

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. No. 716/I&BP/2017

Under section 7 of the IBC, 2016

In the matter of
Ajitnath Steels Pvt. Ltd.
Ram Kunj, FE - 83, Ground Floor
Sector - III, Salt Lake City
Kolkata, West Bengal - 700 106.
.... Applicant

v/s.

Ellora Paper Mills Limited
379, Ashoka Vault Bld
GPJ Nehru Marg
SitaBuldi, Nagpur- 440 012.
.... Respondent

Order delivered on: 19.07.2017

Coram:

Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner: 1. Sandeep Bajaj, Adv.,
2. Soayib Quresh, Adv. i/b Pamasias Law Chambers.

For the Respondent: 1. Zal Andhyarjina, Adv.,
2. Mayur Shetty, Adv.,
3. Archan Shah, Adv. i/b Rajani Associates.

Per V. Nallasenapathy, Member (T)

ORDER

1. The Petitioner, Ajitnath Steels Pvt Ltd., has filed this Insolvency and Bankruptcy Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("the Code") read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 for initiating Insolvency Resolution Process against the Corporate Debtor Ellora Paper Mills Limited.

2. The Petitioner states that on 8.9.2010, a Loan Agreement was entered into between the parties herein wherein the Petitioner agrees to extend and grant financial assistance to the Respondent Corporate Debtor upto a sum of Rs.3,42,70,000/- on fulfilment of conditions precedent mentioned in the Agreement. The Agreement provides that the Petitioner shall disburse the loan either in single disbursement or in tranches, the borrower shall arrange to create charge in favour of the lender by way of pledge of 2,98,000 nos. of equity shares of the Respondent Company aggregating to 14.9% of the fully paid equity capital of the Respondent held by Mr. Sudhir Goenka (HUF), the loan carries an interest of 12% per annum, loan shall be free of interest for a period of four months from the date of disbursement and thereafter, the interest shall become due and payable on the last day of each month, and the loan shall be repaid to the lender after four months, within 15 days of demand from the date of last disbursement. The Respondent executed a Promissory Note for Rs.3,42,70,000/- in favour of the Petitioner. The above said Mr. Sudhir Goenka, the Pledger executed a Power of Attorney in favour of applicant appointing it as true and lawful attorney to accomplish the purpose of the Agreement of Pledge with full authority in terms of agreement of pledge. Further an Agreement of Pledge of Shares was executed on 15.9.2010 by Mr. Sudhir Goenka in favour of applicant wherein the Corporate Debtor is also a party to the Agreement which states that the loan of Rs.3,42,70,000/- granted to the Corporate Debtor is secured by a Pledge of 2,98,000 equity shares of the Corporate Debtor aggregating to 14.90% of the equity share capital of the Corporate Debtor held by Mr. Sudhir Goenka (HUF).

3. The Petitioner states that the loan of Rs.3,42,70,000/- was disbursed to the Corporate Debtor from 9th September, 2010 to 11th November, 2010 and in proof of that the Petitioner has enclosed the statement of account of the Corporate Debtor in its Books of Accounts which shows that a sum of Rs.3,42,70,000/- was shown as debit balance. Further the audited Balance Sheets of the Corporate Debtor for the years 2011-12, 2012-13, 2013-14 and 2014-15 were enclosed to show that the loan of Rs. 3,42,00,000/- was shown as Short Term borrowings under the sub-head Current Liabilities.

4. The Petitioner by a notice dated 29.09.2016 through an advocate requested the Respondent to pay the loan of Rs. 3,42,70,000/- along with interest within a period of 15 days. Further on 7th November 2016 the Petitioner through an advocate issued notice u/s 433 and 434(a) of the Companies Act 1956 demanding a sum of Rs. 3,42,70,000/- along with interest. The Respondent in a reply dated 22.12.2016 sent through an advocate denied the contents of the letter dated 29.09.2016 and disputed all the allegations and demands made therein. It was further averred in the reply that there were certain alternative arrangements between the promoters of the Respondent Company and the Petitioner, pursuant to which the Respondent was released from its liability towards the Petitioner.

5. The Counsel for the Respondent contented that the present application is untenable, misconceived and sheer abuse of law for the following reasons:

- a) The Application is barred by the law of Limitation;
- b) The Applicant has suppressed material facts;
- c) The Applicant cannot be termed as Financial Creditor as envisaged under Section 7 of the Code.
- d) The Applicant have grossly erred in filing the Application.

6. The loan agreement dated 08.09.2010 provides that the loan amount has to be repaid to the Lender after 4 months, within 15 days of the demand from the date of last disbursement. The last disbursement was made on 11.11.2010, hence the amount ought to have been repayable on 11.03.2011. This application is filed on 19.04.2017 and hence the claim is time barred and the Application ought to be dismissed on this ground. This is the contention of the Respondent. For this, the Counsel for the Applicant states that the Respondent doesn't dispute the factum of disbursal of loan amount, contends that Article 19 and 21 of the Limitation Act, 1963 which makes a distinction for the money payable for money lent and money lent under an agreement that itself be payable on demand does not apply to this case, however, Article 113, being a residuary section applies to this case since the loan is payable within 15 days from the date of demand, thus making the period of limitation run from 15th day from the date of demand. Here the demand was made by recall notice dated 29.09.2016 which

was never honoured by the Respondents within 15 days' time frame, therefore the breach occurred or right to sue accrued when the payment was not made within 15 days from the date of demand, and hence the present application is well within the period of limitation. In support of this argument the Counsel relied on *Syndicate Bank V/s. Channaverappa Beleri and Ors.*, (2006) 11 SCC 506. Further, the Counsel for the Petitioner puts forward another point stating that the Balance Sheet of the Respondent signed by its Directors and have time and again been uploaded and filed with the Bombay Stock Exchange and Ministry of Corporate Affairs, it is a settled law that an acknowledgement of debt in the Balance Sheet filed by a party starts the period of limitation afresh as provided under section 18 of the Limitation Act, 1963. The Balance Sheet for the year 2013-14 was signed by the Directors on 24.09.2014, thus at least till 24.09.2014 the Respondent admitted the liability to the Petitioner. This Petition was filed on 19.04.2017 and hence the Petition is well within the period of limitation. To support this contention the Petitioner Counsel relied on *Arham Engineers Pvt. Ltd. v/s. Cepham Organics Ltd.*, 1993 (27) DRJ and an unreported judgement of Delhi High Court in the case of *Shahi Exports Pvt. Ltd. & Anr. V/s. CMD Buildtech Pvt. Ltd.*, CO.PET.468/2011. This Bench accepting the well-established position that an entry made in Companies Balance sheet amounts to an acknowledgement of debt and has effect of extending the period of limitation under Section 18 of Limitation Act, 1963, holds that the Petition is filed within the limitation.

7. The second contention of the Respondent is that the Petitioner Company is one of the business enterprise of Abhijeet Group of Companies, in the year 2010 Mr. Abhishek Jaiswal of Abhijeet Group approached the Respondent showing interest in acquiring the Promoters' stake in the Respondent company to acquire control of the Respondent company, a mutual agreement was entered into between the Promoters of Respondent company and Abhijeet Group on 04.08.2010, few months before the execution of the mutual agreement there was a fire at the Respondent's plant which severely damaged the plant and machinery, Abhijeet Group which contemplated taking over the Respondent offered funds towards repair of plant & machinery which were to be adjusted towards the amount payable by Abhijeet Group towards acquisition

cost, loan agreement was entered into between the Applicant and Respondent on 04.08.2010, there was an understanding between the parties that the loan amount was not to be repaid but was to be adjusted against the acquisition cost payable by Abhijeet Group, therefore, the Applicant not even once sought the repayment of the loan for several years after the due date of payment, with effect from 2010 the operations of the Respondent company were managed by executives of the Abhijeet Group pending completion of acquisition formalities, during the period between September 2010 to August 2013 Abhijeet Group infused funds in the Respondent's plant through the Applicant, the Respondent company suffered unsustainable operational losses under the Abhijeet Group's management, Abhijeet Group when unable to run the operations of the Respondent's company in profitable manner informed the Respondent that they are no longer interested in acquiring the stakes in the Respondent Company and wants to handover the operations back to the Promoters of the Respondent, it was agreed while handing over the operations back to the Respondent by the Abhijeet Group that Abhijeet Group shall not claim the amount infused by them through the Applicant in the Respondent's Company, the Respondent shall not claim for losses suffered during the period when operations of the plant were managed by Abhijeet Group. In view of the above understanding the amount infused in the Respondent's Company was written back as income in the accounts of Respondent's company for the year 2012-13. But, however, the process of writing off the loan of 3.42 crores remained pending as the Applicant was not able to return the share certificate and transfer forms given during the time of pledge. Subsequently, the said loan amount of Rs. 3.42 crores was credited to the account of the Director in the year 2013-14. Further, the Applicant also sought the repayment of another loan of Rs. 14.75 crores infused by the Applicant. With the above averments, the Respondent says that these above facts were suppressed by the Applicant. However, this Bench feels that the Respondent have not produced any material to show that there is an agreement to acquire the controlling interest by the Abhijeet Group. This loan of 3.42 crores is supported by a loan agreement and pledge of shares as security. Even otherwise, the loan agreement is a sovereign document for which the Respondent is liable to make the payment. Even if it is accepted for argument sake, that there is a arrangement to take over the control of Respondent by

Abhijeet Group, without any documentary proof for the same and in the light of loan agreement entered into between the parties, the theory of acquisition cannot be accepted and the advance of loan amount by the Financial Creditor cannot be termed as an investment for acquiring the Corporate Debtor. Since this is an independent transaction and in the absence of material supporting the takeover, the contention of supersession of material fact are in fact immaterial and does not hold water.

8. The third contention of the Corporate Debtor is that the Loan Agreement is merely a part of the arrangement to facilitate takeover of the Promoters' stake in the Corporate Debtor company by the Abhijeet Group, hence the Loan cannot be construed as Financial Debt. In view of the discussion in the previous para, this contention also fails.

9. The fourth contention of the Corporate Debtor is that part V of Form 1 filed along with the application is not in accordance with Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 since a copy of certificate from banker under Section 2A of the Bankers' Books Evidence Act 1891 is not enclosed. In this regard, it is to be noted that Section 7(3)(a) of the Code provides that the Financial Creditor shall along with the Application furnishes record of the default recorded with the information utility or such other record or evidence of default as may be specified. The Code nowhere provides that certificate under Bankers' Books Evidence Act 1891 shall be compulsorily attached to the Application. Since the Applicant substantially complied with the provisions of the Code by filing the loan agreement, the statements of account of the Corporate Debtor and Balance Sheet of the Corporate Debtor which clearly shows that amount is owed to the Financial Creditor, this objection of the Corporate Debtor is unsustainable. Further it is not the case of the Corporate Debtor that they have not received the loan amount, their contention is the amount received by them is not a loan but a investment for acquiring the controlling interest of the Corporate Debtor by Abhijit group through the Financial Creditor. Hence, the non-production of certificate from a banker under Bankers Books Evidence, Act, 1891 cannot be fatal to this Application. However, the counsel for the Petitioner produced a

certificate issued by Canara Bank, Princep Street Branch, Kolkata, on 19.06.2017, confirming the issue of bank statement of the Petitioner, wherein a sum of Rs. 3.42 Crores was paid to the Corporate Debtor in September, 2010 from the account of the Financial Creditor. In view of this, the fourth contention of the Respondent also fails.

10. This Adjudicating Authority, on perusal of the documents filed by the Creditor, it is evident that the Corporate Debtor defaulted in repaying the loan availed and also placed the name of the Insolvency Resolution Professional to act as Interim Resolution Professional, having this Bench noticed that default has occurred and there is no disciplinary proceedings pending against the proposed resolution professional, therefore the Application under sub-section (2) of section 7 is taken as complete, accordingly this Bench hereby admits this Application declaring Moratorium with the directions as mentioned below:

- i. 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 or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation 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.
- ii. 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.
- iii. 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.
- iv. That the order of moratorium shall have effect from 19.07.2017 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.

- v. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
 - vi. That this Bench hereby appoints Mr. Mohan Ram Goenka, 46, B.B. Ganguly Street, 4th Floor, Room No. 6, Kolkata – 700 012, e-mail: goenkamohan@gmail.com, Reg. No.: IBBI/IPA-002/IP-00051/2016-17/1737, as Interim Resolution Professional (IRP) to carry the functions as mentioned under Insolvency & Bankruptcy Code.
11. Accordingly, this Petition is admitted.
 12. The Registry is hereby directed to communicate a copy of this order to both parties.

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V. NALLASENAPATHY
Member (Technical)

/-sd

B. S.V. PRAKASH KUMAR
Member (Judicial)