

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1264 of 2019

[Arising out of Impugned Order dated 10th October 2019 passed by the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi, in C.P. No. IB-422(P.B.)/2018]

IN THE MATTER OF:

**Mukesh Kumar Aggarwal
117, Ram Vihar
Delhi – 110092**

...Appellant

Versus

**1. Anurag Gupta
209-Ram Vihar
Near Anand Vihar
Delhi – 110092**

...Respondent No.1

**2. B.K. Educational Services, Pvt. Ltd.
Shop No.123, First Floor
Vardhaman Market, C.S.C
Ram Vihar, Delhi – 110092**

...Respondent No.2

Present:

For Appellant : Mr Swapnil Gupta and Mr Rudrajit Ghosh, Advocates

**For Respondent : Mr Rohan Chawla, Advocate for R-1
Mr Syed Sarfaraz Karim, Advocate for R-2**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal emanates from the order passed by the Adjudicating Authority/National Company Law Tribunal, Principal Bench, New Delhi, in C.P. No. IB-422(P.B.)/2018, dated 10th October 2019, whereby the Adjudicating Authority has admitted the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**'), against the 'Corporate Debtor' M/s B.K. Educational Services Private Limited. The

parties are represented by their status in the Company Petition for the sake of convenience.

2. Brief facts of the case are as follows:

The Appellant contends that the Respondent No.1 has filed the present Insolvency Petition only to wriggle out of the repayment obligations to the Appellant under the Memorandum of Understanding dated 27th January 2016. The above mentioned MoU was entered into between the Appellant and his wife on one side, and the Respondent No.1/his mother on the other. The MoU provides that the Respondent No.1/his mother are jointly liable to repay the aggregate amount of Rs.20.5 crores to the Appellant and his wife. It further provides that the Appellant and his wife were to hold 90% shares of Respondent No.2 as security for repayment of the amount above.

It is submitted that the Petitioner had disbursed a total amount of Rs.20,46,500/-to the Respondent Company in its capacity as the Director of the said Company in pursuance of the Resolution passed by the Company in the meeting of Board of Directors dated 01st September 2015. The said Resolution provides that since the Company is in deep financial trouble, because of non-availability of funds for payments to Greater Noida Industrial Development Authority (in short '**GNIDA**') and continuing construction, hence the Directors of the Company are authorised to take necessary unsecured loans from shareholders, Directors as well as relatives/related parties. It was further resolved that the said loan shall be

used to clear the overdue amount of GNIDA and to continue construction of school building. The amounts taken will be returned along with interest @ 12%, which is lower than the rate of interest being charged by GNIDA. It was further resolved that any amount of loans obtained by the Company shall be returned soon after receiving loans from the Financial Institutions or by 30th June 2016.

3. In Reply filed by one Mr Mukesh Aggarwal, the Director of the Respondent-Corporate Debtor it contends that the amount claimed in default is not a 'financial debt' within the meaning of Section 5(8) of the Code. The Adjudicating Authority erred in treating the amount claimed by the Petitioner as a 'financial debt', within the meaning of the Code. The Adjudicating Authority has further observed that the Petitioner has also placed on record the bank statements which show that the transactions have been done by him in favour of GNIDA, on behalf of the Company, in terms of the Resolution passed by the Board of Directors in its meeting dated 01st September 2015.

4. There is other reliable evidence placed on record to show that amount as claimed "due and payable", was disbursed by the Petitioner to the GNIDA on behalf of the Respondent Company. It is further observed by the Learned Adjudicating Authority that the Petitioner-Financial Creditor had paid money to the Respondent-Corporate Debtor and the Corporate Debtor has committed default in repayment of the outstanding 'financial debt' which exceeds the statutory limit of rupees one lakh. The Adjudicating Authority further observed that since the Application under Section 7 is complete and

all the requirements of Section 7 of the Code for initiation of Corporate Insolvency Resolution Process stands fulfilled accordingly, the petition got admitted.

5. The Appeal is filed mainly on the ground that the Adjudicating Authority erred in holding that the amount claimed from the Respondent No.2 to the Respondent No.1 is in the nature of loan; the Adjudicating Authority has failed to consider that these amounts were conveniently paid at a time when the Respondent No.1/his family was in complete control of the affairs of the Respondent No.2; the Adjudicating Authority has further failed to consider that the purported Board Resolution dated 01st September 2015, which allegedly authorised the Board of the Appellant to secure loans from the Respondent No.1 is a forged and fabricated document; the Adjudicating Authority has failed to consider that the Respondent No.1 has been unable to disclose any default whatsoever; the Adjudicating Authority has further failed to find that the Respondent No.1 had entered into a binding MoU dated 27th January 2016, whereunder the shares of the Respondent No.2 were transferred to the present shareholders as security for the repayment of Rs.20.5 Crores by the Respondent No.1 to the current shareholders; the MoU is a conclusive record of all the repayment obligations interse the parties, the said Rs.20.5 Crores is payable by the Respondent No.1 and no amounts are due and payable to the Respondent No.1; the Adjudicating Authority has failed to consider that the Respondent No.1 has preferred the present petition for evidence of repayment obligations under the MoU; the Respondent No.2 neither owes any amount to the

Respondent No.1 nor has defaulted in any manner in any repayment obligations.

6. Heard the arguments of the Learned Counsel for the parties and perused the records.

7. The Adjudicating Authority has admitted the petition filed U/S 7 of the Insolvency and Bankruptcy Code 2016 by treating the alleged debt as financial debt based on the judgment of this Tribunal in case of Shailesh Sangani Vs. Joel Cardoso and Another 2019 SCC OnLine NCLAT 52 and noted that the Promoter/Shareholder/Director of the Company could also be its Creditor. The Petitioner, as Director has a status different than that of the Creditor. In the instant case, the Petitioner has invoked the provision of the Code as one of the Creditors of the Respondent Company, and the amount claimed by the Petitioner is a 'financial debt' within the meaning of the Code. The Petitioner contends that the bank statements reveal that the transactions have been made by him in favour of GNIDA on behalf of the Company, given the Resolution Plan passed by the Board of Directors in its meeting dated 01st September 2015. The copies of the balance sheets filed for the years ending 2015, 2016 and 2017 depict the borrowings from Directors, Shareholders and related parties under the heading 'Short Term Borrowings' to the tune of Rs.9 crore. The record is sufficient to show that the amount as claimed by the Applicant is 'due and payable', which was disbursed by the Petitioner to GNIDA on behalf of the Respondent Company and based on the above the Adjudicating Authority has admitted the petition.

8. The Appellant has assailed the impugned order passed by the Adjudicating Authority on the basis that the alleged debt does not fall under the definition of 'financial debt' as defined under Section 5(8)(f) of the Code. The Appellant has placed reliance on the order passed by this Appellate Tribunal passed in Company Appeal No. 38 of 2017 Dr B.V.S. Lakshmi Vs. Geometrix Laser Solutions Private Limited.

9. In the case mentioned above, the three Member's Bench of this Tribunal has noted that:

“15.....the amount as reflected in the earlier balance sheet of the company merely describes certain 'unsecured loan' being payable to the Appellant as on 31st March 2014. The respondent company has already placed on record the auditor certificate, which categorically states that no amount is due and payable to the Appellant. Further, the auditor balance sheet of the Respondent Company as on 31st March 2017 also nowhere reflects any amount being due and payable to the Appellant either as a 'financial debt' or as an unsecured loan. The qualification of the auditor in the balance sheet of the Respondent Company as on 31st March 2016, also categorically states that in absence of any document pertaining to approval of any loan taken, interest erroneously paid on account of an alleged loan given by the Appellant herein is not to be provided and accounted for.

16. Learned Counsel for the Respondent relied on decision of the Hon'ble Supreme Court in "M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. – 2017 SCC OnLine SC 1025", and submitted that the Adjudicating Authority has to be satisfied as to existence of a default. The term 'default' has been defined in Section 3(12) of the 'I&B Code'. For the purpose of ascertainment of default, it is imperative to point out the date and time when the alleged debt has become due and payable.

A debt may not be due, if it is not payable in law or in fact. In the instant case, no debt is due as nothing is payable to the Appellant in law or in fact. Admittedly, the Appellant has not stated any date on which the alleged debt became due and payable.”

10. In the case mentioned above, this Tribunal has noticed that the Appellant has failed to establish that there has been disbursement against consideration of time value and money. The amount, as reflected in the balance sheet of the Company merely describes certain ‘unsecured loans’ being payable to the Appellant whereas the Auditor certificate states that no amount is due and payable to the Appellants. In the circumstances, this Tribunal has rejected the contention of the Appellant and held that Appellant has failed to show that the amount has been raised by the Respondent under any other transaction, such as sale or purchase agreement, having the commercial effect of borrowing.

11. Thus, the above case law does not apply to the facts of the present case. In the instant case, the Respondent No.1 has advanced various sums to the Corporate Debtor B.K. Educational Society to ease its liquidity crunch, thereby improving its economic prospects and to save the allotments by making direct payment to the GNIDA for the plot allotted in the name of Corporate Debtor. The para 6 of the judgment in Shailesh Sangani (supra) of this Tribunal it is held that the monies advanced by a Director to improve the financial health of the Company would have the commercial effect of borrowing even if no interest is claimed on the same.

12. Thus the amount deposited by the respondent No.1 in the account of GNIDA to save the corporate debtor on account of financial crunch to save the allotment made in the name of corporate debtor falls within the ambit of 'financial debt'. Admittedly, the amount has not been paid back, and there is a default. Consequently, the adjudicating authority had admitted the petition filed under Section 7 of the Insolvency & Bankruptcy Code, 2016. In the circumstance, as stated above, we do not find any justification for interfering with the impugned order. Therefore the Appeal is dismissed. No order as to costs.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

[Shreesha Merla]
Member (Technical)

NEW DELHI
08th JUNE, 2020

pks/nn