

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT) (Insolvency No. 346 of 2021

[Arising out of order dated 06.04.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench) in CP (IB) No. 848 of 2019 and IA No. 147 of 2021]

IN THE MATTER OF:

Rahul Arunprasad Patel

Having address at

KALOL, GJ 382721 IN

..... Appellant.

Versus

1. Invesco Asset Management (India) Pvt. Ltd.

Having its registered office at 2101A, 21st Floor, A Wing, Marathon Futurex, NM Joshi Marg, Lower Parel, Mumbai-400013.

..... Respondent No. 1.
(Financial Creditor)

2. Sintex Industries Limited

Represented through Interim Resolution Professional Mr. Pinakin Shah, Having Address A/201 Siddhi Vinayak Towers, B/H BMW Showroom Next to Kataria House, Off S.G. Highway Makaraba, Ahmedabad, Gujarat 380051.

..... Respondent No. 2.
(Corporate Debtor)

Present:

For Appellant: Ms. Purti Gupta, Ms. Heena George, Ms. Shivani Sharma, Advocates.

For Respondent:- Ms. Surbhi Sharma, Ms. Radhika Gautam, Advocate for R-1.

Mr. Ishan Shah, Advocate for R-2.

Mr. Karan Valecha, Advocate for Intervenor- PNB.

J U D G M E N T
(27th February, 2023)

Justice Anant Bijay Singh;

The instant Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (***for short IBC***) has been preferred by the Appellant being aggrieved and dissatisfied by the order dated 06.04.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench) in CP (IB) No. 848 of 2019 and IA No. 147 of 2021 whereby petition under Section 7 of the IBC filed by Respondent No. 1 (herein) – Invesco Asset Management (India) Private Limited/Financial Creditor against the M/s Sintex Industries Limited/Corporate Debtor was admitted by the Adjudicating Authority and further I.A. No. 147 of 2021 filed by the Respondent No. 2 (herein) seeking direction to refer the matter to conciliation, was also disposed of, observing that in view of the admission of Company Petition, the I.A. No. 147 of 2021 has become infructuous.

2. The facts giving rise to the instant Appeal are as follows:

i) The Appellant is the promoter shareholder and suspended director of the Corporate Debtor. The Respondent No. 1 is the original Applicant who had moved

the application under Section 7 of the IBC (*hereinafter referred to as the Insolvency Application*). The Respondent No. 2 is the Corporate Debtor represented through the Interim Resolution Professional. The Respondent No. 1 has filed Section 7 petition dated 06.11.2019 being CP(IB) No. 848 of 2019 before the NCLT, Ahmedabad and the Adjudicating Authority vide order dated 06.04.2021 admitted the insolvency petition against Sintex Industries (Corporate Debtor).

ii) The present insolvency application had come to be filed before the Adjudicating Authority by the Respondent No. 1/Financial Creditor being one Invesco Asset Management (India) Pvt. Ltd. purportedly acting in its capacity as investment manager for Invesco India Credit Risk Fund, a scheme of Invesco Mutual Fund under the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 and purportedly duly authorised by Invesco Trustee Private Limited, the trustee of the fund to file the present insolvency application. The insolvency application has not been filed by the trustee of the fund. The insolvency application has been signed by one Nupur Tainwala in her capacity as Assistant Vice President-Legal of Invesco Asset Management (India) Pvt. Ltd.

iii) The Respondent No. 1 places reliance upon one board resolution dated 18.10.2019 passed by the board of one Invesco Trustee Private Limited giving authority to one Nupur Tainwala, Vice President-Legal of Invesco Asset Management (India) Pvt. Ltd. to file suits, actions, claims, petitions initiated by or against Invesco Asset Management (India) Pvt. Ltd. / Invesco Mutual Fund / the 'Company', where the 'Company' is not defined in such board resolution. The

Form 1 of the insolvency application, wherein under the head 'position with or in relation to the 'Financial Creditor', it is set out as 'Assistant Vice President-Legal'.

iv) As per the own factual submission of the Respondent No. 1, it is not even the case that Nupur Tainwala is Assistant Vice President-Legal of the Financial Creditor (being the debenture holder or the debenture trustee), but is in fact Assistant Vice President-Legal of Invesco Asset Management (India) Pvt. Ltd. (who is not a Financial Creditor), but has filed the insolvency application in its capacity as a purported delegate of the purported power to file the present insolvency application pursuant to purported board resolution given by purported trustee of the fund, being Invesco Trustee Private Limited.

v) Further fact of the case is that the Respondent No. 1/Financial Creditor in its capacity as the Investment Manager for Invesco India Credit Risk Fund, a scheme of Invesco mutual Fund and duly authorised by Invesco Trustee Private Limited, in pursuance of the Investment Management Agreement dated 27th April, 2006, acting in its capacity as the Investment Manager, granted Rs. 15,00,00,000/- being 150 secured non-convertible debentures of face value of Rs. 10,00,000/- each bearing ISIN INE429Co7507 and bearing coupon of 10.70% p.a. and aggregating to Rs. 15,00,00,000/-. The Corporate Debtor defaulted on the due date mentioned in the total principal amount of Rs. 15,00,00,000/- along with interest @ 10.70% p.a. amounting to Rs. 15,40,01,506.85 as on 30th September, 2019 along with 2% p.a. default interest till the date of payment of all outstanding amounts. A sum of Rs. 20,00,000/-

has been paid by the Corporate Debtor on 23rd October, 2019 as part payment towards the amount outstanding and further sum of Rs. 10,00,000/- and Rs. 10,01,507/- have been paid by the Corporate Debtor on 08th November, 2019 and 11th November, 2019 respectively. The default occurred on 30th September, 2019 towards principal of Rs. 15,00,00,000/- along with interest @ 10.70% per annum. Thereafter, the Financial Creditor / Respondent No. 1 (herein) has filed Section 7 petition dated 06.11.2019 being CP(IB) No. 848 of 2019 before the NCLT, Ahmedabad and the Adjudicating Authority vide order dated 06.04.2021 admitted the insolvency petition against Sintex Industries (Corporate Debtor). Hence this Appeal.

3. The Ld. Counsel for the Appellant during the course of argument and in his memo of appeal along with written submissions submitted that the insolvency application has not been filed by the trustee of the fund or the debenture holder itself. The insolvency application has been signed by one Nupur Tainwala in her capacity as Assistant Vice President-Legal of Invesco Asset Management (India) Pvt. Ltd. Nupur Tainwala does not hold any position with Invesco Trustee Private Limited. The manner of filing insolvency application is not permitted, as already laid down by this Tribunal in the case of *“Palogix Infrastructure Pvt. Ltd. V. ICICI Bank Ltd., 2017 SCC OnLine NCLAT 266”*, must be an authorised representative of the ‘financial creditor’ and also must hold a position in relation to the financial creditor. Further, as per case the case of the Respondent No. 1 (Herein) / Financial Creditor before the court itself is not a financial creditor, but is deriving authority from a purported financial creditor

being Invesco Trustee Private Limited and that said Nupur Tainwala is not holding the position of Assistant Vice President-Legal of such purported financial creditor being Invesco Trustee Private Limited but claims to hold position of Assistant Vice President-Legal of Invesco Asset Management (India) Pvt. Ltd.

4. It is further submitted that insolvency application filed by the Respondent No. 1 under the signature of one Nupur Tainwala who does not hold any position in relation to the financial creditor, who as per the case of the Respondent No. 1 itself, is one Invesco Trustee Private Limited and hence the insolvency application not having been filed by any person having position with or in relation to the financial creditor, is not maintainable and the same is liable to be dismissed on this ground itself. This Tribunal in the case of *“Palogix Infrastructure Pvt. Ltd.”* further holds that this kind of delegation of power, wherein the financial creditor delegates its power to another person to file an insolvency application, is not permitted on the ground that because this Tribunal referring to Section 65 of the Code, such delegate of power cannot be punished and hence application/petition in this form by delegation of power to a 3rd party, cannot be permitted and the person signing the insolvency application must hold a position with or in relation to the financial creditor.

5. It is further submitted that the Respondent No. 1 herein, being Invesco Asset Management (India) Pvt. Ltd. is effectively a 3rd party vis-à-vis the purported financial creditor, being the Invesco Trustee Private Limited and the power delegated pursuant to the board resolution is effectively nothing but an appointment of power of attorney, disguised as a board resolution, since it is

pertinent to note that the board resolutions of matters filed by banks etc under Section 7 of the IBC, delegate power to an officer of the bank itself but do not delegate power to a 3rd party to file the Section 7 application on its behalf. Hence the present case gets hit by the said judgment of this Tribunal and hence insolvency application deserves to be dismissed on this ground also.

6. It is further submitted that immediately prior to the passing of such board resolution of 18.10.2019 by Invesco Trustee Private Limited claiming to be trustee of the debentures in question, attention is drawn before the Adjudicating Authority to letter dated 01.10.2019 issued by Dhruve Liladhar & Co., solicitors, for and on behalf of Invesco Asset Management (India) Private Limited where just 18 days before the passing of such board resolution, the debenture trustee qua the debentures in question is set out as 'Vistra ITCL (India) Ltd.', purportedly earlier known as IL&FS Trust Company Limited and immediately within 18 days i.e. on 18.10.2019 the debenture trustee is claimed to be as Invesco Trustee Private Limited. Hence, there cannot be two debenture trustees in a gap of just 18 days. There is no debenture trust deed placed on record which would show that Invesco Trustee Private Limited is the trustee that holds the debentures in question in turn which have come to be purportedly defaulted. Hence, the trustee in question qua the debentures in question, the insolvency application fails.

7. Further, the insolvency application, at no place has the modified debenture trust deed dated 01.11.2015 come to be found and further the debenture trust deed dated 02.08.2014 placed on record in the insolvency application is executed with one IL&FS Trust Company Limited (which is most

definitely not Invesco Asset Management (India) Pvt. Ltd. or Religare Invesco Asset Management Co. Pvt. Ltd.) and hence it is submitted that the demand itself is illegal and hence there is no question of default. The Respondent No. 1 herein and/or the debenture holder had a purported right to put option and/or are right to call for making payment pursuant to purported even of default in a purported debenture trust deed dated 12.06.2019. There are no documents placed on record to substantiate any kind of default under the transactions in question and hence the insolvency application allowed vide the impugned order deserves to be dismissed.

8. It is further submitted that last notice dated 01.10.2019 issued by the Respondent No. 1 herein through their Advocate (at page 540 of the Appeal), the Respondent No. 1 has filed the insolvency application, not with a view to resolve the debts of the Corporate Debtor but filed with the view to arm twist the Corporate Debtor into illegally extorting moneys from the Corporate Debtor before the maturity date would arrive. The Corporate Debtor is a going concern and has an annual turnover of manufacturing of approx. Rs. 1800 crores taking into account the last three financial years and that its employees nearly 4,930 employees including their housing and daily meals and in the event the insolvency application is admitted against the Corporate Debtor, then the future of all such employees will also be at stake.

9. It is further submitted that the Corporate Debtor had also filed application being I.A. No. 38 of 2021 seeking to take its reply on record in main Company Petition (IB) No. 848 of 2019. That no reply has come to be filed by Respondent

No. 1. The Corporate Debtor had also filed application being I.A. No. 147 of 2021 seeking to refer the Section 7 petition to conciliation predominantly in the interest of thousands of workers of the Corporate Debtor. The contents of the said IA are deemed to be part and parcel of the present petition and are not repeated and/or reiterated to avoid bulk. In this also no reply was filed by the Respondent No. 1. That on next date of hearing being 19.02.2021, the conducting Advocate for the Corporate Debtor was on his legs before the Hon'ble High Court, when the matter was called out and hence the matter was adjourned. That on 23.03.2021, unfortunately, the conducting lawyer was not available for the Corporate Debtor and request was made for adjournment and thereafter for Passover, which was not entertained and the matter was reserved for order. It is pertinent that opportunity of hearing be given of oral arguments, since there are concrete contentions which are required to be explained to the Adjudicating Authority, not only on maintainability but also explain how the complicated transaction in question operates considering there was issuance of debentures and exercise of put option by the Respondent No. 1. Hence, it is a fit case for granting the reliefs more particularly prayed in the present appeal.

10. The Ld. Counsel for the Respondent No. 1 in his Reply Affidavit along with written submissions submitted that the Section 7 Application was filed against the Corporate Debtor by Respondent No. 1 in its capacity as the Asset Management Company of Invesco India Mutual Fund ("*Fund*") following the Corporate Debtor's failure to redeem 150 debentures issued by the Corporate Debtor, and subscribed to by the Fund. The total default amount against the

said debentures is a principal sum of Rs. 15 Crores with interest until realization. The said amount is payable by the Corporate Debtor under the debenture trust deed dated 02nd August, 2014 as modified by a deed dated 01st November, 2014 (*collectively referred to as the “Debenture Trust Deed”*) due to (i) certain acts of the Corporate Debtor, that led to an “Event of Default” under Clause 9(B)(vi) of the Debenture Trust Deed and under the terms of the Information Memorandum with respect to the Debentures and (ii) the Corporate Debtor’s failure to honor repayment pursuant to a Put Option exercised under the Debenture Trust Deed, with respect to the Debentures.

11. It is further submitted that the Section 7 application has been duly filed and is maintainable. The Appellant reliance on *Palogix Infrastructure Judgment* does not take his case any further. The Appellant has contended that the Section 7 application was not maintainable as it was not in compliance with the judgment of this Tribunal in “*Palogix Infrastructure Pvt. Ltd. V. ICICI Bank Ltd., 2017 SCC OnLine NCLAT 266*”. The said judgment does not take the case of Respondent No. 1 any further. In particular, the following may be noted:

- The Judgment was passed on 20th September, 2017, it is based on the version of Section 7 that existed prior to its amendment by the Insolvency and Bankruptcy (Second Amendment) Act, 2018. Thus, the words in Section 7(1) expressly allowing specified persons to file applications under Section 7 on behalf of a financial creditor had not been introduced at the time of the judgment.

- This Tribunal decided the question of whether a constituted attorney of a company could file an application under Section 7 (para 3). In the present Appeal, there is no constituted attorney and the application was filed pursuant to a board resolution of the trustee of the Fund. Importantly, in *Palogix*, this Tribunal held that a Board resolution authorising officers to do the needful in legal proceedings can be used to file Section 7 proceedings (para 36).
- It was further held that a person who was authorised to sanction a loan on behalf of an entity could also file an application under Section 7 (para39). In the present case, the Respondent No. 1 has the authority to invest the funds of the Fund under the SEBI (Mutual Fund) Regulations, 1996. Thus, even as per *Palogix*, Respondent No. 1 had the right to file the Section 7 Application.

12. The Fund's authority to initiate CIRP independently of the Debenture Trustee.

- The powers of the debenture trustee for enforcing security or getting repayment from a Corporate Debtor do not preclude the beneficial owners of the debentures to file proceedings *in rem*, such as CIRP against the debtor. In the matter of "*Essar Steel Ltd. Vs. Gramercy Emerging Market Fund, 2013 116 Comp Cases 248 Guj.*" The Hon'ble High Court Gujarat held that the creditors therein, who were the beneficial owners of debt instruments, were in fact entitled to file *in rem* winding up proceedings against the debtor independent of the debenture trustee.

- The Fund currently holds 150 of the debentures issued by the Corporate Debtor under the Information memorandum and the Debenture Trust Deed. This is reflected in the “closing balance” set out in a National Securities Depository Limited (NSDL) Statement as of October, 2019 (*at page 286, Vol.- II of the Appeal*). Thus, the Fund is a beneficial owner of the debentures. As such, the Fund, which is the beneficiary under the Debenture Trust Deed, has the right and standing to file the present petition (acting through Respondent No. 1), independent of any action that the debenture trustee may be entitled to take.

13. Authority of Respondent No. 1 to initiate CIRP on behalf of the Fund.

- Invesco Trust Private Limited ("*Mutual Fund Trustee*") is the trustee of the Fund (*at page 131 of the Appeal*). A Mutual Fund is a trust and as per the SEBI (Mutual Fund) Regulations, 1996, it is managed by a trustee and an asset management company.
- Accordingly, the mutual Fund Trustee, under a Deed of Trust dated 27th April, 2006 was authorized to appoint the predecessor of Respondent No. 1, as the manager of the assets of the Mutual Fund Scheme (*at page 83 of the Appeal*). The said appointment as manager has been made under the Investment Management Agreement dated 27th April, 2006. Under Clause 5(xiv) and (xv) of the aforesaid Investment Management Agreement, Respondent No. 1 has the necessary authorization to file the present petition (*at page 93 of the Appeal*). It is pertinent to note that an Investment Management Agreement is entered into under Regulation 18(1) and 18(2)

of the SEBI (Mutual Fund) Regulations, 1996 and has statutory force. Thus, Respondent No. 1 had the necessary authority to file the Section 7 Application.

- Further, the locus of an asset management company to initiate the CIRP on behalf of a Mutual Fund has also been recognized in the report of the Insolvency Law Committee dated 26th March, 2018 where in footnote 65 read with paragraphs 9.1 and 9.3 it has been observed that “*Alternate Investment Funds, Mutual Funds, Real Estate Investment Trusts, Infrastructure Investment Trusts may file for CIRP through their trustee, asset management company, etc.*”
- The Respondent No. 1 has the authority to invest funds on behalf of the Fund and therefore, as per the judgment in *Palogix Infrastructure*, cited by the Appellant, it was fully entitled to file a Section 7 Application on behalf of the Fund.
- Further, the notification dated 27th February, 2019 issued by the Central Government (which notifies a list of persons who may file an application under Section 7(1) of the IBC), states *inter alia* that *a person duly Authorised by the Board of Directors of a Company* may file such an application. Ms. Nupur Tainwala has been duly authorized by the Mutual Fund Trustee by its resolution dated 18th October, 2019 (*at page 233 of the Appeal*). Therefore, even assuming that the Mutual Fund Trustee and not Respondent No. 1, is the Financial Creditor, this does not take the case of the appellant any further, since the Trustee has authorised Ms. Nupur

Tainwala to file the Section 7 Application vide its Board Resolution and thus the said application was validly filed.

14. The NCLT rightly dismissed the interim applications filed by the Corporate Debtor. The interim applications filed by the Corporate Debtor before the NCLT were mere ruse to prolong and delay the hearing of the Section 7 Application. The attempts made by the Corporate Debtor to delay the present proceedings are recorded *inter alia* in the order dated 23rd November, 2020 of the NCLT in the Section 7 Application. Further, as pointed out by the order of this Tribunal in the case of *“Punjab National Bank Vs. Sintex Industries Ltd., Company Appeal (AT) (Insolvency) No. 200 of 2021, (upheld by the Hon'ble Supreme Court)”*, the Adjudicating Authority is not required to hear pre-admission interim applications and the scope of the Adjudicating Authority under Section 7 is to merely to pass an order of admission or rejection.

15. The impugned order was not passed in violation of the NCLT Rules. The Appellant contended that the cause list for pronouncement of the impugned order was not sufficiently notified under the NCLT Rules, 2016 and therefore, the impugned order ought to be set aside. This is patently incorrect. As the presence of the Advocate of Respondent No. 1 during the pronouncement of the impugned order shows that the additional cause list for the day was sufficiently notified parties of the listing of the Section 7 Application. Rule 89 is directed at the Registry of the Tribunal and not the Tribunal itself. Thus, an order of the Tribunal cannot be set aside on the basis of Rule 89. No prejudice could have been caused to the Appellant due to the absence of the Corporate Debtor at the

pronouncement of the order. The impugned order was published on the website of the Tribunal and admittedly came to the knowledge of the Corporate Debtor within two days of its pronouncement. There was no insufficiency of notice or impropriety of process in pronouncement of the impugned order.

16. Further, in terms of the order dated 06.12.2022, the Ld. Counsel for the Respondent No. 2 / Interim Resolution Professional (*for short "IRP"*) have filed the Progress Report, progress of CIRP proceedings, whereby it is stated that 21st Committee of Creditors meeting was convened on 02nd March, 2022 wherein members representing 98.88% in value members representing 1.12% in value abstained from voting and thereby 100% voted for approval of resolution plan submitted by Reliance Industries Limited jointly with Assets Care and Reconstruction Enterprise Limited and the same is pending before the Adjudicating Authority for approval of the resolution plan.

17. I.A. No. 1933 of 2021 has been filed in the instant Appeal by the Applicant-Punjab National Bank, representing Committee of Creditors, Sintex Industries with a prayer to allow the instant application of the Applicant to intervene in the present Appeal. We have heard the Ld. Counsel for the Intervenor and found that there no separate order is required to be passed in this I.A. Thus, the I.A. No. 1933 of 2021 is hereby disposed off.

18. After hearing the parties and going through the pleadings made on behalf of the parties, we are fully in agreement with the reasons assigned by the Adjudicating Authority whereby objection raised by the Respondent (before the Tribunal) / Appellant so far authorized representative of the Financial Creditor

is concerned, the Adjudicating Authority rightly found that on 18.10.2019 a board resolution was passed by Invesco Trustee Pvt. Ltd., whereby, Ms. Nupur Tainwala, Assistant Vice President-Legal of Invesco Asset Management (India) Pvt. Ltd. is authorised to file any case/suit etc. before any court of law, tribunal, quasi-judicial process etc. which contained the detail power/authorization provided to Ms. Nupur Tainwala by one Ms. Deepti Dave being authorized signatory of Invesco Trustee Pvt. Ltd. Further, in paragraphs no. 20, 21, 22 and 23 of the impugned order, in which paragraph no. 23 gives categorical finding which reads as hereunder:

“23. From the above, it is clear that there is there is “debt” and “due” and the “default” is occurred, which said debt has duly been acknowledged by the Corporate Debtor. This Adjudicating Authority is only required to consider whether there is any “default” and “debt” is due and payable. In the instant case the Applicant has placed on record enough documents evidencing the default. Hence, the present application deserves to be admitted.”

Keeping in view of the aforementioned facts, we do not find any merit in the Appeal to interfere with the order impugned passed by the Adjudicating Authority. The impugned order dated 06.04.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench) in CP (IB) No. 848 of 2019 and IA No. 147 of 2021 is hereby affirmed. The instant Appeal is hereby dismissed. I.A., if any, stands disposed off. No order as to costs.

19. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench), forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Barun Mitra]
Member (Technical)**

New Delhi

27th February, 2023

R. Nath.