NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 650 of 2019

[Arising out of Order dated 8th May, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in CP (I&B) 2528/NCLT/MB/2018]

IN THE MATTER OF:

Alchemist Asset Reconstruction
Company Limited,
A-270, First & Second Floor,
Defence Colony, New Delhi – 110024. .... Appellant

Versus

Sima Hotels & Resorts Limited,
15, Jasville, 4th Flor,
Opp Liberty Cinema,
9, New Marine Lines,
Mumbai – 400020, Maharashtra. .... Respondent

Present:

For Appellant: **Mr. Abhijeet Sinha, Advocate with Mr. Karan, Proxy for Ms. Gyatri Gulati, AoR.**

For Respondent: **Mr. Manoj Munshi and Ms. Pragati Bansal, Advocates.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

As the Appellant Alchemist Asset Reconstruction Company Limited ('Financial Creditor') filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the **'I&B Code'**) to initiate 'Corporate Insolvency Resolution Process' against Sima Hotels & Resorts Limited ('Corporate Debtor'), the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai rejected the application by impugned order dated 8th May, 2019, on the ground that the debt in question

was secured "Corporate Guarantee" of Duggal Projects Development Company Private Limited vide Deed of 'Corporate Guarantee' dated 6th November, 1987 and pursuant to another petition filed by the Appellant against the said 'Corporate Guarantor' being CP No.2527 of 2018 for the same debt and default.

2. Reliance has been placed on decision of this Appellate Tribunal in ***"Dr. Vishnu Kumar Agarwal vs. M/s. Piramal Enterprises Ltd. - Company Appeal (AT) (Insolvency) No.346 of 2018"*** judgment ***dated 8th January, 2019***, wherein this Appellate Tribunal has held that once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower').

3. Learned Counsel appearing on behalf of the Appellant submitted that the judgment in ***Dr. Vishnu Kumar Agarwal*** is not applicable in the present case. Even without initiating 'Corporate Insolvency Resolution Process' against the 'Principal Borrower', it can be initiated against the 'Corporate Guarantor'.

4. It was submitted that the case of the Appellant is covered by the decision of this Appellate Tribunal in ***"Mrs. Mamtha vs. AMB Infrabuild Pvt. Ltd. & Ors. – Company Appeal (AT) (Insolvency) No.155 of 2018, judgment dated 30th November, 2018"*** wherein this Appellate Tribunal held that 'Corporate Insolvency Resolution Process' can be initiated simultaneously against two 'Corporate Guarantors'.

5. The Learned Counsel for the Respondent 'Corporate Debtor' had submitted that the application was barred by limitation. However, according to the Learned Counsel for the Appellant, the application under Section 7 was not barred by limitation because the proceedings having already initiated in the year 1990.

6. From the record we find that 'Loan Agreement' for Rs.675 lacs was signed on 4th November, 1987 by IFCI, IDBI & ICICI Banks secured by the 'Corporate Guarantee' of Dugal Projects Development Company Private Limited apart from various Personal Guarantees. On 25th November, 1987, 'Corporate Debtor' entered into Lease Deed with the said Dugal Projects Development Company Private Limited for a period of 98 years commencing from 1st April, 1987 for development of land. On 13th March, 1989, there was continuous default and, therefore, IFCI issued letter for cancellation of the undisbursed loan. The said IFCI issued a recall of the loan by Demand Notice dated 29th November 1989 for and on behalf of all 'Financial Creditors'.

7. Subsequently, Civil Suit was filed by IFCI, IDBI & ICICI Banks before Hon'ble High Court of Bombay for recovery of Rs.6,04,77,858.50/- including the 'Principal Term Loan' and unpaid interest. The suit was subsequently transferred to Debts Recovery Tribunal, Mumbai, which was registered as O.A. No.224 of 2002. The said original OA No.224 of 2002 along with one O.A. No. 33 of 2011 were heard together and Debts Recovery Tribunal, Mumbai by Judgment and Decree awarded a sum of Rs.2,97,44,081/- in favour of IDBI; Rs.1,55,24,327.50/- in favour of IFCI; and Rs.1,52,09,450/- in favour of ARCIL along with *pendente lite* interest @ 12% per annum. All

the loans of IFCI, IDBI & ICICI Banks were assigned to Appellant – Alchemist Asset Reconstruction Company Limited in the year 2014-2017. In the meantime, the 'Corporate Debtor' preferred Appeal on 28th October, 2015 before Debts Recovery Appellate Tribunal, challenging the final order passed by the Debts Recovery Tribunal. The Debts Recovery Appellate Tribunal disposed of the waiver applications and directed the Appellant to deposit a sum of Rs.40 crores within four weeks, but Appellant committed default as alleged by the Respondent.

8. As the application under Section 7 of the I&B Code was filed by the Appellant on 10th July, 2018, for the said reason, the Respondent has taken a plea that the application under Section 7 was barred by limitation.

9. In the case of ***"Jignesh Shah and Another v. Union of India and Another– (2019) SCC OnLine SC 1254"***, the Hon'ble Supreme Court noticed the provisions of Section 238A of the I&B Code and relevant provisions including Sections 7 and 9 of the I&B Code to decide the question of limitation. The Hon'ble Supreme Court observed and held as follows:--

> *"**8.** In paragraph 7 of the said judgment, the Report of the Insolvency Law Committee of March, 2018 was referred to as follows:*
>
> > *"**7.** Having heard the learned counsel for both sides, it is important to first set out the reason for the introduction of Section 238A into the Code. This is to be found in the Report of the Insolvency Law Committee of March, 2018, as follows:*
> >
> > ***"28. APPLICATION OF LIMITATION ACT, 1963***

28.1 The question of applicability of the Limitation Act, 1963 ("Limitation Act") to the Code has been deliberated upon in several judgments of the NCLT and the NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected.[1] In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred. This requires being read with the definition of 'debt' and 'claim' in the Code. Further, debts in winding up proceedings cannot be time-barred,[3] and there appears to be no rationale to exclude the extension of this principle of law to the Code.

28.2 Further, non-application of the law on limitation creates the following problems: first, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation is "to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or latches"[4]. Though the Code is not a debt recovery law, the

trigger being 'default in payment of debt' renders the exclusion of the law of limitation counter-intuitive. Second, it re-opens the right of claimants (pursuant to issuance of a public notice) to file time-barred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per section 30(4) of the Code.

28.3 Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case to case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its own debts for the purpose of CIRP and are not in the form of a creditor's remedy."

(emphasis supplied)

The Hon'ble Supreme Court further noticed the arguments, observed and held:

*"**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 Limited v. Sunjal Engineering Pvt. Ltd., (1999) 96 Comp Cas 349, 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 de hors 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 Corporation Ltd. v. Rajhans Steel Ltd., (2000) Comp Cas 426 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 No. 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 No. 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 No. 1 cannot be ordered due to non-payment of the said debt."

16. *In Dr. Dipankar Chakraborty v. Allahabad Bank, 2017 SCC OnLine Cal 8742, the fact situation was that a suit had been filed by the petitioner in the City Court at Calcutta for damages against the Allahabad Bank. The Bank, in turn, filed a proceeding under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in 2001 before the Debt Recovery Tribunal, Calcutta. The Civil Suit was also transferred to the Debt Recovery Tribunal, Calcutta where both proceedings were pending adjudication. Meanwhile, under the Securitisation and Restructure of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act"), a notice dated 3rd March, 2016 was issued under Section 13(2) of the SARFAESI Act. The question which arose before the Court was whether the invocation of the SARFAESI Act, being beyond limitation, would be saved because of the pending proceedings under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Court negatived the plea of the Bank, stating:*

> *"**22.** Section 14 of the Limitation Act, 1963 permits exclusion of the time taken to proceed bona fide in a Court without jurisdiction. Such section permits a plaintiff to present the same suit, if the Court of the first instance, returns a plaint from defect of jurisdiction or other causes of like nature, being unable to entertain it. In the present case, a secured creditor is not withdrawing a proceeding pending before the*

Debts Recovery Tribunal under Section 19 of the Act of 1993 to invoke the provisions of the Act of 2002. Rather the secured creditor is proceeding, independent of its right to proceed under the Act of 1993, while invoking the provisions of the Act of 2002. This choice of the secured creditor to invoke the Act of 2002 is independent of and despite the pendency of the proceedings under the Act of 1993, has to be looked at from the perspective of whether or not such an action meets the requirement of Section 36 of the Act of 2002, when the secured creditor is proposing to take a measure under Section 13(4) of the Act of 2002. Although, a secured creditor, as held in Transcore (supra), is entitled to take a remedy or a measure as available in the Act of 2002, despite the pendency of other proceedings, including a proceeding under Section 19 of the Act of 1993, in respect of the self-same cause of action, in my view, the invocation of such independent right under the Act of 2002, has to be done within the period of limitation prescribed under the Limitation Act, 1963 in terms of Section 36 of the Act of 2002. The Act of 2002 gives an independent right to a secured creditor to proceed against its financial assets and in respect of which such asset the secured creditor has security interest. The right to proceed, however, is subject to the adherence to the provisions of limitation as enshrined in the Limitation Act, 1963. The provisions of the Limitation Act, 1963 are, therefore, attracted to a

proceeding initiated under the Act of 2002. That being the legal position, the invocation of the provisions of the Act of 2002 in the facts of the present case, on July 5, 2011, without there being an extension of the period of limitation by the act of the parties cannot be sustained.

xxx xxx xxx

25. The issues raised are, therefore, answered by holding that, the initiation of the proceedings by the bank was barred by the laws of limitation on July 5, 2011 and all proceedings taken by the bank consequent upon and pursuant to the notice under Section 13(2) of the Act of 2002 dated July 5, 2011 are quashed including such notice."

Finally the Hon'ble Supreme Court held:

*"**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 acknowledgement 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."*

10. Similar issue fell for consideration before the Hon'ble Supreme Court in ***"Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Ltd. & Anr.*** in Civil Appeal No.4952 of 2019. The said case was disposed of on 18th September, 2019. In the said case, the Hon'ble Supreme Court noticed that the account of Respondent No.2 was declared NPA on 21st July, 2011 and subsequently, the State Bank of India filed two Original Applications before the Debts Recovery Tribunal in the year 2012 for recovery of the total debt of Rs.50 crores. In the meantime, when the State Bank of India assigned the debt to Asset Reconstruction Company (India) Limited on 28th March, 2014, the Debts Recovery Tribunal vide judgment dated 10th June 2016 held that the waiver was not maintainable. In the said case, this Appellate Tribunal by its judgment held that the limitation for application under Section 7 will be counted only from 1st December, 2016, which is the date on which the I&B Code brought into force. The Appellate Tribunal noted the NCLT Decision that the limitation period for suit was 12 years, their being a mortgage. However, Hon'ble Supreme Court taking into consideration the judgment in ***"B.K. Education Services Private Limited vs. Parag Gupta and Associates - 2018 SCC OnLine SC 1921"*** held that the limitation started from the date of default, i.e., 21st July, 2011 when the account was declared NPA.

11. In the present case, it has been accepted that the 'Corporate Debtor' defaulted on 13th March, 1989. With regard to other Banks, it defaulted on 29th November, 1989. The suit was filed by IFCI, IDBI & ICICI Banks in the year August 1990. The Judgment and Decree has been passed as far back

as on 6th May, 2011. Therefore, we hold that the application filed under Section 7 of the I&B Code is barred by limitation.

12. The aforesaid facts also suggest that the application under Section 7 of the I&B Code was filed for the purpose of execution of the Decree passed by the Debts Recovery Tribunal in favour of the 'Financial Creditor' for the purpose other than for the resolution of insolvency, or liquidation and is covered by Section 65.

13. In view of the aforesaid position of law, we hold that the Adjudicating Authority rightly dismissed the application, which is barred by limitation. This Appeal is dismissed. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

(Kanthi Narahari)
Member (Technical)

NEW DELHI

18th December, 2019

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