NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 410 of 2021

IN THE MATTER OF:

Mr. Kalpesh Dineshbhai Patel **.... Appellant**
Director of Kingston Paptech Pvt. Ltd.
A/904, 9th Floor, Solitare,
Corporate Park, Nr. YMCA Club,
S.G. Highway, Ahmedabad 380054.

Versus

Krishna Paper Trading Co. **.... Respondent No. 1**
4 & 5, Nathalal Estate, Opposite Shakti
Estate, B/h. Gita Process, Narol – Isanpur
Highway, Ahmedabad – 282 443.

Mr. Vinod Tarachand Agarwal **.... Respondent No. 2**
(Resolution Professional)
204, Wall Street 1, Near Gujarat College,
Ellis Bridge, Ahmedabad – 380 006.

Present

For Appellant: **Ms. Manisha T. Karia, Ms. Sukhda Kalra, Mr. Adarsh Kumar and Ms. Nidhi Nagpal, Advocates.**

For Respondents: **Mr. Atul Sharma, Advocate (R-1)**

Mr. Monaal Davawala, Advocate (for RP-R-2)

J U D G M E N T
(DATE: 06.01.2022)
(Virtual Mode)

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

1. This appeal has been filed under section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter called "IBC") by the Appellant, who is aggrieved by the order dated 15.3.2021 passed under section 31 of IBC in CP(IB) No. 543/7/NCLT/AHM/2018 by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench).

2. The Appellant, ex-Director of the Corporate Debtor Kingston Paptech Pvt. Ltd., was arrayed as the Appellant vide order dated 22.7.2021 of this Tribunal in place of the Corporate Debtor company along with the Resolution Professional, who represents the Corporate Debtor, as Respondent No. 2 in the appeal.

3. The Appellant has claimed that section 7 application was filed by Respondent No. 1 claiming to be Financial Creditor on alleged financial loan totaling Rs. 52.50 lakhs. This misconceived

application, the Appellant has claimed, was filed by the Financial Creditor to recover the said amount and no loan of this amount was taken by the Corporate Debtor. The Appellant Kamlesh Dineshbhai Patel, an ex-Director of the Corporate Debtor has claimed that the Impugned Order passed by the Adjudicating Authority is under the misconceived impression that the money owed by the Corporate Debtor to the purported Financial Creditor is due to a loan disbursed in two transactions in the year 2015 viz. Rs. 50 lakhs on 14.7.2015 and Rs. 2.50 lakhs on 20.6. 2015, both transferred to the Corporate Debtor through RTGS.

4. The Appellant has stated in the appeal and argued that the Corporate Debtor is a private limited company incorporated in the year 2008, which is engaged in the business of manufacturing of paper and paper products, and that the Respondent No. 1 is a dealer of the Corporate Debtor Company. The amount totaling Rs. 52.50 lakhs transferred by the Respondent No. 1 to the Corporate Debtor is in the course of business dealings.

5. The Appellant has further stated that Respondent No. 1 filed section 7 application before NCLT, Ahmedabad alleging that

the Corporate Debtor had defaulted in payment of loan and a total debt of Rs.37,10,972.00(Rupees Thirty Seven Lakh Ten Thousand Nine Hundred and Seventy Two only) is due and payable to Respondent No. 1 without giving any proof of the alleged debt or without establishing default or date of default of the alleged financial debt as envisaged under the IBC, but solely on the basis of unaudited ledger account. He has further stated that the Adjudicating Authority was unable to ascertain the existence of default from the information submitted in section 7 application, and hence the Adjudicating Authority passed order on 12.2.2020 seeking certain clarifications under section 7(5) of the IBC from to the Respondent No. 1 (the clarification is attached at pp.103-111 of the Appeal paperbook). Thus the Impugned Order has been passed by the Adjudicating Authority on the basis of a vague clarificatory reply provided by Respondent No. 1, without even ascertaining whether the said amount was financial debt in default as per the definition of 'financial debt' under IBC.

6. Oral arguments of the Learned Counsels for the Appellant and Respondent No. 1 were heard by us and the pleadings filed in the appeal were duly perused.

7. The Learned Counsel for the Appellant has argued that Respondent No.1 does not fall in the category of Financial Creditor on the allegation that the Corporate Debtor took a loan from Respondent No. 1 of an amount of Rs. 52.50 lakhs. She has argued that there is no written or oral agreement regarding the loan between the Corporate Debtor and Respondent No. 1 without any acknowledgment or communication given by the Corporate Debtor regarding the alleged loan. Furthermore, no notice or demand letter was sent by Respondent No. 1 for repayment of the loan to the Corporate Debtor before initiation of IBC proceedings. She has pointed out that in Part IV of the section 7 application filed by Respondent No. 1 there is no mention of the date on which the default is purported to have occurred, and later in the clarificatory reply given by the Respondent No.1 in response to order dated 12.2.2021 of the Adjudicating Authority, no evidence regarding the debt and the date on which the debt became due and payable has been provided. She has argued that the ledger amount and bank statement records do not show accrual of any interest which was supposed to be paid by the Corporate Debtor, which could show that a loan on certain rate of interest was advanced by Respondent No. 1. She has thus clarified that the

amount of Rs. 52.50 lakhs which Respondent No. 1 claims as loan amount was actually paid by Respondent No. 1 to the Corporate Debtor as part of normal business dealing and repayment of Rs. 22.50 lakhs was made vide cheque no. 693350 dated 31.8.2017 drawn on State Bank of India, which was returned unpaid by the bank. The Learned Counsel of Appellant has claimed that since the original amount was paid to the Corporate Debtor as part of business dealing and not as a loan, the Respondent No. 1 should have taken recourse to proceedings under any other law than IBC.

8. The Learned Counsel for Appellant has pointed out that in his reply affidavit filed on 16.11.2021 Respondent No. 1 has filed letter dated 20.7.2015 (attached at page 32 of reply affidavit filed by Respondent No. 1 vide Dy. No. 31470 dated 23.11.2021) as proof of loan wherein the date of the letter is mentioned as 20.7.2015, whereas the date given below the signature of signee is 10.10.2015. Such a discrepancy shows that the letter is fabricated and produced just to show the existence of a debt and the liability to pay interest @ 18% p.a.

9. The Learned Counsel for Respondent No. 1 has argued that a loan was taken by the Corporate Debtor from the Respondent No. 1 for which a letter dated 20.7.2015 was given by the Corporate Debtor stating that it has borrowed Rs. 52.50 lakhs from Respondent No. 1 Company and is liable to pay the borrowed money before 31.7.2017. He has further argued that it is stated in this letter that if the Corporate Debtor is unable to repay the debt, it will be liable to pay 18% interest per annum.

10. The Learned Counsel for Respondent No. 1 has further argued that the statement of HDFC bank showing that an amount of Rs. 50 lakhs was transferred through RTGS to the Corporate Debtor on 14.7.2015 and Rs. 2.50 lakhs was transferred by Respondent No. 1 to the Corporate Debtor by RTGS on 20.6.2015 (both bank statements attached at pp.66-70 of Appeal paperbook). In addition, he has also produced ledger account maintained by the Corporate Debtor wherein, a receipt of total Rs.52.50 lakhs has been shown in two entries on 20.6.2015 and 14.7.2015 (attached at pp. 71-72 of Appeal paperbook). The Learned Counsel has claimed that based on this evidence of transfer of Rs. 52.50 lakhs to the Corporate Debtor by

Respondent No. 1, the existence of loan has been established, which is liable to be paid by the Corporate Debtor to Respondent No. 1.

11. Sub-sections 10, 11 and 12 of Section 3 of IBC contain definitions of 'creditor' (including Financial Creditor), 'debt' and 'default' as follows:-

> *"3 (10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder.*
>
> *3 (11) "debt' means a liability or obligation in respect of a claim which is due from many person and includes a financial debt and operational debt.*
>
> *3 (12) "default" means 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.*

It is clear from the definition of "debt" that it is a liability in respect of a claim due from any person (in this case the Corporate Debtor) and includes financial debt. "Default" is defined as non-payment of debt when whole or part or instalment of the debt that has become due and payable by the Corporate Debtor. Therefore, the existence of debt has to be clearly stated in section 7 application for which a detailed format is provided in the IBC. The application has to be submitted in the stipulated format and the Financial Creditor has to furnish record of the default with the information utility or such other record or evidence of default as may be specified. Further under section 7 application, the satisfaction of the Adjudicating Authority is necessary to establish that default has occurred and financial debt is due and payable.

12. It is seen that Adjudicating Authority provided an opportunity to Respondent No. 1, who claims to be Financial Creditor, vide order dated 12.2.2020 to provide certain clarifications with regard to debt claimed by him. The clarifications provided by Respondent No. 1 are in the form of bank statements and ledger account (supra). The Part IV in the application filed under section 7 does not include any date of default. Moreover, no evidence by way of any written or oral contract or communication regarding the loan or record of information utility has been produced by Respondent No. 1 in support of his claim of advancing a loan to the Corporate Debtor.

13. The letter dated 20.7.2015 (attached at page 32 of the reply affidavit filed by Respondent No. 1) states the Corporate Debtor's commitment to repay borrowed money to Respondent No.1 before 31.7.2015, and in case it fails to repay the loan on time, its liability to pay 18% interest per annum. The bank statement attached by the Appellant shows that Rs. 2.50 lakhs was transferred through RTGS to the Corporate Debtor on 20.6.2015 and Rs. 50 lakhs was transferred to the Corporate Debtor's account on 14.7.2015. The letter which purports to record the fact of loan is dated 20.7.2015 even though the date below the signature of Director of Corporate Debtor Kingston Paptech Pvt. Ltd. is 10.10.2015. We find that the dates of transfer of money through RTGS in the Corporate Debtor's account and the two different dates recorded in the letter dated 20.7.2015, which purports to record the evidence of loan, appear to be incongruous. Moreover, the date on which loan amount becomes due and payable is taken as 31.7.2015, as mentioned in the letter dated 20.7.2015. There is no other acknowledgment from the Corporate Debtor regarding the loan and therefore, we take the date of default as is 31.7.2015, as no date of default has been mentioned in Part IV of section 7 application.

14. We also find that before the filing of section 7 application, there is no demand letter or notice was sent by Respondent No. 1 to the Corporate Debtor regarding delay in repayment of loan. All these facts do not inspire confidence about the authenticity of the letter dated 20.7.2015, and consequently, existence of financial debt as claimed by Respondent No. 1 and default in its repayment.

15. On the basis of the above discussion, we come to the conclusion that the Respondent No. 1 has not been able to prove the existence of the purported loan. Consequently Respondent No. 1 has not been able to establish that he is a Financial Creditor, who is entitled to file application under 7 of IBC. Furthermore, the date of default, which is taken as 31.7.2015 means that section 7 application should have been filed within three years i.e. by 30.7.2018. The section 7 application in this case was filed on 14.9.2018. Hence, even if we assume the transaction between the Corporate Debtor and Respondent No. 1 resulting in financial debt, the section 7 application was not filed within the period of limitation.

16. In the above mentioned situation, we do not find that Respondent No. 1 was able to prove that the loan provided by him to the Corporate Debtor is a financial debt which is due and payable. We, therefore allow the appeal and set aside the Impugned Order dated 15.3.2021. All conditions enforced in compliance of Impugned Order are removed and the Corporate Debtor is released from the rigors of CIRP. No order as to costs.

(Justice Ashok Bhushan)
Chairperson

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
6th January, 2022

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