NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT) (INS) NO.227 OF 2021

In the matter of:

Techengg Project Services & Equipments (I) Pvt Ltd Appellant

Vs

Jayesh Sanghrajka & Anr Respondent

For Appellant: Mr. Apratim Animesh Thakur, Advocate.

For Respondent. Mr Tishampati Sen, Ms Riddhi Sancheti, Mr. Anurag Anand, Mr. G. Karthikeyan, Advocates for R1.

ORDER

05.09.2022: Heard Mr. Apratim Animesh Thakur, learned counsel for the Appellant and Mr. Tishampati Sen, learned counsel for the R1/RP.

The present appeal under Section 61 of the Insolvency & Bankruptcy Code, 2016 has been preferred against an order dated 07.01.2021 passed by the Adjudicating Authority, (National Company Law Tribunal, Mumbai Bench, Mumbai) in IA No.500/2020 in CP No.2714/2018. By the said order the Learned Adjudicating Authority has rejected the interlocutory petition filed by the Appellant which was filed primarily for the following reliefs:-

i) To set aside the decision of the RP partially rejecting the claim of the applicant and direct him to admit the claim of applicant in entirety to the tune of Rs.6,52,95,183/- as submitted in Form C dated 07.12.2018.

ii) To direct the respondents to follow procedures established by law and principles including principles of fairness, impartiality and transparency in the conduct of Corporate Insolvency Resolution Process (CIRP) for Respondent No.2.

iii) To restrain RP from creating any third party interest and dealing with 15 flats situated at B5/1, Lok Nisarg CHS Ltd, Lok Nisarg, Vaishali Nagar, B.R. Road, Mulund West, Mumbai 400080 in a manner that undermines the interest of the applicant with respect to the claim and security interest of the applicant being subject matter of the case at hand.

It is not in dispute that earlier the Appellant had filed a petition under Section 7 of the IBC for initiating Corporate Insolvency Resolution Process (hereinafter referred to as CIRP) against Respondent No.2, Ariisto Developers Pvt Ltd, due to non-payment of corporate debt to the tune of Rs.10 crores plus Rs.4 crores interest amount. However, before admission of the petition filed under Section 7 of the IBC an agreement was entered into in between the Appellant and the Corporate Debtor and on the basis of the Consent Terms which was executed in between the Appellant and the Corporate Debtor on 19th July, 2018, the petition filed by the Appellant before the NCLT was withdrawn. As per the consent on the date of execution itself Rs. 10 crore was already received by the Appellant and thereafter for the remaining amount of Rs.2 crores an agreement was entered into for payment of the said amount in view of the Consent Terms. Payment description has been made in Consent Term in Clause 1(g), which is at running page 236 to 237. It is appropriate to reproduce the same i.e. 1(g) as under:

"1(g) The Respondent/Corporate Debtor undertake to the Honourable Tribunal as under:

i) *At the time of signing of these consent terms, the Respondent/Corporate has handed over the pay order of Rs.10,00,00,000/- (Rupees Ten Crores) towards the Principal Outstanding, to the Applicant/Financial Creditor bearing No.782581 dated June 30, 2018 drawn on HDFC Bank Ltd, Andheri (East) Branch, Mumbai, receipt whereof Applicant admits and acknowledges.*

ii) *The Respondent/Corporate Debtor further undertake to make payment of additional sum of Rs.2,00,00,000/- (Rupees Two Crores only) towards full and final one-time settlement of the interest liability, within 180 days from the signing of these consent terms as agreed upon to the Applicant/Financial Creditor herein. The said payment of Rs.2,00,00,000/- (Rupees Two Crores only) towards full and final settled interest, the Respondent/Corporate Debtor undertakes to this Honourable Tribunal to pay to the Applicant/Financial Creditor as follows:*

a) Rs.1,00,00,000/- (Rupees One Crores only), less applicable TDS, to be paid by the Respondent/Corporate

Debtor to the Applicant/Financial on or before October 18, 2018,

b) *Rs.50,00,000/- (Rupees Fifty lakhs only) less applicable TDS, to be paid by the Respondent/Corporate Debtor to the Applicant/Financial Creditor on or before December 2, 2018.*

c) *A sum of Rs.50,00,000/- (Rupees Fifty lakhs only) less applicable TDS, to be paid by the Respondent/Corporate Debtor to the Applicant/Financial Creditor on or before January 16, 2019.*

It is submitted by the Learned Counsel for the Appellant that since terms and conditions were breached by the Corporate Debtor regarding non-payment of Rs.2 crores the Appellant was entitled to get the earlier agreement restored and in such a situation the Appellant was entitled to claim Rs. Rs.6,52,95,183/-. Learned counsel for the Appellant has also referred to Clause 1(h) of the Agreement dated 19th July, 2018 and as such he requests for directing the Adjudicating Authority to consider the claim to the tune of Rs.6,52,95,183/-. Since he has referred to Clause 1(h) of the Agreement it would be apt to reproduce the same as follows:

> *"h. The parties are at present not ad-idem on the deduction of TDS on sum of Rs.2,00,00,000/- (Rupees Two Crores only) as payable in instalment as aforesaid. Parties with their respective chartered accountants/auditors shall meet and resolve the issues within a period of 15 days from today and arrive at a consensus. Till resolution of applicability of TDS on payment of Rs.2,00,00,000/- (Rupees Two crores only) in three instalments as aforesaid Corporate Debtor on July 20, 2018 shall deposit with Mr. Shyam Devani three post-dated cheques for the entire aggregate amount of Rs.2,00,00,000/- (Rupees Two Crores only) as aforesaid. After expiry of 15 days from the date hereof Corporate*

Debtor shall replace the Security Cheques with new cheques after deducting applicable TDS on the aforesaid sum of Rs.2,00,00,000/- (Rupees Two Crores only) ("Security Cheques"). It is further agreed that if the parties alongwith their Chartered Accountants does not arrive at any consensus within the aforesaid period of 15 days, the Escrow Holder Adv. Mr. Shyam Dewani shall not handover the said cheques to the applicant herein."

Mr. Tishampati Sen, learned counsel for the RespondentNo.1 by way of referring to impugned order submits that the learned Adjudicating Authority has considered each and every aspect and has given detailed reasons and reduced the claim of appellant to the tune of Rs.1 crore. He has also referred to Clause 1(k) of the agreement dated 19.7.2018 which is at running page 238 and is reproduced hereinbelow:-

"k. It is agreed that in case of any default in making the payment of the amounts as agreed in Clause 1(g) above in any manner whatsoever, the Applicant/Financial Creditor shall be entitled to revive all the proceedings in relation to payment of Rs.2,00,00,000/- (Rupees Two crores only) or part thereof as may be left outstanding, which shall be withdrawn at present in pursuance to the execution of these consent terms and also take all such actions/file proceedings for the breach of the terms of these consent terms and undertaking given to the Honourable Tribunal, as the case may be."

Learned counsel for the Respondent by way of referring to aforesaid agreement clause submits that in case of any deviation from the agreement only dispute was confined to the extent of Rs.2 crores or part thereof and it was not permissible to restore the earlier agreement. Learned Counsel for the Respondent No1 further submits that in the present dispute fact remains that

CIRP was initiated on an application filed by M/s Dipco Private Ltd. He submits that the said application was admitted on 20.11.2018. He submits that despite the fact that as per IBC time has been prescribed for conclusion of proceedings but by one way or the other it has been delayed and that the proceeding is still pending before the Adjudicating Authority. The Adjudicating has approved the resolution plan on 23.03.2021. He submits that since the resolution plan has already been approved by the Adjudicating Authority long back nothing is required to be adjudicating in this Appeal. He submits that filing of the present appeal by the Appellant is an abuse of process of law.

Besides hearing we have minutely examined the material available on record. After going through the same, prima facie, we are of the opinion that there is no reason for interference with impugned order by this Tribunal. However, before proceeding we propose to reproduce the impugned order which has been passed by the Adjudicating Authority>

> *"1.This is an application filed by TechEngg Project Services & Equipments (India) Private Limited against Mr. Jayesh Sanghrajka, who is the Resolution Professional of Ariisto Developers Pvt. Ltd. (hereinafter called as the "Corporate Debtor") seeking the following reliefs:*
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> *i. To set aside the decision of the RP partially rejecting the claim of the applicant and direct him to admit the claim of applicant in entirety to the tune of Rs.6,52,95,183/- as submitted in Form C dated 07.12.2018.*

ii. To direct the respondents to follow procedures established by law and principles including principles of fairness, impartiality and transparency in the conduct of Corporate Insolvency Resolution Process (CIRP) for Respondent No. 02.

iii. To restrain RP from creating any third-party interest and dealing with 15 flats situated at B5/1, Lok Nisarg CHS Ltd., Lok Nisarg, Vaishali Nagar, B.R. Road, Mulund West, Mumbai – 400 080 in a manner that undermines the interest of the applicant with respect to the claim and security interest of the applicant being subject matter of the case at hand.

2. The counsel for the applicant alleged that the RP has erroneously and without application of mind, partially rejected the claim of the applicant on the unsubstantiated and unreasoned ground, as recorded in the minutes of the 6th CoC meeting, that the claim of the Applicant is disputed without taking into consideration the following set of facts and circumstances:

i. That between September, 2014 to November, 2015, the Applicant provided financial help to the Corporate Debtor of Rs.10,00,00,000/- at the rate of 24% per annum payable quarterly against mortgage/sale of 15 flats.

ii. that the Corporate Debtor collaterally signed and issued various documents in favour of the applicant including but not limited to Agreement/Memorandum of Understanding, Deed of Mortgage, *Deed of Indemnity, Deed of Transfer, Power of Attorney, Possession Letter etc. towards security but failed to provide the original title deed, chain agreements/documents, etc. for necessary due diligence despite repeated requests and hence never completed the registration process of the said documents.*

iii.The Corporate Debtor failed to repay the Principal amount along with interest and hence, CP No. 425/2018 was filed under Section 7 for initiating CIRP and during the course of proceeding, prior to the admission of the petition, the applicant and the Corporate Debtor entered into "Consent Terms" dated 19.07.2018 for resolution of debt and all the disputes pertaining thereto. In line of this, the Company Petition bearing number 425 of 2018 was dismissed as withdrawn vide an order dated 19.07.2018 of this Tribunal.

iv. However, the Corporate Debtor miserably failed to honour the terms of the consent and consequently there was a breach of Consent Terms.

v. According to the Consent Terms, the Corporate Debtor was to pay a total sum of Rs.12,00,00,000/- towards full and final settlement of the dispute. However, as captured in Clause 1(h), the dispute pertaining to deduction of TDS was to be settled within a period of 15 days from the date of Consent Terms. The disputed amount in terms of Clause(h) was only Rs.20,00,000/- towards deduction of TDS if *applicable at alland the remainder of Rs.1,80,00,000/- was admitted by the parties in any case whatsoever. However, the Chartered Accounts of both the Applicant as well as the Corporate Debtor discussed the TDS issue and came to the conclusion that no TDS was required to be deducted by the Corporate Debtor. But the Corporate Debtor raised an unnecessary demand for furnishing a certificate as provided in Form 26A (Rule 31 ACB) of the Income Tax Rules, 1962. To this, the counsel for the applicant had replied via email dated 17.08.2018 stating that the entire dispute pertaining to TDS stands resolved as discussed between the Chartered Accountants of the parties and no certificate under Form 26A(Rule 31ACB) was required. There was no reply by the Corporate Debtor to this email and the dispute was deemed to be resolved.*

vi. The counsel for the applicant further mentioned that there were cheques provided to the applicant by the Corporate Debtor in respect of Clause 1(I) of the Consent Terms which were dishonoured with the remarks "Funds Insufficient" and a legal notice was issued by the applicant on 23.10.2018. The Counsel for the Corporate Debtor replied to the said Notice on 25.10.2018 wherein it enclosed a Demand Draft of Rs. 90,00,000/- and once again requested for a certificate in pursuance of Form 26A (Rule 31ACB).

vii. vii. He further submitted that with a bona fide intent to close the TDS dispute, the Applicant agreed to issue Form 26A Certificate (Rule 31ACB) and asked the Corporate Debtor to release the balance amount of Rs.10,00,000/- of the first instalment immediately after receipt of this communication. But despite this, the Corporate Debtor failed to comply and blatantly breached the Consent Terms. The counsel for the applicant therefore, stated that the Consent Terms stand breached and the Applicant is reinstated in the original position thereby being entitled to claim the interest in terms of the original Agreement @24% per annum payable quarterly which was duly computed and submitted to the Respondent no. 01 in Form C dated 07.12.2018.

3. Because of the abovementioned reasons, the counsel for the applicant mentioned, that the applicant was constrained to file MA No. 1953 of 2019 before this Tribunal on 29.05.2019 praying therein the partial rejection of claim of applicant by the RP and directing him to accept the claim in entirety to the tune of Rs.6,52,95,183/- as submitted in Form C dated 07.12.2018. The applicant furthermore had asked in its interim prayer to restrain Respondent No. 01 from admitting and acting in pursuance of any Resolution Plan that undermines the interest of the applicant with respect to the claim of the Applicant being subject matter of the present case at hand. This application was dismissed by this

Tribunal vide an order dated 13.11.2019 for being premature, without adjudicating upon the rights of the applicant on merits.

4. The counsel for the applicant mentioned that the Hon'ble Supreme Court and the High Courts, in a catena of judgments, have held that in a situation where there is breach of the settlement agreements entered into between the parties, the cause of action cannot be construed in such an event and cannot be merely limited to breach of settlement agreement. Therefore, it is essentially a matter of interpretation by the Court of the Consent Terms to determine whether the intention of the parties is clear that by execution of the Consent Terms, the original cause of action is discharged.

5. He further stated that a conjoint reading Clause 1(b) and 1(c) of the Consent Terms has to be accorded and upon such a conjoint reading, it appears that the intention of the parties is that only upon the receipt of payment of full and final settlement amount of RS. 2,00,00,000/- against interest due, the settlement agreement comes to full effect and the original cause of action would stand discharged as until then all the documents in relation to which the cause of action has arisen is kept in escrow. Clause 1(c) makes it categorical that handing over of the documents to the Corporate Debtor is to take place only when the full and final settlement amount of Rs.2,00,00,000/- against interest due is received by the applicant.

6. The senior counsel appearing for the RP has denied all the contentions levied against the RP stating that they are false, baseless and devoid of *merits and has submitted that he has acted according to the provisions of the Code. He submitted that the RP has rejected the claim of the applicant after due verification of documents submitted by the applicant along with its proof of claim (Form C) as well as books of accounts of the Corporate Debtor. He submitted that the RP has conducted the CIRP in a transparent and fair manner.*

7. He further stated that Mr. S Gopalkrishnan was appointed as the IRP vide an order dated 20.11.2018 of this Tribunal. Later on, he received around 76 claims from various persons claiming to be financial creditors of the Corporate Debtor and upon receiving the claims and the documents filed along therewith, the IRP was pleased to accept or reject claims. He further mentioned that as per the list of claims of Financial Creditors as on 07.12.2018, the IRP accepted applicant's claim amount to the tune of Rs. 1,00,00,000/- as against the applicant's total claim of Rs. 6,52,95,183/-.

8. The present applicant was subsequently appointed as the RP in the 1st CoC meeting held on 14.12.2018 and later this Tribunal sanctioned this appointment vide an order dated 23.01.2019.

9. He further mentioned that the RP, on persistent request of the applicant to reconsider its claim in entirety, perused the documents on the basis of which the claim was made. He stated that the RP also perused a copy of Corporate Debtor's Balance Sheet dated 31.03.2018 wherein the amount due and payable to the applicant is shown to be Rs. 10,00,00,000/-.

10. The counsel for the applicant stated that it is pertinent to note that the applicant is facing serious tax demand and is in receipt of the notices from the Income Tax Department for non-payment of TDS amount deducted by the Corporate Debtor during the Financial Year 2015-16 & 2016-17 out of the interest amount paid and/or was payable to the Applicant by the Corporate Debtor. He further stated that it was a ploy by the Corporate Debtor with clear intention since beginning to confuse and mislead the applicant and not to pay the already agreed amount to the applicant as per the Consent Terms entered into by the applicant and the Corporate Debtor as the Corporate Debtor is a serious defaulter in paying the statutory dues also.

11. The Senior Counsel for the RP stated that on 19.07.2018, the Corporate Debtor and the Applicant had settled their claims and all disputes by entering into Consent Terms during the course of proceedings in CP 425/2018 wherein the Corporate Debtor had agreed to pay Rs. 10,00,00,000/0- towards the principal liability and Rs. 2,00,00,000/- towards full and final settlement of interest in the manner provided in the Consent Terms. On bare reading of the Consent Terms, specially clauses 1, 1(a), 1(b), 4, 5 and 6, it is apparent that the parties had entered into the aforesaid Consent Terms with an intention of full and final settlement of all their disputes including but not limited to the one arising out of or in connection to CP 425/2018.

12. He further stated that nowhere in the Consent Terms it is mentioned that the applicant would be entitled to claim an alleged amount of Rs.

6,52,95,183/-. Rather, Clause 1(k) of the Consent Terms provides that in case of default in Corporate Debtor's payment, the Applicant shall be entitled to revive all proceedings in relation to payment of Rs. 2,00,00,000/- (Rupees Two Crores Only) or any part thereof as may be left outstanding, which shall be withdrawn at present in pursuance to the execution of the Consent Terms and also take all such actions/file proceedings for the breach of Consent Terms and undertaking given to the Hon'ble Tribunal, as the case may be.

13. The Senior Counsel for the RP further alleged that pursuant to the Consent Terms, the Corporate Debtor had paid principal amount of Rs. 10,00,00,000/- through pay order bearing no. 782581 dated 30.06.2018 drawn on HDFC Bank Ltd. and this fact is not disputed by the applicant. He alleged that this is a preferential transaction as per Section 43 of the Code and the same can be avoided.

14. The Senior Counsel for the RP stated that the Corporate Debtor had agreed to make payment of Rs. 2,00,00,000/- towards full and final settlement of interest liability within 180 days in three instalments in the following manner [Clause 1(g) of the Consent terms]:

> *i. Rs. 1,00,00,000/- less applicable TDS, on or before 18.10.2018: this payment was made by the Corporate Debtor at the rate of 10% i.e. net amount of Rs. 90,00,000/- through Demand Draft bearing No. 148369 dated 24.10.2018 drawn on HDFC Bank which was encashed by the Applicant and this fact has been admitted by the applicant at para 14(k) pg.30 of its application as well as at the*

letter marked as Annexure A-22 to the application. The Senior counsel for RP alleged that this is a preferential transaction as per Section 43 of the Code and the same cannot be avoided;

ii. Rs. 50,00,000/- less applicable TDS, on or before 02.12.2018;

iii. Rs. 50,00,000/- less applicable TDS, on or before 16.01.2019. In respect of the ii. and iii. transaction which were due on 02.12.2018 and 16.01.2019 respectively, it was mentioned that the Company Petition was admitted vide an order dated 20.11.2018 under Section 7 of the Code against the Corporate Debtor and hence, the applicant could have claimed his outstanding of only Rs. 1,00,00,000/- against the Corporate Debtor to the IRP/RP.

15. The counsel further mentioned that it is pertinent to mention here that out of total settlement amount of Rs.12,00,00,000/- agreed between the parties as provided in the Consent Terms, the applicant had received substantial amount of Rs.10,00,00,000/- towards principal outstanding at the time of signing the Consent Terms and Rs.1,00,00,000/- less applicable TDS towards interest as stated in aforementioned paras. Stating this, he concluded that thus, the balance outstanding was Rs.1,00,00,000/- only and therefore, the applicant's claim of Rs.6,52,95,183/- is unreasonable, baseless and hence, inadmissible in the light of the Consent Terms entered into by the applicant and the Corporate Debtor.

16. Further, regarding the second issue of the applicant i.e. the Security available with the Applicant against such claim, the Senior Counsel for the RP stated that Clause 1(b) of the Consent Terms provides that upon receipt of the principal amount of Rs.10,00,00,000/-, the applicant would have to forthwith give up all the rights arising out of all Deeds, Agreements Documents, Negotiable Instruments, Memorandum of Understanding etc. executed by the Corporate Debtor in the captioned matter. And as the applicant has admittedly received the aforesaid principal amount upon signing of the Consent Terms, the applicant is barred from claiming security interest.

17. The Senior Counsel for the RP further stated that the copies of the letters submitted to the RP by the applicant vide email dated 26.05.2019 are nothing but not only various correspondences between the applicant and the Secretary of the Society wherein the aforesaid 15 Flats of the Corporate Debtor are situated and the same do not prove any right or interest of the Applicant in the said 15 flats of the Corporate Debtor.

18. Making the above submissions, the Senior Counsel for the RP prayed for the dismissal of this application on the following grounds:

> *i. that the applicant's claim is unreasonable, baseless and hence, inadmissible in the light of the Consent Terms dated 19.07.2018 and the payments made by the Corporate Debtor in pursuance of the Consent Terms;*
>
> *ii. That the applicant is attempting to unjustly enrich himself by claiming higher amount that which is actually outstanding and is*

trying to go beyond what was agreed between the parties as mentioned in the consent terms.

iii. That the amounts received by the applicant amount to preferential transactions as per Section 43 of the Code;

viii. That the allegations levelled against the RP are baseless and suffer from want of merit as he has acted according to the provisions of law and in complete fairness.

FINDINGS

19. We have heard all both the parties, perused and taken all the documents submitted by them into consideration. After going through the pleadings, we believe that the RP has rightfully partially accepted the applicant's claim after due consideration of the documents provided to the IRP/RP. We would further like to observe that the RP has acted in accordance with the provisions of the Code and the applicable rules and regulations made thereunder and also followed the principles of law including the principles of fairness, impartiality and transparency.

20. Also, the Senior Counsel for the RP had stated that even otherwise, the applicant has submitted various documents along with its claim Form in respect of purported/alleged claim of security interest, these documents are without signature of either of the parties or all the parties, without dates, without details of amount or without applicable stamp duty or registration, as the case may be. In view of this, such documents *were not taken in consideration by the IRP or RP for determining the purported/alleged claim of security interest of the applicant.*

21. The Senior Counsel for the RP has already brought on record that the Principal amount due and payable was already paid by way of a Demand Draft bearing No. 148369. He also terms this transaction as a preferential transaction. But this is not the subject matter of this Application and we need not deal with it in here.

22. It is clear from the facts of the case that out of total settlement amount of Rs.12,00,00,000/- agreed between the parties as provided in the Consent Terms, the applicant had received substantial amount of Rs.10,00,00,000/- towards principal outstanding at the time of signing the Consent Terms and Rs.1,00,00,000/- less applicable TDS towards interest and thus the balance outstanding was Rs.1,00,00,000/- only. Therefore, we are of the opinion that this application needs to be dismissed and there is no wrong committed by the RP in deciding upon the claim of the applicant. With the above directions and observations, this Interlocutory Application numbered 500 of 2020 is dismissed and is accordingly disposed of."

It is evident, on examination of the aforesaid impugned order, that there is no dispute regarding payment of amount which is Rs.10 crores which was claimed by the appellant. The said amount was already received on the date of the agreement i.e. 19.07.2018 and on the basis of the said agreement earlier petition filed by the appellant was withdrawn. So far as amount of Rs.1 crore is concerned para 14(i) of the impugned order categorically reflects that after deducting Rs.10 lakhs as TDS, Rs.90 lakhs was already paid to the appellant. Only for remaining amount of Rs.1 crore, two cheques of Rs.50 lakhs each were issued. Dispute is only to the said amount. On examination of the claim the RP has also accepted regarding claim of the appellant of Rs. 1 crore. We have also perused the terms and conditions as has been explained by the appellant as well as learned counsel for Respondent which we have quoted hereinabove. On going through the same and in view of the fact that the amount of Rs.10 crore was received by the appellant on 19.07.2018 and thereafter Rs.90 lacs after deducting Rs.10 lacs as TDS, we are of the opinion that the Adjudicating Authority has rightly approved the decision of Resolution Professional by reducing appellants' claim to Rs.1 crore only. There was no reason for the Adjudicating Authority to pass a different order. Moreover there is no dispute on approval of Resolution Plan by the Adjudicating Authority.

We find no merit in the Appeal. The Appeal stands dismissed without cost.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member (Technical)

Bm/gc