

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

CP (IB) 3707/MB/2019

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

**Edelweiss Asset Reconstruction Co. Ltd.
..... Applicant/ Financial Creditor**

Versus

**M/s. S. Kumars Limited
..... Corporate Debtor**

Order Delivered on :- 18.11.2022

Coram:

Justice P.N. Deshmukh : Hon'ble Member (Judicial)

Mr. Shyam Babu Gautam : Hon'ble Member (Technical)

Appearances:

For the Financial Creditor: Mr. Rohan Agarwal, Adv

For the Corporate Debtor: Mr. Amir Arsiwala, Adv

ORDER

Per:- CORAM

1. The present Company Petition filed by Edelweiss Asset Reconstruction Company Ltd. under section 7 of the Insolvency and Bankruptcy

Code, 2016 (**Code**) seeking to initiate Corporate Insolvency Resolution Process (**"CIRP"**) against M/s. S. Kumars Limited, (**"the Corporate Debtor"**) alleging default in payment of a Financial Debt for an outstanding amount of Rs. 4,14,29,20,070/- (Rupees Four Hundred and Fourteen Crores Twenty Nine Lakhs Twenty Thousand and Seventy only). The Date of default is 30.04.2010 and the date of declaration of the Principal Borrower's account as Non-Performing Asset is 30.06.2010.

The Submissions of the Financial Creditor are as follows: -

2. In the year 2009, SKM Fabrics Limited, the Borrower had approached the Central Bank of India, the original Lender with a request to advance loan. Thereafter the said facilities were granted vide Sanction letter dated 30.03.2009 as (i) Working Capital facilities to the extent of Rs. 75 Crores and (ii) Term Loan to the extent of Rs. 49 Crores. Further, vide Sanction letter dated 02.07.2010 the facilities reviewed/renewed were as (i) Working Capital Limit to the extent of Rs. 75 Crores and (ii) Term Loan to the extent of Rs. 49 Crores.
3. The Borrower entered into a Term Loan Agreement dated 30.03.2009 with the Original Lender. Further the parties also entered into a Comprehensive Pre and Post Shipment Agreement dated 30.03.2009.
4. The Credit facilities were secured by irrevocable Deed by Corporate Guarantee dated 31.12.2011 created in favour of the Financial Creditor. The Corporate Debtor gave a Corporate Guarantee in favour of the Original Lender. Further the Original lender converted Credit limit to Cash Credit limit vide its letter dated 31.03.2011 and the Borrower acknowledged the same and addressed a letter dated 29.04.2011.

5. The Borrower had created charge on the immovable assets of the Corporate Debtor and the said creation of security was recorded vide the Memorandum of creation of Equitable Mortgage dated 31.12.2011.
6. The Debt had also been acknowledged which is evident from the Demand Promissory Note dated 18.02.2012, thereby unconditionally promising to pay a sum of Rs. 75,00,00,000/-. Further, a letter of continuity dated 18.02.2012 was also sent by the Original Borrower thereby acknowledging its liability.
7. The debt was assigned by the Bank to the Financial Creditor herein by way of an Assignment Agreement dated 28.03.2014. A letter of Assignment Agreement dated 11.04.2014 was then addressed to all the lenders/guarantors and borrowing companies by the original lender thereby informing that the financial creditor has been assigned all the rights and liabilities vide the said Assignment Agreement dated 28.03.2014. Vide the said Agreement, the Financial Creditor entered in to the shoes of the Original Lender.
8. The Corporate Debtor had also issued revival letters, addressed to the Original Lenders dated 18.02.2012 and the second addressed to the Financial Creditor dated 09.02.2015.
9. The Financial Creditor submits that entries in the bankers book in accordance with the Bankers Book Evidence Act, 1891 along with Certificates under Bankers Book Evidence Act, 1891 and also the Certificate of NPA have been produced on record in order to corroborate the claim filed by the Financial Creditor.

10. The Financial Creditor had issued a letter of Invocation of Corporate Guarantee dated 08.01.2015 recalling the payment of the outstanding dues from the Corporate Debtor.
11. A demand notice dated 08.01.2015 under Section 13(2) of the SARFAESI Act, 2002 was issued by the Financial Creditor. The Financial Creditor has also produced on record the Balance Sheet as on 31.03.2018 which reflects the amount of loan extended by the Financial Creditor.
12. The Financial Creditor has produced on record the Balance Sheet of the Corporate Debtor as on 31.03.2018
13. Hence, the petitioner submits that the petition is complete in all respects, the default has been corroborated by enough substantial evidences, therefore, the petition ought to be admitted and the Corporate Debtor's Corporate Insolvency Resolution process be initiated.

The Submissions of the Corporate Debtor are as follows :-

14. The Corporate Debtor filed its Reply dated 11.04.2022 in their defence. The Corporate Debtor states that the Petition is time barred by Petitioners own admission that the date of default is 30.04.2010 and the date of declaration of NPA is 30.06.2010. Further the Petitioner herein has already approached the Hon'ble Debt Recovery Tribunal as this remedy was available to the Petitioner at that time. Merely the Code came to be notified subsequently does not grant the Petitioner to file a time barred claim under the Insolvency Law. Pendency of the

proceedings before the DRT would not refresh the limitation period to approach this Tribunal.

15. Further the Petitioner has failed to show that the Corporate Debtor has acknowledged the purported debt within three years of the date of declaration of NPA. There is nothing on record that the authorized representative has acknowledged the purported debt within three years from the date of default or from the date when account was declared as NPA.
16. Further, the Petitioner has confused two different companies as being the same and some of the documents filed in the Petition pertain to one company and other pertain to the other company. The Petitioner is attempting to initiate CIRP against the Corporate Debtor herein by relying on documents relating to a different company.
17. Further, the defaults and due dates have occurred even before the Code was notified and hence the Petition under the Code is barred by Limitation. The acknowledgement as referred by the Petitioner are of the year 2012 and the said is time barred.
18. The Statements of accounts annexed to the Additional Affidavit appear to be the XBRL extracts and not the annual statements. The said documents are neither signed nor acknowledged by any party. Without the verification of the authenticity of the documents, the acknowledgement of liability under Section 18 of the Limitation Act, would not apply to the same. For the acknowledgement under Section 18, the same must be in writing and signed by the party against whom the debt is claimed.

19. Further, the Corporate Debtor also states that if assuming that the revival letters dated 18.02.2012 and 09.02.2015 issued by the Original Borrower increase the period of limitation, the same would be increased to February 2018. However, the said Petition is filed in October, 2019. Also the annual accounts for the relied upon by the Petitioner do not advance the case of the Petitioner as the same are not acknowledged of debt and hence do not increase the period of limitation.

20. Hence, the Petition is severely time barred and ought to be rejected.

FINDINGS

21. We have heard the submissions of the Counsel appearing for the Financial Creditor and Counsel appearing for the Corporate Debtor.

22. It is further seen from the records that the loan was sanctioned, disbursed to the principal borrower pursuant to a Sanction Letter dated 30.03.2009. The Principal borrower defaulted in repayment of Debt to the Original Lender on 30.04.2010. The Corporate Debtor executed a Guarantee in respect of the loan availed by the Principal Borrower vide a Deed of Corporate Guarantee dated 31.12.2011. Thereafter, the Principal Borrower issued a letter of revival dated 18.02.2012 to the Original lender. The Principal Borrower issued a further Letter of revival dated 09.02.2015 i.e. within 3 years of the earliest letter of revival dated 18.02.2012 to the original lender.

23. Also, there are Annual Statements of the Corporate Debtor wherein the Corporate Debtor has admitted the existence of the Corporate Guarantee amounting to Rs. 124 Crores. Also the Financial

Statement of Accounts for year ending 31.03.2017, 31.03.2018 it shows that the Company has given a guarantee of Rs. 124 Crores for a secured loan. The relevant Note is as under :-

“The Company has given a guarantee of Rs. 124 Crores in 2009 for a secured loan taken by a group Company from a Bank and has created an exclusive mortgage as well as charge in favour of the Bank by depositing title deeds of immovable properties located at Dewas. Upon the borrower failing to repay the credit facilities, the bank has classified the same as non-performing asset in June, 2010. The assets reconstruction Company which has acquired the right in March, 2014, has become a secured creditor in respect of the original borrower. The said ARC has raised a demand for outstanding dues aggregating to Rs. 221.76 Crores on the borrower as well as the guarantor and has taken possession of the mortgaged property vide its letter dated 13.06.2016. however, the borrower company is in negotiations with the ARC for settlement of the dues.”

24. The Statement of Accounts from 28.03.2014 to 10.09.2019 show that Credit has been received in the account of the Corporate Debtor.
25. Hence it is proved that the Principal Borrower and the Corporate Debtor have acknowledged the debt due. Also it is seen that the Corporate Debtor is bound by acknowledgements made by the Principal Borrower according to the clause 21 of the Deed of Corporate Guarantee.
26. Further as held in the matter of *“Asset Reconstruction Company vs. Bishal Jaiswal”* the Hon’ble Supreme Court held that acknowledgement of debt in a balance sheet are acknowledgements within the meaning of Section 18 of the Limitation Act, 1963.

27. Moreover, the Corporate Debtor has not objected nor denied the existence of the debt which is in default. Further it is seen that there was the Settlement proposal dated 18.07.2020 further revised on 12.08.2020 was proposed by the Corporate Debtor but failed to make payments under the settlement proposal. The Corporate Debtor Company were reworking on the settlement proposal diligently and were serious to settle the dues.
28. Hence, it is seen from the records available that the Financial Creditor has established that the various term loan/other facilities were duly sanctioned and duly disbursed to the Corporate Debtor but there is no payment of Debt on the part of the Corporate Debtor. Hence, owing to the inability of the Corporate Debtor to pay its dues, this is a fit case to be admitted u/s 7 of the I&B Code.
29. On going through the facts and submissions of the Financial Creditor and upon considering the same, it is concluded that the Financial Creditor has established that the loan/ facilities was duly sanctioned and duly disbursed to the Corporate Debtor but there has been default in payment of Debt on the part of the Corporate Debtor.
30. Considering the above facts, we come to conclusion that the nature of Debt is a “Financial Debt” as defined under section 5 (8) of the Code. It has also been established that there is a “Default” as defined under section 3 (12) of the Code on the part of the Debtor. The two essential qualifications, i.e. existence of ‘debt’ and ‘default’, for admission of a petition under section 7 of the I&B Code, have been met in this case.

31. As a consequence, keeping the afore said facts in mind, it is found that the Petitioner has not received the outstanding Debt from the Respondent and that the formalities as prescribed under the Code have been completed by the Petitioner, we are of the conscientious view that this Petition deserves '**Admission**'.
32. For the foregoing reasons, the above Company Petition is liable to be admitted, and accordingly the same is admitted by passing the following:

ORDER

- a. **The above Company Petition No. (IB) -3707 (MB)/2019 is hereby admitted** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against S Kumars Ltd.
- b. This Bench hereby appoints Mr. Anjan Bhattacharya, Registration No: IBBI/IPA-001/IP-P00926/2017-18/11533 as the Interim Resolution Professional having registered office at AAA Insolvency Professional LLP, A 301, BSEL, Tech Part, Sector – 30 A, Opposite Vashi, Mumbai, Maharashtra - , email :- anjan.bhattacharya@aaainsolvency.com, to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

c. The Financial Creditor shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

f. That the provisions of sub-section (1) of Section 14 shall

not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

**SHYAM BABU GAUTAM
(MEMBER TECHNICAL)**

Sd/-

**JUSTICE P.N. DESHMUKH
(MEMBER JUDICIAL)**