

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

**Company Appeal (AT) (Insolvency) No. 154 of 2019**

[ arising out of Order dated 2<sup>nd</sup> January, 2019 by NCLT, Principal Bench,  
New Delhi in CP No. (IB) – 792/PB/2018 ]

**IN THE MATTER OF:**

**M/s. Carnoustie Management India Pvt. Ltd.  
19-A, 8<sup>th</sup> Floor, Film City,  
Section 16A, Noida,  
Gautam Budh Nagar,  
Uttar Pradesh – 201 301**

**...Appellant**

**Versus**

**CBS International Projects Pvt. Ltd.  
S-2, Manish Chamber,  
LSC Plot No. 6,  
Mayur Vihar,  
New Delhi – 110 091**

**...Respondent**

**Present:**

**For Appellant :**

**Mr. Amit Sibal, Senior Advocate with  
Mr. Rudreshwar Singh, Mr. Gautam Singh, Ms.  
Radhika Malik and Mr. Rahul Singh, Advocates**

**For Respondent :**

**Mr. Arun Kathpalia, Senior Advocate with  
Mr. Ashish Aggarwal and Mr. Gurcharan Singh,  
Advocates**

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

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant – ‘M/s. Carnoustie Management India Pvt. Ltd.’ moved  
an application under Section 7 of the ‘Insolvency and Bankruptcy Code, 2016

('I&B Code', for short) against the 'CBS International Projects Pvt. Ltd. (Corporate Debtor). The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi by impugned order dated 2<sup>nd</sup> January, 2019 held that mere grant of loan *ipso facto* do not treat the Appellant as 'Financial Creditor' within the meaning of Section 5(7) of the 'I&B Code'. The loan granted was not disbursed against consideration for time value of money and thereby does not come within the meaning of Section 5(8) 'Financial Debt'.

2. The case of the Appellant is that the Respondent - 'CBS International Projects Pvt. Ltd.' was incorporated on 29<sup>th</sup> March, 2007 and was a subsidiary of the Appellant. It was on a special purpose vehicle of the Appellant for undertaking large real estate project in India. The Respondent was granted the facility of Loan Agreement dated 11<sup>th</sup> May, 2007 by the Appellant and agreed to give financial assistance up to Rs. 40 Crores towards the Application money and instalment payments, etc. to be paid for allotments of plots at NOIDA.

3. Clause 5(a) of the Loan Agreement provided interest @ of 12% per annum. It also provides for penal interest at the rate of 24% per annum. However, there was a Moratorium for payment of interest which ends upon the happening of amongst other events, the Respondent ceased to be the subsidiary of the Appellant.

4. The Respondent submitted its application on 6<sup>th</sup> August, 2007 for allotment of plot at NOIDA. As such the Respondent got the benefit of the application for allotment because of the Appellant's financial assistance.

5. Further, the Respondent, which was a subsidiary of the Appellant, ceased to remain so since 13<sup>th</sup> August, 2015. By way of the Share Purchase Agreement (**SPA**) dated 13<sup>th</sup> August, 2015, Mr. Sanjay Rastogi along with his family members purchased 100% shares of the Respondent from the Appellant.

6. The Loan amount was disbursed by the Appellant to the Respondent on various dates starting from 6<sup>th</sup> August, 2007 till 13<sup>th</sup> August, 2015. Further, loan was disbursed on 1<sup>st</sup> July, 2016 and 21<sup>st</sup> July, 2016. The loan amount was to be repaid on demand of the Appellant in terms of Clause 5 (b) and 5(d) of the loan agreement which was so made on 28<sup>th</sup> March, 2018. However, it was denied by the Respondent by letter dated 13<sup>th</sup> April, 2018.

7. Learned counsel for the Appellant submitted that in terms of Clause 6.3 of the SPA given by Mr. Sanjay Rastogi is bound by the loan documentation entered into by the company and outstanding loan amount as on 13<sup>th</sup> August, 2015 is Rs.49,03,54,672/- of which around Rs. 34 Crores is due to the Appellant as per Clause 5(b)(ii) of the 'Loan Agreement', the Appellant is entitled to interest from 1<sup>st</sup> April, 2016.

8. It was submitted that the loan amount has been admitted by the Respondent in its balance-sheets for the financial years 2008 to 2016. However, in the balance sheet for the financial year 2016-17, the loan is maliciously shifted under the heading 'trade payables-sundry creditors' to use it as a self-serving shield in any litigation.

9. It is also submitted that pursuant to the notice dated 30<sup>th</sup> August, 2016 under Section 13(4) of the SARFAESI Act to the Registrar of Companies, the Respondent admitted its liability to the extent of Rs.34,31,87,965 owed to the Appellant. Learned counsel for the Appellant referred to Section 5(7) of the 'I&B Code' and submitted that the loan given to the Respondent was not interest free. It was so disbursed for purchase of land for construction of building thereon i.e. for the business of the Respondent. The interest was become payable from 1<sup>st</sup> April, 2016 as the Respondent was no longer a subsidiary of the Appellant with effect from 13<sup>th</sup> August, 2015.

10. Learned counsel for the Respondent submitted that the alleged debt was not covered under Section 5(8) of the 'I&B Code'. On the face of the record, it was not disbursed against interest or consideration for time value of money. Mere grant of loan and admission of taking loan will not *ipso facto* treat the Appellant as a 'Financial Creditor' within the meaning of Section 5(7) of the 'I&B Code'.

11. It was submitted that even as per the audited balance-sheets of the Appellant Company, there was no interest for the year ending 31<sup>st</sup> March, 2009 and 31<sup>st</sup> March, 2010. Even after that, the Respondent ceased to be a subsidiary of the Appellant since 2015, no interest has been provided in the books of accounts/financial statements of the Respondent. Reliance has been placed on Clause 5(b)(ii) of the alleged 'Loan Agreement' by the Appellant is baseless, which allegedly specified that the interest will be levied upon the Respondent.

12. According to the Respondent, in the years 31<sup>st</sup> March, 2016 and 31<sup>st</sup> March, 2017, the record of the Respondent shows that it had not specifically mentioned loan amount or interest payable thereon.

13. It was further contended that there was no liability on the part of the Respondent to pay the alleged loan amount to the Appellant. As per Clause 2.1 of the 'Share Purchase Agreement' (SPA), the consideration of Rs.6.60 Lakhs was arrived at after taking into account the share of liabilities to be borne by the Appellant. So, admittedly certain liabilities will be borne by the Appellant Company.

14. It was also contended that the Respondent was in heavy losses for more than Rs. 40 Crores approximately due to delay in execution of the project between 2007 – 2015 by the Respondent, which resulted into consequential heavy interest and penalty by NOIDA Authority. The said losses were accumulated in the form of fictitious closing stock on the assets side. The acquirer agreed to purchase the shares on the condition that the loan liability was not to be borne by the Respondent. On the contrary, the same was to be adjusted in future in a tax efficient manner.

15. The aforesaid fact is further corroborated from Clause 6 of the SPA, wherein under the obligations of the acquirer, it has been specified that the acquirer shall be responsible for the advances of Rs. 20 Crores approximately received from the customers and Rs. 48 Crores approximately payable to the NOIDA Authority. It is admitted position that as on the date of SPA the liability of NOIDA Authority was deliberately understated by Rs. 22 Crores approximately, which in fact the Appellant was liable to pay to the

Respondent. In the said Clause 6 of the SPA or any other clause of the SPA, there was no covenant for the acquirers to pay the alleged loan amount of Rs. 33 Crores. It is submitted that the Loan Agreement, alleged to be dated 11<sup>th</sup> May, 2007, is false and fabricated document and there was no original Loan Agreement and in fact criminal proceedings are pending against the Appellant and as such the Appellant is deliberately not producing the forged document. Further, according to the Respondent, no Board Resolution passed either by the Appellant or the Respondent for entering into the alleged 'Loan Agreement'.

16. From the record of the Balance-sheet of the Respondent company for the year ending 2012-2013 were signed by Mr. Rajesh Malik and Mr. Randeep Waraich, Directors of the Appellant. It is duly acknowledged in the said Balance-sheet that there is no term of repayment were stipulated. This is the reason that the Respondent alleged that the forged Loan Agreement was made in which there is a specific clause of repayment.

17. The legal notice dated 28<sup>th</sup> March, 2018 was issued by the Appellant and therein they have not referred to the 'Loan Agreement' dated 11<sup>th</sup> May, 2007. In the reply dated 14<sup>th</sup> April, 2018, the Respondent specifically mentioned that "it is also denied that amongst the documents handed over to my client there was any loan agreement between your client and my client".

18. In the rejoinder notice dated 2<sup>nd</sup> May, 2018, despite specific objection by the Respondent, no alleged loan agreement was referred to by the Appellant. The Appellant claimed interest @ 24% per annum totally contrary to 12% alleged to be contained in the Loan Agreement.

19. The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi noticed the aforesaid fact and observed :

*“Despite serious dispute on the very existence of the loan agreement, applicant has failed to explain as to how; under what circumstances and since when the loan document was given to the borrower. Except a word of mouth, no acknowledgement or papers in this regard have been placed. Neither original loan agreement has been produced nor proper explanation is on record. It is the duty of the applicant to plead and produce evidence. We are constrained to draw adverse inference, in the absence of original loan agreement and for want of adequate explanation in this regard.”*

20. The Respondent placed reports of two experts dated 29<sup>th</sup> July, 2018 and 4<sup>th</sup> August, 2018 before the Adjudicating Authority in support of the contention that the alleged Loan Agreement dated 11<sup>th</sup> May, 2007 is a forged one. The Appellant failed to explain as to why the ‘Expert’s opinion’ is to be ignored.

21. Before the Adjudicating Authority, the Respondent has placed on record the ‘Annual Returns’ of the company for the year ending 31<sup>st</sup> March, 2008 to show that the company was incorporated on 29<sup>th</sup> March, 2007 and that as on 11<sup>th</sup> May, 2007 i.e. the date of the Loan Agreement, the Appellant was not a shareholder of the Respondent company and the Respondent was not a subsidiary of the Appellant.

22. It is not in dispute that the Respondent was a subsidiary of the Appellant and the Respondent ceased to be wholly owned subsidiary after purchase of the share from third party.

23. In view of the aforesaid fact and in absence of any genuine document, on the strength of ex-agreement of which original copy was not produced before the Adjudicating Authority, it is not desirable to hold that the Appellant is a 'Financial Creditor' of the Respondent Company. We may mention that we have not gone into the question of limitation to decide whether the application under Section 7 of the 'I&B Code' was maintainable as the Respondent having ceased to be subsidiary of the Appellant since 31<sup>st</sup> August, 2015, which will be the date of default, as the aforesaid issue was not raised before the Adjudicating Authority.

The Appeal is accordingly dismissed. No order as to costs.

[Justice S.J. Mukhopadhaya]  
Chairperson

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

[ Kanthi Narahari ]  
Member (Technical)

New Delhi

5<sup>th</sup> February, 2020

/ns/