

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1496 of 2019

(Arising out of order dated 21.11.2019 in CP (IB) No. 535/KB/2018
passed by National Company Law Tribunal, Kolkata Bench, Kolkata)

IN THE MATTER OF:

- 1 (a) **Smt. Sangita Agarwal,**
Village- Kanduah, Post Office- Kanduah,
Police Station –Sankrail,
District- Howrah, Pin- 711302.
- 1 (b) **Ankur Agarwal,**
Village- Kanduah, Post Office- Kanduah,
Police Station –Sankrail,
District- Howrah, Pin- 711302.
- 1 (c) **Harsh Agarwal,**
Village- Kanduah, Post Office- Kanduah,
Police Station –Sankrail,
District- Howrah, Pin- 711302.
2. **Biswanath Mondal**
1 Hossain Lane
P.S. Barabazar, P.O. Chinsurah
Pin: 712101

...Appellants
(Corporate Debtor)

Versus

1. **Limtex Tea & Industries Limited & Anr.**
5A, Shakespeare Sarani, 2nd Floor
P.S.: Park Street,
Kolkata-700017
2. **Manish Jain, IRP**
C/o Manish Mahavir & Co.

Bajrang Bhawan
3rd Floor, Room No. 303
2B Grant Lane
Kolkata-700012.

..... Respondents
(Financial Creditor)

Present: -

For Appellant: Mr. Abhijeet Sinha, Ms. Suhita Mukhopadhyay and Mr. Avirup Chatterjee, Advocates.

For Respondents: Mr. Rishab Kaushik and Mr. Shantanu Parashar, Advocates for Respondent No. 1.

Mr. Abhishek Sharma, Advocate for Respondent No. 2 / IRP.

J U D G M E N T

Justice Anant Bijay Singh,

This appeal has been initially preferred by ‘Durga Prasad Agarwal and Biswanath Mondal- Appellant /Corporate Debtor, aggrieved and dissatisfied by the impugned order dated 21.11.2019 in CP (IB) No. 535/KB/2018 passed by National Company Law Tribunal, Kolkata Bench, Kolkata whereby and where under, an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**in short IBC**) was filed by ‘Limtex Tea & Industries Limited’ –Respondent No. 1 (Financial Creditor) was admitted for initiation of ‘Corporate Insolvency Resolution Process’ (**in short CIRP**) against the Company (Appellant / Corporate Debtor).

2. From the perusal of the orders dated 15-12-2020 it appears that one I.A. No. 2910 of 2020 preferred by Legal Heirs of the Late Durga Prasad Agarwal (Appellant No. 1) intimating of this Appellate Tribunal that during the pendency of this Appeal the Appellant No. 1 expired on 14.11.2020 and his

Legal Heirs namely Smt. Sangita Agarwal, Ankur Agarwal and Biswanath Mondal were allowed to substitute and they have persue the Appeal.

3. The case of the Respondent No. 1 before the NCLT Kolkata Bench is that a loan of Rs. 25,00,000/- (Rupees Twenty-Five Lacs Only) was given by the Financial Creditor / Respondent No. 1 (herein) to the Corporate Debtor / Appellants (herein) through Bank on 6th June, 2011 which was duly acknowledged by the Corporate Debtor vide letter dated 6th June, 2011, i.e. loan on interest for short time and the Corporate Debtor was paying interest on the said loan.

4. The Financial Creditor / Respondent No. 1 (herein) being demanded, the Corporate Debtor / Appellants (herein) had paid the said sum of Rs. 25,00,000/- to the Financial Creditor / Respondent No. 1 (herein) vide account payee cheque bearing No. 930562 dated 27.04.2015 drawn on State bank of India. When the said cheque was presented for payment, the same was dishonoured and returned with the remarks "Fund Insufficient".

5. The Financial Creditor / Respondent No. 1 issued a demand notice dated 29th June, 2015 intimating the Corporate Debtor / Appellants (herein) regarding the dishonour of the aforesaid cheque and demanding the sum of Rs. 25,00,000/- within 15 days from the receipt of the notice sent through speed post which was received by Corporate Debtor / Appellants (herein) on 30th June, 2015.

6. The Corporate Debtor / Appellants (herein) has neglected to pay the said sum, thereby compelling the Financial Creditor to file a case under

Section 138/141 of N.I. Act, against the Corporate Debtor / Appellants (herein).

7. On 23rd February, 2018 the Financial Creditor / Respondent No. 1 (herein) again sent a letter requesting the Corporate Debtor / Appellants (herein) to pay the aforesaid amount but they were no response and Application under Section 7 of the 'IBC' was filed on 17th April, 2018 before the NCLT, Kolkata Bench, Kolkata.

Submissions on behalf of the Appellants

8. The Learned Counsel for the Appellants during the course of argument and also their Reply Affidavit filed before the NCLT, Kolkata Bench, Kolkata is that the Application under Section 7 of the IBC hit by limitation and denial of taking loan of Rs. 25,00,000/- on interest for short time was given by the Financial Creditor and the fact that the Appellants / Corporate Debtor have issued a cheque dated 27.04.2015 drawn of State Bank of India in favour of Respondent No. 1 is denied and plea has been taken that signature is forged.

9. The Learned Counsel for the Appellants while referred to page 206 of the Appeal Paper Book shows that the petition filed by the Appellant before the NCLT with a prayer that the Financial Creditor be directed to produce the original cheque and the original cheque inspected by the Questioned Document Investigation Department, CID, West Bengal for verification.

10. The Learned Counsel for the Appellants during the course of argument and his Written Submissions submitted that at page 61 of the Appeal Paper Book Part –IV (Particulars of Financial Debt) is as under:

Part-IV

61

PARTICULARS OF FINANCIAL DEBT		
1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	<p>a) Total amount of Debt granted is Rs. 25,00,000/- .</p> <p>b) Date of Disbursement: 06.06.2011</p> <p>The copy of Money Receipt duly acknowledged by the Corporate Debtor is annexed hereto and marked as Annexure - "C".</p>
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	<p>Amount in default:</p> <p>Principal Amount Rs. 25,00,000/- + Interest @ 15% (w.e.f. 01.04.2014 to 10.04.2018) of Rs. 15,10,274/-</p> <p>TOTAL = Rs. 40,10,274/-</p> <p>Date on which default occurred:</p> <p>01.04.2014 (as agreed between the parties)</p> <p>Interest has been calculated @ 15% on the total amount due w.e.f. 01.04.2014</p> <p>A detailed computation of the above is set out in Annexure "D".</p>

11. The Learned Counsel for the Appellants relied on a judgment of Hon'ble Supreme Court of India reported in 2020 SCC OnLine SC 647 'Babulal Vardharji Gurjar V/s Veer Gurjar Aluminium Industries Pvt. Ltd. and Anr.'

wherein para 96 is as under:

“.....

96. 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.”

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12. It is further submitted that in view of the fact that date of default admittedly mentioned in the Application filed by the Respondent No. 1 before the NCLT, Kolkata Bench, Kolkata is 1st April, 2014 and the Application under

Section 7 of the IBC was filed on 17th April 2018. The Ld. Adjudicating Authority failed to consider that the Application is hit by limitation.

13. It is further submitted that the specific plea has been taken by the Respondents that the cheque in question was forged document. The acknowledge of debt was not stablished and no finding recorded by the Ld. Adjudicating Authority is miss directed.

Submissions on behalf of the Respondent No. 1

14. The Learned Counsel for the Respondent No. 1 during the course of argument and in his Written Submissions submitted that the Application under Section 7 of the IBC filed within limitation. That the date of default was 22.06.2015 when the cheque was dishonoured insufficiency and the Application under Section 7 of the IBC was filed on 17.04.2018 within three years of date of limitation from the date of default, so the 'Babulal Vardharji Gurjar' case is not applicable in the matter.

15. Learned Counsel for the Respondent No. 1 further relied on an order dated 24.10.2019 passed by Ld. NCLT, Allahabad Bench in Company Petition (IB) No. 353/ALD/2018 wherein paragraph Nos. 10 to 15 it was held that the Corporate Debtor will not be allowed to take refuge under technicalities when the pleadings otherwise disclose that the date of default within limitation.

16. The Learned counsel for the Respondent No. 1 submitted that the Corporate Debtor/ Appellants has contested that the date of default mentioned in the Form-I by the Financial Creditor/Respondent No. 1 is 01.04.2014, thus the Application filed under Section 7 of the IBC is time

barred. Aforesaid is nothing but an eye-wash as from a meaningful and holistic reading of the pleadings filed on behalf of the Financial Creditor.

17. It is further submitted that the default occurred when the cheque issued towards repayment of loan was dishonoured on 22.06.2015, which was issued by the Corporate Debtor towards repayment of the entire principle amount issued in pursuance of the understanding of the parties and the Application under Section 7 of the IBC was filed on 17.04.2018.

FINDING

18. We have heard the argument of both the sides and closely scrutinised the records as well as Written Submissions filed on behalf of the parties. On the basis of the pleadings and during the course of arguments and his Written Submissions, two issues emerge:

- i) Whether the Application under Section 7 of the IBC filed by the Respondent No. 1 is barred by limitation?
- ii) Whether the cheque relied upon to establish acknowledgement of debt was genuine?

Issue No. 1: From the perusal of record it appears that at page 53 Annexure A/2 of the Appeal Paper Book the Respondent No. 1 /Financial Creditor in Part-IV (supra) the total amount in default of Rs. 40,10,274/- Principal amount Rs. 25,00,000/- + Interest @ 15% (w.e.f. 01.04.2014 to 10.04.2018) of Rs. 15,10,274/-.

In view of the judgment of Hon'ble Supreme Court of India reported in 2020 SCC OnLine SC 647 'Babulal Vardharji Gurjar V/s Veer

Gurjar Aluminium Industries Pvt. Ltd. and Anr.’ wherein paragraph 96 is as under:

“96. 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.”

Admittedly, from the perusal of the Part IV particulars of financial debt on which default occurred on 01.04.2014 has agreed between the parties.

So, in the light of the aforesaid judgment of the Hon'ble Supreme Court of India (supra) the Application under Section 7 of the IBC filed by the Respondent No. 1 is hit barred by limitation. The Issue No. 1 decided in favour of the Appellant and against the Respondent No. 1.

Issue No. 2: The Appellant has filed I.A. before the NCLT, Kolkata Bench on 27th August, 2018 with a prayer to direct the Financial Creditor to produce the original cheque so that it may be sent to the Questioned Document Investigation Department, CID, West Bengal for verification, but no order was passed by the Adjudicating Authority and no reliance could be placed on the aforesaid document. As the Appellant disputed the cheque in question as it is disputed document, did not decide this issue and no order. So the Issue No. 2 is also decided in favour of the Appellant and against the Respondent No. 1.

19. After going through the records and having heard the counsel for the parties, we are of the considered view that the Ld. Adjudicating Authority have failed to consider the facts that Application under Section 7 of the IBC is barred by limitation and secondly, that so called cheque on which the Respondent No. 1 disputed, no reliance could be placed on the aforesaid document. The impugned order cannot be sustained in the eye of Law and in view of the Judgment of the Hon'ble Supreme Court (Supra) and is hereby fit to be set aside. The Appeal is allowed.

ORDER

- For the reason(s) aforesaid, we set-aside the impugned order dated 21.11.2019 in CP (IB) No. 535/KB/2018 passed by Ld. Adjudicating

Authority, National Company Law Tribunal, Kolkata Bench, Kolkata and dismiss the Application under Section 7 of the IBC filed by the 'Limtex Tea & Industries Limited / Financial Creditor'.

- In the result, 'Corporate Debtor' is released from the rigor of the 'Corporate Insolvency Resolution Process'. All actions taken by the 'Interim Resolution Professional / Resolution Professional' and 'Committee of Creditors', if any, are declared illegal and set-aside. The 'Interim Resolution Professional / Resolution Professional' is directed to handover the records and assets of the 'Corporate Debtor' to the Director of the 'Corporate Debtor' immediately.
- The matter is remitted to the Ld. Adjudicating Authority to decide only fees and costs of 'CIRP' payable to IRP/RP, which shall be borne by the Financial Creditor / Respondent No. 1.
- The Appeal is allowed with the aforesaid observations and directions. No costs.
- Let the Registry to communicate the Judgment to the Ld. Adjudicating Authority, National Company Law Tribunal, Kolkata Bench, Kolkata.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms. Shreesha Merla]
Member (Technical)**

NEW DELHI

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3rd March, 2021.