

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 113 of 2023

[Arising out of Order dated 03.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, Court-III in CP(IB) No. 1103/ND/2020]

IN THE MATTER OF:

Mr. Vipin Sharma,

S/o Durga Dass Sharma Aged about 53 years,

Having his office at C-1 0/3, 1st Floor,

Vasant Vihar, New Delhi-11057

Email id: 1970vipin@gmail.com

...Appellant

Versus

1. KALIBER ASSOCIATES PRIVATE LIMITED,

(CIN: U74140DL2003PTC118931)

A company incorporated and registered under the provisions of the Companies Act, 1956,

Having its registered office at: E-20,

Lajpat Nagar-III, New Delhi-110024.

Through its official liquidator,

Mr. Mohan Lal Jain,

Having office at: B-1/12,

2nd Floor, Safdarjung Enclave,

New Delhi-110029.

Email: cirp.kaliberapl@gmail.com

2. Mr. Rajiv Bajaj,

Interim Resolution Professional of M/s Diamond IT Infracon Pvt. Ltd.,

Having office at 4/180, Backside,

Ground Floor, Subhash Nagar, New Delhi-27,

Email: rbajajip@gmail.com

...Respondents

Cont'd.../

Present:

For Appellant: Mr. Krishnendu Datta, Sr. Advocate, with Mr. Vikas Mishra & Mr. Sanchit Gawri, Advocates.

For Respondents: Mr. Anirban Bhattacharya and Mr. Rajeev Chowdhary, Advocates for R-1.

Mr. Vinod K. Chaurasia & Mr. Shivam Pal, Advocates for R-2

J U D G M E N T

ASHOK BHUSHAN, J.

1. This Appeal by a Shareholder and Suspended Director of the Corporate Debtor has been filed challenging the order dated 03.01.2023 passed by National Company Law Tribunal, New Delhi Bench, Court-III (hereinafter referred to as “**The Adjudicating Authority**”) admitting Section 7 Application of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “**The Code**”) filed by the Respondent No. 1.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:-

a. Kaliber Associates Pvt. Ltd., the Financial Creditor has advanced various amounts to the Corporate Debtor-Diamond IT Infracon Pvt. Ltd. from the year December, 2013 to December, 2017. An insolvency proceedings were initiated against the Financial Creditor-Kaliber Associates Pvt. Ltd. by order dated 18.01.2019.

b. On 31st January, 2019, IRP of Respondent No. 1 wrote to the Corporate Debtor praying for confirmation of balance of Rs. 17,47,50,000/- payable to Respondent No. 1. By further letter

- dated 10th May, 2019, Resolution Professional of Respondent No. 1 wrote to the Corporate Debtor for making payment of Rs. 27,69,14,300/-. Request was again repeated by Resolution Professional on 18th July, 2019 and 09.03.2020 for payment of aforesaid amount of Rs. 27,69,14,300/-.
- c.** Liquidation Proceedings were initiated against Respondent No. 1 by Order of the Adjudicating Authority. The Liquidator filed an I.A. No. 4559 of 2020 before the Adjudicating Authority seeking approval for initiation of proceedings under Section 7 against the Corporate Debtor. The Adjudicating Authority vide Order dated 01.12.2020 allowed the I.A. and granted permission to the Liquidator to file Section 7 Application of the Code.
 - d.** Respondent No. 1 through Liquidator filed a Section 7 Application against the Corporate Debtor being CP(IB) No. 1103/ND/2020 praying for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor for payable financial debt of Rs. 27,69,02,500/-. Along with Section 7 Application, the Respondent No. 1 filed balance sheet of the Corporate Debtor as on 31st March, 2017, copy of the balance sheet of Respondent No. 1 as on 31st March, 2018, the copy of financial statements of Respondent No. 1, record of default of Corporate Debtor available with National e-Governance Service Limited.
 - e.** The Adjudicating Authority issued notice in Section 7 Application filed by Respondent No. 1 vide Order dated 21st December, 2020. Copy of the Petition and all documents were served to the

Corporate Debtor. Corporate Debtor appeared before the Adjudicating Authority on 11.03.2021 and was directed to file Reply within three weeks. On 02.11.2021, the Adjudicating Authority noted that there was no representation on behalf of the Corporate Debtor hence one more opportunity was given for three weeks time to file Reply i.e. by 23.11.2021. On 02.12.2021, the Adjudicating Authority directed to proceed ex-parte against the Corporate Debtor since neither any Reply was filed nor there was any representation. Corporate Debtor filed an I.A. No. 3106 of 2021 for setting aside order dated 02.12.2021 which Application was withdrawn on 29th August, 2022.

- f.** The Adjudicating Authority after granting ample opportunity to the Corporate Debtor proceeded to hear the Section 7 Application and by Impugned Order dated 03.01.2023 admitted Section 7 Application filed by the Respondent No. 1.
 - g.** The Adjudicating Authority held that the balance sheet of the Corporate Debtor shows that corporate debtor has availed loan facility from Financial Creditor. Adjudicating Authority also relied on record of default of NESL. The Adjudicating Authority finding a financial debt and default admitted Section Application.
 - h.** The Appellant being shareholder and suspended director of the corporate debtor aggrieved by the Order dated 03.01.2023 has come up in this Appeal.
- 3.** We have heard Mr. Krishnendu Dutta, Sr. Advocate along with Mr. Vikas Mishra for the Appellant and Mr. Anirban Bhattacharya, Advocate

for Respondent No. 1 and Mr. Vinod Chaurasia, Advocate for Respondent No. 2.

4. Learned Counsel for the Appellant submits that financial creditor and the corporate debtor are related parties and family owned companies. It is submitted that the Adjudicating Authority failed to consider the MoU dated 27.09.2017 executed between the corporate debtor and under which Respondent no. 1 agreed to pay amount as investment. Denial of Respondent No.1 for want of knowledge to the MoU is no denial. There was no financial debt due on the corporate debtor so as to admit the Section 7 Application filed by Respondent No. 1. Erstwhile shareholders of the corporate debtor did not prosecute the Company Petition resulting ex-parte proceeding against the Corporate Debtor. Erstwhile director Lalit Modi assured that he shall prosecute the Company Petition but he failed to duly prosecute the Company Petition. Due to above reasons, Appellant could not bring on record MOU dated 27.09.2017. The Adjudicating Authority failed to consider that alleged loan disbursement was not made for consideration of time value of money and does not qualify to be financial debt within meaning of Section 5(8) of the Code. Appellant may be given opportunity to defend the Company Petition especially due to existence of MoU dated 27.09.2017. Appellant's further case is that Appellant and other shareholders tookover the Corporate Debtor from its erstwhile shareholders in June, 2018. Appellant also has admitted that he received the letters from the Respondent No. 1 in the year 2019 demanding the alleged financial debt by the IRP/RP of Respondent No. 1.

5. Leaned Counsel appearing for Respondent No. 1 refuting the submissions of Learned Counsel for the Appellant submits that ample opportunity was given to the Corporate Debtor to file Reply, twice Adjudicating Authority granted time to file a Reply but no reply was filed and the Adjudicating Authority left with no option directed on 02.12.2021 to proceed ex-parte against the corporate debtor. Although an Application I.A No. 3106 of 2021 was filed by the Corporate Debtor to set aside the Order dated 02.12.2021 but the said application was also withdrawn by the Corporate Debtor on 29.08.2022. The Appellant cannot be heard in saying that Corporate Debtor was not granted ample opportunity by the Adjudicating Authority. MoU dated 27.09.2017 relied on by Corporate Debtor is not available on record of the Respondent No. 1 hence is not admitted. It is submitted that amount advanced by Respondent No. 1 to the Corporate Debtor is reflected in the balance sheet of the Corporate Debtor as well as financial statement of the Financial Creditor. Balance sheet of the Corporate Debtor as on 31st March, 2017 reflects the amount as short term borrowing. Appellant cannot be permitted to challenge the financial statement relying on unregistered MoU. It is submitted that IRP/RP of the Respondent No. 1 has written several letters in 2019 to the Corporate Debtor for refunding the amount which was not responded by the directors of the Corporate Debtor. NESL report itself indicates the financial debt owed by Corporate Debtor to the Financial Creditor which has rightly been relied by Adjudicating Authority. Between 14.12.2013 to 28.12.2017, Respondent No. 1 had disbursed total sum of Rs 27,69,02,500/-. Loan was demanded back by the IRP/RP of Respondent

No. 1 vide various letters issued in 2019 and 2020 which having not been complied, with the permission of the Adjudicating Authority Section 7 Application was filed by the Liquidator of Respondent No. 1 before the Adjudicating Authority.

6. We have considered the submissions of Learned Counsel for the parties and have perused the record.

7. We need to first notice submission of the Appellant that Appellant is entitled for an opportunity by the Adjudicating Authority especially in view of the fact that MoU dated 27.09.2017 could not be brought on record before the Adjudicating Authority.

8. Respondent No. 1 in its Reply has given the details where various orders passed by the Adjudicating Authority by which opportunity was given to Corporate Debtor to file a Reply. Learned Counsel for the Corporate Debtor appeared before the Adjudicating Authority on 11.03.2021 and was directed to file Reply within three weeks. By a further order dated 02.11.2021, three weeks further time was allowed to file a Reply and when no Reply was filed, the Adjudicating Authority having no option, directed on 02.12.2021 to proceed ex-parte against the corporate debtor. Although corporate debtor filed an I.A. No. 3106 of 2021 to recall the order dated 02.12.2021 but the said application was withdrawn on 29th August, 2022. The Corporate Debtor having not filed any Reply in spite of ample opportunity being granted by the Adjudicating Authority and the Application to recall the order proceeding ex-parte having also been dismissed, Appellant cannot be allowed to contend that one more opportunity be given to the Appellant.

9. Now we come to the MoU dated 27.09.2017 which is relied on by the Appellant in the Appeal.

10. The said MoU was not before the Adjudicating Authority to enable the Adjudicating Authority to consider the said MoU. MoU has been brought on record by Appellant in the present Appeal for the first time. The Respondent No. 1 in its Reply has submitted that MoU is not available on record of the Respondent No. 1 hence the same cannot be admitted. It is relevant to notice that amounts which was advanced by the Financial Creditor to the Corporate Debtor were amounts advanced from the year December, 2013 to December, 2017. The reasons by the Corporate Debtor not filing the Reply and placing any reliance on the MoU before the Adjudicating Authority are not forthcoming.

11. The main submission of the Appellant is that as per MoU, amount advanced was only an investment by Respondent No. 1 in the Corporate Debtor and hence is not a financial debt.

12. We need to consider as to whether the Adjudicating Authority committed any error in accepting the Financial Debt and Default on the part of the Corporate Debtor.

13. As noted above along with Section 7 Application, record of default was filed by the Respondent No. 1 where in the remarks following statement has been made under heading “other party information”:

<i>Debt Information</i>	
<i>Type of Debt</i>	<i>Financial</i>
<i>Debt Reference No.</i>	7
<i>Debt Start Date</i>	31.03.2018

<i>Debt Currency</i>	<i>INR</i>
<i>Sanctioned Debt Amount</i>	<i>27,68,81,000.00</i>
<i>Facility Name</i>	<i>Credit Facility</i>
<i>Total Outstanding Amount</i>	<i>27,68,81,000.0</i>
<i>Amount Overdue</i>	<i>27,68,81,000.00</i>
<i>Days past due (DPD)</i>	<i>596</i>
<i>Account Closed Flag</i>	<i>No</i>
<i>Rate of Interest</i>	<i>12</i>
<i>Sanction Currency</i>	<i>INR</i>
<i>Sub Type – Debt</i>	<i>Credit Facility</i>
<i>Funded Type</i>	<i>Funded</i>
<i>Principal Outstanding</i>	<i>27,68,81,000.00</i>
<i>Part-A Remarks</i>	<i>Ex-Director of CD shared Financial Statement of CD with RP as on 18.01.2019 (CIRP Commencement Date) wherein amt of Rs. 276881000 is appearing that Diamond IT infracon Pvt. Ltd. owed to CD and the amount is also being acknowledged in Financial Statement as on 31.03.2018 of Diamond ITinfracon Pvt. Ltd.</i>

14. In Section 7 Application, balance sheet of the Corporate Debtor as on 31st March, 2017 acknowledges loan advanced from body corporate (Kaliber Associates Pvt. Ltd.) as on 31st March, 2017 amounts of Rs. 17,47,50,000/-. Financial Statement of the Respondent No. 1 was also filed along with Section 7 Application where under the heading short-term

loan and advance against the name of Corporate Debtor Diamond IT Infracon Pvt. Ltd. amount about 27,69,14,300/- was shown as on 31st March, 2018 and an amount of Rs. 17,47,50,000/- as on 31st March 2017. The Adjudicating Authority has rightly placed reliance on the financial statement of the Corporate Debtor as well as those of Respondent No. 1 both reflecting the amount as short term loan. When balance sheet and financial statement as on 31st March, 2017 and 31st March, 2018 was filed along with Section 7 Application which statements were prepared in due course and are not subject of any dispute, we are of the view that acknowledgment as contained in the Financial Statements cannot be wished away by the Appellant relying on unregistered MoU dated 27.09.2017 which was never brought on record before the Adjudicating Authority.

15. Learned Counsel for the Respondent No. 1 rightly placed reliance on judgment of this Tribunal in **C.A. (AT) Ins. No. 470 of 2022, Vipul Himatlal Shah vs. Teco Industries & Anr.** where two-member bench of this Tribunal has laid down that when the record of the information utility shows that there is a debt which is in default, the Adjudicating Authority and this Appellate Tribunal are not required to further examine the record maintained by the Information Utility more so when the record of the information utility is deemed authenticated and no dispute or refutation of said record has been done by the Corporate Debtor earlier. In paragraph 16 of the Judgment, following has been laid down:

“16. In the light of the detailed discussion as above, it is clear that in case the record of information utility shows

that there is a debt which is in default, the Adjudicating Authority and this Appellate Authority are not required to further examine the record maintained by the Information Utility, moreso when the record of the information utility is deemed authenticated and no dispute or refutation of said record has been done by the Corporate Debtor earlier. We also note that in the judgment of Rushabh Civil Contractors Pvt. Ltd. Vs. Centrio Lifespaces Ltd. (supra), which has been cited by the Learned Counsel for Appellant, the record that formed the basis for financial debt and default was found to be forged and fabricated, which is not the case in the present appeal. Therefore, this judgment does not come to the rescue of the Appellant.”

16. It is well settled preposition that balance sheets and financial statement of the Corporate Debtor can be looked into for finding any acknowledgement. We may refer to the Judgment of the Hon'ble Supreme Court in **Asset Reconstruction Company (India) Ltd. Vs. Bishal Jaiswal, 2021 6 SCC 366**. The amount advanced to the Corporate Debtor by associates company to improve the financial health of the Corporate Debtor is a disbursement for time value of money. Ex-directors of the Financial Creditor were holding 100% share of the Corporate Debtor. This Tribunal in **Shailesh Sangani v. Joel Cardoso, C.A. (AT) Ins. No. 616 of 2018** decided on 30th January, 2019 laid down that when promoter, director or shareholder of the Corporate Debtor as a stakeholder to improve financial health of the company and to boost its economic prospects, advance an amount, the same would have the commercial effect of borrowing on the part of the corporate debtor

notwithstanding the fact that no provision is made for interest thereon. In paragraph 6 of the Judgment, following was held:

“6. A plain look at the definition of ‘financial debt’ brings it to fore that the debt alongwith interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression ‘if any’ as suffix to ‘interest’ leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of ‘financial debt’. The amount disbursed as debt against the consideration for time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of Section 5(8) embody the nature of transactions which are included in the definition of ‘financial debt’. It includes money borrowed against the payment of interest. Clause (f) of Section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement. It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Corporate Debtor as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the part of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interests be called upon to

respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such situation such funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the Company. Enhancement of assets, increase in production and the growth in profits, share value or equity enures to the benefit of such stakeholders and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with obligation on the part of Company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases the amount taken by the Company is in the nature of a 'financial debt'."

17. The findings recorded by the Adjudicating Authority that financial debt and default is proved is supported by the financial statements and balance sheets of the Corporate Debtor and Financial Creditor which were brought on record along with Section 7 Application. There is no infirmity in the findings of the Adjudicating Authority that debt and default is proved.

18. Learned Counsel for the Appellant has also referred to the grounds taken in the Appeal and also relied on ground taken in the Appeal that the Application Under Section 7 has been initiated by the Liquidator of Respondent No. 1 in collusion with the current stakeholders of Respondent No.1 including Stakeholder Consultation Committee with a sole view to drag into insolvency. We do not find any substance in the

said ground raised in the Appeal, in paragraph 7.21. The Appellant themselves has brought on record letters dated 31st January, 2019, 10th May, 2019, 18.07.2019 and 09.03.2020 issued by the IRP/RP of Respondent No.1 to the Corporate Debtor demanding the amount due to the Financial Creditor by Corporate Debtor. The Liquidator filed Section 7 Application after obtaining order by the Adjudicating Authority permitting the Liquidator to file Section 7 Application. Section 7 Application was filed by the Respondent No. 1 and the Corporate Debtor failed to discharge its financial debt due to the Financial Creditor. We thus reject the allegations of the Appellant that in collusion with current stakeholders, Section 7 Application was filed by Respondent No. 1/Liquidator.

19. We thus are of the view that Adjudicating Authority has rightly come to the conclusion that financial creditor has successfully proved the financial debt and default on the part of the Corporate Debtor in initiation of Section 7 Application. In view of the finding and in view of the principles as laid down by Hon'ble Supreme Court in **Innoventive Industries Pvt. Ltd. Vs. ICICI Bank, 2018 1 SCC 407** where Supreme Court laid down following in paragraph 30:

“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.”

20. We do not find any error in the order impugned passed by the Adjudicating Authority admitting Section 7 Application, there is no merit in the Appeal, the Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Naresh Salecha]
Member (Technical)**

**NEW DELHI
04th July, 2023**

Basant B.