

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No. 51/2021
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 06/04/2021 in
C.P.(IB) No. 196/BB/2020, passed by the ‘Adjudicating Authority’,
National Company Law Tribunal, Bengaluru Bench, Bengaluru)

In the matter of:

Mr. Guruprasad V Hishobkar,

Promoter / Shareholder of Shree Ashraya Infra-Con Limited.,
(the Corporate Debtor),
322, Roy Road,
Tilakwadi,
Belgaum – 590006.

...Appellant

Versus

1. Shree Aashraya Souhard Credit Society Limited.,

Registered office at CTS No. 107,
Arjun Sankul, 1st Floor Dane Galli,
Shahapur, Belagavi,
Karnataka-590003.

...Respondent No.1/ Financial Creditor

2. Shree Aashraya Infra-Con Limited.,

(U45202KA2011PLC058788)

Registered office at No.322,
Audumbar Savali, Roy Road,
Tilakwadi, Belagavi,
Karnataka-590006.

...Respondent No. 2 / Corporate Debtor

Present :

For Appellant : Dr. K.S. Ravichandran, PCS

For Respondent No. 1 : Mr. S. Vivekananda, Advocate

For Respondent No.2/ RP : Mr. Chandramouli Prabhakar, Advocate

J U D G M E N T

[Per: Shreesha Merla, Member (Technical)]

1. This Appeal is filed by the Appellant who is the Promoter/ Shareholder of the Corporate Debtor under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the ‘Code’), against the Impugned Order dated 06/04/2021, passed by the National Company Law Tribunal, Bengaluru Bench, Bengaluru in C.P.(IB) No. 196/BB/2020, by which Order, the Adjudicating Authority has admitted the Section 7 Application preferred by the 1st Respondent / Financial Creditor / Shree Aashraya Souhard Credit Society Limited.

2. The facts in brief as arrayed in the Company Petition are that the Petitioner / First Respondent is a Co-operative Society registered under the ‘Karnataka Co-operative Societies Act, 1959’ and subsequently got registered under ‘Karnataka Souharda Sahakari Act, 1977’ and changed its name to ‘Shree Aashraya Souhard Credit Society Limited’. The Corporate Debtor is a Company which is engaged in the business of Real Estate and Construction, having few Common Directors with the Petitioner’s Society based on which the Petitioner (hereinafter referred to as the ‘Financial Creditor’) had provided Secured Cash Credit Facility to the tune of Rs. 14 Crores, prior to 1997 and thereafter extended Cash Credit Facilities on 08/05/2000, 24/01/2008, 29/08/2009 and 02/04/2010 respectively. It was averred that loan amount was disbursed in several tranches

and since the management of the Financial Creditor and the Corporate Debtor is the same, the Corporate Debtor was able to pool in huge investment from large number of small investors. The Corporate Debtor did not create a charge on the assets of the Corporate Debtor. The Financial Creditor issued various loans dated 22/08/2016, 19/04/2017 calling upon the Corporate Debtor to repay the loan amount for which the Corporate Debtor issued Reply letters dated 22/09/2016 and 02/05/2017, but never made the payments. The Financial Creditor also got issued a Legal Notice on 01/03/2018 which was returned on 10/03/2018 with an endorsement 'Not Claimed'. The Depositors of the Society approached the Registrar of Co-operative Society and expressed their grievance before him, subsequent to which the Registrar appointed a Special Officer to facilitate the holding of Elections in the Society and to appoint a new Board of Directors to regularise the operations of the Financial Creditor. Thereafter, the Liquidator was appointed on 14/01/2019 to recover the pending dues and settle the dues of a large number of individual investors.

3. It is said that as on 31/03/2020, the money due and payable for the Corporate Debtor stood at Rs. 12,09,45,192/- and the Balance Sheet of the Corporate Debtor for the year ending 31/03/2018 makes it very clear that the Corporate Debtor is commercially insolvent and is unable to pay its debts. Hence the Financial Creditor preferred Section 7 Application seeking to initiate

‘Company Insolvency Resolution Process’ (‘CIRP’) in respect of the Corporate Debtor.

4. Submissions of the Learned Company Secretary Dr. K.S. Ravichandran:

- It is submitted that the Corporate Debtor is a going concern and is executing a Project in the name of ‘Aashraya Enclave’, valued at Rs. 19.67 Crores as on 08/08/2020. There is a proceeding initiated by the Financial Creditor before the Registrar of Co-operative Societies, Bangalore and these Proceedings are under the ‘KSS Act’ to direct the Corporate Debtor to pay Rs.8,66,92,215.80/- along with interest, which has been seriously disputed by the Corporate Debtor.
- It is submitted that there is no default on behalf of the Corporate Debtor and the amounts claimed by the Financial Creditor before the Deputy Registrar of Co-operative Societies is disputed on several grounds.
- The Financial Creditor has failed to give credit against the FDRs and wrongfully debited the accounts of the Corporate Debtor in its books. The statement of accounts of the Corporate Debtor does not speak about the reversal of interest waiver of 2012 and also about debiting interest thereon.
- It is submitted that the Adjudicating Authority has not adjudicated the amount in default nor has taken note of the fact that the Statutory Authority under the ‘KSS Act’ is the Competent Authority to determine if any amount is payable.

- A perusal of Section 44 and Section 42 of the 'KSS Act' show that there is a bar on Jurisdiction of Courts and that the disputes may be decided by the Registrar of Co-operative Societies or referred to an Arbitrator. Whether a particular issue constitutes a dispute under the Act, cannot be called in question in any Court. It is strenuously argued by the Learned Company Secretary that unless the amount in default is determined by the Court of Deputy Registrar of Co-operative Societies under the Law of Co-operative Societies which is a special Law, the Adjudicating Authority cannot decide or determine the disputed amount.
- It is argued that the sum Rs. 12.09 Crores shown as amount in default in the Application, is erroneous as the sum of Rs.1.92 Crores towards reversal of Interest waiver and interest thereon was not considered.
- The Financial Creditor issued a last Legal Notice on 01/03/2018, whereas the Corporate Debtor had executed the document only in 2010, subsequent to which there is no acknowledgement of Debt signed by the Corporate Debtor and therefore, the Application is hopelessly time barred. The Adjudicating Authority has wrongly relied on the Balance sheet of the Corporate Debtor as on 31/03/2018 and proceedings during the entire period from 2016-2020 ought to have been taken into consideration which the Adjudicating Authority did not consider.

- The minority Shareholders did not get any relief and since they were in charge of the affairs of the Society and moved this Application in a malicious manner. These aspects were not considered by the Adjudicating Authority.
- It is argued by the Company Secretary that the Adjudicating Authority has wrongly observed that the Corporate Debtor is insolvent on account of having a deposit of Rs.1,11,28,096/- and that the Corporate Debtor is unable to do business.
- The Learned Company Secretary in support of his submissions placed reliance on the following Judgments:

1. *Innovative Industries Ltd Vs. ICICI Bank & Anr.(Company Appeal (AT) (Ins) No. 1 & 2 of 2017.*
2. *Innovative Industries Limited Vs. ICICI Bank and Another (MANU/SC/1063/2017)*
3. *Park Energy Private Limited Vs. Syndicate Bank & Bhadreshwar Vidyut Private Limited (Company Appeal (AT) (Ins) No. 270 of 2020)*
4. *Tottempudi Salalith Vs. State Bank of India (Company Appeal (AT) (CH) (Ins) No. 04/2021*
5. *Kozhikode Coconut Farmers Producer Company Ltd and Ors. Vs. Moolath Mannil Sreenivasan and Ors. (Company Appeal (AT) No. 341 of 2018.*

5. Submission of the Learned Counsel Mr. S. Vivekananda appearing for the 1st Respondent:

- The Learned Counsel submitted that there is no dispute of the amounts due and payable and that the adjustment of the FDR against the outstanding

loan of the Corporate Debtor would result in Preferential Payment. It is contended that there are 6002 deposit holders in the Society, if the request placed by the deposit holders is considered, it prejudices the interest of 5,978 deposit holders who are waiting to receive their deposit money. Further such an adjustment is not permitted under Law, in view of the fact that the 1st Respondent is in Liquidation and therefore the refusal of non-adjustment of FDR, being used as a defense to claim that there is no default, is erroneous.

- The Demand Notice was issued on 01/03/2018 calling upon the Corporate Debtor to pay the amount, but there was no response.
- The Application is not barred by Limitation as till December 2017, Respondent No. 1 and 2 were under common control and management. As such, the Notices and Reply Notice exchanged between common Management during year 2016-17 is not of much consequence. The last Payment was made on 04/12/2017 by transferring Rs. 8,32,413/-, to the loan amount of the Corporate Debtor and the acts of the Corporate Debtor by selectively disclaiming the transfer of Mr. Roshan Raikar's payment to manage the Limitation, is totally uncalled for.
- It is apparent that there is natural fraud in the Society and the Report of Mr. Thoppanavar, makes it pertinently clear that the Society was not following any rules or regulations and a Special Officer was appointed on

28/12/2017. This Officer discovered the wrongful rebate i.e. the reversal of interest debit and sent the 'Notice' claiming back the rebate along with interest and therefore the claim is well within the Limitation.

- As the quantum of Default is more than One lakh Rupees, which was the 'threshold' under 'Insolvency and Bankruptcy Code, 2016', at that point of time, the Section 7 Application is maintainable.
- The Settlement perusal of the Corporate Debtor demonstrated the fact that there is no due and payable. There is no repayment of the Corporate Debtor after issuance of Notice dated 01/03/2018. The Company is unable to pay any amount and the Balance Sheet shows a negative reserve of Rs.1,11,28,096/- and a meagre profit of Rs. 10,50,635/-.

6. Submissions of the Learned Counsel Mr. Chandramouli Prabhakar, representing the 2nd Respondent:

- It is submitted by the Learned Counsel for the 2nd Respondent that the 'Resolution Professional' ('RP') of the Corporate Debtor had provisionally accepted the claim for a sum of Rs. 7,75,52,320/-, upon cross verification with the balance sheet of the Corporate Debtor. Subsequent to the commencement of the CIRP, the RP received an Order dated 11/10/2021, whereby the Deputy Registrar of Co-operative Societies, Bangalore, had allowed JRD/KSCFL/4638/2018-19 and held that the Corporate Debtor is liable to pay a sum of Rs.5,13,71,863/- towards Principal and

Rs. 1,67,86,388 towards interest to the 1st Respondent, which is the debt crystallized on 31/03/2018 together with 15% interest and 2% Penalty interest until the date of payment.

- During the course of ‘CIRP’, the Appellant and the Suspended Directors had presented a Resolution Plan which was approved by the ‘Committee of Creditors’ (‘CoC’), but the Adjudicating Authority had rejected the Application vide Order dated 20/02/2023 in IA No. 192 of 2022 on the ground that the Plan does not satisfy the Provisions of Section 29A(g) read with Section 240 A of the Code.
- Subsequent to rejection of the Resolution Plan, the Meeting of the CoC was convened and on 11/03/2022, the CoC has unanimously approved the settlement plan proposed by the Appellant. As the Adjudicating Authority rejected IA No. 192/2022, vide Order dated 28/02/2023, the ‘Interim Resolution Professional’ (‘IRP’) was left with no option but to file an Application for Liquidation vide IA No. 257/2023.
- It is submitted that subsequent to the approval of such settlement proposal unanimously, on 25/03/2023, the Appellant preferred an IA No. 233 of 2023 and the Adjudicating Authority adjourned the matter, on account of the pendency of the instant Appeal.

Assessment:

6. The brief point that falls for consideration in this ‘Appeal’ is whether the Adjudicating Authority was justified in admitting the Section 7 Application, filed by the Financial Creditor / Shree Aashraya Souhard Credit Society Limited. It is not in dispute that the 1st Respondent’s Society was formed by the same set of Directors, who are in control of the Corporate Debtor. It is seen from the ‘Investigation Report’ that the Society was used as a channel to pool in funds from large number of small investors to fund the financial requirement of the Corporate Debtor. The Corporate Debtor is in the business of Real Estate and Construction and has secured the funds from the general Public through the 1st Respondent / Financial Creditor. The Balance Sheet on 31/03/2011 of the Corporate Debtor Company shows that a major chunk of the deposited amount of the 1st Respondent has been taken by the Corporate Debtor by way of Cash Credit Facility. As per the Books of Account, the loan received by the Corporate Debtor at that point of time was Rs.11,03,82,823/-. The limit of Cash Credit Facility was decided as Rs. 14 Crores without following the regulations. The Investigation Report establishes that the disposing of the said loan itself is a violation of ‘Karnataka Souharda Sahakari Act, 1997’ and the byelaws of the 1st Respondent’s Society.

7. On 22/08/2016, the Respondent sought for repayment of the outstanding amount of Rs. 5,33,14,516.80/- but the Corporate Debtor contended that the

withdrawal slip issued on Multi Purpose Co-operative Society' has not been credited to the CC account and that they had also made Counter Claim in the Proceedings before the Arbitrator. One more Notice dated 19/04/2017 was issued seeking repayment of the same amount and once again, the Corporate Debtor gave the same Reply.

8. On 28/12/2017, a Special Officer was appointed who issued the Final Notice dated 01/03/2018, calling upon the Corporate Debtor to pay the outstanding amount of Rs.6,44,26,647/-, together with the rebate Interest which has been illegally taken by the Board of Directors to the extent of Rs. 71,18,815/- and also the other interest totalling to Rs.1,66,79,159/- to be paid within 7 days from the date of issuance of the 'Notice'. It is significant to mention that the said 'Notice' returned with an endorsement 'Not Claimed'. The Contention of the Learned Company Secretary Dr. K.S. Ravichandran that the 'Quantum of Debt' was never decided and therefore, the Corporate Debtor was not in Default, is untenable.

9. The Special Officer had categorically stated that the reversal of interest waiver, which the Appellant is relying upon to establish their case that the 'Quantum of Debt' is incorrect, is practically inaccurate. Moreover, once the 'threshold on debt' is crossed, the Adjudicating Authority has to admit or reject the Application based on the Provisions of the Code. At this juncture, we find it fit to place reliance on the Judgment in the matter of **'Rajesh Kedia Vs. Phoenix**

ARC Private Limited and Anr.’ in Company Appeal (AT) (Ins) No.

916/2021, wherein, this Tribunal has held as follows:

“ In so far as the contention of the Appellant qua the quantum of payment of debt is considered, we are of the earnest view that the same does not fall for consideration before the Adjudicating Authority at the stage of ‘admission’ of the Application under Section 7 of the Code. The only requirement is that the minimum outstanding debt should be more than the threshold amount provided for under the Code. The actual amount of ‘Claim’ is to be ascertained by the Resolution Professional after collating the ‘Claims’ and their verification which comes at a later stage....”

[Emphasis Supplied]

10. It was decided that once the ‘threshold’ is crossed, it is not for the Adjudicating Authority to decide the exact ‘Quantum of Debt’, but what has to be examined is whether there is a ‘Debt’ and ‘Default’. The grounds raised by the Company Secretary appearing on behalf of the Appellant that the Company was ‘not in Default’, is not supported by any documentary evidence. The Balance Sheet for the year ending 31/03/2018 clearly includes the amount due and payable. The total Debt as on 31/03/2020 stood at Rs. 12,09,45,192/- which includes the rebate amount drawn by the Corporate Debtor and the Corporate Debtor was not in any position to pay. The Liquidator had since proceeded with the filing of the Application under Section 7 of the Code. The Argument of the Appellant that the Application is barred by Limitation, is unsustainable, keeping in view that the material on record, evidences the amount payable by the Corporate Debtor and it

is also recorded in the Balance Sheet. The loan demand was made on 04/12/2017 and the 'Notice' was served on 01/03/2018 and the Section 7 Application was filed on 16/06/2020. Therefore, viewed from any angle, the Application cannot be said to be barred by Limitation.

11. The Hon'ble Apex Court in '**Innoventive Industries Ltd. Vs. ICICI Bank & Anr.**' observed that for initiation of Corporate resolution process by financial creditor under sub-section (4) of Section 7 of the Code, 2016, the 'Adjudicating Authority' on receipt of Application under sub-section (2) is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Under Section 5 of Section 7, the 'Adjudicating Authority' is required to satisfy

- a. Whether a default has occurred;
- b. Whether an application is complete; and
- c. Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional.

Once satisfied, it is required to admit the case but in case the Application is an incomplete application, the financial creditor is to be granted seven days' time to complete the Application. However, in a case where there is no default or defects cannot be rectified, or the record enclosed is misleading, the Application has to be rejected.

12. In the instant case, the record establishes that there is a ‘debt’ and a ‘default’ and the Application is complete and the Adjudicating Authority has rightly admitted the Application under Section 7 of the Code.

13. The argument of the Appellant that the Adjudicating Authority has no jurisdiction to determine the amount in ‘Default’ unless the dispute is decided by the Court of Deputy Registrar of Co-operative Society, cannot be sustained as the RP was in receipt of the Order dated 11/10/2021 whereby the Deputy Registrar of Co-operative Societies, Bangalore had allowed the JRD/KSCFL/4638/2018-19 and had held that the Corporate Debtor is liable to pay a sum of Rs. 5,13,71,863/- towards principal and Rs. 1,67,86,388 towards interest. Therefore, the case of the Appellant that the Corporate Debtor was ‘not in default’, the ‘debt amount was not crystallized’, and that the Deputy Registrar of Co-operative Societies should first decide the disputed amount, fails, keeping in view the aforementioned reasons.

14. It is pertinent to mention that the Adjudicating Authority has rejected the Resolution plan, though approved by the CoC, on the ground that it does not satisfy the provisions of Section 29A(G) read with Section 240 A of the Code. This Tribunal in Company Appeal (AT) (CH) (Ins) No. 110 of 2023 dealing with the Impugned Order dated 28/02/2023 in IA No. 192 of 2022 has upheld the Order of the Adjudicating Authority in rejecting the Resolution Plan filed by the Appellant and the Suspended Directors. It passes beyond one’s comprehension

as to how the Appellant who is assailing the ‘Section 7 Admission Order’ under the ‘IBC Code’ has emboldened himself to present the Resolution Plan.

15. For all the aforementioned reasons this Comp Appeal (AT) (CH) (Ins) No. 51 of 2021 is dismissed as ‘devoid of merits’. No Order as to Costs.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

02/06/2023
SPR/TM