

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No.91 of 2017

(arising out of Order dated 04.05.2017 passed by the National Company Law Tribunal, Mumbai Bench, in C.P. No.464/I&BP/NCLT/MAH/2017)

In the matter of:

Black Pearl Hotels Pvt. Ltd. ...Appellant

Vs.

Planet M Retail Ltd. ...Respondent

Present: For Appellant: Shri Pritha Srikumar Iyer, Advocate

For Respondent: None

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The appellant Black Pearl Hotels Pvt. Ltd. who claimed to be operational creditor, engaged in operating a retail store in a building situated at First Floor, Curzon Complex, No.9, Bangalore – 560001, entered into a Business Conducting Agreement dated 1st February 2008 with respondent, Planet M Retail Limited – (corporate debtor), to conduct and manage the business of running a music concept store by name “Planet M” on behalf of operational creditor, in consideration of which, corporate debtor is liable to pay monthly conducting fee to the operational creditor.

2. Subsequently, at the request of the corporate debtor on the reasoning that business venture is not making profit, on 24th June, 2009, an addendum to agreement was entered whereby the monthly minimum guaranteed fee was

scaled down to Rs.7 lakhs for a period of only 26 months from 1st February, 2009 to 31st March, 2011 retrospectively.

3. According to appellant - operational creditor, the respondent - corporate debtor continued to pay Rs.7 lakhs per month from April, 2011 to September, 2011 as fees instead of paying Rs.11 lakhs per month in terms of Business Conduct Agreement and the Addendum to the said agreement. Thereafter, since October, 2011 the corporate debtor failed to pay the conducting fee and, therefore, the operational creditor terminated the business conduct agreement.

4. On the ground that a sum of Rs.3,92,38,405 is due from corporate debtor, the appellant - operational creditor issued notice under sub-section (1) of section 8 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as I&B Code). The Respondent - corporate debtor, in its reply dated 18th March, 2017 denied the claim on the ground that the operational creditor has not duly performed its duty in terms of agreement.

5. After waiting for 10 days and having received such reply, the appellant - operational creditor, filed an application under section 9 before the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench, Mumbai registered as CP No.464/I&BP/NCLT/MAH/2017 for initiation of corporate insolvency resolution process against the respondent - corporate debtor.

6. The Adjudicating Authority by impugned order dated 4th May 2017 having noticed that an arbitration application was filed by operational creditor, which was dismissed on 4th March, 2014, dismissed the application

under section 9 on one of the grounds that the application was barred by limitation with following observation:

“11. The another contention of the operational creditor that since Arbitration Application was filed for the appointment of Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 and hence the recovery of debt is not barred by limitation, is far fetching in view of the fact that the Arbitration Application was dismissed on 4.4.2014 and that claim covered the debit notes raised from November, 2011 to the date of filing of Arbitration Application on 30.3.2012. In order to save limitation on this portion of the claim, the operational creditor should have obtained liberty to proceed against the corporate debtor but that is not the case herein, the Arbitration Application was dismissed without any liberty. In so far as the debit notes subsequent to the filing of Arbitration Application the same is not covered in the Arbitration Application, the corporate debtor is not in possession of the premises, not carried on his business activities and the raising of the debit notes against the corporate debtor was illegal. It is to be noted that after the last payment in September, 2011, neither there was an acknowledgement of liability nor any payment by the corporate debtor. In this situation, the whole debit as claimed by the financial creditor is time barred.

12. Section 3(11) of IB Code provides that “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operation debt. When the debt is a time barred one, there is no legal obligation on the part of the corporate debtor to pay the same and due to lapse of time the right to sue is barred by limitation, hence, in this case, there is no debt as defined in the IB Code.

13. In view of the above discussion, this Bench is of the view that the debt is time barred and unenforceable and hence the petition is dismissed.”

7. The questions that arises for consideration is :

“Whether the application preferred by appellant - operational creditor is barred by limitation?”

8. Learned counsel for the appellant contended that law of limitation is not applicable and referred to decision of this Appellate Tribunal in **“Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd.”** of Company Appeal (AT) (Insolvency) No.44/2017.

9. In spite of service of notice the respondent has not appeared to contest this appeal. The pleading made in the company petition and the appeal has not been controverted.

9. In ‘Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd.’, similar plea was taken by the appellant of the

said appeal. This Appellate Tribunal by Judgement dated 11th August, 2017 observed and held as follows:

“The next ground taken on behalf of the appellant is that the claim of the respondent is bared by limitation, as the Debentures were matured between the year 2011 – 2013 is not based on Law. There is nothing on the record that Limitation Act, 2013 is applicable to I&B Code. Learned Counsel for the appellant also failed to lay hand on any of the provision of I&B Code to suggest that the Law of Limitation Act, 1963 is applicable. The I&B Code, 2016 is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution Process. If there is a debt which includes interest and there is default of debt and having continuous course of action, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted.”

10. In *Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd.*, Civil Appeal No.10711 of 2017, the parties raised before Hon’ble Supreme Court the question of application of Limitation Act for initiation of Corporate Insolvency Resolution Process under I&B Code. The Hon’ble Supreme Court by order dated 23rd August 2017 while dismissing the appeal observed as:

“In view of the this, we find no merit in the appeal.”

Accordingly, the appeal is dismissed keeping the question of law viz. whether the Limitation Act would apply to this proceeding, open.”

11. In this case even if it is accepted that the Limitation Act, 1963 is applicable for initiation of Corporate Insolvency Resolution Process, in such case Article 137 of the Limitation Act, 1963 will be applicable, which is quoted below:

<i>“Description of application</i>	<i>Period of Limitation</i>	<i>Time from which period begins to run</i>
<i>Any other application for which no period of limitation is provided elsewhere in this division.”</i>	<i>Three years</i>	<i>When the right to apply accrues.</i>

12. Insolvency and Bankruptcy Code, 2016 has come into force with effect from 1st December, 2016. Therefore, the right to apply under I&B Code accrues only on or after 1st December, 2016 and not before the said date (1st December, 2016). As the right to apply under section 9 of I&B Code accrued to appellant since 1st December, 2016, the application filed much prior to three years, the said application cannot be held to be barred by limitation.

13. In so far as the application under section 9 of the Arbitration and Conciliation Act, 1996 preferred by appellant, it has been specifically pleaded by the appellant and not disputed by the respondent that the appellant filed an application to withdraw the application under section 9 of the Arbitration Act, expressly reserving liberty to institute fresh proceeding for interim relief.

In such circumstances and as no arbitral dispute is pending, the application cannot be rejected.

14. There is nothing on the record to suggest that the respondent disputed the claim prior to issuance of notice under section (1) of section 8 of the I&B Code. In the aforesaid background, we are of the view that the Adjudicating Authority, Mumbai Bench was not correct in holding that the application was barred by limitation. For the said reason the order rejecting the application cannot be sustained.

15. We accordingly set aside the impugned order dated 04.05.2017 passed by the Adjudicating Authority, Mumbai Bench in CP No.464/I&BP/NCLT/MAH/2017 and remit the case for admission after notice and hearing the parties. If the application under section 9 is otherwise complete, the Adjudicating Authority will admit the application. In case the application is incomplete or defective, the Adjudicating Authority will allow time to the appellant to complete the documents/remove the defect in terms of proviso to sub-section (5) of section 9 of I&B Code. The Adjudicating Authority is required to pass a reasoned order.

16. The appeal is allowed with aforesaid observations and directions. However, in the facts and circumstances of the case, there shall be no order as to costs.

(Justice S.J. Mukhopadhaya)
Chairperson

Justice A.I.S. Cheema)
Member (Judicial)

(Balvinder Singh)
Member (Technical)

New Delhi
17th October, 2017
/rs/