Sabarmati Gas Limited vs Shah Alloys Limited on 4 January, 2023

Author: C.T. Ravikumar

Bench: M.R. Shah, C.T. Ravikumar

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 1669 of 2020

Sabarmati Gas Limited

…Appellant

Versus

Shah Alloys Limited

…Respondents

JUDGMENT

C.T. RAVIKUMAR, J.

1. This appeal under Section 62 of the Insolvency and Bankruptcy Code, 2016 (IBC) is preferred by Sabarmati Gas Limited (hereinafter referred to as the appellant) against the final judgment dated 19.12.2019 of the National Company Law Appellate Tribunal (NCLAT) in Company Appeal (AT) (Insolvency) No. 820 of 2019. As per the same the NCLAT dismissed the appeal preferred by the appellant against order dated 27.06.2019 in CP (IB) No. 516/9/NCLT/AHM/2018 of the National Company Law Tribunal, Ahmedabad Bench, (NCLT) dismissing the application filed under Section 9 of the IBC, in its capacity as operational creditor of 'Shah Alloys Limited' (hereinafter referred to as the 'respondent').

2. In the captioned appeal mainly, twin questions of law call for consideration id est :-

> (i) Whether in computation of the period of limitation in regard to an application filed under Section 9, IBC the period during which the operational creditor's right to proceed against or sue the corporate debtor that remain suspended by virtue of Section 22 (1) of the Sick Industrial Companies (Special Provisions Act, 1985) (SICA) can be excluded, as provided under Section 22 (5) of SICA?
>
> (ii) Whether the respondent has raised a dispute which is describable as 'pre-existing dispute' between itself and the appellant warranting dismissal of application under Section 9 of the IBC at the threshold?

While considering the stated twin questions certain other allied questions of relevance may also crop up for consideration, which we will state and consider at the appropriate time. The respondent -corporate debtor was the petitioner in Case No. 13 of 2010 before the Board for Industrial and Financial Re-construction (BIFR) and the appellant herein was the applicant in Miscellaneous Application No. 432 of 2013 in Case No. 13 of 2010.

3. Heard learned Senior Counsel for the appellant Shri Shyam Divan and Mr. S. Guru Krishna Kumar, learned Senior Counsel for the respondent.

4. Consideration of the questions, mentioned above and to be mentioned hereinafter, is called for, in the following factual background:

> The respondent, for its manufacturing needs, required commercial supply of natural gas. To facilitate the same on 30.05.2008 the appellant and the respondent entered into a Gas Sales Agreement (GSA) whereby and whereunder the appellant was having the obligation to supply natural gas conforming to the specifications laid down in Annexure-2, appended to GSA and it also forms part of the contract. Going by clause 11.2 of GSA, notwithstanding any dispute in relation to any amount invoiced, the respondent could not withhold payment in accordance with the GSA. According to the appellant, the respondent defaulted payment of invoices inasmuch as it made only partial irregular payments from November, 2011. Meanwhile, the respondent approached BIFR to get it declared as a 'sick unit' and for recommendation of a plan for its rehabilitation, in terms of the provisions under SICA. The reference was admitted by BIFR as case No. 13 of 2010 and as per order dated 31.08.2010 the respondent was declared as a 'sick company'. It is the case of the appellant that by virtue of Section 22 of SICA there was a moratorium on the respondent and therefore, it could not have proceeded against the respondent for outstanding dues, thenceforth, without obtaining the permission of the BIFR. On 07.08.2012 the appellant stopped the gas supply and then, intervened in the pending proceedings before the BIFR viz., 13 of 2010. On 08.03.2013, as per Miscellaneous Application No. 432 of 2013 the appellant sought permission of the BIFR for initiating proceedings against the respondent for recovery of an outstanding dues of Rs. 4,71,56,095/-. On 09.09.2015, the BIFR passed an order thereon. Shortly thereafter, to be precise, w.e.f. 01.12.2016, SICA was repealed.

5. According to the appellant, BIFR became functus officio and all proceedings pending before it, including the case of the respondent, were abated and several sections of IBC, including Sections 8 and 9, came into effect on 01.12.2016. Hence, after the enactment of IBC, the appellant issued a demand notice on 01.04.2017, under Section 8 of the IBC read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules 2016, in Form No. 3 demanding payment of operational debt of Rs. 4,71,56,094.76/-. On 10.04.2017, the respondent gave a reply to the aforesaid demand notice stating that there was shortfall in supply of natural gas and also a huge loss due to the disconnection of gas supply. Raising such contentions, the respondent declined the liability to pay the amount demanded. Thereafter, the appellant filed an application under Section 9

of the IBC before NCLT, Ahmedabad seeking initiation of Corporate Insolvency Resolution Process (CIRP) in its capacity as Operational Creditor of the respondent. The said application was dismissed by the NCLT as per order dated 27.06.2019 on the grounds of being barred by limitation and existence of a 'pre-existing dispute' between the appellant and the respondent. It is the appeal challenging the same before the NCLAT that ultimately culminated in the impugned judgment.

6. We will firstly consider the first question of law arising on account of dismissal of the appellant's application under Section 9, IBC on the ground of being barred by limitation. In the light of the aforesaid factual backdrop and contentions the appellant would contend that the NCLT and NCLAT had failed to look into and appreciate the cumulative effect of sub-sections (1) and (5) of Section 22 of SICA while dismissing the application under Section 9, IBC as barred by limitation. In elaboration of the contention, it is submitted that the NCLT and NCLAT had failed to appreciate that the respondent was admitted as a 'sick company' by the BIFR as per its order dated 31.08.2010 and hence, by virtue of sub-section (5) of Section 22, SICA the period of suspension under SICA viz., from 31.08.2010 to 01.12.2016, ought to have been excluded while calculating the period of limitation. According to the appellant, since the application under Section 9, IBC was filed on 20.08.2018 granting the benefit of such exclusion would have, certainly, put the application well within the limitation period of 3 years as provided under Article 137 of the Limitation Act. The learned counsel for the appellant placed reliance on the decision in Paramjeet Singh Patheja v. ICDS Ltd. 1, particularly paragraph 43

(vii) therein, to support the contention that there was a statutory bar for laying or continuing with any legal proceeding for realisation of a right vested by law on the appellant.

1 (2006) 13 SCC 322

7. Resisting the contentions of the appellant and supporting the impugned judgment the respondent would contend that both NCLT and NCLAT had rightly appreciated the factual positions thereon obtained in the case on hand and applied the provisions correctly, to arrive at the finding that the application filed by the appellant under Section 9, IBC was barred by limitation. According to the respondent there is discrepancy between the stand of the appellant in the Section 9 application and the Demand Notice under Section 8, of the IBC as relates the quantum of alleged outstanding dues. It is also contended that such a discrepancy also exists with respect to the date of cause of action inasmuch as going by Section 9 application the alleged debt fell due on and from November, 2011 and as per the Demand Notice the so-called debt fell due on and from 9th July, 2012 and in either case, Section 9 application was barred by limitation as it was filed only in the year 2018. To wit, beyond 3 years from the alleged default. The benefit of exclusion of period under Section 22(5) of the SICA is not available to the appellant for computing the period of limitation in respect of an application under Section 9, IBC, it is further contended. According to the respondent, Section 22 (1), SICA did not accord a blanket protection against running of cause of action and it is intended to suspend legal proceedings of coercive nature so as to secure assets of an enterprise. In other words, the contention is that filing application for recovery was permissible and Section 22 (1), SICA did not forbid the same and it interdicted only execution or distress or the like against the properties of the industrial company concerned in the contingencies contemplated thereof.

8. When Sections 8 and 9, IBC came into force only with effect from 01.12.2016, the question of initiation of the CIRP by filing an application under Section 9 was possible only from 01.12.2016. But the question is whether any party, which falls under the expression 'Operational Creditor' under the IBC claims to have operational debt due from an industrial company and the cause of action for recovery of the same had accrued much earlier than 01.12.2016, but prevented from enforcing the right against such company in view of statutory prohibition under Section 22 (1), SICA, could initiate CIRP despite the passage of three years since the cause of action claiming the protection of exclusion of the period of suspension by virtue of Section 22 (5), SICA? 8.1 In that context it is only apt to refer to the afore- mentioned relevant provisions under SICA. Section 22(1), SICA was as follows: -

> "22. Suspension of legal proceedings, contracts, etc. – (1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority." 8.2 Section 22(5), SICA, relied on by the appellant for seeking exclusion of the period from 31.08.2010 to 01.12.2016 while computing the period of limitation, was as hereunder: -
>
> "22. Suspension of legal proceedings, contracts, etc. – (1)... (2)... (3)... (4)... (5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded."

9. Thus, Section 22 (1), SICA as extracted above, would make it clear that there was a statutory bar to take to any proceeding for realisation of a right referred to in the said Section against an industrial company when once an enquiry under Section 16, SICA is pending against it or any scheme referred to under Section 17 thereof is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, except with the consent of the Board or the Appellate Authority, as the case may be. As noticed earlier, SICA came to be repealed and IBC came into force (Sections 7 to 9 and various other Sections), on the same day viz, on 01.12.2016.

10. A two-Judge Bench decision of this Court in Paramjeet Singh Patheja's case (supra), more particularly, paragraph 43 (vii), is relied on by the appellant to support its claim for exclusion of the

period from 31.08.2010 to 01.12.2016 while computing the period of limitation for filing applicants under Section 9, IBC. It, in so far as relevant reads thus: -

> "43. For the foregoing discussions we hold:
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> (i)
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> (ii)
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> (iii)
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> (iv)
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> (v)
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> (vi) .....
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> (vii) It is a well-established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in the light of which it was enacted. The object of Section 22, in protecting guarantors from legal proceedings pending a reference to BIFR of the principal debtor, is to ensure that a scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a sick company. To achieve that purpose, it is imperative that the expression "suit" in Section 22 be given its plain meaning, namely, any proceedings adopted for realization of a right vested in a party by law. This would clearly include arbitration proceedings." (Emphasis added)

11. In the light of the position settled thus, in Paramjeet Singh Patheja's Case (supra), it is relevant to refer to an earlier two-Judge Bench decision of this court in Kailash Nath Agarwal and Ors. v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. and Anr.2 That was also a case, involving consideration of the question as to whether Section 22, SICA, afford protection to guarantors of sick company or only to the sick company. It is relevant to note in this context that the decision in Kailash Nath Agarwal's Case (supra) was not brought to the notice of the later bench while deciding Paramjeet Singh Patheja's Case (supra). In other words, the latter case was decided per incuriam. In Kailash Nath Agarwal's Case, after considering contentions akin to those raised in Paramjeet Singh Patheja's Case, this court held that the words "proceedings" and again "suit" had to be 2 (2003) 4 SCC 305 construed differently as carrying different meanings, since, they had been raised to denote different things. It was concluded that Section 22 (1), SICA only prohibits recovery against the industrial company and there would be no protection offered to guarantors against the recovery proceedings.

12. The above conflicting decisions need not detain us from considering the issue further in the light of a subsequent three-Judge Bench decision of this court in KSL & Industries Ltd. Vs. M/s. Arihant Threads Ltd 3. The three-judge bench, after noting the contentions raised before and the findings of

the two-judge bench in Kailash Nath Agarwal's case (supra), found that it did not deal with the question regarding the scope of protection afforded to the industrial company concerned, under Section 22 (1) of SICA. Having observed thus, the three-Judge Bench went on to consider the said question. In that regard, paragraphs 32, 33 and 53 are relevant and reads thus:

> 3 (2015) 1 SCC 166 "32. As observed earlier, Sub-section (1) of Section 22 may be divided into two parts. In one part, it provides that "no proceedings" be instituted for the winding up of the industrial company or for execution, distress or the like against any of the properties of such industrial company, and in the second part it provides that "no suit" for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advances granted to the industrial company, "shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."
>
> 33. Undoubtedly, the present proceedings viz.

"application for recovery" cannot specifically be described as proceedings for execution, distress or the like against any of the properties, but it is certainly a proceeding which results in and in fact had resulted in the execution and distress against the property of the Company and is therefore liable to be construed as a proceeding for the execution, distress or the like against any of the properties of the industrial company. We are of the view that such a construction would be within the intendment of Parliament wherever the proceedings for recovery of a debt which has been secured by a mortgage or pledge of the property of the borrower are instituted. Surely, there is no purpose in construing that Parliament intended that such an application for recovery by summary procedure should lie or be proceeded with, but only its execution be interdicted or inhibited especially. In this context, it may be remembered that the proceedings by way of an application for recovery according to a summary procedure as provided under the RDDB Act are not referred to in Section 22 simply because the RDDB Act had not then been enacted.

53. Moreover, we have found nothing contrary in the intention of the SICA to exclude a recovery application from the purview of Section 22, indeed there could be no reason for such exclusion since the purpose of the provision is to protect the properties of a sick company, so that they may be dealt with in the best possible way for the purpose of its revival by the BIFR. In State of Punjab v. The Okara Grain Buyers Syndicate Ltd. MANU/SC/0023/1963: AIR 1964 SC 669, the Court articulated the importance of preserving the beneficent purpose of the statute and observed:

> 14. ... We shall therefore proceed to examine the provisions of the Act on the footing that the test for determining whether the Government is bound by a statute is whether it is expressly named in the provision which it is contended binds it, or whether it "is manifest that from the terms of the statute, that it was the intention of the legislature that it shall be bound", and that the intention to bind would be clearly made out if the beneficent purpose of the statute would be wholly frustrated unless the Government were bound."

13. Thus, it is obvious that the three-Judge Bench in KSL & Industries Ltd. (supra) considered the question whether a recovery application under the Recovery of Debts Due to Banks and Financial Institutions Act, 1963 (RDDB Act) would lie or be proceeded with against a sick company in view of the Bar contained in Section 22 (1) of SICA. Evidently, even after finding that an 'application for recovery' under RDDB Act could not specifically be described as proceedings for execution, distress or the like against any of the properties, it was held that it is certainly a proceeding which may result in the execution and distress against the property of the company and is therefore, liable to be construed as a proceeding for the execution, distress or the like against any of the properties of the industrial company. Accordingly, it was held that such a construction would be within the intendment of the Parliament. Moreover, it was held therein that there would be no purpose in construing the Parliament intended that such an application for recovery by summary procedure should lie or be proceeded with, but only its execution be interdicted or inhibited. That apart the three-Judge Bench found nothing contrary in the intention of the SICA to exclude a recovery application from the purview of a Section 22 thereof, taking note of the fact that the purpose of the said provision is to protect the properties of sick company, so that they may be dealt with in the best possible way for the purpose of its revival by BIFR.

14. In view of the provisions under Section 22 (1) of SICA and the decisions in Paramjeet Singh case (Supra) and in KSL & Industries Limited (supra), it is worthwhile to note that in the case on hand it was the industrial company (respondent herein) that approached the BIFR under the provisions of SICA and got it declared as 'sick company' by filing Case No. 13 of 2010; that it is thereafter that the appellant filed Miscellaneous Application No. 432/2013 thereon praying, inter-alia, to permit it under Section 22 of SICA to approach a Civil Court of appropriate jurisdiction for recovery of the above-mentioned dues along with interest; that the said application was disposed of only on 09.09.2015, as per Annexure-A40 proceedings, that too, only with a direction to the respondent company to incorporate the dues of the applicant in the DRS and that as per Annexure-A40, Case No.13 of 2010 and M.A. No. 292/2014 filed thereon, were then, posted for hearing. In short, Case No. 13 of 2010 was pending before the BIFR when SICA was repealed w.e.f. 01.12.2016 and Sections 8 and 9, IBC took its effect from 01.12.12016. Thus, obviously, proceedings under SICA were then pending before the BIFR when the default from the part of the respondent allegedly occurred and by virtue of Section 22 (1), SICA and the decisions referred above, the appellant could not have, then, resorted to any legal proceedings for enforcing any right which may result in recovery from the properties of the respondent company. For the same reasons, the contention of the respondent that pending the proceedings before the BIFR the appellant could have resorted to arbitration proceedings also has to fail.

15. Now, we will have to consider the purported intent of Section 22 (5), SICA. The intention appears to be to protect the interest of such a party who was prevented

from lawfully enforcing the right to seek for recovery of dues during the operative period of the bar under Section 22 (1), SICA, if it is otherwise available even after the conclusion of proceedings before the BIFR, to the extent specifically mentioned therein. According to us, any other understanding of the provisions under Section 22 (5) would be wholly pointless and purposeless. When the appellant being a party to BIFR in the sense, on intervention obtained an order to the respondent company to incorporate its dues in the Draft Rehabilitation Scheme (DRS) in an application seeking permission to effect recovery of the dues and such a stage had not reached till 01.12.2016, whether there would be any justification to hold that on the repeal of SICA it could not claim the benefit flowing from the provisions under Section 22 (5) of SICA, subject to the provisions under the relevant laws governing the appropriate forum chosen?

16. In the contextual situation, it is apropos to refer to Section 252 of IBC which reads thus: -

“252. The Sick Industrial Companies (Special Provisions) Repeal Act, 2003 shall be amended in the manner specified in the Eighth Schedule.” 16.1 The Eighth Schedule would reveal the nature and manner of amendment specified thereunder as substitution to sub-clause (b) of Section 4, of SICA Repeal Act, 2003 w.e.f. 01.12.2016, as hereunder:

"(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) shall stand abated: Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016:

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause.".

(Emphasis added)

17. A perusal of the substituted sub-clause (b), as extracted above would reveal that reference made or inquiry pending or any proceeding of whatever nature, before the Board under SICA would stand abated upon its notification by the Central Government. The first proviso to sub-clause (b) only makes reference to the time limit applicable to the company in respect of which the appeal or reference or enquiry or any such proceeding thus stood abated under the said sub-clause. Going by

the said proviso, such a company may make reference to NCLT under IBC within 180 days from the commencement of IBC and in accordance with the provisions thereof. Subsequently, the stated amendment was notified by the Central Government under S.O. 3569 (E) dated 25.11.2016. It is thus clear that on account of repeal of SICA under Repeal Act (1 of 2003) w.e.f. 01.12.2016, any pending proceeding or enquiry under SICA, initiated by an industrial company would get abated and the prescription of such period of 180 days became applicable only to such a company. A scanning of the stated sub-clause (b) and the provisos would not reveal or indicate prescription of any such specific time limit as regards the opposite parties in the abated reference, inquiry or proceeding for proceeding with their available remedy under IBC. In the said circumstances, if such an opposite party falls within the expression 'operational creditor', under IBC, it could only be taken that it should be governed by the provisions under the IBC in regard to the period of limitation for approaching the Adjudicating Authority. In this context, it is also relevant to note that as relates the company whose reference or inquiry or any proceeding got abated, as mentioned, it need not pay any fee for making reference under IBC, in terms of the second proviso to the substituted sub-clause (b) of Section 4 of the SICA Repeal Act. Needless to say, that this exemption is not available to other parties to the abated proceedings, or reference or inquiry concerned.

18. Section 6, IBC provides that where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate CIRP in respect of such corporate debtor in the manner provided under Chapter II of IBC. Section 8, which falls under Chapter II, deals with insolvency resolution by operational creditor. It provides that an operational creditor may, on the occurrence of default, deliver a demand notice of unpaid of operational debt or 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. It is apposite to note that a seemingly printing error had occurred in Section 8 (1), IBC inasmuch as instead of 'a demand notice of unpaid operational debt' it is printed as 'a demand notice of unpaid operational debtor.' Evidently, this must have occurred as in the Gazette Notification also the word 'debtor' is following the words 'unpaid operational'. The word 'debtor' used therein has to be split into 'debt' and 'or' so as to serve the purpose and to give the intended meaning to Section 8 (1) and this view would get support from sub-section (2) of Section 8 itself. Sub-section 2 of Section 8, IBC in so far as it is relevant, reads thus: -

> "8. (1) ....
>
> (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, or 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 payment of unpaid operational debt— (Underline supplied)

19. So also, the said position is evident from Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for short 'the Rules'). Going by the instruction in Form 3, in which a Demand Notice is to be delivered to the corporate debtor under 'the Rules', the said from has to be served on the corporate debtor, ten days in advance of filing an application under Section 9 of the Code. This instruction can only be construed that it shall be served on the corporate debtor not less than ten days in advance of filing an application under Section 9 of the Code for the simple reason that the period of limitation for filing an application under Section 9, IBC is governed by Section 238 A, IBC and therefore, it could not be construed that Section 9 application should invariably be filed on the eleventh day of service of advance demand notice in Form 3. Section 238 A, IBC, dealing with period of limitation, has come into force w.e.f. 06.06.2018 and it reads thus: -

> "238A. Limitation. – The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

> 20. Obviously, Section 238A, IBC makes the provisions of the Limitation Act, 1963 applicable to computation of the period of limitation in regard to proceedings before the Adjudicating Authority and the other forums. This position is made explicitly clear in the decision of this Court in B.K. Educational Services Private Limited v.

Parag Gupta and Associates4 at paragraphs 43 and 48 and they read thus: -

> "43. It will be seen from a reading of Section 8 (2)

> (a) that the corporate debtor shall, within a period of 10 days of the receipt of the demand notice, bring to the notice of the operational creditor the existence of a "dispute". We have seen that "dispute" as defined in Section 5 (6) includes a suit or arbitration proceeding relating to certain matters. Again, under Section 8 (2) (a), the corporate debtor may, in the alternative, disclose the pendency of a suit or arbitration proceedings 4 (2019) 11 SCC 633 filed before the receipt of the demand notice. It is clear therefore, that at least in the case of an operational creditor, "default" must be non-

payment of amounts that have become due and payable in law. The "dispute" or pendency of a suit or arbitration proceedings would necessarily bring in the Limitation Act, for if a suit or arbitration proceeding is time-barred, it would be liable to be dismissed. This again is an important pointer to the fact that when the expression "due" and "due and payable" occur in Sections 3(11) and 3 (12) of the Code, they refer to a "default" which is non-payment of a debt that is due in law i.e. that such debt is not barred by the law of limitation. It is well settled that where the same word occurs in a similar context, the draftsman of the statute intends that the word bears the same meaning throughout the statute (see Bhogilal Chunilal Pandya v. State of Bombay 1959 Supp (1) SCR 310, AIR 1959 SC 356, 1959 Cri LJ 389, Supp SCR at pp. 313- 14). It is thus clear that the expression "default" bears the same meaning in Sections 7 and 8 of the Code, making it clear that the corporate

insolvency resolution process against a corporate debtor can only be initiated either by a financial or operational creditor in relation to debts which have not become time-barred.

48. 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)

21. The decision in B.K. Educational Services Private Limited (supra) would thus reveal that Articles 137 and 5 of the Limitation Act, 1963 are applicable to applications filed under Sections 7 and 9 of IBC. It be so, the position is that the period of limitation is three years from the right to apply accrues but the delay is condonable on sufficient grounds. It is to be noted that the third column in Article 137 of the Limitation Act posits that time runs when the 'right to apply accrues'. In the decision in Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited and Anr.5 this Court considered the question as to when 'right to apply would accrue?' Paragraph 32 of the said decision, in so far as it is relevant for the purpose of this case reads thus:-

> "32. When Section 238-A of the Code is read with the above noted consistent decisions of this Court in Innoventive Industries [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407], B.K. Educational Services [B.K. Educational Services (P) Ltd. v. Paras Gupta & Associates, (2019) 11 SCC 633], Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, 5 (2020) 15 SCC 1 (2019) 4 SCC 17], K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150], Jignesh Shah [Jignesh Shah v. Union of India, (2019) 10 SCC 750], Vashdeo R. Bhojwani [Vashdeo R. Bhojwani v. Abhyudaya Coop. Bank Ltd., (2019) 9 SCC 158], Gaurav Hargovindbhai Dave [Gaurav Hargovindbhai Dave v. Asset Reconstruction Co.

(India) Ltd., (2019) 10 SCC 572] and Sagar Sharma [Sagar Sharma v. Phoenix ARC (P) Ltd., (2019) 10 SCC 353] respectively, the following basics undoubtedly come to the fore:

> (a) that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;
>
> (b) that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;
>
> (c) that intention of the Code is not to give a new lease of life to debts which are time-barred;
>
> (d) that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;

(e) that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs;

(f) that default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and

(g) that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and

(h) an application under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application.

22. The following relevant recitals from paragraphs 34, 34.1, 38 and 38.1 are worthy to be noted in the above context and they read thus:-

> "34..... As noticed, in B.K. Educational Services [B.K. Educational Services (P) Ltd. v. Paras Gupta & Associates, (2019) 11 SCC 633, it has clearly been held that the limitation period for application under Section 7 of the Code is three years as provided by Article 137 of the Limitation Act, which commences from the date of default and is extendable only by application of Section 5 of the Limitation Act, if any case for condonation of delay is made out. The findings in para 12 in Jignesh Shah [Jignesh Shah v. Union of India, (2019) 10 SCC 750] makes it clear that the Court indeed applied the principles so stated in B.K. Educational Services [B.K. Educational Services (P) Ltd. v. Paras Gupta & Associates, (2019) 11 SCC 633], and held that the winding-up petition filed beyond three years from the date of default was barred by time.

34.1. Even in the later decisions, this Court has consistently applied the declaration of law in B.K. Educational Services [B.K. Educational Services (P) Ltd. v. Paras Gupta & Associates, (2019) 11 SCC 633]. As noticed, in Vashdeo R. Bhojwani [Vashdeo R. Bhojwani v. Abhyudaya Coop. Bank Ltd., (2019) 9 SCC 158], 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 Gaurav Hargovindbhai Dave [Gaurav Hargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd., (2019) 10 SCC 572], where the date of default was stated in the application under Section 7 of the Code to be the date of NPA i.e. 21-7-2011, 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 3-10-2017 was barred by limitation.

38. The question as to whether date of enforcement of the Code (i.e. 1-12-2016) provides the starting point of limitation for an application under Section 7 of the Code and hence, the application in question, made in the year 2018, is within limitation, is not even worth devoting much time. A bare look at para 21 of the impugned order [Babulal Vardhaji Gurjar v. Veer Gurjar Aluminium

Industries (P) Ltd., 2019 SCC OnLine NCLAT 295] leaves nothing to guess that such observations by the Appellate Tribunal had only been assumptive in nature without any foundation and without any basis. There is nothing in the Code to even remotely indicate if the period of limitation for the purpose of an application under Section 7 is to commence from the date of commencement of the Code itself. Similarly, nothing provided in the Limitation Act could be taken as the basis to support the proposition so stated by the Appellate Tribunal. In fact, such observations had been in the teeth of law declared by this Court in B.K. Educational Services [B.K. Educational Services (P) Ltd. v. Paras Gupta & Associates, (2019) 11 SCC 633].

38.1. It appears that at the given point of time, NCLAT had been readily adopting such a proposition in other cases too, so as to treat similar applications within limitation. This approach of NCLAT was specifically disapproved by this Court in Sagar Sharma [Sagar Sharma v. Phoenix ARC (P) Ltd., (2019) 10 SCC 353] where, after observing that in B.K. Educational Services [B.K. Educational Services (P) Ltd. v. Paras Gupta & Associates, (2019) 11 SCC 633] it had already been made clear that the date of the Code's coming into force on 1-12-2016 was wholly irrelevant to the triggering of any limitation period for the purposes of the Code, this Court said : (Sagar Sharma case [Sagar Sharma v. Phoenix ARC (P) Ltd., (2019) 10 SCC 353], SCC p. 354, para 3) “3. Article 141 of the Constitution of India mandates that our judgments are followed in letter and spirit. The date of coming into force of the IB Code does not and cannot form a trigger point of limitation for applications filed under the Code. Equally, since “applications” are petitions which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications.”

23. The above-mentioned positions settled with respect to Section 7, IBC will proprio vigore apply to Section 9, IBC. In short, as relates an application under Section 9, IBC the date of coming into force of IBC, viz, 01.12.2016 would not form the trigger point of limitation and the period of limitation for an application for initiating of CIRP under Section 9, IBC would be three years from the date when the right to apply accrues as provided by Article 137 of the Limitation Act and further that the right to apply under the IBC would accrue on the date when default occurs and it is extendable only by application of Section 5 of the Limitation Act. In view of the nature of the provision under SICA and the nature of the orders issuable by the BIFR and the positions qua an application for initiation of CIRP under Section 9 of IBC, referred above, we think it absolutely unnecessary to delve into the question of applicability or otherwise of Section 14 of the Limitation Act in regard to proceedings under Section 9, IBC as the same provides only for exclusion of time of proceedings bona fide in Court without jurisdiction.

24. When the limitation period for initiating CIRP under Section 9, IBC is to be reckoned from the date of default, as opposed to the date of commencement of IBC and the period prescribed therefor, is three years as provided by Section 137 of the Limitation Act, 1963 and the same would commence from the date of default and is extendable only by application of Section 5 of the Limitation Act, 1963 it is incumbent on the Adjudicating Authority to consider the claim for condonation of the delay when once the proceeding concerned is found filed beyond the period of limitation.

25. As relates Section 5 of the Limitation Act showing ‘sufficient cause’ is the only criterion for condoning delay. ‘Sufficient Cause’ is the cause for which a party could not be blamed. We have

already taken note of the legal bar for initiation of proceedings against an industrial company by virtue of Section 22 (1), SICA and obviously, when a party was thus legally disabled from resorting to legal proceeding for recovering the outstanding dues without the permission of BIFR and even on application permission therefor was not given the period of suspension of legal proceedings is excludable in computing the period of limitation for the enforcement of such right in terms of Section 22(5), SICA. In the absence of provisions for exclusion of such period in respect of an application under Section 9, IBC, despite the combined reading of Section 238A, IBC and the provisions under the Limitation Act what is legally available to such a party is to assign the same as a sufficient cause for condoning the delay under Section 5 of the Limitation Act. In such eventuality, in accordance with the factual position obtained in any particular case viz., the period of delay and the period covered by suspension of right under Section 22 (1), SICA etc., the question of condonation of delay has to be considered lest it will result in injustice as the party was statutorily prevented from initiating action against the industrial company concerned. The first question formulated hereinbefore is accordingly answered.

26. In the case on hand, indubitably, the question whether the delay occurred in the matter of filing of application under Section 9, IBC is condonable or not, was not considered. A bare perusal of the impugned order would reveal that after taking into account the date of default and the date of filing of the application under Section 9, IBC the NCLAT held it as time barred. When once it is so found we would have remanded the matter for consideration of the question of limitation afresh, but for the fact that the application under Section 9, IBC was dismissed assigning reason of existence of 'pre-existing dispute' as well.

27. The appellant and the respondent have cited various decisions in support of their rival contentions on the sustainability or otherwise of the dismissal of the stated application on the ground of existence of 'pre-existing dispute(s)' between the parties. Nonetheless, we are of the considered view that in that regard, only the decisions to be referred infra, require consideration. Paradoxically, both sides relied on the decision of this Court in Macquarie Bank Limited v. Shilpi Cable Technologies Limited6.

28. Macquarie Bank Limited's case (supra) is relied on by the appellant to drive home the point that production of the certificate/statement from the financial institution maintaining the accounts of the operational creditor concerned, under Section 9 (3)(c), IBC, is not a condition precedent to trigger CIRP and hence, its insistence will be violative of the law laid down thereunder. In Macquarie Bank Limited (supra), in paragraph 16, this Court held: -

> "16. When we come to clause (c) of Section 9(3), it is equally clear that a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is certainly not a condition precedent to triggering the insolvency process under the Code. The expression "confirming" makes it clear that this is only a piece of evidence, albeit a very 6 (2018) 2 SCC 674 important piece of evidence, which only "confirms" that there is no payment of an unpaid operational debt. This becomes clearer when we go to clause (d) of Section 9(3) which requires such other

information as may be specified has also to be furnished along with the application."

29. This position is thus fairly settled, as above. On the other hand, the respondent relied on the said decision to buttress its contention that existence of 'pre-existing dispute' should entail dismissal of application under Section 9, IBC.

30. In Macquarie Bank Limited (supra), this Court held, at paragraphs, 13 and 14 thus: -

> "13. The first thing to be noticed on a conjoint reading of Sections 8 and 9 of the Code, as explained in Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. (2018) 1 SCC 353, decided on 21-9-2017 at paras 33 to 36, is that Section 9(1) contains the conditions precedent for triggering the Code insofar as an operational creditor is concerned. The requisite elements necessary to trigger the Code are:
>
> (i) occurrence of a default;
>
> (ii) delivery of a demand notice of an unpaid operational debt or invoice demanding payment of the amount involved; and
>
> (iii) the fact that the operational creditor has not received payment from the corporate debtor within a period of 10 days of receipt of the demand notice or copy of invoice demanding payment, or received a reply from the corporate debtor which does not indicate the existence of a pre-existing dispute or repayment of the unpaid operational debt.

14. It is only when these conditions are met that an application may then be filed under Section 9(2) of the Code in the prescribed manner, accompanied with such fee as has been prescribed ..." (emphasis supplied)

31. In the decision in Innoventive Industries Ltd. v. ICICI Bank and Anr.7, at paragraph 29, this Court held thus: -

> "29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing — i.e. before such notice or invoice was received by the 7 (2018) 1 SCC 407 corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

32. A scanning of the decisions referred supra, would reveal that existence of a 'pre-existing dispute' should entail dismissal of an application filed under Section 9 IBC at the threshold. Therefore, the question is whether the respondent had raised a dispute describable as a 'pre- existing dispute' so as to entail dismissal of application of the appellant under Section 9, IBC. In Mobilox Innovations (P) Ltd. (supra), particularly at paragraphs 33 and 51, this Court held thus: -

> "33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8 (1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)
>
> (a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. [...] It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). [. ..] It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility [Section 9(5)(ii)(d)}.

Section 9(5)(ii)(d) refers to the notice of an existing dispute that has so been received, as it must be read with Section 8(2)(a). Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected [Section 9(5)(ii)(e)].

51. 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." (emphasis supplied)

33. In the light of the positions thus settled by this Court in Macquarie Bank Limited (supra) and Mobilox Innovations (P) Ltd. (supra), we will examine the question whether there was a 'pre-existing dispute' between the parties, warranting dismissal of the application for initiation of CIRP filed by the appellant.

34. In this context, it is relevant to note that the Annexure A-41 demand notice under Section 8, IBC was issued by the appellant on 01.04.2017 and the respondent replied the same as per letter Annexure A-42 letter dated 10.04.2017 viz., within 10 days from the date of receipt of Annexure A-41. Evidently, the respondent, in Annexure A-42 reply raised the contentions that there was shortfall in gas supply and that it had suffered huge loss due to the disconnection of gas supply. True that, in terms of the decision in Mobilox Innovations (P) Ltd. (supra) what is to be looked into is the existence or otherwise of a dispute and/or the suit or arbitration proceedings prior to the receipt of demand notice or invoice, as the case may be. In the case on hand, as noticed earlier, the appellant had issued a demand notice under Section 8, IBC read with the Rule 5 of 2016 Rules on 01.04.2017. Obviously, the NCLT and NCLAT referred to a letter dated 04.01.2013 (Annexure A-36 herein) to hold that existence of a pre-existing dispute between the parties revealed from the same. The said letter dated 04.01.2013 issued by way of a reply by the respondent to the letter from the appellant dated 03.01.2013, reads thus:-

> "Date : 04.01.2013 To, The Director, Sabarmati Gas Ltd., Gandhinagar.
>
> Respected Sir, Ref : Your letter dated 03.01.2013 We are registered with BlFR vide Case No. 13/2010 pursuant to Section 22 of SICA no coercive recovery can be made. Kindly note that abrupt disconnection of Gas Supply to our Unit is causing heavy losses on account of production. The loss is further exaggerating on account of non-supply of material to various parties which includes Railway Board and other Big units. Kindly note that you are responsible for the Direct Loss of Production ranging from Rs. 30- Rs. 50 Lakhs per day and also Consequential Losses that may be incurred by us including Penalties for Non-compliance of contract (or supplies for which you will solely be held responsible.
>
> In view of the above subject we agree for payment of bills and request you to wait (or the old bills payment till restructuring is agreed by Honorable BIFR.
>
> Hoping for your best co-operation Thanking you, For Shah Alloys Limited Authorized Signatory"

35. The learned Senior Counsel for the appellant would contend that last para of the said letter dated 04.01.2013 would reveal the fact that the respondent had agreed to effect the payments or bills and requested only to wait for the old bills payments till restructuring is agreed by BIFR and in other words, non-existence of a dispute. That

apart, the appellant heavily relied on paragraph 2.7 and 2.10 (iv) of Annexure 40 which is the proceeding of BIFR in Case No.13 of 2010 dated 09.09.2015, to canvass the position that the contention of the respondent regarding existence of a pre-existing dispute with respect to the dues payable to it, is bereft of any basis. The aforesaid relevant paragraphs in Annexure A-40 are as under: -

"2.7 The Bench then took MA No. 432/2013. The ld advocate representing the applicant (Sabarmati Gas Ltd.) sought time to appear prepared in the next date of hearing, since they have been engaged recently in this case. The ld advocate representing the company submitted that the applicant is an unsecured creditor and he accepted the dues of the applicant. He assured that their reconciled dues will be taken care of in the DRS, as unsecured creditor and they will be paid as per the terms of DRS, as and when it would be approved by the Board. 2.10 Having considered the submissions made during the hearing and material on record the Bench issued following directions:

...

(iv) MA 432 filed by Sabarmati Gas Ltd. is disposed off with the direction to the company to incorporate the dues of the applicant in the DRS."

36. True that paragraph 2.7 of Annexure 40 carries the recording of the submissions made on behalf of the respondent before the BIFR by the learned advocate, as above. Citing all such aspects, the learned Senior Counsel for the appellant contended that the contention of the respondent regarding 'pre-existing dispute' is only a patently feeble legal argument/assertion of fact unsupported by evidence and therefore, it was to be rejected by the Tribunals. It is further contended by the applicant that directions at paragraph 2.10 (iv) also is relevant in this context as it would reveal that the Misc.

Application No.432 of 2013 filed by the Appellant herein was disposed of with the direction to the respondent company to incorporate the position of the appellants/applicant therein in the DRS.

37. Per contra, the learned counsel for the respondent would submit that a scanning of paragraph 2.7 itself would reveal that what was assured by the counsel appearing on behalf of the respondent before the BIFR was not full payment of the amount as claimed by the appellant thereunder and what was assured was that the reconciled dues towards the appellant would be taken care of in the DRS, as unsecured creditor and that it would be paid as per the terms of DRS, as and when it is approved by the Board.

38. In this context the meaning of the word "reconciliation" is to be looked into. Going by Black's Law Dictionary, 10th Edition, the apt meaning suitable to the situation in relation to accounting, reads thus: "an adjustment of amounts so that they agree, especially by allowing for outstanding items". It is submitted by the learned counsel for the respondent that such a reconciliation had not

taken place and also that indisputably, DRS was not formulated and approved. The aforesaid facts revealed from Annexure 40 together with the stand taken by the respondent in the letter dated 04.01.2013 (Annexure 36) would reveal the existence of a pre-existing dispute between the parties. In the contextual situation it is only apposite to be remindful of the observation in Mobilox Innovations (P) Ltd. (supra) that in doing the act of separating the grain from chaff the Court need not to be satisfied that the defence is likely to succeed. It is enough that a dispute exists between the parties and in other words, what is to be seen is whether there was a plausible contention requiring investigation for the purpose of adjudication. Taking note of the nature of the dispute of the respondent as referred hereinbefore in respect of the claim made by the appellant, we do not find any reason to disagree with the concurrent findings of the Tribunals that there existed a 'pre-existing dispute' between the parties before the receipt of demand notice under Section 8, IBC. In other words, the dismissal of the application under Section 9, IBC on the ground of 'pre-existing dispute' cannot be held to be patently illegal or perverse. We also do not find any reason, in the facts and circumstances, to hold that the case set up by the respondent was a patently feeble legal argument. At any rate, we are not inclined to brush aside the case of the respondent as spurious. We may hasten to add here that we shall not be understood to have held that the dispute set by the respondent regarding the dues is ultimately to be upheld. Certainly, when the expression 'pre-existing dispute' is used it will only indicate the existence of a dispute prior to the receipt of a demand notice under Section 8, IBC, and the correctness or its truthfulness is a matter of evidence. In short, the respondent has succeeded in raising a dispute describable as 'pre-existing dispute'. In that view of the matter once we find that the Tribunals have rightfully held that there existed a 'pre-existing dispute' between the parties there cannot be an order of remand of the matter to the Tribunal for reconsideration of Section 9 application under IBC.

39. In the contextual situation, it is also relevant to refer to the fact, rightly taken note of by the NCLT, that the respondent herein had filed a Commercial Suit No.92 of 2017 on 28.04.2017 before the Commercial Court in Ahmedabad, claiming damages for the loss suffered by it due to discontinuation of gas supply. True that on 12.07.2018, the said Commercial Civil Suit was dismissed by the Commercial Court at Ahmedabad on the ground of being barred by limitation. Annexure-B would reveal that against the judgment of dismissal in the said suit, the respondent herein had filed First Appeal No. 3841 of 2018 before the High Court of Gujarat at Ahmedabad. It was disposed of on 11.08.2021, taking into account the joint submission that parties be permitted to settle dispute through arbitration process. In this context it is also to be noted that the notice of arbitration dated 29.11.2019 has been issued by the appellant itself. Recording the submission, the appeal was permitted to be withdrawn leaving the parties to proceed with arbitral process. This fact is not disputed and in fact, it is indisputable in view of Annexure-B, judgment dated 11.08.2021 of the High Court of Gujarat in Misc. First Appeal No.3841 of 2018. In Annexure-B, it is recorded thus:-

"Both the learned counsel have taken instructions and have jointly submitted that let the parties get their dispute settled through the arbitration process where learned former Judge of this Court, Justice J.C. Upadhyaya (Retired) has already been appointed as the arbitrator on 29.11.2019 and since then the matter is pending here." In this context, it is also relevant to note that Gas Supply Agreement (GAS) which is an agreement entered into between the appellant and the respondent

dated 30.05.2008 in regard to the supply of natural gas, contains an arbitration clause viz., clause No.17. When the agreement entered into between the parties carries an arbitration clause and when the parties mutually consented and sought to proceed with arbitration before the High Court and further, when the arbitration proceedings are pending, we are of the view that the parties shall be left with the liberty to raise all contentions before the arbitrator, except the legal questions discussed and decided in this judgment.

40. Subject to the above, this Appeal stands dismissed. All the pending application (s), stand disposed of.

....., J.

(Ajay Rastogi) ....., J.

(C.T. Ravikumar) New Delhi;

January 04, 2023