

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

IA (I.B.C) No. 2706/MB/2023

in

CP (IB) No. 1544/MB/2017

[Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of the National Company Law Tribunal Rules, 2016]

VIKRANT ISPAT UDYOG

....Applicant/Operational Creditor

Versus

B.E. BILLIMORIA AND CO LTD

....Respondent/Corporate Debtor

IN THE MATTER OF:

VIKRANT ISPAT UDYOG

Address: 113/8, 1st Floor, Navyug Market
Ghaziabad-201001, Uttar Pradesh.

...Operational Creditor

V/s

B.E. BILLIMORIA AND COMPANY LIMITED

[CIN: U45200MH1962PLC012268]

Registered Office: Shiv Sagar Estate, 'A' Block
2nd Floor, Dr. A.B. Road, Worli
Mumbai-400018, Maharashtra.

...Corporate Debtor

Pronounced: 05.12.2024.

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances:

Applicant: Adv. Bhuvan Singh i/b. Adv. Devanshu P. Desai

Respondent: Adv. Vidit Divya Kumat a/w Adv. Yash Jariwala

ORDER

[PER: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. BACKGROUND

1.1 This Interlocutory Application, IA(I.B.C) No. 2706/MB/2023 (IA) was filed on 12.06.2023 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 11 of the National Company Law Tribunal Rules, 2016 (NCLT Rules) by Vikrant Ispat Udyog, the Applicant/Operational Creditor (OC) for restoration of the C.P. No. 1544/MB/2017 (Main Application) against B.E. Billimoria and Company Limited, the Respondent/Corporate Debtor (CD,) which was disposed of *vide* order dated 25.01.2019 by the Bench on the ground that the parties had amicably settled the debt amount in question.

1.2 In this IA, the Applicant/OC is seeking restoration of the Main Application and admission of the same by appointing Mr. Ajay Kumar, the proposed Interim Resolution Professional (IRP), for initiating the Corporate Insolvency Resolution Process (CIRP) against the CD.

1.3 The Applicant/OC in the Main Application, had filed C.P. (IB) No. 1544/MB/2017 dated 03.11.2017, against the CD under Section 9 of the IBC for default of Rs.98,79,591/- (Ninety-Eight Lakhs Seventy-Nine Thousand Five Hundred and Ninety-One Rupees), which included interest calculated at

the rate of 24% per annum. The said default amount was based on ten unpaid invoices issued by the OC during the period of 23.09.2015 to 20.12.2015, to the CD, in lieu of supplying goods worth Rs. 2,16,73,188/- in the year 2015.

- 1.4 The OC is a Ghaziabad based partnership firm engaged in the business of supplying iron products while the CD is a Mumbai based Civil Engineering Company engaged in various infrastructure projects. For CD's business purposes, the OC supplied iron products to the CD from 25.08.2015 to 19.12.2015 and issued various invoices for the same. The CD initially used to make payments for the invoices but failed to make further payments afterwards with its last payment of Rs. 15,00,000/- on 09.05.2016, as per the Main Application.
- 1.5 As the CD failed to clear the outstanding dues to the OC, it issued demand notice under Section 8 of IBC for seeking payment of Rs. 98,79,591/- from the CD. However, the CD, *vide* its reply notice dated 07.09.2017, denied the OC's claims citing non-compliance of the provisions of the IBC and seeking payment details from its Delhi branch office.
- 1.6 Since the CD failed to make any payment after the issuance of demand notice, the OC filed the Main Application on 03.11.2017. The date of default as mentioned in Part-IV of the Main Application is 23.09.2015 i.e., the date on which the OC issued the first invoice No. 673 for Rs.6,66,699/- to the CD which remained unpaid along with nine other invoices.

2. CONTENTIONS OF APPLICANT/OC

2.1 During the pendency of the Main Application, the Respondent paid an amount of Rs.51,00,011/-, which had left the balance default amount as Rs.47,79,580/-. As the parties amicably settled the dispute, this Tribunal, *vide* its order dated 25.01.2019 (Settlement Order), disposed of the Main Application, by recording a schedule of payment, with liberty to the Applicant/OC to inform the Bench in the case of default or defiance on the part of the Respondent/CD. Since the parties were not able to settle the rate of interest for delayed payment to the Applicant/OC by the Respondent/CD, they agreed to abide by whatever interest was decided by the Bench. The Bench, therefore, directed the Respondent/CD to pay interest at 12% p.a. for the delayed payment.

2.2 Thereafter, the Respondent challenged the Settlement Order, before Hon'ble NCLAT, which was rejected by Hon'ble NCLAT *vide* its order dated 11.02.2020 in *M/s. B.E. Billimoria and Company Ltd. Vs. M/s. Vikrant Ispat Udyog* [Company Appeal (AT) (Insolvency) No. 477 of 2019].

2.3 Since the Respondent failed to make further payments as per the Settlement Order, the Applicant/OC reminded the Respondent of its obligations *vide* its advocate's notice dated 16.02.2019. Later, the Applicant/OC again issued advocate's notice on 27.02.2020 for demanding Rs. 50,77,573/-, which included the amount of Rs. 38,97,993/-, calculated with interest up to 29.02.2020, as per the Settlement Order.

2.4 However, *vide* its letter dated 05.03.2020, the Respondent rejected the Applicant's claims citing different amount to be paid, i.e., the amount of Rs.

13,28,496/- including the interest, claiming to be complying with the Settlement Order and by making other excuses.

2.5 Subsequently, the Applicant/OC issued another notice dated 18.02.2021 along with its ledger account from 01.04.2015 to 28.02.2021 for settling the outstanding dues, which was denied by the Respondent/CD *vide* its reply notice dated 09.03.2021. The Applicant/OC, *vide* notice dated 02.03.2023, sought total payment of Rs.47,11,110/- comprising of the principal amount of Rs.5,79,580/- along with interest of Rs. 41,31,530/-, calculated at the rate of 12% annum until 01.03.2023. However, the Respondent neither replied to the Applicant's notice nor made any further payment towards settling the outstanding dues to the Applicant/OC.

2.6 Since the Respondent/CD has violated the settlement arrived at with the Applicant/OC and has committed default and defiance of the Settlement Order, the Applicant/OC prays that the Main Application may be revived and CIRP initiated against the Respondent/CD, by appointing IRP.

3. CONTENTIONS OF RESPONDENT/CD

3.1 The Applicant/OC has suppressed material facts in the present matter. Under the Settlement Order, the Respondent/CD was only liable to pay interest at 12% p.a. for the period of delay in payment. However, the Applicant/OC failed to prove any delay in payment by it. Since the Main Application was disposed of on account of amicable settlement between the parties, as per the Settlement Order, any claims raised by the Applicant/OC would be only based on the settlement claim.

3.2 The alleged outstanding claims of the Applicant/OC does not amount to operational debt for the purpose of Section 5(21) of the IBC since it was based on settlement and claims. Unpaid installments of the settlement agreement do not qualify operational debt, and as such, the Applicant/OC's claims can at the best be regarded as simple debt and it has lost the character of operational debt. No proceeding can be initiated in respect of a simple debt under the IBC and the only remedy available to the Applicant/OC is to seek civil proceedings for the same. Breach of terms of the settlement agreement cannot be a ground for triggering CIRP against the Respondent/CD. The Respondent/CD relied upon the decisions of the Hon'ble NCLAT, Chennai in *Mr. Maulik Kirtibai Shah Vs. United Telecom Limited*. [Company Appeal (AT) (CH) (Ins) No. 268/2023] and the order of NCLT New Delhi in *Finsbury Global FZE Vs. M/s. Uttam Sucrotech International Pvt Ltd*. [IA No. 4081/2022 in C.P.(IB) No. 1013/PB/2020] and order of this Bench in *Suresh Gupta Vs. B.E. Billimoria & Co* [CP (IB) No. 838/MB-VI/2019] to buttress this point.

3.3 Merely on the basis of the Settlement Order passed by the Bench, the present IA cannot be allowed to revive the Main Application. Liberty granted by the Bench is no reason for automatic revival of the same. The claims arise out of the settlement agreement between the parties and that the NCLT has nothing to do with the settlement between them. The Respondent/CD cited the decision of NCLT New Delhi in *Bajaj Rubber Company Private Limited Vs. Saraswati Timber Private Limited*, [IA No. 3247/ND/2022 in CP (IB) No. 1441/ND/2018], which was upheld by the Hon'ble NCLAT, New Delhi in *Bajaj*

Rubber Company Vs. Saraswati Timber Pvt. Ltd., [Company Appeal (AT) (Ins) No. 1296 of 2022].

3.4 The Respondent is a well-established civil engineering company and the Applicant, *vide* the present IA has abused the process of law solely for arm-twisting the Respondent/CD and misusing the proceedings under the IBC for recovery over claims based on settlement agreement.

4. REJOINDER OF APPLICANT/OC

4.1 The Applicant/OC submits that the present IA is maintainable as in the Settlement Order, the Bench had granted liberty to it to revive the Main Application in the event of failure of the Respondent/CD in payment of the installments as per the repayment schedule. It cited the decisions of the NCLT, Mumbai in *Delta Electro Mechanical Pvt. Ltd. Vs. Sahara Hospitality Ltd.* [IA No. 2417/2020 and IA No. 2649/2019 in CP (IB) No. 2430/2018] and the Hon'ble NCLAT, New Delhi in *IDBI Trusteeship Services Limited Vs. Nirmal Lifestyle Limited* [Company Appeal (AT) (Insolvency) No. 117 of 2023].

4.2 The IA is not barred by limitation since the period of 15.03.2020 to 28.02.2022 would be excluded to determine limitation as held by the Hon'ble Supreme Court *vide* order dated 10.01.2022 in *IN RE: COGNIZANCE FOR EXTENSION OF LIMITATION* [M.A. No. 21 of 2022 in M.A. No. 665 of 2021 in *Suo Motu* Writ Petition (C) No. 3 of 2020]. As the date of payment for the last installment of the settlement schedule was 04.11.2019, after excluding the aforesaid period, the new period of limitation

would end on 03.11.2023, the IA, filed on 12.06.2023 is within the limitation period.

4.3 The Respondent/CD failed to expressly deny its liabilities towards the Applicant/OC in its reply dated 07.08.2023. Moreover, since the Main Application was filed on 03.11.2017, which was prior to the Notification dated 24.03.2020, enhancing the threshold limit for triggering CIRP, the default amount is well above One Lakh Rupees, for maintaining the same.

4.4 The judgments of Hon'ble NCLAT in *Bajaj Rubbers* (Supra), *Finsbury Global* (Supra) and *Maulik Kirtibhai Shah* (Supra) and the decision of this Bench in *Suresh Gupta* (Supra), as relied upon by the Respondent/CD, are not applicable in the present situation since the factual matrix of all these judgments are totally different from that of the present one and are distinguishable. There is clear cut liberty granted to the present Applicant/OC for revival of Main Application in the event of breach of settlement agreement by the Respondent/CD.

5. ANALYSIS AND FINDINGS

5.1 We have perused all the documents and pleadings and heard both the Ld. Counsel for the Applicant/OC and the Respondent/CD.

5.2 The major objections set up by the Respondent are (i) the outstanding debt under the settlement agreement is not operational debt; and (ii) the IA is barred by limitation.

5.3 Upon perusal of available documents, we find that, as per the Part-IV of the Main Application, out of the original default amount of Rs.98,79,591/-, the

Respondent/CD had already paid Rs. 51,00,011/- at the time of the Settlement Order and the present claims of the Applicant/OC comes to Rs.47,11,010/-, including principal amount of Rs. 5,79,580/- (Installment amount of 04.10.2019 and 04.11.2019, under the schedule of repayment). The Ld. Counsel for the Respondent/CD vehemently opposed to the maintainability of the IA on the ground that it is based on claims out of the settlement agreement. In this connection, it worthwhile considering the Settlement Order, in which the Bench recorded that:

*“A liberty is hereby granted to the Petitioner that **in case of default or defiance on the part of the Debtor** in payment of balance amount as per the terms of the schedule agreed upon, **the same can be informed to this Bench for requisite action upon the Respondent** as prescribed under the Insolvency Code.”* (Emphasis supplied).

5.4 Now, let us consider the rights of parties to settle disputes. Parties to litigation have inherent right to settle their disputes mutually before approaching a Court of Law. Even after filing an application before the Court, the parties have the liberty to settle the disputes and seek approval of the Court for withdrawal of the proceedings. Here is a case where the parties amicably settled their dispute after the Applicant/OC filing the Main Application under Section 9 of the IBC. The parties have jointly reported the Court regarding settlement of the debt amount on 25.01.2019. The terms of the settlement and the payment schedule were also discussed. The Applicant/OC accepted the revised payment schedule. Since the Respondent/CD had not made any provision for payment of interest for the period of delay, the Applicant/OC and

the Respondent/CD jointly communicated to the Court that whatever rate of interest was decided by the Court shall be agreeable to both the sides. The Court, on due consideration of the facts and circumstances, recorded appreciation for the genuine efforts and persuasion of the representatives from both the sides that helped in reaching the settlement. Although there was a clause for interest at 24% p.a., payable by the Respondent/CD, the Court on judicial consideration, directed it to pay interest at the rate of 12% p. a. for the period of delayed payment, which was agreed upon by both the parties. Finally, the Court taking cognizance of their settlement, granted liberty to the Applicant/OC that in case of default or defiance by the Respondent/CD in payment of the balance amount, as per the terms of schedule agreed upon, the same shall be informed to the Court for it to take requisite action on the Respondent/CD. In the circumstances, we hold that the settlement between the Applicant/OC and the Respondent/CD had become final, conclusive and binding on the parties, on the Bench passing the Settlement Order. The Respondent/CD has now violated the terms of the payment schedule and has admittedly, committed defiance of the Settlement Order.

5.5 After agreeing to the interest portion before the Bench, the Respondent/CD unsuccessfully challenged the Settlement Order before the Hon'ble NCLAT. Since the parties have jointly reported the Court as to their settlement; and that the terms of settlement were recorded and the matter was allowed to be disposed of; the Court is, indisputably, a party to the settlement, being a facilitator. In other words, the settlement terms are nothing but enforceable

contract binding on the parties. The Court had already made provision as regards violation of the terms of the settlement contract by the Respondent/CD in order to take necessary action on the Respondent/CD.

5.6 Further, we feel that, by agreeing to settle the dispute before the Bench, the original operational debt as claimed in the Main Application did not extinguish when the Court recorded the same and allowed disposal of the Main Application. We hold that the AA has no power to order extinguishment of an operational debt claimed by an operational creditor but only has the authority to determine whether there exists operational debt or not in a Section 9 application. The determination of operational debt is possible only when the Main Application is heard on merits and disposed of. The Respondent/CD had not filed any reply to the Main Application. In the present case, the Main Application has not been heard on merits as the parties had reported settlement before that stage. Hence, we are of the considered view that the Main Application is required to be revived for determining the existence of operational debt by giving effect to the Settlement Order passed by the Bench.

5.7 Regarding the issue of limitation, we observe that the present IA for restoration of C.P. No. 1544/MB/2017 was filed on 12.06.2023. However, upon perusal of available documents, we find that only payment of Rs.5,79,580/-, as total installment amount of 04.10.2019 and 04.11.2019, was pending with the Respondent as per the settlement schedule. The Ledger account of the Applicant/OC from 01.04.2015 to 06.08.2022 clearly indicate that the last payment of Rs.6,00,000/- was made by the

Respondent/CD on 22.06.2020. In normal circumstances, the limitation period of three years from the last date of payment of debt would have expired on 22.06.2023. This IA was filed on 12.06.2023. Even if limitation becomes a ground to get the Main Application revived, the IA which is nothing but continuation of the dispute between the parties, was filed before expiry of the period in terms of the Limitation Act, 1963. This IA does not have independent existence sans the Main Application. Hence, we feel that there appears to be no necessity to apply the law laid down by the Hon'ble Supreme Court in *IN RE: COGNIZANCE* (Supra) in the present matter. Hence, this issue of limitation is also decided against the Respondent/CD.

5.8 As regards the jurisprudence on settlement agreements vis-à-vis operational debt, the Hon'ble NCLAT, New Delhi in *Vivek Bansal Vs. Burda Druck India Pvt. Ltd.*, [Company Appeal (AT) (Insolvency) No. 552 of 2020] held that in the event of default by the corporate debtor and not adhering to the terms of the settlement agreement, the operational creditor shall be at liberty to seek revival/restoration of CIRP before the AA. This position has been reiterated in the matter of a financial creditors by the Hon'ble NCLAT, Chennai in *M/s. ICICI Bank Limited Vs. M/s. OPTO Circuits (India) Limited.*, [Company Appeal (AT) (CH) (Insolvency) No. 146 of 2021].

5.9 The judgment of the Hon'ble NCLAT in *Bajaj Rubbers* (Supra) is on different factual matrix and is clearly distinguishable from the present matter as in that case, there was inordinate delay in the operational creditor approaching the NCLT for revival of the company petition. Similarly, in *Maulik Kirtibai Shah* (Supra), the claim was based on an MOU entered into between the parties

before they approached the NCLT and the settlement was not facilitated by the AA. The decision of *Suresh Gupta* (Supra) is also on the similar facts. Hence, these decisions would not come to the rescue of the Respondent/CD. In the instant matter, the Main Application was disposed of pursuant to amicable settlement between the parties by an express Settlement Order by the Bench. Further, the Bench had clearly granted the liberty to the Applicant/OC to revive the Main Application in the event of breach by the Respondent/CD. Moreover, the nature of the alleged outstanding claims cannot be said to have changed merely on the ground that it was based on the settlement agreement. We find that in the present case, the Respondent/CD itself acted upon the Settlement Order by making part-payments towards the outstanding claims as settled between them by virtue of the Settlement Order. We observe that after the Settlement Order on 25.01.2019, the Respondent/CD had made part-payments on several dates such as on 25.03.2019; 15.04.2019; 29.04.2019; 04.06.2019; 07.08.2019; 05.10.2019; and 22.06.2020, as reflected on the Ledger account produced by the Applicant/OC. These payments have not been disputed by the Respondent/CD. Hence, we hold that after part-performance of the contractual obligation finalised under the Settlement Order, the Respondent/CD cannot now go back on their remaining commitment.

5.10 Moreover, under Rule 11 of the NCLT Rules, this AA possesses inherent powers to pass orders necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal. This position is reflected in the judgment of the Hon'ble NCLAT, Chennai in *Sree Bhadra Parks and Resorts Ltd. Vs.*

Sri Ramani Resorts and Hotels Pvt. Ltd. [Company Appeal (AT) (CH)

(Insolvency) No. 06 of 2021], wherein it was held that the AA is empowered to restore an original application under Rule 11 of the NCLT Rules, in spite of an express provision in the consent terms to file a fresh application. In view of the legal and factual position, the core issues are decided against the Respondent/CD.

5.11 Before parting, we reiterate that settlement should lead to ending the litigation. Parties should not be allowed to secure settlement orders from Courts only to use them for avoiding or delaying financial obligations. It would not be in the interest of justice to allow parties to freely breach settlement terms, especially when the settlement is consensual and arrived at by an order of the Court. If parties are allowed to breach settlement orders passed by Courts, it would lead to travesty of justice. Settlement is employed as a tool to save prolonged litigation. Moreover, the Court has to ensure compliance of judicial orders by the concerned unless reversed or modified by the Appellate Courts.

5.12 In view of the above discussions, it is a fit case for restoration and **C.P. No. 1544/MB/2017** is restored on file.

5.13 List C.P. No. 1544/MB/2017 for further consideration on **12.12.2024**.

5.14 In the result, I.A. No. 2706/MB/2023 is **allowed** and **stands disposed of**.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

//Tanmay Jain//