



**IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK**

Rst. App (IB)/ 04/CB/2023

In

CP (IB) No. 133/CTB/2019

In the Matter of:

An application has been filed under Section 60 (5) IBC, 2016 R/w Rule 11 of NCLT, Rules, 2016 to restore the Petition C.P (IB) No. 133/CTB/ 2019.

-And-

In the Matter of:

Imperial Refractories, having registered office at- Newer Bhawan, Top Floor, 87, Ghowringhee Road, Kolkata- 700 020;

...Applicant/Operational Creditor

-Versus-

Shrikripalu Steels Private Limited, having its registered office at Niladrivihar, Unit- II, Umapada, Jajpur, Road, Jajpur, Odisha- 755 019.

...Respondent/Corporate Debtor

Appearances (through video conferencing)

For the Applicant : Mr. Baibaswata Panigrahi, Advocate
Mr. Subham Sharma, Advocate

For the Respondent : -Nil-

Coram:

Shri P. Mohan Raj : Member (Judicial)
Shri Kaushalendra Kumar Singh : Member (Technical)

Order Pronounced on: 10.01.2024



ORDER

1. This application has been filed under Rule 11 of NCLT Rules 2016 to recall the order of this Adjudicating Authority dated 13.12.2022 passed in I.A. (I.B) No.346/CB/2022 allowing the applicant to withdraw the C.P. No. (I.B) No. 133/CTB/2019 and restore the C.P. No. (I.B) No. 133/CTB/2019 on file.

2. The Brief facts of the case necessary to dispose of this application are as follows:

The applicant herein is an operational creditor and had filed a petition C.P. No. (I.B) No. 133/CTB/2019 under section 9 of IBC 2016 against the respondent/corporate debtor to initiate CIRP for the default of Rs.26,09,455/-. The petition was admitted on 02.05.2022 and Ms. Shipra Mishra was appointed as Interim Resolution Professional. The suspended Board of directors preferred an Appeal before the NCLAT-Delhi in Company Appeal (AT) (Insolvency) No. 562 of 2022. The NCLAT by order dated 02.09.2022 dismissed the appeal and granted liberty to the appellant to file an application under section 12A of the IBC 2016 within 15 days from the said date of order. The I.R.P. filed an application I.A.No.270/CB/2022 under section 12A of IBC 2016 for withdrawal of main CIRP petition. Later the said application was abruptly withdrawn on 22.09.2022 for non-payment of IRP fees. The second time filed an Application No.346/CB/2022 under section 12A of IBC 2016 for withdrawal along with a copy of settlement agreement dated 10.12.2022. The applicant prayed in the application seeking permission to withdraw the main C.P. No. (IB.) No.133/CTB/2019 in simpliciter and sought to relieve the corporate debtor from the clutches of CIRP and close the proceeding. The said application was allowed on 13.12.2022. No liberty was granted. Now the applicant filed this application on 18.08.2023 to restore the disposed petition stating that the respondent failed to honor the settlement agreement.

Now the point for consideration is:

(1) Whether the main petition C.P (IB) No. 133/CB/2019 is liable to be restored?



3. Point No.1: Before advertng to the aforesaid points, it is necessary to look into the position of law whether the Adjudicating authority can order to restore the petition which was finally disposed of as settled out of court/withdrawn. The provisions of law applicable to withdrawal of a Petition filed under sections 7 and 9 of IBC 2016, are tabulated below: -

Statute (Act or Rules or Regulations)	Provision (Section or Rule or Regulations)
The IBC, 2016	1) Section 12A – withdrawal of application admitted under Section 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 Regulations 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

4. It is thus patent without any ambiguity from the aforesaid statutory provisions relating to settlement/withdrawal that the Financial/ Operational creditor can withdraw the petition either before the admission or after the admission into CIRP. As regards the revival or restoration of disposed petitions, 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 on merits in the absence of the applicant; and, Rule (49) permits restoration of an application decided *ex-parte*.



5. In the IBC 2016 or in NCLT Rules 2016 there is no provision available to grant liberty to restore the finally disposed of petition as settled out of court or as withdrawn. Not only in IBC, 2016 there is no such provision available in any other Act, in this situation, it is better to see the provisions available in Code of Civil Procedure, 1908. Of course, CPC is not applicable to the proceedings under IBC, 2016 but an analogy enshrined in Code of Civil Procedure 1908 can be applied. Order XXIII CPC deals with recording of compromise and withdrawal of suits and the relevant Rules therein are Rules (1) and (3A). 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 said Rule does not permit to restore or revive the earlier suit which was dismissed as settled out of court or as withdrawn.

6. 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. Only under Order XIII, Rule 3A, the court which disposed of the suit 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.

7. Thus, the petitioner is not entitled to any liberty under Order XXIII, Rule 3A, since the Settlement Deed dated 10.12.2022 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 default.

8. 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.

9. Now we will see the present application, admittedly the applicant not obtained any liberty to file this application to revive the main C.P (IB) No.133/CB/2019. On the applicant side stated that provision is made in the settlement agreement particularly in clause 11 to revive this application in the event of respondent committed default in payment of amount as per the payment schedule. Clause 11 of settlement agreement runs as follows”:

11. In the event that an order under Section 12A of IBC, 2016 is passed by the Hon'ble Tribunal setting aside the order dated May, 02, 2022 passed by the Ld. NCLT, Cuttack Bench in C.P. No. 133/CTB/2019 appointing Ms. Shipra Mishra as IRP and the promoter commits a default of terms of Settlement Agreement, then, the Operational Creditor shall be entitled to seek such remedies, including remedies by way of reviving/restoring the instant application filed under the Insolvency and Bankruptcy Code, 2016 being C.P. (IB) No. 133/CTB/2019 as may be permitted under applicable law or filing fresh proceedings under the Insolvency and Bankruptcy Code, 2016 or to initiate contempt proceedings or civil or criminal proceedings against the Promoter or the Corporate Debtor.

10. In pursuance of settlement agreement, the respondent had given four post-dated cheques dated 31.01.2023. When the applicant presented the said cheques for total sum of Rs.32,00,000/- lakhs, the cheques were returned with remark of 'funds insufficient'. The applicant then issued notices to the respondent and proceeded against the respondent under section 138 of Negotiable Instrument Act, 1881 and in further course of action the applicant filed this application for restoration. In support of its case applicant relies upon NCLAT-Order dated



18.07.2022 passed in **Pooja Fin lease Ltd vs Auto Needs (India) Pvt Ltd. & another**. There NCLT permitted the petitioner to withdraw section 7 IBC 2016 petition on the basis of settlement agreement without granting any liberty. The NCLAT- Delhi held that even in the absence of specific liberty not granted, the consent terms itself shall be treated to be part of the order which shall entitle the petitioner to revive the petition in the event of any default. This citation is distinguishable to the case in our hands. The conclusive portion of the settlement referred in the supra citation runs as follows:

“The financial creditor shall be entitled to revive the said petition IB-2340(ND)/2019 in the event of any default of the terms of the present consent Terms on the part of the corporate debtor”

The concluding portion of the settlement filed in the present case runs as follows:

Operational creditor shall be entitled to seek such remedies, including remedies by way of reviving/ resorting the instant application filed under the Insolvency and Bankruptcy Code, 2016 being C.P (IB) No. 133/CTB/2019 as may be permitted under applicable law or filing fresh proceedings under the Insolvency and Bankruptcy Code, 2016 or to initiate contempt proceedings or civil or criminal proceedings against the promoter or the Corporate Debtor.”

11. In the previous cited case the petitioner had retained the power to restore the section 7 IBC 2017 petition alone in the event of default committed by the corporate debtor. But in our case the petitioner retains more options viz ***the power to revive the section 9 IBC 2016 petition in the event of default by the corporate debtor or filing fresh proceedings under the IBC 2016 or filing to initiate contempt proceedings or civil or criminal proceedings against the promoter or corporate debtor***. Here the petitioner retains more than one option and also retains power to proceed against the promoter or the corporate debtor. The petitioner retains power to exercise any of the option and not of all the options because in the settlement the word ‘or’ is used



not 'and'. From the averments of the application, it is made clear that the applicant had already issued notice dated 08.02.2023 *Annexure 4 of application* for dishonors of cheques to the respondent under section 138(b) of the Negotiable instruments Act 1881. Thus, the applicant had already chosen to proceed against the respondent under criminal law. Now apart from that the applicant cannot prefer/choose one more option for revival of IBC petition. Thus, the citation relied by the applicant is not applicable to the facts of this case.

12. In a similar matter the **NCLAT-Delhi held in Company Appeal (AT) (Ins) No. 933 of 2022 dated 03.04.2023 Adhunik Niyat Ispat Limited -vs- Truvoit Engineering Company Private Limited**, para 13 and 15 as follows: -

13. On perusal of the aforesaid order it is very much clear that the right for revival of main application was forfeited by the Ld. NCLT. Once with open mind the appellant has agreed on the terms and thereafter, he preferred to keep his application dismissed, there was no reason to again approach the NCLT for filing an application for restoration. Of course, Ld. NCLT while dismissing the restoration petition had examine the question of threshold, we are of the opinion that those facts are not required to be taken note of at the moment particularly in view of the fact that restoration application has also been dismissed on the ground that no liberty was granted for revival.

15. In view of the facts and circumstances, particularly in the fact that while dismissing the application on the ground of settlement, Ld. NCLT by its implication had restrained the appellant for revival of the application, there is no reason to entertain the present application which has been filed against the impugned order. The Appeal stands dismissed.

13. In *Growel Feeds Pvt Ltd vs Ashadeep Aquaculture Pvt Ltd*, this Adjudicating Authority dismissed the Restoration Application Rst. A (I.B.) No.1/CB/2023 by order dated 18.04.2023 as follows:

In the memo the petitioner specifically prayed to grant liberty in case of default by the Corporate Debtor, to restore petition, but no liberty was



granted. This conscious refusal to grant liberty to revive/restore the withdrawn/dismissed petition might be because of reason as discussed supra that there is no provision available in the existing laws either in IBC, 2016 or in any other Acts or Rules or Regulations to grant such a liberty.

14. In an appeal preferred against the said order the NCLAT-Delhi upheld the said order in **Company Appeal (AT) No. 754 of 2022 Growel Feeds Pvt.Ltd vs Ashadeep Aquaculture pvt. Ltd** by order dated **03.07.2023** as follows:

Subsequent to the said order, it appears that settlement terms were not honoured by the Corporate Debtor. On the breach being committed, an application was filed to revive the CIRP. The Adjudicating Authority has taken the view that there is a fresh cause of auction to take appropriate action against the party concerned which has been observed in Paragraph 9 of the Order. It is further stated that Adjudicating Authority in its order dated 13th September, 2022 in spite of request to grant liberty to revive has negavitated the said request hence the revival cannot be granted.

We are of the view that in the facts of the present case, especially when the liberty sought by the memo was not granted by the Adjudicating/ Authority the course open for the Appellant was to file a fresh application under Section 9 of the Code and the Adjudicating Authority did not commit any error in refusing to revive the earlier Company Petition.

15. The one another factor is the NCLAT in **Company Appeal No. 742 of 2020 Trafiguara India Private Limited -vs- TDT Copper Limited** order dated **15.09.2022**. Upheld the finding of the NCLT-Delhi Bench No. V 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 debt as per section 5(21) of IBC 2016. Following the said ratio the NCLT -Delhi Bench II rejected the application for revival, stating that breach of settlement agreement is not a ground



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to trigger CIRP. It runs as follows:

6. We further observe that though vide order dated 21.01.2019, the liberty was granted, however, subsequently in catena of judgments this Tribunal has held that breach of the terms and condition of payment according to a Settlement Agreement does not come under the purview of the Operational Debt as defined under the IBC, 2016 and it cannot be a ground to trigger CIRP against the Corporate Debtor.

Here also the applicant come forward with this revival application stating that the respondent not adhered to the settlement agreement and failed to pay the instalment amounts; hence supra ratio is applicable to our case also.

16. In the circumstances it is answered that the petition CP.(IB) No. 133/CB/2019 which was finally disposed of as withdrawn cannot be resorted.

17. In the result, this Application is **Dismissed**.

18. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps,

19. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**KAUSHALENDR
A KUMAR SINGH**
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**Kaushalendra Kumar Singh
Member (Technical)**

**PANDIAN
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**P. Mohan Raj
Member (Judicial)**

Signed on this, 10th day of January, 2024.

Supriya_P.S.