

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 274 of 2022

IN THE MATTER OF:

Amitabh Roy

...Appellant

Versus

**Master Development Management (India) Pvt. Ltd.
& Anr.**

Respondents

Present:

For Appellant: Mr. Anand Sukumar, Mr. Mainak Bose and Mr. Bhupesh Kumar Pathak, Advocate.

For Respondents: Mr. Ankur Rai, Advocate for R-1.

ORDER
(Virtual Mode)

18.05.2022: Heard learned counsel for the Appellant as well as learned counsel appearing for the Respondent. This Appeal has been filed against the order dated 25.02.2022 by which the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, has admitted the Section 9 Application filed by the Operational Creditor. The Suspended Director of the Corporate Debtor aggrieved by the order has come up in this Appeal. A few facts need to be noted before considering the submissions raised before us by learned counsel for the parties:-

a) Company Petition No. 1686 of 2018 was filed by the Operational Creditor on 13.12.2018 on the ground that the Corporate Debtor failed to make payment of a sum of Rs.9,48,997/-. There were three other Company Petitions which were filed by the Operational Creditor. After issuance of notices in the Company Petitions, there was certain settlement talks between the parties.

Cont'd.../

Both the counsel made statement before the Adjudicating Authority on 03.10.2019 that they have settled the matter but terms of settlement are yet to be finalized. The Adjudicating Authority disposed off the Company Petition with liberty to revive, if settlement talks fails. Order dated 03.10.2019 is to the following effect:-

“ORDER

Ld. Counsel for the operational creditor as well as corporate debtor appears. It is submitted by the Ld. Counsel for the operational creditor that parties have settled the matter but terms of settlement are yet to be finalised. By that as it may, this matter stands disposed off with liberty to revive the same, if settlement talks fails. CP(IB) 1686/KB/2018 stands disposed off.”

b) Subsequently, the parties entered into settlement i.e. on 04.10.2019. Settlement was entered between the parties with regard to all four Company Petitions. The agreement also mentioned that the claim is inclusive of TDS amount. In the Agreement in Paras (v) and (vi) following was also noticed:

“v) In the event of breach of any terms and conditions of this settlement agreement the Parties of the First will be entitled to initiate appropriate legal Proceedings including application under Section 9 of the Insolvency and Bankruptcy Code, 2016 and to take all other action as may deem fit against the Parties of the Second Part & its Directors/ Authorised Signatories towards realization of amounts due at the costs and peril of the Parties of the Second Part. Any

amount paid from the date of this TOS upto the date of default would be adjusted first against the cost already incurred against the current Insolvency proceedings, all legal charges & other cost and additional cost which would be incurred owing to default which might occur in future, before the same is adjusted against overdue interest and thereafter principal.

vi) In case of breach of any terms and conditions of the settlement agreement the Parties of the First Part would immediately be able to take action and to claim full amount as claimed in the aforementioned proceedings filed before the Hon'ble NCLT, Kolkata Bench plus other legal cost, charges, interest on outstanding's and none of the terms and conditions of the terms of settlement will prevail."

c) After aforesaid settlement amounts were paid by the Corporate Debtor. The Operational Creditor filed an I.A. before the Adjudicating Authority praying for revival of the Section 9 Application on which application Adjudicating Authority passed an order asking the Corporate Debtor to indicate the details of the payment. In pursuance of the direction of the Adjudicating Authority, a Supplementary Affidavit was filed by the Appellant dated 24.01.2022, where payment details of claim amount payable to Operational Creditor were given in Para 3. Further, in Paras 4 and 5 following was stated:-

"4. However, the TDS amount of Rs.66,884/- could not be paid to Income tax authorities. Presuming such

amount of Rs.66,884/- is payable, the same does not come within the pecuniary threshold of this Hon'ble Tribunal.

5. Certain TDS amounts with respect to previous transactions between the parties aggregating to Rs.2,41,215/- also could not be paid to Income tax authorities. Out of the said sum an amount of Rs.1,30,395/- was paid and Rs.1,10,820 remained outstanding. The details of such payment are annexed hereto and marked with the letter "B".

d) After the aforesaid affidavit was filed, the Adjudicating Authority proceeded to hear the matter and by impugned order dated 25.02.2022 has admitted the Application under Section 9.

2. Learned counsel for the Appellant challenging the order submits that present was not a case for revival of the Section 9 proceeding. He has referred to orders passed by the Adjudicating Authority where liberty was granted to revive the same if settlement talks fails. His first submission was that settlement talks did not fail, hence, liberty should not be granted to revive the application. Secondly, in pursuance of the Settlement Agreement, entire payment has already been made to the Operational Creditor with regard to which Supplementary Affidavit has been filed indicating the details of the payments. He further submits that with regard to two TDS amounts, Supplementary Affidavit has clearly mentioned that TDS amount of Rs.66,884/- and Rs.1,10,820/- could not be paid which remained outstanding. He submits that non-payment of TDS amount could not be held

to be a debt on which Section 9 proceeding can be proceeded with and the Adjudicating Authority committed error in admitting the Section 9 Application.

3. Learned counsel for the Respondent refuting the submissions of learned counsel for the Appellant contends that as per the Settlement Agreement the payment of TDS was also part of the settlement and since TDS has not been paid by the Corporate Debtor default was committed and the Adjudicating Authority has every right to initiate Section 9 proceeding. He further submits that there was amount payable concerning earlier transactions also in terms of the TDS. He submits that non-payment of TDS amounts to breach of the Settlement Agreement and the Adjudicating Authority has rightly admitted the Section 9 Application.

4. We have considered submissions of learned counsel for the parties and perused the record.

5. The Adjudicating Authority in the impugned order has noticed the entire facts and circumstances and in Para 10 of the order the Supplementary Affidavit filed on behalf of the Corporate Debtor has been noticed, which is to the following effect:-

“10. The Ld. Counsel appearing on behalf of the Corporate Debtor submits that all the claims have been paid by the Corporate Debtor as per the composite terms of settlement. However, the TDS amount of Rs.66,884/- (Rupees Sixty Six Thousand Eight Hundred Eighty Four only) and Rs.1,10,820/- (Rupees One Lakh Ten Thousand Eight Hundred

Twenty only) could not be paid to the income tax authorities and the same does not come within the pecuniary jurisdiction of this Adjudicating Authority.”

6. The entire consideration of the submissions of the parties and facts and circumstances are contained in Paragraphs 11 to 14. In Para 14 observations have been made which are to the following effect:-

“14. We do not agree with the contention of the Corporate Debtor that the TDS amount of Rs.66,884/- (Rupees Sixty Six Thousand Eight Hundred Eighty Four only) and Rs.1,10,820/- (Rupees One Lakh Ten Thousand Eight Hundred Twenty only) does not come within the pecuniary jurisdiction of this Adjudicating Authority. The Corporate Debtor is liable to pay the said amount.”

7. As noticed above, the liberty to revive was granted in following words:

“liberty to revive the same, if settlement talks fails”

This order was passed on 03.10.2019 by which Company Petition was disposed off. The very next day i.e. on 04.10.2019, Settlement Agreement was entered into between the parties. Thus, there was no occasion for failure of talks between the parties, hence, order reviving application under Section 9 was uncalled for and this was not according to the liberty granted by the Adjudicating Authority.

8. Furthermore, in the Supplementary Affidavit which was filed by the Corporate Debtor it was clearly mentioned that entire dues of the Operational

Creditor have been paid off. There was no such case before the Adjudicating Authority that amount which were payable to the Operational Creditor are not being paid. The only thing which was payable was two TDS amount of Rs.66,884/- and Rs.1,10,820/-.

9. We are satisfied that in non-payment of the TDS amount by the Corporate Debtor there was no occasion for admitting Section 9 Application by the Adjudicating Authority. The Adjudicating Authority committed serious error in admitting Section 9 Application on the aforesaid submission of the Operational Creditor that non-payment of the TDS amounts is default. The consequences of non-payment of TDS are provided under Income Tax Act, 1961 and income tax authorities have ample powers to take appropriate action. Learned counsel for the Appellant submits that both the TDS amounts has already been made, which is disputed by learned counsel for the Respondent. Regarding non-payment of TDS, we are of the view that it is not for us to consider whether TDS amount have been paid or not although it has been clearly submitted at the Bar by the Appellant that they have been paid. We, thus, are of the view that the Adjudicating Authority has committed serious error in admitting the Section 9 Application on the ground of non-payment of two TDS amounts. For the reasons noted above, the order of the Adjudicating Authority admitting Section 9 Application is unsustainable and deserves to be set aside.

10. Present is also a case where the Operational Creditor has misused the process of I&B Code in filing application for revival of Section 9 Application for

non-payment of two TDS amounts. The process of I&B Code cannot be utilized for the above purpose, whereas present is not a case that Corporate Debtor has not paid any amount due to the Operational Creditor. We, are satisfied that Operational Creditor has misused the process of I&B Code. We, thus, allow this Appeal with a cost of Rs.1 Lakh (Rupees One Lakh only) on the Operational Creditor i.e. Respondent which shall be paid within a period of one month to the Corporate Debtor.

**[Justice Ashok Bhushan]
Chairperson**

**[Shreasha Merla]
Member (Technical)**

**[Naresh Salecha]
Member (Technical)**

Archana/nn