

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

IA/3907/2023

In

C.P.(IB)/935(MB)C-III/2020

*(Under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016 r/w Rule 11 of National
Company Law Tribunal Rules, 2016)*

**CH Robinson Worldwide Freight India
Pvt. Ltd.**

.....Applicant

Vs.

Bhrugesh Amin,
*Resolution Professional of Smaaash
Entertainment Private Limited*
*BDO Restructuring Advisory LLP, Level 9, The
Ruby, North West Wing, Senapati Bapat Road,
Dadar (W), Mumbai- 400028*

.....Respondent

In the matter of

Edelweiss Asset Reconstruction Co. Ltd.

.....Financial Creditor

Vs.

Smaaash Entertainment Private Limited

.....Corporate Debtor

Order Pronounced on: 22.12.2023

CORAM:

**SHRI CHARANJEET SINGH GULATI
HON'BLE MEMBER (T)**

**SMT LAKSHMI GURUNG
HON'BLE MEMBER (J)**

Appearances:

For the Applicant : Adv. Ram Jay Narayan

For the Respondent: Adv. Shyam Kapadia

COMMON ORDER

Per- Ms. Lakshmi Gurung, Member Judicial

1. The present application ("Application") is filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("IBC") read with Rule 11 of the National Company Law Tribunal Rules 2016, challenging the rejection of the Applicant's claim by the Resolution Professional and seeking inclusion of the Applicant's claim in the list of claims against the Corporate Debtor.

Relevant Brief Facts as narrated in the Application:

2. The Applicant is a company incorporated under the Companies Act, 1956 and carries on the business of inter alia owning and leasing cranes. The Applicant is a freight forwarder engaged in arranging the carriage and export of goods from, and import of goods into, India.
3. The Corporate Debtor approached the Applicant for freight forwarding and customs clearance services in respect of goods belonging to it. The Applicant successfully performed the services required by the Corporate Debtor and raised several

invoices upon the Corporate Debtor for the services rendered amounting to Rs. 50,04,972/-.

4. The following invoices were raised by the Applicant upon the Corporate Debtor:

- i. Invoice no. 19017104619 dated 02.11.2017 for Rs. 74,277/-*
- ii. Invoice no. 19017118430 dated 04.12.2017 for Rs. 2,25,936/-*
- iii. Invoice no. 19017122054 dated 12.12.2017 for Rs. 69,515/-*
- iv. Invoice no. 190185363 dated 15.12.2018 for Rs. 39,395/-*
- v. Invoice no. 1901852615 dated 30.03.2018 for Rs. 12,47,402/-*
- vi. Invoice no. 1901865585 dated 24.04.2018 for Rs. 19,234/-*
- vii. Invoice no. 190172631 dated 11.01.2017 for Rs. 2,46,010/-*
- viii. Invoice no. 190172633 dated 11.01.2017 for Rs. 73,821/-*
- ix. Invoice no. 190174154 dated 18.01.2017 for Rs. 1,11,939/-*
- x. Invoice no. 190174156 dated 18.01.2017 for Rs. 1,01,165/-*
- xi. Invoice no. 1901955853 dated 02.05.2019 for Rs. 24,04,352/-*
- xii. Invoice no. 1901959809 dated 10.05.2019 for Rs. 1,96,874/-*
- xiii. Invoice no. 1901973574 dated 13.06.2019 for Rs. 1,95,052/-*

5. On 19.06.2019, the Applicant's lawyer addressed a notice of demand under the Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor. The Corporate Debtor admitted the liability and promised to make payment. Upon non receipt of payments, the Applicant was constrained to file CP(IB)/3759(MB)/2019 before this Tribunal.

6. During the pendency of the company petition, the Applicant and the Corporate Debtor entered into the consent terms and same was taken on record by this Tribunal vide order dated 02.03.2020.

7. However, the said consent terms were breached and the parties entered into the fresh consent terms on 03.01.2022, under which the Corporate Debtor admitted the liability for the operational debt and undertook to make payment. The fresh consent terms were taken on record by this Tribunal vide order dated 04.01.2022 and petition was allowed to be withdrawn with liberty to file a fresh Company Petition in case of breach of any of the consent terms.
8. Certain part payments were made, leaving the principal outstanding due to the Applicant as Rs. 20,00,000/-.
9. Meanwhile, on an application under Section 7 of the IBC by Edelweiss Asset Reconstruction Co. Ltd. CIRP was initiated against the Corporate Debtor vide order dated 06.05.2022 and the Respondent was appointed as Interim Resolution Professional (“IRP”).
10. The Respondent issued a public announcement, inviting claims from creditors of the Corporate Debtor. The Applicant filed its claim as Operational Creditor, for Rs. 20,00,000 with the IRP vide its email dated 11.08.2022.
11. On 04.02.2023, the IRP rejected the Applicant’s claim on the basis that the debt arose out of consent terms, cannot be treated as Operational Debt.

Reply by Respondent/RP:

12. The RP has filed detailed reply opposing the application on the grounds that the claim is not an operational debt, and the claim is not in appropriate form.
13. The claim of the Applicant does not amount to an operational debt under Section 5(21) of the Code as the claim is arising from the breach of the consent terms/settlement agreement. It is argued that for a debt to be operational debt, the same should be on the basis of either “contract” or “invoices” for the supply of goods and services. However, the claim of the Applicant is not with respect to the goods or services supplied by the Applicant but based on consent terms/settlement agreement.
14. For this reason, that the Applicant was directed to re-file its claim in right form/format and instead of doing that the applicant has preferred the present application.
15. The Respondent has relied on the decision of Hon’ble National Company Law Appellate Tribunal, in the matter of ***Trafigura India private Limited Vs. TDT Copper Limited*** (Company Appeal (AT) (Ins) No.742 of 2020) passed on 15.09.2022.

Findings and Order:

16. Heard the Parties for both the sides and perused the record.

17. The Applicant submitted that in the present case, the original company petition, i.e. CP (IB)/3759(MB)/2019 was filed on the basis of unpaid invoices for services rendered, therefore the debt is relating to supply of services and is covered as operational debt. The consent terms dated 03.01.2022 specifically state that if there is any default in payment, CH Robinson's (Applicant's) claim will be considered to be under the original cause of action (and not the consent terms). When these consent terms are referred to as the basis of the claim before the RP, it was incumbent on the RP to go through the consent terms properly and to appreciate that the claim relates back to the original cause of action. The RP has completely failed to apply his mind when concluding that the Applicant's debt is not an "operational debt" merely because consent terms had been entered into.

18. The Applicant has submitted the following reasons to contend that its claim is operational debt:

- a. The Claim was admitted by the Corporate Debtor, before this Tribunal under section 9 petition and also prior to that.
- b. The consent terms themselves state that the Applicant's claim is based on its original debt and will be considered an "operational debt". Merely because consent terms were entered into, that does not make the operational debt a non-operational debt.
- c. The Applicant has approached this Tribunal on the basis of its original operational debt, the consent terms

are only an added factor proving the existence of the original operational debt.

- d. This Tribunal has not only accepted the consent terms which specifically state that this is an “operational debt” but also given the Applicant liberty to file another company petition in case of breach of consent terms, thereby accepting that failure to pay will be considered an “operational debt”.
- e. When the Applicant’s Claim was admitted by the Corporate Debtor, itself then the same could not have been rejected by the RP.

19. Per contra, the Respondent has relied on the judgment of Hon’ble National Company Law Appellate Tribunal in **Trafigura India Private Limited Vs. TDT Copper Limited** (Company Appeal (AT) (Ins) No.742 of 2020) decided on 15.09.2022, wherein it was held that where a default in the payment of outstanding instalments is as per a settlement agreement, the same does not fall under the purview of operational debt. The relevant extract is reproduced below: -

“17.

The Adjudicating Authority has considered the Settlement Agreement and rightly come to the conclusion 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 additional debt as per Section 5(21) of the IBC and further prayer made by the Corporate Debtor that the matter be referred to the Arbitration under Section 8 of the Arbitration and Conciliation Act, the Adjudicating Authority has also

rightly held that the role of National Company Law Tribunal is very limited while exercising its power under Section 7, 9 and 10 of the IBC, 2016, it is beyond the scope of Section 9 of the IBC.”

20. The Respondent has not denied the existence of debt towards the applicant. He has in fact directed the Applicant to re-file its claim in right form/format. Therefore, the limited controversy before us is whether the claim of the applicant can be treated as operational claim or other claims.

21. We note that the consent terms were executed between the parties, after the petition under section 9 was filed before this Tribunal, wherein the Corporate Debtor had agreed to pay a sum of Rs. 60,00,000/- (Rupees Sixty Lakhs only) within a period of 9 months from the date of the execution of the Consent Terms. Thereafter, certain part payments were made, leaving the principal outstanding due to the Applicant as Rs. 20,00,000/- (Rupees Twenty Lakhs only).

22. Clause 8 of the Consent Terms which is relevant for deciding the case is reproduced below:

“8. Default

- a. If any of the cheques are dishonored, the Corporate Debtor shall, within 24 hours of such dishonor, make payment of the cheque amount by bank transfer.*
- b. If the payment of the cheque amount is so not made, that shall be considered a breach of these terms.*

c. *The Corporate Debtor confirms that, in case of such breach, in addition to any other civil/criminal remedy the Operational Creditor may have, the Operational Creditor will also be at liberty to seek revival of the present petition/file a fresh petition for insolvency resolution of the Corporate Debtor for the amount of INR 60 lakhs minus any amount received + interest thereon at 18% p.a. from 19 June 2019. The Corporate Debtor agrees that the said amount is an operational debt as detailed in the demand notice dated 19 June 2019, that it is due under the original cause of action and that the date of default for the purpose of any such petition is 19 June 2019.*”

23. The petition under section 9 of the IBC was filed by the applicant as an Operational Creditor and was withdrawn in view of above consent terms and liberty was granted to the Applicant to revive the same on breach of the consent terms. It is clear that parties have agreed that the said outstanding amount is an operational debt as detailed in the demand notice dated 19.06.2019 and is due under the original cause of action. In other words, it means that the amount due is arising out of the original invoices raised by the applicant on the Corporate Debtor for which demand notice was sent.

24. We further note that liberty was granted to the applicant to seek revival of the petition/ or file a fresh petition against Corporate Debtor. Where the parties have agreed to

particular terms and conditions, the same is binding on them unless proved void under any law. In this case, the parties have agreed that the balance amount is arising out of invoices for supply of goods and the outstanding amount continues to be Operational Debt. Based on the agreement between the parties, the Applicant has filed the claim in Form B claiming the outstanding debt to be operational debt.

25. It would be profitable to refer to the judgment of Hon'ble National Company Law Appellate Tribunal in **IDBI Trausteeship Services Limited Vs. Nirmal Lifestyle Limited** (Company Appeal (AT) (Ins) No. 117 of 2023) decided on 15.05.2023 where emphasis was given to the terms of the settlement. The relevant paragraph is as follows:-

“19. We thus in the facts of the present case are of the view that Adjudicating Authority committed error in rejecting the revival application 3196 of 2022 when the consent term itself contemplates a clause for revival in event of default and default having been committed by the Corporate Debtor, rejection of revival is to deny the Financial Creditor rightful remedy. Non-mention of specific liberty in the Order is inconsequential in view of the clear terms in the settlement which was the basis of withdrawal of Company Petition.”

[Emphasis Provided]

26. We draw analogy from the above judgement of Hon'ble NCLAT in the matter of **Nirmal Lifestyle Limited (Supra)**, wherein Hon'ble NCLAT has held that where the consent

terms envisaged so, petition can be revived based on the consent terms between the parties, in the event of default. Therefore, we have no hesitation to hold that the claim of the Applicant herein is an operational debt as agreed between them that the unpaid amount is arising out of invoices and will be treated as operational debt.

27. The Respondent has relied on the judgment of Hon'ble National Company Law Appellate Tribunal in ***Trafigura (supra)***. In that case default was made in the payment of outstanding instalments as per settlement agreement. There are no discussions whether there was any clause about the nature of the outstanding amount and whether the liberty was granted to revive/file fresh section 9 petition. In the present case, the original company petition, i.e. CP (IB)/3759(MB)/2019 was filed by the Applicant on the basis of unpaid invoices for the services rendered. In the consent terms dated 03.01.2022 it is specifically stated that if there is any default in payment, the Applicant's claim will be considered to be under the original cause of action as operational debt and the Operational Creditor is also entitled to revive his petition as Operational Creditor or to file a fresh petition. Corollary, if applicant has a right to pursue his petition as operational creditor then his right to claim his dues as operational debt is also subsisting.

28. In view of the above, we direct the Resolution Professional to consider the claim of the Applicant as an

operational debt and include it in the list of creditors for the purpose of the Corporate Debtor's resolution/liquidation.

29. Accordingly, the present IA/3907/2023 is **allowed** and stands **disposed of**.

Sd/-

CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)

Sd/-

LAKSHMI GURUNG
(MEMBER JUDICIAL)

Arpan, LRA