



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT – III**

C.P.(IB)-1139(MB)/C-III/2022

Under Section 9 of the Insolvency and
Bankruptcy Code, 2016

IN THE MATTER OF

**M/s KATARIA INFRASTRUCTURE
CORPORATION**

Having its registered office address at
10 – 13, Industrial Estate,
Ratlam - 457001....**Operational Creditor**

Versus

M/s MANAS VYAPAR PRIVATE LIMITED

Having its registered office address at
301, Sunflower Tower, Parvati Bhuvan,
Kharkar Ali, Thane, Mumbai – 400601.

...Corporate Debtor

Order pronounced on: 29.10.2024

Coram:

Hon'ble Smt. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati Member (Technical)

Appearances:

For the Operational Creditor: Adv. Aniruth Purusothaman Giriraj

For the Corporate Debtor: Adv. Vishal Pattabhiraman a/w Mittal
Munoth i/b Kookada & Associates

Per: Sh. Charanjeet Singh Gulati, Member (Technical)



1. The Present Company Petition (IB)-1139(MB)/2022 has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (the “**Code**”) by **M/s. Kataria Infrastructure Corporation (“Operational Creditor/Petitioner”)** for initiating Corporate Insolvency Resolution Process (“**CIRP**”) against **M/s Manas Vyapar Private Limited (“Corporate Debtor/Respondent”)** for resolving the default in repayment of an Operational Debt of **Rs. 1,00,00,000/-** (*Rupees One Crore Only*).
2. M/s Manas Vyapar Private Limited was incorporated on 26.11.1992, bearing CIN: U99999MH1992PTC06973. The present Company Petition has been filed on 27.09.2022, on the basis of the following set of facts:

Brief Facts

3. The Operational Creditor is involved in the business of purchasing land and other immovable assets like windmill, etc.
4. It is the case of the Operational Creditor that it entered into an oral agreement for the execution of an “Operation and Management” Contract with the Corporate Debtor for the windmill having particulars as ENERCON made Wind Turbine Convertor, 230 KW, type E-30, with 48M height Tubular Tower, at a windfarm situated in Village Gorera, Near Themda Raj Temple, District Jaisalmer, Rajasthan. Against this contract a sum of Rs. 1,00,00,000/- Crore was advanced by the Operational Creditor to the Corporate Debtor on 21.03.2008. The said agreement was never executed by the Corporate Debtor despite receiving the advance from the Operational Creditor.



5. The advance made by the Operational Creditor of Rs.1,00,00,000/- was shown under the head “Advance Received Against Project to be implemented” maintained until 2017-2018 in the Financial Statements of the Corporate Debtor. Thereafter, the Corporate Debtor started writing-off Rs. 15,00,000/- every year without the consent of the Operational Creditor.
6. The Operational Creditor verbally requested the Corporate Debtor to repay the dues, however, the Corporate Debtor neglected and failed to do so. In accordance with Section 8 of the Code and Rule 5 of the Insolvency and Bankruptcy Rules, 2016, the Operational Creditor issued a Demand Notice dated 20.06.2022 in Form 3 along with annexures which was received by the Corporate Debtor at its Registered Office on 08.07.2022 to which no reply was communicated.
7. The period of 10 days from the receipt of Demand Notice lapsed on 18.07.2022. The Corporate Debtor neither gave a notice of existence of a dispute relating to unpaid operational debt nor any record of the pendency of a suit or arbitration proceeding filed in relation to this dispute, before the receipt of such Demand Notice.
8. In this back ground and due to failure on the part of the Corporate Debtor to pay the amount of Rs 1,00,00,000/-, the Operational Creditor filed the present petition.

Reply of the Corporate Debtor

9. The Corporate Debtor is a going concern engaged in the business of trading and dealing in land and development. They also deal in agricultural lands and products. Over 200 farmers are



associated with the Corporate Debtor who directly or indirectly depend on the Corporate Debtor for their livelihood.

10. The Corporate Debtor further averred following sequence of events in its Reply:

a. Around December 2007/January 2008, a meeting was held among Mr. Vyankatesh Kulkarni of the Corporate Debtor, Mr. Ashok Kataria of the Operational Creditor and Mr. Murtuza Rajkotwala in respect of a land development project at Wada (Maharashtra) belonging to the Corporate Debtor.

b. It was agreed that the Operational Creditor will invest a sum of Rs. 20,00,00,000/-, where the Operational Creditor shall pay a sum of Rs. 5,00,00,000/- in January 2008, Rs. 5,00,00,000/- in April 2008, Rs. 5,00,00,000/- in August 2008 and Rs. 5,00,00,000/- in December 2008. It was agreed that if the Operational Creditor fails to make the aforesaid payments, the amount paid by the Operational Creditor will be forfeited.

c. The Operational Creditor paid Rs.1,00,00,000/- to the Corporate Debtor on 21.01.2008 as part payment of the investment detailed above. However, the Operational Creditor failed to pay any further amount and claimed the refund of Rs.1,00,00,000/- along with interest @ 24% p.a. from the Corporate Debtor. This caused a dispute between the parties to the Oral Agreement.

d. Thereafter, various meeting and discussions took place (2008-2017) between the contending parties, but the dispute could



not be resolved. In May/June 2018, there was a meeting between the parties to settle the disputes wherein Mr. Murtuza Rajkotwala was also present and it was verbally agreed that, the Corporate Debtor would pay a sum of Rs.40,00,000/- only as full and final settlement to the Operational Creditor.

e. It was agreed that the remaining amount of Rs.60,00,000/- will be written down in the books of Corporate Debtor and Operational Creditor in the following manner:

- i. Rs.15,00,000/- in FY 2018 – 2019;
- ii. Rs.15,00,000/- in FY 2019 – 2020;
- iii. Rs.15,00,000/- in FY 2020 – 2021;
- iv. Rs.15,00,000/- in FY 2021 – 2022.

f. It was further agreed that the total amount of Rs. 40,00,000/- shall be paid to the Operational Creditor in the following manner:

- i. Rs.20,00,000/- in FY 2022 – 2023;
- ii. Rs.20,00,000/- in FY 2023 – 2024.

g. Accordingly, the Corporate Debtor started writing off the amount as aforesaid in the books of accounts.

h. In April-May 2019, the Corporate Debtor apprehended adverse financial issues which would have presumably continued for more than two years, therefore, a meeting of Mr. Vyankatesh Kulakrni of the Corporate Debtor, Mr. Ashok Kataria of the Operational Creditor was arranged in which Mr.



Murtuza Rajkotwala was also present. In the meeting, the Corporate Debtor requested to extend the payment schedule as under:

- i. Rs.20,00,000/- in FY 2023 – 2024;
 - ii. Rs.20,00,000/- in FY 2024 – 2025.
- i. The Operational Creditor was ready to extend the time for payment; however, it was seeking a compensation of Rs. 4,00,000/- (10% of the pending claim) from the Corporate Debtor and was subject to no further extension. The Corporate Debtor accepted the aforesaid conditions and agreed to pay the compensation along with the due amount in the following manner:
- ii. Rs.11,00,000/- in the FY 2021 – 2022;
 - iii. Rs.22,00,000/- in the FY 2023 – 2024;
 - iv. Rs.22,00,000/- in the FY 2024 – 2025.
- j. In the beginning of May 2020, the Corporate Debtor became aware that Mr. Ashok Kataria expired.
- k. On 20.06.2022, the Corporate Debtor received a letter from the Operational Creditor claiming a sum of Rs.1,00,00,000/- The Corporate Debtor apprised Mr. Murtuza Rajkotwala about the abovementioned events. Mr. Murtuza informed the Corporate Debtor that he was not in touch with any representative of the Operational Creditor but Mr. Ashok Kataria. The Corporate Debtor annexed a copy of Mr. Murtuza Rajkotwala's Affidavit which records his involvement in the



sequence of events brought on record by the Corporate Debtor.

1. The Corporate Debtor stated that no formal settlement agreement was ever executed between the parties at the request of the Operational Creditor and Corporate Debtor. Since the original investment agreement under which the Operational Creditor had to invest approximately Rs. 20,00,00,000/- was oral, therefore, even the settlement arrived between the parties was not recorded in writing.
 - m. Even after repeated reminders, the Operational Creditor has not provided inspection of the documents relied upon by the Operational Creditor in the Present Petition.
11. The Corporate Debtor raised the following Preliminary Objections to the maintainability of the present Petition: -
- a. The alleged debt is not an 'operational debt' under the Code, because it admittedly does not arise out of the supply of goods or services to the Corporate Debtor and also that the debt claimed is time barred because it arose sometime in January 2008.
 - b. The Corporate Debtor is a solvent and profit gaining company. Therefore, it will be contrary to the object and purpose of the Code if the Present Petition is admitted since it is a settled law that the provisions of the Code shall not be used as a recovery mechanism.



- c. The Petitioner suppressed the fact that both the parties had amicably settled their disputes in presence of Mr. Murtuza Rajkotwala. Pursuant to this settlement, it was agreed between the contending parties that the alleged outstanding due of Rs.1,00,00,000/- would be written down to Rs. 40,00,000/- and this amount was to be paid in two equal tranches of Rs. 20,00,000/- each, payable in FY 2023 – 2024 and 2024 – 2025 respectively. Therefore, the Operational Creditor can only claim Rs. 40,00,000/- which is below the threshold requirement of Rs. 1,00,00,000/- prescribed under the Code.
- d. The claim of Rs. 1,00,00,000/- is based on an oral agreement sometime in January 2008. An oral agreement is required to be proved by an evidence and allowing the opposite party (Corporate Debtor) to cross examine the Petitioner's Witness. Since, this Tribunal only exercises summary jurisdiction under the provisions of the Code, the Present Petition requires a detailed trial to be conducted by a Civil Court of competent jurisdiction.

Additional affidavit filed by the Operational Creditor

12. Through the Additional Affidavit, the Operational Creditor brought on record and annexed copies of Financial Statements of the Corporate Debtor from FY 2007 – 2008 to FY 2020 – 2021 and submitted that, the amount payable to the Operational Creditor has been continuously acknowledged in the Balance Sheets of the Corporate Debtor of Rs.1,00,00,000/- until FY 2017 – 2018, dated 28.09.2018, which is valid acknowledgment for the



purpose of Section 18 of the Limitation Act, 1963. Further the period of three years for the purpose of computing the limitation as per Article 137 of the Limitation Act, 1963 expires on 11.09.2023 after giving effect to the exclusion of period between 15.03.2020 until 28.02.2022 as per order dated 10.01.2022 passed by the Hon'ble Supreme Court, whereas the Present Petition was filed on 27.09.2022, therefore, this petition has been filed within limitation.

13. The Operational Creditor relied on the Hon'ble NCLAT, Principal Bench, New Delhi judgment dated 07.02.2022 in the matter of ***BDH Industries Limited vs Mars Remedies Private Limited [Company Appeal (AT) (Ins) No. 936 of 2020]*** to support its contention that existence of an express agreement is not necessary to prove loan/disbursement under IBC.
14. The Operational Creditor further relied on NCLT, Hyderabad vide their judgement dated 11.08.2017 in the matter of ***Quinn Logistics India Private Limited vs Mack Soft Tech Pvt. Ltd [CP(IB)No.97/7/HDB/2017]*** where the Company Petition was admitted in the absence of a written agreement as the Balance Sheets of the Corporate Debtor itself showed the outstanding amount in the name of the Petitioner therein, in the Balance Sheets. The Hon'ble NCLAT, New Delhi in ***Mack Soft Tech Pvt. Ltd Vs. Quinn Logistics India Private Limited [Company Appeal (AT) (Ins.) No. 143 of 2017]*** held that it was not necessary to interfere with the judgment passed by the NCLT, Hyderabad.



Submission by the Operational Creditor

15. The Operational Creditor submitted that even write-off of a debt owed to a creditor cannot extinguish the debt. The Operational Creditor relied on a Hon'ble Supreme Court Judgment dated 11.05.2006 in the matter of **Salim Akbarali Nanji vs Union of India & Ors;** and further relied on a Hon'ble Supreme Court Judgment dated 04.02.2022 in the matter of **Consolidated Construction Consortium Ltd Vs Hitro Energy Solutions Pvt Ltd.**

Submissions by the Corporate Debtor

16. The submissions made by the Corporate Debtor are extracted in brief here in under:
- a. As per Section 238A of the Code, the provisions of the Limitation Act, 1963 are applicable to the proceedings before this Court. The Hon'ble Supreme Court in the matter of **B.K. Educational Services Pvt. Ltd. vs. Paras Gupta & Associates, (2019) 11 SCC 633**, at Para No. 42, held that Section 137 of the Limitation Act would attract for proceedings viz. applications filed under Section 7 & 9 of the Code. It was further observed that the right to sue accrues when a default occurs and if the default has occurred three years prior to the date of filing of the Application, the Application would be barred as per section 137 of the Limitation Act, 1963.
- b. The Petition being filed on 27.09.2022 is time barred. The Petition is filed after more than three years from the alleged



date of default i.e. 31.03.2018, therefore, by virtue of Article 137 the Present Petition is time barred.

- c. The Corporate Debtor submitted that the decision of Hon'ble Supreme Court Judgment in Suo Moto Writ Petition (Civil) 3 of 2020 relied on by the Operational Creditor, is completely misplaced and untenable. The Corporate Debtor submitted that as per the order, for the limitation expired 15.03.2020 to 28.02.2022 were required to file their respective pleading on or before 30.05.2022, but the Present Petition has been filed on 27.09.2022, the Petitioner should have filed the Petition before the completion of 90 days from 01.03.2022 i.e., on or before 30.05.2022.
- d. The aforesaid sum of Rs.1,00,00,000/- was advanced towards the Operation and Management of windmill. The Corporate Debtor has no nexus to the Operation and Management of the windmill, rather it is engaged in the business of trading and dealing in Land & Development.
- e. The entire claim of the petitioner being based on an 'oral arrangement' is first required to be established by evidence.
- f. The Operational Creditor had parted with Rs.1,00,00,000/- in the year 2008 and for past 14 years has not even once addressed any correspondence in this behalf.
- g. The case of advancing the money towards purported work does not fall within the definition of Operational Debt as per Section 5(21) of the IBC, 2016.



- h. The email ID as per the NeSL records does not belong to the Corporate Debtor as per the Master Data uploaded with the Registrar of Companies, therefore, the Operational Creditor is liable for punishment under Section 75 of IBC, 2016 for providing false information.
- i. The Corporate Debtor's Balance Sheet shows that the amount of Rs.15,00,000/- was written off and the Book showed an amount of Rs.85,00,000/- as on 31.03.2019 as such the debt assuming whilst denying is less than the threshold i.e. Rs.1,00,00,000/- required to maintain a Petition under the IBC, 2016, therefore, there exists no debt due and payable and the Petition is devoid of merits.

Observations & Findings

17. Heard Learned Counsel for both the parties and perused the material available on record.
18. In the Present Petition the Operational Creditor has supported its submissions with evidence by annexing the following;
 - i. Copy of Manas Vyapar Pvt. Ltd. Ledger Accounts maintained from 01.04.2008 to 31.03.2022 in the books of the Operational Creditor. The 01.04.2021 to 31.03.2022 Ledger Account's opening and closing balance was Rs.1,17,05,667/-
 - ii. Copy of Corporate Debtor's Financial Statement from Financial Year 2006 – 2007 to 2017-2018 showing the advance made by the Operational Creditor of Rs. 1,00,00,000/- under the head 'Advance Received Against



Project to be implemented'. Evidently, thereafter, the Corporate Debtor started to write off Rs.15,00,000/-

- iii. Copy of Operational Creditor's Bank Statement of HDFC Bank, Branch – Ratlam, Madhya Pradesh, having Account No. 04752320000282, reflecting disbursement of Rs.1,00,00,000/- through a cheque to 'Manas Vyapar Pvt. Ltd.' on 21.01.2008.
 - iv. Receipt of Rs.1 Crore is not disputed by the Corporate Debtor.
19. Accordingly, and in view of the above documents, the receipt of amount of Rs. 1,00,00,000/- is established and which is not in dispute.
20. The Operational Creditor issued a Demand Notice in Form – 3 dated 20.06.2022 to the Corporate Debtor for an amount of Rs. 1,00,00,000/- as on 18.06.2022. From the track report attached with the Form – 3, it is evident that the Demand Notice was served at the Registered Office of the Corporate Debtor. However, no reply was given by the Corporate Debtor. Further, the facts are not in dispute that no payment has been made by the Corporate Debtor and therefore default is also established.
21. The Corporate Debtor contended that the claim of Rs.1,00,00,000/- by the Operational creditor is based on an oral agreement sometime in January 2008. It being a settled law that an oral argument is required to be proved by evidence and allowing the opposite party to cross examine the witness. In the present case existence of an 'Oral Agreement' if at all arrived,



has not been corroborated with any subsequent event or action on the part of Operational Creditor or Corporate Debtor and has not been further established by any contemporaneous evidence. Therefore, contention of Corporate Debtor regarding the Oral Agreement merely remains as a bald assertion.

22. The Corporate Debtor contended that the debt in question is not an 'operational debt' because it does not arise out of any supply of goods or services to the Corporate Debtor. For ready reference provisions of section 5(21) are reproduced here:

*“5(21) “operational debt” means **a claim in respect of the provision of goods or services** including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”*

(Emphasis supplied)

23. As per the Demand Notice and submissions made by the Operational Creditor, the advance of Rs. 1,00,00,000/- was made to operate and manage the windmill having particulars as ENERCON made Wind Turbine Converter in a windfarm, situated in Village Gorera, near Themda Raj Temple, District Jaisalmer, Rajasthan. The 'Operations and Management' Contract was never executed by the Corporate Debtor. It is noted that the receipt of the said sum has been credited in the books of accounts of the Corporate Debtor under the caption 'Advance Received Against Project to be implemented' which has not been denied by



the Corporate Debtor. Advance towards implementation of project could nothing be other than money received for implementation of the project in future and it connotes '**services**' to be rendered towards implementation of the project. Therefore, as per the definition of 'operational debt' laid down in the Code, the debt falls in the category of operational debt. As the amount in question was paid as advance in respect of a service that is operating and managing a windmill. The Operational Creditor relied on the Hon'ble Supreme Court Judgment dated 04.02.2022, in the matter of **Consolidated Construction Consortium Ltd Vs Hitro Energy Solutions Pvt Ltd; (2022) 7 SCC 164**; wherein it was held that a debt in relation to supply of services, even though it is an advance, shall be considered as an Operational Debt. Accordingly, an amount of Rs.1,00,00,000/- which was advanced against a service to be rendered in future would fall in the ambit of definition of Section 5(21) the Code.

24. The Corporate Debtor submitted that, its Balance Sheet showed an amount of Rs.85,00,000/- as on 31.03.2019 after the amount of Rs.15,00,000/- was written-off. The amount of Rs.85,00,000/- is less than the threshold of Rs.1,00,00,000/- which is mandatory to maintain a Petition under the Code, therefore, there exists no debt due and payable to the Operational Creditor. In this regard, we feel it is necessary to refer to the Judgment of Hon'ble Supreme Court in the case of **Salim Akbarali Nanji Vs Union of India & Ors; (2006) 5 SCC 302**, the relevant part of judgement is as follows:

"17. ...The write off is only an internal accounting procedure to clean up the balance sheet, and it does



not affect the right of the creditor to proceed against the borrower to realize his dues...”

Accordingly, this Bench is of the considered view that, the unilateral write off by the Corporate Debtor is nothing but an Internal Accounting Procedure followed and in the present case, such write-off would not impact the claim of the Operational Creditor adversely.

25. The Corporate Debtor contended that the debt claimed by the Operational creditor is time barred as it arose sometime in January 2008. In this regard it is seen that the Operational Creditor has annexed copies of Corporate Debtor’s Financial Statements from Financial Year 2007 – 2008 to Financial Year 2017-2018 and has submitted that the claim of Rs.1,00,00,000/- account was continuously acknowledged in the Corporate Debtor’s Balance Sheet, subsequent to F.Y. 2017 – 2018 the Corporate Debtor started to write-off the amount of Rs.15,00,000/- annually. The details are tabulated herein under: -

Year	Head under which amount is shown	Balance in the books of Corporate Debtor
2007-2008 To 2014-2015	Advance received against project to be implemented	1,00,00,000
2015-2016 To 2017-2018	Other Loans and advances	1,00,00,000



2018-2019	Other Loans and advances	85,00,000
2019-2020	Other Loans and advances	70,00,000
2020-2021	Other Loans and advances	55,00,000

Therefore, the abovementioned entries in the books of the Corporate Debtor would serve as an acknowledgement of the debt and would renew the period of limitation accordingly.

26. As per the provisions of Section 18 of the Limitation Act, 1963, the entry of unilateral write-off of Rs. 15,00,000/- and mention of balance from the original sum received of Rs. 1,00,00,000/- would serve as a valid acknowledgement of debt. In **CIT v. Shri Vardhman Overseas Ltd., 2011 SCC OnLine Del 5599, the Delhi High Court held: (SCC OnLine Del Para 17)**

“17. In the case before us, as rightly pointed out by the Tribunal, the assessee has not transferred the said amount from the creditors’ account to its profit and loss account. The liability was shown in the balance sheet as on 31-03-2002. The assessee being a limited company, this amounted to acknowledging the debts in favour of the creditors. Section 18 of the Limitation Act, 1963 provides for effect of acknowledgement in writing. It says where before the expiration of the prescribed period for a suit in respect of any property or right, the acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom



such property or right is claimed, a fresh period of limitation shall commence from the time when the acknowledgement was so signed. In an early case, in England, in **Jones v. Bellgrove Properties Ltd.** [**Jones v. Bellgrove Properties Ltd., (1949) 2 KB 700 : (1949) 2 All ER 198 (CA)**], it was held that a statement in a balance sheet of a company presented to a creditor shareholder of the company and duly signed by the Directors constitutes an acknowledgement of the debt. In **Mahabir Cold Storage v. CIT** [**Mahabir Cold Storage v. CIT, 1991 Supp (1) SCC 402**], the Supreme Court held: (**Mahabir Cold Storage case [Mahabir Cold Storage v. CIT, 1991 Supp (1) SCC 402, SCC p. 409, para 12)**)

“12. The entries in the books of accounts of the appellant would amount to an acknowledgement of the liability to Messrs. Prayagchand Hanumanmal within the meaning of Section 18 of the Limitation Act, 1963, and extend the period of limitation for the discharge of the liability as debt.”
...In **S.C. Gupta v. Allied Beverages Co. (P) Ltd.** [**S.C. Gupta v. Allied Beverages Co. (P) Ltd., 2007 SCC OnLine Del 655 : (2009) 163 DLT 495**] and it was held that the acknowledgement made by a company in its balance sheet has the effect of extending the period of limitation for the purposes of Section 18 of the Limitation Act. In **Ambica Mills Ltd. v. CIT** [**Ambica Mills Ltd. v. CIT, 1963 SCC**



OnLine Guj 26 : (1964) 54 ITR 167], it was further held that a debt shown in a balance sheet of a company amounts to an acknowledgement for the purpose of Section 19 of the Limitation Act and in order to be so, the balance sheet in which such acknowledgement is made need not be addressed to the creditors.”

27. The conjoint reading of the judgement in the case of Salim Akbarali Nanji Vs Union of India & Ors (Supra) and CIT v. Shri Vardhman Overseas Ltd. (Supra), make it clear that the unilateral write – off by the Corporate Debtor of Rs. 15,00,000/- would not indicate that the claim amount of Rs. 1,00,00,000 has depleted in any way. After perusing the relevant paragraphs of the abovementioned judgments, it is evident that a fresh period of limitation would commence when the debt was acknowledged in the books of Accounts of the Corporate Debtor for the year ending 31.03.2021. This Balance Sheet for the year ending 31.03.2021 has been signed by the Director; Mr. Vyankatesh Kulkarni. Hence, the limitation, in this case would only expire on or after 31.03.2024, whereas the present petition was filed on 27.09.2022 and therefore is within the limitation.
28. Further, for computing the period of limitation we rely on the decision of Hon'ble Supreme Court in *Suo Moto Writ Petition (Civil) 3 of 2020*, even if the limitation is computed from 31.03.2018 until when the Corporate Debtor in its Balance Sheet has shown full outstanding of Rs.1,00,00,000/-, then the period of limitation begins from 31.03.2018 and expires on



31.03.2021. *The Hon'ble Supreme Court in Suo Motu Writ Petition (C) No. 3 of 2020* have directed that;

“5...

I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.”

(Emphasis Applied)

29. In view of the above directions of the Hon'ble Apex Court period from 15.03.2020 until 28.02.2022 shall be excluded, which in this shall have the effect of extending period of limitation until 15.03.2023, whereas this Petitioner has been filed on 27.09.2022 and therefore in within limitation.

30. The contention of the Corporate Debtor is that the limitation can only extend up to 90 days beyond 28.02.2022 is not found to be the correct application of the Directions of the Hon'ble Supreme Court and the same would have to be applied, where the



exclusion of period from 15.03.2023 to 28.02.2022 may not be possible under provisions of specific applicable law.

31. As regards the affidavit of Mr. Murtuza Rajkotwala, we are of the considered opinion that such affidavit brought on record by the Corporate Debtor to substantiate the Oral Agreement between the Operational Creditor and Corporate Debtor is neither Contemporaneous nor could be substantiated in the summary proceedings before us. The said affidavit was made and filed on 21.12.2022 immediately after the Present Petition was filed and when one the person i.e. person on behalf of the Operational Creditor who supposedly was part of such discussion is no more and has expired in May ,2020. Furthermore, the Corporate Debtor has not brought any other evidence on record to support the sequence of events and Mr. Murtuza Rajkotwala's Affidavit, therefore, the Bench is of the opinion that the submissions made based on such affidavit by the Corporate Debtor is of no consequence to the present proceedings.

32. The corporate debtor has also submitted that it is solvent and a going concern and as such cannot be entered into CIRP. In this regard it is stated that despite acknowledgement of the debt and consequent default, the Corporate debtor has not made the payment to the Operational Creditor and so much so, has not even replied to the demand notice issued under section 8 of the IBC. Under such facts, the contentions of it being solvent and is going concern cannot absolve it from the consequences under IBC, if the application filed by the operational creditor is otherwise complete and valid. We refer to the law laid down in the Hon'ble Supreme Court in the matter of **Vidarbha Industries**



Power Limited Vs. Axis Bank Limited (Civil Appeal No. 4633 of 2021) decided on 12.07.2022 stated that: -

“76. the fact that Legislature used ‘may’ in Section 7(5)(a) of the IBC but a different word, that is, ‘shall’ in the otherwise almost identical provision of Section 9(5)(a) shows that ‘may’ and ‘shall’ in the two provisions are intended to convey a different meaning. It is apparent that Legislature intended Section 9(5)(a) of the IBC to be mandatory and Section 7(5)(a) of the IBC to be discretionary. **An application of an Operational Creditor for initiation of CIRP under Section 9(2) of the IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment of the invoice has been delivered to the Corporate Debtor by the Operational Creditor and no notice of dispute has been received by the Operational Creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.**

79. As observed above, **the financial strength and nature of business of Financial Creditors and Operational Creditors being different, as also the tenor and terms of agreements/contracts with financial creditors and operational creditors, the provisions in the IBC relating to commencement of CIRP at the behest of an Operational Creditor, whose dues are undisputed, are rigid and inflexible. If dues are admitted as against the operational creditor, the corporate debtor must pay the same. If it does not, CIRP must be commenced.** In the case of a financial debt, there is a little more flexibility. The



Adjudicating Authority (NCLT) has been conferred the discretion to admit the application of the Financial Creditor. If facts and circumstances so warrant, the Adjudicating Authority can keep the admission in abeyance or even reject the application. Of course, in case of rejection of an application, the Financial Creditor is not denuded of the right to apply afresh for initiation of CIRP, if its dues continue to remain unpaid.”

(Emphasis applied)

33. Further we refer to the Hon’ble Supreme Court, in the matter of ***Innoventive Industries Limited vs. ICICI Bank and Another (2018)1 SCC 407*** dated 31.07.2017 held as follows:

*“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). **The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed***



to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.

*29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where **an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.*** (Emphasis applied)

34. The Application made by the Operational Creditor is complete in all respects as required by the law. The Debt and default in this



case is established. Further the debt in this case of Rs. 1,00,00,000/- and meets the threshold of section 4(1) of the IBC. Also the petition is filed within limitation and no pre-existing dispute has been reported. Considering the above facts and circumstances, the Tribunal admits this Petition and orders the initiation of CIRP against the Corporate Debtor.

ORDER

- i. The above Company Petition (IB)1139(MB)/2022 is **admitted** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **M/s Manas Vyapar Private Limited.**
- ii. After perusing the written consent of the Insolvency Professional, we hereby appoint **Mr. Kailash T Shah** bearing Registration No: IBBI/IPA-001/IP-P00267/2017-18/10511, having valid Authorization for Assignment up to 18.12.2024, email: *ipktshah@gmail.com*; Address: 505, 21st Century Business Center, Near World Trade Centre Ring Road, Surat, Gujrat – 395002 as an IRP, with a direction to the Operational Creditor to pay remuneration to the IRP and his expenses until the constitution of CoC.
- iii. The Financial Creditor shall deposit an amount of **Rs. 5,00,000/-** towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.



- iv. This Bench hereby directs operation of moratorium under section 14 of Insolvency and Bankruptcy Code, 2016 and prohibits the following:
- a. the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - c. any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - d. the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- v. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.



- vi. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33.
- viii. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- ix. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- x. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.
- xi. The Registry is hereby directed to communicate this order to both the parties and to the IRP immediately.



- xii. The Registry is further directed to send a copy of this order to the Insolvency and bankruptcy Board of India for their record. The Petitioner is also directed to forthwith communicate this order to the IRP.
- xiii. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.
35. The Company Petition **No. 1139 of 2022** is **admitted**.

Sd/-

**CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)**

Vaishnavi, LRA

Sd/-

**LAKSHMI GURUNG
(MEMBER JUDICIAL)**