NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 520 of 2023

[Arising out of order dated 03.03.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench - IV in CP(IB) No. 908/MB-IV/2021].

IN THE MATTER OF:

Sushma Paranjpe
4, Rajab Mahal, 1st Floor
144, M.K. Road
Mumbai – 400 020 **...Appellant**

Versus

Rohan Developers Private Ltd.
Gordhan Building No. II
2nd Floor, 12/14, Dr. Parekh Street
Prarthana Samaj,
Mumbai- 400 002 **...Respondent**

Present:

Appellant: **Mr. Tanmaya Agarwal, Ms. Aditi Agarwal, Mr. Neel Kamal Mishra, Advocates**

For Respondent: **Mr. Gaurav Mitra, Ms. Radhika Gautam, Mr. Adit Singh, Mr. Abhishek Singh Chauhan, Advocates**

J U D G M E N T

[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 03.03.2023 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-IV) in CP (IB) No. 908/MB-IV/2021. By the impugned order, the Adjudicating Authority has dismissed the Section 7 application filed by Mrs. Sushma Paranjpe-Financial Creditor/present Appellant seeking initiation of Corporate Insolvency Resolution Process ("**CIRP**" in short) against the Corporate Debtor - Rohan Developers Private Limited/present Respondent. Aggrieved by the impugned order, the present appeal has been filed by the Appellant.

2. The Learned Counsel for the Appellant has submitted that Shri Vijay N. Paranjpe ("**Vijay**" in short), the deceased husband of the present Appellant paid a sum of Rs.4 crore to the Respondent/Corporate Debtor who was engaged in real estate business. This sum of Rs. 4 crore was paid in 2008 as earnest money against advance sale consideration for booking of a flat. Since there was no progress in the said project until 2011, Vijay sought refund of the earnest money following which the Respondent assured to return the same with interest @ 12% per annum. Since then, the sum of Rs.4 crore was mutually treated as unsecured loan and reflected accordingly in the books of the account of the Corporate Debtor/Respondent. Interest thereon was paid by the Respondent and TDS also deducted thereon for which confirmation of

books of accounts was periodically sought from Vijay by the Respondent. Thus, it was contended that the Respondent by his own conduct changed the status of the Appellant from home-buyer to a financial creditor.

3. It was further submitted that the Respondent paid regular interest till FY 2015-16 until on 31.03.2017 on grounds of financial crunch he sought waiver of interest from Vijay which request was however declined. It is the contention of the Appellant that the Respondent thereafter defaulted in making interest payment since October 2017 and continued to default from FY 2017-18 until FY 2020-21 except for part repayment in 2018. It is further submitted that on the demise of Vijay on 21.10.2018, the loan amount was transferred in the name of the Appellant which stands confirmed from the confirmation of account for FY 2019-20 signed by the Respondent. On account of non-payment of debt, a letter dated 01.02.2021 was sent by the Appellant to the Respondent demanding a sum of Rs.6,20,01,000/- which included principal amount of Rs.4,09,00,000/- and Rs.2,11,01,000/- as interest. Since the amount remained outstanding, the Appellant filed an application Section 7 of the IBC on 06.10.2021 for initiating CIRP of the Corporate Debtor/Respondent for default having occurred in the FY 2016-17, more particularly on 01.10.2017.

4. Elaborating further on the developments, it was added by the Learned Counsel for the Appellant that the Adjudicating Authority took the misplaced view that as no time period was stipulated in the demand notice, it may be held that no default had occurred. In terms of the impugned order, alternatively, default can be deemed to have occurred in February 2021 since

the loan recall notice was dated 01.02.2021. However, this date fell in the prohibited period under Section 10A of the IBC. was unsustainable. Thus, the Adjudicating Authority held that in both these circumstances the Section 7 application was non-maintainable.

5. Assailing this finding returned by the Adjudicating Authority on the non-maintainability of the Section 7 application, it has been strenuously contended that initiation of section 7 proceedings cannot be held to be barred since the default occurred in October 2017 when the Respondent failed to pay the interest on the unsecured loan which period was prior to the Section 10A period and the default had continued thereafter in the Section 10A period. In support of their contention, the Learned Counsel for the Appellant has relied on the judgement of this Tribunal in ***Narayan Mangal v Vatsalya Builders & Developers (P) Ltd 2023 SCC Online NCLAT 545*** where it has been clearly held that if the default is committed prior to Section 10A period and continues in the Section 10 A period, the initiation of proceeding under Section 7 is not barred.

6. Making counter contentions, the Learned Counsel for the Respondent has submitted that there was no agreement between Vijay and the Respondent with respect to the amount advanced by him. Thus, there is nothing on record which outlines the terms of repayment of the amount invested by Vijay. It is also the contention of the Respondent that the investment was made by the Appellant to receive returns on investment from the Corporate Debtor. Hence, the sum advanced was in the nature of speculative investment and cannot be treated as a financial debt.

7. It has been further contended by the Learned Counsel for the Respondent that the company petition is not maintainable since the Appellant is not an 'allottee' within the meaning of Section 2(d) of the Real Estate (Regulation and Development) Act, 2016. It has been further stated that even if the Appellant is considered to be an allottee, the present Section 7 application is liable to be dismissed since it does not fulfil the requirement of filing such an application jointly by not less than 100 of such creditors in the same class or not less than 10% of the total number of such creditors in the same class in terms of the proviso to Section 7 of IBC.

8. It has been argued that in the absence of any express/implied repayment schedule, the date of default as claimed by the Appellant/Financial Creditor cannot be acceded to and the Appellant cannot seek right to repayment as per his choice without justifiable explanation. Furthermore, since the sum advanced can at best be treated as a 'Loan on Demand' and the demand for repayment was made by the Appellant vide their letter dated 01.02.2021, the date of default can only be February 2021 and not October 2017 as claimed by the Respondent. It is also been strongly contended that the Appellant has failed to place any material on record to establish that any default occurred in October 2017 and thus failed to justify 01.10.2017 to be the date of default.

9. The Learned Counsel for the Respondent also contended that the Adjudicating Authority had rightly dismissed the company petition on the ground that the Appellant had addressed the loan recall notice on 01.02.2021

which date falling under the period stated under Section 10A of the IBC, the default arose during the prohibited period and hence the petition was not maintainable.

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

11. We notice that it is the contention of the Appellant that the Respondent has not disputed the fact that prior to February 2011, no amount was paid by them towards interest on the principal amount of Rs.4 crore to the Appellant. Only after February 2011, the principal sum came to be treated as unsecured loan in the books of account of the Respondent/Corporate Debtor. The confirmation of account duly signed by the Respondent for FY 2011-12 to 2018-19 has been placed on record by the Appellant at Annexure-D of the Appeal Paper Book ("**APB**" in short) which shows that the amount was being treated as unsecured loan since FY 2011-12. Averment was made by the Appellant that several letters were issued by the Respondent seeking confirmation from Vijay in respect of the unsecured loan, interest paid and TDS on interest which all cumulatively go to show the mutual acknowledgment of loan transaction between the two parties. Thus, it has been contended that there is a clearcut admission of on the part of the Respondent of having received an unsecured loan from the deceased husband of the Appellant which loan amount was transferred in the name of the Appellant subsequently. Prima facie therefore it has been asserted that debt qua the Appellant stands established.

12. Furthermore, it has been stated that the Respondent has not disputed the fact that the Corporate Debtor was paying interest to the Appellant since 2011. It is also an undisputed fact as evident from a communication dated 31.03.2017 at page 34 of APB that making an admission of their financial difficulties a request was made for waiver of interest by the Respondent to Vijay which was not acceded to by the latter. It is their case that the Respondent default in the payment of interest arose only thereafter. One fact that has been contested is that while the Appellant has contended that the Respondent started defaulting in the payment of interest since October 2017, the Respondent has claimed to have paid interest even in 2018. In support of their assertion, attention has been adverted to page 33 of APB which shows that interest was paid on 04.09.2018 by the Respondent. Be that as it may, the Appellant has vehemently contended that no claim has been made that the interest payments continued to be discharged by the Corporate Debtor after part payment was done in September 2018. Neither has any material been placed on record to show that the interest payments were remitted thereafter except for some part repayment in 2018. Prima facie, the Appellant has emphatically asserted that there is sufficient material on record which shows that default in repayment of debt arose in October 2017 and the defaults continued thereafter except for one tranche paid in September 2018.

13. It may be useful at this stage to notice how the impugned order has dealt with the issue at hand. The relevant excerpts of the impugned order are as follows:

"9. It is not disputed that the advance consideration paid by the Financial Creditors for booking a flat was later converted into a loan as can be perused from the letter dated 31.03.2017 sent by the Corporate Debtor addressing the late husband of the Financial Creditor requesting for a waiver of interest and further substantiated by the Confirmation Accounts for financial year 2011-12 till 2019-20 signed by the Corporate Debtor. Since there was no stipulation as to the rapid of said amount, the loan partake the character of demand loan repayable on demand. The Financial Creditor called for repayment of the amount due from Corporate Debtor vide letter 01.02.2021 and the said letter did not contain the date or period by which the amount was to be paid by the Corporate Debtor. In case it is considered that the loan was repayable immediately on upon receipt of letter dated 01.02.2021, the default can be said to occur on 04.02.2021, considering that the notice is deemed to have been delivered in 48 hours. This date falls under the period stated u/s 10A, which bars initiation any proceeding under the code for the default occurring during that period. Alternatively on the perusal of the demand notice it can be made out that no time period was stipulated in the demand notice for repayment of the amount due from the Corporate Debtor, it cannot be that any default had occurred. Thus, in both the cases the petition is not maintainable.

10. After perusal of the material on record, this Bench is of considered view that the Petition under section 7 filed by the Financial Creditor to initiate the CIRP against the Corporate Debtor is not maintainable."

14. The principal finding of the impugned order is that the Section 7 application was not maintainable by holding the date of default to be February 2021 which was during the prohibited period under Section 10A of the IBC.

This brings us to the issue relating to maintainability of the instant Section 7 application of the Appellant.

15. For proper appreciation of the facts, we may begin by perusing the Section 7 application filed by the Appellant with particular reference to Form 1 at Part IV of the Application under Rule 4 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016. Against the heading "Amount claimed to be in default", the entry made by the Appellant is to the effect: "*The amount claimed to be in default is Rs.6,20,01,000/- (Rupees Six Crore Twenty Lakh One Thousand Only) with further interest thereon at the rate of 12% per annum on the principal amount from 1st January 2021 till payment and/or realisation.*" As against the column "Date on which default occurred", the entry made by the Appellant is to the effect: "*The default occurred in the FY 2016-17, more particularly 1st October, 2017*".

16. It is, however, the case of the Learned Counsel for the Respondent that payment of interest has been made even after October 2017 on 04.09.2018. Therefore, it has been contended that the date of default as claimed by the Appellant to be October 2017 is whimsical and lacks basis. Mere insertion of any date in Form 1 at Part IV of the Section 7 application does not make that date of default valid and binding especially when there is no agreement between the two parties as to what shall constitute an event of default. In the absence of agreement specifying the events of default, the alleged date of default cannot be whimsically decided by the creditor and the creditor needs to be put to strict proof to establish the date of default. It is further the contention of the Respondent that since the Appellant had raised demand for

repayment of the outstanding amount by way of a letter dated 01.02.2021, the Adjudicating Authority had rightly considered the date of default to be in February 2021 and not October 2017. Since the Appellant had addressed the loan recall notice on 01.02.2021 and the said letter did not contain any date by which date the amount had to be repaid by the Respondent, default can be deemed to have occurred in February 2021. Since this period falls under the prohibited period under Section 10A of the IBC, the default arose during the prohibited period and hence the petition was not maintainable.

17. At this stage, it may be useful to have a look at Section 10A of IBC which is as follows: -

> ***Section 10A****: Suspension of initiation of corporate insolvency resolution process.*
>
> *10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:*
>
> *Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.*
>
> *Explanation. – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.*

18. A plain reading of Section 10A signifies that no application/ proceedings under Sections 7, 9 and 10 can be initiated for any default in payment which is committed during Section 10A period. The object and purpose of Section 10A has been explained in the ordinance by which Section 10A was brought into operation. What is essentially barred is initiation of CIRP proceedings when the Corporate Debtor commits any default during the

Section 10A period. However, if the default is committed prior to the Section 10A period and continues in the Section 10A period, this statutory provision does not put any bar on the initiation of CIRP proceedings. Thus, the aim and objective of Section 10A was to protect a Corporate Debtor from the filing of any insolvency application against it for any default committed during the period when Covid-19 pandemic was prevailing. It was never intended to cover any default which occurred before Section 10A period and continuing thereafter.

19. The present is a case where prima facie the default has been committed by the Corporate Debtor since 2018 which is prior to commencement of Section 10A period. Hence, this is a case where the default was undisputedly committed before the bar of Section 10A came into play. There being categorical default by the Respondent prior to Section 10A period, the Corporate Debtor was clearly not entitled to claim the benefit of Section 10A period. Since the liability to pay interest arose prior to Section 10A period since the default was committed prior to Section 10A period, we are of the considered opinion that the view taken by the Adjudicating Authority that the Section 7 application being premised on a letter calling for loan repayment which was dated 01.02.2021 and this date falling during the prohibited period under Section 10A renders the petition non-maintainable is misconceived and untenable in the eyes of law. Considering the overall facts and circumstance of the present case, we have no hesitation in holding that the finding returned by the Adjudicating Authority that the Section 7 application was not

maintainable as the alleged default occurred during the section 10A period is not tenable.

20. We do not find any cogent basis for the Adjudicating Authority to have dismissed the Section 7 application of the Financial Creditor on grounds of non-maintainability in the context of Section 10A of the IBC. We would also like to observe that the Adjudicating Authority has not returned any findings on the basic issue of debt and default which has been the bone of contention. We are of the considered view that, prima-facie, the corpus of facts and material on record are sufficiently adequate to consider the present Section 7 application on merits. The appeal is allowed. The impugned order is, therefore, set aside. Without expressing any opinion on the merits of the claim of the Appellant, the Section 7 application filed by the Appellant is revived and remanded back to the Adjudicating Authority to be considered again in accordance with law. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 06.12.2023

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