

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 224 of 2019

IN THE MATTER OF:

Mr. K.P. Jayaram and Anr.

...Appellants

Vs.

M/s. Radha Exports (India) Pvt. Ltd.

...Respondent

Present: For Appellants: - Mr. M.K.S. Menon, Advocate.

For Respondent: - Mr. Arijit Mazumdar and Mr. Shambo Nandy, Advocates.

O R D E R

02.09.2019— Mr. K.P. Jayaram and Mrs. Shoba Jayaram filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) against ‘M/s. Radha Exports (India) Private Limited’- (‘Corporate Debtor’). The Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai, by impugned order dated 19th December, 2018 rejected the application on the ground that it is barred by limitation and no financial debt is in existence.

2. Learned counsel appearing on behalf of the Appellants while referring to the records has taken plea that the Appellants are the ‘Financial Creditors’ and debt is not barred by limitation.

3. Reliance has been placed on ‘Correlation Statement’ made by the Respondent- (‘Corporate Debtor’), which are as follows:

“CORRELATION STATEMENT

I. Statement of payments made by Radha Exports (Proprietary Concern) to the Appellants – (Sl. Nos. 1 to 5 of Annexure R/4 at Page-11 of the Additional Counter Statement dated 13.06.2019.

Sl. No.	Date	Issuer Bank	Ch. No./D D No.	Name	Amount(Rs.)	Entry in Bank Account	Correlation Page No. in Additional Reply Statement dated 14.08.2019
1.	01.10.2003	Canara Bank A/c. No. 1801 on behalf of 1 st Appellants Customs Under Invoice Case	586096	Chennai Customs-DD	5,305,000/-	YS PO on Chennai	11
2.	12.12.2003	American Express Bank A/C. No. 510260271	696401	K.P. Jayaram	1,660,000/-	Normal Inward Clearing	12
3.	15.03.2004	Canara Bank A/c. No. 1801	795921 [DD. No. 165394]	DD favour Kulasekaran request of 1 st Appellant	1,75,000/-	DD Kulasekaran	15
4.	14.02.2004	American Express Bank A/c. No. 510260271	696420	K.P. Jayaram	2,00,000/-	Normal Inward Clearing	13
5.	18.03.2004	American Express Bank A/c. No. 510260271	696468	K.P. Jayaram	7,00,000/-	Normal Inward Clearing	16
				Total-A	80,40,000		

4. However, we are not inclined to accept such submission as made on behalf of the ‘Corporate Debtor’ that the total amount has been paid because of the two reasons:

(i) The Correlation Statement shows certain amounts paid in favour of the Customs, Chennai amounting to Rs.53,05,000/- and in favour of one Mr. Kulasekaran amounting to Rs. 1,75,000/-. The

payments were for 'Financial Creditors' is disputed by counsel for them. It has not been co-related as to why amount has been paid to Mr. Kulasekaran.

(ii) If the argument is accepted that total amount has been paid then there was no occasion for the Respondent to take plea before the Adjudicating Authority that the amount was not payable in law, it being barred by limitation.

5. In the case of ***"Innoventive Industries Ltd. v. ICICI Bank and Anr.— (2018) 1 SCC 407"***, the Hon'ble Supreme Court while dealing with the provisions of Section 7 observed and held as follows:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a 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 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, 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 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.”

6. If there is a debt and default, normally the Adjudicating Authority is bound to admit the application provided the ‘Corporate Debtor’ with evidence takes plea that it is not payable in law or in fact.

7. The next question arises for consideration is whether the amount payable to the Appellant is barred by limitation and, if that be so, it is

always open to the 'Corporate Debtor' to suggest that the amount is not payable in law.

8. From the records, it appears that the matter relating to the Income Tax pending with the Office of the Assistant Commissioner of the Income Tax, Chennai, whereby letter dated 26th June, 2012, the Assistant Commissioner of Income Tax referred to the Balance Sheet of 'M/s. Radha Exports (India) Private Limited' showing therein the name of Smt. Shobha Jayaram (2nd Appellant) and stated that on verification it found that a sum of Rs. 90,00,000/- for loan advanced by Smt. Shobha Jayaram to the proprietary concern 'M/s. Radha Exports' transferred as Share Application Money after the incorporation of 'M/s. Radha Exports (India) Private Limited.'.

9. After the Remand Report by the Assistant Commissioner of Income Tax dated 26th June, 2012, on 10th October, 2012, the 'Radha Exports (India) Private Limited' written to the Commissioner of Income Tax seeking for rectification of mistake apparent from record.

10. The Appellants- Mr. K.P. Jayaram and Mrs. Shoba Jayaram issued Legal Notice on 19th November, 2012 for proceedings against the 'Corporate Debtor' under Sections 433 and 434 of the Companies Act, 1956 and finally filed Company Petition No. 335 of 2013 against the 'Corporate Debtor' on 15th February, 2013 for winding up. The said winding up petition was transferred by the Hon'ble High Court of Madras to the National Company Law Tribunal, Chennai in terms of Section 434

of the Companies Act, 2013 and the said petition for winding up was dismissed as Section 433 of the Companies Act, 2013 was deleted on 4th October, 2017 with liberty to the Appellants to file afresh, if so advised.

11. It was in this background, Demand Notice was issued by the Appellants to the 'Corporate Debtor' on 7th December, 2017 under the 'I&B Code' to which the 'Corporate Debtor' replied on 14th December, 2017. The matter was again moved before the Adjudicating Authority which by impugned order dated 12th April, 2018 passed in CP/77/IB/CB/2018 allowed to withdraw the application with liberty to the Appellants to file afresh application. It is only thereafter application under Section 7 was filed in Form 1 on 25th April, 2018.

12. From the aforesaid facts, it is clear that the claim of the Appellants is not barred by limitation as at appropriate stage, the Appellants moved application under Section 433 (e) of the Companies Act, 2013 for winding up of the Company. In view of the amendments made, 'I&B Code' was given effect and Section 433 having been deleted from the Companies Act, 2013, the Appellants had no other option but to move an application under the provisions of the 'I&B Code'.

13. The next question for consideration is whether the Appellants can claim to be the 'Financial Creditors'. Admittedly, the amount as shown by the Assistant Commissioner of Income Tax amounting to Rs. 90,00,000/- shows that the amount is disbursed by the 2nd Appellant-Smt. Shoba Jayaram for consideration of time value of money and it is

subsequently converted as Share Application Money of the 'Corporate Debtor'. However, no share was issued by the 'Corporate Debtor' in spite of the Demand Notice.

14. In that view of the matter, the Appellants not being the 'Operational Creditors', there was no occasion for them to issue Demand Notice under Section 8(1) and for the said reason, if the Adjudicating Authority allowed them to withdraw the application under Section 9 of the 'I&B Code' to enable the Appellants to file application under Section 7, we hold that subsequent application was maintainable, as we find that financial debt is payable to the Appellants, particularly the 2nd Appellant as there is a default and the 'Corporate Debtor' has failed to make out a case that it is barred by limitation and is not payable in law, we hold that this was a fit case for Adjudicating Authority to admit the application under Section 7 and initiate 'Corporate Insolvency Resolution Process' against 'M/s. Radha Exports (India) Private Limited'.

15. The Adjudicating Authority having failed to notice the aforesaid fact while wrongly erred that the Appellants are not 'Financial Creditors', we set aside the impugned order dated 19th December, 2018 and remit the case to the Adjudicating Authority, Chennai with direction to admit the application after notice to the 'Corporate Debtor' so as to enable the 'Corporate Debtor' to settle the claim prior to the admission of application under Section 7 of the 'I&B Code'.

The appeal is allowed with aforesaid observations and direction. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Kanthi Narahari)
Member(Technical)

Ar/g