

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 282 of 2021

[Arising out of Order dated 3rd February, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in C.P. (IB) No. 213/KB/2019]

IN THE MATTER OF:

Ishita Halder,

Residing at

6/1/1, Queenspark Ballygunje,

1st Floor,

Kolkata - 700 017.

...Appellant

Versus

Mr. Siba Kumar Mohapatra

E/402, Baishnav Vihar,

Boimikhal, Near Durga Mandap,

Bhubaneswar - 751010.

...Respondent No. 1

State Bank of India

Through its Stress Assets Management Branch (SAMB-II),

1, Middleton Road Street,

Jeevandeep Building, 1st Floor,

Kolkata – 700 071.

...Respondent No. 2

For Appellant: **Mr. Joy Saha, Senior Advocate with Mr. Arani Guha and Mr. D. N. Sharma, Advocates.**

For Respondents: **Mr. Ratnanko Banerji, Senior Advocate with Mr. Kunal Tandon, Advocate for Respondent No. 1.**

Mr. Sanjay Kapur and Mr. V. M. Kannan, Advocates for Respondent No. 2.

J U D G M E N T

[18.08.2021]

A. I. S. Cheema, J.

This Appeal has been filed by the Appellant who claims to be shareholder of the Corporate Debtor – ‘M/s Mackeil Ispat & Forging Limited’ against impugned order dated 3rd February, 2020 passed by the Adjudicating Authority (National Company Law Tribunal) Kolkata Bench, Kolkata in C.P. (IB) No. 213/KB/2019. The said Company Petition was filed by way of application under Section 7 of Insolvency and Bankruptcy Code (‘IBC’ for short) by Respondent No. 2 – ‘State Bank of India’ (Bank- in short) claiming to be ‘Financial Creditor’. The Adjudicating Authority after hearing the parties admitted the application and initiated Corporate Insolvency Resolution Process (CIRP). Thus, the present Appeal.

2. In the present Appeal, the Appellant claimed that the debt of the Corporate Debtor was declared NPA on 31st March, 2013 and the Application under Section 7 was filed on 1st February, 2019 and thus the claim was time barred. The Appellant claims that the Adjudicating Authority did not considered judgments of the Hon’ble Supreme Court in the matter of “*Jignesh Shah and another vs. Union of India and another – (2019) 10 SCC 750*” and “*Gaurav Hargovindbhai Dave vs. Asset Reconstructions Company (India) Limited and another – (2019) 10 SCC 572*”. The Appeal claims that the One Time Settlement (OTS) letters relied on by the

Respondent – State Bank of India could not be treated as acknowledgments. It is also claimed that the Corporate Debtor was protected under Section 23 of the Indian Evidence Act, 1872 in so far as the OTS letters were concerned.

3. Against this, the Respondent No. 2 - State Bank of India has filed reply and it is claimed that the default of the Corporate Debtor for which application under Section 7 was filed was in respect of consortium of Banks comprising Indian Overseas Bank, erstwhile State Bank of Travancore, State Bank of India – Financial Creditor, Allahabad Bank, erstwhile State Bank of Patiala, erstwhile Andhra Bank and City Union Bank. The dates of NPA relating to these Banks are as under:

Name of Bank	Date of NPA
Indian Overseas Bank	01.11.2013
State Bank of Travancore Bank	24.01.2014
State Bank of India	28.01.2014
Allahabad Bank	31.01.2014
State Bank of Patiala	28.02.2014
Andhra Bank	30.03.2014
City Union Bank Ltd.	30.06.2014

4. The Respondent Bank claims that after declaration of account as NPA, the Banks had proceeded under Section 13(2) of SARFAESI Act and the Corporate Debtor had continuously acknowledged debt due and liability and given OTS offers to the Banks. The Respondent refers to the letters dated 20.10.2014 (Appeal Annexure A-13); Letter dated 21.11.2016 (Annexure R-2); OTS Proposal dated 07.04.2017 (Annexure R-3); OTS Proposal dated 16.05.2017 (Annexure R-4); letter

dated 26.07.2017 (Annexure R-5); letters dated 11.05.2018, 02.08.2018 and 04.12.2018 which were duly replied by the Banks. Copies of which are attached with Annexure R-6 (Colly). Respondent Bank also referred to letter dated 14.02.2019 (Annexure R-7), where Corporate Debtor requested for immediate settlement (this would be letter subsequent to filing of Section 7 application). The Respondent Bank has also referred to various amounts paid by the Corporate Debtor while making the OTS offers in 2018. The Bank relies on judgment in the matter of *“Laxmi Pat Surana vs. Union Bank of India & Anr.”*, 2021 SCC Online SC 267 (Annexure R-10) to submit that from the date of every acknowledgment fresh period of limitation would be required to be computed. Reliance is also placed on the judgment of Hon’ble Supreme Court in the matter of *“ARCIL vs. Bishal Jaiswal”*, 2021 SCC Online SC 321 (Annexure R-11). Thus, according to the Respondent Bank, the debt was not time barred and the Adjudicating Authority rightly admitted application under Section 7 of IBC.

5. The Learned Senior Counsel for the Appellant at the time of arguments made submissions on the basis of the Appeal and submitted that the question is whether proposal made in OTS can be considered to be acknowledgement. The Learned Senior Counsel for the Appellant referred to Section 23 of the Indian Evidence Act, 1872. The said section reads as under:

“23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or

under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section one hundred and twenty-six.”

6. The Learned Counsel submits that in view of such Section any admission given in the OTS proposal could not be used in Court of Law. The Learned Counsel submitted that the Adjudicating Authority in the impugned order relied on judgment in the matter of “*Gouri Prasad Goenka vs. Punjab National Bank & Ors.*” – *Company Appeal (AT) (Insolvency) No. 28 of 2019 dated 08.11.2019* and judgment in the matter of “*Shalini Publicity Creative Pvt. Ltd. vs. Dena Bank*” - *Company Appeal (AT) (Insolvency) No. 153 of 2019 dated 18.02.2019* to hold that the claim was within limitation. The Learned Senior Counsel submitted that the judgments relied on by the Adjudicating Authority had not taken note of provisions of Section 23 of Evidence Act and thus they were *per incurium*. Such OTS offers cannot be relied on. It is also argued that statutory provisions were not noticed and thus, the judgment concerned must be treated as *per incurium*. Learned Senior Counsel referred to judgment in the matter of “*Union of India and. Another v. Manik Lal Banerjee*”, (2006) 9 SCC 643 to submit that if a decision has been rendered without taking into account the statutory provision, the same cannot be considered to be a binding precedent.

7. With regard to the payments made while giving the OTS offers, the Learned Counsel submitted that the payments were made so that the OTS proposal would get considered by the Bank and for such payment Section 19 of the Limitation Act cannot be relied on.

8. Against this Learned Counsel for the Respondent Bank argued that Section 23 of the Evidence Act would not apply as no such ground was raised before the Adjudicating Authority and that if the OTS documents are seen there is nothing to show that there was any express condition that evidence of the OTS offer would not be given, nor there is any circumstance from which it can be inferred that the parties agreed together that the OTS offers would not be treated as evidence for the purpose of Court. Thus, Section 23 of the Evidence Act cannot be applied.

9. The Learned Counsel for the Respondent Bank referred to various payments made by the Corporate Debtor from time to time. Para 7 of the Counter Affidavit/ Reply (Dy. No. 27981) reads as follows:

“7. Apart from the above, while proposing the OTS offer, the Corporate Debtor had paid an amount of Rs.0.35Cr, 0.45Cr, 0.10Cr, 0.25Cr, 1.30Cr, 0.30Cr, 0.17Cr, 0.42Cr and 1.08Cr on 14.08.2018, 15.09.2018, 29.09.2018, 01.10.2018, 03.10.2018, 05.10.2018, 15.10.2018, 30.10.2018 and 23.10.2018 respectively, as upfront amount, which would also extend the limitation period.

Copy of the proof of payment of Rs.3.04 Cr on various dates mentioned above is annexed hereto and marked as ANNEXURE R-9."

10. Referring to various letters and OTS offers sent by the Corporate Debtor (referring to the Counter Affidavit), the Learned Counsel referred to his Written Submissions, where relevant portions from the OTS offers are summarised as under:

"7. Furthermore, the CD also proposed one time settlement (OTS) offers for consideration by the Banks. The following are the occasions on which OTS offer was considered b/w the Corporate Debtor and Bank thereby extending the period of limitation.

i) OTS Proposal 1: 21.11.2016

8. In the said letter dated 21.11.2016 (Pg. 11 of Counter), the CD gave a proposal for immediate settlement. The CD "offered amount of settlement for repayment Rs.35 Cr." and also stated "keep our commitment to repayment of bank loan", thereby acknowledging debt.

ii) OTS Proposal 2: 07.04.2017

9. While giving proposal, the CD stated "kindly finalise the settlement at Rs.56 Cr." and also "since we are enjoying a loan but asking for settlement, the question of payment of interest of settlement, if any, need not arise. But in case of failure in future for repayment as per our commitment the interest can be imposed" (@Pg.19 of Counter), thereby acknowledging the debt.

10. *The said proposal was rejected by the Bank vide letter dated 15.05.2017. However, the CD was given opportunity to submit higher and acceptable offer. (@Pg.21 of Counter)*

iii) OTS Proposal 3: 16.05.2017 & 17.05.2017

11. *Vide letters dated 16.05.2017 & 17.05.2017, the CD once again proposed for OTS and provided "source of fund and repayment schedule of settlement of dues". (@25, 26 of Counter)*

iv) OTS Proposal 4: 26.07.2017

12. *At the JLM, the Banks considered the OTS proposal given by the CD stating "the following proposal for sources of fund & repayment schedule of settlement of dues" (@30 of Counter)*

v) OTS Proposal 5: 11.05.2018

13. *The CD once again gave a "Final OTS proposal with State Bank of India of Rs.30.12 Cr." (@36 of Counter).*

14. *By its letter dated 11.07.2018, the Bank informed the CD that the submission of the proposal is subject to the deposit of 10% of the offer amount. (@47 of Counter)*

vi) OTS Proposal 6: 02.08.2018

15. *The CD gave a "Revised and Final OTS Proposal separately for SBI of Rs.30.41 Cr." (@ 40 of Counter)"*

11. Learned Counsel for the Respondent Bank submitted that with regard to the debt of 'State Bank of India', the debt became NPA on 28th January, 2014. In the consortium the earliest date is of 'Indian Overseas Bank' regarding NPA dated 01.11.2013 and the last date relates to 'City Union Bank Ltd.' which is 30.06.2014.

It is argued that the Banks extended various financial facilities to the Corporate Debtor which were defaulted and the accounts became NPA. As on 19.01.2018, total debt outstanding when the restructuring facilities were recalled was Rs.217,42,97,170.42/- it is argued for the Bank.

12. The Counsel for the Appellant as well as Respondent Bank accepted that Respondent Bank filed OA-103 of 2015 for recovery of the debts before DRT. It is stated that DRT vide order dated 08.06.2018 has issued Recovery Certificate. Going through the OTS offers and letters relied on by the Respondent – ‘State Bank of India’ issued in 2016, 2017 as well as in 2018 and the fact of payments made in 2018, we do not find that the debt can be treated as time barred. The Respondent Bank has rightly relied on judgments in the matter of *“Laxmi Pat Surana vs. Union Bank of India & Anr.”* and *“ARCIL vs. Bishal Jaiswal”* (Supra). We also find substance in the submission made by Learned Counsel for the Respondent that Section 23 of Indian Evidence Act cannot be applied to the facts and documents in the present matter. On facts applicability of Section 23 of Evidence Act is not made out.

13. We rely on the judgment in the matter of *“Dena Bank vs. C. Shivakumar Reddy & Anr.”*, Civil Appeal No. 1650 of 2020 dated 04.08.2021, where the Hon’ble Supreme Court considered following issues:

“23. The issue which arises for consideration of this Court, in this appeal is, whether the NCLAT has erred in law in arriving at the

conclusion that, the Petition filed by the Appellant Bank under Section 7 of the IBC was barred by limitation, and setting aside the order dated 21st March 2019 passed by the Adjudicating Authority, admitting the said Petition.

24. In other words, the main question involved in this appeal is, whether a Petition under Section 7 of the IBC would be barred by limitation, on the sole ground that it had been filed beyond a period of 3 years from the date of declaration of the loan account of the Corporate Debtor as NPA, even though the Corporate Debtor might subsequently have acknowledged its liability to the Appellant Bank, within a period of three years prior to the date of filing of the Petition under Section 7 of the IBC, by making a proposal for a One Time Settlement, or by acknowledging the debt in its statutory Balance Sheets and Books of Accounts.

25. Another question which arises for the consideration of this Court is, whether a final judgment and decree of the DRT in favour of the Financial Creditor, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action to the Financial Creditor to initiate proceedings under Section 7 of the IBC within three years from the date of the final judgment and decree, and/or within three years from the date of issuance of the Certificate of Recovery.

26. A third issue which arises for adjudication of this Court is, whether there is any bar in law to the amendment of pleadings, in a Petition under Section 7 of the IBC, or to the filing of additional documents, apart from those filed initially, along with the Petition under Section 7 of the IBC in Form-1.”

14. The Hon'ble Supreme Court extensively considered the Law of Limitation in the context of IBC and observed in Para 141 to 144 as under:

*“141. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act. In **Gaurav Hargovindbhai Dave** (supra) cited by Mr. Shivshankar, this Court had no occasion to consider any proposal for one time settlement. Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-2017, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May 2017. The NCLT rightly admitted the application by its order dated 21st March, 2019.*

142. To sum up, in our considered opinion an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

143. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of

the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid.

144. There is no bar in law to the amendment of pleadings in an application under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 of the IBC in Form-1. In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority committed any illegality or error in permitting the Appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the Adjudicating Authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view, the decision of the Adjudicating Authority to entertain and/or to allow the request of the Appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal.”

15. It is clear that offer of OTS can be relied on for the purpose of considering acknowledgement under Section 18 of Limitation Act. Issue of Recovery Certificate by DRT also is relevant for the purpose of calculating limitation.

16. Respondent Bank claims Corporate Debtor made various repayments in 2018 while making OTS offers. Repayments were made is not disputed by Appellant but argued that payments were made so that OTS proposals should be accepted. We do not find this makes any difference for applicability of Section 19 of the Limitation Act.

17. We do not find that there is any substance in the Appeal. The Appeal is dismissed. There shall be no orders as to costs.

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

[V. P. Singh]
Member (Technical)

Archana