

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 1

ITEM No.128
CP(IB) 231 of 2020

Order under Section 9 IBC

IN THE MATTER OF:

Advatech Cera Tiles Ltd

.....Applicant

V/s

Naumee Ceramica India Ltd

.....Respondent

Order delivered on ..01/02/2022

Coram:

Madan B. Gosavi, Hon'ble Member(J)

Ajai Das Mehrotra, Hon'ble Member(T)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.



**AJAI DAS MEHROTRA
MEMBER (TECHNICAL)**



**MADAN B GOSAVI
MEMBER (JUDICIAL)**

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD
COURT-1**

CP(IB) No. 231/NCLT/AHM/2020

(A petition filed under Section 9 of Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process)

**In the matter of:
M/s. Advatech Cera Tiles Ltd.**

Having Registered Office at:
Survey No. 209, Village Dhanali Tal,
Kadi Mehsana, Gujarat - 382715

....Operational Creditor

Versus

M/s. Naume Ceramica India Limited

Having Registered Office at:
4, Nikunj Apartment, Behind Jaldhara
Complex, Vasna Road, Vadodara,
Gujarat - 390015

.... Corporate Debtor


Order Reserved on: 05.01.2022
Order Pronounced on: 01:02:2022

**Coram: Madan B. Gosavi, Member (Judicial)
Ajai Das Mehrotra, Member (Technical)**

Appearance:

Learned Counsel, Ms. Nikita C Jain, appeared for the Operational Creditor.

Learned Counsel, Mr. Piyush Luktuke, appeared for the Corporate Debtor.

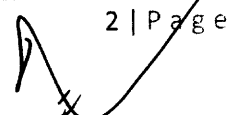


ORDER
[PER BENCH]

1. This application has been filed by M/s. Advatech Cera Tiles Limited, claiming to be an Operational Creditor under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **IBC, 2016**) for initiation of Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor namely M/s. Naumee Ceramica India Limited. The amount of debt claimed in default is Rs.1,47,39,391/- (Rupees One Crore Forty Seven Lakh Thirty Nine Thousand Three Hundred and Ninety One Only) including interest @18% per annum as on 31.01.2020.

2. The facts, in brief, are that the Operational Creditor was engaged in the business of non-metallic mineral products, whereas the Corporate Debtor is a Public Limited Company incorporated under Companies Act, 1956 and is carrying out the business of manufacturing of non-refractory tiles and related products. On demand by the Corporate Debtor the Operational Creditor rendered its services and supplied the required products as demanded by the Corporate Debtor. Thereafter, the Operational Creditor raised invoices

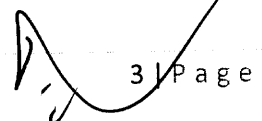


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for the supply of goods to the Corporate Debtor. The due date for payment of each invoice was the day on which the invoice has issued.

3. The Operational Creditor submitted that the Corporate Debtor kept placing the orders of goods to the Operational Creditor, and Operational Creditor supplied the goods as per the orders of the Corporate Debtor. The Corporate Debtor made the payment of Rs. 1,23,77,509/- (Rupees One Crore Twenty Three Lakh Seventy Seven Thousand Five Hundred and Nine Only) towards various old invoices during the period of 17.04.2010 to 07.10.2015. The amount of Rs. 1,47,39,391/- (Rupees One Crore Forty Seven Lakh Thirty Nine Thousand Three Hundred and Ninety One Only) including interest as on 30.11.2018 is pending. The said amount is due against 21 (Twenty-One) invoices raised by the Operational Creditor, the principal amount of debt is Rs. 36,10,953/- (Rupees Thirty Six Lakh Ten Thousand Nine Hundred and Fifty Three Only).

4. The Operational Creditor further submitted that the Corporate Debtor confirmed the amount of Rs. 50,00,000/-



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(Rupees Fifty Lakhs Only) as a default amount as on 01.04.2014. The Operational Creditor also stated that the Corporate debtor had paid an amount of Rs. 3,50,000/- (Rupees Three Lakh Fifty Thousand Only) on 28.05.2019 which extends the period of limitation for filing and adjudication of the present application.

5. The Operational Creditor further stated that the Corporate Debtor failed to pay the due amount even after number of reminders and request, thereupon, the Operational Creditor issued a demand notice dated 19.02.2019 in the prescribed form No. 3 and 4 as per section 8 of IB Code, 2016 r.w. Rule 5 of Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 (hereinafter referred to as "**AA Rules**"). The Corporate Debtor neither replied to the demand notice nor paid the default amount as claimed under aforesaid demand notice.
6. The Corporate Debtor appeared before this Authority and filed its reply to the present petition, and denied the averments made by the Operational Creditor. The Corporate Debtor has submitted that the demand notice dated

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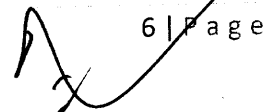
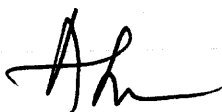
19.02.2019 issued by the advocate on behalf of the Operational Creditor is not valid. The Corporate Debtor further submitted that the Board Resolution dated 12.02.2020 authorizing Director to file the present petition with the Authority is false and self-generated. The E-form MGT-7 (Annual Return) filed with the Registrar of the Companies, Gujarat (on MCA Portal) for the ending year 31.03.2020 does not reflect the said date 12.02.2020 amongst date of other board meetings conducted in the year 2020.

7. The Corporate Debtor further submitted that the claim amount in this petition is barred by limitation as all the invoices were raised in the year 2010 and 2011, the statement of the Operational Creditor itself contradictory that the amount of Rs. 1,23,77,509/- was paid by the Corporate Debtor for old invoices until 17.04.2010 to 07.10.2015, on the other hand the Operational Creditor submitted that all the invoices have been raised in the year 2010 and 2011. If no invoices were raised after 2012, then how the Corporate Debtor is liable to pay the default amount. The Corporate Debtor further submitted that no

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cogent evidence is placed on record by the Operational Creditor such as purchase order, challan and proof of delivery of demand notice. Moreover, no such Demand Notice has been delivered to the Corporate Debtor, the delivery of Demand Notice is an essence for filing the application under section 9 of IB Code, 2016.

8. The Corporate Debtor further contended that no such payment confirmation was made by the Corporate Debtor for the amount of Rs. 50,00,000/- (Rupees Fifty Lakh Only). The Corporate Debtor has stated that the amount of Rs. 3,50,000/- (Rupees Three Lakh Fifty Thousand Only) was paid to the Operational Creditor against the compromise of criminal complaint No. 906 of 2016 filed by the Operational Creditor under the Negotiable Instrument Act, 1881 before the Court of Judicial Magistrate Kadi and not in lieu of the alleged default amount.
9. We have heard learned counsels for the Operational Creditor and Corporate Debtor and have gone through the record. It is an undisputed fact that the goods were supplied to the Corporate Debtor and invoices were raised against the



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Corporate Debtor. It is also noted that the Corporate Debtor has confirmed the balance amount of Rs.50,00,000/- (Rupees Fifty Lakh Only). It is also noted that the amount of Rs. 3,50,000/- (Rupees Three Lakh Fifty Thousand Only) has been paid by the Corporate Debtor on 28.05.2019. Though, the Corporate Debtor has contended that no such cogent evidence on record has been produced by the Operational Creditor before this Authority in support of his claim but the Corporate Debtor has not denied that such amount is not due towards the Corporate Debtor.

10. The amount of Rs. 50,00,000/- (Rupees Fifty Lakh Only) was acknowledged on 01.04.2014 by the Corporate Debtor. Thereafter, no such acknowledgment or payment or part payment in respect to the default amount was made by the Corporate Debtor till 28.05.2019, which is beyond three years from the date of acknowledgement of debt. The contention of the Operational Creditor that the amount of Rs. 3,50,000/- was paid on 28.05.2019 by the Corporate Debtor, which extends the period of limitation for filing and adjudication in the present petition does not sustain. The Limitation Act, 1963 is applicable in the petition filed under

Section 7 or 9 under IB Code, 2016, and that the petition should be under the period of three years from the date of default. Limitation is extended under Section 18 and Section 19 of the Limitation Act, 1963 only in case of acknowledgment or payment or part payment made within three years from the date of default. For ready reference, we reproduce Section 18 and Section 19 of The Limitation Act, 1963 hereunder:

18. Effect of acknowledgment in writing – (1)

Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation – For the purposes of this section, --

- (a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;*

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- (b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and
- (c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

19. Effect of payment on account of debt or of interest on legacy-- Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in awriting signed by, the person making the payment.

Explanation – For the purposes of this section, --

- (a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;
- (b) "debt" does not include money payable under a decree or order of a court.

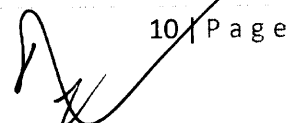
11. In view of aforesaid provisions, the payment of Rs. 3,50,0000- made by the Corporate Debtor on 28.05.2019 to the Operational Creditor is beyond the prescribed period of limitation. Section 19 of Limitation Act, 1963 states that the period of limitation shall be computed from the date of payment in case the payment of debt or interest is made before the expiry of the prescribed period. Sub-section (j) of Section 2 of the Limitation Act, 1963 states that the "period of limitation" means period of limitation prescribe for any

suit or appeal or application by the schedule and computed as per the provision of the Act. For ready reference we reproduce sub-section (J) of section 2 hereunder:

(j) "period of limitation" means the period of limitation prescribed for any suit, appeal or application by the Schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of this Act;

12. The Hon'ble Supreme Court in the matter of **B. K. Educational Services Private Limited V/s Parag Gupta**, upheld that in the application filed under Section 7 or 9 of the IB Code, the prescribed period given under Article 137 of Limitation Act, attracts, which prescribed three years period of limitation regarding the application filed before this Authority under the aforesaid sections. For ready reference in record we reproduce the relevant para of this judgment hereunder:

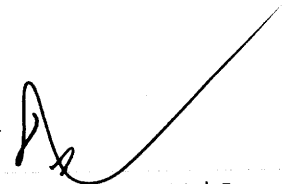
27. It is thus clear that since the Limitation Act is applicable to applications filed Under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a



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default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and 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.

13. In view of the above, we are of the considered view that the date of default was on the date on which the invoices were raised wherein the last date of invoice is 24.04.2012. The acknowledgment was made on 01.04.2014 which extended the Limitation till 01.04.2017. Thereafter the payment of Rs.3,50,000/- (Rupees Three Lakh Fifty Thousand Only) was made on 28.05.2019, which is beyond the period of three years, hence, Section 18 and 19 are not applicable in the present case.
14. We have also observed that for filing the application under Section 9 of IB Code, 2016 the delivery of demand notice is mandatory. The proof of delivery of the said notice is not on record. The present application is not within the period of Limitation as per the applicable provision of the Limitation Act, 1963.



15. We reject the present petition as it is not maintainable being barred by limitation and also for want of evidence of delivery of demand notice to the Corporate Debtor which is mandate of law to maintain application under Section 9 of the IB Code.
16. Accordingly, we reject the present Petition.

No order as to cost.



**AJAI DAS MEHROTRA
MEMBER (TECHNICAL)**



**MADAN B GOSAVI
MEMBER (JUDICIAL)**

Divya/Ramashish