

NATIONAL COMPANY LAW APPELLAT TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No.213/2018

(Arising out of Order dated 27.04.2018 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai in the Insolvency Petition being C.P.No.CP/670(IB)/2017)

In the matter of:

V. R. Hemantraj,
Shareholder of Rajkumar Impex Pvt Ltd,
4th Floor, Old No.93,
New No.119,
St Mary's Road, Abhiramapuram
Chennai 600018, Tamil Nadu

Appellant

Versus

1. Stanbic Bank Ghana Ltd,
Stanbic Heights, 215
South Liberation Link,
Airport City, ACCRA, Ghana.

Respondent No.1

2. Deepa V Ramani
IRP of Rajkumar Impex Pvt Ltd.
40, TNHB Complex,
No.180, LUZ Church Road,
Chennai-600004 Tamil Nadu

Respondent No.2

Present:

For Appellant: Mr. S.N. Jha, Sr. Advocate and Mr. Mohan Parasaran, Sr. Advocate with Mr. Pawan Jhabakh, Ms Radhika Bali, Ms Shruti Iyer, Mr.Anandh K and Mr. Harsh Jha, Advocates.

For Respondents: Mr Anirudh Wadhwa, Mr. Anirudh Krishnan, Mr Hires Chowdhry, Mr. Vipul Kumar, Mr Keerthi Kiran and Ms Sneha Pradeep, Advocates for R-1.

Ms Deepa V Ramani, RP (R-2).

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J

The application under Section 7 of the Insolvency & Bankruptcy Code, 2016 (I&B Code for short) was filed by the -Stanbic Bank Ghana Limited (financial creditor) for initiation of corporate resolution process against 'M/s Rajkumar Impex Pvt Ltd' (Corporate Debtor) having admitted by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai by impugned order dated 27.4.2018. The appellant, a shareholder of Corporate Debtor filed this appeal on following grounds:-

(i) The 1st respondent do not come within the meaning of 'financial creditor' as defined under Section 5(7) r/w Section 5(8) of the I&B Code; and

(ii) In absence of document of debt or default, the application preferred by the 1st respondent, was not maintainable.

3. Appellant has filed the 'Medium term loan' which shows that 'M/s Rajkumar Impex Ghana Ltd', a subsidiary of 'M/s Rajkumar Impex Pvt Ltd' (Corporate Debtor) was granted loan to the extent of US\$ 5,300,000.00 (Five million three hundred thousand United States dollars) by "Stanbic Bank Ghana Limited" (1st respondent). It is also not in dispute that 'M/s Rajkumar Impex Pvt Ltd', is the holding company of 'Rajkumar Impex Ghana Limited', who executed 'guarantee' in favour of "Stanbic Bank Ghana Limited" (1st respondent), and became the 'corporate guarantor'. In the aforesaid background, we hold that the 1st Respondent comes within the meaning of

‘Financial Creditor’, as defined under Section 5(7) read with Section 5(8)(h) of I&B Code.

4. Learned Senior Counsel appearing on behalf of the appellant submitted that the Adjudicating Authority has not recorded their satisfaction as required under Section 7(5) of the I&B Code. Reliance has been placed on the Hon’ble Supreme Court in the ***Innoventive Industries Ltd Vs ICICI Bank (2018) 1 SCC 207***. It was also submitted that the satisfaction of the Adjudicating Authority is a condition precedent for initiating any Corporate Insolvency Resolution Process but nothing of the kind even as an empty formality has been recorded in the impugned order. Therefore, according to him the initiation of the Corporate Insolvency Resolution Process is illegal and void ab initio.

5. It was further submitted that the document relied upon by 1st Respondent is a ‘foreign decree’ of the High Court of Justice, Queens Bench Division Commercial Court which is an ex-parte decree. The said decree can not be treated to be a record of default. It is only a declaration entitling the applicant to a certain sum of money.

6. However, we are not inclined to accept the aforesaid submission, as a record of decree, is a proof of ‘debt’ and the record of default is required to be enclosed separately to suggest that no payment has been made in terms of decree.

7. In ***Innoventive Industries (Supra)*** the Hon’ble Supreme Court held as follows:

“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 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.”

8. The aforesaid decision of the Hon’ble Supreme Court makes it clear that on the basis of any record if the Adjudicating Authority is satisfied that there is a ‘debt’ and default has occurred, the Adjudicating Authority is required to admit the application.

9. Application under Section 7 is filed in Form I which is in 5 Parts. It is not a recovery proceeding or a proceeding for determination of claim on merit,

which can be decided only by a court of competent jurisdiction. Application under Section 7 or 9 or 10 of I&B Code being not money claim or suit and not being an adversarial litigation, the Adjudicating Authority is not required to write a detailed decision as to which are the evidence relied upon for its satisfaction. The Adjudicating Authority is only required to be satisfied that there is a 'debt' and default has occurred.

10. In the present case the Adjudicating Authority has held that "a prima facie case has been made out" by the 1st Respondent/applicant. Such observations having made, we hold that the Adjudicating Authority expressed its final satisfaction both about existence of debt and default.

11. The learned Senior Counsel appearing on behalf of the appellant submitted that the decree is an ex parte decree, but such issue can not be decided while entertaining an application under Section 7 or by the Adjudicating Authority or even by this Appellate Tribunal. The Adjudicating Authority has not been empowered to give such declaration.

12. The decree passed by High Court of Justice, Queens Bench Division, Commercial Court of England, can be challenged only before the Court of Competent jurisdiction. The same cannot be assailed before the Adjudicating Authority, till its existence is denied.

13. Admittedly 'M/s Rajkumar Impex Ghana Ltd', a subsidiary of the Corporate Debtor, was granted medium term loan by 1st Respondent. It is also not in dispute that 'M/s Rajkumar Impex Pvt Ltd' (Corporate Debtor) which is the holding company of 'M/s Rajkumar Impex Ghana Ltd' has executed a guarantee in favour of the 'Stanbic Bank Ghana Ltd' (1st

Respondent). The guarantee given by the Corporate debtor, is on record. The decree passed by the High Court is an evidence in support of such guarantee. As admittedly the debt amount has not been paid by the Corporate Debtor, the Adjudicating Authority rightly admitted the application.

14. We specifically asked the learned senior counsel for the appellant as to whether the 'corporate debtor' disputed the existence of debt or the default. On the other hand, we find that the 'corporate debtor' has taken a plea that there is no debt or that default has not occurred. As the appellant is silent on such issue, in absence of any objection, we accept that the Corporate Debtor has not disputed the question of debt and default.

15. We find no merit in this appeal. The appeal is accordingly dismissed. No cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member (Judicial)

New Delhi

Dated: 29th August, 2018

Bm