

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Ins) 872 of 2020

[Arising out of Impugned Order dated 13th February, 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata, in Company Petition (IB) No. 1499/KB/2019]

IN THE MATTER OF:

**Maldar Barrels Pvt. Ltd.
C-29, MIDC, Industrial Area,
Taioja, Panvvel,
Dist. Raigad, Pin Code-410208.
Maharashtra**

... Appellant

Versus

**Pearson Drums & Barrels Pvt. Ltd.
P-24, Kasba Industrial Estate, Phase-I,
Kolkata-700107.**

...Respondent

Present

For Appellant: Mr. Ramji Srinivasan, Sr. Advocate with Ms. Pratiksha Sharma, Mr. Kunal Kanungo and Mr. Mayur Khandeparkar, Advocates.

For Respondent: Mr. Jishnu Saha, Sr. Advocate with Mr. Lokenath Chatterjee, Mr. Jaydeb Ghorai and Mr. Uddyam Mukherjee, Advocates.

JUDGMENT

(Dated: 17.03.2021)

{Per: Dr. Alok Srivastava, Member (T) }

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The present appeal has been filed by M/s. Maldar Barrels Private Limited, the Appellant, under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called the IBC), aggrieved by the Order dated 13.2.2020 (hereinafter called the 'Impugned Order') passed by the National Company Law Tribunal, Kolkata (hereinafter called the 'Adjudicating Authority') in C.P. (IB) No. 1499/KB/2019. The Corporate Debtor M/s. Pearson Drums & Barrels Pvt. Ltd. is the Respondent in this appeal.

2. The Appellant has filed the appeal on the ground that the Adjudicating Authority has gone beyond the mandate of Section 9 of the IBC in passing the Impugned Order. He has further claimed that unpaid operational debt has been fully paid off in accordance with the full and final settlement and no invoice or notice for payment of any debt was given by the Operational Creditor thereafter, before filing the application under Section 9 of IBC.

3. The facts of the case as presented and argued by both the parties are that the Respondent-Corporate Debtor and the Appellant-Operational Creditor were engaged in business transactions in which the Corporate Debtor failed to pay an amount of Rs.8,82,11,723/- to the Operational Creditor which was

due and payable. Consequently, the Operational Creditor filed Company Petition No. CP(IB) No.513/KB/2017 under Section 9 of the IBC for an operational debt of Rs.8,82,11,723/- as on 9.8.2017, which includes principal debt of Rs.4,75,28,807/- and interest @ 21% per annum. The Adjudicating Authority admitted this Company Petition thereby initiating Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

4. Subsequently, the Corporate Debtor approached the Operational Creditor with a Settlement Agreement (hereinafter called the "Settlement") under which the debt owed by the Corporate Debtor of Rs.8,82,11,723/- to the Operational Creditor was fully and finally settled at a total amount of Rs.3.70 crores subject to compliance of certain conditions included in Clauses 8 to 12 of the Settlement. This Settlement was accepted by both the parties and entered into on 11.01.2018. As the case had by then escalated upto the Hon'ble Supreme Court in Civil Appeal No.778 of 2018, the Hon'ble Supreme Court took a copy of the Settlement dated 11.01.2018 on record by using its powers under Article 142 of the Constitution of India and set aside the order passed by the Adjudicating Authority. Under the Settlement, the Corporate Debtor undertook to pay in thirty seven instalments, each of an

amount of Rs.10,00,000/-(Rupees Ten Lakh Only), on or before 21st day of every month for the next 37 months starting from January 2018 (the first instalment to be paid on or before 15 January 2018) as full and final settlement of the operational debt.

5. The Appellant has claimed that the timeline of payment of instalments that was agreed by both the parties was the “essence of the contract”, as mentioned in Clause 8 of the Settlement with further stipulation that the Corporate Debtor would not seek any extension in these timelines. It has been further claimed by the Operational Creditor that the Corporate Debtor failed to make many payments on their due dates, and therefore committed default and in accordance with Clause 9 of the Settlement all the concessions granted to the Corporate Debtor stood withdrawn and total amount of Rs. 8,82,11,723/- became payable to the Operational Creditor. It has been explained by the Appellant that the Respondent committed multiple defaults between January, 2018 to August, 2018 by failing to adhere to the payment schedule in payment of various instalments. The matter of default due to delay in payments was communicated to the Corporate Debtor vide letter dated 25.8.2018 wherein it was also mentioned that all concessions stood rescinded. Thereafter, a legal notice dated

10.5.2019 was sent to the Corporate Debtor by the Operational Creditor, which was followed by a demand notice dated 27.06.2019 under IBC for payment of Operational Debt. Subsequently, the Operational Creditor filed a fresh application under Section 9 of the IBC seeking initiation of CIRP against the Operational Debtor for non-payment of total due of Rs.9,41,85,391/- in accordance with the terms of the Settlement.

6. The second application under Section 9 of the IBC was dismissed by the Adjudicating Authority by holding that it was not the forum where parties could seek implementation of the Settlement Agreement and that too after the Appellant had accepted a major portion of the amount due. The Adjudicating Authority also held that the amount prayed for by Operational Creditor as operational debt would lead to unlawful enrichment in case the application is accepted and that the Operational Creditor could take resort to other legal remedies available for enforcement of the Settlement Agreement if he so chooses.

7. The Respondent filed reply upon which a rejoinder was filed by the Appellant. Written submissions were filed by both the parties and in compliance of the order dated 19.1.2021 of this Tribunal, the respondent also placed on record through affidavit a

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Statement of Account incorporating the details of all the payments made by the Respondent to Appellant. The Appellant also filed a chart showing the dates of alleged default of various payments and periods of delay thereof. Detailed arguments of the Learned Counsels of both the parties were also heard by us.

8. The Learned Counsel of the Appellant has contended that the Settlement Agreement dated 11.1.2018 was taken on record by the Hon'ble Supreme Court in SLP(C) No.1502 of 2018 (Civil Appeal No. 778 of 2018) and hence it is binding on both the parties. He has further stated that while the total dues payable by the Respondent was Rs. 8,82,11,723/- as on 9.8.2017, he had agreed to receive as "reduced dues" a sum of Rs.3,70,00,000/- as full and final settlement, at the request of the Respondent and by way of concession. Clause 6 of the Settlement (page 104 of Appeal) includes a table, which gives details of the instalments of payment alongwith their due dates. He has further argued that according to Clause 8 of the settlement, the timelines mentioned in Clause 6 is the "essence" of the Settlement Agreement, wherein the Corporate Debtor has agreed not to seek any extension in timelines from the Operational Creditor for payment. Clause 9 of the Settlement Agreement states that in the event the Corporate Debtor fails to

make payment of any instalment on its due date all the aforesaid concession agreed and granted to the Corporate Debtor shall automatically and *ipso facto* be withdrawn and extinguished. Further Clause 10 of the Settlement Agreement states that in the event of any default by the Corporate Debtor in making any payment of instalment on due date to the Operational Creditor, the Corporate Debtor shall pay interest at 21% per annum on the Total Due (minus the monies paid) till such time the entire dues are not cleared and paid to the Operational Creditor.

9. Therefore, the Ld. Counsel for Appellant has argued, in accordance with Clause 11 of the Settlement, the Appellant is at liberty to file new proceedings against the Corporate Debtor or to revive the aforesaid application. He has further claimed that Section 55 of the Contract Act, 1872 is not applicable in the present case even though the Appellant had not raised the issue of default when the first delay in payment took place, since Clause 12 of the Settlement provides that “No failure on the part of the appellant to exercise and any delay in exercising, any right remedy in respect of any provision of this Settlement Agreement shall operate or be termed as waiver of such right or remedy”, shall work in his favor. He has also claimed that since no violation or

novation of any of the terms of the Settlement Agreement has taken place, which according to clause 13 of the Settlement Agreement had to be made in writing, Section 62 of the Contract Act shall also not be applicable in the present case. He has cited the judgments of the Hon'ble Supreme Court of India in the case of **Prithvichand Sablok v/s. S.Y. Shinde 1993 3 271 (paras 6 and 7)** and **Sunil Mehra v. Rajinder S. Gulati (2008) 1 Bom CR 359 (paras 8, 11 and 13)** where, inter alia, a similar default clause has been held to be valid and enforceable and not to be in the nature of a penalty.

10. The Learned Counsel for the Respondent, in support of his case, has claimed that some post dated cheques (PDCs) were returned to the Respondent by the Appellant on mutual agreement, and when it appeared that the Appellant was attempting to take wrongful advantage of the terms of the Settlement Agreement even while accepting payments of some instalments, the Respondent started making payments directly into the bank account of the Appellant through electronic transfer. Therefore, he has argued, there is no question of default and violation of the terms of the Settlement Agreement. He has further argued that the first notice of demand alleging that default of the Respondent was dated May 10, 2019, which was given after the Appellant had received and

accepted payment of instalments till April, 2019. In such a situation, the Respondent's Ld. Counsel has urged, alleged delays in payment of instalments for the months of January, 2018 to July, 2018 could not be taken as default, particularly in view of the provisions of Section 55 of the Indian Contract Act, 1872. He has cited judgments in the cases of **General Manager, Northern Railway and Anr. Vs. Sarvesh Chopra** and **State of Andhra Pradesh vs. M/s. Associated Engineering Enterprises, Hyderabad** to claim that once the Respondent continued to accept payments without retaining any rights under the terms of settlement, no right was reserved by the Appellant in that regard. He has also cited the judgment of Hon'ble Supreme Court of India in **B.L. Sreedharan & Ors. Vs. K.M. Munireddy (Dead) and ors.** in support of his argument that both the parties had agreed to substitute a new contract or alter it and hence the original contract need not be performed. He has, with reference to Section 62 of the Indian Contract Act, 1872, claimed that through their conduct of accepting payments on different dates than what was specified in the Settlement, both the parties had agreed to substitute a new contract or alter it, and hence the Corporate Debtor was not obliged to perform the original contract. The Respondent has cited the decision of the Hon'ble Supreme Court in **M/s. Hind Construction**

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Contractor vs State of Maharashtra (AIR 1979 SC 720), wherein it has been held that if the agreement contemplates imposition of penalty for delay in payment, a stipulation about time cannot be the essence of the contract. He has further, claimed that the Respondent has paid the entire sum of Rs. 3.70 crores within the agreed time and therefore, there has been no delay in payment on the part of the Respondent. He has also claimed that the Appellant has not alleged breach of the terms of the Settlement either in the application filed before NCLT, Kolkata Bench or in the appeal/rejoinder before this Hon'ble Tribunal. He has also pointed to the gap in the Chart submitted by the Appellant showing default in payments wherein the column relating to the date of cheque deposit has been left blank, and since the PDCs were deposited in the bank for realization after delay, the late/delayed payments cannot be attributed to the Respondent-Corporate Debtor.

11. To find out whether delay in payment of instalments constituted default under the terms of the Settlement Agreement leading to triggering of the revival of the old application or filing of a fresh application under Section 9 of the IBC, we turn our attention to the issue whether such a triggering should indeed have taken place. Focusing on the issue whether time is of essence in the

Settlement Agreement, we peruse Clause 6 of the Settlement Agreement which provides the timeline according to which the Respondent was to make payments in 37 instalments totaling Rs.3.70 crores as full and final settlement, starting from January 15, 2018 and thereafter on the 21st of each month from February, 2018 till January, 2021. It is clear from the chart submitted by the Appellant showing the dates on which various instalments were due under the Settlement Agreement and the dates and amount of credit received along with the number of days of delay in receiving the credit (Diary No. 25278 dated 9.2.2021) that there were delays in receipt of amounts of various instalments starting from January, 2018 till July, 2019 and through electronic means thereafter in the bank account of the Appellant. Quite obviously there have been delays in accrual of amounts in bank account of Appellant from January, 2018 to July, 2018, where after the post dated cheques were returned and payments were effected from August, 2018 till January, 2019 through RTGS and from February, 2019 through NEFT. These delays range from zero day to 22 days. It is also seen that payments were made for each instalment for 5 months starting from February, 2018 to May, 2018 and July, 2018 in small tranches, all totaling upto Rs. 10 lakhs for each month.

Interestingly the column showing the dates of depositing of cheques in the bank has been left blank.

12. To get clarification on the dates on which the cheques were presented in the bank for realization we look at the Affidavit submitted by the Respondent with Certificate of Confirmation of Payments from its bank, the State Bank of India (Diary No. 25161 dated 3.2.2021). The Certificate for confirmation of payment from State Bank of India, SME NS Road Branch (15197) 9, Brabourne Road, Kolkata-700001 dated 19.1.2021 is for payments made to Maldar Barrels Pvt. Ltd. totaling Rs.3.70 crores. An advance copy of this Affidavit was directed to be provided to the Applicant by this Tribunal. Additionally, Annexure A-6 (attached at page No.113 of the Appeal paper book) is also perused by us. While the date of deposit of cheques is altogether missing in the Default Date Chart (submitted vide Dy. No.25278 dated 9.2.2021) the Annex A-6 on page 113 of appeal shows that the date of deposition of cheques was in many cases much after the stipulated date of 21st of each month specified in the Settlement Agreement. Since the cheques were presented after 21st of the month in the bank the realization of the related amounts was also delayed. These delays were due to the Appellant and the Corporate Debtor can't be held responsible.

Moreover the Certificate of Confirmation of Payments from the State Bank of India also shows quite clearly that a total amount of Rupees 3.70 crores has been paid into the account of the Operational Creditor by January 2021, a statement that has not been contested by the Corporate Debtor.

13. All this gives us sufficient reason to accept the contention of the Respondent that time was not of essence in the Settlement Agreement. Hence any consequence upon default due to delay in payments cannot fall on the Respondent. From the observation of facts presented above, we come to this inference that a fresh application under Section 9 of IBC cannot be triggered in accordance with Clause 11 of the Settlement Agreement.

14. We find that the reliance placed by the Respondent on the judgments in the cases of **General Manager, Northern Railway and Anr. Vs. Sarvesh Chopra (Civil Appeal 1791 of 2002)** and **State of Andhra Pradesh vs. M/s. Associated Engineering Enterprises, Hyderabad (AIR 1990 AP 294)** support the contention that once the Respondent accepts payment without retaining any right under the terms of settlement and without any demur, time does not remain to be an essence in the Settlement Agreement.

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15. Since the Appellant accepted delayed payments of certain instalments without raising a demur or objection, his conduct led the Respondent to believe that some delay in payment was acceptable to the Appellant which would prima facie imply that time was not of essence in the Settlement Agreement. This position is supported in the ratio of the judgment in **B.L. Sreedharan & Ors. Vs. K.M. Munireddy (Dead) and ors.** In **Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills AIR 1958 SC 512**, the Hon'ble Apex Court has held that the promisee cannot, by unilateral act, extend the time of performance of his own accord and for his own benefit and that the consent of the promisor is necessary. It has also been held in this judgment, that the act of extension of time for performance has to be proved by the oral evidence or evidence of contact.

16. The Hon'ble Apex Court's judgment in **Hind Construction Contractors vs. State of Maharashtra (AIR 1979 SC 720)** does point to a similar situation as in the instant case, wherein even though the construction work was to be completed within 12 months from commencement, time did not remain of essence because -

- (i) There was power to grant an extension of time on reasonable grounds by the Respondent on an application by the Appellant; and
- (ii) There was a provision to recover penalty/compensation from the Appellant at the specified rates during the time the work remains unfinished.

The ratio in this judgment also favors the cause of the Respondent as Clause 10 of the Settlement Agreement provides that in the event of any default by the Corporate Debtor in failing to make payment of any instalment on its due date to the Operational Creditor, the Corporate Debtor agrees and undertakes to pay interest at 21% per annum on the Total Due (minus the monies paid) till such time the entire dues of the Operational Creditor is not cleared and paid to the satisfaction of the Operational Creditor.

17. In the case of **Prithvichand Sablok v/s. S.Y. Shinde 1993 3 271 (paras 6 and 7)** and **Sunil Mehra v. Rajinder S. Gulati (2008) 1 Bom CR 359 (Paras 8, 11 and 13)** the principle that if the party is required to suffer the consequence for his failure to abide by the terms by a stipulated date such a consequence would be penal. We find that this judgment would have no relevance

insofar as this appeal is concerned, as in this case the primary concern is whether time is of essence or not in the Settlement Agreement which would trigger/not trigger fresh action under Section 9 of the IBC.

18. Both the parties have alluded to Section 55 of the Indian Contract Act, 1872 in support of their respective contentions. It is useful to reproduce Section 55 of the Indian Contract Act, 1872:-

Effect of failure to perform at fixed time, in contract in which time is essential - *When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.*

Effect of such failure when time is not essential.--*If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.*

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Effect of acceptance of performance at time other than that agreed upon.-- If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

19. We have, earlier in this judgment, reached a conclusion that prima facie, time was not of essence in the Settlement. Whether any compensation should accrue to the Appellant or not is not a matter for adjudication in this appeal. Also whether Section 62 of the Contract Act, 1872 will apply in the present case, which would change the contract to a new one is not relevant in the present appeal. If the Appellant has any grievance on this account, he could certainly approach the appropriate forum for redressal on this issue which relates to the enforcement of the Settlement Agreement and whether it will be substituted by a new one, if it so wishes.

20. In the light of the above discussion, we come to the unambiguous conclusion that the Appellant has not been able to make out a clear-cut case in his favor. The Settlement Agreement, as has been operated by both the parties, does not show that time was of essence in it. Moreover, the Corporate Debtor has paid the full and final settlement amount by January 2021 to the Operational Creditor. Therefore the term of the Settlement Agreement that provides for reinstatement or fresh filing of the application for initiating Corporate Insolvency Resolution Process for the Corporate Debtor is not triggered. As a result, we find no reason to interfere with the order of the Adjudicating Authority, and consequently dismiss the appeal. There is no order as to costs.

(Justice Bansi Lal Bhat)
Acting Chairperson

(Dr. Ashok Kumar Mishra)
Member(Technical)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
17th March, 2021

/aks/

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