

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 320 of 2018

(Arising out of Order dated 11th May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in C.P. NO. 1729/IBC/NCLT/MAH/2017)

IN THE MATTER OF:

Ajay Chaturvedi

...Appellant

Vs

JM Financial Asset Reconstruction Co. Ltd. & Anr.

....Respondents

Present:

For Appellant: Mr. Arvind Kumar Gupta, Ms. Henna George, Mr. Shreya Mathur and Mr. Atul Batra, Advocates.

**For Respondents: Mr. Ramji Srinivasan, Senior Advocate with Mr. Sonal Jain, Mr. Naveen Hegde, Ms. Aishwarya, Advocates.
Ms. Heena Sharma, Mr. Ishkaran Singh and Mr. Abhishek Anand, Advocates.**

Mr. Anant A. Pavgi, Advocate for R.P.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appeal has been preferred by Mr. Ajay Chaturvedi, Shareholder of 'Yes Power & Infrastructure Ltd.'- ('Corporate Debtor') against the order dated 11th May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, whereby and whereunder, the application under Section 7 of the 'Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) preferred by the Respondent-

‘JM Financial Asset Reconstruction Company Ltd.’- (‘Financial Creditor’) has been admitted.

2. The main plea taken by the counsel for the Appellant is that in spite of the order passed by the Adjudicating Authority no ‘substituted service’ has been made by the Respondent- ‘JM Financial Asset Reconstruction Company Ltd.’- (‘Financial Creditor’) and they sent the notice by Speed Post, which was never received by the Appellant. Therefore, according to Appellant, the admission order dated 11th May, 2018 is bad having been passed *ex parte* by misleading the Adjudicating Authority.

3. Learned counsel for the Appellant submitted that there was no provision for filing an application under Section 7 of the ‘I&B Code’ against the ‘Corporate Guarantor’ except against the ‘Personal Guarantor’. However, such submission cannot be accepted, in view of the definition of ‘Financial Creditor’ as defined in Section 5(7) read with Section 5(8) of the ‘I&B Code’, which reads as follows:

5. Definitions. – (7) “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) “financial debt” means a debt along with interest, if any, which is disbursed against the

consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed; (e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit

from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause”

4. Clause (i) of sub-section (8) of Section 5 shows that any liability in respect of any ‘guarantee’ or ‘indemnity’ for any of the items referred to in sub-clauses (a) to (h) comes within the meaning of ‘Financial Debt’. The ‘Corporate Debtor’ having given ‘guarantee’ on behalf of the principal borrower for the items referred to in sub-clause (a), guarantor company will also come within the meaning of ‘Corporate Debtor’ qua the ‘Financial Creditor’ in whose favour the guarantee has been given.

5. Learned counsel for the Appellant placed reliance on notice issued under the ‘SARFAESI Act, 2002’ on 18th November, 2013, from which it is clear that the ‘Financial Creditor’ has already invoked the guarantee

against the 'Corporate Debtor' and, therefore, it cannot take plea that the guarantor does not come within the meaning of the 'Corporate Debtor'.

6. In so far as the service of notice of admission is concerned, even if it is accepted that it was not served, we are not inclined to remit the case on such ground as it will be mere formality, as admittedly debt is payable by the 'Corporate Debtor' and the 'Corporate Debtor' defaulted to pay. It is not the case of the Appellant that if the notice would have been served before admission of the application under Section 7, the 'Corporate Debtor' would have cleared the debt amount.

7. In view of the aforesaid facts and findings, no relief can be granted. In absence of any merit, the appeal is dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

29th November, 2018

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