

Dolphin Vintrade Private Limited vs M/S. Ashray Vyapaar Private Limited on 22 July, 2022

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No 320 of 2022

&

I.A. No. 1066 & 1082 of 2022

(Arising out of Order dated 31.01.2022 passed by the Adjudicating Authority
(National Company Law Tribunal), Kolkata Bench, Kolkata in I.A.(IB)
No.1069/KB/20221 in C.P.(IB) No.572/KB/2020)

IN THE MATTER OF:

Dolphin Vintrade Private Limited,
Through its Director - Sh. Jarjious Shikh
Registered office at: 187, Rabindra Sarani,
1st Floor, Kolkata-700001.

.... Appellant

Vs

1. Ashray Vyapaar Private Limited,
Through its Director, 145, Rashbehari Avenue,
Gariahat, Kolkata-700029.
2. Gourepore Company Limited (in Liquidation),
Registered Office at: 18, Netaji Subhash Road,
1st Floor, P.S. Hare Street,
Kolkata-700001. Through IRP.

.... Respondents

Present:

For Appellant: Mr. Sanjeev Sen, Sr. Advocate with Mr. Gaurav
Kejriwal and Mr. Arjun Aggarwal, Advocates.
For Respondents: Mr. Abhinav Vasisht, Sr. Advocate along with
Mr. Sadapurna Mukherjeem Mr. Shaunak Mitra &
Mr. Patita Paban Bishwal, Advocate for R-1.
Mr. Sumesh Dhawan & Mr. Neeraj Kr. Gupta,
Advocates for R-2.
Mr. Ankit Kohli, Ms. Manju Bhuteria, & Mr.
Abhishek Jain, Intervenors for Carnation
Distributor, IA 1082 of 2022.
Mr. Sudhir Bansal, Mr. Tanamay Mehta & Mr.
Aveenash Garg, Intervenor in IA No. 1221 of 2022.

JUDGMENT

ASHOK BHUSHAN, J.

This Appeal has been filed challenging the order dated 31.01.2022 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in Company Appeal (AT) (Insolvency) No. 320 of 2022 1 C.P.(IB) No.572/KB/2020, by which order, the I.A.(IB) No.1069/KB/2021 filed by the Appellant seeking dismissal of C.P.(IB) No.572/KB/2020 has been rejected and the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "IBC") by Respondent No.1 was admitted.

2. For appreciating the issues raised in this Appeal, the background facts and sequence of events need to be first noticed.

(i) M/s. Gourepore Company Limited, Corporate Debtor (now in liquidation), (hereinafter referred to as the "Company") is a Company, which was manufacturing Jute goods. In the year 1988, the Corporate Debtor filed reference under Section 15 of Sick Industrial Companies (Special Provisions) Act, 1986. By order dated 12.09.1991, the Board of Industrial and Financial Reconstruction ("BIFR") declared the Company as Sick Industrial Company. The BIFR forwarded the opinion to the High Court at Calcutta that Company should be wound up.

The Company filed an Appeal before the Appellate Authority for Industrial & Financial Reconstruction ("AAIFR"), which Appeal was ultimately dismissed by order dated 05.08.1992.

(ii) In the year 1993, the Company had four Secured Creditors namely - Indian Bank; Allahabad Bank; United Bank of India and Industrial Investment Bank of India Limited. In 1993, Indian Bank filed a suit for recovery of Rs.16,92,08,930/- against the Company and obtained a Certificate from the Debts Recovery Tribunal along with interest. Another Secured Company Appeal (AT) (Insolvency) No. 320 of 2022 2 Creditor, that is, Allahabad Bank filed a suit for recovery and obtained a Decree Certificate from Debts Recovery Tribunal for a sum of Rs.26,20,41,281.18p. with interest on 04.07.1996.

(iii) A winding up petition under Section 433 and 434 of the Companies Act, 1956 being Company Petition No.355 of 1997 was filed by M/s R K Garodia & Company before the Calcutta High Court. The same was admitted on 09.09.1997 by the Calcutta High Court and was allowed by order dated 26.11.1997 directing winding up of the Company (Corporate Debtor). An order of liquidation was passed. The assets of the Company were taken control by the Official Liquidator after order dated 26.11.1997 of the Calcutta High Court passed in Company Petition No.355 of 1997.

(iv) Respondent No1 Company was incorporated on 28.07.2007.

Respondent No.1 claimed to have obtained assignment of debts by the Secured Creditors of the Corporate Debtors on different dates. The details of the assignment of the debts of the Corporate Debtor by different secured/ un-secured creditors in favour of Respondent No.1 are as follows:

(a) United Bank of India on 06.07.2007 has assigned the debts recoverable from the Company to M/s Teesta Multipurpose Private Limited for an amount of Rs.45 lakhs.

M/s Teesta Multipurpose Private Limited in turn assigned the debts of the Company Appeal (AT) (Insolvency) No. 320 of 2022 3 Company to Respondent No.1 on 13.02.2008 for consideration of Rs.1.50 crores.

(b) The Indian Bank vide assignment dated 21.02.2008 assigned its debts of the Company in favour of Respondent No.1 for a consideration of Rs.2.40 crores.

(c) The Allahabad Bank vide assignment dated 05.11.2008 assigned debts of Company through Respondent No.1 for consideration of Rs.5 crores.

(d) The Allahabad Bank subsequently vide registered document dated 14.09.2015 has again assigned the debts of the Company in favour of Respondent No.1 for consideration of Rs.5 crores, which was assigned to it by assignment dated 05.11.2008.

(d) Respondent No.1 entered into One Time Settlement with Industrial Investment Bank of India on 09.01.2009 and paid the entire one-time settlement amount to IIBI, which had confirmed that it has no claim against the Company.

(v) Respondent No.1 by aforesaid assignments, claimed to become Financial Creditor of the Company in place of earlier four Financial Creditors. A letter dated 16.01.2009, is claimed to have been written to the Official Liquidator on behalf of Respondent No.1 stating the Respondent No.1 has become the Company Appeal (AT) (Insolvency) No. 320 of 2022 4 Secured Creditor of the Company and they have paramount charge over the assets and properties of the Company.

(vi) The erstwhile Financial Creditors much before the assignments claimed by Respondent No.1 had initiated action for recovery of their dues against the Company. We may also note the details of proceedings initiated by them:

(a) The Allahabad Bank filed a suit No.78 of 1993 against the Company, which was transferred to the Debts Recovery Tribunal, Calcutta being T.A. No.64 of 1994 and same was Decreed for an amount of Rs.26,20,41,281/-. The Recovery Certificate was issued on 04.07.1996.

(b) The Indian Bank has filed a suit No.493 of 1993, which has been Decreed and transferred to the Debts Recovery Tribunal, Calcutta being T.A. No.7 of 2002 for recovery of dues amounting to Rs.16,92,08,930/-.

(c) The United Bank of India filed suit No.143 of 1991, which was transferred vide T.A. No.34 of 2001 for recovery of its dues against the Company, which was dismissed for non-prosecution on 31.08.2007.

(vii) The Industrial Investment Bank of India Limited vide letter dated 27.01.2009 informed that they have received the entire outstanding amount of Rs.40 lakhs in respect of Gourepore Company Limited (in liquidation) and there is no outstanding

dues in IIBI's books of account against the Company and the Company Appeal (AT) (Insolvency) No. 320 of 2022 5 personal and corporate guarantees, executed to secure IIBI's financial assistance stand discharged.

(viii) In a Registered Indenture dated 14.09.2015, Allahabad Bank and Respondent No.1, there was mention of Recovery Certificate of Rs. Rs.26,20,41,281/- and also the fact that Company went into liquidation on 26.11.1997 and further the Secured Creditor has withdrawn the recovery proceedings initiated by it and pending before Ld. Debts Recovery Tribunal, Kolkata being T.A. No.64 of 1994 and R.P. No.42 of 1996.

(ix) In the Company Petition No. 355 of 1997, several Applications were filed by different creditors. One of the Application was filed by Respondent No.1 also. One Hilton Vinimay Pvt. Ltd.

filed an Application for stay of the winding up order and for appointment of Special Officer. The above Company Petition and the Applications filed therein came to be heard and decided by the Calcutta High Court on 14.07.2014. Calcutta High Court while deciding the Applications also noticed the assignments, which were claimed by Respondent No.1. One of the Application being CA No.453 of 2013 was also filed by Appellant herein namely - Dolphin Vintrade Pvt. Ltd. With regard to assignment in favour of Respondent No.1 debt of nearly Rs.50 crores was noted and consideration of about Rs.9 crores was noticed and the assignment of debts in favour of Company Appeal (AT) (Insolvency) No. 320 of 2022 6 "Ashray" by the four Secured Creditors was held to be dubious. The prayer to stay the winding up order was refused.

(x) After the aforesaid order an CA No.107 of 2016 was filed by Respondent No.1 - Ashray Vyapaar Private Limited (hereinafter referred to as "Ashray") where several prayers were made by Respondent No.1, including a direction for convening a meeting of all creditors of the Company. The said Application came to be allowed by Ld. Single Judge by order dated 05.12.2016 directing for convening a meeting of the Shareholders.

(xi) Challenging the order dated 05.12.2016, an Appeal was filed before the Division Bench. Before the Division Bench, the Appellant before us Dolphin Vintrade Private Limited was also one of the Applicant. The Division Bench vide its order dated 09.08.2017, set aside the order dated 05.12.2016 and while allowing the Appeal, dismissed CA No.107 of 2016 with cost of Rs.1 lakh. The Division Bench had observed that Respondent No.1, a bystander or a passerby cannot be allowed to hijack the assets of the Company (in liquidation) by convening an illegal meeting. While dismissing the Application, the Division Bench further directed that the Applicant, that is, Respondent No.1 by itself or through any agent or otherwise, shall not obtain any orders similar to those sought in CA No.107 of 2016 without the order of the Division Bench being specifically brought to the notice of the Court or forum where such orders Company Appeal (AT) (Insolvency) No. 320 of 2022 7 may be sought. Respondent No.1 filed a Special Leave Petition No.22997 of 2017, which SLP was dismissed by Hon'ble Supreme Court on 18.09.2017. On 19.12.2019, CP No.355 of 1997 was dismissed for want of prosecution by the Calcutta High Court.

(xii) On 20.02.2020, the Respondent No.1 - Ashray filed an Application under Section 7 before the National Company Law Tribunal, Kolkata Bench, Kolkata against Corporate Debtor. On 21.02.2020, the Adjudicating Authority issued notice in Section 7 Application. On 28.02.2020, the order dated 19.12.2019, dismissing the CP No.355 of 1997 was recalled by Calcutta High Court and the Company Petition was revived. On 07.03.2020, Ashray, Respondent No.1 filed an Application being CA 58 of 2020 in the Company Court for transfer of C.P. No.355 of 2017 along with pending Applications to the NCLT Kolkata. On 21.09.2021, Section 7 Application came before the Adjudicating Authority, which recorded the submission that Transfer Petition in the matter is pending before Calcutta High Court.

(xiii) On 12.12.2021, the Appellant - Dolphin Vintrade Pvt. Ltd. filed an I.A. No.1069 of 2021 seeking to intervene in the insolvency Application and praying for dismissal of the Section 7 Application. The Adjudicating Authority by the impugned order dated 31.01.2022 rejected I.A. No.1069 of 2021 and admitted the Application filed under Section 7 by the Ashray. Company Appeal (AT) (Insolvency) No. 320 of 2022 8 The Appellant, who had filed I.A. No.1069 of 2021 before the Adjudicating Authority, aggrieved by the order dated 31.01.2022 has filed this Appeal.

3. We have heard Shri Sanjeev Sen, learned Senior Counsel for the Appellant, Shri Abhinav Vasisht, learned Senior Counsel for Respondent No.1, Shri Sumesh Dhawan, learned Counsel for Respondent No.2. We have also heard Shri Ankit Kohli, Shri Sudhir Bansal, Shri Avneesh Garg, learned Counsel for Intervenors and also Ms. Debjani Mitra, learned Counsel for Official Liquidator.

4. Shri Sanjeev Sen, learned Senior Counsel for the Appellant submits that Appellant herein is an un-secured creditor of the Corporate Debtor, who was heard by the Company Judge in Company Petition No.355 of 1997. The Appellant by I.A. No.1069 of 2021 has brought into the notice of the Adjudicating Authority about the suppression made by Respondent No.1 in his Section 7 Application. Shri Sen submits that Respondent No.1 has deliberately and fraudulently suppressed various orders passed by Calcutta High Court including the order dated 14.07.2014 and the order of the Division Bench dated 09.08.2017. The suppression of the order dated 09.08.2017 was fatal, since Calcutta high Court while dismissing CA No.107 of 2016 filed by Ashray in the Company Petition has directed that Respondent No.1 shall not obtain any order similar to one stated in CA 107 of 2016 without order of the Division Bench being brought to the notice of the Court or forum. Respondent No.1 has conveniently not filed the Division Bench's order dated 09.08.2017, violating the direction of the Company Appeal (AT) (Insolvency) No. 320 of 2022 9 Division Bench, which itself disentitle it to file any Application under Section 7. It is submitted that assignment of debts as claimed by Respondent No.1 from erstwhile Financial Creditors of the Corporate Debtor were all dubious and unreliable. The Calcutta High Court has already in its order dated 14.07.2014 has termed the assignment as dubious and not worthy of any credence and that all assignments were unregistered and without proper stamps. Respondent No.1 claimed assignment of debts of about Rs.50 crores for an amount of Rs.9 crores and Application under Section 7 filed by Respondent Nos.1 for astronomical amount, that is, an amount of Rs.2486,44,80,162.85/-, which is nothing but fraudulent and bogus claim raised by Respondent No.1. In spite of Appellant having brought into notice of all relevant facts, which were sufficient to dismiss Section 7 Application, the Adjudicating Authority committed error in dismissing the Application of the Appellant and proceeded to admit

Section 7 Application.

5. The learned Senior Counsel further submits that in the Part-IV of the Application, Respondent No.1 had claimed that date on which the debt fell due is 19.12.2019. 19.12.2019, is the date when Company petition was dismissed for non-prosecution, which order was subsequently recalled on 28.02.2020 reviving the Company Petition. No debt as claimed by Respondent No.1 in the Application fell due, nor was payable on the date when Application under Section 7 was filed. The Company was in liquidation with effect from 26.11.1997. All assets were in the custody of Official Liquidator, that is, assets of Company are custodial legis. No default on the part of Corporate Debtor can be assumed after liquidation Company Appeal (AT) (Insolvency) No. 320 of 2022 10 order has been passed on 26.11.1997. The date of default mentioned in the Application is imaginary and fictitious, to show the filing of the Application in time. Whereas, the debt due from the Company as claimed by Respondent No.1 is clearly barred by time. In the Application under Section 7 there are no details to show that any cause of action arose to Respondent No.1 to file Section 7 Application within the period of three years from the date of filing of Section 7 Application, that is, within three years from 18th February, 2020. The limitation for filing an Application as per Article 137 is only three years. The Financial Creditors had already initiated proceedings for recovery of the debt even before the Company went into liquidation. The Recovery Certificates were also issued in favour of the Allahabad Bank on 04.07.1996. The Adjudicating Authority has not even looked into the facts and case of Respondent No.1 that how Application under Section 7 can be entertained when Company is already in liquidation and there is no cause of action arose to Respondent No.1 to file the Section 7 Application within three years from 18.02.2020. The Corporate Debtor has already been declared as 'dead' more than 30 years ago, when in the year 1991 BIFR declared the Company fit to be wound up and again on 26.11.1997 when Company was wound up by the Calcutta High Court. Attempts were made by Respondent No.1 on the basis of four assignments before the Calcutta high Court in a Company Petition, which attempts were rejected by Calcutta High Court by making serious adverse remarks against Respondent No.1. Filing of Section 7 Application is another attempt by Respondent No.1 to somehow grab the assets of the Company, which are in possession and control of Official Liquidator appointed by Calcutta High Company Appeal (AT) (Insolvency) No. 320 of 2022 11 Court for last 37 years. The Official Liquidator has issued notice for sale of the assets. It is further submitted that Respondent No.1 himself has filed Company Application No.58 of 2020 for transfer of Company Petition No.355 of 1997 along with all pending application to the NCLT, Kolkata, which Application is still pending. The Adjudicating Authority itself noticed in its proceedings dated 21.09.2021 regarding the pendency of the transfer in respect of CA No. 58 of 2020. But on the next date of hearing, without inquiring and without knowing the outcome of the said proceedings, proceeded to admit the Application. The present is a case where Application filed by Respondent under Section 7 deserves to be dismissed with heavy cost of not less than of an amount of Rs.1 crore.

6. Shri Abhinav Vasisht, learned Senior Counsel appearing on behalf of Respondent No.1, refuting the submissions of learned Senior Counsel for the Appellant submits that Section 7 Application filed by Respondent No.1 was fully maintainable before the Adjudicating Authority despite pendency of Company Petition No. 355 of 1997. It is submitted that Hon'ble Supreme Court in A. Navinchandra Steels Pvt. Ltd. vs. SREI Equipments Finance Pvt. Ltd. - (2021) 4 SCC 435 has laid down that

proceeding under Section 7 are independent proceedings under the IBC and the same can be proceeded irrespective of pendency of Company Petition before the High Court. It is submitted that 'debt' and 'default' are sufficient ground for admitting a Corporate Debtor in the Corporate Insolvency Resolution Process ("CIRP"). Non-registration of 3 out of 4 assignment deeds are inconsequential. At the time of consideration of Section 7 Application the Adjudicating Authority is only to see that there exists a valid debt against Company Appeal (AT) (Insolvency) No. 320 of 2022 12 Corporate Debtor and whether the Corporate Debtor has defaulted in re- payment. During the pendency of the petition for winding up in the High Court, admission of Section 7 Application before NCLT is permissible. The Section 7 Application was filed on 18.02.2020 on which date Company Petition No.355 of 1997 was not pending, since it was dismissed for non- prosecution on 19.12.2019 and there was no hurdle in filing Section 7 Application. There is registered assignment deed executed by Allahabad Bank in the year 2015, which is also on record. Hence, there was at least one registered assignment deed, which proves 'debt' and 'default' on the part of Corporate Debtor. The Corporate Debtor owed debt to Indian Bank, Allahabad Bank, United Bank of India and Industrial Investment Bank of India, hence there is clear-cut 'debt' and 'default', which was sufficient to trigger initiation of CIRP. The Official Liquidator itself has agreed to handover the assets of the Corporate Debtor to IRP in terms of the order dated 31.01.2022. The Official Liquidator has accepted the payment of Rs.10 lakhs by Demand Draft for handing over the possession of assets, but now in proceeding before this Tribunal, the Official Liquidator is opposing to handover possession. Shri Vasisht further submits that the Appellant herein has no locus to either file I.A. No. 1069 of 2021 or to file this Appeal. In Application under Section 7, it is only the Financial Creditors and Corporate Debtor, who are parties and no intervenors can be allowed to intervene between the matter. M/s Carnations Distributors Pvt. Ltd. did not file any intervention application before the Adjudicating Authority, who is now trying to intervene at the stage of Appeal. The Appellant is holding Company of M/s Carnations Distributors Pvt. Ltd. The Company Appeal (AT) (Insolvency) No. 320 of 2022 13 Company Petition No.355 of 1997 having been dismissed for non- prosecution on 19.12.2019, all orders passed therein came to an end.

7. The learned Counsel for Respondent No.2 supported the impugned order and submitted that he has already written to the Official Liquidator for handing over possession on 04.02.2022. The Official Liquidator on 30.03.2022 has requested Respondent No.2 to remain present at his office, but he did not turn up. The Application under Section 19, sub-section (2) is pending consideration.

8. An I.A. No.1082 of 2022 was filed by Carnation Distributor Pvt. Ltd. to intervene in the matter. It is submitted that Applicant has granted opportunity by the learned Company Judge to file affidavit in opposition to the Application CA No. 58 of 2020 filed by Respondent No.1. The Carnation Distributor Pvt. Ltd. had filed an Appeal against the order dated 05.12.2016, which was obtained by Respondent No.1. The Appeal of Applicant was allowed on 09.08.2017 and the CA No.107 of 2016 was dismissed with cost of Rs.1 lakhs. The Applicant is an unsecured creditor of Company and supports the submission of Appellant.

9. On behalf of Workers Union, it has been submitted that workers have been waiting for last 30 years for resolution of the Company in Company Petition and now Section 7 Application has been filed. It is submitted that in Section 7 Application, there is no scope of any resolution of the

Company.

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

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11. The first submission, which has been made by learned Senior Counsel for the Appellant regarding suppression of facts and concealment by Respondent No.1 in his Section 7 Application, needs to be first considered. The Company Petition No.355 of 1997 was admitted by Company Judge, Calcutta High Court by an order dated 26.11.1997. Thereafter, Official Liquidator took possession of the assets of the Company, that is, Corporate Debtor and all assets of the Company thereafter are custodial legis. Few proceedings in the Company Petition No.355 of 1997 need to be noted, where the Respondent No.1 was also party and had filed various application seeking different reliefs. Respondent No.1 - Ashray in Company Petition No.355 of 1997 has based its case on the basis of four consignment deeds as noted above. In Company Petition No.355 of 1997, Company Applications were filed by Respondent No.1 and while considering various Company Applications including the Company Application filed by Respondent No.1, Calcutta High Court passed an order on 14.07.2014, which needs to be noted in detail. While considering the claim of Respondent No.1 - Ashray on the basis of un-registered insufficiently stamp deeds, following has been held by Calcutta High Court in its order dated 14.07.2014:

"It was argued before me that a scheme, if supported by the secured creditors should be very appealing to the court. The workers tried to back the scheme of Hilton. Hilton was also supported by Ashray, the alleged assignee of the four secured creditors. These secured creditors seem to have assigned a debt nearly Rs.50 crores owing to them by the company, to Ashray for a Company Appeal (AT) (Insolvency) No. 320 of 2022 15 little over Rs.9 Crores. The assignment certificate touches immovable property. It is strange how this assignment could be made without registration and without proper stamps. This assignment of debts in favour of Ashray by the four secured creditors is dubious in my opinion. No credence can be given to their support for Hilton."

12. The Calcutta High Court noticed that Secured Creditors seem to assign a debt of nearly Rs.50 crores owing to them to Ashray to a little over Rs.9 Crores. The Calcutta High Court observed the assignment of debts is dubious and held it unworthy of credence.

13. The next order which needs to be noticed is order passed by Division Bench in the Appeal filed against order dated 05.12.2016. The order dated 05.12.2016 was obtained by Respondent No.1 on his CA No.107 of 2016. The CA No.107 of 2016 was filed, where Respondent No.1 prayed for a direction for convening a meeting of all creditors of the Company for consideration of scheme, which was submitted as Annexure-F. The same was allowed by Ld. Single Judge by order dated 05.12.2016, against which an Appeal was filed before the Division Bench. The Division Bench allowed the Appeal. Respondent No.1 has been held to be bystander and a passerby, who was trying to hijack the assets of the Company in liquidation. Following are the observations made by the

Division Bench in its order dated 09.08.2017:

"Applications for meetings to be held of creditors of a company (in liquidation) ought to be seen with a lot more circumspection than is evident from the order impugned. In the scheme of things that existed prior to Company Appeal (AT) (Insolvency) No. 320 of 2022 16 the Companies Act, 2013 and as is still applicable to the company (in liquidation), this Court is in seisin of the company (in liquidation) and its assets and properties and is answerable to all its creditors. A bystander or a passerby cannot be allowed to hijack the assets of the company (in liquidation) by convening an illegal meeting. The Court has to guard against such mala fide attempts as the present one and the Court is duty-bound to do so. Since the very application carried to the company Court, without any reference to a company petition number, was under a provision that does not authorise the making or the receipt of such application, CA No.107 of 2016 is dismissed with costs assessed at Rs.1 lakh for such irresponsible application. The applicant in CA No.107 of 2016, whether by itself or through any agent or otherwise, shall not obtain orders similar to those sought in CA No.107 of 2016 without this order being specifically brought to the notice of the Court or forum where such orders may be sought.

The order impugned dated December 5, 2016 stands set aside. All steps taken pursuant to such order are illegal and of no effect and shall not be given effect to in any manner of form."

14. It is further relevant to notice that against the order dated 09.08.2017 passed by the Division Bench, Respondent No.1 - Ashray filed Special Leave Petition No.22997 of 2017, which was dismissed by Hon'ble Supreme Court vide its order dated 18.09.2017. The Division Bench of the Calcutta High Court in the order 09.08.2017 has categorically directed "The applicant in CA No.107 of 2016, whether by itself or through any agent or otherwise, shall not obtain orders similar to those sought in Company Appeal (AT) (Insolvency) No. 320 of 2022 17 CA No.107 of 2016 without this order being specifically brought to the notice of the Court or forum where such orders may be sought".

15. We may now look into the Section 7 Application filed by Respondent No.1 to find out as to whether Respondent No.1 has disclosed the order of the Division Bench dated 09.08.2017. The copy of the Application filed under Section 7 by Respondent No.1 has been filed as Annexure A-2 to this Appeal. In the list of events, Respondent No.1 has referred to order dated 05.12.2016 at Sl. No.06, which was the order of Ld. Single Judge, allowing the Application filed by Respondent No.1. In the list of dates, Respondent No.1 did not disclose the next order dated 09.08.2017 of the Division Bench by which order, the order dated 05.12.2016 was set-aside. However, in the body of Application in Part-IV, there is mention about the order dated 09.08.2017, by which the order dated 05.12.2016 was set-aside. However, in Item No.8 of Part-V, which is list of documents attached to the Application, following are the only documents, which were attached:

"8. List of other documents attached to 1. Computation sheet this application in order to prove showing amount in the existence of financial debt, the default in tabular format. amount and date of default 2. Copy of all deed of Assignments is annexed separately.

3. Copy of Hon'ble High Court, Calcutta order dated 05.12.2016.

4. Copy of Hon'ble High Court, Calcutta order dated 19.12.2019.

5. Copy of the DRT, Kolkata bench dated 4th July, 1996.

An affidavit verifying the application is annexed herewith and marked as "Annexure-A-17"

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16. The above indicates that although the order dated 05.12.2016 has been filed, but order dated 09.08.2017, which was to be placed before the Adjudicating Authority as per order of the Division Bench dated 09.08.2017, has been concealed. The learned Counsel for Respondent No.1 submitted that since on 19.12.2019, the Company Petition itself was dismissed for non-prosecution, resulting in discharge of all orders passed therein, there was no need to file the Division Bench order in the Application under Section 7. When there was specific order of the Division bench restraining Respondent No.1 to file any Application in any other forum without disclosing the order dated 09.08.2017, it was incumbent upon Respondent No.1 to file the copy of the said order before the Adjudicating Authority. Respondent No.1 has concealed the said order from the Adjudicating Authority, since the order had made adverse observation against Respondent No.1, which would have resulted in rejection of Section 7 Application. Further, the order dated 14.07.2014, where the assignments were observed by the High Court as a dubious, were also not brought before the Adjudicating Authority. We are thus satisfied that Respondent No.1 has concealed the relevant orders passed by the Company Judge in CP No.355 of 1997, which Respondent No.1 was obliged to place before the Adjudicating Authority, especially the order dated 09.08.2017 of the Division Bench, which was passed on the Application filed by Respondent No.1 himself, that is, CA No.107 of 2016. We are, thus, satisfied that Respondent No.1 is guilty of suppression of material facts and relevant orders before the Adjudicating Authority and the submission of learned Counsel for the Appellant is correct that the suppression was Company Appeal (AT) (Insolvency) No. 320 of 2022 19 made only with the motive to obtain an admission order to somehow grab the assets of the Corporate Debtor.

17. The learned Senior Counsel for Respondent No.1 has also questioned the locus of the Appellant, which we need to examine. The learned Senior Counsel for Respondent No.1 submits that in Application under Section 7, it is only the Financial Creditor and the Corporate Debtor, who are parties to the said Application and no one including the Appellant could be allowed to intervene in the matter. Replying to the objection of locus, learned Senior Counsel for the Appellant submits that Appellant has full locus to intervene before the Adjudicating Authority, since attempts were made by Respondent No.1 - Ashray to hijack the assets of the Corporate Debtor without disclosure of all relevant facts. The Appellant's case is that Appellant is an unsecured creditor of the Corporate Debtor. The Appellant also claims to have filed application in Company Petition No.355 of 1997, which Application was entertained and heard by High Court. In the order passed by Company Judge dated 14.07.2014 in CP No.355 of 1997, the Application filed by both Respondent No.1 and Appellant has been mentioned. In order dated 14.07.2014, while describing the Application filed by the Appellant before the Company Judge, following is the observation of the High Court:

"5) Dolphin Vintrade Pvt. Ltd. and Rakhecha Trading Company (C.A. 453 of 2013) This application is made by Dolphin Vintrade Pvt. Ltd. and Rakhecha Trading Company as applicants. They want an order from this Court convening a meeting of unsecured creditors for the purpose of considering the Company Appeal (AT) (Insolvency) No. 320 of 2022 20 scheme of arrangement/ compromise proposed by the applicants.

It is averred in paragraph-9 of the application that the second applicant is an unsecured creditor of the company. The debt of the company towards this applicant was Rs.16,55,762/-. On 14th March, 2013 the second applicant has assigned Rs.8,00,000/- of its claim to the first applicant. Hence, both are creditors of the company and have the necessary locus standi to maintain this application, it was submitted."

18. The Application of Appellant as well as Respondent No.1 was considered and rejected by Company Judge by order dated 14.07.2014. Thus, when the Appellant was before the Company Judge claiming his right as unsecured creditor, he has every right to file an I.A. No.1069 of 2021. When Adjudicating Authority heard the Appellant and considered his claim and rejected the same, we see no reason, as to why the Appellant cannot be held to be aggrieved by the order impugned, so as to enable him to file Appeal under Section 61 of the Code. Section 61, sub-section (1) provides:

"61. Appeals and Appellate Authority.--(1) Notwithstanding anything to the contrary contained under the Companies Act 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal."

19. The Appellant, whose I.A. No.1069 of 2021 was rejected and Section 7 Application has been admitted, is fully aggrieved by the order and hence, he has locus to file this Appeal and the objection of Respondent No.1 cannot Company Appeal (AT) (Insolvency) No. 320 of 2022 21 be accepted. Furthermore, the Appellant by I.A. No.1069 of 2021 has brought into the notice of the Adjudicating Authority, the orders passed by the Company Judge in CP No.355 of 1997, which were not brought before the Adjudicating Authority by Respondent No.1. In I.A. No.1069 of 2021, the copy of the orders dated 14.07.2014 and 09.08.2017 have been filed, which were relevant orders to be considered by the Adjudicating Authority before deciding Section 7 Application. We, thus, are of the view that Appellant has locus to file I.A. No.1069 of 2021 as well as this Appeal challenging the impugned order. The objection raised by Respondent No.1 is regarding locus of the Appellant is overruled.

20. The learned Senior Counsel for the Appellant has further questioned the motives of Respondent No.1, which according to him is apparent from the fact that for a debt of Rs.50 crores, Respondent No.1 obtained assignments for the consideration of Rs.9 crores and in the Application under Section 7, he is claiming a debt of Rs. 24,864,480,162.85/-, which itself indicate the greed of Respondent No.1 and mala-fide attempt to take the entire assets of the Corporate Debtor in the name of his being assignee of debts of creditors of the Company.

21. We may now proceed to consider the submission of the Appellant that there was no debt due to the Corporate Debtor, on the basis of which Section 7 Application could be filed by Respondent No.1. The limitation for filing an Application by Respondent No.1 has long expired and the Application ought to have been rejected as barred by time on which aspect, Adjudicating Authority failed to advert.

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22. It is well settled by catena of judgments of Hon'ble Supreme Court that limitation for filing an Application under Section 7 of the IBC is three years, which is governed by the Article 137 of the Limitation Act, 1963. Article 137 of the Limitation Act provides as follows:

Description of application Period of limitation When the right to apply accrues.

137. Any other application Three years When the right to for which no period apply accrues.

of limitation is
provided elsewhere
in this division

23. We may also notice Section 3, sub-section (1) of the Limitation Act, provides as follows:

"3. Bar of limitation.--(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence."

Thus, when an application is filed beyond the limitation, it has to be dismissed, although limitation has not been set up in the defence.

24. Now we come to Section 7 Application filed by the Appellant. In Part-IV, under the Column-2, following has been stated:

2. Amount claimed to Rs.24,864,480,162.85/- only (Rs. Two be in default and the Thousand Four Hundred and Eighty Six date on which the Crores Forty Four Lakhs Eighty default occurred Thousand One Hundred and Sixty Two (attach the working rupees and eighty five paise) inclusive of for computation of interest.

amount and days of default in tabulation The date on which the debt fell due is form) 19.12.2019
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25. The date of default on which the debt fell due is mentioned in the Application as 19.12.2019. 19.12.2019 is the date when Company Petition No.355 of 1997 was dismissed for non-prosecution, which order was subsequently recalled on 28.02.2020. How the dismissal of Company Petition No.355 of 1997 in default on 19.12.2019 can give cause of action to file an Application under Section 7 by Respondent No.1 has not been explained. The assignment deeds on the basis of which Respondent No.1 has claimed assignment of debts by creditors, itself mentions the details of proceedings initiated for recovery of the dues by the Banks. To take an example, the Allahabad Bank has filed a Suit No. 78 of 1993 against the Company, which was subsequently numbered as T.A. No. 64 of 1994 and recovery certificate for an amount of Rs.26,20,41,281/- was issued. On the basis of which, Recovery Proceeding No. 42 of 1996 was initiated. We may notice averments in paragraph 3, 4 and 5 of the deed of assignment dated 05.11.2008 by which Allahabad bank has assigned its debts to Ashray:

"3. The Assignor had in the ordinary course of its business, at the request of Gourepore Company Limited (now in liquidation) lent and advanced to the said Company certain sums of money against executing various documents by the said Company in favour of the Assignor, whereby the Company had hypothecated/ mortgaged its various assets lying at its factory situated at Post Office Gerifa & Police Station Naihati, District 24 parganos (North), (hereinafter referred to as 'the said assets') more fully and particularly described in Schedule 'A' and 'B'.

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4. Subsequently, the said Company defaulted in making payment and thereafter went into liquidation on 26.11.1997 by an order passed by the Hon'ble High Court at

Calcutta in CP No.355 of 1997 and CA No.597 of 1997.

5. On or about 1993,, the Assignor filed a suit being No.78 of 1993 against M/s Gourepore Company Limited (In Liquidation) and guarantors for recovery of its dues together with interest thereon, which subsequently was transferred to the Debt Recovery Tribunal, 1, Kolkata being T.A. No. 64/1994 and the same has been decreed and necessary certificate of Rs.26,20,41,281.18p was issued and recovery proceedings being R.P. No.42/1996 was initiated."

26. Further, in Indenture dated 14.09.2015, which was got registered by Allahabad Bank, it has made the assignment in favour of Ashray, with effect from 06.11.2008, whereafter noticing the aforesaid Recovery Certificate, the Allahabad Bank has withdrawn the recovery proceedings pending before DRT Kolkata. In paragraph 7 (ii), following has been stated:

7(ii) The Assignor doth hereby conform that in so far as the Company (now in liquidation) is concerned, the Assignor has withdrawn the recovery proceedings initiated by it and pending before the Ld. DRT Kolkata being T.A. No.64/1994 and R.P. No.42/1996."

27. When the Recovery Certificate was issued to the Allahabad bank in 1996, it gave a fresh cause of action to file application within a period of three years, in view of the law laid down by the Hon'ble Supreme Court in Dena Bank vs. C. Shivakumar Reddy and Anr. - (2021) 10 SCC 330. Company Appeal (AT) (Insolvency) No. 320 of 2022 25 The limitation for filing any application for recovery for defaulted amount came to an end three years thereafter.

28. Similarly, other Banks have also initiated proceedings, which have been noticed above. Initiation of proceedings for recovery indicate that default has occurred prior to initiation default by Company. The Application under Section 7 by Respondent No.1 does not indicate as to on what basis it can claim that it has right to file an Application under Section 7 on 18.02.2020. As observed above, the date of default of debt fell due mentioned in the Application as 19.12.2019, is wholly fictitious and incorrect, the said date has no relevance with regard to debt falling due on 19.12.2019. 19.12.2019 is the date when Company Petition was dismissed in default, which order also came to an end on 20.02.2020, when Company Petition was revived. The Application under Section 7 filed by Respondent No.1 was highly barred by time and in the entire Application there is no explanation as to how the limitation for filing the Application is there till 18.02.2020.

29. Admittedly, the Company was in liquidation with effect from 26.11.1997 and all assets of the Corporate Debtor were custodial legis and in the control and possession of the Official Liquidator. How default can be committed by Corporate Debtor after liquidation process has commenced from 26.11.1997 has also not been explained in Section 7 Application. Although, the learned Senior Counsel for the Appellant also attacked on un-registered assignment deeds executed in the year 2007 and 2008, which is the basis of the claim of Respondent No.1, but without entering into the aforesaid issue, on the facts which have been claimed by Company Appeal (AT) (Insolvency) No. 320 of 2022 26 Respondent No.1 itself in Section 7 Application, it is clear that claim of Respondent

No.1 in respect of debt was highly time barred. There shall be default of debt, only when debt is due. Section 3, sub-section (xi) defines the debt in following manner:

"3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

30. There is no foundation laid down in the Section 7 Application as to how the debt has become due from the Corporate Debtor within three years from the date when Section 7 Application was filed, that is, 18.02.2020.

We are thus, satisfied that Adjudicating Authority has committed error in admitting Section 7 Application without advertent to the question as to whether the debt as claimed was due when Section 7 Application was filed.

The question of limitation of an Application has to be gone into by the Court, even though no defence has been taken by the Respondent. In the present case, the Corporate Debtor being into liquidation, it appears that no reply has been filed in Section 7 Application. But when the Appellant has brought all the necessary facts along with I.A. No.1069 of 2021, it was incumbent on the Adjudicating Authority to closely look into the Application for finding out as to whether Application deserves admission or not.

31. It is further relevant to notice that when Adjudicating Authority took the matter for consideration on 21.09.2021, it was informed that a Transfer Petition 58 of 2020 has been filed by Respondent No.1 before the Company Appeal (AT) (Insolvency) No. 320 of 2022 27 Judge for transferring C.P. No.355 of 1997 to the NCLT Kolkata. The order dated 21.09.2021 is as follows:

"1. Ld. Counsel for the Financial Creditor present. Ld. Counsel appearing for the Official Liquidator in respect of the Corporate Debtor present.

2. It is submitted that the transfer proceedings in the matter are pending for final adjudication before the Hon'ble High Court. In view of this post this matter on 24/11/2021. Liberty to mention is granted, in case a decision is taken on the transfer proceedings that are pending before the Hon'ble Calcutta High Court."

32. On the next date, when the matter was heard by the Adjudicating Authority, the Adjudicating Authority failed to advert as to what has happened to the Transfer Petition No.58 of 2020 filed by Respondent No.1 itself.

33. The learned Senior Counsel for Respondent No.1 has heavily relied on the judgment of Hon'ble Supreme Court in A. Navinchandra Steels Pvt. Ltd. vs. SREI Equipments Finance Pvt. Ltd. - (2021) 4 SCC 435. The Hon'ble Supreme Court in the said case has held that petition under Section 7 and Section 9 is independent proceedings, which is un-affected by winding up proceedings that may be

filed qua the same company. It is useful to notice paragraph 25 and 29 of the judgment, which is to the following effect:

"25. A conspectus of the aforesaid authorities would show that a petition either under Section 7 or Section 9 IBC is an independent proceeding which is unaffected by Company Appeal (AT) (Insolvency) No. 320 of 2022 28 winding-up proceedings that may be filed qua the same company. Given the object sought to be achieved by the IBC, it is clear that only where a company in winding up is near corporate death that no transfer of the winding- up proceeding would then take place to NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country. It is, thus, not possible to accede to the argument on behalf of the appellant that given Section 446 of the Companies Act, 1956/Section 279 of the Companies Act, 2013, once a winding-up petition is admitted, the winding-up petition should trump any subsequent attempt at revival of the company through a Section 7 or Section 9 petition filed under the IBC. While it is true that Sections 391 to 393 of the Companies Act, 1956 may, in a given factual circumstance, be availed of to pull the company out of the red, Section 230(1) of the Companies Act, 2013 is instructive and provides as follows:

"230. Power to compromise or make arrangements with creditors and members.--(1) Where a compromise or arrangement is proposed--

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company, or in the Company Appeal (AT) (Insolvency) No. 320 of 2022 29 case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation.--For the purposes of this sub-

section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods."

What is clear by this Section is that a compromise or arrangement can also be entered into in an IBC proceeding if liquidation is ordered. However, what is of importance is that under the Companies Act, it is only winding up that can be ordered, whereas under

the IBC, the primary emphasis is on revival of the corporate debtor through infusion of a new management.

29. Dr Singhvi and Shri Ranjit Kumar have vehemently argued that SREI has suppressed the winding-up proceeding in its application under Section 7 IBC before NCLT and has resorted to Section 7 only as a subterfuge to avoid moving a transfer application before the High Court in the pending winding-up proceeding. These arguments do not avail the appellant for the simple reason that Section 7 is an independent proceeding, as has been held in a catena of judgments of this Court, which has to be tried on its own merits. Any "suppression" of the winding-up proceeding would, Company Appeal (AT) (Insolvency) No. 320 of 2022 30 therefore, not be of any effect in deciding a Section 7 petition on the basis of the provisions contained in the IBC. Equally, it cannot be said that any subterfuge has been availed of for the same reason that Section 7 is an independent proceeding that stands by itself. As has been correctly pointed out by Shri Sinha, a discretionary jurisdiction under the fifth proviso to Section 434(1)(c) of the Companies Act, 2013 cannot prevail over the undoubted jurisdiction of NCLT under the IBC once the parameters of Section 7 and other provisions of the IBC have been met. For all these reasons, therefore, the appeal is dismissed and the interim order that has been passed by this Court on 18-12-2020 [A. Navinchandra Steels (P) Ltd. v. Srei Equipment Finance Ltd., 2020 SCC OnLine SC 1141] shall stand immediately vacated."

34. The position of law is clear by the aforesaid pronouncement of the Hon'ble Supreme Court. Although, pendency of winding-up petition before the High Court may not preclude filing of Section 7 Application, but in the present case, when there are various orders passed by Company Judge, in Company Petition No.355 of 1997, which has relevance and consequence on Section 7 Application, the orders passed in Company Petition ought to have been adverted by the Adjudicating Authority before admitting Section 7 Application. We further notice that Adjudicating Authority itself on 21.09.2021 noticed the pendency of Transfer Petition filed by Respondent No.1 before Company Judge for transferring of Company Petition No.355 of 1997 before NCLT Kolkata, but on the next date of hearing, the Adjudicating Authority did not advert to as to what is the status of said Transfer Petition. When Respondent No.1 himself has filed Transfer Company Appeal (AT) (Insolvency) No. 320 of 2022 31 Petition No.58 of 2020, which was pending before Company Judge for transfer of Company Petition to the NCLT Kolkata, which fact was also noticed by Adjudicating Authority. It cannot be said that pendency of Transfer Petition was irrelevant factor, which need not be adverted to by the Adjudicating Authority in the facts of the present case.

35. We, thus, are fully satisfied that Adjudicating Authority committed error in admitting Section 7 Application, which did not deserve admission in the facts of the present case as noticed above. In the result, we allow the Appeal and set aside the order dated 31.01.2022 and dismiss Section 7 Application in C.P.(IB) No.572/KB/2020 with cost which we assess at Rs.10 lakhs to be paid by Respondent No.1, which amount to be deposited with Official Liquidator within a period of one month, which may be used by the Official Liquidator in the liquidation process. Parties shall bear their own costs.

[Justice Ashok Bhushan] Chairperson [Ms. Shreesha Merla] Member (Technical) [Mr. Naresh Salecha] Member (Technical) NEW DELHI 22nd July, 2022 Ashwani Company Appeal (AT) (Insolvency) No. 320 of 2022 32