

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No. 268/2023
IA No.834/2023 – For Exemption

(Filed under Section 61(1) of the Insolvency and Bankruptcy Code, 2016)

Arising out of the Impugned Order dated 25/05/2023 in C.P.(IB) No.
131/BB/2021 passed by the ‘Adjudicating Authority’, (National
Company Law Tribunal, Bengaluru Bench, Bengaluru)

In the matter of:

Mr. Maulik Kirtibhai Shah
Proprietor of MK Enterprises
R/a No.401, Aarohi Complex,
Vijay Cross Road,
Ahmedabad

.... Appellant

V

United Telecoms Limited
CIN: U32301KA1986PLC007800
Registered Office:
18A/19, Doddanekundi Industrial Area,
Mahadevapura Post, Whitefield,
Bangalore, Karnataka – 560 048

... Respondent

Present :

For Appellant : Mr. Pavan S Godiawala,
Mr. Jerin Asher Sojan
Mr. M S Vishnu Sankar,
M/s. Lawfic Advocates

For Respondent :

J U D G M E N T

(Virtual Mode)

[Per: Shreesha Merla, Member (Technical)]

1. Aggrieved by the ‘Impugned Order’ dated 25.05.2023, passed by the ‘Adjudicating Authority’ National Company Law Tribunal, Bengaluru Bench, Bengaluru in C.P. (IB) No. 131/BB/2021 Mr. Maulikkirithhai Shah/the ‘Operational Creditor’ preferred this ‘Appeal’ under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as the ‘Code’]. By the ‘Impugned Order’, the ‘Adjudicating Authority’ has dismissed the Application filed under Section 9 of the Code, observing as follows:

“6. It is observed by this Tribunal that as per Part IV of Form No.5 the Amount in default mentioned was Rs. 8,46,32,553/- as on 31.01.2021 and payable along with running interest at the rate of 15% p.a on commercial rate of interest. It is discussed above that the corporate debtor has paid the amount of Rs. 2,75,58,000/- out of the principal amount of Rs. 2,80,00,000/- which is admitted by the petitioner in their application. The date of default as per Form – V of the application is stated to be the date where the corporate debtor made the last payment i.e., on 07.06.2019. Further, on perusal of the documents produced it is observed that Clause 1 of the MOU dated 10.09.2005, 42 Page 6 of 6 CP (IB) No.131/BB/2021 between the Petitioner and

Respondent provides that the first party agrees to pay the second party an amount equivalent to 1% of the Total Project Value in case of successfully getting the SWAN project in the following manner: 0.25% of project value after signing of this agreement, and 0.25% of project value from the 1st, 2nd and 3rd quarterly payment made by the respective Government to the corporate debtor. It is seen from the agreement, the parties signed it without mentioning charging of any interest as it was claimed in the application. Further, the Settlement agreement relied upon by the petitioner, is on a stamp paper dated 26.10.2018 (signed on 01.11.2018) wherein the corporate debtor undertakes to make the residual payment on or before 31st March 2018. It therefore cannot be relied upon; since the dates mentioned for the payment in the agreement is antedated to the date of the stamp paper. The respondent has also contended that the same is unstamped and unregistered.

7. In view of the facts and circumstances and in light of the judgments of Hon'ble NCLAT stated supra this Tribunal is of the considered opinion that the present petition is filed for recovery of interest amount which is not maintainable under section 9 of the code."

2. The Learned Counsel for the 'Appellant' vehemently contended that the 'Adjudicating Authority' has failed to take into consideration that pursuant to the 'Settlement Agreement' dated 01.11.2018, cheques were issued by the Respondent/Corporate Debtor and were 'dishonoured'. The mere fact that cheques were given construes that there is an admission of liability by the Respondent/Corporate Debtor. It is submitted that the Operational Creditor was rendering services of 'Business Development' for the Corporate Debtor and the amount of Rs.8,46,32,553/- was due and payable along with a running interest at the rate of 15% per annum on commercial rate of interest basis. An original Memorandum of Understanding was entered into on 10.09.2005 with respect to the 'Business Development', which Project was duly completed and the Operational Creditor was entitled as per the MOU for its commission at 1% of the Total Project Value.

3. It is submitted that the Financial Manager of the Operational Creditor had sent an e-mail dated 18.03.2013 seeking the payment of the 1% commission and the letter dated 01.07.2013 was also addressed on the same issue. It is submitted that the representatives of the 'Corporate Debtor' had induced the 'Appellant'/'Operational Creditor' herein to sign the 'Settlement Agreement' on the ground that the 'Corporate Debtor' is having serious cash flow problems and it was only after continuous follow-ups with the

‘Operational Creditor’, and left with no other remedy, the ‘Settlement Agreement’ was entered into.

4. The Learned Counsel for the ‘Appellant’ submitted that the outstanding payment as agreed was Rs.2,80,00,000/-which is the principal amount as on 31.05.2014 and part payment of Rs.56,18,000/-was paid to the ‘Operational Creditor’ and another part payment of Rs.15,00,000/- was received on 19.10.2017 and after giving credit, together with running interest at the rate of 15% per annum an amount of Rs.7,48,72,688/- became due and payable.

5. A ‘Statutory Demand Notice’ dated 24.08.2018 claiming an amount of Rs.7,48,72,688/- was issued wherein it was categorically mentioned; that last payment of Rs.15,00,000/-was received on 19.10.2017 and the MOU as well as the correspondence and statement of ledger account was produced with the statutory demand notice.

6. It is submitted that on receipt of demand notice in Form No.3, the Corporate Debtor approached the Operational Creditor and submitted that on account of severe financial crises an amount of Rs.4,50,00,000/- to be accepted instead of the total default amount of Rs.7,48,72,688/- and with a view to win trust, also induced the Operational Creditor to enter into a fresh MOU and made payment of Rs.50,00,000/-by RTGS into the account of the Operational Creditor and further undertook to make the payment of Rs.4,00,00,000/- on or

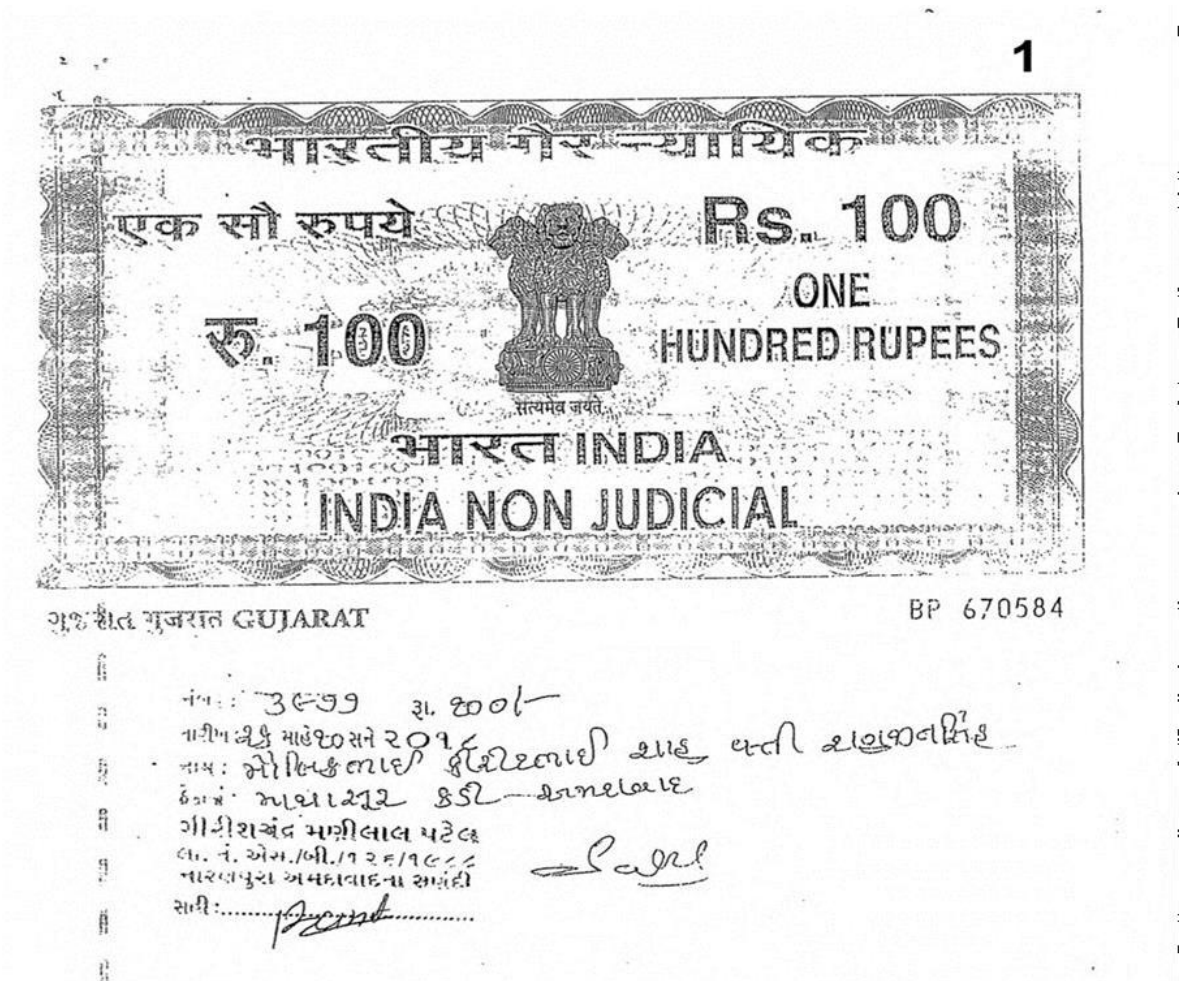
before 31.08.2018 and tendered cheques of different dates with respective amounts as mentioned in the MOU.

7. The Learned Counsel for the 'Appellant' vehemently contended that the MOU was duly signed by the parties and therefore the 'Corporate Debtor' is bound by the terms of the 'Settlement Agreement' and the amounts which are balance and due and payable fall within the definition of 'Operational Debt' and therefore the 'Adjudicating Authority' has erred in dismissing the Section 9 Application.

8. A brief perusal of the Counter filed by the 'Corporate Debtor' before the 'Adjudicating Authority' shows that the 'Corporate Debtor' had categorically denied any agreement entered into; and that prior to the issuance of the 'Demand Notice' as Statutory Notice under Section 138 read with Section 141 of Negotiable Instruments Act, 1881, was issued and a criminal complaint was lodged which evidenced that there was pre-existing dispute prior to the issuance of the 'Demand Notice'. It is also stated in the counter that they had never 'induced' the Operational Creditor' to sign any agreement. It is stated that the cheque totalling to Rs.4,32,00,000/- was issued and a payment of Rs.1,79,40,000/- from 2018 till date and totalling of Rs.2,75,58,000/- was paid. It was denied that there was any acknowledgment of any debt. It was contended that the principal amount was only Rs.2,80,00,000/- and that the Corporate

Debtor had paid almost amount of Rs.2,75,58,000/- and therefore the amount due and payable is only Rs.4,42,000/- which is below the minimum threshold as per Section 4 of the Code and therefore sought for dismissal of the Petition.

9. The main issue which arises in this 'Appeal' is whether the 'Adjudicating Authority' was justified in dismissing the Section 9 Petition on the ground that the 'Settlement Agreement' was anti-dated, unstamped and unregistered. At the outset, the 'Settlement Agreement' dated 01.11.2018, for ready reference is reproduced as hereunder:



This agreement is entered between Maulik K Shah sole proprietorship having place of business at Ahmadabad. Aged adult, occupation :business, hereinafter referred to as Operational Creditor AND United Telecoms LTD a company registered under the provisions of the companies act 1956, having its registered office situated at Bangalore , through Mr Raj Mohan Rao (Chairman/ Director / Authorised Representative) hereinafter referred to as Corporate Debtor. And Whereas both parties entered into consensus on the terms and conditions as : Now this agreement witnessed : (1) the Operational Creditor issued statutory notice for his claim amount to the Corporate Debtor and Corporate Debtor in response to the said notice assured to discharge the dues which has become due and payable by the Corporate Debtor to the Operational Creditor and after correspondence the Corporate Debtor paid part payment of Rs 50,00,000/- (Rupees Fifty lakhs) by RTGS in the account of Operational Creditor and (2) The Corporate Debtor Further undertakes unequivocally to make the residual settled amount of Rs 4,00,00,000/- (Rupees Four Crores), (After making payment of Rs 50 lakhs) on or before 31st March 2018 and hereby tendered the Cheques of amount Rs 4,00,00,000/- (Rupees Four Crores).

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Details of the cheques as follows :

Cheque No.:	Date:	Amount:	Place of issue:
535504	21.12.2018	43,20,000	Bangalore
535505	21.01.2019	43,20,000	"
535506	21.02.2019	43,20,000	"
535507	21.03.2019	43,60,000	"
535508	21.04.2019	43,20,000	"
535509	21.05.2019	43,20,000	"
535510	21.06.2019	43,20,000	"
535511	21.07.2019	43,20,000	"
535512	21.08.2019	43,20,000	"
535513	21.09.2019	37,80,000	"

Respectively In due Discharge of liabilities as claimed in statutory notice. The above cheques shall be honoured and shall not be dishonoured for any reasons. (3) The Operational Creditor assures and undertakes to tender. No Due upon entire amount paid and shall not claim thereafter any amount either in form of principal, interest or damages and in such eventuality the statutory notice shall stand withdrawn. (4) in case of default of any one dishonour the Operational Creditor is entitled and eligible to initiate Insolvency and Bankruptcy Proceedings against Corporate Debtor on the basis of the notice as already issued and received and the Corporate Debtor undertakes not to oppose to the entire claim as made in the notice as issued and received besides the right of the Operational Creditor to initiate such other legal proceedings against the corporate debtor.

The above terms and conditions are entered at free will and without any coercion, threat, fraud, misrepresentation or undue influence.

Maulik Shah

1/11/19

Dr. Raj Mohan Rao

(United Telecoms LTD Bangalore).

It is seen from the afore noted Agreement, relied upon by the ‘Appellant’ that it is dated 01.11.2018 whereas it is specified in the Agreement that the Corporate Debtor further undertakes unequivocally to make the residual Settlement amount of Rs.4,00,00,000/- (Rupees Four Crores), [*after making payment of Rs.50 lakhs*] on or before 31st March 2018 and hereby tendered the Cheques of amount of Rs.4,00,00,000/- (Rupees Four Crores)

10. The very document which the ‘Appellant’ is relying upon establishes that the initial amount of Rs.50 lakhs was to be paid prior to 31.03.2018, and that the balance amount of Rs.4 Crores was to be paid in tranches, whereas it is not in dispute that the agreement is dated 01.11.2018 which is subsequent to the amount of Rs.50 lakhs, and to be paid on or before 31.03.2018. Therefore, this document substantiate that the ‘Settlement Agreement’ is anti-dated, apart from being unstamped and unregistered.

11. Be that as it may, the amount in Part IV of Form-5 mentioned as ‘Default’ is Rs.8,46,32,553/- as on 31.01.2021 whereas the amount in the ‘Settlement Agreement’ appears to have been reduced to around Rs.4 Crores. Admittedly, criminal cases were filed against the Corporate Debtor prior to the issuance of Section 8 Demand Notice’ under Section 138 read with Section 141 of Negotiable Instruments Act, 1881.

12. The first MOU is dated 10.09.2005 and any amount due and payable under it is barred by limitation. The ‘Settlement Agreement’ dated 01.1.2018, cannot be taken into consideration for establishing any debt due and payable as it is anti-dated.

13. The Petition under Section 9 of the Code filed only for the default unpayment of Operational Debt within the meaning of Section 5 (21) of the Code, which is reproduced for ready references as below: -

Section 5 (21): "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

14. From the aforesaid it is evident that the Petition filed in respect of claims arising under the aforementioned Settlement Agreement [even if disputed herein] does not come within the definition of ‘Operational Debt’. Time and again, the Hon’ble Apex Court in a catena of Judgments held that the IBC is not a ‘recovery mechanism’. Even if the Settlement Agreement is taken into consideration, this ‘Tribunal’ is of the earnest view that the claims arising

under the 'MOU' lost the character of 'Operational Debt' and became a debt simpliciter. *In respect of' in the definition of Operational Debt cannot be interpreted widely so as to include any agreement between the parties which does not specifically pertain to the supply of goods or services.* A wide interpretation would only defeat the scope and objective of the code. Keeping in view, the spirit of the Code, this 'Tribunal' is of the considered view that at best, the claims are contractual claims for which appropriate Civil Proceedings may lie.

15. For all the aforementioned reasons, this 'Appeal' fails at the threshold and is accordingly dismissed. No Costs. Connected pending IAs, if any, are closed.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

SE/TM
15/09/2023