

Vedika Credit Capital Ltd vs Shriram Power & Steel Pvt Ltd on 5 January, 2023

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1066 of 2021

[Arising out of Order dated 08.10.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in CP(IB) No. 280/KB/2018]

IN THE MATTER OF:

Vedika Credit Capital Limited,
Through its authorized signatory,
Mr. Gautam Jain having office at
Village-Collage Pally, P.O. - Shiuli Telini Para,
P.S. Titagar Kolkata, Parganas North,
WB 700121

...Appellant

Versus

Shriram Power and Steel Private Limited,
Through its authorized signatory,
Having office at 33A, Jawaharlal Nehru Road,
17th Floor Chatterjee International Centre,
Flat No. 8 Kolkata WB 700071

...Respondent

Present:

For Appellant: Mr. Akhilesh, Mr. Mratyunjay Singh, Mr. Nimit
Bhola, Advocates
Mr. Kapil Kachawa, CS
For Respondents: Mr. Sudhir Mehta, Mr. Pandey Neeraj Rai, Ms.
Rachitta Rai and Mr. Shashank Gupta, Advocates

JUDGMENT

ASHOK BHUSHAN, J.

1. This Appeal has been filed by the Financial Creditor challenging the Order dated 08.10.2021

passed by the National Company Law Tribunal, Cont'd.../ Kolkata Bench, Kolkata (the Adjudicating Authority) by which CP(IB) No. 280/KB/2018 filed by the Appellant under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC in short) has been dismissed.

2. Aggrieved by the Order dated 08.10.2021, this Appeal has been filed.

3. The brief facts of the case necessary to be noted for deciding this Appeal are:

i. The Financial Creditor claimed to have entered into a Loan Agreement with Corporate Debtor on 09.04.2011 for granting Rs.

1.5 Crore repayable on demand. The Financial Creditor claimed to have paid the amount in three tranches on 19.04.2011 a sum of Rs. 56 Lakh, on 02nd May, 2011 a sum of Rs. 75 Lakh and on 19.02.2012 a sum of Rs. 19 Lakh. On 13th August, 2014, notice demanding the repayment of loan was issued by the Financial Creditor.

ii. According to the Financial Creditor, the debt fell due on 12.09.2014. Financial Creditor claims to have initiated arbitration proceedings on 22.09.2014 which proceedings were discontinued due to death of arbitrator. Winding up petition being C.P. No. 957/2014 was filed by the Financial Creditor on 11.11.2014 before the High Court of Kolkata. Above Company Petition was claimed to be pending. On 12.02.2018, Section 7 Application has been filed by the Financial Creditor.

iii. The Adjudicating Authority issued notice to the Corporate Debtor who filed a Reply to Section 7 Application. In the Reply it was Company Appeal (AT) (Insolvency) No. 1066 of 2021 mentioned that the management of the Corporate Debtor was with the Sonthalia Group which was taken over in the year 2012 by Sharda's Group. On 01st March, 2016, the Rungta Group purchased the entire shareholding of the Corporate Debtor Company from Sharda Group and agreement dated 01st March, 2016 was entered which enumerated and disclosed all loans acquired by the Corporate Debtor Company as outstanding in its books as on 1st March, 2016. The loan claimed by the Financial Creditor was not disclosed in the agreement. The balance sheet of the Corporate Debtor ending 31st March, 2012 also does not disclose any loan and for three years preceding its acquisition by Rungtas, the Balance Sheet does not reveal any such loan. It was pleaded in the Reply that loan agreement dated 09.04.2011 relied on by the Financial Creditor is a fabricated document. The Loan Agreement does not bear the name of the Corporate Debtor and the rubber stamp of the Corporate Debtor. No proceedings were initiated by the Financial Creditor for loan amount and for the first time in 2017, on 20th November, 2017 Demand Notice was issued. iv. It was further pleaded that claim raised in the Application is barred by limitation as default occurred on 02nd December, 2014 and no demand notice was raised till 20th November, 2017 and the application was filed on 12.02.2018. The Adjudicating Authority heard the Learned Counsel for the parties and by the Impugned Order has rejected Section 7 Application.

Company Appeal (AT) (Insolvency) No. 1066 of 2021 v. The Adjudicating Authority took the view that Financial Creditor has not been able to cross the threshold hurdle of limitation and materials brought on record creates a shadow of doubt on the authenticity of the loan agreement which

according to the Corporate Debtor is a fabricated piece of document. The Adjudicating Authority further held that Financial Creditor failed to produce any document which would prove that pursuant to the loan agreement regular transaction of repayment took place within three years immediately preceding the filing of the Section 7 Application.

vi. Aggrieved by the Order of the Adjudicating Authority, this Appeal has been filed.

4. Learned Counsel for the Appellant challenging the Order contends that the Application was not barred by time. It is submitted that in view of the filing of the winding up petition which was pending in the Kolkata High Court, Appellant was entitled to take benefit of Section 14 of the Limitation Act, 1963. It is submitted that the amount was disbursed through the bank channel hence Corporate Debtor cannot deny the loan agreement. It is further submitted that present management of the Corporate Debtor who has come in 2016 want to distance from loan taken by the Corporate Debtor through earlier management. There is no ground to doubt the loan transaction.

5. Learned Counsel for the Respondent refuting the submissions of Learned Counsel for the Appellant contends that Application was clearly barred by time. Date of Default having been mentioned in Section 7 Company Appeal (AT) (Insolvency) No. 1066 of 2021 Application as 12.09.2014 and Section 7 Application having been filed on 12.02.2018, the Application was clearly barred by time. There was no grounds mentioned in the Application seeking extension of limitation and it was only during the course of argument that Financial Creditor sought to raise arguments based on Section 14 of the Limitation Act. The Company Petition which is sought to be relied on, shall not extend the limitation for the Financial Creditor. The Financial Creditor has filed CP No. 814 of 2014 which was dismissed on 28.10.2014. Thereafter C.P. No. 957/2014 was filed on same cause of action by suppression of facts and after dismissal of earlier Company Petition. Instead of filing Application for transfer of Company Petition, Appellant has filed Section 7 Application which is barred by time. With the connivance of Mr. Anoop Sonthalia, the earlier promoter of Corporate Debtor, certain bank documents were obtained by the Financial Creditor on basis of which loan agreement was manufactured, the entries alleging payment of amounts to the Corporate Debtor were only parking entries and in no manner there is any financial debt due on the Corporate Debtor. The Balance sheets of the Corporate Debtor for the year 2011-12 did not disclose any loan by the Financial Creditor nor the balance sheets thereafter for three years preceding the acquisition of the Corporate Debtor by Rungta Group contains any mention of the loan. There is no ledger of the Corporate Debtor or the Bank Documents produced to show the transactions. The amount according to the Appellant became due on 12.09.2014 and for the first time demand notice was issued on 28th November, 2017 to the Corporate Debtor which indicates that there is no genuineness in the transaction. Company Appeal (AT) (Insolvency) No. 1066 of 2021 Appellant did not pursue the arbitration proceeding and has also abandoned the winding up proceeding hence is not eligible for any benefit of Section 14 of the Limitation Act.

6. We have considered the submissions of Learned Counsel for the parties and have perused the record.

7. We may first notice the averments made in the Application under Section 7 of the Code. Part-IV of the Section 7 Application is as follows:

"Part-IV PARTICULARS OF FINANCIAL DEBT Total amount of debt Rs. 1,50,00,000/-

1 granted Date(s) of 19th April, 2011 disbursement Amount claimed to be Total amount claimed 2 in default and the date Rs. 3,41,06,997/-

on which the default upto 31.10.2017
occurred (attach the Date of Default:
workings for 12.09.2014
computation of amount
and days of default in
tabular form)

8. Part-V of the Section 7 Application pertaining to Particulars of Financial Debt (Documents, Records and Evidence of Default), there are no mention of any material or any document on basis of which benefit of Section 14 of the limitation can be claimed. In Section 7 Application, the filing of winding up petition was in fact concealed. Law is well settled that for taking benefit of extension of limitation under the limitation act, 1963 there has to be relevant materials brought on record to extend the benefit of Section 14 of the limitation Act, 1963. The Hon'ble Supreme Court in the matter of "Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Company Appeal (AT) (Insolvency) No. 1066 of 2021 Industries Pvt. Ltd. & Anr." [2020 15 SCC 1] laid down that question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of the period of limitation, the relevant facts are required to be pleaded and requisite evidence is required to be adduced. The said judgment was delivered by the Supreme Court in reference to IBC, 2016.

In paragraph 35.1, following has been stated:

"35.1. Therefore, on the admitted fact situation of the present case, where only the date of default as '08.07.2011' has been stated for the purpose of maintaining the application under Section 7 of the Code, and not even a foundation is laid in the application for suggesting any acknowledgement or any other date of default, in our view, the submissions sought to be developed on behalf of the respondent No. 2 at the later stage cannot be permitted. It remains trite that the question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of the period of limitation, the relevant facts are required to be pleaded and requisite evidence is required to be adduced. Indisputably, in the present case, the respondent No. 2 never came out with

any pleading other than stating the date of default as '08.07.2011' in the application. That being the position, no case for extension of period of limitation is available to be examined. In other words, even if Section 18 of the Limitation Act and principles thereof were applicable, the same Company Appeal (AT) (Insolvency) No. 1066 of 2021 would not apply to the application under consideration in the present case, looking to the very averment regarding default therein and for want of any other averment in regard to acknowledgement. In this view of the matter, reliance on the decision in Mahaveer Cold Storage Pvt. Ltd. does not advance the cause of the respondent No. 2."

9. Before the Adjudicating Authority, the Appellant did not bring any material including the details of the winding up petition in its proceedings to claim any benefit of Section 14 of the limitation act, 1963.

10. Learned Counsel for the Appellant has relied on the Judgment of Hon'ble Supreme Court in the matter of "Sesh Nath Singh Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd." [2021 7 SCC 321] to support his contention that Appellant is entitled for benefit of Section 14 of the limitation act. It is seen that in the above case, Section 14 was sought to be relied in reference to the proceeding initiated under SARFAESI Act, 2002 by the Financial Creditor. The proceedings under SARFAESI Act, 2002 were challenged before the High Court and were stayed by the High Court observing that financial creditor being cooperative bank it could not invoke the provisions of SARFAESI Act. In paragraph 68 of the Judgment in reference to applicability of Section 14(2) of the Limitation Act, following was observed:

"68. Section 14(2) of the Limitation Act provides that in computing the period of limitation for any application, the time during which the petitioner had been prosecuting, with due diligence, another Company Appeal (AT) (Insolvency) No. 1066 of 2021 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 proceedings is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it. The conditions for exclusion are that the earlier proceedings should have been for the same relief, the proceedings should have been prosecuted diligently and in good faith and the proceedings should have been prosecuted in a forum which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it."

11. Paragraph 21 of the Judgment of Sesh Nath Singh (supra), Hon'ble Supreme Court has noted that High Court has stayed the proceedings under SARFAESI Act on the ground of want of jurisdiction. Paragraph 21 is as follows:

"21. The relevant dates reveal that the cash credit account of the corporate debtor was declared NPA with effect from 31.3.2013. Proceedings under the SARFAESI Act commenced on 18-1-2014, when a demand notice was issued under Section 13(2) of the SARFAESI Act. In other words, proceedings were initiated under the SARFAESI

Act, 2002, approximately months and 18 days after the date of accrual of the right to issue. The proceedings under the SARFAESI Act, 2002 were stayed by the Calcutta High Court, by an order dated 24.07.2017, on the ground of want of jurisdiction. About 11 months thereafter, while the writ petition Company Appeal (AT) (Insolvency) No. 1066 of 2021 filed by the corporate debtor was still pending in the High Court, and the interim stay of the SARFAESI Act proceedings still continuing, the financial creditor initiated the application under Section IBC."

12. Thus in the above case, the benefit of Section 14 was extended because prima facie it was proved that proceedings under SARFAESI Act were without jurisdiction. Present is not a case where it is even contended that winding up petition filed by the Appellant before the Kolkata High Court were without jurisdiction proceeding or were terminated by the defect of a like nature.

13. Learned Counsel for the Respondent has submitted that earlier Company Petition No. 814/2014 filed by the Financial Creditor was dismissed on 28.10.2014 and thereafter Company Petition 957 of 2014 was filed which has been actually abandoned by the Financial Creditor. For taking benefit of Section 14 of the Limitation Act, certain ingredients have to be proved. In the present case we have found that neither there is any averment in Section 7 Application nor there is any material on record before the Adjudicating Authority to give the benefit of Section 14 of the Limitation Act hence without there being any pleading or material, no plea for extending benefit of Section 14 of the Limitation Act can be entertained. The date of default having been disclosed in Section 7 Application as 12.09.2014 and the Application under Section 7 having been filed in the year 2018, was clearly filed beyond three years from the date when cause of action arose to the Appellant. There is no material on Company Appeal (AT) (Insolvency) No. 1066 of 2021 record to extend the benefit of Section 14 of the Limitation Act. It is also relevant to notice that for extending the benefit of Section 14 or even the principles which are contained in Section 14, certain conditions are to be proved. Section 14 (2) of the Limitation Act provides as under:

"14(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."

14. The proceedings benefit of which is sought to be claimed, it has to be proved that proceedings are prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature is unable to entertain it. Present is not a case where winding up petition filed in the Kolkata High Court was suffering from any defect of jurisdiction or other cause of a like nature. We thus are of the view that foundational fact for taking benefit of Section 14 of the Limitation Act being not laid down by the Financial Creditor, no benefit under Section 14 can be claimed by the Appellant. We thus are in agreement with the view of the Adjudicating Authority that Application filed by the Financial Creditor was barred by time. The Adjudicating Authority has also expressed its doubts over the genuineness of the loan transaction as claimed by the Financial Creditor. Corporate Debtor in its

reply has categorically pleaded that in the balance Company Appeal (AT) (Insolvency) No. 1066 of 2021 sheet of the financial year 2012-13 of the Corporate Debtor there was no mention of the loan taken from the financial creditor. Further when Rungta Group purchased the shareholding of the Corporate Debtor, there was no mention of debt loan in the balance sheet of the Corporate Debtor. When there is no mention of the loan in any of the balance sheets of the Corporate Debtor, the doubt expressed by the Adjudicating Authority about the genuineness of the transaction is not unfounded.

15. We further notice that loan agreement claimed by the Appellant is 09.04.2011 and the resolution of the corporate debtor is subsequent dated 25th April, 2011 wherein it was decided to request the financial creditor for a loan. Loan Agreement filed in the record indicates the interest, there is no claim by the financial creditor that there was any demand made for payment of interest for loan by the Financial Creditor. It is the case of the Corporate Debtor that only notice which was received by the Corporate Debtor was notice dated 28th November, 2017 which was even after three years from date of default as per Financial Creditor itself.

16. Learned Counsel for the Appellant has also relied on the Judgment of Hon'ble Supreme Court in "Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd." Civil Appeal No. 818 of 2018 decided on 22.01.2019. The proposition which was laid down in the above case by the Hon'ble Supreme Court was that proceedings under Section 7 or Section 9 under the IBC is independent proceeding from the winding up proceeding which are initiated under the Companies Act. The above judgment, in no manner, help the Appellant in the present case. Company Appeal (AT) (Insolvency) No. 1066 of 2021

17. We thus are satisfied that Adjudicating Authority did not commit any error in rejecting section 7 application filed by the Appellant. There is no merit in the Appeal, the Appeal is dismissed.

[Justice Ashok Bhushan] Chairperson [Dr. Alok Srivastava] Member (Technical) [Barun Mitra] Member (Technical) NEW DELHI 05th January, 2023 Basant Company Appeal (AT) (Insolvency) No. 1066 of 2021