(2026) ibclaw.in 419 NCLAT

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
Chennai Bench

T. Venkatram Reddy
v.
L & T Finance Ltd. and Anr.

Company Appeal (AT) (CH) (Ins) No. 383/2022 (IA Nos.909/2022 & 715/2024)
Decided on 02-Apr-26

Mr. Justice Sharad Kumar Sharma (Judicial Member) and Mr. Jatindranath Swain (Technical Member)

Add. Info:

Impugned Order(s)/ Judgment(s): Order dated 24.06.2022 passed by the NCLT, Hyderabad Bench in CP(IB)No.88/95/IBC/HDB/2021.

Corporate Debtor: Deccan Chronicle Holdings Ltd.

For Appellant(s): Mr. P. Chidambaram, Senior Advocate For Ms. Krutika Raghavan, Mr. Bhairav Kuttaiah and Mr. Sameeksha Patil, Advocates

For Respondent(s): Mr. T.K. Bhaskar, Advocate For Mr. Shabbeer Ahmed, Mr. Indraprateek Naidu, Mr. V. Aneesh, Advocates and Ms. Renuka Devi Rangaswamy

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J U D G M E N T
(Hybrid Mode)

[Per: Justice Sharad Kumar Sharma, Member (Judicial)]

The instant company appeal puts a challenge to the Impugned Order dated 24.06.2022, as it has been rendered by the Ld. NCLT, Hyderabad Bench in CP(IB)No.88/95/IBC/HDB/2021. As a consequence of the Impugned Order dated 24.06.2022, the Appellant was directed to be admitted into insolvency resolution process under Section 95 of I & B Code, 2016.

2. The brief facts as it engages consideration in the instant company appeal are that, the company under the name and style of M/s. Deccan Chronicle Holdings Limited, (the Corporate Debtor herein), had been incorporated as per the provisions of the Companies Act, as back as on 1991. The said company, i.e., the Principal Borrower was ultimately found to have committed default in the remittance of its financial dues, within stipulated time, as it was agreed upon, by the Corporate Debtor and the Financial Creditor (L & T Finance Limited).

3. Consequentially, they were made to face the CIRP proceedings under Section 7 of the I & B Code. But there are certain inevitable ancillary facts, which too are necessarily required to be conjointly referred to at the stage when we are considering the appeal itself on its merit.

4. It is in relation to fact that, the aforesaid company named as Deccan Chronicle Holdings Limited, (herein after to be referred as the Corporate Debtor) was once pioneering in the field of publication of newsletters and newspapers namely financial English daily -“Financial Chronicle” and Telugu daily, weekly, and monthly publications viz., “Andhra Bhoomi” that was in circulation in two states, i.e., Andhra Pradesh and Telangana. It is submitted that the aforesaid Corporate Debtor had entered into a Facility Agreement dated 13.05.2011, which was executed between Respondent No. 1, as well as the Corporate Debtor for the purposes of extension of a term loan of INR 25 Crores, which was disbursed in a single tranche.

5. It is contended that, on a default being committed, as the pay back instalments were not being remitted within the time period prescribed in accordance with the terms of the Facility Agreement dated 13.05.2011, the recourse to the steps of call options as agreed to be contemplated as per Clause 12 of Schedule II of the Facility Agreement was invoked by the Financial Creditor on 24.05.2012, thereby calling upon the Corporate Debtor to pay back the outstanding amount, which was due to be paid under the Facility Agreement, and in relation thereto, the scheduled date for the purposes of remittance of the amount was referred to, as to be 08.06.2012. It is further contended by the Appellant that due to non-satisfaction of the covenants of the Facility Agreement of 13.05.2011, and upon the exhaustion of the given time period, which was granted therein to comply with the

stipulations, for the remittance of the debt, i.e., as per Clause 12, cut off, of 15 days period was granted from the date of exercise of the call option to repay the loan. Since the said period too had ended on 08.06.2012, and because the Corporate Debtor had apparently failed to repay the amount, and hence it is not in controversy that, the parties to the proceedings have ventured into an arbitration clause, by invoking Chapter IX Clause 9.1 of the Facility Agreement as executed inter-se between the parties, governing the terms and conditions of extension of financial assistance.

6. The dispute, which was referred to under the arbitration clause, has been carried before the Arbitral Tribunal by Arbitration No. 1329/2012, and the Arbitral Tribunal, has consequently for the purpose of adjudication of the respective rights, was constrained upon to proceed ex-parte as against the Appellant and the arbitral award was rendered on 15.03.2013. The said award dated 15.03.2013 was subjected to challenge by initiation of the proceedings under Section 34 of Arbitration and Conciliation Act, 1996, at the behest of the Appellant. The objection thus preferred under Section 34 of Act of 1996, the award dated 15.03.2013, has been confirmed by the Judgment of 05.05.2015 passed by High Court of Bombay dismissing the challenge putforth to the Arbitral Award and consequent thereto, upon on an affirmation of the award, that was rendered under the Arbitration and Conciliation Act of 1996, the same would be executable as a decree of the Civil Court, in accordance with Section 36 of the Act of 1996, and consequentially the execution proceedings had been put to motion and the same is pending consideration before the Hon'ble Bombay High Court. At this stage of the company appeal, these proceedings of the execution of the arbitral award may not be of much relevance, which may at present would not be required to be ventured into by us, at this stage, when we are dealing with the Impugned Order dated 24.06.2022, whereby it has resulted in to, the initiation of the proceedings under Section 95 of I & B Code, 2016, to be read with Rule 7 (2) Insolvency and Bankruptcy Board of India (Application to Adjudication Authority for Insolvency Resolution Process for Personal Guarantors to the Corporate Debtors) Rules 2019, (herein after to be called as the IBBI Rules of 2019).

7. It is contended by the Appellant that, as a consequence to the alleged default, the Respondent No. 1 has come with the case that, as per the Facility

Agreement, the amount thus called upon to be remitted was not discharged by the Corporate Debtor and the Appellant being the Personal Guarantor of Corporate Debtor. This has resulted in the issuance of a demand notice by Respondent No. 01, being a demand notice under Form B, as provided under Section 95(4)(b) of I & B Code, dated 20.01.2020.

8. In the demand notice that, has been thus issued, the date of default, which admittedly according to the Appellant, too was reflected and was shown to be 01.08.2012. This date of default being that, of 01.08.2012, would be the main bone of contention, in the instant company appeal, when we proceed further to deal with the respective cases of the parties to the proceedings, because the solitary question, which has been argued by the Ld. Senior Counsel for the Appellant, while questioning the validity of the Impugned Order, was that, *"Whether at all the proceedings under Section 95 of I & B Code, could have at all been permitted to be admitted by the Ld. Adjudicating Authority, as being barred by limitation!"*

9. Because for the reasons as portrayed by the Ld. Senior Counsel for the Appellant, where he has submitted that the demand notice of 20.01.2020, since admittedly it had referred to the date of default as to be 01.08.2012, if that could be actually taken as to be the date of default for the purposes of initiation of the IRP proceedings and since the default itself was alleged to have been committed on 01.08.2012, then the notices under Section 95(4)(b) of I & B Code, for initiation of the proceedings since was issued on 20.01.2020, the Appellant contended that, the proceeding would be barred by limitation, as the notice under Section Section 95(4)(b) of I & B Code, which was to be read with Rule 7 (1) of the Rules of 2019, was issued much beyond the prescribed period of limitation as stipulated under the law of limitation, as applicable governing the field for drawing the proceedings under Section 95 of I & B Code.

10. The Appellant in furtherance of his argument, while elaborating on the issue, as to whether the proceeding would be barred by limitation or not had submitted that, owing to the fact that, the notice itself was issued on 20.01.2020, in which the Respondent No. 1, has himself disclosed the date of default as to be of 01.08.2012, which would be an admission default date. In that eventuality, if the date of default, which has been expressed in the

notice issued under Section 95 (4)(b) of the I & B Code, was not required to be made as subject of any interpretation, because an admitted date of default has been given in the notice of demand dated 20.01.2020, being that of 01.08.2012, thus its argued that, the entire proceedings will be barred by limitation.

11. It was contended by the Ld. Counsel for the Appellant that the so-called theory of '**continuing guarantee**', which has been argued by the Ld. Counsel for the Respondent, it was drafted, intending to overcome the embargo of the limitation for the purpose of initiation of the proceeding under Section 95 of I & B Code, as argued by the Appellants Counsel in response to Respondents agruments. The Ld. Counsel for the Appellant has taken a stand that, in his reply dated 03.02.2020, that, for the purposes of determining the limitation, the so- called philosophy of the "continuing guarantee", as alleged by the Respondents to have been prescribed under the terms of the settlement agreement will not be attracted. The Appellants contended that as per Section 129 of the Indian Contract Act, 1872, based on which the Ld. Counsel for the Respondent has elaborated his argument that, the aspect of limitation will not at all create any embargo as such in the initiation of the proceedings by issuance of a demand notice on 20.01.2020, because of the fact that, the deed of Guarantee Agreement dated 13.05.2011, which was entered into between the parties it contained a Clause 16 of "continuing guarantee". In that eventuality, the demand as raised by the Appellant by issuance of a notice, would have to be settled in terms of the reference made of a continuing guarantee as per Section 129 of the Indian Contract Act. In order to elaborate on the aforesaid issue, a reference was made to the Facility Agreement itself, which was executed inter-se between the parties, where the term **"facility"** has been described as per Sub-clause (xii) Clause 1.1 of Chapter I, it deals with the 'facility', which defines it as under, and it was also elaborated in the Schedule II of the Facility Agreement, which is also extracted hereunder: –

> *"Facility shall mean the rupee term loan, specified in Schedule II, hereto, agreed to be granted to the borrower by the lender on the terms and conditions contained herein".*
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> ***"SCHEDULE – II***

1. Details/Amount of the Facility : Rs. 25,00,00,000/- (Rupees Twenty Five Crore)

2. Repayment Schedule : Two Years with interest payable monthly and principal payable at the end of the tenure

3. Scheduled Bank at: Hyderabad

4. Applicable Rates at Interest:

(i) Interest on the Facility : 12.0% p.a.

(ii) Interest on other amounts payable by the Borrower : Not Applicable

(iii) Default Rate of Interest : 3.0% p.a. over and above the normal interest rate

(iv) Additional Interest pending creation of final security : Not Applicable

(v) Compound Interest : monthly rests :

(vi) Interest payment Date : As per schedule

(vii) Interest Reset Date : at the end of one year from the date of first disbursement

5. Upfront Interest : NIL

6. *Notice period for drawdown : 3 days*

7. *Availability Period : 3 Months*

8. *Pre-Payment Premium : 3.0% of the pre-paid amount*

9. *Debt to Equity Ratio : 2:1 times*

10. *Legal, Professional and other out of pocket expenses: as per actuals*

11. *Commitment Charges : NIL*

12. *Put /Call option : On the date falling at the end of 12 months from the date of disbursal, the lender shall have a right to call back the loan facility (call option). On the same date penalty (Prepayment option).”*

12. The arguments is that the concept of for use of terminology of “Continuing Guarantee”, has been followed to be argued by the Ld. Counsel for the Respondent in the light of the provisions contained under Section 129 of Indian Contract Act, deriving its precepted perception from the conditions of the contract of the ‘Deed of Guarantee’, itself, contending thereof that, since it was in the shape of a continuing guarantee, in that eventually the aspect of limitation would not be determined exclusively based upon the date of default, which has been given in the notice of demand, as issued by the Respondent for initiation of the IRP proceedings.

13. On the contrary, the Ld. Counsel for the Appellant, in order to answer the aforesaid contentions that has been raised by the Ld. Counsel for the Respondent, giving the shape of the demand, as to be a ‘continuing guarantee’, by attracting Section 129 of the Indian Contract Act. The Ld. Counsel for the Appellant had submitted that, in fact, the aspect of the continuing guarantee, would be an alien argument and concept too, to the present proceedings, for the aforesaid purpose he has submitted that, the aspect of limitation under the I & B Code, has to be strictly governed as per the provisions contained under Section 238A of I & B Code, which is contained under Part V of the I & B Code, which will have to be made applicable. Owing to the fact that though the invocation of Section 238A, it was introduced by way of insertion at a later stage, has been made applicable, with a retrospective effect and in that eventuality, where the provisions of limitation as contained under Section 238A has been made applicable with, a retrospective effect, the same would also govern the period of limitation as prescribed herein, particularly in relation to when the notice for the demand itself, which was admittedly has been issued only on 20.01.2020 and thus he contends that, the limitation would be creating a legal restriction for the Respondent No. 1, in initiating the proceeding under section 95 of I & B Code.

14. Apart from aforesaid, the Ld. Counsel for the Appellant has also contended that, the alleged theory of continuing guarantee, which is being argued in a manner as if it would be extending the limitation to infinity until the repayment of defaulted amount, will not be an aspect, which would at all be attracted in the instant case, or could sound to be reasonable interpretation, for the reason being that they have submitted, that the extended period, by borrowing the concept of 'Continuing Guarantee' does not at all have any intention to revive the time barred debts, which are otherwise restricted by the implications of limitation, as contained under the provision prescribed under Section 238A of the I & B Code. Apart from that in elaboration to his argument the Ld. Counsel for the Appellant, has submitted that, if the ratios as it has been propounded by the Hon'ble Apex Court in various Judgments that, to substantiate his arguments, he has referred to, which will be dealt by us at a later stage. It has been consistently held that the limitation, for the purposes to institute Section 7 or Section 9 proceedings i.e., to be within the period of 3 years from the date of actual or admitted default, which has to be construed in the light of the provisions contained under Section 238A to be read with Article 137 of Limitation Act, and not otherwise as it has been argued by the Ld. Counsel for the Appellant, based upon the extraction of the unknown concept of continuing guarantee by attracting Section 129 of the Indian Contract Act based upon the covenants of the Facility Agreement on which he has relied upon.

15. But, more importantly, what has been argued by the Respondents Counsel is that the so-called philosophy of continuing guarantee, which has been sought to be attracted by the Ld. Counsel for the Respondent, is being vehemently opposed by the Appellant. In continuation to it, the Appellant's Counsel contends that if the said philosophy of continuing guarantee is analysed in the light of the provisions contained under Section 129 of the Indian Contract Act, 1872, which if it is taken into consideration it will lead to a catastrophic situation, deceiving the object of the Code, where despite there being multiple defaults, and for the said aspect to enable to attract a continuing guarantee, a responsibility is casted upon the Respondent to show and demonstrate by documents on record, that there had been a continuous default on multiple occasions and in the absence of the same being established by establishing chain of defaults, by way of an evidence

being brought on record the same cannot be attracted to be applied in the instant case.

16. The Ld. Counsel for the Appellant, further elaborates his arguments contending thereof that the aspect of Continuing Guarantee is a guarantee, which extends to as a consequence of a series of transactions and it does not aim to provide for an infinite guarantee, which could extend for determination of default, meaning thereby he contends that for the purposes to attract the concept of continuous guarantee, under Section 129 of the Indian Contract Act, there has had to be a series of continuous and established transaction and not a single disbursal or a single default, which in the instant case in the absence of which where the aforesaid percept of the Continuing Guarantee was not established by Respondent, that could at all be attracted to be applied for the purposes of expanding the ambit of limitation, then, what was expressed by Respondents themselves in the notice of default, which was issued on 20.01.2020, expressing the actual admitted date of default to be that of 01.08.2012.

17. The Ld. Counsel for the Respondent submitted that, the question which will fall for consideration before this Appellate Tribunal, while interpreting the aspect of the continuing guarantee, would be, which according to him it extends to the series of transactions, then as to what has been pointed out, and the limitation has to be calculated from the date when it is an admitted default deciphered in the notice based on last transaction, which has been expressed by Respondent No. 1, in the demand notice, which has been issued by him on 20.01.2020. He submits that, the date of default as expressed by Respondent No. 1, in the notice issued under Section 95 (4)(b) of I & B Code on 20.01.2020, cannot be permitted to be literally made to be variable and it is not alterable in any manner based upon the implications or attraction of the contents of the Facility Agreement on, which, the reference has been made by the Ld. Counsel for the Respondent.

18. The Ld. Counsel for the Appellant submitted that, if the aspect of default as defined under Section 3 (12) of I & B Code is taken into consideration which for the purposes of brevity is extracted hereunder.

"3(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;"

19. A default under the I & B Code, 2016, would be a single event, which chances and necessitates the issuance of notices for drawing the proceedings under Section 95 of I & B Code, and it is not recurring or variable, its definite in nature. If that be the situation particularly, where even the Facility Agreement deals with only a single transaction of remittance of the amount, as it was said to have been extended by way of a financial assistance by Respondent No. 1, which is alleged to have been defaulted. For the said single transaction Facility Agreement cannot be attracted and interpreted in such a manner that, it could be given it a shape of a continuing guarantee, where an act of default is or could at all be taken as a continuous act for, which the period of limitation could have at all been made variable and be extended beyond 01.08.2012 i.e., the date of default mentioned in notice, and thus submits that in the light of the ratio propounded by the Hon'ble Apex Court, the said date of default couldn't have been a variable factor, which could at all be considered by this Appellate Tribunal, or could not have been otherwise interpreted by holding the debt not to be a time-barred, because of the implications of Section 238A of the I & B Code. In a nutshell, it could be summarised based on arguments, primarily he has levelled upon only a solitary question: –

1. As to whether the initiation of the proceedings under Section 95 of the I & B Code, 2016, at the behest of Respondent No. 1, could be held to be barred by Section 238A of the I & B Code. Owing to the fact that, the date of default, which has been admittedly referred to, as to be 01.08.2012, i.e., the date which is reflected or date of default under the demand notice under Section 95(4)(b) of I & B Code, 2016, or whether it could be varied and brought to 20.01.2020, date of issuance of demand notice that is on the basis of the interpretation of Continuing Guarantee, allegedly being under Section 129 of the Indian Contract Act!

20. We are of the opinion which has been attempted or devised to be discovered, to set back the date of default is not tenable for the reason that, it will be contrary to the very disclosure of the Respondent themselves made

in the demand notice issued in pursuance to the provisions of the I & B code in the instant case, under Section 95(4)(b) of the I & B Code, 2016. He further submitted that, the courts have very clearly laid down the principles that, whatsoever date of default has been described in the notice, which is not disputed, i.e., to be as 01.08.2012, it cannot be permitted to be extended or be permitted to be extended by an interpretation of the Facility Agreement as well as Deed of Guarantee as it was entered into between the parties on 13.05.2011.

21. The arguments as extended to the contrary, where it is submitted by the Ld. Counsel for the Respondent, in response to the argument extended by the Ld. Counsel for the Appellant, that in fact, it would be a case where the transactions of default would be recurring in nature, and hence the so-called theory of the limitation, which has been sought to be argued by the Ld. Senior Counsel for the Appellant would not be attracted. Owing to the implications contained under Section 129 of the Indian Contract Act. The arguments of Ld. Counsel for Respondent No. 1 that, the financial facility, which was taken to be extended to the Corporate Debtor for its corporate purposes and such loan, which was extended by way of a personal guarantee to the Appellant, it was due to continuous default, and particularly, when there is nothing to show that there was any curative action that was taken by the Respondents or could have been in response taken by the Appellant to remit the amount, before the proceedings were drawn. It is not in controversy that the parties have ventured into the arbitration proceedings, but he submits that, the pendency of the arbitration proceedings or an execution proceedings thereof before the Hon'ble High Court of Bombay, for that matter, the pendency exclusively itself will not restrict the Respondent to the initiation of proceeding under Section 95 of the I & B Code, 2016. But still the issue of demand and demand notice thereafter which has been issued in Form B under Section 95 (4) (b) of the I & B code, was as per the necessary implications as per the provisions of the Code, which was preferred before the Ld. Adjudicating Authority for initiation of the IRP proceeding based upon the interpretation of the period of limitation, which was interpreted by the Respondent No. 1.

22. The arguments as extended that, the nature of the transactions, which was emanating from the Facility Agreement, will not be a one-time

transaction, but rather a multiple continuous transactions, to give it a shape of a Continuous Guarantee is a fact which runs contrary to the documents on the record. The argument of the Ld. Counsel for the Respondent who had submitted that the existing promoters and the existing shareholders, managers and directors, officers and other employees, and the workmen of the Corporate Debtor shall be treated to continue to be liable for all the claims, demand and obligation and penalties arising out of any proceedings or enquiries, investigation, orders or show cause notices which were issued irrespective of the pending suits or other litigation. We are of the considered view that, the determination of liability under the I & B code would be and has to be exclusively on the basis of the actual date of default, which is being now drawn to be based on “continuing guarantee”, according to the Respondent. Based upon this, the notice under Section 95 of the I & B Code, was issued by him on the ground that it was a continuing default. The concept of Continuing Guarantee is not acceptable.

23. The Respondent No. 2, had almost extended an akin argument, as that what has been extended by Respondent No. 1, also supporting his contention pertaining to the aspect of default, which has been argued by the Respondent No. 1, as well Respondent No. 2, too supported their theory of continuous default has had to be determined from the date when the notice under Section 95 of I & B Code was issued i.e., on 20.01.2020 and not based on default of date mentioned in the notice of 20.01.2020, i.e., 01.08.2012.

24. The Respondent No. 1 & 2 had submitted that, since the Appellant stood as a guarantor in relation to the loan facility availed by the principal borrower cum Corporate Debtor, that is the Deccan Chronicle Holdings Limited, initially the “Facility Agreement”, which was executed was binding amongst them, where under, the Respondent No. 1 has agreed to lend the amount by way of one term settlement, which was extended to the tune of Rs. 25 Crores to the Corporate Debtor. He submitted that the default and the amount of this liability to be paid by the Appellant has been settled and was coextensive. Owing to the fact that, the arbitration proceedings have proceeded ex parte against him and the matter was presently pending consideration before the execution court. As far as the said contention is concerned, since we are not barging over, the issue to the effect of the proceedings of the arbitration and the execution case, which is pending by

way of an Execution Application No. 2286/2015 before the High Court of Judicature at Bombay.

25. As we are confining ourselves to the question raised by the Appellant as to whether the procedure under Section 95 of I & B Code, would be barred by limitation or not, owing to the admitted date of default as expressed by the Applicant, under Section 95 of the I & B Code, proceedings i.e., the Respondent themselves and which is a fact not denied by them also, that during the course of the pleadings or argument with regards to the date of default as given therein in the demand notice. The only question which is left over to be considered by us would in fact be the light of the judicial proceedings referred to by the counsel for the parties, as to, what would in fact the actual date from which the default has to be determined, for the purposes to sustain the proceedings under Section 95 of I and B code.

26. Considering the arguments of Ld. Counsel for the Respondent, who had intended to elaborate his argument from the view point that, the Code itself is distinct and from Part II of the I & B Code, which contains Section 7 and Section 9 of the I & B Code, 2016. He submits that, the trigger point of filing of an application on Section 7 of the I & B Code, 2016, would be in an event of default committed by the Appellant, on a non-repayment of the debt, in this regards the Appellant has drawn the attention of this Appellate Tribunal to Section 95 (4)(c) of I & B Code. We are of the view that, the legislature in its clear term has defined the term “default”, as a non-repayment of the debt, which is to distinguish to be considered from the other different aspects of failure on part of the corporate debtor to meet their financial obligations. A complete lack of recovery through execution proceedings that were emanating from the arbitration award may not be a compelling circumstances, which at all could be attracted for the purposes of drawing a proceeding under Section 95 of I & B Code, non-repayment of a debt the amount of a debt, which has been determined, which means that it is, and has to be settled as to be a legally enforceable debt as defined under the I & B Code and as such the demand notice, which has been issued by the Respondent No. 1, would be legally valid, and the embargo of limitation will not come into play to mitigate the proceedings drawn under Section 7 of I & B Code or under Section 95 of the Code. Owing to the fact, that due to non-remittance or non-satisfaction of the arbitral award, which was rendered on

15.03.2013. The Respondent had tried to enlarge the period of limitation by drawing his argument from Article 136 of the Schedule to the Limitation Act, 1963 which prescribes for a 12 years period for execution in order to retain the character of the judgment/award dated 15.03.2013. This has to be independent, to the mode of execution prescribe under Arbitration Act 1996, which does not have an overlapping effect, over the proceedings under Section 95 of the I & B Code.

27. After hearing the conclusion the question of limitation, its apparent that the demand notice was issued on 20.01.2020, it mentions the date of default as to be on 01.08.2012 and since the application mentions the default as to be on various dates i.e., 01.08.2012, 19.06.2017 and 13.02.2020 as to be the dates of default that has been derived because of the refusal to pay the debt which has arisen as of the date of the demand only. As the date of default in the instant case, since it has been mentioned in the demand notice as on 01.08.2012, that in itself has to be taken as to be a yardstick for the purposes of attracting the aspect of limitation for sustaining the proceedings under Section 95 of I & B Code.

28. This Appellate Tribunal has to consider the period of limitation after taking into consideration the time duration, and the pendency of the execution proceedings, which has been spent by Respondent No. 1, in pursuing the execution proceedings between 2015 to 2021, which he intends to exclude for the purposes of determining of the limitation for filing of an application under Section 95 of I & B Code. We are not agreeable to this argument as it has no reasonable basis, and this may lead to misuse of the judicial process or to deceive its object.

29. The I & B Code do not contemplate an exclusion of period, which was engaged in pursuing other proceedings, which in the instant case would be the arbitration proceedings and the consequential execution proceedings, which is presently pending consideration before the High Court of Judicature at Bombay because, those proceedings are independent altogether and law under the I & B Code do not anywhere contemplate that while determining the aspect of limitation, the impact of the pending proceedings has not to be taken into consideration while determining the period of limitation as contemplated under Section 238A of I & B Code.

30. Based upon the aforesaid arguments, we have considered respective cases as placed by the Ld. Senior Counsels for the Appellant, as well as the Respondent. Based upon it, it could be summarised that, primarily, it would be a subject of consideration as regards to the interplay of the conditions contained in the Facility Agreement viz-a-viz, the provisions of the Contract Act, as well as, the provisions of I & B Code. It is a settled principle that, as far as, I & B Code is concerned, it is a self-contained special statute, having been provided with an overriding effect over any other law, which are inconsistent to the Code, as envisaged in the light of the provisions contained under Section 238 of I & B Code. Hence, all the proceedings, which are being carried under the Code are to be exclusively governed within the ambit, intention and object of law, as intended to be attained by the provisions contained under the I & B Code.

31. The facts, which are not disputed between the parties are that, admittedly, for the purposes of extension of the financial assistance to the principal borrower, there had been a Facility Agreement of 13.05.2011. Further, it is not in dispute that the Respondent did issued the notices under Section 95 (4) (b) of the I & B Code, 2016, wherein the date of default was admittedly referred to, as to be 01.08.2012.

32. It is at this juncture the issue crops up for consideration, where after referring to the date of default being 01.08.2012 in the notice issued under Section 95 (4) (b) of the I & B Code, 2016, which was for first time issued on 20.01.2020, its here the issue would be, as to whether the limitation would be determined from the date of issuance of a notice under Section 95 of the Code or whether, the same would be determined on the ground of limitation, owing to the fact, that admittedly under the demand notice of 20.01.2020, in the default clause the date of default has been reckoned by the Respondent, as to be 01.08.2012. We, in order to facilitate our reasoning, we feel it apt to consider the provisions contained under Section 95 of the I & B Code, 2016, itself, as to when would it fall for consideration to be invoked for the purposes of initiation of the IRP as against the Personal Guarantor.

33. The basic element, which is required therein under Section 95 of the Code, is that, the Creditor by himself or jointly with other Creditors, could

initiate a process before the Ld. Adjudicating Authority by filing of an application, in that regard, its always subject to the satisfaction of the conditions, that there happens to be a debt, which is co-extensive to the borrower as well as to the Personal Guarantor, i.e., the Appellants herein, who were the signatories of the same set of documents governing the terms and conditions of extension of the financial facility that were extended to the principal borrower.

34. A prior process of issuance of notice under Sub-Section (4) of Section 95 of the Code is mandatory in nature, which prescribes the necessity for the Creditor or the Creditors, for that purpose would only germinate to determine as to when a debt accrues. An accrual of a debt would be followed by the issuance of notice under Clause (b) of Sub-Section (4) of Section 95 of the Code when there is a failure after service of notice by the Debtor to pay the debt. The expression given therein as “failure” by the Debtor “the expression failure itself denotes a fact of default by the Debtor”, and Debtor herein will, in context of Section 95 of the Code, be read in relation to the Personal Guarantors. So two basic elements, which are required to be satisfied, for the purposes prior to the issues of notice under Section 95 (4) is that there had been a reckoned debt and there has been a failure that is both the acts of debt and default are the pre-ingredients, which are required to be satisfied to be existing only when such an evidence is adduced by the Creditor to establish an act of non-payment of debt, which is evidencing the default.

35. So far as the feature of debt is concerned under the given circumstances of the instant case, it is not the case of the Appellant that, he is not a signatory to the Facility Agreement of 13.05.2011, in that eventuality he would not be bound by the terms and conditions of the same as it is not in dispute. Thus, as soon as the demand notice is issued, the fact of debt, which has not been specifically denied by the Appellant too would be treated to have been an existing debt necessitating the initiation of proceedings under Section 95 of the I & B Code, 2016.

36. The only issue, which is now centred around to be considered is on an aspect of default, which would be one of the factors which is to be considered by this Appellate Tribunal in the light of the arguments extended

by the respective counsels for the parties. Under the provisions of the Contract Act, and as particularly that contained under Section 128 of the Contract Act, it is settled that where rights and liabilities of the signatories to a loan agreement, which herein is the Facility Agreement of 13.05.2011, that would be co-extensive, in the light of the provisions contained under Section 128 of the Contract Act. Owing to the implication of Section 128 of the Contract Act, there cannot be any denial as such on part of the Appellant about the harnessing of liability to pay the defaulted amount by the Guarantor, who is a signatory to the Deed of Guarantee and would be equally bound to remit the amount since being co-extensive in nature in the light of the provisions contained under Section 128 of the Contract Act.

37. Reverting back to the aspect of default, though we have already referred to in the preceding paragraphs, but by way of a repetition and in elaboration to what has been observed by this Appellant Tribunal, we feel it necessary to, refer to as what literally the word "default" has been referred to under Section 3 (12) of the I & B Code, 2016, which is extracted hereunder: –

> *"(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 1 [Paid] by the debtor or the corporate debtor, as the case may be;"*

38. In context and under facts of the instant case, whether the act of default could be a singular movement to attract issuance of a notice under Section 95 (4) (b) of the I & B Code, 2016, or it would be as a sequential transaction which is multiple continuous features in the light of the provisions contained under Section 129 of the Contract Act, which has been argued by the Ld. Counsel for the Respondent, alleging it be Continuing Guarantee. The provisions of Section 129 of the Contract Act is extracted hereunder: –

> ***129. "Continuing guarantee".**—A guarantee which extends to a series of transactions, is called a "continuing guarantee".*

39. The gravamen of argument of the Ld. Counsel for the Respondent is that though, the date of default in the notice might have been given as 01.08.2012, but still, merely because the notice of demand has been issued

on 20.01.2020, that in itself may not dilute the aspect of default, on the ground of limitation, the attempt of Ld. Counsel for the Respondent is by bringing the default within the ambit of a continuing guarantee as envisaged under Section 129 of the Contract Act.

40. At this juncture itself we feel it necessary, and we should not be oblivious of the fact that, we are seized with the proceedings under the I & B Code, which as observed by this Appellate Tribunal earlier, is a special self-contained statute and has an overriding effect in the light of the provisions contained under Section 238 of the Code. The reference of the Code, having an overriding effect is necessary, particularly when the process of initiation of the proceedings takes place only when, there is an establishment of a fact of default.

41. In the definition of default, as extracted above, one special expression which has been given therein is “when”, herein it gives an explanation and a meaning to a singular moment for determining of a default and it can never be read to be intended to give it a continuous motion of transactions of default, which has been sought to be attracted by the Ld. Counsel for the Respondent, contending thereof that, since in the light of the stipulations contained under the Facility Agreement and the modalities as prescribed therein, will provide the nature of default as to be a continuous in nature by attempting to bring it within the ambit of Section 129 of the Contract Act, for the purposes to substantiate that the proceedings would not be barred by limitation.

42. So far as we are concerned, having appreciated the arguments extended by the Ld. counsel for the parties, we are of the view that when the statute, quite in its explicit term, while consciously defining the default, has referred to in it the word “when” and that has been used in context of debt “whole or in part”, it deals with a specific singular event of default, which has to be taken as to be a factor for the purposes of issuance of a notice and those factors are inclusive of a default of a whole amount or a partial amount.

43. When the expression in the definition of default contains the whole or any part of installment, which falls due to be paid is to be taken as to be a default. In that eventuality, once the notice is issued for any of the

proceedings contemplated under the Code, and particularly herein the provisions contained under Section 95 of the Code, we are of the considered view, that since the law has used the word “when” and it has been used in context of both a singular event of default or a continuous event of default and when an action of issuance of notice is taken, it will always denote to a singular event of default and it will not be treated as to be continuous for the purposes of extending the argument to be brought within the ambit of Section 129 of the Contract Act.

44. This argument though we have already dealt in the body of the judgment and more particularly since it has been persistently harped upon by the Ld. Counsel for the Respondent, while giving interpretation to the Facility Agreement, particularly the facility as it has been defined therein, when we consider the definition of “facility” as given under Sub-Clause (xii) of Clause 1.1 of the Facility Agreement. The facility herein has been intended to denote a rupee term loan, which has been specified in Schedule II of the Facility Agreement, which has not sub classified the transaction or the defaults as to be consequence of singular transactions or continuous transaction, and when guarantee deed is silent upon it the argument cannot be accepted by this Appellate Tribunal.

45. What is intended to express therein, is that the facility though it is neither given in the shape of a singular or a plural transaction, but any transactions which are given therein are to be taken, and has to be read in context of the loan and not in context of the default to treat it to be a continuous action to bring it, or to read this Facility Agreement as to be falling within the ambit of a Guarantee Agreement as tried to be impressed upon by the Ld. Counsel for the Respondent.

46. If the definition of “facility” as extracted above when it is made to be read harmoniously with Schedule II, if Schedule II of the Facility Agreement, in itself is taken into consideration, it nowhere provides with, the modalities of recovery the amount in an event of default nor the same has been permitted to be carried in phases, nor it is ever been so intended for in the Schedule II, which cannot be excluded to be read for the purposes of considering the definition of “facility”, as given in the Facility Agreement. The wider features of the Schedule II prescribe for the following heads:

(a) A detailed amount of facility being 25 Crore

(b) Repayment schedule would be two years with interest payable monthly and principal payable at the end of the tenure.

(c) Scheduled bank at Hyderabad, and such other features, including more particularly the commitment charges, which is followed by the call options given under Clause 12 of the Schedule II

47. None of the conditions as prescribed therein under schedule II of the facility agreement, is for a continuous repayment of a loan liability on a commission of a default, and thus, in that eventuality, the date of default, which has already been expressed in the notice under Section 95 (4) (b) of the I & B Code, 2016, has to be taken as to be 01.08.2012, couldn't have been permitted to be extended by way of an interpretation merely because the demand notice was issued on 20.01.2020. Thus, the attempt made by the Ld. Counsel for the Respondent, in the context, that may it be that the date of default has been referred to in the notice as to be 01.08.2012, but still merely issuing of a notice on 20.01.2020, will not affect the proceedings merely because, that will be treated as to be providing a continuity in the light of the provisions contained under Section 129 of the Contract Act, in an agreement, which is not acceptable by this Appellate Tribunal. Because the entire term loan which was governing the rights and liabilities of the Appellant, as well as, the Respondent, cannot be taken to be made operative out outside the ambit of the Facility Agreement itself to be read with deed of guarantee and the features contained therein the agreement, since it never prescribed for that, in an event of default its remittance would be a recurring remittance, or would be successive in nature, it will not provide a continuity to the debt, and that too, when the facility as defined under the definition itself is circumscribed and was bound to be read with Schedule II, which in itself doesn't contemplate or give any right to Respondent to continue to recover the amount in the shape of a recurring guarantee, so as to make it, as a Continuous Guarantee, to justify their argument, and stand of Respondent that even if the default notice is issued on 20.01.2020, may be that it admittedly contained the date of default described as to be 01.08.2012, but still would be treated to be a Continuous Guarantee, is not acceptable once it is to be interpreted in the light of the definition of default given

under the Code, as default or even the guarantee cannot be continuous, or be even treated to be continuous, in the absence of such specific condition in the facility agreement.

48. Hence, the argument extended by the Ld. Counsel for the Respondent and that too, for the first time in absence of a condition in the agreement that, if the undertaking given, is in the shape of the Personal Guarantor, is taken as to be a Continuous Guarantee, in that eventuality, the default would be provided with a continuity even if the notice is issued on 20.01.2020, particularly we are of the considered opinion that, in the absence of there being any clause contained under Schedule II nor even having been established by the Respondents, and that too, apart from the fact that, it is not a condition contained under the agreement, it will not have any over-riding effect to the statute, particularly when, and as already dealt by this Appellate Tribunal, the default is an aspect, which under the facility agreement is singular incident, and not a continuous or regular in feature as argued by the Respondents. Hence, the same is not acceptable by this Appellate Tribunal.

49. This argument could further be elaborated by this Appellate Tribunal in consideration, to be made in the context of, as to what would be the effect of the Arbitration proceedings. Admittedly, the parties to the agreement, parties to the Facility Agreement, as well as the Deed the Guarantee, i.e., the Appellant and the Respondent herein, including the borrower, were being governed under the terms of the agreement of 13.05.2011, which had specifically prescribed for, that in an event of any dispute or differences, an Arbitration Clause could be invoked. Part IX of the Facility Agreement dealt with the Dispute Resolution Forum, which was provided under the agreement, first of all it contains its invocation in an event of any dispute or differences or claim, and the claim herein has been denoted to be read in reference to the dispute and difference with the Facility Agreement or the transaction documents, as contained and referred in it.

50. Here in the instant case, admittedly, there had been an Arbitration proceeding which had already been drawn before the Arbitral Tribunal, which had resulted into rendering of an award and as of now, after exhaustion of the proceedings, under Section 34 of the Act of 1996, the same

is at the stage of its execution which has to be done as a decree. If we see the pleadings, as well as the conclusion that has been arrived at, it was on the basis that, the Claimants have filed their statement of claim for the recovery of a sum of Rs. 25,02, 61,350/-, wherein the amount shown therein was shown to have fallen due to be paid, as on 15.10.2012, that means even on the basis of the Arbitration proceedings, there had been a definite determination of default at the hands of the creditor for the purposes of initiating the proceedings of Arbitration, and when it has come to the conclusion about the liability, which could be fastened upon the borrower to be paid and due to be paid was determined to be as on 15.10.2012.

51. Since the claimants, i.e., the Respondents herein, before the Arbitration proceedings in their statement of claim dated 15.10.2012 was issued for recovery of the amount due that would mean that, even as per the Arbitration proceedings too, the aspect of default was once again a definite act which stood conclusively determined which has formed to be the basis for initiation of the proceedings. There too in the arbitration proceedings it had never been the case of the Respondent that, the amount which was sought to be recovered in accordance with the statement of claim was subject to its variation depending upon the accruing interest or accruing of a default at a subsequent stages, and once the amount claimed was shown to be as on 15.10.2012, and that has taken the shape of an award, the aspect of default also stands determined by the award itself, as rendered in Arbitration Case No. 1329 of 2012. Hence, from that perspective too, it could be said that the amount, which was sought to be recovered was not a variable feature, rather it was a definite feature, which has taken the shape of a decree and is now under execution. Besides that, this variable feature was not a case which was portrayed by the Respondents in the arbitration proceedings.

52. In order to better appreciate the argument of the Ld. Counsel for the Respondent, where he attempted to elaborate upon his argument in context of the provisions contained under Section 94 of the I & B Code, which gives the source of initiation of the proceedings under Section 95 of the Code, it yet again prescribes for a conclusive and definite existence of ‘debt’ and ‘default’. Because it is an admitted case, by the Respondent in Section 94 proceedings which is a precondition to be satisfied before initiation of

proceeding under Section 95, there has had to be a default or non-repayment of debt. These facts and figures taken in Section 94 proceedings, will have to be taken conclusive for the purposes of following Section 95 proceedings.

53. If we appreciate the argument of the Ld. Counsel for the Respondent, in regards to the aspect of default, if we take into consideration the provisions contained under Section 95 (4) (c), which reads as under:

"(c) relevant evidence of such default or non-repayment of debt."

54. A particular feature, which is important to be considered, is that, as envisaged under Section 95 (4)(c) is, that as per the conditions contained under Sub-clause (c), which was required to be contained in the notice under Section 95 (4)(b) of the I & B Code, 2016. Its initiation, could have been under law permissible only when the Creditor gives, and places sufficient evidence of such default or non-repayment of debt. This expression of law in itself gives the provision, to be having a definite expression for consideration of default which has had to be initially satisfied in accordance with the statement of schedule of default, available to the Creditor, which has to be read in evidence for the purposes of initiation of the proceeding under Section 95 of the Code, which has to be established at the stage when the notice is issued under Section 95 (4)(b) of the Code for the purposes of initiation of the proceeding under Section 95 of the Code, and its only the evidence of default or the evidence of non-repayment of debt which is a precondition to be satisfied for issuance of notice under Section 95 of the Code. In that eventuality, the default cannot under any of the circumstances be treated as to be falling under the so-called concept of "Continuing Guarantee", as argued by the Ld. Counsel for the Respondents, and particularly in the absence of there being any evidence to the contrary on record placed by the Ld. Counsel for the Respondent, that the default under the given set of circumstances of the instant case was a continuing default which will make the guarantee to be continuing guarantee, and was a continuous event, which could bring the aspect of limitation as to be determined on the basis a Continuing Guarantee, so as to override the effect of notice having been issued on 20.01.2020, and too in the context of the admitted date of default as given under Section 95 (4)(b) notice as to be

01.08.2012.

55. We are unable to appreciate the arguments of the Respondents for the reason being that, even if we read the stand taken by the Respondents in consonance to the above order, and the own case of the Respondent, as it was developed in the proceedings before the Arbitral Tribunal, and as reflected in the Arbitral Award, the Respondent was definite in its quantification of amount and default, as it was existing on a particular date, which was given the reasons to invoke upon for initiation of the arbitration clause. And once its determination has been done in the shape of an award and which is now a subject matter of execution, at least we can reasonably infer that default was admittedly definite and was not a variable factor, rather it could be said that it was definite in accordance with the own conduct of the Respondent and as per the document in itself, which the Respondent have filed to establish the breach of any of the conditions contained under the Facility Agreement of 13.05.2011, or under any of the conditions given therein to invoke arbitration clause, thus, the default was never reserved or kept to be a continuing feature to be brought within an aspect of a Continuing Guarantee, and it had never been the case of the Respondent before Arbitral Tribunal, which in accordance with our view, the concept of Continuing Guarantee would be only when the aspect of default has also been reserved to be kept as a continuing default in arbitration proceedings too, which will always depend upon, the subsequent events which has to be taken into consideration, which is neither the case in the demand notice issued by the Respondent on 20.01.2020, nor even in the case before the Arbitral Tribunal or even the Ld. Tribunal where the proceeding under Section 95 of the I & B Code were being undertaken.

56. Thus, while not accepting the argument that has been extended by the Respondents with regards to the Continuing Guarantee, as it would be an absolute fallacy, to accept that argument, and particularly when, apparently from the face of the record, the proceedings are apparently barred by limitation, owing to, having reference to the date of notice, which is a precondition contemplated under the statute itself, and as per Article 137 of Limitation Act, which is extracted hereunder: –

"137. Any other application for which no period Three years of limitation

is provided elsewhere in this Division."

57. The provisions contained under Article 137 of Limitation Act, is once again definite in its expression as, for the purposes of construing to determine, the period of limitation, which is given therein to be three years, the provision uses the word "when a right to apply accrues" hereto, it's a definite expression, which has been used under law for triggering of the proceedings, and that would be when there is a definite conclusion arrived at by the creditor, about an occurrence of default and consequential cause of action for the purposes of initiation of the proceeding under Section 95 of the Code. Even Article 137 of Limitation Act do not provide that the aspect of determination of limitation could be made, or even permissible to be made under law on the basis of so-called concept of Continuing Guarantee, which is not even thought of under the provisions contained under Article 137 of the Limitation Act.

58. The Ld. Counsel for the Appellant, in order to substantiate his argument, has referred to the judgment of ***Ramesh Kymal versus M/s. Siemens Gamesa Renewable Power Private Limited, as reported in [(2021) ibclaw.in 08 SC] : 2021, Volume 3, SCC, page 224.*** And particularly, he has referred to and relied upon Para 11 of the said Judgment, which is extracted hereunder: –

"11. Under Section 9(1), the operational creditor may file an application before the adjudicating authority for initiating the corporate insolvency resolution process ("CIRP"), after the expiry of a 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 a notice of the dispute under sub-section (2) of Section 8. The appellant having specified 30-4-2020 as the date of default, this appeal must proceed on that basis. It is necessary to make this clear at the outset because an attempt has been made during the course of the submissions by Mr Neeraj Kishan Kaul, learned Senior Counsel appearing on behalf of the appellant, to submit that though the demand notice mentions the date of default as 30-4-2020, the "actual first date of default" was 21-1-2020 when the letter of resignation was tendered and that the "second date of default" was 23- 3-2020 when the

sixty days' notice period from the letter of resignation submitted by the appellant concluded. This attempt to set back the date of default to either 21-1-2020 or 23-3-2020 is plainly untenable for the reason that it is contrary to the disclosure made by the appellant in the demand notice which has been issued in pursuance of the provisions of Section 8(1) and Section 9 of the IBC. The demand notice triggers further actions which are adopted towards the initiation of the insolvency resolution process."

59. In fact, if the determination that has been made by the Hon'ble Apex Court in the said judgment, is taken into consideration in its entirety, it has laid down that, in a proceedings those are held under the CIRP, under Section 9 of the Code, any attempt, which is made by the Creditor to set back the date of default is not acceptable under the eyes of law, as the default in itself happens to be in specific determination to the provisions of the law, and the disclosure of which are otherwise held to be mandatory, which are required to be mandatorily disclosed in the demand notice, which actually triggers the further action for carrying out the CIRP process.

60. We are also of the considered view that, in the light of what we have discussed above in context of the implication of Section 94 and 95, where we have already observed that, the establishment of factum of default is definite in nature and that too in the light of the circumstances of the instant case if it is to be read in context of the material on record and admitted in the arbitration proceedings, which has now taken shape of a decree, the Creditor himself was therein definite in his conception of proceedings holding the aspect of default to be definite, taking it to be as to be the reason for filing of an Arbitration, and as well as to be the reason for initiation of the proceedings under Section 95 of the Code. Because if the date of default is derived from, the findings that were recorded in the award, that itself shows that it happens to be in close proximity to the date of default as given in the Arbitation proceedings, as well as that of date of default as mentioned by the Respondent in the notice under Section 95 (4)(b), of the I & B Code, 2016.

61. In that eventuality, it will be a definite presumption, that the Respondent was conscious that, the aspect of default in either of the circumstances was definite in nature, and it cannot be made variable, that too, particularly

when it was not the case which was ever developed or argued before the Ld. Tribunal by treating the feature of default as to be treating this to be under a Continuing Guarantee, and that too contrary to the contents of the agreement in itself.

62. According to the own showing of the Respondent, the Arbitral Award happens to be that of 15.03.2013. And if that is to be read in context of the date of default given in the notice dated 20.01.2020 being that of 01.08.2012. Even let us presume for the time being that a definite determination of the amount due to be paid has fallen due even on the basis of the Arbitral Award, i.e., of 15.03.2013, then too, in the light of the principles laid down in the judgment in ***Dena Bank v. C. Shivakumar Reddy and Another, as reported in [(2021) ibclaw.in 69 SC] : 2021 Volume 10, SCC, Page 330***, it provides for that the period of three years for initiation of the CIRP, could also be reckoned from the date of recovery certificate issued by the DRT or a judgment or a decree for money or certificate of recovery or "**Arbitral Award**" in favor of the Financial Creditor.

63. The issue which was under consideration in the matters of Dena Bank (Supra) was considered by the Hon'ble Apex Court in para 23, 67 & 141, which is extracted hereunder: –

> *"23. Another question which arises for the consideration of this Court is, whether a final judgment and decree of the DRT in favour of the financial creditor, or the issuance of a certificate of recovery in favour of the financial creditor, would give rise to a fresh cause of action to the financial creditor to initiate proceedings under Section 7 IBC within three years from the date of the final judgment and decree, and/or within three years from the date of issuance of the certificate of recovery."*
>
> > *"67. The scheme of the IBC is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the corporate insolvency resolution process begins. Where any corporate debtor commits default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided in Chapter II IBC."*

> *"141. Moreover, a judgment and/or decree for money in favour of the financial creditor, passed by the DRT, or any other tribunal or court, or the issuance of a certificate of recovery in favour of the financial creditor, would give rise to a fresh cause of action for the financial creditor, to initiate proceedings under Section 7 IBC for initiation of the corporate insolvency resolution process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the certificate of recovery, if the dues of the corporate debtor to the financial debtor, under the judgment and/or decree and/or in terms of the certificate of recovery, or any part thereof remained unpaid."*

64. In a nutshell, the Hon'ble Apex Court has held that, whenever there is an adjudication or a determination of default already made by the courts about the liability of paying off a debt, that itself could too be treated as to be a cause of action to initiate the proceedings of CIRP. If that concept is taken into consideration in the context of the present case, where in the Arbitration proceeding, the Respondent has contended, as per the statement of claim, which was definite, showing the existence of liability or a debt to be as on 15.10.2012. Similarly, in the notice also the date of default was shown to be of 01.08.2012. Then at the most, determining the limitation in the light of the principles laid down in the matters of Dena Bank (Supra) where admittedly, the award herein was rendered on 15.03.2013. If we take up that cut-off period as to be the date of default itself, then too, issuance of a demand notice for first time on 20.01.2020 would be barred by Article 137 of the Limitation Act.

65. As per the conduct and even own admission of the Respondent, in all the proceedings carried by them, the aspect of default has been taken as to be definite arising from a particular date, as shown by the Respondent. And hence, the argument raised to the contrary cannot be accepted to bring the aforesaid default within an aspect of the theory of Continuing Guarantee. It is all the more necessary to draw this conclusion, in context of the observation that has been made in the Dena Bank (Supra) judgment, once the award has been rendered and that has been affirmed in the proceedings under Section 34 of the Act of 1996, and it takes the shape of a decree, which has to be executed as per the provisions contained under Order XXI of the

Code of Civil Procedure. This in itself will amount to determination of default be a definite for determination of a liability, which in the context herein would be treated as to be 15.03.2013, and if the notice is issued at a subsequent stage, that will be barred by limitation.

66. Incidentally, a question, which though had cropped up for consideration, but was never pressed upon to be made as a subject matter of debate, but still we feel it necessary to just consider the same as to what would be the implication, because the provisions of limitation as contained under Section 238A of the Code. The said provisions contained under the I & B Code, which attracted the application of the Limitation Act is contained under Section 238A of the Code. The said provisions was shown to have been inserted upon by the Insolvency and Bankruptcy Code (Second Amendment) Act 2018, with effect from 06.06.2018.

67. There was an argument raised, as to, whether at all this aspect of limitation could at all be applied in the instant case when the law itself was introduced at a later stage, with effect from 06.06.2018, i.e., subsequent to the date of default as in the instant petition, particularly when, according to the defaults as dealt with above, is shown to have been fallen due much prior to, the insertion of the limitation provision under the I & B Code. But the said argument need not to be elaborately addressed upon for the reason being that this aspect of applicability of the limitation over defaults prior to amendment, has already been settled by the Hon'ble Apex Court in the matters of ***B.K Educational Services Pvt Ltd vs Parag Gupta and Associates as reported [(2018) ibclaw.in 32 SC] : (2019) 11 SCC 633*** and particularly, the ratio propounded therein in para 22, 26 and 42 of the said judgment. The application of the newly introduced provisions of limitation, since has been made applicable with the retrospective effect. Section 238 A would also be made applicable, over the defaults occurring prior to the insertion of Section 238A of the Code. Para 22, 26 & 42 is extracted hereunder: –

> *"22. Coming to the next argument that, in any case, Section 238-A, being clarificatory of the law and being procedural in nature, must be held to be retrospective, it is necessary to refer to a few judgments of this Court. In M.P. Steel Corpn. v. CCE [M.P. Steel Corpn. v. CCE, (2015) 7 SCC 58 :*

(2015) 3 SCC (Civ) 510], this Court held: (SCC pp. 97-101, paras 54-60)

> *"54. It is settled law that periods of limitation are procedural in nature and would ordinarily be applied retrospectively. This, however, is subject to a rider. In New India Insurance Co. Ltd. v. Shanti Misra [New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 SCC 840] , this Court held: (SCC p. 844, para 5)*
>
> > *'5. On the plain language of Sections 110-A and 110-F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective.'*
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> *55. In answering a question which arose under Section 110-A of the Motor Vehicles Act, this Court held: (Shanti Misra case [New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 SCC 840] , SCC p. 846, para 7)*
>
> > *'7. ... (1) Time for the purpose of filing the application under Section 110-A did not start running before the constitution of the tribunal. Time had started running for the filing of the suit but before it had expired the forum was changed. And for the purpose of the changed forum, time could not be deemed to have started running before a remedy of going to the new forum is made available.*
> >
> > *(2) Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this*

principle. Generally the law of limitation which is in vogue on the date of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish vested right of action by providing for a shorter period of limitation.'

(emphasis in original)

56. This statement of the law was referred to with approval in Vinod Gurudas Raikar v. National Insurance Co. Ltd. [Vinod Gurudas Raikar v. National Insurance Co. Ltd., (1991) 4 SCC 333] as follows: (SCC p. 337, para 7)

'7. It is true that the appellant earlier could file an application even more than six months after the expiry of the period of limitation, but can this be treated to be a right which the appellant had acquired. The answer is in the negative. The claim to compensation which the appellant was entitled to, by reason of the accident was certainly enforceable as a right. So far as the period of limitation for commencing a legal proceeding is concerned, it is adjectival in nature, and has to be governed by the new Act — subject to two conditions. If under the repealing Act the remedy suddenly stands barred as a result of a shorter period of limitation, the same cannot be held to govern the case, otherwise the result will be to deprive the suitor of an accrued right. The second exception is where the new enactment leaves the claimant with such a short period for commencing the legal proceeding so as to make it unpractical for him to avail of the remedy. This principle has been followed by this Court in many cases and by way of illustration we would like to mention New India Insurance Co. Ltd. v. Shanti Misra [New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 SCC 840]

. The husband of the respondent in that case died in an accident in 1966. A period of two years was available to the

respondent for instituting a suit for recovery of damages. In March 1967, the Claims Tribunal under Section 110 of the Motor Vehicles Act, 1939 was constituted, barring the jurisdiction of the civil court and prescribed 60 days as the period of limitation. The respondent filed the application in July 1967. It was held that not having filed a suit before March 1967 the only remedy of the respondent was by way of an application before the Tribunal. So far as the period of limitation was concerned, it was observed that a new law of limitation providing for a shorter period cannot certainly extinguish a vested right of action. In view of the change of the law it was held that the application could be filed within a reasonable time after the constitution of the Tribunal; and, that the time of about four months taken by the respondent in approaching the Tribunal after its constitution, could be held to be either reasonable time or the delay of about two months could be condoned under the proviso to Section 110-A(3).'

Both these judgments were referred to and followed in Union of India v. Harnam Singh [Union of India v. Harnam Singh, (1993) 2 SCC 162 : 1993 SCC (L&S) 375] , see para 12.

57. The aforesaid principle is also contained in Section 30(a) of the Limitation Act, 1963:

*'**30. Provision for suits, etc., for which the prescribed period is shorter than the period prescribed by the Indian Limitation Act, 1908**.—Notwithstanding anything contained in this Act,—*

(a) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of seven years next after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier:'

58. The reason for the said principle is not far to seek. Though periods of limitation, being procedural law, are to be applied retrospectively, yet if a shorter period of limitation is provided by a later amendment to a statute, such period would render the vested right of action contained in the statute nugatory as such right of action would now become time-barred under the amended provision.

59. This aspect of the matter is brought out rather well in Thirumalai Chemicals Ltd. v. Union of India [Thirumalai Chemicals Ltd. v. Union of India, (2011) 6 SCC 739 : (2011) 3 SCC (Civ) 458] as follows: (SCC pp. 748-49, paras 22-26)

> *'22. Law is well settled that the manner in which the appeal has to be filed, its form and the period within which the same has to be filed are matters of procedure, while the right conferred on a party to file an appeal is a substantive right. The question is, while dealing with a belated appeal under Section 19(2) of FEMA, the application for condonation of delay has to be dealt with under the first proviso to sub-section (2) of Section 52 of FERA or under the proviso to sub-section (2) of Section 19 of FEMA. For answering that question it is necessary to examine the law on the point.*
>
> *Substantive and procedural law*
>
> *23. Substantive law refers to a body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. Right of appeal being a substantive right always acts prospectively. It is trite law that every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation.*

24. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and an aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

25. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to a few of those decisions. This Court in Garikapati Veeraya v. N. Subbiah Choudhry [Garikapati Veeraya v. N. Subbiah Choudhry, AIR 1957 SC 540] , New India Insurance Co. Ltd. v. Shanti Misra [New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 SCC 840] , Hitendra Vishnu Thakur v. State of Maharashtra [Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602 : 1994 SCC (Cri) 1087] , Chintamani Saran Nath Shahdeo v. State of Bihar [Chintamani Saran Nath Shahdeo v. State of Bihar, (1999) 8 SCC 16] and Shyam Sunder v. Ram Kumar [Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24] , has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This Court has held that the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.

26. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.'

60. This judgment was strongly relied upon by Shri A.K. Sanghi for the proposition that the law in force on the date of the institution of an appeal, irrespective of the date of accrual of the cause of action for filing an appeal, will govern the period of limitation. Ordinarily, this may well be the case. As has been noticed above, periods of limitation being procedural in nature would apply retrospectively. On the facts in the judgment in Thirumalai case [Thirumalai Chemicals Ltd. v. Union of India, (2011) 6 SCC 739 : (2011) 3 SCC (Civ) 458] , it was held that the repealed provision contained in the Foreign Exchange Regulation Act, namely, Section 52 would not apply to an appeal filed long after 1-6-2000 when the Foreign Exchange Management Act came into force, repealing the Foreign Exchange Regulation Act. It is significant to note that Section 52(2) of the repealed Act provided a period of limitation of 45 plus 45 days and no more whereas Section 19(2) of FEMA provided for 45 days with no cap thereafter provided sufficient cause to condone delay is shown. On facts, in that case, the appeal was held to be properly instituted under Section 19, which as has been stated earlier, had no cap to condonation of delay. It was, therefore, held that the Appellate Tribunal in that case could entertain the appeal even after the period of 90 days had expired provided sufficient cause for the delay was made out."

A perusal of this judgment would show that limitation, being procedural in nature, would ordinarily be applied retrospectively, save and except that the new law of limitation cannot revive a dead remedy. This was said in the context of a new law of limitation providing for a longer period of limitation than what was provided earlier. In the present case, these observations are apposite in view of what has been held by the Appellate Tribunal. An application that is filed in 2016 or 2017, after the Code has come into force, cannot suddenly revive a debt which is no longer due as it is time-barred."

> *"26. In the present case also, it is clear that the amendment of Section 238-A would not serve its object unless it is construed as being retrospective, as otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not*

being governed by the law of limitation."

"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."

68. Owing to the above reasons, which we observed and after elaborately considering the arguments extended by the Ld. Counsel for the parties, we can summarise the controversy from the following perspective.

i. That in accordance with the provisions of law, the aspect of default, is a precondition in accordance with Section 95 of the Code for the purposes of initiation of proceedings under Section 95, and that aspect has to be definite in its term, showing existence of debt on a particular date of default, so as to conclusively deal with the aspect of limitation, which plays an important role over the proceedings.

ii. In accordance with the documents, which have been brought on record, and also as per the previous proceedings too, the Appellants case itself has been that, there had been a specific cut-off of default, which had been taken as to be the basis for initiation of the Arbitration proceedings as well as that of the proceedings under Section 95 of the Code, which after its determination in a judicial proceedings would be treated to be an aspect having attained finality.

iii. In the light of the ratio laid down by the Hon'ble Apex Court, once there is a determination of liability in a judicial proceeding held by way of a suit or by way of an Arbitral Award, that date itself could be taken as to be the cut-off for the purposes of drawing the proceedings either under Section 7, 9 or 95 of the Code. Since in the present case,

the determination of liability in the shape of an award happens to be of 2013, and the notice was issued on 20.012020, showing default to be of 01.08.2012 it would be exclusively barred by limitation.

iv. The Respondent has utterly failed before the Ld. Adjudicating Authority, as well as before this Appellate Tribunal, to establish by documents on record that the loan facility, as it was extended ever contained a feature which could provide a continuity to the loan facility, and continuity to its feature of repayment. Rather it's absolutely a new case which was developed by the Respondents, which was contrary to records.

v. We are of the view that, for making a guarantee to be continuous, it has to flow from the settlement that has been agreed upon between the parties, has had to be specific, and definite in its term, and should have a binding effect, based upon the terms of the agreement itself, which was not prevailing in the present case. Hence, the argument of the Ld. Counsel for the Respondent, alleging that it will be a continuing guarantee, is not acceptable.

vi. For the purposes of drawing up the proceedings of CIRP under any of the provisions contained under the Code, the determination of feature of default is a precondition, which according to our reasoning and interpretation given to the provisions of law, has had to be definite in nature, and the aspect of default cannot be made variable in the absence of there being any agreement to the contrary.

69. Based upon the aforesaid, since the date of default, as it has been given by the Respondent in the notice of demand dated 20.01.2020, was shown to be that of 01.08.2012, and drawing of the proceedings was by way of issuance of the demand notice of 20.01.2020, would definitely be barred by limitation, and would be bad in the eyes of law. In that eventuality, the 'company appeal' would stand 'allowed'. The impugned order of admission of the Appellant to the IRP under Section 95 of the I & B Code, 2016, would hereby stand quashed, and all interlocutory applications would stand closed.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

02/04/2026