

IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH, KOLKATA

CP (IB) No.1506/KB/2018
CA (IB) No.1220/KB/2019

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process 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;
And

In the Matter of:

Trinetra Electronics Limited, having its registered office at Vaishno Chambers, 3rd Floor, Room No.302, 6, Barbourne Road, near Regional Passport Office, Kolkata - 700 001

.....Financial Creditor

And

In the Matter of:

McNally Bharat Engineering Co. Limited, having its Registered Office at 4, Mangoe Lane, 7th Floor, Kolkata - 700 001

..... Corporate Debtor

Date of Hearing 1st October 2019

Order Delivered on 16th October 2019

Coram:

Madan B Gosavi, Member (J)

Virendra Kumar Gupta, Member (T)

For the Financial Creditor : 1. Mr. Ratnanko Banerjee, Advocate
2. Ms. Urmila Chakravorti, Advocate
3. Mr. Pranav Sharma, Advocate

For the Corporate Debtor : 1. Mr. Anubhav Sinha, Advocate
2. Mr. Som Dutta Bhattacharyya, Advocate
3. Ms. Radhika Misra, Advocate

ORDER

Virendra Kumar Gupta, Member (Technical)

This application under Sec.7 of Insolvency & Bankruptcy Code, 2016 has

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been filed by the financial creditor, viz., Trinetra Electronics Limited to initiate corporate insolvency resolution process against the corporate debtor, viz., McNally Bharat Engineering Co. Limited. The amount of default has been stated in the application at Rs.3,35,62,739.73 which includes principal sum of Rs.2,00,00,000/- and interest thereon of Rs.1,35,62,739.73 as on 30/9/2014.

2. The facts, in brief, are that the financial creditor and corporate debtor entered into an agreement on 6/8/2014 whereby financial creditor agreed to grant Rs.2 crore investment as ICD which carry interest @ 16% and were payable on 30/9/2014. Corporate debtor provided PDC and Demand Promissory Note also, hence, this petition.

3. Ld. Counsel appearing on behalf of the financial creditor after narrating the basic facts drew our attention to letters placed at page 29 to 37 which also contend copies of debt notes for the interest payable by the corporate debtor to show that the claim was not time barred. He, in particular, drew our attention to communication dated 29/1/2018 and 30/7/2018 which were request letters from the side of the corporate debtor to confirm the outstanding balance of ICD as on 31/12/2017 and 30/6/2018 to the auditors of the corporate debtor.

4. Ld. Counsel for the corporate debtor contended that acknowledgment were not in compliance to provision of Sec.18 of the Limitation Act, 1963, hence, not admissible and consequently, debt was time barred. The contention regarding restructuring and other issues between the financial creditor and corporate debtor in relation thereto were also mentioned but in our opinion the same has got no relevance, hence, not deliberated in details.

5. We have considered submissions made by both sides and have also perused the materials on record. The question for our consideration arises is that (i) whether debt is barred by limitation or not; (ii) whether the letters dated 29/1/2018 and 30/7/2018 constitute acknowledgment as per provision of

Sec.18 of the Limitation Act, 1963. It is not in dispute that these letters have been written by the corporate debtor regarding confirmation of outstanding balance of ICD as on 31/12/2017 and 30/6/2018 as per the books of account of Financial Creditor. The confirmation of outstanding balance is to be given to the statutory auditors of the corporate debtor. This exercise cannot be considered in a light manner because reliance on the accuracy of the books of account and financial statement is based upon such standard auditing practice. In the letter dated 29/1/2018 it has been clearly mentioned that such confirmation was in respect of amounts payable in respect ICD as on 31/12/2017 which by itself establishes the fact of acknowledgment of debt beyond any doubt. To deal with the contention of the corporate debtor that such emails do not constitute acknowledgment of debt within the meaning of provision of Sec.18 of the Limitation Act, 1963, we consider it necessary to reproduce the Sec.18 of the said Act as under:-

“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 acknowledgement 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;

(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."

From perusal of the explanation (a) to the said section it can safely be concluded that such letters constitute acknowledgment of debt by the corporate debtor, as it is not necessary that the letter should be written to the financial creditor only. It is further noteworthy that explanation (a) takes into its ambit the generally accepted commercial practices of communication between the parties whereby acknowledgment of debt can be inferred as no specific format has been prescribed.

6. Having stated so, a question may arise that such communications are in respect of the debt outstanding in the books of account of corporate debtor as on 31/12/2017 and 30/6/2018 and have been sent on 29/1/2018 and 30/7/2018 respectively which are beyond three years period from 30/9/2014, hence, whether requirement of Sec.18(1) of Limitation Act, 1963 is complied with. To look into this aspect, we have to see whether presentation in the balance sheet by itself constitutes an acknowledgment of debt or not. Now, there have been catena of decisions of NCLT and NCLAT that presentation of debt in the balance sheet constitutes acknowledgment of debt. Since the corporate debtor, in the present case has asked for conformation of balance from the financial creditor as on 31st December 2017 and 30th June 2016 in respect of loan taken in 2014 which itself implies that such loan is continuously outstanding in the balance sheet of corporate debtor from earlier financial years ending on 31st March 2015, 31st March 2016 and 31st March 2017. Thus, this fact by itself goes against the corporate debtor and irrespective of these emails,

there exists acknowledgment of debt due and payable which is not barred by limitation. This being so, hence, such emails also fall in the period specified for filing of suit as per provisions of Limitation Act, 1963 and, therefore, these comply with the requirements of Sec.18 of Limitation Act, 1963.

7. In the case of Jignesh Shah & another, Hon'ble Supreme Court in the order dated 25th September 2019 at para 19 of the order has held as under:-

"19. The aforesaid judgements correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding up proceeding."

The above findings also support our view.

8. Having stated so, we also take into consideration the provision of Sec.238A of the Insolvency & Bankruptcy Code, 2016 which is re-produced as under:-

"The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

9. Before looking into the ambit and scope of this section, it is stated that this provision was incorporated in Insolvency & Bankruptcy Code, 2016 with the object that stale claims cannot be made alive through the mechanism of

Insolvency & Bankruptcy Code, 2016. This is also so because Insolvency & Bankruptcy Code, 2016 is not a recovery mechanism rather a comprehensive code for insolvency resolution old and stale claims cannot be considered as a source or detecting of signs impending insolvency at an early stage. Hence, for this reason also the necessity was felt to make provision of Limitation Act, 1963 applicable to Insolvency & Bankruptcy Code, 2016. It has been settled judicially that Sec.238A is applicable since the implication of Insolvency & Bankruptcy Code, 2016. It is evident that Sec.238A the word "as far as may be" have been used which means that the provisions of Limitation Act, 1963 would apply to the extent possible and any provision of Limitation Act, 1963 being inconsistent to the provisions of Insolvency & Bankruptcy Code, 2016 will not be applicable. Further, the technicalities of Limitation Act, 1963 would not be applicable as Insolvency & Bankruptcy Code, 2016 is an economic legislation and functions on the principles of summary procedure. As discussed earlier that explanation (a) of Sec.18 of Limitation Act, 1963 provides much flexibility and takes into consideration various factors/situations for explaining as to what would constitute acknowledgment and in view of Sec.238 and 238A of the Insolvency & Bankruptcy Code, 2016, such provision has to be read further in conjunction with the wider meaning given to the term "claim" in Sec.3(6) of the Insolvency & Bankruptcy Code, 2016 which includes right to payment even on equitable ground.

10. In view of above discussion, we hold that there is no merit in the claim of the corporate debtor that the said emails cannot be said to be an acknowledgment within the meaning of provision of Sec.18 of Limitation Act, 1963. Accordingly, we reject the same.

11. The petition is otherwise complete in all respect. Ld. Counsel further submitted that the financial creditor had also proposed the name of the IRP Shri

Kamal Nayan Jain, who is qualified to work and there were no disciplinary proceedings pending against him. He further contended that the requisite consent of proposed IRP was also annexed with the application. Accordingly, we admit the same and order as under:-

ORDER

- i. The application filed by the Financial Creditor under section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, Trinetra Electronics Limited is hereby admitted.
- ii. We declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii. Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

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- b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- v. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- vi. The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii. The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x. Shri Kamal Nayan Jain having registration No.IBBI/IPA-001/IP-P010029/2016-17/10065 e mail id knjain@knjainco.com is

appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.


xi. The Financial Creditor to pay a sum of Rs.3,00,000/- (Rupees Three lakh only) to IRP as advance fee as per Regulation 33(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill. In case further funds are required during Corporate Insolvency Resolution Process and if not provided by Committee of Creditors then IRP/RP can approach this Tribunal for that purpose.


xii. The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

xiii. Registry is hereby directed under section 7(7) of the I.B.Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

12. List the matter on 26/11/2019 for the filing of the progress report.

13. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.


(Virendra Kumar Gupta)
Member (T)


(Madan B Gosavi)
Member (J)

Signed on 16th October 2019