

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (Insolvency) No. 947 of 2022
& I.A. No. 2682, 2683 of 2022 & 1652 of 2023

(Arising out of the Order dated 08.07.2022 passed by the National Company Law Tribunal, New Delhi, Bench – VI in IB- 763/(ND)/2021)

IN THE MATTER OF:

Mr. Rajeev Kumar Jain

Ex-Director/ Shareholder of
M/s Unicast Autotech Private Limited

...Appellant

Versus

1. M/s Uno Minda Limited

Formerly M/s Minda Industries Limited
CIN: L74899DL1992PLC050333
Regd. Office at: B-64/1,
Wazirpur Industrial Area,
New Delhi – 110052.
Email ID: csmil@mindagroup.com

...Respondent No. 1

2. M/s Unicast Autotech Private Limited

Through its Interim Reoslution Professional
Regd. Office at: 27-B/7, New Rohtak Road,
New Delhi – 110005.
Email ID : info@kiranudyogindia.com

...Respondent No. 2

Present

For Appellants:

Mr. Swetab Kumar, Mr. Shashank Agarwal,
Advocates.

For Respondents:

Mr. Mahip Singh, Mr. Karan Kohli, Mr. Krishan
Kumar, Mr. Varun, Advocates.

J U D G E M E N T

(02.01.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present Appeal i.e., Company Appeal (AT) (Insolvency) No. 947 of 2022 has been filed by Mr. Rajeev Kumar Jain, Ex Director and one of the

Shareholders of M/s Unicast Autotech Private Limited (**'Corporate Debtor'**) under Section 61 of the Insolvency & Bankruptcy Code, 2016 (in short **'Code'**). Aggrieved by the Impugned Order dated 08.07.2022 passed by the National Company Law Tribunal, New Delhi, Bench -VI (in short **'Adjudicating Authority'**) in IB- 763/(ND)/2021 where the Adjudicating Authority accepted the application of the Respondent No. 1 i.e., M/s Uno Minda Limited (Formerly known as M/s Minda Industries Limited) filed under Section 7 of the Code and Corporate Insolvency Resolution Process (in short **'CIRP'**) was initiated against the Corporate Debtor.

2. Heard, the Counsel for the Parties and perused the record made available including the cited judgements.

3. It is the case of the Appellant that the Corporate Debtors was incorporated on 23.08.2012 and is engaged in the business of manufacturing aluminium die casts, whereas the Respondent No. 1 is engaged in the business of supplying automotive solutions to original equipment manufacturers (in short **'OEM'**).

4. The Appellant submitted that the Corporate Debtor and the Respondent No. 1 had good business relationship with each other for long time and sometime during December, 2020 the Corporate Debtor and its Promoters including the Appellant herein approached the Respondent No. 1 with an offer to sale 100% stake in the Corporate Debtor along with the only asset if the Corporate Debtor situated at **Narsapura Unit**. It is the case of the Appellant that and after discussions, the Respondent No. 1 made a

Non-Binding Offer (in short '**NBO**') dated 15.02.2021 to the Corporate Debtor.

5. The Appellant submitted that there were some failures on the part of the Corporate Debtor and the Corporate Debtor decided to terminate the said NBO. The Appellant brought out that the Respondent No. 1, subsequently started talk with one **Sandhar Technology Limited**, which later withdrew its offer and therefore the Corporate Debtor and the Promoters including the Appellant herein again approached the Respondent No. 1 expressing their desire to discuss for sale of stake in the Corporate Debtor which was agreed by the Respondent No. 1 through fresh NBO dated 15.04.2021. The Appellant and other Promoters of the Corporate Debtor agreed to transfer the Corporate Debtor along with Narsapura Unit for Rs. 3 Crores against its outstanding dues.

6. The Appellant submitted that in furtherance of the NBO, the Corporate Debtor and its Promoters, namely, Mr. Arvind Kumar Jain, Mr. Vivek Kumar Jain and Mr. Rajeev Kumar Jain entered into a Business Support Agreement (in short '**BSA**') dated 17.04.2021 with the Respondent No. 1. The BSA provided that the Respondent No. 1 was to acquire 100% shareholding of the Corporate Debtor and further agreed to supply raw material funding and critical capital working requirements and it was decided that all such money lent would be considered as unsecured debts given by the Respondent No. 1 to the Corporate Debtor. The Appellant submitted that the understanding between the parties was that such

unsecured debts would become payable only from the Promoters i.e. (Rajeev Kumar Jain, Mr. Arvind Kumar Jain & Mr. Vivek Kumar Jain).

7. It is also the case the Appellant that in the month of May 2021 the Corporate Debtor approached the Respondent No. 1 for further financial assistance. During discussions, the Respondent No. 1 asked the Promoters to pledge their entire shareholding in the Corporate Debtor and also furnish respective guarantees and accordingly the Promoters pledge their shares along with one sister concern i.e., M/s Kiran Udyog Private Limited (in short '**KUPL**'). The Appellant stated that the Promoters & KUPL (jointly termed as '**Promoters Group**') placed their entire shareholding in the Corporate Debtor vide Share Pledge Agreement dated 12.05.2021 (in short '**SPA**'). The Promoters Group issued the deed of guarantee dated 14.05.2021 in favour of Respondent No. 1.

8. The Appellant submitted that all transactions were happening between the Respondent No 1 and the Promoters and not with the Corporate Debtor as such no financial assistance was availed by the Corporate Debtor from the Respondent No.1.

9. The Appellant brought out that as agreed with the Respondent No. 1 the Corporate Debtor continued to purchase various goods from its suppliers and the Respondent No. 1 provided support to the Corporate Debtor in acquiring such goods required for operation and between April, 2021 to May, 2021 certain payments were made by the Respondent No. 1 amounting to Rs. 1.15 Crores. However, due to financial distress of the Corporate Debtor, the same could not be repaid to the Respondent No. 1.

10. The Appellant brought out that the Respondent No. 1 issued a notice terminating the BSA and calling upon the Promoters group to repay Rs. 1.43 Crores as outstanding amount in terms of Clause 2.5 of BSA along with interest @ 18% per annum.

11. The Appellant admitted that they could not reply such notice of the Respondent No. 1 however, on 10th June, 2022 the Corporate Debtor paid Rs. 24 Lakhs and were trying to find to repay the entire money. However, the Respondent No. 1 issued a legal notice on 08.10.23021 for invoking guarantee furnished by the Promoters groups and calling them to pay outstanding dues of Rs. 1,28,94,205/- and finally on 06.12.2021 the Respondent No. 1 filed the application under Section 7 of the code which was admitted by the Adjudicating Authority vide Impugned Order dated 08.07.2022.

12. It is the case of the Appellant that the Impugned Order is illegal as there was no financial debt against the Corporate Debtor and at the best the money owed to the Respondent No. 1 could have been treated as operational debts.

13. The Appellant referred to definition of financial debt under Section 5(8) of the code and stated that since the present case do not fall strictly in the ambit of such definition the same cannot be considered as financial debt.

14. The Appellant conceded that there was a debt but argued that it was more in nature of operational debt rather than a financial debt as no financial assistance has been provided by the Respondent No. 1 to the

Corporate Debtor and the Respondent No. 1 only made payments to the suppliers of the Corporate Debtor procuring raw material on behalf of the Corporate Debtor which cannot be considered as financial debt.

15. It is also the case of the Appellant that there was no stipulated interest as such there was no time value of money and therefore the debt cannot be treated as financial debt. In this connection, the appellant referred to the judgements of the Hon'ble Supreme Court of India like **Anuj Jain, Interim. Resolution Professional for Jaypee Infra.tech Ltd. v Axis Bank Limited & Ors.** [(2020) 8 SCC 401], **New Okhla Industrial Development Authority v Anand Sonbhadra** [2023 (1) SCC 724] and **Amrit Kumar Agrawal v Tempo Appliances Private Limited** [2020 SCC Online NCLAT 1202].

16. It is further the case of the Appellant that debt, at the best was payment to be made by the Promoters group and not by the Corporate Debtor and therefore the application under Section 7 of the Code could not have been accepted by the Adjudicating Authority.

17. The Appellant stated that the Adjudicating Authority erred in concluding that the debt was financial debt because it is secured by SPA and guarantee deeds, whereas the Corporate Debtor never agreed to repay the debt to the Respondent No. 1.

18. The Appellant argued that except the BSA, the Respondent No. 1 was also incharge of the Corporate Debtor both in respect to company affairs and financial affairs and as such the Respondent No. 1 cannot assume the character of the Financial Creditor.

19. Concluding his arguments, the Appellant requested this Appellate Tribunal to dismiss the Impugned Order.

20. Per contra, the Respondent No. 1 denied all the averments of the Appellant treating these as mischievous, misleading and without any substance; with the sole purpose to derail the resolution process of the Corporate Debtor.

21. The Respondent No. 1 gave the entire sequence of the case including financial assistance provided to the Corporate Debtor and the subsequent events which led to filing the application under Section 7 of the Code purely due to failure of the Corporate Debtor in meeting his obligations.

22. The Respondent No. 1 denied the averments of the Appellant that debt arising out of BSA is an operational debt and not financial debt since no disbursement was made by the Respondent No. 1 to the Corporate Debtor. It is the case of the Respondent No. 1 that the Appellant never disputed the execution of the BSA and also not denied that borrowers received the amount from the Respondent No. 1. The Respondent No. 1 stated that default was committed in making repayment to the Respondent No. 1 is undisputed fact. He referred to recital D, Clause 2.4, 2.5 and 3.2 of the BSA dated 17.04.2021 and similarly referred to recital A clause 1.1, Clause 2 and Clause 18.7 of the deed of pledge dated 14.05.2021, in support of his arguments that there was clear financial debt not operational debt.

23. It is the case of the Respondent No. 1 that the debt and the liability of the borrowers is admitted position between parties and once default takes place it is right of the financial creditors to approach the Adjudicating

Authority, who after being satisfied himself about default, is obligated to admit the application under Section 7 of the Code.

24. In this connection, the Respondent No. 1 cited judgment of the Hon'ble Supreme Court of India i.e., ***Innoventive Industries Ltd. v. ICICI Bank***, (2018) 1 SCC 407, ***Shailesh Sangani v. Joel Cardoso & Ors.***, Company Appeal (AT) (Insolvency) No. 616 of 2018, ***E.S. Krishnamurthy v. Bharath Hi-Tech Builders (P) Ltd.*** (2022) 3 SCC 161, ***Radha Sundar Dutta v. Mohd. Jahadur Rahim & Ors.*** AIR 1959 SC 24, ***M/S Orator Marketing Pvt. Ltd. v/s M/S Samtex Desinz Pvt. Ltd*** [Civil Appeal No. 2231/2021] and ***Phoenix Arc Pvt. Ltd. v. Spade Financial Services Ltd. & Ors*** (2021) 3 SCC 475.

25. The Respondent No. 1 cited this Appellate Tribunal judgement in the matter of ***Sach Marketing Pvt. Ltd. v. RP of Mount Shivalik Industries Ltd.***, Company Appeal (AT) (Insolvency) No. 180/2021, where it was held that to constitute the financial debt in terms of Section 5(8) of the Code, the principle element is disbursal of money and commercial effect of borrowing, which accordingly the Respondent No. 1 which fully evident in the present case as such the debt is financial debt.

26. The Appellant submitted that there is fallacy in the argument of the Appellant in trying to differentiate between liability to be paid by the Promoters Group and not by the Corporate Debtor.

27. In this connection, the Respondent NO. 1 responded that the BSA was entered not only by the Promoters but also by the Corporate Debtor and it is only the Corporate Debtor who has been repaying the amount so far to the

Respondent No. 1. The Respondent No. 1 submitted that nothing was paid by the Promoters Group from their accounts, which has also not been disputed even by the Appellant.

28. The Respondent No. 1 also highlighted Clause 2.5 of BSA which very clearly includes both the Corporate Debtor as well as the Promoters to make the payments and similarly clause 18.7 of the SPA also defines joint and several liability on both the Corporate Debtor as well as the Promoters. As such the Corporate Debtor and the Promoters which jointly and severally responsible for the financial debt it owes to the Respondent No. 1.

29. The Respondent No. 1 denied that he was looking after the management of the Corporate Debtor and submitted that Clause 3.2 of BSA was incorporated only to protect the financial interest of the Respondent No. 1, which provided that any withdrawal and borrowing of money or operation of the bank account of the Corporate Debtor was required to be approved by two persons one from the Corporate Debtor and one from the Respondent No. 1. In this connection, the Respondent No. 1 submitted that the authorised personal of the Corporate Debtor refused to sign the cheque to be issued in favour of the Respondent No. 1 towards repayment of the financial debt.

30. Concluding his arguments, the Respondent No. 1 requested this Appellate Tribunal to dismiss the appeal with exemplary costs.

Findings

31. From the averments of the parties, it becomes clear that the main issue is regarding the character of the debt given by the Respondent No. 1

to the Corporate Debtor i.e., whether this is a financial debt or a operational debt.

On one hand, the Appellant has submitted that no financial debt was given to the Corporate Debtor but only to the suppliers of goods on behalf of the Corporate Debtor and as such it should be treated operational debt and not financial debt. He also referred to various clauses of BSA, SPA and debt of guarantee.

On the other hand, on the same issue, regarding character of the debt, the Respondent No. 1 submitted that the Respondent No. 1 was providing working capital required for raw material to the Corporate Debtor and on behalf of the Corporate Debtor and at his instruction the Respondent No. 1 was making payments, as such it was clearly financial debt.

32. The Respondent No. 1 stated that arrangements and funds provided by the Respondent No. 1 to the Corporate Debtor was meeting all requirement of Section 7 of the Code.

33. It would be desirable to refer to various clause of BSA, SPA and deed of guarantee which have been argued by both the parties which reads as under :-

“Business Support Agreement dated 17.04.2021:

• Recital D - The Promoters also expressed that they need assistance towards funds to manage critical working capital requirements of the Business from Minda in order to outstanding customer orders. Therefore, Minda agreed to support the ongoing business by supplying raw

materials funding and managing critical working capital requirements of the Business.

- Clause 2.4 - All the amounts spent by Minda to provide the business support shall be considered as unsecured debt extended by Minda to Unicast.

- Clause 2.5 - Upon termination of this Agreement and in case of any failure by Unicast or Promoters to repay, upon demand and in any event within 7 (seven) days from the date of termination of this Agreement pay Minda, without any demur or protest, any and all the amounts paid by Minda until such date to Unicast, along with interest at the rate of 18% (compounded annually), applicable from the date of termination until repayment.

- Clause 3.2 - Any withdrawal from the CACC and the CA account shall require approvals by two people, one from the Unicast personnel group and other from the Minda group.

Deed of Pledge dated 14.05.2021

The deed refers to Minda as lender and Unicast as borrower.

- Recital A - The Lender has, at the request of the Borrower, agreed at its sole discretion to make available to the Borrower the Financial Assistance, on the terms and conditions set out in the Financing Document (defined hereinafter), Business Support Agreement and other Financing Documents at the sole discretion of Lender.

- Clause 1.1 - Financial Assistance, means assistance provided under Facility Agreement and/or Business Support Agreement or otherwise.

- Financing Document means Facility Agreement, Business Support Agreement and any document executed between Borrowers, Borrowers' affiliate and lender, Lenders Affiliate and its Promoters.

- Clause 2 - The Pledgors hereby confirm that for securing the due repayment of the Financial Assistance in accordance with the terms of the respective Financing Department and Business Support Agreement together with interest and any other monies payable thereon by the Borrower to the Lender, the Pledgors hereby pledge Specified Percentage of Shares of the Borrower, and more particularly described in the Schedule II hereto in favour of the Lender.

- Clause 18.7 - The liability of Borrower and each of the Pledgor under this deed shall be joint and several.

Deed of Guarantee dated 14.05.2021 (Corporate Guarantee and Promoter Guarantee)

- Secured Obligations shall mean at any time all the amounts payable or obligations to be performed by the Borrower and each Obligor to the Lender (i) the total amount of the principal and interest on the Financial Assistance...

- Clause 2.1 - Notwithstanding anything contained herein, the Lender shall have the sole discretion to make disbursements of the Financial Assistance to the Borrower under or in pursuance of the Financing Document / Business Support Agreement...

- Clause 2.2 - The Borrower shall duly and punctually pay to the Lender, the Secured Obligations in accordance

with the Financing Documents and perform and comply with all the other terms, conditions and covenants contained in the Financing Documents.”

(Emphasis Supplies)

34. We will also like to refer to Section 3(6), 3(8), 3(10), 3(11), 3(12), 3(33), 5(7), 5(8), 5(20), 5(21) of the Code.

3. Definitions.

(6) “**claim**” means – (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured; (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured

(8) “**corporate debtor**” means a corporate person who owes a debt to any person;

(10) “**creditor**” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

(11) “**debt**” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

(12) “**default**” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;

(33) “**transaction**” includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

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 alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes ***

(20) “**operational creditor**” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) “**operational debt**” means a claim in respect of the provision of goods or services including employment or a debt in respect of the 2 [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”

(Emphasis Supplies)

35. From above, it becomes clear that the financial debt means debt along with interest, if any, which is disbursed. From this, it emerges that interest is not sine-qua non, therefore, interest may or may not be payable by the Corporate Debtor and it is understanding between the parties which is significant and relevant to ascertain the existence of time value of money which can be in several forms, other than pure payment of interest.

36. It further emerges that disbursal of fund is required but the definition does not use the expression that disbursal should be made to the Corporate Debtor only. Hence, it can be implied that any disbursal made on behalf of the Corporate Debtor or at the instructions of the Corporate Debtor may also tantamount to disbursal made to the Corporate Debtor. We note that it is the Corporate Debtor who was beneficiary of such disbursal. In the present case undisputedly, the Corporate Debtor used to procure raw material from vendors for which payments were made by the Respondent No. 1, at the instructions of the Corporate Debtor and therefore it assume the character of financial debt.

37. Arguments of the Appellant that disbursements were not made in the accounts of the Corporate Debtor is not of much credence. Further the arguments of the Appellant that at the best such financial assistance by the Respondent No. 1 to the Corporate Debtor should be treated as operational debt because it was regarding supply of the material is also not convincing. The Respondent No. 1 was not supplier of the raw material and the Respondent No. 1 was only supplying funds for working capital needs of the Corporate Debtor as such, financial assistance and is nothing but financial debt.

38. We are of the opinion that the intent between the Promoters Group including the Appellant, the Corporate Debtor and the Respondent No. 1 was clear i.e., to provide the working capital to the Corporate Debtor in various forms including for making payments of raw material on behalf of the Corporate Debtor. Raw material is obviously is to be treated as part of

working capital and any financial assistance towards working capital cannot be treated as operational debt and has to be taken only as financial debt.

39. From the various clauses referred earlier of BSA, SPA and deed of guarantees it becomes clear that these documents were made jointly by the Promoters, the Corporate Debtor and the Respondent No. 1. The Corporate Debtor consented to be party of the agreement. At this stage, the contentions of the Appellant that it was the agreement between only the Promoter Group and the Respondent No. 1 and not with the Corporate Debtor cannot be accepted.

40. We have perused the judgment cited by both the parties. The judgements have been passed in given facts of their cases. In the present case, we consider that there is a clear case of financial debt and default which has been rightly appreciated by the Adjudicating Authority in the Impugned Order dated 08.07.2022.

41. Therefore, we do not find any error in the Impugned Order dated 08.07.2022, which requires our interference.

42. In fine, the appeal, devoid of any merit, stand dismissed. No Costs. Interlocutory Application(s), if any are Closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

Sin