NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 130 of 2021

[Arising out of order dated 07.01.2021 in (IB) 3434 (ND)/2019 IA/5412/2020 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-V.]

IN THE MATTER OF:

Avneesh Kumar Singh
(Suspended Director of S N Jee Build Well Private Limited)
112, Indraprakash, 21 Barakhamba Road,
New Delhi - 110001

.... Appellant.
(Corporate Debtor)

Versus

Indian Delco Private Limited
B-II/45, Mohan Cooperative Industrial Estate
Mathura Road, Badarpur, New Delhi – 110004.

.... Respondent.
(Financial Creditor)

Present:

For Appellant: **Mr. Prateek Gupta, Mr. Abhijeet Sinha and Mr. Saikat Sarkar, Advocates.**
For Respondent: **Mr. P. Nagesh, Sr. Advocate with Mr. Anish Gupta and Mr. Akshay Sharma, Advocates.**

J U D G M E N T

(1st December, 2021)

Justice Anant Bijay Singh;

This Appeal has been preferred by Mr. Avneesh Kumar Singh **-** Appellant (Suspended Director of S N Jee Build Well Private Limited) aggrieved and dissatisfied by the order dated 07.01.2021 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-V in (IB) 3434

(ND)/2019 - IA/5412/2020 whereby and where under the Application filed by the Financial Creditor (Respondent herein) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (***for short IBC***) was admitted and initiated Corporate Insolvency Resolution Process (***for short CIRP***) against the Appellant Company and appointed Interim Resolution Professional (***for short IRP***) – Mr. Rakesh Kumar Jain having registration number IBBI IPA-001/IPP01297/2018-19/12068.

2. The facts giving rise in the instant Appeal are as under:

i) The Respondent herein and the Appellant company entered into loan agreement and as per the loan agreement, the said loan facility was extended by the Respondent herein to the Appellant company for a period of six years.

ii) Further case of the Appellant is that as per clause 1 of the loan agreement, the company was liable to pay interest at the rate of 12% per annum to the Respondent herein and the amount of INR 3,59,24,490/- was disbursed by the Respondent to the Appellant company till 28.05.2014.

iii) Further case of the Appellant is that out of the total principal amount disbursed to the Appellant company on 17.12.2014, the company made a payment to the Respondent herein towards the principal amount of INR 15,75,510/- and thereafter stopped making further payments towards the principal amount.

iv) Further case of the Appellant is that the Appellant company also made some payments amounting to Rs. 61,24,769/- to the Respondent herein towards the interest till 19.01.2016 and thereafter stopped making further payments towards the interest.

v) Further case of the Appellant is that since the loan was for a period of six years from the date of agreement, the said period has already expired on 03.08.2019, the entire outstanding amount (principal as well as the interest) has become due and payable by the Appellant company.

vi) Further case is that confirmation of outstanding balance/balance conformation was given by the Appellant company to the Respondent herein, confirming that an amount of Rs. 5,42,67,796/- outstanding as on 01.04.2019.

vii) Further case is that the Respondent herein through its Advocate issued a Demand Notice to the company demanding the unpaid amount. Despite several reminders as well as the legal notice, the company failed to clear the outstanding payments of the Respondent.

viii) Further case is that the Respondent herein filed the Application under Section 7 of the IBC against the Appellant company on 07.12.2019 and the Ld. Adjudicating Authority after hearing the parties passed the impugned order. Hence the Appeal.

Submissions on behalf of the Appellant

3. The Learned Counsel for the Appellant during the course of argument and his memo of Appeal along with Written Submissions submitted that as per Section 7(4) of the IBC, the Ld. Adjudicating Authority has to ascertain the existence of default from the records of the Information Utility or on the basis of other evidence furnished by the Financial Creditor. In the present

case, there is neither any record of default recorded with Information Utility nor evidence of any other default furnished by the Financial Creditor.

4. It is further submitted that the alleged default of debt on the basis of the alleged Loan Agreement dated 02.08.2013 is not a default in the eyes of law as the same is unauthorized and a disputed document.

5. It is further submitted that the alleged loan agreement dated 02.08.2013 is signed by Mr. Nimish Arora, on behalf of the Corporate Debtor. Mr. Nimish Arora was never authorized in any Board Meeting or in Share-holders meeting to sign the loan agreement and borrow money on behalf of the Corporate Debtor.

6. It is further submitted that the alleged borrowing taken by Mr. Nimish Arora from the Respondent is in excess of the aggregate paid-up share capital and free reserves of the Corporate Debtor, the Board of Director has to obtain consent of the company by special resolution as per Section 180(1)(c) of the Companies Act, 2013.

7. It is further submitted that as per Section 180(5) of the Companies Act, 2013, no debt incurred by the company in excess of the limit imposed under Section 180(1)(c) of the Companies Act, 2013 shall be valid or effective.

8. It is further submitted that the loan agreement is antedated, sham and an unstamped document. Mr. Nimish Arora in collusion with the Respondent herein had played fraud on the Corporate Debtor by taking unauthorized, illegal and collusive loan from the Respondent and third parties and later diverted the funds to its group of companies.

9. The Learned Counsel for the Appellant further submitted that these facts are not considered by the Ld. Adjudicating Authority while passing the impugned order. So, based on these submissions the impugned order is fit to be set aside and the Appeal be allowed.

Submissions on behalf of the Respondent

10. The Learned Counsel for the Respondent during the course of argument and his Reply Affidavit along with Written Submissions submitted that in the year 2013, the Respondent extended a loan facility for an amount of INR 5,50,00,000/- to SN Jee Build Well Pvt. Ltd. (Corporate Debtor) by entering into a Loan Agreement dated 02.08.2013 (at page 129 to 131 of the Appeal Paper Book).

11. It is further submitted that the amount of INR 3,59,24,490/- was disbursed by the Respondent to the Corporate Debtor. As per clause 1 of the Loan Agreement, the Corporate debtor was liable to pay interest at the rate of 12% per annum.

12. It is further submitted that out of the total principal amount disbursed, the Corporate Debtor made a repayment towards the principal amount of INR 15,75,510/- on 17.12.2014. An amount of Rs. 61,24,769/- was paid towards interest on 17.12.2014 and 19.01.2016 thereafter, the Corporate Debtor stopped making further payments.

13. It is further submitted that on 01.04.2019, the Corporate Debtor issued confirmation of outstanding balance/balance to the Respondent, confirming

that an amount of Rs. 5,42,67,796/- is outstanding on the date (at page 137 of the Appeal Paper Book).

14. It is further submitted that the Respondent through its advocate issued a legal notice to the Corporate Debtor on 25.10.2019 (at page 138 to 142 of the Appeal Paper Book) demanding the unpaid amount. Admittedly, neither any reply to the said notice nor any payment has been received by the Respondent.

15. It is further submitted that the Appellant herein has not come with clean hands and is guilty of *suppression veri and suggestio falsi* inasmuch as the Appellant has duly acknowledged the debt of the Respondent by counter signing the audited balance sheet of the financial year 2015-16 of the Corporate Debtor (Annexure R-2 at page 18 to 26 of the Reply Affidavit).

16. It is further submitted that the Appellant time and again in the year 2016 has been signing and issuing cheques to the Corporate Debtor on account of payment of interest of the unsecured loan amount clearly acknowledging and admitting the financial debt of the Respondent. The said action of the Appellant clearly shows that the Appellant was in complete knowledge of debt of the Respondent. In such a situation the Appellant is further estopped from alleging to the contrary. Copies of the ICICI Bank cheque bearing no. 044029 dated 19.01.2016 for an amount of Rs. 10,00,000/- and ICICI Bank cheque bearing no. 039986 dated 19.01.2016 for an amount of Rs. 48,965/- issued under the signatures of the Appellant to the Respondent (Annexure-R-3 at page 27 to 28 of the Reply Affidavit).

17. It is further submitted that in the year 2019 itself, the Corporate Debtor sent a confirmation of accounts dated 01.04.2019 (at page 137 of the Appeal Paper Book) acknowledging the amount of loan due to the Respondent which was duly acknowledged by the Respondent.

18. it is further submitted that in response to the forensic report which is being heavily as relied upon by the Appellant, the Respondent respectfully submitted that from the plain reading of internal page 4 of the forensic report (at page 209 Vol.-II of the Appeal Paper Book) it can be clearly seen that the said forensic audit has been conducted on the request of the Appellant and not the Corporate Debtor.

19. It is further submitted that the some of the relevant portions of the forensic audit report which clearly say that the money lent to the Corporate Debtor was used for the affairs of the Company and the Ld. Adjudicating Authority in para 24 of the impugned order has taken note of the fact and also the fact that the Forensic Audit Report, the Auditor has admitted this fact that the fund of Rs. 375 lakhs were received from the 'Indian Delco Private Limited' and it is also admitted that out of that amount Rs. 150 lakhs were properly utilized in the Company. So based on these submissions there is no merit in the instant Appeal, the Appeal is fit to be dismissed.

FINDINGS

20. After hearing the parties and having gone through the pleadings made on behalf of the parties, we are of the considered view that the following facts are admitted in the instant Appeal.

- That in the year 2013, the Respondent extended a loan facility for an amount of INR 5,50,00,000/- to SN Jee Build Well Pvt. Ltd. (Corporate Debtor) by entering into a Loan Agreement dated 02.08.2013 (at page 129 to 131 of the Appeal Paper Book).
- It is also admitted fact that the amount of INR 3,59,24,490/- was disbursed by the Respondent to the Corporate Debtor. As per clause 1 of the Loan Agreement, the Corporate debtor was liable to pay interest at the rate of 12% per annum.
- It is also admitted fact that the total principal amount disbursed, the Corporate Debtor made a repayment towards the principal amount of INR 15,75,510/- on 17.12.2014. An amount of Rs. 61,24,769/- was paid towards interest on 17.12.2014 and 19.01.2016 thereafter, the Corporate Debtor stopped making further payments.
- It is also admitted fact that on 01.04.2019 (at page 137 of the Appeal Paper Book), the Corporate Debtor issued confirmation of outstanding balance/balance to the Respondent, confirming that an amount of Rs. 5,42,67,796/- is outstanding on the date.
- It is also admitted fact that the Respondent through its advocate issued a legal notice to the Corporate Debtor on 25.10.2019 (at page 138 to 142 of the Appeal Paper Book) demanding the unpaid amount. Admittedly, neither any reply to the said notice nor any payment has been received by the Respondent.
- It is also admitted fact that the Appellant has duly acknowledged the debt of the Respondent by counter signing the audited balance sheet of the

financial year 2015-16 of the Corporate Debtor (Annexure R-2 at page 18 to 26 of the Reply Affidavit).

- The Ld. Adjudicating Authority in para 24 of the impugned order rightly taken note of the fact and also the fact that the Forensic Audit Report, the Auditor has admitted this fact that the fund of Rs. 375 lakhs were received from the 'Indian Delco Private Limited' and it is also admitted that out of that amount Rs. 150 lakhs were properly utilized in the Company.

ORDER

21. In view of the above, we are of the considered view that there is no illegality committed by the Ld. Adjudicating Authority while passing the impugned order therefore, we do not need to interfere in the impugned order. The impugned order dated 07.01.2021 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-V in (IB) 3434 (ND)/2019 - IA/5412/2020 is hereby affirmed. There is no merit in the Appeal. The Appeal is hereby dismissed.

22. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Ld. Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-V forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi
1st December, 2021
R. Nath.