

National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 596 of 2020

(Arising out of Order dated 18th March, 2020 passed by National Company Law Tribunal, Kolkata Bench, Kolkata, in C.P. (IB) No.- 1040/KB/2019).

IN THE MATTER OF:

**Rajmee Power Construction Limited,
Through its Managing Director,**

**Having its Registered Office at:
Kumar Niwas, Bright Lane,
Kokar Ranchi, Jharkand – 834001.**

...Appellant

Versus

M/s. Jharkhand Urja Sancharan Nigam Limited

**Having its Registered Office at:
SLDC Building, Kusai Colony,
Doranda, Ranchi, Jharkhand – 834002
Through its Managing Director.**

...Respondent

**Appellant: Mr. Pandey Neeraj Rai and Ms. Rachita Priyanka Rai,
Advocates.**

**Respondent: Mr. Anup Kumar, Sr. Standing Counsel alongwith
Mr. Saurabh Jain and Ms. Shruti Singh, Advocates.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Order dated 18.03.2020 in CP (IB) No. 1040/KB/2019 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata), '*M/s. Rajmee Power Construction Limited*', preferred this Appeal. By the Impugned Order, the Learned Adjudicating Authority had dismissed the Application preferred by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016,

(hereinafter referred to as the '**Code**') solely on the ground of Limitation.

While dismissing the Application, the Learned Adjudicating Authority observed as follows:-

"8. We shall deal with the contentions raised by the Corporate Debtor. On perusal of the proceedings of the Suit filed before the Court of the Civil Judge (Senior Division)-1, Ranchi by the Corporate Debtor it is seen that the suit has been filed on 06.06.2019 and the demand notice was sent on 07.05.2019 through email and 09.05.2019 by hand, hence it is clear that the suit has been filed after the demand notice has been sent, the suit doesn't form a pre existing dispute.

*9. Further, on the point of parallel proceedings the Hon'ble NCLAT has held in **M/s Annapurna Infrastructure Pvt. Ltd. and anr. Vs. M/s SORIL Infra Resources Ltd, Company Appeal (AT) (Insolvency) No. 32 of 2017** that pendency of execution petition of an arbitral award is no bar to file a petition under IBC.*

*10. With regard to the point of limitation, it is seen that there are internal notings made by the Corporate Debtor in its office files which is being referred to and relied upon as an acknowledgment of debt by the Operational Creditor. Even if the said document is taken as an acknowledgment for the purpose of section 18 of the Limitation Act, 1963, the last noting is dated 02.12.2010. If the limitation is calculated on the basis of the said date, the limitation stopped running on 01.12.2013. Apart from the said office notings no other document has been filed that acknowledges the debt within the period of limitation. The Operational Creditor has further relied on a decree dated 06.10.2018 arising out of the challenge against the Arbitral Award dated 14.02.2008 filed by the Corporate Debtor in the year 2011. The said challenge against the Arbitral Award was filed way beyond the period of limitation and was also dismissed on the very same ground. For the said reason, the challenge against the Arbitral Award cannot be considered to having saved the limitation period for the Financial Creditor. The Honourable NCLAT in para 24 in the matter of **Sh. G. Eswara***

Rao vs. Stressed Assets Stabilisation Fund, [Company Appeal (AT) (Insolvency) No. 1097 of 2019], has held as follows:

"24. In the present case, the 'Corporate Debtor' defaulted to pay prior to 2004, due to which O.A. No. 193 of 2004 was filed by Respondent ('Financial Creditor'). A Decree passed by the Debts Recovery Tribunal or any suit cannot shift forward the date of default. On the other hand, the judgment and Decree passed by Debts Recovery Tribunal on 17th August, 2018, only suggests that debt become due and payable. It does not shifting forward the date of default as Decree has to be executed within a specified period. It is not that after passing of judgment or Decree, the default takes place immediately, as recovery is permissible, all the debts in terms of judgment and Decree dated 17th August, 2018 with pendent lite and future interest at the rate of 12% per annum could have been executed only through an execution case."

11. Further, the Operational Creditor has filed office notings of the Corporate Debtor as well as a cheque that was issued in 2016, The Operational Creditor has failed to show that there is a continuous chain of events without violating the provisions of the Limitation Act, 1963. The Hon'ble Supreme Court of India by an order in **B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates, MANU/SC/1160/2018** has held that: An application filed after the IBC came into force in 2016 cannot revive a debt which is no longer due as it is time-barred. The amendment of s. 238A would not serve its object unless it is construed as being retrospective. Otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation.

It is clear from a reference to the Insolvency Law Committee Report of March, 2018, that the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of IBC. The same issue has been dealt with in **Jignesh Shah and Ors. v. Union of India (UI) and Ors. 2019 (13)**

SCALE 61, Sagar Sharma & Anr. v. Phoenix ARC Pvt. Ltd. & Anr. Civil Appeal No. 7673 of 2019, and Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. and Ors., MANU/SC/1301/2019.

11. We, therefore hold that this application is time barred.

12. C.P. [IB] No. 1040/KB/2019 is hereby dismissed on the above grounds.”

2. **Submissions on behalf of Learned Counsel appearing for the Appellant:**

- Learned Counsel for the Appellant strenuously contended that the Arbitral Award was passed in the favour of the Appellant on 14.02.2008, which was not challenged, but was duly implemented. The decision in this regard was conveyed to the Appellant on 30.04.2008 and the money was paid by cheque dated 10.05.2008.
- After payment of the Award Money on 10.05.2008 some tentative steps were taken by the officials of the ‘Corporate Debtor’ reverse and recovery paid money but nothing had happened finally. On 04.12.2012, a proposal was mooted by the Subordinate Authorities of the ‘Corporate Debtor’ and the same was proposed in the file note sheets, but the Higher Authorities did not agree and referred the matter for examination by the Committee on 11.12.2010. There was no decision taken and the matter remained in the internal files noting only.

- A Board decision was taken on 11.01.2011 not to make any recoveries and a decision was taken to challenge the Award, though after a delay of three years.
- The final decision to make recovery was taken only on 29.01.2016 but was never conveyed to the Appellant herein. The Appellant filed an RTI Application and the file notings gave the knowledge about the fact that a Board decision was taken on 29.01.2016 and the amount to be deducted was mentioned as less Arbitration– Rs.11 Crores/-. The total payable sum has been calculated as Rs.2,47,16,999/- after deducting Rs. 11 Crores/-.
- The Appellant was given a cheque for Rs.2,47,16,999/- on 31.03.2016 and having no knowledge about the reason for less payment, the Appellant wrote several letters, but there was no response. It was only on account of the information received through RTI that the Appellant came to know about the internal decisions.
- Learned Counsel submitted that Article 137 of the Limitation Act applies to IBC proceedings and the accrual of 'Right to Issue' would mean 'date of default' and in the instant case, the 'date of default' will be the date of knowledge of default or date for the purpose of accrual of 'Right to Issue'. Learned Counsel placed reliance on the Judgement of the Hon'ble Apex Court in '*B.K. Educational Services Pvt. Ltd.*' Vs. '*Parag Gupta and Associates*', (2019) 11 SCC 633.
- The Section 8 Notice describes the transaction leading to the debt and the letter dated 01.11.2018 was an appended to the Notice which

clearly stated about the payment made in the past against the Arbitral Award, which was, reversed by JSEB by making adjustments.

- Recovery made in 2016 was provisional subject to the challenge against Arbitral Award which got dismissed on 06.10.2018 and as no challenge was preferred, the Limitation start on 06.10.2018. Hence, the Adjudicating Authority had erroneously dismissed the Application as barred by Limitation without taking into consideration the file notings of 2010.

3. **Submissions on behalf of Learned Sr. Counsel appearing for the**

Respondent:

- The Learned Sr. Counsel vehemently submitted that the Application under Section 9 of the Code is not maintainable and severely hit by law of Limitation as the 'date of default' in the Notice under Section 8 of the Code is mentioned as 14.02.2008.
- There is a 'Pre-Existing Dispute' between the 'Corporate Debtor' and the Appellant which is being adjudicated by different Courts of law.
- The Appellant had raised the dispute by filing a Commercial Execution Case No. 11 of 2018 before the Learned Commercial Court, Ranchi and the same was pending for adjudication subject to serious dispute raised by the 'Corporate Debtor'.
- In Part IV of the Application under Section 9 of the Code dated 04.06.2019, the 'date of default' was once again mentioned as 14.02.2008 and therefore the Adjudicating Authority has rightly observed in the Impugned Order dated 18.03.2020 that the

‘Operational Creditor has relied on a decree dated 06.10.2018 arising out of the challenge against the Arbitral Award dated 14.02.2008 filed by the ‘Corporate Debtor’ in the year 2011’.

- He placed reliance on the Section 423 of the Companies Act, 1963 which reads as follows:-

“433. Limitation. – The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.”

- Learned Sr. Counsel placed reliance on the Judgement of the Hon’ble Supreme Court in ‘B.K. Educational Services Pvt. Ltd.’ Vs. ‘Parag Gupta and Associates’, (2019) 11 SCC 633, in which the Hon’ble Supreme Court has laid down as follows:-

“21..... As in the present case, and as is reflected in the Insolvency Law Committee Report of March, 2018, the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of the Code. The Code cannot be triggered in the year 2017 for a debt which was time barred, say, in 1990, as that would lead to the absurd and extreme consequence of the Code being triggered by a stale or dead claim, leading to the drastic consequence of instant removal of the present Board of Directors of the corporate debtor permanently, and which may ultimately lead to liquidation and, therefore, corporate death. This being the case, the expression "debt due" in the definition sections of the Code would obviously only refer to debts that are "due and payable" in law, i.e., the debts that are not time-barred.

27. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets 53 attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be

barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.”

- He also placed reliance on the following Judgements in support of his case:-
 - *‘Vashdeo R. Bhojwani’ Vs. ‘Adhyudaya Coop. Bank Ltd., (2019) 9 SCC 158.*
 - *‘Gaurav Hargovindbhai Dave’ Vs. Asset Reconsturction Co. (India) Ltd., CIVIL APPEAL No. 4952 of 2019 (2019) 10 SCC 572.*
 - *‘Sagar Sharma’ (2019) 10 SCC 353*
 - *‘Jignesh Shah’ Vs. ‘Union of India’, (2019) 10 SCC 750.*
 - *‘Babulal Vardharji Gurjar’ Vs. ‘Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.’, 2020 SCC OnLine SC 647.*
- Learned Counsel concluded that for an amount which fell ‘due and payable’ on 14.02.2008, the Application filed on 04.06.2019 is clearly barred by Limitation keeping in view the ratio of the Hon’ble Supreme Court in the aforementioned Judgements.

Assessment:

4. It is not in dispute that the Arbitral Award was first passed on 14.02.2008 in favour of the Appellant and against the ‘Corporate Debtor’. The Award was accepted on 30.04.2008 and the decision of the Board was conveyed to the Appellant herein (exhibit as Annexure A-3). The implementation was conveyed to the Appellant herein vide letter dated 30.04.2008 based on the Award dated 14.02.2008. At this juncture, it is relevant to reproduce this communication:-

Annexure-A-4

(99)

Trans. 02/5108.

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RAMJEE POWER CONSTRUCTION LIMITED

KUMAR NIVAS, BRIGHT LANE, KOKAR, RANCHI-834001

Bill

Phone : 2543769/2543986
Bill No: RPC/JSEB/08/Award/No. 1
Dated: 02.05.2008.

*Bill Register 55
Sl. No 29*

To,
The Dy. Director of Accounts (RE Plan)
Jharkhand State Electricity Board,
Engineering Building, Dhurwa,
Ranchi-834004.

Through Proper Channel

Sub: Bill against Awards of Sole Arbitrator in case no. 1 of 2007 dated 14.02.2008 for Agreement no. 12/2004-2005 dated 07.02.2005, Agreement no. 13/2004-2005 dated 07.02.2005 for package A (Dumka-Devgahr Transmission line and Grid Substation at Dumka) and Agreement no. 21/2004-2005 dated 19.05.2005, Agreement no. 22/2004-2005 dated 19.05.2005 for package C (Dumka-Pakur Transmission Line).

Ref: Letter No. 318 C.E. (T)/J.S.E.B dated 30.04.2008.
JSEB/ Resolution No. 492 Agenda No. 487/08-09.

Award Dated 14.02.2008

Sl. No.	Claim No.	Description	Amount.
1.	3	Extra Expenditure due to suspension of work due to non release of payment and due to delay in extension of time and due to non approval of quantity schedule and due to imposition of penalty etc.	Rs. 3,18,86,100/-
2.	4	Waiver/refund of interest on mobilization advance as payments of bills have been delayed by respondents from 6 to 18 months.	Rs. 62,56,626/-
3.	5	Interest @ 15 % on delayed payments in excess of 15 days.	Rs. 91,89,700/-
4.	6	Refund of Bank Charges for extension of Bank Guarantees after original contract period i.e. after 15.06.2006 for package A and after 28.10.2006 for package C.	Rs. 34,66,048/-
5.	8	Loss due to withdrawal of construction of Devghar pay from scope of work.	Rs. 45,50,000/-



For Ramjee Power Construction Ltd
[Signature]
Chairman-cum-Managing Director

(45)

Bill No. RPC/J&GB/08/Award-01 dt. 02.5.08.
for Transmission Line work & ES.

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6.	9	Claim against prolongation of Contract value beyond original contract period.	Rs. 5,09,69,425/-
Sub Total			Rs. 10,63,17,899/-
7. a.	11	Interest @ 15% p.a. from the date of award (14.02.2008) under above claims up to 30 days (up to 14.03.2008) ^{15.2.08 to 29.2.08 = 15 days} _{01.3.08 to 15.3.08 = 15 days}	Rs. 1,310,768.00
7. b.		Interest @ 18% P.a beyond 30 days i.e. from 15.03.2008 to 02.05.2008 (date of this bill). (March: 17 days+April 30 days+may 2 days=49 days). ^{16.3.08 to 30.4.08 = 46 days}	Rs. 25,69,106.49 241,814.00
Total			Rs. 11,01,97,774.11
(Eleven Crores one lac ninety seven thousand seven hundred seventy four only)			Rs. 11,00,40,481.00
7. c.		Add: interest @ 18% p.a on award amount i.e. Rs. 52,430.74/day on Rs. 10,63,17,899.00 from 03.05.2008 till date of payment.	
Less: I/Tax @ 2.266%			Rs. 24,93,517.00

Net. Rs. 10,75,46,964.00
For Ramjee Power Construction Ltd.

(G. K. Sinha)
Manager Accounts

Gross total \rightarrow ~~Rs. 13,63,17,899.00~~
plus: Interest on above @ 15% for 30 days. for 15.2.08 to 29.2.08 = 15 days
01.3.08 to 15.3.08 = 15 days
Total for 30 days \oplus Rs. 1,310,768.00

Interest @ 18% p.a. beyond 30 days for 16.3.08 to 31.3.08 = 16 days.
for 01.4.08 to 30.4.08 30 " \oplus Rs. 24,11,814.00.
Total for 46 days \oplus Rs. 11,00,40,481.00

Less: I/Tax @ 2.266% \ominus Rs. 24,93,517.00
Net payable Rs. 10,75,46,964.00

Paid vide Director's cheque no 068910 dt. 10/5/08 for Rs. 10,75,46,964/- of SBI/Doranda. Board's cheque no 927732 dt. 08/5/08 through P/L A/c of SBI/Doranda.



For Ramjee Power Construction Ltd.
Chairman-cum-Managing Director

5. It is also an admitted fact that an amount of Rs.10,75,46,964/- was paid to the Appellant herein vide cheque dated 10.05.2008 (Annexure A-5).

6. Subsequently Jharkhand Urja Sancharan Nigam Limited ('JUSNL'), the statutory successor of Jharkhand State Electricity Board ('JSEB'), took Board decision on 29.01.2016 to recover the money paid to the Appellant. It is the Appellant's case that this decision was never communicated to them. It is also not the case of the 'Corporate Debtor' that they had communicated this decision to the Appellant herein. The Learned Counsel for the Appellant drew our attention to the transfer scheme. The transfer scheme issued under the Electricity Act, by which JUSNL became the statutory successor of the rights and liabilities of JSEB. Subsequently, the Board took a decision that an amount of Rs.11 Crores/- is to be deducted and the same was shown under the head 'keep back Arbitration' and an amount of Rs.2,47,16,999/- was paid to the Appellant vide cheque dated 31.03.2016 after deducting Rs.11 Crores/-. The Appellant preferred an RTI Application on 02.08.2016 seeking the reasons for the less payment which was received by the Appellant on 06.08.2016. The relevant portion of (Annexure A-6) of the Appeal Paper Book signed on 03.12.2010 and 04.12.2010 and 11.12.2010 by the officials of the 'Corporate Debtor' reads as under:-

It may be noted that Member (Finance) has recommended for formation of committee of Engineer-in-Chief, I.G. (Vigilance) and Finance Controller to go through all papers regarding issue of arbitration, delay cost overrun, excess payment etc. Report of Sr. L.A. along-with committee report is to be considered together for deciding future course of action (N/5) [File No. CE (Trans.)/153/03-04/part file, Package A] C/ 8 (8).

Chairman has already ordered for challenging the arbitration award being fraudulent act (N/5) [File No. CE (Trans.)/153/03-04/part file, Package A] C/8 (8)

The details of bills had already been recorded. If all payments are taken into account then nothing is due to agency as the amount paid against arbitration award has been turned as fraudulent act by Chairman.

ESE Tr. Circle Dumka stated at N/2-3 that Dumka GSS was commissioned and put on commercial load on 20.02.09 and 132KV. Dumka Deoghar Tr. Line was finally commissioned on 31.01.10. Accordingly if we consider 15% keep Back-Amount for release then the total net payable amount comes to Rs. 132185413.00. However, Tr. Department also suggested for reserve of notional LD as applicable as per Work Order till decision of Board in this regard. Calculations of LD are as under.

Sl. No.	Order No. & Date	Name of work	Ordered Value	Revised Ordered Value	Delay in Projection	LD in %	LD Amount
1.	PO. No. 7 dtd. 18.01.2005	GSS Dumka, Deoghar - Dumka Tr. Line	256977593	272663211	7 Months	7	19086425
2.	WO No. 2 dtd. 18.01.2005	GSS Dumka, Deoghar - Dumka Tr. Line	102014137	150826537	7 Months	7	10557858
3.	PO No. 20 dtd. 17.05.2005	Tr. Line Dumka-Pakur	95172154	107226850	18 Months	18	19300833
4.	WO No. 5 dtd. 17.05.2005	Tr. Line Dumka-Pakur	98846286	101126859	18 Months	18	18202835
5.	CE (T) Letter No. 692 dtd. 27.09.2008	Maithan- Jamtara reconductoring	50000000	50000000	24 Months	24	12000000
6.	Award of arbitration						0
Total			603010170	681843457			79147951

f.s.k.

.99A

The amount due to firm			
Payable to firm	Rs.	132185413.00	} 'A'
Less Amount of Arbitration	Rs.	110040481.00	
Less Amount of LD	Rs.	79147951.00	
Balance Payable to firm	Rs.	- 57003019.00	

Transmission department has recommended that legal action will delay the completion of work and cost overrun will increase (N/4) [File No. CE(Trans.)/153/03-04/part file, Package A)] C/9.

Member (Technical) in that file has opined that Member (Finance) may consider releasing Rs. 2.00 crore to avoid recurrence of revenue loss on account of procurement of power at higher cost. Now this proposal has been reduced to Rs. 1.00 crore. Basis of revenue loss has not been specified.

Further decision is to be taken as the bills of which package is to considered in pretext of 'A' above. It is also pertinent to inform that at present we have no fund under Plan head for this work.

File put up.

Sd/-
3/12/10

Sd/-
illegible

Sd/
D.D.A. RE/Plan
J.S.E.B. Ranchi.

Sd/-
4/12/10

Notes above

The proposal at N/5 speaks about delay is part of JSEB for 7 months and 18 moths respectively, whereas recommendation for deduction of LD to the tune of Rs. 6.62 crores is also there. Both cannot be effective at the same time.

Out of amount payable to the firm (Rs. 13.22 Crs.) if amount paid against arbitration (Rs. 11.00 Crs.) is adjusted the Rs. 2.22 Crs. remains payable. This can be paid only when L.D. is waived by competent authority and notional deduction of LD is not done. For this an executive order is required.

Sd/-
4/12

M(F)

M(T)

Kindly refer N/7 to N/9 Pl. request accordingly as early.

P. S. K.

7. It was only on 06.08.2016 after the receipt of the information under RTI, that the Appellant got the knowledge of recovery for the very first time and filed the Section 9 Application on 04.06.2019, well within three years. The Hon'ble Supreme Court in '*B.K. Educational Services Pvt. Ltd.*' (*Supra*) has observed that the right to sue accrued on the 'date of default'. This decision has to be understood and interpreted keeping in view the factual matrix of each case. In the instant case the Respondent/'Corporate Debtor' does not deny the main contention of the Appellant that the decision with respect to recovery and deduction of the Arbitral amount was never communicated to the Appellant. Even in their reply before the Adjudicating Authority and before this Tribunal and in the submissions filed before us, the 'Corporate Debtor' is completely silent with respect to this communication having been made to the Appellant herein. Therefore, keeping in view the facts of this case, we are of the view that the date of knowledge of happening of the default is a relevant date.

8. The Hon'ble Supreme Court in '***Dena Bank (now Bank of Baroda)***' ***Vs. 'C. Shivakumar Reddy & Anr.'*** **2021 SCC OnLine SC 543**, has observed as follows:-

"138. A final judgment and order/decree is binding on the judgment debtor. Once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of Recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the Recovery Certificate.

139. The Appellant Bank was thus entitled to initiate proceedings under Section 7 of the IBC within three years from the date of issuance of the Recovery Certificate. The Petition of the Appellant Bank, would not be barred by limitation at least till 24th May, 2020.

140. While it is true that default in payment of a debt triggers the right to initiate the Corporate Resolution Process, 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 in this case would be three years from the date of default by virtue of Section 238A of the IBC read with Article 137 of the Schedule to the Limitation Act, the delay in filing a Petition in the NCLT is condonable under Section 5 of the Limitation Act unlike delay in filing a suit. Furthermore, as observed above Section 14 and 18 of the Limitation Act are also applicable to proceedings under the IBC.

141. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act. In **Gaurav Hargovindbhai Dave** (supra) cited by Mr. Shivshankar, this Court had no occasion to consider any proposal for one time settlement. Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-2017, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May 2017. The NCLT rightly admitted the application by its order dated 21st March, 2019.

142. To sum up, in our considered opinion an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

143. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid.”

The issue of Limitation in the instant case is to be adjudicated on the touchstone of the ratio laid down in **‘Dena Bank (now Bank of Baroda)’ (Supra)**.

9. In **‘Babulal Vardharji Gurjar’ Vs. ‘Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.’ 2020 15 SCC 1**, the Hon’ble Apex Court while discussing the issue of Limitation has observed that not even the foundation is laid in the Application for suggesting any other ‘date of default’. Limitation is essentially a mixed question of law and facts and the material evidence on

record establishes that the Appellant got the knowledge of the deduction for the very first time only after receipt of information vide RTI Application on 06.08.2016. It is pertinent to mention that an amount of Rs.2,47,16,999/- was paid admittedly to the Appellant herein with a cheque dated 31.03.2016. Also Section 19 of the Limitation Act, 1963 is applicable here.

10. The part payment made on 31.03.2016 further extends the 'date of default' keeping in view the facts and circumstances of the attendant case on hand. The challenge to the Arbitral Award was dismissed on 06.10.2018. The recovery made in 2016 was provisional, subject to the challenge against the Arbitral Award, which got dismissed on 06.10.2018 and the same was not challenged further. The Application was filed on 04.06.2019 which is within three years of this date.

11. The contention of the Learned Sr. Counsel appearing for the Respondents that the Arbitral Award was dated 14.02.2008 and this date was mentioned as a 'date of default' in both the Section 8 Notice as well as in part IV of the Application under Section 9 of the Code, and therefore only that date should be considered as the 'date of default', is unsustainable, keeping in view that the same Award was challenged and got dismissed on 06.10.2018; that the Award dated 14.02.2008 was also implemented with cheque dated 10.05.2008; a fresh default arose on 31.03.2016, caused by the reversal/deduction from other bills, the knowledge of accrual of the 'Right to Issue' was on 06.08.2016 (when the Appellant received information under RTI); Section 9 Application was filed on 04.06.2019 which is well within the Limitation of three years.

12. The Hon'ble Supreme Court in '**Dena Bank (now Bank of Baroda)**' (**Supra**) has noted that once a recovery certificate is issued authorising the Creditor to realise its decretal dues, a fresh right accrues to the Creditor to recover amount of the final Judgement/Order/decree. In the instant case, the challenge to the Arbitral Award was dismissed on 06.10.2018, and hence has attained finality, the part payment was made on 31.03.2016 and therefore we are of the considered view that the Application filed on 04.06.2019 is not barred by Limitation.

13. For all the aforementioned reasons, this Appeal is allowed and the Impugned Order is set aside and the Learned Adjudicating Authority shall proceed in accordance with law keeping in view the timelines under the Code.

14. Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, Kolkata Bench) forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
18th November, 2021

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