

Rizwan Ahmad & Anr vs Sojitz India Private Limited & Anr on 1 August, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Contempt Case (AT) No. 14 of 2019
In
Company Appeal (AT) (Ins.) No. 170 of 2019

IN THE MATTER OF:

1. Sojitz India Pvt. Ltd & Anr.
Having its registered office at
7th Floor,
Eros Corporate Tower,
Nehru Place, New Delhi

....Applicant

Vs.

1. Rizwan Ahmad, Director
OREN Hydrocarbons Pvt. Ltd.
28/2 B Saravana Street, T. Nagar,
Chennai, Tamil Nadu 600017

....Respondent No. 1

2. Ramesh Krishnamoorthy, Director,
OREN Hydrocarbons Pvt. Ltd.
28/2 B Saravana Street, T. Nagar,
Chennai, Tamil Nadu 600017

Also at:

Flat No. F1, Adish Anjaneya Flats,
Tansi Nagar, 17th Extension,
Velachery, Chennai- 600042

....Respondent No. 2

3. OREN Hydrocarbons Pvt. Ltd.
28/2 B Saravana Street, T. Nagar,
Chennai, Tamil Nadu 600017

....Respondent No. 3

I.A. No. 1854 of 2019
In
Company Appeal (AT) (Insolvency) No. 170 of 2019

IN THE MATTER OF:

Rizwan Ahmad & Anr.

.. Appellants

Vs.

M/s Sojitz India Private Limited and Anr.

.. Respondents

Present:

For Applicants: Mr. Arun Kathpalia, Senior Advocate with
Mr. V. Rajasekaran, Mr. Akshay Sachthey,
Advocates.

For Respondents: Mr. Viraj Datar, Senior Advocate with Mr. Abhishek
Vikram, Mr. A. Muralidharan, Advocates.

-2-

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 1

JUDGMENT

[1st August, 2022] (Per Hon'ble Mr. Justice M. Satyanarayana Murthy) This application is filed under Section 425 of Companies Act and Rule 11 of the National Company Law Appellate Tribunal, Rules 2016 read with Sections 12 & 14 of Contempt of Courts Act.

The applicant herein was an applicant in an application filed under Section 9 of IBC filed against Respondent No. 3 on 22.09.2018 before National Company Law Tribunal, Chennai, as the 3rd Respondent committed default in payment of debt due to the applicant.

This Petition Interlocutory Application No. 1854 of 2019 along with above Contempt Case is filed by the same Petitioner. The petition in Interlocutory Application No. 1854 of 2019 is filed under Rule-11, read with Rule 31 of NCLAT Rules to recall the order dated 11.03.2019 passed by this Tribunal in CA (AT) (Insolvency) No. 170 of 2019.

Since both the Contempt and the present petition are filed based on same contention raised by both the Petitioner and the Respondents, we therefore find it appropriate to decide both Contempt and Interlocutory Application by a common judgment.

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 The application was admitted by the Tribunal by its order dated 12.02.2019, a Resolution Professional was appointed in respect of Respondent No.3 to take over the management of its affairs and exercise all other statutory powers under IBC.

Respondent Nos. 1 & 2 in their capacity of directors of Respondent No.3 filed Comp. App. (AT) (Ins.) No. 170 of 2019 before this Tribunal, challenging the order dated 12.02.2019. On 20.02.2019 during the course of hearing, Respondent Nos. 1 & 2 expressed their readiness to settle the dispute with the Applicant herein. This Tribunal recording the submissions of Respondent Nos. 1 & 2, permitted them to settle the matter, as Committee of Creditors was not constituted, while, directing CIRP not to constitute the Committee of Creditors until the next date of hearing, to enable the parties to arrive at settlement.

In view of the order passed by this Tribunal, the parties proceeded to settle the dispute, entered into a Settlement Agreement dated 08.03.2019 wherein it was agreed that the respondents would pay an amount of Rs. 24,27,64,004/- (Rupees Twenty-Four Crores Twenty Seven Lakhs Sixty Four Thousand and Four Only) to the applicant, in four installments as stipulated in the Settlement Agreement. As per the terms of the settlement agreement, the 1st installment of Rs.7,00,00,000/- (Rupees Seven Crores only) was payable on 08.04.2019. This Tribunal was pleased to take on record the Settlement Agreement.

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 This Tribunal by order dated 11.02.2019 recorded Clause 1.1 of Settlement Agreement which set out the payment schedule for the Respondent No. 3 to pay installments of settled amount.

This Tribunal also directed parties viz., Respondent Nos. 1 & 2 to comply with the Settlement Agreement as stipulated. It is also further stipulated in the order that in case, the terms of the settlement agreement were not complied in letter and spirit, it is open to the applicant to file an application for contempt, against the Respondents for willful disobedience of the order and also granted liberty to the applicant to revive the prayer of corporate insolvency resolution process with a request to recall the order, for non-compliance.

Respondent Nos. 1 & 2 filed affidavits before this Tribunal undertaking their liability while affirming that they would adhere to the terms and conditions set out in the Settlement Agreement. The Respondent Nos. 1 & 2 categorically stated in the affidavits that, in case of non-payment of any installments as per the terms stipulated in the Settlement Agreement, the applicant shall be entitled to deposit the post dated cheques drawn by the Respondent No. 1 on his personal account to discharge the obligation of respondents to make payment to the applicant.

The respondents counsel, on 04.02.2019 addressed a letter to the counsel for the applicant seeking extension of time for making payment of 1st installment due on 08.04.2019. The applicant through Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 its counsel informed the respondent that no extension would be granted and that the respondent should comply with the directions of this Tribunal as per the orders. As Respondents failed to make payment of the 1st installment amount of Rs. 7,00,00,000/- (Rupees Seven Crores only) on the due date i.e. 08.04.2019 the applicant in strict adherence of Clause 2.3 of the settlement agreement, therefore, deposited the post dated cheque to realize the amount due as 1st installment with the banker on 09.04.2019, but, the cheque was returned unpaid/dishonored by the banker due to insufficiency of funds. Thus, the respondents not only failed to pay the 1st installment, on due date stipulated in the settlement agreement but also failed to maintain balance in the account. The respondents have repeatedly and blatantly disobeyed the directions of this Tribunal and as such the Respondent Nos. 1 & 2 committed willful breach of undertaking given to this Tribunal and disobeyed the order dated 11.03.2019, willfully and intentionally.

In view of disobedience of order of this Court and breach of undertaking by Respondent Nos. 1 & 2, Interlocutory Application No. 1285 of 2019 is filed seeking extension of time for compliance of terms of settlement agreement. This Tribunal after hearing argument on 11.04.2019 disposed of the application, while holding that no case has been made out for extension of time for payment. Thus, the respondents have willfully disobeyed the order and committed breach of undertaking before this Tribunal with an intention to avoid Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 insolvency resolution process. As such, the respondents are liable for punishment as per the provisions of Contempt of Court Act.

In view of willful breach of undertaking and willful disobedience of the order, the applicant requested to initiate contempt proceedings against the Respondents and punish them for their

willful and deliberate disobedience of the order of this Tribunal and for willful breach of the undertaking filed before this Tribunal as per the provision of Contempt of Courts Act.

The Respondent filed a Reply Affidavit admitting about initiation of proceedings under Section 9 of Insolvency & Bankruptcy Code by Applicant, passing of orders, filing of an appeal before this Tribunal in Comp. App. (AT) (Ins.) No. 170 of 2019 and Settlement Agreement dated 08.03.2019 incorporating certain terms and conditions. The respondents however, contended that Clause 1.1 of Settlement Agreement deals with payment schedule, Clause 3.3 of the settlement agreement stipulated that "RA and RK" (Respondent Nos. 1 & 2 herein) shall obtain the consent of Board of Directors of OREN to take on record the settlement agreement and ratify the terms thereof within 5 days from the date of receipt of the order from NCLAT as outlined in Clause 3.1 (e) of the settlement agreement. In obedience of Clauses 3.1 and 3.3 of the Settlement Agreement, the Board meeting was convened on 13.03.2019 to obtain consent to take settlement agreement on record and ratify the terms thereof. But the Board urged to take steps immediately to raise the attachment over the bank Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 account of the company made by the Income Tax Corporate Circle-5, Chennai and declined to take the settlement on record and ratify the terms therein.

The respondents filed I.A. No. 1285 of 2019 in Comp. App. (AT) (Ins.) No. 170 of 2019 seeking extension of time narrating the details of income tax notice issued under Section 226 (3) of Income Tax Act, annexed a copy of order passed by the High Court of Madras dated 03.04.2019 in Writ Petition Nos. 9789, 9925 of 2019 whereby the High Court quashed the impugned order, notices, raised the attachment over the bank account of the Respondent No.3. However, this Tribunal dismissed the Interlocutory Application No. 1285 of 2019 by order dated 11.04.2019.

Again meeting of Board of Directors was convened on 15.04.2019 to obtain consent of the board, to take Settlement Agreement on record and ratify the terms. But, the Board of Directors refused to give consent to the Settlement Agreement dated 08.03.2019 and ratify the terms. The Board of Directors raised serious objection regarding liability, breach, relationship and jurisdiction in the meeting and resolved to invoke arbitration clause.

On 22.02.2018 the applicant sent a mail which runs as follows:

"as discussed, we are monitoring Saudi's situation closely, since this will be a significant amount to reduce our standing amount. However, we don't have any intention for us to get this receivable from you. Anyway to maximize the collection, we do think below will be necessary for OREN" and the email continues. The information furnished by the National e-Governance Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 Services Ltd. (NeSL) dated 24.09.2018 indicates that the transaction between the Applicant and the Respondents is a loan transaction."

The email contents disclose that the transaction between the applicant and the respondents is loan, thereby there is no operational debt.

It is specifically contended that Clause 11 of the settlement agreement dated 08.03.2019 deals with law and jurisdiction which is as follows:

"11.1 - This Settlement Agreement shall be governed by and construed in accordance with the law of India.

11.2 - Any dispute arising out of or in connection with the Settlement Agreement, including any breach of the Settlement Agreement, any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in New Delhi in accordance with the Arbitration & Conciliation Act, 1996 and all amendments thereto. 11.3 - The Parties agree that the Arbitral Tribunal shall comprise a Sole Arbitrator to be selected by OREN and RA from amongst three Arbitrators identified by SJI.

11.4- The seat of arbitration shall be at New Delhi."

In view of the clause, the Respondents sent a legal notice on 24.04.2019 invoking arbitration clause, to resolve the disputes arising out of settlement agreement dated 08.03.2019 and a corrigendum thereof on 27.04.2019, receipt of the same was acknowledged by the applicant. Though 30 days time had expired, the applicant did not take any steps to appoint an arbitrator. Thus, as per Section 11 of Arbitration and Conciliation Act, the respondent filed a petition before the High Court of Delhi.

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 The Respondents entered into an agreement dated 26.02.2016 with Andhra Pradesh Mineral Development Corporation to purchase 1,80,000 MTs of "drilling grade 4.20 specific gravity" Barytes (A Grade). The drilling grade 4.20 specific gravity offered for supply by APMDC under the contract meant for serving the export contract or orders of the respondents with the foreign buyers by the Respondents. In the background, the respondent entered into MOU - Strategic Business Alliance dated 23.06.2016 with M/s Sojitz Corporation, a holding company of Respondent. As per the terms of memorandum of understanding cum strategic business alliance dated 23.06.2016, the parties agreed to become strategic partners to pursue collaboration opportunities relating to the oil and gas field business, but Sojitz India Pvt. Ltd. did not undertake study for investment activities with OREN, the 3rd Respondent herein to develop further relationship between OREN and Sojitz. However, there was correspondence within Sojitz and APMDC for supply of varieties, for assignment of 38,000 MTs „A grade Barytes in favour of the Applicant out of 1,80,000 MT under the agreement dated 09.06.2016. As the supply is not for domestic sale as per conditions of the agreement dated 20.06.2016, the applicant cannot sell „A Grade Barytes in India, as, such sale is prohibited in terms of the agreement. Hence the claim of applicant is not sustainable.

Later, the applicant sent email dated 22.02.2018 which runs as follows:

- 10 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 "as discussed, we are monitoring Saudi's situation closely, since this will be a significant amount to reduce our outstanding amount. However, we don't have any intention for us to get this receivable from you. Anyway to maximize the collection, we do think below will be necessary for OREN and the email continues. Copy of the email dated 22.02.2018 sent by Respondent is enclosed herewith as Annexure A-6".

In view of email referred above, the transaction between the applicant and respondents is a loan transaction. Certain disputes arose between applicant and respondents and the applicant had approached NCLT claiming default in payment of 29,45,27,710/- filed CP/1182/1B/2018 under Section 9 of IBC claiming as an operational creditor. NCLT admitted the application.

Aggrieved by the order of NCLT, Chennai the Respondent Nos. 1 & 2 filed an appeal before this Tribunal bearing Comp. App. (AT) (Ins.) No.170 of 2019 but it was settled between the applicant and respondents. Under the settlement agreement dated 08.03.2019 with certain terms and conditions set out therein. The same was filed before this Tribunal on 11.03.2019.

In the light of the circumstances narrated above, the dispute arose out of settlement agreement dated 08.03.2019 in respect of, breach and validity including jurisdiction, the respondent invoked arbitration clause, sent legal notice dated 24.04.2019 calling the applicant to suggest the name of the arbitrator within 30 days, despite service of notice no action was taken by the applicant, thereupon, the

- 11 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 respondents were constrained to file application under Section 11 of arbitration conciliation act before High Court of Delhi.

Thus, there was no willful disobedience of the order dated 11.03.2019, willful breach of settlement agreement dated 08.03.2019, but due to the circumstances narrated above and consequently requested to dismiss the contempt case.

Based on the above contentions, this Tribunal framed two charges and called for reply from the Respondent Nos. 1 & 2/ Contemnors. The Respondent Nos. 1 & 2/Contemnors denied the charges while reiterating the allegations made in the reply to the contempt application. The charges consist of two parts, one is willful breach of settlement agreement and second is willful disobedience of order of this Tribunal dated 11.03.2019.

During hearing the learned Senior Counsel Sri Arun Kathpalia demonstrated as to how respondents/contemnors violated the undertaking and willfully disobeyed the order referring certain documents which will be discussed at appropriate stage while deciding the issue of

contempt.

Whereas the learned Counsel for the Respondent Sh. Viraj Datar would contend that mere default in compliance of order is not sufficient to punish the respondents/contemnors, it must be a willful disobedience and willful breach of undertaking. It is further contended that the Respondent made every endeavor to comply the order of this Tribunal but unsuccessful, therefore the disobedience or breach of

- 12 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 undertaking cannot be said to be willful and consequently not liable for punishment, requested to dismiss the contempt case holding these respondents not guilty.

Both the learned counsel filed their written-submissions and those submissions will be considered in detail at appropriate stage.

Considering rival contentions, perusing the material on record, the sole point that arises for consideration is:

"Whether the Respondent Nos. 1 & 2/ Contemnors committed breach of settlement agreement dated

08.03.2019 and disobeyed the order of this Tribunal dated 11.03.2019 willfully? If so, are the Respondent Nos. 1 & 2/Contemnors liable for punishment as per Section 12 of Contempt of Court Act?"

P O I N T:

The undisputed facts are that the applicant herein filed petition to initiate CIRP under Section 9 of IBC against the Respondent No. 3 on 22.09.2018. An interim resolution professional was appointed to take over the management of its affairs under the Code. Respondent Nos. 1 & 2 are the Directors of Respondent No. 3, filed Comp. App. (AT) (Ins.) 170 of 2019 before this Appellate Tribunal challenging the order of NCLT, Chennai. While the appeal is pending, the claim of the applicant was settled and parties to the appeal entered into settlement agreement on 08.03.2019, wherein the Respondent Nos. 1 & 2 agreed to pay Rs.24,27,64,004/- (Rupees Twenty Four Crores Twenty Seven Lakhs Sixty Four Thousand and Four Only) in four installments. The

- 13 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 1st installment was to be paid on 08.04.2019 but the same was not paid, however, cheques were issued to the Applicant in terms of settlement agreement for encashment to present the cheque to realize the debt

as 1st installment, in the event of failure to pay the installments. Accordingly, the Applicant presented the cheque for collection, which was dishonored. There was correspondence between the parties but no amount was paid in terms of the settlement agreement and direction issued by this Tribunal on 11.03.2019.

The Respondents admitted about their failure to comply with the terms and conditions of the settlement agreement while pleading that the breach is not willful, it is only on account of paucity of funds and for the reasons beyond their control. Moreover, the respondents have also raised a strange contention that the relationship between the Applicant and the Respondents was only a business partnership, but there is no subsisting legal liability. The specific plea of the Respondents is that the default or their failure to adhere to the terms and conditions of settlement agreement is not willful for the reason that the agreement was not taken on record by the Board of Directors, not ratified, despite, holding meeting twice and the Respondents invoked arbitration Clause and filed petition before Delhi High Court under Section 11 of Arbitration and Conciliation Act.

In view of undisputed facts narrated above, it is apposite to extract relevant terms and conditions of the Settlement Agreement between the Applicant and the Respondents.

- 14 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 Clause 1 deals with settlement amount and 1.1 specified the schedule of payment and the same is extracted hereunder:

"OREN hereby undertakes and confirms that it shall, and RA and RK hereby undertake and assure SJI that they shall take all such actions as may be necessary to ensure that OREN pays an amount of INR 24,27,64,004 ("Settlement Amount") to SJI, without any deductions, reductions or set-offs whatsoever, in the respective amounts set out in the second column of the following table (each such amount being referred to as an „Installment) and on the scheduled dates set out against each instalment in third column of the following (each such amount being referred to as an "Due Date"):

S. No.	Installment (INR)	Due Date
1.	7,00,00,000/- („First Installment)	8 April 2019
2.	6,00,00,000/- („Second Installment)	8 May 2019 (if such day is not a business day for banks in New Delhi (Business Day) then the next Business Day
3.	6,00,00,000/- („Third Installment)	7 June 2019 (if such day is not a business day for banks in New Delhi then the next Business Day
4.	5,27,64,004/- („Final Installment)	8 July 2019 (if such day is not a business day for banks in New Delhi then the next Business Day

Clause 2.4 permits the applicant to present cheques for collection given a security in case the installment amount is not paid.

Clause 3 deals with conditions precedent, Clause 3.1 (c) & (d) runs as follows:

(c) RA and RK shall file affidavits (substantially in form and substance acceptable to SJI) before the NCLAT with an undertaking to the NCLAT to unconditionally pay SJI the Settlement Amount and each installment on or before the respective Due Date in terms of this Settlement Agreement;

- 15 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019

(d) each of RA and RK shall file with the NCLAT all such affidavits/ documents/ applications (substantially in form and substance acceptable to SJI) as may be required to place on record this Settlement Agreement with the NCLAT and if directed by the NCLAT, with the NCLT Chennai;

According to Clause 3.3 the respondents herein shall obtain consent of OREN (Applicant) to take on record the settlement agreement and ratify the terms thereof within a period not later than 5 days from the date of order of NCLAT.

Clause 11.2 says that in case of any dispute arising out of or in connection with this Settlement Agreement, including any breach of the Settlement Agreement, any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in New Delhi in accordance with the Arbitration and Conciliation Act, 1996 and all amendments thereto.

Based on the settlement agreement, the respondents herein invited an order dated 11.03.2019, this Appellate Tribunal recording submissions of counsel, taking the settlement agreement on file without going into the relationship between the parties, issued the directions as follows:

"7. In the circumstances, while we direct the parties particularly the Appellants to comply with the „Terms of Settlements dated 8th March, 2019 and pay the amount within the period as mentioned therein, we set aside the impugned order dated 12th February, 2019 passed by the Adjudicating Authority and dispose of the application under Section 9 filed by the „Operational Creditor as withdrawn.

- 16 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019

8. In effect, order (s), passed by the Adjudicating Authority declaring moratorium and action, if any, taken by the „Interim Resolution Professional all such orders and actions are set aside. The „Corporate Debtor (Company) is released from all the rigour of law and is allowed to function independently through its Board of Directors with immediate effect.

9. The matter is remitted to the Adjudicating Authority for determination of the fee of the „Interim Resolution Professional the „Corporate Debtor will pay the same.

10. We make it clear that in case agreement is not complied with in its letter and spirit, it will be open to the Respondents not only to file a petition for contempt for flouting the direction of this Appellate Tribunal, it will be open to the Respondents to revive the prayer for any proceeding under „Corporate Insolvency Resolution Process and request this Appellate Tribunal to recall the order and to dismiss the appeal for non-compliance."

It is an undisputed fact that, respondent failed to comply with the direction in terms of settlement agreement dated 08.03.2019, but filed notarized undertaking affidavits of Respondent No. 1 & Respondent No. 2 dated 27.03.2019. The specific undertaking in para 2 (a), (b) is also relevant for deciding the issue, it runs as follows:

(a) That the Appellant No. 1 will adhere to the terms and conditions set out in the settlement agreement annexed hereto and take all such actions as may be necessary to pay an amount of INR 24,27,64,004 to the Respondent No. 1 and pay each Installment on or before the respective due date as specified in the settlement agreement dated 08.03.2019, failing which, Respondent No. 1 shall be entitled to deposit the post-dated cheques issued by the Appellant No. 1 corresponding to such non-payment.

(b) In the event of any breach of the terms and conditions of the settlement Agreement, Deponent confirms and affirms that the

- 17 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 Corporate Insolvency Resolution Process under CP/1182/IB/2018 filed by Respondent No. 1 will be revived automatically as per the provisions of the Insolvency and Bankruptcy Code, 2016. Based on the Settlement Agreement dated 08.03.2019, the respondents/contemnors invited an order from the Court dated 11.03.2019. Thus, it is clear that the respondents gave an undertaking to pay Rs. 24,27,64,004/- as per the schedule mentioned in Clause 1.1 of the settlement agreement, extracted above. At the same time, the order passed by the Court dated 11.03.2019 permitted the Applicant to file an application for contempt and to take steps to revive the prayer for CIRP. Thus, this Tribunal in anticipation of such violation, cautiously permitted the Applicant to file contempt in the event of failure to comply with the undertaking and directions issued by this Tribunal, the order became

final.

The Respondent did not dispute non-compliance of the order dated 11.03.2019 and failure to honor the undertaking but explained the reasons to support their contention that their failure is not willful.

Before going to decide the real controversy, it is necessary to advert to the definition of Civil contempt under Section 2 (b) of Contempt of Court Act and it is extracted hereunder:

"civil contempt means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of an undertaking given to a court"

The Apex Court defined „Contempt as disorderly conduct of contemnor causing serious damage to the institution of justice

- 18 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 administration. Such conduct, with reference to its adverse effects and consequences, can be discernibly classified into two categories one which has a transient effect on the system and/or the person concerned and is likely to wither by the passage of time while the other causes permanent damage to the institution and administration of Justice (Vide: Kalyaneshwari vs. Union of India and others¹)."

The Apex Court time and again discussed about the standard of proof in a contempt proceeding, concluded that the standard of proof is almost identical to the standard of proof in a criminal case since the proceedings in contempt is quasi criminal in nature.

The main endeavor of respondents is that the applicant failed to establish that the violation of the order is willful, in the absence of any material to establish that the violation is willful this Tribunal cannot find the respondents guilty for contempt to punish in terms of Section of 12 of the Contempt of Court Act. No doubt, the proceedings in contempt are quasi criminal in nature and the standard of proof is almost identical to the standard of proof in criminal cases. In Kanwar Singh Saini Vs. High Court of Delhi² the Apex Court held that contempt proceedings being quasi criminal in nature, the standard of proof requires in the same manner as in other criminal cases. The contemnor is entitled to the protection of all safe guards/ rights which are provided in criminal jurisdiction including the benefit of doubt. In (2011) 6 SCALE 220 (2012) 4 SCC 307

- 19 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 Mrityunjoy Das vs. Sayed Hasibur Rahman³, U. N. Bora vs. Assam Roller Flourmills⁴, Rama Narang Vs. Ramesh Narang⁵, Debarata Bandhopadhyay Vs. State of West Bengal⁶ the Apex Court reiterated the same principal.

The power of contempt is conferred on the courts and Tribunals only to uphold the dignity of courts and to see that the orders passed by the Courts and Tribunals shall not be disobeyed and to avoid substantial loss to the parties. If no such power is conferred on the courts and Tribunals, courts and tribunals will remain as a "paper tigers", therefore, the legislature thought it fit to provide claws and jaws to prevent abuse of process of the justice system. Thus, the courts and Tribunals are conferred power of contempt to punish the party who disobeyed the order of the Court or Tribunal.

While dealing with the application for the contempt of the court, the court cannot travel beyond the order. It cannot test the correctness or otherwise of the order or give additional directions or delete any directions. That could be exercising review jurisdiction while dealing with an application filed in contempt proceedings. The same would be indefensible, as held in *Prithawi Nadh Ram vs. State of Jharkhand*⁷. The Contempt jurisdiction is not conferred on the Subordinate Courts and it is only conferred on the Court of record and Tribunals, in view of Article 215 of the Constitution of India and (2001) 3 SCC 739 4 (2022) 1 SCC 101 (2009) 16 SCC 600 1969 SCR (1) 304 AIR 2004 SC 4277

- 20 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 Section 425 of Companies Act. According to it, the High Court shall be a Court of record and shall have all the powers of such a Court, including the power to punish for contempt of itself, at the same time this Tribunal is also competent to exercise such power in terms of Section 425 of Companies Act. The jurisdiction of contempt is independent jurisdiction of its original nature. Therefore, this Tribunal is competent to exercise such power to punish a person, who is guilty of contempt and this jurisdiction is enjoyed by this Tribunal, is only for the purpose of upholding the jurisdiction of the judicial system that exists. While exercising this power, the Tribunal must not react by the emotion, but must act judicially.

Contempt proceedings are intended to ensure compliance of the orders of the Court, Tribunals and strict adhering of rule of law.

Once, the essentials for initiation of contempt proceedings are satisfied, the Court shall initiate action, uninfluenced by the nature of direction in a pending lis before the Court vide judgment of Apex Court in *Priya Gupta and others vs. Additional Secretary, Ministry of Health and Family Welfare and others*⁸.

Contempt jurisdiction enjoyed by the Courts is only for the purpose of upholding the majesty of judicial system that exists. While exercising this power, the Courts must not be hyper sensitive or JT 2013 (1) SC 27, 2012 (12) SCALE 289

- 21 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 swung by emotions, but must act judicially (Vide: *Chairman, West Bengal Administrative Tribunal vs. SK. Monobbor Hossain*⁹).

Keeping in view of the limits of contempt jurisdiction and principles regarding standard of proof in contempt case, we would like to analyze the pleas of both parties.

In the instant case, the respondents not only gave an undertaking but also agreed to pay the amount as directed by this Tribunal by order dated 11.03.2019. It is also an admitted fact that the petitioner filed an I.A. No. 1285 of 2019 seeking extension of time for compliance of order of this Tribunal, admittedly the Interlocutory application was dismissed on 11.04.2019 holding that no case has been made out to extend the time for compliance of terms of settlement.

The respondents are aware about their obligation to comply with the terms and conditions, so also their obligation to obey the undertaking but did not comply with the order of this Court 11.03.2019 and did not obey the undertaking. However, the Respondents contended that as per Clause 3.3, the Respondent Nos. 1 & 2 placed the settlement agreement before the Board of Directors of OREN to take on record, the settlement agreement and ratify the terms, on 13.03.2019, also on 15.04.2019 but the settlement agreement was not taken on record, not ratified the terms therein. Copy of resolutions dated 13.03.2019 and 15.04.2019 are placed on (2012) 3 SCALE 534

- 22 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 record. As per resolution dated 13.03.2019 the Board of Directors deferred the issue of taking up the settlement agreement on record and ratify the same but not refused. However, in the meeting held on 15th April, 2019 meeting the Board of Directors did not agree to take on the record, the settlement agreement but resolved as follows:

"RESOLVED THAT the Board of Directors hereby rejects the Settlement Agreement dated 8th March 2019, entered into with M/s Sojitz at New Delhi and hereby authorize the Chairman Mr. Rizwan Ahmad to invoke the Arbitration clause in the agreement and commence Arbitration proceedings with SOJITZ to resolve the issue."

It is evident from the resolution, Respondent No. 1 is the Managing Director and Respondent No. 4 is another Director. Both have signed on the settlement agreement but did not keep up the undertaking. The resolution placed on record does not bare the signatures of the Board of Directors attended the meeting. Therefore, no value can be attached to such rejection as they are stopped to raise such contention being the Managing Director and Director of 3rd Respondent. Hence, the said contention is rejected.

If really, the Respondent Nos. 1 & 2 placed the settlement agreement before the Board of Directors in the meeting dated 13.03.2019 the respondents ought to have mentioned the said fact in I.A. No.1285/2019, the copy of the affidavit and petition in I.A. No.1285/2019 are not placed on record to substantiate such contention, hence the excuse pleaded by the respondent for non-

- 23 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 compliance of order of this Tribunal dated 11.03.2019 is hereby rejected.

It is contended by the Applicant that the order passed by this Tribunal dated 11.03.2019 is violated by the respondents consciously though the respondents are aware about the consequences that flow from such violation and it can be described as culpable/willful disobedience of order of the Court. Filing of I.A. No.1285/2019, inviting an order from the Court for extension of time to comply the directions is strong ground to conclude that the respondents violated the order willfully. Apart from the above facts, Respondent Nos. 1 & 2 filed affidavits before this Tribunal on 02.10.2019 during the pendency of the contempt case, stating that the Respondent Nos. 1 & 2 paid Rupees One crore to the applicant, while requesting to grant some more time to make further payment. Further time, till 31.12.2019, as they intend to pay full amount in terms of the order, while tendering unconditional apology, till date no amount is paid. The conduct of the Respondent Nos. 1 & 2 during the pendency of contempt case prior to initiation of contempt case is sufficient to conclude that the violation of order is willful and deliberate.

The Learned Counsel for the Applicant Sri Arun Kathpalia contended that disobedience and breach of the orders by the contemnors is a matter of serious concern. In such case, the Court must deal with the contemnors sternly. It is settled law that while

- 24 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 considering the question of disobedience of an order, what must be regarded is the letter and the spirit of the order, together with the bonafides or genuine belief of the alleged contemnor as to such order. The same has been enunciated by Hon ble Apex Court in the matter of Lakshman Prasad Agarwal V. Syed Mohammad Kareem¹⁰, In instant case the contemnors though agreed to pay Rs. 24,27,64,004/-, invited several orders including main order dated 11.03.2019 and orders dated 08.04.2019, 08.05.2019, 07.06.2019, 08.07.2019 during pendency of contempt, agreeing to pay the amount in compliance of the undertaking and directions issued by this court dated 11.03.2019 and on subsequent dates. However, the contemnors invented a different plea to escape from their liability to comply the ordered which are not accepted as discussed in earlier paragraphs. One of the contentions of the respondents is that, they are are unable to pay the debt and such inability cannot be described as wilful disobedience. He further contended that mere inability to comply with the order, because of financial condition should not be a reason for punishing the respondents, in support of this contention the counsel relied on the judgment of the Bombay High Court in Mrs. Pushpalata & Ors. Vs. Bhimrao Dinkar Fadtare & Ors¹¹, Such plea is not available to the respondents for the reason that they were unable to pay debt due to the applicant and later entered into the comprise agreed, to pay Rs.24,27,64,004/- but failed to pay the same, such contention is 2009 (6) SCALE 413 C.P.No.97 of 2006 in W.P.No.767 of 2000 dated 15.09.2009

- 25 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 nothing but traversality of facts to circumvent law. Hence, the inability of the respondents is not an excuse. Therefore, such conduct is explicitly pointing out the malafides of the contemnors.

The Respondents Nos. 1 & 2 also tendered unconditional apology while agreeing to comply with the directions issued by this Tribunal 11.03.2019 by filing two separate notarised affidavits as stated above. But tendering an apology is neither a weapon of defence to purge the guilty of their offence nor it is intended to operate as universal panacea as held in Patel Ranjikanth Dhulabhai and Anr. Vs. Patel Chandrakant Dhulabhai and Others¹². In view of the principles laid down in the above judgment, the unconditional apology tendered by the respondents is not an excuse for non-compliance of the order dated 11.03.2019, moreover, the respondents themselves sought time to pay the amount in full to the applicant but not paid. As such, non-payment of the amount even after granting three adjournments is another strong circumstance to reject the defence of Respondent Nos. 1 & 2. On the other hand, it appears that the respondents are resorting to different methods to avoid payment to the applicant, total conduct of respondents/ contemnors is blame worthy, therefore, they are not entitled to raise any plea to justify their acts, when they repeatedly flouted the order of this Tribunal many a times.

As there is no dispute about the jurisdiction of this Tribunal the judgements relied on by the applicants counsel Sri Arun Kathpalia 2008 (10) SCALE 349

- 26 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 needs no further consideration, as such, those judgments relating to jurisdiction are not discussed.

The Learned Senior Counsel for the Respondents Nos. 1 & 2 Sh. Viraj Datar contended that in view of the facts narrated in the reply, the respondents did not disobey the order wilfully. In the absence of a finding as to the intentional or wilful violation, holding the respondents/ contemnors guilty for contempt is illegal. In support of his contentions, he relied on judgment of the Apex Court in Ram Kishan vs. Tarun Bajaj¹³, wherein it was held as follows:

"10. Thus, in order to punish a contemnor, it has to be established that disobedience of the order is „wilful . The word „wilful introduces a mental element and hence, requires looking into the mind of person/ contemnor by gauging his actions, which is an indication of one s state of mind. „Wilful means knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bonafide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a "bad purpose or without justifiable excuse or stubbornly, obstinately or perversely". Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated

action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. "Committal or sequestration will not be ordered unless involves a degree of default or misconduct."

In another judgment of Apex court in *Bordeuri Samaj of Sri Sri Maa Kamakhya Vs. Riju Prasad Sarma & Ors.* has held that:

"9.... The contempt jurisdiction is always discretionary which should be exercised sparingly and with circumspection....

(2014) 16 SCC 204

- 27 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 However, it is always open for the petitioner to adopt appropriate proceedings for recovery of money."

In *Mrs. Pushpalata & Ors. Vs. Bhimrao Dinkar Fadtare & Ors.* (referred supra) observed as under:

"....23. The main argument advanced on behalf of the Respondents is that merely because they are unable to comply with the orders because of the financial condition of the trust or the sugar factory that should not be a reason for punishing the Respondents for contempt. It is not wilful disobedience on their part, but it is their inability to comply with the orders of the court because of financial difficulties and inability to raise funds.....After going through the same I am satisfied that it is not a case of wilful disobedience, but financial difficulties is the main reason for non-compliance of the order of the court...."

The principles laid down in above judgment is not in quarrel, but the conduct of the respondent directly established their intention in disobeying the order of this Tribunal deliberately, the learned counsel also relied on the judgment of Apex Court in *Niaz Mohammad & Ors. vs State of Haryana & Ors*¹⁴, the Apex Court observed that:

"9..... The Court while considering the issue as to whether the alleged contemnor should be punished for not having complied and carried out the direction of the Court, has to take into consideration all facts and circumstances of a particular case. That is why the framers of the Act while defining civil contempt, have said that it must be wilful disobedience to any judgment, decree, direction, order, writ or other process of a court. Before a contemnor is punished for non compliance of the direction of a court the court must not only be satisfied about the disobedience of any judgment, decree, direction or [1994] 6 SCC 332

- 28 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 writ but should also be satisfied that such disobedience was wilful and intentional.... But while examining the grievance of the person who has invoked the jurisdiction of the Court to initiate the proceeding for contempt for disobedience of its order, before any such contemnor is held guilty and punished, the Court has to record a finding that such disobedience was wilful and intentional. If from the circumstances of a particular case, brought to the notice of the court, the Court is satisfied that although there has been a disobedience but such disobedience is the result of some compelling circumstances which it was not possible for the contemnor to comply with the order, the Court may not punish the alleged contemnor."

The law laid down in the above judgement is not in controversy. However, in the facts of the present case the conduct of the respondents/ contemnors directly established their intentional and wilful disobedience of the order of this Tribunal dated 11.03.2019 and subsequent orders referred in the earlier paras. Hence, applying the principles laid down by the Apex Court, the respondents cannot be exonerated from the contempt proceedings.

One of the contention raised by the respondents is that the relationship between the applicant and respondents is business partner in view of business Strategic Alliance and there was no operational debt but the said contention need not be adverted, to record any finding as to subsisting operational debt, in view of the principle laid down by the Apex Court in judgment in Prithawi Nadh Ram vs. State of Jharkhand (referred supra).

- 29 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 The other contention raised by the Counsel for the respondents is that they invoked arbitration clause and filed an application under Section 11 of Arbitration and Conciliation Act before the Delhi High Court. Though, Clause 11.2 permits invocation of arbitration clause in the settlement agreement in case of breach, that itself is not an excuse to hold that the Respondent Nos. 1 & 2, not liable for contempt for violation of the order dated 11.03.2019 passed by this Tribunal, as it made clear that the applicant is at liberty to initiate contempt proceedings in case the order is violated.

The breach of undertaking amounts to contempt as defined under Section 2 (b) of Contempt of Court Act but a remedy is provided in the Clause 11.2 of Settlement Agreement to invoke arbitration clause in case of breach of undertaking. As the respondents invoked arbitration clause and filed application under Section 11 of Arbitration and Conciliation Act before the High Court of Delhi, since, such remedy is available as per the term of the settlement agreement, it is difficult to hold that the Respondent Nos. 1 & 2/ Contemnors committed wilful breach of settlement agreement. Accordingly, we find that Respondent Nos. 1 & 2 did not commit any willful breach of Settlement Agreement dated 08.03.2019.

Considering totality of the facts and circumstances of the case, we hold that the respondents 1 & 2 contemnors wilfully disobeyed the

- 30 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 order of this Tribunal dated 11.03.2019. Since the excuse pleaded by the respondents is not bonafide.

In view of our foregoing discussion, we found that the Respondent Nos. 1 & 2/ Contemnors are guilty for wilful disobedience of order dated 11.03.2019, while holding that the Respondent Nos. 1 & 2/ Contemnors not guilty for wilful breach of settlement agreement dated 08.11.2019.

Coming to the sentence to be imposed under Section 12 of Contempt of Courts Act, the maximum sentence is simple imprisonment for a term which may extend to six months or with fine which may extend to Two Thousand rupees or with both. However, the proviso to Section 12 obligates the Court or Tribunal to consider the apology tendered by the Petitioner while considering the quantum of punishment. We have already discussed the reasons for rejecting the unconditional apology tendered by the Respondent Nos. 1 & 2. On the other hand, they did not comply with the direction of this Tribunal as agreed in the affidavit filed on 23.09.2019, 03.10.2019 before this Tribunal, during the pendency of this contempt case also.

The factual matrix not in dispute has already been narrated in the earlier paragraphs and recorded the findings that the Respondent Nos. 1 & 2 disobeyed the order passed by this Tribunal dated 11.03.2019 based on the compromise, but the respondents did not discharge their obligations under the settlement agreement. Therefore, in view of clause 10 of the order dated

- 31 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 11.03.2019, granted liberty to file a petition for contempt for flouting the directions of this Appellate Tribunal, and it is open to the Respondents to revive the prayer for any proceeding under CIRP and request this Appellate Tribunal to recall and dismiss the Appeal for non-compliance, as the Respondent Nos. 1 & 2 failed to comply the order compromise is deemed to be inoperative the order of this Tribunal dated 11.03.2019 is liable to be recall, consequently, the Petitioner is entitled to revive with Corporate Insolvency Resolution Process.

In view of foregoing discussion, we find that it is appropriate to declare that the order dated 11.03.2019 passed by this Tribunal in CA (AT) (Insolvency) No. 170 of 2019 is inoperative, revived Corporate Insolvency Resolution Process, as requested by this Petitioner in terms of Clause 10 of the Order dated 11.03.2019.

In the result, contempt case is allowed-in-part, finding the Respondent Nos. 1 & 2/contemnors guilty for contempt of Court for disobeying the order of this Tribunal dated 11.03.2019 wilfully. Hence, sentenced the Respondent Nos. 1 & 2/ Contemnors imposing fine of Rs. 2,000/- (Two

Thousands only). The Respondent Nos. 1 & 2/ Contemnors are directed to pay fine of Rs. 2,000/- within two days from the date of this order to the credit of Pay and Accounts, Officer, Ministry of Corporate Affairs, in event of failure to pay fine they are directed to appear before the Registry at 4.00 P.M. on 3rd August, 2022. On their appearance, the Registrar is directed to commit them to civil prison on payment of necessary subsistence allowances.

- 32 -

Contempt Case (AT) No. 14 of 2019 in Company Appeal (AT) (Ins.) No. 170 of 2019 In view of the above, the Petition is allowed to recall the order dated 11.03.2019 passed by this Tribunal in CA (AT) (Insolvency) No. 170 of 2019 and revived Corporate Insolvency Resolution Process.

[Justice Ashok Bhushan] Chairperson [Justice M. Satyanarayana Murthy] Member (Judicial)
[Barun Mitra] Member (Technical) NEW DELHI SA