NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANYAPPEAL (AT) (INSOLVENCY) No.1451 of 2019

(Arising out of Order dated 30.10.2019, passed by National Company Law Tribunal, Kolkata Bench, Kolkata in C.P. (IB)No. 683/KB/2018)

IN THE MATTER OF:

Om Prakash Pandey,
Son of Muralidhar Pandey,
Aged about 54 years, by faith Hindu,
by Occupation Business,
Residing at P-214, Lake Town, Block-A,
Kolkata 700089,
being the Ex-Director of
M/s. Sri Balaji Logs Products Limited **...Appellant**

Versus

1. Bank of India, a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertaking Act, 1970)
Having its Head Office at Star House-I,
C-5, G-Block, Bandra Kurla Complex, Bandra East, Mumbai, Maharashtra; and Having its Branch Office at 5 B.T.M. Sarani, Kolkata – 700001.
Commonly known as its Mid Corporate Branch, under Police Station – Hare Street. **...Respondent No. 1**

2. M/s. AEON Manufacturing Pvt. Ltd. (Formerly known as Shree Ram Saw Mill),
A Company incorporated under the provisions of the Companies Act, 1956, (Formerly known as M/s. Shree Ram Saw Mill)
Having its Registered Office at 226/1,
Trinity Building, 7th Floor, A.J.C. Bose Road, Kolkata – 700020. **...Respondent No. 2**

For Appellant: **Mr. Shubhashis Bhowmick and Ms. Manisha Pandey, Advocates.**

For Respondent No. 1: **Mr. Namit Suri, Surabhi Sinha and Ms.**

Sonam Malik, Advocates for Respondent No. 1.

For Respondent No.2/RP: Mr. Raj Singhania, Advocate for R-2/RP.

J U D G E M E N T

[Per: ShreeshaMerla, Member (T)]

1. Challenge in this Appeal, is to the Impugned Order dated30/10/2019passed by the Learned Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in C.P. (IB) No.-683/KB/2019, by which Order, the Adjudicating Authority has admitted the Application filed by *'M/s. Bank of* India'/ the 'Financial Creditor' under Section 7 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code'), for initiating Corporate Insolvency Resolution Process (CIRP) against *'M/s. AEON Manufacturing Private Limited'*/the 'Corporate Debtor'.

2. Briefly put, the facts in the instant case are that the 'Financial Creditor' has sanctioned limits of Rs.70 Crs./- vide Sanctioned Letter dated 20/07/2012 and thereafter the 'Corporate Debtor' had committed defaults and was declared as an NPA. It is the case of the 'Financial Creditor' that the 'Corporate Debtor' was classified as NPA on 30/06/2016, whereas it is the case of the Appellant herein that the Adjudicating Authority has erroneously recorded the 'date of default' to be 30/06/2016, based on the date mentioned in the Application when the correspondence on record shows that the 'date of default' is 30/09/2014. Despite the Demand Notice dated 08/02/2018, the 'Corporate Debtor' had failed to pay a sum of

Rs.74,28,51,444.72/- and hence the 'Financial Creditor' filed an Application seeking to initiate the CIRP Proceedings.

3. Learned Counsel for the Appellant/'Corporate Debtor' vehemently contended that the Application was 'barred by Limitation' as the date of NPA was 30/09/2014. Learned Counsel drew our attention to the Restructuring Proposals dated 08/10/2014, 09/10/2014, 02/12/2014 and 15/12/2014, whereunder the Bank refused to consider the Restructuring Proposal and declared the 'Corporate Debtor' as 'wilful defaulter', vide letter dated 12/02/2015, whereby the dues were classified as NPA from 30.09.2014. It is submitted that another proposal was sent by the Appellant on 29/12/2014 which was also rejected. On 12/02/2015, the Bank issued a Notice under Section 13(2) of the SARFAESI Act, 2002, to repay the due amount of Rs.54,32,74,829.91/-. The 'Corporate Debtor' preferred an Application under Section 17(1) of the SARFAESI Act, 2002, on 15/09/2016, which is still pending. It is strenuously argued by the Learned Counsel for the Appellant that the 'date of default' being 30/09/2014, and Section 7 Application having been filed on 24/04/2018, which is beyond the three years of the 'date of default', the Application is 'barred by Limitation'. Learned Counsel placed reliance on the Judgement of the Hon'ble Supreme Court in *'Peacock Plywood Pvt. Ltd.' Vs. 'The Oriental Insurance Co. Ltd.', Civil Appeal No. 5608 of 2006,* in paras (36, 38, 39 & 44) in support of his contention that the correspondence made during settlement talks/OTS Proposals will not construe 'acknowledgement of debt'. The Appellant filed their Written Submissions on 04/05/2022 reiterating that the Adjudicating Authority has erred in noting NPA as 30/06/2016 when it is actually

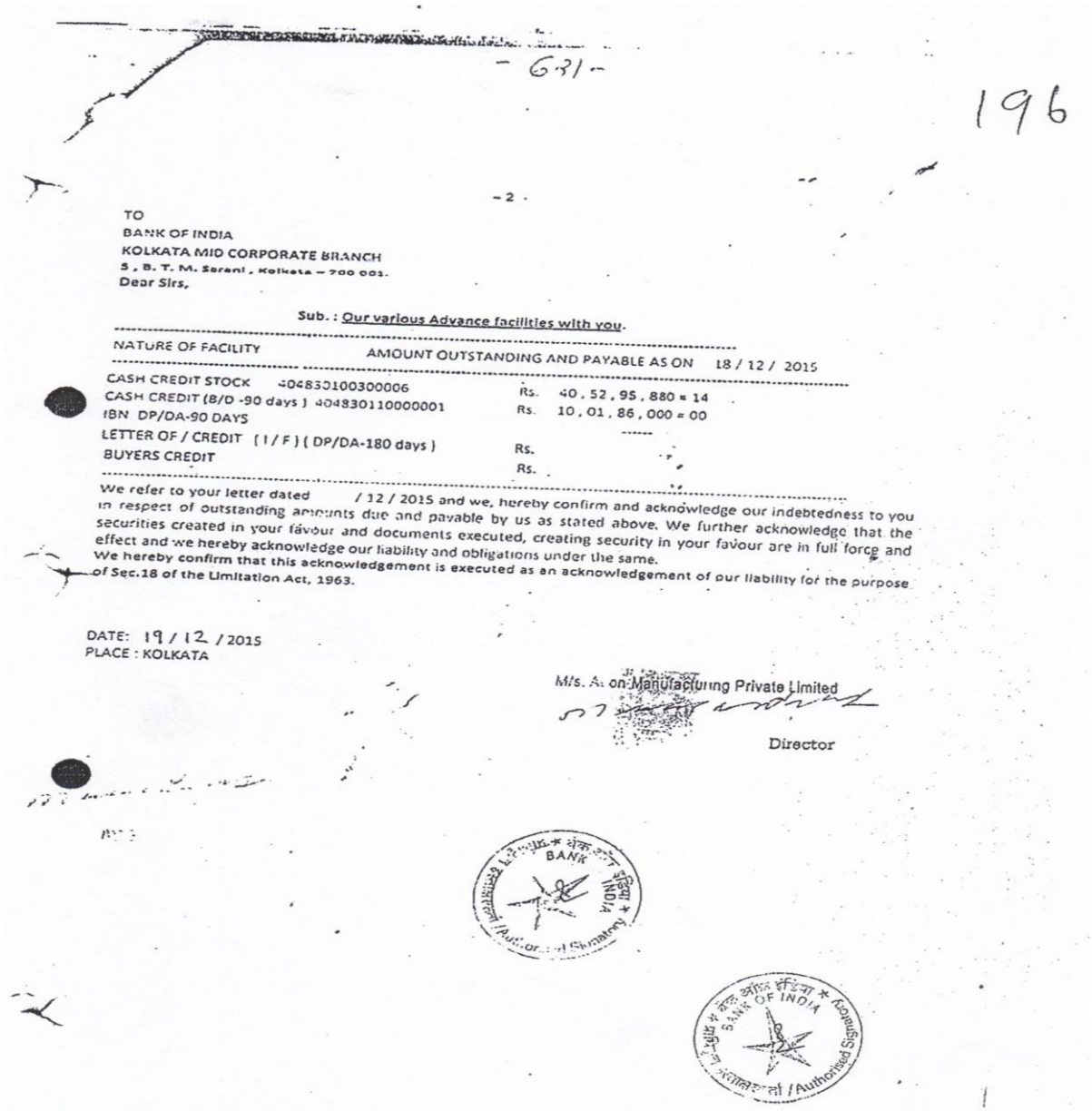
30/09/2014. The dates of the restructuring proposals has been re-emphasised in support of his arguments.

4. Learned Counsel for the Respondent/'Financial Creditor' submitted that the Appeal had become infructuous as on the 16th CoC Meeting held on 24/02/2012, e-voting was done and the Resolution Plan was approved, meeting the requirements under Section 30(2) of the Code. He further submitted that the Plan has also been implemented. Learned Counsel drew our attention to the Confirmation Letter dated 19/12/2015 issued by the 'Corporate Debtor' acknowledging the indebtedness to the 'Financial Creditor' and also the fact that the Balance Sheet for the year ending 31/03/2016 evidences the amounts 'due and payable' to the Bank. He placed reliance on the Judgement of the Hon'ble Supreme Court in *'Dena Bank (now Bank of Baroda)' Vs. 'C. Shivkumar Reddy & Anr.', (2021) 10 SCC 330,* in which it is held that when there is a jural relationship between the parties, an acknowledgement of debt in within three years of the 'date of default', between such parties would amount to acknowledgement under Section 18 of the Limitation Act, 1963. In his Written Submissions, the Counsel also relied on paras 8-11 of *'The Bijnor Urban Co-operative Bank Ltd, Bijnor & Ors.' Vs. 'Meenal Agarwal & Ors.', (2021) SCC OnLine SC 1255,* in support of his arguments.

5. The main point which arises for consideration is whether the Section 7 Application filed by the 'Financial Creditor' is 'barred by Limitation'.

6. The letter dated 02/12/2015 shows that the dues were classified as NPA on 30/09/2014 and the Section 7 Application was filed on 24/04/2018. Admittedly, there was communication and correspondence

between the parties wherein several proposals for Restructuring an OTS were attempted. The Restructuring Proposals dated 08/10/2014, 09/10/2014 and 02/12/2014 are on record apart from the OTS Proposals made between the parties on 03/03/2018, 13/03/2018, 11/06/2018, 13/06/2018 and 07/11/2018 and thereafter. However, the Section 7 Application was filed on 24/04/2018 and there is an 'acknowledgment of debt' vide an acknowledgment letter date 19/12/2015 which reads as hereunder:



- 631 -

196

- 2 -

TO
BANK OF INDIA
KOLKATA MID CORPORATE BRANCH
5, B. T. M. Sarani, Kolkata – 700 001.
Dear Sirs,

Sub. : Our various Advance facilities with you.

NATURE OF FACILITY	AMOUNT OUTSTANDING AND PAYABLE AS ON 18 / 12 / 2015
CASH CREDIT STOCK 404830100300006	Rs. 40, 52, 95, 880 = 14
CASH CREDIT (B/D -90 days) 404830110000001	Rs. 10, 01, 86, 000 = 00
IBN DP/DA-90 DAYS	
LETTER OF / CREDIT (I / F) (DP/DA-180 days)	Rs.
BUYERS CREDIT	Rs.

We refer to your letter dated / 12 / 2015 and we, hereby confirm and acknowledge our indebtedness to you in respect of outstanding amounts due and payable by us as stated above. We further acknowledge that the securities created in your favour and documents executed, creating security in your favour are in full force and effect and we hereby acknowledge our liability and obligations under the same.
We hereby confirm that this acknowledgement is executed as an acknowledgement of our liability for the purpose of Sec.18 of the Limitation Act, 1963.

DATE: 19 / 12 / 2015
PLACE : KOLKATA

M/s. A[illegible]on Manufacturing Private Limited

Director

BANK OF INDIA
Authorised Signatory

BANK OF INDIA
Authorised Signatory

197

We, the guarantor, consent to the foregoing and acknowledge our liability under Agreement of Guarantee executed by us.

We confirm that this acknowledgement is for the purpose of Sec.18 of Limitation Act, 1963.

DATE: 19/12/2015

PLACE: Kolkata

Shree Prakash Pandey

Satya Prakash Pandey

Shova Properties (P) Ltd.

Director

Shova Properties (P) Ltd.

Shree Prakash Pandey

Director

Shree Prakash Pandey

Authorised Signatory

BANK OF INDIA

Authorised Signatory

7. It is significant to mention that the Appellant does not deny this acknowledgment. It is only their case that as proposal for Restructuring was pending, such a letter of acknowledgement does not construe an acknowledgement in the legal sense. The Judgement relied upon by the Appellant Counsel i.e., *'Peacock Plywood Pvt. Ltd.' (Supra)* deals with repudation of an insurance claim on several grounds and an issue was framed as to whether the suit filed challenging this repudation, was 'barred by Limitation'. While deciding the issue pertaining to the case, the Hon'ble Supreme Court observed as follows:

> *"(c) When is correspondence treated as within the rule?*
>
> *The first question is to determine what communications attract without prejudice privilege. The second stage is to consider when the court will, nevertheless, admit such communications.*
>
> *Correspondence will only be protected by without prejudice privilege if it is written for the purpose of a genuine attempt to compromise a dispute between the parties. It is not a precondition that the correspondence bears the heading without prejudice. If it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible. The converse is that there are some circumstances in which the words are used but where the documents do not attract without prejudice privilege. This may be because although the words without prejudice were used, the negotiations were not for the purpose of a genuine attempt to settle the dispute. The most obvious cases are first, where the party writing was not involved in genuine settlement negotiations, and secondly, where although the words were used, they were used in circumstances which had nothing to do with negotiations. Surveyors reports, for example, are sometimes headed without prejudice, although they have nothing to do with negotiations. The third case*

is, where the words are used in a completely different sense. Thus, in Council of Peterborough v. Mancetter Developments, the documentation was admissible because in context the words meant "without prejudice to an alternative right and without concession to the other application" and had nothing to do with settlement.

There are circumstances in which the correspondence is initiated with a view to settlement but the parties do not intend that the correspondence should be without prejudice. It may be that the parties positively want any subsequent court to see the correspondence and always had in mind that it should be open correspondence. It may be a nice point whether negotiations at which no one mentioned the words "without prejudice" should be admitted in evidence: for example at an early meeting between the parties when the dispute first developed. There is no easy rule here. On the other hand, even when a letter is sent as the "opening shot" in negotiations, and is not preceded by any previous correspondence, it may be without prejudice. There are authorities in both directions on this and it will depend on the facts.

It has been said that if one is seeking to change the basis of the correspondence from without prejudice to open it is incumbent on that person to make the change clear, although that may be more a pointer than a rule. There is no reason why every letter for which without prejudice is claimed should contain an offer or consideration of an offer, so long as the without prejudice correspondence is part of a body of negotiation correspondence."

8. In the instant case, the issue raised regarding Limitation is not solely whether the communication initiated between the parties with a view to restructure the loan/OTS Proposals construes 'acknowledgement of debt', but whether the debt acknowledged vide letter dated 19/12/2015 and signed by the Appellants and further whether the amounts reflected in the Balance Sheets tantamounts to 'acknowledgement' as defined under Section 18 of the Limitation Act, 1963.

9. At this juncture, we place reliance on the ratio of the Hon'ble Supreme Court in *Dena Bank (Supra)* which reads 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 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 238-A 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 Sections 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 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 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 Bank in May 2017. The NCLT rightly admitted the application by its order dated 21-3-2019.*
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> *140. To sum up in our considered opinion an application under Section 7 IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the dare or declaration of the loan account of the corporate debtor as NPA, there were an acknowledgment of the debt by the corporate debtor before expiry of the period of limitation of three years, in which case the period or limitation would get extended by a further period of three years."*

10. The aforenoted observations made by the Hon'ble Supreme Court clearly establishes that any acknowledgement under Section 18 of the Limitation Act, 1963 within the three years period, of the date of default,

extends the date of Limitation giving rise to a fresh period of an additional three years. Further, it is not in dispute that the Financial Statements for the year ending 31/03/2016 reflect the loan amounts owed to the 'Financial Creditor'. The Hon'ble Supreme Court in *'Asset Reconstruction Company (India) Limited' Vs. 'Bishal Jaiswal & Anr.', (2021) 6 SCC 366*and also in para 139 of the aforementioned *'Dena Bank' (Supra),* has laid down that the Balance Sheets and Financial Statements of the 'Corporate Debtor', construe acknowledgement of liability which extend the Limitation by three years. The Hon'ble Supreme Court also observed that *'there is no reason why an offer of One Time Settlement of a live claim made within a period of Limitation, should also not been considered as an acknowledgement to Section 18 of the Limitation Act, 1963'.* Therefore, the contention of the Learned Counsel for the Appellant that any acknowledgement given under Restructuring Proposals/OTS cannot be construed as an 'acknowledgement of debt' cannot be sustained.

11. Having regard to the fact that the date of NPA is 30/09/2014, there is an 'acknowledgement of debt' dated 19/12/2015 and the Financial Statements of the year ending 2016 evidence the loans taken by the 'Corporate Debtor', apart from the various Restructuring/OTS Proposals advanced between the parties, indicating the existence of a jural relationship between them, we are of the considered view that the ratio of the Hon'ble Supreme Court in *'Dena Bank' (Supra)* is squarely applicable to the facts of this case and hence we hold that the Application filed under Section 7 of the Code is well within the period of Limitation.

12. We are also conscious of the fact that Resolution Plan has already been implemented.

13. 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.ShreeshaMerla]
Member (Technical)

New Delhi
06th May, 2022
himanshu