

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH**NEW DELHI****COMPANY APPEAL (AT) (Insolvency) No.763 OF 2020****IN THE MATTER OF:****Mazda Agencies (Partnership Firm)**

Ghantiada, Off. Gendigate Road,

Baroda – 390001

Through its partner

Mr. Rashesh Desai

...Appellant**Vs****Hemant Plastics & Chemicals Ltd.**

Factory & Regd. Off. Padra- Jambusar Highway,

Nr. Village Dabhasa, Ta. Padra, Dist.

Vadodara – 391440

...Respondent**PRESENT:****For Appellant:- Mr MSV Sankar, Mr. Sriram P, Mr. AG Nair, Mr. Pawan S Godiawala, Advocates****For Respondent:- None****J U D G M E N T****Jarat Kumar Jain. J:**

The Appellant 'Mazda Agencies' filed this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code') against the impugned order dated 07.07.2020 passed in C.P. (IB) No. 189/9/NCLT/AHM/2017. Whereby Ld. Adjudicating Authority (National Company Law Tribunal) Ahmadabad Bench, rejected the Application under Section 9 of the I&B Code, as barred by limitation.

2. Brief facts of this case are that the Operational Creditor (Appellant herein) supplied printing and packaging material to the Corporate Debtor (Respondent herein). The last payment was made on 22.11.2004. On 11.01.2005 the Corporate Debtor has acknowledged outstanding dues amounting to Rs. 1,48,11,572/- as on 31.12.2004. However, the Corporate Debtor failed to make the payment. Due to financial crunch the Corporate Debtor was referred to BIFR in case No. 83 of 2005. The scheme of rehabilitation however, did not work out. Subsequently, The Sick Industrial Companies (Special Provision) Act, 1985 (in brief SICA) repealed on 01.12.2016 thereafter, Operational Creditor served notice under Section 8 of the I&B Code on the Corporate Debtor though, the Corporate Debtor did not reply thereto. On 24.11.2017 the Operational Creditor filed an Application under Section 9 of the I&B Code. It is stated that the Corporate Debtor acknowledged the debt on 11.01.2005 hence, the period of limitation would start from this date as per the provisions of Section 18 of the Limitation Act, 1963. BIFR and AAIFR proceedings under SICA commenced in the year 2005 and remained in process till repeal of such Act i.e. 01.12.2016. Hence, as per the provisions of Section 22(5) of SICA the period consumed in the course of such proceedings had to be excluded in computing the period of limitation. Thus, the Application under Section 9 of the I&B Code is within limitation.

3. The Corporate Debtor has not filed any Reply/Response to the Application filed under Section 9 of the I&B Code, it is submitted that

Section 22(5) of the SICA is not applicable in this case hence, the Application is barred by limitation.

4. Ld. Adjudicating Authority examined the legal question and after elaborate discussion reject the Application on the ground that the provision of Section 22(5) of the SICA are applicable to suits and not proceedings under Section 9 of the I&B Code. It is also held that under Section 22(1) of the SICA provides that proceedings or suit as specified under Section 22(1) of the SICA can be instituted or proceeded with the consent of BIFR/AAIFR. The Operational Creditor is not part of reference therefore, he cannot claim exclusion of period under section 22(5) of the SICA for the purpose of computation of limitation. Thus dismissed the application under section 9 of the I&B Code as time barred.

5. Being aggrieved with this order the Operational Creditor has filed this Appeal.

6. Ld. Counsel for the Appellant (Operational Creditor) submitted that BIFR in case No. 83 of 2005 vide order dated 17.07.2013 observed that the Respondent (corporate debtor) has proposed for settlement of outstanding dues at 20% and in case this proposed settlement is not acceptable to the appellant, they can wait till the scheme of rehabilitation of the company has worked itself out. Therefore, the Appellant could not initiate any legal action against the Respondent (Corporate Debtor). Hence, the Appellant is entitled to get exclusion in computing the period of limitation spent in legal proceedings specified under Section 22(1) of the SICA. For this purpose,

cited the Judgment of coordinate bench of this Appellate Tribunal in the case of Gouri Prasad Goenka Vs. Punjab National Bank & Anr. CA (AT) (Ins) No. 28 of 2019.

7. Learned Counsel for the Appellant further submitted that there is no conflict between the SICA and I&B Code, 2016. Sanctioning of scheme under SICA is deemed to be approval of Resolution Plan under Section 31 of the I&B Code as held by Hon'ble High Court of Bombay in Company Petition 408 of 1997 Zenith Ltd. Vs. Grand Foundry Ltd. decided on 12.04.2018. The scheme under SICA has been sanctioned by BIFR on 17.07.2013 and was under the implementation till 2017 during this period direction given by the BIFR continued, therefore, the Appellant cannot avail other remedy for recovery of dues and cause of action arises only when the sanctioned scheme has failed in 2017. This aspect of the matter has not been considered by the Adjudicating Authority.

8 It is also submitted that under normal circumstances the date of default is the date when the Corporate Debtor has failed to discharge the debt which is become due and payable. In this case, during the proceedings before the BIFR, the liability of the Appellant (Operational Creditor) was recognised and acknowledged in the scheme.

9. It is also submitted that Ld. Adjudicating Authority, in the impugned order wrongly mentioned that the Appellant (Operational Creditor) has filed suit for recovery of Operational Debt actually, the suit was filed for

declaration and permanent injunction against the Respondent (Corporate Debtor) not to alienate or transfer their assets.

10. It is also submitted that for recovery of operational debt there was a statutory bar under Section 22(1) of the SICA. Therefore, there was no need to file an Application seeking exclusion of period under Section 22 (5) of the SICA. The Appellant is entitled to get exclusion for the period spent in proceedings under SICA. Thus, the Application under Section 9 of the I&B Code is within limitation.

12. Notice of this Appeal, is duly served on the Respondent however, despite service of notice, nobody appear on behalf the Respondent on 13.10.2020, 19.11.2020, 21.12.2020, 12.01.2021 and 13.02.2021, Thus, we proceeded ex-parte against the Respondent.

13. After hearing Learned Counsel for the Appellant, we have perused the record.

14. Following issues are crop up for our consideration: -

(a) Whether as per section 22(1) of the SICA the legal proceedings for recovery of operational debt were suspended, if yes?

(b) Whether as per section 22(5) of the SICA the Appellant is entitled to get exclusion in computing the period of limitation spent in SICA Proceedings?

Issue No. 1

15. It is admitted fact that the Appellant supplied goods to the Respondent and the last payment was made by Respondent on 22.11.2004.

On 11.01.2005 the Respondent has acknowledged outstanding dues amounting to Rs. 1,48,11,572/- as on 31.12.2004. The Respondent failed to make the payment and due to financial crunch, the Respondent was referred to BIFR and vide order dated 17.07.2013 in case No. 83 of 2005 BIFR allowed the scheme for rehabilitation of the Respondent Company. The Appellate Authority vide order dated 17.09.2014 modified the order of BIFR inter alia permitting Appellant to proceed with its pending civil suit. The Respondent challenged this order before Hon'ble High Court of Gujarat in Special Civil Application No. 17055 of 2014. Hon'ble High Court vide order dated 11.09.2015 the proceedings of the Appeal were remanded to the Appellate Authority for rendering a fresh decision. Subsequently, Appellate Authority in Appeal No. 76 of 2014 vide order dated 17.12.2015 disposed of the Appeal with the clarification that if the Appellant (Operational Creditor) feels at any stage during the implementation of the sanctioned scheme that the objects of the scheme have already been fulfilled and the Respondent Company stands revived even prior of the completion of the scheme, it would be at liberty to approach the BIFR to make such prayer for execution of Appellant's decree if any. Subsequently, SICA repealed on 01.12.2016 and thereafter, the Appellant has filed Application under Section 9 of the I&B Code on 24.11.2017.

16. Firstly, we have considered whether the Appellant was part of the scheme approved by the BIFR in Case No. 83 of 2005 on 13.07.2013. BIFR in Para 2.4 in its order observed that:

“Para 2.4 the bench noted that OA (BOI) in its report has also mentioned that three unsecured creditors have given their objections to the reliefs and concessions sought by the Company in DRS. Out of these three unsecured creditors, one is Mazda Agencies and other two are M/s Plasticemiz Industrial and M/s Perfect Clurants and Plastic Pvt. Ltd. the bench also noted that the boards office has also received objections from Ms Hitkari packaging Pvt. Ltd. vide their letter dated 12.07.2013, being unsecured creditors of the Company. The bench further noted that all these three unsecured creditors are opposed the proposal of the settlement of outstanding dues at 20% by the Company in the DRS. The bench observed that as per clause 8(2) on page 15 of the DRS, the Company had proposed for settlement of outstanding dues at 20% and in case, this proposed settlement is not acceptable to both these unsecured creditors they have the option not to accept the scale down value of their dues and instead wait till the scheme of rehabilitation of the Company has worked itself out with an option to recover their debt post such rehabilitation. The bench also observed that the company would have sufficient cash to meet these unsecured creditors after 2017 by which time the company would also turn net worth positive. Thus, the bench observed no change to clause 8(2) on page 15 of the DRS is required.”

17. During sanction of the rehabilitation scheme Appellant filed an application M.A. No. 603 of 2010 under Section 22(1) of the SICA before the BIFR. BIFR vide order dated 20.11.2012 allowed the application and the Appellant was permitted to approach appropriate Civil Court for adjudication of its dues, with the condition that if any, decree awarded by the Court, it would be executed with prior approval of BIFR.

18. With the aforesaid facts, it is clear that the Appellant was not ready to accept proposal of the settlement of outstanding dues at 20% and Appellant sought consent of the board to approach appropriate Civil Court for adjudication of its dues. It means the Appellant was not part of the Scheme and he intends to approach Civil Court for recovery of operational debt.

19. It is also seen that during the pendency of reference before BIFR on 23.03.2009 the Appellant had filed a Civil Suit No. 315 of 2009 before Civil Judge Vadodara for declaration that the transfer or alienation of the assets by the Respondent is illegal and malafide and issue injunction against the Respondent not to transfer or alienate the assets of the Company.

20. The Appellant was not part of the scheme and they have already approached Civil Court. In such circumstances, it cannot be said that the legal right of remedy of the Appellant against the Respondent was suspended as per section 22(1) of the SICA.

Issue No. 2

21. It is argued on behalf of the Appellant that the reference under section 15 of the SICA was made in 2005 and rehabilitation scheme has been sanctioned by the erstwhile BIFR on 17.07.2013 but the scheme could not be implemented till 2017. Therefore, till 2017 the remedy for enforcement of the right to recovery was suspended under section 22(1) of the SICA. As per the provision of Section 22(5) of the SICA the Appellant is entitled to get exclusion for aforesaid period in computing the period of limitation. For this purpose, placed reliance on the order passed by Coordinate Bench of this Appellate Tribunal in the case of M/s Gouri Prasad Goenka Vs. Punjab National Bank & Anr. C.A.(AT) (Ins) No. 28 of 2019.

22. In the forgoing Paras we hold that the Appellant was not part of the scheme and he has obtained the consent of BIFR for initiating its legal right of remedy against the Respondent Company before the Civil Court. Thus the remedy against the Respondent was not suspended, therefore, the Appellant is not entitled to claim extension of period of limitation by virtue of exclusion of period of suspension.

23. With the aforesaid, we are of the view that the facts of this case are distinguishable from the facts of Gouri Prasad Goenka (Supra). Thus, this Judgment is not helpful to the Appellant.

24. We are of the view that Ld. Adjudicating Authority has rightly held that the Appellant is not entitled for exclusion of the period which spent during the pendency of proceedings under SICA. Thus, the Application under Section 9 of the I&B Code is barred by Limitation.

25. With the aforesaid, we find no ground to interfere in the impugned order passed by the Ld. Adjudicating Authority. Hence, the Appeal is dismissed, however, no order as to cost.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

New Delhi
05th March, 2021
SC