Vivek Jha vs Daimler Financial Services India Pvt. ... on 13 January, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) Insolvency No. 756 of 2018
[Arising out of Order dated 03.10.2018 passed by the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench in Company Petition No. (IB)1802/MB/2017]

IN THE MATTER OF:
Vivek Jha .....Appellant
Vs.
Daimler Financial Services India Private Ltd. & Anr. ......Respondents

Present :

For Appellants: Mr. Rakesh Kumar, Mr. Anjaneya Mishra, Mr. Aashish Khattar, Mr. Sahil Advocates For Respondent: Mr.Ritesh Khare, Mr. Pathik Choudhury, Mr. Rajdev Singh, Advocates J U D G M E N T VENUGOPAL M. J.

The Appellant / Director of 'Corporate Debtor' has filed the instant appeal being aggrieved against the order dated 3rd October, 2018 passed by the Adjudicating Authority ('National Company Law Tribunal') Mumbai Bench whereby and where under the application filed by the Respondent / Applicant ('Financial Creditor') (u/s 7 of the 'I&B' Code) admitted. Earlier, the Adjudicating Authority ('National Company Law Tribunal') Mumbai Bench while passing the Company Appeal (AT) Insolvency No. 756 of 2018 impugned order dated 3rd October, 2018 at para 6.4 to 6.6 had observed the following and ultimately admitted the application: -

"6.4. It is further noticed that despite number of notices and reminders the Debtor has failed to make the payment. It is also noticed that the Financial Creditor has made due efforts to serve the Petition / Application to the Debtor but the Debtor has left its registered office. The RoC extract does not show any change in Registered Address of the Debtor Company.

6.5. Hence, keeping the facts and submissions in mind this Bench has come to conclusion that, the nature of Debt is a "Financial Debt" as defined under section 5(8) of the Code. Further, admittedly there is a "Default" as defined under section 3(12) of the Code on the part of the Corporate Debtor.

6.6 On the basis of the evidences on record and statement of account the Financial Creditor has established that the loan was sanctioned and duly disbursed to the Corporate Debtor but 2 Company Appeal (AT) Insolvency No. 756 of 2018 there is

non-payment of the Balance Debt on the part of the Corporate Debtor."

2. The Learned Counsel for the Appellant submits that the Respondent'/Applicant's claim was that there was an agreement dated 28.03.2013 between the Appellant and the Respondent pertaining to the securing of the Loan in respect of 'car' for an amount of Rs. 43,51,403/-.

3. According to the Appellant the remaining payment was of Rs. 34 lakhs with interest @ 9.4012%. The total sum (including principal and interest) payable was Rs. 39,15,180/- out of which the Appellant had made 11 Equal Monthly Instalments.

4. The Learned Counsel for the Appellant contends that the tenure of the Loan was from 30.03.2013 to 30.03.2016 (for three years) and the EMI was of Rs. 1,08,775/-, to be paid in 36 equal instalments. In this connection, it is represented on behalf of the Appellant that the 1st default of the Appellant had occurred on 30.03.2014 and that the 1st Respondent / Applicant had issued a loan recall cum Demand Notice dated 06.05.2014 seeking the principal amount computed with the outstanding interest amount and the future sum upto 27.03.2016. In fact, as per the aforesaid Recall cum Demand Notice dated 06.05.2014, payable outstanding amount by the Appellant was of Rs. 29,29,149.74/-.

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5. The grievance of the Appellant is that the Learned Adjudicating Authority had passed the Ex-parte impugned order dated 03.10.2019 and that the Appellant assails the impugned order on the ground of (i) Barred by Limitation; and (ii) the Application was never served on the Appellant.

6. The Learned counsel for the Appellant forcefully takes a plea that the 'Affidavit of Service' states the Addressee 'Left' and that the Corporate Office of the Appellant could not be stated as 'Left' and no 'Substituted Service' was ordered and in the absence of the same, there was 'No effective Service of notice' on the Appellant. Apart from that, the Respondent / Applicant had not chosen to serve the Appellant through e-mail though an e-mail address of the Appellant was available with it.

7. The Learned Counsel for the Appellant projects an argument that the Hon'ble Supreme Court in Civil Appeal No. 1102 of 2018 in Vashdeo R.Bhojwani Vs. Abhudaya Co-operative Bank and Ors. had observed that if a wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue.

8. The Learned Counsel for the Appellant submits the 'cause of action' in favour of the Respondent / Applicant in regard to the Appellant's loan default took place on 6th May, 2014 and that in the Recall cum demand notice the entire principal sum

including interest and future interest was recalled upto 27.03.2016.

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9. The Learned Counsel for the Appellant points out that the Hon'ble Supreme Court in the decision "Jignesh Shah & Ors." Vs. Union of India & Ors." reported in (2019) SCC Online SC 1254, and in decision Gaurav Hargovind Bhai Dave Vs. Asset Reconstruction Company (India) Ltd. & Ors. (2019)SCC Online SC 1239 had dealt with the aspect of Limitation under 'I&B' Code.

10. Continuing further, the Learned counsel for the Appellant points out that in the judgement in V.Hotels Ltd. Vs. Asset Reconstruction Company (India) Limited in Company Appeal (AT) (Insolvency) No. 525 of 2019, the observations of the Hon'ble Supreme Court were noted and that similar principles of limitation were laid down in the said judgement.

11. Repelling the contentions the Learned Counsel for the Appellant, the Learned counsel for the 1st Respondent submits that the Appellant / 'Corporate Debtor' repeatedly committed default in making payment of instalment amount as and when due, despite receiving several requests and reminders in this regard from the 1st Respondent / 'Financial Creditor'. Therefore, it is the stand of the 1st Respondent that the 1st Respondent/Applicant was perforced to terminate the Loan agreement dated 28.03.2013 because of failure on the part of the Appellant to repay the Loan amount due and the outstanding amount.

12. The Learned Counsel for the 1st Respondent brings it to the notice of the this Tribunal that in the Loan Recall notice dated 6.5.2014 issued to the 5 Company Appeal (AT) Insolvency No. 756 of 2018 Appellant / 'Corporate Debtor' a sum of Rs. 28,44,423 as on 02.05.2014 claimed together with accrued interest and expense till the date of realisation within 7 days from the date of receipt of the notice. In reality, it is the case of the 1st Respondent / Applicant that the Appellant /'Corporate Debtor' paid a sum of Rs. three lakhs on 18.03.2015 (through Cheque No. 51367 and subsequently, the 'Corporate Debtor' had not made any payment towards the outstanding sum.

13. The Learned Counsel for the 1st Respondent points out that the Demand- cum-Insolvency Notice dated 17.08.2017 was sent to the Appellant / 'Corporate Debtor' and Co-Borrowers by the 1st Respondent / 'Financial Creditor' claiming a sum of Rs. 29,29,149.74/-.

14. The Learned Counsel for the 1st Respondent strenuously contends that the application along with the hearing notice was served at the Registered address of the Appellant / 'Corporate Debtor', available in the Master Data with ROC but the same was returned with an endorsement "Addressee Left" and to this effect the affidavit of service was also placed on record and these facts were mentioned in the Impugned Order dated 03.10.2018 passed by the Adjudicating Authority.

Therefore, because of the non-appearance of the Appellant / 'Corporate Debtor', the Adjudicating Authority passed an 'Ex-parte order' on 03.10.2018.

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15. Lastly, the Learned Counsel for the 1st Respondent takes a stand that the Learned Adjudicating Authority had rightly held that there was continuous 'cause of action' when Demand Notice dated 17.08.2017 was issued to the 'Corporate Debtor' and hence the 'Debt' is not time barred.

16. At the outset this court relevantly points out that a 'Hire-Purchase Agreement' provides an alternative to an 'Hirer' to purchase the 'Goods'. The said Agreement begins as a 'Contract' of 'Hire', may result in a complete sale.

17. Section 2(d) of the Hire-Purchase Act, 1972 defines 'Hire-Purchase price' meaning the total sum payable by the hirer under hire-purchase Agreement in order to complete the purchase of or the acquisition of property in the goods to which the agreement relates etc. Section 2(e) of the Act speaks of 'hirer'. Section 2(f) specifies the meaning of 'owner'. Section 10 relates to 'right of hirer' to terminate agreement at any time. Section 19 pertains to 'rights' of owner on termination. In fact, the ingredients of Section 20 of the Act, 1972 pertains to restriction of owner's right to recover possession of goods otherwise than through Court. Section 24 concerns with 'discharge' of price otherwise than by payment of money'.

18. Section 25 of the Hire Purchase Act, 1972, enjoins that if the Hirer is declared 'Insolvent' during the continuance of Hire-purchase agreement then, the official receiver or where the hirer is the Company then, in the event of company being wound up, the Liquidator, has the same rights and obligations 7 Company Appeal (AT) Insolvency No. 756 of 2018 as an Hirer had in regard to the 'Goods'. An official Receiver or the Liquidator with the permission of the court assign the rights of Hirer under the agreement to any other person and the assignee shall have all the rights and is subjected to all the obligations of the Hirer under the agreement. Besides this, Section 238 of 'I&B' Code has an over-riding effect in respect of anything inconsistent contained in any other law.

19. It is not in dispute that the "Natconn Engineering Private Limited", Gurgaon ('Corporate Debtor') and its Director as Applicant and Co-Applicant had approached the Respondent / Applicant with a view to avail financial assistance in purchasing a Mercedes Benz car (E-250-CDI) and pursuant that too the 'Corporate Debtor' as well as Director (as borrower and co-borrower) entered into a Loan cum Hypothecation agreement dated 28.03.2013 and purchased the said car worth Rs. 43,51,403/- and that they made initial payment of Rs. 9,51,403/- and that the balance amount of Rs. 34 lakhs was financed by the Respondent / Applicant.

20. The rate of interest was @ Rs. 9.4012% p.a. and that the aggregate sum of Rs. 39,15,180/- was the contract value within a period of three years. The aforesaid amount was to be repaid in 36 equal monthly instalments of Rs. 1,08,775/- p.m. commencing from 30.03.2013 to 30.03.2016 subject to the terms and conditions prescribed under the loan agreement. 8 Company Appeal (AT) Insolvency No. 756 of 2018

21. The clear cut case of the Respondent is that the 'Corporate Debtor' as well as its Director as Borrower and co-borrower(s) are jointly and severally liable to repay the Loan together with interest and all other dues arising out of Loan Agreement. In short, their liability is co-extensive. It is to be noted that 'onus' is on the Respondent/Applicant to prove that service of summons on the Debtor Company. Even though on the side of the Appellant a plea was taken that there was no effective service on it by the Respondent / Applicant because of the reason that the notice on the 'Registered Address of the Debtor Company' was returned with an endorsement as 'Addressee Left' and as such no substituted service was either directed or effected upon the Appellant and also that no endeavour was made on the side of the Respondent/Applicant to serve the Appellant in the e-mail address, this Tribunal is of the considered opinion that 'Master Data' of the Debtor / available with ROC) reflected the same address and therefore one can safely and securely come to a conclusion in the instant case that the service was avoided by the party concerned. If a service of notice sent through Regd. Post at the correct address, then, in Law it is a 'correct mode of service' and in this regard a mere bald assertion that the registered notice was not served would not be sufficient to discharge the onus cast on an 'Aggrieved person'.

22. As a matter of fact, the Adjudicating Authority had observed in the impugned order that address of the Debtor Company from the Master data is the same for which only the Respondent/Appellant had taken place for sending 9 Company Appeal (AT) Insolvency No. 756 of 2018 them hearing notice. Therefore, there was no necessity for a direction being issued for a 'Substituted service' to be effected upon the Appellant. Moreover, non-serving of notice on the e-mail address of the Appellant is not fatal to the present case, as opined by this Tribunal.

23. It cannot be forgotten that for the Demand Notice dated 17.08.2017 of the Respondent / Applicant ('Financial Creditor'), the 'Corporate Debtor' and the co- borrower(s) to the Loan Agreement although received the same had not issued a Reply and also not repaid the outstanding sum of Rs. 29,29,149.74/-. Before that on 18.03.2015 through cheque No. 51367 payment of Rs. 3 lakhs was made by the 'Corporate Debtor' and subsequently, the 'Corporate Debtor' has not made any payment towards the Loan outstanding amount.

24. Section 3(8) of 'I&B' Code defines that 'Corporate Debtor' meaning a Corporate person who owes a debt to any person.

25. Section 3(17) of the Code speaks of 'financial service provider' meaning a person engaged in the business of providing 'Financial services' in terms of authorisation issued or registration granted by a Financial Regulator.

26. Section 5(7) of 'I&B' Code with 'Financial Creditor' meaning any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

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27. As far as the present case is concerned, the Respondent / Applicant is a 'Financial Creditor' who had initiated proceedings under Section 7 of the 'I&B' Code against the 'Corporate Debtor'.

28. Section 3(14)(b)(iii) while defining Financial Institution (by referring to Section 45(i) of RBI Act, 1934) means a Financial Institution as any non- banking institution which carries on as its business or part of its business in letting or delivering of any goods to a hirer under a Hire-Purchase Agreement as defined in clause (c) of Section 2 of the Hire-Purchase Act, 1972.

29. It is represented before this Tribunal that the Respondent / Applicant had incurred an expense of Rs. 9 lakhs approx. towards 'Corporate Insolvency Resolution Process' cost, Rs. 1,50,000/- 'Litigation Cost' and Rs. one Lakh towards Miscellaneous Expenses' and further that the Liquidation was initiated by the Liquidator.

30. Admittedly, the Loan cum hypothecation agreement was entered into between the parties on 28.03.2013 and the period of 36 equated monthly instalments of Rs. 1,08,775/- per month towards the purchase of car commenced from 30.03.2013 to 30.03.2016 on 06.05.2014, a Loan Recall notice was issued on behalf of the Respondent for termination of loan agreement. It is not in dispute that a payment of Rs. three lakhs through cheque dated 18.03.2015 was made by the 'Corporate Debtor'.

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31. The Demand Notice dated 17.08.2017 was issued by the Respondent / Applicant for which the 'Corporate Debtor' and the co-Borrower to the loan agreement had not responded and (not made payment of the outstanding sum of Rs. 29,29,149.74/-. As per Section 3(12) of the 'I&B' Code the 'Corporate Debtor' had committed default in respect of a financial debt envisaged u/s 5(8) of the Code. In Law, an 'Acknowledgement' in writing within expiration of prescribed period will mark a new commencement period for limitation to base a claim and the same will not create a new contract. In fact, it only extends the limitation period. Suffice it for this Tribunal to make a pertinent mention that if a suit is filed within three years from the last acknowledgement the same is not barred by limitation as per decision Union of India Vs. M.C. Pandey AIR 2009 NOC Page 494 (UTR). Further, an 'Acknowledgement' must be made before the expiration of the limitation period as per Section 18 of the Limitation Act, 1963. An 'Acknowledgement' of Liability not only saves limitation period but also confers on an individual a 'cause of action' to him, to lay his claim.

32. Considering the fact that the Appellant / 'Corporate Debtor' had made a payment of three Lakhs through Cheque on 18.03.2015 and that the said payment was made after the issuance of Loan Recall notice dated 06.05.2014 and later a demand notice dated 17.08.2017 was issued by the Respondent to the Appellant / 'Corporate Debtor' and co-borrower in respect of the loan agreement dated 28.03.2018 where the 'Corporate Debtor' had agreed to pay Rs. 1,08,755/- per month beginning from 30.03.2013 to 30.03.2016 and also 12 Company Appeal (AT) Insolvency No. 756 of 2018 this Tribunal keeping in mind that the application u/s 7 of the 'I&B' Code was filed by the Respondent / Applicant before the Adjudicating Authority on 16.12.2017, this Tribunal comes to a consequent conclusion that the claim of the Respondent / Applicant is not barred by the plea of Limitation. Consequently, the present Appeal fails and the same is dismissed but without costs. All the pending IA's are closed. The Appellant is directed to file certified copy of the Impugned Order dated 03.10.2018 within 4 days from today.

[Justice Venugopal M.] Member (Judicial) [Balvinder Singh] Member (Technical) [Dr. Ashok Kumar Mishra Member (Technical) New Delhi 13th January, 2020 ss 13 Company Appeal (AT) Insolvency No. 756 of 2018