

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL**Company Appeal (AT) (Insolvency) No. 36 of 2018**

[arising out of Order dated 5th January, 2018 by NCLT, Bengaluru Bench, in C.P. No. (IB)-90(BB)/2018]

IN THE MATTER OF :**K. Kesava****Appellant****Vs.****Ajay Gopaldas Samat (HUF) & Ors.****Respondents**

Present: For Appellant: - Mr. Balaji Srinivasan and Ms. Garima Jain, Advocates

For Respondent:- Mr. Nikhil Nayyar and Mr. Divyanshu Rai, Advocates

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

Mr. Kesava, Shareholder and Director of Maxworth Realty India- (Corporate Debtor) has challenged the order dated 5th January, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench, whereby and where under the application preferred by the Respondents under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") has been admitted, order of moratorium has been passed and resolution professional has been appointed with certain directions.

2. The main plea taken by the appellant is that there is a dispute in existence with the Corporate Debtor about the debt and default, therefore, the application under Section 7 was not maintainable. Further, according to

learned counsel for the appellant, the respondent do not come within the meaning of 'financial creditor' as defined under section 5(7)&(8) of the I & B Code.

3. The Adjudicating Authority held that the corporate debtor utterly failed to show any dispute and/or that the amount as claimed was not due. The Authority further held that there is an evidence of default.

4. Learned counsel appearing on behalf of the appellant submitted that the dues of 'Ajay Gopaldas Samat HUF and Mrs. Manisha A. Samat' has already been paid. In the pleadings details of payment made between August 2015 to July 2016 have been shown giving reference to the bank statements attached with the appeal.

5. Mr. Ajay Gopaldas Samat was directed to appear in person along with affidavit to state as to in terms of which agreement he had received the amounts by cheques on different dates as shown and mentioned at pages 'D' and 'E' of the appeal. The respondent has filed affidavit and taken plea that the amount has been paid in terms of other loan agreement and following stand has been taken: -

"4. I state that I have advanced loan to the 3rd Respondent in my individual capacity as well as through my HUF. I state that I maintain separate bank account in my individual name and a separate bank account for my HUF. It has always been the understanding between me and the 3rd Respondent that if I have advanced a loan to the 3rd Respondent in my individual capacity, then the cheque for repayment will be issued in my individual name or directly

transferred to my individual account through online transfer. Similarly, in case the loan is advanced by my HUF, then the cheque for repayment will be issued in the name of my HUF or directly transferred to my HUF account through online transfer. I state that the 3rd Respondent has been acting as per the said understanding and at no point in time has the payment been made to me in my individual capacity when the loan has been advanced by my HUF. Similarly, at no point in time has the payment been made to me in my HUF when I have advanced the loan in my individual capacity.

5. *I state that in my individual capacity, had advanced an amount of Rs. 50,00,000/- (Rupees fifty Lakhs Only) to the 3rd Respondent as Loan Agreement dated 19.08.2014. It was agreed that the 3rd Respondent would repay the loan as per the repayment schedule agreed under the said Loan Agreement dated 19.08.2014 along with interest @ 18% per annum. It was the understanding between the 3rd Respondent and I, that the interest would be calculated on the reducing balance method, based on the timelines agreed under the repayment schedule in the Loan Agreement dated 19.08.2014 and that the entire interest amount would be payable in advance. It was further agreed that the entire loan would be repaid on or before 28.06.2015. A copy of the Loan Agreement dated*

19.08.2014 is produced herewith as **Annexure 'R19'**. I further state that as a security for the aforementioned loan, the 3rd Respondent had mortgaged the Flats bearing No. A-201, A-203 and A-404, along with three covered car parking, in the apartment complex known as 'MAX SPOORTY', constructed on the residentially converted land bearing Sy.No. 71/10, measuring 25 Guntas, situated at Thindlu Village, YelahankaHobli, Bangalore North Taluk. A copy of the Mortgage Deed dated 19.08.2014 is produced herewith as **Annexure 'R20'**. The 3rd Respondent has also executed a hundi in my favour which is produced as **Annexure 'R21'**.

6. I state that as per the above understanding, the interest amount for the entire loan amount, calculated on the reducing balance method, would amount to Rs. 4,12,500/- (Rupees Four Lakhs Twelve Thousand Five Hundred Only) which had to be paid up-front, before the repayment starts. I state that, pursuant to the above, as per the terms of the Loan Agreement dated 19.08.2014 and the understanding, the 3rd Respondent paid the interest of Rs. 4,12,500/- (Rupees Four Lakhs Twelve Thousand Five Hundred Only) up-front, which was credited in my account on 20.08.2014. Thereafter, the 3rd Respondent has repaid an amount of Rs. 35,00,000/- (Rupees Thirty-Five Lakhs Only) towards principal as per the repayment schedule

*and the remaining amount of Rs. 15,00,000/- (rupees Fifteen Lakhs Only) is currently outstanding. These payments are reflected in the table at page 'D' of the appeal under the caption "List of Payments made to Ajay G.Samat" and have no connection whatsoever with the Loan Agreement dated 17.07.2014, out of which the present proceedings arise. I state that I am entitled to interest @ 18% per annum, as agreed, on the outstanding amount of Rs. 15,00,000/- (rupees fifteen Lakhs Only). A table showing the dates and the amount repaid till date and the amount outstanding is produced as **Annexure 'R22'**.*

7. *It is further submitted that the payments mentioned in the other two tables at pages 'D' and 'E' of the appeal under the caption "List of Payments made to Ajay G.Samat(HUF)" and under the caption "List of Payments made to Manisha A.Samat" pertain to payments made with respect to the Loan Agreement dated 17.7.2014, out of which the present proceedings arise. I further state that on Page D of the appeal memorandum, under the caption "List of Payments made to Ajay G.Samat (HUF", an amount of Rs. 5,00,000/- (rupees Five Lakhs Only) allegedly paid on 18.12.2014, was not paid and has been incorrectly shown as paid to the 1st Respondent. I state that the cheque for the said amount of Rs. 5,00,000/- was returned for the reason*

‘insufficient funds’ and the cheque was returned to the 3rd Respondent and the said amount is still outstanding. The sum total of the payments made to the HUF and to Manisha A.Samat clearly shows that there is a default and that the 3rd Respondent Company owed a sum of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) (principal) to both the HUF as well as Manisha A.Samat.”

6. The appellant has disputed the aforesaid stand taken by the respondents and brought to the notice of this Appellate Tribunal the following facts: -

- “4. *It is submitted that Ajay Samat, Manisha Samat and Ajay G.Samat(HUF) herein have entered into a total of eight Agreements whereby amounts have been lent to Respondent No. 3 Company. It would be pertinent to note that some agreements have been entered into individually by Manisha Samat; Ajay Samat; Ajay Samat (HUF). Similarly there are some Agreements wherein amounts have been lent collectively by the aforesaid parties. Further there are some Agreements whereby loan amount has been extended by the aforesaid parties with a third person, namely Geeta Khubani. It would be pertinent to note all the Agreements entered were essentially entered at the behest of Ajay Samat.*
5. *It is submitted the re-payment of all the aforesaid amounts were being done by the Respondent No. 3 simultaneously*

since 2013. For each of the Agreements entered into the Respondent No. 3 company executed Promissory Notes and mortgaged its property as a security for the Loan extended. The same has also been admitted by the Respondent at Para 4 of its Affidavit in Reply dated 14.02.2013. Thus it is clear that the loans that have been advanced have been adequately secured. It would also be pertinent to note that on demand there were blank letter heads and Open Cheques; that were handed over by the Appellant to Ajay Samat.

A Copy of Eight Agreements dated 21.01.2013; 26.08.2013; 11.12.2013; 13.03.2013; 17.07.2014; 19.08.2014; 10.11.2014 and 29.01.2015 is attached herewith as Annexure A1(Colly).

6. That in pursuance of the aforesaid Agreements; Manisha Samat; Ajay Samat (HUF) have extended loan amount of Rs. 5,11,00,000 (Rupees Five Crores Eleven Lakhs) to Respondent No. 3 company. A detailed breakup of the aforesaid is reproduced herein below: -

SL NO.	NAME	LOAN AMOUNT
1.	AJAY G SAMAT	3,66,00,000=00
2.	MANISHA A SAMAT	95,00,000=00
3.	AJAY GOPALDAS SAMAT (HUF)	50,00,000=00

TOTAL**Rs. 5,11,00,000=00**

SL NO.	Date	Cheque NO.	Bank Name	Amount
1.	21.01.2013	000051	Kotak Mahindra Bank	7,500,00
2.	26.08.2013	000115	Kotak Mahindra Bank	7,000,000
3.	27.08.2013	000116	Kotak Mahindra Bank	2,000,000
4.	13.03.2014	RTGS	ICICI Bank	7,400,000
5.	20.08.2014	000192	Kotak Mahindra Bank	5,000000
6.	10.11.2014	RTGS	ICICI Bank	7,700,000
	TOTAL RECEIVED			36,600,00

Amount loaned by Manisha Samat

SL NO.	Date	Cheque NO.	Bank Name	Amount
1.	12.12.2013	000044	Kotak Mahindra Bank	4,500,00
2.	17.07.2014	000137	Kotak Mahindra Bank	5,000,000
	TOTAL RECEIVED			9,500,000

Amount loaned by Ajay Gopaldas Samat-HUF

SL NO.	Date	Cheque NO.	Bank Name	Amount
1.	17.07.2014	00067	Kotak Mahindra	5,000,00

		Bank	
	TOTAL RECEIVED		5,000,000

7. *It is submitted that the Respondent No.3 Company has repaid the entire amount of Rs. 5,11,00,000 (Five Crores Eleven Lakhs) to Ajay Samt; Manisha Samar and Ajay Gopaldas Samat (HUF) along with an additional amount of Rs. 36,77,625 (Rupees Thirty Six Lakhs Seventy Seven Thousand Six Hundred Twenty Five). Therefore the Respondent No. 3 Company has repaid an amount of Rs. 54,777,625 (Rupees Five Crores Fourthy Seven Lakhs Seventy Seven Thousand Six Hundred Twenty Five) to Ajay Samat; Manisha Samat and Ajay Gopaldas Samat (HUF). It is reiterated that the aforesaid repayment took place over a period of 2013-2015 simultaneously for the eight Loan Agreements entered into between the parties. As there were multiple Agreements entered into by different entities, the repayment was being done on account as per verbal instructions issued by Ajay Samat from time to time.”*

8. Copies of the agreements and details of payments have been enclosed with the affidavit.

9. The Hon’ble Supreme Court in **“Innoventive Industries Ltd. v. ICICI Bank in 2017 SCC SC 1025.”** while dealing with such issue held as follows:

“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 sub-section (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.

10. Therefore, Adjudicating Authority while dealing with such application under Section 7 is required to ascertain the ‘existence of a default’ from the records of the information utility or on the basis of evidence furnished by financial creditor. The corporate debtor is entitled to point out to the Adjudicating Authority that a default has not occurred; in the sense that a debt, which may also include a disputed claim, is not due i.e. it is not payable in law or in fact.

11. In the present case, we find that there are eight agreements reached between the respondents ‘financial creditors’ and the appellant. Detail of payments made by appellant from time to time has been mentioned in the affidavit and noticed above has not been disputed by the respondents. There appears to be a dispute about claim made by the respondents. While according to respondents the amount pursuant to a particular agreement (Say Agreement-A) has not been paid, according to corporate debtor, the amount

detailed above is paid against such agreement (Agreement-A). The dates on which payment of more than Rupees Five crore has been made in favour of one or other respondent from time to time is not in dispute. What is in dispute is the debt as claimed, which is not clear as to whether such amount is payable pursuant to such agreement. Thus, there being a dispute about the claim arising out of a particular agreement, and as the respondents have not made it clear that as to against which agreement Rupees Five Crore has been adjusted, we are of the view that it was not a fit case for initiation of corporate insolvency resolution process under section 7, and parties should have been allowed to move before a Court of competent jurisdiction for appropriate relief.

12. For the reasons aforesaid we have no other option but to set aside the impugned order dated 5th January, 2018.

13. In effect, order (s), passed by the Adjudicating Authority appointing 'Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action taken by the 'Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 7 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now 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.

14. The Adjudicating Authority will fix the fee of the 'Resolution Professional', and the 'Corporate Debtor' will pay the fees for the period he

has functioned. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

New Delhi

Dated: 18th July 2018.

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