

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Ins) No. 510 of 2020

(Arising out of Impugned Order dated 25th February, 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Bench-VI, New Delhi in Company Petition No. IB-303/(ND)/2020)

IN THE MATTER OF:

Elektronik Lab India Pvt. Ltd.

... Appellant.

Versus

Pinnacle (Air) Pvt. Ltd.

...Respondent.

Present:

For Appellant: Ms. Jaikriti S. Jadeja, Advocate

For Respondent: Mr. Manan Batra, Advocate, Karan Singh, Advocate

JUDGEMENT
(Date: 25.2.2021)

{Per: Dr. Alok Srivastava, Member(T)}

This appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code 2016 (hereinafter called IBC) against the order dated 25.2.2020 passed by the Adjudicating Authority NCLT, New Delhi Bench-VI (hereinafter called Adjudicating Authority) in Company Petition No. IB-303/(ND)/2020. The Adjudicating Authority has dismissed the application

under Section 9 of IBC filed by the Operational Creditor (Appellant) as being barred by limitation of time.

2. The case as stated in the appeal and argued by the Appellant is as follows:-

(i) The Appellant Company and the Respondent Company are both limited liability companies incorporated and registered under the Companies Act, 1956. The Appellant Company is a marine electronics support, service provider and systems integrator, which specializes in designing and integrating communications and navigation systems. The Respondent Company is a provider of services for operation, management and communication system for aircrafts etc.

(ii) The Respondent approached the Appellant in April, 2010 to provide Airtime/Communication service to the Respondent. These services began to be provided by the Appellant to the Respondent from May, 2010 onwards and invoices were raised periodically by the Appellant to the Respondent for the service rendered, which were cleared from time to time. The Respondent had leased a Falcon 2000 LX Aircraft from M/s, Bajaj Hindustan Sugar Limited on which the Appellant had activated satcom facility.

(iii) Some payments remained to be made to the Appellant by the Respondent. The Appellant sent e-mails in April/May, 2012 to the Respondent to clear outstanding payment of Rs. 37,02,761/- (Rupees Thirty

Seven Lakhs Two Thousand Seven Hundred and Sixty One only). No payments were made in response.

(iv) The Respondent communicated to the Appellant vide email dated 29.5.2012 that they were no longer able to afford the charges of Appellant for the services rendered and requested the Appellant to terminate their services with effect from 01.06.2012. The Appellant thereafter discontinued the services while an amount of payment as mentioned earlier remained pending for payment. The last payment received from the appellant from the Respondent was a sum of Rs.6,89,524/- (Rupees Six Lakhs Eighty Nine Thousand Five Hundred Twenty Four only) through cheque No.713568 dated 10.6.2012 which was cleared and amount credited in the appellant's account on 12.7.2012.

(v) The matter regarding pending payment was discussed by the Appellant with the Respondent and M/s. Bajaj Hindustan Sugar Private Limited (for whom the Respondent Company was arranging Airtime Falcon services). Subsequently, the Appellant issued a legal notice to the Respondent on 30.09.2014 for making the outstanding payment. The Respondent vide reply dated 5.11.2014 informed that the owner of the Falcon Aircraft viz. M/s. Bajaj Hindustan Sugar Limited was liable to clear the pending dues as the Respondent was only maintaining, operating and running the aircraft.

(vi) As the issue of payment of dues remained unresolved, the appellant filed a Company Petition No.06/2015 against M/s. Bajaj Hindustan Sugar

Limited and the Company Directors for winding up under the Companies Act, 1956 before the Hon'ble High Court at Allahabad (Lucknow Bench). This petition, according to the Appellant was filed on 10.7.2015 which is within 3 years of limitation from the date of last payment, which was 12.7.2012. The Winding Up Petition was dismissed on merits on the ground that the petitioner/Appellant was unable to prove the case against M/s Bajaj Hindustan Sugar Limited.

(vii) Subsequently, the Appellant Company issued demand notice under Section 8 of the IBC upon the Respondent on 3.12.2019. In reply dated 12.12.2019 to the notice, the Respondent raised a dispute regarding the demand and refuted its liability to pay the operational debt.

(viii) As the Appellant Company was not satisfied with the reply, it filed an application before the Adjudicating Authority under Section 9 of the IBC on 06.01.2020 which was not admitted by the impugned order passed on 20.5.2020.

3. The Respondent filed reply and both parties filed their written submissions. Both parties were also accorded ample opportunity to present oral arguments in support of their respective cases.

4. In the Appeal preferred by the Appellant, the main ground taken is that the winding up petition before the Hon'ble High Court of Allahabad was dismissed on the ground of misjoinder of party and, therefore, the period

during which the winding-up petition was being prosecuted in good faith before the Hon'ble High Court of Allahabad should be excluded in accordance with Section 14 of the Limitation Act, 1963 in computation of limitation for the Section 9 application under IBC.

5. In support of his case, the Learned Counsel for the appellant has referred to the judgment of the Apex Court in the case of **Jignesh Shah & Anr v. Union of India & Anr; (2019) 10 SCC 750** wherein the Hon'ble Supreme Court has held that

"...in matters pertaining to winding up petitions, Section 433 (e) read with Section 434 of the Companies Act 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. That as such, a company shall be deemed to be "unable to pay its debts" under section 433(e), if a demand is made by the creditor to whom the company is indebted, requiring the company to pay the sum so due, and the company has for three weeks therefore "neglected to pay the sum."

6. The Appellant has also argued that the authorized signatory of the Appellant Company could not approach the Adjudicating Authority with application under Section 9 of IBC within the limitation period as he was ill and indisposed/on bed-rest due to surgery and could not contact the legal counsel for appropriate advice for filing the said application. Therefore, these

periods of illness and indisposition should be excluded from the computation of limitation. In support, the Appellant's Learned Counsel has cited the law laid down by the Hon'ble Apex Court in the case of ***B.K. Educational Services Pvt. Ltd. V. Parag Gupta & Associates; (2019) 11 SC 633***. The Appellant has urged that Section 5 of the Limitation Act, 1963 is a general provision whereby the Adjudicating Authority has discretion to condone the delay in preferring an application, subject to the satisfaction of the Adjudicating Authority regarding the cause for the delay in approaching the Adjudicating Authority.

7. The appellant has claimed in the winding up petition that the limitation for winding-up petition started from the date the Company (M/s. Bajaj Hindustan Sugar Pvt. Ltd.) was "unable to pay its debts" and trigger for limitation was the "neglect to pay its dues" after demand notice under the provisions of Section 433(e) and Section 434 of the Companies Act, 1956 was raised by the creditor. It is noted that in this winding up petition M/s. Pinnacle (Air) Private Limited (respondent in this appeal) was not made a Respondent. The case was heard by Hon'ble Court of Judicature at Allahabad (Lucknow Bench) and was dismissed as the petitioner was unable to produce convincing evidence in support of his contention and the petition was heard in full and dismissed on merits. The relevant portion of this order is reproduced below:-

“.....There is no agreement or document filed before this court, whereby it can be concluded that the respondent-company has any agreement viz-à-viz for taking service or has admitted to have taken service from the petitioner, therefore, the respondent-company is not liable to pay the amount involved. In view thereof, it is not proved that the respondent-company is liable to pay the said amount. The question of fact is involved in this petition as to whether the respondent-company is liable to pay the amount or not, which can only be proved by a detailed evidence. I find it not a proper case to be entertained. The present company petition filed under sections 433(e)(f), 434 & 439 of the Companies Act, 1956, lacks merits and the same is dismissed.”

8. The portions of Section 14 of the Limitation Act, 1963 which are relevant to this appeal are reproduced below:-

14. Exclusion of time or proceeding bona fide in Court without jurisdiction – (1) *In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding, relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*

(2) *In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision,*

against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

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Explanation.- For the purposes of section, -

- (a) In excluding the time during which a former civil proceeding as pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;*
- (b) A plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;*
- (c) Misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”*

9. The Ld. Counsel of Appellant has argued that by virtue of provisions of Section 14(2) of the Limitation Act read with the Explanation 3 (*supra*), misjoinder of party should be deemed to be a cause of a like nature as defect of jurisdiction. On this basis, the Appellant has sought that the time spent by him in prosecution of the winding up of proceedings before High Court of Allahabad should be excluded for computing limitation in accordance with Section 14 of the Limitation Act.

10. The order passed by Hon'ble High Court at Allahabad in winding up Petition No.6 of 2015 does not mention the dismissal of the petition on the

basis of misjoinder of parties. In fact, the order very clearly mentions that *“in view thereof, it is not proved that the Respondent Company is liable to pay the said amount..... The present petition filed under Sections 433(e)(f), 434 and 439 of the Companies Act, 1956 lacks merits and the same is dismissed”*. Under Sub-Section 2 of Section 14 of the Limitation Act, in computing the period of limitation, exclusion of time can be claimed when in the court of first instance or of Appeal or revision, against the same party and for the same relief, such proceedings are prosecuted in good faith which the said court is unable to entertain, from defect of jurisdiction or other cause of like nature. Admittedly, the Appellant was not party in the winding up Petition. Thus, this case may be of non-joinder of parties and not the mis-joinder of parties. The Petition was dismissed by the Hon’ble High Court on the ground that the question of fact involved in the petition as to whether the Respondent Company is liable to pay the amount or not, which can only be proved by detailed evidence. Thus, the Appellant has not fulfilled any of the conditions enumerated in Sub-Section 2 of Section 14 of the Limitation Act.

11. In such a situation, we are unable to accept the contention of the Appellant that the winding-up petition No.6 of 2015 was dismissed on the ground of mis-joinder of parties, and we are not persuaded to allow the Appellant the benefit of Section 14 of the Limitation Act, 1963.

12. Now we look at the date of filing application under Section 9 of the IBC. As mentioned in the impugned order, the winding up petition was filed

in the High Court of Allahabad on 10.7.2015. Since, it was taken up for hearing, we accept that the winding up petition was filed within three years from the date of default, which appears to be 12.7.2012 (which is the date of clearing of the last payment cheque dated 10.6.2012). Since the benefit of Section 14 of the Limitation Act, 1963 is not available to the Appellant and no exclusion of time period spent in prosecuting the winding-up petition is possible, the time period starting from the date of default i.e. 12.07.2012 to the date of filing of application under Section 9 of IBC i.e. 06.01.2020 needs to be explained for deriving the benefit of extension of limitation under Section 5 of Limitation Act, 1963.

13. For this, we consider the averments made in the Application regarding extension of prescribed period as per Section 5 of the Limitation Act, 1963.

14. The Appellant has in a somewhat cursory way tried to explain the delay by the two illnesses and indisposition/bed rest that his authorized representative underwent. Even if we take a very generous view of these indispositions and consequent inability to file the Section 9 application we can give an exclusion of ninety days for each of the two illnesses and subsequent bed rest i.e. a maximum extension of one hundred eighty days (180) days i.e. about six months. Despite giving such an extension in prescribed period the appellant had to explain cogently and convincingly the reason for delay of about two years and ten months days which has not been done by the Appellant. We are, therefore, unable to give him relaxation

under Section 5 of the Limitation Act, 1963 for this unexplained period of about two years and ten months.

15. In view of the detailed discussion in the aforementioned paragraphs, we are not convinced that the delay in filing the application was adequately explained as required in law. Consequently, the application filed by the Appellant under Section 9 of the IBC is very clearly out of limitation. We, therefore, do not find any reason to interfere with the order dated 25.2.2020 of NCLT, Bench-VI, New Delhi. The appeal is, hence, dismissed with no order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
25th February, 2021

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