

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 912-913 of 2019

[Arising out of order dated 9th July, 2019 and subsequent Order of Modification dated 29.07.2019 passed by the Adjudicating Authority, National Company Law Tribunal, Court No. IV at New Delhi in C.A. No. 184 of 2018 in CP(IB) No. 492/ND/2018]

IN THE MATTER OF:

- 1. Smt. Anamika Singh,**
Flat No. 351, Shree Awas RWA (L&T),
Sector-18B, DDA Flats, Dwarka,
New Delhi- 110 078
- 2. Mr. Anand Dubey, HUF**
E-263, Front LFG, Greater Kailash-1,
New Delhi- 110 048
- 3. Smt. Madhulika Chahal**
C-101, The Lions CGHS,
Devinder Vihar, Sector-56, Gurugram,
Haryana- 121 001
- 4. Mr. Dushyant Rana**
C-1/28, Top Floor,
Ashok Vihar, Phase-2,
New Delhi – 110 052
- 5. Mr. Pervinder Yadav**
VPO:- Nakhrola, Tehsil Manesar,
District- Gurugram
- 6. Mr. Shri Bhagwan,**
VPO: Nakhrola, Tehsil Manesar,
District – Gurugram
- 7. Mr. Ankit Yadav**
House No. 119/1,
VPO:- Nakhrola,
District – Gurugram, Haryana
- 8. Mr. Rajender Singh,**
House No. 119/1,
VPO:- Nakhrola,
District – Gurugram, Haryana

9. Mr. Pankaj Pahuja
House No. 1008, Sector-4,
Gurgaon (Haryana)

.. Appellants

Versus

1. **Shinhan Bank,**
Registered office:
701-702, 7th Floor,
Peninsula Corporate Bank,
Tower-1, GK Marg,
Lower Parel (West),
Mumbai- 400 013

Branch Office at:
3rd Floor, D-6,
South Extension Part-II,
New Delhi – 110 049

2. **M/s Sungil (I) Pvt. Ltd.**
Through: Mrs. Kiran Gola,
Plot No. 14, Sector-08,
IMT Manesar,
Gurgaon

3. **Mr. Rajesh Parakh,**
5/51, 2nd Floor, W.E.A. Karol Bagh,
New Delhi 110 005

.. Respondents

Present:

For Appellants: Mr. Ritesh Agrawal, Mr. Aishwarya Adlakha, Mr. Teejas Bhatia, Mr. Abhinav Akesh, Mr. Moni Cinmoy, Advocates

For Respondents: Mr. Abhishek Puri and Mr. V. Siddharth, Advocates for Respondent No. 1

Mr. Davesh Bhatia and Mr. Saurabh Kumar, Advocates for Respondent No. 2

Mr. M.K. Pandey and Mr. Deepak Parashar, Advocates for Respondent No. 3.

J U D G M E N T

(24th June, 2020)

KANTHI NARAHARI, MEMBER (TECHNICAL)

The present Appeal filed by the Appellants against the order passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Court No. IV, New Delhi) in Company Application No. 184 of 2018 in Company Petition (IB) No. 492/ND/2018 dated 9th July, 2019 whereby the Adjudicating Authority has declared that the Appellants are not falling under the category of Financial Creditors but may be un-secured Creditors who may avail other remedies to recover their debts. Appellants also challenged the subsequent modification order dated 29th July, 2019 modifying the order/Judgment dated 09.07.2019 passed in CA No. 184 of 2018 whereby the Adjudicating Authority rectified the corrections.

Brief Facts:

2. M/s Vaiva Metals and Alloys Pvt. Ltd. – Operational Creditor filed Company Petition(IB) bearing No. 492/ND/2018 against M/s Sungil (I) Pvt. Ltd. (Corporate Debtor)- Respondent No. 2 herein before the Adjudicating Authority and the Company Petition was admitted on 01.06.2018. Consequent to admission, Respondent No. 3 herein was appointed as Resolution Professional. Respondent No. 3 issued Public Notice calling upon the Creditors of the Respondent No. 2 (Corporate Debtor) to submit proof of claims. Pursuant to the said Public Notice,

the Appellants filed their respective Claims before the Respondent No. 3 and the details of the claims are given in para-3 at page No. 12 of the Appeal Paper Book. The details of loan of Appellant No. 1 are given at sub-Para (i) of paragraph-3, details of loan of Appellant No. 2 are given at sub-para (ii) of paragraph-3, details of loan of Appellant No. 3 are given at sub-para (iii) of paragraph-3, details of loan of Appellant No. 4 are given at sub-para (iv) of paragraph-3, details of loan of Appellant No. 5 are given at sub-para (v) of paragraph-3, details of loan of Appellant No. 6 are given at sub-para (vi) of paragraph-3, details of loan of Appellant No. 7 are given at sub-para (vii) of paragraph-3, details of loan of Appellant No. 8 are given at sub-para (viii) of paragraph-3 and details of loan of Appellant No. 9 are given at sub-para (ix) of paragraph-3 of the Appeal Paper Book. It is stated that the Appellants have advanced short terms loans and issued cheques to the extent of loans to the Corporate Debtor and in lieu of the said short term loans, the Corporate Debtor (Respondent No. 2) was paid interest per month. It is stated that the Respondent No. 2 failed to pay back said short term loans within the agreed period and as such, said short terms loans were extended with a condition that the interest on the said loans would be 5% per month. However, the interest on the short terms loans advanced by the Appellants varies from Appellant to Appellant. Some of the interest of the Appellants is shown as 4% and some Appellant's interest is shown as 3.3% per month.

3. It is submitted that the Respondent No. 3 sent an e-mail on 18.07.2018 to the Respondent No. 1 (Financial Creditor) stating that the first meeting of the Committee of Creditors (in short **CoC**) to be held on 25.07.2018. However, the Appellants contended that they were not called for the said meeting of the CoC. While so, the claims of the Appellants were accepted by the Respondent No. 3 (Resolution Professional) only to the extent of Principle Amount and the claims of the interest were not accepted the same were kept in abeyance by Resolution Professional. Respondent No. 3 reconstituted the CoC and the same was intimated to the Appellants vide e-mail dated 04.12.2018. At page 456, the reconstitution of the CoC shows the names of the Appellants and the details regarding the amounts claimed by the Appellants/Financial Creditors, amounts admitted and the percentage of voting rights of the Appellants. At the bottom of the Report dated 29.11.2018 it is stated that “the claims admitted are preferential and based on the information/documents received from the Financial Creditors. Only principle amount has been considered in case of Financial Creditors other than Shinhan Bank i.e., Respondent No. 1 herein. The rate of interest has not been finalised and will be taken up for discussion in CoC subject to the approval by the Hon’ble Adjudicating Authority. The claims are subject to further clarifications/documents to be provided by the Creditors.

4. Learned Counsel for the Appellants submitted that the learned Adjudicating Authority without going into the factual aspects, passed

the Impugned Order and declared that the Appellants are not falling under the category of Financial Creditors but may be unsecured creditors who may avail other remedies to recover their debts. Learned Counsel further submitted that the Appellants advanced loans to the Corporate Debtor against which interest was also paid for a stipulated period of time and Appellants cannot be Operational Creditors. He further submitted that the loans advanced by the Appellants fall within the purview of the Financial Debt. Therefore, the Appellants are also to be considered under the definition of Financial Creditors. He further submitted that the Appellants are entitled to file Application under 7 of Insolvency and Bankruptcy Code, 2016 (in short '**IBC**') for invoking Corporate Insolvency Resolution Process (in short '**CIRP**') and not barred by Section 11 of IBC and therefore, they cannot be barred from being part of CoC as Financial Creditors.

5. Learned Counsel for the Appellants further submitted that the Adjudicating Authority dealt with the issue that whether the loans advanced by the Appellants to the Corporate Debtor are deposits within the purview of Section 73 of the Companies Act, 2013 and gave a categorical finding in the Impugned Order that the money advanced by the Appellants to the Corporate Debtor is not deposit but loans advanced to the Corporate Debtor. Learned Adjudicating Authority, however, termed the interest rates on the loan amounts to be exorbitant and therefore, considered to be extortionate transaction under Section 50 of IBC, 2016. On the other hand, the Interim

Resolution Professional (in short '**IRP**') had considered the claims of the Appellants with respect to only the principle amount of loan but not the interest. Leave apart in accordance with Section 50 IBC, 2016 only liquidator or Resolution Professional (in short '**RP**') can make an application to the Adjudicating Authority for setting aside extortionate transaction. However, no such application was made by the IRP in the present case. Learned Counsel for the Appellants relied upon the judgment of the Hon'ble Supreme Court in the matter of "**POINEER URBAN LAND AND INFRASTRUCTURE LTD. & ANR. VS. UNION OF INDIA & ORS.**" reported in (2019) 8 SCC 416 (page -54) to say that the other individuals, who have advanced monies to the Corporate Debtor, should have the right to be on the CoC.:

....

"54. It has been argued that different instructions may be given by different allottees making it difficult for the authorised representatives to vote on the Committee of Creditors and that in any case, the collegiality of the secured creditors will be disturbed.

To this the answer is that like other financial creditors, be they banks and financial institutions, or other individuals, all persons who have advanced monies to the corporate debtor should have the right to be on the Committee of Creditors. True, allottees are unsecured creditors, but they have a vital interest in amounts that

are advanced for completion of the project, maybe to the extent of 100% of the project being funded by them alone. As has been correctly argued by the learned Additional Solicitor General, under the proviso to Section 21(8) of the Code if the corporate debtor has no financial creditors, then under Regulation 16 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, up to 18 operational creditors then become the Committee of Creditors or, if there are more than 18 operational creditors, the highest in order of debt owed to operational creditors to the extent of the first 18 are then represented on the Committee of Creditors together, with a representative of the workers. If allottees who have funded a real estate project of the corporate debtor to the extent of 100% are neither financial creditors nor operational creditors, the mechanism of the Committee of Creditors, who is now to take decisions after the Code is triggered as to the future of the corporate debtor, will be non-existent in a case where there are no operational creditors and no secured creditors, because 100% of the project is funded by the allottees. Even otherwise, as correctly argued by the learned Additional Solicitor General, it would in fact be manifestly arbitrary to omit allottees

from the Committee of Creditors when they are vitally interested in the future of the corporate debtor as they have funded anywhere from 50% to 100% of the project in most cases.”

...

6. He submits that in view of aforesaid Apex Court Judgment, the Appellants should have been treated as Financial Creditor and should be on the CoC. Further, learned Counsel for the Appellants on the point of extortionate transaction is concerned, submitted that as per Section 50 of IBC, only the transaction which have taken place two years preceding to the Insolvency commencement date could be declared extortionate transaction. However, in the present case, Insolvency commencement date of Corporate Debtor is 01.06.2018 but transactions of Appellants No. 1, 5 & 8 took place before the effective date i.e., 01.06.2016 which is two years preceding to the Insolvency commencement date. Therefore, the transactions of these three Appellants are clearly out of purview of Section 50 of IBC, 2016 and cannot be considered to be extortionate. Even otherwise, if these transactions are considered to be extortionate within the purview of Section 50 IBC, 2016 in such case extortionate part i.e., interest part of these transactions should have been set aside by the learned Adjudicating Authority as per Section 51 IBC.

7. Learned Counsel for the Appellants further submitted that the Appellants are not related parties to the Corporate Debtor and the

issue was decided in their favour by the Adjudicating Authority in paragraphs 17,18 & 23 of the Impugned Order. Even otherwise, according to Section 5(24) of IBC, the definition of related party does not cover any of the Appellants as neither of the Appellants ever participated in policy making nor held any key managerial position. He further submitted that Respondent No. 1, who is the sole member of CoC at present has nothing to lose as Respondent No. 1 is protected by the secured amount in the form of FDRS amounting to Rs. 32,98,000/-. In view of the submissions as made above, learned Counsel for the Appellants prayed the Bench to allow the Appeal.

8. Learned appearing on behalf of Respondent No. 1 submitted that the Appeal is devoid of merits on the ground that the learned Adjudicating Authority has correctly held that 2nd to 5th CoC meetings made as nonest on account of Appellants taking part in the said meetings as members of CoC. The RP had re-constituted CoC and admitted the claims of the Appellants as Financial Creditors which is illegal. On the basis of re-constitution of CoC, the voting rights of Respondent No. 1 herein had been reduced from 100% to 0.25% in the CoC. It was observed that large amount of claims had been admitted on behalf of individuals.

9. Learned Counsel for the Respondent No. 1 submitted that on 29.08.2018, they sent an e-mail to the IRP- Respondent No. 3 herein requesting him to furnish the documents relating to re-constitution of CoC and the documents filed before the Adjudicating Authority. While

so, re-constitution of CoC consisting of Respondent No. 1 herein and Appellants constituted the 3rd Meeting held on 29.08.2018, 4th meeting held on 12.09.2018 and 5th meeting held on 29.09.2018 respectively in which by virtue of voting rights of the Appellants, various resolutions have been passed. However, Respondent No. 1 herein dissented to the resolutions under protest. All the above meetings and the resolutions passed therein rightly declared as null & void on account of the fact that the Appellants have been included as Financial Creditors illegally. It is not out of place to mention that Respondent No. 1 filed CA No. 88/2018 before the Adjudicating Authority bringing on record various illegalities that had been committed by the Respondent No. 3 herein in carrying out the Resolution Process pursuant to the 1st CoC meeting. Pursuant to the filing of above CA, the claim of this Respondent has been admitted in the reconstituted CoC, the voting percentage of the Respondent No. 1 herein shown as 14-9% and the said reconstitution of the CoC was intimated by the Respondent No. 3 herein, vide e-mail dated 04.12.2018.

10. Learned Counsel for the Respondent No. 1 further submitted that in view of inclusion of the Appellants as Financial Creditors of the Respondent No. 2 herein, the Respondent No. 1 filed CA No. 184/2018 before the Adjudicating Authority challenging the inclusion of the Appellants as Financial Creditors and also seeking declaration that the 2nd to 5th meetings of CoC and the resolution passed therein be declared as nonest. Learned Adjudicating Authority allowed their

Applications by passing the order which is impugned. It is submitted that the rates of interest charged by the Appellants are exorbitant. The interest claimed by the Appellants clearly make the transactions fall within the meaning of extortionate credit transaction under Regulation 5 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Respondent No. 3 ought to have approached the Hon'ble Adjudicating Authority challenging exorbitant interest and the transactions fell within the extortionate credit transaction. However, Respondent No. 3 did not choose to challenge the same for the reasons best known to him. It is submitted that from the records the transactions are highly suspicious and there are no loan agreements, they are merely relying on certain communications. Most of the Financial Creditors i.e., the Appellants are related to each other or to the Corporate Debtor.

11. Learned Counsel for the Respondent No. 1 further submitted that the transactions between the Appellants and the Corporate Debtor are barred by Section 73 of the Companies Act, 2013 and the transaction is prohibitory in nature. The amounts/monies alleged advanced by the Appellants did not follow the procedure laid down under Section 73 of the Companies Act, 2013. As such, individual transactions entered into by the Appellants are illegal as they are in violation of Section 73 of the Companies Act, 2013. Therefore, by virtue of Sections 23 and 24 of the Indian Contract Act 1872, such transactions are void. He further submitted that the Appellants

advanced monies/loans at extortionate rates of interest i.e., 48 to 60%. Such extortionate rate of interest gave a clear indication that the Appellants are participating in money lending activities and they are well aware of their illegal transactions. Learned Counsel further submitted that the claims of the Appellants cannot fall within the definition of Financial Debt under Section 5(8) of IBC. The alleged transactions fall within the meaning of “Extortionate Credit Transaction” under Section 50 of IBC read with Regulation 5 of Corporate Insolvency Resolution Process Regulation. Hon’ble NCLT has power under Section 51 IBC to strike of such transactions. In view of the reasons aforesaid, learned Counsel for the Respondent No. 1 prayed this Bench to dismiss the Appeal.

12. The Respondent No. 2 has filed its reply. The learned Counsel submitted that the claims of the Appellants No. 1 to 4 are on the basis of certain communications exchanged between the Appellants which do not clearly establish the conditions of loan. However, there are no loan agreement or Board Resolution passed by the Corporate Debtor authorising the Suspended Board of Director of the Corporate Debtor to enter into such communication. Further the claims of the Appellants No. 5 to 9 are on the basis of loan agreements entered into between the Appellants and the Corporate Debtor. However, there are no supporting Board Resolutions passed by the Corporate Debtor authorising Suspended Board of Directors of the Corporate Debtor to enter into such loan agreements. The Hon’ble Adjudicating Authority

in the Impugned Order held that the monies advanced by the Appellants are not in pursuance to any loan agreement but merely on the letters advanced by the Corporate Debtor. Learned Counsel further submitted that the interests charged by the Appellants are ranging between 42 to 60 % per month which is higher than the prevailing market rates. The Hon'ble Adjudicating Authority also held in Paragraph-22 of the impugned order that the agreed rates of interest are 65% in cases of loan given by the Appellants, which leads to consider these transactions as Extortionate Credit Transactions. Section 50 of IBC states that if the Corporate Debtor is involved in any Extortionate Credit Transaction which involves receipt of any money, the RP has to consider the same and avoid such transaction. The Hon'ble Adjudicating Authority held that the Appellants may be unsecured creditors who may avail remedies to recover their debts. In compliance of the Impugned Order, Respondent No. 3 herein sent e-mail to the Appellants on 19.11.2019 requesting them to file their claims in Form-F under Regulation 9A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016. However, no claim has been received. In view of the reasons aforesaid, learned Counsel for the Respondent No. 2 prays this Bench to dismiss the appeal.

13. Respondent No. 3 also filed a Counter Affidavit to the Appeal and from the perusal of the Reply, it is seen that this Respondent No. 3

supporting the stand of the Appellants. It is clearly evident from paragraph XVII at page 14 of their Reply, which states as under:

...

*“XVII. It is submitted that the Appellants may not be made to suffer on account of ill intension and oblique motive of the Respondent No. 1. Whereas, the nature of transaction between the Appellants and Respondent No. 2 make it amply clear that the debt is well within the definition of section 5(8) of IBC i.e., **Financial Debt** and accordingly the Appellants are also well within the definition of the Section 5(7) of the IBC. Therefore, in view of the peculiar fact and circumstances, the Appeal filed by the Appellants deserves to be allowed in the interest of justice and equity.”*

...

Findings:

14. Heard learned Counsel for the respective parties, perused the pleadings, documents filed in their support and citations relied upon by them. After hearing the parties, this Tribunal would consider whether the Appellants have made out any case on the basis of the grounds as made in the instant Appeal. The Adjudicating Authority vide impugned order dated 09.07.2019 allowed CA No. 184 of 2019. The Adjudicating Authority while passing the impugned order framed

issue at paragraph -22 of the impugned order which is extracted herein below:

...

“22. The main issue which is to be decided is:

a. Whether the respondents No. 3 to 11, the member of CoC as on date are Financial Creditors as defined under Section 5(7) while considering the money advanced by them, and/or, will fall under the category of Financial Debt under Section 5(8)(a).

..

15. Admittedly, above application filed by the Respondent No. 1 challenging the status of the Appellants herein as Financial Creditors of the Corporate Debtor. Upon adjudicating the matter, the Adjudicating Authority held that the monies advanced by the Appellants to the Corporate Debtor as loan, and held that Section 73(2) of the Companies Act, 2013 will not apply. However, after examining Section 50 of IBC, the Adjudicating Authority held that the transaction as “Extortionate Credit Transaction” on the ground that the rate of interest is 65% which is exorbitant. Further, learned Adjudicating Authority held that the Appellants are declared as unsecured creditors.

16. The main issue fell for our consideration is whether the loans advanced by the Appellants are legal in the eye of law and whether

they can be treated as unsecured creditors. Before advertng to our finding, we would like to deal with the relevant facts of the case.

17. The Appellants from their pleadings contend that they had advanced short term loans on various dates to the Corporate Debtor. As per the pleadings the details of the short term loans advanced to Respondent No. 2 are given in the following table:

Sl. No.	Appellant No.	Amount of short term loan	Mode of payments.	Rate of interest payable
1.	Appellant No. 1	Rs. 75 lakhs	Cheque No. 223727 dt. 04.11.2015	5% per month
2.	Appellant No. 2	Rs. 30 lakhs	Cheque No. 77544 dated 04.07.2017	3.3% per month
3.	Appellant No. 3	Rs. 10 lakhs	Cheque No. 011089 dated 22.08.2016	3.3% per month
4.	Appellant No. 4	Rs. 10 lakhs	RTGS dated 23.08.2016	3.3% per month
5.	Appellant No. 5	Rs. 5 lakhs	Cheque No. 414455 dated 04.09.2014	4% per month
6.	Appellant No. 6	Rs. 16 lakhs 50 thousand [5 lakhs on 10.10.2017; 2 lakhs on 11.10.2017; 5 lakhs on 13.10.2017; 3 lakhs on 16.10.2017;	-	4% per month

		50,000/- on 22.11.2017, 50,000/- on 23.11.2017 & 50,000/- on 24.11.2017		
7.	Appellant No. 7	Rs. 10 lakhs	Cheque no. 231553 dated 02.08.2016	4% per month
8.	Appellant No. 8	Rs. 15 lakhs [Rs. 10 lakhs & Rs. 5 lakhs]	RTGS dated 07.04.2014 & Cheque No. 308683 dated 04.09.2014	4% per month
9.	Appellant No. 9	Rs. 20 lakhs	Cheque No. 119152 dated 21.03.2017	4% per month

18. From the above table it is evident that the rate of interest shown as 40% to 60% per annum. The stand of the Appellants that the loans were advanced by the individuals to the Corporate Debtor for the business purposes. The Appellants failed to provide any evidence showing that the Corporate Debtor required the loans and Board of the Corporate Debtor decided and resolved in its Board Meetings to take loans @ 3.3%,4% & 5% rates of interest that too from the individuals. In normal course of business, the Company takes loans from the Public Sector Bank or the Private Banks at the rate of interest charged by the Banks or Private institutions. But in the present case, Respondent-Corporate Debtor accepted loans from the individuals with an exorbitant rates of interest and the said advancement of loans by the individuals may be at the behest of Directors in collusion with

the individuals. No reasonable person would agree to such transaction hence we say there appears to be collusion. After initiation of CIRP of the Respondent No. 2-Corporate Debtor, the IRP constituted for 1st CoC meeting on 25.07.2018 in which Respondent No. 1 was shown as only Financial Creditor with 100% voting rights.

19. In the 2nd CoC meeting dated 13.08.2018, the Appellants were shown as Financial Creditors thereby the CoC was reconstituted in the 2nd CoC meeting and Respondent No. 1- Bank's (Shinhan Bank) voting right shown as 0.25%. Having aggrieved by the marginalising the voting rights of the Respondent No. 1 herein, it moved an Application before the Adjudicating Authority and in pursuance thereof, again CoC was re-constituted and voting right of Respondent No. 1 was shown as 14.96%. The Adjudicating Authority took a clear stand that the loans which were advanced by the Appellants were considered as Extortionate Credit Transaction as per Section 50 of the IBC.

20. However, learned Counsel for the Appellants submitted that as per Section 50 of the IBC, only transaction which took place two years preceding to the insolvency commencement date (i.e., 01.06.2018), could be declared Extortionate Credit Transaction. He further submitted that Insolvency commencement date of the Corporate Debtor is 01.06.2018 but the transactions of Appellants No. 1,5 & 8 (1st Appellant – 04.11.2015, 5th Appellant – 04.09.2014 and 8th Appellant – 04.09.2014) took place before the effective date i.e. 01.06.2016 which is two years preceding to the insolvency

commencement date and submitted that these three Appellants are clearly out of provision of Section 50 IBC and cannot be termed extortionate. Learned Counsel also submitted that as per Section 50 of the IBC, the RP or the Liquidator may make an application for avoidance of such transaction to the Adjudicating Authority. However, in the present case, Respondent No. 1, who is a Financial Creditor of the Corporate Debtor, filed the Application before the Adjudicating Authority. He therefore, submitted that the said provision will not attract. For the beneficial reference, Section 50(1) of IBC is extracted hereunder:

...

“50. Extortionate credit transactions ---(1) Where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.”

...

21. It is admitted position that the Appellants No. 2,3,4,6,7 & 9 have purportedly advanced loans to the Corporate Debtor with exorbitant

rates of interest on 04.07.2016, 22.08.2016, 23.08.2016, 10.10.2017, 02.08.2016 and 21.03.2017 which are within period of two years preceding insolvency commencement date i.e., 01.06.2018. Even as per submission of the learned Counsel for the Appellants, these transactions are considered to be Extortionate Credit Transactions and the same needs to be quashed and set aside. The transactions of the Appellants No. 1, 5 & 8 which are prior to two years preceding the insolvency commencement date. However, taking into consideration, the exorbitant rates of interest charged by the Appellants, the said transactions are unconscionable.

22. In so far as the stand of the Appellants that for seeking appropriate direction with respect to make an Application for avoidance of such transaction to the Adjudicating Authority, either liquidator or the RP may make an Application is concerned, in this context we are of the view that as per Section 60(5) of IBC, the Adjudicating Authority has jurisdiction to entertain or dispose of any Application or proceeding by or against the Corporate Debtor or Corporate persons. For beneficial reference Section 60 Sub Section 5 IBC is reproduced below:

...

60. Adjudicating Authority for corporate persons.

...

(5) Notwithstanding anything to the contrary contained in any other law for the time being in

force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”

...

23. In the present case, Respondent No. 1 herein made an Application to the Adjudicating Authority by invoking Section 60 Sub-Section 5 read with Section 22 of the IBC (Annexure R-8, page 90 of Reply) which in our opinion is in accordance with law and the Respondent No. 1 rightly invoked the jurisdiction.

24. Therefore, the Adjudicating Authority passed the order in exercise of jurisdiction as enshrined under Section 60 Sub-section 5 of the IBC.

25. Relying the judgment in the matter of “**Pioneer Urban Land and Infrastructure Limited and another Vs. Union of India and Others**” (supra), the learned Counsel for the Appellants submitted that all the persons who had advanced money to the Corporate Debtor

should have a right to be on the CoC. Per-se the judgement of the Apex Court is binding on all the Courts and Tribunals. However, in the present case, the facts are completely different. As stated above, the Appellants No. 2,3,4,6,7 & 9 their transactions clearly fall under Section 50 of the IBC, 2016 and said transactions are Extortionate Credit Transactions for the reason that the said Appellants have charged exorbitant rates of interest which is not legal in the eye of law. Therefore, in exercise of powers conferred under Rule 11 of NCLAT Rule, 2016 and other enabling Provisions, we treat that these transactions are Extortionate Credit Transactions and we accordingly set aside these transactions as Extortionate Credit Transactions.

26. In so far Appellants No. 1,5 & 8 are concerned, though technically they may not be covered under Section 50(1) of the IBC. However, keeping in view that the rates of interest which they charged are exorbitant, we are of the view that claim of exorbitant rates of interest is extortionate regarding interest and thus illegal. However, Appellants No. 1,5 & 8 can make their claims for Principal Amount as Unsecured Creditors. We have seen that even the RP has not accepted the exorbitant rates of interest charged by the Appellants as stated supra.

CONCLUSION:

27. In view of the aforesaid reasons, the Appeal is disposed off by modifying the order of the Adjudicating Authority in CA No. 184/18 dated 09.07.2018 as under:

- a) Appellants No. 2,3,4,6,7 & 9 transactions are held to Extortionate Credit Transactions as prohibited under Section 50(1) of IBC, 2016 and accordingly the entire Transactions are set aside as illegal & void and not entitled to be considered for any relief;
- b) Appellants No. 1, 5 & 8 are not falling under Section 50(1) of IBC, therefore, the order of Adjudicating Authority is affirmed to these Appellants confirming that they are only unsecured creditors for Principal Amount and not entitled to the interest.
- c) We affirm the order of Adjudicating Authority that the CoC meetings held on 13.06.2018, 29.08.2018, 12.09.2018 and 29.09.2018 are nonest and resolution passed, if any, therein stands nullified.
- d) Order of the Adjudicating Authority dated 29.07.2019 needs no interference.
- e) No orders as to costs.

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

[Justice Anant Bijay Singh]
Member(Judicial)

(Kanthi Narahari)
Member(Technical)

New Delhi

Ahc