NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1490 of 2023 &
Interlocutory Application No. 5343 of 2023

(Arising out of Order dated 21.08.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench in IA No.458/JPR/2023 in CP No.(IB)-17/9/JPR/2022)

IN THE MATTER OF:

Ankit Traders Through Sole proprietor
Mr. Ankit Kumar Goel
251, Narkulaganj,
Nai Basti
Baireilly, Uttar Pradesh-243005. ... Appellant

Vs

Supershine Agrofoods Private Limited
7-55-56, Agrofood Park,
Matdhya Industrial Area,
Alwar, Rajasthan – 301030. ... Respondent

Present:

For Appellant: **Mr. Kunal Godhwani, Advocate**

For Respondent: **Appeared but not marked appearance**

J U D G M E N T

ASHOK BHUSHAN, J.

Interlocutory Application No. 5343 of 2023

This IA has been filed by the Appellant for condonation of 14 days delay in filing of the Appeal. Considering the submissions made on behalf of the Appellant and being satisfied with the reasons mentioned in the IA, the delay of 14 days in filing the present Appeal is hereby condoned. The I.A. No.5343 of 2023 is disposed of.

Company Appeal (AT) (Insolvency) No. 1490 of 2023

This Appeal has been filed by the Operational Creditor, challenging the order dated 21.08.2023, by which order, the Adjudicating Authority allowed Application under Section 12A, permitting withdrawal of Section 9 Application being CP (IB)-17/9/JPR/2022. The Appellant is aggrieved only to the extent that Adjudicating Authority while permitting withdrawal of Section 9 Application did not grant liberty to the Appellant to reapproach the Adjudicating Authority in the event of breach of Memorandum of Understanding ("**MoU**") dated 07.07.2023. Following prayers are made by the Appellant in the Appeal:

> "a) Allow the present appeal;
>
> b) Kindly, set aside the Impugned Order dated 21.08.2023 to the extent it does not grant liberty to the Appellant to approach the Hon'ble Adjudicating Authority in the event of breach of the Memorandum of Understanding dated 07.07.2023.
>
> c) Pass any other appropriate orders as the Hon'ble Appellate Tribunal deems fit."

2. Brief facts of the case are that Section 9 Application was filed by the Operational Creditor, claiming default of operational debt amounting to Rs.1,85,00,668/- plus interest @ 12.75% from 07.11.2021 till the repayment of the entire debt. In Section 9 Application, a MoU was entered between the parties dated 07.07.2023, on the basis of which the impugned order was passed, allowing the withdrawal of Section 9 Application under

Section 12A. In the impugned order, the Adjudicating Authority, while permitting withdrawal, also directed "*we are not inclined to grant any further liberty to the Applicant to re-approach this Adjudicating Authority for the cause of action against the same Corporate Debtor for the purpose of recovery of its operational dues*". Aggrieved against refusal to grant liberty, this Appeal has been filed.

3. Learned Counsel for the Appellant challenging the order contends that after the settlement MoU dated 07.07.2023, only payment received from the Corporate Debtor was Rs.50 lakhs and the rest of the payment has not been paid as per settlement, which was for Rs.1,85,00,000/-. It is submitted that the Corporate Debtor has also not executed Sale Deed in favour of first party as per MoU, nor made the payment of the amount within six months with interest of 12% per annum. It is submitted that Adjudicating Authority ought not to have pass an order refusing the liberty, since the said occasion has not arisen when the order was passed on 21.08.2023 and the liberty to revive ought not have been foreclosed. It is submitted that by not honouring the MoU, the Corporate Debtor has breached the settlement and cannot take benefit of its own wrong.

4. The learned Counsel for the Respondent refuting the submissions submits that MoU was entered between the parties and for breach of terms of MoU, no Application can be filed to revive Section 9 proceedings.

5. We have heard learned Counsel for the parties and perused the record.

6. Learned Counsel for the parties have placed reliance on judgment of this Tribunal in support of their respective submissions, which we shall refer to while considering the submissions in detail.

7. The Adjudicating Authority in the impugned order while allowing the Application under Section 12A and dismissing Section 9 Application as withdrawn, made following observations:

> "Further, it is clarified that the Applicant has undertaken not to pursue this matter on the basis of the settlement reached between the parties. It is a sound principle of law that filing of an Application includes its withdrawal consequently the present Application has been filed under Section 12A of the Code, 2016 whereby the Applicant with his prudence and knowledge agreed to the withdrawal as the dues have been satisfied between the parties therefore, we are inclined not to grant any further liberty to the Applicant to re-approach this Adjudicating Authority. for the cause of action against the same Corporate Debtor for the purposes of recovery of its operational dues (Emphasis Supplied)"

8. The Adjudicating Authority in the above order has observed that the Applicant has undertaken not to pursue this matter on the basis of the settlement reached between the parties. We, thus, have to look into the MoU to find out as to what was undertaken by the Operational Creditor. In the MoU dated 07.07.2023, which is filed at Annexure A-3, after noticing few facts, the parties under the MoU entered into following terms and conditions:

"**NOW THE MOU WITNESSETH AS UNDER:**

1. That the Second Party has agreed to pay a total amount of Rs.1,85,00,000/- (Rupees One Crores Eighty Five Lakhs only) to the First Party towards full and final settlement of all its claims towards it. Against the claimed amount following payments have been made by the Second Party:

   a) Rs.25,00,000/- (Rs.Twenty-Five Lakhs Only) on 30.06.2023 through RTGS vide ICICIR52023063000563570 by Mrs. Smriti Khandelwal wife of Mr. Ankit Khandelwal and

   b) Rs.25,00,000/- (Rs. Twenty-Five Lakhs Only) on 30.06.2023 through RTGS vide ICICIR520236300056285 by Mrs. Smriti Khandelwal wife of Mr. Ankit Khandelwal.

   c) For the payment of remaining settlement amount of Rs.1,35,00,000/- (Rupees One Crores Thirty-Five Lakhs Only) it was agreed between both the parties that either:-

      - Second party shall transfer their all rights in the property namely "Plot No. F-56, Agrofood Park, MIA, Alwar Tehsil, Rajasthan" by execution of sale deed in favour of first party against payment of remaining settlement subject to the receipt of NOC from State Bank of India, Alwar Branch & RIICO within month of execution of this MOU.

OR

- Second Party will do payment of remaining settlement amount within 6 months along with interest thereon @ 12% per annum compounding monthly. Further, second party shall execute an agreement to sell pertaining to the property namely "Plot No.F-57, Agrofood Park, MIA, Alwar Tehsil, Rajasthan" in favour of first party to secure the payment of remaining amount of first party.

2. That both the parties undertake and agree herein that after execution of this MOU, the parties shall jointly file an application with the approval of Committee of Creditors of Second Party before the Hon'ble National Company Law Tribunal, Jaipur for withdrawal / closure of Corporate Insolvency Resolution Process against the Corporate Debtor Company Petition bearing No.17/JPR/2022.

3. That the Second Party shall bear the fee and expenses or any other incidental expenses of the Interim Resolution Professional as decided by the Hon'ble National Company Law Tribunal, Jaipur.

4. Each party thereto represents and warrants that the person executing this MoU on its behalf has express authority to do so, and in so doing, binds the parties hereto.

5. That the present Memorandum of Understanding is confidential and binding on all the parties as both the parties agrees that none of them terminate or deviate from any of the terms of this MoU.

6. No variation or modification of this MoU shall be effective unless in writing and signed by on or behalf of each of the Parties.

IN WITNES WHEREOF both the parties have executed this MoU on the 7th day of July 2023 as mentioned above in the presence of witnesses mentioned hereinafter."

9. When we look into the MoU, Clause-2 of the MoU only states that both the parties undertake and agree that after execution of the MoU, the parties shall jointly file an application with the approval of the Committee of Creditors ("**CoC**") for withdrawal/ closure of Corporate Insolvency Resolution Process ("**CIRP**"). There was no undertaking by the Operational Creditor that Operational Creditor shall not pursue this matter on the basis of settlement reached between the parties. What was undertaken that in view of the settlement between the parties an application shall be filed for withdrawal/ closure of CIRP. The said settlement made in paragraph-2 of the terms and conditions as noted above did not deal with any future contingencies, which would arise in future, nor Operational Creditor relinquished any of its right arising out of its subsequent event. We, thus, are of the view that very basis of denial to grant further liberty to the Appellant to reapproach the Adjudicating Authority was fallacious, as the MoU only states that in view of the agreement between the parties, both the parties shall file an application for withdrawal of Section 9 Application, for which no exception can be taken and the Adjudicating Authority rightly allowed the application for withdrawal. However, the MoU cannot be read to mean that the Operational Creditor has relinquished its right to make

any further application before the Adjudicating Authority in event any default is committed by the Corporate Debtor. The MoU to the contrary contained a condition that MoU is confidential and binding on the parties and none of them terminate or deviate from any of the terms of the MoU. Clause-5 of the MoU, which we have already extracted above, indicates that Corporate Debtor also bind itself with the terms and conditions of the MoU. The Adjudicating Authority having declined to grant any liberty, the Appellant aggrieved by the said direction, has come up in this Appeal. We are of the view that there was no occasion for declining any further liberty to the Operational Creditor to reapproach to the Adjudicating Authority at the stage when Section 9 Application was withdrawn on the basis of Section 12A Application.

10. The learned Counsel for the Appellant has placed reliance on the judgment of this Tribunal in ***Vivek Bansal vs. Burda Druck India Pvt. Ltd. – (2020) SCC OnLine NCLAT 582***, where this Appellate Tribunal while noticing the agreement between the parties, disposed of the Appeal in terms of the Settlement Agreement and granted liberty to revive the CIRP before the Adjudicating Authority. In paragraph-5 of the judgment, this Tribunal held following:

> "**5.** We make it clear that in the event of default not adhering to the terms of 'Settlement Agreement' as regards the payment of the outstanding instalments, the 'Operational Creditor' shall be at liberty to seek revival/restoration of the 'corporate insolvency

> resolution process' proceedings before the Adjudicating Authority."

11. Another judgment relied by the Appellant is judgment in ***Company Appeal (AT) (CH) (Insolvency) No.146 of 2021 – M/s ICICI Bank Ltd. vs. M/s. OPTO Circuits (India) Ltd.****i,* where on the basis of terms of settlement, the Adjudicating Authority though allowed the application, however granted liberty to file fresh Company Petition instead of giving liberty to resume the CIRP, which order was challenged. This Tribunal, noticing the prayer made in the Application filed by the Applicant, where specific liberty was prayed for to resume the CIRP in case of non-compliance of terms of OTS, has allowed the Appeal and modified the order of Adjudicating Authority while granting the liberty to revive the CIRP.

12. In the MoU, between the parties, neither there was any specific prayer made for revival of the CIRP, nor there was any statement that Operational Creditor has relinquished its right to revive the CIRP. The learned Counsel for the Respondent has relied on judgment of this Tribunal in ***Amrit Kumar Agrawal vs. Tempo Appliances Pvt. Ltd. – (2020) SCC OnLine NCLAT 1202***. In the said case, Section 7 Application was dismissed on the ground of default in payment of Settlement Agreement holding that the debt does not come under the definition of financial debt. In the above case, MoU was entered on 22.09.2017 between the Appellant and the Principal Borrower, where Respondent stood as Guarantor. Since, cheques issued by Principal Borrower, were dis-honoured on presentation,

the Respondent as guarantor came forward to pay the outstanding amount of Rs.86 lakhs with interest and issued two cheques in consideration of such liability. The question was whether as per the terms of Settlement, the obligation to pay the outstanding liability of Rs.86 lakhs together with interest on the part of Respondent constituted a financial debt. The issue for consideration has been noticed in paragraph-3 of the judgment, which is follows:

> "**3.** ....The issue for consideration is that whether in terms of this agreement the obligation to pay the outstanding liability of Rs. 86 lakh together with interest on the part of Respondent constituted a 'financial debt' within the purview of Section 5(8) of the 'I&B Code' and whether the Appellant can be treated as 'Financial Creditor' entitled to trigger Corporate Insolvency Resolution Process as Financial Creditor against the Respondent. Section 5(8) of the 'I&B Code' is reproduced herein below: ....."

13. In the above background, this Tribunal held that mere obligation to pay does not bring the liability within the ambit of 'financial debt'. The above case is clearly distinguishable from the facts of the present case. In the present case, MoU was entered between the parties in proceedings under Section 9, with regard to which default was committed by the Corporate Debtor. The said judgment has no application in the present case.

14. In view of the foregoing discussions and our conclusions, we are of the view that order of the Adjudicating Authority insofar as it declines

liberty to the Applicant to reapproach the Adjudicating Authority is set aside. The Appeal is partly allowed to the above extent, setting aside the direction of the Adjudicating Authority declining the liberty. We grant liberty to the Operational Creditor to revive Section 9 Application before the Adjudicating Authority by filing an appropriate Application in accordance with law. The Appeal is disposed of accordingly. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

28th February, 2024

Ashwani