IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

IA No. 1550/MB/C-II/2021

In

C.P (IB) No. 273/MB/C-II/2017

Under Rule 11 of Insolvency and Bankruptcy Code, 2016.

Filed by

Feedback Highway OMT Private Limited. (Formerly known as Feedback Brisa Highway OMT Private Limited)

...Applicant

Vs

Supreme Infrastructure BOT Private Limited

... Respondents

In the matter of

Feedback Highway OMT Private Limited. (Formerly known as Feedback Brisa Highway OMT Private Limited)

...Petitioner/Operational Creditor

Versus

Supreme Infrastructure BOT Private Limited

... Respondent/ Corporate Debtor

Order Pronounced on: 25.02.2022

Coram:

Hon'ble Member (Judicial)	:	Justice P. N. Deshmukh (Retd.)
Hon'ble Member (Technical)	:	Mr. Shyam Babu Gautam

Appearances:

For the Applicant	:	Mr. Manoj Kumar, Advocate.
For the Respondent	:	Mr. Shyam Kapadia, Counsel.

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. The present application is moved by **Feedback Highway OMT Private Limited. (Formerly known as Feedback Brisa Highway OMT Private Limited) Original Petitioner** (hereinafter called as "the Applicants") under Rule 11 of Insolvency and Bankruptcy Code, 2016 against the **Supreme Infrastructure BOT Private Limited Original Respondent** (hereinafter referred to as "Respondents") for seeking Appointment of Interim Resolution Professional as admission order passed on 10th January 2018 instructing that IRP would be appointed vide separate order.

Submissions by Applicant:

2. The Applicant submits that on 10th January 2018, the Company Petition was admitted by this Tribunal and it was instructed that the Interim Resolution Professional would be appointed vide separate order thereby initiating CIRP against the Corporate Debtor. However, till date the IRP has not been appointed in the matter.

3. Subsequently the Applicant herein preferred before this Tribunal another Application against the Corporate Debtor under section 9 of the Code, bearing CP No. 1350 of 2019. However, keeping in view that an order of admission dated 10.01.2018 had already been passed in the captioned

matter against the same Corporate Debtor, this Tribunal disposed off the aforesaid Application as infructuous vide its order dated 25.10.2019.

4. Further while hearing Application it was observed that the Company Petition was never listed for pronouncement of admission of Order. Therefore, this bench sought clarification on this point, the counsel for Applicant in regards of same relied on judgements which are as follows;

   4.1. The Hon'ble High Court of Madras in the matter of *Shaji Purushothaman Vs. Union of India and Ors. 2020 CLA352 (Mad.)* held that Non-adherence to Rules 89, 150 and 153 of NCLT Rules would not vitiate impugned order and thus, cannot be set aside on that ground. The relevant paragraphs are reproduced here below:

   "54. The petitioner got the certified copy of the order within 7 days from the date of pronouncement of the common order dated 20.01.2020 i.e., within the timeline contemplated under Section Sub-section (2) of section 61 of IBC and as such, it cannot be said that he has been put to serious prejudice on account of non-uploading of the information relating to pronouncement of the order on 20.01.2020 and non indication of the same in the Cause List.

   55. Now coming to the mandatory nature of NCLT Rules, 2016, more particularly Rules 150 and 153, in the light of 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 judgement 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 judgement. 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/infraction of the Rules have not been indicated in the Statutory Rules. Hence, the impugned common order cannot be set aside on that ground"*

4.2. The Hon'ble Supreme Court of India in the matter of *Shaji Purushothaman Vs. Union of India and Ors. [Special Leave to Appeal C Nos. 7209/2020]* vide order dated 10.06.2020 upheld the proposition of the Hon'ble Madras High Court.

Submissions by Respondent:

5. The Respondent contends that the said Order of Admission dated 10.01.2018 and the information as gathered by the Respondent indicates that the same was never pronounced in open court and therefore it is a nullity in the eyes of law and same cannot be acted upon. It is the Petitioner's case that an Admission Order dated 10th January 2018 was passed in TCP No.273/2017 initiating CIRP against the Respondent, however, the same did not appoint an interim resolution professional ("**IRP**"). Accordingly, the captioned Application has been filed by the Petitioner for appointment of an IRP in light of the order dated 10th January 2018. Rule 150 of the National Company Law Tribunal Rules, 2016 makes it imperative on the NCLT to pronounce the order after hearing both the parties. The Respondent relied upon the judgements in furtherance of his case relevant portion of which is reproduced here

below:

5.1. The Bombay High Court in *Kamal K. Singh v. Union of India & Ors., 2019 SCC OnLine Bom 5609*, held as follows:

"80. A perusal of the sub-rules of Rule 150 and 151 so also 152 would enable us to hold that the tribunal, after hearing the applicant and respondent, shall make and pronounce the order either at once or, as soon as thereafter, as may be practicable, but not late than thirty days from the final hearing. Apart from the fact that there is a limit set out for everything, that by itself does not mean that rule makers intended total dispensation of the requirement of pronouncement of the order. The pronouncement is necessary. It could be either at once or as soon as thereafter, as may be practicable, but not later than 30 days from the final hearing…However, by sub-rule (2), what is indicated is that every order of the tribunal shall be in writing and shall be signed and dated by the President or Member or Members constituting the Bench which heard the case and pronounced the order…If there was absolutely no necessity of pronouncement of the order, Rule 151 would not have been inserted at all. Rule 151 has been inserted with a purpose. It is stated in Rule 151 that any Member of the Bench may pronounce the order for and on behalf of the Bench…We are aware of the fact that there is great inconvenience to litigants and parties before a court of law if judgments are not duly prepared, signed and pronounced before the presiding officers or Members demit office or handover charge on the eve of either transfer or superannuation. The litigants, therefore, should not suffer after rendering full assistance to the Bench to pronounce its final order. The parties have duly discharged their duty of assisting the court either by arguing in-person or through advocates. Thus, after the oral arguments are concluded or written

submissions are placed on record, all that remains is to pronounce the judgment/order…"

"83.In fact, the judicial proceedings, the orders and judgments therein, have a certain sanctity. Inviolability of judicial proceeding is at the root of everything. The heart of the matter is that the conduct of judicial proceedings or discharge of judicial function by a court of law inspires confidence and maintains the trust and faith of the litigants in the justice delivery system. If that is shaken and destroyed, then, justice itself is a casualty. We must avoid such a situation at all costs. That is why the requirement to pronounce orders is emphasised repeatedly by the Hon'ble Supreme Court…"

5.2. The aforesaid position was reiterated by NCLAT in *M/s Ergomaxx (India) Pvt. Ltd. v. The Registrar & Ors., Company Appeal (AT)(CH)(INS)No.133 of 2021,* wherein it was observed as under:

"21. It cannot be gainsaid that if an order/judgment of a 'Tribunal' is not pronounced at all, the same is a nullity in the 'eye of law', considering the fact that the 'pronouncement' is primarily a judicial act, which is the 'Sanctum Sanctorum of any judicial proceedings' in our 'justice delivery system', as opined by this 'Tribunal."

"22.It is to be relevantly mentioned that 'Pronouncement of Order' is quite distinct from communicating/informing/intimating a deliverance of an order. At any cost, 'Tribunal' cannot dispense with justice. In reality, it must discharge its duties/function with a sole aim and purpose of 'Dispensing Justice'."

"24…The term 'communication' means making known or sharing or imparting. In legal parlance, it means to officially or solemnly, to declare or

affirm as affirm the pronouncement of an 'Order'/'Judgment'. It is to be remembered that pronouncement of an 'Order'/'Judgment' of a Court of Law/a Tribunal is not an empty ritualistic formality. Undoubtedly, the 'Tribunal'/'Appellate Tribunal' is performing/discharging a solemn judicial function. The 'Adjudicating Authority' as per Section 5(1) of the I & B Code is the National Company Law Tribunal."

"25.It cannot be forgotten that if a particular act is to be performed in a particular manner, then, it has to be performed only in that way and not otherwise. Indeed, a procedural wrangle cannot be allowed to be shaked or shackled with. Also that the judicial function of a 'Tribunal' is to be transparent and per contra, it is not to be conducted/performed in an 'opaque' manner."

5.3. In order for a decision / judgment to gain finality the same must be declared / pronounced in open court. Public declaration of a judgment is a pre-requisite for the judgment / decision to come into operation. The Supreme Court in *Surendra Singh & Ors. v. State of Uttar Pradesh, AIR 1954 SC 194,* has held as follows:

"10. In our opinion, a judgment within the meaning of these sections is the final decision of the court intimated to the parties and to the world at large by formal "pronouncement" or "delivery" in open court. It is a judicial act which must be performed in a judicial way. Small regularities in the manner of pronouncement or the mode of delivery do not matter but the substance of the thing must be there that can neither be blurred nor left to inference and conjecture nor can it be vague. All the rest - the manner in which it is to be recorded, the way in which it is to be authenticated, the signing and the sealing, all the rules designed to secure certainty about its content and matter

- can be cured; but not the hard core, namely the formal intimation of the decision and its contents formally declared in a judicial way in open court. The exact way in which this is done does not matter. In some courts the judgment is delivered orally or read out, in some only the operative portion is pronounced, in some the judgment is merely signed after giving notice to the parties and laying the draft on the table for a given number of days for inspection."

"18…For this reason, there is a distinction between judgments which have not been delivered and so have not become operative and those which have. In the former case, the alteration is out of court. It is not a judicial act. It is only part of a process of reaching a final conclusion; also there is no formal public declaration of the Judges' mind in open court and consequently there is no "judgment" which can be acted upon. But after delivery the alteration cannot be made without notice to the parties and the proceedings must take place in open court, and if there is no alteration there is something which is final and conclusive and which can at once be acted upon. The difference is this in the one case, one cannot know, and it would be against public policy to enquire, whether the draft of a judgment is the final conclusion of the Judge or is only a tentative opinion subject to alteration and change. In the second case, the Judge has publicly declared his mind and cannot therefore change it without notice to the parties and without hearing them afresh when that is necessary; and if there is no change the judgment continues in force. By change we mean an alteration of the decision and not merely the addition or subtraction of part of the reasoning."

Therefore, since the Admission Order dated 10th January 2018 passed in TCP No.273/2017 was never pronounced in open court, the same is invalid and does not possess the sanctity of the law.

6. Further the Respondent rebutted the judgment cited by the Petitioner i.e. the judgment of Madras High Court in the matter of *Shaji Purshottam vs. Union of India & Ors. (WP 1926 of 2020)*, the judgment proceeds to direct that the Rules for timelines in respect of passing the orders are directory and not the Pronouncement Rules. Further, in the said judgment, the order was duly pronounced by the Tribunal however the details in respect of the said pronouncement were not made available and accordingly observations were made by the Hon'ble Madras High Court only for the remaining procedure under prescribed under rule 150 and 152.

Findings:

7. Having considered the facts stated as aforesaid and in totality of the circumstances this Bench also considered the Application in the lights of the Supreme Court's judgement in *Surendra Singh & Ors. v. State of Uttar Pradesh, AIR 1954 SC 194* and In the NCLAT's judgement in *M/s Ergomaxx (India) Pvt. Ltd. v. The Registrar & Ors., Company Appeal (AT)(CH)(INS)No.133 of 2021* but the facts of the case are distinguishable in present matter in the hands as the Certified Copy is obtained. In terms of Rule 150 of the Pronouncement Order on perusal of the facts, it is evident that both the Members have signed the Admission Order dated 10.01.2018 and Certified copy of that order was also obtained by the parties. Therefore, as on the date the Admission Order is in the knowledge of parties and in public domain hence, that cannot be treated as nullity in the eye of law. It is further seen that the order does not suffer any infirmity therefore, this Bench is of the considered view that this is a fit case to appoint the IRP.

8. Accordingly, **Ms. Poonam Basak, Regd. No. IBBI/IPA-001-IP-P01234/2018-19/11957** appointed as IRP to carry on functions of IRP as per the IBC Code, 2016. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.

9. During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

10. The Petitioner/Applicant shall deposit a sum of Rs.2,00,000/- (Rupees Two Lakhs only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

11. The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

12. IRP is directed to send a copy of this Order to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the

date of receipt of a copy of this order.

13. With the aforesaid observation the present **IA No. 1550 of 2021 In C.P (IB) No. 273/MB/C-II/2017** stands disposed of.

Sd/-
SHYAM BABU GAUTAM
MEMBER (TECHNICAL)

Sd/-
JUSTICE P. N. DESHMUKH (RETD.)
MEMBER (JUDICIAL)

25.02.2022
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