



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH -I**

CP (IB) 4060/MB/C-I/2019

Under Section 9 of the Insolvency and Bankruptcy
Code, 2016

In the matter of

Mr. Haresh J. Dharmani

Moti Baug Compound, Opp R K Studio, S.T. Road,
Chembur, Mumbai-400071.

... Operational Creditor/Petitioner

Versus

AP Coated Drums and Barrels Private Limited

[CIN: U74999MH2001PTC131731]

Plot No. W-63, MIDC, Taloja, District-Raigad,
Maharashtra-410208.

...Corporate Debtor/Respondent

Order Delivered on 31.03.2023

Coram:

Hon'ble Member (Judicial) : Mr. H.V. Subba Rao

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Operational Creditor : Mr. Prakhar Tandon, Advocate.

For the Corporate Debtor : Ms. Sindhu Kotian, Advocate.

**ORDER**

Per: Shyam Babu Gautam, Member (Technical)

1. This Company Petition is filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) by **Mr. Haresh Dharmani** ("the Operational Creditor hereafter referred to as Petitioner"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **AP Coated Drums and Barrels Private Limited** ("the Corporate Debtor hereafter referred to as Respondent").
2. The Corporate Debtor was incorporated on 23.04.2001 under the Companies Act, 1956. Its Corporate Identity Number (CIN) is U74999MH2001PTC131731. Its registered office is at Plot No. W-63, MIDC, Taloja, District-Raigad, Maharashtra-410208. Therefore, this Bench has jurisdiction to entertain and decide the Petition.
3. The Total Outstanding amount alleged to be in default is Rs. 15,09,317/- (Rupees Fifteen Lakh Nine Thousand Three Hundred and Seventeen Only) inclusive of interest at the rate of 24% p.a. on Total Dues. The Date of Default is 15.01.2019 as stated in the Petition at Page 14.

Submissions made by the Petitioner:

4. The Petitioner had supplied C.R. Sheets to the Respondent in November 2014 and had raised invoices. The Respondent pursuant to the invoices raised was indebted to pay a sum of Rs.67,29,188/- (Rupees Sixty Seven Lakh Twenty Nine Thousand One Hundred and Eighty and Eight) including principal amount to the tune of Rs.37,72,430/- (Rupees Thirty Seven Lakh Seventy Two Thousand Four Hundred and Thirty only) plus interest at the rate of 24% p.a. as on 05.03.2019.



5. As the amount was outstanding, the Petitioner filed an application under Section 9 of the Code bearing no. CP(IB) No. 1365 of 2018. This Tribunal vide Order dated 16.10.2018 admitted the Respondent herein into Corporate Insolvency Resolution Process (“CIRP”). It is submitted that the Respondent approached the Petitioner for out of court settlement of total outstanding dues amounting to Rs.75,10,546/-. A settlement Agreement dated 22.02.2019 was executed between the parties whereby a sum of Rs.70,00,000/- was agreed to be paid by the Respondent against the total dues as settlement amount.
6. The said Settlement Agreement was approved by 100% CoC members. Therefore, the Interim Resolution Professional (“IRP”) filed a Miscellaneous Application bearing No. 982 of 2019 before this Tribunal in order to seek withdrawal of CP(IB) No. 1365 of 2018 filed by the Petitioner.
7. This Tribunal vide Order dated 02.04.2019 allowed withdrawal of Company Petition bearing no CP(IB) No. 1365. It is submitted that the Respondent has not adhered to payment schedule as detailed in the Settlement Agreement. The Corporate Debtor has defaulted in making payment as per the Settlement Agreement.
8. Accordingly, the Petitioner issued a legal notice dated 23.10.2019 requesting the Respondent to pay the balance outstanding amount. Since, the Respondent failed to reply to the said legal notice, the Petitioner issued Demand Notice dated 31.10.2019 under Section 8 of the Code. The Demand Notice was received by the Respondent on 02.11.2019. It is pertinent to note that the Respondent has failed to reply to the statutory demand notice.

**Submissions made by the Respondent:**

9. At the outset, the Respondent submits that no amount is due and payable, the Respondent has paid the total amount of Rs.70,00,000/- as per the Settlement Agreement. The Respondent submits that only grievance raised by the Petitioner is that the Respondent has defaulted in making payments on specified dates as per the Settlement Agreement.
10. It is the Respondent's case that the cheques issued were not deposited by the Petitioner for encashment, the Respondent made online payments through RTGS transfer which were duly accepted by the Petitioner. The timelines which correspond to cheque payments therefore were not applicable.
11. Further, it is argued that the IRP was discharged vide Order of this Tribunal dated 09.04.2019, therefore the payments would be made after the banker of the Respondent changes the signatory from IRP to the Directors of the Respondent. Therefore, timelines under the Settlement Agreement were not binding on parties.
12. The Respondent during the course of the arguments has relied on the Judgment of the Hon'ble NCLAT in *Maldar Barrels Private Limited vs Pearson Drums and Barrels Private Limited [Company Appeal (AT) (Ins) 872 of 2020]* wherein it was held as under :-

"19. We have, earlier in this judgment, reached a conclusion that prima facie, time was not of essence in the Settlement. Whether any compensation should accrue to the Appellant or not is not a matter for adjudication in this appeal. Also whether Section 62 of the Contract Act, 1872 will apply in the present case, which would change the contract to a new one is not relevant in the present appeal. If the Appellant has any



grievance on this account, he could certainly approach the appropriate forum for redressal on this issue which relates to the enforcement of the Settlement Agreement and whether it will be substituted by a new one, if it so wishes.

20. In the light of the above discussion, we come to the unambiguous conclusion that the Appellant has not been able to make out a clear-cut case in his favor. The Settlement Agreement, as has been operated by both the parties, does not show that time was of essence in it. Moreover, the Corporate Debtor has paid the full and final settlement amount by January 2021 to the Operational Creditor. Therefore the term of the Settlement Agreement that provides for reinstatement or fresh filing of the application for initiating Corporate Insolvency Resolution Process for the Corporate Debtor is not triggered. As a result, we find no reason to interfere with the order of the Adjudicating Authority, and consequently dismiss the appeal. There is no order as to costs.”

13. Also, the Hon’ble NCLAT in ***Rohit Motawat vs Madhu Sharma Proprietor Hind Chem Corporation & Anr. [Comp. App. (AT) (Ins) No. 1152 of 2022]***

“10. We have heard counsel for the parties and after perusal of record, are of the considered opinion that the impugned order is patently illegal and deserves to be set aside. The question which has been raised by the Appellant, is hereby answered in favour of the Appellant in view of the decision taken by this Court in case of ‘S.S.Polymers’ (Supra), ‘Permali Wallace Pvt. Ltd.’ (Supra) as well as the decision of the ‘Hon’ble Karnataka High Court’ in the case of ‘Jyothi Limited’ (Supra). Before parting, we are constrained to observe that the Adjudicating Authority has erred in not looking into the facts that the principal amount has entirely been paid and the issue was only regarding to interest for which



the application under Section 9 of the Code was not maintainable as the spirit of the legislation of the Code is for 'resolution of debt' and not for 'recovery'."

Findings

14. We have heard the submissions of both sides and perused the records.
15. It is the Respondent contention that the amount of Rs.70,00,000/- was paid to the Petitioner and the same is corroborated from Table showing default placed at Annexure "F" at Page 40 of the Petition. The Petitioner has filed the present Application only for the recovery of interest at the rate of 24 % p.a. as the instalments were not paid on dates as stipulated in the Settlement Agreement.
16. Further, from the computation of claim placed as "Annexure -A" at Page 14 of the Petition is unclear as to how an amount of Rs.15,09,317/- is arrived at by the Petitioner.
17. The Respondent submits that time was not an essence of contract and in support of the same has placed reliance on *Maldar Barrels Private Limited vs Pearson Drums and Barrels Private Limited* (supra) wherein the Hon'ble NCLAT has answered a similar question of facts in favour of the Respondent herein.
18. Further, it is settled principle of law that the proceedings under the Code are for the Resolution of the Corporate Debtor and not recovery. The Petitioner is liberty to agitate his grievance arising out of the settlement agreement before the appropriate forum.
19. In view of the aforesaid discussion, viewing from any angle, this Bench is of the considered opinion that the above Company Petition is nothing



but a misuse and abuse of the process of the Court by the Operational Creditor and this Tribunal shall not encourage this kind of applications and it is high time to dismiss these kinds of applications by imposing costs.

20. Accordingly, the above Company Petition is dismissed by imposing cost of Rs.1,00,000/- payable by the Operational Creditor to “Bharat Kosh” within two weeks from the date of uploading of the order.
21. The Operational Creditor shall file compliance affidavit regarding payment of cos failing which an appropriate action may be initiated by the Registrar of Companies for recovering the above cost as if it is a Government revenue recoverable from the Operational Creditor on production of this order either by the Corporate Debtor or by the Registrar of this Tribunal.
22. In the above circumstances the petition bearing **CP (IB) 4060/MB/C-I/2019** filed by **Mr. Haresh J. Dharmani**, the Operational Creditor, under section 9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **AP Coated Drums and Barrels Private Limited [CIN: U74999MH2001PTC131731]**, the Corporate Debtor, is **rejected**.

Sd/-

SHYAM BABU GAUTAM

Member (Technical)

31.03.2023

SAM

Sd/-

H.V. SUBBA RAO

Member (Judicial)