

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 1005 of 2019**

**[Arising out of Impugned Order dated 23<sup>rd</sup> August 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Guwahati Bench, Guwahati in Company Petition (I.B.) No. 24/GB/2019]**

**IN THE MATTER OF:**

**Sandeep Kumar Bhagat  
Ex-Director  
Shree Sai Smelters India Limited  
R/o Verdaman Apartment  
Janki Path, Ganeshpuri  
Guwahati – 781006  
Distt. Kamrup (Metro), Assam**

**...Appellant**

**Versus**

**Punjab National Bank  
Head Office:  
Plot No.4, Sector – 10  
Dwarka, New Delhi – 110075  
Branch Office:  
Fancy Bazar, LIC Building  
S.S. Road, Fancy Bazar,  
Guwahati – 781001**

**...Respondent**

**Present:**

**For Appellant : Mr Saurabh Jain, Mr Nishant Das and  
Ms Bhavishya Singh, Advocates**

**For Respondent : Ms Jainikr Mohan, Advocate**

**J U D G M E N T**

**[Per; V. P. Singh, Member (T)]**

This Appeal emanates from the Impugned Order dated 23<sup>rd</sup> August 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Guwahati Bench, Guwahati in Company Petition (I.B.) No.

23/GB/2019, whereby the Adjudicating Authority has admitted the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**') and appointed the Interim Resolution Professional. The Parties are represented by their original status in the company petition for the sake of convenience.

2. These brief facts of the case are as follows:

The Appellant is the suspended Director of the Corporate Debtor Shree Sai Smelters (India) Limited, which availed specific credit facility to the tune of Rs 15,25,00,000/- (Fifteen crores twenty-five lacs) on different dates from 20<sup>th</sup> May 2005 to 20<sup>th</sup> August 2014 from the Respondent Bank. The account of the corporate debtor was classified as NPA on account of alleged default occurred on 27<sup>th</sup> July 2015.

3. It is contended that the Respondent Bank/financial creditor had filed Application before the Adjudicating Authority (NCLT), Guwahati Bench under Section 7 of the I&B Code claiming amount of Rs. 17,52,42,104.49. The Petition was filed on 19<sup>th</sup> May 2018 and date of default as mentioned in the Application is 27<sup>th</sup> July 2015.

4. The Appellant contends that during the pendency of the Petition Respondent Bank entered into OTS. However, the Respondent Bank did not withdraw the Petition and suddenly on 29<sup>th</sup> July 2019 issued a letter asking them to deposit the balance amount as per terms of OTS. But later on, another notice about the revocation of OTS was sent on 31<sup>st</sup> July 2019. The corporate debtor received the said letter on 07<sup>th</sup> August 2019.

5. The Appellant pleaded that the Respondent Bank has not given a reasonable time to the corporate debtor and has acted arbitrarily; that during consideration of OTS, the Appellant on behalf of all the three companies handed over Rs. one Crore to the Respondent Bank on 19<sup>th</sup> August 2019 as part payment against OTS. By accepting the part consideration in connection with the OTS, the Respondent Bank has taken the settlement; the Petition is barred by limitation as per Section 238-A of the Code, read with Article 137 of the Limitation Act; the particulars of Form 2 are incomplete. Therefore, the Application filed under Section 7 of the Code could not have been admitted; the applicant has failed to satisfy the compliance of Section 7(5)(a) of the Code; Para VI of Form 2 is not proper and cannot be treated as a valid declaration; the Hon'ble Guwahati High Court in Writ Petition (C) No.6029 of 2019 has directed parties to maintain status quo. Therefore, the Tribunal should have waited for further orders of the Guwahati High Court; the OTS cannot be treated as an admission of liability.

6. The Appellant contended that the Learned Adjudicating Authority has failed to consider that the Petition is barred by the Limitation Act. The loan was sanctioned in 2004, various enhancements are up to 11<sup>th</sup> June 2012, and alleged restructuring happened in 25<sup>th</sup> July 2014, whereas the Petition was filed on or after 09<sup>th</sup> July 2018. Therefore, the claim of the Respondent Bank is hopelessly time-barred.

7. The Respondent contends that the Appellant is Ex-Director of three Companies namely, Shree Sai Prakash Alloys Private Limited, Shree Sai

Rolling Mills (India) Private Limited and Shree Sai Smelters (India) Limited. Since all the Companies failed to maintain financial discipline, their accounts were classified as NPA on account of default which occurred on 27<sup>th</sup> July 2015.. Since all the three Companies were unable to regularize their accounts despite several requests, the Bank was forced to approach NCLT, Guwahati Bench by filing an Application CP(I.B.) No. 23/GB/2019 under Section 7 of the Code.

8. The Appellant admitted the liabilities of all the three Companies by submitting a consolidated OTS for an amount of Rs.60 Crores, which was approved by the Bank on 27<sup>th</sup> December 2018. The same was also accepted by the Appellant on 10<sup>th</sup> January 2019. However, the Appellant failed to adhere to the terms and conditions of the OTS. As such, the Bank revoked the OTS on 31<sup>st</sup> July 2019 and the same was also conveyed to the Appellant.

9. It is further contended that during the pendency of the Appeal, the Appellant again approach the Respondent Bank for the revival of the OTS by tendering cheque of Rs. One Crore as part payment towards OTS on 10<sup>th</sup> October 2019. Since the offered amount was too low, and the Appellant had earlier failed to comply with the terms and conditions of the OTS; therefore, the Bank did not consider OTS again.

10. The Respondent Bank has admitted in the Written Submissions, *“that the Appellant admitted the liabilities of all the three Companies by submitting a consolidated OTS for an amount of Rs.60 Crores with the Respondent Bank which was sanctioned by the Bank on 27<sup>th</sup> December 2018. The same was*

*also accepted by the Appellant on 10<sup>th</sup> January 2019. However, the Appellant failed to adhere to the terms and conditions of the OTS. As such, the Competent Authority of the Bank revoked the OTS on 31<sup>st</sup> July, 2019 and the same was also conveyed to the Appellant”.*

11. It is further stated in the Written Submissions of the Respondent *“that during the pendency of the present proceedings, the Appellant again approached the Respondent Bank for the revival of earlier OTS by tendering a cheque for Rs. One Crore as partial payment of OTS on 10<sup>th</sup> October 2019. Since the amount offered was on a lower side, and the Appellant had failed to comply the earlier terms and conditions of OTS, the Competent Authority of Bank did not deem it fit to consider it again. The said decision was conveyed by the Respondent Bank vide their letter dated 16<sup>th</sup> October 2019”.*

12. Based on the above submissions, it is undisputed that the consolidated amount of Rs.60/- crores was offered by the Appellant for the outstanding dues of all the three Companies through OTS and this offer was accepted by the Bank on 27<sup>th</sup> December 2018. It is also on record that the corporate debtor acknowledged its liability by submitting OTS on 13<sup>th</sup> March 2018. Copy of acknowledgement letter is on page 77 of the paper book. It is also admitted fact that during the pendency of Appeal, again the Appellant made an offer to abide terms of earlier OTS. The Appellant paid Rs. One Crore as part of OTS on 10<sup>th</sup> October 2019 and this amount was accepted by Respondent.

13. It is also apparent after the revocation of OTS, the Appellant during the pendency of the Appeal made a second attempt to renew the OTS. In response to this, the Appellant made a payment of Rs. One Crore, which was accepted by the Bank. By taking of Rs. One Crore in response to earlier OTS, it is clear that respondent Bank agreed to renew the terms of OTS.

14. In all these Appeals different Companies are involved, but the Directors of the suspended Boards are common, and the Appellant as Director of the suspended Board of all the three companies has challenged the admission order. In all these matters, similar orders have been passed on 23<sup>rd</sup> October 2019, admitting the Section 7 of the Insolvency and Bankruptcy Code, 2016.

15. We have heard the arguments of the Learned Counsel for the parties and perused the records.

16. Learned Counsel for the Appellant emphasized on the non-compliance of the provision of Section 7(5)(a) of the Insolvency and Bankruptcy Code, 2016:

*“Section 7(5) of the I&B Code is as under:*

*Sec 7(5) Where the Adjudicating Authority is satisfied that—*

*(a) a default has occurred and the Application under sub-section (2) is complete, **and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such Application; or***

*(b) default has not occurred or the Application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such Application:*

*Provided that the Adjudicating Authority shall, before rejecting the Application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his Application within seven days of receipt of such notice from the Adjudicating Authority.*

*(6) The corporate insolvency resolution process shall commence from the date of admission of the Application under sub-section (5).*

*(7) The Adjudicating Authority shall communicate—*

*(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;*


*(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such Application, as the case may be.”*

Section 7(5)(a) provides that where the Adjudicating Authority is satisfied that the default has occurred and the Application under Section (2) is complete and no disciplinary proceeding pending against the proposed Resolution Professional, it may, order, admits such Application.



Therefore, a petition under Section 7 can be admitted by the Adjudicating Authority if it is complete and satisfies the parameters as laid down in Section 7(5)(a) of the Code. In this case, the Appellant alleges that Form 2 prescribed under the Adjudicating Authority Rules, which was filed along with the Application, copy of which is Annexure-A3 annexed with the Appeal, is not proper. The Photostat copy of Annexure A3 is as under:

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(Colly)  
**CA. Anil Agarwal**  
Insolvency Professional  
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30<sup>th</sup> January, 2018

To,

The National Company Law Tribunal  
Guwahati Bench  
GS Rd, South Sarania,  
Lachit Nagar,  
Guwahati-781003  
Assam


I, Anil Agarwal, an Insolvency Professional registered with Indian Institute of Insolvency Professionals of ICAI having registration number IBBI/IPA-001/IP-P00270/2017-18/10514 have been proposed as the Interim Resolution Professional by Punjab National Bank (Financial Creditor), in connection with the proposed Corporate Insolvency Resolution Process of **Shree Sai Smelters India Limited**, (Corporate Debtor), do hereby certify as follows:

a) I am eligible to be appointed as an independent director on the board of **Shree Sai Smelters India Limited**, under section 149 of the Companies Act, 2013 (18 of 2013)

b) I am not a related party of **Shree Sai Smelters India Limited**, (Corporate Debtor).

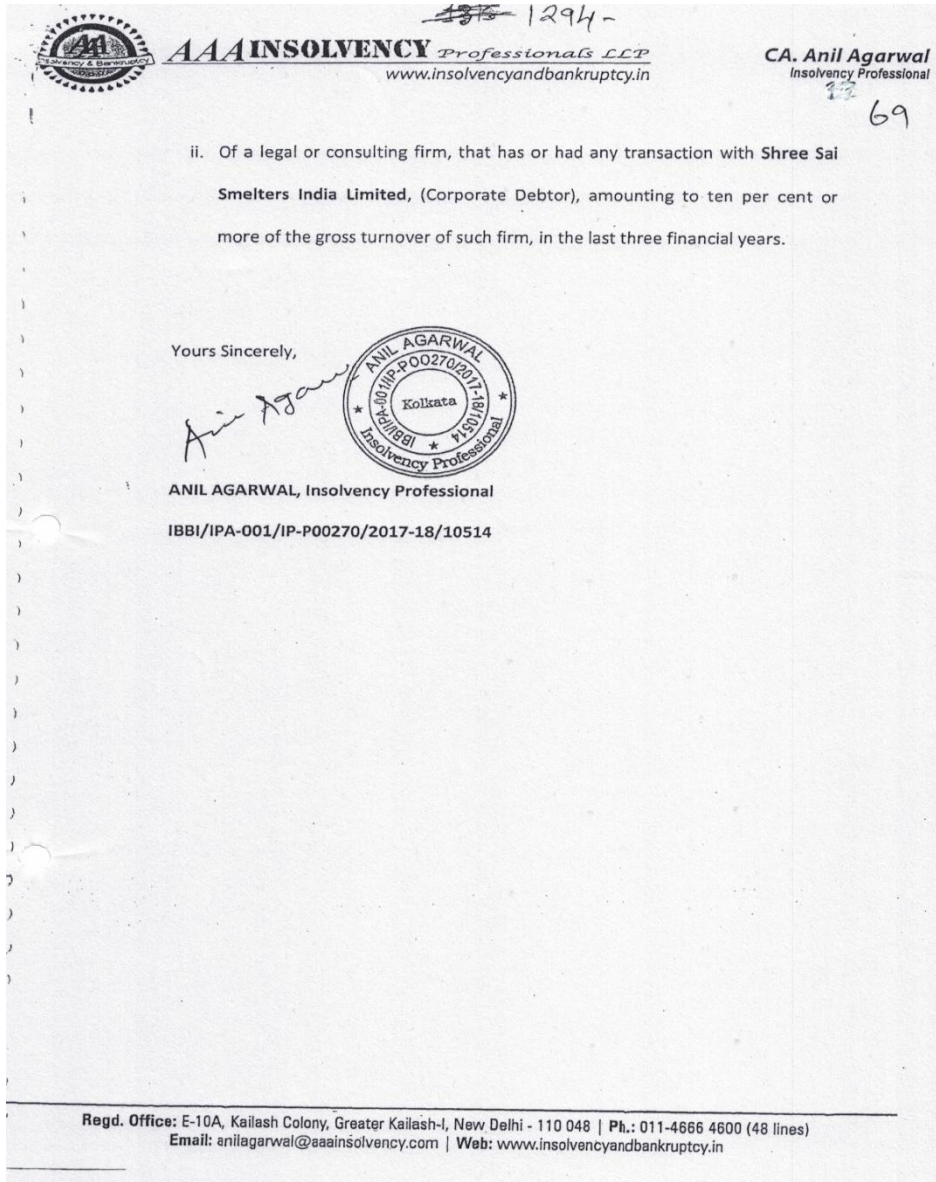
c) I further certify that I am not an employee or proprietor or a partner:

i. Of a firm of auditors or company secretaries in practice or cost auditors of **Shree Sai Smelters India Limited**; or

*Anil Agarwal*  


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On perusal of the declaration by the proposed Insolvency Resolution Professional, it appears that the proposed IRP Mr Anil Agarwal has not given declaration that no disciplinary proceeding is pending against him. It is also evident that the declaration of proposed Insolvency Resolution Professional, Annexure A3, is not in prescribed Form 2 under the Adjudicating Authority Rules. Therefore, as per the Ist proviso to Section 7(5) of the Code, the Adjudicating Authority should have issued notice to the Applicant/Petitioner to rectify the Application within seven days. But in the instant case, the

Adjudicating Authority has not taken into consideration the statutory provision of Sub Clause (5)(a) of Sec 7 of the Code and passed the Admission Order.

17. Learned Counsel for the Appellant further emphasizes that the Adjudicating Authority has failed to appreciate that Hon'ble Guwahati High Court in Writ Petition (C) No.6029 of 2019 is seized of the matter and had directed the parties to maintain status quo. A copy of the Order of Hon'ble High Court, Annexure A-8, is annexed with the Petition, which shows that the above Writ Petition, which was filed on behalf of all the three Companies, the Hon'ble High Court had passed the order of status quo. Copy of order above dated 19<sup>th</sup> August 2019 of the Hon'ble High Court is as under:

*“After hearing the arguments advanced by Mr Choudhury, I am of the view that before passing any further order in the matter, the Respondent Bank must be heard.*

*In the view of the above, Registry to list this case on 26<sup>th</sup> August, 2019 for motion as a fixed item.*

***The Petitioner to serve a copy of the Writ Petition by hand upon the Branch Manager, PNB, Guwahati Branch, intimating him about the pendency of this proceeding and the next date fixed in***

***the matter, so as to enable the Bank to appear before this Court on the next date.***

***Till 26<sup>th</sup> August, 2019 parties to maintain status quo in the matter.”***

18. In the Impugned Order, the adjudicating authority has mentioned that the Corporate Debtor gained so much time on the pretext of settlement and also by filing Writ Petition before the Hon’ble High Court of Meghalaya at Shilong and it is high time to put an end to this matter.

19. It is undisputed that by order of the Hon’ble High Court dated 19<sup>th</sup> August 2019 parties were directed to maintain status quo till 26<sup>th</sup> August 2019. However, the Adjudicating Authority, without taking the status quo of the High Court, passed the Order of Admission on 23<sup>rd</sup> August 2019.

20. The Appellant contends that the Petition is barred by the Limitation Act. The loan is sanctioned in 2004, various enhancement up to 11<sup>th</sup> June 2012, and alleged restructuring happened on 25<sup>th</sup> July 2014, whereas the Petition was filed on 09<sup>th</sup> July 2018. Therefore, the claim of the Respondent Bank is time-barred. In this connection, it is further contended by the Appellant that date of default as shown in Form 1 is 27<sup>th</sup> July 2015 and Petition is filed on 09<sup>th</sup> July 2018. Therefore, it is clear that the Petition is not time barred.

21. It is essential to mention that the Appellant has annexed a letter of acknowledgement D.T. 13<sup>th</sup> March 20 which is at 18, page no 77 of the paper book whereby the corporate debtor submitted One Time Settlement offer to clear the outstanding dues of the Bank.

22. It is on record that on the day petition was admitted there was status quo order by the Hon'ble High Court and which was in the knowledge of the Adjudicating Authority. But the Adjudicating Authority admitted the Petition by the impugned order dated 23<sup>rd</sup> August 2019. Learned Counsel for the Appellant placed reliance on the Respondent's letter dated 29<sup>th</sup> July 2019, which is at page 60 of the paper book. This letter shows that Bank has addressed a letter to the Directors of all the three companies informing that;

*“As per the terms of the conditions of above OTS, you have to deposit Rs. 3/- Crores as upfront, Rs. 3/- Crore immediately after receiving of sanction letter and minimum of Rs.1.50 Crore in each month. But it is a matter of concern that after lapse of more than 6 months, you have deposited Rs.6.79/- Crores against due amount of Rs.16.50 Crores till July 2019.”*

23. It is also clear from the letter mentioned above that the OTS proposal dated 06<sup>th</sup> August 2018 of Rs.60/- Crores in group account was accepted by the Bank on 27<sup>th</sup> December 2018 and the Corporate Debtor has paid Rs.6.79 Crores in furtherance of the OTS. It is also on record that the Respondent Bank has further accepted a sum of Rs. One Crore on 21<sup>st</sup> August 2019 regarding renewal of OTS. The cheque dated 21<sup>st</sup> August 2019

was encashed by the Bank even after revocation of the OTS during the pendency of Section 7 of the Application.

24. On perusal of the record, it is apparent that after acceptance of OTS for settling the dues of all the three companies in Rs. Sixty Crores, Bank has received a substantial amount from the Corporate Debtor. It is also clear that after making default in payment as per terms of OTS, the Corporate Debtor further paid rupees One Crore to the Bank for renewing the OTS. Bank even after accepting after rupees One Crore revoked the offer to renew the OTS. Considering the present/prevailing economic scenario of the country and downfall/slump in every business activity, we deem it fit and proper to provide one more opportunity to the parties for considering the OTS (One Time Proposal) in a fair, just, objective and dispassionate manner.

25. On perusal of the record that it is also evident that there is no proper compliance under Section 7(5)(a) of the Insolvency and Bankruptcy Code, but this defect in the Application is a curable defect which can be rectified. It is also on record that the admission order was passed even after the status quo order of the Hon'ble High Court.

26. In the circumstances, as stated above this Tribunal allows the instant Appeal by setting aside the impugned order and matter is remanded back to the Adjudicating Authority to pass an order afresh, after providing an opportunity to the opposite party in the light of the directions given in the body of the judgment. However, it is also made clear that the Adjudicating Authority should provide one more opportunity for the parties to consider

the renewal of OTS and in the event of renewal of OTS, the said opportunity may be utilised by the parties in right earnest, of course in true letter and spirit. The parties are directed to appear before the Adjudicating Authority (NCLT, Guwahati Bench) on dated 29<sup>th</sup> June 2020. No order as to costs.

[Justice Venugopal M.]  
Member (Judicial)

[V. P. Singh]  
Member (Technical)

[Shreesha Merla]  
Member (Technical)

**NEW DELHI**  
**18<sup>th</sup> JUNE, 2020**

*pks/nn*