

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

Comp App (AT) (CH) (Ins) No. 423/2023

In the matter of:

Xicon International Limited

...Appellant

Versus

VA Tech Wabag Limited

...Respondent

Present:

For Appellant : Mr. Thriyambak J. Kannan, Advocate

ORDER

Per: Justice Rakesh Kumar Jain:

14.12.2023: The present appeal is directed against the order dated 27.09.2023, passed by the Adjudicating Authority (National Company Law Tribunal, Special Bench-II, Chennai) by which an application filed by the Appellant (Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') against the Corporate Debtor has been dismissed.

2. This is the second round of litigation. In the first round, the Appellant sent a demand notice under Section 8 of the Code on 03.02.2020 to which reply was filed on 13.02.2020 and thereafter the Appellant filed the application under Section 9 of the Code bearing IBA/608/2020 for an amount of Rs. 2,57,00,817/-.

3. Pursuant to the aforesaid application, the parties entered into a settlement agreement on 02.10.2021 as per which the Corporate Debtor agreed to pay a sum of Rs. 1,60,94,701/- towards full and final settlement

which was to be paid in six instalments between 04.10.2021 and 20.05.2022.

4. Case of the Appellant is that the Corporate Debtor made payment of Rs. 21 Lakh on 04.10.2021, 30 Lakh on 19.01.2022, 30 Lakh on 03.02.2022 and 25 Lakh on 05.05.2022, in all Rs. 1,06,00,000/-. According to the Appellant, the Respondent (Corporate Debtor) stopped making further payments, therefore, the Appellant sent a demand notice under Section 8 of the Code on 30.09.2022 to which reply was filed by the Respondent on 08.10.2022. Thereafter, the petition under Section 9 of the Code was filed for sum of Rs. 1,63,96,590/- which comprised of Rs. 1,51,00,817/- (principal) and 12,95,773/- towards interest calculated at the rate of 18% p.a. from 20.05.2022 till 09.11.2022. This application was assigned CP/IB/260/CHE/2022, which has been dismissed by the Adjudicating Authority vide its detailed judgment.

5. Counsel for the Appellant has argued that the Respondent has breached the settlement agreement and referred to clause 9 of the said agreement which read as under:-

“9. In the event of any default/delay in the payment in accordance with clause (b) above, the following consequences will follow:

a. The entire amount of 2,57,00,817/- (after adjusting the advance amount) would be payable with interest at 18% p.a. from the date of default of payment Xicon shall be at liberty to seek restoration of Legal Proceedings (Insolvency Petition No. IBA No. 608 of 2020), status quo as of the date of signing will be reinstated and this settlement terms will be treated as null and void;

b. Xicon shall be at liberty to seek restoration of legal proceedings (Ins. Petition No. IBA No. 608 of 2020), status quo as of the date of signing will be reinstated and this settlement terms will be treated as null and void;”

6. It is argued that the Respondent not only committed delay in making the payment as per the settlement chart but also stopped making payment of 5th and 6th tranches, therefore, the Appellant had to file the application under Section 9 of the Code once again which has erroneously been dismissed by the Adjudicating Authority as the debt and default still continues.

7. We have heard Counsel for the Appellant and perused the record. The first petition bearing IBA/608/2020 was dismissed on 04.10.2021 and the following order was passed at that time:-

“Learned Counsel Ms. Haree Priya for the Applicant is present. Learned counsel Mr. Amrit Bhargav for the Respondent is present.

Ld. Counsel for the Applicant states that settlement has been arrived at between the parties.

Hence, a memo by way of e-filing has been filed in the registry seeking permission to withdraw IBA/608/2020.

The Applicant is directed to file a physical copy of the memo during the course of the day.

The memo filed through e-filing is taken on record.

Accordingly, IBA/608/2020 is hereby dismissed as withdrawn”

8. As a matter of fact, the Appellant should have filed an application for revival of the said application in terms of Clause 9(b) of the settlement agreement but even if the fresh application under Section 9 of the Code has been filed, the Adjudicating Authority has recorded a firm finding in Para 40 of the impugned order which read as under:-

“40. Thus, we are of the view that even though clause 6 of the settlement agreement dated 02.10.2021 states that payment to the operational creditor shall not be contingent upon the obligation of Xicon but the operational creditor has not fulfilled his promise of completion of pending works, even though the

entire payment under the settlement agreement has been paid subsequently. Further, we are also of the view that the operational creditor cannot invoke clause 9 of the settlement agreement at this state, after accepting the 2nd, 3rd, and 4th instalment amount with considerable delay. Accordingly, issue nos. (i) and (ii) are answered.”

9. The entire payment of Rs. 1,60,94,701/- was made during the course of hearing as per the settlement agreement dated 02.10.2021 and there is an issue regarding the non-completion of pending work by the Appellant which has also been settled between the parties in para 6 of the settlement agreement which read as under:-

“6. WABAC confirms that all the supplies are complete and further Xicon agrees to complete the pending jobs and assist in commissioning, as per the purchase orders and co-operate in handing over the project information and documents”

10. Since, this issue was raised by the Respondent in reply to the demand notice in so many words, therefore, we do not find that any error has been committed by the Adjudicating Authority while dismissing the application filed by the Appellant.

11. In view of the aforesaid discussion, we do not find any merit in the present appeal and the same is hereby dismissed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

Sheetal