

Babulal Vardharji Gurjar vs Veer Gurjar Aluminium Industries Pvt. ... on 14 May, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

Company Appeal (AT) (Insolvency) No. 549 of 2018

[arising out of Order dated 9th August, 2018 by NCLT, Mumbai Bench, in CP (IB) - 488/I&BP/MB/2018]

IN THE MATTER OF:

Babulal Vardharji Gurjar ,
Suspended Director of
Veer Gurjar Aluminium
Industries Pvt. Ltd.,
R/o Plot No. K-250/2, CEAT Road,
MIDC Area, Walunj,
Distt. Aurangabad - 431 133 ... Appellant

Versus

Veer Gurjar Aluminium
Industries Pvt. Ltd.,
Through Interim Resolution Professional,
Mr. Sundararajan Devanathan,
33, Kamer Building, 5th Floor,
38, Cawasji Patel Street, Fort,
Mumbai - 400 001.

JM Financial Assets Reconstruction
Company Pvt. Ltd.,
Through its Managing Director,
7th Floor, Cnergy,
Appasaheb Marathe Marg, Prabhadevi
Mumbai - 400 025. ... Respondents

Present :

For Appellant : Mr. Piyush Singh and Mr. Kumar Pradyuman,
Advocates

For 1st Respondents: Mr. Ramji Srinivasan, Senior Advocate with
Mr. Sonal Jain, Ms. Sylona Mohapatra, Mr. Nikhil
Ramdev, Ms. Heena Sharma, Advocates for
Respondent No. 1
Mr. Anant A. Pavgi and Mr. A. Anand, Advocates for
Respondent

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Respondent - 'JM Financial Asset Reconstruction Co. Ltd.' filed an application under Section 7 of the 'Insolvency and Bankruptcy Code', 2016 (for short, the 'I&B Code') against 'Veer Gurjar Aluminium Industries Pvt. Ltd.' (Corporate Debtor) which was admitted by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench by an order dated 9th August, 2018.

2. The appeal was earlier taken on 17th September, 2018 by this Appellate Tribunal, when the following order was passed:

"The Appellant, Director of 'Veer Gurjar Aluminium Industries Pvt. Ltd.' (Corporate Debtor) has preferred this appeal against order dated 9th August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench whereby the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short I&B Code) preferred by 'JM Financial Asset Reconstruction Company Ltd.' (assignee of debts of Corporation Bank) has been admitted, order of moratorium has been passed and Interim Resolution Professional has been appointed. Company Appeal (AT) (Insolvency) No. 621 of 2018

2. Learned counsel appearing on behalf of the Appellant submitted that a petition under Section 19 of 'The Recovery of Debts Due to Banks and Financial Institutions Act, 1993' is pending before Debt Recovery Tribunal, Aurangabad. Wherein question has been raised is whether the amount is payable to the assignee or not.

3. However, the initiation of Corporate Insolvency Resolution Process cannot be annulled merely on the ground of pendency of a petition under Section 19 of 'The Recovery of Debts Due to Banks and Financial Institutions Act, 1993'. In fact in terms of Section 14 of I&B Code all such pending proceeding cannot proceed during the period of moratorium.

4. Learned counsel appearing on behalf of the Appellant contended that there is no debt payable. However, when we asked the counsel to file an addition affidavit signed by the Appellant making specific statement that they have not received any amount or amount received Company Appeal (AT) (Insolvency) No. 621 of 2018 has already been paid and therefore there is no debt or there is no default, it is informed by the counsel for the Appellant that such affidavit cannot be filed by the Appellant as the Corporate Debtor had taken loan from the Bank.

5. In view of the aforesaid stand taken by Appellant, we are not inclined to interfere with the impugned order dated 9th August, 2018. In absence of any merit, the appeal is dismissed. No costs."

3. After the aforesaid decision, the Appellant moved before the Hon'ble Supreme Court and taken a plea that the claim of the Respondent (Financial Creditor) is barred by limitation as the 'default' being committed on 8th July, 2011 whereas the petition under Section 7 of the I&B Code was filed in 21st March, 2018.

4. Hon'ble Supreme Court by an order dated 26th February, 2019 in 'Civil Appeal No. 10710 of 2018' remitted the case to this Appellate Tribunal and observed as follows:

"Although, we find that the ground articulated in the appeal memo is vague, but, as the objection regarding limitation goes to the root of the matter and touches upon the jurisdiction of the National Company Company Appeal (AT) (Insolvency) No. 621 of 2018 Law Tribunal to proceed with the claim of the respondent; and since the recent decision of this Court in B.K. Educational Services Pvt. Ltd. Vs. Paras Gupta & Associates - AIR 2018 SC 5601 has held that the question of limitation is applicable even the applications filed under Section 7 of the I. & B. Code, it would be just and necessary to answer the said objection appropriately, in accordance with law.

Indisputably, neither the National Company Law Tribunal nor the National Company Law Appellate Tribunal, in the present case, has examined the said contention. Indeed, according to the respondent, the plea of claim being barred by limitation is unsustainable and, to buttress this argument, the respondent has relied upon the entries in the books of account of the appellant and other related documents. However, that is a matter which ought to be agitated before the National Company Law Appellate Tribunal in the first place."

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5. Learned counsel appearing on behalf of the Appellant argued on the question of limitation and submitted that the 'default' having committed on 8th July, 2011 whereas the petition under Section 7 of the I&B Code having filed in March, 2018, the application is not maintainable being barred by limitation.

6. On the other hand, the learned counsel appearing on behalf of the Respondent submitted that neither the application under Section 7 is barred by limitation nor the claim is barred by limitation as there being continuous cause of action.

7. To decide the issue, it is necessary to notice the relevant facts which are as follows:

8. Loan was sanctioned and disbursed by the 'Corporation Bank' in favour of the 'Corporate Debtor' on 22nd December, 2007. The account of the 'Corporate Debtor' was cleared. The Indian Overseas Bank, as a consortium also granted loan in favour of the 'Corporate Debtor'. On 15th November, 2011 Indian Overseas Bank issued notice to the 'Corporate Debtor' to repay the overdue amount. The Demand Notice under Section 13(2) of the "Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002" (for short, the 'SARFAESI Act, 2002') was

issued by the Indian Overseas Bank being the consortium leader. The demand notice was published in two newspapers i.e. 'Business Standard' and 'Saamna' under the SARFAESI Act on 28th December, 2011. The 'Corporate Debtor' filed the reply to the said objection raised by the 'Indian Overseas Bank' on 16th January, 2012 and 21st January, 2012 respectively. Company Appeal (AT) (Insolvency) No. 621 of 2018

9. A registered 'Assignment Agreement' dated 30th March, 2013 was reached between the 'Corporation Bank' and the 'Financial Creditor'. Since 30th March, 2013, the respondent became assignee on all the loans taken from the Corporation Bank.

10. In the meantime, the 'Corporate Debtor' in its Annual Report dated 13th September, 2012, 15th September, 2013, 1st September, 2014, 10th September, 2016, continued to show the loan given by the 'Corporation Bank' (of which Respondent - 'Financial Creditor' is an assignee of 'Indian Overseas Bank').

11. The Financial Creditor for recovery of loan filed O.A. No. 172/2013 before the Debt Recovery Tribunal, Aurangabad ((for short, the 'DRT') in terms of the recovery of debt provision under Section 19 of 'The Recovery of Debts Due to the Banks and Financial Institution Act, 1993'. The said petition for recovery against the 'Corporate Debtor' is pending before the DRT. This is also accepted by the learned counsel appearing on behalf of the Appellant which is apparent from the order dated 17th September, 2018 wherein the appellant took a plea that petition under Section 19 of 'The Recovery of Debts Due to Banks and Financial Institution Act, 1993' is pending before the DRT, Aurangabad wherein question raised is whether the amount is payable to the assignee or not.

12. The 'Financial Creditor' has also brought on record a letter dated 31st July, 2018 issued by the appellant to the respondent - 'Financial Creditor' for one time settlement. The aforesaid fact shows that there is a continuous Company Appeal (AT) (Insolvency) No. 621 of 2018 cause of action under Section 19 filed by the respondent - 'Financial Creditor' which is pending before the DRT.

13. The respondent has brought to the notice of the Adjudicating Authority 'Form 1' which shows that the 'Corporate Debtor' has mortgaged number of properties at Aurangabad, as is apparent from Part V of Form 1 with the application under Section 7 of the I&B Code. It includes land at plot No. 250/2 admeasuring 1135 sq. mtrs. situated at Waluj, MIDC Industrial Area, Ranjangaon and outside limits of Aurangabad Municipal Corporation; the land at Gut No. 4 total admeasuring 35143.92 sq. ft. at village Ranjangaon, Gangapur District Aurangabad; land and building situated at Plot No. 24, admeasuring 468.75 sq. mtrs. Situated in Sector N-2/A, CIDCO, Aurangabad and other total 9 lands and buildings.

14. The 'Corporate Debtor' has also hypothecated on current assets of the borrower viz. stocks of raw material, stock in process, semi-finished and finished goods, bills receivables etc. both present and future lying or stored in or about or shall hereafter from time to time during the continuance of the security on or about of the 'corporate debtor's factory, premises and godowns situated at Aurangabad in the state of Maharashtra or elsewhere. This apart whole of the movable plant and machinery and other movable assets of the 'corporate debtor', both present and future have been

hypothecated.

15. Apart from the decision of the Hon'ble Supreme Court in 'B.K. Educational Services Private Limited vs. Parag Gupta & Associates' [AIR 2018 SCC page 5601] the Parliament had inserted Section 238A in the I&B Code, which reads as follows :

Company Appeal (AT) (Insolvency) No. 621 of 2018 "238A. The provisions of the Limitation Act, 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." From the decision of the Hon'ble Supreme Court 'B.K. Educational Services Private Limited' (Supra) and Section 238A, it is clear that law of limitation is applicable as far as it's practicable.

16. For filing the application under Section 7 of the I&B Code, Article 132 of Part 2 (other application) is applicable, which reads as follows:

Description of application Period of Time from which limitation period begins to run

132. To the High Court for a certificate of fitness to appeal to the Supreme Court Sixty days. The date of the under clause (1) of article 132, article 133 decree, order or or sub-clause (c) of clause (1) of article sentence. 134 of the Constitution or under any other law for the time being in force.

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17. 'Period of Limitation' in terms of Section 2(j) prescribed in Limitation Act, - Part I. Part I - 'Suits relating to accounts' ; Part II - 'Suits relating to Contracts' ; Part III - 'Suits relating to Declarations' ; Part IV - "Suits relating to Decrees and Instruments" ; Part V - 'Suits relating to immovable property; Part VI - 'Suits relating to movable property; Part VII - Suits relating to Tort'; Part VIII - 'Suits relating to Trusts and Trust property' ; Part IX - 'Suits relating to miscellaneous matters' and Part X - 'Suits for which there is no prescribed period'.

18. Second Division of 'Limitation Act' deals with 'Appeals' whereas Third Division deals with Applications. Part I of Third Division relates to 'Applications in specified cases' and on the other hand Part II of Third Division relates to 'Other Applications'.

19. Part I of Third Division relates to 'Applications in specified cases' which is not applicable for an application filed under Section 7 or 9 or 10 of the I&B Code.

20. Part II of Third Division relates to Article 137, which is not a part of Second & Third Division and deal with 'Other applications' is applicable to the application under Section 7 or Section 9 or Section 10 of the I&B Code, which reads as follows :

PART II - OTHER APPLICATIONS Description of application Period of Time for which limitation period being to run

137. Any other application Three years Where the right to for which no period of apply accrues limitation is provided elsewhere in this division.

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21. The I&B Code has come into existence on 1st December, 2016 and thereafter the right to apply accrued to respondent - 'Financial Creditor' under Section 7 of the I&B code only on 1st December, 2016. The application having filed in the year 2018, we hold that the application under Section 7 is not barred by limitation.

22. Hon'ble Supreme Court in "Innoventive Industries Ltd. v. ICICI Bank," - (2018) 1 SCC 407] observed and held :

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non- payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim"

and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution Company Appeal (AT) (Insolvency) No. 621 of 2018 process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor -- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records Company Appeal (AT) (Insolvency) No. 621 of 2018 required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution

professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may Company Appeal (AT) (Insolvency) No. 621 of 2018 give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

23. In 'Innoventive Industries Ltd. v. ICICI Bank (Supra)' the Hon'ble Supreme Court further held that "where the Adjudicating Authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact."

24. In 'Binani Industries Ltd. vs. Bank of Baroda & Anr.' - Company Appeal (AT) (Insolvency) NO. 82 of 2018' this Appellate Tribunal held that 'Insolvency & Bankruptcy Code' does not relate to litigation nor it is a suit or money suit. In that background the period of limitation prescribed in the First Division is not applicable through I&B Code proceedings.

25. Though we have held that the law of limitation for filing a suit (First Division) or Appeals (Second Division) or application under Part I (Third division) are not applicable, the 'Corporate Debtor' can take a plea that 'debt' is not due, as it is not payable in law being barred by limitation. Company Appeal (AT) (Insolvency) No. 621 of 2018

26. In the present case, it is to be noticed whether the 'debt' is not payable in law by the 'Corporate Debtor' and/or the 'default' being barred by limitation.

27. We have noticed that immediately on 'default', Respondent No. 2 - 'Financial Creditor' has already moved before the DRT under Section 19 of the 'The Recovery of Debts Due to the Banks and Financial Institution Act, 1993' and O.A. No. 172 of 2017 which is still pending. This fact has also been accepted and pleaded by the Appellant.

28. The Appellant has suppressed the fact that recently the 'Corporate Debtor' by letter dated 31st July, 2018 approached Respondent No. 2 (Financial Creditor) for one time settlement. There is a finding that there is a continuous cause of action. The appellant has not disputed that 9 properties i.e. land and building have been mortgaged by the 'Corporate Debtor' with Respondent No. 2 -

'Financial Creditor'. Respondent No. 2 also preferred a criminal proceeding on 27th June, 2017 as the enforcement mortgage of which possession was taken by 2nd Respondent after the order passed by the DRT, Aurangabad.

29. Part V (First Division) of Limitation Act relates to 'Suits relating to immovable property' to recover possession of the property mortgaged and afterwards transferred by the mortgagee for a valuable consideration. The period of limitation is 12 years since the transfer becomes known to the plaintiff [Article 61(b)].

30. In view of the aforesaid position of law, the property having mortgaged, we also hold that the claim is not barred by limitation as the period of limitation is 12 years with regard to mortgaged property and in terms of Company Appeal (AT) (Insolvency) No. 621 of 2018 Section 5 (7) read with Section 5(8) as the property is mortgaged, Respondent No. 2 also comes within the meaning of 'Financial Creditor'.

31. Therefore, we hold that the application under Section 7 is not barred by limitation nor the claim of Respondent No. 2 is barred by limitation. We reject the plea that no 'debt' is payable by the 'Corporate Debtor' in the eyes of law. We find no merit in this appeal. It is accordingly dismissed. No costs.

[Justice S.J. Mukhopadhaya] Chairperson [Justice Bansilal Bhat] Member (Judicial) New Delhi
14th May, 2019 /ns/ Company Appeal (AT) (Insolvency) No. 621 of 2018