

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 521 of 2023

**[Arising out of the Order dated 21.02.2023, passed by the
'Adjudicating Authority' (National Company Law Tribunal,
Mumbai Bench, Court-V), in Restoration Application No. 7 of
2023 in CP (IB) No. 696 (MB) 2021]**

IN THE MATTER OF:

1. 5MF &G Private Limited,

A company incorporated under the provisions of the Companies Act, 2013, having, its registered office at No. 647, 2nd Main, 7th Block, 2nd Phase Banashankari 3rd Stage, Bangalore - 580085.

...Appellant

Versus

1. BMI Wholesale Trading Private Limited,

A company incorporated under the provisions of the Companies Act, 1956, having its registered office at 17, 10th Floor, Pinnacle Corporate Park G Block, Bandra - Kurla Complex, Bandra East, Mumbai - 400051.

...Respondent

Present:

For Appellant : Mr. Atharv Gupta, Advocate.

For Respondent :

J U D G M E N T
(Hybrid Mode)

[Per: Justice Mohd. Faiz Alam Khan, Member (Judicial)]

Instant appeal has been filed by the appellant under Section 61 (1) of the Insolvency and Bankruptcy Code, 2016 against the order dated 21.02.2023 passed by the National Company Law Tribunal, Mumbai Bench, whereby the restoration application/revive application filed by the appellant to restore Company Petition No. 696 of 2021 has been dismissed.

2. The sole Respondent in this appeal after being sufficiently served, do not appear and has been proceeded ex-parte vide order dated 12.07.2023 of this Tribunal.

3. Necessary facts required for disposal of the instant appeal are that in the year 2017 Respondent is stated to have approached the appellant making a request to the appellant to supply it various garments and the appellant accordingly agreed. The appellant started supplying garments to the respondent and also raising purchase orders and invoices. Pursuant to the said purchase orders, the appellant sold, supplied and delivered the garments of high-quality and of the quantity as mentioned in the said purchase orders, to the respondent.

4. It is contended by appellant that he has raised several invoices from time to time on the respondent pertaining to supplies made by it. The aforesaid purchase orders and invoices were required to be cleared within 90 days, however the Respondent initially made some payments towards these invoices, but eventually started defaulting in payment obligations and as such many invoices remained unpaid.

5. It is also contended that due to the repeated defaults committed by the respondent, the appellant issued a demand notice dated 23 December 2020 under section 8 of the Insolvency and Bankruptcy Code 2016, demanding the outstanding amount of Rs. 4,14,43,560/- out of which Rs. 3,25,75,861/- is the principal amount and the remaining amount i.e. Rs. 88,97,699/- was interest, which had accrued till 23 December 2020.

6. It is also the case of the appellant that when this operational debt was not settled by the respondent, despite the service of demand notice, he filed

a Company Petition (IB) No. 696 (MB) of 2021, under section 9 of the Insolvency and bankruptcy Code 2016, hereinafter called the Code, before the learned National Company Law Tribunal, Mumbai.

7. It is also the case of the appellant that during the pendency of the above mentioned petition, the respondent/corporate debtor has approached the appellant and requested to settle the matter and accordingly the parties entered into a settlement, the terms of which were reduced into writing on 4th April 2022, whereby the respondent agreed to pay Rs. 3,10,87,725/- as the settlement amount in full and final settlement of all claims of the appellant and in Clause 4 of these consent terms, a token amount of Rs. 10 lakhs was also required to be paid by the respondent immediately and forthwith upon the execution of the consent terms and as per clause 5 of the said consent Terms the respondent was further obliged to make instalment payments from 30th April 2022 to 30th November 2023.

8. It is further the case of the appellant that clause 12.3 of the consent terms stipulated that in the event, the respondent failed to make payment of the settlement amount in the manner set out in clause 12 read with clause 5 of the consent terms then the appellant would be entitled to the revival of the aforesaid company petition.

9. It is further stated that in execution of the consent terms, the appellant filed memo of withdrawal dated 11th April 2022 with the adjudicating authority requesting to withdraw the aforesaid company petition on the ground of settlement with the respondent in accordance with the consent terms. The memo of withdrawal which was allowed vide order dated 11th April 2022 was having a clear stipulation of liberty to

restore/revive the aforesaid company petition in the event of default of agreed payment by the respondent. The Withdrawal Order Passed by the adjudicating authority on 11th April 2022 also contains this fact and on the basis of the settlement arrived at between the parties the adjudicating authority dismissed the petition as withdrawn and consent terms were also taken on record. The respondent defaulted in the payment schedule as provided in the consent terms and aggrieved by the same the appellant issued a notice seeking payment of the balance settlement amount and further demanding compliance with consent terms wide notice dated 28th November 2022. However, despite receiving the aforementioned notice no further payment was made by the respondent and despite given multiple opportunities he refrained from making any payment and in this background the appellant was constrained to exercise its liberty to seek to restore/review the said company petition in terms of the consent terms/settlement.

10. It is also contended that appellant had filed a restoration application bearing IA No. 7 of 2023 before the adjudicating authority for restoration and revival of the aforesaid company petition and also requesting to continue the proceedings seeking initiation of corporate insolvency resolution process against the respondent however the adjudicating authority in utter disregard to the terms of the settlement dismissed the application moved by the appellant by passing the impugned order of date 21st February 2023.

11. It is further stated that the adjudicating authority has failed to appreciate that the withdrawal order had categorically taken the consent

terms on record and had permitted the withdrawal of the said company petition on the basis of the consent terms and also taking into consideration the provisions of the consent terms, specifically clause 12.3, which has reserved liberty to the appellant to seek to restore/review the said company petition upon the default of agreed payment as per the schedule by the respondent, in accordance with clause 12 of the same. Request has been made to quash/set aside the impugned order and to allow the restoration application moved by the appellant.

12. At this juncture even at the cost of repetition it is recalled that the notice in the Appeal was earlier issued to the respondent and he was also sufficiently served, however vide order dated 12th July 2023 he was directed to be proceeded *Ex Parte* and thereafter the respondent never appeared and therefore this tribunal could not get an opportunity to hear the respondent despite sufficient opportunity of being heard is provided to him.

13. We have heard Ld. Counsel for the appellant and perused the record including the written submissions filed by the appellant.

14. Learned counsel for the appellant submits that adjudicating authority has committed manifest illegality in rejecting the application moved by the appellant and has completely ignored the material placed before it by the appellant.

15. It is further submitted that it was apparent on the face of the record that earlier petition filed by the appellant was withdrawn under the terms of settlement/Consent deed dated 04.04.2022 wherein it was specifically stipulated that if any default would be committed by the appellant the

appellant would be at liberty to get the restoration of the petition earlier filed by him.

16. While drawing the attention of this Appellate Tribunal towards relevant paragraphs of the settlement deed/consent terms it is submitted that even if the order dated 11th April 2022 did not contain the liberty to restore or revive the company petition but it is evident that the petition filed by the appellant has been dismissed only on account of the parties entered into a settlement and this fact has also been recorded in the withdrawal order passed by the tribunal on 11.04.2022. Therefore, keeping in view the specific stipulation in the settlement deed that if the respondent would commit default in making payment to the appellant under the settlement deed, he would be having a right to get the petition revived/ restored. Thus material illegality has been committed by the tribunal and the impugned order be quashed and the petition be restored/revived.

17. Learned counsel for the appellant in support of his submissions has relied on the following case Laws: -

(i) Pooja Finlease Ltd. vs. Auto Needs (India) Pvt. Ltd. & Anr., 2022 SCC Online NCLAT 3883.

(ii) IDBI Trusteeship Services Ltd. vs. Nirmal Lifestyle Ltd., Company Appeal (AT) (Ins) No. 117 of 2023.

(iii) Himadri Foods Ltd. vs. Credit Suisse Funds AG, 2021 SCC Online NCLAT 48.

18. Perusal of the record, in the background of the submissions made by Ld. counsel for the appellant would indicate that appellant had filed an

application under section 9 of the IBC for initiation of CIRP against the respondent /Corporate debtor for the alleged default of Rs. 4,14, 43,560/-. It is also evident that during the pendency of the said petition settlement arrived at between the parties and consent terms were reduced into writing on 4th April 2022. Under the said consent terms an amount of Rs. 3,10, 87,725/- was required to be paid by the respondent to the appellant as full and final settlement of the unpaid dues allegedly owed by the respondent to the appellant.

19. It is also transpired that pursuant to the consent terms the appellant had filed a memo of withdrawal dated 11th April 2022 before the adjudicating authority requesting to withdraw the said company petition on the basis of the settlement arrived at between the parties with the liberty to revive the petition in the event of default of agreed payment in accordance with the consent terms. Ld. tribunal in its order Dated 11th April 2022 while dismissing the petition as withdrawn has also recorded that learned counsel for the petitioner mentions that the matter has been settled amicably between the parties and consent terms has been drawn on 4th February 2022 and these consent terms are taken on record.

20. A copy of consent terms / settlement deed has also been placed on record and relevant portion of this consent terms is being reproduced as under:

“II. PAYMENT OF SETTLEMENT AMOUNT

3. The Parties have agreed that BMI shall, against the Balance Amount, pay an amount of INR 3,10,87,725 (Rupees Three Crores Ten Lakhs Eighty-Seven Thousand Seven Hundred and Twenty-Five) to 5M towards full and final settlement of all of 5M's claims against BMI

("Settlement Amount") as per the ledger statement mutually agreed by way of the Payment Schedule more particularly set out hereunder.

4. Parties agree that out of the total Settlement Amount, a token amount of INR 10,00,000 (Rupees Ten Lakhs) will be paid by BMI to 5M, immediately and forthwith upon the execution of this Agreement.

5. Parties agree that the remaining Settlement Amount shall be paid by BMI to 5M by way of 20 (Twenty) instalments, by way of the following direct deposit through RTGS. BMI agrees, confirms and undertakes to make payments to 5M of the remaining Settlement Amount in the manner set out in the Payment Schedule set out below:

Sr. No.	Mode	Payment Date	Amount (INR)
1	RTGS	30 April 2022	15,00,000
2	RTGS	30 May 2022	15,00,000
3	RTGS	30 June 2022	15,00,000
4	RTGS	30 July 2022	15,00,000
5	RTGS	30 August 2022	15,00,000
6	RTGS	30 September 2022	15,00,000
7	RTGS	30 October 2022	15,00,000
8	RTGS	30 November 2022	15,00,000
9	RTGS	30 December 2022	15,00,000
10	RTGS	30 January 2023	15,00,000
11	RTGS	28 February 2023	15,00,000
12	RTGS	30 March 2023	15,00,000
13	RTGS	30 April 2023	15,00,000
14	RTGS	30 May 2023	15,00,000
15	RTGS	30 June 2023	15,00,000
16	RTGS	30 July 2023	15,00,000
17	RTGS	30 August 2023	15,00,000
18	RTGS	30 September 2023	15,00,000
19	RTGS	30 October 2023	15,00,000
20	RTGS	30 November 2023	15, 87, 725
		Total	3,00,87,725

6. The Parties agree that all the payments shall be made as per the Payment Schedule set out hereinabove.

7. 5M agrees, acknowledges and confirms that the amount specified in this Agreement by way of the Payment Schedule is sufficient towards the full and final settlement of all outstanding disputes and claims of 5M against BMI, in relation to the captioned Company Petition and the transactions set out therein.

8. Without prejudice to and in addition to all that is stated hereinabove, 5M agrees and undertakes to do generally do all acts and deeds required for the effective implementation of this Agreement,

a. Duly execute all such affidavits, undertakings, declarations and provide such assistance as may be required by the Advocates of BMI, to the extent of their requirement, to file before any courts and departments to enable disposal of the Company Petition.

b. Submit the withdrawal memo to withdraw the Company Petition before the Hon'ble NCLT.

9. Subject to the terms of this Agreement, the Parties hereby agree and confirm that they do not have any residual or any other claims against each other and confirm that all pending claims, disputes, demands and/or differences among them stand extinguished upon the execution of this Agreement, on the terms set out herein. No future claims shall arise against BMI by/ on behalf of 5M out of this cause of action/ transaction.

10. The Parties agree and undertake to abide by all the terms and conditions stipulated hereinabove and confirm that their consent has not been obtained by force, fraud, coercion, or undue influence from any person whatsoever.

11. The present Agreement is not presented in collusion between the Parties.

III. DEFAULT IN PAYMENT

12. If BMI fails to make payment of the Settlement Amount as per the Payment Schedule set out above, for any reasons attributable to BMI, then:

12.1 All remaining amounts required to be paid by BMI towards the Settlement Amount, as stated in clause 5 above, shall become payable forthwith and BMI shall be liable to and undertakes to the Hon'ble NCLT to pay the same within 15 (fifteen) days of being put to notice ('**Demand Notice**') of the same by 5M; and in addition,

12.2 Parties agree and undertake to bear their respective costs in connection with and / or arising out of the NCLT proceedings.

12.3 Upon BMI committing the aforesaid breach as aforesaid, BMI hereby agrees and confirms that 5M is entitled to the revival of the captioned Petition.

It is clarified and agreed between the Parties that, if BMI fails to make payment within 15 days of receipt of the Demand Notice (as per clause 12.1 above), the same shall be construed as conclusive proof of default in payment committed by BMI”.

21. Before proceeding further, it is also fruitful to reproduce the impugned order of date 21st February 2023, Whereby the restoration application of the appellant has been dismissed and the same is reproduced as under:

*“Rst.A/7 of 2023- Ms. Tvishi Pant, Counsel for the Applicant is present through virtual hearing. By way of the above Rst.A/7/2023, the Applicants seeks restoration of Company Petition No. 696 of 2021 which was dismissed for default on 11.04.2022, as the matter was settled between the parties. However, perusal of the order dated 11.04.2022 reveals that no liberty was granted to the Applicant/Petitioner to get the Petition revived in the event of any violation/default committed by the Corporate Debtor in terms of settlement. Therefore, the restoration of the Petition cannot be ordered. The above IA is therefore be **dismissed** being devoid of merit”.*

Order dated 11.04.2022 whereby the company petition 696 of 2021 was dismissed as withdrawn is also reproduced as under:

- 1. “Mr. Shashwat Rai, Counsel for the Petitioner is present and mentions that the matter has been settled amicably between the parties and consent terms has been drawn on 04.02.2022. Consent terms taken on record.*
- 2. Company Petition is **dismissed** as withdrawn”.*

22. Perusal of the above placed Consent terms would reveal that in clause 5 of the same the schedule of payment has been provided as to how Rs. 3,00,87,725/- would be paid by the respondent to the appellant. Clause 7 of this consent terms also provides that the payment provided in the above schedule is for the full and final settlement of all outstanding disputes and claims of 5MF & G Pvt. Ltd. against BMI Wholesale Trading Pvt. Ltd. The clause number (III) of the consent terms further provides the default of payment and clause 12.1 provides that if BMI fails to make payment as per the schedule the same would amount to default. The clause number 12.3 of the consent terms also provides categorically that upon BMI Committing default as mentioned in the consent terms, BMI agrees and confirms that 5MF & G Pvt. Ltd. is entitled to the revival of the captioned Petition. Thus, it is clear that the application for withdrawal of the petition was moved by the Appellant/Petitioner under the terms and conditions of the settlement deed/consent terms which has a clear provision that if the respondent will commit default in payment of the settled dues, according to the timeline provided in the Consent terms, the appellant would be entitled to restore/revive the petition before the NCLT. The fact that no such liberty has been provided by the NCLT while passing the order of withdrawal, in our considered opinion would not be of any consequence as the withdrawal order has been passed by the Learned adjudicating authority only on the basis of the submissions made by Ld. Counsel for the appellant/Petitioner informing that, the parties have entered into a compromise/settlement and the settlement deed/ consent terms was also enclosed with the application of withdrawal moved before the learned adjudicating authority and the

same was also taken on record. Thus, the withdrawal before the adjudicating authority was not a 'simpliciter withdrawal' rather it was a withdrawal based on the settlement/consent terms entered into between the parties which contains a clear stipulation of the revival and restoration of the petition in case of default committed by the respondent/corporate debtor in payment of settlement amount. In our considered opinion Ld. tribunal has committed manifest illegality in dismissing the restoration application moved by the appellant on the hyper technical ground that in the withdrawal order that such liberty has not been provided to the petitioner to revive/ restoration of the petition while it was conspicuously evident that the withdrawal order has been passed by the tribunal only on the basis of settlement entered into between the parties and the settlement deed/consent terms were also produced before adjudicating authority, which were also taken on record.

23. A coordinate Bench of this tribunal in **Company Appeal No. (AT) (Insolvency) 117 of 2023, IDBI Trusteeship Services Limited Vs. Nirmal Lifestyle Limited decided on 15.05.2023** speaking through its Chairperson has highlighted the difference between a 'withdrawal simpliciter' and the 'withdrawal of the petition by bringing the settlement/consent terms on record' and while finding the said case under the category where settlement has been brought on record and also considering that in the consent terms there is a stipulation for revival of the petition in the event of default and noticing that in that case default having been committed by the corporate debtor held that rejection of revival would amount to denying the financial creditor a rightful remedy.

24. Similarly, in **Finsbury Global FZE Vs Uttam Sucrotech International Private Limited** decided on 12th February 2024 in **Company Appeal (AT) (Ins) No. 796 of 2023** a coordinate bench of this appellate tribunal while relying on **Ahluwalia Contracts (India) Limited Versus Jasmine Buildmart Private Limited** reported in **2023 SCC Online NCLAT 579**, which was a case under section 9 of the IBC held that the appellant would be entitled to get the application revived if terms of the settlement have been violated.

25. Thus, in view of the aforesaid facts and circumstances as well as the legal precedents placed above we are of the considered opinion that an error has been committed by the Adjudicating Authority in dismissing the restoration/revive application filed by the appellant. Resultantly the appeal succeeds and is **allowed** and the impugned order is hereby **set aside**.

26. The original application/Petition filed by the appellant/applicant is hereby revived/restored, which shall now be disposed of by Learned Tribunal Strictly in accordance with law.

27. There is however no order for costs. The pending IAs are also closed.

[Justice Mohd. Faiz Alam Khan]
Member (Judicial)

[Indevar Pandey]
Member (Technical)

New Delhi.
25.08.2025.

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