The Baroda Rayon Corporation Ltd.

CIN L45100GJ1958PLC000892
P O Fatehnagar, Udhna, Surat 394 220
Tel : 0261-2899555
Email : brcsurat@gmail.com
Website : www.brcl.in

18th May, 2022

To
Department of Corporate Services
BSE Limited
P J Towers,
Dalal Street,
Mumbai - 400001.

Sub – Intimation in terms of Regulation 30 read with Part A of Schedule III of SEBI (LODR) Regulations, 2015 regarding Disposal of appeal filed with NCLAT filed by operational creditor.
Ref – BSE Scrip code – 500270.

Dear Sir(s),

We hereby inform that M/s. Advance Engineering Services, operational creditor of the company had filled Company Appeal(AT)(Ins)/222/2021 with National Company Law Appellate Tribunal (NCLAT), New Delhi against the order of NCLT dated 27.01.2021.

NCLAT vide its order dated 13.05.2022 has rejected the appeal stating that the appellant has not been able to establish the extension of limitation as required under Section 18 of the Limitation Act and has disposed off.

Kindly take the same on your record.

Thanking you,

Yours faithfully,
For The Baroda Rayon Corporation Limited

Kunjal S Desai

Kunjal Desai
Company Secretary

The Baroda Rayon Corporation Ltd. PO Fatehnagar (Surat) 394220

Encl: NCLAT Order

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 222 of 2021

&

I.A. No. 1819 of 2021

IN THE MATTER OF:

M/s. Advance Engineering Services
Having its office at Bungalow No.3,
Sheetal Nagar, Opposite Children Academy School,
Ashok Chakraborty Cross Road,
Kandivali (East), Mumbai-400101. ...Appellant

Versus

The Baroda Rayon Corporation Ltd.
Having its registered office at P.O. Fatehnagar,
Surat – 394220 and at Hoechst House 193,
Backbay Reclamation, Nariman Point,
Mumbai-400021. ... Respondent

Present:

For Appellant: **Ms. Sheetal Parkash, Mr. Durgaprasad Halwai, Mr. Jayesh Desai Advocates.**

For Respondent: **Mr. Manu Aggarwal, Mr. Hamesh Naidu and Mr. Shubham Bhudiraja, Advocates.**

JUDGMENT
(Date: 13.05.2022)

(Virtual Mode)

[Per.: Dr. Alok Srivastava, (Member Technical)]

1. The present Appeal has been filed by the Appellant aggrieved by the order dated 27.1.2021 (hereinafter called 'impugned order') passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench) in Company Petition No. IB (AHM)/555 of 2018.

2. The Appellant, who is an operational creditor of the corporate debtor "The Baroda Rayon Corporation Limited" is aggrieved by the Impugned Order by which the section 9 application under the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') filed by the Appellant has been rejected by the Adjudicating Authority.

3. In brief, the facts of the case are that the Appellant, which is a sole proprietorship firm carrying on its business in engineering sector, performed flooring work on the Mezzanine floor of the plant

of the corporate debtor at Fateh Nagar, Udhna. The Appellant has stated that the work order for the job under question was issued by the respondent company vide letter dated 12.07.2004. The Appellant completed the assigned work and was made some payments by the respondent. Regarding rest of the payment, it was informed by the Respondent Company vide fax dated 19.6.2007 that as per their ledger for the period 1.4.2003 till 30.09.2004, an amount of Rs. 39,00,631.50 (Rupees Thirty Nine Lakhs Six Hundred Thirty One and Paise Fifty Only) is owed to the Appellant. The Appellant has stated that the fact that the respondent company was declared a sick unit under the provisions of the Sick Industrial Companies Act, 1985 (hereinafter referred as 'SICA') and therefore, it performed the job assigned to it in good faith and was awaiting payment of the amount involved in completing the work. The Appellant has further claimed that the respondent company acknowledged the operational debt due to the Appellant on numerous occasions through numerous fax message and hand written acknowledgements on its letters requesting payment of the operational debt. Upon not receiving the due

amount, the Appellant gave a demand notice under section 8 of the IBC and thereafter filed company petition IB No.555/9/NCLT/ AHM/2018. The said application was contested by the respondent company, inter alia, raising the ground that the application was barred by limitation and the Adjudicating Authority vide the Impugned Order dated 27.1.2021 rejected the section 9 application.

4. We heard the arguments advanced by the Learned Counsels of the Appellant and the Respondent and also perused the record.

5. The Learned Counsel for Appellant has argued that after the work order for the said job was issued by the Respondent on 12.07.2004, the Appellant completed the said work and raised 31 invoices for payment. She has claimed that payment was made for about 13 invoices by the Respondent, whereafter the respondent stopped making payment and kept on giving assurances at various points and time to the Appellant that the dues shall be paid, but eventually failed to do so. She has further argued that the

respondent sent fax dated 19.06.2006 and thereafter acknowledged receipt of his letters dated 25.10.2005, 20.12.2007, 5.6.2008, 15.6.2009, 7.10.2010, 4.6.2012, 8.7.2013, 9.9.2014, 29.5.2015, 3.7.2017 and 11.7.2017 wherein these letters carried receipts/endorsements from the Respondent along with the official rubber stamp of the respondent company. He has thus urged that an employee of the respondent has not only endorsed the said letters, but also in some endorsements entered the remark "Received. Sent to Surat for payment" by signing and affixing the company's rubber stamp, which shows that the Respondent acknowledged the owed debt and was promising to pay the operational debt. She has further submitted that the Respondent admitted finally its liability vide letter dated 21.10.2015, and in this letter he has admitted that part payments were made to the Appellant and the Respondent owes a debt which it promises to pay.

6. The Learned Counsel for Appellant has, therefore, claimed that vide letter dated 21.10.2015, the acknowledgment and

confirmation of the balance amount is akin to promise to pay and any written acknowledgment after the confirmation of the balance amount can safely be treated as a promise to pay and not mere acknowledgment, a principle which has been held in the matter **of State Bank of India vs. Kanahiya Lal and Anr. (2016 SCC Online Del 2639)**. The Appellant's Learned Counsel has further claimed that the jural relationship that of debtor and creditor as laid down by Hon'ble Bombay High Court in the matter of **Uma Kumar vs. Reunion Electrical Manufacturers (P) Ltd. (2006 SCC Online Bom 1291)** was established hen the Respondent's employee noted receipt of Appellant's fax and letters and the onus for payment is therefore on the Respondent who has made a promise to pay. The Learned Counsel for Appellant has also urged that the provisions of the Limitation Act, 1963 are applicable to the IBC and with the promise to pay as included in section 25 (3) of the Indian Contract Act, 1872, a debt is not time-barred as there is a fresh promise to pay the amount.

7. The Learned Counsel for Appellant has argued in response to the allegations made by the Respondent that the seal-stamp and signature on letters of the Appellant were forged and fabricated and that Mr. Janardan R. Devrukar was a peon with no authority to acknowledge the debt, that these arguments are nothing but a counter-blast to the Appellant's section 9 application. She has said that issues like insufficient stamping of documents are weak efforts to defeat the claim of the Appellant and are therefore not maintainable.

8. The Appellant filed an application before this tribunal for production of Respondent company's balance sheets for the period 31.3.2014 to 31.3.2020 to show that there is acknowledgement of the debt in the balance sheets which would extend the period of limitation for section 9 application, as it amounts to admission of liability as has been held by the Hon'ble Supreme Court in **Asset Reconstruction Company Limited vs. Bishal Jaiswal (2021 SCC Online 321)**. The Learned Counsel for Appellant has thus urged that the issue of limitation of section 9 application has been

incorrectly adjudicated in the Impugned Order in view of repeated remarks made by the employee of the Respondent company which amount to acknowledgment of debt, and the promise to pay in accordance with section 25 (3) of the Indian Contract Act, 1872, the section 9 application ought to have been admitted.

9. The Learned Counsel for Appellant has also claimed that the Respondent company was a sick company and under SICA the Appellant right to move against the Respondent company for recovery of debt was suspended. Hence, the relevant period should not be counted for the purpose of limitation.

10. In reply, the Learned Counsel for Respondent has argued that it is the admitted case of the Appellant that the invoices on the basis of which the Appellant has claimed operational debt due pertain to the year 2004 and whereafter the Appellant has sought to rely upon remarks on receiving the various document to contend that section 9 application is not barred by limitation. The Learned Counsel for Respondent has claimed that the documents,

on whose basis the Appellant has tried to show that the debt was acknowledged by the Respondent, are forged and fabricated and cannot be relied upon. He has further contended that even in the event that these documents are accepted to be genuine the remarks thereon do not show acknowledgment of the debt by the Respondent and therefore the section 9 application is barred on the ground of limitation.

11. The Learned Counsel for the Respondent has given the following reasons why the documents produced by the Appellant should be considered forged and fabricated: -

(i) The letters allegedly issued by the Appellant on which the receipt of the Respondent's employee is shown pertain to the period of about 14 years, between 2005-2018, but they all have the same font and style which raises doubt that all the letters were printed around the same time.

(ii) The alleged letters which bear dates upto 2017 contain the receipt signed by Mr. Janardan R. Devrukar, but the fact is that he had resigned from the Respondent No.1 company w.e.f. 31.10.2000 and later worked with the Respondent on contractual basis till 31.8.2008 only. Therefore, it is inconceivable that he would give receipt on a letter of Appellant for any dates after 2008, when he was no longer working with the Respondent company.

(iii) The stamp-seal on the letters along with signature of receipt have the name of the city mentioned as Bombay even though the city's name had changed to Mumbai much earlier.

(iv) Mr. Janardan R. Devrukar has denied having received the said documents vide letter dated 28.1.2019 (attached at page 195 of the appeal paperook, vol. II).

(v) In letter dated 5.6.2008 (attached at page 127-A of the appeal paperbook, Vol. I), which is a typed copy of the original letter, the signature of the proprietor is real

one (in free flowing hand) whereas the signature of the person receiving the letter has been shown as "sd –". This shows that this letter is forged and is not a typed copy otherwise the signature of the author of the letter should also have been shown "sd-".

(vi) There is a clear overwriting in the date of receipt of letter dated 15.6.2009 (attached at page 128 of the appeal paperbook, Vol. I) from 2008 to 2009.

(vii) None of the documents have been referred to in the demand notice dated 6.8.2018 issued under section 8 of the IBC by the Appellant.

(viii) Mr. Ramesh Vohra, who has alleged to have issued letter dated 21.10.2015 (attached at page 136 of the appeal paperbook vol. I) had retired from the service of the Respondent Company way back in the year 2000 (related documents attached at pgs.116-117A of the appeal paperbook, Vol.I).

12. The Learned Counsel for the Respondent has urged that in the light of the above mentioned discrepancies in the said letters, the letters are definitely forged and fabricated. He has argued that even if these letters are taken as genuine, mere receipt of the letters in Mumbai office of the Respondent and forwarding them to Surat office by an employee who is a peon, cannot be considered as valid acknowledgment as is required under section 18 of the Limitation Act for extension of limitation for the application under section 9 of the IBC. He has further argued that Mr. Janardan R. Devrukar, who was working with the Respondent only as a peon on contractual basis from the year 2000 till 2008, had no valid authority to give any acknowledgment on behalf of the Respondent company and even assuming that he had such an authority, no such authority continued after 2008, when Mr. Janardan R. Devrukar had demitted office from the contractual post of peon too. Further, he has stated that the last endorsement referring to payment was allegedly made in the letter dated 7.10.2010 and the next acknowledgment in letter dated 21.5.2015 has been issued

after more than 3 years from this date and therefore it cannot extend the period of limitation as required under section 18 of the Limitation Act.

13. The Learned Counsel for Respondent has also controverted the reliance placed by the Appellant on section 25 (3) of the Indian Contract Act, 1872 because this provision requires an express promise to pay and a mere alleged acknowledgement of debt, does not attract the said provision. He has contended that the extension of limitation of section 9 application has to be seen with the light of section 18 of the Limitation Act and therefore, limitation should be extended continuously through a series of acknowledgments starting from the year 2006, whereas the first acknowledgment purportedly in the letter dated 21.10.2015. He has also rebutted the claim of the Appellant that in view of the fact that the Respondent company was a sick company under Sick Industrial Companies Act, section 22 of the SICA cannot extend the period of limitation for initiating proceedings under IBC when the alleged debt did not form the part of the scheme before BIFR.

He has finally urged that the section 9 application is clearly barred by limitation and therefore, the appeal should be dismissed.

14. On perusal of the Impugned Order (attached at pp.35-37 of the appeal paperbook, Vol. I), we note that the Adjudicating Authority has held that the date of default of the operational debt has been stated as 19.06.2006 and thereafter there is a letter of acknowledgment of debt dated 21.10.2015. In view of the no continuation of limitation through acknowledgment of debt starting from the date of default upto the date of filing the section 9 applicant debtor made in 21.10.2015, the section 9 application is barred by limitation.

15. We note that the Appellant undertook to do the work in accordance with the letter of intent given by the Respondent company dated 3.4.2004 and an amended letter of intent vide letter dated 26.5.2004 (attached at paged 74-75 of the appeal paperbook, Vol.I). Thereafter certain payments were made on the basis of the invoices submitted by the Appellant (attached at pp.81-124 of the appeal paperbook), the last payment having been

made ostensibly on 19.6.2006. Thereafter, the Appellant has placed on record a fax message and letters purportedly sent by him to Respondent No. 1 company demanding payment, which were received supposedly by Mr. Janardan R. Devrukar. One such letter for release of payment dated 25.10.2005 is attached at page 125 of the appeal paperbook, Vol. I) wherein the following is recorded:-

"Received on 25.10.2005

Sent to Surat.

-Signed"

Similarly a letter dated 20.12.2007 (attached at page 126 of the appeal paperbook, Vol. I) also has the remarks

"Received on 20.10.2007. Sent to Surat for payment.

-Signed",

There are letters dated 5.6.2005, 15.6.2009, 7.10.2010, 4.6.2012 where similar remarks had been made by the person receiving the letters. The letters dated 8.7.2017, 9.9.2014, 29.5.2015,

11.7.2017 and 23.7.2017 are purportedly received by some employee of the Respondent company, whose name is not clear. We then find that a letter dated 21.10.2015 has been issued by Shri Ramesh J. Vohra,(attached at page 2010 of the appeal paper book vol.I) wherein a liability of Rs 39,00,631.50 is booked and confirmed and it is also mentioned that 18% interest on the dues are in the process of approval with the top management.

16. The Hon'ble Supreme Court has held in the matter of **Assets Reconstruction Company Private Limited vs. Bishal Jaiswal (supra)** that the acknowledgment by the Corporate Debtor should be clear and unambiguous and only then it can be considered as an acknowledgment as required under section 18 of the Limitation Act for the purpose of extending limitation for an application under IBC. Moreover, in the said matter the acknowledgments that were under consideration where by way of balance sheets of the corporate debtor.

17. After this tribunal allowed application bearing No. TA 181 of 2021, the Respondent filed an affidavit dated 6.4.2022 along with Annual Reports for the year 2012-13 till the year 2017-18. These Annual Reports contained balance-sheets which give consolidated figures under various heads. The Respondent has also submitted that in terms of Rule 53 of the Companies (Management and Administration) Rules, 2014 read with the Companies Act, 2013, balance-sheets are required to be maintained for only 8 years from the date of filing with the Registrar of Companies. The Appellant has claimed that the Respondent has only filed its Annual Reports 2012-13 onwards till 2017-18 and which are incomplete as the Annual Reports do not have balance sheets showing break-up of consolidated figures under each head nor individual debtors' names listed. The balance sheets for the years 2012-13 to 2017-18 do not show any operational debt due to the operational creditor and thus do not provide any support to the case of the appellant in extension of limitation for section 9 application.

18. Sub-section (1) and (2) of section 9 of the IBC requires that the application for initiation of Corporate Insolvency Resolution Process by the Operational Creditor shall be filed before the Adjudicating Authority in such form and manner and with such fees as may be prescribed. Further, in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, rule 6 stipulates that the application shall be made in Form 5 accompanied with documents and records required therein and the Applicant should serve the copy of the application to the registered office of the Corporate Debtor and the Insolvency and Bankruptcy Board of India. Furthermore, the format of Form 5 as provided under sub-rule 1 of rule 6 requires the Operational Creditor to provide particulars of operational debt in Part IV, wherein the total amount of debt, details of transactions, date from such debt fell due, amount claimed in default and the date on which the default occurred have to be provided. Thus, it is clear that it is the responsibility of the operational creditor to provide details about the debt and the amount in default and the date on which default has occurred alongwith relevant documents in

support of his application. Therefore, the appellant/Operational Creditor cannot put the onus of producing the balance sheets on the Corporate Debtor.

19. We note that the documents provided by the Appellant in support of his application are as mentioned earlier in this judgment and attached at pp.38-161 of the appeal paperbook, Vol.I. As has been discussed earlier in this judgment, the documents do not show any clear acknowledgement of the operational debt that is due.

20. We now examine the claim of the Appellant that as per section 25 (3) of the Indian Contract Act where there is a "promise to pay" which amount to acknowledgement of the debt. He has adverted to the judgment of **State Bank of India vs. Kanahiya Lal & Anr. (supra)** to claim that the 'promise to pay' under section 25 of the Indian Contract Act, 1872, is a sufficient acknowledgement as required under section 18 of the Limitation Act, and such

promise provides lead of life to the limitation of section 9 application. Para 24 of this judgment states as follows:-

> *"24. No doubt, there is a distinction between an acknowledgment under section 18 of the Limitation Act and a promise under Section 25(3) of the Indian Contract Act, inasmuch as though both have the effect of giving a fresh lease of life to the creditor to sue the debtor, but, for an acknowledgment under Section 18 of the Limitation Act to be applicable, the same must be made on or before the date of expiry of the period of limitation, whereas such a condition is non-existent, so far the promise under Section 25(3) of the Indian Contract Act is concerned....."*

Thus, it is clear that for the extension of limitation under section 18 of the Limitation Act, insofar section 9 application of the appellant is concerned, there has to be a clear acknowledgment of debt within 3 years from 19.6.2006 and mere promise to pay at a much later date, on 21.10.2015 cannot extend limitation as required under section 18 of the Limitation Act.

21. The Learned Counsel for Appellant has cited the judgment of Hon'ble Supreme Court in the matter of **Asset Reconstruction Company Ltd. vs. Bishal Jaiswal & Anr. 2021 SCC online 321** to claim that an acknowledgment by an employee of the corporate

debtor by receiving a letter and sending to the Surat office for payment is 'sufficient' acknowledgment for the purpose of extending limitation under section 18 of the Limitation Act. In this connection, we follow para 32 of this judgment wherein the explicit mention in balance-sheets has been considered as acknowledgment of the debt in question: -

> *"**32.** A perusal of the aforesaid Sections would show that there is no doubt that the filing of a balance sheet in accordance with the provisions of the Companies Act is mandatory, any transgression of the same being punishable by law. However, what is of importance is that notes that are annexed to or forming part of such financial statements are expressly recognised by Section 134(7). Equally, the auditor's report may also enter caveats with regarding to acknowledgments made in the books of accounts including the balance sheet. A perusal of the aforesaid would show that the statement of law contained in **Bengal Silk Mills (supra)**, that there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission, is correct in law as it would depend on the facts of each case as to whether an entry made in the balance sheet qua any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgment of liability has, in fact, been made, thereby extending limitation under Section 18 of the Limitation Act."*

22. The above elucidation by Hon'ble Supreme Court implies that there should be unequivocal or clear-cut acknowledgment of the debt which we do not find in various letters and faxes produced by the operational creditor mere receipts by a peon employed with the corporate debtor, who demitted office in 2000 and worked on contractual basis during the period 2000-2008, cannot be considered as sufficient, proper and unequivocal acknowledgement of the operational debt.

23. The Learned Counsel of Respondent has referred to the judgment of this tribunal in the matter of **Mazda Agencies (partnership firm) through its partner Mr. Rakesh Desai vs. Hemant Plastics & Chemicals Ltd. (2021 SCI online NCLAT 69)** to claim that as per section 20(5) of the Sick Industrial Companies(Special Provision) Act, 1985 (in short 'SICA'), the Appellant was not entitled to get exclusion of the time spent under SICA proceedings in computing the period of limitation. This Tribunal held in paragraph 20 of this judgment as follows:-

"The appellant was not part of the scheme and they have already approached Civil Court. In such circumstances, it cannot be said that the legal right of remedy of the Appellant against the Respondent was suspended as per section 22(1) of the SICA."

Again in paragraph 21 of the same judgment, this Tribunal has held as follows:-

"It is argued on behalf of the Appellant that the reference under section 15 of the SICA was made in 2005 and rehabilitation scheme has been sanctioned by the erstwhile BIFR on 17.07.2013 but the scheme could not be implemented till 2017. Therefore, till 2017 the remedy for enforcement of the right to recovery was suspended under section 22(1) of the SICA. As per the provision of Section 22 (5) of the SICA the Appellant is entitled to get exclusion for aforesaid period in computing the period of limitation. For this purpose, placed reliance on the order passed by the Coordinate Bench of this appellate Tribunal in the case of M/s. Gouri Prasad Goenka Vs. Punjab National Bank & Anr. C.A. (AT)(Ins) No. 28 of 2019."

24. We find that the Appellant was not part of the scheme of rehabilitation and therefore he is not entitled to claim exclusion of any period when its legal right of redressal was suspended.

25. In the result, we come to the conclusion that the appellant has not been able to establish the extension of limitation as required under Section 18 of the Limitation Act on the basis of

valid acknowledgments provided by the corporate debtor to the operational debt, which is in default from June, 2006. We, therefore, are of the view that the Adjudicating Authority did not commit any error in holding that section 9 application of Appellant was barred by limitation. On finding no merit in the appeal, we dismiss it.

26. There is no order as to costs.

(Justice Ashok Bhushan
The Chairperson

(Dr. Alok Srivastava)
Member (Technical)

Dated: New Delhi

13th May, 2022

/aks/