NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 868 of 2022

(Arising out of Order dated 21.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in C.A. No. 1233/2019 in C.P. (IB) 397(PB)/2018)

IN THE MATTER OF:

Amogh Sabharwal
Suspended Director of
Sammi Electronics India Private Limited,
S/o Indrajit Sabharwal,
R/o C-105 Chander Nagar,
Ghaziabad,
Uttar Pradesh – 201011. **...Appellant**

Versus

1. Tata Capital Financial Services Limited
Having its registered office at:
11th Floor, Tower-A,
Peninsula Business Park,
Canpatrao Kadam Marg,
Lower Parel, Mumbai,
Maharashtra - 400013.
Email: shrinivas.kadiyal@tatacapital.com

2. Kapil Dev Taneja,
IRP of Sammi Electronics India Private Limited
R/o 56-C/BB, Janakpuri,
New Delhi – 110058.
kapildtaneja@gmail.com

...Respondents

Present:

For Appellant: **Mr. Pallav Saxena, Mr. Sorabh Dahiya and Mr. Nauseen Samar, Advocates.**

For Respondents: **Ms. Pooja Mahajan and Ms. Mehak Nayak, Advocates.**

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by the Suspended Director of the Corporate Debtor has been filed against the order dated 24.05.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Bench IV by which order Section 7 application filed by the Respondent No.1 – the Financial Creditor has been admitted. Brief facts of the case necessary to be noticed for deciding the appeal are:

(i) Vide Loan Agreement dated 31.08.2012, the Financial Creditor – 'Tata Capital Financial Services Limited' granted financial facility to the tune of Rs.20 Crores to 'Simmtronics Semiconductors Limited', the Principal Borrower. The Corporate Debtor stood as the Corporate Guarantor to the borrowing by furnishing corporate guarantee and also created mortgage towards its immovable property to secure the loan.

(ii) Under the Loan Agreement, default was committed in repayment of loan. Corporate Debtor caused delay in making the payment incurring liability to pay interest as agreed. The Principal Borrower committed default in payment of interest amount and the instalment amount on its due date.

(iii) The Financial Creditor sent notice dated 19.05.2016, 06.06.2016 and 12.09.2016 to the Principal Borrower as well as the Corporate

Guarantor (Corporate Debtor herein) for payment of the outstanding amount to the Financial Creditor.

(iv) On 01.08.2016, winding up proceeding was initiated against the Principal Borrower on petition filed by one DHL Logistics Pvt. Ltd.

(v) The Financial Creditor initiated Arbitration Proceedings against the Principal Borrower on 12.04.2017.

(vi) In September, 2017, the Financial Creditor filed Civil Suit C.S. (OS) No. 439 of 2017 against the Corporate Debtor before the Delhi High Court seeking grant of decree for Rs.2,31,31,720/- which Suit is still pending before the Delhi High Court.

(vii) Arbitral Award dated 11.10.2018 passed against the Principal Borrower.

(viii) An application under Section 7 of the I&B Code has been filed by the Financial Creditor on 31.12.2019 claiming default amount of Rs.2,30,87,069/-. In the application notices were issued by the Adjudicating Authority to the Corporate Debtor but no reply was filed nor did anyone appear on behalf of the Corporate Debtor. The Adjudicating Authority proceeded ex-parte. The Adjudicating Authority by the impugned order dated 24.05.2022 admitted Section 7 Application, appointed the Interim Resolution Professional (IRP) and declared moratorium. Aggrieved by the order dated 24.05.2022, this Appeal has been filed.

2. Learned counsel for Appellant challenging the order impugned submits that application under Section 7 filed by the Financial Creditor on

31.12.2019 was clearly barred by time. No date of declaration of account of Corporate Debtor as NPA has been given in the application under Section 7. According to the Application under Section 7, default of payment of instalment on due date begin from September, 2012. Section 7 application was filed even after three years from the issue of notice to the Corporate Debtor on 19.05.2016, 06.06.2016 and 12.09.2016. The Adjudicating Authority without adverting to the question as to whether the application filed by the Financial Creditor was within time, proceeded to admit the application. Even if proceedings were ex-parte to the Corporate Debtor, the Adjudicating Authority ought to have considered as to whether application is within time. It is further submitted that from the details given in Part IV of the Section 7 application it is clear that there is no outstanding due towards the principal amount and application under Section 7 was filed for recovery of the interest. Application under Section 7 which was filed only for recovery of interest was liable to be dismissed. Period of limitation is only three years from the date of the classification of the credit facility as NPA and I&B Code cannot be utilized for recovery of time barred debts. The Financial Creditor has not come with clean hands nor disclosed the date of classification of account as NPA.

3. Learned counsel for the Respondent refuting the submissions of learned counsel for the Appellant submits that date of NPA classification was not relevant for computation of limitation. The three years period which under Article 137 is to be computed is from the date when default was committed. NPA declaration is made on classification by Financial

Institution of a particular account. In the present case, since the Principal Amount got paid as per RBI Guidelines, there was no requirement of Financial Creditor to make any NPA declaration. Corporate Debtor has failed to pay outstanding amount on demand by Financial Creditor, hence, default was committed. Application filed under Section 7 is well within three years period. The period during which the Financial Creditor was pursuing remedies before other legal forums is liable to be excluded for the purpose of computation of limitation. On 11.11.2016, Corporate Debtor had proposed a One Time Settlement to Financial Creditor proposing a payment of Rs.80 Lakhs which is a clear acknowledgement of liability by the Corporate Debtor giving benefit of Section 18 of the Limitation Act. Learned counsel has relied on the principles under Section 5 and Section 14 of the Limitation Act. It is submitted that claim of additional interest is a financial debt within the meaning Section 5(8) of the I&B Code. The Corporate Debtor did not appear before the Adjudicating Authority nor raised any objection to the application.

4. We have considered the submissions of learned counsel for the parties and perused the record.

5. Section 3 of the Limitation Act provides for bar of limitation. Section 3 Sub-section (1) provides:

> *"3. Bar of limitation.—(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed,*

> *although limitation has not been set up as a defence.*"

6. Section 3 of the Limitation Act puts an embargo on every suit, appeal and application if have been found to be barred by limitation. Section 3 is imperative and cast a duty on the Adjudicating Authority to look into limitation even if limitation is not set up as a defence, which is a well settled principle of law. The present is a case where the Corporate Debtor did not appear or raised any objection to the application, however, the Adjudicating Authority was required to look into at least the averments in the Section 7 application to find out as to whether application under Section 7 is filed within period of limitation or not. Limitation for filing application under Section 7 is three years as provided in Article 137 of the Limitation Act. Part IV of the Application contains particulars of financial debt. In the 'Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016', an application under Section 7 has to be filed in Form-I. Part IV of the application Item No.2 provides amount claimed to be in default and the date on which the default occurred (The computation of amount and days of default in tabular form was attached). When we look into application which has been filed in Part IV, Item 2 details of dates when payment has been received and dates when payment became due has been mentioned. A perusal of the tabular chart in Part IV of the Application indicates that according to the Financial Creditor default started w.e.f. 20.09.2012 which default has been continuing as per chart till August, 2013. After tabulating the details of default in a chart in Part IV of the application beginning from

20.09.2012 till 20.08.2013 following has been stated in the Part IV of the application:

> *"From a perusal of the above details, it is seen that the borrower company committed defaults by not making the payments on their due dates and there was delay in making payments (i.e., payments were not made on their due dates, but after delay)*
>
> *The Financial Creditor also sent notices dated 19.05.2016, 06.06.2016 and 12.09.2016 to the borrower (Simmtronics Semiconductor Ltd. – now under liquidation) as well the Corporate Guarantor-cum-Mortgagor (i.e., Corporate Debtor herein) for the payment of the outstanding amounts to the Financial Creditor. However, neither response was received nor payments were made. Copy of the demand notices dated 19.05.2016, 06.06.2016 and 12.09.2016 sent to the Corporate Debtor herein as well as to the borrower company (since under liquidation) for payment of outstanding dues are annexed collectively as* ***Annexure XII (colly)****.*
>
> *The Corporate Debtor, being the continuing corporate guarantor and the mortgagor in respect of the loan, is co-extensively liable with the borrower company for the payment of the outstanding amounts to the Financial Creditor."*

7. Under Part V certain further details have been given by the Financial Creditor including details of Company Petition No. 690/2015 and Civil Suit

being CS (OS) 439/2017 filed against the Corporate Debtor, Arbitral Award dated 11.10.2018 against the Principal Borrower. Demand Notice dated 19.05.2016, 06.06.2016 and 12.09.2016 sent to the Principal Borrower and the Corporate Debtor has also been mentioned in Part V. When we look into Part IV, tabular form of default according to the application, default is continuing from 20.09.2012. In the reply which has been filed by the Financial Creditor reference of letter dated 11.11.2016 submitted by the Corporate Debtor to the Financial Creditor making an offer of Rs.80 Lakhs towards full and final settlement is made on basis of which extension of limitation under Section 18 is claimed. From 11.11.2016 also, if there will be extension of limitation for 3 years, it will come to an end on 10.11.2019. The application under Section 7 has admittedly been filed on 31.12.2019 beyond three years from the demand notice dated 19.05.2016, 06.06.2016 and 12.09.2016 as claimed in the application. As per notices issued by the Financial Creditor to the Corporate Debtor dated 19.05.2016 default of amount of Rs.2,22,94,220/- was claimed which was required to be cleared within four days. It is useful to extract one of the notices dated 19.05.2016 which is to the following effect:

"To,

1. *M/s Simmtronics Semiconductors Limited,*
   C-41 Okhla Industrial Area Phase-I
   New Delhi Dl 110020

   Kind Attn: Mr. Indrajit Sabharwal

Dear Sir,

Sub: <u>To clear the outstanding dues in Term Loan account Nos.3240439, 3249715, 3257103 and 3375444</u>;

This is to be bring to your notice that as on 17th May, 2016 an amount of ***Rs.2,22,94,220/- (Rupees Two Crores Twenty Two Lakhs Ninety Four Thousand Two Hundred and twenty only)*** *is due and payable by you to us in captioned Loan accounts.*

We request you to clear the aforementioned outstanding amount within four days by way of cheque / RTGS or account payee Demand draft for the above stated amount immediately. The details of account for repayment are as follows:

Bank Name	*HDFC Bank Ltd.*
Branch	*Maneckji Wadia Building, Ground floor, Nanik Motwani Marg, Fort, Mumbai-400 023*
Beneficiary Name	*Tata Capital Financial Services Ltd.*
Account no.	*00600310012676*
RTGS/NEFT – IFSC code	*HDFC0000060*
Account type	*Current Account*

Kindly note that in the event of any default in making payment as sought above, we will be *constrained to make disclosures about the status of your account to the relevant authorities including RBI, CIBIL and also other lenders in terms of the facility agreement and / or would be constrained to initiate appropriate legal action.*

*We hereby, also call upon you, **M/s Sammi Electronics India Private Limited** in the capacity of the **Corporate Guarantor & Mortgagor** to make the payment for the above mentioned outstanding amount at the earliest, failing which we would be constrained to initiate appropriate legal recourse against you and your directors as well.*

Yours faithfully

*For **Tata Capital Financial Services Ltd.***

Authorized Signatory

CC:

1) ***M/s Saami Electronics India Private Limited***
   803 A, Devika Tower, 6, Nehru Place, New Delhi, South Delhi-110019

   Also at

   Industrial Property No.1D/3, Ecotech II, Udyog Vihar Greater Noida, Gautam Budh Nagar, Nr. Chetana Fashion, UP, 201306.

2) ***Mr. Inderjit Sabharwal***
   House no. 104 & 105,
   Chander Nagar,
   Ghaziabad, UP 201011

Also at

C-642, New Friends Colony,
New Delhi – 110065

3) Mr. Amogh Sabharwal
Director
Simmtronics Semiconductors Limited
C-642 New Friends Colony, New Delhi – 110065

4) Ms. Bhavna Sabharwal
Director
Simmtronics Semiconductors Limited
C-642 New Friends Colony, New Delhi – 110065"

8. From the above notice dated 19.05.2016, 06.06.2016 and 12.09.2016 the application is not within three years. There being no details or explanation in application filed under Section 7, Part IV or Part V to indicate that how the application is filed within time, it was incumbent upon the Adjudicating Authority to examine the question whether the application under Section 7 is within limitation or not. The mere fact that Corporate Debtor did not appear or filed any objection, was not relevant for consideration of question of limitation by the Adjudicating Authority. The submission which has now been advanced before us in this Appeal by learned counsel for Respondent is that Applicant is entitled for benefit of Section 5 and Section 14 of the Limitation Act for coming to the conclusion that application is not barred by time. For claiming benefit under Section 5 and 14 of the Limitation Act facts and sequence of the events have to be placed before the Court to consider the question as to whether the Applicant was entitled for benefit under Section 5 or Section 14 or not. The

extension of benefit of Section 14 or Section 5 is dependent on scrutiny of the relevant facts and sequence of events which will required to be examined before returning the finding. In view of the foregoing discussion, we are satisfied that the Adjudicating Authority was obliged to consider the question of limitation of the application under Section 7 filed by the Financial Creditor and without adverting to the said issue application ought not have been admitted. We are of the view that in view of the foregoing discussions the order impugned cannot be sustained and the Adjudicating Authority is required to consider the application afresh.

9. Insofar as submission of learned counsel for the Appellant that application under Section 7 having been filed for recovery of additional interest ought not have been entertained. In view of the fact that matter is being sent back to the Adjudicating Authority for considering the question of limitation, we are of the view that the above submission of the Appellant may also be considered by the Adjudicating Authority. Looking to the facts of the present case, we are also of the view that one opportunity be also provided to the Appellant/Corporate Debtor to file a reply to Section 7 application. We give two weeks' time from today to the Corporate Debtor to file a reply to Section 7 application before the Adjudicating Authority, failing which the Adjudicating Authority may proceed to decide the application on the basis of materials available on the record. We make it clear that we have not expressed any opinion on the above issue and Adjudicating Authority is to consider the respective submissions and take a decision in accordance with law.

10. In result, the Appeal is allowed. The order dated 24.05.2022 is set aside. The Company Petition - C.P. (IB) 397(PB)/2018 is revived before the Adjudicating Authority to be considered afresh in accordance with law. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

23rd November, 2022

Archana