

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

COMPANY APPEAL(AT) (INSOLVENCY) NO.672 OF 2019

(Arising out of impugned order dated 25th April, 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Kolkata Bench, Kolkata in CP(IB)No.1202/KB/2018).

In the matter of:

1. Sesh Nath Singh,
Director,
Debi Fabtech Private Ltd,
96/3, S.C.M. Road,
Suvotala,
Baidyabati,
West Bengal.

2. Akhsar Kumar Singh,
Director,
Debi Fabtech Private Ltd,
96/3, SCM Road,
Suvotala,
Baidyabati, West Bengal.

Appellants

Vs

1. Baidyabati Sheoraphuli Cooperative Bank Ltd,
6, Kalahata Lane,
Sheoraphuli, Hooghly 712223

2. Animesh Mukhopadhyay,
Syndicon Enclave 25/1A/1,
Naktala Road, Kolkata 700047

Respondent

Mr. Aritra Basu, Ms Parshali Banerjee and Ms Sreenita Ghosh, Advocates for appellants.

Mr. J. Sai Deepak and Ms Anjali Gupta, Advocates for R1.

Mr. Pranay Agarwal, Mr. Avinash Kumar Sharma, Advocates for R2.

JUDGEMENT

(22nd NOVEMBER, 2019)

JUSTICE JARAT KUMAR JAIN, MEMBER(JUDICIAL)

The Appellants, in the present Company Appeal (AT) (Insolvency) No.672 of 2019 are the Directors of M/s Debi Fabtech Pvt Ltd, 'the Corporate Company Appeal (AT)(Insolvency) No.672 of 2019

Debtor' against whom the Corporate Insolvency Resolution Process ('for short CIRP) has been initiated and moratorium has been imposed from the date of the admission till the completion of CIRP by the impugned order passed by National Company Law Tribunal, Kolkata Bench vide their order dated 25.4.2019. The Appellants are Mr.Sesh Nath Singh and Mr. Akshay Kumar Singh, Directors of the Corporate Debtor i.e. M/s Debi Fabtech Pvt Ltd in the said appeal filed under Section 61 of the Insolvency & Bankruptcy Code ('for short I&BC) 2016 r/w Section 7 of I&BC, 2016. The appellants have sought the following relief:-

- a) To set aside the order dated 25.4.2019 passed by National Company Law Tribunal, Kolkata Bench initiating CIRP against the Corporate Debtor.
- b) To stay the aforementioned order till disposal of the present Appeal and all further proceedings in the CIRP of the Corporate Debtor that has commenced in terms of the impugned order dated 25.4.2019.

2. The Financial Creditor (Respondent No.1 herein) granted cash credit facility of Rs. 1 crore to the corporate debtor vide sanction letter dated 12.2.2012. The Corporate Debtor execute agreement of hypothecation of book debts. The Corporate Debtor availed cash credit from time to time.

3. According to financial creditor, the corporate debtor committed default in paying financial debt. The account was declared NPA on 31.03.2013 on account of irregularities in payment by the corporate debtor. Demand Notice under Section 13(2) of SARFEASI Act, 2002 was issued on 18.01.2014. Thereafter on 13.2.2014 notice under Section 13(4) of SARFEASI Act, 2002 was issued to corporate debtor. On 19.12.2014 the Corporate Debtor filed a

writ petition bearing No.33799(W) of 2014 against the financial creditor challenging the notice under Section 13(2) of SARFEASI Act, 2002. Hon'ble Kolkata High Court by order dated 24.7.2017 restrained financial creditor from taking any steps against the corporate debtor under the SARFEASI Act, 2002 till further orders. Before that on 24.12.2014 possession notice under Section 13(4) of SARFEASI Act, 2002 alongwith Rule 9 of Security Interest (Enforcement) Rules 2002 has been issued against the corporate debtor and the possession order was issued on 11.5.2017 by the District Magistrate, Hooghly. On 27.8.2018, financial creditor has filed application under Section 7 of I&B Code before the Adjudicating Authority, NCLT, Kolkata Bench, Kolkata.

4. Learned Adjudicating Authority by its impugned order found that the corporate debtor did not dispute two facts that it has received loan from financial creditor and there is default in paying loan amount. Hence the application under Section 7 of I&B Code has been admitted and Corporate Insolvency Resolution Process against the corporate debtor has been ordered.

5. Learned counsel for the appellant submits that the account of Corporate Debtor was declared NPA on 31.03.2013 whereas the application under Section 7 of I&B Code has been filed on 27.08.2018 i.e. after about 5 years and 5 months from the date of accrual of cause of action. Hon'ble Supreme Court in the case of **B.K. Educational Services Pvt Ltd Vs Parag Gupta and Associates 2018 SCC OnLine SC 1921** held that the Limitation Act is applicable to applications filed under Section 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default

has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act.

6. It is also submitted that Hon'ble Supreme Court in the recent judgement ***"Vashdeo R Bhojwani Vs Abhyudaya Cooperative Bank Ltd ^ Anr, Civil Appeal No.11020 of 2018 decided on 2nd September, 2019*** and ***Gaurav Hargovindbhai Dave Vs Asset Reconstruction Company (India) Ltd & Anr, Civil Appeal No.4952 of 2019 decided on 13th September, 2019*** again held that Article 137 of the Limitation Act is applicable to Section 7 of the I&B Code and the intent of the I&B Code is not to give a new lease of life to debts which are already time barred. In this case the Respondent has filed the application under Section 7 of I&B Code on 27.08.2018 after about 5 years and 5 months from the date of accrual of cause of action i.e. 31.03.2013 whereas as per Article 137 of Limitation Act the application may be filed within three years from the date of accrual of cause of action i.e. till 30.03.2016. Thus the application filed under Section 7 of I&B Code is apparently time barred, therefore, the Adjudicating Authority has wrongly admitted the application. Hence the impugned order is liable to be set aside.

7. Learned counsel for the Respondent vehemently opposed the arguments and submitted that it is true that the account was declared NPA on 31.03.2013. Thereafter, the Respondent exercised his remedy under the existing law within the prescribed limit i.e. on 18.1.2014 demand notice under Section 13(2) of SARFEASI Act was issued to the corporate debtor and thereafter the respondent bonafidely prosecuted the application under the SARFEASI Act and ultimately he has got the possession order on 11.5.2017

issued by the District Magistrate, Hooghly. In the meanwhile the appellant/corporate debtor has filed the Writ Petition under Article 226 before the Hon'ble Kolkata High Court on 19.12.2014 and on 24.7.2017 the Hon'ble High Court of Kolkata ordered not to proceed under SARFEASI Act. Thereafter, the Respondent has filed the application under Section 7 of I&B Code on 27.08.2018. It is true that in the light of judgement of Hon'ble Supreme Court in the case of **B.K. Educational Services Pvt Ltd Vs Parag Gupta and Associates 2018 SCC OnLine SC 1921** that the application under Section 7 of the I&B Code be governed by Article 137 of the Limitation Act and within three years the Financial Creditor/respondent can file application. The respondent was quite vigilant in his rights and cannot be said that the respondent was negligent. He has bonafidely prosecuted his application under SARFEASI Act. Therefore, as per Section 14(2) of Limitation Act in computing the period of limitation the time during which the respondent has been prosecuting with due diligence another civil proceedings against the corporate debtor for the same relief shall be excluded. The period from 18.01.2014 (date of notice under Section 13(2) of SARFEASI Act) to 24.07.2017 (when the Kolkata High Court has passed the order against the Respondent), this period will be excluded and if this period of 3 years and 6 months is excluded then the application filed under Section 7 of the I&B Code is within limitation period.

8. We have considered the submissions of the learned counsel for the parties.

9. The corporate debtor has taken a ground that the application under Section 7 of I&B Code is time barred in the appeal itself. Such ground is not agitated before the Adjudicating Authority. Therefore, there is no finding of Adjudicating Authority on this issue.

10. We have carefully examined the issue of limitation. The Respondent has bonafidely prosecuted within limitation period under SARFEASI Act. Therefore, the Respondent is entitled for the exclusion of time period under Section 14(2) of Limitation Act i.e. the period of 3 years and 6 months. After exclusion of this period the application filed under Section 7 of I&B Code is within limitation period.

11. In such circumstances we find that the application under Section 7 is within limitation and there is no force in the argument of Learned counsel for the Appellant that the application is time barred. No interference is called for. Hence the appeal is dismissed. No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

New Delhi

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