

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 847 of 2020

[Arising out of Order dated 30 July 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai in Company Petition (IB) No. 1416/MB/2017]

IN THE MATTER OF:

Mr Sunil Kewalramani
Rimal 2, Jumeirah Beach
Residence, Dubai, UAE

**Appellant/
Original Applicant**

Versus

Kestrel Import & Export Pvt Ltd
Having registered office at:
Unit No. 203, Raheja Plaza
Plot No. 15, CTS No. 844/15/b
Ambivali Village, Andheri (West)
Mumbai – 400053

...Respondent

With

Company Appeal (AT) (Insolvency) No. 848 of 2020

IN THE MATTER OF:

Mr Parmanand Kewalramani
C/o Mr Sunil Parmanand Kewalramani
Rimal 2, Jumeirah Beach
Residence, Dubai, UAE

**Appellant/
Original Applicant**

Versus

Modlite Holdings Pvt Ltd
Having registered office at:
Unit No. 203, Raheja Plaza
Plot No. 15, CTS No. 844/15/b
Ambivali Village, Andheri (West)
Mumbai – 400053

...Respondent

With

Company Appeal (AT) (Insolvency) No. 853 of 2020

IN THE MATTER OF:

1. Sunil Parmanand Kewalramani

**Rimal 2, Jumeirah Beach
Residence, Dubai, UAE**

**Appellant No.1/
Petitioner No.1**

**2. Manoj Parmanand Kewalramani
Rimal 2, Jumeirah Beach
Residence, Dubai, UAE**

**Appellant No.2/
Petitioner No.2**

**3. Parmanand Kewalramani
C/o Mr Sunil Parmanand Kewalramani
Rimal 2, Jumeirah Beach
Residence, Dubai, UAE**

**Appellant No.3/
Petitioner No.3**

Versus

**Urban Sanctuaries Developers Pvt Ltd
Having registered office at:
Unit No. 203, Raheja Plaza
Plot No. 15, CTS No. 844/15/b
Ambivali Village, Andheri (West)
Mumbai – 400053**

...Respondent

With

Company Appeal (AT) (Insolvency) No. 1016 of 2020

IN THE MATTER OF:

**M/s Kestrel Import & Export
Private Limited
304, Makani Centre 35th Road
Behind National College Khar (W)
Mumbai – 400058
E-mail ID: deepak@medilux.co.in
(Corporate Debtor in Original Petition Before
NCLT)**

**Appellant/
Original Respondent**

Versus

**Mr Sunil Parmanand Kewalramani
2005/6, Stellar Tower
Lokhandwala Complex Andheri (W)
Mumbai – 400053 MH IN
E-mail ID: sunilkewalramani@gmail.com**

...Respondent

With

Company Appeal (AT) (Insolvency) No. 1018 of 2020

IN THE MATTER OF:

**M/s Urban Sanctuaries Developers Private
Limited**

Company Appeal (AT) (Insolvency) No. 847, 848, 853, 1016, 1018 & 1019 of 2020

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**304, Makani Centre 35th Road
Behind National College Khar (W)
Mumbai – 400058
E-mail ID: deepak@medilux.co.in**

**Appellant/
Original Respondent**

Versus

- 1. Mr Sunil Parmanand Kewalramani
2005/6, Stellar Tower
Lokhandwala Complex Andheri (W)
Mumbai – 400053 MH IN
E-mail ID: sunilkewalramani@gmail.com** **...Respondent No.1**
- 2. Mr Manoj Parmanand Kewalramani
2005/6, Stellar Tower
Lokhandwala Complex Andheri (W)
Mumbai – 400053 MH IN
E-mail ID:
mkewalramani@gmail.com** **...Respondent No.2**
- 3. Mr Parmanand Kewalramani
2005/6, Stellar Tower
Lokhandwala Complex Andheri (W)
Mumbai – 400053 MH IN
E-mail ID: pkramani48@hotmail.com** **...Respondent No.3**

With

Company Appeal (AT) (Insolvency) No. 1019 of 2020

IN THE MATTER OF:

**M/s Modlite Holdings Private Limited
304, Makani Centre 35th Road
Behind National College Khar (W)
Mumbai – 400058
E-mail ID: deepak@medilux.co.in**

**Appellant/

Original Respondent/
(Corporate Debtor in
Original Petition-
Before NCLT)**

Versus

**Mr Parmanand Kewalramani
2005/6, Stellar Tower
Lokhandwala Complex Andheri (W)
Mumbai – 400053 MH IN
E-mail ID: pkramani48@hotmail.com
(Original Petitioner to Original Petition)**

...Respondent

Present:

For Appellant : Mr Pratik Tripathi, PCS and Mr Rahul Chitnis, Advocates

For Respondent : Mr Dushyant Manocha, Ms Ragini Gupta and Ms Anannya Ghosh, Advocates

J U D G M E N T

[Per; V. P. Singh, Member (T)]

The current set of Appeals emanate from the Order dated 30 July 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai in three separate Company Petitions¹ under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short '**Code**'), which were all dismissed on similar grounds and captioned Appeals raise the identical question of facts and law. Therefore, all these appeals are taken together.

2. The Appellants are aggrieved by the certain observations made against them while dismissing the Petition under Section 7 of the Code. The present Appeals are limited to the extent of observations. Accordingly, the only relief being sought by the Appellant's herein is the quashing/expunging/ setting aside said observations from the impugned judgments.

3. On the contrary, the Respondent contends that the Adjudicating Authority ought to have taken action against the Appellants under Sections 65, 72 and 75 of the I&B Code 2016. The Respondents have preferred the cross Appeals² praying action against the Appellants under Sections 65, 72 and 75 of the Code,

¹ CP (IB) 1416/MB/2017, CP (IB) 1415/MB/2017 and CP (IB) 1414/MB/2017

² CA (AT) (Ins.) Nos. 1016 of 2020, 1018 of 2020 and 1019 of 2020

which were also dismissed by way of the impugned Order. On this score, the Respondents have preferred cross Appeals.

Brief Facts

4. The Respondent Companies in each of the three Appeals are family-owned companies owned by three brothers, with each brother and their siblings are one-third shareholder of each Company. The three brothers of Kanhiyalal Kewalramani, Wadhuram Kewalramani, and Parmanand Kewalramani have one-third of shareholding in each Respondent companies' and, as such, enjoy control over the companies to that extent. The appellants herein belong to the Parmanand Kewalramani family (being Parmanand Kewalramani himself and his son, Sunil Parmanand Kewalramani and Manoj Perमानand Kewalramani).

5. Parmanand Kewalramani and his two sons Sunil Kewalramani and Manoj Kewalramani, advanced loan to the Respondent Companies and, sometimes, in 2017, Parmanand Kewalramani and his sons demanded monies back from the Respondent companies. To that end, notices were issued. Since the other Directors/Stakeholders of the Respondents Companies (i.e. Kanhiyalal Kewalramani and Wadhuram Kewalramani families) were negligent in attending to the affairs of the Respondents Companies, these notices were responded to by the Parmanand Kewalramani and family member itself, admitted that the Respondent Companies did not have sufficient funds.

6. After that, Petitioners moved three Section 7 Petitions; the Adjudicating Authority dismissed all by the impugned Order's dated 30 July 2020. The Adjudicating Authority also dismissed the Application for taking action under Sections 65, 72 and 75 of the Code against the Appellants. The Respondents in

its cross Appeals contend that the Learned Adjudicating Authority ought to have proceeded against the Appellants under Sections 65, 72 and 75 of the Code.

7. The Adjudicating Authority has made the following observations which compelled the Appellants to file the said Appeals.

*"18. The Reply has been filed by the Petitioner and his real brother, Mr. Manoj Kewalramani, themselves on September 2017 on behalf of the Corporate Debtor Company. **This clearly shows that there is no effective service of demand notice as demand notice was sent, received and replied by the Petitioner and his brother among themselves. Therefore, this Bench clearly finds unlawful collusion and misuse of the position by the Petitioner.** This also brings out the fact that there is no difference between the Petitioner and the Corporate Debtor as the Petitioner is Promoter and in control of the day to day affairs of the Corporate Debtor Company. This Bench notes that even in his submissions, the Petitioner has not denied the fact that the demand notice have been issued, received and replied amongst him and his brother only.*

*19. **This Bench also has come to a conclusion that the effective control of the Corporate Debtor Company has remained with the Petitioner only. This Bench also fairly concludes that the whole process of issuing, receiving and replying of the demand notice by the the Petitioner and his brother has been without any knowledge of the other Directors and therefore clearly shows malicious intention of the Petitioners. Therefore, the Bench concludes that there is not been any "Effective service of Demand notice".***

(Verbatim copy, emphasis supplied)

Grounds of Appeal

8. These Appeals are filed mainly on the ground that;
- The Adjudicating Authority has failed to notice that there is no requirement of issuance of demand notices under Section 7 of the Code.
 - The Learned Adjudicating Authority's observation that there was any secret arrangement between the Appellant and the Respondent, which could be termed as collusive, could have been used to obtain a decision from the Tribunal sinister purpose, is without any basis.
 - There were only unsubstantiated allegations against the Appellants without any evidence on record.
 - The Adjudicating Authority concluded that there was collusion between two parties. When one of them was not even a party in the respective petitions, this itself is a ground to set aside the learned Adjudicating Authority's observation in the impugned judgements. Since it is settled law that nobody shall be condemned unheard.
 - The conclusions regarding the Appellants having control over the Respondent companies' affairs are factually incorrect. That has arrived on account of false statements made by the Respondent on the affidavit.

- The Adjudicating Authority has failed to consider that proceeding under Section 7 was filed by the Appellant in the Financial Creditor's capacity to exercise their legal right to do so.
- The Adjudicating Authority has failed to consider that proceeding under Section 72 of the Code could only be initiated after the Petition's admission.

Respondents Contention

9. The Respondents contend that Appellant repeatedly claims that he is not in control of the Corporate Debtor's affairs. But demand notice dated 21 August 2017 issued by the Petitioner was received by the real brother of the Petitioner, and the same was replied to by the real brother of the Petitioner on 4 September 2017, stating that the Corporate Debtor has no fund to repay. This shows that the demand notice issued and replied by the Petitioner and his brother amongst themselves even petitioners tried to remove all the directors on board of the Corporate Debtor stating that they have not attended the board meeting since last one year hence their office is vacated. Even Petitioner filed form DIR 12 on 6 September 2017 for removal of all other directors. But ROC raised a query and did not approve the form. It is contended that the motive behind the filing of fraudulent and malicious IBC petition is to kill the Corporate Debtor to hide all his actions of miss- management, forgery, siphoning off funds, manipulation of statutory records and false attendance of other Directors in the meeting for which a meeting of Board of Directors was called on 27 June 2017. To run away from all the above allegations, the petitioners and all his family members filed

the Petition against the Corporate Debtor and other Directors and tried to kill the Corporate Debtor.

10. We have heard the arguments of the Learned Counsel for the parties and perused the record.

Discussions and Finding

11. Learned Counsel for the Appellants contends that the Adjudicating Authority's observation in the Judgement aggrieves them, so the challenge is limited to the extent of observations of the Adjudicating Authority in the impugned orders. Therefore we are only considering the merit of the impugned orders to the limited extent of observations by the Adjudicating Authority.

12. The Adjudicating Authority has concluded that the alleged debt was not Financial Debt. Undeniably, issuance of demand notice under Section 7 of the Code is not a mandatory requirement. There is no concrete material other than a relationship to conclude any collusion, much less unlawful collusion. All the Allegations against the Appellants are based on unsubstantiated allegations. Suspicion, howsoever strong, does not take the place of proof to conclude collusion. Companies with only family members as shareholders/Directors act beyond relations most of the times. In such companies, parties are related and only due to relationship their acts can't be judged.

13. There was no justification for the Adjudicating Authority to have concluded that there was, in fact, collusion. The term 'Collusion', in judicial proceedings, is well understood. It is defined as a secret arrangement between

two persons so that one person initiates a legal proceeding against the other to obtain the Judicial Tribunal's decision for a sinister purpose.³ It is not the Respondent's case that there was any secret arrangement between the Appellant and the Respondent which could be termed as collusive and could have been used to obtain a decision from the Adjudicating Authority a sinister purpose. Therefore, there could not have been any collusion, as legally understood.

14. The Petitioner, Mr. Sunil Parmanand Kewalramani filed this Petition, seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against corporate debtor 'Kestrel Import and Export Private Limited' alleging that Corporate Debtor committed default as provided under Section 7 of the Insolvency & Bankruptcy Code 2016. The Petitioners contended that they had advanced loan on various dates to the Corporate Debtor, out of which amount is due to the Petitioner by the Corporate Debtor.

15. The Corporate Debtor submits that the Corporate Debtor is a family-owned Company comprising three brothers having 1/3 shares of the Company by each brother and their immediate siblings. It is stated that the Petitioner is Promoter, Director and Shareholder of the Company. The Control over the affairs and management of the Company is lying with the Petitioner group since long but now, rest of the Directors are trying to take control of the affairs of the Company but still Petitioner, his father and brothers are having illegal possession of the statutory records, agreements, registries and cheque books

³ Rupchand Gupta v Raghuvanshi(private) Ltd AIR 1964 SC 1889

of the Company and transferred the funds of the Corporate Debtor to Petitioner and his immediate relatives. All Balance Sheets of financial year 2015-16, through which the Petitioner claims the acknowledgement of outstanding amount by the Corporate Debtor, are signed by Petitioner and his brother only.

16. In addition to CP No 1416/MB/2017 earlier, two more similar Petitions, i.e., CP (IB) 1414/MB/2017 and CP (IB) 1415/MB/2017, were filed by the same Petitioner(s) against other family-owned Companies. It is to be noted that the facts, documents annexed, and submissions made by both the parties are almost the same/similar in all these Petitions.

17. The Corporate Debtor contended that there is no due and payable debt in terms of Section 5(8) of I &B Code, 2016, and therefore there is no default. It is further submitted that the contribution made by the Petitioner was in the form of share capital like other Directors and shareholders, and the amount was invested as quasi capital in the Company. The Petitioner has initiated fraudulent and malicious proceedings against the Corporate Debtor to save themselves from various allegations, which was the subject matter of the Board meeting dated 27.06.2017.

18. The Adjudicating Authority rejected the Application because what is being claimed as debt by the Petitioner is, in fact, infusion of funds as Promoter and Shareholder contributed for running its operations since it is a private business of the Kewalramani family. The amount advanced contributes to the Company's capital structure as there is no written or oral agreement or any fixed tenure for which money has been given to the Corporate Debtor Company.

Hence, by no stretch of the imagination, the amount can qualify as financial debt.

19. The Corporate Debtor filed IA stating that the Petitioner initiated the proceedings fraudulently and falsely intended, not for Insolvency's resolution. The Adjudicating Authority, while rejecting the Petition, further observed that;

"there is no effective service of demand notice as demand notice was sent, received and replied by the Petitioner and his brother among themselves. Therefore, this bench clearly finds unlawful collusion and misuse of the position by the Petitioner. This also brings out the fact that there is no difference between the Petitioner and the Corporate Debtor as the Petitioner is Promoter and in control of the day to day affairs of the Corporate Debtor Company".

20. Being aggrieved by the Adjudicating Authority's observations, the Appellants have preferred the Appeal No's 847, 848 and 853 of 2020. Being aggrieved by Order of the Adjudicating Authority for not taking any action against Petitioners /Appellants, Respondents filed Cross appeals No's 1016, 1018 and 1019 of 2020.

21. Interestingly, collusion, in law, requires more than one person. It was necessary for the Respondent to implede all the parties against whom such collusion was alleged. Indisputably, that was not done. Despite that, the Adjudicating Authority concluded that there was collusion between parties when one of them was not even a party before it in the respective Petitions. That itself is a ground to set aside the learned Adjudicating Authority's observations on this point. Since it is settled law that nobody shall be condemned unheard.

22. The Adjudicating Authority mainly dismissed the petitions on the ground that the alleged debt is not a 'financial debt' as defined under Section 5(8) of the Code.

23. The adjudicating authority has observed that ;

"in this background, this bench tends to agree with arguments submitted by the corporate debtor that what is being claimed as debt by the Petitioner is in fact infusion of funds as promoter and shareholder contributed for running its operations since it is private business of Kewalramani family. This bench is of the view , after looking at the case , that it is a contribution to the capital structure of the Company as there is no any written or oral agreement for any fixed tenure for which money has been given to the corporate debtor company and hence, by no stretch of imagination, the amount can qualify as financial debt."

24. There was no valid ground to conclude that the Petition was filed with malicious intent. The Adjudicating Authority's finding regarding malicious intent cannot be treated as valid by any stretch of the imagination. The Petition was dismissed mainly because alleged debt cannot be treated as financial debt. Only on this basis, the inference cannot be drawn that the Petition was filed with malicious intent. In any event, the apparent malicious intent was for the issuance of the demand notice, which, as stated above, is not even a legal requirement under Section 7 of the Code. Therefore it is clear that the observation of the learned Adjudicating Authority that the Petition is filed with malicious intent is invalid.

25. In the facts and circumstances of the present case, only on the ground that the Adjudicating Authority has not treated the alleged Transaction as a financial debt, no action could have, in any event, be taken under Sections 65, 72 and 75 of the Code. In any event, from the facts of the case, none of the preconditions of the above-mentioned provisions of Sections 65, 72 or 75 of the Code has been satisfied, which is evident from the following.

26. The Appellant had initiated proceeding under Sections 7 of the Code in the financial creditor's capacity to exercise their legal right. While the petitions were dismissed on merits, there is no doubt that the said proceedings were initiated for the purposes envisaged by law.

27. There is nothing on record to show that the proceedings u/s 7 of the Code were initiated for the purpose other than seeking a resolution, which is the sine qua non for initiation of proceedings under Section 65 of the Code.

28. As far as Section 72 is concerned, the same pertains to the punishment for willful and material omission from statements relating to the Corporate Debtor's affairs. Since the Appellant had initiated the proceedings under Section 7 of the Code in their capacity as 'Financial Creditors'. Section 72 of the Code deals explicitly with the punishment for an officer of the corporate debtor's delinquent act. He makes any material and wilful omission in any statements relating to the corporate debtor's affairs. From the present case facts, there was no occasion for invoking Section 72 of the Code.

29. As far as Section 75 of the Code is concerned, it provides punishment for false information furnished in the Application made under Section 7, relating

to material particulars, knowing it to be false or omits any material fact, knowing it to be material. There is nothing on record to show that the Application filed under Section 7 of the Code either contains false particulars in the knowledge of the Applicant/Appellant or Applications were filed after suppressing material facts.

30. In the circumstances as stated above, we are of the considered opinion that the Adjudicating Authority has made invalid observations that were unwarranted. Therefore, we of the considered opinion that Appeal Nos 847, 848 and 853 deserves to be allowed and the remarks/observation made by the Adjudicating Authority in para 18 and 19 of the impugned judgements deserve to be expunged. Cross Appeal Nos 1016, 1018 and 1019 of 2020 deserve to be dismissed.

ORDER

The Appeal Nos. 847, 848 and 853 of 2020 are allowed. We expunge the remarks/observations in para 18 and 19 of the impugned judgements. Cross Appeal Nos 1016, 1018 and 1019 of 2020 sans merit hence dismissed—no order as to costs.

[Justice A.I.S. Cheema]
Officiating Chairperson

[V. P. Singh]
Member (Technical)

NEW DELHI
19th APRIL, 2021

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