

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

T.A. No. 190/2021

(Company Appeal (AT) (Ins) No. 916/2019)

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

**(Arising out of the Impugned Order dated 18/07/2019 in CP/946/IB/2018,
passed by the ‘Adjudicating Authority’, National Company Law Tribunal,
Chennai Bench, Chennai)**

In the matter of:

M/s Actioncor Consultants Private Limited,
K-61, Basement Jungpura Extension, New Delhi,
South Delhi, Delhi 110014.

....Appellant

Versus

M/s. Viprah Technologies Limited,
S.F. No:79, Alampalayam Road, Thakkalur,
Avinashi Taluk, Coimbatore, Tamil Nadu – 641654.

....Respondent

Present:

For Appellant : Mr. T.K.Bhaskar, Advocate
For Mr. P.J. Sri Ganesh, Advocate

For Respondent : None

J U D G M E N T

[Per: Shreesha Merla, Member (Technical)]

1. Aggrieved by the Impugned Order dated 18/07/2019, where by the Adjudicating Authority, National Company Law Tribunal, Chennai Bench has dismissed Section 7 Application namely, CP/946/IB/2018, filed by the Appellant, herein, seeking to initiate ‘CIRP’ against the Respondent Company, M/s Actioncor Consultants Pvt. Ltd. Preferred this Appeal under Section 61 of

the 'Insolvency and Bankruptcy Code, 2016' (hereinafter referred to as 'the code').

2. The facts in brief are that the Respondent Company has been registered with 'Board for Industrial and Financial Reconstruction' ('BIFR') as a sick Industrial Company, vide Case No. 75 of 2006. While so, Mr. Coimbatore Krishnan Anantha Subramanian (hereinafter referred to as 'Mr. Subramanian'), approached Mr. Khodadad Khushroo Moradian (hereinafter referred to as 'Mr. KKM') for loan of a sum of Rs.1,24,00,000/-, as it would be sufficient to pay off the debt of the Secured Creditors of the Company and consequently Mr. Subramanian would initiate steps to deregister it from the 'BIFR'. Between 22/11/2010 to 18/07/2011, there were numerous e-mail communications between Mr. KKM and Mr. Subramanian and it is averred that the intention of the Parties was that a loan was to be provided by the Appellant for revival of the Respondent Company. On 14/07/2010, an 'Investment agreement' was entered into between Mr. KKM and Mr. Subramanian and Mrs. Sujatha Ananth, being the Managing Director and Director of the Respondent Company, whereby, the Appellant agreed to disburse Rs. 1,40,00,000. On 16/08/2010, an 'Addendum Agreement' to the 'Investment Agreement', dated 14/07/2010 was entered into between the same parties and the enforcement of the security was made contingent to the fulfilment of the Addendum Agreement. On 22/07/2010, Mrs. Sujatha Ananth had executed a 'Memorandum of Deposit of Title Deed' wherein, she had agreed to deposit the Title Deeds to one Mr. Kum Kum Sen,

Advocate who was entitled to receive the same on behalf of the Appellant. It is averred that on 13/09/2010, Mrs. Sujatha vide a 'Registered Deed of Mortgage', pledged her property to an extent of $\frac{1}{4}$ th acre and the Respondent had issued an Investment Receipt in its letterhead, duly signed by Mr. Subramanian and Mrs. Sujatha in their capacities as Managing Director and Director of the Company. On 29/09/2010, M/s. BFI Factoring Services Limited, vide a letter to Mr. Subramanian confirmed the receipt of the Cheque for a sum of Rs. 65,00,000/- as full and final settlement of the dues owed by the Respondent Company to 'Asset Reconstruction Company India Limited' ("ARCIL"). On 30/08/2011, an Affidavit was filed by Mr. Subramanian, before the 'BIFR' wherein he categorically stated that the Appellant had provided a loan to the Respondent. The Company continued to be registered under 'BIFR', till it was abolished on 01/12/2016. The Company made no efforts to repay the loan and committed a Default. It is averred that despite a Legal Notice issued on 05/12/2017, demanding the payment of Rs.1,40,00,000/- and a sum of Rs. 4,23,17,951/- towards interest calculated from 1/12/2010 to 30/11/2017, at interest of 22% p.a., there was no payment made by the Respondent Company except for a vague Reply, subsequent to which the Appellant filed a Section 7 Application on 18/07/2018, before the Adjudicating Authority, National Company Law Tribunal, Chennai Bench.

3. The Learned Counsel for the Appellant contended that the Managing Director and Director of the Corporate Debtor Company had approached the Appellant seeking a sum of Rs. 1.25 Crores as loan and an 'Agreement' dated 14/07/2010 was executed between the parties and the said Agreement provides for securing the funds advanced by the Appellant to the Secured Creditors of the Corporate Debtor.

4. It is submitted by the Learned Counsel that an Addendum dated 16/08/2010 was executed and the Director of the Corporate Debtor had also executed a 'Mortgage' vide a 'Registered Deed of Mortgage', dated 13/09/2010 to secure the repayment of the Loan advanced by the Appellant to the Secured Creditors of the Corporate Debtor.

5. The Learned Counsel contended that the Corporate Debtor had issued an 'Investment Receipt' to the extent of Rs. 1.40 Crores confirming that the Appellant had transferred the funds to the Secured Creditors of the Corporate Debtor.

6. It is argued that the Appellant was advancing loans only as per the instructions of the Corporate Debtor as the Corporate Debtor continued to be under 'BIFR', till 01/12/2016. Consequently, the Appellant could not initiate any Legal Proceedings against the Company in terms of Section 22 of the 'Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)'. Therefore, the

Application under Section 7, filed in March 2018, was well within the Limitation.

7. The Learned Counsel contended that the finding of the Adjudicating Authority that the Appellant is not a Party to the 'Investment Agreement' is erroneous as the name of the Appellant is expressly mentioned in the Agreement. The Financial Contract is in the form of the Investment Agreement, the Addendum and the Mortgage Deed, together with the Investment Receipt issued by the Corporate Debtor, were not taken into consideration by the Adjudicating Authority, based on which it was held that the Corporate Debtor did not make any Promise to repay the money to the Appellant herein.

8. The Learned Counsel appearing for the Respondent submitted that there was no repayment obligation on the Respondent and no admitted liability, even as per the 'BIFR' Records and that the loans were taken by Mr. Subramanian and his wife Mrs. Sujatha in their personal capacity and there was no 'Promise to pay' the Corporate Debtor Company.

9. The Learned Counsel relies on Clause 6 of Investment Agreement which states that in the event the Promoters of the Company were unable to deregister the Company from 'BIFR', within one year of the Agreement, the Appellant had the Right to sell the Property to recover his investments. The Learned Counsel submitted that the Property could have been sold as early as 2011 and the Property is in possession of the Appellant and therefore there are no outstanding

dues payable. It is further submitted that the Appellant could have taken leave of 'BIFR' to recover the dues as the execution of the 'Mortgage Deeds' satisfied the Debt as per Section 63 of the 'Indian Contract Act, 1872' read with Section 41 thereof. It is further contended that the interest amount was calculated from 01/12/2010, where as in Para IV of the Application, the date of Default is shown as 01/12/2016, while the actual date of Default is to be seen from 2010, the Section 7 Application is barred by Limitation.

10. The brief point which falls for consideration in this Appeal is whether the amount lent by the Appellant to Mr. Subramanian and his wife Mrs. Sujatha representing the Corporate Debtor Company, can be construed as 'Financial Debt' as defined under Section 5 (8) of the Code.

11. It is the main case of the Appellant that the recitals of the Investment Agreement dated 14/07/2010 stipulates that the loan advanced by the Appellant would be repaid with interest at 22 % p.a.; once the Corporate Debtor is out of 'BIFR', which establishes the 'Time Value of Money'. For better understanding of the case, Clause 6 of the Investment Agreement is reproduced herein as under:

"In case the funds from the sale or lease of the VIPRAH property are not released or if CKAS is not able to ensure VIPRAH's de-registration from BIFR within one year of the signing of this agreement, KKM reserves the right to sell the property to recover the funds he has invested. Mrs. Sujatha Ananth, who is the owner of the property and fully conversant with the above transactions, as a party to the

agreement, shall forfeit the rights to the property. Irrespective of the price at which the property is sold, neither party shall claim from each other the adjustment of cash in case the property is sold at above or below the Rs.140 Lakhs plus interest.”

12. It is significant to mention that the Investment Agreement has been entered into between Mr. Subramanian and Mrs. Sujatha and Mr. KKM and the Corporate Debtor is not a Party to the Agreement, so there is no mention of the Corporate Debtor, but as soon as it is out of ‘BIFR’, in addition to repayment of the loan, by sale of the Property, Mr. Subramanian would also had to be given share to make him 26% overall Share holder of the Corporate Debtor Company. Clause 8 of the Agreement also states that any dispute between Mr. Subramanian and Mrs. Sujatha and Mr. KKM would be settled by ‘Mediation’ which goes to show that this Investment Agreement is expressly between the individuals Mr. Subramanian and Mrs. Sujatha on one hand and Mr. KKM on the other hand. It is crystal clear from the Investment Agreement that the Properties of the Promoters of the Corporate Debtor Company were given as Securities to the Appellant herein and the same could be used for the ‘recovery’ of the amount payable to the Appellant, in the event that the Respondent failed to deregister itself from the ‘BIFR’ within one year of the Investment Agreement dated 14/07/2010. There are no substantial reasons given as to why the Appellant which has the Right to sell the property could not recover the funds which contend due and payable.

13. The Learned Counsel for the Respondent categorically submitted that the Properties are in possession of the Appellant and could have been sold for recovering any outstanding dues. As the properties are in possession of the Appellant herein, it is for the Appellant to take steps for the recovery of the money. On a pointed query from the Bench as to whether the Mortgaged Property was indeed in possession of the Appellant, the Respondent Counsel has submitted in the affirmative. It is the personal Property of the Promoter which was mortgaged in favour of the Appellant and in the event of failure of the Promoter to deregister the Company from 'BIFR', within one year of the said Agreement, the Appellant was free to sell the Property towards repayment of the debt.

14. The Hon'ble Apex Court in 'Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited' Vs. 'Axis Bank Ltd. & Ors.'⁵, has clearly defined the ingredients of a 'Financial Debt' as defined under Section 5(8) of the Code and observed in para 43 as follows:

“43. Having imbibed the basic features associated with a “financial creditor”, we need to examine as to who could at all fall in this category. In order to address this core question, delving into the finer connotations of the expression “financial debt”, as defined in Section 5(8) of the Code is, obviously, necessary. As noticed, while defining “financial creditor” and “financial debt” in Section 5(7) and Section 5(8) of the Code, both the expressions “means” and “includes” have been used. As per the definition, while “financial creditor” means a person to whom a “financial debt” is owed, it also includes a person to whom such debt

has been legally assigned or transferred to. Obviously, a comprehension of this definition of “financial creditor” cannot be complete without taking into account as to what is the meaning assigned to the expression “financial debt”. Again, the term “financial debt” has also been defined with the expressions “means” and “includes”. A “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money; and it includes the money borrowed or raised or protected in any of the manners prescribed in clauses (a) to (i) of Section 5(8).”

15. There should be a direct disbursement of the amount owed, Financial Creditor to the Corporate Debtor for the amount to be construed as a ‘Financial Debt’.

The transaction should be a direct transaction between the Financial Creditor and the Corporate Debtor.

16. The submission of the Learned Counsel for the Appellant is that amount was paid to M/s BFI Factoring Services Limited and other Secured Creditors, under the Instructions of the Corporate Debtor and therefore, the amount should be construed as ‘Financial Debt’, is untenable and there is no evidence on Record substantiating that the amounts were paid by the Appellant *directly to the Corporate Debtor and the same was acknowledged by the Corporate Debtor in their balance sheet as a ‘Promise to pay’*. The Investment Receipt relied upon by the Appellant has to be construed together with the Investment Agreement which clearly stipulates that the Agreement is between Mr. Subramanian and his wife Mrs. Sujatha with Mr. KKM and the Corporate Debtor is not in the picture, as far as a direct Transaction between the Appellant

and the Corporate Debtor is concerned. Though it is not in dispute that the amounts were taken as loan by the Managing Director and Director, the fact remains that the Transactions were never directly with the Corporate Debtor Company. Recently, this Tribunal while dealing with the similar issue in ‘**TA No. 146 of 2021 (Company Appeal (AT) (CH) (Ins) No. 994/2020)**’ has held that amounts taken by their Directors in their personal capacity, though used for the business purposes of the Company, will not fall within the ambit of the definition of ‘Financial Debt’ as defined under Section 5(8) of the Code. This ratio is squarely applicable to the facts of this case. Therefore, the e-mails relied upon by the Appellant, is of no significance. Needless to add, the Appellant is at Liberty to recover the dues from the sale of the Property.

17. For all the foregoing reasons, this Tribunal, is of the considered view that the amount is not a ‘Financial Debt’ as there is no evidence on Record to establish that the amount was directly lent to the Corporate Debtor. In view of this observation, the question whether the date of Default is 2010 or 2016, is not being addressed to. This Company Appeal (AT) (Ins) No. 916 of 2019 is dismissed accordingly. No Order as to Costs.

[Justice M. Venugopal]
(Member Judicial)

[Shreesha Merla]
(Member Technical)

01/06/2023
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