NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1474 of 2023
& IA No.5225 of 2023

[Arising out of order dated 05.07.2023 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench (Court-II) in CP (IB) No.742(ND)/2022]

IN THE MATTER OF:

Vijay Jain & Ors.
H-30, Phase-I,
Ashok Vihar,
Delhi – 110 052 **...Appellants**

Versus

Laxmi Foils Pvt. Ltd.
Shop No. G-22 (UGF), D-1 (K-84),
Green Park Main, South Delhi,
Delhi - 110016 **...Respondent**

Present:

Appellants: **Mr. Krishnendu Datta, Sr. Advocate, Mr. Ashish Verma, Ms. Salonee Keshwani, Mr. Rahul Gupta, Advocates.**

Respondent:

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 ("**IBC**" in short) by the Appellants arises out of the Order dated 05.07.2023 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench (Court-II) in CP (IB) No.742(ND)/2022. By the impugned order, the Adjudicating Authority has dismissed the Section 7 application filed by Mr. Vijay Jain and 13 others seeking initiation of Corporate Insolvency Resolution Process ("**CIRP**" in short) against M/s Laxmi Foils Private Limited-the present Respondent. Aggrieved by the impugned order, the present appeal has been filed by Mr. Vijay Jain and 13 others-the present Appellants.

2. The Learned Senior Counsel for the Appellants submitted that the Appellants had extended loans to M/s Laxmi Foils Private Limited-the Corporate Debtor for business purposes. The Appellants had extended the credit facilities to the Respondent in the form of interest-free unsecured loans as erstwhile shareholders of the Corporate Debtor. It was further stated that a Memorandum of Understanding (hereinafter referred to as "**MoU**") was entered into between the Corporate Debtor, a company named OFB and Appellants (the Promoter Group) in terms of which the OFB was to purchase the shareholding of the Corporate Debtor for Rs.51 crore. Subsequent to the MoU being signed, the OFB and the Appellants entered into a Share-Purchase Agreement (hereinafter referred to as "**SPA**") on 03.02.2022. In terms of MoU dated 25.11.2021 and SPA executed on 03.02.2022, the entire shareholding

of the Appellants in the Corporate Debtor was agreed to be sold to OMAT which was a subsidiary of OFB. OFB was to purchase the shares of the Appellants for Rs.10.62 crore and until the payment was done by OFB, the Appellants were to remain in control of the Corporate Debtor. It has also been submitted that the Appellants and the Corporate Debtor entered into two Finance Facilities Agreement (hereinafter referred to as "**FFA**") recording the terms and conditions for repayment of credit facilities advanced by the Appellants to the Corporate Debtor. The FFAs signify that the Corporate Debtor acknowledged the debts of the Appellants and undertook to discharge them. Further, in terms of the MoU and SPA, it had been agreed that the loans extended by the Appellants to the Corporate Debtor would be repaid by the Respondent on the closing date. As the Respondent had agreed to pay the unsecured loans by the closing date, cheques for an amount of Rs.1.66 crore were to be issued in favour of the Appellants by the Corporate Debtor towards discharge of the outstanding credit facilities. Pursuant thereto, cheques were prepared by the Corporate Debtor but were not counter-signed by Mr. Lokesh Garg, Authorized Representative of the Corporate Debtor for presentment and hence debt could not be discharged. Since these cheques were not counter-signed by the Authorized Representative and the Corporate Debtor failed to make repayment of the credit facilities, the default occurred on 04.03.2022. The Appellants sent demand notices seeking repayment of their loans. However, the Corporate Debtor having failed to make payments, there was a clear incidence of debt and default and hence the Appellants filed a Section 7 petition. It has been contended that the Section 7 application was erroneously rejected by the Adjudicating Authority.

3. We have duly considered the arguments advanced by the Learned Senior Counsel for the Appellants and perused the records carefully. The short point for consideration is whether this was a case of debt and default in the context of IBC which deserved admission of Section 7 application filed by the Appellants.

4. It is the case of the Appellants that the Respondent had accepted and acknowledged its liability in respect of the unsecured loan amounts and agreed to repay the same as is seen from the SPA and FFAs. The FFA was sent by the Corporate Debtor/Respondent to the Appellant on 07.02.2022 and therefore the Corporate Debtor/Respondent cannot claim that they were not party to these agreements.

5. It has been the case of the Respondent before the Adjudicating Authority that the Appellants did not bring on record any documentary evidence to show that FFAs were ever executed between the parties. The Adjudicating Authority had also recorded the submissions of the Respondent that their email of 07.02.2022 had conveyed only a draft FFA which never got firmed up or executed. The so-called FFAs were signed by Appellants and did not bear the signature of any person from the management of the Respondent.

6. We find that the Adjudicating Authority has recorded the finding that the Facility Agreement relied upon by the Appellants in support of their debt is un-dated and hence discounted the same to be credible evidence to prove the existence of debt. More importantly, if the email of 07.02.2022 from the Respondent to the Appellants sharing the FFA is perused as has been placed

at page 231 of the Appeal Paper Book ('APB' in short), we find that it is only a draft agreement seeking comments/observations of the Appellants. Furthermore, we notice that the FFA which has been placed on record at Annex A-5 of the APB does not have the signature of the Respondent but it is the Appellant No. 6 who has signed for the Corporate Debtor as may be seen at page 270 of the APB.

7. Given this position, we do not find any mistake on the part of the Adjudicating Authority in not relying on the FFA to prove the existence of debt.

8. The other ground to prove existence of doubt which has been adverted to by the Appellants is that the financial debt is also disclosed in the provisional balance sheet dated 03.03.2022 as shared by the Respondent themselves vide their email dated 04.03.2022. Furthermore, it has been contended that the Respondent after carrying out due diligence had admitted the balance sheet as on 03.03.2022 which reflects the credit facilities advanced by the Appellants. The Respondent failed to repay the said credit facilities and hence this is a clear case of debt and default.

9. Assertion has also been made by the Appellant that though the debt amounts got removed in the 04.03.2022 balance sheet, this nil statement occurred on account of cheques having been issued by the Corporate Debtor towards discharging the liability appearing in the balance sheet of 03.03.2022. It was contended that cheques for an amount of Rs.1.66 crore was prepared by the Corporate Debtor on 04.03.2022 which was sent for counter signature of their Authorized Representative, Mr. Lokesh Garg. Based

on this assurance, due effect was given in the books of accounts which led to nil statement on 04.03.2022. The cheques however could not be encashed on account of non-countersigning of cheques by the Authorized Representative of the Corporate Debtor. The Corporate Debtor thus having failed to make repayment of the credit facilities, the default occurred on 04.03.2022.

10. It was also argued that the Clause 6.5 waiver in the SPA claimed by the Respondent is a sham argument because if the waiver had actually taken place, then the loan facility should not have been reflected in the balance sheet on 03.03.2022. It has been contended that Clause 6.5 was not applicable to these unsecured loans as the SPA was entered into with the assurance that the unsecured loans will be repaid by the closing date.

11. As is seen from the impugned order, the Respondent had countered similar submissions made by the Appellants before the Adjudicating Authority wherein it was submitted that the 14 cheques dated 04.03.2022 which was allegedly claimed by the Appellant to have been issued by the Corporate Debtor in their favour was surprisingly signed by one of the Appellants (Rajesh Jain) on 04.03.2022 and therefore cannot be treated as cheques having been sent by the Corporate Debtor. It was also pointed out before the Adjudicating Authority that Mr. Rajesh Jain did not have any authorization for signing these cheques on behalf of the Corporate Debtor. The alleged cheques were therefore forged instruments made with the intent to extort money from the Respondent and subject them to insolvency proceedings fraudulently and maliciously. Submission had also been made before the Adjudicating Authority that because of this mala-fide intent of the Appellants, several police

complaints were filed against them and in retaliation of which, the Section 7 application has been filed.

12. Furthermore, pursuant to the SPA, the entire shares of the Corporate Debtor held by the Appellants was transferred at a consideration of Rs.10.62 crore of which Rs.7.96 crore was already paid to the Appellants. Payment of Rs.2.65 crore was deferred to verify the authenticity of the transactions and the warranties of promise, assurances, undertakings, indemnities and other covenants contained in the SPA. In view of the false material representations and warranties made by the present Appellants, a legal notice was issued on 25.08.2022 invoking the right of indemnification as provided for in Clause 10 of the SPA seeking recovery of Rs. 10.94 crore paid in terms of SPA and seeking damages of Rs.3 crore. OMAT also terminated the SPA dated 03.02.2022 and resorted to arbitration in terms of Clause 12 of the SPA. Furthermore, the Corporate Debtor had received demand notices from four alleged Operational Creditors for a total amount of Rs.6.10 crore. On receipt of these demand notices, it came to the knowledge of the Corporate Debtor that the Appellants in their capacity as erstwhile shareholders had entered into certain transactions beyond the accounts date defined in the SPA. It was also pointed out before the Adjudicating Authority that the demand notices of the Operational Creditors were signed by none other than one of the Appellants (Rajesh Jain) on behalf of the Corporate Debtor post-execution of the SPA and that the Corporate Debtor was kept unaware of these transactions nor were the transactions carried out in the ordinary course of business.

13. In their defence before the Adjudicating Authority, the Respondent had also explained that the said credit facilities were waived pursuant to execution of the SPA and particular reference was made to Clause 6.5 thereof. It was also contended before the Adjudicating Authority that the balance sheet of the Corporate Debtor dated 04.03.2022 which has been acknowledged by Appellants show that no amount as claimed by them was due and payable.

14. Before we go into the merits of their rival positions, we may take note Clause 6.5 of the SPA which is to the following effect:

> *"6.5 Each seller, hereby irrevocably and unconditionally as on the closing date, releases, waives and discharges, and undertakes and confirms that all the affiliates of such seller have irrevocably and unconditionally released, waived and discharged, for all purposes any and all of their respective rights (whether contractual or otherwise) claims, demands, damages, losses, costs, expenses, actions or causes of action or lawsuits (in law or an equity), of nature, whether known or unknown, fixed or contingent, direct or indirect, that such seller or any of its affiliates, or their respective assigns and successors (collectively, ''the Released parties''), may have against the company or company's past or present directors, officers, employees, agents, assigns, successors, shareholders investors (collectively , "the Released Parties") in relation to any and all claims and all amounts payable and or due in respect of any event prior to the closing date and arising from or relating to company's obligations and all liabilities arising out of or in relation to, any past event, actions, inactions, omissions or activities or any contact between any Releasing Party and any Released Party prior to the closing date, whether asserted by any Releasing party or any*

person on behalf of any releasing party or by any successor, assignee or transferee of any Releasing Party."

15. A plain reading of the Clause 6.5 leaves no doubt in our minds that the erstwhile shareholders had released/waived/discharged all/any rights and claims against the Corporate Debtor/Respondent. Having relinquished their rights/claims under the SPA, the contention of the Respondent that debt claims of the Appellant stood discharged is prima-facie logical. The absence of proof of crystallized debt is also validated by the balance sheet of the Corporate Debtor dated 04.03.2022 which has been acknowledged by Appellants which reflects that no amount as claimed by them was due and payable. Once the closing had been achieved by the Corporate Debtor in terms of the SPA and the same had been acknowledged by the Appellants upon signing the balance sheet with nil statement, the issue with respect to any amount due and payable by the Corporate Debtor does not arise.

16. Coming to our analysis and assessment, it is well settled that in terms of Section 7 of the IBC, a Financial Creditor may file an application for the initiation of CIRP against a Corporate Debtor. However, Section 7(5)(a) provides that only upon the Adjudicating Authority being satisfied that default on a debt had occurred and that the threshold for filing such an application had been met and that the application under Section 7(2) was complete, it may then only admit the Corporate Debtor into CIRP. It has been well settled by the Hon'ble Supreme Court of India in ***M/s Innoventive Industries Ltd. v. ICICI Bank in C.A. Nos. 8337-8338 of 2017*** that upon the Adjudicating Authority being satisfied that a debt was due and that default had occurred,

it was bound to commit the Corporate Debtor into insolvency. It may be relevant to notice the relevant paragraph of this judgment which is as follows:

> *"30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."*

17. At this juncture, we may notice the relevant findings with regard to debt and default thereto as recorded by the Adjudicating Authority in the impugned order which has come up in appeal. The relevant portions are as excerpted below:

> *"17. From the aforesaid facts, events, and analysis, we observe that the alleged debt claimed by the Applicants is doubtful since (a) the Facility Agreement relied upon by the Applicants in support of their debt is un-dated, (b) as per the Provisional Balance Sheet of the Respondent as of 04.03.2022 (which has been signed and authenticated by the Applicant No. 1 and 6 themselves), the unsecured loan owed to the Directors and Shareholders of the Respondent Company is shown as 'Nil', (c) the new management of the respondent has reportedly paid an amount of Rs.7,96,88,812/- out of the total consideration of Rs. 10,62,51,750/- to the all the shareholders and the debt of the Respondent is discharged in terms of Clause 6.5 of the Share Purchase Agreement dated 03.02.2022, and (d) the Respondent had shown cogent reasons, by*

bringing on record the Section 8 Demand Notices issued to it as the reason for non-payment of the balance amount of Rs.2,65,62,937/-.

18. Thus, in our considered view, Applicants No. 1-10 have failed to prove the existence of any debt that is crystallized or exists beyond any doubt. As regards the alleged debt claimed on behalf of non-shareholders/Applicants No. 11 to 14, it is noticed that their default amount is less than the minimum threshold amount of Rs. 1 Crore prescribed under Section 4 of IBC, 2016. Hence, we have no option but to reject the Application. The Application is accordingly dismissed."

18. The Adjudicating Authority in the impugned order has noticed that the Appellants had sold their shareholding to OMAT by executing the SPA on 03.02.2022 after payment of a lumpsum amount settled between the two parties. The Adjudicating Authority after perusal of the SPA has further noted that Schedule 1A and 1B of the SPA shows that the new management of the Respondent had settled the deal with all the shareholders at a lumpsum amount of Rs.10.62 crore. It has also noted that the provisional balance sheet of the Respondent as of 04.03.2022 shows that unsecured loan owed to the directors and shareholders of the Respondent Company as nil and this document has been signed by Appellants No. 1 and 6. Cognizance has also been taken of the fact that the Corporate Debtor had received demand notices from four alleged Operational Creditors for a total amount of Rs.6.10 crore and hence they held back part of the consideration amount for purchase of shares. After making these observations, on the question as to whether debt and default was adequately demonstrated to the Adjudicating Authority, basis

the records made available before it, the Adjudicating Authority has rightly concluded that it was not satisfied with the evidence produced before it by the financial creditor to prove that a debt had crystallized beyond doubt and that a default has occurred. Having already given our findings on the FFAs and the SPA at para 7 and 15 above, we find no cogent reasons to disagree with the impugned order.

19. In sum, we are of the view that the Adjudicating Authority has rightly dismissed the Section7 application filed by the Appellant. We are satisfied that the impugned order does not warrant any interference. There is no merit in the Appeal. The Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 03.01.2024

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