

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 201 of 2018

(Arising out of Order dated 19th March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench, in Diary No. 733/2017)

IN THE MATTER OF:

Neha Himatsingka & Anr.

...Appellants

Vs

Himatsingka Resorts Private Limited & Anr.

....Respondents

WITH

Company Appeal (AT) (Insolvency) No. 205 of 2018

(Arising out of Order dated 5th April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench, in Diary No. 3(015) of 2018)

IN THE MATTER OF:

Himatsingka Auto Enterprises

...Appellant

Vs

Himatsingka Resorts Private Limited & Anr.

....Respondents

Present:

For Appellant:

Ms. Varsha Banerjee, Mr. Milan Singh Negi, Ms. Juhi Bhambani, Mr. Tarun Mehta and Mr. Kunal Godhwani, Advocates.

For Respondent:

Mr. Arnav Dash and Mr. Omar Hoda, Advocates for R-1.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

As both the appeals relate to initiation of 'Corporate Insolvency Resolution Process' against 'M/s. Himatsingka Resorts Private Limited'- ('Corporate Debtor'), they were heard together and disposed of by this common judgment.

2. Ms. Neha Himatsingka and Mr. Kanishka Himatsingka- ('Financial Creditors') jointly filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) for initiation of 'Corporate Insolvency Resolution Process' against 'M/s. Himatsingka Resorts Private Limited'- ('Corporate Debtor').

3. The Adjudicating Authority (National Company Law Tribunal), Guwahati Bench, by impugned order dated 19th March, 2018, rejected joint application preferred by Ms. Neha Himatsingka and Mr. Kanishka Himatsingka- ('Financial Creditors'), by exercising its inherent powers to address some extraordinary situations regardless of the fact, which otherwise is not required for determination under the provisions of the 'I&B Code'.

4. 'Himatsingka Auto Enterprises', another 'Financial Creditor' filed an application under Section 7 of the 'I&B Code' for initiation of 'Corporate

Insolvency Resolution Process' against 'M/s. Himatsingka Resorts Private Limited'- ('Corporate Debtor').

5. The same very Adjudicating Authority, Guwahati Bench, by other impugned order dated 5th April, 2018 citing similar facts held there is lack of merit since the debt which the 'Financial Creditors' firm made available to the 'Corporate Debtor' during the period become not due even on the representation of the application and thereby, there is no default in repayment of loan.

6. The Adjudicating Authority in both the cases has not disputed that the Appellants are the 'Financial Creditors' and the 'Corporate Debtor' has obtained loan for its business. But in both the cases, the Adjudicating Authority has gone beyond the scope of the 'I&B Code' to come to a conclusion that the application under Section 7 is not maintainable.

7. Ms. Neha Himatsingka and Mr. Kanishka Himatsingka- ('Financial Creditors') brought on record that the 'Corporate Debtor' obtained an unsecured loan to the tune of Rs. 51,50,000/- (Rupees Fifty-One Lac Fifty Thousand only) from Ms. Neha Himatsingka- ('Financial Creditor') in six installments during the period from 30th April, 2013 to 24th April, 2014. They alleged that there was a default in repayment of the principal amount as well as the interest accrued thereon for which an amount to the tune of Rs. 83,30,499.00/- (Rupees Eighty-Three Lacs Thirty Thousand Four Hundred Ninety-Nine Only) had fallen due for payment to Ms. Neha Himatsingka as on 15th November, 2017.

8. It was also brought to the notice of the Adjudicating Authority that Mr. Kanishka Himatsingka disbursed an unsecured loan to the tune of Rs. 25,00,000.00 (Rupees Twenty-Five Lac Only) to the 'Corporate Debtor' on 27th February, 2013 and there was a default in repayment of the principal amount as well as the interest accrued therein to the tune of Rs. 38,52,630.00 (Rupees Thirty-Eight Lac Fifty-Two Thousand Six Hundred Thirty Only) which became due to the said Mr. Kanishka Himatsingka as on 15th November, 2017.

9. The parties placed reliance on the agreement and earlier agreement relating to complete management of the HOTEL with effect from 15th December, 2014.

10. The 'Corporate Debtor' had raised objection alleging that the application is not maintainable. It was submitted that the present management of the 'Corporate Debtor' is in the hands of 'BK Group' which never ever committed any default in repayment of loans in question requiring the 'Financial Creditors' to initiate a proceeding under Section 7 of the 'I&B Code'.

11. Further plea of the 'Corporate Debtor' was that the management of the 'Corporate Debtor' up to 15th December, 2014 were with the 'Financial Creditors' and their father/ father-in-law. Thereafter, it was transferred to 'BK Group' on 15th December, 2014 under certain terms and conditions, relevant of which is extracted below:

*“That the Second Party has agreed to take over the complete management of the **HOTEL** with effect from 15.12.2014 (afternoon) and payment for the same will be made as per Schedule “A” attached hereto.”*

“Schedule A

<i>To shareholder</i>	<i>3,71,68,000.00</i>
Unsecured Loan	2,20,00,000.00
State Bank of India Loan	6,68,47,077.00
<i>Allahabad Bank loan</i>	<i>49,53,200.00</i>
<i>Statutory and Other Liability</i>	<i>1,60,51,723.00</i>
<i>For land</i>	<i>29,80,000.00</i>

“Clause-8: *That the Second party will arrange for funds to invest in the repayment of unsecured loan amounting to Rs. 2,20,00,000.00 (Rupees two Crore twenty lakh) only and balance amount of unsecured loan if any will be arranged and repaid by party of the first part. Loan standing against Allahabad Bank amounting to Rs. 43,53,200.00 (Rupees Forty nine Lakh fifty three thousand two hundred) only, statutory and other liability amounting to Rs. 1,00,41,723/- (Rupees one Crore Sixty lakh fifty one thousand seven hundred twenty three) only will paid and settled by the 2nd party.”*

12. Therefore, according to the ‘Corporate Debtor’, the application as well as the documents, do not disclose any default having been committed by the ‘Corporate Debtor’ in repayment of debt due to the ‘Financial Creditors’.

13. The 'Corporate Debtor' also raised the question about the status of the Appellants and pleaded that they do not come within the meaning of 'Financial Creditors' as defined under Section 5(7) read with Section 5(8) of the 'I&B Code'.

14. The objection was also raised that the claim was barred by limitation. However, the Adjudicating Authority has not accepted the aforesaid objections and proceeded on merit relating to 'agreement' and the so-called dispute and documents relating to 'restructured term loan'.

15. At this stage, it is desirable to notice that after conclusion of the hearing of the application under Section 7 and before the impugned order was passed, the 'Corporate Debtor' filed affidavit requesting the Adjudicating Authority to allow the 'Corporate Debtor' to bring on record two post-dated cheques in favour of each of the 'Financial Creditors' without prejudice to its rights and contentions.

16. The Adjudicating Authority without waiting for those cheques, rejected the application on the ground that 'BK Group' which is presently managing the 'Corporate Debtor' has brought on record the agreement dated 30th July, 2013, wherein one of the clause no.3 (i) stipulates that "*the Company will furnish undertaking that the unsecured loans will not be withdrawn during the currency of the Bank Loan and that these unsecured loans will be non-interest bearing.*"

17. The Adjudicating Authority highlighted the undertaking that the Appellants will not withdraw the amount during the currency of the Bank

Loan and no interest will be paid. However, the Adjudicating Authority failed to take into consideration that the said agreement relates to loan given by Bank to the 'Corporate Debtor'.

18. The 'Corporate Debtor' has obtained term loan from the State Bank of India on executing the agreement dated 30th July, 2013, when the 'Financial Creditors' were part of the management of the 'Corporate Debtor'. The members of 'RHS Group' had signed the agreement dated 30th July, 2013 as the guarantors. The clause 3 (i) of the agreement dated 30th July, 2013 do not show that it relates to the 'Financial Creditors' by their names particularly when the 'RHS Group' was the guarantor.

19. Without discussing the aforesaid relevant fact, the Adjudicating Authority held that there was no proof whatsoever of securing any undertaking from the unsecured creditors of the 'Corporate Debtor' including the 'Financial Creditors', and such vital condition was not met before availing of aforesaid term loan. The Adjudicating Authority while dealing with the matter observed as follows:

"49. Since there was no proof whatsoever of securing any undertaking from the unsecured creditors of the CD including the FCs herein, it needs to be concluded that such a very vital condition was not met before availing of aforesaid term loan, provided by the Bank. In other words, in securing the aforesaid term loan, the CD has ruthlessly

violated some very inviolable terms under which the term loan was made available to the CD and therefore, it is impossible for the BK Group to enforce conditions in clause No. 3 against the unsecured creditors of the CD including the FCs.

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52. On a perusal of the agreement dated 30.07.2013, it is found that the Bank concerned had persistently called upon the CD to fulfill all the requirements, incorporated in the said agreement including conditions in Clause No. 3 before availing of the loan by the CD here. The various documents, annexed with the additional affidavit, further give an irresistible impression that before disbursing said loan, the bank concerned had evidently required the CD to fulfill all the requirements, specified in the said agreement.

53. In the face of such revelations, it would appear clear that all the unsecured creditors are bound by all the conditions, incorporated in the agreement including conditions incorporated in clause No.3 thereof. Therefore, there can be no

escape from the conclusion that the unsecured creditors of the CD including the FCs herein cannot claim re-claim loans, they have granted to the CD before the liquidation of the entire loan which the bank had made available to the CD. What is equally important to note is that the unsecured creditors of the CD are also not entitled to claim any interest on the loans since such loans are found to be non-interest bearing.”

20. According to learned counsel for the Appellant- ‘Neha Himatsingka & Anr.’, the Adjudicating Authority failed to consider the fact that during the pendency of the application under Section 7, the ‘Corporate Debtor’ had paid the principal amount of Rs. 51,50,000/- and Rs. 25,00,000/- to the 1st and 2nd Appellants and also issued postdated cheques of Rs. 29,75,415/- and Rs. 12,46,808/- towards interest thereof, after deducting TDS to the 1st and 2nd Appellants respectively.

21. Learned counsel for the Appellant also brought on record the records of ‘M/s. Himatsingka Resorts Private Limited’- (‘Corporate Debtor’) relating to confirmation of accounts for the period from 15th April, 2013 to 31st March, 2014, Form- 26AS of the Income Tax Act, 1961 relating to TDS as well as the books of the accounts for the financial year 2015-2016 with the ‘Corporate Debtor’s Audit Report wherein against the name of the Appellants ‘term borrowing’ loan have been shown.

22. The Respondents have taken similar plea as was taken before the Adjudicating Authority.

23. In **“Innoventive Industries Limited Vs. ICICI Bank and Another– (2018) 1 SCC 407”**, the Hon’ble Supreme Court explaining Sections 7 & 9 of the ‘I&B Code’ 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 sub-section (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.

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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.”

24. As per the 'I&B Code' and the law laid down by the Hon'ble Supreme Court, as referred above, the Adjudicating Authority is required to go through the details in Form-1 including Part IV and Part V therein to find out whether there is a debt and default. Once it is satisfied that a default has occurred, it is open to admit the case. The 'Corporate Debtor' can show and satisfy the Adjudicating Authority "that a default has not occurred in the sense that the 'debt', which may also include a disputed claim, is not due or payable in law or in fact". The Adjudicating Authority has no jurisdiction to decide any other issue including whether one or other party is guided by a third party agreement relating to loan between the 'Corporate Debtor' and Bank, till specific agreement is reached between the 'Financial Creditor' and the 'Corporate Debtor' referring to a third party agreement.

25. In the present case, we find that the Adjudicating Authority has exceeded its jurisdiction and exercised its inherent powers under Rule 11 of the National Company Law Tribunal Rules, 2016, which is actually not applicable in the cases under Sections 7 or 9 or 10 of the 'I&B Code'.

26. In absence of inherent powers of the Adjudicating Authority, we have no other option but to set aside the impugned order dated 19th March, 2018.

27. In **“Binani Industries Limited Vs. Bank of Baroda & Anr. – Company Appeal (AT) (Insolvency) No. 82 of 2018 etc.”**, this Appellate Tribunal by its judgment dated 14th November, 2018 held as follows:

“17. To decide the issue, it will be desirable to notice the object of the ‘I&B Code’, object of ‘Resolution’ and what is expected from the ‘Committee of Creditors’, as summarized below: -

1. The objective of the ‘I&B Code’

As evident from the long title of the ‘I&B Code’, it is for reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders. The recent Ordinance explicitly aims to promote resolution over liquidation.

2. The objective of the ‘I&B Code’ is Resolution.

The Purpose of Resolution is for **maximisation of value of assets of the ‘Corporate Debtor’** and thereby for all creditors. It is not maximisation of value for a ‘stakeholder’ or ‘a set of stakeholders’ such as Creditors and **to promote entrepreneurship, availability of credit and**

balance the interests. *The first order objective is “resolution”. The second order objective is “maximisation of value of assets of the ‘Corporate Debtor’ and the third order objective is “promoting entrepreneurship, availability of credit and balancing the interests”. This order of objective is sacrosanct.*

*In the matter of “**Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors.**”, the Hon’ble Supreme Court observed that “the ‘Corporate Debtor’ consists of several employees and workmen whose daily bread is dependent on the outcome of the CIRP. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible”.*

3. ‘Financial Creditors’ as members of the ‘Committee of Creditors’ and their Role.

a. The Bankruptcy Law Reforms Committee (BLRC), which conceptualised the ‘I&B Code’, reasoned as under:

i. Under Para 5.3.1, sub-para 4, the BLRC provided rationale for ‘Financial Creditors’ as under:

“4. Creation of the creditors committee

...

*The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that **members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations.** Typically, ‘Operational Creditors’ are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that for the process to be rapid and efficient, the ‘I&B Code’ will provide that the creditors committee should be restricted to only the ‘Financial Creditors’.*

ii. In Para 3.4.2 dealing with ‘Principles driving design’, the principle IV reads as under:

“IV. The ‘I&B Code’ will ensure a collective process.

9. The law must ensure that all key stakeholders will participate to collectively assess viability. The

law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process.

The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.”

b. ***The ‘I&B Code’ aims at promoting availability of credit.*** *Credit comes from the ‘Financial Creditors’ and the ‘Operational Creditors’. Either creditor is not enough for business. Both kinds of credits need to be on a level playing field. ‘Operational Creditors’ need to provide goods and services. If they are not treated well or discriminated, they will not provide goods and services on credit. The objective of promoting availability of credit will be defeated.*

c. *The ‘I&B Code’ is for reorganisation and insolvency resolution of corporate persons,for* ***maximisation of value of assets of such persons to.... balance interests of all stakeholders.*** *It is possible to balance interests of all stakeholders if the resolution maximises the value of assets of the ‘Corporate Debtor’. One cannot balance interest of all stakeholders, if resolution*

maximises the value for a or a set of stakeholder such as 'Financial Creditors'. One or a set of stakeholders cannot benefit unduly stakeholder at the cost of another.

d. The 'I&B Code' prohibits any action to foreclose, recover or enforce any security interest during resolution period and thereby prevents a creditor from maximising his interests.

e. It follows from the above:

- i. **The liabilities of all creditors who are not part of 'Committee of Creditors' must also be met in the resolution.***
- ii. The 'Financial Creditors can modify the terms of existing liabilities, while other creditors cannot take risk of postponing payment for better future prospectus. That is, 'Financial Creditors' can take haircut and can take their dues in future, while 'Operational Creditors' need to be paid immediately.*
- iii. A creditor cannot maximise his own interests in view of moratorium.'*
- iv. If one type of credit is given preferential treatment, the other type of credit will disappear from market. This will be against the objective of promoting availability of credit.*

- v. *The 'I&B Code' aims to balance the interests of all stakeholders and does not maximise value for 'Financial Creditors'.*
- vi. *Therefore, the dues of creditors of 'Operational Creditors' must get at least similar treatment as compared to the due of 'Financial Creditors'.*

3. 'Resolution Plan'

The 'I&B Code' defines 'Resolution Plan' as a plan for insolvency resolution of the 'Corporate Debtor' as a going concern. It does not spell out the shape, colour and texture of 'Resolution Plan', which is left to imagination of stakeholders. Read with long title of the 'I&B Code', functionally, the 'Resolution Plan' must resolve insolvency (rescue a failing, but viable business); should maximise the value of assets of the 'Corporate Debtor', and should promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders.

It is not a sale. *No one is selling or buying the 'Corporate Debtor' through a 'Resolution Plan'. It is resolution of the 'Corporate Debtor' as a going concern. One does not need a 'Resolution Plan' for selling the 'Corporate Debtor'. If it were a sale, one can put it on a trading platform. Whosoever pays the*

highest price would get it. There is no need for voting or application of mind for approving a 'Resolution Plan', as it will be sold at the highest price. One would not need 'Corporate Insolvency Resolution Process', 'Interim Resolution Professional', 'Resolution Professional', interim finance, calm period, essential services, Committee of Creditors or 'Resolution Applicant' and detailed, regulated process for the purpose of sale. It is possible that under a 'Resolution Plan', certain rights in the 'Corporate Debtor', or assets and liabilities of the 'Corporate Debtor' are exchanged, but that is incidental.

It is not an auction. *Depending on the facts and circumstances of the 'Corporate Debtor', 'Resolution Applicant' may propose a 'Resolution Plan' that entails change of management, technology, product portfolio or marketing strategy; acquisition or disposal of assets, undertaking or business; modification of capital structure or leverage; infusion of additional resources in cash or kind over time; etc. Each plan has a different likelihood of turnaround depending on credibility and track record of 'Resolution Applicant' and feasibility and viability of a 'Resolution Plan' are not*

amenable to bidding or auction. It requires application of mind by the 'Financial Creditors' who understand the business well.

It is not recovery: *Recovery is an individual effort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. When creditors recover their dues – one after another or simultaneously- from the available assets of the firm, nothing may be left in due course. Thus, while recovery bleeds the 'Corporate Debtor' to death, resolution endeavors to keep the 'Corporate Debtor' alive. In fact, the 'I&B Code' prohibits and discourages recovery in several ways.*

It is not liquidation: *Liquidation brings the life of a corporate to an end. It destroys organisational capital and renders resources idle till reallocation to alternate uses. Further, it is inequitable as it considers the claims of a set of stakeholders only if there is any surplus after satisfying the claims of a prior set of stakeholders fully. The 'I&B Code', therefore, does not allow liquidation of a 'Corporate Debtor' directly. It allows liquidation only on failure of 'Corporate Insolvency*

Resolution Process’. It rather facilitates and encourages resolution in several ways.”

28. Therefore, the Adjudicating Authority giving reference to exercising inherent powers cannot decide any dispute in a proceeding under Section 7 though it may notice pre-existence of dispute while dealing with the application under Section 9 of the ‘I&B Code’.

29. So far as the Appellants- Ms. Neha Himatsingka and Mr. Kanishka Himatsingka- (‘Financial Creditors’) are concerned, it is not disputed that they have given loan to the ‘Corporate Debtor’; in fact, the ‘Corporate Debtor’ has borrowed for the purpose of its business. Such consideration amount has been invested by the Appellants having time value of money.

30. The record shows that the ‘Corporate Debtor’ has paid interest even after the year 2016-17 and also issued cheques in the year 2018 and, therefore, it cannot be stated that the claim is barred by limitation. Therefore, the objection of the ‘Corporate Debtor’ that the claim is barred by limitation is fit to be rejected. The Adjudicating Authority has rightly not accepted such plea.

31. As we find that there is a debt payable by the ‘Corporate Debtor’ to the ‘Financial Creditors’ and the ‘Corporate Debtor’ has defaulted to pay the same amount, we hold that it is fit case for admission.

32. For the reasons aforesaid, we set aside the impugned order dated 19th March, 2018 and remit the matter to the Adjudicating Authority for admission of the application under Section 7 of the ‘I&B Code’ after notice to

the parties. The Respondents cannot take any plea other than the plea already taken and decided in this appeal. However, it will be open to the Respondents to pay all the dues including the interest, if any, before admission of the application under Section 7. The appeal preferred by 'Neha Himatsingka & Anr.' being Company Appeal (AT) (Insolvency) No. 201 of 2018 is allowed.

33. So far as the case of 'Himatsingka Auto Enterprises'- ('Financial Creditor') is concerned, it is brought on record that the 'Corporate Debtor' had obtained unsecured loan to the tune of Rs. 2,50,73,525.00 (Rupees Two Crore Fifty Lac Seventy-Three Thousand Five Hundred Twenty-Five Only) during the period from 28th June, 2012 to 20th April, 2013. There is an allegation of default in repayment of the aforesaid loan as well as the interest accrued thereon, as on 15th May, 2015 and defaulted amount according to the Appellant comes to the tune of Rs. 2,38,48,327.00 (Rupees Two Crore Thirty-Eight Lac Forty-Eight Thousand Three Hundred Twenty-Seven Only).

34. In the present case, we find that the Adjudicating Authority has taken similar plea as was taken in the earlier case.

35. The Respondents have taken plea that one Sri Bhagya Kalita or for the matter the 'Corporate Debtor' had no obligation whatsoever to repay the entire unsecured loans, obtained by the 'Corporate Debtor' prior to 15th December, 2014 due to change of management. The Adjudicating Authority has referred to an agreement dated 15th December, 2014, wherein one Sri Bhagya Kalita, who is the Managing Director of the 'Corporate Debtor' had

agreed to purchase the entire shareholdings of Mr. Rajesh Himatsingka, his son Mr. Kanishka Himatsingka and his daughter-in-law Ms. Neha Himatsingka. Giving reference to their cases and the agreement dated 15th December, 2014, the Adjudicating Authority has exercised inherent power and refused to entertain the application.

36. We are not going on the detailed reason given by the Adjudicating Authority for exercising inherent power as we have already held that the Adjudicating Authority has no jurisdiction to exercise inherent power for deciding any disputed question whether claim is bonafide or malafide.

37. For the reasons aforesaid, we set aside the impugned order dated 15th April, 2018 passed by the Adjudicating Authority in the case of 'Himatsingka Auto Enterprises' and remit the matter to the Adjudicating Authority for deciding the matter fresh after notice to the parties.

38. The parties are not given liberty to raise any question or dispute, all matters having already heard and decided in the present appeal. If there is debt and default, the Adjudicating Authority will admit the case.

39. If the application under Section 7 filed by 'Neha Himatsingka & Anr.' is admitted in that case the question of admission of the Second application under Section 7 by 'Himatsingka Auto Enterprises' against the same 'Corporate Debtor' will not arise. 'Himatsingka Auto Enterprises' in such case may file claim before the 'Interim Resolution Professional' as may be appointed while dealing with the case of '*Neha Himatsingka & Anr. Vs. Himatsingka Resorts Private Limited*'.

40. However, in case it is informed that the case of '*Neha Himatsingka & Anr. Vs. Himatsingka Resorts Private Limited*' has become infructuous before admission of amount, having paid the amount including the interest, in such case, the Adjudicating Authority will independently decide the application under Section 7 of the 'I&B Code' filed by 'Himatsingka Auto Enterprises' uninfluenced by the impugned order passed by it.

41. Both the appeals are allowed with aforesaid observations and directions. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

30th November, 2018

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