

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 276 of 2020

In the matter of:

Sanjay Lamba

Ex-Managing Director

107, Bharat Chambers,

70, Scindia House, New Delhi - 110001

...Appellant

Vs.

1. Union Bank of India

Through chief manager

C-34, 3rd Floor,

DDA Office Cum Shopping Complex,

Opposite Moolchand hospital

Lajpat Nagar New Delhi - 1100024

...Respondent No.1

2. Shri. Pawan Trivedi, CA

IRP Through M/s. Sainov Spirits Pvt Ltd

J-1001, Park View City-I

Sohan Road, Sector – 48

Gurugram – 122018 (Haryana)

...Respondent No.2

Present:

For Appellant: Mr. Arun Kathpalia, Sr. Advocate with Ms. Sowmya Sai kumar, Mr. Upinder Singh and Mr. Ankush Chattopadhyay, Advocates.

For Respondents: Mr. Vivek Kohli, Sr. Advocate with Ms. Malvika Jain and Ms. Somyashree, Advocates for R-1. Mr. Sandeep Bhuraria and Mr. Aman Anand, Advocates for R-2. Mr. Pawan Trivedi, RP.

J U D G E M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER.

1. The present appeal is filed by the Appellant – Sanjay Lamba under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short ‘Code’) against the Impugned order dated 05.02.2020 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench (Court-II) in (IB) (3383/2019). The Adjudicating Authority has admitted the petition filed under Section 7(5) of the Code r/w Rule 4 of

the IBBI (Applications to Adjudicating Authority) Rules, 2016 on the Application filed by Financial Creditor -Corporation Bank, New Delhi. The Adjudicating Authority has observed that the total amount involved in default is Rs. 70,34,19,678.23/- and the account of the Corporate Debtor was classified as a Non-Performing Asset ('NPA') on 30.09.2016. They have also categorically mentioned that the Corporate Debtor has failed to give cogent reasons as to why CIRP shall not be triggered against it.

Subsequent to the filing of the present appeal the Appellant has filed Interlocutory Application (for short 'IA') No. 1506 of 2020 informing the Tribunal that there has been certain development necessitating the filing of the IA. The Govt. of India vide Gazette Notification dated 04.03.2020 amalgamated Andhra Bank and Corporation Bank (Transferor Bank) into Union Bank of India (Transferee Bank) (for short 'Bank') and the same was allowed by this Appellate Tribunal vide its order dated 16.07.2020.

2. The Appellant is the member of the suspended Board of Directors of the Corporate Debtor - M/s. Sainov Spirits Pvt. Ltd. The Appellant has taken various facilities from the Respondent Bank vide sanction letter dated 01.01.2011, 29.12.2012 etc. involving cash credit facility, term loan facility, Ad hoc working capital limit etc. and the amount is in default mentioned as above. The Appellant has stated that they have paid over Rs.700 Crore as excise duty in 2019 and Rs.800 Crore plus as excise duty in 2018. They have also stated that 1000 families are dependent on the Corporate Debtor. They have also stated that an OTS

Settlement was arrived at between the Respondent bank and Corporate Debtor on 11.06.2019 and they have paid an amount of Rs.8,22,28,000/- towards one time Settlement out of Settlement Amount of Rs. 67 Crore. The Appellant is willing to pay the entire amount by 31.05.2020 which was not accepted by the Bank. They have also stated that the Banks are moving in forum shopping and also online auction under Section 13(4) of the SARFAESI ACT.

3. The Appellant has further submitted that the date of default being NPA date is 30.09.2016 and the Petition was filed on 22.11.2019 (*as mentioned by Appellant in its Written Submission Diary No. 26369 dated 24.03.2021*) and the same is clearly barred by limitation as it has been filed more than three years after the default has occurred and thus the impugned order needs to be set aside. They have supplemented it with the following citations:

- a. *BK Educational Services Pvt Ltd. Vs. Parag Gupta (2019) 11 SCC 633,*
- b. *Gaurav Harigovindbhai Dave Vs. ARC (India) Ltd, (2019) 10 SCC 572,*
- c. *Jignesh Shah & Ar. V. Union of India & Anr. (2019) 10 SCC 750*
- d. *Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd and Anr. (Civil Appeal No. 6347 of 2019*
- e. *Kaustav Ray Vs. State Bank of India (Company Appeal (AT) (Ins) No. 804 of 2020 dated 20.01.2021*
- f. *State bank of India Vs. Krishidhan Seeds Pvt. Ltd, (Company Appeal (AT) (Ins) No. 972 of 2020*
- g. *Jagdish Prasad Sharda Vs. Allahabad Bank (Company Appeal (AT) (Ins) No. 183 of 2020*

*h. V.Padmakumar Vs. Stressed Assets Stabilization Fund (SASF) & Anr.,
Company Appeal (AT) (Ins) No. 57 of 2020*

*i. Bishal Jaiswal Vs. ARC (India) Ltd. & Anr. Company Appeal (AT) (Ins)
No. 385 of 2020.*

4. It has also been mentioned by the Appellant that revival letter and OTS Proposal cannot shift the date of default and so also payments made by the Appellant cannot extend limitation. The Appellant is accepting that they have made an offer around April, 2019 and made a payment of Rs. 8.3 Crore between 13.05.2019 to 16.07.2019 and subsequently the OTS was cancelled by the Bank on 15.11.2019. They have also stated that Balance Sheets cannot be treated as acknowledgment of debt as held by this Tribunal in V.Padmakumar Vs. Stressed Assets Stabilization Fund (SASF) & Anr., Company Appeal (AT) (Ins) No. 57 of 2020. They have also placed reliance on RBI Master Circular to submit that once an account become NPA, the date of default cannot be shifted.

5. However, Respondent No.1 Bank/ Financial Creditor is still affirming in their Petition before the Adjudicating Authority that the date of default / NPA date is 30.09.2016. They have also stated that the Corporate Debtor on account of continuous default issued revival letter dated 21.06.2017 wherein they have categorically acknowledged for the purpose of Section 18 of the Indian Limitation Act, 1963 and the Corporate Debtor has given multiple letters dated 22.04.2019, 26.04.2019 and 12.06.2019 proposing one time settlement offer and the bank has finally agreed for a settlement at Rs. 67 Crore towards the settlement its debt and liabilities vide its letters of June, 2019. All this

amounts to acknowledgment of liability as provided under Section 18 of the Limitation Act.

6. The Bank /Financial Creditor has further stated that they have received a part payment of Rs. 8.28 Crore towards its debt and obligations between May, 2019 to July, 2019. They have also stated that they meet the criteria of Section 19 of the Limitation Act for computation of a fresh period of limitation from the date of such payments. They have also stated that Reserve Bank of India master circular prudential norms Reserve Bank of India – Prudential Framework for Resolution Of Stressed Assets RBI/2018-19/203 DBR No. BP.BC. 45/21/04.048/2019-19 dated 07.06.2019 which highlight the framework classification norms of NPA subsequent to default: ‘Default’ means non-payment of debt and after 90 days the default get converted into “NPA”. They have also stated that default can occur on multiple dates and categorization of the accounts would be termed as a sub-standard. The NPA categorization is only done when the default continues beyond 90 days and the same can be upgraded only when all out standing facilities in the said loan accounts performed satisfactorily. Therefore, the date of default would shift the eventuality of default, the borrower committing in payment of money due to the lender bank in terms of Resolution Plan, one time Settlement or corporate debt restructuring etc.

Based on above submissions, the Respondent-Financial Creditor submitted to dismiss the present appeal and uphold the impugned order of Adjudicating Authority dated 05.02.2020.

7. Apart from the above stated judgment, we have the privilege to go through the following two judgments of Hon'ble Apex Court as mentioned below which have been delivered in the last week of March, 2021:

- a. Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Co-operative Bank Ltd and Anr. in Civil Appeal No. 9198 of 2019 delivered on 22.03.2021
- b. Laxmi Pat Surana Vs. Union Bank of India & Anr. In Civil Appeal No. 2734 of 2020 delivered on 26.03.2021.

In case of Laxmi Pat Surana (as stated supra) the specific question raised was whether an application under Section 7 of the Code filed after 3 years from the date of declaration of the loan account as NPA being the date of default is not barred by limitation. It has been made amply clear that right to initiate action within 3 years from such acknowledgement of debt accrues to the Financial Creditor. However, needs to be exercise within 3 years when the right to sue /apply accrues as per Article 137 of the Limitation Act. This is the affect of Section 18 of the Limitation Act, in that a fresh period of limitation is required to be computed from the time when the acknowledgment was so signed by the principal borrower or corporate guarantor as the case may be.

In respect of Sesh Nath Singh and Anr. (as stated supra) certain extracts are given below for clarity on this subject:

“48. The insolvency Committee of the Ministry of Corporate Affairs, Government of India, in a report published in March 2018, stated that the

intent of the IBC could not have been to give a new lease of life to debts which were already time barred. Thereafter Section 238A was incorporated in the IBC by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (Act 26 of 2018), with effect from 6th June 2018. Section 238A provides as follows:-

“238A. 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.”

49. The language and tenor of Section 238A is significant. The Section reads that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals inter alia before the NCLT/NCLAT.

50. Section 238 gives overriding effect to the IBC, notwithstanding anything inconsistent therewith contained in any other law, for the time being in force, or any instrument having effect, by virtue of any such law.

51. There is no specific period of limitation prescribed in the Limitation Act, 1963 for an application under the IBC before the NCLT. An application for which no period of limitation is provided anywhere else in the Schedule, is governed by Article 137 of the Schedule to the Limitation Act. Under Article 137 of the Schedule to the Limitation Act, the period of limitation prescribed for such an application is three years from the date of accrual of the right to apply.

*52. There can be no dispute with the proposition that the period of limitation for making an application under Section 7 or 9 of the IBC is three years from the date of accrual of the right to sue, that is, the date of default. In *Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. And Anr.**

6 , this Court held:- “6.The present case being “an application” which is filed under Section 7, would fall only within the residuary Article 137.”

53. Section 5 of the Limitation Act provides that any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period of limitation, if the appellant or the applicant satisfies the Court, that he had sufficient cause for not preferring the appeal or making the application within such period. The explanation in Section 5 of the Limitation Act clarifies that, the fact that the appellant or the applicant may have been misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period, may be sufficient cause within the meaning of this Section.

54. In *B.K. Educational Services Private Limited v. Parag Gupta and Associates* 7 , this Court held:- “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.”

55. In *Radha Export (India) Private Limited v. K.P. Jayaram and Anr.* 8 , this Court referred to *B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates (supra)* and held the application under Section 7 of the IBC to be barred by limitation.

56. In *Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd.* and another 9 , this Court held that limitation of three years as provided by Article 137 of the Limitation Act, which commenced from the date of the default, was extendable under Section 5 of the Limitation Act.

59. It is well settled by a plethora of judgments of this Court as also different High Courts and, in particular, the judgment of this Court in *B.K. Educational Services Private Limited v. Parag Gupta Associates and Ors.* (supra) the NCLT/NCLAT has the discretion to entertain an application/appeal after the prescribed period of limitation. The condition precedent for exercise of such discretion is the existence of sufficient cause for not preferring the appeal and/or the application within the period prescribed by limitation.

66. Similarly under Section 18 of the Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgment is signed. However, the acknowledgment must be made before the period of limitation expires.

67. As observed above, Section 238A of the IBC makes the provisions of the Limitation Act, as far as may be, applicable to proceedings before the NCLT and the NCLAT. The IBC does not exclude the application of Section 6 or 14 or 18 or any other provision of the Limitation Act to proceedings under the IBC in the NCLT/NCLAT. All the provisions of the Limitation Act are applicable to proceedings in the NCLT/NCLAT, to the extent feasible.”

8. All this reflects that the Code has not excluded application of Section 4 to Section 24 of the Limitation Act, 1963 while determining period of limitation and Section 29(2) of the Limitation Act appears to be

applicable. Hence, Section 18 & 19 of the Limitation Act, 1963 is applicable to the Code. For clarity Section 18, 19 and Section 29 of The Limitation Act, 1963 is reproduced below for ease of convenience:

“Section 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.

Section 19. Effect of payment on account of debt or of interest on legacy.—Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy

or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made: Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

Explanation.—For the purposes of this section,—

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) “debt” does not include money payable under a decree or order of a court.

Section 29. Savings.—

(1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 (9 of 1872).

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Sections 25 and 26 and the definition of “easement” in section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882 (5 of 1882), may for the time being extend.”

9. After going through the various submissions and the recently judgments delivered by the Hon'ble Apex Court, a clarity has come that Article 137 of the Limitation Act, 1963 defining a period of 3 years will be computed after considering Section 18 or 19 of The Limitation Act, 1963 with a fresh period of limitation inspite of these dates being after the date of **NPA**.

10. In view of the aforesaid submission and the Appellant acknowledging the debt on 21.06.2017 itself shifts the 3 years period to June, 2020 whereas the Application before the Adjudicating Authority itself is filed on 22.11.2019. If we consider the part payment which has been made between May, 2019 to June / July, 2019, then naturally the application has been filed within a period of 3 years.

11. Hence, we do not find any merit in this appeal based on law laid down and hence the appeal deserves to be dismissed and is dismissed.

12. Pending application, if any, stands disposed of.

No order as to costs.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

08th April, 2021

New Delhi

Raushan.K