

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
NEW DELHI

Company Appeal (AT) (Insolvency) No. 142 of 2017
[arising out of Order dated 1st August, 2017 by NCLT, New Delhi,
in IB No. (IB)-229(ND)/2017]

IN THE MATTER OF:

**Sh. Neeraj Bhatia,
S/o Late Shri Narender Nath Bhatia,
Director of M/s. Summit Aviation Pvt. Ltd.
Having its registered office at :
E-55, Greater Kailash Enclave – 1,
New Delhi – 110 48.**

...Appellant

Versus

- 1. Davinder Ahluwalia,
R/o. C-41, Second Floor,
Dayanand Colony,
Lajpat Nagar – IV,
New Delhi – 110 024.**
- 2. Mrs. Mamta Ahluwalia,
R/o. C-41, Second Floor,
Dayanand Colony,
Lajpat Nagar – IV,
New Delhi – 110 024.**
- 3. M/s. Summit Aviation Pvt. Ltd.,
Having its registered office at :
E-55, Greater Kailash Enclave – 1,
New Delhi – 110 48.**

...Respondents

Present:

**For Appellant : Shri Rakesh Kumar and Ms. Chetna Bisht,
Advocate**

For 1st Respondent: Ms. Priyanka Ghowarat, Advocate

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The present appeal has been preferred by the appellant, a shareholder of the 'Corporate Debtor' against order dated 1st August, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench in IB No. (IB)-229(ND)/2017 whereby and whereunder the application preferred by 1st and 2nd Respondents (hereinafter referred to as 'Contesting Respondents') under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I & B Code') has been admitted, order of moratorium has been passed and the 'Interim Resolution Professional' has been appointed with directions as mentioned therein.

2. The Appellant has challenged the impugned order mainly on the ground that the contesting Respondents do not come within the meaning of 'Financial Creditor' as defined under sub-section (7) of Section 5 as the amount claimed to have been deposited do not come within the meaning of 'Financial Debt' as defined under sub-section (8) of Section 5 of the 'I&B Code'.

3. According to Appellant, the debt of the bank owed by the 'Corporate Debtor' was not legally assigned or transferred in favour of the contesting respondents.

4. It is further submitted that the liability of the guarantee in the books of corporate debtor is in the name of the daughter of the contesting respondents, not in the name of the contesting respondents as admittedly the payment to the bank had been made from the account of the daughter to the lender bank. Therefore, the contesting respondents cannot claim themselves to be the 'Financial Creditor'.

5. According to Appellant, the 'Corporate Debtor' (3rd Respondent) never entered into any understanding with the contesting respondents nor the contesting respondents disbursed any amount against consideration of time value of money. Thereby, nature of transactions are not covered by sub-section (8) of Section 5 of the 'I&B Code'.

6. Learned counsel for the Appellant submitted that the claimed amount of Rs. 29,97,000/- does not show the test of sub-sections (7) and (8) of Section 5 of the 'I&B Code', as the payments have been incurred by the contesting respondents for certain obligations of the 'Corporate Debtor' (3rd Respondent). It was informed that a sum of Rs. 5,00,000/- and Rs. 2,20,000/- were deposited in the bank account, whereas payment of Rs. 4,50,000/- and Rs. 3,27,810/- were made towards the payment of salary of the employees of the 'Corporate Debtor'. Another sum of Rs. 15,00,000/- were shown as a cash deposit with the 'Corporate Debtor' and all the aforesaid amount claimed to have been paid in the year 2012 or prior to the said period.

7. The case of the contesting respondents is that 'Corporate Debtor' guaranteed payment of the term loan facility and cash credit limit were availed from the Punjab National Bank. Further loan/finance facilities in the composite sum of Rs. 12.05 crores were availed by the 'Corporate Debtor' from the Bank of Maharashtra. The Corporate Debtor and its Directors – Mr. Neeraj Bhatia and Mrs. Olga Bhatia were exclusive beneficiaries of the said loan/credit facility extended by the bank and no monetary benefit of any nature whatsoever had been derived by the contesting respondents in this respect. The 'Corporate Debtor' requested the contesting respondents, through its Directors, to make payment of a sum of Rs. 90,00,000/- to the lender banks and seek the release of the property owned by contesting respondents, which was pledged and mortgaged by them as guarantee. A specific assurance had been given by the Directors of the 'Corporate Debtor' to the contesting Respondents within two months.

8. According to the contesting respondents, initially a sum of Rs. 80,00,000/- had been deposited with lender's bank which was acknowledged by the Directors of the 'Corporate Debtor' and a total sum of Rs. 1.05 Crores stood deposited by the contesting respondents towards the credit of the loan and finance facilities availed by the 'Corporate Debtor'. Learned counsel for the contesting respondents submitted that a sum of Rs.1.05 Crores has been paid by the contesting respondents pursuant to Contract of Guarantee. Thereby, the payment has been made

by the guarantors towards the loans/finance facilities availed by the 'Corporate Debtor'.

9. Further case of the contesting respondents is that the 'Corporate Debtor' has returned a sum of Rs.27.00 Lakhs along with interest. The 'Corporate Debtor' is additionally liable to pay a sum of Rs. 29,97,000 to the contesting respondents along with interest. This apart, the 'Corporate Debtor' is liable to pay /refund a sum of Rs. 78.00 Lakhs along with interest adjusting the principal amount already paid as due against Rs. 1.05 Crores.

10. We have heard the learned counsel for the parties and perused the record.

11. To determine the question as to whether the contesting respondents come within the meaning of 'Financial Creditor', it is necessary to refer the relevant provisions of the 'I&B Code'.

12. Sub-section (11) of Section 3 defines 'debt' as:

"3(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"

13. 'Default' has been defined in sub-section (12) of Section 3, which is as follows: -

"3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid"

by the debtor or the corporate debtor, as the case may be”

14. As per sub-section (7) of Section 5, ‘Financial Creditor’ means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

15. ‘Financial Debt’ has been defined under sub-section (8) of Section 5, which is as follows:-

“5(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”

16. In “***Nikhil Mehta and Sons (HUF) Vs. AMR Infrastructure Ltd.– Company Appeal (AT) (Insolvency) No. 07 of 2017***”, this Appellate Tribunal while noticing sub-section (8) of Section 5 of the ‘I&B Code’ observed: -

“17. The first question arises for consideration is as to who is a ‘Financial Creditor’. Learned Adjudicating Authority, for determination of the

aforesaid issue examined the definition provided in Section 5 (7) and 5(8) and in the impugned judgement rightly observed: -

“12. A perusal of definition of expression 'Financial Creditor' would show that it refers to a person to whom a Financial debt is owed and includes even a person to whom such debt has been legally assigned or transferred to. In order to understand the expression 'Financial Creditor', the requirements of expression 'financial debt' have to be satisfied which is defined in Section 5(8) of the IBC. The opening words of the definition clause would indicate that a financial debt is a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the events enumerated in sub-clauses (a) to (i). Therefore the first essential requirement of financial debt has to be met viz. that the debt is disbursed against the consideration for the time value of money and which may include the events enumerated in various sub-clauses. A Financial Creditor is a person who has right to a financial debt. The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature has included

such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law Dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money. It is significant to notice that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity has been implied by the opening words of Section 5(8) of the IBC. It is true that there are complex financial instruments which may not provide a happy situation to decipher the true nature and meaning of a transaction. It is pertinent to point out that the concept 'Financial Debt' as envisaged under Section 5(8) of the IBC is distinctly different than the one prevalent in England as provided in its Insolvency Act, 1986 and the 'Rules' framed thereunder. It

appears that in England there is no exclusive element of disbursement of debt laced with the consideration for the time value of money. However, forward sale or purchase agreement as contemplated by Section-5 (8)(f) may or may not be regarded as a financial transaction. A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature an entity may require liquidity against an asset and the financier in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return to the financier. (See Taxman's Law Relating to IBC, 2016 by Vinod Kothari & Sikha Bansal)."

17. In “**Dr. B.V.S. Lakshmi vs. Geometrix Laser Solutions Private Limited**” - Company Appeal (AT) (Insolvency) No. 38 of 2017, this Appellate Tribunal having noticed the aforesaid provision by judgment dated 22nd December, 2017 held as follows :

“29. For coming within the definition of ‘Financial Debt’ as defined under sub-section (8) of Section 5, the Claimant is required to show that (i) there is a debt alongwith interest, if any, which has been disbursed and (ii) such disbursement has been made against the ‘consideration for the time value of money’. Thereby, if the Claimant claims to be ‘Financial Creditor’ he will have to show that debt is due which he has disbursed against the ‘consideration for the time value of money’ and that the borrower has raised the amount directly or through other modes like credit facility or its de-materialised equivalent, note purchase facility or the issue of bonds, notes, debentures, loan stock or any other similar instrument. The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards can also be referred to by the Creditor to claim that there is a ‘financial debt’ due to him which has been disbursed against the ‘consideration for the time value of money’.

To show that there is a debt due which was disbursed against the ‘consideration for the time value of money’, it is not necessary to show that an amount has been disbursed to the ‘Corporate Debtor’. A person can show that the disbursement has been made against the ‘consideration for the time value of money’

through any instrument. For example, for any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction for which only the market value of such transaction shall be taken into account, it is not necessary to show that amount has been disbursed. The disbursement against the 'consideration for the time value of money' is the main factor."

18. The amount of Rs. 1.05 Crores, if paid by the contesting respondents, they have so paid to the Bank (Financial Creditor), as 'personal guarantor' as defined in sub-section (22) of Section 5 and such 'personal guarantor' cannot claim to be a 'Financial Creditor' as defined under sub-section (7) read with sub-section (8) of Section 5 of the I & B Code till it is shown that debt amount has been disbursed against the consideration for time value of money.

19. The amount of Rs. 29,97,000/-, is claimed to have been paid by the contesting respondents either to Captain V. K. Adukia or Captain Rajeev Chauhan or the Punjab National Bank. There is nothing on record to suggest that the amount has been 'disbursed' in favour of 'Corporate Debtor' against 'consideration for the time value of money'. The contesting respondents have also failed to bring on record any evidence to suggest that the money was borrowed or raised by the

‘Corporate Debtor’ under any other transactions including sale or purchase or other mode having commercial effect of borrowing.

20. In view of the aforesaid finding, we hold that the contesting respondents do not come within the meaning of ‘Financial Creditor’ and the application under Section 7 at their instance was not maintainable. The Adjudicating Authority has failed to notice the aforesaid provisions and without going to the question as to whether the application at the instance of the contesting respondents was maintainable or not has admitted the application.

21. In view of the discussions and findings as recorded above, we set aside the impugned order dated 1st August, 2017 passed by the Adjudicating Authority in IB No. (IB)-229(ND)/2017.

22. In effect, order(s), passed by the Adjudicating Authority appointing any ‘Interim Resolution Professional’ or freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, taken by the ‘Resolution Professional’, including the advertisement published in the newspaper calling for applications and all such orders and actions are declared illegal and are set aside. The application preferred by the contesting respondents under Section 7 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The ‘Corporate Debtor’ is released from all the

rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

23. The Adjudicating Authority will fix the fee of the 'Resolution Professional', and the 'Corporate Debtor' (3rd Respondent) will pay the fees for the period he has functioned. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member(Judicial)

[Justice A.I.S. Cheema]
Member (Judicial)

NEW DELHI

9th February, 2018

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