

M/s Ananya Infraventures Private Limited Vs M/s Tulsiani Constructions & Developers Private Limited

Court: National Company Law Tribunal, Principal Bench, New Delhi

Date of Decision: Feb. 8, 2024

Acts Referred: Contract Act, 1872 " Section 10

Limitation Act 1963 " Section 18, 19

Insolvency and Bankruptcy Code, 2016 " Section 7, 238, 238A

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 " Rule 4

Hon'ble Judges: Ramalingam Sudhakar, President Member; Avinash K. Srivastava, Member (T)

Bench: Division Bench

Advocate: Ashish Kumar, Deepak Girdhar, P. Nagesh, Simran Jyot Singh

Final Decision: Disposed Of

Judgement

Date, In favor of, Amount

05.07.2012, "Tulsiani Constructions",

and Developers",

Private

Limited ("CD"), "INR 50,00,000/-

05.07.2012, CD, "INR 83,12,800/-

06.07.2012, CD, "INR 50,00,000/-

30.08.2012, CD, "INR 6,00,00/-

, Total, "INR 1,89,12,800/-

Whereas for other two cheques which were admittedly encashed for an amount of INR 4,38,000/- the ledger entry dated 26.03.2018 only records "Being amt from",

tulsiyan construction".",

c. The Applicant has alleged a set off of INR 50 lacs against the alleged debt payable by the Respondent/ Corporate Debtor to the Applicant whereas Auditors,,

Report placed by the Applicant shows that INR 50,00,000/- was payable to Tulsiani Homes Private Limited and not to the CD.",

ii. In a clarification dated 08.01.2024 furnished by the Applicant in response to aforesaid queries, The Applicant qua first query has admitted that total amount claimed",

to be in default in Row 2 of Part IV, ought to be INR 3,16,18,033/- and calculation as put forth in the Application has been wrongly calculated. As regards the query b",,,

is concerned, the Applicant has only provided that the error made by the accountant of the Applicant Company in stating the head as "Being rent recd from",,,

tulsiyan construction wherein the actual head should have been same as "Being amt from tulsiyan constructions". Further, qua query c, the Applicant has",,,

admitted that Tulsiani Homes Pvt. Ltd. is a separate legal entity from the Respondent herein and have separate transactions with the Applicant.,,,

iii. Respondent has filed Reply dated 22.01.2024 to the clarification so furnished by the Applicant, whereby the Respondent has denied the clarifications as false.",,,

Respondent has also annexed an email dated 13.06.2018 along with the ledger with respect to rent received by the Applicant.,,,

iv. We are not inclined to take on record any additional document(s) furnished by the parties at this stage of clarification.,,,

7. The Financial Creditor has relied upon the following documents:,,

i. Copy of three cheques, bearing no. 40727, 40728 and 40726 along with its return memo of dishonor for cheque bearing no. 40726 as Annexure-B (Colly).",,,

ii. Ledger account maintained by Ananya Infraventures Private Limited for CD as Annexure C.,,,

iii. Auditor's Report, of the Applicant, for FY, ending, on 31.03.2018 as Annexure D.,,,

iv. Legal Notice dated 26.11.2018 along with postal receipts and delivery report as Annexure E (Colly).,,

v. The Bankers' Books of Evidence Act 1891 certificates along with bank statements of the Applicant as Annexure F (Colly).,,

7. The CD has placed the following documents on record:,,

i. Ledger account maintained by CD for Applicant as Annexure A:1.,,,

8. Analysis and Findings.,,

i. We have heard the Ld. Counsel for the Applicant and Ld. Senior Counsel for the CD and perused the documents submitted by them.,,

ii. First and foremost, the issue which needs to be determined is whether the Applicant has been able to prove the existence of "Financial Debt".,,

iii. From perusal of records, we note that there is no formal agreement in place between the Applicant and the CD with respect to financial debt as claimed by the",,,

Applicant.,,

iv. We however at the same time find that the CD has admitted the receipt of INR 1,89,12,800/- in 2012. CD has not provided even a single evidence in support of its",,,

case that that there was an agreement to bring a joint Infrastructure Project on said land, and in relation thereto the Applicant was under an obligation to invest at",,,

least Rs.10 Crore on or before 31st March 2013 in said project, and failure thereof by the Applicant resulted in forfeiture of INR 1,89,12,800/-. Further, no",,,

communication or letter has been provided by the CD to support the case of forfeiture. Hence, there is no dispute that in 2012 the Applicant had given a sum of INR",,,

1,89,12,800/-to the CD.",,,

v.As regards adjustment of INR 50,00,000/-, no document has been produced by the Applicant in this regard to show that it was adjusted towards dues payable to",,,

the CD. However, submission of the CD that the said INR 50,00,000/-, was rather adjusted off against dues payable to one Tulsiani Homes Pvt. Ltd., is substantiated",,,

from bank statements for month of July 2012, placed by the Applicant at page 43 of the Application, which shows that the said sum has been received by the",,,

Applicant from Tulsiani Homes on 06.07.2012, making it dues payable to Tulsiani Homes by the Applicant. Auditor's Report of the Applicant also shows sum of",,,

INR 50,00,000/-payable to Tulsiani Homes Private Limited only and not to the CD. Hence, we find that INR 50,00,000/- payable to Tulsiani Homes Pvt. Ltd. by the",,,

Applicant could not be adjusted against INR 1,89,12,800/- given to CD in 2012. Further, in Clarification dated 08.01.2024, the Applicant has itself admitted that Tulsiani",,,

Homes Pvt. Ltd. is a separate entity and carries separate transaction with the Applicant.,,,

vi.Now it is also not in dispute that the Applicant has let the property bearing Plot No.3, Block N, Green Park (Main), New Delhi-110016 on lease to the CD for a",,,

monthly rent of INR 30,000/-. The submission of the CD that cheques were issued towards rent payable and not towards discharge of any liability towards the alleged",,,

financial debt is partially substantiated from the ledger placed by the Applicant on page 22 of the Application, where it shows via entry dated 10.04.2018 and",,,

11.04.2018 that a cheque to the tune of INR 2,19,000/- was received from the CD, as "Being rent recd from tulsian construction ch no. 40726" which was",,,

dishonored for the reasons of insufficient funds. Whereas for cheques encashed for an amount of INR 4,38,000/- the ledger only records "Being amt from tulsian",,,

construction. We see that with respect to the said unidentified payment of INR 4,38,000/- as "Being amt from tulsian construction", there is no reconciliation",,,

between the parties. Further, we are not convinced with the clarification furnished by the Applicant that mismatch has occurred on account of error made by",,,

accountant and "Being rent recd from tulsian construction ch no. 40726" ought to be recorded by the accountant as "Being amt from tulsian",,,

construction. We see that this fact has not been placed before us at any time before and thus we are not inclined to accept such additional information furnished,,

at the stage of clarification.,,,

vii.Perusal of Auditor's Report for the FY 2017-18 placed by the Applicant, reflects short term loans and advances to the CD for an amount of INR 1,34,74,800/-, at",,,

page 30 of the Application. However, in absence of agreement and from very limited information and documents placed before us by the Applicant we are unable to",,,

infer the capacity in which and purpose of granting said sum by the Applicant to the CD.,,,

viii. In view of the aforesaid, we find that the Applicant at its best has been able to only establish that it had given a sum of INR 1,89,12,800/- to the CD in 2012. The",,,

Applicant has even failed to establish that cheques for an amount of INR 4,38,000/- were issued towards partial discharge of liability.",,,

ix. Applicant has omitted to plead "date of default" in Application. We further find that although the Auditor's Report duly support the case of the Applicant,,

qua principal amount of INR 1,34,74,800/- claimed to be pending, the same is not substantiated from any other document. The Bank Statement provided by the",,,

Applicant has been provided only for July 2012 and March 2018 and does not substantiate the claim of the Applicant for principal amount claimed to the tune of INR,,

1,34,74,800/-.",,,

x. No Financial Contract, setting the terms of financial debt and tenure thereof has been placed. We find it appropriate to mention here that in Form 1, as given under",,,

IBBI (Application to Adjudicating Authority) Rules 2016 for filing Application under section 7 of the Code, requires the Applicant to provide a copy of "Financial",,,

Contract with the Application. At this stage, it is relevant to mention that the Financial Contract is defined under Rule 3 (d) of the IBBI (Application to",,,

Adjudicating Authority) Rules 2016, which reads as follows:",,,

"financial contract" means a contract between a corporate debtor and a financial creditor setting out the terms of the financial debt, including the tenure of",,,

the debt, interest payable and date of repayment.",,,

xi. Ld. Senior Counsel, Mr. P. Nagesh had during the course of arguments relied upon the case decided by The Hon'ble National Company Law Appellate",,,

Tribunal titled as Prayag Polytech Pvt. Ltd. Vs Gem Batteries Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 713 of 2019, where it was held that:",,,

5. Learned Counsel for the Appellant further submits that "financial contract" as defined in the Insolvency and Bankruptcy (Application to Adjudicating",,,

Authority) Rules, 2016 does not debar oral contract and financial contract can be oral in terms of Section 10 of the Contract Act. According to him Section 7",,,

application under IBC should not have been rejected.,,,

6. We have gone through the records and the impugned order. Merely pointing out that TDS was deducted would not be sufficient to conclude that there was,,

financial debt. TDS can be deducted for various reasons.,,,

As regard relying on Section 10 of the Contract Act, 1872, in our view IBC is a complete code in itself. Section 238 of IBC has overriding effect on provisions",,,

inconsistent with IBC. The "Financial contract" is defined in "Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016" Rule",,,

3(1)(d) requires setting out the terms of the financial debt including tenure etc. We find that Appellant has failed to show any record showing financial debt to,,

be there. As such, we are unable to find any fault in the impugned order while rejecting Section 7 application.",,,

In context of the present case, we are inclined to agree with submissions made by the Ld. Senior Counsel, for the CD that Applicant has failed to",,,

show any record establishing "Financial Debt" in terms of IBC.,,,

xii.Further, qua the interest amount claimed, we find that the Auditor's report for the FY 2017-18 placed by the Applicant does not show accrual of any interest",,,

income. As such in absence of any formal agreement, we are unable to accept the submission of the Applicant that the parties had agreed upon deferred interest",,,

@18% after the expiry of five years as if it was true, the accrual of interest would be recorded as Income in the balance sheet as reproduced under the Auditor's report",,,

Report placed by the Applicant.,,,

xiii.It is well settled law that it is for the Applicant invoking CIRP to prima facie show the existence in their favor, of a legally recoverable debt, however, in the present",,,

case, for the reasons aforesaid we find that the Applicant has failed to establish sum of INR 1,89,12,800/- given to the CD to be a "Financial Debt" in terms of IBC.",,,

xiv.Apart from our finding detailed above that Applicant has failed to prove the existence of "financial debt" and as such the case does not survive on merits, we",,,

find even otherwise the Application to be barred by the law of limitation.,,,

xv.That, as per section 238A of the Code, provisions of the Limitation Act, 1963 are applicable to the proceedings before the Adjudicating",,,

Authority. Further, as per law laid down by the Hon'ble Supreme Court, in the case of B.K. Educational Services Pvt Ltd versus Parag Gupta and Associates in",,,

Civil Appeal No. 23988 of 2017, Article 137 of the Limitation Act 1963 is applicable to proceedings initiated under section 7 of the Code.",,,

xvi.As per Article 137 of the Limitation Act, an Application under Section 7 of the Code shall be filed within 3 (Three) years from the date when "Right to Apply",,,

accrues, i.e., when a "default" occurs. If the default has occurred more than three years prior to the date of filing of the application, the application would be",,,

barred under Article 137 of the Limitation Act.,,,

xvii.In the present case, no date of default has been mentioned in the Application. The debt claimed by the Applicant was extended via four different tranches way",,,

back in 2012, with last payment having disbursed on 30.08.2012. Whereas Application under section 7 has been filed on 18.01.2019 i.e., after lapse of more than 6 (Six)",,,

years.,,,

xviii.Further, it is not the case of the Applicant that the CD has acknowledged or made any payment towards discharge of the alleged outstanding debt in terms of",,,

section 18 and 19 of the Limitation Act 1963, within 3 years from the date of cause of action so as to claim the benefit of extension of Limitation under the said",,,

provisions.,,,

xix.Rather, Applicant with its submission that cheques were received from the CD towards partial discharge of liability has made only a failed attempt to claim the",,,

benefit of extension under section 19 of the Limitation Act. We repeat here that the Applicant has failed to prove that those cheques were issued by CD towards,,

partial discharge of liability and also there is no reconciliation between the parties with respect to unidentified payment of INR 4,38,000/- made by the Respondent.",,

Hence, in such scenario, the benefit of extension of limitation cannot be given to the Applicant.",,

xx.We further here appreciate the observation of the Hon'ble Supreme Court made in the case of Radha Exports (India)(P) Ltd. v. K.P. Jayaram (2020) 10 SCC,,

538 that it is for the applicant invoking the Corporate Insolvency Resolution Process, to prima facie show the existence in his favor, of a legally recoverable debt. In",,

other words, the applicant had to show that the debt is not barred by limitation. In the present case, we note that the Applicant has miserably failed to prove that",,

Application has been filed within the prescribed period of limitation.,,

xxi.Further, it is no more res integra that intent of the IBC is not to give a new lease of life to debts which were already time barred. we are of the considered view that",,

the Application under Section 7 of the IBC, having been filed in 2019 while limitation period of three years expired on 30.08.2015, and is therefore hopelessly barred by",,

the law of Limitation.,,

xxii.Even otherwise on merits, in absence of financial contract or other cogent evidence, we hold that Applicant has failed to prove its "financial debt" in terms of",,

section 7 of the Code. The Application filed under section 7 of the case has no merit to survive. Thus, we are inclined to dismiss CP(IB)-286(PB)/2019.",,

9. Order,,

In light of the above facts and circumstances, it is, hereby ordered as follows:",,

i.The Application bearing C.P. (IB) " 286(PB)/2019 filed by the M/s Ananya Infraventures Private Limited, the Applicant/(FC), under section 7 of",,

the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against M/s",,

Tulsiani Constructions and Developers Private Limited, the Respondent/ (Corporate Debtor), is dismissed.",,

ii.No order as to cost.,,

iii.File be consigned to record storage (current).,,

iv.A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.",,