

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT) (Insolvency) No. 1526 of 2022

IN THE MATTER OF:

SUNDER NAGAR CO-OPERATIVE HOUSING SOCIETIES UNION LIMITED.

Through its authorised representative incorporated
Under the provisions of Maharashtra Co-Operative
Societies Act, 1960

Under Reg. No. BOM/HSG/2651 of 86-87

Having its office at Sundar Nagar, Kole Kalyan,
Santacruz (East), Mumbai – 400 098

...Appellant

Versus

STATE BANK OF INDIA

A body corporate constituted under the
State Bank of India Act, 1955, having
Its address at Corporate Centre at State
Bank Bhavan, Madam Cama Road, Nariman
Point, Mumbai – 400 021; and a branch
Amongst others at Stressed Assets Resolution
Group Commercial (III), having its address at
112-115, Floor-1, Plot – 212, West Wing, Tulsiani
Chambers, Free Press Journal Marg,
Nariman Point, Mumbai – 400 021

...Respondent No. 1

HARSHAD SHAMKANT DESHPANDE

Interim Resolution Professional of
AA Estates Private Limited
IBBI/IPA-001/IP-P00166/2017-18/10335
Having his address at 403, Kumar Millennium,

Shivatirtha Nagar Kaman, Hospital,
Opp. Krishna Hospital, Paud Road, Kothrud,
Pune, Maharashtra – 411 038

...Respondent No. 2

Present:

For Appellant : Ms. Mrinal Elker Mazumdar, Mr. Saurabh Singh & Ms. Aarushi Gupta, Advocates.
For Respondents : Mr. Ankur Mittal & Ms. Yashika Sharma, for R-1.
Mr. Anuj Tiwari, for R-2/RP.

With

Company Appeal (AT) (Insolvency) No. 1527 of 2022

IN THE MATTER OF:

MOHAN NATHURAM SAKPAL

Having his address at
A Wing, 903, 9th Floor,
Dynamic Enclave, Plot No. 29, Sector 36,
Kamothe, Panvel, Raigarh, Maharashtra

...Appellant

Versus

STATE BANK OF INDIA

A body corporate constituted under the
State Bank of India Act, 1955, having
Its address at Corporate Centre at State
Bank Bhavan, Madam Cama Road, Nariman
Point, Mumbai – 400 021; and a branch
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 Pune, Maharashtra – 411 038

...Respondent No. 2

Present:

For Appellant : Mr. Krishnendu Dutta, Sr. Advocate along with Mr. Abhijeet Sinha, Mr. Puneet Singh Bindra, Ms. Zaina Khan, Mr. Simranjeet, Mr. Akash Chatterjee, Mr. Kumar Anurag Singh, Mr. Rishabh Gupta & Ms. Neha Agarwal, Advocates.

For Respondents : Mr. Ankur Mittal & Ms. Yashika Sharma, for R-1.
 Mr. Anuj Tiwari, for R-2/RP.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This order shall dispose of two appeals i.e. CA (AT) (Ins) No. 1527 of 2022 titled as Mohan Nathuram Sakpal Vs. State Bank of India & Anr. (In short ‘first appeal’) and CA (AT) (Ins) No. 1526 of 2022 titled as Sundar Nagar Co-operative Housing Societies Union Limited Vs. State Bank of India & Anr. (In short ‘2nd appeal’) as both the appeals have been filed against the same impugned order dated 06.12.2022 by which an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short ‘Code’) r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short ‘Rules’) by State Bank of India (Financial Creditor) against A A Estates Private Limited (Corporate Debtor) for the resolution of an

unresolved financial debt of Rs. 1,35,26,12,129/- inclusive of interest and penal interest has been admitted.

2. The first appeal has been filed by a shareholder/director of the Corporate Debtor whereas 2nd appeal has been filed by a federal society comprising of nine societies incorporated under the provisions of Maharashtra Co-operative Societies Act, 1960.

3. The brief facts of this case are that the Corporate Debtor is a company, which is incorporated under the Companies Act, 1956 on 17.07.1996 engaged in the business of real estate construction and development and is working on multiple residential and commercial real estate projects.

4. The Corporate Debtor vide an application dated 30.09.2011 approached the Financial Creditor for sanction of credit facilities. The Commercial Branch, Vile Parle East, Mumbai of the Financial Creditor granted cash credit facilities of Rs. 70,00,00,000/- vide sanction letter dated 18.02.2012. The Corporate Debtor agreed to pay interest @4.50 bps over base rate with monthly interest in respect of the cash credit facility, including levy of penal interest, on account of non-compliance of sanction conditions.

5. The cash credit facility was secured by the Corporate Debtor by creating a pari passu charge of the flats of the project 'RNA Address', entered into escrow agreement and loan cum hypothecation agreement both dated 18.02.2012. The said cash credit facilities were further secured by way of mortgage of land, owned by RNA Corp. Pvt. Ltd., vide deed of mortgage dated 18.02.2012 and personal guarantee was provided by Anil Kumar Agarwal, Saranga A Agarwal, Anubhav A. Agarwal and Gokul A Agarwal vide guarantee

agreement dated 18.02.2012 and Corporate Guarantee was provided by RNA Corp. Pvt. Ltd. vide guarantee agreement dated 18.02.2012.

6. The Corporate Debtor failed to maintain its account and defaulted on 31.03.2014. The Financial Creditor requested the Corporate Debtor to regularise its account. The Corporate Debtor addressed a revival letter dated 18.03.2014 and acknowledged the outstanding debt. The Financial Creditor vide letter of arrangement dated 18.03.2014 informed the Corporate Debtor that it had sanctioned shifting the Date of Commencement of Commercial Operation (DCCO) by 12 months from June 2013 to June 2014 and shifting of repayment schedule of the then outstanding amount of Rs. 59.33 Crores for a period of one year from September, 2014 to 2015. A Rectification deed dated 21.03.2014 was executed for mortgage of development rights of saleable area of the project alongwith saleable area of the building to be constructed on the land bearing CTS No. 4853, 4853/1 to 85, 87, 88, Village Kolekalyan, Sundernagar, Kalina, Santacruz (East), Mumbai having total saleable area of 6,28,080.07 sq. ft. However, since the DCCO did not occur on 30.06.2014 i.e. twelve months from the original DCCO, the account of the Corporate Debtor was classified as NPA on 30.06.2014, in terms of the guidelines issued by the Reserve Bank of India. The Financial Creditor issued a legal demand notice dated 02.03.2015 to the Corporate Debtor and the personal guarantors under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) recalling the total outstanding liability due and owed to the Financial Creditor but the Corporate Debtor did not remedy the default, therefore, the Financial Creditor served possession notice dated 01.07.2015 intimating the Corporate Debtor that it

has taken over physical possession of the land on 27.06.2015 and has initiated the sale process of the said land for recovery of the debt, but the Financial Creditor did not receive any bids.

7. The Financial Creditor vide legal demand notice dated 05.04.2016, served upon the Corporate Debtor, recalled the entire outstanding dues alongwith interest payable and also filed an original application on 01.07.2016 against the Corporate Debtor and the Guarantors before the Debts Recovery Tribunal-III at Mumbai under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 to claim an amount of Rs. 75,22,70,867.51 plus interest.

8. While application of the Financial Creditor was pending before the DRT, the Corporate Debtor vide its compromise proposal dated 31.01.2018, admitted the liability of outstanding principal amount of Rs. 59.33 Crores and proposed a settlement at Rs. 40 Crore to be paid in full by 31.03.2018. The Corporate Debtor also enclosed a cheque of Rs. 2 Crore which was deposited by the Financial Creditor in a separate no lien account but the compromise proposal was not accepted. The last payment made by the Corporate Debtor in its loan account was Rs. 50,00,000/- on 01.06.2015. The Financial Creditor has thus filed the application under Section 7 of the Code in which the date of default has been categorically mentioned in part IV of the application filed under Section 7 of the Code as 01.06.2015.

9. On the other hand, the Corporate Debtor pleaded in the reply that another Financial Creditor had already filed a Company Petition under Section 7 of the Code separately against the Corporate Guarantor i.e. RNA Corp Pvt. Ltd. which had been admitted by the Adjudicating Authority vide

order dated 26.11.2019 in which the Financial Creditor had filed a claim of Rs. 137,55,54,367/-.

10. The case set up by the Respondent (Corporate Debtor) was that the Financial Creditor, for the same set of debt, cannot file his claim in two separate CIRP, one against the borrower and another against the Corporate Guarantor and relied upon a decision of the NCLAT in the matter of Dr. Vishnu Agarwal Vs. Piramal Enterprises Limited, 2019 SCC Online NCLAT 81.

11. It also raised an objection regarding the maintainability of the application filed under Section 7 of the Code on the ground of limitation alleging that though the Financial Creditor had mentioned that the default occurred on 31.03.2014 but the date of default mentioned in part IV of the application filed under Section 7 of the Code is 01.06.2015.

12. In rejoinder, the Financial Creditor alleged that the facts of Dr. Vishnu Aggarwal (Supra) are different from the facts of the present case. In Dr. Vishnu Aggarwal (Supra) the CIRP was initiated against two Corporate Guarantors as compared to one and moreover, the said decision in the case of Dr. Vishnu Aggarwal (Supra) is under challenge before the Hon'ble Supreme Court in Civil Appeal No. 878 of 2019 in which status quo has been ordered to be maintained.

13. As regards, the different dates of default are concerned, it is submitted by the Financial Creditor that the loan account of the Corporate Debtor was restructured in the month of March 2014 upon the requests of the Corporate Debtor and the terms were modified to shift the DCCO by 12 months from June 2013 to June 2014 which is evidenced by the revival letter, letter of

arrangement and rectification deed. Thereafter, part payment of Rs. 50 lakhs was received from the Corporate Debtor on 01.06.2015 which was the last payment, therefore, the date of default has rightly been considered by the Financial Creditor as 01.06.2015 in regard to the remaining amount due from the Corporate Debtor. It is further alleged that after restructuring, there was further default and the Financial Creditor was bound to further declare the account as NPA on 27.02.2015 which was intimated to the Corporate Debtor vide demand notice dated 02.03.2015, however, since the Corporate Debtor failed to adhere to the revised DCCO, the account was classified as NPA w.e.f. June 30, 2014 as per the guideline of the RBI in master circular – prudential norms on income recognition, asset classification and provisioning pertaining to advances dated 01.07.2014 as such the date of default is 30.06.2014.

14. The Learned Tribunal, in so far as, contention of the Corporate Debtor, raised with the support of a decision of the NCLAT in the case of Dr. Vishnu Aggarwal (Supra), observed that the NCLAT in the case of State Bank of India Vs. Athena Energy Venture Pvt. Ltd. CA (AT) (Ins) No. 633 of 2020 has held that not only the CIRP can be initiated against both the borrower and the guarantor but also held that the claim can be filed for the same debt in the CIRP of both the borrower and the guarantor.

15. As regards, the issue of limitation is concerned, it has been held that the date of default is 01.06.2015 and the compromise letter acknowledging the existence of debt towards the Financial Creditor was written by the Corporate Debtor on 31.01.2018, therefore, the application filed under Section 7 of the Code on 15.01.2021 is within the period of limitation. Admitted, Harshad Shamkant Deshpande was appointed as Interim

Resolution Professional (IRP), moratorium was imposed and aggrieved against the order of admission, the present appeal has been filed. The first appeal is by the shareholder and ex-director whereas in the 2nd appeal, the appellant is a federal society comprising of nine societies incorporated under the provisions of Maharashtra Co-operative Societies Act, 1960. The project includes a plot of land where the Appellant was earlier situated and thereafter, each of the societies, which constitute the Appellant, entered into a development agreement with the Corporate Debtor for the development of the plot of land. The project pertains to plots of land of the Appellant comprising of nine societies alongwith two other Co-operative housing societies and one Shri Sai Seva Kamgar Chawl Rahivashi Sangh. All these entities together comprises of 315 members. For the development of the plots of land, each of the societies as well as the chawl had entered into a development agreement with the Corporate Debtor whereunder the Corporate Debtor was appointed as the developer. The project is in two phases. Phase 1 comprises of wings A to E of rehabilitation buildings as well as Wings A to E of sale buildings. It is alleged that in so far as Phase 1 is concerned, the Corporate Debtor has constructed Wings B to E of rehabilitation buildings and has handed over possession to 255 members out of the total 315 members. Even for the sale buildings, Wings A, B, C, D & E are undergoing construction and 184 flats have been sold to third parties. It is alleged that the Corporate Debtor has rehabilitated 75% of the members of the society and presently 60 members remain to be rehabilitated.

16. In both the appeals, Counsel for the Appellant has argued that the order of admission deserves to be set aside on the ground that the application filed

under Section 7 was barred by limitation. In this regard, it was submitted that the date of default mentioned in part IV of the application under Section 7 of the Code is 01.06.2015 whereas the application itself has been filed on 15.01.2021. It was submitted that the period of limitation for the purpose of filing of an application under Section 7 of the Code is three years from the date of default which had expired on 01.06.2018.

17. In this regard, Counsel for the Respondent has submitted that in between the period 01.06.2015 to 01.06.2018, the Corporate Debtor acknowledged its debt by submitting a compromise letter dated 31.01.2018 in which the Corporate Debtor has clearly acknowledged the principal amount of Rs. 59.33 Crores. In the said compromise letter not only the liability of amount of Rs. 59.33 Crore approximately was confirmed as on 31.01.2018 but also a proposal was made in writing for the settlement of the account. In this regard, the question thus arises as to whether by virtue of the compromise letter dated 31.01.2018, the limitation would again start to run for three years up to 31.01.2021 and the application filed under Section 7 of the Code by the Financial Creditor on 15.01.2021 was within the period of limitation?

18. In this regard, Counsel for the Respondent has relied upon a decision of the Hon'ble Supreme Court in the case of Dena Bank Vs. C. Shivakumar Reddy (2021) 6 SCC 330 in which it was held that "Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This court sees no reason why an offer of one-time settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgement to attract Section 18 of the Limitation Act".

19. In the present case, the claim w.e.f. 01.06.2015 till 01.06.2018 was live because the Financial Creditor could have filed a petition under Section 7 of the Code during this period and the occurrence of one time settlement/compromise, initiated at the instance of the Corporate Debtor during this period vide its letter dated 31.01.2018 had revived the period of limitation from 31.01.2018 to 31.01.2021 in terms of Section 18 of the Limitation Act and the application under Section 7 of the Code having been filed on 15.01.2021 is thus within the period of limitation.

20. Thus, in view thereof, there is no force in the contention of the Appellant for setting aside the order under challenge on the ground that the application filed under Section 7 of the Code was already barred by limitation and could not have been entertained.

21. Counsel for the Appellant has then argued that another Financial Creditor filed a petition under Section 7 of the Code against the Corporate Guarantor i.e. RNA Crop Pvt. Ltd. which was admitted on 26.11.2019 much earlier than the order has been passed in the present case on 06.12.2022 in which the present Financial Creditor has filed the claim. He has relied upon a decision in the case of Dr. Vishnu Aggarwal (Supra) in which it has been held that the Financial Creditor cannot initiate two separate CIRP for the same set of debt.

22. In this regard, Counsel for the Financial Creditor has submitted that in the case of Dr. Vishnu Aggarwal (Supra) CIRP was initiated against the two corporate guarantors as compared to one and the decision of this Tribunal in the case of Dr. Vishnu Aggarwal (Supra) has already been challenged before the Hon'ble Supreme Court in which status quo has been ordered to be

maintained whereas in another case of this Tribunal in State Bank of India Vs. Athena Energy Ventures Private Limited, it was held that the CIRP can be initiated against both the borrower and the guarantors.

23. We have heard Counsel for the parties in this regard. In so far as the decision in the case of Dr. Vishnu Aggarwal (Supra), relied upon by the Appellant is concerned, in that case the application under Section 7 was filed against two Corporate Guarantors whereas in the case of Athena Energy Ventures Pvt. Ltd. (Supra) it was against the borrower and the guarantor. Moreover, the decision in the case of Dr. Vishnu Aggarwal (Supra) is already sub-judice before the Hon'ble Supreme Court in which status quo has been ordered to be maintained and in the case of Athena Energy Ventures Pvt. Ltd. (Supra) this Tribunal has held as under:-

“16....We are also of the view that simultaneously remedy is central to a contract of guarantee and where Principal Borrower and surety are undergoing CIRP, the Creditor should be able to file claims in CIRP of both of them. The IBC does not prevent this. We are unable to agree with the arguments of Learned Counsel for Respondent that when for same debt claim is made in CIRP against Borrower, in the CIRP against Guarantor the amount must be said to be not due or not payable in law. Under the Contract of Guarantee, it is only when the Creditor would receive amount, the question of no more due or adjustment would arise....

19. It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor. The law as laid down by the Hon'ble High Courts for the respective jurisdictions, and law as laid down by the Hon'ble Supreme Court for the whole country is binding. In the matter of Piramal, the Bench of this Appellate Tribunal “interpreted” the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal. For such reasons, we are unable to uphold the Judgement as passed by the Adjudicating Authority.”

24. Therefore, we do not find any error in the approach of the Ld. Tribunal while rejecting the argument of the Appellant in this regard as well.

25. In the end, Counsel for the Appellant has submitted that in the case of Vidarbha Industries Power Limited v. Axis Bank Limited 2022 SCC Online SC 1339 it has been held that the Legislature has intended Section 9(5)(a) of the IBC to be mandatory and Section 7(5)(a) of the IBC to be discretionary, therefore, the Adjudicating Authority should have considered the grounds made by the Corporate Debtor against the admission of the application filed under Section 7 of the Code.

26. In this regard, Counsel for the Respondent has drawn our attention to the order passed by the Hon'ble Supreme Court in the case of Vidarbha Industries Power Limited vs. Axis Bank Limited in which a Review Petition has been filed i.e. Review Petition (Civil) No. 1043 of 2022 which was disposed of on 22.09.2022 with the following observations "The elucidation in paragraph 90 and other paragraphs were made in the context of the case at hand. It is well settled that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or 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 the Judges to embark upon lengthy discussions. The words of Judges interpreting statutes are not to be interpreted as statutes."

27. We have heard Counsel for the parties and are of the considered opinion that in the given facts and circumstances of the case Vidarbha Industries Power Limited (Supra), relied upon by the Appellant, is not applicable because

there is a clear admission on the part of the Corporate Debtor of the amount of debt due in view of the letter dated 31.01.2018.

28. The Hon'ble Supreme Court in the case of M. Suresh Kumar Reddy Vs. Canara Bank & Ors. Civil Appeal No. 7121 of 2022 decided on 11.05.2023 has held that :

“13. Thus, it was clarified by the order in review that the decision in the case of Vidarbha Industries was in the setting of facts of the case before this court. Hence, the decision in the case of Vidarbha Industries cannot be read and understood as taking a view which is contrary to the view taken in the cases of Innovative Industries and E.S. Krishnamurthy. The view taken in the case of Innovative Industries still holds good.”

29. Thus, in view of the aforesaid discussion, there is hardly any merit in these two appeals which do not require any interference and therefore, the present appeals are hereby dismissed, however, without any order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

New Delhi

31st May, 2023

Sheetal