

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-II

CP (IB) No.4276/MB.II/2018

*Under section 7 of the Insolvency and
Bankruptcy Code, 2016*

In the matter of

P.H. Combines (a proprietorship
concern represented by its proprietor, Mr
Pravinkumar Sureshchandra Bhoot)

...Financial Creditor

Versus

MDA Agrocot Private Limited

CIN: U15122MH2011PTC225134

...Corporate Debtor

Order pronounced on 16.10.2020

Coram:

Mr. Rajasekhar V.K. : Member (Judicial)
Mr. Ravikumar Duraisamy : Member (Technical)

Appearances:

For the Financial Creditor : Dr SK Jain a/w Mr Yahya
Batatawala, Advocates.

For the Corporate Debtor : Ms Falguni Shete i/b Intralegal,
Advocates

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. Preamble

1.1. This is a Company Petition filed under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by P.H. Combines, a proprietorship concern represented by its proprietor, Mr Pravinkumar

Sureshchandra Bhoot (*"the Financial Creditor"*) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against MDA Agrocot Private Limited (*"the Corporate Debtor"*).

- 1.2. The Corporate Debtor is a private company limited by shares and incorporated on 19.12.2011 under the Companies Act, 1956, with the Registrar of Companies, Maharashtra, Mumbai. Its Corporate Identity Number (CIN) is U15122MH2011PTC225134. Its registered office is Shop No.21 & 22, Gulshan Tower (4th Floor), Moffisal Plot, Amravati 444601, within the State of Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.

2. *The gist of the present petition*

- 2.1. The present petition was filed on 08.11.2018 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹1,97,96,082.00 (Rupees one crore ninety-seven lakh ninety-six thousand and eighty-two only) as principal as on 21.09.2013, which is the date of default.

3. *The case of the Financial Creditor*

- 3.1. The case of the Financial Creditor is as follows: -
 - (a) The Financial Creditor gave loan in various instalments aggregating to ₹1,97,96,082/- (Rupees one crore ninety-seven lakh ninety-six thousand and eighty-two only) to the Corporate Debtor. There has been no repayment by the Corporate Debtor. The Financial Creditor sent written communication dated 21.09.2013 demanding payment of the debt due from the Corporate Debtor.
 - (b) The Corporate Debtor replied on 19.10.2013, generally contending that the amount allegedly deposited with the Corporate Debtor was actually their own amount which was

repaid to them. Further, the Corporate Debtor questioned the credentials of P.H. Combines to lend such amounts since it did not possess a money lender's licence, nor was it involved in any manufacturing or trading activity. The Corporate Debtor stated that the exact source of such income for P.H. Combines needs to be ascertained and this needed to be reported to the Income Tax Authorities and the Economic Offences wing to find out the exact source of income of the Financial Creditor.

- 3.2. Bank statements are attached as **Exhibit 'C'** at pages 12-125. The total debt due and payable to the Financial Creditor is ₹1,97,96,082.00 (Rupees one crore ninety-seven lakh ninety-six thousand and eighty-two only), as mentioned at page 11 of the Petition.

4. *The reply of the Corporate Debtor*

- 4.1. Ms Falguni Shete i/b Intralegal, Learned Counsel appeared on behalf of the Corporate Debtor and made her submissions.
- 4.2. In its reply dated 04.05.2019, the Corporate Debtor has submitted as follows:-
- (a) The Corporate Debtor denies the averments of the Financial Creditor in full (*para 2 at page 1 of the Reply*);
 - (b) The amount claimed by the Financial Creditor from the Corporate Debtor is the subject matter of a dispute in Suit No.225/2013 which was filed by the Financial Creditor before the Second Joint Civil Judge (Senior Division), Amravati, against the Corporate Debtor. In the said suit, the Financial Creditor dismissed the application of the Financial Creditor for attachment before judgment (*para 3 at page 1 of the Reply*);
 - (c) Aggrieved by the said order, the Financial Creditor filed an appeal before the Hon'ble Bombay High Court, Nagpur Bench, which

dismissed the same *vide* order 25.06.2015 (*para 4 at page 1 of the Reply*);

- (d) The Financial Creditor has suppressed the above material facts from this Authority. The Financial Creditor has not mentioned about the orders passed by the Hon'ble High Court or the Civil Judge (Senior Division), Amravati. The petition must be dismissed solely for suppressing material facts (*para 6 at page 1-2 of the Reply*);
- (e) The amount lying with the Corporate Debtor belongs to Manoharlal Bhoot in his capacity as the *karta* of the HUF (*para 7 at page 2 of the Reply*);
- (f) The petition is barred by limitation, as the transaction pertains to the year 2012, whereas the present application has been filed only in the year 2018 (*para 8 at page 2 of the Reply*);
- (g) Notwithstanding the above contentions, the petitioner cannot be treated as a financial creditor and hence the petition ought to be dismissed with costs (*para 9 at page 2 of the Reply*).

4.3. The Financial Creditor has filed a rejoinder, raising procedural objections to the reply filed by the Corporate Debtor.

4.4. We have heard the arguments of both sides and perused the records.

5. *The thrust of the Corporate Debtor's objections*

5.1. The Corporate Debtor has stated that the claim of the Financial Creditor is not valid, on the following grounds: -

- (a) That the claim is barred by limitation;
- (b) That the amount in question has been claimed in a civil suit before the Civil Judge (Senior Division), Amravati, by the Financial Creditor, which dismissed the application of the Financial Creditor for attachment before judgment. The appeal against the

order has also been dismissed by the Hon'ble Bombay High Court.

(c) These facts have been suppressed by the Financial Creditor in their application before this Adjudicating Authority.

6. *Aspect of limitation*

- 6.1. Section 3 of the Limitation Act, 1963, requires that subject to the provisions contained in sections 4 to 24 (*inclusive*) every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as defence.
- 6.2. Before proceeding with the merits of the matter, we have to see whether the petition answers the test of limitation, since the objection regarding limitation goes to the root of the matter.
- 6.3. The disbursement of the loan has taken place on twenty-two occasions between 07.04.2012 and 26.03.2013, as per Annexure 'A' at p.10 of the petition. Repayment has apparently been made on two occasions, *i.e.*, 30.04.2012 and 26.03.2013 (*incorrectly mentioned as 26.03.2012 in the table*).
- 6.4. The date of default is stated to be 21.09.2013. The entire case of the Financial Creditor is predicated solely on the argument that there is acknowledgement of liability in the balance sheets of the Corporate Debtor as at 31.03.2013, 31.03.2014, 31.03.2015, 31.03.2016, 31.03.2017 and 31.03.2018, which have been attached to the petition at pp.133-219.
- 6.5. Dr SK Jain, learned authorised representative for the Financial Creditor, submitted that acknowledgement of liability in the balance sheets has the effect of extending the period of limitation in terms of

section 18 of the Limitation Act, 1963. He has quoted a number of judgments in support of his contention.

7. *Supreme Court's judgment in Babulal Vardharji Gurjar v Veer Gurjar Aluminium Industries Pvt Ltd & another*

7.1. Be that as it may, in *Babulal Vardharji Gurjar v Veer Gurjar Aluminium Industries Pvt Ltd & another*,¹ decided by the Hon'ble Supreme Court on 14.08.2020, the Hon'ble Supreme Court had occasion to consider a very similar case. In that matter, a section 7 application was filed in March 2018 by the Financial Creditor with the date of default being mentioned as 08.07.2011. It was specifically argued that the liability in relation to the debt in question was consistently acknowledged by the corporate debtor in its balance sheets and therefore, a fresh period of limitation was available from the date of every such acknowledgement and hence, the application was within time. It is worth noting the rival contentions of the contesting parties in that case.

Rival contentions of the contesting parties

7.2. It is apposite to note the rival contentions in *Babulal Vardharji Gurjar (supra)*.

Appellant's contentions

7.3. The learned senior counsel appearing for the Appellant therein contended that –

(a) the debt shown in the balance sheet does not revive the limitation period of three years as applicable to the IBC under Article 137 of the Limitation Act for the reasons that the debt as shown in the balance sheet is not covered by section 18 of the Limitation Act;

¹ 2020 SCC OnLine SC 647

and even otherwise, section 18 of the Limitation Act cannot revive the “default” relevant for IBC and could only revive limitation with respect to the cause of action (para 41);

(b) the legislative policy has moved from “cause of action” to determination of “default” and in the present case, default having occurred when the account became NPA as on 08.07.2011, the application remains barred by limitation (para 42).

Respondent No.2’s contentions (Financial Creditor)

7.4. The learned senior counsel for the Financial Creditor had contended that –

(a) The debt of the corporate debtor has neither been disputed nor denied by the appellant; rather it is stated in ground P in the memo of appeal that the corporate debtor is and has always been willing to settle the amount of outstanding loan in one-time settlement with the respondent No.2 (para 44);

(b) The application under section 7 of the Code is not barred by limitation ... since the debt in question had been legally and unequivocally admitted to be due and payable in writing by the respondent No.1 all throughout from the year 2011 until 2017 in its balance sheets filed along with the annual returns before the Registrar of Companies; and the debt has been shown as the loan amount outstanding to Corporation Bank, who had assigned the same to the respondent No.2 (para 45);

(c) While heavily relying on the observations in *Jignesh Shah*,² learned Senior Counsel has contended that as per the law declared by this Court, the provisions of section 18 of the Limitation Act certainly extend the period of limitation under the Code on any acknowledgement of debt by the corporate debtor. The learned counsel has referred to the provisions of the Companies Act, 2013,

² *Jignesh Shah v Union of India* (2019) 10 SCC 750

particularly section 95 thereof, as also the observations of this Court in *Mahabir Cold Storage v CIT, Patna*,³ to submit that the registers of a company are of *prima facie* evidence and the balance sheet disclosing loans and borrowings and forming part of annual returns, indeed constitute the admission and acknowledgement of the corporate debtor of its indebtedness. Therefore, ... the loan amount acknowledged to be due and payable by the corporate debtor in the balance sheets and annual reports, continuously from the year 2011 and until the year 2017, becomes an admitted fact of evidence and thereby, the period of limitation is extended by dint of applicability of section 18 of the Limitation Act (para 46);

Respondent No.1's contentions (IRP)

7.5. According to the learned counsel (for the IRP),

- (a) the application filed by the respondent No.2 remains within limitation for the reasons: (a) that the liability of loan is long standing and same is recorded in the balance sheets of corporate debtor for the Financial Years 2011-12, 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17; (b) that by way of letter dated 31.07.2018, request for OTS was made on behalf of the corporate debtor; and (c) OA No.172/2013 was filed before DRT well within the stipulated time period and the same is pending (para 51);
- (b) The mere date of default or date of classification of an account as NPA does not put a full stop on 'further cause of action' or 'continuing cause of action' available to the financial creditor. ... On the settled principle of law, the interpretation of statute should always be in furtherance to its objective and to give effect to the intent of legislature ... if an application under section 7 could be filed only within three years from the date of NPA, it would frustrate the objective of IBC to restructure the stressed assets and ensure maximisation of the value of stressed assets (para 52);

³ 1991 Supp (1) SCC 402

- (c) The contention of the appellant that cause of action arose in 2011 and right to sue started ticking in the said year is baseless, as the corporate debtor had continuously admitted its liability in its audited balance sheets until the year 2017 and further admitted its liability with an offer for OTS (para 53).
- 7.6. The Hon'ble Supreme Court noted that the main plank of submissions of the learned counsel for respondents has been that the applicability of section 18 of the Limitation Act ... is not taken away and, for such acknowledgements have been consistently and continuously made in the balance sheets and annual reports by the corporate debtor as also in its offer for OTS, the fresh period of limitation would be available from the date of every such acknowledgement.
- 7.7. The Hon'ble Supreme Court thereafter proceeded to examine the previous judgments on the applicability of limitation to IBC proceedings, most notably in *Innoventive Industries*,⁴ *BK Educational Services*,⁵ *Swiss Ribbons*,⁶ *K Sashidhar*,⁷ *Jignesh Shah*,⁸ *Vashdeo R Bhojwani*,⁹ *Gaurav Hargovindbhai Dave*,¹⁰ and *Sagar Sharma*,¹¹ and noted that the principles enunciated in these judgments remain crystal clear with the consistent decisions of the Hon'ble Court, and that the only area of dispute around which the contentions have revolved, is about applicability of section 18 of the Limitation Act, and the effect

⁴ *Innoventive Industries Ltd. vs. ICICI Bank Limited* (2018) 1 SCC 407

⁵ *BK Educational Services Pvt Ltd v Parag Gupta & Associates* AIR 2018 SC 5601

⁶ *Swiss Ribbons Private Limited v Union of India* (2019) 4 SCC 17

⁷ *K Sashidhar v Indian Overseas Bank & others* (2019) 12 SCC 150

⁸ *Jignesh Shah v Union of India* (2019) 10 SCC 750

⁹ *Vashdeo R Bhojwani v Abhijyudaya Cooperative Bank Ltd* (2019) 9 SCC 158

¹⁰ *Gaurav Hargovindbhai Dave v Asset Reconstruction Company (India) Ltd* (2019) 10 SCC 572

¹¹ *Sagar Sharma v Phoenix ARC Pvt Ltd* (2019) 10 SCC 353

of the observations occurring in paragraph 21 of the decision in *Jignesh Shah (supra)*.

- 7.8. The Hon'ble Supreme Court emphasised that the Court had consistently applied the declaration of law in *BK Educational Services (supra)*. Application of the rules of limitation to CIRP does not, in any manner, deal with any of the rights of respondent No.2, it only bars recourse to the particular remedy of initiation of CIRP under the Code. Equally, the other submissions made on behalf of the respondent about any stringent application of the law of limitation which was introduced to the Code only after filing of the application by respondent No.2; or about the so-called prejudice likely to be caused to other banks and financial institutions are also of no substance, particularly in the light of the principles laid down and consistently followed by that Court right from the decision in *BK Educational Services (supra)*.
- 7.9. Observing thus, the Hon'ble Supreme Court dismissed the Appeal in *Babulal Vardharji Gurjar (supra)*.

8. Findings

- 8.1. Article 141 of the Constitution stipulates that the law laid down by the Hon'ble Supreme Court is binding on all courts throughout the territory of India, including this Adjudicating Authority.
- 8.2. We note the date of default mentioned in the application to be 21.09.2013. Also, the Financial Creditor has relied heavily on the acknowledgements in the balance sheets for the Financial Years 31.03.2013, 31.03.2014, 31.03.2015, 31.03.2016, 31.03.2017 and 31.03.2018, which have been attached to the petition at pp.133-219,

to contend that the application filed under section 7 of the Code to be within the period of limitation.

- 8.3. The facts in the present application are similar to those obtaining in *Babulal Vardharji Gurjar (supra)*.
- 8.4. Applying the date of default criterion laid down by the Hon'ble Supreme Court, we find that the present application filed under section 7 of the Code fails the test of limitation in so far as the Code is concerned. The authorities quoted by Dr SK Jain, learned authorised representative for the Financial Creditor, while no doubt of value under other enactments, cannot be taken into account in the light of the judgment of the Hon'ble Supreme Court in *Babulal Vardharji Gurjar (supra)*, which is directly on this point.

9. Decision

- 9.1. For the reasons stated above, the application fails and therefore, the same is rejected. We, however, make it clear that any observations made in this order should not be construed as expressing an opinion on merits. Further, the right of the petitioner before any other judicial forum shall not be prejudiced on grounds of dismissal of the present petition by this Adjudicating Authority.
- 9.2. The Court Officer of this Court is hereby directed to communicate a copy of this order communicated to the parties in terms of section 7(5)(b) of the IBC.

Sd/-
Ravikumar Duraisamy
Member (Technical)

Sd/-
Rajasekhar V.K.
Member (Judicial)

16.10.2020