
ORDER

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

1. This is an application filed by the original Financial Creditor seeking restoration of the Company Petition bearing CP (IB) No.389/MB.II/2019 to file. The application had earlier been disposed of *vide* this Adjudicating Authority's order dated 29.08.2019 in terms of the settlement arrived at between the parties, after taking the settlement terms on record and making the terms part of the order.

Issue for determination

2. The short question that arises for consideration in the present Application is whether the Applicant/Financial Creditor is entitled to seek restoration of the company petition that has already been disposed of, and whether the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 (*the Code*), has the power to do so.

Terms of settlement arrived at between the parties earlier, and orders passed thereon by the Adjudicating Authority

3. The factual matrix of the present Application would not be complete without examining the Deed of Settlement whose date is mentioned as 23.07.2019 in the order dated 29.08.2019 passed by the Adjudicating Authority. The salient features are extracted below: -

(2) Acknowledgement of Debt: The Second Party (*Himadri Foods Limited*) unconditionally agrees and acknowledges that –

- a. The First Party (*Credit Suisse Funds AG*) has duly disbursed a total amount of USD 1,310,000 to the Confirming Party (*SK Enterprises Limited*), which is a wholly owned subsidiary of the Second Party. The Second Party has executed corporate

guarantee as security for the said loan. The Second Party and the Confirming Party have been unable to make repayments under the Financing Arrangement and the Second Party (*Himadri Foods Limited*) as corporate guarantor is liable to make payments to the First Party under the corporate guarantee;

b. A total amount of USD 539,280/Rs.3,77,49,599/- is currently outstanding as on date of execution of the Deed of Settlement and the same is due and payable to the First Party by the Second Party.

(3) Payment Obligations: That in full settlement of the dispute between the parties, the Second Party has unconditionally agreed to make payment or arrange for making payment of the Total Outstanding Amount to the First Party in stages – (i) an upfront payment of Rs.30,00,000/-; (ii) the second tranche of Rs.1,00,00,000/- on or before 31.10.2019; (iii) the remainder of Rs.2,20,00,000/- in twenty-six monthly instalments commencing from 15.12.2019.

(4) Revival of CP (IB) No.389/2019: The parties agree and acknowledge that subject to receipt of the complete and timely payments, the First Party shall withdraw the Company Petition bearing CP (IB) No.389/2019 filed before this Adjudicating Authority against the Second Party. Provided however that the Petition shall stand revived and admitted on the occurrence of events of default, as defined in clause 5.1 and 5.2 of the Deed of Settlement.

4. In the order dated 29.08.2019 passed by the Adjudicating Authority, the Adjudicating Authority had ordered that the underlying company petition can be disposed of as settled amongst the parties with the liberty that in case of any default matter be reported to the Bench.

5. It is the contention of the Applicant/Financial Creditor that the Respondent/Corporate Debtor had failed to honour the payment deadlines upto 31.10.2019. Therefore, in accordance with the order dated 29.08.2019, the Applicant/Financial Creditor has filed the present Application to report defiance of the terms of settlement dated 23.07.2019 and also of the order dated 29.08.2019 committed by the Corporate Debtor.
6. The Respondent/Corporate Debtor has filed its reply dated 02.03.2020 in the matter. In the reply, the Respondent/Corporate Debtor has raised substantially only one point: that the Code and the order do not provide for revival or restoration of a company petition which has already been disposed of. The Code envisages only three situations – admission, dismissal or withdrawal of a company petition before admission. However, once withdrawn, the Financial Creditor at best has the ability to make a fresh application under the Code, and such application would be subject to fresh adjudication and the debtor shall be entitled to oppose such an application. Therefore, the Respondent has prayed for dismissal of the present Application as legally unfounded and procedurally unsound.

Arguments of Mr Shyam Kapadia, learned counsel for the Applicant/ Financial Creditor

7. Mr Shyam Kapadia, learned counsel for the Applicant/ Financial Creditor, submitted that the Hon'ble Supreme Court, in *ESS Investments Pvt Ltd v Lokhandwala Infrastructure Pvt Ltd & another*,¹ had *inter alia* ordered as follows: -

¹ Order dated 31.01.2020 in Civil Appeal No.324/2020 a/w CA No.325/2020, SLP (C) No.222/2020 & SLP (C) No.451/2020

“6. Since the disputes between the Respondent No.1 and Dalmia Group Holdings has been settled and the order dated 19.09.2019 has been set aside, it will be open to the appellant to proceed against the Respondent No.1 before the NCLT by seeking recall of the order dated 04.09.2018 and revival of its application No.CP(IB) No.4000/MB/2018.”

8. Mr Shyam Kapadia submitted that this order virtually recognises the power of the NCLT to recall its own order and revive an application filed under the Code.
9. Mr Shyam Kapadia has also placed on record the judgment dated 08.06.2010 of a Division Bench of the Hon'ble Bombay High Court in *Corporate Couriers Ltd & others v Wall Street Finance Ltd* wherein it was held that the learned Single Judge was within jurisdiction in restoring the company petition and appointing Official Liquidator. However, we are not considering the same since it concerns revival of a company petition under the Companies Act, 1956, and also because of the order dated 31.01.2020 in *ESS Investments (supra)*.

***Arguments of Mr Murtaza Somjee, learned counsel for the Respondent/
Corporate Debtor***

10. Mr Murtaza Somjee, learned counsel for the Respondent/ Corporate Debtor, reiterated the stand taken by the Respondent/ Corporate Debtor in its affidavit in reply, and stated that there is no provision under the Code for revival of a company petition that has already been disposed of.
11. Mr Murtaza Somjee drew our attention to the order dated 15.02.2018 passed by the Mumbai Bench (Court No.1) in MA No.601/2017 in CP (IB) No.1097/2017, wherein the restoration application was dismissed making it clear that that no procedure for restoration of the Company Petition was available under the Code or Rules thereto.

That order gave liberty to the petitioner therein to file a fresh Company Petition if he was so entitled to do.

12. Mr Murtaza Somjee also placed on record the order dated 13.07.2017 of the Hon'ble NCLAT in *Lokhandwala Kataria Construction Pvt Ltd v Nisus Finance & Investment Manager LLP*,² in which it was held that rule 11 of the NCLT Rules has not been adopted for the purpose of the Code. That order was also upheld by the Hon'ble Supreme Court in appeal.³ This judgment was in a different context seeking withdrawal of a company petition on grounds of settlement arrived at between the parties thereto.
13. Incidentally, the law has also undergone a change since then, permitting withdrawal of applications filed under the Code, in different circumstances.

Findings and decision

14. In the light of the order dated 31.01.2020 in *ESS Investments*, other courts of this Bench have also been taking the view that applications seeking revival of a company petition disposed of as withdrawn after recording the settlement terms arrived at between the parties, is permissible in exercise of the powers conferred on the Tribunal under rule 11 of the NCLT Rules, 2016. Incidentally, exercise of the power conferred by rule 11 of the Rules *ibid* for the purposes of the Code has been upheld by the Hon'ble Supreme Court in *Swiss Ribbons Pvt Ltd & others v Union of India and others*.⁴

² 2017 SCC OnLine NCLAT 406

³ *Lokhandwala Kataria Construction Private Limited v Nisus Finance and Investment Managers LLP*, Civil Appeal No.9279/2017 decided on 24.07.2017, (2018) 15 SCC 589 : 2017 SCC OnLine SC 1715

⁴ MANU/SC/0079/2019.

15. This Bench, therefore, hereby orders as follows: -
- a. MA No.3601/MB.II/2019 in CP (IB) No.389/MB.II/2019 is hereby allowed in exercise of the powers conferred by rule 11 of the NCLT Rules, 2016.
 - b. Consequently, CP (IB) No.389/MB.II/2019 is revived and restored to file. The Court Officer (Court No.2) is directed to list the said CP for hearing before the regular Court No.2 on **17.11.2020**. Parties are directed to complete the pleadings by then, with copies served on the other side at least three days in advance of the next date of hearing.
 - c. No order as to cost.

Sd/-

Ravikumar Duraisamy
Member (Technical)

16.10.2020

Sd/-

Rajasekhar V.K.
Member (Judicial)