

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 497 of 2018**

(Arising out of Order dated 31<sup>st</sup> May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, in (IB)-515(ND)/ 2017)

**IN THE MATTER OF:**

**IFCI Limited**

**...Appellant**

**Vs**

**M/s. Golf Technologies Private Limited**

**....Respondent**

**WITH**

**Company Appeal (AT) (Insolvency) No. 498 of 2018**

(Arising out of Order dated 30<sup>th</sup> May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, New Delhi in (IB)-516 (ND)/ 2017)

**IN THE MATTER OF:**

**IFCI Limited**

**...Appellant**

**Vs**

**M/s. Cedar Infonet Pvt. Ltd.**

**....Respondent**

**Present:**

**For Appellant: Mr. Sushil Gupta, Mr. Ashok Kumar Goel, Mr. Rishi Singh, Mr. Atishay K. Prasad, Advocates.**

**For Respondent: None.**

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

In both the appeals, as Appellant is common and on common ground applications filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) have been rejected, they were heard together and are being disposed of by this common judgment.

**Company Appeal (AT) (Insol.) No. 497 of 2018**

2. This appeal has been preferred against the order dated 31<sup>st</sup> May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, in (IB) No. 515/ND/2017, rejecting the application preferred by the Appellant- (‘Financial Creditor’) under Section 7 of the ‘I&B Code’.

3. The Appellant- ‘IFCI Limited’ filed petition for initiation of ‘Corporate Insolvency Resolution Process’ against ‘M/s. Golf Technologies Pvt. Ltd.’- (‘Corporate Debtor’) as a ‘Financial Creditor’ on the ground of failure of the ‘Principal Borrower’- ‘M/s. Cedar Infonet Private Limited’ to pay the financial debt of Rs.12,24,62,314/- inclusive of interest owned by it out of the financial assistance extended to it in the form of term loan of Rs.50 Crore vide sanction letter dated 23<sup>rd</sup> August, 2010, corporate loan vide sanction letter dated 11<sup>th</sup> May, 2011 not exceeding to Rs.100 Crores, out of which only Rs.20 Crores was disbursed to the said principal borrower, as ‘M/s. Golf Technologies Pvt. Ltd.’- (‘Corporate Debtor’) had executed a

registered deed of mortgage incorporating covenants of guarantee dated 19<sup>th</sup> October, 2012 to secure the repayment of loan and advances aggregating to Rs.150 Crores granted by Appellant- 'IFCI Limited' to 'M/s. Cedar Infonet Private Limited'- ('Principal Borrower').

4. The Adjudicating Authority by impugned order dated 31<sup>st</sup> May, 2018 rejected the application under Section 7 on the ground that the application under Section 7 against the 'Principal Borrower' ('M/s. Cedar Infonet Private Limited') has already been rejected.

**Company Appeal (AT) (Insol.) No. 498 of 2018**

5. In this appeal, the Appellant- 'IFCI Limited' has challenged the order dated 30<sup>th</sup> May, 2018 whereby the application under Section 7 of the 'I&B Code' filed against 'M/s. Cedar Infonet Private Limited' has been rejected on the ground that the Appellant did not file alongwith the application details of the accounts of the Respondent showing value of the invoked shares and the remaining balance, if any, after giving credit in respect of the value of invoked shares. Such finding has been given taking into consideration the report of CIBIL dated 6<sup>th</sup> November, 2017 which mentions that there are "no delinquencies reported on the borrower ('Corporate Debtor') either current or for the last 24 months" in respect of "your institution" (Appellant/ 'Financial Creditor').

6. According to the Appellant- 'IFCI Limited', it granted three loans to 'M/s. Cedar Infonet Private Limited' ('Principal Borrower'/ 'Corporate Debtor') on 29<sup>th</sup> August, 2008, 30<sup>th</sup> August, 2010 and 19<sup>th</sup> May, 2011,

respectively. The details of same were shown in the paper book and have been enclosed in the paper book of the appeal.

7. For default of payment by 'M/s. Cedar Infonet Private Limited', the Appellant- 'IFCI Limited' filed an application under Section 7 of the 'I&B Code' which was dismissed by the Adjudicating Authority on the ground that substantial part of the loan is repaid and no delinquencies are reported in the CIBIL Report.

8. Learned counsel appearing on behalf of the Appellant submitted that the Adjudicating Authority has grossly erred in concluding that as the substantial portion of debt was recovered and, therefore, the Appel was not maintainable. It was submitted that under the provisions of the 'I&B Code', what is required for maintaining the Insolvency Petition is the default of more than Rs.1 Lakh and in the present case admittedly, the default is more than Rs.12 Crores, which is a substantial amount to be paid by the 'Corporate Debtor'.

9. It is further submitted that the Appellant has not willfully suppressed any information from the Adjudicating Authority as the sale of pledged shares is a matter of historic event which took place and the amount claimed in the petition is only after giving effect to the sale of the pledged share.

10. Learned counsel for the Appellant submitted that whether the shares pledged were invoked on the same day when pledged or were invoked on or after the date when the default occurred was the issue before the

Adjudicating Authority. The Adjudicating Authority heavily relied on the chart as placed by the ‘Corporate Debtor’ (M/s. Cedar Infonet Private Limited) for holding that the substantial debt has been paid off.

11. A bare perusal of the chart as on 1<sup>st</sup> September, 2008, it is clear a total of 58,50,000 shares were invoked. Even we accept the plea taken by the Respondent that the second loan was availed on 30<sup>th</sup> August, 2010 and 1,08,50,000 of Tulip shares were pledged pursuant to loan availed on 29<sup>th</sup> August, 2008, and were extended as security for the second loan, such submission is against the Share Pledge Agreement dated 30<sup>th</sup> August, 2010.

12. In spite of service of notice, the Respondents in both the appeals have not appeared. Notices returned un-served and, therefore, it was ordered to make publication in the newspapers— one in English (‘The Times of India’, New Delhi and NCR Region) and another in Hindi (‘The Hindustan’, New Delhi and NCR Region). In spite of publication in the Newspapers, both the ‘Principal Borrower’ and the ‘Corporate Debtor’ not appeared.

13. From the record, we find that the Adjudicating Authority has failed to appreciate the fact that the invocation of pledged shares could not have taken place before the default. Repayment clause in the sanction letter at pages 109 & 117 of the paper book dated 23<sup>rd</sup> August 2010 and 11<sup>th</sup> May, 2011 respectively reads as under:

*“The loan of Rs.50 Crores shall be paid in four quarterly installments after a moratorium of one year from the date of disbursement.”*

14. The letter dated 11<sup>th</sup> May, 2011 reads as under:

*“The loan of Rs.100 Crores shall be repaid in eight quarterly installments of Rs.12.5 Crore each after a moratorium of one year from the date of disbursement.”*

15. Clause 3.1 of the Pledge Agreement relates to remedy in case of event of default. As per Clause 3.2 of the Share Pledge Agreement while dealing with consequences of invocation the same reads as under:

*“3.2.1. Irrespective of anything contained in this Agreement, on invocation of pledge, the shares comprised in the Collateral will not become the property of the Lender, even though transferred or Credited to the account of the Lender with the Depository. The Lender will not be required to acquire any such shares in their own individual account or on account of any funds or client accounts that are managed by the Lender.*

*3.2.2. The economic risk attached to the said shares comprised in the Collateral (including due variations in market price) will continue to be the account of the Pledgor until such time as they are actually sold to a third person.*

*3.2.3. Any appreciation and/or depreciation in the price of the said shares between the time of invocation and the*

*sale of such shares will continue to be to the account of the Pledgors.”*

16. The aforesaid clause makes it clear that it is date of sale of share which matters and not the date of invocation. Further due credit has been given in respect of sale of share which is reflected at page nos. 130 and 137 of the paper book of the Summary of outstanding amount, where the under-noted mentions that more than Rs.25 Crores were credited in the account of the ‘Corporate Debtor’.

17. On 5<sup>th</sup> June, 2012 i.e. prior to date of default which is 16<sup>th</sup> August, 2012 the ‘Corporate Debtor’ had written a letter to the ‘Financial Creditor’ (the Appellant herein), relevant portion of which reads as under:

*“We have paid back loan of Rs. 12.5 Crore from the corporate loan of Rs.50 Crore. We request you to release the proportionate number shares of Tulip Telecom Limited that were pledged against the loan amount.”*

18. The aforesaid letter clearly proves that the shares were not invoked and sold on the date of pledge. If the shares were invoked on the date of pledge, then such shares can’t be released.

19. It has been brought to our notice that in O.A. No. 274/2014 filed by the Appellant- ‘IFCI Limited’ before the Debts Recovery Tribunal-I, Delhi, against ‘M/s. Cedar Infonet Private Limited’ (‘Principal Borrower’/ ‘Corporate Debtor’) under Section 19 for recovery of Rs.7,19,05,825.60 has

been decreed by the DRT by judgment dated 11<sup>th</sup> July, 2018 along with pendente lite and future interest at the rate of 12% p.a. from 3<sup>rd</sup> September, 2014 till its realization.

20. In **“Innoventive Industries Ltd. vs. ICICI Bank and Anr.- 2018 (1) SCC 407”**, the Hon’ble Supreme Court held that 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 Rs.1 Lakh or more. The Hon’ble Supreme Court further held that in the case of a ‘Corporate Debtor’ who commits a default of the 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, which reads as follows:

*“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 non-payment 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.

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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.”*

21. From the record, as we find that there is a debt which is more than Rs.1 Lakh and the matter has been brought to the notice of the ‘Corporate Debtor’, we hold that the Adjudicating Authority wrongly rejected both the applications under Section 7 preferred by the Appellant; one against the ‘Principal Borrower’- (‘M/s. Cedar Infonet Private Limited’) and; another against ‘M/s. Golf Technologies Pvt. Ltd.’.

22. For the reasons aforesaid, we set aside both the impugned orders dated 31<sup>st</sup> May, 2018 and 30<sup>th</sup> May, 2018 and remit the matter to the Adjudicating Authority, New Delhi Bench, for admission of the case if record is complete, after notice to the parties.

23. We make it clear that the application against the Principal Borrower’- (‘M/s. Cedar Infonet Private Limited’) which was filed by the Appellant- ‘Financial Creditor’ was rejected prior to the order dated 31<sup>st</sup> May, 2018 passed in the case of the Corporate Guarantor, the Adjudicating Authority

will first take up the matter which was filed against 'Principal Borrower'-(M/s. Cedar Infonet Private Limited) after notice to the parties. Once it is admitted, the other case against the 'Corporate Debtor' should not have been entertained for the same amount as the Appellant can claim only before the 'Resolution Professional' and same debt amount cannot be claimed in two different 'Resolution Process'.

Before admission of the case, it will be open to the parties to settle the matter and in such case, the Appellant may withdraw the case. Both the appeals are allowed with aforesaid observations and directions. However, in the facts and circumstances of the case, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]  
Chairperson

[Justice Bansilal Bhat]  
Member (Judicial)

NEW DELHI

23<sup>rd</sup> April, 2019

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