

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH

Company Appeal (AT) (Insolvency) No. 994 of 2022

[Arising out of Order dated 23.05.2022 passed by the Adjudicating Authority/National Company Law Tribunal, New Delhi Bench - V, in CP (IB) 283 (ND)/2022]

IN THE MATTER OF:

Indiabulls Housing Finance Limited

Through its authorised signatory Devbrat
Mitra Regd. Office : M-62 & 63, First Floor,
Connaught Place
New Delhi – 110001.
Email: devbrat.mitra@indiabulls.com

...Appellant

Versus

Revital Realty Private Limited

1114 Hamkund Chambers
11th Floor, 89 Nehru Place
New Delhi – 110089.

...Respondent

Present:

For Appellant : Mr. Abhinav Vashisht, Sr. Advocate, Ms. Vatsala Kak, Mr. Sumesh Dhawan, Ms. Priya Singh & Mr. Shaurya Shyam, Advocates.

For Respondent : Mr. Abhijeet Sinha, Mr. Ishan Dewan, Mr. V. Siddharth & Ms. Priyal Bapna, Advocates.

J U D G M E N T

(24.05.2023)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**') against the 'impugned order' dated 23.05.2022 in CP (IB) 283 of 2022 passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi Bench- V), whereby

the 'Adjudicating Authority' dismissed the application of the 'Appellant' treating as barred by limitation. Aggrieved by the same, the 'Appellant' has preferred the present appeal.

2. Heard the Counsel for Parties and perused the records made available including cited judgments.

3. Learned Counsel for the Appellant stated that the 'Appellant' sanctioned one loan for Rs. 85 Crores on 05.02.2016 and entered into the loan agreement on 22.02.2016 which was fully disbursed on 09.05.2016. Learned Counsel for the Appellant brought out that the 'Corporate Debtor' agreed to pay the entire loan amount along with interest in accordance with Repayment Clause i.e. Clause 3.1.1 of Loan Agreement. Learned Counsel for the Appellant further brought to the notice that in terms of Clause 3 of additional conditions stipulated under Schedule- I of the Loan Agreement, both the parties agreed for moratorium on repayment of principal amount, as laid down in Schedule- II of the Loan Agreement and hence, there was a moratorium on repayment of principal amount till 19.07.2017.

4. Learned Counsel for the Appellant submitted that the 'Corporate Debtor' made various repayments through cheques/RTGs from 02.06.2016 to 24.01.2019 and in terms of the agreement between the parties, such credited amount were adjusted towards outstanding dues of the instalments payable till 19.07.2018. Learned Counsel for the 'Appellant' submitted that the 'Corporate Debtor' defaulted payment of the instalment for the month of July 2018 which was due and payable on 19.08.2018 resulting into default in terms of Para 12.1.1 of the Loan Agreement.

5. Learned Counsel for the Appellant stated that due to failure of the 'Corporate Debtor' in making payment towards principal amount and interest, the 'Appellant' invoked Clause 12.2 of the Loan Agreement and recalled the entire loan facility vide Loan Recall Notice dated 25.03.2022. Learned Counsel for the Appellant further stated that despite the Loan Recall Notice, the 'Corporate Debtor' failed to clear the outstanding dues within the timelines provided i.e. 28.03.2022 and accordingly, this date 28.03.2022 was treated as default date in Part IV of the application filed under Section 7 of the Code. Learned Counsel for the Appellant also pointed out that the default is of continuing nature and the same persist till date.

6. Learned Counsel for the Appellant submitted that the 'Appellant' filed Company Petition bearing CP. (IB) 283 of 2022 under Section 7 of the Code on 04.04.2022 seeking initiation of the Corporate Insolvency Resolution Process (in short '**CIRP**'), which was dismissed vide the 'impugned order' dated 23.05.2022.

7. Learned Counsel for the Appellant pointed out that the date 09.05.2016 was wrongly interpreted by the 'Adjudicating Authority' as the date when first instalment was due, payable and default occurred, whereas, factually on 09.05.2016 the entire loan amount of Rs. 85 Crores was disbursed in terms of the Loan Agreement.

8. Learned Counsel for the Appellant reiterated that the payment received from the 'Corporate Debtor' till 24.01.2019 were adjusted towards amount due and payable till 19.07.2018 and technically there was nothing due and payable before 19.07.2018, hence there could not have been any default on 09.05.2016 as wrongly held by the 'Adjudicating Authority' as the

date of default and considered the application filed by the 'Appellant' under Section 7 on 04.04.2022 as barred by limitation.

9. Learned Counsel for the Appellant stated that even taking the first date of default as 19.08.2018 i.e. when the first default took place for non-payment of due amount, would still not be barred by limitation in terms of order dated 10.01.2022 passed by the Hon'ble Supreme Court of India in Suo-moto Writ Petition No. 3 of 2020, in accordance to which the period from 15.03.2020 till 28.02.2022 was to be excluded for the purpose of limitation, as the application was filed under Section 7 of the Code by the 'Appellant' on 04.04.2022 itself.

10. Learned Counsel for the Appellant therefore urged that in view of clear legal position his Application under Section 7 filed within limitation and therefore the 'impugned order' need to be set aside.

11. Learned Counsel for the Respondent submitted that the 'impugned order' was passed by the 'Adjudicating Authority' on 23.05.2022 on the point of issuance of notice without any notice being issued to the 'Respondent/ Corporate Debtor'. Learned Counsel for the Respondent submitted that the 'impugned order' was perfectly legal and cannot be challenged by the 'Appellant'.

12. Learned Counsel for the Respondent stated that alleged date of default of 28.03.2022 cannot be the date of default in terms of Clause 12.2 of Loan Agreement, when an event of default in terms of Clause 12.1 of the Loan Agreement is to be considered and as such the 'Adjudicating Authority' pertinently and correctly held that 28.03.2022 cannot be taken as date of

default since cause of action has happened much prior to issuance of Loan Recall Notice.

13. Learned Counsel for the Respondent alleged that the loan account statement dated 25.03.2022 prepared by the 'Appellant' is a fabricated statement prepared by the 'Appellant' for ulterior motives to initiate the CIRP against the 'Respondent' and cannot be relied upon.

14. Learned Counsel for the Respondent assailed the conduct of the 'Appellant', who unilaterally adjusted the payments made by the 'Respondent' against the earlier amount outstanding, without taking consent of the 'Respondent'. Learned Counsel for the Respondent also brought out that the 'Appellant' had intimated to the 'Respondent' in March, 2019 that no due amount is payable towards principal and interest qua loan account No. S000239453 and hence the 'Appellant' cannot take a plea of any default committed by the 'Respondent' at this stage.

15. Learned Counsel for the Respondent summarised his pleadings with a request to dismiss the application with heavy cost.

16. After taking into account all the averments made by the respected counsels, this 'Appellate Tribunal' is required to deliberate on one specific issue whether the original application filed by the 'Appellant' under Section 7 of the Code before the 'Adjudicating Authority' was within limitation time frame in accordance with the Limitation Act, 1963 or it was time barred as observed by the 'Adjudicating Authority' based on which the Application was dismissed.

17. In order to examine this issue, we need to take into account the relevant documents of this appeal. These read as under :-

12.2 Consequence of an Event of Default

On and at any time after the occurrence of an Event of Default, Lender may, with or without any notice to any of the Obligor(s) and with or without the intervention of the court/arbitrator, (i) cancel/recall the Loan whereupon the Borrower's Dues shall become immediately repayable/payable by the Obligor(s); and/or (ii) initiate/exercise any or all of its rights, actions, remedies and powers under the Loan Documents and/or applicable laws (including issuance of show-cause notice(s) to the Obligor(s) and for making submissions before the relevant committee of the Lender); and/or (iii) enforce, allot, sell, invoke, deliver, deal with, take possession, convey, transfer, assign, lease, sub-lease, encumber and/or dispose off in any manner (including by private treaty and/or auction), on such terms and conditions including the sale/transfer price of the Security or any part/unit thereof as deemed fit by the Lender, any/all/part of the Security including the guarantees and/or the demand promissory notes, and/or do such other things in relation to and/or with respect to the Security (any part thereof) which may be permitted under law.

If the net sum realized through the enforcement/sale/ transfer of Security is insufficient to cover the Borrower's Dues, then without prejudice to the other rights and remedies of the Lender under the Loan Documents and/or in law, the Obligor(s) agree(s) and undertake(s) to pay to the Lender forthwith at the Lender's demand such amount as will make up the shortfall. The decision made by the Lender with respect to any matter under the Loan Documents shall be final and binding on the Obligor(s).

Schedule I

S. No.	Items	Information to be Inserted
1.	Date of the Agreement	Date : 22-02-2016
2.	Loan	Upto Rs. 850000000/- (Rupees Eighty Five Crores only).
3.	Tenure of the Loan	83 (Eighty Three) months from the Date of Disbursement of the Loan or any part thereof, whichever is earlier, under this Agreement.

Schedule II

Subject to the provisions of this Loan Documents, the Payment/Repayment Schedule shall be as follows:

Sl. No.	Due Date(s)	Interest payable (Rs.)	Principal payable (Rs.)	Total Amount payable (Rs.)
1	19-Jun-16	7791667	0	7791667
2	19-Jul-16	7791667	0	7791667
3	19-Aug-16	7791667	0	7791667
4	19-Sep-16	7791667	0	7791667
5	19-Oct-16	7791667	0	7791667
6	19-Nov-16	7791667	0	7791667
7	19-Dec-16	7791667	0	7791667
8	19-Jan-17	7791667	0	7791667
9	19-Feb-17	7791667	0	7791667
10	19-Mar-17	7791667	0	7791667
11	19-Apr-17	7791667	0	7791667
12	19-May-17	7791667	0	7791667
13	19-Jun-17	7791667	0	7791667
14	19-Jul-17	7791667	0	7791667
15	19-Aug-17	7791667	0	7791667
16	19-Sep-17	7791667	12500000	20291667

18. The 'debt' is defined under Section 3(11) of the Code and 'default' has been defined under Section 3(12) of the Code, 'debt' has been defined as a liability or obligation in respect of a claim which is due and 'default' means 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/ Corporate Debtor. We observe from Section 7(1) of the Code that the 'Financial Creditor' may file an application for initiating CIRP when the default has occurred. It is not necessary for the 'Appellant' to file an application under Section 7 of the Code, on the happening of first default of amount due and it is discretion of the 'Financial Creditor' to decide filing an Application under Section 7 as per the facts and his legal rights. In fact, the intention of the 'Code' is to keep the corporate entity as solvent and going concern entity rather than encouraging or contemplating for initiation of the CIRP against

the 'Corporate Debtor' on the drop of the hat i.e. on the first event of default itself. Normally, as commercially prudent mechanism, the financial creditor always tries to resolve the issue with the 'Corporate Debtor' so that his financial interest is not adversely affected and to ensure the same, he sometimes give leeway to the 'Corporate Debtor' to overcome the temporary financial stress of the 'Corporate Debtor' to avoid defaults. It is only this background, the 'Financial Creditor' do not initiate on many occasions the proceeding for CIRP against the 'Corporate Debtor' on the first date of default itself although it is his legal right as provided in the Code and the law.

19. From Schedule II of the Loan Account, discussed earlier, it is seen that there has been moratorium on payment of principal amount and only on 19.09.2017 the principal amount became due and payable. It has been the case of the 'Appellant' that they had adjusted all receipts of money from the 'Respondent' for instalments upto 19.07.2018 and therefore the first default took place on 19.08.2018. The action of not filing application by the 'Appellant' under Section 7 of the Code, in event of default of interest amount cannot be interpreted taking away the rights of the 'Appellant' to sue when the first instalment (in the present appeal it 19.08.2018 when amount became due and not paid) or when the entire loan became due for payment and not paid (herein the Loan Recall Notice was issued according to which the entire loan account became due and payable as on 28.03.2022 and not paid). Thus, the 'Appellant' could have taken legal recourse under the Code either on 19.08.2018 or on subsequent defaults or when entire loan became due, payable and defaulted i.e. on 28.03.2022. We have noted

that in the present case, the 'Appellant' has chosen 28.03.2022 as date of default in the application filed under Section 7 of the Code before the 'Adjudicating Authority'.

20. We also acknowledge that law of limitation is sacrosanct and cannot be allowed to be breached. As per the law, legal remedy is required to be taken within three years from the date when default takes place and any violation of the timeline will render such claims as time barred. The position has been upheld in catena of the judgments by the Hon'ble Supreme Court of India as well as this 'Appellate Tribunal'. This 'Appellate Tribunal' had occasion to examine all such issues in the case of **Koncentric Investments Ltd. & Anr. Vs. Standard Chartered Bank & Anr.** (Company Appeal (AT) (Insolvency) No. 911 of 2021) and detailed judgment was rendered covering all such issues and clearly establishing the fact that it is not the first date of default which need to be reckoned as only date for counting limitation period. It is also settled law that every subsequent default gives fresh right and counting of limitation period.

21. We have noted from the averments and submissions that various payments were made by the 'Corporate Debtor' between 02.06.2016 to 24.01.2019 and the 'Corporate Debtor' started defaulting from the year 2016, however as per the Agreement between the 'Appellant' and 'Respondent', the amount credited between 02.06.2016 to 24.01.2019 were adjusted towards the outstanding dues of instalments payable till 19.07.2018. The 'Corporate Debtor' defaulted the payment of the instalment for the month of July 2018 which was due and payable on 19.08.2018 which could be treated as an event of default in terms of Clause 12.1.1 of

the Loan Agreement i.e., non-payment according to which, if the borrower ('Corporate Debtor') does not pay by the due date(s) the borrower's dues or part thereof and/ or any amount payable pursuant to loan document, the same will be treated as event of non- payment. Similarly, Clause 12.2 of the Loan Agreement describes "consequence of an event of default". It is therefore, clear the date of default could have been taken as 19.08.2018 in terms of various clauses of Loan Agreement. We have already noted that the 'Appellant' filed in Company Petition bearing No. CP (IB) 283 of 2022 under Section 7 of the Code on 04.04.2022 which was not barred by the limitation period of three years in terms of the order dated 10.01.2022 passed by the Hon'ble Supreme Court of India in Suo Moto Writ Petition No. 03 of 2020, wherein the period from 15.03.2020 till 28.02.2022 was excluded for the purpose of Limitation and further giving respite of 90 days from 01.03.2022 for filing suitable application by the aggrieved person. Since, the Application under Section 7 was filed by the 'Appellant' before the 'Adjudicating Authority' on 04.04.2022, the same was squarely covered within the period as per Limitation.

22. The 'Financial Creditor' gets rights for filing an Application under Section 7 of the Code when the right to apply against default accrues and for every default there is a fresh period of limitation. It seems that the 'Adjudicating Authority' has taken the date of 09.05.2016 as the date of default presuming that the first instalment was due, payable and not paid and therefore date of default became 09.05.2016. We take note from the 'List of Dates' which has been filed along with the present appeal that 09.05.2016 is the date when entire loan was disbursed by the 'Appellant' to

the 'Corporate Debtor'. It seems that the 'Adjudicating Authority' has further wrongly presumed that it is the first default which is only relevant date for counting limitation period and has ignored the subsequent defaults which give fresh and new cause of default / defaults.

23. Therefore, it emerges that either of the date i.e. 19.08.2018 i.e., the date on which the instalment was due, resulting into default payable and not paid or the date of 28.03.2022 when the entire loan account stood defaulted in terms of Loan Recall Notice dated 25.03.2022, would have been and is covered within the limitation period as discussed in the preceding paragraphs. The 'Adjudicating Authority' clearly erred in taking the date of default as 09.05.2016 for computing the limitation for filing the Section 7 Application.

24. In view of above analysis and after taking into consideration of all the averments made by the respective parties, cited judgments and the law as contained in the I & B Code, 2016 and Limitation Act, 1963, this 'Appellate Tribunal' has no hesitation in holding that the 'impugned order' was incorrect and is set aside. The 'Appeal' succeeds. Section 7 Application is revived before the 'Adjudicating Authority' to be heard and decided in accordance with law. No costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Naresh Salecha]
Member (Technical)**

Simran/nn