

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 118 of 2019**

(Arising out of Order dated 2<sup>nd</sup> January, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench Chennai in CP/724/IB/2018)

**IN THE MATTER OF:**

**Sanghvi Movers Ltd.**

**...Appellant**

**Vs.**

**M/s. Tech Sharp Engineers Pvt. Ltd.**

**...Respondent**

**Present: For Appellant: - Mr. Shikhil Suri, Mr. Shiv Kumar Suri, Ms. Vinishma Kaul and Ms. Shilpa Saini, Advocates.**

**For Respondent:- Mr. R. Chandrachud, Mr. J.B. Dahia, Mr. Karan Sharma, Mr. Nitin Thukral and Ms. Geetanjali, Advocates.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant- ‘Sanghvi Movers Ltd.’ filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) against ‘Tech Sharp Engineers Pvt. Ltd.’- (‘Corporate Debtor’) claiming that a sum of Rs.38,84,709/- has become due and payable on 28<sup>th</sup> February, 2013. The Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai, by impugned order dated 2<sup>nd</sup> January, 2019 rejected the same on the ground that the claim is time barred with following observations:

*“Counsels for both the parties are present. As seen from the Order dated 18.12.2018, last the final opportunity was granted to the Operational Creditor for seeking instruction from his client. However, the counsel for the Operational Creditor again prayed for time for seeking instruction from his client. It appears that the Operational Creditor is derailing the proceeded of adjudicating, therefore, I proceeded to decide the matter on merits.*

*On perusal of the Application filed under Section 9 of the I&B Code, 2016, it appears that the claim amounting to Rs.38,84,709/- has become due and payable on 28.02.2013. There is a single confirmation of the claim by the Corporate Debtor on 07.11.2013 as reflects from the document placed at page 60 of the typed set filed with the Application. Thereafter, there is nothing on record to suggest that at any point of time the Corporate Debtor confirmed/ acknowledged the debt.*

*In the circumstances, the claim has become time barred and in view of the judgment of the Hon’ble Supreme Court passed in*

*B.K.Educational Services Pvt. Ltd. –vs- Parag Gupta and Associates (2018 SCC Online SC 1921), the Petition stands **dismissed.***”

2. Learned counsel appearing on behalf of the Appellant submitted that the claim is not barred by limitation, the Adjudicating Authority without citing the relevant facts and reasons referred to the decision of the Hon’ble Supreme Court in “**B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates– (2018) SCC OnLine SC 1921**” and rejected the application.

3. It was submitted that the Adjudicating Authority neither noticed nor discussed the relevant fact, as reflected in Form-6 which the application under Section 9 of the ‘I&B Code’ filed by the Appellant.

4. Learned counsel appearing on behalf of the Respondent placed reliance on decision of the Hon’ble Supreme Court in “**B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates– (2018) SCC OnLine SC 1921**”, wherein the Hon’ble Supreme Court observed and held:

*“48. 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.”*

5. The question arises for consideration in this appeal is whether the claim is barred by limitation as observed by the Adjudicating Authority.

6. The aforesaid issue is mixed question of facts and law for which it is necessary to notice the relevant facts and the law.

7. For filing an application under Section 9, no period of limitation has been prescribed in any of the Division or part of Schedule of the ‘Limitation Act, 1963’, therefore, Article 137 of Part II of 3<sup>rd</sup> Division of Schedule to the ‘Limitation Act, 1963’ will be applicable, which reads as follows:

Part II-OTHER APPLICATION			
	Description of application	Period of Limitation	Time from which period begins to run
137.	Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues

8. In the present case, it is not in dispute that right to apply under Section 9 accrued to the Appellant on 1<sup>st</sup> December, 2016, when I&B

Code' came into force. Therefore, we find that the application under Section 9 filed by the Appellant is within the period of three years from the date of right to apply accrued.

9. The next question arises for consideration is whether the claim of the Appellant is barred by limitation? If it is barred by limitation, then the Respondent has right to take plea that there is no debt payable by him in law. In such case, the application under Sections 9 cannot be entertained.

10. To decide the aforesaid issue, we have noticed the facts which were also brought to the notice of the Adjudicating Authority by the Appellant- ('Operational Creditor') and recorded in Part IV- 'Particulars of Operational Debt' of Form-5, as noticed below.

11. The 'Corporate Debtor' placed work orders on 24<sup>th</sup> October, 2011 with the 'Operational Creditor' for 150 MT Manitowoe M 400 C Crane. After execution of the work at the designated site on the designated date, the Appellant- ('Operational Creditor') raised different invoices from time to time for the services rendered by it.

12. According to the Appellant, a sum of Rs.88,87,900/- was payable, out of which, the 'Corporate Debtor' paid only a sum of Rs.41,76,493/- and subsequently a sum of Rs.8,26,698/-. As the 'Corporate Debtor' stopped payment, the Appellant- ('Operational Creditor'), issued legal notice on 6<sup>th</sup> May, 2013 to the 'Corporate Debtor' calling upon it to pay the outstanding amount. The 'Corporate Debtor' by reply dated 17<sup>th</sup> May,

2013, admitted the outstanding dues and agreed to pay the same within six months.

13. According to the Appellant, on considering the business relationship and relying on assurance of the 'Corporate Debtor' to clear its dues in instalments, the 'Operational Creditor' vide letter dated 21<sup>st</sup> May, 2013 offered discount of 10% on the outstanding amount. The offer given by the 'Corporate Debtor' was also accepted by the 'Operational Creditor' as it was informed that the amount will be paid in five monthly instalments commencing from 1<sup>st</sup> June, 2013.

14. Further the case of the Appellant is that the 'Corporate Debtor' having failed to honour its commitments, the 'Operational Creditor' issued a statutory notice dated 14<sup>th</sup> October, 2013 to the 'Corporate Debtor' to which the 'Corporate Debtor' replied on 7<sup>th</sup> November, 2013 and admitted the default. In the said reply, the 'Corporate Debtor' informed that they would write a letter to the principal employer i.e. 'IOCL' to make direct payment to the 'Operational Creditor'. A copy of the said letter was also sent to the 'IOCL' and also enclosed with Form-5.

15. There being no progress of payment either from the 'Corporate Debtor' or from the 'IOCL' in clearing the outstanding dues of the 'Operational Creditor', the Appellant issued a statutory notice under Sections 433 and 434 of the Companies Act, 1956 on 24<sup>th</sup> May, 2014 to the 'Corporate Debtor' calling upon to pay a sum of Rs.38,84,709/- together with interest. The amount having not paid, the Appellant filed a

winding up petition/ Company Petition before the Hon'ble High Court of Judicature at Madras on 4<sup>th</sup> July, 2015 which was registered and numbered.

16. During the pendency of the winding-up petition before the Hon'ble High Court of Judicature at Madras, the 'I&B Code' came into force since 1<sup>st</sup> December, 2016. Section 434 of the Companies Act, 2013 was substituted by Eleventh Schedule of the 'I&B Code'. As per substituted Section 434 (c) of the Companies Act, 2013, all proceeding including winding up proceeding pending before the Hon'ble High Courts stood transferred to the Tribunal. In this background, the notice was issued by the 'Operational Creditor' under Section 8(1) calling upon the 'Corporate Debtor' to pay a sum of Rs.38,84,709/- with interest at the rate of 24% p.a. Thereafter, the 'Corporate Debtor' having failed to pay the amount, the application under Section 9 was filed by the Appellant- ('Operational Creditor').

17. The aforesaid facts brought to the notice of the Adjudicating Authority in Part IV of Form-5 (application under Section 9) have not been considered by the Adjudicating Authority nor discussed and without going into the facts and law, the Adjudicating Authority held that the claim is barred by limitation.

18. From the facts as narrated above, it will be evident that the winding up petition was filed before the Hon'ble High Court of Judicature at Madras which had not reached finality and in the meantime, as the 'I&B

Code' came into force, the demand notice under Section 8(1) was issued on 14<sup>th</sup> November, 2017 for payment of outstanding amount along with the interest. Thus, as we find that there is continuous cause of action the claim is within the period of limitation. The Appellant had moved before an appropriate forum for appropriate relief in time, in accordance with law and so we hold that the claim of the Appellant is not barred by limitation as the petition under Section 433 & 434 of the Companies Act, 1956 become infructuous, by operation of law.

19. For the reasons aforesaid, we set aside the impugned order dated 2<sup>nd</sup> January, 2019 passed by the Adjudicating Authority and remit the case to the Adjudicating Authority for admission of the case after notice to the parties. Before admission of the case, it will be open to the Respondent to settle the matter with the Appellant.

The appeal is allowed with aforesaid observations. No costs.

(Justice S.J. Mukhopadhaya)  
Chairperson

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

(Kanthi Narahari)  
Member(Technical)

NEW DELHI  
23<sup>rd</sup> July, 2019  
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