

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH
NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO.521 OF 2020

IN THE MATTER OF:

B.S. Krishnan

S/o Late Somasundaram Chettiar,
 No. 327, Vinayagar Nagar, Kasakaranur,
 Salem – 636 004
 Tamil Nadu.

...Appellant

Vs

1. Stressed Assets Stabilization Fund,

Represented by its Deputy General Manager,
 IDBI Tower, Cuffe Parade, Mumbai- 400 005

...Respondent No. 1

2. L.S.P Agro Limited,

Rep. By IRP
 No. 22, Ponneri High Road,
 Elanthan Cherry,
 Andarkuppam Check Post,
 Malini New Town,
 Chennai, Tamil Nadu - 600 103.

... Respondent No. 2

PRESENT:

For Appellant:- Mr R. Anand Padmanabhan, Advocate

For Respondent:- Ms. Satya Devi, RP/R2.

**Mr. Sidhartha Barua and Mr. Praful Jindal, Advocates
 for R1.**

J U D G M E N T

Jarat Kumar Jain. J.

The Appellant 'B.S. Krishnan' Ex-Director of the L.S.P. Agro Ltd.
 Company (Corporate Debtor) filed this Appeal against the order dated

25.01.2020 passed by Ld. Adjudicating Authority (National Company Law Tribunal) Special Bench, Chennai in CP-IBA/210/2019. Whereby Ld. Adjudicating Authority admitted the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (In Short I&B Code) filed by Respondent No. 1 (Financial Creditor) and initiated Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. Brief facts of this case are that on 06.03.1998 Industrial Development Bank of India (IDBI) granted a term loan facility of aggregate value of Rs. 650 lakhs to the M/s L.S.P. Agro Ltd. (Corporate Debtor). The aforesaid loan amount was disbursed to the Corporate Debtor from 21.03.1998 to 08.12.1999. Thereafter, on 09.06.2000 IDBI bank granted another loan facility of aggregate value of Rs. 425 lakhs to the Corporate Debtor. Under the second loan agreement amount aggregating to Rs. 400 lakhs was disbursed to the Corporate Debtor from 16.6.2000 till 28.09.2000. Thus, the total loan amount disbursed by the IDBI to the Corporate Debtor under two loan facilities was aggregate to Rs. 10.50 Crores.

3. The Corporate Debtor defaulted in repayment of loan facilities and accordingly on 15.01.2002 the IDBI recalled the said loan facilities against the Corporate Debtor, thereby demanding payment of sum of Rs. 110592701. However, the Corporate Debtor failed to comply with the directions made in the aforesaid recall notice and was unable to regularise the account and make payment of the outstanding dues to the Financial Creditor. Therefore, on 06.02.2002 the IDBI had filed an O.A. No. 78 of 2002 before the Debt Recovery Tribunal-I Chennai (In Short 'DRT'). Subsequently,

the O.A. was transferred to DRT-II and was renumbered as O.A. No. 172 of 2007.

4. While the aforesaid loan was pending for repayment the Central Government set up a Trust Stressed Assets Stabilization Funds (SASF) (Respondent No. 1 herein) for acquiring the Stressed Assets of the IDBI. Subsequently, a Notification was issued by the Ministry of Home Affairs dated 24.09.2004 notifying SASF as a financial institutions as defined under Section 2(h)(2) of the Recovery Due to the Banks and Financial Institution Act, 1993. Thus, SASF on behalf of IDBI is competent for initiating CIRP against the Corporate Debtor.

5. It is pleaded that the Corporate Debtor had acknowledged the debt vide One Time Settlement Proposals (OTS Proposals) dated 10.09.2008, 27.01.2014, 27.05.2014, 08.07.2016, 30.10.2016 and 14.10.2017 However, the Corporate Debtor has not repaid the loan. Therefore, on 23.01.2019 the Respondent No. 1 (Financial Creditor) filed an Application under Section 7 of the I&B Code before the Adjudicating Authority to initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

6. During the pendency of the Application, DRT-II has allowed the O.A. on 29.04.2019 in favour of the Financial Creditor and subsequently, issued a recovery certificate dated 16.01.2020 in favour of the Respondent No. 1 (Financial Creditor) and against the Corporate Debtor for a sum of Rs. 11,05,92,791 alongwith 12% simple interest per annum from the date of institution of O. A. i.e. 06.02.2002 till realisation.

7. The Corporate Debtor has resisted the Application on two grounds that SASF has no locus to file the Application on behalf of the Financial Creditor 'IDBI' and the Application is barred by limitation as the loan accounts have been declared NPA before 2001 and the Financial Creditor has not shown any acknowledgement which is within three years from the date of default. Therefore, the Financial Creditor cannot get extended period of limitation as provided under Section 18 of the Limitation Act.

8. Ld. Adjudicating Authority held that as per the notification dated 29.09.2004 issued by Central Government IDBI transferred its Stressed Assets to the SASF. Thus, SASF being an assignee is Competent to file an Application under Section 7 of the I&B Code for initiating CIRP against the Corporate Debtor. It is also held that there is no acknowledgement of debt however, DRT having passed the order for payment, on this basis, it can be inferred that the debt is not time barred. Therefore, admitted the Application under Section 7 of the I&B Code and initiated CIRP and also declared moratorium under Sub-Section 1 of Section 14 of the I&B Code.

9. Learned Counsel for the Appellant submitted that the Ld. Adjudicating Authority has erroneously held that DRT has ordered for payment on this basis it can be inferred that the debt is not time barred. Hon'ble Supreme Court in the case of Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company India Ltd. & Anr. (2019) 10 SCC 572 held that the Respondent was declared NPA on 21.07.2011. The Bank had filed two O.As before the DRT in 2012 to recover the total debt. Taking into consideration the facts, the Supreme Court held that the default having taken place and as the

account was declared NPA on 21.07.2011, the Application under Section 7 of the I&B Code filed in 2017 is clearly barred by limitation. In the instant case the loan account of Corporate Debtor was declared NPA before the 2001, thereafter, there is no acknowledgement of debt within three years and a decree/order passed by the DRT cannot forward the date of default. Thus, the Application under Section 7 of the I&B Code filed on 23.01.2019 is apparently time barred and therefore, impugned order is liable to be set aside.

10. Per Contra, Learned Counsel for the Respondent No.1 supports the impugned order and submitted that Ld. Adjudicating Authority justly proceeded with the Application under Section 7 of the I&B Code and admitted the same, while taking into consideration the final decree/order dated 29.04.2019 passed by DRT. It is also submitted that Hon'ble Supreme Court in the Case of Vasudev R Bhojwani Vs. Abhyuda Cooperative Bank Ltd. & Anr. reported in (2019) 9 SCC 158 held that Right to sue accrues when a default was occurred further the Court observed that upon issuance of a recovery certificate, limitation would have begun ticking. In the premises, it can be understood that when a recovery certificate is issued by Competent Authority and there is non-payment by the debtor in terms of the recovery certificate, right to sue accrues on such non-payment/default of the debtor applying the said proposition in the facts of the instant case passing of final decree/order dated 29.04.2019 and subsequently, issuance of recovery certificate dated 16.01.2020 and default on part of the Corporate Debtor to make payment of debt/decretal amount resulted in accrual of

right to sue in favour of the Respondent No. 1. Accordingly, Ld. Adjudicating Authority committed no error in admitting the Application under Section 7 of the I&B Code against the Corporate Debtor. Thus, no interference is called for by this Appellate Tribunal.

11. After hearing learned counsel for the parties, we have gone through the record.

12. The Application under Section 7 of the I&B Code for initiation CIRP against the debtor is maintainable only when a default has occurred. Hon'ble Supreme Court in the Case of B.K. Education Services Pvt. Ltd. Vs. Parag Gupta & Associates 2019 11 SCC 633 held that "the right to sue accrues" when a default occurs. If the default has occurred over three years prior to date of filing of the application under Section 7 of the I&B Code; the application would be barred under Article 137 of the Limitation Act. The date of right to sue can be extended only when the debt is acknowledged by the Corporate Debtor within limitation of three years. Admittedly, in this case, the Appellant has committed default and the loan account declared as NPA before 2001 and thereafter, IDBI filed O.A. No. 78 of 2002 before DRT-I. The Respondent No. 1 has not placed on record any document of acknowledgement of debt within limitation of three years, as observed by the Ld. Adjudicating Authority in the impugned order that:

"Though we are of the view that no acknowledgement is present to show that this debt is not time barred"

13. Now, we have considered whether date of default can be shift forward on the basis of the order passed by the DRT-II.

14. For this issue, it is useful to refer the Judgment of five Members Bench of this Appellate Tribunal in the Case of V. Padamkumar Vs. Stressed Asset Stabilization Fund (SASF) & Anr. C.A.(AT) (Ins) No. 57 of 2020 Para No. 16 to 18 and 23 as under:-

16. Appreciating the aforesaid Judgment of the Hon'ble Patna High Court, the Hon'ble Supreme Court in "Jignesh Shah and another vs. Union of India and another" (Supra) observed that the aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding.

Thus, while holding so, the Hon'ble Supreme Court held that the date of default to be taken into consideration for computing the period of limitation of application under Section 7. As the decision of Hon'ble Supreme Court is binding, we hold that mere filing of a suit for recovery or a decree passed by a Court cannot shift forward the date of default.

17. 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 cannot be shift forward to the date of decree or date of payment for execution as a 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.

18. 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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23. In the present case, as we find that the account of the 'Corporate Debtor' was declared NPA on 31st October, 2002 and decree was passed on 19th June, 2009/ 31st August, 2009, we hold that the application under Section 7 filed by 'M/s. Stressed Assets Stabilization Fund (SASF)' against 'M/s. Uthara Fashion Knitwear Limited'- ('Corporate Debtor') is barred by limitation and was not maintainable.

15. In the light of the aforesaid Judgement, we have considered the facts of this case, it is clear that the Corporate Debtor committed default and the

loan account declared as NPA before 2001 and thereafter, there is no acknowledgement of debt within limitation of three years and it is clear that the Judgment/decreed passed by the DRT-II on 29.04.2019 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. Thus, we hold that the Application under Section 7 of the I&B Code filed by the Respondent No. 1 on 23.01.2019 against the M/s L.S.P. Agro Ltd. (Corporate Debtor) is barred by limitation and was not maintainable.

16. However, Ld. Adjudicating Authority erroneously held that:

“This Bench can even admit this Insolvency and Bankruptcy Application based on the direction given the DRT against the Corporate Debtor by taking the order passed by the DRT for initiation of CIRP into consideration. For the DRT having passed the order for payment, we safely infer that this debt is not time barred, therefore, we hereby admit this Insolvency Bankruptcy Application”.

17. In view of the aforesaid findings, we have no other option but to set aside the impugned order dated 25.01.2020. The Application preferred by the Respondent No. 1 under Section 7 of the I&B Code, is dismissed. The Respondent No. 2 is released from rigours of the moratorium and is allowed to function through its Board of Directors from immediate effect. The Interim Resolution Professional shall hand over the records to the Board of Directors.

18. The matter is remitted back to the Ld. Adjudicating Authority to decide fees and costs of ‘CIRP’ payable to IRP/RP, which shall be borne by the Respondent No. 2 (Corporate Debtor).

Thus, the Appeal is allowed with aforesaid observations. However, no order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member (Technical)

New Delhi
17th March, 2021
SC