

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1025 of 2019

IN THE MATTER OF:

Padmaiah Vuppu

...Appellant

Vs

Reliance Capital AIF Trustee Company Pvt. Ltd. & Ors.Respondents

Present:

**For Appellant: Mr. Darpan Wadhwa, Sr. Advocate with
Mr. Somiran Sharma, Ms. Aishwarya Nabh and
Mr. Tushar Bhardwaj, Advocates.**

**For Respondents: Ms. Aanchal Tikmani and Mr. Amit Agrawal,
Advocates.**

ORDER

14.10.2019: The Respondent – ‘Reliance Capital AIF Trustee Company Pvt. Ltd.’ alongwith Another filed application under Section 7 of Insolvency and Bankruptcy Code, 2016 (for short ‘I&B Code’) for initiation of Corporate Insolvency Resolution Process against ‘M/s Fortuna Projects (India) Private Limited’ (Corporate Debtor). The Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench by impugned order dated 9th August, 2019 having admitted the application under Section 7, the present appeal has been preferred by one of the Director/ Shareholder.

2. The appeal has been preferred after delay of 12 days but grounds have been explained. Having heard Mr. Darpan Wadhwa, learned senior counsel for the Appellant and Ms. Aanchal Tikmani, learned counsel for ‘M/s Reliance Capital AIF Trustee Company Pvt. Ltd.’ and being satisfied of the grounds, delay of 12 days in preferring the appeal is condoned. I. A. No. 3080 of 2019 stands disposed of.

3. The case of the Appellant is that 'M/s Reliance Capital AIF Trustee Company Pvt. Ltd.' disbursed loan in favour of 'M/s Fortuna Buildcon India Pvt. Ltd.' (Principal Borrower). While granting such loan, the purported guarantee was given by 'M/s Fortuna Projects (India) Private Limited' (Corporate Debtor) through the erstwhile Managing Director. According to the counsel for the Appellant, the Managing Director had no jurisdiction to provide such guarantee on behalf of 'M/s Fortuna Projects (India) Private Limited'. Though such plea has been taken but it is not disputed that Corporate Guarantee was given by the Corporate Debtor to 'M/s Reliance Capital AIF Trustee Company Pvt. Ltd.' (Financial Creditor) in favour of the Principal Borrower.

4. It is submitted that the Corporate Guarantee was given by the Managing Director of the Corporate Debtor against the provisions of Section 185 of the Companies Act, 2013 and no Board or Special Resolution was passed. However, it is not in dispute that the Corporate Guarantee was executed on 2nd September, 2014 and since then the matter was not challenged by any of the Shareholder / Director of the Corporate Debtor before any competent authority or Court of Law.

5. In such circumstance, it is not open to any Shareholder/ Director/ Managing Director to raise such issue in petition under Section 7 of the I&B Code, as the Adjudicating Authority has no jurisdiction to decide the question of legality and propriety of the Corporate Guarantee executed by the Corporate Debtor.

6. The Hon'ble Supreme Court in *"Innoventive Industries Ltd. Vs. ICICI Bank and Ors."* – (2018)1 SCC 407 observed as under:

“27. *The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under*

Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

- 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 sub-section (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.

7. In the present case, we find that the Adjudicating Authority has noticed that the debt is payable and there is default. In view of the above, we hold that the Adjudicating Authority has rightly admitted the application under Section 7. The appeal stands disposed of with aforesaid observations. No cost.

[Justice S. J. Mukhopadhaya]
Chairperson

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

(Kanthi Narahari)
Member (Technical)

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