

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 163 of 2018**

[Arising out of Order dated 4<sup>th</sup> April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench in Company Petition No. (IB)-197(ND)/2018]

**IN THE MATTER OF:**

**Ramesh Kumar Suneja**

Promoter of M/s Pawan Buildwell Pvt. Ltd.  
Registered Office at: 59-A, Lane C5, Central Avenue,  
Sainik Farms, New Delhi – 110062.

**...Appellant**

**Vs**

**Brij Mohan Sahni**

R/o: J-511A, Lane W, 16, Western Avenue,  
Sainik Farms, New Delhi – 110062.

**....Respondent**

**Present:**

**For Appellant:** Mr. Virender Ganda, Sr. Advocate with Mr. Navin Kumar, Mr. Vishwadeep Hooda and Ms. Shelly Khanna, Advocates.

**For Respondent:** Mr. Krishnendu Datta, Mr. A. K. Prasad, Mr. Sinha Shrey Nikhilesh and Mr. Sumit Sinha, Advocates.

## **J U D G M E N T**

### **SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant – ‘Ramesh Kumar Suneja’ (Promoter of Corporate Debtor) challenged the order dated 4<sup>th</sup> April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, in Company Petition No. (IB)-197(ND)/2018 whereby and whereunder the application preferred by the Respondent under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’) against ‘M/s Pawan Buildwell Pvt. Ltd.’ (Corporate Debtor) has been admitted, order of moratorium has been passed and Interim Resolution Professional has been appointed.

2. Learned counsel for the Appellant submitted that the application under Section 7 filed by Respondent was barred by *principle of res judicata*. According to him, the Adjudicating Authority failed to appreciate that for same amount an application under Section 7 was filed by a partnership firm – ‘M/s Gay Printers’, which was dismissed on 25<sup>th</sup> November, 2011 on merit. The Review Application preferred thereafter was dismissed by the Adjudicating Authority and appeals were also dismissed by this Appellate Tribunal.

3. In the earlier application plea was taken that Late Mr. Surinder Mohan Sahni entered into partnership with Mr. Brij Mohan Sahni and after death of Mr. Surinder Mohan Sahni on 2<sup>nd</sup> October, 2015, partnership between Mr. Surinder Mohan Sahni and Mr. Brij Mohan Sahni came to an end and firm stood dissolved. Mr. Rasik Sahni entered into partnership with Mr. Brij Mohan Sahni on 3<sup>rd</sup> October, 2015 and the new partnership firm took all the assets and liabilities of the old partnership firm i.e. partnership firm between Mr. Brij Mohan Sahni and Late Mr. Surinder Mohan Sahni.

4. Originally, 'M/s Gay Printers' a partnership firm of Mr. Brij Mohan Sahni and (Late) Mr. Surinder Mohan Sahni granted a loan of Rs.1 crore to the Corporate Debtor. After the death of (Late) Mr. Surinder Mohan Sahni, the partnership firm was dissolved. Subsequently, Mr. Brij Mohan Sahni claimed to have constituted another firm and claimed to be 'Financial Creditor' of the Corporate Debtor with regard to loan of Rs.1 crore which was given by 'M/s Gay Printers'.

5. In the present case we find that Mr. Brij Mohan Sahni filed an application under Section 7 on behalf of 'M/s Pawan Buildwell Pvt. Ltd.' (Corporate Debtor). In the impugned order following facts noticed by the Adjudicating Authority:-

*"7. Mr. Surinder Mohan Sahni, who was unmarried and is survived only by his siblings, executed*

*and left behind a WILL dated 17.03.2015 bequeathing his assets to them. In terms thereof, his 50% share in M/s Gay Printer devolved exclusively upon his partner and brother Brij Mohan Sahni, the petitioner herein. It is therefore submitted that all assets of the erstwhile partnership firm M/s Gay Printers, including the loan of Rs.1 crore given to the Corporate Debtor, now sole vest with the petitioner. He has therefore now filed the present petition against the Corporate Debtor for its inability to repay the financial debt as the successor-in-interest and the sole beneficiary of the dissolved partnership M/s Gay Printers.”*

6. The objection raised by the Corporate Debtor was not accepted by the Adjudicating Authority with following observations:-

*“9. This Bench is unable to appreciate the resistance offered by the Corporate Debtor. The principles of res judicata would not be applicable to the facts of this case. This is because while the earlier petition IB No.IB-301/ND/2017 was filed by the Partnership Firm M/s Gay Printers, the present petition has been filed by Mr. Brij Mohan Sahni in his individual capacity. The parties to the lis were therefore distinct*

*and separate. Further, the rejection of the petition in that case was not on merits but on the locus of the new partnership firm to claim the Financial Debt. In the absence of a decision on the merits of the case, res judicata cannot be invoked.”*

7. Earlier ‘M/s Gay Printers’ claimed to be the Financial Creditor and filed application under Section 7 against ‘M/s Pawan Buildwell Pvt. Ltd.’ in respect to the same amount. The case was registered as Company Petition No. (IB)-301(ND)/2017 and the Adjudicating Authority observed as follows:-

*“15. As per the application in Form 1 filed in the present case, at Part 1 the applicant Gay Printers claims itself as the financial creditor with date of incorporation as 1.4.1967. The applicant has failed to disclose here that it is a different partnership firm incorporated on 03.10.2015. At Part IV of Form 1 also there is a claim that applicant gave rupees one crore to the respondent during April, 2014. In the application and in the brief facts and list of dates, it was projected as if the applicant (Gay Printers partnership firm incorporated on 03.10.2015) and the earlier partnership firm (Gay Printers) as one and the self-same entity. The applicant failed to disclose complete and correct facts in Form 1.*

*The applicant has failed to disclose in Form 1 that it is a separate partnership firm commenced vide partnership deed dated 3<sup>rd</sup> October 2015. Only when objection was raised by respondent, the applicant admitted that it is a different entity separate from the earlier Gay printers partnership firm, who had given loan of 1 crore to the respondent company. The applicant has not come with clean hands, as the disclosure in the application was not full and true. On this count alone the application is liable to be rejected.*

16. *It is further seen that the applicant has claimed that the new partnership firm (applicant herein) has taken over all the assets and liabilities of the old firm. In its additional affidavit filed on 17.10.2017 applicant has admitted that consequent upon death of one of the two partners, the earlier firm stood dissolved on 02.10.2015. With the dissolution, the earlier partnership firm came to an end. In normal course both sides of the two partners are entitled to their respective property/interest. On the date of dissolution i.e. on 02.10.2015 the share of the property in the firm of the deceased partner devolves on his legal heirs. The other living partner cannot take entire assets of the firm at the*

*back of the legal heirs of the deceased partner on the next date. There is no whisper as to how the share of the deceased partner was transferred to the surviving partner and his son just on the next day of the death/dissolution. How there was transfer of the interest of the deceased partner, has not been made clear. It has not been made clear as to how the applicant new firm incorporated on 03.10.2015 with father and son on the one side took over the entire business including the share/property of the deceased partner. Part V of Form 1 mandates requirement of documents interalia to prove as to how the claimed financial debt, entirely belongs to the applicant firm to the total exclusion of the legal heirs of the deceased partner. There is absolutely no documentary evidence to establish that the entire assets and liability of earlier firm were transferred to the applicant to the total exclusion of the legal heirs of the deceased partner. Determination of legal heirs and how their shares were to be transferred requires evidence and trial. This is not an application by the surviving partner of the earlier dissolved firm, for his portion of the debt. The applicant firm could not prove that it is the financial creditor in respect of the entire claim of*

*financial debt of 1 crore with interest originally belonged to the earlier firm. On this score also the application deserves rejection.”*

8. Having heard learned counsel for the parties and taking into consideration the facts, we hold that the Adjudicating Authority has failed to take into consideration that there is a dispute as to who is the Financial Creditor, i.e., ‘M/s Gay Printers’ or ‘Mr. Brij Mohan Sahni’? Mr. Brij Mohan Sahni filed application on behalf of ‘M/s Gay Printers’, therefore, subsequent application filed by himself claiming to be the Financial Creditor could not have been accepted, as different stand cannot be taken by the same person. In *“Innoventive Industries Ltd. Vs. ICICI Bank and Ors.” – (2018)1 SCC 407*, the Hon’ble Supreme Court while dealing with application under Section 7 held:-

**“28.** *When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III,*



*particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”*

9. In the present case there is nothing on record to suggest that the Respondent – ‘Mr. Brij Mohan Sahni’ had given a loan. On the contrary claim made in two separate applications, one filed by ‘M/s Gay Printers’ and

another by 'Mr. Brij Mohan Sahni' shows that loan was not given by Mr. Brij Mohan Sahni, but a firm. Therefore, the present application under Section 7 filed by Mr. Brij Mohan Sahni was not maintainable. Para 7 of the impugned order (quoted in Para 5 above) itself shows that the claim of Mr. Brij Mohan Sahni is based on the loan given by M/s Gay Printers.

10. In this background there being a dispute as to who is the 'Financial Creditor', we hold that the application under Section 7 preferred at the instance of Mr. Brij Mohan Sahani was not maintainable. For the reason aforesaid we set aside the impugned order dated 4<sup>th</sup> April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, in Company Petition No. (IB)-197(ND)/2018.

11. In effect, order(s) passed by Ld. Adjudicating Authority appointing 'Resolution Professional', declaring moratorium, freezing of account, and all other order(s) passed by Adjudicating Authority pursuant to impugned order and action taken by the 'Resolution Professional', including the advertisement 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, 2016 is dismissed. Learned Adjudicating Authority will close the proceeding. The 'Corporate Debtor' is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

12. Learned Adjudicating Authority will fix the fee of the 'Resolution Professional', and the 'Corporate Debtor' will pay the fees, and other cost incurred by him. The appeal is allowed with aforesaid observation and direction. No Cost.

[Justice S. J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

**NEW DELHI**

**7<sup>th</sup> August, 2018**

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