

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION
Company Appeal (AT) (Insolvency) No. 44 of 2017**

(arising out of Order dated 21st April 2017 passed by NCLT, Mumbai Bench, Mumbai in C.P.No. 69/I&BP/NCLT/MAH/2017)

**Neelkanth Township and Construction
Pvt. Ltd.**

...Appellant

Vs.

Urban Infrastructure Trustees Limited

.... Respondent

Present: For Appellants: Dr. U.K.Chaudhary, Senior Advocate with Mr. Kush Chaturvedi, Ms. Anshula Grover, Ms. Chaitrika Pathi, Mr. Aman Uarma, Mr. Saket Mone and Mr. Himanshu Vij, Advocates.
For Respondents: Mr. Jaideep Gupta, Sr. Advocate with Mr. Arif Doctor, Ms. Surekharaman and Anuj Sharma, Advocates.

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by Appellant/Corporate Debtor against order dated 21st April 2017 passed by Learned Adjudicating Authority, (National Company Law Tribunal), Mumbai Bench, Mumbai, in C.P.No. 69/I&BP/NCLT/MAH/2017. By the impugned order Learned Adjudicating Authority entertained the application preferred by the Respondent-Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as 'I & B Code'), admitted the application and ordered moratorium with further order to appoint an Insolvency Resolution Professional and passed consequential directions.

2. Learned Counsel for the Appellant-Corporate Debtor assailed the impugned order mainly on the following grounds: -

- (i) The application filed by Respondent under Section 7 is defective and not complete as it was not accompanying the documents, as mandated by sub-section (3) of Section 7 of the 'I & B Code'.
- (ii) The application under section 7 is time barred, as the debt claimed related to the years 2011, 2012 and 2013.
- (iii) That the 'default of debt' as claimed by Respondent has not been admitted by the Corporate Debtor and
- (iv) That the Respondent is not a 'Financial Creditor', but an Investor.

3. Learned counsel for the appellant submitted that an application by a 'Financial Creditor' under Section 7 can only be filed when it is furnished with the documents provided under sub-section (3) of Section 7 and none other, namely (a) a record of the default as recorded with the information utility (b) Such other record or evidence of default as may be specified.

4. The expression "such other record of evidence of default" as may be specified can only be such record or evidence as is specified by the Insolvency and Bankruptcy Board of India (hereinafter referred to as "the Board") under sub-section 2(f) of Section 240 of 'I & B Code'. Reliance was also placed on definition of the word "specified" as defined under Section 3(32) of the 'I&B Code'.

5. Learned counsel for the appellant placed reliance on decision of this Appellate Tribunal in "*Smart Timing Steel Limited Vs. National Steel & Agro Industries Ltd.*" – Company Appeal (AT)(Ins.) No. 28 of 2017 to suggest that the provision of sub-section 3(a) of Section 7 is mandatory.

6. It was also submitted that it was the duty of the Insolvency and Bankruptcy Board of India (In short "Board") to specify Regulations and in absence of the same the proceeding under Section 7 of 'I & B Code' cannot be initiated.

7. In support of the second contention it was submitted that the time barred debt cannot be enforced by filing an application for Corporate Insolvency Resolution Process. The claim of the 'Financial Creditor', is completely time barred as the debenture certificates were due for redemption as far back as in the years 2011, 2012 and 2013 respectively. Consequently, the application filed by the 'Financial Creditor' in the year 2017 is hopelessly time barred.

8. It was next submitted that the respondent does not come within the meaning of "Financial Creditor" as defined in sub-section (7) read with sub-section (8) of Section 5 of the 'I & B code'. No 'financial debt' is owed to the Respondent.

9. Counsel for the Appellant further submitted that 'Debenture Certificates' forming basis of claim of the Respondent do not fall within the definition of 'financial debt' as provided under sub-section (8) of Section 5 of the 'I & B Code'. A plain reading of the definition of 'financial debt' makes it apparent that it is the debt which is only if disbursed against the consideration for **time value of money**. Therefore, there has to be a consideration flowing from the advance of money which is at par with the time value of money. Since the 'debenture certificates' issued to the Respondent were carrying zero interest and another was carrying only one percent interest, the same were not issued against consideration for time value of money, as envisaged under sub-section (8) of Section 5. The debenture certificates were purchased by Respondent only

by way of an investment, and do not come within the meaning of 'financial debt'.

10. Learned Counsel for the appellant also placed reliance on definition of "debt" as defined under sub-section (11) of Section 3 of the 'I & B Code'. It was further contended that there is pendency of proceedings between the parties as the 'Financial Creditor' has already invoked arbitration against the 'Corporate Debtor' for the same cause of action which is an admitted fact.

11. In reply Learned Counsel appearing on behalf of the respondent submitted that in absence of the Regulations framed by the Board, the statutes (I & B Code) cannot be made ineffective, having come into force since 15th December 2016. Reliance was also placed on Insolvency and Bankruptcy (Adjudicating Authority Rules, 2016) (hereinafter referred to as Adjudicatory Rules) framed by the Central Government, under section 239 of the 'I & B Code'.

12. Learned Counsel for the respondent submitted that the Balance Sheet of 'Corporate Debtor' was noticed by Learned Adjudicating Authority, before admitting the case. Reliance was also placed on Regulation 8(2) and 'Form-C' of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (hereinafter referred to 'Corporate Person'), Regulation 2016.

13. The question to be determined is whether in absence of record of default as recorded with the information utility or any other "record or evidence of default" specified by the Board, an application under Section 7 is maintainable or not?

14. Process of initiation of Insolvency Resolution process by a financial creditor is provided in Section 7 of the I & B Code. As per sub-section (1) of Section 7 of the I & B Code, the trigger for filing of an application by a financial creditor before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Sub-section (2) of Section 7 provides that the financial creditor shall make an application in prescribed form and manner and with prescribed documents, including "record of the default" recorded with the information utility or such other record or evidence of default as may be specified"

15. Once the application is filed by the 'Financial Creditor' with the Adjudicating Authority, the Adjudicating Authority, within 14 days of the receipt of the application under sub-section (2) of Section 8 required to ascertain the existence of default from the records of an information utility or on the basis of other evidence furnished by the 'financial creditor' under sub-section (3)(a) of Section 7.

16. 'Financial Creditor' along with the application required to be furnished information and other facts as prescribed under sub-section (3) of Section 7. Where the Adjudicating Authority is satisfied that a default has occurred and the application under sub-section (2) is complete, and there are no disciplinary proceedings pending against the proposed resolution professional, it can admit such application and in case the application is incomplete, required to provide 7 days' time to complete the record and on failure is to dismiss the application.

17. The aforesaid facts are to be considered from the procedure for initiation of corporate insolvency resolution process by 'financial creditor' as mandated under Section 7 of 'I & B Code', and quoted below: -

“7. (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.”

18. It is well settled that rules of procedure are to be construed not to frustrate or obstruct the process of adjudication under the substantive provisions of law. A procedural provision cannot override or affect the substantive obligation of the adjudicating authority to deal with applications under Section 7 merely on the ground that Board has not stipulated or framed Regulations with regard to sub-section 3(a) of Section 7. The language of

Section 240, whereby Board have been empowered to frame regulations is clear that the said regulation should be consistent with the 'I & B' Code and the rules made thereunder by the Central Government.

19. In exercise of power conferred by Section 239 read with Sections 7, 8, 9 and 10 of the 'I & B' code, the Central Government framed the rules known as "Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as 'Adjudicating Authority Rules, 2016'). As per Rule 41, a 'Financial Creditor' required to apply itself or jointly in an application under Section 7 in terms of Form-1 attached thereto. Part V of Form-1 deals with particulars of 'Financial Debt' (documents, record and evidence of default), as quoted below: -

PART V

**PARTICULARS OF FINANCIAL DEBT [DOCUMENTS,
RECORDS AND EVIDENCE OF DEFAULT]**

1. *PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)*
2. *PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)*
3. *RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)*
4. *DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)*
5. *THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)*

6. A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)

7. COPIES OF ENTIRES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891)

8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT”

20. The rules framed by the Central Government under Section 239 having prescribed the documents, record and evidence of default as noticed above, we hold that in absence of regulation framed by the Board relating to record of default recorded with the information utility or other record of evidence of default specified, “the documents”, ‘record’ and ‘evidence of default’ prescribed at Part V of Form-1, of the Adjudicatory Rules 2016 will hold good to decide the default of debt for the purpose of Section 7 of the ‘I & B Code’.

21. We further hold that the ‘Regulations framed by the Board’ being subject to the provisions of ‘I & B Code’ and rules framed by the Central Government under Section 239, ‘Part V of Form – 1’ of Adjudicating Authority Rules, 2016 framed by Central Government relating to ‘documents’, ‘record’ and ‘evidence of default’, will override the regulations, if framed by the Board and if inconsistent with the Rule. However, it is always open to Board to prescribe additional records in support of default of debt, such as records of default recorded with the information utility or such other record or evidence of default in addition to the records as mentioned in Part V of Form-I.

22. At this stage, it is pertinent to note that the Board has also framed Insolvency Resolution Process for Corporate Persons, Regulations, 2016 ('Corporate Persons Regulation' for short). It has come into force since Notification dated 30th November 2016 was issued. Regulation 8 of 'Corporate Persons Regulation', 2016 relate to claims by 'Financial Creditor'. Regulation 11(2) relates to existence of debt due to 'Financial Creditor', which is to be proved on the basis documents mentioned therein and quoted below: -

"8. Claims by financial creditors.

(1) A person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the interim resolution professional in electronic form in Form C of the Schedule:

Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(2) The existence of debt due to the financial creditor may be proved on the basis of -

(a) the records available with an information utility, if any;

or

(b) other relevant documents, including -

(i) a financial contract supported by financial statements as evidence of the debt;

(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;

(iii) financial statements showing that the debt has not been repaid; or

(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.”

23. 'Form - C' attached to the Regulation relates to proof of claim of 'Financial Creditor' whereunder at Serial No. 10, the 'Financial Creditor' is supposed to refer the list of documents in proof of claim in order to prove the existence and non-payment of claim dues to the 'Operational Creditor'.

Therefore, the stand of the appellant that the Board has not framed any Regulations, relating to clause (a) of sub-section (3) of Section 7, cannot be accepted.

24. The next ground taken on behalf of the appellant is that the claim of the respondent is barred by limitation, as the Debentures were matured between the year 2011 - 2013 is not based on Law. There is nothing on the record that Limitation Act, 2013 is applicable to I & B Code. Learned Counsel for the appellant also failed to lay hand on any of the provision of I & B Code to suggest that the Law of Limitation Act, 1963 is applicable. The I & B Code, 2016 is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution Process. If there is a debt which includes interest and there is default of debt and having continuous course of action, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted.

25. Next question arises is whether the respondent come within the meaning of 'Financial Creditor' or not.

26. For determination of the aforesaid issue, it is desirable to notice meaning of 'Financial Creditor', as defined in sub-section (7) of Section 5 of 'I & B Code', and quoted hereunder: -

"(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to"

27. 'Financial Debt' means a debt along with interest, if any, which is disbursed against the consideration of time value and money as defined in sub-section (8) of Section 5, as quoted below: -

"Sec.5. Definitions - In this Part, unless the context otherwise requires, --

xxx

xxx

xxx

(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause."

28. Clause (c) of sub-section (8) of Section 5 deals with any amount raised pursuant to any note purchase facility or the issue of bonds, notes, **debentures**, loan stock or any similar instrument.

29. From the aforesaid provision, we find that the debentures come within the meaning of 'Financial Debt' as defined in Clause (c) of sub-section (8) of Section 5.

30. 'Debt' is defined in sub-section (11) of Section 3 means:

"(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt"

31. It is admitted that the appellant is debenture holder. The Respondent- 'Corporate Debtor' also pleaded that the appellant is Investor. From the relevant facts as we noticed above, we find that the Respondent- 'Corporate Debtor' has a liability and obligation in respect of amount which is due to the debenture holder from the 'Corporate Debtor', including 'Financial Debt' i.e the amount due on maturity of debentures.

32. The 'default' means non-payment of debt as defined in sub-section 12 of Section 3, as below: -

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

33. The fact as pleaded and not disputed by Respondent - 'Corporate Debtor' that the 'debenture holder' (Appellant) and amount matured in the year 2011, 2012 and 2013 has not been paid. Thus, we find there is a default as defined under section 3(12) of the I & B Code.

The 'Corporate Debtor' had a liability and obligation in respect of claim of respondent which includes the 'Financial Debt', including those come within clause (c) of sub-section (8) of Section 5. As per the agreement, the same was liable to be paid from the date of maturity along with interest, if any and the same having not paid, the default of debt is apparent.

34. This apart we find that the amount of debt and interest, as shown by appellant was to be disbursed against consideration for time value of the money. Therefore, it cannot be stated that debentures on maturity do not come within the purview of amount payable against the consideration for the time value of the money.

35. In the aforesaid background, the Learned Adjudicating Authority having admitted the application under Section 7, the application being complete, no interference is called for.

36. In absence of any merit the appeal is dismissed. However, in the facts and circumstances, there shall be no order as to cost.

(Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
11th August, 2017

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