

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

CP(IB)No.2781/NCLT/MB/2018

Under Section 7 of the I&B Code, 2016

In the matter of

A.K Corporation

...Financial Creditor/ Petitioner
v/s

Anupam Extractions Limited

...Corporate Debtor

Order Dated 16th July 2019

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

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

For the Petitioner: Adv. Yahya Batatawala and PCS. S.K Jain

For the Respondent: PCS. P.S Thakre

Per: V.P. Singh, Member (Judicial)

ORDER

1. This is a petition being CP 2781(IB)/MB/2018 filed by **A.K Corporation**, a sole proprietorship concern, the Financial Creditor or Petitioner, under section 7 of Insolvency & Bankruptcy Code, 2016 (**I&B Code**) against **Anupam Extractions Limited**, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**). The petition was filed on 18th July 2018.
2. The Petition is filed claiming a total default of ₹74,33,697.94/- (Rupees Seventy Four Lakhs Thirty-Three Thousand Six Hundred and ninety-Seven and Ninety-Four paise only) as on 31.03.2018. The Petition is filed by Mr Ashok kumar Basudeo Saraf, the sole proprietor of the proprietorship concern who has provided financial assistance by providing loan to the Corporate Debtor, a company registered under the Companies Act, 1956.
3. The Petitioner submits that a sum of ₹26,80,666/- (Rupees Twenty Six Lakhs Eighty Thousand Six hundred and Sixty Six) was granted and disbursed as a loan to the Corporate Debtor by the Petitioner from 24.05.2006 to 31.03.2007. It is stated that out of the total amount in default of ₹74,33,697/- (Rupees Seventy-Four Lakhs) ,Thirty-Three Thousand Six hundred and

Ninety-Seven Only) as on 31.03.2018, the Corporate Debtor failed to pay a sum of ₹26,80,666/- (Rupees Twenty Six Lakhs Eighty Thousand Six Hundred and Sixty Six only) that is the principal amount in default and an interest of ₹47,53,031.94/- (Rupees Forty Seven Lakhs Fifty Three Thousand and Thirty One and Ninety Four paise only) compounded at the rate of 12% per annum. The working for computation of the claim amount and the Ledger Account of the Corporate Debtor in the Books of the Petitioner is annexed to the Petition.

4. The Petitioner submits that the proprietor of the Petitioner concern, Mr Ashok B. Saraf, was the Director in the Respondent Company until 12.03.2008, and the loan is reflected as "Unsecured Loan from Director" in the Audited Annual Accounts of the Respondent. Further, in the Financial Year 2009-10 till 2017-18, the loan given by the Petitioner reflects in the Audited Annual Accounts of the Respondent under the head "Unsecured loans from Shareholders".
5. The Petitioner submits that the loan provided by the Petition reflects as "Long term Borrowings –Loan from Shareholders" in the Audited Balance Sheet of the year 2012-13, 2013-14, 2014-15 and 2015-16 aggregating to ₹82,15,091/- which includes loan of the Petitioner amounting to ₹26,80,666/- (Rupees Twenty Six Lakhs Eighty Thousand Six Hundred and Sixty Six Only). The loan reflects under the head "Loans from Shareholders" in the Audited Balance Sheet for the Financial Year 2016-17. The Audited Balance Sheet from the year 31.03.2008 to 31.03.2017 is annexed to the Petition. Copy of the Audited Financial Statements of the Respondent for the Financial Year 2017-18 is annexed to the Rejoinder filed by the Petitioner.
6. The Bank Certificate issued by the Akola Urban Co-op Bank Limited, Akola Wardha Branch along with the Bank Statement for the period 01.04.2007 to 31.03.2018 and the Bank Certificate issued by the Central Bank of India, MIDC Wardha Branch along with the Bank Statement for the period from 01.04.2006 to 31.03.2010 is also annexed to the Petition.

7. The Petitioner submits that the Petitioner has sought repayment of loan along with interest and TDS Certificates vide its various letters dated 25.03.2007, 15.07.2008, 22.10.2008, 06.06.2009, 13.07.2009, 20.05.2011, 16.09.2017 and 03.10.2017. Copies of the said letters are produced on record.
8. The Respondent filed its Objections to the Petition by way of Affidavit in Reply on 25.02.2019. It is submitted by the Respondent that there is no instrument executed between the Petitioner and the Respondent. The Respondent submits that the Petitioner being a Director was also in charge of the functioning and the management of the day to day affairs of the Company, the monies so provided by the Petitioner were provided to meet the Company's requirements, and it was not agreed to be paid along with any interest.
9. It is further submitted by the Respondent that the document submitted by the Petitioner as "Particulars of Security held, date of Creation and its estimated value" annexed to the Petition is pertaining to the charge created in favour of the Oriental Bank of Commerce for the Corporate Guarantee given by the Respondent for the Credit facility extended by the Oriental Bank of Commerce to M/s Ajanta Extractions, a Partnership firm and the same has no connection with the present Petition. Further, the No Dues Certificate has already been obtained from Oriental Bank of Commerce against the said charge. A copy of the Charge Satisfaction Certificate is annexed to the Objections.
10. It is submitted by the Respondent that the Petition is barred by limitation. The Respondent submits that the Hon'ble Supreme Court of India in the matter of "*B. K Educational Services Private Limited v. Parag Gupta and Associates*", Civil Appeal No.23988 of 2017, has held that the Limitation Act, 1963 will apply to the applications that are made under section 7 and section 9 of the Insolvency and Bankruptcy Code, 2016 on and from the commencement of the I&B Code on 01.12.2016.
11. It is further submitted by the Respondent that the amount claimed to be in default is in dispute. The Petitioner provided the

money to the Respondent Company in the year 2006-07, while the Petitioner was in the Board of Directors. However, subsequently, the Petitioner was removed from Directorship on 12.03.2008 due to mismanagement done by the Petitioner as a result of which the Respondent suffered huge losses. The same was confirmed in Board Meeting dated 24.03.2008. The minutes of the said meeting is annexed to the Objections.

12. The Respondent submits that due to mismanagement of the Petitioner in the Respondent Company, the Respondent was on the verge of closure due to huge losses, and the Petitioner in his Letter dated 25.03.2007 has himself stated that the Respondent has suffered huge losses and is on the verge of closure. The letter dated 25.03.2007 issued by the Petitioner is annexed to the Objections.
13. The Petitioner filed its Rejoinder dated 06.07.2019 and submits that the Affidavit in-Reply does not contain the Board Resolution authorising Mr Rajendra kumar Basudeo Saraf to file the Objections and that it is not by the Rule 34 read with NCLT Form No. 6 of the National Company Law Tribunal Rules, 2016. Further, in the said Affidavit, there is no statement to affirm that the statements made in the Affidavit are true to the best of the knowledge and based on the information believed to be true.
14. The Petitioner in its Rejoinder submits a catena of judgements in support of its claim that the Balance Sheet of the Respondent is an acknowledgement of Debt and that the period of limitation gets a fresh extension from the date of signature on the Balance Sheet.
15. We have heard the parties and perused the records.
16. The Petition is filed by Mr Ashok B Saraf, Sole Proprietor of the Proprietorship Concern, A.K Corporation.
17. The Petitioner claims a due of ₹74,33,697.94 (Seventy Four Lakhs Thirty Three Thousand Six Hundred and Ninety-Seven Rupees and Ninety Four Paise only) including interest as on 31.03.2018.

18. It is an admitted position that the Petitioner was a Director of the Respondent Company when he extended ₹26,80,666/- as a loan to the Respondent from 24.05.2006 to 31.03.2007 and a principal sum of ₹26,80,666/- is claimed to be unpaid till date. In this regard, the Audited Balance Sheets of the Respondent Company from the year 2008 to 2018 are annexed to the Petition which reveals that the Respondent has admitted the fact that said amount is unpaid till date. It is well-established law that an entry in Balance Sheet acknowledging a loan is considered as an acknowledgement as per section 18 of the Limitation Act, 1963.
19. Further, the Board Report of the Respondent Company for the Financial year 2017-18 clearly states that the Respondent has withheld the loan from the Petitioner due to acts of mismanagement by the Petitioner during his tenure as a director of the Respondent Company. The relevant portion of the Board Report is extracted below:

“There is an unsecured loan due to A.K Corporation amounting to ₹26,80,666/-. The proprietor of A.K Corporation is Ashok Kumar Saraf. The amount due to the firm is being withheld by the Company because Mr. Ashok Kumar Saraf resorted to malpractices and embezzlement of funds while he was Director of the Company and as a result of his malpractices was removed as Director of the Company by the shareholders. Also, he did not hand over the records of the Company, and because of that, many tax matters and cases with various Tax Authorities are still pending. In a few cases, the Department has levied heavy penalty due to non-availability of records and lack of information from Mr Ashok Kumar Saraf but to no avail. The Company also informs that all cost/penalties which the Company if/may be held liable to pay by the Department and various authorities, the Company will

hold A.K Corporation responsible for payment of the same”.

20. The Respondent has admitted that debt is due. However the same is withheld on account of malpractices and embezzlement of funds. The Respondent has submitted that there exists dispute about the non-payment of the Loan amounts to the Petitioner. However, the Hon’ble Supreme Court of India in ***M/s Innoventive Industries Limited v. ICICI Bank & Anr in Civil Appeal No.8337-8338/2017***, has held that

“...in the case of a corporate debtor who commits a default of 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...”.

21. In the light of the above judgement and as per section 7 of the I& B Code, 2016, the contention of the Respondent that the debt is disputed is not maintainable as the existence of a dispute is of no consequence in a petition filed under section 7.
22. The Respondent has also taken a contention that the Petitioner and Respondent have not entered into any instrument and that the amount was given by the Petitioner in the capacity of Director on the Board of Directors of the Respondent Company and the basis of mutual understanding between all the Directors of the Respondent Company, and there were no interest provisions for the amount so provided by the Petitioner. In this regard, the Hon’ble National Company Law Appellate Tribunal has elaborately explained that the money extended by the Directors or Promoters of a Company, even at zero rates of interest is financial debt, ***Shailesh Sangani v. Joel Cardoso & Anr in Company Appeal, (AT)(Insolvency)No.616 of 2018***, the relevant paragraph of the judgement is extracted below:

"A plain look at the definition of 'financial debt' brings it to fore that the debt along with interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression 'if any' as a suffix to 'interest' leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of 'financial debt'. The amount disbursed as a debt against the consideration for the time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of Section 5(8) embody the nature of transactions which are included in the definition of 'financial debt'. It includes money borrowed against the payment of interest. Clause (f) of Section 5(8) specifically deals with the amount raised under any other transaction having the commercial effect of a borrowing, which also includes a forward sale or purchase agreement. It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Corporate Debtor as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the -9- Company Appeal (AT) (Insolvency) No. 616 of 2018 part of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interests be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such a situation, such funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to conflict with the interests of

the Company. Enhancement of assets, increase in production and the growth in profits, share value or equity enures to the benefit of such stakeholders, and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with an obligation on the part of Company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases, the amount taken by the Company is like a 'financial debt'."

23. It is observed from the letters dated 25.03.2007, 15.07.2008, 22.10.2008, 06.06.2009, 13.07.2009, 20.05.2011, 16.09.2017 and 03.10.2017 that Petitioner has from time to time called upon the Respondent Company to issue TDS Certificates and Statement of Loan Account and also repayment of the loan.
24. As the debt and default are established, the question that arises at this point is whether the Petition is filed within the period of limitation.
25. It is imperative to mention here that unless the Petition is filed within the period of limitation, the same cannot be considered on merits. In this regard, the Respondent has cited various Supreme Court Decisions that the Law of limitation applies to the proceedings under section 7 and 9 of the Insolvency and Bankruptcy Code, 2016.
26. It is relevant to mention that Section 238A of the Code, 2016 was inserted on 17.08.2018, making it clear that the provisions of the Limitation Act, 1963 applies to the proceedings under the Code. It is further relevant to note that, even prior to the insertion of section 238A of the Code, Article 137 of the Limitation Act, 1963 provided that "The period of limitation for any other application for which no period of limitation is provided elsewhere in this Division is three years, and the limitation commences from the date when the right to apply accrues."

27. A plain reading of Article 137 of the Limitation Act, 1963 makes it crystal clear that the limitation commences from the date when the right to apply accrues. In this regard it is relevant to mention that the Hon'ble National Company Law Appellate Tribunal in the case of ***Pushpa Shah & Anr v. IL & FS Financial Services & Anr in Company Appeal (AT) No.521 of 2018***, the Hon'ble Appellate Tribunal has held that the Code has come into force on 01.12.2016, the right to file application under Section 7 of the Code accrues on or after 01.12.2016 and therefore the application cannot be held barred by limitation. The Hon'ble Appellate Tribunal has reiterated the position of law regarding limitation in the case of ***Gaurav Hargovinda Dave, v. Asset Reconstruction Company (I) Limited & Anr in Company Appeal (AT)(Insolvency) No.655 of 2018*** by order dated 02.05.2019 held that the right to file an application under section 7 of the I & B Code, 2016 accrues on or after 01.12.2016. The position of law is well established that the right to apply to section 7 of the I & B Code, 2016 accrues on or after 01.12.2016, the present Petition is filed well within the limitation and deserves to be admitted.
28. In the light of the above decision of the Hon'ble NCLAT, the right to apply under the Insolvency and Bankruptcy Code, 2016 has accrued to the Petitioner only on the date of commencement of the Code, i.e., on 01.12.2016. The Petition is filed on 18.07.2018 and therefore is well within the limitation period.
29. The Petitioner has proposed the name of Mr Charudutt Marathe, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00350/2017-18/10651] as Interim Resolution Professional, to carry out the functions as mentioned under I&B Code, and given his declaration; no disciplinary proceedings are pending against him.
30. The Application under sub-section (2) of Section 7 of I&B Code, 2016 is complete. The existing financial debt of more than rupees one lakh against the corporate debtor and its default is also proved. Accordingly, the petition filed under section 7 of the

Insolvency and Bankruptcy Code for initiation of corporate insolvency resolution process against the corporate debtor deserves to be admitted.

ORDER

This petition filed under Section 7 of I&B Code, 2016, filed by **A.K Corporation**, Financial Creditor / Petitioner, under section 7 of Insolvency & Bankruptcy Code, 2016 (**I&B Code**) against **Anupam Extractions Limited**, Corporate Debtor for initiating corporate insolvency resolution process is at this moment admitted. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

- I. That this Bench as a result of this 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 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 the moratorium period.

- III. That the provisions of sub-section (1) of Section 14 of I&B Code 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 the date of this order 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 I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, 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 I&B Code.
- VI. That this Bench at this moment appoints Mr.Charudutt Marathe, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00350/2017-18/10651] as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
31. The Registry is at this moment directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp **Compliance report of the order by Designated Registrar is to be submitted on 16th July 2019.**

Sd/-
RAVIKUMAR DURAISAMY
Member (Technical)

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

16th July 2019
Aparna Kulkarni -LRA