

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 1515 of 2024

[Arising out of Order dated 26.07.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-I in CP(IB) 244/2023]

In the matter of:

Jatin Mehta

...Appellant

Vs.

**Rushabh Civil Contractors Pvt. Ltd.
Through: Debi Prasanna Sarangi, IRP & Anr.**

...Respondents

For Appellant: Mr. Kunal Tondon, Mr. Kush Chaturvedi, Mr. Kunal Vaishnav, Mr. Syed Faraz Alam, Mr. Atharv Gaur and Mr. Aayushman Aggarwal, Advocates.

**For Respondents: Mr. Rohan Taneja, Advocate for R1
Mr. Manoj Kumar Agarwal, Advocate for IRP**

**J U D G M E N T
(29th October, 2024)**

Ashok Bhushan, J.

This Appeal by a Suspended Director of the Corporate Debtor has been filed challenging the order dated 26.07.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-I, admitting Section 7 application filed by the Financial Creditor through Interim Resolution Professional (IRP) (Respondent herein)

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:-

2.1. The Financial Creditor- 'Rushabh Civil Contractors Private Limited' disbursed an amount of Rs.3.50 Crores to the Corporate Debtor on 16.12.2016. The Corporate Debtor on amount of Rs.3.50 Crores booked interest as well as TDS in its ledger. On 27.06.2022, NCLT Mumbai Bench admitted Section 7 application against the Financial Creditor. The IRP of the Financial Creditor after looking into the books of account of the Corporate Debtor came to notice that an amount of Rs.4,85,46,862/- is due on the Corporate Debtor as on 31.03.2020. A notice dated 29.11.2022 was issued by the IRP to the Corporate Debtor demanding an amount of Rs.4,74,48,109/- within seven days. The notice sent by the Financial Creditor was not replied. A CP(IB) No.244 of 2023 was filed by the Financial Creditor through IRP claiming the total outstanding amount of Rs.9,56,83,836/-, as on 31.03.2022, date of default mentioned in Part-IV of Section 7 application was 07.12.2022. The Corporate Debtor filed a reply in Section 7 application that the Petitioner (Financial Creditor) has failed to prove that there is financial debt present in the case. It was further pleaded that the loan was disbursed on 16.12.2016 and the application filed by the financial creditor is time barred. In the reply, the Corporate Debtor has relied on the letter dated 20.08.2020 issued by the Corporate Debtor where it was claimed that the parties agreed that the amount be repaid on or before 01.12.2020, failing which, two units developed by the Director of the Corporate Debtor shall be allotted to the financial creditor. It was pleaded that the default has been occurred on 01.12.2020, application is not maintainable in view of Section 10A of the IBC Code. The Adjudicating Authority passed an order on 23.11.2023 asking Financial Creditor to

confront the Exhibit-B (Letter dated 20.08.2020) of the reply of the Corporate Debtor with the Suspended Board and to find out from the Suspended Board, when the loan was due for payment. Corporate Debtor also filed compilation of documents which included the ledger of the Corporate Debtor from 01.04.2016 to 15.12.2023 reflecting an amount of Rs.4,78,69,260/- due to the Financial Creditor. Corporate Debtor also filed its balance sheets.

2.2 Adjudicating Authority after hearing the parties by impugned order has admitted Section 7 application. Adjudicating Authority held that the loan was disbursed to the Corporate Debtor to be repayable with interest on demand. IRP issued demand notice dated 29.11.2022 which was to be paid within seven days. Amount having not paid, the date of default was 07.12.2022. It was further held that the letter dated 20.08.2020 is acknowledgment by the Corporate Debtor. It was held that the IRP was duty bound to take steps to protect the Corporate Debtor and recover the dues. Reliance was placed on Section 18 of the Limitation Act, 1963. The Adjudicating Authority held that the financial debt was proved. It was held that there is requisite authorisation for filing a petition. Adjudicating Authority by the impugned order admitted Section 7 application aggrieved by which order, this Appeal has been filed.

3. We have heard Shri Kunal Tandon, Learned Counsel for the Appellant, Shri Rohan Taneja, Learned Counsel for the Respondent No.1 and Shri Manoj Kumar Agarwal, Learned Counsel for the IRP.

4. Learned Counsel for the Appellant submits that the loan having disbursed on 16.12.2016 which was claimed to be repayable on demand, limitation for such loan will be three years as per Article 21 of the Schedule to the Limitation Act, 1963 and three years period expired on 15.12.2019 and application under Section 7 filed in the year 2023 by the Financial Creditor is barred by time. It is further submitted that the letter dated 20.08.2020 which was written by the Corporate Debtor to the Financial Creditor undertaking to pay the amount by 01.12.2020, the default arose on 01.12.2020 i.e. during period of Section 10A, hence, the application filed by the Financial Creditor was barred by Section 10A.

5. Counsel for the Respondent No.1 refuted the submissions of the Counsel for the Appellant and submits that the financial debt was proved from the materials on record including the ledgers of the corporate debtor and the financial creditor. Both the ledgers contemplate payment of interest which means that there was financial debt. It is submitted that the loan was payable on demand and demand notice was issued by the IRP on 29.11.2022 demanding payment within seven days, hence, the date of default is 07.12.2022 which is not covered by Section 10A. It is submitted that the default having been committed on 07.12.2022, there is no question of application being barred by time.

6. We have considered the submissions of the Counsel for the parties and perused the record.

7. From the submissions which have been advanced by Counsel for the parties and materials on the record, following are the issues which arise for consideration:-

- (i) Whether the amount claimed by the Applicant under Section 7 was a financial debt?
- (ii) Whether Section 7 application filed by the Financial Creditor dated 20.01.2023 was barred by time, loan having disbursed on 16.12.2016?
- (iii) Whether Section 7 application was barred by Section 10A since as per the letter dated 20.08.2020 issued by the Corporate Debtor and acknowledged by the Financial Creditor the amount was to be paid by the Corporate Debtor by 01.12.2020 and the default if any occurred on 01.12.2020 is hit by Section 10A?

8. The above questions are inter-connected and are being taken together.

9. Section 7 application filed by the Financial Creditor has been brought on record as Annexure A-3. Part-IV of Section 7 application which gives the details of disbursement and date of default are as follows:-

“PART IV

PARTICULARS OF FINANCIAL DEBT		
1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	<u>THE TOTAL AMOUNT OF DEBT</u>
		The total outstanding amount of debt is Rs. 9,56,83,836/- (Rupees Nine Crore Fifty Six Lakh Eighty Three Thousand Eight Hundred and Thirty Six

		only). Rs. 3,50,00,000/- (Rupees Three Crore Fifty Lakh Only) being amount towards loans and advances along with interest @ 18% p.a. thereon till 31/12/2022 being Rs. 6,06,83,836/- (Rupees Six Crore Six Lakh Eighty Three Thousand Eight Hundred and Thirty Six Only) The said amount of debt is granted as financial assistance to the Corporate debtor to be repaid as and when demanded by the Financial Creditor. Copy of working for computation of amount and days of default in tabular form is attached herewith and marked as <u>EXHIBIT-E</u>. <u>DATE(S) OF DISBURSEMENT</u> 16th December, 2016
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	<u>AMOUNT CLAIMED TO BE IN DEFAULT</u> The total outstanding amount of debt is Rs. 9,56,83,836/- (Rupees Nine Crore Fifty Six Lakh Eighty Three Thousand Eight Hundred and Thirty Six only). Rs. 3,50,00,000/- (Rupees Three Crore Fifty Lakh Only) being amount towards advance along with interest @ 18% p.a. thereon till 31/12/2022 being Rs. 6,06,83,836/- (Rupees Six Crore Six Lakh Eighty Three Thousand Eight Hundred and

		Thirty Six Only) The said amount of debt is granted as financial assistance to the Corporate debtor to be repaid as and when demanded by the Financial Creditor. <u>THE DATE ON WHICH THE DEFAULT OCCURRED:</u> 07th December 2022 Legal Notice dated 29th November, 2022 demanding payment was sent on 30th November 2022 thereby calling upon the Corporate Debtor to repay the advance amount along with interest within seven days of receipt of the notice.
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10. The first issue to be answered is as to whether Financial Creditor has been able to prove that there was financial debt. It is relevant to notice that in Section 7 application, the financial creditor has filed its ledger with regard to corporate debtor which is part of Section 7 application and as per the ledger as on 31.03.2020 amount outstanding was Rs.4,74,48,109/-. The ledgers indicate that there was entry of payment of interest as on 31.03.2017, 31.03.2018, 31.03.2019 and 31.03.2020. Payment of TDS was also mentioned.

11. The disbursement by the Financial Creditor is not even denied. The Corporate Debtor itself has filed documents before the Adjudicating Authority which contained the ledger Statement from 01.04.2016 to

15.12.2023 which has been filed as Annexure A-6 to the Appeal. A perusal of the ledger indicate that the closing balance of amount in the ledger of the corporate debtor as on 31.03.2020 towards the financial creditor was Rs.4,78,69,260/-. There were entries regarding 'interest on loan' and 'TDS on interest' in the ledger of both the corporate debtor and the financial creditor, hence, there is no doubt that the amount is a financial debt. Further in the letter dated 20.08.2020 which has been written by the corporate debtor to the financial creditor, there is a clear admission of loan. It is useful to extract the entire letter dated 20.08.2020 which is filed as Annexure A-2:-

"To,

Dt: 20th August, 2020

*Rushab Civil Contractors Pvt Ltd,
F79, First Floor, Prime Mall Irla,
Church Road, Vile Parle West, Mumbai-400 058.*

Sir,

In view of our discussion and the prevailing Covid situation it is agreed that with respect to the Loan and the entire outstanding balance shall be repaid by you on or before 1 December, 2020.

In the event we fail the repay the entire outstanding amount on or before 1st December, 2020 it is agreed, accepted and acknowledged that in lieu of the entire outstanding amount we shall ensure allotment of 2 residential premises admeasuring 897 sq. ft each in E-wing at 2nd Floor to you in the project being F Residences Ghatkopar at Chembur, Mumbai which is being currently being developed by a Director of our Company. The present letter by itself shall be treated as letter of allotment for the given area.

You are requested to acknowledge this letter as acceptance to the terms of this letter/allotment.

*M/s. Point Developers Private Limited
Director/ Authorized Signatory*

*M/s Rushabh Civil Contractors Pvt Ltd.
Director/ Authorized Signatory*

Arihant Realtors

Partner

Accepted as agreed above”

12. Thus, Financial Creditor has successfully proved that there is a financial debt.

13. The second submission which has been pressed by the Counsel for the Appellant is that the application is barred by time. Counsel for the Appellant submits that the loan has been disbursed on 16.12.2016 which was payable on demand. Article 21 of the Limitation Act shall be attracted which provide for limitation of three years from the date when the loan is made. It is useful to refer Article 21 of the Schedule of the Limitation Act, 1963, which is as follows:-

**“THE SCHEDULE
(PERIODS OF LIMITATION)
[See sections 2(j) and 3]
FIRST DIVISION—SUITS**

PART II.—SUITS RELATING TO CONTRACTS

<i>Description of suit</i>	<i>Period limitation</i>	<i>of Time from which period begins to run</i>
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21. <i>For money lent under an Three years. agreement that it shall be payable on demand.</i>	<i>When the loan is made.</i>
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14. Counsel for the Appellant has also relied on the judgment of the Hon'ble Supreme Court in ***“Radha Exports (India) Pvt. Ltd. vs. K.P. Jayaram & Anr.- (2020) 10 SCC 538”***. The judgment of the Radha Exports (supra) which has been relied by the Counsel for the Appellant has referred to Article 21 of the Limitation Act. In the above case, an amount of Rs. 2.10 Crore was advanced to Radha Exports, the proprietorship which had taken the loan was subsequently incorporated. The Respondent wrote to the company to convert a sum of Rs.90 Lacs from out of the said outstanding loan as share application money in the name of Respondent No.2 which was confirmed. Subsequently, Respondent No.2 wrote to the Appellant company to treat the share application money of Rs.90 Lakhs as share application money of one Mr. M. Krishnan. The amount of share application money of Rs 90,00,000 transferred to Mr M. Krishnan was to be treated as a personal loan from Respondent 2 to the said Mr M. Krishnan. Initially a winding up petition was filed before the High Court which was transferred and re-numbered before the NCLT. The NCLT rejected the application as barred by time. However, the said order was set aside by the Appellate Tribunal against which Radha Exports filed an appeal. In the above context, in paragraphs 36 and 37, following has been observed:-

“36. Under clauses (19) to (21) of Part II of the Schedule of the Limitation Act, 1963, the period of limitation for initiation of a suit for recovery of money

lent is three years from the date on which the loan is paid. The last loan amount is said to have been advanced in 2004-2005. In the winding-up petition, there is not a whisper of any agreed date by which the alleged loan was to be repaid to the respondents. In the instant case, apparently the debt was barred by limitation even in the year 2013, when winding-up proceedings were initiated in the Madras High Court.

37. *The NCLT rightly refused to admit the application under Section 7 IBC holding the same to be barred by limitation. The Appellate Tribunal has erred in law in reversing the judgment and order of the earlier adjudicating authority. The adjudicating authority rightly rejected the application as barred by limitation. The appellate authority patently erred in law in reversing the decision of the adjudicating authority and admitting the application.”*

15. In the present case, we have already noted the letter dated 20.08.2020 which was filed by the corporate debtor in the reply to Section 7 application. Reliance has been placed on the said letter by the Appellant also in the present Appeal. The letter dated 20.08.2020 contained a promise to repay the outstanding amount. Even for arguments' sake, if we accept that three years period as per Article 21 came to end on 15.12.2019, the letter dated 20.08.2020 is clear promise by the corporate debtor to make the payment and as per Section 25 of the Indian Contract Act, 1872, the corporate debtor is bound by the said promise and fresh period of limitation shall commence from 20.08.2020. Section 25 of the Indian Contract Act, 1872, is as follows:-

“25. Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law.—

An agreement made without consideration is void, unless—

(1) it is expressed in writing and registered under the law for the time being in force for the registration of 1 [documents], and is made on account of natural love and affection between parties standing in a near relation to each other ; or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless;

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.”

16. Section 25 of the Contract Act came for consideration before the Hon'ble Supreme Court in ***"Kotak Mahindra Bank Ltd. vs. Kew Precision Parts Pvt. Ltd. & Ors.- (2022) 9 SCC 364"***. The Hon'ble Supreme Court in the above case had occasion to consider Section 25(3) of the Contract Act. In the above case also offer dated 20.12.2018 was made. The Hon'ble Supreme Court considered the provisions of Section 25(3) in paragraphs 30, 30.1, 30.2, 30.3, 31 and 32 which are as follows:-

"30. In this appeal, it is contended that the last offer of 20-12-2018 was followed by an agreement. Whether there was such agreement or not would have to be considered by the adjudicating authority. To invoke Section 25(3), the following conditions must be satisfied:

***30.1.** It must refer to a debt, which the creditor, but for the period of limitation, might have enforced.*

***30.2.** There must be a distinct promise to pay such debt, fully or in part.*

***30.3.** The promise must be in writing, and signed by the debtor or his duly appointed agent.*

***31.** Under Section 25(3), a debtor can enter into an agreement in writing, to pay the whole or part of a debt, which the creditor might have enforced, but for the limitation of a suit in law. A written promise to pay the barred debt is a valid contract. Such a promise constitutes novation and can form the basis of a suit independent of the original debt, for it is well settled that the debt is not extinguished, the remedy gets barred by passage of time as held by this Court in *Bombay Dyeing & Mfg. Co. Ltd. v. State of**

Bombay [Bombay Dyeing & Mfg. Co. Ltd. v. State of Bombay, AIR 1958 SC 328] .

32. *Section 25(3) applies only where the debt is one which would be enforceable against the defendants, but for the law of limitation. Where a debt is not binding on the defendant for other reasons, and consequentially not enforceable against him, there is no question of applicability of Section 25(3).”*

17. Section 25(3) is attracted when a promise is made by letter to make the payment of a time barred debt. In view of Section 25(3), the said promise is enforceable and the promise in writing given by the corporate debtor in letter dated 20.08.2020 will make the said promise enforceable within a period of three years and the application which was filed by the financial creditor dated 20.01.2023 cannot be said to be barred by time. Hence the application under Section 7 cannot be held to be barred by time relying on Article 21 of the Limitation Act.

18. Another issue raised by the Appellant is for holding the application barred by Section 10A. The Appellant’s case itself is that the loan advanced was payable on demand. According to the own case of the Appellant, limitation of three years will start from the date when loan is made i.e. on 16.12.2016 and the period of limitation shall come to an end on 15.12.2019. Letter dated 20.08.2020 on which Appellant is claiming that the application is barred by Section 10A is the undertaking given by the corporate debtor to make the payment on 01.12.2020. By letter dated 20.08.2020, a date has been given for repayment with regard to loan which according to the corporate debtor itself limitation for filing a proceeding for repayment came

to an end on 15.12.2019 because of Article 21 of the Limitation Act. Corporate Debtor cannot be allowed to choose a date of default of its own which falls within 10A period. It is well settled when default has been committed by the Corporate Debtor prior to commencement of Section 10A period, the application filed under Section 7 cannot be held to be barred by Section 10A. In the present case, as per the case of the Appellant, default took place since the loan was payable within three years from the date of grant of the loan i.e. from 16.12.2016.

19. When we look into the case set up by the financial creditor in Section 7 application which is based on the notice given by the IRP on 29.11.2022 which notice was given by the IRP of the financial creditor after looking to the books of account of the financial creditor where the amount of Rs.4,74,48,109/- was shown to be due along with the interest payable by the corporate debtor. Notice dated 29.11.2022 has been brought on the record at Page 102 which is as follows:-

“Kaustubh Santosh Gaonkar
BLS, LL.B
Advocate High Court

*Office at: 8/B, 401 Paradise Apartment, Kannamwar Nagar 2,
Vikhroli East, Mumbai - 400083.*

*(Mobile No: 9773085458 Email
Id: adv.kaustubhgaonkar768@gmail.com)*

Date: 29th November 2022

*To
Point Developer Limited*

Office No. 505, Business Point
DK Sandhu Marg
Opp. Saibaba Mandir
Chembur, Mumbai-400071

Sub: Advances amounting to 4,74,48,109/- (Rupees Four Crore Seventy-four Lakh Forty-eight Thousand One Hundred Nine only) outstanding in the books of Rushabh Civil Contractors Private Limited from you.

Dear sir,

We are concerned from our client Mr. Debi Prasanna Sarangi, Interim Resolution Professional of Rushabh Civil Contractors Private limited. Under the instructions of our client we hereby state as follows;

1. We say that the Corporate Insolvency Resolution Process (CIRP) was initiated against Rushabh Civil Contractors Private Limited (hereinafter referred as to the "Corporate Debtor"). By virtue of order dated 27th June 2022 as passed by the Hon'ble National Company Law Tribunal, Mumbai Branch, Mumbai under Mr Rajesh Mittal, insolvency Professional was appointed as the Interim Resolution Professional of the Corporate Debtor.

2. We further say that by virtue of order dated 22 August 2022, passed by the Hon'ble National Company Law Tribunal, Mumbai Bench, Mumbai our client Mr. Debi Prasanna Sarangi was appointed as Interim Resolution Professional in place of Mr Rajesh Mittal.

3. We say that on perusal of the books of accounts and records of the Corporate Debtor, our client has noticed that loans and advances of Rs.4,74,48,109 (Rupees Four Crore Seventy-four Lakh Forty-eight Thousand One Hundred Nine Only) ("Advance Amount") along with the interest thereon is

due and payable by you to the Corporate Debtor. The copy of the relevant ledger account in the books of the Corporate Debtor is attached herewith as Exhibit- A.

4. We further say that if you believe that the Advance Amount has been repaid by you, please furnish the proof of such payment of the dues by sending us the following within seven days from the date of receipt of this notice.

i An attested copy of the record of electronic transfer of the unpaid amount or,

ii. An attested copy of record that Corporate Debtor has received the payment.

5. Hence, you are hereby requested to repay the Advance Amount along with the interest @18% thereon, till date, within seven days of receipt of this notice, failing which our client has instructed us to initiate appropriate legal proceeding for recovery of the same.

Thanking you

*Kaustubh Santosh Gaonkar
Advocate of Debi Prasanna Sarangi
Resolution Professional of
Rushabh Civil Contractors Private Limited*

Enclosed:

Ledger Account”

20. Notice issued by the IRP was neither replied nor any amount was paid, hence, the financial creditor treated the date of default as 07.12.2022 i.e. 7 days from the notice.

21. In view of the foregoing discussions, we are satisfied that the application filed by the financial creditor was not barred by Section 10A.

22. One of the submissions also advanced by Counsel for the Appellant is that in the letter dated 20.08.2020 it was provided that in the event, the payment is not made by the corporate debtor prior to 01.12.2020, the financial creditor will be entitled to two residential premises in the project which is currently being developed by the Director of the company. The letter dated 20.08.2020 cannot extinguish the financial debt on a promise to allot two residential premises which is developed not by the corporate debtor but Director of the company. We are not satisfied that the financial debt shall extinguish by the promise made in the letter dated 20.08.2020.

23. In view of the foregoing discussions and our conclusions, we do not find any error in the order of the Adjudicating Authority admitting Section 7 application. There is no merit in the Appeal. The Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

New Delhi
Anjali