

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,  
PRINCIPAL BENCH, NEW DELHI  
Company Appeal (AT) (Insolvency) No. 1106 of 2023**

[Arising out of Order dated 22.05.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh in C.P. (IB) No. 38/Chd/Pb/2023]

**In the matter of:**

**GRI Towers India Pvt. Ltd.**

**...Appellant**

**Vs.**

**Innox Wind Limited**

**...Respondent**

**For Appellant:**

**Mr. D. Rishabh Gupta, Advocate.**

**For Respondents:**

**J U D G M E N T  
(20<sup>th</sup> October, 2023)**

**Ashok Bhushan, J.**

This Appeal by an Operational Creditor has been filed challenging the order dated 22.05.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh by which order Section 9 Application filed by the Appellant has been dismissed.

**2.** Brief facts of the case necessary to be noticed for deciding this Appeal are:-

2.1. The Operational Creditor is engaged in trade and service relating to business of providing equipment and manpower. Operational Creditor's case is that three Purchase Orders were issued by the Corporate Debtor namely— (1) dated 23.02.2013 (2) dated 23.10.2013 and (3) dated 28.08.2017. In

response to Purchase Orders 1 and 2, Operational Creditor issued 65 invoices on different dates from 31.10.2013 to 29.03.2014 total amounting to Rs.3,61,40,025/- out of which payment was made of Rs.2,88,84,623/-. However, till 03.06.2014, there was unpaid amount of Rs.72,55,402/-. In response to 3<sup>rd</sup> Purchase Order, Operational Creditor issued three invoices amounting to Rs. 21,91,122/-. The Operational Creditor filed a Suit No.67 of 2017 dated 03.10.2017 for recovery of monies under 1<sup>st</sup> two Purchase Orders i.e. Stage 1 which suit was withdrawn by the Operational Creditor by order dated 18.07.2022. Operational Creditor issued demand notice dated 27.07.2022 claiming amount of Rs.1,78,78,390/- total amount of which included principal amount under Stage 1 and Stage 2 and interest. The date of default as per Part-IV of Section 9 Application is 30.04.2015 for Stage 1 and on 23.10.2018 for Stage 2. Section 9 Application was filed by Operational Creditor on 05.12.2022. Adjudicating Authority by impugned order has dismissed the Section 9 Application on the ground that it is barred by limitation as well as there being no agreement placed on record for interest it does not fulfil the threshold of Rs.1 Crore. Aggrieved by the impugned order, this Appeal has been filed.

**3.** We have heard Shri D. Rishabh Gupta, Learned Counsel for the Appellant.

**4.** Learned Counsel for the Appellant challenging the order impugned submits that the Adjudicating Authority committed error in dismissing the application as barred by time. It is submitted that the Civil Suit filed by the Appellant being Civil Suit No.67 of 2017 was filed on 03.10.2017 and could

be withdrawn on 18.07.2022 which period need to be excluded giving benefit of Section 14 of the Limitation Act. It is submitted that there is arbitration clause in the agreement and the suit could not have been decided on merits, hence, the benefit of Section 14 needs to be extended to the Appellant. It is submitted that the Adjudicating Authority could have also extended the benefit of Section 5 of the Limitation Act for condoning the delay. It is submitted that the Appellant was entitled to charge interest after 365 days of default. Learned Counsel for the Appellant has placed reliance on the judgment of the Hon'ble Supreme Court in "**Sabarmati Gas Limited vs. Shah Alloys Limited- Civil Appeal No. 1669 of 2020**" to support his submission that application filed by the Appellant under Section 9 was not barred by time.

5. We have considered the submissions of the Counsel for the Appellant and perused the record.

6. The issue to be answered in this Appeal is as to whether Application filed by the Appellant under Section 9 was barred by time.

7. The Appellant having advanced the submission to the effect that the Appellant was entitled for exclusion of period under Section 14 of the Limitation Act during which period the suit filed by the Appellant was pending in the Civil Court, we need to first consider the above submission.

8. Section 14 of the Limitation Act, 1963 relates to "exclusion of time of proceeding bona fide in court without jurisdiction". Section 14 of the Limitation Act is as follows:-

**“14. Exclusion of time of proceeding bona fide in court without jurisdiction. —**

*(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*

*(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*

*(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature. Explanation.— For the purposes of this section,—*

*(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;*

*(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;*

*(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”*

9. According to own case of the Appellant, Appellant has filed Civil Suit No. 67 of 2017 dated 03.10.2017 for recovery of monies for Stage 1 i.e. money due against Purchase Orders 1 and 2. In the suit, an application was filed by the Appellant under Order XXIII Rule 1 of the Code of Civil Procedure for

withdrawal of the suit which was opposed by the Defendant. The Application for withdrawal was allowed subject to cost of Rs.5,000/-. On the basis of allowing the application for withdrawal, the suit was disposed of in terms of the order passed on 02.07.2022. The order passed on Application filed by the Appellant for withdrawal dated 02.07.2022 is as follows:-

*“The present suit is for recovery. Today, Plaintiff and its learned advocate are present and filed withdrawal application under Order XXIII Rule 1 of the Code of Civil Procedure.*

*2. Other side filed its say in detail and strongly opposed the application by contending that, suit is of the year 2017 and defendant is appeared through its lawyer on 24-07-2018. In present suit, application under Order VII Rule 11 is filed for rejection of plaint and still it is pending. It is further submitted that, from the institution of the suit, defendant and its counsel have been present in most of the dates and they occurred so many costs. Therefore, learned counsel for defendant submitted that, if court comes to the conclusion that application is to be allowed and permission is to be granted to withdraw the suit, then considering the stage of the plaint, and year of institution of the suit, heavy costs be imposed.*

*3. Considering the facts of the application and detailed say, it is factual position that, suit is of the year 2017 and pending for application under Order VII Rule 11 of rejection of plaint. The defendant firm is situated at Delhi and for each date authorised*

*person had come from Delhi at Ichalkaranji and he occurs some costs to remain present. Further, it seems that the matter is pending since long only due to plaintiff. Today, plaintiff and its advocate are only present, the learned advocate for the plaintiff pressed for allowing the withdrawal application contending that withdrawal is necessary to be allowed urgently, when I proposed him, keep the matter for Lok Adalat. The other sides, learned advocate and the other side defendant found absent, nobody was present on their side. However, since the plaintiff is going to withdraw the suit, it may be allowed but as the defendant has strongly objected for the withdrawal requesting for imposing heavy costs on the plaintiff since the plaintiff compelled them to face unnecessary litigation and bear costs of the suit including advocate fees etc. Finally, I came to the conclusion that withdrawal can be allowed, but the plaintiff has to pay the costs to the defendant to compensate their expenditure to face the proceeding. Though the defendant has asked for heavy costs, but considering the facts and circumstances the amount of Rs. 5,000/- would suffice the purpose. Hence, I proceed to pass the following order:*

### **ORDER**

*1. The Application (Exh.26) is allowed subject to costs of Rs. 5,000/- (Rupees Five Thousand only) to be paid to the other side.*

*2. Concerned clerk is hereby directed to dispose of the matter in view of application (Exh.26) after payment of costs above mentioned.*

3. *Parties to take note.*”

**10.** For taking benefit of Section 14 of the Limitation Act, several pre-conditions are to be fulfilled as per the provisions of the statute. This Tribunal had occasion to consider the essentials which are required to be fulfilled for extending the benefit under Section 14 of the Limitation Act in IA No.130 of 2023 in Company Appeal (AT) (Insolvency) No.37 of 2023- **“SREI Equipment Finance Ltd. vs. Kalpataru Properties Pvt. Ltd.”**. This Tribunal in the aforesaid judgment has noticed the law laid down by the Hon’ble Supreme Court on Section 14. It is useful to extract paragraphs 15, 16, 17 and 18 of the Judgement: -

*“15. In the judgment of Hon’ble Supreme Court which arose out of Insolvency and Bankruptcy Code, 2016 i.e. “(2021) 10 SCC 401, Kalpraj Dharamshi & Anr. vs. Kotak Investment Advisors Ltd. & Anr.”, Hon’ble Supreme Court while considering the question of applicability of principles under Section 14 of the Limitation Act in an appeal filed under Section 61 of I&B Code has held that principles underlying Section 14 are applicable in an appeal filed under Section 61. In the above case, after order of the Adjudicating Authority an Writ Petition was filed in the High Court which was being bonafidely prosecuted in good faith with due diligence. High Court has dismissed the Writ Petition on the ground that petitioner has an alternative and equally efficacious remedy available. Thereafter, an appeal*

was filed in this Tribunal. In the above background following was observed by the Hon'ble Supreme Court in Para 78:

*“78. In the present case, perusal of the writ petition would reveal, that it was the specific case of KIAL, that its application, objecting to the application of RP for approval of the resolution plan was heard by a Member (Judicial), whereas, the final orders were passed by a Bench consisting of Member (Judicial) and Member (Technical). It has specifically averred, that though an alternate remedy was available to it, it was invoking the jurisdiction of the High Court since the question involved was also with regard to the manner in which the jurisdiction was exercised by NCLT. It could thus be seen, that KIAL was bona fide prosecuting the proceedings before the High Court in good faith. Perusal of the dates referred to herein above would also reveal, that KIAL was prosecuting the proceedings before the High Court with due diligence. Even before the availability of the certified copy, it had knocked the doors of the High Court. The matter before the High Court was hotly contested and ultimately, the petition was dismissed by an elaborate judgment relegating KIAL to the alternate remedy available to it in law. As such, the conditions which enable a party to invoke the provisions of Section 14 of the Limitation Act are very much available to KIAL. If the period during which KIAL was bona fide prosecuting the writ petition before the High Court and that too with due*



*diligence, is excluded applying the principles underlying Section 14 of the Limitation Act, the appeals filed before NCLAT would be very much within the limitation. We find, that KIAL would be entitled to exclusion of the period during which it was bona fide prosecuting the remedy before the High Court with due diligence.”*

*16. The law laid down by the Hon’ble Supreme Court is that even if Section 14 of the Limitation Act does not apply in an appeal, however, the principles underlying Section 14 can be applied while considering exclusion of period under Section 14. Thus, we proceed to examine the contentions of the parties on the premise that principles underlying Section 14 are also attracted in an appeal filed under Section 61 of I&B Code.*

*17. For taking benefit of Section 14 of the Limitation Act several conditions need to be fulfilled cumulatively. In Kalpraj Dharamshi (supra), the Hon’ble Supreme Court relying on its earlier judgment in “(2008) 7 SCC 169, Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and others”, in Para 59 has noted conditions which may be satisfied before Section 14 can be pressed into service, which is to the following effect:*

*“59. The conditions that are required to be fulfilled for invoking the provisions of Section 14 of the Limitation Act have been succinctly spelt out in various judgments of this Court including the one in Consolidated Engineering*

*Enterprises vs. Principal Secretary, Irrigation Department and others, which read thus:*

*“21. “Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:*

*(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;*

*(2) The prior proceeding had been prosecuted with due diligence and in good faith;*

*(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature; (4) The earlier proceeding and the latter proceeding must relate to the same matter in issue; and*

*(5) Both the proceedings are in a court.””*

*18. One of the condition which required to be fulfilled for applicability of Section 14 is that the earlier proceeding failed “from defect of jurisdiction or other cause of like nature”. The provision further provides that earlier Court where the proceedings from defect of jurisdiction or other cause of like nature cannot be entertained. The expression used in Section 14 Sub-section (1) and (2) is “is unable to entertain it”. Thus, defect of jurisdiction and other cause of like nature should result in inability of the Court to entertain it.”*

**11.** One of the conditions which is required to be fulfilled for extending the benefit of Section 14 as per the law laid down by the Hon'ble Supreme Court is "failure of the prior proceedings due to defect of jurisdiction or other cause of like nature". The withdrawal of the suit filed by the Appellant on its own application cannot be said to be failure of prior proceeding due to defect of jurisdiction or other cause of a like nature. When we look into the order passed by the Civil Court as extracted above, it is clear that the Appellant himself has withdrawn the suit for filing the application, which was withdrawn with subject to payment of cost of Rs.5,000/- to the Defendant. Order XXIII Rule 1 under the application was filed for withdrawal of the suit provides as follows:-

*"ORDER XXIII*

*WITHDRAWAL AND ADJUSTMENT OF SUITS*

**[1. *Withdrawal of suit or abandonment of part of claim.*** – (1) *At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*

*Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.*

(2) *An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment*

*proposed is, in his opinion, for the benefit of the minor or such other person.*

*(3) Where the Court is satisfied.-*

*(a) that a suit must fail by reason of some formal defect, or*

*(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,*

*it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.”*

**12.** The order of the Civil Court allowing withdrawal of the suit was based on order passed by the Civil Court on the application filed by the Appellant for withdrawal under Order XXIII Rule 1. Ultimate order was passed by the Civil Court on 18.07.2022 when the suit was disposed of in terms of order dated 02.07.2022 (wrongly mentioned as 04.07.2022 in order dated 18.07.2022. Order dated 18.07.2022 is as follows:-

*“Plaintiff has filed an application below Exh. 27 and submitted that order passed below Exh. 26 on 02-07-2022 and permission is granted to withdraw the suit subject to costs of Rs. 5,000/-. As per order passed below Exh. 26, plaintiff has deposited an amount of Rs. 5,000/- in the court on 11-07-2022.*

*2. Considering the record of the case and remark of Asst. Supdt. on the overleaf of application (Exh.27) regarding credit of costs amount, it appears that all*

*compliance is done, there is no purpose to keep the proceeding pending further. Hence, it will have to be closed finally. Hence, I pass order as under :-*

**ORDER**

1. *Suit is disposed off in view of order passed below Exh. 1 on 04-07-2022.*
2. *Proceeding be closed finally.”*

**13.** The Suit was withdrawn without any liberty to institute a fresh suit which is clear from the order itself. Order XXIII Rule 3 of the CPC itself contemplated that when the Court is satisfied that a suit must fail by reason of some formal defect, or where there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of suit or part of a claim, Court shall grant liberty to institute a fresh suit. No such liberty has been granted to the Operational Creditor to institute a fresh suit. We, thus, are satisfied that the Appellant is not entitled for benefit of Section 14 of the Limitation Act as has been contended by Counsel for the Appellant.

**14.** Counsel for the Appellant relied on judgment in **“Sabarmati Gas Limited”** (supra). In the above case, an application was filed under Section 9 by the operational creditor for computing the limitation for filing Section 9 where one of the issues was as to whether Appellant is entitled to exclude the period during which right to proceed against or sue the Corporate Debtor that remain suspended by virtue of Section 22(1) of the Sick Industrial Companies (Special Provisions Act, 1985). In paragraph 2 of the judgment, Hon’ble Supreme Court has noticed the issue which arose in the case, which is as follows:-

*“2. In the captioned appeal mainly, twin questions of law call for consideration id est :-*

*(i) Whether in computation of the period of limitation in regard to an application filed under Section 9, IBC the period during which the operational creditor's right to proceed against or sue the corporate debtor that remain suspended by virtue of Section 22 (1) of the Sick Industrial Companies (Special Provisions Act, 1985) (SICA) can be excluded, as provided under Section 22 (5) of SICA?*

*(ii) Whether the respondent has raised a dispute which is describable as 'pre-existing dispute' between itself and the appellant warranting dismissal of application under Section 9 of the IBC at the threshold?*

*While considering the stated twin questions certain other allied questions of relevance may also crop up for consideration, which we will state and consider at the appropriate time. The respondent -corporate debtor was the petitioner in Case No. 13 of 2010 before the Board for Industrial and Financial Reconstruction (BIFR) and the appellant herein was the applicant in Miscellaneous Application No. 432 of 2013 in Case No. 13 of 2010.”*

**15.** The Hon'ble Supreme Court after considering the law held that in the facts of the case the Operational Creditor was entitled to exclude the period during which proceedings against the Corporate Debtor was suspended by

virtue of Section 22(1) of the Sick Industrial Companies (Special Provisions Act, 1985). In paragraph 14 of the judgment, Hon'ble Supreme Court laid down following:-

*“14. In view of the provisions under Section 22 (1) of SICA and the decisions in Paramjeet Singh case (Supra) and in KSL & Industries Limited (supra), it is worthwhile to note that in the case on hand it was the industrial company (respondent herein) that approached the BIFR under the provisions of SICA and got it declared as 'sick company' by filing Case No. 13 of 2010; that it is thereafter that the appellant filed Miscellaneous Application No. 432/2013 thereon praying, inter-alia, to permit it under Section 22 of SICA to approach a Civil Court of appropriate jurisdiction for recovery of the above-mentioned dues along with interest; that the said application was disposed of only on 09.09.2015, as per Annexure-A40 proceedings, that too, only with a direction to the respondent company to incorporate the dues of the applicant in the DRS and that as per Annexure-A40, Case No.13 of 2010 and M.A. No. 292/2014 filed thereon, were then, posted for hearing. In short, Case No. 13 of 2010 was pending before the BIFR when SICA was repealed w.e.f. 01.12.2016 and Sections 8 and 9, IBC took its effect from 01.12.12016. Thus, obviously, proceedings under SICA were then pending before the BIFR when the default from the part of the respondent allegedly occurred and by virtue of Section 22 (1), SICA and the decisions referred above, the appellant could not have, then,*

*resorted to any legal proceedings for enforcing any right which may result in recovery from the properties of the respondent company. For the same reasons, the contention of the respondent that pending the proceedings before the BIFR the appellant could have resorted to arbitration proceedings also has to fail.”*

**16.** The Hon'ble Supreme Court in the above case has also held that sufficient cause as contemplated in Section 5 of the Limitation Act also need to be considered. In paragraphs 24 and 25 following was laid down:-

*“24. When the limitation period for initiating CIRP under Section 9, IBC is to be reckoned from the date of default, as opposed to the date of commencement of IBC and the period prescribed therefor, is three years as provided by Section 137 of the Limitation Act, 1963 and the same would commence from the date of default and is extendable only by application of Section 5 of the Limitation Act, 1963 it is incumbent on the Adjudicating Authority to consider the claim for condonation of the delay when once the proceeding concerned is found filed beyond the period of limitation.*

*25. As relates Section 5 of the Limitation Act showing 'sufficient cause' is the only criterion for condoning delay. 'Sufficient Cause' is the cause for which a party could not be blamed. We have already taken note of the legal bar for initiation of proceedings against an industrial company by virtue of Section 22 (1), SICA and obviously, when a party was thus legally disabled from resorting to*



*legal proceeding for recovering the outstanding dues without the permission of BIFR and even on application permission therefor was not given the period of suspension of legal proceedings is excludable in computing the period of limitation for the enforcement of such right in terms of Section 22(5), SICA. In the absence of provisions for exclusion of such period in respect of an application under Section 9, IBC, despite the combined reading of Section 238A, IBC and the provisions under the Limitation Act what is legally available to such a party is to assign the same as a sufficient cause for condoning the delay under Section 5 of the Limitation Act. In such eventuality, in accordance with the factual position obtained in any particular case viz., the period of delay and the period covered by suspension of right under Section 22 (1), SICA etc., the question of condonation of delay has to be considered lest it will result in injustice as the party was statutorily prevented from initiating action against the industrial company concerned. The first question formulated hereinbefore is accordingly answered.”*

**17.** There can be no dispute to the proposition laid down by the Hon’ble Supreme Court in the above case that showing ‘sufficient cause’ is the only criteria on basis of which benefit of Section 5 of the Limitation Act can be extended to an applicant.

**18.** Benefit of Section 14 of the Limitation Act was sought by the Appellant on the basis of filing of suit and pendency of the suit during the period 03.10.2017 till 18.07.2022. As noted above, suit was withdrawn without any

liberty from the Court to institute a fresh proceeding and termination of suit cannot be held on ground of defect of jurisdiction on cause of like nature. Thus, an essential condition for extending the benefit of Section 14 is absent. We, thus, are satisfied that delay in filing Section 9 application with delay cannot be said to be a sufficient cause within the meaning of Section 5. It is relevant to notice that according to Part-IV of the application itself the default occurred on 30.04.2015 for Stage 1 and 23.10.2018 for Stage 2. Column 2 of Part-IV of Section 7 Application is as follows:-

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DATES OF DEFAULT IN TABULAR FORM)	<p><b>Principal:</b> Rs. 72,55,402 (Stage 1) + Rs.21,91,122 (Stage 2) = <b>Rs.94,46,524</b> (Rupees NinetyFour Lakhs Fourty Six Thousand Five Hundred and twenty four only)</p> <p><b>Interest @12% p.a.</b> = <b>Rs.84,31,866</b> (Rupees Eighty Four Lakhs Thirty one thousand Eight hundred and Sixty Six only)</p> <p><b>TOTAL: Rs.1,78,78,390/-</b> (Rupees One crore seventy eight lakhs seventy eight thousand three hundred and ninety only) as on 27.07.2022.</p> <p><b>Date of Default: 30.04.2015</b> for Stage 1 and on 23-10-2018 for Stage 2.</p> <p>Computation Table- <b>“ANNEXURE-J”</b></p>
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**19.** Learned Counsel for the Appellant has also raised submission that there is arbitration clause in contract between the parties and as per the argument of the Appellant, suit was withdrawn by the Appellant because of

the reason that there was arbitration clause. It is not the case of the Appellant that Appellant has instituted any proceeding for arbitration. We are conscious of the legal position that a mere availability of the arbitration or any other proceeding by the operational creditor cannot preclude the operational creditor to initiate proceeding under Section 9 but the question which has arisen in the present case is as to whether application was filed within limitation by the Appellant. As observed above, when the operational creditor is not entitled to get benefit of the period during which Civil Suit filed by the Appellant for recovery of amount of Stage 1 was pending, the application filed by the Appellant on 05.12.2022 for default committed on 30.04.2015 is clearly barred by time.

**20.** We may also notice the judgment of the Hon'ble Supreme Court in ***"Sesh Nath Singh & Anr. vs. Baidyabati Sheoraphuli Co-Operative Bank Limited and Anr.- (2021) 7 SCC 313"*** where Hon'ble Supreme Court considered the delay in filing the application under Section 7 with reference to Section 14 of the Limitation Act. In the above case, the Financial Creditor had issued a notice under Section 13(2) & (4) of the SARFAESI Act which proceeding was challenged by the Corporate Debtor by filing a Writ Petition before Calcutta High Court. During pendency of the Writ Petition in the High Court, Financial Creditor filed an application under Section 7 before the NCLT, Kolkata Bench. Contention was raised that the period during which the Writ Petition remained pending need to be excluded under Section 14 of the Limitation Act. Hon'ble Supreme Court noticing the submission in the above case has noticed the earlier judgment of the Hon'ble Supreme Court

where condition precedent for applicability of Section 14 of the Limitation Act has been noticed. It is useful to extract paragraphs 68, 70 and 71 of the judgment:-

*“68. Section 14 (2) of the Limitation Act provides that in computing the period of limitation for any application, the time during which the petitioner had been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance, or of appeal or revision, against the same party, for the same relief, shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it. The conditions for exclusion are that the earlier proceedings should have been for the same relief, the proceedings should have been prosecuted diligently and in good faith and the proceedings should have been prosecuted in a forum which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it.*

*70. In Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and Ors. 16, a three-Judge Bench of this Court unanimously held that in the absence of any provision in the Arbitration and Conciliation Act, 1996 which excluded the applicability of Section 14 of the Limitation Act, there was no reason why Section 14 of the Limitation Act should not apply to an application for setting aside an arbitral award. This Court held:*

*“19. A bare reading of sub-section (3) of Section 34 read with the proviso makes it abundantly clear that the application for setting aside 14 (2006) 6 SCC 239 15 (2001) 8 SCC 470 16 (2008) 7 SCC 169 the award on the grounds mentioned in sub-section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the court.*

*20. Section 29(2) of the Limitation Act inter alia provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period of limitation prescribed by the Schedule, the provisions of Section 3 shall apply as if such period was the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 shall apply only insofar as, and to the extent, they are not expressly excluded by such special or local law. When any special statute prescribes certain period of limitation as well as provision for extension up to specified time-limit, on sufficient cause being shown, then the period of limitation*

*prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded. As the intention of the legislature in enacting sub-section (3) of Section 34 of the Act is that the application for setting aside the award should be made within three months and the period can be further extended on sufficient cause being shown by another period of 30 days but not thereafter, this Court is of the opinion that the provisions of Section 5 of the Limitation Act would not be applicable because the applicability of Section 5 of the Limitation Act stands excluded because of the provisions of Section 29(2) of the Limitation Act. However, merely because it is held that Section 5 of the Limitation Act is not applicable to an application filed under Section 34 of the Act for setting aside an award, one need not conclude that provisions of Section 14 of the Limitation Act would also not be applicable to an application submitted under Section 34 of the Act of 1996.*

*21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:*

- (1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;*
- (2) The prior proceeding had been prosecuted with due diligence and in good faith;*

*(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;*

*(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;*

*(5) Both the proceedings are in a court.*

*22. The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section*

*34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.”*

73. In his separate concurring judgment Raveendran, J. said:-

*“52. Section 14 of the Limitation Act relates to exclusion of time of proceeding bona fide in court without jurisdiction. ....*

*53. Sub-section (3) of Section 34 of the AC Act prescribes the period of limitation for filing an application for setting aside an award as three months from the date on which the applicant has received the arbitral award. The proviso thereto vests in the court discretion to extend the period of limitation by a further period not exceeding thirty days if the court is satisfied that the applicant was prevented by sufficient cause for not making the application within three months. The use of the words “but not thereafter” in the proviso makes it clear that even if a sufficient cause is made out for a longer extension, the extension cannot be beyond thirty*



*days. The purpose of proviso to Section 34(3) of the AC Act is similar to that of Section 5 of the Limitation Act which also relates to extension of the period of limitation prescribed for any application or appeal. It vests a discretion in a court to extend the prescribed period of limitation if the applicant satisfies the court that he had sufficient cause for not making the application within the prescribed period. Section 5 of the Limitation Act does not place any outer limit in regard to the period of extension, whereas the proviso to sub-section (3) of Section 34 of the AC Act places a limit on the period of extension of the period of limitation. Thus the proviso to Section 34(3) of the AC Act is also a provision relating to extension of period of limitation, but differs from Section 5 of the Limitation Act, in regard to period of extension, and has the effect of excluding Section 5 alone of the Limitation Act.”*

**21.** The Hon’ble Supreme Court noticed that the Hon’ble High Court in the Writ Petition has stayed the proceedings under SARFAESI Act on the ground that proceedings are without jurisdiction. In paragraph 85 of the judgment, following has been noticed:-

*“85. In our view, since the proceedings in the High Court were still pending on the date of filing of the application under Section 7 of the IBC in the NCLT, the entire period after the initiation of proceedings under the SARFAESI Act could be excluded. If the period from the date of institution of the*

*proceedings under the SARFAESI Act till the date of filing of the application under Section 7 of the IBC in the NCLT is excluded, the application in the NCLT is well within the limitation of three years. Even if the period between the date of the notice under Section 13(2) and date of the interim order of the High Court staying the proceedings under the SARFAESI Act, on the prima facie ground of want of jurisdiction is excluded, the proceedings under Section 7 of IBC are still within limitation of three years.”*

**22.** The benefit for exclusion of the time during which proceedings under SARFAESI Act was pending was based on the observation that the said proceedings are without jurisdiction, on which prima facie finding High Court has granted stay. Hon'ble Supreme Court in **“Sesh Nath Singh”** (supra) also observed that Section 5 of the Limitation Act is also applicable in proceedings under Section 9 and on sufficient cause, the said delay can be condoned.

**23.** The Judgment of **“Sesh Nath Singh”** (supra) was in facts and grounds as noted above and does not help the Appellant in the present case. We may further observe that the proceedings under IBC are not proceedings for recovery of contractual dues, as is apparent from the facts of the present case the Operational Creditor has initiated proceeding for recovery of its contractual dues arising out of contract between the parties. Suit for recovery of dues was already filed by the Appellant which was withdrawn by the Appellant. It is, however, relevant to notice that withdrawal of the suit was not on the ground contended by the Appellant nor any liberty was granted by the Civil Court to institute a fresh suit nor Appellant at any point of time

resorted to the proceeding of arbitration which according to the Appellant was reason for withdrawal of suit.

**24.** In the circumstances, we are also satisfied that the present was a case filed by the Operational Creditor only for recovery of its contractual dues with regard to default committed as per the case of the Appellant on 30.04.2015 for stage 1 and 23.10.2018 for stage 2. The Adjudicating Authority did not commit any error in rejecting Section 9 application as barred by time. We do not find any merit in this Appeal. The Appeal is dismissed.

**[Justice Ashok Bhushan]  
Chairperson**

**[Barun Mitra]  
Member (Technical)**

**[Arun Baroka]  
Member (Technical)**

**New Delhi**  
Anjali