NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 494 of 2019

[Arising out of order dated 12th March, 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Mumbai in CP No. 190/IBC/NCLT/MB/MAH/2018]

IN THE MATTER OF:

Bank of India,
Asset Recovery Management Branch,
Bank of India Building,
Ground Floor, 28, S.V. Road
Andheri (West),
Mumbai- 400 058 .. **Appellant**

Versus

Shrenuj & Company Limited
405, Dharam Place 100-103,
N.S. Patkar Marg,
Mumbai- 400 007 .. **Respondent**

Present:

For Appellant: **Mr. Ashish Rana and Shri Ankit Paushyayan, Advocates**

For Respondents: **Mr. Mahesh Agarwal, Shri Arshit Anand, Shri Abhhijeet Sinha and Shri Saikat Sarkar, Advocates (for Intervener)**

J U D G M E N T

(25th February, 2020)

KANTHI NARAHARI, MEMBER (TECHNICAL)

That the present Appeal arises against the part of the order dated 12.03.2019 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in CP No. 190/IPC/NCLT/MB/MAH/2018.

2. The Adjudicating Authority admitted the Application filed by the Appellant herein.

BRIEF FACTS:

3. The Appellant- Bank filed an Application under Section 7 IBC against the Corporate Debtor, namely, Shrenuj & Company Limited/Respondent herein for initiating of Corporate Insolvency Resolution Process (in short "**CIRP**") that the Corporate Debtor/Respondent defaulted of debt in payment of loan advanced by the Appellant. The Adjudicating Authority admitted the Application, however made certain observations. According to the Appellant these observations amount to disparaging unwarranted remarks against the Appellant-Bank. Following are the observations made by the Adjudicating Authority.

> ...
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> *"31. Before we part with this order, this Bench wishes to take a serious note on the conduct of the bank authorities who have granted financial facilities in thousands of crores of rupees on a mere pledge of alleged fake diamonds, as per their own allegations now levelled by the Financial Creditor. It is worth to ponder upon the fact that if the diamonds were fake, the bank authorities must not have been inclined to grant the loan facilities. However, as held in Director of Income Tax V. Bharat Diamond Bourse,*

Order dated 16.12.2002 [(2003) 1 SCC 741], Para 36 says:

> *"....It is wholly unnatural, because one does not expect hard-nosed businessmen to part with an amount of 70 lacs without even recording an agreement under which it is paid, nor without agreeing upon the precise terms of the lease. The story rings false from beginning to end, and yet the tribunal accepted it by saying, "as regards the bonafides of the transactions, in our opinion there is nothing to suspect the same". The Tribunal says, "there is a transparency about the entire transaction which nullifies any attempt to make out the transaction as something - unusual and out of the ordinary." That diamonds are not transparent, that they dazzle with a brilliance that blinds the eye seems to have escaped the notice of the tribunal. It undeservingly accepted the glib explanation of the assesse, though teeming with the improbabilities and strenous on credulity.*
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> *37. We, therefore, are of the view that the tribunal's conclusions on this issue are*

perverse and need to be interfered with. We affirm the conclusions arrived at by the assessing officer and the appellate authority to effect that ₹ 70 lakhs were lent to Bharat S. Shah for substantial periods during the previous years pertaining to the relevant assessment years, without interest and without adequate security."

32. Therefore, I am constrained to make an adverse observation, needless to mention, subject to correction on the final outcome of the investigation, that the shine/gleam of diamonds have blinded the eyes of the bank authorities that they did not even check the veracity of the securities pledged. When a loan is granted as a "cash credit limit/loan" to facilitate the running of a business, the bank authorities pledge the stock in trade. Against the pledge/hypothecation of the stock in trade, cash credit facility is granted, therefore, the stock is always under the strict scrutiny of the bankers. It is a general practice that the stock is valued at regular intervals and on the basis of the analysis of the value of the stock, the facility of the cash credit limit gets fluctuated. In the present case, naturally a

valuable stock was subject to hypothecation/pledge, stated to be diamonds valuing Rs. 959.04 Crores, because a huge loan of Rs. 205 Crores was sanctioned. While granting loan it was obligatory on the bank authorities to check and verify the stock hypothecated by preparing an inventory of the stock in trade duly certified by the management and if deemed necessary, by a valuer. It is also strange that a valuable stock was seized by the authorities but without proper recording of inventories and without obtaining the signatures of the management of the debtor company. All such allegations and many more are definitely to be investigated in-depth.

33. That the above discussion, thus leads to one conclusion that first this Corporate Debtor be put under insolvency proceedings and thereafter simultaneously investigation be carried out so that the interest of all the stakeholders can be watched and protected. The appointed IRP shall communicate this order to all the connected Authorities namely, Enforcement Directorate, Economic Offences Wing, Income Tax Department and Serious Fraud Investigation Office etc. to take due cognizance of this insolvency order for further action."

..

4. Learned Counsel for the Appellant submits that the Adjudicating Authority once it reached a conclusion that there is admission of default by the Corporate Debtor and admitting the Corporate Debtor to CIRP, adverse remarks were blatantly unwarranted and unwanted. It is submitted that the Appellant/Financial Creditor had extended various financial facilities and non- fund based facilities to the tune of Rs. 205.00 Crores from the year 2005 onwards. The Appellant preferred an Application under Section 7 of IBC on 06.01.2008 committing default by the Respondent herein. The Respondent filed Reply Affidavit to the said Application contesting its admission to CIRP. In the Reply, the Respondent alleged that upon an Application of ICICI Bank to the Debt Recovery Tribunal, where recovery proceedings are pending against the Corporate Debtor the Debt Recovery Tribunal, Mumbai-I appointed a 'Receiver to take possession of the movables. The ICICI Bank subsequently sub-delegated its responsibilities to some of its Officer to work in the capacity as Receiver. The Officer of the ICICI Bank along with Police personnel visited the premises of the Respondent and seized diamonds. The Respondent had further alleged that the High Value Fancy coloured original Diamonds have been replaced with coloured stone having hardly any market value. It is further submitted that while the actual market value of the total stone seized was Rs. 1561.87 Crores at the time of seizure, the valuation report valued the stock only to Rs. 199.51 Crores. The Respondent further contended that the stock has been tampered and

misappropriated. The Respondent has further stated that it has filed a Complaint before Economic Offences Wing, Mumbai (in short '**EOW'**) against ICICI Bank and the Appellant (Bank of India) for fraud cheating the Respondent and the investigation is in progress. Learned Counsel further submitted that when the investigation is in progress by some other authority, the Adjudicating Authority, before whom an Application seeking initiation of CIRP filed and having admitted the Application, would not have passed adverse remarks against the Appellant-Bank and the same is out of context and unwarranted. Further the learned Counsel submitted that there was no occasion or requirement for the Adjudicating Authority to examine or appreciate the evidence in this regard especially when the Corporate Debtor has already made a Complaint with the Economic Offences Wing. The said adverse remarks may affect and prejudice the investigation which are being carried out by the Economic Offences Wing as well as harm and spoil the reputation enjoyed by the Appellant. Further, learned Counsel submitted that the Adjudicating Authority failed to appreciate that the written words in official orders form permanent record which can affect severely jeopardise the reputation and goodwill of the Appellant Bank. Further the Adjudicating Authority erred in directing the Interim Resolution Professional to communicate the Impugned Order to all the concerned authorities namely, Enforcement Directorate, EOW, Income Tax Department and SFIO to take due cognizance of this Insolvency Order for further action. Learned Counsel relied upon the judgment of the Hon'ble Supreme Court in the matter of ***"State of Uttar Pradesh***

Vs. Mohammad Naim" reported in AIR 1964 SC 703. The Hon'ble Supreme Court at paragraph 11 held:

> *"It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider*
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> *(a) Whether the party in question had the opportunity of explaining or defending itself,*
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> *(b) whether there is any evidence on record bearing on that conduct justifying the remarks and*
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> (c) *whether the remarks were necessary for the decision of the case, as an integral part of it.*

5. Hon'ble Supreme Court in the matter of '***Om Prakash Chautala Vs. Kanwar Bhan and Ors.***" in Civil Appeal No. 1785 of 2014 on 31.01.2014 at paragraphs 13 & 14 held as under:

> ..
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> *"13. At this juncture, it may be clearly stated that singularly on the basis of the aforesaid principle the disparaging remarks and directions, which are going to be referred to hereinafter, deserve to be annulled but we also think it seemly to advert to the facet whether the remarks were really necessary to render the decision by the learned single Judge and*

the finding recorded by the Division Bench that the observations are based on the material on record and they do not cause any prejudice, are legally sustainable. As far as finding of the Division Bench is concerned that they are based on materials brought on record is absolutely unjustified in view of the following principles laid down in Mohammad Naim (supra):

> *It has been judicially recognized that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct.*

14. On a perusal of the order we find that two aspects are clear, namely, (i) that the Appellant was

not before the court, and (ii) by no stretch of logic the observations and the directions were required to decide the lis. We are disposed to think so as we find that the learned single Judge has opined that the order of suspension was unjustified and that is why it was revoked. He has also ruled that there has been arbitrary exercise of power which was amenable to judicial review and, more so, when the charges were dropped against the employee. Commenting on the second charge-sheet dated 15.3.2004 the learned single Judge, referring to the decisions in State of Andhra Pradesh v. N. Radhakishan MANU/SC/0278/1998 : (1998) 4 SCC 154, State of Punjab and Ors. v. Chaman Lal Goyal MANU/SC/0628/1995: (1995) 2 SCC 570, The State of Madhya Pradesh v. Bani Singh and Anr. MANU/SC/0251/1990: JT 1990 (2) SC 54 and P.V. Mahadevan v. M.D.T.N. Housing Board MANU/SC/0483/2005: (2005) 6 SCC 636, thought it appropriate to quash the same on the ground of delay. The conclusion could have been arrived at without making series of comments on the Appellant, who, at the relevant time, was the Chief Minister of the State."

6. The learned Counsel relied upon a judgment of the Hon'ble High Court of Chhattisgarh at Bilaspur in the matter of "Lambodar Patel Vs. State of Chhattisgarh and Ors.' 2016 CrLJ 2814 wherein the Hon'ble High Court held as under:

> ..
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> *"though judge has unrestricted right to express his views in any matter before him but there is corresponding duty in a judge not to make unmerited and underserving remarks specially in case of witnesses or the parties who are not before him affecting their character and reputation unless it is absolutely necessary for just and proper decision of the case and that too after affording an opportunity of explaining or defending that witness or the party as the case may be, judicial decisions must be judicial in nature and it must show judicial respect to the litigant/party, witnesses who come before the court for their cause. It is also well settled that this Court in exercise of inherent or extraordinary jurisdiction can expunge those remarks made by subordinate court following the three tests laid down in Mohammad Naim (supra), if it is really necessary to do so or prevent abuse of the process of the court or to secure the ends of the justice in exceptional*

cases, where those remarks would cause irreparable injury to the witness or party not before the court holding that retention of those undeserving remarks will cause harm to the person referred and the expunction will not affect the judgment rendered by the court"

..

7. In view of the reasons as stated and relying upon the judgment of Hon'ble Supreme Court and Hon'ble Chhattisgarh High Court, the Appellant prays this Bench to expunge the remarks.

8. Learned Counsel for the Respondent submits that the learned Adjudicating Authority at paragraph-32 of the Judgment clearly stated:

"32. Therefore, I am constrained to make an adverse observation, needless to mention, subject to correction on the final outcome of the investigation, that the shine/gleam of diamonds have blinded the eyes of the bank authorities that they did not even check the veracity of the securities pledged". …

9. Learned Counsel submitted that the said observations will be subject to the outcome of the final investigation and the Respondent-Corporate Debtor had complained to the Economic Offences Wing with

respect to the valuation of the diamond against ICICI Bank and the Appellant-Bank. Learned Counsel submitted that they have filed Reply before the Adjudicating Authority and they have a clear stand against admission of the Application under Section 7 of IBC and also on the merits of the case that the valuation of the stock took over six months i.e., from April, 2016 to February, 2017. ICICI Bank and the Appellant-Bank caused further process of valuation to be unreasonable, prolonged and protracted so as to hide/facilitate the misappropriation or tampering or loss or replacement with other goods of the stock which was in the custody and physical possession of the Joint Receivers.

10. The Respondent in their Reply filed before the Adjudicating Authority stated that on receipt of the valuation report on 02.04.2017, the Company detected glaring discrepancies/mistake in the value, quantity and quality of the stock. While the actual market value of the total stock seized was Rs. 1561.87 cores, at the time of seizure, the Valuation Report appeared to have valued the stock worth only Rs. 199.51 Crores. The Respondent contended that a comparison of the Valuation Report and the Panchnama/statement reveals huge discrepancy/loss in the stock taken from the Company's premises in terms of quantity, quality and value.

11. The learned Counsel for Respondent relied upon the Judgement of Hon'ble Supreme Court in the matter of "***ICICI Bank Vs. Shanti***

Devi Sharma and Others" reported in (2008) 7 SCC 532 at paragraph 9 held as under:

> …
> *"9. Given that the investigation had not been completed, the High Court could have prefaced its observations by stating that the facts were alleged. It did, however, note that '… perusal of the Complaint would reveal that the proximate cause of death … was on account of humiliation caused by the Bank people…" Reference to the "complaint" implies that its contents contain allegations, not facts. Moreover, the investigation was ongoing. Thus, it should have been understood that the High Court was referring to the alleged facts. That said, the Court could have been more careful to note that the facts that it discussed were alleged. Recognising as such, the Court clarified that its observations were not to influence or affect the proceedings."*
> …

12. Heard learned Counsel appearing for the respective parties. Perused the pleading and documents filed in their support. Prima facie, we are not dealing with the admission of the Application under Section 7 IBC in this case. We are, however, confined to whether the observations made at paragraphs 31, 32 & 33 of the impugned order

is germane in the context of admission of Application. The Application was filed under Section 7 of IBC by the Appellant.

13. A Financial Creditor, who intends to initiate CIRP, should file an Application before the Adjudicating Authority in Form-I under Section 7 read with Rule-IV of IBC (Application to Adjudicating Authority Rules, 2016). Form-1 contains V parts for adjudication the Application under Section 7 IBC. It is to be seen whether the Applicant is a Financial Creditor and the Debt duly payable in law by the Corporate Debtor.

When this Appeal came up for Admission as (Fresh Case), the Bench passed the following order on 06.05.2019. Paragraph-2 of the Order reproduced hereunder:

> ...
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> *"2. In the present case, we have to decide as to whether the Adjudicating Authority is empowered to make any observations as it goes through the Form-1, wherein a person is not supposed to write anything relating to fraud and fraudulent action taken by one or other party. It is also not clear whether the 'Corporate Debtor' will appear and state that they have acted in fraud for getting the loan sanctioned. In such situation, whether the Adjudicating Authority has jurisdiction to make any observation, though it gives notice where it has*

referred the matter before the Reserve Bank of India or the Central Government, which is a regulating body and may have taken a decision."

...

14. In view of the above, we need to decide whether the observation made by learned Adjudicating Authority will have any impact on the Appellant-Bank and on investigation which stated to be in progress.

15. Application under Section 7 of IBC, the Financial Creditor to initiate CIRP against the Corporate Debtor before the Adjudicating Authority when a default has occurred. The 'Creditor' has been defined in Section 3(10) of IBC means any person to whom a debt is owed and includes a Financial Creditor, an Operational Creditor, a Secured Creditor, an unsecured Creditor and a Decree holder. 'Debt' has been defined in Section 3(11) means a liability or an obligation in respect of a claim which is due from any person and includes a Financial Debt and Operational Debt. The 'Default' has been defined in Section 3(12) of IBC 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 paid by the Debtor or the Corporate Debtor as the case may be.

16. In view of default made by the Respondent-Corporate Debtor, the Appellant filed the Application before the Adjudicating Authority and the Adjudicating Authority admitted the Application and observed that the debt and default is concerned, the Corporate Debtor does not

deny the same. Further it is observed that the financial facilities have been duly granted and the amounts have been disbursed.

17. It appears that the learned Adjudicating Authority made certain observations at paragraphs 31,32 & 33 in the impugned order on the basis of the Reply filed by the Corporate Debtor therein. It is not out of place to mention that the Appellant-Bank granted cash credit facility/loan for running business of the Corporate Debtor against the pledge/hypothecation of the stock. The observation of the Adjudicating Authority is that the shine/gleam of diamonds have blinded the eyes of the bank authorities that they did not even check the veracity of the securities pledged. Further, it was observed that when the value stock was seized by the authorities, there was no proper record of inventories and without obtaining the clearance of the management of the Debtor Company, and all such allegations are needed to be investigated in depth.

18. It is apparent from the record that the Respondent-Corporate Debtor filed Counter Claims bearing Counter Claim (L) No. 793/2017 and counter Claim (L) No. 156/2018 against Appellant Bank and Members of BOI consortium. The Respondent also filed complaint against Appellant before EOW, Mumbai with respect to inter-alia the theft and criminal misappropriation of the Company's stock of Rs. 1561.87 Crores. Basing on above, the Respondent made allegations against Appellant Bank even before the Adjudicating Authority. It is also stated that the investigation is in progress. It is one of the

submissions of the learned Counsel for the Appellant that Debt Recovery Tribunal on an application made by the ICICI Bank appointed a Receiver to take stock of the Corporate Debtor and in compliance thereof, the Receiver taken possession of the seized stock of the Corporate Debtor. It is submitted that the Appellant-Bank and Consortium have acted in pursuance of the directions of the Debt Recovery Tribunal. However, the proceedings before the Adjudicating Authority are completely different. With respect to the Complaint made by the Corporate Debtor before the EOW and the investigation into the alleged fraud and misappropriation is concern, it is independent to the proceedings before the Adjudicating Authority. The investigation by EOW and the proceedings initiated by the Appellant before Adjudicating Authority are completely different and the learned Adjudicating Authority cannot take a view on the basis of the investigation by the other agencies.

19. We are of the view that the learned Adjudicating Authority while recording the observations at paragraph-32 has stated that the adverse observation is subject to correction on the final outcome of the investigation. Therefore, the Adjudicating Authority had categorically stated that the observations made in paragraphs 31,32 & 33 are subject to outcome of the investigation. We are of the view that the Adjudicating Authority expressed its anguish in relation to the alleged averments made in the Reply. However, the general observations made as to what is done when such loans are granted were avoidable.

Similarly, the observations made with regard to stock seized in proceeding before Debt Recovery Tribunal at the instance of other Bank ICICI were also avoidable as it was not matter before Adjudicating Authority. In any case, the Investigating Agencies are to act independently and the observations are not have any impact on the Insolvency Resolution Process which is under progress. The Hon'ble Supreme Court in the matter of "***State of Uttar Pradesh Vs. Mohd. Naim"*** (supra) in paragraph - 11 held that … *matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider*

(a) Whether the parties in question had the opportunity of explaining or defending itself,

(b) whether there is any evidence on record bearing on that conduct justifying the remarks and

(c) whether the remarks were necessary for the decision of the case, as an integral part of it.

…

20. Learned Counsel for the Appellant relied upon the above decision. However, in the facts of the present case, the Adjudicating Authority has already observed that the adverse observation will be subject to final outcome of the investigation. The Hon'ble Supreme Court in the matter of "***ICICI Bank Vs. Shanti Devi Sharma and***

Others" reported in (2008) 7 SCC 532 (supra) held in paragraph-9 ..... "*the Court could have been more careful to note that the facts that it discussed were alleged. Recognising as such, the Court clarified that its observations were not to influence or affect the proceedings.*"

21. We find that the adverse observations made by Adjudicating Authority, being admittedly subject to correction in investigation, were avoidable. They will not affect investigation in any manner or be basis to hold adversely against Appellant Bank or its officials. For the purpose of finding debt due and default for admitting Application it was not possible to accept defence of valuation claimed in averments vis-à-vis valuation done in record of seizure referred. Adjudicating Authority could not have decided such averments.

22. The Appeal is disposed accordingly. No orders as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

(Kanthi Narahari)
Member(Technical)

(V P Singh)
Member(Technical)

Ahs