<u>NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI</u>

<u>Company Appeal (AT) (Insolvency) No. 1412 of 2019</u>

<u>In the matter of</u>

M/s. NLMK India Service Centre Pvt. Ltd.
235 A, South Court Building,
District Centre, Saket,
New Delhi-110007.
Through its Authorised Representative
Shri Alok Rawat ... Appellant

Versus

M/s. PME Power Solutions (India) Ltd.,
Regd. Office:
303, South Delhi House,
12, Community Centre,
Zamrudpur, New Delhi-110048.

<u>Also at:</u>
B-10 & 11, Site 'C',
Surajpur Industrial Area,
Greater Noida,
Distt. Gautam Budh Nagar,
Uttar Pradesh-201306. ...Respondent

<u>Present</u>

For Appellant:	**Mr. Neeraj Malhotra, Sr. Advocate with Mr. Rachit Devgun, Mr. Nimish Kumar and Mr. Seemant K. Garg, Advocates**
For Respondent:	**Mr. Aneesh Sharma, Mr. Sanjay Jain and Mr. Akash Srivastava, Advocates**

Judgment

(Date: 26.08.2022)

(Per: Dr. Alok Srivastava)

This appeal has been preferred by the Appellant under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called 'IBC') aggrieved by the Order dated 24.09.2019 (hereinafter called 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi) in CP No. 1743/ND/2018 whereby the application filed by the Appellant under section 9 was dismissed as being barred by limitation.

2. In brief, the Appellant's case is that he supplied CRGO Lamination for transformers to Respondent (M/s. PME Power Solutions (India) Ltd.) through purchase orders during the period between years 2015 to 2016 and invoices were issued between 13.8.2015 to 13.3.2016 by the Appellant for payment. The Appellant has further claimed that the Respondent did not make payment against the said invoices and a debit note was issued on 31.3.2016 regarding interest on delayed and outstanding payments of Financial Year 2015-16 for a sum of Rs.12,44,250. Since these payments were not made to the Appellant, he sent an e-mail dated 1.6.2016, wherein a total amount of Rs.1,69,49,767 was mentioned

as overdue payment. Further, the Appellant issued a demand notice dated 13.11.2017 under section 8 of the IBC, which contained a total due debt amount of Rs.1,68,76,753. He has further stated that the Respondent did not respond to the demand notice under section 8, and thereafter he filed section 9 application bearing CP No. 1743/ND/2018 before the Adjudicating Authority, for a total debt of Rs.1,68,76,753 for supply of CRGO Lamination during the period February, 2015 to March, 2016, which fell due for payment and is in default.

3. The Appellant has also stated that he sent an e-mail on 30.1.2016 communicating an amount of Rs. 12,44,250 as interest of delayed payment, which is also included in the ledger account of the corporate debtor maintained by the operational creditor (attached at pp.120-122 of the appeal paperbook). Further, the ledger account as on 1.7.2017 relating to the corporate debtor, maintained by the operational creditor shows the balance of outstanding payment of Rs.1,68,76,753. He has claimed that the operational creditor sent an e-mail on 1.6.2016 (attached at pg.125 of appeal paperbook) for payment with details of the overdue payment, but this email was not replied to by the corporate debtor. He has stated that section 9 application was filed by him on

4.12.2018, which the Adjudicating Authority has held to have been filed beyond limitation. He has finally claimed that information regarding the debit note sent by him to the corporate debtor vide e-mail dated 31.3.2016 and again vide e-mail dated 1.6.2016, which was not replied to, should be considered as "deemed acknowledgment" of the outstanding debt by the corporate debtor, which would make the section 9 application within limitation.

4. We heard arguments of the learned counsels of both the parties and perused the record.

5. The Learned Counsel for Appellant has argued that CRGO Laminations were supplied by the operational creditor to the corporate debtor, for which invoices were issued during the period 13.8.2015 to 13.3.2016. He has based his arguments on the purchase order (attached at pp. 85-86 of the appeal paperbook) dated 15.7.2015 for which the corresponding tax invoice (attached at pg. 96 of the appeal paperbook). He has argued that the tax invoice mentions that "90 days (60 days interest to buyers account @ 10.5% p.a.)", which means that the purchaser will issue a 'Letter of Credit' for 90 days and the supplier is entitled to receive interest for 60 days @ 10.5% p.a. He has also argued that the Bill of Lading dated 13.8.2015 (attached at pg. 98 of appeal paperbook) shows that

a total of 20,474 kg. gross weight of CRGO Lamination was delivered to the corporate debtor. There are similar purchase orders and deliveries (made by the supplier) for which tax invoices have been issued (copies of purchase orders, tax invoices and bills of lading of the deliveries made are attached at pages 85-113 of appeal paperbook).

6. The Learned Counsel for Respondent has further argued that the corporate debtor had on-going business dealing with the operational creditor and he was issuing purchase orders for CRGO Laminations and arranging letters of credit for the same, as is evident by his e-mails dated 13.4.2015, 18.4.2015 and 7.5.2015 (attached at pp.127-128 of the appeal paperbook). He has argued that an e-mail dated 7.5.2015 was sent by the operational creditor to the corporate debtor, which was replied to on the same day by the corporate debtor assuring "to clear all previous outstanding dues within the coming week". He has further submitted that since the corporate debtor did not make payment of the outstanding amount, an e-mail dated 1.6.2016 was sent to the corporate debtor, wherein the pending invoices for payment and the debit note for the interest amount were mentioned (attached at pp. 125-126 of appeal paperbook). He has also submitted that one particular debit note of

an amount Rs. 12,44,250, which was issued on 31.1.2016 is included in e-mail dated 1.6.2016 and which also appears in the debit note which is included as an entry dated 31.3.2016 in the ledger account for the period 1.4.2012 to 1.7.2017 (attached at pp. 120-122 of the appeal paperbook). His contention is that the interest amount is to be considered as operational debt since the invoices allow an interest of 10.5% for a period of 60 days and 90 days for issuing 'letter of credit' and the email dated 1.6.2016 provides 'deemed acknowledgment' of the operational debt.

7. The Learned Counsel for Appellant has referred to debit note dated 31.3.2016, which was for a sum of Rs.12,44,250/- and the operational creditor's e-mail dated 1.6.2016 to show the existence of this debit note which remains pending for payment to claim that the absence of reply by the corporate debtor to this e-mail should be with regard to 'deemed admission' by the corporate debtor, he has referred to the judgment of Hon'ble Delhi High Court in the matter of **Krishan Kumar Aggarwal & Ors. vs. Life Insurance Corporation of India [RFA (OS) No. 93/2010]** wherein it is held that the absence of repudiation or reply to a legal notice leads to adverse inference. He has also referred to the judgment of Hon'ble High Court of Delhi in the matter of **Metropolis Travels & Resorts**

Vs. Sumit Kalra & Ors. [2002 VIAD Delhi 493, dated 7.5.2002], wherein it is held that if no reply is given to a legal notice, it leads to adverse inference. He has pointed out that in the present case the corporate debtor did not reply to the demand notice issued under section 8, and later on did not either reply or repudiate the e-mail dated 1.6.2016, and therefore, an adverse inference should be drawn against him, which implies a 'deemed acknowledgment' of the said operational debt.

8. The Learned Counsel for Appellant has made an alternative argument that even if it is assumed that the date of last payment is 4.9.2015, the period of 90 days which is allowed for issue of letter of credit by the corporate debtor (as included in the Tax Invoices) the period for making the payment expires on 2.12.2015, where after the debt is in default and becomes due for payment. The three-year period of limitation would therefore run till 1.12.2018. He has argued that the section 9 application was filed on 4.12.2018 i.e. after a delay of three days, hence the Adjudicating Authority should have given him a reasonable opportunity to file an application for condonation of delay, which was not done.

9. In support of his contention, the Learned Counsel for Appellant has cited the order of Hon'ble Madhya Pradesh High Court

in the matter of **Madhya Pradesh Grih Nirman Mandal vs. Kamala Devi [MANU/MP/0585/2007]** wherein it is held that an opportunity should be afforded to the party to file an application of condonation of delay under section 5 of the Limitation Act in case the application is found to be barred by limitation.

10. The Learned Counsel for Respondent/Corporate Debtor has argued that as per the demand notice under section 8, the date on which debt fell due for payment is considered as 30.4.2015. Therefore, the three year period of limitation expired on 29.4.2018, whereas the section 9 application was filed on 4.12.2018, after a delay of more than seven months from the date of expiry of limitation period. He has, further, contended that it was the responsibility of the operational creditor to file the application under section 5 of the Limitation act for condonation of delay and no fault can be found with the Adjudicating Authority if such an opportunity was not given to the operational creditor. He has further argued that the debit note dated 31.3.2016 is shown only to claim extended period for limitation so as to get the applicant's application within limitation period, whereas this debit note was never accepted nor admitted by the corporate debtor and, hence, no adverse inference could be drawn from absence of reply to e-mail dated 1.6.2016.

11. The Learned Counsel for Respondent has also referred to the judgment of Hon'ble Supreme Court in **B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates [2018 SCC Online SC 1929]** wherein it is held that the provisions of Limitation Act apply under IBC proceedings. He has cited the judgment of Hon'ble Supreme Court in the matter of **Seshnath Singh and Anr. Vs. Baidyabati Sheoraphuli Cooperative Bank Limited and Anr. [(2021) 7 SCC 313]** wherein it is held that no party can claim condonation of delay under section 5 of the Limitation Act as a matter of right, without making an application. He has also referred to the judgment of Hon'ble Supreme Court in the matter of **M/s. Consolidated Construction Consortium Limited vs. M/s. Hitro Energy Solutions Private Limited [2022 SCC Online 142]** wherein it is held that an application, which is out of limitation and no application under section 5 of Limitation Act has been filed for condonation of such delay, is considered to be barred by limitation. He has also referred to the judgment of NCLAT **in the matter of S.M. Ghogbhai vs. Schedulers Logistics India Pvt. Ltd. [CA(AT)(Ins.) No. 281 of 2022]** that the limitation for a section 9 application is governed by Article 137 of the Limitation Act, and the time from which the limitation period begins to run is when invoices issued by the operational creditor to the corporate debtor are in

default of payment. In this case, an application not filed within the three years' limitation period was considered to be barred by limitation and therefore dismissed.

12. Lastly, the Learned Counsel for Respondent has argued that since date of default as mentioned in the demand notice under section 8 is 30.4.2015, the period of three years will expire on 29.4.2018, and thus the application under section 9 is hopelessly barred by the limitation in the absence of any application filed under section 5 of the Limitation Act, which could have led to condonation of delay after due consideration.

13. In the Impugned Order, the Adjudicating Authority has considered the date of last payment made by the corporate debtor i.e. 15.10.2015 as the date of default. The petition was filed on 4.12.2018, which is more than three years after the date of default and, hence, the application under section 9 has been adjudicated by the Adjudicating Authority as being barred by limitation. In addition, the Adjudicating Authority has also held *"that the debit note which has been raised on 31.3.2016 and which has been incorporated in the ledger account has been made for the purpose of these proceedings and which clearly shows that this Petition is time barred and obviously filed beyond the period of limitation. In view of*

the claim being time-barred, this Petition is dismissed, however, without costs."

14. The main question that arises in this appeal is regarding the date of default, which as claimed by the Appellant is 1.6.2016 i.e. the date on which the operational creditor sent an e-mail to the corporate debtor reminding him of the overdue payments and the e-mail was not replied to by the corporate debtor leading to adverse inference against the corporate debtor regarding the outstanding payment and therefore 'deemed acknowledgment' of the debt, whereas the Respondent has claimed the date of last payment i.e. 4.9.2015 as the date of default.

15. We note that in Part IV of the Section 9 application (at pp. 48-49 of the appeal paperbook), the total amount of debt has been stated as Rs.1,68,76,743 and that the payment against various invoices fell due on various dates between 30.4.2015 to 13.3.2016. In the demand notice under section 8 sent by the operational creditor (attached at pp.61-69 and annexures at pp.83-118 of the appeal paperbook), the same amount of Rs.1,68,76,753 has been claimed to be in default as operational debt. As is clear from record and pleadings, these amounts pertain to various invoices issued by the operational creditor during the period April, 2015 to March,

2016. It is also noted that e-mails/correspondence dated 13.4.2015, 18.4.2015, 7.5.2015 and 1.6.2016 were exchanged between the Appellant and Respondent, which have been attached as annexures to the section 9 application. It is also noted that the appellant communicated to the respondent regarding amounts outstanding and due for payment, which is the operational debt, by demand notice dated 13.11.2017 issued under section 8 of IBC, which was delivered to the respondent through speed post (tracking report attached at pp. 68-69 of appeal paperbook), and which was not replied to by the corporate debtor.

16. Section 8 of the IBC is reproduced below for ready reference:-

> *"**8. Insolvency resolution by operational creditor.** - (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor 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.*
>
> *(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor –*
>
> > *(a) existence of a dispute, 1 [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;*

(b) the payment of unpaid operational debt-

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. – For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred."

17. We note the judgments of Hon'ble Delhi High Court in the matter of **Krishan Kumar Aggarwal & Ors. vs. Life Insurance Corporation of India (supra)** and the Hon'ble High Court of Madhya Pradesh in the matter of **Madhya Pradesh Grih Nirman Mandal vs. Kamala Devi (supra),** wherein it is held that an opportunity should be afforded to the petitioner/appellant in case the application is found to be barred by limitation. We also note that, in the instant case, the appellant did not file an application for condonation of delay, nor did he made any request to file the same.

18. With regard to acknowledgment of operational debt, section 18 of the Limitation Act which relates to effect of acknowledgment in writing is as follows:-

"18. Effect of acknowledgment in writing –

(1) Where before the expiration of the prescribed period for a suit or application in respect or any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derived his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

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

Explanation **-** *For the purposes of this section, -*

a. an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

b. the word "signed" means signed either personally or by an agent duly Authorized in this behalf ; and

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

19. It is, thus, clear that the limitation period of an operational debt under IBC will be extended if before the expiration of the 3 years period, an acknowledgment has been made in writing signed

by the party against whom such property or right is claimed. In the present case, we note that even though the operational creditor sent an e-mail dated 1.6.2016 mentioning the outstanding amount for payment, and debit note was also included in the ledger account dated 31.3.2016, no acknowledgement of the liability has been made in writing by the corporate debtor. In such a situation, the date of default has to be computed from the date of last payment i.e. 4.9.2015. Accordingly, the three years' period shall be over on 3.9.2018 and since the application under section 9 was filed on 4.12.2018, it is clearly beyond the period of limitation and hence is barred as being out of limitation.

20. The decision of Hon'ble High Court of Madhya Pradesh in the matter of **Madhya Pradesh Grih Nirman Mandal (supra)** regarding providing an opportunity to the Appellant to explain the delay as provided in section 5 of the Limitation Act before dismissing the appeal on the ground of limitation is concerned, we find that the Appellant did not seek permission of the tribunal to file an application under section 5 of the Limitation Act for condonation of delay. Therefore, in absence of any such application by the Appellant, there was no occasion for the Adjudicating Authority to grant any extension of limitation to the Appellant.

21. We follow the judgment of Hon'ble Supreme Court in the matter of **Seshnath Singh and Anr. Vs. Baidyabati Sheoraphuli Cooperative Bank Limited and Anr. (supra)**, wherein it is held that no party can claim condonation of delay under section 5 of the Limitation Act without making any application. Moreover, the judgment of NCLAT in **S.M. Ghogbhai (supra)** considers an application in similar circumstances as being barred by limitation.

22. Based on the aforementioned discussion, we reach the conclusion that the Adjudicating Authority has correctly dismissed the section 9 application filed by the Appellant. Finding no merit in the appeal, we accordingly dismiss it.

23. No order as to costs.

(Justice Rakesh Kumar Jain)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
26th August, 2022

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