

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Company Appeal (AT) (Insolvency) No. 234 - 235 of 2017
**[arising out of Order dated 4th & 18th September, 2017 by NCLT,
Chandigarh Bench, Chandigarh in C.P. No. 209/2016]**

IN THE MATTER OF :

Vishwa Nath Singh

Director, Swan Aluminiums Pvt. Ltd.
House No. C-1, 301, Valley Tower,
Gladys Alwares, Manpada, Thane West
Maharashtra – 400 607

...Appellant

Vs.

M/s. Visa Drugs & Pharmaceuticals Pvt. Ltd.

1 A.J.C., Bose Road, Third Floor
(Opp. Lord Sinha Road),
B-Wing, Kolkata,
West Bengal – 700 020

...Respondent

Present:

For Appellant : **Shri Virender Ganda, Senior Advocate assisted by
Shri Vipul Ganda, Shri Mohit Oommen and Ms.
Shreya Jain, Advocates**

For 1st Respondent : **Shri Yash Pal Gupta, Advocate**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The appellant, Director/shareholder of M/s. Swan Aluminiums Private Limited has preferred these appeals against orders dated 4th September, 2017 and 18th September, 2017 both passed by the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh in C.P. No. 209/2016. By the first order, the application preferred by the respondent –

M/s. Visa Drugs & Pharmaceuticals Pvt. Ltd. under Sections 433 and 434 of the Companies Act, 1956 for winding up has been treated as an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') by the Adjudicating Authority admitted the application, passed order of moratorium with certain directions and called for the names of Interim Resolution Professionals and adjourned the matter for appointment of Interim Resolution Professional.

In the second order dated 18th September, 2017 the Insolvency Resolution Professional has been appointed with further directions as given therein.

2. The relevant facts as pleaded are as follows:

The erstwhile shareholder i.e. Shri Ashok Kumar Aggarwala and others approached M/s. Swan Aluminiums Private Limited (Corporate Debtor) for sale of their entire shareholding in M/s. Swan Aluminiums Pvt. Ltd. A Memorandum of Understanding was executed on 18th February, 2013 between M/s. Swan Aluminiums Pvt. Ltd. (Corporate Debtor) and Jupiter Strips Private Limited wherein certain agreements were reached. On 9th December, 2013, all bank accounts in the name of the company M/s. Swan Aluminiums Pvt. Ltd. (Corporate Debtor) were closed after clearance of all past/previous dues/liabilities, (both secured and unsecured) which was reflected in the balance-sheet prepared by the erstwhile shareholders.

4. However, when audited the balance-sheet of M/s. Swan Aluminiums Pvt. Ltd. (Corporate Debtor) were prepared on 31st March, 2014 and 31st

March, 2015, debt due or liability payable to the respondent were not shown therein.

5. On 11th August, 2016 six identical demand notices under Sections 433 and 434 of the Companies Act, 1956 were sent by erstwhile shareholders including the respondent – M/s. Visa Drugs & Pharmaceuticals Pvt. Limited. On 20th September, 2016, a common reply was sent by M/s. Swan Aluminium Pvt. Ltd. (Corporate Debtor) disputing the claim. In the aforesaid background, six company petitions were preferred by the respondent under Section 433(e), 434 and 439 of the Companies Act, 1956 before the Hon'ble High Court of Punjab and Haryana.

6. Pursuant to the Notification No. G.S.R. 1119(E) dated 7th December, 2016, issued by Central Government under sub-section (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of Section 239 of the 'I&B Code', the winding up cases were transferred from Hon'ble High Court to the Tribunal/Adjudicating Authority.

7. The case of M/s. Swan Aluminiums Pvt. Ltd. (Corporate Debtor), was transferred to the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench. The application under Sections 433(e), 434 and 439 preferred by the respondent were treated to be application(s) under Section 7 of the I & B Code and were admitted, as noticed above.

8. Learned counsel for the Appellant has brought to our notice the Central Government notification dated 7th December, 2016 issued from the Ministry of Corporate Affairs. By the said notification, in exercise of the powers conferred

under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of Section 239 of the 'I&B Code', the Central Government framed "The Companies (Transfer of Pending Proceedings) Rules, 2016".

9. Rule 5 relates to transfer of pending proceedings of winding up on the ground of inability to pay debts which are to be transferred from the Hon'ble High Court's to the respective Tribunal and reads as follows: -

"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.- (1) All petitions relating to winding up under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent as required under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7,

required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal within sixty days from date of this notification, failing which the petition shall abate.

2. All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act.”

10. From the aforesaid Rule 5, it is clear after transfer of the case the Applicant (Respondent herein) was required to submit all information, other than information forming part of the records transferred from the High Court, for admission of the petition under Sections 7, 8 or 9 of the 'I&B Code', including details of the proposed 'Insolvency Professional' within sixty days, failing which, the petition shall stand abated.

11. Learned counsel for the appellant submitted that the respondent – M/s. Visa Drugs & Pharmaceuticals Private Limited was a shareholder and do not come within the meaning of “Financial Creditor” as defined under sub-section

(7) r/w sub-section (8) of Section 5 of the I & B Code. The respondent also cannot claim to be an 'Operational Creditor'. He placed reliance on the balance-sheet of M/s. Swan Aluminiums Pvt. Ltd. (pages 322-355 of the paper book) wherein the details of "unsecured loans/advances" as on 5th December, 2013 has been shown and the name of "M/s. Visa Drugs & Pharmaceuticals Private Limited" has been shown therein. It was submitted that the unsecured loan having been taken without any interest cannot be termed to be a 'financial debt' within the meaning of sub-section (8) of Section 5 of the I & B Code.

12. "Financial Creditor" is defined in sub-section (7) of Section 5, which 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".

13. Sub-section (8) of Section 5 defines 'financial debt', as follows:

"(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;*”

14. Learned counsel appearing on behalf of the respondent submits that the loan given by the respondent comes within the meaning of ‘financial debt’ as per clause (a) of sub-section(8) of Section 5 i.e. money borrowed against the payment of interest. However, there is nothing on record to suggest that M/s. Swan Aluminiums Pvt. Ltd. (Corporate Debtor) has borrowed money against the payment of interest from the respondent – Visa Drugs & Pharmaceuticals Pvt. Limited. There may be a loan taken by the Corporate Debtor from the respondent but that does not mean that such loan amount can be termed a money borrowed against the payment of interest.

15. ‘Financial debt’ means a debt along with interest, if any, which is ‘disbursed against the consideration for the time value of money’. In ‘Nikhil Mehta and Sons vs. AMR Infrastructure Ltd. - Company Appeal (AT) (Insolvency) No. 07 of 2017, this Appellate Tribunal, while discussing the aforesaid provisions, observed as follows :

"17. *The first question arises for consideration is as to who is a 'Financial Creditor'. Learned Adjudicating Authority, for determination of the aforesaid issue ii examined the definition provided in Section 5 (7) and 5(8) and in the impugned judgement rightly observed:-*

"12. *A perusal of definition of expression 'Financial*

Creditor' would show that it refers to a person to whom a Financial debt is owed and includes even a person to whom such debt has been legally assigned or transferred to. In order to understand the expression 'Financial Creditor' the requirements of expression financial debt' have to be satisfied which is defined in Section 5(8) of the IBC. The opening words of the definition clause would indicate that a financial debt is a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the events enumerated in sub-clauses (a) to (i).

Therefore the first essential requirement of financial debt has to be met viz, that the debt is disbursed against the consideration for the time value of money and which may include the events enumerated in various sub-clauses. A Financial Creditor is a person who has right to a financial debt. The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature has included such

financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law- Dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money. It is significant to notice that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity has been implied by the opening words of Section 5(8) of the IBC. It is true that there are complex financial instruments which may not provide a happy situation to decipher the true nature and meaning of a transaction. It is

pertinent to point out that the concept 'Financial Debt' as envisaged under Section 5(8) of the IBC is distinctly different than the one prevalent in England as provided in its Insolvency Act, 1986 and the 'Rules' framed thereunder. It appears that in England there is no exclusive element of disbursement of debt laced with the consideration for the time value of money. However, forward sale or purchase agreement as contemplated by Section-5 (8)(f) may or may not be regarded as a financial transaction. A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature an entity may 13 require liquidity against an asset and the financier in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return- to the financier.

*(See Twcman's Law Relating to IBC, 2016 by
Vinod Kothari & Sikha Barisal)."*

16. In the present case, the respondent has failed to show that the amount of loan treated to have been given to the Corporate Debtor were disbursed against the consideration for the time value of money. In absence of any such evidence on record to suggest that the amount was disbursed against the consideration for the time value of money and was borrowed by the Corporate Debtor against the payment of interest, we hold that the respondent – M/s. Visa Drugs and Pharmaceuticals do not come within the meaning of 'financial creditor'.

17. The Adjudicating Authority having failed to notice the facts, we have no other option but to set aside the impugned orders dated 4th September and 18th September, 2017.

18. In effect, order(s) passed by the Adjudicating Authority appointing 'Resolution Professional' declaring moratorium, freezing of account and all other order(s) passed by the 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 Respondent under Section 433 and 434 stands abated. The Adjudicating Authority will now close the proceeding. The Corporate Debtor is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

19. The Adjudicating Authority will fix the fee of the 'Resolution Professional' and the Corporate Debtor will pay the fees of the 'Resolution Professional', for the period he has functioned. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member(Judicial)

New Delhi

13th December, 2017

/ns/