

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 588 of 2018

IN THE MATTER OF:

Rajiv Kumar Agarwalla **...Appellant**

Versus

Mr. Rajesh Kumar Kejriwal & Ors. **...Respondents**

Company Appeal (AT) (Insolvency) No. 589 of 2018

IN THE MATTER OF:

Rajiv Kumar Agarwalla **...Appellant**

Versus

Anadya Properties Pvt. Ltd. & Ors. **...Respondents**

Present:

For Appellant : **Mr. Ashish Dholakia, Mr. Bharat Sood and Dr. Dhanpat Ram Agarwal, Advocates.**

For Respondents: **Mr. Abhijeet Sinha and Mr. Aditya Shukla, Advocates.
Mr. Jitendra Lohia for R.P.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Pursuant to an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) by 'Olympia Credits & Mercantile Private Limited'- ('Financial Creditor'), the Adjudicating

Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, by impugned order dated 24th August, 2018 initiated the 'Corporate Insolvency Resolution Process' against 'Prithvi Finvest Company Pvt. Ltd.'- ('Corporate Debtor').

2. The Adjudicating Authority while admitting the application also passed order of Moratorium under Section 14 of the 'I&B Code'. The 'Resolution Professional' and the suspended Board of Directors were directed to co-operate with the 'Resolution Professional'.

3. However, the Directors/ Promoters (suspended Board of Directors) of the 'Corporate Debtor' did not comply with the direction of the Adjudicating Authority nor handed over the assets and records of the 'Corporate Debtor'.

4. It was in this background, the 'Resolution Professional' filed two Interlocutory Application Nos. 430 & 605/KB/2018 for violation of Section 17 of the 'I&B Code' and Moratorium declared under Section 14 of the 'I&B Code' by the 'Resolution Professional' and the Directors of the 'Corporate Debtor' and for issuing direction to the 'Corporate Debtor' to recall the funds allegedly diverted by the Directors during the period of Moratorium.

5. The Adjudicating Authority on hearing the parties including the Appellant- Mr. Rajiv Kumar Agarwalla, Director/ Promoter allowed the interim relief and passed the following orders:

*“24. The above said discussions leads to a conclusion that the RP has no power to permit the directors to operate the corporate debtor independently and that the fund transfer by the corporate debtor subsequent to the declaration of moratorium i.e. from 15.01.2018 is illegal and in violation of the section 14 and 17 of the Code. Being found that the fund transfer to the creditors referred to in **Annexure R-6** is found in violation of the Moratorium declared in the case in hand those funds to the tune of Rs. 25,78,23,428/- is to be recalled, otherwise the entire CIRP process could be mockery.*

However, on going through the list of transfer or fund in the name of the creditors it is understood that certain transfers are related to payment of professional fees to one of its employees of the corporate debtor to whom allegations also leveled by the financial creditors and the audit fee payable to the auditor. So the creditors who have received the amount from the corporate debtor between 15.01.2018 and till the management of the affairs of the corporate debtor has been taken over by the present Resolution Professional is liable to be

refunded to the account of the corporate debtor. Being satisfied that transfer of fund by the corporate debtor is illegal the interim relief as sought for is to be allowed in the case in hand. Accordingly, interim relief as prayed for is allowed upon the following among orders:

*(i) Creditors named in the **Annexure R-6** list (except employees and auditor) are hereby directed to refund the money to the account of the corporate debtor which have been received by them within 15 days of receipt of the order, failing which the Resolution Professional is directed to take immediate steps to get it refunded from them so as to continue with the CIRP process without any interruption.*

(ii) The RP is hereby directed to demand back the fund from the creditors by issuing individual demand with immediate effect.

List CAs' along with main C.P. for further consideration on 05/09/2018.

Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.”

6. The aforesaid combined order in Interlocutory Applications passed on 24th August, 2018 has been challenged by the Appellant- Director/ Promoter in these appeals.

7. Learned counsel appearing on behalf of the Appellant submitted that the 'Corporate Person' as defined under Section 3(7) of the 'I&B Code' excludes any 'financial service provider'.

8. It was submitted that the alleged 'Corporate Debtor' is engaged in providing 'financial service' and is thus, excluded from the definition of the term 'Corporate Person'.

9. The 'Corporate Debtor' being a 'Financial Institution' as defined under Section 3(14)(a) and 3(14)(b) of the 'I&B Code' and it has obtained a Certificate of Registration under Section 45-IA of the Reserve Bank of India Act, 1934 and is a Non-Banking Financial Company '*not authorised to accept public deposit*' come within the meaning of 'Financial Service Provider'.

10. Reliance has been placed on Memorandum of Association of the alleged 'Corporate Debtor' to show that the main object of it provides '*to lend and advance money with or without security to such person firms or companies*' and as one of its incidental or ancillary objects provides '*to borrow or raise or secure the payment of money from any Bank or Banks or any financial institution or any other persons for the purpose of the Company's main business*'.

11. It was submitted that the transaction on the basis of which the 'Corporate Insolvency Resolution Process' has been initiated against the 'Corporate Debtor' is a loan taken by it from 'Olympia Credits & Mercantile Private Limited'.

12. One of the other Objects of the 'Memorandum of Association of the alleged 'Corporate Debtor' states *'to provide financial service, advisory and counselling services and facilities of every description capable of being provided by share and stock brokers, share and stock jobbers, share dealers, investment fund managers and to arrange and sponsor public and private issues or placement of shares and loan capital and to negotiate and underwrite such issues'*.

13. Reliance has been placed on the decision of this Appellate Tribunal in **"Randhiraj Thakur v. M/s. Jindal Saxena Financial Services Private Limited & Anr.— Company Appeal (AT) (Insolvency) Nos. 32 & 50 of 2018"** to suggest that a Non-Banking Financial Company is excluded from the ambit of the 'I&B Code'.

14. The Respondents in their reply have disputed that the 'Corporate Debtor'- 'Prithvi Finvest Company Pvt. Ltd.' is a 'financial service provider'.

15. Respondent Nos. 1, 2, 4 to 12, 18 & 19 have appeared and opposed the claim.

16. It was stated that the common order dated 24th August, 2018 passed in C.A. No. 605/KB/2018 has already been challenged by three parties who are Promoters namely Mr. Bijay Kumar Garodia, Mr. Nishant Garodia and Mr. Ramgopal Garodia and Sons HUF and filed appeal before this Appellate Tribunal in Company Appeal (AT) (Insolvency) No. 569 of 2018. The said appeal was dismissed by this Appellate Tribunal by an order dated 20th September, 2018 in absence of any illegality in the order passed by the Adjudicating Authority.

17. It was submitted that the Appellants by suppressing the aforesaid fact filed the present appeal with a *malafide* intention for modification of the earlier order passed by this Appellate Tribunal. The Respondents have disputed the claim made by the Appellant that the 'Corporate Debtor' is a 'financial service provider'.

18. The Appellant has not filed copy of the order of admission dated 15th January, 2018 by which the application under Section 7 was admitted. The Adjudicating Authority passed the said order of admission after hearing the parties including the 'Corporate Debtor'- 'Prithvi Finvest Company Pvt. Ltd.'.

19. Before the Adjudicating Authority, at the time of admission, no such plea was taken by the 'Corporate Debtor'.

20. The Appellant has not filed 'Certificate of Registration' issued by the 'Reserve Bank of India', Department of Non-Banking Supervision', Kolkata Regional Office under Section 45 TA of the Reserve Bank of India

Act, 1934. The Respondents have filed 'Certificate of Registration' which shows that the 'Corporate Debtor' is not authorised to accept public deposits to carry on the business of non-banking financial institution.

21. Learned counsel for the Respondents filed a copy of the Directors' Report for the financial year ended on 31st March, 2017 to suggest that though the 'Corporate Debtor' was in the business of Non-Banking Financial Company, but presently engaged in the business of investing in shares and financing of loans.

22. In the Board Meeting of the 'Corporate Debtor' held earlier, the interest, unpaid or unclaimed deposit remained unpaid or unclaimed or outstanding was shown by placing the Balance Sheet.

23. The Respondents have also enclosed the statement ending 31st March, 2017 to suggest that it is merely an accrued interest on unsecured loans but actually not doing any business of 'financial service provider'.

24. Section 3(7) which defines 'Corporate Person' excludes any 'financial service provider'. The said provision does not talk of any non-banking financial institution, in general, as evident from Section 3(7), as under:

"3. Definitions (7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-

section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.”

25. ‘Financial Institution’ as defined under Section 3(14) (a) & (b) of the ‘I&B Code’, as quoted below:

“3. Definitions (14) *“financial institution”*
means—

(a) a scheduled bank;

(b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934).....”

26. From the aforesaid provisions, it is evident that all ‘non-banking financial institution’ has been excluded from the definition of the ‘Corporate Person’, except those which are ‘financial service provider’. The Appellant has failed to show any document that it is actually performing the business of ‘financial service provider’, as defined under the ‘I&B Code’. On the other hand, the Respondents have shown that it is not actually performing the business of ‘financial service provider’ and thereby does not come within the meaning of ‘financial service provider’.

27. However, the aforesaid issue is not being determined in these, appeals as the Appellant has not challenged the order of admission dated 15th January, 2018, whereby the 'Corporate Insolvency Resolution Process' was initiated against the 'Corporate Debtor'- 'Prithvi Finvest Company Pvt. Ltd.'.

28. For the reasons aforesaid, for violating the provisions of the 'I&B Code' including Section 14, if the Appellant is liable for punishment under Chapter VII of the 'I&B Code', particularly Sections 70, 74 etc. of the 'I&B Code', they cannot divert the issue of punishment or their alleged violation of the order of the Adjudicating Authority/ Tribunal by raising a separate issue which is not required for determination in this appeal in absence of any challenge of order of admission.

29. For the reasons aforesaid, we dismiss both the appeals with liberty to the Adjudicating Authority to initiate Contempt Proceeding against the Appellant- Promoters/ Directors etc. for alleged violation and/or to ask for proceeding in terms of Chapter VII of the 'I&B Code', apart from the direction which has already been given. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI
18th November, 2019
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