NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 99 of 2017

[Arising out of judgement dated 3rd July, 2017 passed by the National Company Law Tribunal, Principal Bench, New Delhi in C.P. No. IB-104(PB)/2017].

IN THE MATTER OF :

Tirupati Infra Project Pvt. Ltd. & Another ... **Appellants**

Versus

Bank of India ... **Respondent**

Present: **For Appellants :** **Shri Manoj K. Singh, Shri Vijay K. Singh and Shri Vineet Arora, Advocates**

For Respondent: **Shri Sanjay Bhatt, Advocate**

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by Appellants–Tirupati Infra Projects Pvt. Ltd. (hereinafter referred to as 'Corporate Debtor') and another against judgement dated 3rd July, 2017 passed by the Learned Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi (hereinafter referred to as 'Adjudicating Authority'), whereby and whereunder the application preferred by Respondent-Bank of India (hereinafter referred to as 'Financial Creditor') under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') was admitted, 'Corporate Insolvency Resolution Process' initiated

and consequent order of 'Moratorium' has been passed under Section 14 of the I&B Code. The Interim Resolution Professional has also been directed to perform all his functions contemplated under Sections 15, 17, 18, 19, 20 and 21 of the I&B Code.

2. Learned counsel for the Appellants has submitted that there is a mismatch between amount of debt shown in the original application and the amount shown in record submitted after rectification of defect. Reliance was placed on decision of this Appellate Tribunal in ***'M/s. Starlog Enterprises Limited Vs. ICICI Bank Limited'*** – [Company Appeal (AT) (Insolvency) No. 5 of 2017], wherein, taking into consideration the mismatch of amount shown in notice under Rule 4(3) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and the amount of default mentioned in the application under Section 7, this Appellate Tribunal, by judgement dated 24th May, 2017, held :

> *"20.1 The ascertainment of existence of default by the 'adjudicating authority' which under the provisions of Sub-Section (4) of Section 7 of the I&B Code has to be based on the application/ other evidence submitted by the financial creditor, suffers from non-application of mind given the apparent and conspicuous mismatch between the amount demanded by the Respondent from the Appellant in its demand notice dated 6th*

February 2017 and the amount stated to be in default in the said application."

xxx *xxx*

"21. Showing an incorrect claim, moving the application in a hasty manner and obtaining an ex-parte order from the 'adjudicating authority' which admitted such an incorrect claim, the Financial Creditor cannot disprove its mala fide intention by stating that the claim submitted is correct amount. The I&B Code does not provide for any such mechanism where post-admission, the applicant financial creditor can modify their claim amount.

22. In some of the cases, an insolvency resolution process can and may have adverse consequences on the welfare of the company. This makes it imperative for the 'adjudicating authority' to adopt a cautious approach in admitting insolvency applications and also ensuring adherence to the principles of natural justice."

3. Learned counsel for the Appellants referring the application submitted that Rs.82.37 Crores (Rupees Eighty Two Crore Thirty Seven Lakhs only) was the amount of default shown therein, but after

rectification of defect, the amount of default has been shown to the extent to Rs.1,09,32,72,312.86p. (Rupees One Hundred and Nine Crores Thirty Two Lakhs Seventy Two Thousands Three Hundred & Twelve and Eighty Six Paise only). It was further contended that the Learned Adjudicating Authority though allowed seven days' time to make necessary corrections, but correction was made beyond the period of seven days.

4. Learned counsel for the Respondent-'Financial Creditor' (Bank of India) submitted that the original amount of default of Rs. 82.37 Crores was shown calculating the interest upto 31st March, 2012. Subsequently, statement of uncharged/differential interest combined with the defaulting amount for the period from 1st April, 2012 to 14th May, 2017 was added which comes to Rs. 1,09,32,72,312.86p. It was contended that the supplementary statement filed by the 'Financial Creditor' (Bank of India) cannot be termed to be 'removal of defects'. It was further contended that, in any case, even if the amount of default as shown in original application is taken into consideration, the 'Corporate Debtor' has a right to claim total amount with interest before the 'Interim Resolution Professional'.

5. For the purpose of determination of the objection as raised by appellant, it is desirable to refer Section 7, which is as follows:

> ***"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."

6. From sub-section (5) of Section 7, it is clear that once the Adjudicating Authority is satisfied that a default has occurred and the application under sub-section (2) is complete, and no disciplinary proceeding is pending against the proposed interim resolution professional, it may, by order, admit the application. Only in case(s) where there is no default or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, the Adjudicating Authority may reject such application, but before passing such order of rejection, the Adjudicating Authority is required to give a notice to the applicant to rectify the defect, if any, within seven days.

7. A defective application can be corrected by removing the defect. Similarly, if an application is incomplete, it can be completed, but if any misleading statement is made in an application no time can be granted to

recall the misleading statement and such application is fit to be rejected. This is the essence of the judgement of this Appellate Tribunal in ***M/s. Starlog Enterprises Limited Vs. ICICI Bank Limited.*** In the said case, the Adjudicating Authority held that it was satisfied that there is a default of Rs. 27.77 Crores. Such finding being contrary to the application filed by the 'Financial Creditor' itself and in complete disregard to the apparent and conspicuous mismatch between the amount shown in the notice under Rule 4(3) and the amount shown in the *ex-parte* order of the Adjudicating Authority, the Appellate Tribunal set aside the order of admission.

8. In the present case, it is not the case of the Appellants that there is a mismatch between the amount shown in the notice under Rule 4(3) and the amount of default shown by the 'Financial Creditor' in its original application under Section 7. On the other hand, the 'Corporate Debtor' has explained that the amount of interest as was calculated upto 31st March, 2012, if further calculated for the period from 1st April, 2012 to 14th May, 2017, then the total debt comes to Rs. 1,09,32,72,312.86p. The default amount as on 31st March, 2012 remains constant. Thus we find that neither any misleading statement was made by the 'Financial Creditor' nor any misleading statement of default was made. The case of the Respondent-'Financial Creditor', being different from the case of '***ICICI Bank Limited***' (the 'Financial Creditor' of M/s. Starlog Enterprises Limited), the plea taken by the Appellants cannot be accepted.

9. Another ground taken by Learned Counsel for the Appellants is that the person, who filed the application under Section 7 was not authorised by the Board of Directors of the Bank of India ('Financial Creditor').

10. The Respondent has brought to our notice that the person who has filed the petition under Section 7, is an officer of Bank of India (Financial Creditor) and was authorised by the Board of Directors to do so. Therefore, the impugned judgement cannot be interfered with on such ground.

11. In view of the discussions as made above and in absence of merit, we are not inclined to interfere with the impugned judgment dated 3rd July, 2017 passed in C.P. No. IB-104(PB)/2017 and, accordingly, dismiss the appeal.

However, in the facts and circumstances of the case, the parties shall bear their respective costs.

[Balvinder Singh]
Member (Technical)

[Justice S.J. Mukhopadhaya]
Chairperson

NEW DELHI

23rd August, 2017

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