

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 906 of 2019

[Arising out of Order dated 20th August 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai in Company Petition (I.B.) No. 27 of 2019]

IN THE MATTER OF:

**Mr Rakesh Wadhwan
Shareholder**

**(Housing Development & Infrastructure Ltd.)
Wadhwan House, 32/A, Golf Links, Union Park
Bandra West, Mumbai – 400050**

...Appellant

Versus

**1. Bank of India
Head Office at Star House
C-5, G-block Bandra Kurla Complex
Bandra Mumbai – 400051**

...Respondent No.1

**2. Mr Abhay Narayan Manudhane
Interim Resolution Professional
201, Shubh Ashish, 129, Model Town
Andheri West, Mumbai – 400053
Maharashtra, India**

...Respondent No.2

Present:

**For Appellant : Dr U.K. Chaudhary, Senior Advocate with
Mr Farman Ali and Mr Ashish Verma, Advocates**

**For Respondent : Mr Arun Kathpalia, Senior Advocate with
Ms Meghna Rao, Advocate for R-2.
Mr A.K. Mishra, Advocate for R-1.
Mr Saurabh Upadhyay and
Ms Pallavi Pratap, Advocates for Intervenors.
Mr Rana Mukherjee, Senior Advocate**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal emanates from the Order of admission Dt. 20th August 2019 passed by the Adjudicating Authority/National Company Law

Tribunal, Mumbai Bench, Mumbai in Company Petition (I.B.) No. 27 of 2019, whereby the Adjudicating Authority has admitted the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**') against Housing Development & Infrastructure Limited ("HDIL"). The Parties are represented by their original status in the Company Petition for the sake of convenience.

2. These brief facts of the case are as follows:

The Respondent No.1 Bank of India filed an Application for Initiation of Corporate Insolvency Resolution Process on the ground that the Corporate Debtor committed default on 04th December 2018 in repayment of facilities granted to the extent of Rs. 522,29,06,768/-, under Section 7 of the Insolvency and Bankruptcy Code, 2016.

3. The Petitioner had subscribed to the issue of Non-convertible Debentures (from now on will be referred to as NCD's) offered by the Corporate Debtor to the extent of Rs.248,63,00,000/-. Further, the Petitioner executed the Term Loan facility to the extent of Rs.20,66,59,553/- to the Corporate Debtor. The Corporate Debtor with a view to enhancing the long term resources of the Company for financing the working capital requirements requested the lenders to subscribe to the debentures. The Lenders agreed to subscribe 1,15,000- NCD's of Rs.10,00,000/- each aggregating to Rs. 1150/- Crores and Green Shoes Options of Rs.517/- Crores (Five Hundred Seventeen Crores only). Out of the said debentures, the Petitioner alone has subscribed to the extent of Rs.422.50 Crores. The debentures were secured interalia by mortgage of the properties. The

Debenture Trust Deed dated 22nd March 2010, and other security documents were executed and after that amount was disbursed by the Petitioner. However, the Corporate Debtor committed default in debt servicing, and its account was classified as NPA.

4. The IDBI Trustee, i.e. the trustee of the debenture holders, issued a notice of demand on 08th July 2015 on behalf of Debentures Holders including the Petitioner/Respondent for an amount of Rs. 616,91,40,462.26. But the Corporate Debtor has failed to pay in terms of the demand. Therefore, on 06th December 2016, the IDBI Trusteeship Services Limited took possession of the mortgaged properties.

5. The Petitioner filed a Company Petition No.1788 of 2018 under Section 7 of the Code for Initiation of CIRP. During the pendency of the Petition, the Corporate Debtor proposed to settle the matter by submitting OTS dated 31st August 2018. Resultantly, the Petition was withdrawn. After that, the Corporate Debtor again committed default in making payment as per terms of OTS. The Corporate Debtor issued, post-dated cheques which were all also dishonoured. Therefore, the Petitioner vide letter dated 04th December 2018 revoked the OTS and called upon the Corporate Debtor to pay off Rs.522.30 Crores. The said amount is inclusive of interest.

6. After that, the Petitioner/Respondent filed the second Petition, which was admitted by the impugned Order and moratorium order was passed against the Corporate Debtor. The Appeal is filed mainly on the ground that impugned Order is in violation of the Principles of Natural Justice by not

allowing the Appellant Company to submit its Reply to the Company Petition No. 27 of 2019.

7. The Appellant has claimed that the Adjudicating Authority has failed to appreciate that the Application under Section 7 of the I&B Code read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is not complete. Further, the common Loan Agreement dated 13th October 2006 was made and executed by the Petitioner Bank and 17 other banks, but the Petitioner Bank has alone initiated the proceeding without taking consent of the other banks. No opportunity was given by the Adjudicating Authority to the Corporate Debtor to file a reply.

8. We have heard the arguments of the Learned Counsel for the parties and perused the records.

9. The Learned Counsel for the Appellant/Corporate Debtor emphatically raised the issue of the violation of the Principle of Natural Justice and stated that the Order had been passed without affording an opportunity to the Corporate Debtor to file Reply. It is further contended that the Adjudicating Authority has not given any finding of debt and default, and the Order has been passed even though the application was not complete.

10. It is important to the point that prior to this Company Petition No.27 of 2019, another Company Petition No.1788 of 2018 was filed by the respondent (Financial Creditor) against the Corporate Debtor under Section 7 of the Code, wherein the Corporate Debtor after putting appearance did not oppose the Company Petition, but offered a One Time Settlement (OTS),

which was approved by the Respondent Bank. After that, the Company Petition No.1788 of 2018 was permitted to be withdrawn vide Order dated 25th September 2018 passed by the Adjudicating Authority. In compliance of the OTS post-dated cheques were issued by the Corporate Debtor, which were all dishonoured. In the circumstances, the second Company Petition No.27 of 2019 under Section 7 of the Code is filed.

11. In the Company Petition No.27 of 2019, the Adjudicating Authority on 28th February 2019 passed the following Order;

“Both sides present. Counsel for the Corporate Debtor submits that they have the ability and desire to make the payment to the Petitioner in fact the Corporate Debtor has made the payments to the extent of Rs.691.00 Crores during the last 6 to 7 months to various financial institutions/Banks. Even though this Bench on 01.02.2019 adjourned the matter stating that no further time will be granted. It is the fit case for giving time as requested, considering the scope for settlement.

Accordingly, list this matter on 28.03.2019.”

[Verbatim copy)

12. Thus, it appears that the contention of the Appellant that no opportunity for filing reply is given is erroneous. It is clear that the Corporate Debtor had ample opportunity to file Reply but chose not to do so. On the contrary, the Corporate Debtor after putting an appearance in Court showed his ability and desire to make payment to the Petitioner Bank. On perusal of record from the paper book, it is apparent that again and again time was granted to the Corporate Debtor from 01st February 2019 to 28th

March 2019, in view of the possibility of the settlement. Appellant has also annexed a copy of Order of the Adjudicating Authority dated 08th April 2019 which is at page no. 347 of the paper book. It appears that on 08th April 2019 the Adjudicating Authority granted further time upto 30th April 2019 for making payment of Rupees Forty-Seven Crores in compliance with OTS. It is also on record that on 04th April 2019 both sides were represented before the Adjudicating Authority. Still, despite the failure of the Corporate Debtor in honouring the undertaking given to the Court, further three weeks was given for making payment in pursuance of the settlement. Appellant has also annexed a copy of a letter dated 26th July 2019 issued by the Corporate Debtor for granting further time for payment of Rs.96.50 Crores towards payment against One Time Settlement of NCD's and PMDO facilities. Copy of this letter is annexed (AnnexureA-11) is on page 354 of Appeal paper book. The above letter shows that the Corporate Debtor further sought time up to 09th August 2019 for making payment in response to the OTS. It is also on record that the Corporate Debtor again issued a letter to the Respondent Bank requesting further time to pay the upfront amount for consideration of OTS. All these correspondences clearly show that the Corporate Debtor was granted several opportunities by the Adjudicating Authority for arriving at a settlement. The second Petition was filed after the non-adherence to the terms of OTS, settled in earlier company petition No.1788 of 2018, which was withdrawn after Settlement in Court.

13. Based on the above discussion, it is beyond doubt that there was an admission of debt and default of more than Rs.1,00,000/-. Still, despite

taking several opportunities from the Adjudicating Authority for settlement with the Financial Creditor, the Corporate Debtor defaulted in making the payment. Therefore, the contention of the Appellant that Order has been passed without affording an opportunity for filing Reply, in violation of the principle of natural justice is without any basis.

14. It is the admitted position that for the same Financial Debt the earlier Company Petition No.1788 of 2018 was filed against the Corporate Debtor, which was not opposed and the Corporate Debtor offered One Time Settlement. Based on that offer the Adjudicating Authority permitted the withdrawal of the earlier Petition by its Order dated 25th September 2018.

15. It is also apparent that the Corporate Debtor in compliance of OTS issued post-dated cheques which were returned, dishonoured and Petitioner was constrained to file fresh proceeding under Section 7 of the Code, which was numbered as 27 of 2019. In the second Petition again, the Adjudicating Authority provided several opportunities to the Corporate Debtor considering the scope of the settlement. However, after the failure of any hope of settlement, the Order of admission was passed against the corporate debtor.

16. It is pertinent to mention that statutory provision under the Insolvency and Bankruptcy Code, 2016 does not permit to provide several opportunities to Corporate Debtor in hope of the settlement. However, the Adjudicating Authority has tried his best to afford ample opportunity to both the parties to settle the matter amicably. But despite that, the Corporate

Debtor has failed to make the payment or arrive at a settlement. In this case debt is of more than Rupees One Lac; default in repayment of such debt is admitted and application in Form-1 is also complete. Therefore the Adjudicating Authority has admitted the Petition by the impugned Order.

17. In view of our finding as aforesaid, no interference is called for against the impugned Order dated 20th August 2019. Therefore, Appeal fails. No order as to costs.

[Justice Bansilal Bhat]
Acting Chairperson

[V. P. Singh]
Member (Technical)

[Alok Srivastava]
Member (Technical)

NEW DELHI
13th JULY, 2020

pks/gc