

# **M/S. Tech Sharp Engineers Pvt. Ltd. vs Sanghvi Movers Limited on 19 September, 2022**

**Author: Indira Banerjee**

**Bench: J.K. Maheshwari, Indira Banerjee**

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 296 OF 2020

M/S TECH SHARP ENGINEERS PVT. LTD.

... Appellant

versus

SANGHVI MOVERS LIMITED

... Respondent

JUDGMENT

Indira Banerjee, J.

This appeal under Section 62 of the Insolvency and Bankruptcy Code, 2016, hereinafter referred to as the “IBC” is against a judgment and order dated 23rd July 2019 passed by the National Company Law Appellate Tribunal (NCLAT), New Delhi allowing Company Appeal (AT) (Insolvency) No. 118 of 2019 filed by the Respondent and setting aside an order dated 2nd January 2019 passed by the Adjudicating Authority, i.e., the National Company Law Tribunal (NCLT), Chennai whereby the Adjudicating Authority had dismissed an application filed by the Reason: Respondent as barred by limitation.

2. Pursuant to an agreement executed by and between the Appellant and the Respondent, the Respondent let out on hire to the Appellant, 150 MT crane for erection of equipment at the site of Indian Oil Corporation Ltd. (IOCL) at Paradip in Odisha. The Respondent/Operational Creditor raised invoices on the Appellant between 3rd January 2012 and 4th March 2013 for a sum of Rs.38,84,709/-.

3. On or about 6th May 2013, the Respondent issued notice to the Appellant for payment of outstanding hire charges. By letter dated 17 th May 2013, the Appellant replied to the said notice. Further correspondence ensued.
4. Ultimately, on 14th October 2013, the Respondent issued a statutory notice to the Appellant under Sections 433(e), 434 and 439 of the Companies Act, 1956 for Winding Up of the Appellant-Company. The Appellant duly replied to the notice on 7th November 2013, acknowledging its liability to the Respondent.
5. On 9th November 2013, the Respondent called upon the Appellant to clear its dues. On 24th May 2014, the Respondent issued a statutory notice under Sections 433(e), 434 and 439 of the Companies Act, 1956 calling upon the Appellant to pay Rs.38,84,709/- towards crane hire charges.
6. On or about 22nd December 2015, the Respondent filed a Winding Up petition dated 4th July 2015 in the Madras High Court. On 5 th January 2016, the High Court returned the Winding Up petition to the Respondent for curing of defects. The Winding Up petition was represented on 3rd February 2016, but again returned on 24th May 2016 with an endorsement to comply with the defects as intimated earlier.
7. The IBC came into force on 1 st December 2016. Thereafter the Respondent issued a demand notice on 14 th November 2017 under Section 8(1) calling upon the Appellant to repay its dues.
8. On 30th March 2018, the Respondent filed petition being CP/724/ (IB)/2018 under Section 9 of the IBC for initiation of the Corporate Insolvency Resolution Process (CIRP) in the NCLT. On 20 th June 2018, the Adjudicating Authority (NCLT) directed the Registry to issue notice to the Appellant.
9. By an order dated 2nd January 2019, the Adjudicating Authority (NCLT) rejected the application as barred by limitation, placing reliance on the judgment of this Court in B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates<sup>1</sup>. The application under Section 9 of the IBC was accordingly dismissed.
10. The Respondent appealed to the NCLAT under Section 61 of the IBC. By the impugned judgment and order, the NCLAT has set aside the order dated 2nd January 2019 passed by the Adjudicating Authority (NCLT) rejecting the application of the Respondent under Section 9 of the IBC and has remitted the case to the Adjudicating Authority for 1 (2019) 11 SCC 633 admission after notice to the parties. The NCLAT directed that before admission of the case, it would be open to the Respondent to settle the matter with the Appellant. The NCLAT held :-

“8. In the present case, it is not in dispute that right to apply under Section 9 accrued to the Appellant on 1 st 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.”

11. For the purpose of limitation, the relevant date is the date on which the right to sue accrues which is the date when a default occurs.

In B.K. Educational Services Pvt. Ltd. (supra), cited before the NCLT and referred to in the judgment and order impugned, 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.”

12. In Radha Export (India) Private Ltd. v. K.P. Jayaram and Anr.<sup>2</sup>, this Court referred to B.K. Educational Services Pvt. Ltd.

(supra) and held the application under Section 7 of the IBC to be barred by limitation.

13. In Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Ltd. and Anr.<sup>3</sup>, this Court held that limitation of three years as provided by Article 137 of the Limitation Act, which 2 (2020) 10 SCC 538 3 (2020) 15 SCC 1 commenced from the date of the default, was extendable under Section 5 of the Limitation Act, 1963.

14. 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 Pvt. Ltd. (supra) that 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.

15. In Ramlal, Motilal & Chhotelal v. Rewa Coalfields Ltd.<sup>4</sup>, this Court affirmed the view taken by the Madras High Court in Krishna v. Chathappan<sup>5</sup> and held that Section 5 of the Limitation Act gives the Court a discretion, which is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood.

16. The condition precedent for condonation of the delay in filing an application or appeal, is the existence of sufficient cause. Whether the explanation furnished for the delay would constitute “sufficient cause” or not would be dependent upon facts of each case. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished by the Appellant/applicant for the delay in taking steps. 4 AIR 1962 SC 361 5 1889 SCC Online Mad 1

17. When an appeal is filed against an order rejecting an application on the ground of limitation, the onus is on the Appellant to make out sufficient cause for the delay in filing the application. The date of enforcement of the IBC and/or the date on which an application could have first been filed under

the IBC are not relevant in computation of limitation. It would be absurd to hold that the CIRP could be initiated by filing an application under Section 7 or Section 9 of the IBC, within three years from the date on which an application under those provisions of the IBC could have first been made before the NCLT even though the right to sue may have accrued decades ago.

18. The fact that an application for initiation of CIRP, may have been filed within three years from the date of enforcement of the relevant provisions of the IBC is inconsequential. What is material is the date on which the right to sue accrues, and whether the cause of action continuous.

19. The pendency of the proceedings in a parallel forum, invoked by the Respondent, is not sufficient cause for the delay in filing an application under Section 9 of the IBC. By the time the application was filed, the claim had become barred by limitation.

20. In a notice dated 24th May 2014 issued by the Respondent demanding payment, it was contended that the Appellant had agreed to pay its outstanding dues in five equated monthly installments of Rs.8,48,053/-. The Appellant had, however, defaulted after payment of one installment for the month of June, 2013. A copy of the petition filed by the Respondent in the High Court of Judicature at Madras is enclosed to the paper book. The Respondent asserted -

”The Petitioner states that without any valid reason the Respondent delayed the payment for the Services done by the petitioner. Even after repeated and constant follow-up the Responder did not settle the dues payable to the Petitioner and therefore, the Petitioner issued a notice dated 06.05.2013 and demanded the Respondent to make the payment. The Respondent sent a reply dated 17.05.2013 and in the said reply the Respondent admitted the outstanding dues and agreed to settle the outstanding dues in six months and requested the Petitioner to give discount. The Petitioner issued a rejoinder dated 21.05.2013 providing 10% discount and to settle the remaining amount in 5 equated monthly instalment, commencing from 1st June, 2013. However, it is made clear that the offer given by rejoinder dated 21.05.2013 is subject to the condition that the Respondent issue and honour the post-dated cheques for the five monthly instalments.

The Petitioner states that the Respondent sent a reply dated 07.06.2013 stating that they are unable to pay 1 st instalment on 01.06.2013 and informed that the same will be paid on 20.06.2013. The Petitioner sent a sur-rejoinder dated 14.06.2013 and asked the Respondent to proceed with the payment schedule proposed by them and it is made very clear that the discount and the waiver of interest offered by the Petitioner is strictly on the condition that the Respondent adhere to the payment schedule. The Respondent paid the 1st instalment and failed to make any further payment and therefore the Petitioner sent a reminder dated 02.08.2013. The Respondent did not honour their promise and miserably failed to make payment for the 2 nd instalment and therefore the Petitioner was constrained to revoke their offer and issued notice dated 14.10.2013 demanding the Respondent to pay Rs.38,84,709/- (Rupees Thirty Eight Lakhs Eighty Four Thousand Seven Hundred and Nine only) with interest. The Petitioner states that the Respondent issued reply dated 07.11.2013 and confirmed the non-payment of instalments as per their promise and further stated that the Respondent has requested IOCL to make direct payment to the Petitioner and also enclose a draft letter to be sent by the Respondent to IOCL. The Petitioner sent sur re-rejoinder dated

09.11.2013 and informed the Respondent that the discount offered has been withdrawn due to the failure on the part of the Respondent. However, considering the request of the Respondent gave final opportunity to settle the dues in two instalments and it was made very clear that any failure on the part of the Respondent to clear dues will result in withdrawal of discounts/waivers and the Respondent has to pay the entire amount of Rs.38,84,709/- (Rupees Thirty Eight Lakhs Eighty Four Thousand Seven Hundred and Nine only).”

21. From the averments in the Winding Up petition, it is patently clear that there was no acknowledgment of liability after 7 th November 2013. The last payment was made in June 2013.

22. The Adjudicating Authority (NCLT) held :-

“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 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.”

23. It is now well settled that the provisions of the Limitation Act are applicable to proceedings under the IBC as far as may be. Section 14(2) of the Limitation Act which provides for exclusion of time in computing the period of limitation in certain circumstances, provides as follows:

“14. Exclusion of time of proceeding bona fide in court without jurisdiction.— (1) ...

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.”

24. Similarly, under Section 18 of the Limitation Act, an acknowledgment 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.

25. Proceedings in good faith in a forum which lacks jurisdiction or is unable to entertain for like nature may save limitation. Similarly, acknowledgment of liability may have the effect of commencing a fresh period of limitation.

26. In this case, the last acknowledgment was in 2013 and the Madras High Court neither suffered from any defect of jurisdiction to entertain the winding up application nor was unable to entertain the winding up application for any other cause of a like nature.

27. The NCLAT held :-

“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 th 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.”

28. The limitation for initiation of winding up proceedings in the Madras High Court stopped running on the date on which the Winding Up petition was filed. The initiation of proceedings in Madras High Court would not save limitation for initiation of proceedings for initiation of CIRP in the NCLT under Section 7 of the IBC.

29. A claim may not be barred by limitation. It is the remedy for realisation of the claim, which gets barred by limitation. The impugned order of the NCLAT is unsustainable in law.

30. The appeal is allowed. The impugned order of the NCLAT is set aside.

31. This judgment, however, will not prevent the Respondent from pursuing any other remedy which the Respondent may be entitled to avail in accordance with law and/or pursue any pending proceedings in accordance with law.

.....,J.

[ INDIRA BANERJEE ] .....J.

[ J.K. MAHESHWARI ] NEW DELHI;

SEPTEMBER 19, 2022