

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. No.1101/I&BP/2017

Under section 9 of the IBC, 2016

In the matter of

Valia & Co.
208, Giriraj, S.T. Road, Carnac Bunder
Mumbai – 400 009.

....Applicant

v/s.

Jord Engineers India Ltd.
504, Vishwananak Apartment
Chakala, Link Road, Andheri (E)
Mumbai – 400 057.

....Respondent

Order delivered on: 31.07.2017

Coram:

Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Creditor : Mr. Amir Arsiwala, Advocate
For the Respondent : Mr. Minesh K. Shah, Advocate

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

It is a Company Petition filed u/s 9 of The Insolvency and Bankruptcy Code by the Operational Creditor namely **Valia & Co** against the Corporate Debtor namely **Jord Engineers India Ltd.** for initiation of Insolvency Resolution Process against this Corporate Debtor on the ground that this corporate debtor defaulted making payment to the goods i.e. Iron, Steel and raw-material supplied by the Operational Creditor in between 2011 and 2012 for an amount of ₹4,72,28,431 and also arrears of interest of ₹10,70,493 on delayed payment made prior to 2011 i.e. from 01.04.2010 to 31.03.2011.

Brief facts of the Case:

1. The claim of the Operational Creditor accrued on account of supply of iron, steel and raw-material to the Corporate Debtor supplied during the years 2011-12 basing on details of the invoices as well as the dates upon which the Corporate Debtor became in default in making payments given in annexure-1 (page 10), the same is set out as below:

Computation of Amount in Default

Sr.No.	Date	Invoice #	Amount Outstanding
1.	22.04.2011	2011-12/MUM/26	1,10,205.00
2.	22.04.2011	2011-12/MUM/27	8,53,533.00
3.	03.05.2011	2011-12/MUM/33	8,64,389.00
4.	11.05.2011	2011-12/MUM/40	9,20,372.00
5.	18.05.2011	2011-12/MUM/42	75,735.00
6.	01.06.2011	2011-12/MUM/48	11,54,003.00
7.	02.06.2011	2011-12/MUM/49	14,00,246.00
8.	02.06.2011	2011-12/MUM/50	3,82,949.00
9.	02.06.2011	2011-12/MUM/51	5,25,922.00
10.	08.06.2011	2011-12/MUM/52	11,59,985.00
11.	09.06.2011	2011-12/MUM/53	10,67,165.00
12.	10.06.2011	2011-12/MUM/54	4,96,189.00
13.	26.08.2011	2011-12/MUM/88	19,51,511.00
14.	26.08.2011	2011-12/MUM/89	17,14,965.00
15.	30.08.2011	2011-12/MUM/90	13,69,886.00
16.	30.08.2011	2011-12/MUM/91	19,89,260.00
17.	31.08.2011	2011-12/MUM/92	10,79,415.00
18.	02.10.2011	2011-12/MUM/105	14,22,013.00
19.	24.11.2011	2011-12/MUM/124	22,35,241.00
20.	23.01.2012	2011-12/MUM/155	8,96,103.00
21.	23.01.2012	2011-12/MUM/156	9,13,953.00
22.	24.01.2012	2011-12/MUM/158	12,47,254.00
23.	24.01.2012	2011-12/MUM/159	12,75,153.00
24.	25.01.2012	2011-12/MUM/160	12,15,795.00
25.	27.01.2012	2011-12/MUM/161	11,59,256.00
26.	02.02.2012	2011-12/MUM/162	14,59,222.00
27.	02.02.2012	2011-12/MUM/163	11,07,352.00
28.	17.02.2012	2011-12/MUM/172	10,95,664.00
29.	17.02.2012	2011-12/MUM/173	2,04,979.00
30.	03.04.2012	2011-12/MUM/1	13,39,568.00
31.	03.04.2012	2011-12/MUM/2	16,10,640.00
32.	04.04.2012	2011-12/MUM/3	9,61,651.00
33.	04.04.2012	2011-12/MUM/4	5,48,745.00
34.	16.04.2012	2011-12/MUM/12	5,82,729.00
35.	17.04.2012	2011-12/MUM/13	7,02,226.00
36.	17.04.2012	2011-12/MUM/14	13,55,694.00

37.	19.04.2012	2011-12/MUM/15	19,54,116.00
38.	19.04.2012	2011-12/MUM/16	21,19,614.00
39.	05.05.2012	2011-12/MUM/21	18,93,447.00
40.	05.05.2012	2011-12/MUM/22	20,26,443.00
41.	08.05.2012	2011-12/MUM/23	7,85,743.00
		TOTAL	4,72,28,431.00.00

2. When it has been put to the Creditor Counsel as to how this Creditor entitled to make a claim in the year 2017 over the goods supplied in the year 2011-12, the Creditor Counsel has stated that since this debtor company being referred as sick unit on 09.11.2005 by BIFR and continuing so until before the date of Sick Industrial Companies (Special Provisions) Act 1985 (SICA) was repealed on 1-12-2016, this Creditor was all along deprived by section 22 (suspension of legal proceedings, contracts, etc) of SICA to proceed against this Corporate Debtor for realization of the monies mentioned in the above table. The counsel further says as soon as SICA has been repealed and since right for recovery has been open to the creditor, it has filed this case construing this right for recovery has accrued to the creditor from 1st December 2016 only. For this right has become open to the creditor since 1-12-2016, a notice was issued on 26.04.2017 u/s 8 of this Code to the debtor by sending all the invoices along with the notice. Though the same was received, the Corporate Debtor failed to respond to the notice within 10 days from the date of receipt of notice. However, this Corporate Debtor gave reply on 22.05.2017 stating that the Corporate Debtor is under no obligation to repay this claim because the goods supplied to the Corporate Debtor are inferior in quality, and more so, this claim is barred by limitation for the reference made in this Company Petition will not save limitation to the claim made by this Creditor, because Section 22 of SICA is applicable only to the cases where claim already pending as on date this company was declared as sick unit. In addition to these two defenses, the Corporate Debtor has also raised a defense that this debtor company has never confirmed this claim made by this Creditor.

3. In support of the defenses raised, the Debtor Counsel, to justify his contention, relied upon a judgment in between *Deputy Commercial Tax Officer*

and others v. Corromandal Pharmaceuticals and others (AIR 1997 Supreme Court 2027) and Polymermann (Asia) P. Ltd. v. Union of India & Others ([2006] 133 Comp Cas 894 Bom), to say that suspension of legal proceedings in respect of dues against sick company applies only to such of those dues reckoned or included in the sanctioned scheme for rehabilitation.

4. But by reading these two judgments, it has been again reiterated that the language of section 22 of SICA is wide, it appears that in these cases, the ratio decided by the Supreme Court and High Court is that *it will be reasonable to hold that the bar or embargo envisaged in section 22(1) can apply only to such of those dues reckoned or included in the sanctioned scheme, but amounts like sale tax etc., which industry is enabled to collect after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within section 22 of SICA*, further reiterating that *any other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amounts due to the Revenue and withhold it indefinitely and unreasonably, and such construction is unfair, unreasonable and against the spirit of the statute in a business sense, should be avoided.*

5. Therefore, the points ascertainable from two judgments are –

1. *Courts hold that the language in section 22 is wide.*
2. *It has not been held anywhere that section 22 (5) is not applicable to the arrears or claims raised against sick company, while it is under reference.*
3. *It is said in suggestive manner that embargo envisaged in section 22 (1) can apply only to such of those dues reckoned or included in the sanctioned scheme (given under section 29 of SICA). The point that should not get lost sight of is, in the case on hand, no such scheme has been sanctioned u/s 29 of SICA, and therefore there was no occasion either to include or to exclude this claim when the scheme itself had not come into existence.*
4. *The paramount consideration given by the Supreme Court is that such amounts like sales tax, etc, which sick company is enabled to collect*

after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be withheld under the cover of section 22 of SICA.

5. *Basing on the analogy above, the debtor cannot escape from the liability, because it is a fact that this due is covered by section 22 (5), since it has not been said that section 22 (5) is not in vogue, the argument for inclusion of computation of limitation during suspension u/s 22 (1) is not applicable has no basis.*

6. Here, this debtor company having come out of reference on 01.12.2016, since the claim of this Creditor has risen while the debtor was continuing as sick unit, this claim is claimable from the date BIFR proceedings have been stood as abated, whereby this Bench hereby holds that the claim raised by the Creditor is well within the limitation. So far this company has not initiated any proceedings before this Bench seeking any relief to claim as stated in the eighth schedule of I & B Code, therefore we hold that this claim is within limitation.

7. As to other grounds placed by the Corporate Debtor, i.e. quality of the goods, since these goods have been supplied in the year 2010 and thereafter in the financial year 2011-12, had the quality of goods are of inferior in nature, this Corporate Debtor should have raised this objection immediately after supply of goods but this Corporate Debtor remained quiet all along and it has suddenly woke-up with this defense of quality of goods only after Section 8 notice has been received by this Corporate Debtor, that also 10 days after receipt of notice. It is an admitted fact that this Corporate Debtor has not raised any dispute either by filing any suit or any proceeding in respect to of the quality of goods, therefore, this appears to us it is a defense set up for the sake of frustrating this claim, but not basing on any dispute as required under I & B Code.

8. The Creditor in this case has not claimed any interest over the value of the goods supplied in the year 2011-12, he has only added the arrears of the interest that is payable by the Corporate Debtor for delay that has happened in making payment in respect to earlier invoices in 2010-11. Since it has been

showing in the accounts maintained by the applicant, we believe that this Creditor is entitled to claim the arrears of interest i.e. ₹10,70,400 over the dues of the year 2010-2011. To prove this claim, the Creditor having filed invoices for the goods supplied to the Corporate Debtor, as to default is concerned, since the Corporate Debtor himself has taken ground that the claim is barred by limitation, the Creditor having disclosed that no payment has been made by the Corporate Debtor herein and the same not being disputed by the debtor, it can be said without any further proof that this Corporate Debtor defaulted in making payment of the Claim made by the Creditor.

9. By looking at the documents filed by the Creditor and the Corporate Debtor reply saying that this debt is barred by limitation, that goods are of inferior quality, and those pleas being turned down, we hold that this case is fit for initiation of insolvency resolution process.

10. In view of the reasons given above, we hereby hold that this Petition deserve admission henceforth it is hereby admitted with the relief as follows:

- 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 Securitization 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 31.07.2017 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.

11. 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.

12. 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.

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

14. Order pronounced on 12.07.2017 and delivered on 31.07.2017.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

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