

Aditya Kumar Jajodia vs Srei Infrastructure Finance Ltd. & Ors on 26 April, 2018

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) Nos. 292 & 293 of 2017

(Arising out of Order dated 26.10.2017 passed by the Adjudicating
Authority (National Company Law Tribunal), Guwahati Bench,
Guwahati in Company Petition (IB) No.-20/GB/2017)

IN THE MATTER OF:

Aditya Kumar Jajodia ...Appellant

Versus

Srei Infrastructure Finance Ltd. & Ors. ...Respondents

Present:

For Appellant : Mr. Ajay Gaggar, Mr. Robin Singh Sirohi
and Ms. Vineeta Rathore Advocates.

For 1st Respondent : Mr. Abhijeet Sinha, Mr. Arijit Mazumdar,
Mr. R. N. Ghosh, Mr. Akshay Chandna, Mr.
Saikat Sarkar and Mr. Aditya Shukhla,
Advocates.

For 2nd Respondent: Ms. Jayantika Ganguly and Mr. Rishav
Banerjee, Advocates.

For 3rd Respondent: Mr. Amitesh Gaurav and Mr. Bhavesh
Verma, Advocates.

Company Appeal (AT) (Insolvency) No. 324 of 2017

(Arising out of Order dated 26.10.2017 passed by the Adjudicating
Authority (National Company Law Tribunal), Guwahati Bench,
Guwahati in Company Petition (IB) No.-20/GB/2017)

IN THE MATTER OF:

Allahabad Bank ...Appellant

Versus

Srei Infrastructure Finance Ltd. & Ors. ...Respondents

Present:

For Appellant : Mr. O.N. Rai and Mr. Ashok Kumar Jain,
Advocates.

For 1st Respondent : Mr. Abhijeet Sinha, Mr. Arijit Mazumdar,
Mr. R. N. Ghosh, Mr. Akshay Chandra, Mr.
Saikat Sarkar, Mr. Shambo Nandy and Mr.
Aditya Shukhla, Advocates.

For 2nd Respondent: Ms. Jayantika Ganguly and Mr. Rishav
Banerjee, Advocates.

JUDGEMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

Srei Infrastructure (P) 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 'Corporate Insolvency Resolution Process' against Assam Company India Limited ('Corporate Debtor'). By impugned order dated 26th October, 2017, the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench, Guwahati, admitted the application, passed order of 'Moratorium' and appointed 'Resolution Professional' with certain directions.

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2. The Appellant- Mr. Aditya Kumar Jajodia, a Shareholder and Director of the Company being aggrieved has challenged the impugned order.

3. Learned counsel appearing on behalf of the Appellant submitted that the 'Financial Creditor' has already taken steps under Section 19 of the 'Recovery of Debts Due to Banks and Financial Institutions Act, 1993' (DRT Act). Further, according to him, action has been taken under Section 13(4) of the 'Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002' (the SARFAESI Act). Therefore, according to the Appellant, proceedings under the aforesaid provisions having already initiated, the application under Section 7 of the 'I&B Code' is not maintainable.

4. However, the aforesaid submissions cannot be accepted in view of the decision of this Appellate Tribunal in "M/s. Unigreen Global Private Limited v. Punjab National Bank & Anr. □ Company Appeal (AT) (Insolvency) No. 81 of 2017", wherein this Appellate Tribunal by its judgment dated 1st December, 2017 held:

26. Any proceeding under Section 13(4) of the SARFAESI Act, 2002 or suit under Section 19 of the DRT Act, 1993 pending before Debt Recovery Tribunal or appeal pending before Debt Recovery Appellate Tribunal cannot proceed in view of the order of moratorium as may be passed.

"238. Provisions of this Code to override other laws - The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

Company Appeals (AT) (Insolvency) Nos. 292 & 293 & 324 of 2017 In view of the aforesaid provision also, I & B Code shall have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force including DRT Act, 1993; SARFAESI Act, 2002; money suit etc."

5. It was next contended that the claim amount as shown by the 'Financial Creditor' is different than the claim amount as has been shown in the application under Section 7 of the 'I&B Code'. There being a mismatch of the claim amount, the application is to be rejected. Reliance has been placed on the decision of this Appellate Tribunal in "M/s. Starlog Enterprises Limited V/s. ICICI Bank Limited□Company Appeal (AT) (Insolvency) No. 5 of 2017", wherein this Appellate Tribunal observed and held as follows:

"	xxx	xxx	xxx
20.3	The	notice	has been given without

considering the provisions of sub-rule (3) of Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which mandates that an application shall "dispatch forthwith", a copy of the application "filed with the Adjudicating Authority". Thereby meaning a post-filing notice and not 'before filing', the Company Appeals (AT) (Insolvency) Nos. 292 & 293 & 324 of 2017 obvious purpose for the same being to put the corporate debtor to adequate and informed notice. The 'adjudicating authority' ought to have realised these deviations from the prescribed procedure and either rejected the application or directed the Respondent to follow the provisions of sub-Rule (3) of Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and Rule 21 of the National Company Law Tribunal Rules.

20.4 Lastly, the 'adjudicating authority' has reached a conclusion at paragraph 9 of the impugned order that it is satisfied that the Appellant has committed a default of Rs.27.77 crores, which finding is not only perverse, but also is contrary to the very application of the Financial Creditor itself in complete disregard to the apparent and conspicuous mismatch between the amount demanded by the Financial Creditor from the Appellant-Corporate Debtor in its demand notice dated 6th February 2017 and the amount stated to be in default in the said application.

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21. Showing an incorrect claim, moving the application in a hasty manner and obtaining an ex-parte order from the 'adjudicating authority' which admitted such an incorrect claim, the Financial Creditor cannot disprove its mala fide intention by stating that the claim submitted is correct amount. The I&B Code does not provide for any such mechanism where post-admission, the applicant financial creditor can modify their claim amount.

22. In some of the cases, an insolvency resolution process can and may have adverse consequences on the welfare of the company. This makes it imperative for the 'adjudicating authority' to adopt a cautious approach in admitting insolvency applications and also ensuring adherence to the principles of natural justice."

6. However, we are not inclined to accept the submissions as made on behalf of the Appellant- Mr. Aditya Kumar Jajodia for the reasons mentioned below.

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7. This Appellate Tribunal by aforesaid judgment dated 24th May, 2017 in "M/S. Starlog Enterprises Limited (Supra)" set aside the order on different grounds as mentioned in Paragraph No. 23, which reads as follows:

"23. Admittedly the impugned order is ex- facie illegal and ought to be set aside by the Appellate Tribunal. For the reasons aforesaid, we set aside the ex-parte impugned order dated 17th February 2017 passed by 'adjudicating authority', Mumbai Bench in C.P. No. 12/1&BP/NCLT/MAH/2017 and allow the appeal."

8. It is not the case of the Appellant- Mr. Aditya Kumar Jajodia that the 'Financial Creditor' mislead the Adjudicating Authority and impugned order was passed ex parte in view of such misleading statement.

9. In "Innoventive Industries Ltd. v. ICICI Bank" 2017 SCC OnLine SC 1025", the Hon'ble Supreme Court noticed the Scheme of Code under Section 7 which stands in contrast with the scheme under Section 9 and observed as follows:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a Company Appeals (AT) (Insolvency) Nos. 292 & 293 & 324 of 2017 debt

becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section

4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time Company Appeals (AT) (Insolvency) Nos. 292 & 293 & 324 of 2017 value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

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 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, Company Appeals (AT) (Insolvency) Nos. 292 & 293 & 324 of 2017 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 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 Company Appeals (AT) (Insolvency) Nos. 292 & 293 & 324 of 2017 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."

10. It is not the case of the Appellant- Mr. Aditya Kumar Jajodia that they do not owe any debt to the 'Financial Creditor' or there is no default. The Adjudicating Authority being satisfied that a default has occurred admitted the application which was complete.

11. Another ground taken by the Appellant is that the Form 7 was not signed by the authorised person. However, we are not inclined to set aside the impugned order on such ground as the application under Section 7 (in Form-1) was filed by the authorised employees of the 'Financial Creditor'.

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12. The Appellant- Allahabad Bank is aggrieved against part of the same impugned order dated 26th October, 2017 (Paragraph No. 84), which reads as follows:

"84. On considering the submission by the parties having regard to the materials on record, Company Appeals (AT) (Insolvency) Nos. 292 & 293 & 324 of 2017 it is found that the FC has established that on 11.08.2017, the CD owed an amount to the tune of Rs. 59560655355.00 to the FC and there was clear default on 11.08.2017 in respect of repayment of the same. I have also found that application is complete in all respects."

13. Learned counsel for the Appellant- Allahabad Bank submitted that the Adjudicating Authority was not authorised to decide the claim which is to be determined by the 'Resolution Professional' and then by the 'Committee of Creditors'.

14. The 'Resolution Professional' appeared in person and submitted that the 'Resolution Professional' has considered the claim of the Allahabad Bank on the basis of the claim made by it uninfluenced by the observations made at Paragraph No. 84 of the impugned order. It was further submitted that the 'Committee of Creditors' has also considered the claim of the Appellant- Allahabad Bank independently uninfluenced by observations made at Paragraph No. 84 and quoted above.

15. Having heard learned counsel for the parties, we accept the submissions made on behalf of the Appellant- Allahabad Bank, and accepted by the 'Resolution Professional' that the Adjudicating Authority was not required to make any observations with regard to any claim amount owed to one or other 'Financial Creditor' or Company Appeals (AT) (Insolvency) Nos. 292 & 293 & 324 of 2017 'Operational Creditor' or other Creditor, which is required to be determined by the 'Resolution Professional', and the 'Committee of Creditors'. In case of any dispute, it is open to the Adjudicating Authority to decide the claim. We accordingly, set aside Paragraph no. 84 of the impugned order, but affirm the rest part of the said order.

16. In the result, Company Appeals (AT) (Insolvency) Nos. 292 & 293 of 2017 are dismissed. The Company Appeal (AT) No. 324 of 2017 is allowed with aforesaid observations. However, in the facts and circumstances of the case, there shall be no order as to costs.

(Justice S.J. Mukhopadhaya) Chairperson (Justice Bansi Lal Bhat) Member(Judicial) NEW DELHI
26th April, 2018 /AR/ Company Appeals (AT) (Insolvency) Nos. 292 & 293 & 324 of 2017