

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 317 of 2018

[Arising out of Order dated 13th June, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in Company Petition No. (IB)37 (PB)/2018]

IN THE MATTER OF:

Rajesh Gupta

S/o Late Shri R. K. Gupta
Ex-Director of
Fantastic Buildcon Private Limited
R/o B-393, New Friends Colony,
New Delhi - 110065.

...Appellant

Vs

Mr. Dinesh Chand Jain

S/o Late Shri P. C. Jain,
R/o 10, Palam Marg, Vasant Vihar,
New Delhi - 110057.

Ms. Lata Jain

W/o Mr. Dinesh Chand Jain,
R/o 10, Palam Marg, Vasant Vihar,
New Delhi - 110057.

DJ Tradelink Private Limited

Having its registered office at
201, Surya Kiran Building,
19, Kasturba Gandhi Marg,
New Delhi - 110001.

....Respondents

Present:

For Appellant: Mr. Virender Ganda, Senior Advocate with Mr. Ashish Aggarwal, Mr. Ayandeb Mitra, Mr. Gurcharan Singh and Ms. Shreya Jain, Advocates.

For Respondents: Mr. Krishan Kumar and Ms. Srujana Suman Mund, Advocates for Respondent No.1.

Mr. Om Prakash Vijay, Resolution Professional.

J U D G M E N T

BANSI LAL BHAT, J.

The sole question that arises for consideration in this appeal is whether the Respondents - 'Dinesh Chand Jain and two others' come within the meaning of 'Financial Creditors' as defined under Section 5(7) and (8) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code').

2. Factual matrix of the case germane to the disposal of instant appeal may briefly be noticed. Respondents No. 1 and 2 – the erstwhile Directors of 'M/s Fantastic Buildcon Pvt. Ltd.' (Corporate Debtor) holding a total of 75% share holding of the Company advanced loan to the Corporate Debtor from time to time and also through Respondent No.3 Company at an interest @ 18% p.a., which after adjustment of some part of the loan amount returned by the Corporate Debtor stood at Rs.18,67,11,000/-. Respondents herein, claiming to be 'Financial Creditors' of the Company, through Respondent Nos. 1 and 2, entered into an agreement with one Mr. Lalit Modi, Director and Shareholder in the Corporate Debtor and the Company for sale of the shares of the Respondent Nos. 1 and 2 vide Share Purchase Agreement executed on 02.02.2015 by virtue whereof Mr. Lalit Modi and the Corporate Debtor jointly undertook to refund the entire unsecured loan of Rs.18,67,11,000/- to Respondents 1 and 2 on or before 31.03.2015. Since

the refund of unsecured loan in entirety was to take effect within a period of less than two months, the Share Purchase Agreement did not specifically provide for payment of interest on the unsecured loan. Upon failure of the Corporate Debtor to make payment of the outstanding amount to Respondents 1 and 2 in terms of the said Share Purchase Agreement dated 02.02.2015 despite Respondents 1 and 2 having duly complied with the conditions of Agreement by effecting transfer of their shares, Respondents 1 and 2 filed a petition under Section 7 of the I&B Code before the Adjudicating Authority for triggering the Corporate Insolvency Resolution Process against the Corporate Debtor. By virtue of order dated 11.06.2018, the Adjudicating Authority, upon being satisfied that a default has occurred and the petition was complete, admitted the petition, appointed Mr. Om Prakash Vijay as an Interim Resolution Professional and slapped moratorium imposing the prohibitions in terms of Section 14 of I&B Code. Aggrieved thereof the Corporate Debtor has filed the instant appeal assailing the order of admission of petition under Section 7 of the I&B Code passed by the Adjudicating Authority on the ground urged in appeal.

3. Heard learned counsel for the parties and perused the records. The sole question for consideration is whether Respondents - 'Dinesh Chand Jain and two others' come within the meaning of 'Financial Creditors' as defined under Section 5(7) of the I&B Code. The expression 'Financial Creditor' is defined as under:

“5(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;”

The expression ‘Financial Debt’ is defined under Section 5(8) of I&B Code, which reads as under:

“5(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;*

- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”*

Respondent's claim of being 'Financial Creditors' rests on the premises that the Corporate Debtor owes a financial debt to them. In order to demonstrate that the admitted debt falls within the definition of 'Financial Debt', Respondents relied upon the admitted factual position that Respondents No. 1 and 2 holding 75% shareholding of the company besides being Directors of the Corporate Debtor had lent various amounts to the Corporate Debtor for a hotel project and the principle amount was to the tune of Rs.18,67,11,000/-. Initially this amount was treated as a long time

borrowing at the same was reflected in the Account Books of the Corporate Debtor as also the balance sheet of the Company. This clearly borne out from the audited balance sheet of the Company, for the year ending 31.03.2014. Subsequently, Respondents No. 1 and 2 entered into a Share Purchase Agreement with the Corporate Debtor, which provided for transfer of entire shareholding of Respondents 1 and 2 by way of sale at par value to Shri Lalit Modi, Director and Shareholder of the Corporate Debtor. Whereas, Shri Lalik Modi and the Corporate Debtor jointly undertook to refund the entire unsecured loan of Rs.18,67,11,000/- to Respondents on or before 31.03.2015. Admittedly, the Share Purchase Agreement did not specifically provide for payment of interest on the said borrowings. This is primarily attributed to proximity between the execution date of said Share Purchase Agreement dated 02.02.2015 and the stipulated date of refund of the loan amount before 31.03.2015. That apart, it cannot be disputed that in terms of the Share Purchase Agreement, Respondents No. 1 and 2 transferred their entire shareholding being 7500 number of shares in favour of Shri Lalit Modi, who alongwith the Corporate Debtor undertook to refund the unsecured loan of Rs.18,67,11,000/- to them before 31.03.2015. It is also not in controversy that Respondents No. 1 and 2 performed their part of the contract envisaged under the Share Purchase Agreement by effecting transfer of shares in favour of Shri Lalit Modi. Respondents No. 1 and 2 also resigned from the Board of Directors of the Company paving way for induction of the nominee of Shri Lalit Modi to be inducted as Director in the

Company. It is manifestly clear that Respondents No. 1 and 2 abided by the terms of Share Purchase Agreement and expected the Corporate Debtor to refund the amount of Rs.18,67,11,000/- mutually agreed as outstanding unsecured loan amount before 31.03.2015, which had become payable. This is clearly borne out from the later portion of clause (2) of the Share Purchase Agreement, which reads as under:

“The second party and third party jointly undertake to outgoing shareholders to refund the unsecured loan of Rs.18,67,11,000/- to them or their nominee before 31.03.2015.”

It has already been noticed elsewhere in this judgment that the amount of loan was advanced by Respondents No. 1 and 2 to Corporate Debtor subject to payment of interest @ 18% p.a. and the amount of Rs.18,67,11,000/- stood outstanding as unsecured loan against the Corporate Debtor after adjusting the amount repaid to Respondents No. 1 and 2. It is in this factual background emerging from record that it can be said without any amount of ambiguity that the unsecured loan aforesaid represented the money borrowed against the payment of interest and in terms of clause (a) sub-section (8) of Section 5 of the I&B Code same tantamount to a debt disbursed against the consideration for the time value of money, which falls within the ambit of ‘Financial Debt’. It is apt to notice that the expression ‘debt’ defined under Section 3(11) means a liability or

obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Non-payment of such debt which has become due and payable and is not repaid by the Debtor or Corporate Debtor falls within the mischief of 'default' defined under Section 3(12) of I&B Code. It would therefore be futile on the part of learned counsel for the Appellant to contend that the unsecured loan aforesaid did not fall within the definition of 'Financial Debt'. The manner and circumstances in which the amount of loan was borrowed by the Corporate Debtor from Respondents No. 1 and 2 from time to time with stipulation of interest, leaving an outstanding liability of Rs.18,67,11,000/- coupled with the fact that the Corporate Debtor jointly undertook to refund such unsecured loan to Respondents No. 1 and 2 in terms of clause (2) of the Share Purchase Agreement leaves no room for doubt that the outstanding unsecured debt had all the trappings of a 'Financial Debt'. Admittedly, Respondent No. 1 and 2 were treated as unsecured creditors and in terms of the Share Purchase Agreement they transferred their entire shareholding of 7500 shares in favour of Shri Lalit Modi. They were acknowledged as investors as regards the financial debt *qua* Shri Lalit Modi and the Corporate Debtor, the money having been borrowed initially and such investment having been made for earning interest. Refund of the investment was linked with the transfer of shareholding by the Respondents. Viewed thus, the Respondents can safely be held to be 'Financial Creditors'. Contention raised to the contrary being devoid of merit is repelled.

4. In view of the foregoing discussion, we are of the firm view that the impugned order does not suffer from any legal infirmity or factual frailty. There being no merit in this appeal, the same is dismissed.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

9th August, 2018

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