IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

CP No. 1681/IB&C/2017

Under section 9 of the IBC, 2016

In the matter of
CG Power & Industrial Solutions Ltd.
.... Petitioner

v/s.

ACC Ltd.
....Corporate Debtor

Order delivered on 16.02.2018

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner : Mr. Zat Andyarjina, Adv.a/w Mr. Hemant Prabhulkar, Adv., Mr. Shrey, Adv. & Ms. Prerana S. Adhav, Adv. i/b Jurisperitus.

For the Respondent : Mr. Kumar Tolani, Adv.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Order pronounced on 14.02.2018.

It is a Company Petition filed under section 9 of Insolvency & Bankruptcy Code by the Petitioner against the Corporate Debtor on the footing that the Corporate Debtor having defaulted payment of ₹80,88,364.55 as on 30.09.2017 against an Arbitral Award dated 15.09.2002 directing the Corporate Debtor to pay ₹10,70,834.50 along with interest @18% p.a. to the Petitioner from 12.12.1996 (the date of imposition of liquidated damages) till the date of Award i.e. 15.09.2002, hence this Company Petition for initiation of Corporate Insolvency Resolution Process under Insolvency & Bankruptcy Code.

2. The story of the Petitioner is that there was a company called Idcol Cement Ltd. subsidiary of IDC Orissa Ltd., both were fully owned by Government of Orissa. The Petitioner company formerly known as Crompton Greaves Ltd. was awarded two contracts for

supply of equipment and for erection and commissioning of 132/11 KV Sub-station work by it, in pursuance of being successful bidder, formal contracts were signed in between the Petitioner and Idcol Ltd. for supply of equipment and erection for value of ₹3.91crores and ₹36.37lakhs. Those contracts were executed for a period of one year, thereafter extension was given up to 31.10.1993 for completion of the contracts. For there was a delay in completing the contractual work, as there was a liquidated damages clause for the delay in supply and erection, Idcol Ltd. realized those damages by invoking Bank Guarantees furnished by the Petitioner. On having Idcol Cements wrongfully levied liquidated damages by invoking Performance Bank Guarantee, a dispute arose between the parties, by virtue of which, the Petitioner invoked arbitration vide its letter dated 05.07.1997. Thereafter, this Petitioner sent an advocate notice to Idcol in the month of November 1997 for resolution of dispute by way of arbitration clause. When the Corporate Debtor did not come forward for appointment of an arbitrator in pursuance of the Arbitration Clause present in the contract, the Petitioner approached Hon'ble High Court of Orissa u/s 11 of Arbitration and Conciliation Act, 1996 (hereafter referred as 'The Act'), in pursuance of which, the Hon'ble High Court on 07.03.1999 appointed Rtd. Justice Mr. J.M. Mohapatra as a Sole Arbitrator for adjudication of disputes. This Arbitrator on hearing from either side, passed an Award on 15.09.2002 directing Idcol Cement to pay ₹10,70,834.50 along with interest @18.50 p.a. to the Applicant/ Operational Creditor from 12.12.1996 till the date of Award i.e. 15.09.2002.

3. The Petitioner further says, that Idcol Cement Ltd. challenged the said Award before the Dist. Court Sambalpur u/s 34 of 'The Act' vide Arbitration Petition 1/2002. While this litigation was in progress, the present Corporate Debtor i.e. ACC Cement acquired the entire equity stake of the Industrial Development Corporation of Orissa Ltd. (IDCOL) and Idcol Cements Ltd. in pursuance of share purchase agreement executed in the month of December 2003 among IDCOL, Idcol Cements Ltd. and ACC (Corporate Debtor),

whereby Idcol Cement Ltd. became subsidiary of ACC Cement Ltd. with a name called Bargarh Cement Ltd., in the year 2005, it was again merged into ACC Ltd. It is how the present Corporate Debtor has become liable to pay the outstanding dues subsisting in respect to the supply contract entered between the Petitioner and Idcol Cement Ltd.

4. When the Ld. Dist. Judge of Sambalpur dismissed the challenge made against the Award passed in favor of the Petitioner herein, this Corporate Debtor preferred an Appeal vide ARBA 17/2005 before Hon'ble High Court of Orissa u/s 37(1)(b) of the Act which is still pending till date, but no stay has been granted against execution of the Award. For there being no stay against enforcement of the Award, the Petitioner filed an execution Petition 77/2005 against the Corporate Debtor before Sambalpur Civil Court to recover the amount of ₹72,36,000 as on July 2015.

5. In the meanwhile, Insolvency & Bankruptcy Code having come into force entitling the Petitioner to initiate Corporate Insolvency Resolution Process against this Corporate Debtor, the subject matter being in relation to supply of goods and services, the Petitioner filed this Company Petition u/s 9 of Insolvency & Bankruptcy Code after giving Section 8 notice on 4.10.2017.

6. On the Company Petition filed by the Petitioner, the Corporate Debtor Counsel has sought dismissal of this Company Petition on the ground since the Arbitration proceedings u/s 37 of The Arbitration and Conciliation Act, 1996 ('The Act') on the same subject matter being pending before the Hon'ble High Court of Orissa, the claim made by the Petitioner is liable to be dismissed, because the impugned claim falls under the caption of 'existence of dispute' as on the date of giving notice u/s 8 of the Code and also on the ground that this claim is barred by limitation.

7. To which, the Petitioner's Counsel Mr. Andyarjinaha tried to give justification to the point raised by the Corporate Debtor

Counsel by saying that the proceedings pending before Appellate Authority u/s 37 of the Arbitration and Conciliation Act 1996 will not fall within the ambit of "existence of dispute" as envisaged u/s 5 (6) of IBC whereby, the Counsel has sought for rejection of the point raised by the Corporate Debtor.

8. On hearing the submissions of either side, the short point for consideration is as to –

(i) Whether or not pendency of an appeal u/s 37 of "The Act" for setting aside the arbitral award u/s 34 of "The Act" will amount to "existence of dispute" as envisaged u/s 5(6) & 8 of IBC.

9. For knowing as to whether pending of appeal u/s 37 of The Arbitration and Conciliation Act, 1996, it is pertinent to look into the hierarchy of Adjudicating Authority given in 'The Act'. The arrangement in the 'The Act' is Arbitral Tribunal will pass award u/s 31, thereafter challenge to such award by way of application u/s 34 before Court as the case may be, on judgment u/s 34; appeal shall lie over such judgment u/s 37 of 'The Act'. No doubt, since section 35 of 'The Act' saying arbitral award passed u/s 31 is held as final u/s 35 of 'The Act', the awardee can initiate execution proceeding against the Respondent u/s 36 of 'The Act', unless the Court grants stay of the operation of the Arbitral Award, that being so, in the given case, there being no stay from the Appellate Court, the Petitioner initiated execution proceeding before the respective authority. As there is no stay against enforcement of the award, filing an appeal u/s 37, according to the Petitioner's Counsel will not amount to existence of dispute.

10. When it comes to dispute, section 5(6) of the Code says, dispute includes suit or arbitration proceeding relating to – a) the existence of the amount of debt, b) the quality of goods or service, or c) the breach of a representation or warranty.

11. It is an admitted fact that reference was made for arbitration in the year 2002, thereafter when award was passed, it was in the year 2005 taken to the District Court u/s 34 of 'The Act', there when it was decided against the Corporate Debtor/Respondent, the corporate debtor has filed an appeal u/s 37 and the same is still pending.

12. To justify his argument, the Petitioner's Counsel relied upon a case decided by Hon'ble NCLAT in between ***M/s. Annapurna Infrastructure Pvt. Ltd. v. SORIL Infra Resources Ltd.*** (Company Appeal (AT), (Insolvency) 32 of 2017 decided on 29.08.2017).

> *"22. From clause (a) of sub-section (2) of Sec. 8, we find that pendency of an arbitration proceeding has been termed to be an 'existence of dispute' and not the pendency of an application under Sec. 34 or Sec. 37 of the Arbitration Act.*
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> .....
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> *30. Learned counsel appearing on behalf of the respondent referred to the decision of the Hon'ble Supreme Court in Paramjeet Singh Patheja vs. ICDS Limited - [2006 (13) SCC 322 J wherein interpreting Section 9(2) (a) and (b) of the Presidency Towns Insolvency Act, 1909, the Apex Court held an arbitral award is "decree" or "order" for the purpose of insolvency notice under Section 9(2) of the Presidency Towns Insolvency Act, 1909.*
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> *31. The aforesaid decision is not applicable in the present context, the Presidency Town Insolvency Act, 1909 having superseded by Insolvency and Bankruptcy Code, 2016 and for the purpose of 'dispute' as 'existence of dispute', only the pendency of arbitral proceeding has been accepted as one of the ground of dispute. On the other hand, as apparent from Form 5 of Rules, 2016 for the purpose of I&B Code, and Arbitral Award has been held to be a document of debt and*

non-payment of awarded amount amounts to 'default' debt. Therefore, the aforesaid decision referred by learned counsel for the respondent is of no help to the respondent.

32 What has been held by the learned Adjudicating Authority that a dispute has been pending is not only against the provision of law and rules framed there under, as noticed above, but is also against the decision of this Appellate Tribunal in ***Kirusa Software Pvt. Ltd.*** *as noticed above. In this background, the finding of the Adjudicating Authority that a dispute pending is being against the law cannot be upheld.*

.....

40. For the reason aforesaid, while we hold that the finding of the learned Adjudicating Authority insofar as it relates to 'award', 'default of debt' and the 'alternative remedy', are not based on sound principle and against the provisions of law, we refrain to decide the question as to whether the 1st appellant is an 'operational creditor' or not which is first required to be decided by learned Adjudicating Authority."

13. On reading this entire judgment particularly the paras mentioned above, to say that pendency of arbitration proceeding u/s 34 of 'The Act', the Hon'ble NCLAT, zeroed in on three points saying 1) the arbitral award is held to be document of debt and non-payment of award amounts to default despite appeal proceedings pending u/s 37 of 'The Act', 2)the Petitioner having alternative remedy under some other enactment cannot become a ground for denying relief to the creditors u/s 9 of the Code, 3) for the Hon'ble NCLAT already held in ***Kirusa Software Pvt. Ltd. v. Mobilox Innovations Pvt. Ltd.*** (Company Appeal (AT) Insolvency 6 of 2017) that when an award has been passed by arbitral panel notwithstanding pendency of arbitration proceeding u/s 34 of 'The Act', the Operational Creditor can proceed on the footing arbitral award is a document entitling the creditors to proceed u/s 9 of the Code.

14. As against this proposition placed by the Counsel of the Operational creditor, the only hitch that comes in the way of deciding this case is as to whether proceeding u/s 37 of 'The Act' is an arbitration proceeding or not. This point was not brought to the notice of Hon'ble NCLAT while deciding ***M/s. Annapurna Infrastructure Pvt. Ltd. &Anr. v. M/s. SORIL Infra Resources Ltd. (Company Appeal (AT) (Insolvency) 32/2017*** decided on 29.08.2017) besides this, Hon'ble Supreme Court set aside Hon'ble NCLAT order passed in ***Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd. ((2018) 1 SCC 253)*** stating as follows:

> *"56. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a* ***plausible contention*** *requiring further investigation which is not a patently feeble legal argument or* ***an assertion of facts unsupported by evidence****. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability.*
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> .....
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> *57. The aforesaid finding has been given by Hon'ble Supreme Court extending the existence of dispute to any dispute in pre-existence before issuing notice u/s 8 of the Code notwithstanding the pendency of suit or arbitration proceeding whereby today law of the land is whenever any plausible dispute is in existence before issual of section 8 notice, it has to be taken into consideration as dispute is in existence without going into merit of the disputes. Therefore, now this Bench is constrained to proceed on the premise that when any* ***plausible dispute is in pre-existence before issual of sec 8 notice it has to be***

construed as dispute in existence as mentioned u/s 8 of the Code."

15. Though it is repetition, for the sake of clarity, it is pertinent to reproduce the definition of dispute as envisaged u/s 5(6) and section 8 (2) of the Code.

Section 5(6):"dispute" includes a suit or ***arbitration proceedings*** *relating to –*

(a) the existence of amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty.

Section 8: Insolvency Resolution by Operational Creditors -

(1) .....

(2) The Corporate Debtor shall, within a period of 10 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 creditors –

(a) Existence of dispute, if any, and 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) .....

16. Let us go to following provisions of the Act as well, so as to find out as to whether termination of the arbitral proceedings close out the contention of the Corporate Debtor having regard to the **existence of dispute**, in respect to arbitration. They are as below:

Arbitration & Conciliation Act, 1996

Part 1

Arbitration

Section 2 Definitions:

a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

b) "arbitration agreement" means an agreement referred to section 7;
c) "arbitral award" includes an interim award;
*d) **"arbitral tribunal"** means a sole arbitrator or a Panel of arbitrators.*

*21. Commencement of arbitral proceedings: — Unless otherwise agreed by the parties, **the arbitral proceedings in respect of a particular dispute commence** on the date on which a request for that dispute to be referred to arbitration is received by the respondent*

32. Termination of proceedings:—

*(1) The **arbitral proceedings shall be terminated by the final arbitral award** or **by an order of the arbitral tribunal under sub-section (2).***

*(2) The **arbitral tribunal** shall **issue** an order for the **termination of the arbitral proceedings** where—*

*(a) the **claimant withdraws his claim, unless the respondent objects** to the order and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute,*

*(b) the **parties agree on the termination** of the proceedings, or*

*(c) the **arbitral tribunal finds** that the **continuation of the proceedings** has for any other reason **become unnecessary or impossible.***

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

*35. Finality of arbitral awards: —**Subject to this Part** an arbitral award shall be final and binding on the parties and persons claiming under them respectively.*

17. If we see the design of the Arbitration & Conciliation Act, 1996, it has been divided into IV Parts, which are – ***Part I) Arbitration*** with 10 Chapters covering general provisions (Sec. 2-6), composition of Arbitral Tribunal (Sec. 10-15), Jurisdiction of arbitral tribunals (Sec. 16-17), conduct of arbitral proceedings (Sec. 18-27), making of arbitral award and the termination proceedings

(Sec. 28-33), recourse against arbitral award (Sec. 34), finality and enforcement of arbitral awards (Sec. 35-36), Appeals (Sec. 37), Miscellaneous (Sec. 38-43). ***Part II) Enforcement of certain foreign awards*** with two chapters, New York Convention awards (Sec. 44-52), and general convention award (Sec. 53-60), ***Part III) Conciliation*** (Sec. 61-81), ***Part IV) Supplementary Provisions*** (Sec. 82-86).

18. On having gone through divisions of Parts, arbitration is made as one part with sections 2-43 covering from Definition Chapter to Miscellaneous Chapter including appeal u/s 37 of 'The Act'. For the heading itself indicates appeal is part of the arbitration, can it be limited to arbitration means only the proceedings that happen in between section 21 to section 32 of 'The Act'? Had it been the intention of the legislature to treat arbitral proceeding as arbitration proceedings, Part-I should have been mentioned as arbitral proceeding, instead of giving a heading of arbitration. By this analogy whatever proceedings taken place from section 2 to section 43 of 'The Act' has to be construed arbitration proceedings. In view of this, appeal u/s 37 cannot be singled out as separate and alien to the arbitration proceedings covering from section 2 to section 43.

19. As to interpretation of statutes, as we all know that we have to construct purpose of the section in the section itself, if it is not there, then the title of the section is to be looked into, when we are not in a position to interpret it by looking at the heading of this section, then we will have to see chapter heading then to parts in case the Act is divided into parts. When a specific part of the enactment is titled as arbitration, how could it be said that the proceedings included under the said head is not an arbitration proceeding. Apart from this, interpretation of law normally remains in alignment with context in which application is required, here we are doing all this exercise to arrive to a conclusion as to whether or not pendency of appeal amounts existence of dispute under another enactment, not to decide something under Arbitration and Conciliation Act 1996, here it is Insolvency and Bankruptcy Code.

20. In view of these reasons only, in the Insolvency & Bankruptcy Code, it has been defined as **arbitration proceedings, not as arbitral proceedings,** therefore, beginning from section 21 and ending at section 32 in respect to arbitral proceedings cannot be equated or extended to arbitration proceedings.

21. May be it is to some extent right in respect to issue of limitation and other aspects having regard to arbitration proceedings, but it cannot be exceeded to say that once arbitral proceedings are terminated, dispute between the parties also terminated. The perception that has been given in respect to demarcating arbitral proceedings from arbitration proceedings under the Arbitration and conciliation act 1996 cannot be stretched out to say that the right of assertion of dispute available to the Corporate Debtor is written off.

22. To find out logic in the arbitral proceedings, we must again examine sections 21 and 32 from a different facet of the legislation for two reasons –

(1) As to whether dispute has come into existence by commencement of arbitral proceedings on request for a particular dispute to be referred to arbitration received by the respondent as envisaged under section 21 of The Act or commencement of arbitral proceedings happened owing to preexistence of dispute between the parties.

(2) As to whether it is to be construed that by termination of arbitral proceedings u/s 32 of The Act amounts to termination of existence of dispute between the parties.

23. First point: For answering first point, if we read section 21, it is manifest that commencement of ***arbitral proceedings is in respect to a dispute*** between the parties, it cannot be reversed and read that ***dispute in respect to arbitral proceedings,*** yes if

we read reversing the section, then it could be construed that arbitral proceedings cause dispute. It is sheer common sense that no court proceedings would become cause and effect to dispute. Dispute will obviously become cause and effect for initiation of court proceedings, so is the case in respect to arbitral proceedings as well. Unless there is a preexisting dispute between the parties in respect to clause/clauses of an agreement, there could not be an occasion for a request of reference, after all what is meant by dispute, in normal parlance, difference of opinion and not in a position to arrive to ad idem on a particular point. When it is not resolvable between them, then necessity arises for approaching third person for resolution. On this, a question may come, how would respondent come to know dispute is in existence unless it is put to the respondent without request for reference being received? The answer is simple, non-performance of something that is to be performed as agreed between them amounts to dispute. Let us assume that other side is not aware of dispute before receiving request for reference, then what could be the eventuality, if the other side feels it is obligeable and obliges, then also cause for dispute automatically gets frustrated. Any of this kind happened in this case? What in fact happened is admittedly delay happened in completion of work in late 90s, then bank guarantee invoked, by which, the petitioner having felt aggrieved, it has caused commencement of arbitral proceedings. Dispute here is invocation of bank guarantee, which led to initiation of arbitral proceedings. All was said for one and only one reason is receiving of reference is not commencement of dispute, but commencement of arbitral proceeding is owing to existence of dispute as on the date reference is made. So what we say is existence of dispute and commencement of arbitral proceedings are two different actions, commencement of arbitral proceedings is sequel to existence of dispute, so closure of arbitral proceedings need not be closure of dispute. It will be further clear if answer to second point is looked into.

24. Second point: On close reading of section 32 that is the stage for termination of arbitral proceedings, it is evident that arbitral proceedings can terminate in two ways, one by passing final arbitral award, two by an order of the Arbitral Tribunal under subsection 2 of section 32 of the Act. Under first limb, passing of arbitral award is the termination, in second limb, one, it could be terminated on withdrawal of proceedings, that too only on no objection from other side, two, when parties agree for termination of the proceedings, three, when the Tribunal felt continuation of proceedings would become unnecessary or impossible. It is understandable in second limb; one or two situations may warrant for saying dispute has come to closure, but certainly not under first limb, because upon passing an arbitral award, it is open to the aggrieved to file application u/s 34 and then appeal u/s 37. May be, it is correct to the extent of termination of arbitral proceedings, but not in respect to the existence of dispute when appeal is filed u/s 37 of The Act. In section 21, it is said about dispute, when it has come to section 32, it has not been said anything to say dispute has come to end. When it has been held that existence of dispute and commencement of arbitral proceedings is different, termination of arbitral proceedings under first limb will obviously not tantamount to closure of dispute. Attainment of finality of award passed by Arbitral Tribunal **u/s 35 is subject to the Part**, Part means Part - 1 (sections 2-43, including appeal section -37).

25. As to finality of civil court decree is concerned, there also decree is held as final unless it is reversed by appellate authority, the same is the case in arbitration proceedings as well. It is no different. In civil decree also, unless stay is granted, execution court is free to enforce the decree notwithstanding the pendency of appeal against the decree. Same has to be the case u/s 36 of 'The Act' as well.

26. It is an established proposition of law that appellate proceedings are to be treated as continuation of suit proceedings because a decision in the appeal will have a bearing on the decree

or suit proceedings, likewise, here also a judgment u/s 37 of 'The Act' will have equal bearing on the judgment passed u/s 34 of 'The Act'. Moreover, in section 36 of the Act, it has been clarified; arbitral award is as good as decree passed by Civil Court. So when the proceedings under CPC and the proceedings under 'The Act' are in pari materia in respect to bearing of appeal over the arbitral award, can it be at least for the sake of IBC said that there is no pre-existing dispute in respect to the operational debt claim made by the petitioner. We believe it is not so. May be, it is to some extent right in respect to arbitration proceedings, because for challenge u/s 34, there are some qualifications, likewise to file an appeal u/s 37, there are further qualifications, but those qualifications cannot be magnified to the extent to say that no dispute is in existence in between the Petitioner and the corporate debtor when appeal is pending. If dispute is terminated or closed by virtue of section 32 of the Act, what for appeal is filed?

27. One thing we should not get lost sight of is logic; law is almost all times an imprimatur of state to the logic appealable to layman. When logic is lost in our decision, there is somewhere something wrong in our objective perception, because logic is supported by law. No law without reason.

28. When it comes to existence of dispute under IBC in respect to arbitration proceedings, jurisprudence and the rules of the game will automatically will be different. Just because a claim under the Act is permitted to proceed for enforcement of award u/s 34, it cannot be said that the Corporate Debtor conceded that there is no dispute between the parties. If appeal is not filed, no doubt it can be construed that the petitioner is entitled to proceed under IB Code basing on the award which in all fours has become final. Let us see a converse situation, if the Appellate Authority u/s 37 reversed the arbitral award, what this Corporate Debtor would do if by that time get liquidated under IB Code? Is there any procedure to undo this damage? To get over this kind of predicament, the definition of operational debt has been further safe guarded by

including another essential element i.e. existence of dispute in addition to elements of existence of debt and default which are sufficient enough under section 7 of the Code.

29. By looking all these provisions of the Code as well as 'The Act', the dispute includes pendency of arbitration proceedings, since the Arbitration and Conciliation 1996 Act includes appeal u/s 37, obviously it will become Part-I of the proceedings of the 'The Act' meaning thereby section 37 proceeding is to be construed as arbitration proceeding.

30. Since the Petitioner's Counsel is more on starting of arbitral proceedings u/s 21 of 'The Act' and termination of the arbitral proceedings u/s 32 of 'The Act', it is to be clarified that this so called starting and termination of the proceedings is in relation to arbitral proceedings commenced and closed before arbitral authority i.e., before a sole arbitrator or a panel of arbitrators as defined u/s 2(d) of 'The Act', nothing more nothing less.

31. The Petitioner's Counsel relied upon ***Ishar Singh v. Financial Commissioner and Ors. (1984) 4SCC 17*** to say that when limitation period has not been prescribed in an enactment, Limitation Act is inapplicable to the said enactment.

32. The Petitioner relied upon ***L.S. Synthetics Ltd. v. Fairgrowth Financial Services Ltd. &Anr. (2004) 11 SCC*** 456 to say that Limitation Act is not applicable before bodies other than Courts such as Quasi-Judicial Tribunal or executive authorities, by going through this judgment, it appears the Hon'ble Supreme Court has held that the subject matter involved in that case i.e. Special Court (trial of offences relating to transactions in securities) Act, 1992, has conferred suo-motu powers of attachment of any property of notified person upon the special court to do away the devouring evil the then existing. State time to time comes with enactments to eradicate the evils pestering the society, in doing so; the requisite strength that is required to do away the evil will be

infused into it. It does not mean the same vigor is applicable to another enactment on a particular meaning given in that statute. One of the reasons considered for saying Limitation Act is not applicable in the afore said enactment is due to suo-motu power of attachment of the property of the notified person, for this reason alone, it has been held that Court is not bound by any period of limitation unless it has been prescribed under the said enactment. Same cannot be equated to a case where remedy is provided for a money claim. We must also say one more thing, that is the concept in dealing with winding up proceedings under 1956 Act is different from I&B Code concept. Under old Companies Act, inability of payment is of primordial importance to pass winding up order, but when it comes to IB Code, it is missing. Here, existence of debt and default are elements necessary to admit cases, therefore whatever concepts that are established under old Companies Act cannot be bodily lifted, because the criteria and cause of action for filing money recovery suit and IB Petition are, almost same. Under I & B, Can we go into ability or solvency of the company for either allowing or rejecting IB Petition? It can't, of course effect of admission is different, and thereby the adjudicating authority shall be more cautious in admitting the petition because consequences are beyond the relief of recovery of money. The petitioner relied upon ***A.S.K.Krishnappa Chettiar & Ors. v. S.B.V. Somaiya & Ors. (AIR 1964 SC 227)*** to canvass the same proposition held in other two cases above discussed.

33. However, this Bench having already stated that the dispute is in existence and having stated that termination of arbitral proceeding will not amount to arbitration proceeding, we don't think we are under obligation to deal with limitation aspect. Because this bench having already decided dispute is still in existence, even if this limitation point is assumed as held in favor of the petitioner, then also this petition is liable to be dismissed. In view of the same the issue of limitation has not been decided.

34. One more issue warrants discussion is the Corporate Debtor has not given reply to the petitioner to the notice given u/s 8, of course the petitioner has filed an affidavit stating that neither reply has been given to section 8 notice nor paid claim amount within 10 days from the date of receipt of notice. Inspite of it, it is the duty of this Bench to answer the effect of these actions. For which, we have to visit section 8 & 9 of the Code to examine as to what could be the effect of not giving reply to the petitioner section 8 notice. Sections 8 & 9 of the Code are as below:

> *"8. (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, if any, and 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 repayment 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 repayment of the operational debt in respect of which the default has occurred.*

9. (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section may propose a resolution professional to act as an interim resolution professional. (5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, —

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor; (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

35. In section 8, it has been envisaged that a notice has to be given intimating debt and default, on which, if the corporate debtor having failed to respond to the notice either by paying unpaid debt or by notifying it to the petitioner about existence of dispute within 10 days prior to receipt of section 8 notice, the petitioner gets cause of action to file petition under section 9 on two situations, 1 – if reply has been given notifying existence of dispute since before receipt of notice, 2 – if reply notice has not been given within 10 days from the date of receipt of section 8 notice. On first count, the petitioner if files case under section 9 despite reply has come to it within 10 days disputing the claim, heavy burden lies upon it to prove that no dispute is in preexistence as on the date of receipt of section 8 notice. In second count, if reply has not been given, it cannot be assumed that petition u/s 9 shall be admitted, but burden shifts upon the corporate debtor to prove dispute is in existence. Basing on the cause of not replying alone, petition cannot be admitted, because it has not been said so in section 9 as well. On reading and rereading of section 9, it is understood that if any of the compliance not done as envisaged under section 9 (5) (ii), it shall invariably be rejected without going any further, but as to admission of the case, the petitioner has filed an affidavit stating that it has not received notice of dispute within 10 days from the date of receipt of section 8 notice. It is also not held so far if reply has not been given intimating preexistence of dispute, the corporate debtor is deprived of placing the material reflecting preexistence of dispute. The only difference is, if reply to section 8 notice is not given, burden lies upon the corporate debtor to prove existence of dispute. Here the corporate debtor as well as the petitioner are in ad idem in respect to pendency of appeal u/s 37 of the Arbitration and Conciliation Act 1996, therefore the only legal point for consideration is as to whether pendency of such appeal falls within the ambit of definition of existence of dispute, which has already been held that pendency of the appeal amounts to existence of dispute.

36. In view of Mobilox order of Honorable NCLAT has been set aside by Hon'ble Supreme Court on the ground, existence of dispute is extendable to cases other than suit and arbitration proceedings, we distinguish that the Hon'ble NCLAT finding in Mobilox case is not applicable to the legal proposition existing as on today, henceforth, this Company Petition is dismissed by holding that the dispute has already been in pre-existence in between the Petitioner and Corporate Debtor even before section 8 notice was issued by the Petitioner.

37. Accordingly, this Company Petition is hereby **dismissed** without costs.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B.S.V. PRAKASH KUMAR
Member (Judicial)