

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1340 of 2019

(Arising out of Order dated 26th September, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad in C.P. No. (IB) 182/9/NCLT/AHM/2018)

IN THE MATTER OF:

Ritu Murli Manohar Goyal

...Appellant

Vs.

SVG Fashions Ltd. & Anr.

...Respondents

Present: For Appellant: - Mr. Keith Varghese, Advocate.

For Respondents: - Mr. Rakesh Kumar and Mr. Ankit Sharma, Advocates.

Mr. Sumit Kansal, Advocate for Respondent No.2- 'Interim Resolution Professional'.

J U D G M E N T

Bansi Lal Bhat, J.

Application of Respondent No.1- 'M/s. SVG Fashions Ltd.' ('Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) came to be admitted at the hands of the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad in terms of the order dated 26th September, 2019 impugned in the instant appeal preferred by 'Ritu

Murli Manohar Goyal', one of the Shareholders and Director of the 'Corporate Debtor'- 'M/s. Arpita Filaments Private Limited' primarily on the ground that the claim was barred by limitation and initiation of the 'Corporate Insolvency Resolution Process' could not be sustained.

2. The broad features of the case may be briefly adverted to. 'M/s. SVG Fashions Ltd.' ('Operational Creditor') asserted before the Adjudicating Authority that it was engaged in the business of supply of various fabrics and had been doing business with the 'Corporate Debtor' since the year 2013 regularly supplying various fabrics in respect whereof bills were raised from time to time which were cleared by the 'Corporate Debtor' without raising any dispute in regard to the quality of the products supplied by the 'Operational Creditor'. However, since August, 2013, the 'Corporate Debtor' started making irregular payments and the bills were not cleared in time. As the 'Operational Creditor' raised issue regarding payments with the 'Corporate Debtor', in the year 2015, the 'Corporate Debtor' issued signed cheques as security, but since no payment was forthcoming, 'Operational Creditor' was constrained to issue Demand Notice under Section 8 of the 'I&B Code' calling upon the 'Corporate Debtor' to pay aggregate amount of Rs. 43,96,593/- towards bills raised from 11th August, 2013 to 2nd September, 2013 amounting to Rs. 21,08,821/- plus interest of Rs. 22,87,772/-. Demand Notice dated 19th March, 2018 was duly delivered at the registered office of the 'Corporate Debtor' but the 'Corporate

Debtor' chose not to reply the same, thereby prompting the 'Operational Creditor' to approach the Adjudicating Authority for triggering of 'Corporate Insolvency Resolution Process'.

3. The 'Corporate Debtor', while denying its liability qua claim of operational debt, raised the plea before the Adjudicating Authority that six cheques had been found missing from its cheque book and it had issued letters to 'Surat National Co.op. Bank Ltd.' requesting to stop payment. The Adjudicating Authority directed the 'Corporate Debtor' to place on record the original letters addressed to the Bank. It is noticed in paragraph 18 of the impugned order that the original date of issuance of a letter dated 1st January, 2008 has been struck off and replaced by 4th March, 2017. The comparison made by the Adjudicating Authority raised suspicion about genuineness of such letters. That apart, 'Corporate Debtor' failed to produce credible proof in regard to missing of cheques and subsequent issuance of letters of stoppage of payments to the Bank. Thus, the Adjudicating Authority arrived at the conclusion that the 'Corporate Debtor' had committed default in respect of the operational debt arising out of supply of goods by the 'Operational Creditor' and had fabricated the aforesaid plea raised to defeat triggering of 'Corporate Insolvency Resolution Process' at the instance of 'Operational Creditor'.

4. Learned counsel for the Appellant submitted that the date of default mentioned in the application is 7th October, 2013 while the

application was filed on 20th April, 2018 and in view of Article 137 of the Limitation Act, the application filed by the 'Operational Creditor' was time barred. Per contra, learned counsel for the 'Operational Creditor' submitted that the cheques were issued in acknowledgment of the debt within the period of limitation and the cheques having been dishonoured, 'Corporate Insolvency Resolution Process' was initiated after issuance of Demand Notice within the prescribed period of limitation. It is further submitted on behalf of the 'Operational Creditor' that the 'Corporate Debtor' had denied the very transaction of supply of goods as also issuance of cheques by falsely claiming that the cheques had been lost and the same plea was found to be without substance. It is further submitted that the 'Corporate Debtor' had neither complied with the Demand Notice nor raised any dispute in regard to supply or quality of goods as the Demand Notice was not at all responded to by the 'Corporate Debtor'.

5. Having heard learned counsel for the parties and fathomed through the records, we find that the appeal bears merit for the reasons we would be adverting to.

6. It is the settled proposition of law that an application under Section 9 of the 'I&B Code' is governed by Article 137 of the Limitation Act, 1963, which is reproduced hereunder:

Part II-OTHER APPLICATION		
Description of application	Period of Limitation	Time from which period begins to run When the right to apply accrues
137. Any other application for which no period of limitation is provided elsewhere in this division.	Three years	

The period prescribed under this Article being three years, the ‘Operational Creditor’ is required to satisfy the Adjudicating Authority that the ‘Corporate Insolvency Resolution Process’ is sought to be initiated by filing application within the prescribed period of three years.

7. Form 3 is the Demand Notice issued by the ‘Operational Creditor’ which is at Page 119 of the Appeal paper book. Its perusal brings to fore that the total amount of debt on account of goods supplied by the ‘Operational Creditor’ to the ‘Corporate Debtor’ under various invoices has been calculated at Rs. 42,67,640/- in respect whereof the ‘Corporate Debtor’ is stated to have issued six cheques dated 5th December, 2017 for an aggregate amount of Rs. 5,37,206/- towards part payment which were dishonoured when presented by the ‘Operational Creditor’ for encashment before the Bank.

8. It is manifestly clear that the six cheques claimed to have been issued by the ‘Corporate Debtor’ towards part payment of the liability arising out of outstanding operational debt were issued on 5th

December, 2017 as per admission of the 'Operational Creditor', this fact having been incorporated in Form 3 i.e., the Demand Notice dated 22nd December, 2017. In so far as liability arising out of operational debt is concerned, the invoices raised in regard to the outstanding operational debt covers the period from 11th August, 2013 to 2nd September, 2013. This fact is clearly emerging from paragraph 3 of Form 5 i.e., the application filed by the 'Operational Creditor' before the Adjudicating Authority for triggering of 'Corporate Insolvency Resolution Process' (at Page 39 of the Appeal paper book).

9. The 'Operational Creditor' while placing these facts before the Adjudicating Authority has clearly described the date of default as 7th October, 2013 (Page 46 of the Appeal paper book). The 'Operational Creditor' cannot escape from the factual assertion incorporated in Demand Notice and the application filed before the Adjudicating Authority. A combined reading of the Demand Notice and the application filed for triggering of 'Corporate Insolvency Resolution Process' at the instance of 'Operational Creditor' clearly establishes that the default had occurred on 7th October, 2013 and the application for triggering of 'Corporate Insolvency Resolution Process' under Section 9 of the 'I&B Code' was filed before the Adjudicating Authority on 20th April, 2018 i.e. well after the prescribed period of three years in terms of provisions of residuary clause engrafted under Article 137 of the Limitation Act, 1963. Viewed thus, there can be no hesitation in

holding that the application filed by the ‘Operational Creditor’ under Section 9 of the ‘I&B Code’ was barred by limitation.

10. The next question arising for attention is whether issuance of six cheques by the ‘Corporate Debtor’ towards the part payments of the outstanding operational debt would amount to an acknowledgment of debt thereby giving fresh lease of life to the claim of ‘Operational Creditor’ qua such operational debt. On this issue, it would be appropriate to notice that the general principle embodied in Section 3 of the Limitation Act, 1963 providing that every suit, appeal or application filed after the prescribed period of limitation shall be dismissed irrespective of the fact that limitation has not been set up as a defence is subject to the provisions contained in Sections 4 to 24 (inclusive) of the Limitation Act, 1963. These Sections carve out exceptions by providing exclusion and extension on various grounds enumerated therein.

11. Section 18 of the Limitation Act, 1963 deals with “effect of acknowledgment in writing”. It is reproduced as under:

“18. Effect of acknowledgment in writing.—(1)

Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing

signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,

(b) the word “signed” means signed either personally or by an agent duly authorised in this behalf, and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.”

12. A bare look at the provision engrafted in this Section brings it to fore that an acknowledgment of liability in respect of a right made in writing by a person against whom such right is claimed shall have the effect of computation of fresh period of limitation from the time of signing of such acknowledgment provided such acknowledgment of liability has been made before the expiration of the prescribed period of limitation for a suit or application in respect of such right. The provision is in the nature of extension of period of limitation having the effect of the period of limitation being reckoned afresh from the date of such acknowledgment in writing being signed by the person of incidence. However, such acknowledgment will take effect only if the liability in respect of such right is acknowledged in writing and signed by the person of incidence before the expiration of the prescribed period of limitation for such suit or application in respect of such right. Applying the dictum of this provision in the facts and circumstances of instant case, it is manifestly clear that in respect of the invoices raised in the

year 2013 the prescribed period of limitation being three years in terms of Article 137 of the Limitation Act, 1963 expired in the year 2016 and the issuance of cheques by the 'Corporate Debtor' in the year 2017 being well beyond the prescribed period of three years would not be construed as an acknowledgment in writing within the prescribed period of limitation in terms of Section 18 of the Limitation Act, 1963. The situation would have been different if such cheques issued by the 'Corporate Debtor' towards the part payment of the operational debt had been issued prior to 7th October, 2016 as the date of default occurred on 7th October, 2013 which fact is admitted by the 'Operational Creditor' in Form 5 (Page 46 of the Appeal paper book).

13. In this factual background and on the very basis of what was placed by the 'Operational Creditor' before the Adjudicating Authority, issuance of six cheques dated 5th December, 2017 by the 'Corporate Debtor' towards part payment of the operational debt in respect of invoices with last one raised on 2nd September, 2013 cannot be termed as an acknowledgment of debt within the ambit of Section 18 of the Limitation Act, 1963. The inescapable conclusion is that the operational debt in respect whereof the 'Operational Creditor' sought triggering of 'Corporate Insolvency Resolution Process', was neither due nor payable in law on the date when such 'Corporate Insolvency Resolution Process' was sought to be initiated by the 'Operational Creditor'.

14. We accordingly, uphold the contention raised in this Appeal that application under Section 9 was hit by limitation. That being so, the impugned order admitting the petition under Section 9 of the 'I&B Code' at the instance of the 'Operational Creditor' cannot be sustained. The appeal is allowed and the impugned order is set aside.

15. In effect, order (s), passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications, all such orders and actions are declared illegal and are set aside. The application preferred under Section 9 of the 'I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' (company) is released from all the rigours of law and is allowed to function independently through its Board of Directors from immediate effect.

16. The Adjudicating Authority will fix the fee of the 'Interim Resolution Professional', and the 'Operational Creditor' will pay the fees of the 'Resolution Professional', for the period he has functioned.

The appeal is allowed with aforesaid observations. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice Bansi Lal Bhat]
Member (Judicial)

[V.P. Singh]
Member (Technical)

[Shreesha Merla]
Member (Technical)

NEW DELHI

22nd May, 2020

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