

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,**NEW DELHI****Comp. App. (AT) (Ins) No. 1489 of 2019****&****I.A. No. 4237 of 2019 & 552 of 2022****IN THE MATTER OF:****Sunil Rajaram Ghag & Anr.****...Appellants****Versus****White Water Hospitality Pvt. Ltd & Ors.****...Respondents****Present:****For Appellant : Mr. Krishnendu Datta, Sr. Adv. with Ms. Varsha, S. Alagh, Aviral Kapoor, Rishabh Kapoor, Advocates****For Respondents : Mr. Gautam Singh, Adv. for R2. Mr. Aditya Grover Arjun Gover-R2****O R D E R****Per: Justice Rakesh Kumar Jain:**

17.08.2023: This appeal is filed by the former Directors of the Corporate Debtor (M/s White Water Hospitality Pvt. Ltd.) against the order dated 21.11.2019 passed by the Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) by which an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by Respondent No. 2/alleged Financial Creditor (M/s V.I.R. Foods Ltd.) bearing CP (IB) No. 90/Chd/CHD/2018 for the resolution of a debt of Rs. 52,64,161.64/- allegedly payable by the Corporate Debtor as on 31.12.2017 has been admitted, moratorium under Section 14 of the Code was declared

and Madan Gopal Jindal (Respondent No. 3) was appointed as an Interim Resolution Professional (in short 'IRP').

2. At the time of preliminary hearing on 18.12.2019, this Court passed the following order:-

“Learned counsel for the Appellant submits that ‘M/s. V.I.R. Foods Ltd.’ is an entity controlled by the minority shareholder (Financial Creditor) of ‘M/s. White Water Hospitality Private Limited’ (Corporate Debtor). It is submitted that the application under Section 7 of the ‘I&B Code’ was not maintainable for the following grounds:

- (i) The ‘debt’ was barred by limitation;
- (ii) The ‘MoU’ was irrelevant as alleged; and
- (iii) The records shows that there is no ‘debt’ payable in fact.

Let notice be issued on the Respondents by Speed Post. Requisites along with process fee, if not filed, be filed by 19th December, 2019. If the Appellant provides the e-mail address of Respondents, let notice be also issued through email.

Post the case ‘for Admission (After Notice)’ on 16th January, 2020. In the meantime, the ‘Interim Resolution Professional’ will not sell the assets of the ‘Corporate Debtor’ without prior approval of this Appellate Tribunal. However, he will ensure that the company remains as an on-going concern and will take the assistance of the (suspended) Board of Directors and the employees. The person who is authorised to sign the Bank Cheques may issue cheques but only after counter signature of the ‘Interim Resolution Professional’. The Bank Accounts of the ‘Corporate Debtor’ be allowed to be operated for day-to-day functioning of the company such as for payment of current bills of the suppliers, salaries and wages of the paid Director, the Employees/workmen, electricity bills etc.”

3. The appeal was admitted on 03.02.2020 and the following order was passed:-

“Reply has been filed by the Respondent No. 2. Learned Counsel for the Appellant does not intend to file Rejoinder.
Appeal is admitted for hearing.
List the matter for hearing on the top of the list on 26th February, 2020.”

4. Thereafter on 02.03.2020, the following order was passed:-

“Any further proceedings shall be subject to the outcome of this appeal. List this appeal ‘For Hearing’ on 27th March, 2020.”

5. Brief facts of this case are that the alleged Financial Creditor filed an application under Section 7 of the Code bearing CP (IB) No. 101/Chd/CHD/2017 before the Adjudicating Authority on 12.07.2017 (however, it is mentioned in the impugned order as 11.07.2017). The alleged Financial Creditor made an averment in Part IV of Form 1 in respect of the debt fell due – “that the Corporate Debtor pursuant to its corporate liability repaid a sum INR 15,00,000/- on 24.02.2015 and INR 10,00,000/- on 27.02.2015. That thereafter no repayment of balance amount inclusive of interest due there upon by the Corporate Debtor”.

6. No date of default has been specifically mentioned in the said application, however, in column 2 of Part IV in Form 1, regarding amount claimed to be in default and the date on which the default had occurred, the following averments have been made:-

“Total amount unpaid-Operational Debt is Rs. 50,91,854.79/- out of which of Rs. 18 Lakh fell due as on 28.02.2015, as the last payment of Rs. 10 Lakh in the running account maintained with the Applicant was made by the CD Company on 27.02.2015. Further Rs. 32,91,854.79/- stands payable by the CD Company on account of interest levied @ 18% p.a. (daily simple interest) on the

total advanced loan alongwith outstanding principal due and payable to the Applicant as on 30.06.2017. Total amount unpaid – Operational Deb is Rs. 50,91,854.79/- stands payable by the CD Company to the Applicant as on 30.06.2017. Working for computation of default are set out in Annexure P-3)”

7. This application, however, was withdrawn by the alleged Financial Creditor in terms of an order dated 15.12.2017, which is reproduced as under:-

“After arguing for some time, learned counsel for the petitioner seeks permission to withdrawn the instant petition due to some technical defect with liberty to file fresh one on the same cause of action. Permission is granted. The instant petition is dismissed as withdrawn with liberty aforesaid.”

8. Thereafter, the alleged Financial Creditor filed the present application on 12.03.2018 in which the alleged Financial Creditor, for the first time, introduced a Memorandum of Understanding (MOU) dated 02.05.2012, in Part IV ‘particulars of financial debt’ of Form 1, about which the following averments have been made that “a MOU dated 02.05.2012 was also entered between the parties with regard to the inter-corporate loan facility rendered by financial creditor to the corporate debtor. A copy of the MOU is appended hereto as Annexure A-5”. Rest of the averments were more or less remained the same.

9. The MOU dated 02.05.2012, which had no reference in the first petition filed on 11.07.2017, became the basis of the claim of the alleged Financial Creditor, therefore, it would be relevant to refer to the said MOU also, which is reproduced as under:-

Annexure - A II

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING IS MADE AND EXECUTED AT 2ND DAY OF MAY, 2012 at Chandigarh.

BETWEEN

M/s VIR Foods Limited, a company incorporated under the provisions of Companies Act, 1956, having its registered office at SCO 2437, Sector 22 C, Chandigarh through its director Sh. Mohit Dewan, who has been authorized by way of Board resolution dated 02.05.2012 (hereinafter referred to as 'first party' which expression shall unless repugnant to the context and meaning thereof mean and include their executors, administrators, liquidators, representatives, successors-in-title, and assigns thereof)

AND

M/s White Water Hospitality (P) Ltd, a company incorporated under the provisions of Companies Act, 1956, having its registered office at SCO 2437, Sector 22 C, Chandigarh through its director Sh. Kamal Kant Dewan, who has been authorized by way of Board resolution dated 01.05.2012 (hereinafter referred to as 'second party' which expression shall unless repugnant to the context and meaning thereof mean and include their executors, administrators, liquidators, representatives, successors-in-title, and assigns thereof)

AND WHEREAS the second party being in a need of financial assistance has requested the first party to provide financial assistance to the tune of Rs.2,00,00,000 (Rupees Two Crore Only).

And whereas the first party while acceding to the request of the second party has agreed to provide the loan to the second party of Rs.2,00,00,000 (Rupees Two Crore Only).

AND WHEREAS now they have agreed to enter in to this MoU on mutually agreed terms & conditions, reduced in writing as under:-

NOW THEREFORE THIS MoU WITNESSES AND IT IS AGREED BETWEEN THE PARTIES AS UNDER:-

01. The second party shall pay interest @ 18% p.a. to the first party on the loan amount sought by the second party from the first party. However, if the bank rate increases than 18% at any point of time during the tenure of loan, the rate of interest of loan shall stand revised to a rate at par with the prevailing bank rate, or at an increase of 2%, as may be decided by the by the first party.
02. The interest shall be paid by the second party to the first party on reducing balance
03. That the second party shall book the loan amount in its books of accounts maintained each year.
04. That the second party shall repay the financial assistance sought from the first party, as and when recalled by the first party.
05. That the second party shall be at liberty to repay the loan amount at any point of time to the first party even in piece meal.
06. That the second party shall abide by all the terms mentioned above and shall not breach any of the terms of this MoU. In the event of breach of the terms and conditions of the MoU by the second party, the first party shall be at liberty to avail its appropriate legal remedies available as per the applicable laws.
07. The present MoU shall be valid up till second party shall repay the entire amount due under this MoU to the first party
08. That this MoU can only be modified/amended by a written Agreement / Contract only between the said Parties duly signed by the respective
09. That in the event of any dispute, the matter shall be first amicably resolved between both the Parties and if need arises both the parties shall be at liberty to avail legal remedies as per the applicable laws at the jurisdictional courts at Chandigarh only



M/s VIR FOODS LTD.

[Signature]
Director

For White Water Hospitality Pvt. Ltd

[Signature]
Director

IN WITNESS WHEREOF the parties hereto have set their hands and seals on the 2nd day of May, 2012, first herein above written,

Witness no. 1

[Signature]
VINAY MURTHI
S/O JAGDESH LAL MURTHI
174112, KARNAL GATE
TANAKPUR, DIST KARNAL
HARYANA

Witness no. 2

[Signature]
Kamal Kumar
S/o Sh. Sohan Lal
no. 16-01/2 Sec. 30 Chd

Signed by the first party within Named

Sh. *[Signature]*
Director

Signed by the second party within Named

Sh. For White Water Hospitality Pvt. Ltd.

[Signature] Director

Attested as identified

NOTARY, Chandigarh

02 MAY 2012



[Signature]
Dalip
Kumar
Regd.
No.



10. In clause 4 of the MOU dated 02.05.2012, it is specifically provided that “the second party shall repay the financial assistance sought from the first party, as and when recalled by the first party. In this case, the second party is the Corporate Debtor and the first party is a Financial Creditor. It is conceded before us by Counsel for the Respondent that at no point of time any letter much less notice was issued and served upon by the first party upon the second party recalling the amount of alleged loan.

11. It has also been recorded in the impugned order as a contention of the Respondent (Financial Creditor) that “due to delay in payments by the Corporate Debtor and being non responsive to the calls of the financial creditor, the financial creditor was forced to perceive the non-availability of funds with the corporate debtor”. In this regard, the Adjudicating Authority

has recorded a finding that “as per clause 4 of the MOU dated 02.05.2012, the Corporate Debtor shall repay the financial assistance from the financial creditor as and when recalled by the financial creditor. The Petition filed CP (IB) No. 101/Chd/CHD/2017 on 11.07.2017, therefore, we can say that the financial assistance was recalled on 11.07.2017”.

12. Counsel for the Respondent has also fairly conceded that as per the averments made in Part IV of both first and second applications, filed under Section 7 of the Code, by the alleged Financial Creditor, the last payment was made on 27.02.2015. Since, second application was filed on 16.03.2018, therefore, the Corporate Debtor raised the question of limitation before the Adjudicating Authority which was rejected on the ground that since, the financial assistance was recalled on 11.07.2017 and instant CP (IB) No. 90/Chd/CHD/2018 was filed on 16.03.2018, therefore, it cannot be said that the same is barred by limitation.

13. The Corporate Debtor also contended before the Adjudicating Authority that the MOU dated 02.05.2012, which has become the basis of the second application never saw the light of the day, not being a part of the first application and hence, it is a fabricated document and cannot be relied upon. However, this submission has been rejected by the Adjudicating Authority by observing that “the various contentions raised by the Respondent-Corporate Debtor with regard to fabrication and forgery of documents by the petitioner and also various allegations with regard to transactions entered into between the parties, need not be gone into in detail for the purpose of consideration of admission of this CP under the provisions of the Code and the Regulations made thereunder”. The Adjudicating Authority merely recorded a finding that since there is an admission of debt of Rs. 43 Lacs under the heading of

unsecured loan in Annexure A-16 i.e. auditor's report of the corporate debtor, therefore, the Adjudicating Authority is not required to delve with the issue as to whether the MOU dated 02.05.2012 is forged and fabricated.

14. While assailing the finding of the Adjudicating Authority, Counsel for the Appellant has submitted that the application under Section 7 was itself not maintainable and could not have been filed only because of the reason that there was no cause of action available with the alleged Financial Creditor to file the application as there was no date of default. In this regard, he has referred to Section 3(12) of the Code which deals with the definition of default which means non-payment of debt, when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. It is submitted that as per clause 4 of the MOU dated 02.05.2012, the alleged Financial Creditor would ask for repayment of the financial assistance. Meaning thereby, if the financial assistance is not recalled then the default would not occur, whereas Section 7(1) of the Code provides that a financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. Meaning thereby, occurring of default is the sine qua non for the purposes of filing an application under Section 7 of the Code which has also been held by the Hon'ble Supreme Court in the case of *Innovative Industries Ltd. Vs. ICICI Bank and Anr.* (2018) 1 SCC 407 that "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.”

15. However, in the present case, the Adjudicating Authority has recorded a finding in favour of the Respondent that on 11.07.2017, when the first petition was filed by the alleged Financial Creditor, the date of recalling of the financial assistance in terms of clause 4 of the MOU dated 02.05.2012. However, in our considered opinion, this finding cannot be accepted, the date of default cannot be 11.07.2017 which in fact the date of filing of the petition under Section 7 of the Code because the date of default has to be mentioned in the petition and only thereafter, the application is filed under Section 7 of the Code. It means that the date of default has to be before the date of filing of application under Section 7 of the Code and the date of filing cannot be presumed to be the date of default. As a matter of fact, the Adjudicating Authority, while answering the contention of the Corporate Debtor that the application under Section 7 was not within limitation, has observed that “therefore, we can say that the financial assistance was recalled on

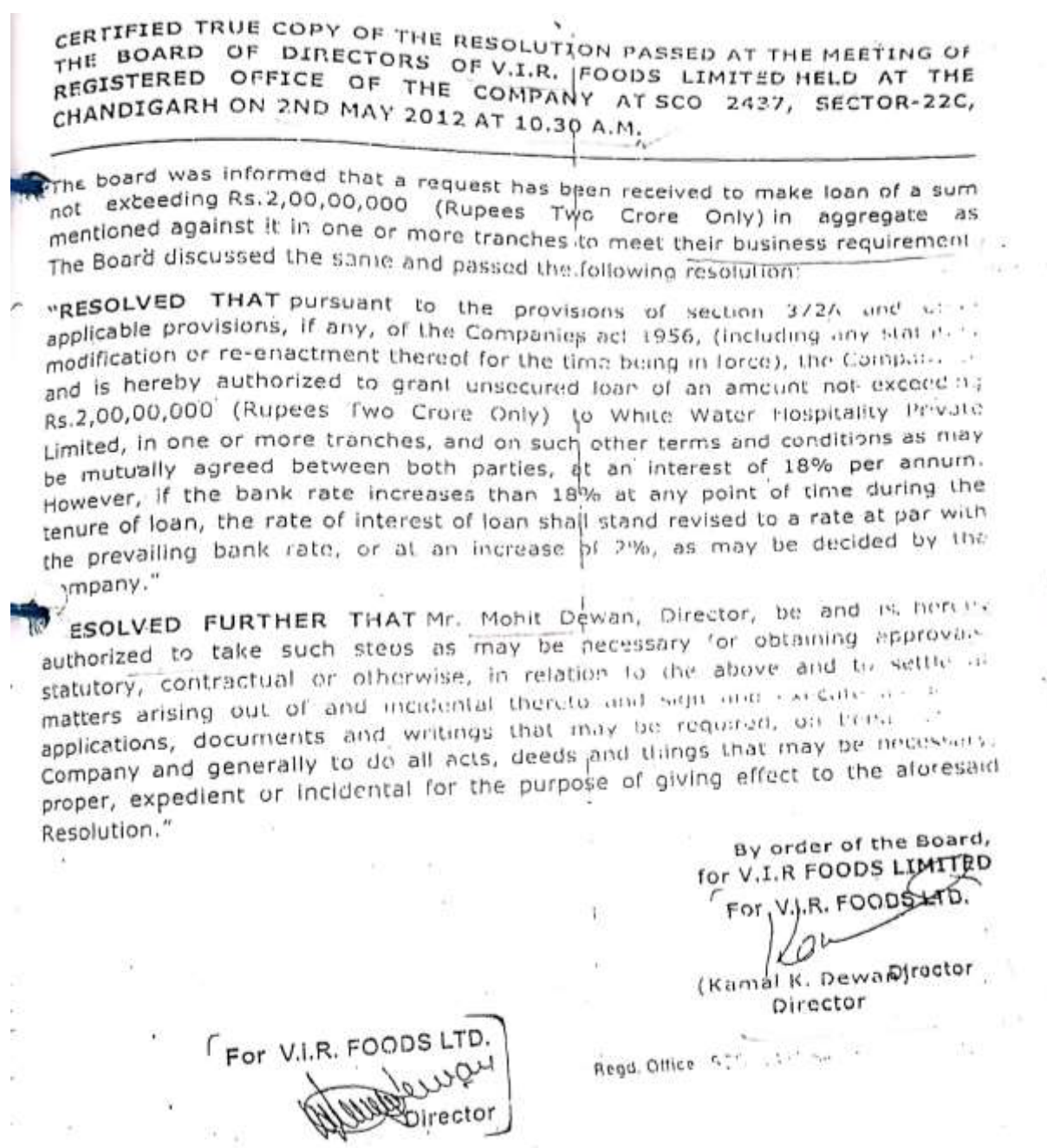
11.07.2017. Since, the instant CP (IB) No. 90/Chd/CHD/2018 was filed on 16.03.2018, it cannot be said that the same is barred by limitation.

16. From this finding, recorded by the Adjudicating Authority, it has taken the date of default 11.07.2017 and date of filing of second petition 16.03.2018 which is apparently within the period of three years as has been provided in Article 137 of the Limitation Act 1963.

17. Now looking from another angle, the application filed under Section 7 is not found to be within the period of limitation because the last payment was admittedly made on 27.02.2015. The application under Section 7 was filed on 16.03.2018 which is apparently beyond the period of three years and was barred by limitation had the date of default not been taken as 11.07.2017 by the Adjudicating Authority as the date of recall of the financial assistance.

18. It is also a matter of significance that the Adjudicating Authority did not care to express any opinion upon the veracity of the MOU dated 02.05.2012 which was not a part of the earlier pleadings of the first petition which was filed on 11.07.2017. Supposing, the said petition was not withdrawn for the purpose of filing of second petition, the MOU dated 02.05.2012 could not have been before the Adjudicating Authority but once the Corporate Debtor had raised an issue that if this MOU was actually executed on 02.05.2012 between the parties then why it was not made a part of the first application and has in fact been created by way of forgery and fabrication to get an order of admission in collusion. In this regard, Counsel for the Appellant has referred to the MOU itself in which interestingly the address of the registered office of both the Corporate Debtor and the Financial Creditor is the same i.e. SCO 2437, Sector 22C, Chandigarh and the director of the Financial Creditor and the Corporate Debtor happens to be the relatives or brothers. He has also

referred to the resolution dated 02.05.2012 passed by the board of directors of the financial creditor in which Kamal Kant Dewan who is the director of the Corporate Debtor has signed as the director of the Financial Creditor and Mohit Dewan, director of financial creditor has been appointed as the authorised representative. The resolution dated 02.05.2012 is also reproduced as under:-



19. Counsel for the Appellant has referred to Section 65 of the Code which provides in the punishment for fraudulent and malicious initiation of proceedings and contended that it is a case where there was collusion for the purpose of obtaining order of admission in regard to the initiation of CIRP against the Corporate Debtor. In our considered opinion, this aspect should have been looked into by the Adjudicating Authority and should not have brushed aside only on the ground that it is not required to look into for the purpose of consideration of admission of the CP.

20. In the end, even after taking into consideration the MOU dated 02.05.2012, which is the basis of the order of admission having been passed by the Adjudicating Authority and relied upon heavily by the alleged Financial Creditor, the application under Section 7 could not have been filed until and unless the financial assistance given by the Financial Creditor to the Corporate Debtor has been recalled which is a fact conspicuous by its absence in these proceedings.

21. Thus, looking from any angle, the order of admission passed by the Adjudicating Authority is found to be patently illegal and therefore, while allowing the appeal, the said order is hereby set aside although without imposing any costs and with that any application pending in this appeal is also hereby closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

Sheetal/RR