NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No.124 of 2024

&

I.A. No.402 of 2024

IN THE MATTER OF:

Desh Bhushan Jain,
Erstwhile Director of Angel Promoters Pvt. Ltd.

...Appellant

Vs.

Abhay Kumar,
IRP of Angel Promoters Pvt. Ltd. & Ors.

...Respondents

Present:

For Appellant: Mr. Rajnish Sinha, Ms. Pooja Singh, Monika Dhruv Jain, Advocates

For Respondent: Mr. Abhimanyu Mahajan, Ms. Anubha Goel, Mr. Mayank Joshi, Advocates for R-2 to 10

Mr. Abhay Kumar, IRP

PCS, Mohammad Khalik (IRP)

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is filed by the erstwhile Director of Angel Promoters Pvt. Ltd. (Corporate Debtor) to challenge the order dated 20.12.2023, passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench IV) by which an application bearing CP No. (IB) 2479/(PB)/2019 filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (In short 'Code') by Respondent No. 2 to 10 (Financial Creditors) against

the Corporate Debtor for the resolution of an amount of Rs. 3,34,07,686/- including interest, has been admitted, moratorium under Section 14 of the Code has been imposed and Abhay Kumar was appointed as the Interim Resolution Professional (In short 'IRP').

2. The Corporate Debtor, in the year 2015, availed loan from Respondent No. 2 to 10 of an amount of Rs. 3,25,00,000/- on interest.

3. Since, the Corporate Debtor defaulted in repayment of the loan, Respondent No. 2 to 10 filed the petition under Section 7 of the Code bearing CP (IB) No. 258(PB)/2018 (hereinafter referred to as 'first petition') before the Adjudicating Authority.

4. During the pendency of the first petition, a settlement was arrived at between the parties on 26.07.2018 and was reduced into a settlement agreement dated 26.07.2018 as per which the Corporate Debtor had agreed to pay to the Financial Creditor an amount of Rs. 4,34,00,000/- towards the loan amount including interest and a further interest @ 12% p.a on the reducing balance amounting to Rs. 49,27,988/-.

5. As per the settlement agreement dated 26.07.2018, the Corporate Debtor agreed to pay to the Financial Creditors the amount of Rs. 4,34,00,000/- by way of 34 post-dated cheques in instalments from 01.10.2018 to 17.10.2020 and interest amount of Rs. 49,27,988/- by way of 27 post-dated cheques in instalments from 30.04.2019 to 30.08.2020.

6. In view of the aforesaid settlement arrived at between the parties on 26.07.2018, the first petition was withdrawn by the Financial Creditors on 27.07.2018. In this regard, a joint application was filed i.e. CA No. 644 of 2018 to bring on record the settlement agreement with a prayer that the matter has been settled and thus, the application filed by the Financial Creditors may be withdrawn. In view thereof, the application bearing CA No. 644 of 2018 was allowed and the application bearing CP No. (IB)258/PB/2018 was withdrawn. The order dated 27.07.2018 is reproduced as under:-

> "A joint application being CA No. 644 of 2018 is filed by the respective parties placing on record the settlement agreement duly executed on 26.07.2018 by nine applicants and one corporate debtor. As per the terms of the settlement agreement, it is stated that the matter is settled against all the creditors and prayed for withdrawal of the application.
>
> The application CA No. 644 of 2018 is allowed and the application (IB)258/PB/2018 is disposed of as withdrawn."

7. The Corporate Debtor did not make timely payments because either the post-dated cheques were dishonoured upon presentation or before the due date of post-dated cheques, the Corporate Debtor would request the Financial Creditors not to deposit the cheque, requesting for some more time to make payment. In respect of some cheques which were due for payment, the Corporate Debtor made payments whereas against some cheques, the Corporate Debtor failed to make payment or issue new cheques in compliance of clause 6 of the settlement

agreement. However, at last due to the defaults committed by the Corporate Debtor, the Financial Creditor filed the petition under Section 7 of the Code bearing CP No. (IB) 2479/(PB) of 2019 (hereinafter referred to as the 'second petition') before the Adjudicating Authority.

8. Aggrieved against the aforesaid order dated 20.12.2023, the present appeal has been filed by the erstwhile director of the CD.

9. At the time of preliminary hearing held on 18.01.2024, the following order was passed by this Court:-

> "Learned counsel for the Appellant submits that the Appellant is ready to make the payment of entire amount as claimed in the Part IV of the Section 9 application i.e. Rs.3,34,07,686/-. He, however, submits that certain amounts have been paid after filing of Section9 application.
>
> In view of the aforesaid, we permit the Appellant to deposit the aforesaid amount i.e. Rs.3,34,07,686/- by way of FDR in name of Registrar, NCLAT within a period of 30 days from today.
>
> Issue notice. Learned counsel for the Respondent accepts notice. He may also obtain instructions.
>
> List this Appeal on 28.02.2024.
>
> In the meantime, in pursuance of the impugned order CoC shall not be constituted."

10. Thereafter, the following order was passed by this Tribunal on 28.02.2024:-

> "Counsel for the Appellant has submitted that in terms of the order dated 18.01.2024, the Appellant has

deposited Rs.3,34,07,686/- by way of FDR in the name of Registrar, NCLAT, New Delhi.

Counsel for the Appellant has argued that the Appellant has already paid a sum of Rs. 87 Lac to the Respondent No. 2 to 10 which is not denied by Counsel for Respondents. However, Counsel for Respondent No. 2 to 10 has submitted that after adjusting the said amount of Rs. 87 Lac in the component of interest, the Appellant is still liable to pay a sum of Rs. 4.10 Crores including principal amount of Rs. 3.34 Cr.. In reply, Counsel for the Appellant has argued that the Appellant is liable to pay only Rs. 3.24 Cr. (principal) and Rs. 10,07,686 (interest) claimed in the application filed under Section 7 for the purpose of withdrawal of CIRP and the Appellant is rather entitled to the refund of Rs. 87 Lac already paid to Respondent No. 2 – 10 and also to return of one of the property papers (CA No. 3, Ground Floor). Both Counsel for the parties have requested for an adjournment to argue the main appeal. On their request, adjourned to 06th March, 2024.

Interim order to continue.

It is made clear that no further adjournment shall be granted."

11. Counsel for the Appellant has submitted that unpaid instalment as per the settlement agreement cannot be treated as debt and breach of settlement agreement cannot be made a ground to file an application under Section 7. In support of his submissions, he has relied upon a decision of this Court rendered in the case of Raj Singh Gehlot Vs. Vistra (ITCL) India and Ors., Manu/NL/050/2022 and has referred to para 28 of the said judgment which read as under:-

> "Even the applicant has mentioned in the Form 1, Part IV total amount of debt guaranteed as on 31.10.2018 Rs. 234,69,62,791/- are in default as per settlement agreement dated 07.04.2017. This suggest that Section 7 of the Code is being invoked pursuant to settlement agreement which is not permissible under Section 7 of the Code."

12. It is further argued that at the time when the order was passed in the first petition, no permission was sought of the Adjudicating Authority to revive the petition. It is further submitted that during the pendency of the proceedings, the Appellant has paid Rs. 87 lac out of the court which cannot be appropriated by Respondent in the component of interest as the amount for which the petition under Section 7 was filed had already been crystallised.

13. In reply, Counsel for Respondent No. 2 to 10 has submitted that it is an apparent case of fraud having been played by the Corporate Debtor because there was no dispute that the loan was disbursed by the Financial Creditors to the Corporate Debtor which was to be returned alongwith interest. It is further submitted that the Appellant has not denied that the CD had defaulted in repayment of loan or was liable to pay unpaid loan amount to the Financial Creditors. It is rather submitted that answering respondents were mischievously influenced by the Corporate Debtor to enter into a settlement agreement on the pretext that the principal amount with interest shall be paid in instalments and as a security, agreement of sale was executed only in respect of one shop which was otherwise to be returned by answering Respondents to the Corporate Debtor after the

entire payment is made. It is also submitted that because of the assurance given by the Corporate Debtor, the gullible answering Respondents withdrew their first petition but when the Corporate Debtor did not make the payment and the post-dated cheques were dishonoured, answering Respondents were constrained to file the second petition, therefore, it is submitted that it was not a case where second petition has been filed on a settlement agreement. It is also submitted that if the argument of the Appellant is accepted then it would give a premium to the defaulting party like the Corporate Debtor who would breach the settlement and challenge the second petition. If this kind of stand is accepted then it would discourage the settlement in cases under the Code. In this regard, he has referred to a decision of this Court in the case of Priyal Kantilal Patel Vs. IREP Credit Capital Pvt. Ltd. & Anr., CA (AT) (Ins) No. 1423 of 2022 in which it has been held that a settlement agreement does not bar the FC from filing a Section 7 petition. It was further observed in that case that if the contention of the CD is believed to be true, then FC would be in a position of disadvantage by entering into a settlement with the CD and in a default of such settlement, the corporate debtor will easily be able to escape from its financial liabilities. It is further submitted that there is no question of seeking permission to the Court because it was not a case of revival of the same petition rather a second petition has been filed after adjusting the payment whatever has been made because the debt and default has never been disputed by the Corporate Debtor at any stage. It is also submitted that on the date of settlement, the Corporate Debtor had to pay to the

Financial Creditor an amount of Rs. 4,34,00,000/- alongwith interest @ 12% per annum on reducing balance in terms of clause 2(i) of the settlement agreement but the Corporate Debtor had only paid Rs. 1,10,00,000/- and no amount had been paid towards interest. The Financial Creditor then filed the second petition and as on the date of the second petition, the CD owed a total amount of Rs. 3,34,07,686/- and during the pendency of this petition, the Corporate Debtor approached the FC and paid an amount of Rs. 87,00,000 to the FC out of the Court. It is submitted that the contention of the Appellant that the amount of Rs. 87 lac. needs to be adjusted in the amount of Rs. 3,34,07,686/- is totally incorrect because the said amount has been adjusted towards interest which has accrued on the amount which is liable to be paid. It is further submitted that amount of interest has been adjusted in terms of Section 60 of the Contract Act, 1872 and the judgment in the case of Leela Hotels Limited Vs. Urban and Housing Development Corporation Limited (2012) 1 SCC 302.

14. Counsel for Respondent No. 1 has also submitted that after the impugned order was passed on 20.12.2023 and pursuant to his appointment, a public announcement was made in Form A in terms of Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (in short 'Regulations') which was duly published in the financial express (English edition) and Jansatta (Hindi Edition) newspapers on 07.01.2024 and collated all information relating to the assets, finances and operations of the CD for determining the financial position.

15. It is further submitted that he collated all the claims submitted by the creditors to the tune of Rs. 15,61,98,258/-. It is also submitted that he had also appointed two registered valuers, namely, INMAC Valuers Pvt. Ltd. and Fidem Corporate Advisor LLP for the purpose of conducting the valuation, including fair value and liquidation value assessments pertaining to the categories of assets owned by the CD i.e. land & building, plant and machinery and financial assets.

16. We have heard Counsel for the parties and perused the record.

17. There is no dispute that the Corporate Debtor availed the loan on interest from the Financial Creditor. Since, the instalments were not paid, the Financial Creditors filed the first petition which was admitted, moratorium was declared and IRP was appointed. In order to save itself to slip into CIRP, the CD approached the FC for a settlement which was ultimately arrived at in writing on 26.07.2018.

18. As per the terms and conditions of the settlement, the CD was to pay sum of Rs. 4,34,00,000 by way of 34 post-dated cheques in instalments from 01.10.2018 to 17.10.2020 and also component of interest of Rs. 49,27,988/- by way of 27 post-dated cheques in instalments from 30.04.2019 to 30.08.2020. The CD made the FC to believe that it would not deviate from the settlement and shall honour its commitments. As a result thereof, the FC agreed to file a joint application with CD before the Adjudicating Authority to bring on record the settlement and also to withdraw the first petition in view of the settlement. In

this regard, an order was passed in the first petition on 27.07.2018. However, post dated cheques issued by the CD towards the principal amount and the interest either were dishonoured upon presentation or the CD requested the FCs for extension of time before the post-dated cheques were deposited for realization. In this process, a sum of Rs. 1,10,00,000/- were paid out of Rs. 4,34,00,000/- but there was continuous default on the part of the CD in honouring the settlement. As a result thereof, the FC once again approached the Adjudicating Authority with the second petition which has now been admitted by the impugned order which is under challenge.

19. We are not at all impressed with the argument of the Appellant which has been raised with the support of the decision in the case of Raj Singh Gehlot (Supra) that the application under Section 7 cannot be filed on the basis of the settlement because the said judgment is not applicable. In the case of Raj Singh Gehlot (Supra) the petition under Section 7 was filed on the basis of settlement agreement dated 07.04.2017 whereas in the present case, the first petition was not filed on the basis of settlement agreement rather it was filed on the basis of the debt due and default committed by the CD. The debt and default was admitted by the Corporate Debtor and hence, approached the Financial Creditors for entering into a settlement to make the payment in instalments through post-dated cheques both in regard to the principal as well as interest component. The Financial Creditors believed the Corporate Debtor and entered into the agreement and further on the asking of the CD filed a joint application in the first petition not only to bring on record the settlement but also

to withdraw the first petition being sanguine of the fact that CD would keep its words and shall honour all the post-dated cheques in time but they were not aware of the intention of the CD as it had not made payment beyond Rs. 1,10,00,000 and were still in the arrears of more than Rs. 3 Cr. The Financial Creditor then filed the second petition of the reduced debt about which the default is not in question, therefore, the Adjudicating Authority has rightly admitted the application.

20. At this stage, we would like to observe that if this kind of tricks, played by the CD with the FC are allowed and the plea raised by the Appellant is accepted that the second petition on the ground of settlement agreement is not maintainable then it would give a premium to the unscrupulous CD to get the petition filed under Section 7 withdrawn on the basis of the settlement which was not to be ultimately followed. Definitely, this kind of attitude and act on the part of the CD is not appreciated.

21. In so far as the issue raised by the Appellant about the amount of Rs. 87 Lac. which has been paid out of the court during the pendency of this appeal to be adjusted in the amount which is stated to be due is concerned, suffice it to say that the Appellant has not brought on record any writing/ agreement in this regard that the said amount has been paid towards the adjustment of the principal amount otherwise the Financial Creditor is entitled to adjust the amount towards the payment of interest component at the first instance.

22. Thus, in view of the aforesaid facts and circumstances, we do not find any merit in the present appeal and the same is

hereby dismissed. The amount deposited by the Appellant in this court by way of FDR is ordered to be returned to the Appellant within a period of one month from the date of passing of this order by the Registrar after due verification.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

[Indevar Pandey]
Member (Technical)

New Delhi
20th May, 2024

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