

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Insolvency) No. 04 of 2021
(Under section 61 of the Insolvency and Bankruptcy Code 2016)
(Arising out of Order dated 12.1.2021 in CP(IB) NO.625/7/HDB/2019
U/s 7 of I&B Code, 2016 read with Rule 4 of I&B (AAA) Rules, 2016)
passed by the Hon'ble National Company Law Tribunal, Hyderabad
Bench

In the matter of:

Tottempudi Salalith

...Appellant

Villa No.86, Lumbini SLN Springs,
Near Botanical Garden, Gachibowli, Hyderabad
Telengana 500084.

V

1.State Bank of India

...Respondent No.1

State Bank Bhavan, 14th Floor,
Madame Cama Road, Nariman Point,
Mumbai, Maharashtra 400021.

2.Totem Infrastructures Limited

...Respondent No.2

Through Interim Resolution Professional
i.e.Shri G.Satyanarayana Murty, H.No.8-2-334/B/2,
Road No.5,Banjara Hills, Hyderabad 500082

3.G.Satyanarayana Murty

...Respondent No.3

Interim Resolution Professional
Flat No.308B, 3rd Floor, Sai Tirumala Towers,
Hyderguda, Hyderabad, Telengana 500029

Present :

For Appellant

: Mr. Amit George, Advocate
For Mr.Dhananjaya Naidu and
Mr.Swaroop George,
Advocates

For Respondent No.1 : Mrs. Vidyalakshmi Vipin, Advocate
For India Law LLP
For Respondent No. 2 : Mr. Satyanarayanamurty,
Resolution Professional

JUDGMENT

(VIRTUAL MODE)

PREAMBLE:

The “Appellant” has filed in the instant ‘Appeal” being dissatisfied with the order dated 12.01.2021 passed by the ‘Adjudicating Authority’ (National Company Law Tribunal Hyderabad Bench, Hyderabad in CP (IB) No. 625/7/HDB/2019.

2. The ‘Adjudicating Authority’ (National Company Law Tribunal) Hyderabad Bench while passing the impugned order dated 12.10.2021 in CP (IB) No. 625/7/HDB/2019 at paragraph 14 and 15 had observed the following:

14.” Apart from the technical issues raised, the Corporate Debtor did not dispute existence of debt and default, albeit it may differ dates of default and so on. Public money cannot be squandered away by the Corporate Debtor by finding loopholes.

15. From the record it is observed that the Corporate Debtor addressed letter dated 29.01.2020 (Annexure -I, Page 4 of Memo dated 07.02.2020 filed by the Corporate Debtor) to the Union Bank of India and also SBI agreeing, in principle, to repay the amount due to the Financial Creditors and requesting the Bank to support them during the financial crisis the Corporate Debtor is facing due to various reasons beyond their control. They also requested vide the above letter to waive off the penal interest levied. The Corporate Debtor has also requested the Financial Creditors for One Time Settlement (OTS). By addressing such letter to the Financial Creditors, the Corporate Debtor has acknowledged the debt and also the Corporate Debtor was seeking OTS from the Financial Creditors. There was a decree issued by the Debt Recovery Tribunal (DRT) in the instant case based on which the instant application was filed and acknowledgement of debt was not paid and finally admitted the ‘Application’ filed by the ‘first respondent/bank/financial creditor’ against the ‘Corporate Debtor/M/s. Totem Infrastructure Ltd, Hyderabad’ and issued necessary directions.

APPELLANT'S SUBMISSIONS:

3. Assailing the correctness, legality and validity of the impugned order dated 12.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad in CP (IB) No. 625/7/HDB/2019, the Learned Counsel for the 'Appellant' submits that the First Respondent/State Bank of India by way of consolidation, had merged its Associate Banks viz State Bank of Hyderabad (SBH), State Bank of Mysore (SBM), State Bank of Travancore (SBT), State Bank of Bikaner & Jaipur (SBBJ) and State Bank of Patiala (SBP) and earlier to such merger, the first respondent/SBI associate Banks SBI, SBH, SBH TL, SBM CC, SBBJ TL had granted and disbursed the facilities which run as under:

Account No.	Date of Disbursement
30319660894 (SBB CC)	07.02.2008
33360886582 (SBI CC)	08.10.2013
62009677471 (SBH CC)	13.06.2006
62106387066 (SBH) TL	08.09.2009
64054173576 (SBM CC)	29.12.2009
61078919101 (SBBJ TL)	22.09.2009
61085563197 (SBBJ TL)	26.12.2009

4. The Learned Counsel for the 'Appellant' contends that the loans were not disbursed to the 'Appellant's Company' in terms of the 'Sanction Letter' and the same is the prime reason for the 'Appellant Company's financial difficulties and 'Loan accounts' being declared as "Non-Performing Assets'. Moreover, the inability to repay was also among other things due to unfavourable market conditions, bad debts, loss 7 BOT projects and 'Land Acquisition' issues etc and further reasons beyond the 'Appellant' Company's control resulting in operational losses.

5. It is represented on behalf of the Appellant's that as referred in the 'Joint Lenders Meeting' dated 31.12.2011 DDP:L invoked SBH Bank Guarantees of 1.17 crore and 1.62 crore on 26.06.2011 and Bank of Baroda BGs of 2 crores and 1 crore on 19.11.2011. Also that, the Dhoot Developers invoked 10 Bank Guarantees issued by the Bank of Baroda for Rs. 35.75 crores and 2 LCs of Rs. 2.26 crores issued by IDBI in September 2011. Added further, NCC invoked the 'Bank Guarantees' of Rs. 49.863 cores. These losses made the Appellant Company contributed to the liquidity crunch faced by the Appellant Company

and at this stage, the Appellant Company's loans accounts were classified NPA during February 2011 – March 2013.

6. The Learned Counsel for the Appellant brings to the notice of this Tribunal that the Demand Notice dated 16.08.2013 was issued by the Union Bank of India, Khairatabad under section 13(2) of the Securitisation and Reconstructions Financial Assets and Enforcement of Securities Interest Act, 2002 which clearly mentions that the loan accounts of the Appellant Company became NPA long back. Besides this, in the 'Joint Lenders Meeting' dated 23.05.2013, the Corporate Debt Restructuring proposal was rejected by the Union Bank of India- Lead Banker.

7. The Learned Counsel for the Appellant points out that the Lenders' filed joint original application No. 154 of 2014 (Re-numbered as 1563 of 2017) (OA I) before the Debt Recovery Tribunal, Hyderabad II, Original Application No. 1930 of 2014 (OA2) Before the Debt Recovery Tribunal, Bengaluru and Original Application No. 3 before the DRT Hyderabad against the Appellant and other Defendants. In fact, the original application No. 1 (Re-numbered as OA 1653 of 2017) resulted in a 'Decree' and 'Recovery Certificate' was issued by the DRT on 17.10.2017. In respect of OA 1930 of 2014 (OA 2), the Recovery Certificate was issued on 04.08.2017 (arising out of Decree). In respect of OA 221 of 2014 (OA III) a decree was passed and Recovery certificate was issued 08.09.2015.

8. The Learned Counsel for the Appellant submits that the Section 7 Application filed by the First Respondent/Bank before the Tribunal was beyond the period of Limitation and indeed, appellant Company's was classified NPA during February 2012- March 2013 and at best the period of limitation would come to an end in March 2016, therefore, the application filed by the First Respondent/Bank on 06.09.2019 before the Adjudicating Authority is barred.

9. The Learned Counsel for the Appellant contends that the demand notice dated 16.08.2013 was issued by the Union Bank of India, Khairatabad Branch under section 13(3) of the Securitisation and Reconstructions Financial Assets and Enforcement of security interest act, 2002 2which mentions that the loan accounts of the Appellant company being declared as 'NPA' in 2012/2013, thereby the three years limitation period would expire during the year 2015-2016.

10. The Learned Counsel for the Appellant takes a stand that a 'Recovery Certificate' issued by the Debt Recovery Tribunal cannot extend the period of

limitation for filing a petition under section 7 of the I & B Code. Further, the 'date of NPA' is the date of default and the orders/Decree passed by the Tribunal cannot be taken as date of default.

11. The Learned Counsel for the Appellant forcefully projects and argument that a Memo dated 07.02.2020 filed by the Learned Counsel for the Corporate Debtor in CP (IB) No. 625/7/HDB/2019 wherein the Financial Creditor through email 04.02.2020 had advised to take up the matter with Lead Lender/Union Bank of India and the Union Bank/Lead Bank through email dated 04.02.2020 had proposed to hold the consortium meeting in the account of the Corporate Debtor on 07.02.2020 at 3.30 PM at Union Bank of India, Somajiguda, to discuss the 'OTS Proposals(s)' as well the other aspects etc and this was not appreciated in proper perspective by the 'Adjudicating Authority' who had relied upon the letter dated 29.01.2020 of the Managing Director of the Corporate Debtor addressed to the Assistant Manager, Union Bank of India in a suo moto manner. As matter of fact the said memo was filed for the purpose of adjournment of the matter before the Adjudicating Authority and in fact, the letter dated 29.01.2020 of the Managing Director of the Corporate Debtor cannot be treated as an acknowledgment of debt.

12. The Learned Counsel for the Appellant contends that the proceeding under the IB Code, 2016 cannot be pressed in to service to execute a 'Decree' of the Recovery Tribunal and in fact, the Code is not a 'debt enforcement procedure'.

13. The Learned Counsel for the Appellant submits that in the decision of the Hon'ble Supreme Court in Dharani Sugars & Chemicals Ltd V Union of India & ors (2019 3 AWC 2581), the circular of RBI dated 12.02.2018 was held to be ultra virus of section 35AA of the Banking Regulation Act and the Hon'ble Supreme Court had set aside all the proceedings initiated by the 'Banks and other Financial creditors' being non est.

14. The Learned Counsel for the 'Appellant' submits that the 'Adjudicating Authority' in the impugned order dated 12.01.2021 in CP No. (IB) No. 625/7/HDB/2019 at paragraph 12 had mentioned the two fold contentions raised by the Corporate Debtor ' (1) The petition is barred by limitation and (2) The Petition has been initiated as per RBI circular dated 12.02.2018 which was held ultra virus of section 35AA of the Banking Regulation Act, by the Hon'ble Supreme Court of India, but on this aspect, there is no discussion in the impugned order and the two contentions were not dealt with by the

‘Adjudicating Authority’ while passing the impugned order and therefore, the said order is an unreasoned one.

APPELLANT’S DECISIONS:

15. The Learned Counsel for the Appellant in support his contention that the period of limitation of 3 years is to be reckoned from the date of NPA relies on the following decisions:

- Reliance Asset Reconstruction Company Limited V Hotel Poonja International Private Limited (2020) SCC OnLine NCLAT 920 – Para Nos 5,41
- C. Shiva Kumar Reddy V Dena Bank (2019) SCC OnLine NCLAT 907 – Para Nos 6-11.
- Rajendra Kumar Tekriwal V Bank of Baroda- MANU/NL/0299/2020 – Para Nos 5-8, 11
- Kotak Mahindra Bank Limited V Indian Speciality Fats Limited (2021) SCC OnLine NCLAT 85 – Para Nos 2-4
- G. Eswara Rao V Stressed Assets Stabilisation Fund (2020) SCC OnLine NCLAT 416 – Para Nos. 4, 24-28.
- B. S. Krishnan V Stressed Asset Stabilization Fund (MANU/NL/0091/2021) – Par Nos 12-17.
- C. R. Badrinath V eight Capital India (M) Limited & anr (2020) SCc ONLine NCLAT 602 – Para Nos 18-21.
- Jagadish Prasad Sarada V Allahabad Bank (2020) SCC OnLine NCLAT 621 – Para Nos 8,10-13.
- Babulal Vardharji Gurjar V Veer Gurjar Aluminium Industries Private Limited (2020) 15 SCC 1 – Para Nos 34-36.
- B. K. Educational Services Private Limited V Parag Gupta (2019) 11 SCC 633 – Para Nos 36-38, 42.
- B Prasanth Hegde V State Bank of India (2020) SCC OnLine NCLAT 717 – Para Nos. 17-24
- Gaurav Hargobindbhai Dave V Asset Construction Company 9India) Limited (2019) 10 SCC 5721 – Para Nos. 1, 6, 8.
- Ishrat Ali V Cosmos Cooperative Bank Limited (2020) SCC OnLine NCLAT 843 – Para No. 15
- A Balakrishnan V Kotak Mahindra Bank Limited (2020) SCC OnLine NCLAT 791 – Para Nos. 15-38

16. As regards to the proposition of acknowledgement is to be within the period of limitation for it to extend limitation, the Appellant places reliance on the following decisions:

- Reliance Asset Reconstruction Company Limited V Hotel Poonja International Private Limited (2020) SCC OnLine NCLAT 920 – Para Nos 30,34,41
- C. Shiva Kumar Reddy V Dena Bank (2019) SCC OnLine NCLAT 907 – Para Nos 6-11.
- Rajendra Kumar Tekriwal V Bank of Baroda- MANU/NL/.0299/2020 – Para Nos 9-11
- Kotak Mahindra Bank Limited V Indian Speciality Fats Limited (2021) SCC OnLine NCLAT 85 – Para Nos 2-4
- G. Eswara Rao V Stressed Assets Stabilisation Fund (2020) SCC OnLine NCLAT 416 – Para Nos. 10,12,13.
- B. S. Krishnan V Stressed Asset Stabilization Fund (MANU/NL/0091/2021) – Par Nos 12,15.
- C. R. Badrinath V eight Capital India (M) Limited & anr (2020) SCc ONLine NCLAT 602 – Para Nos 22-24.
- Bimal Kumar Manu Bhai Savalia V Bank of India (2020) SCC OnLine NCLAT 400 – Para Nos- 5,9,13,14
- Vijay Sitaram Dandnaik V Punjab National Bank MANU/NL/0066/2021 – Para Nos. 5, 10-15
- J C Budhraja V Chairman, Orissa Mining Corporation Limited (2018) 2 SCC 444 – Para Nos. 20-21
- Sampurn Singh V Niranjana Kaur (1999) 2 SCC 679 – Para No. 9
- Babulal Vardharji Gurjar V Veer Gurjar Aluminium Industries Private Limited (2020) 15 SCC 1 – Para Nos 34-36.

17. In regard to the plea of issuance of Recovery certificate or existence of proceedings before the Debt Recovery Tribunal or other legal proceedings will not extend the limitation period, the Appellant has placed the following decisions in support of his contentions:

- Reliance Asset Reconstruction Company Limited V Hotel Poonja International Private Limited (2020) SCC OnLine NCLAT 920 – Para Nos 26,27, 30-41
- C. Shiva Kumar Reddy V Dena Bank (2019) SCC OnLine NCLAT 907 – Para Nos 12-14.

- C. R. Badrinath V eight Capital India (M) Limited & anr (2020) SCC OnLine NCLAT 602 – Para Nos 26-28.
- Rajendra Kumar Tekriwal V Bank of Baroda- MANU/NL/0299/2020 – Para Nos 9-11
- Kotak Mahindra Bank Limited V Indian Speciality Fats Limited (2021) SCC OnLine NCLAT 85 – Para Nos 2-4
- G. Eswara Rao V Stressed Assets Stabilisation Fund (2020) SCC OnLine NCLAT 416 – Para Nos. 24-28.
- B. S. Krishnan V Stressed Asset Stabilization Fund (MANU/NL/0091/2021) – Par Nos 6, 9,10, 12-17.
- Bimal Kumar Manu Bhai Savalia V Bank of India (2020) SCC OnLine NCLAT 400 – Para Nos- 9,13
- Jagdish Prasad Sarda V Allahabad Bank (2020) SCC OnLine NCLAT 621 – Para Nos. 8, 10-13.
- Babulal Vardharji Gurjar V Veer Gurjar Aluminium Industries Private Limited (2020) 15 SCC 1 – Para Nos 34-36.
- Ishrat Ali V Cosmos Cooperative Bank Limited (2020) SCC OnLine NCLAT 843 – Para No. 16-30
- A Balakrishnan V Kotak Mahindra Bank Ltd (2020) SCC OnLine NCLAT 791 – Para No. 15-38,
- Jignesh Shah V Union of India (2019) 10 SCC 750 – Para Nos. 21

18. The Learned Counsel for the Appellant seeks in aid of the following decisions:

- ❖ Reliance Asset Reconstruction Company Limited V Hotel Poonja International Private Limited (2020) SCC OnLine NCLAT 920 – Para No.39
- ❖ C. Shiva Kumar Reddy V Dena Bank (2019) SCC OnLine NCLAT 907 – Para Nos 12-14..
- ❖ C. R. Badrinath V eight Capital India (M) Limited & anr (2020) SCC OnLine NCLAT 602 – Para Nos 26-28.
- ❖ Rajendra Kumar Tekriwal V Bank of Baroda- MANU/NL/0299/2020 – Para Nos 10.
- ❖ Kotak Mahindra Bank Limited V Indian Speciality Fats Limited (2021) SCC OnLine NCLAT 85 – Para Nos 2-4
- ❖ G. Eswara Rao V Stressed Assets Stabilisation Fund (2020) SCC OnLine NCLAT 416 – Para Nos. 24-28.

to fortify his contention that the I& B Code, 2016 cannot be used as Recovery Mechanism.

19. For the contention that 'OTS proposal' 'without prejudice' or if not accepted is not an 'Acknowledgement', the Appellant relies on the judgment of this Tribunal, in Bimal Kumar Manubhai Savalia V Bank of India reported in 2020 SCC Online NCLAT 400 (vide paragraph no. 5, 7& 9).

20. The Learned Counsel for the Appellant refers to the decision of the Hon'ble Supreme Court Babulal Vardalal Ji Gurjar v Veer Gurjar Aluminum Industries P Ltd (2020) 15 SCC 1 (vide paragraphs No. 35, 34.1) for the contention that an acknowledgement has to be pleaded by the creditor before the 'Adjudicating Authority' for it to be considered to extent the period of limitation.

FIRST RESPONDENT/ BANK'S CONTENTIONS:

21. Per contra it is the submission of the Learned Counsel for the First Respondent /Bank that the application filed under section 7 of the Code before the Adjudicating Authority was based on Recovery Certificate No1, Recovery Certificate No2, Recovery Certificate No.3 and the original application (No 1) Original Application No. 2 and Original Application No. 3 had attained finality and as against the orders passed in the three original applications, 'No appeal' was preferred. Further, as per the orders passed in the aforesaid original applications, the Appellant Debt' is due and payable in Law.

22. The Learned Counsel for the First Respondent/Bank contends that the Recovery Certificates provide a distinct 'course of action' under the Code, based on which the section 7 application was filed and they were issued prior to the date of circular. Also that, Dharani Sugars case of the Hon'ble Supreme Court, in no way precludes a Financial Creditor from filing section 7 petition of the Code, if all the ingredients section 7 petition are fulfilled.

23. The Learned Counsel for the First Respondent/Bank points out that the section 7 petition was filed by the First Respondent/Bank based on the RC I dated 17.10.2017, RC II dated 04.08.2017 RC III dated 08.09.2015.

24. The learned Counsel for the First Respondent/Bank refers to the judgement of Hon'ble Supreme Court's in Vashdeo R Bhojwani V Abhyudhaya Cooperative Bank Limited & anr, (Civil Appeal No. 11020 of 2018) wherein paragraphs 4 it is observed as under: "In order to get out of the clutches of Para 12, it is urged

that the Section 23 of Limitation Act would apply to as a result which limitations would be saved in the present case. This contention is effectively answered by a judgment of three learned judges of this court in Ramakrishna Savalram Pujari & ors V Shree Dnyaneshwar Maharaj Sansthan & ors, (1959) supp. (2) S.C.R. 476. In this case, this court has held as follows:

“..... In dealing with this argument it is necessary to bear in mind that S. 23 refers not to a continuing right but to a continuing wrong. It is very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues then the act constitutes continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterized as continuing wrongs that S. 23 can be invoked. Thus considered it is difficult to hold that the Trustees’ act in denying altogether the alleged rights of the Guravs as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was continuing wrong. The decree obtaining by the Trustees’ in the said litigation had injured effectively and completely the Appellants’ rights though the damage caused by the said decree subsequently continued.....” (at page 496)

Following this judgment, it is clear that when the recovery certificate dated 24.12.2001 was issued, this certificate injured effectively and completely the Appellants’ rights as a result of which limitation would have begun ticking.

25., The Learned Counsel for the First Respondent/Bank contends that the section 7 petition was filed based on a recovery certificate within three years from such recovery certificates and therefore, the section 7 petition is not barred by limitation. Also, going by the section 7 of the I & B Code read with the definition ‘debt’ as per section 3(11) of the Code, the said section 7 petition is bound to be admitted if the same was filed within three years from any of the recovery certificates.

26. Yet another submission made on behalf of the First Respondent/Bank is that the ‘Appellant’ through letter dated 29.01.2020 had admitted the liability to repay the amount in atleast four to six instalments spread over a period of one year and the said letter is bears the caption ‘Request for OTS with

consortium Bank in respect of the Corporate Debtor and more pinpointedly , the 'Corporate Debtor' had agreed among themselves to repay the amount due to the Bank. As matter of fact, the letter was addressed to the Assistant General Manager, Union Bank of India, Industrial Finance Branch, Hyderabad (through to the lead bank). Indeed, the said letter dated 29.1.2020 admitting the liability ,come within the limitation period from the recovery certificates' and it is further extends the time under the Limitation Act, 1963.

27. The Learned Counsel for the First Respondent/Bank points out that the order in the original application of the Debt Recovery Tribunal clearly mentions that the 'Appellant' had filed written statements' admitting the liability and an acknowledgement of debt' made in the written statement in the prior proceedings shall operate as an 'acknowledgement' within the meaning of section 18 of the Limitation Act.

28. Moreover, it is the submission of the Learned Counsel for the First Respondent/Bank that if at all the date of NPA is considered as the default date, the period of limitation stands extended by means of admission made in the original applications before the Debt Recovery Tribunal .

GIST OF REPLY OF SECOND AND THIRD RESPONDENTS:

29. The Second Respondent 2 & 3 had filed a 'Reply' (status report) inter alia stating that the Resolution Professional had to proceed with the actions contemplated in the I & B Code and Regulations to conduct 'CIRP'. In fact, at paragraph 5 of the Reply of R2 and R3 filed before this Tribunal, in the instant appeal mentions that, the First Respondent/Bank, in the capacity of the Financial Creditor was asked to bring the proposals of Committee of Creditors to the 'Notice' of the Tribunal etc.

APPRAISAL:

30. At the outset, this 'Tribunal' points out that the First Respondent/Bank in the application filed (Form 1) at Part II had inter-alia stated that the amount that was claimed by the Financial Creditors and its associate Banks in Original Application is Rs. 222, 91, 37, 610. 59 on 30.06.2017 in OA I an order was passed by the Tribunal directing the Corporate Debtor and other defendants to pay a sum of Rs. 864, 36, 71, 855.40 to all the applicant banks therein including the financial creditor and its associate banks.

31. On 17.10.2017 in RC 2615 of 2017, the DRT, Hyderabad had issued a Recovery Certificate (RC I) in the OA I in the favour of the Financial Creditors, and its association banks and other banks to recover an amount of Rs. 1408, 03, 14, 857. 40. Further, out of the aforesaid recovery amount, it was mentioned that the Financial Creditor and the associate banks were entitled to the recovery amounts mentioned as under:

	Amount ordered as Recovery Certificate
1. State Bank of India	- Rs. 196,14,36,399.35
2. State Bank of Hyderabad	- Rs. 76, 85, 47, 437.24
3. State Bank of Mysore	- Rs. 95, 22,29, 512/-
Total	- Rs. 368, 22, 13, 348.59

32. In respect of OA No. II (Original Application 930/2014), the Tribunal on 08.09.2015 passed an order directing the Corporate Debtor and other defendants to pay a sum of Rs. 5, 22, 21, 750/-. A recovery certificate No. 12257 of 2017 (RC II) in OA II was issued in favour of the erstwhile State Bank of Bikaner and Jaipur for recovery of Rs. 5, 22, 21, 750/- along with 14.25% ROI from the date of OA till realization.

33. In respect of OA No. III (Original Application No. 221/2014) filed by the erstwhile State Bank of Hyderabad against the Corporate Debtor and other defendants for recovery of Rs. 11, 51, 64, 253.23 along with interest and costs, on 27.07.2015 an order was passed, directing the corporate Debtor and other defendants to pay a sum of Rs. 14, 50, 06,349.23 to erstwhile State Bank of Hyderabad along with ROI at 14.45% from the date of OA till its realization. A recovery certificate (RC III) In OA III in favour of erstwhile State Bank of Hyderabad for recovery of sum of Rs. 14, 50, 06, 349. 23 along with ROI at 14.45% from the date of OA till its realization was issued .

34. In view of the aforesaid details, the total sum claimed as default in the section 7 application filed by the First Respondent/Bank before the Adjudicating Authority was Rs. 613, 27, 01, 598. 23 and the date of default for the initiation of CIRP against the Corporate Debtor, in the application was mentioned as per the Recovery Certificates issued by the DRT in OA I, II and III. The date of default for the three OAs were mentioned as 17.10.2017 (OA I), 04.08.2017 (OA II) and 08.09.2015 (OA III) respectively.

35. It is represented on behalf of the Appellant that in the demand notice dated 16.08.2013 (issued under section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 addressed to the Corporate Debtor and the Appellant and his wife issued by the Authorised Officer of the Union Bank of India, in respect of State Bank of India it was mentioned as NPA (since July 2012) in SI No. 2, State Bank of Mysore (NPA since June, 2012) in SI No3, State Bank of Hyderabad (NPS since August 2012) in SI No. 4, and in SI No. 10 Syndicate Bank (NPA since March 2013) and if the Limitation is calculated from the year July 2012/March 2013 based on NPA, the application filed under section 7 of the Code by the First Respondent/Bank on 06.09.2019 is beyond the period of limitation and as such the application under section 7 of the Code filed before the Adjudicating Authority is not maintainable in the eye of Law.

36. It comes to be known that in OA 1653 of 2017 (New) (OA 154 of 2014-Old) (OA II) in the file of DRT II, Hyderabad, the State Bank of Hyderabad figured as applicant No. 4 and the same was filed against the Corporate Debtor and the Appellant in the present Appeal and his wife, wherein an order on 30.06.2017 was passed against the Corporate Debtor and the Appellant and another wherein the OA was allowed with costs by directing the defendants No. 1, 2, 3 jointly and severally to pay a sum of Rs. 864, 36, 71, 855. 40. As a matter of fact the defendants no 2 and 3 in OA No. 1653 of 2017 were set ex-parte and although the 'Corporate Debtor' had filed a written statement, later their Learned Counsel reported no instructions in OA 1653 of 2017 and after closing their side evidence and hearing the arguments of the Applicant Bank's Learned Counsel an order was passed and 'Recovery Certificate' was directed to be issued.

37. It is brought to the fore that the Recovery Certificate dated 04.08.2017 in OA 1930/2014 (RC No. 12257/17) was for Rs. 5,22,21,750/- wherein the Applicant Bank/ Certificate Holder is mentioned as State Bank of Bikaner and Jaipur, Bangalore that the defendants/debtors are mentioned as Totem Infrastructure Limited (Corporate Debtor & 3 others). Also that, in Recovery Certificate dated 08.09.2017 in Case No. 221/2014 (OA III) wherein the Applicant Bank is State Bank of Hyderabad, Hyderabad and the M/s. Totem Infrastructure Limited, Hyderabad was shown as First Defendant and the present 'Appellant'/Salalith Tottempudi, Hyderabad 34 was shown as Second Defendant and that the Recovery Certificate was issued by the Presiding Officer of the DRT Hyderabad for Rs. 14, 50, 06, 349.23.

38. The Learned Counsel for the First Respondent/Bank submits that an Application filed within the period of limitation under section 7 of the Code is maintainable in Law, based on an order/Decree passed by a competent forum/court/ tribunal, as the case may be and there is no impediment in this regard.

39. The Learned Counsel for the First Respondent/bank contends that the application under section 7 of the Code by the First Respondent Bank based on RC 1 dated 17.10.2017, RC II dated 05.08.2017 and RC III dated 08.09.2017 respectively. The section 7 application was filed before the Adjudicating Authority on 06.09.2019. As such, the filing of the section 7 application by the First Respondent/Bank before the 'Adjudicating Authority' is well within the 3 years period, in the considered opinion of this Tribunal.

40. Principle of Waiver

It is to be pointed out that the 'Principle of Waiver' or 'approbation' and 'reprobation' lies at the root of conduct productive of change of activation like that of the rule of 'Constructive Resjudicata' as per explanation IV to section 11 of Civil Procedure Code.

41. Estoppel by Election

The 'Principle of Estoppel Election' is rule of 'Equity' and by this, a person is prevented by way of his conduct or action(s) or silence when it is his duty to avail the opportunity of asserting his right which he would otherwise had.

42. Estoppel by Record

The 'Doctrine of Estoppel' by matter of record means that the matter is 'Resjudicata'. No wonder, 'Resjudicata' is an 'Estoppel by Judgment'. In this connection, it is pertinently point out it is the prime duty of the Tribunal/ An appellate Tribunal to check the endeavours of unsuccessful Stakeholders/Litigants to get over the defeat by devising a plea which was never set up, when it should have been taken at the appropriate time, before the competent forum.

Aspect of NPA

43. Dealing with the plea of aspect of NPA since July 2012 (State Bank of India), NPA since June 2012 (State Bank of Mysore) and NPA since March 2013 (Syndicate Bank), projected on the side of the 'Appellant', it is to be pointed out that the Corporate Debtor's NPA accounts being 2012 and 2013, it is to be

pointed out that in OA 1653 of 2017 on the file of DRT II, Hyderabad, the order dated 30.06.2017 shows that the Corporate Debtor/D1 filed written statement, his counsel Totem Infrastructure reported no instruction and their side evidence was closed and Defendant No.2 & 3 were set ex-parte. As such, the order dated 30.06.2017 in OA 1653 of 2017 against the Corporate Debtor and the Appellant etc has become final and it is binding between the parties inter se. Therefore, the plea of NPA of the Corporate Debtor accounts was of the year 2012 and 2013 cannot be raised in the Appeal before the Tribunal. Likewise, as against the Second and Third Original Application 'Orders' in OA 1930 /2014 and OA 221/2014 have become final, and in short, in respect of three 'Original applications' the 'Recovery Certificates', were issued on 17.10.2017 (OA I), 04.08.2017 (OA II) and 08.09.2015 (OA III).

DISCUSSIONS

Scheme of I & B Code

44. In fact, the Code was enacted with the basic objective of consolidating Law pertaining to Insolvency and Bankruptcy and provide for a single legal framework to determine all cases. It is to be remembered that the Code was enacted to consolidate and amend the laws related to reorganisation and Insolvency Resolution of Corporate Persons, Partnership firms, Individuals in a time bound fashion. (a) for maximisation of value of assets of such individuals (b) to promote entrepreneurship (c) for availability of credit and balance the interests of all stakeholders etc. 'Speed' is gist of I & B Code. The Resolution Plan is not a sale/an auction/not recovery/not liquidation. No one is selling or buying the Corporate Debtor through Resolution Plan. It is resolution of the Corporate Debtor as going concern. The Code permits liquidation only on failure of CIRP. Indeed, the I & B Code, does not permit 'Liquidation' of a 'Corporate Debtor'. Undoubtedly, the recovery bleeds the Corporate Debtor to 'Death'. But the 'Resolution' 'endeavours' to keep the Corporate Debtor alive. Significantly, 'Satisfaction' of the 'Adjudicating Authority' is a condition precedent for the approval of a Resolution Plan. Section 12 of the Code provides that the 'CIRP' shall be completed within the period of 180 days etc, from the date of admission of application and further that process is to be completed within 330 days provided in the statute.

45. Initiation of CIRP

A Financial Creditor may initiate the 'CIRP' under section 7 of the Code by filing application before the 'Adjudicating Authority' as per the procedure prescribed, when the default had occurred. The occurrence of default is the pivotal point of commencement of CIRP. An application will be admitted when the 'Adjudicating Authority' is satisfied that among other things the 'default' had occurred and the 'application' was complete.

Admission & Acknowledgement

46. In Law an 'admission' is a piece of evidence and is a waiver of proof. However, an admission must be an unequivocal and comprehensive one. An acknowledgement, merely acknowledges a person's liability and the same is to be before the expiry of the specified period of limitation. The said acknowledgement of an individual, must be conscious of his liability and the commitment should be made towards that liability.

47. It cannot be gain said that a 'judgment in personam' binds both the parties in a given legal proceedings when a person is a party to the judgment/order in a legal proceedings is estopped from pleading that the said judgment/order/Recovery Certificate did not bind him. Further, a person is precluded by way of his action or conduct in not agitating a particular matter before the higher forum. Even an Exparte Decree/order is binding for all purpose. It is well settled that in the absence of fraud or want of jurisdiction or any other irregularity, an Exparte order/Decree will bind the parties at any cost.

48. It is to be mentioned the right to apply under section 7 of the I & B Code accrues to the Bank only when the code came in to force. An Application under Section 7 of the Code is to be considered by the 'Adjudicating Authority' on its merits taking into consideration available materials on record. The reason for the inability of 'Corporate Debtor' to pay its 'debt' is not required to be looked into by the 'Adjudicating Authority'. In short the shift is from 'inability to pay' to the existence of 'default'. In fact, Article 137 of the Limitation Act applies to applications for which no other articles provide for the period of limitation. The term 'dispute' is to be understood to be the 'dispute' between the parties under the I & B Code.

49. In respect of the plea taken on behalf of the Appellant that the petition filed under section 7 of the code by the First Respondent/Bank as per the directions and under the compulsion of the RBI Circular 12.02.2018 which was

held to be ultra virus of section 35AA of the Banking Regulation Act by the Hon'ble Supreme Court in the decision in Dharani Sugars and Chemicals case. It is to be pointed out that after enactment of section 35AA of the Banking Regulation Act, RBI can issue directions to banks to initiate resolution process under the Code with the authorization of Central Government. Further, the RBI can only direct the banking institution to move under the Insolvency Code in two conditions precedent are specified (1) There is a central government authorisation to do so (23) that it should be for specific defaults. In fact the RBI is entitled to give directions to 'Banks' to move under the I & B Code.

50. At the risk of repetition, this Tribunal, relevantly points out that the application under section 7 of the Code is to be decided on its own merits, taking into account the material records, especially in the absence of any evidence to exhibit that the First Respondent/ Bank had filed the application on account of the Circular issued by the RBI (Central Bank of India), the application is necessarily to be admitted.

51. Besides the above, the section 7 application was filed by the First Respondent. Bank before the Adjudicating Authority based on the Recovery Certificates 1 to III dated 17.10.2017, 04.08.2017 and 08.09.2015 respectively and these certificates do provide a separate course of action under the Code and only resting upon the same section 7 application was filed on 06.09.2019. However, the judgement of the Hon'ble Supreme Court in Dharani Sugars case was delivered on 02.04.2019. In fact the aforesaid recovery certificates were issued prior to the RBI circular 12.02.2018. In short, the principles laid down by the Hon'ble Supreme Court's decision will not apply to the present facts and circumstances of the case which float on the surface.

52. It cannot be forgotten the letter of authority in favour of the signatory of the First Respondent/Bank was based on the Gazette Notification dated 26.09.1959, 26.08.1972 and 02.05.1987. As regards the plea of the Appellant that the letter dated 29.01.2020 addressed by the Managing Director of the Corporate Debtor/Totem Ingratitude Limited addressed to Asst. General Manager, Union Bank of India, Hyderabad wherein a request for OTS with consortium banks was made, it is to be pointed out that in paragraph 2 of the said letter the corporate debtor among themselves had agreed to pay the amount due and at the bottom of the letter a request was made to consider this letter as OTS option and to permit them to repay the amount in atleast 4 to 6 instalments spread over to a period of one year and the contents of the letter

are unerringly amounts to an admission of acknowledgement because of the simple reason in the said letter a request was made to inform the 'Corporate Debtor' about exact outstanding amount payable to the banks as on the date of their account becoming NPA in the bank etc. It must be remembered that the letter dated 29.01.2020 addressed by the Managing Director of the Corporate Debtor falls within the period of limitation from the dates of recovery certificates and as such, the contra plea taken on behalf of the Appellant is not acceded to by this Tribunal.

53. It is pertinent to make a mention that section 3 (6) of the I & B Code defines claim. Section 3(10) of the Code defines 'Creditors' meaning any person to whom to debt is owed and includes a financial creditor, operational creditor and secured creditor, an unsecured creditor and a decree holder.

54. Section 3(11) of the code 'Debt' meaning a liability or obligation in respect of claim which is due from any person and includes a financial debt and operational debt .

55. Section 3(12) enjoins 'default' meaning non-payment of debt when whole or any part or instalment of the amount of debt as become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In fact, the term 'default' is similar to that of the term 'negligence'. An individual is said to have defaulted in repayment of debt, when he failed to pay the amount due and payable by him/it at the due date. More importantly, it signifies any 'omission' or failure to perform a legal or contractual duty.

56. In regard to the plea pf the Appellant that the Adjudicating Authority in the impugned order even though at paragraph 12 had mentioned that the Corporate Debtor had raised two fold contention (1) that the petition is barred by limitation (2) the petition has been initiated as by the RBI Circular 12.02.2018 which was held ultra virus of section 35 AA of the Banking Regulation Act by the Hon'ble Supreme Court, this Tribunal ongoing through the impugned order is of the considered view that the Adjudicating Authority had not adverted to the same and the said order in this regard has not spelt out reasons. Therefore, this Tribunal is of the earnest opinion that it is desirable that an 'Adjudicating Authority' is to disclose its mind in future so that the compulsion of disclosure, guarantees consideration apart from the fact, that the duty to assign reasons introduces clarity and minimizes arbitrariness. Also, it will enable the superior authority to evaluate the order so passed on legal plane. However, this Tribunal being an 'Appellate Authority' over the Adjudicating Authority in the present

Appeal has dealt with the aspect of limitation concerning the section 7 application and the aspect of RBI circular dated 12.02.2018 and answered the same at the relevant of this Judgment. As such, the Appellant cannot be an aggrieved person in this regard, in the considered opinion of this Tribunal.

57. It is to be pointed out that in our 'Justice Delivery System', 'Law' is to be decided with reasons which carry convictions within the Codes/Tribunals/Lawyers/Stakeholders and Litigants to make it, stable, predictable and consistent with a view to have certainty and clarity to the benefit of one and all. It cannot be gainsaid that the judgment/order of a Tribunal is to be written only after deep travail and positive vein. Also that, the procedure for developing the law has to be one of evolution. In this connection it is significant to point out that the exception to rule of 'Stare decisis' is that a Court/Tribunal is not bound to follow the decision(s) reached 'per incuriam'.

58 As matter of fact, in the instant case when once the Company has/had defaulted and after the initiation of legal proceedings as available to the Lender on that date (Before the Debt Recovery Tribunal) and when the Financial Creditor/Lender had obtained the order(s) in the 'Original Applications' and later recovery certificates were issued, and when the Original Applications filed before the Debt Recovery Tribunal(s) had attained finality, thereafter it is for the Lender/Financial Creditor/Decree Holder as matter of 'Election' to pursue the recovery mechanism for his/its personal benefits before a 'competent forum' or to initiate Insolvency Proceedings for the benefit of 'stakeholders' and 'one and all'. In the event of the Decree Holder/Lender/Financial Creditor has/had resorted to the initiation of Insolvency Proceedings under relevant section of the I & B Code (after coming into force of the Code) he/it cannot be found fault with, since there is no fetter in 'Law', in this regard.

59. It is pointed out that the decisions cited on behalf of the Appellant before this Tribunal, in the instant case are not applicable to the facts and the circumstances of the present case, hence they are neither considered, nor discussed.

60 Be that as it may, in view of the detailed upshot, this Tribunal taking note of the respective contentions projected by the Learned Counsels appearing for the parties, considering the facts and circumstances of the present case in a proper perspective, comes to a resultant conclusion that the instant case there is a 'Financial Debt' which is due and payable by the 'Corporate Debtor'. Moreover, as against the Corporate Debtor/Totem Infrastructure Limited,

orders were passed by the Debt Recovery Tribunal(s) and the three 'Recovery Certificates' dated 17.10.2017, 04.08.2017 and 08.09.2015 clearly establish the factum of Financial Debt, due and payable, and that default being committed by the 'Corporate Debtor'. To put precisely, the onus of proving the 'debt' and 'default' on the part of the First Respondent/Bank in the instant case, has been duly discharged. Looking at from any angle, the 'admission order' of the section 7 application as against the 'Corporate Debtor' by the Adjudicating Authority, ('National Company Law Tribunal', Hyderabad Bench in an application filed by the First Respondent/Bank) as Financial creditor on 12.01.2021 in CP (IB) No. 625/7/HDB/2019 does not suffer from any material irregularities and patent illegalities in the eye of Law. Resultantly, the Appeal fails.

CONCLUSION:

In fine, the Comp App (AT)(CH)(Ins) No. 04/2021 is dismissed. No costs. The I A No. 09/2021 and 10/2021 are closed.

**Justice Venugopal M
Member (Judicial)**

**Balvinder Singh
Member(Technical)**

25.06.2021

KM