

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPEAL (AT)(Insolvency) No.684 of 2020
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016 read with
Section 421 of the Companies Act, 2013)

(Arising out of Order dated 12.3.2020 passed by the National Company Law Tribunal, New Delhi Bench in Company Petition No. (IB)2978(ND)/2019)

IN THE MATTER OF :

Mr.MOHANLAL DHAKAD
R O 15, Vill : Sikhedi,Po Badwan Appellant
The & Dist, Mandsaur,
Madhya Pradesh 458 667

Versus

BNG GLOBAL INDIA LIMITED,
Having its Registered Office at:
GD ITL A-09, Northex Tower,
5th Floor, 504, Netaji Subhash Place,
Pitambura, New Delhi 110034. ...Respondent

Present:

For Appellant: Ms. Ranjana Roy Gawai &
Mr.Avinash Bhati, Advocates

For Respondent: None

J U D G E M E N T

Venugopal M.J

Preface

The 'Appellant' has filed the present appeal being dissatisfied with the order dated 12.3.2020 passed by the 'Adjudicating Authority' (National Company Law Tribunal), New Delhi Bench-V in (IB)2978(ND)/2019.

2. The 'Adjudicating Authority' (National Company Law Tribunal), New Delhi Bench-V, while passing the 'Impugned Order on 12.3.2020 in (IB)2978/ND/2019 filed by the 'Appellant'/'Financial Creditor' and others (under Section 7 of the Insolvency & Bankruptcy Code) read with Rule 4 of Insolvency & Bankruptcy (Application to the 'Adjudicating Authority')Rules 2016, at Paragraphs 6 to 9, among other things had observed the following:

...." If we shall read the provisions contained under Section 73, 74 and 76 of the Companies Act along with (Acceptance of Deposits) Rule, 2014, then it can be said that all these provisions 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 in view, 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 we have

already held that the 'Financial Creditors' everywhere mentioned the word 'deposit', therefore, the amount which he has deposited with the Corporate Debtor does not come within the purview of the definition of Financial Debt rather the Financial Creditors, 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 Companies Act, read with Company (Acceptance of Deposits) Rule, 2014.

So far, the initiation of proceedings under Section 7 of the Code is concerned, in our view, is not liable to be accepted. At this juncture, we would also like to refer the arguments of the applicants that there is a default in payment of debt, therefore, Section 7 application is maintainable. At this juncture, we 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 and is not 1[paid] by the debtor or the corporate debtor, as the case may be"

8. *Mere plain reading of the provisions show that default means non-payment of debt, whereas in the aforementioned para, we held that the amount which the applicants deposited does not come under the definition of the debt. Therefore, we are unable to accept the contention of the applicants that there is a default in payment of debt.*

9. *As we have already held in the matter of Satish Chand Gupta vs. Servel India Private Limited (IB) 1886 (ND)/2019 and the present case is also covered with this decision, therefore, we are of the considered view that though the applicants have some other remedy under the law to recover the amount which they have deposited with the Corporate Debtor but so far initiation of the Section 7 of the IBC is concerned for the reasons discussed above, the present application is not maintainable, accordingly, we hereby, reject the prayer of the applicants to initiate the proceedings under Section 7 of the Code.”*

and ultimately dismissed the Application, granting liberty to the Appellant to file an appropriate Application under Chapter V of the Companies Act, 2013.

APPELLANT'S SUBMISSIONS:

3. According to the 'Appellant'/Financial Creditors' of the 'Respondent/Corporate Debtor', and Application for initiation of 'Corporate Insolvency Resolution Process' (herein after referred to 'CIRP') under Section 7 of the 'Insolvency & Bankruptcy Code, 2016 (herein after referred to IBC 2016) was filed against the 'Respondent/Corporate Debtor' by the 'Appellant' & other 'Financial Creditors' for a default of Rs.16,28,300/- (Rupees Sixteen Lakhs Twenty Eight Thousand Three Hundred only) which includes a sum of Rs.13,70,000/- (Rupees Thirteen Lakh Seventy Thousand only) towards the amount payable by the 'Corporate Debtor' to the 'Financial Creditors' at the time of expiry of the various schemes floated by the 'Corporate Debtor' along with Rs.2,58,300/- (Rupees Two Lakhs Fifty Eight Thousand and Three Hundred only) towards the interest at the rate of 12% per annum payable by the 'Corporate Debtor' to the 'Financial Creditors' which was calculated from the 'Date of Registration'/'Date of Investment' by the 'Financial Creditors' in the schemes of 'Corporate Debtor' till October,2019.

4. The Learned Counsel for the 'Appellant'/Financial Creditors' points out that the 'Respondent'/'Corporate Debtor' floated 2 'Investment Schemes' under the plans entitled the 'Recurring Investment Plan' and the 'Lumpsum Investment Plan' to collect investments from individual Investors hailing from small towns and villages in India and these schemes were floated after the incorporation of the 'Respondent'/'Corporate Debtor' in 'the' year 2011. The schemes were

floated carrying a term period of 3 years to 10 years under the 'Recurring Investment Plan scheme' as under the 'Lump Sum Investment Plan', scheme. The 'Respondent/'Corporate Debtor' had promised to provide return on the 'Investment sum' along with the 'Principal sum' payable at the time of maturity of the term. Resultantly, under the 'Recurring Investment Plan' the 'Respondent/'Corporate Debtor' had assured to provide the Investor's interest on their investment amount at the time of expiry or of the term along with the Investment amount.

5. The Learned Counsel for the 'Appellant'/Financial Creditors' submits that the 'Respondent/'Corporate Debtor' had assured the Investors that at the maturity of the particular scheme, the Investors will 'either be allotted agricultural land or be paid multi-fold returns on their investments. Also that the 'Respondent/'Corporate Debtor' was committed to pay the Investors, a return on the Investment for the 'time value of money' based on the amount of investments made by the Investors. In fact, the monies were collected in the year 2012 to 2013 and the plans opted by the 'Investors' matured in the year 2018 and that the 'Respondent/'Corporate Debtor' had not only failed to allot the land in favour of the 'Investors', but also failed to pay the amount payable on maturity together with 'interest' and 'Assured return'. Because of the failure of the 'Respondent/'Corporate Debtor' to offer allotment of land or pay the principal amount along with interest, resulted in default, thus leading to the filing of the Application before the 'Adjudicating Authority' (National Company Law Tribunal), New Delhi. Besides this, the refusal of the 'Respondent/'Corporate Debtor'

to honour the 'Promissory Notes' issued by it in lieu of 'Assured' returns' clearly demonstrates the 'Respondent'/'Corporate Debtor's inability to repay its admitted debts.

6. The Learned Counsel for the 'Appellant' contends that the 'Adjudicating Authority' by the 'Impugned Order' dated 12.3.2020 had rejected the 'Application'/'Petition' of the 'Appellant' on the basis that the claim of the 'Appellant' does not come within the ambit of Sec.5(8) of the Insolvency & Bankruptcy Code, 2016 or any Clause(a) to (i), because of the fact that all the Applicants therein is that they deposited the said amount under 'scheme' and they had not given 'Debt' to the 'Corporate Debtor', in as much as they are entitled to get refund under the Companies Act, 2013.

7. The Learned Counsel for the 'Appellant' points out that 'Adjudicating Authority' in the 'Impugned Order' does not consider Section 3(6) and 3(11) of the Code to give a finding whether or not the investment made is a 'Debt' or not, and erroneously referred to the 'Companies (Acceptance of Debts) Rules, 2014', along with Section 73,74 and 76 of the 'Companies Act, 2013' to declare that since the investment made was to be refunded as per 'Companies (Acceptance of Debt) Rules', 2014 and as such the investments made by the 'Appellant' is not a 'Financial Debt' under Section 5(8) of 'Insolvency & Bankruptcy' Code.

8. The Learned Counsel for the 'Appellant' proceeds to point out that the 'Adjudicating Authority' (National Company Law Tribunal) ignored the fact that the 'Insolvency & Bankruptcy' Code is a complete code in itself and the same overrides 'Companies (Acceptance of Debts) Rules, 2014'.

9. It is represented on behalf of the 'Appellant' that the 'Adjudicating Authority' (National Company Law Tribunal) had failed to appreciate an important fact that there was 'Disbursement of Money' against the 'time value of money' in the present case. The other argument advanced on behalf of the 'Appellant' is that in the instant case, there is a clear 'Financial Debt' and as such the 'Appellant' is a 'Financial Creditor' in terms of the Code.

10. The Learned Counsel for the 'Appellant' projects an argument that the case of 'alternate remedy' is not a defence u/s 7 of the Code, since Section 7 Petition of the Code is maintainable during the pendency of 'Suit' or 'Arbitration', especially, the definition under Section 3 of the Code, 'Claim' includes 'disputed claims'.

11. The Learned Counsel for the 'Appellant' refers to Section 129 of Schedule III of the Companies Act, 2013, wherein, the 'Deposits' were directed to be considered as 'Long Term Borrowings' at the time of preparation of Balance sheet. Therefore, as per 'Insolvency & Bankruptcy Code' and the 'Companies Act, 2013, the 'Deposits' made by the 'Appellant' were 'Borrowing'/'Debt' upon the 'Corporate Debtor'.

12. The Learned counsel for the 'Appellant' adverts to the definition of 'Deposits' under Section 2(31) of the Companies Act, 2013 runs as under:

“deposits includes any receipt of money by way of deposit or loan or in any other form by a Company, but it does not include such categories of amount as may be prescribed in consultation with the RBI”.

Appellant's Case Laws:

13. The Learned Counsel for the 'Appellant' cites the decision of Hon'ble Supreme Court in Innoventive Industries Ltd. V ICICI Bank & Another, reported in (2018) SCC 407, wherein it is observed that the Insolvency & Bankruptcy Code over rides other Laws and the 'Claim' included 'Disputed Claims' and the 'Insolvency Process' is triggered the moment the 'default' is committed.

14. The Learned Counsel for the 'Appellant' refers to the judgement of this Tribunal, in Nikhil Mehta & Sons V AMR Infrastructure Ltd. (2017 SCC Online NCLAT 377), wherein it is held that money disbursed against 'time value of money' is a 'Financial Debt'.

15. The Learned Counsel for the 'Appellant' refers to the judgement of this Tribunal, in Ms.Anju Aggarwal V Bombay Stock Exchange & Others reported in (2019 SCC Online NCLAT P 789) wherein it is observed and held that Section 28A of the 'SEBI Act, 1992', being inconsistent with Section 14 of the 'Insolvency & Bankruptcy Code' will prevail over Section 28A of the 'SEBI Act, 1992' etc.

16. In support of the proposition that collective investments schemes are 'Financial Debt' and further that the 'Insolvency & Bankruptcy' Code overrides 'SEBI', the Learned Counsel for the 'Appellant' seeks in aid of the decision of this 'Tribunal' in Bohar Singh Dhillon V Rohit Sehgal reported in 2019 SCC online NCLAT 233.

17. The Learned counsel for the 'Appellant' refers to the decision of this 'Tribunal' in Encore Asset Reconstruction Company Pvt. Ltd. V. Charu Sandeep Desai & Others reported in 2019 SCC online NCLAT 284 to the effect that 'Insolvency & Bankruptcy' Code overrides SARFAESI Act.

Company Appeal (AT)(Insolvency) No.684 of 2020

18. The Learned Counsel for the 'Appellant' refers to the decision of the Hon'ble Supreme court in Embassy Property Developments Pvt.Ltd. V. State of Karnataka and Ors (Civil Appeal No.9170 of 220 dated 3.12.2019) in regard to the jurisdiction of 'National Company Law Tribunal' V. Debt Recovery Tribunal' under the Code.

ASSESSMENT :

19. It is to be pointed that before the 'Adjudicating Authority'(National Company Law Tribunal) New Delhi Bench, the 'Appellant'/'Financial Creditors' had filed the 'Application' under Section 7 of the 'Insolvency & Bankruptcy' Code read with Rule 4 of the 'Insolvency and Bankruptcy' Code (Application to 'Adjudicating Authority') Rules, 2016 (through the 'Appellant', who was authorised by other 'Financial Creditors' to submit the Application jointly) and against the default committed by the 'Corporate Debtor' in respect of them under Part IV of the Application of 'Particulars of Financial Debt', it is mentioned that the total amount of 'Financial Debt' in regard to the 'Financial Creditors' was Rs.16,28,300/- (Rupees Sixteen Lakhs Twenty Thousand and Three Hundred only) which includes a sum of Rs.13,70,000/- (Rupees Thirteen Lakhs and Seventy Thousand only) towards the sum payable by the 'Respondent'/'Corporate Debtor' to the 'Financial Creditors' at the time of expiry of the various schemes floated by the 'Corporate Debtor' together with Rs.2,58,300/- (Rupees Two Lakhs Fifty Thousand Three Hundred only) towards interest @ 12% per annum payable by the 'Respondent'/'Corporate Debtor' which was included from the 'Date of Registration'/'Date of Investment' by the 'Financial Creditors' in the schemes of 'Corporate Debtors' till October 2019.

20. It is the case of the 'Appellant' that the investments made by the 'Financial Creditors' mentioned in the 'Application' before the 'Tribunal' that the investments made by them under the 'Schemes of the Corporate Debtor' matured in the year 2017-2018. But the 'Respondent'/'Corporate Debtor' failed in its commitment to offer the allotment and/ or the possession of the plots of land as promised by it or pay the 'Assured Returns' or repay the amounts collected by it along with interest on the maturity of the schemes. Hence, Joint Application under Section 7 was filed by the 'Financial Creditors' before the 'Tribunal'.

21. According to the 'Appellant, the total amount claimed to be due was Rs.16,28,300/- (Rupees Sixteen Lakhs Twenty Eight Thousand and Three Hundred only) which includes a sum of Rs.13,70,000/- (Rupees Thirteen Lakhs Seventy Thousand only) towards the amount payable by the 'Corporate Debtor' at the maturity of the schemes invested in by the 'Financial Creditors' and Rs.2,58,300/- (Rupees Two Lakh Fifty Eight Thousand Three Hundred only), towards interest at the rate of 12% per annum from the date of expiry of the term under the Certificates till October 2019.

22. The clear-cut stand of the 'Appellant' is that the 'Adjudicating Authority' (National Company Law Tribunal) had failed to take into consideration that the amount paid by the 'Applicants' to the 'Respondent' was clearly of 'Financial Debt'. The other contention of the 'Appellant' is that in terms of the 'Insolvency & Bankruptcy Code' and the 'Companies Act,' 2013 the 'Deposits' made by the 'Appellants' were 'Debts'/'Borrowings' upon the 'Corporate Debtor'.

23. It is to be pointed out that Section 3(11) of the Code defines 'Debt' meaning, a liability or obligation in respect of 'claim' which is due from any person and includes a 'financial debt' and 'operational debt'. Section 3(12) of the Code defines 'default' meaning, non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not (paid) by the debtor or the corporate debtor, as the case may be.

24. It is to be remembered that for a 'default', there must be a subsisting debt. After all, the word 'default' is like not doing something which one should do. In fact, the term 'default' refers to an 'omission' or 'failure' to perform a legal or contractual duty. Suffice it to point that the word 'default', applies to a sum of money which was promised at a future date as against a sum now due and payable.

25. Section 3(6) of the Code defines 'claim' meaning

- a) a right to payment, whether or not such right is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured or unsecured.
- b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgement, fixed, matured, unmatured disputed, undisputed, secured or unsecured.

26. Section 3(8) of the Code defines 'Corporate Debtor' meaning a 'Corporate person who owes a debt to any person.

27. Section 3(7) of the code defines a 'Corporate Person' as a company as defined in clause (20) of section 2 of the Companies Act, 2013, (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the 'Limited Liability Partnership Act,' 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider. The term 'Corporate Person' has a wider meaning than a 'Company' as defined under the 'Companies Act, 2013'.

28. It cannot be forgotten that Section 5(8) of the 'Insolvency & Bankruptcy' Code speaks of 'time value' and these words are interpreted to mean 'compensation' or the 'price paid for the length of time for which the money was disbursed. An existing obligation to pay a sum of money is the sine qua non of a 'financial debt'. The 'Financial Creditor' has a right to 'financial debt'. Thus, the essence of any debt to be mentioned as 'financial debt' is the 'time value of money', as borrowing money is for monetary transaction.

29. To determine the plea of 'occurrence of default' is the debt which must be due and become payable. An existence of 'debt' and 'default' are to be met for 'admission' of an 'Application' under section 7 of the 'Insolvency and Bankruptcy' Code. A 'Debt' is/was recoverable from the 'Corporate Debtor'.

30. It is relevant to point out that a 'deposit' is more than a loan of money. Significantly, 'deposit' is given at the instance of an individual who is making a deposit. Under the Companies Act, 2013, the powers

of 'Tribunal' are of wide amplitude. Rule 17 of 'Companies (Acceptance of Deposits) Rules, 2014' provides that a Company shall be liable to pay penal interest' at 18% p.a. to the 'depositor', if there is any failure to repay 'Deposits' within due date. In fact, the 'penal interest' is payable when the payment was overdue after maturity of the 'deposits'.

31. At the stage of 'Admission', the 'Adjudicating Authority' (National Company Law Tribunal) is to be satisfied that a 'Default' had occurred and the 'Corporate Debtor' is entitled to point out that the 'Default' had not occurred. No other person has the right to be heard at the state of 'Admission'.

32. There is no second opinion of an important fact that distinction between 'Deposits' and 'Loans' may not be a significant factor for interpreting the word, 'Deposit'. One cannot ignore a candid fact that 'maturity of claim', 'default of claim' or 'invocation of guarantee' has no nexus in regard to the filing of claim before the 'Interim Resolution Professional' under section 18(1)(b) of the 'Insolvency & Bankruptcy Code' and the 'Resolution Professional' under section 25(2)(e) of the Code.

33. As per the 'Companies (Acceptance of Deposits) Rules, 2014', the term 'deposit' is defined under rule 2(1) (c) in an inclusive fashion. The meaning of 'deposit' is elongated by covering receipts of money in any other form. For approaching the jurisdiction of the 'Tribunal' as per Section 74(2) of the 'Companies Act, 2013', even a partial failure by the Company to repay the deposit was sufficient.

34. Be that, as it may, in the light of detailed qualitative and quantitative discussions, resting on the fact that the 'Respondent'/'Corporate Debtor' under the 'Recurring Investment Plan' had assured to provide the Investors' interest on their investment sum along with the Investment amount, for the 'time value of money' (of course based on the amounts of investments made by the Investors) and in view of the fact that the 'Respondent'/'Corporate Debtor' failed in its commitment to offer the allotment and/or the possession of the 'Plots of Land' as promised by it or pay the assured returns, or repay the sums collected by it along with interest on the maturity of the schemes etc, this 'Tribunal' comes to a consequent conclusion that the 'Appellant's' position is that of a 'Financial Creditor' as per Section 5(7) read with Section 5(8) of the 'Insolvency & Bankruptcy Code' and that there is default in payment of the accepted amounts by the 'Respondent'/'Corporate Debtor'. In short, the 'Respondent'/'Corporate Debtor' squarely comes within the ambit of definition of 'Financial Debt' and the contra conclusions arrived at by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi Bench-V) to the effect that 'the amount which the applicants deposited does not come under the definition of 'Debt' and further that it was unable to accept the contention of the applicants that there was a default in payment of debt, are incorrect, invalid and the same is set aside by this 'Tribunal' to secure the ends of justice. Likewise, the other observation made by the 'Adjudicating Authority' in the impugned order that the applicants are at liberty to file an appropriate application under Chapter V of the Companies Act, 2013 is also set aside. Resultantly, the 'Appeal' succeeds.

35. In fine, the present 'Appeal' is allowed. However, there shall be no order as to costs. The 'Impugned Order' of the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi, Bench-V) dated 12.3.2020 passed in C.P.No.(IB)2978/(ND)/2019 is set aside by this 'Tribunal' for the reasons ascribed in the instant 'Appeal'.

36. As a logical corollary, the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi Bench-V) is directed to restore the Company Petition in C.P.No.(IB)2978/(ND)/2019 filed by the 'Appellants'/'Financial Creditors'/'Petitioner' (under Section 7 of the 'Insolvency & Bankruptcy Code') to its file and admit the same and to proceed further in accordance with Law. IA No.1842/2020 filed by the 'Appellant' seeking exemption to file the certified copy of the 'Impugned Order' dated 12.3.2020 passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi Bench) is closed with a direction to the 'Appellant' to file the certified copy of the 'Impugned Order' within two weeks from Today.

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

**[Kanthi Narahari]
Member (Technical)**

22nd February, 2021
HR