NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 886 of 2024 & I.A. No. 3196 of 2024

(Arising out of the Order dated 22.02.2024 passed by the National Company Law Tribunal, New Delhi Bench (Court- II) in IB-79/ND/2022)

IN THE MATTER OF:

Ms. Mausumi Bhattacharjee
Promoter of Arjun Industries Limited
Address: C — 9/9366, Vasant Kunj,
New Delhi 110070
Email: mbvk.67@gail.com **…Appellant**

Versus

1. **Jumbo Chemicals And Allied Industries Private Limited**
   Address: D-42, First Floor, Part —I, South Extension, New Delhi—110049 ,
   Email: prakharsinghal@yahoo.co.in **…Respondent No. 1**

2. **Mr. Vikram Bajaj**
   Resolution Professional of Arjun Industries Ltd. Address: 214, Second Floor, Tower A, Spaze Edge, Tower A, Sector 47, Gurgaon Haryana— 122018.
   Email: bajaj.vikram@gmail.com **…Respondent No. 2**

Present

For Appellant:	Mr. Ritin Rai, Sr. Adv. Divyanshu Sahay, Arsh Khan, D. Singla, Akshay Sahay, Shradha Narayan, Adv.
For Respondent :	Mr. Ramji Srinivasan, Sr. Adv. with Mr. Nipun Gautam, Namrata Saraogi, Adv. for -R1 Mr. Aditya Gauri, Amar Vivek, Dhananjaya Sud, Adv. for RP/R2

J U D G E M E N T

(02.07.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present Appeal has been filed by Ms. Mausumi Bhattacharjee the Promoter of Arjun Industries Limited (in short **Appellant**) Ms. Mausumi Bhattacharjee who is the Shareholder and Suspended Board of Director of Arjun Industries Limited (in short **Corporate Debtor**) under Section 61(1) of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**') in Company Appeal (AT) (Insolvency) No. 886 of 2024 against the Impugned Order dated 22.02.2024 passed by the National Company Law Tribunal, New Delhi Bench (Court - II) (in short '**Adjudicating Authority**') in IB-79/ND/2022, whereby an application was filed under Section 7 of the Code by the Respondent No. 1 was considered and Corporate Insolvency Resolution Process (in short **CIRP**) of the Corporate Debtor was initiated. Jumbo Chemicals and Allied Industries Private Limited is the Respondent No. 1 here who is Financial Creditor of the Corporate Debtor.

2. Heard the Counsel for the Parties and perused the records made available including the cited judgements.

3. It has been brought out that the Corporate Debtor availed a loan from Industrial Development Bank of India (in short **IDBI**) of Rs. 3.67 Crores and further entered into agreement for foreign currency loan for Rs. 1.83 Crores. It has been alleged by the Appellant that the entire problem of the Corporate Debtor

began since the IDBI release only Rs. 3.29 Crores against sanction loan of Rs. 3.67 Crores and similarly release only Rs. 1.25 Crores (Foreign Currency Loan) against Rs. 1.83 Crores.

4. The Appellant could not service the debt and repay the loan and IDBI issued legal notice on 10.06.1998. The IDBI also filed OA No. 445/1998 before Debt Recovery Tribunal (in short **DRT**) for recovery of outstanding amount of Rs. 6,19,87,815/- and the Corporate Debtor, during pendency of such proceedings before DRT, approached IDBI for One Time Settlement (in short **OTS**) and agreed to settle the outstanding at Rs. 2.50 Crores.

5. It has been submitted that the Appellant could not pay even the OTS amount and thus OTS failed. The IDBI assigned its outstanding debts to Kotak Mahindra Bank Ltd. on 31.06.2006 and Kotak Mahindra Bank Ltd. further assigned the debt to the Respondent No. 1 on 16.04.2008 by registered deed of assignment. Thus, the Respondent No. 1 became the Financial Creditor of the Corporate Debtor.

6. It was brought out that the Corporate Debtor filed a Writ Petition before the Hon'ble Delhi High Court for restraining the assignment of loan which was dismissed.

7. We note that the Respondent No. 1 filed a petition before the Hon'ble Delhi High Court for winding up of the Corporate Debtor under Section 433 (e) and 433 (f) and Section 434 r/w Section 439 of Companies Act, 1956 before Single Judge

Bench. From the judgement delivered by the Hon'ble Delhi High Court dated 22.05.2014, it is observed that at one time the Delhi High Court asked the Appellant to deposit Rs. 2.5 Crores with the Registry, however, while dismissing the petition for winding up of the Corporate Debtor, the said amount of Rs. 2.5 Crores was ordered to be refunded. The Respondent No. 1 challenged Single Bench Judgement before the Division Bench of Delhi High Court for winding up of the Corporate Debtor which was also dismissed on 02.03.2016.

At this stage, it would be worth noting that these proceedings happened prior to Code came into force.

8. It has been brought out that a meeting was held between the Appellant and the Respondent No. 1 on 12.10.2018 for agreement on disinvestment of mortgaged properties of the Corporate Debtor and based on this meeting, the Appellant and the Respondent No. 1 entered into a settlement agreement on 27.08.2019, whereby it was agreed between the parties to sale the mortgaged properties and divide the proceed of the sale between them.

9. At this stage, we would like to take into account the settlement deed dated 27.08.2019 which reads as under :-

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into at Delhi on this 27th day of August 2019

Between

M/s Arjun Industries Limited, having its registered office at 9/9366, Sector-C, Pocket-9, Vasant Kunj, New Delhi 110049, through Ms. Mausumi Bhattacharjee, authorised signatory of the company as per Board Resolution dt. 26th August, 2019 (hereinafter referred to as First Party).

And

M/s Jumbo Chemicals and Allied Industries Private Limited, having its registered office at D-42, First Floor, South Extension -1, New Delhi 110049, through Mr. Shailendra Kumar Singhal, authorised signatory of the company as per Board Resolution dt. 27/8/19th August, ~~2019~~ (hereinafter referred to as SecondParty).

The expression First Party and Second Party,unless repugnant to the context or meaning thereof, be deemed to mean and include their heirs, legal representatives, successors-in-interest and assigns.

WHEREASthe First Party on 07.10.1996 entered into a Rupee Term Loan Agreement with IDBI and further, entered into a Foreign Currency Loan Agreement dated 06.11.1996.

WHEREAS, the plots bearing No. SP3-11(B) 1 & 2 situated at situated at Khuskhera Industrial Area, Khuskhera, District Alwar, Rajasthan **owned by the First Party**, were mortgaged with IDBI Bank vide letter dated 11.10.1996.

WHEREAS, the bank alleged that the First Party defaulted in repayment of the loan under both the aforesaid loan agreements and arbitrarily vide recall notice dated 10.06.1998, IDBI called upon the First Party to pay the amount due to it along with interest accrued thereon. By a notice dated 26.06.1998, IDBI invoked the guarantee clause and called upon the guarantors to liquidate the dues of the First Party. Thereafter, IDBI filed OA No.445/1998 before the Debt Recovery Tribunal, New Delhi for recovery of loan. The First Party has filed counter claim raising various grounds and the same is still pending before the Debt Recovery Tribunal.

WHEREAS, IDBI assigned the aforesaid debt in favour of Kotak Mahindra Bank by an Assignment Deed dated 31.03.2006.

WHEREAS, Kotak Mahindra Bank, further, assigned the aforesaid debt in favour of Second Party, as per Assignment Deed dt. 16.04.2008.

WHEREAS, both the parties, having dealt with various rounds of litigation at various Forums and a substantial period has already passed, without reaching to a logical and conclusive end.

AND WHEREAS, now the parties herein to buy peace are desirous of amicably settling the disputes and differences between themon the following terms and condition:

THE PRESENT SETTLEMENT WITTNESSETH:

1. The First & Second, both parties have agreed to sell Property bearing No.SP3-11(B) 1 & 2, Khuskhera Industrial Area, Khuskhera, District Alwar, Rajasthan; by executing a tripartite agreement with the proposed buyer at a mutually decided price.

2. The parties herein have agreed to distribute the sale proceeds in two equal proportions. It is further agreed that both the parties would sell the property as early as possible and both parties would render all assistance for the sale of the captioned property.

3. That the parties have further agreed to share/bear all expenses/dues/taxes both direct and indirect taxes/payments to vendors etc., in equal proportion in their endeavor to sell the captioned property. Sale proceeds will be distributed equally and both parties will be liable for their income.

For ARJUN INDUSTRIES LTD.

4. The parties further agree to sell all machines and equipment installed in the captioned property and distributes the sale proceeds equally.

5. The parties further agree to clear all dues pertaining to RIICO/CUSTOMS & EXCISE and expenditure incurred in obtaining NOC from RIICO/CUSTOMS & EXCISE. The expenditure already incurred and will be incurred thereon will be borne by the parties herein in equal proportions.

6. Both the party will equally do effort to clear all hassles in respect of transfer the captioned property in favour of third party.

The parties agree and undertake to strictlyfollow/implement the aforesaid terms and condition.

IN WITNESS WHEREOF the parties hereto have executed this Deed of Settlement on the day, month and year first above mentioned in the presence of the following witnesses.

For ARJUN INDU[illegible]

Director

(FIRST PARTY)

For Jumbo Chain[illegible]

(SECOND PARTY)

Witnesses:

1. Sangeeta Bhatia
C-9/9330, Vasant Kunj
New Delhi

2. Prakhar Singhal
F-296, RIICO Chowk
Bhiwadi

10. From above settlement agreement, it is seen that parties accepted that the Appellant defaulted repayment of both rupee as well as foreign currency loan. The settlement agreement also note that the original loan of IDBI was assigned through Kotak Mahindra Bank Ltd. vide assignment deed dated 31.03.2006 who in turn further assigned the loan to the Respondent No. 1 vide assignment deed dated 16.04.2008.

11. The Settlement Agreement dated 27.08.2019 also stated that the parties have seen several rounds of litigations at different fora and substantial period has elapsed and therefore in order to settle the issues and disputes, it was agreed to sell the property bearing No. SP3-11(B) 1 & 2, Khuskhera Industrial Area, Khuskhera, District Alwar, Rajasthan by executing proposed tripartite agreement with proposed buyers at mutually decided price and subsequently distribute the sale proceeds into equal proportion between the Appellant of the Respondent No. 1.

12. It has been alleged that the Appellant sent an e-mail on 26.07.2021 cancelling the settlement agreement which was replied by the Respondent No. 1 on 04.08.2021 alleging that the Appellant is trying to escape his liabilities to repay the loan to the Respondent No. 1 by way of unilateral suo-moto cancellation of the settlement agreement dated 27.08.2019 which was not permissible.

13. The Respondent No. 1 filed an application under Section 7 of the Code before the Adjudicating Authority, which was allowed and the Corporate Debtor came into CIRP w.e.f. 22.02.2024.

14. The Appellant submitted that Section 62 of the Contract Act, 1872 provides that if parties to a contract agree to substitute a new contract for it, the original contract need not be performed. The Appellant stated that there was novation of contract and the old contract, therefore, ceased to exist between the Corporate Debtor and the Respondent No. 1. The Appellant also argued that in the present case, the Settlement Agreement dated 27.08.2019 did not mention any 'financial debt', which the Corporate Debtor allegedly 'defaulted' and remained payable and therefore at best the settlement agreement dated 27.08.2019 was a simpliciter agreement to sell the mortgaged properties. It is the case of the Appellant that reciprocal promises, alleged breach thereof, on account of its cancellation cannot constitute default under section 3(12) of the Code and therefore no application under Section 7 of the Code could have been filed for enforcement/ specific performance of such agreement to sell.

15. It is the case of the Appellant that in absence of any agreement or contract, there is no question of any debt or default on the part of the Corporate Debtor. It is further the case of the Appellant that the Impugned Order is perverse and need to be set aside.

16. The Appellant alleged that the Respondent No. 1 fraudulently concealed from Corporate Debtor that Respondent No. 1 was not an existing company as it's name had been struck off from the Register of Companies under Section 248 (5), Companies Act, 2013 by Notification dated 08.08.2018. The Appellant further alleged that the Respondent No. 1 preferred Section 7 of the Code application without being in existence and therefore the whole exercise is abuse of process of law.

17. The Appellant submitted that the Adjudicating Authority erred in passing the Impugned Order since the Respondent No. 1 did not have any legal existence.

18. The Appellant elaborated that the Respondent No. 1 i.e., Jumbo Chemicals and Allied Industries Private Limited's name got struck off on 08.08.2018 by the Ministry of Corporate Affair. The Appellant submitted that subsequently an alleged agreement was executed between the Corporate Debtor and the Respondent No. 1 on 27.08.2019 which was void. The Appellant stated that the Corporate Debtor vide email dated 26.07.2021 cancelled the said agreement on account of the non existence of legal entity of the Respondent No. 1, being struck off its name and not remaining as a legal entity in the eyes of law at the time of execution of agreement

19. The Respondent No. 1 submitted that on 18.09.2023, this Appellate Tribunal in the earlier round of litigation between the parties had held that the acknowledgment of debt in the balance sheets from 1998-99 is continuous and

dismissed the argument of the Corporate Debtor based on the judgment rendered by the single judge of the Hon'ble Delhi High Court dated 22.05.2015 wherein it was held that the Financial Creditor has confined its claim only to a sum of Rs. 250 Lacs and interest thereon. The relevant part of this Appellate Tribunal's earlier order dated 18.09.2023 reads as follows:

> *"21. When the Company Petition was dismissed with the observation as observed, we fail to see that how the Respondent can contend that claim of the Appellant is limited to only Rs. 250 Lakhs."*

20. It is the case of the Respondent No. 1 that this Appellate Tribunal while allowing the Appeal filed by the Respondent No. 1 had held that the Adjudicating Authority committed error in rejecting Section 7 Application filed by the Respondent No. 1 as barred by time.

21. The Respondent No. 1 alleged that the Appellant failed to bring out all relevant facts including the balance sheets relevant for the disposal of the Appeal and is trying to mislead this Appellate Tribunal in the present appeal.

22. The Respondent No. 1 refuted the plea of the Appellant about novation of contract and also refuted the plea of the Appellant that the Settlement Agreement dated 27.08.2019 modified the earlier contracts between the parties and was in supersession to all earlier contracts. The Respondent No. 1 submitted that the Settlement Agreement dated 27.08.2019 is not any modification or a novation of

earlier Agreements i.e. Rupee Term Loan and Foreign Currency Loan. The Respondent No. 1 clarified that the Settlement Agreement was arrived at between the parties after long pending multiple cases filed by the Financial Creditor for realization of the loan amount and it was agreed that the mortgaged properties of the Corporate Debtor would be sold to settle the loan amount in full. The Respondent No. 1 also stated that the Settlement Agreement nowhere stated that the Settlement Agreement shall supersede or modify the loan agreements.

23. The Respondent No. 1 pleaded that the original loan/ assignment deed remain valid and continues and the Settlement Agreement dated 27.08.2019 is merely a mechanism to find a way to settle outstanding dues of the Respondent No. 1 and therefore it is not novation of existing legal contracts.

24. The Respondent No. 1 argued that the Section 62 of the Indian Contract Act, 1872 relied by the Appellant is not relevant here as the pre-requisite is substitution of the earlier contract which is not reflected in the contents of the Settlement Agreement. The Respondent No. 1 further stated that no intention on the part of the Appellant and the Respondent No. 1 for any novation resulting into modification/substitution of earlier loan agreement or assignment deed can be seen in the settlement agreement dated 27.08.2019.

25. We note that the requisites of a novation may include elements like an agreement of all the parties to a new contract, the extinguishment of the old obligations, and the validity in supersession of old contract by the new contract,

however, in the present case no such specific clauses exist. We also note that the Settlement Agreement dated 27.08.2019 was only with regard to disposal of the mortgaged properties of the Corporate Debtor.

26. We will examine the pleading of the Appellant that since name of the Respondent No. 1 was struck off on the relevant date of signing of settlement agreement dated 27.08.2019, therefore there was no valid settlement agreement. We note that the name of Respondent no. 1 was struck off since the Respondent No. 1 could not furnish the financial statements to relevant authority on time, however, the same was restored by the National Company Law Tribunal, Bench-IV, New Delhi (in short '**Tribunal'**) vide its order dated 24.03.2021 passed in Appeal No. 533/252/ND/2019. The relevant portion of the order is reproduced as under :-

> *"10. ***The name of the petitioner company shall then stand restored in the Register of the Registrar of Companies (RoC) as if its name of the company had not been struck off."*
>
> *(Emphasis Supplied)*

27. It is significant to note that the Tribunal specifically mentioned the name of the Respondent No. 1 is restored as if its name had not been struck off. We note that the legal implication of this would be that all action taken by the Respondent No. 1 would remain valid including signing of the settlement

agreement dated 27.08.2019 and therefore the pleadings of the Appellant on this ground stand rejected.

28. We understand that if the contract is altered in material particulars to change its essential character, the modified contract must be read as doing away with the original contract but if the modified contract has no independent contractual force, no new contract comes into play. We do not find any such wording in settlement agreement dated 27.08.2019

29. The question whether a subsequent agreement is an additional to the main agreement or not; as well as the fact whether new contract supercede old contract would depend on the facts and circumstances of each case. In the present case based on fact and circumstances brought out on record before us, we do not find that old loan agreements or assignment deeds ceased to exist by signing settlement agreement dated 27.08.2019 and therefore we are unable to accept the pleadings of the Appellant that Section 62 of the Indian Contract Act, 1872 will come into play in the present appeal.

30. We find that in case of ***Manohur Koyal vs. Thakur Das Naskar*** *[(1888) 15 Cal 319]*, the plaintiff sued the defendant to recover Rs. 1100 due on a bond and after the due date of the bond, the plaintiff agreed to accept from the defendant, in satisfaction of the bond, Rs. 400/- in cash and a fresh bond for Rs. 700/-. The defendant failed to pay the Rs. 400 and to give the fresh bond of Rs. 700/-. In a suit by the plaintiff to recover the amount of original bond, the

defendant contended that the subsequent agreement was a novation. It was held that Section 62 did not apply, as the subsequent agreement was made after the breach of the original contract, and that the defendant having failed to perform satisfactorily which he had promised to give, remained liable on the original, contract. This case is similar to facts of the present appeal and is found to be applicable.

31. We find that the existing rupee term loan as well as foreign currency loan assigned by registered assignment deeds remain valid which are relevant documents to establish debt and default. We also note that the amount of default was more than Rs. 1 Crore, thus it fulfils, all the criteria laid down by the Code as well as covered under several judgments of this Appellate Tribunal as well as the Hon'ble Supreme Court of India. The argument of the Appellant that there is no debt and default, is found not sustainable. We also note that this Appellate Tribunal in its earlier order dated 24.03.2021 has already noted the fact that there has been continuous acknowledgements of the debt by the Corporate Debtor in its various balance sheets.

32. As regard, the subject regarding the settlement agreement stand valid or not in view of the issue raised by the Appellant regarding struck off name of the Respondent No. 1 on the relevant date, we reiterate that since the Tribunal gave clear specific verdict that the restoration would have effect as if the name was never struck off would enable the Respondent No. 1 to enforce the agreements.

33. The pleadings of the Appellant that the original term loan/ foreign currency loan agreement which was later assigned by the registered deed in favour of the Respondent No. 1 ceased to exist after signing the settlement agreement dated 27.08.2019 and which the Appellant choose to unilaterally terminate on 26.07.2021, by sending an e-mail to Respondent No. 1 on the plea that the name of the Respondent No 1 was struck off by the Ministry of Corporate Affairs and therefore there is no debt and default and the application filed under Section 7 of the Code could not have been allowed. We wonder, if such types of pleadings of the Appellant are to be accepted then whether any agreement would ever be honoured. Such submissions are legally not tenable and stand rejected.

34. Incidentally we note that the loan was sanctioned by the IDBI somewhere in 1996 and even OTS was approved by the IDBI way back in the year 2006. We also note that IDBI assigned its outstanding debts to Kotak Mahindra Bank Limited on 31.06.2006 and Kotak Mahindra further assigned the debts to Respondent No. 1 on 16.04.2008 by registered assignment deeds.

Thus, we find that the loans were sanctioned somewhere in 1996 i.e., almost 28 years back and the last assignment deed was signed in favour of the Respondent No. 1 on 16.04.2008 i.e., 16 years back and even after decades, the litigation has been continuing and no recovery could be affected by the original financial creditors or the present Respondent No. 1 in whose favour the

assignment deed was signed almost 16 years back. This state of affair is found to be unusual and alarming.

35. In view of above detailed discussions, we find no merit in the appeal. The appeal deserved to be dismissed and stand dismissed. No Costs. Interlocutory Application(s), if any, are Closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

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