

# Hussan Kadri vs Edelweiss Asset Reconstruction Co. Ltd on 22 May, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1073 of 2019

(Arising out of Order dated 25th July, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad in C.P. (I.B) No. 407/7/NCLT/AHM/2018)

IN THE MATTER OF:

Hussan Kadri . . . .Appellant

Versus

Edelweiss Asset Reconstruction Co. Ltd. & Anr. . . . .Respondents

Present:

For Appellant: Mr. Ramesh K. Mishra and Mr. Manasvi Thapar, Advocates.

For Respondents: Mr. Amit Singh Chadha, Senior Advocate with Mr. R.P. Aggarwal, Ms. Srishti Govil, Mr. Sahil Mongia, Mr. Nitish Kumar, Advocates.

## J U D G E M E N T

BANSI LAL BHAT, J.

The limited question involved in this appeal is whether the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") filed by Respondent No.1- 'Edelweiss Asset Reconstruction Company Limited'- ('Financial Creditor') is barred by limitation.

2. Application filed by the 'Financial Creditor' seeking initiation of 'Corporate Insolvency Resolution Process' in respect of Respondent No.2 'M/s. K.K. Kadri Paper Mills Pvt. Ltd.' ('Corporate Debtor') for alleged default in discharge of liability in respect of financial debt to the tune of Rs.44,51,74,964/- came to be admitted in terms of the impugned order dated 25th July, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad which is primarily challenged on the ground that the application is barred by limitation. For

understanding the controversy raised in appeal, it would be appropriate to advert to the factual matrix of the case in brief.

3. The 'Corporate Debtor' approached the Bank of Baroda in 2011 to extend credit facilities for promoting its business. The said Bank sanctioned loan in the form of Cash Credit, Letter of Credit and various Term Loan Facilities amounting to Rs. 14.80 Crores to the 'Corporate Debtor' vide Sanction Letter dated 6th January, 2011. The loan was secured by executing various documents by the 'Corporate Debtor'. However, the 'Corporate Debtor' failed to repay the loan amount despite demand by the 'Financial Creditor'. The 'Corporate Debtor' executed letters of continuing security/ revival letters dated 18th January, 2011 and 11th May, 2012 as also letters acknowledging its liability on 9th May, 2012 and 11th May, 2012. This was supported by the Resolution of the Board of Directors of the 'Corporate Debtor'. The 'Bank of Baroda', vide Assignment Agreement dated 26th March, 2014 assigned the debts Company Appeal (AT) (Insolvency) No. 1073 of 2019 of the Respondent Company to the 'Financial Creditor' who worked out the liability of the 'Corporate Debtor' to the tune of Rs.44,51,74,964/- as on 31st July, 2018 which was payable and the 'Corporate Debtor' defaulted in discharging its outstanding liability.

4. It is contended on behalf of the Appellant that neither the document dated 20th August, 2014 nor the document dated 13th November, 2015 or the OTS dated 02nd December, 2015 amount to acknowledgment under Section 18 of the Limitation Act, 1963 and even if such document is assumed to have the character of acknowledgment of debt on the part of the 'Corporate Debtor', such acknowledgment and payment of Rs.1,47,50,000/- made in pursuance of OTS having been made after the expiry of limitation period would not extend the period of limitation as the claim of the 'Financial Creditor' would be barred by limitation. It is worth mentioning that the Appellant has not disputed any document or communication inter se the parties including the letter dated 20th August, 2014 filed by the 'Financial Creditor'. It is thus evident that making of part payment on 5th December, 2015 and 31st March, 2016 alluded to by the 'Financial Creditor' in its affidavit dated 24th October, 2019 as having been effected in pursuance of the OTS dated 02nd December, 2015, is not disputed, rebutted or controverted by the 'Corporate Debtor', who harps on the tune of the application under Section 7 being hit by limitation on the plea that such documents had been executed after the expiry of period of limitation. Company Appeal (AT) (Insolvency) No. 1073 of 2019

5. Per contra, it is submitted on behalf of 'Financial Creditor' that the financial debt has not been disputed by the 'Corporate Debtor' who defaulted in discharging the liability qua such financial debt culminating in such debt being declared NPA on 30th September, 2012. Reference is also made to OTS proposal emanating from the 'Corporate Debtor' admitting liability as on 26th March, 2014, followed by letter dated 13th November, 2015 admitting liability or making offer of settlement to the tune of Rs.9.5 Crores. It is submitted that this was followed by another acknowledgment of liability in the nature of Settlement Terms agreed upon inter se the parties on 02nd December, 2015 and payment of Rs.47.50 lakhs was made in pursuance of such Settlement Terms on 05th December, 2015, further followed by deposit of Rs.1 Crore by way of cheque with further payment of Rs.1.5 Crore on 09th February, 2017, thereby giving fresh lease of life to the claim on account of financial debt with limitation commencing from 09th February, 2017. Reference is also made to another

letter emanating from 'Corporate Debtor' on 19th March, 2018. It is further submitted that the application under Section 7 of the 'I&B Code' was filed on 16th August, 2018 i.e. within three years from the last acknowledgment of debt as also from the date of part payment having been made by the 'Corporate Debtor'. Thus, the plea of limitation raised by the Appellant has no substance.

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6. After hearing learned counsel for the parties and rummaging through the record, we find that the facts with regard to advancement of loan facility by the 'Bank of Baroda' to the 'Corporate Debtor' and assignment of debt to the 'Financial Creditor' are not in controversy. It is also not in dispute that the outstanding liability qua the financial debt was declared as NPA on 30th September, 2012 and Demand Notice was issued on 01st October, 2012 by the 'Bank of Baroda' who subsequently assigned the debt to the 'Financial Creditor'. Further notice of demand appears to have been issued by the 'Financial Creditor' on 9th July, 2015. These facts clearly emerge from the application of 'Financial Creditor' in Form-1 filed before the Adjudicating Authority on 16th August, 2018 (Page 87-98 of the appeal paper book). It is by now well settled that an application under Section 7 of the 'I&B Code' is governed by Article 137 of the Limitation Act, 1963 prescribing three years' time for triggering of the 'Corporate Insolvency Resolution Process' and such period of limitation is to commence from the date the financial debt is declared as NPA. Reference in this regard may be made to the dictum of law laid down by the Hon'ble Apex Court in "Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Ltd. & Ors." (2019) 10 Supreme Court Cases 572". Section 3 of the Limitation Act, 1963 dealing with bar of limitation inter alia provides that every application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. This general Rule has been subjected to the Company Appeal (AT) (Insolvency) No. 1073 of 2019 provisions contained in Sections 4 to 24 of the Limitation Act, 1963 dealing with extension and exclusion of time in certain eventualities and effect of acknowledgment in writing and effect of payment on account of debt or of interest on legacy made before expiration of prescribed period. Sections 18 and 19 of the Limitation Act, 1963, relevant for disposal of this appeal are reproduced hereunder:

"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.

Company Appeal (AT) (Insolvency) No. 1073 of 2019 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."

"19. Effect of payment on account of debt or of interest on legacy.--Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person Company Appeal (AT) (Insolvency) No. 1073 of 2019 liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

Explanation.--For the purposes of this section,--

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) "debt" does not include money payable under a decree or order of a court."

7. The effect of Section 18 of the Limitation Act, 1963 is that an acknowledgment of liability in respect of a right made in writing and signed by the debtor before expiration of prescribed period for a suit or an application would result in a fresh period of limitation being computed from the time when acknowledgment was so signed. It is abundantly clear that such acknowledgment of liability must be made Company Appeal (AT) (Insolvency) No. 1073 of 2019 by the debtor in writing and signed by him before the expiration of prescribed period of limitation. Interpreting this provision in "Hiralal vs. Badkulal reported in AIR 1953 SC 225", the Hon'ble Apex Court held that an unqualified acknowledgment of liability by a party not only saves the period of limitation but also gives a cause of action to the plaintiff to base its claim. Same principle was reiterated in "Syndicate Bank v. R. Veeranna and Ors. reported in (2003) 2 SCC 15". Again in "J.C. Budhraj v. Orissa Mining Corporation Limited & Anr. reported in (2008) 2 SCC 444", the Hon'ble Apex Court held as under:

"21. It is now well settled that a writing to be an acknowledgement 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 acknowledgement. But if the defendant merely says, without admitting liability, it would like to examine the claim or the accounts, it may not amount to acknowledgement. In other words, a Company Appeal (AT) (Insolvency) No. 1073 of 2019 writing, to be treated as an acknowledgement of liability should consciously admit his liability to pay or admit his intention to pay the debt..... 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 acknowledgement for a new additional claim for damages."

It is manifestly clear that the liability acknowledged by the debtor must be a subsisting liability on the date of such acknowledgment.

8. Section 19 of the Limitation Act, 1963 gets attracted if two conditions are satisfied:

- (a) payment must be made within prescribed period of limitation
- (b) such payment must be acknowledged either by writing of the person making such payment or signed by him.

9. What extends the period of limitation is the payment made and not the writing but since such writing is construed as a mode of proof of Company Appeal (AT) (Insolvency) No. 1073 of 2019 such payment, such acknowledgment becomes relevant. This view is fortified by the judgment of the Hon'ble Apex Court rendered in "Shapoor Freedom Mazda v. Durga Prasad Chamaria reported in AIR 1961 SC 1236".

10. It further emerges from the record that the proposal for OTS was made by the 'Corporate Debtor' on 26th March, 2014 which is in the nature of first acknowledgment of liability and the period of limitation of three years would commence from such date. This was followed by the 'Corporate Debtor' further admitting its liability and making an offer to pay Rs.9.5 Crores in settlement to the 'Financial Creditor'. This happened on 13th November, 2015. The Settlement Terms were finally recorded, signed and accepted on 2nd December, 2015 and in pursuance thereof Rs.47.50 lakhs was paid by the 'Corporate Debtor' on 5th December, 2015. This is in the nature of part payment made within three years from the date of Settlement which itself is within the period of limitation of three years as acknowledgment of liability made before expiry of period of limitation computed from the date of declaration of the financial debt as NPA. Subsequently, an amount of Rs.1 Crore was paid by the 'Corporate Debtor' by way of cheque on 31st March, 2016. This is again a part payment made on

31st March, 2016 in pursuance of the Settlement Terms giving further lease of life to period of limitation commencing from 5th December, 2015. It further emerges from record that in terms of letter/ acknowledgment of payment of Rs.1.5 Crores Company Appeal (AT) (Insolvency) No. 1073 of 2019 approximately in terms of OTS by the 'Corporate Debtor' on 9th February, 2017, the limitation period would further commence w.e.f. such date. Acknowledgment has also been made by the 'Corporate Debtor' in its letter dated 19th March, 2018. These two letters are at pages 12 & 14 of the Additional Affidavit of the 'Financial Creditor'. It is, therefore, abundantly clear that the acknowledgment in the form of letters/ OTS/ Settlement terms has been made by the 'Corporate Debtor' before expiry of period of limitation. The sequence of events is clearly demonstrated by the documents forming a chain of events and the application under Section 7 having been filed on 16th August, 2018 by the 'Financial Creditor' is clearly within the period of limitation.

11. The ample evidence brought on record by the 'Financial Creditor' and not disputed, denied or refuted by the 'Corporate Debtor' brings it to the fore that the financial debt is payable and the acknowledgment in writing before expiry of period of limitation by the 'Corporate Debtor' through a series of written communications in the form of letters, settlement, proposal, settlement agreement and payments made in pursuance thereof have extended the limitation as each of these has the effect of giving a fresh lease of life to the liability with fresh period of limitation commencing from such acknowledgment in writing having been made within limitation period, OTS followed by settlement agreement and part payments made on two occasions in pursuance thereof. Admittedly, application under Section 7 of the 'I&B Code' has Company Appeal (AT) (Insolvency) No. 1073 of 2019 been filed within three years of the last part payment of Rs. 1.5 Crore approx. effected on 9th February, 2017.

12. This factual position emerging from documentary evidence on record stares in the face of the Appellant who has preferred the appeal without substantial grounds. Given the nature of evidence on record, we have no hesitation in holding that the appeal is frivolous. We accordingly dismiss the appeal. There shall be no order as to costs.

[Justice Bansilal Bhat] Member (Judicial) [Justice Venugopal M.] Member (Judicial) [V.P. Singh] Member (Technical) NEW DELHI 22nd May, 2020 AR Company Appeal (AT) (Insolvency) No. 1073 of 2019