

# Logvis Ag vs Quinn Logistics India Ltd on 21 May, 2018

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
NEW DELHI

Company Appeal (AT)(Insolvency) No. 143 of 2017

[Arising out of Order dated 11th August, 2017 passed by the  
Adjudicating Authority (National Company Law Tribunal) Hyderabad  
Bench, Hyderabad in Company Petition (IB) No. 97/7/HDB/2017]

IN THE MATTER OF:

Mack Soft Tech Pvt Ltd. ....Appellant

Versus

Quinn Logistics India Ltd. ....Respondent

Present:

For Appellant : Dr. Abhishek Manu Singhvi and Dr. U.K.  
Chaudhary, Senior Advocates with Ms. Diya  
Kapur, Ms. Akshita Sachdeva, Ms. Ranjana Roy  
Gawai, Ms. Ferida Satarwala, Mr. Pervinder, Mr.  
Vivek Kumar, Mr. Himanshu Vij, Mr. Rohan  
Jaitly, Mr. Avishkar Singhvi and Ms. Madhavi  
Khanna, Advocates

For Respondent : Mr. S.N. Mookherjee, Senior Advocate with Mr.  
Rudreshwar Singh and Ms. Shivambika Sinha,  
Advocates

And

Company Appeal (AT)(Insolvency) No. 175 of 2017

IN THE MATTER OF:

Logvis AG ....Appellant

Versus

Quinn Logistics India Ltd. ....Respondent

Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017

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Present:

For Appellant : Dr. Abhishek Manu Singhvi, Senior Advocate,  
Dr. U.K. Chaudhary, Senior Advocate with Ms.  
Diya Kapur, Ms. Akshita Sachdeva, Ms.  
Ranjana Roy Gawai, Ms. Ferida Satarwala, Mr.  
Pervinder, Mr. Vivek Kumar, Mr. Himanshu Vij,  
Mr. Rohan Jaitly, Mr. Avishkar Singhvi and Ms.  
Madhavi Khanna, Advocates

For Respondent : Mr. Jayant Mehta, and Mr. Ujjal Banerjee  
Advocates

And

Company Appeal (AT)(Insolvency) No. 176 of 2017

IN THE MATTER OF:

Mecon FZE .....Appellant

Versus

Quinn Logistics India Ltd. ....Respondent

Present:

For Appellant : Dr. Abhishek Manu Singhvi, Senior Advocate,  
Dr. U.K. Chaudhary, Senior Advocate with Ms.  
Diya Kapur, Ms. Akshita Sachdeva, Ms.  
Ranjana Roy Gawai, Ms. Ferida Satarwala, Mr.  
Pervinder, Mr. Vivek Kumar, Mr. Himanshu Vij,  
Mr. Rohan Jaitly, Mr. Avishkar Singhvi and Ms.  
Madhavi Khanna, Advocates

For Respondent : Mr. Arun Kathpalia, Senior Advocate with Mr.  
Swapnil Gupta and Ms. Ankiya Sinha,  
Advocates

## JUDGEMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

Mack Soft Tech Private Limited ('Corporate Debtor') was developing an office complex by the name of 'Q-City' in Hyderabad. While it was in developing process, the 'Quinn Logistics India Private Limited' ('Financial Creditor') acquired the entirety/majority of the shareholding of the 'Corporate Debtor' on 23rd October, 2017 for a total consideration of Rs. 126.73 crores.

2. According to the 'Quinn Logistics India Private Limited' ('Financial Creditor'), 'Mack Soft Tech Private Limited' ('Corporate Debtor') become subsidiary Company of the 'Financial Creditor'. During the period 2007- 2010, the 'Financial Creditor' disbursed an interest free unsecured loan of Rs. 62.90 crores to the 'Corporate Debtor' for development of 'Q-City'. Such interest free loan at the relevant time was permitted under the provision of Section 327A (8) of the Companies Act, 1956.

3. 'Mack Soft Tech Private Limited' ('Corporate Debtor'), 'Quinn Logistics India Private Limited' ('Financial Creditor'), 'Quinn Investments Sweden AB' and 'Quinn Logistics Sweden AB' were all part of a group of companies controlled by an Irish businessman, Mr. John Sean Ignatius Quinn, and his family ("Quinn Family"). They were part of a group of Companies known as the "Quinn Group". In April 2011, the "Quinn Group" defaulted in repayment of loans amounting to 2.8 billion Euro Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 taken from one Anglo Irish Bank Ltd. (now known as Irish Bank Resolution Corporation (In Special Liquidation) ("IBRC"), which is controlled by the Minister of Finance for the Government of Republic of Ireland in terms of the Irish Bank Resolution Corporate Act, 2013.

4. Part of default included default by 'Quinn Investments Sweden AB' under a guarantee furnished to IBRC in respect of such loans. It resulted in IBRC initiating bankruptcy proceedings in Sweden against 'Quinn Investments Sweden AB', wherein order was reserved on 21st June, 2011.

5. Subsequent to reserving of such order the Board of Directors of the 'Corporate Debtor' (Mack Soft Tech Private Limited) purported to show dilution of the Respondent's shareholding in 'Mack Soft Tech Private Limited' by allegedly issuing 376,301 fresh equity shares to one 'Mecon FZE', a Dubai Company, for a consideration of only INR 40,71,578/- on 22nd June, 2011. Since then 'Mack Soft Tech Private Limited'- ('Corporate Debtor') ceased to be a subsidiary of the 'Quinn Logistics India Private Limited'- ('Financial Creditor').

6. On the date of such issue, the Board of Directors of the 'Quinn Logistics India Private Limited' ('Financial Creditor') was under control by the Quinn Family as the Quinn Family was in control of the 'Quinn Investments Sweden AB' and the 'Quinn Logistics Sweden AB'. Such issue of shares to 'Mecon FZE' is the subject matter of challenge in Suit No. OS 21 of 2012 filed, inter-alia, by the 'Quinn Logistics India Private Limited'- ('Financial Creditor') before the learned District Judge,

Rangareddy Court, Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 Hyderabad. Since then certain development has been taken place and matter is pending in Suit which are not necessary to be taken into consideration at this stage.

7. The 'Quinn Logistics India Private Limited'-( 'Financial Creditor') by its letter dated 15th June, 2017, called upon the 'Mack Soft Tech Private Limited'- ('Corporate Debtor') to repay the alleged outstanding loan amount of Rs. 62,90,45,905/- (Sixty-two crores ninety lakh forty-five thousand nine hundred five only) on or before 30th June, 2017. In response, the 'Mack Soft Tech Private Limited'-( 'Corporate Debtor') by letter dated 29th June, 2017, sought time to verify its records to clarify the position. According to the 'Mack Soft Tech Private Limited'- ('Corporate Debtor'), there is no amount outstanding in the books of account of the 'Corporate Debtor' payable to the 'Quinn Logistics India Private Limited'- ('Financial Creditor').

8. Having not received the amount, the 'Quinn Logistics India Private Limited'-( 'Financial Creditor') filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of the 'Corporate Insolvency Resolution Process' against the Mack Soft Tech Private Limited- ('Corporate Debtor').

9. On notice from the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, the 'Mack Soft Tech Private Limited'- ('Corporate Debtor') raised its objections. However, objections were not accepted by the Adjudicating Authority. By impugned order dated 11th Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 August, 2017 passed in CP (IB) No. 97/7/HDB/2017, admitted the application, order of 'Moratorium' was passed and 'Interim Resolution Professional' has been appointed with certain directions.

10. Learned Senior Counsel for the Appellant- 'Mack Soft Tech Private Limited' ('Corporate Debtor') submitted that the Respondent- ('Financial Creditor') was the parent company of the 'Mack Soft Tech Private Limited'- ('Corporate Debtor'). The books of account of the Appellant- ('Corporate Debtor') used to be maintained by the Respondent- ('Financial Creditor') and the common auditor. Since 2011, there being a change in control of shareholding and management and the current shareholder took control of the 'Corporate Debtor' and therefore, the Respondent- 'Financial Creditor' was no longer the parent company of the Appellant- 'Corporate Debtor'.

11. It was submitted that at the time of takeover (since 2009) the balance sheet showed a book entry of Rs. 62.9 Crores as owing to the Respondent- ('Financial Creditor'). In the second suit they have casually referred to Rs. 62 Crores payable by the Appellant- ('Corporate Debtor') but had not sought to recover the same in its prayer.

12. Further, according to the Appellant- ('Corporate Debtor'), in respect of books of account entry of Rs. 62.9 Crores from 2011 to 2017, the Respondent- ('Financial Creditor') did not treat it as a debt that was due and payable but merely as a book entry.

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13. It was submitted that the Appellant- ('Corporate Debtor') having realised that there was no document in support of the accounts for this entry and in absence of any correspondence, claim or demand the Appellant changed the entry from its balance sheet and removed the name of the Respondent- ('Financial Creditor'). Therefore, according to the Appellant- ('Corporate Debtor'), as per the legal and accounting advice as the amount was required to be kept on the books until the debt was time barred, after it became time barred in the year 2016, the amount has not been reflected.

14. It was submitted that since 2016 there was no demand or correspondence made by the 'Financial Creditor' in respect of Rs. 62.9 Crores alleged loan and on legal advice the loan has been wrote-off. Even if any such loan was given, it cannot be shown in the books as a claim, it being time barred.

15. Further, according to learned Senior Counsel for the Appellant on 15th June, 2017 a demand notice was sent but with no reference to any loan agreement or document stating how the loan was repayable on the said date. The notice was sent only with the malicious intention to initiate insolvency proceedings against the Appellant- ('Corporate Debtor').

16. It was submitted that on 29th June, 2017, the Appellant- ('Corporate Debtor') informed the Respondent- ('Financial Creditor') that it requires two-three weeks' time to verify its records. However, without waiting, in a premeditated manner, they moved an application under Section 7 of the Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 'I&B Code' on the ground that the 'Corporate Debtor' defaulted in payment of debt of Rs. 62.9 Crores.

17. In "M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr.□2017 SCC OnLine SC 1025", the Hon'ble Supreme Court raised the question of maintainability of the appeal by the 'Corporate Debtor' after initiation of 'Corporate Insolvency Resolution Process' and observed:

"11. Having heard learned counsel for both the parties, we find substance in the plea taken by Shri Salve that the present appeal at the behest of the erstwhile directors of the appellant is not maintainable. Dr. Singhvi stated that this is a technical point and he could move an application to amend the cause title stating that erstwhile directors do not represent the company, but are filing the appeal as persons aggrieved by the impugned order as their management right of the company has been taken away and as they are otherwise affected as shareholders of the company. According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 the sole appellant. This being the case, the present appeal is obviously not maintainable. However, we are not inclined to dismiss the appeal on this score alone. Having heard both the learned counsel at some length, and because this is the very first application that has been moved under the Code, we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law. Entrenched managements are no longer allowed to continue in management if they cannot pay

their debts."

18. According to the learned Senior Counsel for the Appellant- 'Corporate Debtor', the appeal under Section 61 was maintainable as it has been filed through Director. Reliance has been placed on the decision of this Appellate Tribunal in "Steel Konnect (India) Pvt. Ltd. V. M/s. Hero Fincorp Ltd.□ Company Appeal (AT) (Insolvency) No. 51 of 2017", wherein this Appellate Tribunal held that after initiation of 'Corporate Insolvency Resolution Process', the aggrieved parties including the 'Corporate Debtor' can prefer the appeal under Section 61 of the 'I&B Code'.

19. It was submitted that the observations of the Hon'ble Supreme Court in "Innoventive Industries Ltd. (Supra)" is a passing observation and cannot be held to be law laid down under Article 141 of the Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 Constitution of India. However, we are not inclined to deliberate on such issue as the same very impugned order has been challenged by individual in the connected appeals. Further, according to us, any observations of the Hon'ble Supreme Court on the question of law, even if not treated to be a law laid down under Article 141 of the Constitution of India, is binding on this Appellate Tribunal.

20. Learned Senior Counsel for the Appellant challenged the impugned order on the ground that the application did not satisfy the basic requirements of Section 7.

21. The case of the Appellant- ('Corporate Debtor') is that Form-1 requires that the specific information are to be provided in Part-IV of the said Form-1. A bare perusal of the statutory requirements would show that the same is bereft of the information required statutorily to be provided under Section 7(2) and (3) of the 'I&B Code'.

22. It was further submitted that the Respondent- ('Financial Creditor') has not filed any documents "in order to prove the existence of financial debt, the amount and the date of default", as it required in Part-V at Serial No.8 of the statutory Form-1. The dates on which the alleged debt was disbursed or payments were made was not disclosed in the statutory Form-1.

23. It was submitted that the Applicant in terms of Section 7(3) of the 'I&B Code' is required to provide clear proof of default, either maintained Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 by an Information Utility or any other additional documents to prove default of the 'financial debt', which they failed to provide.

24. We have heard the parties and also perused Form 1 (at Page No. 68). Part IV therein (at Page 71) relates to "Particulars of Financial Debt". The Respondent- ('Financial Creditor') has shown the amount disbursed by way of payments made for, and on behalf of the Appellant- ('Corporate Debtor') between October 2007 and July 2010. In support of which the table enclosed at Annexure A-6. The amount claimed to be shown as Rs. 62,90,45,905/- and the date of default has been shown as 15th June, 2017, when the 'Corporate Debtor' failed to repay the outstanding loan amount in spite of notice. A working of the computation of the amount and days of default has been shown in tabular form and is annexed as Annexure A-6 (at Page No. 92).

25. In so far as Part-V of Form-1 is concerned, it relates to "Particulars of Financial Debt (Documents, Records and Evidence of Default)". A certified copy of the bank statements of the 'Financial Creditor's' HSBC Account Number have been enclosed as Annexure A-7 thereto. The 'Financial Creditor' has also enclosed a copy of the balance sheets as on 31st December, 2008; 31st December, 2009; 1st January, 2010 to 31st December, 2010 and 31st March, 2012. The Balance Sheets have been submitted with the Registrar of Companies on 24th December, 2015 and 9th February, 2017. The 'financial statement' for the year 2015-16 has also filed with the Registrar of Companies on 10th March, 2017 etc. Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 On bare perusal of the aforesaid Part V of Form 1, it shows that the Form is complete and there is no infirmity in the same.

26. Learned Senior Counsel appearing on behalf of the Appellant- ('Corporate Debtor') submitted that certain payments have been made in favour of the 'Indu Projects', which has been shown as debt of Appellant. However, no detail deliberation is required to be made on such issue, as it has been brought on record that the payments were made by the Respondent- ('Financial Creditor') to Indu Projects on behalf of the 'Corporate Debtor', which is not in dispute.

27. Learned Senior Counsel for the Appellant- ('Corporate Debtor') referred to the different pages and submitted that the Respondent- ('Financial Creditor') excess amount of Rs. 62,90,45,905/- has been shown as default, but such submission cannot be accepted as it also reflects the amount paid to the Indu Projects is (Rs. 35,88,04,434/-) on behalf of the Appellant, as the Appellant has failed to pay the same.

28. The Hon'ble Supreme Court in "Innoventive Industries Ltd. (Supra)" observed:

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor- it need not be a debt owed to the applicant financial creditor. Under Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the

Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

29. In the present case, it is not in dispute that the Respondent- ('Financial Creditor') given loan to the Appellant- ('Corporate Debtor') in connection with 'Q-City' project. The Appellant- ('Corporate Debtor') has taken plea that the amount so paid is now time barred which is a different issue but the Appellant- ('Corporate Debtor') had taken debt from the Respondent- ('Financial Creditor') has not been disputed. It is not the case of the Appellant- ('Corporate Debtor') that there is no debt or no default has occurred in a sense that the debt, which may also be included a disputed claim is not true. The debt cannot be claimed to be not due being Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 payable in law and in fact the Appellant- ('Corporate Debtor') having accepted that it obtained loan from the Respondent- ('Financial Creditor').

30. The default has occurred as evident from the fact that the Respondent- ('Financial Creditor') asked for refund of the amount by notice dated 15th June, 2017. In reply after asking for two weeks' time, the Appellant- ('Corporate Debtor') failed to pay the amount.

31. This Appellate Tribunal in "M/s. Speculum Plast Pvt. Ltd. Vs. PTC Techno Pvt. Ltd. □Company Appeal (AT) (Insolvency) No. 47 of 2017"

held that the law of limitation is not applicable to 'I&B Code' and observed as follows:

"68. In view of the settled principle, while we hold that the Limitation Act, 1963 is not applicable for initiation of 'Corporate Insolvency Resolution Process', we further hold that the Doctrine of Limitation and Prescription is necessary to be looked into for determining the question whether the application under Section 7 or Section 9 can be entertained after long delay, amounting to laches and thereby the person forfeited his claim.

69. If there is a delay of more than three years from the date of cause of action and no laches on the part of the Applicant, the Applicant can explain the delay. Where there is a continuing Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 cause of action, the question of rejecting any application on the ground of delay does not arise.



70. Therefore, if it comes to the notice of the Adjudicating Authority that the application for initiation of 'Corporate Insolvency Resolution Process' under section 7 or Section 9 has been filed after long delay, the Adjudicating Authority may give opportunity to the Applicant to explain the delay within a reasonable period to find out whether there are any laches on the part of the Applicant."

32. In the said case, this Appellate Tribunal also noticed the alternative submissions regarding application of Limitation Act and held as follows:

"58. Even if it is accepted that the Limitation Act, 1963 is applicable, though we have held otherwise, in that case also application under Section 7 or 9 or 10 cannot be rejected on the ground that the application is barred by limitation for being filed beyond three years for following reasons.

Except Article 137 of Part II i.e. 'other applications', as quoted below, no other provisions Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 of Limitation is applicable in the matter of filing application under Sections 7 or 9 or 10:

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Part II-OTHER APPLICATION Description of application Period of Time from Limitation which period begins to run

137. Any other application for Three years When the which no period of right to limitation is provided apply elsewhere in this division. accrues "

33. There is a continuous cause of action which will be evident from the books of account of the 'Corporate Debtor', wherein it is accepted the liability of loan payable to the Respondent- ('Financial Creditor'). There being a continuous cause of action, the application under Section 7 of the 'I&B Code' cannot be held to be barred by limitation.

34. One of the grounds of challenge is that the Respondent- ('Financial Creditor') do not come within the meaning of 'Financial Creditor' as defined under Section 5(7) read with Section 5(8) of the 'I&B Code'.

35. The aforesaid submissions cannot be accepted for the following reasons.

The main object of the company (Quinn Logistics Private Limited) has been shown in its Memorandum of Association, relevant portion of which reads as follows:

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36. It is not in dispute that the Appellant- ('Corporate Debtor') was developing an office complex by the name of Q-City Hyderabad. In the process of developing such office complex on 23rd October, 2017, the Respondent- ('Financial Creditor') acquired the majority of the shareholding of the Appellant- ('Corporate Debtor') for a total consideration of Rs. 162.73 Crores. Subsequently, in between 2007-2010, the 'Financial Creditor' granted interest free unsecured loan of Rs. 62.90 Crores to the Appellant- ('Corporate Debtor') for development of 'Q-City'.

37. Grant of loan and to get benefit of development is object of the Respondent- ('Financial Creditor'), as apparent from their 'Memorandum of Association'. Thus, we find that there is a 'disbursement' made by the Respondent- ('Financial Creditor') against the 'consideration for the time value of money'. The investment was made to derive benefit of development of 'Q-City', which is the consideration for time value of money. Thus, we find that the Respondent- ('Financial Creditor') come within the meaning of 'Financial Creditor' and is eligible to file an application under Section 7, there being a 'debt' and 'default' on the part of the 'Corporate Debtor'.

38. For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 11th August, 2017 passed by the Adjudicating Authority in CP (IB)No. 97/7/HDB/2017. All other connected appeals being preferred by the other shareholders of the 'Corporate Debtor' against same very impugned order dated 11th August, 2017 also fail for the Company Appeals (AT) (Insolvency) Nos. 143, 175 & 176/2017 reasons aforesaid. All these appeals are accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

[Justice S.J. Mukhopadhyaya]  
Chairperson

[ Justice A.I.S. Cheema]  
Member (Judicial)

[ Balvinder Singh ]  
Member (Technical)

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