NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 719 of 2022

In the matter of:

Shantilal Javerchand Jain
Suspended Director of the Corporate Debtor,
Having residence at:
2nd Floor, Varsha Building 13 Adarsh society,
Ramachandra Lane Extension, Malad – West,
Mumbai-400064. … **Appellant**

Versus

Varsha Corporation Limited,
Through its Interim Resolution Professional
Mr. Vinod Kumar Ambavat,
Having its Office at:
Varsha, 13 Adarsh Society, Ramachandra Lane
Extention, Malad – (West),
Mumbai-400064. …**Respondent No.1**

Mr. Rajendra Shah,
Having his address at:
301/2, Sulsa Society, Ratilal R. Thakkar Marg,
Walkeshwar, Mumbai-400006. … **Respondent No. 2**

Present

For Applicant: **Ms. Anushree Kapadia, Advocate**

For Respondent: **Mr. Subir Kumar, Mr. Vardhman Kaushik, Ms. Disha Shah, Mr. Nishant Gautam, Mr. Prafful Saini, Mr. Syed, Ms. Eesha, Advocates for R-1**
Mr. Vishesh Kalra, Mr. Kunal Kanungo, Advocates for R-2.

JUDGMENT
(Date: 02.11.2022)

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

1. The present appeal has been filed under section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') by the Appellant against the order dated 10.6.2022 in CP No. 3863/IBC/MB/2019 (hereinafter called 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai)/

2. The Appellant is aggrieved by the Impugned Order in that the section 7 application filed by respondent No. 1 has been admitted and Corporate Insolvency Resolution Process (in short 'CIRP') has been initiated against the corporate debtor Varsha Corporation Limited.

3. In brief, the Appellant's case is that a promissory note was executed between the corporate debtor and Respondent No. 2 Mr. Rajendra Shah on 23.2.2012 for a loan of Rs.50,00,000/- (Rupees Fifty Lakhs Only) payable by the corporate debtor, and the requisite amount was given by Respondent No. 2 vide cheque no. 468828 dated 21.2.2012 drawn on Central Bank of India. The Appellant has stated that during the life of the promissory note i.e.

up to 23.2.2015, there was no demand for repayment by Respondent No.2 and therefore, no default can be determined during this period. He has further stated that in accordance with Article 35 of the Schedule which includes periods of limitation in the Limitation Act, 1963, a period of limitation of three years is stipulated for a promissory note, which is payable on demand, and thus the section 7 application filed by Respondent No. 2 on 25.10.2019 was clearly barred by limitation, as it was filed after more than 7 years from the date of issue of promissory note. Lastly, he has stated that since the section 7 application has been filed beyond the limitation period, it has been incorrectly admitted by the Adjudicating Authority.

4. We heard the Learned Counsels for both the parties in the matter and perused the record.

5. The Learned Counsel for the Appellant has argued that the Impugned Order has been obtained by Respondent No. 2/Financial Creditor by claiming himself to be a financial creditor without attaching any financial contract to prove that the alleged debt is a financial debt as required under IBC. He has further argued that the section 7 application does not show how the alleged loan was

disbursed and the date of default has been taken as 16.12.2016, even though the limitation of the promissory note was over on 23.2.2015, and in view of the fact that there is no acknowledgment of the debt by the corporate debt from 23.2.2015 up to the date of default, namely, 16.12.2016, the application under section 7 is clearly barred by limitation.

6. The Learned Counsel for Appellant has referred to letters dated 7.6.2017 and 16.1.2017 which have been submitted by the financial creditor, to claim that these letters are of dates that are clearly beyond the period of limitation, and, therefore, they cannot be shown as acknowledgement of debt to take benefit of section 18 of the Limitation Act, 2013. He has also claimed that reliance placed on the proceedings in the application under section 138 of the Negotiable Instruments Act with respect to dishonouring of three cheques, all dated 22.10.2016, cannot be considered as acknowledgment for extension of limitation under section 19 of the Limitation Act, 1963, since the tendering of three cheques in question was done after the period of limitation had lapsed on 23.2.2015. Moreover, he has claimed, the deposit of TDS amount cannot be taken as acknowledgment of debt by the Appellant. The Learned Counsel for Appellant has lastly argued that there was no

demand made within the validity period of the promissory note i.e. between 23.2.2012 and 23.2.2015 and hence the debt of Rs. 50 lakhs lent through the promissory note became time barred on 12.3.2015, and with no acknowledgment of the debt produced by Respondent No. 2 pertaining to any date before 23.2.2015 to claim extension of limitation, the section 7 application, which is clearly barred by limitation, should be rejected.

7. The Learned Counsel for Appellant has cited the following judgments of NCLAT in support of his contention that lack of record to show disbursal of loan is a serious short-coming in section 7 application on which basis the insolvency application cannot be admitted:-

(i) **Prayag Polytech Pvt. Ltd. v/s Gem Batteries Pvt. Ltd. (Company Appeal (AT) (Ins) No. 713 of 2019).**

(ii) **Pawan Kumar v/s. Utsav Securities Pvt. Ltd. and Anr. (Company Appeal (AT) (Ins) No. 251 of 2020).**

8. The Learned Counsel for Appellant has also cited the judgment of NCLAT in **Anita Jindal Vs. M/s. Jindal Buildtech Pvt. Ltd., [CA (AT) (Insolvency) No. 512 of 2021],** whereby the Hon'ble Tribunal has held that for seeking initiation of CIRP, the

factual matrix of the case should be seen whether it is only with an intention for recovery of dues and not for the purpose of insolvency resolution, and if it is meant for recovery of dues, the application for CIRP initiation ought not to have been admitted.

9. In reply, the Learned Counsel for Respondent has argued that the promissory note was executed between him and the corporate debtor for providing a loan of Rs. 50 lakhs, which was disbursed by cheque no.468828 dated 21.2.2012 drawn on the Central Bank of India. He has further argued that since the corporate debtor was paying interest @ of 15% p.a. on the amount given on loan, he had no reason to demand repayment of the amount as per the promissory note till the year 2016, when on non-receipt of timely interest payment he approached the corporate debtor for repayment of the loan amount alongwith interest. He has referred to letter dated 7.6.2016, sent to him by the corporate debtor, wherein the corporate debtor has admitted receiving a sum of Rs. 50 lakhs by cheque no. 468828 drawn on Central Bank of India with interest @ 15% p.a, and whereby the corporate debtor gave cheque no. 964293 dated 22.10.2016 for Rs.50,00,000/- drawn on the corporate debtor's bank 'Greater Bombay Co-operative Bank, Malad Branch, Mumbai' towards

repayment of the principal loan amount. He has also referred to two other cheques, viz. cheque no. 958801 dated 22.10.2016 for an amount of Rs.3,41,250/- and cheque no. 964332 dated 22.10.2016 for an amount of Rs.1,72,500/-, both issued by the corporate debtor for payment of interest due on the loan amount. He has further submitted that on presentation of these cheques, the Central Bank of India issued three advice notes dated 16.12.2016 dishonouring the three cheques with the statement "Account Closed".

10. The Learned Counsel for Respondent has urged, on the basis of the dishonour of the above-mentioned cheques, that since the corporate debtor was paying interest on the unsecured loan, which is clear from the ledger showing 'Confirmation of Account' for the period 1.4.2014 to 31.3.2015, and also Form 16A showing TDS deduction, that there was no default till then i.e. 16.12.2010. He has submitted that the date of default is the date of the bouncing of the cheque viz. 16.12.2016, and since the section 7 application has been filed on 25.10.2019, it is clearly within limitation of three years. He has strongly argued that even if he did not take any action for repayment of the amount in accordance with the promissory note, the fact that the disbursed amount was a loan

cannot be denied, as is coming out from the letter dated 7.8.2016 of the corporate debtor. Further, he has referred to the judgment of the Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai in Summary Criminal Case No. 2000868/SS/2017, in which the existence of the three cheques bearing no. 964293 for Rs. 50 lakhs, no. 958801 for Rs. 3,41,250/- and no. 964332 for Rs. 1,72,500/-, all issued on 22.10.2016 drawn on the Greater Bombay Co-operative Bank, Mumbai has been found to be correct and so affirmed by the Metropolitan Magistrate, Mumbai.

11. The issue, therefore, that falls for consideration in this appeal is whether the loan advanced by Respondent No. 2 to the corporate debtor regarding which the promissory note has been executed is a financial debt and further whether the letter dated 7.6.2016 constitutes admission of such debt and whether the date of dishonouring of cheques i.e. 16.12.2016 is the date of default.

12. We note that the ledger statement regarding confirmation on account of the corporate debtor for the period 1.4.2014 to 2015, which was sent by the corporate debtor to Respondent No. 2 (attached at page 97 of the appeal paperbook) clearly shows that

interest on unsecured loan amount of Rs.170625/- was paid on 9.4.2014, further an amount of Rs.172500/- was paid on 20.11.2014 and an amount of Rs.341250 was paid on 20.06.2015. Therefore, it is clear, as claimed by Respondent No. 2, that the corporate debtor was paying interest in the years 2014 and 2015 on the loan amount of Rs. 50 lakhs and hence, and so it is logical that the corporate debtor did not demand repayment of the amount of the promissory note. Further, the TDS details updated on 16.7.2014 (attached at pp.99-100 of appeal paperbook) also corroborate the payment of interests by the corporate debtor to Respondent No. 2. Thus, we find the argument of Respondent No. 2 that the question of demanding payment on account of the promissory note during the existence did not arise till June, 2016 when he approached the corporate debtor for repayment of the loan amount convincing.

13. Further, we note that within a period of three years from the date of issue of ledger confirmation of account dated 1.4.2015, the corporate debtor issued a letter dated 7.6.2016 (attached at pg. 80 of the appeal paperbook) wherein the corporate debtor has admitted that Rs. 50 lakhs given by cheque no. 468828 drawn on Central Bank of India was by way of business loan with interest @

15% p.a. This letter also notes that cheque no. 964293 for Rs.50,00,000 has been given by Respondent No. 2 towards repayment with an assurance as follows:-

> *"We have assured you that, when you will deposit your cheque with your bank the same will definitely be honoured and we will neither stop the payment thereof by requesting our bank nor dishonour the same for any reason whatsoever. In case we dishonour the same you will be at liberty to take legal action against us under the provision of the Negotiable Instrument Act. However, we assure you that such a stage will never come. The account of the interest will be settled subsequently."*

14. We also note that three-cheques bearing no. 964293 dated 22.10.2016 for an amount of Rs. 50,00,000/-, cheque no. 958801 dated 22.10.2016 for an amount of Rs.3,41,250/- and cheque no. 964332 dated 27.10.2016 for an amount Rs.1,72,500/- (copies at page 81 of appeal paperbook) relating to the principal loan amount and the interest thereon were presented in the bank for realisation, when they were dishonoured and the advice notes have been sent by the Central Bank of India regarding dishonouring of the three cheques with the comments "Account Closed".

15. While no date of default is mentioned in the promissory note or any other document such loan agreement has been produced, we are of the view that corporate debtor's letter dated 7.6.2016 states very clearly the existence of the loan and also the fact that

on depositing the cheque with the bank of Respondent No. 2, the same will definitely be honoured and the dishonouring of cheques will be taken as default for which the financial creditor can take legal action. Thus the date 16.12.2016 has been correctly considered as the date of default by the Adjudicating Authority, which the said cheques were dishonoured.

16. The corporate debtor has admitted the fact that a loan was taken by the corporate debtor from Respondent No. 2 (para 5 of reply dated 16.1.2017 to the notice of Respondent No. 2, attached at pp. 92-96 of the appeal paperbook). Further in the same reply, the corporate debtor has accepted that such cheques were given by the corporate debtor, but with an understanding that the same shall be deposited in the month of March, 2017. We are not inclined to accept this claim of the corporate debtor and are of the view that Respondent No. 2 deposited the cheques in accordance with date of the cheques, i.e. 22.10.2016. Therefore, it also supports the contention of the Financial Creditor that the date of 16.12.2016, when these cheques were dishonoured, has been correctly considered as the date of default.

17. We peruse the judgment of this tribunal in the matter of **Anita Jindal vs. M/s. Jindal Buildtech Pvt. Ltd. & Anr.(supra)** cited by the Learned Counsel for the Appellant, to note the facts in this case, the section 7 application was dismissed since the matter related to recovery of past dues, whereas in the present case, it is a clear case of loan amount disbursed to the corporate debtor for running his enterprise, and the loan repayment is in default and therefore the section 7 route for insolvency resolution in the present case is possible.

18. The Learned Counsel for Appellant has also referred to the order of this tribunal in the matter of **Prayag Polytech Pvt. Ltd. Vs. Gem Batteries Pvt. Ltd. [Company appeal (AT) (Insolvency) No. 713 of 2019),** wherein it is observed by this tribunal that Appellant has failed to show any record showing financial debt to be there, whereas in the present case the existence of a financial debt has been established without any ambiguity. Also, in the judgment in the matter of **Pawan Kumar vs. Utsav Securities Pvt. Ltd. [Company Appeal (AT)(Ins) No. 251 of 2020)** cited by the Learned Counsel for Respondent holds that the Adjudicating Authority is obliged to investigate the nature of the transaction and should be very cautious in admitting the Application. We

note that in the present case, the Adjudicating Authority has looked at all the documents and events presented by both the parties to arrive at the conclusion that the said debt is 'financial debt'.

19. In view of the discussion in the aforementioned paragraphs, we are of the clear view that the Adjudicating Authority has not committed any error in admitting the section 7 application. The appeal being devoid of merit is, consequently, dismissed.

20. No order as to costs.

(Justice Ashok Bhushan)
Chairperson

(Dr. Alok Srivastava)
Member (Technical)

(Mr. Barun Mitra)
Member (Technical)

New Delhi

2nd November, 2022

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