

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 436-437 of 2019

IN THE MATTER OF:

Damont Developers Pvt. Ltd.

...Appellant

Vs

Bank of Baroda & Anr.

....Respondents

Present:

For Appellant: Mr. Vierendra Ganda, Sr. Advocate with Mr. Kapil Kher, Ms. Deepali Kittal, Mr. Ayandeb Mitra and Mr. Rahul Bhardwaj, Advocates.

For Respondents: Mr. Brijesh Kr. Tamber, Advocate for R-1.

ORDER

24.04.2019: Having heard learned counsel for the Appellant and learned counsel for 'Bank of Baroda' and being satisfied of the grounds, delay of 7 days in preferring the appeal is condoned. I. A. No. 1415 of 2019 stands disposed of.

2. The Appellant claim to have purchased 'Hotel Brys Fort, Jaisalmer', one of the chain hotel of the Corporate Debtor – 'M/s Brys Hotel Pvt. Ltd.' and is in possession of the said hotel for last three years. It was in this background, the Appellant intended to get impleaded before the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi when the petition under Section 7 of the I&B code was filed by the 'Bank of Baroda'. The grievance of the Appellant is that the Adjudicating Authority by impugned order dated 4th February, 2019 rejected the Impleadment Application filed by the Appellant and by subsequent order dated 18th March, 2019 admitted the application under Section 7. Both the aforesaid orders are under challenge in this appeal.

3. We have heard learned counsel appearing on behalf of the Appellant and learned counsel appearing on behalf of 'Bank of Baroda', the Hon'ble Supreme Court in "*Innoventive Industries Ltd. Vs. ICICI Bank and Ors. reported in (2018)1 SCC 407*", observed and held as follows:-

“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 sub-section (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 subsection (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.

...X...X...X...

30. *On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless*

interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

4. From the aforesaid decision it is clear that the Adjudicating Authority is required to go through the record to find if there is a debt and default and while doing so it was open for the Corporate Debtor to show that there is no debt payable and no default, at the stage of admission of the petition. Except the Corporate Debtor, no other party has right to intervene at the stage of admission of a petition under Section 7 or 9. However, an aggrieved party may prefer an appeal if the order of admission affects the person.

5. In the present case, we find that the order of admission dated 18th March, 2019 in no manner has cast any impact on the case of the Appellant. It is merely an order of admission of the application under Section 7 against the Corporate Debtor. In view of the provisions of the I&B Code, in case, the Interim Resolution Professional or Resolution Professional wants to take possession of the Hotel namely 'Hotel Brys Fort, Jaisalmer', the Appellant may bring facts regarding its claim to the notice of the Interim Resolution Professional/ Resolution Professional. Thereafter, the Interim Resolution Professional/ Resolution

Professional will consider it in the light of explanation to Section 18(f) of the I&B Code. Even if, after that the Appellant has some grievance he can move before the Adjudicating Authority under Sub-Section 5 of Section 60 and thereafter, if his grievance is not resolved, he may prefer an appeal under Section 61 before this Appellate Tribunal.

6. In view of the aforesaid, the appeal is not maintainable. No infirmity has been found in order dated 4th February, 2019 and 18th March, 2019. The appeal stands disposed of with aforesaid observations. No costs.

7. We make it clear that we have not expressed any opinion with regard to the claim of the Appellant, which is required to be considered initially by the Interim Resolution Professional/Resolution Professional, if he intends to take possession of 'Hotel Brys Fort, Jaisalmer' and thereafter, if so necessary to be decided by the Adjudicating Authority, uninfluenced by the observations made in this appeal.

[Justice S. J. Mukhopadhaya]
Chairperson

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

(Kanthi Narahari)
Member (Technical)

am/gc

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