

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency)No. 823 of 2019

IN THE MATTER OF:

Bhaskar Biswas

.....Appellant

Vs.

M/s. Devi Trading & Holding Pvt. Ltd. & Anr.

.....Respondents

Present :

For Appellant:

**Mr. Abhijeet Sinha, Ms. Debamitra Adhikari, Mr. Aditya Shukla, Ms. Upama Bhattacharjee, Advocates
Mr. Aditya Sinha for Intervenor**

For Respondents:

**Mr. Chayan Sarkar, Mr. Konark Bhatnagar, Mr. Rakesh Kumar, Mr. Anupamprakash, Advocates for R-2
Ms. Soumya Roy, Advocate for SBI**

O R D E R

29.08.2019 - Learned Counsel for the Appellant submits that the Appellant settled the matter on behalf of the 'Corporate Debtor with 1st Respondent – 'Devi Trading & Holding Pvt. Ltd.' and 'Financial Creditor' prior to the constitution of the 'Committee of Creditors' and filed application under Rule 11 of the NCLT Rules, 2016.

2. The Adjudicating Authority taking into consideration the fact that at the time of hearing of the application a number of allottees (home buyers of the

‘Corporate Debtor’) appeared before the Adjudicating Authority and opposed the prayer for withdrawal on the ground that their claim is settled by the ‘Corporate Debtor’, the Infrastructure Company / builder. In view of the same, the Adjudicating Authority referred to the decision of **Hon’ble Supreme Court in “Swiss Ribbons Pvt. Ltd. Vs. Union of India”** refused to invoke the inherent power under Rule 11 of the NCLT Rules, 2016 by impugned order dated 5th July, 2019.

3. The **Hon’ble Supreme Court in “Swiss Ribbons Pvt. Ltd. Vs. Union of India”** held that the Directors or the shareholders of the ‘Corporate Debtor’ may settle before the constitution of the ‘Committee of Creditors’ and it was observed that in such case, it was open to the Adjudicating Authority to exercise its inherent jurisdiction under Rule 11 of the NCLT Rules, 2016. The relevant observation of Hon’ble Supreme Court is quoted below:-

“79. It is clear that once the Code gets triggered by admission of a creditor’s petition under Sections 7 to 9, the proceeding that is 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 directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of 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.”

4. Normally, before the constitution of ‘Committee of Creditors’ if on behalf of the ‘Corporate Debtor’ a shareholder or Director settles the claim of the Applicant who files an application u/s 7 or 9 of the ‘I&B’ Code, the Adjudicating Authority in normal course can exercise its inherent power under Rule 11 of the NCLT Rules, 2016. However, it is seen that when allowing an application under Rule 11 of the NCLT Rules, 2016 may result into triggering a large number of cases as a number of creditors, including the ‘Financial Creditors’ (allottees) are also in the queue to trigger the process against the ‘Corporate Debtor’, it is open to the Adjudicating Authority to refuse to exercise its inherent power under Rule 11 of the NCLT Rules, 2016 otherwise it may result into triggering number of cases.

5. For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 5th July, 2019, however we allow the Appellant or shareholders on behalf of the ‘Corporate Debtor’ to move an application u/s 12A for settling the claim of all the Creditors particularly the allottees stating how they will take care of the allottees and other lenders and in such cases the ‘Committee of Creditors’ uninfluenced by the order passed by the Adjudicating Authority and this Appellate Tribunal may consider the same and if it is feasible and viable may approve 90% of its voting shares u/s 12A to enable the Applicant

- Devi Trading & Holding Pvt. Ltd.’ to withdraw the application u/s 7 of the ‘I&B’ Code through the ‘Resolution Professional’.

6. We make it clear that we have not stayed the ‘Corporate Insolvency Resolution Process’ and the ‘Resolution Professional’ as also the ‘Committee of Creditors’ are required to proceed in accordance with law. The ‘Resolution Professional’ will ensure that the Company (‘Corporate Debtor’) remains a going concern. In case the records and projects / assets have not been handed over to the IRP / RP, the Appellant and other Promoters will hand over the same immediately and co-operate with the ‘Resolution Professional’.

The appeal stands disposed of. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice A. I. S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

ss/gc