NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.772 of 2019

[Arising out of Order dated 02.07.2019 passed by National Company Law Tribunal, Mumbai Bench in CP 2987(IB)/MB/2018]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
1. Mr. Basab Biraja Paul Residing at Cest La Vie, 164, Hill Road, Bandra (W), Mumbai - 400050	----	Appellant No.1
2. Mrs. Anuradha Basab Paul Residing at Cest La Vie, 164, Hill Road, Bandra (W), Mumbai – 400050	----	Appellant No.2
Versus		
1. Edelweiss Asset Reconstruction Company Limited Edelweiss House, Through its Autho-rized Representative Off. CST Road, Kalian, Santacruz (East), Mumbai - 400098	Financial Creditor/ Petitioner	Respondent No.1

2. Octaga Green Power and Sugar Company Limited through Mr. Gaurav Ashok Adukia, A registered Interim Resolution Professional, Having Registration Number [IBBI/IPA-002/IP-N004 57/201718/11293]	Corporate Debtor	Respondent No.2

For Appellants: **Shri Abhijeet Sinha and Ms. Neeha Nagpal, Advocates**

For Respondents: **Shri Sunil Fernandes and Shri Darpan Sachdeva, Advocate (Respondent No.1)**

Shri P.V. Dinesh, Shri R.S. Lakshman and Shri Ashwini Kumar Singh, Advocates (Respondent No.2)

J U D G E M E N T

A.I.S. Cheema, J. :

1. Edelweiss Asset Reconstruction Company Limited, assignee of debt from original lender – UCO Bank (Assignor), filed CP 2987(IB)/MB/2018 under the Insolvency and Bankruptcy Code, 2016 (IBC) to initiate corporate insolvency resolution process against Octaga Green Power and Sugar Company Limited – Corporate Debtor claiming outstanding debt which was Rs.69,70,15,694/- as per recall Notice dated 15th March, 2018. The Financial Creditor claimed that there was debt which was in default and thus, the Application in format.

2. The matter came up before Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) and the Section 7 Application was admitted on 2nd July, 2019. The present Appeal has been filed by the shareholders of the Corporate Debtor.

According to the Appellants, the Corporate Debtor had availed financial assistance/cash credit facility and term loan from UCO Bank which was sanctioned on 19th January, 2005, 22nd February, 2008, 31st March, 2009, 6th November, 2009 and 18th May, 2012 of a total amount of Rs.29,96,00,000/-. Necessary documents were executed. Later, the Appellants claim that the Corporate Debtor entered into Master Restructuring Agreement (MRA – in short) dated 31st March, 2012 with the Assignor on 22nd June, 2012. Mortgage of properties was created under the Master Restructuring Agreement and other ancillary documents. It is claimed that the account of the Corporate Debtor was classified as non-performing asset (NPA) on 31st March, 2013 and the bank had moved the Debt Recovery Tribunal. The Assignor on 8th July, 2014 assigned debt to Edelweiss Asset Reconstruction Company Limited (Edelweiss - in short) – Financial Creditor vide deed of assignment and MRA and its addendum was executed between Respondent Nos.1 and 2. Financial Creditor – Edelweiss issued Notice under Section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act - in short) on 5th August, 2016 calling upon the Corporate Debtor to pay

Rs.50,44,37,258/- and on 15th March, 2018 sent recall Notice demanding repayment of Rs.69,70,15,694/- from the Corporate Debtor. The Corporate Debtor had offered one-time settlement of Rs.10 Crores and later, revised the same to Rs.11 Crores within 90 days or Rs.18 Crores over 9 years. However, the Financial Creditor filed Section 7 proceedings. The Appellants claim that the proceeding has been filed after a delay of 5 years from the date of the account of the Corporate Debtor being classified as NPA.

3. The Appellants claim that the debt is clearly barred by law of limitation and proceedings before DRT would not save the limitation. The Company Petition has been filed in 2018 for loan facility availed in 2012 which was classified as NPA on 31st March, 2013. Thus, according to the Appellants, the admission of the Application of Financial Creditor (Respondent No.1) is bad in law and the Application should have been dismissed.

4. We have heard Counsel for both sides. It has been argued for the Appellants that the Master Restructuring Agreement dated 31st March, 2012 was executed between the Corporate Debtor and UCO Bank and the Account of the Corporate Debtor was declared as NPA on 31st March, 2013. The Bank/Assignor had proceeded to file recovery proceedings before the Debt Recovery Tribunal in which, according to the Appellants, the Corporate Debtor was not served with papers relating to the proceedings. The said Application is still pending before

DRT. The Appellants have submitted that in spite of the said proceedings, the Respondent No.1 issued Notice on 5th August, 2016 under Section 13(2) of SARFAESI Act for alleged default and called for repayments. Appellants have argued that recall Notice was issued on 15th March, 2018 which was replied by the Corporate Debtor by letter dated 19th March, 2018 offering one-time settlement on "without prejudice basis" which was rejected by the Financial Creditor. It is argued that there is 5 years' delay and the limitation will not get extended because proceeding was filed in DRT. It is argued that Section 14 of Limitation Act, 1963 saves period of limitation in the event of new proceedings being filed when the Court in which the former proceeding was being proceeded suffered from defect of jurisdiction or defect of like nature. Argument is that law does not contemplate two proceedings on same cause of action and as such, the proceeding before DRT will not save period of limitation under IBC. The Appellants also argued that existence of documents of mortgage would not affect limitation as the provisions relating to mortgaged property are with regard to Suit and the present proceeding is an Application under IBC. It is also argued that the Corporate Debtor is a Micro Small and Medium Enterprises (MSME – in short) (UAM No.MH18C0141075) and made efforts to compromise with the Financial Creditor but the Financial Creditor did not give positive response.

5. Against this, for Respondent No.1 – Financial Creditor, it is argued that as on 02.07.2019, there was Rs.93,93,16,689/- outstanding against the Corporate Debtor by way of principal amount and interest as the financial debt. It is argued that there was charge created on the immovable property by way of Memorandum of Entry in respect of extension of charge dated 26th February, 2010, Affidavit-cum-Declaration executed by Corporate Debtor dated 19th April, 2010, second supplemental Memorandum of Entry dated 13th, April, 2010, additional and third supplementary Memorandum of Entry dated 22.06.2012, letter of conformation of extension of charge on the immovable property dated 9th June, 2012 and declaration in the matter of mortgage by deposit of title deeds dated 4th July, 2012. Reliance is also placed on the proceedings filed by way of OA 215/2014 before DRT. The Financial Creditor is also relying on the various one-time settlements offered right up to 2018 by the Corporate Debtor to say that claim is not time barred. As regards the contention of the Appellants that Corporate Debtor is MSME, it is the argument that no proof of such status was given and it is claimed that according to the Resolution Professional, an Application was filed by Corporate Debtor without his concurrence before concerned Ministry on 5th July, 2019, after the commencement of CIRP on 2nd July, 2019 and that the Corporate Debtor had no locus standi to file such Application. Financial Creditor is also referring to provisions of Micro, Small and Medium Enterprises Development Act, 2006 to claim that only where investment in plant

and machinery is more than Rs.5 Crores but does not exceed Rs.10 Crores, the enterprise could be said to be medium but this is not the case with the present Corporate Debtor.

6. Having gone through the matter, there is no dispute with regard to the fact that the Corporate Debtor had taken credit facilities from UCO Bank on 19.01.2005, 22.02.2008, 31.03.2009, 06.11.2009 and 18th May, 2012. There is no dispute regarding the fact that Corporate Debtor had secured the credit facilities taken by equitable mortgage of immovable property and by executing other securities. The filing of proceedings before DRT in 2014 and invoking of Section 13(2) of SARFAESI in 2016 are also not disputed. Amount more than Rs.1 Lakh is in default, is apparent from record. The proceeding in DRT is still pending.

7. Relevant is to see if the debt even if disputed is payable in law or not. In the matter of "M/s. Innoventive Industries Ltd. versus ICICI Bank & Anr." reported in (2018) 1 Supreme Court Cases 407, the Hon'ble Supreme Court observed:-

> "27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a

"claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section

> 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."
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> 29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

It is clear that the question of limitation has to be looked into from the angle whether the debt is payable in law or in fact. Although the proceeding under IBC is an Application, question for consideration is whether the debt is payable in law. The yardstick is to see whether there is continuous cause of action for the debt claimed.

8. In the present matter where creation of equitable mortgage of immovable property is not in dispute, it would be appropriate to refer to The Limitation Act, 1963 where in Schedule, period of limitation prescribed in the First Division relating to Suits, Part V Article 62 reads as follows:-

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"PART V—SUITS RELATING TO IMMOVABLE PROPERTY			
	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.

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The limitation for enforcing payment of money secured by a mortgage or otherwise charged by the immovable property is twelve years at the time when money sued for becomes due. Thus for 12 years after becoming due, the debt would be payable in law. In the present matter, the sanction letters are between 19th January, 2005 to 18th May, 2012 and there were Master Restructuring Agreements executed in 2012. Apart from proceeding filed in DRT in May, 2014, which is pending, the loan was secured by equitable mortgage and as such, it cannot be said that the debt was barred by limitation, when Section 7 Application was filed on 07.08.2018.

9. The Financial Creditor had moved DRT in 2014 which was a relief available at that time. We do not agree with the argument of the Appellants that Section 14 of Limitation permits exclusion of time of proceedings bona fide in a Court when the Court was without jurisdiction, and so pursuing relief in proper Court will not be helpful. It would be strange to say that if you prosecute relief in wrong Court, it would save limitation but if you prosecute relief in right Court, you cannot resort to additional relief which becomes available later. In our view, when the Financial Creditor was pursuing its remedies in proper forum, there was continuous cause of action existing and it cannot be said that the debt became time barred. The IBC was enforced in 2016 and the additional remedy became available. Financial Creditor resorted additionally to it and the Application was filed under Section 7. It could not be said to be time barred.

10. We do not find any substance in the arguments raised with regard to limitation. As such, there is no substance in the Appeal.

11. As regards the claim of the Appellant that Corporate Debtor is MSME, the question was raised only at the time of arguments and the Financial Creditor is raising dispute on the basis that the Application for status of MSME was sought only after the CIRP process started. We need not decide this issue at present as we are on the stage of admission of proceedings under Section 7. Whether or not the Corporate Debtor

can take benefit of Section 29A of IBC would have to be considered at the appropriate stage.

12. There is no substance in the Appeal. The Appeal is dismissed. No Orders as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

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

[Kanthi Narahari]
Member (Technical)

6th September, 2019

/rs/sk