

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 848 of 2022

IN THE MATTER OF:

Mr. Jag Mohan Daga

...Appellant

Versus

**Mr. Bimal Kanti Chowdhary,
Interim Resolution Professional of M/s. Vindhya
Industries Pvt. Ltd. & Anr.**

...Respondents

Present:

For Appellant: Mr. Abhijeet Sinha, Mr. Rishav Banerjee, Mr. Saikat,
Mr. Aditya Shukla, Mr. Neeraj Kr. Gupta, Advocates

For Respondent: Mr. Kunal Tandaon, Mr. Aman Raj Gandhi, Mr.
Parthasarathy Bose, Mr. Pranay Tuteja, Advocates
for R2.

Mr. Samar Kushwaha and Ms. Shivangi Nanda, Ms.
Kavita Vinayak, Advocates for Intervenor

Mr. Shambo Nandy, Advocate for IRP.

ORDER

31.10.2022: Heard Learned Counsel for the parties.

2. This Appeal has been filed against the Order dated 14th July, 2022 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in CP (IB) No. 1786/KB/2019. By which Order, the Adjudicating Authority admitted the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "The Code") by the Respondent –Financial Creditor-Smt. Vrinda Karnani against the Corporate Debtor-Vindhya Industries Pvt. Ltd. for debt totalling Rs. 15,89,632/- which included interest till the date of 31st August, 2019.

3. Notice was issued. The case of the Financial Creditor was that the disbursement of Rs. 20,00,000/- was made to the Mining and Engineering Corporation which is proprietary concern of the Corporate Debtor. It is submitted that certain payments towards interest were made and on default being committed on 30th September, 2016, an Application was filed under Section 7 of the Code. The Corporate Debtor appeared and raised various objections objecting to the Application under Section 7. It was contended before the Adjudicating Authority that Application against the Corporate Debtor is not maintainable since the amount was not disbursed to the Corporate Debtor rather it was given to the proprietary concern the Mining and Engineering Corporation. The Application is barred by time. It is further submitted that under the family arrangement amount of Rs. 20 Lakhs was disbursed by the Financial Creditor in the year 2009. It was not a loan nor any tenure was fixed for the repayment. The Application is not maintainable.

4. The Adjudicating Authority heard the parties and by the Impugned Order has admitted the Application under Section 7 of the Code and held that Application under Section 7 was maintainable against the Corporate Debtor-Proprietary and Proprietorship can not be deemed to be separate entity and the Corporate Debtor being the Proprietary will be liable to clear the dues of the Proprietorship concern.

5. The argument with regard to the Limitation was also rejected by the Adjudicating Authority and held that there was default hence the Application was admitted.

6. This Appeal was taken by this Tribunal on 22nd July, 2022 and following Order was passed:

“22.07.2022: Heard Shri Abhijeet Sinha, Learned Counsel for the Appellant. Learned Counsel for the Appellant challenging the order raised various submissions questioning the admission of Application under Section 9 of the IBC. He also submits that in any view of the matter the amount claimed of Rs. 15,89,632/- which he is ready to deposit in the Court subject to outcome of the Appeal.

2. Learned Counsel for the Resolution Professional is present. He submits that the publication of notice has already been issued and he visited the office of the Corporate Debtor. Submission needs scrutiny.

3. Issue notice. Let Reply be filed within two weeks. Rejoinder, if any, may be filed within two weeks thereafter.

4. List the Appeal on 29.08.2022.

Subject to Appellant depositing Demand Draft of Rs. 15,89,632/- within one week from today drawn in the name of “The Pay and Accounts Officer, Ministry of Corporate Affairs, New Delhi” in pursuance of the impugned order, no further steps shall be taken by the IRP. However, IRP shall continue and keep the Corporate Debtor as a going concern with co-operation of the Ex-Management.”

7. In pursuance of the Order passed by this Tribunal, the Appellant has deposited Demand Draft of Rs. 15,89,632/-. When the Appeal was taken today Learned Counsel for the Appellant submits that he is also ready to pay the interest on the amount which is due up to date and he has offered to pay Rs. 7 Lakhs towards interest. It is submitted that MOU was entered it was family business between the parties and Application was filed due to family dispute i.e. reasons other than resolution of the Insolvency of the Corporate

Debtor. On a pointed query to Learned Counsel appearing for the Financial Creditor, he submits that the Financial Creditor is not interested in accepting the amount as being offered by the Appellant.

8. The Application for Intervention has also been filed by two other family namely Maganlal Daga and Mrs. Usha Daga seeking permission to intervene in the matter. It is submitted that the Applicants also have claims against the Corporate Debtor and they are entitled to be part of the Committee of Creditors.

9. We have heard Learned Counsel for the parties and have perused the record.

10. Learned Counsel for the parties have made elaborate submissions regarding maintainability of the Application under Section 7 of the Code. It is submitted that Under Section 2 of the IBC, Partnership and Proprietorship Firms are separate entities as provided under Section 2(f) which has not yet been notified under the IBC. Learned Counsel for the Respondent relying on the Judgement of the Adjudicating Authority where reliance has been placed on the Judgment of the Hon'ble Supreme Court in the matter of "**Amway India Enterprises Pvt. Ltd. Vs. Ravindranath Rao Sindhia & Ors.**" in paragraph 11.2 of the Impugned Order, submits that proprietorship does not have any legal entity and Corporate Debtor could have been proceeded in IBC Proceeding.

11. After having heard Learned Counsel for the parties, we further notice that before the Adjudicating Authority, one of the submissions which was raised by the Corporate Debtor has been noticed in paragraph 9.7 which is to the following effect:

“9.7 The Financial Creditor has mischievously and surreptitiously filed the instant petition, simply in order to extort money out of M/s. Vindhya Industries Pvt. Ltd. with a sole intention to make recovery of its investment in the business of M/s. The Mining and Engineering Corporation, which is not permissible under IBC, 2016. The purported Corporate Debtor herein has craved for leave to file an appropriate application under Section 65 of the IBC, 2016 against the Financial Creditor for maliciously filing the instant application under Section 7 of the IBC, 2016 without having any intention to initiate Corporate Insolvency Resolution Process.”

12. The MoU which has been referred to, has been brought on record at page 184 which was entered into between Shri Magan Lal Daga and Shri Jag Mohan Daga and Shri Rajesh Kumar Daga. In paragraph 5 of the MoU, following was mentioned:

“5. The Funds of First Party lying in the SMCPPL as on 31/3/2009 shall be transferred to The Mining & Engineering Corporation at the earliest but not later than 31.03.2010:

- a. Magan Lal Daga Self Rs. 2567440*
- b. Usha Daga Wife Rs. 1136653*
- c. Magan Lal Daga HUF HUF Rs. 1776279*
- d. Devashish Daga Son Rs. 686418*
- e. Vrinda Karnani Daughter Rs. 1253828”*

13. The name of the Financial Creditor is mentioned at paragraph 5 (e) and amount referred was Rs. 12,53,828/-.

14. From the perusal of the facts and materials on record, it does appear that the family was carrying a business and business dispute has arisen

between the parties. The proprietorship Company i.e. The Mining and Engineering Corporation had carried out various business. The Amounts were pooled by the Family Members including Financial Creditor.

15. This Court had by its Order dated 22nd July, 2022 on the offer made by the Appellant to deposit the entire amount principal and interest as claimed in the Application was permitted to deposit the amount drawn in the Bank Draft in favour of “Pay and Accounts Officer” Ministry of Corporate Affairs which order has been complied with and when the Case is taken today, the offer made by the Appellant to pay the entire interest up to date by a cheque has also shown the Court. The offer made by the Appellant to pay entire demanded amount with interest has been refused by the Financial Creditor which clearly indicates that Financial Creditor is not interested in the debt or the Insolvency Resolution of the Corporate Debtor and wants the “Corporate Insolvency Resolution Process” (hereinafter referred to as “CIRP”) to be continued. The Hon’ble Supreme Court in the matter of **“Vidarbha Industries Private Limited Vs. Axis Bank Limited” (Civil Appeal No. 4633 of 2021)** decided on 12th July, 2022, has clearly laid down that it is not mandatory that Section 7 Application be admitted on proof of debt and default. In the facts of the present case without entering into other issues which has been raised by the parties, we find it a fit case where CIRP should not be allowed to continue when Financial Creditor proceeded for “CIRP” not for purposes of Resolution of Insolvency of the Corporate Debtor but for other purposes with some other agenda. The Court should not permit such “CIRP” to go on, which has been initiated to settle family business dispute.

In view of the above, we set aside the Impugned Order dated 14th July, 2022 passed by the Adjudicating Authority in CP(IB) No. 1786/KB/2019. It shall be open for the parties to take appropriate remedy for the debt, if any, in accordance with law. The amount deposited under the Direction of this Court by the Appellant, should be refunded to the Appellant. Learned Counsel for the IRP submits that he has made publication and has incurred certain expenses. Learned Counsel for the Appellant is ready to make payment of Rs. 2 Lakh for Fee and Expenses incurred by the IRP within two weeks by a bank draft. In so far as the submissions made on behalf of Intervenors, it is always open for them to take such legal remedy as per law. The Appeal is allowed, accordingly.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

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