NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 132 of 2020

[Arising out of Order dated 11th December, 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Division Bench-I, Chennai in IBA/312/2019]

IN THE MATTER OF:

C R Badrinath
Residing at "Manonmani Terrace"
2nd Floor, 148/55, Greenways Road
R.A. Puram, Chennai – 600028 **...Appellant**

Versus

1. Eight Capital India (M) Limited
Having its registered office at:
C/o G Fin Corporate Services Ltd.
6th Floor, G Fin Tower
42 Hotel Street, Cybercity
Ebene 72201, Mauritius

Through:

Mr Indranil Das / Mr Vijay Lavhale
Authorised persons to accept
Service of process
12th Floor, Crompton & Greaves House
Dr Annie Besant Road
Near Chroma Show Room
Century Bazaar
Mumbai – 400030 **...Respondent No.1**

2. M/s Wellknit Apparels Private Limited
Through the Interim Resolution Professional
Mr A R Ramasubramania Raja
Phase II, Plot No. A11 to A14
MEPZ SEZ
Chennai – 600045

Also at:

3. Sundaram Brothers Layout
Opp to All India Radio
Trichy Road
Ramanathapuram P.O.
Coimbatore – 641045 **...Respondent No.2**

Present:

For Appellant : **Mr Krishnendu Datta and Mr Ravi Raghunath, Advocates**

For Respondent : **Mr Mohit D. Ram and Mr Sachin Kaushal, Advocate for R-1**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal emanates from the Order dated 11th December 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Division Bench-I, Chennai in IBA/312/2019, whereby the Adjudicating Authority has admitted the Insolvency Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code'**). The Parties are represented by their original status in the Company Petition for the sake of convenience.

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

The Applicant/Financial Creditor is a Debenture Holder by virtue of a Master Facility Agreement and Debenture Subscription Agreement dated 21st May 2007 executed between the Respondent No.1 and 2 (R-1 and R-2). Based on these Agreements, a sum of Rs 15 crores was disbursed to the R-2 Company, and the R-1 Company subscribed to two series of fully convertible debentures with each of it for 84 months. As per Clause 1 of Schedule-V of the Debenture Subscription Agreement, during the subsistence of the Agreement and until the date on which fully convertible debentures are converted into equity shares, the fully convertible debentures shall earn

interest quarterly @ 12% per annum and additional 6% per annum in the event of delay in payment of the amount due.

3. The Respondent No.1, herein claims that it has been the debenture holder all along and that the said debentures were never converted into equity. R-1 is shown as Debenture Holder in the balance sheet of R-2/ Corporate Debtor for Financial Year 2016-17 and under the heading "long term borrowings" reflecting the debt repayable to the R-1.

4. The impugned Order is being assailed only on the ground that the R-1's Application is barred by limitation. Since no other point is contended by the Appellant during the hearing, therefore the instant Appeal is being decided only on the issue of limitation.

5. We have heard the arguments of the Learned Counsel for the parties and perused the records.

6. Admittedly, the Financial Creditor and the Corporate Debtor had entered into two agreements viz. Debenture Subscription Agreement and Master Facility Agreement dated 21st May 2007. As per the terms of Agreement, the subscription to the debentures was done for 84 months. Interest @ 12% p.a. and in case of default, an additional interest of 6% p.a. was required to be paid. In the entire duration of the Agreement, the Corporate Debtor paid interest only once, i.e. for the Quarter ending 31st September 2007. The Respondent further contends that the Corporate Debtor defaulted in payment of interest for rest of the period till 20th May 2014, i.e. the expiry of the period as stipulated in the Agreement. The

Corporate Debtor also failed to convert the debentures into equity share capital even after the expiry of the period.

7. The Corporate Debtor has claimed that the Memorandum of Agreement dated 18th April 2017 constituted a separate contract distinguishable from the Master Facility Agreement and it supersedes the earlier contract, and the contract clearly explains the mode and the time of performance of the respective obligations.

8. The Corporate Debtor also contends that the Applicant claims himself to be a Financial Creditor. Although the facility extended in the name of fully convertible debenture does not contemplate any repayment of the amount. It further contends that by conversion of fully convertible debenture into equity shares, the Applicant is a stakeholder in equity and not a Financial Creditor.

9. The Adjudicating Authority, relying on the definition of Financial Debt under Section 5(8) of the Code, has observed that any amount raised pursuant to the issuance of debentures falls within the ambit of "Financial Debt". Therefore, the principal and interest amount are liable to be paid by the Corporate Debtor to the Applicant under the Master Facility Agreement. Further, the Corporate Debtor has acknowledged the Applicant as "Debenture Holder" in its balance sheet for the Financial Year ending 2016-17, which establishes that a "Financial Debt" is due to the Financial Creditor.

10. Based on the above observation, the Adjudicating Authority has admitted the Application of the Respondent/Financial Creditor under Section 7 of the Code, which is under challenge before this Tribunal.

11. The Impugned Order is assailed mainly on the ground of limitation. However, the Adjudicating Authority has not given any finding concerning the issue of limitation.

12. On perusal, it is noticed that the Form-1 of the Application, (Part 4 at serial No.2) records the date of default as 31st December 2007. This Application under Section 7 is filed on 26th February 2019, i.e. after more than 11 years. The Financial Creditor has also admitted in the statutory Form-1 that the consequence of default is that all the interest amount became due and payable forthwith. Hence, the period of limitation admittedly started on 31st December 2007.

13. It is further submitted by the Appellant that even if the contention of the Respondent/Financial Creditor is accepted, the amount becomes due on 20th May 2014. Even in such a scenario, the present Insolvency Application is time-barred, since it is filed on 26th February 2019, i.e. after four years and nine months.

14. The Appellant has further relied on the statutory provision under Section 3 of Limitation Act, 1963, which provides that every Application made after the prescribed period shall be dismissed, even if limitation has not been set up as a defense.

15. This Appellate Tribunal in case of Gauri Prasad Goenka Vs. Punjab National Bank & Others in Company Appeal No. 28 of 2019 and judgment dated 08th November 2019 has held that Section 3 of the Limitation Act is a mandatory provision and it is obligatory on the Tribunal to examine the issue of limitation. Further, if the claim is barred by limitation, the Corporate Debtor cannot be held to have committed a default.

16. The Learned Counsel for the Appellant has further placed reliance on the case of B.K. Educational Services (P) Limited Vs. Parag Gupta & Associates (2018) SCC OnLine SC 1921 wherein Hon'ble the Supreme Court has laid down the law regarding applicability of the Limitation Act.

17. In case of ***"B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates, (2019) 11 SCC 633: (2018) 5 SCC (Civ) 528: 2018 SCC OnLine SC 1921 at page 662*** Hon'ble the Supreme Court of India held:

> ***"38.*** *It will be seen from a reading of Section 8(2)(a) that the corporate debtor shall, within a period of 10 days of the receipt of the demand notice, bring to the notice of the operational creditor the existence of a "dispute". We have seen that "dispute" as defined in Section 5(6) includes a suit or arbitration proceeding relating to certain matters. Again, under Section 8(2)(a), the corporate debtor may, in the alternative, disclose the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice. It is clear therefore, that at least in the case of an operational creditor, "default" must be non-payment of amounts that have become due and payable in law. The "dispute" or pendency of a suit or arbitration proceedings would necessarily bring in the Limitation Act, for if a suit or arbitration proceeding is*

time-barred, it would be liable to be dismissed. This again is an important pointer to the fact that when the expression "due" and "due and payable" occur in Sections 3(11) and 3(12) of the Code, they refer to a "default" which is non-payment of a debt that is due in law i.e. that such debt is not barred by the law of limitation. It is well settled that where the same word occurs in a similar context, the draftsman of the statute intends that the word bears the same meaning throughout the statute (see Bhogilal Chunilal Pandya v. State of Bombay [Bhogilal Chunilal Pandya v. State of Bombay, 1959 Supp (1) SCR 310: AIR 1959 SC 356: 1959 Cri LJ 389], Supp SCR at pp. 313-14). It is thus clear that the expression "default" bears the same meaning in Sections 7 and 8 of the Code, making it clear that the corporate insolvency resolution process against a corporate debtor can only be initiated either by a financial or operational creditor in relation to debts which have not become time-barred."

The legislature did not contemplate enabling a creditor who has allowed the period of limitation to lapse to allow such delayed claims through the mechanism of the Code, and the expression "debt due" in the definition section of the Code would obviously only refer to debts "due and payable" in law, i.e., the debts are that not time-barred.

18. Admittedly, in this case, the Applicant/Financial Creditor has stated that default started from 31st December 2007 and the Application for initiation of Corporate Insolvency Resolution Process is filed on 26th February 2019. The Financial Creditor has also admitted that the consequence of default is that all the interest amount became due and payable immediately. Hence, the period of limitation began from 31st December, 2007. As per the terms of Agreement, the subscription to the

debentures was done for a period of 84 months. Interest @ 12% p.a. and in case of default, an additional interest of 6% p.a. was required to be paid. In the entire duration of the Agreement, the Corporate Debtor paid interest amounting to Rs. 39,86,371/- only once, i.e. for the Quarter ending 31st September 2007. It is further contended that the Corporate Debtor defaulted on the payment of interest till the time stipulated in the Agreement, i.e. up to 20th May 2014. Thus, it is clear that the default started on 31st December 2007. Thereafter, the default continued till 20th May 2014, i.e. the expiry of the period as stipulated in the Agreement. In the case of B.K. Educational (supra) Hon'ble the Supreme Court has held that:

> *"42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the Application, the Application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such Application."*

Therefore, the right to sue accrued from the moment, default first occurred on 31st December 2007. Since the default has occurred over three years prior to the date of filing of the Application, it would be barred by limitation under Article 137 of the Limitation Act.

19. The Learned Counsel for the Financial Creditor submits that bar of limitation cannot be invoked when the Corporate Debtor had acknowledged

the outstanding debt in writing by entering into a Memorandum of Agreement on 18th April 2017. Once there is an acknowledgement in writing, limitation period get renewed and time to initiate action runs from the date of written acknowledgement.

20. The Respondent has placed reliance on the law laid down by Hon'ble the Supreme Court in the case of Food Corporation of India Vs. Assam State Cooperative Marketing & Consumer Federation Limited (2004) 12 SCC 360 on page 366. In the above case, Hon'ble, the Supreme Court of India has held:

> *"14. According to Section 18 of the Limitation Act, an acknowledgement of liability made in writing in respect of any right claimed by the opposite party and signed by the party against whom such right is claimed made before the expiration of the prescribed period for a suit in respect of such right has the effect of commencing a fresh period of limitation from the date on which the acknowledgement was so signed. It is well settled that to amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act, it need not be accompanied by a promise to pay either expressly or even by implication."*

21. In the abovementioned case, Hon'ble the Supreme Court has clearly held that if an acknowledgement of liability is made in writing before the expiration of the period of limitation, then the limitation period gets extended as per statutory provision under Section 18 of Limitation Act. In this case, since default first started in December 2007 and after a lapse of 11 years, acknowledgement of liability in the form of Memorandum of

Agreement has been executed on 18th April 2017. Therefore in this case, a fresh period of limitation will not accrue w.e.f. 18th April 2017.

22. The Learned Counsel for the Corporate Debtor further placed reliance on the case-law of Hon'ble Supreme Court of India in Jignesh Shah v. Union of India, (2019) 10 SCC 750.

23. In the case of ***"Jignesh Shah v. Union of India, (2019) 10 SCC 750: (2020) 1 SCC (Civ) 48: 2019 SCC OnLine SC 1254 at page 770*** Hon'ble the Supreme Court of India has reiterated the law laid down in the case of B.K. Educational (supra). The Learned Counsel for the Respondent has placed reliance on para 21 of the said judgment.

> *"21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgment of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding."*

In the abovementioned case, Hon'ble the Supreme Court has clearly held that when the time for limitation begins to run, it can only be extended in the manner provided under the Limitation Act. For example, an acknowledgment of liability under Section 18 of the Limitation Act would

certainly extend the limitation period, but a suit of recovery which is a separate and independent proceeding, in no manner impacts the limitation for winding-up proceeding.

The arguments advanced by the Appellant finds support from the above case law, as a suit filed for recovery of the interest amount is for a separate and distinct remedy. Therefore, it will not have any impact on the IBC proceedings

24. Hon'ble the Supreme Court of India in case of Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company (2019) SCC OnLine SC 1239 has held that an application which is filed under Section 7 of the Code would fall only within the residuary Article 137 of the Limitation Act and Article 62 of the Limitation Act will not be applicable.

25. The Learned Counsel for the Respondent/Corporate Debtor submits that the plea of limitation was not raised before the Adjudicating Authority. Therefore, the issue of limitation cannot be raised at the Appellate stage. Section 3 of the Limitation Act provides that every Application filed after the prescribed period of limitation shall be dismissed even when limitation has not been set up as a defence. In the circumstances, even if the Corporate Debtor has not raised the issue of limitation, then also it can be raised at the Appellate stage.

26. Thus, in the light of the above discussion, we are of the considered opinion that the Adjudicating Authority erred in admitting the Application

filed under Section 7 of the I&B Code, even though it was time-barred. Therefore, the Appeal succeeds, and the impugned Order is set aside.

27. We further direct the Adjudicating Authority to pass appropriate Order regarding payment of CIRP cost. The Corporate Debtor Company shall be governed by its Board of Directors.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

[Alok Srivastava]
Member (Technical)

NEW DELHI
24th JULY, 2020

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