(NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 330-331 of 2020

[Arising out of Impugned Order dated 28th January 2020, passed and amended by Order dated 10th February, 2020, by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition (IB) No.1447/KB/2018]

IN THE MATTER OF:

State of West Bengal
Through the Principal Secretary
'West Bengal Biotech Development
Corporation Limited'. Appellant

Versus

1. **Keshav Park Private Limited**
Operational Creditor
32, Ezra Street, 6th Floor
Room No.664, Kolkata – 700001
West Bengal Respondent No.1

2. **Mr Sashi Kumar Agarwal**
Interim Resolution Professional
'Subarna Apartment', 21N
Block – A, New Alipore
Kolkata – 700 053, West Bengal Respondent No.2

Present:

For Appellant	:	**Mr Arun Kathpalia, Sr Advocate with Mr DN Sharma, Ms Diksha Gupta and Mr Palzer Mokhtan, Advocates.**
For Respondent	:	**Mr Soumya Dutta and Mr Debmalya Ghosal, Advocates for R-1.** **Ms Shashi Agarwal, Advocate for R-2/IRP**

CORAM:

Hon'ble Mr Justice M. Venugopal, Member (J)
Hon'ble Mr V. P. Singh, Member (T)
Hon'ble Dr Ashok Kumar Mishra, Member (T)

J U D G M E N T
(Virtual Mode)

[Per; V. P. Singh, Member (T)]

1. This Appeal arises out of the Impugned Order dated 28th January 2020, further amended on dated 10th February 2020, passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition (IB) No.1447/KB/2018, admitting the petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**').

2. Parties in the Company Petition represents them in this Appeal for the sake of convenience.

3. **FACTUAL BACKGROUND:**

The Appellant/State of West Bengal, through the Principal Secretary, West Bengal Biotech Development Corporation Limited, which owns 100% share in the 'West Bengal Biotech Development Ltd' (for brevity 'WBBDL') has filed this Appeal against the Order admitting the petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016. Accordingly, the Corporate Insolvency Resolution Process (in short, 'CIRP') was initiated against the Corporate Debtor 'West Bengal Biotech Development Corporation Limited'[1], and a moratorium was declared vide Order dated 28.01.2020 as amended by the Order dated 10.02.2020.

3.1 The Operational Creditor/Respondent No.1 had initially approached the Corporate Debtor 'WBBDCL' and represented that the Company engaged

[1] West Bengal Biotech Development Corporation Limited ('WBBDCL')

in interior decoration and renovation work. Under a bonafide belief on the said representations of the Operational Creditor, the Corporate Debtor assigned a particular job to be performed in respect of a building at Salt Lake City, Kolkata, to the WBBDCL. The said work entailed carrying out glass partitioning, installing electrical fittings, air-conditioning, and false ceilings at the said building. The said work was required by Respondent No.1 by the plan enclosed with the letter dated 22.02.2011 issued by the Corporate Debtor. However, the Operational Creditors/Respondent No.1 could not complete the subject work urgently since the inauguration of the said building was scheduled on 28.02.2011, which was six days after the issuance of the letter described above. Consequently, the Operational Creditor/Respondent No.1 failed to render the work as obligated under the job. The work done by the Operational Creditor/Respondent No.1 was contrary to the plan, and therefore the Corporate Debtor was precluded from issuing a completion certificate. In view, the Corporate Debtor was constrained to carry out the remaining work through certain third-party Vendors.

3.2 Respondent No.1 raised three bills dated 11th February 2012 for the purported work done. However, after passing about five years from the date of the aforesaid invoices, the Operational Creditor/Respondent No.1 has issued the demand notice dated 14th December 2017 under Section 8 of the IBC[2]. After that, the Application under Section 9 of the IBC was preferred by Respondent No.1 before the Adjudicating Authority in October 2018.

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[2] Insolvency and Bankruptcy Code,2016

3.3 The Corporate Debtor sent a reply to the demand notice, dated 14th December 2017, issued by the Operational Creditor.

3.4 The Appellant submits that the Corporate Debtor had provided original invoices, challans issued by the third-party Vendors, engaged by the Corporate Debtor on account of Respondent No. 1's failure to complete the work, as envisaged under the plan.

3.5 The Appellant further submitted that the laws of limitation bar the alleged claims of the Operational Creditor. It is stated that the alleged claim/operational debt, claimed under Section 9 of the Code, 2016 filed by Respondent No.1, is based on three invoices which the Operational Creditor admittedly raised upon the Corporate Debtor dated 11th February 2012. Therefore, on its face, the demand raised against the bill of 11th February 2012 was time-barred and cannot be made the subject matter of the Section 9 petition filed in October 2018 under the Insolvency and Bankruptcy Code 2016.

3.6 Respondent No.1, in his Reply, stated that it had raised three bills on 30th March 2012, 3rd April and lastly on 3rd May 2012, leaving aside a sum of Rs.29,09,899/-. Irrespective of various reminders, the Appellant neither paid the said dues nor rejected the said claim of Respondent No.1.

3.7 Further, Respondent No.1, in his Reply, submitted that the Appellant on 7th November 2017 issued a letter to Respondent No.1 admitting the dues with a further promise to pay the said dues. Consequently, respondent

No.1/Operational Creditor received no payments irrespective of the fact that there was a promise to pay.

3.8 Further in Reply the Respondent No.1 stated that before filling the Application under Section 9 of the Code[3], the Appellant had also issued various letters enclosing the bills. Still, despite receipt of the same, the Appellant/Corporate Debtor never raised any objection about the deficiency in services rendered by the Operational Creditor.

3.9 The impugned Order is being assailed only on the ground that the Respondent No.1/Operational Creditors application is barred by limitation. Since no other point is argued by the Appellant during the hearing, the instant Appeal is being decided only on the issue of limitation.

3.10 We have heard the arguments of the Learned Counsel for the parties and perused the records. The following point in issue has cropped up for the decision of this Appeal.

Whether the Laws of Limitation barred the claim of the petitioner?

4. **Appellants Submission**

4.1 The Corporate Debtor, namely, 'West Bengal Biotech Development Corporation Limited' (however wrongly mentioned in CP (IB) No. 1447/KB/2018 as 'West Bengal Biotech Development Limited' is a wholly-owned Government of West Bengal Undertaking. The State of West Bengal holds the entire shareholding of the Corporate Debtor through its nominee

[3] IBC

and/or nominees. The Corporate Debtor is engaged, inter-alia, in biotechnology.

4.2 The Operational Creditor, i.e. the Respondent No. 1 herein, had initially approached the Corporate Debtor and represented that the Operational Creditor is engaged, among other things, in the business of carrying out interior decoration and renovation work. Accordingly, under the negotiation entered into between the Operational Creditor and the Corporate Debtor, the Corporate Debtor had assigned the job to the Operational Creditor, i.e. Respondent No.1 to carry out glass partition, electrical fittings, air-conditioning fittings and false ceiling fittings in respect of a building situated in Salt Lake, Kolkata. This job work (hereinafter referred to as the 'said work') was to be done by Respondent No. 1 herein, in terms of a plan.

4.3 The Operational Creditor / Respondent No.1 herein was unable to complete the work which was assigned to the Operational Creditor on an emergency basis because the then Hon'ble Chief Minister of West Bengal was to inaugurate the said building situate in Salt Lake on 28th February 2011. Further, the work which was purportedly done by the Operational Creditor was contrary to the plan. Therefore, no Completion Certificate was issued by the Corporate Debtor to the Operational Creditor. Since the work was incomplete, and the Operational Creditor was not in a position to demonstrate that the work was completed as per the terms and conditions and the plan. Therefore, the Operational Creditor was also not in a position to call upon the Corporate Debtor to take steps for issuance of the completion certificate.

4.4 The Appellant states that the Operational Creditor has not been able to produce the job Completion Certificate, which could have demonstrated that the work was allegedly done to the satisfaction of the Corporate Debtor. Therefore, save, and except the amount of Rs.4,05,794/- paid by the Corporate Debtor to the Operational Creditor, no further sum was due and payable by the Corporate Debtor to the Operational Creditor. During this period, the Operational Creditor had raised three purported bills dated 11th February 2012. However, the Corporate Debtor found no sum due and payable to the Operational Creditor. Moreover, the Operational Creditor had not made over the original invoices, vouchers and/or challans to the Corporate Debtor for demonstrating that the third-party vendors were allegedly inducted by the Operational Creditor to carry out the subject work. Further, except for the work of fixing air-conditioners in the said building for which the Corporate Debtor had already made the payment on 30th April 2012, the Operational Creditor was not entitled to claim any further sum from the Corporate Debtor.

4.5 However, all of a sudden, after issuing the statutory Notice dated 7th November, 2017, the Operational Creditor filed an Application under Section 9 of the Insolvency and Bankruptcy Code 2016 sometime in October 2018. The allegations and claims made in the Section 9 Application are false and incorrect and denied and disputed.

4.6 The laws of limitation bar the alleged claim of the Operational Creditor. It is stated that the alleged claim / operational debt claimed in the Application under Section 9 of the Code, 2016 filed by the Respondent No. 1 is based on three bills which the Operational Creditor admittedly raised upon the Corporate Debtor dated 11th February 2012. Therefore, on the face of it, the bills of 11th February 2012 cannot be made to be the subject matter of the Section 9 petition filed under the Code of 2016 in October 2018, since ex facie the claim of such operational debt arising on the said bills are barred by limitation.

4.7 However, the Adjudicating Authority, after hearing the parties had admitted the Application under Section 9 filed by the Operational Creditor and by the Order dated 28th January 2020, allowed the Application primarily on the ground that the Reply dated 14th December 2017 issued by the Corporate Debtor to the Operational Creditor amounts to alleged promise to pay by the Corporate Debtor under Section 25(3) of the Contract Act.

4.8 The Adjudicating Authority has failed to appreciate that the Reply of the Corporate Debtor dated 14th December 2017 could not have been construed as an alleged admission, nor the said letter dated 14th December 2017, amounts to a promise to pay within the meaning of Section 25(3) of the Indian Contract Act. Hence, the Order dated 28th January 2020, as amended by the Order dated 7th February 2020, is liable to be set aside.

4.9 The Ld. Adjudicating Authority has erred in law and fact by admitting the petition solely on the ground of the purported construction and interpretation of the document dated 14th December 2017, which, inter- alia, records as follows:

"With reference to you demand notice date 07.11.2017 on the above subject. I am directed to request you to send one of your representatives/ officials with all relevant papers/ documents in this regard to my office chamber at Vigyan Chetana Bhavan, DD 26/B, 5th Floor, Sector-1, Salt Lake, Kolkata - 700064 for a discussion in order to settle your claim soon.

The date and time of your convenience for the said purpose may please be communicated at the earliest"

[emphasis supplied]

4.10 The Ld. Adjudicating Authority has erred in law and fact by failing to appreciate that document and correspondence which is issued for the purpose of initiating settlement or discussion are always without prejudice to the rights and contentions of the parties, and such letter/communication/ document cannot be construed as an admission. For this proposition, the Appellant relies upon the judgment reported in AIR 1963 Allahabad 157; AIR 1992 Orissa 136 and AIR 1949 Allahabad 440.

4.11 The Ld. Adjudicating Authority has failed to appreciate that there are pre-existing disputes between the parties long before the issuance of the statutory Notice dated 7th November, 2017.

4.12 The Reply dated 14th December, 2017, was issued as a goodwill gesture for the purpose of entering into discussions/meeting for settling the grievance of the Operational Creditor. The amount of alleged debt has not been quantified in the said letter of 14th December 2017.

4.13 The Ld. Adjudicating Authority has failed to appreciate that there is no promise to pay within the meaning of Section 25 (3) of the Indian Contract Act, 1872, which will be evident from the letter dated 14th December 2017.

4.14 There have been pre-existing disputes between the parties. Respondent No.1 / Operational Creditor did not provide necessary documents, bills, and relevant papers supporting its purported claim. The alleged work done was based on verbal assurance as admitted by Respondent No.1 in its letter dated 28th May 2012. Therefore, to claim any sum due based on the work allegedly done beyond the scope of the work order dated 22nd February 2011, needs to be proved and established with the help of supporting documents which were, however, not in this case.

4.15 The proposed meeting at the invitation of the Managing Director of the Corporate Debtor was for this purpose only, and there was no alleged admission or any 'acknowledgement of debt' on the part of the Corporate Debtor as has been incorrectly held upon the misconstruction and misinterpretation of the letter dated 14th December, 2017.

4.16 Respondent No. 1 could not produce the relevant documents called for despite having availed several opportunities from the management of the Corporate Debtor. Respondent No.1 did not provide a copy and details of the completion certificate to the Corporate Debtor.

4.17 There has been non-compliance with the provisions of Section 9(3)) and Section 9(3)(d) of the Code. However, the Adjudicating Authority overlooked the fatal defects that had rendered the Section 9 IBC application not maintainable.

4.18 It is stated that even the name of the Corporate Debtor mentioned in Form 5 of the Adjudicating Authority Rules, 2016 is incorrect, and on this ground alone, the entire proceeding has been vitiated and rendered otiose. Even after obtaining the ex-parte Order dated 10th February 2020 to amend the Order of admission, the name of the Corporate Debtor has been wrongly mentioned in the impugned Order. This is because the name of the Corporate Debtor has been wrongly mentioned both in the Application filed under Section 9 of the Code and in the statutory Notice.

5. **Respondents Submissions;**

5.1 On 22nd February 2011, a Work Order was issued by the Appellant to execute interior work. According to the said Work Order, the Appellant was reimbursed for executing such work. After completing the said interior work, Respondent No.1 had issued three bills for which the Appellant was supposed to reimburse the cost to Respondent No. 1. After that, Respondent No. 1 had paid a part of the total sum due to the job as executed by Respondent No. 1. However, irrespective of repeated reminders, the Appellant neither rejected the claim of Respondent No.1 nor did the Appellant pay the remaining sum to be reimbursed.

5.2 Respondent No.1, on 07.11.2017, issued a Demand Notice in 'Form 3' of the Code[4], which the Respondent received. On receipt of such Notice, the

[4] IBC

Appellant had issued its letter dated 14th December 2017 wherein and wherefrom three essential elements would be evident from such letter, namely:

a) intention to pay off the dues
b) promise to pay
c) acknowledgement of the debt.

6. Responding to the letter dated 14th December 2017, Respondent No.1 had held a meeting. Accordingly, based on the further request, by way of its covering letter dated 11th January 2018, all necessary documents as requested were forwarded to the Appellant herein.

7. The Appellant had failed and/or neglected to pay off the dues. Hence, Respondent No.1 approached the Ld. NCLT under Section 9 of the Code. The Appellant had also admitted in paragraph 3 of its Reply that the dues of the Respondent No.1 are on account of reimbursement of the costs incurred by Respondent No.1 and not otherwise on account of goods sold and delivered.

8. On perusal, it is noticed that the subject matter of the purported claim by the Operational Creditor / Respondent No.1 is based on the two purported unpaid bills, both dated 11.02.2012.

9. **Analysis:**

9.1 It is an admitted fact that in the instant case, the Corporate Debtor issued an order on 22nd February 2011 to the Operational Creditor for interior decoration of the 1st, 2nd and 4th Floor of the building at EN24, Salt Lake, Sector-V, Kolkata. After the completion of the work, the Operational Creditor raised three bills on 11th February 2012, bearing bill No. Keshav / 11-12/1, Keshav / 11-12/2, Keshav / 11-12/3 amounting to ₹ 35,44,776/- and forwarded the same to the office of the Corporate Debtor through its forwarding letter dated 11th February 2012, out of which, an amount of ₹ 634,886/- was paid by the Corporate Debtor the dues above.

9.2 The Operational Creditor contended that despite several reminders, the Corporate Debtor failed to pay the outstanding amount. Finding no other alternatives, the Operational Creditor, as of 7th November 2017, issued a demand notice under Section 8 in 'Form 3' under the Insolvency and Bankruptcy Code 2016 read with Rule 5 of the IBBI (Application to Adjudicating Authority) Rules 2016 to the Corporate Debtor.

9.3 Immediately after receiving the demand notice dated 7th October 2017, the MD[5] of the Corporate Debtor, through its letter dated 14th December 2017, requested the Operational Creditor to send its representative to the office of the Corporate Debtor with all the papers and documents for settlement of the claim thereby duly admitting and accepting the claim of the Operational Creditor. But in spite of their meeting dated 20th December 2017, the Corporate Debtor did not clear the outstanding bills of the Operational Creditor.

9.4 The Operational Creditor's case that despite the meeting dated 20th December 2017 and subsequent receipt of the bills and letters dated 11th January 2018 and 11th April 2018, the Corporate Debtor did not clear the outstanding bills of the Operational Creditor. In view of the above, it is

[5] Managing Director

submitted that the Corporate Debtor is deemed unable to pay its debt. Therefore the Operational Creditor initiated action under Section 9 of the Code[6].

9.5 The Adjudicating Authority had mentioned in its Order that when the case was taken up for hearing, the learned Counsel appearing for the Respondent/Corporate Debtor mainly objected to this Application contending that the claim of the Operational Creditor is barred by limitation. However, according to the learned Counsel for the Corporate Debtor, the bills on the basis of which claims have been raised are dated 11th February 2012; the Application filed on 26th October 2018 is barred by limitation. Therefore, for the said reasons itself, this Application is liable to be dismissed.

9.6 The Adjudicating Authority has noted in its Order that;

> *"Admittedly, the invoice was raised on 11th February 2012 and the work was issued by the corporate debtor on 22nd February 2011. The averments produced on the side of the operational Creditor prove that the operational Creditor demanded the amount repeatedly from 28th May 2012 onwards till 7th June 2016. Failing payment of the amount in demand on the side of the corporate debtor, the operational Creditor was compelled demand notice as per section 8 (1) of the Code. That Notice was issued on 7th November, 2017 and it was admittedly received by the corporate debtor and also sent a reply dated 14th December 2017. The Reply of the corporate debtor is the main document relied on the side of the operational Creditor to prove that the claim of the operational Creditor is not barred by limitation but was within the period of limitation. So,*

[6] Insolvency and Bankruptcy Code, 2016

considering the Reply evidently sent by the corporate debtor is good to read. It reads as under;

> *"with reference to the demand notice dated 7th November 2017 on the above subject, I am directed to request you to send one of your representative/officials with all relevant papers/documents in this regard to my office chamber at Vigyan Chetna Bhawan,DD 26/B, 5th Floor, Sector 1, Salt Lake, Kolkata 700064 for a discussion in order to settle your claim soon.*
> *A date and time of your convenience for the said purpose may please be communicated at the earliest.*
>
> *This is topmost Urgent.*
>
> *Yours faithfully*
>
> *Managing director*
>
> *West Bengal biotech development Corporation limited"*

Relying to reply Notice, the learned Counsel for the operational Creditor submits that the letter amount to a promise to pay a time-barred debt under section 25 (3) of the Indian contract act.----Referring to the Section 25(3) of the Indian contract act, the learned Counsel appearing for the operational Creditor attempted to prove that the corporate debtor did not dispute its claim but showed his readiness to settle the claim after a discussion. So the Reply is a promise to pay the amount claimed by the operational Creditor after discussion. It, according to him, is a promise to pay the amount found due to the operational Creditor and accordingly filing of this Application is within time.

At this juncture, learned Counsel appearing for the operational Creditor referred to the judgement of the Hon'ble High Court of Mumbai reported in SCC online 1993 Mah. J. South Eastern *roadways, Bombay versus U P state Agro industrial Corporation limited shall Corporation limited.---*

Applying the propositions in the above said judgement is in the case in hand, we are of the considered view that the letter dated 14th December 2017 issued by the corporate debtor is a promise to pay after discussions and thereby filing of this Application on 26th October 2018 is within the period of limitation, and Application filed is perfectly has considered maintainable. There is no other objection sufficient enough to uphold anyone contention in the objections being raised on the side of the corporate debtor."

(verbatim copy)

9.7 On perusal of the impugned order, it is clear that the Adjudicating Authority relying on the judgement of the Hon'ble Bombay High Court in the case of South Eastern Roadways (supra), has considered the letter issued by Corporate Debtor dated 14th December 2017 as an acknowledgement of debt in the form of a promise to pay the debt amount and given a finding that the Application filed by the Operational Creditor is beyond the given period of limitation.

9.8 In the circumstances, it is necessary to go through the findings of the Hon'ble Bombay High Court in the above-mentioned case.

9.9 In case of *South Eastern Roadways v. UP State Agro Industrial Corporation Ltd.*, 1992 SCC OnLine Bom 420 : (1993) 1 Mah LJ 236 : (1993) 1 Bom CR 709 : AIR 1993 Bom 300 at page 237 Hon'ble Bombay High Court has held that:

"**4.** *Section 18 of the Limitation Act, 1963 prescribes the effect of an acknowledgment in writing vis-a-vis liabilities for which the limitation has expired. Excluding the unnecessary words, this section reads as follows:—*

> *"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.*

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."*

It cannot be disputed that plaintiff provided storage space to the consignments beyond the free period mentioned in the consignment notes at Exs. 44 to 51. The goods arrived at Thane on 1-8-1977 and under the consignment notes had to be lifted by the Corporation within 15 days. Upto those 15 days no storage charges were to be claimed by the transporter viz. the plaintiff. But actual delivery was taken on 17-9-1977. Therefore for the extra period storage charges had to be paid at the rate *set out in the consignment notes. It was argued that the rate and exact amount payable towards storage charges are matters not proved at the trial. We cannot agree with this submission inasmuch as a term in relation to the payment of storage charges and the rate therefor, is set out in each consignment note. A contract of carriage is governed by the terms recited in the consignment note and there is nothing on record to indicate that the consignment notes figuring in this case did not govern the contract of carriage. Where plaintiff is in difficulty, is, in regard to the amount admissible as unloading charges. It has not established the incurring of any expense for unloading of the consignments. Turning to the major question viz.* ***whether Ex. 35 brings the claim within limitation****, it was argued that the said communication makes no reference to the exact amount payable and to what the said liability relates. We do not see how such an ambiguity can be read into Ex. 35. To understand Ex. 35, one has to go to Ex. 37 to which Ex. 35 purports to be a reply. In Ex. 37, plaintiff was calling upon the Corporation to reimburse it for the storage and unloading charges quantified at Rs. 37,800/- and Rs. 714 respectively. While replying to Ex. 37, the Corporation specifically said that the matter would be settled. The expression "matter" used in Ex. 35 could not but refer to claims appearing in Ex. 37.* ***In spite of the clear words used in Ex. 35 the author of that document entered the witness box, admitted that Ex. 35 bore his signature, but yet saw no difficulty in denying that it constituted an acknowledgment of liability****. This is a surprising stand to have been taken by an Officer of a State Government's Corporation.* ***The mere fact that the amount which was to be settled was not quantified or clarified, will not render Ex. 35 any the less an acknowledgment. To quote the words of the Explanation to section 18 of the Limitation Act "an acknowledgment may be sufficient***

though it omits to specify the exact nature of the property or right". *It will not be correct to say that there is an omission in Ex. 35 for the "matter" referred to in Ex. 35, can be easily understood if Ex. 35 is as it must be corelated to Ex. 37. Such a corelation has to be made because Ex. 35 itself purports to be with reference to the communication contained in Ex. 37. DW 1's saying that Ex 35 did not amount to an acknowledgment coupled with what were conceived to be ambiguities in Ex. 35, seem to have swayed the learned Trial Judge to take a totally erroneous view of the matter. Even if Ex. 35 does not come to the aid of the plaintiff, there is section 25(3) of the Indian Contract Act to which recourse can be had. This provision is in the following words:—*

> *"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 authorised 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 suit.… such an agreement is a contract."*

If Ex. 35 does not amount to an acknowledgment within the meaning of that expression appearing in section 18 of the Limitation Act, the same certainly attracts sub-section (3) of section 25 of the Indian Contract Act. Therefore, however looked at, the claim was within limitation and we so hold."

(emphasis supplied)

9.10 Before arriving at any conclusion, it is also necessary to go through the statutory provision of Section 25 of the Indian Contract Act and Section 18 of the Limitation Act 1961, which is given below for ready reference;

*"**25. Indian Contract Act***

***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—*

> *(1) it is expressed in writing and registered under the law for the time being in force for registration of [documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless*
>
> *(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or 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 authorised 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**.*

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent to the promisor was freely given.

Illustrations

(a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.

(c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) ***A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.***

(f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs. 1,000 for Rs.10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

Sec 18, Limitation Act, 1961

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.

9.11 It is essential to mention that the aforesaid mentioned letter dated 14th December 2017, which the Managing Director wrote of the Corporate Debtor in response to the demand notice dated 7th November 2017, is only about calling the representative of the Operational Creditor for a discussion to settle the claim. Therefore, this letter cannot be considered as an acknowledgement of debt in terms of Section 25 (3) of the Contract Act.

9.12 Section 25 of the Indian contract act provides that agreement without consideration is 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.

9.13 Based on the statutory provision of Section 25(3) of the Contract Act, it is clear that there could be a valid contract to pay wholly or in part a time-barred debt. This can be treated as an exceptional general principle of the Contract Act, which provides that agreement without consideration is void. Illustration (e) of Section 25 of the Contract Act provides that "*if A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.*"

9.14 There is no written promise to pay the time-barred debt or part of that debt in the instant case. So the question does not arise of applying Section 25 (3) of the Contract Act. However, the learned Adjudicating Authority has erroneously considered the applicability of Section 25 (3) of the Contract Act simply on the premise that the Corporate Debtor did not dispute's claim but showed his readiness to settle that the claim after discussion. The phrase 'does not dispute the claim' cannot be equated with acknowledging the liability to pay the time-barred debt.

9.15 It is pertinent to mention that Hon'ble Bombay High Court in the case of South-Eastern Roadways (supra), while considering a specific document containing the signatures but denying acknowledgement of liability, held that the mere fact that the amount which was to be settled was not quantified clarified would not render Ex 35, any less an acknowledgement of liability in terms of the Explanation to Section 18 of the Limitation Act. An acknowledgement might be sufficient though it omits to specify the exact nature of the property or right. The Hon'ble High Court further held that the alleged document does not amount to an acknowledgement within the meaning of that expression appearing in Section 18 of the Limitation Act; the same certainly attracts Sub-section (3) of section 25 of the Indian Contract Act. Therefore, the claim was within limitation.

9.16 Undisputedly the alleged invoices against which Operational Creditor has filed the claim is dated 11th February 2012. The Operational Creditor has issued the demand notice on 7th October 2017. Through its letter dated 14th December 2017, the Managing Director of the Corporate Debtor requested the

Operational Creditor to send its representative to the office of the Corporate Debtor with all the papers and documents for settlement of the claim. Issuance of a letter dated 14th December 2017 by the Corporate Debtor calling the representative of the Operational Creditor with all the papers to settle the dispute cannot be considered as an acknowledgement of debt in terms of Section 18 of the Limitation Act. However, to apply the benefit of Section 18 of the Limitation Act, it is necessary that before the expiry of the prescribed period of limitation for suit or Application, such acknowledgement must be in writing. Regarding the invoices issued on 11th February 2012 maximum period of limitation prescribed under Article 137 of the Limitation Act was three years, which ended on 10th February 2015. However, this petition under Section 9 was filed on 26th October 2018, which by no means can be considered as within limitation.

9.17 Based on the above discussion, we are of the considered opinion that the learned Adjudicating Authority has taken an erroneous view of the matter and on evaluating the letter of the Managing Director of the Corporate Debtor as an acknowledgement of the debt. Accordingly, the said letter was not within limits so that the operational Creditor could claim the benefit of Section 18 of the Limitation Act.

Conclusion

9.18 In the circumstances as stated above, we are of the considered opinion that the Appeal deserves to be Allowed, and the Impugned Order of admitting the petition is liable to be set aside.

ORDER

Company Appeal (AT) Insolvency No. 330-331 of 2020 is Allowed, with no order for costs. Accordingly, the Corporate Debtor is released from all the rigours of the law imposed under section 14 of the I&B Code, 2016. Thus, the management of the Corporate Debtor should immediately be handed over to the erstwhile directors of the Corporate Debtor.

[Justice M. Venugopal]
Member (Judicial)

[Mr. V. P. Singh]
Member (Technical)

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI
08th December, 2021

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