NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 407 of 2019

[Arising out of Order dated 21st March, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench in C.P.(IB)No.244/BB/2018]

IN THE MATTER OF:

C. Shivakumar Reddy,
Former Managing Director of
Kavveri Telecom Infrastructure Limited,
Plot No.31 – 36, 1 Floor 1st Main Road,
2nd Stage, Arekere Mico Layout,
Bannerghatta Road, Bangalore – 560 078. .... Appellant

Vs

1. Dena Bank,
C-10, G-Block,
Bandra Kurla Complex, Bandra East,
Mumbai – 400 051.

Also At

Dena Bank,
Asset Recovery Branch,
C/o Bangalore Zonal Office
38, Sapthagiri Palace, 12th Cross,
Ganganaar North, Bangalore – 560 024.

2. Kavveri Telecom Infrastructure Limited,
Through Interim Resolution Professional,
Shri B. Hariharan,
Having Registered Office at
Plot No.31 – 36, 1 Floor 1st Main Road,
2nd Stage, Arekere Mico Layout,
Bannerghatta Road, Bangalore – 560 078. .... Respondents

Present:

For Appellant: **Mr. Goutham Shivshankar, Advocate.**

For Respondents: **Mr. Divyanshu Sahay, Advocate for Respondent No.1.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Dena Bank ('Financial Creditor') preferred application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the

'I&B Code') to initiate 'Corporate Insolvency Resolution Process' in respect of M/s. Kavveri Telecom Infrastructure Limited. The Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench by impugned order dated 21st March, 2019 admitted the application and appointed 'Interim Resolution Professional'. The Appellant, Shareholder of 'Corporate Debtor' has challenged the same on the ground that the application under Section 7 of the I&B code was barred by limitation.

2. The Learned Counsel for the Appellant submitted that the 'Corporate Debtor' defaulted to pay the debt since 30th September, 2013 and the Respondent – Dena Bank classified the debt as NPA on 31st December, 2013. The date of default being 30th September, 2013 and the classification as NPA on 31st December, 2013, the application under Section 7 was barred by limitation.

3. The learned Counsel appearing on behalf of the Respondent-Dena Bank submitted that the application under Section 7 of the I&B Code is saved by Section 18 of the Limitation Act, 1963, in as much, even if the time, is taken from the date of default, i.e., 30th September, 2013, in view of the acknowledgement of liability given by the 'Corporate Debtor', the application filed by the Respondent cannot be termed as barred by time.

4. The learned Counsel for the Respondent contended that on 28th March, 2014, the 'Corporate Debtor' deposited two months' interest amounting to Rs.111 lakhs. Subsequently, in its reply dated 5th January 2015 to the Demand Notice issued on 22nd December, 2014, the 'Corporate Debtor' sought restructuring of the debt. Infact, the 'Corporate Debtor' defaulted in re-payment of the loan to the 1st Respondent Bank had accepted in the Balance Sheet of the 'Corporate Debtor' that loan is due for the year 2016-17. The 'Corporate Debtor' also acknowledged its liability, which is also clear from the letter of one-time settlement sent on 3rd March, 2017, which was rejected by the Bank on 28th April, 2018.

5. It is not in dispute that the Respondent has accepted that the 'Corporate Debtor' defaulted to pay the debt on 30th September, 2013. The account was classified as NPA with effect from 31st December, 2013.

6. Section 18 of the Limitation Act, 1963 reads as follows: -

> *"**18. Effect of acknowledgment in writing.**— (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.*
>
> *(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.*
>
> *Explanation.—For the purposes of this section,—*
>
> *(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;*

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."

7. In the present case, there is nothing on record to suggest that the 'Corporate Debtor' acknowledged the debt within three years and agreed to pay the debt. The application moved by 'Corporate Debtor' to restructure the debt or payment of the interest, does not amount to acknowledgement of debt. There is nothing on record to suggest that the 'Corporate Debtor' or its authorized representative by its signature has accepted or acknowledged the debt within three years from the date of default or from the date when the account was declared NPA, i.e., on 31st December, 2013. The Balance Sheet of the 'Corporate Debtor' for the year 2016-2017 filed after 31st March, 2017 cannot be termed to be a document of acknowledgement in terms of Section 18 of the Limitation Act.

8. Any dues payable, even if acknowledged after three years of limitation period, cannot be taken into consideration for the purpose of deriving conclusion under Section 18 of the Limitation Act.

9. In the case of ***"Jignesh Shah and Another v. Union of India and Another– (2019) SCC OnLine SC 1254"***, 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***
>
> *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.[1] 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,[3] 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 latches"[4]. 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 counter-intuitive. 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)

The Hon'ble Supreme Court further noticed the arguments, observed and held:

*"**13.** Dr. Singhvi relied upon a number of judgments in which proceedings under Section 433 of the Companies Act, 1956 had been initiated after suits for recovery had already been filed. These judgments have held that the existence of such suit cannot be construed as having either revived a period of limitation or having extended it, insofar as the winding up proceeding was concerned. Thus, in Hariom Firestock Limited v. Sunjal Engineering Pvt. Ltd., (1999) 96 Comp Cas 349, a Single Judge of the Karnataka High Court, in the fact situation of a suit for recovery being filed prior to a winding up petition being filed, opined:*

> *"**8** …To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and de hors that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that debt in the year 1995, and the answer to that*

question has to be in the negative. That being so, the existence of the suit cannot be construed as having either revived the period of limitation or extended it. It only means that those proceedings are pending but it does not give the party a legal right to institute any other proceedings on that basis. It is well settled law that the limitation is extended only in certain limited situations and that the existence of a suit is not necessarily one of them. In this view of the matter, the second point will have to be answered in favour of the respondents and it will have to be held that there was no enforceable claim in the year 1995, when the present petition was instituted."

14. *Likewise, a Single Judge of the Patna High Court in Ferro Alloys Corporation Ltd. v. Rajhans Steel Ltd., (2000) Comp Cas 426 also held:*

*"**12....** In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner-company against opposite party No. 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that court cannot ensure for the benefit of the present winding up proceeding. The debt having become time-barred when this petition was presented in this court, the same could not be legally recoverable through this court by resorting to winding up proceedings because the same cannot legally be proved under section 520 of the Act. It would have been altogether a different matter if the petitioner-company approached this court for winding up*

of opposite party No. 1 after obtaining a decree from the Calcutta High Court in Suit No. 1073 of 1987, and the decree remaining unsatisfied, as provided in clause (b) of sub-section (1) of section 434. Therefore, since the debt of the petitioner-company has become time-barred and cannot be legally proved in this court in course of the present proceedings, winding up of opposite party No. 1 cannot be ordered due to non-payment of the said debt."

16. *In Dr. Dipankar Chakraborty v. Allahabad Bank, 2017 SCC OnLine Cal 8742, the fact situation was that a suit had been filed by the petitioner in the City Court at Calcutta for damages against the Allahabad Bank. The Bank, in turn, filed a proceeding under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in 2001 before the Debt Recovery Tribunal, Calcutta. The Civil Suit was also transferred to the Debt Recovery Tribunal, Calcutta where both proceedings were pending adjudication. Meanwhile, under the Securitisation and Restructure of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act"), a notice dated 3rd March, 2016 was issued under Section 13(2) of the SARFAESI Act. The question which arose before the Court was whether the invocation of the SARFAESI Act, being beyond limitation, would be saved because of the pending proceedings under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Court negatived the plea of the Bank, stating:*

*"**22.** Section 14 of the Limitation Act, 1963 permits exclusion of the time taken to proceed bona fide in a Court without jurisdiction. Such section permits a plaintiff to present the same suit, if the Court of the first instance, returns a plaint from defect of jurisdiction or other causes of like nature, being unable to entertain it. In the present case, a secured creditor is not withdrawing a proceeding pending before the Debts Recovery Tribunal under Section 19 of the Act of 1993 to invoke the provisions of the Act of 2002. Rather the secured creditor is proceeding, independent of its right to proceed under the Act of 1993, while invoking the provisions of the Act of 2002. This choice of the secured creditor to invoke the Act of 2002 is independent of and despite the pendency of the proceedings under the Act of 1993, has to be looked at from the perspective of whether or not such an action meets the requirement of Section 36 of the Act of 2002, when the secured creditor is proposing to take a measure under Section 13(4) of the Act of 2002. Although, a secured creditor, as held in Transcore (supra), is entitled to take a remedy or a measure as available in the Act of 2002, despite the pendency of other proceedings, including a proceeding under Section 19 of the Act of 1993, in respect of the self-same cause of action, in my view, the invocation of such independent right under the Act of 2002, has to be done within the period of limitation prescribed under the Limitation Act,*

1963 in terms of Section 36 of the Act of 2002. The Act of 2002 gives an independent right to a secured creditor to proceed against its financial assets and in respect of which such asset the secured creditor has security interest. The right to proceed, however, is subject to the adherence to the provisions of limitation as enshrined in the Limitation Act, 1963. The provisions of the Limitation Act, 1963 are, therefore, attracted to a proceeding initiated under the Act of 2002. That being the legal position, the invocation of the provisions of the Act of 2002 in the facts of the present case, on July 5, 2011, without there being an extension of the period of limitation by the act of the parties cannot be sustained.

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25. The issues raised are, therefore, answered by holding that, the initiation of the proceedings by the bank was barred by the laws of limitation on July 5, 2011 and all proceedings taken by the bank consequent upon and pursuant to the notice under Section 13(2) of the Act of 2002 dated July 5, 2011 are quashed including such notice."

Finally the Hon'ble Supreme Court 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*

acknowledgement 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."

10. Similar issue fell for consideration before the Hon'ble Supreme Court in ***"Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Ltd. & Anr.*** in Civil Appeal No.4952 of 2019. The said case was disposed of on 18th September, 2019. In the said case, the Hon'ble Supreme Court noticed that the account of Respondent No.2 was declared NPA on 21st July, 2011 and subsequently, the State Bank of India filed two Original Applications before the Debts Recovery Tribunal in the year 2012 for recovery of the total debt of Rs.50 crores. In the meantime, when the State Bank of India assigned the debt to Asset Reconstruction Company (India) Limited on 28th March, 2014, the Debts Recovery Tribunal vide judgment dated 10th June 2016 held that the waiver was not maintainable. In the said case, this Appellate Tribunal by its judgment held that the limitation for application under Section 7 will be counted only from 1st December, 2016, which is the date on which the I&B Code brought into force. The Appellate Tribunal noted the NCLT Decision that the limitation period for suit was 12 years, their being a mortgage. However, Hon'ble Supreme Court taking into consideration the judgment in ***"B.K. Education Services Private Limited vs. Parag Gupta and Associates - 2018 SCC OnLine SC 1921"*** held that the limitation started from the date of default, i.e., 21st July, 2011 when the account was declared NPA.

11. Admittedly, the 'Corporate Debtor' the defaulted in making payments on 20th September, 2013 and the Dena Bank declared the account as NPA

on 31st December, 2013. Therefore, we hold that the application filed under Section 7 of the I&B Code by the Bank is barred by limitation.

12. From the record, we find that the Respondent Bank ('Financial Creditor') has already filed one OA No.16 of 2015 before the Debts Recovery Tribunal Bengaluru. The 'Corporate Debtor' has already appeared before the Debts Recovery Tribunal. The Debts Recovery Tribunal has allowed the said original application OA No.16 of 2015 (TA No.634 of 2017) and recovery certificate was issued on 25th May, 2017. Infact, for non-payment, an FIR dated 26th July, 2017 was also lodged by the Bank against the 'Corporate Debtor' and by notice dated 20th February, 2018, it has been declared as a willful defaulter.

13. The aforesaid facts also suggest that the application under Section 7 of the I&B Code was filed for the purpose of execution of the Decree passed by the Debts Recovery Tribunal in favour of the 'Financial Creditor' for the purpose other than for the resolution of insolvency, or liquidation and is covered by Section 65.

14. For the reason(s) aforesaid, we set-aside the impugned order dated 21st March, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench in CP (IB) No.244/BB/2018 and dismiss the application under Section 7 of the I&B code filed by the Dena Bank.

15. In the result, 'Corporate Debtor' – Kavveri Telecom Infrastructure Limited is released from the rigor of the 'Corporate Insolvency Resolution Process'. All actions taken by the 'Interim Resolution Professional'/ 'Resolution Professional' and 'Committee of Creditors', if any, are declared illegal and set-aside. The Resolution Professional is directed to handover the records and assets of the 'Corporate Debtor' to the Promoters/ Directors of the 'Corporate Debtor' immediately.

16. The matter is remitted to the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench to decide the fee and cost of the

'Corporate Insolvency Resolution Process' as incurred by the 'Resolution Professional, which is to be borne and paid by the Dena Bank ('Financial Creditor'). The Appeal is allowed with the aforesaid observations and directions. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Venugopal M)
Member (Judicial)

NEW DELHI

18th December, 2019

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