

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 984 of 2019

[Arising out of Impugned Order dated 05th July 2019 passed by the Hon'ble Adjudicating Authority, National Company Law Tribunal, Bengaluru Bench, in C.P. (IB) No. 135/IB/2018, filed under Section 7 of the Insolvency and Bankruptcy Code, 2016]

IN THE MATTER OF:

**M/s Ugro Capital Limited
(In place of "Asia Pragati Capfin Pvt. Ltd.)
Having its registered office at:
Equinox Business Park, Tower 3
4th Floor, LBS Road, Kurla (West)
Mumbai - 400070**

...Appellant

Versus

**M/s Bangalore Dehydration and
Drying Equipment Co. Pvt. Ltd. (BDDE)
Having its registered office at:
No. 15, 1st Phase, Peenya
Bangalore - 560058**

...Respondent

Present:

**For Appellant: Mr. Abhishek Singh and J. Amal Anand, Advocates
For Respondent: Mr. Kamaldeep and Mr. J. Jose, Advocates**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Company Appeal emanates from the Impugned Order dated 05th July 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Bengaluru Bench, in C.P. (IB) No. 135/IB/2018 questioning the rejection of the Company Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short '**I & B Code**') by the impugned order.

The Appellant questions the correctness of the impugned order dated 05th July 2019, passed by the Adjudicating Authority. The parties are referred to as per their status in the former Company Application for the sake of convenience.

The Appellant has questioned the validity of the impugned order, specifically relating to the following observations:

“The Petitioner has not explained the reasons as to why it has not prosecuted the judgment and decree it obtained as early as 2015 till now and as to why it has selectively chosen only the ‘Corporate Debtor’ herein leaving the personal guarantors, the principal borrower”.

Appellant further contends that Section 7 of the I & B Code, is solely rejected on the ground that the Respondent had filed an “Application seeking review of the judgment and decree dated 22nd May 2015 and 06th August 2015 passed by the Hon’ble Delhi High Court in CS (OS) No.1030/2012”. The Learned Adjudicating Authority was misled into believing the above made contention of the Respondent; whereas the truth of the matter is that there is no such Application for Review pending before the Hon’ble Delhi High Court.

Brief facts of the case are that the Plaintiff/Appellant filed an Application under Section 7 of the I & B Code in furtherance of the judgment and decree dated 22nd May 2015 and 06th August 2015 respectively, passed by the Hon’ble Delhi High Court in CS (OS) No.1030/2012, wherein a sum of Rs.8,04,43,637 (Rupees Eight Crore Four lakh, Forty-three thousand Six hundred Thirty-seven only) along with past

interest, pendent-lite and future interest @ 21% per annum commencing from 23rd March 2012 till the realisation of the decree, was awarded in favour of the Appellant and against M/s BT & FC Private Limited (Principal Borrower), Mr M.V. Muralidhar, Mrs Padma Muralidhar, Mrs Soumya Muralidhar and the Respondent herein (Defendant No.1 to 5 in the said suit). In consequence to it, a decree dated 22nd May 2015 and 06th August 2015 was drawn and passed by the Hon'ble High Court of Delhi, which was filed before the Adjudicating Authority/ NCLT, Bangalore by the Appellant along with Petition/Application bearing C.P. (IB) No. 135/IB/2018 filed under Section 7 of the I & B Code.

That in response to the petition above, the Respondent herein, committed perjury by making a misleading averment in their Objections/ Reply dated 03rd April 2019, inter-alia contending that they had filed an application seeking review of the judgment and decree dated 22nd May 2015 and 06th August 2015 respectively, and the same was pending before the Hon'ble High Court of Delhi.

The Appellant contends that no such purported and alleged application for review was placed on record by the Respondent. That besides the aforesaid misleading averment, the Respondent placed no document or any evidence or record before the Learned Adjudicating Authority to support the said averments and contention.

The Learned Adjudicating Authority further mentioned in its order that *“the Petitioner has not explained the reasons as to why it has not*

prosecuted the judgment and decree it obtained as early as 2015 till now and as to why it has selectively chosen only the 'Corporate Debtor' herein, leaving the personal guarantors and principal borrower".

The above observation of the Learned Adjudicating Authority is incorrect because the liabilities of the 'Corporate Debtor', personal guarantors and principal borrower were joint and several to discharge their obligations of the decree above, leaving it to the sole discretion of the plaintiff/Appellant to recover the said amount from any of the said Defendants and in pursuance of that, the appellant had filed the Petition under Section 7 of the I & B Code.

It is a settled position of law that liability of Principal Borrower and surety/guarantor is joint and several and thus Lender can choose action against principal borrower or surety either separately or jointly. However, in the instant case, as stated above, the Petitioner had already filed a suit before the Hon'ble Delhi High Court against Principal Borrower and other individual guarantors and also the present Corporate Debtor/Corporate Guarantor, and obtained consent Decree, against the Principal Borrower, personal Guarantors and the instant Corporate Debtor. However, the consent decree is stated to be under review. The Petitioner has not explained the reasons as to why it has not prosecuted the judgment and Decree it obtained as early as 2015 till now and as to why it has selectively chosen only the Corporate Debtor herein leaving other personal Guarantors, the principal borrower. It is settled position of law that Law of Limitation would apply to proceedings under the Code.

The Adjudicating Authority has raised the question as to why it has not prosecuted the judgment and Decree it obtained as early as 2015. The observation of the Learned Adjudicating Authority in the impugned order shows that the Adjudicating Authority had not considered the fact that the decree in CS (OS) No.1030/2012 was finalised by order dated 06th August 2015. Therefore, the period of limitation of three years starts running from 06th August 2015, and the present petition is filed on 27th June 2019, which is well within three years from the date of passing of the final decree dated 06th August 2015. When a petition is filed within the statutory period of limitation, then no adverse inference can be drawn based on not taking action at the earliest opportunity after obtaining the decree.

The Adjudicating Authority has noted in its order that “the contention of the Petitioner that the judgment in question has become final so as so for the Corporate Debtor is concerned is also not incorrect as the judgment is under review”.

The above finding of the Adjudicating Authority is assailed by the Appellant, who submits that the ‘Corporate Debtor’ misled the Adjudicating Authority that the Review Application was pending against the judgment and decree passed by the Hon’ble High Court, which is the very basis of finding, on the application for initiation of Corporate Insolvency Resolution Process (CIRP). The Learned Counsel for the Appellant contends that upon inspection of the Court record of the suit bearing No. CS (OS) No.1030/2012 by the counsel of the Appellant on 19th August 2019, to the shock and surprise, it was learnt that no review application, as claimed by the

Respondent in its reply, had been filed before the Hon'ble High Court of Delhi. On inquiry from the registry of the Hon'ble Delhi High Court, it was learnt that a Review Application was filed with the registry on 13th December 2018 and the same was collected back by the Respondent on 17th December 2018 to cure the defects, as had been raised by the concerned registry.

Appellant further contends that after withdrawing the review application, it was never re-filed. But the Respondent/Corporate Debtor had adopted unfair means, sham practices and made highly perjurious statements to claim that a review application seeking review of the decree and judgment dated 22nd May 2015 was pending before the Hon'ble High Court of Delhi. The appellant further contends that after inspection by his Counsel on 19th August 2019, even after passing of about eight (8) months commencing from 13th December 2018, after the review application was filed and later on taken back on 17th December 2018, no fresh Review Application was filed before the Hon'ble High Court of Delhi. The Learned Counsel for the Appellant contends that the Corporate Debtor misled the Adjudication Authority that the Review Application was pending before the Hon'ble High Court of Delhi and based on that, the application filed under Section 7 of the Code has been rejected.

It is pertinent to mention that the Adjudicating Authority stated in its order that, *"It for the petitioner to take steps to execute the Decree, as it is contending the order and decree in question became final and obtaining a decree from competent Court and also not placed any material to show what steps it has taken about Review pending, and filing the instant petition*

invoking provision of the code, after a lapse of a long time are nothing but abusing of the process of law.”

It is pointed out that the Adjudicating Authority has rejected Review Application mainly on the ground that Review petition is pending before the Hon’ble High Court and the Adjudicating Authority cannot interfere with the powers of the Hon’ble High Court of Delhi. It is also noted by the Adjudicating Authority that “the Petitioner has not placed any material with regard to the filing of an application for review under Section 114 read with Order XLVII Rule I of the Code of Civil Procedure, 1908 filed by the Defendant Nos. 1 and 2, i.e. Principal Borrower and Mr M.V. Muralidhar, Managing Director and Guarantor by seeking review of the order in question.”

It is pertinent to mention that ‘Corporate Debtor’ in its reply had taken the plea that the judgment and decree are not final and Review Application is pending before the Hon’ble High Court of Delhi. Based on the statement made in reply by the ‘Corporate Debtor’ the Adjudicating Authority has presumed pendency of Review Application, whereas no document was placed on record to show the pendency of the Review Application. The burden of proof was also on the ‘Corporate Debtor’, who had contended before the Adjudicating Authority that decree is not final and Review Application is yet pending, but Adjudicating Authority has presumed the pendency of the Review Application for not filing of any document by the Petitioner regarding Review Application. The above finding of the

Adjudicating Authority is incorrect because the burden of proof to show that the review application is pending was on the 'Corporate Debtor'.

The Adjudicating Authority has raised the questions on not taking any steps for filing execution application, even though Review Application is pending. Adjudicating Authority has erroneously rejected the application based on pending review application and for not taking any steps for execution of the decree. Adjudicating Authority was not required to question the reasons for not taking steps for executing the decree in Civil Court. Since the amount is payable to the Financial Creditor and based on the decree passed by the Court, the Financial Creditor was legally entitled to file a petition under Section 7 of the I & B Code.

It is important to point out that the definition of creditor provided in Sec 5(10) of the I&B Code provides that **“Creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder.”**

Based on the decree of the Court this petition was filed U/S 7 of the Code. Since the definition of word creditor in I&B Code includes decree-holder, therefore if a petition is filed for the realisation of decretal amount, then it cannot be dismissed on the ground that applicant should have taken steps for filing execution case in Civil Court.

It is further noted that the 'Corporate Debtor' misled the Adjudicating Authority about the pendency of Review Application despite the fact that no review application was pending before the Hon'ble High Court against the

decree passed by the Court. Therefore, the above finding of the Learned Adjudicating Authority is not sustainable.

The Adjudicating Authority has further observed that “the *instant Company Petition suffers parallel proceedings as suit was filed against the Principal Borrower and Guarantors namely Mr M.V. Muralidhar as Managing Director and Guarantor, Mrs Padma Muralidhar and Ms Sowmya Muralidhar as another Guarantor apart from the instant Corporate Guarantor and invoking provisions of the Code only against the Corporate Debtor is not tenable. The Company Petition under the principle of double jeopardy as Corporate Debtor has already suffered judgment and decree and the same is sub-judice before the Hon’ble High Court of Delhi. Hence, the Company Petition is liable to be dismissed without prejudice to rights of Petitioner in the pending case before the Hon’ble High Court and other Courts.*”

On perusal of the record, it is clear that after the order of the Hon’ble High Court dated 22nd May 2015, and after that by order Dt. 06th August 2015, the Hon’ble High Court of Delhi decreed the entire suit in favour of the Plaintiff/Appellant. Consequently, a decree sheet dated 22nd May 2015 and 06th August 2015 were drawn wherein a decree of payment of Rs.8,04,43,637 (Rupees eight crore four lakh forty-three thousand six hundred thirty-seven only) along with past, present and future pendente-lite interest at 21% per annum was passed in favour of the Appellant.

The ‘Corporate Debtor’/Respondent has neither challenged the decree as mentioned earlier nor filed any review till the date of the filing of the

petition under Section 7 of the I & B Code. It is also clear that the Defendant No.1 to 5 in the said suit were jointly and severally liable to discharge their obligations of the decree above leaving it to the sole discretion of the Plaintiff/Appellant to recover the said amount from any of the said Defendants.

Issue of Limitation

In terms of the decree dated 22nd May, 2015, the Respondent had to make the payment of Rs.4 crore within twelve weeks (i.e. on or before 14.08.2015) from the date of order. The sum of Rs.1 crore had to be made on or before 07th July, 2015 failing which, the entire sum was liable to be decreed. By the order of Hon'ble High Court dated 06th August, 2015, on the Respondents application seeking modification of decree dated 22nd May, 2015, to the extent that Respondent be permitted to pay Rs.1 core on or before 21st August, 2015 at lesser rate of interest i.e. 8% per annum was declined. The entire suit was decreed in terms of the previous consent recorded on 22nd May, 2015. The Respondent/Corporate Debtor committed default in terms of Section 3(12) of the I & B Code for the first time on 07th July, 2015 i.e. when the Respondent had to make the payment of the first instalment of Rs.1 crore. However, on account of default the entire suit amount i.e. Rs.8.04 crore alongwith 21% interest per annum became due and payable on 07th July, 2015 or after that on 06th August, 205 when the prayer for modification of the decree was declined. In terms of Article 137 of The Limitation Act, 1963, for filing Application under Section 7 of the I & B Code three years from the date the right to apply accrued for the first time

on 06th August, 2015 when the Application of Respondent seeking an enlargement of time has been dismissed and the entire suit amount had been decreed or in the alternative the right to apply accrued on 07th July, 2015 when the Respondent defaulted to make the first instalment of Rs.1 crore. Admittedly, the Application under Section 7 of the I & B Code was filed on 27th June, 2018 i.e. well within three years of limitation calculated from 06th August, 2015 or 07th July, 2015 as the case may be. It is also made clear that for the purpose of the Article 136 of the Limitation Act i.e. for execution or for purpose of Article 137 of the Limitation Act i.e. for filing Application under Section 7 of the I & B Code, the period of limitation is to be calculated from the date of decree becoming enforceable. As per the judgment of Hon'ble Supreme Court in B.K. Educational Services Private Limited Vs. Parag Gupta & Associates in para 27. Hon'ble Supreme Court has held that Article 137 of the Limitation Act to will apply to the proceedings filed under Section 7 of the I & B Code. The right to apply for filing Application under Section 7 of the I & B Code would arise upon default on part of the Respondent. The default on part of the respondent first accrued on 07th July, 2015 and after that on 06th August, 2015, and the instant petition was filed on 27th August, 2018 i.e. within three years of Limitation.

It is thus apparent that the 'Corporate Debtor'/Respondent made a false statement before the Adjudicating Authority, and the Adjudicating Authority had no reason to disbelieve such a statement. The Adjudicating Authority had failed to appreciate that the 'Corporate Debtor'/Respondent

had mischievously not placed any record about the alleged Review Application. In the circumstances, we are of the considered opinion that the impugned order dated 05th July 2019 regarding the rejection of the Application filed under Section 7 of the I & B Code deserves to be rejected. Since all the ingredients of Section 7 of the, I & B Code 2016 are satisfied and the Application for initiation of the corporate insolvency resolution process is complete, therefore, the Appeal is allowed.

We further direct the Adjudicating Authority to pass an order for admitting the petition under Section 7 of the I & B Code 2016. Parties are directed to be present before the Adjudicating Authority on dated 27th January 2020.

[Justice Venugopal M.]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[V. P. Singh]
Member (Technical)

NEW DELHI
22nd JANUARY, 2020

pks/md