NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT)(Ins) No. 748 of 2019

IN THE MATTER OF:

Mr. R.R. Gopaljee
Son of Mr. Raghavan
No. 57, Second Floor, Pantheon Road
Egmore, Chennai **...Appellant**

Versus

1. **Indian Overseas Bank**
   Nehru Park Branch
   Represented by its Assistant General Manager
   Mr. S. Ramachandran
   No. 856 A, Poonamalle High Road,
   Chennai-600010 **...Respondent No. 1**

2. **Mr. Radhakrishnan Dharmarajan**
   Interim Resolution Professional
   Malar Energy & Infrastructure Pvt. Ltd.
   D-3, Triumphs Apartments,
   114 Jawaharlal Nehru Salai
   Arumbakkam, Chennai- 600106 **... Respondent No. 2**

3. **Malar Energy & Infrastructure Pvt. Ltd.**
   Through Interim Resolution Professional
   Having Registered Office At:
   No. 57, First Floor, Pantheom Road **... Respondent No. 3**

4. **Shriram City Union Finance Limited** **... Respondent No. 4**

Present:

For Appellant:- Mr. Kaushik. N. Sharma and Mr. Sudhanshu Suman, Advocates for Appellant.
For Respondent:- Mr. Kunal Tandon with Ms. Richa, Advocates for Respondent No. 1
Mr. K.V.Balakrishnan, Advocate for IRP.

Mrs. Anasuya Choudhary, Advocate for Respondnet No.4 Impleader.

JUDGEMENT

(24.06.2020)

Jarat Kumar Jain. J

The Respondent No. 1 Indian Overseas Bank (Financial Creditor) filed an Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (In short I&B Code) for initiation of the Corporate Insolvency Resolution Process (In short CIRP) against the Malar Energy and Infrastructure Pvt. Ltd. (Respondent No. 3) Corporate Debtor. The Adjudicating Authority (National Company Law Tribunal) Special Bench, Chennai, by order dated 05.07.2019 admitted the Application. The Appellant promotor and Shareholder of Respondent No. 3 has filed this Appeal under Section 61(1) of I&B Code, against the impugned order dated 05.07.2019.

2. In this Appeal, Financial Creditor is Respondent No. 1, IRP is Respondent No. 2, Corporate Debtor is Respondent No. 3. During the pendency of Appeal, we have permitted to implead Shriram City Union Finance Limited as Respondent No. 4 because Respondent No. 4's Application under Section 7 of I&B Code, has been disposed of by the Adjudicating Authority Chennai, in the light of impugned order, with the direction to file the claim before the IRP i.e. Respondent No. 2.

3. Brief facts of this case are that at the request of Corporate Debtor, Financial Creditor i.e. Indian Overseas Bank granted financial assistance at

various dates between 13.06.2011 to 29.052015 and the Corporate Debtor disbursed the loan. The Corporate Debtor Respondent No. 3 defaulted in payment of loan, therefore, on 01.04.2015 Corporate Debtor was declared as a Non-Performing Asset (In short NPA). Subsequently, the Financial Creditor had sent a legal notice dated 15.03.2017 demanding the repayment of Rs. 21,86,26,661/- alongwith interest. The Corporate Debtor in his reply to notice dated 27.03.2017 acknowledged the debt and stated that they are in process of settling their dues to the Financial Creditor. Thereafter, Corporate Debtor sent One Time Settlement Proposal on 13.04.2017. The Financial Creditor accepted the proposal on certain terms and conditions vide letter dated 03.07.2017. Thereafter, the Corporate Debtor requested for extension of One Time Settlement period vide letter dated 05.08.2017. The Financial Creditor vide letter dated 28.08.2017 extended the time for payment of One Time Settlement. However, the Corporate Debtor has not repaid the loan amount as per One Time Settlement. Hence, vide letter dated 22.11.2017 the financial Creditor has cancelled the One Time Settlement Proposal. Thereafter, Financial Creditor initiated recovery proceedings under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 and also under SARFAESI Act, 2002 but the proceedings cannot be reached to a logical end. Therefore, the Financial Creditor has filed the application under Section 7 of I&B Code, on 15.03.2019.

4. After, hearing the Learned Counsel for the parties, the Adjudicating Authority by the impugned order admitted the application to initiate CIRP against the Corporate Debtor and issued Moratorium and appointed Mr. Radha Krishnan Dharamrajan as Interim Resolution Professional. Being aggrieved with this order R.R. Gopaljee promoter and shareholder of the Corporate Debtor Company filed this Appeal.

5. Learned Counsel for the Appellant submitted that the Adjudicating Authority did not observe the principle of Natural Justice and had passed the order for commencement of CIRP in nearly three days without even providing an opportunity to file written submissions or objections on application under Section 7 of I&B Code. The Application itself is defective because in the Application the date of default is not disclosed. The date of default is a crucial date on that basis the period of limitation has to be determined. In the demand notice under Section 13(2) of SARFAESI Act, dated 09.07.2015 sent by Financial Creditor, NPA date is mentioned as 30.06.2015 whereas, in the Additional Affidavit filed before the Adjudicating Authority NPA date is disclosed as 01.04.2015. Thus, what is the correct date of NPA is not cleared by the Financial Creditor. In both cases either NPA date is 01.04.2015 or 30.06.2015 the debt is time barred as the application under Section 7 of I&B Code, is filed on 15.03.2019.

6. Learned counsel for the Appellant contended that as per Item No. 2 Part IV of the Application, term loan of 15 crores disbursed on 29.05.2015.

Whereas, the Corporate Debtor's account was declared NPA on 01.04.2015 this itself shows that the NPA date 01.04.2015 is not correct.

7. Learned Counsel for the Appellant contended that the Adjudicating Authority had relied on a letter dated 27.03.2017 as an acknowledgement of debt by the Corporate Debtor, which only states that the Corporate Debtor will settle issue with the Financial Creditor and there is no specific acknowledgement of Debt. The Adjudicating Authority has failed to understand that for the purpose of acknowledgement of debt it has to be specifically, admitted and clearly stated as the exact amount of debt due and the timeline for payment. The Adjudicating Authority had also relied on a letter dated 13.04.2017 which is not in existence as no such letter has been annexed with the Application. Hon'ble Delhi High Court in the Case of Dorham Carelline India Ltd. Vs. Studio Line 2009 DLT 123 held that Section 18 of Limitation Act, requires (i) An admission or acknowledgement (ii) that such acknowledgement must be in respect of a property or right (iii) that it must be made before the expiry of limitation (iv) that it should be in writing and signed by the party against whom such property or right is claimed. None of these conditions are fulfilled by the letter dated 27.03.2017. Therefore, the acknowledgement of debt is not proved. Hence, the claim is apparently, barred by time.

8. Learned Counsel for the Appellant contended that Hon'ble Supreme Court in the case of State of Kerala Vs. T.M. Chacko, (2000) 9 SCC 722 held that

> *"The person acknowledging must be conscious of his liability and commitment should be made towards that liability. It need not be specific, but if necessary facts which constituted the liability are admitted, an acknowledgement may be inferred from such an admission."*

In this Case, the reply to notice by Corporate Debtor dated 27.03.2017 does not specify any commitment towards any liability and is merely reply stating certain meetings with the officials of the Financial Creditor, therefore, it cannot be treated as acknowledgement.

9. On the other hand, learned counsel for the Financial Creditor Respondent No. 1 supported the findings of the Adjudicating Authority and submitted that the Application under Section 7 of I&B Code, filed on 15.03.2019 and after granting proper opportunity the Adjudicating Authority has passed the order on 05.07.2019. It is admitted fact that Financial Creditor has granted Financial Assistance by way of term loan on different dates and on the date of Application claimed total amount is Rs. 29,96,10,603.01/-. The Corporate Debtor has committed default in repayment. Therefore, on 15.03.2017, Financial Creditor has sent a legal notice and in reply to notice dated 27.03.2017 the Corporate Debtor

acknowledged the claim. Thereafter, Corporate Debtor has sent One Time Settlement Proposal which was accepted by the Financial Creditor and thereafter, at the request of Corporate Debtor the One Time Settlement period was extended. However, the Corporate Debtor has failed to make repayment, therefore, the Financial Creditor has filed this Application under Section 7 of I&B Code.

10. The Respondent No. 2 is IRP and Respondent NO. 3 is the Corporate Debtor Company they are the Proforma Respondents and they have not made any submissions.

11. The Respondent No. 4 submitted that the Corporate Debtor had borrowed a sum of Rs. 11 Crores from Respondent No. 4, in order to clear the amount due to M/s Shriram Housing Finance Limited. The Corporate Debtor failed to repay the amount, hence, the Respondent No. 4 filed an Application under Section 7 of I&B Code, (Company Petition No. 1239/IBC/CB/2018) before the Adjudicating Authority Chennai, in the month of November, 2018. In the light of the impugned order dated 05.07.2019 the Adjudicating Authority Chennai, has disposed of the Company Petition filed by Respondent No. 4 with a direction to file a claim before the IRP. i.e. Respondent No. 2. In this context, the Respondent No. 4 supports the impugned order.

12. After hearing Learned Counsel for the parties we have gone the through the record.

13. It is admitted fact that Financial Creditor granted Financial Assistance to Corporate Debtor as term loan of different amount at different dates as mentioned in serial No. 1 Part IV of the Application under Section 7 of I&B Code, and in serial No. 2 Part IV of the Application amount claimed to be in default is shown Rs. 29,96,10,603.01/- as on 28.02.2019 but date of default is not mentioned. In the Additional Affidavit filed on behalf of the Financial Creditor date of default is shown as 01.04.2015. However, in the notice under Section 13(2) of SURFAESI Act, 2002 dated 09.07.2015 NPA DATE is shown as 30.06.2015. The Adjudicating Authority considered the objection and held that according to the Corporate Debtor, the Bank has declared it as NPA on 30.06.2015. We are agreed with the finding of Adjudicating Authority that the NPA date is 30.06.2015. The Application under Section 7 of I&B Code is filed on 15.03.2019 i.e. after three years from the date of default. Therefore, the question for consideration is whether the Corporate Debtor has acknowledged the debt as per the requirement of under Section 18 of Limitation Act, only then, the date of default can be forwarded to a future date as held by this Appellate Tribunal in Sh. G Eswara Rao Vs. Stressed Assets Stabilisation fund [Company Appeal (At) (Ins) No. 1097 of 2019] decided on 07.02.2020.

14. Hon'ble Supreme Court in the case of J.C. Budhraja Vs. Chairman, Orissa Mining Corporation Ltd. (2008) 2 SCC 444 held that:

"20. Section 18 of the Limitation Act, 1963 deals with effect of acknowledgment in writing. Sub-section (1) thereof provides that where, before the expiration of the prescribed period for a suit or application in respect of any right, an acknowledgment of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. The explanation to the section provides that an acknowledgment may be sufficient though it omits to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by a refusal to pay, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the right. Interpreting Section 19 of the Limitation Act, 1908 (corresponding to Section 18 of the Limitation Act, Company Appeal (AT) (Insolvency) No. 1182 of 2019 Page 8 of 18 1963) this Court in Shapoor Freedom Mazda v. Durga Prosad Chamaria [AIR 1961 SC 1236] held: (AIR p. 1238, paras 6-7).

"6. … acknowledgment as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. … Stated

generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a Company Appeal (AT) (Insolvency) No. 1182 of 2019 Page 9 of 18 statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or farfetched process of reasoning. … In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered.

7. … The effect of the words used in a particular document must inevitably depend upon the context in which the words are used and would always be conditioned by the tenor of the said document.…"

21. It is now well settled that a writing to be an acknowledgment of liability must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The admission need not be in regard to any precise amount nor by expressed words. If a defendant writes to the plaintiff requesting him to send his claim for verification and payment, it amounts to an acknowledgment. But if the defendant merely says, without admitting liability, it would like to examine the claim or the accounts, it may not amount to acknowledgment. In other words, a writing, to be treated as an acknowledgment of liability should consciously admit his liability to pay or admit his intention to pay the debt.

15. It is now well settled that a writing to be an acknowledgement of liability must involve an admission of subsisting Jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The Admission need not be in regard to any precise amount nor by expressed words. If a defendant writes

to the plaintiff requesting him to send his claim for verification of payment it amounts to an acknowledgement. The Hon'ble Supreme Court in the aforesaid judgment also held that in construing words used in the statement made in writing on which a plea of acknowledgement rest oral evidence has been expressly excluded but surrounding circumstances can always be considered. It is also held that the statement of which a plea of acknowledgement is based must relate to a person subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words.

16. We will now examine this case with reference to the said principle. In this Case Respondent for the purpose of acknowledgement placed reliance on the reply to demand notice dated 27.03.2017, the One Time Settlement Proposal dated 13.04.2017 and subsequent correspondence between the Appellant and Respondent.

17. In reply to demand notice dated 27.03.2017 the Appellant has admitted the subsisting Jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The Financial Creditor in demand notice dated 15.03.2017 called upon the Corporate Debtor to pay sum of Rs. 21,86,26,661/- along with further interest till date of payment. The Corporate Debtor in his reply to the notice did not dispute the amount and admitted the liability and stated that they are in process of settling the dues

of Financial Creditor. It is also mentioned in the reply that they have visited number of times to the officials of Financial Creditor. The reply to the notice is signed by the Director of Corporate Debtor. Thereafter, on 13.04.2017 the Corporate Debtor sent a One Time Settlement Proposal to the Financial Creditor. It is true that this letter is not on record, however, the Corporate Debtor does not deny that it has not sent One Time Settlement Proposal (in brief OTS) on 13.04.2017 to the Financial Creditor. On 03.07.2017 the Financial Creditor has accepted the (OTS) proposal of the Corporate Debtor on certain terms and conditions. (See page 185-186 Appeal paper book) One of the condition is that the Corporate Debtor shall pay the entire One Time Settlement amount of Rs. 17 Crores within 30 days from the date of communication of this sanction. Thereafter, on 05.08.2017 Corporate Debtor requested for extension of OTS period by another 45 days (See page 187 of Appeal Paper Book). On 28.08.2017 the Financial Creditor extended the time limit for payment of OTS amount on or before 13.09.2017 (See page 190 of Appeal Paper Book). However, the Corporate Debtor has failed to pay the amount even after lapse of more than four months. Therefore, the Financial Creditor has cancelled the OTS vide letter dated 22.11.2017 (See page 191 of Appeal Paper Book)

18. With the aforesaid discussion it is proved that the Corporate Debtor has acknowledged the debt within three years i.e, before the expiration of the prescribed period for a suit or application. Thus, we are of the

considered view that Learned Adjudicating Authority has rightly held that the Application under Section 7 of I & B Code is well within limitation. Therefore, no interference is called for in this Appeal. Interim order passed in this Appeal Vacated.

19. Respondent No. 4 Shriram City Union Finance Limited can file its claim before the IRP as per the direction dated 10.07.2019 by the Adjudicating Authority, Chennai, in Company Petition No. 1239/IBC/CB/2018 filed by Respondent No. 4.

Thus, as aforesaid the Appeal is dismissed. However, no order as to cost.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

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