

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

Company Appeal (AT) (Insolvency) No. 343 of 2024

[Arising out of Order dated 25.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench (Court-II) in IA No.3971/2022 in CP (IB)- 91(PB)/2022]

IN THE MATTER OF:

Ashok Tiwari

....Appellant

Vs.

DBS Bank India Ltd. (DBIL) & Anr.

...Respondents

For Appellant: **Mr. Gaurav Mitra, Mr. Shashwat Anand, Mr. Prabhat Ranjan Raj, Mr. Dhruva Vig, Mr. Gunjesh Ranjan, Mr. Ishan Roy Chowdhury, Advocates.**

For Respondents: **Mr. Dhruv Malik, Ms. Palak Nenwani, Advocates for R-1.
Ms. Prachi Johri and Ms. Abhipsa Sahu, Advocates with Mrs. Ritu Rastogi, IRP in person for R-2**

J U D G M E N T
(12th July, 2024)

Ashok Bhushan, J.

1. This Appeal by Suspended Director of the corporate debtor has been filed challenging the order dated 25.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, Court- II admitting Section 7 application filed by the DBS Bank India Ltd., the

Financial Creditor. Challenging the order admitting Section 7 application against the corporate debtor (corporate guarantor) this appeal has been filed.

2. Brief facts of the case necessary to be noticed for deciding this appeal are:-

2.1. M/s. Vayam Technologies Ltd. (principal borrower) obtained working capital facilities from the financial creditor. The said facilities were renewed in the year 13.09.2012 and 22.11.2013. The corporate debtor- M/s. Abhisar Impex Pvt. Ltd. executed a corporate guarantee dated 14.03.2012 to guarantee the repayment of the said facility and also created a charge by way of equitable mortgage on *pari-passu* basis on commercial property situated at D-319, Sector-63, Noida. As principal borrower failed to honour its obligation and neglected to make the payment. Financial creditor issued Loan Recall Notice dated 20.06.2015 to the principal borrower as well as to the corporate guarantor recalling the entire outstanding amount in terms of the Facility Agreement. Financial creditor filed an OA No.466 of 2015 before the Debt Recovery Tribunal, New Delhi for recovering its outstanding dues. The parties including principal borrower and the corporate debtor entered into settlement and filed a joint application before the DRT which was allowed by order dated 18.07.2016. The Corporate Debtor failed to abide the Terms of the Settlement, hence, financial creditor filed an M.A No. 135/2017 before the DRT for issuance of Recovery Certificate. DRT vide order dated 15.07.2019 issued a Recovery Certificate in favour of the financial creditor for a sum of Rs. 23,29,19,212.46/- along with interest @ 18% from the date of OA till realisation. Recovery Certificate dated 24.07.2019 was issued

thereafter. The principal borrower filed an Appeal No.415 of 2019 before the DRAT against the DRT Order dated 15.07.2019 which was disposed of by DRAT on 08.12.2022. Principal borrower also filed a review of the order of DRT dated 15.07.2019. No amount having paid either by the principal borrower or the guarantor, the financial creditor issued a notice of invocation of guarantee dated 29.10.2021. On 18.01.2022, financial creditor filed Section 7 application against the Corporate Debtor- M/s. Abhisar Impex Pvt. Ltd. (corporate guarantor). Section 7 application was filed relying on the recovery certificate for Rs. 23,29,19,212.46/- dated 24.07.2019 as well as the letter invoking corporate guarantee dated 29.10.2021. Section 7 application was admitted by the Adjudicating Authority by order dated 25.03.2022. Suspended Director of the corporate debtor filed an appeal being Company Appeal (AT) (Insolvency) No.464 of 2022 challenging the order dated 29.03.2022. Company Appeal (AT) (Insolvency) No.464 of 2022 was allowed on 14.07.2022 by which order the corporate debtor was permitted to file a detailed reply within two weeks and Section 7 application was revived before the Adjudicating Authority which was heard and decided. Corporate Debtor filed a reply before the Adjudicating Authority to which rejoinder affidavit was also filed by the financial creditor. Adjudicating Authority after hearing the parties by impugned order dated 25.01.2024 admitted Section 7 application. Adjudicating Authority relying on the order of the DRT found the debt and default. Adjudicating Authority having found existence of default proceeded to admit Section 7 application by the impugned order aggrieved by which order this Appeal has been filed.

2.2. It is also relevant to notice that Section 7 application was also filed against the principal borrower which application was admitted by the Adjudicating Authority vide order dated 25.03.2022. Order dated 25.03.2022 was challenged by Suspended Director in Company Appeal (AT) (Insolvency) No.418 of 2022 which was permitted to be withdrawn with liberty to file application under Rule 49(2) of the NCLT Rules, 2016. Application under Rule 49(2) was also rejected. Against order dated 15.01.2024, Suspended Director of the corporate debtor i.e. appellant herein has filed Company Appeal (AT) (Insolvency) No.195 of 2024 which appeal was also heard and dismissed by order of this Tribunal dated 21.05.2024. Thus, against the principal borrower CIRP has proceeded.

3. We have heard Shri Gaurav Mitra, Learned Senior Counsel for the Appellant, Shri Dhruv Malik, Learned Counsel for the Respondent No.1 and Ms. Prachi Johri, Learned Counsel for the Respondent No.2.

4. Shri Gaurav Mitra, Learned Senior Counsel for the Appellant submits that the Corporate Debtor is a healthy company and it has only one asset i.e. D-319, Sector-63, Noida. The CIRP against the corporate debtor shall not be fruitful since no resolution of corporate debtor may take place. It is submitted that the recovery certificate issued by the DRT dated 24.07.2019 in pursuance of the order dated 15.07.2019 is not a correct recovery certificate. It is submitted that the order of the DRT dated 15.07.2019 is not a final order since an appeal was filed against the said order which was withdrawn with liberty to file a review petition before the DRT. Review petition has been filed which is still pending. The debt and default against

the corporate debtor does not become final nor can be relied in the proceeding by the Adjudicating Authority in Section 7 application. It is submitted that the debt and default as declared by DRT is still *sub judice*. Adjudicating Authority ought not to have admitted Section 7 application.

5. Counsel for the financial creditor refuting the submissions of the counsel for the Appellant submits that the default by the corporate debtor is fully established. Earlier Consent Decree was passed by the DRT on the application filed by the principal borrower and the corporate debtor and due to failure of the corporate debtor to honor the settlement, application was filed for issuance of recovery certificate which recovery certificate was issued. Recovery certificate having been issued for an amount of Rs. 23,29,19,212.46/-, debt and default is fully proved. The corporate debtor has not paid the amount and has been pursuing one after another litigation to avoid the payment. Section 7 application which was filed by the financial creditor in 2022 could be admitted only on 25.01.2024. It is submitted that the CoC have already been constituted. No grounds have been made out to interfere with the impugned order.

6. We have considered the submissions of the Counsel for the parties and perused the record.

7. The corporate debtor was a corporate guarantor of the financial facilities extended to principal borrower- M/s. Vayam Technologies Ltd. It is not disputed that the corporate debtor stood corporate guarantor of the financial facilities. On account of non-payment of amount by principal borrower, the financial creditor filed an OA before the DRT for recovery of its

amount being O.A No. 466 of 2015 in which proceeding initially settlement took place between the parties which settlement having not been honoured. An IA has been filed for issuance of recovery certificate. An order was passed by the DRT dated 15.07.2019 allowing the application for issuance of recovery certificate for Rs. 23,29,19,212.46/- along with interest @ 18% per annum. Even after recovery certificate had been issued, no payments have been made by the principal borrower. The corporate guarantee was invoked on 29.10.2021 and thereafter application under Section 7 was filed by the financial creditor on 18.01.2022. Part IV of Section 7 application has been extracted by Adjudicating Authority in paragraph 7 of the order, which is as follows:-

“7. The details qua the amount defaulted to be paid and the date of default are mentioned in Part-IV of the Application which reads thus:

Part IV

<i>PARTICULARS OF FINANCIAL DEBT</i>		
1	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	<p><i>The Corporate Debtor stood as guarantor to the debt of Rs. 25,00,00,000/- (Rupees Twenty-Five crores) sanctioned to Vayam Technologies Limited ("principal borrower") vide offer letter dated 01.08.2011 and the Working Capital Credit Facility was renewed from time to time on 13.09.2012 and 22.11.2013.</i></p> <p><i>The principal borrower failed to make repayment of the outstanding amounts and therefore it was incumbent upon the Corporate Debtor to honour its agreed obligations in accordance with the Corporate Guarantee. However, the Corporate Debtor failed to make good the default(s) committed even despite service of Guarantee Invocation Notice (as described hereinbelow) upon it.</i></p> <p><i>The dates of disbursement of the amount by the</i></p>

		<i>Financial Creditor are as follows –</i>				
		Date	Facility Number	Disbursement Amount		
		01.08.2011	CDT/ADMIN/334/2011 (Working capital credit facility) CDT/ADMIN/539/2012	25,00,00,000		
		13.09.2012	(Supplemental working capital credit facility)	Fund Based limit 7 Crore	Non-Fund Based Limit 15 Crore	Total Limits 22 Crore
		22.11.2013	CDT/ADMIN/655/2013 (Renewal of working capital credit facilities)	22 Crores		
2	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKING FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	<p><i>While the Corporate Guarantee issued by the Corporate Debtor is for Rs. 25 Crores which is the debt in default, however the total amount of default by principal borrower is Rs. 49,55,93,696.48/- (Rupees Forty-Nine Crores Fifty-Five Lakhs Ninety-Three Thousand Six Hundred and Ninety Six and Paise Forty Eight Only) as on 10.01.2022.</i></p> <p><i>Vide Recovery Certificate No. 347/2019 dated 24.07.2019, the Financial Creditor has been awarded Rs. 23,29,19,212.46/- (Rupees Twenty-Three Crore Twenty-Nine Lakhs Nineteen Thousand Two Hundred Twelve and Paise Forty Six Only) along-with interest @18% p.a. with effect from O.A. i.e., 08.10.2015 till realisation.</i></p> <p><i>Copy of the Recovery Certificate No. 347/2019 issued in M.A. No. 135/2017 in O.A. No. 466/2015 by the Hon'ble DRT, New Delhi is annexed herewith as ANNEXURE 5.</i></p> <p><i>Computation of amount and days of default in tabular form is annexed herewith as ANNEXURE 6.</i></p>				

8. The submission which has been advanced by Counsel for the appellant is that the order dated 15.07.2019 passed by the DRT allowing the

Company Appeal (AT) (Insolvency) No. 343 of 2024

application for recovery of sum of Rs.23,29,19,212.46/- is not final since an appeal was filed before the DRAT. Copy of the order passed by the DRAT has been noticed by the Adjudicating Authority in the impugned order itself. In paragraph 21 of the impugned order, the Adjudicating Authority has extracted the order of the DRAT dated 08.12.2022, which is as follows:-

“21. The salient plea espoused on behalf of the CD is that the Order passed by Ld. DRT-II was challenged by filing Appeal No. 415/2019. The Ld. Counsel for the Applicant could draw our attention to the Order dated 08.12.2022 passed by Ld. DRAT-II dismissing the Appeal. The order reads thus:

"DEBTS RECOVERY APPELLATE TRIBUNAL, DELHI

Appeal No. 415/2019

In

M.A. No. 135/2017

Arising out of O.A No. 466/2015 (DRT-II, Delhi)

*Vayam Technologies Ltd & Anr
Vs
DBS Bank & Ors*

08.12.2022 Hon'ble Mr. Justice Brijesh Sethi

Present

*Mr. Anand Aggarwal. Ld. counsel for appellants
Ms. Sharmistha Ghosh, Ld. counsel for respondent
no.1 bank
Ms. Prerna Sabharwal, Ld counsel for respondent no.5*

*This matter has been taken up by me through
Video Conferencing.*

*Learned counsel for appellants states that
D83 Bank has approached the NCLT and an IRP has
been appointed and the moratorium, has started.*

Learned counsel for the respondent no 1, however, states that the appellants have approached the NCLAT against the said order of NCLT and the said order stands stayed.

Learned counsel for the appellants further states that a review application against the Impugned order has been filed by the appellants before the learned DRT.

Heard Let the review application be decided by the learned DRT and appellants are given liberty to approach this Tribunal in case the review application is decided against them Learned counsel for the appellants, however, states that in case review application is decided against the appellants, the appeal against the present impugned order would become time-barred and, therefore, the present appeal may be adjourned to a longer date.

Heard. Though this apprehension of the learned counsel for the appellants is without any basis the present appeal is accordingly disposed of giving liberty to the appellants to revive the present appeal in case review application before the learned DRT is decided against them.

Registry has reported that the court fee paid by the appellants is short by Rs.30,000/- Learned counsel for the appellants states that the appellants will make good the deficit court fee in case they approach this Tribunal to revive the present appeal.”

9. In the order, DRAT noticed the submission of the counsel for the corporate debtor that review application has already been filed before the DRT, hence, DRAT disposed of the appeal giving liberty to the corporate debtor to revive the appeal in case the review application is decided against the corporate debtor. The order dated 08.12.2022 in no manner effect the validity of the order dated 15.07.2019 passed by the DRT. The default against the principal borrower is fully proved. It is relevant to notice that the recovery certificate has already been issued by the DRT against the principal borrower as well as corporate debtor who was corporate guarantor. Recovery certificate is filed as Annexure A-3 to the appeal. Recovery certificate mentioned the name of Defendant in which corporate debtor- M/s. Abhisar Impex Pvt. Ltd. is also referred as Certified Debtor 5. It is useful to extract following from the recovery certificate:-

“It is certified that the above mentioned sum of RECOVERY CERTIFICATE FOR RS. 23,30,69,212.46 (RUPEES TWENTY THREE CRORE THIRTY LACS SIXTY NINE THOUSAND TWO HUNDRED TWELVE AND PAISE FORTY SIX ONLY) along with future interest is due to the Bank hereinafter referred to as Certified Holder from the defendants, hereinafter referred to as the

<i>Certified Debtor 1</i>	<i>M/s. Vayam Technologies Limited</i>
<i>Certified Debtor 2</i>	<i>Mr. Ashok Tiwari (Managing Director)</i>
<i>Certified Debtor 3</i>	<i>Ms. Amrita Tiwari (Director)</i>
<i>Certified Debtor 4</i>	<i>Mr. Jitender Tiwari (Director)</i>
<i>Certified Debtor 5</i>	<i>M/s. Abhisar Impex Pvt. Ltd.</i>

The Recovery Officer shall realize the amount as per this certificate in the manner and mode prescribed Under Section 25 and 28 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 from the above named Certificate Debtors.

Given under my hand and seal of this Tribunal on this the 24th day of, 2019.”

10. Corporate guarantee was invoked by the financial creditor and thereafter Section 7 application was filed. Adjudicating Authority after considering the submissions of the parties came to the conclusion that the debt and default has been proved and admitted Section 7 application. Adjudicating Authority also in its judgment has relied on the judgment of the Hon'ble Supreme Court in **“Dena Bank vs. C. Shivakumar Reddy and And.- Civil Appeal No. 1650 of 2020”**. In paragraph 27 of the judgment, Adjudicating Authority has made following observations:-

“27. The Ld. Counsel for the CD also raised the plea that the loan was sanctioned by the consortium and the Applicant alone could not have moved the present application. It is stare decisis that, when the loan is sanctioned by the Consortium, and one of the member of the consortium qua the loans the default in repayment of which is committed invoke the procedure under Section 7 of IBC, 2016, these are the other members of the Consortium, who can question the claim of one of the consortium and not the Corporate Debtor/Corporate Guarantor. At this stage, it would not be out of context to refer to the

judgment of Hon'ble Supreme Court in Dena Bank vs. C. Shivakumar Reddy and Anr., (Civil Appeal No. 1650 of 2020). In the said judgment, Hon'ble Supreme Court ruled that the recovery certificate is cause of action to Appellant to institute the petition under Section 7 of IBC, 2016. Para 128, 138, 139 and 143 of the Judgment reads thus:

"128. In the instant case, Rs. 111 lakhs had been paid towards outstanding interest on 28th March, 2014 and the offer of One Time Settlement was within three years thereafter. In any case, NCLAT overlooked the fact that a Certificate of Recovery has been issued in favour of the Appellant Bank on 25th May 2017. The Corporate Debtor did not pay dues in terms of the Certificate of Recovery. The Certificate of Recovery in itself gives a fresh cause of action to the Appellant Bank to institute a petition under Section 7 IBC. The petition under Section 7 IBC was well within three years from 28th March 2014.

138. A final judgment and order/decreed is binding on the judgment debtor. Once a claim fructifies into a final judgment and order/decreed, upon adjudication, and a certificate of Recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decreed and/or the amount specified in the Recovery Certificate.

139. The Appellant Bank was thus entitled to initiate proceedings under Section 7 IBC within three years from the date of issuance of the Recovery Certificate. The Petition of the Appellant Bank, would not be barred by limitation at least till 24th May 2020.

143. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid."

11. The submission of counsel for the appellant is that the corporate debtor has only one asset which may not be sufficient to clear the debt of financial creditor nor sufficient for the resolution of insolvency does not commend us. Initiation of CIRP process is consequent to debt and default on the part of the corporate debtor who was corporate guarantor. The debt and default by the corporate debtor is writ large on the record. The corporate debtor having unable to pay its debt, insolvency resolution process against

such corporate debtor cannot be interdicted on the submission that asset of the corporate debtor is not sufficient to resolve the insolvency of the corporate debtor. These are the issues which have to be addressed in the CIRP of the corporate debtor and cannot be ground to set aside an order of admission under Section 7. We have already noticed that the insolvency process has also commenced against the principal borrower. The order of commencement against principal borrower as well as rejection of application under Rule 49(2) was challenged before this Tribunal by the suspended director of the corporate debtor who has appeared appellant before us which appeal being Company Appeal (AT) (Ins.) No.195 of 2024 has been dismissed by this Tribunal on 21.05.2024. CIRP against the principal borrower already commenced and proceeding.

12. We, thus, do not find any ground to interfere with the impugned order of the Adjudicating Authority admitting Section 7 application against the corporate debtor who was a corporate guarantor. There is no merit in the appeal. The appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

New Delhi
Anjali