

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
NEW DELHI

Company Appeal (AT) (Insolvency) No. 197 of 2020

[Arising out of Order dated 16th December, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-II in CP(IB) 1598/MB/C-II/2019]

IN THE MATTER OF:

Sumeet Maheshwari

W/o- Sh P.K. Maheshwari

R/o-3, Indira Press Complex,

Ram Gopal Maheshwari Marg,

M.P. Nagar, Zone-1,

Bhopal, Madhya Pradesh

....Appellant

Vs.

1. Navbharat Press (Bhopal) Private Limited

Through IRP Mr. Amresh Shukla

Having its office at:

F-05, Jaideep Complex,

112 Zone-II, M.P. Nagar,

Bhopal-M.P.462011.

2. Bank of Maharashtra

Having its Registered Office at

Lokmangal, 1501, Pune-5.

Also at

Gautam Nagar Branch,

Gautam Nagar,

Bhopal, Madhya Pradesh

....Respondents

Present:

For Appellant: Mr. Rishi Sood and Mr. Gaurav Singh, Advocates.

For Respondent No.1: Notice delivered. No appearance.

For Respondent No.2: Mr. V.K. Gupta, Advocate.

J U D G M E N T

Venugopal M., J:

The Appellant/ Shareholder of the 1st Respondent/ Company has preferred the instant Company Appeal being dissatisfied with the order dated 16.12.2019

in C.P.(IB) No.1598/MB/C-II/2019 passed by the Adjudicating Authority, who had admitted the Section 7 Application filed by the 2nd Respondent/ Bank.

2. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-II while passing the impugned order at paragraph 7 to 9 had observed the following:-

- “7. The Bench heard the arguments of the Financial Creditor and perused the records.*
- 8. On the last date of hearing i.e. on 21.08.2019, when matter was called none appeared for Corporate Debtor. Therefore, this Petition was heard ex parte qua the Respondent.*
- 9. The Financial Creditor as per the Decree dated 05.08.2011 by the Debt Recovery Tribunal, Jabalpur and Recovery Certificate dated 06.05.2015 a total sum of Rs.24,93,08,874/- was due. This along with interest and other expenses as on the date of filing the application, as per the petitioner, amounts to Rs.83,40,90,183/-.”*

3. The Adjudicating Authority found that the Application filed by the 2nd Respondent/Financial Creditor was complete in all respects and appointed one Mr. Amresh Shukla, 'Interim Resolution Professional' of the 'Corporate Debtor' to carry out the functions as per IBC.

4. It is the stand of the Appellant that the 2nd Respondent/ Bank had averred in its Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short 'IBC') before the Adjudicating Authority that the amount of Rs.6,63,00,000/- was advanced to the 1st Respondent under Sanction Letter dated 23.10.2002. It comes to be known that the 1st Respondent had executed

demand promissory notes dated 23.10.2002, composite deed of hypothecation dated 23.10.2002. Also that on 23.03.2004, the Directors of the 2nd Respondent/ Bank had sanctioned financial credit of Rs.14.17 crores and that the Directors had signed the documents being the demand promissory note dated 23.03.2004, composite deed of hypothecation dated 23.03.2004 for all facilities.

5 The stand of the 2nd Respondent/ Bank before the Adjudicating Authority is that the 1st Respondent Company had defaulted in respect of repayment of interest as well as the principal sum due as per repayment schedule. A recall notice dated 11.07.2007 was issued by the 2nd Respondent/ Bank to the 1st Respondent/ Company ('Corporate Debtor') for recalling the facility and demanding a sum of Rs.17,94,54,108.73/-. In fact, the 1st Respondent/Company was declared as Non-Performing Asset (NPA) on 31.03.2004. As on 25.07.2009, the outstanding loan was Rs.24,93,08,873.73/-. The amount of Rs.83,40,90,184/- was recoverable on the date of filing of an Application under Section 7 of I&B Code before the Adjudicating Authority.

6. The Learned Counsel for the Appellant submits that the 2nd Respondent/ Bank filed O.A. No.135 of 2009 before the Debts Recovery Tribunal, Jabalpur for the recovery of loan amount and that a Decree was passed on 05.08.2011.

7. The Learned Counsel for the Appellant takes a stand that the 2nd Respondent/ Bank filed an Application under Section 7 of the I&B Code on 16.03.2019 for initiation of 'Corporate Insolvency Resolution Process' (CIRP) before the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench and the said Authority hastily admitted the Application and initiated 'CIRP' by appointing the 'Interim Resolution Professional'.

8. Advancing his arguments, the Learned Counsel for the Appellant proceeds to take a legal plea that the 'Loan Account' of the 1st Respondent/ Company was termed as NPA on 31.03.2004 and that Loan Recall Notice dated 11.07.2007 was sent to the 1st Respondent/ 'Corporate Debtor' requiring it to repay the Loan Amount. Therefore, a forceful submission is projected on the side of the Appellant that the Section 7 Application under IBC before the Adjudicating Authority was filed in the year 2019, which is highly belated and the same is barred by limitation.

9. The version of the Appellant is that the NPA was declared on 31.03.2004 and Respondent No.2/ Bank has to file the Application within a period of three years from the date of default as per Hon'ble Supreme Court decision "**B.K. Educational Services Pvt. Ltd. vs. Parag Gupta and Associates (Civil Appeal No. 23988/17)**". Since the default had occurred over three years prior to the date of filing of the Application, the same is hit by Article 137 of the Limitation Act, 1963. Also, the Learned Counsel for the Appellant cited the judgment dated 17.02.2020 "**Meena V. Kothari Vs. Maberest Hotels Pvt. Ltd - Company Appeal (AT) No.797 of 2019**" whereby and whereunder at paragraph 12 it is observed as under: -

"In this case the right to sue accrues when a default occurred i.e. 25.11.2007. The Financial Creditor has filed the application under Section 7 of I&B Code, on 17.04.2018, i.e. after three years from the date of default apparently the application is time barred."

10. The Learned Counsel for the Appellant contends that the last acknowledgement of debt and security was sent by the 1st Respondent on

05.04.2005 and 18.12.2006 being the balance confirmation letter and it is the crystalline stand of the Appellant that there is no acknowledgement by the 1st Respondent/ Corporate Debtor/ Company after the year 2006. Hence, the Learned Counsel for the Appellant prays for allowing the Appeal and dismissing the Section 7 Application filed by 2nd Respondent Bank.

11. Conversely, it is the submission of the Learned Counsel for the 2nd Respondent/ Bank that the Bank had already credited/ appropriated in the Appellant's Loan Account the sale proceeds of Bhopal property for Rs.224 lakhs and this aspect was not concealed by the 2nd Respondent/ Bank.

12. The Learned Counsel for the 2nd Respondent/ Bank brings it to the notice of this Tribunal that based on the Decree passed by the Debts Recovery Tribunal, Jabalpur in OA No.135 OF 2009, the Bank had claimed the loan amount and in fact a certificate amount of Rs.24,93,08873.73/- was directed to be drawn by the Debts Recovery Tribunal against the Corporate Debtor along with interest 14.25% till realization and other charges. In fact, a total sum of Rs.83,40,90,183/- was claimed from the 1st Respondent/ Company/ Corporate Debtor (Rs.24,93,08,874/- + interest Rs.58,43,50,816/-) for the period from 28.07.2009 to 30.09.2018 and a sum of Rs.4,30,494 and other legal expenses from 05.08.2011 – 31.05.2018).

13. The Learned Counsel for the 2nd Respondent/ Bank comes out with an argument that the Appeal is to be dismissed because of the fact that public money amounting to Rs.84 crores is involved in the present case.

14. The Learned Counsel for the 2nd Respondent/ Bank points out that the Bank filed Execution Application No.156 of 2011 in OA No.135 of 2009 before the

Debts Recovery Tribunal, Jabalpur and the said Application was allowed resulting in a Recovery Certificate dated 06.05.2011 being issued in favour of the 'Financial Creditor'.

15. The Learned Counsel for the 2nd Respondent/ Bank submits that after the Decree of DRT, Jabalpur in OA No.135 of 2009, there is continuous 'cause of action' and that the limitation was running at the time of filing the Application before the Adjudicating Authority (National Company Law Tribunal) Mumbai. Further, the 2nd Respondent Bank takes a plea that by implication of Section 18 of the Limitation Act, 1963 a fresh period of limitation of three years started in continuation and that the Application before the Tribunal (under Section 7 of the Code) was filed on 11.12.2018, which is well within the period of limitation. Further, the 2nd Respondent/ Bank categorically takes a plea that Article 62 of the Limitation Act, 1963 speaks of 12 years of limitation period in respect of recovery of debt secured in regard to immovable property, but Article 137 of the Limitation Act will apply to the Application filed under Section 7 of the Code, even when the debt is secured by mortgage or otherwise charged upon immovable property.

16. The Learned Counsel for the 2nd Respondent/ Bank brings it to the notice of this Tribunal that the Chartered Accountant of the 'Corporate Debtor' had entered appearance on its behalf before the Adjudicating Authority on 10.07.2019 and that the next date of hearing was fixed on 21.08.2019. Moreover, the Appellant's Counsel enquired about the status and that the matter was listed on 22.08.2019 and on that day, the Learned Counsel for the Appellant was absent

and in his absence the matter was heard and orders were reserved and ultimately the orders were passed on 16.12.2019.

17. By way of Reply, the Learned Counsel for the Appellant submits that the Adjudicating Authority had passed the impugned order overlooking the objections/ Reply filed by the 1st Respondent/ Company to the Application filed by the 2nd Respondent/ Bank on 28.08.2019 vide Diary No.D16269.

18. Apart from that, the Learned Counsel for the Appellant had inspected the cause list of 21.08.2019 of the Tribunal and found that on the said day no matter was listed and even in the final order, it was recorded that on the last date of hearing i.e. on 21.08.2019 none appeared on behalf of the 'Corporate Debtor' and that the petition was heard ex-parte qua the Appellant and the 1st Respondent.

19. It is to be relevantly pointed out that under Article 62 of the Limitation Act, 1963 the period for enforcing payment of money secured by mortgage or otherwise charged upon immovable property is 12 years and the period would start running when the money suit becomes due. In order to maintain an Application under Section 7 of the Code, the Applicant has to prove the existence of debt, which is due from the 'Corporate Debtor'. The Adjudicating Authority is not a 'Court of Law' and cannot determine a money claim. It cannot be gainsaid that 'CIRP' is not a litigation. As a matter of fact, the words 'due and payable' implied in the definition of 'default' in Section 3(12) of the Code is quite relevant for the meaning of 'default'. Besides this, the 'default' under Section 2(j) of the 'Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor

consequent upon which the account of such borrower is classified as 'Non-performing Asset' in the books of account of the secured creditor. In fact, the pendency of proceedings before the Debts Recovery Tribunal under 'Debt Recovery Laws' does not bar the initiation of 'Corporate Insolvency Resolution Process'. The Corporate Debtor or its Directors can point out before the Adjudicating Authority that the debt is not payable by the Corporate Debtor in Law and also in fact. The Corporate Debtor can also point out that the 'default' had not occurred and that the 'debt' including the disputed claim is not due.

20. A perusal of the contents of reply dated 28.08.2019 of the Corporate Debtor filed before the Adjudicating Authority latently and patently indicates that the plea was taken that action of the 2nd Respondent/ Bank was contrary to Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 and that the purchaser of the property had not deposited 25% of the bid amount on the date of auction and the balance amount within a period of 15 days as per Rule 9(3) of the Rules of 2002. Also, that the Corporate Debtor had mentioned in the reply before the Adjudicating Authority that financial assistance was provided to the Charak Hospital & Research Centre for making payment of the auctioned amount.

21. It is the stand of the 2nd Respondent/ Bank that it had only put part of the 'Secured Asset' to an auction, which was let out by the Appellant to the Charak Hospital & Research Centre and the remaining was not put to Auction.

22. It is to be mentioned that a final order dated 30.11.2016 in proceeding for possession for immovable properties of 'Corporate Debtor' vide Case No.71/B-121/15-16 was passed by the Learned Additional District Magistrate (First),

Jabalpur and on 23.03.2017, a revised order was passed because of some technical error.

23. Be it noted, that the provisions of I&B Code override other Laws. At the same time, the IBC proceedings cannot be initiated based on time barred claims. Regardless of when IBC came into force, if more than three years had elapsed from the date of default, a creditor is not entitled to maintain an Application under the Code. IBC is not a litigation and that an 'Adjudicating Authority' is not deciding a money claim or suit. In short, an 'Adjudicating Authority' is not a Court of Law.

24. As far as the present case is concerned, the 1st Respondent/ Company – 'Corporate Debtor's' loan account was declared NPA by the 2nd Respondent on 31.03.2004. A Recall Notice dated 11.07.2007 was issued by the 2nd Respondent/ Bank to the Corporate Debtor for recalling the facility and demanding a sum of Rs.17,94,54,108.73/-. The Application before the Tribunal was filed on 11.12.2018. The Application was served on the Corporate Debtor vide letter dated 11.03.2019. The Section 7 Application filed by the 2nd Respondent/ Bank in the year 2018 is a belated one because of the simple reason that in the present case the declaration of NPA or default on 31.03.2004 had occurred over three years prior to the date of filing of the Application and hence, this Tribunal comes to an inescapable conclusion that the Application filed by the 2nd Respondent/ Bank (under Section 7 of the Code) before the Adjudicating Authority is hit by Limitation, as per Article 137 of the Limitation Act, 1963.

25. In view of the aforesaid detailed discussions and also considering all facts and circumstances of the instant case in a cumulative fashion, this Tribunal comes to an inevitable conclusion that Application filed under Section 7 of the

Code by the 2nd Respondent/ Bank before the Adjudicating Authority (NCLAT), Mumbai-II is barred by Limitation and that the Adjudicating Authority had erred in admitting the Application, which needs to be set aside by this Tribunal and accordingly this Tribunal set-aside the impugned order dated 16.12.2019, in the interest of justice.

26. In fine, the impugned order dated 16.12.2019 passed by Adjudicating Authority (NCLT), Mumbai Bench-II in CP(IB)1598/MB/C-II/2019 is set aside by this Tribunal for the reasons assigned in this Appeal. No costs. The Application filed by the 2nd Respondent/ Bank before the Adjudicating Authority (NCLT), Mumbai Bench-II is dismissed. Resultantly, the 1st Respondent/ Corporate Debtor is released from all the rigours of 'Corporate Insolvency Resolution Process'. All actions taken by the 'Interim Resolution Professional/ Resolution Professional/ Committee of Creditors', if any are declared illegal and set-aside. The Interim Resolution Professional/ Resolution Professional is directed to handover the record and assets of the 1st Respondent/Corporate Debtor to the Promoter and Directors of the Corporate Debtor forthwith.

27. The matter is remitted to the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-II for determining the 'fee and costs' of the 'Corporate Insolvency Resolution Process' as incurred by him, which is to be borne and paid by the 2nd Respondent/ Bank (Financial Creditor). Before parting with the case, it is lucidly made clear that the dismissal of the Application filed by the 2nd Respondent/ Bank before Adjudicating Authority will not prevent it from pursuing/ seeking appropriate remedy before the competent Forum for redressal of its grievances, if it is so desires/ advised.

28. The Appeal is allowed with the aforesaid observations and directions.

29. I.A. No.499 of 2020 (Stay) is closed. I.A. No.498 of 2020 (seeking exemption to file certified copy) is closed with a direction to the Appellant to file certified copy of the impugned order within three weeks from today.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

[Alok Srivastava]
Member (Technical)

NEW DELHI

29th May, 2020

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