

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 408 of 2021**

In the matter of:

**Vivekanand Jha (Suspended Management of
Mithilanchal Industries Pvt. Ltd.)
Having its registered office at Block, Plot No.5916,
Road No.59, GIDC, Sachin, Surat (Gujarat)**

....Appellant

Vs.

**1. Punjab National Bank
Surat Main Branch, Surat
Having its Registered Head Office at Plot No.4,
Dwarka, Sector 10, New Delhi-110075**

**2. Mr. Jigar Tarunkumar Bhatt
Resolution Professional of M/s. Mithilanchal
Industries Pvt. Ltd.
B/101, Arvind Citadel,
Behind BSNL Office, Navrangpura,
Ahmedabad- 380009,
Gujarat**

....Respondents

**For Appellant: Mr. Adhitya Srinivasan, Mr. Rahul Patel,
Advocates.**

**For Respondents: Mr. Jigar Tarunkumar Bhatt, Advocate for R2
(RP).
Mr. Abhinav Thareja, Advocate for PNB.**

ORDER

(Through Virtual Mode)

16.06.2021: Heard Learned Counsel for the Appellant.

2. This Appeal has been filed by the Appellant who was on suspended management of the Corporate Debtor-‘Mithilanchal Industries Pvt. Ltd.’. The Appeal has been filed against impugned Order dated 15.04.2021 (read with speaking to minutes order dated 20.04.2021) passed by Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Court No. I) in C.P. (IB) No. 173/7/NCLT/AHM/2019. By the said Impugned Order, the Adjudicating Authority admitted Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC in short) filed by the Respondent-‘Punjab National Bank’ (Hereinafter referred as Bank) against the Corporate Debtor- ‘Mithilanchal Industries Pvt. Ltd.’.

3. In the Application filed under Section 7 of the IBC, the Bank claimed before the Adjudicating Authority that it had approved various financial facilities and disbursed Loan in the form of Cash Credit and over draft facilities dated 6th March, 2013 but the Corporate Debtor did not pay the instalments as per the Agreement. The Bank had to resort to proceedings before Debts Recovery Tribunal (DRT in short). The Bank claimed that Notice under Section 13(2) of SARFAESI Act, 2002 was issued to the Corporate Debtor when the Loan Account became Non-Performing Assets. The Bank claimed that the date of default was 27th December, 2014.

4. Before the Adjudicating Authority, the Bank claimed outstanding dues of Rs. 5,99,73,482/-. Before the Adjudicating Authority, the Appellant raised defence that the claim made by the Bank was time barred. It was claimed that

in Notice under Section 13(2) of SARFAESI, NPA is stated to be dated 29.12.2014 and in Application under Section 7 of the IBC, Date of Default is stated to be dated 27.12.2014. The Corporate Debtor referred to the developments before the DRT where the notice under Section 13(2) was challenged and the Bank was unsuccessful upto the High Court.

5. The Adjudicating Authority heard the parties and after considering the rival assertions observed in Para 7 of Impugned Order that there is no dispute of the fact that the Corporate Debtor has committed default in paying the financial debt more than Rupees One Lakh which is the threshold under Section 4 of the IBC, to the Financial Creditor. Adjudicating Authority recorded further reasons on grounds raised and admitted the Application under Section 7 of the IBC by the impugned order dated 15th April, 2021 (read with speaking to minutes order dated 20th April, 2021). Thus, the present Appeal.

6. The Learned Counsel for the Appellant has referred to Annexure A-2 relating to the Cash Credit Facility on Term Loan approved by the Bank to state that the Cash Credit Facility was accepted to the extent of Rupees Six Crores but if the form for filing the Application under Section 7 (at Page 140 @ Page 145) is perused, it shows that the outstanding shown towards balance is of Rs.5,99,73,485. Thus, it is argued that Appellant still was within the cash credit limit. It is argued that the same is the situation with regard to the term loan also. It is argued that Corporate Debtor was paying the interest and instalments and the account was wrongly shown as NPA. It is argued that the

notice under Section 13 of the SARFAESI issued to the Corporate Debtor by the Bank was not upheld in DRT upto the High Court.

7. We have heard the Counsel and gone through the matter. It appears to us that the Counsel for Appellant is not correctly reading Annexure A-2. It is sanction of credit facilities issued by Bank on 04.02.2013. The Cash Credit limit figure and Term Loan figure are subject to terms and conditions as per Appendix to the letter. The Counsel while reading the format of Section 7 Application Part IV is not reading the Interest and Penalty portions. Minus recovery made the outstanding amount as per Bank on 31.01.2019 was Rs.10,67,06,677.36 paise. Bank has shown other dues also and attached Statement of Accounts with Date of Default shown as 27.12.2014.

8. As regards success on D.R.T. front, Annexure A-8 (Page 79) shows that the matter went to Hon'ble High Court of Gujarat at Ahmedabad as D.R.T had held that there was non-compliance of provisions of Section 13(2) of SARFAESI inasmuch as details of the amounts due were not provided. As such, DRT had directed Bank to restore possession with liberty to proceed afresh under SARFAESI Act (See Para 3 of the Order of High Court). What appears is that the notice failed for want of details of the amounts required under Section 13(3) of SARFAESI. It is not that debt was not due or in default. In application under Section 7 of IBC requisite particulars appear to be there. Hon'ble Supreme Court of India in Judgment in the matter of "M/s. Innoventive Industries Ltd.

vs. ICICI Bank” (Civil Appeal No. 8337-8338/ 2017- dated 31.08.2017) observed in para 27, as under:-

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.”

9. Perusal of the Appeal, Impugned Order and Annexures shows that before the Adjudicating Authority defence taken was of limitation and the Adjudicating Authority considered the defence taken and admitted the application after considering that the debt was within limitation. Learned Counsel for the Appellant is submitting that the Annexure A-6 OTS which is stated to be of 29th March, 2016 was taken from the Appellant under duress as the property had been illegally attached. It does not appear that if the OTS was taken under duress, the Appellant raised any dispute by moving any authority or taking any such defence before the Adjudicating Authority.

10. The present Appeal on facts and with regard to developments is similar to the averments and assertions made in Company Appeal (AT) (Insolvency) No. 407 of 2021 in the context of Corporate Insolvency Resolution Process against 'Telstar Industries Pvt. Ltd.'. We have already discussed the issues raised here, which are same as in that Appeal to find that the claim made by the Bank was within limitation. In the present matter, after going through the Appeal and the impugned order, we do not find any reason to take a different view from what we have taken in Company Appeal (AT) (Insolvency) No. 407 of 2021. The Counsel for Appellant is now trying to claim that the account itself never become NPA. In IBC, the requirements for initiating the proceeding is to see if there is a debt which is due and in default of an amount more than what is specified as a threshold in Section 4 of the IBC. As seen in the Judgment of Innoventive (supra) there can be even a dispute with regard to the actual amount which is outstanding but if the debt outstanding is more than the

amount specified as a threshold in Section 4 of the IBC, the Application is required to be admitted.

11. The Adjudicating Authority in the impugned order recorded in Paras 12 to 17, as under:-

*“12. Learned Counsel for the Corporate Debtor argued that the debt is time barre. According to him, as per the Bank’s own statement, the date of default is 27.12.2014. This application is filed on 12.02.2019. It is filed beyond three (03) years from the date of default and it is time barred. He submitted that as per various rulings of the Hon’ble Supreme Court, right from the rulings of **B.K. Education Society and Others** up to the latest case of the Hon’ble Apex Court held that a date of default does not shift and if the proceedings under the I & B Code is not filed within three years form the date of default, it cannot be entertained as barred by limitation as per the Article 137 of the Limitation Act. He further submitted that Judgment of Hon’ble Apex Court in the case of **Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Co-operative Bank Ltd. & Anr.** is not applicable in this proceeding on facts.*

13. As against this, the Learned Counsel for the Financial Creditor submitted that even after date of default, i.e. 27.12.2014, the Corporate Debtor had approached the Bank each year and has been giving one-time settlement (OTS) proposals thereby admitting the debt. Such OTS proposal lastly was given on 29.03.2016. This application is filed within the three years from the date of last OTS proposal given by the Corporate Debtor. Hence, this proceeding is within limitation in view of Section 18 of the Law of Limitation.

*14. Learned Counsel further submitted that Hon’ble Apex Court, in case of **Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd. & Anr.** has held that if a bank had filed proceeding under SARFAESI Act in debts Recovery Tribunal and then files*

*proceeding under Section 7 in the National Company Law Tribunal, then the period during which the Bank's proceedings under SARFAESI Act was pending, has to be excluded while reckoning the period of limitation as per Article 14 of Law of Limitation. In this case, if that period is excluded, then this application cannot be said to be a time barred. Moreover, Hon'ble NCLAT in case of **Kishanlal Likhmichand Bothra Vs. Canara Bank**, Civil Appeal No. 704 of 2020 has held that: "Fresh period of limitation from the date of which acknowledgement is said shall start as per Section 18 of the Limitation Act."*

15. We considered submissions of Learned Counsels for both the parties. We note that whether the period of limitation gets extended upon acknowledgement of debt or not is the point completely been answered by the Hon'ble NCLAT in case of **Kishanlal Likhmichand Bothra Vs. Cananra Bank**. It has been held by Hon'ble NCLAT that:

"13. Considering above judgment of the Hon'ble Supreme Court of India, we have no difficulty to state that Section 18 of the Limitation Act is applicable to proceedings under IBC and that if there is acknowledgement of debt in the balance sheets or the OTS Proposal, the period of limitation would get extended if the acknowledgment is made before the period of limitation expires....."

16. Keeping before our sight the above order of Hon'ble NCLAT, if we consider the facts in this case, we find that the date of default is 27.12.2014 thereafter by way of OTS firstly dated 09.11.2015 and thereafter on 29.03.2016, the Corporate Debtor acknowledged the date (before expiry of period of three years from the date of default). This application is filed on 12.02.2019, i.e. three years from the last date of acknowledgement of the debt. Hence, we hold that it is filed well within the period of limitation.

17. The Financial Creditor established that an amount of debt of Rs. 5,99,73,482/- is due and payable by the Corporate Debtor and the Corporate Debtor has committed default failed in paying the same. This application is defect

filed within the limitation. Hence, we admit the Corporate Debtor in the Corporate Insolvency Resolution Process.”

12. For such reasons, the Adjudicating Authority found that there was debt due and default and the Application filed by the Bank was complete and that the same deserves to be admitted. What appears is that there was earlier an Offer of Settlement dated 9th November, 2015 and OTS was entered into on 29th March, 2016 to pay Rs.1200 Lacs. Such OTS would amount to an acknowledgment. The OTS dated 29th March, 2016 has been accepted and signed by the Directors for the Corporate Debtor- ‘Mithilanchal Industries Pvt. Ltd.’ as well as ‘Telstar Industries (P) Ltd.’. When acknowledgment is there the Application filed on 12th February, 2019 was within limitation. It appears that even such OTS failed in further execution.

13. Keeping in view the Judgment of the Hon’ble Supreme Court of India in “*Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Co-operative Bank Ltd. & Anr.*” (Civil Appeal No. 9198 of 2019) and “*Asset Reconstruction Company (India) Ltd. vs. Bishal Jaiswal*” in Civil Appeal No. 323 of 2021 dated 15.04.2021, we do not find the Adjudicating Authority committed any error when it admitted the Application by not accepting the claim of the Appellant that the Application was time barred.

14. We do not find that there is any substance in the Appeal. We agree with the Adjudicating Authority with regard to the admission of Application.

15. We decline to admit the Appeal. The Appeal is disposed off. No orders as to costs.

[Justice A.I.S. Cheema]
The Officiating Chairperson

[Dr. Alok Srivastava]
Member (Technical)

Anjali/g