

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 499 of 2018

(Arising out of Order dated 21st August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in CP-(IB)-2051/NCLT/MB/MAH/2018 and M.A. No. 695 of 2018)

IN THE MATTER OF:

Nityank Infrapower & Multiventures Pvt. Ltd.

...Appellant

Vs

Invex Pvt. Ltd. & Anr.

....Respondents

Present:

For Appellant: **Mr. Janak Dwarkadas and Mr. Gopal Mukherji, Senior Advocates with Ms. Bindi Dave, Mr. Pranaya Goyal, Mr. Aman Gandhi, Mr. Abhirath Thakur and Mr. Abhishek Sharma, Advocates.**

For Respondents: **Mr. Amit Sibal and Mr. Arun Kathpalia, Senior Advocates with Mr. Aditya Shankar, Mr. Nakul Mohta, Mr. Videsh Vaish and Mr. Lalit Mohan, Advocates for R-1.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Respondent- 'Invex Pvt. Ltd.'- ('Financial Creditor') filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) for initiation of 'Corporate Insolvency Resolution Process' against 'Dome-Bell Electronics India Pvt. Ltd.'- ('Corporate Debtor').

2. 'M/s. Nityank Infrapower & Multiventures Private Limited'- Appellant moved an intervention application impleading 'M/s. Invex Private Limited'- as 'Financial Creditor' and 'Dome-Bell Electronics India Private Limited' as 'Corporate Debtor' (1st and 2nd Respondent respectively). The said Miscellaneous Application has been filed under Section 7 of the 'I&B Code' for initiation of insolvency proceedings by the 'Nityank Infrapower & Multiventures Pvt. Ltd'- Appellant against 'Dome-Bell Electronics India Private Limited'- ('Corporate Debtor').

3. In the intervention application, the Appellant has also preferred a Misc. Application No. 377 of 2018 wherein 'Nityank Infrapower & Multiventures Pvt. Ltd.' is the Applicant and 'Dome-Bell Electronics India Private Limited' along with 'ECL Finance Ltd.', 'Hindustan Oil Ventures Ltd.' and 'Dish TV India' are the Respondents.

4. The Applicant in the intervention application alleged that there was a fraudulent share pledge transaction entered into by the 'M/s. Invex Pvt. Ltd.'- ('Financial Creditor') in favour of 'M/s. Dome-Bell Electronics India Private Limited'- ('Corporate Debtor') with the intent to defeat the legitimate claim of the Applicant against the 1st Respondent- 'M/s. Invex Pvt. Ltd.'. There is reference of a third entity i.e. 'Hindustan Oil Ventures', Chennai, Tamil Nadu.

5. According to the Applicant, it is a Public Limited Company engaged in the business of oil extraction. With the purpose to raise finances the 'Hindustan Oil' proposed to issue on private placement 16,260

nonconvertible debentures of Rs. 10 Lakhs each having aggregate nominal value of Rs. 1626 Crores. In the said transaction the 'Hindustan Oil Trusteeship Ltd.' (the debenture trustee) executed a 'Debenture Trust Deed' dated 30th December, 2016 (debenture trust deed). Pursuant to the said 'Debenture Trust Deed', the 'Hindustan Oil' issued nonconvertible debentures having face value of Rs. 10 Lakhs each at par aggregating to Rs. 1626 Crores by the debenture trustee in favour of the Applicant- 'Nityank Infrapower & Multiventures Pvt. Ltd. The Applicant-'Nityank Infrapower & Multiventures Pvt. Ltd.' has become the beneficial owner of the said debentures within the meaning of 'Debenture Trust Deed'. It was agreed that the 'Hindustan Oil' will be liable to pay default interest at the rate of 18% which have not been paid on the respective dates. In order to secure the payment obligation, 'M/s. Dome-Bell Electronics India Private Limited'-'(Corporate Debtor)' executed a corporate guarantee deed dated 30th December, 2016 in favour of the Applicant- 'Nityank Infrapower & Multiventures Pvt. Ltd.'. As a result, 'M/s. Dome-Bell Electronics India Private Limited'-'(Corporate Debtor)' had guaranteed the payment obligation of 'M/s. Hindustan Oil' in relation to the debentures. Additionally, the payment obligation was partly secured by a share pledge agreement also dated 30th December, 2016, entered into between the debenture trustee and certain shareholders of 'Videocon D2H Ltd.' including the 'M/s. Dome-Bell Electronics India Private Limited'-'(Corporate Debtor)' in the said share pledge agreement. Under the said share pledge agreement 'M/s. Dome-Bell Electronics India Private Limited'-

(‘Corporate Debtor’) had pledged 44,38,400 equity shares of ‘Videocon D2H Ltd.’ in favour of the debenture trustee. Later on by a letter dated 13th September, 2017, the ‘Hindustan Oil’ informed the Applicant that there had been changes in the corporate structure of certain companies which had also executed similar agreement and pledged shares in favour of the Applicant. Similarly, the ‘Hindustan Oil’ also acknowledged, *inter alia*, that certain shareholders of ‘Videocon D2H’ entered into a share pledge agreement dated 30th December, 2016 for creation of a pledge on an agreed number of 11,34,34,303 shares of ‘Videocon D2H’. The ‘Hindustan Oil’ had also stated that there was a pledger in respect of 44,38,400 equity shares of ‘Videocon D2H’. Therefore, according to the Applicant, the ‘Hindustan Oil’s’ payment obligation towards the Applicant- ‘Nityank Infrapower & Multiventures Pvt. Ltd.’ was undeniable. Further, vide an order dated 27th July, 2017, the National Company Law Tribunal approved a scheme of arrangement for amalgamation of ‘Videocon D2H’ and ‘M/s. Dish TV India Ltd.’. The said scheme provides for allotment of certain number of equity shares of the Dish TV to the shareholders of the erstwhile ‘Videocon D2’ limited. Subsequent to the execution of said transaction document, the ‘Hindustan Oil’ committed defaults in its payment obligation. The details of the impugned defaults have also been elaborated in the Misc. Application. Due to occurrence of events of defaults notices were issued and other correspondence was made. Despite reminders the ‘Hindustan Oil’ as well as the ‘M/s. Dome-Bell Electronics India Private Limited’- (‘Corporate Debtor’) failed to pay the amount due in contravention of payment obligation in

relation to the said debentures. In a reminder notice once again called upon to pay the outstanding sum of Rs. 1873,39,20,000/-. In view of the said default and in view of the indebtedness of 'M/s. Dome-Bell Electronics India Private Limited'- ('Corporate Debtor'), the Applicant- 'Nityank Infrapower & Multiventures Pvt. Ltd.' was constrained to file a Company Petition. In this Application further information is given that the 'M/s. Dome-Bell Electronics India Private Limited'- ('Corporate Debtor') was the owner of 4,08,90,000 shares of 'Videocon D2H'. Pursuant to an oral agreement, it was agreed that the 'M/s. Dome-Bell Electronics India Private Limited'- ('Corporate Debtor') shall issue additional security to the Applicant of those identified shareholding. It was found by the Applicant that 'M/s. Dome-Bell Electronics India Private Limited'- ('Corporate Debtor') had pledged some of those shares to a third party after the default committed of non-payment. Through a correspondence it was found that the 'M/s. Dome-Bell Electronics India Private Limited'- ('Corporate Debtor') had pledged 3,40,00,000 equity shares out of the identified shareholding. According to the Applicant, the impugned transaction was entered fraudulently to defeat the Applicant's- 'Nityank Infrapower & Multiventures Pvt. Ltd.' claims. In a reminder notice the Applicant-'Nityank Infrapower & Multiventures Pvt. Ltd.' had called upon 'M/s. Dome-Bell Electronics India Private Limited'- ('Corporate Debtor') to pay outstanding amount of Rs. 2035,83,00,000/-.

6. The allegation was that although the Company was fully conscious of its obligation towards the Applicant- 'Nityank Infrapower & Multiventures

Pvt. Ltd.’ under the said corporate guarantee it had fraudulently entered into the impugned transaction. According to the Applicant, it was a sham transaction for the purpose of delaying Applicant’s claim against ‘M/s. Dome-Bell Electronics India Private Limited’- (‘Corporate Debtor’) under the said corporate guarantee. An apprehension has been expressed that ‘M/s. Dome-Bell Electronics India Private Limited’- (‘Corporate Debtor’) may create a third party right. The submission is that ‘M/s. Dome-Bell Electronics India Private Limited’- (‘Corporate Debtor’) be restrained from creating any third party right in respect of its assets. The Applicant has learnt that the ‘M/s. Dome-Bell Electronics India Private Limited’- (‘Corporate Debtor’) had made claim before the ‘Dish TV’ for allotment of equity shares in exchange for identified shareholding. The apprehension is that on receipt of the shares, ‘M/s. Dome-Bell Electronics India Private Limited’- (‘Corporate Debtor’) may alienate shares or deal with those shares to defeat the recovery. In the light of the aforementioned background, the application was moved so that the Applicant be made an Intervener, or in the alternate, prayer was made that the Debtor Company be restrained not to pledge 3,40,00,000 shares in ‘Videocon D2H’ in favour of the ‘ECL Finance Ltd.’.

7. The Adjudicating Authority by impugned order dated 21st August, 2018 while admitted the application under Section 7 filed by ‘Invex Pvt. Ltd.’- (‘Financial Creditor’) and initiated ‘Corporate Insolvency Resolution Process’ against ‘M/s. Dome-Bell Electronics India Private Limited’-

(‘Corporate Debtor’), rejected the allegation of ‘collusiveness’, the Appellant having failed to establish the same.

8. The Appellant was the Intervener had taken plea that the copy of the petition under Section 7 was not served on it, but such submission cannot be accepted. The Adjudicating Authority has rightly rejected the plea as the law is settled law is that only after being admitted as a party to the litigation an Intervener can get entitlement for demand of a copy of a pleading. It is also a settled law that the ‘Corporate Insolvency Resolution Process’ is not a litigation as held in **“Binani Industries Limited Vs. Bank of Baroda & Anr. – Company Appeal (AT) (Insolvency) No. 82 of 2018 etc.”**.

9. Therefore, supply of copy of pleading to an intervenor does not arise. This apart, in fact no affidavit or pleading is filed before the Adjudicating Authority but the requisite form such as, (Form-1) is filed for application under Section 7 or (Form-5) for filing application under Section 9. In the said format the applicants only provide the details as required as per the format which includes the name of the ‘Corporate Debtor’, ‘Creditors’, amount of ‘debt’ and debt of ‘default’ etc. along with relevant enclosures thereto.

10. For a petition under Section 65 of the ‘I&B Code’ or for alleged allegation of ‘collusiveness’, the party moving the application is required to prove the same. The Adjudicating Authority cannot pass any order in absence of any corroborating evidence or statement.

11. Section 65 of the 'I&B Code' deals with 'fraudulent or malicious initiation of proceedings' whereas Section 66 relates to 'Fraudulent trading or wrongful trading'. As per sub-section (1) of Section 65, if any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may pass appropriate order of penalty in terms with the said provision. The word 'collusiveness' have not been mentioned there but one can prove collusion to suggest that the proceeding relating to insolvency resolution process was initiated fraudulently in collusion or with malicious intent.

12. Learned counsel appearing on behalf of the Appellant referred to different agreements between 'Dome-Bell Electronics India Pvt. Ltd.', Appellant and other third parties as also 'Share Pledge Agreement'. According to the Appellant, the 'Dome-Bell Electronics India Pvt. Ltd.' Pledged 44,38,400 equity shares in 'Videocon D2H Limited' and also executed a corporate guarantee by way of further security. He has referred to order dated 27th July, 2017 passed by the National Company Law Tribunal, Mumbai, sanctioning the Scheme of Arrangement for Amalgamation of 'Videocon D2H Ltd.' into and with 'Dish TV India Ltd.' Due to defaults in repayment of the debentures, the debenture trustee sent a demand notice to 'Hindustan Oil Ventures Limited' on 20th December, 2017. All those facts were brought on record but the Appellant has failed to suggest that an application under Section 7 was filed by 'Invex Private

Limited' fraudulently or with malicious intent, for the purpose of rejecting the application or for imposing penalty under Section 65 of the 'I&B Code'.

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

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansilal Bhat]
Member (Judicial)

NEW DELHI

30th November, 2018

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