SS(3)

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1

IA 253 of 2019 in IA 8 of 2018 in/with C.P. (I.B) No.189/NCLT/AHM/2017

Coram: Hon'ble Mr. MADAN BHALCHANDRA GOSAVI, MEMBER (JUDICIAL)
Hon'ble Mr. VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING THROUGH VIDEO CONFERENCING BEFORE THE AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 07.07.2020

Name of the Company: Venkat Dharma Reddy Konreddy & Ors.
V/s.
Mazda Agencies & Ors.

Section: IA For Amendment in IA 8 of 2018

ORDER

No one appeared for the Applicant.

Learned Counsel Mr. Pavan S Godiawala appeared Respondent

The case is fixed for pronouncement of order.

The order is pronounced in open court, vide separate sheet.

(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)

(MADAN B GOSAVI)
MEMBER (JUDICIAL)

Dated this the 7th day of July, 2020.

PC

BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
COURT-1

IA 8 of 2018, IA 116 of 2018 and IA 253 of 2019 in IA 8 of 2018
with C.P. (I.B.) No.189/9/NCLT/AHM/2017

Coram: **Mr. Madan B. Gosavi, Member (J)**
Mr. Virendra Kumar Gupta, Member (T)

In the matter of:

Mazda Agencies (Partnership Firm)

Having addressed at:

Ghantiada, off. Gendigate Road,
Baroda 390001

...........Operational Creditor

Versus

Hemant Plastic & Chemicals Limited

Having addressed at:
Factorty & Regd Off.
PadrA - Jambusar Highway
Nr. Village Dabhasa,
Ta. Padra, Dist. Vadodara-391440 ....Corporate Debtor

(Through Video Conferencing)

Order delivered on 07/07 / 2020

Appearance ...

Mr. Pavan S Godiawala, Advocate for the Operational Creditor.

Mr. Jaimin R Dave, Advocate for the Corporate Debtor.

[Per : Shri Virendra Kumar Gupta, Member (Technical)]

ORDER

1. This application has been filed for initiation of Corporate Insolvency Resolution Process (CIRP) by the Operational Creditor, namely, Mazda Agencies, u/s. 9 of Insolvency & Bankruptcy Code, 2016 against the Corporate Debtor, namely, Hemant Plastic & Chemicals Limited. The principal amount of debt claimed in default stands at Rs. 1,48,11,572/- (One crore fourthly eight lakhs eleven thousand five hundred seventy two rupees only).

2. The facts, in brief, are that the Operational Creditor supplied printing and packaging material to the Corporate Debtor. The last supply was made on 22.11.2004. However, Corporate Debtor failed to make the payment because of financial crunch. Due to such financial crunch the Corporate Debtor was referred to BIFR in Case No. 83 of 2005. The Scheme of Rehabilitation, however, did not work out ultimately. Subsequently, on repeal of SICA, 1985 this application was filed on 24.11.2017.

3. Learned counsel for the Operational Creditor submitted that notice u/s 8 of IBC, 2016 had duly been served though Corporate Debtor did not reply thereto. The service of the same was not disputed. It was further submitted that even no reply

was submitted in response to the application filed u/s. 9 of IBC, 2016. It was also pointed out that there existed no dispute at any point of time. Learned Counsel, on the point of limitation, submitted that due to BIFR and AAIFR proceedings under Sick Industrial Companies (Special Provisions) Act, 1985 commenced in 2005 and remained in process till the repeal of such Act on 01.12.2016, hence, as per provisions of Section 22(5) of SICA, 1985, limitation period got extended as period consumed in the course of such proceedings had to be excluded in computing the limitation period. In this regard, learned counsel drew our attention to relevant portion of Section 22(5) r.w. Section 22(1) of the Act of SICA, 1985. It was also submitted that the Operational Creditor had initially lodged its claim with BIFR as creditor but due to a proposal of very huge hair-cut, it did not accept the settlement proposed thereunder. He further submitted that the Corporate Debtor had also acknowledged the debt on 11.01.2005, hence, period of limitation would start from this date as per the provisions of Section 18 of Limitation Act, 1963 though default had occurred earlier. It was further submitted that the application was filed on 24.11.2017 after repeal of the said Act on 01.12.2016, hence, considering the provisions of Section 22(5) as mentioned above, the same was well within limitation.

4. Learned counsel for the Corporate Debtor submitted that due to financial crunch, the outstanding amount could not be paid and

there were serious internal disputes between the Management of the Corporate Debtor. He further submitted that Section 22(5) of the SICA, 1985 was not applicable in the present case, hence, such application was barred by limitation.

5. We have considered the submissions made by both counsels and material on record. It is noted that there is no dispute as regard to supply of goods, quality or price thereof. It is also noted that confirmation of outstanding amount as on 31.12.2004 was made on 11.01.2005 by the Corporate Debtor. It is further noted that no reply either to notice served u/s 8 of Insolvency & Bankruptcy Code, 2016 or to this application has been filed by the Corporate Debtor. Admittedly, the Corporate Debtor was registered with BIFR under SICA, 1985 in the year 2005 and during the course of those proceedings the debt payable by the Corporate Debtor got acknowledged. Thus, there remains no doubt as regard to the amount of outstanding debt. The only aspect which we require to examine is whether debt is due and payable in law or in fact i.e. it is not barred by limitation. For answering this question, we have to look firstly at the scope of Section 22(5) of SICA, 1985 which reads as under:

22(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 <u>this section</u> shall be excluded.

6. From the perusal of the above section, it is apparent that this sub-section (5) is applicable for entire Section 22 because of the expression "this Section" used in this sub-section. Further, this sub-section provides for automatic exclusion of the period of suspension of proceedings or remedy for the purpose of computation of limitation for the enforcement of any right, privilege, obligation or liability u/s 22(1) or by virtue of declaration in sub-section 3 of Section 22. However, for our purposes Section 22(1) of SICA, 1985 is relevant which is reproduced as under:

22(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 (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.

As noted, the above section provides for automatic suspension of two remedies which are otherwise available i.e. **(i)** no proceedings for the winding up or for execution, distress or **the**

like against any properties of the Industrial Company or for appointment of receiver in respect of property of industrial company **(ii)** no suit for recovery of money or for enforcement of any security against industrial company or any guarantors thereof can be instituted or proceeded with further. Thus, it is apparent that the term 'proceedings' and 'suit' which have been used in section operate in different fields and are independent of each other. It is further noted that embargo on the second remedy i.e. on suit for recovery of money or for the enforcement of any security has been brought on the statute by an amendment w.e.f. 01.02.1994. This fact further supports our view that two situations u/s 22(1) are independent of each other and are not interchangeable. We further

mention that such difference was noted by Hon'ble Supreme Court in the case of ***Kailash Nath Agrawal vs. Pradeshiya Industrial and Investment Corporation of UP as registered in (2003) 4 SCC 305.*** This distinction has got bearing on the contentions raised by the Operational Creditor as regard to extension of limitation for the reason that extension of limitation available in respect of one remedy in future cannot be available for the other remedy in future i.e. extension of limitation in respect '(proceeding)' in future cannot be applied to a 'suit' in future and vice versa.

7. Having observed so, the aspect which comes into our mind is that the exclusion of period of automatic suspension as per the

provisions of Section 22(5) of SICA, 1985 for computing extended period of limitation is limited to suits for recovery of money or for enforcement of security. However, present case before us is an application u/s 9 of IBC, 2016 for initiation of Insolvency Resolution Process of the Corporate Debtor and not a suit for recovery of money, hence, provisions of Section 22(5) r.w. Section 22(1) of SICA, 1985 are not applicable at all. To further elaborate on this aspect, now, we look into Section 3 of SICA, 1985 to find out whether term 'suit' used in Section 22(1) has been defined therein or not. From the perusal of the Section 3 it noted that this term has not been defined. Section 3(2) of SICA, 1985 provides that word and expression used in SICA, 1985 and not defined therein would have the same meaning, if any, assigned to such words in Companies Act, 1956 or if not defined therein also then meaning of such words given in the Industries (Development Regulation) Act, 1951 shall apply. We have perused the definition sections of both these Acts and it is found that even in these Acts, the word 'suit' has not been defined. We further looked into the provisions of General Clauses Act, 1897 which resulted into the same conclusion. Thereafter, considering the fact that the issue involved in the present case relate to extension of limitation, we looked into the provisions of Limitation Act, 1963. As per Section 2 (l) of this Act, the word 'suit' **does not include an Appeal or Application.** Even otherwise, we are of the view that suit lies before a Court of law. Thus, we have no hesitation in holding that extension of limitation based on exclusion of suspension period as prescribed in 22(5) of SICA, 1985 is applicable only to suit for recovery of money and not to an application filed u/s 9 of IBC, 2016. In the instant case, the right to sue admittedly arose in 2004 and acknowledgement of debt was made on 11.01.2005. Application u/s 9 of IBC, 2016 has been filed on 24.11.2017, hence, it is clearly barred by limitation. For this view, we further find support from the observations of the Hon'ble Supreme Court in the case of ***Gaurav Hargovindbhai Dave V/s Asset Reconstruction Company (India) Ltd. & Anr. in Civil Appeal No. 4952 of 2019 vide order dated 18.09.2019*** wherein distinction between suit and application has been brought out while deciding that Article 137 of Limitation Act, 1963 would be applicable and not the Article 62 of Limitation Act, 1963 in case of application filed under IBC, 2016.

8. We are further of the view that stale claims cannot be revived in this manner by filing an application u/s 9 of IBC, 2016 as the provisions of Limitation Act, 1963 are applicable to the Code as held by the Hon'ble Supreme Court in the case of ***B.K. Educational Services Private Limited vs. Parag Gupta and Associates,*** vide order dated 11.10.2018.

9. Thus, on this basis alone, the application filed u/s 9 of IBC, 2016 deserves to be dismissed.

10. Second legal aspect which emerges from the perusal of the Section 22(1) of SICA, 1985 is that there is exception or exit route to such automatic suspension i.e. proceedings or suit as specified u/s 22(1) can be instituted or proceeded further with the consent of BIFR/AAIFR. This means that right to remedy is available. Thus, the question arises, in case, a person chooses not to exercise that right/remedy, can such person still claim exclusion of suspension period for the purposes of computation of limitation. In case, a person who is not a part of such reference and does not exercise such right/remedy with consent, then, in our considered opinion, such person is not entitled to claim extension of limitation period by virtue of exclusion of period of suspension because in such situation he sits on the fence and watching and not bothered of limitation to secure his right/remedy. Doctrine of latches also applies in this case.

11. There could be a situation where the creditor participates in the rehabilitation scheme/enquiry and remains part of such proceedings till end. In case, some claim is settled and if he accepts such settlement/scheme, he will get money according to the contours of such scheme. After the implementation of scheme, he will not get any benefit of such exclusion again to institute a suit because such right gets forfeited after implementation of scheme.

12. There could be a third situation where a creditor initially remains part of the scheme, later on backs out in between. In that situation, he can institute suit for recovery of money with the consent of Board/AAIFR and period of automatic suspension as specified in Section 22(1) r.w. 22(5) would be available for filing of such suit in addition to time prescribed for filing of such suit as per the provisions of Limitation Act, 1963. **Here, we again reiterate that such extension would be available only for filing a suit for recovery of money and not an Application u/s 9 of IBC, 2016.** Having stated so, now we proceed to examine the maintainability of this application assuming that extended period of limitation is available u/s 22(5) of SICA, 1985.

13. In the present case, the Operational Creditor was part of scheme under consideration of BIFR and had also filed a suit no. 315/2009 on 23.03.2009 before Civil Judge, Vadodara seeking a decree for the impugned sum which is still alive as the permission to withdraw the same with a liberty to file afresh has been granted by the Civil Court vide its order dated 05.11.2019. The Applicant sought consent of BIFR by filing MA No. 603 of 2010 which was allowed by the BIFR on 20.11.2012 with the condition that decree awarded by the Civil Court will not be executed without prior approval of BIFR. The applicant also approached Appellate Authority (AAIFR) in Appeal No. 76 of 2014 for the same purpose which was disposed of by such Authority vide order dated

17.09.2014 whereby consent as provided u/s 22(1) of SICA to the applicant to proceed with such pending civil suit for recovery of due was granted and order of BIFR dated 17.07.2013 had been modified to this extent. However, it is noteworthy that no material has been brought on record to show that consent of BIFR obtained 20.11.2012 was brought to the notice of Civil Judge so that suit for recovery filed in 2009 was proceeded further on the basis of such consent or not. It is also to be noted that no material has been brought on record to show that why consent of AAIFR was required for the same again. However, in our view, it is the date of consent by BIFR which is to be considered for the purpose of computation of limitation period even though appeal was filed against such consent for the reason that appeal is continuation of original proceedings.

14. Having stated the legal as well as factual position as above, now, we would ascertain the limitation period in third situation. In the present case, the Corporate Debtor confirmed the outstanding balance as on 11.01.2005 though right to sue accrued on earlier date, hence, limitation has to be computed from 11.01.2005. Reference u/s 15 of SICA 1985 was made in 2005 (which has been numbered as 83 of 2005) but neither date of filing nor date of registration thereof is on record, hence, we are left with no option but to estimate date of filing/registration as per the provisions of Section 15 of SICA, 1985 which provide that a reference could be made only on the basis of last Audited Balance

Sheet. In the present case, the reference has been made admittedly on the basis of Audited Financial Statement on 31.03.2005 which could have been audited and approved as per the provisions of Companies Act, 1956 latest by 30.09.2005, hence, a reference could be made only thereafter. Thus, period from 11.01.2005 to 30.09.2005 has to be excluded from the period of extended time limit. In the present case, it is further observed that a suit for recovery had been filed by the Operational Creditor before Civil Judge Vadodara on 22.03.2009 which was numbered as 315/2009. However, consent of BIFR for filing suit for recovery was obtained through MA 603 of 2010 by an order of BIFR dated **20.11.2012.** Thus, if we exclude period from filing of reference i.e. 01.10.2005 till 20.11.2012, the time limit for filing a fresh suit/application comes to an end in early 2015 itself after excluding period from 11.01.2005 till 30.09.2005. We further note that consent of AAIFR has been taken in Appeal No 76 of 2014 vide order dated 17.09.2014. Even when, this date is considered, the time limit for filing of a fresh suit/application comes to an end on 06.01.2017 if we take the period from filing of reference i.e. 01.10.2005 till such consent order of AAIFR on 17.09.2014 after excluding the period from 11.01.2005 till 30.09.2005. We again state that even assuming that such extended period is available to present application which has been filed on 24.11.2017, then also, such application is time barred as having been filed after expiry of extended period of limitation. Thus, Considering the legal aspects as well as factual matrix, we hold that in all possible situations, the application remains time barred. Accordingly, the same is dismissed as barred by limitation.

15. Having decided the matter for the aforesaid reasons, there is another aspect of the matter which we wish to put on record. The Operational Creditor exited from rehabilitation process of the Corporate Debtor while such rehabilitation was under consideration of BIFR/AAIFR for the simple reason that a substantial hair-cut had to be born. The object of SICA, 1985 was to rehabilitate the sick entity which is also an object of IBC, 2016. In the present case, there is no dispute that the corporate debtor is having financial crunch/sickness for very long period. The Operational Creditor is also pursuing separate suit for recovery of its money which is still alive. Can such person be allowed or considered eligible for initiating insolvency proceedings having conducted in this fashion. Thus, for this reason also, in our considered view, this application is not maintainable. From these facts, it is evident that Operational Creditor is interested in recovery of its money which is not an object of IBC as it is a mechanism for insolvency resolution, hence, for this reason also, this application is not maintainable.

16. Further other IAs i.e. IA 8 of 2018, IA 116 of 2018, IA 253 of 2019 in IA 8 of 2018 with CP (IB) 189 of 2017 have been filed wherein maintainability of this application has been challenged. In view of

our decision on merits, such IAs have become infructuos, hence, disposed of as such.

17. In the result, this application and all IAs stands dismissed and disposed of.

18. Urgent certified copy of this order may be issued to all concerned parties, if applied for, upon compliance with all requisite formalities.

7-7-2020

(Virendra Kumar Gupta)
Adjudicating Authority&
Member (Technical)

7/7/2020

(Madan B. Gosavi)
Adjudicating Authority&
Member (Judicial)

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