National Company Law Appellate Tribunal,
Chennai Bench
Company Appeal (AT) (CH) (Insolvency) No. 146 of 2021

(Arising out of order dated 17th August, 2020 passed by National Company Law Tribunal, Bengaluru Bench, Bengaluru in I.A. No. 273 of 2020 in CP (IB) No. 199/BB/2018)

IN THE MATTER OF:

1. M/s. ICICI Bank Limited
Having it's Registered Office at:
Near Chakli Circle, Old Padra Road,
Vadodra- 390097.
Represented by it's Legal Manager,
Mr. Ved Bansod ...Appellant

Versus

1. M/s. OPTO Circuits (India) Limited
No. 83, Electronics City
Bangalore South
Bengaluru 560100

2. Mr. Vinod Ramnani
Share Holder of
M/s. OPTO Circuits (India) Limited
No. 83, Electronics City, Phase-I
Off Hosur Road,
Bangalore- 560100

3. Mr. Pankaj Srivastava
Interim Resolution Professional of
M/s OPTO Circuits (India) Limited
No. 5, 5th Cross, Navya Nagar, Jakkur,
Bangalore- 560064

...Respondents

Present:

For Appellant:	**Mr. V. Suresh, Advocate** **Mr. Dev Eshwaar, Advocate** **For Sivakumar and Suresh, Advocates**
For Respondent No.1:	**Mr. Samarth Shreedhar, Advocate**
For Respondent No. 3:	**Mr. Navaneetha Krishnan, Advocate** **For Mr. N.P. Vijaya Kumar, Advocate** **Mr. P. Srivastava, Erstwhile RP**

J U D G M E N T
(28th April,2022)

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The Present Appeal is filed aggrieved by the order dated 17.08.2020 passed in I.A. No. 273 of 2020 in CP 199 of 2018 by the Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench) whereby the Adjudicating Authority in the above order observed that the Appellant Bank is entitled to file fresh Company Petition in accordance with the provisions of the code instead giving liberty to resume the CIRP against the Corporate Debtor i.e. the 1st Respondent herein.

Brief Facts:

Appellant Submission's:

2. The Learned Counsel appearing for the Appellant submitted that the 1st Respondent Company had approached the Appellant Bank for various credit facilities and as such, availed of non-fund based working capital facilities of a stand by letter of Credit (SBLC facility) by way of Credit Arrangement Letters (CALs) executed between the Corporate Debtor and the Appellant Bank.

3. In view of default committed by the 1st Respondent to the tune of Rs. 1,07,85,59,340.96/- the Appellant Bank had initiated proceedings under Section 7 of IBC, 2016 and the Adjudicating Authority, (NCLT, Bengaluru Bench) admitted the application filed by the Appellant vide order dated 18.03.2020 and initiated CIRP Proceedings against the Corporate Debtor.

4. While so the Corporate Debtor filed a Writ Petition bearing no. 6640 of 2020 before the Hon'ble High Court of Karnataka challenging the admission order passed by the NCLT and the Hon'ble High Court granted interim stay on 24.03.2020 and subsequently extended the interim stay. During subsistence of interim stay, the Corporate Debtor approached the Appellant Bank on 22.04.2020 with one time settlement proposal agreeing to pay a sum of Rs. 22.7 Crores towards full and final settlement. In pursuance of OTS, the Corporate Debtor made a payment of Rs. 4.5 Crores to the Appellant Bank as an upfront payment and the balance amount of Rs. 18.2 Crores shall be paid within a period of three months from the date of acceptance of OTS i.e. 14.07.2020.

5. It is submitted that the 2nd Respondent filed an Appeal before this Tribunal bearing CA (AT) (Ins) No. 673 of 2020, and this Tribunal vide order dated 10.08.2020 directed the 2nd Respondent to file an Application within a period of two weeks from 10.08.2020 before the NCLT Bengaluru Bench to record the settlement as per Section 12 A of the I & B Code, 2016.

6. The 2nd Respondent had filed I.A. 273 of 2020 praying the Adjudicating Authority to terminate the CIRP Proceedings initiated pursuant to the order dated 18.03.2020 in view of the settlement arrived at between the Appellant and the Corporate Debtor. During the Course of hearing of the aforesaid I.A., the Appellant Bank had also filed a Memo before the Adjudicating Authority seeking liberty to revive/restore the order dated 18.03.2020 passed in CP (IB) No. 199 of 2018 in the event of default/ not adhering to the terms as contained in the OTS sanctioned letter dated 10.07.2020.

7. It is submitted that the Adjudicating Authority in the impugned order dated 17.08.2020 instead of giving liberty to revive the very same IBC Petition, however given liberty to the Appellant herein to file a fresh Company Petition in accordance with the provisions of the IBC.

8. The Ld. Counsel submitted that in similar circumstances this Tribunal in the matter of *'Vivek Bansal vs. Burda Druck India Pvt. Ltd. & Anr. in CA (AT) (Ins) No. 552 of 2020'* dated 14.07.2020 held that in the event of default and not adhering to the terms of the settlement agreement, the Operational Creditor shall be at liberty to seek revival/restoration of the CIRP Proceedings before the Adjudicating Authority.

9. In view of the aforesaid reasons, the Ld. Counsel prayed this Bench to set aside the portion of the order dated 17.08.2020 passed by the Adjudicating Authority in I.A. No. 273 of 2020 to the extent that the Appellant is entitled to file fresh Company Petition in accordance with the terms of the Code.

Respondent's Submissions:

10. The Ld. Counsel appearing for the Respondent did not deny the facts as enumerated in the Appeal however submitted that the Corporate Debtor was unable to pay the balance amount for the reason that its Accounts have been blocked in light of communication dated 15.05.2020 issued by the Enforcement Directorate that a complaint has been lodged by the State Bank of India.

11. In view of sudden freezing the Account of the Corporate Debtor, the Corporate Debtor was unable to pay the salaries to its employees, despite having sufficient funds in the accounts of the Corporate Debtor. The Corporate Debtor had taken steps before the respective courts challenging the communication dated 15.05.2020.

12. In view of the reasons that the accounts remained frozen even till date, the Company was unable to operate the accounts and submitted that the Corporate Debtor may be permitted to submit a fresh proposal for settlement of the dues of the Appellant Bank so that the Company can resume its operations and simultaneously pay off the Appellant all its dues of a reasonable period of time.

Analysis/Appraisal:

13. Heard the Ld. Counsel appearing for the respective parties perused the Pleadings, Documents and Citations relied upon by them. After hearing the Ld. Counsel for the parties the only point for consideration is whether the Adjudicating Authority's decision in directing that failing to adhere to terms and conditions of one time settlement, the Appellant Bank is entitled to file fresh Company Petition is justifiable?

14. It is a fact that the Appellant Bank filed an Application under Section 7 of the I & B Code, 2016 before the Adjudicating Authority (NCLT Bengaluru Bench) in CP No. 199 of 2018 against the Corporate Debtor. The Adjudicating Authority admitted the application and initiated CIRP Proceedings by imposing moratorium vide order dated 18.03.2020. It is also fact that the Corporate Debtor filed Writ Petition bearing WP No. 6640 of 2020 before the Hon'ble High Court of Karnataka, and the Hon'ble High Court stayed the order of the Adjudicating Authority dated 18.03.2020 for a period of eight weeks and thereafter extended another period of eight weeks.

15. While matter stood thus, the Corporate Debtor vide a letter dated 22.04.2020 addressed to the Appellant Bank stating that it intends to revise its OTS Proposal for an amount of Rs. 22.70 Crores as against the liability of Rs. 61.70 Crores to repay its dues within a period of three months from the date of approval of OTS proposal and requested the Appellant Bank to accept the said OTS proposal.

16. In response to the above, the Appellant Bank vide a letter dated 10.07.2020 addressed to the Corporate Debtor stating that the Appellant Bank is agreeable to the said proposal for re-payment of Rs. 22.7 Crores as full and final settlement of all the dues under the facilities, subject to the terms and conditions specified in Annexure I to the above letter including payment of all upfront amounts specified in the Annexure. The terms and conditions have been enumerated in Annexure I.

17. In view of the above terms of settlement, the 2nd Respondent a shareholder of the Corporate Debtor filed an Appeal before this Tribunal bearing CA (AT) (Ins) No. 673 of 2020 praying this Tribunal to permit the Corporate Debtor to approach the Adjudicating Authority (NCLT Bengaluru Bench) for invoking its jurisdiction under Rule 11 of the NCLT Rule's 2016 in terms of settlement agreement and giving effect to it. Having heard the parties, this Tribunal observed that the terms and conditions of the Settlement Agreement can be prayed before the Ld. Adjudicating Authority who will have the power and jurisdiction to terminate the Corporate Insolvency Resolution Process by giving effect to the Settlement Agreement. Accordingly, this Tribunal disposed of the Appeal vide order dated 10.08.2020 with a direction/liberty to invoke the jurisdiction of the Adjudicating Authority in accordance with Rule 11 of the NCLT Rule's 2016.

18. As per the directions of this Tribunal (Supra) the Corporate Debtor filed an Application dated 05.08.2020 seeking withdrawal of

CIRP Proceedings under Section 12 A of the I & B Code, 2016 read with Regulation 30 A of the IBBI Regulations 2016 and r/w Rule 11 of the NCLT Rule's 2016 with a **'prayer'** as under:

> *"whereof, in the light of the settlement arrived at between the Petitioner and the Corporate Debtor, it is hereby prayed that the instant matter be disposed of as settled by giving liberty to the Petitioner Bank to resume the CIRP in case of non-compliance of the terms of the OTS."*

19. Subsequently, a memo has been filed by the Appellant dated 14.08.2020 stating that this Tribunal in the matter of *'Vivek Bansal vs. Burda Druck India Pvt. Ltd., CA (AT) (Ins) No. 552 of 2020'* and submitted that the Adjudicating Authority to take into consideration the above judgment of this Tribunal and specifically stated that the Appellant/ Financial Creditor be given liberty to resume the CIRP against the Corporate Debtor in case of non-compliance of the terms of the settlement agreement. It is also stated that the same relief also sought by the Corporate Debtor in the I.A. filed before the Adjudicating Authority.

20. However, the Adjudicating Authority had not taken into consideration the prayer as made in I.A. No. 273 of 2020 dated

05.08.2020 and a memo filed by the Appellant dated 14.08.2020 whereby the Appellant specifically brought to the notice of the Adjudicating Authority with regard to the decision of this Tribunal (Appellate Tribunal) in the matter *'Vivek Bansal vs Bruda Druck India Pvt. Ltd.'* to state that this Tribunal in its judgment specifically held as under:

> *"We make it clear that in the event of default not adhering to the terms of 'settlement agreement' as regards the payment of the outstanding instalments, the 'Operational Creditor' shall be at liberty to seek revival/restoration of the 'Corporate Insolvency Resolution Process' proceedings before the Adjudicating Authority."*

21. The Adjudicating Authority ought to have taken into consideration the decision of this Tribunal being the Appellate Authority as a precedent in a similarly situated facts of the case. Even otherwise the Adjudicating Authority failed to take note of the prayer made by the Corporate Debtor in I.A. No. 273 of 2020 dated 05.08.2020 wherein it is prayed that the matter may be disposed of as settled by giving liberty to the Petitioner Bank (Appellant) to resume the CIRP in case of non-compliance of the terms of the OTS.

22. However, the Adjudicating Authority committed grave error in giving liberty to the Appellant to file fresh Company Petition instead of giving liberty to revive/resume the CIRP Proceedings in case the Corporate Debtor failed to adhere to comply with the terms of settlement in strict sense. Even the Adjudicating Authority failed to take note of the decision of this Tribunal being the Appellate Authority as a precedent in a similarly situated case.

<u>Findings:</u>

23. This Tribunal comes to a resultant conclusion that the Adjudicating Authority in the impugned order dated 17.08.2020 in I.A. No. 273 of 2020 in CP 199 of 2018 with regard to sub para 4 of para 9 of the impugned order regarding the observation/liberty to file a fresh Company Petition by the Appellant Bank is erroneous and without application of mind and without following the Principles of Natural Justice and not adhering to the decision of this Tribunal being the Appellate Authority, is hereby quashed and set aside. We make it clear that the entire sub para 4 of para 9 is hereby set aside by passing the following directions.

24. Accordingly, this Tribunal pass the following order to be read in sub para 4 of para 9 of the impugned order dated 17.08.2020 as under:

> *"It is made clear that in the event of default not adhering to the terms of 'settlement agreement' as regards the payment of the outstanding instalments, the 'Financial Creditor' shall be at liberty to seek revival/restoration of the 'Corporate Insolvency Resolution Process' proceedings before the Adjudicating Authority in CP No.199 of 2018."*

25. With the above directions this Tribunal allows the Appeal to the extent above. However no orders as to cost. Applications if any pending stands closed/disposed of.

[Justice M. Venugopal]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

sr