

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,

NEW DELHI

Company Appeal (AT) (Ins.) No. 983 of 2019

IN THE MATTER OF:

Nirmal Kumar Agarwal

...Appellant

Versus

State Bank of India & Ors.

...Respondents

Present:

**For Appellant: Mr. Anup Kumar, Ms. Shruti Singh, Ms. Neha Jaiswal,
Advocates**

For Respondent: Mr. Vijayant Paliwal, Mr. Nikhil Mathur, Adv. for R1

O R D E R

(ORAL)

Per: Justice Rakesh Kumar Jain:

19.12.2022: This appeal is directed against the order dated 04.09.2019, by which an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by the State Bank of India (Financial Creditor) against the Sungrowth Share and Stocks Limited (Corporate Guarantor) on account of a default committed by the Corporate Debtor (M/s Adhunik Alloys & Power Limited) in paying the financial debt of Rs. 63,04,53,226/- has been admitted by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata).

2. In brief, M/s Adhunik Alloys & Power Limited) is already in Corporate Insolvency Resolution Process (CIRP) vide order dated 23.08.2017 of the Adjudicating Authority. M/s SPV Bhagwati Power & Steel Ltd., Resolution Applicant has submitted the resolution plan which has been approved by the Adjudicating Authority on 07.12.2018. In the said proceedings, the State Bank of India (Respondent herein) has submitted its claim of Rs. 324.73

Crores, which was though considered in the plan but now the Respondent filed an application under Section 7 of the Code against the Sungrowth who stood as a Guarantor vide Deed of Guarantee dated 23.09.2011 to the extent of Rs. 30 Crores for recovery of balance outstanding of the Corporate Debtor M/s Adhunik Alloys & Power Limited.

3. In the present appeal, Counsel for the Appellant has submitted that the application filed under Section 7 of the Code was not maintainable and the Adjudicating Authority had no jurisdiction to initiate the proceedings because Sungrowth was a non-banking financial institution (NBFC) and was registered as such by the Reserve Bank of India (RBI) vide certificate of registration no. B.05.03435, in exercise of the powers conferred on the RBI by Section 45 IA of the RBI Act, 1934. The certificate was issued on 28.03.2001 and was granted to carry on business of non-banking financial institution without accepting public deposits subject to the conditions given in the said registration certificate.

4. It is submitted that the application under Section 7 was filed on 08.06.2018 whereas the certificate dated 28.03.2001 (Annexure A17) was cancelled on 09.07.2018 and intimation was given to Sungrowth about it on 11.07.2018. It is not denied by the Respondent that the cancellation of the certificate was prospective in nature.

5. Counsel for the Appellant has argued that the day on which the application under Section 7 was filed i.e. 08.06.2018, the registration of Sungrowth as NBFC was in operation, therefore, the application under Section 7 of the Code was not maintainable. He has referred to Section 3(7), 3(8), 3(17), 3(18) and Section 5A of the Code to refer to the definitions of the

Corporate Person, Corporate Debtor, Financial service provider, Financial sector regulator and Corporate Guarantor. He has also submitted that proceedings against the Financial service provider could have been initiated only in terms of Insolvency and Bankruptcy (Insolvency And Liquidation Proceedings Of Financial Service Providers And Application To Adjudicating Authority) Rules 2019 (for short 'Rules') which came into force w.e.f. 15.11.2019 in terms of Section 227 read with clause z k of sub-section 2 of 239 of the Code. He has further relied upon two decisions of this Appellate Tribunal in the case of Randhiraj Thakur Vs. Jindal Saxena Financial Services Pvt. Ltd. & Anr., 2018 SCC Online NCLAT 508 and Housing Development Finance Corporation Ltd. Vs. RHC Holding Pvt. Ltd., 2019 SCC Online NCLAT 398.

6. On the other hand, Counsel appearing on behalf of Respondent has vehemently opposed the submissions made by Counsel for the Appellant on the ground that the Appellant was not doing financial services as defined under Section 3(16) and therefore, the registration of the Appellant dated 28.03.2001 was cancelled vide order dated 09.07.2018/11.07.2018. It is further submitted that even if the application under Section 7 of the code was filed on 08.06.2018 and at that time the certificate of registration was in operation but it came to end during the pendency of the proceedings on 09.07.2018/11.07.2018, therefore, the application filed under Section 7 of the Code by the Respondent (State Bank of India) was in accordance with law. It is also submitted that the decision in the case of Housing Development Finance Corporation Ltd. (Supra), this court has dealt with the issue as to whether the service provider in that case was providing the financial services

or not, therefore, the case of the Appellant is not covered by the aforesaid decision.

7. However, in rebuttal, Counsel for the Appellant has submitted that though financial services were provided in terms of Section 3(16)(b), yet the fact remains that Sungrowth was issued registration by the RBI which was in operation on 08.07.2018 when the application under Section 7 of the Code was filed, therefore, initiation of the CIRP proceedings at the instance of Respondent before the Adjudicating Authority on that date was not maintainable.

8. We have heard Counsel for the parties and perused the record with their able assistance.

9. In order to appreciate the rival contentions, it would be relevant to refer to the definitions of Section 3(7), 3(8), 3(16), 3(17), 3(18), 5A, 227 & 239 (2) (zk) of the Code.

“3(7) “corporate person” means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

3(8) “corporate debtor” means a corporate person who owes a debt to any person;

3(16) “financial service” includes any of the following services, namely:—

(a) accepting of deposits;

(b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;

(c) effecting contracts of insurance;

(d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;

(e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of—

(i) buying, selling, or subscribing to, a financial product;

(ii) availing a financial service; or

(iii) exercising any right associated with a financial product or financial service;

(f) establishing or operating an investment scheme;

(g) maintaining or transferring records of ownership of a financial product;

(h) underwriting the issuance or subscription of a financial product; or

(i) selling, providing, or issuing stored value or payment instruments or providing payment services;

3(17) “financial service provider” means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;

3(18) “financial sector regulator” means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government;

(5A) “corporate guarantor” means a corporate person who is the surety in a contract of guarantee to a corporate debtor;

227. Power of Central Government to notify financial service providers, etc.

Notwithstanding anything to the contrary¹ [contained in this Code] or any other law for the time being in force, the Central Government may, if it considers necessary, in consultation with the appropriate financial sector regulators, notify³ financial service providers or categories of financial service providers for the purpose of their insolvency and liquidation proceedings, which may be conducted under this Code, in such manner as may be prescribed.

[Explanation.—For the removal of doubts, it is hereby clarified that the insolvency and liquidation proceedings for financial service providers or categories of financial service providers may be conducted with such modifications and in such manner as may be prescribed.]

239(2) Without prejudice to the generality of the provisions of subsection (1), the Central Government may make rules for any of the following matters, namely:—

.....

(zk) the manner of conducting insolvency and liquidation proceedings under section 227

.....”

10. Section 3(7) defines corporate person. It categorically states that it will not include any financial service provider. Section 3(8) defines corporate

debtor, which means a corporate person. Meaning thereby in order to become corporate debtor entity has to be a corporate person but a financial service provider is not a corporate person. The financial service provider is defined in Section 3(17) which says that any person to whom registration is granted by a financial sector regulator. Section 3(18) defines financial sector regulator which includes the Reserve Bank of India. Financial service is defined under Section 3(16) which according to the decision of this court in the case of Housing Development Finance Corporation Ltd. (Supra) is inclusive and not limited to one which is provided in the said provision.

11. Admittedly, the present proceedings have been initiated against Sungrowth as a corporate guarantor. Section 5A defines Corporate Guarantor which means a corporate person. Corporate person, we have already explained that it would not include a financial service provider. Thus, looking from any angle, Sungrowth having the registration in terms of Section 3(17) as financial service provider by the financial service regulator in terms of Section 3(18) by RBI as on 28.03.2001 which continued up to 09.07.2018/11.07.2018 cannot in any case be called a banking institution. It has to be called a non-banking financial institution and in such scenario the application filed under Section 7 of the Code on 08.06.2018 was not maintainable on that date and therefore, the Adjudicating Authority had no jurisdiction to invoke its power for the purpose of initiation of CIRP proceedings. Similar situation arises in the case of Randhiraj Thakur (Supra) as well as Housing Development Finance Corporation Ltd. (Supra). Thus, looking from any angle, it is a case in which the Adjudicating Authority has committed an error in initiating the proceedings under Section 7 of the Code

though it was not apprised of the facts that Sungrowth (Corporate Guarantor) was a financial service provider.

12. In this matter, regard is to be had to the decision of Hon'ble Supreme Court in the case of Jagmittar Sain Bhagat Vs. Health Services, Haryana, (2013) 10 SCC 136, in which it has been held that if the Adjudicating Authority does not have the jurisdiction to initiate the proceedings then the said proceedings are nonest in the eyes of law and such an issue can be raised even in appeal also. "Para 9. Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a Court or Tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply..." Similar issue was decided by Hon'ble Supreme Court in the case of Kiran Singh Vs. Chaman Paswan, AIR 1954 SC 340, it has been held that "Para 6. It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or

whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.”

13. Thus, in view of the aforesaid facts and circumstances, we are of the considered opinion that there is a merit in the appeal and the same is hereby allowed and the impugned order is set aside.

It is needless to mention that since the proceedings before the Adjudicating Authority has been held to be nonest, therefore, the Respondent (State Bank of India) may initiate proceedings in accordance with law, if so advised.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Kanthi Narahari]
Member (Technical)