NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 335 of 2018

IN THE MATTER OF:

Aditya Enterprises ...Appellant

Vs.

Rajratan Exim Pvt. Ltd. ...Respondent

Present: For Appellant: - Mr. Sushanth Murthy, Advocate

O R D E R

06.07.2018– The appellant preferred the application under Section 433(1)(a) of the Companies Act 1956 before the Hon'ble High Court on the ground that it has lent Rs. 1,00,00,000/- to the Corporate Debtor in two instalments on 8th September 2014 and 10th September 2014 of Rs. 50,00,000/- each but the "Corporate Debtor" have failed to make the payment.

2. In view of the Central Government notification dated 7th December, 2016 issued from the Ministry of Corporate Affairs wherein in exercise of the powers conferred under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of Section 239 of the 'I&B Code', the Central Government framed "The Companies (Transfer of Pending Proceedings) Rules, 2016".

3. Rule 5 relates to transfer of pending proceedings of winding up on the ground of inability to pay debts which are to be transferred from the Hon'ble High Court's to the respective Tribunal and reads as follows: -

"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.- (1) All petitions relating to winding up under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent as required under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal within sixty days from date of this notification, failing which the petition shall abate.

2. All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for

winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act."

4. The case was transferred before the Adjudicating Authority, Mumbai Bench. It was requested to treat the petition as an application under Section 7. On examination of the petition, the Adjudicating Authority come to a conclusion that there was no financial transaction as envisaged under Section 5(7) & (8) of the 'I & B' Code except confirmation of the amount of receipt. The Adjudicating Authority further held that mere receipt of a loan cannot be treated to be 'operational debt' or 'financial debt' or unsecured or secured debt, till the applicant is able to show the purpose for grant of such loan.

5. Learned counsel for the appellant submits that the "Corporate Debtor" took loan which amounted to borrowing this money for business and therefore, it should be treated to be a financial debt within the meaning of Section 5(8)(a). However, such submission cannot be accepted in absence of any record to show that the loan amount was borrowed by the "Corporate Debtor" for its business. Further, we find that "Corporate Debtor" has already disputed the debt by stating that he had already paid back the dues.

6. The Hon'ble Supreme Court in ***"Innoventive Industries Ltd. v. ICICI Bank in 2018 (1) SCC. 407 held as follows:-***

"***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 sub-section (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.

7. In this case there being a dispute about debt, the question of default does not arise. There is no evidence placed on record to suggest that any financial debt is due to the appellant. Therefore, no case is made out to interfere with the impugned order dated 23rd April 2018. The appeal is accordingly dismissed. No cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

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