NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)
TA (AT) No.192/2021
(CA (AT) (Ins) No.1405/2019)

In the matter of:

M/s. Geeta Sugars,
No. 35/1, Jewellers Street,
Shivaji Nagar,
Bengaluru-560001, Karnataka.
Represented through its Proprietor, Anitha Padmesh,
Email Address: geetasugars@gmail.com **…Appellant**

V

M/s. The Indian Sugars and Refiners Limited,
Chitwadgi, Hospet,
Bellary- 58321, Karnataka
Represented through P.S. Krishnamurthy,
Manager Finanace
IRP, Email address: indiasugars@gmail.com **…Respondent**

Present :
For Appellant : Mr. Mithun Shashank, Advocate
For Respondent : No Appearance

JUDGMENT
(Hybrid Mode)

[Per: Justice Sharad Kumar Sharma, Member (Judicial)]

The challenge in the instant Company Appeal is to the Impugned Order dated 18.10.2019, that has been passed by the Learned NCLT, Bangalore Bench, in a proceeding being CP(IB) No. 262/BB/2019 filed under Section 9 of the I&B Code, to be read with Rule 6 of I&B(AAA) Rules, 2016, which stood instituted before it by the present Appellant, M/s. Geetha Sugars. In the said petition, the Appellants had contended before the Learned Tribunal, that, they are the

Operational Creditors and were engaged in the trading business in their status of being a proprietorship firm, that they were engaged in wholesale distribution business of sugar by purchasing sugars from the Sugar Manufacturers and supplying the same to the various food industries and such other manufacturers.

2. The Respondent / Corporate Debtor i.e., M/s. The Indian Sugars and Refiners Limited is a Sugar Manufacturer Unit, situated in Karnataka. The case of the Appellant / Operational Creditor is that, owing to certain business transactions, which were entered into between the parties (though pleaded to be orally), certain amount fell due to be paid, hence the Operational Creditor vide its correspondence of 13.05.2015, is said to have requested for refund from the Corporate Debtor / the Respondents herein, of a sum of Rs.21,08,835 allegedly due because of the reason for non-supply of approximately 880 metric tonnes of sugar, which the Respondent / Corporate Debtor was supposed to supply under the oral purchase order of 21.04.2015 and which it was unable to supply to the OC.

3. The Appellant had come up with the case before Learned Adjudicating Authority, that, the Respondent / Corporate Debtor had in their response of 15.05.2015, had rather acknowledged the debt due and their liability to pay the amount due, because of their inability to supply 880 metric tonnes of sugar, as agreed under the oral agreement of 21.04.2015.

4. This would be one of the points to determine as to whether the response given on 15.05.2015, by the Respondent / Corporate Debtor of their inability to supply the sugar, could be taken as to be an admission of debt due to be paid.

5. What could be borne out of the records is that, there were several sets of negotiations, which had taken place between the two parties, that is, the Appellant / Operational Creditor and the Respondent / Corporate Debtor and owing to an assurance extended by the Corporate Debtor, for the remittance of the amount claimed which was due to be paid as per the letter of 13.05.2015, the business relations, which stood snapped, was said to have been revived back and the Corporate Debtor had agreed for to supply the pending quantity of 880 metric tonnes of sugar which was not supplied by it, as against the advance amount paid to the tune of Rs.21,08,835 and to clear the backlog by January 2016.

6. Another question, that would arise is, as to whether the negotiations, which were held between the Operational Creditor and the Corporate Debtor and the consequential revival of the snapped business transaction will amount to be an admission of the debt due to be paid by the Corporate Debtor, in relation to the business transaction as orally agreed between them. The OC had claimed that despite the assurance extended by the Corporate Debtor to clear the backlog dues amounting to Rs.21,08,835 by January 2016, it did not do so, for which the Operational Creditor / the Petitioner is said to have once again sent a request for the refund of the amount by issuing a letter on 01.01.2016. However, the CD

proposed that it would adjust the same against the future supplies which was agreed by the OC. It is the case of the Appellant / OC that, despite the said assurance, the Corporate Debtor kept insisting for full advance payment for future supplies which the OC had to do so as to get the indented quantity of sugar and the indented quantity of 880 MT of sugar for which it had already paid the amount remained unsupplied. The business transactions continued, inter-se between the Operational Creditor and the Corporate Debtor, but still the old outstanding amount of Rs.21,08,835 was not refunded nor the corresponding supply of sugar made till 23.04.2016, when further supplies from the Respondent / Corporate Debtor came to a halt due to the critical financial crunch faced by the Corporate Debtor.

7. The Appellant came up with the case that, despite the assurance extended during the negotiations by the Corporate Debtor on 15.05.2015 and despite the assurances that were given by the Corporate Debtor at the stage of the additional supply of 1400 metric tonnes, the default persisted ever since 13.05.2015 and therefore, he issued demand notice under Section 8 of I&B Code on 20.06.2018, against the Respondents / Corporate Debtor and that in response to the demand notice issued under Section 8 on 20.06.2018, the Corporate Debtor / Respondents herein, sent a reply on 03.07.2018, which has to be taken as to be an admission of liability by the Corporate Debtor, to refund the amount paid as advance for the supply of sugar on 21.04.2015. The question here would be as to whether the reply of the Respondent / CD dated 03.07.2018 to the demand notice

dated 20.06.2018 can be taken as to be an admission of debt liability and could be taken as to be an acknowledgment for the purposes of determining the aspect of limitation.

8. In the proceedings that were held before the Learned Adjudicating Authority by way of CP(IB)/262/BB/2019, the application under section 9 of the Code was vehemently opposed by the Respondent / Corporate Debtor by filing an objection to it on 30.09.2019, on the grounds that the claim of debt as raised by the Appellant by issuance of the demand notice on 20.06.2018 is devoid of merits, that it denies its liability to make the payment under the demand notice under Section 8 of I&B Code and that the amount claimed to be the debt due, since arising out of the oral purchase order of 21.04.2015 and demanded by the letter dated 13.05.2015, would be barred by limitation as the demand notice was sent only 20.06.2018, more than 3 years from the alleged default. Another ground which was raised by the Corporate Debtor was that, the proceedings under Section 9 of the I&B Code initiated by the OC is in the shape of an arm-twisting for recovering of the amount under the business transaction which is not permitted under I&B Code.

9. Though not relevant, but still the Corporate Debtor took a stand before the Learned Adjudicating Authority, that, sugar falls to be an essential commodity as per the provisions of the Essential Commodities Act of 1955, and therefore, sugar industry is tightly regulated by the Government Regulations, that the established practice in sugar industry is to supply sugar on oral indent and

against 100% advance payment, that the indented quantity should be lifted in full within stipulated time failing which the suppliers / manufacturers are entitled to forfeit the amount of advance payment made by the buyers against such order.

10. The Corporate Debtor's case before the Learned Adjudicating Authority was that the Operational Creditor has placed the purchase order of 5000 Quintals on 21.04.2015, but made payment for 2578 Quintals at the rate of Rs.2,300 per Quintal, plus the additional duties, that the OC placed another order of 5000 quintals on 28.04.2015 with full payment and informed the CD that he will be making the balance payment for the earlier contract and that the advance amount of 880 quintals lying to his credit should be adjusted while completing the contracted quantity. The CD had also represented that since the OC failed to lift the sugar, though the indented amount was kept reserved for it, the CD forfeited the amount as per the industry practice as it suffered loss because of keeping stocks unnecessarily.

11. Thus, the Corporate Debtor came up with the case that, since they have forfeited the amount, it would not fall to be a debt due to be paid, because under the terms of industry practice, failure to lift the balance stock within a period of one week will attract the forfeiture clause and if the forfeiture clause comes into play, the amount thus forfeited will not fall to be a debt due to be paid, which could have enabled the Appellant / Operational Creditor to initiate proceedings, under Section 9 of the Code, by issuance of notice under Section 8 of I&B Code.

12. To dilute the stand taken by the Corporate Debtor / the Manufacturer, the Operational Creditor / the Appellant, herein, in the proceedings before the Learned Adjudicating Authority, had referred to the various correspondences and the responses that were given by the Corporate Debtor contending thereof that, it would be an admission of debt, based on the business transactions as orally entered into between the parties and it would be an admission of their inability to supply the remaining quantity of sugar. The same has been countered by the Corporate Debtor, contending thereof that, in case, the Operational Creditor intends to foundation its proceedings under Section 9 of the I&B Code based upon the aforesaid inter-se communications, the burden to prove the same would shift upon the Operational Creditor.

13. Owing to the aforesaid factual backdrop and after going through the documents, that are placed on record of the instant Company Appeal, we could apparently infer that, primarily the entire controversy is foundationed upon a claim of refund of an amount paid as an advance for the supply of sugar. Paying of an advance by the Operational Creditor to the Corporate Debtor, for the supply of sugar and its failure to lift the sugar within the time period settled under the purchase order, for which there was an invocation of the forfeiture clause, are facts , not denied by the Operational Creditor at any stage of the proceedings before the Learned Adjudicating Authority.

14. It is not the case of the Operational Creditor, that the amount claimed to be due under the demand notice of 20.06.2018, is not the amount paid as

advance for the purchase order of 21.04.2015, which was demanded to be refunded by the correspondence (letter) of 13.05.2015. In that eventuality, even if the due is admitted, it will be deemed to have fallen due and has been defaulted as back as on 13.05.2015 and if that be the situation, the issuance of the demand notice for the first time only on 20.06.2018 would be barred by limitation as it is being beyond the prescribed period as contemplated under Article 137 of the Limitation Act, because the limitation has to be determined from the date of the demand of refund as made by the Operational Creditor on 13.05.2015.

15. The terms of the business transactions and the possibility of invocation of the forfeiture clause by the Corporate Debtor was a fact, which was well within the knowledge of the Operational Creditor. Apart from it, the facts which were brought on record before this Appellate Tribunal in form of correspondences and notices and submissions made before it, point to existence of a disputed claim for the refund of advance, which was agreed to be settled in the subsequent transactions and which was reportedly forfeited by the CD on account of failure to lift the indented stock of sugar within the stipulated time period. Thus the claim of the OC will take the shape of a "**pre-existing dispute**" and that too pertaining to a refund of advance paid towards the purchase of sugar, which will not be falling to be under the definition of debt as provided under the I&B Code.

16. Under the aforesaid backdrop, the impugned order as rendered by the Learned Adjudicating Authority, particularly in context of the finding

recorded is in consonance to the principles laid down by the judgement of Hon'ble Apex Court in the matter of **Mobilox Innovations Pvt Ltd Vs Kirusa Software Pvt Ltd., reported in 2018 Volume 1 SCC Page 353**, and does not appear to be suffering from any error. The relevant para-40 of the aforesaid ratio is extracted here under:

> *"40... it is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the Operational Creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a potently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."*

17. As we have already discussed above, that the nature of amount, which was sought to be recovered by issuance of notice under Section 8 by invocation of proceeding under Section 9 of I&B Code, it did not amount to be a debt, even if it contained an element of default, for the reason being that, if the provisions contained under Section 9 of I&B Code is taken into consideration, the debt and default have to go together and the said logic could be culled out from the definition of 'debt' as given under sub-section (11) of Section 3 of the I&B Code, which is extracted here under:

> *(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;*

18. The said definition of debt has to be harmoniously read with the definition of "default" given under sub-section (12) of Section 3 of I&B Code. If the definition of debt and default are taken together, the invocation of Section 9 is only when there is an establishment of a fact of default in relation to a crystallized and reckoned debt. And since, the amount involved in the transaction would not be falling under the definition of debt, which is said to have been paid by the OC, it could not have been claimed by invocation of Section 9 of I&B Code as the amount sought will not fall to be a claim in shape of a debt which is due from the Corporate Debtor, owing to the fact of pre-existing dispute because of the subsequent settlement, which has been entered into and continuance of business affairs even thereafter and hence the implication of Para 40 of the

Judgment of Mobilox Innovations Pvt Ltd Vs Kirusa Software Pvt Ltd., will come into play.

19. We have already considered that, there had been a settlement, even after the issuance of a letter of 13.05.2015, where the Operational Creditor has raised a demand of the amount due under the purchase order of 21.04.2015. After the settlement there had been a fresh revival of business transactions and fresh orders had been placed. The conditions for revival of the subsequent business transactions and placement of the fresh subsequent purchase order were based under an assurance of deducting the amount that had earlier fallen due to be paid under the advances paid by the Operational Creditor for the purchase of the sugar, will amount to be an occurrence of a pre-existing dispute between the parties, which has been settled under certain terms. In that eventuality, the bar comes into play in the light of the principles laid down by the Hon'ble Apex Court in the Judgment of M/s. Innoventive Industries Ltd vs. ICICI Bank & Anr., reported in 2018 Volume 1 SCC Page 407, particularly in context of Para 29, where it has been observed that unlike the provisions contained under Section 7 of IBC, Section 9 cannot be invoked for the purposes of recovering of a defaulted amount, which is disputed or where there happens to be a pre-existing dispute, owing to the facts of the instant Company Appeal, which has already been discussed by us in the preceding paragraph.

Para 29 of the said judgment is extracted here under:

> *29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.*

20. There is nothing on record nor it had even been the foundation in the pleading of the Operational Creditor too that, there did not exist a forfeiture clause. If that be the situation where there happens to be an automatic forfeiture, there could not have been any refund of the advances paid by the Operational Creditor. It is another thing that the act of forfeiture by CD can be challenged by the OC, but that will be before Civil Courts and not under I&B Code. Though, the question of whether the said refund claimed is a "debt" maybe altogether a different question, which has been dealt with independently, if the forfeiture has already been made in terms of the contract agreed between the parties, it will not fall to be an amount due to be paid under the purchase order. Hence, it will not amount to be a debt even in accordance with the case as projected by the Operational Creditor.

21. That is all the more justifiable reason, why the Tribunal has rightly recorded a finding that in the absence of there being any denial of an existence of a forfeiture clause where the right of forfeiture was reserved and vested with the Corporate Debtor because of the failure to lift the sugar as per the contract, the notice alone cannot give a cause of action for the Appellant to recover the amount by way of refund of the advances paid, which is regulated by the forfeiture clause.

22. Owing to the above, admittedly it is not an undisputed debt amount which was being sought to be recovered by issuance of notices under Section 8 of I&B Code. Because for the purposes of invocation of proceeding under Section 9 of the Code, there has to be an existence of "**an undisputed debt**" which the Appellant has utterly failed to establish, either before the Learned Adjudicating Authority or even before us, hence in view of the finding, which we have recorded, apparently there happens to be a dispute about the payability of amount and there also happens to be a dispute as to whether it would fall to be a "debt" to be paid by invocation of Section 9 of I&B Code. Besides that, on a simpliciter determination, though by way of a partial reiteration admittedly the demand as raised by the Operational Creditor, was by way of the first correspondence of 13.05.2015, admittedly the notice of demand was issued on 20.06.2018 which was beyond the period of 3 years as contemplated under Article 137 of the Limitation Act.

23. For all the aforesaid reasons which we have dealt with, even if we look into the controversy in context of the issue framed by the Appellant in the

memorandum of Appeal, we could see that, the Appellant has not formulated any ground with regards to the interpretation given to the forfeiture clause nor there is any ground which has been pleaded or pressed in the argument by the Appellant pertaining to the aspect of limitation. Hence, we are of the view that the application preferred under Section 9 of the Code by the Operational Creditor / the Appellant, since it did not fulfil the ingredients contemplated under Section 9 (5)(i) of I&B Code, the dismissal of the same by the impugned order by the Learned Adjudicating Authority does not call for any interference by us in the exercise of our Appellate Jurisdiction. Thus, the Company Appeal lacks merit and the same is accordingly dismissed.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

24/04/2026

YS/MS/AK