

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Review Application No. 09 of 2020

in

Company Appeal (AT)(Insolvency) No. 848 of 2019

IN THE MATTER OF:

**Deepakk Kumar
Director of M/s Sovereign
Infrastructure & Developers Ltd.
No. 16, 2nd Floor, Jaladrshini Layout,
New BEL Road, Bangluru**

....Review Applicant/Appellant

Versus

**M/s Phoenix ARC Pvt. Ltd.
(Trustee of Phoenix Trust FY 16-15 Scheme B)
5th Floor, Dani Corporate Park, 158,
CST Road, Kalina, Shatacruz (East),
Mumbai-400098.**

**M/s Sovereign Infrastructure & Developers Ltd.,
No. 16, 2nd Floor, Jaladrashini Layout,
New BEL Road, Bangluru
Through : Resolution Professional
(Regd. No. IBBI/2017/IPA-001/1P-
P00932/2017-18-11550**

...Respondents

Present:

For Appellant: Mr. Dilip Singh, Advocate

**For Respondent: Mr. Suresh Dutt Dobhal along with Ms. Sonakshi
Dhiman, Advocates for R-1**

Mr. Goutham Shivshankar (RP), Advocate for R-3

ORDER

Venugopal M. J

Introduction

The Review Applicant /Appellant has projected the instant Review Application No. 09 of 2020 (under Section 420(2) of the Companies Act, 2013) r/w Rule 11 of the 'NCLAT' Rules, 2016) seeking to '**Review**' the judgement dated 05.03.2020 in in Company Appeal (AT)(Insolvency) No. 848 of 2019 for correction of an error 'apparent on the face of record' leading to an error also.

Review Applicant's Contentions

2. It is the stand of the Review Applicant that an error in the judgement in Company Appeal (AT)(Insolvency) No. 848 of 2019 can be ascertained from the following dates November,(1) 2012, the date of default of the original loan of Karnataka Bank which was later assigned to ARC/Respondent No. 1 (2) 9.6.2016, the acceptance of loan assignment by the 'Corporate Debtor'. (3) 6.9.2018, the application filed u/s 7 of the 'I&B' Code filed before the Adjudicating Authority ('National Company Law Tribunal'), Bengaluru.

3. The Learned Counsel for the Review Applicant/Appellant contends that the application under Section 7 of the 'I&B' Code filed before the Adjudicating Authority ('NCLT'), Bengaluru was beyond the period of limitation and this plea was raised on the basis of simple admitted facts. However, this Appellate

Tribunal held that the said application u/s 7 of the 'I&B' Code is within the limitation period.

4. The Learned Counsel for the Review Applicant/Appellant takes a stand that the 1st Respondent / ARC filed the Section 7 application before the Adjudicating Authority on 05.09.2018 and that the admitted position is there is a gap of five years and ten months. Moreover, it is represented on behalf of the Review Applicant that in Form No. 1 filed by the 1st Respondent / ARC before the 'Adjudicating Authority' November 2012 is categorically written in the date of 'default column' and, therefore, there is no scope for interpretation in respect of the 'date of default', in view of the law laid down in **'Vasdeo R. Bhojwani' V. 'Abhyudya Cooperative Bank Ltd. & Anr.'** (vide Civil Appeal No. 11020 of 2018 reported in 2019) 9 SCC page 158.

5. Advancing his arguments, the Learned Counsel for the Review Applicant/Appellant emphatically comes out with a plea that to bring the application u/s 7 of the 'I&B' Code within the period of limitation, the Tribunal had relied upon the 'acknowledgment' from one subsequent date i.e. 9.6.2016 as on this date an 'Acceptance of Loan Assignment Agreement' was signed with a new loan agreement for fresh financing of Rs. 5 crores was signed by the 'Corporate Debtor' and its Directors including the Appellant. Besides this, some payments were made but in the new loan, as per the averments of the Respondents. But these payments cannot save the time barred loan, as these are beyond the period of Limitation.

6. Expatiating his contention, the Learned Counsel for the Review Applicant/Appellant submits that signing of a new loan agreement or an assignment agreement beyond the period of three years, from the date of default of earlier loan cannot extend the period of limitation of a time barred loan.

7. Added further, it is the case of Review Applicant that the date of default is 1.11.2012 and the three-year period ended on 31.10.2015. Further, in the judgement of **Hon'ble Supreme Court in 'Gaurav Hargovindbhai Dave' V. 'Asset Reconstruction Company (India) and Anr.'** (Civil Appeal No. 4952 of 2019) it is held that the contents of Form 1 that has statutorily to be annexed to the Section 7 application in Column II, which was the date of occurrence of default 1.11.2012. In the instant case, according to the Review Applicant, the default date was filled up in form 1 as 1.11.2012 and that the contents of Form 1 was not considered.

8. The forceful contention advanced on behalf of the Learned Counsel for the Review Applicant/Appellant is that in the present case time begins to run from 1.11.2012 as a result of which the application is time barred, as per law laid down in the decisions of **Hon'ble Supreme Court in 'Gaurav Hargovindbhai Dave' V. 'Asset Reconstruction Company (India) and Anr.'** (Civil Appeal No. 4952 of 2019) relying upon the decision of **Hon'ble Supreme Court 'B.K. Educational Services Pvt. Ltd.' V. 'Parag Gupta and Associates', 2018 SCC online Supreme Court 1921.**

9. The Learned Counsel for the Review Applicant/Appellant submits that there is nothing on record after first default in November, 2012 anything happened till October, 2015 i.e. within three years. Further, there is no pleading in application u/s 7 of the 'I&B' Code and that no application u/s 5 of the Limitation Act, 1963 claiming condonation of delay with averments of acknowledgement or receipt of fresh disbursement of loan was filed.

10. The Learned Counsel for the Review Applicant/Appellant contends that in **Review Application No. 2 of 2018 (Dr. M.A.S. Subramanian & Ors.) Vs. 'T.S. Shivakumar & Ors.'** this Tribunal while dealing with the issue of maintainability of 'Review Jurisdiction' referred to the judgement of the **Hon'ble Supreme Court in the matter of 'Assistant Commissioner, Income Tax', Rajkot V. 'Saurashtra Kutch Stock Exchange Ltd.'** (reported in 2008) 14 SCC at page **171** and that it was discussed and held that any manifest and self-evident error in the judgement which is passed and need not travel beyond record to see whether the judgement is correct or not. Such aspects beyond record cannot be gone into and considered on the strength of Section 420(2) of the Companies Act.

11. The Learned Counsel for the Review Applicant/Appellant takes a plea that in the instant case, for none of the errors, this Tribunal has to travel beyond the record, as all apparent on the record and that the date of default was November, 2012 and that the date of filing of an application u/s 7 of the Code was on 06.09.2018.

12. The Learned Counsel for the Review Applicant/Appellant puts forth legal argument that '*no amount of new loan*' can extend the limitation of old loan and further this Tribunal had applied Section 18 of the Limitation Act to an alleged 'acknowledgement' which is beyond three years from the date of default and this cannot be an 'acknowledgement' in the eye of Law and further that this is the self-evident error from the fact of record and that no other records need to be seen.

13. The Learned Counsel for the Review Applicant/Appellant submits that the 'Default' in 'I&B' Code has a specific meaning as 'default of loan' demanded by the Bank and it cannot be equated with new loan demand. Further, the new loan balance is of Rs. 2.5 crores and had it been demanded, it could have been paid then and there as debtor has this amount available with it from the day one. Also that, the 90-95% of the project is complete and the 'Resolution Professional' has not done anything and that the 'Corporate Debtor' is heading towards 'Insolvency' and that the 'Promoters' are ready to arrange the fund and to complete the project within 3-6 months based on different towers.

14. The Learned Counsel for the Review Applicant/Appellant contends the facts which formed the part of the order dated 30.09.2019, 30.11.2019, 4.12.2019 passed by this Tribunal in Company Appeal (AT)(Insolvency) No. 848

of 2019 were not considered at all in the judgement dated 05.03.2020 and the said facts run as under:-

“a. That there are sufficient funds to complete the project. At present a sum of Rs. 11 Crore is lying with bank, which is sufficient to complete the Block-A&B of the project.

b. Applicant filed affidavit that remaining works of different towers in the project can be completed in 90 days. The tentative dates were given block-wise and Tower wise.

c. The details of receivables from customers given Tower wise to show the solvency of company.

d. 84 flats are already registered in block-A&B and 300 flats are ready for registration.”

15. This Tribunal has heard the Learned Counsel for the Review Applicant / Appellant at the stage of admission of the 'Review Application' and noticed the contentions advanced.

Legal Position of Review

16. It is to be pointed out that the power to 'Review' is not an 'inherent power' and must be showered by Law either expressly or by necessary implication. As a matter of fact, the power to 'review' is a creation of statute. Indeed, a 'Review Jurisdiction' cannot be pressed into service as an 'Appellate Jurisdiction'. Moreover, the 'Power of Review' is not to be confused with an Appellate power. A 'review' cannot be claimed or asked for merely for a fresh hearing or arguments or the correction of an erroneous view taken earlier.

Some Decisions

17. Be it noted, that no error can be said to be an error 'on the face of record' if it is not self-evident and requires an examination or argument to establish it as per decision of **Hon'ble Supreme Court in 'Delhi Administration' V. 'Gurdip Singh' reported in AIR 2000 Supreme Court page 3737.** In reality, 'Review' erases the previous judgement and hence, operates as Law from the inception as per decision of **Hon'ble Supreme Court M.A. Murthy V. 'State of Karnataka & Ors.' reported in 2003 7 SCC at page 517.** Even for correcting an erroneous decision 'Review' does not lie.

18. It is an axiomatic principle in Law that an error contemplated must be such which is apparent on the face of record and not an error which has to be fished out and searched. The term 'Review' judicially and literally means 're-examination' or 're-consideration'. Under the guise of 'Review' the Tribunal would not rehear the parties both on *facts and Law*'. If two views are possible

on the point involved, the same is not a ground for 'Review' as per decision of the **Hon'ble Supreme Court in 'Hari Nagar Sugar Mills Ltd. of Bihar & Ors.'** reported in (2006) 1 SCC page 509. A re-appraisal of evidence on record for finding out an error would amount to an exercise of 'Appellate Jurisdiction' which is impermissible in Law.

19. It is significant to point out that a 'Court' or 'Tribunal' has no jurisdiction to review its decision duly pronounced. It can do so only if it authorised by statute as per decision **'Fernandes' V. 'Ranga Nayakulu' AIR 1953 Mad. 236.** An inherent jurisdiction must be exercised subject to the Rule if the Code does contain specific provisions that would meet the necessities of the case in question, such provisions should be followed, and the inherent jurisdiction should not be invoked as per decision **'Malappa' V. 'Alagiri' AIR 1931 Mad. 79.** Further, the Court has no inherent jurisdiction to reconsider or review an order as per decision **'M Gadiya' V. 'M.K. Sewak' AIR 1977 Mad. 140.**

'I&B' Code, 2016 and 'Companies Act', 2013

20. Section 5 Definition (1) of the 'I&B' Code speaks of 'Adjudicating Authority' for the purpose of this part (part II), meaning 'National Company Law Tribunal' constituted under Section 408 of the Companies Act, 2013 (18 of 2013). Section 2 Definition (4) of the Companies Act, 2013 speaks of 'Appellate Tribunal' meaning the 'National Company Law Appellate Tribunal' constituted under Section 410.

Inherent Powers

21. Rule 11 of the 'National Company Law Appellate Tribunal' Rules, 2016 speaks of 'inherent powers' and the same is as follows: -

“Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal”.

Companies Act

22. Section 420(2) of the Companies Act, 2013 reads as under: -

“(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it and shall make such amendment, if the mistake is brought to its notice by the parties:-

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.”

Discussions

23. A mere perusal of the ‘NCLAT’ Rules, 2016 unerringly point out that there is no express provision for ‘Review’ and further that the Review Applicant / Appellant cannot seek the aid of Rule 11 of the ‘NCLAT’ Rules, 2016 which speaks of inherent powers. Also, that the Review Applicant cannot seek umbrage under section 420(2) of the Companies Act, 2013 for filing the ‘Review Application’ on the purported ground of rectifying any mistake apparent from the record, within two years from the date of order passed, in the considered opinion of this Court.

24. As far as the Company Appeal (AT)(Insolvency) No. 848 of 2019 is concerned, the same was heard on 17.02.2020, arguments were advanced on both sides and that the ‘Judgement’ was reserved. In fact, the judgement was pronounced on 05.03.2020 whereby and whereunder the ‘Appeal’ was found to be bereft of any merits and the same was dismissed without costs. As such, the counter plea taken by the Review Applicant/Appellant that earlier orders dated 30.09.2019, 13.11.2019 and 04.12.2019 were not taken into account by this Tribunal while disposing of main appeal sans merits and it is an otiose one.

25. It cannot be gainsaid that 'I&B' Code, 2016 does not contain any provision for 'Review'. Also, it does not contain any provision similar to Section 420 of the Companies Act, 2013. In this connection, a mere perusal of the 'National Company Law Appellate Rule' 2016 unerringly point out that there is no express Rule for 'Review'. There can be no two opinion of a prime fact that Rule 11 of 'NCLAT' Rules, 2016 is not a substantive Rule which confers any power or jurisdiction on the 'Tribunal'. A 'Tribunal' has no power to perform an act which is forbidden by Law.

26. The term 'record' in Section 420 of the Companies Act, 2013 means record to the proceedings of the case. An error must be a '*patent error*' and not a mere '*wrong decision*'. Where two views are possible and the matter is debatable, the order cannot be rectified by mistake apparent from record as per decision '**Commissioner of Income Tax' V. 'East India Cotton Association Ltd.'** (1984) 149 ITR pg. 274.

When there is no mistake apparent from the record in the judgement delivered by a Tribunal, then an application for review filed by the concerned Applicant cannot be construed to be one under Section 420(2) of the Companies Act or under Rule 11 of 'NCLAT' Rules, 2016.

27. It is worth for this Tribunal to recollect and recall the decision of **Hon'ble Supreme Court in 'Lily Thomas' V. 'Union of India' reported in AIR 2000 Supreme Court pg. 1650 at spl. Pg. 1665** wherein it is held that the power to

rectify or amend the order is exercised to remove the mistake without disturbing its finality.

28. Be that as it may, in view of the fact that 'Re-hearing' and correction of the judgement sought for in the present Company Appeal (AT)(Insolvency) No. 848 of 2019 dated 05.03.2020 is impermissible in Law and in the instant case cemented on the attendant facts and circumstances and on an overall evaluation of the same in a real and proper perspective, this Tribunal is of the considered opinion that the appropriate course of action open to the Review Applicant / Appellant is to approach the Hon'ble Supreme Court against the judgement in Company Appeal (AT)(Insolvency) No. 848 of 2019 dated 05.03.2020 passed by this Tribunal. Viewed in that perspective, the Review Application is devoid of merits.

Disposition

In fine, the Review Application No. 09 of 2020 in Company Appeal (AT)(Insolvency) No. 848 of 2019 is dismissed. No costs.

**[Justice Venugopal. M]
Member (Judicial)**

**[V.P. Singh]
Member (Technical)**

**[Shreesha Merla]
Member (Technical)**

NEW DELHI

17th September, 2020
ss