

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.1382 of 2019

[Arising out of Order dated 30.09.2019 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in C.P. (IB) No.1498/KB/2018]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Gautam Sinha,
Ex-Director/Promoter,
M/s. Kalpataru Cold
Storage Pvt. Ltd.
55, Bhupendra Bose
Avenue,
Kolkata – 700 004

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Appellant

Versus

1. UV Asset Reconstruction
Company Limited,
704, Deepali Building,
92, Nehru Place,
New Delhi – 110019

Applicant/
Financial Creditor

Respondent No.1

2. United Bank of India
HO: 11, Hemanta
Basu Sarani,
Kolkata – 700 001

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Respondent No.2

3. Anup Kumar Sinha
Interim Resolution
Professional,
M/s. Kalpataru Cold
Storage Pvt. Ltd.

IRP

Respondent No.3

For Appellant:

**Shri Ajay K. Jain, Shri Asim Kumar Kundu, Shri
Murari Kumar, Shri Achint Kumar, Shri Atanu
Mukherjee, Advocates
Shri Gautam Sinha, Ex-Director, Appellant in
person**

For Respondent: **Shri Sumesh Dhawan and Ms. Aporva Chowdhary, Advocates (Respondent No.1)**
Shri R.N. Rout, Advocate (Respondent No.2)
Ms. Pratiksha Sharma and Shri Ankit Acharya, Advocates (Respondent No.3)

J U D G E M E N T

(25th February, 2020)

A.I.S. Cheema, J. :

1. Respondent No.1 - UV Asset Reconstruction Company Ltd. (Financial Creditor), on assignment of debt from Respondent No.2 – United Bank of India, filed Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) against M/s. Kalpataru Cold Storage Pvt. Ltd. (Corporate Debtor) claiming that there was debt and default of Rs.21,61,12,013/- not paid by the Corporate Debtor. The Adjudicating Authority heard the parties and by Impugned Order dated 30th September, 2019, brushing aside question of limitation admitted the Application under Section 7. The present Appeal has been filed by Ex-Director/Promoter of Corporate Debtor taking up the case for the Corporate Debtor.

2. Briefly stated, the facts are that Respondent No.2 - United Bank of India (Bank – in short) had sanctioned fresh seasonal cash credit facility, working capital loan and extended bank guarantee facility to the Corporate Debtor in 2006. As per the Application under Section 7 of IBC filed by the Financial Creditor (Annexure A-10 at Page – 205), it is claimed that there was default in repayment of the facilities on 31st December, 2013 and the

Bank declared the Corporate Debtor as NPA (Non-Performing Asset) on 30th March, 2014. The Respondent No.1 – Financial Creditor appears to have been assigned the loan on 29th March, 2017. It is stated that earlier the Bank had moved DRT by way of O.A. No. 530 of 2015 which was pending. The Application under Section 7 came to be filed on 31st October, 2018.

3. Before the Adjudicating Authority, it appears that various disputes were raised with regard to the assignment also. It is seen that the Financial Creditor by letter dated 5th April, 2017 and the Bank vide letter dated 8th April, 2017 had informed the Corporate Debtor regarding Assignment Agreement dated 29.03.2017. The Appellant claims having filed Title Suit No.66/2018 against the Financial Creditor and the bank, on the ground that Assignment Agreement was fraud and it was on insufficient stamp and there was want of registration. In this regard, the observation of the Adjudicating Authority in Para – 13 of the Impugned Order is as follows:

“The law requires that there must be legally assignment of debt. Herein, before us the deed of assignment is produced as Annexure P-3. We find that it is prepared on stamp paper of Rs.100/-. It has been registered duly before the Registrar of Assurance, Kolkata. *Prima facie*, we hold that it is legal and valid deed of assignment of debt. If, at all, it is on insufficient stamp paper, then law requires that deficiency of paying stamp can be recovered with penalty. The deed cannot be said to be illegal thereby. Moreover, the Hon’ble Appellate Tribunal in the order stated above held that in para 16 that, **“The appellant has challenged the ‘Deed of Assignment’ executed between the ‘HSBC & Phoenix’, but while filing reply to the notice issued during the admission of application under section 7 of the I&B Code, such issue cannot be**

raised as it cannot be decided by the Adjudicating Authority on objection.”

In view of above, we hold that the applicant herein is the financial creditor within the meaning of section 5(7) of IBC. We answer first point in the affirmative.”

4. Apparently, dispute regarding the assignment is being contested in City Civil Court and in summary proceeding before the Adjudicating Authority when the Financial Creditor and bank are supporting each other, it is not possible for the Adjudicating Authority to decide the dispute which would be a matter of Suit. Before us, not much stress was laid on this aspect and we do not find any reason to differ from the Adjudicating Authority on this count.

5. The dispute that needs to be decided is with regard to the limitation. The date of default is stated to be 31st December, 2013 and NPA was declared on 30th March, 2014. The Adjudicating Authority found that the claim was within limitation on the following basis:-

“16. However, there is one more dimension as far as case in hand is concerned. The financial creditor and even corporate debtor have produced on record the corporate debtor’s balance-sheet for the year ending March, 2016 (page no.300 onwards in paper book). From the perusal of those financial papers of the corporate debtor, it is seen that corporate debtor noted that they have to pay the debt of United Bank of India. Their account is declared as NPA. In short, in the year 2016, the corporate debtor in its balance-sheet acknowledged the debt to be payable by them which is claimed herein by the financial creditor. This acknowledgement of debt in its balance-sheet by the corporate debtor in the year 2016 has brought the claim of financial creditor within period of limitation.

It is filed well within period of limitation. We hold that the debt is not time-barred. We answer point no.2 in the negative.”

6. Thus, the Adjudicating Authority relied on the balance sheet to hold that there was acknowledgement and thus, the claim was within limitation.

7. Before us, the learned Counsel for the Respondent No.1 (Respondent – in short) referred to the Judgements in the matters of **“Sheetal Fabrics versus Coir Cushions Ltd.”** reported as 2005 SCC OnLine DEL 247; **“The Commissioner of Income Tax-III v. Shri Vardhman Overseas Ltd.”** reported as 2011 SCC OnLine DEL 5599 and **“M/s Mahabir Cold Storage Versus C.I.T., Patna”** reported as 1991 Supp (1) Supreme Court Cases 402. The argument is that acknowledgement of debt in the Balance Sheet also amounts to acknowledgement under Section 18 of the Limitation Act.

8. The Judgement in the matter of “The Commissioner of Income Tax” (supra) was in the context of provisions of the Income Tax Act. In Para – 17 of the Judgement, it was observed:-

17. In the case before us, as rightly pointed out by the Tribunal, the assessee has not transferred the said amount from the creditors' account to its profit and loss account. The liability was shown in the balance sheet as on 31st March, 2002. The assessee being a limited company, this amounted to acknowledging the debts in favour of the creditors. Section 18 of the Limitation Act, 1963 provides for effect of acknowledgement in writing. It says where before the expiration of the prescribed period for a suit in respect of any property or right, an acknowledgement 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, a fresh period of limitation shall commence from the time when the acknowledgement was so signed. In an early case, in England, in *Jones v. Bellgrove Properties*, (1949) 2KB 700, it was held that a statement in a balance sheet of a company presented to a creditor- share holder of the company and duly signed by the directors constitutes an acknowledgement of the debt. In *Mahabir Cold Storage v. CIT* (1991) 188 ITR 91, the Supreme Court held:

“The entries in the books of accounts of the appellant would amount to an acknowledgement of the liability to Messrs. Prayagchand Hanumanmal within the meaning of Section 18 of the Limitation Act, 1963, and extend the period of limitation for the discharge of the liability as debt.”

In several judgments of this Court, this legal position has been accepted.”

The Hon'ble High Court then referred to some of the Judgements.

9. In the Judgement in the matter of “Sheetal Fabrics” (supra), Hon'ble High Court of Delhi referred to Judgement in the matter of “**In re. Padam Tea Company Ltd.**” AIR 1974 Calcutta 170 and referred to the said Judgement as under:-

“10. Let me first deal with the case of *Padam Tea Co. Ltd.* (supra). This case relied upon by learned Counsel for the respondent company in support of his plea that acknowledgement contained in the balance sheet could not be relied upon by the petitioner. However, on going through this judgment, one would clearly notice that it does not lay down the proposition which is sought to be advanced by the learned Counsel. That was a case where balance sheet was not confirmed or passed by the shareholders. The Court observed that such a balance sheet, before it could be relied upon, must be duly passed by the shareholders at the appropriate

meeting and must be accompanied by a report, if any, made by the Directors for its validation. The principle of law laid down was that statement in the balance sheet indicating liability is to be read along with the Directors' report to see whether both so read would amount to an acknowledgement. There is no dispute about this proposition of law. However, in that case, the Court refused to accept entry in the balance sheet as acknowledgement of debt because of two reasons:

- (a) The balance sheet was not passed by the shareholders at the appropriate meeting.
- (b) The Directors' report, in the balance sheet, contained the following statement:

11. Your Directors are of the opinion that the liabilities shown in Schedules 'A' and 'B' of the balance sheet excepting those of United Bank of India, M/s. Goenka and Co. Private Ltd. and Caritt, Moran and Co. Pvt. Ltd. are barred by limitations, hence these liabilities are not confirmed by your Directors.

12. These were the two considerations which led the Court to conclude that even the debt shown in the balance sheet in respect of the said petitioning creditor would not amount to an acknowledgement as contemplated under Section 18 of the Limitation Act and following observations in this regard are reported:

"Therefore, in understanding the balance sheets and in explaining the statements in the balance-sheets, the balance-sheets together with the Directors' report must be taken together to find out the true meaning and purport of the statements. Counsel appearing for petitioning creditor contended that under the statute the balance sheet was a separate document and as such if there was unequivocal acknowledgement on the balance-sheet is a statutory document and perhaps is a separate document but the balance sheet not confirmed or passed by the shareholders at the appropriate meeting and in order to do so it must be accompanied by a report, if any, made by the Directors. Therefore, even though the balance sheet may be a separate document

these two documents in the facts and circumstances of the case should be read together and should be construed together.

13. In the same breath, the High Court also explained as to what would constitute an acknowledgement under Section 18 of the Limitation Act by referring to the judgment of the Supreme Court and this discussion would be found in the following passage:

"It was held by the Supreme Court in the case of *L.C. Mills v. Aluminium Corpn. of India Ltd.*, (1971) 1 SCC 67 : AIR 1971 SC 1482, that it was clear that the statement on which the plea of acknowledgement did not create a new right of action but merely extended the period of limitation. The statement need not indicate the exact nature or the specific character of the liability. The words used in the statement in question must, however, relate to a present subsisting liability and indicate the existence of a jural relationship between the parties such as, for instance, that of a debtor and a creditor and the intention to admit such jural relationship. Such an intention need not, however, be in express terms and could be inferred by implication from the nature of the admission and the surrounding circumstances. Generally speaking, a liberal construction of the statement in question should be given. That of course did not mean that where a statement was made without intending to admit the existence of jural relationship, such intention should be fastened on the person making the statement by an involved and far-fetched reasoning. In order to find out the intention of the document by which acknowledgement was to be construed the document as a whole must be read and the intention of the parties must be found out from the total effect of the document read as a whole."

[Emphasis supplied]

10. Then the High Court after referring to the Judgement in the matter of "Padam Tea Company" examined the case, which was before the Hon'ble

High Court, and in the facts of that matter, found that the list of Creditors maintained by the Respondent Company before High Court or in the balance sheet, was without any conditions or any strings attached.

11. Question before us is whether in the Balance Sheet which is being relied on, what is seen in the statement and if the same could be read as acknowledgement. Copy of the Balance Sheet of 2016 relied on by the Adjudicating Authority is at Page – 412 of the Paper Book of Appeal. Page – 412 is the Directors’ Report which presented the Annual Report and audited Financial Statements for the Financial Year ended 31st March, 2016. The relevant portion pointed out to us by the parties is at Page – 421. It is Annexure – A to the Auditors’ Report and what Auditors’ Report stated in Sub-Para - (viii), is as under:-

“(viii) In our opinion and according to the information and explanations given to us, that Company has not defaulted in the repayment of loans or borrowings to financial institution. The Company did not have any dues outstanding to Government as at the beginning of the year nor did it obtain any such loans during the year. However, the Company has failed to repay its dues owing to bank and has been declared as NPA by bank and the matter is lying with Debts Recovery Tribunal and subjudice (Note No. 29). Amount overdue is as under:

United Bank of India, Lohapatty Branch, Kolkata	Amount outstanding (₹/Lacs)	Period
Term Loan	411.63	2011-2012
Cash Credit	668.99	2014-2015
Working Capital	136.57	2014-2015

”

[Emphasis supplied]

12. The Note No.29 referred by the Auditor at Page – 438 of the Paper Book is as under:-

“29. No balance confirmation/Bank Statement in respect of Term Loans and Other Loans obtained from United Bank of India, Lohapatty Branch, Kolkata has been received by the Company for the period from 01.04.2015 to 31.03.2016, the Company has not provided interest on these loans in the books of account.

Company’s accounts were declared non-performing assets (NPA) earlier on certain defaults in repayment of loans instalments and interest dues thereon to the bank. A Notice under Section 13(2) of the SARFAESI Act, 2002 has been served by bank on 03.04.2014 and date of declaration of NPA is 31.03.2014. The matter is sub judice before the Debts Recovery Tribunal (DRT).”

[Emphasis supplied]

13. Thus, the Auditor rather stated its own opinion and according to the information and explanations given that the Company has not defaulted in the repayment of loan or borrowings to the financial institution. What is further recorded is statement of fact that bank has declared the Corporate Debtor NPA and proceedings are pending before DRT. In effect, Company claimed to the Auditors that Company has not defaulted in the repayment of loans or borrowings. This cannot be read as Acknowledgement.

14. We have already referred to the Judgements in the matters of “Sheetal Fabrics” and “Padam Tea” which show that the Balance Sheet would be required to be read with Directors’ Report. In the Directors Report

which is before us, there does not appear to be any acknowledgement of debt. The statement recorded by the Auditor with regard to the pending litigation in the facts of the present matter, we find, cannot be read as an acknowledgement by Company under Section 18 of the Limitation Act. The Adjudicating Authority did not go into the particulars. In present matter, we are not deliberating whether entry in Balance Sheet can be termed Acknowledgement in law. In our view, even if we are to consider that contents in Balance Sheet could be read as acknowledgment even then if we read the contents in balance sheet in the matter, for reasons stated above, we do not find that the Corporate Debtor acknowledged as such the liability to pay the alleged outstanding debt.

15. It is stated that the Application under Section 19(4) of SARFAESI Act filed by the Bank on 29th June, 2015 is still pending adjudication before DRT-3, Kolkata.

16. We find that default dated 31.12.2013 which was declared NPA on 30th March, 2014, was time barred for the purpose of filing of Application under Section 7 of IBC on 31st October, 2018. The Application thus should not have been admitted.

17.(A) For above reasons, the Appeal is allowed. The Application under Section 7 of IBC filed by Respondent No.1 – Financial Creditor is dismissed.

(B) The Impugned Order is quashed and set aside. Actions taken by IRP/RP in consequence of the Impugned Order are quashed and set aside. The

Corporate Debtor is released from the rigour of law and is allowed to function independently through its Board of Directors. The IRP/RP will hand back the records and management of the affairs of Corporate Debtor, to the Board of Directors.

(C) The IRP/RP will place particulars regarding CIRP costs and fees before the Adjudicating Authority and the Adjudicating Authority after examining the correctness of the same, will direct the Financial Creditor to pay the same in time to be specified by the Adjudicating Authority.

The Appeal is disposed accordingly. No costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

/rs/md