



**IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK**

CP (IB) No. 44/CB/2022

In the Matter of:

An Application filed under Section 7 of the IBC 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

-And-

In the Matter of:

Industrial Promotion and Investment Corporation of Odisha Limited, IPICOL
House, Janapath, Bhubaneswar- 751 022, Odisha;

... **Financial Creditor**

-Versus-

Ores Ispat Private Limited, At Room No. GA-A, Dwibedi Market Complex,
Opposite Old Taxi Stand, Rourkela, Odisha- 769 001.

... **Corporate Debtor**

Appearances

For the Petitioner

Mr. S. S. Sonthalia, CS

For the Respondent

Ms. Prajnaraj Mohanty, Advocate.

Order reserved on: 25.04.2023
Order pronounced on: 26.06.2023

Coram:

Shri P. Mohan Raj

: Member (Judicial)

Shri Satya Ranjan Prasad

: Member (Technical)

ORDER

Per P. Mohan Raj, Member (Judicial)

1. This petition is filed by Industrial Promotion and Investment Corporation of Odisha Limited (IPICOL) herein after called the “Financial Creditor”, to initiate Corporate Insolvency Resolution Process against the Ores Ispat Private Limited (OIPL) herein after called the “Corporate Debtor” under Section 7 of Insolvency and Bankruptcy Code 2016 R/w Rule 4 of Insolvency and Bankruptcy (Application to Adjudication Authority) Rules 2016.



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Brief contents of petition are as follows: -

2. The Financial creditor sanctioned a term loan of Rs.250.00/- lakhs to the corporate debtor on 09.03.2004 to set up a sponge Iron manufacturing unit. The Loan was secured by executing equitable mortgage dated 11.10.2004 over immovable property and by Hypothecation of Tangible property. The loan amount was disbursed as per the terms of the agreement. When the corporate debtor fails to repay the dues, the Financial Creditor sent a demand notice dated 17.11.2005 to clear the dues. The corporate debtor to settle the term loan under One Time Settlement scheme MDF-OTS-07 submitted a letter dated 18.08.2007 for OTS proposal along with a Demand Draft of Rs.25.00 lakhs i.e., 10% of principal outstanding amount as on 27.09.2008. In the meanwhile, the Government of Orissa announced Amended OTS-07 scheme and the financial creditor adopted the Amended OTS scheme, and by letter dated 05.07.2011 the corporate debtor was asked to apply under the Amended- OTS scheme. The corporate debtor applied for OTS proposal under the Amended scheme, but had not paid the initial deposit amount as required under the Amended scheme. The Financial creditor on 28.01.2013 in its 230th Board meeting dropped the Amended OTS scheme. On 20.07.2016 the Financial Creditor with the approval State Government of Orissa launched a new OTS settlement scheme 2016. The corporate debtor applied under new OTS scheme 2016 on 13.03.2016, however without any initial deposit as required under the new scheme 2016. The Financial creditor informed to the corporate debtor by letter dated 13.06.2017 that due to non-payment of initial deposit amount its OTS-Proposal under OTS-2016 scheme is not processed. On 20/22.08.2019 the financial creditor issued notice to the corporate debtor recalling the corporate debtor to repay the entire outstanding liability of Rs.7,11,97,800.00/ as on 15.05.2019. The two other OTS request submitted by the corporate debtor dated 02.03.2020 and 14.12.2020 were not considered by the financial creditor in the absence any existing/operating OTS scheme. In the financial statement of corporate debtor ended 31.03.2021 the borrowing is reflected as loan from IPICOL Rs.286.00 lakhs. As on 30.06.2022 a sum of Rs.225.00 is due towards principal and



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a sum of Rs.4,76,53,867.00/- is due towards the interest total due is Rs.7,01,53,867.00/-. Hence the petition.

Brief facts of the reply are as follows:

3. The petition is filed without supporting affidavit should not be entertained. The financial debt is barred by limitation. The corporate debtor submitted OTS proposal dated 09.07.2011 under the Amended MDF-OTS-07 scheme, it was suspended by financial creditor on 16.07. 2013. There was no acknowledgement of debt made by the corporate debtor for more than three years. The corporate debtor lastly acknowledged the debt on 09.07.2011, then OTS proposal was submitted on 13.09.2016 the said proposal was rejected on 13.06.2017. The OTS proposal was made on 13.09.2016 but before that no acknowledgement was made within three years from 09.07.2011 the debt was already time barred, hence the OTS letter dated 13.09.2016 will not extend the limitation. For the interregnum period of five years between 09.07.2011 and 13.09.2016 there was no acknowledgement, it is fortified by statement of account filed by the petitioner annexure "L", therefore the debt is barred by limitation. The petitioner failed to mention the date of default in part-IV of form the same is mandatory requirement. The statement of account annexure "L" relied by the petitioner is not disclosed the date of default. The date of default defined under section 3(12) is missing to trigger the insolvency proceeding. The recall letter 26.08.2019 relied by the petitioner is not valid because the debt was already barred by limitation. The petition is liable to be dismissed.

The brief facts of the Rejoinder are as follows:

4. The supporting affidavit was inadvertently omitted to file along with the petition but now the affidavit is filed the same may be accepted after condoning the delay. There was default of loan by the corporate debtor and corporate debtor several times acknowledged the debt by offering one time proposal and in the annual statement of account filed with MCA the debt is not barred by limitation. The term loan was given in the year 2004, which was defaulted on 31.05.2005, the loan restructured on 02.08.2006, but due to continuous default by the corporate



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debtor the restructured loan was not implemented. The corporate debtor submitted proposal for OTS on 18.08.2007, it was not accepted, again on 09.07.2011 submitted OTS proposal, the scheme was suspended. Again, submitted a proposal for OTS 03.03.2014, since there was no OTS scheme at the time the same was not considered. As per the Apex court Judgment one time settlement offer is amounts to acknowledgement of debt. The debt is acknowledged by the corporate debtor in its financial statements 2014-2015 to 2020-2021.

5. After the perusal of pleadings and heard both sides submissions the following points are framed for consideration:

1. Whether non-filing of supporting affidavit along with the petition is fatal?
2. Whether the petition is barred by limitation?

Point No.1:

6. The petitioner has filed the petition on 05.09.2022 without accompanying the supporting affidavit as required under Rule 34(4) of NCLT Rules 2016. After pointed out the error the applicant now filed the supporting affidavit on 23.12.2022 along with the rejoinder. Now the defect is cured. The non-filing of supporting affidavit along with the main petition is curable defect now the defect is cured. Further non-filing of supporting affidavit along with the petition is procedural error, procedural law is only handmaid to substantial law. The procedural law should be construed liberally. For curable error or omission, the substantial rights of the parties cannot be curtailed specially when there is no harm is caused or any right accrued on the other side. In the result it is answered that non-filing of supporting affidavit along with the petition is not fatal.

Point No. 2:

7. The petition is filed under section 7 of IBC 2016. In the petition part IV (2) the date of default is not mentioned. To ascertain the fact whether the petition is filed in time, the date of default is to be mentioned in the relevant portion of the petition. The respondent raised this defect in its reply, then the petitioner stated in the rejoinder the date of default is 31.05.2005. The financial creditor has not taken



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any steps to insert the default date in the main petition by an amendment. This petition is filed on 05.09.2022. Even though the default was occurred prior to advent of IBC 2016, the Limitation is applicable from the inception of IBC 2016 in this regard the Apex court held in CIVIL APPEAL NO. 23988 OF 2017 B.K. EDUCATIONAL SERVICES PRIVATE LIMITED ... VERSUS PARAG GUPTA AND ASSOCIATES as follows:

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 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.

8. The applicability of section 18 of Limitation Act 1963, regarding acknowledgement of debt is applicable to the IBC 2016 proceeding also. The Apex court in Dena Bank (now Bank of Baroda) vs Sivakumar Reddy and Anr (2021) 10 SCC 330 held as follows:

As per [Section 18](#) of 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 a fresh period of limitation from the date on which the acknowledgement is signed. Such acknowledgement need not be accompanied by a promise to pay expressly or even by implication. However, the acknowledgement must be made before the relevant period of limitation has expired.



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9. On the applicant side submitted that there is a continuous acknowledgement of debt by submitting OTS proposal by the respondent from 2007 to 2020. On the respondent side stated that the respondent submitted OTS proposal on 09.07.2011 thereafter again submitted on 13.09.2016. The OTS proposal dated 13.09.2016 was submitted after the expiry of three years period of limitation, hence the petition is barred by limitation. On the petitioner side in the rejoinder stated that after 09.07.2011 OTS proposal, the respondent submitted next OTS proposal dated 03.03.2014 was submitted Annexure 2 of rejoinder by the respondent. This fact falsifies the contention of respondent.

10. From the materials submitted on both sides we have to see whether there is continuous acknowledgement of debt or not. The Respondent submitted the OTS proposals on the following dates:

- (i) 18.08.2007,
- (ii) 27.09.2008,
- (iii) 09.07.2011,
- (iv) 03.03.2014,
- (v) 13.09.2016,
- and
- (vi) 14.12.2020

11. In the supra-OTS proposals (I) to (v) were made before the expiry of three years from the previous OTS proposals, within the period of limitation. The (v) OTS proposal was submitted on 13.09.2016, the three years period expired with 13.09.2019, the (vi) OTS proposal was submitted on 14.12.2020 after the expiry of three years period of limitation. Thus, the limitation period chain broken on 13.09.2019, so any action or acknowledgement subsequent to 13.09.2019 will not save the limitation.

12. On the petitioner side stated that on 22.01.2020 petitioner issued demand notice, then respondent submitted OTS proposal on 14.12.2020. The letter dated 22.01.2020 issued by the petitioner does not improve the case of the petitioner. Further petitioner side relies upon the Balance sheet as ended with 31 March 2021



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dated 15.10.2021. In the Balance sheet ended with 31.03.2021, recorded the outstanding loan of Rs. 2,86,00,000.00 for the financial years 2014-2015 to 2020-2021. This acknowledgement was made on 15.12.2021 in the financial statement ended with 31.03.2021 will not save the limitation. On the petitioner side not submitted the financial statement of the respondent for the period 2018-19 ended with 31.03.2019.

13. In the circumstances it is evident that the OTS proposal dated 14.12.2020 was submitted by the respondent after the expiry of limitation period, the debt was not validly acknowledged/renewed by the respondent after 13.09.2019 hence it is answered that the petition is barred by limitation.

In view of the answer arrived to point No. 2 this Petition is **DISMISSED**.

14. Registry is directed to send e-mail copies of the order forthwith to all the party's concern.

15. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2023.06.26 16:34:57 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN
RAJ

Digitally signed by PANDIAN
MOHAN RAJ
Date: 2023.06.26 15:08:17 +05'30'

P. Mohan Raj
Member (Judicial)

Signed on this 26th of June, 2023.

Kaushal P.S.