NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 996 of 2021

(Arising out of Order dated 07.10.2021, passed by National Company Law Tribunal, Court - III, Mumbai Bench in C.P. No. 4277/MB/I&B/2018)

IN THE MATTER OF:

Rajesh Kedia
Ex-Director of Ajanta Paper and General Products Ltd.
R/o Sagar Jyoti, Road No. 6,
Juhu Scheme, Mumbai 400056. **...Appellant**

Versus

1. Phoenix ARC Private Limited,
Trustee of Phoenix Trust FY 15-14
R/o Dani Corporate Park, 5th Floor, 158 CST Road, Kalina, Santacruz (E),
Mumbai – 400098. **...Respondent No. 1**

2. Mr. Rajesh Kumar Mittal,
IRP for Ajanta Paper and General Products Ltd.
R/o 204/A, Navjyoti Darshan CHS,
Near Purnima Talkies, Murbad Road, Kalyan (W) – 421301. **...Respondent No. 2**
Email: csrajeshmittal@gmail.com
IBBI/IPA-002/IP-N00083/2017-18/10224

For Appellant:	**Mr. Vishesh Kalra and Mr. Ayush Puri, Advocates.**
For Respondent No. 1:	**Mr. Manaswi Agrawal & Mr. Mahesh Dube, Advocates for R-1.**
For Respondent No. 2 (IRP):	**Ms. Gunjan Chaubey, Advocate for R-2 (IRP).**

J U D G E M E N T

(Per: Shreesha Merla, Member (T))

1. Aggrieved by the Impugned Order dated 07/10/2021 in C.P. No. 4277/MB/I&B/2018 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench), the Suspended Director of *'M/s. Ajanta Paper and General Products Limited'*/'the Corporate Debtor' preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code').

2. By the Impugned Order, the Adjudicating Authority has admitted the Application filed under Section 7 of the Code observing that in the Balance Sheet for the year ending 31/03/2017, there is a mention of outstanding Non-Convertible Debentures of ₹ 5,00,000/- having a face value of ₹ 100/- each; that the Financial Year ending 31/03/2019 specified the details of debentures issued by UTI along with the fact that the same was recalled in the FY 2002-03. In the Impugned Order, there is a specific finding that there has been 'acknowledgement of debt' as contemplated under Section 18 of the Limitation Act, 1963, keeping in view the Financial Statements of the 'Corporate Debtor' filed with the RoC till 31/03/2019.

3. Learned Counsel appearing for the Appellant strenuously contended that the UTI advanced Financial Assistance to the 'Corporate Debtor' in the form of subscription of ₹ 5,00,000/- Secured Redeemable Non-Convertible Debentures of face value of ₹ 100/- each along with interest and charges payable under the Financial Facility. The sanction letter dated 16/02/1998, the letter of modification dated 04/05/1998 read with a Subscription

Agreement dated 15/06/1998 executed between the 'Corporate Debtor' and UTI explained the terms and conditions of the Financial Facility. It is submitted that on 10/10/2002 UTI issued a recall Notice for default of debentures claiming a sum of ₹ 8,35,74,382/- and on 22/11/2002, a demand was also issued to the Personal Guarantors invoking their personal guarantees. In 2003, UTI filed OA No. 17/2003 in the Debt Recovery Tribunal.

4. It is submitted that on 20/10/2014, UTI accepted a proposal to settle the claims at an amount of ₹ 3,30,00,00,000/-. On 04/12/2014, UTI assigned its debt to the first Respondent. It is submitted that on 09/02/2016 a Demand Notice was issued by the first Respondent under Section 13(2) of the SARFAESI Act, 2002 demanding an amount of ₹ 79,80,00,00,000/- and subsequently on 24/06/2016, the first Respondent took over the possession of the Immovable Property of the 'Corporate Debtor'. Learned Counsel however submitted that in May 2012, the first Respondent received 18.54% of shares of the sale of property and also other sum(s) on sale of hypothecated assets. On 06/11/2018, the first Respondent filed Section 7 Application under the Code.

5. The Adjudicating Authority has failed to consider that the only 'acknowledgement of debt' by the 'Corporate Debtor' is to the tune of ₹ 10,62,92,521/-, as per the Balance Sheet for the year ending 2017 and ₹ 7,77,39,275/- as per the Balance Sheet for the year ending 2021. It is strenuously argued by the Learned Counsel for the Appellant that there being no acknowledgement of any 'interest' as claimed from 2002, the claim for the 'interest' is completely time barred and the Adjudicating Authority

has failed to consider that the first Respondent has approached the Tribunal with an exaggerated claim which is completely 'barred by Limitation'.

6. Learned Counsel contended that the actual debentures for the 'Corporate Debtor' was only for ₹ 5,00,00,000/-, the first Respondent received an assignment of debt for ₹ 3,30,00,00,000/-, but, however made an exaggerated claim to the tune of ₹ 96,01,00,00,000/- including excessive interest, which is 'barred by Limitation'. This fraudulent action of the first Respondent was done only to force the 'Corporate Debtor' into a situation of CIRP and it is only on account of the highly inflated claims that the 'Corporate Debtor' could not pay/settle the actual dues of ₹ 7,77,39,275/-.

7. As against this argument, Learned Counsel for the Respondent/'Financial Creditor' contended that the 'Corporate Debtor' had consistently acknowledged the dues which evidences the jural relationship between the 'Financial Creditor' and the 'Corporate Debtor' and therefore satisfies the essential ingredients contemplated under Section 7 Application in terms of the 'debt' and 'default' having been established. Regarding the submission of the Appellant Counsel that the exaggerated claim of ₹ 96,00,00,000/- ought not to be considered, Learned Counsel for the Respondent submitted that the default was in the year 2002 and 20 years has lapsed and drew our attention to the Statement of Account (exhibit E) filed with their Reply which shows the 'interest' element together with the 'penal interest dues' which has compounded to ₹ 96,00,00,000/-. The assignment of debt of UTI to the first Respondent is in 2003 and the 'Corporate Debtor' is not the part of the Agreement and therefore cannot state that such an assignment construes a 'settlement'.

8. The main point for consideration in this Appeal is whether the Adjudicating Authority was justified in admitting the Section 7 Application against the Appellant herein.

9. It is the main case of the Appellant that since the 'interest' portion has never been reflected in the Balance Sheet since 2012, it cannot be claimed now at this belated stage and is hence 'barred by Limitation' and hence the amount of debt can at best be ₹ 7,77,39,275/-. As per the Financial Facility advanced to the 'Corporate Debtor', in three tranches, it is repayable in equal annual instalments commencing from 16/07/2000 and ending on 05/10/2006. It is not in dispute that the 'Corporate Debtor' has failed to pay the instalment as per the terms of the Financial Facility.

10. Addressing to the issue of Limitation raised by the Counsel for the Appellant, this Tribunal on a bare perusal of the Balance Sheets for the period from 31/03/2003 till 31/03/2019 observe that there is an acknowledgment of debentures of amount of ₹ 5,00,00,000/-. The Auditor's Report accompanying the Financial Statements and Balance Sheet as on 31/03/2017 show that there is an acknowledgement of debentures and also the default in respect thereof for ₹ 10,62,92,521/- due to be paid to the first Respondent. The Auditor's Report accompanying the Financial Statement and Balance Sheet for the year ending 2019 show that though acknowledgment of penal interest of ₹ 2,38,62,89,435/- is due from various secured borrowings of the 'Corporate Debtor', the *same is not provisioned.* It is significant to mention that the Adjudicating Authority in their Order dated 21/01/2019 has recorded that *'the Counsel for the 'Corporate Debtor' accepts the liability as well as default and submits that there is a likelihood of*

settlement in this matter and seeks time'. To reiterate, having regard to the Statement in the Balance Sheet for the year ending March 2012, 2015 and 2017, we are of the considered view that, it construes 'acknowledgement' as contemplated under Section 18 of the Limitation Act, 1963 specially keeping in view the ratio of the Hon'ble Supreme Court in ***'Dena Bank (erstwhile Bank of Baroda)' Vs. 'C. Shivakumar Reddy & Anr.', (2021) 10 SCC 330,*** in which the Hon'ble Apex Court has observed as follows:

> *"138. While it is true that default in payment of a debt triggers the right to initiate the Corporate Resolution Process, and a Petition under Section 7 or 9 of the IBC is required to be filed within the period of limitation prescribed by law, which in this case would be three years from the date of default by virtue of Section 238A of the IBC read with Article 137 of the Schedule to the Limitation Act, the delay in filing a Petition in the NCLT is condonable under Section 5 of the Limitation Act unlike delay in filing a suit. Furthermore, as observed above Section 14 and 18 of the Limitation Act are also applicable to proceedings under the IBC.*
>
> *139. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act. In Gaurav Hargovindbhai Dave (supra) cited by Mr. Shivshankar, this Court had no occasion to consider any proposal for one time settlement. Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-2017, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May 2017. The NCLT rightly admitted the application by its order dated 21st March, 2019.*
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> *140. To sum up, in our considered opinion an application under Section 7 of the IBC would not be*

> *barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.*
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> *(Emphasis Supplied)*

Keeping in view the ratio of the aforenoted Judgement we hold that the Application filed under Section 7 is not 'barred by Limitation'.

11. Learned Counsel for the Respondent drew our attention to Clause (L) of the Assignment Agreement dated 04/12/2014 which describes 'Financial Assistance' as follows:

> *"**Financial Assistance** means all the amount due by the Borrower in respect of the financial Assistance including subscription of 19% (later changed to 17.5%) 5,00,000 number of "Secured Redeemable Non Convertible Debentures" of Rs.100/- each aggregating to Rs.500 Lacs availed by the Borrower from the Assignors under or pursuant to the Financing Documents including principal, interest, compound interest and all other monies whatsoever stipulated in or payable by the Borrower in respect thereof, together with any Security Interest, if any, created to secure the repayment of the same and all the right, title and interest of the Assignors therein and pursuant to the Financing Documents and/or any guarantee issued in relation thereto."*

In the Assignment Agreement dated 04/12/2014 entered into between the UTI and the first Respondent, it is specifically stated in Clause (E) that *'the Borrower had failed to make payment in respect of the Financial Assistance due and payable to the Assignors in accordance with the applicable terms and conditions and an aggregate sum of ₹ 79,26,21,750/- as on 30/09/2014 in respect of the Financial Assistance granted by Assignors is*

outstanding against the Borrower, as per books of accounts maintained by the Assignors.' Having regard to the aforenoted terms of the Assignment Agreement, it is clear that the debt has been assigned to the first Respondent and as on the date of the assignment it is stated that an amount of ₹ 79,66,21,750/- is 'due and payable' by the 'Corporate Debtor'. Be that as it may, it is not within the domain of the Adjudicating Authority to decide the 'amount of debt' at the stage of admission of Section 7 Application.

12. Now we address to the contention of the Learned Counsel for the Appellant that interest does not appear in the Balance Sheet and that the dues ought to be ₹ 7,77,00,00,000/- and not ₹ 96,00,00,000/- and that the 'Corporate Debtor' is being forced into IBC on account of the highly inflated claims raised by the 'Financial Creditors'. It is the contention of the Appellant that the debt amount is not the amount as shown in the form. However, on mere dispute of the quantum of the amount, the Application under Section 7 cannot be rejected. The Hon'ble Supreme Court in ***'M/s. Innoventive Industries Ltd.' Vs. 'ICICI & Anr.', (2018) 1 SCC 407,*** observed the definition of 'Claim' and held that even if right of payment is disputed, the Code gets triggered the moment, the default exceeds the threshold amount. At this juncture, it is relevant to reproduce paras 27, 28 & 30 of the ***'M/s. Innoventive Industries Ltd.' (Supra)*** wherein the Hon'ble Supreme Court has observed as follows:

> *"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide*

terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V.

Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor.

.....

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

(Emphasis Supplied)

13. In so far as the contention of the Appellant qua the quantum of payment of debt is considered, we are of the earnest view that the same does not fall for consideration before the Adjudicating Authority at the stage of 'admission' of the Application under Section 7 of the Code. The only requirement is that the minimum outstanding debt should be more than the threshold amount provided for under the Code. The actual amount of 'Claim' is to be ascertained by the Resolution Professional after collating the 'Claims' and their verification which comes at a later stage. Keeping in view all the aforenoted reasons, this Tribunal is satisfied that there is an admission of 'debt' and 'default' as defined under the Code and we do not find any illegality or infirmity in the Impugned Order dated 07/10/2021, passed by the Learned Adjudicating Authority.

14. For all the aforenoted reasons, this Appeal fails and is accordingly dismissed. No Order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi
11th April, 2022

himanshu