

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 06 of 2019

[Arising out of order dated 25th October, 2018 passed by Adjudicating Authority (NCLT, Division Bench, Chennai) in CP/358(IB)/2018]

IN THE MATTER OF:

1. Vinayaka Exports,

Rep by its Proprietor,
Ms. Bhavika Jain,
No. 51, Hunters Road,
Choolai, Chennai
Tamilnadue- 600 112

2. Mrs. Divya M. Jain,

No. 51, Hunters Road,
Choolai, Chennai
Tamilnadue- 600 112

.. Appellants

Vs.

M/s. Colorhome Developers Pvt. Ltd.,

Mr. D. Ramesh,
Managing Director,
S/o Duraisamy,
No. 26/14, 10th Street,
M-Block, Anna Nagar East,
Chennai, Tamilnadu- 600 102

.. Respondent

For Appellant: Mr. S.M. Vivekanandh, Advocate.

For Respondent: Mr. Murugesh Kasivel, Advocate

J U D G M E N T

KANTHI NARAHARI, MEMBER(TECHNICAL)

The Appellants, aggrieved by the order dated 25th October, 2018 passed by the Adjudicating Authority (NCLT, Division Bench, Chennai) preferred this appeal. The Appellants have raised various grounds in

the appeal in its support contending that the Adjudicating Authority should not have rejected the application preferred by them under Section 7 of Insolvency and Bankruptcy Code, 2016 (in short IBC). The Adjudicating Authority passed the following order:

“ORDER

The Tribunal observes that there are disputes between the petitioners and the Respondent and there are proceedings against them in various forums in matters relating to the present petition.

In this case, the Tribunal observes that, in the statements of accounts, the M/s Colorhomes, the sole proprietorship concern and M/s Colorhome Developers Pvt Ltd, the Respondent herein is used interchangeably. There is no segregation of the amounts paid by both the undertakings from which the liability can be drawn clearly.

In view of the above, the Tribunal observes that the petition is liable to be dismissed under Section 5(6) and Section 5(6)(a) of the IBC, 2016 as there is a civil suit pending and there exists a dispute in the amount of debt between both the parties and also under section 7(5)(b) of the IBC, 2016 for being incomplete in details.

Therefore, the petition CP/358/(IB)/2018 stands dismissed and there will be no order as to costs.”

3. From the perusal of the impugned order it is noted that the Adjudicating Authority dismissed the application which was filed under Section 7 of the IBC read with Rule-4 of Insolvency and Bankruptcy (Application to “Adjudicating Authority”) Rules, 2016 (**IBC Rules**) observing that there are disputes between the Appellants and Respondent, pending proceedings in various Forums and observed that the Statement of Account of M/s Colorhomes, the sole proprietorship concern and M/s Colorhome Developers Private Limited, the Respondent used interchangeably and there is no segregation of the amount paid by both the undertakings from which the liability can be drawn. Further, the Adjudicating Authority observed that the petition/application is liable to be dismissed under Section 5(6) and Section 5(6)(a) of IBC and there is a civil suit pending and there exist a dispute in the amount of debt between both the parties and also under Section 7(5)(b) of IBC for being incomplete in details.

4. Admittedly, the application/petition filed by the Appellants before the Adjudicating Authority under Section 7 of IBC for initiation of Corporate Insolvency Resolution Process against the Respondent/Corporate Debtor. The provision contemplates that the Financial Creditor either by itself or jointly with other Financial

Creditor or any other person on behalf of the Financial Creditor may file an application for initiation of Corporate Insolvency Resolution process against a Corporate Debtor before the Adjudicating Authority, when a default has occurred under Section 7(1) of IBC. The Appellants have rightly invoked the jurisdiction of the Adjudicating Authority under the above provision in a duly prescribed Form-1 (at page- 475, Annexure-A 37 of Paper Book, Vol.-II). The Form-1 consists of five parts. In Part-II of the Form-1, the name of the Corporate Debtor has been mentioned viz., M/s Colorhome Developers Pvt Ltd. In Part- IV, the particular(s) of Financial debt has been given. According to the said particular(s), the First Applicant had granted debt of Rs. 8.20 Crores on 10.08.2012 and 01.12.2012 and Rs. 2 Crores disbursed by the Second Applicant on 28.09.2012. the total amount claimed to be default was Rs. 10,14,53,750/-. In Part-V, the particulars of financial debt, documents, records and evidence were given. As per the said particulars, the Corporate Debtor had given a Promissory Note dated 01.12.2012 for a sum of Rs. 8.20 crores in favour of the First Appellant and Promissory Note dated 28.09.2012 for a sum of Rs. 2 Crores in favour of the Second Appellant. Further the Corporate Debtor i.e., M/s Colorhome Developers Pvt Ltd executed Deed of Mortgage dated 05.06.2015 in favour of the First Appellant. Thus, we find that there is ample proof that the Appellants had disbursed the debt to the Corporate Debtor and the Corporate Debtor, towards security, executed Mortgage Deed and also issued Promissory Notes.

5. We have perused the Promissory Notes issued by the Corporate Debtor i.e., M/s Colorhome Developers Pvt Ltd dated 01.12.2012 for a sum of Rs. 8.20 Crores in favour of First Appellant (at page 37 of Paper Book, Volume-I) and Rs. 2 Crores dated 28.09.2012 in favour of Second Appellant and also the Mortgage Deed executed on 05.06.2015 in favour of the Appellants (at page -41, Annexure-A8 of Paper Book, volume-I).

6. The contention of the Respondent that various proceedings are pending before different Forums is concerned, we have perused the records and observe that the proceedings have nothing to do with the claims of the Appellants. The Corporate Debtor filed Civil Suit before the City Civil Court at Chennai arraying the Appellants and others as Defendants in the said suit seeking declaration that the Plaintiff does not owe any amount to the Defendants and also sought permanent injunction restraining the Defendants, their men, agents, servants or anybody who is claiming under them from any way interfering with the Plaintiffs peaceful possession and enjoyment over the suit schedule property.

7. The Adjudicating Authority was of the view that in view of pendency of the civil suit, there exist a dispute in the amount of debt between both the parties is concerned. The said stand cannot be accepted. The application filed before the Adjudicating Authority is under Section 7 of the IBC and not under Section 9 of the IBC where one can take a plea stating that there exists a dispute between the

parties before issuing a Demand Notice under Section 8(1) of the IBC. Therefore, we are unable to uphold such finding of the Adjudicating Authority.

8. The Adjudicating Authority has also taken a stand that there is no segregation of the amounts paid by both the undertakings i.e., M/s Colorhomes, sole proprietorship concern and M/s Colorhome Developers Pvt Ltd from which the liability can be drawn is concerned, we cannot accept the stand as taken by the Adjudicating Authority for the reason that M/s Colorhome Developers Pvt Ltd had issued Promissory Notes dated 01.12.2012 in favour of the First Appellant and 28.09.2012 in favour of the Second Appellant and also receipts dated 01.12.2012 and 28.09.2012 in respect of the amounts received from the Appellants. Further M/s Colorhome Developers Pvt Ltd represented by Assistant Manager, Marketing – Mr. D. Mohan Raj executed the Deed of Mortgage in favour of the 1st Appellant is itself ample proof that M/s Colorhome Developers Pvt Ltd have the liability to repay the debts to the Appellants. Further, the Respondent, by virtue of the aforesaid documents, admitted the debt that is due and payable which is an admissible evidence and by taking technical objection, saying that M/s Colorhome Developers Pvt Ltd had not borrowed any money is concerned, we are of the view that one cannot escape from the liability having admitted the fact that the debt is payable. Further the Adjudicating Authority was of the view that the petition was liable to be dismissed under Section 5(6)(a) of the IBC is

concerned, we hold that the provision cannot be made applicable in the present case. The said provision of law is extracted herein below for better appreciation:

Section 5(6) defines

“dispute” includes a suit or arbitration proceedings relating to:

(a) The existence of the amount of debt;

(b) The quality of goods or service; or

(c) The breach of a representation or warranty;”

9. The Adjudicating Authority while rejecting application held that there is a civil suit pending and there exist a dispute in the amount of debt between both the parties and also under Section 7(5)(b) of the IBC for being incomplete in details.

Section 7 of the IBC deals with initiation of Corporate Insolvency Resolution Process by Financial Creditor. Sub-section(5) of the said Section reads as under:

“(5) Where the Adjudicating Authority is satisfied that-

(a) a default has occurred and the application under sub-section(2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it

may, by order, admit such application;

or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.”

10. With regard to definition of Section 5(6)(a) of the IBC, we are of the view that the Adjudicating Authority should not have taken the said stand in view of the decision of the Hon’ble Supreme Court in the matter of **“Innoventive Industries Ltd. Vs. ICICI Bank and Anr.”** **[(2018) SCC 407]** held in paragraphs 27, 28, 29 & 30.

11. Before dealing with the judgment of the Hon’ble Supreme Court, we are also of the view that as per Section 7(5)(b) of the IBC, the Appellants in Form-I have given complete details of debt and default in Part-V thereof. Further the Appellants have also given the name of the proposed Interim Resolution Professional (in short **IRP**) and the

IRP has agreed to accept the appointment in Form-2 dated 18.12.2017 addressed to the Adjudicating Authority. The IRP also enclosed his certificate of Registration dated 09.10.2017. According to the above, there is no default and application is complete. Further, the proviso to sub-section 5 (b) of Section 7 clearly states that the Adjudicating Authority shall, before rejecting the application under clause-b of sub-section 5, give a notice to the Applicant to rectify the defect in his application within 7 days of receipt of the said notice from it. We are of the view that the Adjudicating Authority has not afforded any opportunity to the Applicant to rectify the defect. The Respondent through his Advocate issued a Legal Notice dated 24.06.2017 to the Appellant whereby it is admitted that the Respondent i.e., M/s Colorhome Developers Pvt Ltd represented by its Managing Director, Mr. D. Ramesh admitted that they have borrowed hand loan from the Appellants in various parts vide cheque/wire transfer to the tune of Rs. 4 Crores along with 12% interest per annum for its business needs the same is to be repaid in various instalments. The respondent contends that some of the amounts have been paid to the Appellants is concerned, we are not determining any quantum of claim of the Appellants in this appeal.

12. In view of the above reasons, we are of the view that the amounts borrowed by the Respondent is a debt due and payable and it is borrowed against a time value of money. The Hon'ble Supreme Court in the matter

of **“Innoventive Industries Ltd. Vs. ICICI Bank and Anr.” – (2018)1**

SCC 407, in paragraphs 27, 28, 29 & 30 held which read as under:

.....

“27. *The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning nonpayment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has*

been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.

28. *When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant*

in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the

defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. *The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.*

30. *On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”*

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13. We find that there is a debt due and payable which is more than Rs. 1 lakh and the same has been defaulted by the Respondent and being satisfied with the grounds as mentioned by the Appellants and in view of the judgment of Hon^{ble} Supreme Court (supra), we hereby set aside the impugned order dated 25th October, 2018, and hold that it is a fit case to trigger Insolvency Resolution Process.

14. Accordingly, we direct the Adjudicating Authority (NCLT, Chennai Branch, Chennai) to admit the application under Section 7 of IBC after notice to Respondent, in case Respondent wants to settle

claim before order of admission. Parties to appear before the Adjudicating Authority on 16.10.2019 for fixing the date of hearing. No orders as to cost.

[Justice S.J. Mukhopadhaya]
Chairperson

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

(Kanthi Narahari)
Member(Technical)

New Delhi 23rd September, 2019

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