

IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH

CP. No. 1066/2017

Under section 9 of IBC, 2016

In the matter of  
Lark Chemicals Pvt. Ltd.,  
Radha Bhuvan, 3<sup>rd</sup> Floor,  
121 Nagindas Master Road, Fort  
Mumbai - 400 001.

..... Petitioner

Vs.

Goa Antibiotics & Pharmaceuticals Ltd.,  
Tuem, Taluka Pernem,  
Goa - 403 512.

..... Respondent

Order delivered on: 14.08.2017

**Coram:**

Hon'ble Mr. B.S.V. Prakash Kumar, Member (J)

Hon'ble Mr. V. Nallasenapathy, Member (T)

For the Petitioner : Mr. Shyam Kapadia, Mr. Darshan Mehta, Ms. Pooja Kane  
i/b Dhruve Liladhar & Co.

For the Respondent : Mr. Rahul Singh, i/b Legal Catalyst

*Per V. Nallasenapathy, Member (T)*

**ORDER**

1. Lark Chemicals Pvt. Ltd. (hereinafter called 'Applicant') has sought the Corporate Insolvency Resolution Process on Goa Antibiotics and Pharmaceuticals Ltd. (hereinafter called the 'Corporate Debtor') on the ground, that the Corporate Debtor committed default on 25.11.1998 onwards in repayment of principle amount of Rs.1,11,30,063/- along with interest of Rs.4,38,00,611/- calculated @30% per annum till 10.05.2017 and also claiming further interest @30% per annum from 11.05.2017, under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereafter called the 'Code') read with Rule 6 of the

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The Applicant states that the Corporate Debtor was declared as Sick Company under Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) on 15.07.1998 and remained under the purview of SICA up till 02.06.2014. The Applicant filed representation on 16.09.2005 before Board for Industrial & Financial Reconstruction (BIFR) requesting for permission under Section 22(1) of SICA to take legal action against the Corporate Debtor outside the BIFR proceedings, which was turned down and the Appeal filed before the Appellate Authority for Industrial & Financial Reconstruction (AAIFR) was also dismissed.

3. The Applicant states that it has supplied goods to the Corporate Debtor from 24.08.1998 to 24.02.2003 for which invoices and delivery challans were enclosed. The invoices provide that interest @30% will be charged on bill not paid on due date or on demand. The Applicant has sent demand notice on 10.05.2017 to the Corporate Debtor claiming a sum of Rs. 5,49,30,674/- as of 10.05.2017 including interest at 30% p.a. The notice further provides that if the Corporate Debtor disputes the existence or amount of unpaid operational debt in default, the pendency of suit or arbitration proceedings in relation to such dispute filed before the receipt of the said letter or the repayment of debt, if any, be brought to the knowledge of the Applicant within 10 days of receipt of the demand notice. The Applicant filed an affidavit stating that the above said demand notice was delivered to Corporate Debtor on 13.05.2017 and there was no reply from the Corporate Debtor. Hence, this Petition.

4. The Counsel for the Corporate Debtor opposed this Petition on the ground of jurisdiction, limitation and also on some other aspects.

5. The Corporate Debtor Counsel says that though the company went through under BIFR since 15.06.1998, 74% of the stake is held by Central Government and 26% stake is held by the State of Goa, the Corporate Debtor being a public sector undertaking and / or government company cannot be put

into the process of Corporate Insolvency Resolution as per Section 9 of the Code in view of the facts that the preamble to the Code itself provides as below:

*An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate person, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.*

6. The Corporate Debtor Counsel further relied on the objects and reasons of the Code and states that the Code is to promote entrepreneurship and to further to promote priority in making payments of Government dues in view of the provisions of Section 8 read with Section 5(20) and 5(21) of the Code and finally says that these provisions are applicable to claims payable to the Central Government and State Government and to any local authority, the Applicant being a private company, while the Respondent is a Government of India undertaking represented through President of India, this Petition under Section 9 of the Code is an abuse of process of law and the Petition deserves to be dismissed with cost.

7. This Bench is of the view that the argument of the Corporate Debtor Counsel is wholly misplaced. The Corporate Debtor is a company registered under the Companies Act and the same is an artificial person which can sue or be sued in its own name independent of the fact whether it is owned by any Government or by private persons. The provisions of the Code will equally apply to a corporate person as defined under Section 3(7) of the Code. The mere fact that the Corporate Debtor is owned by Central or State Government cannot be a ground for excluding the jurisdiction of the Code/this Adjudicating Authority. Neither the Code nor the statement of objects clause of the Code provides any special treatment to a Public Sector Government Undertaking. In fact, under the provisions of the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 and the Companies Act, 1956, the Government dues are treated as preferential creditor on the concept of "Crown Debt" but whereas under the waterfall mechanism provided under the Code Government dues are arrayed after unsecured creditors.

8. The Hon'ble National Company Law Appellate Tribunal in the case of West Bengal Essential Commodities Supply Corporation Ltd. vs. Bank of Maharashtra, rejected the argument of the appellant which has argued that it is a State Government undertaking supplying essential commodities to the poor farmers and the impugned Order passed against it by the Kolkata Bench of NCLT under Section 7 of the Code shall be set aside.

9. In view of the above discussion, the contention of the Corporate Debtor that this Adjudicating Authority does not have jurisdiction to entertain this application and the contention that the provisions of Section 9 of the Code read with Section 8 of the Code is not applicable to Public Sector Undertaking, falls to the ground.

10. On the ground of limitation the Corporate Debtor Counsel submits that the recovery of alleged dues under invoices dated from 27.08.1998 to 24.02.2003, is ex-facie time-barred since the last date of invoice was 24.02.2003 with a payment period of 60 days, the period of limitation expired in the year 2006, the Applicant was never ipso-facto barred from initiating proceeding of recovery and/or winding up under the Companies Act 1956, Section 22 of SICA does not bar filing a fresh claim but merely suspends the progress in the proceedings before appropriate Court, in the circumstance the present proceedings is barred under the Limitation Act, 1963.

11. It is an admitted fact that the Corporate Debtor was declared a sick company under SICA and a scheme for its revival was sanctioned by BIFR by an order dated 15.07.1998 and was discharged from the purview of SICA by an order of BIFR dated 02.06.2014. On 16.09.2005, the Applicant filed a representation requesting for permission under Section 22(1) of SICA to take legal proceedings against the Corporate Debtor outside the BIFR proceedings, which was declined by BIFR on 16.07.2007 and an Appeal to AAIFR by the Applicant was also dismissed on 21.07.2008. Since the Corporate Debtor was under the purview of SICA from 15.07.1998 to 02.06.2014, the Applicant was not in a position to proceed against the Corporate Debtor till 02.06.2014 and the period of limitation will commence from 03.06.2014 as provided Section 12 of

the Limitation Act, 1963 and the cause of action for filing a case have arisen on 03.06.2014, the proceedings can be initiated on or before 02.06.2017. The Mumbai Bench of NCLT where the present proceedings are initiated was on summer vacation from 04.05.2017 to 02.06.2017, that is the last day on which the period of limitation expires, 3<sup>rd</sup> and 4<sup>th</sup> June 2017 were Saturday and Sunday, on 05.06.2017 when the Tribunal opened for normal functioning this Application was filed and hence there is no question of the proceedings being time-barred. This is the argument put forward by the Counsel for the Applicant.

12. The Counsel for the Respondent submits that Section 12 of the Limitation Act, 1963 excludes the day on which the judgement was sought to be pronounced, that is the order of BIFR was on 2.6.2014, so limitation is upto 1.6.2017, NCLT, Mumbai Bench was functioning on 1.6.2017 and the application filed on 5.6.2017 is time barred.

13. The Counsel for the Applicant contends that the application which was filed on 5.6.2017 that is the day on which the Mumbai Bench of NCLT re-opened after summer vacation is within the period of limitation. In support of this submission, the Applicant relied on the following judgements:

1. *SamaMallappa V. R. P. Siddeshwarappa*, (2016 5 Kant LJ 594.
2. *JaganNath V. Smt. Triveni Devi*, ILR (1970) II Delhi.
3. *Ramani Raja Moholi V. TodanpuriManiah*, 1958 SCC Online AP 201: AIR 1959 AP 103.
4. *Municipal Corporation of Delhi V. ChamanDass*. 1969 SCC Online Del 160: (1969) 5 DLT 642
5. *Rama Aba Sangale and Ors V. Sundarabai w/o Rama Sangale and Anr.* 1979 Mh. L. J. 225.

The above stated judgements support the proposition that if the limitation period expires during the court vacation, the first day of re-opening will be deemed to be the last date on which such limitation period expires, even the Registry of the Courts are functioning during the vacation and accepting filings.

14. Per contra the Corporate Debtor claims that Section 4 of the Limitation Act, 1963 is not applicable to proceedings before this Tribunal since this

Tribunal does not constitute a court for the purpose of Limitation Act, 1963 and to support the said contention, it has relied upon the following judgements:

1. *Harinagar Sugar Mills Ltd. V. ShyamSundarJhunhunwala and Ors.* 1962 SCR (2) 339; and
2. *Sulochana Neelkanth Kalyani V. Takle Investments Company &Ors.* (2016) 4 BomCR 272.

15. Section 4 of the Limitation Act, 1963, provides as follows:

*"Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court re-opens. Explanation – A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remain closed on that day."*

16. The Corporate Debtor in the first part of his written submissions contended that the proceedings initiated by the applicant is beyond limitation and hence the claim is untenable and not maintainable under the eye of law whereas in the succeeding paragraphs, contends that Section 4 of Limitation Act is not applicable to the Tribunal and in support of this contention relied on the judgment of the Bombay High Court in *Sulochana Neelkanth Kalyani vs. Takle Investment Company and others – 2016(4) Bom.C.R.272* wherein certain judgments were discussed and it was held that Company Law Board is not a Court for the purpose of Limitation Action and more specifically for the purpose of Section 3, 4 and Article 137 of Limitation Act. Hence, the applicability of provisions of Limitation does not arise at all. However, it is to be noted that Section 433 of the Companies Act, 2013 provides that *"the provisions of the Limitation Act, 1963 shall, as far as may be, applied to proceedings or appeals before the Tribunal or the Appellate Tribunal as the case may be"*. In view of this specific provision in the Companies Act, 2013, the judgment relied on by the Corporate Debtor will no longer applicable to the case on hand and the contention of the Respondent is unsustainable. Apart from this, while dealing with the cases under the Code the nomenclature given for this Bench is "Adjudicating Authority" which deals with money claims and its default thereof, logically the Limitation Act, 1963 will becomes applicable to the proceedings before the Adjudicating Authority.

17. This Adjudicating Authority is of the view that since the SICA proceedings came to an end on 02.06.2014, the cause of action for this proceedings have arisen on 03.06.2014 and the Application filed on 05.06.2017 after summer vacation as explained in supra is well within the period of Limitation.

18. Another contention of the Respondent is that the Applicant has done business with the Respondent when the Respondent was already under BIFR with the sole assurance of erstwhile parent company of the Respondent i.e. Economic Development Corporation of Goa, Daman and Diu Ltd., by a Memorandum of Undertaking given an assurance that all outstanding payments as on 24.01.2000 shall be paid in 12 equal instalments starting from April 2000 and hence the burden of payment to the Applicant lies on the Economic Development Corporation of Goa, Daman and Diu Ltd. In view of this, the cause of action for recovery arose after March 2001 but the Applicant has not taken any action either against the Respondent or against the Economic Development Corporation of Goa, Daman and Diu Ltd., for more than three years and hence this debt is time barred. In view of the fact that the currency of SICA proceedings between 15.07.1998 and 02.06.2014, this contention does not hold the field.

19. The Respondent contends that the claim of the applicant is not crystallised and invoices were manipulated and there are certain defects in the invoices raised. These contentions are only raised now and there is nothing on record to show that these disputes were raised previously, thus it is clear that these contentions are raised merely for the sake of raising the contention for opposing this Petition.

20. The Respondent further contends that the applicant agreed before BIFR that they will accept 75% of the principal amount and agreed to waive interest of Rs.1.7 crores and the present interest claim of Rs.4.38 crores shows their double standard and illegal approach. However, the Respondent is oblivious of the concept that "money never sleeps" and the applicant contends that the offer

for settlement is without prejudice to their rights which has happened in 2012 and now we are 2017 wherein much waters were flown in between.

21. The Respondent further contended that the applicant played fraud with the forum by claiming interest at higher rate by pleading that its invoices mentioned such rates. It is true that invoices dated 27.8.1998, 16.9.1998 and 25.9.1998, there is a mention of interest as 18% per annum (payment: 90 days hundi interest @ 18% will be charged from due date – in the computer print). But in the same invoices there is a mention at point no.1 that interest @ 30% will be charged on bill not paid on due date or on demand. In all other invoices numbering 12 the interest rate mentioned is 30%. It is not the case of the Respondent that only 18% is mentioned in those three invoices and the applicant wrongly charged 30% interest which is not provided for. Somehow in three invoices 18% and 30% interest rate was mentioned but in all other 12 invoices the rate of interest mentioned is 30% only. Hence, claiming 30% interest by the applicant is in order.

22. The Respondent says that it was restrained by prohibitory order of Tax Recovery Officer, Range 1(2), Mumbai dated 13.03.2013, from making payment to the Applicant and the said order was revoked only on 20.06.2017 by the said Officer, hence the demand notice issued by the Applicant on 10.05.2017 under Section 8 of the Code is illegal and consequently this proceedings filed on 5.06.2017, before lifting of the prohibitory order is illegal. To this, the Applicant says that the prohibitory order dated 13.03.2013 was set aside by an order of the Income Tax Appellate Tribunal, Mumbai Bench dated 06.02.2015 and also contended that the prohibitory order dated 13.03.2013 in no way extinguishes or diminishes the liability of the Respondent. In view of the fact that the appeal preferred by the Applicant herein before ITAT in ITA No. 2636/M/2013, against the Asstt. CIT-1(2) Ayekar Bhavan, Mumbai was allowed on 06.02.2015, the prohibitory order in relation to the same will not have any legs to stand and hence the contention of the Respondent that this Application under section 9 has to be rejected will not survive.

23. This Bench having satisfied with the Application filed by the Operational Creditor which is in compliance of provisions of section 8&9 of the Insolvency



and Bankruptcy Code admits this Application declaring Moratorium with the directions as mentioned below:

- i) That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- ii) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- iii) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- iv) That the order of moratorium shall have effect from 14.08.2017 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- v) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

24. Accordingly, this Petition is admitted.

25. This Bench makes a reference to the Insolvency and Bankruptcy Board of India (IBBI) for the recommendation of Insolvency Professional for appointment as Interim Resolution Professional.

26. The Registry is directed to forward a copy of this order to IBBI and post this matter after receipt of reply from IBBI for the appointment of IRP.

27. The Registry is hereby directed to communicate this order to both the parties.

Sd/-

V. NALLASENAPATHY  
Member(Technical)

Sd/-

B.S.V.PRAKASH KUMAR  
Member (Judicial)