NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT)(Insolvency) No. 201 of 2022

[Arising out of Order dated 22nd November, 2021 passed by the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench, Cuttack) in T.P. No.28/CTB/2019 in C.P. (IB) No.1206/KB/2018]

IN THE MATTER OF:

M/s Ravinder Construction Company
Through its Sole-Proprietor
Mr. Ravinder Singh
Having its Registered Office at:
A-201, Sunny Valley CGHS Plot No. 27
Sector – 12, Dwarka **...Appellant/**
New Delhi – 110008 **Financial Creditor**

Versus

Kalinga Sponge Iron Limited
Having its Registered Office at:
Plot No. 82, Sector A
Kalunga Industrial Estate, Rourkela **...Respondent/**
Sundargarh, Orissa – 770001 **Corporate Debtor**

Present:

For Appellant	:	**Mr. Praveen Chauhan, Mr. Aakash Dubey, Mr. Sarthak Sawhney and Ms. Malvica Satija, Advocates**
For Respondent	:	**Mr. Abhijeet Sinha, Mr. Sanwal Tiberwal and Mr. Saikat Sarkar, Advocates**

J U D G M E N T
(08th December, 2022)

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The Present Appeal is filed against the Order dated 22nd November, 2021 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, Cuttack Bench, Cuttack) in T.P. No. 28/CTB/2019 in C.P.

(IB) No.1206/KB/2018, whereby the Adjudicating Authority has dismissed the Application filed by the Appellant.

Brief Facts:

Appellant's Submissions:

2. Aggrieved by the aforesaid order, the Appellant preferred the present Appeal.

3. The Learned Counsel appearing for the Appellant narrated the facts which led to the filing of the Application before the Adjudicating Authority under Section 7 of the I&B Code, 2016.

4. It is submitted that the Appellant is a Sole Proprietorship Company of Sh. Ravinder Singh, who is an Ex-Director of the Corporate Debtor i.e. Kalinga Sponge Iron Limited. The proprietor was inducted as Director of the Corporate Debtor in the year 2003 and continued up till 28.07.2017. During the said period the Appellant Company has advanced unsecured loans to the Corporate Debtor with consent of other Directors and the said advance amount was used by the Corporate Debtor in its usual course of business for commercial purpose. The amounts were repaid from time to time as and when demanded subject to availability of funds. The loans facilitated by the Appellant were repayable on demand by the Corporate Debtor.

5. It is submitted that the Balance Sheet for the Financial Year 2015-16 of the Corporate Debtor reflects the amount of Rs.6,73,86,240/- as outstanding and payable to the Appellant as on 31.03.2016. The said amount has been carried forward to the Financial Year 2016-17, however,

due to the Balance Sheet being in XBRL format it does not reflect the complete details. However, a sum of Rs.4,62,92,880/- shown in the ledger maintained by the Appellant and the said amount is payable by the Corporate Debtor to the Appellant.

6. It is submitted that the proprietor of the Appellant approached the concerned directors of the Corporate Debtor and requested them to repay the unsecured loans advanced by the Appellant at the earliest. The Corporate Debtor assured to repay all the dues in full by 31.05.2018, however, only Rs.32,00,000/- was paid and no further payment was made by the Corporate Debtor. Having aggrieved by the aforesaid default the Appellant issued demand letter dated 25.06.2018 to the Corporate Debtor demanding repayment of unsecured loan of amount of Rs.4,62,92,880/-. Further, the Appellant issued another demand letter dated 18.07.2018 to the Corporate Debtor. The Corporate Debtor sent a reply dated 14.07.2018.

7. Having not paid the due amount by the Corporate Debtor, the Appellant filed Application under Section 7 of the I&B Code, 2016 before the NCLT, Kolkata Bench, clearly mentioning that the amount of debt granted by the Appellant is Rs.4,62,92,880/- and relied upon the Balance Sheet for the Financial Year 2015-16 of the Corporate Debtor which reflects the said amount as outstanding. The Corporate Debtor filed its reply and contested the matter stating that all the dues of the Appellant have been settled in terms of MoU dated 27.06.2017.

8. It is submitted that the Learned Adjudicating Authority erred in holding that by way of MoU dated 27.06.2017 the liability of the Corporate Debtor towards both the Appellant and Sh. Ravindra Singh (Proprietor) was over. However, the said finding is not correct since the Appellant was not even a party to the MoU. Further, the Learned NCLT erred in observing that the terms of the Balance Sheet for the Financial Year 2017-18, no amount was payable to the Appellant is not correct. The Learned Adjudicating Authority failed to observe the reply of the Corporate Debtor dated 14.07.2018, wherein a clear admission made that the Corporate Debtor owes an amount to the Appellant.

9. In view of the reasons as stated above the Learned Counsel has prayed this Bench to allow the Appeal.

Respondent's Submissions:

10. The Learned Counsel appearing for the Respondent filed its reply and submitted the brief facts. It is submitted that; (1) M/s Hansraj Dhankar, (2) Ravinder Singh (Proprietor) of Ravindra Construction, (3) Shish Pal Solanki, and (4) Amit Kumar Agarwal were the promoters of the Corporate Debtor and held shares of the Company within themselves. The Corporate Debtor was considered as a partnership concern between the four persons. The Corporate Debtor enjoyed credit limits from SBI and Corporation Bank and the Directors had furnished personal guarantees for the limits sanctioned to the Corporate Debtor. While so, the account of the Corporate Debtor with the banks was classified as NPA on 13.02.2013 and the default amount stood at Rs.8,55,05,409/- for which both the Corporate Debtor as well as the

Directors / Personal Guarantors were liable. Notice under Section 13(2) of the SARFAESI Act, 2002 was issued on 14.03.2013, and the property was put for sale on multiple times by the Bank. The said auction did not fetch any buyers and last auction of the properties was published on 13.06.2017 for an amount of Rs.21.58 crores. The default amount as on the date of notice stood at Rs.35.88 crores. The Directors / Personal Guarantors were also liable to make good the balance amount in case of shortfall of recovery. The bank also filed O.A. under the provisions of Recovery of Debt due to bank Act, 1993 before the DRT against the Company and the Personal Guarantors.

11. Under the above circumstances, the present Directors of the Corporate Director entered into negotiations with the above four erstwhile Directors to take over the Corporate Debtor as a going concern by settling the dues of the bank and release of erstwhile Directors from the guarantee and closer of the other dues against the banks. Accordingly, the parties entered into an MoU dated 22.06.2017 for valuable consideration of Rs. 26.00 crores well above the auction price of Rs.21.58 crores. The main reason for higher consideration was that the negotiations also contemplated release of personal guarantees of the Directors.

12. It is submitted that out of Rs. 26 crores the banks would be paid of under OTS and the balance consideration would then be paid to the outgoing parties towards full and final settlement of all the liabilities whatsoever and howsoever of the outgoing parties. The same was agreed to be paid through purchase of their shares and the balance would be payable in the ratio of shareholding / profit sharing of the outgoing parties.

13. The outgoing Directors confirmed vide their letter dated 24.07.2017 that the amount of Rs.26 crores payable as consideration including withdrawal of the guarantees of the outgoing parties as per terms of the MoU and the same was for the full and final settlement of all the liabilities.

14. It is submitted that the Corporate Debtor vide its letter dated 12.04.2018 confirmed that the net liability of Mr. Ravinder Singh stood at Rs.32 lacs after the adjustment in terms of MoU. The said letter was acknowledged by Mr. Ravinder Singh and on the basis of said acknowledgement the balance dues of Rs.32 lacs was paid vide RTGS on 16.04.2018.

15. It is submitted that after having received entire settlement amount ensuring his personal guarantee stood released on 13.04.2018 and 25.04.2018, the Appellant raised frivolous claim of Rs. 4,62,92,888/- by issuing demand letter dated 25.06.2018 and 18.07.2018. It is submitted that no such demand was ever made till the personal guarantees of Mr. Ravinder Singh was released on 13.04.2018 and 25.04.2018. The MoU was entered on 22.06.2017 and the Appellant issued demand letter dated 25.06.2018 and 18.07.2018 i.e. after release of personal guarantees.

16. It is submitted that the audited balanced sheet of the Appellant as on 31.03.2018, the dues payable stood at Rs.31,57,596/- after adjustment in terms of MoU. However, the Appellant was paid an amount of Rs.32 lacs and an excess of amount of Rs.42,404/- was paid which is receivable. The Appellant failed to disclose the MoU and other documents before the

Adjudicating Authority which would establish that the alleged amount has been paid / adjusted in lines with the Agreement / MoU.

17. The Learned Counsel further submitted that the Appellant has chosen to ignore the letter dated 12.04.2018 addressed to the Appellant and the Proprietor confirming settlement of account. The ledger balance relied upon by the Appellant does not show the alleged dues claimed by it. Further, the Balance Sheet of the Respondent for the year ending 31st March 2018 clearly show the unsecured loan of the Appellant stood as Rs.31,57,596/- and the same was squared off by payment of Rs.32 lacs to the Appellant, which cannot be disputed by the appellant after having received the money and being discharged of his personal guarantees from State Bank of India and Corporation Bank.

18. The Learned Counsel submitted that the Learned Adjudicating Authority rightly dismissed the application filed by the Appellant as it was devoid of merits. Further, the Appellant failed to establish that there is a debt and default on the part of the Corporate Debtor. The Learned Counsel prayed this Bench to dismiss the Appeal with exemplary costs.

Analysis / Appraisal:

19. Heard the Learned Counsel appeared for the respective parties perused the pleadings and documents. After analysing the pleadings, the moot point for consideration is whether the Appellant has made out any case to allow the Appeal as prayed for.

20. The Appellant filed an Application under Section 7 of the I&B Code, 2016 before the Adjudicating Authority (NCLT), Kolkata Bench, against the Corporate Debtor seeking initiation of CIRP on the ground that the Corporate Debtor committed default in paying the financial debt of a sum of Rs.4,62,92,880/- as per Part-IV of Form-1. After Constitution of Cuttack Bench, the Application was transferred to the Cuttack Bench and renumbered as T.P. No. 28/CTB/2019. The Corporate Debtor filed its reply and contended that the erstwhile directors entered into an MoU dated 22.06.2017 and the net consideration was fixed as Rs.26 crores to be paid to the outgoing parties / directors. It is further contended that on 12.04.2018 a letter was issued to Mr. Ravinder Singh confirming that his net liability after adjustments in terms of the MoU and clarifications stands at Rs.32 lacs. It is stated that the letter was duly acknowledged by Mr. Ravinder Singh and on the basis of the said acknowledgement, the balance due of Rs.32 lacs was paid through RTGS on 16.04.2018.

21. The Adjudicating Authority recorded the submissions of the parties and dismissed the application of the Applicant by observing as under:

> *"13. The four outgoing Directors, who were present at the meeting wherein it was resolved that there shall be "no claim of money from the parties except to the extent as specified in the Memorandum of Understanding signed between the parties". This resolution of the Corporate Debtor at the Board of Director's Meeting held on 22.06.2017, was also signed by the present applicant in his capacity as the Director of the Corporate Debtor. By Letter dated 22.06.2017, as per the terms and conditions of the Memorandum of Understanding, the physical possession of the company, plant, building was handed over to the present*

Directors. All the four Directors of the Corporate Debtor by Letter dated 28.07.2017 resigned from the Board of Directors of the Corporate Debtor. Thereafter, by Declaration dated 13.04.2018, the applicant along with other three erstwhile Directors has categorically stated that no claims from Mr. Prem Chand Agarwal and his family's members in relation to any matters to Kalinga Sponge Iron Ltd. and that they shall not make any dispute with them in relation to any matter henceforth. Hence, there is a categorical admission that no amount is due and payable. By Letter dated 12.04.2018, the Corporate Debtor has issued a Letter to the applicant, wherein it is stated that based on the Memorandum of Understanding (MOU) dated 22.06.2017 that a sum of Rs.32 Lakh is due and payable by the Corporate Debtor to the applicant towards full and final settlement of all dues. This Letter has been acknowledged by the applicant. However, in course of the earlier, the Counsel for the applicant stated that he denies the authenticity of this Letter. Hence, this cannot be relied upon. In the Balance-Sheet audited for the year 2017-18, it is clear that as on 31.03.2018, no amount is due and payable by the Corporate Debtor to the applicant. At this juncture, it is pertinent to mention that applicant relies upon the Balance-Sheet for the year 2015-16 and 2016-17 as only proof of debt due and payable by the Corporate Debtor. It is important to remember that during this period, the applicant was in the realm of affairs of the Corporate Debtor, the same Auditor has given the Financial Statements for the year 2017-18, stating clearly therein that no amount is due and payable to the applicant.

14. There is no agreement regarding terms and conditions or regarding repayment etc. There is no bank statement or any other supporting evidence produced in support of his claim by the applicant that what is the mode of transaction for providing *such stated loans to the Corporate Debtor. There are discrepancies noted in the ledger sheet of the applicant. We cannot take into consideration one or two Balance-Sheets of the company and conclude the case. Furthermore, there is no documents to show the loan transacted in to the account of the corporate debtor. From the arguments and documents, it is clear that the entire payment is towards the business transfer agreements between the parties for takeover of the Corporate Debtor, various loans were settled by the new Directors. There is also a Memorandum of Understanding (MOU) for the transfer of the shares from the erstwhile Directors to the present Directors. The agreements between the parties were entered on 22.06.2017. However, till 25.06.2018, the applicant has not issued any E-mail or Letter claiming the amount. The claim was after receipt of the full and final settlement of the bank's dues wherein the applicant is one of the personal guarantors. The Memorandum of Understanding (MOU) for transfer of the Corporate Debtor by the present applicant in his capacity as Managing Director was dated 22.06.2017. Relevant dates in this regard have been summarized in the table below:*

1.	*MOU dated*	*22.06.2017*
2.	*Handing of the Corporate Debtor over dated*	*25.06.2017*
3.	*No Due Certificate in respect of loan account of Corporate Debtor from Corporation Bank*	*13.04.2018*
4.	*No Due Certificate in respect of loan account of Corporate Debtor from State Bank of India*	*25.04.2018*

5.	*The Letter of Demand of "debt" from applicant to respondent*	*25.06.2018, 18.07.2018*
6.	*The application was filed on*	*24.08.2018*

15. The applicant has failed to prove that he is entitled to interest on the alleged loan and that it was agreed that corporate debtor shall pay 24% interest P A. No document is filed to support that the alleged amount due is financial loan. Further the date of default is crucial point. The applicant failed to satisfy this tribunal regarding the exact date of default. Hence, the applicant has failed to prove existence of financial loan, interest due, and default.

16. In view of the above discussions, documents on record and after hearing the learned senior Counsel/ Counsel at length we are of firm opinion that this petition ought to be dismissed."

22. The Adjudicating Authority categorically held that by letter dated 12.04.2018, the Corporate Debtor has issued a letter to the Appellant, wherein it is stated that based on the Memorandum of Understanding dated 26.02.2017, a sum of Rs.32 lacs is due and payable by the Corporate Debtor to the Appellant towards full and final settlement of all dues. The Adjudicating Authority also observed that the said letter has been acknowledged by the Appellant. However, the Counsel for the Appellant denied the authenticity of the letter. The Adjudicating Authority also observed that the audited Balance Sheet for the year 2017-18, it is clear that as on 31.03.2018, no amount is due and payable by the Corporate Debtor to the Appellant / Applicant.

23. Further, the Adjudicating Authority observed that there is no agreement regarding terms and conditions of repayment and there is no bank statement or any other supporting evidence produced in support of the claim of the Appellant that what is the mode of transaction for providing such stated loans to the Corporate Debtor.

24. The Respondent filed a detailed counter to this Appeal and narrated the facts with regard to the history of the Corporate Debtor. There is no denial that the Corporate Debtor was promoted by the directors (as stated supra) including the proprietor of the Appellant. However, the Corporate Debtor was classified as NPA on 13.02.2013 and the default amount as on the date of NPA/stood at Rs. 8,55,05,409/- for which the Directors who are the personal guarantors were liable. The bank issued notice under Section 13(2) of the SARFAESI Act, 2002 and initiated recovery proceedings against the Corporate Debtor and personal guarantors of the Corporate Debtor. While so, the property was put for sale on multiple times by the bank, however, the auction did not fetch any buyers. The present Directors i.e. Mr. Prem Chand Agarwal and Akhil Kumar Agarwal entered an MoU dated 22.06.2017 with the Directors. From the preamble, it is evident that all the 4 Directors (outgoing and the two incoming Directors / present Directors or parties to the MoU. The purpose entering the MoU thus read as under:

> *"Both the parties have decided to enter into an arrangement whereby the outgoing parties intend to transfer the ownership rights of M/s Kalinga Sponge Iron Ltd., having its registered office at Plot No. 82A, IDC, Kalunga District, Sundergarh (Odissa) to the incoming parties by way of transfer of shares.*

As the plant was closed since last 5 years there was huge loss. Due to continuing pressure from the bankers for due repayment of the debt and further to this, the failure on the part of the bankers to identify a successful bidder in the public auction called for on previous occasions, this deal was done on mutual agreement."

25. Further the MoU contains the terms of payment, change of management, transfer of shares, clearances of book balances, change of signatories, cases and dues, plant operation and dispute resolution etc. Both the parties have affixed their signatures on the MoU and there is no dispute with regard to the terms and conditions of the MoU. From the MoU, it is apparent that under Clause (3) which refers to consideration of the amount fixed as Rs.26 crores for transfer of ownership. It is mentioned that the amount required for OTS is Rs.21 crore and the balance amount of Rs.5 crore to be paid to the outgoing parties in the ratio of 35:30:20:15. As per the MoU, the proprietor of the Appellant stands at Sl. No. 2 in the preamble of MoU and he holds 30% shares in the company and accordingly it was agreed to pay 30% of the balance payment as stated above.

26. The Learned Counsel for the Appellant contend that the Corporate Debtor defaulted in payment of the amount and relied upon the Balance Sheet for the year 2015-16 of the Corporate Debtor. The photo copy of the Balance Sheet annexed at page 144 of Vol. I, it is seen under the category of long-term borrowings the name of the Appellant reflects and the amount shown as Rs. 6,61,16,240/- (subject to corrections since the photo copy is unclear).

27. It is to be noted that the Balance Sheet of the Corporate Debtor is for the Financial Year 2015-16, however the MoU entered on 27.06.2017 which is subsequent to the Balance Sheet. The Appellant failed to produce any document subsequent to entering into as MoU to establish that the Corporate Debtor owed the amount to the Appellant.

28. For filing an Application under Section 7 of the I&B Code, 2016 seeking for Initiation of Corporate Insolvency Resolution Process against a Corporate Debtor before the Adjudicating Authority, the Applicant has to establish that a default has occurred. Sub-section (3) of Section 7 thus read as under:

> *"The Financial Creditor shall along with the Application furnish (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified, (b) the name of Resolution Professional proposed to act as an Interim Resolution Professional; and (c) any other information as may be specified by the Board."*

29. As per the provisions of law the Financial Creditor has to furnish the details of the default. As stated (supra) the Appellant / Applicant has failed to establish that the Corporate Debtor owed an amount to the Appellant and it defaulted. Further, the Appellant failed to establish the debt and default except in Part-IV of Form-I stating the total amount of debt granted Rs.4,62,92,880/- and there is no evidence with regard to disbursal of amount from the account of the Appellant against the consideration for the time value of money.

30. After entering the MoU dated 27.06.2017, the Corporate Debtor through the erstwhile Directors addressed a letter dated 24.07.2017 to the present Directors wherein it is stated as under:

"Kalinga Sponge Iron Ltd.

Date: 24.07.2017

To

Prem Chand Agarwal &
Akhil Kumar Agarwal
Lal Building, Kachery Road,
Rourkela-769012 (Odisha)

Sub: Our MOU dated 22.06.2017
As discussed with you we would like to clarify/confirm the terms of MOU dated 22.06.2017 as follows:

The consideration of Rs.26.00 Crores is the final settled amount with the outgoing parties towards their shareholdings and other liabilities whatsoever and in lieu of release of the Guarantees of the Outgoing parties. As stated in the MOU the amount paid to the Bank towards OTS will be deducted and the balance will be paid to the outgoing parties in form of purchase of their shareholdings and balance towards other liabilities whatsoever and howsoever.

We also ensure to cordially settle with the banks under One time Settlement Scheme.

Yours faithfully,

For Kalinga Sponge Iron Ltd.	*For Kalinga Sponge Iron Ltd.*
Sd/-	*Sd/-*
Director	*Director"*

31. As per the above letter, the outgoing parties confirmed the terms of MoU dated 22.06.2017 and also confirmed the consideration as final settled amounts towards their shareholding and other liabilities.

32. However, the Appellant contend that it issued a demand letter dated 25.06.2018 and 18.07.2018 addressed to the present Directors claiming balance of amount Rs.4,62,92,880/-. In the very same letter, the Proprietor of the Appellant admitted the receipt of amount Rs.32 lacs on 16.04.2018. In response to the letter dated 25.06.2018, the Corporate Debtor vide its reply dated 14.07.2018 addressed to the Proprietor of the Appellant stating that the balance amount claimed by it do not contain any account ledger substantiating the balance outstanding and requested to provide the year wise ledger of last 5 years of both the accounts i.e. the Appellant and the Proprietor (Mr. Ravinder Singh). The Appellant has not produced any reply or response to the letter dated 14.07.2018 nor produced any documentary evidence to establish the debt owed by the Corporate Debtor.

Conclusion:

33. The Appellant failed to establish with documentary evidence that there is a debt and default. The Adjudicating Authority passed a reasoned order and no interference is called for.

34. This Tribunal comes to an irresistible and inescapable conclusion that the Appeal is devoid of merits and liable to be dismissed. Accordingly, the Appeal is dismissed.

35. Before parting with the judgment this Tribunal is of the view that the Appeal is frivolous and vexatious wasting the precious time of this Tribunal and deserved to be imposed exemplary costs. Accordingly, a cost of Rs.1,00,000/- (Rupees One Lac only) is imposed, which is payable to the Prime Minister Relief fund within a period of one month from the receipt of copy of this order and report compliance before the Registrar of this Tribunal.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

pks