(2025) 02 NCLAT CK 0946

In the National Company Law Appellate Tribunal, Pricipal Bench, New Delhi

Case No : Company Appeal (AT) (Insolvency) No. 147,790,299, of 2020

Pradeep Agarwal & Ors APPELLANT

Vs

Nutan Ispat And Power Private Limited & Ors RESPONDENT

Date of Decision : 06-02-2025

Acts Referred:
Companies Act 2013 — Section 7,61

Citation : (2025) 02 NCLAT CK 0946

Hon'ble Judges : Ashok Bhushan, Chairperson;Barun Mitra, Member (T);Arun Baroka, Member (T)

Bench : Full Bench

Advocate : Gaurav Mitra, Kumarjit Banerjee, Sanchari Chakroborty, Devanshu Laling, Aadil Nausahad , Ishan Roy Chowdhury, Joy Saha , Sidhartha Sharma, Arjun Asthana, Shalini Basu ,Kriti Gera

Final Decision : Dismissed

Judgement

Per: Barun Mitra, Member (Technical)

Present is a set of three appeals filed before us filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (“IBC” in short) which arise out of three separate impugned orders. Company Appeal No. 147 of 2020 arises out of the impugned order dated 02.12.2019 passed by the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench), Cuttack in TP No. 196/CTB/2019 in Company Petition (IB) No. 4684/MB/2018, by which impugned order, the Adjudicating Authority has dismissed the Section 7 application filed by the Appellants on the grounds that neither debt nor default is reasonably proved. The Company Appeal No. 790 of 2021 arises out of impugned order dated 16.04.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench) whereby the Adjudicating Authority has dismissed Misc Application (IB) No. 381/KB/2020 in CP(IB) No. 1680 of 2018 whereby application for revival of main Company Petition No. 1680 of 2018 under Section

7 of the IBC by the Appellant has been dismissed on the ground that a Memorandum of Settlement had been entered between the parties leading to settlement between the parties. Company Appeal No. 299 of 2023 arises out of impugned order dated 13.01.2022 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench) whereby the Adjudicating Authority has dismissed Misc Application No. 382/KB/2020 wherein a prayer had been made for revival of the main Company Petition No. 34/KB/2019 in view of the settlement between the parties and reference of the matter for arbitration proceedings and consequential passing of arbitral award. Aggrieved by these three impugned orders, the present appeal has been preferred by the Appellants.

2. We have heard Shri Gaurav Mitra, Ld. Counsel appearing for the Appellants in CA(AT)(Ins) No. 147 of 2020 and Shri Kumarjit Banerjee, Ld. Counsel appearing for Appellants in CA(AT)(Ins) Nos. 790 of 2021 and 299 of 2023 and Shri Joy Saha, Ld. Sr. Counsel representing Respondents in all the above appeals.

3. Shri Gaurav Mitra, Ld. Sr. Counsel for the Appellants gave a background genesis of the facts of the present case. Since all the three appeals are factually inextricably inter-related, Shri Kumarjit Banerjee, Ld. Counsel appearing for Appellants in the other two appeals also agreed with the factual overview given by Shri Gaurav Mitra and gave his own inputs also which have all been captured together. It was submitted that Pradeep Kumar Agarwal and Nutan Agarwal-Appellants No.1 & 2 were shareholders of the Corporate Debtor-M/s Nutan Ispat and Power Pvt. Ltd. ("Nutan Ispat" in short), which Corporate Debtor owed a debt to SBI and other banks due to which the account of the Corporate Debtor was declared NPA. The Appellants No.1 & 2 approached Bimal Khetan and group-Respondent to make payment of dues of the Corporate Debtor to the Financial Creditors and in return agreed to give up their control over the Corporate Debtor by transferring their shareholding in the Corporate Debtor. On this understanding a Memorandum of Understanding ("MoU" in short) was signed between them on 31.07.2016. In terms of the MoU, the entire shareholding of the Appellant No.1 & 2 was to be transferred to Khetan Group for a consideration of about Rs 45 Cr.

4. Elaborating further it was submitted that pending the full and complete transfer of their shareholding, Appellant No.1 and Appellant No.2 infused a sum of money of Rs 7,26,00,788/- either by themselves or through Appellant No.3-M/s Indo Lahari Bio Power Pvt. Ltd. ("Lahari" in short). These sums were infused towards servicing operational expenditures and financial indebtedness of the Corporate Debtor. It was submitted that these sums of money were infused pending transfer of management and control of the Corporate Debtor upon the express understanding that such investments by the Appellants were to be returned by the Respondent with the agreed rate of interest upon release of the securities and guarantees of the Appellants in terms of MoU. On the transfer of management and control of the Corporate Debtor to the Khetan Group in 2018, the Appellants accordingly demanded repayment of the invested sums together

with interest. Since the payments were not received, on 24.10.2018, the Appellants filed a Section 7 application seeking initiation of Corporate Insolvency Resolution Process ("CIRP" in short) of the Corporate Debtor. The Section 7 application was dismissed by the Adjudicating Authority on 02.12.2019.

5. Submission was pressed that the Adjudicating Authority had failed to recognise that Rs 7.26 Cr was admittedly advanced to the Corporate Debtor by the Appellants which was to be repaid with agreed rate of interest under the terms of MoU upon completion of takeover of financial indebtedness of the Corporate Debtor and release of guarantee-collateral of the Appellants. It was contended that the details of the disbursement of the entire sum of Rs 7.26 Cr. can be seen from the Bank Statements of the Appellants. It was further submitted that the Corporate Debtor had also admitted and acknowledged the dues as evident from their balance confirmation statements for the FY 2017-18. Further submission was pressed that these sums were reflected as loans from related parties in the books of the Corporate Debtor for FY 2017-18 and therefore this constituted unequivocal and unconditional admission that the sums disbursed by the Appellants had commercial effect of borrowing. It is further submitted that the Appellants had sent Demand Notices on 12.09.2018 demanding repayment of the entire sum within 10 days from the date of receipt of the notice failing which it would constitute a default on the part of the Corporate Debtor. The Corporate Debtor failed to repay the said amount which amounted to be a clear default on the part of the Corporate Debtor. Since the existence of financial debt and default are matters of record, this was a fit case for admission of the Section 7 application.

6. Shri Kumarjit Banerjee, Ld. Counsel for the Appellants making submissions in respect of Company Appeal Nos. 790 of 2021 and 299 of 2023 by which the Misc Application (IB) No. 581/KB/2020 filed by the Appellant pursuant to special leave granted by the Adjudicating Authority on 04.10.2019 to revive Company Petition No. 1680 of 2020 upon failure of Memorandum of Settlement ("MoS" in short) dated 21.09.2019 has been dismissed. It was submitted that Company Appeal No. 299 of 2023 has been filed challenging the impugned order dated 13.01.2022 by which Misc Application (IB) No. 382/KB/2020 in CP(IB) No. 34/KB/2020 which had been filed by the Appellant out of the special leave granted by the Adjudicating Authority on 04.10.2019 to revive CP(IB) No. 34/KB/2020 upon failure of settlement in terms of Memorandum of Settlement dated 21.09.2019 had been dismissed. Elaborating further, it was submitted that pursuant to the MoS of 21.09.2019, arbitral proceedings had been initiated but the arbitral award dated 15.11.2019 is presently under challenge by the Appellants under Section 37 of the Arbitration and Conciliation Act before the Hon'ble High Court of Chhattisgarh which is pending adjudication.

7. It was also vehemently contended by the Appellants that the MoS which both parties had entered on 21.09.2019 with intention to settle various disputes pertaining to debt owed by the Corporate Debtor to the Appellants had failed.

Since the settlement failed, an application was filed by the Appellants pursuant to specific leave granted by the Adjudicating Authority on 04.10.2019 to revive Company Petition No. 1680 of 2020 upon the failure of the settlement which was however erroneously dismissed by the Adjudicating Authority. Another application had also been filed by the Appellants seeking revival of the main Company Petition No. 34/KB/2019 upon the failure of the settlement which was also wrongly dismissed by the Adjudicating Authority. It was contended that the issue of settlement of the dispute with regard to the debt as claimed by the Respondent by adverting reference to the fact that the debt was under arbitration is misconceived as the arbitral award was under challenge under Section 37 of Arbitration & Conciliation Act before the Hon'ble High Court of Chhattisgarh. It was also submitted that reference to arbitration cannot be raised in an insolvency matter.

8. Refuting the contentions of the Appellant, Shri Joy Saha, Ld. Sr. Counsel for the Respondent submitted that the Appellants have suppressed the fact that in terms of Clause 5.6 of the MoU, all the liability of the Corporate Debtor prior to 31.07.2016 was payable by the Appellants No.1 and 2. These liabilities of the Corporate Debtor being prior to the MoU were to be borne and paid by Appellants No.1 & 2. Since these transactions, basis which the Section 7 application has been filed, pertain to transactions prior to 31.07.2016 which the Respondent was not liable to discharge, hence, these transactions cannot be viewed as debt, due and payable, by the Respondent. It is further the contention of the Respondent that the Section 7 petition was instituted by Appellants who were in exclusive management and control of the Corporate Debtor during the period of creation of alleged debt. Hence, the purported claim of the Appellant-Creditors was in respect of money allegedly due and owed by the Creditors to themselves, hence, the transactions were not in the nature of debt. Further, in terms of the MoU, the Khetan Group had already made payments to banks and government agencies and taken over liabilities of Rs 52.06 cr. as part performance of the obligations under the MoU. In addition, they had made payments of dues of various agencies and sundry debtors to the tune of Rs 3.19 cr. in terms of Clause 5.6 of the MoU which was payable by Appellants No.1 & 2.

9. It was also asserted that after institution of the Section 7 application by the Appellants, both parties had mutually and amicably agreed to refer their dispute to arbitration and accordingly entered into an Arbitration Agreement on 06.09.2019. The Appellants had never denied the existence of MoS and Agreement for Appointment of Arbitrator. The Agreement of Arbitration was valid and binding and on reference of the dispute to arbitration, the Section 7 application was rendered infructuous and non-maintainable. It was also added that the Appellants had participated in the arbitral proceedings. The Arbitral Tribunal had published its award on 15.11.2019 which award has been put into execution before the Commercial Court at Raipur on 09.03.2020. It was contended that the award of 15.11.2019 completely extinguished the alleged claims of the Appellants. It was also pointed out that the challenge of the arbitral

award of 15.11.2019 made by the Appellants under Section 34 of the Arbitration and Conciliation Act, 1996 was also dismissed. Though the Appellants have preferred an appeal under Section 37 of the Arbitration and Conciliation Act, 1996, there is no stay and hence operation of the existing award remains binding between the parties.

10. It was also contended that the Adjudicating Authority had rightly dismissed the Section 7 application on the grounds that there was no loan agreement between the parties and no interest payable on the purported loans. The Adjudicating Authority had also correctly held that there were no documents to substantiate the claim of the Appellants and there was no due date and default in the Section 7 application. Since neither debt nor default was reasonably proved, the Section 7 application had been dismissed.

11. The matter went through several rounds of hearing and after considering the arguments advanced by the Learned Counsels for all the parties, the matter was reserved for judgement on 19.12.2024. After the matter got reserved, the parties approached each other for amicable settlement to resolve the disputes. It has now been submitted that a Settlement Agreement dated 15.01.2025 has been entered upon. The copy of the settlement agreement executed on 15.01.2025 has been brought on record vide IA No. 687 of 2025 in CA No.147 of 2020; IA No. 680 of 2025 in CA No.790 of 2021 and IA No. 681 of 2025 in CA No.299 of 2023 by the Respondent. The IAs were heard on 30.01.2025 during which the Appellants expressed they are in agreement with the terms of the settlement. We take the settlement on record. In view of the mutual settlement having been entered into between the parties, we are not expressing any opinion on the rights and contentions of either of the parties. Nothing survives to be decided in the appeals. Hence, all the three appeals stand disposed of. No costs.

