

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 117 of 2023

(Arising out of Order dated 21st December, 2022 passed by National Company Law Tribunal, Mumbai Bench, Court III in I.A. 3196 of 2022 in CP (IB) – 4412(MB)/2019)

IN THE MATTER OF:

IDBI Trausteeship Services Limited

Having registered office at:
Asian Building, Ground Floor,
17, R. Kamani Marg,
Ballard Estate, Mumbai
Maharashtra - 400001

**...Appellant/Financial
Creditor**

Versus

Nirmal Lifestyle Limited

Having registered office at:
3rd Floor, Multiplex Building,
Nirmal Lifestyle, L.B.S. Marg,
Mulund (W), Mumbai,
Maharashtra - 400080

**...Respondent/Corporate
Debtor**

Appellant: Mr. Krishnendu Datta, Sr. Advocate, Mr. Pranjit Bhattacharya and Mr. Raj Sarit Khare, Advocates

Respondent: Mr. Kunal Vajani, Mr. Kunal Mimani, Mr. Kartikey Bhatt, Mr. Shubhang Tandon, Advocates.

J U D G E M E N T

ASHOK BHUSHAN, J:

1. This Appeal by the Financial Creditor has been filed against the Order dated 21.12.2022 passed by the National Company Law Tribunal, Mumbai Bench, Court No. III by which I.A. No. 3196 of 2022 filed by the Appellant for

revival of the Company Petition being CP(IB)-4412(MB)/2019 has been rejected.

2. The brief facts of the case for deciding this Appeal are:-

- (i)** The Appellant filed the Company Petition being CP(IB)-4412(MB)/2019 under section 7 of I&B Code, 2016 alleging default of Rs. 2,86,89,35,109/-. In the company petition, a consent term was executed between the Financial Creditor and the Respondent. The consent term was placed on record before the Adjudicating Authority on 05th August, 2021 however the company petition was admitted on 05th August, 2021. Against the Order dated 05th August, 2021, C.A. (AT) Ins. No. 601 of 2021 was filed. This Appellate Tribunal permitted the suspended director to withdraw the Appeal with liberty to move the NCLT for withdrawal of Company Petition under Section 12-A of the Code. Direction was issued not to constitute the Committee of Creditors till the disposal of Section 12-A application.
- (ii)** Based on consent terms, IRP filed an Application under Section 12A, the Adjudicating Authority vide order dated 09.02.2022 allowed the withdrawal of the Company Petition.
- (iii)** The Respondent subsequent to the withdrawal of the Company Petition defaulted in making payment towards the second tranche as per consent term dated 05th August, 2021. The Appellant filed an I.A. No. 3196 of 2022 seeking revival of the Company Petition which has been rejected on 21.12.2022 by Adjudicating Authority observing that when the Company Petition was withdrawn after settlement there is

no specific provision anywhere in the Code for reopening of the Company Petition.

(iv) Challenging the Impugned Order, this Appeal has been filed.

3. Mr. Krishnendu Datta, Learned Sr. Counsel appearing for the Appellant submits that consent term dated 05th August, 2021 itself clearly stipulated that in event of default, the settlement shall be cancelled and company petition can be revived. It is submitted that the mere fact that no liberty was granted in the order passed in 12-A withdrawal application on account of settlement is inconsequential. The consent term itself provided for revival in event of default and the Adjudicating Authority ought to have permitted revival of the Company Petition.

4. Learned Counsel appearing for the Respondent refuting the submissions of Learned Sr. Counsel for the Appellant submits that there being no liberty granted by the Adjudicating Authority in its order dated 09.02.2022, no error has been committed by the Adjudicating Authority in rejecting the Application for revival.

5. Learned Counsel for the parties have relied on various judgments in support of their respective submissions.

6. We may first notice certain clauses of the consent term dated 05th August, 2021 on which settlement the Company Petition under Section 7 was withdrawn. Consent Term was filed in the Company Petition. Clause 4 of the Consent Term provides for settlement amount and the payment plan. Clause 4 of the Consent Term is as follows:

“4. (i) NLL and NLHPL have approached ACRE as the Lender/Debenture holder on record currently with an offer to make payment of an amount of Rs. 339 crores in

full and final settlement of its dues to ACRE (hereinafter “Settlement Amount”), which shall be paid to ACRE as per the dates and tranches set out below:

<i>Tranch</i>	<i>Amount</i>	<i>Payment Date</i>
<i>1</i>	<i>10 crores</i>	<i>NLL and NLHPL have handed over the following two pay orders to ACRE with respect to payment of an amount aggregating to INR 10 crore: (1) Pay order dated 03 August 2021 bearing no. 665692 for an amount of INR 5 Crore; and (2) Pay order dated 04 August 2021 bearing no. 665696 drawn on Union Bank of India for an amount of INR 5 crore</i>
<i>2</i>	<i>40 crores</i>	<i>On or before the expiry of 6 months from the date of these Consent Terms</i>
<i>3</i>	<i>100 crores</i>	<i>On or before the expiry of 12 months from the date of these Consent Terms</i>
<i>4</i>	<i>189 crores</i>	<i>On or before the expiry of 18 months from the date of these Consent</i>

		<i>Terms</i>
<i>Total</i>	<i>389 crores</i>	

NLL and NLHPL agree, declare and confirm that the Payment Date referred to above, means the date by which the entire amount towards the respective Tranches shall be credited to the Designated Account of ACRE as specified hereinbelow (Annexure 1). NLL and NLHPL jointly and severally guarantee and undertake the payment and performance of the Settlement Amount set out in the table hereinabove, as and when the same shall become due and payable.

(ii) The parties agree and confirm that NLL and NLHPL shall have a right to make payment of an amount of Rs. 256 crores under Tranche 2 (instead of Rs. 100 crores as stipulated in clause 4(i) above) on or prior to the expiry of 12 months from the date of these Consent Terms, which amount shall be in addition to the amounts paid/payable under Tranches 1 and 2. In such an event, the total amounts paid under Tranches 1, 2 and 3 aggregating to Rs. 306 crores shall constitute the total Settlement Amount (instead of Rs. 339 crores)."

7. Clause 7 provided about event of defaults. One of the events was, default in making payment of any of the tranches mentioned in Clause 4 above. In clause 10 of the Consent Term, there was undertaking on behalf of Respondent about revival of the Company Petition in case of default. Clause 10 is as follows:

"10. NLL, NLHPL and the Promoter (Dharmesh Jain) agree, declare and confirm that time is of the essence of these terms and any deviation/default in adhering to the dates mentioned above, may be treated as an event of default and in such an event, ACRE shall be entitled

to revive the present Company Application or initiate any other action that may accrue to it under law and the ACRE shall also be entitled to recover all expenses incurred in that regard.”

8. Now we come to the Order dated 09.02.2022 by which order the Adjudicating Authority has permitted withdrawal of Company Petition. The Order dated 09.02.2022 is as follows:

“Counsel for the Resolution Professional, Mr. Amit Tungare, counsel for the Secure Financial Creditor, Mr. Darshit Dave and counsel for the Respondent, Mr. Suri Shikhil Shiv are present through virtual hearing.

I.A. 2938/2021

The above I.A. is filed by the IRP under section 12A of the Code for withdrawal of the CIRP order dated 05th August, 2021 passed against the Corporate Debtor in view of the settlement entered into between the Financial Creditor and the Corporate Debtor by executing a separate consent terms. It is the submission of the IRP that no COC has been constituted so far, in view of the stay granted by the Hon’ble NCLAT and the IRP has received the entire fee and expenses in the above matter and prayed for allowing the above Application.

Mr. Darshit Dave representing one of the Secured Financial Creditor M/s. SREI Equipment Finance Limited who has filed separate Company Petition in CP No. 8091/2021 on the file of Court No. V Mumbai Bench opposed, allowing the above Application on the ground that the above Company Petition filed by them is pending.

The Objection of the Objector is not legally sustainable as he has already filed Company Petition and pursuing his remedy against the Corporate Debtor.

Mr. Suri Shikhil Shiv representing individual home buyers Mr. Girish Manghwami and Mr. Deepak Manghwani opposed, allowing the above Application on the ground that his clients have a claim of around 5 crores against the Corporate Debtor.

The objection of the individual home buyers is also not legally sustainable as they are at liberty to initiate appropriate legal action against the Corporate Debtor by filing separate Company Petition if they meet the eligibility criteria under section 7 of the Code. Therefore, the objection of both the objectors is legally not sustainable and liable to be rejected.

After hearing the submissions on both sides and upon perusing the record, this Bench is of the considered opinion that the above Company Petition deserves to be allowed disregarding the above objections as the Corporate Debtor has entered into settlement with the Financial Creditor at whose behest the above Company Petition is filed. Accordingly, the above I.A. is allowed and the CIRP admission order dated 05th August, 2021 passed by this Bench against the Corporate Debtor is withdrawn by releasing the Corporate Debtor from all rigours of moratorium.”

9. A perusal of the Order indicates that a separate consent terms were executed between the parties and the consent term was brought on record along with the Application.

10. Learned Counsel for the Appellant has placed reliance on Judgment of this Tribunal in C.A. (AT) Ins. No. 103 of 2022, **Pooja Finlease v. Auto**

Needs (India) Pvt. Ltd. In the above case also, on consent terms, the company petition was withdrawn and when default was committed, application was filed for revival of the company petition which was rejected.

This tribunal laid down following in paragraph 7, 8 and 9:

“7. The Consent Terms in Clause 8 as has been extracted above clearly entitle the Financial Creditor to revive the Section 7 petition in event any default of the terms of the Consent Terms. Further, the order dated 05.02.2020 cannot be read as an order by which Consent Terms has not been taken on record when by the said order application filed alongwith the consent terms under Rule 11 of NCLT rules, 2016 was taken on record and was allowed. When the application was allowed in terms of the consent terms, Clause 8 itself shall be treated to be part of the order which shall entitle the Financial Creditor to revive the petition in the event of any default.

8. Judgment of this Tribunal which has been relied by the Respondent in ‘Krishna Garg and Anr. vs. Pioneer Fabricators Pvt. Ltd.’ was a case where neither settlement terms were filed nor the same were brought on the record. The facts in the present case are distinguishable from the above case as Consent Terms were filed and also were taken on record by the Adjudicating Authority. When the Adjudicating Authority allowed the application filed, the Consent Terms were also taken record and the Financial Creditor was fully entitled to seek revival of the Section 7 petition in event of default of consent terms.

9. We, thus, allow this Appeal and set aside the impugned order dated 10.11.2021 and revive the Section 7 petition i.e. C.P. (IB) No. 2340 of 2019 which may be heard by the Adjudicating Authority in accordance with law.”

11. The above Judgment fully supports the submission of the Appellant.

12. The Adjudicating Authority has also referred to the Judgment of this Tribunal in **Himadri Foods Ltd. v. Credit Suisse Funds AG**, C.A. (AT) Ins. No. 1060 of 2020, which was distinguished by the Adjudicating Authority. The Adjudicating Authority held that the liberty was granted by the Adjudicating Authority hence the case is distinguishable.

13. We do not find any distinguishing feature of the Judgment in **Himadri Foods Ltd.** In the above case also, consent terms contemplated event of default and gave liberty to report the matter. In the present case also, Company Petition was disposed of taking settlement on record and when Clause 10 of the Settlement specifically contains an undertaking by the Corporate Debtor for revival, corporate debtor can not be allowed to go back from its commitment as was made in the settlement.

14. Learned Counsel for the Respondent has placed reliance on judgement of this Tribunal in C.A. (AT) Ins. No. 92 of 2021, **Krishna Garg & Anr. v. Pioneer Fabricators Pvt. Ltd.** In the above case, this Tribunal in paragraph 2 has clearly recorded that neither the settlement term was filed nor the same were brought on record. Paragraph 2 of the Judgment is as follows:

“2. Learned counsel for the Appellant has drawn our attention to order dated 27th June, 2019 passed in CP IB-1067/(ND)/2018 filed by the Appellants under Section 7 of the ‘I&B Code’ which brings it to fore that the CIRP was commenced against the Corporate Debtor on 12th June, 2019 with appointment of Interim Resolution Professional (IRP) and slapping of Moratorium. However, a settlement was arrived at between the parties, in pursuance

*whereof the Appellants received some post dated cheques. It appears that it was at the instance of the parties that CIRP was sought to be terminated. The Adjudicating Authority banking upon the judgment of the Hon'ble Apex Court in “**Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.- 2019 SCC OnLine SC 73**” allowed the Appellants – Financial Creditors to withdraw the application and terminated the CIRP. It further emerges from the order that neither the settlement terms were filed nor the same were brought on record and incorporated in the order of the Adjudicating Authority with liberty to revive/restore the CIRP in the event of the Corporate Debtor not adhering to the terms of the settlement or postdated cheques issued to Appellants being dishonored.”*

15. In the present case, consent terms were brought on record since they were part of the Application under Section 12A of the Code which was noticed in the Order of the Adjudicating Authority itself. When consent term itself contains clause for revival, non-giving liberty specifically for revival by the Adjudicating Authority is inconsequential.

16. Another judgment which has been relied on by Learned Counsel for the Respondent is C.A. (AT) Ins. No. 294 of 2021-**SRLK Enterprises LLP v. JALAN Transolutions (India) Ltd.** In the above case, the Adjudicating Authority's Order which was under challenge was noted in paragraph 5. It is useful to extract paragraph 5 of the Judgment which is to the following effect:

“5. The Impugned Order is a short Order which reads as under: “IA/977/2021: The Applicant has filed this Application under Section 60(5) of the IBC Code r/w

Rule 11 of the NCLT Rules. Heard Ld. Counsel appearing for the Applicant and perused the averment made in the Application.

The Ld. Counsel appearing for the Applicant submitted that this Adjudicating Authority vide order dated 09.05.2019 had terminated the CIRP and the file was consigned to the records. He further submitted that the said order was passed in terms of the settlement arrived in between the parties. He further submitted that in the meantime, the Corporate Debtor has violated the terms and conditions of the settlement. Therefore, this Adjudicating Authority under Rule 11 of the NCLT Rules has power to revive the original application. He also placed reliance on the decision of the Hon'ble Supreme Court in Civil Appeal No. 324/2020 as well as decision of the NCLT, Mumbai Bench in M.A. No. 3516 of 2019.

In the light of submissions, we went through the decision on which the Petitioner has placed reliance as well as averments made in the Application. We notice that vide order dated 09.05.2019 passed by this Bench, the petition (IB)- 1721(ND)2018 was withdrawn at the instance of the Financial Creditor and the CIRP was terminated. We further notice that no liberty was given to the Petitioner to revive the application. So, considering this, we are of the considered view that since this Adjudicating Authority was not the part of the settlement arrived in between the parties, rather the settlement was arrived outside the Tribunal. It was on the submissions of the Applicant, the main petition was dismissed as withdrawn and the CIRP was terminated. Therefore, we have no reason to recall our earlier order.

Accordingly, the prayer of the Applicant to recall the earlier order is hereby rejected.

Accordingly, the IA is DISMISSED.””

17. The adjudicating Authority while rejecting the revival application as noted above observed that the settlement was arrived in between the parties outside the Tribunal. In the present case, the Settlement was arrived and submitted before the Adjudicating Authority which was noticed in the Order dated 09.02.2022 hence the Judgement of **SRLK Enterprises LLP** is clearly distinguishable from the facts of the present case. In paragraph 6 of the Judgement, following has been observed:

“6. Going through the Impugned Order dated 26th February, 2021 which seeks to recall the Order dated 09th May, 2019 which also we have seen, we find it difficult to take a different view from the Adjudicating Authority. There is difference between withdrawal simplicitor making statement that parties have settled. It is different when bringing the settlement on record, and making it a part of the Order of withdrawal liberty is taken and brought on record to restore the proceedings in case of default. IBC is not a recovery proceeding where because the money or part of it has not come, the party may repeatedly come to the Court. Adjudicating Authority has rightly observed that no liberty to revive was there and so declined to interfere. The Appellant would be at liberty to pursue other remedies in law”

18. What has been observed in paragraph 6 itself makes a clear distinction between withdrawal simplicitor making statement that parties have settled and bringing on record settlement. This Tribunal itself has

recognized two separate categories. Present case falls in the category where settlement has been brought on record. Thus, Judgement of this Tribunal in **SRLK Enterprises LLP** does not help the Respondent.

19. We thus in the facts of the present case are of the view that Adjudicating Authority committed error in rejecting the revival application 3196 of 2022 when the consent term itself contemplates a clause for revival in event of default and default having been committed by the Corporate Debtor, rejection of revival is to deny the Financial Creditor rightful remedy. Non-mention of specific liberty in the Order is inconsequential in view of the clear terms in the settlement which was the basis of withdrawal of Company Petition.

20. We thus are of the view that the Adjudicating Authority committed error in rejecting I.A. No. 3196 of 2022. Sufficient cause has been made out for allowing this Appeal and setting aside the Order dated 21.12.2022. Consequently, I.A. No. 3196 of 2022 is allowed and the C.P. (IB) No. 4412(MB)/2019 is revived before the Adjudicating Authority to proceed in accordance with law.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi
15th May, 2023

Basant B.