

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No.3637/MB.IV/2018

*Under section 9 of the Insolvency and
Bankruptcy Code, 2016*

In the matter of

M/s Shree Dev Chemicals Corporation
...Operational Creditor

Versus

Gammon India Limited
[CIN: L74999MH1922PLC000997]
... Corporate Debtor

Order pronounced on : 16.07.2020

Coram:

Mr. Rajasekhar V.K. : Hon'ble Member (Judicial)
Mr. Ravikumar Duraisamy : Hon'ble Member (Technical)

Appearances:

For the Operational Creditor : Mr Rushabh H Shah i/b R&R
Associates, Advocates.
For the Corporate Debtor : Ms Jinal Mehta i/b KS Legal &
Associates, Advocates

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by M/s Shree Dev Chemicals Corporation (*Operational Creditor*), a partnership firm represented by its

legal representative, Mr Pravinchandra Shah, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Gammon India Limited (*Corporate Debtor*).

2. The Corporate Debtor is a listed public company limited by shares and incorporated on 15.06.1922 under the Companies Act, 1913, with the Registrar of Companies (RoC), Maharashtra, Mumbai. Its CIN is L74999MH1922PLC000997. Its registered office is at Gammon House, Veer Savarkar Marg, Prabhadevi, Mumbai 400025, in the State of Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed on 25.09.2018 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹7,86,237.68 (Rupees seven lakh eighty-six thousand two hundred and thirty-seven and sixty-eight paise only) as principal as on 23.06.2015, along with interest thereon, which is the date of default.
4. The case of the Operational Creditor is as follows: -
 - (a) The Operational Creditor is a partnership firm and is engaged in the business of manufacturing and supply of construction chemical products. The Corporate Debtor placed purchase orders dated 21.09.2012, 01.08.2013 and 04.01.2014 on the Operational Creditor for supply of construction chemicals (*paras 2.3 and 2.4 at page 38 of the Petition*);
 - (b) Against the said supplies, the Operational Creditor issued invoices dated 26.9.2012, 09.08.2013, 13.11.2013 and 15.02.2014, which were accepted by the Corporate Debtor. The material supplied by the Operational Creditor has been

consumed by the Corporate Debtor without raising any dispute with regard to the quality of these materials (*para 2.5 at page 38 of the Petition*);

(c) Against the total outstanding amount of ₹81,18,833.68, the Corporate Debtor has paid a sum of ₹73,32,596/-, leaving a balance of ₹7,86,237.68 as on 23.06.2015 (*para 2.6 at page 38-39 of the Petition*).

5. Invoices have been placed on record as Exhibit '1' at pp.22-25. The invoices provide for interest in case of delayed payments, to be charged at the rate of 18% per annum. Bank statements are attached as Exhibit '3' at pp.31-32. The total debt due and payable to the Operational Creditor is ₹7,86,237.68 (Rupees seven lakh eighty-six thousand two hundred and thirty-seven and sixty-eight paise only), as mentioned at page 32 of the Petition.
6. The Operational Creditor had served a Demand Notice in Form 3 dated 18.06.2018 to the Corporate Debtor (Exhibit '1', pp.12-18) in terms of section 8 of the IBC. The Corporate Debtor has not replied to the Demand Notice. Necessary affidavit of No Dispute in terms of section 9(3)(b) of the IBC has been annexed at pp.33-35.
7. Ms Jinal Mehta, Learned Counsel i/b KS Legal & Associates, appeared on behalf of the Corporate Debtor and made her submissions.
8. In its reply dated 21.12.2018, the Corporate Debtor has set up the following defence:-
 - (a) Form 5 at p.4 of the petition does not mention the exact date when the alleged debt fell due. The Notice dated 18.06.2018

demanding payment mentions in para 3 that the alleged debt is due as on 15.06.2014 while in para 4 at p.15 that the alleged debt is said to be due from 23.06.2014. However, form 5 at page 4 in para 1 shows the date as 23.06.2015 [*para 3(a) at page 2 of the Reply*];

(b) Affidavit in support of petition mentions that the Applicant is a partnership firm. In terms of section 69(2) of the Indian Partnership Act, 1932, no suit to enforce a right arising from a contract shall be initiated in any court by or on behalf of the firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the Firm [*para 3(c) at page 3 of the Reply*];

(c) Invoices attached are for the period from 2012 to 2014. Assuming without admitting that the debt fell due on 23.06.2015 as mentioned in para 2 on page 14 of the petition, even then the present petition is filed in September 2018, which is after the period of three years and thus barred by limitation [*para 4(a) at page 4 of the Reply*].

9. We have heard the arguments of both sides and perused the records. The Corporate Debtor has stated that the claim of the Operational Creditor is not valid, on the following grounds: -

(a) That the petition cannot be maintained in its present form in terms of section 69(2) of the Indian Partnership Act, 1932; and

(b) That the claim is barred by limitation.

On the question of maintainability qua section 69(2) of Indian Partnership Act, 1932

10. Section 69(2) of the Indian Partnership Act, 1932, reads as follows: -

“No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.”

11. It is clear from the above that the provision would apply only to a ‘suit’ and not to proceedings. Applications filed under the IBC are not ‘suits’ but only proceedings, and therefore, we hold that the bar in terms of section 69(2) of the Indian Partnership Act, 1932, would not apply to applications filed under the IBC.

On the question of limitation

12. In *BK Educational Services v Parag Gupta & Associates*,¹ the Hon’ble Supreme Court held as follows:

“42. 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.”

13. Article 137 of the Limitation Act, 1963 stipulates a limitation period of three years from the date on which the right to apply accrues.
14. In *Vashdeo R Bhojwani v Abhyudaya Cooperative Bank Limited & another*,² the Hon’ble Supreme Court quoted the *BK Educational Services (supra)* judgment and stated that if the default has occurred

¹ (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528 : 2018 SCC OnLine SC 1921 at page 664

² (2019) 9 SCC 158 : (2019) 4 SCC (Civ) 308 : 2019 SCC OnLine SC 1159 at page 159

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.

15. In *Sagar Sharma & another v Phoenix ARC Private Limited & another*,³the Hon'ble Supreme Court emphasised that the date of coming into force of the IBC does not and cannot form a trigger point of limitation for applications filed under the Code. It further reiterated that since "applications" are petitions which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications.
16. The date of default is stated to be 23.06.2015 and the petition was filed on 25.09.2018. Applying the ratio of the judgments quoted in paras 13 *supra*, and also noting that there is no acknowledgment of liability in terms of section 18 of the Limitation Act, 1963, before the expiry of the period of limitation, we hold that the present petition is barred by limitation.
17. For the reasons stated above, the present petition fails and therefore, the same is rejected.
18. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on

³ (2019) 10 SCC 353 : 2019 SCC OnLine SC 1332 at page 354

grounds only of dismissal of the present petition by this Adjudicating Authority.

19. Let a copy of this order be communicated to the parties in terms of the provisions of section 9(5)(ii) of the IBC.

Sd/-
Ravikumar Duraisamy
Member (Technical)
16.07.2020

Sd/-
Rajasekhar V.K.
Member (Judicial)