

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH - I, CHENNAI**

CP/1436/IB/2018

*(filed under Section 7 of the Insolvency and Bankruptcy Code, 2016
and Rule 4 of the Insolvency and Bankruptcy [Application to
Adjudicating Authority], Rules, 2016)*

In the matter of *M/s. Bharani Properties and Developers Pvt. Ltd.*

M/s. ASSET RECONSTRUCTION COMPANY INDIA LIMITED

The Ruby, 10th Floor,
29, Senapati Bapat Marg,
Dadar (West)
Mumbai – 400 028

.. *Financial Creditor*

– Vs –

M/s. BHARANI PROPERTIES AND DEVELOPERS PVT. LTD.

No. B60 – 63, PIPDIC Industrial Estate,
Mettupalayam,
Pondicherry – 605 009

.. *Corporate Debtor*

Order Pronounced on 1st June 2021

CORAM:

**R. VARADHARAJAN, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)**

For the Financial Creditor : P. Elaya Rajkumar, Advocate

For the Corporate Debtor: Shubharanjani Ananth, Advocate

ORDER

Per: R. VARADHARAJAN, MEMBER (JUDICIAL)

1. This Application has been filed under Section 7 of the Insolvency & Bankruptcy Code, 2016 ("hereinafter referred to as IBC, 2016") by **M/s. Asset Reconstruction Company India**

Limited (hereinafter called as "*Financial Creditor*") for the purpose of initiating the Corporate Insolvency Resolution Process (CIRP) against **M/s. Bharani Properties and Developers Private Limited** (hereinafter called as "*Respondent*"). The Respondent / Corporate Debtor, herein has stood as a Corporate Guarantor in respect of the loans availed by the Principal Borrower viz. M/s. Anandram Developers Private Limited ("**ADPL**").

2. Part – I, of the Application discloses the fact that the Petitioner is an Asset Reconstruction Company incorporated under the provisions of the Companies Act, 1956 on 11.02.2002. Part-II of the Application gives all the particulars of the Corporate Debtor from which it is evident that the Corporate Debtor is a Private Limited Company with CIN:U45201PY2005PTC001895 which was incorporated on 31.08.2005 and that its Authorized and Paid up Share Capital is ₹3,00,00,000/- and ₹3,00,00,000/- respectively. The Registered Office of the Corporate Debtor as per the Application is stated to be situated at No. B60 – 63, PIPDIC Industrial Estate, Mettupalayam, Pondicherry – 605 009.

3. Part – III of the Application discloses the fact that the Financial Creditor had proposed the name of one Mr. TVL Narasimha Rao, as the Interim Resolution Professional, who has also filed his consent in Form 2.

4. From Part-IV of the Application, it is seen that on 28.11.2005, Indian Overseas Bank had sanctioned Term Loan of an amount of INR 30 Crore to M/s. Anandram Developers Private Limited ("**ADPL**"), the Principal Borrower and in respect of whom the Liquidation proceedings are pending before this Adjudicating Authority. It is seen that, in order to secure the said loan, on 30.06.2006 the Respondent / Corporate Debtor had executed Guarantee Agreement in favour of Indian Overseas Bank for the repayment of the said Term Loan. Upon failure to repay the due amounts by ADPL, on 31.12.2007, the Indian Overseas Bank classified the account of ADPL as non-performing asset ("**NPA**"). Thereafter, on 10.02.2015 the Indian Overseas Bank assigned the Term Loan to ARCIL, who is the Financial Creditor herein.

5. Similarly, on 31.01.2006, Oriental Bank of Commerce had sanctioned Term Loan of an amount of INR 30 Crores and on 30.06.2009, it sanctioned Funded Interest Term Loan of INR 2.06 Crores to ADPL and in order to secure the said loan, the

Respondent / Corporate Debtor on 10.10.2006 and 30.06.2009 had executed Guarantee Agreements for the repayment of Term Loan and Funded Interest Term Loan respectively, in favour of Oriental Bank of Commerce. Upon failure to repay the due amounts by ADPL, the Oriental Bank of Commerce classified the Term Loan account of ADPL as NPA on 31.08.2007, and the Funded Interest Term Loan account as NPA on 30.09.2009. Thereafter, on 28.03.2014 the Oriental Bank of Commerce assigned both the Term Loan and Funded Interest Term Loan to ARCIL, who is the Financial Creditor herein.

6. The Learned Counsel for the Financial Creditor submitted that they had filed O.A. No. 430 of 2014 before the DRT – II, Chennai (Old O.A. No. 106 of 2012 before DRT – I, Chennai) on 04.06.2012 in respect of the claims from ADPL and the Guarantors for a total sum of Rs.22,77,65,247/- with further interest at the rate of 12% p.a. which came to be allowed by the DRT – II, Chennai vide its order dated 31.10.2016 and the consequently the Recovery Certificate was also issued by the DRT in DRC No. 684 of 2016.

7. It was further submitted that the Financial Creditor, viz. ARCIL has filed O.A. No. 29 of 2016 on the file of DRT – I, Chennai in respect of claims from the Corporate Debtor and

Guarantors for a total sum of Rs.56,49,97,828/- as on 19.10.2015 with further interest at the rate of 16% p.a. and the said O.A. came to be allowed by the DRT – I, Chennai vide its order 13.03.2018. Hence, it was submitted that as per the above said orders passed by the DRT, the Respondent / Corporate Debtor had defaulted in repayment of a sum of Rs.88,83,26,278/- as on 31.10.2018 and that the present Application is filed before this Adjudicating Authority on 14.12.2018. It is pertinent to note here that, the Financial Creditor has not mentioned the 'Date of Default' in Part – IV of the Application, which is crucial for determining as to whether the claim is saved / barred by limitation.

8. At this juncture, it is also apposite to take on record the documents, which have been filed by the Financial Creditor in support of their claims, and based on those documents, this Tribunal will examine the claim of the Financial Creditor and its debt and default on the part of the Respondent / Corporate Debtor;

- Copy of the Sanction Advice dated 28.11.2005 issued by the Indian Overseas Bank (assignor of the Applicant)
- Copy of the Guarantee Agreements dated 29.06.2006 and 30.06.2006 executed by the Corporate Debtor Bharani Properties Developer Private Limited in favour of the Indian Overseas Bank.

- Copy of the Term Loan Agreement dated 10.10.2006 entered into between the Oriental Bank of Commerce.
- Copy of the Agreement of Term Loan (FITL) dated 30.06.2009 entered into between the Oriental Bank of Commerce.
- Copy of the Guarantee Agreement dated 10.10.2006 executed by the Corporate Debtor.
- Copy of the Guarantee Agreement dated 30.06.2009 and 06.07.2006 executed by the Corporate Debtor in favour of the Assignor of the Financial Creditor.
- Copy of the Assignment Agreement dated 28.03.2014 entered into between the Oriental Bank of Commerce and ARCIL.
- Copy of the Assignment Agreement dated 10.02.2015 entered into between the Indian Overseas Bank and ARCIL.
- Order dated 31.10.2016 passed by the Debts Recovery Tribunal – II in O.A. No. 430 of 2014 (Old No. 106 of 2012, DRT – I, Chennai)
- Recovery Certificate issued by DRT in D.R.C. No. 684 of 2016.
- Copy of the order passed by DRT Chennai in O.A. No. 29 of 2016 filed by the Applicant against the Corporate Debtor.
- Certificate of Registration of Mortgage dated 30.06.2006 for the limit of Rs.30 Crores, availed from the Indian Overseas Bank, (Assignor of the Financial Creditor) issued by the Registrar of Companies.
- Certificate of Registration of Mortgage dated 06.07.2006 for the limit of Rs.30 Crores, availed from the Oriental Bank of Commerce, (Assignor of the Financial Creditor) issued by the Registrar of Companies

- Certificate of Registration of Mortgage dated 30.06.2009 for the limit of Rs.2.06 Crores, availed from the Oriental Bank of Commerce, (Assignor of the Financial Creditor) issued by the Registrar of Companies

9. The Respondent / Corporate Debtor has filed its reply and it is averred in the Reply statement that both the loans were serviced by ADPL till 27.03.2011 on *pari passu* basis and that the Corporate Insolvency Resolution Process in respect of the Principal Borrower was initiated by this Adjudicating Authority on 06.06.2018 passed in CP/603/IB/2017. Further, it is averred in the Reply statement that the Hon'ble NCLAT in the matter of **Dr. Vishnu Kumar Agarwal -vs- Piramal Enterprises Ltd;** (2019) 101 taxmann.com 464 (NCLAT) has held that when the creditor has already approached the Tribunal under the IBC, 2016 for claiming the debt due from the borrower, the very same creditor cannot initiate the proceedings under the IBC, 2016 for the same debt against the guarantor and hence the ratio laid down by the NCLAT squarely applies to the case on hand. It is also averred in the Reply statement that the alleged debt of the Financial Creditor against the borrower is not yet crystallized and unless the same is crystallized, the question of payment by the borrower or guarantor to the Financial Creditor does not arise. Thus, for the aforesaid reasons the Respondent /

Corporate Debtor has sought for the dismissal of the present Application.

10. However, before proceeding further to the submissions made by the parties, it is necessary to advert to the issue of whether CIRP can be initiated against the Guarantor as rendered by the Hon'ble NCLAT in the matter of **Dr. Vishnu Kumar** (*supra*), as referred by the Respondent / Corporate Debtor. It is seen that the interpretation of law as made in the judgement of the Hon'ble NCLAT in the matter of **Dr. Vishnu Kumar Agarwal -vs- Piramal Enterprises Ltd** was not followed by a concordant bench of the Hon'ble NCLAT in the matter of **State Bank of India -Vs- Athena Energy Ventures Private Limited** dated 24.11.2020, for detailed reasoning given in the said Judgment by taking note *inter alia* of the amendment made to Section 60(2) and 60(3) of IBC, 2016 by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (Act 26 of 2018) and also of the subsequent decision of the Hon'ble NCLAT in the matter of **Edelweiss Asset Reconstruction Company Ltd. -Vs- Sachet Infrastructure Ltd. & Ors** in *Company Appeal (AT)(Insolvency) No. 377 of 2019* dated 29.09.2019 along with the Report of the Insolvency Law Committee (ILC) dated February 2020. In the circumstances, the issue as to whether CIRP can be initiated simultaneously against two

Corporate Guarantors or for that matter in relation to the Principal Borrower and Corporate Guarantor as in the present instance, has been put to rest by the Hon'ble NCLAT, by the latter decisions of which, we are bound to follow.

11. Now, coming back to the submissions, the Respondent / Corporate Debtor, after filing of the counter statement, has, without obtaining any leave of this Adjudicating Authority, filed an Additional Counter before this Tribunal on 29.01.2021. By referring to the Additional Counter being filed, the Learned Counsel for the Corporate Debtor submitted that the Financial Creditor has wilfully misrepresented in Application that the 'Date of Default' is the date on which the DRT has issued the Debt Recovery Certificate, which goes against the well settled principles of limitation in respect to IBC, 2016. Further, it was also submitted that the Application is also silent about the 'Date of Default' and hence the present Application is not in conformity with the requirements under IBC, 2016.

12. The Learned Counsel for the Corporate Debtor submitted that the Indian Overseas Bank has classified the Accounts of the Principal Borrower as NPA on 31.12.2007 and that the default has happened in the year 2007 and the Financial Creditor has

wilfully chosen not to state the 'Date of Default' in the application. Further, the Learned Counsel for the Corporate Debtor has relied upon the Judgment of the Hon'ble Supreme Court in the matter of **T. Arivandam -Vs- T.V. Satyapal;** (1977) 4 SCC 467, wherein it has been held;

"The question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 CPC. Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint;"

13. The Learned Counsel for the Corporate Debtor has pressed into service the following judgments in support of her arguments;

- (i) **Gaurav Hargovindbhai Dave -Vs- ARCIL** (2019) SCC Online SC 1239; wherein the Hon'ble Apex Court in para 9 has held that Article 137 would apply to cases filed under Section 7 of IBC, 2016 since it was an application and not a suit.
- (ii) **A. Balakrishnan -Vs- Kotak Mahindra Bank & Anr.;** *Company Appeal (AT) Insolvency No. 1406 of 2019;* wherein the Hon'ble NCLAT at para 19 and 20 has held filing of O.A. or obtaining Recovery Certificate does not extend the period of limitation and would not be construed as a continuous cause of action.
- (iii) **Bimalkumar Manubhai Savalia -Vs- Bank of India & Anr.;** *Company Appeal (AT) Insolvency No. 1166 of 2019;* wherein the Hon'ble NCLAT has held that SARFAESI and DRT proceedings would not

extent the period of limitation since those proceedings are independent and as per Section 238 of IBC, 2016 the IBC, 2016 is a complete Code and will have overriding effect on other laws.

- (iv) **State Bank of India -Vs- Krishidhan Seeds Pvt. Ltd.;** *Company Appeal (AT)(Ins) No.972 of 2020;* wherein it has been held by the Hon'ble NCLAT in para 4 that the OTS proposals given by the Corporate Debtor would not extend the Date of Default and thereby having recourse to Section 18 of the Limitation Act, 1963.

14. It is seen from the record of proceedings that, after filing of the Additional Counter, the Financial Creditor was granted an opportunity to file rejoinder. However, upon verification it is seen that the Financial Creditor has not preferred to file any rejoinder to the Additional Counter being filed by the Corporate Debtor.

15. Heard, the submission made by the Learned Counsel for the parties and perused the files including the pleadings placed on record. Section 3 of the Limitation Act, 1963 states 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 a defence. In the present case, the Corporate Debtor has *prima facie* set up the Limitation as a defence in the present Application. The Hon'ble Supreme Court in the matter of **Babulal Vardharji Gurjar –Vs-**

Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. in Civil Appeal No. 6347 of 2019 dated 14.08.2020, while dealing with the aspect of limitation in relation to Applications filed under Section 7 and 9 of IBC, 2016 has held as follows;

“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 Hargovindbhai 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.”

16. From Part – IV of the Application, it is seen that the Financial Creditor has failed to state the Date of Default in the

Application. Further, no pleadings as such has been made by the Financial Creditor as to how the present Application falls well within the period of limitation. At this juncture, it is apt to refer to the para 33 of the decision of the Hon'ble Supreme Court in the matter of **Babulal Vardharji Gurjar** (*supra*), which is as follows;

33. Apart from the above and even if it be assumed that the principles relating to acknowledgement as per Section 18 of the Limitation Act are applicable for extension of time for the purpose of the application under Section 7 of the Code, in our view, neither the said provision and principles come in operation in the present case nor they enure to the benefit of respondent No. 2 for the fundamental reason that in the application made before NCLT, the respondent No. 2 specifically stated the date of default as '8.7.2011 being the date of NPA'. It remains indisputable that neither any other date of default has been stated in the application nor any suggestion about any acknowledgement has been made. As noticed, even in Part-V of the application, the respondent No. 2 was required to state the particulars of financial debt with documents and evidence on record. In the variety of descriptions which could have been given by the applicant in the said Part V of the application and even in residuary Point No. 8 therein, nothing was at all stated at any place about the so called acknowledgment or any other date of default.

33.1. Therefore, on the admitted fact situation of the present case, where only the date of default as '08.07.2011' has been stated for the purpose of maintaining the application under Section 7 of the Code, and not even a foundation is laid in the application for suggesting any acknowledgement or any other date of default, in our view, the submissions sought to be developed on behalf of the respondent No. 2 at the later stage cannot be permitted. It remains trite that the question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of the period of limitation, the relevant facts are required to be pleaded and requisite evidence is required to be

adduced. Indisputably, in the present case, the respondent No. 2 never came out with any pleading other than stating the date of default as '08.07.2011' in the application. That being the position, no case for extension of period of limitation is available to be examined. In other words, even if Section 18 of the Limitation Act and principles thereof were applicable, the same would not apply to the application under consideration in the present case, looking to the very averment regarding default therein and for want of any other averment in regard to acknowledgement. In this view of the matter, reliance on the decision in Mahaveer Cold Storage Pvt. Ltd. does not advance the cause of the respondent No. 2.

(underline supplied)

17. In the case referred above, the Respondent has mentioned the 'Date of Default', however has failed to come up with any pleading in support of the same, and the Hon'ble Apex Court, in the absence of any pleading or averment in regard to the Date of Default and the acknowledgments being made subsequent to it, has stated that the debt is barred by limitation. As to the facts of the present case, the Financial Creditor, has failed to mention the 'Date of Default' in Part – IV of the Application, let alone any averments being made in relation to the acknowledgment of debt.

18. While examining the documents, filed by the Financial Creditor, this Adjudicating Authority has carefully and consciously gone through all the documents, which is extracted in the paragraph *supra*, and it is found that the after the 'Date of

Default' i.e. the date of NPA of 31.12.2007, the Financial Creditor has not placed any record or document recognized under the law to substantiate that the debt falls well within the period of limitation. This Adjudicating Authority is conscious of the decision of the Hon'ble Apex Court in the matter of **Sesh Nath Singh & Anr. -Vs- Baidyabati Sheoraphuli Co-Operative Bank Ltd. & Anr.** in *Civil Appeal No. 9189 of 2019*, has held that the time spent in the SARFAESI proceedings can be excluded in terms of Section 14 of the Limitation Act, 1963 for the purpose of calculating the period of limitation for an Application filed under Section 7 of IBC, 2016. However, even taking into consideration the said fact, it is seen that the India Overseas Bank has filed the O.A. before the DRT – I, Chennai only on 04.06.2012, i.e. after the expiry of almost 5 years from the date of NPA.

19. Further, upon perusal of the Deed of Guarantee dated 30.06.2006 as executed between the Financial Creditor and Respondent / Corporate Debtor, clause 11 therein states as follows;

11. It is also agreed that any admission or acknowledgment in writing by the principal debtor of the amount of indebtedness of the principal debtor in relation to the subject matter of this guarantee or any judgments or award which may be obtained by you against the principal

debtor shall be binding on me/us and I/we accept the correctness of any statement of account served on the principal debtor which is duly certified by any Manager or Officer of the Bank, and shall be binding and conclusive as against me/us also, and I/we further agree that in making an acknowledgment or making a payment he shall be treated as my/our duly authorised agent for purpose of India Limitation Act of 1963.

20. This Adjudicating Authority is also conscious of the decision of the Hon'ble Apex Court in the matter of **Laxmi Pat Surana -Vs- Union Bank of India & Anr.** in *Civil Appeal No.2734 of 2020*, wherein at para 40 it has been held that the liability of the Corporate Debtor (Corporate Guarantor) also triggers when the principal borrower acknowledges its liability in writing within the expiration of prescribed period of limitation, to pay such outstanding dues and fails to pay the acknowledged debt. Correspondingly, the right to initiate action within three years from such acknowledgment of debt accrues to the Financial Creditor.

21. Further, the Hon'ble Supreme Court in the matter of **Asset Reconstruction Company (India) Limited -Vs- Bishal Jaiswal & Anr.** in *Civil Appeal No. 323 of 2021* has held that the balance sheet entry made in the books of the Corporate Debtor, under the facts and circumstances of the case, on being examined, would amount to acknowledgment of debt under

Section 18 of the Limitation Act, 1963. However, in the present case, from the list of documents as extracted in the preceding paragraphs, it may be noted that the Financial Creditor has not placed on record any of the balance sheet of the Corporate Debtor to garner support therefrom in order to repel the contention of the Respondent – Corporate Guarantor on the aspect of Limitation.

22. In order to arrive at a conclusion and in order to ascertain the 'debt' and 'default', the Adjudicating Authority has to come to the conclusion only based upon the documents which are filed by the parties. If the parties fail to file any documents, inspite of opportunity being granted, then the Tribunal is perforce required to arrive at a conclusion based on the documents available on record and cannot arrive at a conclusion on premises and suppositions.

23. Thus, from the very documents filed by the Financial Creditor, we are of the considered view that the debt as claimed by the Financial Creditor is time barred and the Financial Creditor has failed to place on record any shred of document recognized under the law to substantiate that the debt falls well within the period of limitation. Hence this Adjudicating Authority, based on the documents filed by the Financial Creditor, comes to

an irresistible conclusion that the debt on the part of the Respondent/Corporate Guarantor is time barred and as such the Application filed by the Financial Creditor is liable to be dismissed and accordingly, the Application stands **dismissed** as barred by limitation. No order as to costs.

-Sd-
ANIL KUMAR B
MEMBER (TECHNICAL)

-Sd-
R. VARADHARAJAN
MEMBER (JUDICIAL)

Raymond