

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.1012 of 2019

[Arising out of Order dated 22.08.2019 passed by National Company Law Tribunal, Hyderabad Bench, Hyderabad in CP(IB)No.30/7/HDB/2019]

| IN THE MATTER OF: | Before NCLT | Before NCLAT |
|------------------------------------------------------------------------------------------------------|--------------------|---------------------|
| 1. Abhishek Agarwal, S/o Shri Suresh Chand Agarwal, Aged about 35 years, OCC: Business | Financial Creditor | Appellant No.1 |
| 2. Ashish Kumar Agarwal S/o Sri Suresh Chand Agarwal, Aged about 36 years, OCC: Business | Financial Creditor | Appellant No.2 |
| 3. Neha Agarwal W/o Sri Abhishek Agarwal Aged about 32 years | Financial Creditor | Appellant No.3 |

(All Appellants are
R/o. H.No. 1-2-50,
Domalguda,
Opp. Gagan Mahal
Nursing Home,
Himayathnagar,
Hyderabad – 500029)

Vs.

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| M/s. Manasadevi Bakers Pvt. Ltd. Rep by Authorized person Ajay Kumar Agarwal, Occ: Chairman Cum M.D., O/o 6-3-855/10/A, 4A, Sampathji Apartments, Nr Niraj Public School, | Corporate Debtor | Respondent |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|------------|

Lane Opp to
Greenpark hotel,
Ameerpet, Hyderabad

For Appellant: Mr. Anil Kumar, Advocate

**For Respondent: Mr. Satendra K. Rai, Advocate
Mr. Ajay Jain and Mr. Kishore Soni, Advocates for
Intervenor**

J U D G E M E N T

(08.06.2020)

A.I.S. Cheema, J. :

1. The Appellants – original Applicants filed Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the National Company Law Tribunal, Hyderabad Bench, Hyderabad (Adjudicating Authority) having CP(IB)No.30/7/HDB/2019 claiming to be Financial Creditors against Respondent - Manasadevi Bakers Pvt. Ltd. – Corporate Debtor. In the Application, one Vishnu Dutt Gupta, Director of the Corporate Debtor filed counter, claiming to be MD of the Respondent – Corporate Debtor. One Ajay Kumar Agarwal also filed counter statement claiming to be MD and stating that Vishnu Dutt Gupta was not authorized. Vishnu Dutt Gupta has in the Appeal also filed Interlocutory Application for intervention – impleadment. He claims that he is still Director of the Corporate Debtor and has opposed the Application before Adjudicating Authority and this Appeal.

2. The Appellants claim that Vishnu Dutt Gupta had appeared before the Adjudicating Authority without authority and he should not have been heard. Ajay Agarwal, the MD of Respondent has appeared and

admitted the dues of the Appellants and default and thus according to the Appellants, their Application should have been admitted.

3. The Appellants claim that they had disbursed unsecured loan on different dates to the extent of Rs.66,75,000/- which reflected in the Annual Financial Statements of the Corporate Debtor from 2006 – 2007 to 2015 – 2016. Appellants claim that with interest the amount due was Rs.1,47,881,477/-. According to the Appellants, they are individuals and the Corporate Debtor is independent person. They accept that father, father-in-law and brother, brother-in-law of the Appellants are the Directors and 50% shareholders of the Corporate Debtor. According to them, due to relations they had extended unsecured loan. They had sent Demand Notice on 10th June, 2016 and 10th August, 2017. The Corporate Debtor had by Reply dated 18th December, 2017 accepted that the Corporate Debtor owns the money and sought time of six months. After six months, they sent another Notice dated 26th June, 2018 and when there was default, the Application was filed. According to the Appellants, they had nothing to do with Corporate Debtor as individuals and Subordination Agreement of Canara Bank relied on by Vishnu Dutt Gupta should have been ignored.

4. Vishnu Dutt Gupta had filed counter before Adjudicating Authority (Annexure P3) and with the same, filed extract of minutes of meeting dated 7th December, 2009 which shows Vishnu Dutt Gupta as Managing Director and authorized person. Vishnu Dutt Gupta filed Subordination

Agreement (Page – 202) dated 26.08.2014 executed by the Appellants as well as Directors of the Corporate Debtor which states that the Appellants will not claim their dues without first dues of Canara Bank being paid. For this and other reasons, Vishnu Dutt Gupta opposed the Application.

5. Ajay Kumar Agarwal had also filed counter (Annexure P-8 Page 272) before the Adjudicating Authority and claimed that Petitioners had not executed Subordination Agreement with Canara Bank but he himself has executed the same as Director. He admitted the dues of the Appellants and that the same were in default.

6. The Adjudicating Authority heard the parties and after considering the record, concluded that the loan was unsecured loan which was interest free. The Adjudicating Authority referred to MOU dated 29.04.2007 and Agreement dated 8th February, 2012 to find that it was interest free unsecured loan and equity shares were to be allotted to both the parties and both the MOU and the Agreement never discussed about the time of repayment. Thus, it found that the unsecured loan was interest free and the claim of interest in the Application was not tenable. It also held that there was no time fixed to repay the loan. The Adjudicating Authority referred to Financial Statements for 2015 – 2016 and 2016 – 2017 and observed that the same do not reflect any provision for interest against unsecured loans given by the Petitioners. The Adjudicating Authority thus held that the loan does not have

consideration for time value of money and cannot be said to be financial debt. As such, it was found that there was no default under the provisions of IBC. The Adjudicating Authority referred to Subordination Agreement and found that the Petitioners were signatories to the Agreement and that the Petitioners and other signatories had undertaken that they will not issue or collect, assign or receive payment of their claims until claims of the Canara bank are settled. The Adjudicating Authority held the Agreement to be binding on Petitioners and rejected the claim of Petitioners that they had not signed the Agreement. For such reasons, the Application came to be rejected.

7. We have heard the parties and perused the record. At the time of oral arguments, the counsel for Appellants after making oral submissions also filed written submissions across the Bar on 12th March, 2020. With the written submissions, certified copy of counter filed before Adjudicating Authority by Canara Bank as I.A. 432 of 2019 has also been filed. The counter filed by the Officer of Canara Bank shows that when Corporate Debtor availed loan facilities from Canara Bank, the Corporate Debtor was called upon to execute necessary documents and charge of Canara Bank was registered with ROC on 25th September, 2014. The loan facility granted was against security and hypothecation deed was also executed. The counter of the Officer of Canara Bank shows that the Appellant No.1 - Abhishek Agarwal and 11 others executed Subordination Agreement dated 26th August, 2014 in favour of the Bank

accepting the liability of the Corporate Debtor and had also agreed that their claims shall be subordinate to the claim of Canara Bank and that they shall not collect, assign or receive payment from the Corporate Debtor until the claim of Canara Bank is settled. In the certified copy of the counter, there is copy of the Subordination Agreement (Pages – 462 and 463) which shows names of the three Appellants and others and includes their signatures (Page 463). At other places of the Subordination Agreement also, there are signatures appearing to be of the Appellants.

8. All this material was brought before the Adjudicating Authority at the instance of Vishnu Dutt Gupta. The Appeal claims that Vishnu Dutt Gupta was not authorized and the list of dates states that Vishnu Dutt Gupta was removed as MD from the Board on 6th February, 2019. This action was taken against Vishnu Dutt Gupta after the filing of the Application under Section 7 of IBC on 17.12.2018. Considering the counter filed by Vishnu Dutt Gupta and the counter filed by Ajay Agarwal, the record shows that the Directors have differences between themselves and there are groups in the Corporate Debtor. In proceedings under Section 7 of IBC, the Adjudicating Authority need not reconcile the different stands taken by rival groups. While admitting Application under Section 7 if it appears to the Adjudicating Authority that the object is not resolution but object is different, the Adjudicating Authority would have discretion not to act upon the Application and leave the parties to other remedies available. In the present mater, the Appellants have tried to

block Vishnu Dutt Gupta from bringing on record material relevant to the Application claiming that he had no authority or that after filing of the Application under Section 7 of IBC, the said Vishnu Dutt Gupta has been removed from the post of MD. The fact remains that Vishnu Dutt Gupta still appears to be Director of the Corporate Debtor and the Adjudicating Authority, accepted the material pointed out by the said Director, which was found to be relevant. We do not intend to interfere. The Appellants may deny that they were not signatories to the Subordination Agreement but in the face of Affidavit of the Officer of Canara Bank and Subordination Agreement pointed out by the Officer, it can be said that the Appellants cannot maintain the Application under Section 7. The Adjudicating Authority need not settle and decide the claim of the Appellants denying the signatures in the Subordination Agreement of 2014. That is not necessary for the Adjudicating Authority to decide in proceeding under Section 7 of IBC. Considering the documents executed in favour of Canara Bank in ordinary course of business which is admitted by Ajay Kumar Agarwal, it must be said that the Appellants failed to establish that the loan extended by them is payable and hence there is "default". In the absence of settling dues of Canara Bank, Appellants cannot claim that their dues have become payable, and thus there is "default".

9. Apart from above, the Adjudicating Authority has after considering the record, found that there was material in the form of MOU dated

29.04.2007 and Agreement dated 8th February, 2012 which dealt with interest free unsecured loan and equity shares to be allotted to both the parties and concluded that there was no time value of money and that it was not financial debt. Keeping in view the relationships between the parties and record, we find no reason to interfere with such findings recorded by the Adjudicating Authority.

10. For the above reasons, we do not find any substance in the Appeal.

The Appeal is dismissed. No Orders as to costs.

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

(Justice A.B. Singh)
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

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