

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 195 of 2017

IN THE MATTER OF:

Labdhi Enterprises

.. Appellant

Versus

Baramati Agro Pvt. Limited

.. Respondent

Present:

For Appellant: Shri Suresh Dhawan, Ms. Vatsala Kak, Advocates

For Respondents: Shri P.K. Mittal and Ms. Deepika Dixit, Advocates

O R D E R

10.11.2017 The appellant Lobdhi Enterprises (Operational Creditor) filed an application under Sections 433, 434(e) and 439 of the Companies Act, 1956 before the Hon'ble Bombay High Court, Mumbai for winding up the Respondent Company- Baramati Agro Pvt. Limited on the ground that the debtor Company defaulted in making payment of Rs. 27,97,696/- to the Appellant. It was pleaded that the Appellant supplied goods to the Corporate Debtor which they received without raising any dispute but failed to repay the amount in spite of invoices raised and received by them.

During the pendency of the case before the Hon'ble High Court, the Central Government, in exercise of the power conferred under sub-Sections (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-Section

(1) of Section 239 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as '**I&B Code**'), by notification dated 7th December, 2016 framed Rule namely "The Companies (Transfer of pending proceedings) Rules 2016". The said Rule was modified by notification dated 29th June, 2017 by the "The Companies (Transfer of pending proceedings), Second Amendment Rules, 2017. Rule-5 of relates to the transfer of pending proceeding of winding up on the ground of inability to pay debts which reads as follows:

"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts. – (1) All petitions relating to winding up of a company under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under rule 26 of the Companies (Court) rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:

Provided that the petition shall submit all information, other than information forming part of the records transferred in accordance with rule 7, required for admission of the petition under Sections 7,8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.”

In view of the aforesaid provision, the petition under Sections 439, 434(e) and 439 of the Companies Act, 1956, which was pending before the Hon'ble Bombay High Court was transferred to the Tribunal, Mumbai Bench, Mumbai.

The Respondent – Corporate Debtor pursuant to the notice appeared and took plea that the claim was barred by limitation. The Adjudicating Authority by impugned order dated 30th June, 2017 taking into consideration the Central Government Notification dated 7th December, 2016, refused to treat the Application under Section of 9 of the I & B Code on one of the grounds that the Appellant failed to show that the debtor Company acknowledged the debt due since last three years from 27th April, 2010 when it was payable and thereby the debt is time barred.

We have heard the learned Counsel for the Appellant and learned Counsel appearing on behalf of the Respondent (Corporate Debtor).

The question as to whether the Limitation Act, 1963 will be applicable for triggering incorporate resolution process under Sections 7 or 9 of the I & B Code fell for consideration before this Appellate Tribunal in - "*M/s Speculam Plast Pvt. Ltd. Vs. PTC PTC Techno Private Ltd.*"- in Company Appeal(AT) (Insolvency) No. 47/2017. In the said case this Appellate Tribunal, by judgment dated 07th November,2017 held as follows:

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“68. In view of the settled principle, while we hold that the Limitation Act, 1963 is not applicable for initiation of 'Corporate Insolvency Resolution Process', we further hold that the Doctrine of Limitation and Prescription is necessary to be looked into for determining the question whether the application under Section 7 or Section 9 can be entertained after long delay, amounting to laches and thereby the person forfeited his claim.

69. If there is a delay of more than three years from the date of cause of action and no laches on the part of the Applicant, the Applicant can explain the delay. Where there is a continuing cause of action, the question of rejecting any application on the ground of delay does not arise.

70. Therefore, if it comes to the notice of the Adjudicating Authority that the application for initiation of 'Corporate Insolvency Resolution Process' under section 7 or Section 9 has been filed after long delay, the Adjudicating Authority may give opportunity to the Applicant to explain the delay within a reasonable period to find out whether there are any laches on the part of the Applicant.

71. The stale claim of dues without explaining delay, normally should not be entertained for triggering 'Corporate Insolvency Resolution Process' under Section 7 and 9 of the 'I&B Code'."

However, while holding so this Appellate Tribunal in “*M/s Speculam Plast Pvt. Ltd. Vs. PTC PTC Techno Private Ltd.*” also observed:

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“59. From Article 137 of the Limitation Act, 1963, it is clear that the period of three years' is to be counted from the date right to apply accrues to a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Debtor'.

60. For initiation of 'Corporate Insolvency Resolution Process', the right to apply accrues under Section 7 or Section 9 or Section 10 only with effect from 1st December, 2016 when 'I&B Code' has come into force, therefore, the right to apply under Section 7 or Section 9 or Section 10 in all present cases having accrued after 1st December 2016, such applications cannot be rejected on the ground that the application is barred by limitation.”

In view of the fact that the case of the Appellant is covered by the decision of this Appellate Tribunal in -“*M/s Speculam Plast Pvt. Ltd. Vs. PTC PTC Techno Private Ltd.*” (supra), the impugned order cannot be upheld. However, as we find that the Appellant had not submitted all the information other than information forming part of the records of the transferred case, as required in terms of first proviso to Rule -5 aforesaid, we hold that the Application under Sections 433, 434 and 439 of the Companies Act which was transferred to the Tribunal stood abated in view of Rule 5 aforesaid. However, in view of the Second provision to Rule-5, as quoted above, the

Appellant is given liberty to file a fresh Application under Section 9 of the I & B Code in accordance with the provision of law i.e., after giving Notice of Demand under sub-Section (1) of Section 8 in requisite form 3 or 4. After such notice, if there is no dispute and the Appellant prefers application under Section 9 of the I & B Code, in such case, the Adjudicating Authority will not dismiss the case on the ground of delay there being continuing cause of action since 27th April, 2010, and it cannot be held to be barred by limitation. If there remains a defect, the Adjudicating Authority may allow the Appellant to remove the defect in terms of the proviso to Section 9 of the I&B Code.

However, this order will not come in the way of Respondent to settle the dispute before admission of Application under Section 9 of the I & B Code, if preferred or has already been preferred. The Appeal is allowed with the above observation but there shall be no order to cost.

[Justice S.J. Mukhopadhaya]
Chairperson

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

[Balvinder Singh]
Member (Technical)

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