



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT – II**

**IA No. 1375/2022
In
C.P. (IB) 3973/MB/2018**

Under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016

M/s. OCS Group (India) Pvt. Ltd.

Having address at : A-501, Fifth Floor,
Thane One Corporate Business IT Park, DIL
Complex, Next to Tatvagyan Vidyapeeth,
Behind Cine Wonder Mall, Majiwada,
Thane (West), Maharashtra 400610

.... Applicant

V/s

Mystical Constructions Pvt. Ltd.

Having address at: A/603, Al-Akbar
Building, Momin Nagar, Patel Estate Road,
Jogeshwari (West), Mumbai- 400102.

.... Respondent

And

Gulam Hussain Dost Mohd. Sheliya & Ors.

.... Contemnors



Order Delivered on :- 28.11.2024

Coram:

**Mr. Anil Raj Chellan
Member (Technical)**

**Mr. Kuldip Kumar Kareer
Member (Judicial)**

Appearances:

For the Applicant : Adv. Sandeep Sharma

For the Respondent : Adv. Nausher Kohli a/w Adv. Munaf
Virjee a/w Adv. Rushabh Parekh

ORDER

Per: - Mr. Kuldip Kumar Kareer, Member (Judicial)

Brief facts of the application can be encapsulated in the following manner:-

1. The Applicant herein is engaged in the business of Facility Management Services which, interalia, includes Engineering Services, Security Services, Housekeeping Services, Property Maintenance, Electronic Security etc., and the Corporate Debtor has sought manpower services from the Applicant for providing property management and housekeeping services at the Operational Debtor's office at their real estate project known as DB Breeze at 16th Road, Opp. Khar Gymkhana, Khar (West), Mumbai- 400052.



The Applicant Company provided their services to the Respondent Company as per the requirement and against the aforesaid services, invoices were raised upon the Operational Debtor Company from time to time and the Operational Debtor Company was supposed to honour the same within a period of 30 days from the date of the submission of the invoices. However, the Respondent company failed to pay the amount of the invoices.

3. As a result, the Applicant filed Company Petition under Section 9 of the Insolvency and Bankruptcy, 2016 bearing No. 3937 of 2018, against the Respondent Company for declaring it to be an insolvent company as the Respondent Company was not able to pay the outstanding amount to the Applicant Company.
4. The Directors of Respondent Company, i.e. the Respondents/Contemnors, herein approached the Applicant with the intention to settle the dispute and offered to make the payments in 10 instalments through post-dated cheques commencing from 20.10.2019 to which the Applicant also agreed.
5. Accordingly, consent terms dated 22.07.2019 were signed and executed between the Respondents and the Applicant, and in compliance thereof, the Respondent handed over 10 PDCs being signed by the Contemnor to the Applicant. On the basis of said consent terms, the abovementioned petition was disposed of vide order dated 22.07.2019.
6. When the aforesaid cheques were presented for encashment, the same were dishonored. After dishonor of cheques, the Applicant requested the Respondent to make the payment of the dishonored cheques and also to regularize their payments by addressing a letter dated 21.12.2019 to the



Respondent but till date, no response has been received from the Respondent and/or contemnors.

7. It is further stated that Applicant's Advocate addressed notices dated 18.02.2020 and 05.12.2020 to the Directors of Respondent/Contemnors, thereby requesting for payment of the agreed amount; however, they avoided responding to the said notices.
8. In the end, the Applicant has prayed for the following reliefs:-
 - a. That this Tribunal be pleased to issue contempt against the Contemnors, including its Company Secretary and Chief Financial Officer and several other officers of the Respondent Company, responsible for fulfilling the terms of the consent terms by making timely payment to the Petitioner and punish them for willful breach and disobedience of order passed on the basis of consent terms dated 22.07.2019 by this Tribunal in Company Petition No. 3973/2018;
 - b. That this Tribunal be pleased to recall and/or modify the order passed on the basis of consent terms dated 22.07.2019 on such terms and conditions, which this Tribunal may deem fit and proper and also declare the Respondent company as an Insolvent Company and IRP be appointed on the same;
 - c. That, the delay, if any, in taking out the present application be condoned in the interest of justice;
 - d. That, the cost of this application be provided for;



- e. That, such order and further reliefs as the case may require to be granted;.

Reply filed on behalf of the Respondent:-

9. In reply filed by the Respondents all the averments made in the application have been denied as wrong. It has further been submitted that the application is not maintainable under the law nor the delay in filing the application can be condoned.
10. It has further been pleaded that there has been no willful disobedience to any judgment, decree, direction, order, writ, or any other process of court nor any willful breach of an undertaking given to the Court by the Respondent. Clause 5 of the consent terms dated 22.07.2019 provides for a remedy in the event of default and, therefore, the present application cannot be entertained by this Tribunal.
11. It has further been stated in the reply that since there was no clause for recall of the order in the consent terms entered into between the parties, the prayer for recall cannot also be allowed. Even otherwise, no express liberty was granted by the Bench in the order dated 22.07.2019 passed on the basis of the consent terms.
12. It has further been pleaded that the purported outstanding amount of Rs. 48,72,359/- is below the threshold limit of Rs. 1 crore and, therefore, the possibility of the Petition being revived is also out of question. The other averments made in the application have been denied as wrong.
13. In the end, the Respondent has prayed for the dismissal of the application.

**Analysis and Findings:-**

14. We have heard the Counsel for the parties and gone through the record.
15. During the course of the arguments, Counsel for the Applicant has contended that the Respondents are guilty of contempt as they have not adhered to the consent terms dated 22.07.2019, on the basis of which the Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 filed by the Applicant was withdrawn. In this regard, it has been pointed out by the Counsel for the Applicant that in the order dated 22.07.2019, liberty was granted to the Applicant that in case of defiance or default committed by the Corporate Debtor, the matter could be mentioned before the Bench for appropriate action. Therefore, according to the Counsel for the Applicant, it is a fit case for issuing contempt against the Respondents for having violated the terms and conditions of the consent terms dated 22.07.2019 with impunity.
16. On the other hand, Counsel for the Respondents has argued that the application is not maintainable in as much as it is not in the appropriate format. Counsel for the Respondents has argued that no liberty was granted to the Applicant to get the Petition revived in case a default of consent terms was committed by the Respondents. Counsel for the Respondents has further argued that even otherwise, the Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 cannot be revived as the amount in question falls below the threshold limit of Rs. 1 crore. Counsel for the Respondents has further pointed out that so far as the default in respect of dishonored cheques is concerned, as against cheques dated 20.04.2020, 20.05.2020, 20.06.2020 and 20.07.2020, the same is hit by Section 10A of the Insolvency and Bankruptcy Code, 2016. Counsel for the Respondents has further contended



that no case is made out for either revival of the Company Petition or for issuance of contempt proceedings against the Respondents.

17. We have weighed the contentions raised by the Counsel for the parties and have also gone through the records.
18. By way of this application, the Applicant is seeking initiation of contempt proceedings against the Company Secretary, Chief Financial Officer, and several other officers of the Respondent Company who were responsible for abiding by the terms of the consent terms dated 22.07.2019. By way of the consent terms dated 22.07.2019, the Corporate Debtor had agreed to pay a sum of Rs. 47,89,681/- towards full and final settlement of the claim of the Applicant/Operational Creditor in the Company Petition (IB) No. 3973/2018 filed under Section 9 of the Insolvency and Bankruptcy Code, 2016. At the time of execution of the consent terms, the Respondent No. 1 (Corporate Debtor) issued as many as 10 post-dated cheques dated between 20.10.2019 and 20.07.2020 which were dishonoured on presentation on their respective dates. It is not disputed that the cheques were dishonoured nor any payment was remitted to the Applicant by way of RTGS/NEFT as promised in the consent terms. There is, however, no clause in the consent terms dated 22.07.2019 that in the event of non-encashment of the post-dated cheques, the Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 would be revived nor any such liberty was granted by the Bench in its order dated 22.07.2019.
19. A minute perusal of the application reveals that the application has been filed against the Corporate Debtor along with Gulam Hussain Dost Mohd. Sheliya, Abubakar Miyaji Seliya, Salim Abdul Charoliya who are stated to



be the directors of the Corporate Debtor. It has not been mentioned anywhere in the application that the cheques in question which were issued at the time of execution of the consent terms were signed by these directors. It has also not been stated in the application that these directors were responsible for managing day to day affairs of the Corporate Debtor. The consent terms were signed by one Mr. Sumeet Singh, Authorised Signatory of the Corporate Debtor, as stated in the consent terms, who was authorised vide the resolution dated 19.05.2018 passed by the board of directors of the Corporate Debtor. Even Mr. Sumeet Singh, Authorised Signatory has not been arrayed as a party in this application. In the prayer clause of the application, it has been stated that contempt be issued against the Company Secretary, Chief Financial Officer, and several other officers of the Respondent Company for not fulfilling the terms of the consent terms but no name of the officers has been mentioned in the application. In these circumstances, in our considered view, no contempt action can be initiated on the basis of the averments made in the application under consideration.

20. The second prayer in the application is for recall of the order dated 22.07.2019 on the ground that since the consent terms have been violated by the Corporate Debtor with impunity, the Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 at least should be revived and decided on merits. In this regard, Counsel for the Respondents has argued that in the consent terms, there is no clause or stipulation that the Petition could be revived in the event of non-compliance of the conditions of the consent terms nor any liberty was granted by the Court in its order dated 22.07.2019 and, therefore, no case is made out for revival of the Company Petition.



We have thoughtfully considered the matter and are of the considered view that in the order dated 22.07.2019, though no liberty has been granted to the Applicant to get the Petition revived, yet there is an observation that the Petitioner/Applicant would be at liberty to mention to the Bench for appropriate action in case default of the consent terms is committed by the Corporate Debtor. It is not disputed that a default has been committed as all the cheques were dishonored and no payment whatsoever has been made by the Corporate Debtor, as promised in the consent terms. In the given situation, in our considered view, the Corporate Debtor cannot be allowed to take advantage of its own wrongs. The Applicant cannot be rendered remediless in the given situation. No doubt, no liberty was granted to the Applicant to get the Petition revived nor there was any stipulation in the consent terms but our predecessor Bench definitely gave liberty to the Applicant to mention the matter for appropriate action against the Corporate Debtor in the event of default of the consent terms. The said liberty in the given situation can be construed to be a liberty to get the Petition revived and it would be just and equitable if the Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 filed by the Applicant, which was dismissed on the basis of consent terms, is revived to be decided on merits. We are, further of the considered view that in case neither the Petition is revived nor a contempt is issued against the Corporate Debtor, it will cause grave injustice to the Applicant who would be rendered remediless.

22. So far as the question of the threshold limit of Rs. 1 crore is concerned, as raised by the Counsel for the Respondents, the same is not relevant here as the Petition was filed in the year 2018 when the threshold limit was Rs. 1 lakh only which was subsequently enhanced to Rs. 1 crore. Needless to say, the applicable threshold limit at that time was Rs. 1 lakh only. Therefore, merely



because the threshold limit was subsequently increased to Rs. 1 crore, it cannot be said that the C.P. (IB) No. 3973/2018 cannot be restored.

23. As a result of the above discussion, we partly **allow the IA No. 1375/2022** with an order that delay, if any, in filing the application shall stand condoned and the C.P.(IB) No. 3973/2018 under Section 9 of the Insolvency and Bankruptcy Code, 2016 which, was disposed of as withdrawn vide order dated 22.07.2019 on the basis of consent terms, is hereby restored and revived. Registry is directed to list the C.P. (IB) No. 3973/2018 for hearing on **03.01.2025**.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)
Sushil

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)