



INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

(Company formed by ICAI under Section 8 of the Companies Act 2013)

IBC Case Law Capsule

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**INTEC CAPITAL LIMITED VS. EASTERN EMBROIDERY COLLECTIONS PRIVATE LIMITED
COMPANY APPEAL (AT) (INSOLVENCY) NO. 428 OF 2021 ARISING OUT OF ORDER PASSED IN CP (IB)
No. 161(ND)/2021
DATE OF NCLAT JUDGMENT: 26TH OCTOBER 2021**

Facts of the Case: -

The present appeal results from the impugned order passed by the National Company Law Tribunal, New Delhi bench (Adjudicating Authority 'AA') whereby the AA rejected the Application filed under Section 7 of the IBC, 2016.

The facts of the case are that Intec Capital Ltd (Appellant) filed application under Section 7 of the IBC, 2016 for initiation of CIRP against the Eastern Embroidery Collections Private Limited 'EECPL' (Corporate Debtor 'CD' and Corporate Guarantor) for the sum borrowed by the partnership firm M/s Eastern Overseas 'EO'. Appellant had issued two loans to a total tune of Rs. 1,16,85,000/- and the payments of which were not made even after repeated requests as per the agreed repayment schedule. After that, an Arbitration proceeding was also initiated, resulting in an award in favor of the Appellant.

The AA had rejected the prayer for initiation of CIRP against the CD on two grounds. Firstly, the Appellant had applied under Section 7 of the IBC and not under Section 95 of IBC, 2016. Secondly, the Appellant had filed the Application for Initiation of CIRP against the Personal Guarantor and not followed the applicable Rules. As, the Appellant was required to submit the Application under Section 95 (4) of the IBC, after service of demand notice as required under Section 95 (4) (a) read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor's) Rules, 2019, if the debt was not paid within 14 days from the date of service of demand notice.

NCLAT's Observations: -

The Appellate Tribunal was of the view that there were two points for consideration, Firstly, is the CD personal guarantor of the EO? and Secondly, Whether EECPL is the corporate guarantor and therefore CD of the EO, in terms of Subsection (7) and (8) of Sec 3 of IBC, 2016 and will the applicable Rules be Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016?



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The Appellant contended that AA curtailed the remedies available of making an application for resolution of Insolvency of the CD, who qualifies under the definition of 'Corporate Person' and 'Corporate Debtor' as stated under Section 3 (7) and (8) of the IBC, 2016 and that the findings of the AA that Section 5 (22) of the IBC, which defines 'Personal Guarantor' comes into play, was against the law. It further stated that the AA under the wrong apprehension considered CD to be a Personal Guarantor while it is Corporate Guarantor.

The Appellate Tribunal stated that the AA failed to notice that EO had taken Personal Guarantee of Mr. Mahendra Singh Narang and Mrs Manjit Kaur in addition to the Corporate Guarantee given by the CD. Therefore, on the occurrence of default, it was the sole prerogative of the EO to initiate action against the Principal Borrower or the Personal Guarantor of the Corporate Guarantor and since the Appellant had initiated action under IBC, 2016 against the Corporate Guarantor, the Application could not have been dismissed on the erroneous assumption that the Application should have been filed against the Personal Guarantor under Section 95 of the Code.

The Appellate Tribunal further referred the Judgement of **Hon'ble Supreme Court** in *Laxmi Pat Surana V Union Bank of India and Another 2021 SCC Online SC 267* wherein, Apex Court rejected the contention of the Appellant that since the loan was offered to the proprietary firm (not a corporate person), action under Section 7 of the Code cannot be initiated against the Corporate Person even though it had offered Guarantee in respect of the transaction. In this case, Principal Borrower is a proprietary firm, and CD had given the Corporate Guarantee for the said loan. The law laid down in the abovementioned case is fully applicable in the present case.

Order: -

The Appellate Tribunal in view of the above was of the considered view that CD was the Corporate Guarantor of the EO and not a Personal Guarantor. Therefore, in terms of Sub-section (7) and (8) of Sec 3 of IBC, 2016 it is a CD. Further, the applicable Rules would be 'Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016'. Further, the Appellate stated that the AA committed an error in holding that action should have been initiated against the Personal Guarantor of the CD under Section 95 of the Code instead of proceeding against the CD. Hence, the appeal was allowed, and the impugned order passed by the AA was set aside.

Case Review: - Appeal Allowed