

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT) (Ins)NO.246/2021

(Arising out of Judgement and order dated 19.01.2021 passed by the National Company Law Tribunal, Guwahati Bench, Guwahati in CP(IB) No.26/GB/2019).

In the matter of:

AKC Infrastructure Pvt Ltd,
KP2/134.Chaliyam,
District Calicut,
Kerala

Appellant

Vs

Amrit Cement Ltd
Opp to Horse Shoe Building,
Lower lachumerie
Shillong
Meghalaya

Respondent

For Appellant:Mr Shashwat Parihar, Mr. Rishabh Kumar, Advocates.

For Respondent:Mr. Abhijeet Sinha, Sr. Advocate, Mr. Vivek Jhunjhunwala, Ms Wamika Trehan, Mr. Varun Chopra, Advocates.

JUDGEMENT

JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)

The instant appeal is filed by the Appellant against impugned order dated 19.01.2021 whereby the main petition alongwith IA No.11/2020 and 12/2020 was dismissed by the Adjudicating Authority, Guwahati Bench at Guwahati.

2. The application under Section 9 of the IB Code, 2016 was filed by the Operational Creditor on 29.06.2018 against the Corporate Debtor for defaulting

for a sum of Rs.1,95,28,552/- due in respect of the work done *qua* fabrication and erection of steel structure at the plant of the Corporate Debtor situated in Meghalaya.

3. The two work orders, issued by the Corporate Debtor, in favour of the Operational Creditor were dated 13.08.2010 and 20.11.2010. The work was duly completed and a completion certificate dated 15.02.2013 was also issued. The operational creditor raised 81 invoices in respect of the work done and the amount due. It is alleged the operational creditor viz the appellant had made various demands from 2013 till March, 2018 and even sent a demand notice dated 23.03.2018. As there was no reply, hence on 29.06.2018 the Operational Creditor was constrained to move an application under Section 9 of the IB Code, 2016. The defence taken by the Corporate Debtor before the Ld. NCLT was of limitation.

4. It is the submission of the appellant that it filed the company petition within three years from the date of coming into force of IB Code, 2016 *per* Neelkanth Township judgement. However, later the Hon'ble Supreme Court on 11.10.2018 in B.K. Educational Services declared that the law of limitation shall apply from the date of default. In this regard the appellant had moved an application to bring on record the trial balance, ledger accounts, balance sheets and other financial statements of the Corporate Debtor to show the claim of the Operational Creditor was well within limitation. The operational creditor also filed an application being IA No.82/2018 before the Ld. with NCLT for production of documents by the Corporate Debtor. After hearing the parties *vide* order dated

17.12.2018, the said application was dismissed by the Ld.NCLT stating *interalia* it does not have inherent power under the IB Code, 2016.

5. An appeal was preferred against the order dated 17.12.2018 of the Ld. NCLT before this Tribunal on 18.01.2019 which was registered as Company Appeal (AT)(Insolvency) No.97/2019 and it was allowed and the Ld.NCLT was asked to allow the operational creditor to file all necessary documents to show that its claim is within the limitation by way of filing the rejoinder.

6. The appellant then moved an application being IA No.14/2019 before Ld. NCLT calling upon the Corporate Debtor to produce trial balance, ledger account, balance sheet and other financial statements of the Corporate Debtor for the financial years from 2011-12 to 2017-18 as the ledger of the corporate debtor showed an amount of Rs.48 lakhs due to appellant in February 2013.

7. During the pendency of IA 14/2019, the Corporate Debtor sought clarification of the order dated 30.01.2019. This Ld. Tribunal by its order dated 29.03.2019, clarified the earlier order by mandating as to whether the claim of the operational creditor is barred by limitation or not shall be determined by the Ld. Adjudicating Authority. On 25.10.2019 the Adjudicating Authority disposed off IA 14/2019 and had directed the Respondent to produce financial documents as stated above. The corporate debtor filed an appeal before the NCLAT, being Company Appeal (AT)(Ins) No.1330/2019 against the order dated 25.10.2019 but it was dismissed *vide* order dated 25.11.2019.

8. Thereafter IA 11/2019 was moved by the appellant for execution of the order dated 25.10.2019 and IA 12/2019 for contempt petition for non-complying

with the order dated 25.10.2019. The time was granted to the Corporate Debtor to produce the documents. Even on 11.11.2020 the time was granted to Corporate Debtor to produce financial statements. However, the Ld. NCLT later dismissed the main petition u/s 9 of IBC, 2016 on 19.01.2021 even without discussing the impact of such financial statements. The relevant portion of the impugned order is as under:

“17. During the arguments, the learned counsel for the Operational Creditors submits that the Application may be admitted whereas the learned counsel for the corporate debtor has argued that the Petition; needs to be rejected as the Petition filed is barred by Limitation as mentioned in their reply dated 04.04.2018 to the notice issued by the Operational Creditor i.e. invoices were raised between 02.11.2010 to 10.12.2012 and the last payment was received by the Operational Creditor on 11.02.2013.

19. The Hon’ble Supreme Court of India in its judgement dated 14.08.2020 rendered in Civil Appeal No.6347 of 2019 in the case of Babulal Vardharji Gurjar Vs Veer Gurjar aluminium Industries Pvt Ltd & Anr held that an application under the Insolvency & Bankruptcy Code seeking CIRP in respect of the Corporate Debtor having been filed after a period three years from the date of default is barred by limitation.

20. Considering the arguments advanced by the counsels of both the parties, papers/documents made available before this Bench, the observations mentioned in the Points 15, 15.1 to 15.6, 17 and the Judgements of the Hon’ble Supreme Court in the cases of B.K. Educational Services and Babulal Vardharji Gurjar Vs Veer Gurjar Aluminium Industries Pvt Ltd & anr (Civil appeal No.6347/2019), the present petition CP(IB)No.26/GB/2019 is hereby rejected, same being treated as barred by limitation.

21. We also make it clear that the observations made in this judgment are relevant only in regard to the issue determined that the application under section 9 of the code is barred by limitation and not beyond. In other words, nothing in this judgment shall have bearing on any other proceeding that shall be dealt with on its own merits and in accordance with law.”

9. The matter came up before this Tribunal in the present appeal but it also dismissed the appeal *vide* an order dated 25.11.2022 as under:-

“13. Taking all the facts aforementioned, we are of the view that there is dispute between the parties prior to filing Section 9 application regarding work in question and also invoices raised by the Appellant between 02.11.2010 to 10.12.2012. Therefore, we do not find any merit in the instant Appeal, the impugned order dated 19.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Guwahati Bench, Guwahati) in CP(IB) No.26/GB/2019 is hereby affirmed. Accordingly, the instant appeal is hereby dismissed. No costs.”

10. The appellant filed Civil Appeal No.912/2023 wherein the Hon'ble supreme Court had passed the following order:-

“9. It emerges from the record that while the adjudicating authority dismissed the company petition on the ground of limitation, the appellate authority has affirmed the judgment of the adjudicating authority primarily on the ground that there was a pre-existing dispute and on limitation.

10 From the narration of the facts which have been set out above, it appears to this Court that the appellant has a serious grievance on whether the order of the adjudicating authority for the production of documents was complied with. Production of documents was sought to establish that there was an acknowledgment of debt.

11 The impugned order of the NCLAT has not entered any finding of fact on whether there was compliance of the order for production of documents. Though it was urged by the respondent that the order for production of documents had been complied with, we do not find any expression or opinion on finding by the NCLAT on this aspect of the matter.

12. Consequently and without this Court expressing any opinion on the rival contentions on merits, we are of the considered view that it would be appropriate to set aside the impugned order dated 25 November 2022 of the NCLAT in Company Appeal (AT) (Insolvency) No 246 of 2021 and to restore the appeal for disposal afresh.

13 We clarify that all the rights and contentions of the parties are kept open for adjudication of the appeal on remand.

11. Admittedly on 03.12.2020 the Respondents have filed the requisite documents as were required *vide order* 25th October, 2019 and these are annexed as Annexure C to the reply to this appeal. The appellant was, therefore, required to inspect the documents and to pinpoint any document to show any acknowledgement upon the part of the Respondent to its debt after the year 2013. The matter was listed three times thereafter and only written submissions have been filed by the appellant, reiterating the same issue without identifying the exact document to show any acknowledgement of debt by the corporate debtor in the financial documents filed by the appellant since the year *2011-12 till 2017-18* and hence no further opportunity can be granted now. The appellant was not able to identify any entry in the trial balance or in the balance sheet or in other documents which could serve the purpose of acknowledgement of debt and thereby extension of limitation period, and hence we find no force in the appeal and the same is accordingly dismissed for the reasoning given in the order dated 25th November, 2022. The order of the Hon'ble Supreme Court in Civil Appeal No.912/2023 is thus complied with.

12. Pending applications are also disposed off.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Ajai Das Mehrotra)
Member (Technical)

Dated: 19-9-2024