

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.441 of 2019

[Arising out of Order dated 15.03.2019 passed by National Company Law Tribunal, Principal Bench, New Delhi in Company Petition No.(IB)-866(PB)/2018]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Mr. Vineet Khosla
Shareholders and
(ex) Director
Margra Industries
Ltd.
A-501 The Villas

Appellant

Versus

1. M/s. Edelweiss
Asset Reconstruction
Company Ltd.
Edelweiss House,
Off C.S.T. Road,
Kalina
Santa Cruz (East)
Mumbai – 400098

Applicant/
Financial Creditor

Respondent No.1

2. Margra Industries
Ltd.
Administrative
Office:
D-328
Defence Colony
New Delhi

Respondent/
Corporate Debtor

Respondent No.2

3. Mr. Rajender
Kumar Girdhar,
Interim Resolution
Professional
Oshiwara Mahada

Respondent No.3

Complex,
Building No.5
Aster CHS,
Flat No.205,
2nd Floor,
New Link Road,
Osjiwara
Andheri (West)
Mumbai 400053

For Appellant: Shri Pulkit Deora, Advocate

**For Respondent: Shri Sanjay Bhatt, Advocate with Ms. Kiran Sharma,
CS (Respondent No.1)**

**Shri I.P.S. Oberoi, Advocate (Respondent No.2)
for RP**

J U D G E M E N T

A.I.S. Cheema, J. :

1. Respondent No.1 – Edelweiss Asset Reconstruction Company Ltd. (Edelweiss – in short) – Financial Creditor filed Company Petition No.(IB)-866(PB)/2018 before the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) against Respondent No.2 - Margra Industries Ltd. – Corporate Debtor, which has been admitted vide Impugned Order dated 15th March, 2019. Respondent No.3 - Mr. Rajender Kumar Girdhar, came to be appointed as Interim Resolution Professional (IRP). Being aggrieved, the Appellant - Mr. Vineet Khosla – Ex. Director of the Corporate Debtor has filed this Appeal.

2. In the Application under Section 7 filed in Form 1, Edelweiss claimed to be assignee of the loan which was taken by Corporate Debtor by way of financial assistance from Exim Bank. The bank had sanctioned financial assistance amounting to Rs.389 Lakhs in terms of Rupee Loan Agreement. Later on, further financial assistance was extended amounting to Rs.550 Lakhs and Foreign Currency Term Loan Agreement was also executed. Corporate Debtor executed agreement of hypothecation of movable assets and also deed of guarantee was executed. Later on immovable property was also mortgaged and charge created.

3. The Financial Creditor claimed that Exim Bank filed O.A. 177/2001 before DRT, Delhi - II. The Bank also filed O.A. 251/2003 before DRT, Mumbai - II. DRT at Mumbai passed Order with regard to payments to be made by the Corporate Debtor. The Order was passed in 2004. Settlement terms were filed in O.A. 177/2001 at DRT, Delhi between Exim Bank (the assignor of Edelweiss) and the Corporate Debtor and the amount specified was to be paid by 12th September, 2012 and consent decree came to be passed. However, OTS failed for want of repayment by the Corporate Debtor. Then on 2nd January, 2014, Exim Bank assigned the debt along with underlying rights, title and interest. On request of Corporate Debtor, the Appellant gave extension of time for payment on 5 occasions to the Corporate Debtor. The last extension was granted in 2015 which was valid till 31st March, 2016. The Section 7 Application claimed gross amount to

be in default of Rs.44,20,38,989/-. The Application was supported by the necessary documents (Annexures 1 to 29).

4. The learned Adjudicating Authority heard the Financial Creditor and the Corporate Debtor and considered the dispute raised, examined the Application submitted in Form supported by the necessary documents and found that the Financial Creditor had placed voluminous record with overwhelming evidence to support the claim as well as to prove the default. Adjudicating Authority referred to the assignment deed in favour of Edelweiss and noted that it was duly stamped and registered with registering authority in Noida. Adjudicating Authority found that under Sub-Section (7) of Section 5 of the IBC Code the term “Financial Creditor includes a person to whom financial debt has been legally assigned or transferred”. It was held that the outstanding loan amount has been duly assigned by Exim Bank to Edelweiss and Edelweiss came within the definition of “Financial Creditor”.

5. With regard to the dispute raised by the Corporate Debtor that incorrect amount had been claimed, it has been held by Adjudicating Authority that dispute over the quantum of default cannot be a ground to reject the Application under Section 7 as determination of quantum of financial debt is not in the domain of Adjudicating Authority. It was also observed that the Corporate Debtor would be free to raise objection regarding mismatch of dues and excess before the Resolution Professional/Committee of Creditors. Adjudicating Authority also found

that the transaction showed that loan was disbursed against consideration for time value of money with a clear commercial effect of borrowing. It has been found that the record shows that Corporate Debtor availed the loan facility and committed default in repayment of huge outstanding financial debt. Consequently, Adjudicating Authority admitted the Application.

6. In Appeal, the Appellant for Corporate Debtor is claiming and it has been argued that following questions are involved in the present matter:-

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Sl. No.	QUESTION	POSITION/SUGGESTED ANSWER OF THE HUMBLE APPELLANT
1.	<p><u>Question No.1:</u></p> <p>Whether the resolution of disputes between the financial creditor and the corporate debtor can be subjected to adjudication by the Resolution Professional if they already be pending before another judicial forum, all the more so when the claim of the corporate debtor</p>	<p>A resolution professional cannot fill the shoes of a judicial forum that is already seized of a dispute.</p>

	be far larger than that of the financial creditor?	
2.	<p><u>Question No.2:</u></p> <p>Whether the provisions of the IBC can be invoked when it is already known to the financial creditor that there is no possibility whatsoever of keeping the Company as a “going concern” while finding any resolution, and its sole aim is to liquidate the remaining assets?</p>	<p>The primary purpose of the IBC is to provide a mechanism whereby, through resolution of the claims of the creditors, an attempt is made at the survival of the Company, by retain it as a “going concern”, even if under different Management.</p> <p>The IBC cannot be invoked if the sole intent is to put the remaining assets of the financial debtor to auction.</p> <p>In the present case, the financial creditor has already obtained orders from DRT for appointment of a Receiver for the purpose of auction of its remaining assets.</p>

3.	<p><u>Question no.3:</u></p> <p>Whether NCLT should have respected the principles underlying the comity of courts, and should have awaited the decision of the DRT insofar as its finding on the legality of the assignment of the debt from the original lender (i.e. Exim Bank) to Respondent No.1?</p>	<p>Hon'ble NCLT was made fully aware that the issue of whether or not the assignment was proper was under examination by DRT. This being so, by the principle of comity of courts, it should not have decided the question.</p>
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It is argued that if there is already a dispute pending and under consideration in another Forum like DRT, the Application under Section 7 could not have been moved by the Financial Creditor as it would tantamount to Resolution Professional replacing judicial Forum which was considering the dispute. It is also argued that the object of IBC is to provide for resolution so that the Company can be saved and the Company could be kept as a going concern. The Counsel submitted that the Financial Creditor had already obtained Orders from DRT for disposing properties of the Corporate Debtor and Section 7 Application was filed to get disposed the remaining assets of the Corporate Debtor and in such set of facts, Section 7 could not have been invoked as it is against the object of IBC.

The learned Counsel stated that whether or not there was a proper assignment done in favour of Edelweiss, was being looked into by DRT and when this is so, Adjudicating Authority should not have dealt with and held that there was proper assignment.

7. We have gone through the matter and heard the submissions made. We are not convinced with the submissions that only because the Financial Creditor had moved for relief before DRT, it could not have resorted to proceedings under the IBC. There is no provision which bars referring to IBC if already relief has been sought or pending in another Forum. Rather, under Section 238 of IBC, the provisions of IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Once the Application under Section – 7, 9 or 10 is admitted, moratorium prohibiting the other pending actions gets attracted under Section 14. Under Section 14, institution of suits or continuing of pending suits or proceedings against the Corporate Debtor including execution of any Judgement, Decree or Order in any Court of law, Tribunal, Arbitration Panel or other authority gets hit by the moratorium and cannot be proceeded further till moratorium is in force. As such, there is no substance in the argument that if dispute is already pending in another forum, IBC cannot be invoked.

8. We find no force in the arguments that Adjudicating Authority could not have looked into the question whether the debt has been duly assigned

to Edelweiss. The Adjudicating Authority referred to the documents of assignment and provisions under Section 5(7) to conclude that the financial debt had been legally assigned and Edelweiss was coming within the definition of Financial Creditor.

9. In the matter of **“Edelweiss Asset Reconstruction Company Ltd. Versus Synergies Dooray Automotive Ltd. & Ors.”** in Company Appeal (AT) (Insolvency) No. 169 of 2017 and others – by Judgement dated 14th December, 2018, this Tribunal has held (in para – 66 of that Judgement) with regard to Assignment Agreements that when the same are duly executed with concerned authorities and are not questioned by the parties to those proceedings, others would not have locus standi to question the veracity of those documents on mere apprehensions or allegations of malafides etc. It has been held that the person who is not party to the Assignment Agreement, would not be able to raise apprehensions before the Adjudicating Authority to adjudicate on the Assignment Agreements. It was held that the Adjudicating Authority cannot enter into roving enquiry on mere apprehensions and baseless allegations. In the present matter, the Assignment Deed (Page 380 @ 411) shows that Exim Bank executed Assignment Deed in favour of Edelweiss and the same was duly registered. The document clearly refers in the schedule (Page 411) to the Corporate Debtor and the debt assigned. The argument that the Adjudicating Authority could not have looked into such document only

because some dispute was raised before DRT has no substance. We find no reason to interfere with such findings of Adjudicating Authority.

10. The contention of the Appellant that if the Financial Creditor had already got sold part of the assets of the Corporate Debtor, taking direction from DRT, the Corporate Debtor could no more be kept a going concern and so, IBC could not be invoked, also deserves to be rejected. At the stage of admission of the Application under Section 7 of IBC, the Adjudicating Authority need not enter into such disputes raised. Section 7 (4) and (5) of IBC read as under:-

“(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

- (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
- (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of

sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.”

11. In the matter of “**M/s. Innoventive Industries Ltd. Vs ICICI Bank & Anr.**” in Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017 in Judgement dated 15th May, 2017 passed by this Tribunal, it was held in Para – 52 and 53 as under:-

“52. The insolvency resolution process under Section 7 or Section 9 of I&B Code, 2016 have serious civil consequences not only on the corporate debtor - company but also on its directors and shareholders in view of the fact that once the application under Sections 7 or 9 of the I&B Code, 2016 is admitted it is followed by appointment of an 'interim resolution professional' to manage the affairs of the corporate debtor, instant removal of the board of directors and moratorium for a period of 180 days. For the said reason also the Adjudicating Authority is bound to issue limited notice to the corporate debtor before admitting a case under section 7 and 9 of the 'I & B Code', 2016.

53. In view of the discussion above, we are of the view and hold that the Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the corporate debtor and to find out whether the application is complete and or there is any other defect required to be removed. Adherence to Principles of natural justice would not mean that in every situation the adjudicating authority is required to afford reasonable opportunity of hearing to the Corporate debtor before passing its order.”

When the same matter was taken up before the Hon'ble the Supreme Court of India vide Judgement dated 31st August, 2017 – (2018) 1 SCC 407, it was observed in para - 28 of the Judgement as under:-

“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 subsection (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.”

From the above, it is clear that at the stage of admission of Application under Section 7, the requirement is to give limited Notice and the considerations would be to see whether or not satisfaction by Adjudicating Authority could be reflected on the basis of Sub-Section (5) of Section 7. If there is a financial debt, which is more than Rs.1 Lakh and there is a default and if the Application is complete, the Application would have to be admitted. The Corporate Debtor is entitled to point out that a default has not occurred in the sense that the ‘debt’ which may include a disputed claim is not due. Corporate Debtor may point out that the debt is not due by showing that it is not payable in law or in fact.

12. The Adjudicating Authority at that stage is not required to consider if or not Resolution for a given Company would be possible or not and whether or not it would be possible to keep it a going concern as the Corporate Debtor is trying to claim. When efforts are being made to resort to Section 230 of the Companies Act, 2016 even at the stage of liquidation, to see if there could be compromise or arrangements with creditors as can be seen from the Judgement of this Tribunal in the matter of **“Y. Shivram Prasad Vs. S. Dhanapal & Ors.”** in Company Appeal (AT) (Insolvency) No. 224 of 2018 dated 27th February, 2019, there is no substance in this claim made by the Appellant that if it appears that there is no possibility of

keeping the Company a going concern, IBC cannot be invoked. We reject the argument.

13. For the above reasons, we do not find any substance in this Appeal. The Appeal is dismissed. No Orders as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Justice Bansi Lal Bhat]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

06th September, 2019

/rs/sk