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CP 1054 I&BC SM DYECHEM LIMITED
MA 177

In the National Company Law Tribunal
Mumbai Bench.

IBC No. **CP 1054 and MA 177** of 2017/I&BC/NCLT/MB/MAH/2017

Under Section 10 of Insolvency & Bankruptcy Code 2016

In the matter of

S.M. DYECHEM LIMITED

Order delivered on: 13.10.2017

Coram: 1. Hon'ble Shri M.K. Shrawat, Member (Judicial)
2. Hon'ble Shri Bhaskara Pantula Mohan (Judicial)

For the Petitioner(s): : Mr. Rohaan Cama, Counsel with Mr.
Sanjay Udeshi and Mr. Darshan Ashar,
Advocates.

Per M.K. Shrawat, Member (Judicial).

ORDER

1. This Petition is submitted on 29.05.2017 under **section 10 of Insolvency & Bankruptcy Code (hereinafter The Code)** on Form No.6 under Rule 7 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016. According to the Petitioner, total Debt in default was to the tune of ₹240 crores as stated in Part-III of Form No.6 under the column 3 titled as 'Total Debt raised and amount in Default'.
2. Before adjudicating the issue of admission of this Petition, it is worth to shortlist the legal points raised in the Miscellaneous Application as also argued before us as under :-
 - a) Whether the Petition is 'Maintainable under section 10' of The Code when the Board for Industrial and Financial Reconstruction (BIFR) proceedings were finalised in respect of part of the outstanding Debt?
 - b) Whether the Insolvency Resolution Process be commenced in respect of the entire Debt or confined to the part of the Debt which is not considered or adjudicated upon by the authorities of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) ?
3. To get the answer, first a Miscellaneous Application (177 of 2017) is to be addressed wherein it is informed that the '**Modified Draft Rehabilitation Scheme**' (MDRS) filed by the Petitioner on the basis of an order of AAIFR be considered before appointing an Insolvency Professional. The backgrounds of the events were that the Company was promoted by one Mr. S.N. Shetty in the year 1982 to manufacture snack foods and Soya Oil. In the year 1990 there was a diversification in the business for setting up an alcohol based

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Glycol Plant near Pune. The Project was originally estimated at ₹275 crores, however, completed at the cost of ₹388 crores in 1993. The said Project was part-financed by Term Loan of ₹218 crores. The completion of the Project had coincided with the de-control of Molasses and Alcohol prices. Due to the said reason the Project has become unviable, stated to be from inception. The manufacturing Plant worked intermittently and finally closed down in March 1996. The net worth got eroded. Due to erosion of the net worth of the Company an Application was moved before BIFR in the year 1997. In March 1998, the Company was declared as a '**sick Company**' and the revival process had undertaken. A **Draft Rehabilitation Scheme (DRS)** was circulated by BIFR on 07.09.2007. A **Scheme was sanctioned (SS-08)** for revival by BIFR on 28.05.2008 calling the meeting of all the Creditors for taking consent of the majority of the Creditors. Certain promoters have infused substantial funds into the Company for payment towards Creditors and other stake holders. Pursuant to the said SS-08 Scheme the Company was granted several concessions for repayment of outstanding dues viz. Creditors, CBDT and other Agencies. Importantly it is highlighted that **pursuant to the said SS-08 Scheme the Company had made payment to the tune of ₹150.71 crores out of the total liability of ₹152.84 crores.** According to the Petitioner, about 98.61% payment was made against the total outstanding Debt. Progress report implementing the Scheme was submitted with IDBI (OA) and BIFR.

3.1 Our Attention has been drawn on an important fact that due to certain non-compliance of sanctioned Scheme SS-08, the concessions were not granted by few authorities. The two Government Authorities have **not granted waiver** of interest and penalty viz. **Sales Tax Department of Maharashtra** and **PF Department.** As a result, the sanction Scheme could not be totally complied with, hence in exercise of its power under section 18(12) of Sick Industrial Company Act, 1985 BIFR had passed an Order dated 31st October, 2013 directing to, "*submit fully tied Up MDRS incorporating the dues of Sales Tax Department and other Liabilities, to IDBI (MA) within six weeks.*"

3.2 The Sales Tax Department filed a Miscellaneous application seeking recovery under section 22(1) of Sick Industrial Company Act 1985. However, it was not entertained and disposed by BIFR on account of the fact that MDRS was under consideration at that time. In the like manner, the Application of PF Department had also been shelved by the Order of BIFR dated 31st October, 2013 as per the following directions:-

"3. Having considered the submissions made, material on record, the Bench issued the followings:

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(c) PF Department is restrained from taking any coercive against the company and its directors, till the next date of ^{hearing} ~~hearing~~.

(d) since the dues of the Sales Tax Department, Maharashtra will be part of MDRS, therefore, permission for recovery at this stage is not appropriate, therefore, permission for recovery at this stage is not appropriate,..."

3.3 Thereafter, efforts have been made to resolve the issue with Sales Tax Department. Hence IDBI **Operating Agency (OA)** convened a joint meeting on 02-01-2014 for crystallization of dues of Sales Tax Department. On one hand the Company had made an offer of ₹1,67,43,704/- on the other hand the Sales Tax Department offered a final amount of ₹1,69,69,504/-. The MDRS was again submitted for due consideration by BIFR. On 26.10.2016 the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) had given a direction as under :-

"we dispose of this appeal with the direction to the BIFR that the MDRS filed by the appellant should be considered on merits without being influenced, in any manner, by the observations made in the impugned order."

3.4 Thereafter, changes in Law had occurred. **On 25.11.2016 vide Notification No. S.O. 3568 (E), the SICA Act 1985 was repealed.** According to SICA Repeal Act 2003 the proceedings pending before BIFR were transferred to NCLT.

Importantly, vide one more **Notification dated 24.05.2017**, the Schemes sanctioned under section 18(4) of SICA Act and Scheme under implementation under section 18(12) of SICA Act were to be considered as **'approved Resolution Plan'** under the Insolvency and Bankruptcy Code, 2016. At this juncture it is worth to reproduce a portion of Notification SO 3568 (E) and SO 3569 (E) brought into force the Sick Industrial Companies (Special Provisions) Repeal Act 2003 with effect from 01.12.2016 read with SO 1683 (E) dated 24.05.2017:-

"And, whereas, difficulties have arisen regarding review or monitoring of the schemes sanctioned under sub-section (4) or any scheme under implementation under sub-section(12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) in view of the repeal of the Sick Industrial Companies (Special Provisions) Act, 1985, substitution of clause (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 and omission of sections 253 to 269 of the Companies Act, 2013;

Now, therefore, in exercise of the powers conferred by the sub-section (1) of the section 242 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby makes the following Order to remove the above said difficulties, namely :--

1. *Short title and commencement. -(1) This Order may be called the Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017.*

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2. In the Insolvency and Bankruptcy Code, 2016, in the Eighth Schedule, relating to amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, in section 4, in clause (b), after the second proviso, the following provisos shall be inserted, namely :--

"Provided also that any scheme sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall be deemed to be an approved resolution plan under sub-section (1) of section 31 of the Insolvency and Bankruptcy Code, 2016 and the same shall be dealt with, in accordance with the provisions of Part II of the said Code."

4. In the light of the above background, the argument of Learned Counsel Mr. Rohaan Cama is that although the proceedings before the Hon'ble BIFR stood abated but due to filing an Application before the Hon'ble NCLT within a period of 180 days, those very proceedings shall continue. It is also vehemently pleaded that the new proceedings shall commence from that very stage from where it is transferred. A Notification in the form of Insolvency & Bankruptcy Code (Removal of Difficulties) Order, 2017 had clarified that if an order has been passed by BIFR or AAIFR then for continuing the resolution process the scheme shall be incorporated from the stage where it was before the repeal of the SICA Act. Under the said repealed Act, the resolution plan had already been approved by OA, hence not required to submit another plan. Rather, an argument is that there is no requirement of even a submission of form no.6 and the Professional can submit resolution plan under section 30 of I&B Code. out of abundant precaution Form No.6 had been filed to be considered for granting permission to carry out the CIRP from the stage it was left before BIFR and other Authorities due to repeal of the SICA Act. The sanctioned SS-08 scheme thus to be considered as **Approved Resolution Plan (ARP)**. Several Prayers have been made in the impugned Miscellaneous Application No.177 of 2017, reproduced for ready reference :-

- a) *the proceedings pertaining to the Scheme of Rehabilitation filed by the Applicant before the Hon'ble BIFR be transferred to this Hon'ble Tribunal;*
- b) *the sanctioned scheme i.e. SS-08 which is under implementation, be considered as the Approval Plan under section 31 of the Insolvency and Bankruptcy Code, 2016 in pursuance to the provisions of the Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017;*
- c) *further, the Modified Draft Rehabilitation Scheme seeking certain minor modification as per the directions of the Hon'ble BIFR which is approved and recommended by the Operating Agency i.e. IDBI and submitted before the Hon'ble BIFR a copy whereof is also annexed at Exhibit "F" hereto be treated as the Resolution Plan in terms of section 30 of the Insolvency and Bankruptcy Code, 2016;*
- d) *after the aforementioned Modified Draft Rehabilitation Scheme approved and recommended by the Operating Agency i.e. IDBI is treated as the Resolution Plan in terms of section 30 of the Insolvency and Bankruptcy Code, 2016, the said MDRS be*

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approved in terms of section 31 of the Insolvency and Bankruptcy Code, 2016;

- e) *in the alternative to the above and in case the Hon'ble Tribunal is of the view that the MDRS approved and commended by the Operating Agency ought not to be treated as the draft Resolution Plan under section 30 of the Insolvency and Bankruptcy Code, 2016, the Application filed by the Applicant under Section 10 of the Insolvency and Bankruptcy Code 2016 in accordance with Form 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 be considered by the Hon'ble Tribunal from the stage it was pending before the Hon'ble BIFR i.e. pending approval of the MDRS which is equivalent to the Resolution Plan under section 30 of the Insolvency and Bankruptcy Code, 2016 to be considered for approval;*
- f) *in the further alternative to the above, this Hon'ble Tribunal be pleased to consider the application made by the Applicant under Form 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;"*

5. **FINDINGS : -**

On due consideration of the facts of this case and the Law applicable as discussed in the foregoing paragraphs, we have further noticed that there is a similarity in certain provisions now enacted as I & B Act, 2016 with the SICA provisions. There is also similarity in the intension for incorporation of these two Acts viz. Sick Industries Companies (Special Provisions) Act 1985 and Insolvency and Bankruptcy Code 2016, some of them as noted by us are as under :-

- (a) Under the **SICA** it was provided for timely detection of potentially sick Companies and therefore a speedy determination by a **Board of Experts** to explore remedial or ameliorative measures. Under the **IB Code** almost on the same lines the intention is to consolidate and formulate a procedure to reorganize the affairs of a Corporate Body to be proposed by **Insolvency Resolution Professional** in a time-bound manner. Therefore, under the SICA Act, it was to be formulated by a Board. However, under IB Code, restructuring is to be formulated by an IRP.
- (b) Under SICA Act, Financial Institutions, Banks etc. were termed as "**Operating Agencies**" (**O.A.**), whereas under IB Code, the terminology is "**Resolution Professional**". However, there is a key departure because the IRP is an independent person as against the O.A. Under Section 15 of SICA Act, the matter was required to be referred to a Board whereas under the provisions of The Code, Insolvency Process is commenced by Insolvency Professional.
- (c) Under **SICA Act**, vide section 18(2) it is prescribed that as expeditiously as possible and ordinarily within a **period of 90 days** a scheme is to be proposed for financial reconstruction of the sick Unit and also to take measures for proper management. Likewise, under sections of **The Code within 180 days** the Scheme is to be proposed, however the Management of the Company vests with the IP immediately on commencement.

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(d) Measures for **revival of stressed Company** are almost identical under the provisions of SICA Act and under IB Code.

(above illustrations are not exhaustive but only demonstrative)

5.1. The above comparison thus leads us to a conclusion that if there are certain proceedings or measures have already been taken place under the SICA Act or by an order of BIFR or AAIFR, then those Resolutions or Directions are not to be ignored, rather, helpful for speedy resolution under the I&B Code, because the intention and the process involved can be said to be akin to each other. This view has also been expressed in the case of **Hyderabad Abrasives & Minerals Vs. Andhra Cements Ltd. (2003 42 SCL 748 AP)**, as follows :-

"13. As seen from the above synopsis, a scheme which has been sanctioned and made enforceable after duly complying with various provisions of Section 18 of SICA, can even be modified by BIFR in accordance with Clause (b) of Sub-section (3) of Section 18 of SICA. Therefore, the implementation of rehabilitation scheme is a continuous process and can never be said to have been completely implemented with reference to one step or steps in the process of rehabilitation. By reason of the fact that by 15-6-2001, the time granted by BIFR for discharging other creditors is over, the protection under Section 22(1) is not taken away. In the case of SICA, having regard to Section 18(3)(b), where power inheres in the BIFR-to modify the scheme, it is always possible for the respondent-company or others to seek extension of time for accomplishing an important stage in the process of rehabilitation. That a provision prescribing time schedule is not mandatory but directory is a settled proposition of law. A reference may be made to a Full Bench judgment of Patna High Court in Shiveshwar v. District Magistrate . The full Bench after referring to Montreal Street Railways Co. v. Normandin AIR 1917 pc 142 and State of U.P. v. Manbodhan Lal Srivastava and various authorities including Maxwell on Interpretation of Statutes laid down that a provision regarding time limit is directory and not mandatory. The rehabilitation scheme binds the industrial company, the promoter, the participants of the company and the creditors and is in the nature of contract. Therefore, the same principle of statutory interpretation would equally apply in interpreting the rehabilitation scheme as well. Thus, under Section 22(1) of SICA, on expiry of seven years time schedule prescribed in the scheme for settlement of dues of all the other creditors, the protection granted to the respondent-company does not in any manner diminish or is taken away. By reason of non obstante clause under Sub-section (1) of Section 22 of SICA, the company petitions cannot be entertained and there cannot be an order for advertisement of the petitions."

5.2 Likewise, on due analysis of a decision of the **Hon'ble Supreme Court pronounced in the case of Madura Coats Limited Vs. Modi Rubber Limited (2016) 7 Supreme Court Cases 603**), we have noticed that a legal proposition has been laid down that :-

"19. One such situation is where winding-up proceedings are pending and a reference is made to BIFR. This situation occurred in Real Value ^[(1998)5 SCC 554] where winding-up proceedings were pending and the appointment of a provisional liquidator was under challenge. At that stage, steps were taken by Real Value ^[(1998)5 SCC 554] for making a reference under Section 15 of SICA to BIFR. Under these

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circumstances, one of the questions agitated for considered by this Court was whether on the registration of a reference, the Division Bench of the High Court could pass orders in an appeal against an interim order passed by the Company Court."

"23. Another situation is where a winding-up order is passed by the Company Court but it is stayed in appeal. In Rishab Agro^[(2000)5 SCC 515] the company was ordered to be wound-up but his order was stayed by the Division Bench of the High Court concerned. Thereafter the company made a reference to BIFR under Section 15 of SICA."

"..... leave no doubt in our mind that the effect of the section would be applicable even after the winding-up order is passed as no proceeding even thereafter can be proceeded with further under the Companies Act. The High Court appears to have not taken note of the aforesaid words i.e. to be proceeded with further. As the impugned judgment is based upon wrong assumption of the provision of law and completely ignoring the vital words noticed hereinabove the same cannot be sustained."

"27. From the above it is quite clear that different situations can arise in the process of winding up a company under the Companies Act but whatever be the situation, whenever a reference is made to BIFR under Sections 15 and 16 of SICA, the provisions of SICA would come into play and they would prevail over the provisions of the Companies Act and proceedings under the Companies Act must give way to proceedings under SICA."

5.3. In our considered opinion the language of the Notification, comparison of the two statutes, facts of the case and the legal proposition laid down by the Hon'ble Courts, it is deemed expedient to take into account the proceedings already held in the case of this Company by BIFR/AAIFR. We have taken due cognizance of the guidelines issued by the Ministry of Corporate Affairs in the **Notification dated 24.05.2017** as copied supra that the resolution process under the Insolvency Code can be taken up from the stage it was completed or left for further action under the SICA Act. It appears to be very logical that if a Company had undertaken a rehabilitation plan which for some reason or the other could not be finalized and any of the Party of the said DRS/MDRS is not satisfied thus moved Insolvency Petition before NCLT, then because of the impugned action of that solitary party should not hamper or thwart the steps taken so far for rehabilitation or rearrangement of the Debts in question. **An altogether fresh exercise is not warranted** which may lead to undue embarrassment to the new Investors who have proposed for rehabilitation and restructuring of the Company and its Debts. The comparative study as per above paragraphs have also demonstrated that the steps for rehabilitation of a stressed Company are almost identical, therefore, now it is clear that the repetition of those very steps has no logic and shall not going to get a legal sanctity. Up to that stage where certain steps have already been taken and that the Debts have been restructured, now expected to be honoured and recognized by the newly enacted Code.

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- 5.4 The Petitioner has placed on record the consent letter of most of the Creditors affirming therein that although the amount is owed by the Company to them but have no objection if MDRS dated 25.04.2015 being passed as the approved 'Resolution Plan' under the I&B Code 2016. In any case, direction can be given to the appointed IRP to examine this aspect as well from the records of the case so that the Creditors of this Company should not be adversely affected by this Order.
- 5.5 We finally conclude that considering the provisions of section 10 of The Code that the Debtor Company had in fact committed a default in not repaying the outstanding Debt to certain parties, the Petition under consideration deserves to be "admitted".
6. Since the Petition is "admitted" hence the IRP viz. Mr. Anish Kanodia, B-9/10, Ekta Apartment, LBS MARG, Opp: Santoshi Mata Mandir, Mulund-West, Mumbai-400080, Email id: ashishkanodia1972@gmail.com, Registration No.918IBBI/IPA001/IP-00650/2016-17/2131 is hereby appointed.
7. The provisions of section 14 is commenced henceforth and the Moratorium shall take place as under :-
- (a) On enforcement of Moratorium certain prohibitions are applicable such as Institution of any Suit before a Court of Law, transferring of any Asset of the Debtor, encumbering any rights over the assets of the Debtor, however, the supply of essential goods or services to the Corporate Debtor shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan as prescribed under section 31 of The Code.
- (b) The IRP appointed shall act upon as prescribed under the provisions of section 13 of The Code by making a public announcement immediately hereafter within a period prescribed therein. The IRP so appointed shall also comply with the provisions of section 15 onwards of The Code by collating all the claims submitted by other Creditors by constituting a Committee of Creditors. We hereby direct the IRP to inform the progress of the Resolution Plan along with a compliance report within 30 days on receipt of this Order. However, a liberty is granted to intimate the progress even at an early date, if need be.
8. To conclude, the Petition is hereby "admitted" and the commencement of the Corporate Insolvency Resolution Process is hereby declared with effect from the receipt of this Order. The IRP is hereby directed that, the **Scheme Sanctioned** under SICA shall be deemed to be an **Approved Resolution Plan** as prescribed U/s. 31 (1) of the I & B Code, 2016. However, rest of the compliances are to be made as per the provisions of the Code, some of them specified hereinabove.

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9. Accordingly, **this CP 1054/I & BC/NCLT/MAH/2017 stood admitted. The MA 177/2017 is also hereby made absolute only to the extent as directed.**

Sd/-

BHASKARA PANTULA MOHAN
Member (Judicial)

Sd/-

M.K.SHRAWAT
Member (Judicial)

Date: 13.10.2017

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