

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 68 of 2019**

[Arising out of Order dated 14<sup>th</sup> December, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench in C.P. (IB) No.103/BB/2018]

**IN THE MATTER OF:**

Sh. B. Prashanth Hegde,  
Suspended Managing Director,  
Metal Closures Pvt. Ltd.  
S/o Late Rathnakar Hegde,  
Aged about 66 years  
R/o No.261 Indira Nagar,  
Bangalore-560038.

.... Appellant

Vs

1. State Bank of India,  
Stressed Assets Management Branch  
2<sup>nd</sup> Floor, LHO Campus,  
No. 65, St. Mark's Road,  
Bangalore – 560 001.

2. M/s. Metal Closure Pvt. Ltd.  
Through Mr. Abhishek Nagori, IRP,  
No.39/4-B, 12<sup>th</sup> KM,  
Kanakpura Main Road,  
Bangalore-560062.

.... Respondents

**Present:**

**For Appellant: Mr. Sanjay R Hegde, Senior Advocate with  
Mr. Pranjal Kishore and Mr. Anmol Stephen,  
Advocates.**

**For Respondent: Mr. Lakshman R.S., Advocate for Respondent  
No.1.**

**Mr. Mukund P. Unny, Advocate for  
Respondent No.2.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

M/s State Bank of India on behalf of Consortium Banks Assets Management Branch, Bangalore filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the '**I&B**

**Code**) for initiation of ‘Corporate Insolvency Resolution Process’ against M/s. Metal Closure Pvt. Ltd. (‘Corporate Debtor’). The Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench vide impugned order dated 14<sup>th</sup> December, 2018 having admitted the application, the Appellant-Director has challenged the order.

2. The case of the Appellant is that the State Bank of India granted credit facilities to the ‘Corporate Debtor’ since 2007. Subsequently, the Corporation Bank started granting credit facilities to the ‘Corporate Debtor’ since 14<sup>th</sup> August, 2009. On 31<sup>st</sup> January, 2010, the account of the ‘Corporate Debtor’ was classified as an ‘Non Performing Asset’ (for short the ‘**NPA**’) by State Bank of India. However, it was restructured on 17<sup>th</sup> February, 2010 and no notice of classification was given to the ‘Corporate Debtor’.

3. The Punjab National Bank entered the consortium on 26<sup>th</sup> June, 2010 by sanctioning certain facilities to the ‘Corporate Debtor’. The UCO Bank also sanctioned working capital cash credit and Letter of Credit Limit to the ‘Corporate Debtor’ on 11<sup>th</sup> April, 2012.

4. The ‘Corporate Debtor’s’ financial rating was done on 2<sup>nd</sup> July, 2013 by credit rating agency, ICRA. The relevant portion of such report is reproduced below: -

*“The company has been regular in servicing all its principal and interest obligations in a timely manner and there has not been any delay or default (a missed or delayed payment in breach of the agreed terms of the issue) during the specified period. We also confirm that there has been no re-schedulement in regard to any of company’s debt obligations. We also confirm that there has been no overdrawal of the drawing power sanctioned by the bank for a period of more than 30 consecutive days in case of bank facilities which do not have scheduled maturity/ repayment dates.”*

5. According to the Appellant, a Joint Lenders Meeting was held between the Members of the Consortium on 28<sup>th</sup> April, 2014 with the 'Corporate Debtor'. Its Minutes recorded that on 31<sup>st</sup> March, 2014, the Company's IRAC (Income Regulation and Asset Classification) status at that time was 'Standard Asset'. The Minutes also recorded that APITCO, State Bank of India's external consultant had recommended that the working capital limits of the Company be enhanced. In fact, the 'Corporate Debtor' had been making regular payments of the principal amount as well as interest to the Consortium and thereby a total sum of Rs.101.14 crores was paid to the Consortium between 2010 to 2015.

6. Further, case of the Appellant is that on 21<sup>st</sup> June, 2014 the Consortium entered into a Master Joint Lenders Forum Agreement to deal with the subject account. In the meantime, it was decided that a Concurrent Auditor be appointed.

7. The 'Corporate Debtor' was declared to be a NPA by the State Bank of India on 28<sup>th</sup> May, 2014 and the Punjab National Bank also declared the account of 'Corporate Debtor' as NPA on 30<sup>th</sup> June, 2014. The Deputy General Manager, State Bank of India, in view of the failure of re-structuring, requested that the date of NPA of the 'Corporate Debtor' be changed to 31<sup>st</sup> January, 2010. Such suggestion was approved on 10<sup>th</sup> July, 2014.

8. Learned Counsel appearing on behalf of the Appellant relied on the aforesaid decision to change the date of NPA to 31<sup>st</sup> January, 2010 to contend that default, if any, occurred prior to 31<sup>st</sup> January, 2010. According to the learned Counsel, more than three years were passed since 31<sup>st</sup> January, 2010, the application under Section 7 of the I&B Code filed by the State Bank of India was time barred.

9. It was submitted that the Consortium held meeting on 22<sup>nd</sup> July, 2014 and decided to appoint a Concurrent Auditor at Bangalore Unit to oversee all

payments and receipts. Further, Security Guards were also appointed at the Bangalore Unit of the 'Corporate Debtor'.

10. The State Bank of India by letter dated 1<sup>st</sup> August, 2014 intimated the Sankaran and Krishnan, Chartered Accountants, appointing them as Concurrent Auditors for Bangalore Plant. The State Bank of India, thereafter, on 5<sup>th</sup> August, 2014 intimated the 'Corporate Debtor' that the State Bank of India had arranged for a Concurrent Auditor and Security Guards at Bangalore and Kunigal Factories w.e.f. 1<sup>st</sup> August, 2014. On the same day, the State Bank of India intimated the Director, Kashi Security and Consulting Pvt. Ltd. authorizing it to deploy Security Guards at Bangalore and Kunigal Plants of the 'Corporate Debtor'. It was objected by the 'Corporate Debtor' on 7<sup>th</sup> August, 2014.

11. The case of the Appellant is that the State Bank of India issued notice under Section 13(2) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the '**SARAFESI Act**') on 12<sup>th</sup> August, 2014, calling upon the 'Corporate Debtor' to repay a sum of Rs.71,27,47,889/-. The 'Corporate Debtor' was also declared to be a 'Non Performing Asset' by Corporation bank on 10<sup>th</sup> October, 2014. Notice of restoration of NPA was issued on 14<sup>th</sup> October, 2014.

12. The UCO Bank also declared the 'Corporate Debtor' a NPA on 31<sup>st</sup> December, 2014, which was followed by 'Possession Notice' given by the State Bank of India under Rule 8(1) of the Security (Interest) Rules, 2012 on 20<sup>th</sup> February, 2015 in relation to the Bangalore Unit of the 'Corporate Debtor' on 20<sup>th</sup>/21<sup>st</sup> February, 2015. However, the possession notice was withdrawn on 22<sup>nd</sup> June, 2015, but the Bank continued to be in physical possession of the Plants. However, Concurrent Auditors kept vigilant on the audit of the 'Corporate Debtor'.

13. The State Bank of India issued a letter on 7<sup>th</sup> July, 2015 withdrawing the notice dated 12<sup>th</sup> August, 2013 issued earlier under Section 13(2) of the SARAFESI Act.

14. The Appellant also lodged a complaint with respect to cheating and fraud by the Company's CFO Mr. Mahesh Hegde and others against the 'Corporate Debtor' at Ashok Nagar Police Station. The State Bank of India filed OA No.21/2016 seeking recovery of a sum of Rs.200,07,06,237.21/- before the Debts Recovery Tribunal (hereinafter referred to as the '**DRT**'). In the original application, the 'Corporate Debtor' had also filed its claim seeking payment of Rs.1299 crores.

15. Against the application of the State Bank of India, the 'Corporate Debtor' moved in appeal under Section 17 of the SARAFESI Act on 28<sup>th</sup> January, 2016 seeking to quash the taking over possession of the Plants of the 'Corporate Debtor' and appointment of Concurrent Auditor.

16. It is informed that OA filed by the State Bank of India and the SARAFESI Act proceedings filed by the 'Corporate Debtor' are still pending before the DRT, Bangalore. On account of the repeated adjournments, the Bank ultimately moved an application under Section 7 of the I&B Code.

17. It appears that a FIR was lodged by the 'Corporate Debtor' and the same was registered against the employees of the Bank and other accused. The charge-sheet in the above case was filed before the ACMM, Bangalore. The application was submitted by the 'Financial Creditor' before the Adjudicating Authority (National Company Law Tribunal) Bangalore Bench on 23<sup>rd</sup> July, 2018 showing a default of Rs.733,84,00,000/-.

18. Subsequently, the State Bank of India has sought amendment in the petition before the Adjudicating Authority to change the amount of default mentioned in the original petition as Rs.733,84,00,000/- to Rs.282,02,71,568.08/-, which was allowed by the Adjudicating Authority on

11<sup>th</sup> July, 2018. In the FIR also charge-sheet was submitted, followed by the impugned order of admission passed on 14<sup>th</sup> December, 2018.

19. Learned Counsel for the Appellant submitted that as the application under Section 7 of the I&B Code filed by the Bank was barred by limitation, no debt is payable by the 'Corporate Debtor' in the eyes of law.

20. According to the learned Counsel for the Appellant, the Bank had been in critical position of the management of the Corporate Debtor since 2015. It had already taken steps under Section 13(4) for enforcement of security interest and also taken action under Section 15 to take over the Management of the Company under the SARFAESI Act. It was submitted that once, possession in terms of Section 13(4) is taken, the asset of the Company vests with the Bank as it is the owner of the asset. Reliance has been placed on judgment of the Hon'ble Supreme Court in "**Transcore vs. Union of India**" – (2008) 1 SCC 125. It was submitted that in fact, the Management of the Company was actually taken over.

21. We have heard learned Counsel for the Appellant and learned Counsel appearing on behalf of the Respondents, who have opposed the prayer and taken plea that the claim was not barred by limitation.

22. The records suggest that the State Bank of India on 1<sup>st</sup> August, 2014 intimated the Partner of one Sankaran & Krishnan, Chartered Accountants, appointing them as Concurrent Auditors for one of the Unit of the 'Corporate Debtor' is extracted below: -

*"V.V. Krishnamurthy,  
Partner,  
Sankaran & Krishnan,  
12/A, First Floor,  
17<sup>th</sup> Cross, 29<sup>th</sup> Main,  
JP Nagar VI Phase,  
Bangalore-560078.*

*AMCB/RM-2/683                      01.03.2014*

*Dear Sir,*

M/S METAL CLOSURES P LTD. BANGALORE (MCPL)  
CONCURRENT AUDIT

*With reference to the above, we appoint you as concurrent auditor for the captioned unit financed by a consortium, with immediate effect. The scope of audit would be as under.*

*I. Verification of Cash Flows: -*

*a) Inflows*

*Monitoring all the cash inflows to the company on an ongoing basis so as to ensure that all inflows are properly accounted for and are credited only to their escrow account maintained with us.*

*(b) Outflows:-*

*Monitoring of all payments made to from the company's accounts in order to ensure that no funds are diverted and are used only for the purpose of working capital i.e. raw materials, stores, consumables etc and statutory payments. No payments are to be made to NBFCs, unsecured creditors, unsecured loans and on account of capital goods.*

*II. Inventory*

*Monitoring purchase of all raw materials and their accounting in the company's books.*

*III. Compliance and Verification*

- (i) Compliance with regard to irregularities pointed out by Stock Auditors.*
- (ii) Verification of statement being provided to the consortium banks, to ensure that factual position of stocks and receivable is furnished without any distortion.*

(iii) *Monitoring payments to managerial officials to ensure that they are in tune with past salary/ remuneration paid.*

IV. *Fixed Assets: Monitoring of Sale/ Transfer of fixed assets. Information regarding sale of fixed assets should be brought to our notice immediately.*

V. *Monitoring of Consortium Decisions and submission of reports*

(i) *Preparation of monitoring report for submission to Consortium Leader in the prescribed format, at monthly or at such required periodicity.*

(ii) *Report for a particular month to be submitted by 10<sup>th</sup> of the next month.*

VI. *Visits to the units outside Bangalore*

*Auditors to visit the units located outside Bangalore as per the advise of the Bank.*

VII. *General*

a. *The accounts maintained by the company at Bangalore, Kunigal and Himachal Pradesh should be monitored from Bangalore.*

b. *The Auditors shall carry out the audit for minimum period of 3 working days in a week.*

c. *Travelling, Conveyance, Boarding Expenses, if any incurred (applicable for unit visits outside Bangalore) would be payable as per the actual expanses over and above the monthly fees.*

d. *a consolidated Audit Fee of Rs.50,000 per month, inclusive of applicable Service Tax would be paid as*



*remuneration, payable on or before 7<sup>th</sup> of the following month.*

*e. We reserve our right to modify the terms of reference at any point in time.*

*f. The services of the auditor may be terminated by the Bank by giving a notice 15 days in advance.*

*2. Please return the duplicates of this letter, enclosed, duly signed by you in token of your acceptance of the terms & conditions of appointment mentioned there.*

*Yours faithfully,*

*Sd/-*

*Asst. General manager & RM-2.”*

23. It is followed by letter dated 5<sup>th</sup> August, 2014, issued by the State Bank of India to The Director, Kashi Security and Consulting Pvt. Ltd. to deploy Security Guards to monitor the movement of the goods in & out of the factory etc. as extracted below: -

*“The Director,  
Kashi Security and Consulting Pvt. Ltd.  
3332, 13<sup>th</sup> Main,  
6<sup>th</sup> Cross, HAL 2<sup>nd</sup> Stage,  
Bangalore-560038.*

*SMCB / RM-2 / MCPL/ 05.08.2014*

*Dear Sir,*

*Metal Closures Pvt. Limited (MCPL)  
Deployment of security*

*With reference to the above, we authorize you to deploy security guard at the premises of MCIL, at the addresses given below:*

*a. No.39/4B, Dodda Kallasandra, Kanakapura Raod,  
Bangalore – 560 062. Tel-2632 0501*

b. Plot no.37 & 38, KIADB Industrial Area, Kunigal, Tumkur.-572 130, Tel-0813 222 0349

2. The terms and conditions of deployment are as under:

a. The security guards should monitor the movement of good in & out of the factory and details viz. Particulars of goods, invoice no, date etc should be noted.

b. While manufactured products can be permitted to be transported out of the factory, no machinery should be permitted to be shifted without our permission in writing. In case of any attempt to shift machinery, the undersigned should be informed immediately by the guards.

c. 3 guards will be deployed at each of the premises, @one guard in a shift of 8 hrs.

d. The rate per security guard deployed at Kunigal plant will be Rs.12,350.00 per month + Service Tax

e. The rate per security guard deployed at Bangalore plant will be Rs.14276.00 per month + Service Tax.

f. This arrangement can be cancelled by us by giving a notice 30 days in advance.

3. The contact person in MCIL is Mr. Mahesh Hegde, Chief Financial Officer. Contact No. 98450 37701.

4. In case of any dispute with company officials please contact following officials of our bank:

Mr. Manjunath Service Officer – Phone: 080 25943727 Mobile: 9845226873

Mr. Ramesh AGM & RM – Phone: 080 25943743 Mobile: 9980030303

Yours faithfully

Sd/-  
Asst. General Manager & RM-2”

24. The aforesaid action on the part of the State Bank of India was opposed by the 'Corporate Debtor' by letter dated 7<sup>th</sup> August, 2014, whereby it was intimated that there was no necessity to engage any Security Guards as the 'Corporate Debtor' has Security Guards from M/s. Eagle Eye Security, serving the Company since last 12 years. By a subsequent letter dated 11<sup>th</sup> August, 2014, the 'Corporate Debtor' intimated the State Bank of India that the 'Corporate Debtor' being the owner of the premises, the Bank has no right to appoint the Security, unless physical possession of the Unit is taken over along with secured asset under section 13(4) of the SARFAESI Act, 2002.

25. Records suggest that notice was issued to the 'Corporate Debtor' by State Bank of India on 12<sup>th</sup> August, 2014 under Section 13(2) of the SARFAESI Act, intimating them that the accounts have been classified as 'NPA' on 28<sup>th</sup> May, 2014. The 'Corporate Debtor' was asked to deposit the outstanding liability owing to the Bank amounting to Rs.71,27,47,889/-.

26. The State Bank of India, subsequently, on 21<sup>st</sup> February, 2015 giving a reference to notices issued by the Consortium of Bank under Section 13(2) of the SARFAESI Act dated 12<sup>th</sup> August, 2014, 24<sup>th</sup> July, 2014 and 1<sup>st</sup> December, 2014, intimated the 'Corporate Debtor' that since the 'Corporate Debtor' failed to make payment, the possession of the properties mortgaged to the Consortium of Banks consisting of State Bank of India, Punjab National Bank, Corporation bank and UCO Bank as detailed in the schedule were taken over on 20<sup>th</sup> February, 2015 and the notice thereof was given to the 'Corporate Debtor' by 'General Public Notice' by publication in the newspaper 'The New Indian Express' and 'Samyuktha Karnatka' on 21<sup>st</sup> February, 2015. The borrower/ Guarantors in particular and the public in general were cautioned not to deal with the properties of the 'Corporate Debtor' as referred to therein. The copies of 'Possession Notice' were also issued in the newspaper on 21<sup>st</sup> February, 2015.

27. We have already noticed that the State Bank of India filed one OA No.21/2016 on 28<sup>th</sup> December, 2015 for recovery of sum of Rs.200,07,06,237.21 before the DRT. In the same way, the 'Corporate

Debtor’ has also filed counter claim, seeking payment of Rs.1299 crores. Against the action of the Bank, the ‘Corporate Debtor’ also filed an appeal under Section 17 of the SARAFAESI Act on 28<sup>th</sup> January, 2016. Both, the aforesaid OA and application under Section 17 filed by the ‘Corporate Debtor’ are pending before the DRT.

28. The records also suggest that the properties of the ‘Corporate Debtor’ were mortgaged, its ‘Possession Notice’ was given, followed by possession taken by the State Bank of India and other Banks.

29. In the aforesaid background, it is to be determined, as to whether the application under Section 7 of the I&B Code was barred by limitation and, if not, whether the claim of the Banks was barred by limitation to hold that there is no debt payable in the eyes of law?

30. For computing the period of limitation of an application under Section 7, one should refer to Article 137 of Part II of Third Division of the Schedule of Limitation Act, 1963, as quoted below: -

*“PART II – OTHER APPLICATIONS*

<i>Description of application</i>	<i>Period of limitation</i>	<i>Time from which period being to run</i>
<i>137. 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>

31. The right to apply under Section 7 of the I&B Code, accrued to the Bank only since 1<sup>st</sup> December, 2016, i.e., when I&B Code came into force. From the aforesaid provision, we find that the application under Section 7 is not barred by limitation.

32. To find out, as to whether the claim is barred by limitation or not, one should refer to Articles 61 & 62 of Part-V of First Division. It relates to

mortgage of property (Article 61) and enforcement of payment of money secured by a mortgage (Article 62), as quoted below: -

*“PART V – SUITS RELATING TO IMMOVABLE PROPERTIS*

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period being to run</i>
<p>61. <i>By a mortgagor—</i></p> <p>(a) <i>to redeem or recover possession of immovable property mortgaged.</i></p> <p>(b) <i>to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration</i></p> <p>(c) <i>to recover surplus collection received by the mortgagee after the mortgage has been satisfied.</i></p>	<p>Thirty years</p> <p>Twelve years</p> <p>Three years</p>	<p>When the right to redeem or to recover possession accrues.</p> <p>When the transfer becomes known to the plaintiff</p> <p>When the mortgagor re-enters on the mortgaged property.</p>
<p>62. <i>To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.</i></p>	<p>Twelve years</p>	<p>When the money sued for becomes due.”</p>

33. Apart from the fact that the Bank had taken action under Section 13(4) of the SARAFAESI Act and the matter is pending before the DRT since 2015-16, there being 12 years of limitation prescribed for enforcement of payment of money secured by a mortgage, we hold that the claim of the none of the Consortium Banks are barred by limitation and, therefore, the ‘Corporate Debtor’ cannot claim that the debt is not payable in the eyes of law.

34. Learned Counsel for the Appellant gave an idea that the Management of the ‘Corporate Debtor’ was taken over by the State Bank of India and, therefore, if there was any default, the Promoters cannot be blamed. However, from the record we find that though, the possession of the one or the other Unit of the ‘Corporate Debtor’ were taken over by the Bank, they

only deployed their Security Guards and appointed Concurrent Auditors, but not taken over the actual Management of the 'Corporate Debtor'. The Management remained with the Promoters of the 'Corporate Debtor', who in fact, opposed the appointment of the Security Guards. In absence of any specific order of taking over the Management in terms of Section 13(4)(b) of the SARAFAESI Act, which includes the right to transfer by way of lease, assignment or sale for realizing of the secured asset, we hold that the Management of the 'Corporate Debtor' continued with the Promoter. Therefore, if there is any default on the part of the 'Corporate Debtor' to pay the debt amount, the Appellant cannot pass the blame on the Bank.

35. In view of the aforesaid finding and in absence of any merit, we are not inclined to interfere with the impugned order of admission dated 14<sup>th</sup> December, 2018. The Appeal is accordingly dismissed. No costs.

[Justice S. J. Mukhopadhaya]  
Chairperson

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

(Kanthi Narahari)  
Member (Technical)

**NEW DELHI**

26<sup>th</sup> September, 2019

Ash