NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 1036 of 2020
(Arising out of Order dated 15th October, 2019 passed by National Company Law Tribunal, Mumbai Bench, in C.P. (IB) No.- 4428/NCLT/MB/2018).

IN THE MATTER OF:

Sarda Argo Oils Limited
Through its Director- Mr. Jagdish Prasad Sarada

Registered Office at:
Plot No. 655, Satamraj Village,
Gaganpahad, R.R. Dist. Telangana – 501323. **...Appellant**

Versus

Sakuma Exports Ltd.
301 A, Aurdas Chambers,
S.S. Amruthwar Lane,
Near Mahendra Towers,
Worli, Mumbai – 400013. **...Respondent**

For Appellant: **Ms. Tanu Priya Gupta, Advocate.**

For Respondent: **Mr. Amit Shankar Amist & Ms. Mithali Jain, Advocates.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Order dated 15.10.2019 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench), in CP (IB) No.- 4428/NCLT/MB/2018, whereby the Ld. Adjudicating Authority has dismissed the Section 9 Application under Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "The Code") preferred by Operational Creditor-M/s. Sarda Argo Oils Limited-the Appellant herein preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code').

2. While dismissing the Application, the Adjudicating Authority has observed as follows:

> *"8. On perusal of the documents submitted by the parties and in the facts and circumstances of the present case, this Bench is of the view that, it would be relevant to refer to the judgement passed by the Hon'ble Supreme Court in the matter of "**B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates; Civil Appeal No. 23988 of 2017 dated 11.10.2018"** wherein it is observed as follows:*
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>> *"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. "<u>The right to sue", therefore, accrues when a default occurs.</u> **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."*
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> *Therefore, in the light of above judgment, it is clear that limitation period triggers from the date of default and period of limitation for filing Applications under I&B Code is three years. Therefore, in absence of any substantial evidence to prove to the contrary, present Application filed on 26.11.2018 is clearly barred by limitation as the dates of default as mentioned in the Application are 28.02.2014, 09.04.2014, 18.07.2014, 23.12.2014,, 02.02.2015 and 09.04.2015 and period of three years has been elapsed from the said dates of default. Therefore, the Application is barred by limitation and debt of Applicant is time barred.*
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> *9. Further, it is undisputed that the claim amount is advance paid by the Applicant to the 'Corporate Debtor' for goods which were never supplied. In this regard it would be appropriate to note the decision of the Hon'ble National Company Law Appellate Tribunal in "**Roma Infrastructures India Pvt. Ltd. Vs. A.S. Iron & Steel (I) Pvt. Ltd. in Company***

Appeal (AT) Ins. No. 223 of 2019 dated 22.04.2019”, *wherein it is held that since money was paid as advance for supply of goods but the goods were not supplied, hence the Application under Section 9 was not maintainable. The relevant portion of the said Judgement is reproduced below:*

> *“Admittedly, Appellant-Roma Infrastructure India pvt. Ltd. has not supplied the goods nor provided any services to Respondent-A.S. Iron & Steel (I) Pvt. Ltd. It advanced payment of Rs. 74,32,326/- to Respondent for the supply of goods. In view of the aforesaid fact; the payment cannot be treated to be an ‘Operational Debt’ and the application under Section 9 filed by the Appellant was not maintainable. Accordingly, no relief can be granted.”*

3. It is the case of the Appellant that they had entered into Seven Sale Agreements with the Respondent-’Corporate Debtor’ between 28.02.2014 to 09.04.2015 for the import and purchase of Palmolien Oil. As per the terms of the Agreement, the Appellant has paid 10 % of the contract value as advance and the same was required to be adjusted at the time of signing of the final delivery. However, on the request of the Appellant, the adjustment of 10% advance amount at the time of delivery was deferred. It is submitted that the following amount due under various sale Agreements:

Sl No.	***Sale Agreement***	***Amount Due***
1.	*No. 7 dt. 28.02.2014*	*Rs. 1,00,10,032/-*
2.	*No. 10 dt. 09.04.2014*	
3.	*No. 9 dt. 18.07.2014*	*Rs. 96,89,647/-*
4.	*No. 10 dt. 18.07.2014*	
5.	*No. 17 dt. 23.12.2015*	*Rs. 1,21,61,400/-*
6.	*No. 22 dt. 02.02.2015*	*Rs. 8.00,109/-*
7.	*No. 04 dt. 09.04.2015*	*Rs. 2,83,77,948/-*

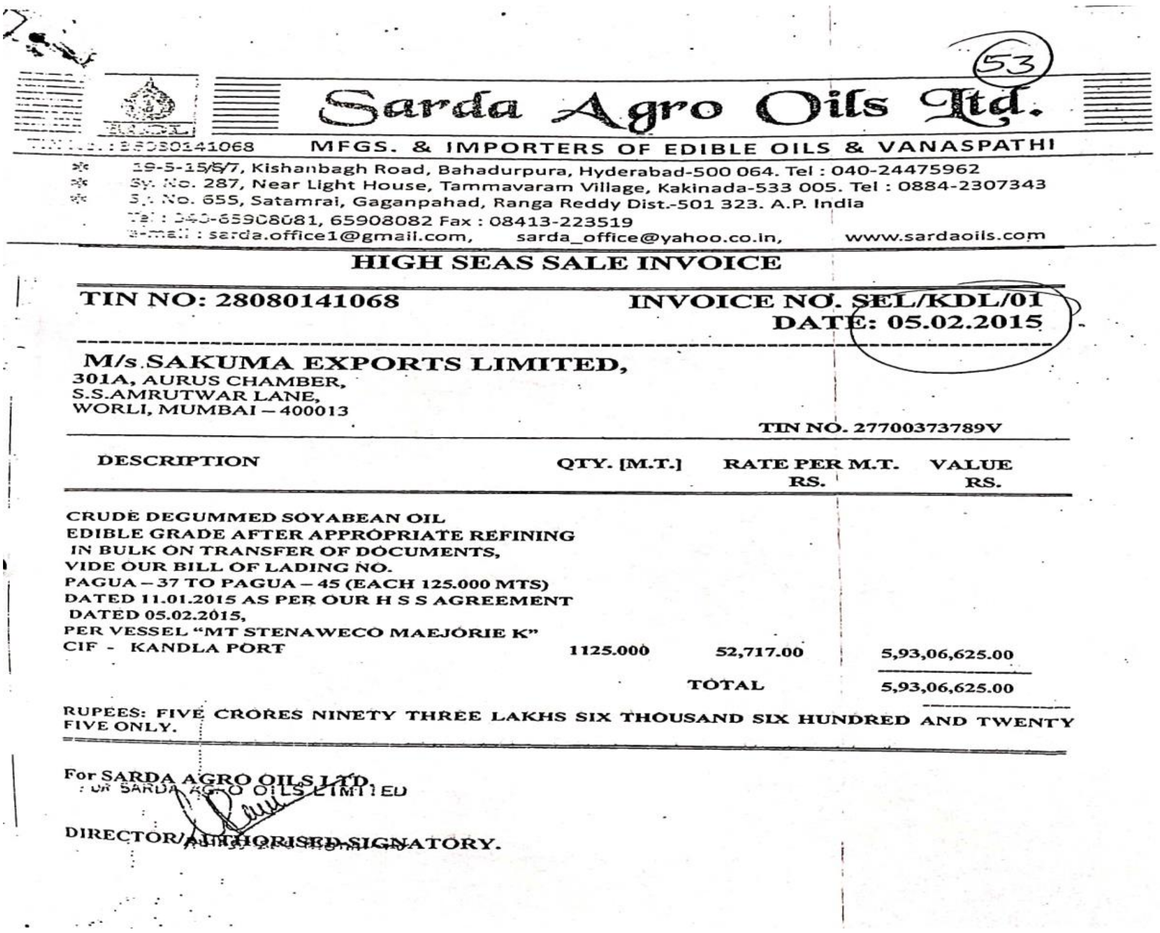
4. It is submitted that out of 1999.926 MT of Palmolien Oil, the Appellant had lifted 180.926 MT and kept remaining balance of 192.996 MT at the storage Terminal at Kakinada Port. It is contended that the 'Corporate Debtor' in connivance with NCS and others unlawfully sold the balance to a third party. It is submitted that out of total amount due, the 'Corporate Debtor' paid only Rs. 1,14,31,778/-on 16.03.2015 and the balance was still pending. The total amount payable by the 'Corporate Debtor' as per books of account of the Appellant is Rs. 10,89,13,983/-. Accordingly, the Appellant raised nine Debit Notes against the 'Corporate Debtor' for non-delivery, excess amount collected, etc. The last Debit Note was raised on 28.05.2015 for demurrage of USD 51472-Vessel. It is contended that the said dispute of demurrage ultimately led to the breaking of ties between the parties. On 13.11.2015, a Legal Notice was issued on behalf of the Appellant demanding Rs. 10,89,13,983/-. A Demand Notice dated 04.04.2018 was also issued, which is well within the three-year period form the last Debit Note raised. Subsequently, the Section 9 Application was filed on 15.10.2019.

5. It is submitted that the Adjudicating Authority without taking into consideration the last Debit Note, the Legal Notice issued and also the fact that three years has not lapsed between the last Debit Note and the Demand Notice under Section 8 of the Code, has erroneously dismissed the Section 9 Application. It is contended that the Debit Note dated 28.05.2015 was objected to by the 'Corporate Debtor', which led to the dispute.

6. It is the case of the Respondent that the Company Petition was barred by limitation as the alleged dates of default are 28.02.2014, 09.04.2014, 18.07.2014, 23.12.2014, 02.02.2015 and 09.04.2015 which are all three years prior to the filing petition which is on 28.11.2018. It is further contended that the advance payment towards supply of goods cannot be treated as 'Operational Debt' under Section 9 of the Code and also that there is a pre-existing dispute between the Appellant and the Respondent vis-à-vis the Amount claimed and further that there is a Civil Suit O.S. No. 271/2015 pending before the Additional District Judge, Kakenada. Learned Counsel for the Respondent strenuously contended that the Section 9 Application is not only barred by limitation but also deserves to be rejected on merits.

Assessment:

7. At the outset, we address to the issue as to whether the Application is within the limitation period. Learned Counsel for the Appellant placed reliance on invoice dated 05.02.2015 which is reproduced hereunder:


53

Sarda Agro Oils Ltd.

TIN NO.: 28080141068 MFGS. & IMPORTERS OF EDIBLE OILS & VANASPATHI

19-5-15/5/7, Kishanbagh Road, Bahadurpura, Hyderabad-500 064. Tel : 040-24475962
Sy. No. 287, Near Light House, Tammavaram Village, Kakinada-533 005. Tel : 0884-2307343
S.No. 655, Satamrai, Gaganpahad, Ranga Reddy Dist.-501 323. A.P. India
Tel : 040-65908081, 65908082 Fax : 08413-223519
e-mail : sarda.office1@gmail.com, sarda_office@yahoo.co.in, www.sardaoils.com

HIGH SEAS SALE INVOICE

TIN NO: 28080141068 INVOICE NO. SEL/KDL/01
DATE: 05.02.2015

M/s.SAKUMA EXPORTS LIMITED,
301A, AURUS CHAMBER,
S.S.AMRUTWAR LANE,
WORLI, MUMBAI – 400013

TIN NO. 27700373789V

DESCRIPTION	QTY. [M.T.]	RATE PER M.T. RS.	VALUE RS.
CRUDE DEGUMMED SOYABEAN OIL EDIBLE GRADE AFTER APPROPRIATE REFINING IN BULK ON TRANSFER OF DOCUMENTS, VIDE OUR BILL OF LADING NO. PAGUA – 37 TO PAGUA – 45 (EACH 125.000 MTS) DATED 11.01.2015 AS PER OUR H S S AGREEMENT DATED 05.02.2015, PER VESSEL "MT STENAWECO MAEJORIE K" CIF - KANDLA PORT	1125.000	52,717.00	5,93,06,625.00
		TOTAL	5,93,06,625.00

RUPEES: FIVE CRORES NINETY THREE LAKHS SIX THOUSAND SIX HUNDRED AND TWENTY FIVE ONLY.

For SARDA AGRO OILS LTD.
FOR SARDA AGRO OILS LIMITED

DIRECTOR/AUTHORISED SIGNATORY.

8. It is seen from the afore-noted invoice that the Operational Creditor raised an invoice on 05.02.2015 for an amount of Rs. 5,93,06,625/-. It is contended that out of their total amount due, the 'Corporate Debtor' paid only Rs. 1,14,31,778/ on 16.03.2015. It is not in dispute that a Legal Notice dated 13.11.2015 was issued and a Demand Notice under Section 8 of the Code was issued on 04.04.2018 and subsequently the Section 9 Application was filed on 26.11.2018. Even if we do not take into consideration the disputed Debit Note dated 28.05.2015, the fact still remains that the last payment was made on 16.03.2015 whereas, the Demand Notice was sent on 04.04.2018. Having regard to the fact that the Legal Notice and the Demand Notice are within three years of the last payment made i.e., 16.03.2015, we are of the considered view that the Application is well within the limitation period. However, perusal of the material on record read together with the grounds of Appeal and the Rejoinder Affidavit, it is crystal clear that there is an admitted dispute between the parties. At this juncture, it is pertinent to quote the statement/submission of the Appellant in the Rejoinder-Affidavit which is detailed as hereunder:

> *"11. As far as the Debit Note dated 28.05.2015 for demurrage of USD 51472-Vessel Mt. Donga-A Rigel V 15-01 is concerned, the same was wrongly objected by the 'Corporate Debtor', which led to the dispute. The said dispute of demurrage ultimately led to the breaking of business ties between the parties."*
>
> *(Emphasis Supplied)*

9. It is also not in dispute that a Civil Suit O.S. No. 271/2015 has been initiated between the parties. Having regard to the fact that the Impugned Order is dated 15th October, 2019 and the Appellant themselves are admitting to the existing dispute, we are of the view that this Appeal has to be decided on the touchstone of the ratio of the Judgement of the Hon'ble Apex Court in the matter of ***'Mobilox Innovations (P) Ltd.' Vs. 'Kirusa Software (P) Ltd.', (2018) 1 SCC 353,*** wherein the Hon'ble Apex Court has observed as follows:

> *"40. 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."*

10. The Appellant themselves are admitting the existence of a dispute which is neither spurious or mere bluster. Further there is a Civil Suit O.S. NO. 271/2015 filed before the Additional District Judge, Kakenada for the amount claimed to be in default and is pending adjudication.

11. We are also conscious of the fact that this Appeal was filed with a delay of 392 days which was condoned keeping in view the Judgement of the Hon'ble Supreme Court in Suo Moto Writ Petition No. 03 of 2020. We also do not find it a fit case to remand the matter to the Adjudicating Authority having regard to the fact that the Impugned Order is dated 15.10.2019 and almost three years has lapsed and additionally the Appellant themselves have admitted to the existence of a dispute.

12. Keeping in view the peculiar facts of this case, we do not find it a fit case to initiate CIRP against the Respondent and with these observations, the Appeal is disposed of.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
19th September, 2022

Basant