Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No.4222 of 2020

Rajendra Narottamdas Sheth & Anr.
.... Appellant(s)

Versus

Chandra Prakash Jain & Anr.
.... Respondent(s)

J U D G M E N T

L. NAGESWARA RAO, J.

1. Respondent No. 2 filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the '*Code*') which was admitted by the National Company Law Tribunal, Ahmedabad bench (hereinafter referred to as the '*NCLT*' or '*Adjudicating Authority*') on 01.06.2020. The Appellants, who are the suspended directors of the board of R.K. Infratel Ltd. (hereinafter referred to as the '*Corporate Debtor*'), filed an appeal which was rejected by the National Company Law Appellate Tribunal, Delhi (hereinafter referred to as the '*NCLAT*'). Therefore, this Appeal.

2. The Corporate Debtor is in the business of setting up underground fiber network in the cities of Surat, Ahmedabad,

Vapi, Silvasa, Ankleswar and in South Gujarat, and providing dedicated dark fiber, broadband, internet leased line, VPN, point-to-point, wi-fi and wiMAX connections and CCTV surveillance services to corporate entities, financial institutions and other organisations. Respondent No. 2, Union Bank of India (hereinafter referred to as the '*Bank*' or '*Financial Creditor*'), sanctioned a loan of Rs. 4.5 crore which was cleared by the Corporate Debtor on 08.12.2012. Another loan was granted by the Financial Creditor for Rs. 3.5 crore which was also repaid on 28.05.2018. Thereafter, loans were granted by the Financial Creditor to the Corporate Debtor but the Corporate Debtor was unable to settle the dues of the Financial Creditor in time. On 30.09.2014, the account of the Corporate Debtor was declared as non-performing asset (NPA). The Financial Creditor issued notice for recovery of all dues payable by the Corporate Debtor on 01.10.2014. Pursuant to the notice, the Financial Creditor filed an application before the Ahmedabad bench of the Debt Recovery Tribunal under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for recovery of the dues, which is still pending consideration.

3. On 25.04.2019, the Financial Creditor filed an application under Section 7 of the Code, which was admitted

on 01.06.2020. The Financial Creditor averred, in the application filed under Section 7 of the Code, that the Corporate Debtor owed an amount of Rs. 24.62 crore as on 31.03.2019. The Financial Creditor submitted documents in support of its claim, including a debit balance confirmation letter dated 07.04.2016 signed by the Corporate Debtor. On the other hand, the Corporate Debtor contended that the application was time-barred. It was further contended by the Corporate Debtor that the application under Section 7 filed by the Financial Creditor was legally untenable, as proceedings before the Debt Recovery Tribunal, including a counter claim by the Corporate Debtor, were still pending consideration. After examining the material on record, the Adjudicating Authority held, by an order dated 01.06.2020, that the application under Section 7 was not barred by limitation. The Adjudicating Authority referred to the debit balance confirmation letter dated 07.04.2016 and regular credit entries made after 07.04.2016 till May, 2018 to come to the said conclusion. A letter by the Corporate Debtor dated 17.11.2018 giving details of the amount repaid till 30.09.2018 and acknowledging the outstanding amount as on 30.09.2018 was also referred to by the NCLT. In addition, the reply of the Corporate Debtor was relied upon wherein

payment of an amount of Rs. 16.17 lakh during the financial year 2019-20 was admitted. The Adjudicating Authority rejected the contention of the Corporate Debtor that the application filed by the power of attorney holder on behalf of the Financial Creditor was not maintainable.

4. The Corporate Debtor reiterated its stand that the application under Section 7 of the Code was barred by limitation before the NCLAT. According to the Corporate Debtor, the payments made by it to the Bank after its account was declared as NPA could not extend the period of limitation. It was further contended by the Corporate Debtor that the "cut back offer" cannot be taken into account for attracting Section 19 of the Limitation Act, 1963 (hereinafter referred to as the '*Limitation Act*'). It was argued on behalf of the Corporate Debtor that Section 18 of the Limitation Act is also not applicable to the facts of this case. The further argument of the Corporate Debtor was that the power of attorney in favour of the individual who has signed the application under Section 7 of the Code had been granted prior to the Code coming into force without any specific authorisation to initiate proceedings under the Code, and therefore, the application was not maintainable.

5. The NCLAT examined the power of attorney given by the Bank to Mr. Praveen Kumar Gupta and found no merit in the argument of the Corporate Debtor that the application under Section 7 of the Code was not maintainable as it was filed by a power of attorney holder. In so far as limitation is concerned, the NCLAT referred to all the documents as well as the "cut back arrangement" relied on by the NCLT to hold that the application under Section 7 of the Code was filed within the prescribed time. It was further observed by the NCLAT that the Corporate Debtor could not demonstrate any error in the order of the Adjudicating Authority. Accordingly, the NCLAT dismissed the appeal of the Corporate Debtor.

6. Essentially, there are two issues that arise for consideration in this Appeal. The first pertains to the maintainability of the application under Section 7 of the Code filed by a power of attorney holder. The second relates to the question of limitation.

Maintainability of the application under Section 7 when filed by a power of attorney holder

7. Mr. Rana Mukherjee, learned Senior Counsel appearing for the Appellants, submitted that the application filed on behalf of the Financial Creditor under Section 7 of the Code was on the basis of a power of attorney. He relied upon a

judgment of the NCLAT in ***Palogix Infrastructure Private Limited v. ICICI Bank Limited***[1] in which it was held that an 'authorised person', distinct from a 'power of attorney holder', can file an application under Section 7 and that a 'power of attorney holder' is not competent to file an application on behalf of a financial creditor. According to Mr. Mukherjee, the defect in filing of the application by an unauthorised person is not curable. Assuming it is curable, the Financial Creditor failed to rectify the defect within the time stipulated under Section 7 (5) of the Code, in spite of an order passed by the Adjudicating Authority on 22.01.2020 granting time to the Financial Creditor. He submitted that the person who filed the application under Section 7 of the Code is not the authorised representative of the Financial Creditor and therefore, the application was liable to be dismissed.

8. On the other hand, the Financial Creditor contended that the power of attorney was executed in favour of Mr. Praveen Kumar Gupta, which was perused by both the Adjudicating Authority and the NCLAT to conclude that the application was filed by the authorised person. Mr. Alok Kumar, the learned Counsel appearing for the Financial Creditor, also relied upon the judgment in ***Palogix***

1 2017 SCC Online NCLAT 266

Infrastructure (supra) and argued that a person authorised by way of a power of attorney can file an application under Section 7 of the Code.

9. Initiation of the corporate insolvency resolution process by a financial creditor is dealt with under Section 7 of the Code. Section 7 (2) provides that the financial creditor shall make an application in such form and manner and accompanied with such fee as may be prescribed. As per Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter, '*the 2016 Rules*'), the financial creditor is required to make an application for initiating the corporate insolvency resolution process against the corporate debtor under Section 7 of the Code in Form 1, accompanied with documents and records required therein. Form 1 is in a tabular form and the financial creditor has to give particulars of the details sought. Further, the Form is required to be signed by the "person authorised to act on behalf of the financial creditor".

10. The authorisation, in terms of the power of attorney, given by the Financial Creditor to Mr. Praveen Kumar Gupta who has filed the application under Section 7 of the Code has been placed on record. Pursuant to the resolution passed by the board of directors of the Bank on 06.12.2008, the power

of attorney was executed by the general managers in 2011. By way of the said power of attorney, Mr. Praveen Kumar Gupta was appointed by the Bank to act as its constituted attorney with respect to "*all the business and affairs of the Bank and to conduct and manage and to assist in the conduct and management of all such businesses and affairs of the Bank, both within and outside India and to do all acts, deeds and things necessary or proper for carrying on the business and affairs of the Bank*". Further, Mr. Praveen Kumar Gupta has also been authorised to "*commence, prosecute, endorse, defend, answer and/or oppose any suit or other legal proceedings including any civil or criminal proceedings in any Court or Tribunals and any demand touching any matters in which the Bank may or may hereafter be interested or concerned and also, ... compromise, refer to arbitration, abandon, submit to judgement or become non-suited, in any such suits or proceedings, to appoint advocate, solicitors and pleaders as occasion shall require and to make sign, execute, present and file all applications, plaints, petitions, written statements, vakalatnamas or any other papers expedient or necessary ... to be made, signed, executed, presented or filed*".

11. The NCLAT in its judgment in ***Palogix Infrastructure*** (supra) held that a 'power of attorney holder' is not competent to file an application under Section 7 on behalf of the financial creditor. However, the NCLAT made certain further observations, as reproduced below:

> "***41.*** *In so far as the present case is concerned, the 'Financial Creditor'-Bank has pleaded that by Board's Resolutions dated 30th May, 2002 and 30th October, 2009, the Bank authorised its officers to do needful in the legal proceedings by and against the Bank. If general authorisation is made by any 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' in favour of its officers to do needful in legal proceedings by and against the 'Financial Creditor' / 'Operational Creditor' / 'Corporate Applicant' in favour of its officer, mere use of word 'Power of Attorney' while delegating such power will not take away the authority of such officer and for all purposes it is to be treated as an 'authorization' by the 'Financial Creditor' / 'Operational Creditor' / 'Corporate Applicant' in favour of its officer, which can be delegated even by designation. In such case, officer delegated with power can claim to be the 'Authorized Representative' for the purpose of filing any application under section 7 or Section 9 or Section 10 of 'I &B Code'.*"

The NCLAT was of the opinion that general authorisation given to an officer of the financial creditor by means of a power of attorney, would not disentitle such officer to act as the authorised representative of the financial creditor while filing an application under Section 7 of the Code, merely because the authorisation was granted through a power of

attorney. Moreover, the NCLAT in ***Palogix Infrastructure*** (supra) has held that if the officer was authorised to sanction loans and had done so, the application filed under Section 7 of the Code cannot be rejected on the ground that no separate specific authorisation letter has been issued by the financial creditor in favour of such officer. In such cases, the corporate debtor cannot take the plea that while the officer has power to sanction the loan, such officer has no power to recover the loan amount or to initiate corporate insolvency resolution process, in spite of default in repayment. We approve the view taken by the NCLAT in ***Palogix Infrastructure*** (supra).

12. In the present case, Mr. Praveen Kumar Gupta has been given general authorisation by the Bank with respect to all the business and affairs of the Bank, including commencement of legal proceedings before any court or tribunal with respect to any demand and filing of all necessary applications in this regard. Such authorisation, having been granted by way of a power of attorney pursuant to a resolution passed by the Bank's board of directors on 06.12.2008, does not impair Mr. Gupta's authority to file an application under Section 7 of the Code. It is therefore clear that the application has been filed by an authorised person

on behalf of the Financial Creditor and the objection of the Appellants on the maintainability of the application on this ground is untenable.

Limitation

13. Mr. Rana Mukherjee, learned Senior Counsel appearing for the Appellants, contended that the date of default is shown as 30.09.2014 in the application filed under Section 7 of the Code. He submitted that the application under Section 7 filed on 25.04.2019 was barred by limitation as it was not filed within three years from the date of default. He further argued that apart from the debit balance confirmation letter dated 07.04.2016, no other document extending the period of limitation has been filed along with the application under Section 7 of the Code. No other information has been provided by the Financial Creditor to show that the application under Section 7 was filed within the period of limitation. The balance sheet referred to by the Financial Creditor in the application relates to the financial year 2015-2016 which does not save the period of limitation. He argued that the application ought to have been rejected at the threshold in view of the absence of any pleading or proof that the application was filed within limitation. Reliance was placed by him on a judgment of this Court in ***Babulal***

Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited & Anr.[2].

14. In response, Mr. Alok Kumar, learned Counsel appearing for the Financial Creditor, submitted that no error was committed by the Adjudicating Authority in admitting the application filed under Section 7 of the Code, after perusing the documents filed by the Financial Creditor along with the application. It was further submitted that the material placed on record by the Corporate Debtor before the Adjudicating Authority clearly shows acknowledgement of the debt till the year 2019. Therefore, the application under Section 7 filed on 25.04.2019 cannot be said to be beyond the period of limitation in terms of Section 18 of the Limitation Act.

15. Section 7 (1) of the Code enables a financial creditor to file an application for initiating corporate insolvency resolution process against a corporate debtor before the adjudicating authority when a default has occurred. Sub-section (2) thereof provides that the application shall be in the form and manner as prescribed. Sub-section (3) obligates the financial creditor to furnish the record of default recorded with the information utility or such other record or evidence of default as may be specified, along with the

2 (2020) 15 SCC 1

application. On the basis of records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3), the Adjudicating Authority within a period of 14 days shall ascertain the existence of a default, as stipulated under sub-section (4). According to sub-section (5), the Adjudicating Authority may admit the application filed under sub-section (2), where the Adjudicating Authority is satisfied that a default has occurred, the application filed is complete and no disciplinary proceedings are pending against the proposed resolution professional. As per sub-section (6), the corporate insolvency resolution process shall commence from the date of admission of the application.

16. Rule 4 of the 2016 Rules prescribes that the application under Section 7 of the Code shall be filed in Form 1, accompanied by documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Regulation 2-A of the said Regulations permits the financial creditor to furnish, as evidence of default, (a) certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891, and (b) an order of a

court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired. Form 1 is in a printed format and in five parts, wherein the financial creditor shall give his particulars, the particulars of the corporate debtor, the proposed interim resolution professional and the financial debt. The date on which the default has occurred shall be provided by the financial creditor as required in Part IV. In Part V of Form 1, the financial creditor is required to furnish documents as listed therein as well as other documents that may be relevant to prove the existence of financial debt, the amount and the date of default.

17. The date of default in the ***Babulal Vardharji Gurjar*** case (supra) was 08.07.2011, being the date of the NPA. The particulars of financial debt with documents and evidence on record as required in Part V of the application were not furnished by the financial creditor. As no foundation was laid in the application suggesting any acknowledgement or any other date of default, the financial creditor was not permitted to make submissions at a later stage to the effect that the application filed was with the limitation period. In the said fact situation, this Court in ***Babulal Vardharji Gurjar*** (supra) held that Section 18 of the Limitation Act and the

principles thereof were not applicable. In ***Dena Bank v. C. Shivkumar Reddy & Anr.***[3], this Court had occasion to deal with the pleadings and the documents required to be filed at the time of making of an application under Section 7 of the Code. It was observed therein that the financial creditor can only fill in the particulars as mentioned in Form 1 and there is no scope for elaborate pleadings. This Court was of the view that an application under Section 7 cannot be compared with a plaint in a suit. It was further held in the said judgment that there is no bar for filing of documents as required under Section 7, until a final order either admitting or dismissing the application has been passed. While concluding, this Court had opined that in case of inordinate delay, the Adjudicating Authority, at its discretion, may allow or decline the request of the applicant to file additional pleadings and / or documents before passing the final order.

18. While examining the question of maintainability of an application filed under Section 7 of the Code in the absence of a plea regarding the acknowledgement of liability, this Court in ***Asset Reconstruction Company (India) Limited v. Bishal Jaiswal & Anr.***[4], gave an opportunity to the financial creditor to amend its pleadings before the NCLAT on

3 2021 SCC Online SC 543
4 (2021) 6 SCC 366

payment of costs of Rs.1 lakh. In the said case, the corporate debtor's account was declared as NPA from 2010. The NCLT admitted the application under Section 7 on the ground that there was a continuing cause of action. The NCLAT dismissed the appeal of the corporate debtor on the ground that limitation would commence from the date on which the Code came into force, *i.e.*, 01.12.2016. This Court remanded the matter back to the NCLAT to re-examine the question of limitation. After remand, the NCLAT allowed the appeal filed by the corporate debtor on the ground that the three years' period from the date of the corporate debtor's account being classified as NPA, prescribed under Section 137 of the Limitation Act, had expired on 30.12.2017. In the appeal filed against the order passed by the NCLAT before this Court, the financial creditor argued that there was acknowledgement on the part of the corporate debtor. On the other hand, the corporate debtor contended that there was no pleading either before the NCLT or the NCLAT regarding the acknowledgement of liability extending limitation. An application was filed by the financial creditor before this Court to amend the pleadings, arguing that such amendment could be permitted by this Court. Noting that the financial creditor had been remiss in pleading

acknowledgement of liability but given the staggering amounts allegedly due, the financial creditor was given an opportunity to amend its pleadings before the NCLAT in support of its contention that there was acknowledgement of liability, subject to payment of costs.

19. Any suit, appeal or application filed after the prescribed period of limitation shall be dismissed in spite of limitation not being set up as a defence, as per Section 3 of the Limitation Act. Section 238A of the Code makes the provisions of the Limitation Act applicable to the proceedings before the Adjudicating Authority, as far as may be. Therefore, the Adjudicating Authority is duty-bound to scrutinise the application filed under Section 7 of the Code and come to a conclusion on whether such application is barred by limitation, even in the absence of any plea with respect to limitation. (See: ***Noharlal Verma v. District Cooperative Central Bank Limited, Jagdalpur***[5])

20. There can be no doubt that it is the responsibility of the financial creditor to give all particulars relating to the debt due and the date of default, along with the requisite documents, at the time of filing of an application under Section 7 of the Code. A plain reading of Section 7, Rule 4 of the 2016 Rules and Form 1 makes it clear that the

5 (2008) 14 SCC 445

Adjudicating Authority may admit an application under Section 7 only if he is satisfied that a default has occurred. The definition of 'default' under Section 3 (12) of the Code refers to non-payment of debts which are "due and payable" in law, meaning thereby that an application under Section 7 of the Code is maintainable only with respect to debts that are not time-barred. (See: ***B.K. Educational Services Private Limited v. Parag Gupta and Associates***[6]) The primary obligation of making out a *prima facie* case of default is on the financial creditor. There is no necessity for the corporate debtor to provide any information at the stage of admission of the application under Section 7 of the Code, as the burden of showing non-payment of a legally recoverable debt, which is not time-barred, is on the financial creditor. At the same time, it is clear from the judgments of this Court in ***Asset Reconstruction*** (supra) and ***Dena Bank*** (supra) that non-furnishing of information by the financial creditor at the time of filing an application under Section 7 of the Code need not necessarily entail in dismissal of the application. An opportunity can be provided to the financial creditor to provide additional information required for satisfaction of the Adjudicating Authority with respect to the occurrence of the default.

6 (2019) 11 SCC 633

21. In the instant case, there is no dispute that the date of default is 30.09.2014 and the application under Section 7 of the Code was filed on 25.04.2019. According to the Financial Creditor, Section 18 of the Limitation Act is applicable in view of the Corporate Debtor acknowledging its debt by way of letters, written in and after 2018, giving details of amount repaid, acknowledging the amount outstanding and requesting consideration of one-time settlement proposal. Sub-section (1) of Section 18 of the Limitation Act reads as under:

> ***18. Effect of acknowledgement in writing. –*** *(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.*

It is no more *res integra* that Section 18 of the Limitation Act is applicable to applications filed under Section 7 of the Code. In case the application under Section 7 is filed beyond the period of three years from the date of default and the financial creditor furnishes the required information relating to the acknowledgement of debt, in writing by the corporate debtor, before the Adjudicating Authority, with

such acknowledgement having taken place within the initial period of three years from the date of default, a fresh period of limitation commences and the application can be entertained, if filed within this extended period.

22. There is no dispute that the date of default in this case is 30.09.2014, as mentioned by the financial creditor in its application under Section 7. A copy of the debit balance confirmation letter dated 07.04.2016 was filed along with the application. As the application was filed only on 25.04.2019, which is beyond a period of three years even after taking into account the debit balance confirmation letter dated 07.04.2016, the application was barred by limitation. However, the Corporate Debtor had, in its reply before the Adjudicating Authority, placed on record a letter dated 17.11.2018, which detailed the amount repaid till 30.09.2018 and acknowledged the amount outstanding as on 30.09.2018. On the basis of this letter and the record showing that the Corporate Debtor had executed various documents amounting to acknowledgement of the debt even in the financial year 2019-20, the NCLT was of the opinion that the application was filed within the period of limitation. The said view was upheld by the NCLAT.

23. We have already held that the burden of *prima facie* proving occurrence of the default and that the application filed under Section 7 of the Code is within the period of limitation, is entirely on the financial creditor. While the decision to admit an application under Section 7 is typically made on the basis of material furnished by the financial creditor, the Adjudicating Authority is not barred from examining the material that is placed on record by the corporate debtor to determine that such application is not beyond the period of limitation. Undoubtedly, there is sufficient material in the present case to justify enlargement of the extension period in accordance with Section 18 of the Limitation Act and such material has also been considered by the Adjudicating Authority before admitting the application under Section 7 of the Code. The plea of Section 18 of the Limitation Act not having been raised by the Financial Creditor in the application filed under Section 7 cannot come to the rescue of the Appellants in the facts of this case. It is clarified that the onus on the financial creditor, at the time of filing an application under Section 7, to *prima facie* demonstrate default with respect to a debt, which is not time-barred, is not sought to be diluted herein. In the present case, if the documents constituting acknowledgement of the

debt beyond April, 2016 had not been brought on record by the Corporate Debtor, the application would have been fit for dismissal on the ground of lack of any plea by the Financial Creditor before the Adjudicating Authority with respect to extension of the limitation period and application of Section 18 of the Limitation Act.

24. In view of the aforesaid, the Appeal is dismissed.

.....J.
[L. NAGESWARA RAO]

.....J.
[B. R. GAVAI]

.....J.
[B. V. NAGARATHNA]

New Delhi,
September 30, 2021