

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 693 of 2020

(Arising out of order dated 17.07.2020 in CP No. 3460/IBC/NCLT/MB/MAH/ 2018 passed by National Company Law Tribunal, Mumbai Bench, Court No. II)

IN THE MATTER OF:

Mr. Kishore Katare

Equity Shareholder
Kamala 259, Sakhar Peth,
Solapur, Maharashtra 413005.
katarespinningmills@gmail.com

**...Appellant
(Corporate Debtor)**

Versus

1. Bank of India

Star House, C-5, G-Block,
Bandrakurla Complex, Bandra (E)
Mumbai 400051
zo.solapur@bankofindia.co.in
Solapur.Solapur@bankofindia.co.in

**...Respondent No. 1
(Financial Creditor)**

2. Katare Spinning Mills Limited

(Through Mr. Vitthal M Dahake
Interim Resolution Professional)
93 Bora Bazar Street, Jain Sthanak
Fort, Mumbai – 400001
vm.dahake@rediffmail.com

...Respondent No. 2

Present: -

**For Appellant: Mr. Krishnendu Datta, Sr. Advocate with
Mr. Rahul Gupta, Advocate.**

**For Respondents: Mr. Aditya Kumar, Advocate for R-1.
Mr. VM Dahake, (RP).**

J U D G M E N T

Justice Anant Bijay Singh,

The instant Appeal has been filed by Appellant – ‘Katare Spinning Mills Limited’ (Corporate Debtor) being aggrieved and dissatisfied by the impugned order dated 17th July, 2020 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Court No. II in CP No. 3460/IBC/NCLT/MB/MAH/2018, whereby and whereunder the Ld. Adjudicating Authority has admitted the Application filed by Bank of India / Financial Creditor, under Section 7 of the Insolvency and Bankruptcy Code, 2016.

2. Brief facts of the case is as under: -

- i) The Respondent No. 1 / Financial Creditor preferred an Application under Section 7 of the IBC against the Respondent No. 2 / Corporate Debtor on 30.08.2018 alleging debt of INR 23.90 CR, and defaulted upon allegedly on 30.06.2015. The same was allowed by the Ld. Adjudicating Authority by way of the impugned order.
- ii) The Respondent No. 1 is the Financial Creditor, a scheduled bank and a body constituted under the Provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.
- iii) The Bank of India / Financial Creditor sanctioned term loan facility of Rs. 9,00,00,000/- and a cash credit facility of Rs. 6,00,00,000/- to the Corporate Debtor vide a sanction letter dated 14.08.2013.

iv) The Respondent No. 1 on 14.08.2013 availed Rs. 25 Crores from Bank of India for modernization of Appellant's existing Units, Working Capital Requirements and for a Solar Project. The Appellant considering the scope of immediate return on investment implemented Solar Project and installed it within a record time of Six months but unfortunately the Government of Maharashtra has not declared grid connectivity policy for Sixteen months and hence the Appellant could not connect generation with the grid and the project stood idle for Sixteen months because of the late declaration and implementation of State Government Policy.

v) The Account of the Corporate Debtor is declared NPA on 31.03.2015 and total amount of debt of Rs. 23 Cr. and 90 Lakhs including interest charges were calculated up to on 28.08.2018.

vi) The Bank of India / Financial Creditor filed Application under Section 7 of the IBC before the Ld. Adjudicating Authority, wherein Part – IV 'Particulars of Financial Debt' the default was shown as 23,90,64,696.69/- including interest and other expenses, as on 28.08.2018. Till date of realisation and further the date of default occurred shown NPA as 30.06.2015.

Submissions on behalf of the Appellant

3. The learned counsel for the Appellant during the course of argument and in his written submissions submitted that account in question was declared NPA on 31.03.2015 and the Application under Section 7 was filed on 30.08.2018.

4. It is submitted that on bare perusal of the said facts, the petition was time barred on 30.06.2018 and therefore the petition filed belatedly could not be the basis of filing the Application under Section 7 of the IBC.

5. It is further submitted that the impugned order relies upon a balance sheet for FY 2015-2016 for acknowledgement of debt, however it is no longer *res integra* that a balance sheet cannot be used for the renewing limitation under Section 18 of the Limitation Act.

6. Learned counsel for the Appellant submitted that in view of the categorical averments made by Respondent No. 1 in their Application under Section 7 of the IBC where the date of NPA is declared on 31.03.2015. In view of the Judgment passed by the Hon'ble Supreme Court in *Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.* (MANU/SC/0589/2020) where Hon'ble Supreme Court observing that the date of declaration as NPA is to be considered as date of default, the Hon'ble Supreme Court has categorically held that Section 18 of the limitation Act, would not be applicable to applications under Section 7 and 9 of the IBC. Therefore, impugned order cannot be sustained in the eye of law.

Submissions on behalf of the Respondent No. 1

7. The learned counsel for the Respondent No. 1 during the course of argument and in his written submissions submitted that the Appellant has been wrongly contended that the Application under Section 7 of the IBC was time barred. It is further submitted that it has been held by this Hon'ble

Tribunal in numerous matters that the date of default is the date of NPA. Admittedly, the date of default / NPA in the present Appeal was 31.03.2015.

8. It is further submitted that the Corporate Debtor had executed two separate Deeds of Acknowledgement of Debt and Securities on 31.08.2015, confirming and acknowledging its indebtedness to the Respondent No. 1.

9. It is further submitted that the Appellant has twice offered the OTS. It shows in the letter dated 1st April 2017 (at Annexure – A/1 page 9 of the I.A.) written by Katare Spinning Mills Limited through its Authorized Signatory to the Bank of India, Main Branch, Solapur, where it is stated at page 11 of the I.A. as follows;

“.....we intend to settle the above matter with Lump-sum Rs. 15 Crore as a full and final settlement which is to be paid within a period of 12 months and with some upfront payment. Due to service financial crises faced by our company we need the above period to settle your dues. Since the amount to be settled is big we need to arrange funds from relatives/friends and from disposal of some properties.”

10. Reference is also made to Annexure A/2 at page 12 of the I.A. the letter dated 21st November, 2017 written by Katare Spinning Mills Limited to the Bank of India, Main Branch, Solapur, caption OTS proposal stating interalia as follows:

“1. Since the disbursement, the company has paid Rs. 3.24 Cr. on account of Interest and principal amount.

2. The company is willing to settle the above matter for an amount of Rs. 15 Cr. for full and final settlement.

3. Account was standard on 31.03.2015 and the company has paid Rs. 3.24 Cr. on account of Interest and principal. Hence, unapplied interest may be waived and if possible in principal also.

4. The company is eager to settle the matter amicably.”

11. Reference is also made to Annexure A/3 at page 14 of the I.A. the letter dated 4th January, 2018 written by Katare Spinning Mills Limited to the Bank of India, Main Branch, Solapur, caption OTS proposal stating interalia as follows:

“1. The Company is ready to settle the above matter for an amount of Rs. 15.50 Cr. for full and final settlement.

2. On approval of your OTS, we will submit ARC letter for the same amount and we will close the issue before 15th February, 2018.

3. Considering the complicated issue and to avoid legal complications among us please consider our request sympathetically.”

12. Reference is also made to Annexure A/4 at page 15 of the I.A. the letter dated 9th July, 2018 written by Katare Spinning Mills Limited to the Bank of India, Main Branch, Solapur, caption OTS Scheme where they have again submitted revised proposal for payment of dues stating interalia as follows:

“.....

3. Considering the above fact, and because of NPA tag, presently no bank will entertain us to come out of this situation. So, we have to make some alternative arrangements for the funds. Moreover we have to bear the additional cost of Rs. 317 lakhs to run the business for 6 months. Hence, we are offering you Rs. 600 Lakhs lump sum against the full and final settlement (including repayment made by us after NPA).

4. On your confirmation.

a) We will deposit 5% on your approval.

b) We will match 25% of the OTS amount within 60 days subject to reopening of Hotel.

c) Remaining amount will be paid within 4 months from the date of approval."

13. Reference is also made to Annexure A/5 at page 17 of the I.A. the letter dated 14.09.2020 written by Katare Spinning Mills Limited to the Bank of India, Main Branch, Solapur, caption OTS where they have stated that Settlement of our dues under BOI OTS 2020 without prejudice during pendency of this Appellate Tribunal stating interalia as follows:

“.....

8. In the above background, we request you to revive / consider our OTS proposal on following lines.

i) OTS amount at Rs. 1117 lakh or lesser as per your liberalized norms for MSMEs.

ii) Adjustment of Rs. 123 lakh viz. 10% of OTS amount to be earmarked out of earlier deposit of Rs. 246 Lakh as our willingness for OTS.

iii) Adjustment of Rs. 123 lakh viz. 10% of OTS amount to be earmarked out of our earlier deposit as upfront payment of OTS amount.

iv) Restart of the hotel for operations. Hotel would continue to be in possession of BOI. Operations including entire cash flow could even be under the supervision of BOI official.

v) Bank can release the amount paid over 10% of OTS amount to help us refurbish the hotel to the minimum extent necessary. Once in operation, we expect top line of around Rs. 300 lakh in a year estimating an ARR of Rs. 2500 and occupancy of 60%. Presuming daily expenses to be taken care of by renting of part of hotel, entire Rs. 250-Rs. 300 lakh can be paid to Bank of India. Please note that we had achieved an ARR of around 2500/- in 2017 when hotel was taken possession of by BOI under SARFAESI. We could also explore contracting out dining and other business to generate some revenue to repay BOI dues. Promoters would also dispose of the assets in the meantime to repay the BOI dues before the lease period i.e. September, 2023.”

14. The learned counsel for the Respondent No. 1 during the course of argument and in his written submissions submitted that question of limitation was not raised by the Appellant before the Ld. Adjudicating Authority and the

first time they are raising this issue before this Appellate Tribunal, it should not be entertained.

15. It was further submitted that the Respondent No. 1 had filed I.A. bearing No. 2569 of 2020 bringing on record and relevant documents and also the letter dated 14.09.2020 (at page 17 of the I.A.) written by Managing Director, Katare Spinning Mills Limited address to Chief Manager, Bank of India, Main Branch, Solapur, during the pendency of this Appeal whereby the Appellant have made request to consider the OTS proposal reads as under;

“.....

8. In the above background, we request you to revive / consider our OTS proposal on following lines.

i) OTS amount at Rs. 1117 lakh or lesser as per your liberalized norms for MSMEs.

ii) Adjustment of Rs. 123 lakh viz. 10% of OTS amount to be earmarked out of earlier deposit of Rs. 246 lakh as our willingness for OTS.

iii) Adjustment of Rs. 123 lakh viz. 10% of OTS amount to be earmarked out of our earlier deposit as upfront payment of OTS amount.

iv) Restart of the hotel for operations. Hotel would continue to be in possession of BOI. Operations including entire cash flow could even be under the supervision of BOI official.

v) Bank can release the amount paid over 10% of OTS amount to help us refurbish the hotel to the minimum extent necessary. Once in operation, we expect top line of around Rs. 300 lakh in a year estimating an ARR of Rs. 2500 and

occupancy of 60%. Presuming daily expenses to be taken care of by renting of part of hotel, entire Rs. 250-Rs. 300 lakh can be paid to Bank of India. Please note that we had achieved an ARR of around 2500/- in 2017 when hotel was taken possession of by BOI under SARFAESI. We could also explore contracting out dining and other business to generate some revenue to repay BOI dues. Promoters would also dispose of the assets in the meantime to repay the BOI dues before the lease period i.e. September,2023.

16. It was further submitted that the Appellant himself have given offer for settlement of the dispute from time to time under OTS Scheme and have also admitted their dues and have deposited 3 Cr. in two instalments.

17. It was further submitted that the conduct of the Appellant is not covered by the Judgment of the Hon'ble Supreme Court (supra).

18. It was further submitted that the Appellant had not denied the genuinity of any of the documents which the Respondent No. 1 brought on record through I.A.

FINDING

19. After hearing we have perused the records of the case, considering the arguments advanced on behalf of the parties and gone through the written submissions filed on behalf of the parties. Taking the aforesaid facts and circumstances, we are of the considered view that in Section 7 of the IBC Application filed on behalf of the Respondent No. 1 that dues amount claimed

in default has been shown as Rs. 23,90,64,696.69/- till 28.08.2018 plus further interest the date of default has been shown on 30.06.2015.

- This fact is apparent from Application under Section 7 of the IBC at Annexure- A/2 page 58 of the Appeal Paper Book filed by Respondent NO. 1 in Colum No. 2 shows date on which the default occurred on 30.06.2015.
- The Appellant had never raised question of Limitation before the Ld. Adjudicating Authority. The Appellant first time raised question of limitation before this Appellate Tribunal.
- The Respondent No. 1 has filed an I.A. No. 2569 of 2020 vide Dairy No. 22926 on 27.10.2020 before this Appellate Tribunal whereby offer of OTS Scheme made by the Appellant on 1st April, 2017 at Annexure- A/1 page 9 of the I.A. written by Katare Spinning Mills Limited through its Authorized Signatory to the Bank of India, Main Branch, Solapur, where it is stated as under;

“.....we intend to settle the above matter with Lump-sum Rs. 15 Crore as a full and final settlement which is to be paid within a period of 12 months and with some upfront payment.”

- Letter dated 21st November, 2017 Annexure A/2 at page 12 of the I.A. written by Katare Spinning Mills Limited to the Bank of India, Main Branch, Solapur, caption OTS proposal and it is further mentioned that the company has paid Rs. 3.24 Cr. on account of interest and principal.

- Letter dated 4th January, 2018 Annexure A/3 at page 14 of the I.A. written by Katare Spinning Mills Limited to the Bank of India, Main Branch, Solapur, caption OTS was reiterated.
- Letter dated 9th July, 2018 Annexure A/4 at page 15 of the I.A. written by Katare Spinning Mills Limited to the Bank of India, Main Branch, Solapur, was again reiterated.
- The instant Appeal was filed on 07.08.2020 and the matter was taken up by this Appellate Tribunal on 17.08.2020 and notices were issued to Respondents. In the meanwhile, during the pendency of this Appeal the Appellant (herein) on 14.09.2020 by Annexure- A/5 at page 17 of the I.A. written a letter without prejudice for OTS address to Chief Manager, Bank of India Main Branch, Solapur (supra).
- So in view of the aforesaid documents it is crystal clear that the Appellant has admitted their dues and ready to settle the matter by OTS proposal.
- The conduct of the Appellant in view of the letters for OTS and in the facts and circumstances is not covered by the Judgment of Hon'ble Supreme Court in Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. (supra).
- The Ld. Adjudicating Authority has rightly taken notes of the facts. There is no illegality in the impugned order. The impugned order dated 17.07.2020 is affirmed. The Appeal is dismissed.

ORDER

20. Having regard to the foregoing discussion, we do not find any merit in the Appeal. The Appellant has failed to demonstrate that the impugned order

suffers from any legal infirmity. The Appeal being devoid of merit, is dismissed.

No order as to costs.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

21st December, 2020

NEW DELHI

RN