

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 57 of 2018

[Arising out of Order dated 2nd February, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad in CP No. (IB) 130/7/NCLT/AHM/2017]

IN THE MATTER OF:

Sanjay Kewalramani

...Appellant

Vs.

Sunil Parmanand Kewalramani & Ors.

...Respondents

Present: For Appellant: - Dr. U.K.Chaudhary, Senior Advocate assisted by Ms. Manisha Chaudhary, Ms. Anisha Mahajan, Mr. Himanshu Vij, Advocates.

For Respondents: - Mr. Arvind Kumar Gupta, Ms. Purti Marwaha and Ms. Henna George, Advocates for 1st to 3rd Respondents.

Mr. Ankur Sood and Romila Mandal, Advocate for 4th Respondent.

Mr. Aditya Madaan, Advocate for CoC.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The 1st Respondent- 'Mr. Sunil Paramanand Kewalramani' filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of 'Corporate Insolvency Resolution Process' against 'Medilux Laboratories Pvt. Ltd.'- ('Corporate Debtor'). The Adjudicating Authority (National Company Law

Tribunal), Ahmedabad Bench, Ahmedabad, by impugned order dated 2nd February, 2018 admitted the application, passed order of 'Moratorium' and appointed 'Interim Resolution Professional' with certain directions.

2. Respondents 1st to 3rd claimed to be a 'Financial Creditors'; their application under Section 7 of the 'I&B Code' was signed by the 1st Respondent, Mr. Sunil Parmanand Kewalramani. The Adjudicating Authority while held that the application at the instance of 1st Respondent Mr. Sunil Parmanand Kewalramani was not maintainable, further held that the 2nd and 3rd Respondents being not party to the guarantee agreement, the application for initiation of 'Corporate Insolvency Resolution Process' at the instance of 2nd and 3rd Respondents is maintainable.

3. The questions arise for consideration in this appeal are:

- i. Whether in absence of authorization letter given by 2nd or 3rd Respondents, after rejection of the application preferred by the 1st Respondent, the joint application under Section 7 at the instance of the 2nd and 3rd Respondent (2nd and 3rd Petitioner before the Adjudicating Authority) is maintainable? and;
- ii. Whether the 2nd and 3rd Respondents are 'Financial Creditors', within the meaning of sub-section (7) read with sub-section (8) of Section 5 of the 'I&B Code'?

4. Learned counsel for the Appellant submitted that the 1st Respondent was not competent to file the petition under section 7 of the 'I&B Code' having held that he was not a 'Financial Creditor'.

5. He further contended that in absence of any signature by 2nd and 3rd Respondents, the joint application under Section 7 of the 'I&B Code' was not maintainable.

6. It was further submitted that in absence of any agreement and written terms and conditions filed with the Form No-1, the 2nd and 3rd Respondents cannot be treated to be a 'Financial Creditors' as mere grant of unsecured loan does not amount to 'Financial Debt' within the meaning of Section 5(8).

7. Referring to Form No-1, it was submitted that unsecured loan of 2nd and 3rd Respondents clearly reflected that there was no term of payment of interest provided therein and the amount cannot be treated to be investment by the Respondents in consideration for the time value of money. It was submitted that Mr. Sunil Parmanand Kewalramani was one of the Directors and 2nd and 3rd Respondents are relatives i.e. father and sister respectively.

8. The 1st Respondent being Director of the 'Corporate Debtor', he managed to get interest free unsecured loan from his father and sister i.e. 1st and 2nd Respondents respectively.

9. The Respondents have taken plea that 1st and 3rd Respondents are 'Financial Creditors' within the meaning of Section 5(8)(a) and 5(8)(f), but such submission cannot be accepted, as the Adjudicating Authority already having held that 1st Respondent is not a 'Financial Creditor' and the impugned order having not being challenged by the 1st Respondent.

10. It is true that as per explanation below Section 7, a 'Financial Creditor' in whose case no default has taken place may also file a petition under Section 7 for default in regard to other creditors joined with him, but the 1st Respondent being not a 'Financial Creditor' as held by the Adjudicating Authority, in absence of any default in respect to the 2nd and 3rd Respondents, the joint petition was not maintainable.

11. Learned counsel appearing on behalf of the Respondents submitted that the default regarding debt of 2nd and 3rd Respondents was more than Rs. 1 lakh and therefore, they were qualified to file a petition under Section 7. However, the date of default and other details of the 2nd and 3rd Respondents having not mentioned, and as no such record was enclosed it cannot be accepted that there was default of debt in regard to 2nd or 3rd Respondent. This apart, in absence of any authorization letter given by either 2nd or 3rd Respondent to file a joint petition on behalf of 2nd and 3rd Respondents, we hold that the application under Section 7 of the 'I&B Code' at the instance of 2nd and 3rd Respondents was not maintainable.

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 under Section 5(8). Merely grant of loan and admission of taking loan will *ipso facto* not treat the 2nd and 3rd Respondents as 'Financial Creditors', till they show that it complies with the substantive definition or any one 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'. As we find that 1st Respondent who signed and filed the application under Section 7 of the 'I&B Code' was not eligible to file the application not being a 'Financial Creditor', as held by the Adjudicating Authority, we hold that the petition at the instance of 2nd and 3rd Respondents were also not maintainable.

14. The Adjudicating Authority having failed to notice the aforesaid facts, we have no other option but to set aside the impugned order dated 2nd February, 2018 passed in CP No. (IB) 130/7/NCLT/AHM/2017, which is set aside.

15. In effect, order (s), passed by the Adjudicating Authority appointing any 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority

pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 7 of the 'I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The appellant 'Corporate Debtor' (company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

16. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed, and the 'Corporate Debtor' will pay the fees of the 'Interim Resolution Professional', for the period he has functioned. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhyaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

NEW DELHI

12th July, 2018

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