NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.390/2022

In the matter of:

M/s. Canara Bank
112, Jayachamarajendera Road,
Bangalore-560 002.
And acting through its Branch at
Assets Recovery Management Branch,
3rd Floor, Circle Office Building,
MCH No.625, Beside Rail Nilayam,
Secunderabad-500 026.
Represented by its Senior Manager …Appellant
V
M/s. DAAJ Hotels & Resorts Private Limited.
Represented by its Managing Director,
H.No.8-2-409, Road No.6, Banjara Hills,
Hyderabad-500 034, Telangana State ...Respondent

Present :

For Appellant : Mr. M L Ganesh, Advocate

For Respondent : Ms. Nishitha, Advocate
For Mr. Abhishek Jenasenan, Advocate

JUDGMENT
(Hybrid Mode)

[Per: Justice Sharad Kumar Sharma, Member (Judicial)]

The Respondent, the alleged Corporate Debtor, is said to have aimed to, lay down the project of the construction of a five-star hotel, which engaged an investment of capital, to the tune, of its estimated value of Rs.101.31 Crores. For the aforesaid purpose, the Corporate Debtor has approached the Financial Creditors, namely the State Bank of India, the State

Bank of Hyderabad, and the Canara Bank, (the Appellant herein). Out of the aforesaid total amount sought for investment, the State Bank of India is said to have extended a financial assistance to the tune of Rs.40 Crores, Rs.10 Crores was extended by the SBH and Rs.30 Crores was said to have been extended by the Appellant (Canara Bank). While the project was being laid, the Corporate Debtor felt that the finances were falling short, and hence, the Corporate Debtor intended to avail of an additional credit facility due to the increased project cost, and accordingly the Corporate Debtor has sought a sanction of an additional term loan to the tune of Rs.25 Crores.

2. The Appellant self-submitted that, despite of the extension of the aforesaid assistance by each members of the consortium which included the Appellant also, the Corporate Debtor i.e, the respondent herein could not receive the estimated revenue, as anticipated by the Corporate Debtor from the proceeds. The Corporate Debtor is said to have resorted to, a restructuring of the financial assistance mechanism, so as to upgrade its financial capability and to improve it in a manner to satisfy, the loan, which was extended by the members of the consortium.

3. However, despite the best efforts made by the Respondent (Corporate Debtor), the object thus aimed at by the Respondent, for the establishment of the hotel, was not materialized to the level of its expectation and which ultimately resulted into a default being committed by the Corporate Debtor.

As a consequence to which, the account of the Corporate Debtor, qua, the present Appellant was declared to be an NPA, by a declaration made to the said effect on 01.10.2012.

4. During the period when, the proceedings under the Recovery of Debts and Bankruptcy Act 1993, were being carried, after the declaration of the account of Corporate Debtor as NPA, the SBH is said to have assigned its financial Debt in favour of M/s. Phoenix ARC Private Limited, vide its assignment Agreement dated 30.09.2015.

5. It is not in dispute, that the members of the consortium, including the appellant herein, are said to have initiated a proceeding under Section 19 of Recovery of Debts and Bankruptcy Act 1993, by filing an Original Application No. 3549/2017, before the Debt Recovery Tribunal (DRT), Hyderabad on 18.08.2017, allegedly for recovering an amount of Rs.131,88,29,454.89/- as a total amount due to be paid to the members of the consortium, in accordance to the breakup of the financial assistance, as is extended by the members of the consortium. In those proceedings under Section 19 before the Debt Recovery Tribunal (DRT), under the Recovery of Debts and Bankruptcy Act, the Appellant herein in the status of being the Financial Creditor and a member of a consortium, has claimed a defaulted amount to the tune of Rs. 50,47,47,470/-. It is the case of the appellant that during the period when section 19 proceedings were pending consideration

before the Debt Recovery Tribunal (DRT), the appellant contended that the Corporate Debtor, had acknowledged, the dues payable by it and assured to pay a sum of Rs.80 Crores, to the appellant by way of a OTS. It is that after the declaration of the account as a Non-Performing Asset on 01.10.2012 and after the initiation of proceedings before the Debt Recovery Tribunal (DRT) on 18.08.2017, the Appellant bank is said to have sent a letter of demand on 29.08.2018 to the Corporate Debtor, for the remittance of Rs.30 Crores, besides a sum of Rs.9.78 Crores, which already stood paid and the balance of Rs.20.22 Crores, as it was said to be due to be paid to the Appellant on 01.03.2020. The Appellant herein is said to have, raised it as an additional demand of sum of Rs.10.28 Crores vide its letter of 29.9.2018, which was demanded to be made payable on or before 28.02.2019. The aforesaid correspondences, and more importantly the demand of 29.08.2018, is being taken as to be determining the default which is taken which is taken to have been committed when the notices were issued for raising a demand, by invocation of Section 7 of I & B Code.

6. The appellant had come up with the case that, though the Corporate Debtor has acknowledged the amount due to be paid as per letter dated 29.08.2018 for the tune of Rs. 30 Crores, by the correspondence dated 30.10.2018, the Corporate Debtor has not remitted the amount due to be paid. And hence, the necessity arose for invocation of the proceeding under Section 7 of I & B Code.

7. It is not a dispute that, while the appellant was invoking the proceeding under Section 7 of I & B Code, simultaneously the Appellant has also been participating in the process of an OTS, which was being ventured into between the members of the consortium and the Corporate Debtor. But the terms of settlement, which was thus incorporated in the OTS were not acceptable, hence the Financial Creditor withdrew from the extension of the OTS offer, and the withdrawal was said to have been communicated to the Respondent on 04.02.2019.

8. While these proceedings were being taken, the members of the consortium, that is the, SBI and M/s. Phoenix ARC Private Limited, (the assignee of the loan), filed an IA No. 3710/2018 in OA No. 3549/2017, seeking to make an attempt to enter into a compromise decree, in terms of the OTS settlement, but however, the Financial Creditors herein, contended that, the OTS arrived at, since has not been accepted and honoured by the Corporate Debtor, OTS had been withdrawn, in the meeting of the consortium, which was held on 04.02.2019. Despite of there being certain controversies pertaining to the acceptance of the proposal, and an offer extended under the OTS scheme, the Appellant bank summits that vide its order dated 03.01.2020, Debt Recovery Tribunal (DRT) Hyderabad, passed a compromise decree, in favour of the SBI and M/s. Phoenix ARC Private limited, (the assignee of the loan) and partly allowed the OA for a sum of Rs.2021.98 Lakhs, which was claimed to be an amount, determined after the

payment of the balance amount, as settled under the OTS, in favour of the Financial Creditors. The effect of the compromise, of the OTS as it finds reference in the Debt Recovery Tribunal (DRT) order of 03.01.2020, the claim amount as raised by the Appellant was said to have been defaulted and as a result thereto the Appellant is said to have initiated the proceedings under Section 7 of I & B Code, for realization of the admitted defaulted amount committed by the Respondent in remittance of the financial assistance, which was extended and admittedly defaulted for the first time on 01.10.2012 when the account was declared as to be an NPA.

9. However, the proceedings of OA No. 3549/2017, which stood decided on the basis of the compromise decree dated 03.01.2020, was put to challenge in proceedings under Section 20 of Recovery of Debts and Bankruptcy Act 1993, by way of preferring of an appeal before Debt Recovery Appellate Tribunal (DRAT) being Appeal RA No. 23/2021/27, which was dismissed on 09.04.2021. Thus, being aggrieved against the two orders, settling the declaration of the non-performing assets, on the basis of the compromise decree of 03.01.2020, as arrived in the proceeding under Section 19 and which ultimately stood dismissed by the Judgment of the Appellate Authority on 09.04.2021.

10. It is not a dispute, that the Appellant had preferred Writ Petition before the High Court of Telangana, which was numbered as Writ Petition No. 14178/2021, and the same is still pending consideration.

11. In the writ petition thus preferred, before the High Court of Telangana, the Appellant who is a petitioner therein, had prayed for, the relief to the effect that, for granting a writ of certiorari, quashing the order passed by DRAT in regular appeal on 09.04.2021. And, quash the order passed in OA No. 3549/2017, on the file of the Debt Recovery Tribunal (DRT), Hyderabad and declared that the order of the Debt Recovery Tribunal (DRT) dated 03.01.2020, as well as the order of the Appellate Authority being contrary to the circulars, which has been issued by the Reserve Bank of India. Which itself the process regulating the parameters for the grant of the OneTime Settlement. With reference hereto, the appellant mentions circular of the Reserve Bank of India being Reference No. RBI/2013-14/503DBOD.BP.BC No.97/2104.132/2013-14 dated 26.02.2014.

12. Though, what implication the circular of the Reserve Bank of India dated 26.02.2014, would have as against the orders passed under Section 19 and 20 of the Recovery of Debts and Bankruptcy Act 1993, is concerned, we are refraining ourselves to venture into those aspects, because it is yet to be considered by the Hon'ble High Court, where the writ petition which has been filed by the Appellant is pending. However, the proceedings which was

drawn by the Appellant, by issuing of the notice under Section 7 of I & B Code. The Appellant has preferred IBC No. 315/7/HDB/2020 before the Ld. NCLT bench at Hyderabad, for initiation of proceedings of the CIRP under Section 7 of I & B Code and the same has been rejected by the Impugned Order of 28.02.2022, which is under challenge. The interlocutory application which was preferred in the pending proceeding under Section 7 of I & B Code, that is in the Company Petition (IB) No. 315/7/HDB/2020, has been dismissed on the following ground:-

1. Since the matter in question pertaining to the recovery of the amount is already pending challenge at the behest of the Appellant, in a Writ Petition, the proceedings under Section 7 of I & B Code, should not be resorted to, till the action taken under Section 13 and consequential decision under Section 19 and 20, is adjudicated finally, by the writ courts.

13. The Ld. Adjudicating Authority has further observed, that so far as the propriety of the withdrawal of the OTS, on the basis of the RBI circular is concerned, that cannot be a subject matter, which could be considered in the proceedings, by the Ld. Adjudicating Authority, since being the aspect, which is outside the domain of exercise of powers under Section 7 of I & B Code, for the purposes of drawing of the CIRP proceedings against the Corporate Debtor. The Ld. Adjudicating Authority, by the Impugned Order,

held that at the stage of consideration of the application under Section 7 of I & B Code including the IA, which was preferred, was found to be not maintainable, on the ground of limitation. The controversy, which would ultimately emerge is, that, admittedly the default was pointed out by the consortium of the Financial Creditors was to be falling due w.e.f. 01.10.2012. It means that it was an admitted date of default, where the account of the Corporate Debtor was declared as to be Non-Performing Asset. There had been a proceeding under the Recovery of Debts and Bankruptcy Act 1993, which ultimately resulted in a compromise decree by an order of 03.01.2020, but then the question emerges for consideration, is that what would be the criteria to determine, as to what would be the date of default has to be, either 01.10.2012 or 03.01.2020, where the OTS/Compromise was in favour of the Financial Creditors was ultimately withdrawn in the meeting of the members of consortium on 04.02.2019. When these issues were taken up, the Ld. Adjudicating Authority, by the Impugned Judgment dated 28.02.2022 had rejected the application preferred under Section 7 of I & B Code, by observing thereof, that when the proceedings under the Recovery of Debts and Bankruptcy Act 1993/Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act were being taken, the proceedings before the Debt Recovery Tribunal (DRT) as well as the Debt Recovery Appellate Tribunal (DRAT), were already a subject matter of consideration before the Hon'ble Telangana High Court. The Ld. Adjudicating Authority while scrutinizing the propriety of the judgment referred to, as rendered in the matters of **Bijnor Urban Co-Operative Bank Limited Vs. Meenal Agarwal & Others**, which was relied by the Appellant, has answered the same by observing thereof, that there cannot be any contrary view, with regards to the guidelines issued for the grant of benefit of the OTS scheme, which though cannot be claimed as a matter of right, because it is an arrangement, made under the guidelines issued by the Reserve Bank of India in order to carve out a middle, way for shortening the settlement of the dispute, but it is not as a matter of right. The Ld. Adjudicating Authority has observed that, the aforesaid authority in the matters of Bijnor Urban Co-Operative Bank Limited (Supra), which deals with regards to the modalities to be adopted for sanctioning of the OTS, for settlement of a dispute is not an arrangement, which is available to a dishonest borrower. The defaulter, Corporate Debtor has not remitted the amount. But so far, the initiation of proceeding under Section 7 of I & B Code, is concerned was being considered by the Tribunal from the perspective as to, whether, the proceedings could at all be permitted to be carried in, violation of the Article 137 of the Limitation Act, because the financial debt itself it stood determined, by the members of the consortium of financial creditors, when they have declared the account as to be Non-Performing Asset on 01.10.2012, and hence issuance of demand notice dated 29.08.2018 to the

Corporate Debtor, cannot be taken as to be the basis to override the period of limitation which has been prescribed for initiation of Section 7 proceedings as per, Section 18 to be read with Article 137 of the Limitation Act.

14. The appellant before the Ld. Adjudicating Authority has sought to, take the benefit of Section 18 of Limitation Act with regards to the date from which, the acknowledgment has been reckoned by the Corporate Debtor, admitting the liability for the remittance of the amount due to be paid. Hence, the appellant takes the benefit, that the period of limitation contemplated under Article 137, has to be reckoned from the date of the acknowledgment made by the Corporate Debtor in the proceedings before the Debt Recovery Tribunal (DRT) and ultimately before the Debt Recovery Appellate Tribunal (DRAT) also. Thus, it was contended that the date of declaration of the account has to be Non-Performing Asset (NPA) on 01.10.2012, would not be the actual date of determination of the limitation, because the same according to the Appellant was to be considered, from the date when the Corporate Debtor has acknowledged the dues.

15. The Ld. Adjudicating Authority, observed that the application under Section 7 of the I & B Code, has been filed on 19.07.2020, and that is being argued to be well within the limitation, determining the same to be with effect from the compromise decree of 03.01.2020. The Ld. Adjudicating

Authority considered the aforesaid aspect and ultimately observed, that default in the case of the proceeding has to be reckoned from the date when the financial creditor had actually got the knowledge of the default having been committed, which in the instant case will be falling to be 01.10.2012 when the notices under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act was issued.

16. In order to substantiate the aforesaid observation, made by the Ld. Adjudicating Authority, the Ld. Adjudicating Authority has made reference to the Judgment of Asset Reconstruction Company Limited, which has held that, the declaration of a loan account/debt as a Non-Performing Asset (NPA) has to be taken as date of default. The said date has to be reckoned as the date of default in order to enable the financial creditor to initiate the proceeding under Section 7 of the I & B Code. Commission of a default consciously means, that it is an expression of default when it is realized and accepted by the Financial Creditor and accepted by the Corporate Debtor when the notices under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act was issued and accepted by the Corporate Debtor. The aspect of default as defined under Section 13 (2) of the SARFAESI Act was to be reckoned from the date notice is issued. It does not mean a debt when held or any part or instalment of the amount becomes due to be payable, but

not paid. It would be actually be the default which has occurred when the notices were issued on 01.10.2012, for drawing the proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, reckoning of the period of limitation prescribed under Article 137 the Limitation Act, since has been given a retrospective effect for the purposes of the proceeding under Section 7 or 9 of the I & B Code. The drawing of the proceedings by issuing a notice or demand on 29.08.2018, after the reckoning of the default committed on 01.10.2012, we render the procedure under Section 7 to be initiated and barred by limitation.

17. For the aforesaid reason, as the entire proceeding under Section 7 of I & B Code, was barred by limitation, the same does not hold merit and would accordingly stand 'dismissed'.The Judgment rendered by the Ld. Adjudicating Authority on 28.02.2022, is hereby upheld.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Indevar Pandey]
Member (Technical)

20.12.2024
SN/TM/MS