

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP 579/I&BP/NCLT/MAH/2018

Under Section 7 of the I&B Code, 2016

In the matter of

Edelweiss Asset Reconstruction Co. Ltd.

....Financial Creditor

v/s.

M/s Birla Cotysn (India) Limited

.... Corporate Debtor

Coram: Hon'ble Mr. V. P. Singh, Member (Judicial)

Hon'ble Mr. Ravikumar Duraisamy, Member (Technical)

For the Petitioner: Mr. Vikram B. Trivedi, Adv. a/w Ms. Suchitra Valjee, Adv., Mr.
Abhishek Bhaduri Adv. i/b Manilal Ambalal & Co.

For the Respondent: Mr. Gaurav Joshi, Senior Counsel, Mr. Saurab Pakale, Adv.,
Ms. Ami Jain, Adv.

Per V. P. Singh, Member (Judicial)

ORDER

1. It is a Company Petition filed u/s 7 of Insolvency & Bankruptcy Code, 2016 by Financial Creditor, namely Edelweiss Asset Reconstruction Co. Ltd. against Corporate Debtor, namely M/s Birla Cotysn (India) Limited stating that the Corporate Debtor failed to make payment of Rs. 29,85,67,332.79/-. The Company Petition is filed to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.
2. The Petitioner herein is the Assignee *vide* registered Deed of Assignment dated 26.5.2017 whereby Axis Bank Limited ('Assignor') assigned the dues of Term Loan and Cash Credit to the Petitioner.
3. The case of the Petitioner is that Financial Facilities, being term loan and cash credit to the tune of Rs. 20,00,00,000/- (Rupees Twenty Crores Only) was granted to the Corporate Debtor by Axis Bank (Assignor) with the date of default being 29.10.2012.

4. It is the case of the Financial Creditor that the liability has been admitted by the Corporate Debtor in the Consolidated Financial Statement of the Corporate Debtor for the period ended 31.3.2017. Further, attention was drawn to the Auditor's comments in the 75th Annual Report 2016-2017, which are:

" ...

8 Dues to Bank and Financial Institutions

8.1 In our opinion, and according to the information and explanation given to us, the Company has defaulted in repayment of dues to financial institutions and banks for principal amount of Rs. 233,23,04,243/- and interest amounting of Rs. 240,89,88,139/- since May 2012...

..."

Attention was also drawn to item no. 3 and 4 (being the dues to Assignor) in the detailed lender wise list in respect of default to bank and financial institutions and government in the abovementioned clause 8.1 of the 75th Annual Report 2016-2017.

5. The Financial Creditor further argued that the Corporate Debtor has issued a Letter of Acknowledgment of Debt dated 3.11.2008. The Financial Creditor also relied on a 'Without Prejudice' letter dated 21.6.2018 by the Corporate Debtor to the Financial Creditor titled 'Proposal for settlement of dues of Birla Cotsyn (India) Limited (BCIL)' whereby a settlement proposal of Rs. 41 crores was made.
6. The Financial creditor has annexed certificate under the Bankers Book Evidence Act, 1891.
7. A reply dated 13.9.2018 has been filed by the Corporate Debtor, *inter-alia*, stating
- a) The discrepancies in the petition pointed at earlier hearing have not been rectified/ removed by the Financial Creditor yet.
 - b) The principal amount claimed is different in the present petition and the earlier notice served on the Corporate Debtor under section 13(2) of Securitisation Act, 2002.

- c) The Financial Creditor has also acquired the financial assets from two other banks and ought to have made full and proper disclosure.
 - d) Without prejudice, the Corporate Debtor made a fair and reasonable offer for one time settlement of the dues of the financial creditors by its letter dated 21.6.2018.
8. The Counsel for the Corporate Debtor argued that the Corporate Debtor has filed a Writ Petition in the Bombay High Court on 26.10.2018 in view of the Reserve Bank of India's circular dated 12.2.2018.
9. The Counsel for the Corporate Debtor argued that there are discrepancies in the amount claimed to be in default as evidenced from the petition. The Counsel further argued that since the law required the Financial Creditor to file bank statement, then the same should tally with the amount in default. Further, few pages annexed as the bank statements are just computer printed tables and do not classify as bank statements.
10. Further, since the date of default for the amounts claimed to be in default is 29.10.2012, the claim is barred by limitation. The Counsel appearing for the Corporate Debtor also referred to the Section 18 of the Limitation Act, 1963 and argued that the acknowledgment relied upon by the Financial Creditor being the financial statement for the year 2016-2017, which is after a period of three years from the date of default; it does not start a fresh period of limitation. For an acknowledgment to start a fresh period of limitation, it has to be necessarily within the prescribed period of limitation. It was argued that the Financial Creditor has not produced balance sheets from 2012 to 2015, which is the original period of limitation and therefore the dues are time-barred.
11. Further, with regards to the acknowledgment made after the period of limitation, the Counsel for the Corporate Debtor argued that an acknowledgment made after the expiry of the period of limitation has to be coupled with a promise to pay an amount as required under Section 25 of the Indian Contract Act, 1872. Since in the present case, the acknowledgment given after the period of limitation is not coupled with a promise to pay, the limitation for the time barred debt is not being reset.

12. With regards to the reliance on the 'Without Prejudice' letter by the Financial Creditor, the Corporate Debtor contended that the same has not been filed by the Financial Creditor and hence cannot be relied upon by the Financial Creditor.
13. The Counsel for the Financial Creditor also placed reliance on the Judgment of Supreme Court in the matter of *M/s Innoventive Industries Ltd. v ICICI Bank & Anr.*¹, specifically,

"30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

14. The Counsel for the Financial Creditor rebutted the argument regarding discrepancies in the amount in default by relying on the case of *Mr. Ajay Agarwal v. Central Bank of India and State Bank of India*² wherein the Hon'ble NCLAT stated

"11. In the present case, the Respondents have explained the difference between the claim amount as made on 19th October, 2015 and as on the date of filing in the year 2017, which has been calculated, taking into consideration the interest payable in the meantime and the amount, if any, recovered under other proceedings. Apart from the aforesaid fact, we are of the view that mere mismatch of the figures will ipso facto not invalidate the order initiating 'Corporate Insolvency Resolution Process' under Section 7 of the 'I&B Code'."

15. The Counsel for the Financial Creditor rebutted the argument regarding exact amount of default by relying on the case of *Phoenix Arc Private Limited v Sarbat Cotfab Private Limited*³ wherein the Hon'ble NCLT stated that "63. The question about the quantum of the amount due is to be ultimately found by the Interim Resolution Professional or the Resolution Professional, as the case may be and not to be exactly decided while disposing off the petition...".
16. The Financial Creditor also drew attention of the Bench to the conduct of the Corporate Debtor who had on the last occasion taken time with the view of settling the matter but failed to do so.

¹ Civil Appeal Nos. 8337-8338 of 2017.

² Company Appeal (AT) (Insolvency) No. 180 of 2017.

³ CP (IB) No. 123/Chd/CHD/2017 with C.A. No. 19/2018.

17. The balance sheets of 2016-17 reflect the debts due. Therefore, it is logical to assume that the debts falling due in 2012 and reflecting in the balance sheets of 2016-17, would have reflected in the intervening balance sheets also. Hence the ground for limitation as argued by the Corporate Debtor does not survive.
18. As per the Section 7 of IBC provides, a petition has to be admitted if a default has occurred, no dispute has been raised with regard to the debt due, application filed is complete and no disciplinary proceedings are pending against the proposed resolution professional.
19. This Petition clearly reveals that there is a debt as defined in Section 3(11) of IBC, also there is default in this case within the meaning of Section 3(12) of IBC and no evidence of dispute with regard to the claim amount has been raised by the Corporate Debtor. The application of the Financial Creditor is complete and there are no disciplinary proceedings pending against the proposed resolution professional. Therefore, this petition is to be admitted.
20. This Bench hereby admits this petition filed under Section 7 of IBC, 2016, declaring moratorium with consequential directions as mentioned below:
 - I. That this Bench hereby prohibits
 - a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- IV. That the order of moratorium shall have effect from 20.11.2018 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of IBC or passes an order for liquidation of corporate debtor under section 33 of IBC, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of IBC.
- VI. That this Bench hereby appoints Ms. Sujata Chattopadhyay having registration number IBBI/IPA-003/IP-N00044/2017-18/10353 as Interim Resolution Professional to carry the functions as mentioned under IBC.

21. Accordingly, this Petition is admitted.

22. The Registry is hereby directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional by email and speed post.

Sd/-
RAVIKUMAR DURAISAMY
Member (Technical)

Sd/-
V. P. Singh
Member (Judicial)

DT. 20th November 2018