NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI
Company Appeal (AT) (Ins) No. 1067/2019

[Arising out of Order dated 19.07.2019 passed by National Company Law Tribunal, New Delhi, Benchin 3, C.P. No. IB -1576/(ND)/2018]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
MRS. R. MANGALAM **C/O VISWAPRIYA** **75 C III CROSS ROAD** **GANDHI NAGAR ADYAR** **CHENNAI 600020**	**.... Petitioner**	**.... Appellant**
Versus		
M/S SPML INFRA Ltd. **F-27/2** **OKHLA INDUSTRIES AREA,** **PHASE II** **NEW DELHI-110020**	**..... Respondent**	**.... Respondent**

For Appellant: **Mr. R. Subramanian, Mr. Shailesh Poddar and Mr. Arnav Dash, Advocates.**

For Respondent: **Mr. Ritin Rai, Sr. Advocate along with Mr. Udai Adity Banerjee and Mr. Debayan Ghosh, Advocates.**

J U D G E M E N T

(18th February, 2020)

A.I.S. Cheema, J. :

This Appeal has been filed by original applicant who had filedapplication under section 7 of Insolvency & Bankruptcy Code, 2016 (In Short- IBC) before Adjudicating Authority (NCLAT, New Delhi, Bench III) having Company Petition No. IB-1576/ND/2018. The Application came to be dismissed as time barred. Thus, this appeal.

2. The Appellant claimed before the Adjudicating Authority and it is argued that the Respondent M/s S.P.M.L Infra. Ltd. (Corporate Debtor) had issued Letter of Offer dated 19.09.1995 (Page 181) (In Short- LOF) in which there was offer of securities being shares and Debentures. The Appellant applied and was allotted 66530 Debentures in the said issue and Debenture certificates were issued for the debentures of face value of Rs. 150/- per debenture. She had paid at the time of application Rs. 20/- per debenture, Rs. 130/- was to be paid on allotment of the debentures. One of the certificate is shown as at exhibit A 7 (Page 217). There was statutory declaration in LOF that entire issue proceeds would be returned if the minimum 90% subscription was not received within 60 days of issue closure and the same would be refunded with interest as per Section 73 of the Companies Act, 1956 if the refund was delayed beyond 78 days from date of closure of issue. It is stated that although 90% subscription was not received the Respondent claimed that the LOF had obtained minimum subscription and allotted shares and Debentures under the LOF.

3. The Appellant claimed that in 2004 SEBI passed orders holding issue under LOF by the Respondent had not received minimum subscription. The said order was challenged by Respondent before Securities Appellate Tribunal and SAT upheld the findings of the SEBI. The Appellant claimed that she got the copies available fromSAT by filing M.A No. 339/2016 which was ordered on 31st March, 2017.

4. The Appellant claimed before the Adjudicating Authority that date of refund of proceeds by Respondent would be 05.01.1996 being 60 days from

date of issue of closure under the LOF and that consequent to SEBI orders dated 28th January, 2004 and 17th August, 2004 which were confirmed by SAT vide order dated 01.06.2006 and 13.12.2006 there was obligation on Respondent to refund the proceeds of the Appellant with interest at 15% per annum from 23.01.1996.

5. The Appellant claimed before the Adjudicating Authority that it was not party to proceedings with regard to fraud by the Respondent before SEBIpassed Orders and earlier Appellant did not have knowledge of the fraud. It is claimed that on receipt of knowledge and getting copies from SAT the application was filed.

6. In the particulars of financial debt submitted in application (Ex. A 2 Page 46) under Section 7, the Appellant stated (At Page 65) with regard to amount in default and date on which default occurred as under:

> *"Rs 3,20,46,117/- (Rupees Three Crore Twenty Lakhs Forty-Six Thousand One Hundred and Seventeen Only) as per working sheet being the amount due on 05.10.2018 in respect of sum of Rs. 13,30,600 being original due in default since 5.01.1996 and payable with 15% pa interest from that date (Working annexed as Annexure-I A)"*

Thus Appellant accepts the date of default to be 05.01.1996

7. The Respondent had appeared before the Adjudicating Authority and resisted the application. The Respondent claimed that the application was time barred. The Respondent claims that on 12th December, 2000 the entire

partly paid Debentures were forfeited and fully paid Debentures had been redeemed by the Company and there was no amount due from Respondent on account of amount raised pursuant to Debentures. The Respondent refers to its annual report dated 31st March, 2001 (Reply Annexure R-3 and Page 41) reference is made to Annexure R/2-Colly- the Notice issued on 1st February, 1996 and 19thSeptember,1998 as well as letter dated 9th October, 2000 filed with the reply (Diary No. 15777). The submission of the Respondent is that in spite of such letters and notices sent, the Appellant had not paid the amount of difference for the Debentures which was issued against receipt of Rs. 20 and the difference Rs. 130/- was due. It is argued that on failure to pay the complete allotment money the Debentures were forfeited on 12.12.2000.

8. It is further the case of Respondent that the amount to be paid on allotment was not paid and thus the forfeiture took place. It is also stated that the Debentures certificate (Annexure-A 7) itself provided regarding redemption and reads as under:

> *"3 Redemption*
>
> *The Company shall redeem the Debentures at par in three annual instalments of Rs. 50/- each on 12.12.1998, 12.12.1999 and 12.12.2000 respectively or earlier at the option of the company."*

The same certificate provided regarding forfeiture also.

9. The Respondent has submitted that even if the entire amount had been paid the Debenture was liable to be redeemed in full by 12.12.2000 and Appellant should have applied if not received money.It is stated Appellant herself defaulted by not paying difference on allotment. Even when respondent after notices forfeited the partly paid debentures on 12.12.2008, Appellant took no action. The Appellant has referredto orders of SEBI of 2004 orders of SAT of 2006 to save limitation. It is stated that, even if those orders were to be considered (of which the respondent has already suffered the punishment imposed) even calculating from dates of those orders, the application under Section 7, must be said to be barred.

10. The Learned counsel for the Appellant submits that the Respondent had not received 90 % of the subscription and thus there was a fraud when the company issued the Debentures and thus limitation will not be affected. If Judgment in the matter of "B.K Educational Services Pvt. Ltd. Vs Parag Gupta and Associates" MANU/SC/1160/2018 is perused it is clear that for application under Section 7 and 9 of IBC, Article, 137 of the Limitation Act, 1963 is attracted and right has to be exercised within 3 years of occurrence of default. The Appellant has referred to the events as under:

"*Date* *Event*

1995 *Respondent offers Debentures and shares for subscription. As per the Letter of Offer and the companies Act 1996 and SEBI guidelines then in force no allotment could be made without receipt of 90% subscription (minimum*

subscription). On debentures Rs. 20 is payable on application and Rs. 130 on allotment. Redemption is due from 1998 to 2000.

1995 Respondent makes allotment of debentures/shares claiming receipt of 90% subscription. Appellant is allotted 66530 debentures against application money of Rs. 13,30,060/-

1996 Respondent agrees to redeem Rs. 20 paid debentures itself waiving Rs. 130/- balance

2000 Respondent claims forfeiture of Debentures for non-payment of Rs 130/- despite waiver

2004 SEBI enquiry holds minimum subscription not received by Respondent in 1995

2006 SAT rejects Respondent appeal against SEBI's orders. SEBI and SAT orders not disclosed by Respondent to its shareholders or affected persons like appellant

2015 Appellant comes to know of existence of SEBI/SAT orders against Respondent

2017 Appellant gets relevant records of Respondent fraud on minimum subscription from SAT

2017 Appellant makes demand of refund of the Debenture Application money from Respondent

2018 Appellant invokes IBC for non-payment as financial creditor on Respondent default"

11. If the above events pointed out by the Appellant herself are perused, and the LOF is considered with the documents pointed out by the Respondentshowing forfeiture on 12.12.2000, it is clear that in spite of what would be default for the Appellant to recover the money deposited by her, she did not take any actionthough her application claims the default to be dated 05.01.1996. Thus her claim was time barred even before SEBI took action. As per Section 9 of Limitation Act once time has begun to run no subsequent disability or inability to make application stops it.

12. The Appellant wants to rely on the order of SEBI which is dated 28.01.2004 (Page 289) which shows that SEBI initiated formal investigation only on 8th June, 1999. This was only on the basis that the Company had actually not received genuine minimum subscription of 90 % of the due. The SEBI passed following order:

"69. In view of the above and in exercise of the powers conferred upon me under Section 19, read with Section 11 and 11B of the Securities and Exchange Board of India Act, 1992 and Regulation 11 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003, I hereby restrain M/s Subhash Projects &

Marketing Limited and its directors viz. Sh P C Sethi, Chairman, Emeritus, Sh Anil Kumar Sethi, Chairman, Mr. Subash Chand Sethi, Vice Chairman & Managing Director and Mr. Sushil Kumar Sethi, Managing Director, from accessing the Securities market and dealing in Securities for a period of Five years."

13. In appeal to SAT(Exhibit A 13) the period of prohibition was reduced to the period of prohibition already under gone till date and the Appeal was disposed by order dated 1st June, 2006. The Appeal claims that there was fraud as noticed in action of SEBI and judgement passed by SAT. Even if these are to be kept in view these Orders were passed in 2004-2006. Still Appellant did not take action even that time with spacious submission that the Appellant was not party.

14. The Appellant claimed in the application [(Annexure –A2 para 3(c)] that fact of fraud first came to known to her in January 2015.She claimed she could get relevant record only in April, 2017. In the application under Section 7 of IBC (Exhibit A 2) Para 4 (XIII),the Appellant claimed that she was not aware of the SEBI order till 2015. This is vague. Nothing is shown how only in 2015 she came to know of the SEBI and SAT Orders.

15. Getting copy of order of SEBI and SAT was not necessary for moving application under Section 7 of IBC. For application under Section 7 of IBC debt due is material and date of default is to be seen. The Adjudicating Authority observed:

> "*However we are not much convinced by the said representation as between final date of redemption as on 12.12.2000 as disclosed in the debenture certificate itself and when the order was passed by SEBI in 2004 in the interregnum more than 3 years have elapsed and the petitioner/Financial Creditor has not been in a position to explain the inaction on her part thus as rightly pointed by Ld. Counsel of Corporate Debtor relying on the principles as enunciated in para 21 and 27 as extracted above of the Hon'ble Supreme Court in BK Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates, we find the claim of the Financial Creditor is hopelessly barred by limitation even assuming that there is an existence of Financial Debt. In the circumstances we are constrained to dismiss this petition, however without cost.*"

16. We find ourselves in agreement with the Adjudicating Authority to hold that from the date of default occurred between 1995-2000, the Appellant did not take any action to resort to remedy if there was default with regard to the Debentures issued. She herself defaulted in not paying the difference and when the Company did not return money or forfeited the Debenture in 2000 she took no action. Till 2004, there was no cause for the appellant to claim that there was any fraud in the action of the Respondent. There was no reason for her not to take any action for default dated

05.01.1996. Even when SEBI took action confirmed by SAT, she did not take any action within time to get relief regarding the amount she had paid for the allotment of the Debentures, with the application. The orders were passed by SEBI after investigation. It is not that the knowledge of such action by SEBI was concealed by fraud. The appellant slept over her rights from 1996. Even with some diligence she would have known what market regulator was doing. With due diligence she would have known about the orders passed by SEBI & SAT.

17. Learned Counsel for the Appellant tried to submit that when 90% subscription was not received, the allotment of debentures itself was vitiated due to fraud and the allotment was void. Learned Counsel tried to refer to Judgements to support the submission. We have seen the Judgements referred by Counsel for Appellant. Keeping the ratio in the Judgements in mind, we need to apply law to the facts. If we accept the submission that the allotment was void and vitiated due to fraud, it cannot be said to be financial debt due so as to invoke Section 7 of IBC. As mentioned, for invoking Section 7, it is necessary to show debt due and default.

18. The Counsel for Appellant then tried to submit that as there was fraud and so the period of limitation would get extended. Relevant part of Section 17 of the Limitation Act reads as under:-

> **"17. Effect of fraud or mistake.**—(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,—
>
> (a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

> (b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or
>
> (c) the suit or application is for relief from the consequences of a mistake; or
>
> (d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him,
>
> the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:"
>
> [Emphasis supplied]

19. It is clear that to take benefit of this Section, the Application has to be based upon the fraud of the Respondent. In the present matter, the Application under Section 7 is based on issue of debenture and default to return money. The Section referred above makes it clear that period of limitation shall not begin to run until the Applicant has discovered the fraud or could, with "reasonable diligence", have discovered it. The Appellant has not brought on record any convincing material to show that in spite of market Regulator – SEBI passing Orders in 2004 and SAT confirming the Orders in 2006, she could not have known about the Orders passed till 2015. Even with some diligence, she would have known about actions taken by the Regulator, leave apart "reasonable diligence" as required by the above Section. We find that the Application filed was hopelessly barred by limitation and there is no error in the Order of the Adjudicating Authority.

20. The Appellant would be at liberty to pursue her remedies, if any, available under the Companies Act, 2013 or under any other provisions of law admissible.

The Appeal is disposed accordingly. No costs.

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

(KanthiNarahari)
Member(Technical)

SC/md