2026 INSC 835

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 876 OF 2021

SRINIVASA REDDY VELAGALA ... APPELLANT

VERSUS

SRAVANTHI INFRATECH PVT. LTD. ... RESPONDENT

J U D G M E N T

J. B. PARDIWALA, J. :

For the convenience of exposition, this judgment is divided into the following parts: -

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1. This appeal arises from the judgment and order dated 01.02.2021 passed by the National Company Law Appellate Tribunal at New Delhi ("**NCLAT**") in the Company Appeal (AT) (Insolvency) No. 188 of 2020, preferred by the appellant herein against the admission of the insolvency application filed by the respondent herein under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), by which the NCLAT affirmed the order of the National Company Law Tribunal, Amravati Bench ("**NCLT**") admitting the Section 9 application and initiating insolvency proceedings against the appellant herein.

A. <u>FACTUAL MATRIX</u>

2. The appellant herein (the corporate debtor) had invited an International Competitive Bid by advertisement dated 13.12.2010, for setting up a 225 MW gas based combined cycle Power Station at Bikkavolu, East Godavari District, Andhra Pradesh.

3. The respondent herein (the original petitioner before the NCLT), i.e., the operational creditor, was awarded the contract for execution of the aforesaid project as it submitted the lowest bid. The appellant issued the Letter of Award dated 24.12.2010 (the "**LOA**") to the respondent for an amount of

Rs. 827 crore. The parties subsequently entered into a contract for Engineering Procurement and Construction ("**EPC agreement**" / "**EPC contract**") dated 09.02.2011. It was decided amongst the parties that the EPC contract was supposed to be completed in 14 months. It was mutually agreed between the parties that any disputes arising out of the EPC Agreement shall be referred to arbitration.

4. The EPC agreement enumerated several obligations and conditions for payment. The terms of payment in the EPC agreement signed between the parties is reproduced hereinbelow:

"*Appendix – B*

TERMS OF PAYMENT

SUPPLY OF EQUIPMENT

Sl. No.	***Milestone***	***Payment***
1	*Initial Advance Payment*	*10% of Contract Price against Corporate Guarantee*
2	*Payment against ordering major equipment;*	*5% of Contract Price*

	a) Against ordering of GTGs *b) Against ordering of STG* *c) Against ordering of HRSGs* *d) Against ordering of CT / ACC*	
3	*Payment against release of advances* *a) Against release of advance of GTGs* *b) Against release of advance of STG* *c) Against release of advance of HRSGs* *d) Against release of advance of CT / ACC*	*5% of Contract Price*
4	*Payment against Billing Break-up (BBU)*	*70% of the contract price shall be paid as per agreed billing break up.*
5	*Payment on Commissioning*	*5% payment shall be made on Commissioning in Open Cycle or 45 days of readiness of facilities and against submission of performance corporate guarantee for 5% of the contract value.*
6	*Payment on Commissioning*	*5% payment shall be made on Commissioning in*

		Combined Cycle or 45 days of readiness of facilities and against submission of performance corporate guarantee for 5% of the contract value.

(…)"

5. The monetary break-up of the contract price in terms of the aforesaid payment schedule is provided below:

Sl. No.	**Milestone**	**Payment**	**Amount to be paid in milestones (In Rs.)**
1	Initial Advance Payment	10% of Contract Price against Corporate Guarantee	82.7 crore
2	Payment against ordering major equipment; e) Against ordering of GTGs f) Against ordering of STG g) Against ordering of HRSGs	5% of Contract Price	41.35 crore

	h) Against ordering of CT / ACC		
3	Payment against release of advances e) Against release of advance of GTGs f) Against release of advance of STG g) Against release of advance of HRSGs h) Against release of advance of CT / ACC	5% of Contract Price	41.35 crore
4	Payment against Billing Break-up (BBU)	70% of the contract price shall be paid as per agreed billing break up.	578.9 crore
5	Payment on Commissioning	5% payment shall be made on Commissioning in Open Cycle or 45 days of readiness of facilities and against submission of performance corporate guarantee for 5%	41.35 crore

		of the contract value.	
6	Payment on Commissioning	5% payment shall be made on Commissioning in Combined Cycle or 45 days of readiness of facilities and against submission of performance corporate guarantee for 5% of the contract value.	41.35 crore
	TOTAL		**827 CRORE**

6. On the basis of the aforesaid payment schedule, the respondent was supposed to receive the payment of 10% of the contract price, i.e., Rs. 82.7 crore upon completion of the first milestone. The first milestone was achieved when the LOA was issued to the respondent on 24.12.2010 and the Corporate Performance Guarantee and Advance Corporate Guarantee respectively was provided by the respondent to the appellant on 26.04.2011 and 29.04.2011 respectively. However, the appellant made payment of Rs. 50.15 crore as advance out of Rs. 82.7 crore that was supposed to be paid.

7. Further, the second instalment of 10% of the contract price, i.e., Rs. 82.7 crore was supposed to be paid once the respondent achieved the second and third milestones. The respondent, having finalized the purchase order copy for GTG, STG and HRSG respectively, submitted the same on 15.02.2011. The status reports in regard to the work done by the respondent on the site were also being forwarded to the appellant regularly. The appellant *vide* its letter dated 05.01.2012 to the Chief Engineer IRP Division Central Electricity Authority, New Delhi, duly acknowledged in detail the work done by the respondent.

8. Though the respondent achieved the first, second and third milestones respectively yet, the appellant made payment of only Rs. 50.15 crore out of the cumulative Rs. 165.4 crore that remained due to the respondent.

9. The respondent, in order to finish the contract works in a timely manner and to achieve the fourth milestone, placed various on shore and offshore orders and hired sub-contractors for completion of the works. The respondent accordingly sent the Billing Break-up ("**BBU**") to the appellant on

13.07.2011. The BBU was submitted once again on 03.01.2012 on demand by the appellant and the same was acknowledged without any dispute by the appellant. However, no payment was made by the appellant to the respondent in pursuance of the BBU.

10. Aggrieved by the non-payment of its dues by the appellant, the respondent sent a notice of suspension dated 30.07.2011 to the appellant on the ground that the amount of Rs. 32.55 crore was pending from the advance payment which became due after the first milestone. Pursuant to the suspension notice, the respondent stopped all EPC activities and stated that the same would be resumed only after the receipt of the initial advance. The respondent also terminated its contracts with the vendors and sub-contractors hired for completing the contract works.

11. The respondent sent legal notices dated 25.07.2014, 16.09.2014 and 15.07.2015 respectively wherein it demanded payment in terms of the payment provisions enumerated in the EPC contract. It was stated in the said notices that the appellant's failure to complete the payment caused the respondent to suspend the works, as it was unable to continue with full mobilization at the site and subsequently, it had to completely demobilize by November 2011. It was clarified that the works remained suspended as the appellant had failed to cure its default in payments. It was further clarified that the appellant had not terminated the EPC agreement and therefore, the duties and obligations thereunder continued to operate as regards the parties. No response to the aforesaid legal notices is present in the record.

12. The respondent after the lapse of almost three years sent a demand notice dated 02.07.2018 in due compliance of the statutory stipulation under Section 8 of the IBC. The total amount of debt demanded thereunder was stated to be Rs. 1292,13,35,000/- (Rupees One thousand Two hundred and Ninety Two Crores Thirteen Lakhs and Thirty Five Thousand Only) which fell due on 25.02.2011. It was also stated therein that the BBUs sent on 03.01.2012 were acknowledged by the appellant but remained unpaid.

13. As there was no response to the aforesaid demand letter, the respondent filed the application under Section 9 of the IBC on 12.10.2018, which came to be admitted on 13.12.2019 by the NCLT. The NCLT admitted the Section 9 application on the following grounds:

a) The application under Section 9 of the IBC was maintainable as the amount demanded by the respondent herein was an operational debt in terms of the definition under Section 5(21) of the IBC.

b) Despite non-payment of the operational debt to the respondent, neither the appellant nor the respondent terminated the EPC contract. The EPC contract was a continuous contract which could only be completed upon fulfilment of the obligations stipulated thereunder or be terminated by invocation of the termination clause by either of the parties. Since neither course of action was taken by the parties, it was held that the EPC contract between the parties continued to subsist. Hence, the appellant owed an operational debt to the respondent in terms of the contractual provisions.

c) As regards the prior existence of a dispute between the parties, it was held that since the appellant did not respond to the respondent's demand notice dated 02.07.2018 issued under Section 8 of the IBC, therefore, there was no question of a pre-existing dispute barring the Section 9 application of the respondent.

d) As regards the issue of Section 9 application being barred by limitation, it was held that since the EPC contract had neither been terminated by the parties, nor did it get frustrated due to efflux of time, the contract continued to subsist. Hence, the plea of the appellant herein that the Section 9 application was time-barred was rejected.

14. Aggrieved by the aforesaid order, the appellant preferred an appeal with the NCLAT. The NCLAT dismissed the appeal by way of the impugned judgment on the following grounds:

a) The question whether the claim of the respondent under Section 9 of the IBC was barred by limitation was answered in the negative. The NCLAT observed that none of the parties terminated the EPC contract. As a result, the same continued to subsist till date. As such, the appellant's plea of limitation could not be accepted as there was no termination of the EPC contract.

b) As regards the issue whether the claim of the respondent was an operational debt in terms of Section 5(21) of the IBC, it was held that the respondent's claim in the Section 9 application was an operational debt.

c) It was further held that since the EPC contract was silent on the frustration of contract due to efflux of time, it could not be said that the contract had automatically been frustrated.

d) As regards the question whether there existed any prior dispute in respect of the claims of the respondent under Section 9 application, it was held that the appellant raised no dispute once the respondent issued the demand notice under Section 8 of the IBC. Therefore, it could not be said that the application under Section 9 of the IBC was liable to be rejected on this ground.

e) In the last, it was observed that the EPC agreement was a continuing contract. Therefore, the debt sought to be claimed by the respondent continued to fall even on the date of the judgment as the EPC contract was never terminated by either of the parties, be it the appellant or the respondent. Thus, there was no error in the NCLT's order admitting the Section 9 application filed by the respondent.

B. SUBMISSIONS OF THE PARTIES

i. Submissions on behalf of the appellant

15. Mr. Shyam Divan, the learned senior counsel appearing on behalf of the appellant, addressed himself on the following points:

- *First,* the operational debt being claimed is a time-barred debt and the insolvency procedure under the IBC cannot be used to revive such time-barred claims.

- *Secondly,* the application under Section 9 of the IBC could not have been filed in light of the pre-existing dispute between the parties in respect of the operational debt.

16. As regards the question whether the claim of the respondent under Section 9 application is barred by limitation, the learned senior counsel submitted that in the facts of the present matter, the due amount claimed by the respondent was first quantified to the tune of Rs. 1210.78 crore for the first time in its legal notice dated 25.07.2014. On the strength of this notice, the recovery proceedings against the appellant ought to have been initiated within 3 years of such breach, in terms of Article 137 of the Schedule to the Limitation Act, 1963.

17. It was submitted that even if the legal notice dated 25.07.2014 was considered to be the date on which the default crystallized, yet the claim of the respondent would remain hopelessly time-barred as the proceedings under the IBC were initiated on 02.07.2018 when the statutory demand notice was sent by the respondent to the appellant. It was the submission of the appellant that the starting point for limitation began even earlier.

18. The learned senior counsel submitted that the application of the respondent under Section 9 of the IBC was liable to be rejected as the respondent placed no explanation/averment on record as regards the exclusion or extension of the limitation period in any manner whatsoever. It was submitted that the respondent was unable to show any acknowledgment of the debt on behalf of the appellant in writing or in the balance sheet, or through payment.

19. The learned senior counsel placed reliance on this Court's dictum in ***Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P) Ltd.,*** reported in **(2020) 15 SCC 1**, to submit that it cannot be the intention of the IBC to give a new lease of life to debts that are time-barred. The period of limitation starts running from the date of the default of non-payment and the right to apply under the IBC accrues from such date. If such default occurred over three years prior to the date of filing of the application, the application would be time-barred unless and until there has been an acknowledgment of the debt.

20. It was further submitted that the judgment in ***Babulal Vardharji Gurjar*** *(supra)* makes it clear that limitation is a mixed question of fact and law, and therefore, any plea for extension or enlargement of the period of limitation must necessarily be accompanied by the relevant facts and evidence. Since no such pleadings were made in the present matter, there could be no extension or enlargement of the period of limitation.

21. As regards the acknowledgment of debt by a debtor, it was submitted by the learned senior counsel that acknowledgment does not create a new right of action, it merely renews the debt. He relied on this Court's judgment in ***Asset Reconstruction Co. (India) Ltd. v. Bishal Jaiswal,*** reported in **(2021) 6 SCC 366** to submit that it is imperative that the statement on which a plea of acknowledgment is based, must relate to a present subsisting liability.

22. Mr. Divan also brought to our attention this Court's observations in ***Sabarmati Gas Ltd. v. Shah Alloys Ltd.***, reported in **(2023) 3 SCC 229** wherein it was held that the period of limitation for an application under Section 9 of the IBC would be three years from the date when the right to apply accrues as provided by Article 137 of the Limitation Act, 1963 (the "**Limitation Act**"). It was further explained that the right to apply under the IBC accrues on the date when default occurs and it is extendable only by application of Section 5 of the Limitation Act.

23. It was further submitted by the learned senior counsel that though the EPC contract provided for arbitration as a method for dispute resolution, yet the respondent elected not to exercise the same and instead, chose to file a time-barred claim under the IBC. Mr. Divan argued that such conduct indicated lack of *bona fide* on the part of the respondent in approaching the NCLT.

24. As regards the question whether there was a pre-existing dispute between the parties, the learned senior counsel submitted that the legal notices dated 25.07.2014, 16.09.2014 and15.07.2015 respectively, sent by the respondent, indicated that there were disputes arising out of the EPC contract. Mr. Divan placed reliance on the judgment of this Court in ***Mobilox Innovations Pvt. Ltd. v. Kirusa Software (P) Limited,*** reported in **(2018) 1 SCC 353** to submit that the application filed by an operational creditor under Section 9 of the IBC was liable to be rejected if there was a pre-existing dispute between the parties in respect of the debt which forms the subject matter of the application. It was argued that the resolution process under the IBC cannot be used for the purpose of recovery of debt.

25. In the last, the learned senior counsel prayed for the relief to set aside the judgment and order delivered by the NCLAT dated 01.02.2021 and to reject the admission of the Section 9 application of the respondent on the grounds that the debt is time-barred and there exists a pre-existing dispute between the parties.

ii. ***Submissions on behalf of the respondent***

26. Mr. Nitin Bhardwaj, the learned counsel appearing on behalf of the respondent, addressed himself on the following questions:

- Whether the EPC contract came to be terminated or frustrated due to efflux of time?
- Whether the debt claimed by the respondent under the Section 9 IBC application was barred by limitation?
- Whether the amount claimed by the respondent under the Section 9 IBC application was in the nature of operational debt under Section 5(21) of the IBC or damages?
- Whether there was a pre-existing dispute between the parties that would bar the respondent from filing the application under Section 9 of the IBC?

27. The learned counsel placed the material facts before us to submit that non-payment of the entire advance amount and the amounts due upon completion of the subsequent milestones was a failure on the part of the appellant to fulfil its obligations under the EPC contract. This compelled the respondent to issue notice of suspension of works dated 30.07.2011.

28. It was submitted by the learned counsel that the suspension in no manner amounted to termination, and the EPC contract could have been revived by either of the parties by fulfilling the terms of the contract. He submitted that treating suspension as termination of the EPC contract would be contrary to the terms of the contract.

29. It was submitted that the contract could have been terminated only by way of invocation of Clause 14 of the EPC contract which reads thus:

> "*14. l Termination for Owner's Convenience. Owner may for its convenience terminate any part of the Supplies or any or all remaining Supplies hereunder at any time upon at least 30 (Thirty) days' prior written notice to Supplier specifying the part of the Supplies to be terminated and the effective date of termination. Upon receipt of such notice, Supplier shall promptly initiate steps to stop provision of such terminated Supplies. In the event of a partial termination, Supplier shall continue to produce the part of the Supplies not terminated. In case of a termination of part of the Supplier's Work, Owner shall authorize a Scope Change Order making reasonable adjustments to one or more of the Schedule Unit(s). Completion date, Scheduled Facility Completion Date, the Contract Price, the Contract*

Schedule, the Performance Guarantees and any other affected provisions of this Agreement, as applicable. In the event of termination by Owner under this Article 14.1, Owner shall pay to Supplier (or Supplier may retain) such amounts as are required pursuant to Article 4.4 hereof In case of a termination of all or remaining part of the Supplier's Work, the Owner shall provide at least 30 days' prior written notice to Supplier providing details of the reasons for such termination and the effective date of termination. Owner will authorize a Scope Change Order making reasonable adjustments to the Contract Price as applicable.

14.2 Termination Upon Non-Payment by Owner. If Owner fails to pay to Supplier any payment as required hereunder and such failure continues for 25 days after written notice thereof has been given to Owner by Supplier, then Supplier shall give ten days' prior written notice thereof to Owner and the Financing Parties, and thereafter may stop all performance of Supplier's obligations hereunder until Supplier receives payment of all amounts then due plus reasonable suspension and resumption expenses. Owner shall be responsible for reimbursement of all costs incurred by Supplier as a result of the stoppage of Supplier's work. If Supplier's performance hereunder is suspended by Supplier pursuant to this Article 14.2, Owner will authorise a Scope Change Order making an equitable adjustment to the Scheduled Unit(s) Completion Date, Scheduled Facility Completion Date and the Contract Schedule and required reasonable adjustments to one or more of the Contract Price, the Terms of Payment and any relevant terms and conditions of this Agreement, as appropriate. If such suspension continues uninterrupted

> *for at least four months, or if two or more suspensions exist for an aggregate of at least four months, Supplier may terminate this Agreement; provided that Supplier shall give the Financing Parties a further 60 days prior written notice, and opportunity to cure, before terminating this Agreement. In the event of such a termination by Supplier, Own.er shall pay to Supplier (or Suppler may retain) such amounts as are required pursuant to Article 4.4. hereof.*"

30. It was vehemently argued by the learned counsel that the EPC contract had never been terminated by either of the parties. Further in a suspended EPC contract which had not been terminated or revived, there was no question of frustration due to efflux of time.

31. Mr. Bhardwaj submitted that the appellant was always in a position to terminate the EPC contract after paying the dues of the respondent that had accrued as on the date, as per the terms of the contract. However, no such action was taken by the appellant. Therefore, the EPC contract continued to exist, and the appellant was duty bound to clear the dues payable to the respondent. In such a scenario, there could be no frustration of contract by efflux of time.

32. As regards the issue whether the claim of the respondent was barred by limitation, it was submitted that the law of limitation would not jeopardize its claim because there exists a continuous cause of action between the parties. The learned counsel placed the aforesaid submission on the ground that the EPC contract had been suspended *vide* notice dated 30.07.2011 because of non-payment of dues by the appellant. However, the works could start again at any time once the appellant cleared dues or alternatively, the EPC agreement could have been terminated as per Clause 14 by clearing all the dues payable to the respondent till date. It was submitted by the respondent that since the appellant had chosen neither of the said courses of action, the EPC contract subsists. Therefore, there was a continuing cause of action thereby putting the claim of the respondent well within the limitation period.

33. As regards the question whether the claims of the respondent amounted to operational debt under Section 5(21) of the IBC or were in the nature of damages, Mr. Bhardwaj submitted that the Resolution Professional ("**RP**") had already undertaken the scrutiny of the books of accounts of the appellant as well as the claim of the respondent. It was submitted that the quantification of claim was the sole responsibility of the RP and he had accordingly rejected the parts of the claim that were concluded to be in the nature of damages and proceeded with the part of the claim that was found to be due and payable as operational debts under the law.

34. Mr. Bhardwaj also canvassed submissions on whether there was pre-existing dispute between the parties. He submitted that at no stage of the contractual relationship between the parties had any dispute as regards the claim amount in question was raised by the appellant. It is an admitted fact that the existence of the debt due and payable to the respondent had never been denied by the appellant in any manner before the application under Section 9 of the IBC was filed.

35. It was submitted that the notices dated 25.07.2014, 16.09.2014 and 15.07.2015 respectively, were sent by the respondent to seek the payment of their dues through the years and none of the aforesaid notices were ever denied or disputed by the appellant. Therefore, the Section 9 application filed by the respondent was not barred in law on account of the existence of a prior dispute between the parties in respect of the same claim.

C. ISSUES TO BE DETERMINED

36. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:

(i) Whether the EPC contract entered into by and between the appellant and respondent was frustrated by the efflux of time?

(ii) Whether the monies claimed by the respondent in the application under Section 9 of the IBC constitute 'operational debt' as defined under Section 5(21) of the IBC?

(iii) Whether there existed a prior dispute in respect of the claims of respondent?

(iv) Whether the application filed by the respondent under Section 9 of the IBC was time-barred in respect of the dues amounting to 'operational debt'?

D. ANALYSIS

(i) Subsistence of the EPC contract

37. The parties have extensively canvassed submissions on whether the EPC contract continued to subsist or got frustrated due to the efflux of time. It is necessary for us to look into the clauses that stipulate the terms of termination of the EPC contract, i.e., Clauses 14.1 and 14.2 respectively. The aforesaid clauses read thus:

> "*14.1 Termination for Owner's Convenience. Owner may for its convenience terminate any part of the Supplies or any or all remaining Supplies hereunder at any time upon at least 30 (Thirty) days' prior written notice to Supplier specifying the part of the Supplies to be terminated and the effective date of termination. Upon receipt of such notice, Supplier shall promptly initiate steps to stop provision of such terminated Supplies. In the event of a partial termination, Supplier shall continue to produce the part of the Supplies not terminated. In case of a termination of part of the Supplier's Work, Owner shall authorize a Scope Change Order making reasonable adjustments to one or more of the Scheduled Unit(s) Completion Date, Scheduled Facility Completion Date, the Contract Price, the Contract Schedule, the Performance Guarantees and any other affected provisions of this Agreement, as applicable. In the event of termination hy Owner under this Article 14.1. Owner shall pay to Supplier (or Supplier may retain) such amounts as are required pursuant to Article 4.4 hereof. In case of a termination of all or remaining part of the Supplier's Work, the Owner shall provide at least 30 days' prior written notice to Supplier providing details of the reasons for such termination and the effective date of termination. Owner will authorize a Scope Change Order making reasonable adjustments to the Contract Price as applicable.*

14.1.1 Owner's Right to Suspend Completion of the Supplier's Work. Owner may elect to suspend completion of all or any part of the Supplies hereunder upon at least 15 (fifteen) days' prior written notice to Supplier (or, in emergency situations, upon such prior notice as circumstances permit) indicating (a) the portion of the Supplies the completion of which Owner has elected to defer; (b) Owner's estimate of the duration of such suspension; and (c) the effective date of such suspension of such Supplies. Upon receipt of and consistent with the effective date of such notice, Supplier shall stop production of the Supplies that Owner has elected to defer and shall continue to complete production of the balance of the Supplies. In the event of a suspension of the Supplier's performance hereunder pursuant to this Article 14.1.1, Owner will authorize a Scope Change Order making required adjustments to one or more of the Scheduled Unit(s) Completion Date, Scheduled Facility Completion Date, the Contract Price, the Terms of Payment, the Contract Schedule, and the Performance Guarantees, as applicable.

14.2 Termination Upon Non-Payment by Owner. <u>If Owner fails to pay to Supplier any payment as required hereunder and such failure continues for 25 days after written notice thereof has been given to Owner by Supplier, then Supplier shall give ten days' prior written notice thereof to Owner and the Financing Parties, and thereafter may stop all performance of Supplier's obligations hereunder until Supplier receives payment of all amounts then due plus reasonable suspension and resumption expenses. Owner shall be responsible for reimbursement of all costs incurred by Supplier as a result of the stoppage of</u>

> <u>Supplier's work</u>. *If Supplier's performance hereunder is suspended by Supplier pursuant to this Article 14.2, Owner will authorize a Scope Change Order making an equitable adjustment to the Scheduled Unit(s) Completion Date, Scheduled Facility Completion Date and the Contract Schedule and required reasonable adjustments to one or more of the Contract Price, the Terms of Payment and any relevant terms and conditions of this Agreement, as appropriate.* <u>*If such suspension continues uninterrupted for at least four months, or if two or more suspensions exist for an aggregate of at least six months, Supplier may terminate this Agreement*</u>*; provided that Supplier shall give the Financing Parties a further 60 days prior written notice, and opportunity to cure, before terminating this Agreement.* <u>*In the event of such a termination by Supplier, Owner shall pay to Supplier (or Supplier may retain) such amounts as are required pursuant to Article 4.4 hereof*</u>."
>
> (Emphasis supplied)

38. The bare perusal of the aforesaid clauses indicates that the EPC contract could have been terminated by either of the parties. Clause 14.1 provides that the appellant may terminate the EPC contract subject to a notice of 30 days to the respondent and clearing of the respondent's dues for the works already completed. Alternatively, Clause 14.1.1 empowers the appellant to suspend a portion of works and defer their completion upon provision of a notice of 15 days to the respondent.

39. Clause 14.2 provides for two tier of actions by the respondent. *First*, if the appellant fails to make payments as per the payment schedule to the EPC contract for more than 25 days after the written notice, the respondent has the right to stop the performance of its obligations under the contract till the time payment is received. *Secondly*, if the period of suspension is prolonged due to non-payment of the respondent's dues for a period of at least four months, the respondent is conferred with the right to terminate the EPC contract. It is worth noting that termination by the Supplier or the respondent herein is not automatic when the suspension period crosses more than four months. The usage of the word 'may' indicates that an option has been provided to the respondent to terminate.

40. In the present matter, neither the appellant nor the respondent elected to terminate the EPC contract despite severe delays in fulfilment of obligations. Since the agreement between the parties is silent on whether time is the essence of the contract, we say without any manner of doubt that the parties intended for the EPC contract to subsist.

41. As regards the appellant's contention that the EPC contract got frustrated due to efflux of time, the same is liable to be rejected. We say so because there can be no frustration due to efflux of time. The expression "*effluxion of time*" is used to describe situations in which a particular contract comes to a close automatically upon completion of all obligations thereunder or with the expiry of the time period stipulated for the operation of the agreement.

42. On the other hand, the doctrine of frustration of contract is triggered when a supervening event results in the automatic discharge of liability of parties to the contract. This is because such supervening event makes it impossible or unlawful for the contract to be performed. Unlike *effluxion of time* which is natural and foreseen mode of discharge of obligations, frustration is discharge of the contract because of an unforeseen extraneous event. Therefore, it would be incorrect to say that there can be frustration of contract due to efflux of time.

43. Further, the perusal of the EPC contract and the conduct of the parties at the material time, indicate that the contractual obligations stipulated in the contract remained unfulfilled. We find it apposite to clarify at the outset that we are not concerned with the causes due to which the appellant did not make payments in consonance with the payment schedule, as the substantive dispute in that regard cannot be adjudged in a statutory appeal from the

NCLAT. However, there is no gainsaying that the works were suspended because of such non-payment.

44. In our considered view, the suspension of works cannot be considered as a supervening impossibility as per the requirement under Section 56 of the Indian Contract Act, 1872 for the doctrine of frustration to apply. This Court in ***Boothalinga Agencies v. V.T.C. Poriaswami Nadar*****,** reported in **1968 SCC OnLine SC 135** observed that a circumstance brought about by a party's election cannot frustrate the contract. The relevant paragraph reads thus:

> *"12. (...) We think the principle of this case applies to the Indian law and the provisions of Section 56 of the Indian Contract Act cannot apply to a case of "self-induced frustration". In other words, the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party. (...)"*
>
> (Emphasis supplied)

45. Since the suspension of works by the respondent arose from the non-performance of obligations under the EPC contract, the same cannot be categorized as a supervening impossibility that was outside the control of the parties. Therefore, there was no question of the EPC contract being frustrated.

46. Further, it must be clarified that since the parties did not complete their respective obligations under the EPC contract, it cannot be said that the agreement came to a natural close. This is especially so because the EPC contract itself provides no strict timeline for the completion of works. Furthermore, the provisions regarding extension of time and performance guarantee tests indicate that the EPC contract could not have come to a close without completion of works or final inspection of the facility to be constructed. Therefore, in our considered view, the principle of efflux of time is also not applicable to the case at hand.

47. In view of the aforesaid, we say without any manner of doubt that the EPC contract continued to subsist.

(ii) <u>Amount claimed by the respondent is operational debt</u>

48. The appellant had submitted before the NCLAT that the amount claimed by the respondent was not in the nature of 'operational debt' under Section 5(21) of the IBC. In our considered view, the material on record shows that the respondent in its legal notices had claimed monies under two broad heads:

- Payment of the amounts due under the first, second, third and fourth milestones in the payment schedule to the EPC contract;
- Suspension and demobilization charges and interest thereupon.

49. Before we deal with the question whether the above-mentioned heads can be the subject matter of an application under Section 9 of the IBC, it is apposite to understand the meaning and scope of 'operational debt' under Section 5(21) of the IBC.

50. Section 5(21) of the IBC defines 'operational debt' as "*a claim in respect of the provisions of goods or services, including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority*."

51. A bare textual reading of the provision indicates that any amount that accrues to an operational creditor on account of the goods and services provided by it to an operational creditor would be treated as operational debt. There is no doubt that the EPC contract is a works contract which involves procurement of goods as well as construction of the natural gas facility. Therefore, all payments that the parties agreed to pay upon completion of the stages of the works as mentioned in the payment schedule to the EPC contract, can be categorized as operational debt once they become payable.

52. Insofar as the amount claimed under the heads of suspension and demobilization charges is concerned, there is no gainsaying that the same would be in the nature of damages. It is a settled position of law that damages, whether liquidated or unliquidated, cannot be treated as operational debt unless and until they are assessed and crystallized by way of adjudication by a court of competent jurisdiction. We say so because the NCLT and NCLAT are not the appropriate fora for determination of disputes. Their functions and powers are for the purpose of ensuring survival of a particular company and alternatively, to ensure maximization of repayment capabilities in the event of liquidation.

53. Therefore, disputes that arise from breach of the contract cannot give rise to an operational debt till the time the debt becomes crystallized and legally enforceable. In the present matter, it was argued that the suspension, idling and demobilization charges accrued to the respondent due to the appellant's alleged breach of contract by failure to pay in terms of the EPC contract. Since, there is no record of a suit or arbitration that assessed, adjudicated and crystallized these claims, the amounts claimed under these heads cannot be treated as operational debt.

54. However, the amounts required to be paid by the appellant to the respondent as per the EPC contract and the payment schedule thereto, qualify as operational debt as they were supposed to be fulfilled as a consideration for the works undertaken by the respondent in terms of the EPC contract.

(iii) Pre-existing dispute between the parties

55. The third leg of the appellant's argument was that there was pre-existing dispute between the parties on the date when the respondent sent the statutory demand notice under Section 8 of the IBC and filed an application under Section 9 thereof.

56. It is a settled position of law that an insolvency application under the IBC cannot be filed for such amounts/debts that are the subject matter of a dispute between the parties. Such dispute must be substantive and must be a matter of clear contestation by both the parties.

57. This Court in ***Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.***, reported in **(2018) 1 SCC 353** held that a Section 9 application under the

IBC is liable to be rejected if it was found that there was a pre-existing dispute between the parties in respect of the same claims as raised by the operational creditor in its insolvency application.

58. As regards the question, when the dispute would be considered to be pre-existing before the application under Section 9 of the IBC, it was observed that in terms of Section 8(2) of the IBC, it would be necessary for the corporate debtor to respond to the statutory demand notice sent by the operational creditor under Section 8(1) of the IBC within ten days. In such reply, the corporate debtor must bring to the notice of the operational creditor, *inter alia*, the existence of a dispute or record of the pendency of the suit or arbitration proceedings filed before the receipt of the statutory demand notice. Section 8 of the IBC reads thus:

> "*8. Insolvency resolution by operation 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, 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

(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 payment of the operational debt in respect of which the default has occurred."

(Emphasis supplied)

59. It is worth noting that the word '*or*' in Section 8(2)(a) was inserted after the pronouncement of the judgment in ***Mobilox*** *(supra)* to give effect to its observations that the existence of dispute cannot be determined solely on, whether the parties had instituted a suit or arbitration proceeding. It was held in ***Mobilox*** *(supra)* that the existence of a prior dispute irrespective of whether it had already progressed to the stage of civil suit or arbitration, would be a bar to insolvency proceedings pursuant to Section 9 of the IBC. The rationale for holding thus was that allowing insolvency proceedings in respect of claims that had already been disputed through notices or otherwise could result in multiplicity of proceedings. The insolvency process would be delayed as there would be no bar on the parties to pursue the resolution of the dispute by way of a suit or arbitration. Therefore, there is no requirement that the parties must show that a pre-existing dispute was being litigated or was the subject matter of an arbitration. The relevant observations in ***Mobilox*** *(supra)* read thus:

> "*38. It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the*

insolvency process, in which case, though a dispute may exist, there is no time to approach either an Arbitral Tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an Arbitral Tribunal or a court for up to three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties."

(Emphasis supplied)

60. This Court in ***Mobilox*** *(supra)* further held that the inquiry into whether a dispute already existed between the parties *qua* the claim amount, it is necessary to ascertain the genuineness of the same. In other words, the dispute whose existence is sought to be evidenced should not be spurious, hypothetical, illusory or misconceived. We also find it apposite to reiterate the observation in ***Mobilox*** *(supra)* that the court's function is restricted to perceiving the genuineness of the dispute and it cannot travel beyond to make observations as regards the merits of the dispute. The relevant paragraphs in ***Mobilox*** *(supra)* are reproduced below:

> "*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)(i)(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)

61. What is discernible from the aforesaid exposition is that it is not necessary that a suit or arbitration proceeding be pre-existing to evidence a dispute. Rather, what is required to be highlighted is that there was a pre-existing dispute between the parties *vide* the conduct of the parties, communication, etc.

62. We may now proceed to consider the appellant's submission that a dispute was evident from the respondent's legal notices dated 25.07.2014, 16.09.2014 and 15.07.2015 respectively. We may be tempted to hold that there was a pre-existing dispute if we constrain ourselves to the aforesaid legal notices and the observations made in ***Mobilox*** *(supra)*. However, what is also required to be seen is the conduct of the appellant as the corporate debtor. It is an admitted fact that the appellant responded to none of the notices sent by the respondent. It also did not reply to the statutory demand notice dated 02.07.2018 to highlight that the legal notices by the respondent indicated a dispute as regards the amount being claimed.

63. Before we make observations as regards the conduct of the appellant, we find it apposite to clarify that as a general rule, silence cannot be considered to be an indicator of no dispute. However, in the present matter, the appellant's total and consistent silence across multiple legal notices sent prior to the filing of the Section 9 application is strong evidence to support the respondent's submission that there was no dispute that in fact existed at the relevant time.

64. Further, in our considered view, the fact that the appellant placed its defence for the first time in the reply to the Section 9 application and disputed the respondent's claims without anchoring such defence in its conduct at the material time indicates that there was no dispute that existed before the Section 9 application, as far as the appellant was concerned. Such conduct, in our opinion, was an afterthought to resist exposure to the insolvency process. Hence, the issue as regards the existence of a prior dispute between the parties must be answered in the negative.

(iv) <u>Respondent's claim is barred by limitation</u>

65. In the present matter, the respondent's claim crystallized in 2012 when the invoices with the BBU were acknowledged by the appellant in its communication to the Chief Engineer, IRP Division, Central Electricity Authority. It is apposite to mention that the debt (partial amount which can be categorized as operational debt in view of the aforesaid part of this judgment) arising from non-payment of amount due under the payment schedule, remained unpaid since February 2011 and February 2012 respectively.

66. The respondent was constrained to issue the notice of suspension of works on 30.07.2011 after it did not receive payments even after completion of the first, second and third milestone in the payment schedule to the EPC contract. The right to suspend works by the respondent, as discussed in the aforesaid part of this judgment, arose from Clause 14.2 of the EPC contract. However, despite suspension of works, subsequent idling and demobilization of the site and the consistent non-payment of dues by the appellant, none of the parties elected to terminate the EPC contract in terms of Clause 14.1 and 14.2 respectively. Therefore, the contract continued to subsist.

67. The respondent sent legal notices dated 25.07.2014, 16.09.2014 and 15.07.2015 respectively after the lapse of more than four years since its claim crystallized and the right to sue accrued to it. The learned senior counsel appearing for the appellant would argue that the legal notices raised the dispute as regards the non-payment of the amounts specified in the payment schedule after the limitation period of three years had already passed. Further, the statutory demand notice under Section 8 of the IBC was sent by the respondent after the lapse of more than seven years since the default occurred and its claim crystallized.

68. The learned counsel appearing for the respondent would argue that its statutory demand notice dated 02.07.2018 was within a period of three years from its last legal notice dated 15.07.2015. Even otherwise, the limitation period would not start running as the continuity of the EPC contract provided continuous cause of action.

69. In such circumstances referred to above, could it be said that because the contract continued to subsist, the respondent had continuous cause of action? In other words, would the subsistence of the EPC contract result in the extension of the limitation period beyond the statutory three years period provided in Article 137 of the Limitation Act, 1963 for the purpose of filing an application under Section 9 of the IBC? In our considered view, the answer to the aforesaid question must be an emphatic 'No'.

70. We say so because Section 238A of the IBC states that the provisions of the Limitation Act, 1963, as far as maybe, would apply to the proceedings or appeals before, *inter alia*, the Adjudicating Authority/ NCLT or NCLAT. Therefore, the 'right to sue' accrues on the date when the default takes place. Section 3(12) of the IBC defines 'default' which reads thus:

> "*(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become*

> *due and payable and is not paid by the debtor or the corporate debtor, as the case may be;"*

71. In the present matter, the operational debt became due and payable on the date of the default, i.e., on 15.02.2011 and 13.07.2011. The liability to pay in respect of both the defaults came to be acknowledged by the appellant on 05.01.2012 and 03.02.2012 respectively.

72. A default arising out of non-payment of the due and payable amount, provides cause of action on the date when the default occurs and cannot serve as a continuing cause of action. We say so because though an unpaid debt may cause continuous damage, yet it does not cause continuing legal injury. In other words, the legal default itself happens only once even though its consequences may be continuing in nature. Therefore, the respondent's assertion that the subsistence of contract would provide it with continuing cause of action is incorrect and liable to be rejected.

73. The "default" envisaged under Section 3(12) of the IBC occurs on non-payment of debt when whole or any part/instalment of the debt becomes due and payable but is not paid by the debtor. Thus, Section 3(12) grounds the occurrence of default at a singular point in time. The mere subsistence of the

EPC contract will not give continuing cause of action in respect of the defaulted amount.

74. This Court in ***Next Education India (P) Ltd. v. K12 Techno Services,*** reported in **2023 SCC OnLine SC 1117**, has held that the Adjudicating Authority must consider invoices for payment in respect of which the default occurred during the three years preceding the date of filing the application under Section 9. This implies that to determine whether the application under Section 9 is within limitation or not, one would have to consider whether the default had occurred within three years of filing the application. The relevant portion of the judgment reads thus:

> "*2. At the outset, it is required to be noted that, in fact, the appellant herein, who claimed to be the "operational creditor" raised 187 different invoices for the digital classroom solution services provided for the period between March 12, 2011 and June 30, 2017. <u>The amounts under different invoices were unpaid, which gave rise to the appellant to initiate the proceedings under section 9 of the IBC before the NCLT. The NCLT considering the starting point of limitation as March 12, 2011 held that the claim is barred by limitation</u>. <u>However, the NCLT did not take into consideration the subsequent invoices at least preceding three years from the date of filing of section 9 application, which ought to have been considered. Under the circumstances, the NCLT ought to have considered the invoices at least for the period preceding three years from</u>*

> *the date of the application under section 9, rather than considering the starting point of limitation as March 12, 2011. Under the circumstances, the order(s) passed by the NCLT and affirmed by the NCLAT are unsustainable.*"
>
> (Emphasis supplied)

75. The aforesaid exposition of law clarifies that under the IBC, the Adjudicating Authority cannot treat all invoices for payment in aggregate and consider the date on which the first invoice came to be issued as the starting point for limitation in respect of the entire set of invoices for which the claim was filed.

76. For the purpose of determining the starting point of limitation, the governing principle is that each invoice generates its own date of default when it becomes due and payable. What is discernible from the exposition in ***Next Education*** *(supra)* is that where the claim is founded on multiple invoices spanning several dates of defaults, the invoices that fall within the three years preceding the date of application ought to be considered. What has been said in so many words is that limitation is tied to each invoice's own due date. Where the claim arises from multiple invoices, it cannot be said that limitation would start from the date of the first invoice or the last invoice as per the wishes of the applicant. Put simply, the decision in ***Next Education***

(supra) lends to the understanding that all invoices must be considered separately when determining the date of default.

77. In the present matter, the default arises from non-payment of dues despite completion of the first, second and third milestones in the payment schedule to the EPC contract. Further, as regards the fourth milestone, the respondent sent to the appellant its BBU. After acknowledgment in January and February 2012 by the appellant, the limitation in respect of the aforesaid defaults started afresh. These dates have also been mentioned by the respondent in its demand notice dated 02.07.2018 as the dates when the default occurred.

78. At this juncture, we may refer to Form 3 provided in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (the "**Rules, 2016**") that stipulates the form in which the demand notice under Section 8 of the IBC is supposed to be issued. Form 3, *inter alia*, requires that the statutory demand notice should specify the date from which the debt fell due, i.e., the date on which the default occurred.

79. This Court in ***B. Prashanth Hegde v. SBI*,** reported in **2026 SCC OnLine SC 197** (wherein one of us, namely Manoj Misra, J., was a part of the Bench) observed in the context of applications made under Section 7 of the IBC, that the forms prescribed in the Rules, 2016 serve the purpose of bringing out the necessary ingredients for presentation of the insolvency application. As regards the requirement of providing the date on which the debt became due, it was observed that specifying the date of default helps the Adjudicating Authority to assess whether the debt has become time-barred or not. The relevant observations in ***Prashanth Hegde*** *(supra)* read thus:

> "*40. In our view, a conjoint reading of sub-sections (1), (2) and (5) of section 7 makes it clear that an application under section 7 of a financial creditor for initiating the corporate insolvency resolution process of the corporate debtor hinges on a default on part of the corporate debtor of financial debt of an amount exceeding the specified threshold. <u>The form prescribed for making the application inter alia serves the purpose of bringing out the necessary ingredients for presentation of an application under section 7(1) of the Insolvency and Bankruptcy Code. The purpose of providing the date of default is to show that the debt is due and payable, i.e., it has not become time barred</u>. Therefore, in our view, if the application is substantially in conformity with the prescribed form and discloses the necessary ingredients for making an application under sub-section (1) of section 7 and provides the relevant materials/information to substantiate those ingredients, the purpose of adhering to the form is served, and such application is not liable to be rejected under clause (b) of sub-section (5) of section 7 of the Insolvency and Bankruptcy Code on the ground of any insignificant*

> *omission or error in the application. The aforesaid view finds support from use of the expression "may" before "reject" in section 7(5)(b) of the Insolvency and Bankruptcy Code. This means that if the Adjudicating Authority is satisfied from the materials placed before it in the application that all the necessary ingredients are satisfied for presentation of an application under section 7(1) of the Insolvency and Bankruptcy Code, it may not reject the application for an insignificant omission or non-adherence to the form."*
>
> (Emphasis supplied)

80. In our considered view, the observations of this Court in the aforesaid decision are applicable on the demand notice to be issued for making an application under Section 9 of the IBC. The respondent itself mentioned in its demand notice dated 02.07.2018 that the debt fell due on 25.02.2011. The portion of the debt amount mentioned in the demand notice that would qualify as operational debt, was acknowledged by the appellant in January and February 2012. Therefore, the respondent was supposed to bring action on these defaults within three years from January and February, 2012. However, the same was not done.

81. Subsequently, after a lapse of four years, the respondent sent three legal notices dated 25.07.2014, 16.09.2014 and 15.07.2015 respectively. However, no response was given by the appellant. In such a scenario, could it be said that the act of sending legal notices would reset the period of limitation and commence the cause afresh? In our considered view, the answer to this question must be an emphatic 'No'.

82. The benefit of extension of limitation by way of acknowledgment in terms of Section 18 of the Limitation Act is available only where, before the expiration of the prescribed period, an acknowledgment of liability has been made in writing by the party against whom the claim stands. In the absence of any such acknowledgment, mere service of a notice of demand would neither revive a time-barred claim nor would give rise to a fresh cause of action.

83. It is apposite to clarify that though the statutory demand notice dated 02.07.2018 was issued within the period of three years from the last legal notice dated 15.07.2015 sent by the respondent, yet it would still be outside the bounds of limitation considering that the legal notice dated 15.07.2015 could not have reset the clock by itself in the absence of any acknowledgment of liability.

84. This Court in ***Babulal Vardharji Gurjar*** *(supra)* summarized and clarified the scope of the IBC after Section 238A was enacted. It was observed that it was not the intention of the IBC to give a new lease of life to the debts that were already time-barred. Further, default occurs on the date of actual non-payment by the corporate debtor when the debt becomes due and payable. If application is filed beyond the period of three years from the date of default, the application would, without a doubt, be time-barred. The relevant observations in ***Babulal Vardharji Gurjar*** *(supra)* read thud:

> "*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 : (2018) 1 SCC (Civ) 356] , B.K. Educational Services [B.K. Educational Services (P) Ltd. v. Paras Gupta & Associates, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528] , Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] , Jignesh Shah [Jignesh Shah v. Union of India, (2019) 10 SCC 750 : (2020) 1 SCC (Civ) 48] , Vashdeo R. Bhojwani [Vashdeo R. Bhojwani v. Abhyudaya Coop. Bank Ltd., (2019) 9 SCC 158 : (2019) 4 SCC (Civ) 308] , Gaurav Hargovindbhai Dave [Gaurav Hargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd., (2019) 10 SCC 572 : (2020) 1 SCC (Civ) 1] and Sagar Sharma [Sagar Sharma v. Phoenix ARC (P) Ltd., (2019) 10 SCC 353 : (2020) 1 SCC (Civ) 175] 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) <u>that intention of the Code is not to give a new lease of life to debts which are time-barred</u>;

(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) <u>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</u>; and

(g) <u>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</u>; 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)

85. We may say, on the strength of the aforesaid exposition, that the respondent ought to have brought its claim within the period of three years from the date of default before a civil court for recovery of money. The IBC proceedings cannot be used to provide a fresh timeline for the period of limitation to run. As such, the NCLT should not have admitted the petition without condoning the delay and therefore, the impugned order upholding the admission was erroneous.

86. We agree that when it comes to complex contracts like those for engineering, procurement and construction, the question of limitation is also complicated. It is a settled principle of law that in EPC contracts, a fresh 'right to sue' may accrue when the final bill is being reconciled or the works are being finally tested, even though the initial cause of action may have arisen at the time of intermediate payments [See: ***Union of India v. West Coast Paper Mills Ltd.,*** reported in **(2004) 2 SCC 747**].

87. However, in our considered view, 'default' as envisaged in Section 3(12) of the IBC means the date when the default of non-payment came to crystallized. The substantive dispute whether the amount is payable or not, is not in question in IBC proceedings. Therefore, the understanding of limitation in cases of EPC contracts for the purpose of contesting substantive claims by way of either a civil suit or arbitration, is not applicable for insolvency applications under Section 9 of the IBC.

88. In such view of the matter, we may say without any manner of doubt that the admission of the Section 9 IBC application of the respondent was erroneous, and the same could not have been done without condonation of delay as per Section 5 of the Limitation Act, 1963.

E. <u>DETERMINATION OF THE ISSUES IDENTIFIED</u>

I. Whether the EPC contract entered into by and between the appellant and respondent was frustrated by the efflux of time?

89. The issue as regards the frustration of the EPC contract due to efflux of time, is answered in the negative. We have said so because though the EPC contract was suspended by the respondent due to non-payment by the appellant of the amount claimed in the Section 9 application, yet none of the parties had gone further to even express, let alone act on the intention to terminate the EPC contract in terms of Clause 14 thereof.

90. Further, the EPC contract could not have reached its natural completion due to *effluxion of time* for the reason that the performance of the contract remained suspended, the obligations required to be fulfilled by the appellant remained incomplete and there was no provision in the EPC contract which indicated that time was of the essence to the contract. Therefore, the EPC contract continued to subsist.

91. Insofar as the appellant's argument that the EPC contract got frustrated, is concerned, we find the same to be incorrect. We have said so because Section 56 of the Indian Contract Act, 1872 envisages frustration of contract to happen due to some supervening impossibility which was unforeseen by the parties to the contract. We have relied on this Court's decision in ***Boothalinga*** *(supra)* that frustration of contract cannot apply to a case of "self-induced frustration". In other words, the contract cannot be deemed to be impossible because of the breach of one of the parties to the contract. Therefore, there is no gainsaying that in the present matter, the EPC contract could not have gotten frustrated as it was the actions and conduct of the contracting parties that led to stalling of the performance of the same.

I. Whether the monies claimed by the respondent in the application under Section 9 of the IBC constitute 'operational debt' as defined under Section 5(21) of the IBC?

92. The question whether the amounts claimed in the Section 9 application were in the nature of operational debt, is partially answered in the affirmative. We have said so because the amounts required to be paid by the appellant to the respondent as per the EPC contract and the payment schedule thereto, would qualify as operational debt. Such payments are the consideration for the works undertaken by the respondent in terms of the EPC contract and non-payment thereof would be treated as *a claim in respect of the provisions of goods and services*, as per Section 5(21) of the IBC.

93. However, the amount claimed under the heads of suspension, idling or demobilization charges would be in the nature of damages as they arise from the alleged breach of the EPC contract by the appellant. It is a settled position of law that damages, whether liquidated or unliquidated, cannot be treated as operational debts unless and until they are assessed and crystallized by way of adjudication by a court of competent jurisdiction. Therefore, these portions of the respondent's claims cannot be treated as operational debt for the purpose of adjudication of an application under Section 9 of the IBC.

II. Whether there existed a prior dispute in respect of the claims of respondent?

94. We have answered the aforesaid issue in the negative. The jurisprudence on the pre-existing dispute in respect of same claims as those in the Section 9 application being a bar to insolvency proceedings, is well settled by this

Court in ***Mobilox*** *(supra)*. It was held therein that the corporate debtor must show that there existed a genuine dispute between the parties irrespective of whether the same had progressed to the stage of arbitration or suit. In cases where the dispute had not escalated to the stage of a civil suit or arbitration proceedings, the corporate debtor would be required to highlight the pre-existing dispute *vide* the conduct of the parties and the communications between them.

95. In the present matter, there was no material placed on the record to show that the parties were litigating or arbitrating any dispute in respect of the claims under Section 9 application. Further, the appellant consistently maintained total silence across all legal notices sent by the respondent asserting their right to be paid in terms of the EPC contract. We find it apposite to clarify that silence by itself cannot be considered to be an indicator of whether the dispute existed or not. However, in cases such as the present matter, wherein the silence was consistent and total, over a period of seven years, it can be considered as a strong evidence of the appellant's intention to not dispute the respondent's claims.

96. Therefore, we have come to the conclusion that there was no pre-existing dispute that would bar the respondent's application under Section 9 of the IBC.

III. Whether the application filed by the respondent under Section 9 of the IBC was time-barred in respect of the dues amounting to 'operational debt'?

97. We have answered the aforesaid question in the affirmative. In our considered view, the respondent's claims crystallized on 05.01.2012 and 03.02.2012 when the liability to pay was acknowledged by the appellant. However, the respondent took no action to pursue its claims within three years from the said dates.

98. The respondent sent legal notices dated 25.07.2014, 16.09.2014 and 15.07.2015 respectively after the lapse of more than four years. However, the legal notices sent by the respondent could not have extended the period of limitation as Section 18 of the Limitation Act, 1963 requires acknowledgment of the liability to be by the person or entity against whom the action is instituted.

99. In the present matter, the appellant gave no reply to the legal notices of the respondent. Therefore, the clock of limitation continued to run its course and there was no action by the parties that reset it. We find ourselves constrained to restate the observation of this Court in ***Babulal Vardharji Gurjar*** *(supra)* that the intention of the IBC is not to give a new lease of life to debts which are time-barred. Therefore, the respondent ought to have pursued its claims within the period of limitation before a civil court or pleaded for condonation of delay before the NCLT.

100. As a result, we say without any manner of doubt in our minds that the default had occurred over three years prior to the date of filing of the application and, therefore, the application is clearly time barred. The NCLAT committed an error in upholding the admission of Section 9 application.

F. CONCLUSION

101. In the result, the appeal succeeds and is hereby allowed. The impugned judgment passed by the NCLAT is hereby set aside. The order passed by the NCLT is also hereby set aside.

102. However, considering the peculiar facts in the present litigation, we give liberty to the respondent to approach the appropriate dispute resolution forum as provided in the EPC contract to contest its claims.

103. Pending applications, if any, shall stand disposed of.

104. Registry shall forward one copy of this Judgment to the National Company Law Appellate Tribunal, Principal Bench, New Delhi who, in turn, shall forward one copy each to all the NCLTs across the country.

……………………………….J.
(J. B. PARDIWALA)

……………………………….J.
(MANOJ MISRA)

New Delhi.
12th August, 2026.