

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 71 of 2023

(Arising out of Order dated 12.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Court No.V, Mumbai Bench, in Company Petition No.699/(IB)-MB-V/2021)

IN THE MATTER OF:

Kalpesh Ramniklal Shah
R/o 7B,Ami Ramkrishna Building,
Happy Home Society, Nehru Road,
Vile Parle (East), Mumbai – 400057.

... Appellant

Vs

1. Mundara Estate Developers Limited
7B 11 Ami Ramkrishna Building,
Happy Home Society, Nehru Road,
Vile Parle (East), Mumbai – 400057.
Through Pinakin Surendra Shah
Interim Resolution Professional

2. Metroglobal Ltd.,
Through its Authorised Officer,
101, 1st Floor, Mangal Disha,
Near Guru Gangeshwar Temple, 6th Road,
Khar (West), Mumbai – 400052.

... Respondents

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Malak Bhatt, Ms. Neeha Nagpal, Mr. Saikat Sarkar & Ms. Samridhi, Advocates.**

For Respondents: **Mr. Salil Thakore & Mr. Yugantar Singh Chauhan, Advocates.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by a Suspended Director of the Corporate Debtor has been filed against the order dated 12.01.2023, admitting Section 7 Application filed by the Respondent – Financial Creditor.

2. The Corporate Debtor entered into an Agreement dated 27.01.2011 with Metrochem Industries Ltd. (now Metroglobal Ltd.). For repayment of principal amount of Rs.24 crores, 11 post-dated cheques were given, while the interest amount of Rs.13.50 crores was to be paid through issuance of 05 post-dated cheques under the Agreement. The Agreement further stipulated that in case of failure to pay, penal interest should be levied on the outstanding amount. Shares of Corporate Debtor and one M/s Parag Kunj Finvest Private Ltd. were also pledged to the Financial Creditor as security.

3. A further Agreement dated 28.12.2012 was entered between Financial Creditor and the Corporate Debtor for a payment of Rs.46 crores. As per the terms of the Settlement Agreement, two properties in Vadodara and Gujarat., amounting to Rs.21.35 crores were assigned through Sale Deed in favour of Mr. Gautam M. Jain and the remaining Rs.24.65 crores were to be settled through the Loan Agreement security at Mumbai for the two properties as security. Financial Creditor issued legal notice to the Corporate Debtor for payment of outstanding amount on 27.05.2016. Section 7 Application was filed by the Financial Creditor in June 2021 seeking initiation of Corporate Insolvency Resolution Process (“**CIRP**”) against the Corporate Debtor for default of an amount of Rs.89,76,41,443/- with outstanding principal amount being Rs.19,63,71,657/- and interest of Rs.70,12,69,786/-. Reply was filed by the Corporate Debtor. In the reply, it was pleaded that petition has been filed without disclosing material information and true nature of relations

between Corporate Debtor and the Financial Creditor. The Loan Agreement is in direct contravention of Section 295 of Companies Act, 1956. Various other pleas were taken in the reply, opposing the Section 7 Application. The Adjudicating Authority by order dated 12.01.2023 admitted Section 7 Application. Aggrieved by the said order, this Appeal has been filed.

4. When Appeal was taken up on 24.01.2023, the Appellant prayed for time to make one more effort to negotiate with the Financial Creditor to make the payment of the dues. The Appeal was adjourned, directing that Committee of Creditors (“**CoC**”) in pursuance of the impugned order shall not be constituted in the meantime. The Appellant on 22.02.2023 further prayed that last opportunity of four weeks be allowed to take steps towards settlement. Since, no settlement could be arrived between the parties, the Appeal was heard on 05.07.2023.

5. The learned Counsel for the Appellant in support of the Appeal submits that key managerial personnel of Financial Creditor, holds majority shareholding in the Corporate Debtor and is a ‘related party’. The Financial Creditor exercises substantial control in the Corporate Debtor, hence, the Financial Creditor could not have filed Section 7 Application. The Adjudicating Authority ignored the settlement, which was entered between the parties and by payment of Rs.46 crores the matter stood settled in the year 2012 itself. The alleged loan transaction was in contravention of Section 295 of the Companies Act. As per Settlement Agreement two properties of Rs.21.35 crores at Vadodara were

assigned via Sale Deed in favour of Gautam Jain, Director of Financial Creditor by Girish Shah, Director of Corporate Debtor. The remaining amount of Rs.24.65 crores was secured through the two properties at Mumbai.

6. The learned Counsel for the Respondent refuting the submission of learned Counsel for the Appellant submits that the Corporate Debtor has admitted the liability in all Balance Sheets signed by the Corporate Debtor under the Companies Act from Financial Year 2010-11 till Financial Year 2019-20. The Balance Sheets acknowledges the debt owed to the Financial Creditor. The Balance Sheets have been signed by the Directors of the Corporate Debtor and few of them have been signed by Kalpesh Shah, who has filed the present Appeal. In each of the Balance Sheets, the Financial Creditor's name is mentioned under the heading "*Loans and Advances*" and in each Balance Sheets, an amount in excess of Rs.25 crores is shown as a liability of the Corporate Debtor. The Balance Sheets further indicate that there are no revenues from operations/sales and the Corporate Debtor is not a going concern, but is only incurring liabilities. The total amount of Rs.24 cores was transferred by the Financial Creditor in favour of the Corporate Debtor. The debt towards the Financial Creditor having been acknowledged by the Corporate Debtor, Section 7 Application has rightly been admitted by the Adjudicating Authority. The contention that against the outstanding amount payable by the Corporate Debtor to the Financial Creditor, Mr. Girish Shah has transferred two parcels of land to Mr. Gautam Jain is completely false. The transactions

between Mr. Gautam Jain and Mr. Girish Shah for purchase of lands is completely different transactions and has nothing to do with the Loan Agreement between the Respondent and the Financial Creditor. The lands were purchased by Gautam Jain in his individual capacity and he had paid consideration to Mr. Girish Shah and others. The settlement as claimed by the Appellant is not admitted and even if for the sake of argument, the settlement is admitted, then also as per the settlement the dues of Rs.25 crores was to be paid by sale of secured properties, which sale never took place. In the audited Balance Sheet of the Financial Creditor 2019-20, the Corporate Debtor has shown an amount in excess of Rs.24 crores as payable to the Financial Creditor. The provisions of Section 295 of the Companies Act, 1956 are not applicable, even, otherwise, it does not lie in the mouth of the Corporate Debtor or the Appellant to contend after having taken the loan, that the transaction violates the law. The Financial Creditor is not a 'related party' of the Corporate Debtor. The Financial Creditor does not exercise substantial control over the Corporate Debtor. Moreover, the Code does not prohibit Application for admission of petition even in cases where Financial Creditor is a 'related party'.

7. We have considered the submissions of the learned Counsel for the parties and have perused the record.

8. The Loan Agreement dated 27.01.2011 entered by Corporate Debtor, with Metrochem Industries Ltd. & GESC Ltd. is an admitted document. The Metrochem Industries Ltd. (Latter have been renamed as

Metroglobal Ltd.), in pursuance of the Loan Agreement, Rs.24 crores were disbursed and the same was to be repaid by the Corporate Debtor in the manner as described in the Loan Agreement. The Balance Sheets of the Corporate Debtor have been brought on record from the year 2010-11 to 2019-20, which Balance Sheets contain clear acknowledgement of the debt. In the Balance Sheet as on 31.03.2012, under the head “*Short Term Borrowing*” an amount of Rs.29,98,71,657/- has been mentioned. This Balance Sheet of the Corporate Debtor clearly acknowledges the debt owed to the Financial Creditor. In the Balance Sheet of Financial Year 2012-13 under the heading “Short Term Borrowing” against Metroglobal Ltd., Ahmedabad an amount of Rs.23,55,72,087/- has been mentioned as on 31.03.2013. The Balance Sheets thereafter continuously acknowledges the debt and Balance Sheet for the year 2018-19, which is stated to be signed by the Appellant as Director, also contains acknowledgment against the Metroglobal Ltd., Ahmedabad under the heading “*Long Term Borrowings*” an amount of Rs.27,34,34,765/-, which is again acknowledgment. The Balance Sheet for the Financial Year 2019-20 again contains acknowledgement of the debt by the Appellant, which clearly proves that the debt continued to be due and the same remained unpaid. The Balance Sheets further indicate that there are no revenues generated. The Corporate Debtor, which is not generating any revenue for the last 10 years and the acknowledgement of debt against the Financial Creditor is continuously recorded in the Balance Sheets, we are

of the view that no error has been committed by the Adjudicating Authority in admitting Section 7 Application.

9. Coming to the settlement, which was claimed to be entered by the Appellant in the year 2012, which according to the Appellant was also recorded on 28.12.2015, suffice it to say that as per the Agreement claimed by the Appellant, a sum of Rs.24.65 crores was still to be recovered by sale of two properties provided as security. The learned Counsel for the Financial Creditor denies the signature on the Settlement Agreement. He, however, submits that even if the Settlement Agreement is accepted for the sake of argument, according to the Settlement Agreement, an amount of Rs.24.64 crores still due to be paid by the Corporate Debtor, which was never paid. Hence, debt and default is proved, which enables the Adjudicating Authority to admit Section 7 Application. The continuous acknowledgment of the debt in the Balance Sheets also runs against the submission of the Appellant that there was any Settlement Agreement and the dues between the party were finally settled. The continuous acknowledgment in the Balance Sheets indicate that debt continued to be due and payable by the Corporate Debtor.

10. The submission of the Appellant regarding key managerial personnel of Financial Creditor, holding majority shareholding in the Corporate Debtor and is a 'related party' and exercises substantial control in the Corporate Debtor is vehemently denied by the Respondent submitting that no transaction was entered between the Corporate Debtor and the related party. The control by the Financial Creditor is also denied

by the Respondent. It is submitted that had Financial Creditor really been in control of the Corporate Debtor, situation of non-payment of loan would not have arisen. The Corporate Debtor is under control of Girish Shah, who has 25% shareholding in the Corporate Debtor and who is a Guarantor as well as Pledgor under the Loan Agreement. With regard to control through M/s. Kava Impex Pvt. Ltd., it has been submitted that more than Rs.15 crores out of Rs.24 crores has been transferred to M/s. Mundara Estate Developers Ltd. even before M/s. Kava Impex Pvt. Ltd. became a partner therein. Further the submission of learned Counsel for the Appellant that loan transaction was in violation of Section 295 of the Companies Act, 1956, does not help the Appellant to deny the loan transaction and the disbursement of the amount. Even if, the allegation of violation of Section 295 of the Companies Act, 1956 may be there, that does not in any manner inhibit filing of Section 7 Application and take appropriate proceedings under the IBC. The purpose and object of the IBC is entirely different. The violation of provisions of Companies Act, 1956, for example Section 295 has different consequences, which consequences in law can take effect and remedial measures can be taken under Section 295, when the ingredients of Section 295 are proved, but that itself cannot be a ground to reject Section 7 Application filed by the Financial Creditor, where debt and default is proved.

11. We may refer to the judgment of the Hon'ble Supreme Court in ***Innoventive Industries Ltd. vs. ICICI Bank and Anr. – (2018) 1 SCC 407***. The Hon'ble Supreme Court in the above judgment while dealing

with the Scheme under Section 7 of the Code has held that when a default of financial debt is committed, the Adjudicating Authority has merely to see the records of the information utility and other evidence produced by the Financial Creditor to satisfy itself that a default has occurred. Following has been laid down by the Hon'ble Supreme Court in paragraph 30 of the judgment:

“30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

12. The law laid down in ***Innoventive Industries Ltd.*** by the Hon'ble Supreme Court has been reiterated by the Hon'ble Supreme Court in ***M. Suresh Reddy vs. Canara Bank & Ors. – Civil Appeal Nos.7121 of 2022 decided on 11.05.2023.***

13. We have noticed above that in the present Appeal also the Appellant took several opportunities to settle the dues with the Financial Creditor, which settlement never took place. Taking into consideration overall facts

of the present case and pleadings on record, we are satisfied that there is no ground to interfere with the impugned order passed by the Adjudicating Authority, admitting Section 7 Application.

14. There is no merit in the Appeal. The Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

14th July, 2023

Ashwani