NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 502 of 2020

[Arising out of Order dated 13.02.2020 passed by the National Company Law Tribunal, New Delhi Bench-V in (IB) 1886(ND)/2019].

IN THE MATTER OF:

Sh. Satish Chand Gupta
S/o Late Gian Chand Gupta
R/o 68A, Saraswati Vihar,
Delhi – 110034. **...Appellant**

Versus

Servel India Private Limited
Having its Registered Office at:
S-15, Okhla Phase-II
New Delhi – 110020. **...Respondent**

Present:

For Appellant: **Mr. Siddhant Buxy, Advocate**

For Respondent: **Ms. Anju Bhushan for IRP**

J U D G M E N T

Venugopal M. J

Preamble

The Appellant has preferred the instant Appeal being dissatisfied with the order dated 13.02.2020 passed by the 'National Company Law Tribunal', New Delhi, Bench-V in (IB) 1886 (ND)/2019.

2. The 'National Company Law Tribunal' while passing the impugned order dated 13.02.2020 had interalia at paragraph 10 to 12 had observed the following:-

> *"10. At this juncture, I would like to refer Companies (Acceptance of Deposits) Rule, 2014, which has come into force on 1st April, 2014, along with Section 73 and 74 of the Companies Act, 2013 and the same is quoted below:-*
>
> ***"73. Prohibition on acceptance of deposits from public.__***
>
> *(1) On and after the commencement of this Act, no company shall invite, accept or renew deposits under this Act from the public except in a manner provided under this Chapter:*
>
> *Provided that nothing in this sub-section shall apply to a banking company and*

nonbanking financial company as defined in the Reserve Bank of India Act, 1934(2 of 1934) and to such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in this behalf.

(2) A company may, subject to the passing of a resolution in general meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to the

fulfilment of the following conditions, namely: -

(a) Issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in such form and in such manner as may be prescribed;

(b) filing a copy of the circular along with such statement with the Registrar within thirty days before the date of issue of the circular;

(c) depositing such sum which shall not be less than fifteen per cent of the amount of

its deposits maturing during a financial year and the financial year next following, and kept in a scheduled bank in a separate bank account to be called as deposit repayment reserve account;

(d) providing such deposit insurance in such manner and to such extent as may be prescribed;

(e)certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits; and

(f) providing security, if any for the due repayment of the amount of deposits or the interest thereon including the creation of such

charge on the property or assets of the company.

Provided that in case where a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as unsecured deposits" and shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits.

(3) Every deposit accepted by a company under sub-section (2) shall be repaid with interest in accordance with the terms and conditions of the agreement referred to in that sub-section.

(4) Where a company fails to repay the deposit or part thereof of any interest thereon under subsection (3), the depositor concerned may apply to the Tribunal

for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non-payment and for such other orders as the Tribunal may deem fit.

(5) *The deposit repayment reserve account referred to in clause (c) of sub-section (2) shall not be used by the company for any purpose other than repayment of deposits."*

"74. Repayment of deposits, etc., accepted before commencement of this Act. ___

(1) Where in respect of any deposit accepted by a company before the commencement of this Act, the amount of such deposit or part thereof or any interest due thereon remains unpaid on such commencement or becomes due at any time thereafter, the company shall____

(a) file, within a period of three months from such commencement or from the date on which such payments, are due, with the Registrar a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment, notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and

(b) repay within one year from such commencement or from the date on which such payments are due, whichever is earlier.

(2) The Tribunal may on an application made by the company,

after considering the financial condition of the company, the amount of deposit or part thereof and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.

(3) If a company fails to repay the deposit or part thereof or any interest thereon within the time specified in sub-section (1) or such further time as may be allowed by the Tribunal under sub-section (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees but which may extend to ten crore rupees and every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years or with fine which shall not be less than

twenty-five lakh rupees but which may extend to two crore rupees, or with both."

This provision came into force with effect from 01st April, 2014. If I shall read the provisions contained under Section 73 and 74 of the Companies Act along with (Acceptance of Deposits) Rule, 2014, then it can be said that both have come into force with effect from 01st April, 2014 and in view of the aforesaid provisions after commencement of this Act, no company can invite, accept or renew deposit in this Act from the public except in the manner provided in this Chapter and a special provision is made regarding the repayment of the deposited amount which was deposited prior to the enforcement of this Section and as per Section 74(1)(b), the company is liable to

repay the amount within 3 years from such commencement on or before expiry of the period from which the deposit is accepted, whichever is earlier and if the company fails to repay the amount then there is a penal provision u/s 74(3) of the Companies Act, 2013. Here, in the case as I have already held that the Petitioner everywhere mentioned the word 'deposit', thereafter, the amount which he has deposited with the Corporate Debtor does not come within the purview of the definition of Financial Debt rather the Petitioner, admittedly, deposited the amount with the Corporate Debtor and in lieu of that he was getting interest from the Corporate Debtor, therefore, he can claim the refund under Chapter V of the Companies Act, read with Company(Acceptance of Deposits) Rule, 2014.

11. So far, the initiation of proceeding under Section 7 of the Code is concerned, in my view, is not liable to be accepted. At this juncture, I would also like to refer the arguments of the Petitioner that there is a default in payment of debt, therefore, Section 7 application is maintainable. At this juncture, I would like to refer the definition of default as defined in Section 3(12) of the Code:-

"Section 3(12)

(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable an is not 1(paid) by the debtor or the corporate debtor, as the case may be."

12. Mere plain reading of the provisions shows that default means non-payment of debt, whereas in the aforementioned para, I held that the amount which the Petitioner deposited does not come under the definition of the debt.

Therefore, I am unable to accept the contention of the Petitioner that there is a default in payment of debt."

and was of the considered view that though the petitioner had some other remedy under the law to recover the amount which he had deposited with the 'Corporate Debtor' but in regard to the initiation of Section 7 of the 'I&B' Code held that the present application was not maintainable and rejected the prayer of the Appellant / Petitioner to initiate the proceedings u/s 7 of the Code and dismiss the application. However, the 'Adjudicating Authority' had granted liberty to the Appellant/Petitioner to file an appropriate application under Chapter V of the Companies Act, 2013.

Appellant's Submissions

13. According to the Learned Counsel for the Appellant the impugned order is an erroneous one both on facts as well as in law for the reason that the amounts disbursed by the Appellant to the Respondent / Corporate Debtor were in lieu of gaining interest on it, which the Respondent had consistently credited till 31.3.2018. Therefore, it is the plea of the Appellant that it was a 'Financial Debt' under section 5(8)(a) and Section 5(8)(f) of the 'I&B' Code.

14. The stand of the Appellant is that his claim is that of a 'Deposit' and not of a 'Financial Debt' was never brought out by either the Respondent or the Adjudicating Authority as such, the Appellant never got an opportunity to respond to the said issue and was shocked by the impugned order.

15. The version of the Appellant is that merely because an amount is described as 'Deposit', it will not be excluded from the definition of 'Financial Debt' *per se.*

16. The Learned Counsel for the Appellant brings to the notice of this Tribunal that the Respondent had accepted certain amounts from the Appellant and consistently credited interest against such amounts for a continuous period of five years in favour of the Appellant to account for the time value of money. As a matter of fact, the Respondent's ledger accounts supported by the Appellant's Bank Account Statements and TDS forms confirm these transactions, as seen from the chart below mentioned in the Appeal:-

Financial Year	Appellant's Bank Statement/Payment made to Respondent	Ledger Statement	Form 16A
2013-14	Rs. 7,00,000- @ p.42	p.43	p.44-45
2014-15	Rs. 1,00,000/- @ p.46	p.47	p.48-49
2015-16	No payment	p.50	p.51-54
2016-17	No payment	p.55	p.56-57
2017-18	Rs. 2,00,000/- @ p.59	p.62	p.63-65

17. The Learned Counsel for the Appellant comes out with a plea that payment of interest on the amounts borrowed by the Respondent / Company is nothing but the consideration for the time value of money, as it increases the value of investment/debt with time. Moreover, interest is the compensation paid by the borrower to the lender for using the lenders money over a period of time and in this regard, the Appellant refers to the decision of this Tribunal in the matter of **'Nikhil Mehta and Sons' v. AMR Infrastructure Limited reported in 2017**

SCC online, NCLAT 859(vide para 17) and the decision of the Hon'ble Supreme Court in the matter of 'Pioneer Urban Land and Infrastructure Ltd. & Anr.' V. 'Union of India & Ors.' reported in 2019 (8 SCC 416 (vide para 71).

18. The Learned Counsel for the Appellant points out that while a debt may be a financial debt without bearing interest, money borrowed against payment of interest by itself is a financial debt. In fact, the definition of financial debt as per section 5(8) of the code money borrowed against payment of interest, even if 'time value of money' is not separately and additionally established.

19. The Learned Counsel for the Appellant proceeds to takes a legal plea that the Depositors / fixed deposit holders are financial creditors and in this regard relies on the judgement of the **Hon'ble Supreme Court in the matter of 'Pioneer Urban Land and Infrastructure Ltd.' & Anr. V. 'Union of India & Ors.' reported in (2019) 8 SCC p.416 vide para (43).**

20. The other contention advanced on behalf of the Appellant is that the agreement between the Appellant and the Respondent as evident from the documents placed on record exhibit that the receipt of money by the Respondent / Corporate Debtor and credit of interest by the 'Corporate Debtor' to the Appellant. Moreover, the e.mail communications between the representatives of the Respondent and the Appellant that are on record disclose the admissions and acknowledgements made by the 'Corporate Debtor' of its liability to repay the Appellant's debt alongwith interest.

21. The Learned Counsel for the Appellant cites the decision of this Tribunal in the matter of **'Shailesh Sangani' v. 'Joel Gardoso & Anr.' reported in 2019 SCC online NCLAT p. 52 (2)** whereby and whereunder this Tribunal, had allowed an application under Section 7 of the Code by a shareholder who gave an unsecured loan with no fixed time period and repayable on demand from time to time by the 'Corporate Debtor'.

22. The Learned Counsel for the Appellant refers to the privy Council decision **'Dilworth' V. 'Commissioner of Stamps', reported in 1899 AC p. 99** wherein it is held that a gift by will, for the maintenance and education of boys who are orphans, or the sons of parents in straitened cirumstances, is "charitable", within the meaning of the New Zealand Exemption Act, 1883 etc. Also it is held that the institute, being an educational endowment in perpetuity vested in trustees without personal interest therein, the whole beneficial interest belonging exclusively and inalienably to the public, is a public institution within the meaning of s.2.

23. The Learned Counsel for the Appellant refers to the decision in the matter of '**Mahalakshmi Oil Mills' V. 'State of Andhra Pradesh' reported in 1989 1 SCC at p. 164 at 170** wherein at paragraph 11 it is held that the expression 'means and includes' in the definition clause indicates exhaustive nature of the definition.

24. The Learned Counsel for the Appellant relies on the judgement of this Tribunal in **Co. Appl.(AT)(Ins.) No. 452 of 2020 in the matter of 'Sh. Sushil**

Ansal' V. 'Ashok Tripathi and two Ors.' dated 14.08.2020 wherein at paragraph 20 it is observed as under:-

> *".....The answer to the question as to whether a decree holder would fall within the definition of 'financial creditor' has to be an emphatic 'No' as the amount claimed under the decree is an adjudicated amount and not at debt disbursed against the consideration for the time value of money and does not fall within the ambit of any of the clauses enumerated u/s 5(8) of the 'I&B' Code".*

25. The Learned Counsel for the Appellant refers to the order of the Adjudicating Authority ('NCLT') Mumbai Bench in CP No. 66/IBC/NCLT/MB/MAH/2018 dated 25.02.2019 wherein at paragraph 22 it is observed as under:-

> *".....All the more, the acknowledgements of the Corporate Debtor to the debt, be it statement of accounts, the*

statement of confirmation of accounts duly signed by the Corporate Debtor, or the reply to this petition, the Corporate debtor has time and again acknowledged the outstanding dues payable to the Financial creditor. It is a well-known principle of law that, quote 'Admissions' are the best proof of the facts admitted. Admissions in pleadings or judicial admissions, made by the parties during the hearing of the case are fully binding on the party that makes them and constitute a waiver of proof' unquote. Hence, in the present case, by admitting the liability in affidavit in reply to this petition, the Corporate Debtor is estopped to prove the non-existence of debt by raising any

kind of 'dispute' or defence as the same is all cliché' for deciding the fate of present proceedings. The petitioner's claim of existence of debt and default has been corroborated with ample evidence and is enough to hold a view in its favour."

and ultimately came to the conclusion that the 'Financial Creditor' had established that the loan was duly sanctioned and duly disbursed to the 'Corporate Debtor' but there was default in payment of debt on the part of the 'Corporate Debtor'. Besides this, it was held that admittedly, it was established that there was a 'default' as defined u/s 3(12) of the Code on the part of the 'Corporate Debtor'.

Respondent's Submissions

26. On behalf of the Respondent, it is submitted that the Learned Adjudicating Authority came to the right conclusion that the alleged deposit made by the Appellant does not fall within the definition of a 'financial debt' as per Section 5(8) of the Code.

27. It is brought to the notice of this Tribunal on behalf of the Respondent that the Appellant neither in its application filed u/s 7 of the Code before the

Adjudicating Authority nor in the legal notice addressed to the Respondent had mentioned that the 'sum' was given as loan to the Respondent and rather it clearly stated that the alleged amount was deposited with the Respondent. But in the Appeal, the Appellant had referred to the alleged amount as an 'unsecured loan'. Moreover, the Appellant is a shareholder in the 'Corporate Debtor' as per list of shareholders as on 31.03.2018.

28. The Learned Counsel for the Respondent submits that the Appellant in the present Appeal states that the alleged amounts disbursed by him to the Respondent were not for any fixed time period and were disbursed at random intervals and the alleged interest on such amount was also credited on a pro-rata basis. Further, it is represented that there was no written or oral agreement between the Appellant and the Respondent in regard to the alleged unsecured loan.

29. The plea of the Respondent is that even assuming that the alleged amounts were not 'Deposits' but 'Unsecured Loans', the same still would not come within the definition of 'financial debt' u/s 5(8) of the code as held by this Tribunal in the decision **'Sanjay Kewalramani' V. 'Sunil Paramanand Kewalramani & Ors., Co. Appl. (AT)(Ins.) 57/2018** wherein at paragraph 12 and 13 it is observed as under:-

"…

12. There is nothing on the record to suggest that 2nd and 3rd Respondents had given the loan in

favour of the 'Corporate Debtor' which can be termed to be disbursement of an amount for consideration for the time value of money as required u/s 5(8). Merely grant of loan and admission of taking loan will ipso facto not treat the second and third respondents as 'financial creditors' till they show that it complies with the substantive definition or anyone or other clause of section 5(8).

13. Mere fact that the company paid interest @ 12% per annum, during certain period cannot be the ground to hold that the 'debt' comes within the meaning of 'Financial Debt to treat the 2nd and 3rd Respondents as 'Financial Creditors'……."

Discussions

30. At the outset, this Tribunal points out that in the application filed by the Appellant / 'Financial Creditor' to initiate 'Corporate Insolvency Resolution Process' *(under Rule 6 of the Insolvency and Bankruptcy (Application to*

Adjudicating Authority) Rules, 2016) dated 16.07.2019 under part IV at S. No. 2 the amount to be claimed in default was mentioned as INR 21,94,771/- (including principal amount of INR 18,63,108 along with unpaid accumulated interests at 13.5% p.a. amounting to INR 3,31,663, as on 01.07.2019.

31. Further, at S.No. 8 of the application it was mentioned that a copy of the Demand Notice dated 21.06.2019 issued to the 'Corporate Debtor' was also enclosed. It appears that an e.mail was sent on 24.06.2019 to the registered e.mail address of the 'Corporate Debtor' and the same was also enclosed with the application.

32. The Learned Counsel for the Appellant had issued a Demand Notice to the Respondent on 21.06.2019 in regard to the unpaid 'financial debt' due from the Respondent whereby and whereunder it was mentioned that the Respondent had committed default as on 31.03.2019 in not providing the statement of account by crediting interest and depositing TDS. Added further, it was mentioned that the Appellant comes within the definition of 'Financial Creditor' and that the Respondent comes as 'Corporate Debtor' and the deposit is a financial debt defined under the 'I&B' Code. Moreover, in the said Demand Notice dated 21.06.2019 of the Appellant side it was clearly mentioned that the 'Deposit' of TDS was reflected in Form 16A of the Income Tax, 1961.

33. It must be borne in mind that a 'Financial Creditor' is a person to whom the financial debt is owed. A 'Financial Creditor' is a person who has a right to financial debt. A 'Financial Creditor' can be either a secured creditor or an unsecured creditor.

34. A 'Corporate Debtor' is a person who owes a debt to any person. The term 'debt' means a liability or an obligation in respect of a claim due from any person and includes (i) a Financial Debt (ii) An Operational Debt. As a matter of fact, Section 3(6) of the Code speaks of 'Definition of Claim' meaning (a) a right to payment, whether or not such right is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured or unsecured.

35. Any person who has the right to claim payment, as defined u/s 3(6) of the Code is supposed to file the claim whether matured or unmatured. The question is as to whether there is a default or not. Section 3(11) of the Code defines debt meaning a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

36. In this connection, it is not out of place for this Tribunal to make a pertinent mention that the maturity of claim, default of claim or invocation of guarantee has no nexus with the filing of claim before the 'Interim Resolution Professional' u/s 18(1)(b) and the 'Resolution Professional' u/s 25(2)(e) of the Code.

37. It cannot be gainsaid that the term 'deposit' includes any receipt of money by a company either as deposit or loan or in any other form by it. Under the Companies (acceptance of deposits) Rules, 2014 the term 'Deposit' is defined under Rule 2(1)(c) in an inclusive manner. The meaning of 'Deposit' is enlarged by covering receipts of money in any other form. After all, a deposit is something more than a mere loan of money.

38. For invoking the jurisdiction of the Tribunal as per Section 74(2) under the Companies Act, 2013, even a partial failure by the Company to repay the deposit was sufficient. In fact, Section 2(31) of the Companies Act speaks of the meaning of deposit. Also, that the Tribunal has vide discretionary powers regarding the repayment of 'Deposit'(s) but it must exercise its discretion objectively taking into consideration all the relevant aspects in a conspectus judicial manner. In reality, the distinction between deposit and loan may not be a relevant factor for interpreting the term 'Deposit'. To put it succinctly, under the new Companies Act, 2013, the definition of the term 'Deposit' is of wider amplitude, as opined by this Tribunal.

39. The Learned Counsel for the Appellant refers to the judgement of this Tribunal dated 18.12.2020 in Co. Appl. (AT)(Ins.) 519 of 2020 in the matter of Mr. Rajnish Jain, the promoter, stakeholder and Managing Director of suspended Board of Directors V. 'Anupam Tiwari' (Resolution Professional for M/s Jain Mfg. (India) Pvt. Ltd. & Anr. wherein it is held that the 3rd Respondent therein 'BVN Traders' is a 'Financial Creditor' within the meaning of Section 5(7) of the Code and the debt in question is a 'financial debt' within the meaning of Section 5(8) of the Code.

40. It is the plea of the Appellant that the 'I&B' Code statutorily acknowledges a deposit as a form of financial debt and further that there was no denial of the fact that the amounts being with the 'Corporate Debtor' as well as of the request to arrange funds for withdrawal. In this connection, it is the stand of the Appellant that Appellant's son Vijesh Gupta sent an e.mail to Rahul Chowdhary

requesting the 'Corporate Debtor' to arrange withdrawal of Rs. 20 lacs as four persons in his family (including the Appellant) had total deposits of around Rs. 70 lacs and they had a requirement of Rs. 20 lacs and thereafter he sent reminder, e.mails on 11.12.2013, 17.12.2018, 20.12.2018 and 24.12.2018 and that on 27.12.2018, Rahul Chaudhary replied that by stating that it was not possible at that moment and that they were trying their best.

41. It comes to be known that on 05.03.2019, Rahul Choudhry, the CEO of the Respondent / 'Corporate Debtor' stated on e.mail to the Appellant's son to the effect that 'as soon as some availability is there, your requirement is on my table, and will be done as much possible. There are times in life when things get stuck. We are sitting here to find early resolutions and this confirms the Respondent / 'Corporate Debtors' admission of debt and acknowledgement of their liability of repayment.

42. On a careful consideration of respective contentions and in view of the fact that the Respondent / Corporate Debtor had accepted certain amounts from the Appellant and credited the interest in a consistent manner against such amounts for a continuous period of five years, as pleaded by the Appellant and also that the 'Corporate Debtor' had accepted money from the Appellant against the payment of interest and bearing in mind the payment of interest on the amounts borrowed by the Respondent Company is nothing but a consideration for the time value of money and in as much as the 'interest' is the compensation paid by the borrower to the lender for using the lender's money over a period of time, this Tribunal comes to an inevitable and inescapable conclusion that the

Appellant's status is that of a 'Financial Creditor' as per Section 5(7) read with Section 5(8) of the Code and that there is a default in payment of the accepted amounts by the Respondent/CD and in short, the Respondent / Corporate Debtor comes within the purview of the definition of 'Financial Debt'. Viewed in that perspective, the contra view taken by the Adjudicating Authority in coming to the conclusion that the application filed by the Appellant / Financial Creditor is not maintainable for initiation of Section 7 of the Code is clearly unsustainable in the eye of law, as held by this Tribunal, to prevent an aberration of justice. Consequently, the Appeal succeeds.

43. In fine, the instant Appeal is allowed. The impugned order of the Adjudicating Authority dated 13.02.2020 passed in (IB) 1886(ND)/2019 dated 13.02.2020 is set aside for the reasons assigned by this Tribunal, of course in this Appeal. The Adjudicating Authority is directed to restore the application filed by the Appellant / Financial Creditor / Petitioner (u/s 7 of the Code), to admit the same and to proceed further in the manner known to law and in accordance with law.

[Justice Venugopal. M]
Member (Judicial)

[V.P. Singh]
Member (Technical)

NEW DELHI,
29th January, 2021
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