S.No.3

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
10-07-2023 AT **10:30 AM**

CP(IB) No.285/9/HDB/2022
u/s. 9 of IBC, 2016

IN THE MATTER OF:
M/s East Coast Constructions and Industries Ltd **…Operational Creditor**

VS

M/s Bhubaneshwar Power Pvt Ltd **…Corporate Debtor**

C O R A M:-
DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

O R D E R

Order pronounced. Recorded vide separate sheets. In the result, in the light of finding of point 1 the CP is dismissed as barred by limitation.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

Swapna

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - I, HYDERABAD

C.P. (IB) No. 285/9/HDB/2022

(Under section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (AAA) Rules, 2016)

Between

M/s. East Coast Constructions and Industries Limited,
having their registered office at:
No: 4, Buhari Buildings,
Moores Road, Chennai – 600006 (T.N).
Rep. by its Chief Operating Officer
Mr. Elias A Latiff, S/o. M.A Latiff
Aged about: 56 years ...Operational Creditor

VERSUS

M/s. Bhubaneshwar Power Private Limited,
A Company incorporated under
The Companies Act, 1956,
Having its registered office at:
Golden Edifice, 1st Floor,
Opp. Visweswarayya Statue, Khairtabad Circle,
Khairtabad, Hyderabad – 500004 .....Corporate Debtor

Date of order: 10.07.2023

Coram:

Dr. N. Venkata Ramakrishna Badarinath, Hon'ble Member Judicial

Shri Charan Singh, Hon'ble Member Technical

Appearance:

For Petitioner: Shri L. Ravichander, Senior Advocate along with Shri Pramod Kumar and Ms. Saritha Mishra

For Respondent: Shri Satyakam along with Shri Arinav Dash, Advocates

PER: BENCH

ORDER

1. This Company Petition is filed under Section 9 of Insolvency & Bankruptcy Code, 2016 r/w Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 by **M/s East Coast Constructions and Industries Limited**, seeking initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor/**M/s Bhubaneshwar Power Private Limited** claiming that a sum of **Rs. 1,43,14,192/-** (Rupees One Crore Forty Three Lakhs Fourteen Thousand one Hundred and Ninety Two only) is due and payable to the Petitioner. However, the Respondent defaulted in making payment of the same.

2. The averments made in the application are:

a. The Corporate Debtor and Operational Creditor entered into a contract vide letter of award dated 14.02.2013 for carrying out civil works for 135 (2x67.5) MW coal based captive power plant in Anantapur Village, Cuttack District, Odisha.

b. It is averred that the entire contractual work awarded was successfully completed and handed over to the Corporate Debtor to the extent of that revised at subsequent stage.

c. However, the dispute arose between the parties which was by virtue of mutual consensus and referred to Sole Arbitrator Ld. Hon'ble Justice Shri T.N.V. Rangarajan (Retd) Judge of Madras High Court and Andhra Pradesh High Court.

d. Both the parties mutually agreed to resolve the dispute amicably with the consent of the Arbitral Tribunal, pursuant to which an agreement dated 09.12.2016 was executed reducing all the terms and settlement arising out of the contract.

e. The Ld. Sole Arbitrator based on the settlement agreement dated 09.12.2016, passed an award dated 09.12.2016. Clause-2 of the agreement laid down the financial obligation on Corporate Debtor for compliance and that the Corporate Debtor had agreed to pay an amount of Rs. 6,80,00,000/- towards full and final settlement.

f. Complying the terms of settlement as per Clause 2.2(a) of the agreement, the Corporate Debtor had released an amount of Rs. 5,90,00,000/- out of the total agreed amount of Rs. 6,80,00,000/-. The balance amount of Rs. 90,00,000/- was retained by the Corporate Debtor for discharge of Operational Creditor's responsibility towards the statutory discharges viz. Provident Fund/ESI/Taxes and such other statutory obligation arising out of the contract and undertook to release the same subject to placing proof of compliance of payment to statutory authorities, limiting them to an extent of the contractual work.

g. That complying with Clause 2.2(g), the Operational Creditor placed the proof of statutory payment made to the authorities for the relevant period and demanded the Corporate Debtor to release the balance amount of Rs. 90,00,000/-, which was denied by the Corporate Debtor vide their letter dated 01.07.2022.

h. It is further averred that when vide letter dated 01.07.2022, the Corporate Debtor had admitted the liability vis-à-vis "*the combined challans submitted by your client for the first time*

ever along with its letter dated 01.06.2022 are for the total establishment of your client", then the denial on the part of the Corporate Debtor to pay the admitted amount is untenable.

i. The Operational Creditor issued a legal notice U/s 8 of IBC, 2016 calling upon the Corporate Debtor to pay a total sum of Rs. 1,43,14,192/- which includes Rs. 90,00,000/- + Rs. 53,14,192/- towards interest calculated @ 12% from 01.07.2017 till 31.05.2022, within 10 days. However, neither the Corporate Debtor discharged the liability nor issued a reply to the legal notice. Thus submitting, prayed the Tribunal to admit the petition and initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

3. The counter filed by Corporate Debtor in brief are:-

(a) **That there is 'No Default'.**

(i) That the basis for the present application is an arbitral award dated 09.12.2016 ("Award") recording a settlement agreement dated 09.12.2016 ("Settlement Agreement") which was entered into between the

Applicant and the Respondent and the Award is classified into two parts:

1) The first portion, for payment of a sum of Rs. Five crores and ninety lakhs to the Applicant (which has admittedly already been complied); and

2) The second portion, for payment of a sum of Rs. 90,00,000/- (Rupees ninety lakhs only). This sum was payable to the Applicant subject to it fulfilling its statutory obligations towards payment of EPF/ESI etc. and submitting the relevant/requisite documents to the total satisfaction of the Respondent.

(ii) The Respondent deny the averment of the Petitioner that it had discharged its statutory dues in respect of the work order. According to the Respondent, though the Petitioner furnished some challans showing statutory dues payable by the Petitioner but the same did not indicate whether such dues have actually been paid. The Applicant's averment that the submission of

challans is proof of payment for its total establishment is false and misleading.

(iii) That there is no admission whatsoever in the letter dated 01.07.2022 of the Respondent that the Petitioner has furnished proof of payment in relation to its total establishment. Further the payment receipts submitted by the Petitioner fail to disclose as to whether such payment is in respect of the work order. Further the payment receipt placed on record by the Petitioner do not cover the entire/relevant period of the work order i.e. 18.03.2013 to 17.09.2014. The footnote in the challans indicate that "the same are not proof of payment". A table detailing the challans and payments receipts, as submitted by the Petitioner for the first time vide its letter dated 01.06.2022 to the Respondent and sample copies of payment receipts of the Respondent are annexed as **Annexure-R1(colly.)**.

(iv) That, the Applicant being the service provider in respect of the Work Order, was required to make the statutory

compliances of EPF, ESI, VAT and TDS and furnish the relevant/requisite documents in terms of the Award. Since the Applicant has failed to furnish any proof that the payments as reflected in the payment receipts submitted by it is towards discharge of the statutory dues in relation to the Work Order, the above sum of Rs. Ninety Lakhs is neither due nor payable and in other words the debt has not been crystallized. As such there is no default in terms of Sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

(b) **Jurisdiction is not attracted**

That the present proceedings are nonetheless not maintainable. According to the Respondent, although the Award was passed on 09.12.2016 i.e., over six years ago, the Petitioner raised its demand by submitting certain documents for the first time only on 01.06.2022. Hence, the Petitioner cannot claim interest component w.e.f. 01.07.2017 when no shred of document was submitted by the Petitioner prior to June 2022 and the demand made after 6 years of the Award

suffers from delays and laches. Further since the demand is below the threshold limit of Rs. One crore as stipulated in Section 4 of the IBC, the present proceedings are not maintainable.

(C) **Applicant is not an 'Operational Creditor'**

It is the contention of the Respondent that the Petitioner herein not an 'operational creditor' within the meaning of Section 5(21) read with Sections 8 and 9 of the IBC since as per law unpaid instalments pursuant to a settlement agreement cannot be the cause of action for approaching this Tribunal under Section 9 of the IBC. The Petitioner being a decree holder who, in any event, cannot initiate a corporate insolvency process on the basis of unrealized sums awarded in its favour. On this aspect, the Respondent relied on the position laid down by the High Court of Tripura in Sri Subhankar Bhowmick v. Union of India (W.P.(C)(PIL) No. 04 of 2022) wherein it has been held as follows:

> *"[10] **A reading of the aforesaid provisions makes it clear that, in effect, an unexecuted decree, in the hands of a decree holder under the IBC regime, cannot be executed.** At best, a decree signifies a claim that has been judicially determined and in that sense is an "admitted claim" against the corporate debtor. Therefore, the IBC rightly categorises a decree holder, as a creditor in terms of the*

> *definition contained in Section 3(10). Execution of such a decree, is however subject to the fetters expressly imposed by the IBC (in addition to and over and above the requirements and limitations of the execution process under the CPC), which cannot be wished away.*
>
> *[11] Looked at from another angle, the decree-holder gets a statutory status as a creditor under Section 3(10) of the IBC, by virtue of the decree. Since the decree cannot be executed by operation of the moratorium under Section 14, the IBC makes a provision to protect the interests of a decree holder by recognizing it as a creditor. The interest recognized is that in the decree and not in the dispute that leads to the passing of the decree.* ***This is apparent from the fact that decree holders as a class of creditors are kept separate from "financial creditors" and "operational creditors".*** *No divisions or classification is made by the statute within this class of decree holders.* ***The inescapable conclusion from the aforesaid discussion is, that the IBC treats decree holders as a separate class, recognized by virtue of the decree held.*** *The IBC does not provide for any malleability or overlap of classes of creditors to enable decree holders to be classified as financial or operational creditors."*
>
> (***Emphasis supplied***)

The above judgement of the Hon'ble High Court of Tripura was challenged before the Hon'ble Supreme Court, which in turn while agreeing with the High Court's view, dismissed the appeal.

It is further contended that since the Arbitration and Conciliation Act, 1996 itself provides for execution of an arbitral award, the same must be exhausted instead of seeking to invoke the jurisdiction of this Tribunal.

(d) There is a pre-existing dispute

(1) It is stated by the Respondent that it had denied its liability vide communication dated 01.07.2022 in response to the letters/notices dated 01.06.2022 and 18.06.2022 stating that the sum demanded by the Applicant is neither 'due' nor 'payable' and that there clearly exists a 'dispute' between the parties as to whether the same is payable. It is contended that the Respondent has not received any purported notice under Section 8 of IBC and that there exists a pre-existing dispute. The Respondent on this aspect, relied on the order passed by the Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") in *M/s **Brand Realty Services Ltd.** **v.** **Sir John Bakeries India Pvt. Ltd. (CA(AT)(Insolvency) No. 958 of 2020)*** **and** ***Neeraj Jain*** **v.** ***Cloudwalker Streaming Technologies Pvt. Ltd. (CA(AT)(Insolvency) No. 1354 of 2019).***

2. The Respondent further relied on the Hon'ble Supreme Court of India in Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. C.A. No. 9405 of 2017, has held the following:

"25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected."

3. Reliance is further placed on the Judgment of the Hon'ble Supreme Court in *Transmission Corporation of Andhra Pradesh Ltd. Vs. Equipment Conductors & Cables Ltd 2018 SCC OnLine SC 2113* wherein it was held:

"51. ***It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties.*** *Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at*

this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

*(**Emphasis supplied**)*

(E) Present proceedings barred by limitation

1. The Respondent submits that the present proceedings is barred by limitation being in the nature of execution/ recovery proceedings. The Respondent, by relying on Article 137 to the Schedule of the Limitation Act, 1963 which is the residuary clause, submits that the limitation for filing any application is three years from the date such payment is due. In the instant case, in terms of the Award (at Annexure-1 thereof), the Applicant was required to furnish proof of payment of statutory dues to the satisfaction of the Respondent no later than 30.06.2017. Therefore, the limitation for filing the present application would expire on 30.06.2020 i.e., three years thereafter. As such the Respondent contends that the instant proceedings are not maintainable

2. The factual matrix relevant to the point supra according to the Corporate Debtor is detailed as follows:

a) **Work order /letter of award dated 14.02.2013-** The Applicant executed a Work Order /letter of award with the Respondent (Corporate Debtor) for carrying out certain Civil Works for its Captive Power Plant in Cuttack.

b) **The Ld. Sole Arbitrator passed an award dated 09.12.2016** ("**Award**"). Pursuant to both the parties mutually agreeing to resolve the dispute amicably by way of a Settlement agreement with the consent of the Arbitrator for a settlement amount of Rs. 6.8 Crore. As per the settlement agreement, the Respondent Corporate Debtor released an amount of Rs. 5,90,00,000/-(Rupees five crore ninety lakhs only). The balance sum of Rs. 90,00,000/- (Rupees ninety lakhs only) was to be released subject to the Applicant discharging its liability towards payment of statutory dues like PF/ESI/Taxes to the Respondent's satisfaction. For The disbursal of the aforementioned

sum of Rs. 90,00,000/-, the Applicant had to provide proof to the Respondent's satisfaction, of its payments of Statutory Dues to the tune of Rs. 90 lakhs in respect of the Work Order for the 18 month period from 18.03.2013 to 17.09.2014.

c) **That on 01.06.2022**, A letter sent by the Petitioner which was received by the Respondent only on 15.06.2022, requesting for balance payment of Rs. 90,00,000/- as per the settlement agreement accompanied by some challans and a few payment receipts and the payment receipts submitted by the Applicant which do not reflect any payment and/or discharge of the statutory dues in respect of the Work Order.

d) **A Legal Notice dated 18.06.2022** sent by the Petitioner was received on 21.06.2022 by the Corporate Debtor demanding a sum of Rs. 1,43,14,192/- (Rs. 90,00,000/- + Interest calculated at 12% upto 31.05.2022).

e) **Reply dated 01.07.2022** by the Respondent denying its liability to pay any amount demanded by the Applicant and raised a dispute to the same effect.

f) Subsequent thereto, no communication has been received by the Respondent from the Applicant.

Further the Respondent placed on record the company's Auditors' Report for the financial year 2021-2022 which indicate the company's total turnover is Rs 500 Crore (approx.) and that the company is solvent and no cause for interference under Section 9 of the IBC is warranted. Further the Petitioner has failed to prove/establish that it has, in fact, made the payments towards statutory dues being ESI/EPF etc. in respect of the Work Order, in accordance with the terms and conditions of the Award, despite specifically seeking the details of payment(s) made by the Applicant with respect to the Work Order vide its letter dated 01.07.2022, the same has not been provided till date.

4. ***Rejoinder*** is filed by the Petitioner, reiterating the averments made in the Petition. The averments in the rejoinder in brief are as under;

(a) The Petitioner has enclosed the receipts of payments to the statutory authority as Annexure to the Rejoinder, which as per the Petitioner were inadvertently not filed along with the Petition, to demolish the contentions of the Corporate Debtor that only challans are filed and proof of payment of such challans were not filed.

(b) The Petitioner submits that the work order executed by them for Corporate Debtor is under the establishment, as such any proof of payment made to statutory authority covers all the contractual works executed by them as the compliance mandated under law is not project specific but for entire establishment.

(c) In response to the Corporate Debtor contention that the amount has been withheld due to the sole reason that no proof of payment of statutory dues by operational creditor has been furnished and that no amount is either due or payable as the amount is not yet crystallised, the Petitioner

submits that the amount withheld to the tune of Rs. 90,00,000/- is crystallized and receipts annexed to the rejoinder to substantiate that the statutory dues have been paid.

(d) In response to the contention of the Corporate Debtor that the amount agreed as per Settlement Agreement i.e., Rs 90,00,000/- which is below the threshold limit of Rs 1 Crore coupled with delay of six years since the award was passed, the Petitioner submits that the Corporate Debtor has misconceived the jurisdiction of this e Tribunal. The Corporate Debtor made the payment of Rs 5,90,00,000/- in trances till the year 2017, thereafter as agreed under Clause 2.2(b) the Corporate Debtor was supposed to release balance Rs 90,00,000/- withheld by them after furnishing of receipts of payment to statutory authority. Thus, the relevancy of timeline was neither discussed nor was there such intention of the parties at the time of entering into settlement agreement.

(e) As regards claiming of interest component is concerned, the Petitioner relied on the Hon'ble NCLAT order in the matter of Mr. Prashant Agarwal v. Vikash *Parasrampuria,* [Company Appeal (AT) (Ins) No. 690 of 2022, Date of Decision - 15.07.2022] wherein it is held that the total amount for maintainability of a claim by an operational creditor will include both the principal debt amount as well as the interest on delayed payment to meet the criteria of Rs. 1 crore as per Section 4 of the Insolvency and Bankruptcy Code, 2016 ("IBC").

(f) Applying the ratio of the judgment to the present case the Operational Creditor and Corporate Debtor mutually agreed that in case of delay in releasing the payment, the Corporate Debtor shall pay an interest @12% p.a. as per Clause 2.2(i) of the Settlement Agreement. Thus, after adding the interest portion to the principal amount the Corporate Debtor is liable to pay a sum of Rs. 1,43,14,192/- (Rupees One Crore Forty Three Lakhs Fourteen Thousand One Hundred and Ninety two only) which is more than the threshold limit, as such this Tribunal has jurisdiction to adjudicate the present

petition as against the contention of the Corporate Debtor. Extract Clause 2.2(i) from the Settlement Agreement for better appreciation:

i. ***In case of delay in payment by BPPL, BPPL would be liable to pay an interest @12% p.a to ECCI.***

(g) In response to Paragraph 11 & 12 of the counter, the Operational Creditor submits that it has rightly enforced its rights under the IBC as the debt has been crystallized by virtue of the Settlement Agreement pursuant to which an arbitral award is passed and relied to the ratio of law laid down by Hon'ble National Company Law Appellate Tribunal in ***Ashok Agarwal Vs Amitex Polymers Private Limited., 2021 SCC OnLine NCLAT 49*** wherein the Hon'ble NCLAT has held that a decree holder can approach NCLT for failure of Corporate Debtor to pay the amount passed in the decree. The relevant paragraph is as under:-

> *"49. Considering the fact that the Appellant/ Operational Creditor in the Company petition in IB 185/ND/2019 before the National Company Law Tribunal, the Principal Bench had come out with a plea that the Respondent/Corporate Debtor owes a sum of Rs. 8,85,000/- and for which a demand notice dated*

11.3.2019 was issued to the Respondent/Corporate Debtor for which no reply was issued by the Respondent/Corporate Debtor to the Appellant/ Operational Creditor and this Tribunal taking note of the prime fact that the Appellant/ Operational Creditor is a "Decree Holder" as per the "Consent Decree" passed on 25.10.2018 in Civil Suit No. 6912 of 2016 by the Learned Additional District Judge, Saket Court, New Delhi, this Court comes to an irresistible and inescapable conclusion that a "Decree Holder" is no way excluded from the purview of the ambit of the term 'Operational Creditor" as per Section 5(20) of The Insolvency and Bankruptcy Code 2016 and the contra view taken by the 'Adjudicating Authority" in the impugned order is clearly held by this Tribunal as an unsustainable one in the eye of Law.

50. In the present case, the Appellant/Operational Creditor supplied the goods based on invoices beginning from 19.2.2011 to 26.3.2011 amounting in all to a sum of Rs. 7,28,072/- and in due discharge of legal liability/lawful debt towards payment of dues/Invoices by the Respondent/Corporate Debtor had paid a sum of Rs. 1,10,221/- as mentioned by the Appellant/Operational Creditor in the Application in Part IV under caption of 'Particulars of Operational Debt'.

53. Section 3(10) of The Insolvency and Bankruptcy Code 2016 defines "Creditor" and even in the said definition a "Decree Holder" cannot be excluded to file an Application under the Code. Going by the definition 3(10) of "Creditor", it includes 'Financial Creditor', "Operational Creditor".

> *54. Be that as it may, in the light of detailed qualitative and quantitative discussions and also this Tribunal keeping in mind the entire conspectus of the attendant facts and circumstances of the instant case in a holistic fashion comes to a resultant conclusion that the impugned order passed by the National Company Law Tribunal, New Delhi Bench dated 8.6.2020 as an incorrect and invalid one in the eye of law. Viewed in that perspective, this Tribunal to prevent aberrational justice and to promote substantial cause of justice set aside the impugned order in IB 1895 dated 8.6.2020 passed by the National Company Law Tribunal, New Delhi Bench. Resultantly the Appeal succeeds."*

Therefore, submits that the law laid down by Hon'ble NCLAT, in Ashok Agarwal (supra) is binding on this Tribunal and the judgment of High Court relied upon by Corporate Debtor fades into insignificance.

h. In response to Paragraph 13, 14 & 15 of the counter, the Petitioner submits that the vague and feeble plea of *"pre-existing"* dispute taken by the Corporate Debtor is misnomer without elaborating the details of pre-existing dispute if at all it exists, more so, once the parties with *consensus ad idem* settled their differences in the form of a settlement agreement.

i. In response to the contention of the Corporate Debtor that the statutory notice under Section 8 of IBC was not received, the Petitioner submits that the same was sent through Registered Post Acknowledge Due on 28.07.2022 through receipt bearing No: RN117216644IN which was served on Corporate Debtor on 27.08.2022.

j. As regards the plea taken by the Corporate Debtor that the Petition is barred by limitation at para 16 of the counter, if the same is read under Article 137 of Limitation Act is untenable as in the present case on hand the debt is crystallized.

k. In reply to Clause 17(f), the Petitioner states that on one hand the Corporate Debtor having admitted receipt of the "payment receipts" along with challans sent with letter Dated: 01.06.2022, and later taking a new plea that the payment do not reflect statutory dues in respect of work order, is false and contrary to earlier defence that the payment receipts do not pertain to the work order.

l. The Petitioner submits that the work order is issued in the name of Operational Creditor, the settlement agreement is entered with Operational Creditor and the award was passed with Operational Creditor as party before the learned Sole Arbitrator. Thus, when the Corporate Debtor in their notice Dated: 01.07.2022 equivocally admit that the challans/ receipts are for entire establishment, that itself covers this contract as there was no separate entity that carried out the contractual work and that there cannot be any standalone challans for project specific. The statement of Corporate Debtor in the aforesaid letter states *"the combined challans submitted by your client for the first time ever along with its letter dated 01.06.2022,* ***are for the total establishment of your client"***. Further the Operational Creditor submits that once Corporate Debtor admits that the challans are for "total establishment" there arises no occasion for Corporate Debtor to deny their lawful/legal liability to pay the admitted amount.

m. In reply to Clause 17(j) the Petitioner submits that the statement made by Corporate Debtor is false and deny the contention that there was no communication after serving legal notice on 21.06.2022. The Operational Creditor had sent Statutory notice U/s 8 of Insolvency and Bankruptcy Code, 2016 through Registered Post Acknowledge Due on Dated: 28.07.2022 vide postal receipt bearing No: RN117216644IN that was served on Corporate Debtor on 27.08.2022 **(Page 156 – 164 of main petition)**, but failed to respond to the same.

n. In reply to Paragraph 18 of the counter, the Petitioner submits that it is irrelevant that the Corporate Debtor is solvent or otherwise for the adjudication of the present petition.

5. In the light of contest as afore-stated, the points that emerge for our consideration are:-

(i) Whether the operational debt as claimed by the Petitioner is barred by limitation?

(ii) Whether an operational debt of a sum of over Rs. 1 crore is due and payable by the Respondent to the Petitioner? If so, whether the Corporate Debtor has committed default in repayment of the same?

(iii) Whether there is a pre-existing dispute as to the operational debt?

6. We have heard the Shri L. Ravichander, Ld. Senior Counsel assisted by Shri Pramod Kumar and Ms. Saritha Mishra for the Petitioner and Shri Satyakam, Ld. Counsel for the Respondent, perused the record and case laws.

7. At the outset, it may be stated that the present application being one under section 9 of IB Code, in order to succeed in this petition, the Petitioner shall establish that an operational debt of sum exceeding rupees one crore is due and payable by the respondent to the Applicant and that the respondent *defaulted* in repayment of the same. However, if

the Respondent is able to show that a *pre-existing* dispute as to the operational debt exits, notwithstanding the presence of operational debt and its default, the Petition is liable to be rejected. In this regard, reliance can be placed on the Hon'ble Supreme Court judgement, *in re*, *Mobilox Innovations Pvt. Ltd. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353, wherein it is held as under:-*

> *"all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exits in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application (emphasis is ours).*

8. In the light of above legal framework and the factual matrix of this case, we proceed to decide the points as above.

Point (i):

Whether the operational debt as claimed by the Petitioner is barred by limitation?

9. Needless to say, that in so far as the plea as to *limitation* is concerned, it is for the Petitioner to establish that the debt claimed under the present petition is not barred by limitation and the burden to establish the same lies on the Petitioner.

10. Refuting the contention of the Respondent that the debt under the present Petition is barred by limitation, Ld. Sr. Counsel for the Petitioner contended that out of the total agreed sum of Rs. 6.80 crores, as mentioned in clause 2.2 of the consent Award dated 09.12.2016 passed by the Sole Arbitrator, a sum of Rs. 5,90,00,000/- payable on or before 30.06.2017 has been paid by 30th June, 2017, however the balance amount of Rs. 90,00,000/- being the amount withheld by the Respondent pending compliance of clause 2.2(b) of the Settlement Agreement, defaulted by the respondent despite compliance of the same by the petitioner. Therefore, according to the Ld. Sr. Counsel the Petitioner,

having complied Clause 2.2 (b), supra, demanded the Respondent to release the said balance amount of Rs. 90 lakhs vide notice dated 18.06.2022, but the Respondent vide reply dated 01.07.2022, falsely denied the said liability, as such the present petition having been filed on 16.09.2022, is not barred by limitation.

11. According to the Ld. Sr. Counsel, unless the amount is not released it will have to be carried forward in each accounting year as such the Hon'ble Supreme Court in *Asset Reconstruction Company (India) Ltd. v. Bishal Jaiswal, 2021 SCC OnLine SC 321*, held that "an entry made in the books of accounts, including the balance sheet, can amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act,1963." As such the assertion that the present petition is barred by limitation, does not arise. It is further submitted that, the present application is covered under Article 137 of Limitation Act and cannot by any stretch of imagination be covered under Article 136.

12. Ld. Sr. Counsel further contends that the arguments that the present case is governed by Article137 and not by Article 136 of Limitation Act is not tenable, as in the present matter the Debt is already crystallized by virtue of an arbitration award, which is not in dispute. Therefore, only when the Operational Creditor approaches this Tribunal for adjudication of debt, Article 136 of Limitation Act applies and not when the debt is already crystallized. Ld. Sr. Counsel also contended that there is no clause in the Memorandum of Understanding executed between the parties, much less, the arbitration award, specifying the timelines for report of compliance. The Corporate Debtor makes a feeble misconceived attempt in stating that receipts ought to be filed by 30.06.2017. Further attention of this Tribunal is drawn to the aforesaid date relied upon by Corporate Debtor which relates to compliance in terms of payment of Rs 5.90 Cr and not for furnishing the proof of payment to ESI/EPF Authorities.

13. According to the Ld. Sr. Counsel, the computation of date of default has to be construed when the Corporate Debtor failed to make the payment under the Arbitral Award Dated: 09.12.2016 after furnishing the proof of payment to ESI/EPF Authorities. Ld. Sr. Counsel further submitted that the aspect of Period of Limitation applies when the Operational Creditor required this Tribunal to delve into the aspect of adjudicating **"debt"** that in the current case is already adjudicated by way of Arbitral Award.

14. Ld. Sr. Counsel reiterated that as no time limit is agreed between the parties by which date the compliance of Operational Creditor is required to be furnished, the Corporate Debtor cannot read/incorporate any new interpretation to the agreed terms of MoU and in the present case on hand, the date of default is when the Corporate Debtor failed to pay the crystallized debt i.e., on 01.06.2022, 18.06.2022, 01.07.2022 or latest by 28.07.2022 (Form – 3).

15. According to the Ld. Sr. Counsel the period of limitation applies when the Operational Creditor approaches the Adjudicating Authority to adjudicate the aspect of Debt. However, in the present facts, the Operational Creditor did not file the application u/s 9 of IBC for adjudication of debt which is already admitted by virtue of an award passed by the Learned Sole Arbitrator Dated: 09.12.2016. Thus, the aspect of limitation act does not apply and such an application is nothing but reading something into the averments which is not at all needed.

16. Ld. Sr. Counsel also relied on the ruling of ***Hon'ble Supreme Court in Union of India v. Harendra Gawaria, 2022 SCC*** On Line Raj 463, wherein it was held that whenever there is a conflict between the substantial justice and hyper-technicality, then the substantial justice should be preferred to avoid the defeat for the ends of justice. If the hyper technical stand of the petitioner is allowed to stand as it is, then it would amount to failure of justice".

17. However, the Ld. Counsel for the Corporate Debtor placing reliance on Article 137 of the Limitation Act, contended that the limitation in this case shall begin to run from 09.12.2016, as such the present petition having been filed on16.09.2022, long after a lapse of *three years from 09.12.2016,* is hopelessly barred by limitation. In support of this plea, the Ld. Counsel for the Corporate Debtor relied on the ruling in *B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Ors. cited as (2019) 11 SCC 633 (Annexure W-1) as follows:*

> *"It will be seen from a reading of Section 8(2)(a) that the corporate debtor shall, within a period of 10 days of the receipt of the demand notice, bring to the notice of the operational creditor the existence of a "dispute". We have seen that "dispute" as defined in Section 5(6) includes a suit or arbitration proceeding relating to certain matters. Again, under Section 8(2)(a), the corporate debtor may, in the alternative, disclose the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice. It is clear therefore, that at least in the case of an operational creditor, "default" must be non-payment of amounts that have become due and payable in law. The "dispute" or pendency of a suit or arbitration proceedings would necessarily bring in the Limitation Act, for if a suit or arbitration proceeding is time-barred, it would be liable to be dismissed. This again is an important pointer to the fact that when the expression "due" and "due and payable" occur in Sections 3(11) and 3(12) of the Code, they refer to a "default" which is non-payment of a debt that is due in law, i.e., that such debt is not barred by the law of limitation. It is well settled that where the same word occurs in a similar context, the draftsman of the statute intends*

> *that the word bears the same meaning throughout the statute (see Bhogilal Chunilal Pandya v. State of Bombay, 1959 Supp. (1) SCR 310 at 313-314). It is thus clear that the expression "default" bears the same meaning in Sections 7 and 8 of the Code, making it clear that the corporate insolvency resolution process against a corporate debtor can only be initiated either by a financial or operational creditor in relation to debts which have not become time-barred."*

18. Ld. Counsel further stated that even if the sum of Rs. 5.90 crores paid by 30.06.2017, besides the ruling in re: Suo Motu Writ Petition (C) No. 3 of 2020 dated 10.01.2022 by Hon'ble Supreme Court of India, is taken into consideration, the present claim is barred by limitation, and on that ground itself the petition is liable to be dismissed.

19. In the light of the contest as above, we have carefully perused the record placed and relied upon by both sides, including the Arbitral Award passed by the sole Arbitrator dated 09.12.2016 wherein the agreement entered between the parties herein, has been incorporated.

20 At the outset we wish to state that the argument of the Ld. Sr. Counsel that the present case is governed by Article136 and not by Article 137 of Limitation Act, as the Debt is already crystallized by virtue of an arbitration award, and

also because the Operational Creditor has not come before this hon'ble Tribunal for adjudication of debt, in our considered view is untenable and unacceptable for the reason that, the present application under section 9 of the IB Code, filed by he petitioner is for initiating of corporate insolvency resolution process against the respondent/corporate debtor on the plea that an operational debt of a sum over rupees one crore is due and payable by the Respondent/Corporate Debtor, but failed to pay, despite receipt of demand notice issued u/s 8(2) of IBC, and not for *execution of the Award or Decree* as the case maybe. It is settled law that Article 137 of limitation is applicable for an application governed by section 9 of IB Code as Hon'ble Supreme Court of India in re, ***Dena Bank vs C. Shiva Kumar Reddy and Anr,*** has held as under:-

"42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 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".

21. Moreover, execution of an Award or Decree is neither permissible through a petition filed under section 9 IB Code, nor the Adjudicating Authority has the jurisdiction to do so.

In fact indisputably, the proceedings under section 9 IB Code, cannot be the proceedings for recovery.

22. Therefore, the legal position as regards limitation for filing an application being as clear as crystal, we now refer to Article 137 of limitation Act, in order to find whether or not the debt claimed under the present petition is barred by limitation?

Article 137 of limitation Act:

Any other application for which no period of limitation is provided elsewhere in this Division is three year when the right to apply accrues.

23. Needless to say the right to apply under Article 137 of Limitation Act accrues, on the date of default committed in repayment of the debt.

24. Here, as regards the date of default, the argument of the Ld. Sr. Counsel that the date of default has to be construed/computed when the Corporate Debtor failed to make the payment under the Arbitral Award Dated: 09.12.2016 only after furnishing the proof of payment to ESI/EPF Authorities, and that there is no clause in the

Memorandum of Understanding executed between the parties, much less, in the Arbitration Award specifying the timelines for reporting compliance and that the date 30.06.2017 relates to compliance of the term relating to payment of Rs 5.90 Cr only and not for furnishing the proof of payment to ESI/EPF Authorities, in our considered view is yet another un acceptable and untenable submission, in view of the law as laid *in re*, ***Dena Bank vs C. Shiva Kumar Reddy and Anr.*** supra, wherein it was held that,

> "42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 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, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

25. We are also not impressed by the submission of the Ld. Sr. Counsel that '*unless the amount is not released it will have to be carried forward in each accounting year as such the Hon'ble Supreme Court in Asset Reconstruction Company (India) Ltd. v. Bishal Jaiswal, 2021 SCC OnLine SC 321, held that held that "an entry made in the books of accounts,*

including the balance sheet, can amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act,1963," as such the assertion that the present petition is barred by limitation does not arise, for the reason that an entry made in the books of accounts, including the balance sheet, of the debtor not the creditor, amounts to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act,1963. Here it is not at all the case of the petitioner that the books of account of the corporate debtor or its balance sheet contain an entry relating to the subject debt, so as to rely on Section 18 of the Limitation Act.

26. Therefore, in the light of our discussion as above and the well settled legal position, the period of limitation in this case needs to be calculated in terms of Article 137 of the limitation Act, from the 09.12.2016, which is the date of the Arbitration Award, where under it was agreed by both sides that a sum of rupees 6.90 crores is payable by the respondent to the Petitioner. So much so, in this case if, *the part payment of Rs. 5.90 crores paid by June 2017*, is not

taken into consideration, then the prescribed period of limitation would end by 08.12.2019, and in that view of the matter, the present petition since filed on 16.09.2022, can be held to have been barred by limitation. However, since admittedly there is a part of payment of the sum of Rs. 5,90,00,000/- as against the sum of Rs. 6.80 Crores payable under the afore stated Arbitral Award by the respondent, by 30.07.2017, which is before the expiry of the prescribed period of limitation, a fresh period of limitation shall accrue in favour of the Creditor/Petitioner in terms of Article 19 of Limitation Act. Though the actual date(s) of payment of the said sum are not specifically pleaded, the payment of the said sum by 30.07.2017 is not in dispute. Therefore, when the above part payment is taken into consideration, three years period of limitation for enforcement of right to receive of Rs. 90 lakhs by the Petitioner would get extend by three more years from 30.06.2017 as per Article 19 of the Limitation Act, which is as below:-

> *19. Effect of payment on account of debt or of interest on legacy.—Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:*

Thus, the period of limitation in this case for recovery of balance amount stands extended till June, 2020. However, since the present Company Petition has been filed on 16.09.2022, it is to be seen whether the claim is barred by limitation or not.

27. Here, it is necessary to refer to ruling of Hon'ble Supreme Court of India vide its judgment dated 10.01.2022 in Suo Motu Writ Petition (C) No. 3 of 2020 with respect to the extension of limitation pursuant to the pandemic, has directed as follows:

> *"5……..*
>
> *III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply."*

28. Since the above ruling is applicable to the case on hand, the limitation in this case once again stands extended till May, 2022. It is pertinent to note that it is not the case of the Petitioner that any payment has been made or the debt is acknowledged in terms of section 18 of limitation Act, by the Corporate Debtor in between the date(s) of payment of Rs. 5.90 crores and 01.06.2022. So much so, the present petition which ought to have been filed before 01.06.2022, since filed on 16.09.2022, we have no hesitation in holding that the debt under the present Company Petition is barred by limitation.

The point is answered accordingly.

Point (ii): Whether an operational debt of a sum of over Rupees one crore is due and payable by the Respondent to the Petitioner? If so, whether the Respondent has committed default in repayment of the same?

29. According to the Ld. Sr. Counsel for the Petitioner, the respondent despite complying Clause 2.2 (1) of the Settlement Agreement dated 09.12.2016 and informing of the same to the Corporate Debtor with necessary documentary proof, the Corporate Debtor illegally failed to

release the amount of Rs. 90,00,000/- together with interest thereon withheld by the respondent. Therefore, a demand notice dated 18.06.2022 in terms of Section 8(2) of IBC has been issued to the Corporate Debtor demanding payment of sum of Rs. 1,43,14,192/- being the outstanding amount together with interest @ 12% p.a agreed to be payable as per Clause 2.2 (1) of the settlement agreement. The Respondent despite receipt of the same, has not sent any reply.

30. The Ld. Sr. Counsel also referred to the legal notice dated 01.06.2022, which has been issued to the Respondent prior to the issuance of the demand notice calling upon the Corporate Debtor to pay the outstanding balance of Rs. 1,43,14,192/- , which has been replied by the Corporate Debtor on 01.07.2022 contending *inter alia*, that;

> *"At the outset it is stated that as per Clause 2.2 (b) read with Annexure-1 of the Settlement Agreement, BPPL shall pay Rs. 90,00,000/- to ECCI by 30th June 2017, subject to ECCI's submission of relevant/requisite documents to the total satisfaction of BPPL (Ref 2.2(b) of this Agreement).*
>
> *Further it is also stated that, the combined challans submitted by your client for the first time ever along*

> *with its letter dated 01.06.2022, are for the total establishment of your client, and do not reflect in any manner if your client has cleared the said dues of Rs. 90 lakhs to the statutory authorities, towards the specific labours engaged at BPPL site during the 18 months period starting from March 2013 to August 2014 under the Contract No. BPPL/HYD/0006/Engg/13 dated 14.02.2013.*

31. Ld. Sr. Counsel for the Petitioner vehemently contended that, the Petitioner has placed the record of proof of payments made to the Statutory Authority (EPF) in respect of the subject contract along with the payment receipts issued by the Statutory Authorities in respect of all the payments made to the EPF Authorities and the said record unequivocally establishes payment in terms of clause 2.2 of the consent agreement, as such the plea that no proof of payment has been submitted by the Petitioner.

32. However, the Ld. Counsel for the Respondent placing reliance on the reply notice dated 01.07.2022, vehemently contended that the combined challans submitted by the Operational Creditor along with the letter/notice dated 01.06.2022 are for the *total establishment* and do not specifically reflect that the said payment was in respect of

the workers engaged in BPPL during 18 month's period starting from March, 2013 to August, 2014, to the statutory authority. According to the Ld. Counsel, the so-called debt as claimed under this petition has been denied, well before the receipt of the demand notice in the reply notice dated 1.07.2022, as such there is a *pre-existing* dispute as to the subject debt.

33. Ld. Counsel further contended that, the operational debt as claimed is below Rs. 1 crore, as no interest is payable. Consequently, the petition is liable to be dismissed.

34. Having heard Ld. Counsels for both sides and on perusal of the record viz, the payment challans, receipts in respect of the payment made to the EPF Authorities from August 2013 onwards, *besides* the notice/letter dated 01.06.2022, the reply notice dated 01.07.2022 to the notice dated 01.06.2022 and the demand notice dated 18.06.2022, we are fully satisfied that "there is an operational debt of a sum over Rupees one crore due and payable by the Respondent/Corporate Debtor in terms of the settlement agreement, supra, which payment is defaulted by

the Respondent / Corporate Debtor. We hereunder state the reasons for our above conclusion.

35. The subject debt is nothing but part of the total sum of Rs. 6.90 crores that both the parties have agreed as payable by the Respondent to the Petitioner in terms of the consent award dated 09.12.2016. Hence the debt is an admitted debt.

36. A bare perusal of the reply letter dated 01.07.2022 by the respondent clearly goes to show that, it is not the case of the Corporate Debtor that the Operational Creditor has not cleared the statutory dues to EPF Authority, as according to the above reply, "the payment challans that have been submitted by the Operational Creditor to the Corporate Debtor vide letter dated 01.06.2022 are <u>for the total establishment and does not specifically state that it pertains to the labour engaged at BPPL site under the contract dated 14.02.2013 commencing from March 2013 to August 2014".</u>

37. However, in the counter filed by the Respondent, it has been contended that "no proof of payment of the EPF dues has been furnished by the Petitioner'. This is nothing but approbate and reprobate, besides a feeble and moonshine defence, in as much as the Respondent having admitted in clear terms that the *payment of the dues of are in respect of the "establishment"* and only wanted *specific proof* of payment relating to the Unit of the subject contract, which information also has been furnished, cannot be allowed to deviate from the earlier admission. Moreover, a perusal of the challans and the payment receipts issued by public Authority discloses that the same are in respect of the dues for the wages for the month of March 2013 till February 14 as sought for.

38. The payment receipts produced by the Operational Creditor for the payments mentioned in the challans supra, clearly confirm that the said payments were made to the account number with establishment Code TNMAS0011677000 East Coast Constructions & Industries Limited.

39. That apart it is not the case of the Corporate Debtor that claim/claims of non-payment have been raised by the labourers engaged at BPPL site between March 2013 and August 2014.

40. Thus, existence of an operational debt of a sum over rupees one crore and as the same is not paid, its default by the respondent stands established.

Point (ii) is answered accordingly.

Point (iii) Whether there is a genuine pre-existing dispute as to the operational debt?

41. It is trite to say that in terms of Section 8 (2) of the Code, in the event the Corporate Debtor is able to show that there is a pre-existing dispute or pendency of a civil suit or arbitration proceedings in respect of the operational debt prior to receipt of the demand notice, then the petition under Section 9 of IBC is liable to be rejected.

42. Referring to the reply dated 01.07.2022, Ld. Sr. Counsel for the Petitioner submits that the plea that under the reply notice dated 1.7.2022, the respondent has pleaded existence of a "pre-existing dispute" is absolutely unfounded and misconceived in as much as at no stage much less under the reply notice dated "existence of dispute" as regards the operational debt has been raised by the Corporate Debtor. In this context, the Ld. Sr. Counsel stated that the so-called letter/reply dated 01.07.2022 does not indicate that the Corporate Debtor has raised any pre-existing dispute as to the payments of the outstanding debt. In fact the letter states that the payment challans only indicate that amount has been paid to the workmen in respect of the subject contract pertaining to the period between March 2013 and August 2014. Ld. Sr. Counsel further stated that the non-payment of EPF, if any, is an issue between the workmen concerned and the Operational Creditor and not between the Petitioner and the Corporate Debtor. So much so, when there is no complaint by any workmen of the workmen regarding non-payment of statutory dues such as EPF etc to

them, and in the light of the receipts that the Operational Creditor has filed before this Tribunal, the plea of pre-existing dispute shall invariably fail.

43. However, Ld. Counsel for the corporate debtor contended that, in the reply notice dated 01.07.2022, the respondent had categorically stated that the combined challans submitted by the Operational Creditor along with the letter/notice dated 01.06.2022 are for the *total establishment* and do not specifically reflect that the said payment was in respect of the labourers engaged in BPPL during 18 month's period starting from March, 2013 to August, 2014, to the statutory authority. According to the Ld. Counsel, the so-called debt as claimed under this petition has been denied, well before the receipt of the demand notice in the reply notice dated 1.07.2022, as such there is a *pre-existing* dispute as to the subject debt. Ld. Counsel further contended that the operational debt as claimed is below Rs. 1 crore, as no interest is payable, consequently, the petition is liable to be dismissed.

44. Having carefully perused clause 2.2(b), which says that "*the balance amount of Rs. 90 lakhs shall be withheld by BPPL towards the obligations of ECCI for payments towards tax/Provident Fund/ESI/other statutory dues/regulatory authorities. This amount shall be paid to ECCI to the extent of amounts paid by ECCI to the relevant regulatory authorities to the satisfaction of BPPL"*, we find no force whatsoever in the contention of the Respondent that there exists a dispute even by the date of reply notice, in as much the operational creditor had not only filed the challans but also receipts evidencing payment of the entire amount that was due and payable to the workmen for the relevant period. More over as already stated that it is not the case of the Corporate Debtor that payments were not at all made by the Operational Creditors to the statutory authorities, when it is sent in reply dated 01.07.2022. That apart, any Unit shall always be part of an 'establishment' hence any payment to an establishment, is payment to the unit as well. Thus, we find no force in the plea of the Corporate Debtor that there is a pre-existing dispute.

45. Therefore, in the light of our discussion as above, we are fully satisfied that the defence of pre-existing dispute as put forth is a frivolous, moonshine and a feeble argument made in order to avoid payment of the legitimate dues of the operational creditor. Therefore, we hereby reject the said plea.

The point is answered accordingly.

46. Now, we shall deal with the rulings relied on by both sides.

(a) The Petitioner relied on the following judgements:-

1. Hon'ble NCLAT in ***Ashok Agarwal Vs Amitex Polymers Private Limited, 2021 SCC OnLine NCLAT 49*** (Para 16, 17, 19, 20, 49, 53, 54) wherein it has been categorically held that Decree Holder is an operational creditor and can maintain an application u/s 9 of IBC.

We have perused the above ruling. This ruling is applicable to the case on hand to the extent the Petitioner who is having an Award in his favour, can maintain the present Petition under Section 9 of IBC.

2. Hon'ble Supreme Court in ***Kotak Mahindra Bank Limited Vs. A. Balakrishnan and Anr., 2022 (9) SCC 186*** (Para 40, 41, 43, 49, 54, 70, 82) and ***Dena Bank (Now Bank of Baroda) Vs. C. Shiva Kumar Reddy and Anr., 2021 (10) SCC 330*** (Para 46, 48, 99, 110, 126, 129, 130, 132, 133, 135, 136, 137) categorially held that Sec 9 can be filed based on an arbitration award.

The above decision squarely applicable to the facts of the present case. In as much as the sum claimed as operation debt is nothing but part of the amount covered by the arbitration award.

3. Judgment of NCLAT Principal Bench ***Mr. Prashant Agarwal Vs. Vikash Parasrampuria and Anr., (Company Appeal (AT) (Ins) No. 690 of 2022, NCLAT, Principal Bench) (Para 9(vi))***, for deciding the threshold limit the interest also has to be accumulated.

The legal position as laid down in this case is not in dispute and the same is squarely applicable to the present case.

4. Hon'ble Supreme Court in ***Asset Reconstruction Company (India) Ltd. v. Bishal Jaiswal, 2021 SCC OnLine SC 321*** held that held that an entry made in the books of accounts, including the balance sheet, can amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act, 1963.

The facts of the above judgment is not applicable in as much as the petitioner has not filed neither the balance sheet of the Corporate Debtor nor any acknowledgement of debt made in terms of Section 18 of Limitation Act, 1963, by the Corporate Debtor.

5. The Hon'ble Supreme Court in Union of India ***v. Harendra Gawaria, 2022 SCC OnLine Raj 463 held that the*** settled position of law is that whenever there is a conflict between the substantial justice and hyper-technicality then the substantial justice should be preferred to avoid the defeat for the ends of justice.

We have perused the above facts, we find the same is not applicable to the above case.

(b) The Respondent relied on the following judgements:

(1) Present proceedings barred by limitation

Hon'ble Supreme Court in re: ***B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Ors****.* cited as *(2019) 11 SCC 633*

The above ruling was referred to by Hon'ble Supreme Court of India in Dena Bank vs Siva Kumar, we have already held that the ruling in Dena Bank vs Siva Kumar is applicable to the facts of the case.

2. Petitioner is not an "Operational Creditor".

(a) Hon'ble NCLAT Digamber Bhondwe vs JM Financial Asset Reconstruction Company being 2020 SCC OnLine NCLAT 399.

(b) Hon'ble NCLAT Trafigura India Private Limited vs TDT Copper Limited being Company Appeal (AT) (Insolvency) No. 742 of 2020.

(c) High Court of Tripura in Sri Subhankar Bhowmick v. Union of India (W.P.(C)(PIL) No. 04 of 2022)

In the light of the above ruling in Kotak Mahindra vs A. Balakrishnan and Anr, supra rendered by Hon'ble Supreme Court of India, ruling in Digamber and Trafigura, rendered by

Hon'ble NCLAT besides Hon'ble High Court of Tripura in Sri Subhankar Bhowmick also not followed.

3. There is a pre-existing dispute

(i) *M/s Brand Realty Services Ltd. v. Sir John Bakeries India Pvt. Ltd.* being CA(AT)(Insolvency) No. 958 of 2020.

ii. *Neeraj Jain v. Cloudwalker Streaming Technologies Pvt. Ltd.* being CA(AT)(Insolvency) No. 1354 of 2019.

iii. *Mobilox Innovations Pvt. Ltd. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353*

4. *Hon'ble Supreme Court in Transmission Corporation of Andhra Pradesh Ltd. Vs. Equipment Conductors & Cables Ltd. being 2018 SCC OnLine SC 2113.*

47. We have already held that on the basis of facts pleaded by both sides following ruling of Mobilox, no pre-existing dispute has been found in this case. The facts covered by and relied by respondent barring Mobilox being different, the same are not followed in this case.

48. Therefore, in the light of our discussion as above and in view of our finding on point 1, the Company Petition is liable to be rejected as barred by limitation, hence the same is hereby rejected as barred by limitation.

49. Accordingly, the CP is dismissed. No costs.

SD/- SD/-

(Charan Singh) (Dr. N.Venkata Ramakrishna Badarinath)

Member (Technical) Member (Judicial)

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