

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

I.A. No. 2068 of 2021

IN

Company Appeal (AT) (Insolvency) No. 412 of 2020

IN THE MATTER OF:

APYA CAPITAL SERVICES PRIVATE LIMITED

**Having its registered office at Flat No. 22,
Tower 6, Pebble Bay, Raj Mahal Vilas II,
Ramakrishnappa Layout, Nagashetty Halli,
Banglore – 560094**

.... Appellant.

Versus

GUARDIAN HOMES PRIVAT LIMITED

**Having its registered office at Office No. 102,
1st Floor, Chintamani Pride, Sr. No. 12/7+8,
Kothrud, Pune 411038**

**..... Respondent/
Applicant.**

Present:

**For Appellant: Mr. Abhishek Kumar Srivastava and Mr. Aditya Sharma,
Advocates.**

**For Respondent: Ms. Priya Hingorani, Sr. Advocate with Mr. Himanshu
Yadav, Advocate for Applicants in I.A. No. 2068/2021.**

ORDER

(9th December, 2021)

Justice Anant Bijay Singh;

The instant Application bearing I.A. No. 2068 of 2021 has been filed on behalf of the Respondent/Applicant under section 424(1) of the Companies

Act, 2013, as amended, read with Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 with a prayer to recall of the judgment and order dated 08.12.2020 passed by this Appellate Tribunal. The relevant authoritative portion of the final judgment and order dated 08.12.2020 is reproduced below:

“ 9. For the reasons recorded hereinabove, we allow the appeal and set aside the impugned order. The Adjudicating Authority is directed to admit the application of Appellant under Section 7 of the ‘I&B Code’ after providing an opportunity to the Respondent – Corporate debtor to settle the claim of Appellant, if it so chooses and pass all consequential directions as a sequel thereto. There shall be no order as to costs.”

[Emphasis Supplied]

2. The Learned Sr. Counsel for the Respondent/Applicant submitted that the relevant extracts from the impugned Judgment clearly depicting the said ex-facie errors are extracted below:

*“ 6.it is futile on the part of the Corporate Debtor to raise the grievance that there was a dispute relating to the quality of service. As already noticed no suit or arbitration proceedings were pending **on the date of filing of application under Section 7** in regard to quality of service to bring the same within the ambit of dispute as contemplated under Section 5(6)(b) of the ‘I&B Code’ to disentitle the **Appellant- Financial Creditor** from initiating Corporate Insolvency Resolution Process. No such dispute was even brought to the notice of the **Appellant-***

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Financial Creditor as the demand notice served under Section 8(1) of the 'I&B Code' was not responded to by the Corporate Debtor. Therefore, we have no hesitation in holding that the **Appellant- Financial Creditor** was entitled to raise the invoice dated 20.04.2019 in regard to the unpaid balance amount of Rs. 2,05,00,000/- in respect whereof default was committed by the Corporate Debtor who admittedly paid only Rs.75 Lakhs as part payment.

8. In view of the foregoing discussion on merits of the case, we are of the considered opinion that the Adjudicating Authority has landed in error in holding that there was no 'debt' as claimed by the Appellant and there was 'deficiency in service' provided by the Appellant. The findings recorded by the Adjudicating Authority are grossly erroneous and same cannot be supported. Once the liability in respect of Rs. 75 lakh was admitted and the same was not discharged by the Corporate Debtor, **dispute in regard to quantum of debt would be immaterial at the stage of admission of application under Section 7 unless the debt due and payable falls below the minimum threshold limit prescribed under law.** The impugned order is liable to be set aside as the same is unsustainable.

9. For the reasons recorded hereinabove, we allow the appeal and set aside the impugned order. **The Adjudicating Authority is directed to admit the application of Appellant under Section 7 of the 'I&B Code' after providing an opportunity to the Respondent- Corporate Debtor to settle the claim of Appellant, if it so chooses and pass all consequential directions as a sequel thereto. There shall be no order as to costs."**

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3. The instant Application has been filed by the Respondent/Applicant with following prayers:

“ a) recall the Order dated 18.12.2020 passed in Company Appeal (AT) (Insolvency) No. 412 of 2020 titled ‘Apya Capital Services Pvt. Ltd. Vs. Guardian Homes Pvt. Ltd.’;

b) direct the Hon’ble National Company Law Tribunal, Mumbai to de novo consider the Section 9 IBC Application of the Appellant/Operational Creditor, bearing C.P. No. 3113/I&B/2019;

c) grant ad-interim stay over the execution of the Order dated 08.12.2020 passed in Company Appeal (AT) (Insolvency) No. 412 of 2020 ‘Apya Capital Services Pvt. Ltd. Vs. Guardian Homes Pvt. Ltd.’ till the pendency of the present Application;

d) pass such other/further Order(s) as deemed fit and proper in the interest of justice.”

4. Vide minutes of the Hon’ble Chairperson dated 22.11.2021, the matter was directed to be listed before this Bench comprising Hon’ble Mr. Justice Anant Bijay Singh, Member (Judicial) and Hon’ble Ms. Shreesha Merla, Member (Technical) and the matter was heard.

5. The Learned Counsel for the Respondent/Applicant submitted that this Hon’ble Appellate Tribunal, vide Order dated 08.12.2020, has committed an ex-facie error apparent on the fact of record since it has treated the Appellant as a ‘Financial Creditor’ under IBC and the Application preferred by it before the Hon’ble NCLT, Mumbai as the one filed under Section 7 of IBC when it is

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apparent from the record and also an admitted case of the Appellant that he is an 'Operational Creditor' and had preferred the Application under Section 9 of IBC.

6. It is further submitted that this Hon'ble Appellate Tribunal has accordingly erred to hold that dispute in regard to quantum of debt would be immaterial at the stage of admission of the said application unless the debt due and payable falls below the minimum threshold limit prescribed under law.

7. It is further submitted that this Hon'ble Appellate Tribunal has erred in holding in Para 8 of the Order dated 08.12.2020 that the pre-existing dispute between the Appellant (an admitted Operational Creditor) and the Respondent/Corporate Debtor in regard to quantum of debt would be immaterial at the stage of admission of the Application of the Appellant (admittedly filed under Section 9 of IBC). The said observation is completely in teeth with the provisions of Sections 8, 9 and 5(6)(a) of IBC and also completely contrary to the record of the case.

8. It is further submitted that the Section 424 (1) of the Companies Act, 2013 empowers this Hon'ble Appellate Tribunal to be guided by the principle of natural justice, subject to the other provisions of the Companies Act, or IBC to regulate its own procedure. The provisions of Section 424 (1) of the companies Act, 2013 as hereunder:

“ The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may

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be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908(5 of 1908), but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act [or of the Insolvency and Bankruptcy Code, 2016 (31 of 2016)] and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.”

9. It is further submitted that Rule 11 of the NCLAT Rules, 2016 vests inherent powers on this Hon’ble Appellate Tribunal to make such orders or give directions as may be necessary for meeting the ends of justice. The Rule 11 of the NCLAT Rules, 2016 as hereunder:

“11. Inherent powers.- Noting in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.”

10. From the perusal of the record it appears that earlier the Appellant has filed the I.A. No. 3012 of 2020 (I.A. No. 1154 of 2020) in Company Appeal (AT) (Insolvency) No. 412 of 2020, this Appellate Tribunal has passed the following orders:

“ Learned Counsel for the Appellant submits that Learned Counsel for the Respondent has moved before the Hon’ble Supreme Court of India in Civil Appeal No. 1813 of

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2021 in the matter of 'Gaurdian Homes Pvt. Ltd. vs. Apya Capital Services Pvt. Ltd.'

The Hon'ble Supreme Court of India Order dated 01.07.2021 has passed the following order:-

"We have heard the learned senior counsel for the appellant and perused the record. We do not see any cogent reason to entertain the appeal. The Judgement impugned does not warrant any interference.

The appeal is accordingly dismissed."

The Appeal stand dismissed and the findings of the Judgement was confirmed. Appeal was dismissed and does not want to press the Interlocutory Application. Accordingly, I.A. No. 3012 of 2020 filed on 17.12.2020 and I.A. No. 1154 of 2021 stand dismissed and not pressed."

11. Thereafter, the Learned Sr. Counsel for the Respondent/Applicant has filed the fresh Application i.e. I.A. No. 2068 of 2021 before this Appellate Tribunal.

12. After hearing the Learned Counsel for the Respondent/Applicant and provisions of law including Section 424(1) of the Companies Act, 2013 and also Rule 11 of NCLAT Rules, 2016, we are of the considered view that the aforesaid judgment of this Appellate Tribunal passed in Company Appel (AT) (Insolvency) No. 412 of 2020 dated 08.12.2020 has been challenged before the Hon'ble Supreme Court in Civil Appeal No. 1813 of 2021 (Guardian Homes Private Limited Vs. Apya Capital Services Private Limited) and the Hon'ble Supreme Court vide order dated 01.07.2021 dismissed the Appeal filed by the

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Respondent/Applicant. Therefore, the judgment passed by this Appellate Tribunal merged with the order passed by the Hon'ble Supreme Court.

13. We have also of the considered view that neither Section 242 (1) of the Companies Act, 2013 nor Rule 11 of the NCLAT Rules, 2016 gives power to this Appellate Tribunal to recall the judgment passed by this Appellate Tribunal, after the judgment dated 08.12.2020 was questioned before the Hon'ble supreme Court in Appeal and the Appeal was dismissed by the Hon'ble Supreme Court.

14. This Appellate Tribunal also takes note of the fact that the order dated 02.09.2021 passed in I.A. No. 3012 of 2020 and I.A. No. 1154 of 2020 in Company Appeal (AT) (Insolvency) No. 412 of 2020 shows that the said I.As have already been dismissed and not pressed.

15. Taking all these facts and circumstances, we are of the considered view that power to recall the judgment is not permitted in IBC. Accordingly, the I.A. No. 2068 of 2021 filed by the Respondent/Applicant is hereby dismissed as not maintainable.

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

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

New Delhi

9th December, 2021

R. Nath.

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