



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

C.P. (IB) No. 60/KB/2021

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

In the matter of:

Venus Buildtech India Private Limited [CIN U45201DL2004PTC126433],
having its registered office at 804, GDITL Tower, B-8, Netaji Subhash Place,
Ring Road, Pitampura, New Delhi – 110 034;

....Operational Creditor

-Versus-

Senbo Engineering Limited [CIN U29248WB1990PLC049424], having its
registered office at 87, Lelin Sarani Kolkata – 700 013;

...Corporate Debtor

**Date of hearing: 12 June, 2023
Order Pronounced on: 04 August, 2023**

Coram:

Smt. Bidisha Banerjee, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical)

For the Operational Creditor : Mr. Rajeev Shrivastava, Adv.

For the Corporate Debtor : Mr. Arik Banerjee, Adv.

: Mr. Sujit Banerjee, Adv.

: Mr. Nilay Sengupta, Adv.

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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. G.D. Khurana, Venus Buildtech India Private Limited (***‘Operational Creditor’***) duly authorised *vide* Board Resolution dated 30 January, 2021¹ for initiation of Corporate Insolvency Resolution Process (***‘CIRP’***) against Senbo Engineering Limited (***‘Corporate Debtor’***).
3. The present Petition was filed on ***17 February, 2021*** before this Adjudicating Authority. The total amount claimed in default is Rs.1,08,14,593/- (Rupees One Crore Eight Lakh Fourteen Thousand Forty Five Hundred Ninety Three only) including. The ***date of default*** is stated to be as on ***06 March, 2020*** i.e., the date of execution order;
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.15,00,00,000/- (Rupees Fifteen Crore only) with subscribed share capital of Rs.14,98,44,560/- (Rupees Fourteen Crore Ninety Eight Lakh Forty Four Thousand Five Hundred Sixty only). 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 The Operational Creditor executed the work awarded by Corporate Debtor with the entire satisfaction of the Corporate Debtor.
 - 5.2 On 05 April, 2010 Corporate Debtor issued a Letter to Operational Creditor for the outstanding balance of Rs.39,35,037/- (Rupees Thirty Nine Lakh Thirty Five Thousand and Thirty Seven only) of Operational Creditor.
 - 5.3 Thereafter, on 24 May, 2010 the Operational Creditor wrote a letter to Corporate Debtor to release the outstanding balance of Rs.77,10,967/-

¹At page 21 of the Petition.

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((Rupees Seventy Seven Lakh Ten Thousand Nine Hundred Sixty Seven only) but Corporate Debtor failed to release the outstanding balance

- 5.4 Due to the non-receipt of the outstanding balance, the Operational Creditor filed a suit under order 37 CPC in the month of November, 2010.
- 5.5 The said suit was decided and decree was passed by Hon'ble Court of Shri Mukesh Kumar Hon'ble ADJ, Patiala House Court, Delhi and as per the said order/judgement dated 12 September, 2017, the Operational Creditor is entitled to recover the Principal Suit amount of Rs.77,10,967/- (Rupees Seventy Seven Lac Ten Thousand Nine Hundred Sixty Seven only) along with interest @ 9% per annum on the money decree from the Corporate Debtor
- 5.6 The total outstanding amount as per order passed by the Hon'ble Court of Shri Mukesh Kumar, ADJ-02, & Wag Tribunal, New Delhi District, Patiala House Courts, New Delhi which is payable to Operational Creditor by the Corporate Debtor is Rs.1,08,14,593/- (Rupees One Crore Eight Lac Fourteen Thousand Five Hundred Ninety Three only). The same is still outstanding and payable by Corporate Debtor to Operational Creditor.
- 5.7 Despite repeated follow ups, communications for several months, Corporate Debtor failed to clear outstanding amount of Operational Creditor for the reasons best known to them.
- 5.8 The Operational Creditor sent a demand notice (Form 3) on dated 12 January, 2021 through e-mail on dated 12 January, 2021 and by Speed Post on dated 13 January, 2021 to Corporate Debtor which was duly received and acknowledged by the Corporate Debtor.
- 5.9 In spite of receiving the statutory legal notice, the Corporate Debtor failed to discharge its liability towards the Operational Creditor.
6. ***Per contra, submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor would be as under:***
- 6.1 That, the claim of the Operational Creditor arises from a decree passed by the Learned Additional District Judge-02, New Delhi, Patiala House Court, Delhi dated 12 September, 2017, passed in CS No. 59127 of 2016.

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- 6.2 Against the said decree, the Corporate Debtor had filed an application under Section 114 read with Order 47 of the CPC, before the Learned Additional District Judge-02, New Delhi, Patiala House Court, Delhi, for review of the decree.
- 6.3 The review petition filed by the Corporate Debtor has been registered as Misc. DJ No.66 of 2021 and the same is pending for hearing before the Hon'ble Court.
- 6.4 The Operational Creditor has entered appearance and has filed their reply affidavit in that matter. Copies of several orders passed in the Misc. DJ No.66 of 2021 [*Reply Affidavit at page 6*].
- 6.5 Further, the Operational Creditor has initiated Execution Proceedings, arising out of the aforesaid decree dated 12 September, 2017, before the Learned ADJ, District & Sessions Judge, New Delhi, PHC, being EX No. 686 of 2017. On top of that the Operational Creditor has again filed the present under section 9 of the Code.
- 6.6 It is well settled principle of law, held by the Hon'ble Apex Court that, the mechanisms of the Code cannot be used as machinery for recovery of the alleged debts of the parties. It is completely barred under the provisions of the Code.
- 6.7 The purported action of the Corporate Debtor i.e., filing Review Application against the decree has severe consequence upon the nature of the debt, as now the debt is not undisputed and has not attained finality, thus, there exists 'pre-existing disputes' between the parties.

Analysis and Findings

7. We have heard the Learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the documents on record.
8. From, the perusal of the records it is seen that the Operational Creditor has stated the date of default to be as on 06 March, 2020 i.e., the date of execution order. However, from the records it is seen that on failure of the Corporate Debtor to release the outstanding balance of the Operational Creditor, the Operational Creditor had filed a civil suit under Order 37 of

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the Code of Civil Procedure, 1908 in the month of November; the dates of even arising are as follows;

<i>Date</i>	<i>Events</i>
15 November, 2010	Due to the non-receipt of payment, the Operational Creditor filed a suit against the Corporate Debtor under Order 37 of Code of Civil Procedure, 1908 in the month of November 2010.
07 March, 2014	Vide order dated 07.03.2014, Hon 'ble High Court at Delhi ordered the Respondent no.2 (Delhi Metro Rail Corporation) to withheld the amount to the tune of Rs.40,00,000/- (Rupees Forty Lacs Only).
01 August, 2014	On 01.08.2014, a deed of settlement was executed between DMRC & Corporate Debtor for withholding of Rs.40,00,000 / - and with the consent of C.D. said amount was withhold.
04 April, 2016	Vide Order dated 04.04.2016 passed by the Ho'ble Delhi High Court the said case ie. CS(OS) No. 2425/2010 was transferred to the Learned District Judge, New Delhi (Patiala House Courts) on account of Notification No.27187/DHC/Orgl. dated 24.11.2015
12 September, 2017	A money Decree was passed by the Hon'ble Court of Shri Mukesh Kumar Hon'ble ADJ, Patiala House Court, Delhi. That as per the said order/ judgement dated 12.09.2017, the Operational Creditor is entitled to recover the Principal Suit amount of Rs. 77,10,967 /-along with interest @ 9 % per annum from the date of institution of the suit till realization from the Corporate debtor.
06 March, 2020	Executing Court ordered DMRC to release the withheld amount of Rs.40,00,000/- to the Operation Creditor. That despite the said order Corporate Debtor never filed any objections nor challenged the said order.

9. Now the issue that comes to the fore is that *can the Date of default be shifted forward to the date of decree?* From the records it is evident that the civil suit was filed by the Operational Creditor on non-receipt of payment from the Corporate Debtor, which means that default must have occurred

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then and triggered the Operational Creditor to file a suit for recovery. Hence, time must have begun then.

- 10.** It is needless to point out that the law relating to the applicability of Section 18 of the Limitation Act, 1963 is fairly well settled. In *Jignesh Shah and Another v. Union of India and Another*², the Hon'ble Apex Court has pointed out that when time begins to run, it can only be extended in the manner provided in the Limitation Act.
- 11.** Further, in *Asset Reconstruction Company (India) Limited vs. Bishal Jaiswal and Another this Court*³, while applying Section 18 of the Limitation Act, the Hon'ble Supreme Court even went to the extent of holding that an entry in the balance sheet of the company could also be treated as an acknowledgment in writing, subject however to any caveat found in the accompanying reports.
- 12.** For this issue, it is also useful to refer the Judgment of five Members Bench of this Appellate Tribunal in the Case of *V. Padamkumar Vs. Stressed Asset Stabilization Fund (SASF) & Anr.*⁴, Para No. 16 to 18 as under:-
- “16. Appreciating the aforesaid Judgment of the Hon'ble Patna High Court, the Hon'ble Supreme Court in “Jignesh Shah and another vs. Union of India and another” (Supra) observed that the aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. Thus, while holding so, the Hon'ble Supreme Court held that the date of default to be taken into consideration for computing the period of limitation of application under Section 7. As the decision of Hon'ble Supreme Court is binding, we hold that mere filing of a suit for recovery or a decree passed by a Court cannot shift forward the date of default.*

² (2019) 10 SCC 750

³ (2021) 6 SCC 366

⁴ C.A.(AT) (Ins) No. 57 of 2020

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17. A suit for recovery of money can be filed only when there is a default of dues. Even if the decree is passed, the date of default cannot be shift forward to the date of decree or date of payment for execution as a decree can be executed within specified period i.e. 12 years. If it is executable within the period of limitation, one cannot allege that there is a default of decree or payment of dues.

18. Therefore, we hold that a Judgment or a decree passed by a Court for recovery of money by Civil Court/ Debt Recovery Tribunal cannot shift forward the date of default for the purpose of computing the period for filing an application under Section 7 of the 'I&B Code'."

(Emphasis Supplied)

13. Further, the Hon'ble NCLAT in *SLB Welfare Assn. v. PSA IMPEX (P) Ltd.*⁵ observed that mere acknowledgement given by the Corporate Debtor and accepting the debt, shall not change the date of default. The date of default and acknowledgement are two different events and date of default is not dependent on acknowledgement of debt.

(Emphasis Supplied)

14. Another issue that is ***can a decree holder file an application under section 9 of the Code?***

15. The above issue has been settled by the Hon'ble Tripura High Court in *Sri Subhankar Bhowmik v. Union of India and Anr.*⁶, where the Hon'ble High Court has held;

"10..... At best, a decree signifies à claim that has been judicially determined and in that sense is an 'admitted claim' against the corporate debtor. Therefore, the IBC rightly categorises a decree-holder, as a creditor in terms of the definition contained in Section 3(10). Execution of such a decree, is however subject to the fetters expressly imposed by the IBC (in addition to and over and above the requirements and limitations of the execution process under the CPC), which cannot be wished away.

⁵ Company Appeal (AT) (Insolvency) Nos. 905 and 642 of 2022, decided on 04-11-2022

⁶ WP(C)(PIL) No.04/2022 decided on 14 March, 2022

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11. Looked at from another angle, the decree-holder gets a statutory status as a creditor under Section 3(10) of the IBC, by virtue of the decree. Since the decree cannot be executed by operation of the moratorium under Section 14, the IBC makes a provision to protect the interests of a decree holder by recognizing it as a creditor. The interest recognized is that in the decree and not in the dispute that leads to the passing of the decree. This is apparent from the fact that decree holders as a class of creditors are kept separate from “financial creditors” and “operational creditors”. No divisions or classification is made by the statute within this class of decree holders. The inescapable conclusion from the aforesaid discussion is, that the IBC treats decree holders as a separate class, recognized by virtue of the decree held. The IBC does not provide for any malleability or overlap of classes of creditors to enable decree holders to be classified as financial or operational creditors.”

(Emphasis Supplied)

- 16.** In view of the above, we hold that distinction of decree holders as creditors from ‘financial creditors’ and ‘operational creditors’, as seen aforesaid is intelligible and take forward the purpose of the Code. Hence, C.P (IB) No. **60/KB/2021** is **rejected**. However, the Operational Creditor is at liberty to resort to other remedies that may be available under any other law.
- 17.** 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 04th day of August, 2023

SA [LRA]