

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 794 of 2018

[Arising out of Order dated 5th December, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in Company Petition No. (IB) 476/KB/2017)

IN THE MATTER OF:

**Avishek Roy, Shareholder of
M/s Reacon Engineers (India) Pvt. Ltd.**
520, Dakshinayan, 3rd Floor, Baishnab Ghata,
Patuli, Kolkata – 700 094.

Presently at
P-82, First Floor,
C. R. Park, New Delhi.

...Appellant

Vs

1. Diamond Steel Enterprise

Having office at
UTSAB BHABAN,
Howrah Amta Road, Dasnagar,
Howrah – 711 105.

2. Ashok K. Dibrewala,

Interim Resolution Professional,
4, Chowringhee Lane, Diamond Chamber,
6th Floor, Unit III, Kolkata – 700 016.

3. Allahabad Bank

Stressed Assets Recovery Trust,
Kolkata.

....Respondents

Present:

**For Appellant: Mr. Jayant Mehta, Mr. Dibyadyoti Banerjee,
Mrs. Sumedha Banerjee and Mr. Rahul Kukreja,
Advocates.**

**For Respondents: Mr. Sermon Rawat, Advocate for R-1.
Mr. Pranav Kumar Chakraborty, Resolution
Professional in person.
Mr. Ashok Kumar Jain, Advocate for Allahabad
Bank.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant, shareholder of 'M/s Reacon Engineers (India) Pvt. Ltd.' has preferred this appeal against order dated 5th December, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata admitting the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') filed by 'Diamond Steel Enterprise' (Operational Creditor) against 'M/s Reacon Engineers (India) Pvt. Ltd.' (Corporate Debtor).

2. Learned counsel for the Appellant has taken plea that parties have settled the claim prior to constitution of the Committee of Creditors and therefore the application under Section 9 should be dismissed.

3. The Respondent, Mr. Pranav Kumar Chakraborty, Resolution Professional submitted that if this Appellate Tribunal allows the appeal in such case the Appellant or Corporate Debtor should be allowed to pay the resolution fee and cost incurred by the Resolution Professional.

4. Learned counsel appearing on behalf of the Allahabad Bank, one of the Financial Creditors, submitted that the Committee of Creditors having

already been constituted, settlement reached between the parties cannot be allowed. Further according to him, the settlement is an afterthought.

5. From the record the following fact emerge:

(i) Section 9 application was filed by the Respondent – ‘Diamond Steel Enterprise’ (Operational Creditor) which was admitted by impugned order dated 5th December, 2018. Against the said order, the Appellant filed appeal and on 19th December, 2018 that is much prior to constitution of Committee of Creditors, when the matter was taken up, this court noticed the stand taken by the Appellant while issuing notice, which reads as follows:

“O R D E R

19.12.2018: *Learned counsel for the Appellant submits that the Corporate Debtor has given the undertaking that it will pay total amount to the Operational Creditor who has filed application under Section 9 of the I&B Code, by March, 2019. However it was not accepted by the Adjudicating Authority and impugned order dated 5th December, 2018 was passed for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor. It is informed that the Guarantors have already prepared a Demand Draft in favour of the Operational Creditor for entire principal amount. The Appellant is ready to make settlement with the Operational Creditor.*

Let notice be issued on Respondent also on the question of settlement as proposed by the Appellant, by speed post. Requisites alongwith process fee, if not already file, be filed by tomorrow. If the Appellant provide email address of the Respondent, let notice be also issued through email.

*Post the case 'for admission' on **21st January, 2019.***

In the meantime, the Interim Resolution Professional will ensure that the company remains going concern and if so necessary may take assistance of the (suspended) Board of Directors. The person who is authorised to sign the bank cheques may issue cheques only after authorisation of the Resolution Professional. The bank account(s) of the 'Corporate Debtor(s)' be allowed to be operated for day-to-day functioning of the company such as for payment of current bills of the suppliers, salaries and wages of the employees'/workmen, water and electricity bills etc."

- (ii) In the meantime, the Appellant prepared a draft dated 18th December, 2018 for Rs.15,78,762/- (Rupees Fifteen Lakh Seventy Eight Thousand Seven Hundred and Sixty Two only) in the name of

'Diamond Steel Enterprises' issued by Bank of India, Beliaghata Branch, Hatta Road, Kolkata.

(iii) On 26th December, 2018, a 'Deed of Settlement' was reached (enclosed at page 13 of I.A. No. 11 of 2019), which is in stamp paper which was purchased by the Operational Creditor prior to Deed of Settlement dated 26th December, 2018. Pursuant to the agreement, the Appellant prepared another additional draft for Rs.6,21,238/- (Rupees Six Lakh Twenty One Thousand Two Hundred and Thirty Eight Only) on 27th December, 2018 in the name of 'Diamond Steel Enterprise' (Operational Creditor) issued by HDFC Bank, U N Brahmachari Street, Kolkata - 700 017. Thereby, the agreement of settlement reached finality on 26th/27th December, 2018.

(iv) The Committee of Creditors was subsequently constituted on 28th December, 2018, which was indicated by order dated 4th January, 2019.

6. From the aforesaid fact it is clear that much prior to constitution of Committee of Creditors parties reached settlement on 26th December, 2018.

7. The question whether in view of settlement reached between the parties prior to constitution of Committee of Creditors, the shareholders of

the Corporate Debtor can be granted relief or not fell for consideration of Hon'ble Supreme Court in '*Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.*', Writ Petition (Civil) No. 99/2018 (2019 SCC OnLine SC 73). In the said case, the Hon'ble Supreme Court observed and held:-

"76. Before this Section was inserted, this Court, under Article 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by the NCLT or the NCLAT."

"79. 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."

8. In the present case, as we find that the parties have reached settlement prior to constitution of Committee of Creditors, in view of that the Appellant is entitled to derive advantage of the settlement. We accordingly set aside the impugned order dated 5th December, 2018 and dismiss the application under Section 9 filed by the Operational Creditor. The Appellant will hand over the drafts to the Operational Creditor, if not yet handed over, failing which it will be open to the Respondent (Operational Creditor) to revive its prayer.

9. The appeal is allowed with aforesaid observations and directions. No Costs. However, this order will not come in the way of other Creditors (Financial Creditors or Operational Creditors) to move appropriate application before a court of competent jurisdiction / Adjudicating Authority.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

12th March, 2019

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