

Cooperative Rabobank U.A. Singapore ... vs Mr. Shailendra Ajmera on 29 April, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 261 of 2018

[Arising out of Order dated 14th May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in MA 421/2018 in C. P. No. (IB) 1371 and 1372 (MB)/ 2017)

IN THE MATTER OF:

Cooperative Rabobank U. A. Singapore Branch
38 Beach Road, #31 - 11, South Beach Tower,
Singapore 189 757

...Appellant

Vs

Mr. Shailendra Ajmera,
EY Restructuring LLP, 3rd Floor,
Worldmark 1, IGI Airport Hospitality,
District - Aerocity, New Delhi - 110037

....Respondent

Present:

For Appellant: Mr. Arun Kathpalia, Sr. Advocate assisted by
Mr. Krishnendu Datta, Ms. Silpa Nair and
Mr. Vividh Tandon, Advocates.

For Respondent: Mr. Ramji Srinivasan, Sr. Advocate assisted by
Mr. Raunak Dhillon, Ms. Gauri Rasgotra, Mr. Karan
Khanna and Ms. Sylona Mohapatra, Advocates.

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J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the Corporate Insolvency Resolution Process against 'Ruchi Soya Industries Ltd.' (Corporate Debtor), the Appellant - 'Cooperative Rabobank U. A. Singapore Branch', one of the creditors, made claim before the Resolution Professional stating that the Corporate Debtor owed to pay USD 107,36,972.90, basing on the Bills of Exchanges, ordering this Corporate Debtor to pay to the Creditor for the goods supplied by another party in between, i.e. 'Avanti Industries Pvt. Ltd.'. The Appellant claimed to be the 'Financial Creditor' which was rejected by the Resolution Professional. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench by order dated 14th May, 2018 also held that the Appellant is not a 'Financial Creditor' but an 'Operational Creditor'.

2. The question arises for consideration in this appeal is whether on the basis of Deed of Exchange, the Appellant can claim to be a 'Financial Creditor'?

3. The case of the Appellant is that it is an international bank, which is in the business of providing banking and financial services including financing export/ import transactions by discounting bills of exchange Company Appeal (AT) (Insolvency) No. 261 of 2018 (BoEs). The sole consideration for the Appellant in discounting BoEs is the discount interest and commission earned by the Appellant based upon the maturity period of the BoEs i.e. based on the time value of money. Such discounting facilities are akin to lending of money for earning interest and are, therefore, purely financial in nature. The Appellant is neither made a party to the export/ import contracts nor is it responsible for any obligations whatsoever under the export/ import contracts.

4. BoEs discounting is one of the modes of raising finance in trade transactions. Banks and financial institutions extend such discounting facilities on the premise that the repayment of debts owed under the BoEs would not be subject to the underlying export/ import transaction.

5. According to learned counsel for the Appellant, certain banks in India such as 'Export Import Bank of India' are primarily involved in the business of discounting BoEs for financing export/import transactions. To classify such BoEs discounting transactions as 'operational debts' would discourage banks and financial institutions from financing trade debts, unless they want to be automatically classified as 'operational creditors' much like suppliers of goods. This would defeat the very objective of the Insolvency and Bankruptcy Code, 2016 to promote the growth of credit market in India.

6. According to the Appellant, it entered into a Master Sales and Purchase Agreement dated 22nd October 2013 (MSPA), wherein it was agreed Company Appeal (AT) (Insolvency) No. 261 of 2018 that upon acceptance by the Corporate Debtor of certain BoEs, the Appellant would discount the BoEs and disburse the discounted proceeds to a third party supplier of the Corporate Debtor, Aavanti Industries Pvt. Ltd. (Aavanti). (Clause 1,2 of the MSPA).

7. It was further agreed under the MSPA that the Appellant will not have any recourse to Aavanti and would be able to claim the amounts due under the BoEs only from the Corporate Debtor. (Clause 4 (C) of the MSPA)

8. In accordance with the MSPA, the Corporate Debtor accepted the BoEs by signing on the BoEs and thereby, unconditionally agreed to pay the amounts due under the BoEs to the Appellant. (Sample BoE)

9. It is only upon the acceptance of the BoEs by the Corporate Debtor, that the Appellant disbursed the discounted proceeds to Aavanti. Accordingly, an aggregate amount of USD 107,376,972.90 (excluding interest and other charges) was payable by the Corporate Debtor to the Appellant under the BoEs. Subsequently, on the maturity of the said BoEs, the BoEs were presented for payment to the Corporate Debtor and were dishonoured due to non-payment

10. Learned counsel for the Appellant submitted that the Resolution Professional has accepted and admitted Appellant's claim of USD 107,36,972.90 alongwith interest and other charges. However, attempt Company Appeal (AT) (Insolvency) No. 261 of 2018 is being made to classify the debt as an 'Operational Debt' and not a 'Financial Debt' despite the pure financial nature of the payments.

11. It was submitted that Bill of Exchange is an independent contract under the provision of Negotiable Instruments Act, 1881 (NI Act). As per Section 32 and 37 of the NI Act, upon acceptance of Bill of Exchange, the acceptor i.e. Corporate Debtor becomes the Principal Debtor of the amount due under the Bill of Exchange. Under the law, unless agreed to the contrary, the drawer would continue to remain liable. However, in the present case, the Bill of Exchanges were discounted without recourse to the Drawer i.e. 'Avanti Industries Pvt. Ltd.'. Reliance has been placed on the decision of Hon'ble Supreme Court in "American Express Bank Ltd. Vs. Calcutta Steel Co. (1993) 2 SCC 199".

12. It was further submitted that discounting of Bill of Exchange falls within the definition of 'Financial Debt' as defined under Section 5(8) of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code') and the 'time value' means the compensation or the price paid for the length of time for which the money has been disbursed. Reliance has also been placed on decision of this Appellate Tribunal in "Dr. B.S.V. Lakshmi Vs. Geometrix Laser Solutions Pvt. Ltd., decided on 13th March, 2017", against which the appeal was dismissed by the Hon'ble Supreme Court. Company Appeal (AT) (Insolvency) No. 261 of 2018

13. Learned counsel appearing for the Resolution Professional submitted that the dispute in the present case arises out of a transaction, whereby 'Aavanti Industries Pte.' ("Aavanti" - an Operational Creditor of the Corporate Debtor) entered into an agreement to supply goods and services to 'Ruchi Soya Industries Limited' (Corporate Debtor) and Aavanti granted the Corporate Debtor, the usual credit facility for supply of goods and services.

14. It was submitted that in terms of Section 5(20) of the Insolvency and Bankruptcy Code, 2016, which defines an 'Operational Creditor' to mean a person to whom an 'Operational Debt' is owed and includes any person to whom such debt has been legally assigned or transferred, the Aavanti being an 'Operational Creditor', its assignee i.e. Appellant will also come within the meaning of 'Operational Creditor'.

15. We have heard learned counsel for the parties and perused the record.

16. Section 5(21) of the I&B Code defines 'Operational Debt' means a claim in respect of the provision of 'goods or services including employment' or a 'debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority'. Admittedly, the Corporate Debtor owed money to 'Aavanti', who is an 'Operational Creditor', which supplied goods which falls squarely within the definition of 'Operational Debt'. Furthermore, in the books of accounts of the 'Corporate Debtor', the overdue Company Appeal (AT) (Insolvency) No. 261 of 2018 amounts have been reflected as over-dues towards 'provision of goods and services'.

17. Section 5(20) of the Code defines an 'Operational Creditor' to mean not only a person to whom an 'Operational Debt' is owed but also a person to whom such 'operational debt' is assigned. In other words, the 'Aavanti' having transferred its right to collect payment due towards the sale of goods to any person, including the Appellant bank, under a Bill of Exchange, the transferee Appellant bank will also remain as an 'Operational Creditor', and cannot become a 'Financial Creditor'.

18. The aforesaid proposition of law is also evident from Sub-section (5) of Section 21 of the I&B Code, which reads as follows:-

"21. (5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer."

19. Therefore, it is clear that an 'Operational Creditor', who has assigned or legally transferred any 'Operational Debt' to a 'Financial Creditor', the assignee or transferee shall be considered as an 'Operational Creditor' to the extent of such assignment or legal transfer.

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20. Section 3 (37) of I&B Code provides that the words and expressions used but not defined in the Code have the same meaning as defined in other Acts as mentioned therein and reads as follows:-

"3. In this Code, unless the context otherwise requires,--

....XX.....X....

(37) words and expressions used but not defined in this Code but defined in the Indian Contract Act, 1872, the Indian Partnership Act, 1932, the Securities Contract (Regulation) Act, 1956, the Securities Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013, shall have the meanings respectively assigned to them in those Acts."

In view of Section 3(37), the Appellant cannot derive any advantage of expressions used in Negotiable Instruments Act, 1881.

21. The agreement dated 22nd October, 2013 has been enclosed by the Appellant. It is between 'Aavanti Industries Pte Ltd.' (the "Seller") and 'Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A. (trading as Company Appeal (AT) (Insolvency) No. 261 of 2018 Rabobank International) Singapore Branch' (the "Bank"). The relevant portion relating to transaction is as under:-

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22. The Deed of Exchange has also been enclosed, which is between 'Aavanti Industries Pte Ltd., Singapore' and 'Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank Nederland) Singapore Branch'. Company Appeal (AT) (Insolvency) No. 261 of 2018

23. One Bill of Exchange out of many has been enclosed by the Appellant, which reads as follows:-

24. From the record also we find that the 'Bill of Exchange' relates to supply of goods and whatever finance given by the Appellant is to 'Aavanti Industries Pte Ltd., Singapore' and not to the 'Corporate Debtor'. The Corporate Debtor has merely received the goods and therefore we hold that the Appellant is not a 'Financial Creditor' but at best can claim to be an 'Operational Creditor' as held by the Adjudicating Authority. Company Appeal (AT) (Insolvency) No. 261 of 2018

25. We find no merit in this appeal. It is accordingly dismissed. There shall be no orders as to costs.

[Justice S. J. Mukhopadhyaya] Chairperson [Justice Bansi Lal Bhat] Member (Judicial) NEW DELHI
29th April, 2019 AM Company Appeal (AT) (Insolvency) No. 261 of 2018