

IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

CP (IB) No.179/CB/2020

An Application under Sections 9 of the Insolvency and Bankruptcy code R/W 6 of the (Application to Adjudicating Authority) Rules, 2016;

And

In the matter of:

M/s. Prakash Corporates, Regd. Office At: T-16, Raheja Tower Fafadih, Raipur, Chhattisgarh – 492 001;

...Operational Creditor

-Versus-

Dee Vee Projects Limited, Regd. Office At: First Floor, Vikas Complex P.H. Road, Korba Chhattisgarh – 495 677;

... Corporate Debtor

Appearances (via video conference):

For the Applicant/ RP:

1. Ms. Saswat Kumar Acharya, Advocate
2. Ms. S. Pholgu, Advocate
3. Mr. J. Joshi, Adv.

For the Respondent;

1. Rishab Garg, Adv.
2. Venugopal Mahapatra, Adv.
3. Sachin Sahu, Adv.

Order Reserved on: 17.02.2022.

Order Pronounced on: 04.03.2022.

Coram:

Shri P. Mohan Raj
Shri Satya Ranjan Prasad

Member (Judicial)
Member (Technical)

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ORDER

Per P. Mohan Raj, Member, (Judicial)

1. The Petitioner ("**Operational Creditor-OC**") has filed this Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**IBC, 2016**") to initiate Corporate Insolvency Resolution Process ("**CIRP**") against the Respondent ("**Corporate Debtor-CD**") for defaulting the sum of Rs.13,36,52,632/- payable towards the services rendered by the OC. The CD filed a Counter on 13.07.2021, which was returned by the Registry to comply certain defects therein. Till date the defects were never rectified by the CD, despite a rejoinder having been filed by the OC. However, the respective Counsel for the OC and CD made their submissions.

2. Thus, when the matter is in a part-heard stage, the OC reported that it will withdraw the Petition, since a Settlement was arrived at between the OC and CD. Pursuant thereto, the OC and CD filed a Joint Memo on 22.12.2021 annexing a copy of the Settlement Deed dated 20.12.2021 executed between them, and prayed to dispose of the Petition accordingly. The aforesaid Joint Memo and the Settlement Deed were perused on 23.12.2021.

3. As per the Settlement, the OC agreed to receive a sum of Rs.11,88,00,000/- towards full and final settlement of dues from the CD, and the CD agreed to pay the said amount in 13 instalments commencing from 23.12.2021 and terminating 30.09.2022. Further, it is seen in the Settlement Deed that the OC has incorporated certain Clauses whereby the OC has reserved liberty to file an application to revive/restore the instant CP(IB) No.179/CTB/2020 in the event

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the CD committed a default in complying with the Settlement Deed. The said
Clauses are extracted below: -

Clause 5 – *“The Corporate Debtor agrees that in the event of failure of the terms of payment on its part including but not limited to failure on the part of the Corporate Debtor in honoring one or more of the above cited post-dated cheques, the instant terms of settlement shall be deemed to have been recalled and the parties shall be deemed to have been restituted to the same position as it were prior to the execution of the instant terms of settlement”.*

Clause 6 – *“The Corporate Debtor unequivocally declares and undertakes that in the event the Corporate Debtor commits a default of the instant terms of settlement, then the Operational Creditor shall be entitled to file an application for reviving/restoring the instant application for the entire defaulted amounts along with due interest, filed under section 9 the Insolvency & Bankruptcy Code, 2016 being CP (IB) No. 179/CTB/2020, as may be permitted under applicable law”.*

Clause 16 – *“The Operational Creditor shall file required application/memo/etc. before the Hon’ble National Company Law Tribunal, Cuttack Bench for withdrawing the Company Petition being CP (IB) No. 179/CTB/2020, immediately on execution of this agreement, to be disposed of accordingly in view of the Terms of Settlement entered into by and between the Parties. However, Corporate Debtor unequivocally confirms that*

Operational Creditor has liberty to revive/restore the Petition being CP (IB) No. 179/CTB/2020 in the event of default, if any, committed by the Corporate Debtor in making payment as agreed in this Settlement agreement."

4. This Tribunal, albeit not provided for in the IBC, 2016, but in order to encourage settlements to facilitate the continuance and rehabilitation of the CD, as distinct from liquidating it, is in fact inclined to allow the OC to withdraw the Petition, without granting any liberty. Patently, the liberty sought by the OC under the aforesaid Clauses is an equitable relief. However, in accordance with the statutory provisions in the IBC, 2016, and the applicable Rules and Regulations, or with the analogous provisions in the Code of Civil Procedure, 1908 ("CPC") this Tribunal is sceptical about the aforesaid Clauses constraining it to question their maintainability.

5. In response, Mr. S.K. Acharya, the Counsel for the OC elaborately argued in support of their maintainability by invoking Rule 11 of the National Company Law Tribunal ("NCLT") Rules, 2016, and relied upon the orders of this Tribunal and other Adjudicating Authorities, and a Judgment of the Hon'ble Supreme Court in support of granting such a relief. The Counsel for the CD left the matter to the discretion of Tribunal.

6. In view of the aforesaid facts and circumstances, the only point that need to be considered herein is: -

"Whether any liberty could be granted to the OC to revive/restore the Petition in CP(IB) No.179/CTB/2020 in the event the CD committed a default in complying with the Settlement Deed?"

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7. Before adverting to the aforesaid Rule 11, it is necessary to look into the provisions respectively enabling the withdrawal of a CIRP and the restoration of disposed applications. The provisions applicable to withdrawal of a CIRP are tabulated below, viz.: -

Statute (Act or Rules or Regulations)	Provision (Section or Rule or Regulation)
The IBC, 2016	1) Section 12A - withdrawal of application admitted under Sections 7 or 9 or 10
The IB (Application to Adjudicating Authority) Rules, 2016	Rule 8 permitting withdrawal of the application made under section 7 or 9 or 10 of IBC, as the case may be, on a request made by the applicant before its admission
The IB Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016	1) Sec.12A, IBC, 2016, R/w Regulation 30A(1)(a) before the constitution of the committee, by the applicant through the IRP, and 2) Sec.12A, IBC, 2016, R/w Regulation 30A(1)(b) after the constitution of the committee, by the applicant through the IRP or the RP, as the case may be

8. As regards the revival or restoration of disposed applications, only Rule's (48) and (49) in the NCLT Rules, 2016, are applicable. Rule (48) permits restoration of an application dismissed for default or decided in the absence of the applicant; and, Rule (49) permits restoration of an application decided *ex-parte*.

9. It is thus patent without any ambiguity from the aforesaid statutory provisions relating to withdrawal and restoration of applications, that the OC can neither settle post admission nor seek liberty to restore the applications, which have been finally disposed of by this Tribunal. If so, the next question to be answered is as to whether the liberty could be granted to the OC by invoking the inherent

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powers conferred in Rule 11 of the NCLT Rules, 2016, and more so since the CD has not objected to granting such a liberty to the OC. The Rule of NCLT Rules 2016 is parimetria to section 151 of Code of Civil Procedure.

Rule 11, NCLT Rules, 2016	Section 151 of CPC
<p><u>Inherent Powers.</u> - Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal</p>	<p><u>Saving of inherent power of the court.</u> - Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court</p>

10. At this juncture, assuming for a moment and for argument's sake that the analogous provisions in the CPC could be made applicable to this Tribunal, the question that whether such a liberty could be granted to the OC has to be culled out from applying the provisions found in Order XXIII, CPC. The said Order XXIII deals with recording of compromise and withdrawal of suits, and the relevant Rules therein are Rules (1), (3) and (3A).

11. Under Order XXIII, Rule 1 (3), the Court can grant liberty to file fresh suit on the same cause of action only when there is any formal defect in the plaint, which liberty is however subject to limitation. It is also to be noted that the above Rule does not restore or revive the earlier suit before the same Court that has granted the liberty, but only permits filing of a fresh suit.

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12. Under Order XXIII, Rule 3 the suit can be disposed of on a compromise. However, there is no reference about the restoration or revival of a disposed case in the same Court before which the suit was compromised. Only under Order XIII, Rule 3A, the Court which disposed of the suit could set aside the compromise decree and restore the suit to the original position on its file. However, Rule 3A is strictly applicable only if the consent of a party to the compromise decree was obtained by fraud or misrepresentation.

13. Thus, the OC is not entitled to any liberty under Order XXIII, Rule 3A, since the Settlement Deed dated 20.12.2021 is voluntarily executed between the OC and CD on mutually agreed conditions without alleging any fraud, coercion or misrepresentation. Further, the Settlement Deed is analogous to passing a money decree directing its payment by instalments as provided in Order XX, Rule 11, CPC, but even the said provision does not provide for restoration of the disposed suit in the event the Judgment Debtor commits a default.

14. Once the *lis* is validly settled between the parties and accepted by the Court, the *lis* attains a quietus and terminates since the cause of action for the *lis* has merged with the final order of settlement. If the terms thereof are violated by any of the parties thereto, the breach thereof provides a fresh cause of action to take appropriate action against the party concerned. However, it shall not under any circumstances restore or revive the cause of action, which had already merged with the final order of settlement.

15. The OC seeking unbridled liberty to restore/revive the application in the event of a future contingency in fact supersedes the Law of Limitation, 1963. This Tribunal is not empowered to grant such a liberty, since it amounts to adjourning

the proceedings *sine die*. Such an adjournment is not authorised under any Law, since it is against public policy and necessity as defined in Sec.23 of the Indian Contract Act, 1872. The Law of limitation is based on public policy as defined in the legal maxim – *interest reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation). [Sec, *Popat and Kotecha Property Vs. State Bank of India Staff Association* reported in 2005 (7) SCC 510]. This is a settled Law.

16. It is the duty of the Court to consider Limitation even if not set up as a defence. If an action is barred by the Law of Limitation, it is not open to a Court to carve out any fresh period or exclusion. Any exclusion of the periods of limitation must be authorized under the Act.

17. Thus, when the intention of the OC is contrary to the object of the insolvency statutes the inherent powers conferred thereof cannot be invoked or exercised by this Tribunal. Hence, in the absence of any statutory power or any provisions, this Tribunal cannot grant any liberty, whatsoever, to the OC to pursue an equitable relief even by invoking the inherent powers conferred under the said Rule 11, which is against public policy and necessity, irrespective of the fact that the CD has not objected to granting such a liberty.

The OC has relied upon the following Judgments, viz. :-

- 1) M/s. ESS Investments Pvt. Ltd. Vs. Lokhandwala Infrastructure Pvt. Ltd., Civil Appeal No. 324/2020 in the Hon'ble Supreme Court.

The subject matter in this case are two petitions filed under Section 7, viz., CP(IB) No.4000/MP/2018 and CP No.1023/MP/2019, both filed

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before the NCLT, Mumbai. The first petition was not disposed of as settled, but dismissed due to the fact that the second petition was admitted.

Subsequently, the second petition was settled, which was never restored. In these circumstances, the Hon'ble Apex Court restored only the first petition, since the petitioner therein was left with no remedy for no fault on his part.

Hence, this Judgment does not assist the OC in any manner, whatsoever.

- 2) Ruchita Modi Vs. Mrs. Kanchan Ostwal, CA (AT) (Ins) No. 1000/2019 in the Hon'ble NCLAT.
- 3) Mohit Minerals Limited Vs. Ballarpur Industries Limited, C.P. (IB) No. 2111/MB/2019 in the Hon'ble NCLT, Mumbai Bench, order dated 15.07.2020.
- 4) Quippo Infrastructure Limited Vs. Supreme Concrete and Infrastructure Pvt. Ltd., T.P. No. 12/CTB/2019 in the Hon'ble NCLT, Cuttack Bench, order dated 30.07.2019 and order of Restoration passed on 22.10.2019.
- 5) M/s. Vikas Scaffolding Systems Vs. M/s. Metro Builders Orissa Pvt. Ltd., C.P. (IB) No. 103/CB/2019 in the Hon'ble NCLT, Cuttack Bench, order dated 06.01.2021 and order of Restoration passed on 31.03.2021.
- 6) Grasim Industries Vs. Jagabandhu Enterprises Pvt. Ltd., T.P. No. 6/CTB/2019 in the Hon'ble NCLT, Cuttack Bench, order dated 23.09.2019 and order of Restoration passed in RST. A. (IB) No. 4/CB/2021 on 30.08.2021.

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No doubt the aforesaid five Judgments has granted liberty similar to the one sought by the OC herein. However, none of them discuss about or refer to the powers conferred upon the Tribunal to grant such liberty in the absence of any statutory power in the insolvency statutes or based on the analogous provisions in other statutes.

18. The Hon'ble Supreme Court in *E.S. Krishnamurthy & Ors. Vs. M/s Bharath Hi Tech Builders Pvt. Ltd. & Anr.*, in C.A. No.3325 of 2020. Dated 14.12.2021 held in para 29 as follows:

"The IBC is a complete code in itself. The Adjudicating Authority and the Appellate Authority are creatures of the statute. Their jurisdiction is statutorily conferred. The statute which confers jurisdiction also structures, channelises and circumscribes the ambit of such jurisdiction. Thus, while the Adjudicating Authority and Appellate Authority can encourage settlements, they cannot direct them by acting as courts of equity.

19. In view of the aforesaid findings of the Hon'ble Supreme Court, this Tribunal cannot act as a Court of recovery, that is not the object of IBC 2016. In fact, the OC by virtue of the liberty reserved in the impugned Clauses is seeking a facilitation to recover the dues from the CD. The seal of approval to the liberty, if any affixed by the Tribunal, does not put an end to the litigation between the OC and CD. In the disguise of encouraging a

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settlement, an equitable relief cannot be granted to the parties to prolong the litigation at their whims and fancies.

20. Last, but not the least, another reason to reject the liberty is that the OC has not filed any petition seeking such a liberty, but instead has only filed a memo along with the Settlement Deed. It is settled Law that no relief can be sought in a memo, since it only informs certain facts to the Court. A memo to be treated as a petition necessitates payment of Court-fees, which has not been paid in the instant case. Thus, in the absence of a petition, a relief prayed for in the memo neither is entertainable nor sustainable. Besides, difficulties and peculiar situations may arise when a petition is restored based on the liberty granted in a future contingency. For instance, if the CD defaults in payment of the last instalment, the defaulted amount might be well below the threshold limit.

21. In view of the reasons stated above, it is concluded that the cause of action upon which petition was filed merged with the final order of settlement, and that a fresh cause of action will arise if any default is committed by the parties to the settlement, no liberty to restore or revive the petition before this Tribunal can be granted. Even otherwise, after final disposal of the *lis* either on merits or by settlement this Tribunal becomes *functus officio*. Thus, the point is answered accordingly.

22. In the result in view of the Settlement/Compromise Memo filed by the Petitioner Operational Creditor the same is recorded and the instant petition in CP (IB) No. 179/CTB/2020 is hereby dismissed as withdrawn. However, the prayer to grant liberty to the Petitioner Operational Creditor

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to restore or revive the instant petition in CP (IB) No. 179/CTB/2020 in the event of default committed by the Respondent/Corporate Debtor is hereby Rejected. Since, the main petition in CP (IB) No. 179/CTB/2020 itself is disposed of the IA No.118/CB/2021 filed by the Respondent Corporate Debtor for an appointment of commission to find out work executed by the Operational Creditor at the site also stands **DISMISSED**.

14. The registry is directed to send e-mail copies of the order forthwith to all the parties and their counsels for information.

15. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

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Satya Ranjan Prasad
Member (Technical)

Kaushal

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P. Mohan Raj
Member (Judicial)

Signed on this the 4th of March, 2022.

सत्य प्रति प्रमाणित होना
CERTIFIED TO BE TRUE COPY

Prasad
11/03/2022

उप कुलसचिव
Deputy Registrar
राष्ट्रीय कम्पनी विधि अधिकरण
National Company Law Tribunal
कटक बेंच
Cuttack Bench