IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No.3402/MB.IV/2019

Under section 7 of the Insolvency & Bankruptcy Code, 2016

In the matter of

UCO Bank … Financial Creditor

Versus

Deegee Orchards Private Limited
[CIN: U01100MH1997PTC108323] … Corporate Debtor

Order pronounced on 06.07.2020

Coram:

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

Appearances:

For the Financial Creditor	:	Mr Rohan Agrawal i/b Mr Nishit Dhruva, Mr Prakash Shinde & Ms Swati i/b MDP & Partners, Advocates
For the Corporate Debtor	:	Dr SK Jain, Practising Company Secretary a/w Mr Yahya Batatawala, Advocate.

ORDER

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

1. This is a Company Petition filed under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by UCO Bank*(Financial Creditor),* seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Deegee Orchards Private Limited *(Corporate Debtor).*

2. The Corporate Debtor is a private company limited by shares and incorporated on 29.05.1997 under the Companies Act, 1913, with the Registrar of Companies, Maharashtra, Mumbai. Its Corporate Identity Number (CIN) is U01100MH1997PTC108323. Its registered office is at Deegee House, Jaistambh Chowk, Rallies Plot, Amravati 444 601, within the State of Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.

3. The present petition was filed on 11.09.2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹43,04,08,269.00 (Rupees forty-three crore four lakh eight thousand two hundred and sixty-nine only) as principal and ₹24,68,45,038.28 (Rupees twenty-four crore sixty-eight lakh forty-five thousand and thirty-eight and paise twenty-eight only)as interest as on 30.06.2014, which is stated to be the date of default.

4. The case of the Financial Creditor is as follows: -

   (a) The Financial Creditor had extended various facilities to the Corporate Debtor as follows: -

      (1) *Vide* sanction letter dated 30.05.2005: cash credit of ₹10.35 crore; warehouse funding of ₹12.50 crore; bank guarantee of ₹0.50 crore.

      (2) *Vide* sanction letter dated 04.10.2006: cash credit-I of ₹10.35 crore; cash credit-II of ₹14.00 crore; bill discounting facility of ₹5.00 crore; bank guarantee of ₹0.50 crore; Total non-fund based limit of ₹0.50 crore.

      (3) *Vide* sanction letter dated 07.03.2008: working capital fund based for existing activity under sole banking cash credit of

₹40.00 crore; working capital (non-fund based) of ₹0.50 crore; bill discounting facility of ₹5.00 crore; bank guarantee of ₹0.50 crore.

(4) *Vide* sanction letter dated 05.11.2008: cash credit of ₹50.00 crore; sub-limit of cash credit: ₹10.00 crore; bank guarantee of ₹1.00 crore; Total non-fund based limit of ₹0.50 crore.

(5) *Vide* sanction letter dated 25.11.2011: total fund-based limit of ₹40.00 crore; Total non-fund based limit of ₹1.00 crore.

(6) *Vide* sanction letter dated 23.12.2013: working capital term loan restructured limit: ₹33.83 crore; working capital fund based: ₹6.17 crore. Total fund-based facility: ₹40.00 crore.

5. The underlying documents have been placed on record as Exhibit E-1 to Exhibit E-6 at pp.34-101. The rate of interest charged is 11.70% per annum. The total debt due and payable to the Financial Creditor is ₹67,72,53,307.28 (Rupees sixty-seven crore seventy-two lakh fifty-three thousand three hundred and seven and paise twenty-eight only), as mentioned at page 101-A of the Petition. The other connected documents such as certificates of registration of charge, demand promissory notes, agreement to pledge the goods, balance confirmation letter dated 30.06.2013, etc, have also been placed on record as Exhibits H to Exhibits I-55 at pp.1703-2084 of the Paper Book.

6. The Financial Creditor has served copies of the petition on the Corporate Debtor *vide* registered letter dated 26.08.2019, which was received by the Corporate Debtor on 29.08.2019. Court Notice dated 24.09.2019 was also issued, which has been served on the

Corporate Debtor by registered post on 30.09.2019. Affidavit of service dated 07.10.2019 has been placed on record.

7. Dr SK Jain, learned authorised representative, appeared on behalf of the Corporate Debtor, and made his submissions along with Mr Yahya Batatawala, learned Counsel.

8. In its reply filed on 04.11.2019 before this Adjudicating Authority, the Corporate Debtor has submitted as follows:-

(a) The Corporate Debtor had requested restructuring of its debt *vide* its letter dated 07.12.2017. There were negotiations held in this behalf. In furtherance thereof, the Financial Creditor advised the Corporate Debtor to make a deposit of ₹25.00 lakh into a no-lien account for considering one-time settlement (OTS).

(b) The Corporate Debtor arranged for the said deposit from a third party and deposited the same with the Financial Creditor on 01.08.2018, with the understanding that if the OTS was not arrived at, the Financial Creditor would return the amount deposited in the no-lien account.

(c) Since the OTS proposal was taking time, the Corporate Debtor requested the Financial Creditor *vide* letter dated 09.09.2019 to return the said sum of ₹25.00 lakh and undertook to deposit the same upon hearing from the Financial Creditor.Subsequent to the filing of the present petition on 11.09.2019, the Corporate Debtor sent another letter dated 25.09.2019 seeking refund of the amount of ₹25.00 lakh.

(d) The Financial Creditor has suppressed the factum of OTS proposals, and the petition was filed even before a decision on the OTS was communicated.

9. The Financial Creditor has filed a rejoinder, broadly stating that there is debt and default before the filing of the present petition. There was no restructuring, and there was only an OTS proposal that was being considered by the Financial Creditor. The Adjudicating Authority is only required to ascertain and record its satisfaction in a summary adjudication as to the occurrence of default, before admitting the petition.

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

11. Before we proceed to the question of whether there is a debt and default,we need to address the question of limitation, given that the date of default is stated to be 30.06.2014.

12. In*BK Educational Services v Parag Gupta & Associates,*[1]the Hon'ble Supreme Court held as follows:

"42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

13. In *Gaurav Hargovindbhai Dave v Asset Reconstruction Company (India) Limited & another,*[2]and *Jignesh Shah v Union of India,*[3]the Hon'ble

[1](2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528 : 2018 SCC OnLine SC 1921 at page 664

[2] (2019) 10 SCC 572 : 2019 SCC OnLine SC 1239 at page 574

[3] (2019) 10 SCC 750 : (2020) 1 SCC (Civ) 48 : 2019 SCC OnLine SC 1254 at page 763

Supreme Court observed that applications under section 7 would fall only within Article 137 of the Limitation Act, 1963.

14. Article 137 of the Limitation Act, 1963 stipulates a limitation period of three years from the date on which the right to apply accrues.

15. In *Vashdeo R Bhojwani v Abhyudaya Cooperative Bank Limited & another,*[4] the Hon'ble Supreme Court quoted the *BK Educational Services (supra)*judgment and stated that if the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, section 5 of the Limitation Act may be applied to condone the delay in filing such application.

16. In *Sagar Sharma & another v Phoenix ARC Private Limited & another,*[5]the Hon'ble Supreme Court emphasised that the date of coming into force of the IBC does not and cannot form a trigger point of limitation for applications filed under the Code. It further reiterated that since "applications" are petitions which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications.

17. Learned Counsel for the Financial Creditor submitted the Financial Creditor had obtained judgment dated 14.10.2019 in OA No.115/2015 filed by it against the Corporate Debtor before the Debts Recovery Tribunal, Nagpur, wherein the Corporate Debtor has been directed to pay to the Financial Creditor a sum of

[4](2019) 9 SCC 158 : (2019) 4 SCC (Civ) 308 : 2019 SCC OnLine SC 1159 at page 159

[5] (2019) 10 SCC 353 : 2019 SCC OnLine SC 1332 at page 354

₹46,82,01,845.20 with simple interest at 9% per annum. He submitted that this would have the effect of shifting forward the period of limitation.

18. Learned Counsel for the petitioner quoted the judgment dated 22.11.2019 of the Hon'ble NCLAT in *Sesh Nath Singh & another v BaidyabatiSheoraphuli Cooperative Bank Limited & another,*[6]to advance his proposition that the time *bona fide* spent in pursuing the application filed by the Financial Creditor under SARFAESI Act, 2002 has to be excluded in computing the period of limitation in terms of section 14(2) of the Limitation Act, 1963. However, this judgment is no longer good law in the light of the judgment of a larger Bench of the Hon'ble NCLAT dated 12.03.2020 in *Ishrat Ali v Cosmos Cooperative Bank Limited & another,*[7]wherein the Hon'ble NCLAT held that an action taken by the Financial Creditor under section 13(2) or section 13(4) of the SARFAESI Act, 2002 cannot be termed to be a 'civil proceeding' before a court of first instance or appeal or revision before an appellate court. Therefore, the action taken under section 13(2) of the SARFAESI Act, 2002 cannot be counted for the purpose of exclusion of the period of limitation under section 14(2) of the Limitation Act, 1963. In this light, the Hon'ble NCLAT held that the decision rendered in *Sesh Nath Singh* did not lay down the correct law.

19. In *Sampuran Singh & others v Niranjan Kaur & others,*[8]the Hon'ble Supreme Court laid down that for section 18 of the Limitation Act,

[6] Company Appeal (AT) (Insolvency) No. 672 of 2019decided on 22.11.2019

[7] Company Appeal (AT) (Insolvency) No.1121 of 2019 decided on 12.03.2020

[8](1999) 2 SCC 679at page 684

1963, to be attracted, the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit, in other words, if the limitation has already expired, it would not revive under this section. It is only during subsistence of a period of limitation, if any, such document is executed, that the limitation would be revived afresh from the said date of acknowledgment.

20. The Learned Authorised Representative for the Corporate Debtor placed reliance also on the judgment of the Hon'ble NCLAT in *Munish Kumar Bhunsali & another v Kotak Mahindra Bank & another,*[9]to support his contention that a one-time settlement proposal given after the period of limitation has expired, cannot be relied upon by the Bank. It is pertinent to mention here that in the present case, as in the case of *Munish Kumar Bhunsali (supra)*, the Financial Creditor did not accept the OTS dated 01.08.2018given by the Corporate Debtor. Therefore, the judgment in this case rightly comes to the rescue of the Corporate Debtor in the present case also. In any case, even this OTS was submitted well after the period of limitation had come to an end.

21. Learned Authorised Representative for the Corporate Debtor invited our attention to the judgment of the Hon'ble NCLAT in *V Hotels Limited v Asset Reconstruction Company (India) Limited,*[10]wherein the judgment of the Hon'ble Supreme Court was referred to in support of the contention that any document or acknowledgement after the completion of the period of limitation cannot be relied upon. Further, in the absence of any record of acknowledgement, the

[9]Company Appeal (AT) (Insolvency) No.1349/2019decided on 08.01.2020

[10]Company Appeal (AT) (Insolvency) No.525/2019decided on11.12.2019

Appellant cannot derive any advantage of section 18 of the Limitation Act. The Hon'ble NCLAT went on to hold that the application under section 7 of the IBC was barred by limitation, the accounts of the Corporate Debtor having been declared as NPA on 01.12.2008.

22. In sum –

(a) The date of default is 30.06.2014.

(b) The balance confirmation letter placed on record is dated 30.06.2013.[11]

(c) The letter informing the Corporate Debtor about the accounts having become NPA is dated 13.11.2014.[12]

(d) There is nothing on record to show that there is any acknowledgement of debt after the accounts were declared as NPA on 13.11.2014.

(e) The OTS proposal is dated 01.08.2018,[13]*i.e.,* long after the expiry of the prescribed period of limitation.

23. Applying the ratio of the judgments of the Hon'ble Supreme Court in *BK Educational Services (supra), Gaurav Hargovindbhai Dave (supra), Jignesh Shah (supra), Vashdeo R Bhojwani (supra), Sagar Sharma (supra) andSampuran Singh (supra),* and those of the Hon'ble NCLAT in *Ishrat Ali (supra), Munish Kumar Bhunsali (supra), and V Hotels Limited (supra),*and the fact that the judgment in *Sesh Nath (supra)* no longer represents the correct law, we hold that the present petition filed by

[11] See page 19 of the Petition

[12]See p.2117 of the Petition

[13]See page 14 of the reply

UCO Bank against Deegee Orchards Private Limited is barred by limitation.

24. Therefore, for the reasons stated above, the present petition fails and the same is rejected.

25. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. 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.

26. Let a copy of this order be 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)

06.07.2020