

## **S. M Ghoghai vs Schedulers Logistics India Pvt. Ltd on 23 May, 2022**

NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI  
Company Appeal (AT) Insolvency No. 281 of 2022

IN THE MATTER OF:

S.M. Ghogbhai,

Amarjyot Estate, Near Narol Char

Rasta, Opp. Evergreen Hotel Narol,

Ahmedabad

...Appellant

Versus

Schedulers Logistics India Pvt. Ltd.

Having its registered office at E-113,

1st Floor Magnet Mall,

LBS Marg, Bhandup (West)

Mumbai Mumbai City MH-400078

...Respondent

For Appellant: Advocate Ekta Mehta

For Respondent: Advocate Kayomars K. Kerawalla, Advocate Kunal Mehta and Advocate Robin Fernades.

### JUDGEMENT

Ashok Bhushan, J:

1. This Appeal has been filed against the Order dated 16th November, 2021 passed by National Company Law Tribunal, Mumbai Bench, Court-III (The Adjudicating Authority) in C.P. No. 3857/I&B/2019. By which Order, the Application being C.P. No. 3857/I&B/2019 filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'The Code') has been rejected as barred by time.

2. Brief facts of the case are as under:

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(i) The Appellant and Respondent-Corporate Debtor were engaged in providing Transport Services. The last payment was received by the Appellant-Operational Creditor from the Respondent-Corporate Debtor on 26.09.2016. Vide Email dated 10.10.2017, Corporate Debtor sought reconciliation of account in respect of the outstanding dues payable to the Appellant. A 'Demand Notice' under Section 8 of the

Code dated 08.03.2019 was issued by the Appellant to the Corporate Debtor demanding outstanding debt of Rs. 76,04,050/-. On 26th March, 2019, Demand Notice was replied by the Corporate Debtor denying the dues. On 24.10.2019, the Appellant filed an Application under Section 9 of the Code seeking 'Corporate Insolvency Resolution Process' (CIRP in short) of the Corporate Debtor. Notice was issued in the Application, the Corporate Debtor filed its Reply-Affidavit to Section 9 Application refuting the claim of the Appellant.

(ii) The Adjudicating Authority by the Impugned Order dated 16th November, 2021 rejected the Section 9 Application holding that all the invoices on basis of which Section 9 Application were filed are earlier to three years period from the date of filing Section 9 Application hence the claim on the basis of total 174 invoices was barred by time.

Aggrieved by the said Impugned Order, this Appeal has been filed.

3. We have heard Learned Counsel-Ekta Mehta for the Appellant and Learned Counsel-Kayomars K. Kerawalla and Kunal Mehta for the Respondent.

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4. Learned Counsel for the Appellant submits that both the parties were maintaining a running account and there have been transactions inter se which is reflected from the Ledger Account filed by the Respondent. In the facts of the present case, Article 1 of the Limitation Act, 1963 was attracted as per which the limitation period of 3 years begins to run from the close of the year in which the last item admitted or proved is entered into the account. Thus the limitation period begins to run from 31st March, 2017 being the close of the financial year in which the last item is entered hence the Application filed on 24th October, 2019 was within three years from 31st March, 2017 and was not barred by limitation. There being mutual account between the parties, Article 1 of the Limitation Act is attracted and the Adjudicating Authority committed error in rejecting the Application as barred by time.

5. Learned Counsel for the Respondent refuting the submissions of Learned Counsel for the Appellant contends that before the Adjudicating Authority, claim were raised by the Appellant was only on the basis of 174 invoices which has been noticed by the Adjudicating Authority. Before the Adjudicating Authority, no case was taken that Article 1 of the Limitation Act is applicable. Article 1 of the Limitation Act is not attracted in the present case since Article 1 of the Limitation Act pertains to suit relating to the Accounts and the Application under Section 9 of the Code cannot be said to be suit relating to accounts hence it is only Article 137 of the Limitation Act which is applicable. The Hon'ble Supreme Court of India in Company Appeal (AT) Ins. No. 281 of 2022

3|Page large number of cases has held that for the Application under Sections 7 and 9 of the Code, it is only Article 137 which is applicable.

6. Learned Counsel for the Appellant in rejoinder submits that Adjudicating Authority ought to have exercised jurisdiction under Section 5 of the Limitation Act in condoning the short delay, if any.

7. We have considered the submissions of Learned Counsel for the Appellant and Respondent and perused the record.

8. In the Application filed under Section 9 of the Code, the Appellant had claimed payment of outstanding dues of Rs. 76,04,050/ on the basis of different invoices issued in the year 2015-16. In total 174 invoices were attached with Section 9 Application, details of which has been noted in tabular form as extracted in paragraph 9 of the order. The Adjudicating Authority after perusing the date of all the invoices returned a finding that Application under Section 9 having been filed on 24th October, 2019 even the last invoices dated 29.09.2016 and 10.10.2016 were more than three years prior to filing of Section 9 Application hence the Application having been not filed within limitation, the same is rejected.

9. Learned Counsel for the Appellant in this Appeal sought to rely on Article 1 of the Limitation Act, 1963 for the purposes of Limitation of Section 9 Application. Article 1 of the Limitation Act provides as follows:

"(Periods of limitations) [See sections 2(j) and 3] FIRST DIVISION - SUITS PART I-SUITS RELATING TO ACCOUNTS Description of Period of Time from which Suit limitation period beings to run

1. For the balance Three The close of the Company Appeal (AT) Ins. No. 281 of 2022

4|Page due on a mutual, years year in which the open and current last item account, where admitted or there have been proved is entered reciprocal in the account;

demands  
between the  
parties

such year to be  
computed as in  
the account.

10. Learned Counsel for the Appellant submits that the provisions of Limitation Act are attracted in reference to Section 7 and 9 Application.

Reliance has been placed on the Judgment of Hon'ble Supreme Court in (2021) 7 SCC 313 in the matter of 'Sesh Nath Singh Vs. Bidyabati Sheoraphuli Coop. Bank Ltd.' In paragraph 65 of the Judgment, following has been laid down:

"65. As observed above, Section 238-A IBC makes the provisions of the Limitation Act, as far as may be, applicable to proceedings before NCLT and NCLAT. The IBC does not exclude the application of Sections 6 or 14 or 18 or any other provision of the Limitation Act to proceedings under the IBC in NCLT/NCLAT. All the provisions of the Limitation Act are applicable to proceedings in NCLT/NCLAT, to the extent feasible."

11. It is well settled that the Limitation Act is applicable in IBC Proceedings and IBC does not exclude the application of Sections 6 to 14 or 18 and any provision of the Limitation Act as has been held by this Court in the above case.

12. The question to be considered in the present case is as to whether Appellant can take benefit of Article 1 of the Limitation Act, 1963. Hon'ble Company Appeal (AT) Ins. No. 281 of 2022

5|Page Supreme Court in the matter of 'B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Ors.' (2019) 11 SCC 633 after considering the provisions of IBC and the Limitation Act had laid down that for filing application under Section 7 and 9, it is Article 137 which is attracted. In Paragraph 42 of the Judgment, following has been laid down:

"42. 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 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."

13. Hon'ble Supreme Court in (2020) 15 SCC 1, 'Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries (P) Ltd.' has reiterated the applicability of Limitation Act and it was again reiterated that period for limitation is governed by Article 137 of the Limitation Act. In Paragraph 32 of the Judgment, following has been laid down:

"32. When Section 238-A of the Code is read with the above-noted consistent decisions of this Court in Innoventive Industries, B.K. Educational Services, Swiss Ribbons, K. Sashidhar, Jignesh Shah, Vashdeo R. Bhojwani, Gaurav Company Appeal (AT) Ins. No. 281 of 2022

6|Page Hargovindbhai Dave and Sagar Sharma respectively, the following basics undoubtedly come to the fore:

(a) that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;

(b) that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;

(c) that intention of the Code is not to give a new lease of life to debts which are time-barred;

(d) that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;

(e) that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs;

(f) that default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and

(g) that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and

(h) an application under Section 7 of the Code is not for enforcement of mortgage liability and Company Appeal (AT) Ins. No. 281 of 2022

7|Page Article 62 of the Limitation Act does not apply to this application."

14. Learned Counsel for the Appellant in support of his submissions submits that there were mutual dealings between the parties and reliance has been placed on the Judgment of Hon'ble Supreme Court of India in 'Hindustan Forest Company Vs. Lal Chand and Ors.' (AIR 1959 SC 1349). Hon'ble Supreme Court in the above case was considering Article 115 of Jammu and Kashmir Limitation Act which was pertaining to suit regarding the balance due on mutual, open and current account. In the above context, the Court noticed in paragraph 5 to the following effect:

"5. Article 115 of the Jammu and Kashmir Limitation Act which is in the same terms as Article 85 of the Indian Limitation Act except as to the period of limitation, is set out below:

Description of Suit Period of Time from which limitation period beings to run

1. For the balance Three The close of the due on a mutual, years year in which the open and current last item admitted account, where or proved is there have been entered in the reciprocal account; such year demands between to be computed as the parties in the account.

15. In the present case, the Appellant has placed reliance on Article 1 of the Limitation Act which we have extracted above. A similar provision akin to Article 1 of the Limitation Act came for consideration before the Hon'ble Supreme Court in Hindustan Forest Company case. Article 1 is in Part-I of the Schedule of the Limitation Act dealing with suits, under the "suit Company Appeal (AT) Ins. No. 281 of 2022

8|Page relating to accounts". The Application filed under Section 9 by the Appellant cannot be said to be a suit relating to accounts.

16. We have noticed the contents of the Application under Section 9 which have been brought on record. The Ledger of Operational Creditor has been brought on record including the Bank Statement which clearly mentions that last payment received by the Appellant was on 26th September, 2016. From the last payment, the Application could have been filed within three years. Application under Section 9 filed by the Appellant was on the basis of 174 invoices as has been noticed by the Adjudicating Authority in the Impugned Order. We are satisfied that for the limitation for filing Section 9 application it is Article 137 of the Limitation Act, 1963 which is attracted. Under Article 137, time from which period begins to run is "when the right to apply accrues" the right to apply accrues when invoices issued by the Appellant to the Corporate Debtor were not paid. Invoices on the basis of which payment is claimed are more than three years earlier from the date of filing of Section 9 Application which is the basis for rejection of the Application of the Appellant by the Adjudicating Authority.

We are not persuaded with the submissions of Learned Counsel for the Appellant that present is the case where Article 1 is applicable and limitation should be counted from 31st March, 2017. Limitation as per Article 137 will begin to run from the date when the right to apply accrues and the Application filed on the basis of 174 invoices and all invoices being prior to much before three years period from filing of Section 9 Application, Company Appeal (AT) Ins. No. 281 of 2022

9|Page the Adjudicating Authority has rightly rejected the Application. We do not find any merit in the Appeal, the Appeal is dismissed.

[Justice Ashok Bhushan] Chairperson [Dr. Alok Srivastava] Member (Technical) New Delhi 23rd May, 2022 Basant Company Appeal (AT) Ins. No. 281 of 2022 10 | P a g e