

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH- IV

IB No. 2032/ND/2019

IN THE MATTER OF:

**M/s. Chowdhry Rubber & Chemical Pvt. Ltd.
19/310, Shahzada Bagh Old Rohtak Road,
Daya Basti, New Delhi-110035**

...PETITIONER/ OPERATIONAL CREDITOR

VERSUS

**M/s. Nikhil Footwears Pvt. Ltd.
100-101, Shahzada Bagh Industrial Area,
Old Rohtak Road, New Delhi-110035**

... RESPONDENT / CORPORATE DEBTOR

Under Section 9 of the Insolvency and Bankruptcy Code, 2016.

Order delivered on: 10.03.2022

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

MS. SUMITA PURKAYASTHA, HON'BLE MEMBER (TECHNICAL)

ORDER

Per: Sh. DHARMINDER SINGH, MEMBER (JUDICIAL)

The present Petition is filed under the Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter, The Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter, Rules) by M/s. Chowdhry Rubber & Chemical Pvt. Ltd., (hereinafter "applicant"), with a

prayer to initiate the Corporate Insolvency Resolution Process against M/s. Nikhil Footwears Pvt. Ltd. (hereinafter, Respondent/Corporate Debtor).

2. As per averments made in the petition, the Operational Creditor is a Company incorporated under the Companies Act, 1956 in the year 2008. The Operational Creditor is engaged in the business of manufacturing of footwears etc. The Corporate Debtor during the normal course of dealings and for the requirement of raw material for the goods manufactured by the Corporate Debtor had approached Operational Creditor from time to time to place verbal purchase orders of rubber chemicals, synthetic rubber and carbon etc. The Corporate Debtor has been demanding goods from the Operational Creditor on credit basis for which they use to do the irregular payments.
3. It is submitted that before the filing of the present petition Operational Creditor had approached before this Tribunal under Section 9 of IBC, 2016 bearing no. IB/ND/520/2017. In consonance to the same Corporate Debtor compromised the matter with the Operational Creditor and executed the memorandum of settlement dated 27.01.2018. However, the corporate debtor has failed to adhere the terms of the said settlement.
4. The applicant then filed the another application bearing no. IB/1394/ND/2018. The said application was dismissed for non-prosecution on 05.03.2019. The applicant however has filed an application for the restoration bearing no. CA 121/2019/IB-

1394/ND/2018. The same application was dismissed by this Tribunal vide order dated 12.04.2019 with a liberty to the applicant to a fresh petition because of the part payment of Rs. 2,00,000/- made by the respondent corporate debtor after filing of IB/1394/2018.

5. Subsequent to the order dated 12.04.2019 the applicant once again issued Demand Notice dated 25.06.2019 in terms of section 8 of the Code to corporate debtor which was served through speed post.
6. As per part IV of the application, Rs. 1,71,54,722/- alongwith interest is still pending to paid by Corporate Debtor for invoices issued between 25.03.2013 till 6.01.2015.
7. Upon issuance of notice, Ld. Counsel for the respondent appeared and filed reply to the present petition raising the following objections against the admission of the present petition:
 - a) It is alleged that the amount claimed by the applicant is time barred in accordance with the provision of Section 238A of the Code. As the period of more than 3 years stands lapsed from the date of the invoice mentioned by the Applicant i.e. 2013-2015. The corporate debtor argued that since the said petition has been filed clearly after the expiration of the period of 3 years from the date when the right to sue occurs, the instant petition is legally untenable.
 - b) Corporate Debtor also stated that the instant application is not in accordance with the provisions of the IBC as certified

under Section (9)(3)(C) of IBC, 2016 i.e. that the applicant failed to annex a copy of the certificate from the financial institutions, which maintains accounts of the Operational Creditor.

c) The corporate debtor stated that it has already made a payment of Rs. 24,50,000/- to the Applicant and there is no amount which is due and payable to the Applicant.

8. The petitioner has filed rejoinder to the reply of respondent and submitted as follows:

a) It is submitted that the limitation issued raised by the Coporate Debtor in the present petition is of no relevant as the settlement agreement was done on date 27.01.2018 bewteen the parties herein. Also, the applicant with respect to the order dated of this Tribunal 12.04.2019 was at liberty to file the petition on the same cause of action. The petition is very well within the period of limitation as per the new cause of action arose i.e. the settlement agreement.

9. The respondent has filed written arguments and submitted that:

a) The respondent has argued that the claim of applicant is based upon a settlement agreement dated 27.01.2018 and therefore, the CIRP cannot be initiated against the corporate debtor on the basis of the claim arising out of settlement agreement. Reliance has been placed upon the order passed by NCLT, New Delhi Bench-V, in the matter of *Brand Reality*


10/13

Services Ltd. Vs. Sir John Bakeries India Pvt. Ltd. In IB No. 1677/ND/2019.

b) The applicant has also placed reliance upon the judgment of *Next Education India Private Limited vs. K12 Techno Seviles Private Limited, CA (AT) (Ins.) No. 98 of 2019*, in support of their contention that the claim of the applicant is barred by limitation.

10. We have heard Ld. Counsel for the parties. We have perused the averments made in the application, reply, rejoinder and written submission filed by the parties.

11. On a perusal of the settlement agreement it is revealed that the respondent corporate debtor has itself gave no objection to initiation of the proceeding before this adjudicating authority. The relevant clauses of the agreement has been reproduced below:

“6. Insolvency petition IB (ND) 520/2017 is revived or refilled against the NFPL as the memorandum of settlement will be filed before the Hon’ble National Company Law Tribunal.

7. That as promised, assured and undertaken by the NFPL that all the liability shall be discharged by 31st March 2018 in the matter as stated above failing which CRCPL shall be at liberty to revive or refile the insolvency proceedings and NFPL shall no objections thereto whatsoever. There is no other case filed by the CRCPL against NFPL except the present one.”

12. It is a well settled principle of law that where one party has by his words or conduct made to the other a clear and unequivocal promise

which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it. Similarly, in the present matter the applicant withdrew the earlier filed petition on a promise made by corporate debtor. The corporate debtor also promised that the it would have no objection against initiation of insolvency proceedings in case of any failure to adhere terms of the agreement.

13. Hon'ble Supreme Court of India in the matter of *Gyarsi Rai And Others vs Dhansukh Lal And Others*, it was held that:

"To invoke the doctrine of estoppel three conditions must be satisfied : (1) representation by a person to another, (2) the other shall have acted upon the said representation, and (3) such action shall have been detrimental to the interests of the person to whom the representation has been made."

14. In the present case also the applicant has acted upon the promise of the respondent corporate debtor and withdrew the earlier petition. The respondent itself made promise and therefore is now estopped from raising objection against the present petition. The order in the matter of *Brand Reality Services Ltd. Vs. Sir John Bakeries India Pvt. Ltd. in IB No. 1677/ND/2019*, as relied by the respondent corporate debtor is not applicable in the present matter, as the respondent settled the matter before this Tribunal after filing of the earlier petition and the corporate

debtor itself by virtue of an agreement stands estopped from objecting the further initiation of proceeding under the Code by applicant. On the other hand in the matter of *Brand Relaity (supra)* the settlement was arrived between the parties before issuance of Demand Notice under Section 8, thus the order in the matter of *Brand Relaity (supra)* would not help the Respondent herein.

15. The respondent has settled the matter with the applicant after filing of IB 520/ND/2017. Thereafter, one more IB petition no. IB 1394/ND/2018 was filed by the applicant and Rs. 2,00,000 were paid by corporate debtor subsequent to filing of IB 1394/ND/2018. Thus, as far as point of limitation is concerned, the respondent itself in its reply has admitted the fact of making partial payments to the applicant even in the year 2018. The same fact was also recorded in the order dated 12.04.2019 passed by this Tribunal. Therefore, fresh cause of actions were started from the each date of payments made by respondent in terms of Section 19 of the Limitation Act. Hence, the application is not time barred and the judgments relied upon by the respondent corporate debtor is not applicable.

16. Resultantly, the present petition is allowed initiating Corporate Insolvency Resolution Process against the Corporate Debtor.

17. The applicant has not proposed the name of an IRP. Therefore, this bench appoints Mr. Rahul Jain as the Interim Resolution Professional of the corporate debtor. The registration number of the IRP being IBBI/ IPA-001 /IP-P02078/ 2020-2021/ 13219 and email id-



ca.rahuljain.2005@gmail.com. IRP above named is appointed subject to the condition that no disciplinary proceedings are pending against him. The specific consent is required to be filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 and made disclosures as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016.

18. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional namely, Mr. Rahul Jain to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

19. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 9 of the Insolvency & Bankruptcy Code, 2016.

20. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:



“(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;

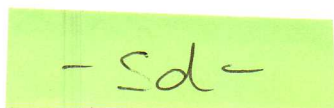
(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.”

21. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

22. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in

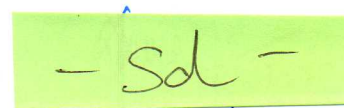
accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

23. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today.



(SUMITA PURKAYASTHA)

MEMBER (T)



(DHARMINDER SINGH)

MEMBER (J)