IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

Company Petition (IB) No. 76/KB/2023

An application 10 of Insolvency and Bankruptcy Code, 2016 read with Regulation 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016.

<u>IN THE MATTER OF</u>:

Ellen Barrie Exim Limited

[CIN: U74900WB1995PLC071206] … Corporate Applicant.

Date of Hearing: October 13, 2023.

Date of Pronouncement: November 09, 2023.

<u>CORAM</u>:
SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)
SHRI ARVIND DEVANATHAN, MEMBER (TECHNICAL)

<u>Appearance</u>:
<u>For Applicant</u>: Mr. Shaunak Mitra, Adv. and Ms. Suparna Sardar, Adv.

ORDER

PER Bidisha Banerjee, Member (Judicial):

1. This Court is congregated through hybrid mode.

2. This instant application is filed by one **Ellen Barrie Exim Limited** under Section 10 of Insolvency and Bankruptcy Code, 2016 (for brevity "IBC") read with Regulation 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking direction from this Adjudicating Authority to initiate Corporate Insolvency Resolution Process (for brevity "CIRP").

3. **Briefs facts of the case:**

3.1. **Ellen Barrie Exim Limited**, the Corporate Applicant herein (for brevity "CA"), a company incorporated under the provision of the Companies Act, 1956 having its registered office at P-17, Kalakar Street, 3rd floor, Kolkata-700007, West Bengal, is engaged in international trading of cut & polished diamonds with its unit located in Special Economic Zone (in short "SEZ"), Falta, West Bengal.

3.2. The Corporate Applicant claims that they have imported 64 consignments of goods from one of their major suppliers, Gulf Dune FZE, Sharjah, UAE during the period October 2007 to March 2008 valued at $ 2,72,14,020.21 out of which they have paid $ 1,08,33,565.82 up to July 2008 and the balance $ 1,63,80,454.39 remained unpaid as on 31.03.2009 and the same is being carried forward as on 31-3-2022.

3.3. The Corporate Applicant further claims that the non-payment of the balance due to the supplier is mainly due to their inability to collect their dues from one of their big customer Bee Kay Distributors Ltd., Hong Kong to the tune of $ 1,55,07,678.06.

3.4. In addition, the CD is unable to pay few other operational debts and also faces several litigations. It is the claim of the CD that they are no longer in a position to bear litigation expenses and the business has come to a complete halt. Hence, this petition for initiating for corporate Insolvency Resolution Process (CIRP) under Section 10 of IBC.

4. Submission made by the Ld. Counsel for the Applicant:

4.1. Ld. Counsel for the corporate applicant submits that they have defaulted in paying Income Tax, the operational creditor Gulf Dune FZE and also to one Financial Creditor named Mr. Ashok Chaudhary to the tune of Rs. 20 Lakh. While the operational debt due to Gulf Dune FZE is from the year 2008-2009, the Income Tax Demand is for the financial year 2006-2007 and 2007-2008 assessed in 2009/2010.

4.2. Ld. Counsel for the corporate applicant further claims that the financial and operational debts put together is far in excess of the threshold limit prescribed under IBC, since the debt incurred in 2008 is carried forwarded in their books till date. The application has been filed within the time limit prescribed under IBC and therefore, prayed for admission of the application made under section 10 of IBC for initiating CIRP of the Corporate Debtor.

5. Analysis and findings:

5.1. We have perused the records and heard the Ld. Counsel for the Corporate Debtor in detail.

5.2. We find that operational debt due to Gulf Dune FZE stood at Rs. 1,28,65,323 (which is in Page No. 269 of the petition) in the Balance sheet as at 31-3-2022 as against the CD's claim in his application as due for an amount of $ 1,63,80,454 which if converted in to Indian rupees is nearly 100 times the due reflected in the balance-sheet as on 31.03.2022.

5.3. The trade receivable from Bee Kay Distributors stood at Rs. 64,85,44,197/- in the Balance Sheet as on 31-3-2022 as against the claim of the corporate debtor in his application than an amount at $ 1,55,07,678 is due from the said Customer, which on conversion to Indian rupees is nearly twice the amount shown in the balance-sheet as receivable.

5.4. In the written note of arguments made by the Ld. Counsel for the Corporate Applicant, it been stated that the Customer Bee Kay Distributors Ltd vide their letter dated 6th April 2016 informed the Corporate Applicant that they will arrange funds from their sources in India on temporary accommodation loan without Interest and requested the Corporate Applicant to share its Bank Details. It has also been stated that parties known to Bee Kay Distributors have transferred money in to the Bank account of Corporate Applicant. Nowhere in the application or in subsequent documents filed, Corporate Applicant has mentioned about details of such payment to them and to the extent of amount remitted.

5.5. Further in the application, it is claimed that they owe Rs. 20 Lakh as financial debt to one Mr. Ashok Chaudry and have relied on letters written by him which has been placed on record from Pages 15 – 19 in the supplementary affidavit filed by the Corporate Applicant without providing any proof of disbursement made by the said Financial Creditor to Corporate applicant. Neither we find any replies made to his letters by the Corporate Applicant nor it is shown as liability in the notes to accounts of the

Financials for the year ended 2021-22. Thus, we are of the view that this claim made by the Corporate Applicant is also baseless.

5.6. There is nothing on record that has been placed to show that any notice or recovery proceedings have been initiated by the said operational creditor even for the amount shown in the Balance sheet as on 31-03-2022, leave alone the amount claimed by the applicant as due in his application.

5.7. Inconsistency is writ large between the claims made in the application filed, the audited financials, averments made during the course of hearing and in the written note.

5.8. In light of several inconsistencies mentioned above apart from lack of **sufficient proof of default**, the applicant has not been to demonstrate the incidence of default and the actual amount due to Financial Creditor and Operational creditor conclusively.

6. In terms of the view above, we find no merit in this application and hence, we **dismiss** this application being **C.P. (IB) No. 76/KB/2023.**

7. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Arvind Devanathan **Member (Technical)**	**Bidisha Banerjee** **Member (Judicial)**

This Order signed on the 09th day of November, 2023.

Bose, R.K. [LRA]/ AR_Steno