

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.212 of 2019

[Arising out of Order dated 2nd January, 2019 passed by National Company Law Tribunal, New Delhi Bench in (IB)-1089(ND)/2018]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Gaurav Agrawal,
Director M/s. Albus
India Ltd.
17 Recreation Road
Raipur – 492001

Appellant

Versus

1. M/s Tuf Metallurgical
(P) Ltd.
TUF House LSC No.3
Shreshtha Vihar,
Post Box No.9237
East Delhi,
Delhi – 110092

Financial Creditor

Respondent No.1

2. M/s Albus India
Ltd.
Through IRP
Professional
F.No.22,
Plot No.29,
Maitri Apartment,
Sector – 9, Rohini,
North Delhi,
New Delhi – 110085

Corporate Debtor

Respondent No.2

For Appellant:

**Shri Vineet Arora, Shri Vidhan Vyas, Shri Akshat
and Ms. Gauri P. Desai, Advocates**

For Respondent:

**Shri Vaibhav Mahajan, Shri Siddhant Gupta and Shri
Ravneet Singh, Advocate (Respondent No.2)**

J U D G E M E N T**A.I.S. Cheema, J. :**

1. Respondent No.1 – M/s. Tuf Metallurgical (P) Ltd. (Financial Creditor) filed Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) against Respondent No.2 – M/s. Albus India Ltd. (Corporate Debtor), before the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) vide (IB)-1089(ND)/2018 which has been admitted by the Adjudicating Authority on 2nd January, 2019 by the Impugned Order. The Appellant - Director of the suspended Board of Directors of Corporate Debtor has filed this Appeal.

2. Copy of the Application which was filed by the Financial Creditor along with Annexures, is at Page – 9 of the Reply filed by the Financial Creditor (Diary No.11325). The Application was filed by the Financial Creditor claiming that there was debt and default of Rs.10,29,56,582/-. In short, the Financial Creditor claimed to have disbursed Rs.2,51,44,385/- in instalments between October, 2016 to March, 2017 to the Corporate Debtor by way of financial assistance. The Financial Creditor claimed that the amount was repayable by 30th June, 2017 or on demand with interest @ 24% per annum. A “Share Pledge/Finance Facility Agreement” dated 4th April, 2017 (Page – 48) was executed, and the limit was extended to Rs.5 Crores. Financial Creditor claimed that on 17th April, 2017, demand Promissory Note (Page – 30) was executed by one of the Directors of the Corporate Debtor for and on behalf of the Company as well as in his personal capacity accepting the liability of the financial loan. The Board of

Directors pledged shares worth Rs.5 Crores. According to the Financial Creditor, later on, on 31st August, 2017, Albus Conserves Pvt. Ltd. – a sister concern of the Corporate Debtor in Board of Directors Resolution took decision and offered security of equitable mortgage to the Financial Creditor. (The document is at Page 107 - Diary No.11325).

3. Before the Adjudicating Authority, the Financial Creditor claimed that there was default on the part of the Corporate Debtor and a Notice dated 23rd February, 2018 was issued. The Corporate Debtor confirmed that a sum of Rs.1,13,46,653/- was also due to the Financial Creditor payable on account of release of 18.761 MT of Graphite Electrodes from the Vizag Port which was paid by the Financial Creditor on behalf of the Corporate Debtor. The Corporate Debtor issued 4 cheques in response to the legal Notice but the same bounced. Thus, the Financial Creditor claimed there were two loans as above.

4. The Corporate Debtor for whom the present Appeal has been filed took a stand before the Adjudicating Authority that it had trade relations with the Financial Creditor and the Financial Creditor had been purchasing Carbon Ferro Chrome which is produced by the Corporate Debtor. According to Corporate Debtor, the money received from the Financial Creditor was with regard to supplies of future material and there was no disbursement of amount against time value of money to qualify as financial debt under the IBC. It is claimed that the Corporate Debtor was in financial difficulty in 2016 and the Financial Creditor was informed,

inability to supply raw material. In order to tide over the financial crisis of the Corporate Debtor, the Financial Creditor offered advance payments for future supplies of material and as the supply was taking more time, the Corporate Debtor executed Promissory Notes only by way of security. According to the Corporate Debtor, as per the terms of the Agreement dated 4th April, 2017, the Financial Creditor was to have first right to procure from the Corporate Debtor on priority basis a minimum of 500 MT of Low Carbon Ferro Chrome per month and if the Corporate Debtor supplied material directly to 3rd parties, the Financial Creditor was entitled to commission of 3 – 5 percent of the billed amounts. The Corporate Debtor claimed before the Adjudicating Authority that Loan 1 was wrongly being stated to be financial debt and that Loan 2 was nothing but payment of demurrage charges.

5. The Adjudicating Authority after hearing the parties, observed in paragraphs – 6 and 7 of the Impugned Order as under:-

“6. Upon appraisal of the facts of the case and arguments advanced on behalf of both parties, this Bench is of the opinion that a financial transaction did take place. The agreement on record is prima-facie one of granting financial assistance to be repaid along with interest. Further, a financial debt as defined under Section 5(8)(f) includes any amount raised under any other transaction, including any forward sale or purchase agreement having the commercial effect of borrowing.

7. The facts of this case squarely fall within the definition of Section 5(8)(f) to qualify as a financial debt, notwithstanding that it was a loan attracting interest. The execution of the demand promissory

note, tender of cheques which bounced, acceptance of receipt of financial assistance against offer of security, execution of a specific Finance Agreement all point out to financial assistance availed to be liquidated against future purchases or be returned on demand. In view of the same, the objections raised on behalf of the Corporate Debtor do not merit any consideration. The petitioner/financial creditor is entitled to the prayer made. This Petition is therefore Admitted.”

Consequently, holding the Applicant as Financial Creditor, the Application was admitted.

6. Before us, the Appellant has argued that the amounts claimed by the Respondent No.1 – Financial Creditor could not be said to be financial debt under Section 5(8) of the IBC as the amount given was not against consideration for time value of money. What is stated to be Loan 2, it is claimed by the Appellant was only amount towards demurrage and cannot be said to be financial debt. The argument is that only because amount is advanced, does not make it a financial debt. There was no stipulation of interest of 24% per annum. It is claimed that subsequent agreement to make the advance payment a financial debt would go against the principal of amount being disbursed against time value of money. Argument is that the subsequent Promissory Note dated 17.04.2017 (Page – 30) with a penalty of 14% per annum would make no effect to the initial amount advanced. The Appellant claims that the real reason behind the Agreement dated 4th April, 2017 was that the Corporate Debtor was producing Low Carbon Ferro Chrome for which the Financial Creditor was the buyer and

subsequent seller in the open market and for which the Corporate Debtor was to get margin. The Corporate Debtor was required to pay commission to the Financial Creditor at 3 – 5 percent of the billed amount as mutually agreed. The transaction was in the nature of business arrangement and thus, it is claimed that there was no financial debt.

7. The Respondent No.1 – Financial Creditor has argued that the Financial Creditor had advanced Rs.2,23,14,261/- and there was further loan of Rs.5 Crores. The Financial Creditor referred to Promissory Note dated 17th April, 2017 (Page – 68 of the Reply - Diary No.11325) regarding the Loan 2 which the Appellant is claiming to be payment of demurrage. The Financial Creditor has referred to letter dated 5th April, 2018 (Page 110 of Reply - Diary No. 11325) which reads as follows:-

“It is hereby confirmed that a sum of Rs.1,13,46,653 (equivalent to US\$177,291.45 as per the then applicable / prevailing exchange rate) is due/payable to M/S TUF Metallurgical Pvt. Ltd. on account of 18.761 MT quantity / supply Graphite Electrodes on account of withholding of the aforesaid material by your Company at Vizag Port, after its release under BE No.3998976 dated 14.11.2017 from M/s TUF Commodities DMCC, UAE, on our behalf. We hereby take notice that demurrage is being incurred by M/s. TUF Metallurgical Pvt. Ltd. towards withholding of this material at the Vizag Port, on our behalf.

We hereby authorize M/s TUF Metallurgical Pvt. Ltd. to sell this material in the market at best available rate to any interested buyer either in domestic/overseas market, as the case may be, so as to reduce/mitigate/minimize the loss on the one hand and to save the material from deterioration on the other. It is affirmed and assured that whatever quantity / load of this material remains unsold (full or part) despite such best efforts, the same together

with its corresponding procurement, withholding, service charge/cost, demurrage, interest, etc. and other associated costs shall lie to my/our account and for which we shall remain legally bound to pay/settle.”

Referring to above, the argument is that the Corporate Debtor clearly accepted in this letter that the demurrage was being incurred by the Financial Creditor towards withholding of the material at Vizag Port on behalf of the Corporate Debtor. The amount was also confirmed and thus, it is claimed that even this amount was due and payable by the Corporate Debtor. The Financial Creditor pointed out a Notice dated 23rd February, 2018 (Page 111 of the Reply) clearly pointing out the Financial Facility Agreement and the amounts due to which the Corporate Debtor gave Reply dated 5th March, 2018 (Page 113 of the Reply) where Corporate Debtor without denying the liability only sought time and accommodation. The Financial Creditor – Respondent No.1 has submitted that the transaction was clearly a transaction of financial debt and the Section 7 Application was rightly admitted.

8. We have gone through the matter. Although the Corporate Debtor is trying to claim that the amount received by the Corporate Debtor from the Financial Creditor was only an advance for future supply of goods, and for the satisfaction of the Financial Creditor, the Agreement dated 4th April, 2017 and Promissory Notes were executed, we are unable to travel beyond the documents executed between the parties. The “Share Pledge/Financial Facility Agreement” dated 4th April, 2017 clearly referred to the Corporate

Debtor as “borrower” and to the Financial Creditor as “lender”. It is mentioned in the document (relevant portions of which are) as under:-

“WHEREAS the Borrower has approached the Lender for a financial assistance in the form of a loan of a sum of INR 5,00,00,000/- (Rs. Five Crores Only) [hereinafter referred to as “the Financial Assistance or Loan”] (to be secured fully through personal guarantees of all the individual directors of the Borrower Company and further assured for its timely repayment through its Promissory Note(s) duly supported by un-dated cheque(s) to stand further as repayment guarantee in addition to the un-dated cheque(s) of the individual directors given in support of & to corroborate their individual personal guarantee – as per the specific description and details as encapsulated through “**Annexure-A**” forming an integral part of this Agreement.....

Furthermore, the said Finance Facility/Loan is subject to performance of the borrower as per conditions mentioned herein and in case of failure of Borrower, the Finance Facility advanced/provided by the Lender shall continue to attract interest calculated @ 2% p.m. on loan outstanding, payable monthly without impairing and without prejudice to the other legal rights of the Lender. The rate of interest and the manner of its calculation/charge shall be subject to change but no change shall become enforceable unless executed into writing by the parties.”

In the terms and conditions, para – 3 of the Agreement reads as under:-

“(3) That the Borrower identifies and acknowledges the selling/marketing and export potential and capabilities of the Lender and this arrangement structured through the present Agreement shall be utilized to work in such a way where the Borrower shall perform the role of fulfilling

the production requirements/orders that may be placed by the Lender and the Lender shall perform the role of seller/marketer/exporter/supplier of the said production, either through/under its own banner or through any of its group entities, establishing a connection/bridge between the Lender and the end user/customers/clients based on price & terms mutually agreed from time to time. The Borrower agrees and assures that the Lender shall have the first right of material procurement from the production capacities of the plant of the Borrower. The Borrower categorically assured that its production facilities shall be under an obligation to keep ready the desired quantity of the material for supply having quality and specification required by the end customers of the lender whose orders have been placed or are placed with the Borrower's production facility with due focus on the timely delivery. Any failure on this count shall be regarded as material breach entitling the Lender to recover penalties/damages/losses as per the terms of Purchase Orders. Any failure on the part of borrower to pay/compensate the Lender on this count shall be entitling the Lender to invoke their rights under the agreement. In case sales are billed directly to Third Parties, Borrower will take prior consent of Lender for direct billing, Borrower will pay Commission to Lender @ 3% to 5% of the billed amount, as mutually agreed on transaction to transaction basis. Commission will be payable on monthly basis. Borrower has assured the Lender that its plant will produce minimum 500 MT of Low Carbon Ferro Chrome per month. In case, actual production is less than 500 MT in a month, Lender will have the right to review this agreement and invoke other rights under the agreement."

9. The above Agreement dated 4th April, 2017 is followed by the Promissory Note executed on behalf of the Corporate Debtor

acknowledging the “short term urgent unavoidable loan”. Not only this record shows that sister concern of the Corporate Debtor had Board of Meeting dated 31st August, 2017 (Page 109 of the Reply - Diary No.11325) and offered security and equitable mortgage to the Financial Creditor (Page 107 of the same Reply) and even these documents make it clear that the transaction between the Financial Creditor and the Corporate Debtor was that of financial debt.

10. Section 5(8) of the IBC describes financial debt as under:-

- “(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 non-recourse basis;

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

¹[Explanation.—For the purpose of this sub-clause.—

- (i) any amount raised from the allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
- (ii) the expressions, “allottee” and “real estate project” shall have the meaning respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]
- (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”

It is apparent from the definition that there could be financial debt along with interest or even without, if the words “if any” are seen. Again the definition is only inclusive of what is mentioned at Clauses (a) to (i).

Sub-Section (g) makes it clear that there can be transactions in which money may not be involved. In the present matter, if the defence of the Corporate Debtor is seen and portions of the Agreement dated 4th April, 2017 as reproduced above are considered, it is apparent that the Financial Creditor for raw material was relying on the Corporate Debtor and when it was noticed that the Corporate Debtor is in difficulty, the Financial Creditor advanced loan to the Corporate Debtor and in the process, assured that future raw material is available to itself. The Agreement does not show that it was advance to be adjusted against price of future goods to be supplied (as is being tried to be claimed by the Corporate Debtor). The Agreement dated 4th April, 2017 read with the Promissory Note dated 17.04.2017 showed that interest was also payable. There is no substance in the argument of the Appellant that the subsequent Promissory Note cannot be looked into for considering the relationship. When the Financial Creditor gave advance to keep the Corporate Debtor running, to ensure that its raw material becomes available to the Financial Creditor, it was clearly a case of borrowing/lending for time value of money for the loan which the Financial Creditor was advancing.

11. The record before the Adjudicating Authority and even this Appeal (Para 7.C) shows the Corporate Debtor admitting at least receipt of Rs.2,51,44,385/- between October, 2016 to March, 2017. Even what is said to be demurrage, the letter dated 5th April, 2018 clearly showed that the Corporate Debtor accepted that on its part, there was liability to pay

Rs.1,13,46,653/- and that the Financial Creditor was incurring demurrage on behalf of the Corporate Debtor. For deciding the present matter, we need not enter into the question whether the said amount would be financial debt or mere debt. On the basis of the amounts advanced in 2016 – 2017 itself, considering the fact that the Corporate Debtor has not paid the amounts claimed, which are clearly more than Rs.1 Lakh, we find there is debt and default and that no error could be said to be there in the Impugned Order admitting the Section 7 proceedings filed by the Financial Creditor – Respondent No.1.

12. There is no substance in this Appeal. The Appeal is dismissed. No Orders as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

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

[Kanthi Narahari]
Member (Technical)

4th September, 2019

/rs/sk