

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 161 of 2024

**(Arising out of the Impugned Order dated 02nd January, 2024
passed by the 'Adjudicating Authority' (National Company Law
Tribunal, Mumbai Bench-I in C.P. (IB) No.966/MB/2020]**

IN THE MATTER OF:

**Mr. Jayesh Dani
(Ex-Director of HBC Auto and
ANC SEZ Private Limited
Having its address at 505, Ceejay House
Dr. Annie Besant Road, Worli
Mumbai – 400 018
Email: info@hbsrealtors.com**

...Appellant

Versus

**1. SREI Equipment Finance Ltd.
Having its address Vishwakarma, 86C
Topsia Road, Kolkata – 700 046
West Bengal
Email: corporate@srei.com**

...Respondent No.1

**2. Mr. Avinash Ambikaprasad Shukla
(Interim Resolution Professional)
Having its address at Level 3, Padma Palace
Plot No. 79, Sector – 28, Vashi
Navi Mumbai, Maharashtra – 400 703
Email: avinashshukla1708@gmail.com**

...Respondent No.2

Present:

For Appellant : Mr. Shivek Trehan, Mr. Ishaan Kumar, Advocates

**For Respondent : Mr. Krishnendu Datta, Sr. Advocate with Mr.
Siddhant Buxy, Mr. Ativ Patel, Ms. Priyanka Vora
and Mr. Rahul Gupta, Advocates**

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

The present Appeal is filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("the Code") by the Appellant being the Ex-Director of HBS Auto and ANC SEZ Private Limited ("Corporate Debtor"), being aggrieved by the Impugned Order dated 02.01.2024 passed by the National

Company Law Tribunal, Mumbai Bench ("Adjudicating Authority"), whereby the Adjudicating Authority admitted the Company Petition (IB) No. 966 of 2020 filed by Respondent No.1 against the Corporate Debtor under Section 7 of the Code.

Appellant's case:

The Development of the SEZ Project

2. The Corporate Debtor, a private limited company established under the Companies Act, 1956, specializes in the development of Special Economic Zones (SEZs) and other infrastructure projects. In 2008, pursuant to a Lease Deed dated 7th October 2008 with the Gujarat Industrial Development Corporation (GIDC), the Corporate Debtor embarked on developing various infrastructure facilities for a SEZ. This included industrial, business, and social amenities such as land development, roads, buildings, sewerage, and warehouses over approximately 309 acres at GIDC Panoli Industrial Estate in Ankleshwar, Gujarat (hereinafter referred to as "the Project"). By 2011, the Project was completed and began operations as a Pharma SEZ, though substantial interest from prospective buyers was not forthcoming.

Sublease Agreements

3. In 2013, the Corporate Debtor entered into two Deeds of Sublease (dated 18th March 2013 and 23rd August 2013) with M/s. HBS City Pvt. Ltd., subleasing portions of the Project land. In 2017-2018, Mahansaria Tyres Pvt. Ltd. expressed interest in acquiring land for automobile operations. Consequently, the Corporate Debtor sought and obtained approval for a

change in manufacturing items and subleased approximately 127 acres to Mahansaria Tyres Pvt. Ltd. on 6th December 2018.

Fundraising and Loan Agreements

4. Seeking funds for further development, the Corporate Debtor approached Respondent No. 1 (the Financial Creditor) in 2017. The Financial Creditor, through an Offer Letter dated 1st July 2017, provided a loan facility of Rs. 60 Crores. This was formalized in the Rupee Loan Agreement dated 19th July 2017, which included terms such as repayment in 54 instalments and conditions for default and notice. It is noted that this agreement was insufficiently stamped. A second loan of Rs. 6 Crores was secured via another agreement dated 15th September 2019, which also contained specific terms for repayment and default, and was likewise insufficiently stamped.

Challenges Leading to Default

5. The Corporate Debtor faced several insurmountable challenges:
- Lack of buyers for SEZ units.
 - Illegal non-utilization charges by GIDC amounting to Rs. 43.6 Crores.
 - An economic slowdown that severely affected cash flow and fund availability.

These factors cumulatively led to the Corporate Debtor's inability to meet its repayment obligations under the loan agreements.

Demand Notice and Company Petition

6. On 27th January 2020, the Financial Creditor issued a Demand Notice demanding Rs. 6.74 Crores, alleging default without specifying the exact date.

The entire credit facility was neither recalled nor accelerated as per the loan terms.

7. Subsequently, on 14th September 2020, the Financial Creditor filed a petition under Section 7 of the Insolvency and Bankruptcy Code, citing a default amount of Rs. 58.38 Crores as of 15th December 2019. This claim was grossly inflated and misleading, given the actual default was only Rs. 6.74 Crores.

OTS Agreement (December 1, 2021):

8. During the discussions and pendency of the Company Petition, the Financial Creditor and the Corporate Debtor entered into an OTS Agreement on December 1, 2021, where Respondent No. 1 agreed to accept an aggregate OTS amount of Rs. 55.60 Crores towards the Corporate Debtor's dues. According to the OTS Agreement and the terms of the Loan Agreement, the payment terms were revised, and Respondent No. 1 postponed the repayment of the Credit Facilities. The Corporate Debtor committed to making the following payments to Respondent No. 1:

- Rs. 6 Crores upfront within 10 days from the date of the letter;
- Rs. 34 Crores on or before March 31, 2022;
- Rs. 15.60 Crores on or before March 31, 2025.

It was mutually agreed that a formal Settlement Agreement capturing the terms of the Settlement would be filed before the NCLT, Mumbai Bench, at the next hearing on January 7, 2022, to obtain an appropriate order.

Initial Payment and Acceptance

9. On December 20, 2021, the Corporate Debtor, acting in good faith, paid the upfront amount of Rs. 6 Crores to Respondent No. 1, which was accepted without protest.

Covid-19

10. From December 2021 till February 2022, there was a sudden rise in the Covid-19 cases, on account of which most of the offices, including that of the Government, were either temporarily shut or were operating on a partial basis. Due to which, the third party purchaser/financer could not comply with the OTS letter dated 1st December, 2021 and also further could not get the requisite permissions from the Competent Authorities, because of which the Corporate Debtor and/or the purchaser/financer were not in position to pay a sum of Rs. 34,00,00,000/- (Rupees Thirty Four Crores Only) on or before 31.03.2022, as specified in the OTS letter dated 1st December, 2021.

11. Consequently, the Corporate Debtor on 24.05.2022 filed IA No. 1473 of 2022, placing the OTS Agreement on record and seeking dismissal of the Company Petition. The Financial Creditor did not respond to this application.

12. Despite agreeing to execute a Settlement Agreement and file it with the Adjudicating Authority, the Financial Creditor obstructed the process and failed to record that the parties had settled the purported debt.

Other attempts at Settlement

13. The CD has given details of his efforts for settlement of the dues. These efforts are being captured herein in next few paragraphs, as they have some

bearing on the settlement of the dues of the CD, even though of not much assistance.

Expression of Interest by MAK Living Realty Pvt. Ltd. (August 2021)

14. Around August 2021, MAK Living Realty Pvt. Ltd. expressed interest in acquiring the remaining portion of the project, approximately 155 acres of land, and sought it free of encumbrances. Consequently, the Corporate Debtor proposed leasing or assigning the remaining SEZ land to MAK Living Realty Pvt. Ltd. and entered into assignment agreements. Under these agreements, MAK Living Realty Pvt. Ltd. committed to repay the pending dues of Respondent No. 1 and discharging the non-utilisation dues levied by GIDC on the Corporate Debtor. Subsequently, MAK Living Realty Pvt. Ltd. entered into agreements with Bhakti Industrial Hub ("Bhakti"), granting leasehold rights over 125 acres of land.

Payments to Statutory Authorities:

15. Acting on the aforementioned agreements, Bhakti paid approximately Rs. 18.5 Crores to various statutory authorities on behalf of the Corporate Debtor to secure the de-notification of the SEZ land for industrial activities.

GIDC Non-Utilisation Charges and High Court Order:

16. To challenge the illegal non-utilisation charges by GIDC, the Corporate Debtor filed Special Civil Application No. 2560 of 2022 before the Hon'ble Gujarat High Court. On February 14, 2022, the High Court ordered a status quo regarding the SEZ land, stalling the de-notification proposal. This status quo order affected the arrangements with MAK Living Realty Pvt. Ltd. and

Bhakti, preventing the Corporate Debtor from making the March 31, 2022, instalment payment. The Corporate Debtor kept Respondent No. 1 informed of these developments.

Further Payments and Revised Proposals:

17. As noted earlier, the Corporate Debtor demonstrated good faith by paying Rs. 6 Crores on December 20, 2021, and further amounts totalling Rs.5 Crores by MAK Living Realty Pvt. Ltd. and Bhakti in September 2022.

18. In response to the inability to meet the March 2022 deadline due to the pandemic and other delays, the Corporate Debtor requested extensions and proposed revised payment schedules, including paying Rs. 5 Crores by June 30, 2022, and Rs. 29 Crores by July 31, 2022. The Financial Creditor, however, threatened to terminate the OTS Agreement without actually doing so.

Revised OTS Proposal (March 14, 2023):

19. In light of the ongoing issues, the Corporate Debtor sent a revised OTS proposal to Respondent No. 1 on March 14, 2023, which was in principle accepted. Respondent No. 1 communicated its conditional approval of the revised OTS on April 3, 2023, subject to incorporating certain terms and conditions.

20. Subsequently, all the endeavours and efforts of the Corporate Debtor and the purchaser/financer went futile and in vain, as the Financial Creditor vide its letter dated 16.05.2022 purported to move ahead with the termination of the said OTS Agreement dated 1st December, 2021.

21. The Corporate Debtor vide its letter dated 23.05.2022 once again requested the Financial Creditor to revisit the timelines of the OTS letter dated 1st December, 2021 and proposed payment of the remaining outstanding due to the Financial Creditor in two tranches viz. Rs. 5 crores on or before 30th June, 2022 and Rs. 29 Crores on or before 31st July, 2022.

Respondent's Defense:

22. The Corporate Debtor's appeal against the initiation of insolvency proceedings appears misguided for the reasons in below mentioned paragraphs.

23. A Clear Admission of Debt: Throughout this process, the Corporate Debtor has repeatedly acknowledged their outstanding debt and inability to pay:

- Their application to dismiss the insolvency petition (IA No. 1473/2022) explicitly mentions this.
- Several letters (dated 23.05.2022, 31.03.2022, etc.) reiterate their financial situation.

These admissions solidify the existence of a valid debt exceeding the Rs. 1 crore threshold.

24. Omissions galore: The Corporate Debtor has consistently avoided its financial obligations. They defaulted on both loans, totalling over Rs. 58 crores. This undeniable fact is supported by:

- Their own admissions in multiple letters and proposals (First and Second OTS).
- Undisputed loan statements and CIBIL reports.

25. Failed Promises and Broken Agreements: The Corporate Debtor attempted to settle their debt through two One-Time Settlements (OTS) but failed to fulfil their promises in both instances. This highlights their inability to meet their financial commitments.

- The First OTS was terminated due to their non-payment.
- The Second OTS, while initially sanctioned, remains unpaid.

These attempts don't erase the original debt. Instead, they serve as additional evidence of their financial struggle.

26. No Dispute, Just Delay: The insolvency process aims to resolve financial distress. By proposing OTS during the proceedings, the Corporate Debtor acknowledges the debt. This attempt to negotiate a settlement doesn't negate the existing financial obligation.

27. A Default is a Default: Even if we consider only the initial default amount of Rs. 6.74 crores, it still surpasses the threshold for initiating insolvency proceedings.

28. Heard Learned Counsels for both the parties and perused all the documents placed before us.

Appraisal:

Background and Factual Matrix

29. The Corporate Debtor was engaged in the development of Special Economic Zones (SEZ) and other infrastructure projects. The project, located at GIDC Panoli Industrial Estate in Ankleshwar, Gujarat, faced numerous challenges including a lack of buyers, economic slowdown, and substantial non-utilization charges imposed by GIDC. To fund the SEZ project, the Corporate Debtor secured a loan facility from the Financial Creditor totalling Rs. 66 Crores under two agreements.

Financial Default and Demand Notice

30. The Corporate Debtor failed to service the loan as per the agreed schedule due to various financial difficulties. Consequently, the Financial Creditor issued a Demand Notice on January 27, 2020, seeking payment of Rs. 6.74 Crores. This notice was followed by a Company Petition filed under Section 7 of the Insolvency and Bankruptcy Code (IBC) on September 14, 2020, claiming a default amount of Rs. 58.38 Crores. The Appellant claims that it is an inflated claim. However, it is belied by proper calculation sheets on record, which provide for the details for distribution of Rs.58.38 crores.

One Time Settlement (OTS) Agreement

31. In an attempt to settle the outstanding dues, the parties entered into negotiations resulting in an OTS agreement on December 1, 2021. According to this agreement, the Financial Creditor agreed to accept Rs. 55.6 Crores as a full and final settlement, structured in a phased payment schedule. The Corporate Debtor made an initial payment of Rs. 6 Crores, which the Financial Creditor accepted.

Failure to Adhere to OTS Terms

32. The Corporate Debtor failed to pay Rs. 34 Crore in Tranche 1 of the First OTS, which was supposed to be paid by 31.03.2022. Thus, Corporate Debtor failed to adhere to the terms of the OTS. This has been accepted by the Corporate Debtor in its I.A. No. 1473 of 2022 which he filed before the Adjudicating Authority on 24 May 2022, in which it is claimed that the Appellant on 12.04.2022 requested the Financial Creditor for further time to pay the balance amount, which was due as on 31 March 2022 and also indicated their readiness and willingness to pay the interest on the delayed payment. The Appellant also sought the relief to dismiss / reject the CP(IB)/66(MB)/2022 in view of the OTS dated 01 December 2021. Per contra Respondent No.1 has clearly brought out that the proposals for OTS with the Corporate Debtor for Rs. 55.60 crores were to be paid in two tranches.

33. Instead, on 12.04.2022 the Corporate Debtor filed an application seeking dismissal of the insolvency petition on the ground of the OTS. The Respondent No. 1 by letter dated 16.05.2022 terminated the First OTS on account of default by the Corporate Debtor. All original terms of the loans extended by the Respondent No. 1 to the Corporate Debtor were reinstated.

34. In response, the Corporate Debtor by letter dated 23.05.2022, once again admitted its debts and offered to pay the balance amount by 31.07.2022. The Respondent No. 1 by letter dated 27.05.2022 rejected this

request and re-iterated that the First OTS was terminated, and all original terms of the loans were reinstated.

35. Second OTS Proposal: On 14.03.2023, the Corporate Debtor sent another OTS proposal to the Respondent No. 1 for Rs. 48.60 crores along with interest, with payment of Rs. 8.50 crores to be made upon sanction of the Second OTS. The Respondent No. 1 by letter dated 03.04.2023 accorded an in-principle sanction to the Second OTS proposal, subject to the terms and conditions mentioned therein. In case of non-adherence to timelines, the original loan liabilities were to revive and the OTS was to be treated as acknowledgment of the debts under the entire loan. The Corporate Debtor did not make any payment under the Second OTS till date. Therefore, the debt and default have been admitted by the Corporate Debtor again and again.

36. We find that the CD has failed to settle their debt through OTS in both instances. In the First OTS it was terminated due to their non-payment the second OTS was sanctioned initially but remains unpaid.

37. The oral arguments of the Corporate Debtor that the OTS novates the original loan agreements cannot be accepted for the reasons that the OTS document clearly states that “any non-adherence to the time lines as stipulated shall amount to revocation of the OTS”. First OTS and Second OTS in the present case did not novate the debt under the original loan agreements. The First OTS was terminated by the Respondent No. 1 and the original loan obligations stood revived. The revival of original loan obligations

in case of default was further reiterated in the Second OTS, which also stood terminated.

38. Despite several requests for extensions, the Financial Creditor found the Corporate Debtor's performance unsatisfactory, leading to the termination of the OTS agreement and the continuation of the insolvency proceedings.

Analysis and Judgment

39. The appeal challenges the Adjudicating Authority's order on several grounds, arguing bad faith by the Financial Creditor, misleading claims of default amount, and obstruction in the settlement process. However, the appeal does not hold upon a thorough examination of the facts and legal principles.

Legality and Validity of the Demand Notice and Company Petition:

40. The Demand Notice and the subsequent Company Petition were issued in accordance with the provisions of the IBC. The Financial Creditor's claim of Rs. 58.38 Crores is backed by the loan agreements and the Corporate Debtor's admitted inability to repay the loans as scheduled. Minor technical objections raised by the Corporate Debtor with respect to the authorization, notice in writing (Clause 8.6 of the loan agreement) and also declaration for acceleration (Clause 8.3.1 of the loan agreement) do not stand the scrutiny basis the material on record, including the rejoinder confirming the debt and also the default. In any case, even if it is assumed that default was of only Rs. 6.74 crores and not of the entire loan amount, the default is still above the

threshold amount of Rs. 1 crore. The debt and default are further established by the following documents (a) CIBIL Report showing overdue amounts; (b) Statement of Loan Accounts of both loans as proof of default (as on 16.06.2020); and (c) Balance sheet of the Corporate Debtor for FY 2017-18. Further, it is not hit by Section 10A, as the date of default as per Part IV of Section 7 petition is 15.12.2019.

Impact of the One Time Settlement Agreement:

41. While the OTS agreement shows the Corporate Debtor's intent to settle the dues, the failure to adhere to its terms, even considering external factors such as the High Court's order, cannot nullify the Financial Creditor's right to pursue insolvency proceedings. The terms of the OTS required strict compliance, and the Corporate Debtor's failure to meet these terms justified the Financial Creditor's decision to terminate the agreement.

Assessment of Financial Creditor's Conduct:

42. The Financial Creditor acted within its rights by accepting the initial OTS payment and subsequently seeking to recover the remaining dues through insolvency proceedings when the Corporate Debtor defaulted. There is no evidence of bad faith or unfair obstruction by the Financial Creditor. The acceptance of partial payments does not negate the default or the legitimacy of the insolvency proceedings.

Adjudicating Authority's Decision:

43. The Adjudicating Authority correctly applied the provisions of the IBC in admitting the Company Petition and initiating CIRP. The Corporate

Debtor's inability to service its debt, as per the loan agreements and the OTS, substantiates the Financial Creditor's petition under Section 7 of the IBC.

Conclusion

44. In light of the above analysis, the appeal against the order of the Adjudicating Authority lacks merit. There is a clear admission of debt and default is clearly established. The default amount is more than Rs.1 crore. The Financial Creditor acted within its legal rights throughout the process, and the initiation of CIRP is justified by the Corporate Debtor's persistent defaults and failure to comply with the OTS terms.

45. The order of the Adjudicating Authority is upheld, and this Appeal is hereby dismissed. The Corporate Insolvency Resolution Proceedings against HBS Auto and ANC SEZ Private Limited shall continue as per the provisions of the Insolvency and Bankruptcy Code. No orders as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

New Delhi.
31st May, 2024

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