

*Through Videoconference*

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH - COURT - II**

**IA No. 215 of 2021**

**In**

**CP No. 1626/MB/C-II/2019**

Under Rule 11 of the National Company Law Tribunal Rules, 2016 for Amending the Application Under Section 7 of the Insolvency and Bankruptcy Code, 2016

**Pegasus Assets Reconstruction Private Limited,  
... Applicant**

*In the matter of*

CP No. 1626/MB/C-II/2019

**Pegasus Assets Reconstruction Private Limited**  
Office at: 55-56, 5<sup>th</sup> Free Press House, Nariman Point,  
Mumbai 400021

**... Financial Creditor**

Versus

**Euro Cylinder India Private Limited**  
Office at: B/301, Sun Vision Classic, F P No. 14,  
Hanuman Road, Vile Parle (E), Mumbai 400057.

**... Corporate Debtor**

**Order pronounced on 07.09.2021**

***Coram:***

Hon'ble Member (Judicial) : Mr. Ashok Kumar Borah  
Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

***Appearance:***

For the Applicant : Mr. Prateek Sakseria, Counsel  
a/w Mr. Vishesh Kalra,  
Advocate.

For the Respondent : Mr. Shanay Shah, Advocate.

### **ORDER**

*Per: Shyam Babu Gautam, Member (Technical)*

1. This is an Application by **Pegasus Assets Reconstruction Private Limited**, Applicant (hereinafter referred to as the Applicant) Under Rule 11 of the National Company Law Tribunal Rules, 2016 for Amending the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016.

The Applicant prays as under:

- a. This Hon'ble Tribunal be pleased to allow the Applicant to amend the Company Petition under Section 7 of the IBC as per Schedule A to the present Application;
- b. Any other reliefs as this Hon'ble Tribunal may deem fit and proper.

For the sake of convenience schedule of amendment is reproduce here below:

### **SCHEDULE OF AMENDMENT**

1. In the part IV Clause 2 i.e. under the entry AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON

WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS DEFAULT IN IN TABULAR FORM) – Please add the following after the word **Exhibit “E (Colly)”**

The date of Default has occurred on 18<sup>th</sup> July 2016, when the Corporate Debtor has categorically acknowledged the debt due and payable by the Corporate Debtor to the Financial Creditor. A copy of the Acknowledgement of Debt dated 18<sup>th</sup> July 2016 is Annexed as **Exhibit M-2**.

Further, after filing of the application, fresh default has occurred on 31<sup>st</sup> May 2019, 28<sup>th</sup> June 2019 and 30<sup>th</sup> July 2019 and various dates in between when the Corporate Debtor has made part payment to the tune of Rs.40 lakhs which have not been adjusted towards the total outstanding of Rs.187,44,74,887.75/- (Rupees One Hundred and Eighty Seven Crores Forty Four Lakhs Eight Hundred and Eighty Seven and Paise Seventy Five Only). A copy of the statement of accounts showing deposit of amounts in suspended account is annexed hereto and marked as Exhibit “AZ”.

Thus, the date of default for the purpose of the Code has arisen on 18<sup>th</sup> July 2016 and on various occasion in May, June and July 2019.

**SUBMISSIONS ON BEHALF OF THE APPLICANT:**

2. The Applicant/Financial Creditor is making the present Application seeking to amend the Company Petition under Section 7 of the Code in light of the Judgement and Order of the Hon'ble National Company Appellate Tribunal ("NCLAT") passed in the matter of *Pegasus ARC vs. Yashomati Hospitals Pvt. Ltd. (Company Appeal (AT) (Inc.) No. 1337 of 2019) dated 24<sup>th</sup> November 2020*. The proposed amendments are as per schedule of amendment to the present Application.
3. The counsel further submitted that the Hon'ble NCLAT has permitted the Financial Creditor to amend/rectify its pleadings to plead limitation and the date of default. This power is directed to be exercised under Rule 11 of NCLT Rules, 2016 to give chance to Financial Creditor to rectify its defects if any with respect to limitation especially in light of the recent judgement passed by the Hon'ble Supreme Court with respect to the law on Limitation and the Insolvency and Bankruptcy Code, 2016.
4. The Applicant states that the Applicant has in the Pleadings files caption Company Petition has placed on record all documents and necessary records to show that the dispute is within limitation, the Applicant seeks to detail the same under Part IV clause 2 as per leave granted in the judgement of Pegasus (Supra).
5. The Applicant states that the Applicant has filed the Petition on 22<sup>nd</sup> April 2019 and replies have been filed in the proceedings. Whilst the Corporate Debtor has rightly not taken any defence of limitation, the intends to amend the Pleadings for the sake of completeness of record.

6. The Applicant submits that the judgement of Pegasus ARC (supra) effectively grants a right to the Applicant to amend its pleadings especially in light of the fact that the Petitioner has otherwise already placed on records all documents to show that the Petition under Section 7 is not barred by limitation and only intends to detail the same in Part IV Clause 2.

**SUBMISSIONS ON BEHALF OF THE RESPONDENT:**

7. The Respondent venemly opposed Application dated 28<sup>th</sup> January 2021 (“*the Application*”) filed by Applicant seeking amendments to the Company Petition to introduce multiple dates of default in contrast to one pleaded in the Company Petition.
8. Further the Respondent states that the Application is misconceived, not tenable in law. There is no provision under the Insolvency and Bankruptcy Code, 2016 (“**Code**”) for amendment to the petition under Section 7 of the said Code. The amendment application is lacking bona fide and it is to get rid of limitation settled by the Hon’ble supreme Court.
9. The Respondent further brought to the attention that the pleadings and evidence in the Company Petition are complete. The matter is at stage or arguments. The amendment application is barred by proviso to Order VI, Rule 17 of the Code of Civil Procedure, 1908 which read thus:

*Provided that to application for amendment shall be allowed after trial has commenced, unless the Court comes to the conclusion that*

*in spite of due diligence, the party could not have raised the matter before the commencement of trial.*

10. The Respondent submits that the sole basis of filing amendment application is the judgment and order dated 24<sup>th</sup> November 2020 (*pg. 7, Application*) and not any relevant fact. The said order is passed in consonance with sub-section (5) of section 7 of the said Code to rectify the defect, if any in the Application (form-I). It is not case of the Applicant that any defect has crept in the Application in reference to the date of defect which needs to be rectified and or repaired.
11. The Respondent further stated that the Applicant has disclosed the date of NPA if 31<sup>st</sup> December 2012 as the date of default and in support thereof the Applicant has relied on following documents:
  - a) NPA Certificate dated 2<sup>nd</sup> April 2019 issued by the assignor Bank (**Ex-C, pg.87, Petition**)
  - b) Statement of accounts from 10/11/2009 to 31/03/2013 showing the defaults prior to dated of NPA of 31<sup>st</sup> December 2012. (**Ex-AZ pg.258, Rejoinder**)
  - c) Demand notice dated 30<sup>th</sup> January 2013 issued under section 13(2) of the SARFAESI Act, 2002 as pleaded in para-5.22 of Original Application No.393 of 2019. ... *The Defendants replied to the said demand notice objecting to the notice and instead continued to ignore, neglect and default to repay the amount due and payable by them to the Originator / Applicant....*

12. The Respondent further added that the applicant has filed Original Application No. 393 of 2019 in the Debts Recovery Tribunal – II, Mumbai. The Applicant has disclosed the NPA of 31<sup>st</sup> December 2012 as the date default in the DRT proceeding. Hereto annexed and marked **Exhibit-“2”** is a copy or Original Application (without annexure).
13. The Respondent submitted that there cannot be two set of defaults, one for DRT and another for proceeding under section 7 of the IB Code.
14. The Respondent placed reliance on following judgements In ***State Bank or India v. Krishindhan Seeds Pvt. Ltd.*** The Hon’ble NCLT has ruled out possibility of two sets of default in the proceeding before the Debts Recovery Tribunal and Hon’ble NCLT. It is held thus:

*4. .... There cannot be two defaults in respect of the same debt, on for the purpose of claim filed before the Debts Recovery Tribunal and the other for purposes of ‘I&B Code’ based on OTS proposal more so when in application filed before the Adjudicating Authority in prescribed format date of default has unambiguously been reflected as 10<sup>th</sup> June, 2014.*

15. In ***B. K. Educational Services Private Limited v. Parag Gupta & Associates*** [2018 SCC online SC 1921], the Hon’ble Supreme Court has held that provisions of the Limitation Act apply to an application made under Section 7 of the Code. The Hon’ble Supreme Court has also held that the term ‘*default*’ has the same meaning in Sections 7 and 8 of the Code and that an application under section 7 cannot be made against the corporate debtor by a financial creditor in relation to a debt which has

become time-barred. In the context of “default” as defined under section 3(12) of the Code the Hon’ble Supreme Court has held thus:

*“36. The definition of “default” in Section 3(12) uses the expression “due and payable” followed by the expression “and is not paid by the debtor or the corporate debtor...”. “Due and payable” in Section 3(12), therefore, only refers to the whole or part of a debt, which when referring to the date on which it becomes “due and payable” , is **not in fact paid** by the corporate debtor. The context of this provision is therefore actual non-payment by the corporate debtor when a debt has become due and payable.*

It is therefore, apparent that the date of default within the meaning of Code is the default arising out of actual non-payment as a matter of fact. It would not admit any ideation, deeming fiction for deferment of default on account of acknowledgement or payment as alleged.

16. The deferment of default on the basis of the alleged acknowledgement dated 18<sup>th</sup> July 2016 or purported fresh defaults of 31<sup>st</sup> may 2019 or 28<sup>th</sup> June 2019 or 30<sup>th</sup> July 2019 on the basis of the part payments is impermissible under the code. In any event, the date of default as contemplated under the Code arising out of actual non-payment of debt (as fact and not any deeming fiction) cannot be extended by acknowledgment under section 18 of the Limitation Act or payment under section 20 of the Limitation Act.
17. The Hon’ble Supreme Court in its recent Judgment in ***Babulal Vardharji Furhar v. veer Gurjar Aluminium Industries Pvt. Ltd.*** [2020 SCC Online SC 647] has considered all earlier decisions of the Hon’ble

Supreme Court in the issue of limitation and summarized the law on para-90 of the Judgment. The Hon'ble Supreme Court has also considered Section 18 of the Limitation Act in paras-91 to 97 of the said judgment and held that section 18 would not apply to the Application filed under section 7 of the IB Code. The Hon'ble Supreme Court has emphasized that the issue of limitation in Section 7 Application is to be decided in the context of “**default**” that has occurred due to **actual non-payment** of the debt.

18. In **Jagdish Prasad Sarada Vs. Allahabad Bank**, [2020 SCC online NCLAT 621] relying on the decision of the Hon'ble Supreme Court in *Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd.* the Hon'ble NCLAT has rejected the contention of extension of limitation on the ground of part payment as per section 20 of the Limitation Act, 1963.
19. Recently, in *Bishal Jaiswal Vs. Asset Reconstruction Company*, five members Bench of Hon'ble NCLAT by its judgement dated 22<sup>nd</sup> December 2020 has held thus:

*13. In “Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.”, Civil Appeal No. 6347 of 2019, the Hon'ble Apex Court observed that Section 18 of the Limitation Act, 1963 would have no application to proceedings under I&B Code.*

*Therefore, the issue raised as regards acknowledgement of liability by reflection in the Balance Sheet/ Annual Return would be irrelevant.*

*14. ...Stretching forward the concept of default beyond NPA, in the context of law declared by the Hon'ble Apex Court as it now stands, would be the forbidden province and the liability in regard to defaulted amount on the basis of classification of account of Corporate Debtor as NPA cannot be given a new lease of life when it is time barred. The judgement of Hon'ble Apex Court in B. K. Educational Services' (supra) is eloquent on the subject.*

20. In the facts and circumstances, the Respondent/Corporate Debtor submitted that the amendment application is not tenable in law. The proposed amendment to introduce fresh date of default on account of acknowledgement and payment is contrary to law.
21. We have perused the documents placed on records and examined the facts of the case in the light of Hon'ble Supreme Court recent judgement dated 04.08.2021 in the matter of *Dena Bank (now Bank of Baroda) Vs. C. Shivakumar Reddy and Anr.* [Civil Appeal No.1650 of 2020] where the same issue was raised, therefore the covers issue in this matter squarely the relevant portion/paras of the same is reproduced here below;

*"26. A third issue which arises for adjudication of this Court is, whether there is any bar in law to the amendment of pleadings, in a Petition under Section 7 of the IBC, or to the filing of additional*

*documents, apart from those filed initially, along with the Petition under Section 7 of the IBC in Form-1.*

*69. The scheme of the IBC is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the Corporate Insolvency Resolution Process begins. Where any corporate debtor commits default, a financial creditor, an operational creditor or the corporate debtor itself may initiate Corporate Insolvency Resolution Process in respect of such corporate debtor in the manner as provided in Chapter II of the IBC.*

*91. On a careful reading of the provisions of the IBC and in particular the provisions of Section 7(2) to (5) of the IBC read with the 2016 Adjudicating Authority Rules there is no bar to the filing of documents at any time until a final order either admitting or dismissing the application has been passed.*

*144. There is no bar in law to the amendment of pleadings in an application under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 of the IBC in Form-1. In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority committed any illegality or error in permitting the Appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the Adjudicating Authority might,*

*at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view, the decision of the Adjudicating Authority to entertain and/or to allow the request of the Appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal.”*

22. We are of the considered opinion that the amendment sought deserves to be allowed. Hence the same is Allowed and permitted to carry out amendment as per “**SCHEDULE OF AMENDMENT**” of IA 215 of 2021.
23. With the above directions the IA 215 of 2021 is disposed of.

**Dated the 7<sup>th</sup> day of September, 2021**

**Sd/-**  
**SHYAM BABU GAUTAM**  
**Member (Technical)**

**Sd/-**  
**ASHOK KUMAR BORAH**  
**Member (Judicial)**

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