

(2021) 06 NCLT CK 0002

In the National Company Law Tribunal

Case No : IA/555/IB Of 2020 IN IBA/1352 Of 2019

M/s. Sakthi Containers Private Limited

APPELLANT

Vs

M/s. Bnazrum Agro Exports Limited

RESPONDENT

Date of Decision : 10-06-2021

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 3(12), 4, 9, 60(5)
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2021) 06 NCLT CK 0002

Hon'ble Judges : R. Sucharitha, J;B. Anil Kumar, Member (Technical)

Bench : Division Bench

Advocate : Jayesh Doha, K.S. Ravichandran

Final Decision : Allowed

Judgement

1. The above application has been preferred by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 and Rule 11 of the

NCLT Rules, 2016 allowing the Applicant to reopen IBA/1352/2019 on account of default in payment by the Corporate Debtor as per the Joint Memo

of Compromise dated 12.03.2020.

2.Â On perusal of this Application, the averments made in the application are that

(i) The Applicant herein being Operational Creditor, with claim of Rs.53,09,980/- filed IBA/1352/2019 under Section 9 of the Code. As per the ""Joint

Memorandum of Compromise and Consent Terms"" filed on 12.03.2020 (page.10), the Corporate Debtor paid Rs.9,27,500/- by RTGS on 11.03.2020

whereas for other monthly instalments, post-dated cheques were issued for the period from April, 2020 to August 2020. The applicant reserved its

right to reopen IBA/1352/2019, if the cheques were dishonoured, under clause 4 of Joint memo of compromise. This Tribunal vide its order dated

17.03.2020 disposed the matter as withdrawn with liberty.

(ii) The applicant has filed the present application, since the cheques issued by Corporate Debtor were dishonoured due to insufficient funds. As on

date, a sum of Rs.37,10,000/- is due from Corporate Debtor. As per the provisions of Section 3(12) of the Code, the date of default is 14.07.2019

when the debt became due and payable by the Corporate Debtor which is prior to 25.03.2020 as notified under Section 10A of the Code and date of

default as claimed by the Respondent i.e. 15.05.2020 is not correct.

3.Â In the written submission filed on 19.02.2021 by the Corporate Debtor, it is contended that

(i)Â The Corporate Debtor had already paid the first instalment of Rs.9,27,500/- on 11.03.2020 and second instalment of Rs.15.04.2020 as per the

schedule of payment provided in the Joint Compromise Memo and the subsequent default has occurred only with respect to amounts payable from

15.03.2020 aggregating to an amount of Rs.37,09,580/-. Thus, in the present case, the date of initiation of Section 9 application bearing IBA/1352/2019

which was filed on 11.11.2019 cannot be a date of default.

(ii) The Respondent cited the order of the Hon'ble NCLT, Mumbai Bench in the matter of M/s. Tata Power Trading Co. Ltd. vs. Indusar Global Ltd

which held ""that there is no specific procedure prescribed under I&B Code, or the Rules thereof for reÂ-opening of the application and

therefore the application on this count alone is to be dismissed"". In the another matter of M/s. Walchandnagar Industries Limited Vs. Karmayogi

Shankarraoji Patil Sahakari Sakhar Karkhana Limited the Hon'ble Mumbai Bench vide its order dated 17.07.2019 held"" it seems that the settlement

agreement has been violated/breached and the applicant seeks for revival of this Petition and the applicant may issue a fresh notice to the

Corporate Debtor and thereafter file fresh Petition. Hence, the application is dismissed'.

(iii) According to the Respondent, by virtue of Notification S.O.1205(E) dated 24.03.2020, as per Section 4 of the IBC, Part- II relating to insolvency

resolution for corporate person, will apply only to matters where the minimum amount of default is of rupees one crore. In the present case,Â the

default has arisen on 15.05.2020 due to non-payment of 3rd instalment and the default amount is Rs.37,09,580/- which is much below the threshold

provided under the IBC in force, for the purpose of initiating CIRP against the Corporate Debtor. Even if the re-opening is permitted, the original

amount of Rs.53,09,980 as per the said Application is below the threshold provided under the IBC.

4. Heard the arguments by both sides and perused the records placed on file. In the present case, the prayer of the operational creditor becomes

pertinent in light of the fact that the minimum threshold of default under section 4 of IBC 2016 has been raised from Rupees One Lakh to Rupees One

Crore vide Notification F. No. 30/09/2020 dated 24th March, 2020 issued by the Ministry of Corporate Affairs. Further, if we did not revive the IBA,

it will give further room to the Corporate Debtor to violate settlement arrived before 24.03.2020, they defeat the very spirit of IBC. Hence, if terms of

compromise are not honoured, there the IBA shall be reverted to its original position and the Adjudicating Authority shall take up the same for

Adjudication.

5. The Hon'ble NCLAT in the matter of Sree Bhadra Parks and Resorts Vs Sri Ramani Resorts and Hotels on 09.04.2021 had deliberated on the

restoration of original application on the breach of the consent terms agreed between the parties. The Hon'ble NCLAT settled that the adjudicating

authority is empowered to restore the original application under rule 11 of the NCLT rules 2016 in spite of the express provision in the consent terms

to file a fresh application. The relevant portions of the order:

It cannot be said by any stretch of imagination that the 'Adjudicating Authority'(National Company Law Tribunal, Kochi Bench, Kerala) cannot pass an order

to restore and revive the application in IBA/13/KOB/2020 by way of an Interlocutory Application filed by the 'Respondent'/Financial Creditor'/Applicant'.

Consequently, the contra plea taken on behalf of the 'Appellant' is not acceded to by this 'Tribunal'.

6. The Hon'ble Supreme Court also in the matter of Ess Investments vs Lokhandwala Infrastructure held that the National Company Law Tribunal can restore a 'Petition' which was dismissed as an 'infructuous one'.

7. In light of the above, the instant application IA/555/IB/2020 is hereby allowed

8. The Registry is directed to list this IB A/1353/2019, on 24.06.2021