

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH-1
KOLKATA**

**I.A. (IB) No. 271/KB/2021
in
C.P. (IB) No. 1039/KB/2019**

In the matter of

An application under rule 11 of the National Company Law Tribunal Rules, 2016.

In the matter of:

Pawan Putra Securities Private Limited
[CIN:U51109WB1993PTC060129] ...

Applicant/Financial Creditor

versus

Wearit Global Limited
[CIN: U40107WB1999PLC089994] ...

Respondent/Corporate Debtor

Order reserved on: 08 February, 2022

Order pronounced on: 24 February ,2022

Coram:

Shri Rajasekhar V.K. : Member (Judicial)

Shri Balraj Joshi : Member (Technical)

Appearances (through video conference):

For the Applicant : Mr. Rahul Parasrampur, PCS

For Respondent : 1. Mr. Joy Saha, Senior Advocate
2. Ms. Urmila Chakraborty, Advocate
3. Mr. Indradeep Basu, Advocate

ORDER

Rajasekhar V.K., Member (Judicial)

1. This Court convened through video conferencing today.
2. The Interlocutory Application i.e. **I.A. (IB) No. 271/KB/2021** has been filed by Pawan Putra Securities Private Limited against Wearit Global Limited seeking for the following reliefs:

- a. allow the present application and pass an order reviving/restoration of the Application being CP (IB) No.1039/KB/2019 filed under section 7 of the Insolvency and Bankruptcy Code, 2016 by the Financial Creditor by recalling the order dated 31st January 2020;
- b. pass an order directing the Corporate Debtor to comply with the settlement terms in the interest of justice.

Submissions of the learned Authorised Representative of the Applicant

3. CP (IB) No.1309/KB/2019 was filed by the Applicant/Financial Creditor under section 7 of the Insolvency and Bankruptcy Code, 2016 (“Code”) against Wearit Global Limited (“Corporate Debtor”) for initiation of Corporate Insolvency Resolution Process (“CIRP”).
4. The Financial Creditor and the Corporate Debtor entered into a settlement agreement on 31.01.2020¹ wherein the Corporate Debtor agreed to pay a sum of ₹1,25,00,000/- (Rupees one crore twenty-five lakh only) to the Financial Creditor by way of RTGS fund transfer in regular instalments from time to time.
5. Pursuant to the settlement agreement, the Company Petition was dismissed on account of settlement terms agreed between the Financial Creditor and Corporate Debtor *vide* order dated 31.01.2020.
6. The Corporate Debtor failed to repay the principal amount of Rs.95,00,0000/- (Rupees ninety-five lakh only) which is outstanding as on 31.12.2019 along with interest amounting to Rs.46,90,830/- (Rupees forty-six lakh ninety thousand eight hundred and thirty only). The Financial Creditor sent a demand letter to the Corporate Debtor on 31.12.2020 demanding the Corporate Debtor to make the payment but no payment was received from the Corporate Debtor.

¹ Annexure B at Pages 14-16 of the I.A.

7. In terms of the settlement agreement, the Corporate Debtor had made a payment of ₹30 lakh out of ₹1.25 Crore. The Corporate Debtor still has a due of ₹95 lakh to be paid to the Financial Creditor.
8. Clause 6 of the Settlement Agreement states that if the Corporate Debtor fails to repay the loan amount within the scheduled time frame as given in the settlement agreement, then the Applicant would be free to initiate legal proceedings and also claim interest on the loan till the repayment of the full amount.
9. The Applicant is entitled to revive the Petition which was dismissed as not pressed in terms of a settlement agreement.
10. The learned Authorised Representative placed reliance on the judgment of Hon'ble NCLAT in *Ruchita Modi v. Kanchan Ostwan and Ors.*² to support his contention.

Submissions of Mr Joy Saha, learned Senior Counsel for the Respondent/Corporate Debtor

11. No liberty was granted to the Applicant to restore or revive the Company Petition or for filing a fresh application on the same cause of action in the order dated 31.01.2020, wherein CP (IB) No.1039/KB/2019 was disposed as withdrawn on the grounds of settlement. The Company Petition was unconditionally withdrawn and hence the present I.A. is not maintainable.
12. Reliance has been placed on *Halsbury's Laws of England, Volume 37, 4th Edition at Page 287* which provides that the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects are to put an end to the proceedings, to preclude the parties from taking any further steps in the action, except where they have provided for liberty to apply to enforce the agreed terms and to supersede the original cause of action altogether.

² MANU/NL/0515/2019

13. Further reliance has been placed on *Sarguja Transport Service v. State Transport Appellate Tribunal*,³ in support of his contention that where a petitioner withdraws a petition without permission to institute fresh petition, the remedy under law is deemed to be abandoned by the petitioner. It would not be open to the Petitioner to file a fresh petition under the same cause of action. The law confers upon a man no right or benefit which he does not desire. Whoever waives, abandons, or disclaims a right, will lose it. In order to prevent a litigant from abusing the process of Court by instituting *lis* on the same cause of action again and again without any good reason leave ought to be sought at the time of withdrawing for filing a petition on the self-same cause of action.
14. Reliance is placed on the following in support of the aforementioned contention:
- (1) **Jacob Cherian v. K N Cherian**⁴ (para 100)
 - (2) **Rajinder & Ors. v. Harsh Vohra**⁵ (para 8)
 - (3) **Kalabati Debi v. Pratapi Debi**⁶
15. Proceedings under section 7 and 9 of the Code are not maintainable in respect of a claim arising out of a settlement agreement, as it does not fall within the meaning of section 5(7) and section 5(20) of the Code. Reliance has been placed in:
- (1) **Brand Realty Services Ltd. v. Sir John Bakeries India Pvt. Ltd.**⁷ (para 10-14)
 - (2) **Delhi Control Devices Pvt. Ltd. v. Fedders Electric Engineering Ltd.**⁸ (para 9,12)

³ (1987) 1 SCC 5 dated 12 November, 1986

⁴ (1973) 43 Comp cases 235 dated 19 August, 1971

⁵ 2011 SCC OnLine Del 852 dated 17 February, 2011

⁶ MANU/WB/1061/2010 dated 30 June, 2009

⁷ C.P. (IB) No. 1677(ND)/2019 dated 22 July, 2020

⁸ 2019 SCC OnLine NCLT 8030 dated 15 May, 2019

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- (3) **Nitin Gupta v. International Land Developers Private Limited**⁹ (para 9-12)
- (4) **Trafigura India Private Limited v. TDT Copper Limited**¹⁰ (para 10-15)
- (5) **Amrit Kumar Agarwal v. Tempo Appliances Pvt. Ltd.**¹¹ (para 4), wherein the Hon'ble NCLAT held that a mere obligation to pay does not bring the liability within the ambit of "financial debt". The debt, along with interest, if any, should be disbursed against the consideration for the time value of money, breach of terms of an agreement including a settlement agreement whereunder payment would be due may not fall within the ambit of section 5(8) of the Code.
- (6) The Hon'ble NCLAT in **Ashok Agarwal v. Amitex Polymers**¹² (paras 2, 25 and 26) repeatedly held that a claim arising out of a settlement or agreement does not fall within the definition of Financial Creditor or Operational Creditor.

16. The Applicant has come before this Adjudicating Authority for recovery of money and not for revival of the Corporate Debtor and the Code has been enacted to revive the Corporate Debtor by protecting it and not a recovery mechanism as held in **Swiss Ribbons Private Limited v. Union of India**¹³ by the Hon'ble Supreme Court.

Reply to the submissions of the Respondent

17. The Authorised Representative relied on **Jai Balaji Industries Limited v. BST Infratech Limited**¹⁴ wherein this Adjudicating Authority has restored the Company Petition which was withdrawn without leave to file again.

Analysis and Findings

⁹ C.P. (IB) No. 507/ND/2020 dated 25 June 2020

¹⁰ C.P.(IB) No. 2817/ND/2019 dated 15 July 2020

¹¹ C.A. (AT) (Ins.) No. 1005 of 2020 dated 25 November 2020

¹² C.A. (AT) (Ins.) No. 608 of 2020 dated 05 February 2021

¹³ (2019) 4 SCC 17 dated 25 January 2019

¹⁴ C.P. (IB) No. 911/KB/2020 dated 03.11.2021

18. The main contention raised by the learned Senior Counsel appearing on behalf of the Respondent is whether a proceeding that has been withdrawn without leave to revive the proceeding, can be restored.
19. On perusal of the order dated 31 January, 2020, liberty was not sought to restore the Petition in case the settlement failed on the day the withdrawal was prayed for. The withdrawal had been allowed pursuant to a settlement agreement between the Applicant and the Respondent and in terms of the settlement agreement and not a withdrawal simpliciter. Allowing such a contention that a petition cannot be revived if no liberty/leave of the Court has been sought, would cause injustice to a creditor who has diligently exercised his rights and filed the Company Petition and thereafter this restoration petition.
20. The second issue raised is whether a settlement agreement can constitute a financial debt or an operational debt.
21. Mr. Joy Saha, learned Senior Counsel has relied on several judgments in support of his contention that settlement agreement is not a financial debt or an operational debt. It is a well settled proposition but the main criteria which is to be considered is: “*whether the section 7 or section 9 petition is being filed on the basis of the settlement agreement or with respect to loan or services provided.*”
22. But the proposition has to be considered along with the facts of the each case in which the proposition was given. In ***Brand Realty Services supra*** the Operational Creditor had filed the section 9 petition for default in payment with respect to the settlement agreement and not invoices. Similarly, ***Delhi Control Devices supra***, the Operational Creditor therein had withdrawn the notice sent under section 8 of the Code in terms of the settlement agreement and had later filed a petition under section 9 of the Code without sending a demand notice under section 8 of the Code.

23. The fact in the present I.A. is for restoration of the main Company Petition that was originally filed for default in payment of Inter Corporate Deposit and not for default in a settlement agreement. The present I.A. has not been filed to initiate CIRP proceedings against the Corporate Debtor but only to restore the Company Petition. The Company Petition will be dealt with on its merits but at this stage we find it prudent to restore the Company Petition and allow the I.A.
24. It is also to be noted that we are allowing only prayer “a” that has been sought for in the I.A. and not prayer “b”. This Adjudicating Authority is not a recovery Court and should not be treated as one either.
25. Hence, the **I.A. 271/KB/2021 is allowed to the extent of prayer “a” alone, and C.P. (IB) No. 1039/KB/2019 is restored to the stage at which it was withdrawn.**
26. **List C.P. (IB) No. 1039/KB/2019 for hearing on 31.03.2022.**
27. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their learned Counsel and Authorised Representative for information and for taking necessary steps.
28. Certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

GGRB [LRA]

24 February 2022