NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.470 of 2023

[Arising out of order dated 28.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-IV in CP (IB) No. 106(ND)/2022]

IN THE MATTER OF:

Naresh Kumar Aggarwal
Shareholder of M/s Nikhil Footwears Pvt. Ltd.
Resident of:
30-B, Road No.78, West Punjabi Bagh,
Punjabi Bagh, West Delhi
Delhi – 110026.

...Appellant

Vs.

CFM Asset Reconstruction Pvt. Ltd.
Through its Authorised Representative
Registered Office at:
A/3, 5th Floor, SafalProfitaire,
Near Prahlad Nagar Garden,
Ahmedabad - 380015.

Dipti RanjanNath
Interim Resolution Professional of
M/s Nikhil Footwears Pvt. Ltd.
Resident of 2504, Pioneer CHS Ltd,
Opp. to Vartak Nagr Police Station,
Vartak Nagar, Thane,
Maharashtra – 400606.

...Respondents

Present:

For Appellant: **Mr. Alok Dhir, Ms. Varsha Banerjee, Ms. Udita Singh, Advocates.**

For Respondents: **Mr. Abhijeet Sinha, Ms. Akanksha Kaushik, Ms. Heena Kochhar, Advocates for R-1.**

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by Shareholder of the Corporate Debtor has been filed challenging the order dated 28.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Court IV by which order Section 7 application filed by the Respondent - CFM Asset Reconstruction Pvt. Ltd. has been admitted. Brief facts of the case necessary to be noticed for deciding this Appeal are:

i. State Bank of India sanctioned various credit facilities in favour of Action Ispat and Power Private Limited (Principal Borrower). In the year 2013, Master Restructuring Agreement was executed between the State Bank of India and several other Banks with the Principal Borrower. The Corporate Debtor – M/s Nikhil Footwear Pvt. Ltd. executed a Deed of Guarantee on 30.09.2013 in favour of SBICAP Trustee Company Ltd. Another Master Restructuring Agreement was executed on 29.06.2016.

ii. Company Petition CP (IB) No.1096 of 2018 was filed by the State Bank of India against the Principal Borrower which was admitted on 23.03.2022.

iii. The State Bank of India entered into an agreement on 18.01.2021 with Respondent No.1 assigning debt owned by the Principal Borrower.

iv. Respondent No.1 filed Company Petition (IB)/106/PB/2022. Notice was issued. Corporate Debtor appeared and filed its reply to Section 7 application. Rejoinder affidavit was also filed by the Financial Creditor.

v. The Adjudicating Authority after hearing both the parties, by the impugned order dated 28.02.2023, admitted Section 7 application. Aggrieved by the order this Appeal has been filed by the Appellant – Shareholder of the Corporate Debtor.

2. Learned counsel for the Appellant challenging the order admitting Section 7 application submits that application filed by Respondent No.1 on the basis of unregistered Assignment Agreement dated 18.01.2021 was not liable to be admitted. The Assignment Agreement being an unregistered agreement, there was no valid assignment in favour of Respondent No.1, so as to entitle him to initiate proceedings under Section 7 of the I&B Code. The Deed of Guarantee was executed in favour of the SBICAP Trustee Company and can only be enforced by security trustee. The SBICAP Trustee Company entered into agreement with the Corporate Debtor on behalf of six lenders. The Adjudicating Authority having already commenced Corporate Insolvency Resolution Process (CIRP) against the Principal Borrower vide its order dated 23.03.2022 by admitting Section 7 application filed by the State Bank of India, on the basis of same debt on same set of facts, filing of present application under Section 7 by Respondent No.1 was a malafide attempt to initiate CIRP on same debt and on same facts. Two applications under Section 7 for same set of claim amount and default cannot be initiated simultaneously.

3. Learned counsel for the Respondent refuting the submissions of learned counsel for the Appellant submits that the Respondent is an Asset Reconstruction Company. The agreement executed by State Bank of India is in accordance with Section 5 of the SARFAESI Act, 2002. Assignment of the financial debt by Bank or Financial Institution in favour of Asset Reconstruction Company can be effected in accordance with the statutory scheme provided in Section 5 of the SARFAESI Act. Section 5 of the SARFAESI Act does not contemplate Assignment of financial debt by registered document. The Respondent No.1 is a Financial Creditor and is fully entitled to initiate Section 7 application. Section 7 application against another Corporate Guarantor i.e. Micro Stock Holding Pvt. Ltd. has already been admitted on an application filed by Respondent No.1 in C.P. (IB) No. 108/2022 by order dated 11.05.2022 which was passed on the same assignment. The submission of the Appellant that simultaneously CIRP against Principal Borrower and Corporate Guarantor cannot be initiated is without any basis. The liability of the Corporate Guarantor is co-extensive with the Principal Borrower. The Financial Creditor is fully entitled to initiate Section 7 proceedings both against the Principal Borrower and the Corporate Guarantor. The Deed of Guarantee executed by the Corporate Debtor provides that the Guarantor shall pay to the Lenders the principal amount along with interest in case of default by Action Ispat. Pursuant to the Assignment Agreement, the MCA has also modified the charge of the Corporate Debtor in favour of the Respondent No.1, which were earlier

registered in favour of SBICAP. Learned Adjudicating Authority has rightly initiated proceedings under Section 7 against the Corporate Debtor.

4. We have considered the submissions of learned counsel for the parties and perused the record.

5. The Assignment Agreement dated 18.01.2021 was entered between the State Bank of India as Assignor and Respondent No.1 as Assignee. The Assignment Agreement provides that Assignee is a securitization and asset reconstruction company registered in pursuant to Section 3 of the SARFAESI Act, 2002. The State Bank of India by the Assignment Agreement has assigned the loan together with all its rights, title and interest in the financing documents and any underlying security interests, pledges and/or guarantees in respect of such loans to the Assignee. The submission which has been pressed by learned counsel for the Appellant is that the Assignment Agreement being unregistered document could not have been relied by the Adjudicating Authority for admitting Section 7 application.

6. There are two reasons due to which we are unable to accept the submission of learned counsel for the Appellant. Firstly, against another Guarantor i.e. Micro Stock Holding Pvt. Ltd., Respondent No.1 filed Section 7 application being C.P. (IB) No. 108/2022 which has been admitted by the order dated 11.05.2022 by the Adjudicating Authority. Section 7 application filed by the Respondent No.1 against another guarantor - Micro Stock Holding Pvt. Ltd. was based on the same Assignment Agreement dated 18.01.2021. A copy of the order dated 11.05.2022 has been brought on the record of the

appeal at page 1652 of the paper book. The Assignment Agreement dated 18.01.2021 was relied by the Financial Creditor and has been referred to by the Adjudicating Authority in Para 5 of the order. The Order dated 11.05.2022 initiating Section 7 application has not been reversed or modified and still in force. Secondly, the Assignment Agreement dated 18.01.2021 being in accordance with Section 5 of the SARFAESI Act, 2002, the Respondent No.1 has to be deemed to be lender and is thus entitle to exercise all rights which were vested in the lender. Section 5 of the SARFAESI Act, 2002 provides as follows:

> *"**5. Acquisition of rights or interest in financial assets.** - (1) Notwithstanding anything contained in any agreement or any other law for the time being in force, any [1][asset reconstruction company] may acquire financial assets of any bank or financial institution—*
>
> *(a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or*
>
> *(b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.*

2[(1A) Any document executed by any bank or financial institution under sub-section (1) in favour of the asset reconstruction company acquiring financial assets for the purposes of asset reconstruction or securitisation shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899 (2 of 1899):

Provided that the provisions of this sub-section shall not apply where the acquisition of the financial assets by the asset reconstruction company is for the purposes other than asset reconstruction or securitisation.]

(2) If the bank or financial institution is a lender in relation to any financial assets acquired under sub-section (1) by the [1][asset reconstruction company], such [1][asset reconstruction company] shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

[2][(2A) If the bank or financial institution is holding any right, title or interest upon any tangible asset or intangible asset to secure payment of any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire the tangible asset or assignment or licence of intangible asset, such right, title or interest shall vest in the asset reconstruction company on acquisition of such assets under sub-section (1).]"

7. Section 5 Sub-section (1) begins with non-obstante clause with the words *"Notwithstanding anything contained in any agreement or any other law for the time being in force…"*. Section 5 is an enabling provision to empower the Asset Reconstruction Company to acquire financial assets in the manner provided in Sub-section (1). The Assignment Agreement dated 18.01.2021 was in accordance with Section 5(1)(b) i.e. by entering agreement with State Bank of India. Sub-section (2) of Section 5 contains a deeming clause. Sub-section (2) provides that Asset Reconstruction Company on such acquisition be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company. When the legislature uses the deeming fiction it is always for purpose and object.

8. Hon'ble Supreme Court had occasion to consider provision of Section 43 of the Indian Contract Act, 1872 which contains the deeming provision and on fulfilling the ingredients as provided in the statute, legal fiction will come into play, irrespective whether the transaction was in fact intended or even anticipated to be so. We may refer to Para 22.2.1, 22.2.2 and 22.3 of the judgment of the Hon'ble Supreme Court in ***"Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Ltd. & Ors., (2020) 8 SCC 401"***, which is to the following effect:

> *"22.2.1. As regards construction of a deeming fiction, this Court pointed out the basic and settled principles in the following:*
>
> > *"88. In every case in which a deeming fiction is to be construed, the observations of Lord Asquith in a concurring judgment in East End Dwellings Co.*

Ltd. v. Finsbury Borough Council: 1952 AC 109 (HL) are cited. These observations read as follows: (AC pp. 132-133)

> *"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says that you must imagine a certain state of affairs. It does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."*

These observations have been followed time out of number by the decisions of this Court. (See, for example, M. Venugopal v. Divisional Manager, LIC: (1994) 2 SCC 323 at page 329).

*** *** ***

94. Although a deeming provision is to deem what is not there in reality, thereby requiring the subject-matter to be treated as if it were real, yet several authorities and judgments show that a deeming fiction can also be used to put beyond doubt a particular construction that might otherwise be uncertain. Thus, Stroud's Judicial Dictionary of Words and Phrases (7th Edition, 2008), defines "deemed" as follows:

> *"Deemed"- as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote", is often a convenient device for reducing the verbiage or an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or things has-the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an indisputable conclusion."*

22.2.2. In Pioneer Urban, this Court further extracted extensively from the decision in Hindustan Cooperative Housing Building Society Limited v. Registrar, Cooperative Societies and Anr.: (2009) 14 SCC 302 on various features of the processes of construction of different deeming provisions in different contexts. Some of the relevant parts of such extraction (as occurring in paragraph 95 of Pioneer Urban) read as follows (in SCC at pp. 524):

> *" '… The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.'*
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> *(Per Lord Radcliffe in St. Aubyn v. Attorney General:1952 AC 15 (HL), AC p. 53)*
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> *14. 'Deemed', as used in statutory definitions [is meant]*
>
> *'to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient devise for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or thing has — the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion.'*
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> *(Per Windener, J. in Hunter Douglas Australia Pty. v. Perma Blinds: (1970) 44 Aust LJ R 257)*
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> *15. When a thing is to be "deemed" something else, it is to be treated as that something else with*

the attendant consequences, but it is not that something else (per Cave, J., in R. v. Norfolk County Court: (1891) 60 LJ QB 379).

'When a statute gives a definition and then adds that certain things shall be "deemed" to be covered by the definition, it matters not whether without that addition the definition would have covered them or not.' (Per Lord President Cooper in Ferguson v. McMillan : 1954 SLT 109 (Scot))

16. Whether the word "deemed" when used in a statute established a conclusive or a rebuttable presumption depended upon the context (see St. Leon Village Consolidated School District v. Ronceray: (1960) 23 DLR (2d) 32 (Can)).

'…. I … regard its primary function as to bring in something which would otherwise be excluded.'

(Per Viscount Simonds in Barclays Bank Ltd. v. IRC: 1961 AC 509 at AC p. 523.)

' "Deems" means "is of opinion" or "considers" or "decides" and there is no implication of steps to be taken before the opinion is formed or the decision is taken.'

[See R. v. Brixton Prison (Governor), ex p Soblen: (1963) 2 QB 243 at QB p. 315.]'"

22.3. On a conspectus of the principles so enunciated, it is clear that although the word 'deemed' is employed for different purposes in different contexts but one of its principal purpose, in essence, is to deem what may or may not be in reality, thereby requiring the subject-matter to be treated as if real. Applying the principles to the provision at hand i.e., Section 43 of the Code, it could reasonably be concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) is presumed to be a preferential transaction at a relevant time, even

though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play; and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per Section 44 of the Code, irrespective whether the transaction was in fact intended or even anticipated to be so."

9. Following the law laid down by the Hon'ble Supreme Court in the above case, when acquisition of assets by Asset Reconstruction Company is made as per Section 5(1), deeming provision contained in Sub-section (2) of Section 5 shall come into play and the Asset Reconstruction Company shall be deemed to be Lender for all purposes. As a Lender, the Respondent No.1 was fully entitled to exercise its right to initiate proceeding under Section 7.

10. We may now notice the judgments which have been relied by learned counsel for the Appellant in support of his submission that assignment of financial debt has to be by registered document. Learned counsel for the Appellant has relied on judgment of this Tribunal in ***"Palm Products Pvt. Ltd. vs. T.V.L. Narsimha Rao and Anr., 2021 SCC OnLine NCLAT 37"***. In the above case, a Non-Banking Financial Company (NBFC) after being held to be related party under Section 29A was kept out of the CoC which action was challenged before this Tribunal. When the NBFC made an application before the Resolution Professional on the basis of Assignment Deed, the said deed was unregistered and that is the reason given by the Resolution Professional for not accepting the claim. The Adjudicating

Authority has observed in the order that applicant was non-financial institution, which findings were challenged before this Tribunal. This Tribunal held that there being NBFC certificate, the applicant was NBFC and the said observation have to be ignored. In Para 21 of the judgment following observations were made:

> *"21. The Learned Counsel for Appellant claimed that the Appellant is also an NBFC as can be seen from copy of document at Page 92 (Annexure A2) and submitted that the observations of the Adjudicating Authority in Paragraph 12 of the Impugned Order that the Appellant is non-financial institution and non-ARC is erroneous. What appears from Paragraph 12 of the Impugned Order is that the Resolution Professional claimed before the Adjudicating Authority that the Applicant is a non-financial institution. Learned Counsel for the Appellant claimed that along with written-submissions filed on 23rd July, 2020 before the Adjudicating Authority vide Annexure A9 Page 300. The Appellant had filed copy of the NBFC Certificate as has now been filed in the Appeal at Page 92. Considering the document of Appellant being NBFC, the observations of the Adjudicating Authority in this regard may have to be ignored where it accepted submission made by the Resolution Professional that the Appellant is non-financial institution and non-ARC. The Resolution Professional is now no more claiming that Appellant is non-financial institution."*

11. A perusal of the above observation indicate that although the application was held to be NBFC, however, there was no case that applicant was Asset Reconstruction Company. Assignment in the above case was not in favour of any Asset Reconstruction Company. Hence, the observation made in the judgment upholding the view of the Adjudicating Authority that document was unregistered hence the Resolution Professional rightly ignored the claim, does not lend any support to the case of the Appellant in the present case. The present is a case of an Asset Reconstruction Company where for acquisition of asset by an Asset Reconstruction Company an particular manner and procedure is prescribed and when asset is acquired as per provisions of Section 5 of SARFAESI Act, deeming section will come into play, as noted above.

12. Another judgment relied by learned counsel for the Appellant is judgment of this Tribunal in ***"Citi Securities & Financial Services Pvt. Ltd. vs. Sudip Bhatacharya, Company Appeal (AT) (Ins.) No. 240 of 2022"***. In the above case, the Appellant – the Financial Creditor had obtained an assignment of debt of Reliance Infrastructure Limited by documents dated 01.03.2019, who filed claim before the IRP, which was rejected. The Adjudicating Authority in the impugned order has also observed that the Assignment Deed dated 01.03.2019 was required to be registered under Section 17 of the Registration Act. This Tribunal in the aforesaid judgment upheld the view of the Adjudicating Authority that Assignment Deed dated 01.03.2019 was required to be registered. The above case was not a case of an Asset Reconstruction Company, hence, in the above case assignment of

debt was not as per Section 5 of the SARFAESI Act, 2002. The case of this Tribunal in ***"Citi Securities & Financial Services Pvt. Ltd. vs. Sudip Bhatacharya"*** is also distinguishable due to the reason that in the present case assignment is in favour of the Asset Reconstruction Company in accordance with the procedure prescribed under Section 5 of the SARFAESI Act, 2002. Thus, this judgment is clearly distinguishable.

13. Learned counsel for the Appellant further submits that the State Bank of India could not have been filed the Section 7 application because guarantee was executed by the Corporate Debtor in favour of SBICAP. SBICAP is Trustee Company on behalf of all the lenders. State Bank of India having assigned its debt to the Respondent No.1, it was open for the State Bank of India to exercise its rights as per the financial documents including Guarantee Deed. The guarantee executed by the Corporate Debtor in favour of SBICAP as Trustee Company of all six lenders, lenders has full entitlement to initiate proceedings under Section 7. As noted above, the Section 7 proceeding has already been initiated against another Guarantor i.e. Micro Stock Holding Pvt. Ltd., which order is still subsisting. We, thus, are of the view that argument of the Appellant that application under Section 7 by Respondent No.1 – Assignee of the State Bank of India was not maintainable, cannot be accepted.

14. Now, we come to last submission of learned counsel for the Appellant that application under Section 7 having admitted against the Principal Borrower, it was not open for the Respondent No.1 to file application against the Corporate Guarantor since two simultaneous proceedings under

Section 7 cannot be proceeded with. Learned counsel for the Appellant has placed reliance on judgment of this Tribunal in ***"2019 SCC OnLine NCLAT 542, Dr. Vishnu Kumar Agarwal vs. Piramal Enterprises Ltd."***, where in Para 32 following observations have been made by this Tribunal:

> *"32. There is no bar in the 'I&B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no application can be filed by the 'Financial Creditor' against two or more 'Corporate Debtors' on the ground of joint liability ('Principal Borrower' and one 'Corporate Guarantor', or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown that the 'Corporate Debtors' combinedly are joint venture company."*

15. The above judgment was delivered by this Tribunal on 08.01.2019. We may notice a subsequent judgment of Hon'ble Supreme Court in ***"Laxmi Pat Surana vs. Union of India & Anr., (2021) 8 SCC 481"***. The Hon'ble

Supreme Court had occasion to consider the right to proceed against Guarantor in aforesaid case. Hon'ble Supreme Court has held in the above judgment that Section 7 is an enabling provision which permits the Financial Creditor to initiate CIRP against a Corporate Debtor. The Corporate Debtor can be the Principal Borrower as well as the Corporate Guarantor. The Hon'ble Supreme Court held that right or cause of action would enure to the lender to proceed against the Principal Borrower, as well as the guarantor in equal measure referred to in Para 23, which is to the following effect:

> *"23. Indubitably, a right or cause of action would enure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. For, as aforesaid, expression "default" has also been defined in Section 3(12) of the Code to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due or*

payable and is not paid by the debtor or the corporate debtor, as the case may be."

16. The scheme of I&B Code, in view of law laid down by the Hon'ble Supreme Court in ***"Laxmi Pat Surana vs. Union of India & Anr."***, we are not persuaded to follow judgment of this Tribunal in Dr. Vishnu Kumar Agarwal (Supra).

17. It is further relevant to notice that no submission have been advanced regarding debt or default. Debt and default by the Corporate Debtor is an admitted fact which has not been questioned or contested. The Adjudicating Authority having returned the finding that there exist financial debt and default, no error has been committed by the Adjudicating Authority in admitting Section 7 application. We, thus, do not find any error in the impugned order admitting Section 7 application. There is no merit in the Appeal. Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

16th May, 2023

Archana