NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT) (Insolvency) No. 962 of 2019

IN THE MATTER OF:

Uniexcel Developers Pvt. Ltd. **...Appellant**

Vs

Uniexcel Ltd. **....Respondent**

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Saurabh Kalia, Mr. Palash Agarwal, Mr. Kanesh Vadula and Mr. Saikat Sarka, Advocates**

For Respondent: **Mr. Bhuvan Gugnani and Ms. Mythili Srinivasamurthy, Advocates**

O R D E R

26.11.2019 This appeal is preferred by Uniexcel Developers Private Limited- Corporate Debtor against whom Uniexcel Limited- Financial Creditor filed application under Section 7 of Insolvency and Bankruptcy Code, 2016 (**IBC** in short) before the Adjudicating Authority (National Company Law Tribunal) New Delhi-II in IB-403/ND/2019. The application has been dismissed on 25.07.2019 with liberty given to the Respondent- Financial Creditor to revive the application, if in spite of Financial Creditor fulfilling formalities to get refund the Corporate Debtor fails to refund.

2. Thus, this appeal has been filed by the Corporate Debtor mainly challenging the last part of the impugned order in paragraph-11 of the impugned order.

3. A few facts may be referred to understand the dispute. The Financial Creditor claimed in Section 7 Application that they had remitted a sum of US $

124,000/- on 05.05.2008 and US $ 142,000/- on 22.09.2008 for issue of shares in favour of the Respondent- Financial Creditor. The allotment of shares was put on hold on the request of the Financial Creditor since an unforeseen dispute on the project land was raised by NOIDA authority which become subject matter before the High Court of Judicature at Allahabad. It is stated that on 27.04.2015 a letter was addressed to the Board of Directors of the Corporate Debtor wherein it was pointed out that Mr. Ajit Kumar Gupta, Director of Corporate Debtor agreed, subject to approval of Reserve Bank of India to refund of share application money as reflected in the balance sheet of the Corporate Debtor as on 31.03.2015. Once again another letter of request for refund of money dated 03.07.2015 was issued and there was default.

4. The Appellant- Corporate Debtor before the Adjudicating Authority opposed the application raising ground that the money was sent for shares and not for any other purpose and it was not automatically change colour or convert particular transaction into loan. The Adjudicating Authority framed issues regarding (1) limitation, (2) whether the claim can be categorized as financial debt and (3) whether there was a default on behalf of Corporate Debtor in payment of the amount claimed. Question of limitation was held in favour of the Financial Creditor. Regarding second issue whether the share money could be categorized as Financial debt, the Adjudicating Authority considered Companies Act as well as Companies (Acceptance of Deposits) Rules, 2014 and concluded in paragraph-10 of the impugned order as under:

.....

10. “It is clear from a reading of Section 42 of the Act and the Deposit Rules that if the shares are not allotted within 60 days of the receipt of the money the share application money has to be refunded and if the refund does not take place within 15 days from the expiry of the 60 days' time limit, then the share application money will be treated as a deposit. On the non-allotment of shares, after the expiry of the time limit of 75 (60+15) days the share application money will be a deposit advanced to the company, which has to be returned by the company at the rate of 12% per annum from the expiry of the 60th day. The person applying for the shares will get compensation for the time value of the share application money given by him to the company, which makes the money advanced a financial debt to be repaid by the company. Thus, the Respondent's plea that the nature of the money given will not change into a loan does not stand as the Act itself allows such re-categorization. In the present case the money was transmitted in 2008 and the allotment has not been made till date, thus, the money transmitted is a deposit and can be treated as a financial debt.”

....

5. Thereafter the Adjudicating Authority in paragraph-11 which is mainly disputed in this appeal has observed as under:

....

“11. However, the third issue cannot be answered in favour of the Applicant as a perusal of the documents show that the

Respondent has been ready to refund the money after it receives the required letter from the Applicant. Although the Applicant has placed on record a letter dated 03.07.2015 signed by the Applicant's representative, there is nothing to show that the said letter was actually delivered to the Respondent. Even if it was delivered by hand as claimed by the Applicant, there should have been an acknowledgement of receipt by the Applicant on the copy of the letter. In the absence of anything to show that the delivery was actually made and that the Applicant has fulfilled all its formalities, it cannot be said that it is the Respondent's fault that the refund of the money has not been made. Allowing this application in such circumstances would amount to allowing the Applicant to take the benefit of its own wrong. <u>Since the Respondent is willing to refund the money even now provided the procedure as prescribed by RBI as followed, the Applicant is hereby directed to fulfil the formalities to get the refund, within three months from the date of this order. If the Respondent fails to refund the money, the Applicant has the liberty to revive this application.</u> Thus, the application is dismissed, with liberty to the Applicant to revive the application if the refund is not made even after the Applicant complies with the required formalities."

(Emphasis supplied)

6. It is clear from the above paragraphs of the impugned order that the Adjudicating Authority came to the conclusion that the money has changed its

color to become Financial Debt. Adjudicating Authority found that the delivery of letter dated 03.07.2015 (page 131 of the Paper Book) by which refund was claimed has not been established and hence it held that although there was claim, default had been proved.

7. Learned Counsel for the Appellant- Corporate Debtor is submitting that no such order (as underlined – supra) could have been given by the Adjudicating Authority once it came to the conclusion that default had not been proved. Against this the learned Counsel for the Respondent – Financial Creditor is claiming that direction was given since the Corporate Debtor had stated before the Adjudicating Authority that it was willing to refund money.

8. What can be seen is that the offer made by the Corporate Debtor was conditional in the sense that it stated that it was willing to refund money provided the procedure prescribed by RBI is followed. Now, before us learned Counsel for both the parties are trying to make submissions against each other. While the learned Counsel for the Financial Creditor states that they made demand and the learned Counsel for Corporate Debtor is submitting that the demand is improper and Rules applicable under FEMA and RBI Act are required to be followed.

9. We do not want to go into these necessities whether the application making claim is properly made or whether the Appellant has justification for not refunding the money. Once the Adjudicating Authority came to the conclusion that default has not been proved, the only option it had was to reject the application and the conditional offer could not have been gone into. We find that

the underlined portion of impugned order (referred supra) where it gives directions to fulfil requirements and liberty to revive cannot be maintained. We set aside the portion of the impugned order in paragraph-11 which reads:

> *"Since the Respondent is willing to refund the money even now provided the procedure as prescribed by RBI as followed, the Applicant is hereby directed to fulfil the formalities to get the refund, within three months from the date of this order. If the Respondent fails to refund the money, the Applicant has the liberty to revive this application."*

The reasons and finding as recorded in paragraph -10 of the Impugned Order regarding it being financial debt, is not agitated before us and we find no reason to disturb the finding.

10. We are disposing this appeal with liberty to the Respondent – Financial Creditor to take necessary steps (which were found wanting in paragrqaph-11 of the Impugned Order) and it may file fresh application under Section 7 of IBC, if so advised. In the circumstance, we keep question of limitation open for consideration when such application is moved.

11. Disposed accordingly. No costs.

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

(Kanthi Narahari)
Member(Technical)

(V P Singh)
Member(Technical)

Akc/Md