

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, SPECIAL BENCH (Court – I)
KOLKATA**

C.P. (IB) No. 207/KB/2022

***An application under Section 9 of the Insolvency and Bankruptcy Code,
2016***

In the matter of:

M/S SHRISTI CONSTRUCTION, a partnership firm registered under the Partnership Act, 1932, having registered office at 2/9, Nibedita Place, Benachity, Durgapur – 713213;

... Applicant/Operational Creditor

-Versus-

NADIA CONSTRUCTIONS PRIVATE LIMITED, CIN: U45400WB2008PTC123956, a company incorporated under the Provisions of the Companies Act, 2013, having its registered office at 81/2A, Raja Dinendra Street, Kolkata – 700006;

...Respondent/Corporate Debtor

Date of hearing: 17/05/2023

Date of pronouncing the order: 20/07/2023

Coram:

Smt. Bidisha Banerjee	:	Member (Judicial)
Shri Balraj Joshi	:	Member (Technical)

Appearances (via video conferencing/physically)

For the Operational Creditor :	Mr. Kalyan Kr. Bandyopadhyaya, Sr. Adv.
	Mr. Suman Sengupta, Adv.
	Mr. Dip Jyoti Chakraborty, Adv.
	Mr. Rahul Kr. Singh, Adv.
	Mr. Aditya Mondal, Adv.

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ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. Heard Ld. Senior Counsel Mr. Kalyan Kumar Bandopadhyay for the Operational Creditor.
2. Having noted that the Corporate Debtor despite repeated opportunities has failed to attend the hearing it was set *ex-parte* way back on 22nd November, 2022 and have not surfaced, since then. Accordingly, we proceed to consider the matter on the basis of available records and pleadings and the oral submissions of the Ld. Senior Counsel appearing for the Operational Creditor.
3. This application under Section 9 of IBC, 2016 read with rule 9 of IBC application (Application to Adjudicating Authority) Rules 2016 has been preferred by the applicant/Operational Creditor M/S Shristi Construction seeking to initiate CIRP process against the respondent Nadia Constructions Pvt. Ltd., being the respondent Corporate Debtor.
4. The Operational Creditor claims to be a partnership firm under the provisions of Partnership Act, 1932 having its registered office at: 2/9 Nibedita Place, Benachity, Durgapur – 713213, and engaged in the business of construction.
5. The summation and summarisation of the grievance of the applicant Operational Creditor would be the following: -
 - (a) Pursuant to an agreement for development and construction of building, dated 18.01.2010, the Operational Creditor was engaged to construct 5 residential towers for the respondent.
 - (b) The Operational Creditor claims that it has completed its job and raised diverse invoices from time to time which were duly acknowledged by the Corporate Debtor and at no point of time the Corporate Debtor raised any objection or complaint regarding the quality of construction or craftsmanship in the work carried out by the Operational Creditor.

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(c) The Operational Creditor further claims that in due acknowledgement of its liability of Rs. 116932047/- (Rupees Eleven Crore Sixty Nine Lakh Thirty Two Thousand and Forty Seven only) the Corporate Debtor has been making part payments against the bills raised. The last of such payment to the tune of Rs. 2 lakhs was made on 20.02.2020 and, therefore, the application is within time.

(d) The Operational Creditor would further claim that after giving due credit to the part payments made by the Corporate Debtor, a sum of Rs. 3,57,78,335/- (Rupees Three Crore Fifty Seven Lakh Seventy Eight Thousand Three Hundred and Thirty Five only) remained due and payable and that such liability is duly admitted by the Corporate Debtor through its various communications of which the last communication was made on 12th December, 2019.

(e) That despite series of correspondence and several reminders the Corporate Debtor has deliberately avoided service of the notice and failed to take any constructive effort to clear the outstanding dues of Operational Creditor.

(f) That the Corporate Debtor was obliged and still is to pay the said sum of Rs. 3,57,78,335/- (Rupees Three Crore Fifty Seven Lakh Seventy Eight Thousand Three Hundred and Thirty Five only), raised on 12th December, 2019 vide an appropriate bill.

(g) The Operational Creditor was therefore constrained to serve a demand notice in the prescribed form under Section 8 of the IBC Code, 2016.

(h) The Operational Creditor claims that the amount in default is Rs. 4,43,65,135.40/- (Rupees Four Crores Forty Three Lacs Sixty Five Thousand One Hundred Thirty Five and Forty Paise

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only) which is inclusive of the Principal sum of Rs. 3,57,78,335/- (Rupees Three Crore Fifty Seven Lakh Seventy Eight Thousand Three Hundred and Thirty Five only) and as such the threshold limit of Rs. 1 crore in terms of Section 4 (1) of IBC is met. Further that the date of default is 31st December, 2019 and, therefore, the petition filed in June 2022 is well within time.

6. The matter was heard from time to time and the gist of the order passed by this Tribunal on various occasions are reflected hereunder for clarity:

ORDERS PASSED BY THE NCLT

1. **11th August, 2022** – Corporate Debtor (in short “CD”) sought time to file reply.
2. **16th September, 2022** – CD sought further time to file reply.
3. **25th October, 2022** – CD was absent. Last opportunity was granted to the CD to file a reply.
4. **22nd November, 2022** – Corporate Debtor was set *ex-parte*.
5. **14th December, 2022** – Adjournment was sought by Operational Creditor.
6. **19th December, 2022** – Matter was heard, directions were given to place on record the Contract Agreement dated 18th January, 2010 to satisfy that the Petition is within the prescribed period of limitation.
7. **18th January, 2023** – Operational Creditor sought further time to comply with the Order dated 19th December, 2022.
8. **16th February, 2023** – Some inconsistency was found in regard to the receipt of the reply annexed at Page 48 and contradictory pleading made in Paragraph 2 at Page 175 of CP. Directions were issued to the Operational Creditor to clarify the position.
9. **17th March, 2023** – Matter was adjourned.
10. **19th March, 2023** – Matter was adjourned further directions were issued to clarify limitation.

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11. On **17.05.2023** list of dates furnished by Operational Creditor was accepted. Matter was finally heard out, and reserved for orders.
7. In substantiation of fact that the claim is not barred by limitation, at hearing, Ld. Senior Counsel Mr. Kalyan Kumar Bandopadhyay appearing for the Operational Creditor would hand over a list of dates and events, an extract whereof would be thus:
1. **18th January, 2010** – Parties entered into a Development Agreement for constructing five residential towers under the project name “Durgapur Residensi”. (Page 6 of CP, and Page 10 of Suppl. Affidavit)
 2. **Till June, 2012** – Construction activity was undertaken by Creditor. Invoices were raised and received. (Page 25 of CP)
 3. **25th February 2013** – A payment of Rs. 5 lakhs was made by the Debtor to the Creditor. (Page 27 & 157 of CP)
 4. **12th August, 2013** – A payment of Rs. 3 lakhs was made by the Debtor to the Creditor. (Page 27 & 154 of CP)
 5. **27th November, 2015** – The Creditor made a demand of Rs. 1,35,58,250.00 from the Debtor which was outstanding till then. (Page 40 of Suppl. Affidavit)
 6. **17th December, 2015** – The Debtor duly acknowledged the due amount mentioned in the letter dated 27th November 2015 and sought some additional time to pay the said outstanding due amount. (Page 41 of Suppl. Affidavit)
 7. **6th December, 2016** – (Page 39 of CP)
27th September, 2017 – (Page 38 of CP)
10th June, 2019 – (Page 36 of CP)
12th December, 2019 – (Page 36 of CP)
– the Creditor requested the Debtor to release the payment. Debtor did not dispute the demand of the Creditor.
 8. **30th June, 2018** – A payment of Rs. 1 lakh was made by the Debtor to the Creditor. (Page 27 & 163 of CP)

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9. **22nd August, 2018** – A payment of Rs. 50,000 was made by the Debtor to Creditor. (Page 27 & 167 of CP)
 10. **8th September, 2019** – An invoice was raised by the Creditor. (Page 26 of CP)
 11. **12th December, 2019** – The project was completed.
 12. **12th December, 2019** – Final Bill was raised by the Creditor. (Page 35 of CP) Principal Amount due was Rs. 3,57,78,335/-.
 13. **25th February, 2020** – Debtor made the last payment of Rs. 2 lakhs to the Creditor. (Page 27 & 170 of CP)
 14. **15th February, 2022** – Creditor served the notice for demand under Section 8 of IBC (Pg. 29 of CP) towards total amount of Debt of Rs. 4,43,65,135/-.
 15. **7th March, 2022** – Debtor acknowledged the receipt of notice u/s 8 and sought additional time for repayment. (Page 48 of CP)
 16. **29th June, 2022** – Application under Section 9 of the Insolvency and Bankruptcy Code was filed before this Bench.
8. Ld. Senior Counsel placing the above list of dates and events would submit that the date of default is mentioned in the CP as 31st December, 2019 and, therefore, the application preferred in the month of June 2022 is well within the three years prescribed period of limitation under Article 137 of the Limitation Act.
9. Ld. Counsel would also draw our attention to Section 238 (A) of the IBC, 2016 to contend that provisions of Limitation Act are applicable in the proceedings under IBC before the NCLT.
10. Further, Ld. Senior Counsel would place Section 18 of the Limitation Act to clarify the effect the acknowledgement in writing and submit that where an acknowledgement of liability in respect of any property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation deserves to be computed from the time when the acknowledgement was so signed.

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11. Ld. Senior Counsel would also place some judicial decisions in support of his contention that an acknowledgement in writing signed by an Authorised Representative of the Corporate Debtor gives rise to a fresh period of limitation from the date of such acknowledgement and, therefore, the last payment of 2 lakhs tendered by the Corporate Debtor is in the acknowledgement of its liability against the principal sum of Rs. 3,57,78, 335/- raised by filing bill dated. 12th December, 2019 by the OC, which acknowledgement by way of payment made on 25.02.2020 would extend the period of limitation to a further period of three years from the date of making last payment, i.e., three years from 25th February, 2020. Therefore, the present application is well within time.

In support of the contention that Section 18 of the Limitation Act is applicable in applications u/s 9 of IBC – following decisions were cited: -

- (i) **Asset Reconstruction Co. (India) Ltd. v. Bishal Jaiswal, (2021) 6 SCC 366**, [Paras 11, 12 & 13];
- (ii) **Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd., (2021) 7 SCC 313**, [Paras 64, 65 & 66];

12. Further that Condonation of Delay, if any, should be granted in terms of the judgment of Apex Court **Suo Motu Writ Petition (C) No. 3 of 2020 – In Re Extension of Limitation** – Para 5(i), thereof.

13. In addition thereof, to contend that even if pleadings of Sec. 18 are not there in the initial Application under Section 9 of IBC, it can be amended to incorporate the pleading of Section 18 of Limitation Act, the following decisions were cited:

–

- (i) **Asset Reconstruction Co. (India) Ltd. v. Bishal Jaiswal, (2021) 6 SCC 366**, [Para 57];
- (ii) **Rajendra Narottamdas Sheth v. Chandra Prakash Jain, (2022) 5 SCC 600**, [Paras 23 to 27];

- (iii) **SVG Fashions (P) Ltd. v. Ritu Murli Manohar Goyal, (2023) 2 SCC 205**, [Paras 2 to 11];

14. The applicable statutory provisions are the following:

- (i) **Section 238(A) of the IBC, 2016 envisages that: -**

Limitation.

“The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.”

- (ii) **Section 18 of the Limitation Act prescribes the following: -**

- (i) *Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement 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, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment as so signed.*

- (a) *Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.*

Explanation: For the purposes of this section, -

- (b) *an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled*

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with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(c) the word “signed” means signed either personally or by an agent duly authorised in this behalf; and

(d) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

(iii) Section 19 of the Limitation Act further prescribes that: -

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:

PROVIDED that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

Explanation: For the purposes of this section, -

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) “debt” does not include money payable under a decree or order of a Court.

(iv) Article 137 of the Limitation Act stipulates: -

That for any other application for which no period of limitation is provided elsewhere in this division.

“The Period of limitation: - Three Years.

Time from which period begins to run: - When the right to apply accrues.”

15. Judicial Precedents: -

- (i) **In B. K. Educational Services (P.) Ltd. (supra) v. Parag Gupta & Associates [2019] 11 SCC 633 – Hon’ble Apex Court held:**

“42. it is thus clear that the provision of Limitation Act are applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act, therefore, 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.

This view has been reiterated in subsequent decisions, viz.,

- (i) **In Radha Export (India) (P.) Ltd. v. K P Jayaram [2020] 10 SCC 538.**
- (ii) **In Babulal Vardhrji Gurjar v. Veer Gurjar Aluminium Industries (P.) Ltd. [2020] 15 SCC 1.**
- (iii) **Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd., [2021] 7 SCC 313.**
- (ii) **In Asset Reconstruction Company (India) Ltd. v. Bishal Jaiswal (2021) 6 SCC 366** a three Judges Bench of the Hon’ble Apex Court held *“it is clear that the principle of Section 9 of the Limitation Act is to be strictly adhered to, namely, that when time begins to run, it cannot be halted. One question that arises before this Court is whether Section 18 of the Limitation Act, which extends the period of limitation depending upon an acknowledgment of debt made in writing and signed by the corporate debtor, is also applicable under Section 238-A, given the*

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expression “as far as may be” governing the applicability of the Limitation Act to the IBC”.

*“11. The aforesaid question is no longer res integra as two recent judgments of this Court have applied the provisions of Section 14 and Section 18 of the Limitation Act to the IBC. Thus, in **Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd.**, after setting out the issues that arose in that case in para 55, and after referring to Section 238-A IBC, held (SCC paras 64-66): -*

“64. Similarly, under Section 18 of the Limitation Act, an acknowledgment of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgment is signed. However, must be made before the period of limitation expires.”

“65. As observed above, Section 238-A IBC makes the provisions of the Limitation Act, as far as may be, applicable to proceedings before NCLT and NCLAT. The IBC does not exclude the application of Section 6 or 14 or 18 or any provision of the Limitation Act to proceedings under the IBC in NCLT/NCLAT. All the provisions of the Limitation Act are applicable to proceedings in NCLT/NCLAT, to the extent feasible.”

“66. We see no reason why Section 14 or 18 of the Limitation Act, 1963 should not apply to proceeding under Section 7 or Section 9 IBC. (emphasis added)

However, Sesh Nath Singh (supra) is a matter where Hon’ble Apex Court held “There can be little doubt that section 14 applies to an application under Section 7 of the IBC. At the cost of repetition, it is reiterated that the IBC does not exclude the

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operation of section 14 of the IBC” and allowed exclusion of time in proceeding a wrong forum (under SARFAESI Act) invoking principles of Section 14 of the Limitation Act to grant relief under Section 5 of the Limitation Act, 1963.

(iii) In Laxmi Pat Surana v. Union of India 26.03.2021 it was held:

“42. Notably the provisions of the Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable. For Section 238-A predicates that the provisions of the Limitation Act shall, as far as may be, apply to the proceedings or appeals before the adjudicating authority, NCLAT, the DRT or the Debts Recovery Appellate Tribunal, as the case may be. After enactment of Section 238-A of the Code on 06.06.2018, validity whereof has been upheld by this Court, it is not open to contend that the limitation for filing application under Section 7 or 9 of the Code would not be limited to Article 137 of the Limitation Act and extension of prescribed period in certain cases could be only under Section 5 of the Limitation Act. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code”. (emphasis added)

16. The principles that can be culled out from above legal propositions would be the following: -

- (i)** The provisions of the Limitation Act have been made applicable to the proceedings under the Code.
- (ii)** Section 238-A predicates that the provisions of the Limitation Act apply to the proceedings before the adjudicating authority.
- (iii)** Article 137 of the Limitation Act prescribes period of limitation as three years which equally applies to application under Section 7 and 9 of the Code.

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- (iv) However, Limitation for filing application under Section 7 or 9 of the Code would not be limited to Article 137 of the Limitation Act.
- (v) Section 18 of the Limitation Act, which extends the period of limitation depending upon an acknowledgment of debt made in writing and signed by the corporate debtor, it also applicable under Section 238-A.
17. The list of dates and events extracted supra when considered in the aforesaid backdrop would irrefutably and indubitably establish that although the agreement was entered in the year 2010, the construction activity was undertaken in 2012, within every three years, there has been an acknowledgement on the part of Corporate Debtor of its liability to make payment against the invoices raised from the Operational Creditor's end, by making payments against such invoices. Such payments continued till 25th February, 2020 and such acknowledgment by way of payment have been made at intervals each of which fell within the three years period of the last payment which would allow a fresh period of limitation to be computed from the date of such acknowledgment, in terms of Section 18 of the Limitation Act.
18. The inevitable conclusion would be that the claim of the Operational Creditor is not barred by limitation.
19. The Petition establishes that the Corporate Debtor is in default of debt due and payable and that the default is more than the of amount stipulated under section 4 (1) of the Code. Further, as envisaged under section 9(3)(b) of the Code, an affidavit has also been filed by the Operational Creditor in support.
20. In view of the above, we make the following orders: -
- (a) The application bearing **CP (IB) No. 207/KB/2022** filed by M/S Shristi Construction, the Operational Creditor, under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Nadia Construction Private Limited, is **admitted**.

- (b) There shall be a moratorium under section 14 of the Insolvency & Bankruptcy Code, 2016, and moratorium prohibits the following: -
- (i) 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;
 - (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- (d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (e) **Mr. Goutam Mukherjee**, registration number – **IBBI/IPA-001/IP-P02696/2022-2023/14170**, email: **gm.resolution@yahoo.com**, *is hereby appointed as Interim Resolution Professional (IRP)* of the Corporate Debtor to carry out the functions as per the Code subject to

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submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code read with relevant regulations.

- (f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the Code. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (g) The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- (h) The Operational Creditor shall deposit a sum of *Rs.3,00,000/- (Rupees Three Lakh only)* with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to

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the Registry of this Court within seven days from the date of receipt of a copy of this order.

21. C.P. (IB) No. 207/KB/2022 to come up on **28.08.2023** for filing the first progress report.

22. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order signed on this, the 20th day of July, 2023.

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