

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH,(Court-II)
KOLKATA**

I.A. (IB) No. 933/KB/2022

And

C.P. (IB) No. 04/KB/2022

An application under Section 9 of the Insolvency & Bankruptcy Code, 2016.

In the matter of:

Pan Pacific Engineering Services Private Limited
[CINU51909KL1994PTC007943]having its registered office at XLIX/2145, Merra
17, Priya Menonparambu Road, Edappilly, Ernakulam – 682024;

....Operational Creditor

-Versus-

Ayyappa Hydro Power Limited[CIN U40100WB2005PLC116955], having its
registered office at “EDCL House” 1A, Elgin Road Kolkata – 700 020.

...Corporate Debtor

I.A. (IB) No. 933/KB/2022

In the matter of:

Pan Pacific Engineering Services Private Limited [CIN
U51909KL1994PTC007943] having its registered office at XLIX/2145, Merra 17,
Priya Menonparambu Road, Edappilly, Ernakulam – 682024;

....Applicant

Date of hearing: 10 February, 2023

Order Pronounced on: 25 July, 2023

Coram:

Shri Bidisha Banerjee, Member (Judicial)

ShriBalraj Joshi, Member (Technical)

Appearances (via video conferencing/physical)

<i>For the Operational Creditor</i>	:	Mr. Sankar P.Panikar, Adv. Mr. Rahul Parasrampur, PCS
<i>For the Corporate Debtor</i>	:	Mr. Rohit Kumar Keshri, Adv. Mr. Kumar Siddharth Singh, Adv. Mr. Nitish Kumar Singh, Adv

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)

Pan Pacific Engineering Services Private Limited v. Ayyappa Hydro Power Limited
I.A. (IB) No. 933/KB/2022
And
C.P. (IB) No. 04/KB/2022

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. V Vinod, Director, Pan Pacific Engineering Services Private Limited(*'Operational Creditor'*)who claims to be duly authorised *vide* Board Resolution dated 21 October, 2021¹for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Ayyappa Hydro Power Limited(*'Corporate Debtor'*).
3. The present Petition was filed on **12 November, 2021**before this Adjudicating Authority. The total amount claimed in default is Rs.1,68,63,425/- (Rupees One Crore Sixty-Eight Lakh Sixty ThreeThousand Four Hundred Twenty Five only). The date of default is stated to be as on **15 June, 2015**.
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.55,00,00,000/- (Rupees Fifty FiveCrore only) with subscribed share capital of Rs.52,00,00,000/- (Rupees Fifty Two Croreonly). Part – IV of the Petition deals with the particulars of the Operational Debt.
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 That the Operational Creditor is a registered Micro, Small and Medium Enterprise (*'MSME'*)engaged in the business of construction of civil engineering projects, construction, and maintenance of industrial facilities such as refineries, chemical plants, construction of dams and other civil projects of rendering services of contracts mainly in construction projects.
 - 5.2 The Corporate Debtor through a tender process shortlisted the Operational Creditor for the labour work (except Supply of materials) of Karikayam Hydro

¹Annexure – 1, Page 34 of the Petition.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Pan Pacific Engineering Services Private Limited v. Ayyappa Hydro Power Limited
I.A. (IB) No. 933/KB/2022
And
C.P. (IB) No. 04/KB/2022

Electric Power Project (**'Project'**) at ChittarPathanamthitta[*Work Order No. AHPL/KKHEP/WO/CIVIL/09-10/012 DATED 15 June, 2009*].

- 5.3 The Operational Creditor states that project was successfully completed as per the stipulations in the work orders in August, 2013. The total retention amount after the completion of the project was Rs.74,33,296.52/- (Rupees Seventy Four Lakh Thirty Three Thousand Two Hundred Ninety Six Fifty Two Paise only). However, a sum of Rs 25,00,000/- (Rupees Twenty Five Lakh only) comprising of Rs.10,00,000/- (Rupees Ten Lakh only) was paid on 14 February, 2015, Rs.5,00,000/- (Rupees Five Lakh only) was paid on 04 August, 2015, Rs.5,00,000/- (Rupees Five Lakh only) was paid on 21 August, 2015 and Rs 5,00,000/- (Rupees Five Lakh only) was paid on 09 August, 2016. After considering the said remittance the net dues to the Operational Creditor was Rs.49,33,296/- (Rupees Forty Nine Lakh Thirty Three Thousand Two Hundred Ninety Six only).
- 5.4 As there was inordinate delay in payment of the dues by the Corporate Debtor, the Operational Creditor approached the MSME Facilitation Council, Thiruvananthapuram for resolution of the matter and filed an application under MSME Act, 2006.
- 5.5 On 25 April, 2019, the Corporate Debtor had confirmed about the dues of Rs 49,33,296/- to the Operational Creditor, through its mail to the Chairman MSME Council and promised to pay the same in instalments. However, the Corporate Debtor did not honour the assurance.
- 5.6 By way of MSME award dated 10 November, 2020 the council has finally decided the matter in OA 71/2018 and directed the Corporate Debtor to pay a sum of Rs. 58,13,559/- along with interest calculated at three times the bank rate notified by the RBI as prescribed in Section 16 of the MSME Act from the date of original default viz., 15 June, 2021.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Pan Pacific Engineering Services Private Limited v. Ayyappa Hydro Power Limited
I.A. (IB) No. 933/KB/2022
And
C.P. (IB) No. 04/KB/2022

- 5.7 Thereafter, the Operational Creditor issued a Demand notice under the Code in Form 3 on 07 April, 2021, which was received by the Corporate Debtor on 23 April, 2021.
- 5.8 In spite of several opportunities given to the Corporate Debtor to present their case before the MSME Facilitation Council, the Corporate Debtor kept on questioning the authority of MSME Facilitation Council to pass such orders. So far the Operational Creditor has not received any copy of the appeal, if any, filed by the Corporate Debtor against such order.
- 5.9 After the issuance of Demand notice under the Code in Form 3 and the reply by the Corporate Debtor, there were several negotiations between the Operational Creditor and the Corporate Debtor resulting to a promise to pay the negotiated amount of Rs 100 lakhs by 10 September, 2021. However, the Corporate Debtor did not oblige to make the payment.
- 5.10 On 13 September, 2021, the Corporate Debtor made a payment of Rs.50,74,076/- (Rupees Fifty Lakh Seventy Four Thousand Seventy Six only) through NEFT (*Ref: UTRN Ref YESBR5202109138412785DT13/9/21*) to the Operational Creditor and informed them that the balance amount of 5% of the value of the work has been held back as the warranty deposit. The said amount will be held back during the warranty period, which is after the completion of the works to the satisfaction of the engineer in charge. The Corporate Debtor also informed that the said deposit will be forfeited in the event of failure to carry out the work to the satisfaction of the engineer in charge [*Annexure – 11*].
- 5.11 It is claimed that the Project was completed in August, 2013 as per the Corporate Debtors' satisfaction and the commercial generation of electricity has started since then. Further, the Corporate Debtor never mentioned about the warranty deposit or warranty period or any forfeiture either to the Operational Creditor or the MSME Facilitation Council.
- 5.12 It is alleged that the Corporate Debtor has very cunningly avoided their dues towards the Service tax in their letter dated 13 September, 2021. As per the

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Pan Pacific Engineering Services Private Limited v. Ayyappa Hydro Power Limited
I.A. (IB) No. 933/KB/2022
And
C.P. (IB) No. 04/KB/2022

Work order, the Service tax Liability fell on the Corporate Debtor, which stood recognised and has been mentioned as findings in the order of the MSME Facilitation Council. Further, another work order referring no. AHPL/KKHEP/WO/CIVIL 14 - 15/01 dated 30 June, 2014 for Rs 2,76,60,000/- where the scope of work was Civil work including supply of material and Labour (2ndPhase) for erection of piers at Karikayam Hydro Electric Project was awarded to the Operational Creditor. This work was for completing the balance work of the project and which was not included in the first set of work orders.

5.13 The Corporate Debtor has made all the payments against this new work order and never raised any objection on the completion of the earlier work orders, warranty deposit or warranty periods etc while awarding the new work order and granting another work order to the Operational Creditor and making full payment against such order proves that there was never any dispute between the Corporate Debtor and the Operational Creditor with regard to the completion of the project.

6. *Per contra, submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor were as under;*

6.1 The Alleged Principal amount of Claim is Only Rs. 7,39,483/- which is much below than Rs. 1 Crore as stated in Section 4 of the Code.

6.2 The Operational Creditor has not complied with the mandatory provision of section 9 of the Insolvency and Bankruptcy Code, 2016 and has further not attached an Affidavit u/s 9(3)(b) as per the Code.

6.3 That, this Petition has been filed on the basis of the Award which was received by the Operational Creditor on 10 November, 2020. The Corporate Debtor has already preferred an appeal having O.P. No.13 of 2022 before the Commercial District Court and the said award has not attained its finality.

6.4 The alleged Purported Claim is barred by Limitation.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Pan Pacific Engineering Services Private Limited v. Ayyappa Hydro Power Limited
I.A. (IB) No. 933/KB/2022
And
C.P. (IB) No. 04/KB/2022

- 6.5 That, the Petition is misconceived, frivolous, and vexatious and is liable to be dismissed *in limine* with exemplary costs. There is no alleged principal amount due to the Corporate Debtor
- 6.6 That, the Application has been filed with ulterior purpose and malafide motive. Further, the Applicant has not approached this Adjudicating Authority with clean hands.
- 6.7 The purported claim of the Operational Creditor is an afterthought with the objective to make wrongful gain at the expenses of the Corporate Debtor. Hence, this Petition is liable to be dismissed with exemplary cost under section 65 of the Code, for fraudulent initiation of CIRP Process.
- 6.8 The Operational Creditor was not registered as an MSME when the Arbitration No.71/2018 was filed for claiming the interest as per MSME Act, 2006 on alleged dues on a retrospective basis w.e.f. 15 June, 2015. It is submitted that the MSME Samadhan Council failed to appreciate that the Operational Creditor got registered with MSME Udyan only on 03 September, 2020, as such it is illegally claiming interest as per MSME Act, 2006 on alleged dues on a retrospective basis w.e.f., 15 June, 2015.
- 6.9 The Operational Creditor did not complete the work order contract but is demanding the full payment along with the Retention Money from the Corporate Debtor.
- 6.10 As it was the Government Project, the Corporate Debtor on having no other options left, appointed some other contractor for the Completion of the said Projects, due to which the time for completing the projects got delayed and the Corporate Debtor had to approach Kerala State Electricity Regulatory Commission, Thiruvananthapuram for extension of the Contract of the Project.
- 6.11 The aforesaid matter is totally based on civil dispute regarding the satisfaction as per the Contract Act described in the purchase Order and the MSME Council has no jurisdiction on it.
7. ***I.A. (IB) No. 933/KB/2022 –***

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Pan Pacific Engineering Services Private Limited v. Ayyappa Hydro Power Limited
I.A. (IB) No. 933/KB/2022
And
C.P. (IB) No. 04/KB/2022

- 7.1 This is an Application filed by Pan Pacific Engineering Services Private Limited(‘**Applicant**’) *inter alia*, praying for the following reliefs;
- (a) *To allow the present application under Rule 55 of the NCLT Rules, 2016 for filing Rejoinder by the Applicant.*
- (b) *To pass any such further order/orders as this Adjudicating Authority may deem fit and proper in the interest of Justice.*
- 7.2 It is submitted that the matter was first listed on 02 March, 2022 for taking Application being CP (IB) 4/KB/2022 on record and pursuant to that order directions were given to issue notice to the Corporate Debtor by speed post and e-mail.
- 7.3 On 25 April, 2022, the Corporate Debtor accepted the notice when a direction to file the reply within three weeks was given. The matter was listed for next date on 17 of June, 2022. Subsequently on 17 June, 2022 the matter was listed before the Division Bench comprising of Hon’ble Member Judicial, Shri Rohit Kapoor and Hon’ble Member Technical, Shri Harish Chander Suri, wherein Mr.Sankar P Panicker, Advocate appeared on behalf of the Operational Creditor appeared virtually and prayed for liberty of filing a Rejoinder to the Reply filed by the Corporate Debtor and the same was allowed. Under the same impression, the Operational Creditor had filed a Rejoinder but while preparing for the next date of hearing on 26th July, 2022 when the Operational Creditor checked the order it appeared that the order which was uploaded was contrary to the order which was passed during the virtual hearing.
- 7.4 The Operational Creditor would submit that on 26 July, 2022 the Hon'ble Division Bench had taken up the matter, where Mr. Panicker appeared along with Mr. Rahul Parasrampuria and had apprised the Bench about the same and have also indicated the email which was sent to the Registrar of National Company Law Tribunal, informing about the error in the order.
- 7.5 Further the Rejoinder was served upon the Corporate Debtor and was also uploaded with the registry due to oversight, inadvertence which had happened

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Pan Pacific Engineering Services Private Limited v. Ayyappa Hydro Power Limited
I.A. (IB) No. 933/KB/2022
And
C.P. (IB) No. 04/KB/2022

by not checking the uploaded copy of the last order passed by the Hon'ble National Company Law Tribunal where the contrary order was passed.

Analysis and Findings

8. We have heard the Learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the documents on record. The issues that arise are as follows;
- (a) Is this Application barred by limitation?
- (b) Whether an Award of MSME can give a fresh lease of life to a belated claim?
- (c) Whether the appeal by the Corporate Debtor before the Commercial District Court against the Award dated 10 November, 2020 of the MSME Council restricts the Adjudicating Authority to pass any order?
9. Before delving into the first issue of the case, the important events that need to be taken into consideration are the following;

Date of Default as per the records	15 June, 2015
Operational Creditor approached the MSME Facilitation Council	In the year 2018
Operational Creditor got registered as MSME	03 September, 2020
MSME Facilitation Council Order	10 November, 2020
Demand notice u/s 8 of the Code	07 April, 2021
Letter by the Corporate Debtor (also made part payment)	13 September, 2021

10. While it is true that failure in payment of a debt triggers the right to initiate the CIRP, and *a Petition under Section 7 or 9 of the IBC is required to be filed within the period of limitation prescribed by law, which would be three years* vide from the date of default by virtue of Law. The Hon'ble Supreme Court laid down the following 'basics' pertaining to the application of principles of limitation to Code in in several Preceded rulings—

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Pan Pacific Engineering Services Private Limited v. Ayyappa Hydro Power Limited
I.A. (IB) No. 933/KB/2022
And
C.P. (IB) No. 04/KB/2022

- (a) *That the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation [Swiss Ribbons (P) Ltd. v. UOI].²*
- (b) *That CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor [Babulal VardharjiGurjar v. VeerGurjar Aluminium Industries Pvt. Ltd. and Ors.].³*
- (c) *That intention of the Code is not to give a new lease of life to debts which are time-barred [Babulal VardharjiGurjar (Supra)];*
- (d) *That the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues [Babulal VardharjiGurjar (Supra)];*
- (e) *That the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs [Laxmi Pat Surana vs. Union Bank of India and Ors.].⁴*
- (f) *That default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and [Laxmi Pat Surana (Supra)];*
- (g) *That if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; [Manish Kumar v. Respondent: Union of India (UOI) and Ors.].⁵*

²MANU/SC/0079/2019

³MANU/SC/0589/2020

⁴MANU/SC/0221/2021

⁵MANU/SC/0029/2021

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)

Pan Pacific Engineering Services Private Limited v. Ayyappa Hydro Power Limited
I.A. (IB) No. 933/KB/2022
And
C.P. (IB) No. 04/KB/2022

11. The applicability of Article 137 of the Limitation Act, 1963 has been dealt with by the Hon'ble Apex Court in *B.K. Educational Services Private Limited v. Parag Gupta & Associates*⁶, wherein it was held:

*“It is thus clear that since the Limitation Act, 1963 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, 1963 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, 1963, 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.”*

[Emphasis supplied]

12. In *Jignesh Shah and Ors. v. Union of India (UOI) and Ors*⁷ the Hon'ble Apex Court has reiterated that;

*“In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, **an acknowledgement of liability Under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding up proceeding.**”*

[Emphasis supplied]

13. The admitted date of default in this case is 15 June, 2015 which is over a three year period prior to the date of filing of the Application. Even going by

⁶Civil Appeal No.23988 of 2017

⁷MANU/SC/1319/2019

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Pan Pacific Engineering Services Private Limited v. Ayyappa Hydro Power Limited
I.A. (IB) No. 933/KB/2022
And
C.P. (IB) No. 04/KB/2022

phantasmagorical thoughts, under no circumstances can this application be held to be within the prescribed period of limitation.

14. Further even if the date of default is taken as the date of passing of the order by MSME i.e. 10th November 2020, then the petition does not cross the barrier of Section 4 of IBC. The pendency of an appeal against such an award is thus of no consequence and does not extend the date of default on this count as well.
15. In view of the above facts and circumstances the *C.P. (IB) No. 04/KB/2022* stands *rejected*. Resultantly, the *I.A. (IB) No. 933/KB/2022* also stands dismissed as *infructuous*. The Petitioner is, however, at liberty to pursue other available means under the law for recovery
16. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The order is pronounced on 25th day of July 2023

SA [LRA]