

NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

C.P. (IB) 4044/2019

Under section 7 of the Insolvency and
Bankruptcy Code, 2016

In the matter of

**Edelweiss Asset Reconstruction Company
Limited**

Registered Office at: Edelweiss House, Off CST
Road, Kalina, Mumbai 400098, Maharashtra
....Petitioner/Financial Creditor

versus

Chemstar Organics (India) Limited

Registered Office at: PNB HOUSE, Phirozsha
Mehta Road, Fort, Mumbai 400001.
....Respondent/Corporate Debtor

Order delivered on: 03.06.2021

Coram:

Hon'ble H. V. Subba Rao, Member (Judicial)
Hon'ble Shyam Babu Gautam, Member (Technical)

Appearance:

For the Petitioner: Mr. Prakash Shinde, Advocate i/b MDP
& Partners

For the Respondent: Mr. Shadab Jan, Advocate i/b
Crawford Bailey & Co.

Per: Shri. H.V. Subba Rao, Member (Judicial)

ORDER

This Company Petition is filed by Edelweiss Asset Reconstruction Company Limited (hereinafter called as the “petitioner”) seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Chemstar Organics (India) Limited (hereinafter called as the “respondent”) by invoking the provisions of Section 7 of Insolvency and Bankruptcy Code (hereinafter called “Code”), 2016 alleging that the respondent committed default in making repayment of the loan facility availed by it from the petitioner.

BRIEF FACTS OF THE CASE:

a. The Bank of Baroda vide sanction letters dated 12.03.1998 and 07.04.1999 had sanctioned various credit facilities to the respondent which are as under;

Sr. No.	Sanction letters
1.	<p>Saction letter dated 12.03.1998 providing the following facilities</p> <p>(i) Term loan- 2,50,000/-</p> <p>(ii) Cash Credit 2,00,00,000/-</p> <p>(iii) Packing credit 2,00,00,000/-</p> <p>(iv) Advance bill- 2,00,00,000/-</p> <p>(v) Cash Credit 50,00,000/-</p> <p>(vi) Letter of credit- 25,00,000/-</p> <p>(vii) Bank Guarantee- 25,00,000/-</p>
2.	Sanction letter dated 07.04.1999 sanctioning Adhoc credit limit of Rs. 70,00,000/-

- b. To secure the facility sanctioned by the petitioner to the respondent, the Bank of Baroda and the Corporate Debtor had entered into various loan agreements.
- c. On 31.05.2000, the respondent had defaulted in repayment of the facilities availed from Bank of Baroda and pursuant to defaults committed by the respondent, it was declared as a non performing asset (NPA) in the books of Bank of Baroda on 30.09.2000.
- d. On 30.06.2003, the respondent has confirmed, admitted and acknowledged the liability by passing resolution for execution of LAD.
- e. On 13.03.2006, the respondent submitted a letter *inter alia* showing their willingness to settle the dues of the Financial Creditor.
- f. Bank of Baroda addressed a letter to the respondent *inter alia* stating that the said amount is as per the schedule and in case of default in complying the terms and condition the petitioner shall treat the compromise as cancelled, the said letter addressed by Bank of Baroda to the respondent was received and accepted by the respondent.
- g. The Bank of Baroda, assignor of the petitioner immediately initiated SARFAESI Act, proceeding against the respondent. On 15.06.2016, it issued notice under Section 13(2), SARFAESI Act to the respondent. On 12.01.2007 issued Notice under Section 13(4) SARFAESI Act and took symbolic possession of the secured assets of the respondent. The respondent filed Securitisation Application being S.A. No. 4 of 2007 under Section 17 of the SARFAESI Act, challenging the measures under section 13(4) of the SARFAESI Act taken by the Bank of Baroda, before the Hon'ble DRT-1 Mumbai, pursuant to which the Hon'ble DRT-1 Mumbai vide order dated

06.04.2007, granted status quo prohibiting Bank of Baroda from taking further action under SARFAESI against the respondent.

- h. The Bank of Baroda assignor of the Financial Creditor as there was the default on part of the Corporate Debtor and huge amount was to recovered from Corporate Debtor filed Original Application being No. 43 of 2007, before the DRT- Ahmedabad for recovery. The said OA is dismissed for default and Misc. Application for restoration of the OA is still pending before before the DRT-Ahmedabad.
- i. The Hon'ble Bombay High Court on 21.06.2007 and 13.11.2009 in Company Petition No. 523 of 1998 has inter alia held that the respondent has made a reference before the B.I.F.R. under the Sick Industrial Companies (Special Provision) Act, 1985.
- j. The petitioner submitted that the respondent, on 24.03.2011 had offered One Time Settlement Proposal to Bank of Baroda for an amount of Rs. 2,75,00,000/-.
- k. On 24.03.2011, the Hon'ble Bombay High Court in Company Petition No. 523 of 1998 passed an order wherein the respondent was directed to be wound up, in the terms of Companies Act, 1956.
- l. Bank of Baroda vide their letter dated 25.10.2011 rejected the OTS proposal of the respondent.
- m. On 23.02.2012, the Hon'ble Bombay High Court in Company Petition no. 523 of 1998 passed an order inter alia recording the submission of the petitioner that the reference before BIFR has been reserved for orders, however no date has been given by BIFR as to when the order shall be pronounced. The petitioner was directed to place copy of this order before BIFR and the matter was adjourned to 14.03.2012.
- n. The respondent had made a reference Case No. 45 of 2007 and later on 45 of 2011, before BIFR under Section 15(1) of "The Sick Industrial Companies (Special Provision) Act, 1985 and the said reference was rejected only on 01.05.2012.
- o. Thereafter the Corporate Debtor challenged the said order dated 01.05.2012, rejecting the reference passed by the BIFR, in Appeal before AAIFR. The dismissal order of BIFR was subsequently upheld by the Hon'ble AAIFR.
- p. On 15.03.2012, the Hon'ble Bombay High Court passed an order inter alia recording that the company's reference under SICA is rejected, however the company has preferred an appeal before the

appellate authority for Industrial and Financial Reconstruction and the same is pending and the next date of hearing before AAIFR is 01.05.2012.

- q. On 21.01.2013, the Hon'ble Bombay High Court inter alia recorded that the next date of hearing before the AAIFR is 11.07.2013. In view of the statement, the hearing of the petition was deferred. The dismissal order of BIFR was subsequently upheld by the AAIFR.
- r. The loan account of the respondent was assigned to the petitioner by Bank of Baroda vide an Assignment Agreement dated 26.03.2014.
- s. The petitioner, vide its letter dated 05.01.2015 accepted the OTS proposal made by the respondent wherein it had acknowledged the debt of Rs. 7,10,00,000/-. The respondent has on 07.01.2015, made a part payment of Rs. 35,00,000/- to the petitioner but in view of the failure on part of the respondent in making the remaining payment, the petitioner vide its letter dated 26.09.2017 revoked the settlement. Further, the petitioner vide its letter dated 29.03.2019 cancelled and revoked the OTS of the respondent as it had committed default in repayment under OTS.

I. SUBMISSIONS OF THE PETITIONER:

- i. Admittedly an outstanding debt of Rs. 142,55,35,318/- is due and payable by the Corporate Debtor to the Financial Creditor as on 23.09.2019.
- ii. There is documentary evidence on record which is not disputed, denied or refuted by the 'Corporate Debtor', which evident that the financial debt is due and payable, there are acknowledgment of debt in writing before the expiry of period of limitation by the 'Corporate Debtor' vide various written correspondence in the form of acknowledgment of debt, one time settlement proposal, revised one time settlement proposal (OTS) and payments made under the OTS from time to time has extended the limitation as each of these has given a fresh lease of life to the liability with fresh period of limitation commencing from such acknowledgement in writing having been made within limitation period, OTS followed with settlement agreement and part payments made on several occasions in pursuance thereof. The sequence of dates and events clearly demonstrated by the

documents forming a chain events and the application under Section 7 having filed on 4.11.2019 by 'Financial Creditor' is clearly within the period of limitation.

- iii. The present petition is not barred by law of limitation. The petition is proper, complete in all respect in terms of Section 7 of the Insolvency and Bankruptcy Code, 2016. The petitioner further submitted that the Corporate Debtor has time and again acknowledged the debt.
- iv. In continuation to the above facts, the petitioner has relied on the Judgment of Hon'ble Supreme Court dated 22.03.2021 passed in **Civil Appeal No. 9198 of 2019 in the case of Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Co-operative Bank Ltd. & Anr** wherein it has inter alia held that:

"66. Similarly under Section 18 of the Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgment is signed. However, the acknowledgment must be made before the period of limitation expires.

88. An Adjudicating Authority under the IBC is not a substitute forum for a collection of debt in the sense it cannot reopen debt which are barred by law, or debt, recovery whereof have become time barred. The Adjudicating Authority does not resolve disputes, in the manner of suits, arbitrations and similar proceedings. However, the ultimate object of an application under Section 7 or 9 of the IBC is the realization of a 'debt' by invocation of the Insolvency Resolution Process. In any case, since the cause of action for initiation of an application, whether under Section 7 or under Section 9 of the IBC, is default on the part of the Corporate Debtor, and the provisions of the Limitation Act 1963, as far as may be, have been applied to proceedings under the IBC, there is no reason why section 14 or 18 of the Limitation Act would not apply for the purpose of computation of the period of limitation.

92. In other words, the provisions of the Limitation Act would apply mutatis mutandis to proceedings under the IBC in

the NCLT/NCLAT. To quote Shah J. in New India Sugar Mill Limited V. Commissioner of Sales Tax, Bihar, “It is a recognised rule of interpretation of statutes that expression used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature”

- v. The petitioner further relied upon the judgment of Hon’ble National Company Law Appellate Tribunal dated 18.12.2020 passed in **Company Appeal (AT)(Insolvency) No. 621 of 2020 Shri, Rajendra Narottamdas Sheth & Anr. Vs. Shri. Chandra Prakash Jain & Anr** wherein it has inter alia held that:

“24. Section 18 applies to not merely suits but also applications and where before expiry of the prescribed period for an Application an acknowledgment is made, the Section provides for computing fresh period of Limitation From the time when acknowledgment was so signed. Perusal of Section 19 shows that where payment is made on account of a debt or interest before expiration of the prescribed period by the person liable to pay, a fresh period of Limitation shall be computed from the time when the payment was made. The date of NPA will not shift. It will remain the foundational date and period of limitation gets triggered from that date. But when prescribed period is computed in accordance with the Limitation Act and facts of this matter, Section 18 and 19 do appear to be attracted.”

- vi. The counsel for the petitioner further submitted that the object of the Code provides for Insolvency Resolution Process of Corporate Persons in a time bound manner for maximization of value of assets of such person. Thus, considering that there is an admitted debt and default as contemplated under the Code, it is imperative that the present petition be admitted.

II. SUBMISSIONS OF RESPONDENT

The respondent has opposed the admission of this petition on the following grounds:

- a. The present application is barred by limitation and the petitioner has not produced a chain of acknowledgments under Section 18 of the Limitation Act, 1963 to prove that the present petition is within limitation;

- b. There is no proof of debt or default produced by the petitioner;
- c. Application is incomplete

A. APPLICATION IS BARRED BY LIMITATION:

a. Alleged acknowledgments are beyond the period of limitation

- i. The respondent has produced the following tabular representation to show that the documents produced by the applicant do not constitute acknowledgement and or extend the period of limitation under Section 18 of the Limitation Act:

Year	Particulars	Comments
04.05.1993	Letter of acknowledgment of debt	Issued prior to date of default for a sum of Rs. 37 Lacs only
04.05.1993	Letter of acknowledgment of debt	Issued prior to date of default for a sum of Rs. 35,29 Lacs only
04.05.1993	Letter of acknowledgment of debt	Issued prior to date of default for a sum of Rs. 5.32 lacs and Rs. 2.12 Lacs only.
May 2000	DATE OF DEFAULT 3 year period to be reckoned from this date.	
May 2003	<u>3 YEAR PERIOD OF LIMITATION EXPIRES</u>	
04.06.2005	Demand Notice issued by petitioner's Advocate	1. Not issued by the Respondent 2. Not issued within 3 years from the date of default 3. Does not constitute acknowledgment under Section 18 of the Limitation Act.
20.08.2010	OTS letter by the Corporate Debtor	1. Letter issued "WITHOUT PREJUDICE" 2. Does not constitute acknowledgment under Section 18 of the Limitation Act; 3. Not issued within 3 years from the date of default.
25.10.2011	Letter issued by Assignor Bank	1. Not issued by the Respondent 2. Not issued within 3 years from the date of default 3. Does not constitute acknowledgment under Section 18 of the Limitation Act.
31.10.2014	Settlement proposal by the Respondent	1. Not issued within 3 years from the date of default 2. Does not constitute acknowledgment under Section 18 of the Limitation Act. 3. Proposal rejected by petitioner

12.12.2014	Draft OTS proposed by the Corporate Debtor via email	1. Issued "WITHOUT PREJUDICE" 2. Draft Notice cannot be taken as acknowledgment 3. Issued after the expiration of period of limitation.
05.01.2015	OTS Letter issued by Applicant	1. Not issued within 3 years from the date of default 2. Does not constitute acknowledgment under Section 18 of the Limitation Act.
26.09.2017	Revocation letter issued by Applicant	1. Not issued by the Respondent 2. Not issued within 3 years from the date of default 3. Does not constitute acknowledgment under Section 18 of the Limitation Act.
08.10.2018	Settlement proposal letter by the Corporate Debtor	Issued after the expiration of period of limitation
19.11.2018	Revised request for OTS proposed by the Corporate Debtor	Issued after the expiration of period of limitation
10.01.2019	Acceptance of OTS proposed by the applicant duly acknowledged by the Corporate Debtor	Issued after the expiration of period of limitation
23.10.2019	Application under Section 7 filed after 9 years and 5 months from the date of default	

- ii. In summary, the following conclusion arise from the above tabular representations:
- None of the above letters have been issued by the Respondent within 3 years of the date of default;
 - None of the above letters would constitute acknowledgment of liability within Section 18 of Limitation Act;
 - None of the above letters would extent the period of limitation;
- iii. The applicant has failed to produce a chain of acknowledgement prior to the prescribed period of limitation i.e. from May 2000 to May 2003 which will extend the period of limitation under Section 18 of

the Limitation Act. Instead, the documents relied upon by the Applicant are much after the expiry of period of limitation, and thus would not aid the applicant in saving the present Application from being barred by limitation. In fact, the Applicant has not produced any document or acknowledgment from the year 2000 till 2010 which will have the effect of extending limitation under Section 18.

b. OTS letters were rejected:

As regards the letters of OTS offers relied upon by the petitioner, the same would not constitute acknowledgment of debt in terms of Section 18 of the Limitation Act, as the said offers were rejected by the Applicant. It has been held by the Hon'ble Appellate Authority in the case of **Bimalkumar Manubhai Savalia V. Bank of India & Anr.** that a rejected OTS proposal would not constitute an acknowledgment of debt under Section 18 of the Limitation Act.

B. NO PROOF OF DEBT OR DEFAULT

- i. In **Swiss Ribbons Pvt. Ltd Vs. Union of India** the Hon'ble Supreme Court has laid down that an petitioner is bound to produce solid documentary evidence which will evidence debt and default. However, in the present case, the applicant has failed to produce any documentary proof/evidence which suggests that the amount of claim i.e. Rs. 142,55,35,318 is due, payable and has remained unpaid.
- ii. It is the petitioner's case that the date of default for the purposes of the present Application is in May 2000. However, there is not even a single document which either corroborates or even remotely suggests that the Respondent has committed default as on May 2000 as suggested in the petition. Even the statement of loan account of the Assignor Bank relied upon by the Applicant is for the period from 01.10.2000 to 01.07.2006 i.e. for period much after the alleged date of default; similarly, the CIBIL Report relied upon by the Applicant is inconclusive, and does not reveal any debt, default or disbursement.
- iii. The application as it stands along with its supporting documents does not reveal in any manner that the alleged claim amount has either been disbursed or has remained unpaid.

- iv. Assuming that the statement of account and the respective ledgers relied upon by the applicant evidence debt or default, the said documents cannot be considered by this tribunal as they are not supported by any certificate as is required under the Banker's Books Evidence Act, 1891.

C. THE PETITION IS INCOMPLETE

The present petition is evidently incomplete in as much as it fails to furnish the following mandatory requirement:

- a. Certificate of eligibility of the proposed IRP required to be furnished along with the application as per Rule 9(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;
- b. Total amount of debt granted along with date of disbursements required to be provided under Part IV of Form 1;
- c. Resolution passed by the Board of Directors authorising the signatory to sign and file the present Application is not annexed to the Application.

The counsel for the concluded by submitting that the said application is an abuse of the process of law and is merely part of a concerned stratagem adopted by the applicant in a bid to pressurize the respondent into making payment of an unjustified, and unsubstantiated amount. With stating all the above grounds the respondent prayed for dismissing this petition with exemplary costs.

FINDINGS

We have heard both the sides at length and after a conscious perusal of all the documents submitted by the parties, we are passing this order by making the following observations:

1. In this matter, it is an admitted fact by both the parties that the date of Default is in the month of May 2000 and the petition has been filed on 23.10.2019 i.e. 19 years 5 months after the date of default. It is a settled principle of limitation that the date of default triggers the period of limitation which is 3 years. It was also upheld by the Hon'ble Supreme Court in the matter of ***Jignesh Shah and another v. Union of India and another (WP (civil) No. 455 of 2019)*** wherein it was held that:

“The trigger for limitation is the inability of the company to pay its debts. Undoubtedly, this trigger occurs when a default takes place, after which the debt remains outstanding and is not paid. It is this date alone that is relevant for the purpose of triggering the limitation for filing of a winding-up petition. Though it is clear that a winding-up proceedings is a proceeding ‘in rem’ and not a recovery proceeding, the trigger of limitation, so far as the winding-up petition is concerned, would be the date of default.”

Therefore, from the above it is clear that this petition is hit by limitation. It is admitted position that there was a huge round of litigation in this matter before different forums. However, the filing of any recovery proceedings (within limitation) does not extend the period of limitation for proceedings under the Insolvency and Bankruptcy Code, 2016 which has also been affirmed by the Hon’ble Supreme Court in the case of **Jignesh Shah Vs. Union of India**.

2. The petitioner has contended that the payments made on 07.01.2015, 06.12.2018, 17.12.2018 & 10.01.2019 would have the effect of extending the period of limitation under Section 19 of the Limitation Act. But we would like to clear here that any extension of limitation by payment under Section 19 of the Limitation Act would ensure to the benefit of the applicant if the same is made within the prescribed period of limitation. Even otherwise, let us examine the legality of the alleged payments relied upon by the petitioner in his books of accounts. In order to substantiate the above payments, the petitioner filed summary of the statement showing the total outstanding dues of the corporate debtor under Exh. F from page nos. 106 to 113 in which the above payments were shown. There was no mention against the said payments in the books of accounts of the petitioner as to whether the respondent has paid the above amounts by way of cash, cheque or demand draft. The petitioner miserably failed to furnish the mode of the above payments despite questioning by this bench during the course of final argument. In this connection, it is appropriate to mention here that mere entries in the books of accounts of the petitioner are not enough to prove the payments as per Section 34 of the Indian Evidence Act more so when the petitioner is an ARC.

Therefore, under these circumstances, the above payments relied upon by the petitioner cannot be said to be proved apart from they were not made within limitation even if they are considered to be true and valid.

In the present case, the date of default has been pleaded as May 2000. Therefore, the said payments are not within the prescribed period of limitation i.e. prior to May 2003. Hence the said alleged payments would not extend or renew any period of limitation.

3. Further, we would also like to mention that the petitioner, in order to save itself from being hit by limitation has even failed to produce any acknowledgment of liability or prove any part payment within the prescribed period of limitation of 3 years as under Section 18 of the Limitation Act to save limitation under Article 137 of the Limitation Act. Under Section 18 of the Limitation Act, a document must meet the following ingredients to qualify as an acknowledgement in writing to extend the period of limitation:

- a. Acknowledgment must be made in writing;
- b. Acknowledgement must be made by person against whom claim is made;
- c. Acknowledgment must be made before expiration of limitation period;

Here, we would like to refer to the decision of the Hon'ble Supreme Court in the matter of **Sesh Nath Singh & Anr. V. Baidyabati Sheoraphulu Co-operative Bank Ltd and Anr** wherein it has affirmed the abovesaid ingredients and has held the following:

"66. Similarly under Section 18 of the Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by a party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgment is signed. However, the acknowledgment must be made before the period of limitation expires.

4. In light of the aforesaid, it is observed that even if the documents produced by the Applicant are taken to be acknowledgment of liability, such documents cannot come to the aid of the applicant as the same are

dated/issued beyond the expiration of prescribed period of limitation. In any case, documents/correspondence relied upon by the petitioner do not constitute any acknowledgment of debt under Section 18 of the limitation Act as the same do not meet the three essential ingredients of Section 18 of Limitation Act. Therefore, we believe that there is no acknowledgement of the debt by the respondent.

Therefore, we believe that this petition is therefore, barred by limitation. On these grounds, the petition is found to be not maintainable and is liable to be dismissed.

5. Accordingly, this Petition is dismissed with on costs.
6. The Registry is hereby directed to communicate this order to both the parties immediately.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

Sd/-

H. V. SUBBA RAO
Member (Judicial)