

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No.446 of 2023

(Arising out of the Impugned Order dated 03.02.2023 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench at Mumbai in Company Petition (IB) No. 1140/MB-IV/2020]

IN THE MATTER OF:

Hiren Meghji Bharani
Plot No.487, Geraldine, 13th Road
Above Yes Bank, Chembur
Mumbai – 400 071

...Appellant

Versus

- 1. Shankheshwar Properties Pvt. Ltd.**
Through its Resolution Professional
Mr. S. Gopalakrishnan
Having its Registered Office at:
101, Sabri Prasad, 11th Road,
Chembur, Mumbai – 71

Also at:

167-B, 16th Floor, Shanti Nagar Building,
98, Nepean Sea Road, Mumbai-06

Also at:

A/6, Sunil Sadan, Central A venue Road,
MDS Road, Near Chembur Railway Station,
Chembur, Mumbai – 71
Email: gopi63.ip@gmail.com

...Respondent No.1

- 2. Rupa Infotech & Infrastructure Pvt. Ltd.**
Having its Registered Office at:
401, Rupa Plaza, Jawahar Road,
Ghatkopar East, Mumbai – 77

...Respondent No.2

Present:

For Appellant : Ms. Anushree Mahindra, Advocate

For Respondent : Mr. Aksh Bhalla, Advocate for R-1
Mr. Varun Singh, Mr. Gaurav Nair, Mr. Ishwar
Ahuja and Ms. Bhairavi SN, Advocates for R-2

J U D G M E N T

[Per: Arun Baroka, Member (Technical)]

This appeal has been filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as “IBC”) by the Appellant-Mr. Hiren Meghji Bharani [Suspended Director of Corporate Debtor (hereinafter referred as “CD”)] against the impugned order dated 03.02.2023 passed by the Adjudicating Authority (hereinafter referred as “AA”) National Company Law Tribunal, Mumbai Bench at Mumbai in Company Petition (IB) No. 1140/MB-IV/2020, by which Corporate Insolvency Resolution Process (in short ‘CIRP’) under Section 7 was ordered against the Corporate Debtor (hereinafter referred as “CD”) / Respondent No.1 and Mr. S. Gopala Krishnan was appointed as the Insolvency Resolution Professional.

2. Both parties were heard and all documents perused.

Brief facts of the Appeal

3. The factual matrix of the present appeal is in subsequent paragraphs.

4. A petition under Section 7 of the IBC, 2016 was filed by Rupa Infotech & Infrastructure Pvt. Ltd. (Financial Creditor (hereinafter referred as “FC”)/ Respondent No.2) under “IBC” before the Adjudicating Authority seeking CIRP against Shankeshwar Properties Pvt. Ltd. (Corporate Debtor / Respondent No.1).

5. The case of the Financial Creditor / Respondent No. 2. is that it had provided inter corporate loan of Rs. 7 crores @ 12% per annum interest for which a document with the title of “confirmation and undertaking” @ interest of 1% per month is on record. The Corporate Debtor had undertaken to make

repayment of Rs.7 crores on demand after a period of 90 days. The Corporate Debtor made payment of interest until 31.03.2016 and the last payment was made on 04.07.2017 for an amount of Rs.1 crore. Section 7 petition was filed by Rupa Infotech & Infrastructure Pvt. Ltd. (Financial Creditor / Respondent No.2) under Insolvency and Bankruptcy Code, 2016 (in short “IBC”) before the Adjudicating Authority seeking CIRP against M/s Shankeshwar Properties Pvt. Ltd. (Corporate Debtor / Respondent No.1).

6. Main ground for the present appeal is that the inter corporate deposit of Rs.7 Crores is captured in an unstamped document with the title of “confirmation and undertaking” @ interest of 1% per month. Further, it is claimed that confirmation and undertaking dated 24.09.2015, being an inter corporate deposit agreement, is mandatorily required to be stamped. It is claimed by the Appellant that such confirmation and undertaking cannot be relied upon as evidence under Section 34 and Article 5(h)(A)(iv) of the Maharashtra Stamp Act. And since this document could not have been relied upon by Adjudicating Authority, therefore, there is a dispute in the existence of a default. It is claimed that there exists no other document which would demonstrate the existence or the terms and conditions for a default.

7. As noted by the AA, the Financial Creditor has filed the National E Governance Services Limited (NeSL) Report dated 24.06.2020, wherein the Date of Default is reflected as 23.12.2015 and the total outstanding is of Rs.4,80,80,000/- (Rupees four crore eighty lakh eighty thousand only). Demand notices were issued by FC on April 11, 2019 and June 19, 2019. The demand has not been disputed. Adjudicating Authority has thus concluded

that Financial Creditor has a total debt of Rs.4.8 cores and the date of default being 23.12.2015.

8. From the above the two **main issues** which emerge are as follows:

8.1. Whether the Adjudicating Authority has incorrectly relied upon unstamped document with the title of “confirmation and undertaking” in deciding for CIRP.

8.2. Whether the Financial Creditor/R2 had made an investment of a sum of rupees seven crores in the project developed by the CD/ R1 or it is a loan.

9. The above two issues are discussed in subsequent paragraphs.

Reliance upon unstamped document in deciding CIRP

10. Firstly, the Appellant submits that Adjudicating Authority has incorrectly relied upon unstamped document with the title of “confirmation and undertaking” in deciding for CIRP.

11. In his written submissions before the Adjudicating Authority, Appellant assails the judgment of this Tribunal in Satra Properties (India) Limited vs. Vistra ITCL India Limited **2022 SCC OnLine NCLT 15**. In the Satra Properties (supra), this Tribunal had observed that there is no need to get into the issue of stamp duty as it is irrelevant and uncalled for as there existed other documents which proved the existence of a debt and a default, which is not the case, in the present matter.

12. Appellant claims that the judgment in Satra Properties (India) Limited vs. Vistra ITCL India Limited 2022 SCC OnLine NCLT 15 [supra] is *per incuriam* as the same has not considered the binding judgment of the Hon'ble

Kumar Gupta & Ors. (2020) 8 SCC 531. Relevant extract are:

*"..152. So far as Civil Appeal No. 7266 of 2019 and Civil Appeal No. 7260 of 2019 are concerned, the resolution professional has rejected the claim of the appellants on the ground of non-availability of duly stamped agreements in support of their claim and the failure to furnish proof of making payment of requisite stamp duty as per the Indian Stamp Act despite repeated reminders having been sent by the resolution professional. The application filed by the appellants before NCLT came to be dismissed by an order dated 14-2-2019 [Essar Steel Asia Holdings Ltd. v. Satish Kumar Gupta, 2019 SCC Online NCLAT 736] on the ground of non-prosecution. The subsequent restoration application filed by the appellants then came to be rejected by NCLT through judgment dated 8-3-2019 [Resolution Professional v. Essar Steel (India) Ltd., 2019 SCC Online NCLAT 750] on two grounds: one, that the applications could not be entertained at such a belated stage; and two, that notwithstanding the aforementioned reason, **the claim had no merit in view of the failure to produce duly stamped agreements**. The impugned NCLAT judgment [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC Online NCLAT 388], at paras 96 and 97, upheld the finding of NCLT and the resolution professional. In view of these concurrent findings, the claim of the appellants therefore requires no interference. Further, the submission of the appellants that they have now paid the requisite stamp duty, after the impugned NCLAT judgment [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC Online NCLAT 388], would not assist the case of the appellants at this belated stage. These appeals are therefore dismissed..." [Emphasis supplied and footnotes in italics]*

13. In view of the aforesaid, it was submitted by the Appellant that the Agreement cannot be relied upon as evidence under the Maharashtra Stamp Act. Its impact is examined later in this section.

14. Appellant's case that the Satra judgement (supra) is *per incuriam* is not helpful to his case as the judgement has examined similar issue comprehensively. Relevant extract of the said judgment of NCLAT is as follows:

“... ”

29. Therefore, on the basis of detailed discussion in the aforesaid paragraphs, we are of the view that the Non-Convertible Debentures are clearly outside the purported “Settlement” arrived in the meeting held on 31.3.2018. Therefore, the Non-Convertible Debentures Subscription Agreement and the Debenture Trust Deed are not novated as a result of the “Settlement” and are relevant in establishing the debt of the corporate debtor as claimed in section 7 application, whose repayment is in default as per clause 11 of the Debenture Trust Deed. We, therefore, come to the conclusion that the section 7 application was admitted correctly by the Adjudicating Authority. We do not find merit in the appeal and accordingly dismiss it....”

15. Appellant's case that the Satra judgement (supra) is *per incuriam* cannot be accepted as the judgement has examined many similar issues comprehensively and still stands. We are obligated to follow the earlier case as the present case is similar to the supra case.

16. Respondent No.1 i.e. Resolution Professional has also relied upon the case of **Mr. Aashish Kadam & Anr. Vs. Nagpur Nagarik Sahakari Bank Ltd.**

& Anr. Company Appeal (AT) (Insolvency) No. 355 of 2022, relevant portion is extracted, which also does not support the case of the Appellant.

“.....

5. We have perused the impugned order. In para 7 of the impugned order, document executed by the Corporate Debtor has been noticed. One of the facts which has been noticed is that present is a case of mortgage by deposit of title deed. Even if the facility agreement was not stamped, there was other materials on the record which clearly prove the financial debt which was owed by the Appellant, hence, we do not find any error in the order of the Adjudicating Authority admitting the Application under Section 7. We, thus, are of the view that there is no merit in the Appeal and Appeal deserves to be dismissed.”

17. We heavily rely on the Apex Court’s latest Judgement in **Curative Petition (C) No. 44 of 2023 in Review Petition (C) No. 704 of 2021 in Civil Appeal No. 1599 of 2020** in which seven judge bench acknowledges and adopts the revised legal stance on the enforceability of unstamped arbitration agreements in the case **“IN RE INTERPLAY BETWEEN ARBITRATION AGREEMENTS UNDER THE ARBITRATION AND CONCILIATION ACT 1996 AND THE INDIAN STAMP ACT 1899”**, the relevant portion is as follows:

“ ...

M. Conclusions

224. The conclusions reached in this judgment are summarised below:

a. Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable;

b. Non-stamping or inadequate stamping is a curable defect;

c. An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The concerned court must examine whether the arbitration agreement prima facie exists;

d. Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal; and

*e. The decision in **NN Global 2** (supra) and **SMS Tea Estates** (supra) are overruled. Paragraphs 22 and 29 of **Garware Wall Ropes** (supra) are overruled to that extent.....”*

18. It has been clearly brought out in the above judgement of the Apex Court that Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act and such agreements are not rendered void or void ab initio or unenforceable and further Non-stamping or inadequate stamping is a curable defect and therefore as claimed by the Appellant unstamped “confirmation and undertaking” doesn’t make the whole process illegal if this document is not even relied upon as an evidence.

19. Furthermore, in the present case Appellant himself has admitted in affidavit in Reply dated 17.01.2022, that Financial Creditor has invested a sum of Rs.7,00,00,000/- (Rupees seven crore only) in the project developed by the Corporate Debtor. And the Corporate Debtor has paid interest on the debt and deducted tax at source also. The Corporate Debtor has himself filed the Audited Financial Statement for the year ended 31.03.2020 vide Additional Affidavit dated 16.11.2022 and the Financial Creditor in that statement has been shown as unsecured loan with the outstanding sum of Rs.3,00,00,000/-. Furthermore, Financial Creditor has attached the records of the debt as obtained from National E Governance Services Limited (NeSL),

in which details of the debt and the date of default has been established with respect to the CD / M/s Rupa Infotech and Infrastructure Private Limited.

20. Appellant himself states in his appeal that the Corporate Debtor had serviced the interest in accordance with the terms of the confirmation and undertaking till 2017. The admission of liability in the balance sheet of Respondent No.1, the part payments made by Respondent No.1 to Financial Creditor from time to time and NeSL records sufficiently demonstrate the admission of liability by Respondent No.1, even without relying upon “confirmation and undertaking” dated 24.09.2015.

21. Averments of the Rupa Infotech & Infrastructure Pvt. Ltd. (Financial Creditor / Respondent No.2) and perusal of the impugned order shows that the Adjudicating Authority has arrived at a conclusion to admit the petition under Section 7 on the basis of only admitted documents namely, audited financial statements of Shankeshwar Properties Pvt. Ltd. / Respondent No.1 and also the demand notices addressed by R-2 to R-1 and also NeSL report.

22. The admission of liability in the balance sheet of Respondent No.1, the part payments made by Respondent No.1 to Financial Creditor from time to time and NeSL sufficiently demonstrates the admission of liability by Respondent No.1, even without relying upon “confirmation and undertaking” dated 24.09.2015.

23. Adjudicating Authority has, thus come to a conclusion that there is a financial debt, there is a default basis other documents and no reliance whatsoever nature has been placed on the confirmation and undertaking dated 29.09.2015. Since Adjudicating Authority has not relied upon that and

have come to a conclusion that there is a debt and default and demand notice which is not disputed and accordingly concluded that sufficient reasons exists for Section 7 CIRP proceedings. The plea of the Appellant, to claim that the unstamped agreement/instrument in question cannot be admitted into evidence under the provisions of the Maharashtra Stamp Act, as a defense, cannot render the corporate insolvency resolution process (“**CIRP**”) non-maintainable, when there exists other material on record to prove existence of default in payment of debt. On this count, we therefore, cannot find any fault in the orders of the Adjudicating Authority.

Financial Creditor made an investment or gave a loan

24. The other argument of the Appellant is that the FC/R2 had “invested” a sum of rupees seven crores in the project developed by the CD/ R1. The appellant had disbursed the said sum of Rs.7 crores vide RTGS on 24th September 2015. The Appellant further claims that the investment made by the FC/R2 in the project was structured through the medium of “loan”. And accordingly was reflected as a loan in the books of the corporate debtor, even though it was an investment and not a loan to the corporate debtor. This argument of the Appellant, that it was not a loan but an investment doesn't stand judicial scrutiny. There is a contradiction to the nature of amount payable to the Financial Creditor which is admitted in the audited financial statements placed by the Corporate Debtor, being shown as unsecured loan, and which has also been noted by the Adjudicating Authority. Furthermore, R1 himself has admitted that it has serviced the interest in accordance with the terms of the confirmation and undertaking till June 2017. National E Governance Services Limited (NeSL) Report dated 24.06.2020, also reflects this as a loan wherein the Date of Default is reflected as 23.12.2015 and the

total outstanding is of Rs.4,80,80,000/- (Rupees four crore eighty lakh eighty thousand only).

25. Adjudicating authority has rightly come to the conclusion that it is a loan and allowed Section 7 proceedings under IBC.

Conclusions

26. Adjudicating Authority has come to a conclusion that there is a financial debt and there is a default on the basis of other documents, and no reliance whatsoever nature has been placed on the confirmation and undertaking dated 29.09.2015. Since Adjudicating Authority has not relied upon the “confirmation and undertaking” and has come to a conclusion that there is a debt and default and demand notice, which is not disputed and accordingly concluded that sufficient reasons exists for CIRP proceedings under Section 7 of IBC, 2016. The plea of the Appellant, to claim that the unstamped agreement/instrument in question cannot be admitted into evidence under the provisions of the Maharashtra Stamp Act, as a defense, cannot render the corporate insolvency resolution process (“**CIRP**”) non-maintainable, when there exists other material on record to prove existence of default in payment of debt. On this count, we therefore, cannot find any fault in the orders of the Adjudicating Authority.

27. In the above-mentioned circumstances, non-stamping of document does not render the corporate insolvency resolution process (“**CIRP**”) application filed to be non-maintainable when there exists other material on record to prove existence of default in the payment of debt. We do not find any error in the order of the Adjudicating Authority admitting Section 7 proceedings of the IBC against the CD/ M/s Shankheshwar Properties Pvt.

Ltd. (R-1). We thus, are of the view that there is no merit in this appeal and the appeal deserves to be dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[BarunMitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

22nd December, 2023

Pks