NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1459 of 2023

[Arising out of order dated 20.10.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench - IV in CP (IB) No. 337/MB-IV/2022]

IN THE MATTER OF:

Sudhir Darode
Suspended Director,
Darode Jog Realties Pvt. Ltd.
1212, Darode Jog House, Apte Road,
Deccan Gymkhana Pune - 411004 **...Appellant**

Versus

ICICI Bank Ltd.
ICICI Bank Tower, Near Chakli Circle,
Old Padra Road Vadodara - 390007 **...Respondent No.1**

Ms. Akansha Ashish Rathi,
Interim Resolution Professional,
Darode Jog Realties Private Limited,
1212, Darode Jog House Apte Road,
Deccan Gymkhana Pune - 411004 **...Respondent No.2**

Present:

Appellant: **Mr. Prakhar Tandon, Ms. Neha Agarwal, Mr. Agam M, Advocates.**

Respondents: **Ms. Prachi Johri, Ms. Abhipsa Sahu, Advocates for R-1.**
Mr. Prafful Saini and Mr. Harshit Khare, Advocates for R-2.

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 ("**IBC**" in short) by the Appellant arises out of the Order dated 20.10.2023 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench - IV in CP (IB) No.337/MB-IV/2022. By the impugned order, the Adjudicating Authority has admitted the Section 7 application filed by ICICI Bank Ltd. – Financial Creditor for admission of Corporate Insolvency Resolution Process ("**CIRP**" in short) against Darode Jog Realties Pvt. Ltd.-Corporate Debtor. Aggrieved by the impugned order, the present appeal has been filed by the suspended director of the Corporate Debtor.

2. The Learned Counsel for the Appellant making his submissions stated that the Respondent No.1-Financial Creditor had sanctioned a term loan facility of Rs.130 crore to the Corporate Debtor in August 2015. This loan facility was secured by charge over immovable properties of the Corporate Debtor. It was submitted that the Corporate Debtor had continued to disburse their debt obligations up to 26.04.2019. However, on account of outbreak of Covid pandemic, which affected their business of construction activities and resultant loss of revenue, the Corporate Debtor faced some difficulties in making payments and hence proposed restructuring of its term loan. It was further submitted that while settlement talks were going on between the Appellant-Corporate Debtor and Respondent No.1-Financial Creditor, the latter had filed a Section 7 application seeking initiation of CIRP against the

Corporate Debtor. As a part of the settlement process, a communication was sent by the Corporate Debtor to the Financial Creditor on 03.12.2022 by which they agreed to pay Rs. 17 crore to the Financial Creditor upon issuance of provisional No Objection Certificates ("**NoC"** in short) in respect of their 3 properties mortgaged with them. The Adjudicating Authority on being apprised that the parties had reached an out of court amicable settlement, the Adjudicating Authority permitted the Financial Creditor to withdraw the Section 7 application vide its order dated 29.03.2023.

3. The Learned Counsel for the Appellant further submitted that following the Settlement Agreement between the two parties dated 08.02.2023, the Corporate Debtor sent a letter on 03.05.2023 and 05.05.2023 to the Financial Creditor to issue a NoC for the property at Serene County land and mortgaged property at village Jambhul and Taradgaon. This was followed by further reminders on 06.05.2023 and 16.05.2023 but requisite NoCs for the said land parcels were not issued by the Financial Creditor. Instead of issuing NoCs, the Financial Creditor chose to file Restoration Application No.24 of 2023 for restoration of main Company Petition No.337/2022 on the ground that the Corporate Debtor had defaulted in the payment. The Learned Counsel for the Appellant vehemently contended that the Restoration Application was allowed by the Adjudicating Authority on 02.08.2023 without granting the Corporate Debtor an opportunity to file a reply. Thus, by not permitting the Corporate Debtor to file their reply, the principles of natural justice were vitiated. When the restored main Company Petition was heard on 25.09.2023, the Adjudicating Authority reserved the matter for orders even though it was

pointed out that settlement process was going on between the two parties. Submission was also made that since the Financial Creditor had already initiated proceedings under the SARFAESI Act, 2002 and the said proceedings are pending, proceedings under IBC could not have been pressed. It is also been strenuously contended that the Financial Creditor has misused the provisions of IBC to use the Adjudicating Authority as a recovery forum. It was further submitted that the Adjudicating Authority vide impugned order wrongly pushed the Corporate Debtor into insolvency during the pendency of discussion on the settlement of debt between the two parties.

4. Refuting the aforesaid contentions of the Appellant, it was submitted by the Learned Counsel for the Respondent No.1 that they had provided term loan to the Appellant in 2015 and the credit arrangement was renewed, amended and modified from time to time. The Corporate Debtor defaulted in their repayment obligations under the Loan Facility Agreement. Having breached several covenants of the Facility Agreement, their account was classified as NPA from 17.05.2018. The Financial Creditor had recalled the entire loan vide their communication dated 13.02.2019 as further rectified on 29.03.2019 seeking payment for an amount of Rs.148.27 crore from the Corporate Debtor. It has been further asserted that the Corporate Debtor never disputed their debt liability even after receipt of the loan recall letter. No reply was either sent by the Corporate Debtor to the loan recall which shows admission of debt and default.

5. While admitting that the two parties had entered into a Settlement Agreement on 08.02.2023, it was asserted that the Settlement Agreement did not make any mention about grant of NoC or release of security by the Financial Creditor before the payment of the settlement amount. It was further stated that the Financial Creditor was secured by way of mortgage over the properties and personal, corporate guarantees and contractual comforts given by the Corporate Debtor and hence the question of their release before settlement amount was paid did not arise.

6. It has been contended that the Appellant does not have any intention to repay the debt which is clear from their default of the loan facility agreement which persisted even under the Settlement Agreement. It was strenuously contended that the Appellant having continued to default and failed to pay the settlement amount contained therein within the agreed timelines, the Adjudicating Authority correctly allowed the Restoration Application for restoring the main Company Petition and for subsequently admitting the Section 7 application. On the issue of pending SARFAESI proceedings, it was contended that the same was noted while entering into the Settlement Agreement. Moreover, it was contended that pendency of actions under the SARFAESI Act does not erode the statutory rights of a financial creditor to seek their remedy under IBC or create any obstruction for filing an application under Section 7 of IBC.

7. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

8. It is the case of the Corporate Debtor that only upon receipt of the provisional NoC qua the three mortgaged properties that the Corporate Debtor had agreed to make payment of settlement amount to the Financial Creditor. It was asserted that the Appellant was only asking for the release of a conditional NoC and not an unconditional release of the security. Further the terms of the Settlement Agreement do not put any bar or embargo on the grant of provisional or conditional NoC prior to payment of settlement amount. It was argued that the Financial Creditor had misconstrued the terms of the Settlement Agreement in holding that NoC was to be issued only after the settlement amount was paid. It was asserted that this stand of the Financial Creditor was in contravention of the understanding arrived at between the parties for settlement of the dues. Having once earlier issued a NoC prior to receiving payment, the Financial Creditor cannot now allege that the Corporate Debtor is forcing the Financial Creditor to issue conditional NoCs in respect of the other mortgaged properties prior to receipt of payment. It was therefore contended that this obstinate and impractical behavior on the part of the Financial Creditor to press the Section 7 proceedings was purely for the purpose of recovery and not for revival of the Corporate Debtor as a going concern. This aspect should have been noticed by the Adjudicating Authority before admitting the Section 7 application.

9. On the contrary, it is the case of the Financial Creditor that the Corporate Debtor has been a chronic defaulter for more than 5 years having initially violated the loan facility agreement and later breached the Settlement Agreement. Substantiating their arguments, it was asserted by the Learned

Counsel for the Respondent No. 1 that in terms of the Settlement Agreement of 08.02.2023, the charge on the mortgaged properties was clearly to be released only upon the receipt of the settlement amount of Rs.17 crore within 90 days from the date of the Settlement Agreement. That this amount was not received from the Appellant within the negotiated time-frame of 90 days tantamount to a default. Thus, having violated the Settlement Agreement, the Corporate Debtor is trying to cover up the breach on their part by craftily shifting the blame on the Financial Creditor that they did not issue the provisional NoCs. It was emphatically asserted that the Settlement Agreement did not bind the Financial Creditor to issue provisional NoCs and any such interpretation amounts to be in the nature of mis-constructing the provisions of the Settlement Agreement. It was also pointed out that the conduct or the bonafide of the Financial Creditor cannot be put to question in the light of the fact that they had agreed to ink the Settlement Agreement even after having filed a Section 7 application thereby offering ample latitude and opportunity to the Corporate Debtor to liquidate their debt. It was further contended that the Adjudicating Authority had correctly noted that debt and default existed while admitting the Section 7 application.

10. For better appreciation of the issue at hand, we may at this stage first take notice of the relevant recitals and clauses of the Settlement Agreement of 08.02.2023 which finds place at page 520 of the Appeal Paper Book ('**APB**' in short) and its bearing on the facts of this case. The relevant recitals of the Settlement Agreement are as under: -

> *"E. In 2018, the Borrower defaulted in its payment obligations under the Facility Agreement. The Borrower also breached several other*

covenants/conditions of the Facility Agreement. The Borrower continued to default in its obligations and consequently, the account of the Borrower was classified as Non-Performing Asset (NPA) from 17 May 2018.

F. *In light of the aforesaid, ICICI Bank, by way of recall letter dated 13 February, 2019 ("Recall Letter") recalled the entire Facility and called upon the Borrower to pay the entire outstanding principal amount, together with interest and other costs/charges/fees/amounts payable in relation to the Facility (which as at 15 January, 2019 was INR 1,482,752,640.0 (Rupees One Thousand Four Hundred and Eighty-Two Million Seven Lakh Fifty Two Thousand Six Hundred and Forty) along with the applicable interest, default interest, premia, charges etc. thereon at the contractual rates upon the footing of compound interest until payment / realization to the satisfaction of ICICI Bank. Guarantee invocation letter were sent to the Guarantors on Feb 25, 2019 ("Invocation Notices").*

G. *Despite the Recall Letter and the Invocation Notices, no payment were received by ICICI Bank either from the Borrower or Guarantors.*

L. *As on January 25, 2023, the amounts due and payable by the Borrower to ICICI Bank is INR 1,928,722,629.0 (Rupees One Thousand Nine Hundred and Twenty Eight Million Seven Lakh Twenty Two Thousand Six Hundred and Twenty) ("Outstanding Dues") with respect to the Facility sanctioned by ICICI Bank to the Borrower.*

N. *The Parties are now desirous of entering into this Settlement Agreement to record the agreed terms and conditions of the settlement."*

The relevant Clauses of the Settlement Agreement are as under:

"1. ACKNOWLEDGMENT OF DEBT.

The Borrower, Guarantors and Security Providers, jointly and severally, unconditionally and unequivocally, agree and confirm that as on January 25, 2022, the total outstanding amounts owed to ICICI Bank under the Facility is INR 1,928,722,629.0 (Rupees One Thousand Nine Hundred and Twenty Eight Million Seven -Lakh Twenty Two Thousand Six Hundred and Twenty Nine) ("Outstanding Dues").

2. SETTLEMENT AMOUNT

2.1 The Borrower undertakes and agrees to make payment of INR 170.0 million(Rupees One hundred and seventy million only) ("Settlement Amount") to ICICI Bank, towards full and final settlement of an amounts due and payable under the Facility, including the

Outstanding Dues, within 90 (Ninety) days from the date the execution of this Settlement Agreement. Payment of the said settlement Amount shall be made by way of RTGS/NEFT.

3. TERMS OF SETTLEMENT

i. Borrower shall make payment of the Settlement Amount within 90 (ninety) days from the date of execution of this Settlement Agreement, as per the provisions of clause 2.1 of this Settlement Agreement.

ii. Post receipt of the entire Settlement Amount to the satisfaction of ICICI Bank, ICICI Bank shall:

(a) issue no dues certificate in relation to the Facility.

(b) Release the Contractual Comforts (mentioned in Schedule 1) and the charge over the Securities (mentioned in Schedule 2)

(c) Withdraw the DRT proceedings and the application filed under Section 7 of IBC.

5. CONSEQUENCES OF EVENT(S) OF DEFAULT

Upon occurrence of the event of default mentioned in clause 4 of this Settlement Agreement, ICICI Bank shall have the right to take any of the following actions:

i. To forthwith terminate this Settlement Agreement, without any prior notice/intimation to Borrower and/or the Guarantors.

ii. To reinstate all amounts due and payable under the Facility, including the Outstanding Dues (reduced only to the extent of amounts, if any, paid under this Settlement Agreement), along with applicable Interest/additional/default interest. The Borrower and Guarantors shall forthwith become jointly and severally liable to pay such reinstated amounts. ICICI Bank's rights to recover the reinstated amounts would be reinstated without any further communication.

iii. To reinstate/revive and/or initiate and/or continue pursuing the following proceedings:

a. Original Application No. 92 of 2021 before the Debt Recovery Tribunal, Pune.

b. Company Petition No. 337 of 2022 before the National Company Law Tribunal, Mumbai.

c. To exercise any other rights / remedies available to ICICI under applicable laws/regulations."

(*Emphasis supplied*)

11. At the very outset, we take notice that the Settlement Agreement was signed by the Appellant and Respondent No. 1 and there is no dispute or controversy surrounding the authenticity of the Settlement Agreement. There

is nothing on record to show that the legal validity of the Settlement Agreement was ever questioned by either of parties. Recital E thereof notes that default was committed by the Corporate Debtor in respect of the loan facility and consequential classification of their account as NPA. Recital F enunciates that the loan facility was withdrawn and the amount due and payable to the Financial Creditor as on 15.01.2019 was Rs.148.27 crore. Recital G is an unequivocal declaration that inspite of the recall letter and invocation notices, no payment was received from the Corporate Debtor while Recital L notices that amount due and payable to the Financial Creditor as on 25.01.2023 was Rs.192.87 crore and Recital N notes that in the light of the OTS proposal of the Financial Creditor dated 03.12.2022, the parties are desirous of entering into a Settlement Agreement on agreed terms and conditions.

12. The above recitals having been signed by both the parties willingly and consensually and not having been disputed, we notice that the Settlement Agreement has clearly noted that there was a debt qua the Financial Creditor and that the Corporate Debtor had clearly defaulted in discharging their debt obligations. Further with a view to settle the terms and conditions for repayment of this outstanding debt, the present Settlement Agreement was proposed to be entered.

13. Now coming to the specific clauses of the Settlement Agreement, a glance at Clause 1 thereof shows that the Corporate Debtor has again unconditionally and unequivocally admitted the debt of Rs. 192.87 crore as on 25.01.2022. Further, Clause 2.1 of the Settlement Agreement stipulates

the full and final settlement amount to be Rs. 17 crore payable by the Financial Creditor within 90 days from the date of execution of the Settlement Agreement. More importantly, Clause 3(ii)(a) and (b) clearly mention that post receipt of settlement amount, the Financial Creditor was to issue no dues certificate with respect to the loan facility agreement and only thereafter release the contractual comforts and charge over the securities. Clause 5 (iii) provides for consequences of breach of Settlement Agreement, inter-alia, entitling the Financial Creditor to revive/reinstate/initiate/continue with the main Company Petition 337/2022.

14. The above-cited clauses are a reiteration of the fact that there was admittedly a debt qua the Financial Creditor and there was a default in discharge of the debt obligations by the Corporate Debtor and that the two parties agreed to enter into a Settlement Agreement on mutually agreeable terms and conditions by which Rs. 17 crore was payable by the Financial Creditor within 90 days from the date of execution of the Settlement Agreement.

15. This now brings us to the contention of the Appellant that vide their letters dated 03.05.2023, 06.05.2023, 16.05.2023 and 12.07.2023, they had requested the Financial Creditor to issue conditional NoC for release of charge of the other properties but the same was adamantly refused without any cogent reasons. It was also submitted that if this conditional NoC was issued, they would have been able to sell the mortgaged properties and repay their debt. Harping on the intransigence on the part of the Financial Creditor to release the provisional NoC and attributing the same to be the reason for the

default having been triggered, it has been the case of the Corporate Debtor that the Financial Creditor cannot be absolved of their responsibility in contributing to this debt and default situation and hence the Adjudicating Authority ought not to have admitted the Section 7 application.

16. Having examined the terms and conditions of the Settlement Agreement, we have no hesitation in our mind that the Settlement Agreement does not make any mention of any form of NoC to be provided by the Financial Creditor with respect to mortgaged properties or any release of security by the Financial Creditor before the payment of the settlement amount. The Settlement Agreement at Clause 3(ii)(b) makes it amply clear that the security was to be released only on payment of the entire settlement amount. Furthermore, when the security provided by the Corporate Debtor had been charged to the Financial Creditor to secure the loan facility, the Financial Creditor cannot be compelled to accede to issue of NoC for sale of these mortgaged properties prior to payment of debt and that too sans any such specific arrangement provided for in the Settlement Agreement.

17. We also notice from the additional affidavit placed on record by the Respondent No.1 that the Financial Creditor had sent emails on 04.05.2023, 08.05.2023 and 26.06.2023 to the Corporate Debtor making it unambiguously clear that in terms of the Settlement Agreement of 08.02.2023 the charge on the mortgaged properties will be released only upon the receipt of the settlement amount of Rs. 17 crore within 90 days from the date of the Settlement Agreement and that this amount has not been received. Per contra, the Corporate Debtor has not placed anything on record to

substantiate that the Financial Creditor had deviated/violated/contravened the terms and conditions of the Settlement Agreement. Thus, when the Financial Creditor had repeatedly made it clear that they were strictly relying on the terms and conditions of the Settlement Agreement and that NoC would be released only after settlement amount was received, levelling of allegation by the Corporate Debtor that the Financial Creditor was responsible for their default is devoid of force and substance.

18. Given such facts and circumstances, we cannot countenance the stand of the Corporate Debtor that the Financial Creditor ought to have released the charge or provided NoC with respect to the mortgaged properties prior to liquidation of the debt. Acceding to any such claim of the Financial Creditor would not be in sync with the construction of the plain words contained in the Settlement Agreement and would tantamount to anomalous interpretation of the Settlement Agreement. Even if on one occasion in the past the Financial Creditor had given the NoC prior to receipt of payment, this relaxation cannot be claimed by the Corporate Debtor as a matter of right since both parties were clearly bound by the Settlement Agreement which Agreement clearly did not contemplate any such arrangement.

19. This brings us now to the impugned order, where we find that the Adjudicating Authority has taken cognizance of Recital L and Clause 1 and 2 of the Settlement Agreement and thereafter admitted the Section 7 application and the relevant findings are as extracted below:

> *"4.4. From the above it flows that the Corporate Debtor has acknowledged the outstanding debt as on 25.01.2022 and had agreed to repay the entire amount, which amounts to acknowledgement of*

liability on the part of the Corporate Debtor. Further, the Corporate Debtor has defaulted in payments in terms of settlement Agreement dated 08.01.2023, leading to Restoration of the Company Petition.

5. The Tribunal, while adjudicating upon an application for admission into Resolution Process filed by a Financial Creditor under section 7 of IBC mandated to ascertain the existence of the debt, and any default in payment of such debt.

6. Considering all the facts placed before us and the fact that the Corporate Debtor owes the Financial Debt in excess of Rs.1 Crore, which is in default, this bench is of the view that in such circumstances, it is imperative that the Corporate Insolvency process to be initiated in the matter of the Corporate Debtor. The petition is complete in all aspect. Since, the debt and default exist, this bench is of the view, that the present case deserves to be admitted under Section 7 of the Insolvency and Bankruptcy Code, 2016."

(Emphasis supplied)

20. The Corporate Debtor while entering into the Settlement Agreement had clearly acknowledged debt and default. We find that under Clause 1 of the Settlement Agreement, it has been admitted unconditionally and unequivocally by the Corporate Debtor that the amounts due and payable to the Financial Creditor as on 25.01.2023 was Rs.192.87 crore. In Clause 2 of the Settlement Agreement, the Corporate Debtor had agreed to pay Rs.17 crore within 90 days from the date of the Agreement. This clause was breached as the settlement amount was not paid by the Corporate Debtor within the prescribed time frame of 90 days. Hence, the Adjudicating Authority on 02.08.2023 had restored the main company petition which was in consonance with the understanding reached between the two parties as outlined in Clause 5 of the Settlement Agreement. On perusal of material on record, we find that during the hearing on the restoration of the main company petition, the Corporate Debtor was represented. After noting that

the present Appellant/Corporate Debtor had sought time to file additional documents, the matter was reserved for hearing by the Adjudicating Authority on 25.09.2023. This order of 02.08.2023 having not been challenged has acquired finality and at this stage the Appellant cannot claim that principles of natural justice was vitiated by the Adjudicating Authority. In any case, once the parties failed to mutually work out the settlement, the Adjudicating Authority was duty bound to decide the case on merits alone which it did by deciding to hear the main company petition. Again, during the hearing of the main company petition on 25.09.2023, we notice that both parties were present and heard and thereafter the matter was reserved for orders. The Appellant's assertion that the Corporate Debtor did not get adequate opportunity to present their case before the Adjudicating Authority is unsubstantiated and contrary to proceedings and order on record. We do not find any violation of the tenets of natural justice at this stage either.

21. Furthermore, we notice that owing to the default of the Corporate Debtor, their account had been classified as NPA on 17.05.2018 and by a loan recall letter dated 13.02.2019 and 29.03.2019, the entire loan facility had been recalled. From the Corporate Debtor's own admission, as evidenced from the Settlement Agreement, we notice that the default had been occasioned in 2018 by which time Covid had not yet descended. That apart, in the financial statement of the Corporate Debtor for financial year ending 31.03.2019 a default to the extent of Rs.53.90 crore has been admitted as is seen at page 383 of APB. Furthermore, the Appellant has been admitted for resolution under IBC almost three years after Covid 19 which testifies that the Corporate

Debtor had continued to default in discharging its obligations to liquidate the debt even after the Covid pandemic meltdown. Hence the ground of Covid 19 conditions raised by the Corporate Debtor also lacks foundational basis.

22. The Hon'ble Apex Court in the case of ***Innoventive Industries Limited v. ICICI Bank (2018) 1 SCC 407***, has laid down the guiding principles to admit or reject an application filed under Section 7 of the IBC. Under the ambit of Section 7 of the Code, the Adjudicating Authority is to only determine whether a default has occurred and whether the debt, which may still be disputed, was due and remained unpaid. It is a well settled proposition of law that only two alternative courses of action are available to the Adjudicating Authority under Section 7(5) of the IBC which is to either admit the application under Section 7(5)(a) or reject the petition under Section 7(5)(b). The moment the Adjudicating Authority is satisfied that a default has occurred, the Application is to be admitted unless it is incomplete. On the question as to whether debt and default was adequately demonstrated before the Adjudicating Authority, basis the records made available before it, the Adjudicating Authority has rightly concluded that it was satisfied with the evidence and material produced before it by the Financial Creditor to prove that a debt had arisen; that a default has occurred and the default is above the threshold limit of Rs. 1 crore. Since debt and default is clearly established, we are of the considered opinion that there is no infirmity in the impugned order admitting the Section 7 application.

23. For the foregoing reasons, we are of the considered view that no error has been committed by the Adjudicating Authority in allowing the Section 7

application and admitting the Corporate Debtor into the rigours of CIRP. We do not find any reason to interfere with the Impugned Order. The Appeal fails and is accordingly dismissed with no costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi
Date: 25.01.2024

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