

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

Company Appeal (AT) (Insolvency) No. 617 of 2023

[Arising out of the Impugned Order dated 24.04.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Kolkata Bench-II in C.P.(IB) No. 1306/KB/2020]

In the matter of:

Manish Mukim,

A suspended board of director of Chandrima Fashion Fabrics Private Limited
Son of Late Kastur Chand Mukim,
Residing at C/2 K.I.T. Flat 30 Madan Chatterjee Lane,
Burra Bazar, Kolkata 700007, West Bengal,
E-mail: manishmukim@yahoo.com

...Appellant

Versus

1. Ms. Rakhi (Proprietor of Srinivasa Cloth Mills),

Having Office at:
1st Floor, R.S. Puram,
Coimbatore,
Tamil Nadu- 641 002;
Mob: 9443370080
ak2556892@gmail.com

...Respondent No.1

2. Mr. Sanjay Khandelwal,

Interim Resolution Professional of Chandrima Fashion Fabrics Private Limited
Office at 25 Strand Road, Room No. 806,
Kolkata 700001, West Bengal
Phone No. 9830359459
Email: sanjay.pfs@gmail.com,
Regn. No. IBBI/IPA-001/IP-P-01714/2019-2020/12754

...Respondent No. 2

Present:

For Appellant : Mr. Himanshu, Ms. Anju Thomas, Ms. Ranjabati Ray,
Advocates.

For Respondent : Mr. Gulshan Kr. Sachdeva, Advocate for R-2 along with
Mr. Sanjay Khandelwal, IRP in person.

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

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 24.04.2023 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench-II) in C.P.(IB) No.1306/KB/2020. By the impugned order, the Adjudicating Authority has admitted the Section 9 application filed by the Operational Creditor and admitted the Corporate Debtor into Corporate Insolvency Resolution Process ('**CIRP**' in short). Aggrieved by the impugned order, the present appeal has been preferred by the Appellant-suspended director of the Corporate Debtor.

2. Coming to the factual matrix of the present case, we notice that the Operational Creditor-Srinivasa Cloth Mills had business relationship with the Corporate Debtor-Chandrima Fashion Fabrics Private Limited for supply of fabric materials. The Operational Creditor had raised invoices for supply of goods between April 2019 to October 2019 and not having received payment had issued a Section 8 Demand Notice on 25.11.2019 following which a Settlement Deed was executed on 31.01.2020 mutually between the Operational Creditor and the Corporate Debtor. In terms of this Settlement Deed dated 31.01.2020, the Operational Creditor had agreed to accept Rs 1,14,84,292/- from the Corporate Debtor. After the execution of the Settlement Deed, the Corporate Debtor made certain part payments to the Operational Creditor which sum had also been accepted by them. However, the Operational Creditor issued another Section 8

Demand Notice against the Corporate Debtor on 19.06.2020 on the ground that there has been a breach of Settlement Deed thereby claiming Rs 1,30,27,634/- from the Corporate Debtor. Thereafter, the Operational Creditor filed a Section 9 application against the Corporate Debtor before the Adjudicating Authority on 17.11.2020 for a total outstanding sum of Rs 1,14,534,363/-. The Adjudicating Authority on 24.04.2023 admitted the Section 9 application and admitted the Corporate Debtor into CIRP. Aggrieved by the impugned order, the present appeal has been filed by the suspended director.

3. The matter was heard by this Tribunal on several occasions. The salient interim orders passed from time to time by this Tribunal are recapitulated for easy referencing. When the matter came up for hearing for the first time at the appellate stage before this Tribunal on 16.06.2023, interim orders were passed staying the operation of CIRP as well as constitution of the Committee of Creditors (COC) When the matter came up for hearing later on 01.07.2024, it was submitted on behalf of the Appellant that an amount of Rs 63 lakhs had already been paid to the Operational Creditor. Two weeks additional time was sought to make the balance payment which was allowed. The orders issued by this Tribunal on 01.07.2024 is as reproduced below:

“Learned Counsel for the Appellant submits that an amount of Rs.63 lakhs has already been paid to the Operational Creditor and only small amount remains to be paid. He prays for two weeks’ further time to make the balance payment. He seeks liberty to file additional Affidavit. He may do so before the next date.

List this Appeal on 18th July, 2024.”

4. Subsequently on 12.08.2024, IA No. 5781 of 2024 was taken up for hearing wherein the purported claim amount of Rs 1.24 Cr. in the Section 9

application and settlement amount of Rs 64.53 lakhs was recorded. The orders of this Tribunal dated 12.08.2024 is as reproduced below:

“By this application the applicant has prayed for modification of the order dated 06.08.2024 to the extent the interim order to be continued in the application in paragraph-8 appellant has given the details of payment till 17.07.2024 which is Rs.64,53,250/-. It is submitted that the claim amount in Section 9 application was Rs.1,24,72,207/- whereas under settlement between the parties the amount have been paid. It is submitted that CoC has not yet been constituted.

In view of the aforesaid, we issue notice in the application.

IRP is present in person and submits that CoC has not yet been constituted.

List this appeal on 03.09.2024.

Reply, if any, may be filed before the next date.

In the meantime, CoC may not constituted.”

5. On 03.09.2024, when the matter was again heard, the Operational Creditor admitted having received the entire settlement amount from the Corporate Debtor. The Resolution Professional also acknowledged receipt of his fees and expenses. This was recorded in the interim order passed by this Tribunal on 03.09.2024 which is as reproduced below:

“Learned Counsel for the Appellant seeks liberty to file settlement with the Operational Creditor on record. He may do so during the course of the day.

2. Counsel for the Operational Creditor submits that the Operational Creditor has received the entire amount.

3. Resolution Professional has also submitted that he has received his fee and expenses.

4. As prayed, list the matter on 05.09.2024.

Interim order to continue.”

6. When this matter came up for hearing on 27.01.2025, submission was made on behalf of the Operational Creditor that though the settlement amount had been paid to them, they are aggrieved that there was delay in receiving the payment. Though the payment was to be made by 21.01.2024, the same had been received in July 2024. Hence, the Respondent would require time to decide

on whether to refund the amount to the Appellant or file Form-FA for withdrawal of CIRP. The Learned Counsel for the Respondent was allowed time to seek instructions from the Operational Creditor on this aspect.

“ Heard Learned Counsel for parties.

Learned Counsel for the Appellant submits that as per the settlement between the parties, the amount had been received by the Operational Creditor which is recorded in order dated 03.09.2024, which order is as follows:

“Learned Counsel for the Appellant seeks liberty to file settlement with the Operational Creditor on record. He may do so during the course of the day.

2. Counsel for the Operational Creditor submits that the Operational Creditor has received the entire amount.

3. Resolution Professional has also submitted that he has received his fee and expenses.

4. as prayed, list the matter on 05.09.2024.

Interim order to continue.”

Learned Counsel for the Operational Creditor submits that the amount was to be paid by 21st January whereas the amount was paid by July and there was delay in payment. However, he submits that he shall obtain instructions from the Operational Creditor as to further steps in the matter, as to whether the Operational Creditor shall file Form-FA or shall refund the amount to the Appellant. Let instruction be obtained by the Counsel for the Operational Creditor within a week.

Learned Counsel for the Appellant submitted in terms of the settlement deed he has made the payment, however with some delay.

List this Appeal on 10.02.2025, high on board.”

7. When this matter came up for hearing on 21.02.2025, the Ld. Counsel for the Respondent submitted that the Operational Creditor was neither ready to return the amount received in settlement nor file Form-FA. The relevant order is as placed below:

“Learned counsel for the Respondent submits the he has obtained instruction from the Respondent that Respondent is neither ready to return the amount received in settlement nor he will file Application under 12A by

giving Form F. Learned counsel for the Respondent submits that agreement/settlement has failed.

Heard learned counsel for the parties. Order reserved.

Both the parties are at liberty to file their Short Notes of Submission of not more than two pages within a week.”

8. Since the Respondent-Operational Creditor was steadfast in their refusal to withdraw the Section 9 application, we are proceeding to look into the matter on merit.

9. Shri Abhijeet Sinha, Ld. Sr. Counsel for the Appellant submitted that the Operational Creditor had admittedly received the entire settlement amount of Rs 64,53,250/- in terms of the Settlement Deed dated 29.09.2023. It was asserted that this categorical admission of the settlement amount was noted in clear terms in the order of this Tribunal dated 03.09.2024. The Operational Creditor even after admitting before the Appellate Tribunal that the entire amount as per Settlement Deed was fully received on 17.07.2024 has now resiled and is not providing the hard copy of the signed Settlement Deed. Admitting that there was slight delay on their part in making the full payment in terms of the Settlement Deed of 29.09.2023, it was asserted that the issue of delayed receipt of payment was never raised by the Operational Creditor at any point of time before 21.02.2025. It was also contended that the very fact that the Operational Creditor continued to receive payments even after 31.01.2024 which was subsequent to the final deadline shows that they had implicitly waived the time-lines. Yet even after receiving full payment of the settlement amount, they reneged on their promise to withdraw the CIRP proceedings against the Corporate Debtor. This demonstrated the unseemly conduct of the Operational Creditor who was trying to harass, arm-twist and coerce the Corporate Debtor

into making further payments beyond what was agreed upon in terms of settlement agreement and that this tantamount to gross misuse of the provisions of IBC.

10. In the light of the fact that the payment is complete in all respect though with some delay, submission was pressed by the Appellant that there is no scope for invoking Section 9 application since there is no debt and default. It was also contended that the claim of the Operational Creditor on account of interest was also not maintainable as there is no provision for payment of interest in the invoices and other documents. It was also pointed out that when the Appellant-Corporate Debtor is a solvent entity, the Operational Creditor cannot misuse the process of law as contained in IBC and push the Corporate Debtor into insolvency.

11. Per contra, Shri Gulshan Kumar Sachdeva, the Ld. Counsel for the Respondent submitted that the Operational Creditor had legitimate reasons for deciding not to refund the amount received or to file Form-FA before the Adjudicating Authority to withdraw the Section 9 application. It was contended that the Corporate Debtor had not adhered to the time dead-line for payments which had been agreed to as per the Settlement Deed. The payment of Rs 64,53,250/- was made on 17.07.2024 which was not as per the Settlement Deed which had stipulated the time-line of 31.01.2024, and for this breach of time-line the Operational Creditor was entitled to reclaim the waiver of interest provided in the agreement. Failure to adhere to payment terms as set out in the Settlement Deed had resulted in a default. Hence for delayed payment, the right to reclaim interest waiver along with penalty was a legally enforceable right as per the Settlement Deed.

12. When we look at the impugned order, we find that the Adjudicating Authority has taken note of the Settlement Deed of 31.01.2020 between the two parties. However, the Adjudicating Authority has recorded the finding that it is not clear as to what payments were made by the Corporate Debtor to the Operational Creditor in respect of the Settlement Deed. It was also held that the default was more than the minimum amount stipulated under Section 4(1) of the IBC at the relevant point of time which was only Rs 1 Lakh. The Adjudicating Authority also held that since the Corporate Debtor had not raised any defence in terms of pre-existing dispute and there being debt and default, the Section 9 application was admitted.

13. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

14. The short issue for our consideration is whether the Section 9 application filed by the Operational Creditor was not maintainable since it was premised on default which had arisen during the prohibited period of Section 10A.

15. It is the case of the Appellant that there is no debt above the threshold level which was due and payable. It is the contention of the Appellant that the Section 9 application which was filed on 22.09.2020 was not maintainable since after deducting the instalments which fell due during the Section 10A period, the outstanding amount failed to meet the threshold limit of Rs 1 Cr. From the second instalment of the payment schedule which fell due on 31.03.2020 until the last instalment which became due on 31.12.2020, all fell during the prohibited period under Section 10A and is therefore time-barred. Thus, apart from the first instalment of Rs 10 lakhs which fell due on 28.02.2020, all other instalments fell during the Section 10A period on the date of filing the Section 9

application. The Adjudicating Authority in not having taken cognisance of the non-maintainability aspect from the perspective of threshold bar had committed a gross error and seen from this angle, the Section 9 application deserves to be outrightly dismissed.

16. To arrive at our findings, it may be useful to first take notice of the payment schedule which had been agreed upon by both parties in terms of the settlement deed. The payment schedule finds place at page 8 of Appeal Paper Book (“**APB**” in short). It is pertinent to note that this schedule has not been refuted by the Operational Creditor and is as extracted below for easy reference:

- (i) Minimum Rs. 10,00,000/- on or before 28/2/2020;*
- (ii) Minimum Rs. 10,00,000/- on or before 31/3/2020;*
- (iii) Minimum Rs.10,00,000/- on or before 30/4/2020;*
- (iv) Minimum Rs. 10,00,000/- or less as the case may be, so the total amount paid as on 15/5/2020 is not less than 40 lakh from the date of first payment under the deed;*
- (v) Minimum Rs.9,00,000/- on or before 31/5/2020 (in addition to and not considering the payment made in point no. 4 above);*
- (vi) Minimum Rs.9,00,000/- on or before 30/6/2020;*
- (vii) Minimum Rs.9,00,000/- on or before 31/7/2020;*
- (viii) Minimum Rs.9,00,000/- on or before 31/8/2020;*
- (ix) Minimum Rs.9,00,000/- on or before 30/9/2020;*
- (x) Minimum Rs.9,00,000/- on or before 31/10/2020;*
- (xi) Minimum Rs.9,00,000/- on or before 30/11/2020;*
- (xii) Balance of the full and final amount on or before 31/12/2020.*

17. Next to appreciate the applicability of the bar imposed by Section 10A in the present factual matrix, it would be relevant to notice the provisions of Section 10A of the IBC, 2016 which is reproduced as follows:

Section 10A: Suspension of initiation of corporate insolvency resolution process.

10A. *Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:*

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation– For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.

18. As regards the ambit and scope of Section 10A, is concerned, the law is well settled in the landmark judgment of the Hon'ble Supreme Court in **Ramesh Kymal Vs Siemens Gamesha Renewable Power Pvt. Ltd., (2021) 3 SCC 224** that no application for initiation of CIRP under Section 9 can be initiated for default which is committed during the Section 10A period. The **Ramesh Kymal judgment supra** made it crystal clear that if any Corporate Debtor suffered default on account of Covid-19, they should be protected from the filing of any insolvency application in respect of default committed by them during this prohibited period. Thus, any default committed after 15.03.2020 till 28.02.2022 (extended period of suo-motu limitation) enjoyed complete immunity from initiation of CIRP proceedings. The legislative intent of introducing Section 10A into the scheme of IBC was to protect the Corporate Debtor from being shoved into the morass of insolvency in the extenuating circumstances inflicted by the Covid-19 pandemic.

19. When we look at Section 3(12) of the IBC which defines 'default' we find that it means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. Default is therefore required to be found out with reference to debt which is outstanding and has become due and payable. This signifies that both events of the debt having become due and the debt having become payable should happen to establish default.

20. In the present facts of the case, when we peruse the payment schedule given in the Settlement Deed, barring one instalment due on 28.02.2020, the rest of the other instalments fell due from 31.03.2020 to 31.12.2020 which were all hit by Section 10A of the IBC on the date of filing of Section 9 application by the Operational Creditor which took place in September 2020, the major portion of the default claimed by the Operational Creditor in the said Section 9 application clearly fell within the protected and prohibited period under Section 10A. Any default falling within this period cannot form the basis for initiating CIRP. The default which occurred during the Section 10A period therefore cannot be included in the calculation of debt and default for initiating CIRP. The outstanding default can be correctly determined only after making the necessary exclusion. The Appellant was therefore clearly entitled to seek exclusion of the sum falling during this prohibited period from the purported debt claimed by the Operational Creditor. The total amount of outstanding default has to be recalculated by excluding the portion protected under Section 10A and when done so in the present case it falls below the threshold requirement. The immunity and protection offered by the legislative fiat of Section 10A in respect of any default committed by a Corporate Debtor cannot be wished away. No

liability can be fastened on the Corporate Debtor for default committed during Section 10A period.

21. In the present case, when the portion of debt claimed by the Operational Creditor falling within the Section 10A period is excluded, the remaining debt does not fulfil the mandatory threshold of Rs 1 Cr. We are therefore of the considered view that the default amount having failed to cross the threshold bar as laid down by Section 4 of IBC, the Section 9 application of the Operational Creditor was rendered non-maintainable.

22. When operational debt above the threshold limit is neither due nor payable, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor. Further, in terms of the objectives of the IBC and settled proposition of law as expressed and explained time and again by the Hon'ble Supreme Court, the provisions of IBC cannot be turned into a debt recovery proceeding as it is a beneficial legislation which envisions the revival of the Corporate Debtor and bringing it back on its feet from the perils of extinction.

23. In the present case, since the entire payment in terms of the Settlement Deed has already been made, even though paid belatedly, we do not countenance the contumacious behaviour of the Operational Creditor in harassing the Corporate Debtor even after having received the entire payment as per Settlement Deed. Such rapacious and intimidatory conduct on the part of any Operational Creditor cannot be tolerated as such conduct violates the quintessential spirit of IBC which is insolvency resolution.

24. In result, the impugned order cannot be sustained and is set aside. The Appeal is allowed. The Corporate Debtor is released from the rigours of CIRP. For the reasons discussed earlier, this Bench is also of the considered view that the

Operational Creditor has been pursuing the Section 9 application in a vexatious manner which does not commend us. We seriously view the unbecoming conduct of the Operational Creditor. We impose cost of Rs. One lakh only on the Operational Creditor which shall be paid by way of Bank Draft to the Appellant within thirty days from today. All other interlocutory applications, if any, also stands disposed of.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi
Date: 05.03.2025

Abdul/Harleen