

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 441 of 2021

IN THE MATTER OF:

**Mr. Kishore Bachuram Kapdi,
(Promotor & Director
of the Suspended Board of Corporate Debtor,
M/s Afcan Impex Pvt. Ltd.)**

A-71, Nabula Tower,
Judges Bungalow, Bodakdev,
Ahmedabad - 380054

...Appellant

Versus

Bank of Maharashtra

“Lokmangal”
1501, Shivajinagar,
Pune.

And
It's Branch at
Kutch, Gandhidham.

...Respondent No. 1

**M/s Afcan Impex Pvt.Ltd.
Through the Resolution Professional
Shri Nitin Narang**
Plot No. 241-243, Sector-4,
Kasez, Gandhidham – 370210

Also at:
B-101, Ground Floor,
Old Gupta Colony, Model Town,
New Delhi - 110009

...Respondent No. 2

For Appellant: Mr. Anurag Mishra and Ms. Brinda Ajmani, Advocates.

For Respondent: Mr. Sudeep Singh, Advocate for R-1.

**Mr. Abhishek Anand, Mr. Kunal Godhwani, Advocates
for RP.**

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ORDER
(Virtual Mode)

11.08.2021: This Appeal has been filed by the Appellant Promoter and Director of the Corporate Debtor – ‘M/s Afcan Impex Pvt. Ltd.’. The Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short ‘IBC’) was filed by the Respondent No. 1 – ‘Bank of Maharashtra’ before the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Court 1 in CP(IB) No.289/7/AHM/2020. The Adjudicating Authority has admitted the Application under Section 7 of IBC vide Impugned Order dated 17.02.2021 and thus this Appeal.

2. Learned Counsel for the Appellant submits that the Appellant could not appear before the Adjudicating Authority as when the matter was filed the Appellant was suffering from COVID and thus could not defend the matter before the Adjudicating Authority.

3. We have then called upon Learned Counsel for the Appellant to demonstrate to us as to what grounds the Appellant has if the Appellant had appeared before Adjudicating Authority. The Learned Counsel submits that the Application filed under Section 7 has suppressed the fact that the Financial Creditor had even resorted to proceedings under Section 13(2) of SARFAESI Act and had moved the DRT which proceedings were subsequently withdrawn. It is submitted by Learned Counsel for the Appellant that Financial Creditor had also moved the Commercial Court at Ahmedabad, as can be seen from Annexure A-25 filed with Additional Affidavit. It is stated that these facts were not mentioned in the Application under Section 7. The Learned Counsel further submits that if the Appellant would have appeared, he would have pointed out to the Adjudicating Authority that the date of

default is not 04.03.2020 as noted by the Adjudicating Authority in the impugned order Para 1. It is stated that the actual date of default is 28.10.2016, which is the date of NPA. The Learned Counsel referred to document at page 294, the Notice under Section 13(2) of SARFAESI issued by the Respondent Bank, which shows in Para 4 that Bank accepted that the date of NPA is 28.10.2016. Learned Counsel referred to judgment in the matter of *“Jagdish Prasad Sarda vs. Allhabad Bank”, Company Appeal (AT) (Insolvency) No. 183 of 2020*, Para 11, to submit that this Tribunal has held that the determining factor is the three years period from date of default/NPA when it comes to calculating period of limitation with regard to Application under Section 7 of IBC. The Learned Counsel also referred to judgment in the matter of *“AKJ Fincap Ltd. vs. Bank of India”, Company Appeal (AT) (Insolvency) No. 178 of 2021* to submit that the order passed should be speaking order. According to the Counsel for the Appellant, in the present matter the impugned order passed is a non-speaking order as it does not take into consideration all the relevant facts for admitting the Application under Section 7 of IBC. The Learned Counsel further submitted that Principles of Natural Justice require that Appellant is given opportunity to defend. Learned Counsel referred to Para 11 of judgment in the matter of *“AKJ Fincap Ltd. vs. Bank of India”* (supra) to submit that this Tribunal had in that matter set aside the concerned order which was passed ex-parte.

4. The Learned Counsel for the Resolution Professional is present and submits that judgment in the matter of *“AKJ Fincap Ltd. vs. Bank of India”* was relating to Adjudicating Authority declining to set aside admission order on the basis that the

Adjudicating Authority did not have power to set aside its Order of ex-parte Admission.

5. The issue raised before us is that at the stage of admission the Appellant was ex-parte and thus the impugned order deserves to be set aside. The other ground raised is that the debt concerned was time barred.

6. We have heard Learned Counsel for the parties and perused the record. What appears is that the Application under Section 7 (Annexure A-2 page 33 at page 38) shows that Respondent No. 1 Bank had correctly mentioned in Part IV of the Format that the date of NPA was 28.10.2016. It appears an error in recording occurred in impugned order Para 1 where date of default has been recorded to be 04.03.2020. Part IV of the Format shows that the Respondent Bank had mentioned that "Total amount of default as on 04.03.2020 was Rs.8,44,15,488". It was specifically mentioned that date of NPA was 28.10.2016.

7. The Learned Counsel for the Resolution Professional has pointed out from the Appeal Paper Book page 176, which is Balance and Security Confirmation Letter dated 30.09.2016 from the Corporate Debtor to the Bank where it has been mentioned at page 177 as under:

"I/we further acknowledge, confirm, record, admit the outstanding balance of Rs.55435843.36 (Rupees Five Crore Fifty Four Lacks Thirty Five Thousand Eight Hundred Forty Three & 36 Paise only) (exclusive of interest chargeable thereon from _____) due as on 30.09.16 and I/we am/are liable to pay the same to you in accordance with the terms thereof."

8. The Balance Confirmation issued by the Corporate Debtor was dated 30.09.2016. Another Balance Confirmation is page 180 @ 181 which shows that further Balance Confirmation was given on 15.07.2019, which reads as under:-

“I/we further acknowledge, confirm, record, admit the outstanding balance of Rs.39764520.36/- (Rupees Three Crore Ninety Seven Lakh Sixty Four Thousand Five Hundred Twenty Rupees Thirty Six Paise only)

(exclusive of interest chargeable thereon from 01.09.2016 due as on 11.07.2016 and I/we am/are liable to pay the same to you in accordance with the terms thereof.

I/we am/are giving the acknowledgement for the purpose of extending the limitation period under S.18 of the Limitation Act for initiation of legal proceedings by the Bank for of outstanding dates due to the Bank and request the Bank to defer for a short period for the time being at the present stage the initiation of legal proceedings by the Bank as aforesaid.”

9. The Learned Counsel for the Appellant is submitting that only because these Balance Confirmations were given these cannot be treated as acknowledgement and limitation cannot get extended.

10. When date of NPA is 28.10.2016 and there is Balance Confirmation as mentioned above of 15.07.2019, the same is within three years. Calculating limitation period from 15.07.2019, Application under Section 7 filed on 28.07.2020 cannot be said to be time barred.

11. As regards, the contention that Principles of Natural Justice were not followed, the law requires that the notice should be issued to the Corporate Debtor. In the impugned order which shows date of hearing as 16.02.2021 and date of

pronouncement of order as 17.02.2021, in Para 3, the Adjudicating Authority mentioned as follows:

“3. This application was filed on 28.07.2020 and notice u/s 7 was issued to the Corporate Debtor on 24.08.2020. After two dates of hearing, Corporate Debtor neither filed Vakalatnama nor affidavit in reply. Hence, this Adjudicating Authority vide order dated 16.01.2021 decided to proceed the matter with ex-parte against the Corporate Debtor.”

12. Appellant has not claimed that Corporate Debtor had not received Notice. The Learned Counsel for the Appellant submits that the Appellant was suffering from COVID at relevant time. The order of Adjudicating Authority shows that the Application was filed on 28.07.2020 and notice was issued on 24.08.2020 and thereafter there were two dates of hearing but still the Corporate Debtor did not appear or file Vakalatnama. When Corporate Debtor is a Company where there are more Directors rather than only one as can be seen from the Balance Confirmation issued by the Company, it does not lie in the mouth of the Corporate Debtor to claim that one Director was suffering from COVID so the Corporate Debtor could not cause appearance before the Adjudicating Authority. Para 7.7 of the Appeal states as under:

“7.7 That the impugned proceedings conducted before the adjudicatory authority was ex-parte. It is submitted that appellant herein was under huge financial pressure due to covid and prevailing financial crunch in the market. It is the case of the appellant herein that appellant herein had approached advocate to contest the matter before the adjudicatory authority. That from 25/11/2020 to 06/12/2020 the director of appellant company

was not in India, he had to travel to Europe for inevitable business tour. That during his tour he was confirmed as Covid-19 positive in Europe. That due to the health issue he came back to India on 06/12/2020 and was quarantine as per guidelines upto 20/12/2020. So under huge financial and mental pressure the appellant could not provide the necessary instruction to the advocate for contesting the matter before adjudicatory authority. That in the absence of any instruction the Ld. Advocate could not appeared before the adjudicatory authority and matter was declared as Ex-parte by the adjudicatory authority.”

13. Considering above there is no reasons why before 16.02.2021 when hearing took place before Adjudicating Authority, Corporate Debtor did not approach Adjudicating Authority to seek to defend.

14. We do not find that there is any substance in the Appeal. We decline to admit the Appeal. Appeal stands disposed of. No cost.

**[Justice A.I.S. Cheema]
The Officiating Chairperson**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

Archana/gc.