

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

C.P. (IB) No. 731/KB/2018

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:

M/S. EDELWEISS ASSET RECONSTRUCTION CO. LTD, a Company incorporated under the Companies Act, 1956, and registered as an Asset Reconstruction Company pursuant to section 3 of the Securitization and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002, acting as a Trustee of EARC Trust-SC 31, having its Registered office at Edelweiss House, Off CST Road, Kalina, Santacruz (East), Mumbai 400098.

... Financial Creditor/Applicant

-Versus-

In the matter of:

M/S. GENA PHARMACEUTICALS LIMITED, a Company incorporated under the laws of India with its Registered Office at 7/2/1, Thakurpukur (N/W) Road, P.S. Barasat, Kolkata, Parganas North 700 1284.

... Corporate Debtor/Respondent

**Coram: Shri Jinan K.R., Hon'ble Member (Judicial) &
Shri Harish Chander Suri, Hon'ble Member (Technical).**

Counsel on Record:

1. Mr. Rahul Auddy, Advocate] For EARC
2. Mr. K. Thaker, Advocate]
3. Mr. A. Bajaria, Advocate] For the Corporate Debtor

Order pronounced on: 09th August, 2019.

ORDER

Per Harish Chander Suri, Member (T).

1. This application filed under Section 7 of the Insolvency and Bankruptcy Code (in short, I&B Code) 2016 read with Rule 4 of the I&B (Application to Adjudicating Authority) Rules, 2016, has been filed by M/s. Edelweiss Asset Reconstruction Co. Ltd., a Corporate entity having its Registered Office at Mumbai, hereinafter referred to as the Financial Creditor/Applicant, as against Gena Pharmaceuticals Limited, a Corporate entity having its Registered Office at Kolkata, hereinafter referred to as the Corporate Debtor. The Applicant/Financial Creditor has authorized Mr. Naman Awasthi, One of its authorized representatives, severally authorized to sign and execute for and on behalf of the Company all the documents and file proceedings under the provisions of the

Code and his name finds mentioned at Sl. No. 47 in the Resolution dated 7th March, 2018.

2. It is submitted by the Financial Creditor that at the request of the Corporate Debtor and its Directors and with the consent and no objection of the United Bank of India, Bank of Baroda took over the credit facilities availed by the Corporate Debtor from the United Bank of India and thereafter the Bank of Baroda issued a letter of sanction dated 13th August, 2008 for an aggregate overall limit of Rs.12,04,35,000/- (Rupees Twelve Crore Four Lakh Thirty Five Thousand Only) which consisted of Term Loan of Rs. 5,67,80,000/- (Rupees Five Crore Sixty Seven Lakh Eighty Thousand Only), Cash credit of Rs.6,25,00,000/- (Rupees Six Crore Twenty Five Lakh Only) and Bank Guarantee of Rs. 11,55,000/- (Rupees Eleven Lakh Fifty Five Thousand Only). To secure the loan, the bank got several documents executed from the Corporate Debtor which are mentioned below:-

- i) Demand Promissory Note for Rs. 6,25,00,000/-,
- ii) Letter of Continuing Security;
- iii) Demand Promissory Note for Rs. 5,67,80,000/-;
- iv) Letter of Instalment with acceleration Clause;
- v) Instrument of Hypothecation of Goods;
- vi) Hypothecation of Machinery;
- vii) Hypothecation of Book Debts;
- viii) Letter of Undertaking;

- ix) Undertaking;
 - x) Undertaking-cum-Declaration;
 - xi) General Undertaking;
 - xii) Undertaking for disclosure of names as defaulters;
 - xiii) Power of Attorney in respect of Book Debts Facility;
 - xiv) Counter Indemnity.
3. The Corporate Debtor deposited the title deeds of the moveable properties with the Bank whereby creating exclusive first charge of its right, title and interest thereon. The loan facilities were further secured by the personal guarantees of the Directors and the guarantees of Superb Drugs Private Limited. After execution of the documents, Bank of Baroda allowed the Corporate Debtor to avail the restructured facilities within the overall limit of Rs. 12,65,54,000/-. It is submitted that the Corporate Debtor failed and neglected to repay the facilities, due to which the account of the Corporate Debtor was classified as NPA by the Bank of Baroda on 31st March, 2010
4. It is further submitted that a notice dated 1st October, 2010 was issued by the Authorized Officer of the Bank of Baroda under Sub Section (2) of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, thereby calling upon the Corporate Debtor and the Directors/Guarantors to pay a sum of Rs. 15,80,50,017.21 (Rupees Fifteen Crore Eighty Lakh Fifty Thousand Seventeen and Paise

Twenty One Only) to the Bank of Baroda with interest up to 31st May, 2011 and an additional sum of Rs. 11,40,500/- (Rupees Eleven Lakh Forty Thousand Five Hundred Only) on account of contingent liability. The Bank of Baroda ultimately filed the proceedings under Section 19 before the Debt Recovery Tribunal (DRT) for recovery of outstanding dues, by way of OA 265 of 2013. The Corporate Debtor also filed an application under the Act of 2002 against the Bank of Baroda challenging the steps taken by the Bank which was numbered as TSA 1 of 2012 which is stated to be still pending adjudication.

5. It is submitted that the Bank of Baroda vide Assignment Agreement dated 26th February, 2014 assigned its debt to the present applicant/Financial Creditor and the Financial Creditor in its capacity as a Trustee on behalf of EARC Trust SC 31 has acquired all rights, title and interest in relation to Bank of Baroda and became a Financial Creditor and stepped into the shoes of Bank of Baroda and is thus entitled to initiate necessary proceedings against the Corporate Debtor in connection with the outstanding dues. The Financial Creditor has thus filed this petition for the purpose and has placed on record all the evidences and documents relating to disbursement of debt by Bank of Baroda, the erstwhile Financial Creditor along with the Assignment Agreement and proof of default and declaration of the account as an NPA. In its reply affidavit the Corporate Debtor has filed an affidavit of Sri Arup

Mukherjee, General Manager of the Corporate Debtor alleging that the loan assigned by the Bank of Baroda to the applicant is not due and payable by the Corporate Debtor and there is no default on the part of the Corporate Debtor, the debt being barred by limitation. It is further submitted in the application that the applicant has grossly suppressed and misrepresented the facts before the Tribunal and it is indulging in forum shopping and multiple proceedings solely to harass and coerce the Corporate Debtor into making payment of unjust, invalid, unenforceable and untenable claim as the applicant is fully aware that the same is not payable. It is further submitted that the Corporate Debtor was made to sign on certain Bank paper/documents prepared by Bank of Baroda under undue influence and not out of its own free will and volition. It is stated in the reply affidavit that the value of the assets which were mortgaged to the Bank of Baroda was well in excess of Rs. 20 crores in 2008 and the Bank granted credit facilities only to the extent of Rs. 12 crore and odd.

6. It is stated that the Corporate Debtor had strictly complied with the terms and conditions stipulated in the sanction letter dated 13th August, 2018 and the Corporate Debtor never had 4 Directors. There were only 3 Directors of the Corporate Debtor. The Corporate Debtor has denied and disputed the sum of Rs. 25,63,11,000/- or any part thereof to be payable by the Corporate Debtor to the Bank of Baroda on 26th February, 2014 or that the

applicant Financial Creditor is entitled to charge Rs. 70,73,21,232/- as interest. It is further denied that Rs. 49,34,86,910/- or any part thereof is outstanding as on 31st March, 2018.

7. The Corporate Debtor has further submitted that it is a viable commercial undertaking which employs around 70 people and is engaged in manufacturing of life saving drugs and submits that in case the application is admitted against the Corporate Debtor it will suffer irreparable loss and injury and thus the application is liable to be dismissed with costs in favour of the Corporate Debtor.

8. Similarly, the Financial Creditor in its rejoinder to the reply, filed by its Authorised Representative Mr. Naman Awasthi has submitted that the averments of the reply affidavit are denied except the ones which are either admitted or are matters of record. It is reiterated by the Financial Creditor that the averments and statements mentioned in the application under Section 7 are correct and reaffirmed. The Financial Creditor further denied that the instant proceedings are an attempt to coerce the Corporate Debtor. It is submitted that the deponent in the reply affidavit has made all frivolous allegations which do not have any merit. It is submitted that there is a clear admissions of default in its Balance Sheet and restructuring documents. It is further submitted in the rejoinder affidavit that mere pendency of proceedings before the DRT, which

is yet to be adjudicated upon, is not a par for proceedings under this Court.

9. It is further denied that the proceedings are barred by law of limitation. The Financial Creditor has submitted that the Balance Sheet of the Corporate Debtor as on 31st March, 2017 has disclosed and admitted a demand of Rs. 25 crores approximately to Bank of Baroda and thus in the light of admission of the Corporate Debtor as regards outstanding in its Balance Sheet in 2017 this submission of the Corporate Debtor that the application under Section 7 is barred by law of limitation is absolutely contrary to their admitted facts, and no facts have been suppressed or misrepresented by the Financial Creditor. It is denied that there is no valid assignment in the eyes of the law or that the debts have not been transferred by the Bank of Baroda to the present applicant/Financial Creditor. It is further denied that the Corporate Debtor had strictly complied by the terms and conditions stipulated in the sanction letter dated 13th August, 2008. If the Corporate Debtor had abided by the terms of the sanction letter, then the credit facilities would not have turned into an NPA and the Corporate Debtor would not have been a defaulter. It is denied by the Applicant that the restructuring of the credit facilities was for the purpose of dressing up of the books of bank or that it was made for the benefit of the Bank of Baroda.

10. It is further denied in the rejoinder affidavit that the Financial Creditor is not entitled to any relief as prayed for in the application, or that the Corporate Debtor is a viable commercial undertaking, or that the Applicant is not entitled to initiate any proceedings against the Corporate Debtor, or that the application should be dismissed.

11. During the course of arguments, the Corporate Debtor submitted that the application is barred by time because the Corporate Debtor's account was classified as Non Performing Assets by the Bank of Baroda on 31st March, 2010 and the present proceedings have been filed on or around 26th April, 2017. The Financial Creditor has denied that the proceedings are barred by laws of limitation. It is submitted by the Financial Creditor that the Balance Sheet of the Corporate Debtor on 31st March, 2017 itself clearly disclosed and admitted a demand of Rs. 25 crores approximately to the Bank of Baroda. Even though the Corporate Debtor might not have admitted the amount due but certainly the amount in excess of Rs. 1,00,000/- is admitted in the Balance Sheet dated 31st March, 2017, which is due and outstanding. It is only because of the default of the Corporate Debtor to pay off its dues, that the credit facilities had to be restructured.

12. We are guided by the law laid down by Hon'ble Supreme Court of India in the case of **B.K. Educational Services Private Limited Vs.**

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Parag Gupta & Associates and the judgement passed in the case of **Babulal Vardhaji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd. and Ors** passed by Hon'ble National Company Law Appellate Tribunal wherein it has been held that where the cause of action is continuing, an application u/s 7 will not be barred by limitation.

13. It is also opined by the Hon'ble National Company Law Appellate Tribunal that wherever property has been mortgaged against a valuable consideration, the period of limitation shall be 12 years. In this matter the Corporate Debtor had requested the Bank of Baroda to restructure the limits which was acceded to and the Corporate Debtor enjoyed the aggregate limit of Rs. 12,65,54,000/- and executed several documents on 6th May, 2009. However, on their failure to adhere to the terms and conditions, the account of the Corporate Debtor was classified as NPA by Bank of Baroda on 31st March, 2010 and they were called upon to pay the sum together with further interest within 60 days from the date of notice and thereafter proceedings under Section 19 of the recovery of debts due to Banks and Financial Institutions, 1993 for recovery of the outstanding dues from the Corporate Debtor was filed before DRT and numbered as OA 265 of 2013. This loan was however, assigned by way of Assignment Agreement dated 26th March, 2014 by Bank of Baroda to the present Financial Creditor which, stepped into the shoes of Bank of Baroda and is thus

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entitled to initiate proceedings as against the Financial Creditor before NCLT in the present proceedings.

14. In the case of Babulal Vardhaji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd. and Ors. (Supra), it is specifically opined that initiation or pendency of a petition under Section 19 before DRT will not in any way affect the initiation of Corporate Insolvency Resolution Process. Rather, under Section 14 of the I&B Code, all such proceedings cannot proceed during the period of moratorium.
15. We have heard both the parties at length and have been taken through each and every document filed by the parties in their support and defence. We are convinced that the Financial Creditor has been able to prove on the basis of documentary evidence placed on record that the credit facilities/debt was duly disbursed to the Corporate Debtor which was later on assigned to the present Applicant M/s. Edelweiss Asset Reconstruction Co. Limited by way of Assignment Agreement dated 26th March, 2014. Along with the assignment, the present Applicant entered into the shoes of Bank of Baroda, the assignor and all the documents of security, securing the loan/credit facilities availed by the Corporate Debtor were handed over to the Financial Creditor which according to our view are sufficient to proceed against the Corporate Debtor and admit the present application for initiation of Corporate Insolvency Resolution Process. The Financial Creditor has been able to prove the default having taken place in payment of the outstanding debt,

as on 31st March, 2018 on which date the account of the Corporate Debtor was declared as an NPA.

16. The Financial Creditor has **proposed** the name of **Mr. Anup Kumar Singh, a Resolution Professional vide Registration No. IBBI/IPA-001/IP-P00153/2017-2018/10322** to act as an IRP in case the application is admitted and the said IRP vide letter dated 6th April, 2018, has addressed a communication to this Tribunal, enclosed with the petition, that he is eligible to be appointed as an IRP in the case of M/s. Gena Pharmaceuticals Limited and he is eligible to be appointed as an independent director on the Board of the Corporate Debtor and he is not an employee or proprietor or partner or any related party of the Corporate Debtor. It is further submitted by the said professional that he agrees to accept the appointment as an IRP in case of admission of the application and he is not serving in any other such proceedings and no disciplinary proceedings are pending against him with the Board or Insolvency Professional Agency of Institute of Chartered Accountants of India.
17. In view of the fact that the application is complete in all respects, and the Financial Creditor has proved the existence of financial debt owed by the Corporate Debtor to the Financial Creditor, the default having been occurred in payment of the financial debt, we have no other option but to admit the application and pass the following orders:-

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ORDERS

(i) The application filed by the Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, **M/s. Gena Pharmaceuticals Limited** is hereby admitted.

(ii) We hereby declare a moratorium, and order public announcement in accordance with Sections 13, and 15 of the IBC, 2016.

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

(iv) Moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 prohibits the following:

a) 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;

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- 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- 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.
- (v) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- (vi) 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.
- (vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- (viii) 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 Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

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

(x) **Mr. Anup Kumar Singh, an Insolvency Professional registered with Insolvency and Bankruptcy Board of India having registration No. IBBI/IPA-001/IP-P00153/2017-2018/10322, e-mail ID: anup_singh@sumedhamanagement.com, is hereby appointed as Interim Resolution Professional by this Tribunal for ascertaining the particulars of creditors and constituting Committee of Creditors for evolving a resolution plan.**

xi) The Interim Resolution professional should convene a meeting of the committee of Creditors and submit the resolution passed by the Committee of Creditors, and shall identify the prospective Resolution Applicant within **105 days** from the insolvency commencement date.

xii) The Corporate Applicant is directed to deposit Rs. 5,00,000/- (Rupees Five Lacs Only) in the ESCROW Account to be operated through the Registrar, NCLT, Kolkata Bench, for the purpose of meeting the preliminary expenses for initiating the CIR Process by the IRP within two weeks from the date of the order.

xiii) The registry is hereby directed under Section 7(4) of the Insolvency and Bankruptcy Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the interim resolution Professional by Speed Post as well as through e-mail.

xiv) List the matter on **17th September, 2019** for the filing of the progress report.

xv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.



(Harish Chander Suri)

Member (T)



(Jinan K.R)

Member (J)

Signed on this 9th day of July, 2019.

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