

Bimalkumar Manubhai Savalia vs Bank Of India & Anr on 5 March, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT) (Insolvency) No. 1166 of 2019

[Arising out of order dated 20th September, 2019 passed by the
Adjudicating Authority, National Company Law Tribunal,
Ahmedabad Bench, Ahmedabad, in CP (I.B.) No.
459/7/NCLT/AHM/2018]

IN THE MATTER OF:

Bimalkumar Manubhai Savalia
Shareholder and Director of
M/s Radheshyam Agro Products Pvt. Ltd,
At- Sajiyavadar, Taluka: Amreli
District: Amreli, Sajiyavadar,
Amreli - 365 601

...Appellant

Vs

1. Bank of India
M.G. Road, Para Bazaar Road,
Rajkot,
Gujarat- 360 001.
2. Chandra Prakash Jian
Interim Resolution Professional of
M/s Radheshyam Agro Products Pvt. Ltd,
D-501, Ganesh Meridian,
Opposite Gujarat High Court, S.G. Road,
Ahmedabad - 380 060.

....Respondents

Present:

For Appellant: Present but did not mark appearance.

For Respondents: Mr. Ashish Rana and Mr. Harshit Garg,
Advocates for Respondent No. 1

Mr. Ravi Raghunath, Advocate for
Respondent No. 2

JUDGMENT

(5th March, 2020) KANTHI NARAHARI, MEMBER (TECHNICAL) The Appeal preferred by a Shareholder and Director of the Corporate Debtor i.e., M/s Radheshyam Agro Products Pvt. Ltd. challenging the order dated 20th September, 2019 passed by the Adjudicating Authority (National

Company Law Tribunal), Ahmedabad Bench, Ahmedabad in CP (I.B.) No. 459/7/NCLT/AHM/2018].

2. The Adjudicating Authority admitted the Application filed by the Respondent No. 1 herein in the capacity as Financial Creditor under Section 7 of Insolvency and Bankruptcy Code, 2016 (in short 'IBC') on the ground that the Corporate Debtor defaulted in payment of debt/loan facility availed by the Corporate Debtor.

3. Learned Counsel for the Appellant submitted that the Application filed by the Respondent No. 1 herein before the Adjudicating Authority was contested by filing objections to the said Application and took a specific stand that the Application filed by the Financial Creditor was time barred. He submits that the Adjudicating Authority admitted the Application and initiated Corporate Insolvency Resolution Process (in short 'CIRP') of the Corporate Debtor.

4. Learned Counsel for Appellant submitted that the Adjudicating Authority did not consider the objections taken by the Corporate Debtor. Hence, the present Appeal has been filed on the grounds as mentioned in Appeal at paragraph-9.

5. Learned Counsel for the 1st Respondent filed Reply Affidavit to this Appeal and vehemently opposed the grounds raised by the Appellant that the Application filed by them is time barred. He submits that though the date of default was mentioned in statutory form-1, as per the rules, shown as 05.11.2014. However, the Application was filed before the Adjudicating Authority on 30.08.2018 is within limitation period for the reason that the Corporate Debtor issued a letter dated 28.04.2016 and the second letter on 01.06.2016 with regard to the settlement. He submitted that the letter dated 28.04.2016 was issued 'without prejudice'. However, in the second letter the word 'without prejudice' was not used and therefore the letter dated 01.06.2016 can be treated as an acknowledgement of debt by the Corporate Debtor. Further the Guarantor paid the amount of Rs. 1,26,619/- and Rs. 1,28,645/- by transferring the same to the account of the Corporate Debtor on 01.04.2017 in accordance with paragraph-6 of the Deed of Guarantee dated 15.07.2010 through the Corporate Debtor. In view of the Deed of Guarantee, executed by the Guarantor on behalf of the Corporate Debtor, the transfer of amount can be treated as an acknowledgement for the purposes of limitation. In view of the aforesaid reasons, the Application filed on 30.08.2018 is within limitation taking into account the settlement letter dated 01.06.2016 issued by Corporate Debtor.

6. Heard learned Counsel for the respective parties, perused the documents and pleadings filed in their support. The main ground taken by the Appellant is with regard to the Application filed by 1st Respondent under Section 7 of IBC is time barred. Since the point of limitation is a mixed question of law and fact, we deal with the same, apart from other, points raised by the Appellant in the Appeal.

7. We have perused form-1, a statutory form to be filed under Section 4(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority Rules), 2016. Part-IV of the Form, the particulars of the Financial Debt has been given and the debt and default has been mentioned as on 05.11.2014. It is an admitted fact that the Application under Section 7 of IBC filed by Respondent

No. 1 therein on 30.08.2018. We have to see whether the Application filed on 30.08.2018 is within limitation period in view of Article 137 of Limitation Act, 1963 which is applicable to Application under Sections 7 & 9 of IBC as held by Hon'ble Supreme Court in "B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates" passed in Civil Appeal No. 23988 of 2017 reported in (2019) 11 SCC 633.

8. We have to go by the judgment of the Hon'ble Supreme Court in strict sense and to see whether the Application filed under Section 7 of IBC by the financial Creditor is within limitation or not. The Adjudicating Authority, after hearing the parties observed as under:

...

"19.2 The CD has defaulted in making repayment of loan/cc to the Petitioner Bank and the date of default is 05.01.2014. the Statement of Accounts and the CIBIL Reports submitted by the Applicant Bank confirm the default committed by the Corporate-Debtor.

19.3 The Petitioner Bank has filed the petition within the period of limitation, as the date of mortgage of the property is 18.11.2010, SARFAESI proceeding initiated in 2014, DRT proceedings started in 2017, Onetime settlement (OTS) revised offer (from Rs. 12.00 Crores to Rs.

14.56 Crores) letter dated 01.06.2016 was submitted by the Corporate Debtor to the applicant Bank and the Credits have come into the loan accounts on 31.03.2017.

19.4 The present I.B. Petition is filed by duly authorised official of the Petitioner Bank in a prescribed format under Section 7 of the I.B. Code annexing copies of loan documents confirming the existence of debt default and proposed a name of Resolution professional to act as an Interim Revolution Professional (IRP)

20. Considering the material, papers filed by the Petition Bank and the facts mentioned in the para No. 19,19.1,19.2, 19.3, 19.4 this Adjudicating Authority is satisfied that,

(a) The Corporate Debtor availed the loan/cash credit from the Petitioner.

(b) Existence of debt above Rs. One Lac;

(c) Debt is due;

(d) Default has occurred on 5/11/2014.

(e) Petition had been filed within the limitation period;

(f) Copy of the Application filed before the

Tribunal has been sent to the Corporate Debtor and the application filed by the Petitioner Bank Under Section 7 of IBC is found to be complete for the purpose of initiation of Corporate Insolvency Resolution process against the Corporate-Debtor- Company.

Hence, the present IB Petition is admitted with the following Directors/observations. The date of admission of this petition is 20.09.2019."

....

9. With regard to the limitation, the Adjudicating Authority observed that the date of mortgage is 18.11.2010, The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (in short 'SARFAESI') and Debt Recovery Tribunal (in short 'DRT') started in 2017, One Time Settle (in short OTS) revised offer from 12 Crores to 14.56 Cores, vide letter dated 01.06.2016 was submitted by the Corporate Debtor to the Financial Creditor-Bank and the credits have come to the loan account on 31.03.2017. The Adjudicating Authority, by observing above, held that the Application is within limitation taking into account the OTS proposal dated 01.06.2016 and the amounts which have come from the Guarantor into the loan account of the Financial Creditor on 31.03.2017. We are of the view that the SARFAESI and DRT proceeding will not extent the period of limitation since those proceedings are independent and as per section 238 of IBC, the Insolvency and Bankruptcy Code is a complete Code and will have overriding effect on other laws. Therefore, the proceedings initiated or pending in DRT, either initiated under SARFAESI or under debts and due to Banks and Financial Institutions cannot be taken into account for the purposes of limitation. OTS was not accepted by the 1st Respondent/the Financial Creditor, therefore, the same cannot be treated as an acknowledgement in view of Section 18 of the Limitation Act, 1963. From the records it is seen that the Appellant also made OTS Proposal on 28.04.2016 prior to the OTS Proposal i.e., 01.06.2016. However, it is stated that first OTS offer was given by the Appellant by using the words as "without prejudice". However, it is contended by the Respondent No. 1 herein, that in the OTS Proposal dated 01.06.2016 there is no use of word "without Prejudice". Therefore, the second OTS Proposal dated 01.06.2016 can be treated as an acknowledge for the purpose of limitation. However, we are not inclined to accept such submission made by learned Counsel for the Respondent No. 1 herein.

10. Learned Counsel for the Respondent No. 1 further submitted that the Guarantors have transferred the amount of Rs. 1,26,619/- and Rs. 1,28,654/- to the Account of the Corporate Debtor on 01.04.2017, therefore the period of limitation is to be counted from 01.04.2017. It is the argument of the learned Counsel for the Appellant that the amounts have been appropriated by the Respondent No. 1 and therefore, appropriation of the Amount by the Respondent No. 1 herein from the Guarantor will not extend the period of limitation. In this regard, Section 19 of the Limitation Act need to be referred:

"Section 19 in The Limitation Act, 1963

19. Effect of payment on account of debt or of interest on legacy.--Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made: 19. Effect of payment on account of debt or of interest on legacy.--Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made\:" Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment. Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

Explanation.--For the purposes of this section,-- Explanation.--For the purposes of this section,--"

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment; (a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;"

(b) "debt" does not include money payable under a decree or order of a court. (b) "debt" does not include money payable under a decree or order of a court."

11. It is to be seen that Article 19 of the Limitation Act will fall under the category of first division of schedule which applies to the suits. However, Section 7 of the IBC is not a suit and as held by Hon'ble Supreme Court, Section 7 is an Application under the IBC which falls under the category of Application in para II of 3rd division. Therefore, the Hon'ble Supreme Court held that the Article 137 will apply to the Applications filed under Section 7 & 9 of the IBC. Therefore, the stand of the Respondent No. 1 that the period of limitation will get extended from the date of payment of amount by the Guarantor on 01.04.2017 cannot be a ground and the limitation will not get extended. Therefore, the submission made by the Respondent no. 1 is negated.

12. Learned Counsel for the Respondent No. 1 also taken a stand that the Appellant filed an Application under Section 17 of 'SARFAESI' Act wherein the Appellant admitted the fact of taking loan and failed to repay the same. Therefore, he submits that the same acts as an acknowledgment for the purposes of limitation.

13. We have perused the Application filed by the Appellant before the DRT, Ahmedabad and at page 25 of the Reply filed by Respondent No. 1, sub-para 2 of paragraph-5 that "the Respondent Bank states that the Principal Company had availed various facilities from the Respondent- Bank." Further the Respondent No. 2 sanctioned the said facilities towards hypothecation, mortgage of

movable and immovable properties owned by the borrower Guarantor, Mortgager as per the Respondent No. 1. In the grounds of the Application, the Applicant (Appellant herein) has taken the technical grounds that the notices have not been served on all the borrower as per Section 13(2) of 'SARFAESI' Act and also taken various other objections which cannot be presumed that there is an acknowledgment by the Appellant herein to the Bank. Therefore, even on this count, the Respondent No. 1 failed to establish the Application filed within the period of limitation. In view of the judgment of the Hon'ble Supreme Court in the matter of "B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates"

(supra), we are of the view that Application is barred by limitation.

14. As a beneficial reference, this Tribunal in the matter of "C. Shivkumar Reddy Vs. Dena Bank and Anr." in Company Appeal(AT)(Insolvency) No. 407 of 2019 dated 18.12.2019, after considering the judgment of the Hon'ble Supreme Court, in the matter of "Jignesh Shah and Anr. Vs. Union of India (UOI) and Anr." reported in MANU/SC/1319/2019 and (2019) SCC OnLine SC 1254 and "Gaurav Horgovindbhai Dave Vs. Asset Reconstruction Company (India) Ltd. & Anr." in Civil Appeal No. 4952 of 2019 and "B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates" passed in Civil Appeal No. 23988 of 2017 reported in (2019) 11 SCC 633 held in paragraph-7 as under:-

"There is nothing on record to suggest that the Corporate Debtor or its authorised representative by its signature has accepted or acknowledged the debt within 3 years from the date of default or from the date when account was declared NPA i.e., on 31.12.2013"

15. In the present case as held supra, there is no acknowledge issued by Appellant/Corporate Debtor prior to expiry of 3 years or from the date of default. Therefore, the Application filed by the 1st Respondent before the Adjudicating Authority on 30.08.2018 is beyond the period of limitation.

16. For the aforesaid reasons and relying on the judgment of the Hon'ble Supreme Court, as stated above, the Appeal is allowed and the Impugned Order passed by the Adjudicating Authority dated 20.09.2019 is quashed and set aside.

17. In the result, the Corporate Debtor is released from the rigor of Corporate Insolvency Resolution Process and action taken by IRP/RP and Committee of Creditor, if any, in view of the impugned order set aside. IRP/RP will hand back the records and management of the Corporate Debtor to the Promoter's/Directors of the Corporate Debtor.

18. The matter is remitted back to Adjudicating Authority to decide the fee and costs of "Corporate Insolvency Resolution process" payable to IRP/RP which shall be borne by the Bank of India.

No orders as to cost.

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