

**National Company Law Appellate Tribunal, Principal Bench,
New Delhi**

Company Appeal (AT) (Ins) No. 362 of 2021

IN THE MATTER OF:

**SUSPENDED MANAGEMENT OF
JAY POLYPACK PVT. LTD.**

A Company registered
under the Companies Act, 1956
And having its registered office at
16 GIDC, Waghodia,
Vadodara, Gujrat – 390760
Through its Authorised Signatory
Mr. Nimmagada Doraprasad

...Appellant

Vs.

1.SGV FOILS PVT. LTD.

A Company Registered under
the Companies Act, 1956
And having its registered office at
17/6 Mathura Road, Faridabad,
Haryana – 121007
Through its Director and Authorised Signatory
Mr. Vikas Aggarwal.

... Respondent No. 1

2. JAY POLYPACK PVT. LTD.

Through, RP, Mr. Pradeep Kabra
Having his office at
M-19-20-21 Metro Tower, Ring
Road, Surat – 395002
Email ippradeep.jay@gmail.com
M: 9374081166

...Respondent No. 2

Present:

For Appellant: Dr. Anshul Shah, Mr. Rishabh Parikh, Advocates
For Respondent: Mr. Vikas Aggarwal (Director, Party in person) R1

Mr. Ravi Raghunath, Advocate for RP, R2

J U D G M E N T

Jarat Kumar Jain: J.

The Appellant “Suspended Management of Jay Polypack Pvt. Ltd.” has filed this Appeal against the order dated 23.03.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad, Court No. I) in I.A. No. 780 of 2020 in CP (IB) 587/NCLT/AHM/2018 with I.A./05 (AHM)/2021 and I.A./19(AHM)/2021 whereby Application for setting aside the ex-parte order filed by the Corporate Debtor under Section 424 (1) of the Companies Act, 2013 r/w Rule 11 of the National Company Law Tribunal, Rules, 2016 was disposed of on the ground that at belated stage the Adjudicating Authority is unable to use power under Rule 49 of National Company Law Tribunal Rules, 2016.

2. Brief facts of this case are that SGV Foils Pvt. Ltd. (Operational Creditor) filed an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) against the Corporate Debtor Jay Polypack Pvt. Ltd. The Adjudicating Authority vide ex-parte order dated 27.05.2020 admitted the Application and initiated Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. On 06.11.2020 the Corporate Debtor has filed an Application I.A. No. 780 of 2020 under Section 424 (1) of the Act r/w rule 11 of NCLT, Rules stating that the Applicant (Corporate Debtor) could not remain present before the Adjudicating Authority due to non-receipt of notices. The Applicant came to know of the ex-parte order dated 27.05.2020 only during a conversation with a bank employee on 06.10.2020, thereafter

the Applicant immediately contacted the IRP and sent an email on 09.11.2020 requesting him not to proceed further with the CIRP and also informed him about the intention to approach the Adjudicating Authority for setting aside the ex-parte order. The Appellant (Corporate Debtor) on 19.11.2020 again sent an email to the IRP requesting to hold back on the proceedings during pendency of the Application I.A. No. 780 of 2020. On the date of Application I.A. No. 780 of 2020 the Committee of Creditors (CoC) was not constituted. On 15.12.2020 the IRP was directed to file Reply of the said Application within two weeks. The IRP instead of filing his reply and awaiting the outcome of the Application proceeded with unnecessary haste in constituting the CoC during the pendency of the Application. The IRP issued notice on 13.11.2020 and kept the first meeting on 20.11.2020 despite being informed that the matter was already settled on 19.11.2020. The Application was kept pending for long period by the Adjudicating Authority and ultimately by the impugned order dated 23.03.2021 the Adjudicating Authority has disposed of the Application with the following order:

“Application is filed for setting aside ex-parte order. However, at this stage we are unable to use our power under Rule 49 of NCLT, Rules so belatedly.
Matter stands adjourned to 27.04.2021
Corporate Debtor may file Appeal.”

3. Being aggrieved with this order, the Appellant “Suspended Management of Jay Polypack Pvt. Ltd.” has filed this Appeal.

4. Ld. Counsel for the Appellant submitted that the Appellant has filed Application for setting aside the ex-parte order on 06.11.2020 and Ld. Adjudicating Authority kept pending the Application for long period and

ultimately after lapsed of more than four months the Application has been disposed of without assigning any reason on the ground that they are unable to exercise the power under Rule 49 of the NCLT Rules so belatedly and directed the Appellant may file Appeal.

5. It is submitted that the Application for setting aside ex-parte order was filed on 06.11.2020 and on 19.11.2020 settlement is arrived at between the Corporate Debtor and the Operational Creditor. Thereafter, on 20.11.2020 the CoC was constituted and the first meeting has taken place where the CoC was informed about the pendency of the application as well as settlement. Therefore, a direction was given to RP to file Application for withdrawal of CIRP by the CoC.

6. Ld. Counsel for the Appellant submitted that Ld. Adjudicating Authority has erroneously refused to set aside ex-parte order though notice was not duly served on the Applicant (Corporate Debtor), therefore, the Adjudicating Authority in exercise of power under Rule 49 (2) of NCLT Rules can set aside the ex-parte order passed against the Applicant (Corporate Debtor). For this purpose cited the Judgment passed by this Appellate Tribunal in the case of M/s AKJ Fincap Ltd. Through Authorized Representative Vs. Bank of India in CA (AT)(Ins) NO. 178 of 2021.

7. Ld. Counsel for the Appellant submitted that the Respondent No. 1 (Operational Creditor) himself stated that there was failure to inform the Applicant (Corporate Debtor) about next date of hearing despite there being orders of the Adjudicating Authority to inform the date of hearing to the Applicant. Notice has to be served only through a procedure prescribed in Rule

6 (2) of the NCLT Rules. The Operational Creditor was aware of these facts and chose to serve Form-3 through email. The Appellant replied with the notice of dispute dated 15.06.2018. The Operational Creditor has conveniently omitted to place the notice of dispute on record which amounts to gross suppression of material facts.

8. Ld. Counsel for the Appellant further submitted that this Appellate Tribunal in the case of Mr. Anmol Takriwal (Shareholder of Corporate Debtor) Vs. M/s Auxichem & Anr. CA (AT) (Ins) No. 570 of 2018 held that since the notice was not served upon the Corporate Debtor, the ex-parte order is liable to be set aside. It is also submitted that the IRP has incorrectly added the Union Bank of India which is nothing but a lender to M/s Jay Agro, a sister concern of the Corporate Debtor. The Appellant was only a guarantor in the financial transaction between the M/s Jay Agro and the Union Bank of India. The Hon'ble Supreme Court in Civil Appeal Nos. 8512-8527 of 2019, in IRP for Jaypee Infratech Vs. Axis Bank Ltd. has held that a third-party security is not a financial debt.

9. Lastly, it is submitted that the ex-parte order of admission to initiate CIRP is harsh order. This order would result in serious and grave consequences since the Corporate Debtor is a going concern. Thus, the impugned order may be set aside.

10. The Respondent No. 1 (Operational Creditor) present in person on 28.06.2021 and submitted that he has filed the Reply Affidavit in response to the Appeal. However, such Reply Affidavit is not available on e-portal and no

physical copy is available in the file. Therefore, we have no occasion to consider such Reply Affidavit of Respondent No. 1.

11. Per Contra, Ld. Counsel for the Respondent No. 2 (RP) submitted that the IBC or Regulations do not confer any power on the Adjudicating Authority to recall or review or set aside the order of admission of CIRP passed under Section 9 of the IBC. Thus, there is no error committed by the Adjudicating Authority while passing the impugned order. For this proposition, placed reliance on the Judgment passed by the NCLT Jaipur in the case of M/s Forts Biotech Pvt. Ltd. Vs. DCB Bank Ltd. I.A. No. 109/JPR/2019 in IB No. 81/07/JPR/2018 order dated 07.06.2019 and in the case of Union Bank of Inida Vs. Mansi Oils Grains Pvt. Ltd. 2019 SCC Online NCLT 7624. The Rule 49 of NCLT Rules, 2016 only permits to set aside the ex-parte hearing and not a final order of admission of CIRP as after passing of the impugned order numerous subsequent events and actions have been taken under the IBC. Presently the CIRP is stage of consideration of revised Resolution Plan, therefore, at this stage the order of admission may not be set aside.

12. Ld. Counsel for the Respondent No. 2 (RP) submitted that notice of the Application was sent to Registered Address of the Corporate Debtor the same is returned with remark left, the notice is deemed to have been served on the Corporate Debtor. For this proposition cited the Judgment of Hon'ble supreme Court in the Case of State Trading Corporation of India Ltd. Vs. Spacevision Impax Pvt. Ltd. 2019 SCC Online NCLT 9770. It is also submitted that once the CoC has been constituted then the Operational Creditor and Corporate Debtor are bound by the procedure prescribed under Section 12A of the IBC

r/w Regulation 30 A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016 (Regulations) as held by the Hon'ble Supreme Court in the case of Swiss Ribbons Pvt. Ltd. Vs. Union of India 2019 (4) SCC 17 Para (82). Therefore, it is requested that there is no merits in this Appeal and the Appeal may be dismissed.

13. After hearing Ld. Counsel for the parties, we have gone through the record.

14. The issue arises before our consideration is whether the Ld. Adjudicating Authority in exercise of power under rule 49(2) of the NCLT Rules 2016 can set aside the ex-parte order for initiating a Corporate Insolvency Resolution Process under Section 9 of the IBC.

15. So far as the service of notice on Appellant (Corporate Debtor) is concerned, Ld. Counsel for the Appellant has produced the order sheet of the Ld. Adjudicating Authority dated 09.01.2019 in which it is mentioned that the notice sent to the Appellant returned with postal remarks as left. In the order sheets date dated 17.07.2019 and 09.10.2019 it is mentioned that the Respondent No. 1 Operational Creditor (Petitioner) is directed to inform the date of hearing to the Corporate Debtor. There is nothing on record that the notice has been duly served on the Appellant (Corporate Debtor).

16. Admittedly, the Ld. Adjudicating Authority has vide order dated 27.05.2020 admitted the application under Section 9 of the IBC filed by the Operational Creditor Respondent No. 1 and the Appellant has filed the Application for setting aside the ex-parte order on 06.11.2020 under Section 424 (1) of the Act r/w Rule 11 of NCLT Rules, 2016 stating that the Corporate

Debtor has not received the notice. It is also an admitted fact that CoC has been constituted on 20.11.2020 i.e. after filing of the aforesaid Application for setting aside ex-parte order of admission.

17. It is useful to reproduce the Rule 49(2) of NCLT Rules, 2016:

“49. Ex-parte hearing and disposal:-

1...

(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.”

18. Now, we have considered whether the Ld. Adjudicating Authority while exercising the power under Rule 49(2) can set aside ex-parte order for initiating a CIRP.

19. Hon’ble Supreme court in the case of Swiss Ribbons Pvt. Ltd. Vs. Union of India (2019) 4 SCC 17 at para 82 held that what is the effect after admission of the Application under Section 7 or 9 of the IBC:

“82. 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.”

20. With the aforesaid preposition of law, it is settled that once the Application under Section 7 or 9 is admitted and CIRP initiated, such proceeding is 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. Before a CoC is constituted, a party can approach the Adjudicating Authority directly and the Adjudicating Authority may in exercise of its powers under Section 12A of the IBC r/w Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 allow or disallow an application for withdrawal or settlement. Similarly, before constitution of CoC if the Adjudicating Authority is satisfied that the notice was not duly served on the Corporate Debtor the Adjudicating Authority may make an order for setting aside the ex-parte order for initiating CIRP upon such terms as it thinks fit. However, after constitution of CoC the Adjudicating Authority cannot set aside even ex-parte admission order and in such a situation the Corporate Debtor has to file the Appeal under Section 61 of the IBC.

21. Now, we have considered the facts of this case, the Application under Section 9 was admitted on 27.05.2020 and the Appellant (Corporate Debtor) has filed the Application for setting aside the ex-parte admission order on 06.11.2020 whereas the CoC has been constituted thereafter on 20.11.2020. In such a situation before constitution of CoC the Ld. Adjudicating Authority

can consider the Application for setting aside ex-parte admission order but after constitution of the CoC the Ld. Adjudicating Authority cannot in exercise of power under Rule 49(2) of the NCLT Rules, 2016 set aside the ex-parte admission order. Ld. Adjudicating Authority has passed the impugned order after constitution of CoC i.e. on 23.03.2021, therefore, we find no illegality in the impugned order.

22. It is submitted on behalf of the Appellant that the Corporate Debtor and Operational Creditor have settled the dispute and they have informed the decision to CoC and the CoC has directed the IRP to file the Application for withdrawal of CIRP. Thus, if the matter is settled between parties, the Operational Creditor (Respondent No. 1) may file the Application for withdrawal under Section 12A of the IBC r/w Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

23. With the aforesaid, no interference is called for in the impugned order. Thus, the Appeal is dismissed, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
20th September, 2021
SC