

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI

CP (IB) No.843/MB/2020

[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]

IN THE MATTER OF:

J. KUMAR INFRAPROJECTS LIMITED

[CIN: L74210MH1999PLC122886]

Registered Office: 16- A, Andheri Industrial Estate

Veera Desai Road, Andheri West

Mumbai- 400058

Maharashtra.

...Operational Creditor

V/S

LIKPROOF INDIA PRIVATE LIMITED

[CIN: U74999MH1984PTC034158]

Registered Office: 105, 1st Floor, Topaz SRA CHS Ltd.

Dr. Anandrao Nair Road, Agripada

Mumbai- 400011

Maharashtra.

...Corporate Debtor

Pronounced: 17.04.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances : Hybrid

Operational Creditor : Adv. Sonia Parab i/b Adv. Tejas P Deshpande

Corporate Debtor : Adv. Nikhil Patil i/b Adv. Prabhakar M. Jadhav

ORDER

[Per: SANJIV DUTT, MEMBER (TECHNICAL)]

BACKGROUND

- 1.1 This Application bearing C.P.(IB) No.843/MB/2020 was filed by J. Kumar Infraprojects Limited, the Operational Creditor, on 04.03.2020, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate the Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of Likproof India Private Limited, the Corporate Debtor.
- 1.2 The Operational Creditor is engaged in the business of execution of civil contracts and civil engineering construction. The Corporate Debtor is engaged in the business of construction of commercial and residential spaces and also provides a range of pre-construction and post-construction services.
- 1.3 The Operational Creditor agreed to supply Ready Mix Concrete (RMC) to the Corporate Debtor as per their requirement. The Corporate Debtor issued purchase orders for supply of RMC for their various projects located at Napean Sea Road, Matunga and Worli in Mumbai. The Operational Creditor periodically raised several Running Account Bills (R.A. Bills) which were submitted to the Corporate Debtor along with detailed documents such as lorry challans and excise invoices.
- 1.4 The total invoices raised by the Operational Creditor were for a sum of Rs.1,30,67,211/-. Out of the said amount, the Corporate Debtor had paid a sum of Rs.1,26,48,311/- and the balance amount of Rs.4,18,900/- (Four Lakhs

Eighteen Thousand Nine Hundred Rupees) was still due and payable by the Corporate Debtor. The Operational Creditor requested the Corporate Debtor on various occasions to clear the outstanding amount of bills but the Corporate Debtor failed and neglected to pay the balance amount of operational debt.

- 1.5 The Operational Creditor issued Demand Notice dated 18.07.2019 to the Corporate Debtor, as required under Section 8 of the Code, seeking payment of the outstanding operational debt within 10 days of receipt of the notice. The Demand Notice was delivered to the Corporate Debtor on the very same day. However, no payment was made by the Corporate Debtor towards the outstanding operational dues. Consequently, the Operational Creditor preferred the present Application seeking commencement of CIRP in respect of the Corporate Debtor.

2. AVERMENTS OF THE OPERATIONAL CREDITOR

- 2.1 The Operational Creditor supplied RMC as per the Corporate Debtor's requirements at their designated sites. The invoices raised by the Operational Creditor were duly received and accepted by the Corporate Debtor without any objections regarding the amount or contents of the bills. Additionally, the Operational Creditor periodically submitted several R.A. Bills to the Corporate Debtor accompanied by detailed documents such as lorry challans and excise invoices.
- 2.2 The total invoices raised by the Operational Creditor were for a sum of Rs.1,30,67,211/- out of which the Corporate Debtor had paid a sum of Rs.1,26,48,311/-. Thus, there remained an outstanding balance of Rs.4,18,900/- due and payable by the Corporate Debtor to the Operational Creditor. The Corporate Debtor issued four cheques bearing Nos.446423,

446424, 446425 and 446426 dated 31.08.2014 for Rs.1,00,000/-, Rs.1,00,000/-, Rs.1,00,000/- and Rs.1,18,899/- respectively to settle the outstanding amounts. However, due to the Corporate Debtor's weak financial position, it informed the Operational Creditor that its account lacked sufficient balance and requested the Operational Creditor to hold the cheques for some time.

2.3 Following the Corporate Debtor's instructions, the Operational Creditor refrained from depositing the said cheques. Despite repeated requests from the Operational Creditor, after the validity of cheques had expired, the Corporate Debtor kept on seeking more time to make payment of the balance amount. However, the assurances made by the Corporate Debtor proved to be false as no payment was made by it till September, 2016.

2.4 Despite continual efforts of the Operational Creditor to recover the outstanding amount, the Corporate Debtor failed to pay the remaining amount of Rs.4,18,900/-. Due to the Corporate Debtor's defaults, the Operational Creditor issued a Demand Notice dated 18.07.2019 under Section 8 of the Code. Upon receipt of the said notice, the Corporate Debtor did not furnish any reply. However, it contacted the Operational Creditor to resolve the issue and a meeting between the parties was held. In this meeting, the Corporate Debtor acknowledged its liability and agreed to clear the debt by or before 31.12.2019. However, once again, the Corporate Debtor failed to pay the balance operational dues of Rs.4,18,900/-. Thus, in view of above facts and circumstances, it is prayed that CIRP may be initiated in respect of the Corporate Debtor.

3. CONTENTIONS OF CORPORATE DEBTOR

- 3.1 The Corporate Debtor *vide* its reply dated 12.10.2023 raised several objections on the maintainability as well as merits of the present Application.
- 3.2 The preliminary objection regarding limitation is raised, asserting that the claim of the Operational Creditor is time-barred as it pertains to the years 2011 and 2012, while the present Application was filed on 04.03.2020. It is stated that the supply of goods happened during 2011 and 2012 and the four invoices were also raised during that period. Relying on the judgment of the Hon'ble Supreme Court in ***B.K. Educational Services Private Limited v. Parag Gupta and Associates***, it is submitted that the present Application is time-barred. It is stated that the invoices in question do not specify any credit period. It is claimed that no evidence has been placed on record to prove any acknowledgment of liability by the Corporate Debtor within three years from the date of invoices. It is submitted that there are no subsequent payments alleged to have been received by the Operational Creditor. Therefore, the present Application is barred by limitation and needs to be dismissed at the very threshold.
- 3.3 No payments are owed to the Operational Creditor. Further, the Operational Creditor has failed to produce the alleged purchase orders placed by the Corporate Debtor against the four invoices in question.
- 3.4 The Operational Creditor has mentioned the date of default as 20.07.2019, which corresponds to the date of issuance of the statutory Demand Notice. It is incorrect to specify this date as the date of default. In fact, on the said date of issuance of the statutory Demand Notice, the alleged claim of the Operational Creditor was already time-barred.

3.5 The Corporate Debtor is a solvent company. The present Application has been filed by the Operational Creditor as a pressure tactic to make recovery of the disputed amount which is not permissible under the Code. Referring to judgments of the Hon'ble Supreme Court of India, it is submitted that the Code is not at all meant to be used as recovery mechanism. In view of the above, it is submitted that the present Application, being abuse of process of law, should be dismissed with exemplary costs.

4. ANALYSIS AND FINDINGS

Upon due consideration of the pleadings and hearing the Counsel for the Operational Creditor and the Corporate Debtor, our findings in the matter are as under:-

4.1 Let us first consider the preliminary issue of limitation raised by the Corporate Debtor, because it goes to the root of the matter. It is now well-settled that the Limitation Act, 1963 is applicable to applications filed under Sections 7 and 9 of the Code right from its inception and Article 137 of the Limitation Act gets attracted. Article 137 of the Limitation Act provides the period of limitation in case of "any other application for which no period of limitation is provided elsewhere" as three years from the time when the right to apply accrues. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of application under the Code, the application would be barred under Article 137 of the Limitation Act, except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.

4.2 In the instant case, it is observed that the four unpaid invoices bearing Nos.147, 176, 227 and 249 were raised by the Operational Creditor on 22.09.2011, 15.10.2011, 13.02.2012 and 26.03.2012 respectively. It is also observed that none of these invoices makes mention of any credit period. In other words, payment under the said invoices fell due on the respective dates of such invoices. It is noticed from the record that the Operational Creditor has not provided any written acknowledgment of debt by the Corporate Debtor or its representative within three years of the date of the default so as to extend the period of limitation in terms of Section 18 of the Limitation Act. In the absence of concrete documentary evidence to substantiate the claim, mere bald assertions by the Operational Creditor of having meetings with the Corporate Debtor wherein the latter allegedly made oral admission of debt cannot be considered as substantive proof of acknowledgment of debt. Though the part payment of Rs.6,92,201/- made by Roxina Real Estate Pvt. Ltd. on behalf of the Corporate Debtor on 13.09.2014 will give rise to a fresh period of limitation in terms of Section 19 of the Limitation Act, it would still not save limitation because the Operational Creditor filed the present Application on 04.03.2020, after a gap of over 5 years therefrom. It is also noticed from the record that the Operational Creditor has not made out a case for condonation of delay under Section 5 of the Limitation Act.

4.3 It is well-established that the burden to prove that the claim made is not barred by limitation lies on the petitioner/applicant. It is observed from perusal of Part-IV of the Application that the Operational Creditor has declared 20.07.2019 as the date on which the debt fell due and the default occurred. It is also observed that the statutory Demand Notice under Section 8 of the Code was issued by the

Operational Creditor to the Corporate Debtor on 18.07.2019 wherein the date of default is mentioned as 01.10.2016. It is pertinent to mention that in case of an operational debt, the date of default can only be ascertained when the invoice becomes due and payable but is not paid. However, it is observed that in the instant case, the Operational Creditor has neither furnished any explanation nor placed on record any documentary evidence to substantiate the claim that the debt in question fell due on either 01.10.2016 or 20.07.2019. This clearly shows that the Operational Creditor has chosen the date of default at its own whims or caprices or to suit its convenience which is legally impermissible. Thus, the Operational Creditor has failed to discharge the burden of proving that the Application is within limitation.

- 4.4 We find merit in the contention of the Corporate Debtor that the purported claim of the Operational Creditor was already time-barred on 18.07.2019 when the Demand Notice was issued. It is now well-settled that the intention of the Code is not to give a new lease of life to debts which are time-barred and that the 'default' referred to in the Code is that of actual non-payment by the Corporate Debtor when a debt has become due and payable. Where the default had occurred over 3 years prior to the date of filing of the application under Section 9 of the Code (as in the instant case), the application would be time-barred. In view of this position, the inescapable conclusion is that the present Application is clearly hit by the bar of limitation. Thus, the same is not maintainable and is liable to be rejected on this count. In view of above, we do not deem it necessary to go into the merits of the case. We are of the considered view that this Application is not fit for admission under Section 9 of the Code.

ORDER

In view of the aforesaid findings, this Application bearing C.P.(IB) No.843/MB/2020 filed under Section 9 of the Code by J. Kumar Infraprojects Limited, the Operational Creditor, for initiating CIRP in respect of Likproof India Private Limited, the Corporate Debtor is **rejected**.

However, rejection of this Application does not have any bearing on any right of the Operational Creditor against the Corporate Debtor which could be agitated before any court/forum as per law.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)
Deepa/JNK

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)