NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1261 of 2022

IN THE MATTER OF:

Chandrakant Khemka

...Appellant

Versus

UCO Bank & Anr.

...Respondents

Present:

For Appellant:	Mr. Sanjiv Sen, Sr. Advocate with Mr. Mayank Baghani, Advocate
For Respondent:	Mr. Partha Sil, Mr. Tavish B. Prasad, Sayani Bhattacharya, Advocates of UCO Bank

O R D E R

11.01.2023: Heard Learned Counsel for the Appellant as well as Learned Counsel for the Respondent.

2. This Appeal has been filed against the Order of the Adjudicating Authority dated 20th September, 2022 by which order the Application under Section 7 filed by the Appellant Financial Creditor has been admitted. The Financial Creditor has filed the Application under Section 7 claiming default to the extent of Rs. 4,52,08,22,525.31/- including interest as on 31st October, 2020. The Adjudicating Authority after hearing the parties came to the conclusion that the Corporate Debtor is a loss making company and is unable to service its debt. It was further held that the debt and default is proved and OTS which was granted

was not honored by the Corporate Debtor and further request for OTS is not obligatory to be accepted. The Corporate Debtor has also placed reliance on the Judgement of the Hon'ble Supreme Court in the matter of "Vidharbha Industries Power Limited Vs. Axis Financial Creditor Limited". Adjudicating Authority after considering the submissions of the parties came to the conclusion that debt and default is proved and there is no such circumstance on which discretion be exercised for not initiating Section 7 Proceedings.

3. Mr. Sanjeev Sen, Sr. Counsel appearing for the Appellant challenging the Order of the Adjudicating Authority contends that the findings recorded by the Adjudicating Authority that it is a loss making company is not correct. He submits that the Company has made payments to its creditors to the extent of Rs. 148.25 Crores in last three financial years and in view of the Judgement of the Hon'ble Supreme Court in "Vidharbha Industries Power Limited Vs. Axis Financial Creditor Limited" the Adjudicating Authority ought to have exercised its discretion in not admitting the Application under Section 7 of the Code. It is further submitted that the Corporate Debtor was NPC Contractor and has its goodwill. There are no much tangible assets from which any amount can be recovered.

4. Learned Counsel for the Respondents-Financial Creditor refuting the submissions of Learned Counsel for the Appellant contends that findings recorded by the Adjudicating Authority that the Company is a loss making company is based on the figures given in the balance sheets for the last six years. It is submitted that it is for the Committee of Creditors as to whether any other

professional be inducted to run the Corporate Debtor. It is submitted that debt and default has been proved and OTS which was approved was not honored.

5. When this Appeal was taken by this Tribunal, Learned Counsel for the Appellant again made a request that Appellant will approach the Bank. On 02.11.2022, this Court adjourned the Appeal accepting the aforesaid request. The Appellant has now filed an affidavit dated 25th November, 2022 where Appellant has brought on record again an OTS proposal where Appellant has offered to make the payment which payment could not be made as per the earlier OTS which was approved on 20th October, 2018.

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

7. From the materials on record, it is clearly established that there is debt and default on the part of the Corporate Debtor. OTS which was given on 20th October, 2018 could not be honored and the OTS which has now been submitted on 25th November, 2022 is not a fresh OTS Proposal but only proposal to make the balance payment as per 2018 OTS Proposal. In so far as the submission of Learned Counsel for the Appellant that Company is not loss making company, when debt and default is proved, on the arguments that company is not a loss making company debt and default cannot be ignored.

8. Coming to the judgement of the Hon'ble Supreme Court in the matter of "**Vidharbha Industries Power Limited Vs. Axis Financial Creditor Limited**" it is true that discretion is vested with the Adjudicating Authority to admit or not

admit the application in view of the peculiar facts and circumstances of a particular case. The Adjudicating Authority has adverted to the submission of the Appellant that Application be not admitted and has found that there are no such reasons due to which Application be not admitted. We are satisfied that no error has been committed by the Adjudicating Authority by admitting Section 7 Application.

9. In so far as last submission of the Appellant that Appellant has submitted an OTS proposal to the Financial Creditors, in event, OTS is accepted, it is always open for the Appellant to file an Application before the Adjudicating Authority for accepting the proposal under Section 12-A of the Code on which the Adjudicating Authority may take appropriate decision in accordance with law.

10. Learned Counsel for the Respondent submits that there was mistake in the Registration Number of the Resolution Professional for which Application has been filed before the Adjudicating Authority for correction. It is open for the Adjudicating Authority to proceed and pass appropriate order on the correction application in accordance with law.

With these observations, the Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Basant/nn