

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 701 of 2019

IN THE MATTER OF:

Mr. Nakul Bharana

...Appellant

Vs.

ICICI Bank Ltd.

...Respondent

Present: For Appellant: - Mr. Vijay K. Singh and Ms. Kanishka Prasad, Advocates.

For Respondent: -Mr. Yugank Goel and Ms. Shivani Rawat, Advocates.

O R D E R

10.07.2019— 'ICICI Bank Limited' filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) against 'Gwalior Bypass Project Limited'- ('Corporate Debtor') which having admitted by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi on 29th May, 2019, the present appeal has been preferred by the Promoter/ Shareholder.

2. Learned counsel appearing on behalf of the Appellant submitted that the impugned order has been passed in complete disregard to the provisions of Section 7 (5) (a) of the 'I&B Code', as per which the admission of application under Section 7 is not contemplated in all cases where default has occurred. The discretion vests with the Adjudicating

Contd/-.....

Authority to admit or reject the application, even if the default has occurred, keeping in mind the object of the 'I&B Code'. However, such submissions cannot be accepted as it is not in dispute that the 'Corporate Debtor' has failed to pay the debt and default occurred.

3. The Hon'ble Supreme Court in ***"Innoventive Industries Limited v. ICICI Bank and Anr.— 2017 SCC OnLine SC 1025"*** observed and held:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which

defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under subsection (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of

default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be

admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is

pre-existing- i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.”

4. In view of the aforesaid decision of the Hon’ble Supreme Court and the fact that the Adjudicating Authority found that there is a debt and default and the application filed by the ‘Financial Creditor’ was complete, we find no infirmity in the impugned order of admission.

5. We observe that if the ‘Financial Creditor’ satisfies all the requirements, the Adjudicating Authority has no discretion to reject the application or defer it unless the ‘Corporate Debtor’ submits that they intend to settle the claim. Only if such request is made to settle the claim, the Adjudicating Authority may give one opportunity to the ‘Corporate Debtor’ to do so instead of admitting the application.

6. The appeal is dismissed with aforesaid observations. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Kanthi Narahari)
Member(Technical)