NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 53 of 2023

[Arising out of Impugned Order dated 05th January, 2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in CP (IB) No. 271 of 2022]

IN THE MATTER OF:

Rajesh Kumar Modi
Shareholder of
M/s La Trendz Fabrica Private Limited
Regd. Office at:
29, Apurva Industrial Estate
Makwana Road, Marol,
Andheri East, Mumbai – 400056 **...Appellant**

Versus

1. **Punjab National Bank (International) Limited**
   Registered office at:
   1 Moorgate, London, EC2R 6JH
   Email: help@pnbint.com **...Respondent No.1**

2. **M/s La Trendz Fabrica Private Limited**
   Having its registered office at:
   29, Apurva Industrial Estate
   Makwana Road, Marol,
   Andheri East, Mumbai – 400059
   Through its RP **...Respondent No.2**

Present:

For Appellant	:	**Mr. Diwakar Singh, Advocate**
For Respondents	:	**Mr. Mithilesh Kumar Pandey, Advocate for R-1**

J U D G M E N T
(26.05.2023)

[Per.: Dr. Alok Srivastava, Member (Technical)]

The Present Appeal has been filed by the Appellant under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short “IBC”) assailing the Order dated 05.01.2023 (in short “Impugned Order”) passed by the Adjudicating Authority (NCLT, Mumbai Bench) in CP (IB) No. 271 of 2022, by which an application under section 7 filed by the financial creditor Punjab National Bank (International) Limited has been allowed and Corporate Insolvency Resolution Process (in short “CIRP”) has been initiated against the corporate debtor M/s La Trendz Fabrica Private Limited.

2. In brief, the facts of the case are that two Credit Facilities were granted to the corporate debtor by the financial creditor Punjab National Bank (International) Ltd. for two term loans, namely one loan of US $ 3.47 Million and the second loan of US $ 1.20 Million vide letters dated 25.10.2011 and 13.08.2014 respectively. Subsequently, two Loan Facility Agreements dated 19.11.2011 and 27.09.2014 were executed between the corporate debtor and the financial creditor. Later, an Amended Facility Agreement dated 08.02.2017 was executed between the corporate debtor and the financial creditor, by which the original facility agreements in respect of both the term loans given by the financial creditor to the corporate debtor were amended.

3. The Appellant has further stated that the two loan Facility Agreements signed by the corporate debtor and the financial creditor contained conditions that the agreement will be governed by the English Law and the Court of England shall have the jurisdiction to

settle any dispute arising out of or in connection with both the Loan Facility Agreements.

4. The Appellant has further stated that a recall notice dated 04.05.2021 was sent to the corporate debtor by the financial creditor demanding repayment of the outstanding loan amount, but in view of the fact that the corporate debtor's business was severely affected due to the unprecedented covid-19 pandemic situation and a big increase in the exchange rate for the US dollar against Indian Rupee, the corporate debtor could not repay the due loan amounts in time and hence the financial creditor filed section 7 application against the corporate debtor, in which CIRP was initiated consequent to admission of the section 7 application on 02.02.2022.

5. We have heard the arguments of both the parties and also perused the record and relevant documents.

6. The Learned Counsel for the Appellant has argued that clauses in the Loan Facility Agreements provide that these agreements shall be governed by English Law and the Courts in England shall have the jurisdiction to settle any dispute arising out of or in connection with the two Loan Facility Agreements. He has further argued that the corporate debtor is not an insolvent company but it experienced severe stress in business due to the Covid-19 pandemic and as a result it was unable to repay the required due instalments against the two Term Loans.

7. The Learned Counsel for Appellant has further argued that the corporate debtor sincerely wants to repay the debt as soon as its business comes back on rails, and therefore the admission of section 7 application for a solvent company is not appropriate course of action. He has further argued that a loan restructuring plan was approved by the financial creditor on 26.12.2016, which extends the period of repayment till 30.06.2028 and therefore, it is not just and fair that the corporate debtor is sent in insolvency due to delay in repayment of certain instalments.

8. The Learned Counsel for Respondent-financial creditor has claimed that the loan accounts of the corporate debtor were declared NPA in the year 2016 but on account of the request made by the corporate debtor, restructuring of the loan took place. He has added that even as per the restructured loan repayment schedule, the corporate debtor defaulted in repayment of the due instalments, where after the financial creditor sent a loan recall notice to the corporate debtor on 04.05.2021 demanding repayment of the outstanding loan amount. The Learned Counsel for Respondent has further argued that the corporate debtor has admitted to the debt and default as is included in para 8 and 9 of the impugned order:

9. The Learned Counsel for Respondent has further argued that the Clause 35 on Loan Facility Agreement very clearly lays down the method of enforcement, and as per Clause 35.1(c), the lender can take

proceedings relating to a dispute in any other courts, apart from courts in England, with jurisdiction to the extent allowed by law and the lender bank is also allowed to take concurrent proceedings in any number of jurisdictions. He has also referred to sub-section (1) of section 60 of the "IBC" to clarify that, in relation to insolvency resolution and liquidation of the corporate debtor, the NCLT, as Adjudicating Authority, has territorial jurisdiction over the place where the registered office of the corporate person is located. He has added that in the present matter, the corporate office of the corporate debtor is located in Mumbai as is clear from the address of the corporate debtor mentioned in the loan sanction letters dated 25.10.2011 and 13.08.2014, which are part of the record of the appeal paper book. Therefore, the territorial jurisdiction of the NCLT, Mumbai will be the territorial jurisdiction of the Adjudicating Authority in the matter of insolvency resolution of the corporate debtor.

10. We first consider the issue of jurisdiction for consideration of section 7 application. We note that the Loan Facility Agreements for both the Term Loans I, . The Loan Facility Agreement for Term Loan-I dated 19.11.2011 (attached at pp 41 - 90 of appeal paper book) in section 10 (Governing Law and Enforcement) states the following:

"SECTION 10

GOVERNING LAW AND ENFORCEMENT

34. GOVERNING LAW

This Agreement is governed by English law

35. ENFORCEMENT

35.1 Jurisdiction

(a) The courts of England shall have Jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispule regarding the existence, validity or termination of this Agreement) (a "Dispute").

(b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

(c) This Clause 35.1 is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions.

35.2 Consent to Enforcement etc.

The Borrower irrevocably and generally consents in respect of any proceedings anywhere in connection with any Finance Document to the giving of any relief or the issue of any process in connection with those proceedings including, without limitation, the making, enforcement or execution against any assets whatsoever (irrespective of their use or Intended use) of any order or judgment which may be made or given in those proceedings.

35.3 Waiver of Immunity

The Borrower irrevocably agrees that, should any Party take any proceedings anywhere (whether for an injunction, specific performance, damages or otherwise in connection with any Finance

Document), no immunity (to the extent that it may at any time exist, whether on the grounds of sovereignty or otherwise) from those proceedings, from attachment (whether in aid of execution, before judgment or otherwise) of its assets or from execution of judgment shall be claimed by it or with respect to its assets, any such immunity being irrevocably waived. The Borrower irrevocably agrees that it and its assets are, and shall be, subject to such proceedings; attachment or execution in respect of its obligations under the Finance Documents."

11. A similar provision regarding law and jurisdiction appears in the Loan Facility Agreement dated 27.09.2014 with regard to term loan-II (attached at pp 91 - 143 of the appeal paper book) wherein Clause 17.7 states as hereunder:

17.7 Law and Jurisdiction

(1) This Agreement shall be governed by and construed in accordance with English law.

(2) The Borrower irrevocably agrees for the exclusive benefit of the Bank that the courts of England shall have jurisdiction to hear and determine any suit action or proceeding, and to settle any disputes, which may arise out of or in connection with this Agreement and for such purposes hereby irrevocably submits to the non-exclusive jurisdiction of such courts of England.

(3) Nothing contained in this Clause shall limit the right of the Bank to take proceedings

against the Borrower in any other court of competent jurisdiction, nor shall the taking of any such proceedings in one or more Jurisdictions preclude the taking of proceedings in any other, jurisdiction, whether concurrently or not (unless precluded by applicable law).

(4) *The Borrower irrevocably consents and agrees to service of any claim form, proceedings or legal process under this Clause 17.7 by registered air mail to the Borrower's address specified above or such other address that the Borrower notifies to the Bank for that purpose in advance and in writing. Service by this agreed method shall be deemed to take place 5 (five) days after postage (whether or not it is received by the Borrower) and shall in any event be valid and effective service on the Borrower.*

(5) *The Borrower irrevocably waives any objection which it may have now or in the future to the courts of England or as nominated for the purpose of sub-clause (3) above and agrees not to claim that any such court is not a convenient or appropriate forum."*

12. A plain reading of the provision relating to jurisdiction makes it abundantly clear that clause 35.1 in the Loan Facility Agreement dated 17.11.2011 is for the benefit of the lender Punjab National Bank (International) Limited, and wherein clause 35.1(c) stipulates that the lender shall not be prevented from taking proceedings relating to a

dispute in any other Courts than the courts of England and also that the lender is empowered to taking concurrent proceedings in any number of jurisdictions. Further, by clause 35.2, the borrower-corporate debtor has irrevocably and generally consented in respect of any proceeding anywhere and has also waived immunity on grounds of sovereignty or otherwise. Further, clause 17.7 of the second Loan Facility Agreement dated 27.09.2014 also makes it clear that for the exclusive benefit of the financing bank. Also, this Facility Agreement provides that the borrower has irrevocably agreed to submit to the non-exclusive jurisdiction of the Courts of England and further the lender bank is allowed to take proceedings against the borrower in any other court of competent jurisdiction and also allowed to undertake any such proceedings in one or more jurisdiction concurrently.

13. We further note that sub-section (1) of section 60 of the IBC provides that the territorial jurisdiction of NCLT, Mumbai shall be the jurisdiction of Adjudicating Authority in respect of the corporate debtor M/s La Trendz Fabrica Private Limited whose registered office is located in Andheri East, Mumbai.

14. Thus, on the issue of jurisdiction it is unambiguously clear that Punjab National Bank (International) Limited as financial creditor is fully entitled and authorised to take action in respect of section 7 application against the corporate debtor under the IBC before the NCLT, Mumbai which shall be the Adjudicating Authority to adjudicate the section 7 application.

15. We further note that the loan recall notice was sent by the financial creditor on 04.05.2021 demanding repayment of the outstanding loan amount and the section 7 application was filed on 02.02.2022 i.e. within one year of the sending of the demand notice to the corporate debtor. The corporate debtor has not denied the issue or receipt of demand notice but has only claimed that it was unable to due repayment amount because of the severe financial and commercial stress experienced by the corporate debtor as a result of the Covid-19 pandemic.

16. We also find that the impugned order in paragraphs 8 and 9 notes that the corporate debtor has submitted that its liability with regard to the loan amounts due and payable is neither disputed nor denied. We also note that the corporate debtor has not raised any dispute regarding the debt or default in repayment of the debt. This fact has been recorded in the Impugned Order in the following paragraphs:

> *"8. The Corporate Debtor further submits that the liability of the Corporate Debtor is neither disputed nor denied. However, due to Covid-19 and other factors its business has drastically gone down, therefore, inability to repay the loan amount, which doesn't mean that the business of the Corporate Debtor is going to wind up. It is trying to restore their business position as it was in the past, but it will take sufficient time to recover in the same manner. Therefore, requires more time to repay the*

loan. The Corporate Debtor relied upon a judgment by the Hon'ble Supreme Court in the case of "A Navinchandra Steels Pvt. Ltd. v/s. SREI Equipments Finance Ltd., 2021 4 SCC 435", which says "every effort should be made to resuscitate the Corporate Debtor in the larger public interest, which includes not only the workmen of the Corporate Debtor but also its creditors and the goods it produces in the larger interest of the company of the country".

9. The Corporate Debtor further submits that it is approaching the Financial Creditor for One Time Settlement (OTS), which itself proves its honest intention to repay the loan. The Corporate Debtor in its reply submitted undertook to repay the liability without any excuse, provided the economic situation of the company gradually improves and requested this Tribunal to consider leniently and provide sufficient opportunity to the Corporate Debtor in terms of repayment and sought to reject the Petition filed by the Financial Creditor."

17. It is thus clear that the repayment of instalments of loan amounts due and payable to the corporate debtor on account of the two loan facility agreements are financial debts which are in default of repayment and the dates of the recall notice and filing of section 7 application make it clear that the application was filed within limitation.

18. On the basis of the above analysis and discussion, we are of the view that the Adjudicating Authority has not committed any error in

the Impugned Order, and hence it does not require any interference. We therefore, dismiss the appeal.

19. In the facts of the case there will be no order as to costs.

[Justice Rakesh Kumar]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi
26th May, 2023

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