

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.302

C.P.(IB)/145(AHM)2023
(BIFR No.145 of 2005)

Proceedings under Section 242 IBC r.w Rule 11 of NCLT Rules, 2016

IN THE MATTER OF:

Fiberweb (India) Ltd
(Formerly known as PVD Plast Mould Industries)

.....Applicant

V/s

.....Respondent

The Principal Commissioner of CGST & Central
Excise,Daman and Ors

Order delivered on: 15/07/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER
(Hybrid Mode)

The case is fixed for pronouncement of the order. The order is pronounced in the open Court, vide separate sheet.

-Sd-
SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-
SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I**

CP (IB) No.145/AHM/2023

(An application under Section 242 of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the Matter of:

M/s Fiberweb (India) Ltd.

Registered office at
Airport Road, Vill Kadaiya,
Nani Daman, (U.T.)396210.

...Applicant

VERSUS

- 1. The Principal Commissioner of CGST & Central Excise, Daman**
2nd Floor, Hani's Landmark,
Above HDFC Bank,
Vapi Daman Road,
Chala Vapi – 396191.

- 2. The Assi. Development Commissioner,**
SEEPZ, Special Economic Zone,
Ministry of Commerce & Industry,
Govt. of India, Andheri (E),
Mumbai – 400096.

- 3. The Chairman & MD**
IDBI Bank Limited

Monitoring Agency
Videocon Tower, 1st Floor,
A-wing, Jhandewalan Extn.
New Delhi-110001.

...Respondents

Order Pronounced On: 15.07.2024

CORAM:

**SH. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)
SH. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)**

APPEARANCE:

For the Applicant : Mr. Rajesh Bohra, Advocate
For the Respondent No.1 : Mr. Siddharth Dave, Advocate

ORDER

1. This is an application filed by the applicant herein under Section 242 of IBC, 2016 r.w Rule 11 of NCLT Rules, 2016 seeking following relief.

(a) direct the Respondent no.1, the Principal Commissioner of CGST & Central Excise, Daman, 2nd Floor, Hanbi's Land Mark, Above HDFC Bank, Vapi Daman Road, Chala Vapi to withdraw the Order dated 26.09.2019 with immediate effect as nothing is payable in terms of SS-15 and claim due related to period prior to cut off date i.e. 31.03.2013 stands waived.

(b) In the meanwhile, as an interim order, direct the Respondent no. 1, the Principal Commissioner of CGST & Central Excise, Daman, 2nd Floor, Hanbi's Land Mark, Above HDFC Bank, Vapi Daman Road, Chala Vapi to not to take any coercive actions against the Petitioner company as well as its promoter and directors till disposal of the present Petition.

(c) Pass such further or other orders as this Hon'ble Authority may deem fit and proper.

2. The brief facts as stated in the applicant are as under:

(i) It is stated that Hon'ble Board for Industrial & Financial Construction (for short 'BIFR') had sanctioned scheme vide order dated 28.10.2015 (SS-15) in case of the petitioner which was complied with by the petitioner and all parties, except for Central Excise Department. It is stated that as per the provisions of SS-15, the R-1 was to waive off interest and penalty payable to Central Excise Department on delayed payment of excise

duty and service tax or any other amount due to the Excise Department.

- (ii) The applicant company was duly registered as case no. 145/2005 with the BIFR.
- (iii) Vide order dated 20.10.2015, SS-15 was sanctioned and the IDBI Bank Ltd. was appointed as Monitoring Agency.
- (iv) It is stated that as per SS-15 para 13.4 is reproduced below.

“13.4. Central Excise Department

To Consider

To waive off interest and penalty payable to the Department of Central Excise on delayed payment of excise duty and service tax or any other amount due to the Excise Department.”

- (v) It is stated that in terms of SS-15 any amount payable qua Central Excise Department prior to cut off date was directed to be waived. The cut-off date was 31.03.2013 as per the SS-15.

(vi) It is stated that as the Petitioner was unable to meet the export obligations, a show cause notice (SCN) being F.No. V(CH.369)3-84/Dem/2004 dated 17.03.2006 issued by the Commissioner, Central Excises & Customs, Daman to the Petitioner asking them to show cause as to why customs duty foregone Rs. 1,31,13,557/- and Rs. 1,63,71,2951 on Import of Capital goods and Raw materials respectively and Central Excise duty foregone Rs. 17,44,964/- on duty free procurement indigenous capital goods & materials against CT-3 certificates, should not be recovered with interest and penalty under the provisions of the Customs Act 1962 and Central act 1944. Copy of Show Cause Notice dated 17.03.2006 is annexed as Annexure – 7.

(vii) The petitioner filed its written reply dated 02.05.2006 to the SCN which is annexed at Annexure-8.

- (viii) The petitioner company was declared sick industrial company under Section 3 (1)(o) of SICA vide order dated 18.01.2007.
- (ix) It is stated that Development Commissioner, SEEPZ-SEZ, Mumbai had also issued a show cause notice bearing No. IA II/28(87)/06-07/9267 dated 28.11.2006 which was replied by the petitioner on 15.01.2007. Later on the Development Commissioner, SEEPZ-SEZ has taken a lenient view and imposed a token penalty of Rs. 50,000/- upon the Petitioner. Copy of order dated 17.12.2008 is annexed at annexure – 11 and the same was paid by the petitioner.
- (x) It is stated that Draft Rehabilitation Scheme (For short 'DRS') was submitted by the Petitioner and a joint meeting of agencies was held on 29.04.2009 and subsequently Hon'ble BIFR vide order dated 27.07.2009 circulated the DRS which was ultimately sanctioned vide order dated 20.10.2015.

One of the clauses being clause 13.4 pertaining to Central Excise Department which has already been quoted in this order.

- (xi) The implementation period of the scheme continued upto 2019. It is the case of the applicant that the show cause notice should have been withdrawn upon sanction of the scheme. However, the same was not done and ultimately vide order dated 26.09.2019, R-1 confirmed duty demand of Rs. 2,94,84,852/- with interest demanded under Section 28 of CA 1962 read with section 9A(8) of Customs Tariff Act, 1975 plus penalty of Rs. 2,94,84,852/- u/s 112(ii) of Customs Act, 1962 and Central Excise duty foregone demanded Rs. 17,44,964/- with interest demanded under Section 11A(10) of Central Excise Act 1944 plus equal penalty of Rs. 17,44,964/- u/s 11AC(1) (C) *ibid.* Copy of Order dated 26.09.2019 is annexed as Annexure - 17.

(xii) It is stated that against the said order, the applicant has preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad.

(xiii) It is stated that vide notification No. 1490 dated 24.05.2017 in exercise of the powers conferred by the sub-section (1) of Section 242 of IBC, 2016 the following order to remove difficulty has been given.

A. Short title and commencement (1) This order may be called the Insolvency and Bankruptcy Code (removal of Difficulties) Order, 2017

B. 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 provisions 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 H of the said Code:

Provided also that in case, the statutory period within which an appeal was allowed under the Sick Industrial Companies (special Provisions) Act, 1985 against an order of the Board had not expired as on the date of notification of this Act, an appeal against any such deemed approved resolution plan may be preferred by any person before National Company Law Appellate Tribunal within ninety days from the date of publication of this order."

Copy of Notification dated 24.05.2017 is annexed as Annexure – 18

- (xiv) In terms of the above notification, the scheme sanctioned by the Learned BIFR is deemed as approved Resolution Plan under IBC, 2016 and this Tribunal has been vested with jurisdiction to deal with it qua its implementation.
- (xv) The applicant has thereafter relied upon the following judgments.
- (a) Misc. Application No. 105/KB/2018 in BIFR Case No. 266/1987, in the matter of Harry Refractory & Ceramic Works Pvt. Ltd. Vs. Jharkhand State Electricity Board by Hon'ble NCLT, Kolkata;
- (b) Civil Appeal No. 375 of 2017 in the matter of Modi Rubber Limited vs. Continental Carbon India Ltd.

Reply

3. R-1 has filed reply which is affirmed by one Mr. Gagandeep Khurana, Assistant Commissioner, CGST & Central Excise, Division-IV, Daman Commissionerate, opposing the present application.
4. The brief grounds of objections are as under:
 - (i) This Tribunal is not vested with the jurisdiction.
 - (ii) Present petition was filed on 27.04.2023 i.e. after lapse of 6 years and 4 months from the date of commencement of IBC and 7 years and 6 months from the date of order on SS-15 passed by Hon'ble BIFR. The Proviso to Section 242 which reads as under:

“Section 242 of IBC'16. (1) *If any difficulty arises in giving effect to the provisions of this Code, the Central Government may, by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of this Code as may appear to be necessary for removing the difficulty.*

Provided that no order shall be made under this section after the expiry of five years from the commencement of this Code.”

- (iii) It is stated that as per Section 142A of the Customs Act, 1962 and Section 11E of Central Excise Act, 1944 liability under the act is to be treated as first charge. Thereafter, the R-1 has given various reasons of the Customs Act and has stated that in terms of various provisions the order dated 26.09.2019 will survive.
- (iv) It is stated that Hon'ble BIFR vide order dated 28.10.2015 has suggested to consider waiver of interest and penalties but not order for the same and in the facts and circumstances of the case, this case is not fixed for waiver of interests and penalties as the appeal is pending before CESTAT. R-1 seeks dismissal of the present application.

Rejoinder

5. Rejoinder was filed under diary No. 2353 dated 20.03.2023. It is the contention of the applicant that the

petition is maintainable and that this Tribunal has jurisdiction.

6. It is stated that the petition is filed in terms of notification No. 1490 dated 24.05.2017 issued by Central Government of India.
7. The applicant has thereafter relied upon **Hon'ble Supreme Court** judgement dated 11.10.2018 passed in Civil Appeal No. 23988 of 2017, **B.K. Education Services Pvt. Ltd. Vs. Parag Gupta and Associates**, wherein, it is held as under:

“27. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. “The right to sue”, therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.”

8. The applicant has stated that this petition is on the basis of notification dated 24.05.2017 wherein, this

Hon'ble Authority is vested with the power to deal with removal of difficulties for implementation of sanctioned scheme by BIFR. It is stated in this notification the scheme sanctioned by BIFR has been treated as deemed approved resolution plan.

- 9.** It is stated that the applicant is not initiating fresh proceedings but is agitating on concluded and sanctioned scheme of BIFR and this authority has been vested with powers under IBC to remove difficulties in the sanctioned scheme.
- 10.** The present petition is not an appeal.
- 11.** Mere filing of appeal before the Hon'ble CESTAT does not take away to right the claim as per the sanctioned scheme.
- 12.** The petitioner is not challenging the order dated 26.09.2019 in the present application but is claiming that in light of the sanctioned scheme the order dated 26.09.2019 would not survive as the entire outstanding

of the Department upto the cut-off date including any of the proceedings prior to that period stands waived.

- 13.** Written submissions have been filed by the applicant under diary No. 4196 dated 22.05.2014 and by the R-1 under diary No. 4736 dated 18.06.2023, the same has been considered.
- 14.** During the hearing, Mr. Rajesh Bohra, learned Counsel for the petitioner states that the show cause notice dated 17.03.2006 was finally decided by the R-1 on 26.09.2019. The company was declared as Sick Industrial undertaking and SS-15 was approved on 24.05.2017 with implementation period upto year 2019. The entire dues of the Respondent were already covered under SS-15 and nothing is due and payable to the respondent as of now.
- 15.** Per contra, learned Counsel Mr. Siddharth Dave, for the Respondent stated that the present application suffers from limitation since it is filed 5 years after the notification No. 1490 dated 24.05.2017 and our

attention was drawn to the Proviso which has been already reproduced in this order above in para 4(ii).

16. We have heard both the learned Counsels and has perused the documents. Following are the undisputed facts in the matter.

- (i) The applicant company was declared as sick industrial company by Hon'ble BIFR under the Provisions of SICA.
- (ii) The scheme was approved by Hon'ble BIFR being SS-15 vide order dated 26.09.2019.
- (iii) The respondent has issued a show cause notice to the petitioner being **F.No. V(CH.369)3-84/Dem/2004 dated 17.03.2006** which was finally decided by order dated 26.09.2019.
- (iv) Through the order, respondent is seeking payment of dues amounting to **Rs.1,31,13,557/- of Customs Duty Foregone on duty free imported capital goods & Customs Duty Foregone on**

imported raw materials amounting to Rs. 1,63,71,295/- from the applicant.

- (v) Central Government vide notification No. 1490 has vested the jurisdiction with this Adjudicating Authority for removal of any difficulties in the scheme which is being approved by Hon'ble BIFR.
- (vi) The said notification also empowers this Adjudicating Authority to treat any approved scheme as a Resolution Plan approved under IBC, 2016.

17. It is the case of the applicant that all dues of the Respondent No.2 were covered under Sanctioned scheme being SS-15. On the contrary, the respondent claims the dues are payable, in this respect, we rely upon clause 13.4 of the sanctioned scheme which is reproduced under para 2 (iv).

18. We have no difficulty to hold that the amounts as demanded under SCN dated 17.03.2006 were covered

and were waived under SS-15 which was approved on 20.10.2015.

- 19.** As regards limitation we do not agree with the contentions of the learned Counsel for the Respondent. In our view, the proviso to Section 242 provides a time limit to the Central Government to come out with a notification within a period of 5 years from commencement of IBC, 2016. Acting upon the same, Central Government has issued the notification No. 1490 dated 24.05.2017 which is well within 5 years.
- 20.** It is seen that order dated 26.09.2019 being final order was passed on SCN dated 17.03.2006, and this petition has been filed before us on 03.05.2023. Benefit of the order of Suo Motu Writ Petition No. 3 of 2020 passed by Hon'ble Supreme Court extending the limitation period vide order dated 10.01.2022 is also available to the applicant.
- 21.** In this connection we rely upon the judgment of Hon'ble Supreme Court in ***Committee of Creditors of Essar***

Steel India Limited through Authorized Signatory
vs. Satish Kumar Gupta and Ors. more particularly
para 67 which is reproduced below.

"67. For the same reason, the impugned NCLAT judgment [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC OnLine NCLAT 388] in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head pop- ping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count."

- 22.** In view of settled provisions of law that the SS-15 is to be treated as a Resolution Plan we are of the view that order dated 26.09.2019 issued by the Respondent No.1 cannot be sustained since the dues were arising out of

(SCN) F.No. V(CH.369)3-84/Dem/2004 dated 17.03.2006 which have already been dealt and waived under SS-15.

23. Hence, Prayer (a) is granted, order dated 26.09.2019 issued by the Respondent No.1, be treated as withdrawn as nothing is payable in terms of SS-15 and claim due related to period prior to cut off date i.e. 31.03.2013 stands waived.

24. Accordingly, this **CP (IB) No. 145(AHM)2023** is hereby allowed and accordingly disposed of.

-Sd-
SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-
SHAMMI KHAN
MEMBER (JUDICIAL)

MD