

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT) (Insolvency) No. 558 of 2019

[Arising out of order dated 3rd May, 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Jaipur Bench, Jaipur in CP No. (IB) 83/7/JPR/2018]

IN THE MATTER OF:

Shyam Sunder Bhatiya

R/o 120, Sukhadiya Nagar, Nathdwara
District- Rajasmand- 313 301

...Appellant

Vs

1. Mr. Khozim Yusuf Nagarwala

R/o Plot No. 3, Solapur Road,
Chowdhary Nagar, Kombdiwala Malla,
Ahmednagar- 414 001
Maharashtra

2. M/s Raj Buildhome Private Limited

Near Garden Sukhadiya Nagar
Nathwara, Rajsamand- 313 301
Rajasthan

...Respondents

Present:

For Appellant:

Dr. Amit George, Mr. Swaroop George, Mr. Piyo Harold, Mr. Rishabh Dheer, Mr. Amol Acharya and Mr. Bharat Rayadurgam , Advocates

For Respondents:

Mr. Ashish Makhija, Mr. Gautam Singh, Mr. Anurag Bhatt, Advocates for Respondent No. 1.

Mr. Amol Vyas, Advocate for Respondent No. 2 -IRP

J U D G M E N T

(11th December, 2019)

KANTHI NARAHARI, MEMBER(T)

Aggrieved by the order dated 3rd May, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur

Bench, Jaipur admitting the application under Section 7 of Insolvency and Bankruptcy Code, 2016 (In short '**IBC**'), the Shareholder of the Corporate Debtor filed the present appeal.

2. The First Respondent herein filed the application under Section 7 of IBC before the Adjudicating Authority, Jaipur Bench, Jaipur for initiation of Corporate Insolvency Resolution Process (in short '**CIRP**') against the Corporate Debtor- M/s Raj Buildhome Private Limited on the ground that the Corporate Debtor defaulted the loan granted to the Corporate Debtor to the extent of Rs. 41,90,000/-.

BRIEF FACTS AND SUBMISSIONS OF THE LEARNED COUNSEL FOR THE RESPECTIVE PARTIES:

3. The 1st Respondent herein i.e., the Financial Creditor, during the Financial Year 2013-14 granted loan to the Corporate Debtor and the funds were transferred to it by Bank Account of the Financial Creditor through RTGS. It is stated that in the balance sheet of the Corporate Debtor for the Financial Years ended on 31.03.2014 and 31.03.2015, the amount has been reflected as Long Term Borrowing. The Financial Creditor – 1st Respondent herein became a Director of the Corporate Debtor w.e.f. 30.03.2015 (page 272, Vol.-II of the Paper Book) and subsequently, he resigned and the same was accepted by the Corporate Debtor vide its Board meeting dated 20.12.2015 (Page 276 Vol. II).

4. The Adjudicating Authority admitted the application on the ground that the loan which was granted by the Financial Creditor, was reflected in the balance sheet as Long Term Borrowing and relied upon written undertaking given by Corporate Debtor dated 09.02.2016 (Page 133 Vol. I) wherein it was categorically admitted that a sum of Rs. 41,90,000/- has been received from the Financial Creditor, his wife and mother. Further, the said written undertaking at clause – 7 reads as follows; (Page 134 Vol-I)

...
“Accordingly the “First Party” accepts to pay
“Second Party” Rs. 79,94,665/- (Principal
27,17,000/- and 14,73,000/- plus interest
38,04,655/-) and initial payment of 78,32,979/-
(outstanding unpaid Monthly Fees 65,20,275/-
plus interest 10,12,705/- from 1-Feb-86). As
such, the “First Party” unconditionally agrees to
pay Rs. 1,58,27,634/- One Crore Fifty Eight
Lakhs Twenty Seven Thousand Six Hundred
Thirty Four only and issued ICICI, Udaipur
Cheque No. 012792 dated 01-Oct-16 to honour
this obligation on 01-Oct-16 to “Second Party”

...

[Emphasis supplied]

As per the above undertaking, the 1st Party accepts to pay to 2nd Party. In the preamble of the undertaking dated 09.02.2016, the

first party is the Corporate Debtor i.e., M/s Raj Buildhome Private Limited and the 2nd party is Financial Creditor i.e., Mr. Khozim Yusuf Nagarwala, Smt. Shirin Y Nagarwala and Smt. Maleka K Nagarwala. Relying upon the above undertaking dated 09.02.2016, the Adjudicating Authority was of the view that there is an acceptance of the Financial Debt and that the Applicant (Financial Creditor) is a Financial Creditor taking into consideration the provisions of IBC and held that the Corporate Debtor Company has committed default.

5. We have perused the application filed before the Adjudicating Authority wherein in paragraph-4, the amount of debt mentioned as Rs. 41,90,000/- and at serial No. 11, it is mentioned that along with undertaking dated 09.02.2016, the Corporate Debtor issued a post-dated cheques bearing No. 012792 dated 01.10.2016 drawn on ICICI Bank, Udaipur for Rs. 1,58,27,634/- in the name of the Financial Creditor with an assurance that the cheque will be honoured on due date and accordingly the Financial Creditor had accepted the same.

6. One of the contentions raised by the Financial Creditor is that as per the undertaking dated 09.02.2016, the Corporate Debtor issued a cheque for Rs. 1,58,27,634/- in the name of Financial Creditor. However, the cheque was dishonored and a notice under Section 138 of Negotiable Instruments Act, 1881 dated 13.12.2016 was issued.

7. The stand of the Appellant for Corporate Debtor is that the Financial Creditor/Respondent (herein) had stolen the cheque book and forged signature on the said cheque and deposited the same. The Corporate Debtor lodged an FIR in that context. Further, the case of the Appellant is that the Respondent/Financial Creditor invested in the Corporate Debtor Company in return of shares, and an assurance for appointment as Director. It is stated that in pursuance thereof, 1st Respondent/Applicant was appointed as Director of the Corporate Debtor Company. The Appellant further contended that prior to admission of the Application i.e. on 03.05.2019, the Corporate Debtor had paid the entire debt as on 19.01.2019.

8. It is submitted that the Applicant has made a joint claim of Financial Debt and Operational Debt in the Application filed under Section 7 of IBC whereas clubbing of alleged Financial and Operational Debt is not permissible under IBC. It appears that Applicant mixed claim towards loan in the nature of Financial Debt with fees in the nature of Operational Debt. From the Balance Sheet for the Financial Year 2014-15, it is seen that the amount of Rs. 41,90,000/- was reflected as Long Term Borrowing (at page 104 and at page 119 of the Paper Book). There is no denial by the Corporate Debtor regarding receipt of Rs. 41,90,000/- as reflected in the Balance Sheet. However, it is stated that the amount was paid back on 17.01.2019 and 19.01.2019. It is submitted that total amount of

Rs. 1,50,17,700/- was paid to the Respondent/Applicant before admission of Section-7 Application. It is also contended by the Appellant that Application for initiation of CIRP was listed before the Adjudicating Authority on 18.01.2019. Representing Corporate Debtor- Appellant Company, one Mr. Sumit Dhadda, a Chartered Accountant, had appeared before the Adjudicating Authority and made a statement that Rs. 50 lakhs had been deposited and Rs. 1,00,17,700/- would further be paid shortly. However, the Adjudicating Authority refused to listen to the submission of the said Representative stating that he has not filed Vakalatnama. It is the stand of the Appellant that if the learned Adjudicating Authority had given an opportunity to the Representative of the Corporate Debtor, the full facts regarding payments made would have been submitted with proof.

9. The main issue is whether the Appellant i.e., Corporate Debtor has paid the debt prior to admission of Application under Section 7 of IBC?

10. We have perused the documents. The 1st Respondent/Financial Creditor relied upon a cheque issued by the Corporate Debtor and on its presentation, the same was dishonoured and a notice under Section 138 of Negotiable Instruments Act, 1881 dated 13.12.2016 was issued and a criminal case has been lodged against the Directors of the Corporate Debtor and they were arrested.

11. In its order dated 17.01.2019, Judicial Magistrate, FC, Court No. 2, Ahmednagar, recorded that a sum of Rs. 50 lakhs by way of Demand Draft has been deposited in the Court to pay the same to the Complainant i.e. Financial Creditor. The Appellant has produced a Chart (page 288-Vol. II of Paper Book) regarding details of all payments made. From the chart, the total amount paid is extracted hereunder.

“DETAILS OF PAYMENT MADE

Total amount paid is Rs. 1,50,17,700/-

	Date	Amount	DD No.	Issuer Pay by to Pay to	
a.	22.12.2018	4190000/-	347033	Kotak Rajbuildhome to Khozim	19.01.2019
b.	28.12.2018	810000/-	347035	Kotak Rajbuildhome to Khozim	19.01.2019
c.	16.01.2019	810000/-	016983	HDFC Manohar Bhatia to Ahmednagar Court	19.01.2019
d.	16.01.2019	4190000/-	016982	HDFC Asha Tobbaco to Ahmednagar Court	19.01.2019
e.	18.01.2019	5017700/-	007918	ICICI Fatima Sajid Hussain to Khozim	19.01.2019

(The Applicants are given no objection for withdrawal of Rs. 50 lac deposited before the concerned J.M.F.C. Court Ahmednagar)”

[Emphasis supplied]

12. From the chart of details of payment made, the total amount of Rs. 1,50,17,700/- has been paid to the Respondent/Applicant.

13. The Appellant, in their Written Submission, have stated that the alleged Financial Debt with the compounding of interest @ 24%, as claimed by Respondent No. 1/Financial Creditor herein would come to Rs. 1,36,67,197/- as on 19.01.2019. It is stated that on 19.01.2019, payment of Rs. 1,50,17,770/- by way of Demand Draft amounting to Rs. 1,00,17,700/- and an amount of Rs. 50,00,000/- which was deposited before the Court on hearing, the complaint under the Negotiable Instruments Act was paid to the Financial Creditor in criminal proceeding initiated. In support of the chart at page-288, the Appellant at pages 288,290,291 & 292 of the Paper Book enclosed photocopies of cheques issued in the name of Respondent/Applicant. The details of the amount mentioned in the cheque for Rs. 41,90,000/- dated 21.12.2018 in favour of 1st Respondent/Financial Creditor, Rs. 8,10,000/- dated 21.12.2018, and Rs. 50,17,770/- dated 18.01.2019 issued in the name of 1st Respondent /Financial Creditor and Rs. 8,10,000/- in the name of 2nd Joint Division Court, Ahmednagar, Rs. 41,90,000/- issued in the name of 2nd Joint Junior Division Court, Ahmednagar. Further, the Appellant also enclosed the photocopy of the Bank Statement at pages 292-297 showing the payments made to the Respondent/Applicant.

14. Record shows that the Payments have been made by the Appellant/Corporate Debtor prior to the admission of the Application i.e., on 03.05.2019.

15. Having made the payment prior to initiation of CIRP, we are of the view that the case of the Respondent/Applicant cannot be treated as a Financial debt and default, in view of no debt payable to the Financial Creditor. Even the Respondent/Applicant did not deny the receipt of the aforesaid amount of Rs. 1,50,17,770/-. Whilst it is stated that the said amount has not been paid towards their debt but it has paid because of criminal cases filed against Directors of Corporate Debtor Company. However, we are not inclined to accept the said contention of the 1st Respondent/Applicant. We take a view that continuing Proceedings despite receipt of debt, cannot be termed as Application for Resolution.

RELEVANT PROVISIONS OF LAW:

16. Section 3(11) of IBC defines 'debt' means a liability or obligation in respect of claim which is due from any person and concludes a Financial debt and Operational debt.

17. Section 3(12) of IBC defines 'default' means non-payment of debt when whole or any part or investment of the amount of debt has become due and payable and is not paid by the Debtor or the Corporate Debtor as the case may be.

18. We conclude that there is no default. For the aforesaid reasons, we allow the appeal, quash and set aside the impugned order dated 03.05.2019 and the Corporate Debtor is released from rigour of 'Corporate Insolvency Resolution Process. The Interim Resolution Professional/Resolution Professional will hand over the management, assets and records to the Corporate Debtor/Promoter/Board of Directors. Henceforth the Corporate Debtor will function independently through its Board of Directors.

19. Financial Creditor is liable to pay the CIRP cost and fees of the Interim Resolution Professional/Resolution Professional. The Interim Resolution Professional/Resolution Professional will file report before the Adjudicating Authority with regard to his fee, CIRP cost and the Adjudicating Authority is requested to pass orders to recover the same from the Financial Creditor. No costs.

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

(Kanthi Narahari)
Member(Technical)

AHC