

**NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

ATTENDANCE CUM ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
BENGALURU BENCH, BENGALURU, HELD ON 13.08.2020

THROUGH VIDEO CONFERENCING

CAUSE LIST

PRESENT: 1. Hon'ble Member (J), Shri Rajeswara Rao Vittanala
2. Hon'ble Member (T), Shri Ashutosh Chandra

CP/CA No.	Purpose	Sec	Name of Petitioner	Petitioner Advocate	Name of Respondent	Respondent Advocate
CP(IB) No. 151/BB/2020	For Pronouncement of orders	Sec 9 of I&B code 2016	CA Galiakotwala & Co Pvt Ltd	Legal Solutions	Vijayeshwari Cotton Mills Pvt Ltd	K Dushyanth Kumar , PCS

ADVOCATE FOR PETITIONER/s:

ADVOCATE FOR RESPONDENT/s:

ORDER

C.P (IB) No. 151/BB/2020 is rejected by separate order.

AS

MEMBER (T)

Rajeswara Rao

MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

C.P. (IB) No.151/BB/2020
U/s 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

Between:

C.A.Galiakotwala & Co. Pvt. Ltd.
R/o. at 125, Nagindas Master Road,
Fort, Mumbai – 400 001 - Petitioner/Operational Creditor

And

Vijayeswari Cotton Mills Pvt. Ltd.,
R/o. at A Block RMC yard,
Chitradurga – 577 502 - Respondent/Corporate Debtor

Date of Order: 13th August, 2020

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present (Through Video Conference):

For the Petitioner : Shri Kunal.K
For the Respondent : Shri K. Dushyanth Kumar

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P.(IB)No.151/BB/2020 is filed by C.A.Galiakotwala & Co. Pvt. Ltd. (hereinafter referred to as 'Petitioner/Operational Creditor) U/s 9 of the IBC, 2016, R/w Rule 6 of the I&B (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of Vijayeswari Cotton Mills Pvt. Ltd (Respondent/Corporate Debtor) on the ground, that it has committed default for total amount of Rs.71,06,498/- (Rupees Seventy One Lakhs Six Thousand Four



Hundred Ninety Eight only) which includes principal and interest @ 15% p.a.

2. Brief facts of the case, which are relevant to the issue in question, are as follows:

- (1) M/s. C.A. Galiakotwala & Co. Pvt. Ltd (Operational Creditor) was incorporated under the provisions of the Companies Act, 1956, having its registered Office situated at 125, Nagindas Master Road, Fort, Mumbai – 400001. The Company is in the business of trading of raw cotton, yarn and allied products. It has business operations globally and is involved in domestic trading, imports and exports of cotton.
- (2) M/s. Vijayeswari Cotton Mills Pvt. Ltd (Respondent/Corporate Debtor) was incorporated under the provisions of the Companies Act, 1956, having its registered Office situated at 'A' Block, R.M.C. Yard, Chitradurga-577502. The Company is in the business of ginning and pressing of cotton and other allied products.
- (3) The Operational Creditor entered into the following contracts with the Corporate Debtor for purchase of 600 fully pressed cotton bales of the description, at the prices and the delivery periods as follows:

Contract No.	Date	Quantity in Bales of 170 Kgs. Each	Price (Rs./Candy ex-gin)	Delivery Period
HB/10-11/001	28.07.2010	300	28,850/-	15.10.2010
HB/10-11/002	28.07.2010	300	28,850/-	15.10.2010

The contracts were specifically made subject to the Bye Laws of the Cotton Association of India, Mumbai. However, the Corporate Debtor failed and neglected to deliver the Operational Creditor contracted quality and quantity of cotton within the period of delivery.

- (4) When the Corporate Debtor failed and neglected to deliver the



cotton to the Operational Creditor even within the extended dated of delivery, the Operational Creditor wrote a letter dated 06.05.2011 to the Corporate Debtor calling upon it to deliver the contracted quality and quantity of cotton by 13.05.2011, and informed the Corporate Debtor that, in case of failure to deliver the same, the Operational Creditor would be forced to invoice back the cotton as per the Bye-Laws of cotton Association of India, Mumbai. Since, the Corporate Debtor did not tender delivery of the contracted cotton to the Operational Creditor against the said contracts, the Operational Creditor eventually invoiced back the cotton as on 13.05.2011 and intimated the Corporate Debtor about the same vide letter dated 31.05.2011, in respect of both the contracts. Further, the Operational Creditor raised and sent vide letter dated 16.08.2011 a Debit Note bearing No. C/O/MB/KR/IB/11-12/001 dated 21.07.2011 for Rs.22,87,421.40 in respect of contract No. HB/10-11/001 dated 28.07.2010 and another Debit Note bearing No.C/O/MB/KR/IB/11-12/002 dated 21.07.2011 for Rs.22,87,421.40 in respect of Contract No. HB/10-11/002 dated 28.07.2010.

- (5) It pursuant to the above letters, the Operational Creditors cautioned the Corporate Debtor that if in case of failure of payment of its referred Debit Notes with interest at the rate 15% per annum by 23rd August 2011, the Operational Creditor would be forced to initiate Arbitration proceedings against the Corporate Debtor with the said Association at the cost of the Corporate Debtor. Since the Operational Creditor did not receive any payment towards the said Debit Notes, the Operational Creditor approached the Cotton Association of India, Mumbai for Arbitration to adjudicate its claim as per the terms of Arbitration as contemplated in the said contracts. Accordingly, Arbitral Tribunal consisting of Learned Sole Arbitrator Mr. Pankaj.S.Kotak was constituted to adjudicate

the dispute on merits thereof in accordance with Rules and Bye Laws of Cotton Association of India, Mumbai. After careful consideration of all the records and facts, arguments advanced by both the parties and keeping in mind the totality of circumstances, the Learned Sole Arbitrator held that the Respondent had failed to tender delivery of the contracted cotton and as such committed a breach of said contract. Accordingly, Arbitration Award was passed on 16.09.2012 in favour of the Operational Creditor by directing the Corporate Debtor to pay to the Operational Creditor, a sum of Rs.31,40,702/- along with interest thereon @ 15% per annum from 21st July 2011 till the payment or actual realization. The Corporate Debtor was further directed to pay to the Operational Creditor cost of the Arbitral reference quantified at Rs.1,35,000/- in accordance with the Rule and Bye-Laws of Cotton Association of India, Mumbai. The Corporate Debtor was served with a Copy of the Arbitral Award on 22.11.2012 and it has not challenged the same under Section 34 of the Arbitration & Conciliation Act, 1996. Therefore, the Award has attained finality and it can be executed as a decree of Civil Court under Section 36 of the Arbitration & Conciliation Act, 1996.

- (6) It is stated that the Petitioner, through its Advocates, sent notice dated 4th September, 2019 under Form 3 and Form 4 as prescribed under IBC, 2016, by calling upon the Corporate Debtor to make payment of the unpaid amount of Rs.71,06,498/-. The Corporate Debtor was further informed that in the event of non-payment of debt within 10 days of the receipt of legal notice, the Operational Creditor may file an Application before the Adjudicating Authority for initiating a CIRP U/s. 9 of the Insolvency and Bankruptcy Code, 2016.
- (7) It is stated that the claim under the Arbitration Award is based out of the matters in relation to goods provided under



the said Contracts and have been adjudicated under the Arbitration and Conciliation Act, 1996 in the form of Arbitration Award dated 16.09.2012 and hence is in the nature of the Operational Debt. The Arbitration Award dated 16.09.2012 is executed as a decree of competent Civil Court under section 36 of Arbitration and Conciliation Act, 1996, Hence, the limitation to execute an Arbitration Award/Decree is 12 years from the date of the said Arbitration Award/Decree and therefore the claim is within the limitation period. Therefore, the Petitioner is entitled to recover the amount due and thus filed the instant Petition to initiate CIRP against the Corporate Debtor.

3. Heard Shri Kunal .K, learned Counsel for the Petitioner and Shri K. Dushyanth Kumar, learned PCS for the Respondents, **through Video Conference**. We have carefully perused the pleadings of the both the Parties and extant provisions of the extant Law, the Rules made thereunder and the law on the issue.
4. Shri Kunal K, learned Counsel for the Petitioner, after arguing the case, has subsequently filed his written gist of arguments dated 04.08.2020, by inter alia stating as follows:
 - (1) The Award in question has attained finality as it was not questioned before Court, and it is executable as a decree of Civil Court, under Section 36 of the Arbitration and Conciliation Act, 1996. Therefore, there is no existence of dispute to oppose the instant Petition. In terms of Award, interest is already started accruing from 16.09.2012.
 - (2) The outstanding amount forming the subject matter of the present Company Petition is an Operational Debt, U/s 5(21) of the Code. The claim in question emanates from the purchase order regarding supply of raw cotton and the amount adjudicated in the Arbitration Award is an Operational Debt.



The Arbitral Award is executable as a decree, U/s. 36 of the Arbitration and Conciliation Act, 1996

- (3) He has relied upon the following judgements of Hon'ble NCLAT in support of his case:
- a) *Overseas Infrastructure Alliance (India) Pvt. Ltd. V. Kay Bouvet Engineering Ltd. (Company Appeal (AT) (Insolvency) No. 582 of 2018;*
 - b) *Ahluwalia Contracts (India) Limited versus Raheja Developers Limited (Company Appeal (AT) (Insolvency) No. 703 of 2018);*
 - c) *Annapurna Infrastructure Pvt. Ltd. v. SORIL Infra Resources Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 32 of 2017.*
- (4) He has contended that in terms of extant provisions of Code, and rules made thereunder, though pendency of a suit or Arbitral Proceeding, has been termed to be 'existence of dispute', an order of a Court, Tribunal or Arbitral Panel adjudicating on the default (Commonly known as Award), has been treated to be a "record of Operational Debt".
- (5) He has asserted that the Petition preferred is within limitation. While it is settled position of law that for the purpose of limitation qua Application/Petition instituted, under the Code, Article 137 of the Code will apply, which prescribes 3 years of limitation period from the date of default. Since Demand Notice in question was sent to the Corporate Debtor on 04.09.2019, it is within 12 years period available for execution of the Arbitration Award. In this regard, he has relied upon the judgement rendered in *Synergy Property Development Service Pvt. Ltd. v. Bellona Estate Developers Ltd.*
5. Shri K. Dushyanth Kumar, learned PCS, while accepting notice for the Respondent, has strongly opposed the Petition as not maintainable either on facts or on law.
6. The main points for consideration in the instant case is whether the Petition is maintainable under the provisions of Code, as it is



filed to seek recovery by way of execution of Arbitration Award; whether it is within limitation.

7. As detailed supra, the claim in question ultimately crystalized by virtue of Arbitration Award dated 16.11.2012 in question. The Petitioner contends that the Arbitration is executable as a decree of Civil Court U/s. 36 of the Arbitration and Conciliation Act, 1996, and thus limitation prescribed under law is 12 years from the date of Award. Since Demand notice dated 04.09.2019 was issued to the Corporate Debtor under the provisions of Code, the Petition is within limitation. It is settled position of law, that any provision of Act will not give cause of action, and it will only provide remedy when cause of action arises with reference to a particular case. And period of limitation would accrue from date of cause of action with reference to facts of a particular case. In the instant case, cause of action arises when Award was passed in Arbitration No.108 of 2011-12 under By-law 38. It is not the case of the Petitioner that law of limitation is not applicable to the provisions of the Code. In any case, period of limitation cannot be counted from the date of issuance of Demand Notice in question, under the provisions of the Code. The contentions of the Petitioner that the Award deemed to be decree, can be executable within a period of 12 years and thus issuing notice would raise cause of action is baseless and not at all tenable, thus it is liable to be rejected.
8. It is also relevant to point out here that after obtaining Award in question in the year 2012, the Petitioner, for the reasons best known to it, has chosen to invoke provisions of Code only in the year 2019. Though notice was issued on 04.09.2019, by demanding the Corporate Debtor to pay amount awarded in Award, within ten (10) days from the date of receipt of copy of the Order, it has chosen to file instant Company Petition, only on 20.02.2020. The Petitioner, though remedy available under Civil Law to file



- execution Petition to execute Award, it has not initiated any proceedings till now. The Petitioner failed to explain the reasons as to why it has not initiated any proceedings before the instant proceedings.
9. It is to be stated that provisions of Code can be invoked to initiate CIRP on justified reason, and it cannot be invoked with an attempt to recover the amount awarded in Arbitration case by contending that amount awarded in Award is recoverable. It is not the case of Petitioner that it has no alternative remedy till enactment of Code. The Petitioner has not averred and substantiated that the Corporate Debtor has become insolvent. It is settled position of law that the provisions of Code cannot be invoked for recovery of alleged outstanding amount. The Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*,¹ has inter alia, held that IBC, 2016 is not intended to be substitute to a recovery forum. So far as question of limitation is concerned, it is a settled position of law that provisions of Limitation Act would be applicable to the provisions of Code. The Hon'ble Supreme Court judgment in the case of *B.K. Educational Services Private Limited Vs. Parag Gupta and Associate*² has inter alia, held that provisions of Limitation Act will apply to proceedings or appeals before NCLT/NCLAT. Section 238A of the Code make provisions of Limitation Act would apply to proceedings under the Code. The contention of Petitioner that the instant Petition is within limitation is not at all tenable and baseless.
10. For the aforesaid reasons and circumstances of the case, we are of the considered opinion that the Petitioner has filed instant Company Petition on misconceived facts and law, and it lacks

¹ (2018) 15CC 353

² 2018 SCC Online SC 1921



merits too. We have carefully perused the judgements relied upon by the Petitioner, as cited supra, and found that facts and circumstances of those cases are not applicable to the facts as available in the instant case. Hence, the Petition is liable to be rejected.

11. In the result, C.P.(IB)No.151/BB/2020 is hereby rejected. We make it clear that this Order will not come in the way of Petitioner from invoking appropriate remedy available to it, by virtue of Arbitration Award. No order as to costs.

**(ASHUTOSH CHANDRA)
MEMBER, TECHNICAL**

**(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL**

Shruthi