

**IN THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"
(Exercising the powers of Adjudicating Authority
under the Insolvency and Bankruptcy Code, 2016)**

**CP NO. 184/2016
RT CP No. 133/Chd/Hry/2017**

**Under Section 9 of the
Insolvency
and Bankruptcy Code, 2016.**

In the matter of:

M/s. ACE Build Pvt. Ltd. having its registered office at
SCO No. 10-12, Sector 17, Chandigarh.

....Petitioner-Operational Creditor

Vs.

The A 2 Z Powercom Limited, having its office at:
First Address: O-116, First Floor, Shopping Mall, DLF
City, Gurgaon-122002 (Haryana) India and
second address – Plot No. B-38, Near Jharsa Chowk,
Sector 32, Gurgaon, Haryana (India)-122003.

....Respondent-Corporate Debtor

Order delivered on: 26.07.2017

Coram: Hon'ble Mr. Justice R.P. Nagrath, Member (Judicial).

For the petitioner : Mr. Vibhor Bansal, Advocate.
For the respondent : None.

JUDGEMENT

The petition dated 09.09.2016 was filed in the Hon'ble Punjab and Haryana High Court in terms of Section 433 (e) of the Companies Act, 1956 with a prayer for winding up of the respondent-company for its inability to pay the debt due to the petitioner. Since the respondent was not served while the matter was pending in the Hon'ble High Court, the petition has been transferred to the Tribunal in terms of Section 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016. The said Rule 5 as amended vide

Notification dated 29.06.2017 reads as under:-

CP NO. 184/2016
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" 5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.- (1) All petitions relating to winding up of a company under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of Section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part-II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent."

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2. The instant petition has been treated as a petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short, hereinafter to be referred as the 'Code') the petitioner being an Operational Creditor. The application has been filed in Form 5 as prescribed under Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, the 'Rules'). The Respondent-Corporate Debtor was incorporated on 28.04.2008 and its registered office is at Gurgaon, now Gurugram in the State of Haryana. The matter, therefore, falls within the territorial jurisdiction of this Tribunal. The petitioner has furnished both the addresses of registered office as well as corporate office of the respondent and both are situated at Gurgaon (now Gurugram).

3. The Petitioner-Operational Creditor is also a company incorporated under the Companies Act, 1956 with its registered office at Chandigarh. The instant petition has been filed through Mr. Hans Raj Chaudhary, Director of the company as per the Board of Directors resolution dated 06.09.2016 (Annexure A-2). This resolution also formed part of the petition filed before the Hon'ble High Court.

4. The facts of the case briefly are that the Operational Creditor did construction work for the power plant of the Respondent- Corporate Debtor at Nakodar (Punjab). The initial value of the Purchase Order was ₹3,68,06,200/- and during execution of the work, additional Purchase Orders were also issued and the final amount of the work done was ₹4,91,36,121.22/-. Copy of the Purchase Order dated 06.08.2010 is already annexed as Annexure P-2 with the Demand Notice and the copy of first page of final Purchase Order dated 20.07.2012 is at Annexure P-4 of the petition under section 433 & 434 of

(Signature)

Companies Act, 1956. The amount in default under the contract is stated to be ₹49,31,452/- along with interest till the date of payment. With regard to the date on which the debt fell due, against Col. I (Part-IV) of application Form No. 6, it is stated that on 21.09.2012, the Corporate Debtor confirmed and reconciled all the accounts and sent confirmatory email of reconciliation statement to the Operational Creditor on 21.09.2012 showing the balance of ₹49,31,452/-. Copy of reconciliation statement is at Annexure A-6. This reconciliation statement was sent by the Respondent-Corporate Debtor on the email of the petitioner vide email at Annexure A-6.

5. It is further stated that vide email dated 29.07.2013, the petitioner sought for the meeting with the Managing Director of the Respondent-Corporate Debtor and vide email dated 30.07.2013, it called the representative of the Operational Creditor. A meeting was held in the office of the Managing Director of the respondent-company on 02.08.2013 at 12 Noon and the Managing Director of the respondent-Corporate Debtor assured the release of ₹49,31,452/-. Copies of emails dated 29.07.2013 and 30.07.2013 are Annexures A-7 and A-8.

6. It is further stated that the Petitioner-Operational Creditor sent email dated 20.09.2013 (Annexure A-9) to the representative of the Corporate Debtor in which reference to the meeting dated 02.08.2013 was made. Even in the month of October, 2013, a meeting was held with Mr. Amit Kumar representative of the Corporate Debtor and the petitioner sent email dated 24.10.2013 (Annexure A-10) again making request for payment.

7. This petition was filed after serving the petitioner with a Demand Notice dated 07.06.2017 (Annexure A-3). Along with this petition, all the

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documents i.e. agreements emails, reconciliation statement of accounts were also sent.

8. In order to comply with the requirement of sub-rule (2) of Rule 6 of the Rules, the applicant despatched copy of the application filed with the Adjudicating Authority by Speed Post/Registered Post at the registered office of the Corporate Debtor as well as the corporate office. The acknowledgments are at page 86. The Demand Notice was earlier sent at both the addresses by registered post on 07.06.2017 as per the postal receipts (Annexure A-3).

9. I have heard the learned counsel for the Petitioner-Operational Creditor and perused the record carefully. I am of the view that this petition would not be maintainable; the debt being time barred. Section 3 (11) of the Code defines the term debt as meaning a liability or application in respect of a claim which is due from any person and includes a financial debt and operation debt. In this case, the petitioner could best rely upon the reconciled ledger statement sent by the Respondent-Corporate Debtor vide email dated 21.09.2012 showing the outstanding balance of ₹49,31,452/- as on 21.09.2012 (Annexure A-6).

10. Other than the exchange of emails and that too the respondent having last sent the email on 30.07.2017 for calling the meeting, that could not extend the period of limitation. The learned counsel for the petitioner vehemently contended that the respondent had been assuring orally to make the payment but it was admitted that there is no acknowledgement in writing signed by the respondent for extending the period of limitation to recover the amount. Sub-section (1) of Section 18 provides that "*where, before the expiration of the prescribed period for a suit or application in respect of any*

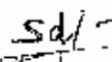
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property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed."

11. Therefore, the cause of action can be said to have lastly accrued on 21.09.2012 and, therefore, the petition is hopelessly time barred. This petition is dated 09.09.2016 and was filed in the Hon'ble High Court on 23.09.2016. The period for the purpose of limitation is to be counted upto the date when the petition was presented before the Hon'ble High Court as this case has been transferred to this Tribunal. The debt has become hopelessly time barred for which the process of initiating the insolvency resolution process cannot be invoked.

12. The learned counsel for the petitioner also refers to the order dated 31.08.2016 at Annexure A-12 passed in earlier CP No.134/2016 filed by the petitioner against the respondent. The said petition was dismissed as withdrawn with liberty to file a fresh petition with better particulars but learned counsel admitted during arguments that the earlier petition was also filed in the year 2016.

13. In view of the above, the debt having become time barred by limitation, the instant petition is rejected. Copy of the order be communicated to both the parties.


 (Justice R.P. Nagrath)
 Member (Judicial)
 Adjudicating Authority

July 26, 2017
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