NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1461 of 2023

[Arising out of order dated 13.10.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench - IV in CP (IB) No.264/MB/IV/2023]

IN THE MATTER OF:

Narendrabhai
S/o Kantibhai Patel
Suspended Director of
Nakoda Fruit Products Pvt. Ltd.,
239, Bagadganj, Small Factory Area,
Nagpur, Maharashtra - 440008 **...Appellant**

Versus

PNB Housing Finance Ltd.
9th Floor, Antriksh Bhawan,
22, Kasturba Gandhi Marg,
New Delhi – 110 001 **...Respondent No.1**

Varun Vashisht,
IRP of Nakoda Fruit Products Pvt. Ltd.
R-8, South Extension Part-2,
New Delhi – 110 049 **...Respondent No.2**

Present:

Appellant: **Mr. Abhijeet Sinha, Advocate.**

Respondents: **Mr. Naman Singh Bagga, Advocate.**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 ("**IBC**" in short) by the Appellant arises out of the Order dated 13.10.2023 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench - IV in CP (IB) No.264/MB/IV/2023. By the impugned order, the Adjudicating Authority has admitted the Section 7 application filed by PNB Housing Finance Ltd.-Financial Creditor seeking initiation of Corporate Insolvency Resolution Process ("**CIRP**" in short) against M/s Nakoda Fruit Products Pvt. Ltd.-Corporate Debtor. Aggrieved by the impugned order, the present appeal has been filed by the suspended director of the Corporate Debtor.

2. The factual matrix of the case which is necessary to be noted for deciding the matter are as below: -

- The Corporate Debtor had availed loan from the Financial Creditor and mortgaged its immovable property for this purpose. The loan had been sanctioned for an amount of Rs.10.52 crore on 29.09.2018 which was for a tenure of 144 months with floating interest and repayable in EMI amounts of Rs.13,03,220/-.
- The loan account of the Corporate Debtor was classified as Non-Performing Asset (NPA) on 14.12.2019 by the Financial Creditor as according to them the Corporate Debtor had allegedly failed to regularize the loan account.

- A loan recall cum arbitration notice dated 26.12.2019 was issued by the Financial Creditor against the Corporate Debtor.
- The Financial Creditor issued a notice under Section 13(2) of the SARFAESI Act, 2002 on 15.01.2020 and later on took possession of the mortgaged property of the Corporate Debtor on 16.09.2021.
- Section 7 application under the IBC was filed by the Financial Creditor seeking initiation of CIRP against the Corporate Debtor in 24.01.2023.
- In terms of Part IV of the Section 7 application, the amount claimed is Rs. 15.18 crore and date of default shown as 14.12.2019 which was also the date of NPA.
- The application was admitted by the Adjudicating Authority on 13.10.2023 and aggrieved by this order of admission, the Appellant/Corporate Debtor has come up in appeal.

3. The Learned Counsel for the Appellant making his submissions, at the very outset, denied that the Corporate Debtor had committed any default in the discharge of the purported financial debt as claimed by the Financial Creditor. It was contended that in terms of the loan sanction document, the EMIs for the month of July and August 2019 had already been paid. Further, the EMIs from September to December 2019 were adjusted out of the Fixed Deposit Receipts (FDR) of the Corporate Debtor lying with the Financial Creditor. Claiming that the EMI dues had already been equated by the Financial Creditor from the FDRs, it was vehemently contended by the Learned Counsel for the Appellant that the Corporate Debtor continued to

discharge its obligations in terms of the loan document even though their factory got gutted in a fire incident in June 2019. The EMIs having been serviced on time, no default was therefore committed by the Corporate Debtor in the context of IBC.

4. It was further added that the Corporate Debtor had never defaulted in the payment of EMIs for 90 days at a stretch as mandated by the RBI for any account to be classified as NPA. Since, the Corporate Debtor was liable to pay only the EMI amount and not the entire purported loan advanced, it is misconceived to hold that any default had occurred on the date of NPA. Since the Financial Creditor filed the Section 7 application in January 2023 on the basis of classification of the account of the Corporate Debtor as NPA as on 14.12.2019, the application was barred by limitation.

5. It was further argued by the Learned Counsel for the Appellant that even if it is assumed that there was a default, since the EMIs due from the Corporate Debtor till 19.03.2020 stood clear, such a default can be said to have surfaced somewhere in June 2020 and therefore clearly hit by Section 10A. In support of their contention, reference was made to the judgment of the Hon'ble Supreme Court in the matter of ***Ramesh Kymal v. Siemens Gamesha Renewable Power Pvt. Ltd. in (2021) SCC 224.***

6. Advancing their arguments further, it has been submitted by the Learned Counsel for the Appellant that the Corporate Debtor had been earnestly trying to keep its loan account healthy and untainted. This is evident from the fact that even during the Covid period, the Corporate Debtor

had deposited Rs. 12 lakhs which is also recorded in the ledger statement of the Corporate Debtor. The Corporate Debtor had also sent letters to the Financial Creditor for one-time restructuring and OTS proposals which also proves their bona-fide. Relying on the judgment of the Hon'ble Supreme Court in the matter of ***M/s Vidarbha Industries Power Ltd. v. Axis Bank (2022) 8 SCC 352,*** it was pointed out that since the insurance claim arising out of the fire outbreak incident is pending adjudication before the District Consumer Disputes Redressal Commission, the Adjudicating Authority before admitting the Section 7 petition should have looked into the difficulties of the Corporate Debtor and allowed it a fair chance for revival.

7. It has also been submitted that the Financial Creditor/Respondent No. 1 deliberately concealed the issue of arbitration notice of 26.12.2019 which categorically indicates existence of dispute. Hence, though the Section 7 application was hit by Section 5(6) of the IBC, this has been ignored by the Adjudicating Authority. By overlooking the fact that the application was hit by Section 5(6) of the IBC and that a pre-existing dispute existed which was not frivolous and spurious, the Adjudicating Authority ought to have rejected the Section 7 application. The Financial Creditor had also willfully breached the terms and conditions set out in the loan document which provided for remedies in case of contingencies or unprecedented situation that would arise in the course of these transactions.

8. Making rival submissions, the Learned Counsel for the Respondent No. 1 emphatically asserted that the loan account of the Corporate Debtor continued to be an NPA and remained in default since 2019. The loan facility

was recalled on 26.12.2019 and at the time of loan recall, the total outstanding amount was Rs.10.95 crore. The said loan account could not be regularized since in terms of the RBI framework, NPA account cannot be upgraded/regularized unless the entire amount comprising of arrears of interest and principal are paid by the borrower. Thus, it is clear that the account was never regularized/upgraded and the Corporate Debtor's debt obligation was unequivocal and indisputable. It is also been contended by the Learned Counsel for the Respondent No.1 that OTS offer letters issued by a Corporate Debtor also amounts to clear admission of debt and default as has been held by the Hon'ble Supreme Court in ***Dena Bank (Bank of Baroda) v. C. Shivakumar Reddy & Ors. (2021) 10 SCC 330*** *(**"Dena Bank"*** in short*).*

9. Countering the contention of the Appellant that since the date of default is to be reckoned from the date of NPA as mentioned in the Section 7 application, which being 14.12.2019, the Section 7 application filed in 2023 was hit by limitation, it was contended that date of default had shifted since the Corporate Debtor had sent letters to the Financial Creditor for one-time restructuring and OTS proposals thereafter. In support of their contention, reliance has been placed on the judgement of this Tribunal in ***SBI v. Hackbridge Hewittic and Easun Ltd.*** in ***CA (AT) (CH) (Ins.) No. 05 of 2021*** wherein it has been held that the date of default shifts to the date when the OTS offer is made.

10. On the contention raised by the Appellant that the EMIs due from the Corporate Debtor having been cleared till 19.03.2020, default in the discharge of debt obligations, if any, arose only on or after 25.03.2020, which period

being covered under Section 10A of the IBC, no Section 7 application was maintainable, the Learned Counsel for the Respondent No.1 submitted that, in the first place, this pleading needs to be rejected since it was never raised before the Adjudicating Authority. In any case, it was contended that this standpoint of the Appellant is misplaced since the first default arose in May 2019, which date corresponds to a period prior to 25.03.2020 and hence the bar of Section 10A would not apply.

11. Further, it has also been stated that the plea taken by the Appellant that they need to be given a chance for revival is misconceived. It was also added that the contention of the Appellant that their debt can be paid out of the proceeds of the insurance claim deserves scant regard since the purported insurance claims had already been rejected by the insurance provider. Further the erstwhile directors of the Corporate Debtor having resigned from their directorship without the consent of the Financial Creditor in breach of the loan documentation shows their mala-fide intent not to pay the outstanding debt.

12. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

13. At the outset, we must deal with the contention raised by the Learned Counsel for the Appellant that the impugned order was passed by the Adjudicating Authority without considering the written submissions of the Corporate Debtor thus rendering the impugned order perverse. It is submitted that when the main company petition was listed before the Adjudicating

Authority, the Corporate Debtor was left unrepresented and could not file its detailed reply to counter to the Section 7 application. Not getting an opportunity to participate in the proceedings before the Adjudicating Authority, their rights stood jeopardized.

14. Perusal of the interim orders passed by the Adjudicating Authority as placed at Annexure A-14 of the Appeal Paper Book ("**APB**" in short) shows that on 19.06.2023 the Corporate Debtor had sought time to file reply which was allowed. On the next date of hearing on 07.07.2023, the Counsel for the Corporate Debtor had made a submission that the IA No. 3163/2023 filed by them challenging the company petition itself may be treated as their reply and that they were engaging with the Financial Creditor for settlement. When the matter came up next for consideration again before the Adjudicating Authority on 18.07.2023, 24.07.2023 and 26.07.2023, it is seen from the interim orders that the Counsel for the Corporate Debtor was present on each occasion and no further request for filing any reply was made. When the matter was finally heard on 27.07.2023, there was a change in the Counsel for the Corporate Debtor who sought time to file reply. Since the earlier Counsel had categorically stated that IA 3163/2023 filed by them seeking direction to consider their OTS proposal was to be treated as their reply, the Adjudicating Authority while reserving the matter for orders gave liberty to both the parties to file their written synopsis. The written submissions were also filed by the Corporate Debtor on 04.08.2023. Thus, the matter having been heard on 8 occasions and permission having been granted to file written submissions even after the matter was reserved for orders and this opportunity had also

been availed by the Corporate Debtor, we are of the considered opinion that their contention of having been denied opportunity to be heard before the Adjudicating Authority lacks foundational basis.

15. At this juncture, it may be useful to notice the findings returned by the Adjudicating Authority which is to the effect:

> *"4. We have heard the arguments of Learned Counsel for Financial Creditor and the Corporate Debtor.*
>
> *4.1. The bench observes that, the Financial Creditor in Part IV of the application has specified date of default as 14.12.2019, which is date of NPA. Since the account was classified as NPA on 14.12.2019, the date of default would be 90 days prior i.e. 13.09.2019. The SARFAESI notice u/s 13(2) was sent to the Corporate Debtor on 15.01.2020. The Corporate Debtor through its correspondences dated 24.08.2020 and 11.11.2022 to the Financial Creditor submitted the OTS proposal and these OTS proposals constitute acknowledgement u/s 18 of the Limitation Act. The present petition is filed on 24.01.2023 is well within the limitation. Therefore, this Tribunal has jurisdiction to adjudicate the Company Petition filed by the Financial Creditor.*
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> *4.2. The bench further notices that, the Corporate Debtor's obligation to repay the Financial Creditor is unequivocal, undisputed and established. The Tribunal,*

while adjudicating upon an application for admission into Corporate Insolvency Resolution Process filed by a Financial Creditor, is mandated to ascertain the existence of the debt, and any default in payment of such debt. Further in the facts and circumstances as set out, it is clear that the Corporate Debtor is unable to pay off its debts arising in the usual and ordinary course of its business and is in default of the amount claimed in the petition.

5. Considering the facts placed before us and the fact that, the Corporate Debtor owes the Financial Debt in excess of Rs.1 Crore, which is in default, this bench is of the view that in such circumstances, it is imperative that the Corporate Insolvency process to be initiated in the matter of the Corporate Debtor. The petition is complete in all aspect. Since, the debt and default exist, this bench is of the view, that the present case deserves to be admitted under Section 7 of the Insolvency and Bankruptcy Code, 2016."

16. This brings us to the contention of the Learned Counsel for the Appellant that the Adjudicating Authority had failed to recognize that the Financial Creditor had failed to produce incontrovertible and unimpeachable evidence to prove the debt. It is their case that EMIs having been serviced on time, the Corporate Debtor had continued to discharge their debt obligations in terms of the loan document. Further, letters were addressed by the

Corporate Debtor to the Financial Creditor on 09.08.2019 and 31.10.2019 to adjust the EMIs from September to December 2019 out of the FDRs of the Corporate Debtor lying with the Financial Creditor. It was also submitted that the Financial Creditor had at no point of time objected to the request of the Corporate Debtor to adjust the FDRs against the EMIs. Neither did the Financial Creditor send any written communication to the Corporate Debtor refusing to consider their request for adjusting the EMIs against the FDRs. The Financial Creditor had infact willingly liquidated the FDRs and appropriated the amounts towards repayment of the purported EMIs. It has been pointed out that part liquidation of the EMI against the FDR was done on 27.12.2019. It has also been pointed out that liquidation of the second part of the FDR was done on 19.03.2020. This re-appropriation was also confirmed by the Financial Creditor on 26.12.2019 and 18.03.2020. No default was therefore committed by the Corporate Debtor in the EMI repayment. It has also been contended that the loan account of the Corporate Debtor under these circumstances could not have been legitimately classified as NPA.

17. On the plea taken by the Appellant that there was no default since the EMI amounts had been liquidated by appropriation from FDR, it has been contended by the Financial Creditor that FDRs were pledged as security towards the loan and hence regularization of the loan account from such security interest was an untenable proposition. It was also added that the FDRs being in the nature of Debt Service Reserve Account (DSRA), the funds in DSRA are to be used on discretion of the Financial Creditor and not the

Corporate Debtor. Moreover, whether security interest could be enforced from the DSRA was the prerogative of the Financial Creditor and the Corporate Debtor was not entitled to dictate the timing of enforcement of the security interest. Moreover, encashment/appropriation of FDR entailed a corresponding obligation on the Corporate Debtor to replenish the said amount which obligation was duly communicated to the Corporate Debtor on 07.01.2020.

18. We have perused the email as placed at pages 82-83 of the APB and we notice that in the said communication, the Financial Creditor had clearly asked the Corporate Debtor to clear the EMI overdue for the next month along with the earlier months' appropriation done from the FDR. It was clearly indicated in the letter that the FDR amount of Rs. 50 lakh was required to be restored. This replenishment was however not done by the Corporate Debtor and therefore there is substance in the contention of the Financial Creditor that EMI appropriation from the FDR cannot be treated as automatic regularization of the loan account and that this was clear evidence of debt and default.

19. The Learned Counsel for the Respondent No.1/Financial Creditor has further submitted that the limited contours of enquiry while considering a Section 7 application is that there must be a debt and there must be existence of default as held by the Hon'ble Supreme Court in the matter of ***Innoventive Industries Ltd. v. ICICI Bank (2018) 1 SCC 407.***

20. It has been contended by the Financial Creditor that the present facts of the case show that this is a case of admitted debt and default by the Corporate Debtor in the context of the IBC. It has been stated that the Adjudicating Authority had taken note that in so far as existence of financial debt and default in repayment is concerned it is undisputed in view of the OTS offer letters. These OTS offer letters had been brought to the attention of the Adjudicating Authority but since the Appellant had not placed them on record before this Tribunal, they were allowed to be placed by way of Additional Affidavit by the Financial Creditor. It is the case of the Financial Creditor that the Adjudicating Authority has correctly referred to the communications sent by the Corporate Debtor to the Financial Creditor on 24.08.2020 and 11.11.2022 containing OTS proposals. We agree with the Financial Creditor that in the OTS request dated 24.08.2020, the Corporate Debtor has categorically admitted that the account was a NPA as on 14.12.2019 as is seen from the communication placed at page 9 of Additional Affidavit. Further, in the OTS proposal of 11.11.2022, the Corporate Debtor has again acknowledged the existence of a loan account amounting Rs.10.40 crore since 2018. In this letter, as placed at page 11 of Additional Affidavit, we notice that the Corporate Debtor after acknowledging that their account had become irregular and converted into NPA, they have stated that they wanted to settle the said loan account by paying Rs.4 crore towards full and final OTS. This proposal of 11.11.2022 was rejected by the Financial Creditor on 13.07.2023 for being a meagre sum and this has been acknowledged the Corporate Debtor in their communication dated 27.07.2023 when they again submitted a revised OTS proposal of Rs.4.10 crore. This communication has

been placed at page 12 of the Additional Affidavit. The Financial Creditor again rejected the modified OTS proposal on 04.08.2023 as is seen from page 16 of the Additional Affidavit.

21. Basis these OTS proposals, it has been contended by the Financial Creditor that such OTS offers made on more than one occasion clearly constitute acknowledgment of debt and default. The only defence which has been raised by the Corporate Debtor is that the OTS offers were made "without prejudice". Be that as it may, even if the OTS offer were made on a "without prejudice" basis, it does not dilute the acknowledgment of debt. This has already been well settled by this Tribunal in ***Ishrat Ali v. The Kosmos Cooperative Bank Ltd. in CA (AT) (Ins.) No. 373 of 2022*** that merely because the standard phrase of 'without prejudice' has been used, it cannot be construed as denial of debt involved. Further the Appellant before the Adjudicating Authority in the hearing held on 07.07.2023 as placed at page 103 of APB has made a clear submission about their engagement with the Financial Creditor for settlement which again validates that there is a clear admission of debt and default. Thus, in the face of multiple communications wherein the Corporate Debtor has admitted debt and default, the Adjudicating Authority did not commit any error in holding that these OTS proposals constitute acknowledgement.

22. This now brings us to question whether the Section 7 application was filed on time or whether it was barred by limitation. The Learned Counsel for the Appellant has emphasized that the date of default is to be reckoned from the date mentioned in the application under Section 7 of the IBC. On the

contrary, the Learned Counsel for the Respondent No.1 has submitted that the OTS letters and restructuring proposals of 24.08.2020, 11.11.2022 and 27.07.2023 clearly acknowledge the admission of debt and thereby constitute acknowledgement under Section 18 of the Limitation Act, thereby making the Section 7 application as one which was filed well within the limitation period.

23. The application of Section 18 of the Limitation Act, 1963 under IBC has been well settled in the judgment of the Hon'ble Apex Court in ***Laxmi Pat Surana Vs. Union Bank of India & Anr. (2021) 8 SCC 481***. It has been held therein:

> *"43. .....Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 IBC ensures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to*

acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 IBC. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 IBC."

24. Clearly the OTS proposals, which undisputedly fall within the three-year period from the date of default, clearly provided for a fresh period of limitation of three years. We, therefore, find that the Adjudicating Authority did not commit any error in holding that the OTS proposals dated 24.08.2020 and 11.11.2022 constitute acknowledgement under Section 18 of the Limitation Act, 1963 and hence the Section 7 application filed on 24.01.2023 was correctly held to be within the limitation period.

25. Now we come to the contention raised by the Learned Counsel for the Appellant that for arguments sake, even it is assumed that there was a default in the liquidation of the debt, however, as the EMIs due from the Corporate Debtor till 19.03.2020 stood extinguished, default would have arisen only sometime in June 2020 and in that case the Section 7 application would have been clearly hit by Section 10A. The Learned Counsel for the Respondent No. 1 countering these submissions has stated that the Corporate Debtor's loan account was declared NPA on 14.12.2019 on account of non-discharge of debt since May 2019. The loan facility stood recalled since 26.12.2019. Thus, the default pre-dated the period covered by Section 10A of IBC.

26. A bare reading of Section 10A shows that what is barred is initiation of CIRP proceedings when the Corporate Debtor commits any default during the

Section 10A period. However, if the default is committed prior to the Section 10A period and continues in the Section 10A period, this statutory provision does not put any bar on the initiation of CIRP proceedings. The present is a case where the default has been committed by the Corporate Debtor prior to commencement of Section 10A period. The default having been committed before the bar of Section 10A came into play, the Corporate Debtor was clearly not entitled to claim that the Section 7 application was not maintainable.

27. The Hon'ble Apex Court in the case of ***Innoventive Industries Limited v. ICICI Bank (2018) 1 SCC 407***, has laid down the guiding principles to admit or reject an application filed under Section 7 of the IBC. Under the ambit of Section 7 of the Code, the Adjudicating Authority is to only determine whether a 'default' has occurred and whether the 'debt', which may still be disputed, was due and remained unpaid. A debt may not be due if it is not payable in law or in fact. The moment the Adjudicating Authority is satisfied that a default has occurred, the Application must be admitted unless it is incomplete. On the question as to whether debt and default was adequately demonstrated before the Adjudicating Authority, basis the records made available before it, the Adjudicating Authority has rightly concluded that it was satisfied with the evidence and material produced before it by the Financial Creditor to prove that a debt had crystallised; that a default has occurred and that the Section 7 petition is complete in all aspect. In view of the foregoing discussions, we find no cogent reasons to disagree with the impugned order.

28. For the foregoing reasons, we are of the considered view that no error has been committed by the Adjudicating Authority in allowing the Section 7 application and admitting the Corporate Debtor into the rigours of CIRP. We do not find any reason to interfere with the Impugned Order. The Appeal fails and is accordingly dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi
Date: 03.01.2024

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