

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 1307 of 2019

IN THE MATTER OF:

Prayag Polytech Pvt. Ltd.

...Appellant

Versus

Good Marketing and Sales Pvt. Ltd.

...Respondent

Present:

For Appellant : **Ms. Shreya Jain and Ms. Alexandra Celestine,
Advocates**

For Respondent : **Mr. Nikhil Kohli and Ms. Gunjan Tejwani, Advocates**

O R D E R

25.11.2019 Learned counsel for the Appellant submits that the certified copy of the impugned order dated 20th September, 2019 was received on 3rd October, 2019 and the appeal was preferred on 16th November, 2019.

Having heard Ms. Shreya Jain, learned counsel appearing on behalf of the Appellant and Ms. Gunjan Tejwani, learned counsel appearing on behalf of the Respondent and being satisfied with the grounds, the delay of 13 days in preferring the appeal is condoned.

I.A. No. 3767 of 2019 stands disposed of.

The Appellant preferred an application under Section 7 of the 'Insolvency and Bankruptcy Code, 2016 (for short, 'the I&B Code') for initiation of 'corporate insolvency resolution process' against 'M/s. Good Marketing and Sales Private Limited' (Corporate Debtor). The Adjudicating Authority (National Company Law Tribunal), Bench-III, New Delhi by the impugned order dated 20th September, 2019 rejected the application on the ground that the Appellant has failed to show

the default of any 'financial debt' and that the Adjudicating Authority cannot go into the aspect of fraud which is within the purview of the Criminal Courts. Learned counsel appearing on behalf of the Appellant submits that the amount of Rs.3,45,00,000/- remains as the balance amount as on 14th March, 2016 apart from the interest amount. It is submitted that in support of the disbursal of the amounts as well as sums paid in part payment of the 'Corporate Debtor', the evidence was brought to the notice of the Adjudicating Authority including the Audit Report of 31st March, 2017.

She further submits that the Adjudicating Authority failed to notice the aforesaid fact and has gone into the merit of the claim and counter-claim of the parties, which is not permissible. However, such submission is disputed by the learned counsel appearing on behalf of the Respondent.

From the record we notice that the 'Corporate Debtor' opposed the prayer and informs that in the earlier letter dated 1st October, 2018 the appellant was informed of its obligation to undertake equity investment in the respondent company in terms of the 'memorandum of understanding' (MoU). No reply was received from the applicant in respect of the equity investment nor it has consented to the applicant for receiving the encashment of the cheques which were provided along with 'memorandum of understanding'. The 'Corporate Debtor' requested the Appellant to provide written consent for encashment within a period of 15 days but the appellant instead of adhering to the terms of 'memorandum of understanding' recalled notice dated 2nd January, 2019 to the 'Corporate Debtor' which wrongly claimed an amount of Rs.5,10,41,072/- from the Respondent Company.

The Appellant filed a rejoinder dated 29th March, 2019 in which the following plea was taken :

- “6. *The Petitioner has filed a rejoinder dated 29.03.2019 in which following things had been stated:*
- *The FC denies the existence of the purported loan agreement dated March 10, 2014 and the false and fabricated MOU dated April 3, 2017, the FC states that the said documents are antedated, false and fabricated made in collusion with Mr. D.K. Aggarwal, one of the directors of the FC.*
 - *FC stated that CD had omitted to make reference to true and correct facts such as the FC disbursed an amount of Rs. 3,45,00,000/- along with the interest amounting to Rs. 1,65,41,072/- as on December 25, 2018 and in relation to this loan, CD had paid interest and deposited the tax deducted at source in favour of the FC.*
 - *The CD as an afterthought, in order to take a false alibi so as to create a frivolous defence to the CIRP, sent a notice dated January 18, 2019 to the FC for referral of dispute to arbitration.*
 - *FC Counsel in response to the e-mail dated January 28, 2019 sent its letter of objections dated February 7, 2019 and February 14, 2019 to the Ld. Sole arbitrator, objecting to the existence of the purported MOU and the*

appointment of the Ld. Sole arbitrator in the arbitration proceedings.

- *It was pointed out by FC that Mr. Devender Kumar Aggarwal who is the signatory to the purported MOU, purportedly on behalf of the FC along with other co-accused is facing criminal investigation in pursuance of a first information report registered with the Sector 40, Gurugram police station.”*

The Adjudicating Authority noticed the aforesaid fact and came to the conclusion that the default as alleged cannot be determined in absence of any requisite document. The Adjudicating Authority also held that the fraud is the question which cannot be decided by the Adjudicating Authority and can be decided only by the Court of Criminal jurisdiction.

We have heard the learned counsel for the parties and find no ground to interfere with the impugned order. However, taking into consideration the imposition of the cost, we set aside the impugned order dated 20th September, 2019 so far it relates to the imposition of the cost of Rupees One Lakh.

The appeal stands disposed of with aforesaid observations.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

[Justice Venugopal M.]
Member (Judicial)

/ns/gc