

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 756 of 2024

[Arising out of the Order dated February 21, 2024, passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench, Court-II) in CP (IB) / 1051/MB/2023]

IN THE MATTER OF:

Mobile Constructions Private Limited

Having address at: 6th Floor, A Wing
Universal Business Park, Chandivali,
Andheri East, Mumbai – 400072
Maharashtra

...Appellant

Versus

Apple Land Development Private Limited

Having address at: 2348, Bldg. No. 49
Shree Satya Sai Kripa SOC
Gandhi Nagar, Opp. MIG Cricket Club
Bandra (East), Mumbai – 400051
Maharashtra

...Respondent

Present:

For Appellant : Mr. Kunal Cheema, Mr. Sanket Gupta, Advocates

For Respondent : None

ORDER
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

This is an Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (for short 'IBC') against the dismissal of the Company Petition bearing CP (IB) No.1051/MB/2023 by which the Adjudicating Authority has dismissed the Section 7 Petition.

2. The Appellant / Financial Creditor had extended financial assistance in the nature of a loan to the Corporate Debtor / Respondent and disbursed a total amount of Rs 1,57,50,000/- (rupees one crore, fifty-seven lakhs and

fifty thousand only) with the condition that the Corporate Debtor would pay interest on a half yearly basis @ 12% per annum within a period of one year from the date of disbursal. The Appellant contends that it disbursed in tranches as per the details given below:

Sl. No.	Date	Amount (Rs.)
1.	10 th April, 2019	30,00,000.00
2.	11 th April, 2019	30,00,000.00
3.	12 th April, 2019	29,50,000.00
4.	18 th April, 2019	35,00,000.00
5.	24 th April, 2019	33,00,000.00
	Total (Rs.)	1,57,50,000.00

3. The Respondent started committing default from the first instalment of half yearly interest, which became due and payable on 10.10.2019. And, thereafter, the Respondent failed to pay further interest and the principal outstanding amount.

4. The Appellant issued a demand notice dated 20.07.2020 recalling the overdue payment. The principal amount had become due on April, 2020, and recurring instalments of half yearly interest were in default since 10.10.2019. Thereafter, the Financial Creditor issued a demand notice on 25.05.2023 recalling the entire principal amount with interest as on May, 2023. The total of that was Rs 2,57,53,424/- (rupees two crores, fifty-seven lakhs, fifty-three thousand, four hundred and twenty-four only) as on 31.07.2023.

5. The Appellant filed a Section 7 Petition under the Code in August, 2023. On behalf of the Respondent, no one appeared during these proceeding before the Adjudicating Authority. Therefore, the Respondent was proceeded

ex-parte vide Order dated 19.12.2023. So, there was no denial of liability or the notices from the Respondent / Corporate Debtor. The Appellant has also filed the report of the NeSL in 'Form D', which is a record of the default with respect to the Respondent. Even though it was submitted to NeSL on 13.10.2023, it is deemed to be authenticated on 29.10.2023, wherein the default with respect to the Respondent has been noted in the information utility. The NeSL report notes at page 104 that the email has been delivered at premalparekh75@gmail.com and also opened by the addressee and three reminders have also been issued, which has also been opened by the addressee. In the NeSL report, the date of default was mentioned as 10.10.2019.

6. It is to be noted that no one had appeared before the Adjudicating Authority and before this Tribunal also. The matter has been taken up by this Appellate Tribunal on various dates i.e. 07.05.2024, 23.07.2024, 04.09.2024, 28.10.2024 and finally on 14.11.2024. Substituted service was also done through publication in the newspaper on as per the orders of this Tribunal dated 04.09.2024, which has been noted in the Order of 28.10.2024. Even then, no one has appeared. The matter was, therefore, heard ex-parte by us on 14.11.2024.

7. We have noted the contentions of the Appellant. The only issue before us is whether the Adjudicating Authority could have calculated a date of default, dehors the agreement between the parties especially when the Respondent chose not to challenge those notices or contest the Petition.

8. It is noticed that the disbursement of Rs 1,57,50,000/- (rupees one crore, fifty-seven lakhs and fifty thousand only) has been made through bank transfer as noted in the bank statement, which is on record from page 64 to 65 of the appeal paper book. The disbursement is, thus, clearly established as per these bank statements.

9. The Appellant has also produced the Independent Auditors Report of the Appellant for the financial year ending on 31.03.2022, which reflects the loans and advances to the Respondent as noted at page 98 of the appeal paper book. It clearly notes a loan entry of Rs 1,57,50,000/- (rupees one crore, fifty-seven lakhs and fifty thousand only) against the Respondent.

10. It is on record that the Appellant had issued notice to the Respondent on 20.07.2020, in which he has brought out the failure to repay the loan of Rs 1,57,50,000/- (rupees one crore, fifty-seven lakhs and fifty thousand only), which is given from page 67 to 69 of the appeal paper book.

11. From the available record, it is an admitted position that there was no loan agreement between the parties at the time of advancing of the loan. It is also not disputed that this amount was disbursed and is established from the bank account statement. It is claimed by the Appellant that the loan carried an interest and first instalment of interest became due on 10.10.2019, which is the first date of default.

12. However, the Adjudicating Authority dismissed the Section 7 Petition on the ground that date of default was 04.08.2020 and the said date fell

within the period of Section 10A and, therefore, no petition under Section of the Code can ever be filed as the default has taken place within 10A period i.e. 25.03.2023 to 24.03.2021.

13. Adjudicating Authority, while dismissing the Section 7 Petition, has noted that:

“in the absence of any document or proof with regard to the repayment terms, in our considered view, the date of default has to be considered when the loan was demanded back vide notice dated 20.07.2020 and it was not paid back. Therefore, in our considered view, the correct date of default under the circumstances is 04.08.2020 as the Corporate Debtor failed to repay the loan with interest within the time period of 14 days granted vide notice dated 20.07.2020”.

14. It is to be noted that it is not necessary that a financial debt can be provided only by a written agreement. This has been clearly settled in **‘Agarwal Polysacks Limited Vs. K.K. Agro Foods and Storage Limited 2023 SCC OnLine NCLAT 624,’** wherein this Tribunal held that if the transaction can be proved from other materials on record, requirement of written financial contract is not a pre-condition for proving debt. Following was laid down in paragraph 31:

“31. The Adjudicating Authority, however, took a view that there should be financial contract between the parties which elucidate the rate of interest and date of repayment. The Adjudicating Authority took a view that there is no written agreement to establish the nature of transaction between the parties, hence, Appellant failed to prove the debt. We have already held that requirement of written financial contract is not a pre-condition for proving debt.

When Adjudicating Authority itself given finding in Para 5-6 the disbursement was with interest and repayment was on demand, two essential conditions of financial debt were present with regard to time value of money. When the financial statement indicate amount with interest since the loan of Rs.75,00,000 increased in the FY 2017-18 and amount due was shown as Rs.79,70,250, which clearly was after adding the interest, disbursement has to be held for time value of money. We, thus, are satisfied that all pre-conditions for establishing financial debt are proved by the Financial Creditor and the order of the Adjudicating Authority rejecting Section 7 application is not sustainable.

15. Furthermore, even if no date of default is noted, the default still exists. The determination of the date of default by the Adjudicating Authority on its own, without going into the details of the date of default provided by the Appellant, cannot be justified on the grounds stated in the judgment. As claimed by the Petitioner, the loan was repayable within one year and payment of interest @ 12% per annum was to be made on half yearly basis and, as per the claim of the Petitioner, the first instalments was due on 10.10.2019, which is set to be the first date of default. The argument that date of default will be after the issue of the demand / recall notice dated 20.07.2020 is not tenable. It was also held by the Adjudicating Authority that so called period of six months, if at all, can be counted from 24.04.2019 when the disbursement of loan was completed and not from 10.04.2019 when only a part sum of Rs 30,00,000/- (rupees thirty lakhs only) was disbursed. The relevant portion of the orders of the Adjudicating Authority are at paras 10 and 11 which are noted as below:

“.....

10. Admittedly, no loan agreement was executed between the parties at the time of the advancing of alleged loan. It is not disputed that the loan of Rs. 1,57,50,000/- was disbursed by way of five tranches beginning from 10.04.2019 and the last trench of Rs.33,00,000/- was disbursed on 20.04.2019. It has been claimed by the Petitioner that the loan was repayable within one year and payment of interest @ 12% p.a. was to be made on half- yearly basis. On the basis of this assertion, the Petitioner has claimed that the first instalment of interest became due on 10.10.2019 which is said to be the first date of default.

11. However, this plea raised on behalf of the Petitioner does not appear to be tenable. In our considered view, the so-called period of six months, if at all, can be counted from 24.04.2019 when the disbursement of the loan was completed and not from 10.04.2019 when only a sum of Rs. 30,00,000/- was disbursed. Apart from this, no action was taken by the Petitioner in respect of the default of first instalment of interest. The Petitioner is shown to have issued a demand/recall notice dated 20.07.2020 and in the said notice, it is clearly mentioned in para 3 that the Corporate Debtor has committed a default in repayment of loan and also in payment of interest and as such the loan was being recalled. Thus, in our considered view, the default, if any, took place when the payment was not made by the Corporate Debtor despite the receipt of the notice dated 20.07.2020 whereby the loan was recalled. In this context, it is pertinent to mention that in the absence of any document or proof with regard to the repayment terms, in our considered view, the date of default has to be considered when the loan was demanded back vide notice dated 20.07.2020 and it was not paid back. Therefore, in our considered view, the correct date of default under the circumstances is 04.08.2020 as the Corporate Debtor failed to repay the loan with interest within the time period of 14 days granted vide notice dated 20.07.2020. If the date of default was 04.08.2020, it clearly falls within the 10A period and as per the provision of the Section 10A, no Petition under Section 7 of the IB Code, 2016 can ever be filed, if the default has taken place within the 10A i.e. from 25.03.2020 to 24.03.2021.”

16. There is no justification for the Adjudicating Authority that the period of six months, if at all, can be counted from 24.04.2019 when the disbursement of the loan was completed and not from 10.04.2019, when only a sum of Rs 30,00,000/- (rupees thirty lakhs, only) was disbursed. We do not concur under this finding. Be that as it may, even if the date of default

is to be counted from 24.04.2019, the position does not change much materially. The Respondent has committed a default outside 10A period, even though the Appellant had issued a demand notice on 20.07.2020. After issuing the initial demand notice on 20.07.2020, the Appellant had not issued any further demand notice. Later on, the Appellant issued a demand notice dated 25.05.2023 recalling the entire principal amount with interest as on May, 2023. And the Section 7 Petition was filed in August, 2023. The date of default, as claimed by the Appellant, as noted in Part IV of this Petition, is 10.10.2019 i.e. the date on which the first instalment of half yearly interest became due and payable by the Corporate Debtor to the Appellant. It is also contended that the default is continuing even till date, as there is no repayment by the Corporate Debtor either for the interest or principal amount.

17. The Adjudicating Authority has relied upon the demand recall notice dated 20.07.2020 and come to a conclusion that the date of default can be calculated by adding 14 days to the demand notice of 20.07.2020, which makes it fall within the 10A period. On the other hand, as per Part IV, even if it is presumed that the last date of disbursement is 24.04.2019, and not the first instalment date of disbursement of 10.04.2019, we find that six months from that will fall on 24.10.2019, when the interest falls due. No repayment of interest has been made on this particular date, automatically making it the date of default.

18. The Appellant has also relied upon the judgment in '**Narayan Mangal Vs. Vatsalya Builders & Developers Pvt. Ltd. in Company Appeal (AT) (Insolvency) No. 294 of 2023**,' paras 10 and 12, which are quoted as follows:

“10. The Section 10 A provides that no application/proceedings under Section 7,9 & 10 is to be initiated for a default which is committed during Section 10A period. What is bar is initiation of proceedings when Corporate Debtor commits default in Section 10 A period. If the default is committed prior to Section 10A period and continues in the Section 10 A period the initiation of proceeding is not barred.

12. If the default is committed prior to Section 10 A period and default continues there is no prohibition in initiating proceedings under Section 7 and we are not persuaded to accept the submission of the counsel for the respondent that the liability of interest which accrued during Section 10 A period should be ignored or should not be computed in the amount while finding the threshold. Liability to pay interest which default committed prior to Section 10 A period continues and is not obliterated by Section 10 A.”

19. The facts in the present case are similar. The liability to pay interest had occurred prior to Section 10A period, continues in the 10A period, and also exists beyond the 10A period. Hence, the Appellant cannot be barred under Section 10A to file proceedings under Section 7.

20. The Appellant has also relied upon another judgment of this Appellate Tribunal in '**Nitin Chandrakant Desai Vs. Edelweiss Asset Reconstruction Ltd. & Anr. in Company Appeal (AT) (Insolvency) No. 1022 of 2023**,' para 6, which is quoted as follows:

“6. The Adjudicating Authority has noticed and returned a finding that the default recorded in the NESL is 31.01.2020. The default on 31.01.2020 is obviously prior to the Section 10A period. When default has been committed by the Corporate Debtor prior to Section 10A period, any default committed during the Section 10A period cannot be held to bar the application which is filed on the

basis of default prior to Section 10A and subsequent to Section 10A period.”

21. In the present case, date of default has been noted in the NeSL portal on a date which is much prior to Section 10A period. The default, which is much prior to the 10A period, becomes an admitted fact as it is not challenged by the Respondent, since they neither appeared before the Adjudicating Authority nor before this Appellate Tribunal. So, it can be concluded that the default date is much prior to Section 10A period.

22. The determination of any other date of default by the Adjudicating Authority, on the basis of the initial demand notice, cannot be justified on the basis of the facts of the case. Therefore, we cannot agree with the finding of the Adjudicating Authority that the date of default falls within the 10A period.

23. We also note that no repayment has been made prior to the 10A period, and the default continues during and beyond the 10A period. It is a clear case of disbursement and default and, more particularly, it is not being denied either at the level of the Adjudicating Authority or at the Appellate level.

Conclusions and Order:

24. In view of the foregoing reasons and conclusions, we dispose of the Appeal in the following manner:

- (i) The Order dated 21.02.2024 passed by the Adjudicating Authority rejecting the Section 7 Application is set aside.

- (ii) The Adjudicating Authority may pass an order admitting the Section 7 Application within a period of one month from the date on which a copy of this order is produced before the Adjudicating Authority.
- (iii) During the aforesaid period of one month, it shall be open to the Corporate Debtor to enter into settlement, if any, with the Financial Creditor for discharge of its debt. In the event of any settlement, the same may be brought before the Adjudicating Authority who may consider and pass an appropriate order in accordance with law.

25. Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

New Delhi.

11th December, 2024.

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