

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Comp. Appeal (AT) (Ins) No. 797 of 2019

IN THE MATTER OF:

MEENA V KOTHARI

R/O 802, SUMMER HEIGHTS,

K.M. MUNSHI MARG,

OPP. BHARAT VIDYA BHAVAN,

MUMBAI

(THROUGH HER SPECIAL POWER

OF ATTORNEY HOLDER

MR. DILIP V. KOTHARI VIDE SPA DATED 06.07.2019)

...APPELLANT

Versus

M/S MABEREST HOTELS PVT. LTD.

(CIN: U55101GA1972PTC000142)

HAVING ITS REGSITERED OFFICE AT:-

18TH JUNE ROAD, HOTEL FIDALGO, PANAJI, GOA-

403001

THROUGH ITS DIRECTOR

...RESPONDENT

Present:

For Appellant:- Mr. Chandra Shekhar Yadav, Advocate for Appellant.

For Respondent:-Mr. Dhruv Tamta, Advocate for Respondent.

JUDGEMENT

(17.02.2020)

Jarat Kumar Jain. J.

This Appeal has been preferred by Meena V. Kothari (Financial Creditors) against the Order dated 29.03.2019 passed by Adjudicating Authority (National Company Law Tribunal) Mumbai, Bench Mumbai.

2. By the impugned order, the Adjudicating Authority rejected the Application under Section 7 of the Insolvency & Bankruptcy Code, 2016 (In Short I&B Code) preferred by Meena V Kothari.

3. Brief facts of this case are that on 12.08.2002 the Appellant (Financial Creditor) advanced a loan of Rs. 10 Laks to Respondent (Corporate Debtor) as a temporary financial assistance. The loan was to be repaid with the interest at the rate of 18% per annum as soon as financial crisis is over within reasonable time i.e., 6 months to 12 months. The Corporate Debtor acknowledged the debt vide balance confirmation letters at the end of every financial year i.e., on 31 .03.2003 to 31.03.2006 and 01.04.2007. The Financial Creditor wrote a letter dated 17.09.2007 by registered post demanding loan amount but the Corporate Debtor failed to repay the loan amount with interest. Thereafter, financial creditor served a legal notice dated 23.10.2007 but the corporate debtor neither paid the loan nor replied the notice. Therefore, the Financial Creditor filed winding up Petition No. 25/2009 before the Bombay High Court, Bench at Goa. The Hon'ble High Court disposed of the Petition in view of the agreed terms between the parties directing inter alia that the Financial Creditor shall file a Civil Suit for recovery of amount claimed before Civil Court. Thereafter, the

Financial Creditor filed a Civil suit No. 165/2010 before the Civil Court of Junior Division at Punji, Seeking recovery of loan amount along-with interest. Civil Court vide order dated 05.10.2018 rejected plaint under Order 11 Rule 7(d) of CPC holding that the last balance confirmation is on 01.04.2007 hence, suit ought to have been filed within 3 years from 01.04.2007. Whereas the suit is filed on 15.10.10 which is beyond the period of 3 years and therefore, barred by law of limitation. The Financial Creditor preferred an Appeal No. RCA 1580/2018 Challenging the Order dated 05.10.18, the Appeal is pending before the Court of District Judge at Punji (Goa). Thereafter, the Financial Creditor filed an application under Section 7 of I&B Code, on 17.04.2018.

4. The Adjudicating Authority by the impugned order rejected the application on the ground that the debt is not due i.e., not payable hence there is no question of default in repayment of debt.

5. Learned Counsel for the Appellant submits that the Adjudicating Authority erroneously held that the claim of the Financial Creditor is contingent upon the final decision of Civil Court and unless the same is decided the debt of the Financial Creditor cannot be said to be in existence and due. This Tribunal in the case of Company Appeal (AT) (Ins) No. 323/2019 (Neeraj Jain Vs. Yes Bank Ltd. & Anr.) decided on 10.04.2019 held that Section 7 being an independent proceeding is nothing to do with the pendency of Criminal Case relating to misappropriation of funds. This Tribunal in the case of Comp. App. (AT) (Ins) No. 1021/2019 (Karan Goel Vs. M/s Pashupati Jewellers & Ors.) decided on

01.10.2019 held that merely because suit has been filed by the Financial Creditor and pending, cannot be ground to reject the application under Section 7 of the I&B Code.

6. Learned Counsel for the Appellant further submits that the Hon'ble Supreme Court in the case of Innovative Industries Ltd. Vs. ICICI Bank & Anr. (2018) 1 SCC 407 held that claim mean a right to payment even if it is disputed. In the present case, it is admitted fact that the Financial Creditor advanced a loan of Rs. 10 Lakh at the interest of 18% per annum and the loan has not been repaid to the Financial Creditor in such circumstances, the order passed by the Adjudicating Authority is liable to be set aside.

7. On the other hand, learned counsel for the Respondent supports the impugned order and submits that as per the Section 238-A of I&B Code the provision of Limitation Act, 1963 shall apply to the proceedings before the Adjudicating Authority. The last balance confirmation is on 01.04.2007 by the Corporate Debtor therefore, the application ought to be filed within 3 years from 01.04.2007 i.e., till 31.03.2010. However, the Application has been filed on 17.04.18 therefore, claim is time barred.

8. Having heard learned counsel for the parties, we have gone through the record.

9. Firstly, we would like to refer the judgement of the Hon'ble Supreme Court in the case of Innovative Industries Ltd. (Supra):

“(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 the 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.”

10. In the said case, the Hon'ble Supreme Court, held that when the Adjudicating Authority is satisfied on the basis of record that the debt is payable in law or in fact and there is default, the Adjudicating Authority is required to admit the application. Thus, in the present case, we have to consider that when the debt is payable in law or in fact and when default is occurred. In the application under Section 7 of I&B Code, it is pleaded that Rs. 10 lacs of loan as temporary assistance was granted on interest at the rate of 18% Per annum on dated 12.08.2002 and the loan was to be repaid as soon as Financial Crisis is over within reasonable time i.e. 6 to 12 months. It is further pleaded that the Corporate Debtor has acknowledged the debt by balance confirmation letters and lastly on 01.04.2007. It means the loan was not advanced for any fixed period and the due date of debt was extended. It is also pleaded that the Financial Creditor wrote a letter dated 17.09.2007 by Registered post demanding the loan amount but the Corporate Debtor failed to repay the amount.

11. Thereafter the Financial Creditor, demanding the loan served legal notice dated 23.10.2007 and call upon the Corporate Debtor to repay the loan amount within a period of 3 weeks from the receipt of the notice. The Notice was served on Corporate Debtor on 04.11.2007. After receipt of the notice the Corporate Debtor has to repay the loan within a period of 3 weeks i.e. till 25.11.2007 thus after service of notice on 04.11.2007 the debt becomes due and payable. The Corporate Debtor has not repaid the loan till 25.11.2007 and committed default hence the date of default is 25.11.2007. In the application under Section 7 of I&B Code, the Financial Creditor has to mention the date of default however, no such date is mentioned in the application. The Financial Creditor has to file the application under Section 7 of I&B Code, within 3 years from the date of default as held by Hon'ble Supreme Court in the case of B.K. Educational Service Pvt. Ltd. Vs. Parag Gupta and Associates: [2018 SCC ONLINE 1921]

“It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. “The right to sue”, therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, section 5 of the Limitation act may be applied to condone the delay in filing such application.”

12. In this Case the right to sue accrues when a default occurred i.e. 25.11.2007. The Financial Creditor has filed the application under Section 7 of I&B Code, on 17.04.2018, i.e. after 3 years from the date of default apparently the application is time barred.

13. The Adjudicating Authority rejected the application on the ground that after final decision of Civil suit, the debt become due; this tribunal in the case of Karan Goyal (Supra) held as under:

“from the aforesaid finding of the Hon’ble Supreme Court, it is clear that once the Adjudicating Authority is satisfied on the basis of records that the debt is payable and there is default, the Adjudicating Authority is required to admit the application. The Respondent – M/s Pashupati Jewellers having enclosed the copy of the ‘Corporate Guarantee and Undertaking’ Agreement dated 07.04.2017 instituted on e-Stamp, issued by Government of National Capital Territory of Delhi, it was not open to the Adjudicating Authority to deliberate on the issue whether e-Stamp is a forged document or not. Merely because a suit has been filed by the Appellant and pending, cannot be a ground to reject the application under Section 7 of the I&B Code. Pre-existing dispute cannot be a subject matter of Section 7, though it may be relevant under Section 9 of the I&B Code”

14. This Tribunal in the case of Neeraj Jain (Supra) held as under:

“Having heard Mr. Darpan Wadhawa, learned Senior Counsel for the Appellant and Mr. Anant A. Pavgi, learned counsel for the ‘Interim Resolution Professional’, we are of the view that an application under Section 7 being an independent proceeding has nothing to do with the pendency of the Criminal Case relating to misappropriation of the funds by the Chief Financial Office of the ‘Corporate Debtor’ and the employees of the banks. The Bank which is the ‘Financial Creditor’ is a separate entity from the Chief Financial Officer of the ‘Corporate Debtor’ or the individual employees of the Bank(s), if any, involved. The Pendency of the investigation or trial cannot be a ground to refuse an application under Section 7 if the application is complete and there is a debt and default. The I&B Code being a complete code will prevail over the other Acts and no person can take advantage of the pendency of the case to stall Insolvency and Bankruptcy proceeding filed under Section 7”

15. With the above discussion, we are unable to agree with the findings of the Adjudicating Authority that the claim of the Financial Creditor is contingent upon the final decision of Civil suit and unless the same is decided the debt of Financial Creditor cannot be said to be in existence and due. As we discussed above the debt was due on 04.11.2007 when the legal notice was served on the Corporate Debtor. However, the Corporate Debtor failed to repay the loan and

committed the default with effect from 25.11.2007 and this application is filed after 3 years from the date of default. Thus, the application is time barred.

16. With the above discussion we are of the view that the application under Section 7 of I&B Code, is barred by limitation, therefore, the application is liable to be rejected. The Adjudicating Authority rejected the application on the ground that debt is not due i.e not payable according to us, it is not correct.

Accordingly, the Appeal is dismissed. However, no order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

NEW DELHI

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