

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 366 of 2020

(Arising out of order dated 13.02.2020 in CP (IB) 1016/IBC/MB/2019
passed by National Company Law Tribunal, Mumbai Bench.)

IN THE MATTER OF:

Mr. Rajendrakumar Kundanmal Jain
(Shareholder & Ex-Director)
Survey No. 20, G.H. No. 695/2/5,
New Mulchand Compound, Katail Village,
Bhiwandi District Thane, Maharashtra 421302

Also At:

20/24, Old Hanuman Lane
3rd Floor, R.No. 46, Kalbadevi Mumbai 400-002.

.....Appellant
(Corporate Debtor)

Versus

1. Mr. Vijal A. Jain
Proprietor – EPPAJ India
66/72, Manahar Building, Dadiseth Agiyari Lane
Ground Floor, Kalbadevi Road
Mumbai – 400002

.....Respondent
(Operational Creditor)

2. Mr. Vimal Kumar Agrawal
(Interim Resolution Professional)
Shree Daksh Jyot Silk Mills Private Limited
Office No. 11-12, Krishna Kunj, Above HDFC
Bank Limited, near East West flyover, Bhayander West
Thane 401101- Maharashtra.
Email: vimalpagarwal@rediffmail.com

..... Respondent
(Corporate Debtor)

3. Mr. Vinod Kumar Ambavat
(Resolution Professional)

**Room No. 40, 9/15, Morarji Velji Building,
1st Floor, Dr. M.B. Velkar Street, Kalbadevi,
Mumbai.**

**.....Respondent
(Corporate Debtor)**

Present: -

**For Appellant: Mr. Chandra Shekhar Gupta and Mr. Anand Shukla,
Advocates.**

Mr. Rajender Jain, Party in Person.

**For Respondents: Mr. Rajnish Kumar Jha, Advocate for Respondent No.
1.**

Mr. J. Ranawat, Advocate for Respondent No. 2.

**Mr. Atishay Jain, Mr. Ankit Acharya and Mr. Kunal
Kanungo, Advocates for R-3.**

J U D G M E N T

Justice Anant Bijay Singh;

This appeal has been preferred by 'Mr. Rajendrakumar Kundanmal Jain (Shareholder & Ex-Director)' Appellant / Corporate Debtor, aggrieved and dissatisfied by the impugned order dated 13.02.2020 in CP (IB) 1016/IBC/MB/2019 passed by National Company Law Tribunal, Mumbai Bench whereby and where under, an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**in short IBC**) was filed by 'Mr. Vijal A. Jain' –Respondent No. 1 (Operational Creditor) was admitted for initiation of 'Corporate Insolvency Resolution Process' (**in short CIRP**) against the Company (Appellant / Corporate Debtor) and have appointed one Mr. Vimal Kumar Agarwal as Interim Resolution Professional.

2. The case of the Respondent No. 1 before the NCLT, Mumbai Bench is that the Appellant / Corporate Debtor committed default in payment of the dues to the Respondent No. 1 / Operational Creditor invoking the provisions

of Section 8 and 9 on Insolvency and Bankruptcy Code read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

3. The Respondent No. 1 / Operational Creditor is a proprietorship concern represented by its proprietor, Mr. Vijal A. Jain- Respondent No. 1 who is sold, supplied and delivered goods to the Appellant (herein).

4. The Appellant / Corporate Debtor is a company incorporated on 25.04.1988 bearing CIN: U99999MH1988PTC047141 and having authorized share capital Rs. 10,00,00,000/- and paid up share capital of Rs. 8,38,03,000/-.

5. The Respondent No. 1 / Operational Creditor time to time sold, supplied and delivered to the Appellant / Corporate Debtor Plastic Sheets and Box Goods under twelve bills, during the period between 18.10.2014 to 14.02.2015 for an aggregate amount of Rs. 7,15,940 and raised the following invoices:

Invoice No./Bill No.	Date of Invoice	Amount in ₹
147	18.10.2014	84,298/-
153	28.10.2014	78,485/-
163	05.11.2014	22,234/-
167	07.11.2014	1,02,275/-
171	12.11.2014	35,320/-
176	24.11.2014	71,850/-
186	04.12.2014	39,917/-
212	19.12.2014	76,453/-
213	25.12.2014	51,282/-
222	08.01.2015	40,592/-
229	23.01.2015	32,145/-
257	14.02.2015	79,089/-
Total outstanding amount		₹7,15,940/-

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6. The Respondent No. 1 / Operational Creditor mentioned that the Appellant (herein) paid sum of Rs. 40,000/- vide cheque No. 110087 dated 16.02.2016 to the Respondent No. 1/ Operational Creditor.

7. The Respondent No. 1 adjusted the said amount to the running account of the Appellant leaving an outstanding amount of Rs. 6,75,940/- as due and payable under the said invoices, along with further interest @ 12% from the date of filing till realization of the payment which is described in particulars of claim.

8. The Appellant issued a cheque dated 12.01.2016 for a sum of Rs. 44,298/- to the Respondent No. 1. On presentation of the said cheque, it got dishonoured for the reason "*Payment stopped by drawer*" (*Exhibits "D & D-1*) at page 25 to 26 of the petition filed before the NCLT.

9. The Respondent No. 1 sent the confirmation of Accounts on 01.04.2015 to the Appellant. The Appellant accepted and acknowledged the said confirmation of accounts.

10. The Respondent No. 1 sent Demand Notice on 16.10.2018 under Section 8 of the Code, where in a demand was made for payment of the unpaid operation debt due on the Appellant / Corporate Debtor was duly sent which was received by the Appellant / Corporate Debtor. There was no reply to this Demand Notice.

11. The Respondent No. 1 has filed Application under Section 9 of the IBC on 03.06.2019. The Appellant / Corporate Debtor has filed a reply dated 10.06.2019 to the petition filed by the Respondent No. 1 before the NCLT,

Mumbai Bench. In which reply it has been stated that the Operational Creditor, with malicious intention had created a cause of action vide alleged issuance of notice dated 16.10.2018, which itself reflects that the alleged dispute pertains to the years 2014 & 2015. The said demand notice is not received by the Corporate Debtor and therefore the present proceeding is time barred and is filed after expiry of limitation period of three years.

12. The Adjudicating Authority after hearing the parties have admitted the Application under Section 9 of the IBC and appointed one Mr. Vimal Kumar Agarwal as Interim Resolution Professional and hence the Appeal.

Submissions on behalf of the Appellant

13. The Learned Counsel for the Appellant during the course of argument and his Written Submissions have stated that the present claim of default, on the basis of which impugned order has been passed in the Application under Section 9 of the IBC filed by the Respondent No. 1/Operational Creditor is clearly barred by limitation under Section 238A of IBC 2016 read with Article 137 of Limitation Act, and hence present Appeal.

14. It is further submitted that the Application under Section 9 of the IBC 2016 filed by Respondent No. 1 / Operational Creditor raised Invoices with their due dates on 29-10-2014, 06-11-2014, 08-11-2014, 13-11-2014, 25-11-2014, 05-12-2014, 20-12-2014, 26-12-2014, 09-01-2015, 24-01-2015, 15-02-2015 at page 58 to 68 of Appeal Paper Book is barred by limitation.

15. It is further submitted that the Demand Notice under Section 8 of the IBC dated 16.10.2018 at page 77 to 86 of the Appeal Paper Book was not

served to the Appellant / Corporate Debtor but there are no discussions in the impugned order passed by the Ld. Adjudicating Authority.

16. It is further submitted that in the reply at page 97 to 104 of the Appeal Paper Book, the Appellant / Corporate Debtor raised objection of time barred claim but same was not considered by the Ld. Adjudicating Authority.

17. It is further submitted that there is no Claim, Debt, Operational Debt, due and payable by the Appellant / Corporate Debtor as falsely claimed by the Respondent No. 1 / Operational Creditor.

18. Learned Counsel for the Appellant relied on a judgment of Hon'ble Supreme Court of India reported in **1967 (1) SCR 190 (Jiwanlal Achariya V/s Rameshwarlal Agarwalla)** wherein para 10 reads as under:

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“10. This brings us to the question of limitation. The facts are not in dispute now. The promissory note was executed on February 4, 1954. On the same date a post-dated cheque bearing the date February 25, 1954 was given by the defendant-appellant to the plaintiff-respondent, the intention being that on being realised it would be credited towards part payment. It was realised sometime after February 25, 1954 and was credited towards part payment, the appellant himself having made an endorsement admitting this part payment. But it is contended on behalf of the appellant that as the post-dated cheque was given on February 4, 1954, that must be held to be the date on which part payment was made. It has been held by the High Court that the acceptance of the post-dated cheque on February 4, 1954 was not an unconditional acceptance. Where

a bill or note is given by way of payment, the payment may be absolute or conditional, the strong presumption being in favour of conditional payment. It follows from the finding of the High Court that the payment was conditional i.e. that the payment will be credited to the person giving the cheque in case the cheque is honoured. In the present case the cheque was realised and the question is what is the date of payment in the circumstances of this case for the purpose of s. 20 of the Limitation Act. Section 20 inter alia lays down that where payment on account of debt is made before the expiration of the prescribed period by the person liable to pay the debt, a fresh period of limitation shall be computed from the time when the payment was made. Where therefore the payment is by cheque and is conditional, the mere delivery of the cheque on a particular date does not mean that the payment was made on that date unless the cheque was accepted as unconditional payment. Where the cheque is not accepted as an unconditional payment, it can only be treated as a conditional payment. In such a case the payment for purposes of s. 20 would be the date on which the cheque would be actually payable at the earliest, assuming that it will be honoured. Thus if in the present case the cheque which was handed over on February 4, 1954 bore the date February 4, 1954 and was honoured when presented to the bank the payment must be held to have been made on February 4, 1954, namely, the date which the cheque bore. But if the cheque is post dated as in the present case it is obvious that it could not be paid till February 25, 1954 which was the date it bore. As the payment was conditional it would only be good when the cheque is presented on the date it bears, namely, February 25, 1954 and is honoured. The earliest date therefore on which the respondent could have realised the cheque which he had received as conditional payment on February 4, 1954 was the 25th February 1954 if he had presented it on that date

and it had been honoured. The fact that he presented it later and was then paid is immaterial for it is the earliest date on which the payment could be made that would be the date where the conditional acceptance of a post-dated cheque becomes actual payment when honoured. We are therefore of opinion that as a post-dated cheque was given on February 4, 1954 and it was dated February 25, 1954 and as this was not a case of unconditional acceptance, the payment for the purpose of s. 20 of the Limitation Act could only be on February 25, 1954 when the cheque could have been presented at the earliest for payment. As in the present case the cheque was honoured it must be held that the payment was made on February 25, 1954. It is not in dispute that the proviso to s. 20 is complied with in this case, for the cheque itself is an acknowledgment of the payment in the handwriting of the person giving the cheque. We are therefore of opinion that a fresh period of limitation began on February 25, 1954 which was the date of the post-dated cheque which was eventually honoured.”

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19. Learned Counsel for the Appellant submitted that these facts are not considered by the Ld. Adjudicating Authority while passing the impugned order. In view of the aforesaid facts the appeal be allowed and impugned order is set aside.

Submissions on behalf of the Respondents

20. Learned Counsel for the Respondent No. 1 / Financial Creditor Reply Affidavit and also during his argument submitted that the statutory demand notice under Section 8 of the IBC was sent on 16.10.2018 but the Appellant (herein) did not to reply the statutory demand notice.

21. It is further submitted that the copy of the demand notice sent through Registered AD dated 16.10.2018 addressed to the Appellant is marked at page 77 of the Appeal Paper Book and his Reply Affidavit at page 101 of the Appeal Paper Book filed before the Hon'ble NCLT where it is stated that "in order to create a cause of action vide alleged issuance of Notice, dated 16.10.2018, which itself reflects that the alleged dispute pertains to the years 2014 and 2015, however, the said demand notice is not received by the corporate debtor and therefore the present proceeding is time barred and is filed after the limitation period of three years".

22. It is further submitted that the demand made by the Learned Counsel for the Appellant before the Hon'ble NCLT in their reply it is not correct to show that the demand under Section 8 of the IBC was not complied.

23. Learned Counsel for the Respondent No. 1 further submitted that that the Ld. Adjudicating Authority have taken note of the fact that cheque bearing no. 110088 dated 12.01.2016 issued by Corporate Debtor for amounting of Rs. 44,298/- was dishonoured and the legal proceeding under Section 138 of Negotiable Instrument Act. was initiated.

24. It is further submitted that the Ld. Adjudicating Authority taking note of this fact and also the fact that demand notice dated 16.10.2018 was duly served upon Appellant / Corporate Debtor but no reply to demand notice was given by the Appellant (herein).

25. It is further submitted that the Appellant / Corporate Debtor has never raised any debit note regarding the inferior quality of the goods and have time

to time made the payment which depicts from the confirmation of accounts for the year 01.04.2014 to 31.03.2015 and the same is approved and confirmed by the Corporate Debtor.

26. It is further submitted that no grievance was raised by the Appellant before the issuance of demand notice under Section 8 of the IBC and thus, the Ld. Adjudicating Authority has rightly passed the impugned order, so there is no merit in the Appeal.

FINDING

27. We have perused the records of the case, considered the arguments advanced on behalf of the parties and gone through the written submissions filed on behalf of Appellant.

- Taking the aforesaid facts and circumstances, we are of the considered view that the judgment (supra) relied by Learned Counsel for the Appellant is not applicable in the facts of this case in as much as the case which has relied by the Learned Counsel for the Appellant is that the promissory note was executed on 4th February, 1954 and on the same date a post-dated cheque dated 25th February, 1954 was given by the defendant/appellant to the plaintiff /respondent, in the facts of this case the Hon'ble Supreme Court of India has held that the post-dated cheque issued on 04.02.1954 was unconditional acceptance for it was held and for the purpose of Section 20 of the Limitation Act. In terms of the Section 20 of the Limitation Act, a fresh period of limitation began

on 25th February, 1954 which was the date of the post-dated cheque which was eventually honoured.

28. Wherein the instant case it is born from the record that the Appellant have issue cheque on 12.01.2016 for sum of Rs. 44,298/- in favour of the Respondent No. 1 which amounts from acknowledgment of the debt although the said cheque dishonoured for the reason “payment stopped by drawer” (Exhibits “D & D-1) at page 25 to 26 of the petition filed before the NCLT.

29. From the perusal of the records at page 49 of the Appeal Paper Book which the Application under Section 9 of the IBC filed before the NCLT by Respondent No. 1 Part –IV Colum 2 the Debt from which such Debt fell due “The Respondent made part payment on 16.02.2016, after which no payment was made and cheque issued on 12/01/2016 was returned dishonoured”.

So, this fact also supports the view of the Respondent No. 1 on the date on which cheque was dishonoured which was issued by the Appellant on 12.01.2016 and which is within the period of limitation. So, the Judgment (supra) relied by the Appellant is not applicable in this fact.

30. We are of the further view that the Learned Counsel for the Appellant have failed to make out any ground and the finding recorded by Ld. Adjudicating Authority, so we are affirmed the finding recorded in the impugned order dated 13.02.2020 in CP (IB) 1016/IBC/MB/2019 passed by Ld. Adjudicating Authority, National Company Law Tribunal, Mumbai Bench.

ORDER

31. Having regard to the foregoing discussion, we find no merit in this Appeal. The Appellant has failed to demonstrate that the impugned order suffers from any legal infirmity. The Appeal being devoid of merit is dismissed. No order as to costs.

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

**[Ms. Shreesha Merla]
Member (Technical)**

NEW DELHI

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4th March, 2021.