

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH-I

KOLKATA

CP (IB) NO.1873 /KB/2019

An application for initiation of the 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;

In the matter of

State Bank of India is a public sector Banking and Financial Services Statutory body constituted under the State Bank of India Act,1955 having registered office at Madame Cama Road, Nariman Point, 'Corporate Centre', Floor-14th Mumbai-400021 having PAN No. AAACS8577K

.....Financial Creditor

-Versus-

Jupiter Coke and Energy Private Limited, a company constituted under the Companies Act,1956 and is a Company within the meaning of the Companies Act, 2013 and has its registered office at Pashupati Bhattacharjee Road, 36/4, Kolkata- 700041, West Bengal, having CIN: U23100WB2008PTC126028.

.....Corporate Debtor

Date of Hearing: 28/03/2022

Date of pronouncing the order:26/04/2022

Coram:

Shri Rajasekhar V. K, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing):

For the Financial Creditor: Mr. Ajay Gaggar, Adv

Mr.Uttiyo Mallick, Adv

For the Corporate Debtor: No representation

ORDER

Balraj Joshi, Member (Technical)

1. *Preliminary*

- 1.1. This Court convened through video conferencing.
- 1.2. This Company Petition bearing no. CP(IB)/1873(KB)/2019 under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed by **State Bank of India (PAN No.AAACS8577K)** (hereinafter referred to as the 'Financial Creditor'), a body Corporate seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against **Jupiter Coke and Energy Private Limited (CIN No.U23100WB2008PTC126028)** a corporate entity (hereinafter referred to as the 'Corporate Debtor') as the Corporate Debtor committed default in paying the financial debt of Rs.197,42,65,297.38/- (Rupees One hundred and ninety-seven crores forty-two lakhs sixty-five thousand two hundred ninety-seven and thirty-eight paise Only). The date of filing this petition is 23.09.2019.

2. Submission by the Financial Creditor/Petitioner

- 2.1. It is the case of the Financial Creditor that at the request of the Corporate Debtor, they have sanctioned the credit facility of Rs.68.28 crores in respect of cash credit (Term Loan-I) of Rs.32.28 Crores and cash credit (Term Loan-II) of 36.00 crores in the shape of a revolving letter of credit vide sanction letter dated 03.04.2010. The copy of the sanction letter is placed in **Annexure-VI**¹ and the Board Resolution accepting the loan by the corporate debtor is given in **Annexure-I**². The credit facility was secured by way of hypothecation³/mortgage of land along with fixed assets & current and future assets, Personal (Shri Nabarun Bhattacharjee and Smt. Sampa Bhattacharjee) and corporate guarantee (Jupiter Spun Pipes & Casting Private Limited), letters of hypothecation, Agreement

¹ Page 60-70 of the petition.

² Page 39 of the petition.

³ Details given in part V, Form-I, Page 9

of Pledge as well as lease deed of the land and charge recorded by Registrar of Companies as per **Annexure-IX**⁴; Further the Directors the Corporate Debtor had guaranteed the credit facilities on a personal basis. The loan was to be repaid in 26 quarterly instalments starting from 02.12.2011 to March 2018. The details of these credit facilities and the financial contracts *via* instruments securing them are given in **Annexure-XI to XXX** of the petitions.

- 2.2. At the time of scheduled repayment, the account of the Corporate Debtor became irregular and was classified as a Non-Performing Asset (NPA) on 28.12.2012. As the Corporate Debtor has defaulted in payment, hence the Company Insolvency Petition has been filed against the corporate debtor. The date of default has been mentioned as 28.12.2012 in Form - 1 Part-IV attached with the petition.
- 2.3. The said credit facilities were recalled by the financial creditor on 14.08.2013 asking for a sum of Rs.74,43,60,967.89 which included interest till 13.08.2013. The demand notice is placed in Annexure XXXIII on page 367 of the petition.
- 2.4. In support of the petition, the petitioner has annexed the following documents to prove the existence of financial debt and evidence of default as per the requirement of Sec 7(3) of the Insolvency and Bankruptcy Code, 2016.
 - i. Record of the default recorded with the Information utility are⁵: the Credit Information Bureau (India) Limited CIBIL Report marked as **Annexure-XXXI**⁶; A copy of the statement of Account certified under the Bankers' Books Evidence Act, 1891 is marked as **Annexure-XXXII**⁷;
 - ii. A certified copy of the petition filed before the Debt Recovery Tribunal bearing O.A No.78/2014, Kolkata, is enclosed with the application and is marked as **Annexure -XXXIV**⁸. The Financial

⁴ Page No. 84-87 of the petition.

⁵ Regulation 2(A) of the IBBI, 2016

⁶ page 347-353

⁷ page 354-366

⁸ page 374-408 of C.P(IB)1873 /KB/2019

creditor viz. State Bank of India (SBI) had filed the said Original Application No.78 of 2014 under Section 19 (3) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (in short RDDB Act of 1993) before the Debt Recovery Tribunal (DRT), Kolkata⁹ for recovery of Rs.78,19,60,059.00 (Rupees seventy-eight Crores Nineteen Lacs Sixty Thousand and Fifty-nine) only against the company (in liquidation) with following reliefs: -

"(a) That a receiver be appointed to make an inventory of the assets of the defendants.

"(b) That a recovery order be passed against the defendant to pay a sum of Rs. 78,19,60,059.00 together with interest pendent lite and further interest at Contractual rate @ 17.45% per annum from 02.03.2014 till realization of the entire amount due in full."

"(c) passing an order of injunction restraining the defendants from alienating and/or otherwise disposing of, in any manner.

The subject application which was filed on 18.03.2014 is presumably receiving consideration at DRT, Kolkata.

iii. The Financial creditor has proposed the name of the resolution professional **Shri Binay Kumar Singhania** bearing Registration Number **IBBI/IPA-001/IP-P00041/2017-18/10102** and he has agreed to act as an interim resolution professional for the resolution of the corporate debtor. Written communication by the proposed interim resolution professional is set out in Form 2.¹⁰

3. **Observations and findings:**

3.1 We have heard the learned counsel appearing on behalf of the Financial Creditor and perused the pleadings filed by it. This order is passed ex-parte, as there was no representation on the behalf of the Corporate Debtor nor any replies filed.

⁹ Date of filing of O.A 78 of 2014 at DRT 18/03/2014

¹⁰ Annexure-XXXV page 409

In order to admit the application under Section -7 of the code, following are the pre-requisites:

- I. Existence of a financial debt
- II. Whether the debt is due and payable
- III. The date of default
- IV. Whether the petition is filed within the limitation period.

These pre-requisites have been captured in the Form-I (Application to the Adjudicating Authority), which is designed with a view to aid the Adjudicating Authority to decide as to which aspect of the application needs to be looked into a larger detail and as such the format of Form-I is found to be helpful in expeditious disposal of the cases. One such aspect is the date of default and its bearing on the limitation aspect of the application. Part V of the Form-I specifically asks for a date of default, which in the instant case has been mentioned as 28.12.2012. On further examination it is seen that this date is, in fact, the date of the loan being declared as an NPA, which is not the same as the date of default, however, it can be said that the date of default would, in any case, pre-date this date. Thus taking the case at its highest, the right to apply would occur with effect from 28.12.2012 and this right should have been exercised till 27.12.2015 in accordance with section 137 of the Limitation act 1963, read with the judgment by Hon'ble SC in the matter of, **B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates, (2019) 11 SCC 633: (2018) 5 SCC (Civ) 528: 2018 SCC OnLine SC 1921 on page 664, which reads as under :**

42. 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.

In the present case, no such condonation has been sought by the financial creditor in filing the present petition. However, since the relevant sections of the IBC came to be notified on the 1st of December 2016, the period between 27.12.2015 to 01.12.2016 would have to be excluded and advantage is given to the petitioner, whereby the petition should have been lodged by 2nd December 2016. Notwithstanding the exclusion of the period, the application has come to be filed on 23.09.2019 which is much beyond the period of limitation and thus hopelessly barred by the statute of Limitation. The import of the judgment, the interpretation, and the reasoning adopted by the Supreme Court are indicative of the intent behind the introduction of Section 238A of IBC and so the same should be followed in its letter and spirit.

Another argument for extension of the limitation that could be advanced in such matters is the effect of acknowledgment of the liability in writing as provided in Section 18 of the limitation act before expiration of the prescribed period. Further, it has been held by Hon'ble NCLAT in *V. Padmakumar v. Stressed Assets Stabilisation Fund*¹¹- that an entry in a balance sheet serves as an acknowledgment for the purposes of Section 18 of the Limitation Act (para 15).

- 3.2 Now coming to deal with the issue of 'entry in the balance sheet' as an acknowledgment of liability and the matter of extension of limitation by taking recourse to section 18, of the limitation Act 1963 by virtue of the fact that the respondent though had acknowledged the debt in the balance sheet but is much beyond the period of limitation and thus even here the petitioner cannot claim relief under section 18 of the limitation act. No other document such as acknowledgment of debt or payment within the period of limitation, or balance sheet acknowledgments, that would have the effect of extending the period of limitation has been placed on record as being in teeth of the decision in cases *supra*, the Hon'ble Supreme Court in **Babulal Vardharji Gurjar vs. Alumunium Industries Pvt. Ltd. & anr.**¹² has held that the three-year period of limitation from the date of default for an

¹¹ *Company Appeal (AT) (Insolvency) No. 57 of 2020*

¹² (2020) SCC online SCC 647

application for initiation of the corporate insolvency resolution process ('CIRP') under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('IBC') is only extendable under Section 5 of the Limitation Act, 1963 if an appropriate case for condonation of delay is made out. SC further observed that while 'date of acknowledgment of debt' may extend the limitation as per Section 18 of the Limitation Act, 1963 the same is only relevant for recovery suits and is not applicable for initiation of CIRP under the IBC.

- 3.3 The contention of extension of limitation due to its filing of the application before DRT also does not hold water in view of the judgment of the Hon'ble NCLAT in the matter of **Bimalkumar Manubhai Savalia vs. Bank of India and ors.** Company Appeal (AT)(Insolvency) No. 1166 of 2019 wherein it has been inter-alia held as follows:

(Para no.9; page 07): *"We are of the view that the SARFAESI and DRT proceedings are independent and as per section 238 of IBC, the Insolvency and Bankruptcy Code is a complete code and will have an overriding effect on other laws. Therefore, the proceedings imitated (initiated) or pending in DRT, either initiated under SARFAESI or under Debts due to the Banks and Financial Institutions cannot be taken into account for the purpose of limitation."*

In view of the above, it is concluded that the present petition is squarely hit by limitation and is therefore liable to be rejected accordingly.

The examination of the other pre-requisites for admitting an application under section -7, though become academic in this conspectus, but still the same are discussed hereunder for the sake of completeness.

(1) Existence of financial debt:

The sanctions letters by the Bank and documents executed by the corporate debtor as per the terms and conditions of the sanction letters issued from time to time are on record. The Corporate Debtor has executed various loan and banking documents including consent-cum-authorization letters signed by the authorized directors of the corporate debtor and submitting of the title deeds of the immovable property as also the

hypothecation of the machinery and the inventory duly signed by the corporate debtor in favor of the financial creditor. The corporate debtor has also acknowledged the subsistence of the liability in respect of the credit facilities by executing confirmation of balances and revival letters from time to time. From the foregoing it is clear that there was a financial contract between the financial creditor and the corporate debtor and the condition of the existence of the debt is therefore met. A snapshot of various credit facilities is given on pages 133-346 of the petition.

In regard to this being a **financial debt** which as per Section 5(8) of the Code would mean a debt along with interest and which is disbursed against the time value of money, one needs to see the certificates said to have been given under Section 2A (a) of the Bankers Book Evidence Act 1891 (as amended) which are collectively put at **Annexure-XXXII**¹³ of the petition, which shows various term loan and cash credit accounts wherein the interest has been booked to the account of the corporate debtor. It therefore could be regarded as the amount mentioned in part IV of Financial Debt particulars as claimed by the financial creditor, the name of the corporate debtor has indeed been mentioned in the reports. Therefore, conditions of existence of **financial debt** are fulfilled.

(II) Whether the debt is due and payable

The financial creditor *vide* his letter dated 14.08.2013 sent a notice of demand under 13(2) of the SARFAESI Act, which has been placed on page 367 of the petition. Later the Financial creditor-initiated action under 13(4) of SARFAESI. The first sanction letter of 03.04.2010, does specify a timeline for the repayment of the first term loan in 26 quarterly installments, which extends up to FY 2017-2018. Now considering the Bankers Book entries placed in Annexure-XXXII¹⁴ it is seen that accounts statements as presented do not show that the interest was not being serviced but the loan account details of the corporate debtor placed on page 83 of the petition show the outstanding payable amount calculated up to 31.08.2019 to be Rs. 197.42 Crores. Moreover, a credit received on

¹³ Copies of entries in a Banker's Book pages 354-366.

¹⁴ Page 354-366

08/12/2016 of Rs 5000 placed on page 365 of the petition doesn't make mention of the account being Non- Performing Assets (NPA in short), and none of any such communications that may support the financial creditor regarding reminders to the corporate debtor as stated in the recalling of loan letter. Evidently, the financial creditor seems to not have done proper due diligence and has not placed the necessary documents which could show 'beyond doubt that the corporate debtor has either not paid or has neglected to pay.

4. In light of the above, the petition made by the Financial Creditor under Section 7 of the Code, seeking initiation of CIRP in respect of the corporate debtor with the specific assertion of the date of default as **28.12.2012** and relying on the judgment of the Hon'ble Supreme Court as stated above, the petition is dismissed as barred by limitation. This shall not, however, affect the right of the petitioner to pursue other remedies as may be available to it under any other law or before any other forum.
5. **C.P.(IB) No. 1873/KB/2019** is accordingly dismissed.
6. The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
7. Certified copy of this order may be issued, if applied for, upon compliance with all the requisite formalities.

BALRA
J JOSHI
Digitally signed
by BALRAJ
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Balraj Joshi
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