

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 729 of 2023

[Arising out of the Order dated 21st March, 2023 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – IV), in I.A. No.962/2023 in C.P.(IB)/642(MB)/2022]

IN THE MATTER OF:

Ashok Tiwari

Aged: 52 years, India Inhabitant,
Occupation – Business
Having address at: Vista – 1,
1501, Tower B, Wadhwa,
The Address, LBS Marg,
Mumbai – 400086.

...Appellant.

Versus

Tattva & Mittal Lifespaces Private Limited

A private limited company incorporated under the provisions of the Companies Act, 1956.
Having its registered office address at:
33, 3rd Floor, Todi Building,
Mathurdas Mill Compound,
Lower Parel (West),
Mumbai – 400013.

...Respondent.

Present

For Appellant:

Mr. Prasannan S. Namboodiri, Advocate.

For Respondent:

Mr. Ravi Raghunath, Advocate.

J U D G M E N T

[Per: Ajai Das Mehrotra, Member (T)]

1. The present Appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter called 'IBC, 2016') on 12.05.2023, by 'Mr. Ashok Tiwari' (hereinafter called the 'Appellant') against the Impugned Order dated 21.03.2023 read with Order dated 17.01.2023 passed by the National Company Law Tribunal, Mumbai Bench, Court – IV, (hereinafter referred to as the 'Adjudicating Authority'). The Application of the Appellant herein, being C.P. (IB)/642(MB)/2022 was dismissed as not maintainable as

the default occurred in the period excluded as per the provisions of Section 10A of the IBC, 2016, vide Order dated 17.01.2023 of the Adjudicating Authority. The Appellant herein had applied for rectification of the said Order vide filing dated 15.02.2023, which was partly allowed vide Order dated 21.03.2023.

2. The Learned Counsel for the Respondent have questioned the maintainability of the present Appeal on the grounds of period of Limitation under Section 61(2) of the IBC, 2016. The Respondents have submitted that the Appellant had not filed Appeal against the substantive Order dated 17.01.2023, the period of filing of Appeal for this Order expired on 16.02.2023 and the condonable period of 15 days expired on 03.03.2023 and therefore, the Appellant cannot challenge the findings rendered by the Learned Adjudicating Authority in the Order dated 17.01.2023. It is submitted that the present Appeal is filed only on 12.05.2023 and therefore the present Appeal is only against the Order dated 21.03.2023 which partly allowed and partly refusing to rectify the Order dated 17.01.2023.

3. The Appellant had submitted that the present Appeal is filed on 12.05.2023, which is within the period of 30 days form the date of Impugned Order dated 21.03.2023, excluding the time taken for obtaining the certified copy of the Impugned Order. As per the stamp of the Registry of the Adjudicating Authority, the certified true copy was applied on 23.03.2023 and was issued on 17.04.2023. The Appellant submitted that he did not file Appeal against the dismissal Order dated 17.01.2023 as his application for rectification of Order dated 17.01.2023 was filed on 15.02.2023, which is within 30 days. The screen shot of the NCLT website showing date of filing as 15.02.2023 of the said rectification Application numbered as I.A. 962/2023

has been submitted as evidence. The Appellant has placed on record the Judgement dated 05.02.2020 of three Member Bench of this Tribunal in the case of '**Mohinish Kumar & Anr.**' Vs. '**Mohit Chawla RP of Premsons Super Steels Pvt. Ltd. and Ors.**' reported as **2020 SCC OnLine NCLAT 918**, wherein this Tribunal had considered that rectification should have been pursued before filing of the Appeal before the Tribunal. The copy of the Order is reproduced below for ready reference:

“An error appears to have crept in the minutes of proceedings recorded on 23rd January, 2020 by inadvertently observing that the Liquidator will proceed in accordance with the decision of this Appellate Tribunal rendered in “Y. Shivram Prasad v. S. Dhanapal - Company Appeal (AT) (Insolvency) No. 224 of 2018 disposed of on 27th February, 2019”. This is actually and factually, incorrect as no order of liquidation has been passed in the application filed under Section 10 of the Insolvency and Bankruptcy Code, 2016 by the Corporate Applicant. The error is rectified by recalling such observation.

After hearing learned counsel for the parties for a while, we find that the Appellant has filed an application for rectification of some errors stated to have crept in the Impugned Order passed by the learned Adjudicating Authority, National Company Law Tribunal, New Delhi, Court - III. But at the same time the instant appeal has been preferred against the Impugned Order. This is not a happy situation. The Appellant may either pursue the application for rectification before the learned Adjudicating Authority or withdraw the same to pursue the instant Appeal.

Faced with this situation, learned counsel for the Appellant seeks to withdraw the instant Appeal with liberty to re-agitate the matter in the event of his prayer not being entertained by learned Adjudicating

Authority. We accordingly, dismiss this Appeal with the aforesaid liberty.

Learned Adjudicating Authority, National Company Law Tribunal, be informed of this order. It would advised to do well by first taking up the Applicant application for rectification before considering the application for passing of order of Liquidation.”

4. We have considered the submissions made by both sides and we find that the Appellant herein had filed for rectification of Order dated 17.01.2023 on 15.02.2023 which is within 30 days of the said Order. The Order dated 17.01.2023 was partly rectified vide Order dated 21.03.2023 and, excluding the period taken for obtaining the certified copy, the Appeal has been filed within 30 days of the said Order. The Order dated 17.01.2023 has merged with the Order dated 21.03.2023 due to partial rectification.

5. Regarding exclusion of period taken for obtaining certified copy of the Order in computing the period, reference is invited to sub-Rule (2) of Rule 22 of the NCLAT Rules, 2016, regarding presentation of Appeal, which provides that every Appeal shall be accompanied by a certified copy of the Impugned Order. Reference is also invited to Section 12 in Part III of Limitation Act, 1963, which provides that time requested for obtaining a copy of the Order appealed against shall be excluded in counting for Limitation. Reference is invited to Order of the Hon’ble Supreme Court in the case of **‘Sanket Kumar Agarwal & Anr.’ Vs. ‘APG Logistics Private Limited’** in **Civil Appeal No.748/2023**, wherein the following observations are recorded in Para 28 of the said Order:

“28. In the present case, the application for a certified copy was sent from Delhi to Chennai on 2 September 2022, which was received on 5 September 2022, within the period of limitation of 30 days specified in Section 61(2). This aspect lies in contrast to the facts

as they obtained before this Court in the judgment in V Nagarajan (supra) where even the application for obtaining the certified copy was not filed. In the present case, the appellant exercised due diligence and applied for a certified copy upon pronouncement of the order in terms of Rule 22(2) of the NLCAT Rules 2016. The certified copy was provided to the appellant on 15 September 2022. Hence, the period of 10 days between 5 September 2022 and 15 September 2022 taken by the court to provide a certified copy of the order ought to be excluded when determining the period of limitation under Section 61(2) of the IBC."

(Emphasis Supplied)

6. Thus, considering the Order of the Hon'ble Supreme Court cited supra and provisions of sub-Rule (2) of Rule 22 of NCLAT Rules, 2016 and Section 12 of the Limitation Act, 1963, the period spent in obtaining certified copy of the Impugned Order is to be excluded while calculating the period of 30 days prescribed for filing Appeal under Section 61 of the IBC, 2016. Further, following the Order of this Tribunal cited supra, the Appellant cannot be faulted with for seeking rectification of the Order dated 17.01.2023 before filing the Appeal before this Tribunal. Considering the above facts, we hold that Appeal under Section 61 of the IBC, 2016, filed before this Tribunal is within time and the rectification Order dated 21.03.2023 merges with the original Order dated 17.01.2023, and proceed ahead for determination of issued in the present Appeal.

7. The facts of this case as submitted by the Appellant, briefly are that the Appellant had disbursed the loan of Rs.1,50,00,000/- to M/s. Tattva Properties LLP (hereinafter called the `Principal Borrower`) for development of a Project known as Bombay XI located at Mumbai vide Loan Agreement dated 12.10.2020, which was executed by and between the Appellant, the Principal Borrower and the Respondent/Tattva Mittal Lifespaces Private Limited (hereinafter referred to as the `Corporate Guarantor`). The Corporate

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Guarantor was signatory to the Loan Agreement and had given two cheques as security. As per Clause V of the Loan Agreement, the Principal Borrower was required to pay the loan amount between the period 15.02.2021 to 15.03.2021. On failure of the Principal Borrower to pay the loan amount as per repayment Plan, the loan facility was to be extended as per Clause VI of the Loan Agreement dated 12.10.2020, which states that in case of delay in repayment, the interest charges applicable will be 24% per month and further the Principal Borrower will provide security in the form of Residential Flat to the Appellant in the said Project Bombay XI. For the period from April, 2021 to December, 2021 the Principal Borrower failed to repay the loan amount and failed to provide the Residential Flat as security, leading to event of acceleration in terms of Clause IX of the Loan Agreement. The Appellant deposited cheques given by the Principal Borrower as well as the Respondent which were dishonoured by Bank Memo dated 19.01.2022. The default of the Corporate Guarantor arose only on the failure of the Principal Borrower and only when the Principal Borrower failed to pay the amount with interest, the Guarantee was invoked by depositing the security cheques issued by the Corporate Guarantor with the Bank, and issuing Notice to the Respondent to pay the amount in default of the Principal Borrower. Hence the date of deposit of the cheque or date of receipt of Notice dated 31.01.2022 has to be considered as the date of invocation of the guarantee and the date of dishonour of the security cheques as the 'date of default'.

8. The Learned Counsel for the Appellant further submitted that the date of invocation of Guarantee and date of dishonour of the cheques is beyond the period covered by provisions of Section 10A of the IBC, 2016.

9. Learned Counsel for the Respondent submitted that there is no error in the Order of the Adjudicating Authority and the loan was to be originally repaid during the period 15.02.2021 to 15.03.2021 which is the period excluded by Section 10A of the IBC, 2016, for which Corporate Insolvency Resolution Process (‘CIRP’) cannot be initiated. The Respondent also submitted that the name of the Corporate Guarantor does not figure as a party in the personal Loan Agreement dated 10.12.2020, that the Corporate Guarantor is not a ‘surety’ in the Contract of Guarantee to the Corporate Debtor as the personal Loan Agreement dated 12.10.2020 in Clause VI states that the Respondent is a Guarantor towards (loan taken by the Directors). It is submitted that Respondent is not a Guarantor to any loan taken by the Corporate Debtor/Tattva Properties LLP and therefore Insolvency Petition is not maintainable against the Respondent. The Respondent also submitted that the alleged Guarantee was never invoked by the Appellant. Respondent relied upon the Judgements in the case of **‘Ramesh Kymal’ Vs. ‘Siemens Gamesa Renewable Power (P) Ltd.’, (2021) 3 SCC 224**, and **‘Zhejiang Industrial Group Co. Ltd.’ Vs. ‘Al Badr Seafoods Private Limited’, 2023 SCC OnLine NCLAT 573.**

10. We have heard the Parties and perused the documents.

11. Through Personal Loan Agreement dated 12.10.2020, M/s. Tattva Properties LLP, the Corporate Debtor had taken loan of Rs.1,50,00,000/- from the Appellant, Financial Creditor. Though the name of the Respondent/Corporate Guarantor is not included in the name of the parties listed on page 1 of the Agreement, as per Clause VI of the Agreement, the Corporate Guarantor M/s. Tattva Mittal Lifespaces Pvt. Ltd. has undertaken to act as a Guarantor towards loan. On page 4 of the Agreement, the Borrower

is shown as the Corporate Debtor M/s. Tattva Properties LLP and Guarantor is shown as Tattva Mittal Lifespaces Pvt. Limited. Similarly, Schedule 1 & 2 on page 5 of the Agreement are signed by the Respondent Corporate Guarantor. Thus, it is clear that the Respondent Tattva Mittal Lifespaces Pvt. Ltd. has stood as a Guarantor to the loan taken by Tattva Properties LLP for which they have also issued two security cheques of Rs. 75,00,000/- each. As per certificate of the IDFC First Bank dated 19.01.2022, the cheques were not encashed due to insufficient funds. Vide Notice dated 31.01.2022 issued to both the Corporate Debtor and the Corporate Guarantor, the Appellant herein had brought to their Notice that the cheques have been dishonoured and had demanded the repayment from the Guarantor within 15 days from the receipt of the said Notice as per Clause 13 (b) of the Notice. The dishonour of security cheques and subsequent Demand Notice dated 31.01.2022 indicates that the Guarantee was invoked in January, 2022, which is the period not covered by provisions of Section 10A of the IBC, 2016.

12. The Judgements cited by the Respondent in para 9 quoted supra are not relevant here as they are basically stating that the default committed during the period covered by the provisions of Section 10A of the IBC, 2016 will save the Corporate Debtor from initiation of CIRP. The issue herein is whether the date of default is the original date of default as per repayment schedule given in Clause V of the Loan Agreement dated 12.10.2020, or the date of default is in January, 2022 when the security cheques were deposited and the Notice for repayment was issued to the Corporate Guarantor. In the Order dated 28.04.2023 in the case of '**Pooja Ramesh Singh**' Vs. '**State Bank of India & Anr.**' in **Comp. App. (AT) (Ins.) No. 329/2023**, this Tribunal has held that date of default in the case of Corporate Guarantor shall be the

date on which the Corporate Guarantee was invoked. In this case the Principal Borrower's account was declared as NPA on 05.12.2019 and the Guarantee was invoked by Notice dated 01.10.2020. It was held that the date of default is 01.10.2020 in the case of Corporate Guarantor, which is within the period declared as prohibited period under Section 10A of the IBC, 2016. This Judgement was followed in Judgement dated 03.05.2023 in **Comp. App. (AT) (Ins.) No. 486/2023** in the case of '**JC Flowers Asset Reconstruction Private Limited**' Vs. '**Deserve Exim Private Limited**'. Para 8 of the said Judgement states as under:

“The question as to when the default on part of the Guarantor is to considered has been decided by this Tribunal in a recent judgment pronounced on 28.04.2023 in “Company Appeal (AT) (Ins.) No.329 of 2023, Pooja Ramesh Singh vs. State Bank of India”, where it has been held that default on the part of the Corporate Guarantor shall be held to have been committed only when guarantee was invoked, when Deed of Guarantee itself mentions issue of demand notice by the Bank. The issues which have been raised in the present appeal are fully covered by the judgment in Pooja Ramesh Singh vs. State Bank of India.”

13. In another Judgement of this Tribunal in the case of '**Vikram Kumar Proprietor Vs. Arcana (Mumbai) Private Limited**' in **Comp. App. (AT) (Ins.) No.836 of 2023**, it was held that the date of default in the case of the Guarantor is the date on which the Guarantee was invoked.

14. By its action of depositing the security cheques and issue of Notice dated 31.01.2022, the Financial Creditor, the Appellant herein, is deemed to have invoked the Corporate Guarantee in the month of January, 2022, which is to be considered as the date of default, and which lies beyond the period prohibited under Section 10A of the IBC, 2016. In the light of the aforesaid detailed discussion, and relying on the Judgements of this Tribunal quoted

supra, it is concluded that the date of default lies beyond the prohibited period prescribed under Section 10A of the IBC, 2016. The Adjudicating Authority is directed to hear and decide the Application of the Financial Creditor under Section 7 by treating it as a case not covered by the provisions of Section 10A of the IBC, 2016. Considering the loss of time, it is expected that the said Application will be decided by the Adjudicating Authority expeditiously.

15. With these directions *Comp. App. (AT) (Ins.) No. 729/2023* is allowed and disposed of. No order as to costs.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ajai Das Mehrotra]
Member (Technical)**

**Principal Bench,
New Delhi
31st October, 2023**

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