

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 124 of 2023

IN THE MATTER OF:

Premjayanti Enterprises Pvt. Ltd.

...Appellant

Versus

Shivam Water Treaters Pvt. Ltd.

...Respondent

Present:

For Appellant: Ms. Purti Gupta, Ms. Henna George, Advocates.

For Respondent: Mr. Vivek Kumar, Mr. Aditya Parolia, Mr. Akshay Srivastava, Advocates.

O R D E R
(Hybrid Mode)

Per: Justice Rakesh Kumar Jain (Oral)

25.04.2024: This appeal is directed against the order dated 06.12.2022 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench) by which an application filed by the Appellant under Section 7 of the Insolvency & Bankruptcy Code, 2016 (in short 'Code') read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') against M/s Shivam Water Treaters Pvt. Ltd. (Corporate Debtor) has been dismissed.

2. The brief facts of this case are that the Appellant served the notice in Form-3, in terms of Section 8 of the Code dated 11.09.2018 upon the Respondent in which it was averred that "*the Operational Creditor has invested*

the amount into the LLP which was ultimately used by the Director of Corporate Debtor as per the board resolution dated 21.09.2017”.

3. It is further averred in the said application that “*however, the details of the unpaid debt as per the ledger account is Rs. 58,30,077/- plus interest of INR 20,87,136/-.*”

4. The application under Section 9 was filed by the Appellant on 13.11.2018 in which the Appellant has made the following averments “*the Operational Creditor on the request of Mr. Gaurav Hargovindbhai Dave (Director of the corporate debtor) has invested funds amounting to INR 58,30,077/- (Rupees fifty-eight lakh thirty thousand seventy-seven) from time to time into HDFC bank account bearing No. 00060340009256 of the Corporate Debtor*”.

5. The application under Section 9 is filed on a printed performa supported by an affidavit of Devendra Tripathi s/o Raghupatiram Ram Prasad Tripathi, the Assistant Manager of the Appellant who made the following averments “*the statements made in paragraphs Part I to V of the petition herein now shown to me are true to my knowledge, and the statements made in Part-IV is based on information obtained from records, and I believe them to be true*”.

6. The aforesaid averments made in Para 2 of the affidavit is verified by the said deponent as under:-

“I, the above-named deponent, verified that the contents of Para 1 and 2 of my above affidavit are true and correct to the best of my knowledge and belief and no part of it is false and nothing has been concealed therein.”

7. The application was contested by Respondent. During the pendency of this case before the Adjudicating Authority, Mr. Pavan S. Godiawala appeared on behalf of the Resolution Professional and apprised the Adjudicating Authority about the order passed under Section 7 of the Code on 15.10.2018 by the NCLT, Mumbai Bench against the present Corporate Debtor in which the IRP has been appointed.

8. In view of the statement made by Pavan S. Godiawala, the application filed under Section 9 by the Appellant was withdrawn. The said order dated 01.01.2019 is reproduced as under:-

“The instant application is filed under Section 9 of the Insolvency and Bankruptcy Code by the petitioner namely Premjayanti Enterprise Pvt. Ltd. upon Corporate Debtor i.e. Shivam Water Treaters Pvt. Ltd.

On coming to know about the filing of the instant application, the Ld. Lawyer namely Advocate Mr. Pavan Godiawala appeared on behalf of the RP and apprised this Bench with regard to the passing of an order under Section 7 of the Insolvency and Bankruptcy Code, on 15.10.2018 by the National Company Law Tribunal, Mumbai Bench, against the present Corporate Debtor i.e. Shivam Water Treaters Pvt. Ltd., wherein, Interim Resolution Professional -RP is already appointed.

Ld. Lawyer appearing on behalf of RP also submitted the photo-state copy of the order so passed by the National Company Law Tribunal, Mumbai Bench and further submitted that the petitioner may lodge his claim, if any, before the RP for consideration.

He further submitted that under such circumstances the instant application filed under Section 9 of the Insolvency and Bankruptcy Code by the petitioner is not maintainable.

Ld. Lawyer appearing on behalf of petitioner have gone through the order dated 15.10.2018 passed under section 7 of the Insolvency and Bankruptcy Code and on careful perusal filed a pursis to withdraw the instant application. A prayers is granted. The petitioner have liberty to put his claim before the RP.”

9. After the withdrawal of the application filed under Section 9 of the Code as operational creditor, the Appellant filed the present application as a financial creditor under Section 7 of the Code on 12.07.2020 in which it was alleged that the amount of Rs. 58,30,077 was advanced as loan which was earlier alleged to have been invested when the application under Section 9 was filed.

10. The Appellant claimed sum of Rs. 1,00,46,246.17/- which includes the interest of Rs. 42,16,169.17/- besides the principal amount of Rs. 58,30,077/-.

11. The application under Section 7 is filed by Mr. Bankim Jayantilal Shah, Director of the Appellant. During the pendency of this petition, the Respondent paid the principal amount of Rs. 58,30,077/-, therefore, the Adjudicating Authority dismissed the application filed by the Appellant on the ground that the application under Section 7 is not maintainable regarding the interest only as it was not found to be a financial debt.

12. Counsel for the appellant has argued that the Adjudicating Authority has committed an error in dismissing the application because the amount of interest can also be claimed by filing an application under Section 7 and has relied upon a decision of this Court rendered in Company Appeal (AT) (Ins.) No. 882 of 2022 titled as '*Base Realtors Pvt. Ltd. vs. Grand Realcon Pvt. Ltd.*' decided on 15.11.2022.

13. On the other hand, counsel for Respondent has submitted that the Appellant did not approach the Court with clean hands and is guilty of *supprssio veri* or *suggestion falsi*. It is submitted that the Appellant initially filed the application under Section 9 as an operational creditor in respect of the amount of Rs. 58,30,077/- claiming it to be an investment. However, the said application was withdrawn by the Appellant in view of the order passed by the NCLT, Mumbai because another application filed under Section 7 by a different financial creditor against the same CD was admitted. It is further submitted that it was not the case of the Appellant that the application filed under Section 9 of the Code was withdrawn because there was a defect in the pleadings because no such application was ever filed. It is further submitted that the decision in the case '*Base Realtors Pvt. Ltd. (Supra)*', relied upon by the Appellant is not applicable to the facts of the present case because the said case was regarding the interest arising out of debenture which was locked in for a period of six years and the amount of interest was to be paid by the CD at regular intervals and was not paid.

14. In rebuttal, counsel for the Appellant has submitted that the appellant has filed rebuttal affidavit in this case and alleged that there was a mistake in the application filed under Section 9 in which it is alleged that the amount in question was an investment though it was a loan.

15. We have heard counsel for the parties and perused the record with their able assistance.

16. It is needless to mention that the proceedings under the Code are summary in nature, based upon the pleadings and documentary evidence. The applications are filed on printed forms provided in the Rules and the averments made in the application are supported by an affidavit of the parties.

17. In the present case, the Appellant first approached the Adjudicating Authority with the application filed under Section 9 alleging itself to be an Operational Creditor and the amount in question as an investment. This averment was made not only in the demand notice but also in the main application which was supported by an affidavit. Thus, averments made in the application filed under Section 9 were on oath by the Appellant but the said application was withdrawn because an application filed under Section 7 of the Code by some other financial creditor against the Appellant (CD) was admitted by another Adjudicating Authority and it is not the case of the Appellant that the said application was withdrawn by it on the ground that pleadings in the application filed under Section 9 were erroneous and the Appellant wanted to file an application under Section 7 after the withdrawal of the application

rather the Appellant took a somersault and changed its pleadings entirely and became a financial creditor from an operational creditor.

18. The Appellant did not make any effort to bring to the notice of the Adjudicating Authority in the application filed under Section 9 about the bonafide mistake which has been pleaded in the rejoinder filed in the present appeal in order to avoid the pleadings already set up in the application filed under Section 9 of the Code in which it was averred that the amount in question has been invested which is now sought to be changed as a loan. It is pertinent to mention that Respondent has already paid the principal amount of Rs. 58,30,077/- to the Appellant but the Appellant is pursuing the present appeal for the resolution of the amount of interest, however, in our considered opinion, the petition filed before the Adjudicating Authority under Section 7 is an abuse of process of law because the Appellant cannot change the stand taken in the application filed under Section 9 of the Code by it on its convenience and drag the Respondent before the Adjudicating Authority and this Court in an unnecessary litigation.

19. In view of the aforesaid facts and circumstances, the conduct of the Appellant is depreciable and deplorable because this kind of practice is not acceptable before this Court, therefore, this is one such case in which the Appellant deserves to be saddled with costs for initiating a frivolous litigation. Hence, while dismissing the present appeal, we impose a cost of Rs. 1 Lac.

upon the Appellant which shall be paid by it to the Respondent by way of a demand draft within a period of 30 days from the date of passing of this order.

20. It is made clear that in case this amount is not paid by the Appellant as directed, the Respondent may approach this Court again with an application so that appropriate proceedings may be initiated against the Appellant under the provisions of the Contempt of Court Act.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevvar Pandey]
Member (Technical)

Sheetal/Ravi