NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

CP (IB) 393 (ND)/2021

IN THE MATTER OF:

ASSET RECONSTRUCTION COMPANY (INDIA) LTD.

HAVING ITS REGISTERED OFFICE AT:
The Ruby, 10th Floor, 29 SenapatiBapat Marg,
Dadar (West), Mumbai-400028

...APPLICANT/FINANCIAL CREDITOR

VERSUS

M/S UDAY ESTATES PVT LTD.

HAVING ITS REGISTERED OFFICE AT:
6, Alipur Road, Civil Lines
New Delhi-1100054

...RESPONDENT/CORPORATE DEBTOR

UNDER SECTION 7 of INSOLVENCY AND BANKRUPTCYCODE, 2016R/W RULE RULE 4 OF INSOLVENCY AND BANKRUPTCY (APPLICATION TO ADJUDICATING AUTHORITY) RULES, 2016

Order Reserved on: 22.10.2021
Order delivered on: 15.11.2021

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. AVINASH K. SRIVASTAVA, MEMBER (TECHNICAL)

PRESENT:

For the Financial Creditor : Adv. Dinkar Singh, Adv. Rohit Singh, Adv. Gagan Garg

For the Corporate Debtor : Sr. Adv. Ashwini Kumar Mata, Adv. Sanjay Sharma, Adv. Karan Gaur, Adv. Deepak Basht

ORDER

PER MR. AVINASH K. SRIVATAVA (MEMBER TECHNICAL)

1. The present Application is being preferred by **Asset Reconstruction Company (India) ltd.** (hereinafter referred to as "Financial Creditor") against **M/s Uday Estates Private Limited** (hereinafter referred to as "Corporate Debtor") under Section 7 of the Insolvency & Bankruptcy Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate Corporate Insolvency Resolution process (CIRP) in respect of Corporate Debtor.

2. The Financial Creditor is an Asset Reconstruction and Securitization company duly incorporated under the provisions of Companies Act, 1956 having its Registered Office at 'The Ruby, 10th Floor, 29, SenapatiBapat Marg, Dadar (West), Mumbai-400028'. The Respondent/Corporate Debtor is a company incorporated under the Companies Act, 1956 having its registered office at '6, Alipur Road, Civil Lines, New Delhi-110054'. The Master Data from the website of the Ministry of Corporate Affairs in relation to the Corporate Debtor has been already placed on record.

3. Brief facts of the Application filed by Financial Creditor in short are as follows:

i. That in the year 2009, the Corporate Debtor availed financial facilities for an amount of Rs. 60 crore from the Bank of Baroda, vide Term Loan Agreement dated **28.07.2009 (Term Loan-I)** for the purpose of the funding part of the cost of land and construction/development of Hotel "De Aqua" at Hotel Plot No. 1, Shastri Park, District Centre, Delhi. Again, in 2011, the Corporate Debtor availed another financial facility from Bank of Baroda for an amount of Rs. 13 crore vide term loan agreement dated **08.01.2011 (Term Loan-II)** for the purpose of funding part of the increased cost of the Hotel Project and internal designing/upgradation. **So, the total amount of secured debt granted by the Bank of Baroda to the Corporate Debtor is Rs. 73 crore.**

ii. That Bank of Baroda disbursed Rs. 60 croreat the contractual rate of interest BPLR + 1% per annum towards **Term Loan-I.**

iii. That Bank of Baroda disbursed Rs. 13 croreat the rate of interest 5% above Base Rate per annum towards **Term Loan-II.**

iv. That as per the covenants of Term Loan Agreement I and II, the Corporate Debtor was required to foreclose both **Term Loan-I as well as Term Loan-II** on or before June 2019. The copy of the Loan Agreements dated 28.07.2009 and 08.01.2011 are enclosed alongwith the application and are collectively marked as **Annexure A/5 (Colly)**.

v. That the total amount claimed as per the the statement of claim as on 30th June, 2021 is Rs. 152,69,04,865/-. Consolidated statement of account as on 30.06.2021 is annexed as **Annexure-A/6 (Colly)**

vi. That the Corporate Debtor admittedly failed to adhere to the terms of payment as per loan agreement. Therefore, the account of the Corporate Debtor was declared as a Non-Performing Asset on **31.12.2011.**

vii. That the Bank vide demand notice dated **11.06.2012 (annexed as Annexure A/7)**, issued under Section 13(2) of SARFAESI Act, 2002, demanded total amount of default as on 11.06.2012 of Rs. 79,93,84,596 (Rupees Seventy-Nine crore Ninety-Three lakhs Eighty-Four thousand Five hundred and ninety-six only).

viii. That Bank of Baroda vide Deed of Assignment dated **13.03.2013** duly assigned, under Section 5 of the SARFAESI ACT, 2002, the debt of the Corporate Debtor in favor of the Financial Creditor.

ix. It is further contended that the Corporate Debtor in its Balance sheet for the Financial Year 2012-2013 duly signed on 04.09.2013 and adopted in its AGM held on 30.09.2013 acknowledged the grant of financial assistance granted by Bank of Baroda duly assigned to the Financial Creditor. It is contended by Financial Creditor that the limitation period would extend to three years from date of signing of Balance sheet on 04.09.2013 to 30.09.2016.

x. That DRT (Debt Recovery Tribunal), Delhi vide its judgement annexed as **(Annexure-A/28)** dated 29.04.2016 directed the Corporate Debtor to pay the dues of the Financial Creditor within 9 months. That, the Corporate Debtor failed to pay the dues within time issued by DRT. It has been contended by the Financial Creditor that the period of limitation will extend to three years from the date of the Judgement viz. **29.04.2016 upto 28.04.2019.**

xi. It is further contended that the Corporate Debtor feeling aggrieved by the judgement of the DRT and subsequent order of DRAT filed Writ Petition before the Delhi High Court which was

dismissed by Hon'ble High Court by its judgement dated **11.07.2018**. In the judgement, it is stated that the petitioner had paid Rs. 15 crore when the matter was pending before DRT and no payment made thereafter. The judgement of High Court is found on record **(Annexure-A/29)**. It is further stated in the judgement that "obligation to pay Rs. 81.60 crore with applicable interest (less 15 crore) is undisputed. In this factual background, counsel for the Respondent (ARCIL) states that amount of Rs. 130 crore is due and payable by the Petitioner(Corporate Debtor) to the Respondent.Learned Senior Advocate for the petitioner(Corporate Debtor) states and accepts that about Rs. 100 crore is payable." Therefore, it is submitted that the period of limitation will extend for three years from **11.7.2018 to 10.7.2021.**

xii. That, the Financial Creditor submits that the Corporate Debtor vide its Settlement proposal dated 03.07.2018 duly received by Financial Creditor on 09.07.2018 acknowledged its liability towards the Financial Creditor. The same has been annexed as **Annexure- A/19**. It is further submitted that the Corporate Debtor vide its Settlement Letter dated 11.08.2018 acknowledged its liability towards the Financial Creditor, annexed as **Annexure- A/20.**

xiii. Applicant has placed catena of judgements by various courts of the country to substantiate his point regarding the extension of the limitation period wherein it was held that the entry in the Balance sheet constitutes a valid acknowledgment as well as OTS proposal also constitutes a valid acknowledgement of liability of debt under Section 18 of The Limitation Act, 1963

4. Submissions made on behalf of the Corporate Debtor in the facts and circumstances of the case are:

i. That the present Application filed by the Financial Creditor is barred by time and is liable to dismissed. To substantiate his contention, Corporate Debtor mentioned various which are:

a. Account of the Corporate Debtor was classified as NPA on 31.12.2011 and period of limitation would expire on 30.12.2014 but before the expiry of the limitation period, Corporate Debtor made the payments of Rs. 15 crore from 06.03.2014 till 13.08.2014 and thus the period would stand extended till 12.08.2017. However, Corporate Debtor submitted that they have made the payment pursuant to the order of the DRT and the said payments were made without prejudice to the rights and contentions of the Corporate Debtor in the proceedings.

b. Corporate Debtor averred that the payments cannot be considered as acknowledgement under the provision of Section 18 of the Limitation Act, 1963.

c. Corporate Debtor has specifically submitted that the documents that were relied upon by the Financial Creditor to extend the limitation period are not sustainable under the law for extension of the limitation period. The documents which were relied upon are **Deed of Assignment of Debt, Balance Sheets for the relevant time period of the Respondent/Corporate Debtor** (wherein Corporate Debtor had admitted the liability under the head 'Long Term Borrowings')**OTS (One Time Settlement) proposal sent by the Corporate Debtor, letters written by the Corporate Debtor addressed to**

the Financial Creditor, document for the Minutes of the Meeting held by the Corporate Debtor (wherein Corporate Debtor has accepted and acknowledged the liability).

d. It is specifically averred by the Corporate Debtor that, in the balance sheets they have never admitted the liability of the debt, letters sent by the Corporate Debtor were "*Without prejudice to the rights and contentions of the Corporate Debtor*",OTS sent by the Corporate Debtor does not constitute a valid Acknowledgement as OTS has never been accepted by the Applicant, and the Settlement Proposal does not come under the purview of any acknowledgement of liability or debt.

ii. The Corporate Debtor also submitted various judgements to rebut the contention of the Financial Creditor.

5. In the light of the aforesaid discussions, when we consider the case in hand, then we find that the application is complete and the term loan facility has been availed by the Corporate Debtor and the same has not been repaid by the Corporate Debtor, therefore there is default in payment of debt. That there is a valid Assignment of Debt and before the expiry of limitation period to initiate proceedings, there is a payment of Rs. 15crore pursuant to the order of DRT and order of DRT is placed on record. Aggrieved by the order of DRT, Corporate Debtor went in Writ Petition before the Hon'ble High Court, Delhi. Hon'ble High Court's judgement is also placed on record.

6. There is a valid acknowledgement on the part of the Corporate Debtor in the form of Settlement Proposal and there is settled law as declared by Hon'ble NCLAT in the matter of **Manesh Agarwal Vs Bank Of India and Anr.** (Company Appeal 1182/2019).

7. We are of the opinion that, the term "Without prejudice to the rights and contentions of the Corporate Debtor" does not negates the admission of the liability of the debt. Acknowledgement of liability under Section 18 of the Limitation Act, 1963 itself demands a broader interpretation to serve the ends of justice. That is why Section 18(2)(a) of the Limitation Act states that:

"an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right".

8. In the landmark Case of **Shesh Nath Singh Vs Baidyabati Sheoraphuli Cooperative Bank Ltd. & Anr. LL 2021 SC 177** wherein, the Apex Court held that **(Para 102):**

"In any case, Section 5 and Section 14 of the Limitation Act are not mutually exclusive. Even in a case where Section 14 does not strictly apply, the principles of Section 14 can be invoked to grant relief to an applicant under Section 5 of the Limitation Act by purposively construing 'sufficient cause'. It is well settled that omission to refer to the correct section of a statute does not vitiate an order. At the cost of repetition it is reiterated that delay can be condoned irrespective of whether there is any formal application, if there are sufficient materials on record disclosing sufficient cause for the delay".

9. Therefore, we are of the opinion that OTS shall constitute a valid acknowledgement under Section 18 of the Limitation Act, 1963.

10. Accordingly, this petition is ADMITTED. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith prohibiting:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Further:

(e) the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

The provisions of (a), (b), (c) & (d) shall not apply to:

i) such transactions as may be notified by the Central Government in consultation

with any financial sector regulator or any other authority,

ii) a surety, in a contract of guarantee to a corporate debtor.

11. The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

12. The Financial Creditor has proposed the name of ***Mr. Nilesh Sharma R/o -10, LGF, Lajpat Nagar-III, New Delhi-110024 having Email: nilesh.sharma@rrrinsolvency.comand Registration No.: IBBI/IPA-002/IP-N00104/2017-18/10232***, duly empanelled with the IBBI as the Interim Resolution Professional ("hereinafter referred to as IRP"). Written Communication by proposed Interim Resolution Professional in accordance with Rule 9(1) of Insolvency and Bankruptcy(Application to Adjudicating Authority), Rules, 2016 has been annexed as **Annexure A/4.** Therefore, he is appointed as IRP in this matter and directed to take such steps as are mandated under the Code, more specifically under Sections 15, 17, 18, 20 and 21 and shall file his report before the Adjudicating Authority.

13. The Financial Creditor is directed to deposit a sum of Rs. 2 lakh to meet the immediate expenses of IRP. The same shall be fully accountable by the IRP and shall be reimbursed by the Committee of Creditors, to the Financial Creditor to be recovered as CIRP costs.

14. Copy of the order be sent to both the parties as well as to the IRP.

15. To come up on for further consideration.

Sd/-

AVINASH K. SRIVASTAVA

Member (T)

Sd/-

ABNI RANJAN KUMAR SINHA

Member (J)