

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

Coram: Shri Madan B. Gosavi, Member [Judicial]

Shri Virendra Kumar Gupta, Member [Technical]

C.P. (IB) No. 1040/KB/2019

In the matter of:

An application U/S. 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

And

In the matter of:

M/S Ramjee Power Construction Limited, represented by its Managing Director Ashok Kumar Singh, having its Registered office at Kumar Niwas, Bright Lane, Kokar Ranchi, Jharkhand- 834001;

... Operational Creditor

-Versus-

M/S Jharkhand Urja Sancharan Nigam Limited, having its Registered Office at SLDC Building, Kusai Colony, Doranda, Ranchi, Jharkhand- 834002;

... Corporate Debtor

Counsel/Authorised Representative appeared:

1. Pandey Neeraj Rai, Advocate
2. Anil Kumar Dubey, Pr. C.S.

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]for the Operational Creditor

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1. A.K. Srivastava, Advocate]
2. Akash Sharma, Advocate]
3. Navin Kumar, Advocate]for the Corporate Debtor

Date of hearing 11/03/2020

Order pronounced on 18/03/2020

O R D E R

Per Virendra Kumar Gupta, Member [T]

1. This is an application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as the "I & B Code"] by M/S Ramjee Power Construction Limited- the Operational Creditor for initiating Corporate Insolvency Resolution Process [hereinafter referred to as "CIRP"] against M/S Jharkhand Urja Sancharan Nigam Limited- the Corporate Debtor on the basis of an arbitration award passed in favour of the Operational Creditor on 14.02.2008, claiming an amount of Rs. 32,06,54,395.75/-.
2. It is submitted by the Operational Creditor that the arbitration award was passed after disputes arose due to delayed payment on part of the Corporate Debtor and in terms of the work agreements, the dispute was referred to arbitration and the sole arbitrator passed an award in favour of the Operational Creditor on 14.02.2008. The Operational Creditor raised a bill on the basis of the award on 02.05.2008. It is further stated that the Corporate Debtor had challenged the said award under Section 34 of the Arbitration on 15.01.2011 which was dismissed on 06.10.2018 for being time barred. The Operational Creditor raised another bill after the dismissal of the appeal dated 01.11.2018. Despite several requests and reminders the Corporate Debtor failed to pay the Operational Creditor and hence the Operational Creditor sent a demand notice under Section 8 of the I & B Code through email on 07.05.2019 and by hand on

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09.05.2019. It is further stated that the Corporate Debtor replied to the demand notice on 20.05.2019.

3. Notice of the application was delivered to the Corporate Debtor. The Corporate Debtor has filed its affidavit-in-reply on 25.10.2019. The Corporate Debtor has raised the following objections:
 - a. The application is time barred;
 - b. There is a pre-existence of dispute;
 - c. Two parallel proceedings cannot be filed on the same cause.
4. On the point of limitation the Ld. Counsel for the Corporate Debtor drew our attention to Part IV of the Form V wherein the Operational Creditor has stated that the date on which the default has occurred is 14.02.2008 and the application has been filed on 04.06.2019 and hence the application is barred by limitation. The Ld. Counsel for the Operational Creditor submitted that the amount claimed arises out of a continuous cause of action as the Corporate Debtor has made notings with respect to the claim of the Operational Creditor in 2010 and thereafter the Corporate Debtor challenged the award which was dismissed in the year 2018 hence the debt was not barred by limitation.
5. The Ld. Counsel further submitted that there is a pre-existing dispute and that the Corporate Debtor has filed Suit No. 435/2019 on 06.06.2019 before the Court of the Civil Judge (Senior Division)-1, Ranchi, the Corporate Debtor has filed a Supplementary affidavit wherein the plaint of the suit has been annexed.
6. On the point of parallel proceedings the Ld. Counsel for the Corporate Debtor has relied on paragraph 9 of an order passed by the Hon'ble NCLT, Principal Bench, New Delhi in **Deem Roll-Tech Limited vs. R.L. Steel & Energy Ltd.** [Company Application No. (I.B.) 24/PB/2017 wherein it is stated:

"9. In relation to the decree obtained from the civil court in relation to the amounts claimed, we are of the considered view that the petitioner is well within its rights to have it executed before the appropriate civil courts meant for execution and that this Tribunal cannot be converted into an executing court of the above said ex-parte order decree obtained. Further, we have categorically held in matter of Annapurna Infrastructure Pvt. Ltd. Vs. Soril Infra Resources Ltd. in

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C.P. No. (IB)-22(PB)/2017 dated 24.03.2017 that a petitioner cannot seek to avail multiple remedies in respect of the same cause of action and thus venture into forum shopping."

7. Heard the Ld. Counsel for the Operational Creditor and the Ld. Counsel for the Corporate Debtor and perused the records.

8. We shall deal with the contentions raised by the Corporate Debtor. On perusal of the proceedings of the Suit filed before the Court of the Civil Judge (Senior Division)-1, Ranchi by the Corporate Debtor it is seen that the the suit has been filed on 06.06.2019 and the demand notice was sent on 07.05.2019 through email and 09.05.2019 by hand, hence it is clear that the suit has been filed after the demand notice has been sent, the suit doesn't form a pre existing dispute.

9. Further, on the point of parallel proceedings the Hon'ble NCLAT has held in **M/s Annapurna Infrastructure Pvt. Ltd. and anr. Vs. M/s SORIL Infra Resources Ltd, Company Appeal (AT)(Insolvency) No. 32 of 2017** that pendency of execution petition of an arbitral award is no bar to file a petition under IBC.

10. With regard to the point of limitation, it is seen that there are internal notings made by the Corporate Debtor in its office files which is being referred to and relied upon as an acknowledgment of debt by the Operational Creditor. Even if the said document is taken as an acknowledgment for the purpose of section 18 of the Limitation Act, 1963, the last noting is dated 02.12.2010. If the limitation is calculated on the basis of the said date, the limitation stopped running on 01.12.2013. Apart from the said office notings no other document has been filed that acknowledges the debt within the period of limitation. The Operational Creditor has further relied on a decree dated 06.10.2018 arising out of the challenge against the Arbitral Award dated 14.02.2008 filed by the Corporate Debtor in the year 2011. The said challenge against the Arbitral Award was filed way beyond the period of limitation and was also dismissed on the very same ground. For the said reason, the challenge against the Arbitral Award cannot be considered to having saved the limitation period for the Financial Creditor. The Honourable NCLAT in para 24 in the matter of **Sh. G. Eswara Rao vs. Stressed Assets Stabilisation Fund, [Company Appeal (AT) (Insolvency) No. 1097 of 2019]**, has held as follows:

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“24. In the present case, the ‘Corporate Debtor’ defaulted to pay prior to 2004, due to which O.A. No.193 of 2004 was filed by Respondent (‘Financial Creditor’). A Decree passed by the Debts Recovery Tribunal or any suit cannot shift forward the date of default. On the other hand, the judgment and Decree passed by Debts Recovery Tribunal on 17th August, 2018, only suggests that debt become due and payable. It does not shifting forward the date of default as Decree has to be executed within a specified period. It is not that after passing of judgment or Decree, the default takes place immediately, as recovery is permissible, all the debts in terms of judgment and Decree dated 17th August, 2018 with pendent lite and future interest at the rate of 12% per annum could have been executed only through an execution case.”

11. Further, the Operational Creditor has filed office notings of the Corporate Debtor as well as a cheque that was issued in 2016, The Operational Creditor has failed to show that there is a continuous chain of events without violating the provisions of the Limitation Act, 1963. The Hon’ble Supreme Court of India by an order in **B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates, MANU/SC/1160/2018** has held that: *An application filed after the IBC came into force in 2016 cannot revive a debt which is no longer due as it is time- barred. The amendment of s. 238A would not serve its object unless it is construed as being retrospective. Otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation. It is clear from a reference to the Insolvency Law Committee Report of March, 2018, that the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of IBC.* The same issue has been dealt with in **Jignesh Shah and Ors. v. Union of India (UOI) and Ors. 2019(13)SCALE61, Sagar Sharma & Anr. v. Phoenix ARC Pvt. Ltd. & Anr. Civil Appeal No. 7673 of 2019, and Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. and Ors., MANU/SC/1301/2019.**

11. We, therefore hold that this application is time barred.

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12. C.P. [IB] No. 1040/KB/2019 is hereby dismissed on the above grounds.
13. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Sd/-
18/3/2020

[Virendra Kumar Gupta]
Member [T]

Sd/- 18/3/2020

[Madan B. Gosavi]
Member [J]

Signed on this, the 18th day of March 2020.