

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.346 of 2020

[Arising out of Order dated 14.02.2020 passed by National Company Law Tribunal, Jaipur Bench in IA No.203/JPR/2019 IB – 596(ND)/2018 TA No.116/2018]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Gyanchand Mutha
Shareholder of
Arkay International
Finsec Limited,
C-11, Raja Park,
Jaipur – 302004,
Rajasthan

...

Appellant

Versus

1. M/s. Aditya Birla
Money Limited,
Indian Rayon
Compound, Veraval,
Gujarat – 362266

Operational Creditor/
Applicant

Respondent No.1

2. Arkay International
Finsec Limited
Through IRP
Shri Vijendra Bangar,
B-73, Rajendra Marg,
Bapu Nagar,
Rajendra Marg,
Jaipur,
Rajasthan 302015

Corporate Debtor/
Respondent

Respondent No.2

For Appellant: **Shri Susshil Dagga and Ms. Mamta, Advocates
PCS Annie Singh Jhala**

For Respondents: **Shri Arvind Nayar, Sr. Advocate with Shri Ajay
Bhargawa, Ms. Wamika Trehan and Ms.
Raddhika Khanna, Advocates
Shri Amol Vyas (RP) and Shri Saumil Sharma,
Advocates (R-2)
Ms. Vanita Bhargava and Ms. Upasna
Chandrashekharan, Advocates**

ORDER
(Virtual Mode)

18.03.2021 The Appellant claims to be shareholder of M/s. Arkay International Finsec Ltd. – the Corporate Debtor. Respondent No.1 – M/s. Aditya Birla Money Ltd. filed Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the Adjudicating Authority (National Company Law Tribunal, Jaipur Bench) in IA No.203/JPR/2019 IB – 596(ND)/2018 TA No.116/2018. Operational Creditor claimed that the Respondent No.1 – Operational Creditor is a limited Company and also that the Corporate Debtor – Respondent No.2 is also a limited Company. The Operational Creditor claimed that the Corporate Debtor had availed the services of the Operational Creditor and had opened a trading account No.1070913 through its Branch Office at Jaipur and started trading from September, 2017 and continued till November, 2017. The Operational Creditor claimed that the Corporate Debtor had purchased 1 Lakh shares of Steel Exchange of India Ltd. at the average rate of Rs.130.055 per share and in view thereof Rs.1,30,38,956.27 was debited to the account of the Corporate Debtor. The Operational Creditor claimed that sum of

Rs.90,24,817.40 became due on 30.11.2017 from the Corporate Debtor. Since the value of the shares reduced, the Operational Creditor sold 30,873 shares of the Corporate Debtor for a consideration of Rs.25,70,364.42. When the value of shares reduced to Rs.52.25 on 8th December, 2017, Operational Creditor sold 69,127 shares out of the remaining shares and the account of Corporate Debtor was credited with Rs.36,05,249.28 and reduced the debit balance to Rs.28,83,058.80. The Operational Creditor claimed that Notice dated 21st December, 2017 was sent to the Corporate Debtor claiming outstanding Rs.28,90,835.10 with interest. However, the amount was not paid. Subsequently, Notice under Section 8 was also issued on 15th March, 2018. The Operational Creditor then filed Application under Section 9 for the debt due and in default.

2. The Adjudicating Authority after hearing the parties admitted the Application and thus the present Appeal.

3. When the matter had come up before this Tribunal on 28th February, 2020, after hearing Counsel, we had noted the dispute as under:-

“Heard Learned Counsel for the Appellant. It is stated that the Appellant is NBFC which is exempted from the purview of “Corporate Person” under Section 3 (7) of the Insolvency and Bankruptcy Code, 2016. Learned Counsel states that this was brought to the notice of the Adjudicating Authority. The Certificate of the Registration is at Page 349. Learned Counsel states that the Adjudicating Authority raised question whether the Appellant is still functioning as NBFC and order dated 23rd October, 2019 (Page 334) was passed. Learned Counsel states in response, the Appellant brought letter from Reserve Bank of India

(Page 335) to show that the Company had filed returns till date. It is stated that the Adjudicating Authority noticed these facts in Para 28 of the Impugned Order but still went ahead to analyse that in KYC form which was submitted by the Company to the Operational Creditor, it was not stated that the Corporate Debtor was NBFC. Against this, Ms. Wamika Trehan, Advocate appears on behalf of the Respondent/Operational Creditor. She states that the Operational Creditor had filed caveat in this matter and the Appellant have not served notice on the Operational Creditor. Learned Counsel for the Appellant states that the Appellant has served the notice and only thereafter registry accepted the Appeal.

The Learned Counsel for Operational Creditor shows a copy of the KYC Form to submit that the Corporate Debtor claimed to be "Pvt. Ltd. Company" by ticking concerned Colum in Para 5 instead of the Colum of "Financial Institution". She states that the Adjudicating Authority rightly considered the conduct of the Corporate Debtor to be not proper.

The matter is required to be heard"

4. The above is gist of the dispute. We have heard the Counsel for both sides. Learned Counsel for the Appellant is relying on Section 3(7) of IBC to submit that the provisions of Section 9 could not have been invoked against the Corporate Debtor as the Corporate Debtor is financial service provider.

5. Section 3(7) of IBC which defines Corporate Person, reads as under:-

"(7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited

liability under any law for the time being in force but shall not include any financial service provider;

[Emphasis supplied]

6. The learned Counsel submits that there is no amendment to Section 3(7) of IBC and the Corporate Debtor is still protected from application of provisions of IBC in view of said definition. The learned Counsel has relied on two Judgements of this Tribunal to submit that the financial service providers have been protected and the CIRP could not have been initiated against the Corporate Debtor.

7. The learned Counsel for the Appellant referred to the KYC Form which is the bone of contention between the parties. The photocopy of this Form is at Page 112 of the Appeal. The concerned column regarding status was column No.5. The document as filed at Page 112 is not very clear and thus Counsel for both sides have referred to the contents of these entries in the KYC Form as reproduced by the Respondent No.1 in Reply (Diary No.25152) Para – 3S. The same reads as under:-

“5. Status (Please tick any one)

Private Limited Co.	Public Ltd. Co.	Body Corporate	Partnership
Trust	Charities	NGO's	FI
--	HUF	AOP	Bank
Government Body	Non-Government Organization	Defence Establishment	BOI

Society	LLP	Others (Please specify)	_____
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”

8. It is stated by learned Counsel for the Appellant who referred to such contents of the Form where the Corporate Debtor in KYC had ticked “Public Limited Company”. It is stated that this could not be found fault with, as the Corporate Debtor is in fact a Public Limited Company. The learned Counsel submits that the Adjudicating Authority has at the time of hearing the Application, directed the Corporate Debtor to show that it was still functioning as NBFC. Reference is made to the Order dated 23rd October, 2019 (Page 334) which reads as under:-

“ORDER

Heard the arguments advanced by the counsel for the Operational Creditor and also submissions made by the counsel for the Corporate Debtor. Counsel for the Corporate Debtor is directed to produce a letter as well as a document from RBI which shows that it is still holding the status of NBFC and also that the Corporate Debtor is doing NBFC business and filing the returns regularly with the regulator. Counsel for the Corporate Debtor has sought two weeks’ time to furnish the above documents. The request is acceded to. The counsel for the Corporate Debtor is also directed to serve an advance copy of the said documents on the counsel for the Operational Creditor. post the matter to 14.11.2019.”

9. Learned Counsel for the Appellant submits that in response, the Corporate Debtor approached the Reserve Bank of India and received letter No.244/09.10.207/2019-20. The contents of which read as under:-

“In the matter of: M/s Aditya Birla Money Ltd. VS. M/s Arkay International Finsec Ltd.

On the request of M/s Arkay International Finsec Ltd. vide letter dated 31.10.2019, it is stated:-

1. M/s Arkay International Finsec Ltd. having its registered address at 123, Stock Exchange Building, Malviya Nagar, Jaipur – 302017 is holding certificate of registration no. 10.00021 dated March 3, 1998 issued by Reserve Bank of India.
2. The company has filed all its returns till date.”

10. It is argued that the Corporate Debtor tried to satisfy the Adjudicating Authority that it was working as NBFC and that it was protected as the Company was still functioning as NBFC and had even filed its Returns with the Reserve Bank of India till 6th November, 2019. It is argued that the Adjudicating Authority in the facts of the matter, could not have initiated CIRP against the Corporate Debtor which was NBFC in view of the protection given by law.

11. Thus learned Counsel for the Respondent – Operational Creditor has submitted that the Adjudicating Authority in Paragraphs - 28 and 29 of the Impugned Order took note of the conduct of the Corporate Debtor as follows:-

- “28. Heard the submissions made by both the parties. On perusal of all the files it is seen that the respondent had executed the KYC form in its own name i.e. M/s Arkay International Finsec Ltd. for the purpose of trading in Securities, i.e. financial product. The RBI, i.e.

financial service regulator has granted the certificate of registration to carry on the business of Non-Banking Financial Institution in 1998. As per the Memorandum of Association of the Respondent the main objects include among other things, to carry on the business of financiers and to invest in and acquire and hold, sell, buy or otherwise deal in shares, debentures, bonds etc. Such activities fall under the definition of Financial Service as stated above. The RBI has also confirmed vide letter dated 06.11.2019 that the respondent is holding Certificate of Registration No.10.00021 dated 03.03.1998, to carry on the business of non-banking financial institution and has filed all its return.

29. However, the fact that the RBI has granted Certificate of Registration to carry on the business of non-banking financial institution to the Corporate Debtor was neither brought to the knowledge of the Applicant at the time of executing the KYC nor in the reply to the statutory notice sent by the Applicant. The said fact is brought to the notice of the Tribunal and the Applicant only after 2 months from the date of the Application being filed by the applicant, through an IA. Also, as noted above in para 19, the respondent has intentionally deceived the applicant while executing the KYC Form. Now he can not escape from his liability by raising an objection of NBFC. It can be said that though the respondent is an NBFC, however, without ignoring the fact that the respondent himself entered into the transaction with the Applicant in the capacity of a Private Limited Company. Thus, in regard to the transaction under consideration the respondent falls under the definition of Corporate Debtor and cannot fall under the shell of the term 'NBFC'."

12. The learned Counsel for Operational Creditor then referred to para – 31 of the Impugned Order to show that the Adjudicating Authority has further noted conduct of the Corporate Debtor and considering all the

relevant facts as the Adjudicating Authority found that the Corporate Debtor had intentionally deceived the Operational Creditor, the Application was admitted. The learned Counsel submits that in the Judgements being relied on by the learned Counsel for the Appellant, this Tribunal has examined whether there were documents to show that entity claiming to be NBFC was still functioning as NBFC. It is stated that other than the certificate of Reserve Bank of India, no other material is brought in present matter.

13. We have heard Counsel for both sides. In the KYC Form (Page – 112), there was a column of ‘FI’ i.e. Financial Institution. The Corporate Debtor ticked ‘Public Limited Company’ and not ‘FI’. It is argued by the learned Counsel for Respondent No.1 that if at all, the Corporate Debtor should have ticked both ‘Public Limited Company’ and ‘FI’, and then the Operational Creditor would have considered whether or not to extend the services to the Corporate Debtor. It is further argued by the learned Counsel for Respondent No.1 that the Corporate Debtor even in Column 8, ticked portion that the Corporate Debtor intended to invest in the stock market with own funds rather than borrowed funds. It is stated that if the Corporate Debtor was NBFC, it was not trading on the basis of its own funds. Thus, the learned Counsel is submitting that the conduct of the Corporate Debtor has not been fair.

14. The Certificate of NBFC in favour of the Corporate Debtor (Page – 349) has been filed. It was issued in March of 1998. The learned Counsel

for the Corporate Debtor has relied on Memorandum of Association (Page – 352) which shows one of the objects of the Corporate Debtor is to deal in shares, debentures, etc. This is pointed out as Object No.2 of the company. Admittedly, between the parties, the KYC was filled up so that the Corporate Debtor could trade in shares and securities. When this is so, it is apparent that the steps taken by the Corporate Debtor were in furtherance of the objects with which the Corporate Debtor was incorporated. The Certificate of the Reserve Bank of India shows that the Corporate Debtor is still holding such Certificate dated 3rd March, 1998 and that the Company has filed all its Returns till date. When such Returns have been filed up to date, it would not be appropriate to presume that the Corporate Debtor is not functioning as an NBFC. If the Operational Creditor has any grievance that a particular column also should have been ticked, the relief of the Operational Creditor may lie somewhere else but it does not appear appropriate or legal that CIRP should have been initiated on the basis that the Corporate Debtor had “intentionally deceived the applicant while executing the KYC Form”.

15. The learned Counsel for the Appellant has relied on Judgement of this Tribunal in the matter of **“Randhiraj Thakur Versus Jindal Saxena Financial Services Private Limited and Another”** reported as 2018 SCC OnLine NCLAT 508, in which para – 10, the observations were as under:-

“10. If the entire scheme of the I&B Code is seen, it will be evident that the Code is to consolidate and amend the laws relating to reorganisation and

insolvency resolution of ‘corporate persons’, ‘partnership firms’ and ‘individual’ in a time bound manner. It is a self-contained Code which is exhaustive in nature when it comes to reorganisation and insolvency resolution. However, an exception had been carved out while enacting the Code that the ‘financial service providers’ have been kept outside the purview of the Code. Being a consolidating legislation only those acts are permitted which are mentioned in the Code and it cannot be made applicable to ‘financial service providers’ including ‘non-banking financial institutions’ and MFI’s banks, which have been kept outside the purview of the Code.”

16. The Appellant has further relied on Judgement of this Tribunal in the matter of **“Saumil A. Bhavnagri Versus Nimit Builders Private Limited and Another”** reported as 2019 SCC OnLine NCLAT 1312, in which para – 7, the observations were as under:

“This Bench finds itself in agreement with the law as explained by the Division Bench of this Tribunal (to which one of us – Justice A.I.S. Cheema was also Member). The definition of Corporate Person in Section 3(7) of IBC specifically provides that it shall not include “any financial service provider”. Considering the Certificate issued by the Reserve Bank of India and also documents as placed on record by the Appellant – Corporate Debtor, we have no hesitation to hold that the Corporate Debtor in the present matter on date of Application being financial service provider, the provisions of IBC could not have been invoked against the Corporate Debtor. It would not be in the realm of Adjudicating Authority and thus, for this Tribunal to go into the details whether the conditions attached have been followed or not by the NBFC as held in the matter of HDFC (supra). If there is any violation of conditions, the aggrieved person may bring it to the notice of RBI to look into the same. According to us, whenever the Corporate Debtor demonstrates that it is financial service provider and supports the claim with evidence by

Certificate by Reserve Bank of India, it is appropriate for the Adjudicating Authority to lay off its hands from such Corporate Debtor considering the definition of “Corporate Person”, under Section 3(7).”

17. For the above reasons, considering the position of law, it appears to us that the Adjudicating Authority could not have initiated CIRP when the Corporate Debtor did not fall in the concerned definition of ‘Corporate Person’ under IBC. Under Section 3(8) “Corporate Debtor” means a corporate person who owes a debt to any person. The Application could not have been admitted as if by way of punishment for concealing particular fact in KYC. The conduct of the Corporate Debtor may attract any other action which the Operational Creditor may take. However, when it comes to invoking provisions of IBC, if the law has protected the financial service provider, IBC could not have been invoked in the manner in which it has been done.

18. We hold that the Application under Section 9 could not have been admitted. We pass the following Order:-

ORDER

(A) For above reasons, the Appeal is allowed. The Impugned Order is quashed and set aside. The Application under Section 9 of IBC filed by Respondent No.1 – Operational Creditor before the Adjudicating Authority is dismissed.

(B) Actions taken by IRP/RP in consequence of the Impugned Order are quashed and set aside. The Corporate Debtor is released from the rigour of law and is allowed to function independently through its Board of Directors. The IRP/RP will hand back the records and management of the affairs of Corporate Debtor, to the Board of Directors.

(C) The IRP/RP will place particulars regarding CIRP costs and fees before the Adjudicating Authority and the Adjudicating Authority after examining the correctness of the same, will give directions regarding payment, as per provisions existing under IBC.

The Appeal is disposed accordingly. No costs.

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

[Dr. Alok Srivastava]
Member (Technical)

rs/md