

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT)(Insolvency) No. 1220 of 2022

&

I.A. No. 4804 of 2022

IN THE MATTER OF:

Ashok Sethi

...Appellant

Versus

URGO Capital & Anr.

...Respondents

Present:

For Appellant : Mr. D.P. Singh, Ms. Sonam Gupta, Mr. Devansh Arya, Mr. Saumay Kapoor and Mr. Arunima Nair, Advocates

For Respondents : Mr. Arvind Jadon, Mrs. Pallavi Jadon, Ms. Taru Saxena, Advocates and Mr. Ramlal Gupta- Authorised representative.

With

Company Appeal (AT)(Insolvency) No. 379 of 2023

IN THE MATTER OF:

A.ES Engineers Pvt. Ltd.

...Appellant

Versus

Kiran Udyog Pvt. Ltd.

...Respondent

Present:

For Appellant : Mr. D.P. Singh, Ms. Sonam Gupta, Mr. Devansh Arya, Mr. Saumay Kapoor and Mr. Arunima Nair, Advocates

For Respondent : -

O R D E R

[Per: Justice Rakesh Kumar Jain (Oral)]

18.09.2023 This appeal is preferred against the order dated 04.10.2022 passed by the National Company Law Tribunal, New Delhi, Bench-VI (**'Tribunal'**) by which an application filed under Section 7 of IBC, 2016 (**Code**) read with Rule-4 of the IBC (Application to Adjudicating Authority) Rules, 2016 ('Rules') bearing No. IB-706/N D/2021 by URGO Capital Ltd. against A.ES Engineers Pvt. Ltd. (Corporate Debtor) has been admitted, moratorium was declared and Abhishekh Anand was appointed as an Interim Resolution Professional (IRP).

2. At the time of hearing on 12.10.2022, this Tribunal passed the following order:

ORDER

12.10.2022: *Learned Counsel for the Appellant submits that the Appellant is a supplier who has supplied the goods to 'Kiran Udyog Private Limited' and under the Agreement, the Financial Creditor- 'UGRO Capital Limited' has to make the payment after the bills were cleared by 'Kiran Udyog Private Limited'. He submits that with regard to the supply of goods, the payments were received by the Appellant. Now, the proceeding under Section 7 is initiated by 'UGRO Capital Limited' against the Appellant as a Corporate Debtor, relying on the Master Service Agreement and Facility Agreement on the ground that borrower i.e. 'Kiran Udyog Private Limited' has not made payment to the Financial Creditor, hence, Insolvency be initiated against the Corporate Debtor. It is submitted that the Appellant who has supplied goods has received the payment and in the facts of the present case, no Insolvency Proceeding could have been initiated against the Appellant. It is further submitted that both the parties have already initiated Arbitration Proceedings one in the Delhi High Court and another in the Calcutta*

High Court which are pending consideration for resolving the dispute between the parties.

2. *Learned Counsel appearing for the Financial Creditor submits that under the Service Agreement r/w Facility Agreement, the Financial Creditor was entitled to proceed both against the borrower as well as 'Kiran Udyog Private Limited' and in exercise of the rights under the Facility Agreement, the Application has been filed.*

3. *In the facts of the present case, we are of the view that prima facie case has been made out to grant interim order.*

4. *Issue notice. Let a Reply be filed within two weeks. Rejoinder, if any, may be filed within two weeks thereafter.*

5. *List this Appeal on 21.11.2022.*

In the meantime, the order passed by the Adjudicating Authority dated 04.10.2022 shall remain stayed.

3. The application under Section 7 has been filed in Form-I for the resolution of an amount of Rs. 1,96,26,033/- as on 18.11.2021 and the date of default, in part-IV of the application, has been mentioned as 20.04.2021.

4. The case set up by the Financial Creditor is that an amount of Rs. 200 lakhs (2 crores) was disbursed vide Master Facility Loan Agreement dated 20.03.2019 for supply Chain Finance loan which was to be repaid within 90 days from the respective date of disbursement of fund by the Corporate Debtor and the period of facility was for 12 months. In paragraph-8 of form - I, the Financial Creditor made the following averments:

....

"8. That "**KUPL**" has a network of suppliers who supply various raw materials, component, equipment etc. to it and those suppliers require financial

assistance. The Corporate Debtor/Respondent is one such vendor and the Facility was in the nature of a bill discounting or Supply of Chain Finance. While the Corporate Debtor/Respondent is liable to pay their own dues, in the event of a default by the Corporate Debtor/Respondent in payment, KUPL has agreed to backstop the liabilities of the Corporate Debtor/Respondent in the separate Master Service Agreement, KUPL is not a party o the proceedings as the principal liability for repayment was with the Corporate Debtor/Respondent.

...

However, in paragraph 9 & 10, the following averments have been made:

...

“9. That the Corporate Debtor/Respondent availed Supply Chain Finance loan in terms of Cash Credit (CC) Limit/Revolving Loan facility in respect of sales invoices raised by the Corporate Debtor/Respondent to the “KUPL” for the purchase of goods or raw materials required for the expansion of its business wherein Respondent/Corporate Debtor to borrow up to a limit of Rs. 200,00,000/- (Rupees Two Crores Only) and agreed to repay each Drawing/Trenches on its Maturity Date in the currency in which it was made available which is 90 days from the date of each disbursement. The Respondent/Corporate Debtor also agreed to pay interest on each Drawing/tranches at the interest rate of 13% p.a. (floating) for each Interest Period in respect thereof upfront. In this revolving credit facility or supply

chain finance facility an established Renewed Master Facility Loan Agreement executed between the Respondent/Corporate Debtor and the Applicant where the line of credit replenishes up to a maximum approved limit. Each time the Respondent/Corporate Debtor makes a repayment, its available credit limit increases, and vice versa for drawings.”

“10. That accordingly a CC Limit of loan upto INR. 200 Lakhs (Rupees Tw Crore only.) was approved and sanctioned to the corporate debtor on terms and conditions as mentioned in Renewed Sanction Letter dated 9SME CODE; 99014458) 7th August 2020. The Corporate Debtor accepted the terms and conditions and signed the said sanction letter. The said tenor of the facility was 12 months.”

5. The Tribunal after referring to the averments made in the application filed under Section 7 of the Code, the Reply filed to the application and the Rejoinder filed thereto, has recorded its finding in paragraph-9 of the Impugned Order which read as under:

“9. When considering the remaining transactions that may be admitted as part of this Petition, per the opinion of the Supreme Court in Indus Biotech Pvt. Ltd v. Kotak India Ventures (offshore) Fund and Ors. (2021) 6 SCC 436, there must be the existence of a debt as well as the occurrence of a default. Per the facts of this case,

the Corporate Debtor availed Supply Chain Finance

loan in terms of Cash Credit Limit/Revolving Loan Facility in respect of invoices raised by the Corporate Debtor to KUPPL for the purchase of goods or raw materials up to the limit of Rs. 2,00,00,000 (Two Crore Rupees). Further, the Corporate Debtor agreed to repay each drawing on its Maturity Date which was 90 days. The Corporate Debtor also agreed to pay interest on such drawings at a rate of 13% p.a. (floating) for each interest period upfront. The Corporate Debtor accepted the terms and conditions and signed the sanction letter dated 07.08.2020.”

It further recorded its findings in paragraph-10 which also read as under:

...

“10. The Hon’ble Supreme Court in the case of M/s Orator Marketing Pvt. Ltd. vs M/s Samtex Desinz Pvt. Ltd. Civil Appeal No. 2231 of 2021 held that:

“the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor. ‘Default’ means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The

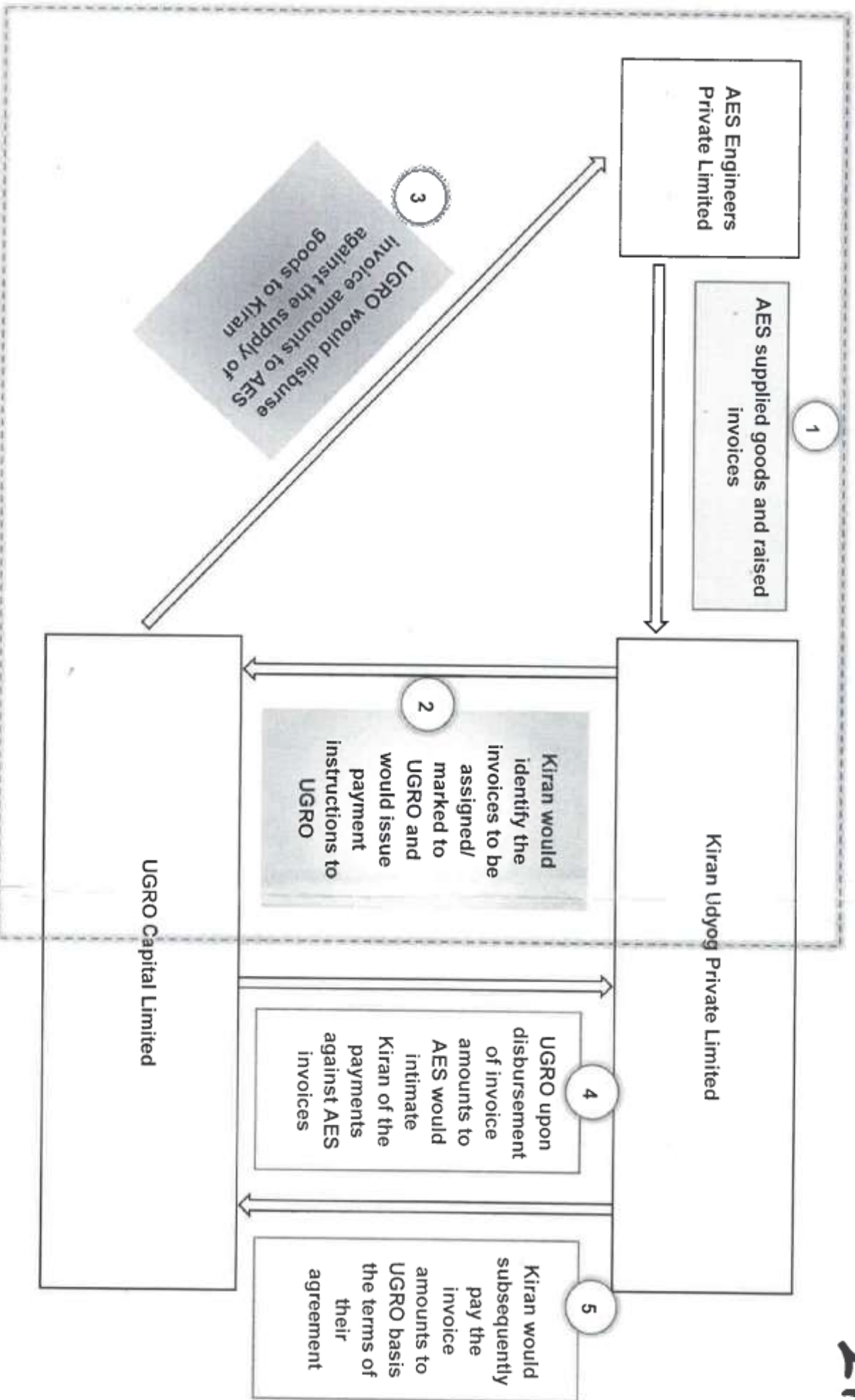
definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest free loans advances to finance the business operations of a corporate body."

In the present case, the Corporate Debtor has knowingly defaulted in the payment of outstanding amount as per the Cash Credit Limit/Revolving Loan Facility Agreement in terms of Clause 5.1 & 5.2 of the Facility Agreement dated 07.08.2020."

...

6. Assailing the findings in the Impugned Order, Counsel for the Appellant has submitted that the Tribunal has committed an error in not referring to various evidence on record which would indicate that it was a transaction between the parties in the nature of payment by the Financial Creditor to the Corporate Debtor on behalf of M/s KUPL. It is submitted that it is a case of bill discounting by the Respondent herein at the instance of M/s KUPL and not a case of loan alleged to have been availed by the Appellant on payment of interest @ 13%. In this regard he has referred to a chart prepared by the Appellant to show as to how the goods were to be supplied to M/s KUPL and how the payment was to be made by the present Financial Creditor to the Corporate Debtor and how the payment, which is stated to have been made by Financial Creditor, was recoverable from M/s KUPL. For ready reference, the said chart is reproduced below:

DIAGRAM OF TRIPARTITE TRANSACTIONS BETWEEN AES ENGINEERS, KIRAN UDYOG & UGRO CAPITAL



Note: For invoices not marked to UGRO, Kiran owed direct liability to make payments to AES.

TRUE COPY

7. It is further submitted that there are e-mails on record i.e., e-mail dated 14.10.2020 by which the Corporate Debtor wrote to the Financial Creditor for bill discounting. The said e-mail is as under:

*“Kiran Udyog Pvt. Ltd. | Plot-32, Sector-3, Imt Manesar,
Gurgaon 122 050 | P +91 124 4742400/600 India. W
Kiranu*

....

*From: Anil Sethi [Mailto:aesengg89@gmail.com]
Sent: Wednesday, October 14, 2020 2:30 PM*

To: finance

Subject: A.ES BILLS FOR DISCOUNTING

Meet

New meeting

Join a meeting

Hangouts

*FW: A.ES BILLS FOR DISCOUNTING
Inbox*

*Finance<finance@kiranudyogindia.com>
to me, scf, Sanjeet, Manpreet, bass, pa, vd, Kiran*

Dear Sir, Bills are ok...

@UGRO Capital Limited kindly make the payment.

*Warm Regards,
Chetan Sharma
Finance & Accounts*

*Kiran Udyog Pvt. Ltd. | Plot-32, Sector-3, Imt Manesar,
Gurgaon 122 050 | P +91 124 4742400/600 India. W
Kiranudupgomdoaa/com*

This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. If you are not the intended recipient you are notified that disclosing, copying, distributing or taking any action in reliance on the contents of this information is strictly prohibited.

*From: Anil Sethi [Mailto:aesengg89@gmail.com]
Sent: Wednesday, October 14, 2020 2:30 PM*

To: finance

Subject: A.ES BILLS FOR DISCOUNTING”

8. It is further submitted that in reply, M/s KUPL instructed the Financial Creditor to make the payment. The said e-mail is reproduced hereunder:

*“FW: A.ES BILLS FOR DISCOUNTING
Inbox*

financefinance@Kiranudyogindia.com

Dear Sir,

Bills are ok.

@UGRO Capital Limited Kindly make the payment.

*Warm Regards,
Chetan Sharma
Finance & Accounts*

9. He has further argued that even the Master Facility Loan Agreement has not been properly read and appreciated by the Ld. Tribunal which has only referred to clauses 5.1 & 5.2 (mentioned in the Impugned Order) without going into it as to what would be the import of the said clauses and therefore, it is a case of non-reading and mis-appreciation of the evidence on record. He has also submitted that the Master Facility Loan Agreement by itself could not have been considered as loan as the Tribunal was required to refer to the Master Facility Loan Plan to find out the truth of business transaction between the three parties i.e. namely, the Financial Creditor (Respondent No. 1) the Corporate Debtor and M/s KUPL. He has argued that all these aspects seem to have been missed by the Ld. Tribunal which are required to be re-appreciated if the matter is remanded back for the purpose of declaring as to whether it is a case of bill discounting (payment made by the Financial Creditor to the Corporate Debtor on behalf of M/s KUPL) or a case of availing loan by the Corporate Debtor from the Financial Creditor directly without there being any involvement of M/s KUPL (Principal).

10. In reply, Counsel for the Respondent has vehemently argued that there is no error in the Impugned Order which requires interference by this Tribunal as it has been clearly held in paragraph-9, after taking into consideration the evidence brought on record by both the parties, that it is a case of supply of Chain Finance loan by the Financial Creditor given to the

Corporate Debtor and as per clause 5.2 of the Master Facility Loan Agreement, in case of non-payment of the amount by the Principal in the bill discounting, the Financial Creditor was entitled to ask for the amount having been paid to the present Appellant within a prescribed time. It is further submitted that the amount taken by the Appellant also carries an interest @ 13 % therefore, it falls under the definition of 'debt' as defined under Section 5(7 & 8) of the Code.

11. We have heard Counsel for the parties and perused the record.

12. Keeping in view the finding recorded in paragraphs 9 & 10 of the impugned order (supra), the question which arises for our consideration is about the manner in which the findings that have been recorded. On the one hand in paragraph-8 of the application (Form-1) it is stated to be transaction of bill discounting or supply of Chain Finance loan and on the other hand in paragraph 9 & 10 it is claimed it to be a transaction of loan which has been advanced to the Appellant. These two situations are contradictory to each other and has to be decided after taking into consideration the entire evidence on record which has not been done. All that has been stated in the impugned order is that because Master Facility Loan Agreement has provided for the payment of Invoices raised by the Corporate Debtor to M/s KUPL therefore, it is a case of loan and not of bill discounting.

13. In this regard we are of the opinion that the Tribunal should have discussed about bill discounting and how the loan is raised and disbursed.

Unfortunately, the Tribunal has not deliberated upon the terms and conditions of the Master Facility Loan Agreement except for referring them in paragraph 10 of the Impugned Order. It is needless to mention that admission of an application under Section 7 of the Code has a serious impact upon a going concern because immediately after the appointment of IRP, the reins of the company goes into the hands of IRP and claims of all the creditors start pouring in. However, in this case, on the first date of hearing, the impugned order was stayed by this Tribunal. Therefore, not much damage has been caused to the Appellant.

14. Be that as it may, after taking into consideration the aforesaid facts and circumstances, we are of the considered opinion that it is a fit case in which the matter requires to be re-heard and re-decided and a categorical finding is required to be passed by the Tribunal as to whether it is case of bill of discounting or a case of loan. The impugned order is set aside and the matter is remanded back to the Tribunal to decide in accordance with law by giving a categorical finding, after perusing all available records, as to whether it is a case of bill discounting or a case of loan.

15. The parties are directed to appear before Tribunal on **9th October, 2023**.

Company Appeal (AT)(Insolvency) No. 379 of 2023

Counsel for the Appellant has submitted that this appeal has become infructuous. The appeal is dismissed as infructuous.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Arun Baroka]
Member (Technical)

Akc/RR