

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
PRINCIPAL BENCH
NEW DELHI**

Company Application No. (I.B) 18(PB)/2017

**Present: CHIEF JUSTICE (Retd.) SHRI M.M.KUMAR, HON'BLE PRESIDENT
& SHRI S. K. MOHAPATRA, MEMBER (TECHNICAL)**

In the matter of:

Section 9 and other applicable provisions of the Insolvency and Bankruptcy Code, 2016 read with the rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the Matter of:

1. **M/S Prowess International Private Limited
A-18 , 6th Phase, Adityapur Industrial Area,
Gamharia, Jamshedpur,
Jharkhand-832108**

.....Operational Creditor

2. **Action Ispat and Power Private Limited
5th Floor. Block A. ITL Twin Tower
Subhash Palace, Pitampura,
New Delhi-110088**

.....Operational Debtor

Counsel for the Petitioner: Manjulika Pal, Advocate





ORDER

(Order reserved on 09.03.2017)

On the ground that default has occurred, this application has been filed by M/s Prowess International Private limited, Operational Creditor to initiate corporate insolvency resolution process under Section 9 of the Insolvency and Bankruptcy Code, 2016 against corporate debtor M/s Action Ispat and Power Private Limited.

2. The precise case of the applicant is that in the course of its business the applicant company had supplied equipments and parts (2*15 Ton Landle Refining Furnance) through various sales invoices dated 30.03.2011 for an aggregate value of Rs. 2,92,51,560/- to M/s Action Ispat and Power Private Limited. It is also their case that the supplies were accepted without any demur and M/s Action Ispat and Power Private Limited made part payments against these supplies on various occasions and the last payment against the said supplies was made on 29.08.2012 for Rs. 20,00,000/-. As per the petitioner a sum of Rs. 79,76,715/-(Rupees seventy nine lac seventy six thousand seven hundred fifteen only) is still payable to them by M/s Action Ispat and Power Private Limited against the aforesaid supplies.

3. It is submitted that after the last part payment made on 29.08.2012, payment to the petitioner was stopped. On its follow up for payment the petitioner received a mail from respondent company on 29.07.2013 which envisages that:

“ Subject: RE: Project pending invoice

Dear Sir,





This is once again to remind you kindly furnish the status for your billing amount as the discussed bill is over & above the ordered value.

Plz reconcile the matter latest by 31st July, 2013 otherwise we have to book the bill at value of ZERO. In case no reply is received it will be treated as consent from your end."

4. As desired the petitioner company had sent the payment details through mail on the same date on 29.07.2013. However it is alleged that despite the compliance M/s Action Ispat and Power Private Limited failed to make any further payments.

5. It is also the case of the petitioner that Respondent company vide Ref AIPL/HO/PH-V/SMS/01 dated 13th October, 2010 had agreed to pay an additional 10% of the total value of supplies made through its aforesaid purchase order if those supplies were successfully made within 4 months of issue of its purchase order dated 5th October, 2010. It is submitted that the supplies were manufactured and kept ready for delivery within 4 months of the stipulated time, but the company failed to take delivery in time and as such total value of the supplies got enhanced.

6. Petitioner submits that despite repeated demands and requests made by the Petitioner for payment of the outstanding dues amounting to Rs. 79,76,715/-, respondent company has failed and neglected to pay the same on one pretext or the other.

7. Petitioner further states that a legal notice dated 15th May, 2016 was sent to the respondent company demanding payment of the outstanding sum of Rs. 79,76,715/-, however despite such notice the company failed to make payment of the aforesaid outstanding dues.

Handwritten signature/initials

Handwritten mark

8. It is submitted that respondent company has acknowledged the aforesaid dues in the company's audited financial statements for the FYs 2012-13, 2013-14, and 2014-15 and that the said amount has not been written off.

9. The petitioner further submits that no part of the petitioner's claim is barred by limitation in as much as the transaction between the petitioner and the respondent company was continuous.

10. Petitioner has prayed for grant of reliefs claimed in the petition as the respondent corporate debtor has deliberately failed and neglected to pay off the legitimate claim of the petitioner without any lawful or reasonable excuse.

11. Heard Ld. Counsel for the petitioner and perused the case records.

12. In order to ascertain as to whether there is a default in making payment of the operational debt, the tribunal is required to examine that the claim made before it is within time. In case of revenue recovery the limitation period is three years from the date on which the debt has fallen due or the claim has arisen. Law of limitation has to be applied with all its rigour and tribunal has no power to extend the period of limitation. A live claim after lapse of limitation period becomes a stale claim unenforceable in law. Accordingly it is to be seen whether the tribunal has been moved within the maximum period of three years prescribed under the Indian Limitation Act, 1963 from the date on which the debt has fallen due or the claim has arisen.

13. Admittedly the present claim arises in respect of supplies made by the petitioner to the respondent company during the year 2011-12 through various sales invoices all dated 30th March, 2011. Almost long six years have since passed. There is also no dispute that last part payment against the said supplies was made by respondent company on





29.08.2012 and there after it has stopped making any payment to the petitioner. The present application has been filed on 15.02.2017 much after the limitation period of three years.

14. Ld. Counsel for the petitioner vehemently argued that no part of the petitioner's claim is barred by limitation in as much as the transaction between the petitioner and the respondent company was continuous. It is further contended that petitioner has been constantly chasing with regular follow up actions for the payment of the outstanding dues. In this regard there is no dispute that the claim in question arises in respect of supplies made during the year 2011-12 through various sales invoices all dated 30th March, 2011. There was no subsequent sale invoice after 30th March, 2011. This therefore, cannot be termed as continuous transaction to save limitation. Similarly the contention that there was continuous follow-up and chase for the payment of the outstanding dues will also not help. It is no longer *Res-integra* that repeated representation and letters not provided under law, cannot itself extend limitation (S.S. Rathor v. State of M.P., AIR 1990 SC 10).

15. Ld. Counsel further argued that respondent company has acknowledged the aforesaid dues in the company's audited financial statements for the FYs 2012-13, 2013-14, and 2014-15, and that the said amount has not been written off. The rulings in the case of S. C. Gupta v. Allied Beverages Company Pvt. Ltd. were referred, wherein it was held that the acknowledgement made by a company in its balance sheet has the effect of extending the period of limitation for the purpose of Section 18 of the Limitation Act.

16. Law in this regard is clear that acknowledgement executed within subsistence of period of limitation creates fresh period of limitation from the date of acknowledgement. An unqualified acknowledgement of liability by the debtor not only saves the period of limitation but also gives a cause of action to the creditor to base its claim thereon. In the present case however, no doubt the Petitioner has enclosed the financial statements for the




FYs 2012-13, 2013-14, and 2014-15 of the respondent company, but it could not be specifically shown as to where the aforesaid dues outstanding to petitioner has been reflected in the company's audited financial statements or which entry establishes that the said amount has not been written off. It could not be shown specifically as to where acknowledgement has been made by respondent company in its balance sheet. All that could be shown from the financial statements of the company is one general entry showing total outstanding amount without any specific imputation of outstanding dues in the name of the petitioner. It is pertinent to note here that last part payment against the said supplies was made by respondent company on 29.08.2012 and there after it has stopped making any payment to the petitioner. Petitioner has to show something specific for proving the acknowledgement of debt thereafter. When a person is bound to prove the existence of any fact, the burden of proof lies on that person. The plea of existence of acknowledgement of debt through mere oral submission, in the absence of any documentary evidence, cannot be accepted. The petitioner miserably failed to establish his contention. Once the acknowledgement of debt is not established, the present belated claim, filed after the lapse of limitation period by petitioner against the respondent, is to be taken as time barred.

17. In the case of *Bombay Dyeing and Manufacturing Company Limited v. State of Bombay* AIR 1985 SC 328 Hon'ble Apex Court has held that *expiry of the period of limitation prescribed under the Limitation Act could not extinguish the debt but it would only prevent the creditor from enforcing the debt*. Therefore when a debt becomes time barred, it does not become extinguished but only unenforceable in a court of law. Though the right is not extinguished, the remedies are clearly barred. These rights are known as imperfect rights.

18. 'Debt' has been defined in the Insolvency and Bankruptcy Code, 2016 as a liability or obligation in respect of a claim which is due and includes a financial debt and

~~ATA~~
/

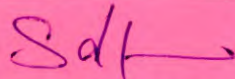
operational debt. "Default" has been defined in the Code as non-payment of debt which has become due and payable. (Emphasis given) A debt which is not recoverable for any valid reason ceases to be an amount due and payable. Default arises for non-payment of an amount which could be recovered in law. Default is the event on the occurrence of which, the insolvency proceedings may be initiated under the Code.

19. Claims which are time barred are not amount due and cannot be recovered under law. Creditors have no right to recover claims of such due that become time barred. The debt in question has become more than three years old and was, therefore, not enforceable from respondent company in view of the law of limitation. Consequently in the present case, as discussed, there has been no default for initiation of insolvency proceedings.

20. In the facts and in the absence of default, the application filed by M/s Prowess International Private limited to initiate corporate insolvency resolution process under Section 9 of the Insolvency and Bankruptcy Code, 2016 against M/s Action Ispat and Power Private Limited, is rejected without any order as to costs.

Pronounced in open court on 15.03.2017.

15-03-2017



(CHIEF JUSTICE M.M. KUMAR)
PRESIDENT



(S. K. MOHAPATRA)
MEMBER (TECHNICAL)