

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL**Company Appeal (AT) (Insolvency) No. 209 of 2017**

(Arising out of Order dated 21st August, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai in TCP/89/(IB)/CB/2017)

IN THE MATTER OF:**D. Muthukumar****...Appellant****Vs.****A. Premkumar & Another****...Respondents****Present: For Appellant:- Mr. Goutham Shivshankar, Advocate****For Respondents:- Mr. Biju Thankappen with Mr. Prakash Yedhola, Advocates.****J U D G M E N T****SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Respondents, A. Prem Kumar & Another originally filed an application under Section 433(e) & (f) of the Companies Act, 1956 before the Hon'ble High Court of Madras. The case was transferred to the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai, pursuant to "The Companies (Transfer of Pending Proceedings) Rules, 2016" framed by Central Government in exercise of the powers conferred under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of Section 239 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code").

2. The Adjudicating Authority by impugned order dated 21st August, 2017 in TCP/89/(IB)/CB/2017 treated the application under Section 433(e) & (f) of the Companies Act, 1956 to be an application under Section 7 of the 'I&B Code' read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "Adjudicating Authority Rules, 2016"), admitted the application, passed order of moratorium and appointed 'Interim Resolution Professional' with certain directions. The said order is under challenge in this appeal.

3. The case of the Appellant is that prior to 2004, he along with his wife and one Mr. P. Asokan and Mr. P. Velraj were doing real estate business through a proprietary concern in the name and style of M/s. K.K.Flats. During the year 2004, the said Company was floated and ventured into a land project belonging to M/s. Madura Coats Ltd. at Madurai by utilising the funds available with the proprietary concern and taking further investments from different persons including Mr. P. Asokan and Mr. P. Velraj. Thereby, the land was procured, details of completion of the projects that the Company purchased and promoted an amount contributed by different persons have been shown. The amount paid by one or other persons in favour of one or other creditors has also been detailed and it was submitted that the table shows that the Company had paid back the investments made in it through various

transactions coming to its total sum of Rs. 1,54,93,980/- (Rupees one Crore fifty-four lakhs ninety-three thousand nine hundred and eighty only). It is alleged that the Respondents without paying back the amount with sole motive of unjustly enriching themselves, issued a statutory notice on 25th October, 2014 alleging that the Company has taken loan from them, to which, the Appellant objected.

4. Thereafter, the Respondents filed an application for winding up under Section 433(e) & (f) of the Companies Act, 1956 before the Hon'ble High Court of Madras. The said case was transferred to the Adjudicating Authority, who treated the petition as an application under Section 7 of the 'I&B Code' and passed the impugned order dated 21st August, 2017.

5. Learned counsel for the Appellant submitted that the Respondents are not 'Financial Creditor', within the meaning of sub-section (7) read with sub-section (8) of Section 5 of the 'I&B Code'. It was also submitted that before admitting the application under Section 7, all facts were required to be brought to the notice of the Adjudicating Authority, were not pleaded.

6. The Appellant has enclosed copies of the cheques issued by Mr. P. Asokan, apart from copies of the relevant pages of ledger book to suggest that repayment has already been made to the 1st Respondent- A.

Premkumar. Balance sheets has been enclosed in support of the plea that the due amount had already been paid to the 1st Respondent.

7. According to 1st Respondent, he approached the Appellant Company on many occasions, seeking repayment of dues, along with the accrued interests but the amount was not paid. Further, according to 1st Respondent, the Income Tax Return was submitted by the Company (KK Flats (P) Ltd) and enclosed by Appellant suggests that the amount was taken from the 1st Respondent and shown as 'loan', relevant portion of which is quoted below: -

KK FLATS PRIVATE LIMITED NO. 1E, SUN FLOWER APARTMENT 10, MANDABAM CROSS ROAD KILPAUK, CHENNAI-10 SCHEDULES TO BALANCE SHEET AS ON 31.03.2012		
Amount in (Rs.)		
Particulars	31.03.2012	31.03.2011
SCHEDULE - D		
Unsecured Loans		
Anitha R	1070224	1070224
Arun P.V.	2064647	2064647
Asokan P	1880913	1880913
Deva Kavitha	7940000	10390000
KK Flats Deva Kavitha	348500	5348500
Muthukumaar	13918058	13667758
Porkodi	961586	961586
Prem Kumar	3110382	3110382
Raja sekar	3366713	3366713
Rithu Pandey	324000	324000
Ram kumar A	2645114	2645114
Shanthi V	1708167	1708167
Others	338000	338000
Paramendra Tiwari	3450000	3450000
Rathinapandian	300000	300000
Tamilselvan	600000	0
Ajay Prakash V	1477521	1477521
Alagesan & Ajitha	500000	500000
Prakash S	100000	100000
TOTAL	46103825	52703525

For M/s K K Flats Private Limited	For Ravichandran & Thangaraj Associates	
Sd/- D. Muthukuma Managing Director	Sd/- M. Devakavitha Director	Sd/- G. Thangaraj Partner
Place: Chennai	Date :	

8. We have heard learned counsel for the Appellant and learned counsel for the Respondents.

9. To decide the issue, it is desirable to refer the Rule framed by the Central Government, pursuant to which pending winding up cases were transferred from the Hon'ble High Courts to the Adjudicating Authority (Tribunal).

The Central Government in exercise of the powers conferred under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of Section 239 of the 'I&B Code' framed "The Companies (Transfer of Pending Proceedings) Rules, 2016". Rule 5 therein relates to transfer of pending proceedings of winding up on the ground of inability to pay debts and reads as follows: -

"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.- (1) All petitions relating to winding up under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the

respondent as required under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal within sixty days from date of this notification, failing which the petition shall abate.

2. All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the

Act, pursuant to section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act.”

10. Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 relate to “Application by ‘Financial Creditor’”, as quoted below: -

“4. Application by financial creditor. – (1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under Section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution process for Corporate Persons) regulations, 2016.”

(2) Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.

(3) The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.”

11. From sub-rule (1) of Rule 4 of the Adjudicating Authority Rules, 2016, it is clear that the applicant is required to provide information as required under Form-1. Sub-rule (3) of Rule 4 of the Adjudicating Authority Rules, 2016, mandates the applicant to provide the copy of the application to the ‘Corporate Debtor’, immediately after filing of the application.

12. As per Form-1 i.e. the format for filing an application under Section 7 of the I&B Code as per which following details are to be provided.

“Part I- Particulars of Applicant (Please provide for each Financial Creditor Making the Application)

Part II- Particulars of Corporate Debtor

Part III- Particulars of the Proposed Interim Resolution Professional

Part IV- Particulars of Financial Debt

Part V- Particulars of Financial Debt [Documents, Records and Evidence of Default]

I, hereby certify that, to the best of my knowledge, [name of proposed insolvency professional], is fully

qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016 and the associated rules and regulations.

[Name of the financial creditor] has paid the requisite fee for this application through [state means of payment] on [date].”

As per the instructions, the following documents are required to be attached:

- “Annex I Copies of all documents referred to in this application.*
- Annex II Written communication by the proposed interim resolution professional as set out in Form 2.*
- Annex III Proof that the specified application fee has been paid.*
- Annex IV Where the application is made jointly, the particulars specified in this form shall be furnished in respect of all the joint applicants along with a copy of authorisation to the financial creditor to file and act on this application on behalf of all the applicants.”*

13. From the record we find that except for the information as mentioned in the petition under Section 434 (e) & (f) of the Companies Act, 1956, no further information was provided by the Respondents in terms of Rule 5 of “The Companies (Transfer of Pending proceedings) Rules, 2016”. As per proviso, the Respondent was required to submit all *Company Appeal (AT) (Insolvency) No. 209 of 2017*

information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under Sections 7, 8 or 9 of the 'I&B Code. In the present case, there is nothing on the record to suggest that in terms of Part V of Form-1 'Particulars of Financial Debt [Documents, Records and Evidence of Default]' have been supplied by the Respondents nor copies of documents as mentioned below Part V of Form I were provided by the Respondents. For example, the Respondents have not filed any record of default with the information utility nor any other record, as prescribed by 'Insolvency and Bankruptcy Board of India' has been enclosed.

14. This apart, there is a doubt, as submitted by the learned counsel for the Appellant, as to whether the 1st Respondent, A. Prem Kumar can claim to be a 'Financial Creditor'.

15. From the Income Tax Return enclosed by the 1st Respondent, while we find that the 1st Respondent has been treated to be a 'Creditor', but in Schedule D, the debt has been shown to be unsecured loans. The 1st Respondent has not brought on record to suggest that debt along with interest, if any, has been disbursed by the 1st Respondent to the 'Corporate Debtor' against '***the consideration for the time value of money***' or that the said money was borrowed by the 'Corporate Debtor' for one or other purpose as shown in sub-section (8) of Section 5 of the 'I&B Code'.

16. The Adjudicating Authority without ascertaining the question as to whether the 1st Respondent is a 'Financial Creditor' or not, particularly in absence of any pleading treated the application under Section 7 of the 'I&B Code', which shows non application of mind on the part of the Adjudicating Authority.

17. For the reasons aforesaid while we hold that the application under Section 433 (e) & (f) of the Companies Act, 1956 transferred to the Tribunal cannot be treated to be an application under Section 7 of the 'I&B Code', the impugned order dated 21st August, 2017 being bad in law, and in view of the observations made above, is set aside. In the result, in terms of proviso to Rule 5 of "The Companies (Transfer of Pending proceedings) Rules, 2016", the application preferred by the Respondents under Section 433 (e) & (f) of the Companies Act, 1956 stands abated. However, it will be open to the Respondents to move before appropriate forum for appropriate relief.

18. In effect, order (s) passed by Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account and all other order (s) passed by Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications and all such orders and actions are

declared illegal and are set aside. The application preferred by Respondent is dismissed as abated. Learned Adjudicating Authority will close the proceeding. The 'Corporate Debtor' company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

19. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed, and the 'Corporate Debtor' will pay the fees of the Interim Resolution Professional, for the period he has functioned. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice Bansi Lal Bhat)
Member (Judicial)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

6th December, 2017

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