

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 181 of 2018

(Arising out of Order dated 26th March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in CP(IB) No. 215/07/HDB/2017)

IN THE MATTER OF:

P. Chandra Shekhar

...Appellant

Vs.

Wincere Inc. & Ors.

...Respondents

Present: For Appellant: - Mr. Varun Mishra, Advocate.

For Respondents: - Mr. Anand Varma, Mr. Abhishek Prasad, Ms. Akansha Dixit, Mr. Dhairya Madan and Mr. Shwetank Singh, Advocates.

J U D G M E N T

Bansi Lal Bhat, J.

Joint application of 'Wincere Inc.'- (Respondent No.1) and 'Mr. Himanshu P. Kansara' (Respondent No.2) (hereinafter referred to as 'Financial Creditors') under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) came to be admitted as against Respondent No.3- 'Cybermate Infotek Limited'- ('Corporate Debtor') in terms of the impugned order dated 26th March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad

Bench, Hyderabad with consequential orders of appointment of 'Interim Resolution Professional' and slapping of 'Moratorium' on the assets of the 'Corporate Debtor'.

2. Through the medium of instant appeal, Sh. P. Chandra Sekhar, Director of the 'Corporate Debtor' has assailed the impugned order on various grounds said out in the memo of the appeal to which we shall advert to at the appropriate stage.

3. A brief reference to the factual matrix is inevitable. Be it seen that the case of the 'Financial Creditors' for triggering of the 'Corporate Insolvency Resolution Process' is based on a Loan Agreement dated 31st August, 2013 and a subsequent Settlement Deed dated 7th September, 2016. The 'Corporate Debtor', engaged in the business of developing software for computer systems and providing consultancy services, was incorporated under the Companies Act, 1956. It set up a wholly owned subsidiary in USA and its wholly owned subsidiary rendered software consultancy services to Respondent No.1. Invoice was raised in regard to rendering of the aforesaid software consultancy services.

4. The 'Corporate Debtor' availed a loan of Rs. 4.44 Crores from 'Financial Creditors' and 'Wincere Inc.' on different dates commencing from 6th June, 2012 to 20th December, 2013. Loan Agreement dated 31st August, 2013 was executed between 'Wincere Solution Pvt. Ltd. (WSPL)' and Mr. P.C. Pantulu, on behalf of the 'Corporate Debtor' in the capacity

of its Promoter. This was followed by a Settlement Deed dated 7th September, 2016 executed between the parties to discharge liability of the 'Corporate Debtor', the amount borrowed by the 'Corporate Debtor' being settled at Rs.7.37 Crores. Parties to the Settlement Deed, besides Respondent Nos. 1 & 2 are WSPL (the lenders), Mr. P.C. Pantulu acting as authorised representative of 'Corporate Debtor'- 'Cybermate Infotek Limited' (Borrower) and the Appellant- Mr. P.C. Shekhar, the director of 'Cybermate Infotek Limited' as Guarantor. The 'Corporate Debtor' also issued letter dated 1st February, 2017 admitting its liability and undertaking to repay the dues through issue of cheques described in the letter. Since there was a default in clearing the liability, the 'Financial Creditors' triggered 'Corporate Insolvency Resolution Process' by filing an application under Section 7 of the 'I&B Code' before the Adjudicating Authority culminating in passing of the impugned order.

5. It is contended on behalf of the Appellant that the 'Corporate Debtor' is not a signatory to the Loan Agreement dated 31st August, 2013 which has been executed *inter se* WSPL as lender and Mr. P.C. Pantulu as borrower. Thus, it is contended that there is no privity of contract between the 'Corporate Debtor' and the 'Financial Creditors'. It is further submitted that even in the Balance Sheet for the year ending 31st March, 2015, WSPL has acknowledged Mr. P.C. Pantulu as a borrower and not Respondent No.3, whose name is conspicuously absent in the Balance Sheet.

6. It is further submitted that even if Respondent No.3 is assumed to be the borrower under the aforesaid Loan Agreement, it is not the lender (WSPL), but Respondent Nos.1 and 2 i.e., 'Wincere Inc.' and 'Mr. Himanshu P. Kansara' who have approached the Adjudicating Authority with application under Section 7 of the 'I&B Code' claiming to be the 'Financial Creditors'.

7. It is further submitted that as regards the Settlement Agreement dated 7th September, 2016, Respondent No.3 is not even a party to such Settlement Agreement and Mr. P.C.Pantulu has signed the Agreement in his personal capacity and not for and on behalf of Respondent No.3.

8. It is further submitted that the Settlement Agreement does not in any way alter the nature of the loan or the position of the lender and the borrower and Mr. P.C.Pantulu continues to remain the 'Borrower' and WSPL continues to remain the 'lender'. The position in regard to the status of borrower as reflected in the Balance Sheet of the year 2015 is stated to have again found reflection in the Balance Sheet of the year ending 31st March, 2017. It is submitted that this is significant since this Balance Sheet has been drawn up after the execution of the Settlement Agreement dated 7th September, 2016. Validity of the Loan Agreement and the Settlement Agreement has been under challenge before Civil Court at Hyderabad and this fact has been suppressed by the 'Financial Creditors' before the Adjudicating Authority. It is further

submitted that even if it is assumed that the payment made to the 'Cybermate Infotek Ltd. Inc.' was in fact a loan, such loan taken by a subsidiary cannot be foisted on its parent company, the two being distinct legal entities. It is submitted that the Loan Agreement and the Settlement Agreement have not been executed on behalf of the Company and Respondent No.3 is not even a party to such agreements.

9. It is lastly submitted by the Appellant that the debt as claimed by the 'Financial Creditors' is not due in the sense that it is not payable in law or in fact and the impugned order cannot be sustained.

10. Per contra, it is submitted on behalf of the 'Financial Creditors' that the loan amount was advanced by the 'Financial Creditors' to the 'Corporate Debtor' for its business and working capital requirements and this fact is manifestly clear from the stipulations in the Loan Agreement and the Settlement Deed.

11. It is further submitted that the 'Corporate Debtor' has admitted its liability in its letter dated 1st February, 2017 assuring repayment of loan amount by issuance of cheques. It is submitted that the promoter of the 'Corporate Debtor' is the 'Borrower' who had approached the 'Financial Creditors' for the business of the 'Corporate Debtor' and this fact is clearly borne out by the Loan Agreement. With reference to the Settlement Deed dated 7th September, 2016, it is submitted that the same has been executed between the Respondent Nos. 1 and 2 and

WSPL as 'lenders' with Mr. P.C. Pantulu acting as authorised representative of 'Cybermate Infotek Limited' i.e., the 'Corporate Debtor' as 'borrower' with the Appellant- Mr. P.C.Shekhar, i.e., the Director of the 'Corporate Debtor' acting as 'Guarantor'. It is submitted that the Settlement Deed was in furtherance of the loan amount extended by the 'Financial Creditors' to the 'Corporate Debtor' to discharge the liability of the 'Corporate Debtor'.

12. It is submitted that in terms of the letter dated 1st February, 2017 issued by the 'Corporate Debtor' liability for an amount of Rs.3,87,00,000/- towards the 'Financial Creditors' was admitted whereas liability in regard to the remaining amount was admitted towards WSPL. It is further submitted that the cheques issued towards repayment of dues were dishonoured upon presentation which manifested in filing of the complaints under Section 138 of the Negotiable Instruments Act, 1881 which are pending for determination before the Competent Court.

13. It is submitted that the 'Financial Creditors' have restricted their claim to Rs.3,87,00,000/- i.e., the liability admitted by the 'Corporate Debtor' towards the 'Financial Creditors' in letter dated 1st February, 2017. According to the 'Financial Creditors', 'Cybermate Infotek Ltd. Inc.' and 'Cybermate Infotek Ltd.' are one and the same and 'Cybermate

Infotek Limited' is also operating in USA because of which INC was added to it by the 'Corporate Debtor'.

14. It is further submitted that the Board of Directors of both the Companies comprises of the same persons. It is further submitted that the Appellant cannot resile from its admission that the loan amount was transferred to 'Corporate Debtor' by the 'Financial Creditors' as it emerges from paragraph 5 of the memo of appeal. Further, there being clear admission of debt on the part of the 'Corporate Debtor' in its letter dated 1st February, 2017 towards the 'Financial Creditors' with the assurance to repay the amount through issue of cheques which were earlier dishonoured, the Appellant cannot raise the issue as sought to be raised through the medium of this appeal.

15. Heard learned counsel for the parties at length and perused the record meticulously.

16. It is not in controversy that Sh. P.C.Pantulu is the Managing Director while Appellant- Mr. P. Chandra Shekhar, son of Sh. P.C.Pantulu, is the Director of 'Cybermate Infotek Limited'- ('Corporate Debtor'). The father and son duo have jointly issued letter dated 1st February, 2017 on the letter head of the 'Corporate Debtor' to Mr. Himanshu P. Kansara (Respondent No.2) clearly admitting the liability of the 'Corporate Debtor' towards the 'Financial Creditors' and assuring repayment of the admitted amount by issuance of cheques. This

admission knocks the bottom of the plea taken in regard to there being no privity of contract between the 'Financial Creditors' and the 'Corporate Debtor', and the promoters/ directors foisting their personal liability on the 'Corporate Debtor'. This fact is writ large on the face of the aforesaid letter, genuineness whereof has neither been seriously disputed nor challenged before any competent forum. Even issuance of cheques in pursuance of the aforesaid acknowledgment of liability to the extent of Rs.3,87,00,000/- towards the 'Financial Creditors', (the remaining admitted towards WSPL), which were later dishonoured upon presentation as manifested by invoking of jurisdiction of Criminal Court under Section 138 of the NI Act, stares in the face of the Appellant and 'Corporate Debtor', who cannot wriggle out of the liability by taking the fake plea of 'Cybermate Infotek Ltd. Inc.' and the 'Corporate Debtor'- 'Cybermate Infotek Ltd.' being separate and distinct entities.

17. Perusal of records clearly bears out the fact that father and son have been working in tandem to defraud the Creditors and raising the false plea of there being no privity of contract between the 'Corporate Debtor' and the 'Financial Creditors' while being fully conscious of the fact that the financial assistance was obtained for promoting the business of the 'Corporate Debtor'. While Mr. P.C. Pantulu acted as authorised representative of the borrower- 'Cybermate Infotek Limited', son Mr. P. Chandra Shekhar (Appellant), Director of the 'Corporate Debtor', acted as Guarantor. The Settlement deed dated 7th September,

2016 executed between the lenders including the 'Financial Creditors' and the aforesaid father and son duo is in furtherance of loan extended by the 'Financial Creditors' to the 'Corporate Debtor' towards discharge of liability of the 'Corporate Debtor'. The Letter dated 1st February, 2017 issued by the 'Corporate Debtor' to Respondent No.2 is also to the same effect. This conclusion is further reinforced from the fact that Mr. P.C.Pantulu is clearly reflected as Promoter of the 'Corporate Debtor' in the Loan Agreement with further stipulation that the loan has been raised for working capital requirements of the 'Corporate Debtor'. It is, therefore, futile to contend that the 'Corporate Debtor' is not a signatory to the Loan Agreement and there is no privity of contract between the 'Corporate Debtor' and the 'Financial Creditors'. The Settlement Agreement dated 7th September, 2016 and the letter dated 1st February, 2017 admitting the debt on behalf of the 'Corporate Debtor' confirm these conclusions. It is, therefore, of no avail for the Appellant to contend on behalf of the 'Corporate Debtor' that the debt, liability in respect whereof has been admitted and acknowledged and default has been committed by dishonour of cheques, was not payable in law or in fact.

18. The issue raised and the arguments advanced on behalf of the Appellant being devoid of merit are repelled. The impugned order does not suffer from any legal infirmity or factual frailty.

The Appeal is accordingly dismissed. However, there shall be no order as to costs.

[Justice Bansilal Bhat]
Member (Judicial)

[V.P. Singh]
Member (Technical)

[Shreesha Merla]
Member (Technical)

NEW DELHI

22nd May, 2020

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