

Corporation Bank vs Sjn Energy Infrastructure Pvt. Ltd on 5 March, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT) (Insolvency) No. 1184 of 2019

[Arising out of order dated 25th September, 2019 passed by the
Adjudicating Authority, National Company Law Tribunal, New Delhi
Bench, New Delhi, in (IB)-538(ND) 2019]

IN THE MATTER OF:

Corporation Bank
Regd. Office at:
Mangla Devi Temple Road,
Mangalore, Karnataka

...Appellant

Vs

1. M/s SJN Energy Infrastructure Pvt. Ltd.
Through its Directors
A-16, Khasra no. 29/10, Ground Floor,
Near Shiv Mandir, Libaspur,
Delhi- 110 042.

Also at:
S-30 To 34, Sipcot Industrial Growth Centre,
Perundurai, Erode District
Tamil Nadu- 638 502

Also at:
New No. 33, Old No. 13/2, Chari Street
T. Nagar,
Chennai- 600 017

Also at:
Flat No. SNB-502, 5TH Floor, East facing
Shipra Neo Apartment, Block-B
Shipra Suncity, Vaibhav Khand,
Indirapuram, Ghaziabad
UP- 201 014

Also at:
F-10001, Jaipuria Sunrise Green,
Indirapuram,
UP-201 014

2. Sh. Prashant Kumar Mishra,
S/o Sh. Krushna Chandra Mishra,
Flat No. SNB-502, 5TH Floor, East Facing
Shipra Neo Apartment, Block-B

Shipra Suncity, Vaibhav Khand,
Indirapuram, Ghazaibad
UP- 201 014

Also at:

House No. HIG-165, Mouza Polariput
PS- Khandagiri, Dist- Khurda
Bhubaneshwar, Odisha- 752 055

3. Ms. Nandita Mishra

W/o. Sh. Prashant Kumar Mishra
Flat No. SNB-502, 5TH Floor, East facing
Shipra Neo Apartment, Block-B
Shipra Suncity, Vaibhav Khand,
Indirapuram, Ghaziabad
UP- 201 014

4. Sh. Jyotish Chandra Mishra

Flat No. SNB-502, 5TH Floor, East facing
Shipra Neo Apartment, Block-B
Shipra Suncity, Vaibhav Khand,
Indirapuram, Ghaziabad
UP- 201 014

5. Ms. Satyabhama Mishra,

S/o Sh. Krushna Chandra Mishra
OM bhawan, Sabarsahi Lane,
Bhubaneshwar, Khurda,
Odisha- 752 055

6. Sh. Sanjeev Kapoor

S/o Late Sh. Kuldeep Singh,
14,1333, Kishanpura, Saharanpur
Uttar Pradesh.

....Respondents

Present:

For Appellant: Mr. Samarendra Kumar, along with Mr.
Murali Tummala, Chief Engineer

For Respondents: Mr. Saman Batra and Mr. Rajesh
Sharma, Advocates for Respondent No.

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JUDGMENT

(5th March, 2020) KANTHI NARAHARI, MEMBER (TECHNICAL) The Appeal preferred by the Corporation Bank aggrieved by the order dated 25.09.2019 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi in (IB)-538(ND) 2019.

2. The Appellant filed an Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (in short 'IBC') before the Adjudicating Authority against the Respondent No. 1 (herein)-Corporate Debtor seeking initiation of Corporate Insolvency Resolution Process (in short 'CIRP'). The

Application filed in Statutory Form-1, as per rules, claiming an amount of Rs. 31,63,29,782.20 on 31.12.2018. The Appellant contended that they have provided Term Loan Facility and Cash Credit Facility to the Corporate Debtor- 1st Respondent herein. The Corporate Debtor failed to repay the amount. For the aforesaid reason, Application under Section 7 of IBC has been filed.

3. From the records it appears that the Corporate Debtor contested the matter opposing the admission of the Application filed by the Appellant herein. One of the grounds raised by the Corporate Debtor before the Adjudicating Authority is that the Application filed by the Appellant was time barred stating that the Appellant Bank classified the Respondent No. 1 as NPA on 23.05.2014 whereas the Application was filed by the Appellant Bank in the month of January, 2019. Therefore, the Application was barred by limitation.

4. After hearing the parties, the Adjudicating Authority passed a detailed order rejecting the Application of the Appellant held that the Application filed by the Appellant-Bank was not within the period of limitation. The observations of the learned Adjudicating Authority are reproduced hereat in verbatim:

...

"10. As per the particulars of Financial Debt provided in Part-IV of the Application and para-11 of the rejoinder submitted by the Applicant Corporation Bank, Account of the Respondent No. 1 was classified as non-performing asset on 23.05.2014 as per the prudential norms of the Reserve Bank of India. Further, the Applicant Corporation Bank has filed the present application on 05.02.2019.

11. Hence, the facts which are material in respect of the Limitation for maintainability of the application need to be considered first. The date of default averred by the Petitioner in Part-IV of the application is 23.05.2014. That Section 238A of the Insolvency and Bankruptcy Code 2016, makes the Limitation Act, 1963 applicable to the Code, reads as follows:

"238A. The provisions of the Limitation Act, 1963 (36 of 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."

12. Here it is worthwhile to refer to the Judgement of the Hon'ble Supreme Court in the matter of "B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates - Civil Appeal No. 23988 of 2017" in which the Hon'ble Court held the following:

"27. Since the Limitation Act is applicable to applications filed under Section 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act get 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 fact of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application". ...

13. That the Petitioner has placed two Letters dated 08.09.2015 showing 'Acknowledgement of Debt/ Liability by the Borrowers' made by the Respondent. Even if one takes into account the abovementioned acknowledgement letters, the limitation gets extended till 07.09.2018 only. However, the Petition in the instant case by the Financial Creditor is filed only on 05.02.2019. Further, the Respondent Company has raised a specific objection in its reply regarding maintainability of the application on the round of limitation. The Petitioner has failed to rebut the objection even in its rejoinder.

14. As a sequel to the above discussion, this Bench is of the view that the Petition has not been filed within the Limitation period. Hence, this Petition fails on the ground of limitation and the same is rejected." ..

5. Learned Counsel for the Respondent filed their Reply Affidavit before this Tribunal taking similar stand as taken before the Adjudicating Authority and vehemently opposed the Appeal for the reason that the Application filed by the Appellant-Bank is time barred and the Appeal needs to be rejected.

6. Heard learned Counsel for the respective parties, perused the pleadings, citations and Written Submissions filed in their support.

7. Learned Counsel for the Appellant in its grounds of Appeal and questions of law raised that whether the Application filed under Section 7 IBC can be rejected on the ground of limitation, whether the Impugned order dated 25.09.2019 passed by the Adjudicating Authority is in accordance with the provisions of Section 3(6)(a), 3(11)(12) read with Section 5(6)(a) of IBC. Further the learned Counsel for the Appellant has taken a stand that as per Article 137 of the Limitation Act, 1963, the Application is maintainable within 3 years from the date when the right to apply accrues and the Appellant filed the Application within 3 years from the date of acknowledgment. From the perusal of Form-1, which is a statutory form to be filed along with Application in Part-IV, there is specific mention with regard to date of NPA i.e., 23.05.2014. Accordingly, the limitation will be ticking from the date of declaration of NPA i.e., 23.05.2014, however, the Application filed by the Appellant before the Adjudicating authority is on 05.02.2019. As per the judgment of the Hon'ble Supreme Court in the matter of "B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates" passed in Civil Appeal No. 23988 of 2017 reported in (2019) 11 SCC 633 dated 11.08.2018, the Hon'ble Supreme Court at paragraph-27 of the judgment clearly held as under:

...

"27. 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 53 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."

..

8. Further, Hon'ble Supreme Court in the matter of "Sagar Sharma & Anr. Vs. Phoenix Arc Pvt. Ltd. & Anr." in Civil Appeal No. 7673 of 2019 dated 30.09.2019 at paragraph-3 held"

..

"3. Article 141 of the Constitution of India mandates that our judgments are followed in letter and spirit. The date of coming into force of the IBC code does not and cannot form a trigger point of limitation for applications filed under the Code. Equally, since "applications" are petitions which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications."

..

9. In view of the judgment of the Hon'ble Supreme Court, the Article 137 of the Limitation Act, 1963, which is a residual Article will apply to the Sections 7 & 9 of the IBC as held by the Hon'ble Supreme Court Supra in "B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates" (supra). Therefore, we are of the view that the date of default in this case is 23.05.2014 and Section 7 Application was filed on 05.02.2019 which is beyond the period of limitation and the Adjudicating Authority rightly rejected the Application filed by the Appellant. With regard to the letter dated 08.09.2015 is concerned, learned Counsel for the Appellant contented that from the date of acknowledgement, the limitation will get ticking and three-year period will have to be counted from 08.09.2015 in pursuance of Article 18 of the Limitation Act, 1963 and taking into consideration, the letter dated 08.09.2015, the Application is within limitation. Even without admitting the letter is considered as an acknowledgment, still the Application filed under Section 7 of IBC by the Appellant is barred by limitation since, the Application under Section 7 IBC was filed on 05.02.2019 and three-year period expires on 08.09.2018. In so far as Sections 3(6)(a), 3(11), 3(12) of the IBC are concerned, Section 3(6)(a) of IBC is defined "claim" "means a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured."

We are not on the point of claim of the Appellant, therefore, such question deciding claim does not arise.

Further, Section 3(11) of IBC is concerned it defines "debt" which means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt; Section 3(12) of IBC defines "default" means, 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.

Even we are not deciding the issue of debt and default of the Appellant. Further the learned Counsel for the Appellant relied upon Section 5(6)(a) of IBC which define "dispute" includes a suit or arbitration proceeding relating to (a) the existence of the amount of debt....

10. It is evident from the records that both Appellant and Respondent No. 1 herein resorted to filing proceedings/claims/counter claims before other forums.

11. Even if the learned Counsel for the Appellant intend to take a stand that the pending proceeding before the DRT and other Civil Courts get extends the limitation, we are of the firm opinion that the proceedings before the DRT and other forums, will not get the benefit of extending the limitation period merely on the basis of pending proceedings before the DRT. In this regard, it is unequivocal and settled law that the IBC is a complete Code and as per Section 238 of IBC it has overriding effect on other laws. Therefore, pending proceedings before other forums, the limitation will not get extended.

12. Further the learned Counsel for the Appellant contend that as per Section 7(5)(a), where the Adjudicating Authority is satisfied that

(a) a "default" has occurred and the Application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application. As per Section 7 of IBC; financial creditor can initiate Corporate Insolvency Resolution Process either by itself or jointly against the Corporate Debtor before the Adjudicating Authority when a default has occurred. The "Creditor" defined under Section 3(10) means any person to whom a debt owed and includes a Financial Creditor, and Operational Creditor, Secured Creditor an Unsecured Creditor and a Decree Holder. Whilst the Appellant cannot take a stand since the default has occurred, the Adjudicating Authority on satisfaction, the Application should be admitted automatically. Before admission of the Application either under Section 7 or 9 of IBC, one has to file the Application within a period of limitation as prescribed under Section 238A of IBC. The Adjudicating Authority and this Tribunal are bound by the decision of the Hon'ble Supreme Court where the Hon'ble Supreme Court in "B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates" (supra) clearly held that Article 137 of the Limitation Act, 1963 will apply to Sections 7 & 9 of IBC.

13. Therefore, we follow the decision of the Hon'ble Supreme Court in letter and spirit as mandates under Article 141 of the Constitution of India as held in "Sagar Sharma & Anr. Vs. Phoenix Arc Pvt. Ltd. & Anr." (supra).

14. For the foregoing reasons, we do not find any illegality in the order passed by Adjudicating Authority in rejecting the Application filed by the Appellant-Bank under Section 7 of IBC and no interference is called for. The Appeal is devoid of merits and liable to be dismissed.

Accordingly, the same is dismissed. No orders as to cost.

[Justice Venugopal M.] Member (Judicial) (Kanthi Narahari) Member(Technical) (V P Singh)
Member(Technical) Akc.