NATIONAL COMPANY LAW APPELLATE TRIBUNAL. PRINCIPAL BENCH,

NEW DELHI

Company Appeal (AT) (Ins) No. 1286 of 2022

IN THE MATTER OF:

RAMDAS DUTTA

Suspended Director of D.P. Agro Mills Pvt. Ltd., Son of Late Dhanapati Dutta, Working for gain at Alamganj (Near S.B.S.T.C Garage), P.O. Nutanganj, P.S. and District – Burdwan, Alamganj, West Bengal – 713 102 **...Appellant**

Versus

IDBI BANK LIMITED

A Banking Company constituted under the Industrial Development Bank of India Act, 1964, Having its registered office at: IDBI Tower, WTC Complex, Cuffe Parade, Mumbai 400 005 Acting through NPA Management Group, IDBI Bank Limited, 44, Shakespeare Sarani, Kolkata – 700 017 **...Respondent No. 1**

MR. PANKAJ KUMAR TIBREWAL

Interim Resolution Professional of D.P. Agro Mills Pvt. Ltd. having his office at: Chita 3E, Duke Residence, 13, Chanditalal Lane, Ashok Nagar, Tollygunge, Regent Park, Kolkata West Bengal, 700 040 **...Respondent No. 2**

Present:

For Appellant : SR. Adv. Malvika Trivedi, Adv. Ashish Choudhury, Adv. Arpit Choudhury, Adv. Anand Kamal, Adv. Shailendra Salria, Adv. Sujal Gupta, Adv. Akash Agarwal.

For Respondent : Adv. S.K. Garg, Adv. Girish Verma, for IDBI
Adv. Aditya Gauri, Adv. Abhinav Tyagi, for R2

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is filed by the Suspended Director of the Corporate Debtor (D.P. Agro Mills Pvt. Ltd) against the order dated 26.08.2022 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench –I, Kolkata) in CP(IB) No. 1847/KB/2019 by which an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Code') by the IDBI Bank Limited (Financial Creditor) has been admitted and Pankaj Kumar Tibrewal has been appointed as the Interim Resolution Professional (in short 'IRP'). However, at the time of preliminary hearing of this appeal on 20.12.2022, notice was issued to the Respondents and Interim order was granted to the effect that "no further steps shall be taken in pursuance of the impugned order".

2. Brief facts of this case are that the IDBI Bank Limited (in short 'Bank') filed an application under Section 7 of the Code before the Adjudicating Authority on 01.11.2019 for the resolution of the defaulted amount of Rs. 31,57,17,939.56 calculated as on 08.01.2019 which includes interest @10.75%. According to the Bank, it sanctioned cash credit limit of the Corporate Debtor to the tune of Rs. 5,00,00,000/- which later on enhanced to Rs. 7,50,00,000/-. The Bank had allegedly issued a loan recall notice on 26.02.2013 and also issued notice on 17.08.2013 invoking personal guarantee of the directors of the Corporate Debtor, namely, Shri Ramdas Dutta, Shri Debdas Datta and Shri Biprodas Dutta. It also issued letter

dated 17.08.2013 to the Corporate Debtor regarding redemption of mortgage for the default committed by the Corporate Debtor and took recourse under the SARFAESI Act, 2002 by issuance of notice dated 10.10.2013 under Section 13(2) of the said Act. Subsequently, the Bank issued notice dated 01.01.2014 under Section 13(4) of the SARFAESI Act, 2002 to the Corporate Debtor.

3. It is averred that the Bank, with the concurrence of the Corporate Debtor offered One Time Settlement (OTS) vide letter dated 01.11.2018 under SARAL KARJ BHUGTAN YOJNA which was accepted by the Corporate Debtor on 28.12.2018 and the said OTS was extended from time to time but the Corporate Debtor failed to pay and hence OTS proposal was cancelled on 01.08.2019 and on 01.11.2019 the petition under Section 7 of the Code was filed before the Adjudicating Authority.

4 It is an admitted fact that the Bank did not mention the date of default in Part IV of Form 1 which is a mandatory requirement in view of the fact that Section 7 of the Code can be invoked only if there is a debt and default. Consequently, the Adjudicating Authority passed an order dated 15.11.2021 providing an opportunity to the Bank to file a supplementary affidavit to place on record formal date of default, the balance sheet of the Corporate Debtor and one time settlement related communications. In this regard, it would be relevant to refer to the order dated 15.11.2021 which read as under:-

> “Ld. Counsel on both sides present.
> Ld. Counsel appearing for the Financial Creditor seeks leave to file a Supplementary Affidavit to place on record the formal date of default and the Balance Sheet of the Corporate Debtor and OTS related communication. In view of the judgment of the Hon’ble

Supreme Court in Bank of Baroda (Dena Bank) Vs. Shiva Kumar Reddy dated 04.08.2021.
At request leave to file Supplementary Affidavit is granted. Supplementary Affidavit is to be filed within a period of three weeks and copy shall be served on the Counsel on record for the Corporate Debtor, who shall have 10 days thereafter to file the reply affidavit.
List this matter upon completion of pleadings on 14.01.2022."

5. Pursuant to the aforesaid order, Supplementary Affidavit was filed in which the following averments were made in Para 26 which read as under:-

"26. A statement showing the series of events for the accounts maintained of the Corporate Debtor maintained with the Applicant Bank:-

D.P. Agro Mills Pvt. Ltd.

Sl. No.	Particulars	Date
1.	Date of Default	30.06.2011
2.	Date of NPA	28.09.2011
3.	Recourse under SARFAESI Act, 2002	10.10.2013
4.	Date of Representation /s 13(3) of SARFAESI Act, 2002	04.12.2013
5.	Balance Sheet of the CD showing loan	31.03.2015
6.	Balance Sheet of the CD showing loan	31.03.2016
7.	Balance Sheet of the CD showing loan	31,03.2017
8.	Balance Sheet of the CD showing loan	31.03.2018
9.	Letter issued by the Applicant Bank for OTS under SKBY	01.11.2018
10.	OTS Offer under SKBY accepted and signed by the CD	28.12.2018
11.	Letter of Approval of OTS under SKBY accepted and duly signed again by the Corporate Debtor	21.01.2019
12.	Letter from the CD regarding acknowledgement of debt due to the Applicant Bank and acceptance of offer to replay in terms of the SKBY Yojna	19.04.2019

6. However, it is made clear that the dates given in Para 18 of the impugned order appears to have been inadvertently mentioned as the dates

and events mentioned in para 18 of the impugned order pertains to another case bearing CP (IB) No. 1749/KB/2019 which was also decided on the same date i.e. 26.08.2022 in which CA (AT) (Ins) No. 1285 of 2022 has been filed before this Tribunal.

7. Be that as it may, the Corporate Debtor contested the application filed under Section 7 of the Code on the ground that it has been filed beyond the period of limitation and is not maintainable. The Adjudicating Authority framed a question as to whether the petition filed under Section 7 of the Code is barred by limitation or not. The Adjudicating Authority recorded following findings of fact in Para 20, 21, 22, 25 & 26 of the impugned order to arrive at the conclusion that the application filed under Section 7 of the Code by the Bank is within limitation:-

> "20. Upon perusal of the record, it is apparent that transaction between the parties was purely financial in nature and there is an existence of Financial Debt. From the above records it is apparent that from time to time the Financial Creditor under SARAL KARJ BHUGTAN YOJNA extended One Time Settlement offer to the Corporate Debtor and the OTS was accepted by the Corporate Debtor [at page 233 of the Company Petition].
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> 21. Balance sheet for year ending as on 2014 - 2015, 2015 - 2016, 2016 - 2017 & 2017 - 2018 of the Corporate debtor reflects that Corporate Debtor has certain short term borrowings which is showing that there exists cash credit facilities from the Bank. Further the Balance sheet also reflects secured term loans (Long term borrowings). Thus it is evident that the Corporate Debtor is still acknowledging the debt due to the financial creditor being the Financial Creditor in the instant case.
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> 22. Further, as per the Auditors' Report of the Corporate Debtor for financial year ending as on 2014 – 2015 (page 61 of the Supplementary Affidavit), 2015 – 2016 (page 80 of the Supplementary Affidavit), 2016 - 2017 (page 101 of the Supplementary Affidavit) & 2017 - 2018 (page 125 of the

Supplementary Affidavit), it states that the Corporate Debtor has defaulted in the repayment of loans or borrowings to financial institutions, banks.

25. In light of the above facts and circumstances there has been continuous acknowledgement in the Balance Sheet of the Corporate Debtor for the Financial Balance sheet for year ending 2011, 2012, 2013 & 2018 of the Corporate Debtor, which would extend the limitation period from time to time.

26. Further, it is seen from the record that the date of default has been mentioned as 30 June, 2011, which stood revived with the acceptance of the OTS proposal by the Corporate Debtor on 28 December, 2018. Moreover, upon perusal of the records at page 231 and 232 of the Petition, it is apparent that the Corporate Debtor also made part payment of the OTS proposed amount. Further, the settlement proposal under the SARAL KARJ BHUGTAN YOJNA provided for the payment of the balance amount within 31 March, 2019."

8. Counsel for the Appellant has vehemently argued that an application under Section 7 of the Code can be filed for initiation of Corporate Insolvency Resolution Process (in short 'CIRP') only on the occurrence of the default. In this regard, Section 7(1) of the Code has been referred to which is reproduced as under:-

"7. Initiation of corporate insolvency resolution process by financial creditor.
(1) A financial creditor either by itself or jointly with 2[other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred."

9. She has further submitted that it is now well settled that the limitation to file an application under Section 7 of the Code is to be taken

from Article 137 of the Limitation Act, 1963 (in short 'Act') which is also reproduced as under:-

Description of suit	Period of limitation	Time from which period begins to run
Any other application for which no period of limitation is provided elsewhere in this division.	Three years.	When the right to apply accrues.

10. It is further submitted that the Bank has itself given the date of default as 30.06.2011 which shall be the date when the right to apply accrued and thereafter the limitation of three years is to be counted which stand expired w.e.f. 01.07.2014. It is contended that the Adjudicating Authority has made contradictory observations in Para 21 and 25 of the impugned order because in Para 21 it has been observed that "Balance sheet for year ending as on 2014-15, 2015-16, 2016-17 & 2017-18 of the Corporate Debtor reflects that the Corporate Debtor has certain short term borrowings which is showing that there exists cash credit facilities from the Bank." In para 25 it has been observed that "In light of the above facts and circumstances there has been continuous acknowledgement in the balance sheet of the Corporate Debtor for the Financial year ending on 2011, 2012, 2013 & 2018 of the Corporate Debtor, which would have extended the limitation period from time to time". It is further submitted that the Adjudicating Authority appears to have mixed the facts of two cases which were disposed of on the same day i.e. CP(IB)No. 1847/KB/2019 and CP(IB) No. 1749/KB/2019. Otherwise, the date of default is given in the

supplementary affidavit, which has been referred to above, and balance sheet for the year 31.03.2015 onwards till 31.03.2018 have been mentioned but there is no balance sheet of the year 2011, 2012 & 2013 on record. It is further submitted that since there is no balance sheet of the year 2011, 2012 and 2013 filed by the Bank, therefore, there is no question of acknowledging the debt during this period which has to be counted from 30.06.2011 to 30.06.2014 for the purpose of further extending the limitation. It is further submitted that as per Section 18 of the Act the acknowledgement of a debt has to be unambiguous and unequivocal which would further extend the period of limitation from the date of acknowledgment. She has referred to Section 18 of the Code which is reproduced as under:-

> "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.”

11. She has also referred to a judgment of the Hon’ble Supreme Court rendered in the case of ‘Sampurna Singh & Ors. Vs. Niranjan Kaur & Ors., AIR 1999 SC 1047’ in which it has been held that the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing of the suit, and if the limitation has already expired it would not revive under this Section. She has further submitted that the Bank cannot take refuge to the OTS because if the OTS is an acknowledgment then it has to be within the period when the limitation was subsisting whereas according to the Respondent OTS was allegedly accepted in January, 2019.

12 In reply, Counsel for Respondent has admitted that the date of default was not mentioned in the Part IV of Form 1 and has been mentioned only in the supplementary affidavit which is 30.06.2011. It is also not denied that the balance sheet of the year 2011, 2012 & 2013 are also not on record, however, it is argued that the Appellant had admitted its liability while replying to the notice dated 10.10.2013 issued under Section 13(2) of the SARFAESI Act, 2002 on 04.12.2013. It is also submitted that the Appellant had also admitted its liability when it accepted the OTS offer made by the Bank on 21.01.2019 whereas the Application under Section 7 was filed on 01.11.2019.

13. We have heard Counsel for the parties and perused the record.

14. The issue involved in this appeal is as to whether the application filed under Section 7 of the Code is within the period of limitation?

15. It has now been repeatedly held by the Hon'ble Supreme Court and followed by this Tribunal that Article 137 of the Act would apply for counting the period of limitation in respect of an application filed under Section 7 of the Code. Article 137 of the Act provides three years from the date when the right to apply accrues. Right to apply accrues from the date of default as has been provided in Section 7 of the Code itself.

16. Admittedly, the Bank did not mention the date of default in Part IV of Form 1 of the application filed under Section 7 of the Code and disclosed the date of default as 30.06.2011 only in the supplementary affidavit. The trigger date is thus 30.06.2011 for the purpose of counting the period of three years which is up to 30.06.2014. Meaning thereby, w.e.f 01.07.2014 the limitation to apply under Section 7 of the Code had expired. However, Section 18 of the Act deals with acknowledgement of the debt for the purpose of extension of limitation but it categorically provides that the acknowledgement has to be made during the period of three years and not beyond that. In the present case, the Bank could not produce any evidence to prove that there has been acknowledgment in writing and signed by the Appellant for the purpose of extension of period of limitation except for the reply to the notice issued under Section 13(2) of the SARFAESI Act, 2002 in which the Appellant did not make any unambiguous and unequivocal acknowledgement which could extend the period of limitation. The Bank has also relied upon OTS offer dated 28.12.2018 which is purported to have been approved and accepted by the Corporate Debtor on 21.01.2019 but that too was not during the period of limitation and cannot be counted for

the purpose of extension of period of limitation in terms of Section 18 of the Act.

17. Thus, the limitation counted from the date of default i.e. 30.06.2011 had expired on 30.06.2014 and there is no acknowledgement of debt during this period in terms of Section 18 of the Act. The Bank did not place on record the balance sheet prior to 2014 and the only balance sheets placed on record are from 31.03.2015 to 31.03.2018 and the OTS also took place on 21st January, 2019 much beyond the period of three years.

18. Thus, looking from any angle, we do not find any substance in the argument of Counsel for Respondent for the purpose of maintaining the impugned order which is patently erroneous and based upon mis-reading of evidence. Hence, the appeal is hereby allowed and the impugned order is set aside. No order as to costs.

19. Before parting with the order, it would be relevant to refer to the prayer made by the IRP during the course of hearing about the cost incurred for which he may avail any other remedy available to him in accordance with law.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi

26th April, 2023.

Sheetal