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Application under Section 7 or 9 of the IBC is extendable only by an application under Section 5 of Limitation Act on grounds of sufficient cause

The Supreme Court of India (**"Supreme Court"**) in the case of ***Sabarmati Gas Limited vs. Shah Alloys Limited***[1] held that (a) in an application under Section 7 or 9 of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**), the period of limitation would be 3 (three) years from the date when the right to apply accrues, i.e. the date when default occurs and is extendable only by an application under Section 5 of the Limitation Act, 1963 ("**Limitation Act**") on grounds of 'sufficient cause'; and (b) while considering existence of a pre-existing dispute between the parties, the courts need not be satisfied that the defence is likely to succeed; it is enough that a dispute exists between the parties, i.e. there is a plausible contention requiring investigation for adjudication.

Brief Facts

Shah Alloys Limited ("**Respondent**") required commercial supply of natural gas for its manufacturing needs. To facilitate the same, the Respondent and Sabarmati Gas Limited ("**Appellant**") entered into a gas sales agreement ("**GSA**") dated May 30, 2008, whereunder the Appellant had the obligation to supply natural gas. According to the Appellant, the Respondent defaulted in making payment of invoices.

In the meanwhile, the Respondent approached Board for Industrial and Financial Reconstruction ("**BIFR**") to get it declared as a 'sick unit' in terms of the Sick Industrial Companies (Special Provisions) Act, 1985 ("**SICA**"), which was allowed by BIFR. By virtue of Section 22 of SICA, there was a moratorium on the Respondent. Accordingly, the Appellant sought permission of BIFR for initiating proceedings for recovery against the Respondent. BIFR passed an order thereon on September 9, 2015. However, shortly thereafter, on December 1, 2016, SICA was repealed and IBC was enacted.

After the enactment of IBC, the Appellant issued a demand notice on April 1, 2017 under Section 8 of IBC, demanding payment of operational debt. The Respondent replied on April 10, 2017 and stated that there was a shortfall in supply of natural gas by the Appellant and leading to loss suffered by the Respondent. The Respondent thus declined its liability to pay the amount demanded.

The Appellant filed an application under Section 9 of IBC (**"Application"**) before National Company Law Tribunal, Ahmedabad ("**NCLT**") seeking initiation of corporate insolvency resolution process ("**CIRP**") of Respondent. NCLT dismissed the Appellant's Application on 2 (two) grounds – (a) Application being barred by limitation, and (b) existence of a 'pre-existing dispute' between the parties. Aggrieved by the Order of NCLT, the Appellant preferred an

[1] Civil Appeal No. 1669 of 2020 decided on January 4, 2023

appeal before the National Company Law Appellate Tribunal ("**NCLAT**"), which was also dismissed. Therefore, the Appellant appealed before the Supreme Court.

Issue

1. Whether, in computation of the period of limitation in an application under Section 9 of IBC, the period during which the operational creditor's right to proceed against or sue the corporate debtor that remained suspended by virtue of Section 22(1) of SICA can be excluded, as provided under Section 22(5) of SICA?
2. Whether there was a pre-existing dispute between the parties, warranting dismissal of Application under Section 9 of IBC at the threshold?

Decision and Observations of the Supreme Court

Computation of period of limitation

The Supreme Court noted Section 22 (1) of SICA, which provides for a statutory bar against various types of proceedings, among others, recovery of money or enforcement of security against an industrial company, in the following scenarios – (a) when an enquiry under Section 16 of SICA is pending; (b) any scheme referred to under Section 17 of SICA is under preparation or consideration or a sanctioned scheme is under implementation; (c) where an appeal under Section 25 of SICA is pending, except with the consent of the BIFR. It was observed that the underlying idea is to protect the properties of the sick company. Section 22 (5) of SICA protects the interest of a party who was prevented from lawfully enforcing the right to seek for recovery of dues in the period during which the bar under Section 22(1) is in place, by excluding such time which was suspended.

In the present case, the Appellant had applied to the BIFR seeking permission to approach a civil court for recovery of the dues. The Appellant's application was disposed of on September 9, 2015 with a direction to the Respondent to incorporate the dues of the Appellant in the draft rehabilitation scheme ("**DRS**") in the BIFR proceedings. While the proceedings under SICA were pending, IBC came into effect, which repealed SICA. Therefore, the Appellant could not have resorted to any legal proceedings (including arbitration) to enforce its rights.

The Supreme Court observed that Section 238A of IBC makes the provisions of the Limitation Act applicable to the computation of the period of limitation in regard to proceedings before the NCLT and took note of the law laid down in *B.K. Educational Services Private Limited v. Parag Gupta and Associates*[2] that the period of limitation is 3 (three) years from the date on which the right to apply accrues, but the delay is condonable by showing 'sufficient cause' as provided under Section 5 of the Limitation Act. 'Sufficient cause' is the cause for which a party could not be blamed. As such, in the absence of provisions for exclusion of the period of suspension of legal proceedings, the same can be excluded and is sufficient cause for condoning the delay under Section 5 of the Limitation Act. Unless the question of condonation of delay is considered, it will result in injustice as the Appellant was statutorily prevented from initiating action against the Respondent. It was also held that for an application under Section 7 or 9 of IBC, the date of coming into force of IBC, *viz.* 1 December 2016, would not be the trigger point of limitation; limitation for such application would be 3 (three) years from the date when the right to apply accrues as provided under Article 137 of the Limitation Act.

Pre-existing dispute

The Supreme Court noted the position laid down in *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.*[3] that what has to be looked into is the existence or otherwise of a dispute and/or the suit or arbitration proceedings prior to the receipt of demand notice or invoice, as the case may be. The Supreme Court reiterated the principle that in separating the grain from the chaff, the NCLT was not required to be satisfied that the defence is likely to succeed; it is enough

[2] (2019) 11 SCC 633
[3] (2018) 1 SCC 353

that a dispute exists between the parties. There needs to be a plausible contention requiring investigation for adjudication. The correctness or truthfulness of such dispute (prior to the receipt of the demand notice) is a matter of evidence.

The Supreme Court took note of the following facts to conclude that there was a pre-existing dispute between the parties – (a) correspondence between the parties regarding the dispute pertaining to the amount payable to the Appellant; (b) the amount due to the Appellant not being reconciled; and (c) the amount payable to the Appellant as included in the DRS in the BIFR proceedings not being formulated and finalised. In view of the pre-existing dispute between the parties, the matter was not remanded to NCLT for reconsideration of the Section 9 Application.

JSA Comment

The Supreme Court has strictly interpreted the provisions relating to limitation of time for filing proceedings before adjudicating authority. This decision has also clarified the position that the adjudicating authority must take into consideration the aspect of condonation of delay under Section 5 of the Limitation Act while dealing with an application for CIRP in cases where the party was statutorily prevented from doing so, within the ambit of the wide powers granted conferred on it. Further, relying on the well-settled principle laid down by the apex Court in *Mobilox (supra)*, that while considering an application under Section 9 of the IBC, the adjudicating authority must consider whether the dispute raised by the corporate debtor is (a) pre-existing; and (b) a plausible contention requiring consideration for the purpose of adjudication, without getting into aspect of whether such defence raised by way of a dispute is likely to succeed.

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