Invent Assets Securitization And ... vs Xylon Electrotechnic Pvt Ltd on 11 August, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 677 of 2020

IN THE MATTER OF:
Invent Assets Securitization and
Reconstruction Pvt. Ltd. ...Appellant

Versus
Xylon Electrotechnic Pvt. Ltd. ...Respondent

Present:
For Appellant : Mr. Pallav Saxena, Mr. Prateek Khetan, Mr. Syed Arsalan Abid and Mr. Apoorv Malhotra, Advocate

ORDER

(Through Virtual Mode) 11.08.2020 Appellant - Financial Creditor's application filed under Section 7 of the 'Insolvency and Bankruptcy Code, 2016' ('I&B Code') against 'Xylon Electrotechnic Pvt. Ltd.' (Corporate Debtor) for having committed default to repay the outstanding amount of Rs.54,49,40,510.35 came to be dismissed in terms of the impugned order dated 28th May, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench on the ground that the claim in respect of the 'financial debt' was barred by limitation and the Applicant/Appellant had not submitted any proof of continuous acknowledgement of debts by the Corporate Debtor. Aggrieved thereof the Appellant (Financial Creditor) has filed the instant appeal assailing the impugned order on the ground that the debt was payable in law as the same had been acknowledged by the 'Corporate Debtor' in its balance-sheet of financial years commencing from 2010 to 2016 which for purpose of Section 18 of the Limitation Act amounted to acknowledgement of liability on the part of the Respondent (Corporate Debtor).

After hearing the learned counsel for the Appellant at the pre-admission stage, we find that the Union Bank of India, who was the Appellant's Assignor had filed for recovery of the outstanding financial debt in question before the DRT, Mumbai on 8th February, 2011 for default on the part of the Respondent (Corporate Debtor) which was alleged to have occurred on 20th February, 2010. The DRT allowed the claim of the Appellant. The appeal against the judgment of the DRT dated 17th January, 2014 is stated to be pending consideration before the 'Debt Recovery Appellate Tribunal, Mumbai.

From record, it emerges that initially cash-credit facility was sanctioned by the assignor in favour of the 'Corporate Debtor' in terms of its sanction letter dated 3rd January, 2008. These facilities were restructured on 12th June, 2009. The assignor classified the account of Respondent (Corporate Debtor) as the Non- Performing Account (NPA) on 20th February, 2010. Subsequently, the 'financial debt' came to be assigned by the assignor to the Appellant herein. It is, therefore, clear that the date of default, reckoned on the basis of the Corporate Debtor's account having been classified as

NPA is to be taken as 20th February, 2010 i.e. the date Respondent/Corporate Debtor's account was classified as NPA. Admittedly, no acknowledgement has been made in writing by the Corporate Debtor before the expiry of the period of three years reckoned from such date so as to extend the period of limitation. It is by now well settled that the application under Section 7 of the I&B Code is governed by Article 137 of the Limitation Act and any application filed by the 'Financial Creditor' for imitation of the 'corporate insolvency resolution process' beyond three years from the date of the Corporate Debtor's account being classified as Non-Performing Account would be barred Company Appeal (AT) (Insolvency) No. 677 of 2020 by limitation. It having been found that there is no acknowledgement in writing on the part of the Respondent (Corporate Debtor) before the expiry of period of limitation computed from the date of default, it is required to be seen whether reflection of the 'financial debt' in balance-sheet of the 'Corporate Debtor' for the relevant period would amount to such acknowledgement of debt within the purview of Section 18 of the Limitation Act to extend the period of limitation.

The issue regarding exclusion and extension of period within the ambit of Limitation Act fell for consideration before this Appellate Tribunal on several occasions. Upon noticing that in 'Sesh Nath Singh & Ors. v. Baidyabati Sheoraphuli Cooperative Bank Ltd. in Company Appeal (AT) (Insolvency) No. 672 of 2019' a three Member Bench of this Appellate Tribunal had held that the 'financial creditor' who bonafidely prosecuted his application under SARFAESI Act, 2002 was entitled to exclusion of period spent in prosecuting the civil proceedings against the 'Corporate Debtor' while computing the period limitation for initiation of the 'corporate insolvency resolution process', this Appellate Tribunal constituted a larger Bench of four Member as the correctness of the earlier judgment was doubted. The larger Bench was constituted for rendering decision in 'Ishrat Ali v. Cosmos Cooperative Bank Ltd. & Anr.' - Company Appeal (AT) (Insolvency) No. 1121 of 2019. After consideration of the various judgments of the Hon'ble Apex Court on the subject, this Appellate Tribunal held as under:

> "11. The aforesaid decisions of the Hon'ble Supreme Court and this Appellate Tribunal make it clear that for the purpose of computing the period of limitation of Company Appeal (AT) (Insolvency) No. 677 of 2020 application under Section 7, the date of default is 'NPA' and hence a crucial date.
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> 15. A suit for recovery of money can be filed only when there is a default of dues. Even if the decree is passed, the date of default does not shift forward to the date of decree or date of payment for execution. Decree can be executed within specified period i.e. 12 years. If it is executable within the period of limitation, one cannot allege that there is a default of decree or payment of dues.
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> 16. Therefore, we hold that a Judgment or a decree passed by a Court for recovery of money by Civil Court/ Debt Recovery Tribunal cannot shift forward the date of default for the purpose of computing the period for filing an application under Section 7 of the 'I&B Code'.

21. An action taken by the 'Financial Creditor' under Section 13(2) or Section 13(4) of the 'SARFAESI Act, 2002' cannot be termed to be a civil proceeding before a Court of first instance or appeal or revision before an Appellate Court and the other forum. Therefore, action taken Company Appeal (AT) (Insolvency) No. 677 of 2020 under Section 13(2) of the 'SARFAESI Act, 2002' cannot be counted for the purpose of exclusion of the period of limitation under Section 14(2) of the Limitation Act, 1963.

In an application under Section 7 relief is sought for resolution of a 'Corporate Debtor' or liquidation on failure. It is not a money claim or suit. Therefore, no benefit can be given to any person under Section 14(2), till it is shown that the application under Section 7 was prosecuting with due diligence in a court of first instance or of appeal or revision which has no jurisdiction.

22. The decision rendered in "Sesh Nath Singh & Ors. v. Baidyabati Sheoraphuli Cooperative Bank Ltd." (Supra) thereby cannot be held to be a correct law laid down by the Bench."

From the above, it is manifestly clear that the determination of the claim of the proceedings before the DRT would neither extend the time nor exclude the period of limitation. The limitation commenced from the date of default reckoned on the basis of classification of Corporate Debtor's account as NPA would not admit of any extension or exclusion on the basis of pursuit of a remedy under the 'SARFAESI Act, 2002 or in a recovery proceedings before the DRT. The date of default computed with effect from the date of account of the 'Corporate Debtor' Company Appeal (AT) (Insolvency) No. 677 of 2020 being classified as NPA would not shift as in the instant case proceedings taken before the DRT for recovery of the 'financial debt' would not be a proceeding being pursued before a wrong forum nor would that be a continuation of the cause of action. As regard the issue raised by the Appellant in regard to reflection of the 'financial debt' in the balance-sheet of the 'Corporate Debtor' for the relevant period amounting to acknowledgement of liability, it would suffice to refer to the following observations made in majority judgment of the four Member Bench of this Appellate Tribunal in V. Padmakumar v. Stressed Assets Stabilitation Fund (SASF) & Anr. - Company Appeal (AT) (Insolvency) No. 57 of 2020' decided on 12th March, 2020. Paragraph 22 thereof is reproduced hereunder:

"22. In view of the aforesaid findings, agreeing with the decisions aforesaid, at the cost of repetition, we hold:

(i) As the filing of Balance Sheet/ Annual Return being mandatory under Section 92(4) of the Companies Act, 2013, failing of which attracts penal action under Section 92(5) & (6), the Balance Sheet / Annual Return of the 'Corporate Debtor' cannot be treated to be an acknowledgement under Section 18 of the Limitation Act, 1963.

(ii) If the argument is accepted that the Balance Sheet / Annual Return of the 'Corporate Debtor' amounts to acknowledgement under Section 18 of Company Appeal (AT) (Insolvency) No. 677 of 2020 the Limitation Act, 1963 then in such case,

> it is to be held that no limitation would be applicable because every year, it is mandatory for the 'Corporate Debtor' to file Balance Sheet/ Annual Return, which is not the law."

The law as interpreted in the aforesaid judgment holds the field till date. Therefore, the argument advanced on behalf of the Appellant to find fault with the impugned order on the ground of limitation being extended on account of the financial debt being reflected in the balance-sheet/annual return of the Corporate Debtor for the relevant period has to be repelled.

We find no legal infirmity in the impugned order and uphold the view of the Adjudicating Authority that the default in respect of the 'financial debt' admittedly declared as NPA occurred on 20th February, 2010 and the debt was barred by limitation.

The appeal is accordingly dismissed.

[Justice Bansi Lal Bhat] Acting Chairperson [Justice Anant Bijay Singh] Member (Judicial) [Dr. Ashok Kumar Mishra] Member (Technical) /ns/gc/ Company Appeal (AT) (Insolvency) No. 677 of 2020