In the National Company Law Tribunal
Mumbai Bench.

MA 740/2018 in CP 1321/I&BC/NCLT/MB/MAH/2017

Under Section 9 of Insolvency & Bankruptcy Code, 2016

In the matter of

Nikhil Gandhi & Ors. : Applicants

AND

In the matter of

Shrikant Poddar : Operational Creditor / Petitioner
V/s
Skil Infrastructure Ltd. : Respondent / Corporate Debtor

Order delivered on: 08.08.2018

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)

For the Petitioner(s): : 1. Ms. V.C. Khatri, Advocate,
2. Mr. Shrikant Poddar, Applicant/Petitioner.

For the Respondent(s): : 1. Mr. Janak Dwarkadas, Sr. Advocate,
2. Mr. Kunal Mehta, Counsel,
3. Himanshu V. Pradhan, Advocate, i/b. Crawford Bayley & Co.

Per M.K. Shrawat, Member (Judicial).

ORDER

1. An Application (MA 740/2018) is submitted dated 27.07.2018 on receiving an Order of this NCLT Bench bearing CP No.1321/I&BC/NCLT/MB/MAH/2017 titled as "Shrikant Poddar, 20/A, Shri Ram Bhuvan, 2nd Floor, Walkeshwar Road, Mumbai – 400006, Operational Creditor/(Petitioner) v. SKIL Infrastructure Limited, SKIL House, 209, Bank Street Cross Lane, Fort, Mumbai – 400023, Corporate Debtor (Respondent) dated 16.05.2018, admitting a Petition submitted on 14.08.2017 u/s. 9 of the Insolvency & Bankruptcy Code for a default of alleged outstanding Operational Debt of ₹3,52,000/- + Interest thereon of ₹2,80,000/-.

2. The Applicant is stated to be one of the Promoters of the Company holding about 60% Equity in the Debtor Company, listed with National Stock Exchange, engaged in the business of Infrastructure Development of Sea Ports, Defence Ship Building, SEZ, etc. allegedly having net worth of ₹2600 Crores. According to this Application the amount of Debt comparing the economic size of the Company, was miniscule and the Company had given instruction for settlement before the lodging of the Main Petition but due to

miscommunication that the amount being disputed, hence Petition is not maintainable under the provisions of Insolvency Code, the instruction of Settlement could not be carried out by the authorized Representative. The impugned Order dated 16.05.2018 is going to adversely affect the functioning of the Company along with over 100 employees and other connected persons. Presently the Company is engaged in several Infrastructure Projects.

3. It is stated that since inception the Promoters have given instruction to settle the Debt amount by making the payment, therefore, immediately on receiving the information of "Admission" of the Insolvency Petition and commencement of CIRP by appointing a Resolution Professional, directed to pay the Debt amount to the Creditor.

4. On the date of hearing, Senior Advocate Mr. Janak Dwarkadas appeared and vehemently pleaded that in a situation when the Debt amount has already been paid and the Petitioner is *suo moto* withdrawing the Petition, request for withdrawal by the Petitioner be permitted considering the totality of the facts and circumstances of the case as also considering the miniscule Debt in question, as against the economic size of the Company. He has stated that the Company is Solvent having good reputation with its financial creditors. Learned Sr. Advocate has also drawn attention on a Letter of the Insolvency Professional viz. Mr. Akshay Shah appointed as IRP, willing to be discharged from the duties as IRP mainly because of the reason that the Petitioner Mr. Poddar had not communicated the impugned Order of the NCLT, Mumbai and did not approach him to initiate the Insolvency Proceedings. Reliance was placed on an Additional Affidavit and certain Case Laws referred therein as under :-

> "3. The Applicants state that paragraph 6.10 of the Company Application refers to the Petitioner and the Applicant entering into consent terms for the purpose of
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> (i) the Applicant settling the outstanding debt of the Petition on an immediate basis;
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> (ii) settlement of all outstanding disputes between the Petitioner and the Applicant; and
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> (iii) withdrawal of the insolvency proceedings instituted pursuant to the Order dated 16th May, 2018.
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> The Applicant hereby submits that the Applicant has erroneously missed filing the Consent Terms dated 23rd July, 2018 ("Consent terms") entered into between the Petitioner and the Applicant. Hereto annexed and marked as **Exhibit "A"** is a copy of the Consent Terms entered into between the Petitioner and the Corporate Debtor. *Further, the Applicant has also received a Withdrawal Memo from the Petitioner permitting withdrawal of the Company Application in lieu of execution of the Consent Terms.*
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> *The Interim Resolution Professional (IRP) Mr. Akshay Shah vie its letter dated 31st July, 2018 addressed to the Hon'ble Tribunal confirmed that though he has given his consent to act as the IRP on 6th November, 2017 he*

has neither received any appointment letter as the IRP nor has received the copy of the Order dated 16th May, 2018 passed by the Hon'ble Tribunal hence the IRP has not initiated any work/action in the present matter and thus requested the Hon'ble Tribunal to take the said letter on record of the Hon'ble Tribunal. Hereto annexed and marked as ***Exhibit "B"*** *is a copy of the said letter dated 31st July, 2018 addressed by the IRP to the Hon'ble Tribunal.*

4. *In addition to the above, the Applicant would like to rely upon certain Judgments pursuant to which the Applicant requests the Hon'ble Tribunal to permit withdrawal of the insolvency proceedings instituted pursuant to the Order dated 16th May, 2018:*

(A) Mr. Dinesh Kumar Bhasin v. Batliboi Impex Limited & Anr. (Company Appeal (AT) (Insolvency) No. 318 of 2018)

"In the abovementioned matter the Hon'ble National Company Law Tribunal, Mumbai admitted an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 thereby instituting the insolvency proceedings with respect to a company, Tiger Steel Engineering (India) Private Limited (being the Corporate Debtor). Subsequently, the abovementioned order was challenged in National Company Law Appellate Tribunal on the grounds that the Corporate Debtor has paid all outstanding amounts to the creditor and settled the outstanding claim. The Hon'ble National Company Law Appellate Tribunal set aside the order of the Hon'ble National Company Law Tribunal, Mumbai and permitted the withdrawal of the insolvency proceedings".

(B) ***HGS India Limited v. Geo Api Solutions Private Limited***

"In the abovementioned matter the Hon'ble National Company Law Tribunal, Mumbai admitted an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 thereby instituting the insolvency proceedings with respect to a company, Geo Api Solutions Private Limited (being the Corporate Debtor). Subsequent to the commencement of the insolvency proceedings, no committee of Creditors has yet been formed and that the Corporate Debtor is willing to settle the disputed amount, for which, the Operational Creditor has agreed and thus the said Company Petition for Insolvency was disposed of and the IRP was recused from further proceedings"

(C) ***Lokhandwala Kataria Cosntruction Private Limited Vs Nisus Fianance and Investment Managers Limited (Order dated 24th July, 2017 in Civil Appeal No.9279 of 2017 passed by the Hon'ble Supreme Court of India)***

"In the abovementioned matter the Hon'ble Supreme Court of India in exercise of its powers vested under the Article 142 of the Constitution of India took the Consent terms dated 28.6.2017 and 12.7.2017 entered into between the parties on record and also record the undertaking of the Appellant before us to abide by the Consent Terms in toto. The Appellant also undertakes to pay the sums due on or before the dates mentioned in the aforesaid Consent Terms".

5. The Petitioner has entered into the settlement with the Corporate Debtor and thereafter on receiving the outstanding debt of Rs.3,52,000/- (Rupees three lakh fifty two thousand only) given his consent to withdraw the Company Application. The outcome of the withdrawal of the Company Application is that the Petitioner is not proposing to continue with the insolvency process or to assist the IRP so appointed. Further, the Petitioner has till date not forwarded a copy of the order dated 16th May, 2018 or provided any other communication/ information to the IRP with respect to the IRP's appointment and the insolvency process. As a consequence, the appointment of IRP has become redundant de facto and de jure.

6. The next implication of execution of the Consent Terms and Withdrawal Memo is that the Petitioner is no more willing to bear the insolvency resolution process cost as prescribed under Regulation 31, 32 and 34 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. In

view thereof on technical grounds as well the insolvency resolution process may not continue since the Petitioner will not be bearing the insolvency resolution process cost.

7. The Applicant humbly submits that in accordance with the provisions of Section 60(5) of the Insolvency and Bankruptcy Code, this Hon'ble Tribunal be pleased to decide question of priority and question of law that in a situation when the Petitioner / Creditor has settled the outstanding debt and does not want to pursue the insolvency proceedings in such a case whether the Order dated 16th May, 2018 be strictly adhered to.

The Applicants therefore pray that:-

(a) *this Hon'ble Tribunal be pleased to take on record the Consent Terms executed between the Applicants and the Petitioner and permit withdrawal of the insolvency resolution process instituted pursuant to the Impugned Order dated 16th May, 2018 and permit the withdrawal of the Petition;*

(b) *pending the hearing and final disposal of this Company Application, all further proceedings in relation to the corporate insolvency resolution process of the Respondent / Company be stayed;"*

5. Further, on the date of hearing, Mr. Shrikant Poddar, Applicant/Operational Creditor appeared in person and duly endorsed on the Order Sheet the request of grant of withdrawal. He has also affirmed the execution of "Consent Terms" dated 23.07.2018 acknowledging therein the receipt of Debt and thereafter *suo moto* withdrawal of the impugned Petition/Case.

6. Almost on identical circumstances, Hon'ble NCLAT in the case of Batliboi Impex Ltd. V/s. Tiger Steel Engineering (India) Private Ltd. in Company Appeal (AT) (Insolvency) No. 318 of 2018, vide an order dated 29.06.2018 has held as under :-

"6. Having heard learned counsel for the parties and taking into consideration the fact that the impugned order dated 18th May, 2018 was passed by the Adjudicating Authority without hearing the 'Corporate Debtor' in violation of rules of natural justice and all the time the 'Corporate Debtor' was ready to settle the matter, we have no other option but to set aside the impugned order dated 18th May, 2018, However, taking into consideration the fact that the parties are ready to settle the dispute, the case is not remanded to the Adjudicating Authority.

7. In effect, order(s), passed by the Adjudicating Authority appointing any 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order(s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' (company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

8. As agreed by the parties, the Respondent will now pay a sum of ₹ 1.5 (sic) lakhs (Rupees One lakh five thousand only) to the 'Interim Resolution Professional', for the period he has functioned and towards the resolution cost. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be o orders as to cost."

7. As a consequence, in the said case titled as "Batliboi Impex Vs. Tiger Steel (India) Pvt. Ltd. (MA No. 596 of 2018 in CP No. 146/I&BC/NCLT/MB/MAH/2018) Order dated 31.07.2018 NCLT, Mumbai has closed the Insolvency Proceedings by consigning the case files to records.

8. Respectfully following the view expressed by Hon'ble NCLAT and taking due cognizance of the fact that the miniscule Debt amount had been paid and that the Petitioner has suo moto withdrawn the Petition and that the appointed IRP has not taken any step for commencement of Insolvency and that the Petitioner has not even communicated the order to IRP for further action, I hereby hold that this is a fit case to grant permission of "withdrawal". Resultantly, this Miscellaneous Application stood allowed.

9. As a consequence, Petition (CP 1321/I&BC/2017) is disposed of as "withdrawn". To be consigned to records.

SD/-
(M.K. SHRAWAT)
Member (Judicial)

Date : 08.08.2018
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