NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.998 of 2019

[Arising out of Order dated 29.07.2019 passed by National Company Law Tribunal, Chandigarh Bench, Chandigarh in CP (IB) No.341/Chd/Pb/2018]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
Ashok Kumar Sachdeva 17A, Amritsar Cantonment Amritsar – 143 001	....	Appellant
Versus		
1. Kotak Mahindra Bank Ltd. 27, BKC, C 27, G Block, Bandra Kurla Complex, Bandra (E) Mumbai – 400 051 Through Ajay Kumar Raina (VP)	Petitioner/ Financial Creditor	Respondent No.1
2. Sh. Himanshu Jetley Interim Resolution Professional SCO 131, Sector 5, Panchkula, Haryana – 134112	IRP	Respondent No.2
3. Sachdeva And Sons Rice Mills Limited 17, 17A, Amritsar Cantonment, Amritsar – 143 001	Respondent/ Corporate Debtor	Respondent No.3

For Appellant: **Shri Rajiv Bahl, Advocate**

For Respondents: **Shri Manish Jain and Ms. Srishti Kapoor, Advocates (R-1)**
Shri Viren Sharma and Shri A. Anand, Advocates (R-2 – RP)

O R D E R

21.01.2020 This Appeal has been filed by Director of Respondent No.3 – Sachdeva And Sons Rice Mills Limited – the Corporate Debtor, against Impugned Order dated 29th July, 2019 passed by Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) in CP (IB) No.341/Chd/Pb/2018. The Appellant claims that the Section 7 Application, which has been admitted by the Adjudicating Authority, should not have been admitted.

2. According to the Appellant, Respondent No.3 Company had secured credit facility from erstwhile Bank of Punjab which later merged into Centurion Bank of Punjab Limited. The loan was sanctioned to the Respondent No.3 – Corporate Debtor on 24th September, 2002. Subsequently, due to default, the account became NPA on 31st December, 2004. Centurion Bank assigned debt to Kotak Mahindra Bank (Respondent No.1) by deed on 27.09.2007. Assignee filed Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC –in short) for total dues of Rs.1,28,65,40,328.38. Section 7 Application came to be filed on 21st September, 2018.

3. It is stated that the Centurion Bank of Punjab Limited had filed OA against the Corporate Debtor in September, 2006 before DRT and the proceedings are still pending. It is stated that Notice under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act - in short) was given on 17th February, 2005 and Possession Notice was issued on 17th September, 2012 and Sale Notice was issued on 20th June, 2014. It is stated that Securitisation Application has also

been filed in 2014 and the proceedings are pending at DRT, Chandigarh as well as DRT, Mumbai.

4. According to the Appellant, when the account became NPA on 31st December, 2004, the Section 7 Application filed in 2018 was time bared and the Adjudicating Authority wrongly admitted the same. The Appellant is relying on Judgement in the matter of "**B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates"** (2018 AIR SC 5601). According to the Appellant, the Supreme Court has held that the period of limitation for filing Application under Section 7 and 9 of the Code will be based on Article 137 of the Limitation Act.

5. The learned Counsel submits that the admission of the Section 7 Application and initiation of the insolvency and resolution process needs to be set aside.

6. The learned Counsel for the Respondent referred Annexure A-2 – the Form Part – V Para – 2 with regard to "Particulars of any Order of a Court/Tribunal or Arbitral Panel adjudicating on the default" where details are given with regard to the various proceedings which were initiated. It is submitted that the Respondent has been diligently pursuing remedies available to it and thus, it cannot be held that the claim of the Respondent – Financial Creditor is time barred. The learned Counsel referred to Reply filed by the Respondent and the Balance Sheet of the Corporate Debtor which was for the period ending 31st March, 2015 (Annexure R-2 of the Reply). The learned Counsel pointed out that the Balance Sheet was signed on 3rd

September, 2015 and thus till that point of time also, the Respondent was acknowledging that the amounts are outstanding. The learned Counsel submitted that after the Balance Sheet for Financial Year ending 31st March, 2015, the Corporate Debtor did not prepare Balance Sheets and thus, should not be allowed to take disadvantage as the balance sheets would have reflected the amounts outstanding. The learned Counsel for the Respondent is pointing out Judgements to show that the acknowledgement in the balance sheet is also to be treated as acknowledgement under Section 18 of the Limitation Act, 1963.

7. According to the learned Counsel for Respondent, this Tribunal has in the matter of **"Mr. Basab Biraja Paul and another Vs. Edelweiss Asset Reconstruction Company Limited"** in Company Appeal (AT) (Ins) No.772 of 2019 held that if pursuing remedy in wrong Court gets protected by Section 14 of Limitation Act, pursuing remedy in the right Forum should be treated as saving limitation and it is stated that as the remedies now have become available under the IBC, Section 7 Application was rightly admitted and the admission Orders may not be disturbed.

8. Having heard Counsel for both sides, we find that in the present matter, we need not decide the effect of Balance Sheet and if it would amount to acknowledgement as the last Balance Sheet relied on here was, in any case signed on 3rd September, 2015 and even if it was to be considered, the Section 7 Application filed on 21st September, 2018 would be beyond period of 3 years and thus would not get protected. With regard to the Judgement in the matter of "Mr. Basab Biraja Paul and another Vs. Edelweiss Asset Reconstruction

Company Limited" of this Tribunal relied on by the learned Counsel for the Respondent, the said judgement is dated 6th September, 2019. Subsequent to that Judgement of this Tribunal, Judgement of Hon'ble Supreme Court came to be passed on 18th September, 2019 in the matter of **"Gaurav Hargovindbhai Dave V. Asset Reconstruction Company (India) Ltd. and Another"** reported in 2019 SCC OnLine SC 1239. If that Judgement is perused, it can be seen that in that matter the account became NPA on 21.07.2011. By 2012, DRT was already moved. The said O.A. was found not maintainable on 10.06.2016. Subsequently, on 3rd October, 2017, Section 7 Application under IBC came to be filed. The Adjudicating Authority in that matter held relying on Article 62 that mortgage being there, limitation was saved, but the Hon'ble Supreme Court observed in para 7 as under:-

> "**7.** 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."

9. Apart from above, there is further Judgement of Hon'ble Supreme Court in the matter of "**Jignesh Shah and Another v. Union of India and Another"** reported in 2019 SCC OnLine SC 1254 where the date of default noticed was based on the Agreement. The suit was filed in time and was still pending when

IL&FS in that matter issued Notice on 03.11.2015 under Sections 433 and 434 of Companies Act to La-Fin. IL&FS then filed Winding up Petition on 21.10.2016. The winding up Petition came to be filed after 3 years of default and as such it was found that the same would not help to convert the said proceeding into Section 7 proceeding under IBC. Some observations of the Hon'ble Supreme Court may be referred:-

> "**21.** The aforesaid judgements 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.
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> .....
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> **27.** ..... It is clear that IL&FS pursued with reasonable diligence the cause of action which arose in August, 2012 by filing a suit against La-Fin for specific performance of the Letter of Undertaking in June, 2013. What has been lost by the aforesaid party's own inaction or laches, is the filing of the Winding up Petition long after the trigger for filing of the aforesaid petition had taken place; the trigger being the debt that became due to IL&FS, in repayment of which default has taken place.
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> **40.** We therefore allow Civil Appeal (Diary No.16521 of 2019) and dispose of the Writ Petition (Civil) No.455 of 2019 by holding that the Winding up Petition filed on 21st October, 2016 being beyond the period of three-years mentioned in Article 137 of the Limitation Act is time-barred, and cannot therefore be

> proceeded with any further. Accordingly, the impugned judgement of the NCLAT and the judgement of the NCLT is set aside."

10. Considering above Judgements of the Hon'ble Supreme Court and keeping in view Article 137 of Limitation Act, we find that the Adjudicating Authority erred in admitting Application under Section 7 considering the facts of the matter and it should have been held that when Section 7 Application was filed, it was beyond 3 years of the default occurring which arose in 2004, when NPA was declared on 31.12.2004.

11. For reasons mentioned above, the Appeal is allowed. The Impugned Order is quashed and set aside. The Application filed under Section 7 of IBC is dismissed. The Corporate Debtor is released from the rigours of moratorium and is allowed to function through its Board of Directors. The Interim Resolution Professional/Resolution Professional will hand back the management of the affairs of the Corporate Debtor along with records. The IRP/RP will submit particulars regarding the CIRP costs and fees of IRP/RP to the Adjudicating Authority and the Adjudicating Authority will pass Orders for payment of the same by the Financial Creditor (Respondent No.1) who initiated the proceedings under Section 7 of IBC.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

/rs/md