

Ramdas Dutta vs Idbi Bank Limited & Anr on 26 April, 2023

1

NATIONAL COMPANY LAW APPELLATE TRIBUNAL. PRINCIPAL BENCH,

NEW DELHI

Company Appeal (AT) (Ins) No. 1285 of 2022

IN THE MATTER OF:
RAMDAS DUTTA

Suspended Director of Saraju Flour Mills Pvt.
Ltd., Son of Late Dhanapati Dutta, Working for
gain at 146A, Cotton Street, Kalkatta - 700 001 ...Appellant
Versus

IDBI BANK LIMITED

A Banking Company constituted under the
Industrial Development Bank of India Act, 1964,
Having its registered office at: IDBI Tower,
WTC Complex, Cuffe Parade, Mumbai 400 005
Acting through NPA Management Group, IDBI
Bank Limited, 44, Shakespeare Sarani,
Kolkata - 700 017 ...Respondent No. 1

MR. PANKAJ KUMAR TIBREWAL

Interim Resolution Professional of
Saraju Flour Mills Pvt. Ltd., having his office at:
Chita 3E, Duke Residence, 13, Chanditalal Lane,
Ashok Nagar, Tollygunge, Regent Park, Kolkata ...Respondent No. 2
West Bengal, 700 040

Present:

For Appellant : SR. Adv. Malvika Trivedi, Adv. Ashish Choudhury, Adv.
Arpit Choudhury, Adv. Anand Kamal, Adv. Shailendra
Salria, Adv. Sujal Gupta.

For Respondent : Sr. Adv. Sh. Gopal Jain, Adv. S.K. Garg, Adv. Girish
Verma, for IDBI
Adv. Abhinav Tyagi, Adv. Dhananjaya, for R2

Company Appeal (AT) (Ins) No. 1285 of 2022

2

JUDGMENT

Per: Justice Rakesh Kumar Jain:

This appeal has been filed by the Suspended Director of the Corporate Debtor, namely, 'Saraju Flour Mills Pvt. Ltd.' against the order dated 26.08.2022 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench -I, Kolkata) in CP(IB) No. 1749/KB/2019 by which an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Code') by the IDBI Bank Limited (Financial Creditor) is admitted and Pankaj Kumar Tibrewal has been appointed as the Interim Resolution Professional (in short 'IRP').

However, at the time of preliminary hearing of this appeal on 20.12.2022, notice was issued to the Respondents and it was ordered that "no further steps shall be taken in pursuance of the impugned order".

2. Brief facts of this case are that the IDBI Bank Limited (in short 'Bank') sanctioned cash credit limit of the Corporate Debtor to the tune of Rs. 8,50,000/- which was later on enhanced to Rs. 15,54,000/-. According to the Bank, the Corporate Debtor was in default of payment of Rs. 15,22,21,838.58/- including interest calculated as on 01.08.2019. The Bank has also alleged that the directors of the Corporate Debtor executed five separate guarantee agreements on 13.07.2009 and the Corporate Debtor entered into a tripartite inter-se agreement with the Bank and West Bengal Industrial Development Corporation Limited on 16.06.2010 to create hypothecation of the plant and machinery both present and future and collateral security for the facilities. It is alleged that the Corporate Debtor Company Appeal (AT) (Ins) No. 1285 of 2022 failed to repay the credit facility to the Bank who initiated the proceedings under the SARFAESI Act, 2002 by issuance of a demand notice dated 27.09.2014 under Section 13(2) of the SARFAESI Act, 2002. It is also alleged that the Bank offered OTS (One Time Settlement) under SARAL KARJ BHUGTAN YOJNA to the Corporate Debtor on 23.10.2018 which was duly accepted by the Corporate Debtor on 29.12.2018 and the same was approved by the Bank on 11.01.2019 but the Corporate Debtor failed to honour the terms of repayment of the OTS, therefore, the settlement was revoked and the petition under Section 7 of the Code was filed on 18.10.2019.

3. The Corporate Debtor contested the application, inter alia, on the ground of limitation that the petition has been filed beyond the period of three years from the date of default.

4. It is pertinent to mention that since the Bank did not mention the date of default in its application filed under Section 7 of the Code in Part IV of Form 1, therefore, the Adjudicating Authority by way of a separate order dated 03.11.2021 allowed the Bank to file a supplementary affidavit to specifically mention the date of default, balance sheet of the Corporate Debtor and one time settlement. In this regard, it would be relevant to refer to the order dated 03.11.2021 which read as under:-

"Ld. Counsel on both sides present.

This matter was taken up for admission today. It is noticed from the application that while the NPA date has been mentioned, the date of default is not. Secondly, even if we go by the NPA date as the date of default, no material has been placed on record to deal with the limitation aspect. Mr. Shaunak Mitra refers to page 45(a) of the petition to say that there has been part payment.

Company Appeal (AT) (Ins) No. 1285 of 2022 We have perused the statement at page 45(a) and it is seen that while payments have been made, there is no corresponding pleading to say that this repayment is in respect of the facilities advanced to the CD. Mr. Shaunka Mitra also submits that balance sheet acknowledgements are available. However, from the records we see that the Balance sheet as on 31.03.2013 alone is place on record. Mr. Shaunak Mitra also relies certain OTS proposal.

Ld. Counsel for the Financial Creditor seeks to file a short supplementary affidavit to place on record (i) the formal declaration of the date of default (ii) the balance sheet which in his views will save limitation and (iii) the OTS proposal. He is permitted to do so in view of the Hon'ble Supreme Court Judgment dated 04.08.2021 in the case of Dena Bank (now Bank of Baroda) Vs. C. Shiva Kumar Reddy. The supplementary affidavit shall be filed within a period of 10 days from today. Copy thereof shall be served on the counsel on record of the Corporate Debtor. The Corporate Debtor to file reply within 10 days if need be to the Supplementary Affidavit.

List this matter after completion of pleadings on 06.12.2021."

5. Apropos the aforesaid order dated 03.11.2021, the Bank filed the Supplementary Affidavit in which it disclosed the date of default, date on which the payment was received from the Corporate Debtor etc. Para 20 of the Supplementary Affidavit in which the dates have been mentioned is reproduced as under:-

"20. A statement showing the series of events for the accounts of the Corporate Debtor maintained with the Applicant Bank:-

Saraju Flour Mills Pvt. Ltd.

Sl. No.	Particulars	Date
1.	Date of Default	31.08.2013
2.	Date of NPA	31.03.2014
3.	Date of Representation u/s 13(3) of SARFAESI Act, 2002	21.11.2014
4.	Payment received from the CD	29.03.2017

Company Appeal (AT) (Ins) No. 1285 of 2022

5.	Payment received from the CD under OTS Offer SKBY	31.12.2018
6.	Further payment received from the CD	22.01.2019
7.	Further payment received from the CD	06.03.2019
8.	Limitation period ending on	06.03.2022

6. The Adjudicating Authority recorded its findings in Para 21, 22 & 23 of the impugned order for the purpose of holding that the application filed under Section 7 of the Code by the Bank was within limitation, which are reproduced as under:-

"21. Upon perusal of the record it is apparent that transaction between the parties was purely financial in nature and there is an existence of Financial Debt. From the above records it is apparent that the Financial Creditor under SARAL KARJ BHUGTAN YOJNA extended One Time Settlement offer to the Corporate Debtor and the same was accepted by the Corporate Debtor [at page 260 of the Company Petition]

22. Moreover, upon perusal of the records at page 259 of the Petition, it is apparent that the Corporate Debtor also made part payment of the OTS amount. Further, the settlement proposal under the SARAL KARJ BHUGTAN YOJNA provided for the payment of the balance amount within 30 days from the date of Letter of Approval of OTS i.e., 11 January, 2019. Hence, this falls within the ambit of acknowledgement of debt due and payable'.

23. Balance sheet for year ending as on 2017 - 2018 of the Corporate debtor reflects that Corporate Debtor has certain short term borrowings which is showing that there exists cash credit facilities from the Bank. Further, as per the Auditors Report of the Corporate Debtor for financial year ending as on 2017-2018 (page 104 of the Supplementary Affidavit), it states that the Corporate Debtor has defaulted in the repayment of loans or borrowings to financial institutions, banks."

7. Counsel for the Appellant has submitted that admittedly no date of default was mentioned by the Bank in Part-IV of Form 1 and the date of Company Appeal (AT) (Ins) No. 1285 of 2022 default has been given in the supplementary affidavit as 31.08.2013. It is submitted that the application under Section 7 of the Code, for the purpose of initiation of the Corporate Insolvency Resolution Process (CIRP), can be filed on account of default. In this regard, Section 7(1) of the Code is reproduced for a quick reference:-

"7. Initiation of corporate insolvency resolution process by financial creditor.

(1) A financial creditor either by itself or jointly with 2[other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution

process against a corporate debtor before the Adjudicating Authority when a default has occurred."

8. She has further submitted that the date of default triggers the period of limitation which is provided under Article 137 of the Limitation Act, 1963 (in short 'the Act'). Article 137 of the Act is reproduced as under:-

Description of suit Period of limitation Time from which period begins to run Any other Three years. When the right to application for apply accrues.

which no period of
limitation is
provided elsewhere
in this division.

9. It is further submitted that admittedly the application under Section 7 of the Code has been filed on 18.10.2019 whereas the date of default is given as 31.08.2013 and the period of three years had expired on 31.08.2016. It is further submitted that there has been no acknowledgment in between 31.08.2013 to 31.0.2016 to attract Section 18 of the Act for the purpose of extension of period of limitation.

Company Appeal (AT) (Ins) No. 1285 of 2022

10. It is further submitted that the Adjudicating Authority has itself observed in para 23 of the impugned order that the balance sheet for the year ending on 2017-18 reflects that the Corporate Debtor has certain short term borrowings but the said balance sheet would not extend the period of limitation in view of Section 18 of the Act because the acknowledgement has to be during the currency of the period of limitation. In this regard, she has referred to Section 18 of the Act which 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."

11. She has also referred to judgment of the Hon'ble Supreme Court rendered in the case of 'Sampurna Singh & Ors. Vs. Niranjana Kaur & Ors., Company Appeal (AT) (Ins) No. 1285 of 2022 AIR 1999 SC 1047' in which it has been held that the acknowledgment if any has to be prior to the expiration of the prescribed period for filing of the suit and if the limitation has already expired it would not revive under this Section.

12. She has further submitted that the Adjudicating Authority has referred to OTS for the purpose of bringing the application filed under Section 7 of the Code within the limitation on the ground that the OTS was approved in January, 2019 and the application was filed on 18.10.2019. However, it is submitted that even the OTS has to occur during the currency of the period of limitation and it cannot extend the period of limitation which had already expired.

13. On the other hand, though Counsel for Respondent has submitted that the date of default has been mentioned as 31.08.2013 in the supplementary affidavit but limitation would trigger from the date of NPA which is specifically mentioned in Form 1 as the date of default. It is further submitted that since the date of default is 31.03.2014, therefore, it will run up to 31.03.2017 and since the Appellant had deposited a sum of Rs. 2.75 Lakh on 29.03.2017 in their account, therefore, the limitation would further extend from 29.03.2017 to 29.03.2020 in view of Section 19 of the Act and as the application under Section 7 of the Code is filed on 18.10.2019, therefore, it has to be taken to have been filed within the period of limitation. He has also submitted that there has been one time settlement (OTS) which was approved and accepted, therefore, the period of limitation would further extend by it.

Company Appeal (AT) (Ins) No. 1285 of 2022

14. In rebuttal, Counsel for the Appellant has submitted that the Bank is trying to make out a new case in this appeal by referring to the date of NPA dated 31.03.2014, which is mentioned in Part IV, as the date of default because the Bank, on an affidavit, has disclosed the date of default as 31.08.2013 and the date of NPA as 31.03.2014. It is further submitted that the date of NPA is not recognised by law for the purpose of triggering the period of limitation of three years rather it is the date of default which is the sine qua non. In this regard, she has relied upon four decisions of the Hon'ble Supreme Court rendered in the case of 'Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries P. Ltd. & Anr., (2020) 15 SCC 1', 'B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates, (2019) 11 SCC 633', 'Jignesh Shah & Anr. Vs. Union of India & Anr.,

(2019) 10 SCC 750' & 'Laxmi Pat Surana Vs. Union Bank of India, (2021) 8 SCC 481'.

15. She has further submitted that the alleged payment dated 29.03.2017 cannot be taken as an acknowledgement in terms of Section 19 of the Act because the acknowledgement has to be in the form of writing by the person paying and signed by him. In this regard, she has relied upon a decision of the Hon'ble Supreme Court rendered in this case of 'Shanti Conductors Pvt. Ltd. Vs. Assam State Electricity Board, (2020) 2 SCC 677'.

16. It is further submitted that the OTS, relied upon by the Respondent shall not extend the limitation because it did not happen during the currency of the period of limitation.

17. We have heard Counsel for the parties and perused the record with their able assistance.

Company Appeal (AT) (Ins) No. 1285 of 2022

18. There is no dispute that the Bank did not mention the date of default in Part IV of Form 1 i.e. the application filed under Section 7 of the Code and disclosed the date of default only in its supplementary affidavit which was filed pursuant to the order passed by the Adjudicating Authority. The Bank has mentioned the date of default as 31.08.2013 in the affidavit. It has also mentioned the date of NPA as 31.03.2014. The Bank has tried to change the date of default as 31.03.2014 which in fact has been mentioned as the date of NPA. The period of limitation, counted from 31.08.2013 i.e. date of default would continue till 31.08.2016 and shall expire w.e.f. 01.09.2016. The Bank failed to produce any evidence of acknowledgement of debt on the part of the Appellant during the period from 31.08.2013 to 31.08.2016. Faced with these difficulties, the Bank has tried to project the date of NPA i.e. 31.03.2014 as the date of default to take it up to 31.03.2017 so that it may use the payment of Rs. 2.75 Lakh made on 29.03.2017 in the account as acknowledgment under Section 19 of the Act in order to gain further period of three years from that date i.e. 29.03.2017 till 29.03.2020 to bring the application filed under Section 7 of the Code on 18.10.2019 within the period of limitation.

19. The first question is as to whether the date of default can be changed by the Bank? In this regard, it has been held by the Hon'ble Supreme Court in the case of 'Ramesh Kymal Vs. Siemens Gamesa Renewable Power Pvt. Ltd., (2021) 3 SCC 224' that the date of default cannot be changed. It has also been held in the case of Laxmi Pat Surana (Supra), Babulal Vardharji Gurjar (Supra), B.K Educational Services Pvt. Ltd. (Supra) and Jignesh Shah (Supra) that the period of limitation would be attracted from the date when Company Appeal (AT) (Ins) No. 1285 of 2022 the default occurs and not from the date of declaration of NPA. Therefore, the date of NPA cannot be taken to be the date of default for the purpose of limitation.

20. In so far as, the issue regarding the payment of Rs. 2.75 Lakh on 29.03.2017 by the Appellant in their account is concerned, it has now been well settled by three judge bench of the Hon'ble Supreme Court, in the case of Shanti Conductors Pvt. Ltd. (Supra), that Section 19 would come into play if the payment is acknowledged in the handwriting of, or in a writing signed by the person making the payment. In this regard, Para 15 and 16 of the Judgment is reproduced as under:-

"15. Order VII Rule 6 uses the words "the plaintiff shall show the ground upon which exemption from such law is claimed". The exemption provided under Sections 4 to 20 of the Limitation Act, 1963 are based on certain facts and events. Section 19, with which we are concerned, provide for a fresh period of limitation, which is founded on certain facts, i.e., (i) whether payment on account of debt or of interest on legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy, (ii) an acknowledgement of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

16. We may notice the judgment of this Court dealing with Section 20 of the Limitation Act, 1908, which was akin to present Section 19 of the Limitation Act, 1963. In *Sant Lal Mahton Vs. Kamla Prasad and Others*, AIR 1951 SC 477, this Court held that for applicability of Section 20 of the Limitation Act, 1908, two conditions were essential that the payment must be made within the prescribed period of limitation and it must be acknowledged by some form of writing either in the handwriting of the payer himself or signed by him. This Court further held that for claiming benefit of exemption under Section 20, there has to be pleading and proof. In paragraphs 9 and 10, following has been laid down:-

"9. It would be clear, we think, from the language of s. 20, Limitation Act, that to attract its operation two conditions are Company Appeal (AT) (Ins) No. 1285 of 2022 essential : first, the payment must be made within the prescribed period of limitation and secondly, it must be acknowledged by some form of writing either in the handwriting of the payer himself or signed by him. We agree with the Subordinate Judge that it is the payment which really extends the period of limitation under s. 20, Limitation Act; but the payment has got to be proved in a particular way and for reason of policy the legislature insists on a written or signed acknowledgment as the only proof of payment and excludes oral testimony. Unless, therefore, there is acknowledgment in the required form, the payment by itself is of no avail. The Subordinate Judge, however, is right in holding that while the section requires that the payment should be made within the period of limitation, it does not require that the acknowledgment should also be made within that period. To interpret the proviso in that way would be to import into it certain words which do not occur there. This is the view taken by almost all the High Courts in India and to us it seems to be a proper view to take (See *Md. Moizuddin v. Nalini Bala* A.I.R. (24) 1937 Cal 284 : I.L.R. (1937) 2 Cal. 137; *Lal Singh v. Gulab Rai* 55 All 280, *Venkata Subbhu v. Appu Sundaram* 17 Mad. 92, *Ram Prasad v. Mohan Lal* A.I.R. (10) 1923 Nag 117 and *Viswanath v. Mahadeo* 57 Bom. 453.

10.If the plaintiff's right of action is apparently barred under the Statute of limitation, O. 7, R. 6, Civil P.C. makes it his duty to state specifically in the plaint the grounds of exemption allowed by the Limitation Act upon which he relies to exclude its operation; and if the plaintiff has got to allege in his plaint the facts which entitle him to exemption, obviously these facts must be in existence at or

before the time when the plaint is filed; facts which come into existence after the filing of the plaint cannot be called in aid to revive a right of action which was dead at the date of the suit. To claim exemption under s. 20. Limitation Act the plaintiff must be in a position to allege and prove not only that there was payment of interest on a debt or part payment of the principal, but that such payment had been acknowledged in writing in the manner contemplated by that section....."

21. Therefore, no advantage can be given to the Bank of the entry dated 29.03.2017.

Company Appeal (AT) (Ins) No. 1285 of 2022

22. As regards the OTS, it has come on record that the OTS has occurred much after the expiry of period of limitation, therefore, it cannot be taken into consideration for the purpose of Section 18 to extend the period of limitation.

23. Thus, in view of the aforesaid facts and circumstances, we are of the considered opinion that the impugned order is patently illegal and the appeal is thus hereby allowed and the impugned order is set aside. No costs.

24. Before parting with the order, it would be relevant to refer to the prayer made by the IRP during the course of hearing about the cost incurred for which he may avail any other remedy available to him in accordance with law.

[Justice Rakesh Kumar Jain] Member (Judicial) [Dr. Alok Srivastava] Member (Technical) New Delhi 26th April, 2023.

Sheetal Company Appeal (AT) (Ins) No. 1285 of 2022