

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 341 of 2021

(Arising out of Order dated 10.11.2020, passed by National Company Law Tribunal, New Delhi Bench V, New Delhi in C.P. No.IB-866/ND/2020)

IN THE MATTER OF:

**PEC Limited,
Registered Office at:
Hansalaya, 15 Barakhamba Road,
New Delhi -110001.**

...Appellant

Versus

**Tathagat Exports Pvt Ltd,
Shop No.201, 2nd Floor,
Vardhman Sudharshan Plaza,
Plot No.4, Sector 5, Dwarka,
Delhi-110075.**

...Respondent

For Appellant: Mr. Rajeev Kumar Yadav, Advocate.

For Respondent: None.

J U D G E M E N T

(Per: Shreesha Merla, Member (T))

1. Challenge in this Company Appeal (AT)(Insolvency) No.341/2021 is Impugned Order dated 10/11/2020 in C.P. No. IB-866/ND/2020 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, whereby the Adjudicating Authority has dismissed the Application filed under Section 7 of the Insolvency & Bankruptcy Code, 2016 (Hereinafter referred to as the 'The Code'), as being barred by Limitation.

2. Succinctly put, the facts in brief are that the Appellant, *M/s PEC Ltd*, the 'Financial Creditor' has financed the 'Corporate Debtor' for procurement of 'iron ore lumps and sized ore' not exceeding an amount of Rs.10 crores and executed an 'Associateship Agreement' dated 23.09.2008 which was validated till June, 2012. On 30.06.2013 an Addendum No.1 was again executed

between the parties, by which the Financial Creditor provided credit facilities to the tune of Rs.16 crores. The validity of the Associateship Agreement was till 31.12.2014 or till such time as the Associate/Corporate Debtor fulfils its obligations to the satisfaction of the 'Financial Creditor'. According to Clause 4 of the 'Associateship Agreement' of 2012, the Financial Creditor would finance 75% of the value of the stocks pledged in its favour. Accordingly, the Corporate Debtor created a pledge of appropriate value in favour of the Financial Creditor by way of executing multiple Deeds of Pledge.

3. Submissions on behalf of the Learned Counsel for the Appellant.

- The Learned Counsel for the Appellant contended that the 'Adjudicating Authority has erroneously dismissed the Section 7 Application on the ground of Limitation without taking into consideration that the Respondent had, on several occasions for the period commencing from 2013 to 2017 acknowledged its liability to repay the amount of credit facilities availed. The Learned Counsel drew our attention to the email dated 18.06.2013 wherein the Respondent had acknowledged debt of Rs.17,82,41,112/-, by providing a schedule of repayment wherein the last instalment would be on 30.03.2014. The Learned Counsel also placed reliance on email dated 29.09.2014 whereby the Respondent had agreed to pay Rs.5-6 crores by the end of October, 2014 and another Rs.5-6 crores by the end of March, 2015. The Learned Counsel also drew our attention to letter dated 18.11.2015 in which the Respondent had stated that an amount of Rs.20,58,29,912/- was payable to the Appellant herein.
- The Learned Counsel for the Appellant strenuously contended that the cheques 30.01.2017, 10.02.2017, 23.02.2017 (two cheques) for an

amount of Rs.4 crores each total amounting to Rs.16 crores were dishonoured on 01.02.2017, 13.02.2017 and 24.02.2017 respectively, pursuant to which the Appellant had issued a Legal Notice dated 02.03.2017, for which the Respondent had sent a 'Reply' dated 18.03.2017, in which letter, the settlement of accounts was proposed by the Respondent. It is further submitted that the Appellant had sent a Notice dated 07.04.2017 under Section 176 of the Indian Contract Act, 1872 calling upon the Respondent to repay a sum of Rs.26,69,23,769/- for which the Respondent replied on 12.04.2017 wherein once again, the Respondent acknowledged the financial obligations.

- It is the case of the Appellant that despite these acknowledgements in the email dated 29.09.2014, Minutes of Meeting dated 23.09.2016 and the cheques dishonoured read with Reply to the Notice dated 12.04.2017, all of which fall within the ambit of the Section 18 of the Limitation Act, 1963, the Learned Adjudicating Authority has not considered the ratio of the Hon'ble Supreme Court in catena of Judgements and has dismissed the Application. The Learned Counsel for the Appellant has relied on the following judgements:-
 - a) *Yogesh Kumar Jashwantlal Thakkar Vs Indian Overseas Bank and Ors MANU/NL/0341/2020*
 - b) *Rajesh Kumar Vs Prem Chand Jain AIR 1998 Delhi 80*
 - c) *V.K. Abdul Rahim Vs The Federal Bank Ltd & Anr, Company Appeal (AT) (Insolvency) No.1297 of 2019*
 - d) *Bank of India Vs Multi Arc Coating and Straps Ltd; Company Appeal (AT)(Insolvency No.891/2019*

- e) *Malti Arc Coating and Straps Ltd Vs Bank of India; Civil Appeal No.2195/2020*
- f) *RR Gopaljee Vs Indian Overseas Bank and Ors. MANU/NL/0276/2020*
- g) *Lakshmirattan Cotton Mills co Ltd and Ors Vs The Aluminium Corporation of India Ltd AIR 1971 SC 1482*
- h) *Mahavir Spinning Mills Ltd Vs HB Leasing and Finances Co Ltd 199(2013) DLT 227*
- i) *Dena Bank Vs C Shivakumar Reddy and Ors MANU/sc/0502/2021*
- j) *Asset Reconstruction Company (I) Ltd Vs Bishal Jaiswal and Ors MANU/SC/0279/2021*
- k) *Suo Moto Writ Petition (C) No.3/2020 Order dated 10.01.2022*
- The Sole Respondent was issued Notice on 01.06.2021 and was directed to file Reply within four weeks. The Office Report specifies that Notice were sent through email and Speed Post. The Notice vide email was delivered but the Notice issued through Speed Post was received back. Affidavit of Service on behalf of Appellant was filed on 17.08.2021.
 - The matter was taken up again on 10.08.2021. None appeared for the Respondent. On 13.09.2021, on perusal of the Service Affidavit filed by the Appellant herein, this Tribunal noted that the Appellant had complied with the order dated 10.08.2021 and appropriate steps were taken up by the Appellant on 03.06.2021. Further, on 17.08.2021 by way of an email ID tathagatexports@yahoo.co.in, on their registered email, a copy of the Appeal Book was sent. Despite service of Notice, none appeared on 13.09.2021. It was made clear that if the Respondent failed to appear on the next date, this Tribunal may proceed *ex-parte*

against Respondent. The Respondent failed to appear on 15.11.2021 and again one more opportunity was given and the matter was posted on 07.01.2022. Despite service of Notice, the Respondent failed to appear and was proceeded *ex-parte*.

Assessment

4. The brief point which falls for consideration in this Appeal, whether the Adjudicating Authority was justified in dismissing the Section 7 Application solely on the ground of Limitation that it was barred by Limitation.
5. The Learned Adjudicating Authority while dismissing the Application observed as follows:-

“29. Since, much reliance has been placed by the Learned Counsel for the petitioner on the reply filed by the Corporate Debtor in pursuant to the legal notice issued under Section 138 of the NI Act, therefore, we would like to consider this document at first and we have gone through the reply filed by the Corporate Debtor in response to the legal notice issued under Section 138 of the NI Act and we noticed that at page 376, it is mentioned that Corporate Debtor had proposed for settlement of the account and on the basis of that Ld. Counsel for the petitioner submitted that the Corporate Debtor has acknowledged the debt by sending the reply to the Legal Notice issued under Section 138 of the NI Act and we also noticed that in its reply to the Legal Notice issued under Section 138 of the NI Act, in para 6 of the reply, which is at page 374 of paper book, it is mentioned that undated cheques were handed over to the petitioner and that is the reasons the date, when the cheques were handed over to the petitioner are not disclosed in the notice. Therefore, at this juncture, we would like to examine this fact that whether the petitioner has mentioned in its application, the date when the petitioner received the cheque, we have gone through the application and the averments made in the petition and we noticed that at page 7 in para 12, the petitioner has mentioned that the Corporate Debtor had handed over four cheques, each of Rs. 4 Crore but no where the petitioner has mentioned that the date, when the cheques were handed over to the petitioner by the Corporate Debtor, of course, the date of cheque is mentioned at page 8 of

the application but it is not mentioned when the Corporate Debtor had handed over the cheques to the petitioner. Therefore, so far the contention of the petitioner regarding the part payment of the amount, and claim of the petitioner under Section 19 of the Limitation Act is concerned, in the absence of specific date of receiving the cheque or receiving the part payments in the form of cheque, specially when it is mentioned in the reply that undated cheques were handed over, it cannot be accepted that the part payment was made on the date, which appears in the cheques.

30. Apart from that, in the case of Yogesh Kumar Jaswantlal Thakkar Vs Indian Overseas Bank and Ors reported in MANU/NL0341/2020 passed by Hon'ble NCLAT, Hon'ble NCLAT held that Section 19 of the Limitation Act is not applicable so far the IBC is concerned.

31. Now coming to Section 18 of the Limitation Act, the petitioner contended that since it is mentioned in the reply dated 18.03.2017 that he is ready to settle the statement of accounts, which amounts to the acknowledgement of debt, therefore, at this juncture, we would like to refer to agreement on the basis of which the petitioner is claiming that amount is due and payable. The petitioner has enclosed the agreement from Page 40 to 54 of the paper book and on the basis of that, we noticed that last agreement was of dated 01.07.2012 and that was amended on 30.06.2013.

32. At this juncture, we would also like to refer the part-4 of the application and we notice that date of default is not shown rather it is mentioned that "the detailed working for computation of the amount and default (in days) is annexed herewith as Annexure K" and Annexure K, which is from 80 to 84. We noticed that there is no specific date of default is mentioned rather the petitioner has referred the balance sheet for the different financial years and on the basis of that the petitioner is claiming since the amount is shown in the balance sheet, therefore, the date of default, is the date mentioned in the balance sheet.

33. Therefore, we are of the considered view that in Part -IV, the date of default is not mentioned. Since the last agreement was executed on 30.06.2013, therefore, the payments on the basis of that agreement must be made within 3 years from the date of last agreement, which was executed on 30.06.2013 and

acknowledgement also must have been made within that period.

34. At this juncture, we would like to refer the submissions of the petitioner's counsel, who has placed reliance upon the reply to the legal notice dated 02.03.2017, which is much after the 3 years, therefore, even if we accept the contention of the petitioner that reply which was given in response to the legal notice under Section 138 of NI Act will be treated as an acknowledgement of debt, the same has also been made after three years from the date of execution of last agreement, whereas in view of Section 18 of the Limitation Act, the acknowledgement must be made within the period of limitation, hence, we are unable to accept the contention of the Ld. Counsel for the petitioner that the present application is within time."

6. We are of the considered view that this Appeal be decided on the touchstone of the ratio of the Hon'ble Supreme Court in the case of *Asset Reconstruction Company (India) Ltd V. Bishal Jaiswal 2021 SCC OnLine SC 321* and the preposition laid down in *Dena Bank (now Bank of Baroda) Vs. C. Shivakumar Reddy and Another (2021) 10 Supreme Court Cases 330*.

7. The Addendum No.1 to the Associateship Agreement dated 01.07.2012 is signed on 30.06.2013 between the Financial Creditor and the Corporate Debtor wherein it is clearly stated that an amount of Rs.16 crores would be lent on a rotational basis and the validity in Clause 19 shall be read as under:-

"This agreement shall be valid till 31.12.2014 or till such time as the Associate fulfils its obligation to the satisfaction of PEC, whichever is later."

8. From the aforementioned terms, it is clear that the Agreement shall be valid till 31.12.2014. The Section 7 Application was filed on 10.06.2020. At this juncture, we find it relevant to reproduce letter dated 18.11.2015 addressed by the Corporate Debtor to the Financial Creditor acknowledging that an amount of Rs.20,58,29,912/- is payable as on 06.08.2015.



18th Nov, 2015

To,
PEC Limited,
New Delhi

Kind Attention : Mr. Rajiv Chaturvedi, Chief General Manager

Dear Sir,

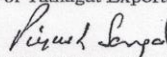
At the outset, we would thank you for your cooperation extended in the matter of repayment of financed amount for Iron Ore. We sincerely regret the delay and assure you that we will complete the repayment against the same.

We hereby admit that there is an outstanding amount of Rs. 20,58,29,912 as on 06.08.2015, which is payable to you from us against financing facilities availed from you towards procuring Iron Ore.

Thanking you,

Yours Sincerely

For Tathagat Exports Pvt. Ltd.


PIYUSH SENGAR
DIRECTOR



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9. It is the case of the Learned Counsel for the Appellant that in the legal notice dated 02.03.2017 issued under Section 138 of the Negotiable Instruments Act, 1881 for dishonour of the four cheques there was a clear acknowledgement that in a Meeting held on 23.09.2016 a road map was discussed for repayment of the dues. The Learned Adjudicating Authority has not taken this acknowledgement into consideration observing that the legal notice is dated 02.03.2017 which is beyond three years of the last Agreement

executed on 30.06.2013. It is seen from the record that there is a letter dated 18.11.2015 reproduced in para 8 acknowledging the debt of Rs.20,58,29,912/- thereby extending the period of limitation to 18.11.2018. Admittedly the cheques issued in the months of January and February, 2017 were all dishonoured in the same months.

10. The material on record shows that a Legal Notice was issued by the Financial Creditor to Corporate Debtor on 02.03.2017, for which the Corporate Debtor replied on 18.03.2017, which relevant portion is reproduced as hereunder:-

“b)That because the downward market trends continued, which fact were continuously apprised of, despite best efforts of our Client No.1, the kind of returns envisaged at the time of entering the agreement could not be achieve. Vide various letters including those dated 28.03.2016 and 30.05.2016, our client No.1 brought up the subject of settlement of accounts and proposed various means to settlement of accounts in a manner that would not break its back in a flailing market situation, and would ensure that all dues were repaid to M/s PEC Limited. It is stated that Our Client No.1 has never run away from the fact that it has dues pending, nor has our Client No.1 ever by words or actions communicated that it had/has no intention to repay them. On the other hand Our client No.1 has constantly sought out meetings and discussions with concerned personnel regarding the same and has always kept M/s PEC Limited up to date with all happenings and issues and sought the help and assistance to M/s PEC Limited on the same.

c) In fact, M/s PEC Limited has full knowledge of the fact that the cargo as envisaged under the Agreement dated 01.07.2012 was sought to be used in a plant owned by a known concern, i.e. M/s Maa Tarini Industries Limited, which concern also saw a huge downturn in business given the slow down in the steel industry which in turn impacted Our Client No.1 We would like to reiterate that there has always been full disclosure and updating by our Client No.1 regarding all aspects to M/s PEC Limited. In fact all facts are completely known to M/s PEC Limited since Maa Taarini Industries Limited has also sought financial assistance from M/s PEC Limited. Thus all the facts and intricacies of the situation are within the knowledge of M/s PEC Ltd.

d) It is further stated that M/s PEC Limited has never doubted or refuted any of the issues brought up by Our client No.1, be it the slow down of the industry, falling prices of sponge iron, or the intention of our Client No.1 to repay all our dues as arising under the agreement dated 01.07.2012.

e)It is further stated that as recently as 23.09.2016, a Meeting was held at PEC office, where a road map was discussed for repayment of the dues, and Our Client No.1 had agreed to give working proposals once again for repayment of dues. In the said meeting, our Client No.1 had requested M/s PEC Limited not to pursue any legal or punitive proceedings as that would distract from the legitimate efforts being made to repay dues.”

11. In the aforementioned Reply to the Legal Notice there is a clear admission of the debt and also refers to the Meeting took place on 23.09.2016 where some deliberations were made for repayment of the dues.

12. It is significant to mention that the Appellant herein has filed Balance Sheets before the Adjudicating Authority reflecting the amounts due and payable by the Respondents. The Learned Adjudicating Authority has recorded the same in para 26 of the Impugned Order.

13. The Hon'ble Supreme court in the case of **Asset Reconstruction Company (India) Ltd Vs Bishal Jaiswal and Anr 2021 SCC OnLine SC 321** in paras 14, 27 and 28 has observed as follows:

“14. Several judgments of this Court have indicated that an entry made in the books of accounts, including the balance sheet, can amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act. Thus, in Mahabir Cold Storage V CIT, 1991 Supp (1) SCC 402, this Court held:

“12. The entries in the books of accounts of the appellant would amount to an acknowledgement of the liability to M/s Prayagchand Hanumanmal within the meaning of Section 18 of the Limitation Act, 1963 and extend the period of limitation for the discharge of the liability as debt. ...”

27. In CIT-III V. Shri Vardhman Overseas Ltd., 2011 SCC OnLine Del 5599 : (2012) 343 ITR 408, the Delhi High Court held:

“17. In the case before us, as rightly pointed out by the Tribunal, the assessee has not transferred the said amount from the creditors' account to its profit and loss account. The liability was shown in the balance sheet as on 31 st March, 2002. The assessee being a limited company, this amounted to acknowledging the debts in favour of the creditors. Section 18 of the Limitation Act, 1963 provides for effect

of acknowledgement in writing. It says where before the expiration of the prescribed period for a suit in respect of any property or right, an acknowledgement 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, a fresh period of limitation shall commence from the time when the acknowledgement was so signed. In an early case, in England, in *Jones v. Bellgrove Properties*, (1949) 2KB 700, it was held that a statement in a balance sheet of a company presented to a creditor-share holder of the company and duly signed by the directors constitutes an acknowledgement of the debt. In *Mahabir Cold Storage V CIT* (1991) 188 ITR 91 : 1991 Supp (1) SCC 402, the Supreme Court held:

“The entries in the books of accounts of the appellant would amount to an acknowledgement of the liability to Messrs. Prayagchand Hanumanmal within the meaning of Section 18 of the Limitation Act, 1963, and extend the period of limitation for the discharge of the liability as debt.”

In several judgments of this Court, this legal position has been accepted. In *Daya Chand Uttam Prakash Jain V Santosh Devi Sharma* 67 (1997) DLT 13, S.N. Kapoor J. applied the principle in a case where the primary question was whether a suit under Order 37 CPC could be filed on the basis of an acknowledgement. In *Larsen & Toubro Ltd V. Commercial Electric Works* 67 (1997) DLT 387 a Single Judge of this Court observed that it is well settled that a balance sheet of a company, where the defendants had shown a particular amount as due to the plaintiff, would constitute an acknowledgement within the meaning of Section 18 of the Limitation Act. In *Rishi Pal Gupta V S.J. Knitting & Finishing Mills Pvt Ltd.* 73 (1998) DLT 593, the same view was taken. The last two decisions were cited by Geeta Mittal, J. in *S.C. Gupta v. Allied Beverages Company Pvt. Ltd.* (decided on 30/4/2007) and it was held that the acknowledgement made by a company in its balance sheet has the effect of extending the

period of limitation for the purposes of Section 18 of the Limitation Act. In *Ambika Mills Ltd Ahmedabad V. CIT Gujarat* (1964) 54 ITR 167, it was further held that a debt shown in a balance sheet of a company amounts to an acknowledgement for the purpose of Section 19 of the Limitation Act and in order to be so, the balance sheet in which such acknowledgement is made need not be addressed to the creditors. In light of these authorities, it must be held that in the present case, the disclosure by the assessee company in its balance sheet as on 31st March, 2002 of the accounts of the sundry creditors' amounts to an acknowledgement of the debts in their favour for the purposes of Section 18 of the Limitation Act. The assessee's liability to the creditors, thus, subsisted and did not cease nor was it remitted by the creditors. The liability was enforceable in a court of law."

28. In *Shahi Exports Pvt Ltd V CMD Buildtech Pvt Ltd.*, 2013 SCC OnLine Del 2535 : (2013) 202 DLT 735, the Delhi High Court held:

"7. It is hardly necessary to cite authorities in support of the well-established position that an entry made in the company's balance sheet amounts to an acknowledgement of the debt and has the effect of extending the period of limitation under section 18 of the Limitation Act, 1963. However, I may refer to only one decision of the learned single judge of this Court (Manmohan, J.) in *Bhajan Singh Samra V Wimpy International Ltd.* 185 (2011) DLT 428 for the simple reason that it collects all the relevant authorities on the issue, including some of the judgments cited before me on behalf of the petitioners. This judgment entirely supports the petitioners on this point."

14. To reiterate, Learned Adjudicating Authority has recorded in para 32 of the Impugned Order as follows:

"At this juncture, we would also like to refer the part-4 of the application and we notice that date of default

is not shown rather it is mentioned that “the detailed working for computation of the amount and default (in days) is annexed herewith as Annexure -K” and Annexure K, which is from 80 to 84. We noticed that there is no specific date of default is mentioned rather the petitioner has referred the balance sheet for the different financial years and on the basis of that the petitioner is claiming since the amount is shown in the balance sheet, therefore, the date of default, is the date mentioned in the balance sheet.”

While the Adjudicating Authority has clearly referred to the balance sheets and the amount shown in the balance sheet as due and payable and recorded the submissions of the Appellant that the default amounts are reflected in the balance sheets, the Adjudicating Authority has not considered the aforementioned ratio of the Hon’ble Supreme Court in ‘Asset Reconstruction Company (India) Limited Vs. Bishal Jaiswal and Anr.’, wherein the Hon’ble Supreme Court has laid down that Acknowledgement in the balance sheet construes Acknowledgment under Section 18 of the Companies Act, 1963.

15. Having regard to the letter dated 18.11.2015 which acknowledges the debt amount due and payable to the tune of Rs.20,58,29,912/-; the cheques dated 23.02.2017 issued by the Corporate Debtor to the Appellant herein for an amount of Rs.16 crores which has been dishonoured; the acknowledgement of debt in the Reply issued by the Corporate Debtor dated 18.03.2017 which establishes the jural relationship between the parties as envisaged by the Hon’ble Supreme Court in the Case of ‘**Dena Bank (Now Bank of Baroda) Vs. C. Shivakumar Reddy & Anr.**’; and specifically the acknowledgment in the Balance Sheets in the Impugned Order which extends the limitation by three years, this Tribunal is of the earnest view that the

Respondent has clearly acknowledged the 'Debt' due and payable to the Appellant and even proposed settlement of the accounts.

16. Keeping in view the ratio of the Hon'ble Supreme Court in the case of *Dena Bank (Supra) and Bishal Jaiswal (Supra)* we are of the view that the Application filed on 10.06.2020 is within three years of the last date of acknowledgment and hence is not barred by Limitation.

17. For all the aforementioned reasons, this Appeal is allowed. Impugned Order dated 10.11.2020 is set aside. The matter is remitted to the Adjudicating Authority to proceed in the matter in accordance with Law.

18. The Registry is directed to upload the Judgement on the website of this Tribunal and send a copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi) forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms Shreesha Merla]
Member (Technical)**

**New Delhi
18th April, 2022**

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