

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI BENCH**

**CHENNAI**

**T.A. No. 40 of 2021 in**

**Company Appeal (AT)(Insolvency) No.1087/2020**

**(Appeal filed u/s 61(1) of the I&B Code, 2016)**

**[Arising out of impugned order dated 13.11.2020 passed by the National Company Law Tribunal, Special Bench, Chennai in IBA/779/2019]**

**In the matter of:**

**S. Ravindranathan  
Ex-Director of Corporate Debtor  
MPL Parts and Services Pvt. Ltd.  
New No. 10, Old No. 5,  
Saradambal Street, Gokulam Colony,  
T Nagar,  
Chennai – 600017.**

**Appellant**

**Vs.**

**Sundaram BNP Paribas  
Home Finance Ltd.  
21 Patullos Road,  
Chennai – 600002.**

**Respondent No. 1**

**MPL Parts and Services Private Ltd.  
Through IRP : Mr. A. Mohan  
No. 31B, Enfield Avenue, 2<sup>nd</sup> Street,  
Madipakkam,  
Chennai – 600091.**

**Respondent No. 2**

**Present:**

**For Appellants : Mr. Rohan Rajasekaran, Advocate for Mr. Kartik Malhotra, Advocate.**

**For Respondents: Mr.S.Sathiyanarayanan, Advocate for Respondent No.1.**

**Mr. S. Venkateshan, Advocate for Respondent No.2**

**Coram: Mr. Justice M. Venugopal Actg. Chairperson  
Mr. Kanthi Narahari Member (T)**

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

**(Virtual Mode)**

**M. VENUGOPAL (J)**

**Preface:**

The “Appellant/Suspended Member of the Board of Directors” of Second Respondent/Corporate Debtor has preferred the instant Comp. App. (AT)(Ins) No.1087/2020 being aggrieved against the order dated 13.11.2020 in IBA/779/2019 (filed by the 1<sup>st</sup> Respondent/Applicant/Financial Creditor) under Section 7 of the I&B Code, 2016 R/w Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, passed by the Learned ‘Adjudicating Authority’ (‘National Company Law Tribunal’, Special Bench, Chennai.

2. The Adjudicating Authority (National Company Law Tribunal, Special Bench, Chennai) while passing the impugned order dated 13.11.2020 in IBA/779/2019 filed by the 1<sup>st</sup> Respondent/Applicant/Financial Creditor at paragraph 13 to 20 had observed the following:

*“13. Prima facie it is the contention of the Ld. Counsel for the Corporate Debtor that since the Financial Creditor has initiated recovery proceedings under the SARFAESI Act, 2002 by taking possession of the property under Section 13(4) of the SARFAESI Act, 2002 and as such the*

*Financial Creditor cannot initiate parallel proceedings under IBC, 2016 to recover the said sum from the Corporate Debtor. The identical issue fell for consideration before the Hon'ble NCLAT in the matter of **Rakesh Kumar Gupta V. Mahesh Bansal & anr** in Company Appeal (AT)(Insolvency) No. 1408 of 2019, dated 20.02.2020, wherein the Hon'ble NCLAT has held as follows:*

*".....Insolvency & Bankruptcy Code 2016 is subsequent Code to SARFAESI Act of 2002 and Recovery of Debts Due to Banks & Financial Institution Act, 1993 with provision of Moratorium under Section 14 and Section 238 giving the Provisions of the Code overriding effect on other laws. The Judgement relied on by Learned Counsel for Appellant does not appear to support the argument of learned Counsel for Appellant that if Bank had resorted to SARFAESI or proceeding before DRT, it is barred from resorting to IBC.*

*....The pendency of actions under the SARFAESI Act or actions "under the Recovery*

*of Debts Due to Banks and Financial Institutions Act, 1993 does not create obstruction for filing an Application under Section 7 of Insolvency and Bankruptcy Code, 2016, specially in view of Section 238 of IBC. The Application is more to bring about a Resolution of Corporate Debtor than any penal action or any recovery proceedings. We do not find any substance in the Appeal. The Appeal is dismissed. No costs.*

*14. It is also significant to refer to the decision of the Hon'ble Madras High Court in the matter of M/s Anandram Developers Pvt Ltd & Anr Vs The National Company Law Tribunal & Anr. in W.P. Nos. 29084 and 29085 of 2017 and W.M.P. Nos. 31321 to 31323 of 2017 decided on 17.11.2017, wherein it has held as follows:*

*“48. Further contention of the petitioners that the action of the 2<sup>nd</sup> Respondent in approaching the NCLT, would amount to forum shopping, also cannot be countenanced, for the reason, I&B Code, 2016, has been enacted, consolidating various enactments, such as , sick Industrial Companies (Special Provisions) Act, 1985; the*

*Recovery of Debts Due to the Banks and Financial Institutions Act, 1993 The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; Companies Act, 2003; Insolvency and Bankruptcy Law and other laws.*

*49. As per Section 238 of the Insolvency and Bankruptcy Code, 2016, provisions of the Code shall have the effect, notwithstanding anything inconsistent therewith, contained in any other law, for the time being in force or any instrument, has effect, by virtue of such power. As per sub-Section (4) of Section 60 of the Code, the National Company Law Tribunal is vested with all the powers of the Debts Recovery Tribunal, as contemplate under Part II of the Code, for the purpose of sub-section (2) of Section 60 of the Code and therefore, it is for the NCLT to consider, all the materials, and pass appropriate orders.*

*50. Code enables a financial creditor to make an application, under Section 7 of the Code, if the Adjudicating Authority is satisfied that default has not occurred or the application is complete and there is no disciplinary proceedings pending*

*against the proposed resolution professional, it may, by order, admit such application. Contention of the Learned Counsel that applications are mechanically admitted, cannot be accepted. Contention that approach of the 2<sup>nd</sup> Respondent to NCLT, amounts to forum shopping is not tenable, as the Code enables filing of an application, notwithstanding the pendency of any proceedings, under the SARFAESI Act, 2002. When the Code has not been stayed, the process envisaged in the Code, has to be continued, and cannot be restrained.”*

*15. The Hon’ble NCLAT also in the matter of Harkirat S Bedi Vs Oriental Bank of Commerce (2019) 108 taxmann.com 110 (NCLAT) held as under:*

*“From the aforesaid finding, it is evident that even if a claim is disputed and if the amount payable is more than Rupees 1 lakh, the application u/s 7 of the &B Code is maintainable. Mere pendency of the case before the DRT for adjudicating of such disputed amount cannot be a ground to reject the application u/ s7 of the I&B Code,*

*if the Adjudicating Authority is satisfied that there is a 'Debt' and 'default' and the application is complete. On the other hand, in view of Section 14 all such proceedings in respect of any debt will remain stayed and cannot proceed during the period of moratorium."*

16. *Thus, from the Judgement cited above, it is now trite that pendency of actions under the SARFAESI Act by the Financial Creditor is not a bar for filing an Application under Section 7 of IBC, 2016, especially in view of Section 238 of IBC. Further, the proceedings under IBC, 2016 cannot be said to be a parallel proceeding since the Application under Section 7 of IBC, 2016 is filed to bring about a Resolution for the Corporate Debtor, on the other hand the proceedings under SARFAESI Act, 2002 is for recovery of the amount which is due and payable to the Financial Creditor.*

17 *Under these circumstances, we are satisfied that there is a debt and default on the part of the Corporate Debtor and the Corporate Debtor is*

*unable to repay its dues to the Financial Creditor. It has also been consistently held by the Hon'ble Supreme Court both in Innoventive Industries Ltd Vs ICICI Bank and another (2018) 1 SCC 407 as well as Mobilox Innovations Pvt Ltd Vs Kirusa Software Pvt Ltd (2018) 1 SCC 353 after going through the Scheme of I&B Code, 2016 in depth in relation to an Application under Section 7 filed by a Financial Creditor as compared to the one filed under Section 9 by an Operational Creditor, in relation to a Section 7 Application where there is an existence of a 'financial debt' and its default is in excess of Rs.1,00, 000/- (now increased to Rs.1 Crore), this Tribunal is bound to admit the Application and as a consequence trigger the Corporate Insolvency Resolution Process (CIRP) and in relation to a Section 7 Application defence of set off or counter claim put forth by the Corporate Debtor cannot be considered as a dispute in relation to the Financial debt and default in relation to it.*

*18. It is also seen that the present Application has been filed before this Tribunal on*



*17.05.2020 and as such the Notification issued by the Central Government in this regard by increasing threshold limit from Rs.1 lakh to Rs. 1 crore would not apply to the facts and circumstances of the present case, as the amount claimed to be in default is already more than Rs.1 Crore.*

*19. It is also noted that the Central Government by way of an amendment inserted in Section 10A of I&B Code, 2016 wherein the default in respect of the dues arising from the period 25.03.2020 till 25.09.2020 (now extended upto 25.12.2020) has been excluded and as such in the present case from Part-IV of the Application it is seen that the default has occurred much prior to 25.03.2020 and hence Section 10A of &B Code, 2016 also would not come to the aid of the Corporate Debtor.*

*20. Thus taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that this Application as filed by the Applicant-Financial Creditor is required to be admitted under Section 7(5) of the I&B Code, 2016.”*

and finally admitted the Application by appointing Mr. A. Mohan Kumar, as 'Interim Resolution Professional' and declared moratorium etc.

**Appellant's Submissions:**

3. Challenging the validity, propriety and legality of the impugned order dated 13.11.2020 passed by the 'Adjudicating Authority', (National Company Law Tribunal, Special Bench, Chennai) in IBA/779/2019 (filed by the 1<sup>st</sup> Respondent/Financial Creditor), the Learned Counsel for the Appellant submits that the Second Respondent/Company is in the business of trading in earth moving spares and service activity, providing employment to about 100 persons. In fact, in the year 2015, the 2<sup>nd</sup> Respondent had the desire of purchasing an Apartment and therefore, a tri party agreement was entered into between the Developer M/s Cal Express Construction (India) Pvt. Ltd, the First Respondent (Financial) and Second Respondent (Borrower) whereby it was agreed that the loan would be raised from the First Respondent and pay to the Developer directly by agreeing to create equitable mortgage over the Apartment proposed to be developed.

4. According to the Appellant, the Second Respondent had entered into a construction agreement with the Developer dated 9.06.2019 for an Apartment No.E5 of an extent of 3,772.77 square feet on 5<sup>th</sup> floor in the Building, "USHERA" in Sholinganallur, Kanchepuram, to be delivered by the developer within 36 months from date of agreement or within 6 months from obtaining final statutory clearance. The said agreement was registered as Doc No.7462 of 2015 on the file of the Sub-Registrar, Neelankarai. Further a sale deed dated 28.09.2015 registered as Doc No.7463 of 2015 on the file of the Sub-Company Appeal (AT)(Insolvency) No.1087/2020

Registrar, Neelankanai was executed by the Developer in favour of the 2<sup>nd</sup> Respondent for UDS of an extent of 1186.85 sq. ft.

5. The Learned Counsel for the Appellant points out that the First Respondent had sanctioned a housing loan to the Second Respondent and that a loan agreement dated 30.06.2015 was entered into between the parties for housing loan to an extent of Rs.3,78,00,000/- repayable over 120 monthly instalments. In fact, the Memorandum of Deposit of Title Deeds dated 28.09.2015 were also executed by the Second Respondent in favour of the First Respondent as registered Document bearing No.7466 on the file of Sub-Registrar, Neelankarai, and mortgage was created by depositing the original sale deed 28.9.2015 and the construction agreement dated 9.6.2015.

6. It is the version of the Appellant that the First Respondent had disbursed only Rs.2,00,00,000/- and "Equal Monthly Instalments" were paid regularly by the Second Respondent. A sum of Rs. 34,44,209/- was paid in regular instalment. Later, the Developer had defaulted in completion of the Project because of some alleged disputes with their investors. One Mr. Ashok Sachdev, Investor of the Developer had even filed a Section 7 Application against the Developer M/s Cal Express Construction (India) Pvt. Ltd. and the matter is still pending in IBA698/2019, yet, the Second Respondent, on 13.04.2017 had paid an additional sum of Rs.18,38,141/- to the First Respondent with an intention to regularise their account.

7. The Learned Counsel for the Appellant contends that without considering the default on the part of the Developer, the First Respondent had arbitrarily issued a Notice dated 1.2.2017 under Section 13(2) of the Company Appeal (AT)(Insolvency) No.1087/2020

SARFAESI Act, 2002 to the Second Respondent alleging that the Second Respondent had defaulted in seven Equal Monthly Instalments and declaring the Account as NPA w.e.f. 31.10.2016. Simultaneously, the First Respondent had also addressed various correspondence to the Developer, calling upon them to cancel the allotment of the flat in favour of the Second Respondent and to refund the amounts received by the Developer from the Respondent No.1 and 2.

8. It is represented on behalf of the Appellant that the First Respondent on 4.4.2018 had issued a possession notice as per Rule 8(1) of SARFAESI Rules, 2002 and went ahead in taking physical possession of the Apartment. As a matter of fact, the First Respondent was enjoying the possession of the Apartment and it was not disclosed as to whether the said Apartment was sold by the First Respondent.

9. The Learned Counsel for the Appellant, brings to the Notice of this Tribunal that after more than a year of appropriating the Apartment, during June, 2019 the First Respondent filed IBA/779/2019 (Section 7 Application) before the Adjudicating Authority, for an alleged default of Rs.2,74,49,023/- and under the 2<sup>nd</sup> Respondent filed its counter along with documents on 21.11.2019, before the 'Adjudicating Authority', raising numerous objections to the Application.

10. The stand of the Appellant is that having taken possession and appropriated the secured Assets of the Corporate Debtor, being valued by the First Respondent at Rs.5,05,89,202/-, Section 7 application was filed in respect of the default sum of Rs.2,74,49,023/-.

11. The Learned Counsel for the Appellant takes a forceful plea that the 'Adjudicating Authority' had failed to appreciate that the First Respondent / Financial Creditor took possession of the secured asset worth Rs. 5,05,89,202/-, for an alleged default of only Rs. 2,74,49,023/- and that there existed no 'Financial Debt'.

12. The Learned Counsel for the Appellant contends that the First Respondent by filing an application u/s 7, had abused the 'I&B' Code as a Forum for recovery amount, defeating one of the primarily legislative intent behind the introduction of the Code, which is to promote '*entrepreneurship*'.

13. The Learned Counsel for the Appellant points out that the 'Status Report' dated 17.02.2021 filed by the Second Respondent / Interim Resolution Professional divulges that the only claim was received only from the First Respondent / Financial Creditor.

14. The Learned Counsel for the Appellant submits that the 'Corporate Debtor' does not want reorganisation and/or Insolvency Resolution Process adumbrated by the Code.

### **First Respondent's Contentions**

15. The Learned Counsel for the First Respondent / Financial Creditor submits that the building which is mortgaged to the First Respondent / Financial Creditor is incomplete and only 'pillars' are raised and that it does not have even 'walls'. Moreover, the First Respondent had not taken the 'physical possession' of the property but took only 'symbolic possession' of the same.

16. According to the Learned Counsel for the First Respondent, the First Respondent had neither sold the property nor realised any 'Sale Proceeds'. Apart from this, the construction of the said property was stopped because of the dispute between the developers and purchasers/investors. In fact, the 'Developer' and the 'Corporate Debtor' took no concrete steps to complete the construction of the said property and as on date, the '*Half Constructed Structure*' cannot be put to 'any commercial use' unless further investment is made into it.

17. The Learned Counsel for the First Respondent / Financial Creditor refers to the judgement of this Tribunal '**Encore Asset Reconstruction Company(P) Ltd.' Vs. 'Ms. Charu Sandeep Desai'** (vide Comp. App. (AT)(Ins.) 719/2018) wherein it is observed and held as under:-

*“It is not the case of the Appellant that the title of the assets has already been transferred or they have sold the assets in terms of Section 13(4) of the 'SARFAESI Act, 2002'. It is also not the case of the Appellant that the assets owned by a third party is in possession of the 'Corporate Debtor' in terms of Section 18, as it is the duty of the 'Interim Resolution Professional' to take control and custody of any asset over which the 'Corporate Debtor' has “ownership rights” as recorded in the balance sheet of the 'Corporate Debtor'. Even if it is not in possession of the 'Corporate Debtor', a*

*person who is possession of the same, including the 'Dena Bank' or 'Encore Asset Reconstruction Company Pvt. Ltd.' is bound to hand over the same to the 'Resolution Professional', when title still vests with 'Corporate Debtor'.*

*14. Decision in "Transcore's case (supra)" was rendered in the year 2008 when the 'I&B Code' was not in existence. The 'I&B Code' came into force w.e.f. 1<sup>st</sup> December, 2016 and Section 238 reads as follows:*

*"238. Provisions of this Code to override other laws.-*

*The provisions of this Code 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."*

*15. 'SARFAESI Act, 2002' being an existing law, Section 238 of the 'I&B Code' will prevail over any of the provisions of the 'SARFAESI Act, 2002' if it is inconsistent with any of the provisions of the 'I&B Code.'*

16. *In the aforesaid background, we hold that Section 18 of the 'I&B Code' will prevail over Section 13(4) of the 'SARFAESI Act, 2002' and the 'Dena Bank' cannot retain the possession of the property in question of which the 'Corporate Debtor' is the owner."*

18. The Learned Counsel for the First Respondent / Financial Creditor contends that the Adjudicating Authority after being satisfied on the existence of 'Financial Debt' and default on the part of Corporate Debtor had rightly admitted the application filed by the First Respondent (u/s 7 of the 'I&B' Code) and initiated 'CIRP' for the 'Corporate Debtor' bearing in the mind the decision of the ***Hon'ble Supreme Court in 'Innoventive Industries Ltd. Vs. ICICI Bank Ltd.'***

**Second Respondent (Resolution Professional's Status Report)**

19. The Adjudicating Authority while ordering the initiation of CIRP of the 'Corporate Debtor' (vide application No. IBA/779 of 2019) on 13.11.2020 had appointed Mr. A. Mohan Kumar/Insolvency Resolution Professional, as an Interim Resolution Professional of M/s MPL Parts and Services Pvt. Ltd.

20. According to the Learned Counsel for the Second Respondent, the Insolvency Resolution Professional issued a notice dated 11.12.2020 of the First meeting of the 'Committee of Creditors' of the 'Corporate Debtor', which took place on 17.12.2020. In fact, the 'Committee of Creditors' comprise of the First Respondent / M/s. Sundarama BNP Paribas Home Finance Ltd. (Financial Creditor).

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21. It is the plea of the Learned Counsel for the Second Respondent that the 'Interim Resolution Professional' took note of the claims submitted pursuant to publication of notice, constituted the Committee of Creditors and the voting share of the Committee of Creditors as per Section 25(2)(e) of the Code, r/w Regulation 12 of IBBI(CIRP) Regulations. In the meeting held on 17.12.2020 the Committee of Creditors had affirmed and approved the appointment of IRP Mr. A. Mohan Kumar, as the Resolution Professional. In fact, Mr. Mohd. Abdul Rahim and Mr. M. Kumarendran were appointed as the Registered Valuers on 24.12.2020.

22. It is brought to the fore that the 'Resolution Professional' through e.mail dated 20.11.2020 sent to the Suspended Directors of the Corporate Debtor had prayed for the following details:-

*a. Financial Statement for the last 2 years along with Schedules and supporting ledger accounts*

*b. Provisional financial statement for the current financial year till date.*

*c. Guarantees given in relation to the debts, if any, specifying which of the guarantors is a related party.*

*d. Details of all Material Litigation and ongoing investigations or proceedings*

*initiated by Government and Statutory  
Authorities*

*e. The number of workers and  
employees and liabilities of the Company  
towards them.*

*f. Tally backup as on 17<sup>th</sup> November  
2020*

*g. Particulars of a debt due from or to  
MPL Parts and Services with respect to  
related parties.”*

23. The grievance of the Second Respondent / Resolution Professional is that inspite of few reminders being sent to him and an endeavor was made to reach out the ‘Corporate Debtor’, no response was received till date. Besides this, the Resolution Professional is not able to complete the preparation of information memorandum. Indeed, the public advertisement for Expression of Interest was made in the newspapers (i) Financial Express and (ii) Makkal Kural on 27.01.2021.

24. In reality, in the absence of accounting records and documents, current position of assets and liabilities of the Corporate Debtor could not be ascertained and placed before the Committee of Creditors for further consideration and deliberation.

### **Discussions**

25. It is seen from part IV particulars of Financial Debt of the application filed by the First Respondent / Financial Creditor (u/s 7 of the I&B Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. It is mentioned that the Corporate Debtor had availed the financial assistance for Rs. 3.78 crore from the Applicant and executed Loan Agreement on 30.06.2015. Further as on 5.6.2019 Rs. 2,74,49,023/- was due from the Corporate Debtor and the break up is as under:-

|                |   |                   |
|----------------|---|-------------------|
| Principal      | : | Rs. 1,85,02,033/- |
| Interest       | : | Rs. 57,18,103/-   |
| Other Expenses | : | Rs. 32,28,887/-   |
| Total          | : | Rs. 2,74,49,023/- |

26. According to the First Respondent/Financial Creditor, the 'Account of the Corporate Debtor' was classified as Non-Performing Asset on 31.10.2016. Besides this, the 'Assets of the Debtor Company' were offered as security to the First Respondent/Applicant/Financial Creditor. The estimated value or security, as on date of sanction of loan was Rs. 5,05,89,202/-.

27. Before the 'Adjudicating Authority' the Corporate Debtor / in its counter had mentioned that it availed a housing loan for a sum of Rs. 3,78,00,000/- out of which Rs. 2,00,000,00/- was disbursed by the Applicant Financial Creditor to the builder in the year 2015. The housing loan was utilised by the Corporate Debtor to purchase a flat in the name of the Company, more fully mentioned in the schedule of the mortgaged deal, in June, 2015. In fact, the Company had paid a sum of Rs. 34,44,209/- to the Financial Creditor as 'EMI'

along and disbursed a sum of Rs. 18,38,141/- on 13.4.2017, in respect of this project to regularise the 'Equal Monthly Instalment'.

28. The 'Corporate Debtor' in its counter (Before the Adjudicating Authority) had averred that there was no financial debt outstanding, as per definition of Section 5(8) of the I&B Code. The First Respondent / Financial Creditor took possession of the property of the secured assets as on 04.04.2018 and that it is under their possession and further that original title deeds were also available with them. Also that, the outstanding amount claimed was only Rs. 2,74,49,023/- and that the property is worth Rs. 5,05,89,202/-.

29. The 'Corporate Debtor' in the counter (Before the Adjudicating Authority) took a plea that the 'Financial Creditor' can sell the secured assets of which were taken possession as per the *SARFAESI Act, 2002* and realise the money alleged due and payable by the 'Company' and set-off the same, in respect of the outstanding loan. Further, they cannot take shelter under the 'I&B' Code to 'speed up recovery' or to terrorise the 'Corporate Debtor'.

30. Be it noted, that there is no impediment for an 'Applicant' to prefer an Application under section 7 of the I&B Code, 2016 when already the proceedings under *SARFAESI Act, 2002* are pending. For maintaining an application u/s 7 of the Code, an applicant is to establish the existence of a debt, which is due from the Corporate Debtor. In fact, the issue of whether there is debt and default can be looked into only if the Corporate Debtor disputes the debt or takes a plea that there is no default though there is debt as per decision ***R.B.Synthetics V. Bee Ceelene Textile Mills Ltd. reported in (2018) 148 SCL 584.***

31. It must be borne in mind that there is no command under the I&B Code to find out as to whether the loan was expended in relation to the affairs of the Corporate Debtor or for any other purpose. At this stage, this Tribunal worth recalls and recollects the decision of the **Hon'ble Supreme Court in *Innoventive Industries Ltd. V. ICICI Bank reported in 2017(205) Comp. cas. 57(SC)*** wherein at paragraph 27 to 28 it is observed as under: -

*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.*

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 1, 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 sub-section (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.”*

32. Ordinarily, the ‘Corporate Debtor’ is empowered to point out that a ‘Default’ had not occurred. It cannot be forgotten that a debt may not be due, if it is not payable either in law or in fact. In the instant case, just because a ‘Guarantee Deed’ is furnished by a different entity, the same would not in any way relieve the obligation of the ‘Corporate Debtor’ to pay the First Respondent / Financial Creditor as Principal Borrower. On behalf of the First Respondent / Financial Creditor/Applicant it is brought to the notice of this Tribunal that the Corporate Debtor had availed the financial debt / loan by executing a Loan Agreement and Promissory Note to and in favour of the First Respondent / Financial Creditor.

33. It cannot be forgotten that in Law, it is always open to a ‘Financial Creditor’ in a given case to take all possible steps that are available to him / it to recover the money lent to the borrower. Indisputably, the ingredients of the I&B Code, 2016 will have an overriding effect in respect of the SARFAESI Act, 2002, by means of Section 238 of the Code.



## **Claim**

34. Section 3(6) of the I&B Code, 2016 defines 'claim' and the word claim is linked with the '*claim of any debt*' made by Creditors or claimants. A right to payment refers to any enforceable obligation of the Debtor including payment from the Estate or distribution from the Bankruptcy Estate. In this connection, this Tribunal relevantly points out that in a fixed claim, the Creditor has a right to payment of a specific amount. However, in a legal claim, the right of claimant to the 'payment of debt' or any other payment is legally enforceable.

## **Debt**

35. Section 3(11) defines 'debt'. An Insolvency proceeding can be commenced if a default is committed in payment of the debt that is due and become payable by the Corporate Debtor. Of course, inability to pay debt is not sufficient to initiate the process of Insolvency Resolution. A 'Financial Debt' is a debt together with interest, if any, which is disbursed against the consideration for time value of money like loan or borrowing.

## **Default**

36. Under Section 3(12) which defines '*default*', for a default thereto, there has to be a subsisting debt. Even if a person has the ability to repay the debt, there can be a willful default. Indeed, the debt must be due and payable. As a matter of fact, in the decision ***NaZamunnessa Begum Vs. Vidyasagar Cotton Mills Ltd. reported in (1963) 33 Comp Cas 36(Cal.)*** it is observed and held that 'default' is purely a relative term just like negligence.

### **Requisites for Admission of Application**

37. It is to be pointed out that 'once the Adjudicating Authority' is satisfied as to the existence of the default and has ensured that the application is complete, and no disciplinary proceedings are pending against the proposed Resolution Professional, it shall admit the application. The Adjudicating Authority is not required to look into any other criteria for admission of the application.

38. Undoubtedly, under the I&B Code, 'CIRP' is not an adversarial litigation, like the 'Court of Law'. An 'Adjudicating Authority' is not deciding a money claim in a civil suit. An Adjudicating Authority's part is confined to the act of deciding whether the application is complete, and whether there is any debt or default.

39. As far as the present case is concerned the 'Corporate Debtor' before the 'Adjudicating Authority' in its 'counter' to the Section 7 application IBA 779 of 2019 (filed by the First Respondent / Financial Creditor) had tacitly admitted that the estimated value of the property was Rs. 5,05,89,202/- and the same should be 'set off' against the outstanding loan which was Rs. 2,74,49,023/- being the lesser amount, then the value of the property by the estimation of the First Respondent / Financial Creditor. Further, the Corporate Debtor had also averred in its 'Counter' to the main application (filed by the First Respondent / Financial Creditor/Applicant) that the First Respondent / Applicant / Financial Creditor can sell the 'Secured Assets' already under possession as per SARFAESI and realise the money for the

alleged due and payable by the Company and ‘set off’ the same in respect of the ‘Outstanding Loan’.

40. Be that as it may, in view of the fact that in the present case the existence of ‘*debt of the Corporate Debtor and default*’, committed thereto, this ‘Tribunal’ is of the considered view that the Section 7 application (filed under I&B Code, 2016 in IBA 779 of 2019 by the First Respondent / Financial Creditor/Applicant is complete and viewed in that perspective, the impugned order dated 13.11.2020 passed by the ‘Adjudicating Authority’ (National Company Law Tribunal) Special Bench, Chennai in IBA/779/2019 in admitting the application and appointing the ‘Interim Resolution Professional’ Mr. A. Mohan Kumar and declaring Moratorium etc. are free from any legal infirmities. Consequently, the Appeal is devoid of merits.

**Disposition**

In fine, the Comp. App. (AT)(Ins.) 1087/2020 is dismissed. No Costs.

I.A. No. 2929/2020 (stay application) and I A No. 2930/2020 (seeking exemption from filing certified copy of the impugned order) are closed.

**[Justice M. Venugopal]  
Acting Chairperson**

**[Kanthi Narahari]  
Member (T)**

**25<sup>th</sup> October, 2021**

**Shashi**

Company Appeal (AT)(Insolvency) No.1087/2020