IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

C.P. (IB) No. 915/KB/2018

In the matter of:

An application by the Operational Creditor to initiate Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

And

In the matter of:

Relief Infrastructures, Gopalmath, District Burdwan, Durgapur-17

...Operational Creditor

Versus

Ashirbad Real Estate & Transport Private Limited, Chhata Pathar Bye Pass Road, P.O. Kalipahari, Asansol - 713339

...Corporate Debtor

Coram:

Shri Jinan K.R., Hon'ble Member (Judicial)

Counsels Present:

For Operational Creditor : Mr. D.N. Sharma, Mr. N. Sengupta, Mr. Shailendra Jain, and Mrs. Swati Agarwal, Advocates

For Corporate Debtor : Mr. Joyak Kr. Gupta, Mr. Rudra Prasad Matilal and Mr. Pabitra Biswas, Advocates

Date of pronouncement of Order: 19/03/2020

ORDER

1. This is a Petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code") by Relief Infrastructures, (hereinafter referred to as the Operational Creditor) a partnership firm represented by its partner, Mr. Sanjay Ghosh for initiating Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") against Ashirbad Real Estate & Transport Private Limited (hereinafter referred to as the Corporate Debtor/Respondent).

2. Brief facts of the Operational Creditor's case as per Form 5 is that the Corporate Debtor had issued a work order on or about 10.02.2015, pursuant to the said work order, in course of performance of work, the Operational Creditor raised 3 RA bills totalling to Rs. 2,01,70,551/- (Two Crore One Lakh Seventy Thousand Five Hundred and Fifty One Only). The

Corporate Debtor, to discharge its liabilities, had paid a sum of Rs. 66,00,000/-(Sixty Six Lakh Only). Thus, the remaining amount of Rs. 1,35,70,551/- (One Crore Thirty Five Lakh Seventy Thousand Five Hundred and Fifty One Only) is due with the Corporate Debtor and the amount claimed to be in default including the interest is Rs. 2,04,91,532/- (Two Crore Four Lakh Ninety One Thousand Five Hundred and Thirty Two Only) from 01.08.2015. The Corporate debtor had unconditionally accepted their liability under the aforesaid 3 bills by paying TDS on them. Soon thereafter, the Corporate Debtor asked the Operational Creditor to discontinue the said job. The Operational Creditor sent a notice dated 19.05.2018 under section 8 of the Code which was received by the Corporate Debtor on 22.05.2018. The Ld. Counsel appearing for the Operational Creditor submitted that the said demand notice was not replied to within 10 days.

3. Notice of this application was served on the Corporate Debtor. The Corporate Debtor filed an affidavit in reply wherein it has denied and disputed all the contentions raised by the Operational Creditor. The learned counsel appearing on behalf of the Corporate Debtor submitted that no proper date of default has been mentioned in Form V and has mainly raised 4 defences viz.,

I. The application has been filed by an unregistered partnership firm therefore the application is not maintainable under section 69 (2) of the Partnership Act;

II. The application is time barred;

III. There are pre-existing disputes.

IV. No amount is due to the Operational Creditor, in fact, excess amount has been paid;

4. Defence No. (I) - With regard to the competency of an unregistered partnership firm to sue the Corporate Debtor, the Ld. Counsel appearing for the Corporate Debtor submits that under section 69(2) of the Partnership Acct, 1932, the present application is not maintainable. The Ld. Counsel for the Operational Creditor, on the other hand, submitted that an application under section 9 of the Code can be filed by an unregistered partnership firm. For this purpose, the Operational Creditor has relied on few judgments namely, Shree Balaji Steels v. Gontermann-Peipers (India) Ltd., (2003) CompCas 193, Durre Welt Overseas v. M/s. Gheli International Pvt. Ltd., (IB)-754(ND)/2019 and M/s. NN Enterprises v. Relcon Infra Projects Limited, CP(IB)3890/MB/C-IV/2018. In NN Enterprises v. Relcon Infra Projects Limited, the Ld. Mumbai Bench has held that:

"We, therefore, hold that the provisions of section 69(2) of the Indian Partnership Act, 1932 applies to "suits" and therefore, cannot apply to "proceedings" under the IBC."

In my opinion also, the bar under section 69(2) of the Partnership Act, does not apply to the applications under section 7 and 9 of the Code. I, therefore, hold that section 69(2) of the Partnership Act is not applicable to the present case and the said argument of the Corporate Debtor is found devoid of any merit.

5. Defence No. (II) - The Ld. Counsel appearing for the Corporate Debtor submits that the present application is time barred since the same has been filed beyond the period of limitation. As per the Form V, the work order was issued on or about 10.02.2015 and the last payment in furtherance of the three RA bills was made by the Corporate Debtor on 06.06.2015. No date of default is mentioned in the Form V. As per the Operational Creditor's submission in para (i) of column 2 of Part IV of the Form V, *"the Respondent Company/Corporate Debtor had obtained the aforesaid sum of Rs. 1,35,70,551/- only on 7th June, 2015 knowing very well that they were not in a position to provide the marketable title of the landed*

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property in question", whatever does the submission mean, if the said date, i.e. 07.06.2015, is taken as a date of default this application is indeed time barred since the same was filed on 21.06.2018, i.e. beyond three years . In para (ii) of column 2 of Part IV of the Form V, it is submitted that *"Thus they should be held responsible to refund the same along with the interest @ 18% p.a. from 1st August, 2015 onwards upto 30th May, 2018",* in absence of a date of default and a proper working computation of amount and dates of default in tabular form or any document corresponding to the said date substantiating the same, the bench is unable to understand as to from where such dates have been arrived at. For the said reason, I am of the considered opinion that the application is time barred.

6. At this juncture the Ld. Counsel for the Operational Creditor submitted that the Corporate Debtor has admitted the said outstanding amount since the TDS has also been paid and the proof thereof is on record. However, it is a well settled law that the TDS does not amount to acknowledgment of any liability by one party to the other. At the most the TDS can be relied on as a proof of deduction of Tax at source by the Corporate Debtor. The attempt on the side of the Operational Creditor is to show that a fresh period of limitation starts from

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the date of certificate, i.e. from 20.07.2015. So, the question is whether the TDS certificate amounts to an acknowledgment under section 18 of the Limitation Act, 1963.

7. Section 18 of the Limitation Act which speaks of the effect of acknowledgment in writing reads as follows:

"18. Effect of acknowledgment in writing.-
(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.
(2) Where the writing containing the acknowledgment is undated oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.
Explanation.- For the purposes of this section,-
(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right;
(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and

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(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."

8. From a reading of Sub section (1) of Section 18 it is evident that to invoke this provision:

(1) there must be an acknowledgment of liability in respect of property or right;

(2) the acknowledgment must be in writing signed by the party against whom such right or property is claimed (or by any person) through whom he derives his title or liability;

(3) the acknowledgment must be made before the expiration of the period prescribed for a suit or application (other than application for the execution of a decree) in respect of such property or right.

9. The effect of such an acknowledgment is that a fresh period of limitation has to be computed from the time when the acknowledgment was so signed. It may be noted that for treating a writing signed by the party as an acknowledgment, the person acknowledging must be conscious of his liability and the commitment should be made towards that liability. It need not be specific but if necessary facts which constitute the liability are admitted, an acknowledgment may be inferred from such an admission. Such an inference cannot be drawn

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from a TDS certificate. None of the ingredients of Section 18 of the Limitation Act, read with the Explanation are not at all satisfied by a TDS certificate. Though no reference to judicial decision to strengthen this view is to be searched for, in S.P. Brothers, a partnership firm Vs. Biren Ramesh Kadakia, 2009(1)BomCR453, the Hon'ble High Court of Bombay held that:

> *"The issuance of TDS certificates does not amount to an acknowledgment of liability within the meaning of Section 25 of the Indian Evidence Act and the Full Bench judgment of this Court in the case of Jyotsna K. Valia Vs. T.S.Parekh And Co., 2007(3)BomCR772 puts the matter beyond doubt. The TDS certificate is primarily to acknowledge the deduction of tax at source. The certificate does not refer to any amount of loan or even the rate of interest which is payable on the said principal amount. It does not refer to any contract between the parties and even a transaction..."*

10. The abovesaid decisions were followed by the Hon'ble High Court at Calcutta in J.K. Engineering Pvt. Ltd. vs. ANE Industries Pvt. Ltd., MANU/WB/0278/2019. Referring to the said decisions and the decision of the Delhi High Court in Utility Powertech Limited Vs. Amit Traders reported in (2018) SCC Online Del 9096 wherein it was held that *TDS can be deducted even on the expectation of estimated*

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*liability.*followed the decision of the Supreme Court in Commissioner of Income Tax Vs. Gujarat Fluoro Chemicals reported in (2012) 13 SCC 731, wherein the Hon'ble Supreme Court has observed that:

> *"admission of an existence of a jural relationship is not the same as acknowledgment of liability of a specific amount outstanding to an alleged creditor, unless the books of accounts of the alleged debtor reflects the amount as a debt or money kept aside and liable to be paid to the creditor in question."*

11. The TDS certificate, therefore, in my view, cannot be taken as *prima facie* evidence of the debt or liability of the Petitioner in the sum of Rs. 1,35,70,551/- as claimed by the Operational Creditor. Thus the Application is time barred.

12. Defence No. (III & IV) - The Ld. Counsel for the Corporate Debtor submits that there are pre-existing disputes with respect to the existence of amount of debt; the Counsel submits that no amount is due to the Operational Creditor, in fact, excess amount has been paid. The Counsel drew my attention towards two letters. First, a letter dated 05.03.2018 wherein the Operational Creditor has requested the Corporate Debtor to make the payment of the outstanding amount and a second letter dated 16.04.2018 which was in response to the first letter. Both these letters are dated before 19.05.2018

which is the date when the statutory demand notice was sent, which establishes that the dispute existed prior to the date when the demand notice was sent. He relies on para 40 of Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd., to support his submission that the application is not maintainable on ground of pre-existing dispute.

13. Further, in the said second letter the Corporate Debtor had denied that any amount was outstanding and that an amount of Rs. 5,05,670/- has been paid in excess to the Operational Creditor. The Ld. Counsel further brought to light several documents in order to prove that the amount has been paid in excess and that no amount is due. The Counsel for the Operational Creditor challenged the signature on one such document and submitted that the documents have been forged after the receipt of the demand notice. However, the genuineness of the said signature or the document cannot be looked into by this Tribunal. So it is uncertain whether the amount as claimed is due and payable by the CD as alleged. On the other hand, existence of dispute as regards existence of debt as claimed by the OC stands proved in this case.

14. In view of law discussed herein with respect to Section 18 of Limitation Act and law laid down in judgments referred

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hereinbefore, I am satisfied that the application was filed not in time and it is barred by limitation. Moreover, the Corporate Debtor has succeeded in proving that there existed a dispute regarding the existence of debt as claimed before the date of issuance of demand notice. Accordingly this application is liable to be dismissed.

15. In the result the Application bearing C.P.(IB)No.915/KB/2018 is dismissed. No orders as to cost.

19/3/20

(Jinan K.R)
Member (Judicial)

Signed on this 19th day of March, 2020.

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