

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 105 of 2020

IN THE MATTER OF:

Gouri Prasad Goenka

...Appellant

Versus

Surenda Kumar Agarwal & Anr.

...Respondents

Present:

For Appellant : **Mr. Abhijeet Sinha, Mr. Rishav Banerjee and Mr. Mrinal Elker Mazumdar, Advocates**

For Respondents : **Mr. Pranay Agarwal and Mr. Umang Srivastava, Advocates for 1st Respondent**
 Ms. Sonal Shah and Ms. Shruti Agarwal, Advocates for 2nd Respondent
 Mr. Abhirup Dasgupta and Mr. Pratik Ghosh, Advocates for Intervenor (Assets & Reconstruction Co. Ltd.)

O R D E R

30.01.2020 ‘M/s. Tirupati Timber & Packaging Limited’- (‘Operational Creditor’) moved an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**“I&B Code”**, for short) against ‘M/s. Duncans Industries Limited’- (‘Corporate Debtor’). The Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata by impugned order dated 18th December, 2019 admitted the Application.

2. According to learned counsel for the Appellant, the matter was immediately settled with the ‘Operational Creditor’ much prior to the constitution of the ‘Committee of Creditors’ and more than the amount claimed

has been paid by two Demand Drafts handed over to the Advocate on record of the 'Operational Creditor' on 9th January, 2020.

3. The 'Operational Creditor' also moved an Application for withdrawal under Rule 11 of the NCLT Rules, 2016 on the same date i.e. on 9th January, 2020, but no order was passed and it was adjourned for 3rd March, 2020. The Adjudicating Authority directed the 'Interim Resolution Professional' to constitute the 'Committee of Creditors' within a week. It is submitted that such direction itself made application under Rule 11 infructuous so that the parties cannot settle which is against the decision of the Hon'ble Supreme Court in ***"Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.— Writ Petition (Civil) No. 99 of 2018"***.

4. Ms. Shruti Agarwal, Advocate appears on behalf of the 'Operational Creditor' accepts that two Demand Drafts have been handed over to the Advocate on record of the 'Operational Creditor', but has not been handed over for encashment as settlement has not been reached.

5. Mr. Pranay Agarwal, Advocate appears on behalf of the 'Interim Resolution Professional' accepts that the direction was given by the Adjudicating Authority to constitute the 'Committee of Creditors' on 14th January, 2020.

6. Mr. Abhirup Dasgupta, Advocate appears on behalf of 'Asset Reconstruction Company (India) Limited', a member of the 'Committee of Creditors'. He was allowed to file the intervention application. According to him, the 'Asset Reconstruction Company (India) Limited' has already moved an application under Section 7 of the 'I&B Code' against 'M/s. Duncans Industries Limited'- ('Corporate Debtor') and is pending for consideration.

7. On the other hand, the learned counsel for the Appellant submits that the Application preferred under Section 7 of the 'I&B Code' filed by the 'Asset Reconstruction Company (India) Limited' is pending. It is also submitted that it is to be noticed whether the claim is barred by limitation and the Application under Section 7 is barred by limitation.

8. Taking into consideration the fact that the Appellant has already settled the matter with the 2nd Respondent – ('M/s. Tirupati Timber & Packaging Limited' – 'Operational Creditor') much prior to the constitution of the 'Committee of Creditors' and two demand drafts have also been handed over on 9th January, 2020 and the 'Interim Resolution Professional' also accepted that the 'Committee of Creditors' was not constituted by that date and the Application under Rule 11 of the NCLT Rules, 2016 has been moved, we hold that the Adjudicating Authority without disposing of the Application filed under Rule 11 of the NCLT Rules, 2016 has no jurisdiction to defer the matter and direct the 'Interim Resolution Professional' to constitute the 'Committee of Creditors' to render Application filed under Rule 11 as infructuous. If the Adjudicating Authority (National Company Law Tribunal) is of the view that the Application under Rule 11 is fit to be rejected and only after rejecting the same, it could have directed the 'Interim Resolution Professional' to constitute the 'Committee of Creditors'.

9. We have noticed that the impugned order is dated 18th December, 2019 and within a month i.e. prior to the constitution of the 'Committee of Creditors' on 9th January, 2020, the demand drafts had been prepared and handed over.

For the said reason, we are of the view that it is a fit case to entertain the Application under Rule 11 of the NCLT Rules, 2016 and to allow the same.

10. So far as the claim of 'Asset Reconstruction Company (India) Limited', is concerned, the matter was pending since February, 2018 for any good or bad reason, that cannot be a ground to file an Application under Rule 11 of NCLT Rules, 2016 in a separate case.

11. For the reason aforesaid, we set aside the impugned order of admission dated 18th December, 2019 and dispose of the Application filed under Section 9 of the 'I&B Code' by 'M/s. Tirupati Timber & Packaging Limited'- ('Operational Creditor'), as withdrawn. It will be open to the 'Operational Creditor' to encash the Demand Draft.

12. The Appellant/Corporate Debtor will pay the fees and cost to the 'Interim Resolution Professional' within three weeks after adjusting the amount which has already been paid by the 'Operational Creditor'.

13. In effect, order (s) passed by Ld. Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium and all other order (s) passed by Adjudicating Authority pursuant to the impugned order and action taken by the 'Resolution Professional' are set aside. The Application preferred by the Respondent under Section 9 of the 'I&B Code' is disposed of as withdrawn. The Adjudicating Authority will now close the proceeding. The Respondent Company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

14. The impugned order dated 18th December, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata and the present order passed by this Appellate Tribunal will not come in the way of the Application filed under Section 7 of the 'I&B Code' by 'Asset Reconstruction Company (India) Limited'. The Adjudicating Authority will decide the same independently after notice and hearing the 'Corporate Debtor'. As the matter is pending for the last two years, it is expected that the Adjudicating Authority will dispose of the said Application at an early date. It will be open to the 'Corporate Debtor' and the 'Asset Reconstruction Company (India) Limited' to settle the matter before admission of the Application.

The Appeal stands disposed of. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Shreesha Merla]
Member (Technical)

/ns/gc/