

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**NEW DELHI****Company Appeal (AT) (Ins) No. 1448 of 2019**

(Arising out of order dated 30th October, 2019 passed in TCP (IB) 71/7/AMR/TP/2019 CP (IB) No. 699/7/HDB/2018 by National Company Law Tribunal, Hyderabad)

In the matter of:

- 1. Bank of India
Chennai Large Corporate Branch,
4th Floor, Tarapore Towers 826,
Anna Salai Chennai 600002**

- 2. Central Bank of India
Corporate Finance Branch, 1st floor,
Bank Street, Koati
Hyderabad 500095**

...Appellants**Versus**

**Coastal Oil Gas Infrastructure Pvt. Ltd.
Municipal No.9-13-45/3/5/4
CBM Compound Ease Exten VIP Road,
Siripuram Vishakhapatnam
Vishakhapatnam,
Andhra Pradesh 530003**

**Also at
4th Floor, MAAS Heights,
8-2-577/B, Plot No.34, Road No.8,
Banjara Hills
Hyderabad 500034
Present:**

....Respondent

**For Appellants: Mr. Vadlamani Seshagiri and Mr. Siddharth Sachar,
Advocates**

For Respondent: Mr. Ramesh Babu Palutla, Advocate.

J U D G M E N T

(21.09.2020)

Mr. Balvinder Singh, Member (Technical)

1. The present appeal has been preferred by the Bank of India and Central Bank of India (hereinafter referred to as 'Financial Creditors') U/S 61 of the Insolvency & Bankruptcy Code 2016 (hereinafter referred as 'I&B Code') challenging the impugned order dated 30th October, 2019 passed in TCP (IB) 71/7/AMR/TP/2019 CP (IB) No. 699/7/HDB/2018 by the National Company Law Tribunal, Hyderabad Bench (hereinafter referred to as 'Adjudicating Authority') u/s 7 of I&B Code, for the initiation of Corporate Insolvency Resolution Process against Coastal Oil Gas Infrastructure Pvt. Ltd. (hereinafter referred to as 'Corporate Debtor') alleging default in repayment of Financial Debts. The Adjudicating Authority rejected the application on the ground that the application is barred by limitation and was filled before it more than 3 years after the default.

2. The brief facts of the case are that the Corporate Debtor is a company incorporated under Companies Act, 1956 having its registered office at Vishakhapatnam, Andhra Pradesh. The Financial Creditors and other consortium members at the request of Corporate Debtors had sanctioned term loan limit of Rs. 641.85 Crores to design, finance, procure, supply, construct, operate and maintain 12 crude oil tank facilities and associated infrastructure

on Build Own Operate Transfer basis (“BOOT”) and to design, finance, procure, supply, construct and maintain 60 products and intermediates tank farm facilities on Build Own Transfer basis (“BOT”) and other project facilities and services and its refinery at Cuddalore, Tamil Nadu in accordance with the provision of Terminal Service Agreement (“TSA”). The Appellant No. 1 and 2 had sanctioned to the Corporate Debtor a term loan facility of Rs. 198.00 crores and Rs. 98.85 crores respectively. It has been observed by the Adjudicating Authority that the Corporate Debtor has not repaid the loan but rejected the application on the ground that the application is barred by limitation and was filed before it more than 3 years after the default. Hence the present appeal is filed by the Financial Creditors.

3. It is stated on behalf of Financial Creditors that the Board of the Corporate Debtor vide resolution dated 25th July, 2011 resolved to borrow the term loan from Consortium Banks. The member of the Corporate Debtor vide resolution dated 22nd July, 2011 passed resolution under section 293 (1) of Companies Act, 1956 and authorized the Corporate Debtor to borrow a sum not exceeding Rs. 700 crores. The Corporate Debtor executed various loan agreements and mortgage deeds on 1st August, 2011 in favor of the members of the Consortium to secure the repayment of the loan sanctioned by the Financial Creditors and the other Consortium members.
4. It is further stated on behalf of Financial Creditors that the Corporate Debtor again approached the Financial Creditors and other Consortium members to modify/ amend/ replace certain terms and conditions in the common loan agreement and the Financial Creditors and other members of Consortium

agreed for modifications and accordingly the following documents were executed.

- i. First Amendment Agreement 28th June, 2013 to the Common Loan Agreement dated 1st August, 2011.
- ii. First Amendment Agreement 28th June, 2013 to the Security Trusty Agreement dated 1st August, 2011.
- iii. Revival Letter dated 30th June, 2014.

5. It is submitted by the Financial Creditors that the Corporate Debtor again approached the Financial creditors and other consortium members to modify/ amend/ replace certain terms and conditions in the Common Loan Agreement and Financial Creditors and other members of the Consortium upon considering the request made by the Corporate Debtor agreed for modifications of the terms and conditions of the loan agreement and accordingly Second Amendment Agreement 31st March, 2015 to the Common Loan Agreement 1st August, 2011 was executed.

6. It is further submitted by the Financial Creditors that the Corporate Debtor with the intent to secure the repayment of credit facilities sanctioned/ to be sanctioned to the Corporate Debtor executed registered indenture of mortgage No. 14/2011 dated 2nd August, 2011 and the same was registered in Joint Sub Registrar, Cuddalore and also deposited with the Consortium lenders including the Financial Creditors and thereby created mortgage under section 58(f) of the Transfer Of Property Act and the Memorandum of Deposit of title deed was registered as document No. 4148/2012 dated 25th October, 2012 in SRO, Cuddalore.

7. It is contended on behalf of the Financial Creditors that the Corporate Debtor failed to repay the dues in accordance with the agreed terms and as such the Financial Creditors were constrained to initially classify the account as Non-Performing Asset (NPA) as per the prudential norms prescribed by the Reserve Bank of India. However, the Financial Creditors at the request of the Corporate Debtor restructured the account and allowed the Corporate Debtor to pay the Financial Creditors as well as the Consortium members, the outstanding dues on quarterly basis commencing from December 2015 and complete by September 2025. The Corporate Debtor for due repayment had executed Second Amendment Agreement 31st March, 2015 to the Common Loan Agreement dated 1st August, 2011 in favor of the Financial Creditors and the other Consortium Member Banks. The Corporate Debtor despite the restructuring of the account had failed to comply with the terms of the Second Amendment Agreement whereby, the Financial Creditors were constrained to issue notice of default date 7th December, 2017 demanding the payment of the total overdues.
8. It is further contended by the Learned counsel of Financial Creditors that the Financial Creditors along with other lenders have filed an Original Application (OA) being number 478/2018 before the Debt Recovery Tribunal- II, Chennai for the recovery of sum of Rs. 750,60,918.63.51/- and the same is pending before Debt Recovery Tribunal- II, Chennai.
9. It is further stated on behalf of Financial Creditors that they filed an application under section 7 of Insolvency and Bankruptcy Code, 2016 on 19th September, 2018 before the Adjudicating Authority which was dismissed by

the Adjudicating Authority on the ground that the application is barred by limitation through Impugned Order dated 30th October, 2019.

10. It is further stated on behalf of the Financial Creditors that the Financial creditors and the Corporate Debtor executed a revival letter dated 31st January, 2017 as per the terms of the section 18 of the Limitation Act and the same was not considered by the Adjudicating Authority while passing the Impugned Order.
11. It is further stated by the learned counsel of the Financial Creditors that the Adjudicating Authority had erred in appreciating that the Corporate Debtor had in their Balance sheet filed with ROC for the financial year ending on 31st March, 2017 and 31st March, 2018 respectively admitted the liability.
12. In the light of the above contentions the Financial Creditors prays for the following reliefs: -

Main Reliefs

- i. That this Hon'ble Tribunal be pleased to set aside the Impugned Order, being order dated 30th October, 2019 passed by the Hon'ble NCLT, Amravati Bench at Hyderabad in CTCP (IB) 71/7/AMR/2019 CP (IB) No. 699/7/HDB/2018;
- ii. That this Hon'ble Tribunal be pleased to remand the matter to Hon'ble NCLT, Amravati Bench at Hyderabad to reconsider the application filed by the Appellants;
- iii. That this Hon'ble Tribunal be pleased to pass such order or further orders or directions as this Hon'ble Tribunal may deem fit and proper

in the facts and circumstances of the present case and in the interest of justice.

Interim Reliefs

- i. Pass an ad-interim ex-parte order staying the operation of the impugned order dated 30th October, 2019;
- ii. Pass any such other or further orders or directions as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case and in the interest of justice.

13. Learned counsel for the Appellants submits that there is an urgency in the matter. For this purpose, he filed an Application under I.A No. 1601 of 2020 and stated that the Corporate Debtor entered into Terminal Service Agreement (TSA) with Nagarjuna Oil Corporation Ltd. (NOCL) for a period of 20 years and approached the applicants and State Bank of India and Canara Bank for financial assistance for the project they would be constructing for NOCL. The applicant upon considering the viability of the project advanced a Term Loan of Rs. 641.85 Crores on various terms and conditions. The Corporate Debtor to secure the credit facility advanced to it had mortgaged to Applicants 322.401 acres of land along with the structures to be constructed on the said land after seeking due consent of SIPCOT and NOCL. The said mortgaged land was in fact leased to NOCL by SIPCOT. The total land which was leased to NOCL was about 1647.34 acres. An extent of 322.401 acres was sub-leased by NOCL on 18th October, 2012 to the Corporate Debtor for 20 years with prior consent of SIPCOT.

14. The Learned Counsel for the financial creditors also submits that NOCL had failed to adhere to the terms of TSA whereby an event of default on the part of NOCL occurred. Thereafter, one of the operational creditor of NOCL filed an application before NCLT, Chennai which was duly admitted and thereafter the liquidation proceeding was initiated against NOCL. The liquidator had called for bid under Section 230 of Companies Act, 2013 read with I&B Code 2016 wherein one of the bidders who had shown interest to take over the assets of the NOCL was Haldia Petrochemicals Ltd. (HPL). HPL put a condition that the entire lease land of NOCL including the land sub-leased to the Corporate Debtor which was duly mortgaged to the financial creditors should also be included in the scheme of arrangement and refused to pay the financial creditors and other consortium members who had advanced the credit facilities to Corporate Debtor.
15. It is further submitted on behalf of the Financial Creditors that the liquidator is now proceeding to approve the bid submitted by HPL in which the property mortgaged to the financial creditors has also been wrongly included. This act of liquidator is beyond his power conferred under I&B Code and would seriously affect the recovery of the public money.
16. The Learned Counsel for the financial creditors prayed that the liquidator of NOCL should be restrained from taking possession of land admeasuring 322.401 acres mortgaged to the financial creditors.
17. The Corporate Debtor filed its short reply and contended that the appeal does not appear to be bonafide as it is based on concealment of pleadings filed before the Adjudicating Authority and as such the same is liable to be dismissed.

18. It is further contended on behalf of the Corporate Debtor that the Financial Creditors in order to cover its own lapses has conveniently suppressed the Company Petition it had filed itself before the Adjudicating Authority. In fact every other document has been filed except the company petition.

19. The Corporate Debtor argued that on the bare perusal of the said Company Petition which would reveal that the Financial Creditors had itself pleaded unequivocally that the date of default is 16th March, 2015. That even before the Adjudicating Authority at the time of hearing the Counsel for the Financial Creditors herein had made the same submission.

20. It is further stated by the Learned Counsel for the Corporate Debtor that the Application under section 7 of I&B Code had been filed on 25th September, 2018 i.e. after more than 3 years of the date of default, thus the Adjudicating Authority rejected the Company Petition as having been barred by limitation.

21. It is further submitted on behalf of the Corporate Debtor that the Financial Creditors are now making completely contrary submissions and the pleadings made before the Adjudicating Authority were suppressed just in order to give an impression that the order of NCLT is flawed. It is completely unfair to make aspersions against the Adjudicating Authority which can only pass an order on basis of pleadings made before it and submissions advanced by counsel.

22. The Corporate debtor submits that the ratio laid down by the Hon'ble Supreme Court in **B.K. Educational Services PVT. LTD. V. Paras Gupta &**

Associates (2019) 11 SCC 633 is squarely applicable to this case. The ration laid down is captured in para 27 of the Judgment. \

Para 27 - 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.

23.The Corporate Debtor also referred to the Judgment **Babulal Vardharji Gurjar V. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr, in Civil Appeal No. 6347/2019** and states that it had been held by the Hon’ble Supreme Court that I&B Code is not a mere money recovery legislature for creditors. The scheme of the code is such that it is triggered on the determination of default and not on an inability to pay. As such, an acknowledgement of debt will extend the time to sue for recovery of money, but does not extend the time for triggering an action under the Code.

24.It is further stated by the Corporate Debtor that the date of default is sacrosanct for computing the period of limitation and no subsequent action would extend the period of limitation available for instituting proceedings under the code. It is submitted by the Corporate Debtor that the revival letter protects the right to recover in suits only while it does not confer any right on the Financial Creditors to plead for admission of Section 7 petition wherein the default occurred three years before.

25. Having heard to both the parties the Adjudicating Authority had noted the following issues and stated its observations as follows:

Issue Nos. I & II:

8. Admittedly the Respondent had entered into an Agreement (TSA) with NOCL for setting up the storage facility for the proposed refinery project. It had availed credit facility from the consortium of lenders including the Petitioners, respectively the Bank of India and Central Bank of India. It is not disputed that the Petitioner banks have advanced credit facility respectively to the tune of Rs. 198 Crs and Rs. 98.85 Crs. The Respondent availed the credit facility upon execution of loan agreements and mortgage by deposit of title deeds. Financial Debt defined in section 5 (8) of the Code *inter alia* includes money borrowed against payment of interest. Admittedly credit facility carried an

interest on money advanced. The credit was advanced against the consideration for time value of money. The plea raised by the Respondent that the project could not be completed due to the NOCL's inability to set up the refinery and the reasons for the Respondent's inability to repay the loan as defence would be irrelevant

9. in a proceedings under the Code. Admittedly the Respondent has not repaid the loan. Both the issues are accordingly answered in the affirmative.

Issue No. III:

10. According to the Petitioners the date of default is 16.03.2015 (Part-IV of the Company Petition). The Company Petition was filed on 25.09.2018 more than 3 years after the default. In this connection reference may be made to the decision of the Hon'ble Apex Court in Gaurav Hargovindbhai Dave vs Asset Reconstruction Company (Civil Appeal No. 4952 of 2019 decided on 18.09.2019). The Hon'ble Apex Court held as follows.

“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 learned counsel appearing on behalf of the appellant, time, therefore, begins to run of 21.07.2011, as a result of which the application filed under section 7 would clearly be time-barred. So far as Mr. Banerjees reliance on para 7 of B. K. Educational Services Private Limited (supra), 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.”

In view of the law thus settled the present Application being barred by limitation cannot be admitted. Issue No. III is answered in the negative. In view of the finding in the present issue the Application cannot be admitted. Hence ordered.

26. We have heard the learned counsel for the parties and perused the records. We are of the opinion that the main issue under the present appeal is whether the application filed before the Adjudicating Authority was barred by limitation

or not. We have observed that the Adjudicating Authority have considered the date of default as 16th March, 2015 but have failed to notice the revival letter dated 31st January, 2017 which clearly stipulates that for the purpose of Section 18 of Limitation Act, 1963 and in order to preclude any question being raised on limitation regarding the liability of the Corporate Debtor for the payment of outstanding amounts the liability shall remain in full force. This amounts to the acknowledgement of debt by the Corporate Debtor and the same was made before the expiry of the limitation period for filing the suit. The revival letter also fulfill the other conditions laid down under section 18 of the Limitation Act, 1963.

27. We have also gone through the Second Amendment Agreement executed on 31st March, 2015 to the Common Loan Agreement dated 1st August, 2011. The loan schedule was restructured and the parties agreed that the “First Repayment Date” under the Second Amendment Agreement shall mean 31st December, 2015. Thus the first default occurs on 31st December, 2015. Following is the repayment schedule agreed between the parties under Second Amendment Agreement:

| | Total | BOI | SBI | Canara | CBI |
|----------------|--------|--------|--------|--------|-------|
| Quarter ending | 641.85 | 198.00 | 197.00 | 148.00 | 98.85 |
| Dec- 15 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Mar- 16 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Jun-16 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Sep-16 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |

| | | | | | |
|--------|-------|------|------|------|------|
| Dec-16 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Mar-17 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Jun-17 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Sep-17 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Dec-17 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Mar-18 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Jun-18 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Sep-18 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Dec-18 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Mar-19 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Jun-19 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Sep-19 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Dec-19 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Mar-20 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Jun-20 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Sep-20 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Dec-20 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Mar-21 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Jun-21 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Sep-21 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Dec-21 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Mar-21 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Jun-21 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Sep-21 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Dec-21 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Mar-22 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |

| | | | | | |
|--------|-------|------|------|------|------|
| Jun-22 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Sep-22 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Dec-22 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Mar-23 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Jun-23 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Sep-23 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Dec-23 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Mar-24 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Jun-24 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Sep-24 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Dec-24 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Mar-25 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Jun-25 | 16.05 | 4.95 | 4.93 | 3.70 | 2.47 |
| Sep-25 | 16.05 | 4.95 | 4.73 | 3.70 | 2.52 |

The Financial Creditors issued a notice of recall dated 7th December, 2017 demanding the payment of the total overdues as on that date within a period of 15 days from the date of notice of recall. Thus the payment for Quarter ending December 2017 to September 2025 will become due and payable and come under default on 22nd December, 2017 i.e. on the expiry of 15 days from the date of default notice which was served upon the Corporate Debtor for recalling the loans. Thus the default cannot occur before the amount becomes due and payable as per the Second Amendment Agreement. Also, on entering into the Second Amendment Agreement on 31st march, 2015 the earlier Agreement shall be subsumed with the Amended Agreement and all the prior

defaults shall become irrelevant and the date of default shall be decided as per the Second Amendment Agreement dated 31st March, 2015.

Therefore, we are of the opinion that the Adjudication Authority have wrongly considered the date of default to be 16th March, 2015 for computation of limitation period to file an application before it.

28. The principles laid down under **B.K. Educational Services PVT. LTD. V. Paras Gupta & Associates** and **Babulal Vardharji Gurjar V. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr** as referred by the Corporate Debtor under its submissions are not applicable to the facts and circumstances of the present case since the application was filed before the Adjudicating Authority within the limitation period i.e. three years from the date of default.

29. In case there is any discrepancy found in the application relating to the date of default being wrongly pleaded by the financial creditors as contended by the Corporate Debtor. The Adjudicating Authority may ask the financial Creditors to rectify the same. The limitation is a mixed question of law and facts therefore, unless it becomes apparent from the reading of the company petition that the same is barred by limitation the petition should not be rejected by selectively considering the documents on record. We are of the view that the application filed by the Corporate Debtor under Section 7 was required to be admitted by the Adjudicating Authority, but the Adjudicating Authority failed to consider the matter in proper perspective.

30. In light of the above observations the appeal is allowed and we set aside the impugned order dated 30th October, 2019 passed by National Company Law Tribunal, Hyderabad.

31. We are further remanding back the matter to the Adjudicating Authority to admit the application under section 7 after issuing notice and examining all other aspects under section 7 of I&B Code. Since, a considerable period has been lost from the date when the application was filed before the Adjudicating Authority we expect that the case shall be decided expeditiously within a period of one month. No Order as to cost.

[Justice Venugopal M.]
Member (Judicial)

[Mr. Balvinder Singh]
Member (Technical)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi

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