National Company Law Appellate Tribunal, New Delhi

Principal Bench

COMPANY APPEAL (AT) (Insolvency) No. 98 of 2019

(Arising out of Order dated 20th December, 2018 passed by National Company Law Tribunal, Bengaluru Bench, in Company Petition (IB) No.- 114/BB/2017)

IN THE MATTER OF:

M/s. Next Education India Private Limited
Sri Nilaya Cyber Spazio, 8-2-269/A/2/1-6,
1st Floor, East Wing, Road No. 2,
Beside Annapurna Studios,
Banjara Hills,
Hyderabad – 500 034. **.....Appellant**

Versus

M/s. K12 Techno Services Private Limited,
2nd Floor, No. 70, HMT Main Road,
9th Main Road, Opp. SBM,
Mathikere, Bengaluru – 560054. **....Respondent**

Appellant: **Mr. Amit Sibal, Sr. Advocate with Mr. Kumar Sudeep, Mr. Saksham Dhingra, Ms. Shraddha Gupta and Mr. Pavan Kumar, Advocates.**

Respondent: **Mr. Debal Banerji, Sr. Advocate with Mr. Sanjay Nuli, Mr. Suraj Kaushik and Mr. Agam Sharma, Advocates.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. The Appellant M/s. Next Education India Private Limited ('Operational Creditor') has filed an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short the **'I&B Code'**) against M/s. K12 Techno Services Private Limited ('Corporate Debtor') and the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench, by its Impugned Order dated 20.12.2018, rejected the Application on the ground of 'Pre-Existing Dispute' and 'Claims being time barred'.

Brief Background:

2. The Adjudicating Authority while dismissing the Application noted as follows;

> ***"13.*** *The Hon'ble Supreme Court in the case of B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates[1], has inter alia held that provisions of Limitation Act will apply to proceedings or appeals before NCLT/NCLAT. Section 238A of the Code make provisions of Limitation Act would apply to proceedings under the Code. As stated supra, debt in question fell on various dates on and after October, 2011 and there is no explanation for the laches and delay on the part of the petitioner. Moreover, as per the terms and conditions as stipulated in the Master License Agreement in question, the debt in question itself is subject to various compliances as stated supra.*
>
> *The Hon'ble Supreme Court of India, in a recent case, in Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited[2], has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down whenever there is existence of real dispute, the IBC provisions cannot be invoked.*
>
> *In another latest judgement rendered in Transmission Corpn. Of A.P. Vs. Equipment Conductors and Cables Ltd.[3], it has inter alia held that existence of un-disputed debt is sine qua non of initiating CIRP. As per para 34 of judgement, it is stated that Adjudicating Authority, while examining an application under Section 9 of Code, will have to determine:*
>
> *i. Whether there is an 'operational debt' as defined exceeding Rs. 1 Lakh?*
> *ii. Whether documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?*
> *iii. Whether there is existence of dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before receipt of demand notice of the*

unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

***"14.** In view of the above facts and circumstances of case, we are of the considered view that debt in question is not only in serious dispute, but it is also barred by laches and limitation, and the petitioner, in fact seeking recovery of alleged debt under the provisions of code. We have gone through the citations given by the learned Counsel for the Petitioner, and found that ratio given in those judgements is not applicable to the facts and circumstances of the instant case. Therefore, it is not a fit case to initiate CIRP as prayed for, and thus it is liable to be rejected".*

3. On an Appeal preferred by the Appellant/'Operational Creditor' in *Company Appeal AT (Insolvency) No. 98 of 2019* dated 01.08.2019, this Tribunal allowed the Appeal observing as follows;

"The Appellant brought on record (Form 5) of 'debt' and 'default'. It is also brought on record the Demand Notice u/s 8(1) of the 'I&B Code' was issued on 8th August, 2017. The Adjudicating Authority on the ground that the respondent has filed reply on 8th September, 2017 to the Demand Notice noticed that several disputes had been raised. They have also annexed several correspondence about the defective services provided by the Appellant. However, when we asked, the learned counsel for the Respondent could not lay hand on any of the correspondence to show that prior to Section 8 notice, the Respondent (Corporate Debtor) intimated that there were defective services provided by the Appellant.

It is a settled law that if any dispute is raised prior to the issuance of the invoices or Demand Notice u/s 8(1) of the I&B Code with regard to quality of service or goods or pendency of the suit or arbitration, in such case one may take the plea that there is an 'existence of dispute' but if any dispute is raised after issuance of Demand Notice u/s 8(1) that cannot be termed to be a 'pre-existing dispute'.

We find that the Adjudicating Authority has failed to notice the aforesaid issue and observed that 'debt' in question is not only serious dispute but also barred

by limitation and laches and not discussed under which provision the 'Master Service Agreement' with 'Sri Gowtham Academy of General and Technical Education' was consequentially issued on 8th February, 2016 and the reply to the Demand Notice was issued on 8th August, 2017.
For the reasons aforesaid, we set aside the impugned order dated 20th December, 2018 and remit the case to the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench for admitting the application u/s 9 of the 'I&B Code' after notice to the 'Corporate Debtor'. We allow the 'Corporate Debtor' to settle the claim before its admission, if it so chooses.
The appeal is allowed with aforesaid observations and directions."

4. Aggrieved by the Order dated 01.08.2019 of this Tribunal, the Respondent/'Corporate Debtor' preferred Civil Appeal No. 7646/2019. The Hon'ble Supreme Court allowed the said Appeal with the following observations;

"3. In our opinion, the issue of limitation and other issues have not been adverted to in detail by the NCLAT. It was incumbent upon the NCLAT, while reversing the order, to revert to the reasonings employed by the NCLT in its order, which has not been done.
4. It was submitted by Mr. Amit Sibal, learned senior counsel appearing on behalf of the respondents that various documents are on record to support the order of NCLAT. We find that no such document has been considered by the NCLAT.
5. Let NCLAT consider all the documents, which were placed on record and reasons given by NCLT and thereafter render a reasoned decision, in accordance with law. The impugned order passed by NCLAT is set aside. We request the NCLAT to decide the matter afresh unfettered by any observation made in this order or in the order passed by its earlier. Let the decision of the appeal be expedited.
6. The appeal is, accordingly, allowed."

5. Succinctly put, the facts in brief are that the Appellant (herein after referred to as the 'Operational Creditor') and the Respondent (herein after

referred to as the 'Corporate Debtor') entered into a Master Licence Agreement dated 03.01.2011 for providing Digital Classroom Solutions to the 'Corporate Debtor', which is engaged in the business of Educational Development. It is stated that the 'Operational Creditor' manages and provides services to Gowtham Model Schools and the 'Corporate Debtor' approached the 'Operational Creditor' to provide Digital Classroom Solutions in its effort to provide better Teaching and Coaching facilities to the students. It is stated that the 'Operational Creditor' agreed to provide Hardware, Content and Maintenance Services to the 'Corporate Debtor' as per the terms and conditions of the Master Agreement. During the course of their transactions, the 'Operational Creditor' raised 187 invoices during the period March 12, 2011 and June 30, 2017 for total amount of Rs. 2,39,85,521.35 which remained unpaid.

Submissions of the Operational Creditor:

6. Learned Counsel appearing for the 'Operational Creditor' contended that 187 invoices were raised for the Digital Classroom Solution Services provided for the period between 12.03.2011 and 30.06.2017; that the 'Corporate Debtor' has sent a letter dated 11.09.2015 pertaining to an audit confirmation wherein there was an express admission for an amount of Rs. 2,46,61,404, 'due and payable' to the 'Corporate Debtor'; that an email dated 27.04.2016 was also addressed to the Corporate Debtor wherein the liability to pay the dues was admitted; that an Addendum Agreement dated 01.07.2016 was entered into between the parties wherein an amount of Rs. 2.69/- Crores was once again confirmed as payable by the 'Corporate Debtor'; that the amount payable was intentionally delayed and never paid

despite repeated requests and hence a Demand Notice dated 08.08.2017 under Section 8(1) of the 'IBC' was issued which was received by the 'Corporate Debtor' on 12.08.2017, but was not replied to within the statutory period of 10 days; that the Corporate Debtor sent a belated Reply dated 08.09.2017 denying all the claims of the Appellant and raised fictitious and non-existent disputes.

7. Learned Counsel for the Operational Creditor further submitted that the Learned Adjudicating Authority has erred in not appreciating that the purported dispute sought to be raised by the 'Corporate Debtor' in its Reply dated 08.09.2017 was never raised prior to the issuance of Section 8 Notice; that the Demand Notice including the Addendum Agreement dated 01.07.2016 is noted in para 2 (serial no. 2 in the list of documents); that the Addendum Agreement read with the Letter dated 11.09.2015, the emails dated 29.02.2016 and 27.04.2016 clearly show the admission by the 'Corporate Debtor' that an amount of Rs. 2.69/- Crores is 'due and payable'. It is pointed out by the Learned Counsel that nowhere in this communication, the 'Corporate Debtor' had raised any issue of any dispute except for routine everyday services which are a part and parcel of running and maintaining the hardware and software systems.

8. The Learned Counsel appearing for the Operational Creditor further contended that the earliest invoice in the three years preceeding 26.10.2017 is dated 02.04.2015 and the latest invoice is dated 30.06.2017 hence the question of the Application being barred by limitation does not arise, as even if we take the period between 02.04.2015 and 30.06.2017, there is an

unpaid debt of Rs. 36.8/- Lakhs which is above the threshold of Rs. 1/- Lakh required for triggering the CIRP Process.

Submissions of the Corporate Debtor:

9. Learned Counsel appearing for the Corporate Debtor argued that the Section 9 Application is barred by limitation as the amount alleged to be due pertains to the month of March 2011 onwards whereas the Petition was filed on 26.10.2017; that the Demand Notice and From-V do not mention the Addendum Agreement; that the Adjudicating Authority has rightly observed that the alleged Agreement was not properly executed; that the Appellant had terminated their Agreement with Sri Gowtham Academy of General and Technical Education (SGAGTE) on 08.02.2016; that there is a long standing relationship between the 'Operational Creditor' and the 'Corporate Debtor' because of which the 'Corporate Debtor' themselves contacted the end users i.e. SGAGTE to assess the amount 'due and payable'; that the 'Operational Creditor' had failed to provide the requisite support with request to the supplies provided by them as they were faulty; that the invoices were sent to SGAGTE and not to the 'Corporate Debtor'; that there was a total failure of systems for 18 days from 08.10.2013 to 25.10.2013; that there was a breach of clauses 6.1 and 6.8 of the Master Agreement which show the rights and obligations of the 'Operational Creditor'; that the matter at hand is only a suit for recovery camouflaged as an Application under Section 9 of 'IBC'; that the 'Operational Creditor' was obligated to spend Rs. 25/- Lakhs in Joint Media Advertising which was never done; that the 'Telugu content' and the 'Training Sessions' promised by the 'Operational Creditor' was never provided and these breaches amount to 'Pre-Existing Disputes' and hence

the Learned Adjudicating Authority had rightly relied on the ratio in ***'Mobilox Innovations Private Limited' V/s. 'Kirusa Software Private Limited', (2018) 1 SCC 353*** and rejected the Application.

10. Learned Counsel for the 'Corporate Debtor' drew our attention to the invoices (on pages 399 to 406, Volume II) in which the unpaid debt is reflected from 12.03.2011 onwards. It is submitted that the last invoice is dated 30.06.2017 which is beyond three years of the date of default and therefore the Application is barred by limitation. He further contended that the breach of clauses 6.4, 6.5 and 6.6 was never denied by the 'Operational Creditor'; that in the Demand Notice under Section 8(1) the date of default has been show as 12.03.2011. The Counsel contended that the Learned Adjudicating Authority has rightly observed that the Section 9 Application was not only barred by limitation but also that there was a 'Pre-Existing Dispute' with respect to the services rendered by the 'Operational Creditor'.

Assessments:

11. Heard both sides. The two main points for consideration in this Appeal are whether the Learned Adjudicating Authority was justified in holding that;

a. the Section 9 Application was barred by limitation
b. that there was a 'Pre-Existing Dispute' prior to the issuance of the Demand Notice under Section 8(1) of the Code.

12. At the outset, we first address ourselves to the issue whether the Application filed under Section 9 of the Code, is barred by limitation. Admittedly, the invoices (reflected in pages 399 to 406 of Volume II), pertain to the period from 12.03.2011 to 30.06.2017. It is vehemently contended by

the Learned Counsel for the 'Operational Creditor' that even if invoices are taken into consideration, from 04.02.2015 onwards, (page 402 Volume II) till the last invoice of 30.06.2017, the total amount claimed to be 'due and payable' by the 'Operational Creditor' is Rs. 36.8/- Lakhs which is beyond the threshold of Rs. 1/- Lakh prescribed under Section 4 of 'IBC' for triggering CIRP Process.

13. *Whether the 'Operational Creditor' can change the 'date of default' by confining the invoices to a later period, when the Demand Notice under Section 8 includes all the invoices from the date of default and the 'debt amount' is crystallized based on the invoices?*

14. It is the case of the 'Operational Creditor' that these invoices read with the Letter dated 11.09.2015, addressed by the 'Corporate Debtor' to the 'Operational Creditor' as part of the audit confirmation and signed and stamped by the 'Corporate Debtor' shows that an amount of Rs. 2.46/- Crores was 'due and payable' and hence the Application is within the limitation period.

15. The law with respect to 'date of default' and 'limitation' under 'IBC' has been clearly laid down by the Hon'ble Supreme Court in a catena of Judgements. In ***'Vashdeo R. Bhojwani' V/s. 'Abhyudaya Co-operative Bank Limited and Another' – (2019) 9 SCC 158,*** the Hon'ble Supreme Court referring to ***'BK Educational Services (P) Ltd.' (2019) 11 SCC 633*** observed;

> *"3. Having heard the learned counsel for both parties, we are of the view that this is a case covered by our recent judgment in B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, para 42 of which reads as follows:*

> *"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."*
>
> *Dealing with Section 23 of the Limitation Act, 1963, the Hon'ble Supreme Court observed:*
>
> *"xxx xxx xxx*
> *Following this judgment, it is clear that when the recovery certificate dated 24-12-2001 was issued, this certificate injured effectively and completely the appellant's rights as a result of which limitation would have begun ticking"*

16. The Hon'ble Apex Court in ***'Babulal Vardharji Gurjar' V/s. 'Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.', 2020 SCC Online SC 647,*** has also reproduced the relevant passages of the said decision in ***'Gaurav Hargovindbhai Dave' V/s. 'Asset Reconsturction Company (India) Ltd. & Anr.', (2019) SCC OnLine SC 1239,*** detailed as hereunder

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

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

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

7. *This being the case, we fail to see how this para could possibly help the case of the respondents. Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular article gets attracted.* ***It is well settled that there is no equity about limitation*** *- judgments have stated that often time periods provided by the Limitation Act can be arbitrary in nature. 8. This being the case, the appeal is allowed and the judgments of the NCLT and NCLAT are set aside."*

(Emphasis in bold supplied)

"29. *Close on the heels of* ***Gaurav Hargovindbhai Dave*** *(supra), this Court dealt with similar issue yet again in the case of* ***Sagar Sharma*** *(supra), decided on 30.09.2019. Therein, apart from disapproving the proposition that the date of commencement of the Code could be the starting point of limitation (as noticed hereinabove), this Court again pointed out the fallacy in applying the period of limitation related to*

mortgage liability to the application under Section 7 of the Code and said, –

> *"**2**.....However, we find in the impugned judgment that Article 62 (erroneously stated to be Article 61) was stated to be attracted to the facts of the present case, considering that there was a deed of mortgage which was executed between the parties in this case.* ***We may point out that an application under Section 7 of the Code does not purport to be an application to enforce any mortgage liability.*** *It is an application made by a financial creditor stating that a default, as defined under the Code, has been made, which default amounts to Rs 1,00,000 (Rupees one lakh) or more which then triggers the application of the Code on settled principles that have been laid down by several judgments of this Court."*
>
> *(Emphasis in bold supplied)*

"30. *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; € 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)

17. In the aforenoted Judgement it is clearly observed 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 the 'Right to Apply' accrues. In the instant case, the material on record and the admitted invoices, (pages 399 to 406 of Volume II) evidence that the first unpaid debt is dated 12.03.2011. Page 402 is relevant as the Learned Counsel for the Appellant sought to rely on the debt for the period from 02.04.2015 upto 30.06.2017 (page 406). For better understanding of the case, the same is reproduced as hereunder;

Bill No.	*Date*	*Milestone*	*Total Amount Billed (Inclusive of Tax)*	*Status*	*Balance O/s.*
2012-2013/HYD/TN/67667	*5/7/2012*	*5/7/2012*	*123,550.00*	*UnPaid*	*18,051,540.00*
2012-2013/HYD/TN/68306	*5/14/2012*	*5/14/2012*	*123,550.00*	*UnPaid*	*18,175,090.00*
2012-2013/HYD/TN/38669	*2/6/2012*	*2/6/2012*	*68,300.00*	*UnPaid*	*18,243,390.00*
2012-2013/HYD/TN/39221	*2/14/2012*	*2/14/2012*	*85,000.00*	*UnPaid*	*18,428,390.00*
2012-2013/HYD/TN/39725	*2/18/2012*	*2/18/2012*	*124,880.00*	*UnPaid*	*18,553,270.00*
2012-2013/HYD/TN/39711	*2/18/2012*	*2/18/2012*	*124,880.00*	*UnPaid*	*18,678,150.00*
2012-2013/HYD/TN/39710	*2/18/2012*	*2/18/2012*	*124,880.00*	*UnPaid*	*18,803,030.00*
2012-2013/HYD/TN/40258	*2/22/2012*	*2/22/2012*	*4,400.00*	*UnPaid*	*18,807,430.00*
2012-2013/HYD/TN/42644	*2/29/2012*	*2/29/2012*	*124,850.00*	*UnPaid*	*18,932,280.00*
2012-2013/HYD/TN/45738	*3/13/2012*	*3/13/2012*	*1,83,000.00*	*UnPaid*	*19,115,280.00*
2012-2013/HYD/TN/59143	*4/9/2012*	*4/9/2012*	*123,550.00*	*UnPaid*	*19,238,830.00*
2012-2013/HYD/TN/59039	*4/9/2012*	*4/9/2012*	*123,550.00*	*UnPaid*	*19,362,380.00*
2012-2013/HYD/TN/59075	*4/9/2012*	*4/9/2012*	*123,925.00*	*UnPaid*	*19,486,305.00*
2012-2013/HYD/TN/59572	*4/10/2012*	*4/10/2012*	*123,550.00*	*UnPaid*	*19,609,855.00*
2012-2013/HYD/TN/61385	*4/18/2012*	*4/18/2012*	*122,900.00*	*UnPaid*	*19,732,755.00*
2012-2013/HYD/TN/61384	*4/18/2012*	*4/18/2012*	*122,900.00*	*UnPaid*	*19,855,655.00*
2012-2013/HYD/TN/67619	*5/5/2012*	*5/5/2012*	*123,525.00*	*UnPaid*	*19,979,180.00*
2012-2013/HYD/TN/67667	*5/7/2012*	*5/7/2012*	*123,550.00*	*UnPaid*	*20,102,730.00*

2012-2013/HYD/TN/68306	***5/14/2012***	***5/14/2012***	*123,550.00*	*UnPaid*	*20,226,280.00*
2015/2016/HYD/TN/330770	***4/2/2015***	***4/2/2015***	*73,680.00*	*UnPaid*	*20,299,960.00*
2015-2016/HYD/TN/330772	*4/2/2015*	*4/2/2015*	*17,588.00*	*UnPaid*	*20,317,548,00*
2015-2016/HYD/TN/330771	*4/2/2015*	*4/2/2015*	*29,757.00*	*UnPaid*	*20,347,305.00*
2015-2016/HYD/TN/330773	*4/2/2015*	*4/2/2015*	*8,670.00*	*UnPaid*	*20,355,975.00*

18. It is significant to note that there is gap between 14.06.2012 and 02.04.2015 of almost three years. Be that as it may, the date of default is of relevance here.

19. It is pertinent to note that the date of default in the Section 8(1) Application dated 08.08.2017 is 'March 2011', the particulars of which is reproduced below:-

Particulars of the Unpaid Operational Debt		
1.	Total amount of debt	Rs. 2,39,85,521.35/- (Rupees Two Crores Thirty Nine Lakhs Eighty Five Thousand Five Hundred Twenty one and Thirty Five Paise only)
	Details of transactions on account of which debt fell due:	Master License Agreement signed 03rd January 2011 for providing digital classroom solution at various branches.
	The date from which such debt fell due:	**March 12, 2011**
2.	Amount claimed to be in default and the date on which the default occurred	Rs. 2,39,85,521.35/- (Rupees Two Crores Thirty Nine Lakhs Eighty Five Thousand Five Hundred Twenty one and Thirty Five Paise only), occurred on various dated staring from March 12, 2011
3.	Particulars of security held, if any, the date of its creation, its estimated value as per Next Education India Pvt. Ltd.	NIL
	Attach a copy of a certificate of registration of charge issued by the registrar of companies	Not Applicable
4.	Details of retention of file arrangements in respect of goods to which the operational debt refers	Not Applicable
5.	Record of default with the information utility	Not Applicable

6.	Provision of law contract or other document under which debt has become due	Under Section 8(10 of the Insolvency and Bankruptcy Code, 2016
7.	List of documents attached to this application in order to prove the existence of operational debt and the amount in default	As described in Table 2

At this juncture, we find it relevant to reproduce the statutory provisions of Section 8 and Section 9 of the Code as hereunder;

> ***"Section 8: Insolvency resolution by operational creditor.***- *(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.*
>
> *(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—*
>
> *(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to*
> *such dispute;*
>
> *(b) the repayment of unpaid operational debt—*
>
> *(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or*
>
> *(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.*
>
> ***Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred".***

> ***"Section 9: Application for initiation of corporate insolvency resolution process by operational creditor.***- *(1) After the expiry of the period of ten days from the date of delivery of the*

notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt [3][by the corporate debtor, if available;]

[4][(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

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

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section".

(Emphasis Supplied)

20. As the Code mandates, Section 9 Application is filed after the issuance of Demand Notice under Section 8(1) which contains the details of unpaid Operational Debt. It is also interesting to note that Part IV of the Application under Section 9 mentions the 'date of default' as 'June 30, 2017'; for an amount of Rs. 2,39,85,521.35/-. It is seen from the record that the date of first default is March 2011 and the cumulative amount claimed is Rs. 2,39,85,521.35/-. Section 9 Application emanates from the Demand Notice under Section 8(1). Both have to be read conjointly and the date of

default cannot be construed to be different merely because it is differently mentioned as '2011' in Section 8 Notice and '2017' in Application under Section 9.

21. As can be seen from Section 8, reproduced above, the moment there is an occurrence of a default, copy of an invoice demanding payment of the amount involved in the default is to be delivered by way of a Demand Notice to the 'Operational Creditor'. Form III gives the details of the invoices. In the instant case, the 'Operational Creditor' has given the details of invoices from (pages 399 to 406 of Volume II) and has also crystallized the amount at Rs. 2,39,85,521.35/-, which is unpaid from 2011. Therefore, the argument of the Learned Counsel for the 'Operational Creditor' that the period should be confined only from 2015 to 2017 cannot be sustained. The Tribunal cannot confine to one or other invoice if the Applicant has relied on all the invoices to arrive at the amount of Rs. 2,39,85,521.35/- in the Demand Notice under Section 8. We are of the view that the Tribunal does not have Jurisdiction in these Insolvency Proceedings to cut-short the invoices which would cause recurring dates of cause of action as it is not a suit for recovery.

22. To reiterate, once the default takes place, the Right to file Application accrues as provided under Article 137 of the Limitation Act, 1963. In the instant case, we are of the considered view that the 'Right to Application' first accrued within three years of 12.03.2011, which limitation ends on 12.03.2014. If the argument of the Counsel for the Operational Creditor is accepted, then there would be several dates of default 2011, 2012, 2015 etc. *It is not the discretion of the Tribunal to accept one date or the other. The date of default is fixed and hence a crucial date and cannot be shifted* and hence

we are of the considered opinion that the first date of default in the instant case is 12.03.2011.

23. Now we address ourselves to the letter dated 12.09.2015, the email communication 29.02.2016 and 27.04.2016 whereby and whereunder the 'Operational Creditor' seeks to establish 'Acknowledgement of debt' under Section 18 of the Limitation Act, 1963.

24. The Counsels placed reliance on the email dated 27.04.2016 (Annexure A-4) and we find it relevant to reproduce the same as hereunder;

> *"On the balance amount due we are awaiting the signing of the Escrow agreement from GMS and shall share the same with you.*
> *We have no intention of holding the funds at K12 and if possible we would like to have done a direct payment from SGATE to Next but due to various complexities it has to be routed to K12 as the liability is with K12."*
>
> *(Emphasis Supplied)*

25. Additionally, an email dated 29.02.2016 sent by the 'Corporate Debtor' to the 'Operational Creditor' states that *'in this process we wish to clarify that as the contract is with K12 all liability will remain with K12 and K12 will ensure that the balance payments will be made. We are in the process of closing legal agreements with SGATE. As this is part of the larger agreement we request you to please maintain confidentially and not disclose or discuss any information on our agreement with any party. Also could you send us a status of our account so we can reconcile the same to our books before closing any documents'.*

26. As we hold that the date of default is 12.03.2011, the correspondence relied upon by the Appellant Counsel is dated 12.09.2015 and is beyond three years of the date of default, we are of the considered view that these

documents do not extend the period of limitation. In the present case, the 'Operational Creditor' failed to bring on record any acknowledgement in writing by the 'Corporate Debtor' or its representative within three years of the date of the first default. As the scope and objective of the Code is not to give a fresh lease of life to time barred debts, we are of the considered view that the ratio of the Hon'ble Supreme Court in ***'Babulal Vardharji Gurjar' (Supra)*** is squarely applicable to the facts of this case. Hence, we hold that the Application filed under Section 9 is barred by limitation.

Whether there is any Pre-Existing Dispute between the Parties

27. Now we address ourselves to the second issue raised by the parties as to whether there was any 'Pre-Existing Dispute' prior to the issuance of the Demand Notice under Section 8(1) of the Code. It is the main case of the 'Corporate Debtor' that there was a 'Pre-Existing Dispute' with respect to Rs. 25/- Lakhs amount which was agreed to be spent on advertising and was never adhered to by the 'Corporate Debtor' and that the said allegation was never denied by the 'Operational Creditor'. In response to this, Learned Counsel appearing for the 'Operational Creditor' drew our attention to the 'Rejoinder Affidavit' filed before the Adjudicating Authority wherein there is a specific denial that the 'Operational Creditor' had never come forward to spend Rs. 25/- Lakhs towards advertising. It is significant to mention that a perusal of the material on record does not evidence any such issue raised by the 'Operational Creditor' prior to the issuance of the Demand Notice. It is stated in that Affidavit that training was given to the teachers as and when required by the 'Corporate Debtor'. We observe that there is no such 'dispute' with respect to 'training' raised in any of the emails exchanged

between the parties prior to 08.08.2017. The aspect regarding the 'training sessions' to be provided as per clause 6.3 of the Agreement was raised for the very first time in the belated Reply filed before the Adjudicating Authority.

28. The Hon'ble Supreme Court in ***'Transmission Corporation of Andhra Pradesh Limited' V/s. 'Equipment Conductors and Cables Limited', (2019) 12 SCC 697,*** while deciding the issue of Pre-Existing Dispute and in ***'Mobilox Innovations Pvt. Ltd.' Vs. 'Kirusa Software (P) Limited'- 2017 1 SCC OnLine SC 353*** has clearly laid down the law that the 'existence of dispute' must be Pre-Existing' i.e. it must exist before the receipt of the Demand Notice or invoice as the case may be. In ***'Mobilox Innovations' (Supra)*** the Hon'ble Supreme Court has observed as follows;

> *"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. ....."*

"17. In the said case, the Hon'ble Supreme Court held as to what are the facts to be examined by the Adjudicating Authority while examining an application under Section 9, which is as follows:

> *34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)*
>
> *(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*
>
> *(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration Proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*
>
> *If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."*

"18. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs. 1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt

of the demand notice of the unpaid 'operational debt', the application under Section 9 cannot be rejected and is required to be admitted."
(Emphasis Supplied)

29. In the instant case, Learned Counsel appearing for the 'Corporate Debtor' drew our attention to pages 626 to 630 of Volume III, which is a part of the Reply filed before the Adjudicating Authority wherein the email correspondence between the parties dated 21.07.2012, 18.12.2013, 31.07.2015, 18.08.2015 is reproduced. It is seen from this correspondence that it pertains to the period between 2012 to 2015 and establish that they relate to regular day-to-day issues viz. 'projector having been switched off', 'shifting of the computers systems', 'the costs charged for the shifting', issue regarding 'DG set' etc. It is noted that the last 'Complaint' about the equipment or services rendered is dated 19.08.2015. It is pertinent to mention that nowhere in this correspondence any issue with respect to training or payment of Rs. 25/- Lakhs or any other breach of the clauses of the Master Licence Agreement has been raised.

30. Keeping in view the ratio of the aforenoted Judgement of the Hon'ble Supreme Court in ***'Transmission Corporation' (Supra)*** and ***'Mobilox Innovations', (Supra)*** that the dispute should be 'Pre-Existing', we are of the considered opinion that the material on record and the documentary evidence filed does not establish that there was any dispute prior to issuance of the Section 8 Demand Notice or that there was any assertion of facts supported by any evidence to establish existence of a dispute. The Demand Notice under Section 8(1) dated 08.08.2017 and the Reply which was filed one month later for the very first time raises these issues.

Therefore, we are of the considered view that though the Application is barred by limitation there is no 'Pre-Existing Dispute' between the parties.

31. In the result this Appeal is dismissed as we find no illegality or infirmity in the Order of the Learned Adjudicating Authority in so far as the same relates to finding on issue of limitation. For all the aforenoted reasons, this Appeal is dismissed. No Order as to costs.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
17th March, 2021

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