

1. Mr. Biplab Some, Advocate] For the
] Corporate
] Debtor

Order pronounced on 14/09/2018

ORDER

1. This is an application filed u/s. 9 of the Insolvency and Bankruptcy Code, 2016 (In short, I & B Code, 2016) by the Industrial and Engineering Corporation/operational creditor for initiating Corporate Insolvency Resolution Process (In short, CIRP) alleging that an amount of Rs.4,77,270/- is the outstanding amount due from the corporate debtor and corporate debtor despite receiving demand notice, did not pay the amount, hence, filed this application.

2. Briefly, stating the facts as follows:-

(a) The operational creditor specializes in the sales of chemical (insecticides and pesticides) which are used for agricultural purposes and at tea gardens and had a long standing business with Nuddea Plantations Limited and thereby had regularly supplied chemical (insecticides and pesticides) to Totapara Tea Estate.

Nuddea Plantations Limited is the owner of Totapara Tea Estate.

(b) The corporate debtor had approached the operational creditor for supply of chemical (insecticides and pesticides) from sometime around January, 2014 and on several occasions thereafter the operational creditor had supplied chemicals (insecticides and pesticides) in terms of demand and purchase order placed by the manager of Totapara Tea Estate from 2013-2014. In this connection, the copies of the invoices are collectively annexed to the application and marked as **Annexure E**.

(c) The corporate debtor had duly accepted such goods without demur and protest at any point of time and admitting such debt/liability arising out of the said supply of chemical, part payments were made from time to time by the manager of Totapara Tea Estate against the orders placed for that period. Last such payment was made in the month of 20th June, 2014. From June 2014, such debt fell due.

(d) In view of the above, the corporate debtor is liable to pay an amount of Rs. 4,77,270/- (Rupees Four Lakhs Seventy Seven Thousand Two Hundred Seventy only) along with an interest @18% p.a.

(e) As the corporate debtor did not pay the outstanding dues above referred, the operational creditor issued demand notice in Form 3 on 05/01/2018. The notice was delivered to the corporate debtor on 09/01/2018 and to prove the delivery of notice, copy of the Track Consignment was produced. The applicant did not propose any Interim Resolution Professional and produced u/s. 9(3)((b) affidavit swearing that there is no notice given by the corporate debtor relating to the dispute of the unpaid operational debt and also produced u/s. 9(3)(c) certificate from Bank. The application is filed by one of the partners, who has been given authorisation to institute the application before the Tribunal and copy of the authorisation was also produced by the operational creditor. The operational creditor prays for admitting the application.

3. The respondent/corporate debtor entered appearance and filed reply affidavit. The relevant contentions for the consideration of this application in brief are the following:-

(a) One of the directors, filed the affidavit contending that he was badly under medical treatment and that the company was originally run by the earlier directors, Prakash Ch. Saha & Others and even after that there was a change of management in the month of September 2006 and the present management is unable to manage the company due to financial difficulties. The company is running in loss and as on 31/03/2014, the accumulated loss sustained by the company comes to Rs. 14,45,58,436/-. The company is facing difficulties in disbursing wages and salaries to the employees of the company and it is struggling for their survival in the tea business due to continuous recession in Indian Tea Market scenario.

(b) That being so, the Tea Board of India classified the company in Grade 'D' as a stressed company. Since the cash flow position of the company became so stressed that the company's garden could not carry out any development activities and also failed

in paying the statutory dues, like, Provident Fund, Gratuity, Salary and Wages in time. The service of demand notice was not issued in terms of the law. The demand of Rs.4,77,270/- is not true. The List of Documents attached to the Form 3 Demand Notice has never been produced as verified by the professional accountant and/or by the Chartered Accountant and contents thereof are not in terms of the facts as well as in terms of law.

(c) The operational creditor is not entitled to any demand rather the operational creditor is entitled to get legal enforceable demand or debt on the corporate debtor and therefore, the operational creditor is not entitled to get any relief as prayed for.

(d) The operational creditor failed to communicate such debt, if any, within the tenure of 3 years from the purported date of accrual by the operational creditor to the corporate debtor and as such there is no legal force to claim in terms of facts as well as in terms of law. The application is liable to be rejected and dismissed with exemplary cost.

4. The applicant filed rejoinder denying the averments raised by the corporate debtor in its reply and reiterated the contentions raised by the applicant in its application.

5. Heard the Ld. Counsel for the applicant. Ld. Counsel for the corporate debtor prays for an adjournment for want of arguing Counsel. No valid reason for the absence of arguing Counsel was submitted at the time of hearing and the Counsel who appeared did not argue the case hence taken for orders.

6. This is an application filed by the operational creditor u/s. 9 of the I & B Code, 2016 for initiating CIRP as against the corporate debtor on the allegations that corporate debtor failed in paying the unpaid operational debt despite service of demand notice issued u/s. 8 of the I & B Code, 2016. The applicant contends that an amount of Rs. 4,77,270/- (Rupees Four Lakhs Seventy Seven Thousand Two Hundred Seventy only) is the outstanding operational debt due from the corporate debtor with interest @ 18% per annum and despite issuance of demand notice the corporate debtor did not pay nor raised any dispute relating to the unpaid operational debts and hence this application is liable to be admitted.

Sd

7. The corporate debtor contested the application by filing reply affidavit. Though demand notice was served upon the corporate debtor, no reply was sent by the corporate debtor to the operational creditor. The corporate debtor mainly raised two contentions in the reply affidavit. Firstly, it pleaded inability to pay the debt on the allegations that the corporate debtor is running in loss and that the Tea Board graded the company as 'D' stressed company and the accumulated loss as on 31/03/2014 comes to Rs. 14,45,58,436/-. Secondly, it contends that there was no claim of this amount within 3 years' time period by the operational creditor and, therefore, the application is barred by limitation.

8. The demand of the applicant is based on the supply of chemicals, like insecticide and pesticide on the strength of invoices referred to in **Annexure F**. The period of transactions evidenced from the invoices (**Annexure F**) is from 20/01/2014 to 19/04/2014. There are 7 (seven) invoices. The last payment admittedly received by the operational creditor was on 20/06/2014. This application was filed on 07/03/2018. Therefore, the claim is barred by limitation. The applicant has no contention that there was any acknowledgment of debt extending the period of limitation. According to the Ld. Counsel


for the applicant/operational creditor, as per the order dated 05/07/2018 of the Hon'ble National Company Law Appellate Tribunal in **C.A. (AT) (Insolvency) No. 312 of 2018** the cause of action being accrued on 1st December 2016, the application of this nature is not barred by limitation.

9. It appears to me that the facts in the aforesaid case are not similar to the fact in the instant case. Moreover, Hon'ble Supreme Court in **Civil Appeal No. 1074 of 2017**, filed against the judgement of Hon'ble National Company Law Appellate Tribunal in the Neelkanth Township and Construction Pvt. Ltd.'s case, while dismissing the Appeal in relation to the question whether the Limitation Act would apply to Insolvency and Bankruptcy proceedings, has chosen to keep the same open. Since the Hon'ble Supreme Court chooses to keep the question open and since Section 238 of the Code has been amended by inserting Section 238A to the Code stating that the provisions of Limitation Act, 1963 shall, as far as may be applied to proceedings or appeals under the Code before the National Company Law Tribunal or National Company Law Appellate Tribunal, as the case may be, the period of limitation would apply in the factual situation of the case in hand and accordingly, I hold that this application is not maintainable as

the claim is barred by Law of Limitation. Being found that the application is not maintainable, it is liable to be dismissed.

10. In the result, the application is dismissed. However, no order as to costs.

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 (J)

Signed on this, the 14th day of September, 2018.

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