

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH

Company Appeal (AT) (Insolvency) No. 808 & 809 of 2021

[Arising out of Orders dated 07.04.2021 and 12.05.2021 passed by the Adjudicating Authority/National Company Law Tribunal, New Delhi Bench - VI, in (IB) – 1023/ (ND)/2020]

IN THE MATTER OF:

JSP Projects Pvt. Ltd.

Flat No. 5, 2nd Floor,
3rd B-2, Nehru Nagar,
Ghaziabad, U.P.

...Appellant

Versus

Sam Business Continuity Services

B-352 A, 2nd Floor,
Vasant Kunj Enclave,
Near Nangal Dewat,
New Delhi – 110070.

...Respondent

Present:

**For Appellant : Mr. Sunil K. Jain & Ms. Reeta Choudhary,
Advocates.**

For Respondent : Present but appearance not marked.

J U D G M E N T

(01.06.2023)

JUSTICE ANANT BIJAY SINGH;

1. The instant appeal is being preferred by the Corporate Debtor i.e. JSP Projects Pvt. Ltd. being aggrieved and dissatisfied by the Impugned Order dated 07.04.2021 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench- VI) in IB- 1023/(ND)/2020, whereby an application was filed under Section 9 of the Insolvency & Bankruptcy Code,

2016 (in short '**IBC**') with a prayer to initiate Corporate Insolvency Resolution Process (in short '**CIRP**'), the prayer was allowed and the CIRP was initiated and Mr. Mansij Arya was appointed as Interim Resolution Professional (in short '**IRP**').

2. The facts giving rise to this Appeal are as follows:

- (i) Both the parties entered into Consultancy Agreement dated 20.10.2018 according to which the Respondent had to provide consultancy services to the Appellant.
- (ii) The Respondent had raised two invoices for amount of Rs. 2,65,500/- and Rs. 59,00,000/- dated 18.06.2019 and 16.12.2019, respectively which were paid by the Appellant after verification.
- (iii) The Respondent had sent a Demand Notice to the Appellant which was filed under Section 8 demanding for payment of Rs. 4,59,97,062.64/- under the Consultancy Agreement dated 11.09.2020, which is annexed as Annexure A-8 of the Appeal Paper Book.
- (iv) The Appellant had filed the Reply to the Demand Notice dated 14.09.2020, where it was stated that there was no mention about notice of dispute prior to issuance of the statutory Demand Notice sent by Respondent after which Rejoinder was filed by the Respondent.
- (v) The Respondent had filed an application dated 19.10.2020 for initiation of CIRP proceedings.

- (vi) Thereafter, the Respondent had filed the Reply dated 26.11.2020 to the Insolvency Application which was filed under Section 9 of the IBC.
- (vii) Further, the Respondent had filed the Rejoinder on 10.12.2020.
- (viii) The Respondent had filed Written Arguments on 28.01.2021.
- (ix) The Impugned Order dated 07.04.2021 which was passed by the Adjudicating Authority, wherein it was held that the Respondent had established the debt and default on the part of the Appellant. The Adjudicating Authority admitted the petition and ordered to initiate CIRP on the Appellant with immediate effect.
- (x) The Appellant was forced to enter into a Settlement Agreement between the parties dated 21.04.2021 and had to pay Rs. 2,75,00,000/- + GST to save the business. The Company at the relevant time was executing contract worth Rs. 2250/- Crores.
- (xi) The Application was filed under Section 12A of the IBC r/w Regulation 30A of the CIRP and Rule 11 of NCLT Rules dated 26.04.2021 was filed.
- (xii) The Respondent filed an Application for withdrawal of the CIRP under Regulation 30A of IBBI (Insolvency Regulation Process for Corporate Persons) Regulations, 2016.
- (xiii) Thereafter the aforesaid agreement was filed before the Adjudicating Authority in IB-1023/ND/2020 on 05.05.2021, the matter was taken up but due to insistence of the alleged creditor,

the Appellant was forced to make a statement that it shall make the balance payment within 5 days.

(xiv) After which an order dated 12.05.2021 was passed by the Adjudicating Authority, wherein it was allowed the withdrawal of the matter and the main petition was dismissed.

3. Based on above mentioned facts, the instant appeal has been preferred under the following grounds :-

(i) The judgment was passed by the Hon'ble Supreme Court of India in case of **S.P. Chengalvaraya Naidu (dead) by Lrs. Vs. Jagannath (Dead) by Lrs. & Ors.** reported [(1994) 1 SCC 1] has held as under :-

"...One who comes to the court, must Come with clean Constrained to say that more often than not, process of the court is being hands. We are abused. Property-grabbers, tax-evaders, bank-loan-dodgers lever to and unscrupulous persons from all walks of retain other life find the court-process a convenient the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

(ii) Further, the judgment passed by the Hon'ble Supreme Court in case of **A.V. Papayya Sastry & Ors. Vs. Govt. of A.P. & Ors.** [(2007) 4 SCC 221] has held as under:

"39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by

practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it is has been said that a judgment, decree order obtained by fraud has to be treated as a nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior.

40. *Hence, the argument of Mr. Venugopal cannot be upheld. Even if he is right in submitting that after dismissal of SLPs, the respondent herein could not have approached the High Court for recalling its earlier order passed in April 2000 and the High Court could not have entertained such applications, nor the recalling could have been done, in the facts and circumstances of the case and in the light of the finding by the High Court that fraud was committed by the landowners in collusion with the officers of the Port Trust Authorities and the Government, in our considered view, no fault can be found against the approach adopted by the High Court and the decision taken. The High Court, in our opinion, rightly recalled the order, dated 27-4-2000 and remanded the case to the authorities to decide the same afresh in accordance with law.”*

4. The matter was heard on 04.05.2023 and on that date after hearing the both the parties, this Appellate Tribunal directed to Counsel for the Appellant and Respondent to file Written Submissions not exceeding five pages with relevant case laws, within two weeks from today and the

judgment was reserved. On 25.05.2023 the Respondent filed the Written Submissions which is taken on record.

5. Further, Counsel for the Appellant apart from relying upon two cases of the Hon'ble Supreme Court had further argued the matter, while assailing the Impugned Order the Appellant submitted that he had never received two invoices but the Respondent persuaded the Adjudicating Authority to appoint IRP by falls and fraudulent, these invoices were never raised nor uploaded on the GST Portal. Counsel for the Appellant further submitted that the agreement was entered by him due to coercion and the reputation of the Company was at stake.

6. Counsel for the Appellant submitted that the new invoices were raised after the settlement was recorded between the parties ignoring the earlier ones which were neither raised nor uploaded on the website, therefore, the entire case of the Respondent is based on fraud and on fictitious documents and the Impugned Orders is fit to be set aside with the imposition of maximum penalty of Rs. 1 Crore.

7. Counsel for the Respondent during course of arguments and in their Written Affidavit submitted that vide Impugned Order dated 07.04.2021 by which CIRP of the Corporate Debtor was initiated is not in operation today and the said order was set aside. Pursuant to which, an application was filed under Section 12A of the IBC, 2016 r/w Regulation 30A of CIRP Regulation 2016 and Rule 11 of the NCLT Rules 2016. As the Appeal is barred of principles of res judicata, the Appeal was preferred against the order dated 07.04.2021 which was filed by the Appellant.

8. It was further submitted by Counsel for the Respondent that an order was passed vide order dated 12.05.2021 on the application bearing IA No. 2063/2021 filed under Section 12A of the IBC, 2016 r/w Regulation 30A of CIRP Regulation 2016 and Rule 11 of the NCLT Rules 2016 which was filed by the Erstwhile IRP Mr., Mansij Arya on behalf of the Operational Creditor subsequent to the Settlement Agreement dated 21.04.2021 entered between the Parties on its free will and upon negotiations. Counsel for the Respondent has further drawn attention in this regard to Clause 1 and Clause 10 of the Settlement Agreement, which are as herein under :-

“1. That this Settlement Agreement is being executed by the Parties out of their own free will, without any force, undue pressure, influence, coercion or deceit.

10. The Parties unequivocally agree that the terms of this Settlement Agreement would supersede all the terms and conditions under all previous agreements/ documents/ correspondence exchanged between the Parties except for such terms as stated in this Settlement Agreement.”

9. It was further stated by Counsel for the Respondent that this Appellate Tribunal under Section 61(1) of the IBC 2016 has jurisdiction to entertain an Appeal from the order which is in operation and in the even of no order in existence and operation, the said Appeal is not maintainable.

10. Counsel for the Respondent submitted that as the Impugned Order dated 07.04.2021 is concerned, the same is not in operation today as the same was effectively set aside by the withdrawal of the order dated

12.05.2021, which relieved the Corporate Debtor from the clutches of the CIRP.

11. Counsel for the Respondent further submitted that so far as the Impugned Order dated 12.05.2021 is concerned, the same was passed on the Settlement Agreement signed mutually between the parties, on the basis of which the Operational Creditor had submitted the Form FA to the IRP, which is reproduced as hereunder :-

FORM FA
APPLICATION FOR WITHDRAWAL OF CORPORATE INSOLVENCY
RESOLUTION PROCESS
[Under Regulation 30A of the Insolvency and Bankruptcy Board of India
(Insolvency Resolution Process for Corporate Persons) Regulations, 2016]
[21.04.2021]

To
The Adjudicating Authority
NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI

[Through Mr. Mansij Arya, the Interim Resolution Professional]
[JSP PROJECTS PRIVATE LIMITED]

Subject: Withdrawal of Application admitted for corporate insolvency resolution process of JSP PROJECTS PRIVATE LIMITED

1. Sam Business Continuity Services, having its registered office at F-68, IIIrd Floor, Village Katwaria Sarai, New Delhi – 110016 and branch office at D-73, Nangal Dewat, New Delhi – 110070 represented through Partner Mr. Sandeep Kumar authorized vide Authority Letter dated 06.01.2020 had filed an application bearing No. CP (IB)-1023/2020, titled "SAM Business Continuity Services vs JSP Projects Pvt. Limited on

For SAM Business Continuity Services



21.10.2020 before the Adjudicating Authority under Section 9 of the Insolvency and Bankruptcy Code, 2016. The said application was admitted by the Adjudicating Authority on 07.04.2021 in case bearing CP (IB)-1023/2020

2. That the Operational Amount in default, basis which the Operational Creditor (SAM Business Continuity Services) had filed the application bearing No. CP (IB)-1023/2020, titled "SAM Business Continuity Services vs JSP Projects Pvt. Limited , have been settled to be paid by the Corporate Debtor to the Operational Creditor in accordance with the Settlement Agreement dated 21.04.2021 by paying the Settlement Amount. A copy of the Settlement Agreement dated 21.04.2021 is attached herewith as Annexure A.
3. I therefore hereby withdraw the application bearing application bearing No. CP (IB)-1023/2020, titled "SAM Business Continuity Services vs JSP Projects Pvt. Limited filed by me before the Adjudicating Authority under Section 9 of the Insolvency and Bankruptcy Code, 2016 subject to liberty of this Authority to revive the Corporate Insolvency resolution Process of JSP Projects Private Limited, in case of default by the JSP Projects Private Limited to pay to the Operational Creditor (SAM Business Continuity Service) the Settlement Amount under the Settlement Agreement.
4. I attach the NOC of the IRP, Mr. Mansij Arya.(Annexure B)

(SAM BUSINESS CONTINUITY SERVICES)
Through Sandeep Kumar Partner

Date: 21.04.2021

For SAM Business Continuity Services

Place: New Delhi



Partner

12. Counsel for the Respondent further submitted that the Appellant had made inappropriate averments as regards GST is concerned. It is submitted that whether the GST rules were complied or not by the Operational Creditor, did not vitiate the fact that there was an operational debt in default without there any pre-existing dispute raised in respect of that debt.

13. Counsel for the Respondent submitted that the Adjudicating Authority was not a court and the process before the Tribunal not being a litigation, the Tribunal had rightly passed both the orders dated 07.04.2021 and 12.05.2021 on its merits. As far as reliance on order dated 27.04.2021 passed by Hon'ble Supreme Court in Misc. Application No. 665 of 2021 in SMW(C) No. 3 of 2020 is concerned, the same do not need any reply.

14. Counsel for the Respondent in his Written Submission submitted that payment to the Operational Creditor is due under Article- 6 of Marketing and Consultancy Fees. Counsel for the Respondent relied upon Article 6.2 of the Agreement dated 20.10.2018 which reads as under:-

“6.2 The Marketing Consultancy Fees payable by JSPPPL to the CONSULTANT is based on Work Order Value as detailed in Article 6.1. The agreed payment terms for this are:

- *JSPPPL shall pay Rs. Fifteen Lac Only (Rs. 15 Lac) to the Consultant on receipt of the LOI/LOA.*
- *JSPPPL shall pay Rs.1.0% of the Tender Contract (Works Order Value) to the Consultant, less Rs. 15 Lacs paid at the time of LOI/LOA against submitting the corporate BG by Consultant to JSPPPL, immediately on Signing of Agreement/ Work Contract from the end client for the Works Awarded.*

- *JSPPPL shall pay of a sum equivalent to 2.0 % of the Tender Contract (Works Order Value) to the Consultant on Bill to Bill basis (Pro Rata basis as and when the bills are cleared& Payments received by JSPPPL).*

JSPPPL shall also deduct any other advances paid as per the terms of the clause 5 of this agreement from any fee payable to the Consultant pursuant to this agreement.”

15. Counsel for the Respondent further submitted that the aforesaid clause provides for milestones on which the Corporate Debtor was to make payment to the Operational Creditor. The transaction between the parties was particularly with respect to tender ref: 136/PR/JBVNL/18-19.

16. Counsel for the Appellant concluded his arguments and submitted that there is no merit in the Appeal and the Appeal is fit to be dismissed.

17. After hearing both the Parties and going through the records and submissions filed on behalf of the Respondent, Appellant did not file any Written Submissions in fact the order was passed on 04.05.2023 by this Appellate Tribunal that the Parties have to file their Written Submissions within two weeks. Counsel for the Appellant did not file any submissions, till date.

18. We have also gone through the Impugned Order dated 07.04.2021, whereby the relevant Para of the order is marked as Para-4, which is reproduced as under:-

“4. We have heard the arguments made by the counsel for the Operational Creditor and perused the documents filed by him. The Operational Creditor has established the existence of debt and default on the part of the Corporate

*Debtor. The Corporate Debtor's plea of Consultancy agreement being void ab initio and error in computation of default amount does not stand any merit along with that, no documentary evidence substantiating the Corporate Debtor's plea regarding pre-existence of dispute in relation to non performance of agreement was annexed in the reply. Furthermore, the Corporate Debtor's plea that a civil or Criminal litigation against Operational Creditor has already been initiated has not been substantiated with any relevant document. Hence, the Corporate Debtor fails to establish any pre-existence of dispute and in view of the above situation, this Tribunal **admits** this petition and **initiates CIRP** on the Respondent with immediate effect.”*

19. From the aforementioned Para, the Learned Adjudicating Authority had admitted Section 9 Petition filed on behalf of the Respondent – Operational Creditor and initiated CIRP proceedings.

20. We do not find any irregularities and therefore according to which we do not find any merits in this Appeal. The Appeal is hereby dismissed.

21. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench), forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Naresh Salecha]
Member (Technical)**

Simran