

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**Company Appeal (AT) (Insolvency) No. 111 of 2020**

(Arising out of Impugned Order Dated 26.11.2019 passed by National Company Law Tribunal, New Delhi, Bench VI in Company Petition No. (IB) 987 of 2019)

In the matter of:

**Mrs.Rita Kapur
Resident of Flat No.381,
A.T.S. Village, Sector 93-A
Noida, UP-201304**

...Appellant

Vs.

**1.Invest Care Real Estate LLP
Registered office:
307-308, Roots Tower,
Laxmi Nagar District Centre,
New Delhi – 110092**

....Respondent No.1

**2.Sh. Samar Vijay,
Promoting Partner,
Registered Office:
307-308, Roots Tower,
Laxmi Nagar District Centre,
New Delhi – 110092**

...Respondent No.2

**3.Sh. Ajit Sinha
Designated Partner,
Registered Office:
307-308, Roots Tower
Laxmi Nagar District Centre,
New Delhi – 110092**

...Respondent No.3

**4.Sh. Ajit Kumar Mishra
Designated Partner,
Registered Office:
307-308, Roots Tower
Laxmi Nagar District Centre,
New Delhi – 110092**

...Respondent No.4

Present:**For Appellant: Mr. Ranvir Singh, Advocate.****For Respondent: Mr. Vivek Sinha and Mr. Vivek Malik, Advocate for R-1 and R-3.****J U D G M E N T****DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER**

1. The Appellant- Mrs. Rita Kapur, has filed this Appeal under Section 61 read with Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code, 2016') against the Impugned order dated 26.11.2019 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench VI) in Company Petition No. (IB) 987 of 2019.
2. The Adjudicating Authority has rejected the Petition of the Appellant in terms of Section 7 (5) of the I&B Code, 2016.
3. The Learned Counsel for the Appellant has filed Affidavit dated 19th March, 2020 stating that Respondent No.2 & Respondent No.4 were served with notice through speed post. They have not appeared and treated as 'ex parte'. The Appellant has given loan of Rs.40 Lakhs to the Respondent No.1 – Invest Care Real Estate LLP, incorporated under the LLP Act, 2008 and the same was to be repaid in four instalments. She has also submitted that she has not been paid neither the principal amount nor interest

thereon. Her grievance is there that the 'loan' has been converted into 'equity' on 25.03.2014. She has also averred that there is irregularity in purchase of Non-judicial e-Stamp paper of dated 05th June, 2013 and amount paid from the account of Respondent No.1. She has also alleged that the loan has been converted into equity, which is against the terms and conditions of 'Loan Agreement' dated 09.07.2013. The 'Loan Agreement' is elaborate and contains terms of repayment including penalty. It is also averred in the Application that in the same LLP, her late husband has also invested Rs.1 Crore and her late husband – Mr. Sudhir Kapur has also not been repaid either principal amount nor interest amount. She has also raised the issue that she is a 'Financial Creditor' and has acted through an Authorized Representative or an Advocate duly appointed and hence no action can be taken on that ground. She is asserting that she is a 'Financial Creditor'.

4. The Appellant has also disputed that how her "Loan" can be converted into "Equity" based on a certified copy of the Resolution which is attached with her paper book at page 173 and 174 signed by two 'Designated Partner' and not by other partners. She has also alleged of pre-planned acts to deceive and defraud and has alleged illegality. She has also submitted that she is a senior citizen and has desired that maturity amount to be paid to her. She wants that CIRP be commenced immediately and the order of the Adjudicating Authority be set aside. She has also cited some of the

judgments to prove her stand including on the issue of striking down and unfair an unreasonable contract; dishonesty should not be permitted to bear the fruits and benefits to the persons who played fraud or made misrepresentation etc.

5. On behalf of the Appellant, the following judgments are cited:
- a. In the decision of Palogix Infrastructure Pvt. Ltd; Vs. ICICI Bank decided on 20.09.2017 by this Appellate Tribunal. It has observed at para 32 & 33:

“Para 32: *This ‘I&B Code’ is a complete Code by itself. This provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.*

Para 33: *Therefore, we hold that a ‘Power of Attorney Holder’ is not competent to file an application on behalf of a ‘Financial Creditor’ or ‘Operational Creditor’ or ‘Corporate Applicant’.”*

- b. In the decision of Hon’ble Supreme Court 1996(9)SCC 388: Namburi Basava Subramanyam Vs. Alapati Hymvathi: decided on 02.04.1996, at Para 3/Page 18 has observed that :

“...The recitals in the document as a whole and the intention of the executant and

acknowledgment thereof by the parties are conclusive.”

- c. In the decision of Hon’ble Supreme Court 2008 (11) SCC 349: National Insurance Co. Ltd. Vs. Gulab Nabi: decided on 24.07.2008 at Para 8 &9 has observed that:

“Para 8 – Reasons in clarity...,”

Para 9 – Giving of reason in one of the fundamental of good administration ...Reason are like links between the mind of the decision taker of the controversy in question and the decision or conclusion arrived at, Reasons substitute subjectively by objectivity.”

- d. In the decision of Hon’ble Supreme Court 2009 13 JT 366: Revajeetu Builders & Developers Vs. Narayanaswamy & Sons : decided on 09.10.2009 at Para 25, 34 & 54 has observed that:

*“ **Para 25-** If we carefully examine all the cases, the statement of law declared by the Privy Council in *Ma Shwe Mya Vs. Maung Mo Hnaung* AIR 1922 PC 249 has been consistently accepted by the courts till date as correct statement of law. The Privy Council observed:*

"All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."

Para- 34- *In the leading English case of Cropper v. Smith (1884) 26 Ch D 700, the object underlying amendment of pleadings has been laid down by Browne, L.J. in the following words:*

"It is a well established principle that the object of the courts is to decide the rights of the parties and not punish them for mistakes they make in the conduct in their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in

controversy, and I do not regard such amendment as a matter of favour or grace ... it seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

Para – 54- *Reversing the order of the High Court, this Court (per Shah, J., as he then was) made the following oft-quoted observations:*

18 (1969) 1 SCC 869 "Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party Applying, was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however

late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

- e. In the decision of Hon'ble Supreme Court 2019 (5) Scale 680 : Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan; Geetu Gidwani Verma & Anr. H. Note decided on 02.04.2019 at Para 6.5 & 6.7 has observed that:

" Para – 6.5- unfair trade practice..... Quoting para 89 from (1986) 3 SCC 156: "..... This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power..."

Para 6.7 – " A term of a contract will not be final and binding if it is shown that the flat purchase had no option but to sign on the dotted line, on a contract framed by the builder."

- f. In the decision 2019 (173) DRJ 626: Migrndra Pritam Vikram & Ors. Vs. Jaswinder Singh & Ors. Decided on 10.01.2019 at Para 6.4 & 6.5 has observed that:

" Para 6.4 – Refers S.C. Judgments on fraud/collusion."

“Para 6.5 – Quoting Para 32 & 34 of 2010 (8) SCC 383:

32- The ration laid down by the court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud.

34 -... A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.”

- g. In the decision (F.B) Assitant General Manager & ors Vs. Radhey Shyam Pandey decided on 02.03.2020 at Para 50 to 59 deals with contract : (Page 90-188) Law points are referred to in Paras 6(4) (iv) ; 6 (4) (v); 6(4)(vii); 6(4)(ix) of appellants rejoinder affidavit.
- h. In the decision of Shah Faesal and Ors. Vs. Union of India and Anr. [2020 (2) MadLj 536] decided on 02.03.2020 at para 18 page 130 : law point decided by Hon'ble Supreme court, given in Para 18 of the judgments, is submitted in Para 6(4) (v) of appellant in rejoinder affidavit dated 14.08.2020.

6. The Respondent No.1&3 which includes Corporate Debtor has raised several issues including the period of Limitation in the filing of the present Appeal, filing of the petition by 'Power of Attorney' holder of Financial Creditor, Appellant- Mr.Ranvir Singh, Advocate etc. The Respondent has also observed certain irregularity in signing of Power of Attorney/Authority Letter based in London, witnessing in India. The Respondent has alleged that the Appellant is the 'Investor' initially as a loan-provider in July, 2013. However, the Respondent categorically mentioning about 'Amended Agreement' dated 01.12.2013 wherein all the 'Investors' numbering 40(forty) have become either designated partner or general partner as per details furnished by Respondent in his counter page 57 to 67, where the name of the Appellant along with her signature is appearing at Serial No.29 of page 65 of the said document. However, the Appellant disputed her signature on the same. Apart from this agreement a 'Supplementary Agreement' dated 25.03.2014 was also executed by all the partners including appellant and the same is recorded with ROC NCLT Delhi and Haryana, and the same is at para 7 of Written Submission of Respondents and Page No.77-93 of the 'Counter-Affidavit' duly signed by Appellant at Page No.78-93 of the Counter-Affidavit. The Auditor certificate has also been furnished at Page No.94 to 99 of 'Counter Affidavit' certifying the investment as capital contribution which includes the name of the Appellant also. The Respondent has submitted that the Appellant is not a Financial Creditor rather a related party and hence in no way she can be treated as a 'Financial Creditor' etc.

7. As seen from the impugned order of the Adjudicating Authority had observed that the investment is not a 'Financial Debt'. The Adjudicating Authority had also touched upon the subject of violation of Advocates Act, 1961 and the Bar Council of India Rules for professional conduct and ethics for Lawyers and is not happy with the Advocate becoming the 'Power of Attorney Holder' and affirming Affidavit on behalf of the Appellant. The Adjudicating Authority had elaborately discussed the various case Laws cited on either side and finally rejected the petition on the ground that the Appellant -Mrs.RitaKapur is not a 'Financial Creditor'. However, the Adjudicating Authority had observed that passing the order by Hon'ble Members will not affect the merit of the controversy and the right of the Appellant to approach appropriate forum. It may not be out of place of this court to make significant mention that the Hon'ble Supreme Court in *Pravin C. Shah vs K.A. Mohd. Ali & Anr in Appeal (Civil) No. 3050 of 2000 (decided on 9 October, 2001)* (2001) 8SCC 650 had observed that professional duty including the counselling to client, legal opinions, drafting affidavits, pleadings and participating in Law conference. Further, in the decision *Brij Mohan Lal v. Union of India, (2012) 6 SCC 502* has observed that "Right to practice Law is not an absolute right and it is subject to the possession of requisite qualifications as contemplated under Advocates Act and regulatory regime and the Bar Council of India Rules." In this connection it is to be pointed that the Appellant in his Memo of Appeal has inter alia stated that the Respondents objection

that the Authority Letter dated 19.03.2019 of the Appellant, signed at Delhi and varying at London and was admitted to be a typing error and the matter heard on merits without returning the application for rectification and as such this Tribunal is not delving deep into the same because of the fact that the issue whether 'Investment' is not a 'Financial Debt', specially, in the teeth of the fact that once a debt is converted into capital whether the same can be categorized as 'Financial Debt'. That apart, the decision of Hon'ble Supreme Court in D.P. Chadha vs Triyugi Narain Mishra & Ors on 5 December, 2000 reported in AIR 2001 (1) SC at page 457, it is observed that a Lawyer in discharging his professional assignment has a duty to his client, a duty to his opponent, a duty of the court, a duty to the society at large and a duty to himself. It needs a high degree of probity and poise to strike a balance and arrive at the place of righteous stand more so when there are conflicting claims

8. This Tribunal has noticed the submissions advanced on both the sides meticulously and is of the view that the Application under Section 7 of the I&B Code, 2016 cannot be rejected on the ground that the same set was filed by the 'Power of Attorney Holder'. The delay has also been condoned by this Appellant Tribunal vide its order dated 24.01.2020. The Appellant case is that she and her late husband has invested huge amount in the Corporate Debtor, and she is a senior citizen. The Corporate Debtor has failed to provide audited profit loss account for the years 2013-14 till date to the Appellant, it

seems that the Corporate Debtor is suffering from several irregularities. However, the provisions of Section 7 of the I&B Code, 2016 provides for initiation of the CIRP by 'Financial Creditor; only and that too, if there is a 'Debt' and 'Default'. So, the first question is the Appellant must be a 'Financial Creditor'. Section 5(7) of I& B Code, 2016 defines 'Financial Creditor' and Section 5(8) I&B Code, 2016 defines 'Financial Debt' and the same are depicted below:

Section 5(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;*

Section 5(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;

9. Section 7 of I&B Code, 2016 is reproduced below:

Section - 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.

10. From the above provisions of law, it is latently & patently clear that once the 'Debt' is converted into "Capital" it cannot be termed as 'Financial Debt' and the Appellant cannot be described as 'Financial Creditor'.

11. Hence, the grievance of the Appellant does not fall under the provision of 'Insolvency and Bankruptcy Code, 2016'. Accordingly, the Appeal is devoid of merits and the same is hereby dismissed. However, the Appellant is at liberty to approach an appropriate forum for seeking necessary relief(s) for redressal of grievances, of course, in accordance with Law. Interim orders, if any, were

issued, stands vacated. Pending IA(s), if any, stands closed. There shall be no order as to costs.

**[Justice Venugopal M.]
Member (Judicial)**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

2nd September, 2020

New Delhi

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