

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court– I)
KOLKATA**

C.P. (IB) 21/KB/2023

*A petition under **section 7** of the Insolvency and Bankruptcy Code, 2016, read with
rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,
2016*

In the matter of:

Omkara Assets Private Limited [CIN: U67100TZ2014PTC020363]

..... *Financial Creditor/ Petitioner*

-versus-

Mahendra Commercial Limited [CIN: U65993WB1980PLC032458]

..... *Corporate Debtor/ Respondent*

Date of Pronouncement of the order: 10.04.2024

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical):

Mr. Ratnanko Banerjee, Sr. Adv.] *For the Financial Creditor*

Mr. Shaunak Mitra, Adv.]

Ms. Ritoban Sarkar, Adv.]

Ms. Avishek Das, Adv.]

Mr. Joy Saha, Sr. Adv.] *For the Corporate Debtor:*

Mr. Rishav Banerjee, Adv.]

Mr. P.P. Bishwal, Adv.]

Ms. Suranjana Chatterjee, Adv.]

ORDER

Per Coram:

1. This Court convened through hybrid mode.

2. This is a Company Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (herein after referred as “the Code” or “IBC”) by **Omkara Assets Reconstruction Private Limited**, hereinafter referred to as “*Financial Creditor*” seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Mahendra Commercials Limited**, hereinafter referred to as “*Corporate Debtor*”.
3. The Corporate Debtor is a private limited company incorporated on 03.01.1980. The authorized share-capital of the company ₹25,00,000/- and the paid-up share capital of the company is ₹25,00,000/-.
4. The total amount claimed to be in default by the Financial Creditor, is Rs. 22,30,33,310/-. The date of default is mentioned as 31.03.2017.
5. The Financial Creditor has relied on the various documents in support of its claims, including:
 - a) Agreement for loan sanction, annexed as Exhibit **D**;
 - b) Demand Letter, annexed as Exhibit **G**;
 - c) Assignment Agreement, annexed as Annexure **E**;
 - d) Balance Sheet of the Corporate Debtor for F.Y. 2018-19, annexed as Annexure **F**;

6. Submissions on behalf of the Financial Creditor:

- 6.1 A credit limit of Rs. 10,00,00,000/- (Ten Crore Only) was sanctioned and disbursed to the Corporate Debtor, vide an agreement for cash Credit/Overdraft Facility¹ dated June 01, 2015 by IndusInd Bank Ltd (“predecessor to the Financial Creditor”). The same was subsequently increased to Rs. 13,00,00,000/- (Thirteen Crore Only) vide a sanction letter dated June 01, 2016, issued by the said predecessor to the Financial Creditor.
- 6.2 After the failure on the part of the Corporate Debtor to make payment towards the Overdraft facility the account of the Corporate Debtor was declared as Non-Performing Asset on 31st March 2017 which is taken as the date of default.

¹Annexure D

6.3 Subsequently, a demand letter² was issued by the said IndusInd Bank seeking the refund of the unpaid loan amount along with interest amounting to Rs. 11,82,64,786/- (Eleven Crore Eighty two lakh Sixty Four Thousand Seven Hundred and Eighty Six only) as on 31st March 2017 upon the Corporate Debtor.

6.4 The said loan facility was ultimately assigned to the Financial Creditor herein through an Assignment Agreement³ dated 30th September 2021. The corporate debtor has neither responded nor ever disputed the loan.

6.5 The Corporate Debtor has unequivocally acknowledged the debt in its balance sheet⁴ for the Financial year 2018-19. Further, the Hon'ble Supreme Court of India has also excluded the period of lockdown from March 23, 2020 to February 28, 2022. As such the instant petition is well within the period of limitation.

6.6 The total amount in default is Rs. 22,30,33,310/- which comprises of a principal amount of is Rs. 11,08,31,120/- and an interest of Rs. 11,22,02,190/-, calculated upto 24.11.2022.

7 Submission on behalf of the Corporate Debtor:

7.1 The purported Power of Attorney on the basis of which this instant application has been filed is not a specific Power of Attorney authorising Mr. Ankur Rastogi to initiate CIRP against the Corporate Debtor. Further, the Board Resolution disclosed at pages 22 to 23 of the Application filed by the Financial Creditor does not authorise Mr. Ankur Rastogi to file the Application under Section 7 of the IBC to initiate CIRP against the Corporate Debtor. As such, Mr. Ankur Rastogi is not authorised to initiate CIRP in respect of Corporate Debtor.

7.2 The instant petition is ex facie barred by limitation. The date of default as mentioned by the purported Financial Creditor is 31st March, 2017 and this

²Annexure G

³Annexure E

⁴Annexure F

instant application has been filed on or around January, 2023 which makes it ex facie barred by limitation.

7.3 While the Financial Creditor has purportedly made an attempt to save limitation on the basis of a purported acknowledgement of debt in the Balance Sheet of the Corporate Debtor for the Financial Year 2018-19, it is evident from page 224 of the petition filed by the Financial Creditor, the purported acknowledgment is a ledger account which says that "The company has "Zero Balance" certificate from the predecessor-in- interest of the Financial Creditor as on 31 March, 2018 and the accounts of the bank have not been adjusted and updated pending proceedings of the Court." This itself shows that the purported acknowledgement is not an unconditional and unequivocal admission of debt.

7.4 The debt and default are absent in the instant case. The predecessor-in-interest of the petitioner Financial Creditor had already issued "Zero Balance" certificate on 25th May, 2017 in the name of the Corporate Debtor wherein the Financial Creditor has confirmed that there is "Zero Balance" payable by the Corporate Debtor to the predecessor-in- interest of the Financial Creditor and the predecessor-in-interest of the Financial Creditor had issued "Zero Balance" certificate which states that "Zero Balance" payable as on 31 March, 2017 from the Corporate debtor to the predecessor-in-interest of the financial Creditor. As such the account of the Corporate Debtor has been written off by the predecessor-in-interest of the Financial Creditor, namely, IndusInd Bank. The Financial Statement/Balance Sheet for the Financial Year 2021- 2022 has been uploaded with the Registrar of Companies, Ministry of Corporate Affairs by the Corporate Debtor and is part of the public records. The Financial Creditor suppressed the subsequent Balance Sheet of the Corporate Debtor at the time of filing this application and has further suppressed the fact that the predecessor of the Corporate Debtor issued Zero Balance certificate to the Corporate Debtor certifying that that "Zero Balance" amount was payable by the Corporate Debtor to the predecessor of the Financial Creditor.

7.5 The purported assignment by the predecessor of the Financial Creditor to the Financial Creditor is bad in law. If there is no debt, nothing could have been assigned by the predecessor of the Financial Creditor to the Financial Creditor in this petition. There was no financial asset, which was to be transferred to the Financial Creditor herein from the predecessor of the Financial Creditor. In any event, the purported assignment agreement is not duly stamped and is not duly registered under the provisions of the Stamp Act and the Registration Act and as such, the purported assignment agreement cannot be looked into in the eyes of law.

7.6 It is further evident from the documents disclosed by the Financial Creditor that the purported loan account of the Corporate Debtor being Account Number 603014024851 has not been assigned to the Financial Creditor as even the purported loan account numbers which has been assigned are different. As would be evident from Page 126 of the Petition filed by the Financial Creditors, the loan account number i.e. 603014027256 which has been purportedly assigned is also different and the said loan account number was not the loan account number of the corporate debtor at any, material point of time. In any event, there was no loan/debt that could be assigned as even as per the records of the Financial Creditor as disclosed in Page 233 of the Petition filed by the Financial Creditor, the account of the corporate debtor being Account Number 603014024851 was already written off by IndusInd Bank, the predecessor in interest of the Financial Creditor. Even schedule – I of the said Assignment Agreement dated 30th September 2021 indicates that that the debt has been written off.

7.7 The fact there is no debt that is due and payable and the fact that the debt stood discharged is further evident from the fact that the original title deed of the properties which were hypothecated to the predecessor in the interest of the financial creditor has been returned to the corporate debtor by IndusInd Bank after the corporate debtor was duly discharged by the predecessor in interest of the financial creditor. This explicitly proves that the debt was duly discharged.

7.8 The Financial Creditor has purportedly relied upon the Balance Sheet of the Corporate Debtor in order to show that there is an acknowledgement of liability/debt on the part of the Corporate Debtor, however, the purported acknowledgement relied upon by the Financial Creditor is much beyond the mandatory three years period from the date of purported declaration of the of the assets of the Corporate Debtor as NPA and as such, the purported acknowledgement will not extend the period of limitation under Section 18 of the Limitation Act, 1963 by no stretch of imagination.

7.9 The present Application is also not maintainable because it does not comply with the notification No. IBBI/2022-23/GN/REG085 dated 14th June, 2022, which directed that any insolvency application filed by a financial creditor under Section 7 of the IBC must be accompanied by a default record from an Information Utility. The absence of any such record in the present Application makes it non- maintainable.

8 Rejoinder filed on behalf of the Financial Creditor:

8.1 Mr. Ankur Rastogi has been authorised to file the instant proceedings vide board resolution dated 22.06.2022.

8.2 It is submitted that the Corporate Debtor has misused the balance certificate for a particular account to absolve the loan which it has admittedly received from IndusInd Bank whom the loan was assigned to the Financial Creditor. The admission in the balance sheet as on 31st March, 2019 is unequivocal and clear.

8.3 The loan account of the Corporate Debtor was originally opened as a normal Overdraft account being account no 603014024851 instead of an Overdraft account under Priority Sector Lending(hereinafter called as PSL). Hence sometime around in November 2016, IndusInd Bank Ltd transferred the existing liability from the OD account to the newly opened Overdraft account under PSL. This new loan account no was 603014027256. Due to this transfer, the outstanding balance in account number 603014024851 was

shown as zero on 28th October, 2016. The No Dues Certificate as referred to by the Corporate Debtor is a "Balance Confirmation Certificate" issued on 25-May-2017 for the particular account no 603014024851 at the specific request of the borrower/account holder. A balance confirmation Certificate in no way can be construed as a "No Due Certificate" Also, this balance confirmation Certificate is dated 25- May-2017, which is after the Bank informed the Corporate Debtor of the overdue in the account and also shared the statement of accounts vide its letter dated 09-May-2017.

8.4 The loan was disbursed by the IndusInd Bank through Account Number 603014024851. The loan account of the Corporate Debtor was originally opened as a normal Overdraft account being account no 603014024851 instead of an Overdraft account under Priority Sector Lending (hereinafter called as PSL). Hence sometime around in November 2016, IndusInd Bank Ltd transferred the existing liability from the OD account to the newly opened Overdraft account under PSL. This new loan account no was 603014027256. The outstanding balance of Rs. 11,67,40,041/- was transferred to the new account number 603014027256. The amount transferred to account number 603014027256 was Rs. 11,68,88,445/-which includes interest of Rs. 1,48,404/- for 3 days i.e., from 28/10/2016 to 30/10/2016. Due to this transfer the outstanding balance in account number 603014024851 was shown zero as on 28th October, 2016. Subsequently on corporate debtor's demand and to prevent further ambiguity, with regard to the account number 603014024851, the bank has issued balance confirmation certificate. It is to be mentioned here that the balance confirmation certificate is not for the account new account i.e., 603014027256.

8.5 Furthermore, returning of the original Title Deeds of the properties under hypothecated, do not absolve any liability to repay the outstanding due payable as alleged or at all.

9 Analysis and Findings:

9.1 Heard the Ld. Sr. Counsels on behalf of both the parties and perused the records.

9.2 Upon perusal of the same, the following timeline emerges:

Date	Event
01.06.2015	1 st loan sanctioned
01.06.2016	2 nd loan sanctioned
31.03.2017	Date of declaration of the Corporate Debtor's account as NPA- also considered as the date of default
04.01.2018	Demand notice sent
31.03.2019	Acknowledgment in balance sheet for F.Y. 2018-19
30.09.2021	Execution of assignment agreement
30.12.2022	The petition was filed under section 7 of IBC

9.3 The Corporate Debtor has contended that the instant petition is barred by limitation and that the balance-sheet statement relied upon by the Petitioner to extend the limitation period cannot be considered as unequivocal acknowledgement. The Corporate Debtor has also relied upon the decision of the Hon'ble Supreme Court in the matter of *Asset Reconstruction Company (India) Limited vs. Bishal Jaiswal &Anr.*⁵ and thereby contended that when an acknowledgment of liability contained in a balance-sheet has been clarified by a 'note and wherever there are caveats in the balance-sheets, such acknowledgment cannot be deemed unequivocal. In this regard, it is pertinent to refer to the following paragraph of the said order in *Bishal Jaiswal &Anr.* (supra):

"12. In an illuminating discussion on the reach of Section 18 of the Limitation Act, including the reach of the Explanation to the said Section, this Court, in [Khan Bahadur Shapoor Freedom Mazda v. Durga Prasad](#), (1962) 1 SCR 140 ["Shapoor Freedom Mazda"], after referring to Section 19 of the Limitation Act, 1908, which corresponds to [Section 18](#) of the 1963 Act, held:

"It is thus clear that acknowledgement as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgement of the liability in

⁵ 1991 Supp (1) SCC 402

respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgement is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgement must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgement rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. Broadly stated that is the effect of the relevant provisions contained in [Section 19](#), and there is really no substantial difference between the parties as to the true legal position in this matter.” (at pages 144-145)

....

22. *A perusal of the aforesaid Sections would show that there is no doubt that the filing of a balance sheet in accordance with the provisions of the [Companies Act](#) is mandatory, any transgression of the same being punishable by law. However, what is of importance is that notes that are annexed to or forming part of such financial statements are expressly recognised by Section 134(7). Equally, the auditor's report may also enter caveats with regard to acknowledgements made in the books of accounts including the balance sheet. A perusal of the aforesaid would show that the statement of law contained in [Bengal Silk Mills](#) (supra), that there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission, is correct in law as it would depend on the facts of each case as to whether an entry made in a balance sheet qua any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgement of liability has, in fact, been made, thereby extending limitation under [Section 18 of the Limitation Act.](#)””*

9.4 In the instant case, it is seen that the Corporate Debtor, in its balance sheet for the Financial Year 2018-19, has mentioned in its long term borrowings, the loan sanctioned by IndusInd Bank for an amount of Rs.11,67,40,041/-. It is also seen that even though the Corporate Debtor has claimed via notes therein to possess a “zero balance certificate” from IndusInd Bank in that regard, the aforesaid amount of Rs.11,67,40,041/- has still been taken into account to calculate the total long term borrowings. By doing so the Corporate Debtor has not denied its jural relationship with IndusInd bank, rather, it has confirmed its debt owed to the Financial Creditor. The Corporate Debtor's contention, to this extent is not maintainable.

9.5 The date of N.P.A. i.e 31.03.2017 has been taken as the date of default by the Financial Creditor, which means that the original period of limitation would end on 31.03.2020. However, in light of the aforesaid balance-sheet acknowledgement dated 31.03.2019, the limitation period will be extended till

31.03.2022. Further, in light of the *suo moto* order dated 10.02.2022 passed by the Hon'ble Supreme Court, the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation and the balance period of limitation remaining as on 03.10.2021, shall become available with effect from 01.03.2022. As such, the limitation period will be further extended to 16.03.2024. The instant petition is therefore within limitation period.

9.6 Coming to the authorisation of the Mr. Ankur Rastogi, it is seen that the Petitioner has annexed to the petition⁶ the board resolution of the Petitioner company passed on 29.06.2022 whereby Mr. Ankur Rastogi has been authorised to carry out several actions, including the following:

- a. institute legal or other proceedings,
- b. to sign, seal, execute and deliver all necessary applications, petitions, affidavits and to affirm, declare and sign the same before any Tribunal;
- c. to appear, represent the company before any Tribunal and Appellate tribunal.

9.7 It is clear from the said board resolution that Mr. Ankur Rastogi has proper authorisation to file the instant proceedings before this Adjudicating Authority.

9.8 Coming to the merits of the case, the Corporate Debtor has claimed that there is no debt and default to warrant admission of the Corporate debtor into CIRP and in order to substantiate such contention, the Corporate debtor has relied on the "zero balance certificate"⁷ dated 25.05.2017 issued by IndusInd Bank. However, on perusal of the same, it is seen that the document is a balance confirmation certificate issued only in respect of Account No. 60301402851 *i.e* the initial overdraft account. It has been admitted by both parties that the loan was initially disbursed to the said Account No. 603014024851. It is also seen from the ledger inquiry for the said Account No. 603014024851 that on 28.10.2016, the amount acknowledged in the balance-sheet for F.Y. 2018-19 *i.e* Rs. 11,67,40,041/- was transferred from the said overdraft account. The said transfer has not been denied by the Corporate Debtor in its Reply.

9.9 The Financial Creditor has claimed that the said loan amount of Rs. 11,67,40,041/- was transferred to another loan account *i.e* Account No. 603014027256 along with

⁶ Annexure B to the Petition

⁷ Annexure "A" to the Reply- Affidavit

interest of Rs.1,48,404/- for 3 days *i.e* from 28.10.2016 to 30.10.2016, bringing the total amount to Rs. 11,68,88,445/-. The said claim was also not refuted by the Corporate Debtor in due course of arguments.

9.10 The Financial Creditor herein bought the debt belonging to loan Account No. 603014027256 of the Corporate Debtor from IndusInd Bank under the registered Assignment Agreement dated 31.09.2021 for an amount of Rs. 14,95,60,165.32. Further, as per the Corporate Debtor's records maintained by National E-Governance Services Limited (NESL) an amount of Rs. 14,95,60,165/- is outstanding payment as on date. It is noted that the Corporate Debtor nowhere has denied its liability to repay the sanctioned loan amount.

9.11 At this juncture, we would like to refer to the decision of the Hon'ble Supreme Court in *Innoventive Industries Ltd. v. ICICI Bank*⁸ wherein the Apex Court has held as follows:

“28. [.....]It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”

9.12 As such, in order to adjudicate upon a petition filed under section 7 of the Code, the Adjudicating Authority needs to primarily ascertain that a 'debt' and 'default' exist.

⁸2017 SCC SC 1025

9.13 It is clear that the loan amount was disbursed to Account No. 603014024851 and then the said loan was transferred to Account No. 603014027256. The said Account No. 603014027256 was assigned to the Financial Creditor who has in turn filed the instant proceedings. Thus the 'debt' in respect of the sanctioned loan amount exists, and since the account of the Corporate Debtor was declared NPA, it is clear that 'default' occurred. It is also clear that the amount claimed exceeds the pecuniary threshold of Rs. One Crore as prescribed under section 4 of the Code. As such, we are satisfied that the instant petition should be admitted.

9.14 It is, accordingly, hereby ordered as follows:-

- i. The application bearing **CP (IB) No. 21/KB/2023** filed by **Omkara Assets Reconstruction Private Limited** (Financial Creditor), under section 9 of the Code read with rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Mahendra Commercial Limited** (CIN:U65993WB1980PLC032458), the Corporate Debtor, is *admitted*.
- ii. There shall be a moratorium under section 14 of the IBC.
- iii. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- iv. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- v. **Mr. Netai Basak**, having registration number IBBI/IPA-003/IPN00327/2020-21/12321, **email: nbasak2002@yahoo.co.in**, as per the IBBI Panel S.no.13 for the WB region, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the

Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016.

- vi. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- vii. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- viii. The IRP/RP shall submit to this Adjudicating Authority, periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- ix. The Financial Creditor shall initially deposit a sum of ₹ 3,00,000/- (Rupees Three lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC). Further, the Fees of the IRP will be subject to the approval of the COC in accordance with Notification No. IBBI/2022-23/GN/REG091 dated 13.09.2022, issued by the Insolvency and Bankruptcy Board of India, as published in the in the Official Gazette.
- x. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
- xi. **Additionally**, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate

**In the National Company Law Tribunal,
Kolkata Bench (Court- I)**

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Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

10 CP (IB) No. 21/KB/2023 to come up on **17.05.2024** for filing the progress report.

11 A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 10th day of April, 2024

SM(LRA)