

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 592 of 2018

(arising out of order dated 21st August, 2018 passed by National Company Law Tribunal, Principal Bench, New Delhi in Company Petition No. (IB)-361(PB)/2018)

IN THE MATTER OF:

Ravinder Pal Singh Lamba
H. No. E. 28, Bali Nagar,
New Delhi – 110 015

...Appellant

Versus

Satkar Air Cargo Services Pvt. Ltd.
B-72, 2nd Floor, Rohit House,
Vishwakarma Colony,
Tughlakabad,
M.B. Road,
New Delhi – 110 044.

...Respondent

Present:

For Appellant : **Mr. Pankaj Jain and Ms. Dhriti Sarin, Advocates**

For Respondent : **Mr. Vaibhav Dabas, Advocate**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by ‘Ravinder Pal Singh Lamba, who claims to be a ‘Financial Creditor’ against judgment dated 21st August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi dismissing the application under Section 7 of the ‘Insolvency and Bankruptcy Code, 2016 (for short, ‘the **I&B Code**’) filed by the appellant. The only question that arises for consideration in this appeal is whether the appellant

comes within the meaning of 'Financial Creditor' as defined under Section 5(7) r/w (8) of the 'I&B Code'.

2. Learned counsel for the appellant referring to the amount disbursed by the Appellant submitted that the same was a 'long term loan' for the consideration of time value of money.

3. On the other hand, according to the learned counsel for the respondent, the amount paid by the Appellant does not come within the meaning of 'Financial Debt' as defined under Section 5(8). Reliance has also been made on certain decisions of this Appellate Tribunal including "**Dr. B.V.S. Lakshmi vs. Geometrix Laser Solutions Private Limited – Company Appeal (AT) (Insolvency) No. 38 of 2017**" decided on 22nd December, 2017 and "**Vishwa Nath Singh vs. Visa Drugs & Pharmaceuticals Pvt. Ltd. – Company Appeal (AT) (Insolvency) Nos. 234-235 of 2017**" decided on 13th December, 2017 wherein on the basis of the record this Appellate Tribunal held that Appellants therein do not come within the meaning of 'Financial Creditor'.

4. The case of the appellant is that the Appellant advanced loan of Rs. 80,00,000 (Rupees Eighty Lakhs only) to the 'Corporate Debtor' between 26th March, 2011 and 16th April, 2013 on the basis of mutual discussion and arrangement with Mr. Aman Preet Singh Bawa, Promoter/Director of the 'Corporate Debtor'. In spite of repeated demands by the Appellant, the 'Corporate Debtor' failed to pay Rs. 1,77,71,974 i.e. Rs. 80,00,000/- towards principal loan and Rs.97,71,974/- towards interest @ 18% on the principal loan amount. In this background, Form 1 was filed by the Appellant.

5. According to respondent, M/s. Satkar Air Cargo Services Pvt. Ltd. is one of the group companies namely – 'Satkar Air Cargo Services Pvt. Ltd.', 'Satkar

Terminals Ltd.', 'Satkan Logistics Pvt. Ltd.' and 'Satkan Container Lines Pvt. Ltd.'. The said group of companies is engaged in the business of logistics and freight forwarding throughout the world. According to the respondent, the Appellant along with his son namely Mr. Gursimran Singh Lamba, who are related to the Promoter Directors of the said Companies, approached them with a request to allow the Appellant and his son to enter into the business of logistics and freight forwarding so that Mr. Gursimran Singh Lamba i.e. the son of the Appellant can learn and enter into the said business. During the initial meetings, the Appellant as well as his son namely Mr. Gursimran Singh Lamba had assured the Promoter Directors of the abovementioned group of Companies that Mr. Gursimran Singh Lamba was capable of looking after the day today affairs of the business and accordingly a request was made by the Appellant to incorporate a new Company to carry on the business of Air Cargo. Thus, Satkar Air Cargo Services Private Limited was incorporated with Mr. Gursimran Singh Lamba as one of the Promoter Shareholder and a Promoter Director. Also, the Appellant's son Mr. Gursimran Singh Lamba was inducted as Director and/or shareholders in other group of companies as detailed herein above.

6. Further, according to the Respondent, the Respondent herein namely M/s Satkar Air Cargo Services Pvt Ltd was incorporated with Mr. Gursimran

Singh Lamba as one of the Promoter Shareholders and a Promoter Director as per the request of the Appellant. As per the terms of the agreement, investment was made by the Appellant as well as his son namely Mr. Gursimran Singh Lamba in the Respondent Company and it was a clear understanding that whatever money was provided by the Appellant was not given as a loan "**but was an investment on the part of the Appellant as well as his son namely Mr. Gursimran Singh Lamba for running the business of Satkar Air Cargo Services Private Limited**". Hence, there is no question of the alleged demand as being made by the Appellant from the Respondent Company.

7. Further, it was agreed between the Appellant, his son namely Mr. Gursimran Singh Lamba and other promoters of the abovementioned group of companies that the air cargo business which was to be run under the name and style of Satkar Air Cargo Services Pvt. Ltd. shall be jointly run with Mr. Gursimran Singh Lamba being one of the Promoter Director and shareholder of the Company. Upon incorporation of the Respondent Company, Mr. Gursimran Singh Lamba was inducted as one of the director in the company and was given the responsibility of independently running the business of the company through the company office situated at Mahipalpur, New Delhi. However, Mr. Gursimran Singh Lamba mishandled the said business and as

a result, the Respondent Company suffered huge losses. In fact, many of the customers of the Respondent Company refused to pay the outstanding dues by citing not only negligence and carelessness but also on the ground of poor services and gross misbehaviour on the part of Mr. Gursimran Singh Lamba, who was handling the entire business. In view of such poor services, the Respondent company was constrained to close down its office situated at Mahipalpur, New Delhi and had carried out the growth of the business of Satkar Air Cargo Services Pvt. Ltd. from the corporate office of the above-mentioned group of companies. On account of the losses suffered by the Respondent Company, the Appellant as well as his son namely Mr. Gursimran Singh Lamba requested the Promoter Directors of the Group of Companies for additional responsibilities to look after the affairs of Satkar Terminals Ltd. It was assured by the Appellant as well as his son namely Mr. Gursimran Singh Lamba that given a chance, Mr. Gursimran Singh Lamba would show his administrative and business skills and further assured that Satkar Terminals Limited would do extremely good business. Upon such assurances, Mr. Gursimran Singh Lamba was given the responsibility to perform the overall functions of 'Satkar Terminals Limited' including sale and business, development, employees' recruitment, statutory compliance, operational activities, cash and bank accounts handling, payments and recovery etc.

Further, on requests made by the Appellant as well as Mr. Gursimran Singh Lamba, independent responsibility was given to Mr. Gursimran Singh Lamba to handle Satkar Terminals Limited and the same is also evident from the various communications which were exchanged between Mr. Gursimran Singh Lamba exclusively with various clients of the Company, associates, vendors, employees, land owners etc.

8. From the aforesaid statement of the ‘Corporate Debtor’, we find that the plea has been taken that the appellant and his son Mr. Gursimran Singh Lamba were provided with the amount not as a loan but as an investment on the part of the appellant as well as his son namely – Mr. Gursimran Singh Lamba for running the business of ‘Satkar Air Cargo Service Pvt. Ltd.’ This is evident from the statement made in the reply as made at paragraph 4 and highlighted above.

9. The appellant has also produced the record of ‘M/s. Satkar Air Cargo Services Pvt. Ltd.’ for the financial year 2015-16 wherein at “Note No. 4 – Long – Term Borrowings” the name of Mr. Ravinder Pal Singh Lamba is shown as unsecured lender of Rs. 65 Lakhs, relevant of which reads as follows:

(F.Y. 2015-16)

Note No. 4 Long-term borrowings

₹ in rupees

Particulars	As at 31 st March, 2016			As at 31 st March, 2015		
	Non-Current	Current Maturities	Total	Non-Current	Current Maturities	Total
Term Loan From Banks- ICICI Bank Ltd. secured	61,539.00	76,443.00	1,37,982.00	1,34,107.00	3,71,928.00	5,06,035.00
	61,539.00	76,443.00	1,37,982.00	1,34,107.00	3,71,928.00	5,06,036.00

Loans and advances from related parties	50,00,000.00	0.00	50,00,000.00	50,00,000.00	0.00	50,00,000.00
Harmandeep Singh Khurana Unsecured	65,00,000.00	0.00	65,00,000.00	65,00,000.00	0.00	65,00,000.00
Ravinder Pal Singh Lamba Unsecured						
	1,15,00,000.00	0.00	1,15,00,000.00	1,15,00,000.00		1,15,00,000.00
The above Amount includes						
Secured Borrowings	61,539.00	76,443.00	1,37,982.00	1,34,107.00	3,71,928.00	5,06,035.00
Unsecured Borrowings	1,15,00,000.00	0.00	1,15,00,000.00	1,15,00,000.00	0.00	1,15,00,000.00
Amount Disclosed under the Head "Other Current Liabilities (Note No. 8)		(76,443.00)	(76,443.00)		(3,71,928.00)	(3,71,928.00)
Net Amount	1,15,61,539.00	0	1,15,61,539.00	1,16,34,107.00	0	1,16,34,107.00

10. Section 5(7) defines 'Financial Creditors' and Section 5(8) defines 'Financial Debt' as follows:

- (7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;
- (8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the

consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on nonrecourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the*

market value of such transaction shall be taken into account;

- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”*

11. In the present case, it is admitted that the appellant Mr. Ravinder Pal Singh Lamba has invested the money for running the business of ‘M/s. Satkar Air Cargo Services Pvt. Ltd.’ (‘Corporate Debtor’), as accepted in the pleadings of the respondent. The record also shows that it is a ‘long term borrowing’. Therefore, it is clear that the amount was disbursed by the appellant against the consideration for time value of money and the ‘Corporate Debtor’ is shown as ‘long-term borrowings’ for running the company. For the reason aforesaid, we hold that the appellant comes within the meaning of ‘Financial Creditor’, as the amount disbursed comes within the meaning of ‘Financial Debt’. The Hon’ble Supreme Court in *“Innoventive Industries Ltd. v. ICICI Bank - (2018) 1 SCC 407* held that Section 3(b) which defines ‘claim’ to mean a right of payment even if it is disputed. The Hon’ble Supreme Court further held that Section 7 stands in contrast with the scheme under Section 8 where an ‘Operational Creditor’, on the occurrence of default, has right to show the existing dispute. On the other hand, in the case of ‘Corporate Debtor’ who commits a default of ‘financial debt’,

the Adjudicating Authority has merely to see the records of information utility or other evidence produced by the 'Financial Creditor' to satisfy itself that a default had occurred. This is evident from the relevant portion of the judgment, which is as follows:

“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.

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- 29.** *The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the*

corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

- 30.** *On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”*

12. In the present case, it is not in dispute that the ‘Corporate Debtor’ has defaulted in making payment and record shows that the appellant has disbursed the amount and therefore has right to claim. Having held that the appellant comes within the definition of ‘Corporate Debtor’, we are of the view that the application filed by the appellant under Section 7 was required to be admitted by the Adjudicating Authority, but the Adjudicating Authority having failed to consider the matter in proper perspective, we set aside the impugned order dated 21st August, 2018 and remit the case to the Adjudicating Authority (National

Company Law Tribunal), Principal Bench, New Delhi to admit the application under Section 7 after notice to the 'Corporate Debtor', who in the meantime, may settle the claim. The appeal is allowed with aforesaid observations and directions. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

New Delhi

23rd April, 2019.

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