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SUPREME COURT HOLDS THAT A DECREE OR A RECOVERY CERTIFICATE CONSTITUTES A FRESH CAUSE OF ACTION FOR IBC PROCEEDINGS

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The Supreme Court in its recent decision in *Dena Bank (now Bank of Baroda) v C. Shivakumar Reddy and Anr*, (Civil Appeal 1650 of 2020) has *inter alia* held that a final judgement, decree and/or a recovery certificate passed/ issued by a court or tribunal would give rise to a fresh cause of action for a financial creditor to initiate proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC).

Brief Factual Background

In 2011, Dena Bank (Bank) sanctioned a Term Loan in favour of M/s. Kavveri Telecom Infrastructure Limited (Corporate Debtor). In 2013, the Corporate Debtor defaulted in payment, following which, its loan account was declared as a Non-Performing Asset (NPA) by the Bank. While certain part payments were received from the Corporate Debtor in 2014, the Bank subsequently issued a legal notice to the Corporate Debtor for payment of its outstanding dues. Thereafter, in 2015, the Bank filed an application before the Debt Recovery Tribunal, Bangalore (DRT) for recovery of the said dues. During the pendency of proceedings in 2017, the Corporate Debtor shared a proposal for one time settlement of the loan amount in March 2017 (OTS Letter). Also in March 2017, the DRT passed a final judgement against the Corporate Debtor (DRT Judgement) and subsequently issued a Recovery Certificate dated 25 May 2017 (Recovery Certificate) for INR 52.12 Crores.

Since no payment was forthcoming for more than a year, the Bank approached the National Company Law Tribunal (NCLT) in 2018 by way of a petition under Section 7 of the IBC (the Petition). Subsequently, two applications were filed by the Bank in 2019 to bring on record additional documents, including the DRT Judgement, Recovery Certificate, OTS Letter and financial statements of the Corporate Debtor for F.Y. 2016-17 and 2017-18. The NCLT, by an order dated 21 March 2019, admitted the Petition and rejected the Corporate Debtor's objections as to limitation.

Thereafter, in the Promoter's appeal from the NCLT judgment, the National Company Law Appellate Tribunal (NCLAT) set aside the NCLT decision in 2019. NCLAT's decision, in turn, was challenged before the Supreme Court by the Bank.

Issues before the Supreme Court

1. Whether a petition under Section 7 of the IBC would be barred by limitation on the sole ground that it had been filed beyond three years from the declaration of

the loan account as an NPA, even though the Corporate Debtor may have subsequently acknowledged the liability.

2. Whether a final judgment and decree of the DRT in favour of the financial creditor, or a Recovery Certificate, would give rise to a fresh cause of action to initiate proceedings under Section 7 of the IBC.
3. Whether there is any bar in law to the amendment of pleadings to include additional documents under a Section 7 petition.

Court's Findings

It is well established that the principles of Section 18 of the Limitation Act are applicable to Section 7 petitions under IBC. As per Section 18 of the Limitation Act, 1963, an acknowledgement of a subsisting liability in respect of any right claimed by the opposite party has the effect of commencing a fresh period of limitation from the date on which the acknowledgement is signed. The acknowledgement, however, must be made before the relevant period of limitation has expired. It is also well established that acknowledgement of a debt in a company's balance sheet extends the period of limitation; see Ergo Update on *ARCIL v Bishal Jaiswal*, 2021 SCC OnLine SC 321. [\[Link\]](#)

The Court rejected the Corporate Debtor's objection that the additional documents (containing the purported acknowledgements) were not originally filed with the Petition. Stressing on the need for a purposive interpretation of the provisions of the IBC, the Court held that provisions thereof must not be given a pedantic interpretation. It conjointly read Sections 7(2) to 7(5) of the IBC along with the relevant rules to hold that there is no bar in law to the amendment of pleadings or filing of additional documents at any time until a final order admitting or dismissing the application has been passed. The Court, however, observed that in an event of inordinate delay, the NCLT may use its discretion to decline such a request.

Considering the above, the Court held that the financial statements of the Corporate Debtor for F.Y. 2016-17 and 2017-18 as well as the OTS Letter were brought on record before NCLT prior to admission of the petition; consequently the period of limitation was extended by the Corporate Debtor's acknowledgement of the debt in its accounts and in its offer for one time settlement. In light of this, the finding of the NCLAT that there was no acknowledgement of debt within 3 years was held to be unsustainable.

With respect to the issue of limitation, the Court further proceeded to hold that the Recovery Certificate in itself gave a fresh cause of action to the Bank to institute proceedings under Section 7 of IBC. In support of the above finding, the Court referred to a decision of the Patna High Court in *Ferro Alloys Corporation Limited v. Rajhans Steel Limited* [(1999) SCC Online Pat 1196] which was cited by the Supreme Court in *Jignesh Shah and Another. v Union of India* [2019 SCC OnLine SC 1254]. The Court observed that once a claim fructifies into a final judgment and order/decree upon adjudication, and a certificate of recovery is also issued, a fresh right accrues to a creditor to recover the amount specified in the certificate of recovery. The court further held that on a conjoint reading of the provisions of IBC, it was clear that a final judgement and/or decree of any court or tribunal or any arbitral award for payment of money, if not satisfied, would fall within the ambit of "financial debt", enabling a judgment creditor to initiate proceedings under Section 7.

Comments

While NCLAT, in its certain previous decisions, had adopted a contrary view, the Supreme Court has now laid down that a subsequent judgement, decree or recovery certificate will lead to a fresh cause of action for the purpose of initiating proceedings under IBC.

Notably, this is the first time that the Supreme Court has ruled on the maintainability of petition under Section 7 of IBC by a decree holder on the basis of a recovery certificate or decree. NCLAT, previously, had taken a view that a decree/ certificate holder does not fall within the definition of a “financial creditor” and therefore, cannot maintain proceedings under Section 7 of IBC (see Digamber Bhondwe, 2020 SCC OnLine NCLAT 399 and Sushil Ansal v Ashok Tripathi, 2020 SCC OnLine NCLAT 680). A three judge bench of the Supreme Court stayed NCLAT’s judgment in Digamber Bhondwe and an appeal is also pending in Supreme Court from Sushil Ansal; see Ergo Update on *Sushil Ansal v Ashok Tripathi* here. [\[Link\]](#)

This decision may pave the way for judgment creditors / decree holders to approach the NCLT under Section 7 of IBC with a claim based on a decree / recovery certificate. It is bound to be exalted by banks and financial institutions, who may, under certain circumstances, prefer the IBC route over conventional execution proceedings.

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