

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Ins) No. 391 of 2021

IN THE MATTER OF:

MR HARISH RAGHAVJI PATEL,

AN INDIAN RESIDENT,

HAVING HIS 1101, NUTAN KAILASH NIWAS,

RB MEHTA ROAD,

GHATKOPAR EAST, MUMBAI 400 077.

harish.patel@rajeshlifespaces.com

... Appellant

VERSUS

1. SHAPOORJI PALLONJI FINANCE PRIVATE LIMITED

A COMPANY INCORPORATED UNDER THE

COMPANIES ACT, 1956 HAVING ITS

REGISTERED OFFICE AT:

SP CENTRE, COURTYARD 10B,

41/44 MINOO DESAI ROAD, COLABA,

MUMBAI – 400 005.

sanjay.hinduja@shapoorji.com

husein.savliwala@shapoorji.com

2. RAJESH CONSTRUCTION COMPANY PRIVATE LIMITED

THROUGH MR. ABHIJIT GOKHLE

INTERIM RESOLUTION PROFESSIONAL

HAVING ITS REGISTERED OFFICE AT:

139, SEKSARIA CHAMBERS, 2ND FLOOR,

NAGINDAS MASTER ROAD,

FORT, MUMBAI – 400 023.

cirp.rajeshconstruction@gmail.com

... Respondents

Present:

For Appellant: - Mr. Abhijeet Sinha, Mr. Nitin Mishra, Ms. Mitali

Gupta and Mr. Sumit Shukla, Advocates.

For Respondent: -

Mr. Arun Kathpalia, Sr. Advocate with Mr. Kunal Kanungo, Advocates for R-1.

Mr. Abhijit Ghokale, Mr. Amey Hadwale, Advocates for R-2, IRP.

Mr. Prakash Shah and Mr. Durgaprasad Poojari, Intervention for Chintamani Enclave Pvt. Ltd.

ORDER
(06th October, 2021)

Heard Ld. Counsels for the parties on I.A. No. 2122 of 2021 an Application under Rule 11 r/w Rule 31 of NCLAT Rules, 2016 to place on record terms of settlement agreement and set aside the impugned order dated 13.05.2021 passed in CP No. 1236/IBC/NCLT/MB/MAH/2020.

2. Ld. Counsel for the Appellant submitted that the Ld. Adjudicating Authority vide impugned order dated 13.05.2021 admitted the Respondent No. 1's Company Petition u/s 7 of the IBC and initiated Corporate Insolvency Resolution Process (CIRP) against the Appellant (Corporate Debtor). The Appeal is filed against the impugned order. Before constitution of CoC, on 23.09.2021 the settlement arrived at between the parties and the terms of settlement are filed alongwith this Application. Therefore, it is prayed that the terms of settlement may be taken on record.

3. It is further submitted that this Appellate Tribunal exercising the inherent power under Rule 11 of NCLAT, Rules, 2016 can set aside the impugned order and quash the CIRP against the Corporate Debtor in terms of settlement. In support of the arguments he placed reliance on the Judgements of Hon'ble Supreme Court and the Judgment of this Appellate

Tribunal. (i) Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors (2019) 4 SCC 17 (ii) Brilliant Alloys Pvt. Ltd. Vs. S. Rajagopal & Ors. Special Leave to Appeal (c) No (s). 31557/2018 order dated 14.12.2018 (iii) Kamal K Singh Vs. Dinesh Gupta & Anr. Civil Appeal No. 4993 of 2021 order dated 25.08.2021 (iv) Anuj Tejpal Vs. Rakesh Yadav & Anr. Company Appeal (AT) (Insolvency) No. 298 of 2021 order dated 07.07.2021.

4. Ld. Sr. Counsel appearing on behalf of the Respondent No. 1 supports the arguments advanced by the Ld. Counsel for the Appellant and also submits that in case the Application for withdrawal of the Petition is filed, it will take time to decide before the Adjudicating Authority, consequently, the CIRP costs may be increased, therefore, it is requested that this Appellate Tribunal may take on record the terms of the settlement and set aside the impugned order.

5. After hearing Ld. Counsels for the parties, we have gone through the record.

6. Firstly, we have considered the citations of Hon'ble Supreme Court. Ld. Counsel for the Appellant place reliance on para 82 of Swiss Ribbons case (Supra). Para 82 of the Judgment is reproduced as under:-

“82. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of

its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case.”

(under lined by us)

7. In the aforesaid Judgment Hon’ble Supreme court in unequivocally held that before constitute of committee of creditors, a party can approach the NCLT directly, and the Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case. It cannot be read that Hon’ble Supreme Court has held that this Appellate Tribunal should exercise inherent power and allow or disallow an Application for withdrawal or settlement.

8. Hon’ble Supreme court in the case of Brilliant Alloys Pvt. Ltd. (Supra) held that Regulation 30-A (1) of the Regulations is not mandatory but a directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation of expression of interest under Regulation 36-A. The facts of present case are altogether different.

9. Now we have considered the case of Kamal Singh (Supra). In this case Dinesh Gupta (Operational Creditor) who initiated the CIRP against the Corporate Debtor, filed an Application before the Adjudicating Authority for withdrawal of the Petition and set aside the initiation of CIRP before the Constitution of CoC. The Application was dismissed by the Adjudicating Authority. In this context, the Hon’ble Supreme Court held that the Applicant Dinesh Gupta (Operational Creditor) was justified in filing the Application

under Rule 11 of NCLT Rules for withdrawal of Petition on the ground that the matter has been settled between the parties. There is no ratio of this order that this Appellate Tribunal should exercise inherent power under Rule 11 of NCLAT Rules and entertain the Application for withdrawal of Petition on the ground that the matter has been settled between the parties. Thus, none of the Judgment/Order supports the arguments advanced by the Ld. Counsels for the parties.

10. It is well settled that inherent power can be exercised only when no other remedy is available to the litigant and nowhere a specific remedy is provided by the statute. If an effective alternative remedy is available, inherent power will not be exercised, especially when the applicant may not have availed of that remedy. It is also settled law that inherent power cannot be invoked which intends to by-pass the procedure prescribed. The procedure prescribed under the law is to be followed strictly.

11. Rule 11 of NCLAT Rules, 2016 provides that the inherent power of the Appellate Tribunal can be exercised to make any orders as may be necessary for meeting the ends of the justice or to prevent abuse of process of the Appellate Tribunal. This provision suggest that such power can be exercised in the absence of express provision of the Code or Regulation.

12. The procedure prescribed for withdrawal of the petition under Section 7, 9 or 10 of the IBC before the constitution of CoC and after constitution of CoC is provided in Section 12-A and Regulation 30-A of the Regulation. When the settlement has taken place at an appellate stage the Applicant who has filed the petition under Section 7 or 9 of the IBC may file the Application (Form

– FA) under Section 12-A of the IBC r/w Regulation 30-A of the Regulations for withdrawal of the Petition before the Ld. Adjudicating Authority.

13. In this Application and the arguments of Ld. Counsel for the parties have not specified as to why they do not want to file the Application as per prescribed procedure.

14. We are of the view that there is a prescribed procedure for withdrawal of Petition under Section 7 of the IBC. Therefore, there is no justification to invoke inherent power of this Appellate Tribunal and to take on record the terms of the settlement and pass the order for withdrawal of Petition under Section 7 of the IBC. On the contrary, in the facts of the present case exercising the inherent power under Rule 11 of NCLAT Rules amounts to abuse of process of this Appellate Tribunal.

Thus, the Application I.A. No. 2122 of 2021 is dismissed.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi
SC