

Sree Bhadra Parks And Resorts Ltd vs Sri Ramani Resorts And Hotels Pvtltd on 9 April, 2021

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Insolvency)No.06 of 2021
(Under section 61 of the Insolvency and Bankruptcy Code 2016)
(Arising out of Order dated 28.01.2021 in IA No.2/KOB/2021 in IBA/13/KOB/2020
passed by the Hon'ble National Company Law Tribunal, Kochi Bench

In the matter of:

Sree Bhadra Parks and Resorts Ltd.
27/480 (1), Museum Road, Chembukkavu,
Thrissur, Kerala 680 020
Represented by its Mangaing Director
Mr.K.N.Namboothiripad :Appellant/Respondent/
Corporate Debtor

V.

Sri Ramani Resorts and Hotels Pvt.Ltd.
8/42, Maharaja Surya Road,
Alwarpet,
Chennai 600 018. :Respondent/Petitioner/
Applicant

Present

For Appellant : Mr. Anil D.Nair, Advocate
For Respondent : Mr.PH. Arvind Pandian, Sr. Counsel For
Jayanthi K.Shah, Advocate

JUDGEMENT

VENUGOPAL M J The Appellant/Respondent/Corporate Debtor has preferred the present Appeal being aggrieved with the Order dated 28.1.2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench) in IA No.2/KOB/2021 in IBA/13/KOB/2020.

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2. Earlier, the 'Adjudicating Authority'(National Company Law Tribunal, Kochi Bench) while passing the 'Impugned Order' dated 28.1.2021 in IA No.2/KOB/2021 in IBA/13/KOB/2020 (filed by the Respondent/Applicant/Financial Creditor) under Rule 11 of the National Company Law Tribunal Rules, 2016, had at Paragraphs 4 and 5 had observed the following :

"Respondent / Corporate Debtor filed a counter statement opposing the reliefs sought in the Interlocutory Application. They have stated that the applicant company has only two directors namely Palani Shanmugham and Kolappan Ambujam Kalaavathy. The Director Palani Shanmugham (PR Shanmugham) verified and signed the applications and affidavits stating that he is director of the company. However, both the Directors have been disqualified under Section 164(2) of the Companies Act, 2013 w.e.f. 1.11.2016 to 31.10.2020. It is further stated that by fraud the applicant/financial creditor obtained an order from this Tribunal, as the application has been filed by an incompetent person. It is also stated that this Tribunal by order dated 24.9.2020 granted liberty to the applicant to file fresh application, if the Corporate Debtor did not comply with the conditions stipulated in the settlement. Hence, if the applicant is aggrieved, he has to file a fresh application. They have also made so many allegations such as the applicant is not a financial creditor etc. which they have already contended while contesting the IBA. The contention of the respondents is that the applicant is neither a financial creditor nor an operational creditor. However, they stated that they are taking steps to settle the matter. Further submission is that the letter dated 28.11.2018 cannot be treated as an acknowledgment of debtor, as after three years, it is not a valid acknowledgment and is barred by Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 limitation. They have referred to the decision of the Hon'ble Supreme Court in (1996) 5 SCC 550-, (2003) 8 SCC 319 and 1995(2) CLJ 388 to state that a person playing deceit or fraud is not entitled to be heard.

5. We have heard the learned Senior Counsel Shri Aravind Pandian appearing for the applicant/financial creditor and the learned counsel for the respondent/Corporate Debtor Shri PV George (Puthiyedam). With respect to the contention of the respondent regarding the disqualification of the Director, the learned Senior counsel has stated that the Hon'ble Madras High Court vide judgment dated 15.12.2020 in W.P.No.18641 of 2020 and W.M.P. Nos.23123, 23125, 23127 and 23129 of 2020 held as under:

"43. In the result, these appeals are allowed by setting aside the impugned order dated 27.1.2020. Consequently, the publication of the list of disqualified directors by the ROC and the deactivation of the DIN of the Appellants is hereby quashed. As a corollary to our conclusion on the deactivation of DIN, the DIN of the respective directors shall be reactivated within 30 days of the date of receipt of a copy of this order. Nonetheless, we make it clear that it is open to the ROC concerned to initiate action with regard to the disqualification subject to an enquiry to decide the question of attribution of default to specific directors by taking into account the observations and conclusions herein. No costs. Consequently, connected miscellaneous petitions are closed."

5. In view of the above decision, the contention regarding the disqualification of the directors will not stand. The question is only the date of removal of disqualification, which have no mush

relevance in this matter, as the question here is only whether the Corporate Debtor has complied with the conditions stipulated in the settlement agreement produced before this Tribunal. It is true that the IBA has been disposed of on the basis of settlement Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 arrived between the parties stating that they have settled the matter stating that on 26.8.2020 settlement has been arrived for a total sum of Rs. 2,25,00,000/- (Rupees two crores twenty- five lakhs only) as full and final settlement of the entire claim between the Corporate Debtor M/s Sree Bhadra Parks and Resorts Limited on the terms mentioned in the settlement agreement. When a settlement has been arrived between the parties, it is duty bound by the Corporate Debtor to make good the payments proposed in that settlement. They cannot go back making various allegations including maintainability of the IBA after making default in the payment agreed to between the parties. The contention regarding the application is not maintainable as the order stipulates for filing a fresh application cannot be accepted because merely on technicalities the Corporate Debtor cannot wash away their hands from complying with the conditions stipulated in the final order passed by this Tribunal"

and resultantly allowed the Application by restoring the IBA/13/KOB/2020 to file. Moreover, the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench) had also directed the listing of IBA/13/KOB/2020 for hearing on 17.2.2021.

APPELLANT'S CONTENTIONS :

3. The Learned Counsel for the 'Appellant' submits that the case of the 'Appellant'/'Respondent'/'Corporate Debtor', right from the beginning is that the application under section 7 of the 'Insolvency & Bankruptcy Code', 2016 is not maintainable and that the application was filed for 'return of monies' together with interest on the amounts advanced towards purchase of shares of the 'Appellant'/'Company'.

4. It is the stand of the 'Appellant' that it was demonstrated before the 'Adjudicating Authority' that the 'Respondent'/'Petitioner' is neither an 'Operational Creditor' nor a 'Financial Creditor' and further that Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 there is no 'debt' and that the 'Respondent' is not in 'Default' under the Code.

5. The Learned Counsel takes a stand that the competence of the signatory to the Section 7 Application of the I & B Code, 2016 was also questioned as he was disqualified as 'Director' at the time of signing the Section 7 'Application' and the 'Consent Terms'. Also that, the Order of the Hon'ble Madras High Court whereby the disqualification was set aside is not an absolute one.

6. The Learned Counsel for the 'Appellant' projects an argument that there is a gross abuse of Rule 11 of the National Company Law Tribunal Rules, 2016, since there is no power enjoined upon the 'Adjudicating Authority' to 'Review' its own 'Orders'.

7. The Learned Counsel for the 'Appellant' brings it to the notice of this 'Tribunal' that an 'Application' was filed in Form-1 by the Respondent/Applicant, seeking to recover certain amounts along interest on the premise that the agreement for purchase of shares did not fructify and that the 'Appellant' had promised to pay the advance paid by the 'Respondent/Applicant'. Added further, the Learned Counsel for the 'Appellant' points out that on 25.8.2020, in the said 'Application', an 'Interim Resolution Professional' came to be appointed and 'Moratorium' was granted. Subsequently, the 'Appellant'/'Respondent' offered to settle the amount which was offered to him through email dated 16.8.2020, wherein it was offered to make good the payment in terms of the said offer and Liberty was also reserved for the 'Respondent'/'Applicant' to file fresh 'Application' in case of 'Default'.

8. It is represented on behalf of the 'Appellant' that certain payments were made in terms of the agreement and an 'Application' was filed to 'Recall the Order at the instance of the Appellant. In fact, Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 the 'Application' was allowed by an order dated 24.9.2020 and original petition stood disposed of, by granting liberty to file fresh 'Application' by the Corporate Debtor(Appellant) had not complied with the conditions mentioned in Form -FA.

9. Advancing his arguments, the Learned Counsel for the 'Appellant' proceeds to point out that 'Petitioner/Applicant' in the Company Petition was disqualified with effect from 01.11.2016 till 31.12.2022 and it is the consistent plea of the 'Appellant' that 'Deponent' was not competent to project the said 'Application' that the 'Applicant' is neither a 'Financial Creditor' nor an 'Operational Creditor'.

10. Besides the above, it is projected on the side of the 'Appellant' that since the terms of the agreement were not complied with, the 'Respondent'/'Applicant' filed a Petition under Rule 11 of the National Company Law Tribunal Rules, 2016, wherein a relief was sought to allow the IA No.02/KOB/2021 and to pass an order in restoring and reviving the Application No.IBA /13/KOB/2020 filed under Section 7 of the Insolvency & Bankruptcy Code, 2016 and further prayed for passing an order in directing the 'Corporate Debtor'(Appellant) to comply with the consent terms in the interest of justice.

11. The grievance of the 'Appellant' is that the 'Appellant' had filed a reply to IA No.02/KOB/2021 before the 'Adjudicating Authority' raising legal and factual contentions, but the 'Adjudicating Authority' although took judicious note of these legal arguments, was not inclined to adjudicate upon the same on the premise that they were technical in nature.

12. The Learned Counsel for the 'Appellant' emphatically contends that the 'Adjudicating Authority' had reviewed its own order disposing of the IBA /13/KOB/2020 by reserving liberty to the 'Applicant' to file fresh application and that there is no error 'apparent on the face of the Company Appeal (AT) (CH)

(Insolvency)No.06 of 2021 record' so as to 'Review' the said orders. In this connection, the Learned Counsel for the 'Appellant' relies on the decision of the Hon'ble Supreme Court in 'Delhi Administration' V. 'Gurudip Singh' reported in AIR 2000 SC, P.3737 and that of the decision of the Honble Supreme Court in MA Murthy V 'State of Karnataka & Ors.' reported in 2003 7 SCC at P.517.

13. The Learned Counsel for the 'Appellant' submits that the 'Tribunal' will have jurisdiction to 'Review' its 'Order' only if it is authorised by the 'Statute' and in the absence of the same, it cannot assume jurisdiction to 'Review' its own order and in this regard, the Learned Counsel for the 'Appellant' refers to (i) the decision of the Hon'ble Madras High Court in Mallappa Chettiar and Others V.Alagiri Naicker & Ors reported in AIR 1931 Mad 791, (ii) the decision of the Hon'ble Madras High Court in Manilal Gadiya V Mangilal Kesarinath Sewak and Ors. reported in AIR 1977 Mad P.140 and (iii) the decision in SJS Fernandes V Ranganayakulu Chetty reported in AIR 1953 Mad

236.

14. The Learned Counsel for the 'Appellant' takes a plea that in 'Review Application' No.09 of 2020 in Comp.App.(AT)(Ins)849 of 2019 whether the 'Adjudicating Authority' under section 10 has jurisdiction to 'Review' its 'Order' in an 'Application' filed under Rule 11 was answered.

15. The Learned Counsel for the 'Appellant' contends that in the instant case on hand, on the basis of an offer given by the 'Appellant' and on the basis of the 'Application' filed, the said Company Application came to be disposed of and further that in the counter of the 'Respondent' wherein the judgements were relied upon, are not applicable to the facts of the present case and in fact, in all those cases, the Petition was dismissed as withdrawn and the consent terms Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 contemplated, revival of the petition including the appointment of 'Insolvency Resolution Professional' in case of 'Default'.

16. Moreover, in the orders referred to by the 'Respondent' they expressly recorded the right to revival of the said 'Petition' unlike the instant case, where 'Liberty' was granted to file fresh 'Application'.

17. APPELLANT'S DECISIONS:

(i) The Learned Counsel for the 'Appellant' cites the decision of the Hon'ble High Court of Madras in Mallappa Chettiar and Ors. V.Alagiri Naicker and Ors. reported in AIR 1931 Mad 791, wherein at Paragraph 6, it is observed as under :

"Therefore it will be seen that Athappa Chetty v. Ramanatham Chetty MANU/TN/0076/1919 : (1919) 10 L.W. 359 : 37 M.L.J 536 which the judges in

Sheikh Muhammad Mararayar v. Rengasami Naidu (1921) 16 L.W. 515 thought was authority for permitting the court to remand when there was a specific provision in Order 41, Rule 27, is authority for precisely the Contrary view. The mistake has crept in by careless head noting. The Judges in Aathappa. Chetty v. Ramanatham Chetty MANU/TN/0076/1919 : (1919) 10 L.W. 359 : 37 M.L.J. 536 said: "Where a power is given expressly, courts should not exercise their inherent power which ought to be very cautiously indented upon". The headnote changes this to, "where express power are also given, the Courts should be very cautious in resorting to their inherent powers" 10 L.W. 359. And so "should not" has become "should cautiously."

And then when one goes behind Athappa Chetty c. Ramanatham Chetty MANU/TN/0076/1919; (1919) 10 L.W. 359 : 37 M.L.J. 536 to what is undoubtedly the leading case in this matter, the Full Bench Calcutta decision, the headnote is both correct and clear.

"Inherent jurisdiction must be exercised with care, subject ... to the condition that the matter is not one with which the Legislature Company Appeal (AT) (CH) (Insolvency) No.06 of 2021 has so specifically dealt as to preclude the exercise of inherent power".

(ii) The Learned Counsel for the 'Appellant' relies on the decision of the Hon'ble High Court of Madras in Manilal Gadiya V Mangilal Kesarinath Sewak and Ors. reported in AIR 1977 Mad P.140, wherein at Paragraph 5, it is observed as follows:

" On the other hand, Mr. Raja Masilamani pointed out that the Court's jurisdiction cannot be invoked under Secs. 151 and 152 C.P.C for the purpose of amending the decree. There is absolutely no error, clerical or otherwise to invoke the jurisdiction of Court under Sec. 152. Further when the remedy is available for the petitioner to file either review petition or appeal, the Court's jurisdiction cannot be invoked under Sec. 151 C.P.C. For this proposition he cited the decisions in Abdul Razack Sahib v. Abdul Hamid Said, MANU/TN/0100/1951 : AIR 1951 Mad 406 ; Bhikhi Lal v. Tribeni, MANU/SC/0327/1964 : AIR 1965 SC 1935 and Nagarathnamma v. Seetharamamma MANU/TN/0157/1952 : AIR 1952 Mad 237 . I have been taken through these decisions and also the pleadings in the present case including the evidence given by P.W. 1. There is absolutely no difficulty from the pleadings and the evidence given by P.W. 1. that the shares of the plaintiff and the second defendant are equal. It is also clear from the Civil Procedure Code and also from Form No.21 of appendix D of the Code that the Court which drafts a decree must declare the shares also. It is not necessary to declare the shares in the judgment rendered by the Court. But when it is proved from the pleadings and also from the evidence that parties have equal shares the decree has to be drafted by declaring the shares of the parties also. This is a clear case where the Court has failed to draft the decree in accordance with Company Appeal (AT) (CH) (Insolvency) No.06 of 2021 Order 20, rule 15 and Form 21 as stated above. The decisions cited by Mr. Raja Masilamani, learned counsel for the respondents dealt with cases wherein the statutory rights of the parties have not been

properly considered by the Court. In such circumstances, it has been held that the decree cannot be amended under Sec. 151 and Sec. 152 C.P.C but the remedy lies only by way of appeal and review petition. As far as the present case is concerned, it is the duty of the court to draft the decree in accordance with Order 20, Rule 15 C.P.C. and Form No. 21. The mistake committed by the Court has to be rectified only under Sections 151 and 152 C.P.C. No authority has been cited contra to this proposition stated by me."

(iii) The Learned Counsel for the 'Appellant' refers to the decision of the Hon'ble High Court of Madras in *SJS Fernandes V V.Ranganayakulu Chetty* reported in AIR 1953 Mad 236, wherein at paragraph 6, it is observed as under:

"So far as the invocation of the inherent powers of court is concerned, it has been held repeatedly and has now become well settled law that the power to review is not an inherent power of a judicial officer but such a right must be conferred by Statute. This is based upon the common sense principle that prima facie a party who has obtained a decision is entitled to keep it unassailed unless the Legislature has indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. Therefore, the course of decisions in this country has been to the effect that a right to review is not an inherent power: see - '*David Nadar v. Manicka Vachaka Desika Gnana Sambanda Pandara Sannathi*', 33 Mad 65; -- '*LA=ala Prayag lal v. jai Narayan singh*', 22 Cal 419; -- '*Baijnath Ram Goenka v. Nand Kumar Singh*', 34 Cal 677 and - '*Anantharaju Shetty v. Appu Hegade*', 37 MLJ 162".

Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 Respondent's Submissions:

18. The Learned Counsel for the 'Respondent' submits that the 'Respondent' filed an 'Application No.IBA/13/KOB/2020 (under section 7 of the Insolvency & Bankruptcy Code, 2016) before the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala) and that by an order dated 25.8.2020, the said authority was pleased to allow the 'Application' and declared 'Moratorium'.

19. The Learned Counsel for the 'Respondent' points out that before the paper publication was effected, the 'Appellant' expressed willingness to settle the matter on the following terms and the said mail for 'Settlement Terms' runs as under:

"Please see the matter (below) for withdrawing the application and do the needful
Thanks and regards Narayanan Namboodiripad
Dear sir, I hereby state that on 26.8.2020 settlement has been arrived for a total sum of Rs. 2,25,00,000/- as full and final settlement of the entire claim between the Corporate Debtor M/s Sree Bhadra parks and Resorts Ltd on the following terms

a) M/s Sree Bhadra Parks and Resorts Ltd have paid a sum of Rs. 1,00,000/- 26.08.2020.

b) cheque dated 10.9.2020 bearing No. 214323 for Rs 10,00,000/-

was given however returning the said cheque M/s Sree Bhadra Parks and Resorts Ltd has made an electronic transfer through RTGS of Rs 10,00,000/- to the account of M/s Sri Ramani Resorts and Hotels Pvt Ltd on 10.09.2020.

c) A cheque dated 30.11.2020 bearing No.214322 for Rs.2,14,00,000/- drawn on South Indian Bank Ltd., Kanyakumari Main Branch is yet to be encashed and can be done only on 30.11.2020.

3. I further submit that the balance amount of the settlement of Rs.2,14,00,000/- arrived between the parties is only for this Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 settlement and if the Corporate Debtor fails to pay the said sum on or before 30.11.2020 then M/s Sri Ramani Resorts and Hotel Pvt Ltd shall be at liberty to file fresh application with actual amount vide IBA/13//KOB/2020 i.e. Rs 4,25,32,016.405/- along with 24% per annum stand due as on date.

Based on this above understanding I request your good selves to withdraw application IBA/13/KOB/2020 Thanks and regards"

20. The Learned Counsel for the 'Respondent' brings to the notice of this 'Tribunal' that resting on the aforesaid settlement, the 'Appellant' paid a sum of Rupees One Lakh on 26.8.2020 and Rupees Ten Lakhs on 10.9.2020 to the account of the 'Respondent' and based on the 'Settlement', the 'Appellant' filed a 'Recall Application' (under Rule 11 of the National Company Law Tribunal Rules, 2016) to permit them to recall the order dated 25.8.2020 and permit the parties to settle the matter. Besides this, the 'Respondent' file Form FA with liberty to file fresh 'Application', if the aforesaid settlement fails and that the 'Adjudicating Authority' was pleased to pass orders on 24.9.2020 granting liberty to the 'Appellant' and the relevant portion of the order is to the following effect:

"In view of the settlement arrived between the parties by filing FA before this Tribunal and that the IRP stated that he has received his fees, the IBA/13/KOB/2020 stands disposed of. However, the Applicant is at liberty to file fresh application if the Corporate Debtor has not Complied with the conditions stipulated in the settlement as mentioned in FA."

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21. The Learned Counsel for the 'Respondent' contends that after the said terms arrived at between the parties, the 'Appellant' had not come forward to make payment towards 'Settlement' which was due on 30.11.2020 and requested the 'Appellant' not to present the cheque amounting to Rs.2,14,00,000/- dated 30.11.2020 on the said date and sought time on several occasions.

22. The Learned Counsel for the 'Respondent' contends that 'Directors' of the Respondent' came to note that they were disqualified as 'Directors' and filed a Writ Petition 18641 of 2020 before the Hon'ble High Court of Madras, challenging their disqualification and the said Writ Petition was allowed by an order dated 15.12.2020 which reads as under :

"In the result, these appeals are allowed by setting aside the impugned Order dated 27.1.2020. consequently, the publication of the list of disqualified directors by the ROC and the deactivation of the Din of the Appellants is hereby quashed. As a corollary to our conclusion on the deactivation of Din, the Din respective Directors shall be reactivated within 30 days of the date of receipt of a company of this order, nonetheless we make it clear that it is open to the ROC concern to initiate action with regard to disqualification subject to an enquiry to decide the question of attribution of default to specific Directors by taking into account the observations and conclusions herein. No cost consequently connected miscellaneous Petitions are closed"

23. The Learned Counsel for the 'Respondent' submits that only due to failure of the aforesaid settlement, the 'Respondent' was perforced to file an 'Application' under Section 11 of the National Company Law Tribunal Rules, 2016 to restore the Petition vide IA No.2/KOB/2021 in IBA/13/KOB/2020.

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24. Continuing further, it is the stand of the 'Respondent' on 23.12.2020, the 'Appellant' requested the 'Respondent' to present a cheque amounting to Rs.2,14,00,000/- (vide cheque No.214322 drawn on South Indian Bank Limited, Kanyakumari dated 30.11.2020) and the said cheque bounced as per 'Return Memo' dated 24.12.2020.

25. The Learned Counsel for the 'Respondent' adverts to the order of the 'Adjudicating Authority' dated 28.1.2021 in IA No.02/KOB/2021 in IBA/13/KOB/2020, whereby and whereunder, its among other things, observed as under:

....."it is the duty bound the Corporate Debtor to make good the payments proposed in that settlement. They cannot go back making various allegation including maintainability of the IBA after making default in the payment agreed to between parties. The contention regarding the application is not maintainable as the Order stipulates for filing a fresh application cannot be accepted because merely on technicalities the Corporate Debtor cannot was away their hands from complying with the conditions stipulated in the final order passed by this Tribunal. Hence the Application IA No.2/KOB/2021 is to be allowed."

26. The Learned Counsel for the 'Respondent' points out that on 25.2.2021, again the 'Appellant' requested the 'Respondent' to present the cheque amounting to 'Rs.2,14,00,000/- dated 30.11.2020 and the said cheque bounced as per memo dated 26.2.2021.

27. The Learned Counsel for the 'Respondent' projects an argument that even assuming that if the 'Writ Petition' was not filed even on the date of filing an 'Application' under Section 7 of the Insolvency & Bankruptcy Code, Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 2016, the 'Respondent' is protected as per Section 167(a) of the Companies Act, 2013, and it is clear that the 'Office of the Director' shall become vacant in all the Companies other than the Company which is in 'Default', as per Section 167(a) of the Companies Act, 2013.

28. The Learned Counsel for the 'Respondent' submits that the disqualification of the Directors for the 'Respondent's default was quashed by the order passed by the Hon'ble High Court of Madras in Writ Petition No.18641 of 2020 dated 15.12.2020.

29. It is represented on behalf of the 'Respondent' that the 'Application' in IA No.02/KOB/2021 in IBA/13/KOB/2020, the order in which an 'Appeal' was filed before this 'Tribunal' on 20.12.2020 and the order in Writ Petition 18641 of 2020 was made on 15.12.2020. Therefore, it is the contention of the Learned Counsel of the 'Respondent' that the Directors were very much qualified as on the date of filing of the 'Application' in IA No.2/KOB/2021 before the 'Adjudicating Authority'.

30. RESPONDENT'S CITATIONS:

(i) The Learned Counsel for the 'Respondent' submits that this 'Tribunal' had dealt with inherent powers of the National Company Law Tribunal, under Rule 11 of National Company Law Tribunal Rules, 2016 in the judgement in NUI Pulp & Paper Industries Pvt.Ltd. V M/s Roxcel Trading GMBH (vide Co.Apl.(AT)(Ins) No.664 of 2019 and the same was upheld by the Supreme Court in Civil Appeal No.6697 of 2019 dated 11.9.2019.

(ii) The Learned Counsel for the 'Respondent' refers to the judgement of this 'Tribunal in Ruchita Modi V. Kanchan Ostwal in Co.Apl.(AT)(Ins) No.1000 of 2019 dated 4.11.2019 wherein it is observed as under:

Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 " Both parties state that they will be bound by this settlement. In exercise of inherent powers under Rule 11 of the NCLAT Rules, 2016, we allow the Company Appeal (AT) (Ins) No.1000 of 2019 settlement and set aside the Impugned Order dated 18th September 2019 passed by Adjudicating Authority (NCLT) Jaipur (Court No.1). Company Petition No. (IB)-93/9/JPR/2018 filed by Mrs. Kanchan Ostwal against MEC shot Blasting Equipment Private Limited is disposed of as withdrawn. The Appellant as well as shareholders, Directors of the Corporate Debtor will be bound by the terms of settlement. In case there is default in the payment in terms of settlement, it will be open for the Operational Creditor to move this Appellate Tribunal for recall of this Order and to revive the CIRP process against the Corporate Debtor. The Operational Creditor may also file Application for initiation of the contempt proceedings against the defaulting Appellant, Directors/Director and Shareholders".

(iii) The Learned Counsel for the Respondent points out the judgement of the Hon'ble Supreme Court dated 31.1.2020 in the matter of M/s Ess Investments Pvt.Ltd. Lokhandwala Infrastructure Pvt.Ltd. & Anr. in Civil Appeal No.324 of 2020 wherein it was held that the National Company Law Tribunal can restore a 'Petition' which was dismissed as an 'infructuous one'.

(iv) The Learned Counsel for the Respondent places heavy reliance upon the Judgement of the Hon'ble Supreme Court in Swiss Ribbons Pvt.Ltd. V Union of India reported in Manu/SC/0079 of 2019, wherein it was held that the National Company Law Tribunal Rules, 2016, can be invoked by the 'Tribunal' for the proceedings Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 under Insolvency & Bankruptcy Code, 2016. Further, the relevant portion of the judgement at Paragraph 52 runs as under :

" It is clear that once the Code gets triggered by admission of a Creditors petition under Sections to 9, the proceeding that us 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 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."

31. The Learned Counsel for the 'Respondent' contends that in the present case, the 'Committee of Creditors' is not constituted and upon 'default' in the payment in the terms of the Settlement dated 26.8.2020, the 'Respondent' invoked Rule 11 of the National Company Law Tribunal Rules, 2016 and the 'Adjudicating Authority' was pleased to allow the 'Restoration Application'.

Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 EVALUATION :

32. The 'Respondent'/'Applicant'/Financial Creditor' projected an 'application' in IBA/13/KOB/2020 on the file of the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala) (Under Section 7 of the Insolvency & Bankruptcy Code, r/w Rule 4 of the Insolvency & Bankruptcy Code (AAA) Rules, 2016, averring that the 'Appellant/Respondent/Corporate Debtor' had committed 'default' in making payment of Rs.4,25,32,016.405 and thereby sought to initiate 'Corporate Insolvency Resolution Process' (CIRP) against the 'Appellant/Respondent/Corporate Debtor'.

33. To put it precisely, in Form-1, Part-II of the Application under Section 7 of the Insolvency & Bankruptcy Code, the 'Respondent'/ 'Applicant'/'Financial Creditor' had averred that it entered into 'Share Purchase Agreement' with the 'Appellant'/ 'Respondent'/'Corporate Debtor' for purchase of

100% shares of the 'Appellant' for a total consideration of Rs.33,08,00,000/- and that the 'Respondent' paid a sum of Rs.1,00,00,000/- on 21.11.2012. Further, it was mentioned by the 'Respondent'/'Financial Creditor' that at the time of entering into the aforesaid agreement, the 'Appellant'/'Corporate Debtor' intimated that the properties and assets were encumbrance free and that on investigation, the 'Respondent'/'Financial Creditor' found that there were numerous encumbrances and both parties entered into 'Addendum' on 21.11.2012 itself, wherein the 'Appellant'/'Corporate Debtor' instructed the 'Respondent'/'Financial Creditor' to pay part of the consideration to its other Creditors directly as mentioned in the Agreement.

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34. The 'Respondent'/'Financial Creditor' had also averred that other creditors of the 'Appellant'/'Corporate Debtor' had not accepted the 'Settlement' of the 'Appellant' and requested to take any payments from the 'Respondent'/'Financial Creditors' on behalf of the 'Appellant'/'Corporate Debtor'.

35. In the application, the 'Respondent'/'Financial Creditor' had claimed a sum of Rs.4,25,32,016.405 along with interest at 24% per annum based on the fact that the debt was acknowledged by the 'Appellant'/'Corporate Debtor' from time to time as per their letter dated 5.9.2014, 17.3.2015, e-mail dated 28.11.2018 and the reply notice dated 31.1.2018, whereunder the liability was not denied.

36. The 'Respondent'/'Applicant'/'Financial Creditor' had filed Section 7 Application of the Code, alleging violation of 'Share Purchase Agreement' dated 21.11.2012, in and by which a sum of Rs.30,00,00,000/- was agreed to be paid by the 'Respondent'/'Financial Creditor' to the 'Corporate Debtor' for acquiring the Company. Further, on the aforesaid date an 'Addendum' to the 'Agreement' was also executed wherein the 'Respondent'/'Financial Creditor' agreed to make payment to the Creditors of the 'Appellant'/'Corporate Debtor'.

37. Besides, this, the 'Appellant'/'Corporate Debtor' on 27.11.2012, had issued a letter requesting to hand over a sum of Rs.1,00,00,000/- to Dr.J.J.R.Justin. Subsequently, on 5.9.2014 and 17.3.2015, the 'Respondent'/'Financial Creditor' had issued a letter agreeing to refund the advance amount.

38. Also that, on 28.11.2018, the Corporate Debtor had issued another Letter to the 'Respondent'/'Financial Creditor' interalia stating that they were in verge of selling their property in order to Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 settle their liabilities and further that they were trying their level best to find a buyer and to refund the 'Respondent's' advance amount and requested to bear with the delay in this regard and assured the refund as soon as possible.

39. Taking note of the fact, the 'Respondent'/'Applicant'/'Financial Creditor' had filed Application under Section 7 of the Insolvency & Bankruptcy Code, on 21.1.2020 and keeping in mind that the 'Appellant'/'Corporate Debtor' acknowledged the debt of 'Respondent'/'Financial Creditor' on 28.11.2018, it is held by this 'Tribunal' that the application filed by the 'Respondent'/'Applicant'/'Financial Creditor' in IBA/13/KOB/2020 is within the limitation period.

40. Before the 'Adjudicating Authority', the 'Appellant/Respondent/Corporate Debtor' in its Counter to Application IBA/13/KOB/2020 had stated that the agreement was made between two parties and the same ought to be made in stamp paper when the subject matter was related to the transfer of 100% share and Company including Immovable properties, the same is a 'Compulsorily Registerable Document'. Furthermore, it was mentioned that the said agreement was executed in a 'white paper' without registering the same and hence it is an invalid one.

41. Continuing further, the 'Appellant'/ 'Respondent'/ 'Corporate Debtor' had also stated in the Counter (before the 'Adjudicating Authority') that the 'Agreement' lacked the common seal of the company and as such the same could not be treated as an agreement executed by the company and further that the said agreement is not a valid document. Apart from that, the stand of the 'Appellant'/ 'Respondent'/Corporate Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 Debtor' is that Section 7 Application filed by the 'Respondent'/ 'Financial Creditor' was filed by an incompetent person.

42. In view of the fact that the 'Share Purchase Agreement' dated 21.11.2012 entered into between the parties had not fructified, the aspect of validity of the said agreement due to non-registration is an otiose one and as such, it is not delved in deep, by this 'Tribunal'.

43. The 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala) on 25.8.2020 came to the conclusion that the present debt arose out of the 'Share Purchase Agreement' dated 21.11.2012 and that the said amount was a 'debt' disbursed against the consideration for advance payment as per the agreement and hence was covered within the definition of 'financial Debt' and that the 'Respondent'/ 'Applicant' would be treated as 'Financial Creditors' and resultantly admitted the Section 7 Application of the 'Respondent'/ 'Financial Creditor'/ 'Applicant' for initiation of CIRP.

44. It comes to light that the 'Appellant' / 'Corporate Debtor' filed application as per Rule 11 of the National Company Law Tribunal Rules, 2016 to recall the order passed by the 'Adjudicating Authority' dated 25.8.2020 in IBA/13/KOB/2020 and permitted it to settle the matter, along with the Application Form FA for withdrawal of CIRP, duly signed by the 'Respondent'/ 'Applicant' in IBA/13/KOB/2020 mentioning that on 26.8.2020, a settlement was arrived at for a total amount of Rupees Two Crore twenty Five Lakhs only) as full and final settlement of the whole claim between the 'Appellant'/ 'Corporate Debtor' on the following terms:

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a) M/s Sree Bhadra Parks and Resorts limited have paid a sum of Rs.1,00,000/- on 26.8.2020.

b) Cheque dated 10.09.2020 bearing No.214323 for Rs.10,00,000/- was given. However, returning the said cheque M/s Sree Bhadra Parks and Resorts Limited has made an electronic transfer through RTGS of Rs.10,00,000/- to the account of M/s Ramani Resorts and Hotels Pvt.Ltd. on 10.09.2020.

c) A cheque dated 30.11.2020 bearing No.214322 for Rs.2,14,00,000/- drawn on South Indian Bank Limited, Kanyakumari Main Branch is yet to be encashed and can be done only on 30.11.2020.

45. Not resting with the above, it was further averred that the remaining amount of settlement of Rs.2,14,00,000/- arrived at between the parties was only for the settlement and if the 'Appellant'/ 'Corporate Debtor' fail to pay the said sum of on or before 30.11.2020 then the 'Respondent'/ 'Financial Creditor'/ 'Applicant' shall be at liberty to file a fresh application with a actual sum of Rs.4,25,32,016.405 together with interest at 24% per annum standing due as on date etc.

46. Viewed in that background, the 'Applicant' desired to withdraw the application IBA/13/KOB/2020 (filed under Section 7 of the Code) with liberty to file fresh application, if the settlement agreement was not complied with by the 'Appellant'/ 'Respondent'/ 'Corporate Debtor'.

47. The 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala), because of the settlement arrived at between the parties by filing of Form FA before it Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 had disposed of the IBA/13/KOB/2020, granting liberty to the 'Respondent' / 'Financial Creditor'/ 'Applicant' to file fresh application, if the 'Appellant'/ 'Corporate Debtor' complied with the conditions mentioned in the settlement in Form -FA.

48. The 'Respondent'/ 'Financial Creditor'/ 'Applicant' before the 'Adjudicating Authority' had filed IA No.02/KOB/2021 in IBA/13/KOB/2020 (under Rule 11 of National Company Law Tribunal Rules, 2016) against the 'Appellant'/ 'Respondent'/ 'Corporate Debtor' seeking an order to restore and revive Application No.IBA/13/KOB/2020 (filed under Section 7 of the Insolvency & Bankruptcy Code, 2016) and to pass an order in directing the 'Appellant'/ 'Corporate Debtor' to comply with the consent terms and the 'Adjudicating Authority' after observing that when a settlement was arrived at between the parties, it is duty bound by the 'Appellant'/ 'Corporate Debtor' to make good the payments proposed in the settlement etc. and ultimately allowed IA No.02/KOB/2021 and ordered the restoration of the main application in IBA/13/KOB/2020 to its file.

49. It is brought to fore that the 'Appellant'/ 'Corporate Debtor' based on the settlement arrived at between the parties had paid a sum of Rs.1,00,000/- on 26.8.2020 and Rs.10,00,000/- to the account of the 'Respondent'/ 'Financial Creditor' on 10.9.2020.

50. In regard to the plea of the disqualification of the 'Directors' of the 'Respondent'/ 'Financial Creditor'/ 'Applicant', the Writ Petition No.18641 of 2020 was filed before the Hon'ble High Court of Madras on 15.12.2020, the Hon'ble High Court of Madras had allowed the 'Appeals' by setting aside the Impugned Order dated 27.1.2020 therein and consequently, Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 quashed the publication of the list of disqualified Directors by the 'Registrar of Companies' and the deactivation of the Directors of the 'Appellants', etc. COMPANIES ACT 2013:

51. It is to be pointed out that Section 164 of the Companies Act, 2013, provides disqualification for appointment of a person as a 'Director' of Company. Section 164(2) of the Companies Act, 2013

came into effect from 01.01.2014 and it applies prospectively. In fact, Section 164 of the Companies Act, 2013 applies by operation of Law resting on the circumstances emerging and coming into existence of the set of facts mentioned therein. As per Section 164(2) of the Companies Act, 2013, there is no distinction between the defaulting Public Company and Private Company. It is relevantly pointed out that the Companies Act, is silent on the qualification for 'Directorship' although it specifies the grounds on which a person may be disqualified from being appointed as 'Director' of any Company. The defaults enjoined under section 164(2)(a) of the Companies Act, 2013 in regard to the non- filing of Financial Statements and Annual Returns for any continuous period of three financial years would be defaults, to be reckoned from the Financial Year 2014-15 and not 2013/2014.

52. A mere glance of the ingredients of Section 167(1)(a) of the Companies Act, clearly points out that the Office of the Director shall be vacant in all the Companies other than the Company which is in default. In fact, the Directors' were disqualified for 'Respondent' / 'Company's default and hence they were authorised and qualified to prefer the original Application by virtue of Section 167(1)(a) of the Companies Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 Act, 2013. It must be borne in mind, the disqualification was quashed by the order of the Hon'ble High Court of Madras on 15.12.2020 in Writ Petition No. 18641 of 2020 and therefore, the contra plea taken on behalf of the 'Appellant' is unworthy of acceptance.

53. It is relevantly pointed out that as per amendment made by Companies (Amendment) Act, 2019, (w.e.f. 2.11.2018) a new clause (i) has been inserted in sub-section (1) as per which a person shall be subject to disqualification if he accepts Directorship exceeding maximum number of Directorship provided in Section 165 of the Companies Act, 2013.

REVIEW:

54. In Law, a 'Review Petition' has a limited role and cannot be allowed to act as an 'Appeal' in disguise. Only a manifest error would be a ground for 'Review'.

I & B (APPLICATION TO ADJUDICATING AUTHORITY) RULES, 2016:

55. Dealing with the aspect of the Appellant's contentions that as per Rule 10 etc., of the Insolvency & Bankruptcy (Application to 'Adjudicating Authority) Rules, 2016, under the caption 'Filing' of application and application fee' that, "till such time the Rules of Procedure for conduct of proceedings under the Code are notified, the application made under Sub-

Section (1) of Section 7, Sub-Section (1) of Section 9 or Section (1) of Section 10 of the Code shall be filed before the 'Adjudicating Authority' in accordance with Rules, 20,21,22,23,24 and 26 of Part III of the National Company Tribunal Rules, 2016" etc., this 'Tribunal' pertinently points out Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 that the decision of the Hon'ble Supreme Court in Swiss Ribbons Pvt.Ltd. V. Union of India dated 25.1.2019 reported in Manu/SC/0079/2019 squarely applies to the facts of the present case and in fact, the Hon'ble Supreme Court at Paragraph

52 of the Judgement in Swiss Ribbons had made it clear that at any stage where the 'Committee of Creditors' is not yet constituted, a party can approach National Company Law Tribunal directly, which 'Tribunal' may in exercise of its 'inherent powers' under Rule 11 of the National Company Law Tribunal Rules, 2016 allow or disallow an application for withdrawal or settlement and as such, 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'.

INHERENT POWER:

56. It is to be mentioned that an 'inherent power' of the 'Tribunal' has its gross root in necessity and the said power can be exercised by a 'Tribunal' based on the rudimentary principle that an 'act of Court shall prejudice no person'. Further, to meet the ends of justice an 'inherent power' of a 'Tribunal' being 'Co-extensive with need' can be exercised to render justice to the litigants. Also that, I A No. 02/KOB/2021 filed by the Respondent/Financial Creditor/Applicant to restore and Revive the Application IBA/13/KOB/2020 (filed under Section 7 of the Code) is not to be termed as one of 'Review Application' or to be confused with, in the considered opinion Company Appeal (AT) (CH) (Insolvency)No.06 of 2021 of this 'Tribunal'. Undoubtedly, the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala) had rightly allowed IA No.02/KOB/2021 in IBA/13/KOB/2021 on 28.01.2021 (filed under Rule 11 of National Company Law Tribunal Rules, 2016 by the 'Respondent'/'Financial Creditor') of course, based on proper material before it and the same requires no interference in the hands of this 'Appellate Tribunal' sitting in 'Appeal'. Looking at from any angle, the 'Appeal' sans merits.

CONCLUSION:

In fine, the instant Company Appeal Comp.App.(AT)(CH)(Ins) No. 06/2021 is dismissed. No costs. IA No.17 of 2021(Stay Application) is closed.

[Justice Venugopal M] Member (Judicial) [V.P. Singh] Member (Judicial)
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