Loramitra Rath V. JM Financial Asset Reconstruction Company Ltd.

Loramitra Rath
Suspended Director of Maa Durga
Commotrade Pvt. Ltd.,
Kairapari, Kotasahi, Bainchua,
Tangi, Dist. Cuttack, Odisha – 754 022

…Appellant

Versus

JM Financial Asset
Reconstruction Company Ltd.
(formerly JM Financial Asset
Reconstruction Company Pvt. Ltd.)
Acting in its capacity as Trustee of
Karnataka 2014 Trust
7th Floor, Cnergy, Appasaheo Marathe Marg,
Prabhadevi, Mumbai – 400025
Also having office at
8th Floor, Kankaria Estate,
6, Little Russel Street,
Kolkata – 700071

…Respondent No.1

Bishwanath Choudhary
Resolution Professional of
Maa Durga Commotrade Pvt. Ltd.
Flat No. 8F, Block 7, Prasad Exotica,
71/3, Canal Circular Road, Kolkata,
West Bengal 700 054

…Respondent No.2

Case No: Company Appeal (AT)(Insolvency) No. 1359 & 1360 of 2023

Date of Judgement: 01.11.2023

Judges:

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)
[Arun Baroka]
Member (Technical)

For Appellant: Mr. Saswat K. Acharya, Mr. Dhananjay Bhaskar Ray, Advocates.
For Respondents: Mr. Utsav Mukherjee, Mr. Vikalp Wange, Advocates

Facts:

Corporate Debtor (Maa Durga) had taken a loan of Rs. 1 crore from Karnataka Bank Ltd (KBL) in 2010. Loan account became NPA on 05.07.2013 due to non-repayment of dues. KBL issued notice under SARFAESI Act on 29.08.2013, replied by Maa Durga on 06.09.2013. KBL assigned the debt to JM Financial Asset Reconstruction Company Ltd (JMFR) on 15.12.2014. Maa Durga submitted OTS proposal of Rs. 7.5 crores to JMFR on 21.10.2016, but failed to pay. JMFR filed Section 7 petition for CIRP against Maa Durga. After conclusion of hearings, NCLT Cuttack reserved order on 07.08.2023.In the interim, Maa Durga filed IA 253/2023 seeking recall of reserved order and rehearing. NCLT dismissed IA 253/2023 and admitted Section 7 petition on 25.09.2023. Appeal filed against both orders by suspended director of Maa Durga

NCLT's Decision:

Rejected IA 253/2023 on ground that it cannot be entertained after reserving judgment as per SC decision in Arjun Singh case. Admitted Section 7 petition holding that debt and default stood established. Assignment deed was attached to

Section 7 petition. Issue of stamp duty etc cannot be raised at belated stage. Maa Durga sending OTS proposal to JMFR instead of KBL shows awareness and acceptance of assignment. Acknowledgment of debt evident from reply to SARFAESI notice, balance sheets showing debt and OTS proposal. Balance sheets reflecting KBL as creditor is not relevant since Maa Durga has accepted JMFR as assignee. Technical objections cannot obfuscate admission when debt and default stood established

NCLAT's Decision:

Affirmed NCLT's decision to reject IA 253/2023 after reserving orders, following settled position of law. Maa Durga was aware of assignment to JMFR which is clear from OTS proposal sent to them. Assignment deed was annexed to Section 7 petition, issue cannot be raised at belated stage now. Acknowledgment of debt is clear from SARFAESI reply, balance sheets and OTS proposal. Anomaly regarding name in balance sheets is irrelevant given acceptance of assignment. Technical objections cannot override debt and default which stand clearly established. Dismissed appeal finding no reasons to interfere with NCLT's orders.

Relevant Legal Provisions:

Section 7 and Section 61 of Insolvency and Bankruptcy Code 2016. Regulation 4(2) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. Section 18 of Limitation Act – Acknowledgment of debt. Referred judgment of Supreme Court in Arjun Singh case on entertaining application after reserving orders

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Full Text of Judgment:

[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 two orders dated 25.09.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Cuttack) in CP (IB) No.30/CB/2022 and in IA (IB) No. 253/CB/2023. By the impugned order passed in IA (IB) No. 253/CB/2023 (hereinafter referred to as "First Impugned Order"), the Adjudicating Authority rejected the I.A. filed by the present Appellant on the ground that the main company petition was reserved for orders. By the impugned order passed in the main company petition (hereinafter referred to as "Second Impugned Order"), the Adjudicating Authority admitted the application under Section 7 of the IBC filed by JM Financial Asset Reconstruction Company Limited – the present Respondent No.1 and initiated Corporate Insolvency Resolution Process ("CIRP" in short) of the Corporate Debtor – Maa Durga Commotrade Private Limited. Aggrieved by these impugned orders, the present appeal has been filed by the suspended director of the Corporate Debtor assailing both these orders.

2. The brief facts of the case are as follows: –

- The Corporate Debtor-Maa Durga Commotrade Pvt. Ltd. had obtained credit facility from the Karnataka Bank Limited ("KBL" in short) in 2010 for an amount of Rs.1 crore.
- The loan account of the Corporate Debtor was classified as NPA by the KBL on 05.07.2013 since the Corporate Debtor failed to repay the loan.
- A demand notice under the SARFAESI Act was sent by KBL to the Corporate Debtor on 29.08.2013 to which the Corporate Debtor had sent a reply on 06.09.2013.
- The KBL subsequently assigned the debt to JM Financial Asset Reconstruction Company Ltd.-present Respondent No.1 on 15.12.2014 by way of an Assignment Deed.
- The Corporate Debtor submitted an OTS proposal to the Respondent No.1-Financial Creditor on 21.10.2016 for an amount of Rs.7.50 crore which was approved by the Financial Creditor.

- The Corporate Debtor failed to pay back in terms of the OTS leading to revocation of the same.
- The Respondent No.1-Financial Creditor filed a Section 7 petition under the IBC for initiation of CIRP of the Corporate Debtor. The matter was heard by the Adjudicating Authority and reserved for orders on 07.08.2023. The orders were pronounced on 25.09.2023.
- In the interregnum between the conclusion of hearing and the pronouncement of the order on 25.09.2023, the Corporate Debtor filed IA No. 253/CB/2023 seeking recall of the order which had been reserved on 07.08.2023 and to rehear the matter on the basis of additional objections contained in the IA No. 253/2023 filed by them.
- The IA No.253/2023 was dismissed by the Adjudicating Authority on 25.09.2023 on the ground that it had been filed after the final arguments in the main company petition had been heard and matter reserved for orders. On the same date, the Adjudicating Authority also passed the orders in the main company petition directing initiation of CIRP of the
  Corporate Debtor.
- Aggrieved by the said impugned orders, the appeal has been preferred by the suspended director of the Corporate Debtor.

3. Making his submissions, the Learned Counsel for the Appellant stated that when the Section 7 main company petition was by itself incomplete, the IA No.253/2023 which had been filed by the Appellant for re-hearing the main company petition on questions of law should have been heard by the Adjudicating Authority rather than be rejected on the ground that the main petition stood reserved for orders. Further as the Appellant had taken a loan from KBL and not from Respondent No.1, in such circumstances, the Respondent No.1 did not have the locus to file the Section 7 application against the Appellant. It was further submitted that the purported

assignment of the debt to Respondent No.1 by the KBL, the original Financial Creditor was incomplete as the Assignment Deed assigning the loan was insufficiently stamped and therefore not admissible in evidence. Moreover, the said deed not having been placed on record violated Rule 4(2) of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "AA Rules"). Moreover, the Corporate Debtor had not been a party to the Assignment Deed. In the absence of the Trust Deed, the application under Section 7 should have been treated to be incomplete. Further, the Adjudicating Authority had erroneously admitted the Section 7 application since the date of default being 06.09.2013, the application was barred by limitation. The OTS proposal on which the Adjudicating Authority has premised the impugned order had been made by the Corporate Debtor after a lapse of more than three years and therefore clearly time barred.

4. The Learned Counsel for the Respondent No.1 rebutting the arguments of the Appellant submitted that in Section 7 application, the key issue that is required to be seen by the Adjudicating Authority is whether there is a debt owed by the Corporate Debtor which is due and payable and if so whether any default has been committed in repayment of the debt. It was added that in this case both debt and default stood established and Adjudicating Authority has rightly held that this is a fit case for admission of Section 7 application.

5. Elaborating further, the Learned Counsel for the Respondent No. 1 asserted that the ground raised by the Appellant that Section 7 application was barred by limitation was utterly misconceived. The debt had been acknowledged by the Appellant on 06.09.2013 in their reply to the SARFAESI notice and subsequently an OTS proposal had been sent by them to the Respondent No.1 on 21.10.2016. That apart, the balance sheets of the

Corporate Debtor for the years 2014-15 and subsequently in 2017-18 and 2018-19 clearly depicts acknowledgment of financial debt.

6. It was further contended that the Corporate Debtor was fully aware of the fact that Section 7 application was filed by the Respondent No.1 in its capacity as a trustee. Further, the Corporate Debtor was also aware of the assignment of the debt by the Original Financial Creditor. By sending their OTS proposal to the assignee, the Appellant had accepted and acknowledged the assignment of debt by the original Financial Creditor to Respondent No.1. Moreover, the issue of assignment deed not being validly stamped and duly registered was never raised by the Corporate Debtor during the hearing of the main petition or at any stage prior to reserving the matter for orders. Similarly, the issue of non-attachment of the Trust Deed was also raised by the Appellant in the I.A. after the main company petition was reserved for order.

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

8. The short question to be answered is whether the dismissal of the IA 253/2023 by the Adjudicating Authority on the ground that it was filed after the main company petition was reserved for orders caused any serious miscarriage of justice to the Appellant which warrants the setting aside of both the impugned orders as prayed.

9. It is the case of the Appellant that the Section 7 application was filed by the Respondent No.1 in its capacity as Trustee of the KBL as is borne out from the Memo of Parties. Therefore, the Respondent No.1 ought to have placed the Trust Deed on record as mandated by Rule 4(2) of the AA Rules. In the absence of any Trust Deed placed on record, the claim of the Respondent No.1 to have locus as the Financial Creditor was questionable

and therefore the application under Section 7 should have been treated to be incomplete and could not have been admitted. It was also pointed out that the Assignment Deed was inadequately stamped and the Corporate Debtor not being a party to the Assignment Deed, it was not admissible in evidence.

10. Making counter arguments, it has been submitted by the Respondent No. 1 that in the Memo of Parties filed by them in the main company petition before the Adjudicating Authority, they had done so in their capacity as a trustee. That being
so, the Corporate Debtor was fully aware of the trustee capacity of Respondent No. 1. It therefore does not stand to any logical reasoning as to why this issue was not raised in the main company petition but is being raised belatedly in the I.A.

The Respondent No. 1 also vehemently contended that the assignment agreement, basis which, Section 7 application was filed was validly stamped and duly registered. Moreover, the Appellant having already accepted and acknowledged the existence of the assignment agreement while sending their OTS proposal, it again does not stand to reason how the plea of technical deficiency in terms of insufficiency of stamping of the said agreement could now be belatedly raised in the I.A. 253/2023. It has been submitted that the Appellant has raised a meritless contention that the Section 7 application should have been dismissed by the Adjudicating Authority on the ground of non-attachment of the Trust Deed.

11. Having seen the material on record, we are convinced that the Appellant was fully aware of the assignment of debt by the original Financial Creditor to the Respondent No.1 which is amply evident from the fact that they had themselves chosen to send the OTS proposal to Respondent No.1 on 21.10.2016 instead of sending the same to the original Financial Creditor. The OTS proposal is placed at page 287 of the Appeal Paper Book

("APB" in short). It is, therefore, clear that the Appellant/Corporate Debtor was not only aware of the assignment of the debt but had accepted and acknowledged this fact by sending the OTS proposal to the assignee. Moreover, the issue of assignment deed was never raised by the Appellant during the hearing of the main petition or at any stage prior to reserving the matter for orders.

12. We quite agree that there is no dispute to the fact that Regulation 4(2) of AA Rules provides that the application shall be accompanied with a copy of the assignment deed to demonstrate the assignment or transfer. We however notice that the Assignment Agreement was duly annexed to the Section 7 application by the Appellant as Annex F as placed at page 122 of the APB. When this fact of Assignment Agreement was already in existence when the matter came up for hearing in the main company petition before the Adjudicating Authority, it was open to the Appellant to agitate its sustainability at that stage and not after the matter had been reserved for orders. We fail to comprehend why this issue has now been raised by the Appellant in IA 253/2023 after the main company petition have been reserved for order.

13. It is a well settled proposition of law that the two stages of reserving of judgment and pronouncement of judgment are in a continuum with no hiatus or gap as such in the two stages. That being the well accepted and time-tested practice in court proceedings, subsequent pleadings filed by way of an I.A. after the judgement is reserved is normally not entertained for reasons of procedural propriety. The Adjudicating Authority while dismissing the I.A. has applied the same settled position of law that when a matter is reserved for orders, there is no scope for entertaining application from parties to re-hear the matter. The Adjudicating Authority has relied on the judgment of the Hon'ble

Supreme Court in Arjun Singh v. Mohindra Kumar & Ors. 1964 5 SCR 946 and Hon'ble Rajasthan High Court in Rajasthan Financial Corporation v. Pukhraj Jain & Ors. in AIR 2001 Raj 71 to hold that no application could be moved after the final arguments were heard and the case was closed for judgment. Hence, we find that the Adjudicating Authority had committed no error in not entertaining the I.A. particularly so when the I.A. contained facts which were already in existence at the time of filing of reply and at the time of making pleadings in the main company petition. Neither do we find any cogent grounds having been cited to explain what had impeded the Appellant from flagging these issues during the hearing of the main company petition. It also does not stand to any logical reasoning as to why the issues raised in the I.A. could not have been raised in the main company petition. Raising such technical issues and that too after detailed hearing in the main petition was concluded clearly shows that the Appellant was merely trying to raise feeble grounds in the I.A. to somehow delay and derail the admission of CIRP. Hence in our considered opinion, the Adjudicating Authority had rightly rejected the I.A. 253/2023.

14. This now brings us to the contention of the Appellant that the debt was barred by limitation. It is their case that the date of default was 06.09.2013 and the OTS proposal of 21.10.2016 was made after more than three years and hence
could not have been taken as acknowledgment for the purposes of limitation. During the period of three years from the date of default, no payments had been made by the Corporate Debtor which can be treated to be an acknowledgement of
debt for the purposes of limitation. It is further their contention that the balance sheets of the Corporate Debtor reflect the name of the KBL as the financial creditor and do not reflect the name of Respondent No.1.

Therefore, according to the
Learned Counsel for the Appellant, the entries in the balance sheet cannot be held to be acknowledgment under Section 18 of the Limitation Act and this is where the Adjudicating Authority committed an error in passing the second impugned order.

15. At this stage it may be useful to extract the relevant portions of the second impugned order to see how the Adjudicating Authority has dealt with this issue while examining the main company petition. The relevant paragraphs of the second impugned order are reproduced below:

"5. The assignment is transfer of one's right to recover debt to another person. Assignment is essentially a contractual concept and refers to an agreement by which the rights and obligations of one party can be transferred to another. By virtue of assignment, the assignee steps into the shoes of her assigns and assignee is entitled to enforce it. An assignment of rights effectively makes the assignee stand in the shoes of the assignor. The assignee gains all the rights against the debtor that the assignor had the assignment is absolute hence any right already accrued and any right will acquire in future over the subject matter of assignment all vest upon the assignee.

6. In respect of acknowledgement of debt is concern section 18 of Limitation Act speaks about acknowledgement of property and rights accordingly here the respondent in the financial statement 2014-2015 acknowledge the debt covered under the assignment deed, of course in favour of the assignor it will not change the position. The debt is acknowledged by the debtor against whom the debt is claimed.

7. In these circumstances it is answerer that the acknowledgement of debt made by the corporate debtor in its balance sheet for the year 2014-2015 in favour of assignor, is valid, and subsequently the respondent

submitted OTS proposal to petitioner recognizing it as an assignee. On the petitioner side proved that there is a debt, and default, the twin vital requirements to admit the petition."

16. Having heard both parties and perused the records, it is an undisputed fact that the Corporate Debtor had availed the loan facility undisputedly from KBL, the original Financial Creditor. This debt had also been clearly acknowledged
by the Appellant on 06.09.2013 in their reply to the SARFAESI notice. The balance sheets of the Appellant/Corporate Debtor for the years 2014-15 and subsequently in 2017-18 and 2018-19 as placed at pages 303-328 of the APB also clearly depicts an acknowledgment of financial debt. It is, however, the case of the Appellant that the financial debt in the balance sheet is reflected qua KBL, the original Financial Creditor and not to the Respondent No.1. Be that as it may, it
is an undisputed fact that the OTS proposal had been sent by the Appellant not to KBL but to the Respondent No.1 on 21.10.2016. This constitutes sufficient evidence that they were very much aware that assignment of the debt in favour of
Respondent No.1 was already in place. From this OTS proposal, it can be safely inferred that the Corporate Debtor had acknowledged their liability to pay to the Respondent No. 1. The acknowledgment of debt in the present facts of the case is therefore clear and unambiguous.

17. The balance sheets also reflect that debt is owed by the Corporate Debtor to the original Financial Creditor. Since the Appellant was well aware of the assignment of the debt, they cannot take advantage of the anomaly in the balance
sheet with respect to the continuation of the name of KBL as the debtor. There isno material on record to show

that this debt had been liquidated by the Corporate Debtor. That being so, the debt was continuing and there was a default in
repayment and nothing on record controverts that position. The Corporate Debtor having accepted the assignment agreement in their OTS proposal has no ground to deny knowledge of the fact that the Respondent No.1 had stepped into the shoes of the original Financial Creditor and therefore it has been correctly concluded by the Adjudicating Authority that the loan facility acknowledged in the name of the Financial Creditor in the balance sheet is to be construed as acknowledgement of debt qua the Appellant. The Appellant is contesting the legal tenability of the Assignment Agreement on hyper-technical grounds which cannot be accepted. We are of the considered opinion that since in the facts of the present case, a debt has arisen which is due and payable by the Corporate Debtor and a default has occurred, admission of Section 7 application cannot be obfuscated by raising technical pleas and that too after hearing in the main petition stood concluded and matter was reserved for hearing.

18. In view of the above discussions, facts and circumstances, we therefore affirm the findings of the Adjudicating Authority and are of the considered opinion that there are no convincing reasons to interfere with either of two impugned orders. In the result, both the appeals having no merit are dismissed. No Costs