

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Before: Justice Ashok Bhushan, Chairperson, Justice Jarat Kumar Jain, Dr. Alok Srivastava

Ome Prakash Verma (Suspended Director of Neesa Leisure Limited) - Appellant,
versus

Amit Jain, (RP of Neesa Leisure Limited) - Respondents.

Company Appeal (AT) (Insolvency) No. 827 of 2020 (Arising out of Order dated 27.07.2020 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad Court 2, in IA 415 of 2020 in CP (I.B) No.127/7/NCLT/AHM/2017)

04.01.2022

(i) IBC, Section 18, 60 - Resolution Professional does not enjoy the adjudicatory functions - As per Section 18 of the IB Code, one of the duties of Interim Resolution Professional is to receive and collate all the claims submitted by the creditors to him - Similarly, the Regulations empowers the Resolution Professional to call for such other evidence or clarification as he deems fit from the creditors for substantiating the whole or part of the claim - Regulation 12, sub-regulation (3) uses the expression 'submission of proof of claims' -

Resolution Professional has to thus receive and collate all the claims, call for such other evidence, ask for any information from the creditors to substantiate their claims - Regulation 13(b) provides for 'verification of claims' - The above duties and functions are administrative in nature while accepting, collating and verifying the claim, the Resolution Professional is to be prima-facie satisfied that claim, which is submitted by a creditor is made out from the documents submitted - The Resolution Professional does not enjoy the adjudicatory functions - The Adjudicating Authority has complete jurisdiction to adjudicate on the claim, which was filed against the Corporate Debtor. [Para 9, 11]

(ii) IBC, Section 7 - When an Application under Section 7 cannot be entertained for a debt, which is barred by time and is liable to be rejected, any addition in the claim, which may fall into the category of time barred debt, also cannot be entertained. [Para 17]

Held, The present is a case where Appellant was complaining about the addition of certain claims of the Financial Creditor - Respondent No.2, consequent upon assignment by United Bank of India had become barred by time. Section 7 Application was filed by Respondent No.2 on the ground of default as mentioned in the Application. The Respondent No.2 has filed the Application on the basis of inclusion of assignment by ICICI Bank. The objection raised by the Appellant is with regard to assignment by United Bank of India, which objection has been specifically taken in email dated 14th June, 2020 as well as in the Application being I.A. No.415 of 2020 filed by the Appellant. The Appellant's grievance was that there has been increase in the voting shares of Respondent No.2 consequent to

admitting assignment of United Bank of India by which voting shares increased by more than 8.4%. The case of the Appellant was that the United Bank of India placed the account of Corporate Debtor as NPA in the year 2015 and the limitation of three years came to an end in the year 2018, hence, the said claim stood barred by time.

For Appellant: Mr. Uday Bali and Mr. Jaitegan Singh Khurana, Advocates. For Respondents: Mr. Sumant Batra, Ms. Niharika Sharma and Ms. Ruchi Goyal, Advocates (R1). Mr. Dinkar Singh, Mr. Gagan Garg and Mr. Rohit Singh, Advocates (R2).

JUDGMENT

ASHOK BHUSHAN, J. - This Appeal has been filed by a Suspended Director of the Corporate Debtor, challenging order dated 27th July, 2020 passed by Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad by which I.A. No.415 of 2020 filed by the Appellant was rejected.

2. Brief facts of the case and sequence of events necessary to be noted for deciding this Appeal are:

(i) *Asset Reconstruction Company (India) Limited - Respondent No.2. filed an Application under Section 7 against the Corporate Debtor M/s Neesa Leisure Limited. Adjudicating Authority by an order dated 24th April, 2019 initiated the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. Section 7 Application was filed on the strength of assignment of debt by ICICI bank in favour of Respondent No.2.*

(ii) *On 31.05.2019 first Meeting of the Committee of Creditors (CoC) of Corporate Debtor was held. The Asset Reconstruction Company (India) Limited - the Financial Creditor was assigned 23.10% voting share in the constitution of Committee of Creditors.*

(iii) *After 9th Meeting of CoC held on 11th June, 2020, the Appellant sent an email to the Resolution Professional on 14th June 2020, objecting to the acceptance of delayed claim by ARCIL on account of assignment of debt by United Bank of India in favour of ARCIL.*

(iv) *On 15th June, 2020, Resolution Professional replied to the Appellant stating that on the basis of document provided by ARCIL, the claim has been provisionally admitted.*

(v) *The Appellant filed the detailed objection on 19th June, 2020, objecting to acceptance of ARCIL claim on account of assignment from United Bank of India on grounds of limitation. The Appellant stated in the objection that United Bank of India in the year 2015 placed the account of the Corporate Debtor as an NPA. Therefore, period of limitation ended in the year 2018 and hence, the said claim has become barred by limitation.*

(vi) *The Appellant thereafter filed Application being I.A. No.415 of 2020 before the Adjudicating Authority praying for a direction that the claim of Respondent No.2 as*

assignee of United Bank of India be held to be time barred.

(vii) The said Application has been rejected by the Adjudicating Authority by the impugned judgment dated 27th July, 2020 observing that the commercial wisdom of the Committee of Creditors cannot be interfered with by the Adjudicating Authority. Challenging the order of the Adjudicating Authority, this Appeal has been filed.

3. The learned Counsel for the Appellant submits that assignment of claim of United Bank of India giving rise of voting share of Respondent No.2 to the extent of 8.4% was illegal, since the dues of United Bank of India have become time barred and by virtue of applicability of Section 238A, the Limitation Act is applicable in proceedings under Section 7 of the IB Code and time barred claim could not have been considered or added in the Application. The United Bank of India could not have filed the Application under Section 7 of IB Code against the Corporate Debtor, hence addition of that claim in the claim of Respondent No.2 is impermissible. Learned Counsel for the Appellant submits that the observation of Adjudicating Authority that suspended management has no role to play in the matter is incorrect. The Appellant is objecting to inclusion of time barred claim in claim of Respondent No.2.

4. Learned Counsel for Respondent No.1 refuting the submissions made by learned Counsel for the Appellant submits that provisions of Section 238A of the IB Code do not apply to the process before the Resolution Professional and the said provision is applicable only with respect to proceedings before Adjudicating Authority and National Company Law Appellate Tribunal. The Appellant does not have the locus to challenge the admission of claim. The duty of Resolution Professional is only to collect, collate and admit the claim. The Resolution Professional cannot adjudicate on the claim. It is submitted that challenge to admission of claim is not bonafide and has been done with intent to derail the CIRP process. It is submitted that Appellant had challenged the Resolution Plan even before an Application for approval was filed before the Adjudicating Authority, which Application was dismissed with cost of Rs.50,000/-.

5. We have heard the learned Counsel for the parties and perused the record.

6. We may first notice the statutory scheme with respect to Corporate Insolvency Resolution Process. We need to first notice the duties and functions of the Resolution Professional. Section 18, sub-section (1) (b) enumerates that one of the duties of the Interim Resolution Professional is to receive and collate all the claims submitted by creditors to him. Section 25, sub-section (2)(e) oblige the Resolution Professional to maintain an updated list of claims. The Regulations have been framed namely – The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Regulation 8 provides the manner of submission of claims by Financial Creditors. Regulation 10 deals with ‘Substantiation of claims’, which is as follows:

“10. Substantiation of claims.

The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for

substantiating the whole or part of its claim.”

7. Next important Regulation to be looked into is Regulation 12, which deals with ‘Submission of proof of claims’. Regulation 12 is as follows:

“12. Submission of proof of claims.

(1) *Subject to sub-regulation (2), a creditor shall submit proof of claim on or before the last date mentioned in the public announcement.*

(2) *A creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee.*

(3) *Where the creditor in sub-regulation (2) is a financial creditor, it shall be included in the committee from the date of admission of such claim:*

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.”

8. Regulation 13 deals with ‘Verification of claims’. We may also notice Section 60 of the IB Code. Section 60, sub-section (2) & (5), which are relevant are as follows:

“60(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or 1 [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before the National Company Law Tribunal.

(5) *Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –*

(a) *any application or proceeding by or against the corporate debtor or corporate person;*

(b) *any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and*

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

9. When we look into the Regulation and Section 60 of the IB code as above, it is apparent that as per Section 18 of the IB Code, one of the duties of Interim Resolution Professional is to receive and collate all the claims submitted by the creditors to him. Similarly, the Regulations empowers the Resolution Professional to call for such other evidence or clarification as he deems fit from the creditors for substantiating the whole or part of the claim. Regulation 12, sub-regulation (3) uses the expression 'submission of proof of claims'. Resolution Professional has to thus receive and collate all the claims, call for such other evidence, ask for any information from the creditors to substantiate their claims. Regulation 13(b) provides for 'verification of claims'. The above duties and functions are administrative in nature while accepting, collating and verifying the claim, the Resolution Professional is to be prima-facie satisfied that claim, which is submitted by a creditor is made out from the documents submitted. The Resolution Professional does not enjoy the adjudicatory functions.

10. In *Swiss Ribbons Private Limited and Anr. vs. Union of India and Ors.* (2019) 4 SCC 17 Hon'ble Supreme Court has held that the Resolution Professional has no adjudicatory powers. In paragraph 88, following has been laid down:

"88. It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. Section 18 of the Code lays down the duties of an interim resolution professional as follows:

"18. Duties of interim resolution professional.—(1) The interim resolution professional shall perform the following duties, namely—

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate

debtor, including information relating to—

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15;

(c) constitute a Committee of Creditors;

(d) monitor the assets of the corporate

debtor and manage its operations until a resolution professional is appointed by the Committee of Creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

- (iii) tangible assets, whether movable or immovable;***
- (iv) intangible assets including intellectual property;***
- (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;***
- (vi) assets subject to the determination of ownership by a court or authority;***
- (g) to perform such other duties as may be specified by the Board.***

Explanation.—For the purposes of this section, the term “assets” shall not include the following, namely—

- (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual***

arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.””

11. As per Section 60 and sub-sections (2) and (5) an Application can be filed before the Adjudicating Authority regarding any claim made by or against the Corporate Debtor to any proceeding by or against the Corporate Debtor. In this case, an Application was filed by the Appellant under Section 60, sub-section (2) and (5) of the IB Code being I.A. No.415 of 2020. The Adjudicating Authority has complete jurisdiction to adjudicate on the claim, which was filed

against the Corporate Debtor. The Adjudicating Authority rejected the Application of the Appellant by making the following observation:

“RP is an appointee of the Court and he has to collate all the information and submit the same before the COC. The COC based on its commercial wisdom is to decide the matter. Hon’ble Supreme Court of India in its judgment passed in Civil Appeal no.8766-67 of 2019 – Committee of Creditors of Essar Steel India limited through Authorise Signatory vs. Satish Kumar Gupta & Ors. observed that the commercial wisdom of the Committee of Creditors cannot be interfered into by the Adjudicating Authority. In that event the Suspended Management has no role to play.”

12. The Adjudicating Authority has rejected the Application observing that in view of the judgment of the Hon’ble Supreme Court in *Committee of Creditors of Essar Steel India Limited through Authorise Signatory vs. Satish Kumar Gupta & Ors. (2020) 8 SCC 531*, the commercial wisdom of the Committee of Creditors cannot be interfered into by the Adjudicating Authority.

13. The law laid down by the Hon’ble

Supreme Court in the above case is clear and is to be followed by all. The observation made by the Adjudicating Authority as stated above, however, does not apply in the facts of the present case. The present is a case where Appellant was complaining about the addition of certain claims of the Financial Creditor - Respondent No.2, consequent upon assignment by United Bank of India had become barred by time. Section 7 Application was filed by Respondent No.2 on the ground of default as mentioned in the Application. The Respondent No.2 has filed the Application on the basis of inclusion of assignment by ICICI Bank. The objection raised by the Appellant is with regard to assignment by United Bank of India, which objection has been specifically taken in email dated 14th June, 2020 as

well as in the Application being I.A. No.415 of 2020 filed by the Appellant. The Appellant's grievance was that there has been increase in the voting shares of Respondent No.2 consequent to admitting assignment of United Bank of India by which voting shares increased by more than 8.4%. The case of the Appellant was that the United Bank of India placed the account of Corporate Debtor as NPA in the year 2015 and the limitation of three years came to an end in the year 2018, hence, the said claim stood barred by time.

14. Hon'ble Apex Court in (2019) 11 SCC 633 - B.K. Educational Services Private Limited vs. Parag Gupta and Associates while considering the question of applicability of the Limitation Act, 1963 in the IBC proceedings has held that an Application filed under Section 7 after the Code has come into force, time barred debt cannot be revived.

15. We may at this stage refer to Report of the Insolvency Law Committee submitted to the Government of India on 26th March, 2018, with regard to

application of Limitation Act, 1963 in paragraph 28.1 and 28.2 following was stated:

“28.1 The question of applicability of the Limitation Act, 1963 (“Limitation Act”) to the Code has been deliberated upon in several judgments of the NCLT and the NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected.¹⁴⁷ In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred.¹⁴⁸ This requires being read with the definition of ‘debt’ and ‘claim’ in the Code. Further, debts in winding up proceedings cannot be time-barred,¹⁴⁹ and there appears to be no rationale to exclude the extension of this principle of law to the Code.

28.2 Further, non-application of the law on limitation creates the following problems: first, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation is “to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party’s own inaction, negligence or latches”¹⁵⁰. Though the Code is not a debt recovery law, the trigger being ‘default in payment of debt’ renders the exclusion of the law of limitation counter-intuitive. Second, it re-opens the right of claimants (pursuant to issuance of a public notice) to file time-barred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per section 30(4) of the Code.”

16. Referring to the above mentioned Insolvency Law Committee Report in *B.K. Educational Services Private Limited* (supra), the Hon’ble Supreme Court laid down following in paragraph 34:

*34. It is important to remember that interpretation is the art of matching the text with the context. In a slightly different context, under Section 86 of the Electricity Act, this Court, in *A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd.* [*A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd.*, (2016) 3 SCC 468], refused to apply the principle of these cases stating: (SCC p. 497, paras 30-31)*

“30. ... In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular

suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.

31. We have taken the aforesaid view to avoid injustice as well as the possibility of discrimination.

We have already extracted a part of para 11 of the judgment in *State of Kerala v. V.R. Kalliyankutty* [*State of Kerala v. V.R. Kalliyankutty*, (1999) 3 SCC 657] wherein the Court considered the matter also in the light of Article 14 of the Constitution. In that case the possibility of Article 14 being attracted against the statute was highlighted to justify a particular interpretation as already noted. It was also observed that it would be ironic if in the name of speedy recovery contemplated by the statute, a creditor is enabled to recover claims beyond the period of limitation. In this context, it would be fair to infer that the special adjudicatory role envisaged under Section 86(1)(f) also appears to be for speedy resolution so that a vital developmental factor — electricity and its supply is not adversely affected by delay in adjudication of even ordinary civil disputes by the civil court. Evidently, in the absence of any reason or justification the legislature did not contemplate to enable a creditor who has allowed the period of limitation to set in, to recover such delayed claims through the Commission. Hence, we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court.”(emphasis supplied)

This case is most apposite. As in the present case, and as is reflected in the Insolvency Law Committee Report of March 2018, the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of the Code. The Code cannot be triggered in the year 2017 for a debt which was time-barred, say, in 1990, as that would lead to the absurd and extreme consequence of the Code being triggered by a stale or dead claim, leading to the drastic consequence of instant removal of the present Board of Directors of the corporate debtor permanently, and which may ultimately lead to liquidation and, therefore, corporate death. This being the case, the expression “debt due” in the definition sections of the Code would obviously only refer to debts that are “due and payable” in law i.e. the debts that are not time-barred. That this is the case has already been held by us in *Innoventive Industries Ltd. v. Icici Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356] as follows: (SCC pp. 438-39, paras 28 & 30)

“28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any [Ed.: The word “any” has been emphasised in original.] financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to adjudicating authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a

detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.””

17. When an Application under Section 7 cannot be entertained for a debt, which is barred by time and is liable to be rejected, any addition in the claim, which may fall into the category of time barred debt, also cannot be entertained. The Appellant having objected to the

addition of claim consequent to assignment by United Bank of India, it had every right to agitate the issue and pray for adjudicatory orders from the Adjudicating Authority, which he did by filing an Application being I.A. No.415 of 2020. The Adjudicating Authority by misplaced observation rejected the Application without considering the merits of the claim.

18. We, thus, are of the view that order impugned is unsustainable and deserve to be set aside. The Adjudicating Authority having not considered the claim on merits, ends of justice would be met in directing for fresh consideration of I.A. No.415 of 2020 by the Adjudicating Authority. This direction shall, however, subject to one condition, that is, the Resolution Plan has not yet been approved by the Adjudicating Authority.

19. We have looked into the additional affidavit filed on behalf of Respondent No.1, where details have been given of various Applications filed by Suspended Directors of Suspended Management praying for one or other reliefs in the Corporate Insolvency Resolution Process, which Applications were rejected. Application filed by Sanjay Gupta and others being I.A. No.29 of 2020, I.A. No.484 of 2019 and I.A. No.429 of 2020 have been referred to, which were all rejected by order dated 02.11.2020 and 31.12.2020 of the Adjudicating Authority, wherein observation has also been made that Applications are nothing but abuse of process of law.

Reference to another I.A. No.564 of 2020 needs to be made, which was filed by Vikalp Gupta, Suspended Board of Directors of the Corporate Debtor where Audit Report submitted was challenged. The Application was rejected with cost of Rs.50,000/-. One Application filed by present Appellant – OME Prakash Verma being I.A. No.761 of 2020 also needs to be referred to where Appellant has sought direction to Respondent No.1, not to accept Resolution Plan submitted by Respondent No.2 in the above Plan, which Application was rejected on 09.11.2020 with cost of Rs.50,000/-.

20. Due to above reasons, we are of the view that fresh consideration of Application being I.A. No.415 of 2020 should be done by the Adjudicating Authority, only when Resolution

Plan has not yet been approved. In event, the Resolution Plan has already been approved by the Adjudicating Authority, the Application – I.A. No.415 of 2020, needs no further consideration and be treated to be as closed. This Appeal is disposed of with aforesaid direction. No costs.