2022 SCeJ 1096

Supreme Court of India

JUSTICE S. Abdul Nazeer JUSTICE V. Ramasubramanian

PUNJAB NATIONAL BANK v. MR. VIJAY SITARAM DANDNAIK & ANR.

CIVIL APPEAL NO.2277 OF 2021

30th August 2022

ibc – Section 7(1) of the IBC enables a financial creditor to initiate corporate insolvency resolution process "when a default has accrued" – The Explanation under sub-Section (1) of Section 7 makes it clear that a default includes a default in respect of a financial debt owed not only to the applicant--Financial Creditor but to any other financial creditor of the Corporate Debtor – The fact that the corporate debtor has been ordered by the High court to be wound up, is proof enough to show that the case falls under the category mentioned in the Explanation to section 7(1) – Facts, order of the Debt Recovery Tribunal in the Original Application filed by the appellant under Section 19 of the Act, 1993, is dated 01.11.2016 – Corporate Debtor executed Balance and Security Confirmation letters dated 03.07.2014 and 17.06.2017 and made a request for restructuring the loan – High Court passed an order dated 04.01.2018 directing the winding up of the Corporate Debtor – on 06.11.2019, NCLT admitted the petition filed under Section 7 IBC – Application filed by the appellant under Section 7 was clearly within three years from the date on which the "right to apply" in terms of Article 137 accrued. [Para 6]

IBC – Limitation – For the law of limitation, the remedy is the goal post and the right is the sign post from where the journey commences. A person initiating any proceeding in a court of law must show the existence of both a right in himself and a remedy for himself, but the IBC is a law where the sign post namely the right is for the financial/ operational creditor and the goal post namely the remedy, is for the corporate debtor, though the creditor may also recover a portion of his debt after having a hair-cut, if not a tonsure. [Para 24]

Cases Cited :

1.Para 5: Jaipur Metals and Electricals Employees Organization V. Jaipur Metals and Electricals Ltd. & Ors., (2019) 4 SCC 227
2.Paras 6, 12: Babulal Vardharji Gurjar V. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr., (2020) 15 SCC 1
3.Paras 10, 11: B.K. Educational Services Private Limited V. Parag Gupta and Associates, (2019) 11 SCC 633
4.Paras 11, 12: Jignesh Shah and Anr. V. Union of India and Anr., (2019) 10 SCC 750
5.Paras 13, 14: Vashdeo R. Bhojwani V. Abhyudaya Co–operative Bank Ltd. & Anr., (2019) 9 SCC 158
6.Para 15: Asset Reconstruction Company (India) Limited V. Bishal Jaiswal and Anr., (2021) 6 SCC 366
7.Paras 16, 17: Dena Bank V. C. Shivakumar Reddy and Another, (2021) 10 SCC 330
8.Para 17: Kotak Mahindra Bank Ltd. V. A. Balakrishnan, (2020) SCC OnLine SC 706
9.Para 20: Innoventive Industries Ltd. V. ICICI Bank & Anr., (2018) 1 SCC 407

Petitioner Counsel: Mr. Dhruv Mehta, Ms. Kusum Lata, Mr. Mahesh K. Chaudhary, Mr. Sushmita Chaudhary, Ms. Sushma Das

Respondent Counsel: Mr. Rahul Totala, Mr. Rohit Anil Rathi

JUDGEMENT

1. The order of admission of their petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short "IBC") passed by the National Company Law Tribunal (for short "NCLT"), having been reversed by the National Company Law Appellate Tribunal (for short "NCLAT") on the ground that the application was barred by limitation, the Financial Creditor–Punjab National Bank has come up with the above appeal.

2. We have heard Shri Dhruv Mehta, learned senior counsel appearing for the appellant and Shri Rahul

Totala, learned counsel appearing for the respondents.

3. The appellant herein filed a petition under Section 7 IBC against M/s Jailaxmi Sugar Products Pvt. Limited, the Corporate Debtor, who is the second respondent herein claiming, inter alia, (i) that vide sanction letters dated 07.05.2010 and 28.09.2010, a term loan was sanctioned to the second respondent herein; (ii) that by a letter dated 17.09.2011, restructuring of the existing term loans and fresh sanction of term loan was granted to the Corporate Debtor; (iii) that the Corporate Debtor defaulted in repayment and became a npa on 31.03.2013; (iv) that the appellant issued a demand notice dated 30.04.2013 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002; (v) that the Corporate Debtor also executed Balance and Security Confirmation letters dated 03.07.2014 and 17.06.2017; (vi) that the appellant, along with the Union Bank of India also filed an application in O.A. No.185 of 2014 on the file of the DRT, Pune for the issue of a certificate of recovery; (vii) that the original application was allowed by DRT, Pune by an order dated 01.11.2016, directing the Corporate Debtor and others including respondent No.1 herein to jointly and severally pay to the appellant herein, a sum of around Rs.45 cores together with interest @16.25% per annum (apart from the amount payable to Union Bank of India); (viii) that the total amount outstanding from the Corporate Debtor as on 13.08.2019 was Rs.108,34,33,364.19; and (ix) that in a parallel proceeding, the High Court of Judicature at Bombay had passed an order dated 04.01.2018 directing the winding up of the Corporate Debtor.

4. By an order dated 06.11.2019, NCLT admitted the petition of the appellant herein, filed under Section 7 IBC. Challenging the order of admission, the first respondent herein, who claims to be a 50% shareholder, promoter, director and creditor of the Corporate-Debtor filed an appeal before NCLAT. By the order dated 02.03.2021 impugned in this appeal, the NCLAT set aside the order of the NCLT on the ground that the claim of the appellant–Financial Creditor was barred by limitation. Aggrieved by the said order, the Financial Creditor is on appeal before us.

5. Before the NCLAT, the first respondent raised a preliminary objection that in the light of the order of winding up passed by the High Court of Judicature at Bombay, an application under Section 7 IBC was not maintainable. But the said contention raised by the first respondent was rejected by NCLAT on the basis of the decision of this Court in Jaipur Metals and Electricals Employees Organization v. Jaipur Metals and Electricals Ltd. & Ors., (2019) 4 SCC 227.

6. After overruling the objection relating to maintainability raised on the basis of the order of winding up, NCLAT took up for consideration the question of limitation. NCLAT opined that the decision of this Court in Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr., (2020) 15 SCC 1, clinched the issue on the question of limitation and that the application under Section 7, filed on 10.10.2019 was beyond a period of three years from the date of default (NPA) namely 31.03.2013. The Balance and Security Confirmation Letter dated 17.06.2017 was held by NCLAT to have been given after the expiry of three years from the date of default and as a consequence, Section 18 of the Limitation Act was also held to be inapplicable to the case of the appellant. Hence the present appeal.

6. But a perusal of the records and a careful consideration of the contentions raised on both sides show that NCLAT failed to take note of certain important aspects, both on fact and on law. Section 7(1) of the IBC enables a financial creditor to initiate corporate insolvency resolution process “when a default has accrued”. **The Explanation under sub-Section (1) of Section 7 makes it clear that a default includes a default in respect of a financial debt owed not only to the applicant--Financial Creditor but to any other financial creditor of the Corporate Debtor.** The fact that the corporate debtor has been ordered by the High court of Judicature at Bombay to be wound up, is proof enough to show that the case falls under the category mentioned in the Explanation to section 7(1).

7. The word “default” is defined in Section 3(12) of the IBC to mean “*non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be*.”

8. By Act 26 of 2018, Section 238A was inserted in the IBC to provide that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority and the NCLAT. By virtue of the above amendment, the doubt if any, on the question of applicability of the law of

limitation to the proceedings under the IBC, got cleared.

9. It may be noted that different provisions of IBC, 2016 came into force on different dates. Sections 4 to 32, Sections 60 to 77, Sections 198, 231 and 236 to 238 came into force on 01.12.2016, vide SO No.3594 (E) dated 30.11.2016.

10. Act No.26 of 2018, by which Section 238A was inserted, came into force on 06.06.2018. Therefore, a question arose in B.K. Educational Services Private Limited v. Parag Gupta and Associates, (2019) 11 SCC 633 as to whether the provisions of the Limitation Act, 1963 would apply to applications filed under Sections 7/9 of the IBC on and from its commencement on 01.12.2016 till 06.06.2018. This Court took note of Section 3(37) of the IBC which makes a reference to the Companies Act, 2013, insofar as words and expressions not defined in the IBC are concerned and made a reference to Sections 408 and 424 of the Companies Act, 2013 and came to the conclusion that by virtue of Section 433 of the Companies Act, 2013, the provisions of the Limitation Act will apply even to proceedings initiated before the insertion of Section 238A. As a consequence, this Court held that Article 137 of the Schedule to the Limitation Act, which prescribes a period of three years from the date "when the right to apply accrues", to any application for which no period of limitation is provided elsewhere in the Schedule, will be applicable.

11. The ratio in B.K. Educational Services (supra), found elaboration in Jignesh Shah and Anr. v. Union of India and Anr., (2019) 10 SCC 750, where this Court held a petition for winding up to be barred by limitation, as it was filed beyond a period of three years from the date on which the cause of action, as mentioned in an already instituted suit for specific performance/damages arose. Two important principles could be deduced from the decision in Jignesh Shah (supra). They are: (i) a suit for recovery based upon a cause of action that is within limitation, cannot in any manner impact the separate and independent remedy of winding up proceedings and hence the proceeding for winding up should also have been initiated before the expiry of the period of limitation; and (ii) in law, when time begins to run, it can only be extended in the manner provided in the Limitation Act, say for instance, an acknowledgment of liability under Section 18 of the Limitation Act.

12. After Jignesh Shah (supra), this Court was concerned in Babulal Vardharji Gurjar (supra), with a case where one of the questions that came up for consideration was whether the period of limitation for filing an application under Section 7 of the IBC, would be different in the case of a debt secured by a mortgage. For answering the said question, this Court considered all previous decisions of this Court and enunciated the principles of law as culled out from those decisions in paragraph 32 as follows:

> "32. When Section 238–A of the Code is read with the above-noted consistent decisions of this Court in Innoventive Industries, B.K. Educational Services, Swiss Ribbons, K. Sashidhar, Jignesh Shah, Vashdeo R. Bhojwani, Gaurav Hargovindbhai Dave and Sagar Sharma respectively, the following basics undoubtedly come to the fore:
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> (a) that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;
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> (b) that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;
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> (c) that intention of the Code is not to give a new lease of life to debts which are time–barred;
>
> (d) that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;
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> (e) that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs;
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> (f) that default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and
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> (g) that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and
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> (h) an application under Section 7 of the Code is not for enforcement of mortgage liability and Article

62 of the Limitation Act does not apply to this application."

13. After answering the question relating to a debt secured by a mortgage as aforesaid, this Court took up for consideration in Babulal, the question regarding applicability of Section 18 of the Limitation Act. Though the decision in Jignesh Singh was by a three member Bench which held in paragraph 21 of its decision that "*in law when time begins to run it can only be extended in the manner provided in the Limitation Act*", it was held in Babulal (by a 2 member Bench) that Limitation would begin to run from the date of NPA itself. To come to the said conclusion, this Court referred to the decision in Vashdeo R. Bhojwani v. Abhyudaya Co–operative Bank Ltd. & Anr., (2019) 9 SCC 158.

14. But Vashdeo R. Bhojwani (supra) was a case where the debt was declared as NPA in 1999 and a Recovery Certificate was issued in 2001, but the petition under Section 7 IBC was filed in 2017. It is only because of this, that this Court held in Vashdeo R. Bhojwani that when the Recovery Certificate dated 24.12.2001 was issued, *that Certificate injured effectively and completely the appellant's rights, as a result of which limitation would have begun ticking.*

15. In other words, this Court found in Vashdeo R. Bhojwani, that the application under Section 7 was filed beyond a period of three years from the date of the certificate of recovery and not from the date of declaration of NPA. Therefore, the somewhat discordant note struck in Babulal, did not and could not have altered the ratio laid down in paragraph 21 of Jignesh Shah. The cloud of doubt created by Babulal with regard to the applicability of Section 18 of the Limitation Act stood cleared subsequently in Asset Reconstruction Company (India) Limited v. Bishal Jaiswal and Anr., (2021) 6 SCC 366, wherein this Court went to the extent of holding that an entry in the balance sheet of the company could also be treated as an acknowledgment in writing, subject however to any caveat found in the accompanying reports.

16. In any case, this Court clarified in Dena Bank v. C. Shivakumar Reddy and Another, (2021) 10 SCC 330 that Babulal was rendered in the particular facts of the case. It will be relevant to take note of the discussion in paragraph 105 to 107 of the decision in Dena Bank (supra) which reads as follows:

> "105. The judgment of this Court in Babulal Vardharji Gurjar was rendered in the facts of the aforesaid case, where the date of default had been mentioned a 8–7– 2011 being the date of NPA and it remained undisputed that there had neither been any other date of default stated in the application nor had any suggestion about any acknowledgment been made.
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> 106. In the backdrop of the aforesaid facts, this Court observed that even if Section 18 of the Limitation Act and principle thereof were applicable, the same would not apply to the application under consideration, in view of the averments regarding default therein and for want of any other averment with regard to acknowledgment.
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> 107. It is well settled, that a judgment is a precedent for the issue of law that is raised and decided and not any observations made in the facts of the case. As very aptly penned by V. Sudhish Pai in Constitutional Supremacy–A Revisit,
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> > "Judicial utterances/pronouncements are in the setting of the facts of a particular case. To interpret words and provisions of a statute it may become necessary for judges to embark upon lengthy discussions, but such discussion is meant to explain not define. Judges interpret statutes, their words are not to be interpreted as statutes."

The aforesaid passage was extracted and incorporated as part of the judgment of this Court in Sesh Nath Singh."

17. The correctness of the decision in Dena Bank (supra) was questioned by a corporate debtor in Kotak Mahindra Bank Ltd. V. A. Balakrishnan, (2020) SCC OnLine SC 706 wherein it was contended that the decision in Dena Bank (supra) was per incuriam, on the ground it did not take into account sub-Sections (22) and (22A) of Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as DRT Act) as well as Clauses (6), (10), (11) and (12) of Section 3, Clauses (7) and (8) of Section 5, Section 6 and Section 14(1A) of IBC. While rejecting the said contention, this Court reiterated in no uncertain terms in Kotak Mahindra Bank (supra) that a person would be entitled to initiate CIRP within a period of three years from the date on which the recovery certificate is issued by DRT.

18. Therefore, Dena Bank holds the field as on date. In the case on hand, the order of the Debt Recovery

Tribunal in the Original Application filed by the appellant under Section 19 of the Act, 1993, is dated 01.11.2016. It is only thereafter that the Corporate Debtor issued Balance and Security Confirmation letter dated 17.06.2017, apart from making a request for restructuring the loan. Therefore, the application filed by the appellant under Section 7 was clearly within three years from the date on which the "right to apply" in terms of Article 137 accrued. Hence the impugned order of the NCLAT, which places heavy reliance only upon Babulal, is not correct.

19. Before parting, we cannot resist the temptation to point out an incongruity in the way the law has developed. The Limitation Act, 1963, as is well understood, extinguishes the remedy and not the right. This is why the Act itself contains several provisions for the exclusion of time, while computing the period of limitation.

20. Consistently this Court has held that the initiation of CIRP under the IBC is to put the corporate debtor back on its feet, by retaining the substratum, even while replacing the management with a new team (Resolution Applicant). In other words, the object of IBC has been understood to be something that is beneficial for the corporate debtor so that it continues to survive as a going concern. As pointed out by this Court in Innoventive Industries Ltd. v. ICICI Bank & Anr., (2018) 1 SCC 407, "*…the scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet…*" (paragraph 33 of the decision).

21. In other words, IBC is projected as a law which enables the financial/operational creditor to initiate CIRP, not for helping himself out with the recovery of the debt due to him, but for helping the corporate debtor to survive and continue in business. A financial/operational creditor does not go to court or other forum with the altruistic mission of helping the corporate debtor to continue as a going concern. But after repeatedly holding that the proceedings under the IBC are not in substance, proceedings for recovery of money, this Court and the statute have effectively applied the law of limitation, which was intended to apply to proceedings for enforcement of rights.

22. It may be pointed out that the Schedule to the Limitation Act, 1963 is divided into three divisions. The First division relates to suits, the Second division relates to appeals and the Third division relates to applications. The First division which relates to Suits is divided into 10 parts which deal respectively with:–

(i) Suits relating to accounts;

(ii) Suits relating to contracts;

(iii) Suits relating to declarations;

(iv) Suits relating to decrees and instruments;

(v) Suits relating to immovable property;

(vi) Suits relating to movable property;

(vii) Suits relating to Tort;

(viii) Suits relating to Trust and Trust property;

(ix) Suits relating to miscellaneous matters; and

(x) Suits for which no period is prescribed.

23. The Second division of the Schedule to the Limitation Act deals with appeals. The Third division of the Schedule to the Limitation Act is again divided into two parts, with Part–I dealing with applications in specified cases and Part–II dealing with other applications.

24. **For the law of limitation, the remedy is the goal post and the right is the sign post from where the journey commences.** A person initiating any proceeding in a court of law must show the existence of both a right in himself and a remedy for himself, but the IBC is a law where the sign post namely the right is for the financial/ operational creditor and the goal post namely the remedy, is for the corporate debtor, though the creditor may also recover a portion of his debt after having a hair–cut, if not a tonsure. This incongruity

has perhaps led this Court undertaking an arduous journey through the path of limitation and trying to negotiate its way through several bad patches.

25. Now coming back to the case on hand, the application filed by the appellant–Bank under Section 7 IBC was within the period of limitation. Therefore this appeal is allowed and the impugned order of the NCLAT dated 02.03.2021 is set aside. No order as to costs.

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Tags: 2022 SCeJ 1096, PUNJAB NATIONAL BANK v. VIJAY SITARAM DANDNAIK, VIJAY SITARAM DANDNAIK