

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 246 of 2024**

[Arising out of order dated 20.12.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench (Special) Court No. II, Kolkata in CP (IB) No.26/KB/2023]

**IN THE MATTER OF:**

**1. New Era Propcon Private Limited**

B-12 & B-13, First Floor,  
Flat No.10 Indra Enclave,  
Neb Sarai, New Delhi-110068  
Email: newerapropcon@gmail.com  
Through its authorized representative, Mr. Naveen  
Sharma

**2. Swastik Infrsolutions Private Limited**

Triveni Apartment, A-94,  
Shop No.1, Swayam Sewa Group Housing Society,  
Vivek Vihar, New Delhi-110095  
Email: swastikinfrsolutionspvt@gmail.com  
Through its authorized representative, Mr. Naveen  
Sharma

**...Appellants**

**Versus**

**1. SREI Equipment Finance Limited**

Vishwakarma, 86C, Topsia Road,  
Kolkata- 700046, West Bengal  
Email: secretarial.sefl@srei.com

**2. Varutha Developers Private Limited**

Unit No. 709, 7th Floor,  
Merlin Infinite DN-51, Sector-V,  
Salt Lake City, Kolkata- 700091, West Bengal  
Email: Varuthadevelopers@gmail.com

**...Respondents**

**Present:**

**For Appellant:** Mr. Arun Kathpalia, Mr. Abhijit Sinha, Sr. Advocates with Mr. Rajesh P. Mr. Rajat Juneja, Mr. Anmol Kumar, Advocates.

**For Respondents:** Mr. Krishnendu Datta, Sr. Advocate with Mr. Milan Negi, Ms. Asmita Rakheechea, Ms. Raniya Hariharan, Mr. Nikhil Kumar Jha, Mr. Soumjit Shah, Advocates for R-1.

## **J U D G M E N T**

### **ASHOK BHUSHAN, J.**

This Appeal by an Applicant who has filed an Intervention Application in a Section 7 application initiated by Respondent - SREI Equipment Finance Limited, has been filed aggrieved by order dated 20.12.2023 admitting Section 7 application filed against Varutha Developers Private Limited – the Corporate Debtor. Applicant has come up in this Appeal aggrieved by order dated 20.12.2023. Brief facts of the case necessary for deciding this appeal are:

- (i) The Appellants entered into a Share Purchase Agreement dated 17.05.2019 with Vision India Fund (VIF) and Infra Resurrection Fund (IRF), the shareholders of Varutha Developers Private Limited (Corporate Debtor). Under which Share Purchase Agreement, the Appellants were required to pay Rs.1 Crore as share purchase consideration towards value of the shares to VIF and IRF and sum of Rs.299 Crore to the Corporate Debtor towards repayment of debt of Rs.300 Crores availed by the Corporate Debtor from SREI Equipment Finance Limited for purchasing 9.26 acres of land situated at Sector 62, Gurugram.
- (ii) SREI Infrastructure Finance Limited (SIFL) invited bids for 9.26 acres of land situated at Sector 62, Gurugram. Corporate Debtor –

VDPL submitted its bid and declared as Successful bidder on 09.08.2019 and a sale certificate was issued.

- (iii) The land was provisionally attached by the Enforcement Directorate (ED) by order dated 04.02.2020 which was later confirmed by the Adjudicating Authority under PMLA Act, 2002 vide order dated 27.08.2021.
- (iv) As a result, the transaction has not fructified and the Appellants initiated arbitration proceeding owing to the failure of shareholders of the Corporate Debtor to honour their obligations in which a Settlement Award dated 19.04.2021 was passed. Despite several reminders by the Appellant VIF and IRF failed to honour their obligation.
- (v) Section 7 application was filed by SREI Equipment Finance Limited against the Corporate Debtor on default being committed in repayment of loan of Rs.300 Crores which was disbursed by SREI Equipment Finance Limited to the Corporate Debtor. Section 7 application was filed in the year 2023 by Administrator of SREI Equipment Finance Limited appointed by order dated 04.10.2021.
- (vi) In Section 7 application notices were issued to the Corporate Debtor. The Corporate Debtor was set ex-parte by order dated 08.05.2023. The Adjudicating Authority on 14.05.2023 reserved the order on Section 7 application. After the Section 7 Application was reserved for orders, the Appellants have filed an I.A. No.39 of

2023 praying for Intervention in the Section 7 proceeding. The Intervention Application was filed on 06.12.2023 by the Appellant.

(vii) The Adjudicating Authority on 26.12.2023 passed the impugned order admitting Section 7 application. Aggrieved by which order this Appeal has been filed.

2. Shri Arun Kathpalia, learned senior counsel appearing for the Appellants challenging the order contends that Appellants having entered into the Share Purchase Agreement with two shareholders of the Corporate debtor namely VIF and IRF, Appellants were always ready to perform its obligation of paying amount to clear the debt of the Corporate Debtor. Initiation of CIRP against the Corporate Debtor shall cause prejudice to the rights of the Appellants. It is submitted that the Appellant has entered into the Share Purchase Agreement with the Shareholders of the Corporate Debtor for acquiring the 9.26 acres of land on which Corporate Debtor was declared as Successful Bidder. It is submitted that the loan transaction of Rs.300 crores by SEFL in favour of the Corporate Debtor was a sham transaction. The Administrator of the SEFL has already filed an application under Section 66 of the Code for avoiding the loan transaction of Rs.300 crores in favour of the Corporate Debtor, which application is pending. It is submitted that Section 7 application could not have been proceeded with before the Adjudicating Authority as the Appellant was always ready and willing to liquidate the debt of the Corporate Debtor to which he could not get any opportunity since the VIF, IRF and SIFL did not perform their obligations.

3. Shri Krishnendu Datta, learned senior counsel appearing for the Respondent submits that the Appellant has no locus to challenge the order dated 20.12.2023. Appellant is not even shareholder of the Corporate Debtor. Appellant has only entered into a Share Purchase Agreement with two shareholders of the Corporate Debtor which also could not fructify. It is submitted that the land has already been provisionally attached by the Enforcement Directorate (ED), which order has been confirmed on 27.08.2021. There is no right in the Appellant to question the admission under Section 7. It is submitted that there was debt and default having been proved, the Adjudicating Authority did not commit any error in admitting Section 7 application. The debt and default is admitted fact which is clear from assertion of the Appellants that Appellants were ready to clear the debt by paying Rs.299 crores to the Corporate Debtor. In so far as submission of the Appellant that they have obtained Settlement Award in arbitration proceeding on 19.04.2021, it is open for the Appellants to execute the Settlement Award. The submission of the Appellant that in view of the pendency of Section 66 application against the loan facility, Section 7 application ought not have been proceeded, has no merit. Section 7 application was filed on account of there being debt and default and resolution of insolvency of the Corporate Debtor was necessitated in view of the default committed by the Corporate Debtor. It is submitted that Section 66 application is for different purpose and object and mere pendency of Section 66 application cannot be an impediment for filing an application under Section 7. It is submitted that both the Section 7

application as well as Section 66 application has been filed by the Administrator. The filing of Intervention Application was belated attempt on behalf of the Appellant to stall the CIRP proceedings. Section 7 application was registered on 03.02.2023 and reserved for orders on 14.07.2023 and the Intervention Application was only filed on 06.12.2023.

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

5. We need to first examine the question as to whether the Appellant had locus to challenge the order of admission passed by the Adjudicating Authority. Appellant's own case is that the Section 7 application was filed by the Administrator of SREI Equipment Finance Limited against the Corporate Debtor for default committed by the Corporate Debtor in repayment of loan of Rs.300 crores extended by the Respondent. The Appellant's case as set up on the appeal is that the Appellant has entered a Share Purchase Agreement dated 17.05.2019 with two shareholders of the Corporate Debtor namely Vision India Fund (VIF) and Infra Resurrection Fund (IRF). Share Purchase Agreement has been brought on the record by the Appellant which indicate that it was entered with two entities VIF and IRF and the Corporate Debtor was also part of the Share Purchase Agreement entered with two shareholders of the Corporate Debtor. The Appellants could not acquire any shareholding of the Corporate Debtor since according to its own case the Share Purchase Agreement could not be given effect to in view of attachment of land by the

Enforcement Directorate (ED) on 04.02.2020. The Appellant has referred to Settlement Award dated 19.04.2021 where it was agreed between the parties that the Appellants would be liable to pay the amounts due towards repayment of the loan amount received by Varutha Developers Private Limited (VDPL) within 360 days of the variation of the ED order, whereunder the Land had been attached by the ED. Provisional attachment has been confirmed by the Adjudicating Authority under the PMLA Act.

6. Section 7 application has been filed by the SREI Equipment Finance Limited challenging default on part of the Corporate Debtor in repayment of loan of Rs.300 crores. The Appellant's case itself is that it has undertaken to pay the loan of the Corporate Debtor. Thus, the Appellant is not disputing the debt and default committed by the Corporate Debtor in repayment of loan. Order of admission has been passed by the Adjudicating Authority finding debt and default. In Para 17, 18 and 21 following has been held:

*“17. Further it is evident from Clause 2.10.1 (a) of the Agreement that the Loan Facility shall be repaid in bullet at the end of 9 months from the Initial Disbursement Date. It is further noted that that the said Clause as amended by clause 4.2.1 (page 133 of the Application) and clause 4.4 (Page 134 of the application) of the Amendatory and Supplementary Loan Agreement stipulates that the Loan facility was*

*required to be repaid in bullet by the Corporate Debtor to the Financial Creditor on October 31, 2021.*

*18. Further, it is evident from the CIBIL Report of the Corporate Debtor at pages 163- 168 as Annexure "F" to the Application that the Corporate Debtor has availed Credit Facility Details as Borrower (relevant page at 166 of the application) from the Financial Creditor of Rs. 300 Crore. Hence, the CIBIL Report clearly exhibits the existence of Debt by the Corporate Debtor. Also the MCA master data on charges also shows a charge by SREI for Rs.300 Crores against the Corporate Debtor.*

*21. Since the existence of debt has been borne out from the agreement as also the registration of the Charges with MCA, and also that the debt has not been paid back in the stipulated time i.e. by October 31, 2021., therefore a default has occurred. In the light of the facts stated in this application bearing Company Petition (IB) No. 26/KB/2023, and the documents placed on record and the discussion hereinabove, we ALLOW the application filed under Section 7 of I&B Code, and accordingly, we order the initiation of Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor by the following Orders: .....*"

7. Learned counsel for the Appellants has placed much reliance on the fact that Section 66 application has been filed by the Administrator for avoiding the transaction of loan by which SEFL has given loan of Rs.300 crores to the Corporate Debtor, which application is still pending. The purpose and object of application under Section 66 is entirely different and the mere fact that Section 66 application has been filed cannot impede the



proceedings of Section 7 application. Learned counsel for the Appellants has also placed reliance on judgment of Hon'ble Supreme Court in "*Phoenix ARC Private Limited vs. Spade Financial Services Limited & Ors., (2021) 3 SCC 475*". Reliance has been placed on Para 48 of the judgment, which is as follows:

*"48. The above discussion shows that money advanced as debt should be in the receipt of the borrower. The borrower is obligated to return the money or its equivalent along with the consideration for a time value of money, which is the compensation or price payable for the period of time for which the money is lent. A transaction which is sham or collusive would only create an illusion that money has been disbursed to a borrower with the object of receiving consideration in the form of time value of money, when in fact the parties have entered into the transaction with a different or an ulterior motive. In other words, the real agreement between the parties is something other than advancing a financial debt. A useful elaboration of "sham transactions" can be found in the opinion of Diplock, L.J. in *Snook v. London & West Riding Investments Ltd.* 14: (QB p. 802)*

*"As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham," it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the*

*parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.” (emphasis supplied)”*

8. The submission of the Appellant is that the transaction which is sham or collusive can only create an illusion that money has been disbursed to a borrower. The present is a case where there is no dispute raised that money has not been disbursed. The disbursement of money is not an issue raised. The filing of Section 7 application by the Administrator of SEFL was on the basis that loan was sanctioned and in pursuance of the loan amount was disbursed. Copy of the Statement of Account was also filed along with the Section 7 application which also indicate that amount was disbursed. The observation made by the Hon'ble Supreme Court in Para 48 of the judgment in *“Phoenix ARC Private Limited vs. Spade Financial Services Limited & Ors.”* that where a transaction is sham or collusive, it would only create an illusion that money has been disbursed to a borrower is not applicable in the present case. Present is a case where disbursal is not an issue. The question whether the loan transaction is fraudulent transaction within the meaning of Section 66 is engaging attention of the Adjudicating Authority in a separate application filed by Administrator of SEFL which needs no consideration or observation in the present proceeding.

9. Learned counsel for the Appellant has referred to Settlement Award dated 19.04.2021. The Settlement Award dated 19.04.2021 has been brought on record in appeal as Annexure A-10. The Settlement Award is;

*“Between:*

*1. New Era Propcon Private Limited Through its Director*

*Having its Registered Office at:  
50 F, Street No. 4, Baljit Nagar,  
West Delhi, New Delhi-110 008*

*2. Swastik Infrasoftware Private Limited Through its Director*

*Having its Office at:  
A-94, Triveni Apartments,  
Shop No. 1, Swayam Seva Group Housing Society,  
Vivek Vihar, New Delhi-110 095.*

*.....Claimants*

*And*

*1. Vision India Fund*

*Through Its Trustee*

*Having its Registered Address at:  
Vishwakarma, 86 C, Topsia Road (South),  
Kolkata, West Bengal - 700 046*

*2. Infrastructure Resurrection Fund*

*Through its Trustee*

*Having its Registered Address at:  
Vishwakarma, 86 C, Topsia Road (South),  
Kolkata, West Bengal -700 046*

*3. Varutha Developers Private Limited*

*Registered Office at:*

*45, Radhanath Choudhary Road,  
Kolkata-700 015, West Bengal*

*.....Respondents.”*

10. The contents of Settlement Award indicate that the Appellants, Corporate Debtor and SIFL had acknowledged the loan liability and the Appellant had undertaken to pay Rs.299,00,00,000/- to clear the debt of lenders. Following part of Settlement Award clearly contains the acknowledgement:

*“AND WHEREAS, after having entering into the SPA, the same was renegotiated and accordingly an Amended and Restated Share Purchase Agreement dated May 17, 2019 was entered into and executed (hereinafter referred to as 'First Amendment Agreement"). Pursuant to the execution of the First Amendment Agreement, the sale and transfer of 100% (Hundred percent) fully paid equity shares of Varutha was made subject to certain conditions that inter alia included payment of the loan liability of the Lender of Varutha aggregating to Rs. 299,00,00,000/- (Rupees Two Hundred and Ninety Nine Crores Only) by the Purchaser(s). The Lender provided the loan facility to Varuthe for the purpose of acquisition of a parcel of land situated at revenue estate of village Tigra, Nangli Umarpur and Ghata, Sector 62, Gurugram, Haryana ("Said Land") by Varutha. Varutha purchased the Said Land under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2003 ("SARFAESI") proceedings by way of auction from SIFL as the Sald Land was mortgaged with SIFL as a security for certain loan facilities extended by SIFL.”*

11. The above facts makes it clear that the debt and default is not denied only by the Corporate Debtor but the Appellants also. We fail to see any valid ground on which Appellants can question order of Adjudicating Authority admitting the Section 7 application.

12. The Appellant has every right or jurisdiction to enforce his Settlement Award. Appellant has also brought on the record application filed by Appellant for execution of award dated 19.04.2021 before the District Judge Cum Presiding Officer Special Commercial Court, Gurugram, Haryana.

13. In view of the facts and sequence of events, as noticed above, we are of the view that there being debt and default against the Corporate Debtor, which is an admitted fact, no error has been committed by the Adjudicating Authority in admitting Section 7 application. It is always open for the Appellant to file its claim, if any, in the CIRP of the Corporate Debtor which may be considered in accordance with law. With the above observation, we dismiss the appeal.

**[Justice Ashok Bhushan]  
Chairperson**

**[Barun Mitra]  
Member (Technical)**

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

**NEW DELHI**

**16<sup>th</sup> April, 2024**

*Archana*