NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 32 of 2020

IN THE MATTER OF:

Mr. Harsukbhai P. Lakkad ....Appellant

Vs.

Bank of Baroda (Erstwhile Dena Bank) & Anr. ....Respondents

Present:

For Appellant: **Ms. Debolina Roy, Ms. Anshula Grover and Mr. Dhaval Mehrotra, Advocates.**

For Respondents: **Mr. Arun Aggarwal and Mr. Anup Kumar Pandey, Advocates.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

'Bank of Baroda' (erstwhile Dena Bank)- ('Financial Creditor') filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) for initiation of the 'Corporate Insolvency Resolution Process' against 'Sunrise Ginning Private Limited'- ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, by impugned order dated 20th November, 2019 admitted the application.

2. Learned counsel for the Appellant submitted that the application under Section 7 filed by the 'Bank of Baroda' is barred by limitation as

default took place on 1st June, 2015 and recorded as NPA on 28th October, 2015.

3. Learned counsel appearing on behalf of the Respondents submitted that the claim is not barred by limitation. The equitable mortgage has already been detailed in the Affidavit under the head 'collateral security'. Therefore, Article 62 of the Limitation Act, 1963 would apply. As admittedly period of limitation 12 years would remain there, the claim cannot be held to be barred by limitation.

Reliance has been placed on the decision of this Appellate Tribunal in ***"A. Maheshwaran v. Stressed Assets Stabilization Fund & Anr.– IV (2019) BC 171 (NCLAT)"***.

4. The 'Dena Bank' (now 'Bank of Baroda') by letter dated 27th September, 2012 sanctioned cash credit hypothecation facility of Rs.9,00,00,000/- in the favour of the 'Corporate Debtor'. Further, the Respondent Bank sanctioned another cash credit hypothecation facility of Rs. 1,50,00,000/- to the 'Corporate Debtor'.

5. As per the account statement filed by the Respondent Bank, the 'Corporate Debtor' defaulted in repayment of the loan facility on 31st May, 2015. The account of the 'Corporate Debtor' was declared NPA on 28th October, 2015.

6. After account was declared NPA, the Bank issued notice on 28th December, 2015 under Section 13(2) of the SARFAESI Act, 2002 to the 'Corporate Debtor' demanding payment of an amount of Rs.12,57,86,554.88/- within 60 days. The 'Corporate Debtor' filed objections on 24.02.2016. The Bank thereafter took steps under Section 13(4) of the SARFAESI Act, 2002 on 8th March, 2016. On 10th March, 2016, the Bank also moved Original Application bearing O.A. No. 239 of 2016 before the Debt Recovery Tribunal, Ahmedabad for recovery of a sum of Rs.13,07,14,630/- taking the date of trigger point of limitation as 30th January, 2014.

7. On 26th July, 2016, the 'Corporate Debtor' disputed its liability and action of the Respondent including Section 14 order passed by the District Magistrate under the SARFAESI Act, 2002 and, therefore, preferred a Securitisation Appeal No. 155 of 2016 before the Debt Recovery Tribunal II Ahmedabad.

8. When the matter remained pending, the Bank moved application under Section 7 on 19th October, 2018 for initiation of the 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor', in which the impugned order has been passed.

9. In ***"B.K. Educational Services Private Limited Vs. Parag Gupta and Associates–(2019) 11 Supreme Court Cases 633"***, the Hon'ble Supreme Court held that for the purpose of Section 7, the

Limitation Act, 1963 is applied from the date of inception of the Code. The Hon'ble Supreme Court noticed Section 238A, inserted by Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, which relates to the 'proceedings' or 'appeals' before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal.

However, as Section 238A does not deal with application under Sections 7, 9 or 10 of the 'I&B Code', the decision of the Hon'ble Supreme Court in ***"B.K. Educational Services Private Limited Vs. Parag Gupta and Associates"*** (Supra) being law of land under Article 141 of the Constitution of India, Article 137 of the Limitation Act, 1963 will be applicable to application under Sections 7, 9 or 10 of the 'I&B Code' since the date of inception of the Code (commencement of the Code i.e. 1st December, 2016).

10. In ***"Jignesh Shah and another vs. Union of India and another – (2019) 10 SCC 750"***, the Hon'ble Supreme Court taking into consideration the fact of filing of an application under Sections 433 and 434 of the Companies Act, 2013 observed as follows:

> *"13. Dr Singhvi relied upon a number of judgments in which proceedings under Section 433 of the Companies Act, 1956 had been initiated after suits for recovery had already been filed. These judgments have held that the existence of such suit cannot be construed as having either revived a*

period of limitation or having extended it, insofar as the winding-up proceeding was concerned. Thus, in Hariom Firestock Ltd. v. Sunjal Engg. (P) Ltd., a Single Judge of the Karnataka High Court, in the fact situation of a suit for recovery being filed prior to a winding-up petition being filed, opined:

> *"8. … To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and dehors that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that debt in the year 1995, and the answer to that question has to be in the negative. That being so, the existence of the suit cannot be construed as having either revived the period of limitation or extended it. It only means that those proceedings are pending but it does not give the party a legal right to institute any other proceedings on that basis. It is well-settled law that the limitation is extended only in certain limited situations and that the existence of a suit is not necessarily one of them. In this view of*

the matter, the second point will have to be answered in favour of the respondents and it will have to be held that there was no enforceable claim in the year 1995, when the present petition was instituted."

14. Likewise, a Single Judge of the Patna High Court in Ferro Alloys Corpn. Ltd. v. Rajhans Steel Ltd. also held:

> *"12. … In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner Company against Opposite Party 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that Court cannot ensure for the benefit of the present winding-up proceeding. The debt having become time-barred when this petition was presented in this Court, the same could not be legally recoverable through this Court by resorting to winding-up proceedings because the same cannot legally be proved under Section 520 of the Act. It would have been altogether a different matter if the petitioner Company approached this Court for winding-up of Opposite Party 1 after obtaining a decree from the Calcutta High Court in Suit No. 1073 of 1987, and the decree remaining unsatisfied, as provided in clause (b) of sub-section (1) of Section 434. Therefore, since the*

> *debt of the petitioner Company has become time-barred and cannot be legally proved in this Court in course of the present proceedings, winding up of Opposite Party 1 cannot be ordered due to non-payment of the said debt."*

Finally, the Hon'ble Supreme Court after taking into consideration the date of default observed: -

> *"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.*
>
> *xxx xxx xxx*

28. A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the company is unable to pay its debts, and that Section 434 is a deeming provision which refers to three situations in which a company shall be deemed to be "unable to pay its debts" under Section 433(e). In the first situation, if a demand is made by the creditor to whom the company is indebted in a sum exceeding one lakh then due, requiring the company to pay the sum so due, and the company has for three weeks thereafter "neglected to pay the sum", or to secure or compound for it to the reasonable satisfaction of the creditor. "Neglected to pay" would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. Equally in the second situation, if execution or other process is issued on a decree or order of any court or tribunal in favour of a creditor of the company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. This again is clearly a fixed date depending on the facts of each case. And in the third situation, it is

necessary to prove to the "satisfaction of the Tribunal" that the company is unable to pay its debts. Here again, the trigger point is the date on which default is committed, on account of which the company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(e) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding-up petition under Section 433(e) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434."

11. Similar issue fell for consideration before the Hon'ble Supreme Court in ***"Gaurav Hargovindbhai Dave vs. Asset Reconstructions Company (India) Limited and another – (2019) 10 SCC 572"***. In the said case, the Hon'ble Supreme Court has noticed that the Respondent was declared NPA on 21st July, 2011. The Bank had filed two OAs before the Debts Recovery Tribunal in 2012 to recover the total debt. Taking into consideration the facts, the Supreme Court held that the default having taken place and as the account was declared NPA on 21st July, 2011, the application under Section 7 was barred by limitation.

For proper appreciation, it is better to note the facts of the judgment as follows: -

"In the present case, Respondent 2 was declared NPA on 21-7-2011. At that point of time, State Bank of India filed two OAs in the Debts Recovery Tribunal in 2012 in order to recover a total debt of 50 crores of rupees. In the meanwhile, by an assignment dated 28-3-2014, State Bank of India assigned the aforesaid debt to Respondent 1. The Debts Recovery Tribunal proceedings reached judgment on 10-6-2016, the Tribunal holding that the OAs filed before it were not maintainable for the reasons given therein.

2. As against the aforesaid judgment, Special Civil Application Nos. 10621-622 were filed before the Gujarat High Court which resulted in the High Court remanding the aforesaid matter. From this order, a special leave petition was dismissed on 27-3-2017.

3. An independent proceeding was then begun by Respondent 1 on 3-10-2017 being in the form of a Section 7 application filed under the Insolvency and Bankruptcy Code in order to recover the original debt together with interest which now amounted to about 124 crores of rupees. In Form-I that has statutorily to be annexed to the Section 7 application in Column II which was the date on which default occurred, the date of the NPA i.e. 21-72011 was filled up. The NCLT applied Article 62 of the Limitation Act which reads as follows:

"Description of suit	Period of limitation	Time from which period begins to run

62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property	Twelve years	When the money sued for becomes due."

Applying the aforesaid Article, the NCLT reached the conclusion that since the limitation period was 12 years from the date on which the money suit has become due, the aforesaid claim was filed within limitation and hence admitted the Section 7 application. The NCLAT vide the impugned judgment held, following its earlier judgments, that the time of limitation would begin running for the purposes of limitation only on and from 1-12-2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force. Consequently, it dismissed the appeal.

4. Mr Aditya Parolia, learned counsel appearing on behalf of the appellant has argued that Article 137 being a residuary article would apply on the facts of this case, and as right to sue accrued only on and from 21-7-2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates [B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633] in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

5. Mr Debal Banerjee, learned Senior Counsel, appearing on behalf of the respondents, countered this by stressing, in particular, para 11 of B.K. Educational Services (P) Ltd. and reiterated the finding of the NCLT that it would be Article 62 of the Limitation Act that would be attracted to the facts of this case. He further argued that, being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

6. Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being "an application" which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by the learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21-7-2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr Banerjee's reliance on para 11 of B.K. Educational Services (P) Ltd., suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.

7. This being the case, we fail to see how this para could possibly help the case of the respondents. Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular article gets attracted. It is well settled that there is no equity

about limitation - judgments have stated that often time periods provided by the Limitation Act can be arbitrary in nature.

8. This being the case, the appeal is allowed and the judgments of the NCLT and NCLAT are set aside."

12. Therefore, it will be evident that for triggering application under Section 7 the date of default is to be noticed for counting the period of limitation under Article 137 of the Limitation Act, 1963.

13. Application in Form-1 (under Section 7) was filed by the Bank on 19th October, 2018. Therein the date of default has been shown as 28th October, 2015 i.e. the date of NPA. This is apparent from the relevant extract of Part IV of Form-1, which reads as follows:

"**Part-IV**

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	Rs.17,13,47,983-88 Ps. As on 30-09-2018 (Rs.11,98,45,722-88 Ps. Principal amount + Rs.4,35,17,417-00 Ps. Uncharged interest from 01-06-2015 to 30-09-2018 +Rs.79,84,844-00 Ps. Penal interest from 01-06-2015 to 30-09-2018). Date on which default occurred is 28-10-2015, on which date the account was classified as "Non Performing Asset" (NPA).

14. To find out as to what is the exact date of default, we have gone through the records enclosed by the Appellant and not disputed by the Respondent Bank.

15. The Appellant has brought on record a photocopy of Original Application No. 239 of 2016 filed on 10th March, 2016 by 'Dena Bank' enclosed as Annexure A-5 before the Debts Recovery Tribunal No.II at Ahmedabad under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. 'Dena Bank' was the Appellant therein. 'M/s. Sunrise Ginning Private Limited' ('Corporate Debtor') was the Defendant No.1. In paragraph 5 (5.l) therein, 'steps taken under Securitisation Act' has been pleaded showing issuance of Notice under Section 13(2) on 3rd September, 2014 on declaration of NPA. The photocopy bears stamp of the 'Dena Bank', as extracted below:

> *"(5.l) <u>STEPS TAKES UNDER SECURITISATION ACT</u>*
>
> *That defendant no.1 has committed default in repayment of the aforesaid facilities of Cash Credit as a result whereof the said facility has been declared as 'non performing assets' as per the Reserve Bank of India's guideline and direction. The applicant-Bank therefore constrained to issue notice under Section 13(2) of the Securitisation and*

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'Securitisation Act') on 3rd September 2014 and demanded the payment of Rs.12,57,86,554/88 under the said facilities within 60 days from the receipt of the said notice by the defendants. Inspite of the service of the said notice, the defendants have failed to make payment of the said total amount of Rs.12,57,86,554/88. The authorized officer of the applicant Bank will take further action under the provision of the SARFAESI Act. The action to be taken by Authorized Officer appointed by the applicant-Bank under the Securitisation Act is independent action and the same will not affect the right of the applicant-Bank to recover the debt by enforcing its remedy under R.D.B Act."

16. From the aforesaid fact, it will be evident that Section 13(2) notice was issued on 3rd September, 2014 as the 'Corporate Debtor' (Defendant No.1) committed default in repayment of the said cash credit facilities after the said facility has been declared as NPA.

17. In paragraph 7(v) of the appeal, the Appellant has specifically pleaded that the date of default as per the Respondent's own statement of account is (i) A/c No. 14111331015- 31.05.2015 and (ii) A/c No. 141113031020- over due on 30.09.2015. In reply Affidavit, the Bank has merely disputed the aforesaid fact and pleaded that the credit facility has already NPA and the same has correctly been declared so.

18. In the year 2016, before the Debt Recovery Tribunal, the Bank had already pleaded that the cash credit facility has been declared as 'NPA' on 30th January, 2014. Such plea has been taken as back as in the year 2016. It emerges from perusal of O.A. No. 239 of 2016 filed before the Debt Recovery Tribunal No.II at Ahmedabad that the aforesaid cash credit facility has been declared as NPA culminating in issuance of notice under Section 13(2) of the SARFAESI Act, 2002 on 3rd September, 2014. It is abundantly clear that the cash credit facility stands declared as NPA prior to issuance of notice under Section 13(2) of the SARFAESI Act, 2002 which happened on 3rd September, 2014. Even if date of default in the context of cash credit facility being declared as NPA is taken as 3rd September, 2014, application under Section 7 of the 'I&B Code' having been filed on 19th October, 2018 is clearly beyond three years and as such barred by limitation. Showing a subsequent date of NPA i.e. 28th October, 2015, the Bank cannot derive advantage of filing an application under Section 7 to suggest that it is within the time of three years.

19. In the facts and circumstances of the case, we hold that the application under Section 7 has not been filed within three years from the date of default/ NPA having been declared before 3rd September, 2014, as pleaded before the Debt Recovery Tribunal, Ahmedabad in Original Application No. 239 of 2016. As the application under Section 7 being barred by limitation, we also hold that the application was not maintainable and was fit to be dismissed.

20. We, accordingly, set aside the impugned order dated 20th November, 2019 passed by the Adjudicating Authority, Ahmedabad Bench, Ahmedabad and dismiss the application under Section 7 filed by the Bank of Baroda.

21. In effect, order(s), passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 7 of the 'I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' (company) is released from all the

rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

22. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' and 'corporate insolvency resolution process cost' and 'Bank of Baroda' will pay the fees of the 'Interim Resolution Professional' and 'corporate insolvency resolution process cost', as may be determined.

The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI
12th March, 2020

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