**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**
**PRINCIPAL BENCH: NEW DELHI**

**Company Appeal (AT)(Insolvency) No. 997 of 2022**

**[Arising out of Order dated 12th August, 2022 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-I, Mumbai) in C.P. (IB) No. 1807/MB/2018]**

**IN THE MATTER OF:**

**Mr. Abhay Narendra Lodha**
**Member of the Suspended Board of Director of**
**Topworth Urja and Metals Ltd.**
**602, Vaitarman Building Sir Pokhanwala Road**
**Worli Sea Face, Worli**
**Mumbai – 400 030** **...Appellant**

**Versus**

1. **Bank of Baroda**
   **Reg. Address: Baroda House, Mandvi,**
   **Baroda – 390006 acting**
   **Through its ARM Branch**
   **Address: Meher Chambers,**
   **Ground Floor,**
   **SB Marg, Mumbai – 400001** **...Respondent No.1**

2. **Topworth Urja and Metals Limited**
   **Through its Resolution Professional**
   **Mr. Alok Kailash Saksena**
   **Office: 308, 3rd Floor,**
   **Ceejay House, Dr. AB Road**
   **Worli, Mumbai – 400018** **...Respondent No.2**

**Present:**

**For Appellant** : **Mr. Nikhil Nayar, Sr. Advocate with Ms. Eshna Kumar, Mr. Aditya Maheshwari, Mr. Devashish Chauhan, Mr. Paras Mithal, Ms. Prachi Bhatia, Advocates**

**For Respondent** : **Mr. Ramji Srinivasan, Sr. Advocate with Mr. Bishwajit Dubey, Ms. Surabhi Khattar, Ms. Neha Shivhare, Ms. Shruti Pandey, Advocates for R-1, BOB**
**Mr. Kunal Vasant, Mr. Kunal Mimani, Mr. Shubhang Tandon, Advocates for R-2, IRP**

**J U D G M E N T**
**(20th December, 2022)**

**KANTHI NARAHARI, MEMBER (TECHNICAL)**

**Preamble:**

The Present Appeal is filed under Section 61 of the I&B Code, 2016 against the Order dated 12th August, 2022 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-I, Mumbai) in C.P. (IB) No. 1807/MB/2018, whereby the Adjudicating Authority admitted the Application filed by the 1st Respondent herein.

**Brief Facts:**

**Appellant's Submissions:**

2. Sh. Nikhil Nayyar Learned Sr. Counsel appearing for the Appellant submitted that aggrieved by the aforesaid order, the Appellant being the Suspended Director of the Corporate Debtor preferred the present Appeal and narrated the facts as under.

3. It is submitted that the Respondent Bank along with the consortium landers granted various credit facilities to the Corporate Debtor from time to time and the credit facilities included term loans, working capital facilities, cash credits, letter of creditors etc. On 27.03.2015, the facilities granted to the Corporate Debtor by the 1st Respondent were restructured on the basis of the terms and conditions as set out in the sanction letter dated 27.03.2015. Subsequently, on 30.03.2015 MRA (Master Restructuring Arrangement) entered into between the Respondent and the Corporate Debtor wherein the parties agreed to restructure the debt payable to the Respondent Bank. On 14.05.2015, 1st supplemental working capital

consortium agreement was entered between the Respondent and the Corporate Debtor wherein the detailed terms and conditions of the enhanced working capital credit facilities were captured.

4. While so, on 01.02.2016, the Respondent issued a recall notice by which MRA was revoked and the Corporate Debtor was called upon to pay an amount of Rs.174.61 crores as on 31.12.2015. Pertinently, the said recall notice categorically recorded the date i.e. 27.03.2015 as the date of NPA. Respondent by its letter dated 23.02.2016, froze the account of the Corporate Debtor and in the said letter also it is categorically stated that the account of the Corporate Debtor declared NPA on 27.03.2015. Even in the DRT proceedings initiated by the Respondent, the Respondent categorically admitted the facts that the account of the Corporate Debtor was declared as NPA on 27.03.2015.

5. From the aforesaid events, it is a fact that the Respondent Bank categorically admitted that the account of the Corporate Debtor was declared as NPA on 27.03.2015.

6. Learned Sr. Counsel submitted on 17.05.2018, Respondent Bank filed Company Petition before the Adjudicating Authority under Section 7 of the I&B Code, 2016 seeking initiation of CIRP of the Corporate Debtor and in the application in Part-IV the following dates have been mentioned:

| **Facility** | **Amount in default** | **Date of defaults** |
|---|---|---|
| Term Loan 1 | Rs.37,63,33,783.45p | 30.01.2016 |
| Funded Interest | Rs.4,90,16,105.07p | 30.09.2015 |

| | | |
|---|---|---|
| Term Loan II | Rs.50,34,10,876.82p | 30.01.2016 |
| Funded Interest | Rs.6,66,52,574.70p | 30.11.2015 |
| Cash Credit | Rs.60,13,43,090.66p | 29.10.2015 |
| Letter of Credit | Rs.58,46,63,792.66p | 23.09.2015 |
| **Total** | **Rs.218,14,20,222.95p** | |

7. The Learned Sr. Counsel submitted that the Respondent Bank took different stand with regard to the date of default when an application filed before the DRT, Mumbai against the Corporate Debtor and the date of default shown as 27.03.2015 and in the application filed before the Adjudicating Authority under Section 7, the Respondent shown the above dates, which are contradictory.

8. The Learned Sr. Counsel submitted that whether there can be two dates of defaults in respect of the same debt one for the purpose of proceedings filed before the DRT and the other for the purpose of proceedings before the Adjudicating Authority.

9. It is submitted that the MRA was revoked by the Respondent Bank and the date of NPA shown as 27.03.2015 and the date of NPA should be taken as date of default. However, the impugned order is vague and unreasoned and has been passed on the basis of incorrect facts. The Learned Adjudicating Authority erred in not appreciating the fact that the application filed by the Respondent was barred by law of limitation as the same was filed beyond 3 years from the date of actual default i.e. the date when the account of the Corporate Debtor was declared as NPA i.e. 27.03.2015. The Application

under Section 7 was filed on 17.05.2018 which is beyond 3 years from the date of NPA.

10. The Learned Sr. Counsel further submitted that the Adjudicating Authority in the impugned order wrongly recorded the fact that there is no record of termination of the MRA dated 30.03.2015, as a matter of fact the MRA was revoked by the Respondent Bank by its letter dated 01.02.2016 and the Respondent Bank called upon the Corporate Debtor to pay an amount of Rs. 174.61 crores. Further, the dates of default taken by the Respondent Bank in the Application under Section 7 is without any basis and has conveniently been taken by the Respondent Bank so as to bring the application within the period of limitation.

11. The Learned Sr. Counsel further submitted that once the amount was recalled by the Respondent Bank, the date of default could be the date of declaration of NPA i.e. 27.03.2015 and in this regard a reliance is placed from the judgment of the Hon'ble Supreme Court in ***Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company Ltd. (2019) 10 SCC 72***.

12. In view of the reasons as stated above the Learned Counsel has prayed this Bench to allow the Appeal by setting aside the impugned order, which is contrary to the facts and law.

**1st Respondent's Submissions:**

13. Sh. Ramji Srinivasan the Sr. Learned Counsel appearing for the Respondent Bank submitted that the present appeal is not sound in law

which has been filed with the sole purpose of enabling reneging Corporate Debtor to continue evading from its obligations under the I&B Code.

14. It is submitted that the only pre-requisite for admitting an application under Section 7 of the I&B Code, 2016 is that there must be a debt due and default and in the present case, it is clearly established that the Corporate Debtor defaulted in payment and the same has been acknowledged continuously. The default claimed by this Respondent in Section 7 Application are under the MRA dated 30.03.2015 and Supplemental Working Capital Consortium Agreement dated 14.05.2015 entered into between the Corporate Debtor and the Respondent. The Section 7 Application was filed on 17.05.2018 within 3 years of the 1st date of default under the MRA and Supplemental WC Agreement which occurred in September, 2015 and hence the same is within the three year' period as per Article 137 of the Limitation Act, 1963.

15. It is submitted that, it is a settled position that where a debt has been restructured as in the present case, the date of default must be under the new repayment schedule under the restructuring document, as in the present case the MRA and the Supplemental WC Agreement.

16. It is submitted that the classification of an account as a Non-Performing Asset (NPA) is irrelevant for the purpose of initiation of CIRP under the Code, whilst the period of limitation commences only from the "date of default" as required under the I&B Code. The Corporate Debtor committed defaults under MRA dated 30.03.2015 and the Supplemental WC

Agreement dated 14.05.2015 respectively. The total outstanding in relation the facilities claimed in Section 7 Application as on 30.04.2018 was Rs.218,14,20,222.95.

17. The Learned Sr. Counsel further submitted that the Respondent Bank had placed several documents before the Adjudicating Authority evidencing debt and default such as record of default under the report of the Central Repository of Information on Large Credits (CRILC) dated 01.09.2017 where the accounts of the Corporate Debtor have been classified as SMA-I and doubtful restructured. Further, the record of default under the report of the CIBIL dated 01.08.2017 has been summarised in the application wherein the concerned accounts have been classified as doubtful. Further, the statement of accounts of Respondent Bank (copies of Bankers book maintained in accordance with Bankers Book Evidence Act, 1891) evidencing default on the part of the Corporate Debtor have been mentioned in the application filed before the Adjudicating Authority.

18. Further, the default committed by the Corporate Debtor in repayment of the facilities granted by the Bank have been clearly acknowledged in the annual report of the Corporate Debtor for FY 2015-16. Further, the standalone financial statements of the Corporate Debtor for the period of 01.04.2017 to 31.03.2018 available on the website of the Ministry of Corporate Affairs filed alongwith the classification note dated 19.12.2021 also filed before the Adjudicating Authority which clearly evidences an acknowledgement that the Corporate Debtor has defaulted in making interest payments on working capital, term loans etc.

19. The Learned Sr. Counsel further submitted that the Hon'ble Supreme Court in the case of ***Innoventive Industries Ltd. Vs. ICICI Bank (2018) 1 SCC 407 paras 28 & 30 and Mobilox Innovations PVt. Ltd. Vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353 para 37*** has already laid down the law in relation to admission of Application under Section 7 of the I&B Code, that the only thing the applicant has to establish is the existence of the debt and default of the Corporate Debtor.

20. The Learned Sr. Counsel submitted that the Adjudicating Authority has rightly held that a default has occurred and the pre-requisite for admission of Section 7 are duly satisfied. Hence, the impugned order requires no interference. Further, the issues which have been raised by the Appellant in the present Appeal have already been raised by the Corporate Debtor before the Adjudicating Authority and the issues have attained finality and therefore, required no further consideration. Hence, the Learned Sr. Counsel prayed this Bench to dismiss the Appeal with costs.

**Analysis / Appraisal:**

21. Heard the Learned Sr. Counsel appeared for the respective parties perused the pleadings and documents and the citations relied upon by them. After analysing the pleadings, the moot point for consideration is whether the Appellant has made out any case to be interfered with the order passed by the Adjudicating Authority.

22. The 1st Respondent Bank filed an application before the Adjudicating Authority under Section 7 of the I&B Code, 2016 seeking Initiation of

Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor for the reason that the Corporate Debtor defaulted re-payment of Rs.218,14,20,222.95. From the perusal of Part-IV of the Application under Column-1, it is stated that the Financial Creditor had granted certain term loan and working capital facilities to the Corporate Debtor from time to time and restructured on the terms and conditions as per the sanctioned letter dated 25.03.2015 and the MRA dated 30.03.2015. Further it is stated that the detailed terms and conditions of enhanced working capital credit facilities incorporated in the first Supplemental Working Capital Consortium Agreement dated 14.05.2015. The details of term loan disbursed were also shown in Column-1. In Column-2, the occurrence of default under term loans have been specifically mentioned such as the date of defaults i.e. 30.01.2016, 30.01.2016, 30.09.2015, 30.11.2015, 29.10.2015 and 23.09.2015. Further in Part-V, the particulars of financial debt and the evidence of default have been mentioned. It is a specific case of the Respondent that the record of default as available with the Bank is (1) report of Trans Union CIBIL dated 01.08.2017 and (2) report of the Central Repository of Information on Large Credits dated 01.09.2017. Further, the Bank relied upon the copies of entries in a Bankers Book in accordance with the Bankers Books Evidence Act, 1891. Further, the Bank also relied upon the documents to prove the existence of financial debt, the amount and date of default i.e. (1) recall notice dated 01.02.2016 issued by the Financial Creditor to the Corporate Debtor demanding payment of Rs. 174.61 crores, (2) Annual Report for the Financial Year 2015-16 of the Corporate Debtor.

23. The Corporate Debtor contested the matter by filing a reply affidavit taking the similar stand as taken in the present appeal stating that the Application under Section 7 of I&B Code, 2016 is barred by limitation on the ground that the occurrence of NPA dated 27.05.2015 and Section 7 Application filed on 17.05.2018 which is beyond 3 years and is not permissible under the law of limitation as held by the Hon'ble Supreme Court. Further, the Appellant taken the stand before the Adjudicating Authority that the alleged amount claimed by the Bank is not due and payable. The Adjudicating Authority having gone through the issue raised by the Corporate Debtor and passed the order by observing as under:

> *"36. The Corporate Debtor has contended the matter and opposed admission on three grounds. First being debt claimed under Section 7 Application is stated to be on the basis of incorrect date of default. While perusing the records, we have observed that the Financial Creditor granted various facilities to the Corporate Debtor and upon non-payment of those facilities, the Account of the Corporate Debtor became NPA. Thereafter, the Applicant and Respondent vide Agreement dated 30.03.2015 entered into MRA. Excerpts of Schedule of repayment agreed vide MRA is also annexed to the Petition under which repayment was to be made till 2024-25. Even after entering the MRA, the Corporate Debtor defaulted the repayment schedule of MRA.*
>
> *37. Vide letter dated 01.02.2016, the Financial Creditor called upon the Corporate Debtor to pay a sum of Rs.174.61 crore being the amount due and payable as on 31.12.2015 within 7 (Seven) days from the date of receipt of recalled notice. Therefore, it can be construed as date of default were taken by*

*the Applicant were correct. The Corporate Debtor failed to comply with the MRA.*

*38. Secondly, the Corporate Debtor contented that the amount claimed in the Application is not due and payable, the moment there is revocation of the MRA, the rights and liabilities of the parties falls back to the original facility agreements which were already declared NPA by the Applicant as has been demonstrated above upon the perusal of records. We have noticed that both the parties entered into MRA and there is no record of terminating MRA. Therefore, the Corporate Debtor's arguments are devoid of merits that the amount claimed is not due and payable under MRA.*

*39. Also, the reliance placed by the Corporate Debtor on judgement of Innoventive Industries is misplaced, even if we consider the situation that MRA was revoked and rights and liabilities of parties falls back the original facilities Agreements vide which Respondent was declared NPA way back in this situation also there was default on part of the Respondent. Hence now Respondent cannot shy away from the fact that there is debt and default in repayment was committed by the Respondent. The MRA was to facilitate restructuring of the Corporate Debtor and not to defraud the Creditor. Therefore, this Bench is of the considered opinion that the Corporate Debtor owes money to the Financial Creditor."*

24. The contention of the Appellant is that the date of NPA i.e. 27.03.2015 is to be taken as date of default and the dates mentioned by the Bank in Part-IV of the application cannot be taken into consideration for the reason that the MRA dated 30.03.2015 has been revoked by the Bank by issuing a recall notice dated 01.02.2016. The Respondent taken a stand that the

declaration of NPA cannot be taken as a date of default. For the purpose of filing Application under Section 7, the date of default is crucial for initiating CIRP proceedings of the Corporate Debtor. The Bank has categorically stated that the record of default of the Corporate Debtor has been classified as SMA-1 and under the report of CIBIL the record of default has been summarised. Further, the statement of accounts of the Bank maintained in accordance with the Bankers Book Evidence Act, evidencing occurrence of default on the part of the Corporate Debtor. In addition, it is also submitted that the Annual Report of the Corporate Debtor for the Financial Year 2015-16 shows the existence of the financial debt and the said Annual Report is an acknowledgment for the purpose of limitation. From the perusal of the documents, it establishes the existence of debt and a default occurred in non-payment of debt due to the Bank. Further, it is also evident from the recall notice dated 01.02.2016 that the Bank demanded the payment of Rs.174.61 crores which there is no denial or dispute with regard to existence of debt. The Adjudicating Authority clearly observed that there is a debt and default in repayment by the Corporate Debtor. The argument of the Appellant that the Bank has issued a recall notice dated 01.02.2016 thereby the MRA has been revoked is concerned, this Tribunal is of the view that there is ample evidence with regard to the debt and default from the documents filed by the Banks such as the entries in a Banker's Book in accordance with Bankers Book Evidence Act, and recall notice itself establishes that there is a debt and default. Further the Annual Report establishes the existence of debt. In this regard, the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. Vs. Union of India (2019) 4 SCC 17 para 55*** held that:

*"55. Apart from the record maintained by such utility, From I appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, makes it clear that the following are other sources which evidence a financial debt:*

*(a) Particulars of security held, if any, the date of its creation, its estimated value as per the creditor;*

*(b) Certificate of registration of charge issued by the Registrar of Companies (if the corporate debtor is a company);*

*(c) Order of a court, tribunal or arbitral panel adjudicating on the default;*

*(d) Record of default with information utility;*

*(e) Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925;*

*(f) The latest and complete copy of the financial contract reflecting all amendments and waivers to date;*

*(g) A record if default as available with any credit information company;*

*(h) Copies of entries in a bankers book in accordance with the Bankers Books Evidence Act, 1891."*

25. The Hon'ble Supreme Court (supra) clearly held that the other source of evidence can be taken into consideration for the purpose of existence of financial debt includes the copies of entries in a Bankers Book in accordance

with the Bankers Book Evidence Act, 1891. The Bank has in its application clearly mentioned in Part-V, Column-7 regarding the reliance of copies of entries in Bankers Book. Further the Bank also relied upon the other documents such as recall notice dated 01.02.2016 and Annual Report for the Financial Year 2015-16. Sub-section (2) of Section 7, provides the form and manner an application under Sub-section (1) can be filed duly accompanied with such fee as may be prescribed. Further Sub-section (3) of Section 7 provides the Financial Creditor shall along with the application furnish (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified. As stated supra the Bank has filed the said documents for the purpose of establishing the debt and default.

26. Further the aforesaid documents also can be relied upon for the purpose of acknowledgement of debt in the eye of law. Therefore, this Tribunal affirms the view taken by the Adjudicating Authority that the Appeal is within the limitation.

**Provision of law**

27. Section 7 deal with Initiation of Corporate Insolvency Resolution Process by Financial Creditor sub-section (1) thereof read thus:

> *"A Financial Creditor either by itself or jointly with (other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government,) may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred."*

28. In view of the above provision of law, the Application under Section 7 can be initiated when a default has occurred and there is no such provision that the occurrence of default can be taken into account from the date of NPA. The argument of the Appellant is negated with respect to the contention that the date of NPA is to be treated as date of default. In this regard, the word default has been defined under Section 3(12) of the I&B Code, 2016 *"means a 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."*

29. The Hon'ble Supreme Court in various decisions has categorically held that Trigger for Initiation of CIRP by a Financial Creditor is the date of "default" on the part of the Corporate Debtor i.e. actual non-payment of debt repayable by the Corporate Debtor when a debt has become due and payable and not the date of NPA. With regard to the aforesaid finding, a beneficial reference is drawn in the matter of ***Laxmipat Surana Vs. Union Bank of India (2021) SCC Online SC 267 para 42, 43, 49*** whereby the Hon'ble Supreme Court held that the date of default is to be reckoned for the purpose of Initiation of CIRP and not the date of NPA.

> *"42. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code. Section 18 of the Limitation Act reads thus:*
>
> *43. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 IBC.* ***However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the***

***expression "default" — not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean 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****. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non– payment of debt.* ***Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 IBC. Further, the acknowledgment must be of a liability in***

***respect of which the financial creditor can initiate action under Section 7 IBC.***

***49. Section 18 of the Limitation Act, however, posits that a fresh period of limitation shall be computed from the time when the party against whom the right is claimed acknowledges its liability. The financial creditor has not only the right to recover the outstanding dues by filing a suit, but also has a right to initiate resolution process against the corporate person (being a corporate debtor) whose liability is coextensive with that of the principal borrower and more so when it activates from the written acknowledgment of liability and failure of both to discharge that liability."***

30. In view of the decision of the Hon'ble Supreme Court (supra), Section 18 of the Limitation Act, 1963 applicable to Section 7 Applications under I&B Code and held that the acknowledgment of debt by a borrower initiates a fresh period of limitation from the date of acknowledgement of debt.

31. The documents as relied upon by the Respondent Bank is sufficient to establish that there is debt and default and the Adjudicating Authority having satisfied that there exists a debt and default and is incompliance with the provisions of law as encapsulated under Section 7 of the I&B Code. There is no error and illegality in the order passed by the Adjudicating Authority. Accordingly, the issue is answered.

**Conclusion:**

32. Viewed in that perspective this Tribunal comes to an irresistible and inescapable conclusion that order passed by the Adjudicating Authority dated 12.08.2022 need no interference.

33. Resultantly, the Appeal sans merit and the same is liable to be dismissed. Accordingly, the Appeal is dismissed. No orders as to cost.

**[Justice Ashok Bhushan]**
**Chairperson**

**[Mr. Kanthi Narahari]**
**Member (Technical)**

**[Mr. Barun Mitra]**
**Member (Technical)**

*pks*