

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**CHENNAI BENCH****CHENNAI****COMPANY APPEAL (AT)(CH)(INSOLVENCY) No.29 OF 2022****(Appellate Jurisdiction)**

**(Arising out of Order dated 04.01.2022 passed by the
'Adjudicating Authority', National Company Law Tribunal,
Hyderabad, in CP (IB) No.237/9/HDB/2019)**

In the matter of:

Mr Srinivasula Reddy,
Former Director & Shareholder
Of M/s Teja Cement Ltd,
No.148A, Niduzuvvi,
Beside Highway Niduzuvvi,
Yerraguntla,
Cuddapah,
Andhra Pradesh 516039

Appellant

-Vs.-

1. Mr. I.V. Nanda Gopal
R/o Apt No.301,
Aditya Castle Apartments,
Plot No.141, Srinagar Colony,
Hyderabad 500073

2. Mr. P.M.V Subbarao,
1-7-12, Flat No.408
Chippendale Apartments,
Golkonda X Road,
Musheerabad,
Back Side NBK Estate,
Hyderabad 500020

Respondents

Present:

For Appellant : **Mr. P.H. Arvind Pandian, Sr. Advocate**
For Mr. Avinash Krishnan Ravi, Advocate.
Mr. G.S. Ramarao
Ms. Jerin Asher Sojan } **Advocates**
Mr. Naveen }

For Respondents : **Mr. Vijay Narayan, Sr. Advocate**
For Mr. Gowtham Kumar
Advocate- Respondent No. 1
Mr. K. Manivannan,
Advocate for Respondent No. 1
Mr. N.P. Vijay Kumar,
Mr. R. Pradeep,
Mr. Navaneethakrishanan, **Advocates for**
R-2

JUDGEMENT VIRTUAL MODE

JUSTICE M. VENUGOPAL, MEMBER (JUDICIAL)

INTRODUCTION:

The Appellant/Shareholder/Erstwhile Director/Promoter of the Corporate Debtor has preferred the instant Company Appeal (AT)(CH)(Ins) Nop.29/2022 as an ‘Aggrieved Person’ being dissatisfied with the impugned order dated 04.01.2022 in (IB) No.237/9//HDB/2019 passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Hyderabad Bench).

2. The 'Adjudicating Authority' while passing the impugned order dated 04.01.2022 in CP(IB)No.237/9/HDB/2019 (Filed by the 1st Respondent/ Applicant/Operation Creditor under Section 9 of the Code r/w Rule 6 of I&B (AAA), Rules 2016) at paragraph 39 to 43 had observed the following:-

"39. In the present case the Operational Creditor is able to demonstrate by way of several communications that there was a contract of employment, whether disputed or undisputed and there is breach thereof. Latest of such communications is e-mail dated 27.09.2016 (page 81 of the petition) addressed by M. Srinivasulu Reddy, Director to the Corporate Debtor. The relevant para reproduced below:

"I will have to discuss the points you have raised especially, the part of compensation in cash, tax implications of sweat equity vs ESOP, exit options, etc, with the company CA and CS and other promoters and see how best we can get to a mutually agreeable solution. Like I said earlier, we have agreed to compensate you 75 crores rupees for your work and contribution made in the last 6 and half years. You have also agreed to that amount. How to compensate you that amount is the domain of financial professionals and I need a little more time to see how best it could be done."

40. We are therefore, of the opinion that the petitioner's claim does commensurate with the definition provided under Section 3© of the I&B Code, 2016. Thus, there is no need to emphasize

that we have not even remotely considered the principles of equity. Thus Issue No.(iv) is answered in negative.

41. The claim of the petitioner is continuous spanning over the years. Looking at the peculiar facts of the present case, we are of the view that there is ample and irrefutable evidence of association of the Operational Creditor with the Corporate Debtor/Company and the services rendered by the Operational Creditor for the Corporate Debtor/Company while appreciating the covenants/contracts entered into between individuals in private sector, it is to be borne in mind that the perfection as it available in public sector government sector in the matter of appointments cannot be expected in private sector. Private sector is a group of individuals, which owns private-sector business. For example, an individual or group of individuals might own a sole proprietorship or LLC, while shareholders own corporations. Whereas, Governmental agencies are not owned by individuals, they are owned by and operated on behalf of the public and they are governed by written laws, which have been enacted in the constitution or in legislation. In other words, the level of perfection practised in Union Public Service Commission or Staff Selectin Commission in the matter of appointments cannot be expected in a private sector.

42. Therefore, having heard the learned counsel for both parties, considering the submissions made by the learned counsels, on perusal of the record, written submissions and the case law, we are of the view that the present application deserves to be admitted under Section 9 of the I&B Code,

2016. Accordingly, the application filed by the Operational Creditor is admitted and the Corporate Debtor is put under CIRP.

43. Shri P.M.V.Subba Rao has filed Memo dated 09.12.2021 along with Form-2, for his appointment as IRP in this matter.

and admitted the 'Application' under Section 9 of the I&B Code by declaring moratorium for the purposes referred to in Section 14 of the Code and issued necessary directions.

APPELLANT'S SUBMISSIONS:

3. Challenging the impugned order dated 04.01.2022 in CP(IB) No.237/9/HDB/2019 (Filed by the 1st Respondent/Applicant/Operational Creditor under Section 9 of the I&B Code in Form 5, under Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016) passed by the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench), the Learned Counsel for the Appellant submits that the impugned order was passed by the Adjudicating Authority, (National Company Law Tribunal, Hyderabad Bench) without taking into account several material facts, which clearly established that the 'Debt' alleged by the 1st Respondent/Operational Creditor was clearly a 'Disputed Debt' and hence, could not be the basis of admission of an 'Application' under Section 9 of the Code, 2016.

4. The Learned Counsel for the Appellants contends that the 'Adjudicating Authority' had failed to appreciate the fact that the 1st Respondent/Applicant/Operational Creditor had forged the signatures and created/fabricated the documents, to establish a 'Debt' when no 'Debt' is owed by the Corporate Debtor to the 1st Respondent/Operational Creditor/Applicant.

5. The Learned Counsel for the Appellant points out that the 'Adjudicating Authority' had overlooked the disputed letters and emails, when the same were not established by following the due procedure established by Law.

6. The Learned Counsel for the Appellant takes a stand that the 1st Respondent was acting like a 'De-facto Director' and hence, had an access to the 'Letter Head' and other documents of 'Corporate Debtor', which he had misused in gross violation of his 'Fiduciary Duty' to the 'Corporate Debtor', to concoct documents in his favour.

7. The Learned Counsel for the Appellant comes out with a plea that the 'Corporate Debtor' never used the domain name "tejacement.com" to send Emails to any person and that the 1st Respondent/Applicant/Operational Creditor had created and controlled as 'Administrator', the entire document of

tejacement.com to concoct Emails, which are used as evidence and admission to the present case.

8. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' had failed to take note of the fact that a 'Criminal Complaint' was lodged in FIR No.4/2018 on 21.12.2018 i.e. much earlier to the filing of the 'Application' under Section 9 of the Code and that the said complaint is sub-judice before the Hon'ble 6th Additional Distt. Magistrate, Hyderabad, in view of view of the 'protest petition' filed by the 'Corporate Debtor' against the 'Closure of the First Information Report' on account of 'inability' to decide complex matter of 'cybercrime'.

9. The Learned Counsel for the Appellant submits that the pendency of the 'Protest Petition' involving determination of 'Forgery' and 'Fraud' would constitute a pending legal dispute, under the tenets of the I&B Code, 2016 and, therefore, the 'Application' filed by the 1st Respondent/Operational Creditor warrants dismissal, in respect of a 'Disputed Debt'.

10. The Learned Counsel for the Appellant comes out with a plea that the Annual Report of the 'Corporate Debtor' being a 'Public Document' clearly shows that there are no employees in the

‘Corporate Debtor’ and further that the ‘Corporate Debtor’ had consistently not treated anyone, as its ‘Employee’.

11. The other argument advanced on behalf of the Appellant is that there is no Board Resolution which was produced by the 1st Respondent/applicant which actually permits the Appellant, to have agreed to allot shares for Rs.7.50 crores.

12. According to the Learned Counsel for the Appellant the ‘Adjudicating Authority’ had failed to take note of the fact that even as per the 1st Respondent, the question of allotment of shares worth Rs.7.5 crores only arises, when the ‘Authorised’ capital of the ‘Corporate Debtor’ was raised to 150 crores, which admittedly was not done, in the facts of the present case.

13. The Learned Counsel for the Appellant forcefully points out that there is no default in the present case and as such, the application under Section 9 of the Code is a premature one.

14. The Learned Counsel for the Appellant advances an argument that the 1st Respondent/Applicant is deemed to have had a ‘Constructive Notice’, in respect of the ‘Annual Reports’, ‘Articles of Association’ and ‘Memorandum of Association’ of the ‘Corporate Debtor’.

15. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' had acted like a 'Civil Court' seeking to decide substantial questions of 'Fraud and Forgery' in a 'Summary Proceedings' thereby, exceeded its 'Jurisdiction'.

16. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' acted like a 'Civil Court' in 'comparing the signatures' and rendered a 'finding' on the 'similarity of the signatures' by exercising powers, similar to that of Section 73 of the Indian Evidence Act, 1872, when no such power is vested upon it.

17. The Learned Counsel for the Appellant proceeds to point out that the failure to allot shares in respect of 'Salary' alleged to be payable cannot be treated as an 'Operational Debt' under Section 5(21) of the I&B Code.

18. The Learned Counsel for the Appellant brings it to the notice of this 'Tribunal' that the remedy under Section 58 and 59 of the Companies Act, 2013 are exclusive remedies, in respect of the 'Non-allotment of shares'.

19. The Learned Counsel for the Appellant submits that the 'issue' of failure to allot 'under the Companies Act, 2013 is barred

from consideration of the Adjudicating Authority' constituted under the Code, in view of Section 430 of the Companies Act, 2013.

20. The Learned Counsel for the Appellant raises a plea that the 1st Respondent/Applicant had not filed an 'Affidavit' of 'No Dispute' as per Section 9(5) of the I & B Code and hence, the 'Application' filed by the 1st Respondent/applicant is liable to be dismissed.

21. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' in a 'summary proceeding' cannot determine 'Damages' and further that the alleged 'Debt' is clearly barred by the 'plea of Limitation. Moreover, there cannot be any extension by an 'Acknowledgement', as per Section 19 of the Limitation Act, 1963 which is not satisfied, in the present case on hand.

22. The Learned Counsel for the Appellant submits that the concept of 'continuing cause of action' as per Section 23 of the Limitation Act 1963, is inapplicable to the 'proceedings under Section 7 and 9 of the Code'.

23. The Learned Counsel for the Appellant contends that the underlined 'Debt' alleged is not a 'Debt' or even a claim as per Section 3(6) read with Section 3(11) of the I&B Code, 2016.

24. The Learned Counsel for the Appellant submits that the Adjudicating Authority had incorrectly considered the 'Emails' relied on by the 1st Respondent/applicant as computer typed letters. Further that the said 'Emails' are disputed seriously by the 'Corporate Debtor' and the same could not have been considered, without following 'due procedure', established under Section 65(b) of the Indian Evidence Act, 1872.

25. The Learned Counsel for the Appellant prays for setting aside the impugned order dated 04.01.2022 in CP(IB) No.237/9/HDB/2019 passed by the 'Adjudicating Authority', (NCLT Hyderabad Bench) in furtherance of substantial cause of justice.

APPELLANT'S CITATIONS

26. The Learned Counsel for the Appellant refers to the judgement of this Tribunal in M. Ravindranath Reddy V. Mr G. Kishan and others (Vide Company Appeal (AT)(Ins) No.331/2019) to point out that the 'satisfaction is sine qua non' for treating any 'Debt' as an 'Operational Debt' under the I&B Code.

27. The Learned Counsel for the Appellant adverts to the judgement of this 'Tribunal' in Abhijeet Guhathakurta V Royale

Partners Investment Fund Ltd (Vide Company Appeal (AT)(Ins) No.287/2020).

28. The Learned Counsel for the Appellant relies on the judgment of the Hon'ble Supreme Court in Vashdeo Bhojwani V. Abhyudaya Cooperative Bank Ltd (Vide Civil Appeal No.11020 of 2018) to submit that Section 23 of the Limitation Act, 1963 is inapplicable to the proceedings under Section 7 and 9 of the Code.

29. The Learned Counsel for the Appellant refers to the order of this 'Tribunal' in Sanjeev Kumar V. Aithent Technologies Pvt Ltd and others reported in Manu/NL/0420/2020 to point out that the determination of the 'Default' in respect of the damages cannot be done by the 'Adjudicating Authority'.

1ST RESPONDENT'S SUBMISSIONS

30. The Learned Counsel for the 1st Respondent contends that the 1st Respondent was introduced to the Appellant, as a family friend during the year 1998 and the year 2010 the Appellant had requested the 1st Respondent/Applicant to help him with the establishment of a Cement Plant of Teja Cement Ltd (Company) since he was occupied with other business affairs at Yerraguntla

and requires some trustworthy person to handle the affairs of setting up the Plant.

31. According to the Learned Counsel for the 1st Respondent/Applicant on 01.04.2010, the 1st Respondent/Applicant had commenced work on Consultancy Basis for the company and was actively involved in the affairs of the company. As a matter of fact, the company through its letter 25.07.2011 had offered the 1st Respondent a position on the Board of the Company with a monthly salary of Rs.5 lakh. However, the Salary/Remuneration, as promised, was not paid to the 1st Respondent, from the year 2010 to 2015.

32. It is represented on behalf of the 1st Respondent that the 'Company' had addressed a letter to the 1st Respondent, that 'you would be entitled to a total remuneration of Rs.5,28,24,000/- from 01.04.2010 till 31.03.2015', which would be paid, through 'Shares of Company' and that the 1st Respondent/Applicant would be paid a monthly salary of Rs.6 lakhs w.e.f. 01.04.2015.

33. It is the version of the 1st Respondent that inspite of the letters and correspondences, the 'Company' had merely promised on another 'Email' dated 10.08.2016 that the 1st Respondent would be entitled to Rs.7,50,00,000/- as 'sweat equity shares' in

the form of remuneration and a detailed letter was also issued by the company on 28.08.2016, with a break up of amounts due to the 1st Respondent and the method of payment which runs as under:-

“1. You will receive a compensation of Rs.7,50,00,000/- (Rupees Seven Crores and Fifty Lakhs) for the work rendered from 01.04.2010 to 31.07.2016 through shares of Teja Cement Limited @ Rs.10/- (Rupees Ten) per share Calculation sheets for arriving at the above amount is annexed to this letter.

2.The shares will be issued to you as a combination of Sweat Equity and Employees Stock Options.

3.Of the total amount of Rs.7,50,00,000/-, shares for Rs.3,75,00,000/- will be issued in FY 2016-2017 and shares for Rs.3,75,00,000/- will be issued in FY 2017-2018.

4.You will be inducted as Full time Director of the Company with designated responsibilities. The salary and perks will be commensurate with other full time Directors of the Company.

5.The monthly salary and perks will be paid from the month of October, 2016. Salary for the months of August and September 2016 shall be paid in the month of October, 2016.

6.The above compensation package will be discussed by the Board Members with the Chartered Accountant and Company Secretary and appropriate Board Resolutions will be passed by 15.09.2016

I once again, would like to let you know that we truly appreciate all work you have done for M/s Teja Cement

Limited in the past and I hope that you will continue to be associated with us in the future.”

34. The Learned Counsel for the 1st Respondent takes a plea that there was no progress, even post August, 2016 and hence, the 1st Respondent through ‘Email’ dated 26.09.2016 had requested the Appellant to finalise the details of the compensation package to be paid to the 1st Respondent/Applicant, for the work done for over six years.

35. The Learned Counsel for the 1st Respondent points out that on 27.09.2016, the Appellant, through his ‘Email’ had admitted that the ‘Company’ had agreed to accommodate the 1st Respondent with Rs.7.5 crores for the work done, since April, 2010, but failed to make any payment. Hence, the 1st Respondent reiterated his demand through his Email dated 17.10.2016 and called upon the ‘Appellant’ to honour his obligations, as promised.

36. The Learned Counsel for the 1st Respondent brings it to the notice of this ‘Tribunal’ that there was no payment forthcoming from the Appellant and hence, the 1st Respondent/Applicant had decided to ‘exit from the Company’ in January, 2017 and met the ‘Appellant’ personally, to convey the said decision. In fact, the ‘Appellant’ had promised to clear the dues of the 1st Respondent,

but till April, 2017. he failed to do so and that the 1st Respondent had addressed another 'Email' on 19.04.2017 to Sh C Shekar Reddy, Director narrating all the earlier events and demanded payments for the work done between 2010 and 2016.

37. The Learned Counsel for the 1st Respondent submits that after numerous endeavours, to recover the amount 'due and payable', the 1st Respondent/Applicant, had issued a 'Demand Notice' on 05.12.2018, as per Section 8 of the Code and that the Appellant in its 'Interim Reply' dated 13.12.2018 had denied the claims made in the 'Demand Notice' in a vague manner and alleged that the supporting documents annexed to the 'Demand Notice' are also false and fabricated. Moreover, the 'Appellant' without issuing any detailed reply, through the company filed a complaint/FIR No.4/2018, on 20.12.2018, before the 'Crime Investigative Department of the Telangana State Police' and in October, 2019, the 'Criminal Case' was closed, on the ground that allegations against the 1st Respondent were not proved and 'undetectable', based on the 'Final Report' filed by the CID Police Station, Hyderabad.

38. The Learned Counsel for the 1st Respondent proceeds to point out that when there was no 'reply' for well over three months, the

1st Respondent filed an 'Application' in CP(IB) NO.237/9/HDB/2019 (under Section 9 of the Code, before the 'Adjudicating Authority', (National Company Law Tribunal, Hyderabad Bench) and the said 'Application' was admitted by on 04.01.2022, by the 'Adjudicating Authority' and 'CIRP' was ordered against the Company.

39. The Learned Counsel for the 1st Respondent submits that the 'Application/Petition' in CP(IB)No.237/9/HDB/2019 filed before the 'Adjudicating Authority' by the 1st Respondent/Applicant/Operational Creditor is well within 'Limitation Period' and that the Company had addressed a letter to the 1st Respondent/Applicant on 25.07.2011, conveying their decision, to offer the 1st Respondent/Applicant a position on the 'Board of the Company', with a monthly salary of Rs.5 lakh and further, it was stated that a sum of Rs.80,00,000/- would be paid through shares of the 'Company', for the period beginning from April, 2010 to July 2011.

40. According to the Learned Counsel for the 1st Respondent/Applicant, the 'Company' wrote a letter to the 1st Respondent, on 29.01.2015 stating that the 1st Respondent would be entitled to a total remuneration of Rs.5,28,24,000/- from 1.04.2010 till 31.03.2015 and that the said amount would be paid through

shares of Company and that the 1st Respondent would be paid a salary of Rs.6 lakhs per month, from 01.04.2015. Also that, the Company had conveyed to the 1st Respondent on 10.08.2016 that he would be entitled to Rs.7,50,00,000/- as 'sweat equity shares' in the form of Remuneration.

41. It is pointed out on behalf of the 1st Respondent that the 'Company' wrote a letter to the 1st Respondent, (with reference to earlier letters dated 25.07.2011 and 29.01.2015) wherein, it was mentioned that the 1st Respondent would receive a compensation of Rs.7.5 crores through the shares of the Company at Rs.10/- per share, issued as combination of 'Sweat Equity' and ESOP. Moreover, it was mentioned that shares for Rs.3.75 crores would be issued in Financial Year 2016-17 and shares for Rs.3.75 crores would be issued in Financial Year 2017-18. Apart from this, it was mentioned that the 1st Respondent would be designated as 'Full Time Director' with responsibilities.

42. The Learned Counsel for the 1st Respondent refers to the Email of the Appellant which was addressed on 27.09.2016 to the 1st Respondent, admitting that the Company had agreed to compensate the 1st Respondent with Rs.7.5 crores for the work and

contribution made by the 1st Respondent, since April, 2010 and assured to compensate the 1st Respondent.

43. The contention of the Learned Counsel for the 1st Respondent is that the failure of the Company to pay its dues is a 'Continuing Breach' and hence it is a 'continuous cause of action as per Section 22 of the Limitation Act 1963'. In fact, the payments were not made despite several Emails and correspondences between the year 2015 and 2017 and the Company violated its obligations continuously.

44. The Learned Counsel for the 1st Respondent points out that on 27.09.2016 there is an admission of 'outstanding dues' by the 'Appellant' and as such the right to sue for the sum in question, accrued to and in favour of the 1st Respondent and that the aspect of issuance of the 'Demand Notice' on 05.12.2018 and filing of CP(IB) No.237/9/HDB/2019 is well within three years period of limitation. In fact, the last written acknowledgement is on 27.09.2016 and from that date, the 'period of limitation' is to be taken into account, as per Section 18 of the Limitation Act, 1963.

45. The Learned Counsel for the 1st Respondent contends that the Letter of the 'Company' dated 25.07.2011 indicates that the 1st Respondent/Applicant, continued to work with the 'Company' and

was taking care of its affairs in regard to the Plant at Hyderabad right from 01.04.2010. Furthermore, the 'Company' in its reply had admitted before the 'Tribunal' that the credentials of tejacementlimited@gmail.com and the 'Letter Heads' were handed over to the 1st Respondent.

46. The Learned Counsel for the 1st Respondent submits that in various correspondences address by the other 'Companies' as early as in year 2010, the name of the 1st Respondent was mentioned, thereby establishing the fact that the transactions and communications of the 1st Respondent/Applicant/Operational Creditor are 'genuine' and in the course of 'normal business' and they were not forged or fabricated.

47. The Learned Counsel for the 1st Respondent contends that the claim of 'outstanding salary' due to the 1st Respondent/Applicant comes within the definition of 'Operational Debt' as per decisions in (1) *Suyresh Narayan Singh*, reported in MANU/NL/0238/2018(NCLAT) (2) *Kriti Paul Gera v. Devang Holdings*, MANU/NC/5483/2018 (NCLT, Delhi).

48. The Learned Counsel for the 1st Respondent comes out with an argument that the 1st Respondent/Applicant had offered 'services' to the 'Corporate Debtor', which is established from the

Appellant's documents. In fact, there is a promise to pay for the 1st Respondent's 'services' and that the quantum of compensation was also determined. Moreover, the contention of the 1st Respondent is that the 'money due' being quantified for the services rendered, in the instant case, there exists a 'Creditor-Debtor' relations between the parties and the 1st Respondent/Applicant is entitled to maintain an 'Application' under Section 9 of the Code, 2016.

49. The Learned Counsel for the 1st Respondent points out that E-Mail ID msr@tejacement.com was the official email ID of Appellant and that the documents relied on are not 'bogus/fabricated/forged' and in fact, they are genuine one in the ordinary course of business. Apart from this, in the 'Criminal Case' the creator of the domain 'tejacement.com' had stated before the 'Investigation Officer' that the domain was created by him and the Appellant and 1st Respondent together approached him for the same.

50. The Learned Counsel for the 1st Respondent submits that the 1st Respondent had shared the credential of the new Email IDs of the Appellant and his daughter with Appellant's daughter and had asked the change the 'password' in 2013. Even the 'wedding invite'

of the Appellant's daughter was served vide msr@tejacement.com. Also, the payment for 'Design and Hosting' of the Company's website www.tejacement.com in 2017 was made from the 'Company' and the same is evident from the 'Balance Sheet' filed (as on 31.03.2014).

51. The Learned Counsel for the 1st Respondent contends that in the 'Closure Report' there were clear findings that the email ID msr@tejacement.com was in Appellant's control and that all the e-mails were addressed by the 'Appellant'.

52. The Learned Counsel for the 1st Respondent submits that the findings of the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench) were based on the final report filed by the 'CID' which was filed after a detailed 'investigation' and 'enquiry'.

53. The Learned Counsel for the 1st Respondent projects and plea that as on date of the 'Demand Notice' on 05.12.2018, there were no 'Criminal Cases' filed and that the 'Appellant' filed a 'Criminal Complaint' on 21.12.2018, which could not be taken advantage based on the plea that there were 'pre-existing' disputes.

54. The Learned Counsel for the 1st Respondent submits that the 'Questions of Fraud' can be enquired to by the 'Adjudicating Authority' as per the decision of the Hon'ble Supreme Court in Embassy Property Developments v. State of Karnataka, reported in (2010) 13 SCC (308).

55. The Learned Counsel for the 1st Respondent contends that the 'instant demand' is based on compensation for the 'Services' rendered and not for any demand for repayment share capital money. Continuing further, it is the stand of the 1st Respondent that the pendency of 'protest Petition' to the closure under the Criminal Procedure Code, does not amount to a 'dispute proceeding' between the parties.

FIRST RESPONDENT'S CITATIONS:

56. The learned Counsel for the 1st Respondent/Applicant cites the Judgment of this 'Tribunal' dated 21.07.2017 in Company Appeal (AT) No. 100 of 2017 in '**Aurosagar Estates Private Limited & Ors. v. M.C. Davar Holdings Private Limited**', reported in Manu/NL/0042/2017 for the proposition that under Section 408 of the Companies Act, 2013, the 'National Company Law Tribunal' has powers, similar to that of a 'Civil Court' as mentioned in Section 424 of the Companies Act, 2013.

57. The Learned Counsel for the 1st Respondent refers to the judgment of this 'Tribunal' 26.09.2018 in '**Suresh Narayan Singh v. Tayo Rolls Limited**' reported in Manu/NL/0238/18 wherein at paragraphs 4 to 6, it is observed as under:

4. "Section 5(20) read with Section 5(21) of the 'I&B Code' makes it clear that the workmen of a Company come within the meaning of 'Operational Creditor'. If Section 8 & 9 area read with Form-5, it will be clear that the person authorized to act on behalf of the 'Operational Creditor' is entitled to file an application under Section 9. Therefore, where workmen/employees are 'Operational Creditors', the application may be made either by an 'Operational Creditor' in an individual capacity or as a joint capacity by one of them who is duly authorized for such purpose.

5. The basic scheme of the law, as enunciated in Sections 8 and 9, has been explained by the Hon'ble Supreme Court in "**Innoventive Industries Ltd. v. ICICI Bank and Anr.** MANU/SC/1063/2017; (2018) 1 SCC 407", wherein the Hon'ble Supreme Court observed:

"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 sub-section (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.”

6. *Therefore, it is clear that if there is a ‘debt’ and there is a ‘default’ which in this case has not been disputed by ‘Tayo Rolls Limited’-(‘Corporate Debtor’), the application being complete, the Adjudicating Authority should have entertained the application, instead of raising a technical ground that it was filed on behalf of 284 workmen.”*

58. The Learned Counsel for the 1st Respondent seeks in aid of the Judgment of this ‘Tribunal’ dated 03.05.2018 in “**Kriti Paul Gera v. Devang Holdings (P) Ltd.**” reported in Manu/NC/5483/2018 wherein at paragraphs 10 to 12 it is observed as under:

10. *“The “Operational debt” has been defined under Section 5(21) of the Code as follows:*

“Operational Debt” means a claim in respect of the a provision of goods or services including employment or a debt in respect of the repayment 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;

Operator creditor has also been defined at section 5(2) as follows:

“Operation Creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred’.

59. The Learned Counsel for the Respondent No. 1 relies on the decision of the Hon’ble Supreme Court in ***Embassy Property Developments Private Ltd. v. State of Karnataka & Ors.*** reported in (2020) 13 SCC 308 at spl. Page 336 wherein at paragraphs 51 to 53 it is observed and held as under:

51 Even fraudulent trading carried on by the Corporate Debtor during the insolvency resolution, can be inquired into by the Adjudicating Authority under Section 66. Section 69 makes an officer of the corporate debtor and the corporate debtor liable for punishment, for carrying on transactions with a view to defraud creditors. Therefore, NCLT is vested with the power to inquire into (i) fraudulent initiation of proceedings as well as (ii) fraudulent transactions. It is significant to note that Section 65(1) deals with a situation where CIRP is initiated fraudulently “for any purpose other than for the resolution of insolvency or liquidation”.

52. Therefore, if, as contended by the Government of Karnataka, the CIRP had been initiated by one and

the same person taking different avatars, not for the genuine purpose of resolution of insolvency or liquidation, but for the collateral purpose of cornering the mine and the mining lease, the same would fall squarely within the mischief addressed by Section 65(1). Therefore, it is clear that NCLT has jurisdiction to enquire into allegations of fraud. As a corollary, NCLAT will also have jurisdiction. Hence, fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in Section 61.

Conclusion

53. The upshot of the above discussion is that though NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arising under MMDR Act, 1957 and the rules issued thereunder, especially when the disputes revolve around decision of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence, the High Court was justified in entertaining the writ petition and we see no reason to interfere with the decision of the High Court. Therefore, the appeals are dismissed. There will be no order as to costs."

ASSESSMENT

60. Before the 'Adjudicating Authority', the 1st Respondent/Applicant/Operational Creditor in the Application (under Form 5) Part IV, 'Particulars of Operational Debt' at Sr. No.1 and 2 had observed the following:-

1.	TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE	Rs. 7,50,00,000/-, which is the amount pending pursuant to the Joint settlement memo entered into between the parties.
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DATES OF DEFAULT IN TABULAR FORM)	Rupees 7,50,00,000/- 25 th July 2011

61. The 1st Respondent/Applicant in the Application under Part V Column 'Particulars of Operational Debt (Documents, Records and Evidence of Default)' at Sl.No.6 had observed the following:

6.	PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH OPERATIONAL DEBT HAS BECOME DUE	Letters addressed by the Managing Director on behalf of the Company.
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REPLY OF CORPORATE DEBTOR

62. Before the Adjudicating Authority, the Corporate Debtor (M/s. Teja Cement Ltd.) had filed a Reply inter alia stating that the 'Corporate Debtor' was in the process of obtaining numerous permissions and approvals for the establishment of a cement factory and was also procuring lands for the same and that in the year 2010, the First Respondent / Applicant had approached the Appellant / one of the Directors and stated that he was keen and interested to invest in the cement factory being established by the Corporate Debtor. Further, as the Corporate Debtor was still under the process of securing all clearances / approvals from the necessary authorities, the Appellant / Director of the Company had informed the First Respondent / Applicant that investments in the company can be made at the time of procuring land parcels for the Company or at the time of actual establishment of the cement factory etc.

63. In fact, according to the Appellant, the First Respondent / Applicant had offered to help the Company in all its letters / communications being addressed to the regd. Office of the Company and the e.mail correspondence with the officials. Moreover, the Appellant was not having the technical know-how in

respect of creating and operating an e.mail account, the Company's e.mail tejacementlimited@gmail.com was created by the family of the Appellant and was being operated by them, on his instructions until the same was entrusted to the First Respondent / Applicant. Only upon faith and trust of the First Respondent, the Appellant had handed over the login details of the Companies e.mail account which was being used for all communications on behalf of the Company and that the first Respondent alone was operating the said e.mail account since then and none of the other Directors / Promoters/Authorised representatives of the Company had operated the said e.mail account.

64. The stand of the Appellant is that the Companies' letter heads and other documents relating and / or belonging to the Company for the purpose of communicating with the officials and others on the instructions of the Appellant were given to the First Respondent / Applicant. In fact, the First Respondent / Applicant is to utilise those letter heads and other documents only upon specific instructions of the Appellant and on some occasions, the First Respondent / Applicant had accompanied the Appellant while meeting numerous officials for the purpose of setting of the factory.

65. The Corporate Debtor took a stand before the 'Adjudicating Authority' in its reply to CP (IB) No.237/9/HDB/2019 that the First Respondent/Applicant had agreed to invest and made an investment sum of Rs. 20,00,000/- into the Corporate Debtor/Company. It is the plea of the Corporate Debtor that after transferring the amount to the Company, the first Respondent/Applicant had requested the Appellant to return the money, since he required the same for urgent financial exigency and promise to re-invest the money, within two months. Further, based on the representation of the First Respondent / Applicant, the said amount was returned to him who had not re-invested the same into the Company.

66. According to the Appellant, none of the Directors / Promoter and authorised representatives of the Corporate Debtor (including the Appellant) had ever promised or undertook to take the First Respondent/Applicant under employment of the Company. Apart from this, only upon the First Respondent/Applicant making substantial investments into the Company, the issue of allotment of shares or offering the First Respondent/Applicant about the Directorship of the 'Company' will arise.

67. It is the version of the Corporate Debtor before the Adjudicating Authority that the Company was consulting Mr. Om Prakash Jagetiya who earlier worked in senior positions for the ACC cements and Zuari Cements, who has high reputation in the cement industry, for the purpose of co-ordinating with various officials and guidance for procuring numerous approvals from different bodies. Indeed, the First Respondent/Applicant was co-ordinating with the Appellant, was taking instructions from Mr. Om Prakash Jagetiya for the purpose of addressing communications. The said Om Prakash Jagetiya had also travelled with the Appellant on many occasions for meeting the various officials in regard to the process of securing approval/licences.

68. According to the Appellant in the year 2016 the First Respondent/Applicant for the first time had demanded the Appellant that he be appointed as a Director of the Company and his salary to be fixed for his proposed employment with a Company as a Director but the same was declined by the Appellant, as the First Respondent/Applicant was never promised any employment with the Corporate Debtor and no amount can be paid to him by the Company or its Directors/Promoters/Authorised Representatives and that he was permitted to take part in the

affairs of the Company to a limited extent of helping and aiding the Appellant in getting the necessary approvals/licences as he proposed to invest substantial amounts in the Company.

69. It is represented on behalf of the Appellant that the First Respondent/Applicant had threatened the Directors of the Company that he will file false cases against the Company so that no further approvals/licences were granted.

70. The Corporate Debtor in its reply before the Adjudicating Authority had mentioned that the First Respondent/Applicant had created false letters which were annexed to the notice and also annexed to the instant application by falsifying the signature of the Appellant and by misusing the letter heads of the Company which were kept in the custody of the First Respondent/Applicant also that the e-mails relied on by the First Respondent/Applicant were also sent by him by creating and sending e-mails from msr@tejacement.com to his e.mail account, both of which were created by the First Respondent/Applicant himself and that he himself was in control of the logging credential of the said 'e.mail accounts'.

71. The Corporate Debtor had taken a stand before the 'Adjudicating Authority' in its Reply that the E-mails and letters

were created by the 1st Respondent/Applicant alleging that they were sent by the Appellant for the purpose of threatening and blackmailing the company and its Directors for declining the 1st Respondent/Applicant illegal demand for money and directorship in the company. As a matter of fact, the 1st Respondent/Applicant had not referred to any of the letters dated 25.07.2011 and 29.1.2015 which are allegedly addressed by the Appellant to the 1st Respondent/applicant, in its alleged emails dated 10.8.2016 and 26.9.2016 and also the purportedly email dated 27.09.2016, allegedly addressed by the Appellant.

72. The 1st Respondent/Applicant is seeking to misuse the provisions of the I&B Code, for his illegal gain and that no claim arises against the 'Corporate Debtor', which can be sustained in any Court of Law. Further, all such emails and letters being relied upon by the 1st Respondent/Applicant to prove an alleged 'operational debt' against the company are being investigated by the Police under FIR No.04 of 2018, filed by the Appellant.

73. It is projected on the side of the Appellant that according to the Email dated 29.1.2015 and 28.8.2016 and the emails dated 10.8.2016, 26.9.2016, 27.9.2016 and 19.4.2017, the 1st Respondent/applicant had agreed to the alleged proposal of the

Appellant, for allotment of sweat equity shares in the company, instead of payment of money to the 1st Respondent/Applicant. Therefore, according to the Appellant, the 1st Respondent/Applicant cannot now claim any sum from the company. The claim of the 1st Respondent/Applicant is barred by limitation and that it is the plea of the 1st Respondent/Applicant that the Company had employed him from April, 2010 onwards under promise to pay the amount, as is being claimed by the 1st Respondent/Applicant. The Application filed by the 1st Respondent/Applicant under Section 9 of the Code in respect of an alleged 'operational debt' is not maintainable and also it is barred by Limitation.

74. The 'Corporate Debtor' came out with a plea before the 'Adjudicating Authority' that as and when the applicant had incurred any expenditure during the approval/sanctioning processes, the company had reimbursed the 1st Respondent/Applicant for the same. The Appellant had never corresponded with the 1st Respondent/Applicant through emails at any point of time. The Company is a solvent and maintaining a strong financial background, as is evident from the Financial Statement projected before the 'Registrar of Companies'. The

purported 'operational debt' is seriously disputed in toto by the company.

75. According to the Appellant, the alleged 'debt' is clearly barred by Limitation and further that there cannot be any 'extension' by acknowledgement thereof, since the ingredients of Section 19 of the Limitation Act, 1963 were admittedly not satisfied based on the facts of the present case.

76. The 1st Respondent/Applicant's side comes out with a plea that the claim made by virtue of the 'Demand Notice' dated 05.12.2018 is a valid one and that the amount claimed to be in 'default' is Rs.7,50,00,000/- and further that the 'debt' fell due on 01.04.2010 i.e. the date of commencement of services for the Company and thereafter, on a monthly basis when the remuneration was payable on 25.07.2011, 29.01.2015, 11.08.2016, 28.08.2016, 27.09.2016 when the amounts were admitted by the Company. In fact, the 1st Respondent/Applicant/Operational Creditor refers to the letters dated 29.01.2015, 26.09.2016, 28.08.2016, 10.08.2016 and 17.10.2016 addressed to the 'Corporate Debtor' and emphatically takes a stand that the Company had admitted through its letters dated 28.08.2016 and 17.10.2016 in respect of the outstanding

sum due to the Applicant i.e. a sum of Rs.7.5 crore for the work rendered from 01.04.2010 to 31.07.2016 and out of Rs.7,50,00,000/-, shares for Rs.3,75,00,000/- would be issued in the financial year 2016-2017 and the shares for Rs.3,75,00,000/- would be issued in the Financial Year 2017-18. Further, in the letter dated 28.08.2016 addressed by the Director of the Corporate Debtor to the 1st Respondent/Applicant in Serial No.4 it was mentioned that he would be inducted as Full Time Director of the Company with designated responsibilities and in Serial No.5 of the said letter it was mentioned that 1st Respondent/Applicant would be paid the monthly salary and perk from the month of October, 2016 and that the salary for the month of August and September, 2016 shall be paid in October, 2016.

77. In the instant case, it is brought to the fore that the application in CP(IB)No.237/9/HDB/2019 was filed before the 'Adjudicating Authority' on 29.03.2019. From the date of issuance of 'Demand Notice' on 05.12.2018 and filing of the application in CP(IB) No.237/9/HDB/2019 before the 'Adjudicating Authority' on 29.03.2019, the same being within the three years limitation period. In this connection, this Tribunal relevantly points out that the Reply of the Director of the Corporate Debtor dated 27.09.2016

addressed to the 1st Respondent/Applicant shows that the 1st Respondent/Applicant had played an invaluable part in the Company and it was also mentioned that the Company had agreed to compensate him 7.5 crores Rupees for the work and contribution made by him in the last six and half years and moreover, the 1st Respondent/Applicant was required to continue to work with the same diligence and zeal and that the 'Teja Cements Ltd' needs his services now more than ever.

ACKNOWLEDGEMENT

78. It is to be pointed out that an acknowledgement within the meaning of Section 18 of the Limitation Act is an acknowledgement of liability existing during the time of acknowledgement and not of its having existed, sometime earlier as per decision Pandit Ram Hazari V. Ram Narain reported in AIR 1963 All at Page 422 at Spl Page 424. An acknowledgement ought to be clear and made with an intention to admit the jural relationship of 'Debtor' and 'Creditor' as per decision R.S. Swami Rao V. Kumaraswamy reported in 1994 (II) Madras Law Journal Page 200 at Spl Page 202. In fact, an 'acknowledgement' is to be made before the lapse of the period specified for a suit or application in respect of such property or right as per decision in Shivam Construction Company

V. Vijaya Bank, Ahmedabad reported in AIR (1997) Guj 24 at Pages 29, 30. An unqualified acknowledgement is sufficient to furnish a 'cause of action' for maintaining the suit.

79. An 'acknowledgement' may be an 'express' or an 'implied' one. An 'acknowledgement' is to relate to a current subsisting liability, although the specific character or exact nature of the said liability, may not be indicated in words as per decision State of Rajasthan V. Bundi Electric Supply Co Ltd, Bundi AIR 1971 Raj Page 24 at Spl Page 30. Once an 'admission' is made in regard to the subsisting sum, it is a clear case of an 'acknowledgement of liability', in the considered opinion of this 'Tribunal'.

80. **Continuing violation of contract**

In respect of continuing breach of contract/in the event of a continuing Tort, a new/fresh period of limitation that starts to run at every moment of the time during which, the breach of the Tort, as the case may be continues.

Also that, in respect of breach of Contract as well as to the suits based on 'Torts' Section 23 of the Limitation Act, 1963 applies and the term 'injury' in Section 23 of the Act includes a legal injury as per decision Govind Narayan Kakade V. Ranganath Gopal Baijopadhye

reported in AIR 1930 Bom. Page 572 at page 585. Furthermore, the 'act' in Section 23 of the Limitation Act will include an omission as per decision Kedarnath V. Har Govind reported in AIR 1926 Allahabad page 605 at page 609.

81. This 'Tribunal' taking note of the fact that the 'Demand Notice' was issued by the 1st Respondent/Applicant on 05.12.2018, considering the letters and emails communication filed by the 1st Respondent/Applicant and that on 27.09.2016, there is 'an admission of outstanding sum' due by the 'Appellant', it is crystalline clear that the right to sue for the sum accrued in favour of the 1st Respondent/Applicant and viewed in that perspective the filing of the Application by the 1st Respondent/Applicant in CP(IB) No.237/9/HDB/2019 before the 'Adjudicating Authority' is clearly within the three years Limitation period and this 'Tribunal' unhesitatingly comes to consequent conclusion that the 'Application' in CP(IB) No.237/9/HDB/2019, on the file of the 'Adjudicating Authority', is not barred by limitation and the point is answered accordingly.

82. It is to be pointed out that the Company's letter dated 25.07.2011 points out that the 1st Respondent/Applicant continued to work with the Company and he took care of its affairs

in regard the Plant at Hyderabad, from 01.04.2010. In fact, the 1st Respondent/Applicant was offered a position on the Board of the Company by the Company, with a salary of Rs.5 lakhs per month. Further, a sum of Rs.80 lakhs would be paid through shares of the company for the work rendered by the 1st Respondent/Applicant for the period from the April, 2010 to July, 2011 (vide letter of the Company addressed to the 1st Respondent/Applicant dated 25.07.2011).

83. Besides the above, there were email communications and letters made by the 1st Respondent/Applicant, for and on behalf of the Company, as regards the putting up of the Cement Plant, in the normal course right from the year 2010 to 2017. Even the email correspondences and letters, SMS and Whats App messages exchanged between the Appellant and 1st Respondent/Applicant clinchingly prove the involvement of 1st Respondent/Applicant, in relation to the 'company affairs'.

84. There is no two opinion of a premodial that the 1st Respondent/Applicant had offered services to the Corporate Debtor/Company, which is established from the Appellant's documents and to put it precisely, there was a promise to pay for the services and quantum of compensation was also fixed and

initially the promise made was in the nature of money and later, altered to that of shares and subsequently partly by 'shares' and partly by 'money' and they were not fulfilled. From these ground realities, the amount being quantified for the services rendered, there is clear cut creditor-debtor relationship between the parties. Therefore, the Application in CP(IB) NO.237/9/HDB/2019 filed by the 1st Respondent/Applicant before the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench) is maintainable per se in the eye of Law, as held by this Tribunal.

85. It cannot be gain said that in the impugned order in CP(IB)No.237/9/HDB/2019 dated 04.01.2022 the 'Corporate Debtor' in Annexure A-6 had mentioned the following:-

"Mr Nanda Gopal has degree in Mechanical Engineering from University of California, San Deigo, USA and Law degree from Osmania University, Hyderabad, India. After returning to India, he started and headed companies in the fields of Computer Aided Designing, IT Enabled Services, Satellite Communications, and Publishing and Mining and has vast experience in starting and successfully managing on enterprise. He has been with Teja Cement Limited for over 4 years and is actively involved in all aspects of the company."

and the aforesaid statement was mentioned by the 'Corporate Debtor' in its 'Economic Feasibility Report' pertaining to the setting

up of Cement Plant by the Company. Therefore, the 'Techno Economic Feasibility Report' is clearly in favour of the 1st Respondent/Applicant that he was in employment of the Company from the year 2011.

86. In regard to the criminal complaint given by the 'Corporate Debtor' against the 1st Respondent/Applicant which got registered as First Information Report No.04/2018 dated 21.12.2018 before the CID, TS, Hyderabad Police Station was investigated and a 'Final Report' was given to the effect that '.....as such the allegations against I.V. Nanda Gopal (1st Respondent/Applicant) are not established with clinching evidences' and that the 'case' was closed as undetectable and that an approval of the Final Report was sought for and necessary proceedings be issued.

87. Not resting with the above, the Corporate Debtor was constrained to file criminal MP No.162/2021 on the file of Court of Vith Additional Chief Metropolitan Magistrate, Hyderabad (vide Crime No.4/2018 (CID Hyderabad) in which interim order was not passed. It cannot be forgotten that when the plea of forgery was negatived, as evident from requisite authority, the contra plea taken on behalf of the 'Corporate Debtor' in regard to forgery is unworthy of acceptance by this Tribunal.

88. Moreover, the findings in the 'Closure Report' unerringly shows that the email ID msr@tejacement.com was in Appellant's control and all the emails were addressed by the Appellant (vide CID Final Report-Volume VI of the Appellant Paper Book Page No.969 at Page No.972, 973). In short, the findings rendered in the 'Closure Report' are not in favour of the Appellant and the other unfavourable circumstance hovering around the Appellant is that the creator of the domain 'tejacement.com' had stated before the 'Investigating Officer' that he had created the domain, when the Appellant and the 1st Respondent/Applicant approached him.

89. The very fact that the payment for 'Design and Hosting' of the 'Company' website www.tejacement.com on 2013 was effected from the Company, as seen from the Balance Sheet as on 31.03.2014 filed in this regard (vide Volume IV of Appellant's Paper Book in the instant appeal page No.601) is another factor which goes against the Appellant's version, as opinion by this Tribunal.

90. It cannot be brushed aside that the 'Final Report of Closure' filed by the Police in respect of Forgery was submitted after a 'due enquiry' and 'investigation process' and in fact, the 'Adjudicating Authority' had negated the plea of 'Forgery' projected on the side of the 'Appellant', solely resting upon the 'Final Report' furnished

by the Police. Therefore, it cannot be said by any stretch of imagination the ‘aspect of fraud’/forgery cannot be gone into by the ‘Adjudicating Authority’ in a summary proceeding under the I&B Code, 2016. Looking at from that perspective, the contra pleas taken on behalf of the Appellant with reference to Section 73 coupled with Section 45 of the Indian Evidence Act, 1872 are not acceded to by this ‘Tribunal’.

91. It must be borne in mind that on the date of issuance of ‘Demand Notice’ dated 05.12.2018 no criminal case filed and it is to be remembered that on 21.12.2018 a criminal complaint was filed, which cannot lead one to arrive at a conclusion that there was a pre-existing dispute.

92. When the 1st Respondent/Applicant was offered with an employment in the ‘Corporate Debtor/Company’ (notwithstanding the fact that his status was not clearly described), the claim of the 1st Respondent/Applicant in CP (IB) No.237/9/HDB/2019 before the ‘Adjudicating Authority’ is that of the ‘Operational Creditor’ as per Section 5(21) of the Code which proceeds to the following effect:-

Section 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.

93. Bearing in mind of the fact that in present case, there are several communications indicating that there was a contract of employment and in fact the 1st Respondent/Applicant's claim made in the Application in CP(IB) No.237/9/HDB/2019 before the Adjudicating Authority comes squarely within the definition of Claim as per Section 3(6) of the Code which runs to the following effect:-

Section 3(6) - "claim" means-

- (a) a right to payment, whether or not such right is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
- (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

DISPUTE

94. To be noted, a 'Dispute' will not mean 'just a denial' so to say that 'there is no payment due', because of the 'Dispute'. If the

ingredient of Section 8 of the I&B Code is construed by appreciating the 'Dispute' as a just assertion and denial, then, no applicant/operational creditor can project a petition, once the 'Corporate Debtor' issues a 'Reply Notice' by denying the claim filed by the 'Operational Creditor'.

AMBIT OF REVIEW

An 'Adjudicating Authority' while considering an application u/s 9 of the Code is to decide:-

- (a) Whether there is an 'Operational Debt' as per Section 4 of the I&B Code, 2016;
- (b) Whether the material evidence submitted along with the application indicates that the 'Debt' is due and payable and was not paid yet;
- (c) Whether there is existence of a dispute between the parties or the record of pendency of a suit or arbitration proceedings filed before the receipt of demand notice in respect of the unpaid 'Operational Debt', pertaining to the dispute.

95. An 'Adjudicating Authority' is to scrutinise the 'application' in ascertaining as to whether the dispute raises a 'plausible contention' which needs more investigation and the same is not a

mere assertion of fact or a weak plea. In fact, an 'Adjudicating Authority' is not to examine the pros and con of the merits of the matter in detail.

96. In Law, if the 'Adjudicating Authority' is satisfied that the dispute is a plausible one and projected by a party as envisaged in Section 8(2)(a), an application is liable to be rejected by the 'Adjudicating Authority' (filed by the 'Operational Creditor'), praying for the initiation of 'Corporate Insolvency Resolution Process'.

97. In the present case, although there is no formal appointment order in respect of the First Respondent/Applicant, yet the fact of the matter is that the Appellant had written to the First Respondent/Applicant appointing him to work for the Company and fixed his remuneration. The First Respondent/ Applicant in regard to the 'Approvals' to be secured for the Company had attended the meetings from the year 2010 through number of e.mails, letters and other documents and the services rendered by the 1st Respondent/Applicant squarely falls within the parameters of the definition of 'Operational Debt', as per Section 5(21) of the I&B Code, 2016. The e.mail communication addressed by the

Appellant, directed the 'Corporate Debtor' indicates that the First Respondent's contribution to the Company for six and half years and that the Company had agreed to compensate the First Respondent/Applicant a sum of Rs. 7.5 crores for the contribution and work he had performed.

98. Be that as it may, in view of the aforesaid qualitative and quantitative discussions, this 'Tribunal' keeping in mind the surrounding facts and circumstances in the instant case comes to an inevitable, irresistible and inescapable conclusion that the 'Adjudicating Authority', National Company Law Tribunal, Hyderabad had rightly admitted the application in CP (IB) No.237/9/HDB/2019 by passing the impugned order on 04.01.2022 and the same does not suffer from any material irregularity or patent illegality in the eye of law. Consequently, the Appeal fails.

RESULT

In fine, the instant COMPANY APPEAL (AT)(CH)(INS) No.29 of 2022 is dismissed. No Costs. The 'Interim Order' granted earlier by this 'Tribunal' shall stand vacated. IA No. 57/2022 is closed.

(Justice M. Venugopal)
Member(Judicial)

21st March, 2022
Bm/akc/ss

Per: KANTHI NARAHARI, MEMBER (TECHNICAL)

I have perused the Judgment passed by my learned brother and I agree other issues. However, on the aspect of limitation I am differing and taking separate view as under:

Preamble:

The Present Appeal is filed aggrieved by the order passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) in CP(IB)No.237/9/HDB/2019 filed Under Section 9 of IBC, 2016 whereby the Adjudicating Authority admitted the Application vide order dated 04.01.2022 filed by the First Respondent herein.

Brief Facts:**Appellants Submissions:**

2. The Learned Senior Counsel appearing for the Appellant submitted that the Appellant is a shareholder, Former Director and Promoter of the Corporate Debtor preferred the present Appeal against the order passed by the Adjudicating Authority, wherein the Corporate Debtor was admitted into CIRP (Corporate Insolvency Resolution Process).

3. It is submitted that the first Respondent herein preferred an Application under Section 9 of the I & B Code, 2016, alleging that he was an employee of the Corporate Debtor and claiming that a default has occurred in payment of a sum of Rs. 7,50,00,000/- (Seven Crore Fifty Lakh Rupees) to the first Respondent here in, and also claimed that the Corporate Debtor failed to allot sweat equity shares.

4. It is submitted that the Corporate Debtor was incorporated in the year 2007 for the purpose of setting up a cement factory in Yerraguntla Mandal, YSR Kadapa District, Andhra Pradesh and is a closely held Company and the shares of the Corporate Debtor are only subscribed by family and Close Friends of the Directors/Promoters of the Corporate Debtor.

5. It is submitted that the first Respondent herein approached the Appellant stating that he is keen and interested to invest in the Cement factory being established by the Corporate Debtor. As the first Respondent had shown interest in making investments into the Corporate Debtor and he was known to the Appellant through family friends since long time, the Appellant reposed immense trust in the first Respondent. The first Respondent was based in Hyderabad, had offered to help the Corporate Debtor in all its

official Communications letters being addressed to the Registered Office to the Corporate Debtor and the e-mails correspondence with the Officials. The Appellant reposing utmost faith and trust on the first Respondent handed over the login details of the Corporate Debtor's e-mail account; tejacementlimited@gmail.com which was being used for all official communications on behalf of the Corporate Debtor.

6. It is submitted that the first Respondent was keen on making substantial investments in the Corporate Debtor and at the time of such investments he was to be offered shares and directorship of the Corporate Debtor depending upon the investments being made by him but not under any other circumstances. Since no investment has been made the question of allotment of any shares or the directorship in the Corporate Debtor did not arise.

7. The Learned Senior Counsel submitted that in the year 2016 the first Respondent had for the first time demanded the Appellant that he be appointed as a Director of the Corporate Debtor and his salary to be fixed for his proposed employment with the Corporate Debtor as a Director. However, the Appellant declined the same and never promised any employment with the Corporate Debtor. However, the first Respondent changed the login credentials of the

e-mail account that was created by the Corporate Debtor and has not handed over the letter heads and other materials pertaining to the Corporate Debtor and started using another e-mail address viz srinivasareddymoole@gmail.com from July, 2016 onwards for the purpose of handling all e-mail correspondence on behalf of the Corporate Debtor.

8. It is submitted that the Appellant had addressed an e-mail dated 14.11.2017 to the Commissioner of Industries and Commerce informing them that all further correspondence to be addressed to the Corporate Debtor Company i.e. s@tejacement.in and srinivasa@tejacement.in.

9. It is submitted that the first Respondent herein sent the demand letter notice dated 05.12.2018 under the I & B Code, 2016 stating that the Corporate Debtor is due and liable to pay him a sum of Rs. 7,50,00,000/-. The Corporate Debtor addressed a Reply dated 13.12.2018 denying all the allegations and claims being made by the first Respondent.

10. It is submitted that the first Respondent had obtained a domain name tejacement.com without the knowledge and authorisation of the Corporate Debtor or its Director and also created its e-mail address purportedly to be that of the Appellant

Mr. M. Srinivasula Reddy for the purpose of addressing e-mails to himself from the said e-mail account and claiming that the same have been sent by the Appellant for the purpose of establishing his illegal and falsified claims.

11. It is submitted that the Corporate Debtor or any of the Directors or having any knowledge of the domain name tejacement.com and the same was created by the first Respondent without any authorisation. In this regard, the Appellant filed a Criminal complaint against the first Respondent for all the Criminal Acts and the same was registered by the CID Police vide FIR No. 04/2018 dated 21.12.2018. The said FIR was closed by filing a Final Report against which a Protest Petition is filed and pending before the Sixth Additional Chief Metropolitan Magistrate at Hyderabad in Criminal MP No. 162 of 2021.

12. It is submitted that the debt alleged to be due and payable is disputed for being false, fabricated and based on documents that are falsified and concocted for the purpose of setting up the present claim against the Corporate Debtor.

13. It is submitted that neither the Corporate Debtor nor any of its Directors, Promoters have ever promised and/or undertaken to pay any amounts to the first Respondent. The Learned Counsel

submitted that the Corporate Debtor has not employed any person till date which is evident from the annual financial statement of the Company. The first Respondent claims to have closely worked in the Corporate Debtor, however, he cannot after a lapse of 8 years claimed that the Corporate Debtor has employed him is false and concocted. The first Respondent failed to produce the income tax returns to show that he is under employment of the Corporate Debtor.

14. The Learned Senior Counsel submitted that the Application itself is barred by limitation and Learned Adjudicating Authority ought not to have admitted the Application. The Corporate Debtor filed a detailed Reply before the Adjudicating Authority setting out various defences viz that the entire documentation for the alleged liability is forged fabricated. The Corporate Debtor had no employees however the contention of the first Respondent that he was an employee and a de facto Director runs contrary to several document. In view of factual disputes and discrepancies which clearly constitute a dispute for the purpose of I & B, Code and an Application under Section 9 cannot be admitted. Non-allotment of shares cannot be a claim under the code and does not constitute

a debt, let alone an Operational debt under the tenants of the Code.

15. As stated supra the claim is barred by limitation as the date of default as per the Application is 25.07.2011, whereas the first acknowledgment is 29.01.2015 i.e. much after 3 years from the date of default. Therefore, any acknowledgement had to be inconsonance with Section 19 of the Limitation Act, 1963 which is admittedly not the case herein. Therefore, the Application under Section 9 is barred by limitation.

16. It is submitted that the claim of the first Respondent that the Corporate Debtor had not allotted shares is concerned, the non-allotment of shares can only be under Section 58 and 59 of the Companies Act, 2013 and not under Section 9 of the Code. Therefore, the Adjudicating Authority cannot decide the issues pertaining to non-allotment of shares which is clearly barred under Section 430 of the Companies Act, 2013.

17. The Learned Counsel further submitted that the Adjudicating Authority cannot determine the substantial questions of fraud and forgery in a summary proceeding thereby grossly exceeded its jurisdiction. The Hon'ble NCLT failed to take note that the underlying alleged debt is not a debt or even a claim as per Section

3 (6) read with Section 3 (11) of the Code. The Hon'ble NCLT failed to take note that whether failure to allot shares in respect of salary alleged to be payable can be treated as an Operational Debt under Section 5 (21) of the Code. It is submitted that Section 58 and 59 of the Companies Act, 2013 are exclusive remedies in respect to non-allotment of shares and whether such non-allotment can be considered as a default.

18. The Learned Senior Counsel also raised various grounds in support of the Appeal and also relied upon various Judgments in support of his case.

19. The Learned Senior Counsel submitted that the Adjudicating Authority failed to consider the facts and law as stated above in entertaining and admitting the Application under Section 9 of the I & B Code, 2016 thereby causing severe prejudice to the Corporate Debtor which is a solvent Company.

20. In view of the reasons as stated above the Learned Senior Counsel prayed this Bench to allow the Appeal by setting aside the impugned order dated 04.01.2022 passed by the Adjudicating Authority (NCLT, Hyderabad Bench, Hyderabad).

First Respondent's Submissions

21. The Learned Counsel for the Respondent contended that this Respondent was introduced to the Appellant as a family friend in 1998 and in 2010 the Appellant requested this Respondent to help him with the establishment of a cement plant of Teja Cement Limited (Company) since he was occupied with other business affairs at yerraguntla.

22. It is submitted that the first Respondent commenced his work on 01.04.2010 on consultancy basis for the Company and was actively involved in affairs of the Company. The Company vide its letter dated 25.07.2011 offered this Respondent a position on the board of the Company with a monthly salary of Rs. 5,00,000/-. The remuneration as promised never paid to the Respondent from 2010-2015. On 29.01.2015 the Company addressed a letter that he would be entitled to a total remuneration of Rs. 5,28,24,000/- from 01.04.2010 till 31.03.2015 which would be paid through shares of Company and he would be paid a monthly salary of Rs. 6,00,000/- w.e.f. 01.04.2015. Thus, the first Respondent is entitled to Rs. 7.5 Crores as sweat equity shares in the form of remuneration and in that regard a detailed letter was also issued by the Company on 28.08.2016.

23. It is submitted that the Appellant admitted vide e-mail dated 27.09.2016 to compensate this Respondent with Rs. 7.5 Crores for the Work done since April, 2010 but failed to make any payments. This Respondent decided to exit the Company in January, 2017, however, the Appellant promised to clear the dues but failed to do so. The Respondent issued demand notice on 05.12.2018 under Section 8 of I & B Code, 2016 however, the Appellant vaguely denied the claims as made by him vide their Reply dated 13.12.2018 and alleged that the supporting documents annexed to the demand notice are false and fabricated. In view of default in payment this Respondent proceeded to file Application under Section 9 of the I & B Code, 2016 before the Adjudicating Authority.

24. In response to the limitation it is submitted that the Corporate Debtor on 25.07.2011 conveyed their decision to offer this Respondent a position on the Board of the Company within a monthly salary of Rs. 5,00,000/- and an amount of Rs. 80,00,000/- would be paid through shares for the period from April 2010 to July 2011. Further, the Corporate Debtor vide its letter dated 29.01.2015 stated that this Respondent would be entitled to a total remuneration of Rs. 5,28,24,000/- from

01.04.2010 till 31.03.2015 and the said amount would be paid through shares of the Company and also stated that he would be paid a monthly salary of Rs. 6,00,000/- w.e.f. 01.04.2015. Further, the Corporate Debtor vide e-mail dated 10.08.2016 conveyed that this Respondent would be entitled to Rs. 7.5 Crore as sweat equity shares in the form of remuneration. It is submitted that the failure to pay the dues is a continuing breach and as such is a case of continuing cause of action within Section 22 of limitation Act, 1963.

25. It is submitted that with regard to the contention that the communications/documents are forged is concerned, this Respondent establishes that the transaction and communications are genuine in the course of normal business and not forged or fabricated. From the correspondences this Respondent establishes the active involvement in the affairs of the Company and represented the Company before various clients/persons and Government Authorities thereby strengthens the stand that there exist an employer and employee relationship since he was in the employment in the Corporate Debtor and had provided services which clearly comes within the definition of Operational Creditor

and the outstanding salary due to him comes within the definition of Operational debt.

26. With regard to the allegation that the documents are forged fabricated is concerned it is submitted that all the communications of the Company sent by this Respondent sufficiently establish that the transactions and communications are genuine and in the course of normal business and not forged or fabricated. Even the CID Report are clear to prove that the documents were not forged and the e-mail id msr@tejacement.com was in the exclusive control of the Appellant. It is submitted that the IBC, 2016 being a complete code in itself and the Adjudicating Authority as per Section 5 (1) of IBC being the NCLT has powers under Section 408 of the Companies Act, 2013 akin to that of a Civil Procedure Code as prescribed under Section 424 of the Companies Act, 2013. Even the questions of fraud also can be enquired into by the NCLT as held by the Hon'ble Supreme Court in '*Embassy Property Development vs. State of Karnataka (2020 13 SCC 308)*'. It is submitted that in any event as on date of demand notice dated 05.12.2018 there were no criminal cases filed it was only an after-thought the Appellant filed a criminal complaint on 21.12.2018.

Therefore, the Appellant cannot take the advantage stating that there have been pre-existing dispute.

27. It is submitted that the claim of this Respondent is an Operational debt and not for allotment of shares. It is evident from the letters of the Corporate Debtor whereby it is stated that this Respondent would be entitled to a remuneration of Rs. 7.5 Crores which the Company failed to pay. The Learned Counsel further submitted that the reliance placed by the Appellant on '*Seshagiri Gopala Krishnan vs. Essilor India Pvt. Ltd.*' is not relevant to the present facts of the case. It is submitted that the claim made by the Respondent based on compensation for services rendered and not for any demand for repayment of share application money. The learned Counsel also relied upon the Judgments in support of his case. He prays the Bench to dismiss the Appeal as devoid of any merits.

Analysis/Appraisal

28. After analysing the pleadings, documents and citations relied upon by the respective parties the only issue felt for consideration and need to be addressed is.

Whether the application filed by the first Respondent herein is within the period of limitation or barred by limitation?

Now I deal with the issue:

29. The Adjudicating Authority as at point no.1 framed issue whether the application is barred by law of limitation. In answer to the said point the Adjudicating Authority was of the view that the Appellant categorically admitted while letters dated 28.08.2016 and 17.10.2016, the outstanding dues of the first Respondent namely an amount of Rs. 7.5 Crores towards salary and shares worth Rs. 3.75 lakhs and observed that the Application having been filed on 29.03.2019 is well within the period of limitation as provided under Article 137 of the Limitation Act and further observed that the claim as made under the demand notice as well as the application are within the period of limitation.

- (i) The Observation of the Adjudicating Authority in computing the period of limitation for the purpose of maintaining the application is completely contrary to the facts and law.
- (ii) The Adjudicating Authority in its order at paragraph 2 (A) stated that the Operational Creditor relied upon the documents purported to have been issued by the Respondent Company namely letter dated 25.07.2011 wherein the content of the letter stated to be that the

first Respondent had started working with the Appellant Company from 01.04.2010 onwards and the Applicant was offered Rs. 5,00,000/- as monthly salary. Further at paragraph 2 (B) of the order, the Adjudicating Authority referred to a letter dated 29.01.2015 wherein the content of the letter stated to be that the remuneration payable to the Applicant for the period from 01.04.2010 to 31.05.2015 was Rs. 5,28,24,000/-. Further, the Adjudicating Authority at paragraph (C) quoted a letter dated 28.08.2016 wherein the contents of the said letter is that the first Respondent will receive a remuneration of Rs. 7.5 Crores for the work rendered by the first Respondent from 01.04.2010 to 31.07.2016 through shares of the Corporate Debtor at Rs. 10 per share. It is also stated in the letter that the shares will be issued to the first Respondent as a combination of sweat equity and Employee Stock Options.

- (iii) Having taken the above letters for the purpose of deciding the issue that the first Respondent rendered services to the Corporate Debtor however, omitted the dates on which the purported letters issued by the

Corporate Debtor. When the Adjudicating Authority relying upon the contents of the letter, it should have also taken into consideration the dates on which the letters have been issued for the purpose of limitation. The Adjudicating Authority cannot omit the same and take the dates i.e. the dates subsequent to the letter dated 29.01.2015 and the date of demand notice 05.12.2018 and filing of the Application before the Adjudicating Authority and observed that the same is well within the limitation on the date of filing of the Application i.e. 29.03.2019 is absolutely incorrect finding and erroneous observation of the Adjudicating Authority.

- (iv) It is to state that the first Respondent in its Section 9 application dated 23.03.2019 at part 4 in column 2 under the category “*date on which the default occurred*”, the Respondent specifically mentioned the date as 25.07.2011 and admittedly the date of default as per the first Respondent is 25.07.2011. Taking into account the applicability of Limitation Act, 1963, according to Article

137 of the Limitation Act, 1963, the period of limitation for the purpose of filing applications is three years.

- (v) In this regard, the Hon'ble Supreme Court in the matter of '*Vashdeo R. Bhojwani vs. Abhyudaya Co-operative Bank Ltd. & Ors.*' Held at paragraph 3 as under:

"3. Having heard Learned Counsel for both parties, we are of the view that this is a case covered by our recent judgment in B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates, MANU/SC/1160/ 2018: 2018 (14) Scale 482, para 27 of which reads as follows:

27.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. "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".

- (vi) Admittedly the first Respondent shown the date of default is 25.07.2011 and taking into consideration the three years period limitation which expires on 24.07.2014. For the purpose of continuation of limitation there must be acknowledgment before expiry

of three years as per Section 18 of the Limitation Act, 1963.

- (vii) In the present case the first Respondent had not produced any acknowledgment prior to 24.07.2014. However, the first Respondent relied upon the letter dated 29.01.2015 to state that the Corporate Debtor admitted to issue shares for Rs. 80,00,000/- towards remuneration for the work rendered from 01.04.2010 to 31.07.2011 and a monthly salary of Rs. 5,00,000/- from August, 2011. According to the first Respondent the Corporate Debtor issued first letter dated 25.07.2011 to state that the first Respondent became an integral part of Teja Cement Limited from 01.04.2010 onwards and decided to offer a position on the Board of Directors of Teja Cement Limited with a monthly salary of Rs. 5,00,000/- and other fringe benefits commensurate to his position. Further, in the letter it is also stated that an amount of Rs. 80,00,000/- will be paid through shares of Teja Cement Limited for the work that has already been rendered and contributed from April, 2010

to July, 2011. It is also stated that the shares will be allotted on or before 31.03.2012.

- (viii) For all the purposes the purported letter dated 25.07.2011 is to be treated as date of default and three years to be taken into account which gives the limitation period up to 24.07.2014. However, the first Respondent relying upon the letter dated 29.01.2015 to show that the Corporate Debtor purportedly issued that letter wherein a reference made to a letter of the Corporate Debtor dated 25.07.2011. It assumes significance that there is no communication in the form of acknowledgment prior to 24.07.2014. The letter dated 29.01.2015 relied upon by the first Respondent to show that the Corporate Debtor is liable to pay the remuneration and allotment of shares. The aforesaid letter dated 29.01.2015 is beyond the period of limitation i.e. three years from 25.07.2011. Admittedly there is no acknowledgment prior to expiry of three years period for the purpose of counting the limitation from 25.07.2011. Further, even in the demand notice issued by the first Respondent dated 05.12.2018 its states the date of debt felt due was shown as 01.04.2010 i.e. the commencement of service for the Company and remuneration payable on 25.07.2011, 29.1.2015 and subsequent letters dated 11.08.2016, 28.08.2016 and 27.09.2016. From the aforesaid dates it is clear that there is no communication/ acknowledgment prior to

29.01.2015. Therefore, it is unequivocal that the application filed by the first Respondent herein before the Adjudicating Authority clearly barred by limitation. On this basis itself the application filed by the first Respondent herein before the Adjudicating Authority invoking its jurisdiction under Section 9 is not maintainable and the same is liable to set aside.

- (ix) It is to state that the Hon'ble Supreme Court in '*Ramesh Kymal vs. Siemens Gamesa Renewable Power Pvt. Ltd.*' reported in (2021) 3 SCC 224 paragraph 9,10,11 held that a Operational Creditor is bound by the date of default mentioned in the demand notice, the same is recapitulated here at.

"9. The date of default is crystallised as 30.04.2020 in the demand notice issued by the Appellant in Form 3, which is prescribed under Rule 5 of the Insolvency and Bankruptcy (Application to adjudicating authority) Rules, 2016. The statutory form provides for a disclosure of the particulars of the operational debt. The disclosure which has been made by the appellant includes the amount claimed in default and the date of default, as tabulated below:

2.	Amount claimed to be in default and the date on which the default occurred [attach the workings for computation of-*default in tabular form]	INR 104,28,76,479 (Indian Rupees one hundred and four crores, twenty-eight lakhs, seventy-six thousand, four hundred and seventy – nine only) as on 30.04.2020 along with interest @ 18%(eighteen percent) p.a. till the date of realisation of entire payment.
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10. Sub-section (1) of Section 8 of IBC stipulates:
“8. Insolvency resolution by operational creditor- (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of the unpaid operational debt or a copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.”

11. Under Section 9(1), the operation creditor may file an application before the adjudicating authority for initiating the corporate insolvency resolution process (“CIRP”), after the expiry of a period of ten days from the date of delivery of the notice (or invoice demanding payment) under sub-section (!) of Section 8, if the operational creditor does not receive payment from the corporate debtor or a notice of the dispute under sub-section (2) of Section 8. The appellant having specified 30.04.2020 as the date of default, this appeal must proceed on that basis. It is necessary to make this clear at the outset because an attempt has been made during the course of the submissions by Mr. Neeraj Kishan Kaul, learned Senior Counsel appearing on behalf of the appellant, to submit that though the demand notice mentions the date of default as 30.04.2020, the “ actual first date of

default” was 21.01.2020 when the letter of resignation was tendered and that the “ second date of default” was 23.03.2020 when the sixty days’ notice period from the letter of resignation submitted by the appellant concluded. This attempt to set back the date of default to either 21.01.2020 or 23.03.2020 is plainly untenable for the reason that it is contrary to the disclosure made by the appellant in the demand notice which has been issued in pursuance of the provisions of Section 8(1) and Section 9 of the IBC. The demand notice triggers further actions which are adopted towards the initiation of the insolvency resolution process.”

Findings

30. In view of the aforesaid Judgement of the Hon’ble Supreme Court the date of default which is crystallised i.e. 25.07.2011 in the application, the period of limitation triggers from that date and three years as specified under Article 137 of the limitation Act, 1963 is made applicable as per the decision of the Hon’ble Supreme Court in ‘*re- Vashdeo R. Bhojwani vs. Abhyudaya Co-operative Bank Ltd. & Ors.*’, and the three year period expires on 24.07.2014 and the first Respondent failed to produce any acknowledgment for the purpose of fresh period of limitation which shall be computed from the time when the acknowledgment was so signed.

31. In the present case there is no acknowledgment prior to 24.07.2014 and the only documents relies upon by the first

Respondent is letter dated 29.01.2015 which is beyond the period of limitation. Therefore, from the facts and law the application filed by the first Respondent herein before the Adjudicating Authority is barred by limitation and not maintainable the same is hereby set aside. Accordingly, the issue is answered.

32. In view of the above observations and Findings the instant Appeal is allowed by setting aside the impugned order dated 04.01.2022 passed by the Adjudicating Authority (NCLT, Hyderabad Bench, Hyderabad) in CP (IB) No. 237/9/HDB/2019.

33. Resultantly, the Corporate Debtor i.e. M/s. Teja Cement Limited is released from all rigours of law and free to function independently through its Board of Directors.

34. The IRP shall handover all the records of the Corporate Debtor to the Management of the Corporate Debtor. It is hereby directed the first Respondent/Operational Creditor to pay the fees and expenses of the IRP.

[Kanthi Narahari]
Member (Technical)

21st March, 2022

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH, CHENNAI

OFFICE NOTE

In view of the divergent judgments delivered by the Hon'ble Members, on 21st March, 2022, the Registrar of 'NCLAT', Principal Bench, New Delhi, is to place the record in Company Appeal (AT) (CH) (INS) No. 29 of 2022 together with the copies of the said judgments before the Hon'ble Chairperson of 'NCLAT', Principal Bench, New Delhi, for constituting an appropriate Bench / nominating the Hon'ble Third Member for rendering his Opinion / Decision in 'Appeal'.

Justice M. Venugopal
Member (Judicial)

Kanthi Narahari
Member (Technical)

March 21, 2022.

