

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

Company Appeal (AT) (Ins.) No. 579 of 2022

IN THE MATTER OF:

1. EXPORT-IMPORT BANK OF INDIA

Centre One Building, 21st Floor,
World Trade Centre, Cuffe Parade,
Mumbai – 400 005

2. BANK OF INDIA

New York Branch
277, Park Ave, B/t 47th& W 48th St,
New York – 10172
United States of America

3. STATE BANK OF INDIA

IFSC Banking Unit No. 1401,
14th Floor, Hiranandani Signature
Tower, Gift SEZ, Gandhinagar-
382 355 Gujarat

4. UNION BANK OF INDIA

Hong Kong Branch,
Nine Queens Road,
Central Unit No. 1903 – 4
Hong Kong

...Appellants

Versus

MANEESH PHARMACEUTICALS LTD.

29/33, Ancillary Industrial Plots,
Govandi, Mumbai – 400 043

...Respondent

Present:

For Appellant:

Mr. Krishnendu Datta, Sr. Adv. with Ms. Varsha
Himatsingka, Mr. Shubhabrata Chakraborti, Ms.
Palak Nenwani, Advocates

For Respondent:

Mr. Abhijeet Sinha, Kumar Anurag Singh, Zain A
Khan, Mr. Aditya Shukla, Advocates

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 25.03.2022, passed by the Adjudicating Authority (National Company Law Tribunal, Court-3, Mumbai Bench) by which an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Code' & 'Rules') has been dismissed on the ground of limitation.

2. In brief, the Appellants, namely, Bank of India, New York, The Export Import Bank of India, State Bank of India & Union Bank of India, Hong Kong Branch alongwith Barclays Bank PLC, extended term loan facilities to the tune of USD 45 Million to M/s Svizera Holdings B.V., a company incorporated under the laws of the Netherlands (hereinafter referred to as 'Borrower'), a wholly owned foreign subsidiary of the Respondent (Maneesh Pharmaceuticals Limited) vide facility agreement dated 24.09.2007 (in short 'Facility Agreement') which was executed between the Borrower, the Respondent as the Guarantor and Barclays Bank PLC, Hong Kong Branch, acting as an Agent and the Offshore Security Trustee of the Financial Creditors (Facility Agent).

3. Subsequently, the part of commitment of Barclays Bank PLC (as the Lender) was transferred to Union Bank of India, Hong Kong vide transfer certificate dated 03.11.2008. Therefore, Union Bank of India also joined with other lenders in filing the Company Petition in its capacity as the Financial Creditor.

4. The term loan extended vide facility agreement was secured by way of “(a) 2 (two) Deeds of Hypothecation both dated 3rd June 2008 by which the Respondent hypothecated its present and future movable assets in favour of IL&FS Trust Company Limited, the Onshore Security Trustee of the Appellants (“Onshore Security Trustee”). (b) Share Pledge Agreement dated 3rd June 2018 by which the shares of the Respondent Company held by its Managing Director, Mr. Vinay Sapte were pledged in favour of the Onshore Security Trustee; (c) Memorandum of Mortgage by Deposit of Title Deeds dated 26th March 2010 (“Mortgage Deed”) by which a first priority pari passu charge by way of equitable mortgage was created by the Respondent in favour of the Onshore Security Trustee”.

5. The Respondent gave its unconditional and irrevocable corporate guarantee to the Appellants for the punctual performance of the Borrower’s obligation under the finance documents which includes the facility agreement as well.

6. Clause 17 of the facility agreement is pertaining to guarantee and indemnity, which is reproduced as under: -

“17. Guarantee and Indemnity:

17.1 Guarantee and Indemnity

The Guarantor irrevocably and unconditionally:

Guarantee to each Finance Party punctual performance by the Borrower of all the Borrower's obligations under the Finance Documents;

Undertakes with each Finance Party that whenever the Borrower does not pay any amount when due under or in connection with any Finance Document, the Guarantor shall immediately on demand pay that amount as if it was the principal obligor”

.....

17.2 Continuing Guarantee

This guarantee is a continuing guarantee and will extend to the ultimate balance of sums payable by the Borrower under the Finance Documents, regardless of any intermediate payment or discharge in whole or in part.”

7. The Borrower failed to make the timely repayments, consequently its account was classified as Non-Performing Asset (NPA) in compliance with the RBI Guidelines.

8. Pursuant to the default, the facility agent in terms of Clause 22.18(b) of the facility agreement sent a loan acceleration notice dated 03.02.2012 to the Borrower recalling the entire outstanding loan amount together with the interest accrued on it but no payment was received pursuant to the loan acceleration notice. The Facility Agent invoked the corporate guarantee given by the Respondent vide guarantee invocation notice dated 21.02.2012 calling upon the Respondent to pay the entire outstanding amount due but despite that repayment was not made.

9. The Facility Agent filed a suit against the Borrower and the Respondent vide case no. 2012 Folio 277 (Foreign Suit) before the High Court of Justice Queen's Bench Division Commercial Court, London (Queen's Bench, UK) on 22.02.2012 in terms of clause 37.1 of the facility agreement. The said suit was contested by the Respondent on merits by filing a statement of defence on 29.05.2012.

10. While Foreign Suit was pending the Respondent filed a reference with BIFR u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) on 06.11.2012 which was registered as BIFR Case No. 74 of 2012 (Reference). The BIFR vide its order dated 07.12.2012 registered the

reference and restrained the Respondent from disposing of or alienating in any manner any fixed assets of the Respondent without consent of the BIFR.

11. On the other hand, the Respondent contested the foreign suit without mentioning the pendency of the Reference before the BIFR nor mentioned about the foreign suit in the reference. The Respondent also did not raise any objection in regard to continuation of the foreign suit on account of the pendency of the reference. The foreign suit was decreed on 08.04.2014.

12. The Facility Agent alongwith the Security Trustee filed an intervention application being Miscellaneous Application No. 253/BC/2013 before the BIFR with a request to implead them in the pending reference. The Respondent was asked to file reply in that application which was filed on 14.08.2013 but the application for intervention was not decided.

13. Meanwhile, the Government of India vide Notification No. S.O. 3568(E) dated 25.11.2016 repealed the SICA and replaced it by the Sick Industrial Companies (Special Provisions) Repeal Act of 2003 w.e.f. 01.12.2016. As a result thereof, BIFR and AAIFR stood dissolved and SICA was repealed and proceedings in respect of the Respondent under SICA before the BIFR stood abated.

14. It is also pertinent to mention that as per proviso to Section 4(b) of the Repeal Act including the third and fourth provisos which were enacted vide notification dated 24.05.2017 company in respect of which appeal, reference or inquiry was pending and stands abated, is at liberty to make reference to the Hon'ble NCLT under the IBC within 180 days from the commencement of the said IBC. But the Respondent did not avail the transition period of

180 days. It is alleged that the Appellants filed Company Petition on 30.08.2019 before the Adjudicating Authority.

15. The case set up by the Respondent in the reply is that the petition is barred by limitation. The amount allegedly claimed to be in default is arising out of the loan agreement dated 24.09.2007 whereas the Date of Default is mentioned as 21.02.2012. The date of NPA has been mentioned in respect of all the lenders i.e. Bank of India, New York Branch as 31.07.2011, State Bank of India, Gift City Branch as 26.06.2011, Export Import Bank of India as 30.06.2011 and Union Bank of India, Hong Kong Branch as 30.06.2011, therefore, the date of default could not have been 21.02.2012 and had to be a date prior to the date when the account of the Borrower was declared as NPA whereas the petition under Section 7 of the Code was filed on 30.08.2019. The Respondent has alleged that Article 137 of the Schedule of the Limitation Act, 1963 provides a period of three years for maintaining an application under Section 7 of the Code from the date when the right to apply accrues. It is the case of the Respondent that the date of default according to the Appellant is 21.02.2012 and the period of three years stood expired on 21.02.2015 when the right to apply accrued whereas the application under Section 7 of the Code was filed on 30.08.2019 much beyond the period of limitation. It is also the case of the Respondent that books of accounts of the Respondent does not reflect any debt due and payable and that the Appellants have admitted that pursuant to the judgment dated 08.04.2014 passed in the foreign suit, UDS 727648.32 has been realized from sale of offshore securities and that the Appellants have not preferred any proceedings between the year 2014 to 2017 whereas the

application under Section 7 of the Code has been filed only in 2019 which was hopelessly time barred.

16. In rebuttal, case of the Appellant is that while the foreign suit was pending, the Respondent filed a reference on Form A which was registered on 07.12.2012 and a restrained order was passed. The Facility Agent along with Security Trustee filed an Intervention Application in the pending reference and in view of the Section 22(5) of the SICA, the period during the pendency of the reference till 01.12.2016 when the Act was repealed had to be excluded.

17. The Adjudicating Authority, on the aforesaid facts and circumstances observed that the issue involved is as to whether the Appellant can take advantage of Section 22(5) of the SICA while it had continued with the proceedings in the foreign suit. It has found that the Respondent filed the reference on 07.11.2012 in which the order was passed under Section 22(1) of the SICA on 07.12.2012. The Adjudicating Authority observed that on the one hand the facility agent and the trustee participated in the proceedings before BIFR and at the same time they were pursuing the foreign suit, obtained judgment decree dated 08.04.2014, without informing the said court that they have already filed an application for impleadment before the BIFR nor informed the BIFR about the foreign suit. The Adjudicating Authority opined that though the Appellant could not succeed in getting impleaded in the proceeding before the BIFR but if they were taking the advantage of moratorium under SICA, the proceedings before the Queen's Bench could not have been initiated. It also observed that the agent did not

apply before the BIFR under the relevant provisions of SICA for grant of permission to proceed against the Respondent in the foreign suit, therefore, they cannot allege that they were restrained in any manner on account of pendency of proceedings with the BIFR and hence, the limitation period between admission of reference with SICA on 07.11.2012 till the date when SICA was repleaded on 01.12.2016 cannot be allowed to be excluded while computing the period of limitation for filing the petition under Section 7 of the Code. The application was thus dismissed holding that it has been filed after more than five years from the date of the final judgment of the foreign suit.

18. It is pertinent to mention that in the present appeal, the parties were directed to maintain status quo on 23.09.2022 and the said order has been continued.

19. Counsel for the Appellant has argued that the petition under Section 7 of the Code has been filed against the Respondent in its capacity as a Corporate Guarantor who had guaranteed the obligation of the Borrower. The Corporate Guarantee was invoked after the default committed by the Borrower by issuance of notice dated 21.02.2012 and on the very next day i.e. 22.02.2012, the foreign suit was filed against the Borrower and the Respondent in view of Clause 37.1 of the facility agreement whereas the Respondent while contesting the foreign suit on merits, filed a reference under Section 15(1) of the SICA on 06.11.2012 which was registered by the BIFR on 07.12.2012.

20. It is further argued that the foreign suit was decided on 08.04.2014 directing the Respondent and Borrower to pay Approx. USD 35 Million and the foreign judgment was not challenged by the Respondent and has thus attained finality. It is further argued that BIFR vide its order dated 21.11.2014, admitted the reference declaring the Respondent a sick industrial company in terms of Section 3(1)(o) of the SICA. The Appellants filed an application for intervention before the BIFR to intervene in the reference and in the reply to the application the Respondent clearly admitted its liability qua the Appellants. It is also submitted that though the pleadings in the intervention application were complete but it was not finally decided by the BIFR till the repeal of the SICA. It is argued that for the purpose of filing the foreign suit prior consent of the BIFR was not required because the SICA does not have extra territorial jurisdiction. In this regard, reliance has been placed upon a decision of the Hon'ble Bombay High Court rendered in the case of Ashapura Minechem Ltd. Vs. Armada (Singapore) Pte. Ltd., 2016 SCC Online Bom 5326.

21. It is further argued that the Learned Adjudicating Authority has erred in holding that the Appellants cannot take benefit of Section 22(5) of the SICA because they were pursuing the foreign suit when the Respondent was before BIFR. It is also argued that even approaching BIFR is not a sine qua non for seeking exclusion of period spent while the Respondent was before the BIFR and has relied upon a decision of the Hon'ble Andhra Pradesh High Court rendered in the case of Hyderabad Abrasives & Minerals Vs. Andhra Cements Ltd., 2002 SCC Online AP 1080 in which it has been held that the benefit of exclusion of period spent while the company was before BIFR will

be applicable to even those creditors who did not approach BIFR. However, it is submitted that the facility agent on behalf of the Appellants had approached the BIFR with the intervention application.

22. It is further argued that as per Section 22(5) of the SICA, period spent before BIFR has to be excluded from the period of limitation and since SICA was repealed on 01.12.2016 the Appellants have three years to initiate proceedings against the Respondent which started running from the date of repeal of SICA i.e. w.e.f. 01.12.2016 and was available till 01.12.2019 whereas the Company Petition was filed on 30.08.2019. In this regard, reliance has been placed upon a decision of this Tribunal rendered in the case of Gouri Prasad Goenka Vs. Punjab National Bank, CA (AT) (Ins) No. 28 of 2019 decided on 08.11.2019 and a Judgment of Delhi of Delhi High Court rendered in the case of IFCI Factors Limited Vs. Ramsarup Industries Limited Delhi High Court, 2019 SCC Online Del.

23. It is also argued that the Respondent has admitted and acknowledged the debt in the foreign suit, in their reply to the application filed for intervention application before the BIFR and even in the financial statement in the year 2016-17 admitted its liability as a corporate guarantor on behalf of the subsidiaries associates.

24. On the other hand, Counsel for the Respondent has argued that the account of the Corporate Debtor was declared as NPA by all four lenders between 26.06.2011 to 31.07.2011 and the period for filing any application or suit against the borrower –Svizera expired between 26.06.2014 and 30.07.2014, upon the expiry of the period of three years from the date when

the right to apply accrued (dates of NPA) and thus, the application filed under Section 7 is hopelessly time barred as it has been filed on 30.08.2019 after over a period of eight years from the date of NPA. It is further submitted that the lenders did not file any suit by 30.07.2014 before any court of law in India rather they filed a foreign suit against the Borrower and the Guarantor (Respondent) and obtained a judgment and decree dated 08.04.2014 during the period when the reference was pending before the BIFR under the SICA. It is further submitted that there is no acknowledgment as per Section 18 of the Act for the purpose of extension of period of limitation because in the present case the limitation had expired on 26.06.2014 and 30.07.2014. In this regard, reference has been made to a decision of the Hon'ble Supreme Court in the case of Sesh Nath Singh Vs. Baidyabati Sheoraphuli Coop. Band Ltd. , (2021) 7 SCC 313. It is further argued that as per principle of co-extensiveness, non-payment of dues can be raised against the Guarantor for the time barred debt if it cannot raise against the principal debtor. According to the Respondent the debt against the Borrower became time barred in June/July, 2014, therefore, a application under Section 7 of the Code could not have been filed against the Guarantor in the year 2019.

25. We have heard Counsel for the parties and perused the record.

26. There is no dispute raised regarding the liability of the Corporate Debtor towards the Financial Creditors and the guarantee by the Respondent. The account of the Borrower was declared as NPA in 2011 but the proceedings were initiated by the Financial Creditors against the

Guarantor after issuance of loan acceleration notice dated 03.02.2012 issue to Borrower recalling the entire outstanding loan amount with interest and by invocation of the corporate guarantee given by the Respondent, vide invocation notice dated 21.02.2012, calling upon the Respondent to pay the entire outstanding amount due. However, no payment was made by the Respondent and hence the date of default cannot be taken to be a date of NPA of the Borrower but the date of default has to be taken when the guarantee invocation notice dated 21.02.2012 was given.

27. It is also not disputed that the Facility Agent filed the suit against the Borrower and Respondent on 22.02.2012 i.e. on the very next day when the guarantee invocation notice dated 21.02.2012 was given to the Respondent. The said foreign suit was contested by the Respondent on merits.

28. Then while the foreign suit was pending the Respondent filed a reference with the BIFR on 06.11.2012 which was registered on 07.12.2012 and the Respondent was restrained from disposing of or alienating in any manner any fixed assets without the consent of the BIFR. Neither the foreign suit was contested by the Respondent mentioning the pendency of the reference nor mentioned about the foreign suit in the reference. The foreign suit was decreed on 08.04.2014. The Facility Agent also filed an application for intervention before the BIFR for their impleadment but the said application was not decided. The Respondent has argued that the Appellant cannot claim benefit of Section 22(5) of the SICA while they were pursuing the foreign suit when the Respondent was before the BIFR as it did not seek permission from the BIFR cannot be accepted in view of a decision of the

Hon'ble Bombay High Court in the case of Ashapura Minechem Ltd. (Supra) in which it has been held that:

“28. The question that arises for consideration of this Court is whether the respondent no.1 was required to obtain any prior consent of the BIFR under Section 22 of the SICA for taking steps in execution of the said two foreign awards in respect of the properties of the petitioner situated outside India.

29. A conjoint reading of Section 1(2) and Section 21 of the SICA clearly indicates that the provisions of the SICA are extended only to the whole of India and not outside India. The expression "any of the properties of the Industrial Company" in Section 22 of the SICA will ppn 17 12.conp-89.15(j).doc have to be read with Section 1(2) of the SICA which provides for territorial jurisdiction of the BIFR which is extended only to any part of this country and not outside India. A reference to the judgment of this Court in the case of Murablack India Limited (supra) will be useful to deal with this issue raised by the learned senior counsel for the respondents. It is held by this Court in the said judgment that prima facie, provisions of Section 22 which have only territorial application would not be attracted to restrain a party from proceeding with the suit instituted outside India even before an application was moved by other party before the BIFR. It is held that the Courts would not injunct proceedings in a foreign Court unless this Court by itself would have jurisdiction to grant the relief and considering other factors.

30. In my view, the facts before this Court in the case of Murablack India Limited (supra) are identical to the facts of this case. Though this Court had made such observation prima facie to this effect in paragraph 7 of the said judgment, on interpretation of Section 1(2) read with Section 22 of the SICA, I am of the view that prior consent of the BIFR under Section 22 was not required to be obtained by the respondent no.1 to execute the said two foreign awards against the petitioner in any country other than India. In my view, prior consent of the BIFR was required only if an application for execution of a degree, for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company in India was made.”

29. It has also been held in the case of Hyderabad Abrasives & Minerals (Supra) that the benefit of exclusion of period for computing the limitation period, spent while the Company was before BIFR shall be applicable even to those creditors who did not approach BIFR. Para 14 & 15 are relevant which are reproduced as under;-

“14. Insofar as the question of limitation is concerned, the submission of the learned counsel for the respondent cannot be accepted. He submits that the benefit of Sub-section (5) of Section 22 of SICA of extending the period of limitation would extend only to a person who applies for the consent of BIFR and fails to get such consent is too incongruous proposition to accept. Any such interpretation of Sub-section (1) of Section 22 of SICA would render itself constitutionally invalid and cannot be accepted, for it is settled point of law that the Court should prefer an interpretation which will render a statutory provision constitutionally valid - K.P. Varghese v. ITO .

15. The Constitution recognised the right of every person to seek appropriate remedy before appropriate forum. To say that the period of limitation where the industrial company in a reference to BIFR gets extended only to those who file application seeking consent of BIFR to initiate legal action against the industrial company and not others would render Sub-section (5) of Section 22 of SICA ultra vires the Constitution. Further, there is nothing in Sub-section (5) of Section 22 of SICA to indicate that in computing the period of limitation for enforcement of any right, privilege or liability, the period during which the remedy remains suspended is available only to those who approach BIFR under Section 22(1) is absent. The Court cannot introduce such element in Sub-section (5) of Section 22 of SICA. The right, privilege, obligation or liability can be enforced by any person against the industrial company subject to Sub-section (1) of Section 22 of SICA after the scheme is implemented. The bar for such enforcement is only during the four stages before BIFR and not otherwise.”

30. However, in the present case, the Appellant made an effort to become a party by filing a Miscellaneous Application before the BIFR but the said application was not decided though the Respondent filed the reply also to the said application.

31. In the present case, if we refer to the dates then date of invocation of guarantee is 21.02.2012. Form A Case No. 74 of 2012 (reference) is 06.11.2012, the reference was registered on 07.12.2012 and the SICA was repealed w.e.f. 01.12.2016 vide notification dated 25.11.2016, therefore, the limitation would start running from 01.12.2016 and shall go up to 01.12.2019. The application under Section 7 has admittedly been filed on 30.08.2019 which is prior to the expiry of period of limitation. It has been held in the case of Gouri Prasad Goenka Vs. Punjab National Bank, CA (AT) (Ins) No. 28 of 2019 decided on 08.11.2019 and a Judgment of Delhi of Delhi High Court rendered in the case of IFCI Factors Limited Vs. Ramsarup Industries Limited Delhi High Court, 2019 SCC Online Del 9457 that the period shall start running from the date of repeal of SICA.

32. Thus, from the aforesaid facts and circumstances, we are of the considered opinion that the order under challenge is patently illegal. The appeal is thus allowed and the impugned order is hereby set aside. No costs.

**[Justice Rakesh Kumar Jain]
Member (Judicial)**

**[Dr. Alok Srivastava]
Member (Technical)**

New Delhi

09th May, 2023

Sheetal