NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

<u>Company Appeal (AT) (Ins) No. 1042 of 2021</u>

<u>IN THE MATTER OF:</u>

ASHOK BALASAHEB GAJBAR
Erstwhile Director of Shaila Clubs & Resorts Pvt. Ltd.
72/3, Prabhat, Shivaji Partk,
Cross Road No. 1, Dadar, Mumbai - 400028 **...Appellant**

Versus

1.MRS. MEGHNA RAJEEV KORE
Residing at Kore Lawn, 383/3,
Sahyog Nagar, MSEB Road, Govt. Colony,
Vishrambaug, Sangli – 416 416

2. MS. SAKSHI RAJEEV KORE
Residing at Kore Lawn, 383/3,
Sahyog Nagar, MSEB Road, Govt. Colony,
Vishrambaug, Sangli – 416 416

3. MASTER DEV RAJEEV KORE
Through his mother and natural guardian
Mrs. Meghna Rajeev Kore,
Residing at Kore Lawn, 383/3,
Sahyog Nagar, MSEB Road, Govt. Colony,
Vishrambaug, Sangli – 416 416

4. SHAILA CLUBS AND RESORTS PRIVATE LIMITED
Registered Office Address:
Kore Plaza, Behind Hotel Pai-Prakash, Vishrambag,
Sangli – 416 415

Through Its Resolution Professional,
Mr. Milind Kasodekar, Regn. No. IBBI/IPA-002/
IPN00116/2017-18/10285, 3rd, Floor Satyagiri Apartment,
77 Vijay Nagar Colony, 2147 Sadashiv Peth,
Pune – 411 030
Email: Milind.kasodekar@kmdscs.com **...Respondents**

Present:

For Appellant :	Ms. Ruby Singh Ahuja, Mr. Lakshya Khanna, Ms. Honey Maini, Advocates
For Respondent :	Mr. Raghunath S. Mr. Rajesh C. Ms. Meenakshi Rawat, Adv. for R1, 2 and 3. Mr. Avinash R. Khanolkar, Mr. G. Kaushal, Mr. Arun Pal, Advocates for R-4/RP

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is preferred by an erstwhile Director of the Corporate Debtor (Shaila Clubs & Resorts Private Limited), being aggrieved against the order dated 29.10.2021, passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court-II) in CP (IB) 170/MB/C-II/2018, by which an application filed by Respondents No. 1 to 3 (Financial Creditors), under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') to initiate Corporate Insolvency Resolution Process (in short 'CIRP') against the Corporate Debtor has been admitted.

2. In short, the Respondents No. 1 to 3 are the legal heirs of Rajeev Ramling Kore, a founding member, promoter and Director of Respondent No. 4, who passed away on 08.07.2013. The Respondents No. 1 to 3 filed an application under Section 7 of the Code r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') alleging that Respondent No. 4 had borrowed an amount of Rs. 3,59,00,000/- from late Rajeev Ramling Kore. It is alleged that Respondents No. 1 to 3 addressed a letter dated 03.10.2017 asking Respondent No. 4 to repay a sum of Rs. 3,59,00,000/- together with interest @ 18% p.a. within

seven days of the receipt of the notice and thereafter filed the application under Section 7 of the Code claiming an amount of Rs. 3,76,70,410/- (including interest) assigning the date of default as 14.10.2017.

3. The Corporate Debtor contested the application, inter alia, on the ground that the application filed under Section 7 of the Code could be maintained only if it is proved that there is a debt and default in non-payment of the amount of debt which are conspicuously absent from the pleadings as well as evidence led by the Financial Creditors as they have failed to prove that the principal loan amount had become due and payable. It was also stated that nothing has been brought on record to prove that there was any agreement between the parties to pay interest on the amount stated to have been advanced by late Rajeev Ramling Kore, therefore, neither the said amount falls in the definition of financial debt nor discloses the default as prescribed under Section 2(12) of the Code. Rather it is submitted that the principal amount was to be repaid from the sale proceeds of the principal assets (Club Premises) which is the subject matter of the arbitration and litigation, therefore, the principal loan amount has not become due and payable and as such there was no default on the part of the Corporate Debtor (Respondent No. 4) which may trigger the cause of action for the filing of application under Section 7 of the Code.

4. Counsel for the Appellant has submitted that the Adjudicating Authority has passed the impugned order without applying its mind to the facts and circumstances much less the evidence brought on record as according to the Appellant the amount of Rs. 3,59,00,000/- is shown in the

balance sheet of the year 2013 -14 only and in this regard, he has drawn our attention to the auditor's report pertaining to the assessment year 2013-14 in which clause 3(b) provides as under:-

> "(b) The Company has taken unsecured loans from other parties listed in the register maintained under Section 301 of the Act and the maximum outstanding balance and also the closing balance of the said parties were given as per the table below:

Name of the Person	Maximum Balance Outstanding during the year	Closing Balance
Rajeev R. Kore	35,913,539	35,913,539
Sanjay Pratap	495,000	495,000
Vilasrao Patil	5,100,000	5,100,000
Rajesh V. Patil	3,000,000	3,000,000

5. Thereafter, he has referred to the annual report for the assessment year 2014-15, in which clause 3(b) provides as under:

> "(b) The Company has taken unsecured loans from other parties listed in the register maintained under Section 301 of the Act and the maximum outstanding balance and also the closing balance of the said parties were given as per the table below:

Name of the Person	Maximum Balance Outstanding during the year	Closing Balance
Rajesh V. Patil	3,000,000	3,000,000
Amit Kore	72,85,000	72,85,000

6. It is further submitted that the date of default is mentioned as 14.10.2017 in part-iv of the application which is filed under Section 7 of the Code in Form-1 without explaining as to how the date of default has been ascertained in the absence of any agreement between the parties about the manner in which the amount was to be repaid except that it shall be after the sale of the assets of the club premises. In this regard, Counsel for the Appellant has referred to the definition of financial debt which is provided in Section 5(8) of the Code and submitted that it does not come within the purview of the financial debt which means a debt alongwith interest and the debt is defined under Section 3(11) of the Code as a liability or obligation in respect of a claim which is due from any person. Similarly, Counsel for the Appellant has referred to the definition of default provided in Section 3(12) which means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. It is further submitted that the debt and default are the two main components of Section 7 which provides that an application may be filed for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. The sum and substance of the arguments of Counsel for the Appellant is that not only the Respondents No. 1 to 3 had to plead and prove that there was a debt but also it had become payable and in the event of non-payment a default has occurred to attract the provision of Section 7 of the Code for seeking initiation of CIRP against the Corporate Debtor. It is further submitted that in the latest decision of

the Hon'ble Supreme Court in the case of Vidarbha Industries Power Limited Vs. Axis Bank Limited, 2022 SCC Online SC 841, it has been held that the Adjudicating Authority is not to pass an order of admission mechanically even if the discretionary powers have been conferred upon it. It is argued that the impugned order has been passed mechanically, without application of mind and also without giving any reasons. In this regard, it is submitted that the Adjudicating Authority has observed in Para 11 of the impugned order that "we have heard the arguments of Financial Creditor and Corporate Debtor and perused the records" whereas the order was ex-parte because no one had appeared on behalf of the Respondent (Corporate Debtor) which is also evident from the first page of the impugned order where the appearance of counsel for the parties has been marked. In the end, it is submitted that since none of the contentions, though noticed from Paragraph 8 to 10 in the impugned order have been discussed while recording its satisfaction in Para 12 and 13 of the impugned order for the purpose of initiation of CIRP against the Corporate Debtor, therefore, the impugned order may be set aside and the matter may be remanded back to the Adjudicating Authority to decide it again after taking into consideration the facts and circumstances of the case much less the primary issue as to how the provision of Section 7 of the Code are attracted when the amount of debt has neither become due nor payable and as such does not fall within the definition of default.

7. On the other hand, Counsel appearing on behalf of the Respondents No. 1 to 3 has submitted that the Adjudicating Authority has taken into

consideration all the aspects of the matter at the time of passing of the impugned order. In this regard, it is submitted that the Adjudicating Authority has referred to the audited statement of accounts from the year 2011 -12, 2013-14, 2014-15 and 2015-16 in para 4 of the impugned order. Counsel for the Respondent, in reply to the contention of the Appellant that there is no reference of the amount of Rajeev Ramling Kore in the column of outstanding in the audited report of assessment year 2014-15 stated that the balance sheet as on 31.03.2014 reflects the amount of the long term borrowings which includes the component of the amount advanced by Amit Kore. It is further submitted that before filing the application under Section 7 of the Code a notice was served upon the Corporate Debtor on 03.10.2017 and after waiting for sufficient time the application under Section 7 of the Code was filed assigning the date of default as 14.10.2017. It is further argued that the component of interest has been applied to the principal amount which was not paid despite notice and that the amount in question had become due and payable with the service of the notice of demand.

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

9. In the matter of judicial review in appeal, the Appellate Court is more concerned about the manner in which the findings are ultimately recorded, while admitting or rejecting the application filed either under Section 7, 9 or 10 of the Code as the case may be because a reasoned and speaking order is the soul of principle of natural justice which has to be observed by the Adjudicating Authority being a quasi judicial authority. It has been found

from the impugned order that the Adjudicating Authority has divided its order in three parts. The first part deals with the submissions of Financial Creditor, second part deals with the submissions of Corporate Debtor and the third is about its satisfaction for admitting the application filed under Section 7 of the Code. We have carefully gone through the impugned order and are surprised to note that none of the contentions of the Corporate Debtor have been discussed except for noticing in the fact that a demand notice was issued by the Financial Creditor, there was an acknowledgement by the Corporate Debtor in various financial statements and that the understanding that money shall be paid after sale of assets is of no substance. In this regard, Paragraph 12 and 13 of the impugned order deserves to be mentioned which contains the findings of the Adjudicating, Authority for the purpose of admitting the application.

> "12. In the present case in hand it is noted that the legal heirs of the FC also successor to the Original FC now on record. Petitioners vide a notice of demand called upon the CD dated 03.10.2017 to pay to Petitioners. Further it is also noted that money/loan acknowledged by the CD in various financial statements. The contention of the CD that there was understanding that money will be paid after sale of asset only has no substance in it.
>
> 13. We also consider the facts of the case in the lights of the Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors. (writ Petition (c) No. 99 of 2018) upholding the constitutional validity of IBC, the position is very clear that unlike Section 9, there is no scope of raising a dispute as far as

> Section 7 petition is concerned. As soon as a debt and default is proved, the adjudicating authority is bound to admit the petition"

10. The Adjudicating Authority, has apparently committed an error in not deciding the issue as to whether there was actually a default on the part of the Appellant. It should have given the reason as to why the contention of the Corporate Debtor that there was an understanding that money shall be paid after the sale of assets only has no substance in it and how it has come to the conclusion that various financial statements shows acknowledgement of the money/loan by the Corporate Debtor. There is no discussion at all by the Adjudicating Authority about these material facts. Not only that, it appears that the Adjudicating Authority has not looked into the fact that no one had appeared on behalf of the Corporate Debtor before it when the matter was argued and reserved and still it is recorded in its order that it had heard the arguments of the Corporate Debtor. All these facts cumulatively shows that there was no application of mind much less judicious in passing of the impugned order which has been apparently passed in a most mechanical manner. The Adjudicating Authority has to take into consideration the fact that the proceedings of CIRP, initiated after the admission of the application, has an immense adverse effect upon the Corporate Debtor, therefore, such application should not be admitted as a matter of routine and that too in a mechanical manner.

11. Thus, in view of the aforesaid facts and circumstances, we are of the considered opinion that the impugned order suffers from non-application of mind and is not a reasoned/speaking order, therefore, the same is hereby

set aside and the matter is remanded back to the concerned Adjudicating Authority to decide the lis again by passing a speaking order. The parties are directed to appear before the Adjudicating Authority on 20th December, 2022. The registry is directed to send the copy of this order to the concerned Adjudicating Authority for compliance.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Kanthi Narahari]
Member (Technical)

New Delhi

01st December, 2022

Sheetal