NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 832 of 2021
&
I.A. 1381 of 2022

(Arising out of the Order dated 17th September, 2021 passed by National Company Law Tribunal, Mumbai Bench, Court – III, in C.P. No.-4182/IBC/MB/2018)

IN THE MATTER OF:

Haridas Gautamkumar Dave
Suspended Director of the Corporate Debtor
Having residence at:
703, Uphar 2, 7 Bungalows,
Andheri West, Mumbai – 400061. **…Appellant**

Versus

1. Indian Transformers Co. Ltd.
Through its Interim Resolution Professional,
Mr. Ankur Kumar
Having its Office at:
Office No. 9, Shri Ramwadi, J P Road,
Near Dhake Colony,
Andheri West,
Mumbai – 400058. **…Respondent No. 1**

2. Union Bank of India
Through its authorised representative
Having its registered office at:
Union Bank Bhavan, 239,
Vidhan Bhavan Marg,
Mumbai – 400021. **…Respondent No. 2**

Present

For Appellant:	**Mr. Akshay Srivasatava, Mr. Piyush Singh & Mr. Aditya Parolia, Advocates.**
For Respondent No. 2:	**Mr. Rishi Kumar Singh Gautam, Advocate for R-2.**

(J U D G E M E N T)

[Per; Shreesha Merla, Member (T)]

1. Challenge in this Appeal is to the Impugned Order dated 17.09.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – III) in C.P. No. 4182/IBC/MB/2018 by which Order, the Learned Adjudicating Authority has admitted the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'The Code') preferred by the 'Financial Creditor'/'M/s. Union Bank of India' against the 'Corporate Debtor'/'M/s. Indian Transformers Company Limited'. Aggrieved by this Order, the Shareholder of the 'Corporate Debtor' preferred this Appeal. While admitting the Section 7 Application, the Adjudicating Authority addressed the issue of 'Limitation' and noted the following:

> *"Whether the above Company Petition is within limitation?*
>
> *3. In order to decide the above issue, it is important to mention that the loan facilities availed by the Corporate Debtor were originally declared as NPA in 2011 and subsequently loan facilities were restructured, and fresh documents were obtained from the Corporate Debtor in 2013 and the accounts were declared as NPA on 31.03.2013. The Financial Creditor annexed two debit balance confirmations dated 14.07.2015 at page numbers 219 to 220 of the Company Petition in respect of loan account bearing no. 320506310000007 for an amount of Rs. 146936720.80 and 320505010090079 for an amount of Rs. 5,00,00,000/-respectively which are within 3 years from the date of declaring the account as NPA.*

4. Subsequently, the Corporate Debtor paid an amount of 50,000/- on 13.10.2017 which was also confirmed by the Corporate Debtor through their reply dated 04.12.2017 raising objection to the possession notice issued by the Financial Creditor under SARFAESI Act. The Corporate Debtor also addressed letter dated 24.02.2016 confirming the LC outstanding dues and LG outstanding dues. The above Company Petition being filed on 31.10.2018 is well within limitation. As per the law laid down by the Hon'ble Supreme Court in Dena Bank (now Bank of Baroda) Vs. C. Shivakumar Reddy & another; an OTS letter addressed by borrowers also amounts to an admission of liability/acknowledgment of debt. Therefore, the only legally sustainable plea of limitation raised by the Corporate Debtor in the sur-rejoinder and written submission is liable to be rejected and accordingly rejected.

5. Upon hearing the submissions of the counsel appearing for the Financial Creditor and upon perusing the material available on record, this bench is of the considered opinion that the Financial Creditor has successfully proved the existence of debt and default and the debt is also within limitation. The Financial Creditor has also suggested the name of proposed Interim Resolution Professional in part-3 of the Petition along with his consent letter in Form-2. Thus, the present Company Petition satisfies all the necessary legal requirements for admission."

2. It is the main case of the Learned Counsel for the Appellant that the Impugned Order was obtained by playing fraud as the date of NPA was wrongly mentioned by the 'Financial Creditor' as 31.03.2016, whereas it was 31.03.2011; the 'Financial Creditor' has concealed this fact and made an incorrect statement of oath that the NPA was 31.03.2016; the terms of restructuring of the account mentioned in the letter dated 23.05.2013, was never complied with by the

'Financial Creditor'; due to non-implementation of the restructuring terms, the loan account remained an NPA and could not be upgraded from the default status; the Adjudicating Authority failed to appreciate that there was no default under the Code as on 31.03.2016; that the Additional Affidavit was filed by the 'Financial Creditor' only on 19.08.2021 through one Mr. R. Surya Prakash Rao, with the support of the Power of Attorney dated 24.02.2015 issued by the Corporation Bank and not the 'Financial Creditor' and that the Application though 'barred by Limitation' was not considered by the Adjudicating Authority.

3. Learned Counsel in support of his submissions that the Application was 'barred by Limitation' relied on the following Judgements:

- *'Sesh Nath Singh & Anr.' Vs. 'Baidyabati Sheoraphuli Co-operative Bank Ltd. & Anr.'*[1].
- *'Laxmi Pat Surana' Vs. 'Union bank of India & Anr.'*[2].
- *Asset Reconstruction Company (India) Limited' Vs. 'Bishal Jaiswal & Anr.'*[3].
- *'Dena Bank (now Bank of Baroda)' Vs. 'C. Shivakumar Reddy & Anr.'*[4].
- *'Khan Bahadur Shapoor Fredoom Mazda' Vs. 'Durga Prasad Chamaria & Ors.*[5].

[1] (2021) 7 SCC 313
[2] 2021 SCC OnLine SC 267
[3] 2021 SCC OnLine SC 321
[4] (2021) 10 SCC 330
[5] AIR 1961 SC 1236

- *'Sahara India' Vs. 'Shri Nandkishor & Anr.'*[6].
- *'Gaurav Hargovindbhai Dave' Vs. 'Asset Reconstruction Company (India) Ltd. & Anr.'*[7].
- *'Bhawanishankar Harishchandra Sharma' Vs. 'Feedback Highways OMT Pvt. Ltd. & Anr.'*[8].
- *'Babulal Vardharji Gurjar' Vs. 'Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.'*[9].
- *'M/s. Tech Sharp Engineers Pvt. Ltd.' Vs. 'Sanghvi Motors Limited'*[10].
- *'Sukbiri Devi & Ors.' Vs. 'Union of India & Ors.'*[11].
- *'M/s. Invent Asset Securitisation & Reconstruction Pvt. Ltd.' Vs. 'M/s. Girnar Fibres Ltd.'*[12].

4. It is further argued that there is no ascertainment of 'debt' or 'default', and that the present proceeding is only a 'Recovery Proceeding', which is evident from the fact that no effective Resolution has been approved and the 'Financial Creditor' has actually opted for Liquidation of the unit, which is an MSME. The Appellant filed their Additional Written Submissions, reiterating the facts and contending that the Demand Notice dated 31.03.2016 issued under SARFAESI cannot be a basis for fresh cause of action under IBC.

[6] Comp. App. (AT) (Ins.) No. 368/2021
[7] (2019) 10 SCC 572
[8] Comp. App. (AT) (Ins.) No. 217 & 218 of 2022
[9] (2020) 15 SCC 1
[10] Civil Appeal No. 296/2020
[11] Civil Appeal No. 10834/2010
[12] Civil Appeal no. 3033/2022

5. Learned Counsel appearing for the first Respondent/Resolution Professional submits that the Company is already gone into Liquidation and therefore the matter stands infructuous.

6. Learned Counsel appearing for the second Respondent/'Financial Creditor' submitted that the Appellant was enjoying Credit Facilities to the extent of Rs.24Crs./- vide sanctioned letter dated 14.10.2010; that the account earned NPA on 31.03.2011, but was subsequently restructured vide another sanctioned letter dated 23.05.2013, whereby the Credit Facilities of another 6Crs. was sanctioned; that the Appellant failed to comply with the terms of the restructuring dated 23.05.2013 and therefore a Demand Notice was issued on 29.04.2016 under Section 13(2) of the SARFAESI Act, 2002, demanding the outstanding amount; there was no objection raised by the Appellant at that point of time; an Original Application bearing No. 1009/2018 was filed before the Hon'ble DRT III for a Claim amount of Rs.37,18,82,327.80/– and thereafter Section 7 Application was filed before the Adjudicating Authority on 23.10.2018 and therefore the Application is well within the period of Limitation as fresh cause of action begins from 29.04.2016, i.e., the date on which the Demand Notice was issued and also because the last payment was made on 13.10.2017, which was also confirmed by the 'Corporate Debtor'. In support of his contentions, the Learned Counsel relied upon the following Judgements:

- *'Dena Bank (now Bank of Baroda)* Vs. *'C. Shivakumar Reddy & Anr.'*[13].
- *'Sesh Nath Singh & Anr.'* Vs. *'Baidyabati Sheoraphuli Co-operative Bank Ltd. & Anr.'*[14].
- *'Laxmi Pat Surana' Vs. 'Union bank of India & Anr.'*[15].

Assessment:

7. The material on record shows that the 'Corporate Debtor' had paid an amount of Rs.50,000/- on 13.10.2017, reaffirmed by the 'Corporate Debtor' vide Reply dated 04.12.2017, whereunder an objection was raised to the possession Notice issued by the 'Financial Creditor' under the SARFAESI Act. The Hon'ble Supreme Court in ***'Dena Bank (now Bank of Baroda)' (Supra)*** has held as follows:

> *"132. We see no reason why the principles should not apply to an application under Section 7 of the IBC which enables a financial creditor to file an application initiating the Corporate Insolvency Resolution Process against a Corporate Debtor before the Adjudicating Authority, when a default has occurred. As observed earlier in this judgment, on a conjoint reading of the provisions of the IBC quoted above, it is clear that a final judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money, if not satisfied, would fall within the ambit of a financial debt, enabling the creditor to initiate proceedings under Section 7 of the IBC.*
>
> *133. It is not in dispute that the Respondent No. 2 is a Corporate Debtor and the Appellant Bank, a Financial Creditor. The question is, whether the petition under*

[13] (2021) 10 SCC 330
[14] (2021) 7 SCC 313
[15] 2021 SCC OnLine SC 267

Section 7 of the IBC has been instituted within 3 years from the date of default. 'Default' is defined in Section 3(12) to mean "non-payment" of a debt which has become due and payable whether in whole or any part and is not paid by the Corporate Debtor"........................

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."

8. From the ratio of the aforenoted Judgement, it is clear that even an offer of One-Time Settlement made within the period of Limitation can be construed as an 'Acknowledgement of Debt'. Any acknowledgement in the Balance Sheets, or any part payments made thereunder can be construed as an 'Acknowledgement' under 'Section 18 of the Limitation Act, 1962'. There is also a specific pleading that copies of the following documents have been annexed to the Company Petition:

- *"Hypothecation Agreement of Good and Debts dated 12.10.2013.*
- *Composite Hypothecation Deed dated 12.10.2013.*
- *Supplementary Memorandum (Equitable Mortgage) dated 12.10.2013 along with Notice of intimation dated 11.11.2013.*
- *Letter of Guarantee dated 12.10.2013.*
- *General Term Loan Agreement dated 12.10.2013.*
- *Demand Promissory Note dated 12.10.2013.*
- *Letter of Undertaking not to alienate Hypothecated Goods dated 12.10.2013.*
- *Agreement on Rate of Interest dated 12.10.2013.*
- *Letter of Continuity dated 12.10.2013.*
- *Letter to be obtained from Directors in cases where advances have been permitted to private limited/limited company dated 12.10.2013.*
- *Debit Balance confirmation and Acknowledgement (Revised rate of interest) dated 12.10.2013."*

9. The Hon'ble Apex Court in a catena of Judgements has laid down that it is not the date of NPA which strictly triggers the cause of action but the date of default. In the instant case, it is to be construed that the date of default is 31.03.2016 as till then, several attempts were made to restructure the loan and fresh sanctions were also made in favour of the 'Corporate Debtor'. At the cost of repetition, the last payment was made on 13.10.2017 and this part payment is covered under Section 18 of the Limitation Act, 1962. Therefore, we are of the considered view that the Application was well within the period of Limitation. It is also relevant to note that the copy of the Financial Statements dated 2013, 2014 showing the record of default were also appended to the Application. The documents on record clearly evidence that there was a 'date of default' and we find no illegality or infirmity in the Order of the Adjudicating Authority in admitting the Section 7 Application. However, we are conscious of the fact that the Company is already under Liquidation as of today.

10. For all the aforenoted reasons, this Appeal is dismissed. No order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

Principal Bench,
New Delhi
23rd November, 2022

himanshu