

Amrit Kumar Agrawal vs Tempo Appliances Pvt Ltd on 25 November, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 1005 of 2020

In the matter of:

Amrit Kumar Agrawal

....Appellant

Vs.

Tempo Appliances Pvt. Ltd.

....Respondent

Present:

Appellant: Mr. Avneet Singh Sikka, Advocate

ORDER

(Through Virtual Mode) 25.11.2020: Appellants' application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) against 'Tempo Appliances Pvt. Ltd.' (Corporate Debtor) came to be dismissed in terms of the impugned order dated 28.09.2020 by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-V on the ground that the default in payment of Settlement Agreement does not come under the definition of financial debt. Appellant, being aggrieved thereof, has filed the instant appeal on the ground that the Respondent who was the Corporate Guarantor was liable in terms of the Memorandum of Understanding dated 22.09.2017 to discharge the liability with respect to the financial debt advanced to the principal borrower- 'Tempo Appliances India Ltd.' and this was independent of Settlement Agreement, whereunder the Corporate Guarantor had undertaken to discharge the liability arising out of dishonoring of cheques issued by the Principal Borrower in favour of the Financial Creditor.

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2. After hearing learned counsel for the Appellant, we are of the considered opinion that the impugned order is not flawed. Admittedly, in terms of the Memorandum of Understanding dated 22.09.2017, Appellant agreed to advance a loan of Rs.1,50,00,000/- to 'Tempo Appliances India Ltd.' (Principal Borrower) with interest @18% per annum payable monthly. Respondent herein i.e. 'Tempo Appliances Pvt. Ltd.' together with its Director Mr. Suresh Kumar Aggarwal stood as guarantor for the said loan amount. The Principal Borrower issued two account payee cheques dated 20.09.2019 and 20.10.2019 for amount of Rs. 86 lakhs and Rs. 18 lakhs respectively in favour of the Appellant towards discharge of outstanding liability. However, both cheques bounced when presented for encashment. This led to filing of the complaint under Section 138 of the Negotiable Instruments Act against 'Tempo Appliances India Limited' (Principal Borrower). While the matter was pending determination before learned Metropolitan Magistrate, South East District, Saket Courts, Delhi, an amicable settlement was reached and Settlement Agreement was executed between the Appellant and the Respondent in terms whereof Respondent agreed to pay the balance loan amount of Rs. 86 lakh along with interest calculated as specific amount and issued two post-dated

cheques to discharge the said liability. These cheques were also dishonored when presented by the Appellant.

3. A glance on the Settlement Agreement dated 16.01.2020 executed inter se the parties to this appeal lays it bare that preceding this Settlement Agreement Memorandum of Understanding dated 22.09.2017 had been executed between the Appellant and the Principal Borrower, wherein Respondent herein stood as guarantor. Since the cheques issued by the Principal Borrower were dishonored Company Appeal (AT) (Insolvency) No. 1005 of 2020 on presentation, Respondent as guarantor came forward to pay the outstanding amount of Rs.86 lakh with interest calculated at Rs.22 lakh and issued two cheques in consideration of such liability. It appears that the payment schedule had been agreed upon. A bare look at this Settlement Agreement would reveal that the same supersedes the Memorandum of Understanding dated 22.09.2017 entered between the Appellant and the Principal Borrower. The issue for consideration is that whether in terms of this agreement the obligation to pay the outstanding liability of Rs. 86 lakh together with interest on the part of Respondent constituted a 'financial debt' within the purview of Section 5(8) of the 'I&B Code' and whether the Appellant can be treated as 'Financial Creditor' entitled to trigger Corporate Insolvency Resolution Process as Financial Creditor against the Respondent. Section 5(8) of the 'I&B Code' is reproduced herein below:

"5. Definition.-(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes--

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Company Appeal (AT) (Insolvency) No. 1005 of 2020 Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any

derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;"

4. Mere obligation to pay does not bring the liability within the ambit of 'financial debt'. The debt, along with interest, if any, should be disbursed against the consideration for the time value of money. Breach of terms of an agreement including a Settlement Agreement whereunder payment may be due would not fall within the ambit of Section 5(8) so as to constitute a 'Financial Debt'. Admittedly, inter se the parties, there is no disbursement against the consideration for the time value of money. Principal borrower is not a party to Company Appeal (AT) (Insolvency) No. 1005 of 2020 Settlement Agreement. Viewed in the context of Settlement Agreement, there is no borrowing on the part of Respondent from the Appellant. Mere obligation to pay under a Settlement Agreement would not amount to disbursement of amount for consideration against the time value of money and breach thereof would not entitle the Appellant in the instant case to trigger Corporate Insolvency Resolution Process against the Respondent. Viewed from this prospective, we find that bouncing of cheques issued in discharge of obligation under the Settlement Agreement would not fall within the purview of default in regard to financial debt.

5. Thus, viewed we find no legal infirmity in the order. The Appellant may have other remedies available under law for effecting recovery of money due in terms of the Settlement Agreement but the triggering of Corporate Insolvency Resolution Process is not warranted. Insolvency proceedings stand at a different footing and cannot tantamount to recovery proceedings. Corporate Insolvency Resolution Process cannot be initiated for purposes of recovery of money.

The appeal being devoid of merit is dismissed.

[Justice Bansi Lal Bhat] Acting Chairperson [Justice Anant Bijay Singh] Member (Judicial)
[Shreesha Merla] Member (Technical) AR/g Company Appeal (AT) (Insolvency) No. 1005 of 2020