

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

C.P. (IB) No. 159/KB/2019

IN THE MATTER OF:

Application by Financial Creditor to initiate Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 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:

United Bank of India, having its head office at 11, Hemanata Basu Sarani, 9th floor, (formerly known as 16, old court house street), Kolkata- 700 001 and *interalia*, carrying on its business at its branch office at Garia Branch, P-123 Raja S.C. Mullick Road, Kolkata- 700 084.

...Applicant

Versus

IN THE MATTER OF:

Zenith Finesee India Private Limited, a company constituted and incorporated under Companies Act, 1956 having CIN: U36998WB2003PTC096317, having its registered office at Century Tower, 2nd floor 45, Shakespeare Sarani, Kolkata- 700 017.

...Respondent

sel -

CORAM:

Jinan K.R., Hon'ble Member (Judicial)

For Petitioner:

- 1) Mrs. Lipika Ghosh, Advocate
- 2) Mr. S.K. Shahrukh Raja, Advocate

For Respondent:

- 1) Rajarshi Dutta, Advocate
- 2) Madhurima Das, Advocate

Date of pronouncement of Order: 20th November, 2019

ORDER

Per Jinan K.R., Hon'ble Member (J):

1. This Petition has been filed by United Bank of India, Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter, "I&B Code") to start Corporate Insolvency Resolution Process against Zenith Finesee India Private Limited, the Respondent/Corporate Debtor.

2. It is submitted that upon request of the Respondent, the Petitioner sanctioned term loan amounting to 764.69 Lakh on 29.09.2010 which was later reviewed and restructured by the Petitioner for an overall limit of Rs. 950.69 Lakh on 27.02.2013. After certain time, the Respondent became a defaulter and the account was declared as NPA on 31.03.2015. The date of default is claimed to be 01.01.2015 and the total amount claimed to be in default is 14,55,06,946.72/-. The Petitioner has proposed one Mr. Animesh

Sd/-

Mukhopadhyay, a registered insolvency professional, as interim resolution professional whose written communication is annexed to the Petition.

3. In its Affidavit in opposition/reply to the Petition, the Respondent has submitted that no debt is due or payable and that the claim is time barred. The Respondent has, contravening its own submission, admitted in its reply that in order to generate funds for setting up business, the Respondent availed a loan of Rs. 764.69 Lakh on 29.09.2010. It is further submitted through Reply that vide its letter dated 28.09.2015 the Respondent proposed to enter into a settlement with the Petitioner. Similar offers were admittedly made by the Respondent on 07.11.2015, 18.01.2016, 19.02.2016 03.03.2016 and 24.03.2016 but to no avail. The Respondent then requested the Petitioner to agree to an OTS in order to clear off its dues vide letters dated 12.08.2016, 18.12.2016, 20.12.2018, 16.02.2019 and 22.03.2019. It is further submitted that the OTS of Respondent is pending.

4. In rejoinder to the reply, the Petitioner submitted that the Petition is not time barred since it has *“already filed recovery suit before DRT, Kolkata and as such bank has taken remedy under the existing law within three years from date of execution of last document and by filing OA within limitation period continuous cause of action is there. Moreover the present application was filed within 3 years from the date of IBC came into force and thereby the present application and the claim made therein are not barred by limitation”*.

5. During arguments, mainly two defences have been taken by the Respondent viz. i) the Petition is time barred since the date of default is 01.01.2015 and it was filed on 25.01.2019 and ii) that the admission of debt was not clear and unequivocal. To substantiate its submission with regard to limitation, the Respondent has relied on two Supreme Court Judgments viz.,



Sagar Sharma & Anr. v. Phoenix ARC Pvt. Ltd. & Anr., Civil Appeal No. 7673 of 2019 and *Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. & Anr. Civil Appeal No. 4952 of 2019*. Whereas, the Petitioner has argued that the Petition is not time barred since there is an admission on the part of Respondent through its OTS proposal dated 03.09.2016 and a fresh period of limitation starts therefrom. To substantiate its contention, the Petitioner has relied upon a judgement by this Tribunal in the matter of *International Asset Reconstruction Company Ltd. V. Aditi Oil Extraction Private Ltd. CP (IB) No. 1140/KB/2018*. The Counsel for the Petitioner further argued that even though the OTS has failed, the admission on part of the Respondent holds good.

6. Heard both the side. Perused the documents.

7. In the Petitions of such nature the position with regards to limitation is well settled now. The honourable Supreme Court in the matters of *Sagar Sharma & Anr. v. Phoenix ARC Pvt. Ltd. & Anr.* has held that:

2) We had also made it clear beyond any doubt that for applications that will be filed under Section 7 of the Code, Article 137 of the Limitation Act will apply....”

“3) Article 141 of the Constitution of India mandates that our judgments are followed in letter and spirit. The date of coming into force of the IBC Code does not and cannot form a trigger point of limitation for applications filed under the Code. Equally, since “applications” are petitions which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications.”

A similar view was taken by the honourable Supreme Court in *Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. & Anr.* From the aforementioned judgements, it is clear that in Petitions of nature

scf

such as the one in hand the limitation shall be decided as per Article 137 of Limitation Act which reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
Any other application for which no period of limitation is provided elsewhere in this Division	Three years.	When the right to apply accrues.

8. As per the aforementioned provision, the limitation in the present case shall start running when the right to apply accrued which is the date of default i.e. 01.01.2015 therefore, the Petition should have been filed before 01.01.2018 however, it was filed on 25.01.2019 rendering the Petition time barred. The Petitioner however drew my attention towards acknowledgement by the Respondent in various letters written by the Respondent to the Petitioner for settlement of dues that saves the limitation in the present case by virtue of section 18 of the Limitation Act. On 18.12.2016, i.e. within the limitation period, admittedly, an OTS proposal was sent by the Respondent, it appears from the record that even after this date several proposals were sent. In the last paragraph of the letter dated 18.12.2016, the Respondent clearly states that:

“we therefore propose to pay Rs. 9.70 Cr or part of the sum in the month of June 2017. Any residue will be paid by March, 2018 along with interest on residue @ 6% p.a.”

In the last paragraph of letter dated 20.12.2018 the Respondent clearly states that:

CP

“Hope, you will appreciate our endeavour and intention to clear the dues through OTS and we will be obliged with your valued advice on the same”

In the last paragraph of letter dated 20.12.2018 the Respondent clearly states that:

“Hence we, once again request you to approve our offer and help us to clear the liabilities immediately...”

9. From the above letters it is clear that the debt and liabilities have been acknowledged by the Respondent which falls under the purview of section 18 of the Limitation Act, thus are an acknowledgment of debt. Also, in view of the statements made in the aforementioned letters I find no strength in the argument of Respondent that admission was not clear and unequivocal. Moreover, in *Sudarshan Cargo Pvt., Ltd., v. M/s Techvac Engineering Pvt. Ltd.*, CO. P. NO. 11/2013 the honourable High Court of Karnataka has observed that:

"Section 18 does not provide that acknowledgment has to be in any particular form or to be express. Even a statement which, if literally construed, does amount to an acknowledgment, may be sufficient, if it implies an admission of liability. A narrow interpretation should not be put on what constitutes acknowledgment under section 18. An acknowledgment is an admission by the debtor to the creditor indicating that he owes money to the creditor. The acknowledgment requires to be examined in the light of surrounding circumstances by an admission that the writer owes debt. Generally speaking, a literal construction of the statement on which the acknowledgment is sought to be founded should be given. if there is an admission of

sd

fact of which the liability in question is a necessary consequence, it should be taken as an acknowledgment. The term acknowledgment has to be construed in its plain literary sense..."

Therefore, in light of the aforementioned discussions, it is held that the Petition was filed within limitation period.

10. It is clear from the Reply filed by the Respondent that the debt is admitted however, the default is disputed since, as per the Respondent, the OTS is still pending however it appears from the rejoinder that an OTS proposal was approved by the Petitioner vide letter dated 14.04.2016 however, the Respondent failed to honour the OTS which therefore failed and the failure was also communicated to the Corporate Debtor vide letter dated 30.09.2016. It has also been argued by the Petitioner that no OTS proposal is pending.

11. The present Petition has been filed in proper form. The Petitioner has produced several documents including loan sanction letter, final recall notice, CIBIL report, etc. The Petitioner has also proposed the name of interim resolution professional and filed the original written communication by the said professional. It seems that all the compliance under section 7 of the I&B Code has been made.

12. Another point of authorisation has been raised by the Respondent. We find that Mr. M.K. Zama working as Assistant General Manager with the Petitioner Bank has been properly authorised by the General Manager (Recovery, Legal, Credit Monitoring, RTI, DRT & SAMV) to initiate CIRP against the Respondent Company on behalf of the Bank.

Sd/

13. In the light of the above said discussions, the Petition is hereby admitted under section 7 of the I&B Code upon the following directions:

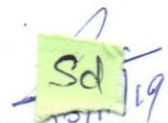
- i. The Petition filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Insolvency Resolution Process in respect of Zenith Finesee India Private Limited.
- ii. I hereby declare a Moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii. The 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 the 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 judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

sd

- 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 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 or suspended or interrupted during the 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 Sec.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.

Sd

- x. Mr. Animesh Mukhopadhyay Resident of Syndicon Enclave, 25/1A/1 Naktala Road, Kolkata-700 047 having registration no. IBBI/IPA-001/IP-P00124/2017-2018/10266 and e-mail: animesh_fca@yahoo.co.in is hereby appointed as Interim Resolution Professional for ascertaining the particulars of Creditors and convening a meeting of Committee of Creditors for evolving a Resolution Plan.
- xi. The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- xii. Registry is hereby directed under Section 7(7)(a) of the I.B. Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the Interim Resolution Professional by Speed Post as well as through e-mail.
- xiii. List the matter on 06.01.2020 for the filing of the progress report.
- xiv. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.


(Jinan K.R.)
Member (Judicial)

Signed on this, 20th day of November, 2019.

/hb./