

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 989 of 2019

[Arising out of Judgment dated 23th August 2019 passed by NCLT, New Delhi (Principal Bench) in C.P. No. IB-271(PB)/2017]

IN THE MATTER OF:

Rajeev Anand

...Appellant

Versus

Srei Equipment Finance Limited & Anr.

...Respondents

Present:

For Appellant: Mr Muneesh Malhotra, Mr Rajat Bhardwaj, Ms Manpreet Kaur and Ms Vanya Khanna, Advocates.

For Respondent: Mr Arijit Mazumdar, Ms Akanksha Kaushik and Mr Devesh Ajmani, Advocates for Respondent No. 1

Shri Hasmad Nabi, Shri Puneet Pankaj, Advocates for Financial Creditor.

Ms. Aditi Sharma, Mr. Aman Khan, Advocates and Mr. Harshal Madan (CS) for IRP.

J U D G M E N T

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

That the Appellant / Respondent has preferred this appeal against the order of Admission under Section 7 of the 'Insolvency and Bankruptcy Code 2016 passed by the National Company Law Tribunal, New Delhi (Principal Bench). The present proceeding has been initiated on account of the default committed by the 'Corporate Debtor' in repayment of its dues under the loan Agreement dated 1st April 2016 bearing Contract No. 105996. As per the Appellant/Respondent, the repayment under the Loan Agreement was to commence from September 2016. The Appellant / Respondent has realised

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the instalments for September 2016 till February 2017. However, the instalments for March 2017 to July 2017 amounting to Rs. 5,13,47,660/- has not been paid by the Respondent.

2. The total amount claimed to be in default, and the details of default have been given in sub-para 2 of Part-IV of Form 1. Thus, the case of the Petitioner is that on 29th July 2017, a sum of Rs. 214,168,423/- is outstanding, and the petition has been filed on 4th August 2017. The 'Corporate Debtor' filed Supplementary Affidavit dated 6th June 2018 showing disbursement of Rs. 18,86,00,000/- on 1st April 2016 to the 'Corporate Debtor'.

3. The 'Corporate Debtor' in its reply stated that sum of Rs. 25,73,96,034/- was rescheduled by the Appellant into 3 Loan Accounts of the equal amount, the total amount due was Rs. 35,66,61,986/-, which was again rescheduled by the Appellant into the loan Accounts, including the penal charges and other charges with the understanding that for one year the 'Corporate Debtor' is not liable to pay the instalment. Accordingly, it was agreed between the parties that first six months there would be moratorium of interest and balance six months interest shall be added to the loan amount. After adding the interest portion of one year (inclusive of moratorium of six months) in loan amount of Rs. 35,66,61,986/-, the total outstanding amount became Rs. 38,39,00,000/- which was financed in the present two loan accounts, and the instalment for the 1st loan account was due to be paid on 22nd March, 2017 and for the 2nd loan account was due to be paid on 22nd June, 2017.

4. The 'Corporate Debtor' contends that on the date of filing of the petition, there was no default as contemplated in Section 7 of the Insolvency and Bankruptcy Code 2016. The 'Corporate Debtor' /Respondent further contends that the petition is pre-mature, and filed after the suppression of facts. The alleged amount is not due and payable at the time of filing of the petition.

5. The Adjudicating Authority admitted the petition on the ground that the 'Corporate Debtor' in the previous round of litigation had candidly admitted the restructuring of total loan amount of Rs. 35,66,61,986/- by way of executing two contracts, firstly by Agreement No. 105996 dated 1st April 2016 for facility of Rs. 18,86,00,000/- and secondly being Agreement No. 111305 dated 24th June 2016 for facility of Rs. 19,53,00,000/-. The Adjudicating Authority has also observed that on perusal of Supplementary Affidavit dated 3rd August 2018 read with a copy of confirmation of transaction that a sum of Rs. 18,86,00,000/- was further disbursed by the petitioner on 13th April 2016 to the 'Corporate Debtor'. Relying on the admission in connection with the previous round litigation, the Adjudicating Authority has held that the Rs. 18,86,00,000/- was further disbursed by the petitioner on 13th April 2016 to the 'Corporate Debtor', which is an independent transaction and having no relevancy with the previous one. It does not lie in the mouth of the 'Corporate debtor' to take a contrary stand and principles like estoppel would come into play.

6. The appeal has been filed mainly on the ground that no amount has been disbursed to the Appellant on 1st April 2016. The Respondent

/Financial Creditor has not filed any document to show the disbursement of Rs 18,86,00,000 on 1st April 2016. The Respondent /Financial creditor was granted liberty by the Adjudicating Authority to cure the defects in the application, Form 1, vide order dated 11th July 2018. The respondent was directed to file the certificate admissible under the Banker's Book Evidence Act, 1891 within a week. Despite opportunity, the Appellant / Respondent didn't file a certificate or any other document evidencing the disbursement on 1st April. 2016.

7. The Appellant has also contended that the Applicant / Respondent has failed to establish the existence of the financial debt as there is no evidence on record evidencing disbursement of the amount of Rs. 18,86,00,000/- on 1st April, 2016.

8. The Appellant further contended that there is no debt payable in law or fact, and the impugned order has been passed by the Adjudicating Authority **based on presumed debt**. It is further contended that the Adjudicating Authority has committed a serious error in law by placing reliance on the frivolous claims of the Applicant / Respondent which does not even find mention in Form 1.

9. That the Appellant further contended that the Adjudicating Authority in the impugned order had placed reliance on the Supplementary Affidavit filed by the Respondent with dairy No. 3737 dated 6th June 2018, whereas the Adjudicating Authority already rejected the said affidavit on 11th July 2018.

10. The Appellant further contends that the impugned order has been passed on averments, which do not find mention in Form 1, and the Adjudicating Authority has presumed the debt on account of previous litigation. The Appellant has also stated that the impugned order has been passed by the Adjudicating Authority without providing any opportunity to the 'Corporate Debtor' to file an objection, which is against the principle of natural justice.

11. On perusal of the record, it is clear that Respondent has not filed any document to prove the contents of part 4 of Form 1. The applicant has mentioned that the amount of Rs. 18,86,00,000/- was disbursed on 1st April 2016. Whereas, in the Colum, about the total amount disbursed and debt granted and Date of Form 1, it is specifically stated by the Applicant / Respondent that total amount of Rs. 18,86,00,000/- was disbursed on 1st April, 2016. Further in Part 5 of Form 1 it is also mentioned that charges were also created on 1st April, 2016 for the loan amount of Rs. 18,86,00,000/-.

12. It is pertinent to mention that the 'Corporate Debtor' / Applicant has filed an Affidavit dated 28th March 2019 along with letter issued by YES Bank, dated 10th August 2018, to substantiate that the amount of Rs. 18.86 crores under the loan agreement dated 1st April, 2016 was credited in its account, and it immediately paid back the entire amount to the Applicant / Respondent in two tranches, firstly on 13th April, 2016 a sum of Rs. 17 Crores and secondly on 16th April, 2016 a sum of Rs. 1.86 crores. It is also

asserted that the said amount has not been paid towards any previous outstanding.

13. It is important to point out that the Appellant has filed a copy of the order sheet of (IB)-271(PB)/2017 dated 29th November, 2018 with the appeal which is given below for ready reference: -

“During the course of arguments Mr. Malhotra, Ld. Counsel for the corporate debtor has pointed out that the amount disbursed in pursuance of loan agreement or on any other count dated 01-04-2016 (18,86,00,000/-) has been paid back on 13-04-2016 and 16-04-2016 itself, and as on date no payment is due to the financial creditor under the said agreement. Mr Malhotra, Ld. Counsel for the respondent states that an affidavit of the corporate debtor to that effect shall be filed within one week with a copy in advance to the counsel for the financial creditor-applicant. Reply to the affidavit be filed within five days thereafter with a copy in advance to the counsel opposite.”

14. On perusal of the above order sheet, it appears that the ‘Corporate Debtor’ pleaded before the Adjudicating Authority that amount disbursed under the Loan Agreement dated 1st April, 2016, Rs. 18,86,00,000/- has been paid back on 13th April 2016 and 16th April 2016 itself, and as on date, no payment is due to the ‘Financial Creditor’ under the said Agreement.

15. It also appears that the Adjudicating Authority passed an order on the plea of the corporate debtor, that the 'Corporate Debtor' may file Affidavit in support of its contention and after that Applicant to file Affidavit in reply within 5 days.

16. In compliance of the said order the corporate debtor filed its Affidavit, which is also annexed with the appeal, reiterating that amount disbursed under the Loan Account dated 1st April, 2016, was paid back in two tranches on 13th April 2016 and 16th April 2016 to the UTI Bank in the name of the Applicant / Respondent. The 'Corporate Debtor' has also stated in the Affidavit that this amount has not been paid towards any previous outstanding. The 'Corporate Debtor' / Applicant has also annexed the copy of the certificate of Bank statements of YES Bank evidencing RTGS transfer of Rs 17 crores on 13th April, 2016 and Rs. 1,86,00,000/- on 16th April, 2016 in the Account of M/s Wianxx Impex Ltd., the Financial Creditor.

17. It appears that in compliance with the order of the Adjudicating Authority dated 29th November 2018 the 'Corporate Debtor' filed an Affidavit along with Bank certificate. But in reply no evidence was submitted to prove that the outstanding amount is due and payable.

18. It is also important to mention that on perusal of the order sheet dated 11th July 2018 it's evident that the Adjudicating Authority has rejected the Supplementary Affidavit dated 6th June 2018 which was filed by the Petitioner, but while passing the Order of Admission, in Para 14 of the Impugned Judgment, the Adjudicating Authority mentioned that: -

“Afterwards vide diary No. 3737 dated 06-06-2018 petitioner has filed a supplementary affidavit along with bank transfer receipt (Annexure-A) showing disbursement of Rs. 18,86,00,000/- on 01-04-2016 to the Respondent and a certificate under Section 2-A of the Bankers Books Evidence Act, 1891 (Annexure-B). The petitioner has asserted that the Respondent has made payment of Rs. 18,86,00,000/- on 13th April, 2016 and 16th April, 2016 and thereafter of Rs. 16,80,62,000/- from 5th July, 2016 and 19th July 2016 as would be evident from pgs. 11 & 12 of the counter affidavit filed on behalf of the Respondent. Thus, the sum of Rs. 35,66,62,000/- which has been paid by the Respondent to the Petitioner is on account of its previous outstanding of Rs. 35,66,61,986/- which was outstanding on the part of the Respondent as on 31st March, 2016 as was unconditionally and unequivocally admitted by the Respondent in page 24 of its counter affidavit filed by it in the prior proceeding (I.B. No. 54(PB)/2017). A sum of Rs. 18,86,00,000/- was once again disbursed to the Respondent by the petitioner on 1st April 2016, which is still due and payable to it.”

19. Thus, it is clear that document which was already rejected by the Adjudicating Authority, has been made the basis for passing the Order of Admission, which is not permissible under law.

20. Based on loan Agreement dated 1st April 2016 the amount Rs. 18,86,00,000/- was disbursed bank certificate filed by 'Corporate Debtor' shows that while amount has been returned back. But the finding of the Adjudicating Authority that a sum of Rs. 18,86,00,000/- was again disbursed to the 'Corporate Debtor' is not supported by any evidence. The 'Corporate Debtor' has filed the document to prove that he has repaid the said amount through RTGS transfer to the account of the 'Financial Creditor'.

21. During the argument, it is admitted by the parties that previous petition filed by the 'Financial Creditor' was withdrawn. The document (s) filed in the earlier petition, which was dismissed as withdrawn, could not have been relied on by the Adjudicating Authority. Therefore, it is clear that finding of the Adjudicating Authority that a sum of Rs. 18,86,00,000/- was again disbursed to the 'Corporate Debtor' by the 'Financial Creditor' which is still due and payable is erroneous, without any basis and un-sustainable.

22. In effect, order (s) passed by Ld. Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account and all other order (s) passed by Adjudicating Authority pursuant to impugned order and action taken by the 'resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by the 1st Respondent under Section 7 of the I&B Code is dismissed. The Adjudicating Authority will now close the proceeding. The 2nd Respondent Company is released from all the rigour of proceedings and

is allowed to function independently through its Board of Directors from immediate effect. 'Interim Resolution Professional'/'Resolution Professional' will hand over the management and records of the 'Corporate Debtor'.

The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' for the period he has functioned which shall be paid by the 'Financial Creditor'. The appeal is allowed with aforesaid observation and direction, there shall be no order as to cost.

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

[Kanthi Narahari]
Member (Technical)

[V. P. Singh]
Member (Technical)

NEW DELHI

5th December, 2019

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