

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins.) No. 299 of 2021
Under Section 61 of the Insolvency and Bankruptcy Code, 2016)
(Arising out of the `Impugned Order' dated 29.04.2021 in
IBA No.364 of 2020,
passed by the `Adjudicating Authority' National Company Law
Tribunal, Division Bench – II, Chennai)

In the matter of:

M/s. Primee Silicones (Chennai) Pvt. Ltd.

Rep. by its authorized person

R. Giridharan

No. 131/B, JRR Tower, Mustafa Street,

Rajarajan Nagar, Mettukuppam,

Vanagaram, Chennai 600095

..... Appellant

v.

M/s. UCAL Fuel Systems Ltd.

Raheja Towers, Delta Wing, Unit 705177

Anna Salai, Chennai 600002

..... Respondent

Present:

For Appellant : Mr. T. Sri Krishna Bhagavat, Advocate

For Respondents : Mr. P.H. Arvinth Pandian, Senior Advocate

For Ms. R. Raghav Sudha, Advocate

J U D G M E N T

(Virtual Mode)

[Per; Ms. Shreesha Merla, Member (Technical)]:

1. Dissatisfied with the 'Order' dated 29.04.2021 passed by the Learned Adjudicating Authority, (National Company Law Tribunal, Division Bench – II, Chennai) in IBA No.364/2020, M/s. Primee Silicones (Chennai) Private Limited/the 'Operational Creditor' preferred

this ‘Appeal’, challenging the ‘Order’ of dismissal of the Application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as ‘The Code’). While dismissing the Section 9 Application, the ‘Adjudicating Authority’ observed as follows:

“6. Further, the account is not a “Running Account” as stated in reply by respondent. Clearly, 17 out of 25 invoices are beyond the period of limitation. The applicant has not filed any documents to satisfy that the old invoices are valid and enforceable in the eye of law. The respondent has stated in para-8 of the reply, the payment was made to exact amount of each invoice. Hence, on perusal of pleadings and documents, we conclude that the account cannot be termed as “running account” as evidence in Invoices at Page 18 to page 42, calculation sheet at page.43. The Operational Creditor has claimed interest at the rate of 24% per annum since earliest invoice dated 29.04.2015. The claim of Applicant included principal and interest since 29.04.2015. Admittedly, out of 25 invoices 17 are barred by limitation. The applicant has failed to prove “debt” and “default” as stated in application. However, this order does not bar the applicant to approach Civil Court for recovery, if any.”

2. It is stated that the ‘Operational Creditor’ is involved in the business of manufacturing Metal Forming Fluid Lubricant and Industrial Oils and in the due course of business, the ‘Corporate Debtor’ had placed several ‘Orders’ and accordingly the ‘Appellant’/‘Operational Creditor’ has supplied ‘Die Coat’ to the ‘Corporate Debtor’ from the Year 2013 onwards and corresponding Tax Invoices were raised from time to time. It

is the case of the 'Appellant' that the last payment was received from the 'Corporate Debtor' on 07.11.2019 and despite several emails sent for seeking payment, the 'Corporate Debtor' did not respond. It is submitted that a 'Demand Notice' was issued on 07.02.2020, which was received by the 'Corporate Debtor', but the 'Company' has not made any further payments. It is the case of the 'Operational Creditor' that the 'Corporate Debtor' is required to pay a sum of Rs.13,24,275/- (Rs.8,03,815/- towards 'principal amount' and Rs.5,20,460/- towards 'interest' at 24% p.a.) and with further interest of 24% p.a. till the date of payment.

3. Learned Counsel for the 'Appellant' strenuously contended that the 'Operational Creditor' is a registered MSME; that the 'Corporate Debtor' has not disputed the receipt of goods or raised any disputes prior to the receipt of 'Statutory Notice' dated 07.02.2020, but their only contention is that some of the invoices are dated prior to 2017 and are hence 'time barred'. It is submitted that the Account is a 'running Account' and the 'claim' is well within the period of 'Limitation'. It is the case of the 'Appellant' that even if the Accounts are not construed to be a 'running Account', the email sent by the 'Corporate Debtor' on 23.10.2018, asking the 'Appellant' to reconcile the Accounts and share of 'payment advice' mentioning Invoice Number very specifically and also mentioning the details of the cheque dated 13.03.2017 drawn on Bank of India for

Rs.3Lakhs/- would show that the Respondent Company had admitted the liability. It is argued that since the payment was not received by the 'Appellant' as on 13.03.2017 or on any other subsequent dates, the communication between the 'parties' in October 2018 should be construed as an actual date of acknowledgment of default and therefore the 'Right to Sue' accrues on that date, and the Section 9 Application having been filed on 24.02.2020 was well within the period of 'Limitation'.

4. Learned Counsel for the 'Appellant' submitted that during the pendency of the case on 06.03.2021, at 4:00 PM, an amount of Rs.3,23,723.36/- was transferred to the Account of 'Appellant' without seeking leave of the 'Tribunal' and without giving any 'Notice' to the 'Appellant'. Therefore, the 'Appellant' as per Section 60 of the Contract Act, 1872, has adjusted the amount paid towards the interest dues. It is contended that the Respondent had served a memo on 08.03.2021 that 8 invoices, which are not 'barred by Limitation' have been paid, but the same was objected to on the ground that the amount was apportioned towards interest. As far as interest is concerned, the 'terms' and 'conditions' of the invoice attract 'Penal Interest' at 24% p.a. after the Credit period of 90 days. It is also submitted that the Hon'ble Supreme Court has held that any acknowledgement in the Balance Sheet of the

‘Corporate Debtor’ is an ‘acknowledgement of debt’, and in the present case, the ‘Corporate Debtor’ having admitted to the invoices in October 2018, would only show that ‘Corporate Debtor’ has acknowledged their liability to pay the amounts. Further, the earliest unpaid invoice is dated 29.04.2015, for which the ‘Limitation’ of three Years, expires on 28.04.2018, but the cheque payment alleged by the ‘Corporate Debtor’ is dated 13.03.2017 which construes an intention to pay and therefore the Application is well within the period of ‘Limitation’.

5. Learned Sr. Counsel Mr Pandian argued that the Application was clearly ‘barred by Limitation’ and that the Account cannot be termed as a ‘running Account’ as the ingredients of a ‘running Account’ would include:

(a) the value of the goods supplied to be debited in the Debit Column;

(b) when amounts are paid by the ‘buyer’ to the ‘seller’, they are entered in the Credit Column; and

(c) the difference is continuously maintained in the column for balance.

6. It is argued by the Learned Sr. Counsel for the Respondent/‘Corporate Debtor’, that non-payment of invoices and payment without specifying a particular invoice does not make the

transaction a 'running Account', which in any case is not the position in the present matter. The 'Appellant' for the first time in these proceedings, contended that the amount of Rs.3,23,723.36/- paid by the 'Corporate Debtor' has been appropriated in the manner provided in Section 60 of the Contract Act 1872, as the payment was made only towards the 'principal amount' in respect of the 8 invoices thereby eliminating any question of it being appropriated towards any alleged interest amounts and hence Section 60 of the Contract Act, 1872, is inapplicable to the facts of this case. It is only to overcome the bar of 'Limitation', that the 'Appellants' have resorted to this argument that the amount was apportioned towards interest, when many of the invoices do not carry the interest component. The 'interest rate' has been stipulated as 24% p.a. on every invoice, except the invoices raised between the Years 2017 & 2019, which are already paid by the 'Corporate Debtor'. The 'Appellant' themselves have calculated the number of days and delay and interest in respect of each 'individual invoice' clearly recognising that the transactions were on an individual 'invoice to invoice' basis and not a 'running Account'. It is the case of the Respondent/'Corporate Debtor', that the 'Appellant' cannot claim an interest on all the 17 invoices, in respect of which all claims are clearly 'time-barred'. With respect to the balance 8 invoices which have already been cleared, they do not stipulate

for payment of any interest and therefore the question of any interest liability in respect of these payments does not arise.

7. It is the case of the 'Corporate Debtor' that the email communications relied upon by the 'Appellant' does not construe 'acknowledgement of debt', but only contain a 'payment advice' from the Respondent. Further, the cheque which was issued by the Respondent in respect of these amounts was not even cleared by the Bank. The email includes a 'payment advice' from the Respondent that they have made payments to the tune of Rs.3Lakhs/- towards certain invoices by a cheque dated 13.03.2017. It is the case of the Respondents that the email can at best be treated as a Statement of payment and not an acknowledgement of a subsisting debt. Learned Sr. Counsel placed reliance on the Judgement of the Hon'ble High Court of Madras in '*Karamadai Naicken*' Vs. '*R. Raju Pillai & Anr.*'¹, in support of his submissions that a Statement made by the Debtor that he was under a liability, coupled with a Statement that he has discharged the debt, would not amount to an 'acknowledgement' of a subsisting liability. It is also contended that a cheque which is dishonoured, cannot be construed as part payment within the meaning of Section 20 of the Limitation Act, 1963. It is the case of the Respondent that the issue of Balance Sheets and 'acknowledgement' therein was

¹ AIR 1949 Mad 401

raised by the ‘Appellant’ for the very first time in these ‘Appeals’ and the said Balance Sheets have also not been filed. Nor is there any attempt made by the ‘Appellant’ to show as to how *‘Asset Reconstruction Company India Limited’ Vs. ‘Bishal Jaiswal and Anr.*², is applicable to the facts of this case.

Assessment:

8. The main point for consideration in this ‘Appeal’ is whether the ‘Adjudicating Authority’ was justified in dismissing the Application filed under Section 9 of the Code, as ‘barred by Limitation’. At the outset, the question as to whether the ‘Account’ between the ‘parties’ could be construed as a ‘running Account’ is being decided. Learned Sr. Counsel for the Respondent/‘Corporate Debtor’ has strenuously argued that the basic requirements of the Account having clear ‘Debit’ and ‘Credit’ entries was not satisfied in the present case and that all payments have been made towards ‘individual invoices’ and therefore the Account cannot be construed as a ‘running Account’. At this juncture, the Respondent placed reliance on the Judgement of the Hon’ble Delhi High Court in *‘Bharat Skins Corporation’ Vs. ‘Taneja Skins Corporation Private Limited’*³ in which, para 19, reads as follows:

“19. In case of a running and non-mutual account between the buyer and seller, when goods are

² (2020) 16 SCC 366

³ (2012) 186 DLT 290

delivered by the seller to the buyer, the value of the goods is debited in the debit column and when amounts are paid by the buyer to the seller, they are entered in the credit column. The difference is continuously struck in the column for balance. In such a case, when the buyer defaults to make balance payment, the seller's action is not for the price of goods sold and delivered but for the balance due at the foot of an account. Thus, Article 14 would have no application in suits of recovery of money due on a running and a non-mutual current account between the buyer and seller."

9. The Hon'ble High Court of Bombay in **'Wilson's Jacobs' Vs. 'Lucid Prints & Ors.'**⁴, has observed as hereunder:

"7. There is then an argument that between the parties there was a running account. The fact that there were continuous transactions does not make it a running account. Again the concept of a running account in commercial practice is well-known. It must be demonstrated that there are debits and credits going on simultaneously or on a regular basis and that balances are struck with some periodicity; not that there are a number of invoices, some of which remain unpaid. Non-payment of invoices and payment without specifying a particular invoice does not make the transactions a "running account"."

(Emphasis Supplied)

10. From the aforementioned Judgements it is clear that for an Account to be termed a 'running Account' it must be demonstrated that there are 'Debits' and 'Credits' entries going on simultaneously or on a regular

⁴ 2018 SCC OnLine BOM 1998

basis and the balances are struck with some periodicity. Non-payment of invoices and payment without specifying a particular invoice does not make the transaction a 'running Account'. As can be seen from the invoices/communication dated 18.04.2018, 24.04.2018, 12.05.2018, 12.10.2018, 26.10.2018, 15.11.2018, 11.12.2018 & 24.12.2018, it can be clearly seen that the amounts were paid towards specific invoices and therefore keeping in view the ratio of the aforementioned Judgements the said 'Account' cannot be termed as a 'running Account'.

11. Learned Counsel for the 'Appellant' placed reliance on the email dated 23.10.2018 in support of his contention that the said email specifies that the 'Corporate Debtor' had acknowledged their liability and the dishonouring of the cheque dated 13.03.2017 further strengthens his case. At this juncture, this 'Tribunal' finds it relevant to reproduce the email dated 23.10.2018:

From: Charles <materials_mmn@ucalfuel.co.in>
Date: Tue, 23 Oct 2018 at 15:23
Subject: Old Dues Payment Advice
To: <mkta@primeesilicones.com>

Sir,

Pls find attached Payment Advice from which pls reconcile with ur over dues ledger and revert back..

Regards,
B.Charles Moses,
Materials Dept,
Ucal Fuel System Ltd - Plant 1,
Maraimalai Nagar - 603209.
Kanchipuram District,
Chennai - Tamil Nadu.
India

Desk:044 - 47408187
Mail : materials_mmn@ucalfuel.co.in

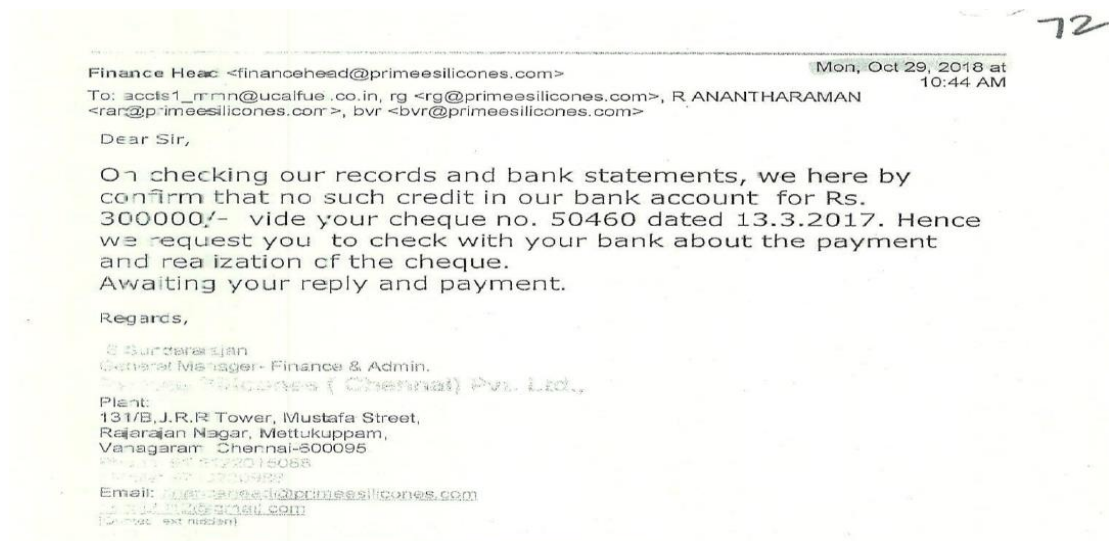
69

12. From the aforementioned email, it is clear that the subject of the email was 'payment advice' and the cheque was dated 13.03.2017 and the payments were towards the specific invoices the amount is for Rs.3Lakhs/-:

Payment Advice

UCAL FUEL SYSTEMS LIMITED						
Vendor Name	:	PRIMEE SILICONES (CHENNAI) PVT. LTD./10811				
Address	:	NO.5 MARUTHI NAGAR II PHASE TUNDALAM VILLAGE THIRUVERKADU POST, CHENNAI TAMIL NADU 600077				
Bank Account Name	:	BOI-CCB-Cash Credit				
Bank Account Num	:	801530110000006				
Check Number	:	50460				
Check Date	:	13-MAR-2017				
Invoice Number	Invoice Date	Voucher Number	Invoice Type	Invoice Amount	Amount paid	Amount Remaining
140-2015/16	25-MAY-2015	801719664	STANDARD	51304	51304	0
181-2015/16	04-JUN-2015	801719664	STANDARD	51304	51304	0
218-2015/16	16-JUN-2015	801719664	STANDARD	12451.5	12451.5	0
281-2015/16	01-JUL-2015	801719664	STANDARD	12826.5	12826.5	0
300-2015/16	06-JUL-2015	801719664	STANDARD	25652	25652	0
330-2015/16	13-JUL-2015	801719664	STANDARD	25652	25652	0
363-2015/16	22-JUL-2015	801719664	STANDARD	25652	25652	0
406-2015/16	03-AUG-2015	801719664	STANDARD	25652	25652	0
496-2015/16	22-AUG-2015	801719664	STANDARD	12826.5	12826.5	0
62-2015/16	29-APR-2015	801719664	STANDARD	51304	5904	0
620-2016/16	26-SEP-2015	801719664	STANDARD	51304	50775.5	0
				Total Amount:	300000	

13. It is also relevant to reproduce the email dated 29.10.2018:



14. From the aforementioned email it is established that the cheque was never realised and the amount was not paid. This cheque was meant for invoices dated 25.05.2015 to 25.09.2015, as can be seen from the aforementioned Statement of Account.

15. It is clear from the para 14 Statement of Account that these invoices pertain to the period from 25.05.2015 to 25.09.2015 and therefore pertain to the period 3 Years prior to the filing of the Application. The Section 9 Application was filed on 24.02.2020 and it is the case of the 'Appellant' that during the pendency of the proceedings on 08.03.2021, a sum of Rs.3,23,723.36/- was also paid by the Respondent.

Section 18 of the Limitation Act, 1963 reads as follows:

“18. Effect of acknowledgment in writing.—

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any

property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,

(b) the word “signed” means signed either personally or by an agent duly authorised in this behalf, and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.”

16. In the instant case, the contention of the Learned Counsel for the ‘Appellant’ that the email dated 29.05.2019 should be construed as ‘acknowledgement’ is also not within 3 Years of the dates of invoices. It

is also a settled proposition of law that a cheque which has not been encashed cannot amount to an 'acknowledgement of liability' in terms of Section 18 of the Limitation Act, 1963. This 'Tribunal' is of the considered view that the emails relied upon by the 'Appellant' do not strictly construe an 'acknowledgement of liability' as provided for under Section 18 of the Limitation Act, 1963. Though it is mentioned by the 'Appellant' in the 'Notes of Submissions' that these amounts have been 'acknowledged' in the Balance Sheets, the same has neither been produced before the 'Adjudicating Authority' or before this 'Tribunal'. This Pleading is not even a part of the grounds of 'Appeal' or pleaded before the 'Adjudicating Authority'.

17. This 'Tribunal' is also conscious of the fact that some of the invoices does not carry the interest component. Be that as it may, it is seen from the record that majority of the invoices are beyond the period of 'Limitation' and that interest claimed by the 'Appellant'/'Operational Creditor', as can be seen from the Statement made in Part-IV of the Application @24% p.a. is from the invoices dated 29.04.2015. The amounts said to be 'due and payable' include the 'principal and interest' calculated from the Year 29.04.2015 and therefore this 'Tribunal' agree with the finding of the 'Adjudicating Authority' that out of 25 invoices, 17 are 'barred by Limitation'.

18. The Hon'ble Apex Court in a catena of Judgements has laid down that IBC is not a Recovery Proceeding but is meant for Resolution. The 'Adjudicating Authority', exercising powers under Section 7 or Section 9 of IBC, is not a 'Debt Collection Forum'. The IBC tackles and/or deals with Insolvency and Bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize 'Solvent Companies' for non-payment of disputed dues claimed by an 'Operational Creditor'.

19. Needless to mention that the 'Appellant' may avail such other remedies or may be available in accordance with law.

20. For all the foregoing reasons, this 'Tribunal' is of the earnest view that there is no 'illegality' or 'infirmity' in the 'Well Considered and Reasoned Order' of the 'Tribunal' ('NCLT') in IBA No.364/2020 and therefore this 'Tribunal' hold that *Comp. App. (AT) (CH) (Ins.) No. 299/2021* is accordingly 'dismissed'. No costs.

**[Justice M. Venugopal]
Member (Judicial)**

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

17/02/2023
HIMANSHU / TM