

National Company Law Appellate Tribunal
Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 556 of 2020

(Arising out of Order dated 03rd March, 2020 passed by National Company Law Tribunal, Chandigarh Bench, Chandigarh, in C.A. No. 882/2019 in C.P. (IB) No.- 347/Chd/Pb/2018).

IN THE MATTER OF:

**M/s. Invent Assets Securitisation &
Reconstruction Pvt. Ltd.**

**Having its registered office at:
Jolly Maker Chamber No. 2,
225, Nariman Point, Mumbai – 400021**

And

**Corporate Office at suite B,
Ground Floor,
Bhaktawar Commercial Premises Society,
Nariman Point, Mumbai - 400021**

...Appellant

Versus

**M/s. Girnar Fibres Ltd.
Having its registered office at:
Guru Nanak Dev Nagar,
Street No. 6, Basti Jodhwal,
Ludhiana – 141007.**

...Respondent

Appellant: Mr. Anoop Prakash Awasthi, Advocate.
Respondent: Mr. Manish Jain and Ms. Divya Sharma, Advocates.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Impugned Order dated 03.03.2020 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) in CA No. 882/2019 in CP(IB) No. 347/Chd/Pb/2018, *M/s. Invent Assets Securitisation & Reconstruction Pvt. Ltd.* preferred this Appeal against *M/s. Girnar Fibres Limited* (hereinafter

referred as 'Corporate Debtor'). By the Impugned Order, the Adjudicating Authority has dismissed the Application filed by the Appellant under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the 'Code'), on the ground that the Application was barred by Limitation.

2. **Submissions of Learned Counsel appearing on behalf of the Appellant**

- Learned Counsel vehemently contended that the Corporate Debtor had failed to repay the amount of the Financial Facility granted to it, on account of which the Corporate Debtor was classified as NPA by State Bank of India (SBI) on 28.02.2002. On 21.05.2005, the Account of the Corporate Debtor was restructured under Corporate Debt Restructuring (CDR) Scheme by the Corporate Debt Restructuring Cell with an approval dated 25.05.2005. Various credit facilities were sanctioned by the SBI under CDR Mechanism till 30.06.2005.
- It is submitted that the first reference before BIFR was made on 24.11.2003 and the second reference was made on 01.11.2004. The BIFR 107/2004 and 338/2004 respectively were dismissed on 04.05.2016 as not maintainable. Therefore, the period between 27.11.2003 uptill 04.05.2016 has to be excluded for the purpose of calculating limitation.
- The Application under Section 7 was filed before the Adjudicating Authority on 01.10.2018, within three years of the first accrual of the cause of action which is on 05.05.2016 after the dismissal of BIFR reference on 04.05.2016.

- Learned Counsel for the Appellant had filed an affidavit dated 26.11.2019 giving the timelines for the purpose of Limitation and also attached the RTI Application together with the Reply received from SBI in which the date of NPA was mentioned.
- It is argued that fresh loan documents were executed under the Restructuring Mechanism right from 25.05.2005 till the revival letter was sent by the Corporate Debtor on 31.01.2007. It is also submitted that the transactions in the Loan Account actively continued till June, 2008. It is contended that the first cause of action accrued on 05.05.2016 after dismissal of both the BIFR references and the Application was filed on 01.10.2018. Without addressing the issues, the Adjudicating Authority has erroneously dismissed the Application on the ground of limitation.

3. **Submissions of the Learned Counsel appearing on behalf of the Respondent:**

- Learned Counsel appearing for the Corporate Debtor submitted that the period of limitation had already expired even before the reference was made to the BIFR.
- The period from 25.04.2006 to 05.05.2016 cannot be excluded for computing the limitation period. Section 22(5) of SICA, 1986 is not attracted to the present case since the period of limitation i.e. 3 years had already expired before the BIFR reference was made by the Corporate Debtor.
- Admittedly, the Appellant had taken the possession of the property of the Corporate Debtor on 03.10.2012 under Section 13(4) SARFAESI

Act, 2002. On account of which, any reference before the BIFR stands abated, if the secured creditor has taken measures under Section 13(4) of the SARFAESI Act, 2002.

- The alleged admission in the balance sheet cannot extend limitation as the unsigned pages without any authentication also demonstrates that SBI is still the charge holder.
- The original lender, SBI vide its letter dated 07.04.2010 informed the Respondent that its Account has been assigned to the Appellant on 07.04.2010, whereas the Deed of Assignment was purportedly dated 31.03.2010.
- In the Demand Notice dated 07.11.2011 there is a reference to existence of a fresh Deed of Assignment dated 22.09.2011 executed in favour of the Appellant with retrospective effect, on 31.03.2010. The earlier Deed of Assignment was reported to have been lost as mentioned in the latter deed. It is contended that there has been legally untenable proposition of two deeds of Assignment in favour of the Appellant, effective from 31.03.2010 to 21.09.2011.
- The name of the Appellant does not reflect in the list of charge holders on the MCA websites.
- The Learned Counsel strenuously argued that no additional documents can be allowed to be placed by the Appellant which were not part of the record before the Adjudicating Authority. The Adjudicating Authority had given an opportunity to the Appellant to rectify the defect in the certificate under the Banker's Book of

Evidence Act, subsequent to which, the Appellant filed a compliance affidavit vide diary No. 7268 dated 18.12.2019 which was later withdrawn with the liberty to file a fresh compliance affidavit. Subsequently a fresh compliance affidavit vide diary No. 1246 dated 14.02.2020 was filed attaching another certificate under the Banker's Book of Evidence Act. Hence sufficient opportunity was given to the Appellant and further ought to be permitted to be filed at this stage.

Assessment:

4. While dismissing the Application preferred under Section 7 of the Code, the Ld. Adjudicating Authority observed as follows:

"25. In the present case, Invent Assets has not placed on record any such order made by the Board which would give right to Invent Assets to claim the exclusion of period under Section 22(5) of SICA, 1985.

26. Therefore, the claim of exclusion for the purposes of limitation in view of Section 22(5) of SICA, 1985 cannot be accepted.

27. The learned counsel for Invent Assets has relied on the Annual reports for 2015-2016 and 2016-17 of Girnar to show that Girnar has availed credit facilities from BI which were subsequently assigned to Invent Assets and therefore, the period of limitation is extended.

28 Section 18 of the Limitation Act, 1963 is as below:-

"18. Effect of acknowledgment in writing.

(1) Where, before the expiration of the prescribed period for a suit of 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."

29. In the present case, the prescribed period commence from 28.02.2002 and as discussed above, can be taken to be extended and fresh period of limitation computed from the claimed payment on 23.06.2008. The present claim based on the annual reports for 2015-16 and 2016-17 are beyond the expiration of the prescribed period and therefore, Section 18 of the Limitation Act, 1963 does not have Application. Moreover, the acknowledgment of liability is to be made in writing signed by the party against whom the property or right is claimed. No such signatures at pages 922 and 923 of the petition are brought to our notice. Moreover, pages 922 and 923 are only "Classification of Borrowings (Table)" and the complete Balance Sheet is not filed. The plea under Section 18 of the Limitation Act is therefore, rejected.

30. The learned counsel for Invent Assets has relied on *M/s R. Sureshchandra & Co. vs. M/s Vadnere*

Chemical Works AIR 1991 Bom 44 and to para 10 thereof which reads as follows:-

"10. There is another reason why the claim is good in law even if we assume that Ex. D was not executed before the expiry of period of limitation. Section 25(3) Contract Act validates a promise to pay a debt barred by limitation. This, it was argued, is not the stand of the plaintiff and cannot therefore be taken into consideration. The pleadings do not have to reflect legal submissions. They are to incorporate only the material facts. The making of the acknowledgment has been pleaded and this is cited as a reason for the claim in suit being within time. Not describing the acknowledgment as a promise would not deprive plaintiff of the right to have recourse to the legal provision applicable. I understand that after the expiry of the period of limitation nothing short of a clear promise can provide a fresh period of limitation. But such a promise can also be inferred by necessary implication. The Supreme Court in *Hiralal v. Badkulal* quoted with approval a Privy Council decision in *Maniram v. Seth Rupchand* 33 Ind Appeals 165 (PC) (C), that an unconditional acknowledgment was sufficient to furnish a cause of action for it implied a promise to pay. A decision of the Allahabad High Court to the contrary (AIR 1935 All 129), was held as not laying down good law. There is nothing ambiguous about Ex.D. It Says that as on 13-11-1974 defendant 1 is indebted to the plaintiff to the extent of Rs. 3,40,652,26 ps. The balance sheet is signed by defendant 3 who is a partner of the firm. Her competence to bind the firm is not disputed. Being thus clear, it amounts to a promise within the meaning of Section 25(3) of the Contract Act. If so, the suit is plainly within time".

31. Section 25(3) 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....

(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....

32. Therefore, Section 25(3) of the Indian Contract Act 1872 becomes applicable only where a promise is made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf. The Hon'ble Bombay High Court in *M/s R. Sureshchandra & Co. vs. M/s Vadnore Chomical Works* AIR 1991 Bom 44 supra has similarly held that the balance sheet is signed by defendant 3 who is partner of the firm, her competence to bind the firm is not disputed, and being thus clear, it amounts to a promise within the meaning of Section 25(3) of the Contract Act. In the discussion with reference to Section 18 of the Limitation Act, we have found that the complete balance sheet for 2015-16 and 2018-17 is not filed and that even the extract given at pages 922 and 923 of the petition are not signed. Therefore, the judgement of the Hon'ble Bombay High Court in *M/s R. Sureshchandra & Co. vs. M/s Vadnore Chemical Works* AIR 1991 Bom 44 supra and Section 25(3) of the Indian Contract Act are not applicable to the facts of the present case.

33. In result thereof, the plea raised by Girnar that the Application in CP (1B) No.347/Chd/Pb/2018 is not filed within the period of limitation is accepted.

34. CA No.882/2019 is allowed and CP 1B No.347/Chd/Pb/2018 is dismissed.

Pronounced in open court"

5. The main point for consideration in this Appeal is whether the Application preferred by the Appellant under Section 7 of the Code, is barred by Limitation.

6. It is not in dispute that the SBI had declared the account of the Corporate Debtor as NPA on 28.02.2002. On 25.04.2006, the Corporate Debtor was declared sick by BIFR under the SICA Act, 1986. It is the main case of the Appellant that the Corporate Debtor was sanctioned various credit facilities by SBI till 30.06.2005 under the CDR Mechanism; that the Appellant had assigned the loan by SBI with an Assignment Agreement dated 22.09.2011; that a demand notice was issued under Section 13(2) of SARFAESI Act, 2002 on 07.11.2011 to the Corporate Debtor as well as to the Guarantors in the loan account of the Corporate Debtor demanding an amount of Rs. 49,78,54,187.32/-; that the Corporate Debtor filed a reference before BIFR vide a Case No. 107/2004 and 338/2004, whereby it was declared as sick unit on 25.04.2006 and then reference was dismissed as not maintainable on 04.05.2016; that the Corporate Debtor challenged the validity of the assignment deed dated 22.09.2011 which is pending before the Hon'ble High Court of Madhya Pradesh; that the Application was preferred by the Appellant on 01.10.2018 and therefore it is within three years of the first accrual of cause of action, which is contended to be 05.05.2016, subsequent to the dismissal of the BIFR reference on 04.05.2016.

7. It is seen from the record that three years form the date of NPA i.e. 28.02.2005, as per Article 137 of the Limitation Act, 1963, expires on

28.02.2005. AAIFR order dated 01.10.2015 as reproduced in the Rejoinder dated 08.12.2020 filed by the Appellant herein is detailed hereunder:

“15. For the aforesaid reasons, we are of the considered view that the pending reference of the respondent sick company cannot be maintained in its present form and is liable to be dismissed. However the cause for the non-maintainability of the reference is curable by suitable modification/amendments of the pending reference. Accordingly we dispose of the appeal with direction to BIFR not to continue the reference of the respondent sick company in its present form. However the respondent sick company would be at liberty to modify/amend the said reference by excluding the asset already taken over by the secured creditors under Sec 13(4) of SARFAESI Act within 30 days. If such an amendment/modification is carried out by the respondent sick company in its pending reference, then BIFR would consider the same and continue with it. However if the respondent sick company fails to do so within the stipulated time, then its pending reference will be deemed to have been dismissed as non-maintainable.”

(Emphasis Supplied)

8. This issue is to be decided on the touchstone of the ratio of the Hon’ble Supreme Court in ‘Dena Bank (now Bank of Baroda)’ Vs. ‘C. Shivakumar Reddy & Anr.’ 2021 SCC OnLine SC 543, in which Judgement, the Hon’ble Apex Court in paras 142 & 143 has concluded as follows:-

142. To sum up, in our considered opinion an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

143. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid.”

(Emphasis Supplied)

9. At this juncture, it is important to see the Chronological events which are tabled as hereunder:-

1.	28.02.2002	NPA declaration by SBI	
2.	25.04.2006	CD was declared sick by BIFR under SICA	4 years and 58 days
3.	04.05.2016	Dismissal of reference by BIFR	10 years and 9 days
4.	01.10.2018	Filing of Application u/s 7 before Ld. Adjudicating Authority by Appellant	2 years and 149 days

10. The BIFR reference was abated as the Corporate Debtor did not modify the pending reference therefore the deemed date of abatement of reference relates back to 13.08.2015. Section 22(5) of SICA, 1968 is not attracted to the present case since the period of limitation i.e. 3 years had already expired before the BIFR reference was made by the Corporate Debtor. Any reference before the BFIR is abated, if secured creditors have taken measures under Section 13(4) of the SARFAESI Act, 2002 as provided for under Section 41 of the SARFAESI Act, 2002. The period between

25.04.2006 when the Corporate Debtor was declared sick by BIFR under SICA and 04.05.2016 when the reference was dismissed cannot be excluded from computing the limitation period. Especially keeping in view the fact that the possession of the property of the Corporate Debtor under Section 13(4) of SARFAESI Act, 2002 was taken away back on 03.10.2012. At the cost of repetition, as the reference stands abated on 03.10.2012, the period of limitation cannot be extended to 2016. The contention of the Learned Counsel for the Appellant that the CDR was sanctioned to the Corporate Debtor vide a letter dated 30.06.2005 and since the loan was attempted to be restructured, it has to be construed as continuing cause of action, is untenable, keeping in view that the Corporate Debtor was declared sick by BIFR on 25.04.2006 itself. The argument of the Learned Counsel that 05.05.2016 should be taken as the first accrual of the cause of action is unsustainable, as the period of limitation i.e. 3 years had already expired before the BIFR reference was made by the Corporate Debtor. The documentary evidence on record does not establish any acknowledgment of liability made in writing, signed by the party against whom the property or right is claimed and hence Section 18 of the Limitation Act, 1963 cannot be made applicable to the facts of the instant case.

11. In Jignesh Shah and Anr. Vs. Union of India 2019 (10) SCC 750, the Hon'ble Apex Court observed that *"the acknowledgment of liability under Section 18 of the Limitation Act, 1963 would certainly extend the limitation period but a suit for recovery which is a separate and independent proceeding distinct from the remedy for winding up would in no manner impact the limitation within which the winding up proceeding is to be filed, by somehow*

keeping the date alive for the purpose of winding up proceeding". In '*Basudev R. Bhujwani*' Vs. '*Abhyudaya Co-operative Bank Ltd.*' (2019) 9 SCC 158, it is further held that *"the right to sue accrues when a default occurs"*. In '*B.K. Educational Services Pvt. Ltd.*' Vs. '*Parag Gupta and Associates*', (2019) 11 SCC 633, it is observed by the Hon'ble Supreme Court that *"if the default occurred over three years prior to the date of filing of the Application, the Application would be barred under article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such an Application"*.

12. In the instant case, it is clear that the right to sue accrued when the default occurred way back on 28.02.2002. The material on record does not evidence any acknowledgment of liability under Section 18 of the Limitation Act, 1963 to extend the limitation period. The dismissal of the BIFR reference, relied upon by the Learned Counsel for the Appellant, is also dated 04.05.2016 which is beyond three years from the date of default. The Application under Section 7 was filed on 04.06.2019 for an amount which even according to the Appellant, fell due on 14.02.2008 and cannot revive a debt which is no longer due as it is time barred. Therefore, we are of the considered view that the ratio of the Hon'ble Supreme Court in paras 142 & 143 of '*Dena Bank (now Bank of Baroda)*' (*Supra*) is squarely applicable to the facts of this case. All the Judgements relied upon by the Learned Counsel for the Appellant have been discussed by the Hon'ble Supreme Court in '*Dena Bank (now Bank of Baroda)*' (*Supra*).

13. In a catena of Judgements, the Hon'ble Supreme Court has observed that IBC is not a recovery proceeding.

14. For all the afore-noted reasons, we are of the considered view that the Ld. Adjudicating Authority has rightly dismissed the Application filed under Section 7 of the Code, as barred by limitation. Accordingly, the Appeal is dismissed. The Impugned Order is upheld. No order as to costs.

15. Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench) forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
18th November, 2021

ha/basant