

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 428 of 2018

[Arising out of Order dated 11th June, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench in Company Petition No. (IB) 553 (ND)/2017]

IN THE MATTER OF:

Jagmohan Bajaj

S/o Late Shri Panna Lal Bajaj
R/o E-11, Sector 30,
Goutam Budh Nagar,
Noida- 201303, UP.

...Appellant

Vs

1. Shivam Fragrances Private Limited

Having it's Registered office at:
2331/1, First Floor,
Tilak Bazar, Khari Baoli,
Delhi - 110006.

Also at:

A-184, Sector 63
Noida, Goutam Budh Nagar,
U.P., PIN – 201301.

2. Amiga Informatics Pvt. Ltd.

Having office at
A-61, Sector – 65, Noida,
Gautam Budh Nagar, U.P.
PIN 201301.

....Respondents

Present:

For Appellant: Mr. Manoj Kumar Garg and Mr. Santosh Kumar,
Advocates.

J U D G M E N T

BANSI LAL BHAT, J.

Appellant – ‘Jagmohan Bajaj’, one of the shareholders of Respondent No. 1 - ‘Shivam Fragnances Pvt. Ltd.’ (Corporate Debtor) is aggrieved of admission of petition filed by Respondent No.2 - ‘Amiga Informatics Pvt. Ltd.’ (Financial Creditor) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’) by virtue whereof Corporate Insolvency Resolution Process was triggered, moratorium slapped, Interim Resolution Professional appointed and the necessary directions were given.

2. The facts leading to filing of petition for initiation of Corporate Insolvency Resolution Process at the hands of ‘Financial Creditor’ are not in controversy. The ‘Financial Creditor’ granted financial assistance of Rs.1.02 Crores in the form of a loan to the ‘Corporate Debtor’ in the year 2016. The said amount was repayable with interest calculated @1.5% per month w.e.f. December, 2016. Upon failure of Corporate Debtor to abide by the repayment schedule, the loan amount was recalled by the Financial Creditor together with interest accrued thereon. Since the Corporate Debtor was in default, the Financial Creditor took recourse to arbitration in terms of agreement executed inter-se the Financial Creditor and the Corporate Debtor on 24.09.2016. The arbitral proceedings culminated in passing of award dated 14.08.2017 favouring the Financial Creditor. As the Corporate

Debtor failed to comply with the award, it undertook to transfer its immovable assets in favour of the Financial Creditor in accordance with the terms of the award. However, there was no compliance with the terms of arbitral award and the Corporate Debtor continued with the default, resulting in initiation of Corporate Insolvency Resolution Process at the instance of the Financial Creditor.

3. The impugned order has been assailed on the ground that a serious dispute of oppression and mismanagement of the Corporate Debtor is pending adjudication under Section 241 and 242 of the Companies Act, 2013 before National Company Law Tribunal (for short 'NCLT'), New Delhi and since the pre-existing dispute regarding oppression and mismanagement of the Corporate Debtor is subjudice, initiation of Corporate Insolvency Resolution Process was not just and equitable. Learned counsel for the Appellant vehemently contended that the Corporate Debtor failed to comply with the arbitral award and was prevented from transferring its property to discharge the liability as there were serious disputes inter-se the Directors which are under adjudication before the Tribunal. Wherein, the Tribunal has directed maintenance of status quo as regards by constitution of Board of Directors and the Shareholding pattern. Per contra it is argued on behalf of the Financial Creditor that dispute inter-se the Directors was irrelevant for initiation of Corporate Insolvency Resolution Process as there was a debt and default and the application under Section 7 of I&B Code was complete.

4. Initiation of Corporate Insolvency Resolution Process by Financial Creditor is regulated by the provision engrafted in Section 7 of I&B Code, which reads as under:

7. Initiation of corporate insolvency resolution process by financial creditor. — (1) *A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) *The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.*

(3) *The financial creditor shall, along with the application furnish—*

- (a) *record of the default recorded with the information utility or such other record or evidence of default as may be specified;*
- (b) *the name of the resolution professional proposed to act as an interim resolution professional; and*
- (c) *any other information as may be specified by the Board.*

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

- (a) *a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*
- (b) *default has not occurred or the application under sub-section (2) is incomplete or any disciplinary*

proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor,

within seven days of admission or rejection of such application, as the case may be.

Dealing with the ambit and scope of Section 7 of I&B Code in “*Innoventive Industries Ltd. Vs. ICICI Bank and Ors.*” – (2018)1 SCC 407, the Hon’ble Apex Court observed as under:

“28. *When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by*

registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”

5. Insolvency Resolution Process, as envisaged under the I&B Code, arises out of default in payment of debt which has become due. Section 3(11) defines 'debt' as a liability or obligation in respect of a claim which encompasses a right to payment even if disputed. 'Default' as defined under Section 3(12) postulates non-payment of a due and payable debt including part thereof or an installment amount. Insolvency Resolution Process can be triggered, if the default is to the tune of Rs.1 lakh or more. In so far as triggering of Insolvency Resolution Process at the hands of a 'Financial Creditor' is concerned, same can be initiated in respect of a debt owed to any Financial Creditor in respect whereof default has been committed though the debt may not be owed to the applicant Financial Creditor. Once a Financial Creditor approaches the Adjudicating Authority for initiation of Corporate Insolvency Resolution Process with an application under Section 7 of I&B Code filed in Form 1 accompanied by documents, records and evidence of default, he is required to dispatch a copy of the application to the registered office of Corporate Debtor by registered post or speed post. Within 14 days thereof the Adjudicating Authority is required to ascertain the existence of a default. This is to be done on the basis of record of information utility or evidence produced by the Financial Creditor. The Adjudicating Authority must be satisfied as regards occurrence of default. The Corporate Debtor is entitled to show that the debt is not payable in law or in fact and there is no default. If the Adjudicating Authority is satisfied that a default has occurred and the application is complete, will pass order

admitting the application. In the event of the application being incomplete, the Adjudicating Authority will put the Financial Creditor on notice to remove the defect within 7 days.

6. Adverting to the facts of the case in hand, be it seen that the Appellant has neither disputed the factum of owing debt to the 'Financial Creditor' nor assailed the order of admission of petition under Section 7 of I&B Code on the ground that the debt was not payable. Admittedly, Appellant is one of the Shareholders of Respondent No.1 - 'Shivam Fragrances Pvt. Ltd.' (Corporate Debtor) and seeks to question the legality of initiation of Corporate Insolvency Resolution Process at the hands of Financial Creditor on the sole ground of there being an inter-se dispute amongst the Directors of Corporate Debtor. The stand taken by the Corporate Debtor before the Adjudicating Authority was that the Financial Creditor had granted loan of Rs.1.02 Crores in favour of the Corporate Debtor to enable it to develop and construct a building on Plot no. A-184, Sector 63, Noida but the Corporate Debtor failed to repay the loan amount due to financial crunch. The Corporate Debtor did not dispute the existence of arbitral award in favour of the Financial Creditor but pleaded that the Corporate Debtor was prevented from effecting transfer of its property to satisfy the award due to internal dispute of the Directors which were under adjudication before National Company Law Tribunal, New Delhi Bench and an interim direction had been passed therein to maintain status quo. The same ground is urged before us through the medium of instant appeal. It is abundantly clear that the

Appellant has filed the instant appeal with the ulterior motive of wriggling out of the liability and evading the obligation arising out of the arbitral award in terms whereof the Corporate Debtor had agreed to transfer an immovable asset in favour of the Financial Creditor. This is a clever ploy to frustrate the arbitral award. Inter-se dispute between the Directors as regards transfer of shareholding and allegations of oppression and mismanagement stated to be pending adjudication before the Tribunal may or may not be a fixed match to jeopardize the legitimate interests of Investor/Financial Creditor. But the fact remains that there being no dispute in regard to raising of loan by the Corporate Debtor in the nature of a financial debt which was due and payable and there being default on the part of Corporate Debtor, who failed to transfer the immovable asset in terms of the arbitral award to discharge the obligation arising out of financial debt, the Financial Creditor was within its rights to initiate Corporate Insolvency Resolution Process. Internal dispute of Directors of Corporate Debtor and pendency of application under Section 241 and 242 of Companies Act, 2013 before NCLT, New Delhi Bench for adjudication does not construed a valid defense to triggering of Insolvency Resolution Process. I&B Code is a special law having an overriding effect on any other law as mandated under Section 238 of I&B Code. Triggering of Insolvency Resolution Process cannot be defeated by taking resort to pendency of internal dispute between Directors of Corporate Debtor on allegations of oppression and mismanagement. The statutory right of a Financial Creditor

satisfying the requirements of Section 7 of the I&B Code to trigger Insolvency Resolution Process cannot be made subservient to adjudication of an application under Section 241 and 242 of the Companies Act, 2013. I&B Code is supreme so far as triggering of Insolvency Resolution Process is concerned and same cannot be eclipsed by taking resort to remedies available under ordinary law of the land.

7. Having conspectus of all relevant considerations, we are of the firm opinion that the instant appeal is frivolous and the Appellant has encroached upon the precious time of this Appellate Tribunal on flimsy grounds. It lacks merit. Admission is accordingly refused and appeal is dismissed. Appellant is saddled with costs of Rs.1 lakh (Rupees One Lakh Only), which shall be deposited with the Registrar, NCLAT within 15 days reckoned from today.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

14th August, 2018

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