

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

**Company Appeal (AT) (Insolvency) No. 227 of 2017**

[Arising out of Order dated 8<sup>th</sup> September, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench in Company Petition No. CP(IB) No.96/7/HDB/2017]

**IN THE MATTER OF:**

**M/s Asset Advisory Services India Pvt. Ltd.**

Flat No. 402, 3-4-756/1, Sri Raghavendra Residency,  
Barkatpura, Hyderabad – 500027.

**...Appellant**

**Vs**

**M/s VSS Projects Pvt. Ltd.,**

Registered office situated at Plot No. 74,  
Street No. 6, Umanagar,  
Begumpet, Hyderabad – 500016  
Represented by its Managing Director  
Mr. B. Phaniraju

**....Respondent**

**Present:**

**For Appellant:** Mr. M. Suryanarayana, Advocate.

**For Respondent:** Mr. S. Agasthya Sharma, Advocate.

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

This appeal has been preferred by Appellant – ‘M/s Asset Advisory Services India Pvt. Ltd.’ (Financial Creditor) against order dated 8<sup>th</sup> September, 2017 passed by the Adjudicating Authority (National Company

Law Tribunal), Hyderabad Bench, in Company Petition No. CP(IB) No.96/7/HDB/2017 whereby the application preferred by the Appellant under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') has been dismissed on two grounds:-

- (i) there is a dispute in existence; and
- (ii) the application filed by the Appellant with malicious intent.

2. Learned counsel appearing on behalf of the Appellant submitted that the Adjudicating Authority cannot dismiss an application under Section 7 under I&B Code on the ground of existence of dispute. It was further submitted that question of malicious intent to file application cannot be a ground to reject an application under Section 7, except for the ground as mentioned in Section 65 of the I&B Code, which has not been pleaded by the Respondent nor held by the Adjudicating Authority.

3. Learned counsel appearing on behalf of the Respondent submitted that the application was preferred by the Appellant as a 'Financial Creditor' whereas factual matrix prima facie reveals that the Appellant is a 'Operational Creditor' and was under legal obligation to issue notice under Section 8(1) of the I&B Code, but no such notice was issued. It was also submitted that the Company has not granted 'any loan security facility' and therefore cannot be treated to be a 'Financial Creditor'.

4. The Adjudicating Authority noticed the plea taken by the Respondent at para 18 and observed as follows:-

*“18. It is stated that version of Financial Creditor to the effect that “There is a financial debt in existence within the meaning of section 8(a) of the code” is untenable since Financial Creditor did not comply with the requirement of demand notice as envisaged in section 8(1) as a consequence the Corporate Debtor could not respond as specified in section 8(2)(a). However, viewed from any angle, the approach of Financial Creditor before this Honorable Tribunal is premature apart from its failure to ensure compliance of section 8(1) of the code, since Financial Creditor is relying upon section 8(a) of the code. It is further contended that the Corporate Debtor has not committed any default as per section 3(12) of the code as is evident from the above submission. M/s VSS Projects Pvt. Ltd. is not a Corporate Debtor within the meaning of section 8. Even today, Corporate Debtor is prepared to deposit an amount of 2.5 crores before Competent civil court, where the case COS: 1/2017 is pending, in the event of allowing Corporate Debtor to sell some of the 17 unsold flats; which could not be sold due to the Status Quo Order. The said I.A. is pending adjudication before the Hon’ble XIII Addl District Judge, R.R. District Court. The Corporate Debtor had also clearly pleaded about the mode of*

*payment of principle loan and also the counter- claim against Financial Creditor by paying court fee and the same is pending adjudication in COS court fee and the same is pending adjudication in COS No. 1 of 2017 before XIII Addl Judge, R.R. District”*

5. At para 9 the Adjudicating Authority further observed:-

*“9. It is not in dispute that the Financial Creditor extended short loan of Rs. 2.5 crores to the Corporate Debtor, and in pursuant to that, a promissory note also was issued by the Corporate Debtor to repay on or before 30.06.2016 together with @ 24 % P.A. payable in advance monthly installments.”*

6. Though the aforesaid observation has been made with regard to mortgage of 17 flats, it was noticed that the Respondent has disputed the mortgage and the Appellant has filed Civil Suit being CO. S.No. 1/2017 by questioning sale of flats contrary to the agreement.

7. It is not in dispute that the Appellant had extended a “short loan of Rs.25 Crore to the Corporate Debtor” and in pursuant to which a promissory note was issued by the Corporate Debtor to repay the loan on or before 30<sup>th</sup> June, 2016 together with interest @24% p.a. payable in advance monthly installments. Aforesaid fact has also been noticed by the Adjudicating Authority. In view of such admitted position, we hold that the Appellant comes within the meaning of ‘Financial Creditor’, as defined in Section 5(7), which is also accepted by the Adjudicating Authority at Para 9 and quoted above.

8. In that view of the fact that the Appellant is a 'Financial Creditor', the question of issuance of any demand notice under Section 8(1) does not arise, it being not applicable for filing application under Section 7.

9. The Hon'ble Supreme Court in "*Innoventive Industries Ltd. Vs. ICICI Bank and Ors.*" – (2018)1 SCC 407, has observed 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 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.”*

10. In the present case as admittedly the Appellant had given loan and a debt is due to the Appellant has not been repaid and there is a default on the part of the Corporate Debtor, the Adjudicating Authority was wrong in holding that the application was not maintainable due to existence of dispute (pendency of a suit) and that no notice under Section 8(1) was issued or that the application was filed by the Appellant with malicious intent.

11. We accordingly set aside the impugned order dated 8<sup>th</sup> September, 2017 passed by the Adjudicating Authority and remit back the case to the Adjudicating Authority for admission of the application filed by the Appellant under Section 7, the Form 1 being complete. However, before the admission of the application, it will be open to the Respondent to settle the claim with the Appellant to enable the Appellant to withdraw the application. The appeal is allowed with aforesaid observations and directions. No costs.

[Justice S. J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

**NEW DELHI**

**18<sup>th</sup> September, 2018**

AM