

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

**Company Appeal (AT) (Insolvency) No. 1326 of 2023**

**[Arising out of order dated 03.07.2023 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench (Court- II) in Company Petition No. (IB)-865(ND)/2022]**

**IN THE MATTER OF:**

**Mr. Surendra Kanhaiyalal Shah**

**(Promotor of Shah Photo Film Company)**

**Having its Office at: 2<sup>nd</sup> Floor, B J House,**

**Nr. Mount Carmel School, Bata House Building,**

**Ashram Road, Navrangpura, Ahmedabad,**

**Gujrat-380009.**

**Resident: 6, Sweta Park, Soc.-2,**

**Nr. Manekbag Hall, Ambawadi,**

**Ahmedabad-380015**

**...Appellant**

**Versus**

**Magicon Impex Private Limited**

**Having its Registered Office at B1/625,**

**2<sup>nd</sup> Floor, Main Road, Janakpuri,**

**New Delhi-110058.**

**...Respondent**

**Present:**

**Appellant:**

**Advocate Gulshan Kr. Sachdev.**

**For Respondents:**

## **J U D G M E N T**

### **[Per: Barun Mitra, Member (Technical)]**

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) by the Appellant arises out of the Order dated 03.07.2023 (hereinafter referred to as “**Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench Court-II) in Company Petition No. (IB)-865(ND)/2022. By the impugned order, the Adjudicating Authority has dismissed the Section 7 petition filed by the Financial Creditor/Appellant - Mr. Surendra Kanhaiyalal Shah, Proprietor of Shah Photo Film Company seeking initiation of Corporate Insolvency Resolution Process (“**CIRP**” in short) against the Corporate Debtor- Magicon Impex Private Limited, the present Respondent. Aggrieved by the impugned order, the present appeal has been preferred by the Appellant.

**2.** Submission was made by the Learned Counsel for the Appellant that the Appellant was appointed as Consignment and Freight Agent (CFA) for handling etc. of the goods belonging to the Corporate Debtor/Respondent. Both parties entered into an Agreement for this purpose which Agreement was valid for a period of one year with effect from 28.02.2019. It was further added that in terms of the said Agreement, the Appellant made a refundable security deposit of Rs. 70,00,000/- with the Respondent which deposit was to be treated as an investment on which the Respondent was to provide a return of 1% per month besides a commission amount of 1% per month on monthly sales turnover.

**3.** It was further submitted that the Appellant on being dissatisfied with the business chose to terminate the Agreement on 11.12.2019 and thereafter sought refund of the security deposit amount which was followed up by multiple reminders. Since the Respondent did not clear the outstanding dues of the refundable security deposit along with interest and commission, the Appellant filed a Section 7 petition against the Respondent. However, the said application was rejected by the Adjudicating Authority on the fallacious ground that the outstanding amount of default did not meet the threshold limit in terms of Section 4 of the IBC. It was also contended that though the Appellant was entitled to charge interest and penalty on the outstanding amount as per the Agreement, the Adjudicating Authority has erroneously failed to take this factor into consideration while working out the outstanding dues. Aggrieved by the impugned order, the present appeal has been preferred by the Appellant.

**4.** We have duly considered the arguments advanced by the Learned Counsel for the Appellant and perused the records carefully.

**5.** It is the principal stand of the Appellant that though their claim of outstanding dues amounting Rs. 1,11,63,151/- qua the Respondent is duly reflected on the NeSL data, the Adjudicating Authority erroneously held the default amount to be less than the prescribed threshold limit.

**6.** This makes it necessary for us to explore how the Adjudicating Authority came to the conclusion that the prescribed threshold limit was not met. We need to also find out as to whether this conclusion of the Adjudicating Authority of the Appellant not having met the threshold limit has been

reasoned out appropriately and adequately substantiated in the impugned order.

**7.** Interestingly, we find that the Adjudicating Authority in the impugned order took notice of the fact that the Appellant had unsuccessfully filed a Section 7 application on an earlier occasion wherein the principal amount was shown as Rs. 70,00,000/- only along with an interest amount of Rs. 10,05,672/-. This Section 7 application had been dismissed on 27.05.2022 by the Adjudicating Authority on the ground that the total claim amount being Rs. 80,05,672/- only, which claim amount was clearly below the threshold limit. That this earlier Section 7 application was dismissed on grounds of threshold remains undisputed.

**8.** On perusal of the impugned order, we further find that the Adjudicating Authority while considering the instant Section 7 application, it also examined in details at para 7 the contents of Part-IV in Form I as filed by the Appellant in the Section 7 application on both the occasions. It has been noticed by the Adjudicating Authority that the principal amount claimed as outstanding in both the Section 7 petitions remained constant at Rs. 70,00,000/- only. Further it was also noted that the principal amount in both the applications also arose from the same transaction. It has also been noticed that the date of default in Part-IV is shown as 25.01.2020 on both these occasions. However, there is a variance in the computation of the interest amount in both the petitions. As against a lesser amount claimed as interest amount in the previous application, the interest amount in the present application has been

enhanced by the Appellant to Rs. 41,63,151/- thus, aggregating a total outstanding amount of Rs. 1,11,63,151/-.

**9.** We also notice that the Adjudicating Authority has proceeded to unearth the reason as to how and why the interest amount stood at variance between the two Section 7 applications filed by the Appellant. The Adjudicating Authority in the impugned order has taken the trouble of comparing the computation of debt amount inclusive of principal amount and interest as made out by the Appellant in both the Section 7 applications as may be seen at para 10 of the impugned order. From the comparative analysis made by the Adjudicating Authority, it has been recorded that the difference in the interest amount claimed in the two applications arose since the Appellant calculated “Interest up to the date of Demand Notice” without however indicating the specified period for which the interest amount has been calculated for making the claim in both the applications.

**10.** We however find that in the interest of justice, the Adjudicating Authority did not outrightly dismiss the interest calculations made by the Appellant in respect of both the applications. Instead, the Adjudicating Authority made extra endeavors to go under the skin of the computation of quantum of debt and default. It has noted that both the Appellant and the Respondent are *ad idem* that the Appellant had deposited Rs. 70,00,000/- as security deposit. It has also noted that in terms of clause 9 of the Agreement, the Appellant was entitled to a minimum assurance of 24% p.a. return on the security deposit which was inclusive of 1% interest and 1% commission on sale. It has also noted that it is indisputable that in terms of clause 2 of the

Agreement, the duration of the Agreement was one year. Since the term of the Agreement was one year only, the Adjudicating Authority has held that the logical corollary flowing therefrom is that the Appellant was entitled to receive interest payment for a period of one year only. Based on this premise the Adjudicating Authority has made the computation of the principal and interest amount at paras 20 and 21 of the impugned order which is as reproduced below:

*“20. As observed earlier, the petitioner disbursed an amount of Rs. 70,00,000/- as Security Deposit in terms of the Agreement dated 25.03.2019, which was valid for a period of 01 year. This implies that the Petitioner was entitled to receive interest payment only for up to 1 year. Since the rate of Interest as per the aforesaid Agreement was agreed upon as 1% per month, therefore, we would like to calculate the amount of interest receivable @12% per annum by the petitioner. Accordingly, the interest amount payable comes to the tune of (Rs. 70,00,000 x 12 x 1 / 100) Rs. 8,40,000/-. When we add to this, the principal amount of the security deposit of Rs. 70,00,000/- deposited by the Petitioner with the Respondent, the total amount of the unpaid Financial Debt i.e., principal + interest comes to Rs. 78,40,000/- only, which is when we have not deducted the part payment on account of interest/commission made by the Respondent to the Petitioner.*

*21. In view of the above, the maximum financial debt entitlement of the Petitioner comes to Rs. 78,40,000/- only, which is less than the minimum threshold amount prescribed under Section 4 of IBC 2016, therefore, **we find that the present petition is not maintainable. Accordingly, the petition is dismissed.**”*

**11.** At a time when the principal outstanding amount; the applicable rate of interest and date of default in both the Section 7 applications remained constant and the duration of Agreement was only one year, the interest calculations should have remained confined to one year only. The reason for

calculating the interest amount for a different time-period in the present Section 7 application, prima-facie, appears unjustified and irrational. We are therefore inclined to agree with the findings of the Adjudicating Authority that the interest calculation in the present Section 7 application has been unduly inflated and enhanced by the Appellant with the ulterior motive of crossing the threshold limit.

**12.** This now brings us to the other major contention as to whether “commission on sale” amount which has been excluded by the Adjudicating Authority should have been included in the computation of debt amount. We find that the Adjudicating Authority in the impugned order at para 17 has referred to the definition of ‘financial debt’ as given under Section 5(8) of the IBC and thereafter recorded its reasoned findings as to why “commission on sale” does not qualify to be a “financial debt”. The relevant findings contained in para 18 of the impugned order is as extracted below:

*“18. On a perusal of the definition (ibid), it is observed that “financial debt” has the following essential ingredients –*

- a) Debt along with interest, if any,*
- b) which is disbursed*
- c) against the consideration for the time value of the money, and*
- d) includes the type of transactions under sub-clause (a) to (i).*

*Thus, the portion of the unpaid debt claimed by the Petitioner herein towards the Security Deposit along with interest is undoubtedly a Financial Debt. However, the portion of unpaid debt claimed in respect of the “commission of sale” has neither the time value of money nor is covered under any type of transactions specified under sub-clauses 5(a) to 5(i). **Hence, in our considered view, the “commission on sale” is not a Financial Debt, and therefore, the Petitioner cannot claim the same as unpaid financial debt.***”

**13.** At this juncture, we may first glance at the definition clause of ‘financial debt’ as contained in Section 5(8) of the IBC which reads as follows:

*“5(8) **“financial debt”** means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—*

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on nonrecourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*[Explanation. -For the purposes of this sub-clause,-*

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
- (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”*



**14.** Furthermore, it is a well settled proposition of law that any debt to be treated as “financial debt”, there must take place disbursal of money and the disbursal must be against consideration for time value of money and also includes anything which is equivalent to the money that has been loaned as long as commercial effect of borrowing or profit is discernible.

**15.** Tested against this statutory construct of IBC with regard to “financial debt” and the settled position of law as mentioned in the preceding paragraphs, we do not find any good reason to disagree with the findings referred in the impugned order that “commission on sale” amount neither falls in the menu of transactions delineated at sub clauses (a) to (i) of Section 5(8) of the IBC nor does it fall in the category of being a disbursal having time value of money. To our minds, “commission on sale” does not carry the implications of commercial effect of borrowing either.

**16.** Given this backdrop, we find that the Adjudicating Authority did not commit any error in coming to the conclusion that the amount of outstanding financial debt is only Rs. 78,40,000/- and that this amount does not meet the threshold limit of Rs. 1 crore as stipulated under Section 4 of the IBC. We are also inclined to agree with the findings of the Adjudicating Authority that the Appellant having failed to meet the threshold limit in the earlier Section 7 application has now tried to overcome this impediment by inflating the claim amount by resorting to a calculation methodology which lacks rational basis. This is a clear case where the Appellant has reagitated the same issue which had been already dismissed by the Adjudicating Authority on an earlier occasion simply to cross the threshold bar. This amounts to misuse of the

provisions of IBC to resolve a contractual dispute. Such pernicious practice of filing frivolous litigations adds to the burden on both the adjudicatory and appellate forum and leads to unnecessary waste of their time and therefore found to be reproachable. Under these circumstances, the imposition of costs of Rs 1,00,000/- only on the Appellant as ordered by the Adjudicating Authority is affirmed.

**17.** In view of the forgoing discussions, we find no merit in the appeal. The appeal is dismissed.

**[Justice Ashok Bhushan]  
Chairperson**

**[Barun Mitra]  
Member (Technical)**

**[Arun Baroka]  
Member (Technical)**

**Place: New Delhi**

**Date: 20.02.2024**

Ram N.