

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.710 of 2019

[Arising out of Order dated 14.06.2019 passed by National Company Law Tribunal, New Delhi Bench-III in CA No.101/C-III/ND/2019 - C.P.No.IB-464/(ND)/2017]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Saumil A. Bhavnagri
R/o 601, Parshwa
Tower, 132 Feet Ring
Road, Satellite,
Ahmedabad – 380015

Appellant

Versus

1. Messers Nimit Builders
Private Limited,
Through its Director,
83/2, 2nd Floor
Back Side,
Bharatnagar,
N.D – 110025

Financial Creditor

Respondent No.1

2. Messers Jeevan Jyoti
Vanijya Limited
Through
Mr. Deepak Sarpuriya,
210, Hubtowns,
Off Western
Express Highway,
Jogeshwari (East)
Mumbai – 400060

Corporate Debtor

Respondent No.2

For Appellant:

Shri Dinkar Singh, Advocate

For Respondents:

**Shri Ashish Aggarwal and Shri Gurcharan
Singh, Advocate (Respondent No.1)**

**Shri Ahsan Ahmad, Advocate (for Resolution
Professional)**

J U D G E M E N T
(21st November, 2019)

A.I.S. Cheema, J. :

1. Nimit Builders Private Limited (Financial Creditor) filed Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench-III) having No. C.P. IB-464/(ND)/2017, against Jeevan Jyoti Vanijya Limited (Corporate Debtor). The Application was admitted on 15th January, 2019.

The Corporate Debtor then filed Application under Rule 11 (CA No.101/C-III/ND/2019) before the Adjudicating Authority to recall the Order of admission which has been dismissed with costs and hence, the present Appeal.

2. The Financial Creditor in the Application under Section 7 claimed that it had disbursed a loan of Rs.3,00,00,000/- on 2nd May, 2017 and that there was default in repayment. The Financial Creditor served Notice dated 12th August, 2017 on the Corporate Debtor. The Corporate Debtor had appeared before the Adjudicating Authority and claimed that there is a compromise and payment will be made. The Adjudicating Authority after considering the Application, Reply and the submissions had admitted the Application on 15th January, 2019. In the subsequent CA 101/2019, Corporate Debtor moved the Adjudicating Authority to recall the Order, now claiming that it was a NBFC (Non-Banking Finance Company) registered on 1st January, 2003 having Registration No.B.14.00908 and

claimed that the Application could not have been admitted against the Respondent – Corporate Debtor. The Adjudicating Authority heard both the sides. The Financial Creditor claimed that the certificate granted by the Reserve Bank of India was subject to certain terms and conditions. The learned Adjudicating Authority was of the view that it was not vested with power to revisit the final Order of admission, by way of review or recall of Order. The Adjudicating Authority observed that it was mindful that CIRP cannot be initiated against the corporate person who has been excluded from the purview of the definition of the corporate person and such exercise would be in excess of its jurisdiction. The Adjudicating Authority was of the view that Corporate Debtor was required to establish that it was rendering financial services as defined under Section 3(16) of IBC and that it is financial service provider as defined under Section 3(17) of IBC which would require appreciation of evidence. After recording such and other reasons, the Adjudicating Authority declined to recall the Order and rejected the CA 101/2019 with costs of Rs.50,000/-.

3. We have heard Counsel for both sides. The present Appeal has been filed by shareholder of the Corporate Debtor. It is claimed in the Appeal and it has been argued for the Appellant that in December, 2017, when Adjudicating Authority issued Notice to the Corporate Debtor, the Financial Creditor and Corporate Debtor both entered into compromise agreement in April, 2018 and Corporate Debtor had agreed to pay unpaid amount by equal monthly instalments and undated cheques had been

issued. However, the Application under Section 7 came to be admitted. The Appellant for Corporate Debtor claims that it is non-banking finance company and documents in that connection, have been filed on record and that under Section 3(7) of IBC where definition of “Corporate Person” is given, “Financial Service Provider” has been excluded and thus, provisions of IBC could not have been invoked against the Appellant – Corporate Debtor.

4. The Respondent No.1 – Financial Creditor has filed Reply in the Appeal and it has been argued for the Financial Creditor that when the Application under Section 7 had come up, the Corporate Debtor has not at that stage claimed that it was engaged in accepting deposits, administering assets belonging to other persons, effecting contract of insurances, managing assets belonging to another person or any other services as referred to in Section 3(16) of IBC. It is the case of Financial Creditor that the grant of Certificate dated 1st January, 2003 to the Appellant – Corporate Debtor was subject to terms and conditions as stipulated on the reverse of the Certificate as well as in the terms and conditions as specified in the letter dated 2nd January, 2003 issued by RBI. It is claimed that nothing has been placed on record that the said conditions were fulfilled. It is argued that the Certificate issued did not permit the Appellant – Corporate Debtor to accept public deposits. The Financial Creditor has also in Reply referred to the settlement which was

entered into with the Corporate Debtor in April, 2018 (Copy of which has been filed at Annexure - B - Diary No.14195).

5. The Appellant in Rejoinder has filed copy of its balance sheets for Financial Year 2016 – 2017 and 2017 – 2018 as well as certified copy of the list of NBFC issued by RBI which reflects the name of the Corporate Debtor. The Appellant has filed copies of statutory certificates for the years 2015 – 2016 to 2017 – 2018 and also certified copies of Annual Returns of 2016 – 2017 and 2017 – 2018. Copy of the letter of RBI dated 2nd January, 2003 as well as the Certificate of Registration as NBFC dated 1st January, 2003 is also placed on record. The learned Counsel for the Appellant at the time of arguments also tendered the conditions attached to the above certificate B.14.00908.

6. At the time of arguments, Counsel for the Appellant strenuously argued to show that the Appellant – Corporate Debtor is an NBFC and also working as NBFC and thus, did not fall under the definition of Corporate Person. Against this, the learned Counsel for Respondent (Financial Creditor) referred to the Certification of Registration as NBFC to submit that it was issued with certain conditions and the conditions were required to be examined if the same were complied and if those conditions fall under the definition of financial service as defined in Section 3(16). It is argued that accepting of public deposits was not allowed to the Corporate Debtor.

Section 3(7) reads as under:-

“(7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;”

Section 3(16) is as follows:-

“(16) "financial service" includes any of the following services, namely:—

- (a) accepting of deposits;
- (b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;
- (c) effecting contracts of insurance;
- (d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;
- (e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of—
 - (i) buying, selling, or subscribing to, a financial product;
 - (ii) availing a financial service; or
 - (iii) exercising any right associated with a financial product or financial service;
- (f) establishing or operating an investment scheme;
- (g) maintaining or transferring records of ownership of a financial product;

- (h) underwriting the issuance or subscription of a financial product; or
- (i) selling, providing, or issuing stored value or payment instruments or providing payment services;”

Section 3(17) is as follows:-

“(17) "financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;”

7. Having heard the parties and having gone through the matter, we find that the present case is squarely covered by a Judgement of this Tribunal in the matter of **“Housing Development Finance Corporation Ltd. vs. RHC Holding Private Ltd.”** in Company Appeal (AT) (Insolvency) No.26 of 2019 delivered on 10th July, 2019. In that matter, Section 7 Application against M/s. RHC Holding Private Ltd. (Corporate Debtor) had been rejected giving rise to the Appeal. The Appellant – HDFC claimed that the Corporate Debtor in that matter was not Financial Service Provider. In that matter also, the Corporate Debtor had been issued Certificate by RBI as NBFC and had not been allowed to accept public deposits. Division Bench of this Tribunal had considered the relevant provisions and after referring to the definition of “financial service” as given in Section 3(16) (supra), it was observed:-

“13. The definition of ‘financial services’ as defined in Section 3(16) of I&B Code is not limited to the 9 activities as shown at Clause (a) to (i) of Section 3(16).

The aforesaid Clauses (a) to (i) are inclusive which means there are other services which come within the meaning of “financial services.

14. The Registration Certificate issued by RBI shows that it has granted certificate to commence/carry on business of “non-banking financial services”. However, the Respondent has not been allowed to accept the public deposit and such certificate is condition to other conditions as provided in the back of the Certificate.”

Reference was made by this Tribunal to Chapter III of Reserve Bank of India Act, 1934 which relates to “Provisions Relating to Non-Banking Institutions Receiving Deposits and Financial Institutions”; Section 45-I(a) and (c) as well as (f) to consider “financial institutions” and “non-banking financial company” and it was found:-

“19. Therefore, it is clear that the Respondent, a non-banking financial institution is carrying on business of financial institution and thereby it being financial service provider do not come within the meaning of Corporate Person/Corporate Debtor.

20. So far as the allegation that the Respondent, Non-Banking Finance Company, is taking deposits from others in violation of conditions imposed by the Reserve Bank of India, such issue cannot be decided by the Adjudicating Authority while considering an Application under Section 7 or 9 of the I&B Code. Only on such ground the Adjudicating Authority cannot admit or reject an application under Section 7 or 9 of the I&B Code. If the terms and conditions imposed by Reserve Bank of India or there is violation of any of the provision of Reserve Bank of India, one may bring the same to the notice of Reserve Bank of India and not before the Adjudicating Authority.”

This Bench finds itself in agreement with the law as explained by the Division Bench of this Tribunal (to which one of us – Justice A.I.S.

Cheema was also Member). The definition of Corporate Person in Section 3(7) of IBC specifically provides that it shall not include “any financial service provider”. Considering the Certificate issued by the Reserve Bank of India and also documents as placed on record by the Appellant – Corporate Debtor, we have no hesitation to hold that the Corporate Debtor in the present matter on date of Application being financial service provider, the provisions of IBC could not have been invoked against the Corporate Debtor. It would not be in the realm of Adjudicating Authority and thus, for this Tribunal to go into the details whether the conditions attached have been followed or not by the NBFC as held in the matter of HDFC (supra). If there is any violation of conditions, the aggrieved person may bring it to the notice of RBI to look into the same. According to us, whenever the Corporate Debtor demonstrates that it is financial service provider and supports the claim with evidence by Certificate by Reserve Bank of India, it is appropriate for the Adjudicating Authority to lay off its hands from such Corporate Debtor considering the definition of “Corporate Person”, under Section 3(7).

8. We do not find fault with the Impugned Order of Adjudicating Authority where it observed that it does not have jurisdiction to recall its Order of admission but do not agree with its other findings referred earlier and imposing of costs. However, this Tribunal has jurisdiction in Appeal to consider whether initiation of CIRP process against the Corporate Debtor is legal or not. As we find that the Corporate Debtor in the present matter is NBFC and being financial service provider, Section 7 Application

could not have been admitted against such Corporate Debtor, we set aside not only the Impugned Order but also the original Order dated 15th January, 2019 passed by the Adjudicating Authority admitting the Application under Section 7 of IBC.

9. In the facts and circumstances for reasons stated above, we quash and set aside the impugned order dated 14.06.2019 as well as Order dated 15.01.2019 admitting the Section 7 Application under IBC as well as further steps taken on admission of the Application and release the 'Corporate Debtor' from rigour of 'Corporate Insolvency Resolution Process'. The 'Interim Resolution Professional'/RP will handover the assets and records of the 'Corporate Debtor' to Promoters/Board of Directors of Corporate Debtor. The Adjudicating Authority will close the proceeding. The fees of IRP/RP and CIRP costs incurred will be settled by the Adjudicating Authority which Financial Creditor who initiated the Section 7 Application, will pay.

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

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

/rs/md