15.10.2020
Item No. 03
Ct. No.19
PG

**C.O. 1257 of 2020**
**Gouri Shankar Chatterjee**
**Vs.**
**State Bank of India**

Ms. Noella Banerjee
Mr. Dipak Dey.....for petitioner

Mr. Om Narayan Rai.....for opposite party

This petition under article 227 of the Constitution of India is directed, inter alia, against order dated 19th August, 2019 passed by National Company Law Tribunal, Kolkata Bench (NCLT) in CPI (IB) 1111/KB/2018 (State Bank of India vs. Hanumanta Engineering Private Limited).

Ms. Banerjee, learned advocate had appeared on behalf of petitioner to move it on 6th August, 2020. She had demonstrated proof of service, submitted that an earlier similar petition was pending, which would be withdrawn at first opportunity and prayed for interim order. Her submission regarding withdrawal was not recorded but there is recollection of such submission having had been made. Court had directed service of copy of order dated 6th October, 2020, since State Bank went unrepresented. Today Mr. Rai, learned advocate appears on behalf of the bank.

Ms. Banerjee submits, her client's challenge to the two impugned orders is that the Tribunal did not have jurisdiction to make it. By impugned order dated 19th August, 2019 the Tribunal admitted application of the bank made under section 7 of Insolvency and Bankruptcy Code, 2016 and made consequent directions. She submits, it would appear from paragraph 17 of the application that the bank admits to have declared the corporate debtor's account as a Non Performing Asset (NPA) on 6th August, 2012. She points out from the affidavit verifying the application that it was notarised on 8th August, 2020.

She relies on judgments of Supreme Court. Firstly, on **Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd**. reported in **(2020) 222 CompCas115(SC)**, paragraph 30. She submits, the application of Limitation Act, 1963 made by the Code by section 238-A and the attending principles, had been declared by the Court in that paragraph. Paragraph 30 is quoted below:

> *"**30**. When Section 238-A of the Code is read with the above-noted consistent decisions of this Court in Innoventive Industries, B.K. Educational Services, Swiss Ribbons, K. Sashidhar, Jignesh Shah, Vashdeo R. Bhojwani, Gaurav Hargovindhbhai Dave and Sagar Sharma respectively, the following basics undoubtedly come to the fore: (a) that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation; (b) that CIRP is not intended to be*

*adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor; (c ) that intention of the Code is not to give a new lease of life to debts which are time-barred; (d) that the period of limitation for an application seeking initiation of CIRP Under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues; (e) that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs; (f) that default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and (g) that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and (h) an application Under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application.*

*Whether Section 18 Limitation Act could be applied to the present case ?"*

She also relies on **Gaurav Hargovindhbhai Dave vs. Asset Reconstruction Company (India) Ltd.** reported in **(2019) 10 SCC 572**. Her submission, by this judgment Supreme Court said that time begins to run on and from date of declaration of the borrower's account as NPA. She submits, where article 137 requires the application to be brought within three years from date when the right to apply accrues, Supreme Court having said that time begins to run from date of declaration of NPA and corporate debtor's admitted date of declaration as NPA being 6th August, 2012, on those facts the Tribunal lacked jurisdiction to direct admission of the application.

Mr. Rai submits, statutory right of appeal is available to petitioner. That should not be allowed to be bypassed. However, he would first proceed to demonstrate that the Tribunal had jurisdiction and at best it can be said that it came to a wrong decision, but on appeal.

He relies on judgment of Supreme Court in **Ittyavira Mathai vs. Varkey Varkey** reported in **AIR 1964 SC 907**. A passage from paragraph 8 is extracted and set out below:

> *"8. .....If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not doing something which it had not jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities".*

Regarding interference by High Court inspite of statutory remedy being available, he relies on judgments of Supreme Court, firstly in **Embassy Property Developments Pvt. Ltd. vs. State of Karnataka** available at **2019 SCC Online SC 1542**. He submits, one of two questions dealt with in the

judgment was whether the High Court ought to interfere under article 226/227 of the Constitution, with an order passed by NCLT in a proceeding under the Code (2016), ignoring availability of statutory remedy of appeal to National Company Law Appellate Tribunal (NCLAT). It would be sufficient to extract a passage from paragraph 22 and entire paragraph 24 for reproduction below.

> *"22....Therefore the question whether the error committed by an administrative authority/tribunal or a court of law went to jurisdiction or whether it was within jurisdiction may still be relevant to best whether a statutory alternative remedy should be allowed to be bypassed or not."*

> *"24. Therefore in so far as the question of exercise of the power conferred by Article 226, despite the availability of a statutory alternative remedy, is concerned, Anisminic cannot be relied upon. The distinction between the lack of jurisdiction and the wrongful exercise of the available jurisdiction, should be certainly be taken into account by High Courts, when Article 226 is sought to be invoked bypassing a statutory alternative remedy provided by a special statute."*

He then relies on **Deep Industries Limited vs. Oil and Natural Gas Corporation Limited**, available at **2019 SCC Online SC 1602**, where in paragraph 25, observations were made regarding the question relating to jurisdiction of High Courts under article 227 of the Constitution of India in relation to matters decided under Arbitration and Conciliation Act, 1996. Mr. Rai submits, he relies on the observations, as applicable, since both, the Act of

1996 and Code of 2016 are complete Codes in themselves, providing for original and appellate actions. The observations made in the judgment, as relied upon, are quoted below:

> *" Mr. Rohtagi is also correct in pointing out that the legislative policy qua the general revisional jurisdiction that is contained by the amendments made to Section 115 C.P.C. should also be kept in mind when High Courts dispose of petitions filed under article 227. The legislative policy is that no revision lies if an alternative remedy of appeal is available. Further, even when a revision does lie, it lies only against a final disposal of the entire matter and not against interlocutory orders."*

Court had observed, to arguing learned advocates, prima facie satisfaction for interfering in the interim on directions to be had for filing affidavits and hearing of the petition thereafter. Mr. Rai wanted and obtained hearing at this stage, for disposal.

That article 137 in Limitation Act, 1963 would apply for the purpose of the Bank's application made before the Tribunal, is undisputed. As much was said in **Babulal Vardharji Gurjar** (supra). Court notices such judgment was made on appeal from an appeal under section 62 of the Code (that is on a statutory appeal to the Supreme Court as provided in the Code). Nevertheless, said Court in the judgment said, inter alia, intention of the Code (2016) is not to give a new lease of life to debts, which are time-barred, period of limitation for an application under section 7 of the Code is governed by article 137

in the Limitation Act, that the right to sue accrues on the date when default occurs and if the default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases, on facts, the delay in filing may be condoned. On inquiry Court has ascertained that there was no condonation of delay by the impugned order though, Mr. Rai submits, an application under section 5 was made by his client. This fact, coupled with what was said in **Gaurav Hargovindhbhai Dave** (supra) that time begins to run on the date of declaration as NPA, stares in the face against the application being admitted, having been brought six years, more or less, after the corporate debtor was declared to be NPA on 6th August, 2012. Section 3 in the Limitation Act mandates dismissal of, inter alia, an application, which is barred by limitation.

On perusal of the impugned order, as pointed out by Mr. Rai, it appears from paragraphs 19 and 20 that the bank had asserted, the bar of limitation did not apply as the corporate debtor had made acknowledgements in its balance sheets, acknowledgements as in section 18 of the Limitation Act, for the period of limitation being extended.

Declaration of law or the principles of law applicable regarding provisions in the 2016 Code were

declared by Supreme Court in **Babulal Vardharji Gurjar** (supra), the judgment bearing date 14th August, 2020. The judgment, therefore, was not before the Tribunal as on date of impugned orders.

Court is convinced that mandate of Limitation Act is for dismissal of, inter alia, an application such as the Bank's, on having been brought more than three years after right to sue accrued. The Tribunal, on the facts, lacked jurisdiction to admit it. Therefore, interference is warranted. Here, such interference cannot be prevented by contention of Mr. Rai on reliance of **Deep Industries Limited** (supra). Legislative intent regarding amendment to section 115 in Code of Civil Procedure, 1908 had been expressed by the observations in paragraph 25, extracted above. There has been no constitutional amendment in respect of article 227. Furthermore, even if the legislative intent on amendment to section 115 is applied as a guide to exercise of power under article 227, interference in this case is sought by the party applying on contention that the application should have been dismissed. That, as far as the application made under section 7 of the 2016 Code is concerned, would have disposed of it.

In **Embassy Property Development Pvt. Ltd**. (supra) Supreme Court found interference by

High Court of Karnataka justified as would appear from paragraph 47, extracted and reproduced below:

> *"47. Therefore, in fine, our answer to the first question would be that NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ petition, on the basis that NCLT was coram non judice."*

Mr. Rai submits further, this petition is delayed and therefore, petitioners are not entitled to relief from Court. Ms. Banerjee submits, the subsequent order passed on 20th February, 2020, directing liquidation, has also been challenged by this petition. Soon after, in March, 2020 the pandemic happened, which is why there has been some delay, if at all. This ground of delay does not bear substance particularly in view of Supreme Court having taken *suo motu* cognizance to pass **order dated 23rd March, 2020** in re **Suo Motu Writ Petition (Civil) no.3/2020** in consequence of the pandemic.

For reasons aforesaid, the impugned order dated 19th August, 2020 is set aside and quashed. There will necessarily be consequence on also impugned order dated 20th February, 2020.

**(Arindam Sinha, J.)**