

Pawan Kumar vs Utsav Securities Pvt Ltd & Anr on 3 August, 2021

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH:
NEW DELHI
Company Appeal (AT) (Ins) No. 251 of 2020

In the matter of:

Pawan Kumar

Ex-Director and Shareholder

Vogue Clothiers Pvt. Ltd.

C2/18, Ashok Vihar - II

Delhi - 110052

....Appellant

Vs.

1. Utsav Securities Pvt. Ltd.

16/121-122, Jain Bhawan Faiz Road,

W.E.A Karol Bagh,

New Delhi

Central Delhi - 110005

...Respondent No. 1

2. Vogue Clothiers Pvt. Ltd.

(Through Ms. Karuna Sharma, Interim
Resolution Professional).

110, 1st Floor, Plot No. 5, Lsc,

Mohan Complex, H Block,

Ashok Vihar Phase - I,

Delhi - 110052

Email: sharma.karuna@gmail.com

...Respondent No. 2

Present

For Appellant: Mr. Aman Bhalla and Mr. Vivek Sandhu, Advocates.

For Respondents: Mr. Kartikeya Singh, Mr. Raktim Gogoi and Mr. Samarth
Shandilya, Advocates for R-1.

Mr. Karan Valecha, Mr. Rajiv K Virmani (RP) and Mr.
Karuna Sharma (RP), Advocates for R-2.

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JUDGMENT

Jarat Kumar Jain: J.

The Appellant 'Pawan Kumar' who is ex-director of the Corporate Debtor 'Vogue Clothiers Pvt. Ltd.' filed this Appeal against the order dated 30.01.2020 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) in CP (IB) No. 1593/(ND)/2019 whereby admitted the Financial Creditor's Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) and initiated Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. Brief facts of this case are that the business of the Financial Creditor is that of Non-Banking Finance company and having the Certificate of Registration issued by the RBI. The Financial Creditor had granted financial assistance to the Corporate Debtor for a total of Rs. 6.10 Cr in between 16.02.2017 to 22.02.2017 through Bank Account. The Corporate Debtor has paid interest Rs.6,05,718, once on 14.02.2018 after deduction of TDS. Thereafter corporate debtor failed to pay interest. Therefore, the Financial Creditor vide notice dated 27.04.2019 has recalled the loan. The Corporate Debtor has not liquidated the outstanding liabilities. Hence, the Financial Creditor has filed the Application under Section 7 of the IBC.

3. The Corporate Debtor has filed the Reply and resisted the Application on various grounds inter alia lack of any contractual agreement, an undefined period of loan, absence of any agreement for payment of interest at any specific rate and the said transaction does not fall within the definition of Financial Debt.

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4. Ld. Adjudicating Authority considered the submissions of Ld. Counsels for the parties, found no substance in the defence raised by the Corporate Debtor and the transaction does not get vitiated for want of agreement in terms of section 186(11) of the Companies Act 2013 (The Act). Thus, transaction in question is a financial debt. Therefore, admitted the Application under Section 7 of the IBC and initiated CIRP against the Corporate Debtor and appointed Insolvency Resolution Professional (IRP) 'Ms. Karuna Sharma'.

5. Being aggrieved with this order, the Appellant who is ex-director of the Corporate Debtor has filed this Appeal under Section 61(1) of the IBC.

6. Ld. Counsel representing the Appellant submitted that the Adjudicating Authority failed to appreciate that the Financial Creditor (R1) did not produce any loan agreement or instrument alongwith its Application under Section 7 of the IBC. There is no pleadings regarding the basic terms of the alleged Financial Contract or Financial Debt including the date of repayment, applicable interest and date of default. In absence of written agreement of loan and terms thereof the Financial Creditor (R1) had failed to establish that he is a Financial Creditor and amount shown in the Application is a Financial Debt, as per terms of Section 5(7) and 5(8) of the IBC.

7. It is also submitted that a clause 5 of part (v) of Form I shows that the Financial Creditor is required to attach a latest and complete copy of Financial Contract reflecting all amendments and

waivers up to date and in absence of such contract the transaction cannot be termed as Financial Debt. The Financial Contract has been defined under clause (d) of sub-Rule 1 of Rule 3 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, Company Appeal (AT) (Ins) No. 251 of 2020 2016. For this purpose, placed reliance on the order passed by the Adjudicating Authority (NCLT, New Delhi) in Prayag Polytech Pvt. Ltd. Vs. Gem Batteries Pvt. Ltd. CP (IB) No. 178/ND/2019, Utsav Securities Pvt. Ltd. Vs. Timeline Buildcon Pvt. Ltd. CP (IB) NO. 1559 (PB)/2019 and Judgement passed by this Appellate Tribunal in the case of, Caliber Associates Pvt. Ltd. Vs. M/s Tripat Kaur CA (AT) (Ins) No. 52 of 2017 and Judgement passed by the Hon'ble Delhi High Court in the case of M/s Utility Powertech Ltd. Vs. Amit Traders 2018 SCC Online DL 9096.

8. Ld. Counsel for the Appellant further submitted that this Appellate Tribunal in the case of Sanjay Kewalramani Vs. Sunil Parman and Kewalramani & Ors. 2018 SCC Online NCLAT 310 held that the mere facts that the Company paid interest and deducted TDS, itself cannot be sufficient to impose liability on the Corporate Debtor.

9. Ld. Counsel for the Appellant lastly submitted that the demand notice shows that there was regular transaction in business between the parties, therefore, such transaction cannot be termed as Financial Debt. There was no loan granted by the Financial Creditor (R1) to the Corporate Debtor and the transaction in question is in normal course of business for other purposes. Hence, the Financial Creditor failed to prove that the amount disbursed against the consideration for the time value of money. Ld. Adjudicating Authority has erroneously admitted the Application under Section 7 of the IBC, which is liable to be set aside.

10. Per contra, Ld. Counsel for the Respondent No. 1(Financial Creditor) submitted that the Financial Creditor is a Non-Banking Financial company Company Appeal (AT) (Ins) No. 251 of 2020 and in normal course of business, they had advanced the loan to the Corporate Debtor. As per section 10 of the Contract Act oral agreement is valid and enforceable as written agreement. Financial Creditor is NBFC therefore as per section 186(11) of the Act written agreement is not required. The Financial Creditor has filed banking entries which are not disputed by the Corporate Debtor. The Corporate Debtor has paid interest and deducted the TDS as per the provisions of Income Tax Act. The loan disbursed by the Financial Creditor against the consideration for time value of money. The Financial Creditor has proved that the amount is a Financial Debt as defined under Section 5(8) of the IBC and the Respondent No. 1 is a Financial Creditor under Section 5(7) of the IBC. Ld. Counsel for the Financial Creditor (R1) placed reliance on the Judgment of Hon'ble High Court of Calcutta in the case of United Conveyor Corporation (India) Pvt. Ltd Vs Pravash Kumar Mukherjee 2020 SCC online Cal.1575 . Hon'ble High Court of Delhi in the case of Sheetal Prasad Kalra vs Naresh Bahadur & Ors RFA 514/2015 and CM No 13780/2015 and M/S Bigdot advertising and Communications Pvt. Ltd Vs Union of India & another CS(OS)No 226/2000. It is requested that there is no merit in this Appeal therefore it may be dismissed.

11. After hearing Ld. Counsels for the parties, we have gone through the record.

12. The only issue arises in this Appeal is whether the transaction in question is a Financial Debt?

13. Certain essential conditions are required to be satisfied by a Financial Creditor seeking to invoke the provisions of CIRP as against the Corporate Company Appeal (AT) (Ins) No. 251 of 2020 Debtor. We have taken into consideration Section 5(7), Section 5 (8) read with Section 7 of IBC. Following essential conditions are required to be satisfied by a Financial Creditor.

(i) There must be disbursal of loan amount.

(ii) Such disbursal should be made for a consideration for time value of money, and

(iii) When the debt (Whole or any part or instalment) become due and payable and is not paid by the Corporate Debtor means committed default.

14. The above all conditions are to be satisfied by the Financial Creditor then Adjudicating Authority may admit the Application under Section 7 of the IBC and initiate the CIRP against the Corporate Debtor. In the present case, it is an admitted fact that financial Creditor transferred Rs. 6.10 Crs. through RTGS between 16.02.2017 to 22.02.2017 to the Corporate Debtor's bank account. This fact is corroborated by the bank entries filed by the Financial Creditor and the Corporate Debtor has not denied that the Corporate Debtor has not received such amount. Thus, we hold that aforesaid amount has been disbursed by the Financial Creditor to the Corporate Debtor. However, there is no written agreement between the parties to show that the disbursement of such amount is a loan transaction.

15. Now, we have considered whether such amount is disbursed for a consideration for time value of money?

16. According to the Financial Creditor the Corporate Debtor has paid interest Rs. 6,05, 718 on 14.02.2018 after deduction of TDS and this fact is undisputed. Therefore, it is proved that such disbursal has been made for a Company Appeal (AT) (Ins) No. 251 of 2020 consideration for time value of money. However, as per the Corporate Debtor, on the basis of deduction of TDS such inference cannot be drawn.

17. We have considered the submissions in the identical facts Coordinate Bench of this Appellate Tribunal in the Case of Prayag Polytech Pvt. Ltd. Vs. Gem Batteries Pvt. Ltd. CA (AT) (Ins) No. 713 of 2019 held that:

"Merely pointing out that TDS was deducted would not be sufficient to conclude that there was a Financial Debt. TDS can be deducted for various reasons."

18. Thus, we are of the view that on 14.02.2018 aforesaid amount after deduction of TDS has been paid to the Financial Creditor on this basis it cannot be concluded that the transaction in question is a Financial Debt.

19. According to the Financial Creditor an oral loan agreement can be enforceable in law in view of the Section 10 of the Indian Contract Act and Section 186(11) of the Act.

20. On the other hand, as per the Corporate Debtor in absence of a Financial Contract defined in Rule 3 (1) (d) the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 between the Corporate Debtor and Financial Creditor, the transaction cannot be termed as Financial Debt. RBI on 18.02.2013 issued guidelines to Non-Banking Finances Companies for fair practices which states that the Non-Banking Finances Company should convey in writing to the borrower in vernacular language as understood by the borrower by means sanctioned letter or otherwise, the amount of loan sanctioned alongwith the terms and conditions including annualised rate of interest. Thus, it is obligatory on the part of the Financial Creditor that there should be a loan agreement in writing only.

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21. We have considered the submissions, the Financial Creditor has not furnished any document to show that the transaction in question is a loan transaction. So far as the section 10 of Indian Contract Act and Rule 3 (1) (d) of the Rules is concerned we again refer the Prayag Polytech (Supra) in which this Tribunal held that:

"7. As regard relying on Section 10 of the Contract Act, 1872, in our view IBC is a complete code in itself. Section 238 of IBC has overriding effect on provisions inconsistent with IBC. The 'Financial contract' is defined in "Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016" Rule 3(1)(d) requires setting out the terms of the financial debt including tenure etc. We find that Appellant has failed to show any record showing financial debt to be there. As such, we are unable to find any fault in the impugned order while rejecting Section 7 application."

22. With the aforesaid, we are of the view that the Financial Contract as per the Rule 3(1) (d) is must between the corporate Debtor and the Financial Creditor for setting out the terms of a Financial Debt including the tenure of the Debt, interest payable and the date of repayment. In the absence of such Financial Contract, the Financial Creditor has failed to satisfy that when the debt and interest become due and payable.

23. Now, we have considered, whether the Corporate Debtor failed to pay (Whole or any part or instalment of the debt) when the debt become due and payable?

24. As we have already discussed that the Financial Creditor has not filed any writing to show that when the debt become due and payable. As per the Financial Creditor the debt in question is payable on demand. From the notice and the Application, it is not clear that on which date the demand was Company Appeal (AT) (Ins) No. 251 of 2020 made and the loan and interest become due and payable. In Para 7 of the notice there is vague allegation that:

"Despite repeated request and reminders, no payments either towards the loan or outstanding/overdue interest has been paid by the borrower. Thus, coercing our client to issue the present demand notice recalling the loan and the overdue interest

accruing till 31.03.2019."

25. The Section 7 (3) (a) of the IBC, provides that the Financial Creditor shall along with the Application is a required to furnish, a record of default recorded with the information utility or such other record or evidence of default as may be specified. The Financial Creditor has not filed any evidence of default along with the application under section 7 of IBC.

26. With the aforesaid, we are of the view that the Respondent No. 1 (Financial Creditor) failed to establish when the debt become due and payable and the Corporate Debtor has committed default.

27. Apart from the aforesaid, we have considered the other circumstances. Admittedly, there is no agreement of loan and interest and no document is to stipulate the period of repayment even from the demand notice and the Application under Section 7 of the IBC. The terms of the loan agreement and other factors are not clear. The Corporate Debtor Company is having authorized and paid up capital Rs. 1 Lacs whereas the Financial Creditor between 16.02.2017 to 22.02.2017 advanced loan of Rs. 6.10 Cr. From the pleadings it is not clear that at relevant time the Corporate Debtor was need of such huge amount and the Financial Creditor agreed to advance unsecured loan for such a huge amount. It is nowhere disclosed that the Corporate Company Appeal (AT) (Ins) No. 251 of 2020 Debtor is engaged in which business and the loan and finances was required for which business requirements. The Financial Creditor has not filed copy of their balance sheet for relevant years and also balance sheet of the Corporate Debtor Company.

28. According to the Hon'ble Supreme court while admitting the Section 7 Application, it is the duty of Adjudicating Authority to investigate the real nature of transaction. For this purpose, we would like to refer the Judgment of Hon'ble Supreme Court in the case of Phoenix Arc Pvt. Ltd. Vs. Spade Financial Services Ltd. & Ors. Civil Appeal No. 2842 of 2020 decided on 1st February, 2021 which reads as under:

"48 The IBC has made provisions for identifying, annulling or disregarding "avoidable transactions" which distressed companies may have undertaken to hamper recovery of creditors in the event of the initiation of CIRP. Such avoidable transactions include: (i) preferential transactions under Section 43 of the IBC;

(ii) undervalued transactions under Section 45(2) of the IBC; (iii) transactions defrauding creditors under Section 49 of the IBC;

and (iv) extortionate transactions under Section 50 of the IBC. The IBC recognizes that for the success of an insolvency regime, the real nature of the transactions has to be unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors."

29. With the aforesaid preposition of law, it is clear that the IBC recognizes that for the success of Insolvency regime the real nature of transaction has to be unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors. It

means, while admitting the Application under Section 7 of the IBC, it is the duty of the Adjudicating Authority to investigate the real nature of the transaction in Company Appeal (AT) (Ins) No. 251 of 2020 order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors.

30. Now we would like to refer another pronouncement of Hon'ble Supreme Court in the case of Swiss ribbons (P) Ltd v Union of India, (2019) 4 SCC 17 held;

Para 55.....
.....

"A conjoint reading of all these Rules makes it clear that at the stage of the adjudicating authority's satisfaction under Section 7(5) of the Code, the corporate debtor is served with a copy of the Application filed with the adjudicating authority and has the opportunity to file a reply before the said authority and be heard by the said authority before an order is made admitting the said Application. What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process mala fide, the Code prescribes penalties. Thus, Section 65 of the Code reads as follows:

"65. Fraudulent or malicious initiation of proceedings. -- (1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of Insolvency, or liquidation, as the case may be, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees. (2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees."

60. Also, punishment is prescribed under Section 75 for furnishing false information in an application made by a financial creditor which further deters a financial creditor from wrongly invoking the provisions of Section 7. Section 75 reads as under:

"75. Punishment for false information furnished in Application.

-- Where any person furnishes information in the Application made under Section 7, which is false in material particulars, knowing it to be false or omits any material fact, knowing it to be material, such person shall be punishable with fine which shall not be less than one lakh rupees, but may extend to one crore rupees."

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31. The Hon'ble Supreme Court in the above-mentioned case held that even if the Application filed under Section 7 meets all the requirements, then also the Adjudicating Authority has exercised discretion carefully to prevent and protect the Corporate Debtor from being dragged into the Corporate Insolvency Resolution Process mala fide.

32. Thus, it is clear that the Adjudicating Authority is obliged to investigate the nature of the transaction and should be very cautious in admitting the Application in order to prevent taking undue benefit of provisions of IBC to detriment of the rights of legitimate creditors as well as to protect the Corporate Debtor from being dragged into CIRP with mala fide. Section 65 provides that if any person initiates the Insolvency Resolution Process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for resolution of Insolvency or Liquidation, the Adjudicating Authority may impose upon such person a penalty. Section 65 provides that where any person furnishes any information under Section 7, which is false in material particulars, knowing it to be false or omits any material facts, knowing it to be material such person shall be punished with fine.

33. With the aforesaid discussion, we are of the considered view that Ld. Adjudicating Authority has erroneously admitted the Application under Section 7 of the IBC, whereas, the Financial Creditor has failed to establish that the transaction in question is a Financial Debt and due and payable and the Corporate Debtor has committed default. Thus, we have no other option but to set aside the impugned order.

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34. In effect, orders passed by the Adjudicating Authority initiating CIRP against the Corporate Debtor and appointing IRP and all other orders pursuant to impugned order and actions are declared illegal and are set aside. The Application preferred by the Respondent No. 1 under Section 7 of the IBC is dismissed. Ld. Adjudicating Authority will now close the proceedings. The Respondent No. 2 Corporate Debtor Company is released from all the rigour of law and is allowed to function independently through its board of directors with immediate effect.

35. The Adjudicating Authority will fix the fees of IRP/RP/Liquidator, as informed that Corporate Debtor Company is in liquidation. Payment of fees and CIRP Costs will be regulated in accordance with the provisions of the IBC and Regulations. The Appeal is allowed with aforesaid observations, however, there shall be no order as to costs.

[Justice Jarat Kumar Jain] Member (Judicial) [Dr. Ashok Kumar Mishra] Member (Technical) New Delhi 03th August, 2021.

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