Manesh Agarwal vs Bank Of India & Anr on 28 February, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 1182 of 2019

[Arising out of Impugned Order dated 22nd October 2019 passed by the Hon ble Adjudicating Authority, National Company Law Tribunal, Allahabad Bench in C.P. (IB) No. 349/ALD/2018]

IN THE MATTER OF:

Manesh Agarwal ...Appellant
S/o Sh. Roop Kishore Agarwal
Aged about 47 years
R/o A-200, Kamla Nagar
Agra, Uttar Pradesh

Versus

1. Bank of India
   Through its Authorized Officer
   Neeraj Kumar Sharma
   Branch Manager
   Office at:
   Agra Mid Corporate Branch
   49-50, Sulabh Puram
   Near Kargil Petrol Pump
   Sikandara-Bodla Road, Agra - 282007 ...Respondent No.1

2. M/s B.B. Foods Private Limited
   Through the Interim Resolution Professional
   Pramod Kumar
   R/o H.No. 16, Dashrath Kunj „B
   West Arjun Nagar - 282001 (U.P.)
   Email: pksharmapcs@gmail.com ...Respondent No.2

Present:

For Appellant : Mr Nikhil Nayyar, Sr. Advocate with Ms Vanshaja Shukla, Ms Anuja Pethia and Mr Noor Shergill, Advocates.
For Respondent : Mr V. Seshagiri and Mr Siddharth Sachar, Advocates.

J U D G M E N T

[Per; V. P. Singh, Member (T)] This Appeal emanates from the order passed by the Adjudicating Authority/National Company Law Tribunal, Allahabad Bench in C.P. (IB) No. 349/ALD/2018, whereby the Adjudicating Authority has admitted the application filed by the Respondent Bank under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short „I&B Code). Parties are represented by their original status in the company petition for the sake of convenience.

2. Brief facts of the case are as follows:

> The Applicant/Respondent herein filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process against the corporate Debtor - Company M/s B.B. Food Private Limited.

3. The Petitioner submits that on the request of the Corporate Debtor - Financial Creditor - Bank of India has granted various credit limits of an aggregate amount of Rs. 28,00,00,000/- (Rupees twenty-eight crores only). The Corporate Debtor defaulted in repayment of dues of the applicant bank. The Financial Creditor classified the account of the Corporate Debtor as NPA on 29th January 2013 under the guidelines issued by RBI, and the total amount claimed to be in default is Rs. 40,33,04,620/- (Rupees forty crore thirty-three lacs four thousand six hundred twenty only) but after that, the Corporate Debtor had executed the document dated 13th April 2015 and thereby acknowledge the debt.

4. In reply to the petition, the Corporate Debtor submitted that the petition filed by the Financial Creditor is not maintainable and is barred by Limitation. It is stated that on the advice of the Financial Creditor, the Corporate Debtor had already submitted „One Time Settlement proposal dated 05th October 2018 for an amount of Rs. 1,60,00,000/- and deposited Rs.1,60,00,000/- vide demand draft and the same has been duly realised, and it had been informed to the Corporate Debtor that his proposal is under consideration. It is further submitted by the Corporate Debtor that the present application under Section 7 of the I&B Code is barred by limitation under Section 238A of I&B Code. Article 137 of Limitation Act, which prescribes the limitation period of 3 years for the application and is to be computed from the date of occurrence of the default, so the period of limitation ended on 28th January 2016.

5. It is further contended by the Corporate Debtor that the Financial Creditor sold the secured assets of the Corporate Debtor under the provision of SARFAESI ACT, and realised Rs.4,93,10,000/-.

6. In response to the reply of the Corporate Debtor, the Financial Creditor submits that the Corporate Debtor had filed a Writ Petition before the Hon ble High Court, which was disposed of with the direction to the Corporate Debtor to deposit the balance amount on or before 30th September 2019 and in case of failure to do so, it will be open to the bank to proceed against the Corporate Debtor under law. But no payment towards OTS has been made, and the Corporate Debtor has not complied with the order.

7. It is further contended by the Financial Creditor that the bank statement which is filed by the Financial Creditor, is duly certified as per provisions of Bankers Book of Evidence Act. The Learned Counsel for the Corporate Debtor empathically opposed the claim of the Financial Creditor on the ground of limitation.

8. Learned Counsel for the Appellant further emphasised that the Adjudicating Authority has failed to take note that the submission of OTS and part payment in respect of the said OTS is beyond the

expiry of the limitation period, i.e. three years and thus, any event after the expiry of the limitation period, could not have amounted to initiate a fresh period of limitation.

9. It is further contended by the Appellant that the finding of the Adjudicating Authority is erroneous in holding that a fresh period of limitation begins from 05th October 2018, i.e. the date when OTS application has been submitted, and part payment of Rs 1.60 crores has been made.

10. Learned Counsel for the Appellant has placed reliance on the law laid down by the Hon ble Supreme Court in case of Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company, wherein the Hon ble Supreme Court has held that the limitation period shall start running from the date of NPA mentioned in Form-1.

11. Appellant further contends that the Hon ble Supreme Court in Jignesh Shah Vs. Union of India (2019) 13 SCALE 61 has held that other proceedings for distinct remedies under the law, and their continuation in a separate forum, cannot be allowed to serve as a ground to defeat the intention of the law of limitation.

12. It is further emphasised by the Appellant Counsel that each of the alleged events of acknowledgement relied upon by the bank in the counter affidavit are beyond the prescribed three years period of limitation, that ended on 29th January 2016, or in alternative 13th April 2018.

13. The Learned Counsel for the Appellant further emphasised that the balance sheet of the Corporate Debtor cannot be treated as a document of acknowledgement in terms of Section 18 of the Limitation Act. The Learned Counsel has placed reliance on the judgment of this Tribunal in Company Appeal No.407 of 2019 C. Shivkumar Reddy Vs. Dena Bank, decided on 21st March 2019. In this case this Tribunal held that:

> "In the present case, there is nothing on record to suggest that the „Corporate Debtor acknowledged the debt within three years and agreed to pay the debt. The application moved by „Corporate Debtor to restructure the debt or payment of the interest, does not amount to acknowledgement of debt. There is nothing on record to suggest that the „Corporate Debtor or its authorized representative by its signature has accepted or acknowledged the debt within three years from the date of default or from the date when the account was declared NPA, i.e., on 31st December, 2013. The Balance Sheet of the „Corporate Debtor for the year 2016-2017 filed after 31st March, 2017 cannot be termed to be a document of acknowledgement in terms of Section 18 of the Limitation Act. 8. Any dues payable, even if acknowledged after three years of limitation period, cannot be taken into consideration for the purpose of deriving conclusion under Section 18 of the Limitation Act."

14. Learned Counsel for the Respondent No.1 - Bank admitted that account of the Corporate Debtor was classified as NPA on 29th January 2013. It is further contended that the Corporate Debtor executed a letter of acknowledgement in favour of the bank on 13th April 2015. After that, the Respondent No.1 Bank initiated SARFAESI on 06th March 2013 under Section 13(2) of the Act. It is

also stated that the bank also initiated action under Section 19 for Recovery of Debt and Dues to Banks and Financial Institutions Act, 1993 before the Debt Recovery Tribunal on 04th July 2015.

15. It is further contended by the Respondent Bank that the Corporate Debtor Company issued a letter of acknowledgement/one-time settlement offer on 01st June 2016. Therefore, a fresh period of limitation of three years started w.e.f. 01st June 2016, under Section 18 of the Limitation Act, and Application under Section 7 of the Insolvency & Bankruptcy Code is filed on 29th September 2018, which is well within limitation. It is further said that given acknowledgement of debt dated 01st June 2016, limitation for application was available up to 31st May 2016, and before that, on 05th October 2018, the Corporate Debtor again submitted an OTS proposal, thereby acknowledging the liability to repay the debt and also paid Rs.1,60,00,000/- as a part payment, against the outstanding debt. In the circumstances, the Respondent No.1 - Bank claim is within limitation.

16. We have heard the arguments of the Learned Counsel for the parties and perused the record.

17. The Learned Counsel for the Respondent - Financial Creditor contended that Hon ble Supreme Court in case of Gaurav Hargovindbhai Dave Vs. ARC India Limited (2019) 2 SCC 572 and Sagar Sharma Vs. Phoenix ARC (2019) 10 SCC 353 has laid down the law that for an Application under Section 7 or 9 of the Insolvency and Bankruptcy Code, 2016 Article 137 of the Limitation Act shall apply from the time of coming into force of the Code.

18. Hon ble Supreme Court in case of B.K. Educational Services Vs. Parag Gupta (2018) SCC OnLine SC 1921 has held that Article 137 of the Limitation Act, 1963 applies to Applications filed under Section 7 or 9 of the Code.

19. Hon ble Supreme Court in case of J.C. Budhraja v. Chairman, Orissa Mining Corpn. Ltd., (2008) 2 SCC 444: (2008) 1 SCC (Civ) 582 on page 456 has 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, 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 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 far- fetched 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.
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> 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. Let us illustrate. If a creditor sends a demand notice demanding payment of Rs 1 lakh due under a promissory note executed by the debtor and the debtor sends a reply stating that he would pay the amount due, without mentioning the amount, it will still be an acknowledgment of liability. If a writing is relied on as an acknowledgment for extending the period of limitation in respect of the amount or right claimed in the suit, the acknowledgment should necessarily be in respect of the subject-matter of the suit. If a person executes a work and issues a demand letter making a claim for the amount due as per the final bill and the defendant agrees to verify the bill and pay the amount, the acknowledgment will save limitation for a suit for recovery of only such bill amount, but will not extend the limitation in regard to any fresh or additional claim for damages made in the suit, which was not a part of the bill or the demand letter. Again, we may illustrate. If a house is constructed under the item rate contract and the amount due in regard to work executed is Rs two lakhs and certain part-payments say aggregating to Rs 1,25,000 have been made and the contractor demands payment of the balance of Rs 75,000 due towards the bill and the employer

acknowledges liability, that acknowledgment will be only in regard to the sum of Rs 75,000, which is due. If the contractor files a suit for recovery of the said Rs 75,000 due in regard to work done and also for recovery of Rs 50,000 as damages for breach by the employer and the said suit is filed beyond three years from completion of work and submission of the bill but within three years from the date of acknowledgment, the suit will be saved from bar of limitation only in regard to the liability that was acknowledged, namely, Rs 75,000 and not in regard to the fresh or additional claim of Rs 50,000 which was not the subject-matter of acknowledgment. What can be acknowledged is a present subsisting liability. An acknowledgment made with reference to a liability, cannot extend limitation for a time-barred liability or a claim that was not made at the time of acknowledgment or some other liability relating to other transactions. Any admission of jural relationship in regard to the ascertained sum due or a pending claim, cannot be an acknowledgment for a new additional claim for damages."

(Quoted verbatim)

20. Based on the above judgment of the Hon ble Supreme Court, it is apparent that Section 18 of the Limitation Act, provides that where before the expiration of the prescribed period of limitation for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing then fresh periods of limitation shall be computed from the time when acknowledgement was so signed. In the case of J.C. Budhraja (supra) Hon ble Supreme Court has specified that explanation to Section 18 provides that an acknowledgement may be sufficient though it omits to specify the exact nature of the right are 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 address to a person other than a person entitled to the right.

21. In the case mentioned above, Hon ble Supreme Court has relied on its earlier judgment passed in Shapoor Freedom Mazda Vs. Durga Prasad Chamaria AIR 1961 SC 1236. In the said case, Hon ble Supreme Court has clarified that acknowledgement as prescribed by Section 19 merely renews debt; it does not create any new right. It is a mere acknowledgement of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or either by implication. The statement of which the plea of acknowledgement is based must relate to the present subsisting liability, though the exact nature of the specific character of the said liability may not be indicated in words.

22. Based on the above judgment in case of Shapoor Freedom Mazda (supra), J.C. Budhraja (supra) it is thus clear that before expiration of the period of limitation, acknowledgement of liability in writing, renews the debt but does not create a new right or action and it is also the Hon ble Supreme Court, that by acknowledgement in writing a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

20. In the case of Jignesh Shah v. Union of India, (2019) 10 SCC 750: (2020) 1 SCC (Civ) 48: 2019 SCC OnLine SC 1254 at page 764 Hon ble Supreme Court held that:

"8. ... To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and dehors that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that debt in the year 1995, and the answer to that question has to be in the negative. That being so, the existence of the suit cannot be construed as having either revived the period of limitation or extended it. It only means that those proceedings are pending but it does not give the party a legal right to institute any other proceedings on that basis. It is well-settled law that the limitation is extended only in certain limited situations and that the existence of a suit is not necessarily one of them. In this view of the matter, the second point will have to be answered in favour of the respondents and it will have to be held that there was no enforceable claim in the year 1995, when the present petition was instituted."----------

21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgment of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding."

23. Thus in the case mentioned above, the Hon ble Supreme Court has held that the limitation can only be extended in the manner provided U/S 18 of the Limitation Act. For example, an acknowledgement of liability under Section 18 of the Limitation Act would certainly extend the limitation period.

24. In this case, admittedly the account of the Corporate Debtor was classified of NPA on 29th January 2013. Therefore, as per the law laid down by the Supreme Court case of Gaurav Hargovindbhai Dave (supra), the date of default shall be computed from the date when the account was classified as NPA, i.e.29th January 2013.

25. Given the law laid down by the Hon ble Supreme Court in case of B.K. Educational Services (supra) Article 137 of the Limitation Act shall be applicable for an Application filed under Sections 7, 9 or 10 of the I&B Code. Since the account of the Corporate Debtor was classified as NPA on 29th January 2013. Therefore, default started on 29th January 2013 and three years period of limitation was available for applying u/s Section 7 of the Code. It is also clear that the Corporate Debtor issued a letter of acknowledgement on 13th April 2015, therefore, in terms of Section 18 of Limitation Act, a fresh period of limitation started from 13th April 2015. It is also apparent that within the limitation

period, another letter of acknowledgement with One Time Settlement offer was submitted on 01st June 2016 by the Corporate Debtor in favour of the Respondent No.1 - Bank.

26. The scanned copy of the letters of acknowledgement with One Time Settlement offer is as under:

27. Thus, a fresh period of limitation of three years started w.e.f. 01st June 2016 in terms of Section 18 of the Limitation Act. Thus it is clear that the petition filed under Section 7 of the Code on 29th September 2018 is well within limitation. The impugned order is assailed only on the Limitation ground therefore Appeal deserves to be rejected.

28. Thus, in the circumstances as aforesaid, we do not find any justification for the interference with the Impugned Order and Appeal is liable to be dismissed. Accordingly, Appeal dismissed. No order as to costs.

[Justice Venugopal M.] Member (Judicial) [V. P. Singh] Member (Technical) [Shreesha Merla] Member (Technical) NEW DELHI 28th FEBRUARY, 2020 pks/nn