NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 158 of 2017

IN THE MATTER OF:

JORD ENGINEERS INDIA LIMITED
504, Vishwananak Apartment,
Chakala, Link Road, Andheri (E),
Mumbai – 400 057 **...Appellant**

Versus

VALIA & CO.
208, Giriraj, S.T. Road,
Carnac Bunder, Mumbai-400 009 **...Respondent**

Present:

For Appellant:	**Mr. Arvind Kr. Gupta, Mr. Henna George, Advocates**
For Respondents:	**Mr. Amir Arsiwala, Mr. Dhaval Deshpande, Nupur Shah, Advocates**

J U D G M E N T

Per: Justice Rakesh Kumar Jain.

This appeal is preferred by the Corporate Debtor against the order dated 31.07.2017 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) by which an application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by the Operational Creditor has been admitted.

2. Briefly stated, the Applicant/Respondent filed the application under Section 9 of the Code in respect of an operational debt of Rs. 4,82,98,924/- accrued on account of supply of Iron, Steel Goods and Raw material to the Corporate Debtor. Admittedly, the Operational Creditor has claimed the aforesaid operational debt occurred in terms of 41 invoices, starting from

22.04.2011 to 08.05.2012. However, the Operational Creditor has pleaded that the Corporate Debtor, was referred to as a sick unit on 09.11.2005 by BIFR and the amount of Operational Debt became recoverable only when the Sick Industrial Companies (Special Provisions) Repeal Act, 1985 was brought into force w.e.f. 01.12.2016.

3. The Operational Creditor served a statutory notice dated 26.04.2017 under Section 8 of the Code upon the Corporate Debtor providing a period of 10 days to clear the outstanding dues.

4. The said notice was replied by the Corporate Debtor on 22.05.2017. Thereafter, the Operational Creditor filed the application before the Adjudicating Authority on 29.05.2017 to which reply was filed by the Corporate Debtor on 12.07.2017.

5. The Corporate Debtor raised the issue of limitation before the Adjudicating Authority on the ground that the default is of the year 2011-12 whereas the application under Section 9 of the Code was filed in the year 2017, therefore, it was barred by limitation having been filed after three years. But the contention of the Corporate Debtor was rejected on the ground that the Corporate Debtor was referred to as a Sick unit on 09.11.2005 by BIFR and till the Sick Industrial Companies (Special Provisions) Act, 1985(for short 'SICA') was repealed on 01.12.2016, the Operational Creditor was deprived of taking legal recourse in view of Section 22 of the SICA.

6. Initially, this appeal was allowed by this Appellate Tribunal vide order dated 13.10.2017 on the ground that notice under Section 8(1) of the Code was given through the advocate. However, the order dated 13.10.2017 was set aside by the Hon'ble Supreme Court vide order dated 02.04.2018 in Civil Appeal No. 8145 of 2018 filed by the Operational Creditor and the case was remanded back to this Appellate Tribunal for a fresh disposal in accordance with law.

7. After the remand, the present appeal was disposed of by order dated 09.07.2018, upholding the order of the Adjudicating Authority. The Corporate Debtor challenged the order dated 09.07.2018 before the Hon'ble Supreme Court by way of Civil Appeal No. 7281 of 2018 on the ground that no notice was given to them and hence, they remained unrepresented before the Appellate Tribunal. The said appeal was allowed, order dated 09.07.2018 was set aside and the case was again remanded back to this Appellate Tribunal for fresh hearing.

8. Counsel for the Appellant has raised two issues, namely, the application filed under Section 9 of the Code is barred by limitation because the operational debt is pertaining to the year 2011-12 whereas the application under Section 9 of the Code was filed in the year 2017 and that there is a pre-existing dispute.

9. Counsel for the Appellant, while assailing the finding of the Adjudicating Authority on the issue of limitation has submitted that it is now well settled by a catena of Judgments, both by the Hon'ble Supreme Court and this Appellate Tribunal, that the period of three years is to be

counted from the date of default till the date of filing of the application, in view of Article 137 of the Limitation Act, 1961 and in this regard reliance has been placed upon the case of B.K Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates [(2019) 11 SCC 633], Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. [(2020) 15 SCC 1], Sagar Sharma & Anr. Vs. Phoenix Arc Pvt.Ltd. [(2019) 10 SCC 353), Gaurav Hargovind Dave Vs. ARCIL [(2019) 10 SCC 572], Dena Bank (now Bank of Baroda) Vs. C. Shivakumar Reddy & Anr. [(2021) 10 SCC 330] and S.M. Ghogbhai Vs. Schedulers Logistics India Pvt. Ltd. [CA (AT) (Ins) No. 281 of 2022]

10. It is further submitted that Respondent cannot take advantage of the fact that the Applicant Company was before BIFR and Section 22 of the SICA applies to the cases where claim is pending as on the date when the company was sick and the pendency of the reference of the Company by BIFR does not extend the period of limitation.

11. In reply to this argument, Counsel for the Respondent has submitted that the Appellant Company was referred to as a sick unit on 09.11.2005 by BIFR and it continued as such till SICA was repealed on 01.12.2016 and as a result thereof, in view of Section 22 of the SICA, the Respondent was deprived of taking legal action against the Appellant for realisation of their money. It is submitted that the right to apply for recovery of operational debt was made available on 01.12.2016 pursuant to which a notice was issued on 26.04.2017 under Section 8 of the Code by sending all the invoices alongwith notice to the Appellant but the Appellant failed to reply the notice

within a period of 10 days. However, it is submitted that the Reply was given on 22.05.2017 alleging that the Appellant is not obliged to reply to the claim. It is submitted that counting the period of limitation from 01.12.2016 and the fact that the application under Section 9 was filed on 29.05.2017, it was well within the period of three years as provided under Article 137 of the Limitation Act, 1961.

12. We have heard counsel for the parties in respect of the issue as to whether the application filed under Section 9 was barred by limitation or not as alleged.

13. It is needless to mention that the law is now well settled that the limitation for filing an application either under Section 7 or 9 of the Code is three years in view of Article 137 of the Limitation Act, 1961 which has to be seen from the date of default.

14. There is no dispute that the Appellant was referred to as a Sick unit by BIFR on 09.11.2005 and the embargo of Section 22 of the SICA was lifted with the repeal of SICA w.e.f. 01.12.2016. In this regard, it would be relevant to refer to Section 22 of the SICA which read as under:-

> 22. Suspension of legal proceedings, contracts, etc.—(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a

receiver in respect thereof 3 [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

(2) Where the management of the sick industrial company is taken over or changed 3 [in pursuance of any scheme sanctioned under section 18], notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law—

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) 1 [Where an inquiry under section 16 is pending or any scheme referred to in section 17 is under preparation or during the period] of consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order and accordingly,—

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect—

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.

15. Thus, in view of the facts and circumstances, right to apply under Section 9 of the Code accrued to the Respondent after SICA Act was repealed on 01.12.2016 and also when the Insolvency and Bankruptcy Code, 2016 came into force. Hence, in our considered opinion the application filed under Section 9 of the Code by the Respondent is well within the period of three years and as such the application is not barred by limitation.

16. The other issue raised by the Appellant is about the pre-existing dispute.

17. Counsel for the Appellant has submitted that because of the poor quality of material supplied by the Respondent their orders were cancelled by the Indian Oil Corporation Limited (IOCL) which has caused them huge losses. It is alleged that the Appellant had requested the Respondent for

lifting the scrap and taking the liability to pay the freight charges of the said material which was admitted by the Respondent during the personal visit. Thus, on this premise, it is submitted that there existed a dispute before filing of the application.

18. In this regard, Counsel for the Appellant has submitted that if there is a pre-existing dispute before the application is filed under Section 9 of the Code then it was not maintainable and relied upon the decisions of the Hon'ble Supreme Court in the cases of Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. [(2018) 1 SCC 353], Innovative Industries Limited Vs. ICICI Bank [(2018) 1 SCC 407], Transmission Corporation of A.P. Vs. Commissioner of Income TaxA.P. [(2019) 17 SCC 662], K Kishan Vs. Vijay Nirman Company Pvt. Ltd. [(2018) 10 SCC 483], Kay Bouvet Engineering Limited Vs. Overseas Infrastructure Alliance (India) Pvt. Ltd. [(2021) 10 SCC 483] and Allied Silica Limited Vs. Tata Chemicals Limited [(2012) 4 SCC 515].

19. On the other hand, Counsel for the Respondent has submitted that the issue regarding the pre-existing dispute is concocted by the Appellant because no evidence is brought on record to show that there has ever been any effort by the Appellant either by filing any suit or any proceedings in respect of quality of the goods. It is further submitted that the Appellant, in the written submissions filed before the Adjudicating Authority has made bald averments of making request several time to the Respondent to takeback the material which has not been accepted by the IOCL, without giving any particular date of the said instance. Therefore, the objection

raised by the Appellant about the pre-existing dispute is just for the sake of an objection otherwise it has no legs to stand.

20. In view of the aforesaid discussion, we do not find any merit in this appeal and thus, the same is hereby dismissed. However, there shall be no order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

[Mr. Naresh Salecha]
Member (Technical)

New Delhi

30th August, 2022.

Sheetal