

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

Comp. App. (AT) (Ins.) No. 619 of 2022

In the matter of:

Zoom Communications Pvt. Ltd.

....Appellant

Vs.

M/s. Par Excellence Real Estate Pvt. Ltd.

...Respondent

For Appellant: Mr. Mohit Sethi, Mr. Nikhil Singhvi, Advocates.

For Respondent: Mr. Vikas Mehta, Ms. Akanksha Vigyan, Mr. Jishnu Bhardwaj, Advocates.

ORDER

(Through Virtual Mode)

27.07.2022: Heard Learned Counsel for the Appellant.

2. This Appeal has been filed against the order passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench (Court-II) dated 17.05.2022 by which the Application filed under Section 9 of the IBC by the Appellant, an Operational Creditor, has been dismissed and the Adjudicating Authority has also directed by the same order to issue show-cause notice under Section 65(1) to the parties for appropriate action. The brief facts of the case which are necessary to be noticed are:

A loan of Rs.7 Crores was obtained from IndiaBulls in favour of the Corporate Debtor which document has now been screen shared by the Learned Counsel appearing for the Corporate Debtor before us and he pointed out that the loan was applied by the Corporate Debtor and co-applicant was Mr. Gulshan Jhurani, the Director of the Operational Creditor. Section 9

Application was filed claiming that a debt of Rs.57,25,000/- is due which was process fee for procuring the loan for the Corporate Debtor. The Adjudicating Authority after hearing the parties took the view that transaction which took place between two related companies in the year 2015 appears to be sham transaction and which could not be basis for initiating any CIRP. Challenging the said order, this Appeal has been filed.

3. Learned Counsel for the Appellant submits that the present management who has filed Section 9 Application was not aware about Mr. Jhurani who was Director being related party. It is further submitted that the aforesaid fact was not in the knowledge of the present management of the Corporate Debtor. Further show-cause notice issued under Section 65(1) is mere formality since findings and observations have already been made in the impugned order. Hence, the show-cause notice shall not serve any purpose.

4. Shri Vikas Mehta, Learned Counsel for the Respondent referring to paragraph 11 of the impugned order submits that the balance sheet of the Corporate Debtor for the year 2017-18 which has been extracted in the said paragraph clearly mentions that Mr. Jhurani was Director of both the Corporate Debtor as well as the Operational Creditor.

5. Learned Counsel for the Appellant also submitted that the Balance Sheet has been filed by the Operational Creditor of the year 2015-16 where there was no related party shown.

6. We have considered the submissions of the Learned Counsel for the parties and perused the record. Paragraphs 19, 20 & 21 of the impugned order

contains the relevant discussion by the Adjudicating Authority which are to the following effect:-

“19. Hence, it is clear from the aforesaid analysis that both the Applicant Company, which has claimed the operational debt based on an invoice for a loan procured for the Corporate Debtor and the Corporate Debtor against whom the Applicant is seeking to initiate CIR Process were having common Director namely, Mr. Gulshan Kumar Jhurani (DIN: 00209894). By way of visiting the records at the MCA Website and on piercing the corporate veil, it is clear that not only both the Applicant Company as well as the Corporate Debtor were 'related party' due to common Directorship on the date of the invoice but also here is a case, where Director of the Corporate Debtor (in the capacity of Director of the Applicant Company) has procured a loan for his own company and is charging procurement fee therefor. In view of the aforesaid finding, we are of the considered view that the aforesaid transaction, which had taken place between the two related Companies in the year 2015 is sham and the CIR Process cannot be initiated on the basis of such a sham transaction.

20. That we are conscious of the provision contained in Proviso to Section 21 (2) of IBC, 2016, whereby no right of representation, participation or to vote has been granted to a 'Related Party' on initiation of CIRP of the Corporate Debtor. Hence, in our considered view, the related party is having no control in the CIR Process. Therefore, the intention of a related party of initiating the CIR Process shall always raise eyebrows.

21. The aforesaid sequence of events shows that the Application for initiating the CIR Process has been filed by concealing a material fact that the Applicant and the Corporate Debtor were related Parties at the time of transaction basing on which operational debt has been claimed. Since, the said transaction has turned out to be a sham transaction, we are of the considered view that both the parties are in collusion and the present Application has not been filed for the resolution of Insolvency rather, the parties have attempted to kickstart the CIR Process with a malicious intent for a purpose other than the resolution of insolvency of the Corporate Debtor, which is not permissible under the IBC 2016. As per the Code, if any person [as defined under Section 3(23) of IBC] initiates the Insolvency Resolution

Process fraudulently or with malicious intent for any purpose other than for the resolution of the insolvency, or liquidation and such an act is punishable under Section 65 (I) of IBC 2016. Hence, before taking any action under Section 65(1) IBC 2016, we think it proper to issue a show cause notice, under Rule 59 of the National Company Law Tribunal Rules 2016, to M/S. Zoom Communications Pvt. Ltd. through its Directors and M/S Par Excellence Real Estate Pvt. Ltd. through its Directors and to Mr. Gulshan Kumar Jhurani as to why the penalty as stipulated under Section 65(1) of IBC, 2016 shall not be imposed on them. Ld. Registrar NCLT is directed to issue the show cause notice under Section 65(1) of IBC 2016 read with Rule 59 of the National Company Law Tribunal Rules, 2016 by giving them fifteen days' time to explain and submit in writing as to why the penalty as stipulated under Section 65(1) of IBC, 2016 shall not be imposed on them. The Registry is directed to allot a Case No. for the proceedings for which the Show Cause Notice is being issued to the concerned parties under Section 65(1) of IBC, 2016. Registry/ Court Officer to list this matter on 03.06.2022."

7. The loan sanction order which has been placed before us indicates that along with the Corporate Debtor who was Applicant for the loan, the Director of the Operational Creditor Mr. Jhurani was also co-applicant. Thus, when both the Operational Creditor and the Corporate Debtor were Applicants, we fail to see that how the Operational Creditor can claim payment of fee for procuring the loan.

8. Shri Vikas Mehta, Learned Counsel for the Respondent submits that under Section 188 of the Companies Act such transaction was permissible.

9. We in the present case are considering the initiation of the CIRP, the Adjudicating Authority had sufficient reason to believe that debt itself is doubtful. No error has been committed by the Adjudicating Authority in refusing to initiate the CIRP on such suspicious debt. Thus, the order of the Adjudicating Authority refusing to initiate CIRP cannot be faulted and we affirm the said order passed by the Adjudicating Authority.

10. Now, we come to the submission of the Counsel for the Appellant regarding show-cause notice under Section 65(1) of the IBC. The notice has been issued consequent to the impugned order passed, to which the parties were entitled to file reply. Learned Counsel for the Appellant submits that the Appellant has already filed a Reply to show-cause notice and Learned Counsel for the Respondent submits that he has also filed a Reply to the show-cause notice. Order under Section 65 after considering the show-cause notice are yet to be passed by the Adjudicating Authority. We only observe that while passing the order under Section 65, the Adjudicating Authority shall consider the

Reply given by the Respondent and shall not be influenced by any observation made in the impugned order.

11. Subject to the above observations, the Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Justice M. Satyanarayana Murthy]
Member (Judicial)**

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

Anjali/nn