

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 1476 of 2023

(Arising out of the Impugned Order dated 25.08.2023 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench in Company Petition (IB) No. 147/MB-IV/2021]

IN THE MATTER OF:

**M/s Laxmi Trading Corporation
Having its Office at 2518/7, 2nd Floor
Ajmal Khan Road, Karol Bagh
Delhi – 110005
Email: Laxmitradingcorp@gmail.com
Contact No.: +91-9899 403405**

...Appellant

Versus

**M/s Hindustan Construction Company Limited
Having its Registered Office at Hincan House
Lal Bahadur Shastri Marg, Vikhroli West
Mumbai – 400083
Email: veersen.sidhwani@hccindia.com
Contact No.: +91-99675-04400**

...Respondent

Present:

For Appellant : Mr. P. Nagesh, Sr. Advocate with Mr. Rajiv Malik, Ms. Pratiksha Singh, Ms. Mansi Agarwal, Mr. Akshay Sharma & Mr. Vijay Agarwal, Advocates

For Respondent : Mr. Abhijeet Sinha, Sr. Advocate with Mr. Kunal Verma, Mr. Yugandhara Pawar Jha, Ms. Lavanya Dhawan, Mr. Ritik Gupta and Mr. Shivraj Pawar, Advocates

J U D G M E N T

(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

This is an appeal under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as "IBC") filed by the M/s Laxmi Trading Corporation (hereinafter referred to as LTC or Operational Creditor) M/s

Hindustan Construction Company Limited (hereinafter referred to as HCCL or Corporate Debtor) against the Impugned Order dated 25.08.2023 passed by the National Company Law Tribunal, Mumbai Bench, (Adjudicating Authority) in Company Petition (IB) No. 147/MB-IV/2021 under Section 9 of the IBC, 2016.

Brief facts of the Appeal relevant for the case:

2. M/s Laxmi Trading Corporation (Operational Creditor) was supplying hardware tools, rubber goods, pipes and fittings, and other related equipment to M/s Hindustan Construction Company Limited (Corporate Debtor), which is engaged in the business of Engineering and Construction, Real Estate, Infrastructure, Urban Development & Management. The Corporate Debtor had bought hardware goods from the Operational Creditor by various purchase orders between the period of 2010 to 2019. The OC had issued/raised various invoices with a total amount of Rs.3,71,55,764.8 (Rupees Three Crores Seventy-One Lakhs Fifty-Five Thousand Seven Hundred Sixty-Four and eighty Paisa only), aggregating in all the projects. Out of these invoices, the CD has made partial payments on running account basis amounting to Rs.2,17,47,092.13 (Rupees Two Crores Seventeen Lakhs Forty-Seven Thousand and Ninety-Two and Thirteen Paisa Only) aggregating in all the six projects. Overall, there was a shortfall of Rs.1,54,08,672.77 (Rupees One Crores Fifty-Four Lakhs Eight Thousand Six Hundred Seventy-Two and Seventy-Seven Paisa Only).

3. The OC issued e-mail dated 14.07.2017 to the CD requesting for the payment for each of the projects. The CD deposited Rs.4,00,000/- (Rupees

Four Lakhs Only) in the account of the OC, but it was never received by the OC and this was conveyed also to the CD. The OC sent another e-mail on 07.01.2019 and 26.01.2019 and both e-mails were unanswered. On 30.10.2019 partial payment of Rs.3,00,000/- was made by CD on a running account basis. Again on 03.08.2021 partial payment of Rs.2,00,000/- was made by the CD and which was a last payment received from the CD.

4. The OC issued a demand notice on 17.03.2020 as per Rule 5 of the Insolvency and Bankruptcy Rules, 2016, with a demand of Rs.3,73,32,239.30 (Rupees Three Crores Seventy-Three Lakhs Thirty-Two Thousand and Two Hundred Thirty-Nine and Thirty Paise Only) which included interest calculated @ 24% p.a. up to 29.02.2020.

5. The CD failed to reply to the demand notice and accordingly, the OC filed the application before the NCLT, New Delhi, which was dismissed by the impugned order and which is the matter of Appeal herein.

Respondent's case in brief:

6. Respondent submitted that the claims made by the Appellant are beyond the period of limitation. Out of 234 invoices, 224 invoices are ex-facie time barred. Also, the claims which are within the period of limitation are below the threshold limit of Rs.1,00,00,000/- (Rupees One Crore Only) as provided under Section 4 of the Code. The claims of the Appellant that there is a running account with the Corporate Debtor and the separate ledgers referred to by the Adjudicating Authority were only for the sake of convenience of the Appellant as a ground was not raised by the Appellant before the

Adjudicating Authority. This is also not contended by the Appellant in his Form-5 and more particularly in Part-IV wherein the Appellant has filed the ledger accounts for these projects as Annexures along with the Company Petition, which shows that the Appellant have been maintaining separate ledger accounts for separate projects. These projects are not only situated in different States, but the invoices raised by the Appellant on different projects are also separate.

7. Furthermore, Respondent claims that the emails of 10.11.2017 and 14.07.2017, purportedly, sent by the Respondent to the Appellant will not make Section 18 of the Limitation Act applicable in the present case as the so called acknowledgement of liability by these emails is not before the expiration of the period of limitation i.e. as such the claims pertaining to Kashang Hydro Electric Project and the Uri Project were rendered time barred as these emails are much beyond the period of expiration of limitation. Individually, in the case of Kashang Hydro Electric Project the due date for the last invoices had fallen on 28.06.2014. The claims were rendered time barred on 28.06.2017. And the purported emails sent by the Appellant is dated 10.11.2017, which is much after the period of expiry of limitation. Similarly, the due date for the last invoice for the Uri Project had fallen on 23.01.2014. The claims were rendered time barred on 23.01.2017. Appellant had relied upon email dated 14.07.2017, which is much after the period of expiry of limitation.

8. Respondent also relies upon the judgment of this Tribunal in ***S.M. Ghogbhai Vs. Schedulers Logistics India Pvt. Ltd. (2022) SCC OnLine 216***, wherein it has been held that Section 9 cannot be set to be a suit relating to accounts and as such Article 1 of the Limitation Act, 1963 (hereinafter referred to as “the Act”) is not applicable and the period of limitation for application under Section 9 of the IBC, would be governed by Article 137 of the Act. This Tribunal has held under Article 137 of the Limitation Act, the time from which period of limitation begins is when the right to apply accrues and right to apply accrues when the invoices were paid and in the current case, the invoices were raised during the period 2012 to 2015 and if these amounts are excluded the debt claims falls below the threshold Rs.1,00,00,000/- (Rupees One Crore Only). Respondent also claims that Appellant has shown total outstanding for the above three projects during the course of the arguments in a tabular form, which makes it above Rs.1,00,00,000/- (Rupees One Crore Only) for three projects which is contrary to the records. This has been created by inflating by adding interest to the original claimed amounts which is impermissible.

Appraisal:

9. We have heard the Learned Counsel for both the parties and also perused the records.

10. The issues before us in this case are whether the claims made by operational creditor are time barred and whether the claims are meeting the threshold limit of INR1,00,00,000 for them to be eligible for section 9

proceedings. Other ancillary issues like running account and acknowledgment of debt are also examined simultaneously.

Running account vs project wise accounts:

11. The claim of the Operational Creditors that they were having a running account between them and the Corporate Debtor needs critical scrutiny as on this basis they are claiming that the period of limitation stood extended from time to time as per Article 1 of the Limitation Act. In other words, their claim is that there is continuing cause of action that has arisen in favour of the Operational Creditor. It claims that the time stood extended till 15.03.2020 and they have filed the company petition on 19.01.2021 and also the period from 15.03.2020 till 28.02.2022 should be excluded basis the judgment of Hon'ble Apex Court in Su moto writ petition No. 3/20 dated 10.01.2022.

12. Perusal of the ledger accounts produced by the Operational Creditor, particularly paper book from pages 330 to 367, indicates that ledger accounts are being maintained project wise and are not on running account basis. The Operational Creditor has been maintaining separate accounts for each project and the receipts of payments were deposited in appropriate specific project account and not in a common account. The claim of the Operational Creditor that these are prepared for their convenience is not a satisfactory reply and cannot be accepted.

13. There is an attempt by the Operational Creditor to take refuge under Article-1 for calculating the limitation period, instead of Article 137 of the Schedule of the Limitation Act, 1963, by claiming their account to be a

running account. The question of applicability of Article 1 or Article 137 in IBC proceedings is well settled. For appreciating applicability of the correct article, both Article-1 and Article 137 of Limitation Act, 1963 are extracted as follows:

<p style="text-align: center;">THE SCHEDULE (PERIODS OF LIMITATION) [See sections 2(j) and 3] FIRST DIVISION—SUITS</p>		
Description of suit	Period of limitation	Time from which period begins to run
PART I.—SUITS RELATING TO ACCOUNTS		
1. For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years.	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.
XXX	XXX	XXX
PART II—OTHER APPLICATION		
137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years.	When the right to apply accrues.

This Tribunal in **S.M. Ghogbhai Vs. Schedulers Logistics India Pvt. Ltd.** [2022 SCC Online NCLAT 216] had held that proceedings under Section 9 of the IBC 2016 cannot be set to be a suit relating to accounts and as such Article 1 of the Limitation Act is not applicable and the period of limitation for application under Section 9 of the IBC, would be governed by Article 137 of the Limitation Act. Accordingly, the time from which period of limitation begins is when the right to apply accrues and right to apply accrues when the invoices were to be paid. The relevant extracts of this judgement are as follows:

“...

12. The question to be considered in the present

case is as to whether Appellant can take benefit of Article 1 of the Limitation Act, 1963. Hon'ble Supreme Court in the matter of '**B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Ors.**' (2019) 11 SCC 633 after considering the provisions of IBC and the Limitation Act had laid down that for filing application under Section 7 and 9, it is Article 137 which is attracted. In Paragraph 42 of the Judgment, following has been laid down:

"42. 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."

13. Hon'ble Supreme Court in (2020) 15 SCC 1, '**Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries (P) Ltd.**' has reiterated the applicability of Limitation Act and it was again reiterated that period for limitation is governed by Article 137 of the Limitation Act. In Paragraph 32 of the Judgment, following has been laid down:

"32. When Section 238-A of the Code is read with the above-noted consistent decisions of this Court in Innoventive Industries, B.K. Educational Services, Swiss Ribbons, K. Sashidhar, Jignesh Shah, Vashdeo R. Bhojwani, Gaurav

Hargovindbhai Dave and Sagar Sharma 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.”*

[Emphasis supplied]

14. For better appreciation of the applicability of Limitation Act in the facts of this case, the details of invoices, as contained in Part IV of Form 3 in the Demand Notice issued by the Operational Creditor, are summarised as follows in a tabular form:

Name of HCC Project as per the petition	Amount Claimed in Rs.(rounded off)	Total Number of invoices issued	Invoices period	Due date of last invoice	Limitation period expires under Section 137 of Limitation Act on	Meets Threshold of Rs. 1 crore or not
Kashang	2,001,072	47	2013, 2014	28.06.2014	28.06.2017	No
T-48 - Ram Ban	10,553,987	164	2013, 2014	7.05.2014	7.05.2017	Yes
Peerpanjal	294,647	7	2012, 2013, 2014	8.01.2014	8.01.2017	No
Pipalkoti	998,244	10	2017, 2018, 2019	15.10.2019	15.10.2022	No
Uri	826,472	4	2013	23.01.2014	23.01.2017	No
T-49A	734250	2	2014	3.09.2014	3.09.2017	No
Totals	15,408,672	234				

Time barred claims:

15. Out of total 234 invoices, 224 invoices (i.e. towards Kashang Hydro Electric Project I, Peerpanjal Tunnel VA Rail Project, T-48A and Uri projects) aggregating to an amount of INR 1,44,03,646/- have been issued between 2012 to 2014. Each of the said invoices is stated to be payable within 30 days of the invoice. Their default dates varies sometime in the year 2012 to 2014 in majority of the cases. As such, the 224 invoices are ex-facie time barred, as the due dates of these invoices admittedly are from 2013 to 2014 and time

of more than three years has lapsed in these cases. Except for 10 invoices of Peerpinjal project, for all other invoices due date of payment for last invoice is prior to 2014. Therefore, the three-year limitation period even for the last invoice out of the 224 invoices has lapsed in September 2018, while the instant Company Petition was filed on 25th February, 2021. The balance 10 invoices aggregating to INR 9,98,244/- (Rupees Nine Lakhs Ninety-Eight Thousand Two Hundred and Forty-Four Only), are stated to be due between 14th December 2017 to 10th April 2019 for the Pipalkoti Project. Therefore, at the highest only a claim of INR 9,98,244/- (Rupees Nine Lakhs Ninety-Eight Thousand Two Hundred and Forty-Four only) could be considered to be within limitation on the date of filing of the Company Petition. But this balance claim falls well below the threshold of Rupees One Crore as prescribed under Section 4 of the IBC.

16. Basis the law laid down and noted in previous paragraphs the Limitation period begins to run from the time when the right to apply accrues i.e. limitation will be three years from when the right to apply accrues, which is over for 224 out of 234 invoices, as the due dates of these invoices, admittedly are from 2013 to 2014. In the instant case there are six projects, located in different locations, though under the same construction company viz HCCL. Most of the invoices pertain to the period of 2012 to 2014 and default dates varies from the year 2012 to 2014 in majority of the cases. Therefore, the three-year limitation period, even for the last invoice out of the 224 invoices had lapsed in September 2018, while this Company Petition was filed on 25th February, 2021. Therefore, the argument of the petitioner that

the limitation stood extended is not tenable. And the arguments of the respondent for application of Article 1 of the Limitation Act stand rejected and under Article 137 out of 234 claims 224 are ex-facie time barred.

17. Furthermore, it is claimed that the period of limitation stood extended separately for the six sites and the claim for none of these sites have been barred by limitation. Two grounds are presented. First ground is that there are running accounts and the second one is that limitation stands extended as the Corporate Debtor has acknowledged the debt as per emails.

18. The legal tenability of running accounts has already been noted in the instant case for all the invoices together and there cannot be any better justification to settle them project wise as per Article 1 and therefore they also have to be settled as per Article 137 of the Limitation Act. The Operational Creditor has not been able to cross the hurdle of limitation and the threshold of Rupees one crore in a consolidated manner for 234 invoices claimed in his demand notice. By further subdividing the claims of 234 invoices in six different projects, the claims per project will further come down and threshold will once again be impossible to be met. Even for arguments sake if we presume that the claims are not barred by limitation, the claims of the operational creditor will fail on threshold if taken project-wise and it will not help the Applicant as the total claims will be further subdivided into six parts. Therefore, going into the project wise claims will not serve any purpose. Moreover, the total claim has to be seen, which has already been examined by us in the earlier paragraphs. We have already noted earlier that with

respect to 234 invoices, which are payable within 30 days of the invoices, 224 invoices are ex-facie time barred and the remaining 10 invoices do not meet the threshold of Rs.1,00,00,000/-. Therefore, this line of argument of the operational creditor is also not tenable.

Emails- are they acknowledgement of debt?

19. The ground that limitation stands extended as the Corporate Debtor has acknowledged the debt as per emails is now being seen by us. Operational creditor relies on an e-mail of 13th August 2016 in which Ledger was shared with the CD with an outstanding of INR 1,67,92,643. The operational creditor has not been able to establish any linkage between the outstanding in a consolidated manner of this e-mail and also the invoices which have been listed in the demand notice. Even if we presume that this is an acknowledgement, then the limitation of three years from the date of alleged admission i.e. 13th August 2016 had already expired on 12th August 2019 and therefore the company petition has been filed much after the expiry of the said limitation. Therefore, section 18 of the Limitation Act will not help and this email as the acknowledgement of debt does not help the operational creditor.

20. Now we look into the issue whether the emails of 14.07.2017, 07.01.2019 and 26.03.2019, annexed to the petition constitute an acknowledgement of debt or not. We have already noted that most of the claims of Operational Creditor have become time barred and for the remaining 10 invoices it is not able to cross the hurdle of the threshold of Rupees one crore. As the emails exchanges listed herein are not before the expiration of

the period of limitation and limitation has expired much prior to the email exchange. Therefore, the claims either suffer from hurdle of limitation or threshold or most of the time by both. In the present case as the so-called acknowledgement of liability by these emails is not before the expiration of the period of limitation. Taking these projects individually, in the case of Kashang Hydro Electric Project the due date for the last invoices had fallen on 28.06.2014. The claims were rendered time barred on 28.06.2017. And the purported emails sent by the Appellant is dated 10.11.2017, which is much after the period of expiry of limitation. Similarly, the due date for the last invoice for the Uri Project had fallen on 23.01.2014. The claims were rendered time barred on 23.01.2017. Appellant had relied upon email dated 14.07.2017, which is much after the period of expiry of limitation. Same is the case for other projects also. Therefore, section 18 of the Limitation Act doesn't apply and these emails do not provide any acknowledgement of the debt and doesn't help the Appellant.

Conclusion:

21. It is well settled that the period of limitation for application under Section 9 of the IBC, would be governed by Article 137 of The Limitation Act, 1963. The claim of the Operational Creditor that they were having running account and are covered under Article 1 of the Limitation Act cannot be accepted. Since their claim of a running account cannot be accepted, therefore, the limitation does not get extended as claimed. Accordingly, the time from which period of limitation begins is when the right to apply accrues and right to apply accrues when the invoices were to be paid. In the instant

case in most of the claims, as noted by the Adjudicating Authority they are time barred. Specifically, out of 234 invoices 224 are ex-facie time barred and for the remaining 10 invoices the total does not make it more than the threshold of Rupees one crore and therefore the claims of the Operational Creditor cannot be accepted. Accordingly, the Appeal is dismissed. No orders as to the cost.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

[Mr. Arun Baroka]
Member (Technical)

27th February, 2024

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