

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

I.A. No. 4373 of 2024

in

Company Appeal (AT) (Insolvency) No. 121 of 2023

In the matter of:

Arunkumar Jayantilal Muchhala

Amar Mahal, Ground Floor,
Near Chandan Cinema, Juhu,
Mumbai, Maharashtra- 400 049

...Appellant

Versus

1. Awaita Properties Pvt. Ltd.

SKIL House, 209,
Bank Street, Cross Lane, Fort,
Mumbai, Maharashtra- 400 023

...Respondent No.1

2. Tarapur Textiles Park Limited

Having Registered address at:
Amar Mahal, Ground Floor,
Near Chandan Cinema, Juhu,
Mumbai, Maharashtra- 400 049.

Through
CA Prashant Jain
Reg No. IBBI/IPA-001/IP-P01368/2018/12131
IRP of Tarapur Textiles Park Limited
AFA Valid till 3rd October 2023
Address: B-601, BSEL Tech Park
Sector- 30A, Opp- Vashi Railways Station
Navi Mumbai- 400 703

...Respondent No.2

Present :

For Appellant : Mr. Lovkesh Sawhney Sr. Advocate with Ms. Hemlata Rawat,
Mr. Rahul Bhatt, Mr. Aryan Mishra, Advocates.

For Respondent : Mr. Shikhil Suri, Ms. Vidhi Kapoor and Ms. Ishita Ahuja,
Advocates.

Mr. Kunal Godhwani, Ms. Kinjal Chadha, Advocates for R-2/RP.

O R D E R
(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present application I.A. No.4373 of 2024 has been preferred by the Appellant under Rule 11 of NCLAT Rules seeking recall of the order (hereinafter referred to as the '**Impugned Order**') passed by this Tribunal dated 02.04.2024 by which order this Tribunal had dismissed the appeal filed by the present Appellant challenging the order dated 06.12.2022 passed by National Company Law Tribunal, Mumbai Bench, Court-III in C.P. No. 4076/IBC/MB/2018 by which Section 7 application was allowed and Tarapur Textile Park Ltd-Corporate Debtor was admitted into Corporate Insolvency Resolution Process ('**CIRP**' in short). The present application has been filed in pursuance of order dated 06.05.2024 passed by the Hon'ble Supreme Court of India in Civil Appeal No. 5531 of 2024.

2. The chronological sequence of the events of the present case, put briefly, is that the Respondent No.1-Awaita Properties Pvt. Ltd had filed a Section 7 application against the Corporate Debtor for a default amount of Rs. 8,56,30,137/- only. The National Company Law Tribunal, Mumbai Bench-III admitted the Section 7 application vide its order dated 06.12.2022. Aggrieved by the above order of the Adjudicating Authority, an appeal was preferred by the ex-Director of the Corporate Debtor before this Tribunal vide CA(AT)(Insolvency) No. 121 of 2023. In exercise of its appellate jurisdiction, this Tribunal, on 02.04.2024, dismissed the appeal and affirmed the order of the Adjudicating

Authority dated 06.12.2022. Aggrieved by the decision of this Tribunal dated 02.04.2024, the Appellant filed a Civil Appeal No. 5531 of 2024 before the Hon'ble Supreme Court.

3. The Hon'ble Supreme Court passed the following order on 06.05.2024 in Civil Appeal No. 5531 of 2024:

“Learned Senior Advocate appearing for the appellant seeks permission to withdraw the present appeal and states that the appellant – Arunkumar Jayantilal Muchhala may file an application seeking a review of the impugned judgment, limited to the ground that the petition under Section 7 of the Insolvency and Bankruptcy Code of India, 2016 was barred by limitation. It is stated that the question was specifically raised in the National Company Law Appellate Tribunal, but has not been answered.

In view of the statement made, the appeal is dismissed as withdrawn.

If any such application is filed, the same will be considered in accordance with law. We make no comments either way in this regard.”

4. In pursuance of the above order of the Hon'ble Supreme Court, the Appellant filed the present I.A. No. 4373 of 2024 in CA(AT)(Ins) No. 121 of 2023 under Rule 11 of NCLAT Rules, 2016 making the following prayers as reproduced below:

“In light of the abovementioned facts and circumstances this Hon'ble Tribunal may graciously be pleased to:

- i. Allow the present application and recall the order dated 02.04.2024 passed by this Tribunal and/ or;*
- ii. Reject the Company Petition No. 4076/IBC/MB/2018 filed under Section 7 by Respondent No.1, and/ or;*
- iii. Pass any other order/ orders which this Hon'ble Tribunal may deem fit and proper in the interest of justice.”*

5. We have heard Shri Lovkesh Sawhney, Ld. Sr. Advocate appearing for the Appellant, Shri Shikhil Suri, Ld. Counsel for the Respondent No. 1 and Mr. Kunal Godhwani, Ld. Counsel for the Resolution Professional.

6. Making his submissions, the Ld. Sr. Counsel for the Appellant submitted that this Tribunal while dismissing their appeal contained in CA(AT)(Ins) No. 121 of 2023 had failed to appreciate that the Company Petition filed before the Adjudicating Authority was not maintainable on the ground of limitation. It was also asserted that even though the point of limitation was raised in the appeal, lack of consideration of the same by this Hon'ble Tribunal, has caused prejudice to the interests of the Appellant. Placing reliance on the judgment of the Hon'ble Supreme Court in ***Budhia Swain & Ors. Vs. Gopinath Deb & Ors. (1999) 4 SCC 396***, it was asserted that in the given facts and circumstances, the application for recall is very much maintainable. It was pointed out that the disbursal of the alleged financial debt which had taken place on 01.01.2014 was repayable on demand. In terms of Article 21 of the Limitation Act, limitation period for money which is lent under an agreement which is payable on demand, the period of limitation begins from the time when the loan is made. In the present case, since the alleged amount was given on 01.01.2014, the period of limitation ended on 01.01.2017. Thus, as the notice under Section 7 was issued on 20.02.2018, the debt stood time-barred. It is an erroneous and misleading interpretation to the law on the part of Respondent No.1 to say that only Article 137 is applicable to Section 7 petition under IBC. Stating that such a time-barred debt could not be viewed as a debt in default, reliance was placed on the judgement of the Hon'ble Supreme Court in ***B.K. Educational Services Pvt.***

Ltd. Vs. Parag Gupta Associates (2019) 11 SCC 632 that an application filed under IBC, cannot suddenly revive any debt which is no longer due and is time-barred. It was therefore submitted that the Adjudicating Authority had erred in holding that the Company Petition filed in 2018 was within the limitation period.

7. It is also the contention of the Appellant that the issue of limitation was pleaded in the Company Petition as well as in the appeal before the Tribunal. The Appellant has adverted attention to decision of the Hon'ble Supreme Court in **V.M. Salgaocar & Bros Vs. Board of Trustees of Port of Mormugao & Anr. AIR 2005 SC 4138** to assert that it is the duty of the Court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact whether the ground of limitation has been set up as a defence. Limitation is an issue which the courts are bound to decide even if the issue is not pleaded.

8. Refuting the contentions advanced by the Appellant, the Learned Counsel appearing on behalf of the Respondent No. 1 submitted that the Hon'ble Supreme Court had granted liberty to the Appellant to file a review application and not a recall application before this Tribunal. It has been contended by the Respondent that since no liberty was granted to the Appellant to file a recall application, the present recall application is not maintainable and ought to be dismissed on this ground itself. It has been further submitted that the power of recall can be exercised by this Tribunal only when any procedural error has been committed in delivering the earlier judgment. In the present case, it has been contended by the Ld. Counsel for the Respondent No.1 that the Appellant has urged the ground of limitation for recall, which not being a procedural error,

basis this ground, no recall application can be filed. It was also pointed out that the issue of limitation was not pressed before this Tribunal during the course of oral arguments. It is also contended that since the Company Petition was filed by the Appellant under Section 7 of the IBC and it is the settled law that an application filed under Section 7 would fall only within the residuary Article 137 of the Limitation Act, the period of limitation will be three years from the date of default. In the present case, since the date of default is 15.03.2016 and the Company Petition was filed on 24.10.2018, hence, it fell within the period of limitation. In any case, the plea of limitation was not available to the Appellant as it had not disputed the date of default i.e. 15.03.2016 before the Adjudicating Authority. It was further pointed out that the Adjudicating Authority had examined the aspect of limitation and given detailed reasoning in holding that Article 21 of the Limitation Act was inapplicable in the present case besides holding the Company Petition to be within limitation. It is the contention of the Respondent No.1 that the present application is only an attempt by the Appellant to frustrate, delay and protract the conclusion of the CIRP Process of the Corporate Debtor.

9. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

10. The preliminary issue before our consideration is whether in view of the facts and circumstances of the case, there are sufficient and cogent grounds for recall of the order of this Tribunal of 02.04.2024 at a time when liberty was given

by the Hon'ble Supreme Court to file a review of the said order limited to the grounds of limitation.

11. It is the case of the Appellant that Tribunals including this Tribunal has inherent powers to recall and set aside its order as laid down by the Hon'ble Supreme Court in ***Budhia Swain & Ors. Vs. Gopinath Deb & Ors. (1999) 4 SCC 396***. It is the rival contention of the Respondent No. 1 that while liberty was given by the Hon'ble Supreme Court to file a review of the said order limited to the grounds of limitation, the Respondent No. 1 has chosen to file a recall application which liberty was not given by the Hon'ble Apex Court and that ground of limitation is not a ground for recall of the order of this Tribunal.

12. Before we dwell on the rival contentions of both sides, we need to notice that the gamut and scope of power to review and the power to recall which can be exercised by this Tribunal has been elaborately considered by this Tribunal in its judgement in the matter of ***Union Bank of India Vs. Dinkar T. Venkatasubramanian and others in I.A. No. 3961 of 2022 in CA(AT)(Ins.) No. 729 of 2020***. This order of the five-members Bench of this Tribunal in I.A. No. 3961 of 2022 has attained finality having been upheld by the Hon'ble Supreme Court in Civil Appeal No. 4620 of 2023. The Tribunal in delivering its judgement on the power to review and the power to recall had arrived at its findings after having noted various judgements of the Hon'ble Supreme Court, viz. ***Budhia Swain Vs. Gopinath Deb (1999) 4 SCC 396, Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal 1980 Supp SCC 420, Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd.***

(2005) 13 SCC 777, SREI Infrastructure Finance Ltd. Vs. Tuff Drilling Pvt. Ltd. (2018) 11SCC 470 and thereafter observed the following:

“20. The above judgments of the Hon’ble Supreme Court clearly lays down that there is a distinction between review and recall. The power to review is not conferred upon this Tribunal but power to recall its judgment is inherent in this Tribunal since inherent power of the Tribunal are preserved, powers which are inherent in the Tribunal as has been declared by rule 11 of the National Company Law Appellate Tribunal Rules, 2016. Power of recall is not power of the Tribunal to rehear the case to find out any apparent error in the judgment which is the scope of a review of a judgment. Power of recall of a judgment can be exercised by this Tribunal when any procedural error is committed in delivering the earlier judgment; for example: necessary part has not been served or necessary part was not before the Tribunal when judgment was delivered adverse to a party.

There may be other grounds for recall of a judgment. Well known ground on which a judgment can always be recalled by a court is ground of fraud played on the court in obtaining judgment from the court. We, for the purpose of answering the questions referred to us, need not further elaborate the circumstances where power of recall can be exercised.

26. In view of the law laid down by the Hon’ble Supreme Court which holds that the Tribunal has inherent power to recall its judgment on appropriate grounds, the three-member Bench judgment in Agarwal Coal Corporation P. Ltd. v. Sun Paper Mill Ltd. observing that the Tribunal does not have power to recall cannot be approved. The three-member Bench judgments of this Tribunal in so far as observation that this Tribunal has no power to review, no exception can be taken to that part of the judgment. We, however, hold that the judgment laying down that this Tribunal has no power to recall the judgment does not lay down correct law.

(Emphasis supplied)

13. Thus, the law as it stands today, this Tribunal in exercise of its inherent jurisdiction can entertain an application for recall of judgment on sufficient grounds. Inherent powers not being powers which are conferred expressly upon the Tribunal but are innate powers of the court which can be exercised to dispense justice between the parties subject to exercise of these powers not

contravening or violating any express provision in the statute. When we look at the present case, we find that the Appellant has invoked the inherent powers of recall under Rule 11 of the NCLAT Rules which has been opposed by the Respondent No.1 stating that the issue of limitation, not being a procedural error, no recall application can be filed. We are conscious of the fact that there is no express provision in the IBC or the Regulations/Rules framed thereunder conferring on this Tribunal the jurisdiction to recall its order on the issue of limitation. We however also notice that the Appellant has relied on the judgement of the Hon'ble Apex Court **V.M. Salgaocar *supra*** in canvassing their argument that the Tribunal is expected to look into the matter of limitation even if no such defence is set up and no pleadings or arguments are raised to that effect. Furthermore, liberty has been granted to the Appellant by the Hon'ble Apex Court in order dated 06.05.2024 in Civil Appeal No. 5531 of 2024 to raise the issue of limitation, albeit in accordance with law. Strictly speaking, the issue of limitation cannot be a subject matter of a recall application. However, we have entertained the recall application given the peculiar and exceptional circumstances which have emerged in the present case as already delineated above. In the attendant circumstances, in the interest of doing justice between the parties, we propose to embark upon to satisfy ourselves on the issue of limitation, though there is no express provision as such in the Act or the Rules framed thereunder requiring this Tribunal to do so.

14. We would like to strictly confine ourselves to the issue of limitation in the present case. At this stage, it would be useful and constructive to go through the pleadings made by the Appellant before the Adjudicating Authority with regard

to the issue of limitation. In their Reply Affidavit in the Company Petition which is placed at pages 156 onwards in the Appeal Paper Book, the Appellant had simply made an observation at page 165 therein that *“the captioned proceedings are initiated beyond the period of limitation and are therefore unenforceable.”*

15. In spite of this one sentence pleading made by the Appellant on the issue of limitation, the Adjudicating Authority in the impugned order at para 22 (b) inter alia framed the following question for adjudication:

“b. Whether the Company Petition filed by the Financial Creditor is within the period of limitation?”

16. We now come to the findings of the Adjudicating Authority in this regard which is as extracted hereunder:

*“26. To answer the second question, we refer to the Judgement passed by the Hon'ble Supreme Court in the matter of **B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta (2019; 11 SCC 633)**. In para 42 of the said judgement it is held as:*

“42. It is thus clear that since the Limitation Act is applicable applications filed under Sections 7 and 9 of the Code from the inception the Code, Article 137 of the Limitation Act gets attracted. “The right 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”.

27. We are convinced that the loan amount claimed to be in default was repayable on demand and accordingly the demand was raised in 2018 which is not refuted by the Corporate Debtor. The Company Petition is filed in 2018 which is well within limitation and thus needs no further clarification. Accordingly we answer the second question in affirmative. Even if we are to consider the arguments of the Corporate Debtor, then too, there is no doubt that in **B.K Education Services Pvt. Ltd. (supra)** the

*Hon'ble Supreme Court has made it clear that a petition u/s 7 of the Code will fall within the residuary Article 137 of the limitation Act under which it is clear that the period of limitation is 3 years from the date of default. The same has been reiterated by the Hon'ble Supreme Court in **Sagar Sharma and Anr versus Phoenix Arc Pvt. Ltd & Anr (2019; SCC Online SC 1332)** and has been made clear beyond any doubt that for applications that will be filed under section 7 of the Code, Article 137 of the Limitation Act will apply. Thus, the argument of the Corporate Debtor that Article 21 of the Limitation Act, debars the Financial Creditor, is unsustainable in law. In light of the same we hold that the present Company Petition is within limitation and thus the answer to the second question is affirmative."*

Thus, after having framed the question of limitation, the Adjudicating Authority had duly considered the matter and having outlined its detailed reasoning held that the Section 7 application was filed within the period of limitation since the debt was not found to be time-barred.

17. When the above order of the Adjudicating Authority was assailed before this Tribunal, in their appeal affidavit it was submitted that the Adjudicating Authority had failed to consider that the Company Petition is barred by limitation since the loan was granted on 01.01.2014 while the Company Petition was filed in 2018 which is more than 4 years of the loan. It is the contention of the Respondent No.1 that however this issue of limitation was not further pressed during the arguments before this Tribunal. Be that as it may, we would now dwell upon this aspect to satisfy ourselves on the correctness of the Adjudicating Authority in holding that company petition was not barred by limitation.

18. When we look at the matter at hand, we find that it is an admitted fact that a sum of Rs.5 crore was disbursed by the present Respondent No.1 to the

Corporate Debtor on 01.01.2014 which was admittedly payable on demand. It was the case of the Respondent No.1 that the Corporate Debtor had defaulted in repaying the said loan even after having assured that it would pay the entire loan along with interest @ 15% p.a. by 15.03.2016. The entire loan along with interest having become due and payable on 15.03.2016 and the Corporate Debtor having failed to make payment of the outstanding debt on such date, the present Respondent No.1 filed the company petition on 15.02.2018 which the Adjudicating Authority held to be well within the period of limitation prescribed under Article 137 of the Limitation Act.

19. This brings us to the question of date of default in the present case. We are well aware that in any proceeding initiated under Section 7 of the IBC, the application is required to be filed in a prescribed form along with relevant documents annexed therein. We therefore need to notice Column 2 of Part-IV of Form-1 where date on which the default had occurred has been pleaded before the Adjudicating Authority. The same is as extracted below:

PART- IV

PARTICULARS OF FINANCIAL DEBT

2.	Amount claimed to be in default and the date on which the default occurred (attach the workings on computation of amount and delays of default in tabular form)	<p>Amount in default: Rs 8,56,30,137/- i.e. outstanding principal of Rs 5,00,00,000/- plus interest of Rs 3,56,30,137/- at the rate of 15% per annum as on 30th September, 2018.</p> <p><u>Date of default: 15th March, 2016.</u></p> <ul style="list-style-type: none"> ▪ The Financial Creditor disbursed a loan for an amount of Rs 5 crores which was repayable on demand, during the financial year 2013-2014 to the Corporate
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		<p>Debtor towards its working capital.</p> <ul style="list-style-type: none"> ▪ The Corporate Debtor agreed to pay interest at the rate of 15% p.a. from the date of disbursement until the date of repayment to the Financial Creditor. ▪ <u>From February 2016 onwards, the Financial Creditor repeatedly demanded repayment of the loan amount. The Corporate Debtor assured that it would pay the entire loan amount of Rs 5 crores along with interest at the rate of 15% p.a. by 15th March, 2016.</u> ▪ <u>However, no payment was received by the Financial Creditor on or before 15th March, 2016. Thus, the date of default is 15th March, 2016.</u> ▪ <u>The Financial Creditor has vide letter dated 20th February, 2018 and 30th May, 2018 called upon the Corporate Debtor to make payment of the loan amount of Rs 5 crores along with interest at the rate of 15% p.a.</u> ▪ <u>The Advocate for Corporate Debtor vide its interim letter dated 26th February, 2018 intimated that detailed reply will be issued shortly. However, till date, the Financial Creditor has not received any response.</u> <p>A working for computation of amount claimed to be in default along with detailed working of</p>
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		the principal and interest is set out in ' Exhibit 1 ' herein.
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20. In the present matter, the Adjudicating Authority considering the facts of the attendant case, has relied on the ratio of the judgment of the Hon'ble Supreme Court in ***B.K. Educational Services supra*** to hold that for calculating the period of limitation in an application under Section 7 of the IBC, the date of default is significant and keeping in mind that the present Company Petition is filed within 3 years from the date of default, it held that the petition was within the period of limitation in terms of Article 137 of the Limitation Act.

21. On the correctness of the decision of the Adjudicating Authority on the applicability of Article 137 of the Limitation Act in respect of applications filed under Section 7 of the IBC, we find that the Hon'ble Supreme Court has consistently affirmed its findings in the ***B.K. Educational Services judgement supra***. This ratio was reiterated by the Hon'ble Supreme Court in ***Sagar Sharma And Another Vs. Phoenix ARC Private Limited And Another (2019) 10 SCC 353***. Similar view has been espoused again by the Hon'ble Supreme Court in ***Jignesh Shah Vs. Union of India' (2019) 10 SCC 750*** wherein it held 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. This has been further validated by a decision of a three Judge Bench of the Hon'ble Supreme Court in ***Laxmi Pat Surana Vs. Union Bank of India & Anr. (2021) 8 SCC 481*** where it held:

"43. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor

to initiate action under Section 7 IBC. However, Section 7 comes into play when the corporate debtor commits “default”. Section 7, consciously uses the expression “default”- not the date of notifying the loan account of the corporate person as NPA. Further, the expression “default” has been defined in Section 3(12) to mean non-payment of “debt” when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.”

Given the catena of judgments of the Hon’ble Supreme Court which affirm the applicability of Article 137 of the Limitation Act in respect of Section 7 applications filed under IBC, we find that the contention of the Appellant that the present Section 7 application be held as time-barred under Article 21 of the Limitation Act is misconceived and untenable.

22. In view of the foregoing discussions, we are of the considered view that the Adjudicating Authority did not commit any error in holding that the Company Petition was not barred by limitation. We thus do not find any error in the order of the Adjudicating Authority holding that the application is well within time. There is no merit in the recall application. The application is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

Place: New Delhi

Date: 10.09.2024

Harleen/Abdul