Corporate Debtor has committed default. The judgment cannot be relied as laying down any preposition that unless there is Financial Contract to establish financial debt, Financial Creditor cannot prove the financial debt by any other document. The above judgment of this Tribunal has also referred to another judgment of this Tribunal in **“Prayag Polytech”**.

16. **“Prayag Polytech Pvt. Ltd. vs. Gem Batteries Pvt. Ltd., Company Appeal (AT) (Ins.) No. 713 of 2019”** decided on 24.09.2019 was a case where Financial Creditor was relying on the TDS deducted on the interest to prove the Financial Debt. It was held that merely pointing on the TDS deducted would not be sufficient to conclude that there was financial debt. In Para 5, 6 and 7 following was held:

“5. Learned Counsel for the Appellant further submits that “financial contract” as defined in the Insolvency and Bankruptcy (Application to Adjudicating Authority)

Rules, 2016 does not debar oral contract and financial contract can be oral in terms of Section 10 of the Contract Act. According to him Section 7 application under IBC should not have been rejected.

6. We have gone through the records and the impugned order. Merely pointing out that TDS was deducted would not be sufficient to conclude that there was financial debt. TDS can be deducted for various reasons.

7. As regard relying on Section 10 of the Contract Act, 1872, in our view IBC is a complete code in itself. Section 238 of IBC has overriding effect on provisions inconsistent with IBC. The ‘Financial contract’ is defined in “Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016” Rule 3(1)(d) requires setting out the terms of the financial debt including tenure etc. We find that Appellant has failed to show any record showing financial debt to be there. As such, we are unable to find any fault in the impugned order while rejecting Section 7 application.”

17. What was held in Para 7 that Appellant has failed to show any record showing financial debt to be there. Thus, above judgment also does not lay down that unless there is written contract, the Financial Creditor is precluded to prove financial debt by any other relevant material.

18. The next judgment relied by learned counsel for the Respondent is in **“Prayag Polytech Private Limited vs. Bon Lon Petrochem LLP, Compnay Appeal (AT) (Ins.) No. 705 of 2019”** was the case where this Tribunal held that default could not be established. The Appellant in that case disbursed

amount on the basis of alleged oral agreement. It was held by this Tribunal that default cannot be established on oral pleading of evidence. The above judgment cannot be relied as it does not lay down any preposition that written financial contract is mandatory and is the only document by which a Financial Creditor can prove the financial debt.

19. Another judgment which has been relied by learned counsel for the Respondent is **“Company Appeal (AT) (CH) (Ins.) No. 108 of 2023, M/s IFCI Ltd. vs. Sutanu Sinha & Anr.”**. In the above case, this Tribunal has looked into the Balance Sheets to find out as to whether any such entry can be construed as financial debt as defined in the Code. Para 32 of the judgment is as follows:

“32. It is evidenced from the material on record that as per terms of the CLA between the Lenders Consortium, assigned to ACRE and the Corporate Debtor, the Corporate Debtor was prohibited from taking any further debt without the consent of the assignee. The Record does not show anywhere that any such approval was sought by the Corporate Debtor from the Lenders Consortium. At the time of disbursal of the amount, it was to be treated as Equity alone and not as ‘Debt’. Even if these amounts were reflected in the financial statements of the Corporate Debtor as ‘Other Financial Liability’, it would depend on the facts of each case as to whether such an entry in the balance sheet construes a ‘Financial Debt’ as defined under the Code. In the instant case, the terms of the DSA, CLA and the ‘Share Agreement’ have to be read together with the fact that it was the Sponsor Company which was liable to pay the interest component and not the

Corporate Debtor. The Hon'ble Supreme Court in a catena of Judgments has categorically held that 'IBC Code, 2016' is a time bound process and any delay in challenging the rejection of the claims cannot be condoned as a matter of routine. In the instant case, the claim of the Appellant was rejected on 09/08/2022 where as the challenge to the Rejection was filed only on 30/11/2022 after a period of four months after the rejection of the claim. Today, the Resolution Plan has already been approved by the CoC by 100% majority voting share."

20. The above judgment also thus indicate that Balance Sheets can also be looked into to find out existence of financial debt. Learned counsel for the Appellant has relied on judgment of this Tribunal in **"Satish Balan VS Mrs. Neeta Navin Nagda & Anr., Company Appeal (AT) (Ins.) No. 718 of 2023"** decided on 04.07.2023, where in Para 14 and 15 following has been laid down:

"14. This 'Appellate Tribunal' observe that the Code nowhere prescribes that there should be a written agreement between the parties to prove the loan and its disbursement to be treated as financial debts. It is also observed that if there are acknowledgments by the 'Corporate Debtor' and where the statements of accounts of the 'Corporate Debtor' are in position to proof disbursement of loan and payment of interest, the absence of formal written agreement would not bar the 'Financial Creditor' (the Respondent No. 1 herein) from initiating the CIRP.

15. We take note from the record made available that there have been clear acknowledgments which have been issued by the 'Corporate Debtor' for the money

received from the Respondent No. 1 which also mentioned the quantum of interest payment to be made by the 'Corporate Debtor' to the Respondent No. 1. Similarly, we also take into account the fact that TDS was deducted regarding interest paid and the name of the Appellant as 'deductor' and the name of the Respondent No. 1 as 'deductee' is clearly evident. This does not give any scope for benefits of the 'Appellant'."

21. When we look into the statutory scheme as reflected in the Application to Adjudicating Authority Rules, 2016 and CIRP Regulations, 2016, it is clear that financial debt can be proved from other relevant documents and it is not mandatory that written financial contract can be only basis for proving the financial debt. We, thus, answer Issue No.1 holding that it is not necessary that written financial contract be the only material to prove the financial debt.

22. The second question is as to whether Appellant by filing relevant materials was unable to prove that there was any financial debt which was extended to the Corporate Debtor.

23. It is relevant to note that in the present case disbursement of Rs.75 Lakhs by RTGS is proved by the bank record and not ever disputed by the Corporate Debtor. We may now look into the relevant Balance Sheets which have been relied by learned counsel for the Appellant to prove his submission. The Appellant has referred to and relied on Balance Sheet of the Corporate Debtor as on 31.03.2018 (FY 2017-18). Under the heading 'Note-III' Long Term Borrowing of amount of Rs.79,70,250 has been mentioned against Agarwal Polysacks Limited unsecured. Under the heading 'Term of Repayment of Loan', it is mentioned that against M/s Agarwal Polysacks Limited

“repayment on demand”. Balance Sheet for FY 2017-18 of Corporate Debtor is as follows:

“KK AGRO FOODS & STORAGE PRIVATE LIMITED
2244, Gali Raghunandan, Naya Bazar, Delhi-110006
CIN : U51909DL2012PTC234782, Ph. No: 9811441758
Email : aniltradingco1@gmail.com

(F.Y. 2017-2018)

Note No.3 Long-term borrowings

In rupees

Particulars	As at 31 st March 2018			As at 31 st March 2017		
	Non-Current	Current Maturities	Total	Non-Current	Current Maturities	Total
Term Loan-From banks						
Secured Loan from HDFC Bank	2,72,26,254.00	35,32,178.00	3,07,58,432.00			
	2,72,26,254.00	35,32,178.00	3,07,58,432.00			
Term Loan-From Others						
Reception Tracom Pvt. Ltd.				2,00,00,000.00		2,00,00,000.00
Unsecured Gin Raj Estate Pvt. Ltd. unsecured	2,00,00,000.00		2,00,00,000.00			
Agarwal Polysacks Ltd. unsecured	79,70,250.00		79,70,250.00			
	2,79,70,250.00		2,79,70,250.00	2,00,00,000.00		2,00,00,000.00
Loans and advances from related parties						
Om Prakash Kasal unsecured	22,21,166.00		22,21,166.00	18,40,849.00		18,40,849.00
Kisan Lal Kamani unsecured	30,12,379.00		30,12,379.00	16,91,667.00		16,91,667.00
	52,33,545.00		52,33,545.00	35,32,516.00		35,32,516.00
The Above Amount includes						
Secured Borrowings	2,72,26,254.00	35,32,178.00	3,07,58,432.00			
Unsecured Borrowings	3,32,03,795.00		3,32,03,795.00	2,35,32,516.00		2,35,32,516.00
Amount Disclosed Under the Head “Other Current Liabilities” (Note No.5)		(35,32,178.00)	(35,32,178.00)		0	0
Net Amount	6,04,30,049.00	0	6,04,30,049.00	2,35,32,516.00	0	2,35,32,516.00

a. Term of Repayment of Loan

- i. During the year HDFC BANK LTD. granted loan of Rs.3.30 Cr. Repayable in 60 instalments per month, Particulars of the property or asset(s) charged (including complete address and location of the property) 1) Hypothecation on Plant and Machinery 2) Industrial unit admeasuring 12140.47 Sq. Mts. (24 Kanal i.e. 3 acres). Comprised in Khewat No.30, Khata No.42, Mustail No.22, Killa No.23 (8-0), Mustail No.25 Killa No. 3(8-0), Situated at village- Liwaspur, Sonipat, Haryana.
- ii. M/s. Reception Tracom Private Limited: Term of Repayment on Demand
- iii. M/s. Giri Raj Estate Private Limited, Repayment on Demand
- iv. M/s. Agarwal Polysacks Limited; Repayment on Demand
- v. Mr. Om Prakash Kasat, Repayment on Demand as Director of the Company
- vi. Mr. Kisan Lal Karnahi, Repayment on Demand”

24. Balance Sheet of FY 2018-19 of the Corporate Debtor has also been brought on record, where under the heading Long Term Borrowing against M/s Agarwal Polysacks Limited Rs.88,42,993 has been mentioned and previous year balance was Rs.79,70,250. Balance Sheet of FY 2018-19 is as follows:

“KK AGRO FOODS & STORAGE PRIVATE LIMITED
2244, Gali Raghunandan, Naya Bazar, Delhi-110006
CIN : U51909DL2012PTC234782, Ph. No: 9811441758
Email : aniltradingco1@gmail.com

(F.Y. 2018-2019)

Note No.3 Long-term borrowings

In rupees

Particulars	As at 31 st March 2019			As at 31 st March 2018		
	Non-Current	Current Maturities	Total	Non-Current	Current Maturities	Total
Term Loan-From banks						
Secured Loan from HDFC Bank	1,88,22,041.00	62,40,296.00	2,50,62,337.00	2,72,26,254.00	35,32,178.00	3,07,58,432.00
	1,88,22,041.00	62,40,296.00	2,50,62,337.00	2,72,26,254.00	35,32,178.00	3,07,58,432.00
Term Loan-From Others						
Giri Raj Estate Pvt. Ltd. Unsecured	25,00,000.00		25,00,000.00	2,00,00,000.00		2,00,00,000.00
Agarwal Polysacks Ltd. unsecured	88,42,993.00		88,42,993.00	79,70,250.00		79,70,250.00
	1,13,42,993.00		1,13,42,993.00	2,79,70,250.00		2,79,70,250.00

Loans and advances from related parties						
<i>Om Prakash Kasat unsecured</i>	33,94,640.00		33,94,640.00	22,21,166.00		22,21,166.00
<i>Kisan Lal Kamani unsecured</i>	33,78,154.00		33,78,154.00	30,12,379.00		30,12,379.00
	67,72,794.00		67,72,794.00	52,33,545.00		52,33,545.00
The above Amount Includes						
<i>Secured Borrowings</i>	1,88,22,041.00	62,40,296.00	2,50,62,337.00	2,72,26,254.00	35,32,178.00	3,07,58,432.00
<i>Unsecured Borrowings</i>	1,81,15,787.00		1,81,15,787.00	3,32,03,795.00		3,32,03,795.00
<i>Amount Disclosed Under the Head "Other Current Liabilities" (Note No.5)</i>		(62,40,296.00)	(62,40,296.00)		(35,32,178.00)	
Net Amount	3,69,37,828.00	0	3,69,37,828.00	6,04,30,049.00		6,04,30,049.00

a. Term of Repayment of Loan

- i. During the year HDFC BANK LTD. granted loan of Rs.3.30 Cr. Repayable in 60 instalments per month, Particulars of the property or asset(s) charged (including complete address and location of the property) 1) Hypothecation on Plant and Machinery 2) Industrial unit admeasuring 12140.47 Sq. Mts. (24 Kanal i.e. 3 acres). Comprised in Khewat No.30, Khata No.42, Mustail No.22, Killa No.23 (8-0), Mustail No.25 Killa No. 3(8-0), Situated at village- Liwaspur, Sonipat, Haryana.
- ii. M/s. Reception Tracom Private Limited: Term of Repayment on Demand
- iii. M/s. Giri Raj Estate Private Limited, Repayment on Demand
- iv. M/s. Agarwal Polysacks Limited; Repayment on Demand
- v. Mr. Om Prakash Kasat, Repayment on Demand as Director of the Company
- vi. Mr. Kisan Lal Karnahi, Repayment on Demand, as Director of the Company."

25. From the aforesaid Balance Sheet following can be deciphered:

- (i) The Corporate Debtor has referred to amount received from the Appellant as 'Long Terms Borrowing'.

- (ii) M/s Agarwal Polysacks Ltd. is mentioned as 'unsecured' under the heading 'Term Loan'
- (iii) Term of payment of loan indicates that loan of M/s Agarwal Polysacks Ltd. is 'repayable on demand'.

26. The above clearly prove that there was tenure of the loan i.e. repayment on demand. Further, loan was unsecured loan and thereby the loan was coupled with interest component since in the Balance Sheet of FY 2017-18 amount mentioned was Rs.79,70,250 which was increased to Rs.88,42,993 in the FY 2018-19, which is on account of interest component.

27. Learned counsel for the Respondent referring to the reply filed in this case submitted that in the Balance Sheet of Appellant the borrowing is not shown as Long Term Borrowing with regard to the aforesaid amount. Respondent has brought on record the Balance Sheet of FY 2017-18 of the Appellant alongwith Annexures to Director's Report, Schedule '10', which is to the following effect:

**"AGARWAL POLYSACKS LIMITED
E-649, M.I.A. II ND PHASE, BASNI, JODHPUR**

SCHEDULE '10'

S. No.	SHORT TERM LOANS & ADVANCES	As at 31st March 2018 Rs.	As at 31st March 2017 Rs.
	SECURITY DEPOSITS		
1	Security Deposit- JVVN Limited for Unit I	176151	484732
2	Security Deposit- JVVN Limited for Unit II	489158	974879
3	Security with Cattle Feed	5000	5000
4	Sales Tax Security	2000	2000
5	Security with Andhra Dairy	25000	25000
6	Security with Jalgaon Jhila Sahkari Sangh Ltd.	25000	25000
7	Security- RCDF Ltd.	632000	246000
8	Security- Karnataka Milk Federation Ltd.	420239	395239
9	Security with SDCMPU Ltd., Salem	10000	10000

10	Security with GCMMF Ltd.	341000	341000
11	Security with Punjab State Co-op. Milk Producers	210000	0
12	Security with Gangol SDUS Ltd., Pratappur	25000	25000
13	Security with Deshratna Dr. Rajendra Prasad DCMPU Ltd.	0	50000
14	Security- Krishna DCMPU Ltd.	16500	16500
	TOTAL A	2377048	2600350
	<u>ADVANCE RECOVERABLE IN CASH OR IN KIND</u>		
1	Tata Capital Ltd. – TDS	0	434
2	Indiabulls Housing Finance Ltd.- TDS	81078	71616
3	Staragri Finance Ltd.- TDS	0	342215
4	Prem Kishore Agarwal & Sons HUF	0	397189
5	Sai Krupa Gravure	106965	0
6	Pre paid expenses	1149720	893100
7	Advance for Land & Property	-762500	23513500
8	Karuna Distributors (P) Ltd.	22200000	0
9	K.K. Agro Foods (P) Ltd.	7970250	0
10	Samdari Strips (P) Ltd.	3000000	0
11	S.J. Datamatics (P) Ltd.	5000000	0
	TOTAL B	38745513	25218054

28. When we look into the above financial statement, it is clear that amount of Rs.79,70,250 is mentioned against the Corporate Debtor – K. K. Agro Foods (P) Ltd. under the heading “Advance Recoverable in Cash or in Kind”. Thus, the factum of amount of Rs.79,70,250 due on the Corporate Debtor is corroborated by Balance Sheet of Appellant also. The mere fact that it is under the heading Short Term Loans and Advances does not have any adverse consequence. We already noticed that term of loan as reflected in the Balance Sheet of the Corporate Debtor is ‘on demand’. Thus, the Balance Sheet of the Corporate Debtor also corroborate the amount due on the Corporate Debtor.

29. Learned counsel for the Appellant has also relied on Form 26AS, where TDS on payment of interest has been deducted of Rs.52,250 in the FY 2017-18. Payment of interest has been shown from Corporate Debtor in Form 26AS. This Tribunal in **“Prayag Polytech Pvt. Ltd. vs. Gem Batteries Pvt.**

Ltd., Company Appeal (AT) (Ins.) No. 713 of 2019” has held that merely pointing out that TDS was deducted would not be sufficient to conclude that there was financial debt. There can be no quarrel to the above proposition but when the said document i.e. Form 26AS entries corroborates to the claim of the financial debt, the document is a piece of evidence which can be looked into. Thus, Form 26AS corroborates to the entries in the Balance Sheet to prove that it is a financial debt.

30. In view of the above foregoing discussion and conclusions, we are of the considered opinion that the Adjudicating Authority committed error in dismissing Section 7 application holding that the Appellant failed to show the nature of transaction and the amount shown is covered under the definition of ‘financial debt’. The findings recorded by the Adjudicating Authority are not in accordance with the relevant documents brought on the record by the Financial Creditor. The Adjudicating Authority has returned a finding in Para 5 that Financial Creditor disbursed a total amount of Rs.75,00,000/- to the Corporate Debtor at the interest rate of 12% per annum. In Para 5 of the judgment following has been observed by the Adjudicating Authority:

“5. In the case at hand, we have perused the Bank Statements for the period of 01.07.2017 to 29.09.2017 submitted by the Financial Creditor, we find that the Financial Creditor disbursed a total amount of Rs.75,00,000/- to the Corporate Debtor at the interest rate of 12% per annum and the said amount was credited in the account of the Corporate Debtor through RTGS and in support of that the Financial Creditor placed reliance upon Annexure-7 of the paper book which is the Bank Account Statement of the Financial

Creditor. However, the same is not stamped or certified as per Regulation 2A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.”

31. The Adjudicating Authority, however, took a view that there should be financial contract between the parties which elucidate the rate of interest and date of repayment. The Adjudicating Authority took a view that there is no written agreement to establish the nature of transaction between the parties, hence, Appellant failed to prove the debt. We have already held that requirement of written financial contract is not a pre-condition for proving debt. When Adjudicating Authority itself given finding in Para 5-6 the disbursement was with interest and repayment was on demand, two essential conditions of financial debt were present with regard to time value of money. When the financial statement indicate amount with interest since the loan of Rs.75,00,000 increased in the FY 2017-18 and amount due was shown as Rs.79,70,250, which clearly was after adding the interest, disbursement has to be held for time value of money. We, thus, are satisfied that all pre-conditions for establishing financial debt are proved by the Financial Creditor and the order of the Adjudicating Authority rejecting Section 7 application is not sustainable.

32. Learned counsel for the Respondent has also referred to requirement of special resolution for the purpose of Section 186 of the Companies Act, 2013. Learned counsel for the Appellant has made two submissions. Firstly, it is submitted that a resolution was passed by the Board of Directors as well as the loan granted was well within the limit of the Financial Creditor.

We may also notice that the Adjudicating Authority on 10.02.2020 has

passed an order directing the Corporate Debtor to file the documents based on which it has deducted the TDS. The Corporate Debtor did not comply with the order, which was noticed in the subsequent order dated 28.02.2020. The Appellant has brought the copy of Board Resolution dated 10.07.2007. We, thus, are of the view that there is no non-compliance of Section 186(3) of the Companies Act, 2013.

33. In view of the foregoing discussion and our conclusions, we hold order of the Adjudicating Authority rejecting Section 7 application is unsustainable and deserve to be set aside. In result, we allow the Appeal. Set aside order dated 29.07.2022 and direct the Adjudicating Authority to pass an order admitting Section 7 application within the period of 30 days from the date copy of this order is produced. Appeal is allowed accordingly.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

11th September, 2023

Archana