

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT)(Insolvency) No. 1138 of 2019

IN THE MATTER OF:

Partha Paul
(erstwhile Director of M/s. Multiple Hotels Pvt. Ltd)
S/o Mr. Kartick Paul,
6, Milan Pally,
Milan Sangha Club, DP Nagar
Belgharia, North 24 Parganas,
West Bengal – 700 056 .. **Appellant**

Versus

1. Kotak Mahindra Bank Ltd.
27BKC, C27, G Block, Banddra Kurla Complex
Bandra, Mumbai – 400 051 .. **Respondent No. 1**

2. Shri Jitendra Lohia,
IBBI/IPA-001/P00170/2017-18/10339
No.6, Milan Pally,
Milan Sangha Club, DP Nagar
Belgharia, North 24 Parganas,
West Bengal – 700 056 .. **Respondent No.2**

Present:

For Appellant: None

For Respondents: Mr. Amit Mahaliyan, Advocate for R-1.
Mr. Jitendra Lohia, RP

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Present Appeal has been filed by the Appellant under Section 61 of the Insolvency and Bankruptcy Code, 2016 (for short 'Code') against the impugned order dated 04.10.2019 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata (the Adjudicating Authority) in CP(IB) No. 204/KB/2019.
2. The Appellant has sought the followings relief:
 - a. To set aside the order dated 04.10.2019 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata in CP/IB/204/KB/2019 etc.
3. The Appellant is the 'Erstwhile Director' of the Corporate Debtor (CD) namely Multiple Hotels Pvt. Ltd. The CD was incorporated on 1998 and was successfully running the business of construction. The Respondent No.1, Kotak Mahindra Bank sanctioned facilities vide sanction letter for amount of Rs. 3 Crores to M/s. Camellia Educate Services Ltd and Rs. 8.5 Crores each to M/s. Multiple Educational and manpower Development Trust (MEMDT) and Camellia Educate Trust (CET) respectively, in the year 2012 for the purpose of furtherance of the objectives of the Trust in development of educational services. The loan amount was disbursed vide its sanction letter dated 05.11.2012 and 27.09.2012 and as such in pursuance to such sanction, an agreement dated 11.11.2012 was executed by and between the said borrowers and the bank to the

tune of Rs. 20.80 Crore. On 30.11.2012, the CD had executed a Corporate Guarantee agreement in lieu of the above said loans apart from offering its properties in mortgage. Out of the three borrowers, two of them are 'Trusts' as incorporated under the Indian Trust Act, 1961 namely Multiple Educational and Manpower Development Trust and Camellia Educare Trust while the other borrower is a company incorporated as per the provisions as laid down in the Companies Act, 1956. It is pertinent to mention that all the three borrowers were engaged in the field of education and for the reason of enhancing the same and to spread their goods cause among the various parts of West Bengal, they have approached the Respondent for the financial facilities which was duly sanctioned on agreed mutual terms and conditions as contained in the Loan agreement. The above said loan facilities were payable in equated monthly installments, carrying an interest rate of 25% p.a., payable every 6 months. Bifurcating, the first component of the loan was payable within a time period of 18 months, ending 2014, while the other component was payable within 60 months. The borrowers were regular in making payments, the Respondent failed to provide them with a statement of accounts and started disputing on the order of satisfaction of the equated monthly instalments in terms of the agreement executed in respect of the financial facilities. Without answering to the calls of the appellant to furnish a detailed

statement of claims, the Respondent with all its malafide intention issued a notice under Section 13(2) of the SARFAESI Act, 2002 vide their letter dated 29.12.2016 demanding an amount of Rs. 14 Crore approx. to the borrowers and the corporate guarantors. That it is pertinent to note that the date of default as mentioned in the above said notice was on 28.09.2015 and 29.09.2015 for MEMDT and CET respectively. On receipt of such demand notice of the Respondent, the CD through its Ld Advocate immediately replied and requested the Respondent to recall the same and also to rectify the gross irregularities committed by the Respondent in respect of the said accounts and financial facilities.

4. The Appellant further stated that the Respondent has completely suppressed the amount that they have received till December, 2018 in respect of the said financial facilities from the date of commencement. It is further stated that till December, 2018 the Respondent has approximately received an amount to the tune of RS. 28 crores, more particularly an amount of Rs. 6.97 Crores was paid by the Appellant, from the date of default till present. The said fact was completely suppressed before the Adjudicating Authority while passing the impugned order dated 04.10.2019. The Appellant has also stated that the Respondent has with all its malafide intention filed the application under Section 7 of the Code, suppressing the fact, that the said demand notice along with other

gross irregularities has been challenged by the Appellant's Company i.e. the CD before the DRT-II Kolkata under Section 17 SARFAESI Act, 2002 being S.A No. 360 of 2017, whereby several orders were passed and the matter is sub judice. The DRT-II Kolkata had passed an order under an instance of an Interim Application moved before the Adjudicating Authority, whereby the Adjudicating Authority by virtue of an order dated 14.12.2018, and directed the borrowers to visit the Head office of the Respondent and to meet the decision making officer and to resolve the same through One Time Settlement (OTS). It is pertinent to mention that the said order direction was also given upon the Respondent that any measures under the SARFAESI Act taken up by the Respondent shall be communicated to the Appellant's company prior to such effect. The borrower visited the head office of the Respondent to settle the issue and also made representation by providing an OTS to the Respondent vide letter dated 14.01.2019 with Demand Draft as an ad-hoc upfront amount but the same was refused by the Respondent without any reasoning vide its letter dated 08.02.2019

5. The Appellant has also stated that the Respondent did not comply with the same solemn order and without any prior notice had issued a notice under SARFAESI Act. The Appellant has stated that challenging such action, the Appellant's company further filed an Interim Application in the said SARFAESI Application whereby the

ld court without any prayer and / or pleadings of either parties has appointed a Joint Receiver vide its order dated 08.08.2019 and the same was challenged before the Hon'ble High at Calcutta, whereby the Hon'ble High Court was pleased to set aside the same vide its order dated 06.09.2019. In the meantime, the Respondent has also filed an O.A No. 189 of 2019 under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 for the issuance of Certificate of Recovery against all the borrowers and the guarantors including the corporate guarantor i.e. the Appellant's company to the tune of Rs. 10 Crore approx. It is also stated by the Appellant that the Respondent has initiated multiplicity of proceedings in different avenues of law for the purpose of fulfilling of their own mala fide intention and to take over the management of the Trust and also of the Appellant's company.

6. The Appellant has also stated that the Respondent also tried to grab the management of Trusts by filing a Suit under the Indian Trust Act against the actual borrowers before the Hon'ble High Court at Calcutta and such plea of the Respondent was refused and rejected by the single bench vide order dated 16.08.2018 and the same was appealed before the Division Bench of the Hon'ble High Court at Calcutta and the same had upheld by the Single Bench vide its order dated 03.12.2018. The Appellant has further stated that subsequently after being refused from the avenues of the Law, the

Respondent preferred an application under Section 7 of the Code as mentioned above before the Adjudicating Authority and moved the same, whereby the Adjudicating Authority pleased to pass an order vide order dated 13.03.2019, to serve the copy of the same upon the Appellant's company and the matter was further posted for consideration on 09.07.2019, whereby the Adjudicating Authority allowed the erstwhile Advocate who appeared on behalf of the Appellant's company i.e. CD to submit the reply upon the payment of cost of Rs. 10,000/- to the Respondent as fixed by the Adjudicating Authority and the same was further posted for hearing on 05.08.2019. On 05.08.2019, whereby the Adjudicating Authority has granted time to the Appellant to file all their reply and to pay the cost of the Respondent and the same was further posted for consideration on 01.10.2019. It is pertinent to mention that though the entire contention of the CD were submitted before the Adjudicating Authority below by the erstwhile advocate but the same was neither recorded nor heard. The Appellant has also stated that being dissatisfied with the erstwhile conducting advocate, the Appellant changed the advocate and appointed Mr. Joydip Mukherjee, Advocate, to look after the same and the matter stood thus, without any knowledge neither to the Appellant nor to the erstwhile advocate, the said matter was listed on 27.08.2019, despite of recording that the said matter shall appear next on

01.10.2019. It is pertinent to mention that the said matter was listed as Ex parte vide order dated 27.08.2019 without any knowledge or intimation upon the Appellant neither to the Advocate. It is further stated that the Adjudicating Authority has failed to appreciate that the supporting document/ annexures in connection to the said application placed before the Adjudicating Authority by the Respondent is already under challenged before the appropriate forum and as such fixing the matter as ex parte on an earlier date would render the CD helpless. That though, its present advocate as mentioned in the erstwhile paragraph made an appearance on 01.10.2019, whereby the Appellant came to know the fact that the same has been moved and/or kept in Ex parte and such has been kept reserved for judgment without considering the issue and objection raised by the advocates of the Appellant's company in regard to the same. The matter stood thus, the impugned order was passed on 04.10.2019, by initiating the Insolvency Resolution Process and by appointing Shri Jitendra Mohan Lohia, as the IRP alongwith declaration of Moratorium period as per Section 14 of the Code and paper publication thereto. The Appellant has also stated that the Adjudicating Authority has failed to appreciate its own order dated 05.09.2019, and take up the matter arbitrarily and whimsically on 27.08.2019 without any knowledge to the Appellant. The Adjudicating Authority has failed to appreciate the objection

raised before it in respect of the said application and also the facts as mentioned in the above paragraph and the dispute in the agreement and the said demand notice and the pendency of the same dispute in DRT. The Adjudicating Authority failed to appreciate the Respondent is not the creditor of the Appellant's Company and moreover has no outstanding debt in respect of the same as placed in the said application. The Appellant has stated that a mere perusal of the said documents will suggest that the original borrowers are the two trusts and another company as referred in the above-mentioned paragraph and moreover, the property of the said trust are still under the possession of the Respondent and such as been reflected in the said agreement. It is further stated that the R1 Bank in all its mala fide has made all attempts to ensure that the business of the Appellant's company comes to a halt whereby the R1 bank can illegally, forcefully and by making misuse of law grab hold of the management of the Appellant's company and/or the assets of the co-guarantors/borrowers, which are of the much higher value than the entire loan amount or the outstanding amount at any given point of time which has been admitted by the Respondent Bank in its several correspondences, while rejecting the OTS proposal offered by the borrowers and / or guarantor. The Appellant craves the kind leave

of this Tribunal to refer to such copies of correspondences at the time of hearing, if necessary.

7. It is stated that the Appellant is only a corporate guarantor in respect of the loans granted to three separate entities and that the Respondent bank without initiating appropriate action against the borrowers and/ or stating the exact amount received from the borrowers till date has in all its mala fide filed the application under Section 7 of the Code against the Appellant company. It is stated that the Respondent bank has totally suppressed that the Appellant company/CD was not required to make payment as long as the borrowers were making payment to the Respondent Bank. It is also stated that although the borrowers were regularly making payment to the Respondent Bank, the Respondent Bank in all its malafide declared those amounts as NPA and issued notice under Section 13(2) of the SARFAESI Act, 2002 vide their letter dated 29.12.2016. The Respondent bank has also suppressed the fact that the borrower has immediately replied to the said notice for recalling of the same as the said notice was issued based on gross misrepresentations and irregularities as committed by the Respondent Bank in declaring the accounts as NPA. It is stated that accounts could at the most be declared as substandard accounts but not NPA and as such the same was also challenged before the DRT, Kolkata which is still pending adjudicating and both the

parties are contesting the same. Under such circumstances, the Respondent Bank could not have filed the application under Section 7 of the Code against the Appellant company which is one of the corporate guarantors and more so when the factum of interest over interest and the component of the outstanding amount is under challenge.

8. It is also stated by the Appellant that the Respondent Bank has made no efforts to recover the outstanding amounts and/or cooperate with the borrowers for settlement of such amount and instead has been deliberately raising false and frivolous claims. It is extremely germane to the state herein that the Respondent bank has never declared the entire amount of money as received by them against the sanctioned loans / financial facilities availed, on the other hand had made whimsical and arbitrary adjustment of such payment towards interest over interest. It is stated that had the respondent bank been diligent in its conduct then the present matter could have been settled long back without wasting precious judicial hours by embroiling the Appellant in multiplicity of proceedings. It is stated that the conduct of the Respondent Bank is wholly unethical and unsustainable in the eyes of law. It is stated that the Respondent Bank has been indulging in forum shopping and as when the illegal and arbitrary actions of the Respondent Bank have been challenged before the appropriate court of law the

Respondent Bank has sought to divulge to other avenues and has deliberately delayed the proceedings in which its action has been challenged and the same are pending adjudication. That all the actions of the Respondent bank are devoid of any merit or at all and that the Respondent Bank has created a web of litigations by initiating multiplicity of proceedings which are extremely prejudicial to the Appellant's company and wastage of precious judicial hours. It is stated that the Respondent Bank has indulged in reckless spending of public money and has been constantly availing the luxury of initiating frivolous litigations at the costs of public money only in order to satisfy its illegal and insatiably greed which is not permissible in the eyes of law. It is stated that such illegal conduct of the Respondent Bank has immensely prejudiced the Appellant company and has put a huge financial loss on the appellant company which has adversely affected the business of the Appellant company for no valid reason, whatsoever. It is stated that as per the notice under Section 13(2) of the SARFAESI as sent by the R1 bank the total outstanding dues as on 29th December, 2016 was Rs. 14,73,14,456/- astonishing the same total amount due and payable as on 30.11.2018 as per the claim of the R1 bank in its application under Section 7 of the Code has leaped to Rs. 21,60,18,331/- although a hefty amount of Rs. 5.5 Crores has been paid to the Respondent bank post the issuance of notice under Section 13(2) of

the said Act, 2002. More shockingly, the R1 bank did not disclose the amount received by them during the period from 2016 to 2018 from the borrowers and/or guarantors far less any adjustment thereof, if at all so under which head. It is stated that the R1 bank entirely suppressed before this Tribunal that the R1 bank has preferred a SLP (C) No. 26419 of 2019 before the Hon'ble Apex Court in the self-serving cause of action and that the same is subjudice. The Respondent therein has entered appearance and the matter is being contested by both the parties. It is further stated that the Appellant herein had already sent a fresh proposal for settlement in pursuance of solemn order dated 04.12.2019 showing its bonafide intention to make payment towards the outstanding dues minus the penal interest and the same would be evident from the directions as contained in the said order dated 04.12.2019. It is stated that the submissions of the Appellant on 04.12.2019 before this Tribunal and its subsequent fresh proposals for settlement dated 07.12.2019 proves the bonafide of the Appellant herein and at the same time exposes the malafide and deceitful conduct of the R1 bank as the Respondent No.1 Bank has altered their claim time and again without providing logical reasoning thereof.

9. The R1 Bank, is a banking company incorporated under the banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, having its registered office at 27 BKC, C 27, G Block Bandra Kurla

Complex, Bandra (E) Mumbai – 400 051 and having its Branch office at 6th floor, 12BKC, Plot No. C-12 G Block Bandra Kurla Complex, Bandra (E), Mumbai – 400 051. Mr. Parag B.Dholakia, Vice President presently posted at Kotak Mahindra Bank Limited, 6th floor, 12 BKC, C 12, G Block Bandra Kurla Complex, Bandra (E) Mumbai – 400 051 is authorised representative of the R1 bank.

10. The Ld counsel for the R1 has submitted that on 27.09.2012, on request of Camellia Educare Services Limited (CESL), the Appellant bank – Kotak Mahindra Bank Limited had sanctioned a Term Loan of Rs. 300 lakhs. The said loan facility is secured apart from other security/collaterals by mortgage qua property being land measuring 157 cottah at badu Road, Madhyamgram (owned by Camellia Educational and manpower Development Trust). Similarly, on 05.11.2012, on request of MEMDT, the Appellant bank had sanctioned a Term of Rs. 850 lakhs. The said loan facility is secured apart from other security/collaterals by mortgage qua property being land measure 341 Cottah & building at Ghola Barasat, Kolkata (owned by Camellia Educare Trust). Simultaneously on 05.11.2012, on request of CET, the Applicant Bank has sanctioned a Term Loan of Rs. 850 Lakhs. The said loan facility is also secured apart from other security/ collaterals by mortgage qua property being land measure 341 Cottah & building at Ghola Barasat, Kolkata. The said loan facilities of (i) Rs.300 lakhs to CESL, (ii) Rs.

850 lakhs to MEMDT, and (iii) Rs. 850 lakhs to CET is duly secured by way of Corporate Guarantee by the CD vide Deed of Guarantee dated 30.11.2012. It is pertinent to mention that the said loan facility was disbursed, availed and utilized by (i) CESL availed Rs. 300 lakhs, (ii) MEMDT availed Rs. 840 Lakhs and (iii) CET Rs. 850 lakhs. However, (i) CESL, (ii)MEMDT, and (iii) CET failed to pay the principal amount of loan, interest and other dues and have defaulted. Further, they also failed to observe and perform other terms and conditions of the said agreement, the Applicant as per guideline of RBI declared loan accounts of the CD as NPA, as (i) CESL on 29.09.2015, (ii) MEMDT on 28.09.2015 and (iii) CET on 28.09.2015. Therefore, the Appellant had issued a Recall Notice dated 27.02.2018 to the said Borrowers, Mortgagors and also the CD (being Corporate Guarantor). An Insolvency Proceedings was initiated against the CD by the Applicant bank and was filed before the Adjudicating Authority bearing no. CP(IB) 204(KB)/2019, and title as Kotak Mahindra Bank Limited Vs. Multiple Hotels Pvt. Ltd. Vide hearing dated 11.02.2019, the Adjudicating Authority was issued notice to the CD, returnable on 13.03.2019. Thereafter, on 13.03.2019, the CD made appearance through counsel and sought time to file Vakalathnama and Affidavit in Reply. The Adjudicating Authority was granted that and re-notified the matter to 08.05.2019. On 08.05.2019, the Adjudicating Authority had noted and recorded

in the order that the Vakalathnama and Affidavit in Reply has not been filed. However, the Adjudicating Authority was again granted another opportunity to the CD to file the same within two weeks and re-notified the matter to 09.07.2019. On 09.07.2019, the Adjudicating Authority had again noted and recorded in the order that the Vakalathnama and Affidavit in Reply has not been filed. Because of which, however, the Adjudicating Authority was pleased to impose cost of Rs. 10,000/- on the CD and again granted another opportunity to the CD to file Vakalathnama and Affidavit in reply within seven days with memo of cost and re-notified the matter to 05.08.2019. on 05.08.2019 the Adjudicating Authority had noted and recorded in order that the Vakalathnama and Affidavit – in Reply not filed and cost also not been paid. However, the Adjudicating Authority was again granted another opportunity to the CD to file the same within 3 days from 05.08.2019. Failing which no reply shall be accepted and the matter shall be heard ex parte, and was re-notify the matter to 01.10.2019. Thereafter, the matter was listed on a priority list on 27.08.2019 and the Adjudicating Authority was informed about the non-compliance of the directions by the CD. The Adjudicating Authority has observed that the CD is already ex parte and again adjourned the matter to 04.10.2019. It is pertinent to mention that vide hearing dated 04.10.2019, the Adjudicating Authority was pleased to admit the Petition and IRP

was accordingly, appointed. Hence, the present appeal against the said impugned order dated 04.10.2019 by the Appellant.

11. It is stated by the Id counsel for the R1/ Bank that the present appellant had never submitted before the Adjudicating Authority about the intention of settling the matter, by returning the public money, which CD had utilized and enjoyed before defaulting in the repayment of the same. The Appellant do not deserve any relief from this Tribunal and is prayed to dismiss the present appeal. The R1 Bank has already given the credit of all the payments made by the borrowers/ CD and proof of the fact is that the Appellant herein in hearing dated 04.12.2019 had submitted that they want to pay the outstanding dues minus the contractual penal interest charged by the R1/ Bank. However, it is submitted that till date no relief has been granted by the DRT, Kolkata to the borrowers/CD. The option for settlement given to the borrower, since the borrower never had intention to make any payment, was gone in-vein as well. The Borrower/CD had never got any relief to their I.As, thereby challenging the action initiated by the R1 Bank from DRT, Kolkata. It is submitted that the R1 bank has and is exercising the legal remedies available in the law, in order to recover the outstanding dues, which is the public money. The order dated 16.08.2018 and 03.12.2018 are based upon the technical requirement for take over the management of trust of the borrower. The said proceedings have

no relevance to the present matter in hand. That action was against borrower trusts and the present matter is against the Corporate Guarantor Company. The List of date of Dates has depicted below:

S. No.	Date	Particulars
1	27-09-2012	On request of Camellia Educare Services Limited (CESL), the Applicant Bank – Kotak Mahindra Bank Limited had sanctioned a Term Loan of Rs 300 Lakhs. The said loan facility is also secured apart from other security/collaterals by mortgage qua property being land measuring 157 Cottah at Badu Road, Madhyamgram (owned by Camellia Educational and Manpower Development Trust).
2	05-11-2012	Similarly, on request of Multiple Educational and Manpower Development Trust (MEMDT), the Applicant Bank – Kotak Mahindra Bank Limited had sanctioned a Term Loan of Rs 850 Lakhs. The said loan facility is secured apart from other security/collaterals by mortgage qua property being land measuring 341 Cottah & building at Ghola Barasat, Kolkatta (owned by Camellia Educare Trust).
3	05-11-2012	Simultaneously, on request of Camellia Educare Trust (CET), the Applicant Bank – Kotak Mahindra Bank Limited had sanctioned a Term Loan of Rs 850 Lakhs. The said loan facility is also secured apart from other security/collaterals by mortgage qua property being land measuring 341 Cottah & building at Ghola Barasat, Kolkatta.
4	30-11-2012	The said Loan Facility of (i) Rs 300 Lakhs to Camellia

		Educare Services Limited (CESL), (ii) Rs 850 Lakhs to Multiple Educational and Manpower Development Trust (MEMDT), and (iii) Rs 850 Lakhs to Camellia Educare Trust (CET) is duly secured by way of corporate guarantee by the Corporate Debtor herein, i.e., Multiple Hotels Private Limited, vide Deed of Guarantee dated 30-11-2012 Annexed with FORM-A (C.P. (IB)-204(KB)/2019), annexed as ANNEXURE-A3 with the reply to the present appeal (page 181 starts for the Guarantee and page 185 is the schedule to the Guarantee)
5	28-9-2015 & 28-9-2015 & 29-9-2015	It is pertinent to mention that the said Loan facility was disbursed, availed and utilized by (i) Camellia Educare Services Limited (CESL) availed Rs 300 Lakhs, (ii) Multiple Educational and Manpower Development Trust (MEMDT) availed Rs 850 Lakhs, and (iii) Camellia Educare Trust (CET) availed Rs 850 Lakhs. However, (i) Camellia Educare Services Limited (CESL), (ii) Multiple Educational and Manpower Development Trust, and (iii) Camellia Educare Trust (CET) failed to pay the principal amount of loan, interest and other dues and have defaulted. Further, they also failed to observe and perform other terms and conditions of the said Agreements, the Applicant as per guideline of Reserve Bank Of India declared loan accounts of the Corporate Debtor as Non Performing Asset ("NPA"), as (i) Camellia Educare Services Limited (CESL) on 29-9-2015, (ii) Multiple Educational and Manpower Development Trust (MEMDT) on 28-9-2015, and (iii) Camellia Educare Trust (CET) on 28-9-2015.
6	27-02-2018	The Applicant - Kotak Mahindra Bank Limited had recalled all the said loan and had issued a Recall Notice dated 27-02-2018 to the said Borrowers, Mortgagees and also to Corporate Debtor (being Corporate Guarantor).
7	Admission of default, acknowledgment of debt/payment and limitation	In paragraph No. 7.8 at page 8 of the present Appeal. The appellant has admitted the debt and that they have made payment till December, 2018, i.e., after the default. And have further annexed an One Time Settlement offer given by the borrower/guarantor. Which in accordance to the Hon'ble Supreme Court's judgment, as held in the matter of Dena Bank vs. C. Shivakumar Ready and Anr., in Civil Appeal No. 1650/2020, order dated 04-08-2021, that "One Time Settlement of live claim constitute acknowledgment of liability which extended the limitation by three years" . Accordingly, the Section 7 IBC petition filed by the Kotak Mahindra Bank Limited was within the limitation. Further, the show the payment made by the CD and other said borrower companies. An affidavit was also filed vide Diary No. 32624 dated 03-01-2022, alongwith the statement of accounts. Which proves the continuation of limitation period.
8	February, 2019	An Insolvency proceeding against the Corporate Debtor was initiated by the Applicant Bank, and an Insolvency Petition was filed before Hon'ble National Company Law Tribunal, at Kolkata. The said Insolvency is duly numbered as C.P. (IB)-204(KB)/2019, and titled as Kotak Mahindra Bank Limited vs. Multiple Hotels Private Limited.
9	11-02-2019	In hearing dated 11-02-2019, Hon'ble NCLT, Kolkata Bench was pleased to issue notice to the Corporate

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		Debtor, returnable on 13-03-2019.
10	13-03-2019	In hearing dated 13-03-2019, the Corporate Debtor made appearance through counsel and sought time to file Vakalatnama and Affidavit-in-Reply. Hon'ble NCLT, Kolkata Bench was pleased to grant that and re-notified the matter to 08-05-2019.
11	08-05-2019	In hearing dated 08-05-2019, Hon'ble NCLT, Kolkata Bench had noted and recorded in order that the Vakalatnama and Affidavit-in-Reply has not been filed. However, Hon'ble NCLT, Kolkata Bench was again pleased to grant another opportunity to the Corporate Debtor to file Vakalatnama and Affidavit-in-Reply within two weeks, and re-notified the matter to 09-07-2019.
12	09-07-2019	In hearing dated 09-07-2019, Hon'ble NCLT, Kolkata Bench again noted and recorded in order that the Vakalatnama and Affidavit-in-Reply has not been filed. Because of which, However, Hon'ble NCLT, Kolkata Bench was pleased to impose cost of Rs 10,000/- on the Corporate Debtor and again granted another opportunity to the Corporate Debtor to file Vakalatnama and Affidavit-in-Reply within 7 days with memo of cost, and re-notified the matter to 05-08-2019.
13	05-08-2019	In hearing dated 05-08-2019, Hon'ble NCLT, Kolkata Bench had noted and recorded in order that the Vakalatnama and Affidavit-in-Reply not filed and cost also not been paid. However, Hon'ble NCLT, Kolkata Bench was again pleased to grant another opportunity to the Corporate Debtor to file Vakalatnama and Affidavit-in-Reply within 3 days from 05-08-2019. Failing which no reply shall be accepted and the matter shall be heard ex-parte, and was re-notify the matter to 01-10-2019.
14	27-8-2019	The Hon'ble NCLT, Kolkata was informed about the non-compliance of the directions by the Corporate Debtors. The Hon'ble NCLT, Kolkata has observed that the Corporate Debtor is already set ex parte and again adjourned the matter to 01-10-2019.
15	01-10-2019	Hon'ble Adjudicating Authority noted that despite of grant of multiple opportunities, the corporate debtor still not filed counter and vakalatnama, and was pleased to reserved the order on section 7 IBC petition.
16	04-10-2019	Hon'ble NCLT, Kolkata was pleased to allow the C.P. (IB)-204(KB)/2019, in the matter of Kotak Mahindra Bank Limited vs. Multiple Hotels Private Limited. Hence the present appeal by the ex-director of CD.

In view of the above stated facts and circumstances, it is most respectfully prayed that this Hon'ble Tribunal may be pleased to dismiss the present appeal.

12. The Adjudicating Authority while passing the impugned order dated 04.10.2019 has observed the followings:

3. The learned counsel appearing on behalf of the Corporate Debtor drew our attention to these facts and on enquiry from the Bench, it was submitted that the second term loan was finally payable in 2017 and this petition had been filed in 2019, hence, not barred by Limitation.
4. That matter was heard ex-parte. Based upon contentions made by the learned counsel for the Financial Creditor and on perusal of records, it is noted that banking facility has been given to various entities of the Corporate Debtor. The notice under section 13(2) of SARFAESI Act, 2002 has been issued on 29.12.2016 as per the recall of facilities letter, which has been placed at page 169 to 171 of the Paper Book. The date of amount payable under various loan agreement has been stated as 27.02.2018.
5. This is an undisputed fact that an agreement is duly executed and remains valid. There is a default in respect of debt due and payable which is not barred by limitation. Hence, prima-facie the petition is liable to be admitted. This petition is otherwise complete in all respects and the name of

13. We have carefully gone through the pleadings of the parties and further submissions made by the Ld counsel for the Respondent bank and extant provisions of the Code and we are having the following observations:

- a. It is undisputed fact that the impugned order of Adjudicating Authority dated 04.10.2019 was passed ex parte.
- b. This Tribunal has observed that loan facility has been granted to the 'Trust' which is engaged in 'Educational Services' @25% p.a by the R1/Bank which itself seems to be very high. It is difficult to predict about the bargaining power of the Trust/CD with the banks to borrow at such a high rate of interest.
- c. Although, not much details are provided but as it looks that sanctioned amount is Rs. 3 Crore to M/s. Camellia Educare Services Ltd., and Rs. 8.5 Crore each to M/s. Multiple Educational and Manpower Development Trust and Camellia Educare Trust sanctioned in the year 2012 for the furtherance of the objective of the trust for Development of Education Services and the Corporate Guarantee Agreement was executed apart from offering its properties in mortgage for Rs. 20.80 Crore (appearing at page 5 of the Appeal Paper Book)
- d. The CD has paid to the Bank of Rs. 28 Crore from 2013 to December, 2018. However, it is not in the domain of the Code to

go into these details. However, the impugned order being ex parte, it is thought prudent to look at these issues.

- e. It is also evident from the pleadings that the Corporate Debtor/Guarantor has executed a 'Corporate Guarantee Agreement', in lieu of the above said loans apart from offering its property in mortgage.
- f. The demand notice was issued on 29.12.2016 apart from the Corporate Debtor, the Corporate Guarantor and Borrower. It also appears from the Appeal Paper Book at page 62 to 65, the Bank/R1 has approached the Hon'ble High Court of Calcutta and the orders passed by the Single Bench dated 16.08.2018 and the Division Bench order dated 03.12.2018 are extracted below for ease of reference:

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ORDER SHEET
CS No.99 of 2018
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

KOTAK MAHINDRA BANK LIMITED & ANR.
Versus
MULTIPLE EDUCATIONAL AND MANPOWER DEVELOPMENT TRUST & ORS.

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
Date : 16th August, 2018.

Appearance:
Mr. S. Chakraborty, Adv.
Mr. Varun Kedia, Adv.
Mr. Kumardeep Majumder, Adv.

The Court : The plaintiff has filed a suit praying, inter alia, for leave under Section 92 of the Code of Civil Procedure, Order 2 Rule 2 of the Code of Civil Procedure and Order 1 Rule 8 of the Code of Civil Procedure. The relationship of the plaintiff no.1 and the defendants is of creditor and debtor. The plaintiff claims to have lent and advanced sums of money to the defendant no.1 and it is alleged that the defendant no.1 did not repay the said loan. The defendant no.1 is a defaulter. The plaintiff is aware that the remedy for recovery of the loan has to be initiated before other forum and the suit before this Court for recovery is not maintainable. The plaintiff could have filed a suit under Section 92 of the Code of Civil Procedure provided the plaintiff has an interest in the management of the defendant no.1. Section 92 of the Code of Civil Procedure deals with public charities. A suit may be filed by a person who alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or

where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the leave of the Court, may institute a suit, whether contentious or not, in the principal Civil Court seeking various reliefs.

Apart from the fact that no application has been filed seeking leave of the Court to institute a suit, the fact remains that the plaintiff does not come within the purview of "any person" having any interest in the trust inasmuch as the breach alleged is of the agreement between the plaintiff and the defendant no.1 and the plaintiff proceeds on the assumption that non-payment of the alleged dues of the bank is arising out of a mismanagement of the trust property.

Under such circumstances, CS No.99 of 2018 is not admitted and is dismissed.

(SOUMEN SEN, J.)

APO No. 276 of 2018
in
CS No. 99 of 2018
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

KOTAK MAHINDRA BANK LTD. & ANR.
Versus
MULTIPLE EDUCATIONAL AND MANPOWER DEVELOPMENT TRUST & ORS.

BEFORE:
The Hon'ble JUSTICE SANJIB BANERJEE

The Hon'ble JUSTICE SUVRA GHOSH
Date : 3rd December, 2018.

Appearance:
Mr. Moley Ghosh, Sr. Adv.
Mr. Samik Chakraborty, Adv.
Mr. Varun Kedia, Adv.
Mr. Kumardeep Majumder, Adv.

Mr. Jayanta Kr. Mitra, Sr. Adv.
Mr. S. N. Mitra, Sr. Adv.
Mr. Niladri Bhattacharjee, Adv.
Mr. Siddhartha Banerjee, Adv.
Mr. Pijush Biswas, Adv.
Mr. Uttiyo Mallick, Adv.
Mr. Bikramaditya Ghosh, Adv.
Mr. Niladri Banerjee, Adv.
Mr. Soumyajyoti Nandy, Adv.

The Court : The respondents have been put on notice, but have not been called upon.

The grievance of the appellants, the would-be plaintiffs in a suit sought to be instituted under Section 92 of the Code, is that the leave was erroneously declined by the interlocutory Court for the institution of the suit.

The first appellant is a creditor of the relevant trust, which is engaged in the field of education.

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The second appellant is the vice president of the first appellant. It is plain to see that the first appellant has a claim against the trust in respect of the credit facilities advanced. The proposed plaint was a thinly-veiled attempt to coerce the trust into paying off its debts qua the first appellant or be embroiled in time-consuming and expensive litigation at the behest of such creditor.

Quite appropriately, the interlocutory Court saw through the game and recognised the appellants for what they actually are. As a creditor, the first appellant may have some interest in the trust, but not the kind of interest that would excite any Court to put a scheme of management in place to ensure that the creditors' dues were paid. At any rate, the bare-bodied plaint contained vague and general allegations without any particulars of mismanagement.

Ordinarily, a trust is entitled to carry on its activities and Court will allow an attempt at interference only upon some credible allegations being brought. The proposed plaint in this case was singularly lacking in such regard.

The appellants are left free to approach any appropriate forum for the realisation of the first appellant's perceived dues; the destruction of the debtor-trust is not one of the ways that should be permitted. The order impugned dated August 16, 2018 does not call for any interference.

APO No.276 of 2018 is dismissed.

There will be no order as to costs.

(SANJIB BANERJEE, J.)

(SUVRA GHOSH, J.)

kc.

The Bank has also used the same for removal of Trustee apart from the chasing of payment at the Hon'ble High Court of Calcutta as it is evident from the above order.

- a. It is very much evident from the order of the Hon'ble High Court of Calcutta that the Respondent Bank is chasing for payment, which the Hon'ble High Court has categorically mentioned in the Judgment as above.
- b. It is also observed that the R1/Bank also issued 'demand notice' on 29.12.2016 under the provisions of SARFAESI Act, 2002 to

the Appellant demanding further Rs. 14 Crore from the Appellant being the Corporate Guarantor. It is also observed from the pleadings that the Appellant has given reply of the said 'demand notice' as per provisions laid in SARFAESI Act, 2002 vide their letter dated 13.02.2017 **denying and disputing** the said '**demand notice**' and the **quantum**. It has also been mentioned in the pleadings that the borrower was continuously making payment inspite of receiving 'demand notice' under the relevant provisions of SARFAESI Act, 2002. As per the pleadings, it is also mentioned that the 'original borrower' has paid an amount of Rs. 92 lakhs during the time of pendency of the said application. The pleadings also confirms that the DRT, Kolkata vide its order dated 14.12.2018 (appearing at page 9 of the Appeal paper book) directed the borrowers to visit head office of the Respondent and to meet decision making officer to resolve through OTS. The Borrower visited the head office of the Respondent to settle the issue and also made representation for OTS vide its letter 14.01.2019 with 'demand draft' as an ad hoc upfront amount but the same was refused by the Bank/R1 without assigning any reason vide its letter dated 08.02.2019 (appearing at page 10 of the Appeal Paper Book). The bank/R1 has even approached under 'Section 19 of the Recovery of Debts and Bankruptcy Act,

1993' for the issuance of certificate of recovery against Borrowers and Guarantors.

- c. All this suggests that the Bank/R1 is involved in **forum shopping** to the multiple 'Courts/Tribunals' just to harass the 'Guarantor' as it has moved the Hon'ble High Court of Calcutta at Calcutta to coerce the trust into paying of its debts and involving the Appellant in time consuming and expensive litigation at the behest of this concerned branch of the Bank/Respondent No.1.
- d. It is a settled law that the practice of **Forum Shopping** be condemned as it is an abuse of law. This case is beyond doubt falls under the category of **Forum Shopping** as it is a classic example of Forum Shopping when the Respondent Bank has approached one Court for relief but does not get the desired relief and then approached another court for the same or similar relief; (refer) Hon'ble Apex Court Judgment in Union of India & Ors. Vs. Cipla Ltd. & Anr (2017) 5 SCC 262- para 148, Vijay Kumar Ghai & Ors. Vs. The State of West Bengal & Ors. in Criminal Appeal No. 463 of 2022- para 9.
- e. The Hon'ble Supreme Court has already settled the matter that the provision of the Code is not intended to be a substitute to be a recovery forum. The Hon'ble Supreme Court in Civil Appeal No.9597 of 2018, "Transmission Corporation of Andhra Pradesh limited Vs. Equipment Conductors and Cables

Limited” vide para 15 has already held that IBC is not intended to be a substitute to a recovery forum and also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked. The Code cannot be used whenever there is existence of real dispute and also whenever the intention is to use the Code as a means for chasing of payment or building pressure for releasing the payments.

f. Reliance is placed on the celebrated case of Swadeshi Cotton Mills Vs. UOI (1981) I SCC 664 (paras 26-30). The Hon’ble Madras High Court has also in Shree Krishna Educational Trust Vs. Government of TN 2016 SCC Online Mad 20115 (para 6.12 to 6.17) succinctly laid down the components of a fair hearing which have not been complied with in the present case. The principles of natural justice are embedded in the Indian Legal jurisprudence. In Meneka Gandhi Vs. Union of India (1978) 1 SCC 248, the Hon’ble Supreme Court has held:

“....The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould

and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker, L.J., emphasized in Russel v. Duke of Norfolk (1949) 1 ALL ER 109 that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case".

- g. Considering all the above aspects, we thought it fit and proper to remand back the matter to the Adjudicating Authority to give a patience hearing also to the Appellant and the Respondents including the RP and then to decide the matter considering the fact of the case as well as the provisions of applicable laws on the issue and then to finally pass appropriate order in accordance with law.
- h. Hence, we are setting aside the order of the Adjudicating Authority and remanding back the matter to the Adjudicating Authority as stated above.
- i. Accordingly, the Appeal is allowed.

Interim order, if any, passed by this Tribunal stands vacated.
Pending application, if any, stands disposed of. No order as to
costs.

(Justice M. Venugopal)
Member(Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

10th June, 2022

New Delhi

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