IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

CP (IB) No.14/CB/2021)

In the Matter of:

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the Matter of:

Ms. Rourkela Steel Syndicate, (A Partnership firm represented through its partner Mr. Manish Patodia) Gaffor Colony, Opp. SBI, Udit Nagar Rourkela, Odisha-769012

...Applicant

-Versus-

Metistech Fabricators Private Limited, 47/10, Nehru Nagar (East) Bhilai, Chhattisgarh- 490 020.

...Corporate Debtor

***Appearances (through video conferencing*)**

For the Petitioner	:	Mr. Swayamjit Rout, Adv. Mr. Milan Negi, Adv. Mr. Sidhant Chandan, Adv.
For the Respondent	:	Mr. Akshay K Sail, Adv. Mr. Aagney Sail, Adv.

Order reserved on:06.05.2022
Order Pronounced on: 09.06.2022

Coram:

Shri P. Mohan Raj	:	Member (Judicial)
Shri Satya Ranjan Prasad	:	Member (Technical)

O R D E R

Per P. Mohan Raj, Member, (Judicial)

The contents of the petition in brief are as follows: -

1. The petitioner/operational creditor is an unregistered partnership firm engaged in business of supplying finished steel for fabrication purposes. In the year 2016 the respondent approached the petitioner for supply of steel by an e-mail dated 04.08.2016, which was confirmed by the petitioner by an e-mail dated 04.08.2016 by quoting the price.

2. The petitioner started to supply the desired goods to the respondent, in respect of which seventeen invoices were raised totalling Rs.2,00,86,015/-. The goods were supplied from Rourkela, Odisha to Bhilai, Chhattisgarh, through lorries. The respondent accepted all the e-way bills and corresponding invoices have been duly received by the respondent. When the respondent failed to make payments for the good supplied, the repeated requests from the Petitioner through telephone and by e-mails did not yield much result.

3. The respondent belatedly paid a total sum of Rs.94,67,318/- and hence a balance of Rs.1,06,18,697/- is still due towards the invoices as the principal amount. The aforesaid balance amount was confirmed by the Respondent on 01.04.2019 and 01.04.2020.

4. The petitioner sent statutory notice to respondent on 13.02.2021 through an e-mail as well as by speed post. The notice sent by post delivered on 18.02.2021. The respondent did not reply to the statutory notice, which shows that the respondent has committed default, and hence file this petition.

The contents of the reply in brief are as follows: -

5. There is no written contract between the parties and the levy of interest at 2% per month was mentioned only in the invoice dated 04.08.2016. The petitioner is not entitled to interest at 2% per month. Its claim in respect of the invoices dated 05.06.2018, 09.06.2018 and 12.06.2018 totalling a sum of Rs.94,67,318/- are barred by limitation.

6. The goods were supplied on various dates hence the date of delivery of last goods cannot be taken for limitation. The date of delivery of each lot of the goods is to be taken separately for the purpose of limitation.

7. After deducting the amount of Rs.94,67,318/- barred by limitation as aforesaid, the instant application is hit by section 4 of IBC 2016, since the remaining amount falls short of the threshold amount.

8. When the matter was heard, both sides reiterated their case as pleaded. Apart from that one more aspect primarily taken for consideration is regarding the maintainability of the petition by the petitioner is an unregistered partnership firm in view of bar provided under section 69(2) Partnership Act 1932, which is a question of Law. Hence, we are constrained to hear and decide on this impact of the aforesaid statutory bar on the maintainability of the petition even in the absence of specific pleadings in this regard.

The points for determination are:

1. Whether the part of claim is barred by Limitation?

2. Whether the claim is hit by section 69(2) of Partnership Act 1932?

Point No.1:

9. The petition is filed on the strength of 17 invoices commencing from 05.06.2018 to 02.11.2018. The petitioner states that the goods were delivered as and when orders were placed in terms of e-mail dated 04.08.2016. Thus, a running account was maintained between the parties hereto and accordingly the last payment was made on 21.10.2020. This petition filed on 21.06.2021 is well within the period of limitation.

10. On the respondent side stated that the limitation starts from the date of delivery of materials and hence the claims pertaining to the ten invoices dated 05.06.2018, 09.06.2018 and 12.06.2018 totalling to Rs.94,67,318/- is barred by limitation.

11. The said contention is not acceptable because the respondent made part payments on 15.09.2018, 16.10.2018, 21.02.2019, 02.04.2019 and 21.10.2020. These part payments were made prior to expiry of limitation; hence, these payments extended the period of limitations.

12. Pertinently, in *Suo Moto W.P. (C) No.3 of 2020 in Re: Cognizance for Extension of Limitation* the Hon'ble Apex Court on 10.01.2022 has held that the period from 15.03.2020 to 28.02 2022 is to be excluded from the period of limitation. Accordingly, the petitioner is entitled to exclude the period from 20.03.2020 to 20.02.2021. Thus, in any event no portion of claim is barred by limitation. This point is answered accordingly.

Point No.2:

13. The petitioner has argued that the bar provided under section 69(2) of Partnership Act 1932 is only limited to suits and not applicable to the petitions filed under section 9 of IBC 2016. In support of this contention relied upon the Order passed on 16.07.2020 by the Mumbai Bench – IV of the NCLT in *M/s. Shree Dev Chemicals Corporation vs. Gammon India Limited* in CP (IB) No.3637/MB. IV/2018.

14. It is further argued that the petition is not hit by the expression "other proceedings" appearing in section 69(3) of the Partnership Act, because it is applicable only in the event of claiming counter claim or set off in the pending suit. In this regard relies upon the Apex court Judgment rendered in *Umesh Goel vs Himachal Pradesh Co-operative Group Housing Society Ltd*. and reported in (2016)11 SCC 313.

15. Section 69(1) of Partnership Act bars any person suing as partner of unregistered Partnership firm against the firm or any of the partners of the said firm. Section 69(2) bars the unregistered partnership firm or any of the partners of said unregistered firm to file any suit against any third parties. Section 69(3) bars the unregistered firm or any one of the partners of the said unregistered firm from filing counter claim or set off in the pending suit. Hence, in the instant dispute *inter se* between third parties, it has to be seen as to whether this petition is barred under section 69(2) of the Partnership Act 1932.

16. Thus, on reading section 69(2) of the Act, that the following elements are necessary to attract the bar, viz.: -

(i) An unregistered partnership firm,

(ii) A right arising out of contract, and

(iii) The institution of a suit in a court.

17. Admittedly, the petitioner is an unregistered partnership firm, and hence attracts and fulfils the aforesaid first element of section 69(2).

18. It is settled position of law that section 69(2) of Partnership Act 1932 does not bar all suits by an unregistered partnership firm against third parties. It does not bar a suit by unregistered partnership firm for enforcement of a statutory right or a common law right. However, the suit filed for enforcement of rights arising out of contract to which the unregistered partnership firm is a party, is certainly barred.

19. The words "enforcing a right arising under the contract" appears in section 69(2) of the Act denotes that only the rights arising out of a contract are unenforceable by an unregistered firm. In the instant case, admittedly the dispute has arisen only from the contracts in respect of the business transactions between the unregistered petitioner and the respondent, and thus the aforesaid second element of section 69(2) is also attracted and fulfilled.

20. In the landmark Judgement rendered by the Apex Court in *Swiss Ribbons Pvt. Ltd. v. Union of India* reported in (2019) 4 SCC 17 while upholding the provisions of the IBC, 2016, had held that CIRP is a right arising out of contract. The Apex Court has explicitly affirmed that the creditors can 'claim' for CIRP when a debt is due, in the case of an operational creditor and when it is 'due and

payable', in the case of a financial creditor. In any case, claim, as defined under the IBC, arises in cases of a breach of contract, when such breach gives rise to a right to payment. Hence, since the initiation of a claim is through a contract itself, it cannot be understood as a right accruing solely to a statute.

21. Regarding the aforesaid third element, the main contention of the petitioner is that the instant petition filed under section 9 of IBC 2016 is not a suit, and hence the statutory bar under section 69(2) of the Act is not attracted.

22. There is no definition of suit either in Code of Civil Procedure, 1908 (C.P.C.) or in the General Clauses Act or in the Partnership Act. Section 26(1) of C.P.C. reads as follows:

> *"(1) Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed."*

23. The Apex court in its judgment rendered in *Patel Roadways Limited vs Birla Yamaha Limited* and reported in AIR 2000 SC 1461: 2004 (4) SCC 91 has dealt with the issue as to whether the petition filed under the Consumer Protection Act before the consumer forum is a suit or not, and held as follows**:**

> *The term suit has not been defined in the Carriers Act nor is it provided in the said Act that the term suit will have the same meaning as in the Civil Procedure Code. Therefore, the ordinary dictionary meaning of the term will have to be taken for ascertaining its meaning. In Ramanathan Aiyar's Law Lexicon 1997 Edition some of the references of the term are: Suit Prosecution of pursuit of some claim,*

demand or request; the act of suing, the process by which one endeavours to gain an end or object; attempt to attain a certain result; the act of suing; the process by which one gains an end or object, an action or process for the recovery of a right or claim; the prosecution of some demand in a Court of Justice; any proceeding in a Court of Justice in which plaintiff pursues his remedy to recover a right or claim; the mode and manner adopted by law to redress Civil injuries; a proceeding in a Court of Justice for the enforcement of a right. The word suit in Ss.51 to 55 Act IX of 1879, Court of Wards Act, does not mean only what is usually called a regular suit. It embraces all contentious proceedings of an ordinary civil kind, whether they arise in a suit or miscellaneous proceedings. Suit Action. Suit is a term of wider signification than action; it may include proceedings on a petition. (Emphasis supplied) From the above it is clear that the term suit is a generic term taking within its sweep all proceedings initiated by a party for realisation of a right vested in him under law. The meaning of the term suit also depends on the context of its user which in turn, amongst other things, depends on the Act or the Rule in which it is used. No doubt the proceeding before a National Commission is ordinarily a summary proceeding and in an appropriate case where the Commission feels that the issues raised by the parties are too contentious to be decided in a summary proceeding it may refer the parties to a civil court. That does not mean that the proceeding before

> *the Commission is to be decided ignoring the express statutory provisions of the Carriers Act (section 9) in a proceeding in which a claim is made against a common carrier as defined in the said Act. Accepting such a contention would defeat the object and purpose for which the Consumer Protection Act was enacted. A proceeding before the National Commission, in our considered view, comes within the term suit.*

24. The above Judgment has been approved by a Constitution Bench of Apex Court in *Economic Transport Organisation vs M/S Charan Spinning Mills (P)* reported in (2010) 4 SCC 114, and further reiterated in *Ethiopian Airlines vs Ganesh Narain Saboo* reported in AIR 2011 SC 3495.

25. From the above Judgment, it is clear that the term "suit" is a generic term, which includes all proceedings before the judicial or quasi-judicial forums. According to Black's Law Dictionary, the word "suit" means "any proceeding by a party or parties against another in a court of law." Applying the *supra* principal it is clear that the petition filed by operational creditor under section 9 of the IBC, 2016, to establish its rights arising under a contract to which it is a party is also a suit.

26. The next thing is whether proceedings before the Tribunal will be considered proceedings before the court. The word "court" is defined in section 3 of Indian Evidence Act 1872, "Court" includes all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence. As per this definition this Tribunal also comes under the purview of court.

27. The court can be described as the judicial body set up by the government to adjudicate disputes between the competing parties through a formal legal process. It aims at giving justice in civil, criminal and administrative matters, as per the rule of law. In short, a court is a government institution where the decision on legal matters is taken by the judge or panel of judges or magistrate. Both courts and tribunals are established by the Government, which possess judicial powers and have a perpetual succession. By and large, tribunals deal with special cases for which they are formed, while the rest of the cases are dealt in the courts, on which the judge gives his verdict.

28. In view of above discussion, the aforesaid third element of the statutory bar under section 69(2) of the Partnership Act is also attracted and fulfilled, and hence the instant petition is neither maintainable nor sustainable nor enforceable.

29. The terms “Claim” and “Debt” defined in the IBC 2016 shall be construed as legally enforceable claim and legally enforceable debt. If the contention of the petitioner is accepted and ordered CIRP then it gives room for the operational creditors holding debts unenforceable before the regular civil courts to file petition to trigger CIRP. Though the IBC 2016 is not a debt recovery law the trigger being default in payment of debt, it permits the claimants to file unenforceable debt with IRP/RP, which may potentially be a part of the resolution plan. The person whose claim is barred under a regular civil court cannot be permitted to circumvent and utilise the provisions of IBC, 2016 to recover the amount.

30. Pertinently, while introducing section 238A provision for Limitation the Committee observed in its Report that the intent of the Code could not have been to give a new lease to debt which is already time barred. Similarly, it is not intended anywhere in the Code to give an opportunity to the claims which are barred before the regular civil courts.

31. In the circumstances this point is answered that the petitioner being an unregistered partnership firm the claim is unenforceable, in consequence the petition is liable to be dismissed.

In the result petition is **DISMISSED.**

32. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps,

33. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD Date: 2022.06.09 15:50:05 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN RAJ Digitally signed by PANDIAN MOHAN RAJ Date: 2022.06.09 16:00:55 +05'30'

P. Mohan Raj.
Member (Judicial)

Signed on this 9th day of June, 2022.

Supriya p.s