

Insolvency and Bankruptcy Board of India

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12th June, 2023

Subject: Judgment^[1] dated 1st June 2023 of National Company Law Appellate Tribunal, Chennai in the matter of Actioncor Consultants Private Limited Vs. Viprah Technologies Ltd. T.A. No.190/2021 (Comp. App. (AT) (Ins) No. 916/2019)

I. BRIEF BACKGROUND

The Corporate Debtor (CD) is a sick company in terms of orders of BIFR. The appellant/Financial Creditor (FC) had disbursed a sum of Rs.1.40 crore as a credit facility to the managing director and director of the CD to repay the debts of secured creditors in order to come out of BIFR. For securing the credit facility, the personal asset of the managing director and the director was mortgaged with the FC, and an investment agreement was executed by them with FC. The CD made no efforts to repay the loan; thereby committing default. Owing to the default, the FC filed a section 7 application in respect of the CD for debt along with interest at the rate of 22% pa. The AA dismissed the application of the FC holding that CD had not made any promise to repay the money. Aggrieved by the order of AA, FC filed an appeal before National Company Law Appellate Tribunal (NCLAT).

II. ISSUE

Whether the sums lent by FC to the managing director and the director representing the CD can be construed as '*financial debt*' in terms of section 5(8) of the Code?

III. OBSERVATION

The NCLAT observed that as per the investment agreement, the managing director and director of the CD had created a mortgage for securing the sums for repayment to secured creditors and to deregister the CD from the BIFR within one year of the execution of the investment agreement. One of the clauses in the said agreement stipulates the settlement of disputes through mediation. Despite the failure to adhere with the terms of said agreement, FC has not taken steps to sell the property to recover the funds. Further, the CD is not a party to the investment agreement executed between the parties' managing director, the director of the CD, and the FC.

The NCLAT, while dismissing the appeal, referred to the judgment of the Hon'ble Supreme Court in the case of Anuj Jain, IRP of Jaypee Infratech Limited Vs. Axis Bank and Ors. and held that to be construed as a '*financial debt*', there should be a direct disbursement of the amount owed and there should be a direct transaction between FC and the CD. In the present case, there is no evidence on record substantiating disbursement of debt to the CD and the same having been acknowledged by the CD in their balance sheet as a '*promise to pay*'. It held that the managing director and the director had admittedly taken the loan and the CD was never directly figuring in the transaction. It further held that the FC are at liberty to recover their dues from the sale of the property.

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