NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1423 of 2022
&
I.A. No. 4457 of 2022

IN THE MATTER OF:

Priyal Kantilal Patel

...Appellant

Versus

IREP Credit Capital Pvt. Ltd. & Anr.

...Respondents

Present:

For Appellant: Mr. Abhijeet Sinha, Mr. Nitin Mishra and Mitali Gupta, Mr. Akash Chatterjee, Advocates

For Respondent: Mr. Vikas Mohta, Mr. Pranav Sarthi, Advocates for R-1
Mr. Pranjit Bhattacharya, Ms. Raj Sarit Khare, Advocates for R-2

O R D E R

01.02.2023: Heard Learned Counsel for the parties.

2. This Appeal has been filed against the Order dated 10.10.2022 by which order, the Adjudicating Authority has admitted Section 7 Application filed by the Financial Creditor under I&B Code, 2016.

3. An application under Section 7 was filed by the Financial Creditor-Debenture Holder on 20th December, 2019 being CP No. 45/IBC/NCLT/MB/MAH/2020. In the said Company Petition, a consent terms was entered between the parties with other stakeholders. According to the

consent terms, the Financial Creditor-Respondent herein agreed to withdraw the Company Petition. It was further contemplated in the consent terms that in event, there is default of the terms of present consent terms on the part of the corporate debtor in addition to the consequence provided in Clause 8(B)(a)(iv), the Financial Creditor shall be entitled to claim the entire amount outstanding and revive Company Petition 45/2020.

4. Subsequently, it appears that consent terms was defaulted, the cheques which were issued by the Corporate Debtor were dishonored. The Financial Creditor instead of reviving earlier company petition, filed a fresh company petition CP (IB) No. 1029 of 2021. In the company petition, the Financial Creditor has based his claim on the basis of the initial financial debt as was claimed in the original application and in the application has also given the details of the consent terms and the subsequent event which took place. The said company petition has now been admitted by the Impugned Order passed the Adjudicating Authority.

5. Aggrieved by the said order, this Appeal has been filed.

6. Mr. Abhijeet Sinha, Learned Counsel for the Appellant challenging the Order impugned submits that there being breach of the consent terms, Section 7 application filed by the Financial Creditor was not maintainable since breach of consent terms does not furnish any right to initiate Section 7 Application, since breach of consent terms can not be treated to be financial debt. It is further submitted that Adjudicating Authority committed error in admitting Section 7

Application. Mr. Sinha has relied on two judgements of this Tribunal in support of his submission that are Judgement in **Amrit Kumar Agrawal Vs. Tempo Appliances Pvt. Ltd. [2020 SCC OnLine NCLAT 1202]** decided on 25.11.2020 as well as Judgement in **Dr. Gopal Krishnan MS & Anr. Vs. Mr. Ravindra Beleyur & Anr. [CA(AT)(CH)(INS) No. 316 of 2022].** It is further submitted that there is no consensus for initiating Section 7 Application amongst the Debenture Holders and Respondents were only 12% Debenture Holder.

7. Learned Counsel appearing for the Respondent-Mr. Vikas Mohta refuting the submissions of Learned Counsel for the Appellant contends that nature of debt which was claimed under Section 7 Application remains the financial debt and by virtue of consent terms which was entered during earlier company petition, the nature of debt shall not be changed and present is not a case where the Financial Creditor was trying to enforce the settlement agreement between the parties rather the Application was filed claiming as financial debt and the application has rightly been admitted. Learned Counsel for the Respondent further submitted that under the consent terms also, there was clear stipulation that any default by Corporate Debtor in following terms, revival application could have been filed, however under the legal advice, the fresh application was filed which cannot be defeated on the said ground.

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

9. There is no dispute between the parties that on the consent terms which was entered between the parties, the earlier company petitioner 45/2020 was withdrawn. The same was clearly stipulated in paragraph 1.1(e). One more clause which need to be noticed is clause 9 which is to the following effect:

> *"9. The Corporate Debtor undertakes to fully comply with the payment schedule set out in Annexure A and Annexure B and represents that it shall not commit any default in releasing of the amounts agreed under the present Consent Terms. It is agreed by the parties that in the event of default of the terms of the present Consent Terms on the part of the Corporate Debtor, in addition to the consequences provided in clause 8(B)(a)(iv) above, the Financial Creditor shall be entitled to claim the entire amount outstanding and revive Company Petition 45 of 2020. In the event of default committed by the Corporate Debtor, the Financial Creditor shall be entitled to claim the entire amount as may be due on the date of the default in terms of the Transaction Documents."*

10. Now we come to the Section 7 Application which was filed by the Financial Creditor. Part-IV of the Application under which 'Particulars of Financial Debt' has been given is as follows:

PARTICUALRS OF FINANCIAL DEBT		
1.	*TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT*	*A SUM OF RS. 26,96,49,413 (RUPEE TWENTY SIX CRORES NINETY SIX LAKH FORTY NINE THOUSAND FOUR HUNDRED AND THIRTEEN ONLY) WITH FURTHER INTEREST THEREON TILL*

		PAYMENT AND/OR REALIZATION (DUE AS ON 8TH OCTOBER, 2021) WHICH INCLUDES THE FOLLOWING: *i. RS. 18,00,00,000/- (RUPEES EIGHTEEN CRORES ONLY) BEING THE REDEMPTION (FACE VALUE) OF 18 FULLY PAID UP UNRATED, UNLISTED, SECURED, REDEEMABLE, NON-CONVERTIBLE DEBENTURES ("SERIES DEBENTURES") ISSUED BY THE CORPORATE DEBTOR;* *i. RS. 3,64,31,833/- (RUPEES THREE CRORES SIXTY FOUR LAKHS THIRTY ONE THOUSAND EIGHT HUNDRED AND THIRTY THREE ONLY) BEING THE REDEMPTION PREMIUM ACCRUED;* *ii. RS. 64,71,708 (RUPEES SIXTY FOUR LAKH SEVENTY ONE THOUSNAD SEVEN HUNDRED NAD EIGHT ONLY) BEING THE PENAL INTEREST;* *iii. RS. 4,67,45,872 (RUPEES FOUR CRORES SIXTY SEVEN LAKH FORTY FIVE EIGHT HUNDRED AND SEVENTY TWO ONLY) BEING THE INTEREST*

11. When we look into the Part-IV of Section 7 Application, in the Application the Financial Debt as was originally claimed in the earlier application has been claimed. The Application is not founded only on the default of the consent terms rather application is founded on the original financial debt which was extended by the financial creditor to the corporate debtor.

12. The judgement which has been relied by Learned Counsel for the Appellant "Amrit Kumar Agrawal" (supra) was a case where section 7 application was filed on the ground of default in payment of settlement agreement where the court held that default in payment of settlement agreement does not constitute a financial debt. The facts of the present case are clearly distinguishable. Present is not a case where Section 7 Application has been filed only on the ground of default in the settlement agreement rather section 7 application has been filed on the basis of original financial debt which was extended by the Financial Creditor to the Corporate Debtor. The mere fact that in earlier company petition, consent terms was arrived, which consent terms was breached by the corporate debtor, the financial debt which was claimed by the financial creditor would not be wiped out nor the nature and character of financial debt shall be changed on account of breach of the consent terms. Permitting such interpretation shall be giving premium to the corporate debtor who breach the consent terms. Another judgement which has been relied on by Learned Counsel for the Appellant is "Dr. Gopal Krishnan MS", (supra) which is also judgement relying on "Amrit Kumar Agrawal". The court in the facts of the said case came to the conclusion that debt is not a financial debt. The above judgement is also clearly distinguishable.

13. It is relevant to notice that in clause 9 of the consent terms there was clear stipulation that financial creditor shall be entitled to revive the company petition, the mere fact that instead of reviving company petition, a fresh company petition has been filed under section 7 shall not be reason to reject the company petition and not to entertain the said company petition.

14. No coming to the second submission of Learned Counsel for the appellant that the application could not have been filed under section 7 by the financial creditor, there is no dispute that financial creditor has extended financial benefits to the corporate debtor. The mere fact that the majority debenture holders have not initiated any section 7 application shall not preclude the financial creditor who was entitled to initiate section 7 application on its own right. We thus do not find any substance in the submission of learned counsel for the Appellant.

15. It shall be open for the appellant, in event, settlement is entered between the parties, to file Application under Section 12-A of the I&B Code, 2016.

In view of the aforesaid, we do not find any error in the impugned order, the Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Basant/nn