

Bank Of India vs Multi Arc Coating & Straps Ltd on 6 February, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal(AT) (Insolvency) No. 891 of 2019

IN THE MATTER OF:

Bank of India,
Bharuch Branch,
New Rasda Building,
Bharuch

...Appellant

Vs

Multi Arc Coating and Straps Limited

Registered Office:

Survey No. 7/8/9,
National Highway No. 8,
Bharuch - 392 015.

....Respondent

Present:

For Appellant:

Mr. Shivanshu Kumar and Mr. Vikky Dang,
Advocates.

For Respondent:

Ms. Aastha Mehta, Advocate.

ORDER

06.02.2020 This Appeal has been filed by Bank of India (Financial Creditor) who had filed Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (in short 'IBC') before the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench), Ahmedabad in C.P.(I.B.) No. 349/7/NCLT/AHM/2018. The Application was filed claiming that there was a financial debt outstanding, the total value of which is Rs. 22,01,85,312/- which was not cleared by the Respondent- Multi Arc Coating and Straps Limited (Corporate Debtor). There was debt outstanding and default was claimed. The Appellant relied on various documents in support of his claim which can be seen from the Impugned Order itself.

2. The learned Adjudicating Authority heard parties and observed in paragraph -15 of the Judgment as under:

..

" In view of the above, while going through the documents so filed by the petitioner, admittedly, corporate debtor executed joint documents on 10.08.2007 and 23.11.2009 and corporate debtor again admitted and acknowledged liability by letters of acknowledgement of debt/balance confirmation letters dated 24.04.2012 in favour of the petitioner. The said fact could be revealed from petitioner's own documents i.e. original application No. 334/2015 filed before the DRT-II at Ahmedabad and placed at page No. 73 (part of pleadings) to the application. Under such circumstances, even if it is calculated from 24.04.2012, the three years' period gets over somewhere in April, 2015, whereas, the instant application is filed on 11.07.2018 i.e. much beyond

three years. There is/are no acknowledgement before the expiry of three years placed by the petitioner so as to extent the period of limitation beyond three years."

...

On the above basis, the Application came to be rejected as barred by limitation.

3. We have heard Advocate Mr. Shivanshu Kumar and Advocate Mr. Aastha Mehta of the parties. Learned Counsel for the Appellant is pointing out that the Adjudicating Authority Noticed the acknowledgement letter dated 24.04.2012 (page- 277 of Paper Book) and stated that if the limitation is calculated from that date, three years' period would be over in April, 2015. Learned Counsel stated that there was also another letter of acknowledgement issued by the Corporate Debtor which is dated 12.03.2014 (page-419 of the Paper Book) wherein the Corporate Debtor had clearly acknowledged the dues of the consortium Banks and wrote with regard to the action taken under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short 'SARFAESI') and suggested certain actions to banks regarding sale of properties so as to recover money. Learned Counsel for the Appellant then referred to another acknowledgement in the form of letter from the Corporate Debtor, copy of which is at page- 420. This letter is dated 09.06.2016. Learned Counsel states that this letter was also placed before the Adjudicating Authority as can be seen from the list reproduced by the Adjudicating Authority in paragraph-5 of the Impugned Order. It is stated that the Adjudicating Authority did not consider these documents and did not refer to them and thus committed an error in recording that the claim was time barred.

4. Letter dated 09.06.2016 from Corporate Debtor to Financial Creditor and other Banks (page-420) has heading "Request for One Time Settlement of outstanding dues as per OTS agreed upon for 12.30 crores". Letter reads as under:

"Respected Sir, With reference to the above referred subject, I would like to bring to your kind notice that this property of the undersigned, situated at Bharuch, being Plot No. 7,8 & 9 was mortgaged with the consortium of Banks consisting of Bank of India and Punjab National Bank, wherein the Bank of India was lead bank in the consortium of the Bank.

As per the one time settlement (OTS) agreed upon, the consortium of Banks was agreeable to One Time Settlement proposal for amount of Rs. 12.30 Cores. In response to this the undersigned has already deposited Rs. 1 Crores in the 'no lien account' as well as the Bank has already recovered the amount of Rs. 6,00,40,000/- by auction sale of Thane Property and have recovered the further amount of Rs. 1,17,00,000/- from auction sale of Plant & Machinery of Bharuch Property.

Further, I am in receipt of communication dated 7.6.2016 from a proposed buyer, who is interested in purchasing the Plot Nos. 7 & 8 of village Vadadala, District-Bharuch, which are mortgaged to Bank of India and Punjab National Bank after clearing the differential outstanding OTS amount, out of the total amount of Rs.

12.30 Crores. It is further even stated in the said proposal that the said proposed buyer will also take the responsibility of clearing all the statutory dues that has been imposed on the lands in question.

In the light of above, if the bank is agreeable to abide by the onetime settlement (OTS) as agreed upon for a total amount of Rs. 12.30 Crores, wherein substantial amount has already been recovered by the Bank, then the proposed buyer who is interested in purchasing the said land as agreeable to pay the differential outstanding amount from the Total Amount of Rs. 12.30 Crores as per OTS.

The aforesaid proposal is without prejudice to the rights and contentions of the undersigned of the pending court proceedings.

In view of above, I would request your goodselfs to take immediate steps on the aforesaid proposal and intimate us with regard to the decision of both the Banks so that the immediate steps can be taken by the proposed buyer and the issue can be resolved at the earliest in the interest of all the parties."

...

5. Learned Counsel states that this letter also constitutes an acknowledgement in terms of Section 18 of the Limitation Act, 1963 as it shows that the Corporate Debtor acknowledged debt and suggested steps are required to be taken so that proposed buyer can take necessary steps and pay differential outstanding as claimed by the Corporate Debtor. Learned Counsel further states that Notice dated 10.04.2012 (page-275) issued under SARFAESI had informed the Corporate Debtor that the Account had become NPA with effect from 30.06.2009. Learned Counsel states that if the acknowledgement dated 24.04.2012 (page-277), then letter of acknowledgement dated 12.03.2014 (page-

419) and then letter dated 09.06.2016 (page-420) are considered, the acknowledgements are within three years of each other and thus the Section 7 Application filed on 11.07.2018 was within limitation period.

6. Learned Counsel for the Respondent submits that the Appellant had sanctioned various facilities in 2006 and there is no dispute regarding the fact that the Account had become NPA on 30.06.2009. She states that the Appellant served Notice under Section 13(2) of SARFAESI only on 10.04.2012 and Debt Recovery Tribunal was moved only in 2015. She accepts that Respondent had sent letter dated 09.06.2016 (page-420) but it is her submission that the letter cannot be construed as an acknowledgement. She states that the letter clearly states that the same is made by the Corporate Debtor without prejudice to rights and contentions of the Corporate Debtor in the Court proceedings pending. It is stated that this letter could not be treated as an acknowledgement. Learned Counsel for the Respondent is submitting that because of this, the Adjudicating Authority ignored the letter dated 09.06.2016 and she supported the judgement of the Adjudicating Authority.

7. Section 18 of the Limitation Act reads 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, 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."

[Emphasis supplied]

8. In this context, learned Counsel for the Appellant has referred to the judgement of the Hon'ble Supreme Court in the matter of "ITC Limited Vs. Blue Coasts Hotel Ltd." [CIVIL APPEAL Nos. 2928-2930 OF 2018] - MANU/SC/0263/2018. Paragraph 35 of the said judgment reads as under:

...

Letter of Undertaking "Without Prejudice"

"35. Much was sought to be made of the words "without prejudice" in the letter containing the undertaking that if the debt was not paid, the creditor could take over the secured assets. The submission on behalf of the debtor that the letter of undertaking was given in the course of negotiations and cannot be held to be an evidence of the acknowledgement of liability of the debtor, apart from being untenable in law, reiterates the attempt to evade liability and must be rejected. The submission that the letter was written without prejudice to the legal rights and

remedies available under any law and therefore the acknowledgement or the undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a letter that fell for consideration in Spencer's case as pointed out by Mr. Harish Salve, "as a rule the debtor who writes such letters has no intention to bind himself further than is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure."

It was argued in a subsequent case that an acknowledgment made "without prejudice" in the case of negotiations cannot be used as evidence of anything expressly or impliedly admitted. The House of Lords observed as follows:

"But when a statement is used as acknowledgement for the purpose of s. 29 (5), it is not being used as evidence of anything. The statement is not an evidence of an acknowledgement. It is the acknowledgement."

Therefore, the without prejudice rule could have no application. It said:

"Here, the respondent, Mr. Rashid was not offering any concession. On the contrary, he was seeking one in respect of an undisputed debt. Neither an offer of payment nor actual payment."

We, thus, find that the mere introduction of the words "without prejudice" have no significance and the debtor clearly acknowledged the debt even after action was initiated under the Act and even after payment of a smaller sum, the debtor has consistently refused to pay up."

...

9. Learned Counsel has then referred to judgment of this Tribunal in the matter of "Gouri Prasad Goenka Vs. Punjab National Bank and Ors." in Company Appeal (AT)(Insolvency) No. 28 of 2019 dated 08.11.2019 and "K.R.V. Uday Charan Rao Vs. Bank of India and Ors." in Company Appeal (AT)(Insolvency) No. 731 of 2019 dated 13.11.2019 to submit that this Tribunal has accepted in earlier Judgment that the OTS Proposal acts as an acknowledgement.

10. We have gone through the matter and having heard learned Counsel for both the sides it appears that keeping in view of provision of Section 18 of the Limitation Act and reading the same with the contents of letter dated 09.06.2016, the same needs to be construed as an acknowledgement of the debt outstanding and merely because in the document the Corporate Debtor mention that the proposal was given was without prejudice to the rights and contentions in pending Court proceedings, will not make any difference. In this view of the matter, when NPA was declared on 30.6.2009, the documents pointed out by the learned Counsel for the Appellant dated 24.04.2012 (page 277), 12.03.2014 (page-419) and 09.06.2016 (page-420) calculated from the date of NPA, give fresh periods of limitation and filing of Section 7 Application on 11.7.18 was not barred.

11. We hold that the Adjudicating Authority erred in dismissing the Application under Section 7 of the IBC.

12. For the above reasons, the Appeal is allowed, the Impugned Order is quashed and set aside. The matter is remitted back to the Adjudicating Authority. The Adjudicating Authority will admit the Application under Section 7 of the IBC and pass further suitable orders required to be passed on admission of Application under Section 7 of IBC.

The Appeal is disposed of accordingly. No costs. The parties to appear before the Adjudicating Authority on 26.02.2020.

[Justice A.I.S. Cheema] Member (Judicial) [Justice Anant Bijay Singh] Member (Judicial) (Kanthi Narahari) Member(Technical) Akc/Md