

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH,
KOLKATA

CORAM: Shri Vijai Pratap Singh, Hon'ble Member (J)

CA (IB) No. 322/KB/2017

In the matter of:

Insolvency and Bankruptcy Code, 2016

And

In the matter of:

An application under section 9 and other applicable provisions
of the Insolvency and Bankruptcy Code, 2016

And

In the matter of

Aryan Mining & Trading Corporation Private Limited, company
Incorporated under the provisions of the Companies Act, 1956
carrying out business at P-1, Hide Lane, 8th Floor, Aryan House,
Kolkata-700073:

Operational Creditor

Ganesh Sponge Private Limited, a company incorporated
under the provisions of Companies Act, 1956 and having its
Registered office at B-40, Shaheed Nagar, 1st Floor, Bhubaneswar-
751007, Odisha.

Corporate Debtor.

Counsels on Record:

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|-------------------------------------|---|---------------------|
| 1. Mr. Anuj Singh, Sr. Advocate |] | |
| 2. Ms. Urmila Chakraborty, Advocate |] | For the Petitioner |
| 3. Mr. Ritoban Sarkar, Advocate |] | |
| |] | |
| 1. Mr. D.N. Sharma, Advocate |] | For the Respondent. |
| 2. Mr. Anunoy Basu, Advocate |] | |

Date of pronouncing the order: 3rd day of August 2017

The company application has been filed jointly by M/s Ganesh Sponge Private Limited (Corporate Debtor) and Aryan Mining & Trading (Operational Creditor) with the prayer that original application filed by the Operational Creditor, CP(IB) No. 341/KB/2017, may be allowed to be withdrawn in terms of settlement dated 21st July, 2017. Applicants have stated in the petition that the operational creditor / applicant No. 2 had filed an application under section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter will be referred as IBC Code) read with 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter will be referred to as Rules 2016) to initiate Corporate Insolvency Resolution Process against the Corporate Debtor / applicant No.1. The said application under section 9 of the Insolvency and Bankruptcy Code was admitted by an order, dated 19th July, 2017, and process for declaration of moratorium and public announcement, as stated in section 13 and 15 of Insolvency and Bankruptcy Code, 2016 has been ordered. During the course of the proceedings, it was mutually decided by the parties to withdraw the application subject to the fulfilment of the terms and conditions in the Terms of Settlement, which is annexed as Annexure 'B' with the application.

In the circumstances, the petitioner further stated that under section 13 of the Insolvency and Bankruptcy Code no public announcement has been made and no steps have been taken by the Interim Resolution Professional in terms of the order, dated 19th July, 2017. On the basis of Terms of Settlement, both Corporate Debtor and Operational Creditor, have filed a joint application for withdrawing the petition no. CP (IB) 341/KB/2017 in terms of settlement arrived at between the parties.

Further, the Ld. Counsel for the parties made a request that till date, after admission of the petition the Interim Resolution Professional has not proceeded further and no advertisement and public announcement as per Rule 13 & 15 of the Insolvency and Bankruptcy Code, 2016 has been made so far, therefore, permission may be given for withdrawing the petition.

An Insolvency Resolution Professional, Mr. Vijay Murmuria has filed an affidavit, wherein he has stated that on 21st July, 2017 a letter was given to him whereby he was informed that the parties have settled the disputes amicably and a joint application for withdrawing the petition under section 9 of Insolvency and Bankruptcy is being given by the parties. It is also mentioned in the affidavit that he was served with a certified copy of an Order dated 22nd July, 2017 passed by Learned Civil Judge, (Senior Division), Bhubaneswar in IA No. 1 of 2017 arising out of C.S. No. 1067 of 2017 by which he has been specifically restrained from making any public announcement of Corporate Resolution process against the Corporate Debtor till 5th August, 2017. Operation Creditor has attached a copy of the order passed by Ld. Civil Judge (Senior Division), Bhubaneswar, District-Khurdah in IA 1 of 2017 arising out of civil suit 1067 of 2017. It appears from the order of Ld. Civil Judge (Senior Division) that the court has passed an order that:

“Examined the contents of the plaint, interlocutory application and documents filed, such as the photocopies of deed of Settlement dated 21st July, 2017 and 3 nos. of post-dated cheque Nos.431333 dated 20.08.2017, 431330 Dt.05.08.2017 and 431331 DT. 15.08.2017 by the petitioners.

Hearing the other side, is the rule of law before granting injunction. Taking note of an averment made in the plaint as well as in the interim application, it reveals that this is a suit for permanent injunction. Considering the pleadings of the petitioners, documents and in view of its urgency, I deem it proper to restrain the O.P. from making any public announcement of corporate insolvency Resolution process against the petitioner No. 1 either by himself or by any of his authorised persons in any manner till 5th August, 2017 and put up on the aforesaid date for appearance of O.P., filing of show-cause by him and hearing. The petitioners are directed to comply the mandatory provision of order 39 Rule 3 of CPC forthwith”;

On the basis of the order passed by the Ld. Civil Judge (Senior Division), the Insolvency Resolution Profession had not proceeded with the order of the Adjudication Authority passed under the Insolvency & Bankruptcy Code, 2016.

It is to be made clear that section 231 of the Insolvency and Bankruptcy Code, 2016 clearly provides that no civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority under this Code.

On the above basis, it is clear that Ld. Civil Judge (Senior Division) was having no jurisdiction to grant stay against the order passed by the Adjudicating Authority under Insolvency and Bankruptcy Code. The order passed by Ld. Civil Judge (Senior Division) is without any jurisdiction which is a nullity in the eye of Law. It is pertinent to mention that section 238 of Insolvency and Bankruptcy Code, 2016 provides that the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

On the above basis, it is clear that provision of Insolvency and Bankruptcy Code, 2016 has overriding effects over other laws and civil court jurisdictions have been barred by the statutory provisions of section 231 of Insolvency and Bankruptcy Code, 2016. In the circumstances, the order passed by Ld. Civil Judge (Senior Division) is nullity in law and cannot be given effect.

Regarding the prayer for permission for withdrawing the petition in terms of settlement, it is to be clarified with rule 8 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which provides that the Adjudicating Authority may permit withdrawal of the petition made under Rules 4, 6, or 7, as the case may, on a request made by the applicant before admission.

The above rule clearly permits withdrawal of application under Insolvency and Bankruptcy Code only before admission. In this case, it is undisputed that the petition has been admitted and order has been passed for initiating Corporate Insolvency Resolution Process. Therefore, in compliance of Rule 8 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, permission cannot be given to withdraw the petition.

It is pertinent to mention that Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 95 of 2017 in the matter of Lokhandwala Kataria Construction Pvt. Ltd.-Vs- Nisus Finance and Investment Manager has dealt with the similar matter and has upheld that:

"At this stage, we may notice and refer Rule 8 of I&B (Application to Adjudicating Authority) Rules, 2016, which reads as follows :

The Adjudicating Authority may permit withdrawal of the application made under Rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission".

Thus, before admission of an application under section 7, it is open to the Financial Creditor to withdraw the application but once it is admitted, it cannot be withdrawn and is required to follow the procedures laid down under Sections 13,14,15,16 and 17 of I&B Code, 2016. Even the Financial Creditor cannot be allowed to withdraw the application once admitted and matter can not be closed till claim of all the creditors are satisfied by the corporate debtor. Mere admission without subsequent step of advertisement having carried out, would not amount to refusal of claim of other creditors. Such submission as made by learned counsel for the appellant cannot be accepted in view of the provisions of the Act."

On the basis of law laid down in the above mentioned case by Hon'ble NCLAT, it is clear that after admission of the petition under Insolvency and Bankruptcy Code, 2016 proceedings cannot be closed till claim of all the creditors are satisfied by the corporate debtors and Hon'ble NCLAT has further laid that

mere admission without subsequent steps of advertisement having carried out will not be a ground for permitting the withdrawal against the statutory provisions.

It is also important to mention that the order passed by Hon'ble NCLAT was challenged before the Hon'ble Supreme Court and in the same case the Hon'ble Supreme Court exercised powers under Article 142 of the Constitution to record consent terms between the parties post admission of the application under Insolvency and Bankruptcy Code, 2016 and granted permission to withdraw the petition.

Therefore, it is clear that Hon'ble Supreme Court has not relaxed the statutory provision of Rule 8 of Insolvency and Bankruptcy (Application to Adjudication Authority) Rule, 2016.

On the above basis, it is clear that in the present case it is undisputed that the case has been admitted and the parties entered into settlement after admission of the petition and rule 8 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 prohibits withdrawal after admission, therefore application deserves to be dismissed.

ORDER

C.A. (IB) No. 322/KB/2017 for permission to withdraw Company Petition 341/ KB/ 2017 is dismissed. Interim Resolution Professional is directed for immediate compliance of order dated 19.07.2017 passed in CP (IB) No. 341/KB/2017, ignoring the order passed by the Civil Judge (Senior Division), Bhubaneswar, which is without jurisdiction and against the statutory provision of sections 231 and 238 of Insolvency and Bankruptcy Code, 2016 and submit the progress report within 10 (ten) days from today.


(Vijai Pratap Singh)
Member (J)

Signed on this 3rd day of August, 2017