

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 932 of 2019

[Arising out of Order dated 26th August, 2019 passed by the National Company Law Tribunal, Guwahati Bench, Guwahati in C.P.(IB) No. 23/GB/2018]

IN THE MATTER OF:

Mr. Piyush Periwal

S/o Late Sh. Madanlal Periwal
R/o – 12E, Judges Court Road, P.S. Alipore,
Kolkata – 700 027 (W.B.)
(As Promoter and Shareholder of
National Plywood Industries Ltd.)

...Appellant

Vs

Stressed Assets Stabilization Fund (SASF),

Having its Principal Office at:-
3rd Floor, D-Wing, IDBI Tower,
WTC Complex, Cuffe Parade,
Mumbai – 400 005.

....Respondent

Present:

For Appellant: Mr. Ratnanko Banerjee, Sr. Advocate with Mr. Ranvir Singh and Mr. Manish Verma, Advocates.

For Respondent: Mr. Ritin Rai, Senior Advocate with Mr. Sidhartha Barua, Advocate for R-1.

Mr. Anand Verma, Mr. Abhishek Prasad and Mr. Ashok Tibrewala Advocates with Mr. Sandeep Khaitan, RP for Resolution Professional.

J U D G M E N T

BANSI LAL BHAT, J.

This appeal has been preferred by Mr. Piyush Periwal, Promoter/ Shareholder of 'National Plywood Industries Ltd.' (NPIL), the Corporate Debtor, against impugned order dated 26th August, 2019 passed by the Adjudicating Authority (National Company Law Tribunal) Guwahati Bench, Guwahati by virtue whereof application of Respondent – 'Stressed Assets Stabilization Fund' (SASF) - Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') came to be admitted with consequential directions declaring moratorium and appointment of Mr. Sandeep Khaitan as Interim Resolution Professional as a sequel to the order of admission. Aggrieved thereof, the Appellant has assailed the impugned order primarily on the ground that the application was time barred and also not maintainable under Section 7 of the I&B Code.

2. For a better grasp of the issues raised in this appeal a peep into the factual matrix would be inevitable. 'Industrial Development Bank of India' (IDBI) advanced loan facilities to 'National Boards Ltd.' (NBL) – the Principal Borrower under its Project Finance Scheme for which the 'Corporate Debtor' stood as 'Corporate Guarantor'. It happened on 27th March, 1997. The Principal Borrower – NBL defaulted in repayment of loan to IDBI. IDBI

recalled the loan facility on 9th November, 2001 and invoked corporate guarantee of the Corporate Debtor – NPIL vide letter dated 3rd December, 2001 raising a demand of Rs.5,42,94,868/-. IDBI filed OA No. 27/2002 with Debts Recovery Tribunal (DRT), Guwahati and obtained a recovery certificate dated 5th January, 2005 against the Principal Borrower – NBL and its personal guarantors. Corporate Debtor – NPIL was not a party to the said OA. A reference was filed before the ‘Board for Industrial and Financial Reconstruction’ (BIFR) and the said reference was pending before BIFR till 30th November, 2016 when SICA was repealed. Despite being armed with the recovery certificate issued by DRT Guwahati and the Principal Borrower – NBL having entered into a One Time Settlement (OTS) with IDBI, the amount in question remained unrecovered from the Principal Borrower and its Personal Guarantors. Subsequently, in terms of Assignment Deed dated 30th September, 2004, IDBI assigned its debts to SASF, who became the Financial Creditor as Assignee of IDBI and filed application under Section 7 of the I&B Code against the NPIL – the Corporate Debtor, who raised the plea of limitation, the Deed of Guarantee being legally unenforceable, effect of OTS emanating from the Principal Borrower without its consent and knowledge and the application being not maintainable for failure to prove default before the Adjudicating Authority which came to be repelled in terms of the impugned order.

3. It is contended on behalf of Appellant that the application preferred by the Financial Creditor – SASF before the Adjudicating Authority was time

barred as the same has not been preferred within three years in terms of Article 137 of Limitation Act, 1963 which applies in view of mandate of Section 238 A of I&B Code. Reference in this regard is made to Table in Para 3 of Brief Note of Submission of NPIL (Respondent before the Adjudicating Authority), which is extracted below:-

S. No.	Particulars	Date	Remarks
1.	Date of Invocation of Corporate Guarantee which is the start date for the default	03.12.2001	a. Invocation letter (pages 58-60 of Appeal) b. SASF also admits this date as invocation date and beginning of cause of action in their petition (page 75 of Appeal and Rejoinder (page 99 of Appeal) c. From the Petition, it appears that the date of default has been taken as 03.12.2001 as interest has been calculated from 03.12.2001 (page 76 of Appeal)
2.	Date of receipt of Second Reference by BIFR	21.02.2003	a. Page 61 of Appeal. No dispute with regard to this date. b. Question is whether this date has any relevance for effect of Section 22 of SICA
3.	Date of registration of the Second Reference by BIFR under Section 16 of SICA	01.07.2003	a. Page 61 of Appeal. Again, no dispute with this date. b. According to Appellant, this is the triggering point as held by several Supreme Court decisions for exclusion of limitation time under Section 22 of SICA.
4.	No. of days from 03.12.2001 to 01.07.2003 is 575 days		This period is the question of legal determination in the Appeal.

5.	Date of repeal of SICA and abatement of Reference	01.12.2016	Again, no dispute with regard to this date.
6.	Date of institution of Insolvency Petition (CP (IB) No. 09/GB/2019)	12.03.2019	Admitted date by SASF
7.	No. of days from 01.12.2016 to 12.03.2019 is 831 days		No dispute with regard to this period as SASF has also admitted the period (page 99 of Appeal & page 11 of Reply)
8.	Total no. of days is 575 + 831 = 1406 days (3 years 10 months and 5 days)		

It is further submitted that the contention of SASF that period of the first reference filed by Corporate Debtor before BIFR on 2nd March, 2001 until 25th June, 2002 when the reference came to be dismissed was liable to be excluded in calculating the limitation as also the contention that the date of receipt of second reference i.e. 21st February, 2003 should be taken as the date for calculation of Section 22 limitation instead of date of registration i.e. 1st July, 2003 is unsustainable as under SICA and its Regulations a reference declined to be registered shall be deemed not to have been made. It is submitted that first reference which was not even registered and got dismissed as being time barred has no effect whatsoever on calculation of limitation period. It is submitted that the bar of proceedings under Section 22 of SICA can operate only when a reference has been registered by BIFR. It is further submitted that the Appellant has given the correct dates for

calculation of period of limitation in filing the insolvency petition which is after a period of 3 years 10 months and 5 days from the date of invocation of Corporate Guarantee on 3rd December, 2001 and after taking into consideration of the date of registration of reference on 1st July, 2003. It is further submitted that the exclusion of period under Section 22 of SICA would not bar a proceeding under Section 7 of I&B Code as there is a non-obstinate clause in Section 238 of I&B Code. Therefore, proceedings pending under SICA by reason of a reference would not aid SASF in exclusion of time period under Article 137 of Limitation Act for filing Section 7 application 18 years after the date of default. It is submitted that when a guarantee is invoked, there can be no question of a continuing cause of action, limitation will set in from the date of invocation of Corporate Guarantee. It is submitted that there is no acknowledgement of debt by Principal Borrower in respect of the claim made in the instant proceedings. Moreover an acknowledgement of liability by a Principal Borrower cannot be construed as acknowledgement of liability by a Guarantor who is the Corporate Debtor in the instant case. SASF invoked the Corporate Guarantee on 3rd December, 2001. The Guarantee agreement clearly provided that the question of limitation as against the Corporate Debtor will commence from the demand under the guarantee as against the Corporate Debtor. Thus, it is contended, the default in this case will start from 3rd December, 2001 when Corporate Guarantee was invoked. It is therefore contended that the insolvency petition was barred by limitation. It is further contended that the SASF discharged the Corporate Debtor from all liabilities

during the period when CD was in BIFR. No dues certificate was issued by SASF when the Principal Borrower was already in default. Thus, the Corporate Guarantor was absolved from all liabilities under the Corporate Guarantee and SASF is deemed to have waived, surrendered, and abandoned all its claims against the Corporate Debtor.

4. Learned counsel for Respondent, relied upon the tabular chart in his written submissions which depict the relevant dates/ events and is reproduced herein below:-

S. NO.	EVENTS	DATES
A.	Date of institution of First Reference Case bearing No. 160/2001, filed by the Corporate Debtor before the learned BIFR	02.03.2001 (2 nd March, 2001)
B.	Date of invocation of Corporate Guarantee by the IDBI Bank against the Corporate Debtor	03.12.2001 (3 rd December, 2001)
C.	Dismissal/ disposal of First Reference Case by the learned BIFR	25.06.2002 (25 th June, 2002)
D.	Date of institution of Second Reference case bearing No. 259/2003, filed by the Corporate Debtor before learned BIFR	21.02.2003 (21 st February, 2003)
E.	Period/ number of days to be included in computation of period of limitation i.e. between 25.06.2002 and 21.02.2003 (D-C)	241 Days
F.	Date of abatement of SICA, 1985	01.12.2016 (1 st December, 2016)
G.	Date of filing of Section 7 application by the Respondent before the National Company Law Tribunal, Guwahati Bench.	12.03.2019 (12 th March, 2019)

H.	Period/number of days to be included in computation of period of limitation i.e. between 01.12.2016 and 12.03.2019 (G-F)	831 days
I.	Total period / number of days in which Section 7 application filed by the Respondent. (E+H)	1072 days (35 months and 12 days)

It is submitted that the first reference case was finally disposed of by BIFR on 25th June, 2002, therefore, the period from 3rd December, 2001 till 25th June, 2002 (the dates relating to invocation of guarantee and disposal of first reference, respectively) was liable to be excluded from the period of limitation under Section 22 (1) of SICA, 1985. It is further submitted that the second reference came to be filed on 21st February, 2003 before BIFR. Thus, period from 25th June, 2002 till 21st February, 2003 (dates intervening disposal of first reference case and filing of second reference case) calculated at 241 days would be included in the limitation period. Pendency of second reference before BIFR from 21st February, 2003 till 1st December, 2016 was followed by repeal of SICA with enforcement of I&B Code, 2016 on 1st December, 2016. Thus, the period of limitation for filing of application under Section 7 of I&B Code would begin to run from 1st December, 2016 till filing of such application on 12th March, 2019, which comes to 1072 days i.e. 35 months and 12 days. It is submitted that the application was filed within 35 months and 12 days from the date of commencement of period of limitation reckoned from the date of invocation of Corporate Guarantee on 3rd December, 2001. The application was within

the limitation period of three years. It is further submitted that since on the date of invocation of Corporate Guarantee i.e. 3rd December, 2001, first reference case of Corporate Debtor under SICA was pending adjudication before BIFR, Section 22 of the SICA would not permit institution of any recovery proceedings against the Corporate Debtor. It is submitted that the calculation provided by the Appellant is incorrect as the same does not take into consideration the period of pendency of first reference case on the date of invocation of Corporate Guarantee and till its final disposal. It is submitted that the date for purposes of calculating limitation has to be taken from date of filing of the reference and not from the date of its registration. It is submitted that with the filing of second reference by Corporate Debtor before BIFR on 21st February, 2003, the IDBI Bank was prevented from taking recovery steps against the Corporate Debtor. The period from date of disposal of first reference case till filing of second reference case has to be added in the period of limitation. It is submitted that the provision contained in Section 22 (1) of SICA, 1985 clearly provides that when enquiry under Section 16 is pending, no legal proceedings can be instituted/ proceeded with further. The statutory provision being unambiguous no external aid of interpretation was to be applied. Cause of action against the Corporate Debtor is a continuing one. IDBI Bank had issued letter dated 3rd December, 2001 invoking the Corporate Guarantee against the Corporate Debtor who did not refute the IDBI's claim. Thus, the Corporate Guarantee securing the loan does not extinguish till its terms are satisfied by the executant and cause continues to run in favour of the

Assignee. The Principal Borrower has acknowledged its liability in respect of outstanding dues time and again and such acknowledgement is equally binding on the Guarantor, the liability of Guarantor being coextensive with the liability of Principal Borrower. Thus, the period of limitation has been reset by the acknowledgment of liability issued by Principal Borrower vide its letter dated 20th December, 2016. The application, thus viewed, was filed within the prescribed period of limitation.

5. We have been taken through the record and apart from, oral hearing, written submissions have been filed by learned counsels for the parties. Appeal against admission of application under Section 7 of I&B Code in terms of the impugned order dated 26th August, 2019 initially filed as Company Appeal (AT) (Insolvency) No. 932 of 2019 by the present Appellant came to be disposed off by this Appellate Tribunal in terms of judgment rendered on 25th November, 2019. This Appellate Tribunal held that the application under Section 7 of the I&B Code was well within the period of limitation. The appeal was accordingly dismissed. Appellant assailed the judgment of this Appellate Tribunal through the medium of Civil Appeal No. 9142 of 2019 before the Hon'ble Apex Court which disposed off the appeal vide order dated 20th January, 2020 setting aside the judgment rendered by this Appellate Tribunal and remanded the matter for fresh consideration. The order passed by the Hon'ble Apex Court is reproduced hereinbelow:-

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No.9142 OF 2019

Order
Dipnig
21/1/2020

PIYUSH PERIWAL

... APPELLANT

Versus

STRESSED ASSETS STABILIZATION FUND (SASF)

... RESPONDENT

O R D E R

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Heard learned counsel for the parties.

It is conceded at the Bar that the date of filing of reference before BIFR has wrongly been noted as 21.02.2002 instead of 21.02.2003.

In view of the fact that the National Company Law Appellate Tribunal (for short, 'NCLAT') noted 21.02.2002 instead of 21.02.2003 while computing the limitation, we set aside the order passed by the NCLAT. We request the NCLAT to consider the matter afresh in accordance with law. All questions including the submission raised on behalf of the respondent as to effect of the earlier proceeding initiated in 2001/2002 are kept open.

The appeal stands disposed of accordingly.

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-SD-
(ARUN MISHRA)

.....
-SD-
(INDIRA BANERJEE)

NEW DELHI;
JANUARY 20, 2020.

It is abundantly clear that all questions have been kept open and the appeal is to be considered afresh on all issues raised therein. The issue of limitation is the core issue. We propose to deal with the same in the light of admitted facts and the law bearing on the subject.

6. Section 238 A of the I&B Code extends the provisions of Limitation Act, 1963, as far as may be, to proceedings before the Adjudicating Authority. It is well settled by now that where periods of limitation have been laid down in the Code, same will apply notwithstanding anything to the contrary in the Limitation Act. In para 42 of the judgment rendered by the Hon'ble Apex Court in **“B. K. Educational Services Private Limited Vs. Parag Gupta and Associates”**, reported in (2019)11 SCC 633, it was held:-

“42. It is thus clear that since the Limitation Act is applicable to applications filed under Section 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.”

This preposition of law was again reiterated in **“Sagar Sharma & Anr. Vs. Phoenix ARC Private Limited & Anr.”**, reported in (2019) 10 SCC 353. The Hon’ble Apex Court observed that since application(s) under Section 7 of the I&B Code are petition(s) which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications.

7. Now advertent to the facts of instant case be it seen that the original lender - IDBI which had advanced Term Loan of Rs.32 million to the Principal Borrower – ‘NBL’ in respect whereof ‘NPIL’ had executed Corporate Guarantee dated 16th July, 1997, recalled the entire outstanding amount of the loan vide letter dated 9th November, 2001. This factual position emerges from the communication dated 3rd December, 2001 forming Annexure A-3 to the appeal paper book. The Financial Creditor invoked Personal Guarantees of Shri Madanlal Periwal and Shri Piyush Periwal (Appellant) vide letter dated 19th November, 2001 as the dues remained unpaid. The Financial Creditor also invoked Corporate Guarantee of NPIL vide letter dated 3rd December, 2001. This emerges from Part-V of Form-1 (Application by Financial Creditor to initiate Corporate Insolvency Resolution Process under the I&B Code) at page 75 of the appeal paper book. It is in this background that the issue of limitation has to be examined keeping in view the fact that proceedings were pending before BIFR under SICA. It emerges from record that the first reference was made on 2nd March, 2001 and upon its dismissal 2nd Reference was made on 21st February, 2003. This is the admitted factual position and not controverted or disputed at the hearing. The

second reference under Section 15(1) of SIC (SP) Act, 1985 dated 21st February, 2003 was registered as Case No. 259/2003 as reflected in the communication dated 1st July, 2003 from Registrar of BIFR forming Annexure A-4 to the appeal paper book at page 61. There is no controversy as regards registration of second reference as borne out by the aforesaid communication. In so far as first reference being Case No. 160/2001 before BIFR is concerned, same appears to be have been taken up by BIFR for consideration on 25th June, 2002 and dismissed as being time barred on account of delay of over six months in filing the reference. BIFR observed in its order that it did not have any powers for condonation of delay in filing the reference. This is reflected in the order of BIFR dated 25th June, 2002 forming page no. 42 to 45 of the reply filed by the Respondent. It is manifestly clear that the reference was declined to be registered, same being barred by limitation and BIFR being not vested with powers to condone delay. The first reference would therefore have to be excluded while computing limitation, in terms of provisions of Section 22 of SICA, depending on the date of commencement of enquiry taking effect from the date of registration. Learned counsel of Appellant has vehemently argued that a reference declined to be registered will be deemed to not have been made. It is submitted that since the first reference was dismissed, Respondent cannot derive any benefit from it. The question for consideration is whether the first reference can be taken into consideration for purposes of exclusion of time within the ambit of Section 22 on account of suspension of legal proceedings pending enquiry under Section 16 of

SICA. Section 16 of SICA vests jurisdiction in BIFR for determining whether any industrial company has become a sick industrial company. Cognizance can be taken by BIFR upon receipt of a reference under Section 15 or upon information received. BIFR is also empowered to commence enquiry upon its own knowledge as to the financial condition of the company. Regulation 19(7) of BIFR Regulation dealing with references under Section 15 of the SICA provides that a reference declined to be registered shall be deemed not to have been made. In this regard it would be apposite to refer to the judgment of the Hon'ble Apex Court in **“Real Value Appliances Vs. Canara Bank and Ors.”, reported in (1998) 5 SCC 554**, wherein the Hon'ble Apex Court after analyzing various provisions of SICA and taking note of views expressed by various High Courts held:-

“30., once the reference is registered and when once it is mandatory simultaneously to call for information/documents from the informant and such a direction is given, then inquiry under Section 16 (1) must – for the purposes of Section 22 – be deemed to have commenced. Section 22 and the prohibitions contained in it shall immediately come into play”

The first reference was dismissed for being barred by limitation and BIFR expressed its inability to condone delay for want of jurisdiction. The question is whether dismissal of such reference in the given circumstances

would attract Regulation 19(7) of BIFR Regulations to hold that such reference was never made for having been declined to be registered. The answer lies in Regulation 19 itself. Regulation 19(3) provides that a reference may be filed either by delivering it at the office of the Board or by sending it by registered post. Regulation 19(4) provides that on receipt of a reference the Secretary/ Registrar shall cause to be endorsed on each reference the date on which it is filed or received in the office of the Board. Regulation 19(5) provides that if on scrutiny, the reference is found to be in order, it shall be registered, assigned a serial number and submitted to the Chairman for assigning it to a Bench. Regulation 19(6) provides that if on scrutiny, the reference is not found to be in order, the Secretary/Registrar may by order decline to register the reference. In the instant case the first reference was, after its receipt, registered and assigned case number 160/2001. It was placed before the Bench, which took up the reference on 25th June, 2002 for consideration so as to determine the status of company's sickness. However, the reference came to be dismissed as being time barred. It is therefore manifestly clear that the reference was registered and came to be dismissed on consideration. Therefore, Regulation 19(7) would not come into play and the period from filing of reference with BIFR under Section 15(1) of SICA on 2nd March, 2001 till its dismissal on 25th June, 2002 will have to be excluded within the purview of Section 22 of SICA providing for suspension of legal proceedings including institution of suits for recovery of money or for enforcement of security against the

industrial company or any guarantee in respect of any loans or advances granted to the industrial company.

8. It is not disputed that the original lender IDBI invoked the Corporate Guarantee on 3rd December, 2001. Subsequently, the debt came to be assigned to Respondent – SASF, who was not a party before DRT Guwahati in OA No. 27/2002 as also in Case No. 259/2003 before BIFR. It is not in dispute that SASF initiated proceedings against NPIL (Corporate Debtor) in respect of the Corporate Guarantee before the Adjudicating Authority on 12th March, 2019. Therefore, the period from 3rd December, 2001 (date of invocation of Corporate Guarantee) till 25th June, 2002 (date of dismissal of first reference case before BIFR) has to be excluded in terms of section 22(1) of SICA while computing the period of limitation. Admittedly, the second reference case was filed on 21st February, 2003 before BIFR, therefore period from 25th June, 2002 till 21st February, 2003 (calculated at 241 days) has to be counted towards the limitation period. From 21st February, 2003 till 1st December, 2016 second reference case of the Corporate Debtor was pending consideration before BIFR and on 1st December, 2016, with enforcement of I&B Code, the SICA, 1985 was repealed. Thus, the period of limitation for triggering of CIRP at the instance of Assignee – SASF against the Corporate Debtor would commence from 1st December, 2016 till application under Section 7 was filed on 12th March, 2019. This is rightly calculated by Responded at 831 days. Thus, we find that the period counting for limitation will be 241 days + 831 days = 1072 days i.e. 35 months and 12

days. It is abundantly clear that the application under Section 7 at the instance of SASF against the Corporate Debtor came to be filed well within three years from the date of invocation of corporate guarantee on 3rd December, 2001. It is indisputable that the Corporate Guarantee executed by the Corporate Debtor for securing the loan advanced to the Principal Borrower, by its very nature continues to run in favour of SASF – the assignee of original lender IDBI and does not extinguish until satisfaction of its terms by the Corporate Guarantor. The cause of action survives till discharge of liability and satisfaction of its terms. It is also settled law of the land that the period of limitation does not commence until the account is live i.e. not duly settled by payment of outstanding dues and/or there is no refusal from the Guarantor towards its obligations. Reference in this regard may be made to the judgment of Hon'ble Apex Court in "**Margaret Lalita Samuel vs Indo Commercial Bank Ltd.**", reported in (1979) 2 SCC 396.

10. The liability of the Guarantor being coextensive to the liability of the Principal Borrower and the acknowledgment of liability by the Principal Borrower, in terms of letter dated 20th December, 2016 forming Annexure R-7 to the Reply affidavit (page 64), is binding on the Guarantor and he cannot wriggle out of its liability to discharge its obligations towards SASF. It goes without saying that in terms of Clause 11 of the Corporate Guarantee dated 16th July, 1997, the Corporate Guarantor is liable to be proceeded against by the lender or its assignee in the same manner as if it was the Principal Borrower/ Debtor.

11. For the foregoing discussion, we are of the considered opinion that the application filed by the Respondent under Section 7 of I&B Code for triggering CIRP against Respondent – Corporate Guarantor on 12th March, 2019 was not barred by limitation. Contention raised by the Appellant as regards plea of limitation and other contention in regard to discharge of obligation of Appellant – Corporate Guarantor towards SASF are accordingly repelled.

12. No other issue was pressed during hearing of Appeal. We find no infirmity in the impugned order. The appeal is dismissed. There shall be no orders as to costs.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[V. P. Singh]
Member (Technical)**

NEW DELHI

24th November, 2020

AM