NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 345 of 2023
& I.A. No.1164 of 2023

[Arising out of Order dated 12.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Court III in C.P. No.1941(ND)/2019]

In the matter of:

M/s. Ahluwalia Contracts (India) Ltd. **...Appellant**

Vs.

M/s. Jasmine Buildmart Pvt. Ltd. **...Respondent**

For Appellant:	**Mr. Anil Airi, Sr. Advocate with Mr. Sunil Kumar Mund, Mr. Mrityanjay Singh, Mr. Jagjeet Singh, Mr. Mudit Ruhilla, Mr. Biswajit Kumar Patra and Mr. Vedant Mund, Advocates.**
For Respondent:	**Mr. Sumant Batra, Ms. Bina Gupta, Ms. Sheena Taqui and Ms. Akansha Saini, Advocates.**

J U D G M E N T
(1st September, 2023)

Ashok Bhushan, J.

1. This Appeal has been filed by the Operational Creditor challenging the order dated 12.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Court III, by which order Section 9 Application filed by the Appellant has been dismissed as not maintainable. Operational Creditor aggrieved by the said order has come up in this Appeal.

2. Brief facts of the case are:-

2.1. Work Order/ Agreement was executed between the Operational Creditor and the Corporate Debtor- 'Jasmine Buildmart Private Limited' in pursuance of which RA Bills were raised by the Operational Creditor between 04.11.2011 to February, 2016. When despite regular reminders, payment was not made, a demand notice under Section 8 was issued by the Operational Creditor and Section 9 Application CP IB No.488(PB)/2017 was filed seeking initiation of the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. During pendency of above Section 9 Application, a Term Sheet of Settlement was recorded between the parties where Corporate Debtor admitted liability of paying unpaid amount of Rs.19.81 Crores. In lieu of the Settlement amount, the Respondent has offered securities. In view of the Settlement dated 16.12.2017, Section 9 Application was dismissed as compromised between the parties on 18.12.2017. The Operational Creditor could not receive the amount as stipulated in the Settlement Agreement. A letter was issued to the Corporate Debtor to comply the Terms of the Settlement Agreement, failing which demand notice under Section 8 was issued on 28.05.2019 by the Operational Creditor and an Application under Section 9 was filed on 01.08.2019. Corporate Debtor filed a reply to Section 9 Application and the Adjudicating Authority by the impugned order dismissed Section 9 Application. The Adjudicating Authority held that mere breach of terms of any agreement including a settlement agreement by a party, whereby some payment is due cannot take colour of an operational debt. Application was dismissed as not maintainable.

3. We have heard Shri Anil Airi, Learned Senior Counsel for the Appellant and Shri Sumant Batra, Learned Counsel appearing for the Respondent.

4. Learned Counsel for the Appellant submits that the operational debt was due on the Corporate Debtor consequent to RA Bills issued in pursuance of the contracts entered between the parties. Corporate Debtor despite settlement dated 16.12.2017 failed to honour the Settlement Agreement leading the Operational Creditor to file fresh Section 9 Application. It is submitted that the Adjudicating Authority committed error in holding that Section 9 Application is not maintainable. Learned Counsel for the Appellant relied on the judgment of this Tribunal in ***"Ahluwalia Contracts (India) Limited vs. Logix Infratech Pvt. Ltd.- Company Appeal (AT) (Ins.) No. 696 of 2022"*** and submits that this Tribunal has held that Memorandum of Understanding entered between the parties was only with regard to mode and manner of payment, hence, the Corporate Debtor on not being able to pay the debt cannot be absolved from his debt and default. The Adjudicating Authority had taken too technical view of the matter in holding that breach of settlement does not entitle the Operational Creditor to file Section 9 Application whereas Section 9 Application was filed on the basis of dues which became due on account of work awarded to the Appellant by the Corporate Debtor. It is submitted that the Adjudicating Authority has placed reliance on the judgment of this Tribunal in ***"Amrit Kumar Agrawal vs. Tempo Appliances Pvt. Ltd.- Company Appeal (AT) (Ins.) No.1005 of 2020"*** which has no application in the facts of the present case.

5. Learned Counsel appearing for the Respondent supported the order of the Adjudicating Authority rejecting Section 9 Application. It is submitted that the Settlement Agreement which was entered on 16.12.2017 was between the present parties as well as 'Krrish Realtyniramn Ltd.' (later named as VentaRealtech Pvt. Ltd.). It is submitted that in the CIRP of VentaRealtech Pvt. Ltd., Appellant has filed its claim for amount of Rs.19,81,00,000/- which was admitted by the Resolution Professional of 'VentaRealtech Pvt. Ltd.' It is submitted that the proceedings in the IBC are not meant for money recovery. It is submitted that the default of instalment of Settlement Agreement does not come within the definition of operational debt.

6. We have heard Learned Counsel for the parties and perused the record.

7. The Adjudicating Authority dismissed the Section 9 Application holding that debt claimed is not the debt owed for the supply of goods or rendering of services, it is a debt which has arisen from the breach of the Settlement Agreement. In paragraph 13 of the judgment, following has been held:-

> *"13. Having regard to the conspectus of all relevant facts and circumstances and the judgments cited supra, we are of the view that the outstanding debt as claimed in the present application does not fall under the definition of Operational Debt as defined under Section 5(21) of the Code, 2016 as the debt claimed is not the debt owed for the supply of goods or rendering pf services, it is a debt which has arisen from the breach of the Settlement Agreement.*

Accordingly, the present application being not maintainable stands dismissed. No orders to cost."

8. We need to first notice the claim of the Operational Creditor as is reflected from Application under Section 9. Application under Section 9 which was filed on 01.08.2019 by the Operational Creditor. Part-IV gives 'particulars of operational debt'. It is useful to extract Part-IV, Item No.1 where details of operational debt have been mentioned:

"**PART-IV**

PARTICULARS OF OPERATIONAL DEBT

1.	TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL	Total Amount of Debt: INR 19,81,00,000/- (Nineteen Crore Eighty One Lakhs Only). Details of transactions on account of which debt fell due and due date: That in furtherance of the representations and assurances given by the M/s Jasmine Buildmart Pvt. Ltd., to abide by the payment schedule and sufficient capital for timely payments and assistance, Ahluwalia Contracts (India) Limited (hereinafter 'ACIL') accepted the contract awarded by JBPL for construction of Krrish Provence Estate (Structure and Finishing work) at Sector 3, Gwal Pahari, Gurgaon, Haryana. That the said work contract consisted of two independent components, first being the structure work and the second one being the finishing work. That in pursuance of the work done under both structure and finishing work, Operational Creditor raised timely bills which were duly certified by Corporate Debtor. That 49th

		and 50th RA bill (being the final bill) for the work done by ACIL towards the finishing work were accordingly raised and were duly certified by JBPL after join measurement of the parties) and as on 16.12.2017, the amount outstanding in favor of Operational Creditor, against the construction work of the said project tunes up to INR 19,81,00,000 (Nineteen Crore Eighty One Lakhs Only) along with applicable interest @12 % per annum on the amount of Rs. 13.11 Cr. and @24% per annum on Rs.4.24 Cr for reconciliation, out of the Settlement Amount as per Clause 4 of the Settlement Agreement dated 16.12.2017. As against the work done, RA Bills were raised and certified accordingly, the amount due in default towards the certified RA Bills, the Settlement Agreement dated 16.12.2017, order of the NCLT dated 18.12.2017 & Order of the Hon'ble High Court dated 16.04.2019 the amount claimed stands due in default in favour of the Operational Creditor. In such circumstances, the total unpaid amount which stands due in the favor of ACIL and against the JBPL (for the work done in the structural and finishing work and retention money amounts therein) tunes up to INR 19,81,00,000 (Nineteen Crore Eighty One Lakhs Only). The transaction is described in greater detail in the note appended with the application. Due Date: 16.12.2018. The said amount in *toto* further fell due when JBPL admitted the outstanding

		amount to the tune of INR 19,81,00,000 (Nineteen Crore Eighty One Lakhs Only). Furthermore, the said amount fell due again when M/s Ahluwalia Contracts (India) Ltd. issued a Statutory Notice dated 31.07.2017, under section 8 of the Insolvency Code, 2016 and called upon the JBPL to make payment of the outstanding operational debt of INR 19,81,00,000 (Nineteen Crore Eighty One Lakhs Only) and has been due since then. The said amount further fell due on 16.12.2017, the Corporate Debtor has entered into Settlement Agreement with the admission to pay the Outstanding amount. The said amount further fell due on 18.12.2017 when the settlement deed dated 16.12.2017 was placed before the NCLT, Principal Bench in the IB-488(PB)/2017. The said amount again fell due when after the expiry of 12 months of the settlement arrived at between the Operational Creditor and Corporate debtor, the Corporate Debtor failed to clear the outstanding dues. Again the amount fell due and payable on 16,04.2019 when the Arbitration Petition filed by the Corporate Debtor before the Hon'ble High Court of Delhi was dismissed. The said outstanding amount further fell due when on 28.05.2019 the Operational Creditor served a statutory demand notice under section 8 of the Insolvency and Bankruptcy Code, 2016 demanding the payment in respect of the unpaid operational debt.

9. When we look into the nature of debt claimed by the Operational Creditor the debt emanates from 49^{th} and 50^{th} RA Bills being a final bill for the work done by the Operational Creditor towards work in pursuance of award of the contract by the Corporate Debtor to the Operational Creditor. Details of Settlement Agreement dated 16.12.2017 and the order passed on 18.12.2017 has also been narrated in Part-IV. The Settlement Agreement dated 16.12.2017 was executed between the Operational Creditor and the Corporate Debtor where Corporate Debtor undertook to pay the debt.

10. A judgment has been relied by the Learned Counsel for the Appellant in support of his submission i.e. judgment of this Tribunal in ***"Ahluwalia Contracts (India) Limited vs. Logix Infratech Pvt. Ltd.- Company Appeal (AT) (Ins.) No. 696 of 2022"***. The aforesaid case relates to the Appellant, the same Operational Creditor, which was filed against a different Corporate Debtor- 'Logix Infratech Pvt. Ltd.'. The Operational Creditor was awarded a contract for civil and structural work. After final bill was prepared, Memorandum of Understanding / Settlement Agreement was entered between the parties on 30.09.2019 under which Rs.11 Crore was to be paid to the Appellant towards the work done. Payment not being made, Section 9 Application was filed where Adjudicating Authority dismissed Section 9 Application on the ground that there is no operational debt, which order came to be challenged. This Tribunal in paragraphs 7 to 12 of the judgment, held as follows:-

"7. The Operational Creditor has carried out the work and as per the final bill certificate, an amount of Rs. 11 crores was to be paid. Subsequently, Memorandum of Understanding was entered on 30.09.2019 laying down the manner of payment of Rs. 11 crores amount on breach of which compelled the Appellant to file section 9 application.

8. The Adjudicating Authority has in the impugned order relied on the two orders passed by NCLT and has held that Applicant is not covered as Operational Creditor, hence the application is not maintainable.

9. Present is a case where the Appellant was awarded the contract to carry on construction and structural work and the dues claimed by the Appellant are operational debt. The Memorandum of Understanding entered between the parties was only with regard to mode and manner of payment, that too after final bill certificate which was duly signed by both the parties.

10. Adjudicating Authority did not consider the nature of transaction between the parties and has erroneously come to the conclusion that section 9 application was not maintainable. The judgement of Adjudicating Authority cannot be sustained.

11. Learned Counsel for Respondent has also fairly submitted that Corporate Debtor is unable to make payment.

12. In view of the above, we allow the appeal by setting aside the order of Adjudicating Authority directing the Adjudicating Authority to pass an order of admission and other consequential order within a period of four weeks from the date of receipt of this order. The appeal is allowed accordingly."

11. In the above judgment, it is clearly held that Memorandum of Understanding entered between the parties was only with regard to mode and manner of payment and that too after final bill certificate which was duly signed by both the parties. It was held that Application under Section 9 ought not to have been rejected. Present is also a case where the operational debt arose out of contract awarded by the Corporate Debtor to the Operational Creditor, with regard to which RA Bill Nos.49 and 50 final bills were issued. Present is not a case that Corporate Debtor denied his liability to pay the bills rather during pendency of earlier Section 9 Application entered into settlement dated 16.12.2017 for payment of the amount. The above Judgment fully support the submissions of Appellant.

12. The Adjudicating Authority has relied in the impugned order the judgment of this Tribunal in ***"Amrit Kumar Agrawal"*** (supra) which was a case where corporate guarantor after failure of principal borrower to make the payment came forward and entered into settlement agreement, there being breach of settlement agreement, Application under Section 7 claiming financial debt was filed. This Tribunal in paragraph 4 of the judgment held that there was no financial debt since there is no disbursement for time value of money. In paragraph 4 of the judgment, following was held:-

> *"4. Mere obligation to pay does not bring the liability within the ambit of 'financial debt'. The debt, along with interest, if any, should be disbursed against the consideration for the time value of money. Breach of terms of an agreement including a*

> *Settlement Agreement whereunder payment may be due would not fall within the ambit of Section 5(8) so as to constitute a 'Financial Debt'. Admittedly, inter se the parties, there is no disbursement against the consideration for the time value of money. Principal borrower is not a party to Settlement Agreement. Viewed in the context of Settlement Agreement, there is no borrowing on the part of Respondent from the Appellant. Mere obligation to pay under a Settlement Agreement would not amount to disbursal of amount for consideration against the time value of money and breach thereof would not entitle the Appellant in the instant case to trigger Corporate Insolvency Resolution Process against the Respondent. Viewed from this prospective, we find that bouncing of cheques issued in discharge of obligation under the Settlement Agreement would not fall within the purview of default in regard to financial debt."*

13. The judgment of this Tribunal in ***"Amrit Kumar Agrawal"*** (supra) was a case where this Tribunal was examining the Application on the **issue** whether it is financial debt. In the said background, it was held that Settlement Agreement subsequently entered between the Financial Creditor and the Corporate Guarantor does not contain any element of financial debt, hence, its breach was not financial debt. The judgment of this Tribunal in ***"Amrit Kumar Agrawal"*** (supra) was entirely on different facts and circumstances and has no application in the present case. In the present case, as noted above, the nature of the operational debt was payment of RA Bills submitted by Operational Creditor and Settlement Agreement was entered for payment but payment having not been made in pursuance of the Settlement Agreement, liability of the Corporate Debtor to make the payment continues and Operational Creditor was well within its right to file Section 9 Application.

14. Learned Counsel for the Respondent has placed reliance on the judgment of this Tribunal in Company Appeal (AT) (Ins.) No.742 of 2020- ***"Trafigura India Private Limited vs. TDT Copper Ltd."*** for the proposition that breach of settlement agreement does not give any rise to operational debt. This Tribunal in the said judgment made following observations:-

> *"The Adjudicating Authority has considered the Settlement Agreement and rightly come to the conclusion that default of instalment of Settlement Agreement does not come within the definition of 'operational debt' as it does not fall within the definition of additional debt as per Section 5(21) of the IBC and further prayer made by the Corporate Debtor that the matter be referred to the Arbitration under Section 8 of the Arbitration and Conciliation Act, the Adjudicating Authority has also rightly held that the role of National Company Law Tribunal is very limited while exercising its power under Section 7, 9 and 10 of the IBC, 2016, it is beyond the scope of Section 9 of the IBC."*

15. We have already noticed the nature of operational debt claimed in Section 9 Application, which arose out of construction contract granted to the Operational Creditor by the Corporate Debtor. Settlement during earlier Section 9 proceeding was only mode of payment to the operational debt. The facts of the present case are clearly distinguishable. The judgment of this Tribunal in ***"Trafigura India Private Limited vs. TDT Copper Ltd."*** does not come to any aid to the Appellant.

16. Learned Counsel for the Respondent submitted that in the CIRP of 'VentaRealtech Pvt. Ltd.' who had under Settlement Agreement undertook to make the payment, the Appellant has filed its claim which has been accepted by the Resolution Professional, hence, Section 9 Application was not maintainable. It is submitted by the Appellant that the acceptance of claim in CIRP of 'VentaRealtech Pvt. Ltd.' does not absolve the Corporate Debtor from paying its operational debt.

17. Learned Counsel for the Respondent has also relied on the judgment of the Hon'ble Supreme Court in ***"Ghanshyam Mishra and Sons (P) Ltd. vs. Edelweiss Asset Reconstruction Co. Ltd.- (2021) 9 SCC 657"*** to support his submission that in view of Appellant filing his claim in CIRP of 'VentaRealtech Pvt. Ltd.', his claim being partially allowed, rest was extinguished. In the CIRP of 'VentaRealtech Pvt. Ltd.', the claim of the Appellant which has not been granted shall stand extinguished but said extinguishment of claim does not extinguish the claim of the Appellant against the Corporate Debtor who was liable to pay the dues and debt of the Appellant. We, thus, are of the view that the judgment of the Hon'ble Supreme Court in ***"Ghanshyam Mishra and Sons (P) Ltd."*** (supra) does not help the Appellant in the present case.

18. We are of the view that filing of claim in the CIRP of 'VentaRealtech Pvt. Ltd.' has no effect on maintainability of Section 9 Application. In the CIRP what amount Operational Creditor i.e. Appellant is entitled or receives are different issues, any amount received by the Appellant in CIRP of 'VentaRealtech Pvt. Ltd.' may be adjusted but that itself cannot be a ground to not proceed with Section 9 Application filed by the Operational Creditor. We, thus, are of the view that the Adjudicating Authority committed error in rejecting the Application of the Appellant on the ground that there is no operational debt. The issue is fully covered by judgment of this Tribunal in ***"Ahluwalia Contracts (India) Limited vs. Logix Infratech Pvt. Ltd."***.

19. In view of the foregoing discussions, we are of the view that impugned order of the Adjudicating Authority is unsustainable. In result, the Appeal is allowed. The order dated 12.01.2023 is set aside. Section 9 Application filed by the Appellant is revived before the Adjudicating Authority to be proceeded with in accordance with law.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi
Anjali