NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 450 of 2018

[arising out of Order dated 6th July, 2018 by NCLT, Hyderabad Bench, in I.A. Nos. 48 & 71 of 2018 CP (IB) – 306/10/ HDB/2017]

IN THE MATTER OF:

PTC India Financial Services Ltd.,
Through Authorised Representative,
7th Floor, Telephone Exchange Building,
8 Bhikaji Cama Place,
New Delhi – 110 066. **...Appellant**

Versus

1. **Mr. Venkateswarlu Kari,**
NSL Nagapatnam Power & Infratech Ltd.,
Flat No. 406, Everest Block, Aditya Building,
7-1-618, Ameerpet, Opp. Saradhi Studios,
Besides Mythri Vanam,
Hyderabad – 500 038.

2. **Mandava Holdings Private Limited,**
NSL Icon, 8-2-684/2/A, Plot No. 1 to 4,
4th Floor, Road No. 12, Banjara Hills,
Hyderabad – 500 034. **...Respondents**

Present:

For Appellant :	**Mr. Arun Kathpalia, Senior Advocate assisted by Mr. Mayank Mishra and Ms. Pallavi Kumar, Advocates**
For 1st Respondent:	**Mr. John Mathew and Mr. Karthik S.D., Advocates**
For 2nd Respondent :	**Mr. Sajan Poovayya, Senior Advocate with Mr. Jasthi Bhushan, Mr. G. Ramakrishna Prasad, Mr. P. Singh Khosla and Ms. Meka Rana, Advocates**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the 'Corporate Insolvency Resolution process against 'NSL Nagapatnam Power and Infratech Ltd.' ('NPIL' for short) – 'Corporate Debtor', the Appellant 'PTC India financial Services Ltd. ('PFS' for short) filed a claim before the 'Resolution Professional' which having rejected, the Appellant moved before the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad, which also rejected the application filed by the Appellant by impugned order dated 6th July, 2018 in I.A. No. 48 of 2018 and I.A. No. 71 of 2018.

2. The question arises for consideration is whether the Appellant can be held to be a 'Financial Creditor', who claimed to be a 'Financial Creditor' for accepting its claim.

3. The case of the Appellant is as follows.

The 'Bridge Loan Agreement' was reached on 10th March, 2014 between 'NSL Nagapatnam Power and Infratech Limited' (Corporate Debtor) and the Appellant – 'PTC India Financial Services Limited' pursuant to which a sum of Rs. 125 Crores was disbursed to the 'Corporate Debtor' on the terms and conditions as set out in the agreement, for setting up a 1320 MW coal based thermal power project (super-critical) at Tentulei Village, Talcher Taluk, District Angul, Odisha.

4. The aforesaid 'debt' was secured by a 'Deed of Pledge' of shares dated 10th March, 2014 owned by 'Mandava Holdings Private Limited ('MHPL' for short) in 'NSL Energy Ventures Private Limited' ('NEVPL', for short).

5. On 3rd June, 2016, the 'Corporate Debtor' defaulted in its payment, both principal and interest – under the 'Bridge Loan Agreement'. Owing to such default and dishonour of cheques, the Appellant (PFS) issued notice on 28th December, 2017 to the 'Corporate Debtor' and/or its promoters and group companies and also giving loan recall notice.

6. The Appellant (PFS) preferred an application under Section 7 of the 'Insolvency and Bankruptcy Code, 2016' (for short, 'the I&B Code') against the 'Corporate Debtor'.

In the meantime, the 'Corporate Debtor' (NPIL) filed an application under 10 of the 'I&B Code' which was admitted on 18th January, 2018 declaring moratorium in terms of Section 13 and 14 of the 'I&B Code' and Mr. Venkateswarlu Kari, 1st Respondent, has been appointed as 'Interim Resolution Professional'.

7. As Section 10 application was admitted by the Adjudicating Authority, the Appellant (PFS) was allowed to withdraw its application filed under Section 7 of the 'I&B Code' on 30th January, 2018 with liberty to file its claim for 'financial debt' in the prescribed form.

8. The Appellant (PFS) thereafter instead of preferring the claim, issued a letter to 'MHPL' on 23rd January, 2018 informing that the Appellant had exercised its rights under Clause 6.1 of the 'Pledge Deed' on 16th January, 2018 whereby the Appellant specifically reserved its right to transfer and sell the 'Pledged Shares'.

9. The Appellant thereafter filed a claim in 'Form C' on 10th February, 2018 before the 'Interim Resolution Professional' for Rs. 169,19,17,637/- as on 18th January, 2018 accompanied by supporting documents such as 'Agreements' and 'correspondence' and 'Statement of Accounts' showing outstanding 'Debt'. It further disclosed that the total amount of claim is subject to deduction of amount realised from sale of 'pledged shares' to the third party as and when such sale is effected, as per applicable law. According to the Appellant, this is 'conclusive evidence' of the amount due in terms of Clause 17.4 of the 'Pledge Deed'.

10. The 'Interim Resolution Professional' on 14th February, 2018 communicated to the Appellant stating, *inter alia,* that it had received a claim of Rs.319 Crores from 'MHPL' against the 'Corporate Debtor'. 'MHPL's claim, is based on exercise of its right under Clause 6.1 of the Pledge Deed. 'MHPL' has alleged that the value of the 'Pledged Shares' at the time of creation of pledge was Rs.319 Crores. Thereby, 1st Respondent – 'Interim Resolution Professional' called upon the Appellant (PFS) to justify, *inter alia,* the reason why its claim as a 'Financial Creditor' be not rejected on account of satisfaction of its 'financial debt' by invocation of the 'Pledged Shares'.

11. Pursuant to such letter, the Appellant (PFS) responded to 'Interim Resolution Professional' on 16th February, 2018 by *email* dated 14th February, 2018 stating, *inter alia,* as follows:

> *"Pertinently, PFS has not sold the shares to any third party as yet; nor has realised any value against the shares till*

> *date… The Pledged Shares are still being retained by PFS as security for the Financial Debt and in case, MHPL or the Borrower wants to redeem the said shares they can do so after discharging the debt owed by them to PFS.*
>
> *The financial debt of PFS as stated in Form C submitted by it has therefore not been discharged as on the insolvency commencement date i.e. January 18, 2018 and continues to remain outstanding as on date;"*

(Emphasis added)

12. It was further informed that 'MHPL', being a related party to the 'Corporate Debtor' (ultimate holding company of the 'Corporate Debtor') cannot be allowed to participate or exercise voting rights in the 'Committee of Creditors'.

13. The 'Interim Resolution Professional' (1st Respondent) issued *email* on 19th February, 2018 to the Appellant rejecting the financial claim of the Appellant on the purported ground that the claim had been satisfied as on the insolvency commencement date by invocation of pledge.

14. The Appellant challenged the aforesaid decision before the Adjudicating Authority under Section 60(5) of the I&B Code in I.A. No. 48 of 2018.

15. 'MHPL' also filed an application under Section 60(5) – I.A. No. 71 of 2018 seeking a direction that it ought to be included in the 'Committee of Creditors'

since the 'debt' owed to the 'PFS' (Appellant herein) stands discharged by invocation of pledge by 'PFS' (Appellant) .

16. The 'Interim Resolution Professional' constituted 'Committee of Creditors' on 20th February, 2018 consisting of 'Indian Overseas Bank' to whom an amount of Rs. 33,27,373/- was due and payable. The first meeting of the 'Committee of Creditors' was convened on 28th February, 2018 when the 1st Respondent was confirmed as the 'Resolution Professional' of the 'Corporate Debtor'.

17. The Adjudicating Authority by order dated 6th March, 2018 directed the 'Resolution Professional' to reconsider the competing claims of both PFS and MHPL and to take a decision. The Appellant filed a detailed representation by *email* dated 14th March, 2018 to the 'Resolution Professional' and requested him to reconsider its decision stating *inter alia* the following :

> *"From a conjoint reading of Section 5.1(m) with Sections 6.1 and 6.2, it is clear that until such time the Pledged Shares are sold to a third party for valuable consideration, the Pledged Shares remain in the sole beneficial ownership of the Pledgor i.e. MHPL. Therefore, pursuant to the invocation of the Deed of Pledge by PFS on January 16, 2018, there has been only transfer and not sale (contemplated under Section 6.1) of Pledged Shares by PFS to itself, with the beneficial ownership of such shares being retained by MHPL and PFS not having realised/appropriated anything from such invocation. In view of Section 176*

> *of the Indian Contract Act, 1872, MHPL thereby has a right to discharge the Corporate Debtor's debts by making payment to PFS for recovering the Pledged Shares."*

18. On 23rd March, 2018, the 'Resolution Professional' conveyed its final decision not to entertain the claim of the Appellant as being fully satisfied on account of invocation of the 'Pledged Shares'. This was confirmed by the Adjudicating Authority by impugned order dated 6th July, 2018.

19. Learned counsel appearing on behalf of the Appellant submitted that in terms of Clause 6.1, though transfer amount has not been transferred in favour of the Appellant (PFS) and the pledged shares are still being retained by PFS as security for the 'financial debt' and 'MHPL' redeemed the said share, they can do so after discharging the same to the 'MHPL'.

20. According to the learned counsel for the Appellant as a matter of law, transfer of ownership of pledged shares cannot take place without complying with requirement of clause 6.1 of the 'Pledge Deed. The Appellant has not caused the sale including the sale to itself or appropriation or transfer of ownership. It is submitted that the 'debt' is set off only when sale of shares takes place and not on transfer of pledged shares. The law of pledged shares is not supplanted by the Depositories Act, 1996. Therefore, setting off debt on mere 'transfer' of pledged shares would have disastrous consequences.

21. Referring to Section 176 of the Contract, Act, 1872, it was contended that in terms of the said provision, it is required to be sent to the 'pledgor' prior to effecting a sale of 'pledged shares' i.e. before any change of ownership takes place. It is also submitted that Section 176 is mandatory and non-

derogable provision and in support of which reliance has been placed on the decision of Hon'ble Bombay High Court in ***"Official Assignee of Bombay v. Madholal Sindhu & Ors."*** *– 'ILR 1948 Bom 1948,* wherein while dealing with this issue, Hon'ble High Court held :

> *"If one looks at the various sections of the Indian Contract Act, one finds that some of them specifically mention "in the absence of a contract to the contrary." There is no such saving clause in S. 176, and in my opinion is provisions are mandatory and it is not open to parties to contact themselves out of those provisions."*

Reliance has also been placed in ***'GTL Limited v. IFCI Ltd.' – (2011) 126 DRJ 394***, wherein Hon'ble High Court of Delhi observed:

> *"64. The judicial opinion in the field is well settled that the notice under section 176 of the contract act is mandatory in nature and any sale affected without giving notice to the pawnor is vitiated and hence is void."*
>
> *"66. From the above observations two things immediately become clear first….. Secondly, the wordings of the section 176 are not eclipsed by the qualification "In the absence of the*

contract to the contrary" which means that the notice under section 176 is mandatory and mush be given effect to in all circumstances before the power to sale can be exercised."

22. According to him, even "appropriation" or "sale to itself" or "conversion" of Pledged Shares by pledgee cannot be done without notice under Section 176.

23. Therefore, according to the learned counsel for the Appellant, the Appellant has not caused a sale or sale to itself or appropriation or transfer of ownership.

24. Learned counsel appearing on behalf of the 'Resolution Professional' has taken a similar plea as taken before the Adjudicating Authority that the Appellant in its letter dated 23rd January, 2018 having intimated the 'Corporate Debtor' that the Appellant have transferred 31,80,678 shares of 'NEVPL' and the Appellant itself having said that the Appellant is a 100% subsidiary company of the 'MHPL' and 'MHPL' has pledged 31,80,678 equity shares of 'NEVPL' and having claimed its shareholding in 'NEVPL'. So far as the valuation of the pledged shares transferred to the Appellant in its account without valuation, its claim or claim of 'MHPL' cannot be crystalized or accepted.

25. For deciding the issue, it is desirable to notice the important clause of 'Deed of Pledge of Shares' of 10th march, 2014.

Clause 5.1(m) is a 'Pledgor's Undertaking, which reads as follows:

"*The Pledgor's Undertakings*:

The Pledgor assures, undertakes and agrees with the Bridge Loan Lender that throughout the continuance of the pledge created pursuant to this Deed of Pledge and until the repayment of the Amounts Outstanding in full under the Transaction Documents, the Pledgor:

(m) remain the sole beneficial owner at all times of the Pledged shares except on a sale by the Bridge Loan Lender of the Pledged Shares"

(Emphasis supplied)

Clause 6.1 is a 'Registration in the name of the Bridge Loan Lender', relevant portion of which is as follows:

"Registration in the Name of the Bridge Loan Lender:

The Pledgor agrees that, upon the receipt of a notice of occurrence of Event of Default issued by the Bridge Loan Lender, the Bridge Loan Lender shall have the right to have the Pledged Shares transferred in its name or its nominees"

(Emphasis supplied)

Clause 6.2 relates to 'Enforceability and Sale', which reads as follows:

***"Enforceability and Sale**:*

Upon occurrence of an Event of Default, the Bridge Loan Lender or its nominee may without further authority and without prejudice to their

other rights under applicable law but after giving notice to the Pledgor 5 (five) days' notice (which period of notice the pledgor agree is reasonable notice) sell or otherwise dispose off all or any part of the Pledged Shares in such manner and for such consideration as the Bridge Loan Lender may in its sole judgement deem fit (whether by private sale or otherwise) and apply the net proceeds of any such sale or disposition in accordance with Section 11 thereof."

(Emphasis supplied)

Clause 8 relates to 'Claims by the Pledgor', relevant of which reads as follows:

"Claims by the Pledgor:

Until all the Amounts Outstanding are irrevocably paid in full, the Pledgor [MHPL] *shall not exercise any right or make any claim in the insolvency or liquidation of NEVPL or any other Person in competition with the Bridge Loan Lender [PFS]"*

(Emphasis supplied)

Clause 11 relates to 'Appropriation of payments', which is as follows:

"Appropriation of payments:

All monies, sums, distributions, and monetary accretions received or recovered by the

Bridge Loan Lender under or pursuant to this Deed of Pledge shall be applied, and appropriated in accordance with the Transaction Documents. Any surplus of such monies following payment of the Amounts Outstanding in full held by the Bridge Loan Lender shall until such surplus amounts are paid to the Pledgor, be held in trust for the benefit of the Pledgor."

Clause 14.1 relates to 'Release and Termination' of 'Deed of Pledge', which is as follows:

"Release and Termination:

This Deed of Pledge shall terminate upon the repayment in full of the Amounts Outstanding or upon a sale, transfer or other disposition of all the Pledged Shares in accordance with the terms of this Deed of Pledge."

Clause 17.4 relates to 'Evidence of Debt', which reads as :

"Evidence of Debt*:*

Any statement of account purporting to show Amounts outstanding due under the Bridge Loan Agreement and signed as correct by the Bridge Loan Lender/ Bridge Loan Lender's Agent or any of their authorized officers shall, in the absence of manifest

> *error, <u>be conclusive evidence of the amount so due shall be binding on the Pledgor."</u>*

26. It is not disputed that the Appellant issued a letter to 'MHPL' on 23rd January, 2018 intimating that the Appellant (PFS) had exercised its rights under Clause 6.1 of the 'Pledge Deed' on 16th January, 2018 and it is informed that the Appellant had specifically reserved its right to transfer and sell the pledged shares. Relevant thereof is reproduced hereunder:

> *"This intimation is being issued for your information and is without prejudice to any rights or remedies available to PFS in terms of the Pledge Deed, Bridge Loan Agreement and/or the security documents executed In pursuance to the Bridge Loan Agreement. <u>PFS expressly reserves its right to transfer and sell shares for value after providing five day notice as required under Clause 6.2 of the Pledge Deed and under Section 176 of the Indian Contract Act, 1872."</u>*

27. It is a different thing that in terms of Clause 6.2 of the 'Deed of Pledge' or Section 176 of the Contract Act, 1872, the Appellant has not transferred the shares. However, it is accepted that the Appellant invoked Clause 6.1 and after service of notice on occurrence of default issued by the 'Bridge Loan Lender' (Appellant herein), the 'Bridge Loan Lender' transferred the shares in its name. By letter dated 23rd January, 2018 written to the 'Corporate Debtor', Appellant have already intimated the 'Corporate Debtor' that the Appellant has transferred 31,80,678 shares of 'NEVPL' and thereby the Appellant have become the 100% owner of the shares. By the said letter dated 23rd January,

2018, the Appellant (PFS) having already intimated that the rights applicable to the shareholder of NEVPL has been transferred in its favour, we hold that the Appellant settled the dues in full or part by way of transfer of shares. Now it is for the Appellant to transfer the shares in accordance with law but it cannot be denied that the Appellant is the owner of the shares.

28. In view of the aforesaid position, as we held that the Appellant became the shareholder in terms of Clause 6 of the 'Pledge Deed' dated 10th March, 2014, the Appellant cannot take the advantage of Section 176 of the Contract Act. Section 176 of the Contract Act also cannot be taken into consideration for the purpose of collating the claim of any claimant (creditor) by the 'Resolution Professional' under Section 18 of the I&B Code. It is settled law that the 'Resolution Professional' can collate the claim and may accept full or part of the claim but has no power to determine the claim or reject, which power is only vested with the 'Liquidator'.

For the reasons aforesaid, no interference is called for against the impugned order. We find no merit in the appeal. It is accordingly dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

New Delhi
20th June, 2019

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