

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 322 of 2019**

(Arising out of Order dated 11<sup>th</sup> March, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CP (IB) No. 1340/KB/2018 along with CA (IB) No. 1110/KB/2018)

**IN THE MATTER OF:**

**Suraksha Asset Reconstruction Pvt. Ltd. ...Appellant**

**Vs.**

**Jindal Steel and Power Limited & Anr. ...Respondents**

**Present: For Appellant: - Mr. Arun Kathpalia, Senior Advocate with Mr. C.A. Sinha and Ms. Sonali Khanna, Advocates.**

**For Respondents:- Mr. Ratnanko Banerji, Senior Advocate with Mr. Karan Batura and Ms. Priyal Chaturvedi, Advocates.**

**Company Appeal (AT) (Insolvency) No. 255 of 2019**

(Arising out of Order dated 11<sup>th</sup> March, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CP (IB) No. 1340/KB/2018 along with CA (IB) No. 1110/KB/2018)

**IN THE MATTER OF:**

**Sh. Arun Kumar Jagatramka ...Appellant**

**Vs.**

**Jindal Steel and Power Limited & Anr. ...Respondents**

**Present: For Appellant: - Mr. Abhijit Sinha, Mr. Sandeep Bajaj, Mr. Soayib Qureshi, Mr. Deepanjan Dutta, Mr. Vikas Maini, Mr. Aditya Shukla and Mr. Saikat Sarkar, Advocates.**

**For Respondents:- Mr. Ratnanko Banerji, Senior Advocate with Mr. Karan Batura, Advocate.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

**Company Appeal (AT) (Insolvency) No. 322 of 2019**

‘Jindal Steel and Power Limited’- (1<sup>st</sup> Respondent) filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) against ‘Bharat NRE Coke Limited’- (‘Corporate Debtor’) which has been admitted by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, by impugned order dated 11<sup>th</sup> March, 2019. The Appellant, a ‘Financial Creditor’ has challenged the aforesaid order.

2. Learned counsel appearing on behalf of the Appellant submitted that ‘Jindal Steel and Power Limited’ do not come within the meaning of the ‘Financial Creditor’ as defined under Section 5(7) read with Section 5(8) of the ‘I&B Code’.

3. Further, it was submitted that an Arbitral Award cannot be treated as a ‘financial debt’.

4. According to learned counsel, the following transactions had taken place:

- a. On 27<sup>th</sup> August, 2013, a 'Coal Purchase Agreement', was entered between 'Gujarat NRE' and the 1<sup>st</sup> Respondent for the supply of 50,000 MT of Coal. The 1<sup>st</sup> Respondent advanced an amount of 39,00,00,000/- for the purchase of coal which was secured by way of pledge of shares owned by 'Gujarat NRE' and 'Gujarat NRE Mineral Resources Limited' (now merged with the 'Corporate Debtor').
- b. Subsequently, dispute arose between 'Gujarat NRE' and 1<sup>st</sup> Respondent for the non-supply of Coke, which culminated into Arbitration and a consequent Award dated 16<sup>th</sup> August, 2016 was passed, which has been upheld by the Hon'ble Delhi High Court, vide order dated 1<sup>st</sup> February, 2017.
- c. The 1<sup>st</sup> Respondent, in the capacity of an 'Operational Creditor', had issued a Demand Notice under section 8 of the Code to 'Gujarat NRE'. However, as the 'Corporate Insolvency Resolution Process' of 'Gujarat NRE' had already commenced based on an application under section 10 of the Code, the 1<sup>st</sup> Respondent submitted its claim to the 'Resolution Professional' as an 'Operational Creditor' under Form-B.
- d. Thereafter, 1<sup>st</sup> Respondent invoked the pledged shares of the 'Corporate Debtor' in satisfaction of the 'Share Pledge Agreement'. The said shares (2,00,00,000 in number) were confiscated on 24<sup>th</sup> March, 2017 by 'SMC Global Securities Limited'. A value worth INR 57,00,00,000/- (Rupees Fifty-Seven

Crores only) was assigned to these shares.

- e. Despite, the obligation of the 'Corporate Debtor' being limited to the pledged shares, which was discharged on account of their invocation by 1<sup>st</sup> Respondent, an application under section 7 of the Code was filed by 1<sup>st</sup> Respondent before the Adjudicating Authority purportedly on the basis of the Arbitral Award dated 16<sup>th</sup> August, 2016.

5. Learned counsel for the Appellant relied on the decision of this Appellate Tribunal in ***“Dr. Vishnu Kumar Agarwal v. M/s. Piramal Enterprises Limited– Company Appeal (AT) (Insolvency) Nos. 346 & 347 of 2018”*** disposed of on 8<sup>th</sup> January, 2019 to suggest that for same claim, the 'Financial Creditor' cannot trigger 'Corporate Insolvency Resolution Process' against two 'Corporate Debtor(s)'.

6. It was further submitted that there is no 'financial debt' as the transaction under the 'Coal Purchase Agreement' is in the nature of provisioning of goods and services and that too by 'Gujarat NRE Coke Limited' not by 1<sup>st</sup> Respondent. Therefore, the 1<sup>st</sup> Respondent did not provide any service but on the contrary was a recipient of a service.

7. It was further submitted that the Award dated 16<sup>th</sup> August, 2016 stands satisfied since, 'Gujarat NRE Mineral Resources Limited' had pledged 1 Crore shares, as security, for the discharge of obligation of 'Gujarat NRE Coke Limited' in terms of 'Coal Purchase Agreement'. The

obligation of the 'Corporate Debtor' under the 'Coal Purchase Agreement' dated 27<sup>th</sup> August, 2013 was merely that of a pledger, by virtue of 'Gujarat NRE Mineral Resources Limited' having been amalgamated into it could only be construed to have the same liability as 'Gujarat NRE Mineral Resources Limited' and nothing more.

8. Learned counsel appearing on behalf of 1<sup>st</sup> Respondent submitted that the appeal under Section 61 is not maintainable as the Appellant is a 'Financial Creditor' and not an aggrieved person.

9. It was further submitted on the ground that the debt of the Appellant is being regularly serviced, the impugned order cannot be challenged. The Appellant's share in the 'Committee of Creditors' of the 'Corporate Debtor' being less than 4%, no prejudice shall be caused to the Appellant as the voting share of other 'Financial Creditors' is approx. 96% who have not appealed against the impugned order.

10. According to counsel for the 1<sup>st</sup> Respondent- the 'Jindal Steel and Power Limited' come within the meaning of 'Financial Creditor' as defined under Section 5(7) read with Section 5(8) of the 'I&B Code'. It fulfils each and every requirement of provisions.

11. Learned counsel for the 1<sup>st</sup> Respondent placed reliance on 'Coal Purchase Agreement' entered into between 'Gujarat NRE Coke Limited', 'Gujarat NRE Mineral Resources Limited' (now merged with the 'Corporate Debtor') wherein it is specifically encapsulated that the

advance payment made was to be adjusted against the supply of coal and in the event of non-performance, interest @ 30% p.a. (compounded annually) on the unadjusted advance payment was to be paid to the 1<sup>st</sup> Respondent which fulfils the requirement of 'time value for money'.

12. Admittedly, 'Jindal Steel and Power Limited' disbursed amount for purchase of coal from 'Gujarat NRE Coke Limited' and 'Gujarat NRE Mineral Resources Limited' (now merged with the 'Corporate Debtor') with clear stipulation that in the event of non-performance, interest @ 30% p.a. on the unadjusted advance payment is to be paid. In the event of non-performance, the amount so invested will be deemed to have been paid as consideration for time value of money.

13. It is not in dispute that the 'Gujarat NRE Mineral Resources Limited'- ('Corporate Debtor') since amalgamation failed to perform its duty, for the said reason, the Award was passed in favour of the 1<sup>st</sup> Respondent. Therefore, the amount disbursed by the 1<sup>st</sup> Respondent- 'Jindal Steel and Power Limited' to the 'Corporate Debtor' on failure, performance became 'time value for money' as the 1<sup>st</sup> Respondent is entitled for interest @ 30% p.a. on the unadjusted advance payment as allowed by the Arbitral Tribunal. Therefore, we hold that the 1<sup>st</sup> Respondent comes within the meaning of the 'Financial Creditor'.

14. The decision of this Appellate Tribunal in "**Dr. Vishnu Kumar Agarwal v. M/s. Piramal Enterprises Limited**" (Supra) relates to

triggering 'Corporate Insolvency Resolution Process' by same 'Financial Creditor' against two different 'Corporate Debtor', one the 'principal borrower' and the other 'guarantor'. In the said case, this Appellate Tribunal by judgment dated 8<sup>th</sup> January, 2019 observed and held as follows:

*"31. The matter can be looked from another angle. The question arises whether the 'Financial Creditor'- ('M/s. Piramal Enterprises Ltd.') can claim same amount of Rs. 40,28,76,461/- from the 'Resolution Professional' appointed pursuant to the 'Corporate Insolvency Resolution Process' against the 'Corporate Guarantor No.1' ('Sunrise Naturopathy and Resorts Pvt. Ltd. '), as also from the 'Resolution Professional' appointed pursuant to 'Corporate Insolvency Resolution Process' initiated against 'Sunsystem Institute of Information Technology Pvt. Ltd.'- ('Corporate Guarantor No.2')? Admittedly, for same set of debt, claim cannot be filed by same 'Financial Creditor' in two separate 'Corporate Insolvency Resolution Processes'. If same claim cannot be claimed from 'Resolution Professionals' of separate 'Corporate Insolvency Resolution Processes', for same claim amount and default, two*

*applications under Section 7 cannot be admitted simultaneously. Once for same claim the 'Corporate Insolvency Resolution Process' is initiated against one of the 'Corporate Debtor' after such initiation, the 'Financial Creditor' cannot trigger 'Corporate Insolvency Resolution Process' against the other 'Corporate Debtor(s)', for the same claim amount (debt).*

32. *There is no bar in the 'I&B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no application can be filed by the*



*‘Financial Creditor’ against two or more ‘Corporate Debtors’ on the ground of joint liability (‘Principal Borrower’ and one ‘Corporate Guarantor’, or ‘Principal Borrower’ or two ‘Corporate Guarantors’ or one ‘Corporate Guarantor’ and other ‘Corporate Guarantor’), till it is shown that the ‘Corporate Debtors’ combinedly are joint venture company.”*

15. In the present case, the Appellant has not triggered any application under Section 7 or Section 9 against ‘Gujarat NRE Coke Limited’ which is undergoing liquidation. ‘Gujarat NRE Coke Limited’ filed application under Section 10 on the basis of which ‘Corporate Insolvency Resolution Process’ was started. The Appellant has triggered ‘Corporate Insolvency Resolution Process’ only against ‘Bharat NRE Coke Limited’- (‘Corporate Debtor’), therefore, it cannot be held that the Appellant had triggered two ‘Corporate Insolvency Resolution Process’ against two different sets of the ‘Corporate Debtor’ for same set of claim.

16. So far as the claim of 1<sup>st</sup> Respondent is concerned; it has not been made clear as to whether the claim against ‘Gujarat NRE Coke Limited’ arises out of same agreement based on which application under Section 7 has been preferred against ‘Bharat NRE Coke Limited’- (‘Corporate Debtor’).

17. Further, even if it is admitted that it is for the same set of claim, it is for the 1<sup>st</sup> Respondent to decide before which 'Resolution Professional' it will raise its claim i.e. the 'Resolution Professional' of 'Bharat NRE Coke Limited' or the 'Resolution Professional' of 'Gujarat NRE Coke Limited'.

18. An aggrieved person can prefer an appeal under Section 61, which reads as follows:

***“61. Appeals and Appellate Authority. - (1)***  
*Notwithstanding anything to the contrary contained under the Companies Act 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal. ....”*

19. The present appeal has not been preferred by the Director or Promoter of the 'Corporate Debtor' but by one of the 'Financial Creditor' of the 'Corporate Debtor'. The Appellant being 'Financial Creditor' of the 'Corporate Debtor' cannot be said to be an aggrieved person, against the order of initiation of the 'Corporate Insolvency Resolution Process'. Initiation of the 'Corporate Insolvency Resolution Process' in no manner will affect the right of the Appellant- who is a 'Financial Creditor' and has a right to submit its claim before the 'Resolution Professional'.

20. Further the 'Financial Creditors' of the 'Corporate Debtor' having 96% of the voting shares have also not raised any such plea. In fact, it appears that the contest between the Appellant and the 1<sup>st</sup> Respondent is whether 1<sup>st</sup> Respondent can be a member of the 'Committee of Creditors' or not which cannot be decided by this Appellate Tribunal while deciding the question of initiation of the 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'.

We find no merit in this appeal. It is accordingly dismissed. No costs.

**Company Appeal (AT) (Insolvency) No. 255 of 2019**

21. This appeal has been preferred by Sh. Arun Kumar Jagatramka, Promoter of 'Bharat NRE Coke Limited'- ('Corporate Debtor') against the same very impugned order dated 11<sup>th</sup> March, 2019.

22. This Appellant has also taken similar plea that the 1<sup>st</sup> Respondent has no 'financial debt' within the meaning of Section 5(8) of the 'I&B Code' and therefore, the 1<sup>st</sup> Respondent cannot be treated as a 'Financial Creditor' on the basis of Award dated 16<sup>th</sup> August, 2016.

23. Learned counsel for the Appellant/ Promoter has also relied on the decision of this Appellant Tribunal in "**Dr. Vishnu Kumar Agarwal v. M/s. Piramal Enterprises Limited**", as noticed above.

24. It is stated that initially the 1<sup>st</sup> Respondent had issued a Demand Notice under section 8 of the Code to 'Gujarat NRE'. However, as the 'Corporate Insolvency Resolution Process' of 'Gujarat NRE' started pursuant to an application under section 10 of the Code, no application was filed by the 1<sup>st</sup> Respondent.

25. In the present case, the Appellant- Promoter has taken plea that the 1<sup>st</sup> Respondent invoked the pledged shares in the 'Corporate Debtor' in satisfaction of the 'Share Pledge Agreement'. The said shares (2,00,00,000 in number) were confiscated on 24<sup>th</sup> March, 2017 by 'SMC Global Securities Limited'.

26. It was submitted that the 1<sup>st</sup> Respondent initially filed liquidation proceeding pursuant to the Award against the 'Corporate Debtor' which was withdrawn and thereafter filed application under Section 7.

27. Reliance has also been placed on the agreement, as noticed earlier.

28. In the present case, we have already held that the 1<sup>st</sup> Respondent comes within the meaning of 'Financial Creditor', as defined under Section 5(7) having disbursed the amount for consideration of time value of money as defined under Section 5(8).

29. We have also noticed the decision of this Appellate Tribunal in ***“Dr. Vishnu Kumar Agarwal v. M/s. Piramal Enterprises Limited”*** is not

applicable in the present case. The case of the Appellant being similar, the prayer made by the Appellant- Promoter is also rejected.

30. In the result, both the appeals are dismissed. No costs.

(Justice S.J. Mukhopadhaya)  
Chairperson

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

(Kanthi Narahari)  
Member(Technical)

NEW DELHI  
23<sup>rd</sup> July, 2019  
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