

**In the National Company Law Tribunal,
Kolkata Bench, Kolkata**

CP (IB) No.571/KB/2017

In the matter of:

Edelweiss Asset Reconstruction Co. Ltd.

.....Applicant/Financial Creditor

-Versus-

Shree Coke Mfg. Co. Pvt. Ltd.

.....Respondent/Corporate Debtor

Order Delivered on 22nd December 2017

Coram:

V. P. Singh, Member (J)
Jinan K.R., Member (J)

For the Applicant/Financial Creditor : 1. Mr. Souvik Majumdar, Advocate
2. Mr. Arif Ali, Advocate

For the Respondent : Mr. Saket Chowdhury, Advocate

ORDER

Per Jinan KR, Member (J)

This is an application filed by Edelweiss Asset Reconstruction Co. Ltd. under Sec.7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as I & B Code, 2016) read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against Shree Coke Manufacturing Co. Pvt. Ltd., a corporate debtor.

2. The brief facts of the case, as stated in the application, are that Edelweiss Asset Reconstruction Co. Ltd. is a corporate body having its Registered Office at Edelweiss House, Off. CST Road, Kalina, Mumbai - 400 098,

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Identification No. is U67100MH2007PLC174759. Ms. Sukanya Sahani has filed this application on behalf of Edelweiss Asset Reconstruction Co. Ltd. based on authorization letter dated 17/8/2017 annexed with the application at page 26 and 27 marked as Annexure A.

3. The Corporate Debtor Shree Coke Manufacturing Co. Pvt. Ltd., Identification No. is U23101WB2010PTC153439. The name and registration number of the proposed interim resolution professional is Mr. Anil Agarwal, Registration No. is IBBI/IPA-001/1P-P00270/2017-18/10514 and address is AAA Insolvency Professionals, LLP, 15F, Anil Roy Road, 2nd Floor, Kolkata – 700 029 emails anilagarwal@aaainsolvency.com.

4. The applicant has stated that the respondent approached for various credit facilities from Bank of India. Accordingly, by a sanction letter dated 15/12/2011 Bank of India agreed to sanction cash credit of Rs.5 crore and letter of credit of Rs.20 crore totaling a sum of Rs.25 crore. Copy of the sanctioned letter is annexed with the application and marked as Annexure C.

5. In terms of the sanctioned letter the corporate debtor was obliged to secure the loan by way of mortgaging immovable properties as collateral security, hypothecating the tangible movable assets, plants and machinery and by providing personal guarantee of the Directors. The corporate debtor created equitable mortgage by depositing original title deed of immovable properties. The corporate debtor had thereafter acted in default and the loan account had been classified as Non-Performing Asset by Bank of India.

6. While so, by a registered assignment agreement dated 26/3/2014, Bank of India assigned all its rights and liabilities with respect to the loan account to the corporate debtor in favour of financial creditor herein i.e. Edelweiss Asset Reconstruction Co. Ltd.

7. The corporate debtor defaulted in repaying the loan on 31/3/2013. The Financial Creditor claims a sum of Rs.37,25,85,833/- as on 25/10/2017. The fact of default is also admitted by the corporate debtor in its letter dated 15/3/2013 and 22/5/2013 which are annexed with the application and marked as Annexure U and V respectively. The applicant further states that the applicant issued notice under Sec.13(2) of the SARFAESI Act, 2002 on 27/9/2017 to the corporate debtor. Copy of the said notice is annexed with the application and marked as Annexure CC. The applicant claims that Rs.37,25,85.833/- (Rupees Thirty Seven crore twenty five lakh eighty five thousand eight hundred thirty three) is the defaulted amount due from the corporate debtor as on 25.10.2017. Upon the above said circumstances the applicant prays for initiating corporate insolvency resolution process as against the corporate debtor.

8. The corporate debtor has filed objection mainly because the application is harassed, vexatious, mala fide and bears no cause of action. Moreover, the said application is barred by law of limitation and estoppel.

9. The corporate debtor has further submitted that the said application is false, incorrect and fabricated and is based on manipulated and fabricated calculations and documents. The provision of Insolvency and Bankruptcy Code, 2016 are strictly applicable to the willful defaulters and not diligent, honest and circumstantial defaulters who have no control over the business policies.

10. The corporate debtor further states that there is no privity of contract by and between Edelweiss Asset Reconstruction Co. Ltd. and the corporate debtor. Edelweiss Asset Reconstruction Co. Ltd. is an invited guest and the corporate debtor challenge the status of Edelweiss Asset Reconstruction Co. Ltd. at the appropriate forum in accordance with law.

11. It is the case of the corporate debtor that the application is filed by one Ms. Sukanya Sahani who is authorized to file the application by a board resolution which cannot be terms as a board resolution as the same is signed by Company Secretary and not Chairman or the Managing Director or Director of the Board. As such by way of such improper authorisation cannot be accepted and encouraged. In view of the above circumstances the corporate debtor prayed for dismissal of the application in limini with cost.

12. The applicant filed rejoinder denying the contentions raised in the objection by reiterating what has been stated in its application.

13. Heard Ld. Counsel for the petitioner as well as the Ld. Counsel for the respondent at length and perused the records.

14. Ld. Counsel for the respondent mainly stressed his argument based on the assignment agreement Annexure-T that there is no pre-existing contract between the corporate debtor and the applicant and that Annexure T is not binding on it. According to him it is not a legally executed document and, therefore, the petitioner herein is not a financial creditor. He also highlighted an interim application at his hand and prays for leave to challenge the status of applicant in proper forum in accordance with law and prays for an adjournment of the hearing of this application. He contends that he can establish that the assignment agreement executed by the Bank of India in favour of the petitioner is not a legally executed document and, therefore, no application can be filed by the petitioner as an assignee.

15. This is an application filed under section 7 of I&B Code. The question for determination in a case of this nature is entirely different than that of consideration of a petition filed under section 8 & 9 of I&B Code. The petitioner disputes the status of the applicant and dispute the validity of Annexure T. What are the factors to be considered in a case of this nature is noted by the

Hon'ble Supreme Court in **Innoventive Industries Ltd. v. ICICI Bank & Anr.** (Civil Appeal Nos.8337 - 8338 of 2017) SC. It is good to read Paragraph 29 and 30 in the said judgment. It read as follows:

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

16. In the case in hand corporate debtor admitted its defaults vide its letter **Annexure U** and **Annexure V**. Truly its admission is not to the applicant but to the Bank of India. Being admitted a debt is due to the Bank of India from whom the corporate debtor availed loan the limited question in a case of this

nature is to ascertain as to whether the petitioner is a Financial Creditor as alleged and whether there is existence of default from the evidence furnished by the financial creditor as provided under section 7 (4) of I&B code. That being the limited question to be determined in this case we are not inclined to grant leave to file interim application to challenge the status of the applicant company and declined to grant further time to file additional objections.

17. The Ld. Counsel for the corporate debtor/respondent main challenge is that respondent did not recognize the petitioner and therefore there is no privity of contract by and between petitioner and the respondent. According to him the Annexure T is not a legally executed assignment deed and hence petitioner cannot file an application of this nature. Annexure T at page 109 is the disputed assignment deed. Ld Counsel for the respondent further submits that petitioner is not financial creditor as alleged.

18. Annexure T is the copy of the assignment agreement executed by **Bank of India** in favour of the petitioner. Admittedly, the respondent availed the loan from the Bank of India. Bank of India had granted credit facility amounting to Rs.25 crore in favour of the corporate debtor and in pursuance of the sanction letter issued by the bank, the corporate debtor, the respondent herein, had executed various documents and demand promissory note and hypothecation agreement and thereafter defaulted the loan account. According to the Ld. Counsel for the respondent, the petitioner purchased the alleged debt due by the respondent to the Bank of India at peanut prise so that it can provide either legitimate or illegitimate action against the respondent.

19. The petitioner claimed that it is a financial creditor on the strength of Annexure T. So, let us see whether the petitioner is a financial creditor as defined under section 5 (7) of I&B code. Section 5(7) read as follows: -

S.5 (7) "**Financial Creditor**" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to; It is also good to read what is financial debt.

Financial debt is defined under section 5(8). It read as follows: -

S.5 (8) "**Financial Debt**" means a debt along with interest if any, which is disbursed against the consideration for the time value of money and include-

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- (h) any counter -indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

20. So, a financial creditor falls under section 5(7) can file an application for initiating corporate insolvency resolution process against a corporate debtor before this Adjudicating Authority when the default has occurred. No doubt the debt claimed is a financial debt as defined under section 5(8) of I&B Code. Herein this case **Annexure T** is found a legally executed assignment agreement. It is a registered document, stipulating all the terms and conditions. Being found Annexure T, a document admissible in evidence, this Adjudicating Authority cannot go behind the purpose of execution of the deed. Ld. Counsel for the respondent submits that it is a fraudulent document and that respondent has no knowledge about the execution of the deed. The said contentions are unsustainable in the peculiar circumstances of the case in hand. Annexure T proves that petitioner is an assignee comes under the purview of section 5(7) of I&B code. Pursuant to Annexure T, the assignee herein has got right to enforce such security interest, pledges, and/or guarantees and appropriate the amount realized their form towards repayment of loan and to exercise all the rights of Assignor Bank in relation to such security interest, pledges and guarantees. The assignment of debt not at all affect the right of the debtor and therefore, respondent being evident that is a borrower does not have any right to object to the assignment of the debt by the lender. The Hon'ble High court of Delhi in **Hindon River Mills Ltd. Vs. IFCI & Anr.** a similar case of assignment of debt [2012]173 Comp Cas 264 (Delhi) has held that "The assignment of a debt does not affect the right of the debtor". It is good to read para 43 in the above referred citation". It read as follows: -

43. It is no doubt true that a financial institution, as a lender, owes a duty to act fairly and in good faith with the borrower and there has to be a fair dealing between the financial institution and the borrower, but only with respect to such actions which affect the right of the borrower. Pertaining to the sale of a Non-Performing Asset by way of assignment, in Mardia Chemicals Ltd.'s case (*supra*), while upholding sale of Non-Performing Assets by way of assignments, the Supreme Court very categorically observed in para 46 of its opinion that 'Such transfer in no manner affects any right or interest of the borrower(s) (customer)'. In para 47 of its opinion, the Supreme Court in no uncertain words opined that when a debt is assigned by a financial institution it 'is only transferring its rights under a contract and its own asset, namely, the debt as also the mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or in the assets'.

21. The fact in this case is similar to the fact in the above cited case. Here in this case also the creditor assigned the Non-Performing Assets to the petitioner herein. The respondent alleged that the assignment is bad and with mala fide intention to defeat the valuable right of the respondent. Bare in mind the proposition held in the above cited decision, the challenge raised by the respondent as against the status of the petitioner and that the assignment deed is not a legally executed document, and not binding on the respondent and that it was executed with a malafide intention is found unsustainable under law. Being found that petitioner is an assignee to whom debt due to Bank of India has been legally assigned we have no hesitation in holding that petitioner is a financial creditor comes under the definition of section 5(7) of I&B Code.

22. One another contention stressed by the Ld. Counsel for the respondent is that Ms. **Sukanya Sahani** is not authorised to sign and affirm the application filed in this case and hence this petition is not maintainable for want of valid authority. According to him the resolution relied upon by the petitioner cannot be termed as a board resolution as it was signed by the company secretary of the company. Petitioner has filed this application based on resolution dated 17/8/2017. The resolution is shown as Annexure A. A perusal of Annexure A shows that it is certified copy of the resolution passed by circulation by the Board of Directors. Annexure A, shows that Ms. Sukanya Sahani is the authorised signatory authorised by the board resolution. The Company Secretary of the company signed it as a true copy. The resolution produced is a copy of the board resolution authorising Ms. Sukanya Sahani. Therefore, we find no defect in the resolution Annexure A submitted along with this petition. The resolution can be acted upon in a case of this nature.

23. The next contention of the Ld. Respondent is that this application is factually barred by laws of limitation and hence financial creditor has no legal right to file the application. The said contention is also found devoid of any merit. It has been held in **Speculum Plast Pvt.Ltd vs. PTC Techno Pvt.Ltd** by Hon'ble NCALT that law of limitation not applicable in a case of this nature. A reading of paragraph 60 is good to understand applicability of limitation in a case of this nature. It read as follows.

Para 60 "For initiation of 'Corporate Insolvency Resolution Process', the right to apply accrues under Section 7 or Section 9 or Section 10 only with effect from 1st December 2016 when 'I&B Code' has come into force, herefore, the right to apply under Section 7 or Section 9 or Section 10 in all present cases having accrued after 1st December 2016, such applications cannot be rejected because the application is barred by limitation"

24. In a recent National Company Law Appellate Tribunal (NCLAT) ruling of **Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd.** [1] (11.08.2017), one among the issues under consideration was the question of application of Law of Limitation about the Insolvency and Bankruptcy Code, 2016. The issues for consideration before the NCLAT was whether the application under Section 7 of the IBC is time barred, as the debt claim related to the years 2011, 2012 and 2013 and it was held that "*the Limitation Act, 1963[3] (Limitation Act) does not apply to IBC*". So, no doubt the contention of the Ld. Counsel that the application is barred by limitation is also not sustainable under law.

25. The next and last contention challenging the maintainability of this petition is that since the financial creditor has also allegedly invoked the SARFESI Act of 2002 for the enforcement of assets and properties of the corporate debtor this application is to be dismissed. In **Edelweiss Asset Reconstruction Company Ltd.Vs. Jalan International Hotels Ltd** we hold that proceedings pending before Debt Recovery Tribunal will not be a bar in considering the petition under section 7 of I&B Code. That being the settled legal stand we have already taken very same proposition is applicable in this case. Hence, we are of the view that initiation of proceedings under SARFESI Act,2002, by the petitioner is also not a bar to the application in hand.

26. The rest of the allegations that petitioner filed this petition with mala fide intention, that petitioner suppressed material facts are all found not worthy for consideration. In an application of this nature, this Adjudicating Authority is bound firstly to consider as to whether there is existence of default from the records and information utility or based on other evidence furnished by the financial creditor. If the petitioner succeeds in proving default of which the claim put forward by the petitioner and satisfy Sec.7 (5)(a) of the

I & B Code, this Adjudicating Authority is bound to admit the application. The procedure adopted for the disposal of this application is summery in nature. This petition has been filed by the petitioner on 25/10/2017. Petitioner has succeeded in proving existence of default. Annexure U dated 15th March 2013 and Annexure V dated 22nd May 2013 strengthen the petitioner's contention that respondent admitted its default. The respondent in the said letter requested the Bank for reconstruction of their account. The petitioner also produced statement of accounts and computation statement to show that amount claimed in the application is due from the respondent. Computation statements are Annexures W1, W2 and W3. Annexure W3 is the certificate showing that Rs.37,25,85,833/- (Thirty-Seven Crores Twenty-Five Lakhs Eighty-Five Thousand Eighty Hundred and Thirty-Three only) is the amount due from the respondent as on 26/10/2017. The existence of default is, therefore, stand proved by the petitioner.

27. Petitioner produced written communication issued from the proposed interim resolution professional as Annexure DD (page 353). The petitioner proposed the name of Resolution Professional, Shri Anil Agarwal, who is competent to work as IRP. No disciplinary proceeding is pending against him.

28. The petitioner succeeded in establishing that the application is complete in all respects. For the aforesaid reasons we are inclined to admit this petition.

29. Accordingly, we admit this petition under section 7 of I&B Code, declaring a moratorium for the purpose referring to in section 14 of the I&B Code with following directions.

(a) 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;

(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(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.

(2) 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.

(3) 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.

(4) The order of moratorium shall affect the date of such order till the completion of the corporate insolvency resolution process.

30. 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 section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order.

31. Mr. Anil Agarwal, Registration No. is IBBI/IPA-001/1P-P00270/2017-18/10514 and address is AAA Insolvency Professionals, LLP, 15F, Anil Roy Road, 2nd Floor, Kolkata - 700 029 emails anilagarwal@aaainsolvency.com is hereby appointed as Interim Resolution Professional.

32. Necessary public announcement as per section 15 of the I & B Code, 2016 may be made. Let the copy of the order be communicated to the Applicant/Operational Creditor as well as Corporate Debtor, and I.R.P by way of E-mail and post forthwith.

List the matter for hearing on 15-1-2018

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22/12/17

V.P. Singh.
Member (J)

8d
22/12/17

Jinan K R,
Member (J)

Signed on 22nd December 2017