

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

IBA/103/2020

*(filed under Section 9 of IBC, 2016 read with Rule 6 of Insolvency and
Bankruptcy (Application to Adjudicating Authority Rules), 2016)*

In the matter of ***M/s. Texcel International Private Limited***

Shalimar Paints Limited

Stainless Centre,
4th Floor, Plot No. 50,
Sector – 32,
Gurgaon, Haryana – 122 001

... Operational Creditor

-Vs-

Texcel International Private Limited

Flat No.405,
M/s. Supreme Homes,
Karkuzhai Street,
Periyakuppam, Tiruvallur,
Tamil Nadu – 602 001

... Corporate Debtor

Order Pronounced on 3rd May, 2021

CORAM :

R. VARADHARAJAN, MEMBER (JUDICIAL)

ANIL KUMAR B, MEMBER (TECHNICAL)

For Operational Creditor : Sabhay Choudhary, Advocate

For Corporate Debtor : A. R. Nixon, Advocate

ORDER

Per: R. VARADHARAJAN, MEMBER (JUDICIAL)

1. The Applicant / Operational Creditor has moved an Application under Section 5 of the Limitation Act, 1963 read with Rule 11 of

National Company Law Tribunal Rules, 2016 for filing an Application under Section 9 of Insolvency and Bankruptcy Code, 2016, seeking relief as follows;

- (i) *Condone the delay of forty – eight days in filing of the present Application on behalf of the Applicant*
- (ii) *Pass any other order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.*

2. The Learned Counsel for the Applicant submitted that in the course of business, the Corporate Debtor had placed numerous orders upon the Operational Creditor for supply of paints and allied products and pursuant to the same, the Operational Creditor had supplied the materials which were ordered by the Corporate Debtor over a period of time and these invoices were payable within a period of 30 days from the date of issuance of the same. It was submitted that the Operational Creditor was maintaining a running account in their books of account and as on 31.03.2019, a sum of Rs.2,32,923/- is due and payable by the Corporate Debtor to the Operational Creditor. Hence, it was submitted that the Operational Creditor has issued Demand notice to the Corporate Debtor under Section 8 of IBC, 2016 on 17.09.2019 which was served upon the Corporate Debtor on 24.09.2019 and the Corporate Debtor had replied to the said Demand

Notice by stating that "No dues are payable to the Operational Creditor". Thereafter, the Applicant / Operational Creditor has filed IBA/103/2020 before this Tribunal on 18.10.2019 before this Tribunal along with an Application seeking thereof to condone the delay of 48 days in filing the Application under Section 9 of IBC, 2016.

3. It is seen from the Application filed under Section 5 of the Limitation Act, 1963 that the Applicant has stated that the Corporate Debtor had made the last payment for a sum of Rs.2,43,201/- on 30.07.2016 and pursuant thereto, the Operational Creditor has dispatched the notice under Section 8 of IBC, 2016 to the Corporate Debtor on 17.09.2019 and as such a delay of 48 days has occurred. However, it was submitted by the Learned Counsel for the Applicant that there was a delay of 79 days in filing the main application. It was further submitted by the Learned Counsel for the Applicant that the delay was due to the reason that the Operational Creditor was operating the books / accounts of the Corporate Debtor from its Chennai Depot and the documents pertaining to the Corporate Debtor were in the custody of officials working in the Chennai branch of the Operational Creditor and without the invoices and the ledger account, the Counsel for the Operational Creditor was not able to issue the Demand Notice. The Learned Counsel for the Applicant relied upon

the Judgment of the Hon'ble Supreme Court in the matter of **B.K. Educational Services Private Limited –Vs- Parag Gupta and Associates** (2019) 11 SCC 633 and submitted that the Limitation Act, 1963 applies to Application to be filed under Section 7 and 9 of IBC, 2016 and further relied upon the decision of the Hon'ble Supreme Court in the matter of **Gaurav Hargovindbhai Dave –Vs- Asset Reconstruction Company (India) Ltd. & Anr** Civil Appeal No. 6347 of 2019 to submit that the period of limitation for the purpose of filing an Application under Section 7 and 9 was not 12 years and it is in fact only 3 years.

4. The Respondent / Corporate Debtor has filed counter and it was submitted by the Learned Counsel for the Corporate Debtor that the present Application is not maintainable in view of the fact that Section 5 of the Limitation Act can apply only to appeal and application and Section 5 of the Limitation Act cannot be extended to an Application filed under Section 7 or 9 of IBC, 2016.

5. Heard the submissions made by the Learned Counsel for the parties. It is no longer *res integra* as held by the Hon'ble Supreme Court of India in a couple of decisions that Section 5 of the Limitation Act, 1963 would apply to a proceeding under Section 7 or 9 of IBC, 2016 and hence bowing down to the provisions of Article 141 of the

Constitution of India, though this Tribunal had expressed a view otherwise in the matter of ***M/s. FNA Multi-trade Private Limited - vs- M/s. VA Tech Wabag Limited in MA/561/2019 dated 29.09.2020*** taking into consideration the decision of the Hon'ble Madras High Court under the Presidency Town Insolvency Act, 1909. Be that as it may, the Applicant who seeks for condonation of delay has to adequately explain to the satisfaction of this Tribunal the 'sufficient cause' and 'reasonableness' for condoning the delay in filing the main Application.

6. At this juncture, it is relevant to refer to certain judicial precedents in relation to the condonation of delay;

(i) In **Kandaswamy and four others vs. Krishnamandiram Trust, Karur, by its Trustees and 33 others** 2001 (4) CTC 722 the Madras high Court took note of the fact that the conduct of the revision petitioner in keeping quite for over two years only on account of inability to mobilise other petitioner evidences would amount to gross negligence, irresponsible inactive attitude and therefore the petitioner lacks bonafides. Under those circumstances, this Court refused to condone the delay of 797 days in filing a petition to set aside the exparte decree. In the above case, the Court also referred to the decision of the Honourable Supreme Court reported in (M.K Prasad vs. P. Arumugam) (2001) 6 Supreme Court Cases 176.

(ii) In **Sundar Gnanalivu rep. by his power of attorney agent Mr. Rukmini vs. Rajendran Gnanavolivu, rep. by its power of attorney agent Veina Gnanavalivu** 2003 1 Law

Weekly 585, the Division Bench of the Madras High Court held that when the averments in the affidavit are untrue, lacks bona fides, then the case falls within the exception to the Rule of Liberal approach and it does not deserve the liberal approach formula in matters relating to condonation of delay. In this case also, the Division Bench of this Court followed the decision of the Honourable Supreme Court reported in (M.K Prasad vs. P. Arumugam) (2001) 6 Supreme Court Cases 176.

(iii) In **Oriental Aroma Chemical Industries Limited vs. Gujarat Industrial Development Corporation and another** 2010 AIR SCW 1788 the Honourable Supreme Court rejected an application for condonation of delay of 4 years in filing an application to set aside an *ex parte* decree on the ground that the explanation offered for condonation of delay is found to be not satisfied.

7. It should be borne in mind that while filing an Application for condonation of delay under Section 5 of the Limitation Act, 1963 there should be an explanation in respect of 'sufficient cause' and 'reasonableness'. The explanation so made, has to be reasonable and plausible so as to persuade the Tribunal to believe that explanation rendered is not only true, but it is worthy of exercising judicial discretion. This Tribunal is of the considered view that the averments made in the Application for condonation of delay are not correct and *ex-facie* sans bonafide. The Supreme Court in the matter of **P.K.R. Ramachandran –Vs- State of Kerala** (1997) 7 SCC 556 has held that an essential pre requisite of exercising discretion to condone the

delay is that the Court must record its satisfaction that the explanation of delay was either reasonable or satisfactory.

8. Further, the Applicant has sought for a prayer to condone the delay of 48 days in filing the present Application, however, in the rejoinder, the Applicant has stated that there has been a delay of 79 days in filing the main Application. The Applicant in the present Application in the relief portion has sought to condone a delay of 48 days, however in the rejoinder has sought to condone a delay of 79 days. Hence there seems to be a paradoxical stand being taking by the Applicant in the present Application seeking for condonation of delay. It is the cardinal principle of limitation that the Applicant, who seeks to condone the delay, has to explain the delay for each and every day as sought for, more particularly this Tribunal is of the considered view in relation to a proceeding under IBC, 2016 being a proceeding *in rem* and has an impact on all the stakeholders of the Corporate Debtor unlike a suit for recovery of money filed before the Civil Court and in the circumstances this Tribunal is required to be more circumspect in condoning the delay as compared to a liberal approach as canvassed by the Applicant.

9. The stand of the Applicant that the Operational Creditor is operating its office from Chennai depot is not a 'sufficient cause' or a

'reasonable cause' for the Tribunal to condone the delay in filing the main Application. In the present case, the Applicant has not satisfactorily explained to this Tribunal the delay of 48 days (albeit 79 days) in filing the main Application.

10. Thus, for the reasons stated above, the Application as filed by the Operational Creditor seeking thereof to condone the delay of 48 days is not explained by the Applicant to the satisfaction of this Tribunal and hence the Application filed under Section 5 of the Limitation Act, 1963 stands **dismissed**. As a consequence thereof, IBA/103/2020 stands **closed**.

-Sd-

ANIL KUMAR B
MEMBER (TECHNICAL)

-Sd-

R. VARADHARAJAN
MEMBER (JUDICIAL)

Raymond