NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1504 of 2019

[Arising out of Order dated 26th November, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in CP (IB) No. 900/I&B/MB/2019]

IN THE MATTER OF:

Anubhav Anilkumar Agarwal
RNA Corp. Pvt. Ltd.
601, Khatau, Condiminium
J.M. Mehta Road, Off. Nepean
Sea Road, Malabar Hill, Mumbai-400006. ....Appellant

Vs

1. Bank of India
   Andheri Large Corporate Branch
   MDI Building 1st Floor 28 SV Road
   Andheri (W), Mumbai – 400058.

2. RNA Corp. Pvt. Ltd.,
   RNA Corporate Park Next to Collectors Office
   Kalanagar, Bandra (E), Mumbai – 400051. ....Respondents

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Mahesh Agarwal, Mr. Divyand Chandiramani, Mr. Syaishir Divatia and Mr. Rajeev Kumar, Advocates.**

For 1st Respondent: **Mr. Aditya Dewan, Mr. Somesh Dhawan, Mr. Jayant Mehta and Mr. Siddharth Chechani, Advocates for R-1.**

Mr. Sugam Seth, Advocate.
Mr. Syed Sarfarar Karim, Advocate for IRP.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Bank of India moved an Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the **'I&B Code'**),

pursuant to which, by impugned order dated 26th November, 2019 the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench initiated 'Corporate Insolvency Resolution Process' against RNA Corp. Pvt. Ltd. ('Corporate Debtor'), who was the Guarantor.

2. The Appellant has challenged the impugned order on these grounds: -

(i) The Application under Section 7 of the I&B Code was barred by limitation; and

(ii) Bank of India has already moved second Application under Section 7 of the I&B Code for the same set of claim against Chamber Constructions Pvt. Ltd., Guarantor ('Corporate Debtor' herein) and is not maintainable.

3. It is desirable to state the facts with regard to Bank of India ('Financial Creditor'), as pleaded and recorded by Adjudicating Authority (National Company Law Tribunal), as under: -

> *"3. The counsel for the petitioner submits that a Corporate Term Loan of Rs.75,00,00,000/- was granted to the Corporate Debtor vide Sanction Letter dated 24/10/2013. The said amount was also disbursed by them in favour of the Corporate Debtor. The counsel for the petitioner mentioned that there was Deed of Guarantee entered into dated 29th October, 2013 and 9th December, 2013. There were also registered mortgage deeds dated 29th October 2013, 10th December 2013 and 16th December 2013.*
>
> *4. The counsel for the petitioner also submits that the date of default and that of declaration of NPA of*

the Corporate Debtor is 31/12/2014. The principal outstanding amount as on 10/02/2019 amounts to Rs.40,58,23,360.83/- whereas the interest is Rs.34,81,43,071.74/-, penal interest is Rs.5,30,37,157.27/- and other legal expense etc. is amounting to Rs.3,72,775.00/-. Therefore the total amount claimed is Rs.80,73,76,364.84/-"

4. The Term Loan dated 29th October, 2013 shows that a sum of Rs.75,00,00,000/- was allowed in favour of RNA Corp. Pvt. Ltd. ('Corporate Debtor'). It was declared a Non-Performing Asset (NPA) on 31st December, 2014. Therefore, if the period of limitation is counted from the date of default/ NPA, the Application under Section 7 of the I&B Code was barred by limitation by 31st December, 2017. Admittedly, the Application under Section 7 of the I&B Code was filed in the year 2019 showing the debt payable as on 10th February, 2019. It is in this background, that the Appellant pleaded that the Application under Section 7 of the I&B Code was barred by limitation.

5. The Respondent claimed that the Application was not barred by limitation, as the 'Corporate Debtor' has acknowledged the debt in April 2016.

6. As per the judgment of the Hon'ble Supreme Court in ***"B.K. Educational Services Private Limited vs. Parag Gupta and Associates* – (2018) SCC Online SC 1921"**, the Limitation Act, 1963 has in fact been applied from the inception of the Code.

7. In ***"Vashdeo R. Bhojwani vs. Abhyudaya Co-operative Bank Limited and another – (2019) 9 SCC 158"***, the Hon'ble Supreme Court referring to ***B.K. Education*** (Supra) observed: -

> *"**3.** Having heard the learned counsel for both parties, we are of the view that this is a case covered by our recent judgment in B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, para 42 of which reads as follows:*
>
> > *"42. 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."*

Dealing with Section 23 of the Limitation Act, 1963, the Hon'ble Supreme Court observed:

> *"xxx xxx xxx*
> *Following this judgment, it is clear that when the recovery certificate dated 24-12-2001 was issued, this certificate injured effectively and completely the appellant's rights as a result of which limitation would have begun ticking"*

8. In ***"Jignesh Shah and another vs. Union of India and another – (2019) 10 SCC 750"***, the Hon'ble Supreme Court taking into consideration the fact of filing of an Application under Sections 433 and 434 of the Companies Act, 2013 observed as follows:

> *"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 Ltd. v. Sunjal Engg. (P) Ltd., 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 dehors 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 Corpn. Ltd. v. Rajhans Steel Ltd. 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 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 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 1 cannot be ordered due to non-payment of the said debt."

Finally, the Hon'ble Supreme Court after taking into consideration the date of default observed as follows: -

"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.

xxx xxx xxx

28. A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the company is unable to pay its debts, and that Section 434 is a deeming provision which refers to three situations in which a company shall be deemed to be "unable to pay its debts" under Section 433(e). In the first

situation, if a demand is made by the creditor to whom the company is indebted in a sum exceeding one lakh then due, requiring the company to pay the sum so due, and the company has for three weeks thereafter "neglected to pay the sum", or to secure or compound for it to the reasonable satisfaction of the creditor. "Neglected to pay" would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. Equally in the second situation, if execution or other process is issued on a decree or order of any court or tribunal in favour of a creditor of the company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. This again is clearly a fixed date depending on the facts of each case. And in the third situation, it is necessary to prove to the "satisfaction of the Tribunal" that the company is unable to pay its debts. Here again, the trigger point is the date on which default is committed, on account of which the company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(e) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding-up petition under Section 433(e) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434."

9. Similar issue fell for consideration before the Hon'ble Supreme Court in ***"Gaurav Hargovindbhai Dave vs. Asset Reconstructions Company (India) Limited and another – (2019) 10 SCC 572"***. In the said case, the Hon'ble Supreme Court has noticed that the Respondent was declared NPA

on 21st July, 2011. The Bank had filed two OAs before the Debts Recovery Tribunal in 2012 to recover the total debt. Taking into consideration the facts, the Hon'ble Supreme Court held that the default having taken place and as the account was declared NPA on 21st July, 2011, the Application under Section 7 was barred by limitation.

For proper appreciation, it is better to note the facts of the judgment as follows: -

> *"In the present case, Respondent 2 was declared NPA on 21-7-2011. At that point of time, State Bank of India filed two OAs in the Debts Recovery Tribunal in 2012 in order to recover a total debt of 50 crores of rupees. In the meanwhile, by an assignment dated 28-3-2014, State Bank of India assigned the aforesaid debt to Respondent 1. The Debts Recovery Tribunal proceedings reached judgment on 10-6-2016, the Tribunal holding that the OAs filed before it were not maintainable for the reasons given therein.*
>
> *2. As against the aforesaid judgment, Special Civil Application Nos. 10621-622 were filed before the Gujarat High Court which resulted in the High Court remanding the aforesaid matter. From this order, a special leave petition was dismissed on 27-3-2017.*
>
> *3. An independent proceeding was then begun by Respondent 1 on 3-10-2017 being in the form of a Section 7 application filed under the Insolvency and Bankruptcy Code in order to recover the original debt together with interest which now amounted to about 124 crores of rupees. In Form-I that has statutorily to be annexed to the Section 7 application in Column II which was the date on which default occurred, the date of the NPA i.e. 21-7-*

2011 was filled up. The NCLT applied Article 62 of the Limitation Act which reads as follows:

"Description of suit	*Period of limitation*	*Time from which period begins to run*
62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property	*Twelve years*	*When the money sued for becomes due."*

Applying the aforesaid Article, the NCLT reached the conclusion that since the limitation period was 12 years from the date on which the money suit has become due, the aforesaid claim was filed within limitation and hence admitted the Section 7 application. The NCLAT vide the impugned judgment held, following its earlier judgments, that the time of limitation would begin running for the purposes of limitation only on and from 1-12-2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force. Consequently, it dismissed the appeal.

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 21-7-2011, 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 (P) Ltd. v. Parag Gupta and Associates [B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633] 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 11 of B.K. Educational Services (P) Ltd. 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 the learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21-7-2011, 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 11 of B.K. Educational Services (P) Ltd., 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."

10. Normally, the period of limitation is to be counted from the date of default/ NPA. However, the date of default stands forwarded, if the Borrower acknowledges the debt and agrees to pay on a future date in terms of Section 18 of the Limitation Act, which reads as under: -

> ***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."

11. In the present case, the 'Corporate Debtor' by its letter dated 18th March, 2016/ 20th March, 2016 has specifically stated that it will make an effort in reducing their outstanding dues and raise other funding to save their Bank account from getting NPA. The letter is quoted below: -

"18th March 2016
Mr. Vivek Wahj
Deputy General Manager
Bank of India
Andheri Large Corporate Branch

Dear Sir,

Your letter AnLCB/ARD/RK/2015-16/2181 dated 11-3-2016 received on 15th March 2016

We are in receipt of your abovementioned letter and have to state as under:
We are shocked and surprised at the contents of your said letter. At the outset, we would like to state that we are not willful defaulters and we have every intention to repay every paise borrowed from your bank. The reasons why we have not been able to make timely payments have been conveyed to you time and again through various letters. The same is due to circumstances beyond our control, the adverse economic

scenario of the country and globally, which is very well known to everybody.

You are very well aware that the real estate market has been hit by a slowdown since 2008. Subsequently, to make matters worse, the construction of projects slowed as the Government initiated changes in the real estate guidelines. There were hardly any approvals coming and/ or construction happening in the city for almost 4 years, from 2010-11 onwards. However, despite all the severe challenges, which badly blocked the flow of funds, we have made payments to you to the best of our abilities. An amount of Rs. 5 crores was paid to you between December 2015 and January 2016.

We would also like to place on record that we had, vide our letter dated 5th May 2015, informed you that we had another bank willing to take over a significant part of our debt subject to you granting a conditional NOC for release of one of the secured properties. It should be stated that as on April 2015, your total overdue was Rs.18.50 crores. The other bank was willing to release Rs.12.86 crores towards this overdue against your conditional NOC (of releasing this property as security in favour of the other bank, on receipt of the said funds). For the remaining 5.64 crores, we were hopeful to manage the same once your overdue would have reduced substantially. It should be mentioned that the other bank was funding almost the same amount of loan which you have considered against the said security. Thus, there would have been no dilution of security at your end. Infact, due to repayments already happened earlier, the security cover would have been more than that as per sanctioned terms. However, despite our many requests, including vide our said letter, you did not provide the

conditional NOC. Infact there was no response from you for over two months and suddenly, vide your letter dated 26th July, 2015, you conveyed us that you are not willing to grant the conditional NOC. Then immediately on the very next day, you sent us a notice initiating the process for identification as willful defaulter. Then on 29th July, 2015 you sent us a notice under section 13(2) of the SARFAESI Act. Though we did not respond to your said notice but had instead submitted repayment proposals, including trying to revive the earlier proposal of taking over of the security as mentioned above. However, till date, our proposal was neither accepted nor declined. Please note that despite all the notices, we continued to make payments to you, with the last payments, being made in January 2016. This would surely reflect our intention, efforts and relationship with the bank.

Thus, an effort which would have helped in reducing your outstanding and probably helped us too by able to make us raise other funding had your account be saved from getting NPA, went futile. We are sure that there can be no doubt on either our intentions and / or efforts in making payments to you, despite the challenging situation. Considering all this, there should be no reason for you to categorise us as a willful defaulters and take actions as such. Otherwise also, we understand that there are RBI and Supreme Court (through its various judgments) guidelines which needs to be followed before labelling a borrower as a willful defaulter.

We would like place on record that we have a very good reputation and goodwill which we have managed to create after many years of hard work. It is this reputation and goodwill that has enabled us to make payments to you, time and again, despite the severe

slowdown in the real estate market and despite the fact that you have taken possession of the secured assets. This also is effectively preventing us from developing the secured real estate and raising funds, to repay you.

We are really concerned by your threat to publish the photographs of the promoters and have been advised legal recourse (defamation/ loss of reputation and direct/ losses on account of it; civil or criminal), to stop any attempt in this regard (to malign or tarnish image/ reputation/ goodwill). Further, your action would also jeopardize our efforts to raise further funds through sale, etc. However, considering what has been mentioned herein, our relationship, etc. we are sure you will not let us down and infact continue to provide your support in helping us to regularize your account at the earliest.

We are again reiterating that we are not only have all intention but are also making our best efforts to repay your loan at the earliest. Meanwhile, in this regard, we enclose herewith a repayment proposal for your perusal.

Thanking you,
Yours sincerely,
RNA Corp Pvt. Ltd.
Sd/-
Authorised Signatory"

12. The last three paragraphs of the aforesaid letter show that to save the Bank Account from getting NPA and citing the good reputation and goodwill, the 'Corporate Debtor' agreed to pay the amount and acknowledged the dues.

13. In view of the letter dated 18th March, 2016 written to the Bank, we hold that the period of limitation stands shifted to the date on which the

'Corporate Debtor' agreed to pay and thus, we hold that the Application under Section 7 of the I&B Code was not barred by limitation.

14. The other plea taken by the Appellant is that 'Corporate Insolvency Resolution Process' has been initiated against one of the Guarantor for same set of claim, i.e., M/s Chamber Constructions Pvt. Ltd. in C.P. No.3962/IBC/NCLT/MB/MAH/2018. There is nothing on the record to suggest that with regard to the same very debt, M/s Chamber Constructions Pvt. Ltd. had issued any guarantee. The Appellant has enclosed certain Bank Guarantee, which has been issued by certain individual. Therefore, the Appellant has failed to make out a case to get relief in terms of decision of this Appellate Tribunal in ***"Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd. – Company Appeal (AT) (Insolvency) No.346 of 2018***.

We find no merit in this Appeal. It is accordingly dismissed. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Shreesha Merla]
Member (Technical)

NEW DELHI

7th February, 2020

Ash