

Mr. Ashique Ponnamparambath vs Federal Bank on 19 July, 2021

NATIONAL COMPANY LAW APPELLATE TRIBUNAL CHENNAI BENCH

Company Appeal (AT) (CH)(Insolvency) No. 22 of 2021

[Arising out of Order, dated the 08th of March 2021 passed by the Adjudicating Authority/National Company Law Tribunal, Kochi Bench, Kochi in IBA No.25/KOB/2020]

IN THE MATTER OF:

Ashique Ponnamparambath
Member of Suspended Board of Directors of
The Corporate Debtor,
M/s Platino Classic Motors (India) Pvt Ltd
Having its registered office at:
No. II 6B, N.H.47, Bye Pass Road,
Maradu, P.O., Kochi 682 304.
Resident of:
Ponnamparambath House, Konad Beach,
West Hill Post, Calicut - 673005, Kerala

...Appellant

Versus

The Federal Bank Limited
Having its registered office at:
Federal Towers, PB No.103,
Alwaye, Ernakulam 683 101

...Respondent

Present:

For Appellant : Mr R Murari, Sr Advocate
For Ms Ramya Subramaniam, Advocate

For Respondent : None for Respondent

J U D G M E N T

[Per; V. P. Singh, Member (T)] The Appellant, Suspended Director of the Corporate Debtor, M/S Platino Classic Motors, had challenged the admission order passed under Section 7 of the Insolvency and Bankruptcy Code 2016 by the Adjudicating Company Appeal (AT) (CH)(Ins.) No. 22 of 2021 1 of 12 Authority/National Company Law Tribunal in IBA/25/KB/2020 dated the 7th of December 2020. Parties original status in the Company Petition represents them in this Appeal for the sake of convenience.

Brief Facts

2. The Financial Creditor/Respondent herein is the Federal Bank Ltd has applied under Section 7 of the Insolvency and Bankruptcy Code 2016 to initiate a Corporate Insolvency Process against the Corporate Debtor 'Platino Classic Motors'.

3. The Appellant is an Ex-director of the Corporate Debtor 'Platino Classic Motors' engaged in the sale of vehicles. Respondent/Financial Creditor purportedly entered into a Term Loan Agreement (here-in-after referred to as 'TML') dated the 30th of June 2014 with the Corporate Debtor. The 'TML' contained various ancillary provisions that in effect sought to create a charge of the Respondent over the assets of the Corporate Debtor as security for the loan of ten crores, extended under the 'TML'. However, as per the Financial Creditor's statement of account, the total amount of debt is 6,39,13,042.98 only.

4. The Financial Sector/Federal Bank contends that on the 30th of June 2019, the Corporate Debtor had availed, among other things, a term loan of ten crores with an agreement to repay the same in 120 monthly instalments together with interest and charges outlined in the loan document. The Corporate Debtor as collateral security for the debt created an equitable Company Appeal (AT) (CH)(Ins.) No. 22 of 2021 2 of 12 mortgage favouring the Applicant. However, due to default in monthly instalments, the Corporate Debtor account status regarding the credit facility changed to a Non-Performing Asset with effect from the 29th of October 2019. The Financial Creditor caused a demand notice dated the 16th of December 2019 to the Corporate Debtor requiring them to repay the outstanding loan amount. The Corporate Debtor failed to pay the amount demanded. As of the 16th of March 2020, an amount of 6,39,13,042 is due from the Corporate Debtor, and it has committed default in paying the same. Grounds of Appeal

5. The Appeal is filed on the ground that the Adjudicating Authority has failed to consider that the purported 'Term Loan Agreement' is the Umbrella Agreement concerning not only the subject loan itself but the various security obligations/security documents thereunder. It provides for the hypothecation of immovable property, the mortgage of other pieces of immovable property owned by the Corporate Debtor by deposit of title deed and the creation of a floating charge on the Appellant's asset.

6. The Adjudicating Authority has failed to consider that it is settled law that under Section 17 of the Registration Act 1908, such agreements must be compulsorily registered for being considered legally admissible. Further, all the ancillary security documents executed under the Term Loan Agreement were entered into by the Corporate Debtor are under security obligations reduced in writing, including the creation of charge over the immovable property.

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7. The demand promissory note dated the 30th of June 2014 and the Agreement of Guarantee dated the 30th of June 2014, provided by the promoters of M/S Koyenco Auto Private Limited towards the obligation of the Corporate Debtor under the Term Loan Agreement, are not legally valid and enforceable. These all three documents find their basis and foundation in the Term Loan Agreement. However, the Term Loan Agreement is lawfully inadmissible and not an enforceable

document because of its being unregistered and the absence of the common seal of the Corporate Debtor. Corporate debtor's submission

8. In the original Company Petition, the Corporate Debtor filed its response stating that the Application is filed by Maya C., as a Power of Attorney holder without any specific authorisation by the Board of Directors of the Financial Creditor. A Power of Attorney does not grant a general authorisation to present before all Tribunals. Therefore, a power of attorney does not affect to present petition before the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016.

9. Application U/S 7 is filed merely based on the bank statement. The Financial Creditor has not produced any valid documents to show that the Corporate Debtor had received the alleged amounts that could be termed as financial debt under Section 5 (8) of the Code. There was no promise to repay within the stipulated time. There has been no default in terms of the Agreement. Therefore, there is no legally recoverable debt against the Company.

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10. Further, no consideration has been passed from the Financial Creditor to the Corporate Debtor against the promissory note. Therefore, there is no evidence to show that the amount of ten crores have been given to the Respondent under the promissory note.

11. There is no Debtor-Creditor Relationship between the Financial Creditor and the Corporate Debtor. There is no undertaking to repay the amount with interest within the specified period, and hence there is no default. Based on the documents which are not enforceable in law, the Financial Creditor cannot claim to owe "Financial Debt" from the Corporate Debtor and thereby cannot claim to be Financial Creditor as defined under Section 5 (7) and (8) of the Insolvency and Bankruptcy Code, 2016. Though the Financial Creditor had given money to the Corporate Debtor, there was no understanding to repay the amount by the Corporate Debtor, nor is there any Agreement for payment of interest.

12. Further, the Application filed by the financial sector under Section 7 of the Insolvency and Bankruptcy Code 2016 is not complete as it is not supported by the documents mandated under the IBC. The Applicant has not complied with Section 7 (3) of the Code because Applicant failed to submit a record of default recorded with the information utility or such document specified.

Discussion and findings

13. We have heard the argument of the learned Counsels for the parties and perused the record. The impugned Order is mainly challenged on the Company Appeal (AT) (CH)(Ins.) No. 22 of 2021 5 of 12 ground that the petition filed under Section 7 of the Code is not maintainable. After all, the entire loan transaction is based on the 'Term Loan Agreement', an inadequately stamped document inadmissible in evidence.

14. The following points arise for our consideration:

Whether petition filed under Section 7 of the code is not maintainable because the entire loan transaction is based on the 'Term Loan Agreement', which is an inadequately stamped document, therefore, inadmissible in evidence?

15. The Appellant contends that the purported Term Loan Agreement is the Umbrella Agreement with respect to the subject loan itself and the various security obligations/ documents thereunder. It is an Agreement creating a right/title/interest in immovable property. It provides for the hypothecation of immovable property, the mortgage of other pieces of immovable properties owned by the Corporate Debtor by deposit of title deeds and the creation of a floating charge on the Appellant's asset. The Adjudicating Authority has failed to consider that it is settled law that as per Section 17 of the Registration Act, 1908, such Agreements must be compulsorily registered for being considered admissible.

16. It is further contended that all the ancillary security documents executed pursuant to the Term Loan Agreement specify that they are being entered into as a result of the obligations imposed upon parties in the Term Loan Agreement. Thus, by the said Term Loan Agreement, all the Corporate Company Appeal (AT) (CH)(Ins.) No. 22 of 2021 6 of 12 Debtor's security obligations were registered in writing, including the creation of charges and mortgage over immovable property. Therefore, the registration of such a document is compulsory.

17. The Adjudicating Authority further failed to consider the case-law of the Hon'ble Supreme Court, State of Haryana v Navir Singh, 2010 SCC OnLine SC 36, and in the case of United Bank of India versus Lekharam Sonaram and Company, AIR 1965 SC 1591.

State of Haryana and Ors. vs Navir Singh and Ors.

(07.10.2013 - SC) : MANU/SC/1036/2013 "14. Mortgage inter alia means transfer of interest in the specific immovable property for the purpose of securing the money advanced by way of loan. Section 17(1)(c) of the Registration Act provides that a non-testamentary instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extension of any such right, title or interest, requires compulsory registration. Mortgage by deposit of title-deeds in terms of Section 58(f) of the Transfer of Property Act surely acknowledges the receipt and transfer of interest and, therefore, one may contend that its registration is compulsory. However, Section 59 of the Transfer of Property Act mandates that every mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument. In the face of it, in our opinion, when the debtor deposits with the creditor title-deeds of the property for the purpose of security, it becomes mortgage in terms of Section 58(f) of the Transfer of Property Act and no registered Company Appeal (AT) (CH)(Ins.) No. 22 of 2021 7 of 12 instrument is required Under Section 59 thereof as in other classes of mortgage. The essence of mortgage by deposit of title- deeds is handing over by a borrower to the creditor title-deeds of immovable property with the intention that those documents shall constitute security, enabling the creditor to recover the money lent. After the deposit of the title-deeds the creditor and borrower

may record the transaction in a memorandum but such a memorandum would not be an instrument of mortgage. A memorandum reducing other terms and conditions with regard to the deposit in the form of a document, however, shall require registration Under Section 17(1)(c) of the Registration Act, but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration."

18. The Appellant has further placed reliance on the Hon'ble Supreme Court's decision in *United Bank of India v Lekharam Sonaram & Co*, AIR 1965 SC 1591 wherein it is stated that;

"Parties reducing the contract to writing -- Registration, held, necessary. The essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration Company Appeal (AT) (CH)(Ins.) No. 22 of 2021 8 of 12 under S. 17 of the Indian Registration Act, 1908, as a non- testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either. In the present case the letter does not mention what was the principal amount borrowed or to be borrowed. Neither does it refer to rate of interest for the loan. The letter does not mention details of title deeds which are to be deposited with the plaintiff-bank. The document was not intended to be an integral part of the transaction and did not, by itself, operate to create an interest in the immovable property. It follows, therefore, that the document did not require registration under S. 17 of the Indian Registration Act. "

19. In reply to the above, the learned Counsel for the Respondent/Financial Creditor had taken a stand before the Adjudicating Authority that the contention of the Corporate Debtor that "Term Loan Agreement" is an insufficiently stamped document, hence inadmissible in evidence, was an incorrect one. The Term Loan Agreement is a document that purports to create a right, title and interest in immovable property that is incorrect. At the broadest imagination, the same could only amount to security for payment of money. At the same breath, it is to be noted that the said document would not create a mortgage concerning the property mentioned therein. In the circumstances, the said document is not such a document for which registration is compulsory.

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20. Further, the Corporate Debtor's contention that the letter of hypothecation has to be deemed an agreement related to deposit of title deeds and compulsorily registrable is also incorrect and

unsustainable, as the said document does not even indicate the deposit of the title deed.

21. The Appellant further contends that the impugned Order of admission was made despite the Corporate Debtor making the oral submission without prejudice willing to pay the outstanding amount to the Respondent within six months, thereby rendering the need for admission of insolvency proceedings superfluous infructuous. In the circumstances, there was no necessity of putting the Corporate Debtor into rigours of the Corporate Insolvency Resolution Process for one purportedly outstanding debt. The Appellant has stated that it is at an advanced stage of entering into a settlement with the Financial Creditor. It has proposed a short six months to settle all disputes between the parties.

22. Further, on the 10th of March 2021, the Appellant sent an email to the Financial Creditor making the settlement offer. Based on the settlement offer Appellant has prayed that the impugned Order of admission should be set aside.

23. It is to be clarified that the impugned Order of admission cannot be set aside simply in anticipation of settlement in the parties.

24. The Appellant has annexed the list of documents submitted by the Financial Creditor along with the Application, which is on page No 101 of the Company Appeal (AT) (CH)(Ins.) No. 22 of 2021 10 of 12 Appeal paper book. The list of the document shows that the Financial Creditor had submitted Term Loan Agreement, dated the 30th of June 2014; Demand Promissory Note for ten crores, dated the 30th of June 2014; Security Deposit Letter, dated the 30th of June 2014; Agreement of Guarantee executed by Ashique P P and Shameena Ashique, dated the 30th of June 2014; Agreement of Guarantee by M/S Koyenco Auto Ltd, dated the 30th of June 2014; a letter evidencing the deposit of title deed, dated the 01st of July 2014; certificate of registration of charge with the ROC, dated the 30th of June 2014; Sale Deed No's 3992, 3993 and 3994, dated the 24th of November 2010 of M/S Platino Classic Motors; a statement of accounts; certificate under the Bankers Book of Evidence Act; CIBIL report etc.

25. Based on the documents filed by the Financial Creditor, it is clear that the Financial Creditor has proved that the Corporate Debtor has defaulted in making the payment is 6,39,13,042 due on the Corporate Debtor. Therefore, if it is considered that the Term Loan Agreement is insufficiently stamped for argument sake, then it is inadmissible in evidence. Furthermore, the claim of the Financial Creditor is fully corroborated by other evidence filed.

26. The Corporate Debtor committed default in repayment of the loan amount to the Financial Creditor. Hence its loan account was declared as NPA. In light of facts and circumstances, debt and default are reasonably established by the Financial Creditor.

27. The Application filed by the Financial Creditor under Sub-section (4) of Section 7 of the Insolvency and Bankruptcy Code 2016 was complete in all Company Appeal (AT) (CH)(Ins.) No. 22 of 2021 11 of 12 respects. Therefore, the Adjudicating Authority admitted the petition filed under Section 7 of the Code.

28. The objections raised by the Appellant/Corporate Debtor are unsustainable. First, the Appellant emphasised the alleged insufficiently stamped Term Loan Agreement. However, in addition to the Term Loan Agreement, the Financial Creditor relies on Demand Promissory Note, Hypothecation letter regarding depositing of title deed, a certified copy of the bank statement, and so many other documents filed along with the Application. Therefore, even if it is considered that the Term Loan Agreement is insufficiently stamped and it cannot be accepted in evidence, then also alleged debt and default are proved beyond doubt. Furthermore, the Application filed under Section 7 is complete.

29. Based on the above discussion, we find no merit in the Appeal, hence liable to be dismissed.

ORDER The Appeal is dismissed -no order as to costs.

[Justice Venugopal M.] Member (Judicial) [V. P. Singh] Member (Technical) NEW DELHI 19th JULY, 2021 pks Company Appeal (AT) (CH)(Ins.) No. 22 of 2021 12 of 12