NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1379 of 2019

[Arising out of Order dated 22.10.2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in Company Petition No. 429 (IB)/MB/2019]

IN THE MATTER OF:

Digamber Bhondwe, Director
Raipur Tresure Island Private Limited
Shop No. 118, 1st Floor V Mall, Thakur Complex,
Kandivali East Mumbai-400101, Maharashtra, India **....Appellant/Corporate Debtor**

Vs

JM Financial Asset Reconstruction Company Limited (in capacity as Trustee of JMFARCO-UCO March 2014-Trust)
7th Floor, Cnergy, Appasabeb Marather Marg, Prabhadevi, Mumbai-400025 **....Respondent/Financial Creditor**

Present:
Mr. Krishnendu Dutta, Mr. Sunil Mund, Mr. Rahul Gupta and Mr. S. Patra, Advocates for Appellant
Mr. Ramji Srinivasan, Sr. Advocate with Mr. Ishkaran Singh, Advocate for Respondent.

J U D G M E N T

[05th March *2020]*

Justice A.I.S. Cheema.

The Respondent/Financial Creditor filed Application Under Section 7 of Insolvency and Bankruptcy Code, 2016 (I&B Code) having No. CP 429

(IB)/MB/2019 before Adjudicating Authority (NCLT Mumbai Bench). The Application was admitted by the Adjudicating Authority by impugned Order dated 22nd October, 2019, against Corporate Debtor "Raipur Treasure Island Pvt. Ltd." and hence the present Appeal by Director of the suspended Board of Corporate Debtor.

2. Facts necessary for decision of the present Appeal need to be stated. The Financial Creditor/Respondent claimed before the Adjudicating Authority that it is assignee of UCO Bank (The Original Lender). The UCO Bank had extended financial assistance to the Corporate Debtor by way of loan of Rs. 75 Crores, for developing Shopping Mall and Office Complex at Raipur. There was default in repayment of the Loan. Original Application No. 225 of 2013 was filed before Debt Recovery Tribunal, Jabalpur (DRT) which allowed the claim of the Financial Creditor and held that the Corporate Debtor was liable to pay Rs. 85,94,62,955.00 with interest from the date of filing of Original Application dated 28th September, 2013 till realization. The application under Section 7 was filed on the basis of such final order dated 22.10.2016 (Annexure A-5 Page 45) passed by DRT which issued Recovery Certificate in the nature of decree under Section 19(22) of "Recovery of Debts Due to Banks and Financial Institutions Act 1993".

3. Before the Adjudicating Authority, the Corporate Debtor raised dispute of limitation claiming that the loan was made in 2013 and the Application which is filed based on order dated 22.10.2016 was time barred when the Application came to be filed on 07th January, 2019. The Adjudicating Authority however,

recorded that the Application was based on the order dated 22.10.2016 and thus was within limitation. Thus, the Application came to be admitted.

4. The present Appeal claims that the Account of Corporate Debtor was declared as NPA on 30.06.2013 vide notice dated 07th August, 2013 (Annexure A-3) (Page 38) which was issued by UCO Bank and Action was initiated under Section 13 (2) of "Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002" **(SARFAESI Act).** The notice (Annexure A-3) stated that the Account had become NPA on 30th June, 2013. The Appellant claims that the Original Application came to be filed before DRT on 30th September, 2013. The Corporate Debtor had contested the notice under Section 13(2) of the SARFAESI Act and still the Bank went ahead to file Original Application No. 225 of 2013 and the order passed by DRT is ex parte. The application filed under Section 7 of I&B Code dated 17th January, 2019 is time barred keeping in view, the date of NPA dated 30th June, 2013.

5. The Learned Counsel for the Appellant has referred to Judgment in the matter of **"Sh G Eswara Rao Vs. Stressed Assets Stabilisation fund",** Company Appeal (AT) Insolvency No. 1097 of 2019 dated 07th February, 2020 and has submitted that the Application under Section 7 of I&B Code is required to be filed within 3 years of Account becoming NPA. It is stated that the Application filed on the basis of order of DRT OA No. 225/2013 cannot save limitation with regard to Account which had become NPA on 30th June, 2013. The Learned Counsel referring to the judgement in the matter of "Sh G Eswara Rao" (Supra)

stated that the other Hon'ble Bench of this Tribunal has specifically considered question as under:

> *"ii. Whether the order of Decree passed by the Debts Recovery Tribunal-I, Hyderabad on 17th August, 2018 can be taken into consideration to hold that application under Section 7 of the I & B Code is within period of three years as prescribed under Article 137 of Limitation Act 1963"?*

6. The Learned Counsel stated that after elaborate discussion, this Tribunal has concluded that a Decree cannot be executed by resorting to Application under Section 7 and the debt does not become in default when Judgment and Decree is passed by DRT.

7. A perusal of the Judgment in the matter of "Sh G Eswara Rao" shows that in that matter also the Appellant for Corporate Debtor claimed that the period of 3 years was required to be counted from date of default or when Account became NPA while the Financial Creditor claimed that it should be counted from date of Decree passed by DRT. In that matter also it appears that the Application under Section 7 was based on the date of Decree and order of DRT and default was calculated accordingly. This Tribunal considered provisions of Section 18 of Limitation Act. One ground was raised in that matter to save limitation by relying on Balance-sheet. This is not the ground before us and we are not entering into that aspect. This Tribunal in Judgment of "Sh G Eswara Rao" referred to the Judgments of Hon'ble Supreme Court of India in the matter of **"B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates", (2019)11 SCC 633,** and Judgement in the matter of **"Vashdevo R. Bhojwani VS.**

Abhyudaya Co-operative Bank Limited and Another" (2019) 9 SCC 158. Reference was made to Judgment in the matter of "**Jignesh Shah and Another Vs. Union of India and Another" 2019 10 SCC 750,** and portions from the said judgment were reproduced. Similarly a reference was made to Judgment in the matter of **"Gaurav Hargovindbhai Dave Vs. Asset Reconstructions Company (India) Limited and Another"- (2019) 10 SCC 572,** It was noted that in the matter of Gaurav Hargovindbhai Dave, the Bank had filed two OAs before DRT to recover the total debt and that Hon'ble Supreme Court had found that there was default and as the Account was declared NPA on 20th July, 2011 in the matter, the Application under Section 7 was barred by limitation. This Tribunal also reproduced relevant portions from the judgment of "Gaurav Hargovindbhai Dave" (Supra) also. It was noted that in view of the Judgments of Hon'ble Supreme Court, for Application under Section 7 of the Code, Article 137 of Limitation Act 1963 will apply. After reference to the Judgments, it was observed by this Tribunal in "Sh G Eswara Rao" (Para 24) as under:

> *"24. In the present case, the 'Corporate Debtor' defaulted to pay prior to 2004, due to which O.A. No. 193 of 2004 was filed by Respondent ('Financial Creditor'). A Decree passed by the Debts Recovery Tribunal or any suit cannot shift forward the date of default. On the other hand, the judgment and Decree passed by Debts Recovery Tribunal on 17th August, 2018, only suggests that debt become due and payable. It does not shifting forward the date of default as Decree has to be executed within a specified period. It is not that after passing of judgment or Decree, the default takes place immediately, as recovery is permissible, all the debits in terms of judgment and*

Decree dated 17th August, 2018 with pendent lite and future interest at the rate of 12% per annum could have been executed only through an execution case".

8. Thereafter, in "Sh G Eswara Rao" reference was made to judgment in the matter of "**Binani Industries Limited VS Bank of Baroda & Anr".** Company Appeal (AT) Insolvency No. 82 of 2018 dated 14th November, 2018 passed by this Tribunal to observe that 'Corporate Insolvency Resolution Process' is not a recovery proceeding. The judgement has then held:

"26. By filing an application under Section 7 of the I&B Code, a Decree cannot be executed. In such case, it will be covered by Section 65 of the I&B Code, which stipulates that the insolvency resolution process or liquidation proceedings, if filed, fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, attracts penal action.

27. The Adjudicating Authority (National Company Law Tribunal) has failed to consider the aforesaid fact and wrongly held that the date of default took place when the judgment and Decree was passed by Debts Recovery Tribunal on 17th August, 2018.

28. As noticed above, in absence of any acknowledgement under Section 18 of the Limitation Act, 1963, the date of default/NPA was prior to 2004 and does not shift forward, therefore, the period of limitation for moving application under Section 7 of the I&B Code was for three years, if counted, to be completed in the year 2007. As date of passing of Decree is not the date of default, we hold that the application under Section 7 of the I&B Code was barred by limitation, though the claim may not be barred".

9. Considering the judgment of this Tribunal in "Sh G Eswara Rao", when the present set of facts are seen it is apparent that the judgment applies to the present set of facts also.

10. The Learned Counsel for the Respondent however, submitted that in the judgment of "Sh G Eswara Rao" although this Tribunal referred to the judgment of "Vashdeo R. Bhojwani" (Supra) and reproduced some part of the judgment, there is no discussion of the judgment. The Learned Senior Counsel stated that if that judgment is seen, it shows that the Hon'ble Supreme Court has observed that the limitation would be ticking from the date of recovery certificate. It is argued that even in that matter the Corporate Debtor was declared NPA on 23. 12. 1999 and recovery certificate dated 24th December, 2001 was issued and in last part of Para 4 of the Judgment, it was observed that when recovery certificate was issued, the same injured effectively and completely the Appellant's rights as a result of which the limitation had begun ticking. Learned Senior Counsel is suggesting that the Judgment holds that limitation will start running from the date of Recovery Certificate for application under Section 7 of I&B Code. It is stated that Section 3(10) of I&B Code shows that "Creditor" includes a "decree-holder".

11. We do not agree with this submission of the Ld. Senior Counsel for Respondent. To understand, it would be appropriate to reproduce the judgment of the Hon'ble Supreme Court in the matter of "Vashdeo R. Bhojwani" (Supra) which is not very long:

"1. In the facts of the present case, at the relevant time, a default of Rs. 6.7 Crores was found as against the Respondent No. 2. The Respondent No. 2 had been declared a NPA by Abhyudaya Co-operative Bank Limited on 23.12.1999. Ultimately, a Recovery Certificate dated 24.12.2001 was issued for this amount. A Section 7 petition was filed by the Respondent No. 1 on 21.07.2017 before the NCLT claiming that this amount together with interest, which kept ticking from 1998, was payable to the respondent as the loan granted to Respondent No. 2 had originally been assigned, and, thanks to a merger with another Cooperative Bank in 2006, the respondent became a Financial Creditor to whom these moneys were owed. A petition under Section 7 was admitted on 05.03.2018 by the NCLT, stating that as the default continued, no period of limitation would attach and the petition would, therefore, have to be admitted".

2. An appeal filed to the NCLAT resulted in a dismissal on 05.09.2018, stating that since the cause of action in the present case was continuing no limitation period would attach. It was further held that the Recovery Certificate of 2001 plainly shows that there is a default and that there is no statable defence.

3. Having heard 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 Private Limited vs. Parag Gupta and Associates", 2018 (14) Scale 482, para 27 of which reads as follows: -

> *"27. 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."*

4. In order to get out of the clutches of para 27, it is urged that Section 23 of the Limitation Act would apply as a result of which limitation would be saved in the present case. This contention is effectively answered by a judgment of three learned Judges of this Court in "Balkrishna Savalram Pujari and Others vs. Shree Dnyaneshwar Maharaj Sansthan & Others", [1959] supp. (2) S.C.R. 476. In this case, this Court held as follows:

> *"… … . In dealing with this argument it is necessary to bear in mind that S. 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is*

only in regard to acts which can be properly characterized as continuing wrongs that S. 23 can be invoked. Thus considered it is difficult to hold that the trustees, act in denying altogether the alleged rights of the Guravs as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had injured effectively and completely the appellants' rights though the damage caused by the said decree subsequently continued…."

(At page 496)

Following this judgment, it is clear that when the Recovery Certificate dated 24.12.2001 was issued, this Certificate injured effectively and completely the appellant's rights as a result of which limitation would have begun ticking.

5. This being the case, and the claim in the present suit being time barred, there is no debt that is due and payable in law. We allow the appeal and set aside the orders of the NCLT and NCLAT. There will be no order as to costs."

(Emphasis supplied)

12. The "Recovery Certificate" concerned in the present matter relates to the Respondent Co-operative Bank under Section 101 of the Maharashtra Co-operative Societies Act**.** It can be seen that the Financial Creditor had succeeded before Adjudicating Authority & NCLAT on the basis that default continued and no period of limitation would attach.

13. We have carefully gone through the judgment of the Hon'ble Supreme Court in "Vashdeo R. Bhojwani" and it can be seen that the Hon'ble Supreme Court in Para 3 of the judgment laid stress on its findings in Para 27 of the judgment in the matter of "B.K. Educational Services Pvt. Ltd". (Supra). The observations in concluding part Para 4 of the judgment, have been made by the Hon'ble Supreme Court as it appears that the Financial Creditor in the matter in order to save limitation claimed that Section 23 of the Limitation Act would apply and the limitation would be saved.

The Hon'ble Supreme Court in such context appears to have referred to judgment of Hon'ble Supreme Court in the matter of "Balakrishna Savalram Pujari Waghmare" (Supra) and reproduced part of Paragraph from that judgment. Perusal of that judgment in the matter of "Balakrishna Savalram Pujari Waghmare" shows that the Appellants therein had been claiming right of hereditary worshipers at "Shree Dhyaneshwar Maharaj Sansthan, Alandi" and had dispute with the Trustees of the Said Sansthan. That judgment shows there were various litigations between the parties. In that context, the question of limitation was discussed in Para 31 of that judgment. That judgment is dated 26th March, 1959 and Article 120 referred in Para 31 of that judgment was naturally in that context of then applicable Limitation Act of 1908 which is corresponding to present Article 113 of Limitation Act 1963. Present Article 113 relates to any suit for which no period of limitation is provided elsewhere in that schedule. Section 23 referred in Para 31 of that judgment in the matter of "Balakrishna Savalram Pujari" under the earlier Act of 1908 is corresponding to

present Section 22 relating to "Continuing breaches & torts" in the Limitation Act 1963.

Section 23 of Limitation Act 1908 read as under:

> *"23. Continuing breaches and wrongs. In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."*

Article 120 of Limitation Act 1908 read as under:

"THE FIRST SCHEDULE. - contd.

FIRST DIVISION: SUITS-contd.

Description of suit.	Period of limitation.	Time from which period beings to run.
120. Suit for which no period of limitation is provided elsewhere in this schedule.	[1][Six years]	When the right to sue accrues.

14. Keeping above provisions in view helps understand the context for para 31 of that Judgment, we refer to Para 31 from the judgment of "Balakrishna Savalram Pujari" which reads as under:

> *"31. It is then contended by Mr. Rege that the suits cannot be held to be barred under Article 120 because Section 23 of the Limitation Act applies; and since, in the words of the said section, the conduct of the trustees amounted to a continuing wrong, a fresh period of limitation began to run at every moment of time*

during which the said wrong continued. Does the conduct of the trustees amount to a continuing wrong under Section 23? That is the question which this contention raises for our decision. In other words, did the cause of action arise de die in diem as claimed by the appellants? In dealing with this argument it is necessary to bear in mind that Section 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterized as continuing wrongs that Section 23 can be invoked. Thus, considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the Guravs as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The Decree obtained by the trustees in the said litigation had injured effectively and completely the appellants' rights though the damage caused by the said Decree subsequently continued. Can it be said that, after the appellants were evicted from the temple in execution of the said decree, the continuance of their dispossession was due to a recurring act of tort committed by the trustees from moment to moment? As soon as the decree was passed and the appellants were dispossessed in execution proceedings, their rights had been completely

injured, and though their dispossession continued, it cannot be said that the trustees were committing wrongful acts or acts of tort from moment to moment so as to give the appellants a cause of action de die in diem. We think there can be no doubt that where the wrongful act complained of amounts to ouster, the resulting injury to the right is complete at the date of the ouster and so there would be no scope for the application of 23 in such a case. That is the view which the High Court has taken and we see no reason to differ from it".

15. It is clear that in that matter, the Appellants tried to claim that there was continuing wrong and the Hon'ble Supreme Court had found that the Decree obtained by the Trustees in the litigation had injured effectively and completely the rights of the Appellants therein even if the damage continued subsequently.

16. Para 1 of the judgment in the matter of "Vashdevo R. Bhojwani" (Supra) Hon'ble Supreme Court shows that the Application filed by the Respondent Bank under Section 7 claimed that the amount together with interest kept ticking from 1998. The last part of Para 4 of the judgment is required to be read keeping this, in view. The Perusal of the judgment shows that Hon'ble Supreme Court did not accept that cause of action in that matter was continuing and no limitation period would attach which was the basis for holding claim to be within limitation in NCLT & NCLAT. Both the Judgments of NCLT & NCLAT were set aside. Hon'ble Supreme Court rather held that the claim was time barred and there was no debt due and payable in Law.

17. We do not accept the argument of the Learned Counsel for the Respondent that judgment in the matter of "Vashdeo R. Bhojwani"(Supra) should be read in

a manner to state that limitation would start ticking from date of recovery certificate. On analyzing the Judgment of Hon'ble Supreme Court, we are unable to agree with the Ld. Counsel for Respondent. We are unable to hold that date of N.P.A is to be ignored & limitation is to be counted from Date of Recovery Certificate for Section 7 of I&B Code.

18. It is clear from the judgments of Hon'ble Supreme Court referred by this Tribunal in the matter of "Sh G Eswara Rao" that the applicable provision is Article 137 of the Limitation Act 1963 and the relevant date is date of default for the purpose of Application under Section 7 or Application under Section 9 of Insolvency and Bankruptcy Code, 2016. Once, the time starts running, subsequent filing of the Application to DRT and judgment passed by DRT does not make a difference, for the purposes of provisions of I&B Code.

19. We further reject the submission that because in Section 3(10) of I&B Code in definition of "Creditor" the "decree holder" is included it shows that decree gives cause to initiate application under Section 7 of I&B Code. Section 3 is in Part I of I&B Code. Part II of I&B Code deals with "Insolvency Resolution And Liquidation For Corporate Person", & has its own set of definitions in Section 5. Section 3 (10) definition of "Creditor" includes "financial creditor", "operational creditor" "decree-holder" etc. But Section 7 or Section 9 dealing with "Financial Creditor" and "operational creditor" do not include "decree-holder" to initiate CIRP in Part II. We accept the submissions made by the Learned Counsel for the Appellant and hold that the Application under Section 7 in this matter was time barred and impugned order admitting the Application deserves to be set aside.

A. For the above reasons, we set aside the impugned order passed by Adjudicating Authority and dismiss the Application under Section 7 of I&B Code filed by the Respondent.

B. In the result, the Corporate Debtor "Raipur Treasure Online Pvt. Ltd." is released from the rigor of Corporate Insolvency Resolution Process and actions taken by IRP/RP and Committee of Creditors, if any, in view of the Impugned Order are set aside. IRP/RP will hand back the records and management of the Corporate Debtor to the promoters/directors of the Corporate Debtor.

C. The matter is remitted back to the Adjudicating Authority to decide the fee and costs of 'Corporate Insolvency Resolution Process' payable to IRP/RP which shall be borne by the Respondent J.M. Financial Asset Reconstruction Company.

The Appeal is allowed as above, no costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

New Delhi

Basant B.