NATIONAL COMPANY LAW APPELLATE TRIBUNAL

CHENNAI BENCH

(APPELLATE JURISDICTION)

TA No. 117/2021

[COMPANY APPEAL (AT) (INSOLVENCY) NO. 553/2020]

(Appeal filed under Section 61 of the I & B Code arising out of the impugned order dated 28.01.2020 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Bengaluru Bench) in CP (IB) No. 1/BB/2019)

In the matter of:

Mrs. Jayanthi G. Ravi
No. 1629, 31st Cross,
16th Main,
Banashankari 2nd Stage,
Bangalore- 560070 **Appellant**

Versus

M/s Chemizol Additives P Ltd.
Having its Registered Office at
Plot No. 19, E & F,
Bidadi Industrial Area
2nd Phase, Sector I, Talakuppe Village,
BidadiHobli, Ramanagara District,
Bangalore Rural, Karnataka - 562109 **Respondent**

Present:

For Appellant: Ms. Haripriya Padmanabhan,)
Mr. Rahul Kripalani,)
Mr. Rea Bhallo,) …. Advocates

For Respondent: Mr. Dhritiman Bhattacharyya, …Advocate.

JUDGEMENT

VIRTUAL MODE

M. VENUGOPAL, MEMBER(J)

I.A. NO. 1415 OF 2020

The Applicant/Appellant has preferred I.A. No 1415 of 2020 in Company Appeal (AT)(Ins) 553 of 2020 (T.A. No. 117 of 2021) seeking to condone the delay of 15 days in filing the instant 'Appeal' stating that her daughter was in a third and final trimester of pregnancy and hence she went to her daughter's place at Mumbai and later, there were certain socio-religious events in her family etc and because of that, the 'delay' in question had occurred, which is neither 'wilful' nor 'wanton', but due to aforesaid reasons. Accepting the aforesaid reasons ascribed on behalf of the Appellant/ Applicant, in preferring the instant Comp. Appeal (AT)(Ins) 553 of 2020 (T.A. No. 117 of 2021) with a delay of 15 days, this 'Tribunal', in the interest of justice, allows I.A. No. 1415 of 2020. No costs.

I.A. NO. 1414 OF 2020

2. According to the Learned Counsel for Applicant/Appellant the Appellant has filed I.A. No. 1414 of 2020 in Com. Appeal (AT)(Ins) 553 of 2020 (T.A. No. 117 of 2021) seeking permission to bring on record, the additional documents (which were not part of the proceedings before the 'Adjudicating Authority' in CP (IB) No. 1/BB/2019), in view of the fact that the said documents are very much essential for proper and effective adjudication of the 'Appeal'.

3. Because of the fact that the 'Adjudicating Authority' in the impugned order had rendered findings like there was 'misrepresentation', 'misappropriation', fabrication of documents and accounts, the 'additional documents' admittedly, which were not filed earlier, in the Section -7 Application, the Applicant/Appellant has chosen to file the 'additional documents' to substantiate her case and these documents, according the Learned Counsel for the Applicant/Appellant will definitely assist this 'Tribunal' to deliver 'Judgment' in the instant 'Appeal' in and effective manner.

4. Taking into account of the fact that the 'additional documents' projected on the side of Applicant/Appellant are very much essential to proper and effective adjudication of the controversies revolving around the 'Application' in CP (IB) No. 1/BB/2019, relating to 'financial debt', this 'Tribunal' allows I.A. No. 1414 of 2020, to secure the ends of justice. No costs.

Preamble

5. The Appellant/Applicant/Financial Creditor has preferred the present CA (AT) (Ins) 553 of 2020 before this Tribunal being dissatisfied with the order dated 28.01.2020 in CP (IB) No. 1/BB/2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Bengaluru Bench) in dismissing the Application.

6. The 'Adjudicating Authority' (National Company Law Tribunal, Bengaluru Bench) while passing the 'impugned order' dated 28.01.2020 in CP (IB) No. 1/BB/2019 at paragraph 8 to 14 had observed the following:

"In the instant case, the amounts are stated to be given at a time when the Petitioner was a Director in the Respondent Company, for the purpose of keeping the Company running and meeting the Company's funding requirements. As per the Petition, the Petitioner herself informed the Board about the fund requirement. That was much in the interest of the Petitioner herself as of the Respondent Company, as she was a Director. She then advanced the amounts on 01.12.2016 and 18.01.2017 in two tranches, totalling Rs. 4.10 crore. In the Board Meeting of 23.02.2017, another Director Sri S Jairam, a close associate and statutory auditor in other Companies in which the Petitioner was a Promoter Director and later in the Respondent Company as well, only "informed" the Board that the amounts had been received and were to be repaid in 6 months and bore an interest of 7.5% pa. There was therefore no Agreement or prior approval for the borrowing or for any terms and conditions, nor any other document to establish the debt. The amounts contributed were for the operational expenses of the Company. The amounts were not demanded or borrowed by the Company from the Petitioner. In this entire period, the Petitioner herself was the key person in the Company, chairing the Board meeting, and signing its minutes. All the decisions were virtually taken by the Petitioner unilaterally – decision on requirement of funds, information of payments and terms and intimation of the same, and adoption of Resolutions about each of these events. It is also seen that in the Resolution

adopted on 06.04.2017, when the Petitioner was still a Director, the period of return is stated to be 60 days as per the Petition, and not 6 months as mentioned elsewhere. Similarly the two amounts of Rs. 50 lakh each diverted immediately after receiving the above amounts in the Company to a another non-existent Company, in which the Petitioner had been a Director, without any approval, even though the amounts were stated to be given to the Respondent company to meet its expenses.

9. In view of the above facts, even though she may have given amounts as a Director, to meet the expenses of the Company, it does not necessarily make the amounts owed to her a 'debt' in the sense conceived in the Code. Debt, as defined under the Code in Section 3 (11) means a liability or obligation in respect of a claim which is due from any person, and includes a financial debt or an operational debt. Such a debt would arise from a claim, as also defined in Section 3 (6), i.e. from a right to payment in the hands of the Creditor. In the present context, such a right could arise from some prior terms and conditions agreed to by the concerned opposite parties, in the shape of a Contract or an Agreement between them, prior to the loan being given, so that the same could be enforced. It was also not a Financial Debt as per the definition given in section 5 (8) of the Code, as the amounts were not "money borrowed" by the Corporate Debtor. All actions regarding the loans in question were taken unilaterally by the

Petitioner. In addition there as lack of clarity as to whether it was in the nature of a Financial debt or an Operational debt. A borrowing may be reflected in the Balance Sheet, as pointed out by the Petitioner, but the same may not constitute a Financial Debt that could be enforced as per the Code. As held by the Hon'ble NCLAT in the case of Dr. BVS Lakshmi v. Geometric Laser Solution Pvt. Ltd. dated 22.12.2017, in such circumstances it cannot be said the amounts stated to have been given acquired the nature of a 'financial debt' and the Petitioner cannot be termed as a Financial Creditor. The Petition becomes liable to be dismissed on this ground as well.

10. Proceedings under the Code are summary proceedings, where even if there was debt, the same should be undisputed and the default, as defined under Section 3 (12) of the Code should be clearly established. While the amounts had been given in December 2016 and January 2017, and became due by June 2017, the demand notice (under section 9 and not under section 7 of the Code) was sent by the Petitioner only on 26.09.2018, that is, after a lapse of more than a year. In the intervening period, when she wielded full powers, took all the decisions and signed all the minutes of the Meetings, there were disputes that led to financial due diligence being undertaken by the Company through an independent Malaysian Financial Consultant, at the behest of the Investing Company / foreign Directors, which led ultimately to

the resignation of the Petitioner in July 2017 from Company, as it threw up issues of misrepresentation and misappropriation, fabrication of documents and accounts etc. Issues were also raised earlier about the Petitioner and her husband selling their shares in the Company to foreign entities of Singapore and Samoa, when they were Directors, at exaggerated valuation in collusion with the Auditor. Payments totalling Rs one crore were made in December 2016, when the Petitioner was a Director and under her supervision, to M/s Chemizol Lubricants Private Limited, a Company which had already been dissolved on 11.08.2016. Thus not only the purpose of giving the amounts but also the net amount payable, came into dispute much prior to the demand notice issued the Petitioner.

11. It is settled position of law that the provisions of the Code cannot be invoked for recovery of outstanding amount but can be invoked to initiate CIRP for justified reasons as per the Code. The Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited has inter alia, held that I&B Code, 2016 is not intended to be a substitute to a recovery forum and cannot be used to jeopardize the financial health of an otherwise solvent company by pushing it into insolvency. The Hon'ble Supreme Court in the case of K. Kishan Vs. Vijay Nirman Company Pvt. Ltd. clarified that the Petitioners cannot use IBC either prematurely or for extraneous

considerations or a substitute for debt enforcement procedures. In Transmission Corporation of A.P. Ltd. Vs. Equipment Conductors and Cables Ltd., Hon'ble Supreme Court of India has inter alia held that existence of undisputed debt is sine qua non of initiating CIRP. While we shall not go into the dispute per se, it is clear that the debt, if any was not clear or free from dispute, even prior to the issue of the legal notice, and the Petitioner has attempted to use these proceedings only for recovery of its claimed amounts.

12. Proceedings under the Code are for initiation of Insolvency proceedings, when a Corporate Debtor is found to be completely unable to repay its debts, a situation compelling enough for this Adjudicating Authority to order a CIRP. No case has been made out in the Petition that the Respondent Company is Insolvent. The Respondent Company is 99.99% wholly owned subsidiary of M/s. OnChamp Investments Limited, a foreign Company which has made huge Foreign Direct Investments in to the Corporate Debtor. Further, it is a 100% Export Oriented Unit and is committed to continue its regular operations and also to support hundreds of its employees. It has total assets of Rs. 152,05,49,836/- as at 31.03.2018, and net worth of Rs. 132.5 Crore with few liabilities. It has an investment in Land and Buildings of about Rs. 136 Crore. It was therefore a solvent Company, though there may have been temporary cash flow issues.

13. Section 7 (5) of the Code uses the term "may", which gives this Adjudicating Authority the option to weigh the pros and cons of initiating a CIRP against the Corporate Debtor. In the circumstances stated above, we do not consider it justifiable to send the Respondent into CIRP, as that would have serious socio-economic repercussions on an Export oriented Company with huge foreign funding, and of the stature mentioned above, especially on the hundreds of employees and other stakeholders and customers, and that too when the Respondent Company is undergoing a temporary funding lull and expects to recover soon.

14. Though we have held that the legal as well as factual position does not warrant initiation of a CIRP as per the provisions of the Code in respect of the Respondent/ Corporate Debtor, we make it clear that the dismissal of this Petition will not come in the way of the Petitioner to settle its dispute, if any, with the Respondent/ Corporate Debtor and seek refund of any amount due to it, by approaching any other forum or under any other Law."

and resultantly dismissed the 'Application' filed by the Appellant/ Applicant/Financial Creditor.

Appellant's Contentions

7. Challenging the order of dismissal dated 28.01.2020 in CP (IB) No. 1/BB/2019 passed by the Adjudicating Authority (NCLT, Bengaluru Bench) The Learned Counsel for the Appellant contents that the impugned order

passed by the Adjudicating Authority dated 28.01.2020 is an invalid and illegal one and that the Adjudicating Authority wrongly came to the conclusion that there was a dispute as to the purpose for which the amount was given.

8. According to the Learned Counsel for the 'Appellant' the 'Adjudicating Authority' had erroneously held in the 'impugned order' that a borrowing being reflected in the 'Books of Account' is not a 'Financial Debt'.

9. It is represented on behalf of the Appellant whether an amount Loaned by the Director to a 'Company' recorded as a Loan in the Minutes of the Meeting of the Board of Directors is not a 'Financial Debt'?

10. The Learned Counsel for the Appellant proceeds to point out that even in September, 2016, the 'Board of Directors' were aware of the fact that the Company was in the requirement of 'Funds' and it was discussed in the meeting of the Board of Directors.

11. The Learned Counsel for the Appellant brings it to the notice of this Tribunal that the loan of Rs. 4.10 Crores was disbursed by the Appellant to the Respondent/Company in two tranches, the first tranche of Rs. 2.50 Crores was made on 1.12.2016 and the second tranche of Rs. 1.6 Crores was made on 18.01.2017.

12. The Learned Counsel for the Appellant refers to clause 26 of the 'Articles of Association' which provides for the 'Borrowing Powers' of the 'Board of Directors' to the effect that 'the Board of Directors may from time to time at their discretion borrow from individual Directors, Members or other persons,

any sum or sums of money for the purpose of the Company on such terms and conditions as the Board of Directors may agree in each case'.

13. The Learned Counsel for the Appellant comes out with a plea that the 'Board of Directors' is empowered to subsequently ratify an Act which was done earlier and to lend support to this contention cites the decision of the Hon'ble Supreme Court in ***'Goa Shipyard Ltd. v Babu Thomas'*** reported in 2007) 10 SCC page 622 where in at paragraph 13 it is observed as under:

> *"13....**The question whether the Board of Directors of a company could subsequently ratify an invalid act and validate it retrospectively is no more res integra. The question has been considered by a three-Judge Bench of this Court in Maharashtra State Mining Corpn. v. Sunil [(2006) 5 SCC 96 : 2006 SCC (L&S) 926].** In that case the respondent, an employee of the Corporation was dismissed by the Manging Director preceded by an inquiry. A writ petition was filed challenging the dismissal order on the ground that the Managing Director of the Corporation was incompetent to pass such an order. During the pendency of the writ petition, the Board of Directors of the Corporation passed a resolution ratifying the impugned action of the Manging Director and also empowering him to take decisions in respect of the officers and staff in the grade of pay the maximum of which did not exceed Rs. 4700 p.m. The Managing Director who dismissed the employee had earlier the power only in respect of those posts where the maximum pay did not exceed Rs. 1800 p.m.*

The employee at the relevant time was drawing more than Rs. 1800 p.m. and, therefore, the Managing Director was incompetent to dismiss the employee. The High Court set aside the order of termination on the ground that the invalid act cannot be subsequently ratified by the Board of Directors. This Court after referring to various earlier decisions set aside the order of the High Court. This Court held as under: (SCC pp. 99-100, paras 7 & 10)

> *"7. The High Court was right when it held that an act by a legally incompetent authority is invalid.* ***But it was entirely wrong in holding that such an invalid act cannot be subsequently 'rectified' by ratification of the competent authority. Ratification by definition means the making valid of an act already done. The principle is derived from the Latin maxim ratihabitio mandato aequiparatur, namely, 'a subsequent ratification of an act is equivalent to a prior authority to perform such act'. Therefore ratification assumes an invalid act which is retrospectively validated.***
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> *10. In the present case, the 'Managing Director' order dismissing the respondent from the service was admittedly ratified by the Board of Directors on 20-02-1991 and the Board of Directors unquestionably had the power to terminate the services of the respondent. On the basis of the authorities noted, it must follow that* ***since the order of the Managing***

Director had been ratified by the Board of Directors such ratification related back to the date of the order and validated it."

14. Advancing the argument, the Learned Counsel for the Appellant submits that even if there was no earlier approval for taking of the 'Loan' and the terms of 'repayment' was subsequently ratified by the Board of Directors in not one, but two meetings of the Board of Directors i.e. on 23.02.2017 and on 06.04.2017. Furthermore, the 'Minutes of the Meeting' was signed by the 'Appellant' but Mr. Ooi Boon Aun was present in the meeting. However, the minutes of the meeting was signed by Mr. Ooi Boon Aun on 06.04.2017 as the 'Chairman of the Meeting' and that the 'Appellant' had not participated in the said meeting, because of the fact that it related to a 'Loan' given by her.

15. The Learned Counsel for the Appellant adverts to the fact that Mr. Ooi Boon Aun also had signed the Ledger Book recording the Loan given by the Appellant and added further, the 'Balance Sheet' of the Respondent/Company for the period from 01.04.2016 to 31.03.2017 mentions the outstanding liability to the Appellant of Rs. 4.10 crores.

16. The Learned Counsel for the Appellant points out that the Balance Sheet of the Respondent/Company for the period even after resignation i.e. for the period from 01.04.2017 to 31.03.2018 again mentions the outstanding liability to the Appellant.

17. The Learned Counsel for the Appellant brings it to the notice of this 'Tribunal' that the instant case relates to a 'Financial Debt' and it does not

pertains to the difference between a 'Secured' and an 'Unsecured Creditor'. In this regard, the Learned Counsel for the Appellant seeks in aid of the decision of the Hon'ble Supreme Court in ***Orator Marketing Pvt. Ltd. v Samtex Desinz Pvt. Ltd.*** reported in 2021 SCC Online SC 513 where in an expansive definition of 'Financial Debt' is laid down as under:

> 21. *"The definition of 'financial debt' in Section 5(8) of the IBC has been quoted above. Section 5(8) defines 'financial debt' to mean "a debt alongwith interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8) (a) of the IBC. The definition of 'financial debt' in Section 5(8) includes the components of sub-clause (a) to (i) of the said Section."*
>
> *31. "At the cost of repetition, it is reiterated that the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor. 'Default' means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'debt' is also expansive and the dame includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest free loan advanced to finance the business operations of a corporate body."*

18. The Learned Counsel for the Appellant points out that because of the fact that 'Repayment' never took place, the Appellant finally resigned as 'Director' of the Respondent/Company, on 25.07.2017. Besides this, the Appellant had approached an Advocate requiring him to issue a legal notice for Repayment upon the Respondent/Company. In this regard, the Learned Counsel for the Appellant submits that the Advocate for the Appellant had issued a notice mistakenly claiming to be an 'Operational Creditor' and in fact, the Appellant having realised the mistake had engaged a new Advocate, who issued a legal notice dated 26.06.2018, to the Respondent/Company as 'Financial Creditor'.

19. It is projected on the side of the Appellant that the Respondent/ Company gave a reply to the legal notice of the Appellant, on 05.07.2018, admitting the loan given by the Appellant and requested the Appellant for more time to repay the amount. Indeed, the 'Director' of the Respondent/Company (Mr. Ooi Boon Aun) on 25.10.2018 addressed a letter to the Appellant, apologising and sought more time for repayment and also requested that legal action was not to be initiated.

20. The pivotal stand of the Appellant is that Mr. Weiqui wrote a letter on 07.06.2017 to the Appellant apologising for the breach of the repayment deadline 05.06.2017 and by an another letter dated 27.06.2017 addressed to the Appellant Mr. Weiqui promised that the loan would be repaid by 10-15.07.2017.

21. The Learned Counsel for the Appellant brings it to the notice of this Tribunal that the Respondent/Company filed its Reply in March 2019 (through its Company Secretary) thereby admitted its liability to repay the Appellant, the Principal as well as Interest. On the same day, Mr. Ooi Boon Aun (the Director) wrote to the Appellant under the Letterhead of the Respondent/Company, which is extracted as under:

> *"Thank you or your patience and co operation regarding your loan to Chemizol Additives Pvt. Ltd. Bangalore (CAPL). We have been working strenuously to raise funds from investors and it is his wish to make a personal request to you to allow us to repay you're the entire loan and interest thereon – in 1 payment – by 30 April 2019. I have been informed that tomorrow 13 March 2109, there will be an NCLT final hearing for admission of the case. In connection therewith I would be grateful if you would advise your counsel to inform the Court to settle the entire loan and interest thereon by 30 April 2019. I look forward to your kind co-operation to save CAPL from winding up which would adversely affect the livelihood of employees and creditors."*

Appellant's Decisions

22. The Learned Counsel for the Appellant refers to the Judgment of this Tribunal in ***Shailesh Sangani v Joel Cardoso and Anr.*** Reported in 2019 SCC Online NCLAT 52, wherein it is held that the 'Money' advanced by a 'Director' or 'shareholder' of a Company to improve financial health of the Company or Boost its economic prospects has the 'Commercial Effect of Borrowing' and as such, it is a 'Financial Debt'. Likewise, is the ruling in ***Rajesh Gupta v Dinesh Jain***, reported in 2018 SCC Online NCLAT 412.

23. The Learned Counsel for the Appellant advances an argument that the I & B Code, 2016 does not give an option to a creditor to decide whether it wants to be a 'Financial Creditor' or an 'Operational Creditor'. In this connection the learned Counsel refers to the decision in ***G. Sreevidhya v Karismaa Foundation's Pvt. Ltd.*** , 2019 SCC Online NCLAT 145 wherein a 'Demand Notice' was incorrectly issued, under wrong 'Legal Advice' given by the 'Advocate' treating the 'Debt' as an 'Operational Debt'. However, this 'Tribunal' held that since the Respondent had committed default in discharge of 'Financial Debt', the 'Appellant' was within her Rights to initiate 'Corporate Insolvency Resolution Process' even the Civil Appeal No. 3376 of 2019 filed against the aforesaid decision, before the Hon'ble Supreme Court of India was dismissed as Withdrawn.

24. The Learned Counsel for the Appellant categorically contends that the 'Adjudicating Authority' had ignored the admission of the Respondent Companies' response dated 05.07.2018 to the Appellant's legal notice wherein the Company had not disputed the loan advanced but instead sought further time to repay the loan.

25. The Learned Counsel for the Appellant cites the decision in ***Vinayaka Exports v Colourhome Developers***, reported in 2019 SCC Online NCLAT 606 where in at paragraph 7, it is observed as under:

> *7. "The Adjudicating Authority was of the view that in view of pendency of the civil suit, there exist a dispute in the amount of debt between both the parties is concerned. The said stand cannot be accepted. The application filed before the Adjudicating*

Authority is under Section 7 of the IBC and not under Section 9 of the IBC where one can take a plea stating that there exists a dispute between the parties before issuing a Demand Notice under Section 8(1) of the IBC. Therefore, we are unable to uphold such finding of the Adjudicating Authority."

26. The Learned Counsel for the Appellant refers to the decision of the Hon'ble Supreme Court in ***Innoventive Industries Ltd. v ICICI Bank (2018) 1 SCC 407*** at paragraph 30 wherein it is held that in case the 'Corporate Debtor' commits default of a 'Financial Debt', the Adjudicating Authority is to merely see the evidence produced by the 'Financial Creditor' to satisfy itself that a 'Default' has occurred. As a matter of fact, the Hon'ble Supreme Court had held as under:

"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 may reject an application and not otherwise."

27. The Learned Counsel for the Appellant takes a stand that the 'Dispute' was raised only at a later point of time, as an afterthought, by way of conflicting 'Second Affidavit' filed before the 'Adjudicating Authority'. Apart from this, the 'Audit Report' notes Debts due to 'Ex- Directors'.

28. While summing up, the Learned Counsel contends that the 'impugned order' of the 'Adjudicating Authority' in dismissing the Application in CP (IB)

No. 1/BB/2019 filed by the Appellant/Applicant, cannot be Countenanced in the eye of Law.

Respondent's Pleas

29. According to the Learned Counsel for the Respondent that the 'Demand Notice' dated 26.06.2018 issued by the Appellant indicates that the 'Debt' as an 'Operational Debt' but in the Application filed by the Appellant/Applicant it is mentioned as 'Financial Debt' and as 'Financial Creditor', as per the Code.

30. The Learned Counsel for the Respondent/Company points out that the Appellant was the Executive Director of the Company, having unfettered powers in day today affairs and functioning of the Company. In fact, all the Board Meetings held in the Financial Year 2016-2017 shows that the Appellant either had participated or 'chaired' including the meeting that took place on 23.02.2017, held under the Chairmanship of the Appellant which records a 'Resolution' to the effect that the Respondent/ Company had obtained a Loan from the Appellant, to be repaid, within Six Months from the date of the first disbursement with interest at 7.5%.

31. It is the version of the Respondent/Company that the 'Appellant' had stepped down from their position of 'Executive Director' and had agreed to continue as Non-Executive Director, and it was recorded that the loan Secured from the 'Appellant' was to be repaid within 60 days, from the date of the meeting with interest at 7.5%. Moreover, the 'Minutes' had recorded that the 'Appellant' as an 'interested person' had not taken part in the discussion of the 'Resolution'.

32. The Learned Counsel for the Respondent takes a stand that in the meeting that took place on 23.02.2017, a Resolution was recorded to the affect that it was passed in compliance with Section 179 (3) (d) of the Companies Act, 2013, to ratify the 'Loan' obtained by the Respondent from the Appellant. The Learned Counsel for the Respondent adverts to Section 179 of the Companies Act, 2013 which among other things mentions that certain 'Resolutions' is required to be passed in the Board Meeting. Apart from that, Section 179 (3) (d) specifies that the Board of Director shall exercise its power 'To Borrow Monies' only through a Resolution passed at the meetings of the Board.

33. The Learned Counsel for the Respondent comes out with a plea that Section 179 of the Companies Act, 2013 vests the 'Directors', the 'Power to Borrow' after deliberating the Financial needs of the Company, implications thereof, rate of interest etc. in a properly convened 'Board Meeting' and the same cannot be passed in circulation. In this regard, the stance of the Respondent is that the 'Post Facto' ratification is not envisaged under the Section.

34. The Learned Counsel for the Respondent brings it to the notice of this tribunal that as per Section 73 read with Section 76 of the Companies Act,2013 and the Companies (acceptance of deposit) rules 2014 'Loans' obtained from the Directors or excluded from the purview of 'Deposits' and does not require any compliance of the aforesaid provisions. Moreover, it is pointed out on behalf of the Respondent that 'non- confirming Loans' would

not enjoy such exemption and needs to comply with Section 73 read with Section 76 of the Companies Act, 2013 and the Companies (acceptance of Deposit) rules 2014.

35. The Learned Counsel for the Respondent submits that after the Appellant resigned from the Respondent/Company, she had no interest in the Company and issued a 'Demand Notice' dated 26.09.2018, after a year of her resignation, to avenge her personal Vendetta and that to as an 'Operational Creditor'.

36. The Learned Counsel for the Respondent cites the Judgment dated 19.10.2020 of this Tribunal in ***Volkswagen Finance Pvt. Ltd. v Balaji Printo Pack Pvt. Ltd.*** (Vide Company Appeal (AT) (Ins) No. 02 of 2020) wherein in it is held that non- compliance of the provisions of the Act has 'ramifications' under the code.

37. On behalf of the Respondent, the Judgment of the Hon'ble Supreme Court in Asha John Divianathan v. Vikram Malhotra and Others, 2021 SCC online SC 147 is cited before this 'Tribunal' for the proposition that 'where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to given it effect. (See Mellis v. Shirley L.B. [(1885) 16 Q.B.D. 446: 55 LJQB 143 : 2 TLR 360]).

Assessment

38. The Appellant/Applicant in the Application filed by the financial Creditor under Section 7 of the Code read with rule 4 of the Insolvency and

Bankruptcy (Application 2 Adjudicating Authority) rules 2016 in December, 2018 under part 4 'particulars of financial debt' had mentioned that the total sum of debt which was granted by the Appellant/Applicant was Rs. 4,10,00,000/-. The date of disbursement was mentioned as 1.12.2016, Rs. 2,50,00,000/- and on 18.01.2017, a sum of Rs. 1,60,00,000/- was disbursed by the Appellant.

39. The Appellant/Applicant in the 'Application' had mentioned that as on 31.11.2018, the 'Corporate Debtor' was liable to repay the Principal amount of Rs. 4,10,00,000/- together with interest of Rs. 60,50,000/- calculated at 7.5 p.a. from 1.12.2016 to 31.11.2018, thus aggregating to Rs. 4,70,50,000/.

40. The Respondent/Company in its 'Reply' to the 'Application' filed by the Appellant CP (IB) No.1/BB/2019 had stated that the 'Demand Notice' issued by the 'Appellant' shows that the 'Debt' as 'Operational Debt', but the Petition indicates that the 'Debt' as 'Financial Debt' and the 'Appellant' as 'Financial Creditor' as per the Code.

41. It is further averred in the 'Reply' of the Respondent that in January-February 2017 an 'Audit' was conducted relating to the affairs of the Respondent/Company, by a Malaysian Firm 'VCus', which found out that there was 'Misrepresentation' and 'Misappropriation' of funds, as observed by the 'Adjudicating Authority' in the impugned order. Thereafter, a meeting was held on 06.04.2017, wherein, the 'Appellant' had stepped down from the post of 'Executive Director' and further that 'New Directors' were appointed and

given 'Authority' to sign 'Cheques' and other agreements on behalf of the Respondent/Company. Finally, the 'Appellant' resigned on 25.07.2017.

42. The stand of the Respondent is that during the year 2016-2017 the Respondent/Company was under a 'Liquidity' crisis and an impression was made by the 'Appellant' that the purported loan was granted by the Appellant, in order to meet the 'Operational Expenses', especially 'Employees Salaries'.

43. The Respondent has assets worth Rs. 152.05 Crores and its Net worth is Rs. 132.5 Crores and total outside liabilities of the Company is Rs. 14.39 Crores (Excluding the disputed amount of Rs. 4.10 Crores claimed by the Appellant/Applicant).

44. It transpires that the Appellant's Counsel had issued a legal notice dated 26.06.2018 addressed to the Managing Director of M/s Chemizol Additives Pvt. Ltd. and the board of Directors of the Respondent/Company wherein the details of the entire claim was mentioned as Principal Sum Rs. 4,10,000,00/- and Rs. 32,09,794/- towards interest from 05.06.2017 till date, amounting to Rs. 4,42,09,794/-. Apart from that, a sum of Rs. 15,000/- was mentioned, to be paid towards 'Notice Charges' by the Respondent/Company.

45. The Respondent's Advocates had issued a 'Reply' dated 05.07.2018 to the Appellant's Advocate whereby and whereunder a sufficient time was sought to refund the sum of Rs. 4,10,00,000/- at the agreed interest till date of repayment.

46. It is to be pointed out that in order to prove an existence of debt, the 'Onus' is on the concerned Applicant/Petitioner. The 'Adjudicating Authority' must be satisfied as to the existence of 'Default' and in fact, is not required to note any other criteria for 'Admission of the Application'. In short, where the Applicant/Petitioner is able to establish the existence of a 'Debt' and the Corporate Debtor's default, and if the 'Application' is complete in all aspects, necessarily, the Application is to be admitted by the 'Adjudicating Authority' as opined by this 'Tribunal'.

IBC DEFINITIONS

47. Section 3(11) of the I & B Code, 2016 speaks of 'Debt' meaning a liability or Obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Section 3 (12) of the Code defines ' default' meaning non- payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the Corporate Debtor, as the case may be.

48. Section 5 (7) of the Code enjoins 'Financial Creditor' meaning any person to whom a 'Financial Debt' is owed and includes a person to whom such debt has been legally assigned or transferred to. Section 5 (8) refers to 'Financial Debt' meaning a debt with interest, if any, which is disbursed against the consideration for the time value of money and includes a money borrowed against the payment of interest; (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent etc.

49. Section 3(8) of the I & B Code, 2016 defines "Corporate debtor means a corporate person who owes debt to any person. Section 3(6) of the I&B Code, 2016 defines "claim" meaning:

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment fixed, matured, unmatured, disputed, undisputed, secured or unsecured"

50. It must be borne in mind that 'Financial Debt' under Section 5(8) of the I & B Code, is an inclusive definition and even if a transaction which does not fall under any of those described under the provision can be classified as a 'Financial Debt'. It is to be remembered that a 'Financial Creditor' is a person who has a right to the 'Financial Debt'.

51. Section 3(10) if the I&B Code, 2016 defines 'creditor' meaning any person to whom a 'Debt' is owed and includes a 'financial creditor', 'operational creditor, 'secured creditor, 'un-secured creditor' and a 'decree holder'.

52. It is to be pointed out that where the record showed that an 'Application' was filed on the proforma specified under Rule 4(2) of the Insolvency and Bankruptcy (Adjudicating Authority), Rules, 2016, and when the 'Adjudicating Authority' was subjectively satisfied that a default had occurred,

the right course of action for the 'Adjudicating Authority' in law, is to admit the Application.

53. Undoubtedly, the 'Adjudicating Authority' deals with the matter of 'Insolvency' and firstly is to take steps for 'Resolution' of the 'Corporate Debtor'. The 'Resolution Process' is not a 'litigation' and that the 'proceedings' under the I & B Code, 2016 are of a 'Summary Jurisdiction' and it is not 'Adversial' in character.

54. At this juncture, this 'Tribunal' relevantly points out that in respect of 'Loan' the 'Borrowing' is primarily is for the benefit of 'Borrower'. In fact, the 'Lender' is in receipt of benefit, through 'interest'. In case of 'Loan', the obligation to repay the sum arises immediately n receipt of 'Loan'.

55. It cannot be ignored that 'Loan' is payable only, when the obligation to repay the money arises, in terms of the 'Agreement'. After all, the stark reality is that 'Loan' is taken at the instance of a person requiring money.

56. Be it noted, that Section 73 of the Companies Act, 2013, deals with 'Prohibition on acceptance of deposits from public. Section 76 of the Companies Act, 2013, provide for the 'Acceptance of deposits' from public by certain Companies.

57. Rule 2(1)(c) of the Companies (Acceptance of deposits), Rules 2014, reads as under:

> *(c) "deposit" includes any receipt or money by way of deposit or loan or in any other form, by a company, but does not include-*

(viii) any amount received from a person who, at the time of the receipt of the amount, was a director or the company or a relative of the director of the Private company;

Provided that the director of the company or relative of the director of the private company, as the case may be, from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the Board's report;"

58. The term 'Deposit' and 'Loan' they include 'borrowing of money' and in 'Deposit', the 'Depositor' is a prime mover. In 'Loan', the 'Borrowing' is to ultimately, benefit the 'person who borrows'.

59. In the present case, it is brought to the forefront that the 'Appellant' had issued the declaration under the proviso to, Rule 2(c) of the Rules. There is no gainsaying of the fact that the ingredients of Sections 73 & 76 are not meant to protect the Company to whom the sum is given.

60. In the present case, it is to be pointed out that at no point of time the Respondent/Company sought to avoid the 'Loan Transaction' with the 'Appellant'. As a matter of fact, the Respondent and its Officers had confirmed their obligations to repay the 'Loan' to the 'Appellant'. As such, the plea of 'Voidability' of the 'Loan Transaction' is not available to the Respondent/ Company, in the considered opinion of this 'Tribunal'.

61. On behalf of the 'Appellant' a reference is made to the 'Order' passed by the 'Adjudicating Authority' (NCLT, Mumbai Bench) in CP No.

66/IBC/NCLT/MB/MAH/2018 between ***Anchor Leasing Pvt. Ltd. v. Euro Ceramics Ltd.*** wherein it is observed and held that the Code nowhere prescribed the compulsory existence of an express agreement to prove the loan and its disbursement. The Statement of Accounts produced on record were held enough to prove the disbursement of the loan amount.

62. Section 5(21) of I & B Code 2016, defines (2) 'Operational Debt' meaning a claim in respect of provision of goods or services including employment or a debt in respect of the (payment) of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

63. In law, for initiating the 'Corporate Insolvency Resolution Process', the 'Debt' in question is not to be a disputed one.

64. In the present case on hand, it is quite clear from the Minutes of the Meeting of the Board of Directors of the Respondent/Company ('Corporate Debtor') dated 23.03.2017 wherein at serial No. 5 it is mentioned as under:

> *"Mr. Jairaj S, Director of the company informed the board of the Company has obtained loan from one of its Director- Madam Jayanthi G Ravi on an agreed terms and conditions and the Board need to ratify the same.*
>
> *The Board further agreed the interest rate of 7.5 percent annum on the drawn amount and further agreed for the loan term for a period of six months from the date of first disbursement."*

65. It is seen from the Minutes of the 78th Meeting of the Board of Directors of the Respondent/Company dated 06.04.2017 that 'The Minutes of the previous Meeting of the Board were taken note and confirmed at the Meeting.

66. It is evident from the 'Receipt Voucher' of the Respondent/Company dated 01.12.2016 Mr. Ooi Boon Aun had signed the Ledger Book on 06.04.2017 wherein it was mentioned that Rs. 2,50,00,000/- was mentioned to be the amount received from the 'Appellant' towards Loan, vide transaction dated 01.12.2016. In fact, the 'Minutes of the Meeting' was signed by the 'Chairman' of the Meeting Mr. Ooi Boon Aun on 06.04.2017.

67. Just because in the Lawyer's Notice seeking repayment by the 'Appellant' it was wrongly claimed as an 'Operational Creditor' the same mistake after realisation, the Appellant had engaged new Advocate, who issued a Notice dated 26.06.2018 to the Respondent/Company as 'Financial Creditor'. The mistake that had crept in the First Legal Notice was corrected by the Second Legal Notice, issued through a new Advocate, is not a fatal one, to the facts of the case which float on the surface.

68. In fact, Mr. Qi Wei through letter dated 07.06.2018 addressed to the Appellant had among other things mentioned that …'this will be last delay. It can only be earlier than the date I had promised. I can only deal with some urgent thing at noon time and at night. Again please understand my situation.'

69. In reality, the Director of the Respondent/Company, Mr. Ooi Boon Aun had addressed a reply (to the Legal Notice dated 06.09.2018) on 25.10.2018, to the 'Appellant' wherein deferring of any Legal Action was mentioned and a

reiteration was made that the Respondent/Company 'will repay the entire Loan amount at an agreed interest rate of 7.5% per annum within sixty days from 6th April, 2017 i.e., from 5th June, 2017'.

70. In the present case, the Second transfer Rs. 1.60 crores was made to the Respondent/Company on 18.01.2017 and the said transfer was effected from the Appellant's personal Bank Account to the Current Account of the Respondent/Company. In fact, the first Transfer of Rs. 2.50 Crores, was made on 01.12.2016 to the Respondent/Company and these were recorded in the Minutes of the Board of Director's on 22.03.2017 and 06.04.2017 respectively.

71. Be that as it may, this 'Tribunal' taking note of the facts and circumstances of the instant case and also considering the fact that the first tranche of Rs. 2.50 Crores was disbursed by the 'Appellant' to the Respondent/Company on 01.12.2016, and the second tranche of Rs.1.60 Crores was Transferred from the Appellant/Applicant's 'personal Bank Account' to the 'Current Account' of the Respondent/Company and these transfers were recorded in the 'Minutes of the Meeting of the Board of Directors' on 23.02.2017 and 06.04.2017, that the Respondent/ Company had mentioned in its 'Balance Sheet' for 01.04.2016 to 31.03.2017 about the outstanding liability to the Appellant of Rs. 4.10 Crores, the 'Balance Sheet' of the Respondent/Company, (even after the resignation of the 'Appellant' from the Company) also mentions the factum of 'outstanding liability' to the 'Appellant' and in spite of several assurances made to the 'Appellant', the Respondent/Company had not repaid the due outstanding sum to the 'Appellant' (received as 'Loan') and the correspondences between the parties,

and even the 'Reply' of the Respondent/Company filed before the 'Adjudicating Authority' (during March, 2019) 'clinchingly' establishes that the Respondent/Company had admitted its liability to repay the 'Principal sum' and 'Interest' ('Admission' is the best piece of evidence in Law), especially the Respondent/Company had sought time to repay Loan and Interest thereon, in one payment by 30.04.2019 and taking into account all these cumulative facts in an integral manner, this 'Tribunal' comes to an inevitable, inescapable and consequent conclusion that the 'Appellant/Financial Creditor' had established the 'Financial Debt' and 'Default' being the pre-requisites for admitting the 'Application' (under Section 7 of the I & B Code, 2016), filed by the 'Appellant'. Viewed in that perspective, the contra views arrived at by the 'Adjudicating Authority' that the 'Loan' was not a 'Financial Debt', as the amounts were not 'money borrowed' by the 'Corporate Debtor' and that the borrowing may not constitute a 'Financial Debt' that could be enforced as per the I & B Code, 2016 though the 'Borrowing' may be reflected in the 'Balance Sheet' as pointed out by the 'Petitioner (Appellant)' etc; are legally 'invalid' and 'untenable'. Looking from that angle, this 'Tribunal' interferes with the 'impugned order' dated 28.01.2020 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Bengaluru Bench) in CP (IB) No. 1/BB/2019) and set aside the same, to promote substantial cause of justice. Consequently, the 'Appeal' succeeds.

Conclusion

72. In fine, the T.A. No. 117 of 2021 [Com. Appeal (AT)(Ins) No. 553 of 2020] is allowed. No costs. The 'Adjudicating Authority' (National Company Law

Tribunal, Bengaluru Bench) is directed to restore the CP(IB) No. 1/BB/2019 to its file, to admit the 'petition' and to proceed further in the manner known to Law and in accordance with Law.

(Justice M. Venugopal)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

3rd January, 2022

AKC