

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1209 of 2023

[Arising out of order dated 17.05.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-V in IA/2002/2023 in C.P. (IB) No.283(MB)2023]

IN THE MATTER OF:

Sanjay Pandurang Kalate,

Suspended director of
Evirant Developers Private Limited
I-403, Mont Vert Tropez, Wakad,
Taluka - Mulshi, Pune 411057
Email: sanjaykalate2020@gmail.com

...Appellant

Versus

1. Vistra ITCL (India) Limited

IL & FS Financial Centre,
Plot C-22, G-Block, 6th Floor,
Bandra - Kurla Complex, Bandra East,
Mumbai-400051
Email: itclcomplianceofficer@vistra.com

2. Jayant Vallabhadas Kaneria

A/34, Abhimanshree Society.
Pashan Baner Link Road.
Pashan, Pune-411008
Email: jkaneria@montverthomes.com

3. Dhirajlal Gordhandas Hansalia

Nirmal plot no 12, Pallod farms II,
Street No 03, Behind Bharat petrol Pump,
Baner Road, Baner, Pune 411045
Email: dghansalia@gmail.com

4. Mohan Pandurang Kalate

Pandurang Niwas, S.No-277,
Wakad Chowk, Wakad, Pune-411057
Email: Mohan kalate@yahoo.com

5. Jayesh Natvarlal Sanghrajka

Insolvency Professional
405-407, Hind Rajasthan Building,
Dadar, Mumbai, Maharashtra - 400014
Email: jayesh@jsandco.in

...Respondents

Cont'd.../

Present:

For Appellant: Mr. Kaushal Bansal and Mr. Kiran Shinde, Advocates.

For Respondents: Mr. Arvind Nayar, Sr. Advocate with Mr. Varun Kalra, Mr. Anand Sengar, Mr. Akshay Joshi, Mr. Samir Malik and Ms. Mehreen Garg, Advocates for R-1.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by a Suspended Director of the Corporate Debtor has been filed challenging the order dated 17.05.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-V in IA/2002/2023 filed by the Appellant in C.P. (IB) No.283(MB)2023. By the impugned order IA filed by the Appellant has been dismissed. Aggrieved by which order this Appeal has been filed. Notices were issued in the appeal by order dated 14.02.2024. On 14.02.2024 following order was passed:

“O R D E R **(Hybrid Mode)**

14.02.2024: *Learned counsel for the Appellant submits that application filed by the Appellant before the Adjudicating Authority has been rejected by the impugned order observing that Applicant is not authorised by the Corporate Debtor. The Adjudicating*

Authority has further observed that application is Vexatious. Learned counsel for the Appellant submits that in the application Appellant has brought relevant facts and was questioning the authority of Mr. Kaneria who has filed reply in the Section 7 petition there being no authorisation by the Board of Directors of the Corporate Debtor. It is submitted that against the order an appeal was filed, which was dismissed by this Tribunal on 05.10.2023 on the ground of limitation, which order was challenged and was set aside by the Hon'ble Supreme Court. Subsequently, by order of this Tribunal dated 11.01.2024 delay has been condoned and appeal is now listed for admission. It is submitted that during pendency of the proceedings before the Hon'ble Supreme Court and this Tribunal, in the CIRP, Resolution Plan was received and approved by the CoC on 24.01.2024 and an application has been filed before the Adjudicating Authority for approval of the Resolution Plan. Submission raised by the Appellant needs consideration.

Issue notice. Shri Nayar accepts notice on behalf of Respondent No.1. Learned counsel appearing for Respondent No.5 accepts notice. Issue notice to other Respondents.

Let Reply be filed within two weeks. Rejoinder be filed within one week thereafter.

*List this Appeal on **11.03.2024**.*

Learned counsel for the Resolution Professional submits that he shall seek adjournment before the

Adjudicating Authority on the application filed for approval of the Resolution Plan, till the next date.”

2. A reply has been filed by the Respondent No.1 to which rejoinder has also been filed by the Appellant. Before we notice the contentions raised by learned counsel for the parties in this appeal, it is relevant to notice certain background facts giving rise to this appeal.

- (i) The Appellant along with Respondent No. 2 - Jayant Vallabhdas Kaneria, Respondent No.3 - Dhirajlal Gordhandas Hansalia and Respondent No.4 - Mohan Pandurang Kalate were appointed as Directors of the Corporate Debtor – Envirant Developers Private Limited, which was incorporated for carrying out construction activity on 09.10.2018.
- (ii) Prior to 09.10.2018, Appellant with Respondent Nos. 2, 3, 4 and Mr. Mayur Kalate (Brother of Appellant) formed a partnership firm 'Montvert Associates' for carrying out business of construction in Wakad, Pune.
- (iii) Corporate Debtor availed credit facility from Motilal Oswal. A Debenture Trust Deed was executed on 26.11.2018 to avail India Reality Fund Series III and IV managed by Motilal Oswal Financial Services Limited acting through its Debenture Trustee, Vistra ITCL (India) Ltd.
- (iv) The Financial Creditor agreed to invest in the Corporate Debtor under the agreement, Company authorizing execution of deed in respect of issuance of 5,790 fully secured, unlisted,

redeemable, cumulative, non-convertible Series-A debentures of par value Rs.1,00,000/- each for the purpose of inter alia meeting costs for obtaining approvals for Project Vedanta and Project Panorama.

- (v) In the Corporate Debtor, the Appellant along with his two brothers held 50% shares and Respondent No.2 and 3 jointly had 50% shares. There being some dispute between the Appellant and his brothers, Family Settlement Deed was executed between the Appellant and his brothers.
- (vi) A Mortgage Deed dated 07.09.2019 was executed by Respondent No.2 and 3 on behalf of the Corporate Debtor in favour of the Financial Creditor for immovable assets of the Corporate Debtor.
- (vii) There was dispute between the Appellant and Respondent Nos.2 and 3 and other members with regard to business carried on by the Corporate Debtor as well as business carried by Respondent Nos. 2, 3 and other members of Montvert Group.
- (viii) A Memorandum of Understanding was executed on 29.01.2022 between Appellant, Respondent Nos. 2, 3 and other members of the group under which Respondent No.2, 3 and other members agreed to retire from all companies and firm and transfer their shareholding and rights in favour of the

Appellant in lieu of payment as envisaged in the Memorandum of Understanding.

- (ix) After Memorandum of Understanding, Respondent No.2 and 3 continued to act as Directors of the Corporate Debtor and take decisions.
- (x) Appellant came to know a Term Sheet dated 11.09.2018 was executed by Respondent No.2 and 3 with Motilal Oswal even before formation of Corporate Debtor to take credit from Motilal Oswal. Appellant sent various letters to Respondent No.2 and 3 to comply the terms of Memorandum of Understanding.
- (xi) Respondent No.2 and 3 provided copy of conditional NOC issued by Motilal Oswal. Various correspondences were exchanged between the parties. Financial Creditor also acknowledged the settlement between the parties vide letter dated 04.05.2022.
- (xii) Appellant sent a letter to Respondent No.2 and 3 to provide accounts of the Corporate Debtor and details of the Return, which was not replied.
- (xiii) Appellant filed Civil Suit being Special Civil Suit No.2182/2022 praying for decree of injunction as well as specific performance of Memorandum of Understanding. In the Civil Suit interim injunction was granted on 14.10.2022 restricting Montvert Group from dealing with properties mentioned in the schedule including plots of the Corporate Debtor.

- (xiv) Appellant has previously filed written complaint dated 07.07.2022 at Wakad Police Station addressing various illegal activities, fraudulent actions and forgery of documents allegedly committed by Respondent Nos. 2 and 3 in collusion with Respondent No.1, Motilal Oswal and others. Complaint was investigated, however, FIR was not registered.
- (xv) Appellant filed an application under Section 156(3) of Cr.PC, before Judicial Magistrate First Class, Pune praying for direction for registration of FIR. By order dated 10.03.2023, Judicial Magistrate First Class, Pune directed Police Inspector, Wakad Police Station to make investigation after registration of offence. FIR No.253 of 2023 has been registered under Section 403, 409, 408, 120-B, 420, 464, 467, 468, 471, 34 of IPC and Section 447 and 448 of Companies Act, 2013 in which Respondent No.1 to 4 and Motilal Oswal has been named as accused.
- (xvi) A Company Petition No. (IB) No.283 (MB) 2023 was filed by Respondent No.1 before the Adjudicating Authority for initiating Corporate Insolvency Resolution Process against the Corporate Debtor claiming a default of Principal Amount of Rs.34,41,00,000/- and claiming an amount of Rs.65,08,05,433/- and date of default mentioned as 11.02.2023 consequent to Put-Option Notice issued on 12.01.2023.

- (xvii) In the Company Petition, notice was issued by the Adjudicating Authority on 11.04.2023. On 09.05.2023, Respondent No.2 on behalf of the Corporate Debtor filed reply. On 11.05.2023, the Company Petition under Section 7 filed by Respondent No.1 was heard and reserved.
- (xviii) Appellant when came to know about the notice issued in the Company Petition filed application I.A. No.2002 of 2023 on 14.05.2023 pleading that the reply filed on behalf of Corporate Debtor by Respondent No.2 has concealed various important facts. It was prayed that reply filed by Respondent No.2 be rejected and Appellant be permitted to engage any counsel to defend the Corporate Debtor.
- (xix) Adjudicating Authority passed an order on 17.05.2023 by which I.A. No.2002/2023 filed by the Appellant has been rejected.
- (xx) By a subsequent order dated 19.05.2023, the Adjudicating Authority admitted Section 7 application filed by Respondent No.1. The Appellant has filed an appeal against order dated 19.05.2023 being Company Appeal (AT) (Ins.) No. 742 of 2023 which has been dismissed by this Tribunal by order dated 05.10.2023 which order has already been challenged by the Appellant before the Hon'ble Supreme Court, which is pending consideration before Hon'ble Supreme Court.

3. We have heard Shri Kushal Bansal, learned counsel appearing for the Appellant and Shri Arvind Nayyar, learned senior counsel appearing for Respondent No.1.

4. Learned counsel for the Appellant challenging the order impugned passed by the Adjudicating Authority submits that the Adjudicating Authority has committed error in rejecting I.A. No.2002/2023 filed by the Appellant. It is submitted that in the Application the Appellant has pleaded that Section 7 application filed by Respondent No.1 has been filed in collusion with Respondent No.2 and 3. Respondent No.2 has been falsely claiming to be authorized person of the Company and filed reply on 09.05.2023 without there being any authorization. There is a collusion between Respondent No.2 and Financial Creditor and the Appellant has come to know about various malafide acts committed by Respondent No.2 and 3 seriously jeopardizing the Appellant and other shareholders. Memorandum of Understanding dated 29.01.2022 has not been complied as per which Respondent No.2, 3 and other members have agreed to retire from the shareholding of the Corporate Debtor and other companies but instead of retiring from the shareholding they continued to act as Directors of the Corporate Debtor. It was agreed that Respondent No.2 and 3 shall transfer their respective shareholding in favour of the Appellant after obtaining consent of the lenders. By the application, it is submitted that Respondent No.2 and 3 have executed a Mortgage Deed on assets of the Corporate Debtor. Mortgage Deed dated 07.09.2019 and 21.12.23019 have been executed without any knowledge or information to the Appellant.

Amendment to Debenture Trust Deed, First Supplemental dated 27.09.2019 was executed by Respondent No.2 and 3, in which the Appellant was not party nor he has signed the said deed. It is submitted that the Appellant has filed a Civil Suit No.2182 of 2022 for decree of injunction, in which Respondent No.2, 3, and others are party and in which interim injunction was also granted. A written complaint alleging fraud and forgery against Respondent No.2, 3 and 1 was also filed at Police Station, Wakad, in which investigation was conducted by Economic Offences Wing, Pimpri Chinchwad. By order passed by Judicial Magistrate First Class, Pune, FIR has also been registered against Respondent Nos. 2 and 3 as well as the Financial Creditor, who all are accused in the said criminal proceeding. Respondent No.2 in reply filed in the Company Petition did not bring relevant facts on the record and reply has been filed to facilitate admission of the Section 7 application. The Adjudicating Authority has proceeded to reject the application observing that application has not been filed on the basis of board resolution hence the application need not be entertained. It is submitted that the Appellant in his applicant has not claimed that the application has been filed on the basis of board resolution rather the application has been filed by the Appellant in his capacity as Director. The Adjudicating Authority by rejecting the application of the Appellant has deprived the Appellant to bring relevant materials on record to indicate the illegalities committed by Respondent No.2 and 3 in collusion with the Financial Creditor. Learned counsel for the Appellant in support of his submission has relied on various judgments

of Hon'ble Supreme Court and this Tribunal, which shall be considered while noticing the submissions in detail.

5. Shri Arvind Nayar, learned counsel appearing for Respondent No.1 refuting the submissions of learned counsel for the Appellant submits that no error has been committed by the Adjudicating Authority in rejecting I.A. No.2002/2023 filed by the Appellant. Appellant is only a Director of the Corporate Debtor having only 16.66% shareholding whereas Respondent No.2 has 27.50% shareholding and Respondent No.3 has 22.50% shareholding. The internal dispute between Appellant and Respondent No.3 cannot be made subject matter of adjudication in proceeding under Section 7 initiated by the Financial Creditor. It is further submitted that this Tribunal while dismissing Company Appeal (AT) (Ins.) No.742 of 2023 filed by the Appellant challenging the order dated 19.05.2023 admitting Section 7 application has observed that rejection of the application of the Appellant was in accordance with law. In view of the order passed by this Tribunal dated 05.10.2023 dismissing Company Appeal (AT) (Ins.) No.742 of 2023 where the rejection of the application has also been upheld, this appeal need to be dismissed. It is submitted that the Appellant in his application being I.A. No.2002/2023 has nowhere pleaded that there is no debt and default by the Corporate Debtor. Appellant being party to the Debenture Trust Deed dated 29.04.2018, in which Corporate Debtor had undertaken to make the payment along with interest and payment having not been made. The Adjudicating Authority rightly admitted Section 7 application and the issues relating to inter se dispute between the Directors

of the Corporate Debtor has rightly been ignored by the Adjudicating Authority which cannot be made subject matter of adjudication in Section 7 application. It is submitted that on the principles as contained in Order XXIX Rule 1 of the Code of Civil Procedure, 1908 which provides that any pleading in a suit by or against a corporation can be signed and verified by the corporation's secretary, director, or other principal officer, the Respondent No.2 who was Director of the Company had every authority to file Reply in Section 7 application and Respondent No.2 was fully competent to file reply on behalf of the Corporate Debtor. It is submitted that in application under Section 7, Adjudicating Authority has limited jurisdiction to ascertain existence of debt and default. Since the Corporate Debtor in its reply dated 09.05.2023 did not contest debt and default, the Adjudicating Authority did not commit error in admitting Section 7 application. In any view of the matter, the application filed by the Appellant, I.A. No. 2002/2023 having not disputed the debt and default, no purpose would be served in giving opportunity to the Appellant and the Adjudicating Authority has rightly dismissed his application. Learned counsel for the Respondent has referred to Para 17 of the judgment dated 05.10.2023 passed by this Tribunal in Company Appeal (AT) (Ins.) No.742 of 2023. Debenture holders having subscribed the EDPL Series A non-convertible debentures as per Debenture Trust Deed, which was amended by First Supplemental and Amendment Deed dated 27.09.2019, Debenture holders were entitled to a coupon rate of 12.5% per annum compounded quarterly. Debentures were to be redeemed in 8 quarterly instalments

commencing from 31.03.2022. Put-Option Notice was issued to the Corporate Debtor on 12.01.2023 calling upon to redeem 3441 EDPL Series A non-convertible debentures. The Corporate Debtor having failed to make payment, Section 7 application was filed by the Financial Creditor in which notices were issued on 11.04.2023 and arguments were heard on 11.05.2023. It is stated that application I.A. No.2002/2023 was belatedly on 14.05.2023 filed by the Appellant after orders were reserved on 11.05.2023. Shri Nayar further submits that FIR filed by the Appellant on which much reliance has been placed has already been stayed by Bombay High Court vide order dated 28.08.2023 in Writ Petition No.1725 of 2023 which fact has not been mentioned on behalf of the Appellant. It is submitted that in so far as resolution passed by the Corporate Debtor is concerned, the creditor is entitled to rely on doctrine of indoor management which entitle an outsider to presume that all actions by the company are being done in accordance with the Articles of Association and Memorandum. Shri Nayar has relied on CP Satisfaction Notice dated 01.11.2019 which was signed by the Appellant where the Company has confirmed fulfilment of conditions as per Clause 4 of the Debenture Trust Deed dated 26.11.2018, hence, the Appellant cannot deny the facility extended by Debenture Trust Deed. Learned counsel for the Respondent No.1 has relied on judgments of Hon'ble Supreme Court and High Court which shall be referred to while considering submissions in detail.

6. Learned counsel for the Appellant in his rejoinder submits that dispute is not merely between the shareholders. In the first information

report (FIR) filed by the Appellant, the Appellant has challenged the signature on various documents including mortgage document which were forged and fabricated.

7. We have considered the submissions of learned counsel for the parties and perused the record.

8. We need to first consider the submission of learned counsel for the Respondent that application I.A. No.2002/2023 was belatedly filed by the Appellant, hence, was not required to be considered.

9. We have noted the sequence of events and fact which indicate that on 11.04.2023 notices were issued by the Adjudicating Authority. Appellant came to know on 24.04.2023 about the notices. After hearing of the application on 11.05.2023, Appellant learnt that Respondent No.2 has unilaterally appointed a lawyer and filed Reply. On 14.05.2023, an application was filed by the Appellant. 11.05.2023 was the first date for hearing in the company petition. Immediately after coming to know about the proceeding on 11.05.2023, when application was filed by the Appellant on 14.05.2023, it cannot be said that there was any delay caused by the Appellant in filing application which was filed within three days from the date of hearing. The Application I.A. No.2002/2023 was filed by the Appellant on 14.05.2023 on which date the Section 7 application was still pending consideration since order were reserved on 11.05.2023. Thus, it cannot be said that application was belatedly filed.

10. We need to notice certain pleadings which was made by the Appellant in the application to find out the nature of allegations which were made by the Appellant in the application. In Para 5 of the application Appellant stated:

“5. The Applicant states that, the actual understanding between the Financial Creditor and the said Company, basis which the Applicant herein is disputing the maintainability of the captioned petition, has not been brought before the Hon'ble Tribunal. Therefore, Applicant is seeking the leave of this Hon'ble Tribunal, to file a detailed reply in response to the petition filed by the Financial Creditor.”

11. In Para 6 of the Application, Appellant has pleaded certain facts. Sub-para (a) to (f) are as follows:

“6. Brief facts leading to the present application:

a. The said Company was incorporated on 9th October 2018 wherein the Applicant along with Mr.Dhirajlal Goradhandas Hansalia, Mr.Jayant Vallabhdas Kaneria, Mr.Mohan Pandurang Kalate were appointed as Directors therein. At the time of incorporation the share holding pattern of the said Company was:

Mr. Sanjay Pandurang Kalate - 16.66%

Mr. Mohan Pandurang Kalate - 16.67%

Mr. Mayur Pandurang Kalate - 16.67%

Mr. Jayant Vallabhdas Kaneria - 27.50%

Mr. Dhirajlal Goradhandas Hansalia - 22.50%

b. The Applicants states that, said Mr. Kaneria is habitual to behave in an arbitrary and illegal manner and has time and again prejudiced the interests of the said Company. It is the specific case and contentions of the Applicant that there is collusion between said Mr. Kaneria and Financial Creditor.

c. The Applicant learnt about various malafide acts committed by said Mr. Kaneria and Mr. Hansalia in the said Company, severely jeopardising the interests of the said Company, the Applicant and the other shareholders.

d. Thereafter disputes arose between the Directors of the said Company leading to execution of a family settlement deed dated 31 October 2019 read along with MOU dated 05th November 2019 and 29th January 2022.

e. Under the aforesaid agreements, Mr. Kaneria, Mr. Hansalia and Mr. Mohan Kalate ("the said other Directors") agreed to retire as directors of the said Company and transfer their respective shareholding in favour of the Applicant herein subject to Mr. Kaneria obtaining the consent of the lenders.

f. The Applicant states that, Motilal Oswal Real Estate Investment Advisor Private Limited (Debenture Holders) and the Financial Creditor are both aware of aforesaid agreements executed

between the Directors of the said Company. Infact, the said Motilal Oswal issued letters dated 23rd March 2022 and 4th May 2022, acknowledging the aforesaid settlement. Further in view of the doctrine of novation of contract between the Parties, the said Motilal Oswal offered and was open to altering the repayment schedule in view of the aforesaid settlement. However, this fact is suppressed by Financial Creditor and said Mr. Kaneria before this Hon'ble Tribunal. Therefore, it is evident that the said Mr. Kaneria is not interested in continuing the business and safeguarding the interests of the said Company.”

12. In Para 7 of the Application, Appellant has pleaded that reply filed by Mr. Kaneria – Respondent No.2 on behalf of the Company was without authority and by keeping other directors including the Appellant in dark. In Para 7 Sub-para (b), Appellant has pleaded regarding illegalities caused in the loan documents not brought to the notice of the Tribunal. Para 7(b) (i) to (ix) is as follows:

“b. Illegalities caused in the loan documents not brought to the notice of this Hon'ble Tribunal:

- i. The Applicant states that, there are fatal illegalities in the documents allegedly executed between the Financial Creditor and the said Company. However, the said reply filed by Mr. Kaneria in the captioned petition is surprisingly silent about such illegalities. This gives rise to a reasonable apprehension in the mind of the*

Applicant that, the said Mr. Kaneria is acting hand on glove with the Financial Creditor, only to defraud the said Company and usurp the properties.

- ii. The Applicant has recently learnt about a Mortgage Deed dated 7th September 2019 and 21 December 2019 allegedly executed between the Financial Creditor and the said Company. erroneously mortgaging the assets of the said Company (being Plot Nos.195 and Plot Nos.277), without valid and requisite approvals.*
- iii. The said Mortgage Deed was illegally signed Mr.Kaneria and Mr.Hansalai on behalf of the said Company, without a valid board resolution and without informing Applicant. Infact, all this while the Applicant was deliberately kept uninformed about the existence of such mortgage deed.*
- iv. No due diligence appears to have been carried out by the Financial Creditor prior to executing the alleged Deed of Mortgage and the due diligence report was not supplied despite of demand made by the Applicant.*
- v. Further, upon procuring a copy of the said Mortgage Deed, the Applicant has learnt about a Term sheet dated 11th September 2018 annexed thereto, allegedly executed by Mr.Kaneria and Mr.Hansalia, on alleged behalf*

of the said Company, agreeing to avail credit facility from Motilal Oswal.

- vi. Upon perusal, it appears that the said Term sheet was executed even before the incorporation of the said Company and prior to obtaining rights over the allegedly mortgaged properties and the same was never disclosed to the Applicant.*
- vii. Further Applicant has also come across an alleged board resolution dated 9th January 2019 annexed to the said Mortgage Deed, allegedly passed by the said Company. The said board resolution erroneously approves the Company to avail a credit facility and security interest for an amount not exceeding Rs.75 Crores.*
- viii. Firstly, no such board meeting was ever conducted and if so, the Applicant was deliberately not informed about the same. Moreover, the said resolution is signed only by said Mr. Kaneria on behalf of the said Company. Further, the alleged limit of 75 Crores was also exceeded while granting the basket finance. All this was done behind the back of the Applicant.*
- ix. Therefore, the said resolution is nothing but a bogus, manipulated and illegal document created by the said Mr. Kaneria in collusion with the Financial Creditor to support their interest.”*

13. In Para 7(c), Appellant pleads collusion between the Financial Creditor and Mr. Kaneria. In Para 7(c) (i) and (ii) following has been stated:

“c. Suspected collusion between the Financial Creditor and Mr.Kaneria

- i. *It is pertinent to note that, the Financial Creditor was clearly aware that the aforesaid documents were executed by the said Mr.Kaneria and Mr. Hansalia without sufficient authority from the Company. Despite the same, the Financial Creditor has acted hand in glove with the said Mr.Kaneria and have executed these bogus documents, with an intention to defraud the said Company and grab its properties.*
- ii. *Further it appears as though, the said Mr. Kaneria is assisting the Financial Creditor so as to protect his interest with respect to his other projects wherein financial assistance has been availed from the financial creditor. It is a matter of record that, Financial Creditor advanced a credit facility in the nature of a basket to the said Company and other Obligors. Such basket finance necessarily involves multiple securities being created in favour of the Financial Creditor. In spite of the same, the Financial Creditor and said Mr.Kaneria have conspired to sell only the property of said Company over which Applicant has individual interests.”*

14. In the application, the Appellant has also given in Para 7(f) details of written complaint and FIR registered against Respondent No.2 and 3. In Para 12 of the application following prayers have been made:

“a) This Hon'ble Tribunal be pleased to discard or reject or ignored the alleged reply dated 9th May 2023 filed by Mr.Jayant Vallabhdas Kaneria on the alleged behalf of the said Company in the captioned matter.

b) This Hon'ble Tribunal be pleased grant an opportunity to the said Company to appoint a new advocate to represent the said Company and file a fresh reply in the captioned petition dealing with the merits of the matter.

c) Pending hearing and final disposal of the present application, this Hon'ble Tribunal be pleased stay the effect and implementation of order dated 11th May 2023 and de-reserve the captioned petition for orders.”

15. Now we come to the order which was passed by the Adjudicating Authority rejecting the application. The Adjudicating Authority in the impugned order has although noted certain submission of the Appellant made in the application but held that there being no authorization of the Board of Directors to file the application, application appears to be frivolous and seem to have been filed with the view to delay the proceeding. Appellant in the application has not claimed the application is being filed by any authorization of the Board. In the reply which was filed by

Respondent No.2, which is also on the record, does not indicate that Respondent No.2 claimed any board resolution for filing reply on behalf of the Corporate Debtor. When reply filed by Respondent No.2 dated 09.05.2023 did not claim any board resolution for filing reply, we fail to see that how the application filed by the Appellant can be rejected on the ground that there is no board resolution supporting filing of the application. Appellant has filed the application as Director of the Corporate Debtor to bring various facts which according to the Appellant indicate that there is collusion between Respondent No.2, 3 and the Financial Creditor and several relevant facts have not been brought before the Adjudicating Authority by Respondent No.2 in his reply. The facts and material brought on the record does indicate that there has been serious dispute between the Directors inter se and a Memorandum of Understanding was also executed on 29.01.2022, in which Memorandum of Understanding both the Appellant as well as Respondent No.2 and 3 with other persons were parties. Memorandum of Understanding notices the agreement that Respondent No.2, 3 and other Directors shall retire from the shareholding in the Corporate Debtor and other companies and transfer their shareholding to the Appellant. There are dispute between the parties regarding implementation of the Memorandum of Understanding. According to the Appellant, the Memorandum of Understanding was not implemented and Respondent No.2 and 3 continued to act as Directors without there being any authority. It is submitted that certain documents including mortgage of the properties of the Corporate Debtor was executed

by Respondent No.2 and 3 which does not contain any signature or consent of the Appellant.

16. The observations of the Adjudicating Authority that application has been filed to delay the proceeding also does not commend us. 11.05.2023 was the first date of hearing on which order was reserved. The application was filed within three days i.e. on 14.5.2023, hence, conclusion drawn by the Adjudicating Authority that application has been filed to delay the proceeding is without any basis.

17. The submission which has been pressed by Shri Nayar on behalf of the Respondent is that the Debenture Trust Deed which was executed between the parties dated 26.11.2018 is not disputed. The debenture holders Having subscribed to the debentures, the obligation of the Obligors to make repayment is undisputed. It is submitted that even in the application filed by the Appellant, I.A. No.2002/2023, there is no averment disputing the debt and default. As noted above, Appellant although does not dispute the Debenture Trust Deed dated 26.11.2022 but has disputed the Mortgage Deed and First Supplemental and Amendment Deed. Allegations has also been made against Respondent No.2 and 3 with regard to finances of the Corporate Debtor. The application also pleaded that there was collusion between Respondent No.2, 3 and the Financial Creditor. It is true that allegation regarding collusion or malafide is easy to allege but difficult to prove. The Adjudicating Authority had no occasion to examine the allegation any further since he proceeded to reject the application on

the ground that it is not supported by resolution of the board of the Corporate Debtor.

18. We may notice certain judgments which has been relied by learned counsel for the Appellant. Appellant has placed reliance on judgment of this Tribunal in “*Company Appeal (AT) (Ins.) No.24 of 2022, CFM Asset Reconstruction Pvt. Ltd. vs. Swatantra Kumar & Anr.*” where in Para 11 and 13 following has been laid down:

“11. The application by the Appellant was competent application filed under Section 60(5) of the Code r/w Rule 11 of NCLT Rules, 2016 and under Section 65 of the Code and the Adjudicating Authority was obliged to look into the allegations to find out if there is any ground to grant any of the prayers made in the application. The finding of the Adjudicating Authority that the Appellant has no locus cannot be sustained. When the Appellant claims to be the Financial Creditor who is assignee of the Financial Creditor and the application records sequence of events and various proceedings prior to the application under Section 7, the allegations ought to have been looked into and could not have been brushed aside by observing that the applicant has no locus.

13. Now, we come to the order dated 01.11.2021 by which the Adjudicating Authority admitted the Section 7 application. The Adjudicating Authority in the impugned order has noticed the submission made by the Respondent No.1 – Financial Creditor.

The Corporate Debtor in its reply dated 07.11.2020 has accepted the loan and its liability to pay to the Financial Creditor. The order indicates that the order was passed with no contest. As observed above, the Adjudicating Authority committed error in rejecting the application of the Appellant, who vide application I.A. 572 of 2021 has brought materials for consideration under Section 7 application. We, thus, are of the view that order dated 01.11.2021 cannot be sustained and is set aside. In result, I.A. No. 572 of 2021 is allowed, the Appellant is allowed to intervene in the matter. I.A. No. 572 of 2021 as well as C.P. No. 395/IBC/NCLT/MAH/2021 are revived before the Adjudicating Authority which need to be considered afresh after hearing the parties. Both the Appeals are allowed accordingly.”

19. Learned counsel for the Appellant relying on the said judgment submits that when allegations were made in his application, the Adjudicating Authority was obliged to look into the allegations if there were any grounds in the prayers made in the application.

20. Another judgment relied by the Appellant is **“SMBC Aviation Capital Ltd. and Ors. Vs. Interim Resolution Professional of Go Airlines (India) Ltd. and Ors., Company Appeal (AT) (Ins.) Nos. 593, 603, 604 and 615 of 2023”** where in Para 21 of judgment following has been laid down:

“21. There cannot be any quarrel to the proposition laid down by the Tribunal in the above case. In

appropriate case where there is an Application under Section 65 of the Code before the Adjudicating Authority, the Adjudicating Authority after initiation of proceedings under Section 10 and before passing any order on Section 10 Application notices that initiation is fraudulent and malicious, the Adjudicating Authority is well within its jurisdiction to consider the Application and if it is held and found that initiation is fraudulent and malicious, the Adjudicating Authority is fully entitled to reject the said Application.”

21. Learned counsel for the Appellant has also relied on judgment of Hon’ble Supreme Court in **“Beacon Trusteeship Limited vs. Earthcon Infracon Private Limited and Another, Civil Appeal No.7641 of 2019, decided on 18.02.2020”**, where in Para 7 and 8 Hon’ble Supreme Court observed:

“7. Considering the provision of Section 65 of the IBC, it is necessary for the Adjudicating Authority in case such an allegation is raised to go into the same. In case, such an objection is raised or application is filed before the Adjudicating Authority, obviously, it has to be dealt with in accordance with law. The plea of collusion could not have been raised for the first time in the appeal before the NCLAT or before this Court in this appeal. Thus, we relegate the appellant to the remedy before the Adjudicating Authority.

8. In case, a proper application is filed, aspect whether the proceedings have been Initiated in

collusive manner will be looked into, in accordance with law and the appropriate orders have to be passed, considering the facts and circumstances of the case. We have made it clear that we have not commented on the merit of the case. We set aside the impugned order passed by the NCLAT and dispose of the appeal in accordance with the aforesaid direction.”

22. Learned counsel for the Appellant has also referred to judgment of Hon’ble Supreme Court in **“A. V. Papayya Sasty & Ors. Vs. Govt. of A.P. and Others, (2007) 4 SCC 221”** for the purpose that if any judgment or order is obtained by fraud said judgment is in nullity. There is no dispute to the above proposition of law, however, in the present case we are only concerned with the order passed by the Adjudicating Authority rejecting the I.A. filed by the Appellant. Order passed by the Adjudicating Authority under Section 7 admitting the application has been separately challenged which was upheld by this Tribunal and the matter is pending in the Hon’ble Supreme Court. Hence, we in this appeal are not concerned with order passed by the Adjudicating Authority admitting Section 7 application.

23. Learned counsel for the Appellant has also referred to the judgment of this Tribunal in **“Hytone Merchants Pvt. Ltd. vs. Satabadi Investment Consultants Pvt. Ltd., Company Appeal (AT) (Ins.) No.258 of 2021”**, where in Para 31 and 32 following has been held:

“31. We have heard argument of the Learned Counsel for the parties and perused the record.

Based on the pleadings of the parties, the question that arises for our consideration is as under;

Whether the petition complying with all requirements of Section 7(5) of the Insolvency and Bankruptcy Code, 2016, but if it appears that the Application is filed collusively, not with the intention of Resolution of Insolvency, and so with malicious intent, or malafides, then whether the Application can be rejected relying on Section 65 of the Code?

32. Undisputedly the petition filed under Section 7 of the Code meets all the requirements under the Insolvency and Bankruptcy Code, 2016. The Adjudicating Authority has also observed that "the Application is complete in all respects as required by law and the Application clearly showed that the Corporate Debtor is in default of a debt due and payable and that the default amount is more than the minimum threshold stipulated in Section 4 (1) of the Code".

24. Shri Nayar has placed reliance on judgment of the Division Bench of Allahabad High Court in the matter of **“Lakshmi Ratan Cotton Mills Co. Ltd., Kanpur vs. J. K. Jute Mills Co. Ltd., Kapur, AIR 1957 All 311”**. It is submitted that doctrine of indoor management has been accepted and reiterated in the above case. Reliance has been placed on Para 24, which is as follows:

“24. In view of the above provisions, there can be no doubt that Sri Gulab Chand Jain who was the

director of the defendant company, the director of the managing agency and also a delegate of the managing agency could be authorised to enter into this transaction. Under the above circumstances, even supposing that there was no actual resolution authorising him to enter into this transaction on behalf of the defendant company either by the Board of Directors or by the Board of Managing Agents the claim of the plaintiff who was a creditor cannot be affected. A creditor dealing with a trading company is required by law to be conversant with the terms of its Memorandum and Articles of Association and no more. If it is found that the transaction of loan into which the creditor is entering is not barred by the charter of the Company or its Articles of Association, and could be entered into on behalf of the Company by the person negotiating it, then he is entitled to presume that all the formalities required in connection therewith have been complied with. If the transaction in question could be authorised by the passing of a resolution, such an act is a mere formality. A bona fide creditor, in the absence of any suspicious circumstances, is entitled to presume its existence. A transaction entered into by the borrowing company under such circumstances cannot be defeated merely on the ground that no such resolution was in fact passed. The passing of such a resolution is a mere matter of indoor or internal management and its absence, under such circumstances, cannot be used to defeat the just claim of a bona fide creditor. A creditor being an outsider or a third party and an innocent stranger is

entitled to proceed on the assumption of its existence; and is not expected to know what happens within the doors that are closed to him. Where the act is not ultra vires the statute or the company such a creditor would be entitled to assume the apparent or ostensible authority of the agent to be a real or genuine one. He could assume that such a person had the power to represent the company, and if he in fact advanced the money on such assumption, he would be protected by the doctrine of internal management.”

25. Learned counsel for the Respondent has also relied on judgment of Hon’ble Supreme Court reported in **“(1996) 6 SCC 660, United Bank of India vs. Naresh Kumar and Others”** where considering Order VI Rule 14 of Civil Procedure Code, the Hon’ble Supreme Court has observed that in a suit by or against a corporation the Secretary or any Director or other Principal Officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. There can be no dispute to the proposition laid down by the Hon’ble Supreme Court in the above case. In the present case, dispute between the Respondent No.2 and the Appellant is authority to file reply on behalf of the Corporate Debtor. It is not the case of the Respondent No.2 that there is resolution passed by the Board authorizing Respondent No.2 neither the Appellant has claimed resolution of the Board for filing application.

26. Shri Nayar has also submitted that judgment of this Tribunal dated 05.10.2023 in Company Appeal (AT) (Ins.) No.742 of 2023 filed by the

Appellant challenging the order dated 19.05.2023 admitting Section 7 application has already upheld the rejection of I.A. No.2002/2023, which contention has been noticed. Learned counsel for the Respondent has referred to Para 17 of the judgment, which is as follows:

“17. We are inclined to agree with the reasoning of the Adjudicating Authority in dismissing the IA. It is a settled proposition of law that to prove any transaction to be collusive and fraudulent in nature, the degree of proof and evidence required should be of unimpeachable nature and beyond reasonable doubt. In a matter as serious as this where an imputation of fraud is being made by the Appellant on behalf of the Corporate Debtor against the Respondents, the Adjudicating Authority has rightly held that allowing such an application, without approval of the Board would suffer from impropriety and hence dismissed it as a frivolous and vexatious. While we prima-facie agree that a collusive Section 7 petition can be rejected as has been laid down in the Hytone (supra) ratio, we must hasten to add the inapplicability of that judgment since in that case the Corporate Debtor was trying to escape its liability as a corporate guarantor in collusion with the Financial Creditor, thereby making the facts distinguishable. We do not countenance this approach of the Appellant of attempting to take undue benefit of the mercies of law by seeking invocation of Section 65 of the IBC. We are also cognizant that given the statutory construct of IBC, the scope and jurisdiction of the Adjudicating Authority being summary in

nature, it is distinctly not as extensive as that of a civil court to enquire into disputes arising out of MoUs and related specific performance which have been agitated in the IA. Allowing such meritless and unscrupulous litigation would logically entail derailing the insolvency resolution process which goes against the twin objectives of the IBC of maximization of the value of assets and time-bound insolvency resolution.”

27. It is true that this Tribunal while deciding the Company Appeal (AT) (Ins.) No.742 of 2023 filed by the Appellant by order dated 05.10.2023 has also noticed the I.A. No.2002/2023 and made certain observations. The observations made in the order dated 05.10.2023 were in reference to consideration of challenge to the order dated 19.05.2023 admitting Section 7 application. Order passed on 17.05.2023 was not under challenge in Company Appeal (AT) (Ins.) No.742 of 2023, hence, the observation made by this Tribunal in said judgment at best can be treated as an observation in reference to challenge to the order dated 19.05.2023 and cannot be read as finding in reference to the appeal filed by the Appellant challenging the order dated 17.05.2023 rejecting I.A. No.2002/2023.

28. We, thus, are of the view that Appellant is entitled to raise relevant grounds and facts in his appeal which challenges order dated 17.05.2023 passed in I.A. No.2002/2023, which challenge raised in this appeal cannot be repelled relying on order dated 05.10.2023 passed by this Tribunal in Company Appeal (AT) (Ins.) No.742 of 2023.

29. Shri Nayar has further submitted that Appellant has not disclosed the order of the Bombay High Court by which the Bombay High Court has stayed the investigation in the FIR lodged by the Appellant. The copy of the order dated 28.08.2023 passed by the Bombay High Court in Writ Petition No.1725 of 2023 has been brought on record by the Respondent, which order is as follows:

“DATE : 28th August, 2023.

P. C.:

- 1. Mr. Kadam, learned counsel for Respondent No.2 seeks time to file a brief reply, annexing the documents on which Respondent No.2 places reliance.*
- 2. At his request, stand over to 20th September 2023.*
- 3. Till the next date, ad-interim relief in terms of prayer clause (g).”*

30. The ad-interim relief was granted by the Bombay High Court in prayer ‘g’ of the Writ Petition. Prayer ‘g’ as claimed in the Writ Petition is as follows:

“g. That pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to stay the further investigation in the Impugned FIR bearing No. 0253 dated March 14, 2023 registered by Wakad Police Station, Pune;”

31. The order staying the further investigation was passed on 28.08.2023 whereas the impugned order against which this appeal has been filed was passed on 17.05.2023 by which date there was no stay on the investigation. Further, the appeal has been filed by the Appellant in this Tribunal on 10.07.2023 by which date also order of stay was not passed by the Bombay High Court. We, thus, are of the view that in the appeal there was no occasion to disclose the order dated 28.08.2023 which was passed subsequent to filing of the Appeal. The pleading in the application I.A. No.2002/2023 by the Appellant that FIR has been registered against the Respondent Nos.1 to 4 under different sections of IPC, as noted above, was relevant fact to be noticed by the Adjudicating Authority on the date when order was passed i.e. on 17.05.2023.

32. In view of the foregoing discussion and conclusions, we are of the view that the Adjudicating Authority committed error in rejecting I.A. No.2002/2023 filed by the Appellant. The order passed by the Adjudicating Authority dated 17.05.2023 cannot be upheld and is set aside.

33. We make it clear that application I.A. No.2002/2023 having rejected at very threshold without entering into allegations made in the application and without giving opportunity to the contesting parties, our observations in this order are not any expression of opinion on the merits of the allegations.

34. In result, we allow the appeal and set aside impugned order dated 17.05.2023. Application under Section 7 having already been admitted by

order dated 19.05.2023, which order having also been upheld by this Tribunal, against which appeal is pending in the Hon'ble Supreme Court, we only observe that it shall be open for the Appellant to file appropriate application before the Adjudicating Authority for such prayers as may be advised. Appeal is allowed as above.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

NEW DELHI

19th April, 2024

Archana