

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.785 of 2018

[Arising out of Order dated 25.10.2018 passed by National Company Law Tribunal, New Delhi Bench in (IB)-1243(ND)2018]

IN THE MATTER OF:

Before NCLT

Before NCLAT

India SME Asset
Reconstruction Co.
Limited
1004, 10th Floor,
Naman Centre,
Plot No.-C-31,
G-Block, Bandra
Kurla Complex,
Bandra (East),
Mumbai
Maharashtra-400051

Financial Creditor

Appellant

Versus

Medirad Tech India
Limited
D-155, Sarita Vihar,
New Delhi – 110076

Corporate Debtor

Respondent

For Appellant:

**Shri Sumesh Dhawan, Ms. Vatsala Kak and
Ms. Geetika Sharma, Advocates
Ms. Seema Jungid, CS**

For Respondent:

**Dr. U.K. Chaudhary, Senior Advocate with
Shri Anurag Bhatt, Shri Sanjay Katiyal,
Shri Lokesh Pathak and Shri Dhruv Gupta,
Advocates**

J U D G E M E N T**A.I.S. Cheema, J. :**

1. The Appellant/Financial Creditor (India SME Asset Reconstruction Co. Limited) is assignee of a debt availed by Respondent – Corporate Debtor (Medirad Tech India Limited) from IDBI Bank Ltd. and Axis Bank Ltd. vide assignment deed dated 12th December, 2012 (Page – 231 of documents filed – Diary No.8538) and assignment deed dated 30th March, 2011 (Page – 193 of documents filed – Diary No.8538), respectively.

2. The Appellant filed Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) No.(IB)-1243(ND)2018 claiming that there was outstanding debt of Rs.39,20,76,489/- due from the Corporate Debtor and the same was in default. For the purpose, the Appellant filed the Application in Form – 1 and annexed documents (Annexures 1 to 42).

3. On 25th October, 2018, the Adjudicating Authority passed Impugned Order observing that the case arose out of loan transaction which was given in 2001 and 2005 and refusal to honour agreement for the purpose of its return, was in 2007. The Adjudicating Authority observed that there was nothing on record to extend limitation and the Financial Creditor had been given enough time to satisfy the Bench. Adjudicating Authority by short Order proceeded to dismiss the Application.

4. Aggrieved by the Impugned Order, the present Appeal has been filed. The Appellant is relying on the various documents Appellant had filed along with the Application under Section 7 as well as additional documents which have been produced (with Diary No.8538) and claims that the amount in default could not be said to be debt not legally enforceable. It is the case of the Appellant that even the balance sheet for the Financial Year – 2015 – 2016 of the Respondent – Corporate Debtor (Page 147 – Diary No.8538) showed that the Company was still showing that the secured loans of the Axis Bank and IDBI Bank were there. The Appellant also referred to OA 18/2009 filed by Axis Bank against the Respondent before DRT, Cuttack (Page 409 – Diary No.8538) and the written statement filed by the Respondent acknowledging the debt. The Appellant points out that the debt owed to IDBI Bank was supported by mortgage of immovable properties by the Corporate Debtor and Corporate Debtor had filed Writ Petition No.13910/2012 against IDBI Bank before the High Court of Orissa, Cuttack (Page 447 – Diary No.8538). It is argued that both the banks had initiated litigations on the basis of law as was applicable at the concerned time and with the coming into force of IBC, relief as now available was resorted to and thus, it cannot be said that the debt was time barred. Appellant also claims that there was creation of charge by the Respondent in favour of Axis Bank on 10.8.2004 and in favour of IDBI Bank on 06.08.2003 and on 23rd April, 2001 and later on, there was modification of charge in favour of the Appellant on 30th March, 2011 and 12th December, 2012. Corporate Debtor had in 2014, moved

Regional Director, Northern Region, MCA against IDBI Bank and the Appellant sought setting aside of the two From No.8. Respondent had also filed complaint before Registrar of Companies seeking rectification of charge recorded. Appellant referred to the documents filed to show creation of the equitable mortgage by deposit of title deeds. Appellant claims that even the website of Ministry of Corporate Affairs shows existence of the charge in favour of the Appellant.

5. Against this, the Respondent – Corporate Debtor has submitted that the loan of IDBI became NPA on 30th June, 2007 and recalled the IDBI loan vide Notice dated 13.07.2012 and that date must be treated as date of default and thus, the Application under Section 7 must be said to be time barred. As regards Axis Bank, it is argued that the account became NPA on 5th January, 2007 and the bank recalled loan on 25th November, 2007 and thus, the claim with regard to loan from Axis Bank also must be said to be barred by limitation. Relying on the Judgement in the matter of **“B.K. Educational Services Pvt. Ltd. vs. Parag Gupta and Associates”** – **(AIR 2018 SC 5601)** passed by Hon’ble The Supreme Court of India, it is argued that debt which had already become time barred cannot be relied on to pursue proceeding under the IBC. The Respondent denies that the reflection of the debt of Axis Bank and IDBI Bank in the balance sheet of Corporate Debtor would tantamount to acknowledgement under Section 18 of the Limitation Act, 1963 (Limitation Act – in short) as according to the Respondent, the name of the two banks does not mean the name of

the Appellant - India SME Asset Reconstruction Co. Limited is reflected. Apart from this, it is claimed that in the Balance Sheet relied on by the Counsel for the Appellant, the Company has mentioned in the same Balance Sheet (at Pages 154 and 155 – Diary No.8538) regarding the pending litigations. According to the Respondent, Article – 62 of the Limitation Act would not be helpful as it relates to Suit.

6. Keeping in view Judgement relied on and arguments, we have gone through the record, especially, Form – 1 and its Annexures as were submitted before the Adjudicating Authority. The Appellant disclosed particulars regarding the Corporate loan and working capital credit facilities given by IDBI and Axis Banks. Referring to IDBI Bank, the Applicant pointed out that on 23.04.2001, IDBI gave term loan of Rs.100 Lakhs as per the Loan Agreement and the Corporate Debtor executed Deed of Hypothecation dated 23.04.2001; deed of guarantee by Dr. A.K. Rath and Smt. L.K. Panigrahi as well as two undertakings were given by the Corporate Debtor. There is reference to the mortgage of immovable property by the Corporate Debtor on 20.01.2003 (Annexure A-5 – Page 106). The Application shows that on 06.08.2003 – Corporate Debtor asked for additional loan of Rs.100 Lakhs and term loan was sanctioned. Agreement in this regard was executed along with further documents on 12.11.2003 and there was further mortgage of property by the Corporate Debtor. It is stated that IDBI recalled entire loan outstanding on 13.07.2012. It appears Notice dated 28.03.2008 under Section 13(2) of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI - in short) was issued. The Application No.02/2010 was filed before the District Magistrate of Khurda, Bhubneswar. Against such action initiated by the Appellant – Financial Creditor, the Corporate Debtor went and filed Writ Petition 13910/2012 (Page 447 – Diary No.8538) in High Court which is still pending.

7. With regard to Axis Bank, the Application filed before Adjudicating Authority shows that on 27th February, 2004, Corporate Debtor sought and was sanctioned working capital of Rs.50 Lakhs and granted term loan of Rs.500 Lakhs. Axis Bank issued sanction letter and term loan was approved of Rs.500 Lakhs on 17th May, 2004 and Promissory Note and other six documents were executed by the Corporate Debtor on 10.08.2004. Later on, Corporate Debtor applied for further loan of Rs.200 Lakhs on 18th April, 2005 and necessary documents in this regard were executed on 2nd July, 2005. On 13th March, 2006, sanction letter to restructure the term loan was executed with regard to both the loans and the Corporate Debtor executed necessary documents on 31st October, 2006 including acknowledgement dated 31st October, 2006. The Application shows Notice being issued to Corporate Debtor by Axis Bank to pay outstanding dues on 25th November, 2007. Axis Bank applied to DRT, Cuttack vide OA 18/2009 (Page 409 – Diary No.8538) dated 30.10.2009 which is stated to be still pending.

8. The Application in format is supported by Annexure 1 to 42. The necessary particulars were given by the appellant in the format. The record shows that Corporate Debtor executed documents on 31st October, 2006 along with acknowledgement and when there was default, Axis Bank approached DRT filing OA 18/2009. Respondent does not show as to how when DRT was moved, the claim of Axis Bank could be said to be time barred. As regards the claim by IDBI, admittedly there were documents of mortgage in existence. There is mortgage dated 12th November, 2003 and it appears that IDBI took action under SARFAESI in 2010. There is no substance in the argument of the learned Counsel for the Respondent that Article 62 of the Limitation Act cannot be referred to because the said Article refers to Suit. Under IBC, relevant factor for the purpose of limitation is to consider if the debt is enforceable in law or not. Under Article 62 of the Limitation Act to enforce payment of money secured by a mortgage or otherwise charged upon immovable property, the limitation is 12 years from the time when the money sued for becomes due. At the relevant time IDBI Bank had the option to file Suit or resort to proceedings as per SARFAESI Act. IDBI resorted to proceeding under the SARFAESI and the Respondent filed Writ Petition which is said to be pending. The actions resorted to by the Axis Bank and IDBI Bank to get relief under the laws available at the concerned time (and which actions are still pending) show that it cannot be said that the claims moved at that time were barred

by limitation. With the coming into force of the Insolvency and Bankruptcy Code, 2016, new relief became available and the Appellant resorted to Application under IBC in spite of the other litigation pending. In this view of the matter, we are unable to agree with the claim of the Respondent that the debt was stale or time barred. The banks were pursuing the litigations on the basis of legal provisions as were available earlier. It cannot be said that the debt was time barred. This is apart from the fact that admittedly Respondent has been showing the debt in its balance sheet even right up to 2015 and 2016. Only because the Respondent has added note in the balance sheet that litigations regarding the debt are pending, does not mean that existence of debt outstanding is denied.

9. We are thus unable to agree with the Adjudicating Authority. With the Application, there were already sufficient documents showing existence of debt and particulars were given of the litigations pending and thus, the Adjudicating Authority should not have dismissed the Application holding that the debt was time barred.

10. For reasons mentioned, we allow the Appeal. The Impugned Order is quashed and set aside. The matter is remitted to the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench). The Application under Section 7 No.(IB)-1243(ND)2018 is restored. The Adjudicating Authority is directed to admit the Application (after Notice to

the Corporate Debtor, in case the Corporate Debtor is desirous of paying the dues before admission Order).

No orders as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

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

[Kanthi Narahari]
Member (Technical)

4th September, 2019

/rs/sk