NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 742 of 2023

[Arising out of order dated 19.05.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench-V in CP (IB) No.283 of 2023.]

IN THE MATTER OF:

Sanjay Pandurang Kalate,
Suspended Director of
Evirant Developers Pvt. Ltd.
403, Mont Vert Tropez,
Wakad, Taluka-Mulshi,
Pune – 411 057 **...Appellant**

Versus

Vistra ITCL (India) Ltd.
IL&FS Financial Centre,
Plot C-22, G Block, 6th Floor,
Bandra-Kurla Complex, Bandra East,
Mumbai – 400 051 **...Respondent No.1**

Jaynat Vallabhdas Kaneria,
A/34, Abhimanshree Society,
Pashan Baner Link Road,
Pashan, Pune – 411 008 **...Respondent No.2**

Dhirajlal Gordhandas Hansalia
Nirmal Plot No.12,
Pallod Farms-II, Street No.03,
Behind Bharat Petrol Pump,
Baner Road, Baner,
Pune – 411 045 **...Respondent No.3**

Mohan Pandurang Kalate
Pandurang Niwas, S. No.-277,
Wakad Chowk, Wakad,
Pune – 411 057 **...Respondent No.4**

Jayesh Natvarlal Sanghrajka
Insolvency Professional
405-407, Hind Rajasthan Building,
Dadar, Mumbai, Maharashtra – 400 014 **...Respondent No.5**

Present:

Appellant:	**Mr. Abhinav Vashisht, Sr. Advocate with Mr. Kushal Bansal, Ms. Nidhi Yadav and Ms. Sonal Sarda, Advocates.**
For Respondents:	**Mr. Arvind Nayyar, Sr. Advocate with Mr. Mohd. Shahan Ulla, Mr. Akshay Joshi, Mr. Shubham Pandey, Advocates for R-1** **Mr. Dhaval Deshpande and Mr. Amir Arsiwala, Advocates for R-5.**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 ("**IBC**" in short) by the Appellant arises out of the Order dated 19.05.2023 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-V) in CP (IB) No.283 of 2023. By the impugned order, the Adjudicating Authority has admitted the application under Section 7 of the IBC filed by Vistra ITCL (India) Ltd.- present Respondent No.1 and initiated Corporate Insolvency Resolution Process ("**CIRP**" in short) of the Corporate Debtor – Evirant Developers Pvt. Ltd. ("**EDPL**" in short). Aggrieved by this impugned order, the present appeal has been filed by Shri Sanjay Pandurang Kalate, suspended Director of the Corporate Debtor.

2. The brief facts of the case which are necessary for deciding this appeal are as outlined below: -

- The Appellant along with his father and brothers teamed up with Respondents No.2 and 3 to undertake development and construction of residential and commercial projects in Pune.

- Subsequently, on 09.10.2018, EDPL-Corporate Debtor was incorporated by them to develop Project Panorama and Project Vedanta on plot 277 and 195 at Wakad, Pune.
- The Corporate Debtor authorized the issuance of 5790 fully secured, redeemable, non-convertible debentures ("**NCD**" in short) having par value of Rs.1 lakh each by way of private placement and Respondent No.1- Vistra ITCL was appointed as the Debenture Trustee as per the Debenture Trust Deed of 26.11.2018.
- Debenture holders, namely, India Realty Excellence Fund III and India Realty Excellence Fund IV managed by Motilal Oswal Financial Services Ltd. as Fund Manager agreed to invest in the project by subscribing to 3441 NCDs.
- Subsequent to the subscription of NCDs, the debenture holders invested Rs.34,41,00,000/-. On 27.09.2019, the First Supplemental and Amendment Deed to the Debenture Trust Deed came to be executed.
- The Corporate Debtor started committing payment defaults besides not complying to obligations set out in the Debenture Trust Deed. The Debenture holders and the Fund Manager issued notices / emails to the Corporate Debtor seeking payment of outstanding amounts.
- As the Corporate Debtor continued to remain in default, the Respondent No.1 issued a Put-Option Notice dated 12.01.2023 to the Corporate Debtor calling upon it to redeem or purchase the NCDs from the debenture holders.
- The Corporate Debtor failed to redeem the NCDs and repay the due amount of Rs.65,08,05,433/- following which the Financial Creditor –

Respondent No.1 filed the Section 7 application vide CP(IB)/283(MB)2023 before the Adjudicating Authority.

- An IA No. 2002/MB/2023 had also been filed in the main company petition by the present Appellant in which it was stated that there were disputes amongst the Directors of the Corporate Debtor; that the Respondent No.2 acted in collusion with the Financial Creditor to defraud the Corporate Debtor and the Respondent No.2 had represented the Corporate Debtor in the main company petition without authorization.
- The main CP(IB) petition was heard by the Adjudicating Authority on 11.05.2023 and was reserved for order. Before pronouncement of the orders in the main company petition, IA 2002/2023 was heard by the Adjudicating Authority on 17.05.2023 and dismissed.
- The orders reserved by the Adjudicating Authority in the main company petition was pronounced on 19.05.2023 whereby it admitted the Section 7 application.
- Aggrieved by the impugned order, the present appeal has been preferred.

3. The Learned Senior Counsel for the Appellant submitted that Section 7 application has been mischievously filed in collusion between the Financial Creditor and Respondents No.2 to 4. It was vehemently contended that though the insolvency petition was filed by Respondent No.1 with fraudulent and malicious intent, the same was ignored by the Adjudicating Authority. It was further stated that though IA No.2002/MB/2023 had been filed by the Appellant to show the unhealthy collusion amongst Respondents Nos. 1 to 4, yet the Adjudicating Authority passed the impugned order without

adjudicating upon the above IA. The impugned order was assailed on the ground that it did not even in the passing make a mention about the IA which had been filed by them regarding these serious allegations of fraud, misrepresentation and collusion.

4. It was further submitted that the Respondents No.2 and 3 took unilateral decisions on behalf of the Corporate Debtor while keeping the Appellant uninformed. Further, the Respondents refused to provide statutory records and audited financial statements of the Corporate Debtor to the Appellant. Besides a Civil Suit bearing No.2182/2022 which was filed against the Respondents in District Court, Pune, multiple criminal complaints and related FIRs were filed against them. However, the Adjudicating Authority failed to take cognizance of these factors and in unearthing the collusion amongst Respondents No.1-4.

5. Advancing their arguments further, it was stated that the present Section 7 application has been filed with the help of fabricated and manufactured documents as well as by suppression of material facts. It was reiterated that the Adjudicating Authority should have taken due cognizance of the interim application filed by the Appellant and hearing of the main company petition while the interim application was pending cannot be justified. Rather than admitting the Section 7 application, the Adjudicating Authority could have considered passing orders under Section 65 of the IBC.

6. Refuting the above submissions made by the Appellant, the Learned Senior Counsel for the Respondent submitted that the Corporate Debtor in their reply before the Adjudicating Authority having clearly admitted that there was a financial debt owed to the Financial Creditor and that there was

a default committed thereto, the Adjudicating Authority committed no error in admitting the Section 7 application. Rebutting the contention of the Appellant that the Adjudicating Authority had passed the impugned order in the main company petition without adjudicating on the IA No. 2002/2023, it was pointed out that the said IA was duly considered on 17.05.2023 by the Adjudicating Authority before passing of the impugned order on 19.05.2023. Moreover, while dismissing the said IA, the Adjudicating Authority had duly recorded the reasons for doing so.

7. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

8. It is trite law that under the IBC once a debt becomes due or payable, in law and in fact, and there is incidence of non-payment of the said debt in full or part thereof, CIRP may be triggered by the Financial Creditor as long as the amount in default is above the threshold limit. It is also well accepted that debt means the liability in respect of a claim and claim means a right to payment even if it is disputed.

9. Given this settled position of law, at this juncture we may now glance through the facts of the present case. We find that at no point of time, the Corporate Debtor had contested before the Adjudicating Authority the fact that the Financial Creditor had disbursed credit facilities to the Corporate Debtor by issuance of NCDs. It has also been admitted by the Corporate Debtor that in terms of Debenture Trust Deed dated 26.11.2018, the Financial Creditor was entitled to redemption of the NCDs. The Corporate Debtor did not deny or dispute the claim made by the Respondent No.1 amounting Rs.65,08,05,433/- which had become due and payable on 11.01.2023.

Admittedly, the Corporate Debtor failed to redeem these NCDs and remit the requisite amount to the Financial Creditor. We also notice that the Corporate Debtor while explaining as to how and why they had defaulted in repayment of the debt, several reasons were attributed but none of them assigned any fault on the part of the Financial Creditor. We find that the Corporate Debtor on their own volition admitted before the Adjudicating Authority that various macro-market and micro-market factors propelled by the economic downturn caused by the Covid pandemic led to decline in their sales, revenue and cash flow. This had prevented them from paying back the amount due to Financial Creditor on time. The only reprieve which had been sought by the Corporate Debtor was that they be given one chance to revive themselves as they were seriously endeavouring to settle the matter by getting in some investors. This testifies that they admitted that they were financially incapacitated in repaying the outstanding debt on their own steam and were trying to mobilize resources to liquidate their debt.

10. Now coming to the impugned order, we find that all these facts have been appropriately captured therein by the Adjudicating Authority in arriving at their findings. The relevant portions of the impugned order is as reproduced below:

> *"18. On the other hand, in the reply filed by the Corporate Debtor no solid defence has been raised. It has simply been stated that* ***due to circumstances beyond its control, the Corporate Debtor could not pay the amount due and payable to the Financial Creditor****. It has also been stated in the reply that the Real Estate industry was going through a lean patch and* ***there was overall slowdown in the Real Estate Industry at the national level*** *and owing to low demand and slow convertibility, the projects of the Company could not take off. Besides,* ***the business was hit hard by COVID lockdowns****. The Corporate Debtor has further stated in the reply that he was trying to settle the matter by getting some investors and, therefore, the Corporate Debtor ought not be admitted into CIRP.*

19. Considering the fact that ***no substantive defence has been raised in the reply filed by the Corporate Debtor and the factum of disbursement of loan by way of issuance of NCDs and the subsequent default committed by the Corporate Debtor has also not been disputed, it stands established that there has been a Financial Debt in respect of which a default has been committed.*** *The loan was disbursed between 31.12.2020 and 31.12.2022 and the default was committed on 11.02.2023 after the payment was not made even after issuance of put option notice dated 12.01.2023. Therefore, the present Petition is well within the period of limitation.*

20. As a corollary to the above discussion, we hold that the Petitioner/Financial Creditor has been able to establish the existence of Financial Debt and the default committed by the Corporate Debtor. Therefore, a clear cut of admission of Section 7 of the Code is made out."

(Emphasis supplied)

11. In this factual backdrop, when financial debt is undisputedly established and default in payment is also crystal clear, we are of the considered opinion that the Adjudicating Authority did not commit any error in admitting the Section 7 application.

12. This now brings us to the primary contention of the present Appellant that the Adjudicating Authority committed an error for having passed the impugned order in the main company petition without adjudicating on the IA No. 2002/2023. It has been the case of the Appellant that the Adjudicating Authority failed to appreciate various judgments of the Hon'ble Supreme Court which have emphasized that Adjudicating Authority have an important role in preventing any blatant effort made by any party to bring a Corporate Debtor under the rigours of CIRP by taking recourse of malicious and/or collusive filing of insolvency petition. The Learned Senior Counsel for the Appellant referred to the judgment of this Tribunal in ***Company Appeal (AT)***

(Ins.) No.258 of 2021 in the Hytone Merchants Private Limited v. Satabadi Investment Consultants Pvt. Ltd. ("**Hytone**" in short) in which it had been held that if a Section 7 application is filed collusively and with mala-fide intention, the application can be rejected by relying on Section 65 of the IBC.

13. In support of their contention, averment has been made that in IA 2002/23 that certain disputes had arisen between the Appellant and his brother, Respondent No. 4 following which a Family Settlement Deed dated 31.10.2019 was executed along with a Memorandum of Understanding dated 05.11.2019 (hereinafter referred to as "MoU-1"). By virtue of this MoU, the brothers of the Appellant were to transfer their respective shareholdings to him for which he paid certain amounts to his brothers but after partially acting upon the settlement agreement, they had later backtracked.

14. It was also submitted that the said I.A. pointed out that Respondents No. 2 and 3 had executed two mortgage deeds on 07.09.2019 and 21.12.2019 by which the property of the Corporate Debtor was mortgaged to the Fund Manager for Rs.114 crore though mortgage rights were given only for about Rs.12 crores. The mortgage deed was illegally executed on the basis of a Board Resolution dated 09.01.2019. This Board Resolution had been passed illegally in violation of the provisions of the Companies Act, 2013 by keeping the Appellant in the dark. Elaborating further, it was submitted that once the Appellant started investigating into the fabrication of documents leading to illegal utilization of the monies by Respondents No.2 and 3, the latter had executed a Memorandum of Understanding on 29.01.2022 (hereinafter referred to as "MoU-2"). By this MoU-2, Respondents No.2 and 3 had agreed

to retire from the Corporate Debtor but subsequently failed to perform their obligations particularly in obtaining an unconditional NoC from the Fund Manager. It was further added that the said IA pointed out a Civil Suit and criminal complaints had been filed by the Appellant against the Respondents for forgery of documents and fraud committed by them but the Adjudicating Authority passed the impugned order without deliberating on the facts placed before it. In the given circumstances, it was unjustified on part of the Adjudicating Authority to have heard the main company petition while keeping the IA pending though serious questions relating to both facts and law were raised therein and deserved to have been adjudicated upon in the first instance. Submission has been pressed that the impugned order being bereft of any reference to the IA shows that the Adjudicating Authority wrongly glossed over the fact that the main company petition was fraudulent, collusive and malicious in intent.

15. This was strongly countered by the Learned Senior Counsel of Respondent No. 1 by stating that the contention of the Appellant lacked credence since the IA was considered on 17.05.2023 by the Adjudicating Authority before passing of the impugned order on 19.05.2023. It was asserted that while dismissing the IA, proper reasons were also duly recorded in holding that the IA was frivolously filed by the Appellant and sans the approval and authorization of the Board of Directors of the Company.

16. From material facts on record, we find substance in the contention of Respondent No.1 that the IA was not only heard by the Adjudicating Authority but was heard before pronouncing the order in the main company petition. It is also borne out from the orders that both parties were present and had

placed their respective contentions / arguments before the Adjudicating Authority in the matter of the IA. Hence, we are not in a position to accept the submission of the present Appellant that the IA has not been properly adjudicated upon by the Adjudicating Authority. It may now be useful to take note of the orders passed by the Adjudicating Authority in I.A. 2002/2023 which is to the effect:

> *"Adv. Sarosh E. Bharucha appeared for the applicant.*
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> *Adv. Ryan D'Souza a/w. Adv. Zaid Mansuri i/b. DSK Legal appeared for the Financial Creditor. The present application is filed by Mr. Sanjay Pandurang Kalate who is Director and Shareholder of the Corporate Debtor under Rule 11 of NCLT Rules, 2016.*
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> *Heard IA No. 2002/2023. Applicant claims that certain fraud has been committed by one Mr. Kaneria. It has been stated that C.P.(IB)/283/2023 has already been Reserved for Order by this Bench. In the C.P.(IB)/283/2023 which has been filed under Section 7 of Insolvency & Bankruptcy Code, 2016, one Mr. Kaneria is stated to file reply without any authorization of Board of Directors. It has further been pointed out that* ***there is some dispute inter se between the Directors of the Company and some settlement agreement*** *was executed whereby, Mr. Kaneria agreed to step down from his Directorship. It is further been pointed out that the reply filed by the Mr. Kaneria in the C.P.(IB)/283/2023 should not be taken into consideration as the same has been filed without any authorization of the Board of Directors of the Company.*
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> *During the course of the arguments* ***when the Counsel for the applicant asked as to whether the instant application has been filed with the approval and authorization of the Board of the Directors of the company. It was stated by the Counsel for the applicant that there is no such authorization on behalf of the Board of the Directors of the company to file the instant application.*** *That being so, on the basis on this the instant* ***application which appears to be frivolous*** *application and seems to have been filed with the view to delay the proceedings of C.P.(IB)/283/2023 the proceedings of C.P.(IB)/283/2023 cannot be derailed. Therefore, we find the IA No. 2002/2023 has been filed without any merit and the* ***same is hereby dismissed being vexatious in nature****."*
>
> ***(Emphasis supplied)***

17. We are inclined to agree with the reasoning of the Adjudicating Authority in dismissing the IA. It is a settled proposition of law that to prove any transaction to be collusive and fraudulent in nature, the degree of proof and evidence required should be of unimpeachable nature and beyond reasonable doubt. In a matter as serious as this where an imputation of fraud is being made by the Appellant on behalf of the Corporate Debtor against the Respondents, the Adjudicating Authority has rightly held that allowing such an application, without approval of the Board would suffer from impropriety and hence dismissed it as a frivolous and vexatious. While we prima-facie agree that a collusive Section 7 petition can be rejected as has been laid down in the ***Hytone*** (supra) ratio, we must hasten to add the inapplicability of that judgment since in that case the Corporate Debtor was trying to escape its liability as a corporate guarantor in collusion with the Financial Creditor, thereby making the facts distinguishable. We do not countenance this approach of the Appellant of attempting to take undue benefit of the mercies of law by seeking invocation of Section 65 of the IBC. We are also cognizant that given the statutory construct of IBC, the scope and jurisdiction of the Adjudicating Authority being summary in nature, it is distinctly not as extensive as that of a civil court to enquire into disputes arising out of MoUs and related specific performance which have been agitated in the IA. Allowing such meritless and unscrupulous litigation would logically entail derailing the insolvency resolution process which goes against the twin objectives of the IBC of maximization of the value of assets and time-bound insolvency resolution.

18. We have already observed in the preceding paragraphs that it is an undisputed fact that there was disbursal of funds by the Financial Creditor to the Corporate Debtor. Receipt of this amount by the Corporate Debtor has not been controverted by the Appellant. Neither has any claim been made that this entire sum was repaid by the Corporate Debtor. That being the case there arises no doubt in our mind that there was a debt on the part of the Corporate Debtor qua the Financial Creditor which remained unpaid. There is no infirmity in the findings of the Adjudicating Authority that the Financial Creditor having successfully proved the financial debt and default on the part of the Corporate Debtor, Section 7 application has been admitted. Even if for arguments sake we accept the contention raised by the Appellant that there were serious internal disputes amongst the Respondents that cannot be a cogent and reasonable ground for denying the Financial Creditor their right to claim payment towards the debt owed to them by the Corporate Debtor.

19. In fine, we do not find any error in the order impugned passed by the Adjudicating Authority admitting the Section 7 application. There is no merit in the Appeal. The Appeal is dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 05.10.2023

PKM