NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 292 of 2023

[Arising out of order dated 03.02.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench-V, Mumbai in C.P. (IB) No. 196/MB/2021]

In the matter of:

Jaiprakash Agarwal
Managing Director,
(Powers of Board of Directors suspended)
Bazargaon Paper & Pulp Mills Pvt. Ltd.,
Flat No. 702, Rachna Galaxy,
Apartment, Opposite North Ambazari Road
Shivaji Nagar, Nagpur- 440010.

...Appellant

Versus

1. **Alka Prakash Agarwal**
A-6, Ganga Sagar, 83 Canal Road,
Ramdaspeth, Nagpur - 440010,
Maharashtra

....Respondent No. 1

2. **Bazargaon Paper & Pulp Mills Pvt. Ltd.**
Through the Interim Resolution Professional.
Having registered office at :
A-404, Twin Towers CHS Ltd.,
2nd Cross Lane, Lokhandwala,
Andheri (W), Mumbai - 400053, Maharashtra

....Respondent No. 2

Present :

For Appellant : Mr. Sameer Jain and Mr. Syed Fazl Askari, Advocates.

For Respondents : Mr. Adarsh Rai, Advocate.

Mr. Shivam Singh and Mr. Bharat Gupta, Advocates for R-2

J U D G M E N T

(Hybrid Mode)

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 03.02.2023 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-V) in C.P. (IB) No. 196/MB/2021. By the impugned order, the Adjudicating Authority allowed the Section 7 application filed by M/s Alka Prakash Agarwal and admitted the Bazargaon Paper & Pulp Mills Pvt. Ltd.-Corporate Debtor into the rigours of Corporate Insolvency Resolution Process ('**CIRP**' in short). Aggrieved by this impugned order, the suspended director of the Corporate Debtor has preferred this appeal.

2. Making his submissions, the Learned Counsel for the Appellant submitted that Bazargaon Paper & Pulp Mills Pvt. Ltd.-Corporate Debtor had taken an unsecured loan from Ms. Alka Prakash Agarwal-Respondent No.1 of Rs.70 lakhs based on an oral agreement which loan was repayable on demand. The entire amount of Rs.70 lakhs was disbursed to the Corporate Debtor in four tranches based on an oral understanding on varying rates of interest from 15% to 18% p.a. of simple interest. It is further submitted that during F.Y. 2010 to 2017, the Corporate Debtor had repaid a total amount of Rs.1.16 cr to the Respondent No.1 which included Rs. 70 lakhs towards principal amount and Rs.46 lakhs towards interest. In support of their contention, it is submitted that the financial statements of Respondent No.1

as well as their Form-26AS shows that payment of Rs.46,04,548/- was already made towards interest on which TDS was also duly deducted. However, though the total amount was repaid, this has deliberately not been disclosed before the Adjudicating Authority and hence the ex parte order of the Adjudicating Authority admitting the Section 7 application of the Respondent No. 1 suffers from grave infirmities.

3. On the quantum of interest which was chargeable on the unsecured loan, it was contended that there was no written contract between the parties regarding any agreed rate of interest. It has also been submitted that with a view to cross the threshold of Rs.1 cr as provided under Section 4 of the IBC, the claim has therefore been inflated by the Respondent No. 1 by applying compounded interest of 24% p.a. by relying on fabricated and self-serving ledgers and other documents. There is no written contract or any written document between the two parties to establish that the interest was to be paid compounded @ 24% p.a. The books of accounts of the Corporate Debtor which has been relied upon by Respondent No.1 also shows that the loan amount carried simple rate of interest and not compounded interest.

4. It was further asserted that the loan had been given by Respondent No.1 on the basis of an oral agreement and that the said the loan was repayable on demand. It was pointed out that following repayment of the outstanding amount in June, 2017 by the Corporate Debtor, no demand was thereafter raised by Respondent No.1 nor any notice for payment of any

outstanding amount was served upon the Corporate Debtor which clearly shows that the loan and interest thereupon had already been paid.

5. Assailing the impugned order, it has been contended that the impugned order has been wrongly premised on doctored claims put forth by the Respondent No.1. Besides adding compounded interest to the principal amount to cross the threshold limit of Rs.1 cr, it is also contended that Respondent No.1 had filed the Section 7 application before the Adjudicating Authority on the basis of forged documents. The balance confirmation document contained the forged signature of the Appellant. Hence, a police complaint had also been filed in this regard. However, since the Adjudicating Authority did not take cognizance of the fact that the Section 7 application was based on fabricated documents, the impugned order was therefore liable to be set aside.

6. The Learned Counsel for the Appellant further submitted that the Respondent No.1 placed a forged statement of reconciliation before the Adjudicating Authority and obtained an ex-parte order from the Adjudicating Authority bringing Corporate Debtor into the folds of CIRP. Reiterating that the Respondent No.1 had never made any demand or sent any notice to the Corporate Debtor seeking the outstanding amount before the passing of the ex-parte order by the Adjudicating Authority, it was vehemently contended that impugned order has been passed ex parte violating the principles of natural justice in a summary manner without the essential element of the proof of debt and default having been established. Despite there being a genuine reason for non-appearance on behalf of the Appellant before the

Adjudicating Authority due to demise of an immediate family member leading to the closure of the office of the Corporate Debtor, this factum was overlooked by the Adjudicating Authority while passing the impugned order.

7. Rebutting the contentions raised by the Appellant, it was submitted by the Learned Counsel for the Respondent No.1 that the ground of violation of natural justice raised by the Appellant is a farce. The Appellant was pretty much aware of the ongoing Section 7 proceedings as these proceedings find mention in the two Criminal Applications filed by them. Having wilfully abstained from attending the proceedings before the Adjudicating Authority while pursuing their related contemporaneous Criminal Applications, it does not stand to reason that demise of one of their relative constituted sufficient and rational basis for them not being able to effectively participate in the proceedings before the Adjudicating Authority.

8. On the claim made by the Appellant that the Corporate Debtor had paid a sum of Rs.1.16 cr, it is contended by the Respondent No.1 that this figure does not tally with the bank statement placed by the Appellant. It has also been contended that the very fact that the Appellant did not produce their own ledger statement raises serious question marks on their transparency and fairness. It was stoutly contended that the Corporate Debtor at no stage denied that they had to make payments to the Respondent No.1 as is borne out from the contents of the criminal applications as well as their statement given by them to the Economic Crime Branch on 12.06.2021. Even the police complaint lodged by the Appellant with regard to the balance confirmation

being forged and fabricated was only an eyewash as it was filed on 28.02.2023 being only one day prior to the filing of Section 7 application by the Respondent No.1. It was further denied that 24% interest was not agreed between the parties. Admitting that there was no written contract between the two parties with regard to the quantum of interest payable, it was submitted that Form-26AS of F.Y. 2015-16 clearly shows that the interest component calculated was at 24% compound interest and this calculation was reported to the Income-Tax Department by the Appellant himself. Hence the denial on the part of the Appellant of debt and default is only to escape the liability to repay the outstanding principal and interest amount which meets the pecuniary limits set under the IBC.

9. The Learned Counsel for the Respondent No. 2-Resolution Professional submitted that an I.A. No.5717 of 2023 has been filed by them to take on record two agreements entered into by the Appellant. It was submitted that one agreement was entered into by the Corporate Debtor with a sister-concern to sell of its assets including sale of non-agricultural land and sale of plant and machinery of the Corporate Debtor. It has also been submitted that by another agreement, the Appellant has transferred to its sister-concern Rs.98.34 lakhs which amounts to siphoning of the said amount. The RP has submitted that this illegal transfer has been noticed and recorded in the first meeting of the CoC.

10. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully. The short

point for our consideration was whether there was a debt and default by the Corporate Debtor qua the Respondent No.1 and whether the default amount crossed the prescribed threshold limit of Rs. 1 cr under Section 4 of IBC.

11. At the outset, it may be useful to examine the tenability of the contention of the Appellant that the impugned order was set ex-parte against them in violation of the principles of natural justice thereby causing great prejudice to their interests. It goes without saying that real and effective opportunity to hear is one of the critical quotients of the tenets of natural justice. When we see the material on record, we find that the Appellant did not appear before the Adjudicating Authority on multiple occasions, following which the Adjudicating Authority had directed paper publication of the notice so that the contesting party is put on notice. The notice was duly published in two newspapers on 01.04.2022 but in spite of that, the Appellant failed to remain present before the Adjudicating Authority until the matter was set ex-parte and reserved for orders. In the given facts of the case, we are satisfied that adequate notice was given to the Appellant to appear before the Adjudicating Authority to present their case. The impugned order also took notice of the non-participation of the Appellant in the proceedings before it, which is as extracted hereunder:

> *"2. The Corporate Debtor has never appeared before this Bench. It is seen that no one appeared on behalf of the Corporate Debtor on 11.03.2022, 21.04.2022, 12.07.2022 and 14.12.2022. No reply has been filed to the Present Company Petition, although notice was validly served by the Petitioner on the Corporate Debtor on 24th August 2021 and 18th April 2022. Therefore, the Corporate Debtor was set ex-parte on 29.07.2022. Affidavits supporting the service of notice was placed before this Bench. The counsel for the*

Petitioner brought the attention of this Bench to the paper publication carried out by the Petitioner in two local newspaper i.e. Free Press Journal (English newspaper) and Navshakti in (Marathi newspaper). Due to repeated non-appearance by the Corporate Debtor, the Corporate Debtor was set ex-parte."

12. The justification proffered now by the Appellant to explain their absence is that there was a demise in the family. Even if we give the benefit of this explanation to the Appellant, this ground cannot hold good for having been absent on 18 occasions each time when the matter was fixed for appearance and hearing. Furthermore, there is force in the contention of the Respondent no. 1 that when the Corporate Debtor also had other Directors on the Company, it is left unexplained why the others could not have pursued the matter before the Adjudicating Authority. Thus, this story of demise of a close relative to explain their absence from appearing before the Adjudicating Authority at a time when the matter was listed for hearing on 18 occasions lacks merit and is an eyewash which deserves scant regard. Moreover, it is noteworthy that during the same period the Appellant was aggressively pursuing the Criminal Applications nos. 585 of 2022 and 181 of 2023, in which applications, the Appellant had contemporaneously acknowledged that Section 7 application is pending before the Adjudicating Authority. In spite of having full knowledge of the Section 7 application and yet not appearing before the Adjudicating Authority cannot be lost sight of casually. This recurrent absence clearly demonstrates that the Appellant was intentionally not participating in the proceedings before the Adjudicating Authority. Under such circumstances, it is difficult to grant any indulgence to the Appellant in entertaining their complaint that there has been miscarriage of natural

justice. When the Appellant failed to participate in the proceedings before the Adjudicating Authority despite reasonable opportunity having been afforded to the Appellant, the impugned order cannot be said to have been vitiated on grounds of violation of the principles of natural justice.

13. This brings us to the basic question of debt and default and at the outset we would like to refer to the guiding principles propounded by the Hon'ble Apex Court in the case of ***Innoventive Industries Limited v. ICICI Bank (2018) 1 SCC 407*** on admission or rejection of an application filed under Section 7 of the IBC. It is well settled that under the ambit of Section 7 of the IBC, the Adjudicating Authority is to only determine whether a default has occurred and whether the debt, which may still be disputed, was due and remained unpaid. The moment the Adjudicating Authority is satisfied that a default has occurred and the amount of default is more than the prescribed amount under Section 4 of the IBC, the application is to be admitted unless it is incomplete.

14. When we look at the impugned order, we find that the Adjudicating Authority has admitted the Section 7 application after satisfying itself of the presence of debt and default. The relevant excerpts of the impugned order are as placed below:

> *"11. We have heard the Learned Counsel appearing for the Petitioner and perused the record. The Present Petition is filed under Section 7 of the Code, wherein the Petitioner contends that the Corporate Debtor had failed to repay the total debt amount of Rs. 1,17,76,398/-. On the basis of an Oral Agreement, the Petitioner had disbursed the loan amount of Rs. 70,00,000/- to the Corporate Debtor, in tranches, starting from 2010 to 2012, to be repayable on demand, at the interest rate varying from 15% to 24% per annum.*

12. The Petitioner further contended that the Corporate Debtor had admitted its liability by the last payment made by the Corporate Debtor on 13th June 2017 and also had acknowledged its debt vide the document annexed as "Confirmation of Accounts" dated 31st March 2018 which is duly signed by both the parties. Further, the Corporate debtor had also paid a part payment of principal amount, along with the interest, which is evident from the document annexed as "Working Of Default" to the Company Petition.

13. After hearing the submissions of the Learned Counsel appearing for the Financial Creditor and upon perusing the above documents relied by the Financial Creditor, this Bench is of the considered opinion that the "debt and default" in this case are proved beyond doubt. Since the Corporate Debtor remained ex-parte, the claim of the Financial Creditor remained unchallenged."

15. In arriving at its findings, we also notice that Adjudicating Authority has taken note of the material on record/documents to satisfy itself about the debt and default. The relevant para is extracted below as under :-

"3. The Petitioner has attached the following documents to demonstrate the existence of Debt:

i. The Ledger Statement of the Corporate Debtor for the period beginning from 1st April 2010 to 30th November 2020.

ii. Form 26AS which is Tax Statement under Section 203AA of the Income Tax Act, 1961 for the Financial Years 2008-09 to 2019- 20 reflecting payments made by the Corporate Debtor towards the payment of the TDS amount on interest payment under section 194A of the Income Tax Act, 1961.

iii. Form 26AS for the Financial Year 2015-16 reflecting payments made by the Corporate Debtor towards the TDS amount deducted on interest payment.

iv. Copy of Bank Statement of the Petitioner for the period of 01st April 2011 to 30th November 2020.

v. Copy of Audited Financial Statement of Corporate Debtor for the Financial Year 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16.

vi. Copy of the Working for Debt Default.

vii. Copy of Ledger for loan, Unpaid TDS Ledger & the ledger account reflecting Interest Payment."

16. It is the case of the Appellant that in the absence of any financial contract between the parties, it is not clear as to on which date the debt and interest thereon had become due and payable. In support of their contention that in the absence of a financial contract there is no proof of debt or default, the Appellant has relied on the judgement of this Tribunal in ***Pawan Kumar vs Utsav Securities Pvt. Ltd*** in ***CA(AT)(Ins)No. 251 of 2020***. Further reliance has been placed on the judgement of this Tribunal in ***Kalpesh Dineshbhai Patel vs Krishna Paper Trading Co & Ors*** in ***CA(AT)(Ins)No. 410 of 2021*** to assert that as there is no demand letter or notice, consequently, it is not established by the Respondent No. 1 that any loan was due and payable by the Appellant.

17. When we look at the facts of the present case, we notice that in para 7.5 at page 13 of Appeal Paper Book ('**APB**' in short) filed by the Appellant, it has been unequivocally admitted by the Appellant-Corporate Debtor that in the year 2010-11, on an oral agreement, a "friendly loan" of Rs.50 lakhs was given by Respondent No.1 to the Corporate Debtor bearing an interest of 15% p.a. It has also been admitted in the same paragraph that a further sum of Rs.10 lakhs was borrowed in F.Y. 2011-12 and 2012-13 at the rate of 18% simple interest. Thus, it is clear that admittedly a friendly loan had been taken by the Corporate Debtor, which was repayable on demand, for which there

was no written contract between the parties and that the rate of interest was varying.

18. We also notice that the Respondent No.1 has relied on the financial statements of the Corporate Debtor till F.Y. 2015-16; Form 26AS Tax Statements reflecting payments made by the Corporate Debtor towards TDS amount on interest payment and a statement of reconciliation from F.Y. 2018 to evidence debt and default. It is also the case of the Respondent No.1 that the Corporate Debtor on several occasions admitted its liability by reflecting the name of the Respondent No.1- Financial Creditor under the head "unsecured loan" from other parties in its audited financial statements till 31.03.2014 and in the balance confirmation statement for the financial year ending 31.03.2018. These documents were also placed by the Respondent No.1 before the Adjudicating Authority to establish debt and default.

19. On the Appellant's claim that the outstanding payments were cleared in June 2017, it has been contested by the Respondent No.1 on the basis of the ledger statement as on 31.03.2017, as emailed to the Appellant by the Respondent No.1 on 16.08.2017, which showed that the closing balance was Rs.51.81 lakhs as placed at page 449 of APB. There is no material placed on record by the Appellant which shows that this ledger statement was controverted at any stage. That the Appellant was required to make payments to the Respondent No.1 has also not been denied as is clearly borne out from the contents of the criminal applications as well as the statement given by them to the Economic Crime Branch on 12.06.2021.

20. It has been disputed by the Appellant that there was no reconciliation of an accounts between the two parties post 2017 and that the document dated 31.03.2018 put forth by the Respondent no.1 is a forged document on which a police complaint was lodged and therefore cannot be relied upon. Be that as it may, we cannot side-step the plea raised by the Appellant that the police complaint was lodged by the Appellant with regard to forged and fabricated balance confirmation as late as on 28.02.2023 which was one day prior to the filing of Section 7 application by the Respondent No.1. This gives a semblance of credence to the allegation of the Respondent No.1 that the police complaint was more in the nature of an after-thought. Further, there is no material placed on record by the Appellant which shows that the police investigation has reached any finality and keeping in view the summary jurisdiction bestowed upon the Adjudicating Authority and this Tribunal, we do not wish to delve any further on the forgery aspect of the balance confirmation.

21. The bone of contention between the parties seem to also arise from the fact that the levy of 24% compounded interest by the Respondent No.1 was contested by the Appellant. When it is an admitted fact that the loan was premised on an oral agreement and the rate of interest was varying, in the absence of any contrary material being brought on record by the Appellant, the contention of the Respondent No.1 that Form-26AS of F.Y. 2015-16 as placed at page 168 of APB clearly shows that the interest component mentioned therein is calculated at 24% compound interest and that this has been reported to the Income Tax Department by the Appellant himself cannot

be discounted. Further it has been claimed that this interest rate tallies with the interest rate of 24% p.a. as mentioned in the ledger at page 101 of APB and page 38 of APB. Furthermore, once payment of interest had been shown from the Corporate Debtor in Form 26AS and Form No. 26AS entries correspond to the claim of financial debt, the said document becomes another piece of evidence to prove that it was a financial debt**.**

22. At this stage it may be useful to note that the judgement of this Tribunal in ***Pawan Kumar supra*** does not come to the aid of the Appellant in view of the clear findings of this Tribunal in the case of ***Agarwal Polysacks Ltd. vs K. K. Agro Foods & Storage*** in ***CA(AT)(Ins)No.1126 of 2022*** wherein the facts of the two cases have been distinguished and held that the judgement of this Tribunal in ***Pawan Kumar supra*** was applicable only in the context of a Non-Banking Financial Corporation. After going into Regulation 8(2) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, and Rule 3(1)(d) and Rule 4(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which regulates filing of application by the Financial Creditors, it has been held in ***Agarwal Polysacks supra*** that written financial contract is not a pre-condition or an exclusive requirement for proving existence of debt. It has been further amplified that the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and CIRP Regulations makes it is clear that financial debt can be proved from other relevant documents and it is not mandatory that written financial contract can be the only basis for proving the financial debt. If disbursement of loan was with interest and repayment

was on demand, the two essential conditions of financial debt stand established with regard to the time value of money. Since the loan had been given on the basis of an oral agreement and was admittedly repayable on demand, there was no need to issue any written notice on the Corporate Debtor seeking repayment.

23. It is trite law that under the IBC once a debt which becomes due or payable, in law and in fact, and if there is incidence of non-payment of the said debt in full or even part thereof, CIRP may be triggered by the financial creditor as long as the amount in default is above the threshold limit. Once the Adjudicating Authority is subjectively satisfied that there is a debt and a default has been committed by the Corporate Debtor and the Section 7 application is complete in all respects, the Adjudicating Authority in the exercise of summary jurisdiction has to admit the Section 7 application.

24. In our considered view, on the question as to whether debt and default was adequately demonstrated before the Adjudicating Authority, basis the records made available before it, the Adjudicating Authority has rightly concluded that it was satisfied with the evidence and material produced before it by the Respondent no.1 to prove that a debt had arisen; that a default has occurred and the default is above the threshold limit of Rs. 1 crore. This is a case where all the pre-requisites for filing a Section 7 stood fulfilled and the Adjudicating Authority cannot be held to have committed an error in admitting the Corporate Debtor into CIRP for having defaulted in repaying a financial debt which was above the threshold limit.

25. In result, we are of the view that the Adjudicating Authority did not commit any error in admitting the Section 7 application and bringing the Corporate Debtor into the fold of CIRP. The impugned order does not warrant any interference. There is no merit in the Appeal. Appeal is dismissed. The interim stay stands vacated and Resolution Professional may now continue to proceed with the CIRP process in accordance with law. All I.A.s are disposed of in the above terms. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 02.07.2024
Harleen Kaur