

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V
(Special Bench)

Item No.-07
IB-507/ND/2021
Int. Pet./33/2022

IN THE MATTER OF:

Axis Trustee Services Ltd.

Vs.

Nimitya Infotech Pvt. Ltd.

....Applicant

....Respondent

SECTION

U/s 60(5) of IBC

Order delivered on 23.05.2023

CORAM:

**SHRI P.S.N PRASAD,
HON'BLE MEMBER (JUDICIAL)**

**DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)**

PRESENT:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open court vide separate sheets. Int. Pet./33/2022
in IB-507/ND/2021 is **dismissed without cost.**

Sd/-
(DR. BINOD KUMAR SINHA)
MEMBER (T)

Sd/-
(P.S.N PRASAD)
MEMBER (J)

**THE NATIONAL COMPANY LAW TRIBUNAL
COURT V, NEW DELHI**

Int. Pet. 33/2022

IN

Company Petition No. (IB) – 507/(ND)/2021

*Under Section 60(5) of the Insolvency and Bankruptcy
Code, 2016 read with Rule 11 of NCLT Rules, 2016.*

IN THE MATTER OF:

AXIS TRUSTEE SERVICES LIMITED

.... FINANCIAL CREDITOR

VERSUS

NIMITAYA INFOTECH PVT. LTD.

..... CORPORATE DEBTOR

AND IN THE MATTER OF-

APPOLLO EQUIPMENTS PVT. LTD.

(THROUGH ITS DIRECTOR MR. PRAVEEN KUMAR MAHAJAN)

HAVING ITS REGISTERED OFFICE AT:

C-225/1 MAYAPURI INDUSTRIAL AREA

PHASE- II, NEW DELHI

.... APPLICANT/INTERVENOR

Order Pronounced on: 23.05.2023

CORAM:

SHRI. P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

Int. Pet. 33/2022

In

IB No. 507 of 2021

Order Delivered on: 23.05.2023

APPEARANCES

For the Applicant : Sr. Adv Krishnendu Datta, Mr. Prateek Kumar, Ms. Vaishnavi Chillakuru, Ms. Varsha

For the Respondent : Mr. P. Nagesh Sr. Adv, Mr. Nakul Mohta Adv, Mr. Zain A. Khan, Adv, Mr. Vinayak Bhandari, Adv, Mr. Samyak Jain Adv

For the Intervenor : Adv Ankur Goel

ORDER

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

1. This application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 on behalf of the Appollo Equipments Pvt. Ltd. seeking intervention and quashing of the insolvency proceedings under IBC bearing C.P. (IB) No. 507 of 2021.

The applicant in the present application has prayed for the following reliefs: -

- a) *That this Hon'ble Adjudicating Authority may allow the Applicant to intervene by allowing the present application, in the interest of justice;*
- b) *That this Hon'ble Adjudicating Authority may be pleased to grant any ancillary or consequential directions or such other and further reliefs as may.*
- c) *Be deemed fit and proper by this Hon'ble Tribunal, in the interest of justice.*

2. Briefly stated the facts of the case as mentioned in the instant application, which are just and necessary for adjudication, are as follows: -

- (i) That, the present Application is filed under Section 60(5) of IB Code, 2016 read with rule 11 of the National Company Law Tribunal Rules

seeking intervention and quashing of the insolvency proceedings under IBC bearing C.P (IB) No. 507 of 2021, and any other proceedings emanating therefrom, which has been fraudulently and maliciously initiated by Axis Trustee Service Ltd. under Section 7 of IBC against the Corporate Debtor.

- (ii) That the Corporate Debtor along with M/s Janak Raj & Co. had approached the Applicant with an offer of investment in high value commercial property being 4th Floor, Plot 108, Udyog Vihar, Gurgaon, Haryana, 122016. That the Corporate Debtor sought investment/funding from the Applicant and in view of the representations made by the Corporate Debtor and M/s Janak Raj & Co., and consequently, the Applicant invested a sum of Rs. 1,00,00,000/- (INR One Crore) which has to be treated as an advance against the property.
- (iii) That pursuant to that the parties namely the Applicant, Corporate Debtor and M/s Janak Raj & Co. entered into a Memorandum of Understanding dated 28.01.2019 (“**MoU**”) and subsequently entered into an Agreement to Sell dated 18.01.2021 (“**ATS**”), it was agreed that the Corporate Debtor shall not create any third-party rights/interest in any manner whatsoever upon the property and will not affect the right and interest of the Applicant.
- (iv) However, the Corporate Debtor maliciously and fraudulently started raising funds from financial institutions and started engaging in commercial dealings so as bring in Quasi-Equity providers to infuse additional funds. Corporate Debtor dishonestly entered into various Agreements such as Debenture Subscription Agreement dated 27.03.2019, Debenture Trust Deed dated 28.03.2029, Corporate Guarantee and Personal Guarantee etc. in order to prejudice the interest of the Applicant. That the aforesaid agreements entered by

Corporate Debtor thereby creating third-party rights in the aforesaid property are illegal, unlawful and void-ab-initio.

- (v) That the Applicant in apprehension of his interests not being secured, filed a Commercial Suit for Declaration and Permanent Injunction being Commercial Suit No. 70/2021 before the Ld. ADJ at Gurugram, Haryana against the Corporate Debtor on 13.09.2021 seeking declaration of the aforesaid Debenture Subscription Agreement, Debenture Trust Deed and transaction between the Corporate Debtor and Financial Creditor as null and void-ab-initio. It is submitted that the LD. ADJ vide order dated 20.09.2021 was pleased to grant interim stay in favour of the Applicant.
- (vi) That the Debenture Subscription Agreement between the Corporate Debtor and Financial Creditor are null and void as the same are in contravention of the MoU dated 28.01.2019 & ATS dated 18.01.2021 executed between the Applicant, Corporate Debtor and M/s Janak Raj and Co. These malicious and mala fide acts of the Corporate Debtor and Financial Creditor were further fortified when the captioned proceedings were initiated by the Financial Creditor under Section 7 of the IBC which are not maintainable and liable to be dismissed with costs. Therefore, the present petition has been filed.

3. We have gone through documents on record filed by the applicant and arguments advanced by counsel for the Applicant.

4. In the present case, the Applicant is an allottee of the Corporate Debtor in relation to 4th Floor of its building situated at Plot 108, Udyog Vihar, Gurgaon, Haryana, 122016, and the Applicant being an allottee of the Corporate Debtor claims that the Applicant Company has an interest in the matter and its right will be severely prejudiced if the Corporate Debtor

is entered into insolvency. The Applicant, therefore, seeks intervention in Section 7 proceedings.

5. The right to initiate Corporate Insolvency Resolution Proceedings (CIRP) vests with the Financial Creditor (by virtue of Section 7 of the IB Code, 2016), Operational Creditor (by virtue of Section 9 of the said Code) and the Corporate Debtor (by virtue of Section 10 of the said Code). The same has been reaffirmed by the Hon'ble Supreme Court in the case of ***M/s Innoventive Industries Ltd. v. ICICI Bank & Anr., 2017***, wherein, the Hon'ble Court has held that:

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom

an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services”.

Further, it was observed by the Hon’ble Supreme Court that it is the duty of the Corporate Debtor to bring into the notice of this Adjudicating Authority that there exists a financial debt and that there is a default in the payment of such debt. The court held that:

“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 is 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”.

6. Further, the Hon’ble National Company Law Appellate Tribunal (NCLAT) in the case of ***L&T Infrastructure Finance Company Ltd. v. Gwalior Bypass Project Ltd., Company Appeal (AT) (Insolvency) No. 676 of 2019***, opined that it is only the Corporate Debtor who can intervene in the application under Section 7 or 9 of the Code. It was observed that no Financial Creditor can intervene in Section 7 proceedings. The Hon’ble NCLAT has held that:

“16. In view of the aforesaid position of law, we hold that the Appellant being not a Member/ Shareholder of the ‘Corporate Debtor’, and has claimed to be a ‘Financial Creditor’ of the ‘Corporate Debtor’ has no right to intervene to oppose admission of the application under Section 7 preferred by the ICICI Bank against the Corporate Debtor”.

7. Therefore, we are of the view that Section 7 application bearing CP (IB) No. 507/ND/2021 is filed by the Financial Creditor, M/s Axis Trustee Services Ltd. for initiation of CIRP of the Corporate Debtor and it is not open for any third party, including the present applicant, to intervene in these proceedings at pre-admission stage. Hence, the instant application bearing

Int. Pet. No. 33 of 2022 is not maintainable and the applicant is neither a necessary nor a proper party in the matter and present application is accordingly dismissed without costs.

Let copy of the order be served to the parties.

Sd/-
(DR. BINOD KUMAR SINHA)
MEMBER (TECHNICAL)

Sd/-
(P.S.N. PRASAD)
MEMBER (JUDICIAL)