

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 723 of 2019

[Arising out of order dated 12th March, 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Mumbai in CP No. 190/IBC/NCLT/MB/MAH/2018]

IN THE MATTER OF:

Vishal Doshi

R/o 162, Neelamber CHS Ltd.,
37, Dr. Gopal Deshmukh Marg,
Peddar Road,
Mumbai-400 026

.. Appellant

Versus

1. Bank of India,

Star House, C-5, G-Block,
Bandra Kurla Complex,
Bandra (E),
Mumbai – 400 051

2. Shrenuj & Co Limited

405, Dharam Palace 100-103,
N S Patkar Marg,
Mumbai – 400 007

.. Respondents

Present:

For Appellant:

**Mr. Mahesh Agarwal, Shri Arshit Anand,
Shri Abhijeet Sinha, Shri Himanshu Satija,
Mr. Rohan Talwar, and Shri Saikat Sarkar,
Advocates**

For Respondents:

**Mr. Ashish Rana, Shri Ankit Paushyayan,
Mr. Arurag Singh Advocates for
Respondent No. 1**

J U D G M E N T

(25th February, 2020)

KANTHI NARAHARI, MEMBER (TECHNICAL)

The Appellant, a shareholder/promotor and Director of Respondent No. 2 herein has filed the present Appeal challenging the admission of Company Petition No. 190/IBC/NCLT/MB/MAH/ 2018 dated 12th March, 2019.

3. The Respondent No. 1 herein-Bank of India filed an Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (in short '**IBC**') before the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Mumbai) seeking initiation of Corporate Insolvency Resolution Process (in short '**CIRP**') against Respondent No. 2 herein and the Adjudicating Authority, vide order dated 12th March, 2019 admitted the Application and imposed Moratorium.

4. The Appellant challenges the order of admission on the ground that the debt has been satisfied and set off in diminution of the amount of Rs. 1,561.87 Crores against debt of Rs. 226.50 Crores (Page 34, paragraph-A) claimed by Respondent No. 1 herein. It is further averred that the Adjudicating Authority overlooked the overwhelming evidence which shows that the Company's valuable stock of which market value is Rs. 1561.87 Crores which formed the security for loan facilities advanced by Bank of India Consortium was misappropriated/lost due to the fraudulent negligent acts of the members of Bank of India and its Consortium. It is also averred that the Bank of India along with other members of the Bank of India Consortium are jointly and

severely liable to pay Rs. 1,561.87 Crores along with applicable interest to the Respondent No. 2- Company. Further, it is stated that the value of the Stock was more than sufficient to cover not only the loan facilities extended by the Bank of India but also the aggregate loan facilities extended by the entire Bank of India Consortium. The other ground taken by the Appellant is that the Respondent No. 1 herein is not a Financial Creditor of the Respondent No. 2 in terms of Section 5(7) of the IBC and had no locus under Section 7 of IBC to file Application before the Adjudicating Authority. It is stated that in terms of Section 5(7) of the IBC, a Financial Creditor means any person to whom a Financial Debt is owed and includes a person to whom such debt has been legally and validly assigned.

The facts of the case are:

5. It is stated that Respondent No. 2 had availed certain credit facilities from the Respondent No. 1 Consortium and the other Banks comprised of its Consortium Bank are ICICI Bank, State Bank of India, Union Bank of India, Punjab National Bank etc. The ICICI Bank by way of Loan Recall Notice dated 02.05.2016 informed Respondent No. 2 that its account with ICICI Bank had been classified as Non-Performing Asset ('**NPA**') with effect from 31.03.2016. It is stated that the Respondent No. 2, on 09.05.2016, replied to the said Notice setting out that it was facing temporary financial difficulties and clarified that the Company was taking steps for regularisation of its loan account and that the other lenders have verbally considered its request and

hence not to take any coercive step, till 31.05.2016. In June, 2016, ICICI filed O.A. No. 406/2016 before the Debt Recovery Tribunal (in short '**DRT**') seeking repayment of Rs. 1,65,71,12,358.13 Crores along with interest. ICICI Bank also filed an Interim Application praying for appointment of a Receiver in respect of the mortgaged immovable assets and moveable assets of Respondent No. 2. The said Receiver was appointed to take physical possession of the movables. It is submitted that after taking possession of the entire stock by the Receiver, ICICI Bank caused the stock to be valued by Jay Jewellers and the valuation process took over six months and submitted the valuation report. Respondent No. 2 received the same on 02.04.2017. The Appellant submits on receipt of Valuation Report, glaring discrepancies/mistakes were detected in the value, quantity and quality of the stock. The actual market value of the total stock seized was Rs. 1561.87 Crores at the time of seizure, the valuation report shows the value of the stock worth Rs. 199.51 Crores. Therefore, the stand of the Appellant that the Company's stock had been tampered with/misappropriated. It is further submitted that in August, 2018, Criminal Complaint was filed on behalf of the Respondent No. 2 before Economic Offences Wing, Mumbai (in short '**EOW**') alleging that that Respondent No. 1 & Consortium misappropriated the Company's stock of Rs. 1561.87 Crores under various Sections of IPC for negligent activities of the Respondent No. 1, its Consortium Officers of ICICI Bank and Bank of India (Page 44 paragraph (H)), it is stated that the FIR was registered and the EOW is investigating into the Complaint.

6. In view of the reasons, learned Counsel had referred to Form-1 filed by Respondent No. 1 herein where in Part IV debt is shown as Rs. 205 Crores and it is claimed the value of the stock seized by the ICICI Bank is approximately Rs. 1561.87. Learned Counsel submits that in the eye of law, Respondent No. 2 company has no liability to pay. In view of that the net stock amount and as per their valuation, the total stock was seized by ICICI Bank is worth Rs. 1561.86 Crores and the total amount claimed to be in default stated to be Rs. 226 Crores (page 34, paragraph – 9(A)). It is claimed if the debt is adjusted, in such case, the Respondent No. 1 had no obligation to pay same and the Respondent No. 1 cannot maintain the petition under Section 7 of IBC before the Adjudicating Authority and the admission order needs to be set aside.

7. Learned Counsel for the Respondent No. 1 submitted that the Appellant had not disputed the factum of loans/finances advanced by the Respondent No. 1 consortium from time to time under various financial facilities. Respondent No. 2 herein has been admittedly unable to pay financial facilities owed by it to seventeen Banks including Respondent No. 1 herein. He has submitted that without going into the merit of the case, the Appellant has not made out any case either on fact or in law. Learned Counsel for the Respondent submitted that during hearing of Section 7 Application, the Adjudicating Authority was not concerned with the Counter Claim or the allegations made by Respondent No. 2 against Respondent No. 1

with respect to replacement of hypothecated diamonds or lower valuation stock seized by the Court Receiver of the ICICI Bank.

8. Learned Counsel further submitted that there is no misappropriation or tampering done by the Respondent No. 1 with the stock seized by the Court Receiver of ICICI Bank appointed by Debt Recovery Tribunal-1, Mumbai as alleged by the Appellant. The valuation has been done with video recording and even Respondent No. 2 was issued notices each and every time to be present at the time of valuation. The contention of the Appellant that the stock valued at Rs. 1561.87 Crores is baseless and vague. Learned Counsel further submitted that the Adjudicating Authority is only concerned with default occurred due to Respondent No. 1 by not paying the admitted financial debt to the Respondent No. 1. He submitted that the stocks were seized in accordance with the order passed by Debt Recovery Tribunal-1, Mumbai wherein the Court Receiver had seized stocks of the Respondent No. 2 and kept the same in the vault of ICICI bank. Learned Counsel submitted that Respondent No. 1 herein was never a part of the seizure as alleged by the Appellant. Learned Counsel further submitted that Respondent No. 2 – Company was in default of the amounts owed to various Banks and its account had also been declared as NPA. The Respondent No. 2 herein has already filed complaint before EOW which will be deciding the allegations whether there is any tampering or misappropriation with the stock of the Respondent No. 2 which was seized by the Receiver appointed by Debt

Recovery Tribunal. In view of the progress of investigation no conclusion can be drawn as contended by the Appellant. Learned Counsel submits that in filing an Application under Section 7 of IBC, the essential ingredients are that there must be debt due which was not paid and so default. In the present case, Respondent No. 1 had established the debt due and default against Respondent No. 2 and basing on the demand of debt by the Respondent No. 1, the Application under Section 7 IBC has been admitted by the Adjudicating Authority. Learned Counsel submitted that the Appellant has not made out any case and the same need to be rejected.

9. Heard learned Counsel appearing for both the parties, perused pleadings and documents filed in their support. The only point for consideration is whether the Respondent No. 1 who filed an application before the Adjudicating Authority seeking initiation of CIRP is in accordance with law and whether it fulfilled the requirements under IBC for the purpose of said Section.

10. From the perusal of Form-1 (at page 175), we have seen that the paragraph-IV of the Financial Debt, the total amount of debt granted/disbursed on various dates is shown as Rs. 205.00 Crores. In part V of Form-1 (at page 176), the particulars of Financial Debt, it was specifically mentioned that first Pari passu charge by way of hypothecation of stocks as per stock statement of 30.04.2016 is Rs. 959.04 Crores and receivable and other current assets present and

future shown as particulars of security. However, the total value available shown as Rs. 199.52 Crores

11. The Appellant had not denied regarding Financial Debt due and payable. However, the only ground taken by the Appellant is with regard to that the alleged debt of Respondent No. 2 stood extinguished/satisfied and the Respondent No. 1 herein is not a Financial Creditor of the Appellant.

12. The Adjudicating Authority had dealt with all the points. Learned Adjudicating Authority recorded the submissions of the Respondent No. 2 herein that the Respondent No. 2 has also filed Counter Claim bearing (L) no. 156/2018 on 05.03.2018 against Respondent No. 1 in O.A. No. 344/2017 in relation to its claims. Averments as made in this Appeal by the Appellant were also made before the Adjudicating Authority and the Adjudicating Authority had recorded all the submissions of the Respondent No. 2 herein even with regard to the complaint made to EOW and the stock which was seized by the Receiver claimed to be worth Rs. 1561.87 Crores. However, Valuation Report showed the stock was worth of Rs. 199.51 Crores Only. The Adjudicating Authority had dealt with the issues elaborately and given a finding as under:

“19. Therefore, I am of the conscientious view that counter claim, that too in the nature of damages, to the amount claimed by the Financial Creditor cannot, in

*fact or in law, be the basis to dispute the amounts owed to the Financial Creditor. Hon'ble Supreme Court in **Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors. [Writ Petition (Civil) NO. 99 of 2018]** upholding the Constitutional validity of IBC, has held that the position is very clear that unlike Section 9, there is no scope of raising a 'dispute' as far as Section 7 petition is concerned. AS soon as a 'debt' and 'default' is proved, the Adjudicating Authority is bound to admit the petition.*

20. *As regards the debt and default is concerned, the Corporate Debtor does not deny the same. Financial Facilities have been duly granted and the amounts have been disbursed. There has been a default in repayment and the same has been admitted to some extent. This can be said in view of the reply letter dated 09.05.2016, wherein the Company replied to the notice of ICICI Bank saying that it was facing temporary financial difficulties and that they were taking steps towards regularising its loan account. It is worth to note that there is no denial of the debt amount by the Corporate Debtor.*

21. *Also, the pendency of proceedings in DRT is no bar to the present Section 7 proceedings in view of*

Section 238 of the Code. The petitioner's claim of existence of debt and default has been corroborated with ample evidence and is enough to hold a view in its favour.

22. On going through the facts and submissions of the petitioner and upon considering the same, it is concluded that the Financial Creditor has established that the loan was duly sanctioned and duly disbursed to the Corporate Debtor but there has been default in payment of Debt on the part of the Corporate Debtor.

23. Considering the above facts, I come to conclusion the nature of Debt is a 'Financial Debt' as defined under section 5 (8) of the Code. It has also been established that admittedly there is a 'Default' as defined under Section 3(12) of the Code on the part of the Debtor.

*24. As a consequence, keeping the admitted facts in mind, it is found that the Petitioner has not received the outstanding Debt from the Respondent and that the formalities as prescribed under the Code have been completed by the Petitioner, I am of the conscientious view that this Petition deserves **'Admission'***

13. Learned Adjudicating Authority gave a finding that debt and default is concerned, the Corporate Debtor had not denied the same. The financial facilities have been duly granted and the amounts have been disbursed. Further, it is also observed that there has been default in repayment of the same has been admitted to some extent. It is also evident from the Reply letter of the Respondent No. 2 dated 09.05.2016 wherein it replied to the notes of ICICI Bank saying that it was facing temporary financial difficulties and that they were taking steps towards regularisation of its loan account. In view of the aforesaid reason that there is no denial of the debt amount by the Corporate Debtor.

14. The Adjudicating Authority has to see whether the ingredients of Section 7 of IBC has been fulfilled or not. Section 7(1) of IBC, a Financial Creditor either by itself or jointly with (other Financial Creditors or any other person on behalf of the Financial Creditor, as may be notified by the Central Government) may file an Application for initiation of CIRP against the Corporate Debtor before the Adjudicating Authority when a default has occurred. In the explanation a default includes a default in respect of Financial Debt owed not only to the Applicant Financial Creditor but to any other Financial Creditor of the Corporate Debtor. 2. The Financial Creditor shall make an Application under Sub Section (1) in such a form and manner and accompanied with such fee as may be prescribed.

15. Respondent No. 1 had fulfilled criterion as envisaged under Section 7 of IBC. Section 5(7) of IBC defines 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.

16. Learned Counsel for the Appellant contend that the Respondent No. 1 herein is not a Financial Creditor of the Corporate Debtor in accordance of Section 7(5)(b) of IBC and had no legs under IBC to file a petition. We have perused Form-1 filed by the Respondent No. 1 with regard to the debt and default. We do not have any hesitation to say that the grounds raised by the learned Counsel for the Appellant does not have any merit. In view of the legal position as explained above, Respondent No. 1 is a Financial Creditor and the debt is a Financial Debt. In accordance of Section 5(8) of IBC, we hold that the Application filed by the Respondent No. 1 is maintained and the same is in accordance with law. The Appellant has failed to show by actionable material that the Valuation Report, got done officially when Receiver seized stock at the instance of ICICI has been held to be wrong. Mere averment to the contrary to claim set off that the stock was worth Rs. 1561.87 Crores without official valuation got done is not helpful.

17. With regard to Counter claim is concerned, the Adjudicating Authority cannot decide while admitting the Application. As such, all the essential requirements have been fulfilled and Application under Section 7 IBC was rightly admitted by the Adjudicating Authority. The Hon'ble Supreme Court in "**Swiss Ribbon Private Limited & Ors. Vs.**

Union of India & Ors.” [Writ Petition (Civil) No. 99 of 2018] reported in (2019) 4 SCC 17 at paragraphs 35 and 36 held as under:]

“35. Insofar as set-off and counterclaim is concerned, a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way – amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional.....”

36. Equally, counterclaims, by their very definition, are independent rights which are not taken away by the Code but are preserved for the stage of admission of claims during the resolution plan.....”

18. The Counter Claim and the set off as claimed by the Appellant herein cannot be decided either by the Adjudicating Authority or by this Appellate Tribunal, we refrain from interfering with such issues.

19. In view of the aforesaid reasons, the Appeal is devoid of merits and liable to be dismissed. Accordingly, the same is dismissed. No orders as to cost.

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

(Kanthi Narahari)
Member(Technical)

(V P Singh)
Member(Technical)

Ahs