Rajendra Kumar Tekriwal vs Bank Of Baroda on 10 August, 2020

NATIONAL COMPANY LAW APPEALLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 225 of 2020

(Arising out of Order dated 3rd January, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Indore Bench at Ahmedabad in C.P. (IB) No.421/7/NCLT/AHM/2018)

IN THE MATTER OF:

Rajendra Kumar Tekriwal
(Ex- Director: Pithampur Poly Products Limited)
115, Sector III, Industrial Area,
Pithampur, District- Dhar (M.P.) ....Appellant

Versus

Bank of Baroda
(Before merger with Respondent Bank
was known as "Dena Bank")
Navlakha Chouraha
A.B. Road
Indore- 452001 .....Respondent

Present:

For Appellant: Mr. Manoj Munshi, Mr. Ajay K. Jain and Mr. Atanu Mukherjee, Advocates.

For Respondent: Mr. Amit Mahaliyan, Advocate.

J U D G M E N T

BANSI LAL BHAT, J.

Through the medium of instant appeal filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short), Shri Rajendra Kumar Tekriwal, Ex-Director of 'Pithampur Poly Products Limited'- ('Corporate Debtor') assails the impugned order dated 3rd January, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Indore Bench at Ahmedabad in C.P. (IB) No. 421/7/NCLT/AHM/2018 by virtue whereof application filed by 'Dena Bank' (before merger with 'Bank of Baroda')- ('Financial Creditor') under Section 7 of the 'I&B Code' came to be admitted with consequential orders in the nature of slapping of Moratorium on the assets of the 'Corporate Debtor' and appointment of 'Interim Resolution Professional'. The challenge to impugned order is limited to issue of limitation, it being raised as a ground in appeal that the financial debt in respect whereof the 'Financial Creditor' sought triggering of 'Corporate Insolvency

Resolution Process' was not payable in law, same being barred by limitation.

2. Learned counsel for the Appellant submitted that in the instant case the admitted date of the default of the financial debt is 1st May, 2000 which is the date on which such debt was declared as NPA and in view of the same, such debt could be claimed by the 'Financial Creditor' within three years from such date. It is further submitted that any subsequent acknowledgment would not change the date of default which remains static. It is further submitted that the 'Corporate Insolvency Resolution Process not being a recovery proceeding, triggering thereof is permissible within the limitation commencing from the date of default and not the date of acknowledgment of liability. The Company Appeal (AT) (Insolvency) No. 225 of 2020 argument is further elaborated by canvassing that the 'Financial Creditor' gets the right to file an application when a default has occurred and such default surfaces when the 'Corporate Debtor' has defaulted in repayment of liability and the 'Financial Creditor' has classified the account as NPA. It is submitted that the acknowledgment signed by the borrower may be considered for the purpose of admission of liability but it cannot change the date of NPA based on date of default which has already occurred upon happening of an event of non- payment of liability. It is contended that even the acknowledgment would not extend the date of default and the triggering of the 'Corporate Insolvency Resolution Process' in the instant case being beyond three years from the date of classification of debt as NPA, the impugned order cannot sustain.

3. Per contra, it is submitted on behalf of the 'Financial Creditor' that the 'Corporate Insolvency Resolution Process' can commence when a default takes place which occurs when a debt becomes due and is not paid. It is submitted that in the instant case the debt never got out of limitation as there is no break in the continuation of the limitation period. It is submitted that the Corporate Debtor's account was classified as NPA on 1st May, 2000 as it failed to pay the principal amount of loan together with the interest accrued thereon. However, the 'Corporate Debtor' regularly kept acknowledging its debt by executing Letters of Acknowledgment dated 31st March, 1999, 31st March, 2001 Company Appeal (AT) (Insolvency) No. 225 of 2020 and 12th January, 2004 which was followed by filing of claim by 'Dena Bank' before the Debts Recovery Tribunal, Jabalpur on 30th June, 2004 which was decreed on 27th July, 2011. It is further submitted that the 'Corporate Debtor' had filed a Writ Petition No. 5330/2013 before the Hon'ble High Court of Madhya Pradesh wherein the Hon'ble High Court had granted interim stay in favour of the 'Corporate Debtor' which came to be vacated when the Writ was finally disposed off in 2018. It is only thereafter the 'Financial Creditor' filed C.P. (IB) No. 421/7/NCLT/AHM/2018 under Section 7 of the 'I&B Code' seeking 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'. Thus, it is submitted that the claim fell within limitation when initiation of 'Corporate Insolvency Resolution Process' was sought by the 'Financial Creditor'.

4. Heard learned counsel for the parties and perused the record.

5. The factual matrix of the case has not been adumbrated in detail as the only issue arising for consideration revolves around the point of limitation. It is well settled by now that the provisions of the Limitation Act, 1963 are applicable to applications relating to triggering of 'Corporate Insolvency Resolution Process' under 'I&B Code' and Article 137 of the Limitation Act, 1963 prescribing a

period of three years applies to such applications. In "Vashdeo R. Bhojwani vs. Abhyudaya Co-operative Bank Limited and another - (2019) 9 SCC 158", the Company Appeal (AT) (Insolvency) No. 225 of 2020 Hon'ble Apex Court referring to its Judgment rendered in "B.K. Educational Services Private Limited vs. Parag Gupta and Associates - (2018) SCC Online SC 1921" held:

> "3. Having heard the learned counsel for both parties, we are of the view that this is a case covered by our recent judgment in B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, para 42 of which reads as follows:
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> "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."

6. From the aforesaid Judgment, it is manifestly clear that the right to sue accrues when a default occurs and if such default has occurred over three years prior to the date of filing of application, the application would be barred by limitation except in cases where on the facts of the case such delay is condoned.

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7. In "Gaurav Hargovindbhai Dave vs. Asset Reconstructions Company (India) Limited and another - (2019) 10 SCC 572", the Hon'ble Apex Court noticed that the 'Corporate Debtor' had been declared NPA on 21st July, 2011. The 'Financial Creditor' had filed two OAs before the Debts Recovery Tribunal in 2012 to recover the debt. The Hon'ble Apex Court held that the default having taken place on 21st July, 2011 when the account was declared NPA, application under Section 7 was barred by limitation. It is apposite to reproduce the relevant portion of the Judgment herein below:

> "In the present case, Respondent 2 was declared NPA on 21-7-2011. At that point of time, State Bank of India filed two OAs in the Debts Recovery Tribunal in 2012 in order to recover a total debt of 50 crores of rupees. In the meanwhile, by an assignment dated 28-3-2014, State Bank of India assigned the aforesaid debt to Respondent 1. The Debts Recovery Tribunal proceedings reached judgment on 10-6-2016, the Tribunal holding that the OAs filed before it were not maintainable for the reasons given therein.
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> 2. As against the aforesaid judgment, Special Civil Application Nos. 10621-622 were filed before the Gujarat High Court which resulted in the High Court remanding the aforesaid matter. From this order, a special leave petition was dismissed on 27-3-2017.

3. An independent proceeding was then begun by Respondent 1 on 3-10-2017 being in the form of a Company Appeal (AT) (Insolvency) No. 225 of 2020 Section 7 application filed under the Insolvency and Bankruptcy Code in order to recover the original debt together with interest which now amounted to about 124 crores of rupees. In Form-I that has statutorily to be annexed to the Section 7 application in Column II which was the date on which default occurred, the date of the NPA i.e. 21-7-2011 was filled up. The NCLT applied Article 62 of the Limitation Act which reads as follows:

"Description of suit		Period of limitation	Time from which period begins to run
62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property		Twelve years	When the money sued for becomes due."

Applying the aforesaid Article, the NCLT reached the conclusion that since the limitation period was 12 years from the date on which the money suit has become due, the aforesaid claim was filed within limitation and hence admitted the Section 7 application. The NCLAT vide the impugned judgment held, following its earlier judgments, that the time of limitation would begin running for the purposes of limitation only on and from 1-12-2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force. Consequently, it dismissed the appeal.

4. Mr Aditya Parolia, learned counsel appearing on behalf of the appellant has argued that Article 137 Company Appeal (AT) (Insolvency) No. 225 of 2020 being a residuary article would apply on the facts of this case, and as right to sue accrued only on and from 21-7-2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates [B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633] in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

5. Mr Debal Banerjee, learned Senior Counsel, appearing on behalf of the respondents, countered this by stressing, in particular, para 11 of B.K. Educational Services (P) Ltd. and reiterated the finding of the NCLT that it would be Article 62 of the Limitation Act that would be attracted to the facts of this case. He further argued that, being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

> 6. Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being "an application" which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by the learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21-7- 2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr Banerjee's reliance on para 11 of B.K. Company Appeal (AT) (Insolvency) No. 225 of 2020 Educational Services (P) Ltd., suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.
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> 7. This being the case, we fail to see how this para could possibly help the case of the respondents. Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular article gets attracted. It is well settled that there is no equity about limitation - judgments have stated that often time periods provided by the Limitation Act can be arbitrary in nature.
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> 8. This being the case, the appeal is allowed and the judgments of the NCLT and NCLAT are set aside."

8. On consideration of the aforesaid Judgments of the Hon'ble Apex Court, a five-member Bench of this Appellate Tribunal held in para 11 of Company Appeal (AT) (Insolvency) No. 1121 of 2019 titled as "Ishrat Ali vs. Cosmos Cooperative Bank Ltd. & Anr.":-

> "11. The aforesaid decisions of the Hon'ble Supreme Court and this Appellate Tribunal make it clear that for the purpose of computing the period of limitation of application under Section 7, Company Appeal (AT) (Insolvency) No. 225 of 2020 the date of default is 'NPA' and hence a crucial date."

9. In the aforesaid Judgment rendered by this Appellate Tribunal, it has been laid down in unambiguous terms that mere filing of a suit for recovery or a decree passed by a Court cannot be held to be deferment of default. In this regard, it would be appropriate to extract paras 15 and 16 of the aforesaid Judgment as under:

> "15. A suit for recovery of money can be filed only when there is a default of dues. Even if the decree is passed, the date of default does not shift forward to the date of decree or date of payment for execution. Decree can be executed within specified period i.e. 12 years. If it is executable within the period of limitation, one cannot allege that there is a default of decree or payment of dues.
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> 16. Therefore, we hold that a Judgment or a decree passed by a Court for recovery of money by Civil Court/ Debt Recovery Tribunal cannot shift forward the date of default for the purpose of computing the period for filing an application under Section 7 of the 'I&B Code'."

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10. As regards computation of a fresh period of limitation from the date of acknowledgment of liability, be it noticed that such acknowledgment in respect of any right has to be in writing and signed by the borrower against whom such debt is claimed well before the expiration of the prescribed period for a suit or application in respect of such right. Any acknowledgment made after the period for enforcement of such right, recovery of such property or debt would not fall within the purview of Section 18 of the Limitation Act, 1963 for the purpose of commencement of fresh period of limitation. In the instant case, the account of the 'Corporate Debtor' was classified as NPA on 1st May, 2000 which is admitted as the date of default. This being an admitted fact and clearly discernible from Form-1 (application by Financial Creditor to initiate Insolvency Resolution Process under Section 7 of the 'I&B Code') Column 2 of Part-IV at page 65 of the appeal paper book which clearly specifies the date of default as 1st May, 2000 when the account of 'Corporate Debtor' was classified as NPA as stated earlier. The filing of recovery proceeding before the Debts Recovery Tribunal and the claim being subsequently decreed would not shift the date of default. It is settled position of law that in application under Section 7 of the 'I&B Code' relief is sought for Resolution of Insolvency of the 'Corporate Debtor'. It is not a recovery claim or suit. Any acknowledgment of liability made subsequent to occurrence of default and beyond the period of limitation reckoned from such date of default Company Appeal (AT) (Insolvency) No. 225 of 2020 leading to classification of the account of the 'Corporate Debtor' as NPA in any form including floating of an OTS proposal by the 'Corporate Debtor' in recognition of liability would not in any manner affect the occurrence of default for purposes of triggering of 'Corporate Insolvency Resolution Process'. Respondent's plea that the Corporate Debtor had in terms of letters of acknowledgment dated 31st March, 1999, 31st March, 2001 and 12th April, 2004 acknowledged its liability qua the financial debt owed to Respondent, apart from not being entertainable for the forgoing reason, would still not render the financial debt payable in law even if the period of computation is reckoned from the date of last acknowledgment dated 12th April, 2004. It is apt to notice that Section 7 of the 'I&B Code' has been brought into force on 1st December, 2016 vide S.O. 3594(E) dated 30th November, 2016. Therefore, triggering of Corporate Insolvency Resolution Process in respect of defaults occurring prior to 1st December, 2013 would be impermissible in view of application of Article 137 of the Limitation Act, 1963. This view is fortified by the Judgments referred to hereinabove.

11. In view of the foregoing discussion, we find that the arguments canvassed on behalf of the Appellant that initiation of 'Corporate Insolvency Resolution Process' at the instance of the 'Financial Creditor' was unsustainable as the same had been filed well beyond the period of three years from the date the account of 'Corporate Debtor' was classified as NPA. In these circumstances, we uphold the argument Company Appeal (AT) (Insolvency) No. 225 of 2020 advanced on behalf of the Appellant that the subsequent developments in the form of recovery proceedings before the Debts Recovery Tribunal culminating in passing of recovery order/ decree would not shift the date of default leading to classification of Corporate Debtor's account as NPA. We find that on the date of triggering of 'Corporate Insolvency Resolution Process' at the instance of the 'Financial Creditor', the claim was clearly barred by limitation in terms of Article 137 of the Limitation Act, 1963.

12. We, accordingly, allow the Appeal and set aside the impugned order dated 3rd January, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Indore Bench at Ahmedabad.

13. In effect, order(s), passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications, all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 7 of the 'I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' (company) is released from all the Company Appeal (AT) (Insolvency) No. 225 of 2020 rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

14. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' and 'Pithampur Poly Products Pvt. Ltd.' will pay the fees of the 'Interim Resolution Professional', for the period he has functioned.

[Justice Bansi Lal Bhat] Acting Chairperson [Justice Anant Bijay Singh] Member (Judicial) [Dr. Ashok Kumar Mishra] Member (Technical) NEW DELHI 13th August, 2020 AR Company Appeal (AT) (Insolvency) No. 225 of 2020