

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 68 of 2019**

**[Arising out of Impugned Order dated 14<sup>th</sup> December 2018 passed by the Adjudicating Authority/National Company Law Tribunal, Bengaluru Bench, Bengaluru in Company Petition (IB) No. 103/BB/2018]**

**IN THE MATTER OF:**

**Sh. B. Prashanth Hegde  
Suspended Managing Director,  
Metal Closures, Pvt Ltd  
S/o Late Rathnakar Hegde  
Aged about 66 years  
R/o No. 261 Indira Nagar  
Bangalore – 560038**

**Appellant**

**Versus**

**1. State Bank of India  
Stressed Assets Management Branch  
2<sup>nd</sup> Floor, LHO Campus  
No.65, St. Mark's Road  
Bangalore – 560001**

**Respondent No.1**

**2. M/s Metal Closures, Pvt Ltd  
Through Mr Abhishek Nagori, IRP  
No. 93/4-B, 12<sup>th</sup> KM  
Kanakpura Main Road  
Bangalore – 560062**

**Respondent No.2**

**Present:**

**For Appellant : Mr Harin Rawal, Sr. Advocate alongwith  
Mr Avishkar Singhvi and Mr Nipun Katyal,  
Advocates**

**For Respondent : Mr V M Kannan, Advocate for R-1/SBI.  
Mr Mukund P. Unny, Advocate for R-2 (RP).**

**J U D G M E N T**

**[Per; V. P. Singh, Member (T)]**

This Appeal emanates from the Impugned Order dated 14<sup>th</sup> December 2018 passed by the Adjudicating Authority/National Company Law

Tribunal, Bengaluru Bench, Bengaluru in Company Petition (I.B.) No. 103/BB/2018, whereby the Adjudicating Authority has admitted the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**'). The Parties are represented by their original status in the Company Petition for the sake of convenience.

2. These brief facts of the case are as follows:

The State Bank of India, Assets Management Branch, Bangalore on behalf of Consortium Banks filed an Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (from now on referred to as the 'I&B Code') for initiation of 'Corporate Insolvency Resolution Process' against M/s. Metal Closures Pvt Ltd ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench vide Impugned Order dated 14<sup>th</sup> December 2018 having admitted the Application, which is challenged by the Appellant, ex-Director of the Corporate Debtor.

3. The case of the Corporate Debtor was that the State Bank of India granted various credit facilities to the 'Corporate Debtor' since 2007. Subsequently, the Corporation Bank started giving credit facilities to the 'Corporate Debtor' since 14<sup>th</sup> August 2009. On 31<sup>st</sup> January 2010, the account of the 'Corporate Debtor' was classified as a 'Non-Performing Asset' (hereinafter '**NPA**') by State Bank of India. However, it was restructured.

4. The Punjab National Bank entered the Consortium on 26<sup>th</sup> June 2010 by sanctioning certain facilities to the 'Corporate Debtor'. The UCO Bank

also sanctioned Working Capital Cash Credit and Letter of Credit Limit to the 'Corporate Debtor'.

5. According to the Appellant, a Joint Lenders Meeting was held on 28<sup>th</sup> April 2014 between the Members of the Consortium with the 'Corporate Debtor'. The Minutes also recorded that APITCO (Andhra Pradesh Industrial and Technical Consultancy Organisation), State Bank of India's external consultant had recommended that the working capital limits of the Company be enhanced.

6. Further, the case of the Appellant is that the Consortium entered into a Master Joint Lenders Forum Agreement to deal with the subject account. In the meantime, it was decided that a Concurrent Auditor be appointed.

7. The account of 'Corporate Debtor' was declared to be an NPA by the State Bank of India on 28<sup>th</sup> May 2014. The Punjab National Bank also declared the account of 'Corporate Debtor' as NPA on 30<sup>th</sup> June 2014. Later on the Deputy General Manager, State Bank of India, given the failure of restructuring, requested that the date of NPA of the 'Corporate Debtor' be changed to 31<sup>st</sup> January 2010, which was approved on 10<sup>th</sup> July 2014.

8. The Appellant further contends that the State Bank of India issued a notice under Section 13(2) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (from now on referred to as the 'SARAFESI Act') on 12<sup>th</sup> August 2014, calling upon the 'Corporate Debtor' to repay a sum of Rs.71,27,47,889/-. The Corporation

Bank also declared the account of the 'Corporate Debtor' as 'Non-Performing Asset' on 10<sup>th</sup> October 2014.

9. The Appellant submits that the UCO Bank also declared the account of 'Corporate Debtor' an NPA on 31<sup>st</sup> October 2014, which was followed by 'Possession Notice' given by the State Bank of India under Rule 8(1) of the Security (Interest) Rules, 2012. However, the possession notice was withdrawn on 22<sup>nd</sup> June 2015, but the Bank continued to be in physical possession of the Plants of the Corporate Debtor.

10. Further, the State Bank of India issued a letter on 7<sup>th</sup> July 2015 withdrawing the notice dated 12<sup>th</sup> August 2014 issued earlier under Section 13(2) of the SARFAESI Act, 2002. The 'Corporate Debtor' moved in an Appeal under Section 17 of the SARFAESI Act to seek relief to quash the taking over possession of the Plants of the 'Corporate Debtor' and appointment of Concurrent Auditor.

11. The Appellant submits that the initiation of the CIRP was fraudulent, malicious and not intended for any resolution. It was meant to act as a process for recovery of the alleged dues of the Financial Creditor and defeat the Cost and Compensation claim under Section 19 of the SARFAESI Act and damages under Section 19(8) of the RDDB Act, which together is higher than alleged due to Banks. However, the Bank ultimately moved an Application under Section 7 of the I&B Code, which was admitted by the Adjudicating Authority.

12. The Appeal against the said Order of admission was dismissed by this Appellant Tribunal, which was challenged before the Hon'ble Supreme Court in Civil Appeal No.8010 of 2019 wherein the Hon'ble Supreme Court set aside the Order of this Appellate Tribunal and remanded back the matter to this Appellate Tribunal with the following direction:

***"Heard the learned Senior Counsel appearing for the parties.***

***Following our judgment in Sagar Sharma and Another vs. Phoenix ARC Pvt. Ltd. And Another, 2019 SCC OnLine SC 1332, we set aside the impugned judgment of the National Company Law Appellate Tribunal, New Delhi dated 26.09.2019.***

***The NCLAT will now re-examine the question of Limitation having regard to the judgments in B.K. Educational Services Private Limited vs. Parag Gupta and Associates, 2018 SCC OnLine SC 1921 as well as Sagar Sharma and Another (supra) applying Article 137 of the Limitation Act, as expeditiously as possible.***

***The Appeal is allowed in the aforesaid terms. Further pending proceedings will be held in abeyance. Pending applications stand disposed of."***

13. As per directions of the Hon'ble Supreme Court, we have re-examined the question of Limitation, having regard to the law laid down by the Hon'ble Supreme Court in **B K Educational Services Private Limited vs Parag Gupta and Associates, 2018 SCC OnLine SC 1921** and **Sagar Sharma**

**and Another vs Phoenix ARC Private Limited & Another, 2019 SCC  
OnLine SC 1332.**

14. We have heard the arguments of the Learned Counsel for the parties and perused the record.

15. Admittedly, in the year 2007 State Bank of India granted credit facilities to the Corporate Debtor M/s Metal Closures Private Limited. The account of the Corporate Debtor was classified as NPA by SBI on 31<sup>st</sup> January 2010. However, it was restructured on 17<sup>th</sup> February 2010, and the Punjab National Bank entered into the Consortium by sanctioning certain credit facilities to the Corporate Debtor on 26<sup>th</sup> June 2010. As a member of Consortium, the UCO Bank sanctioned 'Working Capital Cash Credit' and 'Letter of Credit Limit 'to the Corporate Debtor on 11<sup>th</sup> April 2012. The Consortium executed the Master Joint Lenders Forum Agreement on 21<sup>st</sup> June 2014. The Corporate Debtor's account was classified as NPA by SBI on 28<sup>th</sup> May 2014; by Corporation Bank on 30<sup>th</sup> June 2013. After the failure of restructuring, the NPA date of the Corporate Debtor was changed to 31<sup>st</sup> January 2010.

16. The Application submitted in 'Form-1' shows the total outstanding as on 14<sup>th</sup> December 2017 was Rs.282,02,71,568.08 (Rupees Two Hundred Eighty-Two Crores Two Lakhs Seventy One Thousand Five Hundred Sixty-Eight and Eight Paise only). **The date of default is not mentioned in Form-1.** Given the law laid down in Supreme Court of India in case of Gaurav Hargovindbhai Dave 2019 (10) SCC 572, Jignesh Shah 2019 (10

SCC 570), Sagar Sharma 2019 (10) SCC 353, B K Education 2019 (11) SCC 633, Babulal Vardharji Gurjar (Civil Appeal No.6347) and Vasudeo Bhojnani and others 2019 (9) SCC 158, the period of Limitation for Section 7 or 9 and Applications under the Insolvency and Bankruptcy Code 2016 would be governed by Article 137 of the Limitation Act, 1963.

17. The Appellant contends that due to repeated failures of M/s. Metal Closures Pvt Ltd ('Corporate Debtor') to regularize the accounts of the members of the Consortium of Banks, the debts of the Corporate Debtor were classified as Non Performing Asset on 31<sup>st</sup> October 2010 by State Bank of India; by Punjab National Bank on 30<sup>th</sup> June 2014; by Corporation Bank on 31<sup>st</sup> December 2014; and by UCO Bank on 31<sup>st</sup> December 2014. Even if the date of default is taken to be the last of the four dates, when the account of the Corporate Debtor was classified as NPA, i.e. 31<sup>st</sup> December 2014, then also it is clear that default occurred prior to 31<sup>st</sup> December 2014. As per Article 137 of the Limitation Act, three years period of Limitation ended on 30<sup>th</sup> December 2017. However, this petition is filed on 23<sup>rd</sup> July 2018, i.e. beyond three years from the time, when account of the Corporate Debtor was classified as NPA on 31<sup>st</sup> December 2014.

18. In the case of *Jignesh Shah v. Union of India*, (2019) 10 SCC 750: (2020) 1 SCC (Civ) 48: 2019 SCC OnLine SC 1254 at page 770 Hon'ble Supreme Court has held ;

*"21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within Limitation cannot in any manner impact the separate and independent*

*remedy of a winding-up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an 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.*"

19. In **Sagar Sharma v. Phoenix Arc (P) Ltd.**, (2019) 10 SCC 353: 2019 SCC OnLine SC 1332 at page 354, Hon'ble Supreme Court has observed:

*"3. Article 141 of the Constitution of India mandates that our judgments are followed in letter and spirit. The date of coming into force of the I.B. Code does not and cannot form a trigger point of Limitation for applications filed under the Code. **Equally, since "applications" are petitions which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications.***"

(emphasis supplied)

20. In case of Babulal Vardharji Gurjar Vs Veer Gurjar Aluminium Industries Pvt Ltd and Another 2020 SCC Online SC 647 Hon'ble Supreme Court observed that;

*"A few days after the decision in Vashdeo R. Bhojwani, a three-Judge Bench of this Court had another occasion to apply and explain the ratio in B.K. Educational Services. That was in the case of Gaurav Hargovindbhai Dave (supra), decided on 18.09.2019. Therein, the financial creditor had stated in the relevant column of Form No. 1 of the Application under Section*



*7 of the Code the date of default to be the date of NPA i.e., 21.07.2011. The Application under Section 7 was filed on 03.10.2017. The Adjudicating Authority applied Article 62 of the Limitation Act and reached to the conclusion that since the limitation period was twelve years from the date on which money sued has become due, the claim was within Limitation and hence, admitted the Application. The NCLAT applied another reasoning that the time of Limitation would begin to run only from 01.12.2016, the date on which the Code was brought into force. This Court took note of the contentions of both the parties and while accepting the submissions that time began to run on 21.07.2011 (the date of NPA), held that the Application filed under Section 7 was time-barred."*

*(emphasis supplied)*

21. Thus, it is clear that the Application filed by the Respondents under Section 7 of the Code in the present case is an effort to revive a dead debt. The date of default is crucial to determine the date when the cause of action accrued. In this case, the Respondent has not mentioned the date of default. In the case of Gaurav Hargovindbhai Dave (supra), Hon'ble Supreme Court has considered that the date of default to be the date of NPA. Therefore, the date of default, in this case, is 31<sup>st</sup> January 2010.

The right to sue under IBC occurs when default occurs. If the default has occurred over three years period prior to the date of filing the Application, the Application would be time-barred given the law laid down by Hon'ble Supreme Court in B K Educational (supra).

22. Admittedly, in this case the Corporate Debtor was declared to be Non-performing Asset on 28<sup>th</sup> May 2014. The date was later changed to 31<sup>st</sup> January 2010. Therefore, if the position taken by the Financial Creditor Bank is taken as correct, 'Default' occurred on or before 31<sup>st</sup> January 2010. The period of Limitation for the same would expire on 30<sup>th</sup> January 2013. The Application for initiation is filed on 23<sup>rd</sup> July 2018. The contention of the Respondent that their right accrued only on 01<sup>st</sup> December 2016 is not consonant to the ratio of judgement in B K Educational Services (supra) wherein the Hon'ble Supreme Court has held that "*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. In view of the law enunciated by the Hon'ble Supreme Court of India in the above-mentioned cases and the facts and circumstances of this case, it is clear that the Application filed under Section 7 of the Code by the Financial Creditor is barred by Limitation.

24. Given the findings above, we have no other option but to set aside the Impugned Order dated 14<sup>th</sup> December 2018. The Application preferred by Respondent No.1 State Bank of India, against the Corporate Debtor,

Respondent No.2 (Company) under Section 7 of the Code is dismissed. The Appellant' Corporate Debtor' (Company) is released from all rigours of 'Moratorium' and is allowed to function through its Board of Directors with immediate effect. The Interim Resolution Professional/Resolution Professional will provide and intimate the fees for the period he has functioned and costs of the 'Corporate Insolvency Resolution Process' incurred by him to the Financial Creditor. The IRP/Resolution Professional will hand over the assets and records of the Corporate Debtor to its Board of Director.

[Justice Venugopal M.]  
Member (Judicial)

[V. P. Singh]  
Member (Technical)

[Dr. Alok Srivastava]  
Member (Technical)

**NEW DELHI**  
**14<sup>th</sup> OCTOBER, 2020**

*pks*