NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH, CHENNAI

MA/72/IB/2018

In the matter of
Rule 11 of the NCLT Rules, 2016 read with Sections 31 and Section 60 of the Insolvency and Bankruptcy Code, 2016 and Removal of difficulties Order dated 24.05.2017 of Ministry of Corporate Affairs.

In the matter of
M/s.Sudarsan Clay and Ceramics Limited

M/s.Sudarsan Clay and Ceramics Limited .....*Applicant*

Order delivered on 07.08.2018

CORAM:
K. ANANTHA PADMANABHA SWAMY, MEMBER (J)
S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

For the Applicant: Shri.P.H.Arvind Pandian, Senior Advocate
: Shri.Cibi Vishnu, Advocate.

ORDER

Per: S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

1) M/s.Sudarsan Clay and Ceramics Limited **("the Company")**, the Applicant herein, is a Company registered under the Companies Act, 1956 incorporated on 05.04.1973 in the State of Kerala. The Company is incorporated for manufacturing of roofing tiles and other earthenware pipes, bricks etc. using clay at its factory in Aluva, Ernakulam District, Kerala.

2) In the year 1989 the Company was referred to the Board for Industrial and Financial Reconstruction (BIFR) under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. Considering the status of the Company, BIFR vide order dated 22.03.1990 declared the Company as Sick Company in terms of Section 3(1)(o) of SICA. Subsequently the Scheme for Revival as filed by the Company i.e., Modified Rehabilitation Scheme (MRS) - 07 which was sanctioned by BIFR vide order dated 21.05.2007. The Company implemented the Scheme and the Net worth of the Company is positive.

3) On 15.10.2003, BIFR permitted the company to sell about 15 acres of land subject to certain conditions. Pursuant to the said order, on 30.12.2003 the Company entered into a sale agreement with M/s.Safecare Associates to sell 15 acres of land for a total consideration of Rs.3.60 Crores. Since M/s.Safecare Associates could not perform the obligations in terms of the agreement, the Company cancelled the sale agreement with Safe Care Associates and entered into a fresh agreement with The M/s.FACT Managerial Staff

House Construction Co-Operative Society Ltd., (FACT SOCIETY) on 07.07.2004 to sell 15 acres of land subject to approval of the BIFR and the Assets Sale Committee appointed by the BIFR.

4) On 27.09.2004 BIFR passed an order recommended winding up of the Company. This order was passed by BIFR on the ground that the Company had not complied with the order dated 15.10.2003 of BIFR. The Company challenged the order dated 27.09.2004 of BIFR by filing an appeal before the Appellate Authority (AAIFR) M/s. Safe Care Associates, with which the Company had earlier entered into a Sale Agreement for sale of 15 acres land, also filed an appeal against the order dated 27.09.2004 of BIFR. While admitting the appeal filed by M/s Safe Care Associates, AAIFR specifically directed the Company not to transfer, sell, alienate or create any third party right over the land belonging to the company. The appeal (Appeal No.238/2004) filed by the Company along with appeal filed by M/ s Safe Care Associates was disposed of on 20.07.2005 on the consent of all parties, including FACT SOCIETY who had been permitted to

get itself impleaded in the proceedings. The order of BIFR recommending winding up of the company was set aside and the matter was remanded to BIFR with a direction to hear the matter afresh after taking into account the developments that had taken place after the order impugned in the appeal had been passed. Meanwhile, the company had entered into another agreement with FACT SOCIETY on 6/1/2005.

5) BIFR vide order dated 01.03.2006 directed the company to cancel the sale agreements entered into with both the buyers namely M/s Safecare Associates and FACT SOCIETY and directed the company to return the advances received from them(**Annexure - A3).** Pursuant to the said order of BIFR the Applicant company has already returned the land advance amount to M/s. Safecare Associates. As regards FACT SOCIETY, the Company issued a cheque for the advance amount of Rs.109.00 Lakhs together with interest and with regard to payment of Rs 91.00 lakhs the Company expressed the readiness to return the funds, the return of 91.00 Lakhs is also ordered in the BIFR scheme MRS 07, the advance of Rs 91.00 Lakhs is against the 2.60 acres of land which

was conveyed without BIFR Approval. However the same was not accepted by FACT SOCIETY at that point in time. The Company has again issued payments to the FACT SOCIETY for the advance of Rs 109.00 lakhs along with applicable interest net of TDS of Rs.10.76 Lakhs i.e. totaling Rs.1,19,76,702/- by cheque no: 45426 dated 29.03.2018 drawn on State Bank of India, Metro Station Branch, Ernakulam and also for Rs 91.00 lakhs together with applicable interest of Rs 8.98 Lakhs ie totaling Rs. 99,98,898/- by cheque no 45427 dated 29.03.2018 drawn on State Bank of India Metro Station Branch, Ernakulam. As on date there is no liability to the FACT SOCIETY in the books of the company **(Annexure- A4).**

6) After cancellation of the agreements by order dated 01.03.2006 the BIFR circulated a Modified Draft rehabilitation Scheme MDRS and the same was sanctioned by order dated 21.05.2007 as MRS 07. The FACT SOCIETY never challenged the BIFR Scheme MRS -07.

7) The Proposal contemplated under the Scheme in Para 5.0, in page no.9 of MRS-07, is as follows -

"The company is reported to have complied with all the directives issued by the BIFR in its hearing held on 01.03.06. The company proposes to manufacture floor tiles, but with a lesser capacity. In addition to manufacture of tile, the company has now proposed to diversify into construction and sale of residential/ commercial units. This would ensure gainful utilization of the surplus land available to the company and realization of higher margin. The company has worked out a revised scheme based on the above factors. The modified scheme has been drawn-up after considering the cut-off date (COD) as 31.03.06.

Obligations of the Promoter(s) as provided m Para 6.0(c) of the Modified Scheme -

The promoter(s) is/ are to infuse the envisaged amount of promoter's contribution, in a time-bound manner and, beside this, the short-fall of fund, if any, for successful implementation of the scheme, would be infused by the promoter(s).

The promoter(s) to restore the company's manufacturing operations by June 2007."

8) FACT SOCIETY and M/s.Safecare Associates filed Appeals before AAIFR and thereafter before Hon'ble High Court and Supreme Court against the order dated 01.03.2006 of BIFR. The writ petitions were dismissed by the High Court on the finding that neither FACT SOCIETY nor the Association formed by some members of FACT SOCIETY have the *locus standi* to challenge the order dated 01.03.2006 and the Hon'ble Supreme Court while disposing of the SLPs held that the

Scheme (ie MRS07) shall continue to operate and gave liberty to file an Application before BIFR to determine whether the Company continued to be a SICA Company.

9) After the hearings conducted pursuant to the directions of the Hon'ble Supreme Court, BIFR by its order dated 09.04.2012 held that the company was engaged in small scale industry etc and hence BIFR didn't have jurisdiction and deregistered the company on 09.04.2012. The Company filed an appeal against the order dated 09.04.2012 of BIFR before AAIFR. FACT SOCIETY also filed an appeal against the said order of BIFR. These appeals were numbered as Appeal Nos.132 of 2012 and 136 of 2012 respectively. While the company challenged the finding of BIFR that it is no longer a sick industrial company and the de-registration of its reference thereof, FACT SOCIETY challenged the finding that the de-registration of the reference of the company has no retrospective effect.

10) AAIFR gave its finding that the company ceased to be a sick company under the SICA from 2003 onwards. The Company filed a Writ Petition No.14887 /2013 before the

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Hon'ble High Court of Kerala challenging the order dated 27.05.2013 of AAIFR. The Single Bench of Hon'ble High Court vide order dated 26.05.2014 allowed the Writ Petition with certain directions to BIFR.

11) FACT SOCIETY challenged the said order before Division Bench of Hon'ble High Court which appeal was dismissed by the Hon'ble Court. The SLP filed by FACT SOCIETY before the Hon'ble Supreme Court against the said order was dismissed on 30.01.2018. By virtue of the dismissal of SLP the order dated 26.05.2014 of Hon'ble High Court of Kerala has attained finality. Relevant portion from the order dated 26.05.2014 of the Hon'ble Court of Kerala in W P (C) No.14887 /2013 has been extracted hereunder.

(i) Exhibits P1O (Order dated 9.4.2012 of BIFR) and P13 (Order dated 27.05.2013 by AAIFR) are set aside and the parties are relegated back to the BIFR.

(ii) The BIFR shall specifically consider the implementation of the scheme MRS-O7 and if the Directors who were cast with the responsibility of implementation of the scheme have failed to put the funds received from real estate business towards reviving the industry, then the

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BIFR shall take appropriate action as provided under SICA, specifically under Chapter IV.

(iii) BIFR will also have to *consider whether any action or proceedings have* to *be taken under Section 24 of SICA after looking at the report of the Operating Agency on the actual implementation of the scheme. The BIFR is also not powerless in so far as effectuating proper implementation of a scheme by adopting the various devices and measures listed out in sub-section (1) and sub-section (2) of Section 18; with emphasis on reviving the industry as such.*

(iv) The BIFR shall consider whether the implementation of the scheme MRS-07 is possible at this stage and whether the same can be continued on suitable measures being taken as provided under sub-sections (1) and (2) of Section 18.

(v) The BIFR shall consider the viability of revival based on the observations made by this Court and shall pass an order within a period of six months from today.

12) The Hon'ble High Court while allowing the Writ Petition has issued certain directions to BIFR with respect to the Scheme (MRS-07). Due to the repeal of the Sick Industrial companies (Special Provisions) Act, 1985

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(SICA) effective 01.12.2016, BIFR and AAIFR stand dissolved. By virtue of notification dated 24.05.2017 of the Ministry of Corporate Affairs, Scheme sanctioned by BIFR under section 18(4) of SICA shall be deemed to be an approved Resolution Plan under section 31(1) of the Insolvency And Bankruptcy Code, 2016 (IBC) and the same to be dealt with in accordance with the provision of IBC. By virtue of the said notifications the Scheme MRS-07 as sanctioned by BIFR shall be deemed to be an approved Resolution Plan under section 31(1) of the Code and the directions as specified by the Hon'ble High Court of Kerala to BIFR as aforesaid would have to be dealt by the this Tribunal.

13) As the Resolution Plan shall be dealt with in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016, and pursuant to the terms specified in the order dated 26.05.2014 of the Hon’ble High Court, it has become necessary for the Company to approach this Tribunal, Chennai Bench which is the Adjudicating Authority.

14) It has been further stated that the Promoters of the Company as envisaged in the scheme in para 5.0 have implemented the scheme as detailed below.

(i) Infused funds to the tune of Rs.562 lakhs and also infused additional funds for the implementation of the scheme.

(ii) Restored the manufacturing activities by production of tiles/blocks from financial year 2007-08. Though according to the scheme the manufacturing operations shall commence by June 2007, the actual operations could commence only in early 2008 because of the delay in receipt of the order of BIFR.

(iii) Invested in one mixing machine and two tile pressing machine

(iv) The company commenced construction activities envisaged in Sanctioned Scheme MRS 07 in the year 2011-12 and completed the project in financial year 2014-15. The company sold 95% of the apartments and handed over the possession to the customers.

15) The manufacturing of tiles/blocks and sale of apartments as contemplated in the MRS-07 resulted in net worth of the company becoming positive and the company has been revived. Copies of the Financial

Statements for the years ended from 31.03.2015 till 31.03.20 17 along with Certificate of the Statutory Auditors that the Net Worth of the Company is Positive,

Relief(s) sought:

(i) To declare that the Modified scheme MRS-07 as sanctioned by BIFR vide order dated 21.05.2007 has been implemented by the Applicant Company and accordingly the net worth of the Applicant Company is positive as per the financial statements and net worth certificate issued by the Statutory Auditors, which are filed by the Applicant Company;

(ii) Pass such other order as this Hon'ble Bench may deem fit.

ORDER

In view of the above circumstances the Tribunal has asked for the recommendation of names of RP by the Applicant Company vide order dated 01.06.2018. From the names given by the Applicant Company, Mr.Kizhakkekara Kuriakose Jose is appointed as the Resolution Professional by this Tribunal.

The RP is directed to go through the books of accounts and the other records of the Applicant Company and give his opinion as to the net worth and financial position of the Company based on the relevant records including the certificates issued by the statutory authorities.

Based on the RP's Report the Tribunal will consider whether the terms of MRS-07 and the directions of the Hon'ble High Court of Kerala vide its order dated 26.05.2014 have been fully complied with.

The Scheme-MRS-07 dated 21.03.2007 is deemed to be the Resolution plan under section 31 of the IBC, 2016 and the Resolution Process is to be concluded as per the terms of the order of the Hon'ble High Court Of Kerala vide order dated 26.05.2014.

Details of the Resolution Professional:
Mr.Kizhakkekara Kuriakose Jose
Reg. No. IBBI/IPA 001/IP-P00445/2017-18/10788
ICAI Membership 200725
Kizhakkekkara House,
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S. Vijayaraghavan.

(S.VIJAYARAGHAVAN)
MEMBER (TECHNICAL)

(K.ANANTHA PADMANABHA SWAMY)
MEMBER (JUDICIAL)

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