

Jubin Kishore Thakkar v. Phoenix ARC Pvt. Ltd.

Jubin Kishore Thakkar

...Appellant

Phoenix ARC Pvt. Ltd.

...Respondent

Case No: Company Appeal (AT) (Insolvency) No.273 of 2023

Date of Judgement: 22nd December, 2023

Judges:

Justice Ashok Bhushan – Chairperson

Barun Mitra – Member (Technical)

For Appellant: Mr. Krishnendu Datta, Sr. Advocate with Mr. Kumar Anurag Singh, Mr. Zain A. Khan and Ms. Neha Aggarwal, Advocates

For Respondent: Mr. Arvind Nayyar, Sr. Advocate with Mr. Amit Mahaliyan and Mr. Akshay Joshi, Advocates for Respondent No.1. Mr. Aditya Gauri and Mr. Dhananjaya Sud, Advocates for Respondent No.2 (RP).

Facts:

A consortium of Banks had extended various financial facilities to the Corporate Debtor Colour Roof (India) Limited in 2002. The account of Corporate Debtor was declared NPA by Bank of India on 31.03.2015. On 16.09.2016, Bank of India issued Recall Notice to the Appellant Jubin Kishore Thakkar recalling monies payable by the Corporate Debtor. On 22.11.2018, Bank assigned the debt along with all underlying security interest to the Respondent No.1 Phoenix ARC Private Limited under Deed of Assignment. Letter of Acceptance was issued on 24.04.2019 and an agreement was entered for Corporate Debtor to repay amounts to Financial Creditor. On 01.11.2021, Section 7 application was filed by

Phoenix ARC Private Limited. On 26.09.2022, Consent Terms were entered between the Corporate Debtor and Phoenix ARC Private Limited in DRT proceedings. By the impugned order dated 24.02.2023, the NCLT admitted the Section 7 application finding debt and default.

Arguments by Appellant Jubin Kishore Thakkar:

The Section 7 application was barred by limitation. The application itself mentions date of default as 31.03.2015 which at best with the acknowledgement on 30.01.2016 would extend limitation till 29.01.2019. Hence the application filed on 01.11.2021 was beyond 3 years. The Consent Terms dated 26.09.2022 would extend limitation by 3 years but it required Financial Creditor to withdraw Company Petition which was not done. Hence Consent Terms cannot extend limitation. Several proposals were submitted to Financial Creditor for repayment from March 2023 onwards but settlement could not be arrived.

Arguments by Respondent No. 1 Phoenix ARC Private Limited:

The application was within limitation. The Letter of Acceptance dated 24.04.2019 was a novation of agreement which gave fresh cause of action. Hence application was within 3 years. The Corporate Debtor did not honour Consent Terms, hence there was no need to withdraw Company Petition. Debt and default stood proven, hence Section 7 application was rightly admitted.

Court's Opinions:

Consent Terms dated 26.09.2022 have no relevance for application filed in 2021 for deciding limitation issue. However, Letter of Acceptance dated 24.04.2019 being a fresh agreement acknowledging debt will give fresh period of limitation. As per Supreme Court decision in Kotak Mahindra Bank Ltd. v. Kew Precision Parts (P) Ltd., a promise to pay time barred debt constitutes novation and fresh period of limitation. Hence from Letter of Acceptance dated 24.04.2019, the application filed within 3 years i.e. on 01.11.2021 was within limitation. Objection on limitation has no merit. Appellant tried to settle debt from March 2023 but settlement talks failed. Debt and default stood proven. Hence no error in admitting application.

Sections:

The provisions related to initiation of Corporate Insolvency Resolution Process by Financial Creditor under Section 7 of Insolvency and Bankruptcy Code, 2016 have been referred.

Cases Cited:

Kotak Mahindra Bank Ltd. v. Kew Precision Parts (P) Ltd. (2022) 9 SCC 364

The Supreme Court laid down that a promise to pay time barred debt constitutes novation and fresh period of limitation.

Bombay Dyeing & Mfg. Co. Ltd. v. State of Bombay AIR 1958 SC 328

The debt is not extinguished by passage of time, only the remedy gets barred.

Referred Laws:

Provisions of Limitation Act with respect to a fresh promise signed by debtor to pay a time barred debt under Section 25(3) giving fresh period of limitation have been referred.

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Court

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Full Text of Judgment:

1. This Appeal has been filed against order dated 24.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV by which order Section 7 application filed by the Respondent No.1 – Financial Creditor has been admitted. The Appellant, Suspended Director of the Corporate Debtor aggrieved by the admission has come up in this Appeal. Brief facts of the case necessary to be noticed for deciding this Appeal are:

i. A consortium of Bank extended various financial facility to the Corporate Debtor in the year 2002.

ii. The account of Corporate Debtor was declared NPA by Bank of India on 31.03.2015.

iii. On 16.09.2016, Bank of India issued Recall Notice to the Appellant recalling monies payable by the Corporate Debtor under the various credit facilities.

iv. On 22.11.2018, Bank assigned the debt along with all underlying security interest under the Deed of Assignment to the Respondent No.1.
v. Letter of acceptance was issued on 24.04.2019 and an agreement was entered under which the Corporate Debtor was to repay the amounts payable to the Financial Creditor.-3-

Company Appeal (AT) Insolvency No. 273 of 2023

vi. On 01.11.2021, Section 7 application was filed by the Respondent No.1.

vii. On 26.09.2022, Consent Terms were entered between the Corporate Debtor and the Financial Creditor in the proceedings before Debts Recovery Tribunal.

viii. By order dated 24.02.2023, the Adjudicating Authority finding debt and default admitted Section 7 application. Aggrieved by which order this appeal has been filed.

2. We have heard Shri Krishnendu Datta, learned senior counsel appearing for the Appellant and Shri Arvind Nayyar, learned senior counsel appearing for Respondent No.1.

3. When the Appeal was taken on 03.03.2023, learned counsel for the Appellant submitted that they have submitted proposal to Respondent No.1 for repayment of dues. Noticing the aforesaid, interim order was passed on 03.03.2023. Following order was passed on 03.03.2023:

03.03.2023: Learned Counsel for the Appellant submits that a proposal has been submitted to Respondent on 01st March, 2023 for repayment of ARC Dues.

2. Learned Counsel for the Respondent submits that proposal has been received which is still under consideration.

3. Learned Counsel for the Appellant prays that Appeal be taken after two weeks to enable the Respondent to consider the proposal.

As prayed, list this Appeal on 22nd March, 2023. In the mean time, in pursuance of the order impugned, Committee of Creditors shall not be constituted."

4. Matter was again adjourned on 22.02.2023 noticing that proposal of the Appellant is under consideration. Appellant took further opportunity on 19.04.2023 to make another endeavour to submit better

offer. Subsequently, again on 25.05.2023 it was noted that proposal is under consideration, however, no settlement between the parties could take place. Learned counsel for the Appellant addressed his submission on 22.11.2023.

5. Shri Krishnendu Datta, learned counsel for the Appellant submits that application filed by the Financial Creditor was barred by time. Section 7 application itself mention 31.03.2015 as date of default and the acknowledgement made on 30.01.2016 at best shall extend the limitation till 29.01.2019. It is submitted that the application filed by the Appellant on 01.11.2021 was clearly beyond three years. It is submitted that the Consent Terms dated 26.09.2022 shall extend the limitation for three years which was the reason recorded by the Adjudicating Authority for holding that the application is within time, is erroneous. The Consent Terms cast a duty upon the Financial Creditor to withdraw the Company Petition which was not withdrawn.

6. Learned counsel appearing for the Financial Creditor refuting the submissions of learned counsel for the Appellant contends that application was well within time. Learned counsel for the Respondent No.1 has referred to the letter of acceptance dated 24.04.2019, where the Corporate Debtor has acknowledged the debt and entered into fresh agreement, which was novation of agreement and provide fresh cause of action. From 24.04.2019, the application under Section 7 was well within time. The Consent Terms dated 22.09.2022 arrived before Debts Recovery Tribunal, Mumbai was not honoured by the Corporate Debtor. The Corporate Debtor having not honoured the Consent Terms, there was no occasion to withdraw the Company Petition. The Adjudicating Authority has rightly held that Section 7 application was well within time. It is submitted that debt and default having been proved the Adjudicating Authority has rightly admitted Section 7 application.

7. We have considered the submissions of learned counsel for the parties and perused the record.

8. We may first notice the amount claimed and date of default as contained in Part IV of the Section 7 application. In Part IV Item No. No.2 following has been stated:

2.	<p>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM) (ANNEXED AS ANNEUXRE-2)</p>	<p style="text-align: center;"><u>Cash Credit Facility</u></p> <p>1. Outstanding Amount as on October 31, 2021 – Rs.43,18,11,891 (Rupees Forty Three Crores Eighteen Lakhs Eleven Thousand Eight Hundred Ninety One Only).</p> <p>2. Date of Default – The account of the Corporate Debtor was declared as NPA on March 31, 2015.</p> <p style="text-align: center;"><u>Star Sahayata Term Loan</u></p> <p>1. <u>Outstanding Amount as on October 31, 2021</u> – Rs.99,74,73,641/- (Rupees Ninety Nine Crores Seventy Four Lakhs Seventy Three Thousand Six Hundred Forty One Only).</p> <p>2. <u>Date of Default</u> – March 31, 2015, as evidenced from the Statement of Account of the Term Loan</p> <p style="text-align: center;"><u>Inland Bill Purchase Account</u></p> <p>1. <u>Outstanding Amount as on October 31, 2021</u> – Rs.23,40,63,483 (Rupees Twenty Three Crores Forty Lakhs Sixty Three Thousand Four Hundred Eighty Three Only).</p> <p>2. <u>Date of Default</u> – September 30, 2015.</p> <p style="text-align: center;"><u>Date of declaration of Corporate Debtor's Account as NPA – March 31, 2015</u></p> <p style="text-align: center;">Date of Default under the LOA – March 31, 2019.</p> <p>Apart from the aforesaid dates of default, the Corporate Debtor has acknowledged its liability in respect of the aforesaid financial facilities in various documents including (without limiting) in the LOA dated April 24, 2019 and the Corporate Debtor's Balance Sheets from time to time.</p>
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9. There is no doubt that date of default has been mentioned as 31.03.2015 on which date the account of Corporate Debtor was declared as NPA. There is no doubt that date of default has been mentioned as 31.03.2015 on which date the account of Corporate Debtor was declared as NPA, however, the Letter of Acceptance dated 24.04.2019 has also

been pleaded in Part IV, as noticed above. The Adjudicating Authority in the impugned order has noticed the DRT Consent Terms dated 26.09.2022 and observed that fresh period of limitation shall start, hence the objection on the ground of limitation have no merit. Para 13 of the impugned order is as follows:

“13. In view of the Consent Terms and the Order of DRT Mumbai dated 26.09.2022, the fresh period of limitation will start and hence, the present application is not barred by limitation. Nonetheless, a sum of Rs.23,40,63,483/- is claimed to be outstanding under ‘inland bill purchase account’ facility and is stated to in default since 31.03.2019 as per Part-IV of the Petition. Also, the Corporate Debtor has acknowledged its liability in respect of all three Credit Facilities vide LOA dated 24.04.2019. In view of this also the objection on ground of limitation does not have any merit.”

10. In Para 13 of the Adjudicating Authority two documents have been noticed; Consent Terms dated 26.09.2022 and Letter of Acceptance dated 24.04.2019. We are of the view that in so far as Consent Terms dated 26.09.2022 and fresh period of limitation thereafter, they have no relevance in the present application which was filed in the year 2021. However, the later part of the order where Letter of Acceptance dated 24.04.2019 has been noted is relevant for the purpose of limitation. Letter of Acceptance dated 24.04.2019 issued by Respondent No.1, Financial Creditor has been filed at page 493 of the appeal. The Letter of Acceptance has been signed by the Financial Creditor and the Directors of the Corporate Debtor including the Appellant before us. The Letter of Acceptance is in the nature of agreement which is signed by all parties and amounts to fresh agreement between the parties. This fresh agreement acknowledges the debt of Rs.106,97,76,398.83/- along with interest. The Letter of Acceptance further provides that the Obligors shall jointly and/or severally to pay Rs.43,89,46,000/- along with interest towards the settlement of assigned debt due. The Letter of Acceptance which is an agreement between the parties shall give a fresh period of limitation after 24.04.2019, which is within three years of 01.11.2021, date on which Section 7 application was filed.

11. The Hon'ble Supreme Court in "Kotak Mahindra Bank Ltd. vs. Kew Precision Parts (P) Ltd., (2022) 9 SCC 364" in Paras 30 and 31 has laid down following: "30. In this appeal, it is contended that the last offer of 20-12-2018 was followed by an agreement. Whether there was such agreement or not would have to be considered by the adjudicating authority. To invoke Section 25(3), the following conditions must be satisfied: 30.1. It must refer to a debt, which the creditor, but for the period of limitation, might have enforced. 30.2. There must be a distinct promise to pay such debt, fully or in part. 30.3. The promise must be in writing, and signed by the debtor or his duly appointed agent.

31. Under Section 25(3), a debtor can enter into an agreement in writing, to pay the whole or part of a debt, which the creditor might have enforced, but for the limitation of a suit in law. A written promise to pay the barred debt is a valid contract. Such a promise constitutes novation and can form the basis of a suit independent of the original debt, for it is well settled that the debt is not extinguished, the remedy gets barred by passage of time as held by this Court in Bombay Dyeing & Mfg. Co. Ltd. v. State of Bombay [Bombay Dyeing & Mfg. Co. Ltd. v. State of Bombay, AIR 1958 SC 328]."

12. In view of the law laid down by the Hon'ble Supreme Court, there shall be fresh period of limitation from 24.04.2019 and the application filed by the Appellant within three years from the said date was well within time. The Adjudicating Authority in Para 13 has also noticed the Letter of Acceptance dated 24.04.2019 for holding that objection on ground of limitation does not have any merit. We fully concur with the view of the Adjudicating Authority that objection raised on the ground of limitation has no merit.

13. In the present case, there is no dispute to the debt and default there being acknowledgments by the Corporate Debtor. We have also noticed that in this Appeal several opportunities were taken by the Appellant to settle the debt which could not fructify.

14. We, thus, are of the view that application filed by the Financial Creditor was not barred by time and the debt and default being proved, the Adjudicating Authority did not commit any error in admitting

Section 7 application. There is no merit in the Appeal. Appeal is dismissed.