

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

CP (IB) NO. 221/KB/2018

Coram: Shri Jinan K.R., Hon'ble Member (Judicial)  
Shri Madan B. Gosavi, Hon'ble Member (Judicial)

**IN THE MATTER OF:**

An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

And

**IN THE MATTER OF:**

Rakesh Pandey, son of Jagmohan Pandey residing at 90, L.I.C. Gali, Mohsinpur, Mansoorpur, Akbarpur, Ambedkar Nagar, Uttar Pradesh 224122 .. Financial Creditor

And

**IN THE MATTER OF:**

**JHV DISTILLERIES AND SUGAR MILLS LIMITED**, a limited Non-Government Company, limited by shares registered under the provisions of the Companies Act, 1956 and having its registered office at 156-A, Lenin Sarani, Room No.212, II Floor, Kolkata 700 013, in the state of West Bengal under the aforesaid jurisdiction.

.. Corporate Debtor

**Counsels on Record:**

Mr. Udit Agarwal, Advocate	}	For the Financial Creditor.
Mr. Rashmi Kedia, Advocate	}	For the Corporate Debtor.

Date of pronouncement of the order: 8th May 2018.

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## ORDER

Per Shri Jinan K.R., Member (J).

1. This is an application filed by the Financial Creditor namely Rakesh Pandey for initiating Corporate Insolvency Resolution Process under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short, I&B Code) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short, the Rules) in respect of Corporate Debtor/ JHV Distilleries and Sugar Mills Ltd. The Financial Creditor has also proposed the name of Mr. Alok Kumar Kuchhal as Interim Resolution Professional (IRP) having registration No. IBBI/IPA-002/IP-N00114/2017-2018/10284 who had duly submitted the Form 2 which is annexed as Annexure '1' to the Application.

2. The present application is filed on the basis of default in payment of the debt due to the Financial Creditor till date. The total amount of default as claimed by the Financial Creditor is of Rs. 2,21,00,000/- (Two Crores Twenty-One Lacs Only) along with interest at the rate of 12% per annum totalling to Rs. 5,21,56,000/- (Five crores twenty-one lakhs fifty-six thousand only). The loan provided by the Financial Creditor was disbursed in two tranches dated 23.06.2005 and 03.01.2007 respectively.

3. The Financial Creditor contends that the Corporate Debtor failed to repay the loan within a period of one month as agreed to by the Corporate Debtor and the Financial Creditor. The loan amount is reflected in the Balance Sheet of the Corporate Debtor for the year ending 31.03.2012 which is annexed as Annexure '5' to the Application. The applicant further contends that the Corporate Debtor has acknowledged the debt due to the Financial Creditor and agreed to pay the amount along with interest to the Financial Creditor vide letter dated 22.12.2012 but

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Corporate Debtor failed to pay the amount as promised to the Financial Creditor. Thereafter, a demand notice dated 5.05.2015 demanding repayment of the default amount was sent by the Financial Creditor to which no reply was given by the Corporate Debtor.

4. On 13.01.2018, the Financial Creditor came to know through an advertisement in Amar Ujala newspaper that the assets of the Corporate Debtor have been sold and thereafter filed this Application. A Supplementary Affidavit was filed by the Financial Creditor before the Tribunal disclosing the Balance Sheet of the Corporate Debtor for the year ending 31.03.2017 which was reflecting the loan amount of Rs. 2,21,00,000/- borrowed from the Financial Creditor. Upon the said contentions the applicant prays for initiation of CIRP in respect of the Corporate Debtor under Section 7 of the I&B Code, 2016.

5. The respondent / Corporate Debtor filed reply affidavit opposing the application contending in brief is the following: -

6. The respondent alleged that the Financial Creditor provided the funds to the Corporate Debtor for an undefined period in order to facilitate the poor financial conditions of the Corporate Debtor and to aid in reviving the sick industrial unit of one Cawnpore Sugar Works Limited (CSWL) which was under the management of the Corporate Debtor. That fund was contributed towards capital and not as a loan as alleged. It was also alleged that the amount given by the Financial Creditor was to be repaid by the Corporate Debtor subject to the availability of the funds. The Corporate Debtor further alleged that there was no default in repayment of the loan as there was no specified date as to when the amount becomes due and payable. The application is liable to be dismissed since the applicant is guilty of gross suppression of material facts. Though BIFR sanctioned a scheme for rehabilitation of CSWL to a Company Gangotri

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Enterprises Ltd, the sanctioned scheme could not be implemented due to financial difficulties. The debt allegedly due to the applicant is not a financial debt within the meaning of I&B, Code. Since there is no default as per section 3(12) of the Code an application of this nature also not maintainable. Upon the above said contentions the respondent prays for dismissal of the application.

Heard Ld. Counsel on both sides. Perused the records.

7. The applicant/financial creditor filed this application contending that an amount of Rs.2,21,00,000/- (Rupees Two Crores Twenty-one lakhs only) was granted to the respondent as a loan at simple interest at 12% p.a agreeing to repay the amount with interest within one month from the date of demand and demanded back the amount by sending a letter dated 15.12.2012 (Annexure 4) but failed to repay the debt for the reason of inability of the corporate debtor. According to the financial creditor, based on the long-standing business relationship, the applicant extended the loan in the year 2005, but even after repeated request the respondent failed to repay the debt and on 05.05.2015 issued demand notice but again the respondent failed and since the respondent as per advertisement in a newspaper showed disposal of its assets, the applicant filed this application for initiating CIRP as against the respondent. The total amount with interest as on the date of filing this application outstanding is Rs. 5,21,56,000/- (Rupees Five crores twenty-one lakhs fifty-six thousand only).

8. It is submitted by the Ld. Counsel on the side of the respondent that the debt claimed is not a financial debt and that the fund received by the respondent was not a loan as alleged but is a contribution towards the capital. To substantiate the said contention herein this case no proof. The respondent has no case that upon receipt of the said amount issued

shares or that the applicant has given any application for shares or any agreement was entered into so as to prove that the alleged loan was an investment towards capital as alleged by the respondent. On the other hand, the balance sheet of the respondent for the financial year ending on 31.03.2017 produced on the side of the applicant proves that the loan amount allegedly given to the respondent is shown as the amount outstanding towards the applicant. The key feature of financial debt as provided under section 5(8) of I&B Code seems to have satisfied in the case in hand. Thus, the said contention is found devoid of any merit.

9. The next contention of the respondent is that there is no default. According to the Counsel the respondent inability to pay off the debt is known to the applicant and hence respondent could not repay the amount and therefore there is no default. The above said argument advanced on the side of the respondent has no legal force. Thus, in this case respondent admittedly received the amount as alleged. Admittedly there is no repayment. At this juncture one another argument was advanced that the claim if any is barred by limitation.

10. Truly as per the documents annexed, it is understood that the date of default was 22.12.2012 and according to the applicant the period of repayment was extended in the year 2005 and demanded the amount on 05.05.2015. But, no document produced to prove that the period of repayment was extended as alleged. However, the Ld. Counsel for the applicant submits that there is acknowledgement so as to save limitation and limitation if any started from the said date as per Section 18 of the Limitation Act, 1963 since the debt was acknowledged by the Corporate Debtor on that date itself. There is a clear written acknowledgement of the default amount and a promise to pay the same along with interest in the letter dated 22.12.2012 argued by the Ld. Counsel for the applicant.

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11. As per section 18 of the Limitation Act, 1963, it is clear that acknowledgement of the debt can provide for a fresh period of limitation provided the acknowledgement is made before the expiration of the prescribed period of limitation.

However, in circumstances where the acknowledgement is made beyond the period of limitation a reference should be made to Section 25 (3) of the Indian Contracts Act, 1872. Relevant portion of the provision is produced hereunder:

*"25. Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law. --An agreement made without consideration is void, unless--*

*...  
(3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract..."*

12. It is clear from the above statutory provision that a promise to pay the debt which is in writing, even made after the expiry of the period of limitation would cause revival of the claim, notwithstanding the limitation. On similar lines the following was held in the case of **State Bank Of India v. Kanahiya Lal & Anr, [2016 SCC OnLine Del 2639]**.

*"No doubt, there is a distinction between an acknowledgement under Section 18 of the Limitation Act and a promise under Section 25 (3) of the Indian Contract Act inasmuch as though both have the effect of giving a fresh lease of life to the creditor to sue the debtor, but, for an acknowledgement under Section 18 of the Limitation Act to be applicable, the same must be made on or before the date of expiry of the period of limitation whereas such a condition is non-existent so far as the promise under Section 25 (3) of the Indian Contract Act is concerned. A promise under Clause 3 of Section 25 of the Indian Contract Act, even made after the expiry of the period of limitation would be applicable and would cause revival of the claim, notwithstanding the limitation. Under Section 25(3) of*

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the Indian Contract Act, a promise in writing to pay in whole or in part, a time barred debt is not void .”

13. Referring to a judgement of Hon'ble High court of Delhi in Bhajan Singh Sarma Vs. M/s.Wimpy International Ltd., Ld. Counsel for the applicant submits that the acknowledgement of the loan amount in the balance sheet of the corporate debtor constituted fresh cause of action and extending the period of limitation. So according to her since the loan amount is reflected in the Balance Sheet for the year ending on 31.03.2017, it is an acknowledgement on the part of the Corporate Debtor extending the period of limitation.

14. It is good to read para 13 of the above cited decision. It read as follows:

*“Having heard the parties, this Court is of the opinion that the petitioning-creditor has to satisfy the Court that the debt on which the petition is based was due and payable on the date of the petition. Certainly, a time barred debt cannot be the basis of a winding up petition. However, admission of a debt either in a balance sheet or in the form of a letter duly signed by the respondent, would amount to an acknowledgement, extending the period of limitation. Section 18(1) of the Limitation Act, 1963 reads as under:*

*18. Effect of an acknowledgement in writing.*

*(1) Where, before the expiration of the prescribed period for a suit or application in respect of any 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.*

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*18. Moreover, as in a winding up petition, a disputed question of fact cannot be adjudicated, this Court has to believe the defense set up by the respondent. Consequently, this Court has to examine as to whether share application money of Rs.50,00,000/-, as contended by the respondent company, constitutes a debt.*

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24. *In the opinion of the Court, as the sum of Rs.50,00,000/- has not been refunded by the respondent, such sum constitutes a debt in present. Consequently, the sum of Rs.50,00,000/- constitutes an unsecured debt in the hand of the respondent company which is due and payable to the petitioner."*

15. In this case, the period of limitation i.e. three years gets over on 22.12.2015 from the initial date of acknowledgement i.e., 22.12.2012. The present application has been filed on 12.02.2018. However, upon perusal of the Balance Sheet of the Corporate Debtor for the year ending on 31.03.2017 and in view of the aforesaid judgement of the Hon'ble Delhi High Court, it is clear that there is an express acknowledgement of the loan amount due to the Financial Creditor which causes the revival of the claim from the said date notwithstanding the bar of limitation. Therefore, upon perusal of the records and in full satisfaction thereof, we come to the conclusion that the present application is not time barred due to the aforesaid reasons.

16. This is a petition filed by a financial creditor under section 7 of the I & B Code. In a case of this nature what is to be looked into is settled by the Hon'ble NCLAT in **Innovative Industries Ltd. vs. ICICI Bank & Anr.** The Hon'ble NCLAT has laid down that ".....for initiation of corporate resolution process by financial creditor under sub Sec.(4) of Sec.7 of Insolvency and Bankruptcy Code, 2016 the adjudicating authority on receipt of the application under sub Sec. (2) is required to ascertain existence of the default from the records of information utility or on the basis of other evidence furnished, the financial creditor under sub-section (3), under sub-section (5) of Sec.7 adjudicating authority is required to satisfy where a default has occurred, whether an application is complete and whether any disciplinary proceeding against the proposed Insolvency Resolution Process. Once it is satisfied it is required to admit the case".



17. In the light of above said discussions we come to a conclusion that the objections raised on the side of the respondent are unsustainable under law. On a perusal of the records we are also satisfied that this application is complete as per section 7(5) (a) of the I&B code. The applicant proposes Mr. Alok Kumar Kuchhal, C.S., address: C-154, Sector 51, Noida-201 301 (Mobile No.9810894275) e-mail: csaloknoida@gmail.com as an insolvency professional and produced Form2 along with written communication. The written communication includes a certificate to the effect that no disciplinary proceedings is pending against him. Accordingly, this application is liable to be admitted under section 7 of the I&B Code.

### ORDER

(i) The petition filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Insolvency Resolution Process in respect of JHV Distilleries and Sugar Mills Limited. Moratorium order is passed for a public announcement as stated in Sec.13 of the IBC, 2016.

(ii) The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

(iii) Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

1. The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of

any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

2. Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
  3. 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);
  4. The recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- (iv) 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.
- (v) 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.
- (vi) The order of moratorium shall affect the date of admission till the completion of the Corporate Insolvency Resolution Process.
- (vii) 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 Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease

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to have effect from the date of such approval or liquidation order, as the case may be.

(viii) Necessary public announcement as per Sec.15 of the IBC, 2016 may be made.

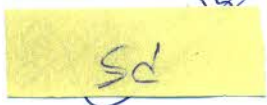
(ix) Mr. Alok Kumar Kuchhal, C.S. (Mobile No.9810894275) e-mail: [csaloknoida@gmail.com](mailto:csaloknoida@gmail.com) with Registrtrion No.IBBI/IPA-002/IP-N00114/2017-2018/10284 is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

(x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

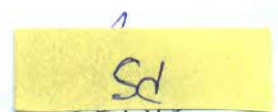
(xi) Registry is hereby directed under section 7(7) of the I.B. Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

Let the certified copy of the order be issued upon compliance with requisite formalities

List the matter on <sup>13<sup>th</sup></sup> June 2018 for the filing of the progress report.



**(Madan B. Gosavi)**  
**Member (J)**



**(Jinan K.R.)**  
**Member (J)**

*Signed this day of 8th May, 2018.*

*PS\_Aloke*