

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.93 of 2023

(Arising out of Order dated 29.11.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-IV, in C.P. (IB)/166(MB)2022)

IN THE MATTER OF:

State Bank of India
Through its authorise representative
State Bank Bhavan, Nariman Point,
Madam Cama Road, Mumbai,
Maharashtra.

... Appellant

Vs

Dharamraj Aluminium Industries Private Limited
A-31, Green Fields CHS,
Opposite Johari Nursing Home,
Kapad Bazar Lane, Mahim
Mumbai 400016.

... Respondent

Present:

For Appellant: Mr. Harshit Khare, Mr. Praful Saini, Advocates

For Respondent: Mr. Dhruv Gupta and Bhumi Agarwal, Advocates

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 29.11.2022 passed by the National Company Law Tribunal, Mumbai Bench, Court-IV by which Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”) filed by the Appellant was dismissed.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:

- (i) State Bank of India has sanctioned Cash Credit Facility of Rs.7 crores and Forward Contract of Rs.0.2 crores on 01.02.2013. Sanction was renewed and Facilities were advanced from time to time.
- (ii) On 30.01.2016, default took place on the part of the Corporate Debtor – Dharamraj Aluminium Industries Private Limited. On 29.04.2016, the account of the Corporate Debtor was classified as Non-Performing Asset (“**NPA**”). On 02.05.2016, the State Bank of India issued notice under Section 13(2) of the SARFAESI Act, 2002. O.A. No.762 of 2017 was filed by the State Bank of India seeking recovery certificate for a sum of Rs.22,27,07,356/- being outstanding as on 19.09.2016.
- (iii) In a winding up petition under Sections 433, 434 and 439 of the Companies Act, 1956 filed by one M/s Oswal Minerals Limited against the Corporate Debtor, the Bombay High Court allowed the winding up petition vide order dated 25.01.2018. The High Court directed that the company be wound up under the orders, direction and supervision of the Court and an Official Liquidator be appointed to take charge of the company and to conduct its affairs during the course of its winding up.

- (iv) A petition under Section 7 was filed by the State Bank of India before the Adjudicating Authority on 13.01.2022 claiming an amount of Rs.22,52,02,115.61/-. The date of default mentioned in the Part-IV of the Application was 30.04.2016. In Section 7 Application, the Appellant has also annexed the order dated 25.01.2018 of the Bombay High Court in Company Petition No.678 of 2015. An additional affidavit was also filed by the Appellant in support of Section 7 Application.
- (v) The Adjudicating Authority issued Notice. In response to the Notice, the Corporate Debtor did not appear nor filed any reply. The Adjudicating Authority heard the learned Counsel for the Appellant and observed that default had occurred on 30.04.2016 and Section 7 petition was filed on 13.01.2022, which petition filed after three years, is barred by time. The Appellant before the Adjudicating Authority relied on the judgment of the Hon'ble Supreme Court in **Sesh Nath Singh vs. Baidyabati Sheorapuli Co-op Bank Limited**, which was distinguished by the Adjudicating Authority. It was observed that the third party M/s Oswal Minerals Limited has filed winding up petition on the basis of which Appellant cannot claim benefit of exclusion of period during which Company Petition filed by the third party remained pending.

The Appellant aggrieved by the aforesaid order has come up in this Appeal.

3. We have heard Shri Harshit Khare, learned Counsel appearing for the Appellant and Shri Dhruv Gupta and Bhumi Agarwal, learned Counsel appearing for the Respondent.

4. The learned Counsel for the Appellant submits that Adjudicating Authority committed error in refusing to extend the benefit of Section 14 of the Limitation Act. The OA No.762 of 2017 filed by Appellant before the Debts Recovery Tribunal could not be prosecuted on the ground of winding up order dated 25.01.2018. The proceedings initiated by the Appellant under SARFAESI Act, could not be proceeded with, due to winding up order. Hence, period during which OA remained pending needs to be excluded, giving benefit of Section 14 of the Limitation Act. The proceeding under SARFAESI Act was aborted due to winding up order. Hence, the time taken in the earlier civil proceedings, which was instituted with due diligence needs to be excluded by giving benefit of Section 14 of the Limitation Act. The learned Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in **Sesh Nath Singh vs. Baidyabati Sheorapuli Co-op Bank Limited - (2021) 7 SCC 313**. The learned Counsel for the Appellant further submitted that the Corporate Debtor has made a request for One Time Settlement on 08.07.2021 for settlement of dues by payment of Rupees four crores, on the basis of which

proposal, the Appellant is entitled for extension of limitation by virtue of Section 25, sub-section (3) of the Contract Act, 1872.

5. The learned Counsel for the Respondent refuting the submission of the learned Counsel for the Appellant submits that Application under Section 7 filed by the Appellant was clearly barred by time. Date of default being 30.01.2016 and petition having been filed on 13.01.2022, after six years, was rightly dismissed as barred by time. It is submitted that the Appellant cannot take benefit of stay of proceedings as the Appellant never tried to file any application or petition for seeking leave for initiating the proceedings against the Respondent and also the Appellant ignored the request of Liquidator by not taking any steps against the Respondent. The Liquidator on several occasions had sent letters to the Appellant for providing details of physical possession and any information regarding the assets of the Corporate Debtor. The Liquidator asked the Appellant to take steps otherwise the Office of Official Liquidator shall proceed to take the physical possession of the assets. The Liquidator has sent an email dated 24.02.2023 to the Appellant. Benefit of Section 14, sub-section (2) of the Limitation Act is not applicable since the said benefit can be extended when same party for the same relief has been prosecuting in another civil proceeding. The Appellant was not the party in Company Petition 678/2015 filed in the Bombay High Court. Hence, the Appellant cannot take benefit of any limitation for the proceedings in which he was not even the party. The judgment of the Hon'ble Supreme Court in **Sesh Nath**

Singh vs. Baidyabati Sheorapuli Co-op Bank Limited is not attracted in the present case. The Appellant was not vigilant throughout the period.

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

7. Section 14, sub-section (2) of the Limitation Act, 1963 on which reliance has been placed, provides as follows:

“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.”

8. The winding up petition was filed by M/s Oswal Minerals Ltd. in the Bombay High Court. The said proceeding was initiated by third party. The period during which the winding up petition remained pending, cannot come to rescue of the Appellant, nor Section 14, sub-section (2) of the Limitation Act is attracted in the present case. The benefit of Section 14, sub-section (2) of the Limitation Act can be extended when the Applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal and 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. Winding up petition has been

admitted in Hon'ble High Court vide its order dated 25.01.2018, where following direction was passed in paragraph 4, 5, and 6 of the order, which is as follows:

“4. In the circumstances, company petition is allowed in terms of prayer clauses – (a) and (b) which read as under:

(a) that the respondent company, namely M/s. Dharmraj aluminum industries Pvt. Ltd. having its registered office at B/s, Devprayag, Bhaktimandir Marg, Opp. Thanawala Automobiles, Thane – 400 602, Maharashtra, be wound up by and under the orders, direction and supervision of this Hon'ble Court;

(b) That the Official Liquidator or some other fit and proper person be appointed as Liquidator of respondent company with all powers under the provisions of Companies Act, 1956 or later enactment to take charge of respondent company and to conduct its affairs during the course of its winding up.

5. Official Liquidator to take steps immediately without waiting for notification.

6. Company petition accordingly stands disposed.”

9. The Official Liquidator appointed in the winding up petition, has been in communication with the Appellant. The Appellant in his additional affidavit has informed that notice issued by Official Liquidator to the Appellant was dated 15.02.2018, where the State Bank of India - Appellant was called to attend a meeting. Copy of one of the letters sent by Official

Liquidator dated 24.02.2023 has been filed along with the additional affidavit. The Liquidator, has issued notice to the Appellant and called them to participate in the winding up petition and the Appellant was also asked to inform about the outcome of the proceedings initiated under SARFAESI Act. The Liquidator has also referred to Section 446, sub-section (1) of the Companies Act, 1956 and the Appellant was requested to obtain leave of the Court to proceed with the suit. Following parts of the letter of the Liquidator is relevant to notice:

“In view of your email dated 22/02/2023, your kindly attention is invited to the provisions of Section 446(1) of the Companies Act, 1956 which is re-produced as below:-

Section 446 (1): When a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator no other legal proceedings shall be commenced or if pending at the date of winding up order shall be proceeded with against the company except by leave of the court and subject to such terms as the court may impose.

You are therefore requested to obtain necessary leave as required under Section 446(1) of the Companies Act, 1956, from the Hon’ble High Court, Bombay for continuing the above said Suit and for impleading the Official Liquidator in the matter and to serve a copy thereof to this office for taking necessary action at our end. In case leave was obtained already please send the copy of the same.

It is stated that this office had held meeting on 23/02/2018 and 10/07/2018 (copy enclosed) wherein the representatives of your bank made submission that your bank has taken symbolic possession of the assets of the company (In Liqn.) under SARFAESI Act and is under way for taking physical possession. Thereafter on several occasions this Office of Official Liquidator has send letters dated 16/12/2020, 01/11/2021 and 13/12/2022 (copy enclosed) requesting you to provide details of physical possession and any information regarding the assets of the company (In Liqn.). This Office of Official Liquidator has not received no details and any information regarding the assets of the company (In Liqn.) from your good Bank. Therefore your are once again requested to give details of such properties in following format:

Sr. No.	Particular/ Location of property	Description of property	Title deed/sale deed	Form 8	Form 13	annexures
1						

In addition to above, you are once again requested to inform about the outcome of SARFAESI proceedings initiated by your bank in respect of the properties of the Company (In Liqn.) if any, so that further necessary action in the matter may be taken.

Further it is to state that till date no step has been taken by you in respect of taking physical possession of the immovable property of the company (In. Liqn) situated at Plot No.M-146 MIDC, Walung, Aurangabad and Plot No.E-64, MIDC, Walung, Aurangabad. In view of the same you are once again requested to take the physical

possession of the said property within seven (7) days if not, this Office of Official Liquidator shall proceed to take the physical possession of the same.

This may be treated as MOST URGENT.

Yours faithfully,

*Dy. Official Liquidator
High Court Bombay”*

10. The Appellant never sought leave of the Company Judge to proceed with SARFAESI proceedings. The Appellant is not entitled for the benefit of Section 14 of the Limitation Act due to pendency and winding up petition in the High Court.

11. The learned Counsel for the Respondent has relied on the judgment of this Tribunal in **Company Appeal (AT) (Ins.) No.1066 of 2021 – Vedika Credit Capital Limited vs. Shriram Power and Steel Pvt. Ltd.**, where this Tribunal has noticed the requirement to be fulfilled for extending the benefit of Section 14 of the Limitation Act, 1963. This Tribunal in the said judgment has noted and dealt with the judgment of the Hon’ble Supreme Court in **Sesh Nath Singh vs. Baidyabati Sheorapuli Co-op Bank Limited** and has noted the reason due to which benefit of Section 14 was extended in **Sesh Nath Singh** case. It is useful to note paragraphs 10, 11 and 12 of the said judgment, which is as follows:

*“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 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 to jurisdiction. About 11 months thereafter, while the writ petition 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.”*

12. In the above case, a winding up petition was filed and thereafter a civil application. Based on that benefit of Section 14 was sought, which

was denied as noted above. Present is a case where winding up petition was filed by the third party. We, thus, are of the view that Adjudicating Authority has rightly distinguished the judgement of the Hon'ble Supreme Court and rightly took the view that the Appellant is not entitled to take the benefit of judgment of the Hon'ble Supreme Court in **Sesh Nath Singh** (supra).

13. The learned Counsel for the Appellant has lastly contended that one time request for settlement was received on 08.07.2021, hence, the Appellant is entitled for the benefit of Section 25, sub-section (3) of the Contract Act, 1872. The learned Counsel for the Appellant has also relied on judgment of the Hon'ble Supreme Court in **(2022) 9 SCC 364 – Kotak Mahindra Bank Limited vs. Kew Precision Parts Private Limited and Ors.** The learned Counsel for the Appellant relied on paragraph 28, 29, 30 and 31 of the judgment, which are to the following effect:

“28. Section 25 of the Contract Act provides as follows:

“25. Agreement without consideration void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law.—An agreement made without consideration is void, unless

(1) It is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless.

(3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a) A promises, for no consideration, to give to B Rs 1000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, B, Rs 1000. A puts his promise to B into writing and registers it. This is a contract.

(c) A finds B's purse and gives it to him. B promises to give A Rs 50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B Rs 1000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs 500 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth Rs 1000 for Rs 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs 1000 for Rs 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.”

29. *From the above, it is clear that any agreement to pay a time-barred debt, would be enforceable in law, within three years from the due date of payment, in terms of such agreement. It appears that Section 25(3) of the Contract Act was not brought to the notice of NCLAT. NCLAT also did not consider the aforesaid section.*

30. *In this appeal, it is contended that the last offer of 20-12-2018 was followed by an agreement. Whether there was such agreement or not would have to be considered by the adjudicating authority. To invoke Section 25(3), the following conditions must be satisfied:*

30.1. *It must refer to a debt, which the creditor, but for the period of limitation, might have enforced.*

30.2. *There must be a distinct promise to pay such debt, fully or in part.*

30.3. *The promise must be in writing, and signed by the debtor or his duly appointed agent.*

31. *Under Section 25(3), a debtor can enter into an agreement in writing, to pay the whole or part of a debt, which the creditor might have enforced, but for the limitation of a suit in law. A written promise to pay the barred debt is a valid contract. Such a promise constitutes novation and can form the basis of a suit independent of the original debt, for it is well settled that the debt is not extinguished, the remedy gets barred by passage of time as held by this Court in *Bombay Dyeing & Mfg. Co. Ltd. v. State of Bombay* [*Bombay Dyeing & Mfg. Co. Ltd. v. State of Bombay*, AIR 1958 SC 328] .”*

14. In the present case, the letter dated 08.07.2021 submitted by the Corporate Debtor has been brought on the record. The aforesaid letter has been filed at page 192 as Annexure-4 to the Appeal. The letter dated 08.07.2021, claimed to be addressed by the Corporate Debtor to the Bank, is as follows:

*“To
The Chief Manager & Authorized Officer,
State Bank of India (SAMB II),
Mumbai*

Sub: Request for one time settlement of loan

Dear Sir,

I Bharat Babulal Gujar (Director) of M/s Dharmraj Aluminium Industries Waluj, Aurangabad having loan A/c bearing No.86398505260.

I would like to State that OTS offer was given to me on Dt. 20.10.2020 by your Branch and OTS amount was Rs.5,37,07,441.17 ps. But due to pandemic situation, the Business was collapsed totally, since last year.

I therefore request you, kindly to allow me an offer (OTS amount) of Rs.4.00 (CR.) which will be paid by me without fail as under.----

- 1) OTS Amount 4.00 CR.*
- 2) Amount 10% of the OTS will be paid within thirty days of OTS sanctioned Date.*
- 3) Remaining Amount will be paid within Six Months from the date of OTS sanctioned with the regular installment without fail.*

Your Resolution Agency namely M/S Dynamic Financial Services Aurangabad Prop. M.V. Deshmukh personally following us for recovery.

I hope you will consider my case in a sympathetic view.

Thanking you,

Yours faithfully

Sd/-

*Bharat Babulal Gurjar
Director
(M/s Dharmraj Aluminium Industries)”*

15. The said offer was rejected on 15.07.2021 by the Bank asking the Corporate Debtor to improve the offer. In the Application, which was filed under Section 7, the Appellant has not brought on record the OTS offer

given by the Corporate Debtor and for the first time in the Appeal, the said document has been brought on record. The Corporate Debtor has no opportunity to file a reply to the OTS offer or to make its submission on the said letter. We, thus, are of the view that ends of justice be served in granting opportunity to the Corporate Debtor to file a reply with regard to OTS offer dated 08.07.2021, which is brought on the record in this Appeal. We make it clear that other issues regarding benefit of Section 14 of the Limitation Act on the basis of winding up petition or SARFAESI Act proceedings shall not be allowed to reopen, which have already been not accepted by the Adjudicating Authority, rightly so. Only issue, which needs to be considered by the Adjudicating Authority is as to the effect and consequence of One Time Settlement, if any by the Corporate Debtor on the question of limitation.

16. We, thus, partly allow the Appeal filed by the Appellant, set aside the order dated 19.11.2022 of the Adjudicating Authority insofar as it dismissed the Section 7 Application. We revive the Section 7 Application before the Adjudicating Authority and direct the Adjudicating Authority to consider afresh the claim of State Bank of India raised in the Appeal on the strength of One Time Settlement offer dated 08.07.2021, which needs to be decided in accordance with law. The Corporate Debtor is allowed one month's time to file reply, insofar as One Time Settlement offer made by the Appellant is concerned. The Adjudicating Authority may hear the parties and decide Section 7 Application afresh in accordance with law. We, however, make it clear that Appellant's claim to the benefit of Section 14 of

the Limitation Act on the basis of winding up petition in the Bombay High Court as well as SARFAESI proceedings initiated by the Appellant, shall be treated to have become final and shall not be allowed to reopen. The Appeal is disposed of accordingly. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

10th November, 2023

Ashwani