

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

C.P. No. 1095/IBC/2017

Under section 7 of the IBC, 2016

In the matter of
Punjab National Bank

....Petitioner

v/s.

Anand Distilleries Pvt. Ltd.

....Corporate Debtor

Order delivered on 14.02.2018

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

For the Petitioner : Mr. Pankaj Vijayan, Adv. a/w
Mr. Siddharth Mataliya i/b Intralegal

For the Respondent: Mr. S.D. Khati, Adv. a/w Mr. S.N. Fuladi, Adv.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Order pronounced on 14.02.2018.

It is a Company Petition filed under section 7 of Insolvency & Bankruptcy Code by the Financial Creditor namely; Punjab National Bank (PNB) against the Corporate Debtor namely; Anand Distilleries Pvt. Ltd. seeking initiation of Corporate Insolvency Resolution process against the Corporate Debtor for having this debtor defaulted in making repayment of the loan facility availed from the Bank on 31.05.2011, therefore, this Petitioner sought repayment of ₹79,10,51,494 outstanding due as on 31.05.2017.

Brief facts of the case:

2. As this Corporate Debtor approached the Petitioner for loan facility, on 23.09.2006 the Petitioner informed the Corporate Debtor that it sanctioned Term Loan of ₹12 crores and Fund based limit of ₹3 crores with terms and conditions as mentioned in the said sanction letter and agreement entered between them, in pursuance thereof, above said amounts were disbursed on 23.09.2006 itself. Again on

29.10.2007, the Petitioner sanctioned additional Term Loan of ₹6 crores, that was also disbursed on 29.10.2007. Thereafter, additional term loan of ₹6 crores with enhancement limit up to ₹6.75 crores from the existing ₹3 crores through another sanction letter dated 29.04.2008, in pursuance of this facility was also availed by the Corporate Debtor on 29.04.2008. In addition to these facilities, this Corporate Debtor availed temporary enhancement to working facility limit to a tune of ₹1.6 crores from ₹6.75 crores through sanction letter dated 30.03.2010, however, this has been subsequently shown as adjusted/paid. Besides the facilities availed as mentioned above, this Corporate Debtor has also availed ad-hoc cash credit facility of ₹3.4 crores on 28.06.2010 by a sanction letter dated 28.06.2010 and another ₹5.5 crores ad-hoc facility on 28.3.2011 basing on a sanction letter dated 28.3.2011. So, the aggregate loan facility availed by the Corporate Debtor under different heads came to ₹30,00,75,000.

3. For availing all these loans, this Corporate Debtor executed term loan agreement (Exhibit-H) dated 20.10.2006 for an amount of ₹3.6 crores, hypothecation agreement (Exhibit-I) dated 20.10.2006 for an amount of ₹3 crores, agreement of guarantee (Exhibit-J) dated 20.10.2006 executed by Shri Anandkumar Bhamore, Shri Abhay A. Bhamore, Shri Arvindkumar Bhamore, Shri Ramniwas G. Chadelwal, Smt. Sarla A. Bhanmore and Smt. Madhu A. Bhamore for an amount of ₹15 crores, hypothecation of asset to secured term loan agreement (Exhibit-K) dated 20.10.2006 for an amount of ₹8.40 crores, the term loan dated 08.12.2007 for an amount of ₹2.19 crores, hypothecation of asset to secured term loan agreement (Exhibit-M) dated 08.12.2007 for an amount of ₹3.81 crores, agreement of guarantee (Exhibit-N) dated 08.12.2007 for an amount of ₹21 crores, hypothecation of Goods & Books to secure Cash Credit Facility dated 20.05.2008 (Exhibit-O) for an amount of ₹6.75 crores, hypothecation of assets to secure term loan agreement (Exhibit-P) dated 20.05.2008 for an amount of ₹6 crores, agreement of guarantee (Exhibit-Q) dated 20.5.2008 executed by the same guarantors mentioned above for amounts of ₹6 crores and 6.75 crores, supplementary agreement dated 20.5.2008 (Exhibit-R) to

avail credit limits of above ₹25 lakhs for an amount of ₹30.75 crores, letter of consent from guarantors (Exhibit-S) given by director of Anand Distilleries in respect to credit facility sanctioned, consent letter from guarantor dated 14.09.2009 (Exhibit-T) and supplementary agreement dated 14.09.2009 (Exhibit-T1), hypothecation of Goods & Books to secure cash credit facility dated 30.03.2010 (Exhibit-U) for an amount of ₹1.6 crores wherein limit increased from 6.7 crores to ₹8.35 crores, agreement of guarantee dated 30.03.2010 (Exhibit-V) by the same guarantors for an amount of ₹8.35 crores, hypothecation of Goods & Books debts to secure cash credit facility dated 29.06.2010 (Exhibit-W) for an amount of ₹10.15 crores, agreement of guarantee dated 03.02.2011 (Exhibit-X) by the same guarantors for an amount of ₹12.25 crores, hypothecation agreement 03.02.2011 (Exhibit-Y) for an amount of ₹12.25 crores, agreement of guarantee dated 03.02.2011 (Exhibit-Z) executed by the guarantors for an amount of ₹12.25 crores, an agreement of guarantee dated 03.02.2011 (Exhibit-AA) executed by Mr. Anandkumar Bhamore and Abhay Anand Bhamore for an amount of ₹12.25 crores in favour of the Petitioner. These are various documents executed by the Corporate Debtor and some documents by the guarantors in favour of the petitioners binding themselves as liable to repay the loan facilities availed by the Corporate Debtor.

4. Apart from the documents above mentioned, the Petitioner filed balance confirmation letters dated 09.02.2008 (Exhibit-AB), 23.6.2010 (Exhibit-AC), 28.5.2011 (Exhibit-AD), 25.9.2012 (Exhibit-AE), from time to time reflecting how much debt liability remained outstanding against the Corporate Debtor. When this account became NPA, this Petitioner issued notice (Exhibits AF-AK) 21.7.2011 u/s 13(2) of SARFAESI Act 2002 to the company as well as to the persons stood as guarantors putting them to notice that the Corporate Debtor having defaulted in paying instalments/interest/principal debt, the account has been classified as NPA on 31.5.2011 as per RBI Guidelines stating that the amount due as on 31.5.2011 is ₹32,65,09,799.27 with further interest until payment in full had been made. The petitioner in the same notice detailed various assets

given as security by further mentioning that if the entire payment has not been paid with interest in full within 60 days from the date of this notice, the bank would exercise the power u/s 13(4) of SARFAESI Act 2002 against the various securities given from the Corporate Debtor's side. To which, a reply (Exhibit-AL) was given on behalf of the Corporate Debtor on 30.08.2011 asking for conversion of cash credit limit to working capital terms payable in yearly instalments of 7 years, existing term loan and bridge loan be permitted to repay in yearly instalments of 7 years with simple interest @10% on all restructured term loans with liberty to start repaying interest after 7th year and also to waive the penal interest levied against this loan, saying so, the Corporate Debtor side earnestly prayed the petitioner to save this agro unit from closing down by accepting the request proposal in the interest of all. Simultaneously, this Corporate Debtor has further stated that the notice u/s 13(2) of SARFAESI is totally baseless, unwarranted, misconceived and contrary to the provisions of SARFAESI. To the reply aforesaid, this Petitioner gave a reminder notice (Exhibit-AM) on 08.09.2011 saying that there could not be any objection to the impugned notice and if the amount was not received within stipulated time, the Petitioner would be constrained to proceed with further action in accordance with law. Again, this Petitioner sent another notice (Exhibit-AN) on 17.09.2013 calling upon the Corporate Debtor to clear the entire outstanding dues to the bank as on 31.8.2013 of ₹31,27,63,024.27 within 30 days of receipt of the notice, in the event of failure, the bank would proceed against the Corporate Debtor. When no repayment came from the Corporate Debtor, the Petitioner filed an application before the Debt Recovery Tribunal, Nagpur against the Corporate Debtor u/s 19 of Recovery of Debts and Bankruptcy Act, 1993 for a direction against this Corporate Debtor and the guarantors thereof to pay jointly and severally to this bank a sum of around ₹45 crores and also to issue recovery certificate u/s 19(22) of the Act for a recovery of the debt amount from the Corporate Debtor and its guarantors as per contractual rate of interest, for attachment of hypothecated and mortgaged properties of the Corporate Debtor and the guarantors and also for the removal

of the corporate debtor and the guarantors from the possession of the mortgaged properties by submitting list of assets to the Tribunal, but till date, this Petitioner could not realize anything from the Corporate Debtor. When no relief has been forthcoming from the proceeding lying with the Debt Recovery Tribunal, the Petitioner issued statutory notice to the Corporate Debtor u/s 434(1) of Companies Act 1956 demanding the Corporate Debtor to pay the sum due (which amounts to ₹26,23,96,256 as on 30.9.2016), failing which the Petitioner would file petition for winding-up of the company.

5. The Petitioner Counsel, in respect to this fact, candidly admits that the outstanding due shown as ₹26,23,96,256 as on 30.09.2016 is incorrect, indeed it is the principal amount due and payable as on 30.09.2016 along with interest, therefore, this error could not be construed as due outstanding as on 30.09.2016. He says when the principal as on the date of filing Application u/s 19 of RDBA 1993 was above ₹45 crores, how could it even be imagined as ₹26 crores outstanding due as on 30.09.2016? The Petitioner's Counsel has given this explanation because the Corporate Debtor Counsel has taken it as one of its grounds stating that the Petitioner mentioned outstanding due in winding up notice in the year 2016 as ₹26 crores, that being so, the corporate debtor counsel says, how could the outstanding due would be ₹72 crores within one year i.e. 2016-17? Which in any case even if calculated at exorbitant interest rate, it could not be ₹72 crores.

6. The Petitioner has even filed CIBIL report reflecting this liability against the Corporate Debtor payable to the Petitioner herein. Though the date of default in this case was shown as 31.5.2011, the Petitioner has filed a chart showing the corporate Debtor making part payments even after 31.5.2011 reflecting the corporate debtor paying ₹17,000 on 31.05.2011, ₹1,85,884 on 24.06.2011, ₹5,00,000 on 29.06.2011, ₹50,000 on 19.07.2011, ₹5,00,000 on 01.08.2011, ₹3,30,000 on 10.8.2012, ₹14,50,000 on 11.8.2012, ₹3,00,000 on 29.12.2012, ₹39,000 on 31.12.2012, ₹3,07,000 on 04.01.2013, ₹1,40,000 on 10.1.2013, ₹62,000 on 18.1.2013,

₹3,00,000 on 19.01.2013, ₹3,14,000 on 24.2.2013, ₹76,000 on 5.2.2013, ₹62,000 on 7.2.2013 and ₹52,000 on 8.2.2013.

7. The Petitioner's Counsel filed an additional affidavit on 4.7.2017 along with a letter (Exhibit-B in the additional affidavit) written by the Corporate Debtor addressing to the Chief Manager of the PNB on 16.07.2014 stating that the term loan accounts sanction by the bank are not disputed by the Corporate Debtor, the only dispute, the corporate debtor raised in that letter is in relation to an amount of ₹5,94,98,311 alleged to have been paid to the Bank. The Counsel on behalf of the Corporate Debtor in this letter has not disputed on availing the loan or even liability, but only thing raised in the letter is, a part payment was made that has not been fully reflected in the accounts of the Corporate Debtor.

8. On 30.03.2016, the corporate Debtor wrote a letter (Exhibit-C in the additional affidavit), through its director, Anand Bhamore, to the Executive Director of PNB, Beikaji Kama Palace, New Delhi, stating that the directors of the corporate debtor appeared and attended before the addressee authority, wherein during discussion, the directors of the corporate debtor showed their desire for repayment provided one time settlement proposal is given for an amount of ₹27 crores towards full and final satisfaction of the bank dues against the account by selling the collateral securities as mentioned in the said letter. By saying so, they sought for acceptance of their OTS proposal to get the dues of the Bank recovered as earliest as possible.

9. In addition to the above material, on 13.9.2016, the corporate debtor wrote a letter (Exhibit-D in the additional affidavit) to PNB Nagpur submitting OTS proposal for ₹27 crores which was by then not acceded by the Bank. In relation to tagging of account, the corporate debtor tendered three cheques for an amount of ₹5,00,000 in No-Lien account. When SARFAESI action was initiated, the corporate debtor filed an application before Debt Recovery Tribunal u/s 17(1) of the SARFAESI Act challenging the action taken by the Petitioner Bank under the provision of Section 13(4) of the SARFAESI

Act, the Ld. Tribunal wherein passed an order dated 12.02.2014 (Exhibit-F in the additional affidavit) directing the Bank to consider reschedulement of loan.

10 By showing all these documents filed with additional affidavit, the Petitioner Counsel submits that though the Corporate Debtor defaulted in making repayment on 31.05.2011, the Petitioner having filed application u/s 19 of Recovery of Debts and Bankruptcy Act, 1993 before Debt Recovery Tribunal within limitation, it has to be construed that limitation against this claim has been arrested, because lis over the claim is pending before a competent forum, thereby this case has to be entertained under IBC treating cause of action arose in respect to this claim is within limitation.

11. It goes without saying when lis is pending before any court of law, limitation will not run against the claim pending before a competent court. Therefore, the claim filed u/s 7 of this Code shall not be treated as barred by limitation.

12. Another ground the Petitioner's Counsel raised in respect to limitation, though the account has been classified as NPA on 31.05.2011, since the corporate debtor has been making part payments to the loan account of the corporate debtor and coming up with proposal of one time settlement admitting the debt, it has to be construed that this claim has to be treated as alive by virtue of acknowledgement and part payments made by the corporate debtor as envisaged u/s 18 and 19 of the Limitation Act. Moreover, since the corporate debtor has not made any argument saying that the company accounts have not been reflecting this debt liability in the Books of the company, indeed having the corporate debtor admitted in the letter dated 16.7.2014 addressed to the Chief Manager, Punjab National Bank, Nagpur, stating that company availed aforesaid loan from the Petitioner Bank with a corollary with regards to cash credit (Hyp) 87-8378 stating that the Corporate Debtor paid ₹5,94,98,311, therefore, it cannot be said that the Corporate Debtor has not made any acknowledgement in respect to this loan liability subsequent to filing case before Debt Recovery Tribunal, Nagpur.

13. On reading of explanation given to section 18 of Limitation Act, 1963, it is evident that acknowledgement of liability can be in any mode as mentioned in the explanation, which is as follows:

Section 18 in The Limitation Act, 1963

18. Effect of acknowledgment in writing:-

(1) Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation: -For the purposes of this section,-

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

14. So, it is clear that acknowledgement,

- need not specify the exact nature of the right or property, or
- can be an averment that the time for payment, delivery, performance or enjoyment has not yet come,
- can be accompanied by a refusal to pay, deliver, perform,
- can be a permission to enjoy the property or right,
- can be coupled with a claim to set-off,
- can be addressed to a person other than claimant.

15. When acknowledgement is allowed in various ways, the Corporate Debtor having admitted debt liability on 09.02.2013 that they had been enjoying various credit facilities with Petitioner bank and due to reasons beyond their control, they say their account were classified as NPA from 12.4.2011, in addition to this, they say they already paid ₹5.5crores in the overdraft and term loan accounts during past 1.5 years, therefore, sought the bank not to take SARFAESI action against the company and would settle their accounts at the earliest, thereafter again admitted the liability on 16.07.2014 with a caveat of making part payment of ₹5.94crores in the past, thereafter an application for one time settlement on 30.03.2016. Having this Bench considered all these acknowledgements as saving this claim from limitation issue in the light of section 18 of Limitation Act, 1963, we hereby hold that this claim is within limitation in the light of section 18 of the Limitation Act, 1963.

16. By virtue of the correspondence taken place in between the Petitioner and Corporate Debtor, this debt has to be treated as continuously acknowledged by the corporate debtor.

17. In view of the material facts and submissions placed by the Petitioner Counsel, the corporate debtor counsel made his written submissions stating that this claim is barred by limitation because as per the records of the Petitioners itself, since this account has been classified as NPA on 31.05.2011, it remained live for three years from the date of default. By the time, this company petition was filed, since three years already lapsed, this petition is out-rightly barred by limitation, henceforth this claim shall not be maintainable. As to OTS proposal is concerned, the Corporate Debtor Counsel says, since records disclosing that last payment was made by the corporate debtor on 08.02.2013, even if OTS proposal is taken as given on 31.03.2016, three years being lapsed in between 8.02.2013 and 31.03.2016, OTS proposal cannot become an acknowledgement for already three years lapsed even before OTS proposal has been made, on this count also this claim is liable to be dismissed on the ground of bar of limitation. The Corporate Debtor Counsel has not argued

over the document annexed to the affidavit filed by the Financial creditor on 04.07.2017, wherein there are several documents, which this Bench has taken into consideration, reflecting the Corporate Debtor acknowledging the liability from time to time up to 13.09.2016.

18. As to subsidy granted by Central Government which came to this loan account on 24.07.2014, the corporate debtor counsel says it cannot become an acknowledgement by the corporate debtor because this payment has not been made by the corporate debtor as part payment to survive the limitation, he says, if section 19 of Limitation Act is looked into, it is evident that such part payment shall be made by the person liable to pay the debt or his agent before the expiration of the prescribed period, since the government cannot be treated as an agent to the corporate debtor even if that payment is taken as part payment towards the loan account, it will not amount to payment made by the corporate debtor whereby fresh period of limitation shall not be computed from the date of adjustment of subsidy amount towards the loan liability. So the corporate debtor counsel says, this is no way helpful to say that fresh period of limitation will start from 24.07.2014.

19. To bolster the point that this claim is within limitation, the Petitioner Counsel relied upon a citation in between JC Budhreja v. Chairman Orissa Mining Corp. Ltd. (2008)2SCC P444, Cadar Constructions v. Tara Tiles 1984 (2) BomCR P530, LS Synthetics Ltd. v. Fairgrowth Financial Services Ltd. & Anr. (2004) 11SCC P456, MP Steel Corporation v. Commissioner of Central Excise (2015)7SCC P58, Canara Bank & Anr. v. Vijay Shamrao Ghatole & Ors. 1996(5)BomCR 338, R Madesh v. M. Rathinam (Mad HC, 11.2.2015), to say that claim is not barred by limitation.

20. For the reasons stated above and material papers filed by the petitioner, it is no doubt fact that the corporate debtor availed loan facilities from the Petitioner and thereafter defaulted in making repayment to the Petitioner Bank, therefore the only consideration left to be decided by this Bench is as to whether this claim is barred

by limitation or not. This Bench being satisfied that the Petitioner furnished all the material papers reflecting existence of debt and default within limitation, and the name of the Resolution Professional proposed to act as Interim Resolution Professional, this Bench hereby admits this application prohibiting all of the following item-I, namely:

- I (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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESI Act);
- (d) 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 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) 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 **14.02.2017** till 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. Dushyant C. Dave, 1101, Dalamal Tower, Nariman Point, Mumbai – 400 021 having Registration Number: IBBI/IPA-003/IP-00043/2016-17/1343, whose name has been given by the petitioner, as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

21. Accordingly, the Petition is **admitted**.

22. The Registry is hereby directed to communicate this order to both the parties within seven days from the date order is made available.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

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