NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1238 of 2019

[Arising out of Order dated 26th September 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai in Company Petition No. 343/I&BC/NCLT/MB/MAH/ 2019]

IN THE MATTER OF:

Jayprakash Vyas
S/o Shri Mafatlal Vyas
R/o 601 A Wing, Rustomji Residency
Near J S Road, Dahisar West
Mumbai – 400068 **...Appellant**

Versus

1. **Prabhat Steel Traders Pvt. Ltd.**
   Through its Authorized representative
   Having its registered office at:
   535 Vyapar Bhawan, 49 P D'Mello Road
   Carnac Bunder, Mumbai – 400009 **...Respondent No.1**

2. **Mr Bhaskar Gopal Shetty**
   Resolution Professional
   Shree Sai Steel Pvt Ltd
   C-77, Shanti Shopping Centre
   Mitra Road East
   Maharashtra - 401107 **...Respondent No.2**

Present:

For Appellant : Ms Prachi Johri, Advocate

For Respondent : Mr Ankur Singhal, Advocate for R-1
Ms Udita Singh and Mr Siddharth Chechani, Advocates for R-2.

J U D G M E N T

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

This Appeal emanates from the Order dated 26th September 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai in Company Petition No.

343/I&BC/NCLT/MB/MAH/2019, whereby the Adjudicating Authority has admitted the Application under Section 9 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. The brief facts of the case are as follows:

The Operational Creditor "M/s Prabhat Steel Traders Private Limited" filed an Application under Section 9 of the I&B Code, 2016 for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor "Shree Sai Industries India Private Limited" for a total debt amount Rs 5,97,09,566/- which includes the principal amount of Rs 2,05,28,636.00 and interest @ 21% p.a till 30th November 2018 amounting to Rs 3,91,80,930.00/-. The Respondents/Applicant served the demand notice dated 09th June 2018, but when the Corporate Debtor did not repay the amount, the petition under Section 9 was filed.

The Learned Adjudicating Authority has observed the following in the impugned order: "*considering the totality of the facts and circumstances of the case, it is now ascertained that the goods were supplied on demand, however, without any reason the value of the goods have not been paid by the debtor. The invoices raised remained unpaid. As per the Ledger Account along with the Statement of Account the outstanding debt in question was duly acknowledged by the Corporate Debtor. As a consequence, this Bench of the view that this is a fit case of existence of debt and default in payment of the said debt; hence this petition deserves admission.*"

The Adjudicating Authority admitted the petition, which is assailed in this Appeal.

3. The Appeal is filed mainly on the ground that the Adjudicating Authority has failed to consider that Application filed under Section 9 of the Code is incomplete; it does not have requisite annexures, and Application is not in a proper format. Application is also incomplete on the ground of non-compliance of statutory provision of Section 9(3)(b) and 9(3(c) of the I&B Code. The Application is marred by suppression of material fact about the pre-existing dispute. The debit notes have not been annexed, although those are crucial documents showing deficiency in the quality of goods and services rendered. The Adjudicating Authority has failed to consider that the Application is time-barred in as much as debt is claimed under invoice dated 13th December 2011, which is almost nine years old. The balance confirmation is alleged to have been signed on 01st April 2017, which is also not within the limitation, hence asserted that the acknowledgement of debt would not provide a fresh period of limitation.

4. We have heard the arguments of the Learned Counsel for the parties and perused the records.

5. The Petitioner contends that various goods were sold, supplied and delivered to the respondents raising necessary invoices in respect thereof. As per the terms of the invoice, interest @ 21% per annum was to be paid in case of delay of more than 60 days in payment.

6. The Petitioner's case is mainly based on the balance confirmation letter dated 01st April 2017, acknowledging a sum of Rs 2,06,84,088.47/- due to the Respondents. The Respondent/Corporate Debtor verified the accounts and acknowledged Rs 2,05,28,636.05 due and outstanding as on 01st April 2016. After that, the Petitioner issued a demand notice dated 09th June 2018. When no payment was made, the Application under Section 9 was filed by the Operational Creditor.

7. The claim of the Operational Creditor is premised mainly on the basis of tax invoice. Admittedly, the said tax invoice is dated 13th December 2011, and as per its terms, interest rate @ 21% was to be charged in case payment was delayed by more than 60 days. The Respondents/Applicant has also filed the balance confirmation letter dated 01st April 2017, which shows that the Corporate Debtor acknowledged the balance of Rs 2,05,28,636.05 as on 01st April 2017.

8. The Appellant has challenged the admission order mainly on the ground of limitation. The Appellant contends that the Applicant/Operational Creditor has mentioned in its demand notice that 12th January 2012 is the date from which such debt fell due. Appellant further contends that last part payment was made on 30th May 2015; after that, the Corporate Debtor confirmed the outstanding dues through balance confirmation letter dated 01st April 2017. The alleged claim of the Operational Creditor is relating to the invoice dated 13th December 2011.

9. The Learned Counsel for the Appellant has further placed reliance on the case of B.K. Educational Services (P) Limited Vs. Parag Gupta & Associates (2018) SCC OnLine SC 1921 wherein Hon'ble the Supreme Court has laid down the law regarding applicability of the Limitation Act.

10. In case of ***"B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates, (2019) 11 SCC 633: (2018) 5 SCC (Civ) 528: 2018 SCC OnLine SC 1921 at page 662*** Hon'ble the Supreme Court of India held:

> ***"38.*** *It will be seen from a reading of Section 8(2)(a) that the corporate debtor shall, within a period of 10 days of the receipt of the demand notice, bring to the notice of the operational creditor the existence of a "dispute". We have seen that "dispute" as defined in Section 5(6) includes a suit or arbitration proceeding relating to certain matters. Again, under Section 8(2)(a), the corporate debtor may, in the alternative, disclose the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice. It is clear therefore, that at least in the case of an operational creditor, "default" must be non-payment of amounts that have become due and payable in law. The "dispute" or pendency of a suit or arbitration proceedings would necessarily bring in the Limitation Act, for if a suit or arbitration proceeding is time-barred, it would be liable to be dismissed. This again is an important pointer to the fact that when the expression "due" and "due and payable" occur in Sections 3(11) and 3(12) of the Code, they refer to a "default" which is non-payment of a debt that is due in law i.e. that such debt is not barred by the law of limitation. It is well settled that where the same word occurs in a similar context, the draftsman of the statute intends that the word bears the same meaning throughout the statute (see Bhogilal Chunilal Pandya v. State of Bombay [Bhogilal Chunilal*

Pandya v. State of Bombay, 1959 Supp (1) SCR 310: AIR 1959 SC 356: 1959 Cri LJ 389], Supp SCR at pp. 313-14). It is thus clear that the expression "default" bears the same meaning in Sections 7 and 8 of the Code, making it clear that the corporate insolvency resolution process against a corporate debtor can only be initiated either by a financial or operational creditor in relation to debts which have not become time-barred."

The legislature did not contemplate enabling a creditor who has allowed the period of limitation to lapse to allow such delayed claims through the mechanism of the Code, and the expression "debt due" in the definition section of the Code would obviously only refer to debts "due and payable" in law, i.e., the debts that are not time-barred.

11. In the above case, Hon'ble the Supreme Court of India has further held:

"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."

Therefore, the right to sue accrued from the moment default first occurred on 13th December 2011. Since the default has occurred over three years prior to the date of filing of the Application, it would be barred by limitation under Article 137 of the Limitation Act.

12. Hon'ble the Supreme Court in the case of Food Corporation of India Vs. Assam State Cooperative Marketing & Consumer Federation Limited (2004) 12 SCC 360 on page 366 has held:

> *"14. According to Section 18 of the Limitation Act, an acknowledgement of liability made in writing in respect of any right claimed by the opposite party and signed by the party against whom such right is claimed made before the expiration of the prescribed period for a suit in respect of such right has the effect of commencing a fresh period of limitation from the date on which the acknowledgement was so signed. It is well settled that to amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act; it need not be accompanied by a promise to pay either expressly or even by implication."*

13. In the abovementioned case, Hon'ble the Supreme Court has held that if an acknowledgement of liability is made in writing before the expiration of the period of limitation, then the limitation period gets extended as per statutory provision under Section 18 of Limitation Act. In this case, the acknowledgement letter, which is exhibit 'D' on page 50 of the Appeal paper book, is dated 01st April 2017. The alleged amount is due on account of goods supplied on 13th December 2011 w.e.f. 12th January 2012, i.e. after the expiry of two months grace period allowed for making payment of the invoice. The first date of default is 12th January 2012, and after a lapse of about five years, acknowledgement of liability was made on 18th April 2017. Therefore, in the instant case, a fresh period of limitation will not accrue w.e.f. 01st April 2017 since three years limitation period for realization of the amount was up to 12th December 2014. However, the acknowledgement of

debt is dated 01st April 2017. Thus, it is apparent that acknowledgement dated 01st April 2017 is not obtained within the limitation period. As a consequence thereof, the Petitioner/Operational Creditor cannot claim the benefit of Section 18 of Limitation Act, which provides that where, before the expiration of the prescribed period of limitation for a suit or Application in respect of any property or right, an acknowledgement 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, then a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

14. Admittedly, in this case, the alleged amount is due on account of non-payment of invoice amount, generated on 13th December 2011. The acknowledgement of debt, which is beyond the limitation period, i.e. 01st April 2017 cannot provide a fresh period of limitation under Section 18 of the Limitation Act.

15. 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 the Supreme Court of India has reiterated the law laid down in the case of "B.K. Educational" (supra). The Learned Counsel for the Respondent has placed reliance on para 21 of the said judgment.

> *"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."

16. In the above-mentioned case, Hon'ble the Supreme Court has clearly held that when the time for limitation begins to run, it can only be extended in the manner provided under the Limitation Act. For example, an acknowledgment of liability under Section 18 of the Limitation Act would certainly extend the limitation period.

17. The Appellant has further relied on the statutory provision under Section 3 of Limitation Act, 1963, which provides that every Application made after the prescribed period shall be dismissed, even if limitation has not been set up as a defence.

18. This Appellate Tribunal in case of Gauri Prasad Goenka Vs. Punjab National Bank & Others in Company Appeal No. 28 of 2019, judgment dated 08th November 2019, has held that Section 3 of the Limitation Act is a mandatory provision, and it is obligatory on the Tribunal to examine the issue of limitation. Further, if the claim is barred by limitation, the Corporate Debtor cannot be held to have committed a default.

19. The Learned Counsel for the Respondent No.1/Operational Creditor submits that it has received the last payment from the Corporate Debtor on 30th May 2015 and the Appellant has acknowledged the liability on 01st April

2017. Based on the above, the Operational Creditor claims that given the acknowledgement of liability by the Corporate Debtor, through the confirmation of accounts dated 01st April 2017, the fresh period of limitation will be computed from the date of said acknowledgement.

20. Section 19 of the Limitation Act deals with the computation of period of limitation in case of part payment in lieu of debt. Section 19 of Limitation Act is as under:

> ***"Section 19. Effect of payment on account of debt or of interest on legacy***
>
> *19. Effect of payment on account of debt or of interest on legacy.—Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:*
>
> *Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.*
>
> *Explanation.—For the purposes of this section,—*
>
> *(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment.*
>
> *(b) "debt" does not include money payable under a decree or Order of a court."*

Thus, it is clear that when part payment is made before the expiration of the prescribed period of limitation by the person liable to pay the debt, a fresh period of limitation shall be computed from the time when the payment was made.

21. In the instant case, the Operational Creditor claims that it has received last payment in lieu of debt from the Corporate Debtor on 30th May 2015. Alleged liability is on account of invoice dated 13th December 2011. Therefore, the limitation period cannot be extended, given the statutory provision under Section 19 of the Limitation Act as the Corporate Debtor has made part payment after expiration of the period of limitation.

22. The balance confirmation dated 01st April 2017 will also not have any impact on the computation of limitation period as it is made after the expiration of the limitation period, i.e. three years.

23. In this case, the Adjudicating Authority has passed the Order of admission under Section 9 of the Code, without even considering the statutory requirement of Section 9(3)(b) and 9(3)(c) of the Code. The Adjudicating Authority has even not considered the issue of limitation, though Section 3 of Limitation Act mandates to decide the issue of limitation.

24. The Adjudicating Authority has admitted the time barred petition, though as per statutory provision of Section 3 of the Limitation Act, it was obligatory on the Adjudicating Authority to examine the issue of limitation. In the case of Gauri Prasad Goenka (supra) this Appellate Tribunal has

already held that if the claim is barred by limitation, the Corporate Debtor cannot be held to have committed a default. In this case, the Adjudicating Authority has erred in admitting the petition even without any consideration on the issue of limitation. Based on the facts of the case, it is clear that Operational Creditor's claim is barred by limitation. Therefore, the Appeal succeeds, and the impugned Order is set aside.

25. We further direct the Adjudicating Authority to pass appropriate Order regarding payment of CIRP cost. The Corporate Debtor Company shall be governed by its Board of Directors.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

[Alok Srivastava]
Member (Technical)

NEW DELHI
24th JULY, 2020

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