

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1069-1070 of 2019

[Arising out of orders dated 30.08.2019 in CP No. 1951/ IBC/ NCLT/ MB/ MAH/ 2019 and 16.09.2019 in MA 2984/2019 & MA 3061/2019 in C.P. 1951(IB) (MB)/2019 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), Mumbai Bench.]

IN THE MATTER OF:

Yogesh Mehra

Partner of Vaayu Infrastructure LLP

(Powers Suspended)

201, Hare Krishna Presidency Society

North South Road No. 8

JVPD Scheme; Vile Parle (West)

Mumbai – 400049, Maharashtra

..... Appellant.

Versus

1. Vaayu Infrastructure LLP

Through Resolution Professional

Mr. Shailen Shah

1102(2), 11th Floor, Fortune Terrace

New Link Road, Andheri (West)

Mumbai – 400053, Maharashtra.

..... Respondent No. 1.

2. Vejas Power Projects Ltd.

IL&FS, Financial Centre

Plot No. C-22, G Block

Bandra Kurla Complex

Bandra (East)

Mumbai – 400051, Maharashtra.

..... Respondent No. 2.

3. Union of India

Through Secretary,

Ministry of Corporate Affairs

5th Floor, 'A' Block,

Shastri Bhawan,

New Delhi – 110001.

..... Respondent No. 3.

4. Infrastructure Leasing and Financial Services Ltd.

IL&FS, Financial Service Centre
 Plot No. C-22, G Block
 Bandra Kurla Complex
 Bandra (East)
 Mumbai.

..... Respondent No. 4.

5. Radhika Mehra

201, Hare Krishna Presidency Society
 North South Road No. 8
 JVPD Scheme; Vile Parle (West)
 Mumbai – 400049, Maharashtra.

..... Respondent No. 5.

Present:

For Appellant: Mr. Abhinav Vasisht, Sr. Advocate with Ms. Varsha Banerjee and Mr. Kumar Anurag Singh and Mr. Palash Singhai, Advocates.

For Respondents: Mr. Satendra K. Rai and Mr. Pravara Veer Mishra Advocates for R-1.

Mr. R. Sudhinder, Ms. Ekta Bhasin, Mr. Ranjit Shetty, Ms. Priyanka Shetty and Mr. Samar Kachwaha, Advocates for R-2.

Mr. Rahul Kumar, Advocate for R-4.

Mr. Abhijeet Sinha, Aditya Shukla and Mr. Saikat Sarkar, Advocates for R-5.

J U D G M E N T

(11th February, 2022)

Justice Anant Bijay Singh;

This Appeal has been preferred by the Appellant – Yogesh Mehra, Partner of Vaayu Infrastructure LLP (Powers Suspended) being aggrieved and dissatisfied by the orders dated 30.08.2019 in CP No. 1951/ IBC/ NCLT/ MB/ MAH/ 2019 and 16.09.2019 in MA 2984/2019 & MA 3061/2019 in C.P. 1951(IB) (MB)/2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench wherein the Application filed by the Respondent No. 2 herein (Financial Creditor) – ‘Vejas Power Projects Ltd.’ under Section 7 of the Insolvency and Bankruptcy Code, 2016 ***(for short IBC)***

against the 'Vaayu Infrastructure LLP' (Corporate Debtor) was allowed and further Application filed by the Corporate Debtor for staying the operation of Insolvency proceeding was rejected.

2. The facts giving rise to this Appeal are as follows:

i) The IL&FS Financial Services Ltd. (IL&FS) had provided Wind World Wind Farms (MP) Private Limited (for short WWWFPL) with financial assistance for an amount of Rs. 100,00,00,000/- (Facility 1) and Rs. 110,00,00,000/- (Facility 2) vide Facility Agreements dated 27.06.2014 and 24.09.2014 respectively.

ii) The IL&FS had assigned its debt in favour of the Financial Creditor herein pursuant to the Assignment Agreement dated 30.12.2015. The Corporate Debtor is the guarantor of WWWFPL for it had executed irrevocable and unconditional guarantees in respect of the Facilities granted to the WWWFPL.

iii) The Financial Creditor in its Form 1 mentioned that amounts under Facility 1 and facility 2 are disbursed on different dates which are given hereunder:

Facility 1- Rs. 100,00,00,000/-		Facility 2- Rs. 110,00,00,000/-	
Date	Amount Disbursed	Date	Amount Disbursed
30.06.2014	42,00,00,000	27.06.2014	45,00,00,000
11.07.2014	25,00,00,000	29.09.2014	40,00,00,000
08.08.2014	10,00,00,000	30.09.2014	25,00,00,000
26.08.2014	23,00,00,000		
Total	100,00,00,000	Total	110,00,00,000

- iv) The Financial Creditor contends that an amount of Rs. 1,26,24,68,685/- is due and payable in respect of Facility 1 and an amount of Rs. 1,42,63,76,004/- is due and payable in respect of Facility 2.
- v) The Loan facilities are secured by hypothecation of various movable properties, the Corporate Guarantee given by the Corporate Debtor vide letters of Guarantee dated 27.06.2014 and 24.09.2014 for the two facilities respectively, the Corporate Guarantee given by the Vish Wind Infrastructure LLP vide letters of Guarantees of Mr. Ajay Mehra and Mr. Yogesh Mehra.
- vi) The Financial Creditor issued a recall notice dated 29.01.2018 to the WWWFPL for an outstanding amount of Rs. 254,72,62,584/- as on 28.01.2018 but nothing fructified. The Financial Creditor, thereafter, issued a letter dated 07.02.2018 to the Corporate Debtor for invocation of guarantee issued to the Financial Creditor for the debt of WWWFPL in respect of the default committed in repayment.
- vii) Further case is that the Corporate Debtor has not appeared before the Ld. Adjudicating Authority despite opportunities being given. Notices for intimation of dates of hearing have also been sent and affidavit of service has been produced on record by the Financial Creditor. The Corporate Debtor has nowhere denied his liability to pay the amount claimed.
- viii) After hearing the parties, the Ld. Adjudicating Authority has given finding that the Corporate Debtor has defaulted in repayment of debt and the Financial Creditor has made out its case with ample evidences for his claim, so the debt and default has been admitted in terms of Section 5 (8) of the IBC and Section 3 (12) of the IBC and Mr. Shailen Shah appointed as Interim

Resolution Professional to conduct the Corporate Insolvency Resolution Process. Being aggrieved, the Appellant has filed the present Appeal.

Submissions on behalf of the Appellant

3. The Learned Senior Counsel for the Appellant during the course of argument and in his memo of Appeal along with Written Submissions submitted that the Appellant herein being one of the Partner of Corporate Debtor – ‘Vaayu Infrastructure LLP’ is aggrieved by the impugned orders dated 30.08.2019 and 16.09.2019 which are bad in law as the same had been passed by the Ld. Adjudicating Authority without even considering the relevant provisions of law and in grave violation of principles of natural justice. The Appellant as well as the Corporate Debtor were denied an opportunity to be heard and file its reply before the Ld. Adjudicating Authority, which lead to wrongful initiation of proceedings under Section 7 of the IBC.

4. It is further submitted that the initiation of Corporate Insolvency Resolution Process against the Corporate Debtor is *non-est* and the impugned orders initiating the same had been passed on the sham and fraudulent transactions portrayed as loan/debt by the Financial Creditor (Respondent No. 2) and the Ld. Adjudicating Authority without providing any opportunity to the Corporate Debtor to counter the said facts on merits proceeded ex-parte in a hastened manner on 28.08.2019 and purportedly pronounced impugned order on 30.08.2019 without even listing the same for the said purpose.

5. It is further submitted that the Appellant seeks liberty of this Hon'ble Tribunal to reproduce chronology of the events passed by the Ld. Adjudicating Authority which are hereunder:

27.05.2019 Respondent Financial Creditor sent a copy of the
Application to the Corporate Debtor vide letter dated
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- 27.05.2019. It is pertinent to mention herein that the date of hearing was not mentioned in the letter dated 27.05.2019 addressed by the advocate for the Financial Creditor. This was merely an advance notice of the Petition without any intimation of date of hearing.
- 24.07.2019 The Ld. Adjudicating Authority passed an order wherein due to the fact that no notice was served upon the Appellant, the Appellant could not remain present before the AA on 24.07.2019.
- 31.07.2019 Financial Creditor addressed a letter dated 31.07.2019 to the Corporate Debtor which was received by the Corporate Debtor on 06.08.2019. In the said letter, the advocates for the Financial Creditor informed the Corporate Debtor for the first time that the matter is listed on 27.08.2019 (at page 119, Vol. I of the Appeal).
- 27.08.2019 As an abundant caution, on 27.08.2019, the Appellant though its representative instructed its lawyer to appear before Ld. Adjudicating Authority on 28.08.2019 (at page 107-108, Vol. I of the Appeal) and seek time to file reply so that it could establish that the petition preferred by the Financial Creditor is a frivolous petition.
- 28.08.2019 The Ld. Adjudicating Authority rejected the prayer of granting time to file vakalatnama and reply and proceeded to hear the matter ex parte. Further, Ld. Adjudicating Authority reserved its order on the same date.
- 30.08.2019 The Ld. Adjudicating Authority purportedly pronounced its order and admitted Company Petition bearing CP No. 1951/IBC/NCLT/MB/MAH/2019 preferred under Section 7 of IBC by the Financial Creditor and appointed Mr. Shailen Shah, having registration No. IBBI/IPA-001/IP P00408/2017-18/10724, as Interim Resolution

Professional ("IRP"). This order came to the knowledge of the Appellant only on 10.09.2019(at page 89-90, Vol. I of the Appeal).

- 03.09.2019 The Appellant immediately after the hearing order dated 28.08.2019 filed an application being CA No. 2984 of 2019 (at page 102, Vol. I of the Appeal).
- 05.09.2019 The Appellant through its counsel mentioned the aforesaid application and Ld. Adjudicating Authority allowed the circulation of the said application to 24.09.2019 and directed the Appellant to give a notice of hearing to the Financial Creditor.
- 10.09.2019 In the interregnum, the order dated 30.08.2019 admitting the CIRP came to the knowledge of the Appellant and was uploaded on the official website of the Ld. Adjudicating Authority on 10.09.2019.
- 11.09.2019 The Appellant filed another application bearing No. 3061 of 2019 under Section 424 of the Companies Act, 2013 and Section 60(5) of the IBC seeking stay of order dated 30.08.2019 passed by the Adjudicating Authority till the time MA No. 2984 of 2019 was heard and disposed of by Ld. Adjudicating Authority (at page 88, Vol. I of the Appeal).
- 12.09.2019 In light of the order dated 30.08.2019 initiating CIRP in the case of the Corporate Debtor, the Appellant mentioned its pending application being MA No. 2984 of 2019 and sought urgent hearing of the said application. The matter was accordingly, listed on 16.09.2019.
- 13.09.2019 The application as preferred by the Appellant seeking stay of the order dated 30.08.2019 was mentioned on 13.09.2019, wherein the Adjudicating Authority rejected the interim say as sought by the Appellant on account of

pendency of MA No. 2984 of 2019 which was listed for hearing on 16.09.2019.

16.09.2019 The Ld. Adjudicating Authority after hearing the counsels without providing any opportunity to place on record the reply on merits to Application under Section 7 of IBC, reserved its order.

27.09.2019 Order dated 16.09.2019 was uploaded on the official website of the Adjudicating Authority on 27.09.2019.

6. It is further submitted that the finding of the Ld. Adjudicating Authority below is premised on the wrong interpretation of the law and provisions of the IBC as the Ld. Adjudicating Authority failed to exercise the power and jurisdiction vested upon it by the legislature which has caused grave prejudice to the interest of the Corporate Debtor as well Appellant.

7. It is further submitted that the Ld. Adjudicating Authority failed to provide reasonable opportunity to the Corporate Debtor of being heard which is in violation of principles of natural justice and not followed the due process and procedure as stipulated under Rule 150 of NCLT Rules and also failed to consider that the alleged transactions reflected as loan/debt is a sham transaction and in the absence of any reply the same could not be adjudicated upon.

8. It is further submitted that the Ld. Adjudicating Authority in a hasten manner proceeded with the matter ex-parte on 28.08.2019 and inspite of the presence of Authorised Representative of Corporate Debtor which is evident from Reply Affidavit of Respondent No. 2 (Para 6, at page 3 of the Reply) as well as observation of Ld. Adjudicating Authority at para 6 of the order dated 16.09.2019 (at page 84 of the Appeal). It is noteworthy to mention that no Company Appeal (AT) (Insolvency) No. 1069-1070 of 2019

daily order or record of proceeding dated 28.08.2019 is available, which makes it further clear that due process and procedure was not followed by the Ld. Adjudicating Authority while adjudicating the matter and the order suffers from grave infirmity which makes it *non est* in the eyes of law. The Rule 49 of NCLT Rules is reproduced hereunder:

“ Rule 49:

(1) Where on the date fixed for hearing the petition or application or on any other date to which such hearing may be adjourned, the applicant appears and the respondent does not appear when the petition or the application is called for hearing, the Tribunal may adjourn the hearing or hear and decide the petition or the application ex parte.”

9. It is further submitted that the Corporate Debtor being aggrieved by order dated 28.08.2019 passed by the Ld. Adjudicating Authority, filed CA No. 2489 of 2019 for recall of the said order dated 28.08.2019. In the interregnum on 10.09.2019, the Corporate Debtor became aware of the fact that the Ld. Adjudicating Authority without listing the matter for pronouncement and uploaded the impugned order dated 30.08.2019 which is again in contravention to Rule 150 of NCLT Rules.

10. It is further submitted that Corporate Debtor upon coming to know about impugned order dated 30.08.2019 filed MA No. 3061 of 2019 seeking stay on impugned order dated 30.08.2019 till CA No. 2498 of 2019 is adjudicated by the Ld. Adjudicating Authority. The Ld. Adjudicating Authority on 16.09.2019 heard both the Applications of Corporate Debtor and without application of mind passed the impugned order dated 16.09.2019 which is premised on wrong understanding and interpretation of law.

11. It is further submitted that the impugned order dated 16.09.2019 is premised on the wrong understanding and interpretation of law as the Ld. Adjudicating Authority failed to consider the power and jurisdiction vested upon NCLT in terms of Rule 49(2) of NCLT Rules, wherein NCLT is well within its jurisdiction to recall any *ex parte* order upon the sufficient cause being shown by the party. The Rule 49(2) of NCLT Rules read as hereunder:

“ 49(2): Where a petition or an application has been heard ex parte against a respondent or respondents, such respondent or respondents may apply to the Tribunal for an order to set it aside and if such respondent or respondents satisfies the Tribunal that the notice was not duly served or that he or they were prevented by any sufficient cause from appearing (when the petition or the application was called) for hearing, the Tribunal may make an order setting aside the ex parte hearing as against him or them upon such terms as it thinks fit: Provided that where the ex parte hearing of the petition or application is of such nature that it cannot be set aside as against one respondent only, it may be set aside as against all or any of the other respondents also.”

12. The Learned Senior Counsel for the Appellant placed reliance upon two judgments passed by this Appellate Tribunal in the case of **“AKJ Fincap Limited Vs. Bank of India, Company Appeal (AT) (Insolvency) No. 178 of 2021 and Bhasker Vs. Sai Precious Traexim Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 531 of 2020”** wherein it is categorically observed that the Ld. Adjudicating Authority has power in terms of Rule 49(2) of NCLT Rules, 2016 to recall any ex-parte order if sufficient cause is shown. Further this Appellate Tribunal is such circumstances when the Ld. Adjudicating Authority

failed to exercise jurisdiction as per Rule 49(2) and initiated the CIRP, has released the Corporate Debtor from the rigours of CIRP by declaring all the actions taken so far by Resolution Professional, Committee of Creditors as illegal and remanded the matter to the Ld. Adjudicating Authority for adjudication. Based on these submissions the impugned orders be set aside and the matter be remanded to the Ld. Adjudicating Authority for passing appropriate orders.

Submissions on behalf of the Respondent No. 1

13. The Learned Counsel for the Respondent No. 1 during the course of argument and in his short Reply submitted that vide order dated 30.08.2019 passed by Ld. Adjudicating Authority under which the Ld. Adjudicating Authority initiated Corporate Insolvency Resolution Process and appointed Mr. Shailen Shah as the Interim Resolution Professional, the Respondent No. 1. Pursuant to the order dated 30.08.2019 he has taken charge of the Corporate Debtor. Further, this Appellate Tribunal in its order dated 17.10.2019 has directed the IRP to ensure that the Corporate Debtor is maintained as a going concern.

14. It is further submitted that the Respondent No. 1 after taking charge, certain expenses in relation to the CIRP of the Corporate Debtor have been incurred including cost and expenses of the IRP. The Respondent No. 1 prays that in the event the instant Appeal is allowed by this Appellate Tribunal and the order initiating the CIRP of the Corporate Debtor is set aside, then this Appellate Tribunal be pleased to pass appropriate orders directing the Appellant to pay the expenses and costs incurred in respect of the IRP, IRP entity, IRP team and IRP advisors and any other CIRP expenses, if any, from

the date of the IRP taking charge of the Corporate Debtor till the date of disposal of the instant Appeal.

Submissions on behalf of the Respondent No. 2

15. The Learned Counsel for the Respondent No. 2 during the course of argument and in his Reply Affidavit along with Written Submissions submitted that on 24.07.2019 the matter was listed before the Ld. Adjudicating Authority wherein it was recorded that Company Petition was served to Appellant/Corporate Debtor but there is no response also non-attendance at the time of hearing and further it was recorded that this is a high-stake case which is required to be taken on priority basis. The Respondent No. 2/Financial Creditor was directed to serve notice upon the Appellant/Corporate Debtor as a last chance to make a representation in the matter.

16. It is further submitted that on next date i.e. 28.08.2019, when the case matter was called before the Ld. Adjudicating Authority, an Advocate appeared for the Corporate Debtor without a Vakalatnama or an authority letter and requested for further time. Since the matter was being heard after three months of filing of the Company Petition and ample time was given to the Appellant/Corporate Debtor, the Ld. Adjudicating Authority proceeded to hear the matter and eventually reserved the matter for orders. Thereafter, the Ld. Adjudicating Authority pronounced the order and admitted the Company Petition.

17. It is further submitted that the Appellant/Corporate Debtor have further tried to made out a case that the order was not pronounced in open Court and it was not mentioned in the Cause List. Further reliance is placed on Rule 151

of the NCLT Rules, 2016. The said Rule Directory in nature and further, reliance is placed on the Judgment passed by the **Hon'ble Madras High Court** in the case of **“Shaji Purushothaman Vs. Union of India & Ors., W.P. No. 1926 of 2020 and W.M.P. No. 2253 of 2020”** decided on 19.03.2020, wherein para 55 and 56 read as hereunder:

“55. Now coming to the mandatory nature of NCLT Rules, 2016 more particularly Rules 150 and 153, in the light of the settled legal position that consequences that may arise on account of the non-adherence to the time line/procedure have not been indicated in the said Rules, it can be considered to be only directory.

56. The Division Bench judgment of the Bombay High Court in Kamal K. Singh V. Union of India [MANU/MH/3538/2019] is distinguishable for the reason that the legal position as laid down by the Hon'ble Apex Court in the various pronouncements as to the directory/mandatory nature of Statutory Rules have not been dealt with in the said judgment. It is a settled legal dictum that "when a public functionary is required to perform a public function within a time frame, the same will be held to be directory unless the consequences there for are specified". Admittedly, the consequences that may emanate as to the non-adherence/infracton of the Rules have not been indicated in the Statutory Rules. Hence, the impugned common order cannot be set aside on the ground.”

18. It is further submitted that the Appellant has placed reliance on Rule 49 of the NCLT Rules, which is completely erroneous as the date of hearing which was already fixed on 28.08.2019 by the order dated 24.07.2019 making abundantly clear to the effect that the same would be its "last chance" to

represent the matter. Therefore, the Rule 49(2) will not be applicable in this case. Based on these submissions there is no merit in the Appeal, the Appeal is fit to be dismissed.

Submissions on behalf of the Respondent No. 4

19. The Learned Counsel for the Respondent No. 4 during the course of argument and in his Reply Affidavit submitted that the Respondent No. 4 has no connection whatsoever with the present matter. The Appellant/Corporate Debtor is seeking to drag Respondent No. 4 in the present matter by alleging some sort of connection between the transaction which forms the subject matter of the petition and a set of completely distinct transactions which are the subject matter of another Corporate Insolvency Resolution Process ongoing before the Ld. NCLT, Ahmedabad Bench.

20. It is further submitted that the CIRP is ongoing before the Ld. NCLT, Ahmedabad in respect of Wind World (India) Limited whereas Jogihali Wind Energy Private Limited, Mahidad Wind Energy Private Limited, Sipla Wind Energy Private Limited have submitted their claims to the Resolution Professional. Jogihali, Mahidad and Sipla are subsidiaries of IL&FS Energy Development Company Limited.

21. It is further submitted that the dispute in the present Appeal is between the Appellant/Corporate Debtor and the Respondent No. 2/Financial Creditor. The Respondent No. 4 is not privy to the contract between the Appellant and Respondent No. 2. There are no grounds or reasons to implead Respondent No. 4 and hence the Respondent No. 4 should not be impleaded in the present proceedings. Further, Respondent No. 4 is not required to adjudicate the

dispute under Section 7 of the IBC filed by the Financial Creditor against Corporate Debtor.

Submissions on behalf of the Respondent No. 5

22. The Learned Counsel for Respondent No. 5 during the course of argument and in his Written Submissions submitted that the Respondent No. 5 was granted liberty to impugn the orders dated 30.08.2019 and 16.09.2019 in terms of the order dated 06.01.2020 (at page 11 of I.A. No. 1021 of 2021) passed by the Hon'ble High Court of Bombay. Thereafter, the Respondent No. 5 joined the proceedings and supported the case of the Appellant herein.

FINDINGS

23. After hearing the parties and having gone through the pleadings made on behalf of the parties, we are of the considered view that the Ld. Adjudicating Authority passed the order dated 30.08.2019 in CP No. 1951/IBC/NCLT/MB/MAH/2019 and admitted the petition filed by the Respondent No. 2 herein (Financial Creditor) - 'Vejas Power Project Ltd.' under Section 7 of the Insolvency and Bankruptcy Code, 2016 against the Appellant herein (Corporate Debtor) - 'Vaayu Infrastructure LLP' and further while dismissing the Application filed by the Appellant herein vide order dated 16.09.2019 in MA 2984/2019 & MA 3061/2019 in C.P. 1951(IB) (MB)/2019, the Ld. Adjudicating Authority has not considered the provisions of Rules 37, 49 and 150 of the NCLT Rules. In view of the above, the impugned orders dated 30.08.2019 and 16.09.2019 are hereby set aside and the matter is remitted back to the Ld. Adjudicating Authority (National Company Law Tribunal), Mumbai Bench with a request to hear the parties including the

Appellant herein and Respondent No. 1 herein about his fee and expenses for the period he has worked as IRP and pass appropriate orders within six weeks from the date of receipt of this judgment.

24. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Ld. Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms. Shreesha Merla]
Member (Technical)**

New Delhi

11th February, 2022

R. Nath.