

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 5, MUMBAI BENCH

CP (IB) - 65/MB/2020

Under Section 7 of the I&B Code, 2016

In the matter of

State Bank of India,
Stressed Assets Management Branch- II,
Raheja Chambers, ground floor, Wing- B,
Free Press Journal Marg, Nariman Point,
Mumbai- 400021

.... Petitioner

vs.

Vindhyavasini Corporation Private
Limited,
Flat No. 101, OG-III, Oberoi Garden,
Thakur Village, off western Expressway
Highway, Kandivali (East), Mumbai-
400101

.... Corporate Debtor

and

I.A. 23/2021

in

C.P. (IB) - 65/MB/2020

Under Section 5 of the Limitation Act,
1963 read with Sections 238A and 60(5)
of I&B Code, 2016

In the matter of

State Bank of India

.... Applicant

vs.

Vindhyavasini Corporation Private
Limited

.... Respondent

Order Pronounced on: 30.08.2021

Coram: Hon'ble Suchitra Kanuparthi, Member (Judicial)
Hon'ble Chandra Bhan Singh, Member (Technical)

For the Petitioner: Senior Counsel Mr. Zal Andhyarujina, Counsel Mr. Rohit
Gupta a/w Mr. Abdullah Qureshi, Ms. Nishitha Nambiar, Ms.
Maithili Prabhu

For the Respondent: Adv. Taruna Prasad, Adv. Vandana Mishra

Per: Chandra Bhan Singh, Member (T)

ORDER

1. State Bank of India (hereinafter called 'Petitioner') has sought the Corporate Insolvency Resolution Process of Vindhyavasini Corporation Private Limited (hereinafter called the 'Corporate Debtor') on the ground, that the Corporate Debtor committed default to the extent of Rs. 338.55 Crores including applicable interest as provided under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called the 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Contentions of the Petitioner:

2. The Counsel for the Petitioner submits that the Corporate Debtor approached the Petitioner to grant it credit facilities/ term loans and the same was sanctioned vide Letter of Arrangement dated 21.09.2010 by the Petitioner. Subsequently, the Petitioner granted renewal and enhancement of further facilities vide Sanction Letter dated 24.03.2012 to the Corporate Debtor on certain terms & conditions which were duly accepted by the Corporate Debtor by executing various documents, agreements and deeds from time to time to secure

the said facilities/ loans.

3. The Corporate Debtor defaulted in repaying the principal, interest and other monies on due dates as agreed in terms of documents, agreements and deeds as on 31.12.2012. The Petitioner then classified the Corporate Debtor's loan account as Non-Performing Asset (NPA) on 31.03.2013. Thereafter, the Petitioner had issued a demand notice under Section 13 of SARFAESI Act, 2002 dated 02.07.2013 to the Corporate Debtor demanding the outstanding debt amount. Also, an Original Application No. 760/2014 was filed before the Hon'ble Debts Recovery Tribunal, Mumbai on 26.06.2014 against the Corporate Debtor and further, an Order was passed by the Mumbai Debts Recovery Tribunal-III in the said Original Application No. 760/2014 on 08.01.2015 granting interim relief to the Petitioner by restraining the Corporate Debtor to create any third party rights on the secured assets. The Petitioner had declared the Corporate Debtor and guarantors of the Corporate Debtor as the willful defaulters in September, 2014 and accordingly, public notices were published in the newspapers on 04.08.2019.

4. Thereafter, the Petitioner conducted Forensic Audition Loan Account of the Corporate Debtor in November, 2015 and based on its findings, the loan account of the Corporate Debtor was declared as fraud and consequentially, First Information Report (FIR) was lodged with Central Bureau of Investigation (CBI) by the Petitioner against the Corporate Debtor. The Petitioner also filed an Application under Section 14 of the SARFAESI Act, 2002 before the Hon'ble District Magistrate, Palghar, at Palghar for taking physical possession of certain secured assets mortgaged in favor of the Petitioner and the said Application was allowed.

5. The Counsel for the Petitioner further submits that the Corporate Debtor vide Letter dated 16.05.2019 had approached the Petitioner with a Compromise Offer to settle the loan account of the Corporate Debtor. However, after detailed

discussion, the Compromise Offer of the Corporate Debtor was rejected by the Petitioner. Till date, the Corporate Debtor has failed to pay the outstanding debt amount to the Petitioner. Therefore, the Petitioner filed the Company Petition under Section 7 of the Code.

6. The Counsel for the Petitioner then submits that the date of default in the present case was 31.12.2012 and the Company Petition No. 65 of 2020 was filed on 20.12.2019 with the delay of 1450 days, whereas, the limitation period of three years has already expired on 31.12.2015. It is further submitted that the Code was passed by the Parliament in May, 2016 and became effective only from December, 2016. Section 238A of the Code was inserted vide Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 with effect from 06.06.2018. Therefore, the delay from 31.12.2015 to 06.06.2018 was beyond the control of the Petitioner. Although, the Petitioner had initiated various other proceedings against the Corporate Debtor for recovery of its dues. The IA 23 of 2021 in CP 65 of 2020 has been filed by the Petitioner under Section 5 of the Limitation Act, 1963 to condone the delay of 1450 days in filing the Company Petition 65 of 2020.

7. The Counsel for the Petitioner submits that the intention of the Code is to provide a justified balance between an interest of all stakeholders of the Company so that they can enjoy the availability of credit and the loss that a creditor might have to bear on account of default. Therefore, it is absolutely necessary that the delay of 1450 days in filing the Company Petition be condoned by exercising the power that the Tribunal has under Section 5 of the Limitation Act, 1963 in the interest of both the parties as well as other stakeholders.

Contentions of the Corporate Debtor:

8. The Counsel for the Corporate Debtor submits that the Company Petition No. 65 of 2020 is extensively time barred and liable to be dismissed at the outset

as the Petitioner/ Applicant itself admits in the IA that there is an enormous delay of 1450 days in filing the Company Petition. The Petitioner/ Applicant has also completely failed to explain the 'sufficient cause' for delay in filing the Company Petition beyond the prescribed limitation period of three years as required under Section 5 of the Limitation Act, 1963 and now, without any sufficient cause and in complete abuse of the process of law, the Petitioner is trying to get the delay condoned to recover a time barred debt against the Corporate Debtor. It is a settled law that when a debt is barred by time, the right to a remedy is also time barred. In the present case, the cause of action arose on the date of default, i.e., 31.03.2013 and hence, the limitation period ended on 31.03.2016 which is three years from the date of default.

9. The Counsel for the Corporate Debtor submits that during the implementation of Insolvency and Bankruptcy Code, 2016, the statute was silent on the applicability of principles of limitation for filing of applications/ claims under the Code. But, after the inclusion of Section 238A in the Code from 06.06.2018, this anomaly was resolved. However, the Code was not legislated to renew the time barred claim, therefore, right to apply did not arise then also when the Code was introduced and became effective. The contentions of the Petitioner that from 06.06.2018 till 20.12.2019, it was exploring the options available under law for recovery of its legitimate dues cannot be entertained because even after the Code came into effect from 01.12.2016, the Petitioner did not take any steps to initiate action for recovery of debt.

10. It is then submitted by the Counsel for the Corporate Debtor that the conduct of the Petitioner clearly shows that the Petitioner did not take any steps to initiate any action against the Corporate Debtor within the prescribed limitation period. It is not that the Petitioner was remedy less during the time of default, but the Petitioner chose not to take any steps at the right time and has now, with an extensive and unexplained delay of 1450 days, filed the Company Petition for recovery of a time barred debt. The Petitioner cannot be allowed to

walk in the court as per its own whims and fancies ignoring all laws of limitation. It is therefore submitted that the Tribunal should dismiss both the Company Petition and Interlocutory Application.

Findings:

11. The Petitioner, State Bank of India, has filed the Company Petition No. CP 65/2020 against the Respondent under Section 7 of Insolvency & Bankruptcy Code, 2016 (hereinafter called as “the Code”) for an amount of Rs. 338.55 crores as on 30.11.2019. It is an admitted position by the Applicant that there has been a delay of 1,450 days in filing the said Company Petition. The Applicant has filed an IA No. 23 of 2021 under Section 5 of the Limitation Act, 1963 r/w Section 238A of the Code for condonation of delay for filing the said Company Petition.

12. The Petitioner has mentioned that the after putting the applicable rate of interest on the Term Loan and Cash Credit Facility, the total due as on 30.11.2019 stands at Rs. 338.55 crore. The date of default is 31.12.2012 and date of NPA is 31.03.2013. This Bench notes that the facts relating to the amount of debt, the date of default and the date of NPA has not been disputed by the Respondent, i.e., M/s. Vindhyavasini Corporation Pvt. Ltd. However, the only point of dispute is that the said Company Petition, i.e., CP No. 65 of 2020, has been filed on 20.12.2019 after a delay of 1,450 days. Initially, the Petitioner had filed an IA No. 23 of 2021 in CP 65 of 2020 for condonation of delay of 1450 days. In this IA No. 23 of 2021 in CP 65 of 2020, the Petitioner had pleaded that there is “sufficient cause” under Section 5 of the Limitation Act, 1963 for the Bench to condone the delay of 1450 days in filing this Petition after the period of almost 4 years as provided under Section 137 of the Limitation Act, 1963. The primary issues before this Bench are: (a) whether there is applicability of Limitation Act, 1963 to the proceedings under the Code and; (b) whether there is sufficient cause that falls under Section 5 of the Limitation Act, 1963 to condone

the delay of 1,450 days which is almost 4 years after the period of 3 years as provided under Article 137 of the Limitation Act, 1963.

13. Keeping in view the fact that the ‘debt’ and ‘default’ have not been disputed by the Corporate Debtor’s side, the only issue of consideration before the Bench was regarding whether the Petitioner attracts limitation as mentioned in the above paragraphs, i.e., regarding applicability of limitation to the proceedings of the Code and if so, whether under Section 5 of the Limitation Act, 1963, sufficient cause is there to condone the delay of almost 4 years in filing the Company Petition.

14. It is now a settled fact that the Limitation Act, 1963 in entirety is applicable to the proceedings under the Code. Here, the Bench would like to draw attention to Section 238A of the Code which was inserted in the year 2018 and provides for applicability of Limitation Act, 1963 to the proceedings under the Code. Section 7 being proceedings before the Adjudicating Authority would be covered u/s 238A of the Code. The Section 238A of the Code reads as under:-

“Section 238A. Limitation: The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.”

15. The Bench further relies upon the Judgment in the case of *B. K. Educational Services Pvt. Ltd. vs. Parag Gupta & Associates [Civil Appeal No. 23988 of 2017]* and also in *Babulal Vardharaji Gurjar vs. Veer Gurjar Aluminium [Company Appeal (AT) (Insolvency) No. 549 of 2018]*, where the Hon'ble Supreme Court has held that the period of limitation for filing Petition under Section 7 of the Code would be governed by Article 137 of the Limitation Act, 1963. Therefore, the period of limitation would be 3 years from the date of default/ NPA.

16. It is clear to the Bench from the above that Section 5 of the Limitation Act, 1963 is applicable to the Petition filed under Section 7 and 9 of the Code. The Bench would like to draw attention to Section 5 of the Limitation Act which reads as under:

“Section 5: Extension of prescribed period in certain cases- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation- The fact that the appellant or applicant was missed by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.” [Emphasis Supplied]

17. The Bench notes that the Petitioner had proceeded against the Corporate Debtor under Section 13 of the SARFAESI Act, 2002 for recovery of outstanding loan amount by issuing a Demand Notice on 02.07.2013 to the Corporate Debtor. The Petitioner had also filed an Application on 26.06.2014 before the DRT for recovery of the entire dues. The DRT vide Order dated 08.01.2015 granted interim relief restraining the Corporate Debtor to create any third-party rights on the secured assets. Similarly, under the SARFAESI Act, 2002, the District Authorities had allowed, in early 2017, to take physical possession of the secured assets mortgaged in favor of the Petitioner. The Petitioner had also tried auctioning the mortgaged immovable property in February, 2020. However, no bids were received.

18. The main issue before the Bench was whether the Petitioner has given sufficient cause for the condonation of delay as prayed for in IA No. 23 of 2021

of CP 65 of 2020. The Bench had heard the matter and reserved it for orders on 25.02.2021. However, soon after this, the Hon'ble Supreme Court pronounced a Judgement on 15.04.2021 in the matter of *Asset Reconstruction Company (India") Ltd. vs. Bishal Jaiswal & Anr. [Civil Appeal No. 323 of 2021]*. In this Judgement, the Hon'ble Supreme Court had clearly spelt out that the entries in the balance sheet, which is required to be prepared to comply with the statutory requirements, will amount to acknowledgement of debt under Section 18 of the Limitation Act, 1963 and has the effect of extending the period of limitation for the purpose of filing an application for initiation of the CIRP under the IBC.

19. Pursuant to the Daily Orders of this Bench dated 30.04.2021 and 06.05.2021, the Bench had put the matter for further clarification in wake of Hon'ble Supreme Court's Judgement in the matter of *Asset Reconstruction Company (India") Ltd. vs. Bishal Jaiswal & Anr. [Civil Appeal No. 323 of 2021]*. The Bench had asked the Petitioner to file the balance sheets of the Corporate Debtor Company by way of an Additional Affidavit and also serve a copy of the same to the Corporate Debtor side. Thereafter, the matter was finally heard on 09.07.2021 and was reserved for orders.

20. The Bench notes that the Petitioner, by way of an Additional Affidavit, filed the last audited balance sheet for the year 2016-17 of the Corporate Debtor available with the Registrar of Companies (ROC). This balance sheet of the Corporate Debtor shows an unsecured loan of about ₹124,48,94,206/- which is the same amount as has been claimed by the Petitioner as principal amount in Part IV of the Petition. This amount with an accumulated interest of ₹4,58,32,367/- at the end of the financial year, i.e., 31.03.2017 became ₹129,07,26,473/-. The relevant page of the balance sheet of the Corporate Debtor is as under:

IDHYAVASINI CORPORATION PRIVATE LIMITED Standalone Financial Statements for period 01/04/2016 to 31/03/2017

Indebtedness of the Company including interest outstanding / accrued but not due for payment

Particulars	Secured Loans excluding deposits (Rs.)	Unsecured Loans (Rs.)	Deposits (Rs.)	Total Indebtedness (Rs.)
Indebtedness at the beginning of the financial year				
i) Principal Amount		1244894206	45832367	0 <u>1290726473</u>
ii) Interest due but not paid	0	0	0	0 0
iii) Interest accrued but not due	0	0	0	0 0
Total (i+ii+iii)		1244894206	45832367	0 1290726473
Change in Indebtedness during the financial year				
Addition			0	0 0 0 0
Reduction			0	0 0 0 0
Net Change			0	0 0 0 0
Indebtedness at the end of the financial year				
i) Principal Amount		1244894206	45832367	0 <u>1290726473</u>
ii) Interest due but not paid	0	0	0	0 0
iii) Interest accrued but not due	0	0	0	0 0
Total (i+ii+iii)		1244894206	45832367	0 1290726473

21. We note that in the present Petition, the date of default is 31.03.2013. Now, this gets duly extended as a result of the acknowledgement of debt by the Corporate Debtor in its audited balance sheet of 2016-17, i.e., from 01.04.2016 to 31.03.2017. As a result of this acknowledgement of debt in the audited balance sheet of 2016-17, the limitation stands extended up to 31.03.2020 in

accordance with Section 18 of the Limitation Act, 1963. Since the Petitioner has been filed by the Financial Creditor on 20.12.2019, it is well within the limitation period of 3 years.

22. In the light of above facts and circumstances, the existence of debt and default is reasonably established by the Petitioner as a major constituent for admission of a Petition under Section 7 of the Code. In light of the Supreme Court's Judgement in the matter of *Asset Reconstruction Company (India) Ltd. vs. Bishal Jaiswal & Anr. [Civil Appeal No. 323 of 2021]* which allows entries in the balance sheet to be treated as acknowledgement of debt in terms of Section 18 of the Limitation Act, 1963, the Bench observes that **IA 23/2021** seeking condonation of delay under Section 5 of the Limitation Act, 1963 has become infructuous.

23. In view of the above, **IA 23/2021 in CP 65/2020** stands “**infructuous**” and **CP 65/2020** is “**admitted**” accordingly, prohibiting all of the following of item-(I), namely:

- (I) (a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

(II) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during

moratorium period.

(III) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(IV) That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, as the case may be.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under Section 13 of the Code.

(VI) That this Bench hereby appoints, Mr. Naren Sheth, having office at 1014-1015, Prasad Chamber, Tata Road No. 1, Opera House, Charni Road (East), Mumbai, Maharashtra- 400004; having Registration No. IBBI/IPA-001/IP/P-00133/2017-18/10275 as an Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

24. The Registry is hereby directed to communicate this order to both the parties and the Interim Resolution Professional immediately.

Sd/-
Chandra Bhan Singh
Member (Technical)

Sd/-
Suchitra Kanuparthi
Member (Judicial)