

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 1109 of 2019

[Arising out of order dated 16th September, 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Hyderabad Bench, Hyderabad in CP(IB) No. 277/9/HDB/2019]

IN THE MATTER OF:

G. Shivramkrishna,

Director,
M/s OM Shakti Renergies Limited
H.8-2-293/52/DKN/2, Road No. 51,
Jubilee Hills,
Hyderabad- 500 033
Telengana

.. Appellant

Vs.

1. M/s Isgec Covema Limited

Represented by its Constituted Attorney,
Mr. Kapil Kumar Singh,
D-860, New Friends Colony,
New Delhi- 110 065

Also at:

A-4, Sector-24, NOIDA,
Uttar Pradesh- 201301

2. M/s Om Shakti Renergies Limited,

Represented by IRP Mr. Chilla Rajesh,
H.8-2-293/52/DKN/2, Road No. 51,
Jubilee Hills,
Hyderabad- 500 033
Telengana

.. Respondents

Present:

For Appellant: Mr. Bhagabati Prasad Paohy, Advocate

**For Respondents: Mr. Shambhu Sharan, Mr. Yaman Kumar
and Mr. Shashaank Bhansal, Advocate**

J U D G M E N T

(7th February, 2020)

KANTHI NARAHARI, MEMBER(T)

The present Appeal arises out of the order dated 16th September, 2019 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad), Hyderabad in CP(IB) No. 277/9/HDB/2019 whereby the Adjudicating Authority admitted the Application filed by the Applicant/Operational Creditor- M/s Isgec Covema Limited – Respondent No. 1 herein under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short '**IBC**').

2. The Appellant herein against whom 'Corporate Insolvency Resolution Process' (in short '**CIRP**') was initiated by the Adjudicating Authority preferred the present Appeal challenging the order of admission. The Appellant herein challenged the Impugned Order of admission on the following grounds namely:

- a) "Section 9 Application has been filed belatedly for the reason that the operational debt was dated back to 05.12.2002;
- b) The statutory Demand Notice has not been delivered/served to the Corporate Debtor herein and finding of the Adjudicating Authority that the Demand Notice has been duly served, and the

Postal track record has been filed through a Memo is grossly erroneous.

- c) The Adjudicating Authority failed to appreciate that the Operational Creditor – Respondent No. 1 herein has not attached a copy of the invoice to the Demand Notice as required under Section 8(1) of IBC for malafide reasons as the alleged Proforma Invoice is highly belated i.e., 05.02.2002.
- d) That the Adjudicating Authority failed to appreciate that the notice of the Company Petition was not served to the Appellant herein even through e-mail describing the fact that the e-mail ID of the Appellant (Corporate Debtor) is available on the MCA portal. The finding of the Adjudicating Authority that the claim is within period of limitation is grossly erroneous and the Adjudicating Authority has not discussed the starting point of limitation.”

3. Learned Counsel for the Appellant vehemently opposed the admission of the Application by the Adjudicating Authority and submitted that the Adjudicating Authority ought to have considered and rejected the Application on the grounds as mentioned above. He submitted that the Appellant had not received the Demand Notice and

the copy of Application filed under Section 9 of IBC before the Adjudicating Authority.

4. On the other hand, learned Counsel appearing on behalf of the Respondent No. 1 submits that the Demand Notice has been served on the Appellant and filed proof of service before the Adjudicating Authority. Further, the copy of the Application filed before Adjudicating Authority has been sent to the Appellant. However, the same was returned with remark, 'left' and subsequently, notices have been sent to the changed address as available on the MCA Portal and the same has been delivered to the Appellant. He submitted that the Appellant had failed to appear before the Adjudicating Authority in spite of service of notice and failed to reply to the Demand Notice. The Adjudicating Authority had afforded opportunities to the Appellant herein. However, the Appellant had not appeared before the Tribunal nor filed any Reply affidavit to the Application. The Adjudicating Authority had considered all aspects and admitted the Application on the basis of available records and factual position.

5. Heard learned Counsel appearing for the respective parties. Perused the pleadings and citations relied upon by them.

FACTS

6. The Respondent No. 1 herein filed an Application before the Adjudicating on 03.04.2019 in a prescribed Form-V. Part-II of the Form at serial no. 5 (Page-63), the address of the Respondent No. 2

herein has been mentioned as M/s Om Shakati Renergies Limited, H.No. 8-2-684/3/15, Bhavani Nagar, Road No. 12, Banjara Hills. In part-IV of the said Rorm (page-64), the amount of Operational debt and due is shown as Rs. 1,89,02,200/-. It is stated that the debt has fallen due on 30.05.2013 and again on 27.01.2016. In serial no. 2 of Part-IV (page-65), the date of default shown as 02.02.2019 and the amount payable as per Clause-1 of the award is Rs. 65,18,000/- and the interest calculated @ 24% per annum till 22.01.2019 is Rs. 1,23,84,200/-. The total amount claimed to be in default is Rs. 1,89,02,200/-. It is a fact that Respondent No. 2 owed a debt of Rs. 24,60,000/- to the Respondent No. 1 i.e., Operational Creditor with regard to a Work Order placed on him by the Respondent No. 2 on 05.12.2002. Thereafter, there were existence of disputes between the parties.

7. By an order dated 26.04.2010, the Hon'ble High Court of Andhra Pradesh appointed a Sole Arbitrator to resolve the disputes between the parties arising out of the above work order dated 05.12.2002. Both the parties appeared before the Sole Arbitrator and the Sole Arbitrator passed the award on 30.05.2013 (page-30-47) awarding an amount of Rs. 65,18,000/- to be paid to the Claimant i.e., Respondent No. 1 by the Respondent No. 2 along with interest @ 24 % per annum from the date of claim of settlement till the actual payment of amount.

8. Even the Award was passed on 30.05.2013, Respondent No. 2 Company had not honoured the Award. Respondent No. 1 issued a

Demand Notice on Respondent No. 2 dated 06.11.2013 (Page-48) for payment of awarded amount and filed a Postal Receipt showing despatch of Notice to the Respondent No. 2 dated 07.11.2013 at 9:58 hrs. (page-50) and the Track Result of Indian Post Office filed at page-51 of Paper Book which shows that the Article/consignment has been dispatched on 13.11.2013. Respondent No. 2 filed Original Petition bearing No. 739 of 2014 before XXIV Additional Chief Judge, City Court, Hyderabad seeking to set aside the Award passed by the Sole Arbitrator dated 30.05.2013. Learned XXIV Additional Chief Judge, City Court, Hyderabad dismissed the said Original Petition by an order dated 27.01.2016, the same is reproduced here at. "Petitioner called absent. No representation. Hence this petition is dismissed without costs."

9. Learned Counsel for the Respondent No. 1 herein submitted that after dismissal of the Original Petition filed by the Respondent No. 2 herein the Award attained finality and neither the Appellant nor the Respondent No. 2 preferred any Appeal against the said dismissal order dated 27.01.2016.

10. Respondent No. 1 issued Demand Notice under Section 8 of IBC dated 22.01.2019 demanding payment of Rs. 1,89,02,200/- (Page 53). The Demand Notice was sent through Courier to the Respondent No. 2 and the Track Report of the Courier has been filed at page no. 57 which shows that the said Demand Notice has been delivered to the Respondent No. 2 on 24.01.2019.

11. Learned Counsel for the Appellant contended that the Registered Office of the Respondent No. 2 has been changed and the same has been notified by the Registrar of Companies (in short RoC). We have perused Form No. 22 at page 70 of the concerned RoC wherefrom it appears that the Registered Office of the Company has changed w.e.f. 16.04.2019 and the new address reflects as H. No. 8-2-293/52/DKN/2, Road No. 51, Jubilee Hills, Hyderabad, Telangana-500 033. It is to be seen that when the Application under Section 9 was filed before the Adjudicating Authority on 02.04.2019, the Registered Office of the Respondent No. 2 was at the address i.e., M/s Om Shakthi Renergies Limited, H.No. 8-2-684/3/15, Bhavani Nagar, Road No. 12, Banjara Hills, Hyderabad.

12. Learned Counsel for the Respondent No. 1 submitted that the Adjudicating Authority in its order dated 01.05.2109 recorded that the Notice on the Corporate Debtor i.e., Respondent No. 2 herein has been served and proof of service to that effect has been filed by the Respondent No. 1 herein.

13. We have perused the Order sheet of the Adjudicating Authority dated 01.05.2019 (page-11 of the Reply) wherein it is stated that the Notice was served on Respondent No. 2 herein for appearance and filed proof of service. Vide order dated 06.06.2019 (page -28 of Reply), learned Adjudicating Authority recorded that the Notice was returned un-served and directed issue fresh Notice to the Corporate Debtor

(Respondent No. 2) and directed learned Counsel to serve on the Corporate Debtor (Respondent No. 2) to file proof of service.

14. Vide order dated 03.07.2019 (page 13 of the Reply), learned Adjudicating Authority recorded that learned Counsel for the Operational Creditor present and reported that the Notice sent to the Corporate Debtor was returned with the endorsement "left". She again requested to order fresh Notices to the Corporate Debtor and also to the Directors of the Company and further notices to be sent to the e-mail address of the Corporate Debtor Company. Learned Adjudicating Authority directed to provide address particulars of the Directors of the Company including new address of the Corporate Debtor and also e-mail address in the Registry and directed Registry to prepare fresh Notice on 29.07.2019 (page-14 of the Reply). Learned Adjudicating Authority recorded that none appeared for the Corporate Debtor. Learned Counsel reported that Notices were served on the Corporate Debtor as well as on the Directors. On 05.08.2019 (page 15 of the Reply), learned Adjudicating Authority recorded that Counsel for the Operational Creditors are not present. He has filed a Memo along with Annexure stating that Notice was served on the Company. Notices issued to the Directors were returned unserved with endorsement 'left'. Since notice was served on the Corporate Debtor Company, service held is sufficient. Further in the said order it is recorded that Representative for Corporate Debtor is called absent. Corporate Debtor is treated as absent. Learned Counsel Operational Creditor is directed

to suggest the name of IRP and also file his consent in Form-2. Subsequently, the matter was listed before the learned Adjudicating Authority on several occasions and passed the Admission Order on 16.09.2019. Learned Adjudicating Authority at paragraphs 3,4,5,6 of the order observed as under:

...

3. *The Operational Creditor filed Form-5. It is clear from the record that Operational Creditor sent Demand Notice in Form-3 to the corporate debtor to its address. Operational Creditor also filed Arbitral Award marked as Annexure-C. The Operational Creditor also filed copy of the Hon'ble Additional Chief Judge Order marked as Annexure-D. The Operational Creditor also filed copy of the Demand notice for payment of awarded amount along with postal receipt and POD marked as Annexure-E. Operational Creditor filed copy of demand notice issued u/s 8 of the I&B Code, 2016 along with courier receipt and POD which is marked and annexed as Annexure- F. Thus, Operational Creditor filed documentary proof in support of the claim and also placed evidence that Corporate*

Debtor committed default. Therefore, petition is liable to be admitted.

4. *We have heard the Counsel for operational creditor. This Petition is filed by operational creditor under section 9 of I&B Code. Operational creditor filed Form-5 and furnished the information with regard to the operational debt which is committed default by corporate debtor.*
5. *The Notice was served on the corporate debtor, Post track record is filed through Memo. Learned Counsel contended that corporate debtor has not replied or failed to defend. The claim is submitted within period of time prescribed under Limitation act, 1963. Thus, the claim is within limitation. There is no representation or reply by the Corporate Debtor. Corporate debtor was served with notice before admission however, corporate debtor remained absent and it did not contest the claim.*
6. *In view of the above we are of the considered view that the operational creditor has been able to establish un-disputed debt against corporate debtor and the corporate debtor*

has been in default with regard to the payment of dues to the operational creditor amounting to Rs. 1,89,02,200/-. The Operational creditor is able to establish through documents that corporate debtor committed default of operational debt and there is no pre existing dispute. Thus, this Petition is complete and is liable to be admitted.”

...

15. From the perusal of the order, learned Adjudicating Authority was satisfied with the Notice served on the Corporate Debtor i.e., Respondent No. 2 herein and the Postal Track Report filed through Memo. Further, learned Adjudicating Authority recorded that the claim is submitted within a period prescribed under Limitation Act, 1963. Thus the claim is within limitation. There is no representation nor any reply by the Corporate Debtor. The Corporate Debtor was served with notice before Admission. However, the Corporate Debtor remained absent and it did not contest the claim.

16. From the records filed by the Respondent No. 1 with regard to the service of Demand Notice dated 22.01.2109 and the Application dated 03.04.2019 filed before the Adjudicating Authority, it is unequivocal that the Notices were served on the Corporate Debtor prior to the change of Registered Office i.e., on 16.04.2019. Further the learned Adjudicating Authority after filing of the Application ordered

notice to be served to the new address of the Corporate Debtor and its Directors. As per the Direction of the learned Adjudicating Authority, Respondent No. 1 herein had taken steps in serving the Notice on Respondent No. 2. Learned Counsel for the 1st Respondent relied upon judgment of this Tribunal (page-4 of WS of R-1) in the matter of **“Alloysmin Industries Vs. Raman Casting Private Limited”** passed in Company Appeal(AT)(Insolvency) No. 684 of 2018 whereby this Tribunal held that if the Demand Notice under Section 8(1) of IBC is served on the Corporate Debtor either on its Registered Office or its Corporate Office, it should be treated as valid service of Notice under Section 8(1) of IBC and Application under Section 9 of IBC on failure of payment if filed after 10 days’ is maintainable. As discussed above, the statutory Demand Notice under Section 8 and courier receipt and the delivery report evidencing proper service has already been filed has at page 56 and 57 of the Appeal Paper Book. Thus, we held that there is ample proof that the Notice had been served on Respondent No. 2 by the Respondent No. 1.

17. With regard to the limitation and admitting the Application, which is a time barred claim is concerned, we are of view that the claim is not time barred for the following reasons as stated here at. It is an admitted fact that Respondent No. 2 owe a debt to the Respondent No. 1 and failed to pay the debt to Respondent No. 1. Respondent No. 1 invoked the jurisdiction of arbitration. The Respondent No. 2 participated in the Arbitral proceeding before the Sole Arbitrator

through their Counsel and it is evident from the Award of the Sole Arbitrator that the Respondent No. 2 contested the matter. The learned Sole Arbitrator had passed the Award and the same is binding on Respondent No. 2. However, Respondent No. 2 challenged the said Award under Section 34 of the Arbitration and Conciliation Act, 1996 by filing Original Application before Learned XXIV Additional Chief Judge, City Court, Hyderabad and having not pursued the Petition by the Respondent No. 2, the Petition came to be dismissed on 27.01.2016. Thus the Award has attained its finality. We are of the view that by passing Award by the learned Sole Arbitrator, the amount has been crystalized and by default in payment and by not honouring the Award, the amount became due and payable. The Respondent No. 1 had rightly invoked jurisdiction of the Adjudicating Authority under Section 9 of the IBC after issuance of Demand Notice as prescribed under Section 8 of IBC. The Respondent No. 2 had not replied nor brought any dispute with regard to the claim made by Respondent No. 1.

18. Learned Counsel for the Appellant submitted that the learned Adjudicating Authority should not have admitted the Application since the IBC cannot be invoked for execution of an Award. In this regard, we are of the view that the word 'Creditor' has been defined in Section 3(10) of IBC which reads as under:

*“creditor” means any person to whom a debt is owed
and includes financial creditor, operational creditor,*

a secured creditor and unsecured creditor and a decree-holder”

The Respondent No. 1 is a Decree-Holder in the eye of law. Learned Counsel for the Appellant submitted that the Impugned Order is in the teeth of the settled law with the provision of Article 137 of the Limitation Act, 1963 shall be applicable for filing a petition under Sections 7 & 9 of the IBC. It is submitted that the Hon’ble Supreme Court in the matter of **“B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates”** [2018(14) Scale 482] wherein the Hon’ble Supreme Court held that the Limitation Act will apply to Sections 7 & 9 of IBC at paragraph 27 of the said Judgment and the relevant part of judgement reads as under:

...

“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 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.”

..

[Emphasis supplied]

19. The Hon’ble Supreme Court held that 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 Applicant would be barred under Article 137 of the Limitation Act. The Hon’ble Supreme Court gave exception in those cases wherein the facts of the case Section 5 of the Limitation Act may be applied to condone the delay in filing such Application. Therefore, there is an exception in the facts of the case to invoke Section 5 of the Limitation Act to condone the delay. However, the facts of the present case are different. In the present case, admittedly, there was an Award passed by the Sole Arbitrator on 30.05.2013. However, Respondent No. 2 challenged the said Award before Learned XXIV Additional Chief Judge, City Court, Hyderabad and the Hon’ble Court dismissed the said petition on 27.01.2016. It is admitted that after dismissal of the petition under Section 34 of the Arbitration and Conciliation Act by the learned XXIV Additional Chief Judge, City Court, Hyderabad, there is no appeal preferred by Respondent No. 2. Section 34 of the Arbitration and Conciliation Act falls in Chapter-7 of the Act which empowers for filing Application for setting aside the Arbitral Award. By the said Chapter of the Arbitration

and Conciliation Act, 1996, an Appeal lies under Section 37 against the said Order. The said provision is reproduced herein below:

...

“37. *Appealable orders.*—

(1) *An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—*

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) *An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—*

(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) *No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.*

.... *[Emphasis supplied]*

From the reading of the above provision, an Appeal shall lie from the following orders to the Court authorised by law to hear the Appeal beyond original Decree of the Court passing order namely:

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

20. As per Article 116 of the Limitation Act 1963, which is under the Second Division Appeal, the period prescribed is 90 days to file Appeal before the High Court from any Decree/Order. Against the order passed under Section 34 of the Arbitration and Conciliation Act, 1996, the only Appeal lies under Section 37 of the Arbitration and Conciliation Act 1996 before the Hon'ble High Court and the limitation for the said period is covered under Article 116 of the Limitation Act which is under the caption of Second Division appeal.

21. In the present case, the learned XXIV Additional Chief Judge, City Court, Hyderabad, dismissed the petition on 27.01.2016 and the statutory period for filing Appeal under Section 37 of Arbitration and Conciliation Act is 90 days in case of Decree. The Appeal under Section 37 of the Arbitration and Conciliation Act excludes the limitation from 27.04.2016 i.e. 90 days from 27.1.2016 as per Article 116 of the Limitation Act and if three years is taken from 27.01.2016, following the Judgment of the Hon'ble Supreme court in the above decision [B.K.

Educational.. supra] and as per Article 137 of the Limitation Act, three years' period would expire on 27.04.2019. Whilst, the Application under Section 9 of IBC filed on 03.04.2019. Accordingly, it is well within the period of limitation.

22. The learned Counsel for Respondent No. 1 submitted that the Hon'ble Supreme Court in the matter of **"K. Kishan Vs. Vijay Nirman Company Private Limited"** reported in (2018)17 SCC 662 held in paragraph-27 of the Judgment as under:

...

"27. We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an arbitral award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an award, continues even after the award, at least till the final adjudicatory process under Section 34 and 37 has taken place."

...

[Emphasis supplied]

23. We are of the view that the said Judgment is squarely applicable to the facts of the present case. For the reason that Application/Petition under Section 34, Arbitration and Conciliation

Act, 1996 has been dismissed on 27.01.2016 and the period for preferring the Appeal under Section 37 of the Act i.e. 90 days is excluded, the period of limitation would commence from 27.04.2016 and as per the Judgment of the Hon'ble Supreme Court in the matter of "**B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates**" [2018(14) Scale 482] (supra) i.e. three years' period of Limitation would expire on 27.04.2019. As stated supra, applying the principle and the law laid down by the Hon'ble Supreme Court in the matter "**K. Kishan Vs. Vijay Nirman Company Private Limited**" reported in (2018)17 SCC 662 the facts are squarely applicable in the present case. We conclude that the Application filed by the Applicant before the Adjudicating Authority is within the period of limitation.

24. In view of the above discussion and the provisions of law and the applicability of the judgement of the Hon'ble Supreme Court, we do not find any merit in the Appeal. Accordingly, the Appeal is dismissed. However, no orders as to cost.

[Justice Venugopal M.]
Member (Judicial)

(Kanthi Narahari)
Member(Technical)

(V P Singh)
Member(Technical)

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