NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 904 of 2022

In the matter of:

Mr. Shubh Gautam,
S/o Shri Surya Pratap Gautam,
r/o Villa No. VI/1, Block g,
Jaypee Greens, Greater Noida,
Uttar Pradesh-201306. … **Appellant**

Versus

Anjani Technoplast Limited,
Having its Registered Office at:
AV Kunj Apartments, Plot No. 87, I.P. Extension
Patparganj, East Delhi, Delhi-110092. … **Respondent**

Present

For Applicant: **Mr. Sanjiv Sen, Sr. Advocate with Mr. Piyush Vats, Advocate.**

For Respondent: **Mr. Ashish Dholakia, Sr. Advocate with Mr. Shaurya Krishna, Mr. Amit Gard, Mr. Akash Panwar and Mr. Arpit Singh, Advocates**

JUDGMENT
(Date: 01.11.2022)

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

1. This appeal has been filed under section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') by the Appellant aggrieved by order dated 20.6.2022 passed by the Adjudicating

Authority (National Company Law Tribunal, New Delhi) in CP No. (IB)-766 (ND)/2021 (hereinafter called the 'Impugned Order') by which the Adjudicating Authority has dismissed the application filed under section 7 of the IBC on the ground that a decree holder does not come within the definition of 'Financial Creditor'. The Adjudicating Authority has further held that in view of the facts and circumstances of the instant case, the debt in question which is included in the section 7 application does not come under the purview of 'financial debt'.

2. The Appellant's case is that upon a request made by the Respondent, he disbursed an interest-bearing loan for a sum of Rs.2,50,00,000 (Rupees Two crores Fifty Lakhs only) for a period of two months carrying interest @ 12.75% p.a. payable on half yearly basis vide a loan agreement dated 24.2.2010 to the Respondent. He has added that Respondent again approached the Appellant requesting for further financial assistance to meet his working capital requirements, and consequently another loan agreement dated 31.3.2010 was executed between the Appellant and Respondent by which the Respondent borrowed another sum of Rs. 2,00,00,000 (Rs. Two Crores only) from the Appellant for a period of 15 days along with an interest @ 3% p.m. payable on half yearly basis.

3. The Appellant has further stated that he submitted cheques, meant for repayment issued at the time of execution of the loan agreement in the bank, for payment, which were dishonoured, whereafter he initiated proceedings under the Negotiable Instruments Act against the Respondent. He has further stated that a Compromise Deed dated 31.8.2013 was executed between the Appellant and Respondent and a cheque of an amount as per the Compromise Deed was given to the Appellant which was also dishonoured upon presentation in the bank. Frustrated at the non-repayment of the amount given by the Appellant, he preferred a summary suit being Civil Suit (Original Side) No. 66 of 2016 before the Hon'ble High Court of Delhi for recovery of an amount of Rs.4,38,00,617 along with an admitted interest @ 24%. Another Compromise Deed dated 23.12.2016 was executed between the parties, whereby the Respondent gave two post-dated cheques bearing nos. 000130 and 000132 dated 31.12.2017 for a total amount of Rs.2,38,61,907, but these cheques were also dishonoured upon presentation in the bank. The Appellant has submitted that the Respondent made a part payment of Rs. 25 lakhs only out of the total due amount of Rs.4,38,00,617/- and interest which was outstanding on 6.1.2018. In the Civil Appeal No. 66 of 2016, the Hon'ble High Court of Delhi passed a

judgment-decree dated 11.1.2018 for a sum of Rs.4,38,00,617 alongwith an interest @ 24% p.a. from 1.2.2016 alongwith pendente lite along with future interest till the date of actual payment, after deducting an amount of Rs. 25 lakhs that was paid by the Respondent on 6.1.2018. The Respondent filed an appeal bearing RFA(OS) No. 48 of 2018, aggrieved by the judgment-decree dated 11.1.2018 before the Hon'ble Delhi High Court, in which the Hon'ble High Court vide judgment dated 27.11.2018 affirmed the financial debt and dismissed the said RFA(OS) No. 48/2018 with a cost of Rs.25,000/-. After obtaining the decree from Hon'ble High Court of Delhi, and as the default was continuing, the Respondent filed Company Petition No. IB-766(ND)/2021 as financial creditor under section 7 of the IBC for initiation of Corporate Insolvency Resolution Process (in short 'CIRP') of the Respondent, and by the Impugned Order dated 20.6.2022, the Adjudicating Authority dismissed the said company petition.

4. It is the Appellant's case that he had provided loan through two separate loan agreements dated 24.2.2010 and 31.3.2010 for amounts of Rs. 2.50 crores and Rs. 2 crores respectively, with both loans carrying an interest and a time period for repayment, and therefore, he is a 'financial creditor' under the IBC. He has further claimed that the Impugned Order does not consider the decree

passed by the Hon'ble Delhi High Court as a result of default of repayment of loan amounts, which provides a fresh cause of action for the financial debt owed by the Respondent to the Appellant.

5. We heard the arguments of Learned Counsels for both the parties and perused the record.

6. The Learned Sr. Counsel for Appellant has referred to the two loan agreements, namely, the first one dated 24.2.2010, which is for an amount of Rs.2,50,00,000 (Rupees Two Crores and Fifty Lakhs only) carrying an interest @ 12.5% p.a. payable on half yearly basis for a period of 2 months and in the case of delay or default in payment of either principal or interest or in part thereof, the borrower shall be liable to pay a penal interest @ 10% per month over and above the interest mentioned in loan agreement, and the second loan agreement dated 31.3.2010 for an amount of Rs.2,00,00,000 (Rupees Two Crores only) for a period of 15 days carrying an interest rate of 3% p.m. payable on half yearly basis, with a penal interest @ 10% per month over and above the interest on the loan in case of delay or default in payment, and has argued that both the loan agreements, established a jural relationship of financial creditor-corporate debtor between the Appellant and the Respondent. He has further argued that the loans are for time

value of money and are, therefore, financial debts under the definition of 'financial debt' in the IBC.

7. The Learned Senior Counsel for Appellant has further argued that cheques were provided for repayment, which were dishonoured on presentation in the bank and even after a Compromise Deed was signed between the parties on 31.8.2013 consequent to proceedings under the Negotiable Instrumental Act, the cheque given in response to the Compromise Deed, was dishonoured on presentation in the bank and the Appellant was forced to prefer a Civil Suit bearing No. Civil Suit (Original_Side_66 of 2016) before the Hon'ble High Court of Delhi on 1.2.2016 for recovery of overdue amount along with interest, and a decree was passed in favour of the Appellant for an amount of Rs.4,38,00,617 along with interest @ 24% from 1.2.2016, and pendente lite alongwith interest till the date of actual payment of full amount. He has pointed out that this judgment-decree passed vide judgment dated 11.1.2018 was confirmed by the Division Bench of Hon'ble High Court of Delhi in RFA (OS) No. 48/2018. He has argued that the decree dated 11.1.2018 of the Hon'ble High Court of Delhi has provided a fresh cause of action under section 7 of the IBC and therefore the petition is within limitation.

8. The Learned Senior Counsel for Appellant has further argued that the Impugned Order has mis-interpreted the judgment passed by Hon'ble Supreme Court in the case of **Dena Bank (now Bank of Baroda) vs. C. Shivakumar Reddy in Civil Appeal No. 1650 of 2020** by stating that the ratio does not apply in the instant matter since no dispute was raised on the status of the applicant bank as financial creditor in the **Dena Bank case,** whereas in the present case the status of Appellant as financial creditor is not established. He has also pointed out that paragraph 10 of the Impugned Order is not factually correct in stating that *'the component of interest comes into existence only on adjudication of the claimed amount by the High Court and the initial alleged claimed amount of Rs.2,50,00,000 for a period of two months vide loan agreement dated 24.2.2010 and another sum of Rs.2,00,00,000 for a period of 15 days vide loan agreement executed on 31.3.2010 does not have interest component"*, whereas the fact is that both the loan agreements are interest bearing loans as is clear from clause 2 of both the loan agreement dated 24.2.2010 loan agreement dated 31.3.2010 respectively.

9. In support of his contentions, the Learned Senior Counsel for Appellant has again referred to the judgment of Hon'ble Supreme Court in the matter of **Dena Bank (now Bank of Baroda)**

(supra) wherein in paragraph 141, the Hon'ble Apex Court has very clearly held that judgment/or decree for money in favour of financial creditor passed by the DRT or any tribunal or court would give rise to a fresh cause of action for the financial creditor, to initiate proceedings under section 7 of the IBC for initiation of CIRP within 3 years from the date of such judgment and/or decree. He has also referred to Hon'ble Apex Court's judgment in the matter of **Kotak Mahindra Bank Limited vs. A. Balakrishnan & Anr. (2022 SCC OnLine SC 706)**, wherein it is held that a liability in respect of claim arising out of recovery certificate would be a "financial debt" within the meaning of clause (8) of section 5 of IBC and this judgment has also upheld the judgment of two-Judge Bench in the case of **Dena Bank (supra)** as being correct in law. He has, therefore, claimed that on account of the two loan agreements cited by him earlier, a clear jural relationship that of a financial creditor and debtor is established between the Appellant and Respondent and the debt advanced by the Appellant qua the two loan agreements are financial debts which are in default and further section 7 application which has been filed within limitation should have been admitted by the Adjudicating Authority.

10. The Learned Counsel for Respondent has argued that the alleged loans have been shown as interest-bearing loans by the

Appellant by manipulation of books of accounts and falsification of the component of interest therein qua the amounts lent to the Respondent company in 2010 and therefore by misrepresentation of facts before the Hon'ble High Court of Delhi, the Appellant was able to obtain a judgment-decree in his favour. He has also claimed that the calculation of the debt amount of Rs.3,22,02,660/- is prima facie incorrect and that the Appellant never showed the interest in his books of accounts and hence the interest portion as calculated by the Appellant for the amount claimed before Hon'ble High Court of Delhi in CS (OS) No. 66 of 2016 becomes disputed or false. The Learned Counsel for Respondent has claimed that thus the decree is non-est in law and should be set aside and any action based on such a decree cannot provide cause of action to the Appellant to file an application under section 7 of IBC for initiation of CIRP. He has finally contended that the Adjudicating Authority has interpreted the facts and the citations relating to **Dena Bank (supra)** correctly and not admitted the section 7 application. The Learned Counsel for Respondent has finally argued that the corporate debtor is a solvent company which should not be pushed into insolvency due to a fraud played by the operational creditor.

11. We note that the Impugned Order in para 13 observes as follows:-

> *"The Applicant has failed to provide any supporting documents/evidence to establish that the alleged amount advanced by the Applicant vide loan agreements dated 24.2.2010 and 31.3.2010 involves time value of money or have commercial effect of borrowing to bring the alleged loan advances within the ambit of definition of financial debt."*

12. Further, in para 14 of the Impugned Order, the Adjudicating Authority again observes as hereunder: -

> *"in the case before us, the Appellant has not disbursed any debt against the consideration for the time value to the corporate debtor, consequently the corporate debtor does not own any 'financial debt' to the Applicant and further goes on to say that the transactions in question do not fall within the brackets of 'financial debt' only for the reason that the Hon'ble High Court of Delhi in CS(OS) 66 of 2016 preferred by the Applicant vide judgment dated 11.1.2018 decreed in favour of the Applicant a sum of Rs.4,38,00,617/- along with interest @ 24% p.a. from the corporate debtor".*

13. Thus, it is clear that the Adjudicating Authority has not considered the amount advanced by the Appellant to the Respondent as financial debt particularly because in its opinion the advanced amounts do not involve a time value of money.

14. We look at two loan agreements wherein the relevant clauses regarding the amount, period and interest rates are mentioned, which are reproduced below for reference:-

Loan Agreement dated 24.2.2010 at pp.59-61 of the appeal paper book.

> ***1.*** *At the request of the Borrower, the Lender lends and advances to the Borrower a loan of Rs. 2,50,00,000/- (Rupees Two Crores and Fifty Lakhs only) for a period of 2 months.*
> ***2.*** *The said loan shall carry interest at the rate of 12.75% p.a. payable on half-yearly basis. In case of delay or default in payment, either of the principal or of the interest or any part thereof, the Lender shall be entitled and the Borrower liable to pay a penal interest @ 10% per month over and above the interest mentioned hereinabove.*

Loan Agreement dated 31.3.2010 attached at pp. 62-64 of the appeal paperbook.

> 1. *At the request of the Borrower, the Lender lends and advances to the Borrower a loan of Rs. 2,00,00,000/- (Rupees Two Crores only) for a period of 15 days.*
> 2. *The said loan shall carry interest at the rate of 3% per month, payable on half-yearly basis. In case of delay or default in payment, either of the principal or of the interest or any part thereof, the Lender shall be entitled and the Borrower liable to pay a penal interest @ 10% per month over and above the interest mentioned hereinabove.*

15. The above extracts from the two loans agreements in question make it clear that the loans are interest bearing and the interest rate is also clearly specified in the respective loan agreements. The time period of the loans are also specified in the loan agreements and security towards timely repayment of loan has also been specified in clause 3 of both the loan agreements. Further clause 5 of both the loan agreements make it clear that

the borrower shall execute post-dated cheques for repayment in favour of lenders. All these features of the two loan agreements very clearly show that the amounts advanced by the Appellant to Respondent are in the nature of financial debt which carry time value of money.

16. We also peruse the judgment-decree of Hon'ble High Court of Delhi dated 11.1.2011 (attached at pp.65-69 of the appeal paperbook), wherein the relevant portion is as follows:-

> *"13. Accordingly, the present suit is decreed against the defendant jointly and severally for a sum of Rs.4,38,00,617/- along with interest @ 24% per annum from 01st February, 2016 (date of filing of suit) along with pendente lite and future interest till the date of actual payment of the full amount after deducting payment of Rs. 25 lacs paid by the defendants to the plaintiff on 06th January, 2018."*

17. This judgment-decree of Single Judge of Hon'ble Delhi High court was confirmed by the Division Bench through order dated 27.7.2018 (attached at pp.70-82 of the appeal paperbook) wherein in paragraph 17, the Hon'ble Division Bench has held as follows:-

> *"17. We find no infirmity with the view taken by the Single Judge that in the absence of leave to defend objection, with regard to the jurisdiction and the plaintiff being the money lender, could not have been considered. Additionally, we are of the view that once the appellant had entered into a settlement with the plaintiff and no plea of jurisdiction was raised at that point of time, the appellant cannot be allowed to*

raise the same at this stage. There is no merit in the appeal, the same is dismissed with costs of Rs.25,000."

18. A plain reading of the judgment of Single Judge of Hon'ble High Court of Delhi of 11.1.2018 makes it clear that the Hon'ble High Court has passed a decree against the defendants (Anjali Technoplast Limited & Ors.) for an amount of Rs.4,38,00617 alongwith interest @ 24% p.a. from 1.2.2016 alongwith pendente lite till the date of actual payment of the full amount after deducting Rs.25 lakhs paid by the plaintiff. It appears that the interest rates mentioned in loan agreements have not been noticed by the Adjudicating Authority and the interest rate of 24% p.a., which is included in the decree by Hon'ble Delhi High Court, has been taken as the first instance when interest was levied on the amount of debt. We do not think this the correct reading of the loan agreements as loan amounts have associated interest rates and time periods. The jural relationship between the parties is also clearly established in the loan agreements and thus the amounts advanced by the Appellant are covered in the definition of 'financial debt' under sub-section (8) of section 5 of the IBC. We are also of the clear opinion that no fraud has been played by the operational creditor on obtaining the decree from Hon'ble High Court of Delhi. Moreover, the corporate debtor has not taken any

action on the order of Division Bench of Hon'ble Delhi High Court claiming that the decree was obtained by fraud.

19. We also peruse the judgment in the matter of **Dena Bank (supra),** which has been cited by both Learned Counsels in support of their respective contentions. We reproduce paragraph 141 of the judgment below:-

> *"**141.** Moreover, a judgment and/or decree for money in favour of the financial creditor, passed by the DRT, or any other tribunal or court, or the issuance of a certificate of recovery in favour of thee financial creditor, would give rise to a fresh cause of action for the financial creditor, to initiate proceedings under Section 7 IBC for initiation of the corporate insolvency resolution process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the certificate of recovery, if the dues of the corporate debtor to the financial debtor, under the judgment and/or decree and/or in terms of the certificate of recovery, or any part thereof remain unpaid."*

20. The ratio cited above of the **Dena Bank (supra) judgment** makes it clear that the judgment or decree of money in favour of the financial creditor passed by DRT or any other tribunal or court would give rise to a fresh cause of action for the financial creditor, to initiate proceedings under section of the IBC. In the present case, the judgment-decree dated 11.1.2018 of the Hon'ble High Court of Delhi in favour of Appellant thus provides a fresh cause of action to the Appellant to move application under section7 of IBC.

The loan agreements also establish the jural relationship between the Appellant and Respondent.

21. The Learned Senior counsel for Appellant has argued that the Respondent cannot at this stage of appeal raise frivolous issues to fill up gaps and remove any lacunae in their case in Appeal. He has cited following two judgments in support of his arguments:-

(i) **Mr. Shankar Sundaram Vs. M/s. Amalgamations Limited and Ors. – TA No. 18 of 2021 – NCLAT Para – 12-14.**

(ii) Union of India Vs. Ibrahim Uddin and Anr. (2012) 8 SCC 148 Para – 37-43.

22. We also note the judgment of Three Judge Bench of Hon'ble Apex Court in the matter of **Kotak Mahindra Bank Limited vs. A. Balakrishnan & Anr. (supra)** wherein the wherein it is held that the view taken by Two Judges' Bench of the Supreme Court in case of Dena Bank (supra) is correct in law.

23. In the light of detailed discussion in the aforesaid paragraphs, we hold the view that the Adjudicating Authority has erred grossly by not considering that the two loan agreements and

the features therein are in fact relating to financial debts which are due and payable to the Appellant by the Respondent. As a result, we set aside the Impugned Order and direct admission of the section 7 application. The matter is sent to the Adjudicating Authority for passing necessary orders under the IBC consequent to the admission of section 7 application. The Adjudicating Authority shall pass such orders within a period of 4 weeks from the date of passing of this order.

24. There is no order as to costs.

(Justice Ashok Bhushan)
Chairperson

(Dr. Alok Srivastava)
Member (Technical)

(Mr. Barun Mitra)
Member (Technical)

New Delhi
1st November, 2022

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