

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT)(Insolvency) No. 60 of 2021

IN THE MATTER OF:

Amit Arora

S/o Sh. Satnam Arora
Suspended Director of Aryavir Buildcon Pvt. Ltd.
R/o 248, Satnam Dfarms Westend Marg,
Saiduljab, Saket, Delhi

....Appellant

Versus

Tourism Finance Corporation of India

A Company incorporated under
The Companies Act, 1956 and
Having its Registered Office at
4th Floor, Tower – I, NBCC Plaza,
Pushp Vihar, Sector – 5, Saket, New Delhi - 110017

....Respondent 1

Aryavir Buildcon Pvt. Ltd.

Through Mr. Shahsi Kant Nemani
Interim Resolution Professional of the Aryavir Buildcon Pvt. Ltd.
A Company incorporated under the
Companies Act, 1956 and having
Its Registered Office at
Old No. – 25, New – 33, G/F,
JMD Kohinoor Galleria
Masjid Moth, G.K.- II, New Delhi – 110048

....Respondent 2

Present:

**For Appellant: Mr. Virender Ganda, Sr. Advocate with Ms. Eshna Kumar
and Mr. Aditya Maheshwari, Advocates.**

**For Respondents: Mr. Amit Singh Chadha, Sr. Advocate with Mr. Suresh
Dutt Dobhal and Mr. Shikhar Kumar, Advocates for R –
1. Mr. Abhirup Dasgupta, Mr. Ishaan Duggal, Ms.**

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**Bhavna Sharma, Advocates for R – 2.
Mr. Shailendra Singh and Ms. Muskaan Garg, Advocates
for Intervenor.**

**JUDGMENT
(Date:10.02.2022)
(Virtual Mode)**

{Per.: Dr. Alok Srivastava, Member (Technical)}

1. This appeal under Section 61 of Insolvency and Bankruptcy Code, 2016 (hereafter called IBC) has been filed by the Appellant Amit Arora, suspended director of the corporate debtor Aryavir Buildcon Private Limited (Respondent No. 2) against the order dated 17.12.2020 (hereafter called “Impugned Order”) passed by the National Company Law Tribunal, New Delhi (the Adjudicating Authority) in CP (IB) 581/ND/2020 qua which the Adjudicating Authority has admitted application under Section 7 of IBC filed by Tourism Finance Corporation of India (in short called ‘TFCI’, Respondent No. 1) and thereby initiated Corporate Insolvency Resolution Process (in short “CIRP”) against the Corporate Debtor.

2. The Appellant has assailed the Impugned Order in the appeal memo on the ground that TFCI is only interested in enforcing a security interest over the assets of CD and has no interest in the growth and survival of the CD and thus it does not satisfy the test of being a ‘financial creditor’ under the IBC. Furthermore, he has averred that the Adjudicating Authority did not consider the averments made in IA No. 4701 of 2020, which was for production of minutes to see whether the TFCI was actually a financial creditor or not and this IA No. 4701 of 2020 was dismissed *in limine* without proper consideration. The Appellant has also claimed that the Adjudicating Authority has failed to appreciate the meaning of ‘debt’ and ‘default’ and no default has occurred under the loan agreement as loan instalments were to be paid till 15.1.2031 and TFCI could not recall the loan at any earlier date. Further grounds raised by the Appellant are that the Corporate Debtor is not a failing business but it is a new and a profit making hotel and CIRP will put the entire business in jeopardy. Lastly, the Appellant has claimed that

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Mr. N. Ramachandran, who filed the Section 7 application, did not have the necessary authorization to file the Section 7 application and hence it was not maintainable.

3. In brief, the facts of the case, as presented and argued by the Appellant, are that an operating agreement was executed between Marriott Hotel and the Corporate Debtor on 17.2.2012 and accordingly the Corporate Debtor constructed a 134-room hotel in Amritsar and the said hotel started functioning from mid-2017. The Corporate Debtor took a loan of Rs. 50 crore from Infrastructure Leasing and Financial Services Limited ('ILFS 'in short) and in 2018 the loan was assigned to TFCI. Thereafter, on 7.3.2018 a sanction letter was issued by TFCI to the Corporate Debtor for refinancing the entire loan of Rs. 50 crore and terms and conditions of this loan were accepted by the Corporate Debtor. It is stated by the Appellant that, later on 28.3.2018, a loan agreement was executed between the Corporate Debtor had TFCI regarding repayment of loan till 15.01.2031 and shares of Corporate Debtor were pledged in favor of TFCI to secure this loan. Thereafter on 20.11.2019, the Corporate Debtor signed a mandate in favor of TFCI to look for buyers of the hotel and issued an advertisement inviting bidders for acquisition of the hotel on 17.12.2019, whereafter an offer of approximately Rs.75-80 crore was received, which according to the Appellant was much below the hotel's market value.

4. It is further stated by the Appellant that on 18.2.2020, TFCI issued notice under section 13(2) of SARFAESI Act, 2002 to the Corporate Debtor for the payment of Rs.50,78,74,188.00 and on 19.2.2020 TFCI, as financial creditor, filed a Section 7 application under IBC against the corporate debtor which was taken up for consideration by the Adjudicating Authority. It is further claimed by the Appellant that the corporate debtor sent a request to TFCI on 19.6.2020 for restructuring of the loan and an offer to make repayment by 29.2.2020, which was rejected by TFCI on 29.6.2020. Again, another proposal for restructuring of the loan was made by the corporate debtor which was again rejected on 3.7.2020.

5. We heard arguments on behalf of the Appellant and the Respondents and also perused the record.

6. The Learned Senior Counsel for Appellant has stated that the date of default mentioned in column 2 of Part IV of the application under Section 7 (attached at page 214 of the Appeal Paperbook Vol.I) mentions the date of default as 15.2.2020 and the total amount outstanding as Rs. 50,78,74,188.00 along with further interest at contractual rates with effect from 15.2.2020 till realization with all costs and charges. He has further argued that in the loan agreement dated 28th March 2018 between TFCI and the corporate debtor(attached at pp. 64-88 of Appeal Paperbook Vol. I) the event of default is included in clause 2.6(1)(a) and (b)which is as follows: –

2.6(i)(a) If the Borrower commits as default in payment or repayment of three consecutive instalments of principal amounts of the Loan or Interest thereon or any combination thereof; or

(b) the affairs of the borrower pertaining to the project are, in the opinion of the lead institution/lenders, being mismanaged in a manner which is likely to affect prejudicially the interest of the Lenders;

Then the Lenders shall have the right to convert (which right is hereinafter referred IV as “the conversion right” at its option the whole of the outstanding amount of the Loan or a part not exceeding 20% of the Loan, whichever is lower, into fully paid-up equity shares of the Borrower, at par, in the manner specified in a notice of not less than 30 days in writing to be given by the Lenders to the Borrower (which notice is hereinafter referred to as “notice of conversion”) prior to the date on which the conversion is to take effect which date shall be specified in the said notice of conversion (hereinafter referred to as the “date of conversion”).

7. The Ld. Senior Counsel for Appellant has argued that since an explicit express provision has been made about right of lender to get the debt in default converted to equity shares, the financial creditor could not have taken recourse to the 'General Terms and Conditions - Applicable to Assistance Provided by Financial Institutions (attached at pp. 89 – 111 of Appeal Paperbook vol. 1) and filed a section 9 application. He has also argued that since there was no default as of 15.1.2020 there was no reason or event for the financial creditor to recall the loan. Further, his argument is that in view of the fact that the market value of the full property is Rs.120.67 crores, as evidenced in the valuation report prepared by the consultant (attached at page 181 of Appeal Paperbook Volume. I), and the default alleged is just a little over Rs.50 crores, it is not proper to put a fully operational corporate debtor into insolvency resolution. He has further referred to Para 6.28 of the judgment of Hon'ble Supreme Court in **Innoventive Industries Limited versus ICICI Bank Limited (2018 1 SCC 407)** to claim that if debt is not due, default cannot be said to have occurred. Further, he has referred to the judgment in the matter **Anuj Jain versus Axis Bank Limited [2020 SCC online SC 237]** to emphasize that TFCI is not directly engaged in the functioning, rejuvenation and revival of the corporate debtor and is not interested in the growth of the Corporate Debtor but is merely an assignee of the loan taken by the corporate debtor from ILFS which was only transferred to TFCI in the year 2018. In short, the argument of the Learned Senior Counsel of Appellant is that the Respondent No. 1 is not a financial creditor and in the light of the fact that there was no default, the recall of the loan by the purported financial creditor TFCI was not in order, and hence the appeal should be allowed.

8. The Learned Senior Counsel for Respondent No. 1 has argued that the Adjudicating Authority has very clearly held in Paragraphs 11 and 12 of the Impugned Order that the loan agreement entered into between the financial creditor/TFCI and the corporate debtor dated 28.3.2018 very clearly provides that if there is a breach in the payment of EMI and interest, then the financial creditor has the authority to recall the total loan. Furthermore, he has argued that the Impugned Order very clearly states that

the right to convert the loan to shares in case of default in repayment is only an option available to the financial creditor, which the financial creditor has decided not to exercise. He has argued that the resolution plan approved by the Adjudicating Authority amounts to Rs. 67.50 crore and even Hon'ble Supreme Court has not accepted the argument that the amount of resolution plan as approved cannot be different from the market value of the assets of Corporate Debtor.

9. The Learned Senior Counsel for Respondent No. 1 has further argued that the corporate debtor, through letter dated 6.10.2020, had promised to deposit Rs.60 crore in one month, but he retracted later. He has further argued that the resolution plan for the corporate debtor was approved by the Adjudicating Authority on 21.6.2021, whereafter an appeal was preferred by the suspended director of the Corporate Debtor in NCLAT which was dismissed. He has also argued that the resolution plan has been implemented and the hotel in question is now running properly.

10. The Learned Counsel for Respondent No. 2(Resolution Professional) has urged that the Corporate Debtor has shown that there is a default in payment of interest of the principal loan which is evident from the 'Interest Commitment and other charges account sheet' (attached at page 243 of the Appeal Paperbook Volume II) meaning that repayment of interest amount was overdue and therefore in default of payment. Furthermore, he has argued that the repayment in loan account was heavily irregular, as is clear from the account statement attached at pp. 238 – 243 of the Appeal Paperbook Volume II. He has reiterated the argument that the right of conversion of the loan amount in default into equity shares is only a right and there is no obligation on the part of financial creditor to convert loan amount into equity shares. He has also rebutted the argument of the Learned Senior Counsel for Appellant that this is not a case of recovery, but the intention of financial creditor was to restructure the loan to ensure that the Corporate Debtor would run properly, as is evident from various letters given by the Corporate Debtor to TFCI/financial creditor regarding restructuring of the loan. He has lastly claimed that in this case a proper resolution of the Corporate Debtor has been

achieved and now the Corporate Debtor has no debt which is overdue.

11. The Section 7 application filed by the financial creditor/Tourism Finance Corporation of India Limited (attached at pp. 205 – 219 of Appeal Paperbook, Vol. I) mentions in Part IV the total amount of debt granted as Rs. 50 crore and the amount claimed in default as follows:-

(i)	Principal –	Rs.48,50,00,000
(ii)	Interest due as on 15.2.2020 –	Rs. 2,12,53,490
(iii)	Sundry Debtors –	Rs. 16,20,698
Total		Rs.50,78,74,188

Thus, the total amount claimed in default is Rs.50,78,74,188 due on 15.2.2020 along with further interest at contractual rates w.e.f 15.2.2020 till payment or realization together with all costs and charges. The financial creditor has also attached a statement of account/ledger from the Applicant along with supporting affidavit as annexure. The Section 7 application has the copy of the loan sanction letter dated 17.3.2018 and loan agreement dated 28.3.2018 along with hypothecation deed, personal guarantee deed and pledge of shares as security to the loan attached with it. Copy of the notice under Section 13(2) of SARFAESI Act, 2002 is also annexed with the Section 7 application. Schedule V of the Loan Agreement (attached at pp. 82-83 of Appeal Paperbook, Vol. I) contains the repayment amortization schedule starting from 15th April 2019 to 15th January 2031. Thus it is clear that a loan of Rs. 50 crores was taken by the corporate debtor Aryavir Buildcon Private Limited from the financial creditor TFCI.

12. The repayment schedule, as mentioned is at pp. 82 - 83 of Appeal Paperbook Volume 1, along with the “General Conditions - GC-1-91 “Applicable to Assistance Provided by Financial Institutions” of the Tourism Finance Corporation of India Limited states the “Events of Default” in Article X at page 112 of Appeal Paperbook volume I. The relevant “Events of Default” are extracted below: –

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“Article X

EVENTS OF DEFAULT AND REMEDIES

Section 10.1- If one or more of the events specified in this section (hereinafter called events of default) happen(s), the Lead Institution or the Landers or any of them may, by notice in writing to the Borrower, declare the principal of and all accrued interest on the Loans to be due and payable forthwith and the security created in terms of Article(III) of the Loan Agreement shall become enforceable and the Landers shall have the following rights (anything in these General Conditions to the contrary notwithstanding) namely:-

- (i) To enter upon and take possession of the assets of the Borrower; and
- (ii) To transfer the assets of the Borrower by way of lease or leave and license or sale.

EVENTS OF DEFAULT

(a) **DEFAULT IN PAYMENT OF PRINCIPAL SUMS OF THE LOANS**

Default has occurred in the payments of principal sums of the Loans on the due dates.

(b) **DEFAULT IN PAYMENT OF INTEREST**

Default has been committed by the Borrower in payment of any instalment of interest on the Loans and such default has continued for a period of 30 days.”

Xxx xxx xxx

Section 10.2 - **CONSEQUENCES OF DEFAULT:**

On the happening of any of the events of default, in addition to the rights specified in Section 10.1 hereof, each of the Landers shall be entitled to

- (a) charge additional/penal interest @ 1% p.a. or at the prevailing rate as per extant policy of TFCI, over and above the rate/s specified in Schedule IV of the Loan Agreement or such other rate as may be specified by the Lenders from time to time, from the respective date/s of such default till the default is remedied, without prejudice to the

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Lender's other rights available as per this Agreement.”

13. Thus, the event of default has been very clearly outlined under Article X of the aforementioned General Conditions to loans provided by TFCI (supra) and therefore any default in payment of principal sum or interest is considered a default under the General Conditions GC-1-91. Furthermore, we note that in the notice under Section 13(2) of SARFAESI Act, 2002 dated 18.02.2020, sent by TFCI to the corporate debtor/Aryavir Buildcon Private Limited, the figure of debt in default is stated as follows -

" 5. Accordingly, in exercise of the powers conferred in terms of Section 13(2) of the securitization and reconstruction of financial assets and enforcement of security interest act, 2002 (hereinafter referred to as "the said Act"), TFCI hereby declares that the aggregate amount of Rs.50,78,74,188 (Rupees Fifty Crores Seventy Eight Lacs Seventy Four Thousand and One Hundred Eighty Eight only) in particulars whereof are set out in Annexure III (due as on 15.2.2020) being the record date is immediately due and in favour of TFCI."

14. In the light of the aforementioned, it is clear that a total debt amount of Rs.50,78,74,188 is the debt that is in default on 15.2.2018 and payable to Corporate Debtor.

15. We now look at the contention of the Learned Senior Counsel for Appellant that there was no default in repayment and hence, there was no need for recalling of a loan. In cases of default the applicable provision is Clause 2.6 of the loan agreement dated 28.3.2018 which has been reproduced earlier in paragraph 6 of this judgment. According to this Clause 2.6(i)(b) if a default has occurred, then the lenders shall have the right to convert at its option the whole of the outstanding amount of the loan or part not exceeding 20% of the loan, whichever is lower, into fully paid-up equity shares of the borrower at par. His contention, that since an express provision on an event of default is included in the loan agreement there is no need to look at the "General Conditions No. GC-1-91" (supra) which are applicable to assistance provided by

financial institutions. The consequences of default are contained in section 10.2 of the “General Conditions” (supra). Furthermore, Section 10.3 of the General Conditions (supra) provides that notice to the lender on the happening of an event of default has to be given in writing specifying the nature of such event of default.

16. Looking at the provisions in the loan agreement dated 28.3.2018 regarding conversion right in the case of default, we note that the lenders shall have the right to convert the outstanding amount into fully paid equity shares, but it is a right which is provided to the lender. Certainly, Section 10.1 “events of default” define “default in payment of principal sums of the loans” and “default in payment of interest” as events of default. Furthermore, there is a requirement of notice to be given by the borrower. It is clear from the ledger accounts of the Corporate Debtor that default in late of prepayment of interest has taken place, which has been brought to the notice of the borrower vide notice dated 18.2.2018 under the SARFAESI Act. The provision regarding right of conversion is at the option of the lender and in this case, the lender has chosen to exercise its right under the IBC in the event of default in repayment which is certainly permissible under law. Hence we are not persuaded by the argument of the Learned Senior Counsel of Appellant that the Respondent should have first taken recourse to the rights conversion rather than prefer an application under Section 7 of IBC.

17. The Learned Senior Counsel for Appellant has also contended that the market value of assets of the Corporate Debtor is Rs.120.67 crore as per evaluation report (attached at page 181 of the Appeal Paperbook Vol.I), and the alleged default is approximately Rs.50 crore and therefore, it is not prudent to put Corporate Debtor for resolution of insolvency, when the alleged default is much less than the market value. There is no provision in the law that alleged default should be greater than the market value of the assets of the Corporate Debtor for admission of a Section 7 application. It could very well be that the Corporate Debtor is not very well managed, which has led to a default in debt repayment and even if the Corporate Debtor is a going concern,

improved management as a result of insolvency resolution could certainly result in better and more robust functioning of the corporate Debtor from the financial and management angles.

18. The Appellant has also alleged that the application under Section 7 has been filed by a person who has a mere power of attorney, but not proper authorization by the Board of Directors of the Corporate Debtor. In this regard, he has referred to the judgment of NCLAT in the case titled **Palogix Infrastructure Private Limited versus ICICI Bank limited [2017 SCC Online NCLAT 266]** to claim that if the applicant who presents the section 7 application is not properly authorized, the insolvency application under sections 7, 9 or 10 of the IBC will be considered defective. On perusing the extract of the minutes of the Board of Directors meeting of Tourism Finance Corporation of India Limited held on 17.5.2004 (attached at pg. 225 of Appeal Paperbook Vol. I) we find that Board of Director has provided authorization in favour of Shri N. Ramachandran, Manager (law) to file suits/claims or initiating legal proceedings against defaulting assisted concerns and/are all guarantors of loans and/or against any such person/persons, body corporate, firms for recovery of dues of the company and/or otherwise inappropriate courts or tribunal. The power of attorney has been issued on the basis of such an authorization by the Board of Directors of the TFCI. Hence we do not find strength in this argument of the Appellant that the application under Section 7 is defective on account of improper authorization of the person filing the application.

19. The Learned Counsel for Appellant has also referred to the judgment of Hon'ble Supreme Court in **Anuj Jain (supra)** to contend that Respondent No. 1TFCI does not satisfy the test of being a financial creditor under the IBC and its application IA No. 4701/2020 was not considered by the Adjudicating Authority for establishing that TFCI was not a financial creditor. We notice that in the matter of Anuj Jain(Supra)the question was whether the lenders of 'Jaypee Associates Limited' could be recognized as financial creditors of 'Jaypee Infratech Limited' on the strength of mortgage created by it as collateral security of the debts given to the holding company Jaypee Associates

Limited. In this case the Hon'ble Supreme Court had held that disbursement to the Corporate Debtor against the consideration for the time value of money is an essential ingredient for a creditor to qualify as a financial creditor. In the present case, the Respondent No. 1 TFCI has given a loan of Rs. 50 crores vide loan agreement dated 28.3.2018 and therefore it is not coming under Section 7 of IBC as a creditor, which has provided collateral security but as a proper financial creditor which has disbursed loan against time value of money. Therefore, we are not convinced with the argument of the Learned Senior Counsel for Appellant that TFCI was not entitled to prefer an application under Section 7 as financial creditor.

20. Learned Senior Counsel for Appellant has also claimed that the impugned order has not appropriately appreciated the meaning of 'debt' and 'default' as has been explained by the Hon'ble Supreme Court in the case of **Innoventive Industries (supra)** wherein it is held that a default will occur when debt is due and payable in fact and in law. We find that there is a default in accordance with the definition of events of default in the Section 10.1. of the General Conditions No. GC -1 - 91(supra) wherein the events of default in the payment of principal sums of the loans and interest have been defined. The default as claimed by the financial creditor in the present case is a default and therefore, view taken in the present case is not in conflict with the ratio in Innoventive judgment (supra).

21. Thus we come to the conclusion that, in the light of loan agreement dated 28.3.2018, Respondent No. 1/TFCI is clearly a financial creditor who had provided loan of Rs. 50 crores to the Corporate Debtor/Aryavir Buildcon Private Limited. The repayment of this loan was in default, and consequently the financial creditor sent a notice dated 18.02.2020 to the corporate debtor informing him about the default in repayment as per agreed terms and conditions. As the debt is in default and due for payment to the financial creditor, the Section 7 application has been correctly admitted by the Adjudicating Authority. We, therefore, do not think that the order of the Adjudicating Authority needs any interference, and accordingly we dismiss the appeal.

The appeal is thus disposed of.

22. There is no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

New Delhi
10th February, 2022

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