NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1097 of 2019

{Arising out of Order dated 1st October, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Amaravathi Bench at Hyderabad, in TCP(IB) No.87/7/AMR/2019 [CP(IB) No.200/7/HDB/2019]}

IN THE MATTER OF:

Sh G Eswara Rao
Off. No.28, Navodaya Colony,
Road No.2, Banjara Hills, Hyderabad ....Appellant

Vs

1. Stressed Assets Stabilisation Fund
Registered office at IDBI Tower,
3rd Floor, D-Wing, WTC Complex,
Cuffle Parade, Mumbai–400005. ....Respondent No.1

2. M/s Saritha Synthetics & Industries Ltd.
Through its Interim Resolution Professional
Registered office at Village V.R. Agraharam,
Rajam Mandal, Srikakulam District,
Andhra Pradsh-532127. ....Respondent No.2

Present:

For Appellant: **Ms. Aakriti Dhawan, Mr. Mayank Jain, Mr. Parmatma Singh and Mr. Madhur Jain, Advocates**

For 1st Respondent: **Mr. Sidhartha Barua and Mr. Aditya Gupta, Advocates**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Pursuant to the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the **'I&B Code'**), filed by Stressed Assets Stabilisation Fund, the Adjudicating Authority (National Company Law Tribunal) Amaravathi Bench, Hyderabad by impugned order

dated 1st October, 2019 initiated 'Corporate Insolvency Resolution Process' against Saritha Synthetics and Industries Ltd. ('Corporate Debtor').

2. The Appellant Mr. G Eswara Rao, Shareholder, Director challenged the order on the ground that Application under Section 7 of the I&B Code was barred by limitation.

3. The Adjudicating Authority (National Company Law Tribunal) taking into consideration that the Debts Recovery Tribunal-I, Hyderabad (**DRT**) by order dated 17th August, 2018 allowed the application of recovery of debt with *pendent lite* and future interest at the rate of 12% per annum, held that the application is not barred by limitation.

4. The questions arise for consideration are:

(i) Whether the application under Section 7 of the I&B Code was barred by limitation? and;

(ii) Whether the order of Decree passed by the Debts Recovery Tribunal-I, Hyderabad on 17th August, 2018 can be taken into consideration to hold that application under Section 7 of the I&B Code is within period of three years as prescribed under Article 137 of Limitation Act, 1963?

5. According to the learned Counsel for the Appellant, the three years' period is to be counted from the date of default/ the date on which the account was declared as Non-Performing Asset (NPA). On the other hand, according to the learned Counsel for the Stressed Assets Stabilisation Fund ('Financial Creditor'), it should be counted from the date when the Decree was passed by the Debts Recovery Tribunal, i.e., 17th August, 2018.

6. In Part-IV of Form-1 (application under Section 7), the particulars of the financial debt shown by the 'Financial Creditor' are as follows: -

"PART-IV

PARTICULARS OF FINANCIAL DEBT		
	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	*<u>TOTAL AMOUNT OF DEBT GRANTED:</u>* *Details of the loan amounts and the total amount of debts granted are hereunder:* *(i) Rupee Term Loan – 1* *Rs.2,85,00,000/- (Rupees Two Crore Eighty Five Lakh only)* *Disbursed on 30.11.1994, 31.03.1995, 30.10.1995, 26.03.1996 and 27.11.1996.* *(ii) Rupee Term Loan – II* *Rs.4,25,00,000/- (Rupees Four Crore Twenty Five Lakh only)* *Disbursed on 19.06.1996, 18.07.1996 and 11.09.1996.* *(iii) Rupee Term Loan – III* *Rs.10,00,00,000/- (Rupees Ten Crore only).* *Disbursed on 05.05.2001.* *(iv) Rupee Term Loan – IV* *Rs.14,00,00,000/- (Rupees Fourteen Crore only).* *Disbursed on 25.01.2001.* *(v) Rupee Term Loan – V* *Rs.72,00,000/- (Rupees Seventy Two Lakh only)* *Disbursed on 25.01.2001.* *(vi) Rupee Term Loan – VI* *Rs.8,00,00,000/- (Rupees Eight Crore only)* *Disbursed on 31.05.2001.*

		(vii) Foreign Currency Term Loan *Rs.3,50,00,000/- (Rupees Three Crore Fifty Lakh only)* *Disbursed on 01.05.1998.* *TOTAL AMOUNT OF DEBT GRANTED i + ii + iii + iv + v + vi = Rs.43,32,00,000/- (Rupees Forty Three Crore thirty Two Lakh only)."*

7. The date of default has been shown by Respondent ('Financial Creditor') as 17th August, 2018, the date the order passed by the Debts Recovery Tribunal, Hyderabad in O.A. No.193 of 2004, as shown in Part-IV of Form-1 is as follows: -

	"AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	*(i)* <u>*Amount claimed to be in default:*</u> *As per the orders of DRT dated 17.08.2018 in O.A. No.193 of 2004, the amount claimed to be in default is Rs.158,16,18,256/- (Rupees One Hundred and Fifty Eight Crore Sixteen Lakh Eighteen Thousand Two Hundred Fifty Six only) as on 01.03.2019.* *Workings for computation of amount claimed to be in default payable by Corporate Debtor to Financial Creditor in tabular form is filled herewith as an Exhibit.* *(ii) Date on which the default occurred:* *17.08.2018 – Order passed by Debts Recovery Tribunal – I, Hyderabad in O.A. No.193 of 2004 admitting the claim of Financial Creditor. The Corporate Debtor*

		defaulted in complying with the orders of the DRT dated 17.08.2018. Therefore, the default date is 17.08.2018 *Hence, the application is well within limitation."*

8. In Part-V, the particulars of financial debt and evidence of default have been mentioned. With regard to default, except the Decree, nothing has been brought on record.

9. The Form-1 shows that loans were disbursed by 'Financial Creditor' on 30th November, 1994, 31st March, 1995, 30th October, 1995, 26th March, 1996, 27th November, 1996, 19th June, 1996, 18th July, 1996, 11th September, 1996, 5th May, 2001, 25th January, 2001 and 31st May, 2001. Some loan was also disbursed on 1st May, 1998.

10. The original application by O.A. No.193 of 2004 was filed in the year 2004 before the Debts Recovery Tribunal and the amount claimed to be in default was shown therein. The aforesaid fact shows that the default took place in the year 2004. Therefore, the account was declared as NPA in the year 2004.

11. If the period of limitation is counted from the date of default/ NPA then the period comes to an end in the year 2007. In such a case, the application under Section 7 of the I&B Code is clearly barred by limitation.

12. The date of default can be forwarded to a future date only under Section 18 of the Limitation Act, 1963, which reads as follows: -

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."

13. As the Decree passed by DRT on 17th August, 2018 cannot be said to be an acknowledgement of debt by the 'Corporate Debtor' in terms of Section 18 of the Limitation Act, 1963 learned Counsel for the Respondent relied on Balance Sheet of the 'Corporate Debtor' for the years ending 2014-15, 2015-16 and 2016-2017 to suggest that the 'Corporate Debtor' admitted the liability in its Independent Auditor's Report and Balance Sheet.

14. Section 92 of the Companies Act, 2013 mandates a Company to prepare a return in the prescribed form as they stood on the close of the financial year regarding providing different details. Under Section 92(5), if a Company fails to file its annual return under sub-section (4), before the expiry of the period specified, it is punishable with fine and the Officers of the Company on such default are also punishable with imprisonment or fine or both as under: -

Companies Act section 92(1), (4), (5) and (6) to be reproduced

*"**92. Annual return.**—(1) Every company shall prepare a return (hereinafter referred to as the annual return) in the prescribed form containing the particulars as they stood on the close of the financial year regarding—*

(a) its registered office, principal business activities, particulars of its holding, subsidiary and associate companies;

(b) its shares, debentures and other securities and shareholding pattern;

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(d) its members and debenture-holders along with changes therein since the close of the previous financial year;

(e) its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year;

(f) meetings of members or a class thereof, Board and its various committees along with attendance details;

(g) remuneration of directors and key managerial personnel;

(h) penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment;

(i) matters relating to certification of compliances, disclosures as may be prescribed;

(j) details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors; and

(k) such other matters as may be prescribed, and signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice:

Provided that in relation to One Person Company and small company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.

Provided further that the Central Government may prescribe abridged form of annual return for "One Person Company, small company and such other class or classes of companies as may be prescribed".

xxx xxx xxx

(4) Every company shall file with the Registrar a copy of the annual return, within sixty days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty days from the date on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting, with such fees or additional fees as may be prescribed.

(5) If a company fails to file its annual return under sub-section (4), before the expiry of the period specified [therein], the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakhs rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

(6) If a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made there under, he shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees."

15. As the filing of Balance Sheet/ Annual Return being mandatory under Section 92(4), failing of which attracts penal action under Section 92(5) & (6), the Balance Sheet / Annual Return of the 'Corporate Debtor' cannot be treated to be an acknowledgement under Section 18 of the Limitation Act, 1963.

16. If the argument is accepted that the Balance Sheet / Annual Return of the 'Corporate Debtor' amounts to acknowledgement under Section 18 of the Limitation Act, 1963 then in such case, it is to be held that no limitation would be applicable because every year, it is mandatory for the 'Corporate Debtor' to file Balance Sheet/ Annual Return, which is not the law.

17. Section 238A of the I&B Code, which applies provisions of Limitation Act, 1963 "as far as may be", is quoted as under: -

> *"**238A. Limitation.**—The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."*

18. The application of Article 137 of Limitation Act, 1963 for moving application under Sections 7 or 9 of the I&B Code, fell for consideration before the Hon'ble Supreme Court and this Appellate Tribunal in number of cases. In ***"B.K. Educational Services Private Limited vs. Parag Gupta and Associates* – (2018) SCC Online SC 1921"**, the Hon'ble Supreme Court held that the Limitation Act, 1963 has in fact been applied from the inception of the Code.

19. 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*
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> *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"*

20. 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: -

> *"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.*
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> xxx xxx xxx
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> *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."

21. 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 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.*
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> *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	*Twelve years*	*When the money sued for becomes due."*

mortgage or otherwise charged upon immovable property		

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."

22. In ***"Sagar Sharma & Anr. vs. Phoenix ARC Pvt. Ltd. & Anr. – Civil Appeal No.7673 of 2019 – (2019) 10 SCC 353"***, the Hon'ble Supreme Court vide its judgment dated 30th September, 2019, referring to the decision in ***B.K. Educational Services Private Limited*** (Supra) reminded this

Appellate Tribunal that for application under Section 7 of the Code, Article 137 of the Limitation Act, 1963 will apply. Article 62, which relates to deed of mortgage executed between the parties, cannot be taken into consideration for counting the period of limitation. The Hon'ble Supreme Court specifically observed that Article 141 of the Constitution of India mandates that its judgments are followed in letter and spirit. The date of coming into force of IBC Code does not and cannot form a trigger point of limitation for application filed under the Code. Equally, since "applications" are petitions, which are filed under the Code, it is Article 137 of the Limitation Act, 1963 which will apply to such applications.

23. This Appellate Tribunal also considered the same issue in ***"V Hotels Limited vs. Asset Reconstruction Company (India) Limited – Company Appeal (AT) (Insolvency) No.525 of 2019"*** decided on **11th December, 2019,** by referring to the aforesaid judgment of the Hon'ble Supreme Court observed: -

> *"17. In the present case, in fact the default took place much earlier. It is admitted that the debt of the 'Corporate Debtor' was declared NPA on 1st December, 2008 as has been noticed by the Adjudicating Authority.*
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> *xxx xxx xxx*
>
> *19. Section 13(2) of the 'SARFAESI Act, 2002' reads as follows:*
>
> *"**13. Enforcement of security interest**.— ……(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt*

or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as nonperforming asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

20. Admittedly, the 'Financial Creditor' took action under the 'SARFAESI Act, 2002' in the year 2013. Therefore, the second time it become NPA in the year 2013 when action under Section 13(2) was taken."

Referring to Section 18 of the Limitation Act, 1963, this Appellate Tribunal further observed: -

"22. The aforesaid provision makes it clear that for the purpose of filing a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has to be made in writing duly signed by the party against whom such property or right is claimed.

23. In the present case, 'Asset Reconstruction Company (India) Ltd.'- ('Financial Creditor') has failed to bring on record any acknowledgment in writing by the 'Corporate Debtor' or its authorised person acknowledging the liability in respect of debt. The Books of Account cannot be treated as an acknowledgment of liability in respect of debt payable to the 'Asset Reconstruction Company

(India) Ltd.'- ('Financial Creditor') signed by the 'Corporate Debtor' or its authorised signatory.

24. In ***"Sampuran Singh and Ors. v. Niranjan Kaur and Ors.— (1999) 2 SCC 679"****, the Hon'ble Supreme Court observed that the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit. In the present case, the account was declared NPA since 1st December, 2008 and therefore, the suit was filed. Thereafter, any document or acknowledgment, even after the completion of the period of limitation i.e. December, 2011 cannot be relied upon. Further, in absence of any record of acknowledgment, the Appellant cannot derive any advantage of Section 18 of the Limitation Act. For the said reason, we hold that the application under Section 7 is barred by limitation, the accounts of the 'Corporate Debtor' having declared NPA on 1st December, 2008.*

24. In the present case, the 'Corporate Debtor' defaulted to pay prior to 2004, due to which O.A. No.193 of 2004 was filed by Respondent ('Financial Creditor'). A Decree passed by the Debts Recovery Tribunal or any suit cannot shift forward the date of default. On the other hand, the judgment and Decree passed by Debts Recovery Tribunal on 17th August, 2018, only suggests that debt become due and payable. It does not shifting forward the date of default as Decree has to be executed within a specified period. It is not that after passing of judgment or Decree, the default takes place immediately, as recovery is permissible, all the debts in terms of judgment and Decree dated 17th August, 2018 with *pendent lite* and future interest at

the rate of 12% per annum could have been executed only through an execution case.

25. In ***"Binani Industries Limited vs. Bank of Baroda & Anr. – Company Appeal (AT) (Insolvency) No.82 of 2018"*** decided on 14th November, 2018, this Appellate Tribunal has held that 'Corporate Insolvency Resolution Process' is not a recovery proceeding. It is not a 'litigation' nor it is an auction.

26. By filing an application under Section 7 of the I&B Code, a Decree cannot be executed. In such case, it will be covered by Section 65 of the I&B Code, which stipulates that the insolvency resolution process or liquidation proceedings, if filed, fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, attracts penal action.

27. The Adjudicating Authority (National Company Law Tribunal) has failed to consider the aforesaid fact and wrongly held that the date of default took place when the judgment and Decree was passed by Debts Recovery Tribunal on 17th August, 2018.

28. As noticed above, in absence of any acknowledgement under Section 18 of the Limitation Act, 1963, the date of default/ NPA was prior to 2004 and does not shift forward, therefore, the period of limitation for moving application under Section 7 of the I&B Code was for three years, if counted, to be completed in the year 2007. As date of passing of Decree is not the date of default, we hold that the application under Section 7 of the I&B Code was barred by limitation, though the claim may not be barred.

For the said reason, we set-aside the impugned order dated 1st October, 2019 and dismiss the application under Section 7 of the I&B Code filed by Stressed Assets Stabilisation Fund ('Financial Creditor'). The 'Corporate Debtor' is released from all the rigors of 'Corporate Insolvency Resolution Process'. The 'Interim Resolution Professional' will handover the assets and records to the Promoters/ Board of Directors immediately. The Adjudicating Authority will decide the fee and cost incurred and payable to the 'Interim Resolution Professional'/ 'Resolution Professional', which will be borne by Stressed Assets Stabilisation Fund. The case stands remitted to the Adjudicating Authority only for such determination.

The Appeal is allowed. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

7th February, 2020

Ash