

National Company Law Appellate Tribunal, New Delhi

Principal Bench

COMPANY APPEAL (AT) (Insolvency) No. 90 of 2020

(Arising out of Order dated 06th November, 2019 passed by National Company Law Tribunal, Mumbai Bench, in Company Petition (IB) No.- 3568/NCLT/MB/2019)

IN THE MATTER OF:

**Mr. Vijay Sitaram Dandnaik
Dandnaik Complex, Tambir
Vibhag Osmanabad 413 501 MH IN**

.....Appellant

Versus

**1. Punjab National Bank
Aurora Towers, 9, Moledina RD,
Camp, Pune, Maharashtra 411001**

...Respondent No. 1

**2. M/s. Jailaxmi Sugar Products
Pvt. Ltd. through Dharit Kishorbhai Shah
Resolution Profession of
Jailaxmi Sugar Products Pvt. Ltd.
T02, G6, Phase II, Ganga Dham,
Market Yard,
Pune - 411 037**

...Respondent No. 2

Appellant: Ms. Madhumita Chakraborty, Advocate.

**Respondents: Mr. PBA Srinivasan and Mr. Avinash Mohapatra,
Advocates for R-1.
Mr. Vicky Dang, Advocate for R-2 (RP).**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Impugned Order dated 06.11.2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, in CP (IB) No. 3568/NCLT/MB/2019, admitting the Section 7 Application filed by Punjab National Bank; the Financial Creditor, Jailxami Sugar Products (Nitali) Private Limited, the Corporate Debtor preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short the 'IBC'). While admitting the Application, the Learned Adjudicating Authority in the Impugned Order observed as follows:-

“15. On perusal of the Sanction letters dated 07.05.2010, 28.09.2010 and 17.09.2011, Term Loan Facility Agreement dated 29.09.2010 and Bank statement of the Corporate Debtor's account annexed to the Application and it is established that the Corporate Debtor has received the debt amount.

16. On perusal of letter dated 11.06.2017 issued by Corporate Debtor to Applicant seeking restructuring of the loan and Balance & Security Confirmation Letter dated 17.06.2017, it is clear that the Corporate Debtor has admitted to its liability to repay the debt amount received from the Applicant.

17. On perusal of the bank statement of the Corporate Debtor along with certificate under section 2A of the Bankers Books Evidence Act, 1891 it is seen that the Corporate Debtor has not made any payments to the Applicant. The date of default being the date of classification of the Corporate Debtor's account as NPA i.e. 31.03.2013.

18. The Corporate Debtor initiated proceedings before Debt Recovery Tribunal, Pune in OA No. 185/2014 and vide order dated 01.11.2016 it was held that the Corporate Debtor is liable to repay the debt amounts to the Applicant. The Applicant has issued letter for restructuring the loan on 11.06.2017 acknowledged its liability to repay debt amounts on 17.06.2017.

19. The present application is filed by the Applicant The debt amount of more than Rupees One Lakh and default by the Corporate Debtor has been established. The application is filed on proper Form 1 and is complete. The Application has been filed within the period of limitation.”

2. Learned Counsel appearing for the Appellant contended that the Application filed by the Financial Creditor was barred by limitation; that the Petition was filed six years after the account by the Corporate Debtor was declared as NPA and was therefore barred by limitation; that a winding up Order has been passed and an Official Liquidator was appointed by the Hon'ble High Court of Bombay which was not considered by the Adjudicating Authority; that the Directors were not served with a copy of the

Petition; that the Company was classified as NPA on 31.03.2013 and the Petition was filed in the year 2019 after a lapse of six years and was clearly barred by limitation; that the Official Liquidator cannot handover the documents to the IRP without seeking permission of the Hon'ble High Court of Bombay and sought for setting aside the Impugned Order.

3. Leaned Counsel appearing for the Appellant relied on the following Judgements to establish that the Application was barred by limitation;

- ***'Babulal Vardharji Gurjar' V/s. 'Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.', 2020 SCC Online SC 647.***
- ***'Rajendra Kumar Tekriwal' V/s. 'Bank of Baroda', Company Appeal (AT) (Insolvency) No. 183 of 2020,*** dated 13.08.2020.
- ***'Jagdish Prasad Sarda' V/s. Allahabad Bank', Company Appeal (AT) (Insolvency) No. 183 of 2020,*** dated 28.08.2020.
- ***'Bimalkumar Manubhai Savalia' V/s. 'Bank of India & Anr.', Company Appeal (AT) (Insolvency) No. 1166 of 2019*** dated 05.03.2020.

4. Learned Counsel appearing for the Respondent contended that though a winding up Order has been passed by the Hon'ble High Court of Bombay and an Official Liquidator was also appointed, the Hon'ble Supreme Court in the case of ***'Jaipur Metals and Electricals Employees Organization' V/s. 'Jaipur Metals and Electricals Ltd. & Ors.'*** has observed that 'Section 7 Application filed under the Code is an independent proceeding which has nothing to do with the transfer of pending and winding up proceedings before the High Court' and submitted that in view of the precedent laid down by the Hon'ble Supreme Court, pendency of winding up Petition before the

High Court will not be a bar for initiation of proceedings under Section 7 of the Code.

5. The Learned Counsel further submitted that the Account was classified as NPA on 31.03.2013, but the Application filed under Section 7 is well within the period of limitation as it is a well settled proposition of law that wherever there is an acknowledgement of debt in writing, the period of limitation gets extended and fresh limitation starts from the date of acknowledgement by virtue of the provision of Section 18 of the Limitation Act, 1963. The Learned Counsel placed reliance on the letter dated 11.06.2017 (exhibit W) addressed by the Corporate Debtor to the Respondent Bank requesting for restructuring of the existing loan and sanction of fresh loan. The Counsel also drew our attention to the 'Balance and Security Confirmation Letter' dated 17.06.2017 wherein the Corporate Debtor had confirmed the correctness of the balance of Rs. 32,52,07,800.75/- as the amount due in terms of the Agreement dated 29.09.2010. The Learned Counsel vehemently contended that this 'Balance and Security Confirmation Letter' squarely falls within 'acknowledgement of debt' as provided under Section 18 of the Limitation Act, 1963 and therefore the Judgement of the Hon'ble Supreme Court in '**S. Natrajan' V/s. 'Sama Dharman' 2012 SCC OnLine Mad 2776**' is squarely applicable to the facts of this case.

6. Heard both sides at length. The Contention of the Learned Counsel that the Directors were not served a copy and therefore sufficient opportunity was not given to them to present their case is untenable, in the light of the admitted position of fact that the Notice was admittedly hand

delivered to the Official Liquidator who was appointed by the Hon'ble High Court of Bombay on 25.01.2018; but the Corporate Debtor did not enter any appearance nor has chosen to file any Reply despite the Adjudicating Authority having given sufficient opportunities to do so.

7. It is not in dispute that the Hon'ble High Court of Bombay had ordered for winding up of the Company in Company Petition No. 614 of 2015 dated 04.01.2018. The Hon'ble Supreme Court in **'Jaipur Metals and Electricals Employees Organization' (Supra)** held as follows;

“17. However, this does not end the matter. It is clear that Respondent No. 3 has filed a Section 7 application under the Code on 11.01.2018, on which an order has been passed admitting such application by the NCLT on 13.04.2018. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court. It was open for Respondent No. 3 at any time before a winding up order is passed to apply Under Section 7 of the Code. This is clear from a reading of Section 7 together with Section 238 of the Code which reads as follows;

238. Provisions of this Code to override other laws.- *The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”*

8. Learned Counsel appearing for both parties accepted the applicability of the decision of the Hon'ble Supreme Court in **'Jaipur Metals and Electricals Employees Organization' (Supra)** and in **'Forec India Limited' V/s. 'Edelwiss Assets Reconstruction Company Limited'** in Civil Appeal No. 818 of 2018 that the Application under Section 7 was maintainable irrespective of the pendency of the Petition before the Hon'ble

High Court of Bombay in CP No. 614 of 2015 in which the Hon'ble High Court has passed Order of winding up the Company on 04.01.2018.

9. The Resolution Professional has also filed a status report that seven CoC Meetings were conducted and in the Meeting held on 07.10.2020 one Expression of Interest (EOI) was received from a prospective Resolution Applicant after the cutoff date, however, a decision was taken by the CoC to republish the Form-G to accommodate the prospective Resolution Applicant.

10. Now we address ourselves to the main point for consideration as to whether the Section 7 Application is barred by limitation. The Hon'ble Supreme Court in **'Babulal Vardharji Gurjar' V/s. 'Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.'**, 2020 SCC Online SC 647, has elaborately discussed the issue of Limitation and placing reliance on **'BK Educational Services (P) Ltd.'** (2019) 11 SCC 633, **'Gaurav Hargovindbhai Dave' V/s. 'Asset Reconstruction Company (India) Ltd. & Anr.'** (2019) SCC OnLine SC 1239, **'Jignesh Shah' V/s. 'Union of India'** (2019) 10 SCC 750, **'Vashdeo R. Bhojwani' V/s. 'Abhydaya Coop. Bank Ltd.'** (2019) 9 SCC 158 has observed as follows;

"25.2. This Court accepted the contentions urged on behalf of the appellants and while reproducing the relevant passages from B.K. Educational Services, held that the bar of limitation was operating over the application filed by IL&FS in the following words:-

12. *This judgment clinches the issue in favour of the Petitioner/Appellant. With the introduction of Section 238A into the Code, the provisions of the Limitation Act apply to applications made under the Code. Winding up*

petitions filed before the Code came into force are now converted into petitions filed under the Code. What has, therefore, to be decided is whether the Winding up Petition, on the date that it was filed, is barred by lapse of time. If such petition is found to be time-barred, then Section 238A of the Code will not give a new lease of life to such a time-barred petition. **On the facts of this case, it is clear that as the Winding up Petition was filed beyond three years from August, 2012 which is when, even according to IL & FS, default in repayment had occurred, it is barred by time.**”

(Emphasis in bold supplied)

“25.3. Though with the aforesaid finding, the matter stood concluded that the petition filed by IL&FS was barred by limitation but thereafter, the Court also proceeded to examine another line of submissions of the parties as regards effect of the suit for recovery over the proceedings under Section 433 of the Companies Act, 1956, where it was argued on behalf of the appellants that existence of such a suit cannot be construed as having either revived the period of limitation or having extended it, insofar as concerning the proceeding for winding up. This Court accepted the said contention of the appellants and in that context, made the observations that are relied upon by the parties and read as under:-

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.”

11. The Hon'ble Apex Court in '**Babulal Vardharji Gurjar**' (*Supra*) has also reproduced the relevant passages of the said decision in '**Gaurav Hargovindbhai Dave**' (*Supra*) detailed as hereunder

“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 21.07.2011, 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 Private Limited v. Parag Gupta and Associates, 2018 SCC OnLine SC 1921 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 7 of B.K. Educational Services Private Limited (supra) 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 learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21.07.2011, 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 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.

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.”

(Emphasis in bold supplied)

12. In the case of **‘Jignesh Shah’ (Supra)** 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**

Company Appeal (AT) (Insolvency) No. 90 of 2020

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. 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, 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 laches". 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 counterintuitive. 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)

In the aforementioned Judgement the scope and intent of the Code that it cannot be treated as a Debt Recovery Law and cannot reopen the right of claimants to file time barred claims has been made clear.

13. In **'Babulal Vardharji Gurjar' (Supra)** the Hon'ble Apex Court while dealing with **'whether Section 18 Limitation Act could be applied to that case'** observed as follows;

“32.1. Even in the later decisions, this Court has consistently applied the declaration of law in **B.K. Educational Services (supra)**. As noticed, in the case of **Vashdeo R. Bhojwani (supra)**, this Court rejected the contention suggesting continuing cause of action for the purpose of application under Section 7 of the Code while holding that the limitation started ticking from the date of issuance of recovery certificate dated 24.12.2001. Again, in the case of **Gaurav Hargovindbhai Dave (supra)**, where the date of default was stated in the application under Section 7 of the Code to be the date of NPA i.e., 21.07.2011, this Court held that the limitation began to run from the date of NPA and hence, the application filed under Section 7 of the Code on 03.10.2017 was barred by limitation.

32.2. In view of the above, we are not inclined to accept the arguments built up by the respondents with reference to one part of observations occurring in paragraph 21 of the decision in **Jignesh Shah (supra)**.

33. Apart from the above and even if it be assumed that the principles relating to acknowledgement as per Section 18 of the Limitation Act are applicable for extension of time for the purpose of the application

under Section 7 of the Code, in our view, neither the said provision and principles come in operation in the present case nor they ensure to the benefit of respondent No. 2 for the fundamental reason that in the application made before NCLT, the respondent No. 2 specifically stated the date of default as '8.7.2011 being the date of NPA'. It remains indisputable that neither any other date of default has been stated in the application nor any suggestion about any acknowledgement has been made. As noticed, even in Part-V of the application, the respondent No. 2 was required to state the particulars of financial debt with documents and evidence on record. In the variety of descriptions which could have been given by the applicant in the said Part V of the application and even in residuary Point No. 8 therein, nothing was at all stated at any place about the so called acknowledgment or any other date of default.

(Emphasis Supplied)

14. In the instant case the date of default (NPA) is 31.03.2013 and the Application under Section 7 was filed on 10.10.2019. The contention of the Learned Counsel appearing for the Bank that there was another 'Balance and Security Confirmation Letter' dated 03.07.2014, page 84 of the Reply, which is vehemently opposed by the Appellant Counsel on the ground that it has not been filed before the Adjudicating Authority, which would give a

fresh lease of life to the debt, is unsustainable as three years has lapsed for computing the limitation as the date of filing of the Application is 10.10.2019. The other 'Balance and Security Confirmation Letter' relied upon by the Respondent Counsel is dated 17.06.2017 which is also beyond three years of the date of NPA. The letter dated 11.06.2017 written by the Corporate Debtor seeking for request for restructuring of the existing loan has not been accepted by the Bank. Be that as it may, this communication relied upon by the Respondent Bank is beyond the period of three years from the date of NPA and also does not fall within the provisions of Section 18 of the Limitation Act, 1963. Keeping in view the ratio laid down by the Hon'ble Supreme Court in the aforementioned catena of Judgements, we are of the considered view that this Application under Section 7 is barred by limitation as it is filed beyond three years of the date of NPA. Further, as we observe that there is nothing on record to suggest that the Appellant has acknowledged the debt '*within three years*' and has agreed to pay the debt. As the scope and objective of the Code was not to give a fresh lease of life to time barred debts, we are of the considered opinion that the ratio of '***Babulal Vardharji Gurjar***' (*Supra*) is squarely applicable to the facts of the instant case.

15. The material on record shows that the Company Petition No. 614 of 2015 for winding up was taken up for admission by the Hon'ble High Court of Bombay on 02.07.2016 and an Order of winding up was passed on 04.01.2018 and then official liquidator was appointed on 25.01.2018. The Suspended Board of Directors has not challenged the winding up Orders.

16. Although we are dismissing the present stand-alone Petition filed under Section 7 of IBC, without seeking transfer of winding up proceedings, as time barred, we record that dismissal of the present Application will not come in the way of the parties to proceed with the winding up proceedings before the Hon'ble High Court of Bombay, or seek transfer in accordance with law, if permissible.

17. For all the aforementioned reasons this Appeal is allowed and the Impugned Order is set aside. It is open to the parties to take recourse before an appropriate forum.

18. The matter is remitted to the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) to be listed on 5th April, 2021 for quantifying the fees of the RP to be borne by Applicant/Financial Creditor. The Registry is directed to upload the Order in website and also to remit one copy of Order to the Adjudicating Authority.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
02nd March, 2021

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