

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

IB-633/ (ND) /2018

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

M/s PARAGON CERAMICS

Through its proprietor, Sh. K.K. Bhagi
Krishna Nagar, Plot No.3, Sector-25,
Faridabad, Haryana

...Applicant

Versus

M/s RATHI ISPAT LTD.

C-220, Savitri Nagar, Malviya Nagar,
New Delhi -110017

...Respondent

Coram:

SHRI. P.S.N. PRASAD

Hon'ble Member (Judicial)

DR. V.K. SUBBURAJ

Hon'ble Member (Technical)

Counsel for Applicant: Mr. Gaurav Jain and Punit Vinay,
Advocates

Counsel for Respondent: Mr. Satish Kumar Tripathi, Advocate

IB-633/ND/2018

M/s Paragon Ceramics v. M/s Rathi Ispat Ltd.



ORDER

Per SHRI. P.S.N. PRASAD, MEMBER (JUDICIAL)

Date: 07.09.2020

1. This is an application filed by M/s Paragon Ceramics to initiate corporate insolvency resolution process ("CIRP") against Rathi Ispat Ltd. under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code") for the alleged default on the part of the Respondent in settling an amount of Rs. 27,97,788 /- including interest are lying towards the goods supplied by the Applicant. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

- i. That the applicant supplied the basic and high temperature refractories items to M/s Rathi Ispat Ltd. (Respondent) on various dates through various invoices.
- ii. The applicant stated that the details of the invoices/bills against which the outstanding amount is due and a copy of all the invoices of year 2006-2007 and



bank statement of transaction between parties have been annexed with the application.

- iii. The applicant further submitted that as per the statements of the account of the applicant as on 28.02.2011 an amount of Rs. 27,97,788/- including interest are lying outstanding in the name of the Respondent.
- iv. That the Respondent did not make any single payment in favour of the Applicant against the outstanding dues. The applicant sent a legal notice to the Respondent dated 14.12.2009 to make the outstanding due payment of Rs. 16,39,935/- with interest @16% per annum.
- v. The applicant stated that on 24.03.2010, a letter was issued to the Respondent for the issuance of "C" FORM for the financial year 2006-07 as it was required by the sales Tax Department. The applicant furthers states that the Respondent denied to provide the FORM "C" stating that the said company was closed since October 2007 and the Bankers i.e. Punjab National Bank have taken the possession of



the company with all the material records. Whereas, the applicant was shocked as the Respondent company was transacting with the applicant in the year 2007 and 2008.

- vi. The Applicant submitted that on 24.07.2010 a letter was issued to the Punjab National Bank for issuing "C" FORM against which no reply was made by the Punjab National Bank and due to which the applicant paid Rs. 1,25,935/- as a penalty to the Sales Tax Department vide Demand Draft No. 141830 dated 05.01.2011 in favor of the assessing authority.
- vii. That the applicant filed a suit for recovery titled as *M/s Paragon Ceramics versus Rathi Ispat Ltd.*, against the Respondent and its director for recovery of Rs. 27,97,788/- before the Ld. Civil Judge (Senior Division), District Courts, Faridabad, Haryana.
- viii. That the Decree was passed on 26.09.2016, by Mrs. Saurab Gussain, Ld. Civil Judge (Senior division) District Courts, Faridabad, Haryana in favour of the applicant in the said Civil Suit titled as *M/s Paragon*

Ceramics versus Rathi Ispat Ltd., holding that the applicant is entitled to receive a sum of Rs. 27,97,788/- along with interest @9% per annum from the date of filing i.e. 11.03.2011 to 10.03.2018 (84 months) amounting to Rs. 17,62,606/- apart from cost of litigation of Rs. 1,32,162/- plus interest on amount of Form "C" @ 9% is Rs. 10,97,328/- which now totals to Rs. 57,89,884/- till 10.03.2018 from the respondent.

- ix. That the applicant in pursuance of said decree dated 26.09.2016 passed in said suit for recovery the applicant has filed an execution application to which the Respondent filed an objection on 18.07.2017 wherein the Respondent has claimed that all of its assets and records has been taken over by the Punjab National Bank on 26.05.2008 and by the State Bank of India on 27.05.2008.
- x. That the said Punjab National Bank had also filed an objection dated 08.09.2017 to the said execution application regarding final decree dated 26.09.2016 wherein it has been clarified that although being

secured creditor it has taken the symbolic possession of mortgaged property at south side plot No.2, G.T. Road, Industrial Area, Ghaziabad but said secured asset could not be sold out till date.

- xi. The applicant submits that a demand notice dated 02.04.2018 under section 8 of the Insolvency and bankruptcy Code, 2016 was sent to the Respondent at its registered office and also to its directors for the payment of the outstanding amount of Rs. 57,89,884/- which was duly served except to one director. The applicant further submitted that no notice of pre-existing dispute has been received by the applicant within a period of 10 days of service of demand notice.
2. Since the application filed by the Applicant fulfilled all the conditions required under Section 9 of the Code, this Tribunal ordered issue of notice to the Respondent by all modes. However, the Applicant during the hearing on 11.10.2018 contended that the affidavit of service has been filed, No one has represented on behalf of the Respondent. However, despite service of notice by all

modes, none appeared on behalf of the Respondent and as a result the Respondent was proceeded ex-parte on 11.10.2018.

3. The Respondent filed CA No. 155/2018 with the prayer to set aside the ex-parte order passed against the respondent on 11.10.2018. The learned counsel for the Respondent stated that the application was served on the old address of the Respondent and placed on record the Company master data of the Respondent company which is reflecting the new address of the Respondent. The Respondent also placed on record the form duly filed with ROC on 22.08.2016 reflecting the change of the Registered address of the company. The prayer made by the learned counsel was granted and the order dated 11.10.2018 was set aside and respondent was allowed to file the reply.
4. Consequent to the ex-parte set aside order by this Tribunal, the Respondent filed its reply in which the following contentions are made:
 - i. That the present application filed by the applicant is not maintainable in eyes of law because the petitioner is not a legal entity (not a body corporate

nor even otherwise entitled under law to institute a case).

- ii. The Respondent submits that since the claim of the applicant was based on a decree dated 26.09.2016 obtained in name of petitioner, a proprietorship concern, which itself is not executable nor enforceable in eye of law.
- iii. The Respondent further submits that no valid demand notice as per the requirement of Section 8 of IBC, 2016 had ever been served upon the Respondent.
- iv. The Respondent submitted that the applicant knowingly and deliberately mentioned wrong address of the Respondent company in the demand notice sent under section 8 as well the as in the application, despite of the fact that the new registered address of the respondent was duly uploaded on the website of the ROC way back in year 2016 on dated 22.08.2016 and the same was in the knowledge of the applicant.



- v. That since, the Respondent company stand idle since October, 2007 when Punjab National bank being head of consortium Banks have taken action against the respondent company under SARFAESI Act and consequent thereto have taken over possession of all assets of the company vide possession notice dated 28.12.2007 and therefore, the applicant needs to file its claim before the said bank.
- vi. The Respondent submits that due to heavy losses and unforeseen closure of production of the Respondent Company, there are other number of cases which has been filed by different entities and persons before different courts and some of them have been decreed and some are still pending in the Hon'ble courts. That the winding up petitions filed against the respondent Company and pending before Hon'ble High Court of Delhi at different stages viz. Co. petition No. 180/210- Indian Bank v. Rathi Ispat Ltd., Co. Petition No. 289/2006- Inox Air Products v. Rathi Ispat Ltd., Co. Petition No.116/2009- Avantika



Chemicals metals Pvt. Ltd. v. Rathi Ispat Ltd. etc.
and therefore this Hon'ble Tribunal may not proceed
against the respondent company which otherwise
lead to multiplicity of the proceedings.

vii. The Respondent further submitted that all assets of
the company has been attached by the excise
Department, Nagar Nigam Ghaziabad and even
factory premises was sealed by the authorities
concerned.

5. Pursuant to the reply filed by the Respondent the
applicant has filed its Rejoinder in which the following
contentions were made:

i. The applicant submits that the respondent in his
reply claimed that he had shifted his registered
office to C-220 from C-235 of Savitri Nagar, Delhi,
whereas on the other hand the affidavit of Atul
Sharma, the Respondent filed in support of
application for setting aside ex-parte orders
mentions C-235, Savitri Nagar, Delhi, as it
registered office.



- ii. The applicant further submitted that the Respondent while making submission for the ex-parte order set aside application has not revealed as to when and on which date said registered address was uploaded on the website of the ROC, as before sending the statutory demand notice to the Respondent the applicant had found from the website of the ROC that registered address of Respondent is C-235, Savitri Nagar, Delhi.
- iii. The Respondent further submitted that the objection application dated 08.09.2017 to the execution application filed by the Applicant before Faridabad court concerned, the Punjab National Bank had clarified that it has taken only the symbolic possession of the mortgaged property/factory but could not sell it out so far. As, taking symbolic possession of some of the assets of the Respondent does not bar the applicant from filing the above said petition and that the same is maintainable before this Hon'ble Tribunal.



6. We have gone through the documents filed by both the parties and from the perusal of the application filed by both the applicant it is clear that the applicant has supplied basic and high temperature refractories items to the Respondent M/s Rathi Ispat Ltd. and various outstanding invoices were raised against the Respondent.
7. Further, the claims of the applicant are barred by the Limitation Act, 1937, because last invoice was raised by the applicant on 22.03.2007 against which the Limitation has expired way back. The remedy pursued by the applicant by way of recovery suit which was decided on 26.09.2016 does not entitle the applicant to exclude such period out of limitation for the purpose of ascertaining limitation under the provisions of the code.
8. At this juncture, we would like to refer to the judgement of ***Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 1121 of 2019 in the matter of Ishrat Ali vs. Cosmos Cooperative Bank Ltd. & Anr. Dated 12.03.2020 in which Hon'ble NCLAT referred the decision of Hon'ble Apex Court reported in 2019 (10) SCC 750***

Jinesh Shah and another vs. Union of India and another
which Hon'ble Apex Court held that-

***“that 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:” by placing reliance upon
this “thus, while holding so, the Hon’ble Supreme
Court says that the date of default is the date for
the purpose of computing the period of limitation of
application under section 7.***

*The same principle is applicable in the present case. mere
filing of a suit for recovery or a decree passed by a court
cannot be held to be deferment of default is the date for the
purpose of computing the period of limitation of application
under section 7. The same principle is applicable in the
present case, mere filing of a suit for recovery or a decree
passed by a court cannot be held to be deferment of
default. A suit for recovery of money can be filed only when
there is a default of dues. Even if the decree is passed, the
date of default does not shift forward to the date of decree*

or date of payment for execution, Decree can be executed within specified period i.e. 12 years. If it is executable within the period of limitation, one cannot allege that there is a default of decree or payment of dues. Therefore, we hold that a judgement or a decree passed by a court for recovery of money by a Civil Court / Debt Recovery Tribunal cannot shift forward the date of default for the purpose of computing the period for filing an application under section 7 of the IBC.

9. *The Hon'ble NCLAT held that "In an application under section 7 relief is sought for resolution of a corporate debtor or liquidation on failure, it is not a money claim or suit. Therefore, no benefit can be given to any person under section 14(2) till it is shown that the application under section 7 was prosecuting with due diligence in a court of first instance or of appeal or revision which has no jurisdiction."*

10. In light of the above, after careful consideration of the entire matter and hearing the arguments of the parties and upon appreciation of the documents placed on record to substantiate the claim, we find and hold that the



operational creditor is not entitled to get the computation of limitation under section 14(2) of the Limitation Act therefore the same is barred by limitation and the application is liable to be dismissed on this ground alone. Since, we hold that the application is barred by limitation, therefore, we would not like to consider other points raised by both the parties.

The present application is **Dismissed**.

- S d -

(DR. V.K. SUBBURAJ)
MEMBER (TECHNICAL)

- S d -

(SHRI. P.S.N. PRASAD)
MEMBER (JUDICIAL)

Ramandeep Singh