NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 406 of 2024

IN THE MATTER OF:

Pancham Studios Pvt. Ltd. **...Appellant**

Versus

Konark Aquatics & Exports Pvt. Ltd. **...Respondent**

Present:

For Appellant : Mr. Kumarjit Banerjee, Mr. Sanchari Chakraborty, Mr. Aadil Naushad, Mr. Sahil Sharma, Mr. Shashank Agarwal, Advocates.

For Respondent : Mr. Rajesh Aggarwal, Dr. B.K. Dash, Ms. Deeksha Aggarwal, Mr. Mayank Dash, Mr. Ninad Dash, Advocates.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 29.11.2023 passed by the NCLT, Cuttack Bench by which an application bearing CP (IB) No. 37/CB/2022 filed by the Appellant under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') against Konark Aquatics and Exports Private Limited (Corporate Debtor) for the resolution of an interest free loan of Rs. 4,43,50,000/- has been dismissed.

2. The case set up by the Appellant is that the CD is in the business of sea foods processing and exports. The business of the CD suffered because of the death of one of the promoters of the CD which led to classify the account of

the CD with secured creditors as NPA. It is alleged that on the request of the CD, the Appellant agreed to disburse inter corporate loan to discharge the liabilities of the other secured financial creditors. The loan advanced by the Appellant did not bear interest and was to be repaid after the settlement of the secured financial loans of the CD under the one time settlement scheme but when the CD failed to repay the loan after settlement of the secured loans, the Appellant issued notice dated 20.08.2019 and recalled its loan of Rs. 4,43,50,000/- to be repaid within 15 days. The Appellant has alleged that the amount of loan is reflected in the financial statement of the Respondent as unsecured loan.

3. On the other hand, the case set up by the Respondent is that the loan, if any, advanced without interest is not a financial debt. There was no agreement between the parties for disbursement and no due date was fixed for repayment. It is also alleged that the amount was released to Mr. Devprakash Mahapatra, MD of the CD against the sale consideration of a joint family property transferred in favour of the Appellant by way of sale deed dated 15.03.1999 and for development of commercial complex. It is also alleged that the Appellant and the Respondent companies are family owned and are in the same management under common directors because Mr. Debasis Mahapatra and Mr. Devprakash Mahapatra are brothers. The amount stated to have been paid is due to mutual cooperation. It is also alleged that amount in question has been shown in the balance sheet for the year 2020-21 under the head short term loans and advances. The Respondent pleaded that Section 186 of the Companies Act, 2013 (in short 'Act') has not

been complied with. It is also alleged that the joint family property owned by Mr. Debasish Mahapatra, Mr. Devprakash Mahapatra and Ms. Sonali Mahapatra, at Plot No. 149, Khata No. 596, Mouza Rudrapur, Bhubaneshwar, measuring an area of Ac.2.610 Acs was transferred to the Appellant in the year 1999 with mutual understanding to develop a commercial project and to equally distribute the sale proceeds profits proportionately being 1/3rd each among the land owners in future. It is alleged that it was also agreed that the proceeds received from the sale of the commercial project by the financial creditor were to be released in phases as and when received in favour of the other group companies for their revival and growth. The Respondent has also alleged that a sale deed was executed on 15.03.1999 by the land owners and the Appellant and thereafter, on 22.10.2012 a joint development agreement was executed between the Appellant and M/s Oorijita Projects Pvt. Ltd., Hyderabad for development of a commercial complex on the said land. As per joint development agreement clause 6, an amount of Rs. 1,53,00,000/-as interest free refundable, adjustable deposit paid by developer was distributed / shared by the parties accordingly. He has alleged that share of Devprakash Mahapatra, MD, Respondent received was Rs. 17 Cr. out of which a sum of Rs. 37,50,000/- paid to Mr. Devprakash Mahapatra and a sum of Rs. 4,43,50,000/- paid to CD whereas the balance amount due towards the Appellant is Rs. 12,19,00,000/-

4. Controverting the aforesaid allegations / averments, the Appellant has alleged that the amount of Rs. 4,43,50,000/- is admitted by the CD in its own balance sheets for the financial year 2017-18 and 2020-21 as unsecured

loans. It is reiterated that the CD sought financial assistance in terms of an inter corporate interest fee loan repayable within two years from the last date of disbursement or after completion of debt settlement and acquisition of plant and machinery from bank or six years from the first date of disbursement or on demand whichever is earlier. The Respondent has also filed the sur-rejoinder.

5. The Tribunal on the pleadings of the parties framed three questions for determination of the application filed under Section 7 of the Code, namely, whether the CD owed a financial debt of Rs. 4,43,50,000/- to the Appellant, whether loan given in violation of section 186 of the Act is void and whether the Appellant has not complied with the requirements of Section 7(3)(a) of the Code? If yes what are its consequence?

6. In so far as the first point is concerned, the Tribunal has answered the same in the following manner:-

> "14. For financial debt the following elements are necessary (i) Disbursement and (ii) the disbursement must be against the time value of money and for commercial purpose. In our case as discussed above it is proved by the respondent that no loan was given by the petitioner to the respondent company, the amount of Rs.4,43,50,000 is not a loan amount, this was the amount payable to the managing director of the corporate debtor towards his 1/3 share in the joint-family property sold in the name of the petitioner. There are no elements of commercial transaction, only the amount paid by the developer Oorjit Projects Private Limited was disbursed to the respondent through the petitioner, because of an internal family arrangement arrived among the siblings of Late Tarakanta Mahapatra. In these circumstances it is answered that amount given by the petitioner to the respondent is not a debt, in particular it is not a financial debt; hence the respondent is not owed to pay the petitioner; thus, this point is answered."

7. As far as the second point is concerned, the Tribunal has held that the loan was given in violation of Section 186 of the Act, therefore, it was void and thus unforceable.

8. The third point was also decided against the Appellant holding that it has not complied with the requirement of Section 7(3)(a) of the Code. Consequently, the application was dismissed.

9. Counsel for the Appellant has argued that the entire amount of Rs. 4,43,50,000/- was disbursed to the CD through banking channels. It is further submitted that the disbursement of the amount has not been disputed by the Respondent either before the Tribunal or before this Tribunal, therefore, there is no issue on the disbursement of the amount. It is submitted that since the said amount was disbursed to enable the CD to liquidate its financial liabilities towards secured financial creditors under an OTS arrangement and the amount was repayable after OTS was over but the Respondent did not repay the amount despite five demand notices which were served between 02.08.2019 to 30.05.2022. The receipts of the notices has not been dined by the Respondent but no repayment was made, therefore, there was admittedly a default in repayment by the Respondent of the aforesaid amount of the loan alleged to have been advanced by the Appellant.

10. Counsel for the Appellant has further submitted that the Tribunal has committed an error in respect of the first point as to whether amount in question was a financial debt. The finding recorded by the Tribunal is that

the amount in question is not the loan amount but it was disbursed out of amount paid by the developer Oorijit Project Pvt. Ltd. to the Respondent through the Appellant on the basis of internal family arrangement.

11. Counsel for the Appellant has argued that the amount in question has been reflected in the financial statement of the CD as unsecured loan. In this regard, he has referred to financial statement of the year 2016-17 in schedule 3A under the heading unsecured loans towards Pancham Studio of an amount of Rs. 4,42,50,000/-. Similarly, in the financial statement of the year 2017-18 in schedule 3A under the heading unsecured loan the amount in the name of Pancham Studio is Rs. 4,43,50,000/- and in the financial year 2020 to 21 the same entry is repeated. It is contended that the amount in question has been reflected as unsecured loan from the FC in the financial statement of the CD at all relevant times and particularly on and from financial year 2016 -17 to 2020-21. These entries are without any qualification and / or caveat whatsoever, therefore, it has been admitted by the CD as unsecured loan having the commercial effect of borrowing. It is also submitted that entries in the financial statement/balance sheets constitutes the acknowledgement or admission of debt and also about the nature and character of the debt as a financial debt.

12. Counsel for the Appellant has further submitted that in the letter dated 28.10.2017 it has been clearly admitted that the funds of Pancham Studio had been utilized to repay the part debt of one of the sister companies, namely, Konark Aquatics & Exports Pvt. Ltd. (Respondent). It is submitted that such interest free loan granted by the FC at the behest of a stakeholder

of CD for the purpose of discharging the CD's financial liabilities /debts, designed towards improving the financial health of the CD has the commercial effect of borrowing. It is further submitted that interest free loan advanced to meet the financial requirements of a CD has commercial effect of borrowing and in this regard relied upon a decision in the case of Orator Marketing pvt. Ltd. Vs. Samtex Desinz Pvt. Ltd., 2021 SCC OnLine SC 513. It is further submitted that the existence of a formal agreement or financial contract is not necessary for establishing a financial debt and in this regard, reliance has been placed upon a decision in the case of M/s Agarwal Polysacks Pvt. Ltd. Vs. M/s K.K. Agro Foods & Storage Ltd., CA (AT) (Ins) No. 1126 of 2022 and BDH Industries Ltd. Vs. Mars Remedies Pvt. Ltd., CA (AT) (Ins) No. 936 of 2020.

13. As regards the issue of non-compliance of Section 186(2) of the Act is concerned, it is submitted that the Tribunal has committed an error in holding that the loan advanced in violation of Section 186(2) of the Act is void and unforceable because Section 186(2) of the Act is to protect shareholders / stakeholders of a financial creditor so as to safeguard granting of excessive loans by the management of the FC beyond the capacity of the FC for which such shareholders/stakeholders can challenge such violation and it is not open for the CD to take shelter under such provision and refuse the repayment of the borrowed sums. It is submitted that the CD being the beneficiary / recipient of the sums advanced has no locus to assail a transaction on account of violation of Section 186(2) of the Act. It is also submitted that for the violation of Section 186(2) of the Act, penal provisions

of fine and imprisonment has been provided but it will not invalidate the transaction qua the third party borrower. In this regard, he has referred to a decision in the case of Sarveshwar Creations Pvt. Ltd. Vs. Union Bank of India, CA (AT) (Ins) No. 1003 of 2020 in which it has been held that *"l. As far as the issue of contravention of provision of Section 185 of the Act prevailing as on that date (pre -07.05.2018 amendment to the Act) is concerned, it is very much clear that this is the provision which the company has to comply internally and if they fail to comply the necessary punishment is available in the same section i.e. Section 185, both monetary penalty and /or imprisonment. As far as bank is concerned, they have been provided time to time the Board Resolution showing the approval of the Board. Hence, if there is any irregularity then for that the Members of the Board are responsible. If the official of the bank have committed some irregularity, then it is the Bank who has to prosecute these officers against the provisions laid down under the law applicable to them. Bank is required to investigate internally. However, as far as the public fund with the public sector bank is concerned, the "Doctrine of Indoor Management" will be wholly and exclusively applicable"*

14. Counsel for the Appellant has further submitted that the last finding recorded by the Tribunal about the non-compliance of Regulation 20(1A) of IBBI (Information Utilities) Regulations, 2017 being mandatory is erroneous and in this regard, he has relied upon a decision of this Court in the case of Vijay Kumar Singhania Vs. Bank of Baroda & Anr., CA (AT) (Ins) No. 1058 of 2023 in which the following observations have been made:-

> 28. Regulation 20 of the IBBI (Information Utilities) Regulations, 2017 as amended w.e.f 14.06.2022 i.e. Regulation 20(1A) requires

Financial Creditor before filing an application to initiate corporate insolvency resolution process under section 7 or 9, as the case may be, the creditor shall file the information of default, with the information utility and the information utility shall process the information for the purpose of issuing record of default in accordance with regulation 21. The submission is that after insertion of the above sub-regulation (1A) in Regulation 20, now no application can be filed under Sections 7 and 9 if it is not accompanied by record of default issued by Information utility as contemplated by Regulations 20 and 21. Regulation 20 although has been amended w.e.f 14.06.2022 but there is no amendment either in Section 7 of the IBC which empowers Financial Creditor to file record of the default recorded in the information utility or such other record and default as may be specified or in Rules 2016 or CIRP Regulations 2016. The statutory scheme, thus, contemplates furnishing record of default by the financial creditor as recorded with the information utility or such other record or evidence of default as may be specified. We have already noticed that the record of default for purposes of Section 7(3)(a) has been specified by Regulation 2A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Thus, record of default recorded with the information utility is not the only document which has to be furnished by financial creditor. Financial creditor is at liberty to submit such other record of default as may be specified which is a statutory provision contained in Section 7. Further Regulation 2A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 clearly refers to provide for record or evidence of default by financial creditor. We have also noticed that the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which are Rules framed by the Central Government provides for filing of the application under Section 7 in Form-1 and under Form-1, Part-V under 'particulars of financial debt (documents, records and evidence of default)', it is not only the record of default with information utility but other record of default has also been contemplated. We have noticed that Regulations framed by the Board as per Section 240(1) has to be consistent with provisions of the Code and the Rules. If Regulation 20(1A) is to be read as Regulation now mandating the Financial Creditor to file only the record of default in the information utility, the said Regulation will not be consistent with provision of Section 7(3) of the Code and Rule 4 of the Insolvency and Bankruptcy (Application to

> Adjudicating Authority) Rules, 2016 which provides that what documents have to be filed by the Financial Creditor. Sub-rule (1) of Rule 4 provides for documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Thus, CIRP Regulations 2016 are referred to in Rule 4 sub-rule (1), hence, the interpretation of Regulation 20(1A) as put by the Counsel for the Appellant shall also not be consistent with Rule 4. When Section 240 itself provides that regulations have to be consistent with provision of Code and Rules, no regulation can be implemented or enforced which is not in consonance with the Code and the Rules.
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> 29. From the above examination of statutory scheme, Rules and Regulations, it is clear that Regulation 20(1A) cannot be read to mean that after the said amendment brought in regulation w.e.f 14.06.2022 an application filed under Section 7 which is not supported by information of default from an information utility is to be rejected and if the Financial Creditor has filed other evidence to prove default which is contemplated by the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the said application has not to be considered. We, thus, are of the considered view that even after amendment of Regulation 20 by insertion of Regulation 20(1A) w.e.f 14.06.2022, Financial Creditor is entitled to file evidence of record of default as contemplated by Regulation 2A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. We, thus, do not find any substance in the submission of the Appellant that since Financial Creditor has not filed the record of default from an information utility, Section 7 deserves to be rejected.

15. In the end, it is submitted that the disbursement of the amount, default on the part of the Respondent in not repaying the amount despite five notices and the amount has been recorded as debt in the financial statement of the Respondent is sufficient for admission of the application under Section 7 of the Code. In this regard, he has relied upon a decision in the case of

Innoventive Industries Ltd. Vs. ICICI Bank, (2018) 1 SCC 407 in which it has been held that *"30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."*

16. On the other hand, Counsel for the Respondent has submitted that the disbursement of loan was in violation of Section 186 of the Act as per which no company can directly or indirectly give any loan exceeding 60% of its paid up share capital without prior approval by means of special resolution passed in the general meeting and loan cannot be granted without interest or at a less rate of interest. It is argued that no general meeting at all and the loan was also interest free. In this regard, he has relied upon a decision in the case of M Sai Eswara Swamy Vs. Siti Vision Digital Media Pvt. Ltd., CA (AT) (Ins) No. 706 of 2021.

17. Counsel for the Respondent, having merely relied upon Section 186 of the Act, has further submitted that the amount of loan has been given without any document / agreement and without interest, therefore, it is not a financial debt.

18. Finally, he has also referred to Regulation 20 to contend that the Appellant has not filed any record of default with the information utility which is a mandatory requirement.

19. We have heard Counsel for the parties.

20. There is no dispute to the fact that the amount in question is continuously reflected in the balance sheet of the Respondent from 2016 -17 to 2020-21 in schedule 3A as unsecured loan without any caveat, therefore, such entry without any qualification / caveat is acknowledgment of debt by the CD as unsecured loan is having commercial effect of borrowing.

21. Much emphasis has been laid by the Respondent as well as the Tribunal about non-adherence to the provision of Section 186 of the Act. Section 186(2)(a) of the Act says that "no company can directly or indirectly give any loan exceeding 60% of its paid up share capital free reserves and securities premium account of its free reserves and securities premium account whichever is more". However, Section 186(13) provides for punishment for violation of the provisions of the section. It provides that "the Company shall be punishable with fine which shall not be less than Rs. 25000 but which may extend to Rs. 5 lakh and officer of the company who is in default shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than Rs. 25000 but which may extend to Rs. 1 lakh."

22. But in no case the debt advanced by the Company to a corporate body can be held to be unrecoverable only because of the reason that there was a irregularity in advancement of the loan which became a debt to a third party

or in other words the CD cannot take the shelter of Section 186 of the Act to deny its liability to return the amount taken by it being a corporate body which is due and payable.

23. The decision in the case of M Sai Eswara Swamy (Supra) is not applicable to the present controversy because in that case the basic issue was as to whether the company petition was filed by the person without having the authority of the board through resolution. In this regard, the finding has been recorded in the said case is that "thus, we are affirmed the finding of Ld. Tribunal that there is no board resolution authorising the petitioner to file the petition, therefore, the petition is not maintainable". It has also held that with the aforesaid we are of the view that the Tribunal has rightly held that the petition is not maintainable, therefore, no interference is called for in the impugned order. The said appeal was dismissed summarily and no reasoning was given in this regard that if there is violation of Section 186 then the CD can take the plea that the transaction has become void and is not liable to repay the same.

24. The argument of the Respondent that a written financial contract is necessary for providing debt has been negated by this Court in the case of M/s Agarwal Polysacks Ltd. (Supra) in which the following observations has been made :-

> 11. We need to test the submission of learned counsel for the Respondent that the written financial contract is necessary for proving debt. A financial contract supported by financial statements as evidence of the debt is one of the documents contemplated in Regulation 8(2) but that is not exclusive requirement for proving existence of debt. Financial contract thus

> can very well be furnished to prove the financial debt but a plain reading of Regulation 8(2) indicate that it is not mandatory that existence of financial debt has to be proved by a financial contract. For example: records available with an information utility can very well be used as proof for existence of financial debt. Further, financial statements showing that the debt has not been paid is also one of the clauses in Regulation 8(2) by which existence of debt can be proved.

25. The Appellant has already proved on record about the amount which was disbursed as it has not been disputed and that the said amount is a debt fully reflected in its balance sheet continuously as an unsecured loan and had not been paid despite the fact that repeated demands were made through five demand notices, therefore, it falls within the definition of default on the part of the Respondent.

26. Hence, once the debt and default has been proved, therefore, the Tribunal has committed a patent error in dismissing the application filed under Section 7 of the Code and consequently, the present appeal is hereby allowed and the impugned order is set aside though without any order as to costs.

I.As, if any, are hereby closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

New Delhi
15th July, 2025
Sheetal