

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT- I
KOLKATA**

**Inv. P(IB) No. 10/KB/2023
and
Inv. P(IB) No. 11/KB/2023
in
Rest. App. (IB) No. 15/KB/2021
in
C.P(IB) No. 49/KB/2021**

A Petition under section 9 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:-

Polymet SA (S) Pte. Limited

... Operational Creditor

versus

Shree Tel Fab Industries Private Limited

... Corporate Debtor

And

Inv. P(IB) No. 10/KB/2023

*An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016
and Rule 11 of the National Company Law Tribunal Rules, 2016.*

In the matter of:-

Sanjay Goswami

... Applicant

And

Inv. P(IB) No. 11/KB/2023

*An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016
and Rule 11 of the National Company Law Tribunal Rules, 2016.*

In the matter of:-

Green Valley Steel Industries

... Applicant

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT- I

Inv. P(IB) No. 10/KB/2023 & Inv. P(IB) No. 11/KB/2023
in C.P(IB) No. 49/KB/2021

Date of pronouncement: 29 February 2024

Coram:

Shri Rohit Kapoor : **Member (Judicial)**
Shri Balraj Joshi : **Member (Technical)**

Appearances (through video conferencing):

For the Operational Creditor : 1. Ms. Urmila Chakraborty, Advocate
2. Ms. Sweta Mohanty, Advocate
For the Corporate Debtor : 1. Mr. Joy Saha, Senior Advocate
2. Ms. Rashmi Bothra, Advocate
For the Applicant in Inv. P (IB) No. 10/KB/2023 : 1. Mr. Sourojit Dasgupta, Advocate
2. Mr. Tanmay Das, Advocate
For the Applicant in Inv. P (IB) No. 11/KB/2023 : 1. Mr.. Zeeshan Haque, Advocate

COMMON ORDER

Per Balraj Joshi, Member (Technical)

1. The Court convened through hybrid mode.
2. Both the petitions are being considered together as the prayers sought in the Intervention Applications are analogous.

Inv. P(IB) No. 10/KB/2023

3. Submissions of the learned Counsel appearing for the Applicant

3.1. This Intervention Petition has been filed by Sanjay Goswami, under section 60(5) of the Insolvency and Bankruptcy Code (“Code”) seeking the following reliefs:

- a. Leave be granted to the applicant to intervene in Restoration Application (IBC) No. 15/JB/2021 in C.P.(IB) No. 49/KB/2021 [Polymet SA (S) Pte Limited vs. Shree Tel Fab Industries Private Limited];*
- b. The previously filed Inv. Petition (IBC) No. 6/KB/2023 bearing an inadvertent error be disposed off;*

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT- I**

**Inv. P(IB) No. 10/KB/2023 & Inv. P(IB) No. 11/KB/2023
in C.P(IB) No. 49/KB/2021**

- c. A restoration application being Restoration Application (IBC) No. 15/KB/2021 for restoring the petition being C.P. (IB) No. 49/KB/2021 be dismissed;*
- d. Stay of all further proceedings in a restoration application being Restoration Application (IBC) No. 15/KB/2021 for restoring the petition being C.P. (IB) No. 49/KB/2021, pending disposal of the present application;*
- e. Ad interim order in terms of prayers above;*
- f. Such further order and/or orders be made, and direction be given as the Hon'ble Court may deem fit and proper.*

3.2. The learned Counsel submitted that the Applicant is a 12.45% shareholder of the Corporate Debtor.

3.3. It is further submitted that the Restoration Application is a collusive application. In support of this plea, the following averments as made in the Inv. Petition are reproduced as under:

- a. Even though the debt was primarily barred by limitation, a document dated 15th February 2020 has been produced by the Operational Creditor, allegedly signed by the respondent no.4, wherein, the company had purportedly agreed to pay a time barred claim. The contents of the aforementioned document are also unnatural.
- b. In the reply affidavit to the petition, the said purported document dated 15th February 2020 has been claimed to be a forgery by the company.
- c. In the said situation, the company ought to have contested the matter. However, with ultimate motive and for the purposes mentioned above, the company has allegedly sent letter dated 15th February 2020.
- d. The company entered into Terms of Settlement dated 28th August 2021. The company has promised to make payment of USD 1,72,000 in the said purported Terms of Settlement. The said purported Terms of Settlement appears to have been executed by the purported directors of the company. Upon checking the records of the Operational Creditor, it was discovered that the alleged director and signatory, Shyama Prasad

Banerjee is in fact, not a director. There is no cause or reason why this document could have been executed.

- e. On enquiry by the petitioner, no board resolution could be referred to by the respondent nos.2 to 10 of the application filed under section 241-242 of the Companies Act, 2013 which is registered as C.P. No. 374/2022, authorizing the purported Terms of Settlement dated 28th August 2021.
- f. In the said circumstances, it appears that Restoration Application No. 15/KB/2021 and C. P. No. (I.B) 49/KB/2021 is an attempt on the part of the respondent nos. 2 to 10 of the application filed under section 241-242 of the Companies Act, 2013 which is registered as C.P. No. 374/2022, to wrongfully send the company into insolvency.
- g. In view of the fact that Restoration Application No. 15/KB/2021 and C.P.(IB) No. 49/KB/2021 is a collusive litigation and is a fraud perpetrated on this Adjudicating Authority by Mr. Ajay Kumar Agarwala and Mr. Vikash Kumar Agarwala, wrongfully attempting to exercise control over the company, it has become necessary for the applicant to intervene in the present proceedings.

Inv. P(IB) No. 11/KB/2023

4. Submissions of the learned Counsel appearing for the Applicant

4.1.This Intervention Petition has been filed by Green Valley Steel Industries, under section 60(5) of the Insolvency and Bankruptcy Code (“Code”) seeking the following reliefs:

- a. *Allow the present application and implead the applicant as respondent in the above petition being Restoration Application (IB) No. 15/KB/2021 in CP (IB) No. 49/KB/2021;*
- b. *In the alternative the applicant be allowed to intervene in the above petition being Restoration Application (IB) No. 15/KB/2021 in CP (IB) No. 49/KB/2021 for its proper decision in the interest of justice, equity and fair play;*
- c. *Pass such further Order and/or orders and/or direction and/or directions as the Hon’ble Tribunal may deem fit and proper.*

- 4.2. It is submitted that the Applicant is the major shareholder i.e. 61.59% share in the Corporate Debtor.
- 4.3. It is submitted that *vide* an order dated 30 August 2021, the main underlying Company Petition was withdrawn in terms of the settlement agreement dated 28 February 2021. Thereafter the Operational Creditor filed a Restoration Application for revival of the main Company Petition.
- 4.4. On 12 May 2022, when the restoration application was listed for hearing, the learned Counsel submitted that Corporate Debtor submitted that as soon as permissions are received from the RBI, the payments will be made to the Operational Creditor.
- 4.5. The learned Counsel submitted that the alleged settlement entered between the Operational Creditor and the Corporate Debtor represented by 4.28% share of the Corporate Debtor cannot bind the other shareholders of the Corporate Debtor. It is submitted that the settlement agreement is not supported with any resolution of the Board of Directors of the Corporate Debtor.
- 4.6. Hence, there is an act of collusion between the Operational Creditor and the Corporate Debtor.

5. *Submissions of the learned Counsel appearing for the Corporate Debtor*

- 5.1. It is submitted that Mr. Vikash Kumar Agarwala resigned as a director and the date of resignation has been updated in the relevant Form No. DIR-12, hence it was not possible for him to issue notice on 15 February 2020.
- 5.2. The Learned Counsel further submitted that the Corporate Debtor has utmost bonafide intentions with the regard to entering into the Terms of Settlement with the Operational Creditor on 28 August 2021. Both of the Directors of the Corporate Debtor have jointly entered into the Terms of Settlement and agreed to pay USD1,72,000.00 as a final settlement of the claim to the Operational Creditor through recognised banking channels and no approval is required from the shareholders in this regard.
- 5.3. It is further submitted that no approval is required by the shareholders while settling a dispute with any third party by fulfilling its claim in amount of money and the decision of entering into an agreement can be made by the Board of Directors only.

6. The Operational Creditor has not filed a reply affidavit, but has argued the matter and also filed written notes, the arguments are same for both the Intervention Petitions.
7. *Submissions of the learned Counsel appearing for the Operational Creditor*
- 7.1. The Operational Creditor had filed the underlying Company Petition, which was disposed of by an order dated 30 August 2021 in respect of terms of settlement executed on 28 August 2021 by and between Operational Creditor and Corporate Debtor.
- 7.2. The Corporate Debtor failed to make any payment in terms of the settlement agreement, hence, the Operational Creditor filed an application in December 2021 for restoration of the company petition.
- 7.3. The restoration application is appearing on board of this Adjudicating Authority on and from 24 January 2022. In the said restoration application, from time to time orders and/or directions have been passed. The Corporate Debtor had been directed to pursue with Reserve Bank of India ("**RBI**") to get necessary approval expeditiously so that payment as agreed between the Operational Creditor and Corporate Debtor can be made in USD as per settlement.
- 7.4. Further the DGM, RBI, Patna was directed to be physically present before this Adjudicating Authority by an Order dated 07 December 2022. The Corporate Debtor also informed this Adjudicating Authority and placed on record an Order dated 25 November 2022 passed by the Hon'ble Patna High Court in respect of a writ petition filed by the Corporate Debtor against RBI, Patna.
- 7.5. The learned Counsel submitted that after all the aforesaid facts and events took place, both the applicants who are claiming to be a shareholders of Corporate Debtor has sought to intervene in the present proceeding in the year 2023, though fact remains that the restoration application has been pending adjudication since December, 2021 and many Orders have been passed therein.
- 7.6. The learned Counsel submitted that the intervention applications are not maintainable for the following reasons:

a. The applicant has no locus to intervene in a proceeding under the Code, at the preadmission stage. On such proposition the learned Counsel relied upon the following judgments:

i. ***Deb Kumar Majumder and Others Versus State Bank of India*** 2019 SCC OnLine NCLAT 26

paragraph 2 "We agree with the observations made by the Adjudicating Authority at the stage of application filed under Section 7 that no person has right to claim for hearing except the 'Corporate Debtor'. No other 'Financial Creditor' or 'Operational Creditor' or any other creditor is required to be heard except the 'Financial Creditor' who has filed an application under Section 9 of the I&B Code. The Adjudicating Authority is required to notice whether there is a 'debt' and 'default' committed by the 'corporate debtor' if the application under Section 7 is filed. On the other hand, if the application is under Section 9, the Adjudicating Authority is to notice whether there is a 'debt' and 'default' and whether there is a 'pre-existing dispute' "

ii. ***Vekas Kumar Garg Versus DMI Finance Pvt. Ltd. and Another***, 2021 SCC OnLine NCLAT 72, paragraphs 3, 4

"3. ...In an application under Section 7, the Financial Creditor and the Corporate Debtor alone are the necessary party and the Adjudicating Authority is, at the preadmission stage, only required to satisfy itself that there is a financial debt in respect whereof the Corporate Debtor has committed a default warranting triggering of CIRP. The Adjudicating Authority is required to satisfy itself in regard to there being a financial debt and default thereof on the part of the Corporate Debtor besides the application being complete as mandated under Section 7(5) of the 'I&B Code' and then pass an order of admission or rejection on merit as mandated under sub-section (4) of Section

7 within 14 days. No third party intervention is contemplated at that stage.

4. No lengthy hearing is warranted at the pre-admission stage nor can the dispute in regard to shareholding or inter se directorial issue be entertained."

iii. Prayag Polytech Pvt. Ltd. Versus Hind Tradex Ltd. 2019 SCC OnLine NCLAT 1029

paragraph 4 "...we are of the view that there is no requirement for intervention of any Directors or shareholders of the 'Financial Creditor' or any other party before admission of Application under Section 7 of IBC. If the application is admitted, it would be open to any aggrieved party to move before this Appellate Tribunal."

- b. The learned Counsel submitted that the applicants had previously filed intervention applications being IVN.P (IB) No. 1/KB/2023 and IVN.P (IB) No. 6/KB/2023, which were dismissed as withdrawn, with no liberty to file afresh. As no liberty were granted to the applicants, the applicants could not have filed the present intervention applications on the self-same cause of action. The learned Counsel placed reliance on the following judgments:

- i. **Sarguja Transport Service v. State Transport Appellate Tribunal (1987) 1 SCC 5** paras 7, 9 - Where a petitioner withdraws a petition filed by him without permission to institute fresh petition, the remedy under law is deemed to be abandoned by the petitioner. It would not be open to him to file a fresh petition under the same cause of action. The law confers upon a man no right or benefit which he does not desire. Whoever waives, abandons, or disclaim a right, will lose it. In order to prevent a litigant from abusing the process of court by instituting on the same cause of action again and again without any good reason, leave ought to be sought at the time of withdrawing for filing a petition on the self-same cause of action.

- ii. *Jacob Cherian v. K N Cherian - (1973) 43 Comp Cases 235 (Mad HC)*
 - iii. *Rajinder & Ors. v. Harsh Vohra - 2011 SCC Online Delhi 852*
 - iv. *Kalabati Debi v. Pratapi Debi - MANU/WB/1061/2010*
- c. In any event, the applicant has already filed a company petition under sections 241 and 242 of the Companies Act, 2013 which is pending adjudication before this Adjudicating Authority in respect of the Corporate Debtor. By filing the intervention applications, the applicants cannot convert insolvency proceeding against the corporate debtor into a derivative action and as such, on this ground the said application is liable to be rejected with exemplary costs

Analysis and Findings

8. Heard the Learned Counsel appearing on behalf of the Applicants in the Intervention Petition and the Operational Creditor and the Learned Senior Counsel appearing on behalf of the Corporate Debtor and perused the record.
9. In the first instance, we see that the Operational Creditor has raised an objection that the Intervenor had filed Intervention Application i.e. IVN.P (IB) No. 6/KB/2023 was filed previously which was dismissed as withdrawn, hence, the Intervenor is barred from filing the present Intervention Application for the same cause of action. Taking into note the contention raised by the Operational Creditor, it is important to note that the earlier Intervention Application had been filed seeking leave to intervene in the Company Petition i.e. C.P. (IB) No. 49/KB/2021 whereas the present Intervention Application has been filed praying for intervention in the Restoration Application. Therefore, the plea of the Operational Creditor is not correct and therefore the same deserves to be rejected, the judgment relied upon by the respondent will not apply to the facts of this case which are different as noted above.
10. Both the Intervention Applications have been taken together as the main prayer in both the applications is to allow the applicants to intervene in the Restoration Application (IB) No. 15/KB/2021 in CP (IB) No. 49/KB/2021.

11. With respect to the aspect of the maintainability of the Intervention Applications and the prayer to implead the Applicants as Respondents in the Restoration Application, we would like to refer to an order of this Adjudicating Authority in *Rishima SA Investments LLC (Mauritius), (2022) ibclaw.in 599 NCLT*, wherein this Adjudicating Authority has placed reliance on an order of the Hon'ble NCLAT and allowed the intervention petition.

*“5.2 Regarding the objection of non-applicant regarding maintainability of this application and reliefs sought therein, we would like to refer to the Hon'ble NCLAT's decision in the matter of **SREI Infrastructure Finance Ltd v. Right Tower Pvt. Ltd** [2018 SCC Online NCLAT 58], wherein, while upholding the right of any person to intervene, the following was held:*

“4. It is submitted that if any person initiates the Insolvency Resolution Process fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, the Adjudicating Authority may impose such person any penalty as stipulated under Section 65. According to 2nd Respondent (Intervener), any person can bring to the notice of the Adjudicating Authority that the Insolvency Resolution Process has been initiated by the person fraudulently and with malicious intent for the purpose other than resolution of insolvency. For bringing the aforesaid facts to the notice of the Adjudicating Authority it is not necessary that he should be a shareholder or a creditor or a debtor for the Corporate Debtor. It is submitted that the 2nd Respondent (Intervener) intends to bring certain facts to the notice of the Adjudicating Authority, to suggest that it is a case for initiating proceeding and to punish the concern person under Section 65.

5. We have heard Learned Counsel for the parties. The Corporate Insolvency Resolution Process can be initiated under Section 7 or Section 9 or Section 10 of I&B Code. Section 55 to 58 of 'I&B Code' also relates to initiation of Corporate Insolvency Resolution Process known as 'Fast Track Corporate Insolvency Resolution Process'. Section 65 of 'I&B Code' which relates to penal provision not only covers initiation of

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT- I

**Inv. P(IB) No. 10/KB/2023 & Inv. P(IB) No. 11/KB/2023
in C.P(IB) No. 49/KB/2021**

Corporate Insolvency Resolution Process under Section 7 or 9 or 10 but will also cover 'Fast Track Corporate Insolvency Resolution Process, if initiated under Section 55 to 58 of the 'I & B Code'.

6. Such being the position, any person may intervene any may bring the facts to the notice of the Adjudicating Authority. So far as the Respondent (Intervener) is concerned, we leave the question open for Adjudicating Authority to decide the issues as raised and alleged by the 2nd Respondent (Intervener) keeping in mind the question of maintainability of the application as raised by the Appellant."

12. Keeping in view the allegations raised with respect to collusion in the Intervention Applications and to consider the aspect *in toto*, we allow the Intervention Applications being Inv. P (IB) No. 10/KB/2023 and Inv. P (IB) No. 11/KB/2023 to the extent of intervention of the Applicants in the respective intervention applications as Respondents in the Restoration Application (IB) No. 15/KB/2021 in CP (IB) No. 49/KB/2021.
13. Allowing the said Intervention Applications shall not be construed as any opinion on the basis of merits of the allegations raised in the Intervention Applications.
14. A copy of the Restoration Application shall be served upon the Applicants in Inv. P (IB) No. 10/KB/2023 and Inv. P (IB) No. 11/KB/2023.
15. In view of the above directions, ***Inv. P (IB) No. 10/KB/2023 and Inv. P (IB) No. 11/KB/2023 are hereby disposed of.***
16. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
17. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.
18. File be consigned to the records.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Order signed on the 29th day of February 2024.