

National Company Law Appellate Tribunal, New Delhi

Principal Bench

COMPANY APPEAL (AT) (Insolvency) No. 1017 of 2020

(Arising out of Order dated 31st August, 2020 passed by National Company Law Tribunal, Mumbai Bench, Court No. II, in Company Petition (IB) No.- 4137/MB/2018)

IN THE MATTER OF:

**Shri Abhinandan Jain,
Director,
R/o B-702, Tridev Apartment,
Bhakti Marg Mulund West
Mumbai – 400080
Email: ca_abhinandanjain@hotmail.com
Representing the suspended management of
RISA INTERNATIONAL LTD.
(A company incorporated under the provisions of
the Companies Act, 1956)**

**Having its registered office at:
7/A, Beaumoon Chambers, Nagindas Master
Road,
Hutatma Chowk, Fort, Mumbai – 400021**

.....Appellant

Versus

**Tanaya Enterprises Pvt. Ltd.
(A company incorporated under the provisions of
the Companies Act, 1956)
Through its Directors**

**Having its office at:
F-108/109, Ansa Industrial Estate,
Sakivihar Road, Sakinaka, Andheri (E)
Mumbai – 400072
E-Mail: info@tepl.biz, accounts@vemb.biz**

....Respondent

**Appellant: Mr. Sudhir K Makkar, Sr. Advocate alongwith
Mr. Shalabh Singhal and Ms. Saumya Gupta,
Advocates.**

Respondent: Mr. Anant A. Pavgi and Mr. Abhishek Anand, for R-1.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. The Appellant, the Suspended Director of the Corporate Debtor has filed the present Appeal assailing the Impugned Order dated 31.08.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court No. II) in C.P. (IB) No. 4137/MB/2018, admitting the Application filed by the Respondent 'Operational Creditor' under Section 9 of the Insolvency and Bankruptcy Code, 2016 (In Short '**the IBC**').

2. Learned Adjudicating Authority while admitting the Section 9 Application observed as follows;

"14. On going through the submissions made by the Counsel from the both the sides and on perusing the documents produced on record, this Bench takes note of the fact that the six invoices and delivery challan raised by the Petitioner have been duly acknowledged by the Corporate Debtor by putting their stamp. Hence the contention raised by the Corporate Debtor denying and disputing the invoices and delivery challans does not have any foundation.

15. The Petitioner has also duly produced the running books of Account of the Corporate Debtor regarding the transactions and invoices. This shows an outstanding Debt of Rs. 90,49,843/- due from the Corporate Debtor as on 31.0.2018. This clearly shows the amount due from the Corporate Debtor.

16. This Bench on examination, finds that the Demand Notice dated 10.09.2018 has been duly served through registered post by the Petitioner at 604, Kaushal Point, 4th Floor, Behind Uday Cinema, Ghatkopar (W), Mumbai. A proof of delivery by way of acknowledgement card has been attached by the Petitioner with his Petition. That it is the correct address for delivery of Demand Notice is borne out by the fact this address is mentioned as the Registered address of the Corporate Debtor Company even in their Annual Report of 2018-2019. This Bench,

therefore, has no doubt that the Demand Notice was duly served upon the Corporate Debtor and it chose not to contest it.

17. The Petitioner is registered under the MSME Act, 2006. Since the default amount as per the petition is Rs. 90,49,843/- and the Petitioner claimed Rs. 1,77,11,546/- in Demand Notice. The Bench, while not going into the actual calculation of interest, is of the view that on the Principal amount due the petitioner can claim interest on the amount due in terms of Section 16 of MSME Act;

“Where any buyer fails to make payment of the amount to the supplier, as required under Section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.”

18. The Corporate Debtor has not been able to produce a single piece of paper which points towards it raising any dispute regarding the transaction, invoices or the amount payable. This bench has no doubt that at least an amount of Rs. 90,49,843/- is a liability which is due from Risa International Limited and qualifies as Operational Debt both in terms of section 3(11) and Section 5(21) of the IBC, 2016. This Bench also concludes that there is a default in terms of Section 3(12) of the IBC, 2016 which defines as “... non-payment of Debt when whole of any part or instalment of the amount of debt has become ‘due and payable’...” The two essential requirements, i.e. existence of ‘debt’ and ‘default’, for admission of a petition under Section 9 of the I&B Code, has been met in this case.

Submissions of the Appellant

3. The main submissions of the Learned Counsel for the Appellant are three fold:-

(a) Notice mandated under Section 8 of the IBC, 2016 was never served upon them.

(b) That the Application arises out of 'time barred claims'.

(c) That there is a "Pre-Existing Dispute" prior to the filing of the Application under Section 9 of the IBC.

4. Learned Counsel for the Appellant submitted that Section 9(3)(a) mandatorily requires that the Application should be accompanied with a copy of the Demand Notice delivered by the Operational Creditor to the Corporate Debtor; that Sections 8 & 9 of the Code should be conjointly read with Rules 5 & 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which provide for the mode of service of the Demand Notice on the Corporate Debtor, a sine qua for maintaining an Application under Section 9 of the IBC. Learned Counsel drew our attention to Page Nos. 109-115 of the Appeal Paper Book, which contained the copies of the Registered Post, Acknowledgement due sent to the Corporate Debtor and the Directors of the Corporate Debtor Company; he submitted that the notice sent to the Appellant/Mr. Abhinandan Jain was returned to the Operational Creditor with an endorsement 'closed in the period 2017-2018'. Likewise, the notice sent to Priya Arhant Jain, Mr. Arihant Jain and Mr. Shital Rikhabchand Multha were also returned with an endorsement 'closed for a period 2017-2018'. Regarding the service of notice on the Corporate Debtor, Learned Counsel for the Appellant argued that the stamp on the acknowledgement card is that of 'Brahmecha Modi, Chartered Accountants' who has nothing to do with the Corporate Debtor.

5. With respect to service of notice on Mr. Vipin Champawat Shantilal, Learned Counsel for the Appellant submitted that though the acknowledgement card is signed by him, being an independent Director, he does not occupy any 'Key Managerial Position' and therefore cannot be said to be 'effective service' as provided for under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

6. Learned Counsel for the Appellant further submitted that the Operational Creditor had never directly handed over a copy of the Petition to the Corporate Debtor prior to the filing of any Application.

- Application arising out of 'Time Barred Claims'.

7. Learned Counsel for the Appellant contended that the Petition filed by the Operational Creditor was based on six invoices with dates ranging from 27.10.2014 to 31.10.2014 which were to be paid within 90 days as per the date of invoices. As per the Demand Notice dated 10.09.2018 under Section 8, the date of default is stated to be 29.01.2015 and the Respondent has stated that due dates of payments of the alleged invoices were 25.01.2015, 26.01.2015, 27.01.2015, 28.01.2015 and 29.01.2015. Learned Counsel for the Appellant drew our attention to the fact that interest @ 19.5% was calculated by the Respondent, from these due dates up to 10.09.2018 amounting to Rs. 1,77,11,546/-. It is argued that as the Application was filed on 19.10.2018 and the invoices pertain to the period October, 2014 to January, 2015, the claims arising out of these invoices are time barred. In support of these arguments, he relied upon the Judgments of the Hon'ble Supreme Court in **'Noharlal Verma' Vs. 'District Co-operative Central Bank Limited, Jagdalpur'** (2008) 14 SCC 445, **'Thambusamy' Vs.**

‘Mani’, 2009 SCC OnLine Mad 1774 and ‘Pegasus Assets Reconstructions Pvt. Ltd.’ Vs. ‘Yashomati Hospitals Pvt. Ltd.’, 2020 SCC OnLine NCLAT 793.

8. Learned Counsel for the Appellant further contended that the Respondent/‘Operational Creditor’ cannot change the date of default to 22.09.2016 on the ground that the Corporate Debtor had paid an amount of Rs. 30,30,000 on 22.09.2016, out of which an amount of Rs. 7,06,000/- was adjusted against invoice No. 24. He placed reliance on the Judgment of the Hon’ble Supreme Court in **‘Babulal Vardharji Gurjar’ V/s. ‘Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.’, 2020 SCC Online SC 647.**

- ‘Pre-Existing Dispute’

9. Learned Counsel for the Appellant submitted that the Corporate Debtor had business transactions with one Mr. Puneet Shivkumar Agarwal since September, 2013 through his group/related companies which are as follows:

- a. Akash Lifestyle Pvt. Ltd.
- b. Shirin Export Pvt. Ltd.
- c. Anmol Lifestyle Pvt. Ltd.
- d. Matheysh Multitrading Pvt. Ltd.
- e. Vallari Trading Pvt. Ltd.
- f. Jetspeed Tradecom Pvt. Ltd.
- g. Vigorous Tradelink Pvt. Ltd.
- h. Tanaya Enterprises Pvt. Ltd.
- i. Vemb Lifestyle Pvt. Ltd.”

10. It is submitted that all the email correspondence from Mr. Punit Shivkumar Agarwal was done by Ms. Rashmi Shetye through her email id and vide email dated 03.11.2014, Ms. Rashmi Shetye sought confirmation from the Corporate Debtor of its credit balance with the group companies to the tune of Rs. 34,23,71,004/-. It is argued by the Learned counsel for the

Appellant that the said invoices are forged and fabricated; that the Respondent had filed self-serving documents; that no amount was 'due and payable' under the said invoices; that there is a 'Pre-Existing Dispute' between the parties established from the fact that the Corporate Debtor had filed an Application under Section 8&9 of the IBC against 'Aakash Lifestyle Pvt. Ltd.' and 'Shirin Exports Pvt. Ltd.', which are the companies of Mr. Punit Shivkumar Agarwal before NCLT, Mumbai, vide order dated 14.11.2019 CP(IB) No. 2306/I&BP/2019 in 'Risa International Pvt. Ltd.' Vs. 'Aakash Lifestyle Pvt. Ltd.' and order dated 14.11.2019 in CA(IB) No. 2581/I&BP/2019 in 'Risa International Pvt. Ltd.' Vs. 'Shirin Exports Pvt. Ltd.' Learned Adjudicating Authority was pleased to allow the said Petitions. It was contended that there is a dispute between the parties and the present petition was filed to prevent the Corporate Debtor from making its rightful claims against the related companies.

Submissions of the Learned Counsel for the Respondent.

11. Learned Counsel appearing for the Respondent 'Operational Creditor' submitted that the Demand Notice under Section 8 of the IBC was duly served through registered post at "604, Kaushal Point, 4th Floor, Behind Uday Cinema, Ghatkopar (W), Mumbai - 400086", which is the Registered Address of the Corporate Debtor since 2012 as per the records of the MCA and the same address has been mentioned by the Corporate Debtor in the latest available Annual Reports of 2011-12, 2018-19 and 2019-2020; that the Corporate Debtor on page 13 of their Annual Report of 2012 have approved the shifting of their Registered Office to the aforementioned address and since then, is continuing to operate through the same Registered Office

address; that the proof of delivery is also reflected from the acknowledgement card that was annexed by the answering Respondent alongwith his Application under Section 9 of the IBC; that the registered office of the Corporate Debtor is also used by other relatives of the Promoters/Directors of the Corporate Debtor; that the copy of the acknowledgement alongwith the Master Data of the Corporate Debtor and the letter from the Department of Posts- India confirming the delivery of the document on 21.09.2018 to the Corporate Debtor read with the relevant pages of the Annual Report establishes that the Demand Notice of Section 8 was sent by registered post and delivered to the Corporate Debtor and the Directors.

12. Learned Counsel for the Respondent submitted that the Corporate Debtor maintained a running account with them which is reflected in Annexure-5, (Pages 125 to 154 of the Reply Paper Book) filed before this Tribunal. It is submitted that the Appellant has failed to disclose this running account which reflects outstanding debt of Rs. 90,49,843/- due from the Corporate Debtor as on 31.03.2018. It is further submitted that the Notification dated 24.03.2020 issued by the Ministry of Corporate Affairs, Government of India, whereby the minimum threshold for triggering of an Application under Section 9 of the IBC was raised from Rs. 1,00,000 to 1,00,00,000/- is prospective in nature as laid down by this Tribunal in the case of ***'Madhusudan Tantia' Vs. 'Amit Choraria & Anr.' Company Appeal (AT) (Insolvency) No. 557 of 2020 dated 12.10.2020.***

13. Learned Counsel for the Respondent vehemently denied that there was any 'Pre-Existing Dispute' between the parties and further submitted

that the Appellant in contravention of the provisions of the Code, withdrew an amount of Rs. 1,03,30,513/- on 03.09.2020 subsequent to the initiation of the Corporate Insolvency Resolution Process (CIRP) dated 31.08.2020 and thereafter preferred this Appeal on 10.11.2020. Learned Counsel for the Respondent drew our attention to I.A. No. 2065 of 2020 filed by the Resolution Professional (RP in short) under Section 60(5) of the Code seeking direction to the Directors to return the money withdrawn by them. He submitted that this Appeal is preferred subsequent to the filing of the Application by the RP only as an after thought.

Assessment

14. At the outset, we address ourselves to the issue whether Demand Notice under Section 8 has been duly served upon the Appellant 'Corporate Debtor', as per the statutory provisions under Sections 8 & 9 of the Code; which read as follows;

8. Insolvency resolution by operational creditor.

- (1) *An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed*

(2) *The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—*

(a) *existence of a dispute, 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.

(Emphasis Supplied)

9. Application for initiation of Corporate Insolvency Resolution Process by Operational Creditor. –

(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.

(e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(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 subclause (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.

15. At this juncture, it is relevant to reproduce Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 dealing with service of Demand Notice.

“5. Demand Notice by Operational Creditor. – (1)
An Operational Creditor shall deliver to the Corporate Debtor, the following documents, namely:-

(a) a Demand Notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The Demand Notice or the copy of the invoice demanding payment referred to in sub-section (2) of Section 8 of the Code, may be delivered to the Corporate Debtor, -

(a) at the registered office by hand, registered post or speed post with acknowledgement due;

or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the Corporate Debtor.

(3) A copy of Demand Notice or invoice demanding payment served under this rule by an Operational Creditor shall also be filed with an information utility, if any.

(Emphasis Supplied)

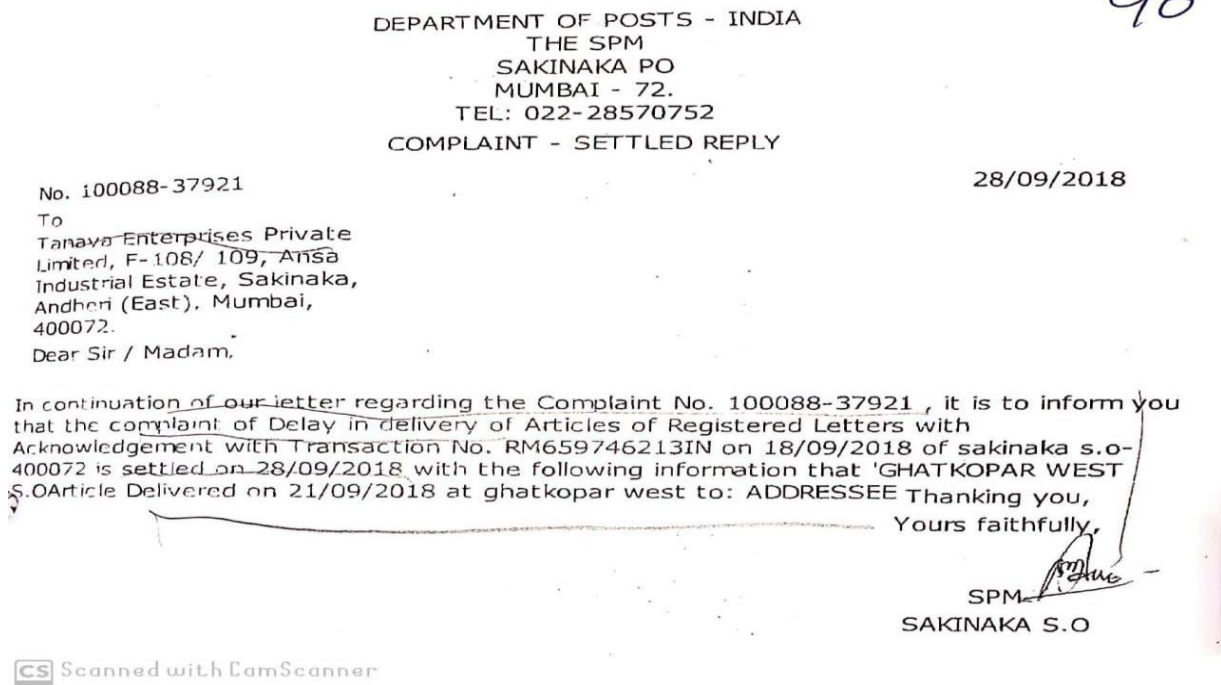
16. In the instant case, it is seen from the record that Demand Notice under Section 8 was sent to the Corporate Debtor by 'Registered Post, Acknowledgement Due' to '604, Kaushal Point, 4th Floor, Behind Uday Cinema, Ghatkopar (W), Mumbai – 400086'. Rule 5 provides that the Notice is to be served on the Corporate Debtor at the Registered Address available on the Records/Portal of the MCA. A perusal of the Master Data, evidences that the Registered Address is '604, Kaushal Point, 4th Floor, Behind Uday Cinema, Ghatkopar (W), Mumbai – 400086'. In the Master Data, the signatory details of the Directors, is stated as below;

<i>Din/PAN</i>	<i>Name</i>	<i>Begin date</i>	<i>End Date</i>	<i>Surrender DIN</i>
03157346	Shital Rikhabchand Mutha	10/12/2011		
03199953	Abhinandan Jain	19/10/2011		
AFFPJ2303D	Abhinandan Jain	12/02/2015		
03288261	Arihant Jain Suresh	27/05/2013		
06369837	Vipin Champawat Shantilal	01/09/2012		
07211719	Priya Jain Arihant	25/06/2015		

17. The documentary evidence on record establishes that the notice was served by Registered Post to the 'Registered Address' as mentioned in the 'Master Data' of the Ministry of Corporate Affairs, MCA. It is the main case of the Appellant that the Registered Post Acknowledgement Card, though sent to the Registered Address of the Corporate Debtor, bears the stamp of one 'Brahmecha Modi & Company', a Chartered Accountant Firm which has nothing to do with the Corporate Debtor and hence cannot be stated to be "received by the Corporate Debtor".

18. In the instant case the Department of Posts, Government of India, has also given a report dated 28.09.2018 that the said letter sent by registered post to the Corporate Debtor was delivered on 29.01.2018. Since the main point for consideration in this case is with respect to service of notice under

Section 8 of the IBC, we find it relevant to reproduce the said letter issued by the Department of Posts, Government of India.



19. Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 specifies that the Demand Notice by Operational Creditor should be served at the Registered Office by hand, Registered Post or Speed Post with acknowledgement due; **or** by Electronic Mail Service to a whole time Director or Designated Partner or Key Managerial Personnel, if any, of the Corporate Debtor.

20. If the argument of the Learned Counsel for the Appellant is accepted that service on the Corporate Debtor was 'insufficient' on the ground that it was *received by somebody else*, though admittedly addressed to the Registered Address, then such an observation would be ultra vires to what has been provided for in Rule 5 of the 'IBC' 2016 and in the Statutory Provisions of Section 8 of the 'IBC'. As long as it has been addressed

properly and once served at the Registered Address, it is not the concern of the Applicant as to who receives it.

21. It is also the case of the Appellant that though the notice was admittedly served to Mr. Vipin Champawat, he is only an Independent Director and does not fall within the definition of 'Key Managerial person' of the Corporate Debtor.

22. The receipt of notice by the Independent Director further fortifies the case of the Operational Creditor, as he is a Member of the Board of Directors and it can be safely construed that the Board of Directors has knowledge of the same. It is the Board of Directors who takes a call and acts on behalf of the Corporate Debtor and the Independent Director is a part of it. Be that as it may, the Respondent had got issued a Legal Notice dated 20.08.2018 prior to the issuance of the Demand Notice in September 2018, addressed to the Corporate Debtor at the Registered Address. The same has not been denied by the Corporate Debtor. Additionally, a notarized Affidavit of service has been filed with respect to handing over a copy of the Petition to the Office of the Corporate Debtor.

23. Keeping in view the facts of the attendant case, Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and Sections 8 & 9 of the IBC, the letter issued by the Department of Posts, Government of India alongwith the fact that admittedly the Registered Office of the Corporate Debtor in the Master Data, Ministry of Corporate Affairs is "604, Kaushal Point, 4th Floor, Behind Uday Cinema, Ghatkopar (W), Mumbai - 400086" and the same is further reflected in the Annual Report filed before us, we are of the considered view that service of Demand

Notice mandated under Section 8 of the IBC to the aforesaid address of the Corporate Debtor is satisfactory and is therefore held sufficient.

Whether the claims made by the Operational Creditor are ‘time barred’?

24. Now we address ourselves to the issue of time barred claims raised by the Learned Counsel for the Appellant. The Hon’ble Apex Court in **‘Babulal Vardharji Gurjar’ (Supra)**, placing reliance on **‘BK Educational Services (P) Ltd.’ (2019) 11 SCC 633**, **‘Gaurav Hargovindbhai Dave’ V/s. ‘Asset Reconstruction Company (India) Ltd. & Anr.’ (2019) SCC OnLine SC 1239**, **‘Jignesh Shah’ V/s. ‘Union of India’ (2019) 10 SCC 750**, **‘Vashdeo R. Bhojwani’ V/s. ‘Abhydaya Coop. Bank Ltd.’ (2019) 9 SCC 158** observed that the scope and intent of the Code was not to reopen the right of claimants to file time barred claims and treat the Code as a Debt Recovery Law.

25. The citations relied upon by the Learned Counsel for the Appellant viz. **‘Pegasus Assets Reconstructions Pvt. Ltd.’ (Supra)**, **‘Noharlal Verma’ (Supra)** and **‘Thambusamy’ (Supra)**, in support of his contention that the alleged debt, is barred by limitation, are not relevant to the facts of the attendant case. In **‘Thambusamy’ (Supra)** the ratio laid down by the Hon’ble Apex Court is with respect to Article 67, of the Limitation Act, 1963 has been elaborately dealt with by the Hon’ble Supreme Court in matters of IBC in **‘Gaurav Hargovindbhai Dave’ (Supra)**.

26. The Hon’ble Apex Court in **‘Babulal Vardharji Gurjar’ (Supra)**, has reproduced the relevant passages of the said decision in **‘Gaurav Hargovindbhai Dave’ (Supra)** detailed as hereunder;

“4. Mr Aditya Parolia, learned counsel appearing on behalf of the appellant has argued that Article 137 being a residuary article would apply on the facts of this case, and as right to sue accrued only on and from 21.07.2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in B.K. Educational Services Private Limited v. Parag Gupta and Associates, 2018 SCC OnLine SC 1921 in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

5. Mr Debal Banerjee, learned Senior Counsel, appearing on behalf of the respondents, countered this by stressing, in particular, para 7 of B.K. Educational Services Private Limited (supra) and reiterated the finding of the NCLT that it would be Article 62 of the Limitation Act that would be attracted to the facts of this case. He further argued that, being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

6. Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being “an application” which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr Banerjee’s reliance on para 7 of B.K. Educational Services Private Limited (supra), suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.

7. This being the case, we fail to see how this para could possibly help the case of the respondents. Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular article gets attracted. It is well settled that there is no equity about limitation - judgments have stated that often time periods provided by the Limitation Act can be arbitrary in

nature. 8. This being the case, the appeal is allowed and the judgments of the NCLT and NCLAT are set aside.”

(Emphasis in bold supplied)

27. In **‘Babulal Vardharji Gurjar’ (Supra)**, the Hon’ble Apex Court while dealing with **‘whether Section 18 Limitation Act could be applied to that case’** observed as follows;

“32.1. Even in the later decisions, this Court has consistently applied the declaration of law in **B.K. Educational Services (supra)**. As noticed, in the case of **Vashdeo R. Bhojwani (supra)**, this Court rejected the contention suggesting continuing cause of action for the purpose of application under Section 7 of the Code while holding that the limitation started ticking from the date of issuance of recovery certificate dated 24.12.2001. Again, in the case of **Gaurav Hargovindbhai Dave (supra)**, where the date of default was stated in the application under Section 7 of the Code to be the date of NPA i.e., 21.07.2011, this Court held that the limitation began to run from the date of NPA and hence, the application filed under Section 7 of the Code on 03.10.2017 was barred by limitation.

32.2. In view of the above, we are not inclined to accept the arguments built up by the respondents with reference to one part of observations occurring in paragraph 21 of the decision in **Jignesh Shah (supra)**.

33. Apart from the above and even if it be assumed that the principles relating to acknowledgement as per Section 18 of the Limitation Act are applicable for extension of time for the purpose of the application under Section 7 of the Code, in our view, neither the said provision and principles come in operation in the present case nor they ensure to the benefit of respondent No. 2 for the fundamental reason that in the application made before NCLT, the respondent No. 2 specifically stated the

date of default as '8.7.2011 being the date of NPA'. It remains indisputable that neither any other date of default has been stated in the application nor any suggestion about any acknowledgement has been made. As noticed, even in Part-V of the application, the respondent No. 2 was required to state the particulars of financial debt with documents and evidence on record. In the variety of descriptions which could have been given by the applicant in the said Part V of the application and even in residuary Point No. 8 therein, nothing was at all stated at any place about the so called acknowledgment or any other date of default.

(Emphasis Supplied)

28. In the instant case the documentary evidence, that is the ledger and the running account filed evidences that the first invoice dated 27.10.2014 is for an amount of Rs. 17,84,640/-, part payment of which i.e. Rs. 7,06,008/- was received, leaving a balance amount of Rs. 10,78,632/-. The other invoices and the amounts claimed for in Part III, Form V of the Application are detailed as hereunder;

- a) Invoice no. TEPL/RIL/024/14-15, dated 27.10.2014, for an amount of Rs. 17,84,640/-. [Part Payment of Rs. 07,06,008/- has been received against the said invoice, leaving behind balance amount receivable to the tune of Rs. 10,78,632/-].
- b) Invoice no. TEPL/RIL/025/14-15, dated 27.10.2014, for an amount of Rs. 23,32,624/-.
- c) Invoice no. TEPL/RIL/026/14-15, dated 28.10.2014, for an amount of Rs. 14,68,125/-.
- d) Invoice no. TEPL/RIL/027/14-15, dated 29.10.2014, for an amount of Rs. 10,57,770/-.
- e) Invoice no. TEPL/RIL/028/14-15, dated 30.10.2014, for an amount of Rs. 17,62,200/-.

f) Invoice no. TEPL/RIL/029/14-15, dated 31.10.2014, for an amount of Rs. 13,50,492/-.

29. The Appellant himself had admitted that 90 days' time was given for the amounts to be paid. The last payment made by the Corporate Debtor was Rs. 30,30,000/- (Rs. 10,15,000/-, Rs. 10,00,000/- & Rs. 10,15,000/-) on 22.09.2016. We find force in the contention of the Learned Counsel for the Respondent that the amount became 'due and payable' on 22.09.2016 when only a part payment was made. Section 3(11) defines "debt" as a *liability or Application* in respect of a claim which is due from any person and includes Financial Debt and Operational Debt. Section 3(12) defines "default" as *non-payment of debt* when whole or any part or instalment of the amount of debt has become 'due and payable' and is not paid by the Debtor or the Corporate Debtor as the case may be. In the instant case part or instalment of the amount of debt has become 'due and payable' as on 22.09.2016. It being a running account, considering the manner in which such businesses are conducted and accounts are kept, it would be material to see when the parties concerned treat the debt to be in 'default'. It is pertinent to mention that the date of default mentioned in Form V of the Application is 22.09.2016 and the Application was filed in October, 2018, keeping in view the ratio laid down by the aforementioned Judgements, specifically regarding the date of default, is squarely applicable to the facts of this case. Hence we are of the considered view that the Application was filed well within the period of limitation.

Whether there is any 'Pre-Existing Dispute'?

30. The contention of the Learned Counsel for the Appellant that there were transactions between one Mr. Puneet Shiv Kumar Agarwal and the Operational Creditor through various group of Companies cannot fall within the definition of dispute relevant to the subject matter of the instant case, in the absence of any communication filed evidencing any 'Pre-Existing Dispute', prior to the filing of the Section 9 Application. It is pertinent to mention that in their Reply to the Application, filed before the Learned Adjudicating Authority, the Appellant apart from raising a bald denial has not filed any substantive material in support of their contentions. We are of the considered view that ratio laid down by the Hon'ble Supreme Court in **'MobiloX Innovations Private Limited' V/s. 'Kirusa Software Private Limited', (2018) 1 SCC 353** is squarely applicable to the facts of this case. At this juncture, we find it relevant to reproduce the specific paragraphs is detailed as hereunder;

"40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at

this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

The contention of the Learned Counsel for the Appellant regarding false and fabricated invoices is unsustainable having regard to the fact that the invoices on record bear the stamp of the Corporate Debtor by way of an acknowledgement.

31. In the instant case, going by the aforesaid test of the ‘existence of dispute’ it is clear that the Appellant has not raised any plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence.

32. For all the aforementioned reasons, we do not find any illegality or infirmity in the Impugned Order passed by the Ld. Adjudicating Authority. Hence, this Appeal is dismissed accordingly. No order as to cost.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
22nd March, 2021
ha/sc