

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH- II**

KOLKATA

IA(IBC)/889/KB/2022

IN

C.P (IB) No.1422/KB/2018

In the matter of

An application under Rule 11 read with Rule 49 of the National Company Law Tribunal Rules, 2016 .

And

In the matter of:

M/s S.S. Engineers.

... Applicant

Versus

In the matter of:

Mr. Nitesh Kumar More, Interim Resolution Professional

...Respondent/IRP

Date of hearing :13/01/2023

Order Pronounced on : 07 /02/2023

Coram:

Mrs. Bidisha Banerjee, Member (Judicial)

Mr. Balraj Joshi, Member (Technical)

Counsels appeared through Physically/ Video Conference

Mr. Ritoban Sarkar, Adv.] For the Operational Creditor

Mr. Abhidipto Tarafdar, Adv.]

Mr. Ranjit Singh, Adv.]

Ms. Tutul Das Singh, Adv.]

Ms. Pooja Sett Chakraborty,]

Mr.Saurav Jain, Adv.] For Respondent

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. Ld. Counsel for the parties was heard.
2. This is an application filed under Rule 11 read with Rule 49 of the National Company Law Tribunal Rules, 2016 for setting aside of the order dated 23rd May, 2022 passed by this Adjudicating Authority. The Applicant by way of this application has sought for recalling and/or modification of the order dated 23rd May,2022 whereby and whereunder the applicant was directed to pay the CIRP cost in favour of the Respondent/IRP.
3. It is alleged that the said Respondent had not come with clean hands and had not submitted the correct facts as well as the details of the expenses incurred by him and the actual fees due and payable to him. The order dated 23rd May, 2022 is extracted hereunder: -

“1. Ld. Counsel for the IRP present.

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2. This application has been filed by the IRP seeking payment of his fees and CIRP costs which has been incurred by the IRP in connection with the CIRP process. 3. It is submitted that vide order dated 12/02/2020 the Corporate Debtor was admitted under CIRP appointing the applicant herein as IRP. However, vide order dated 26/02/2021 in Civil Appeal No. 1898/2020, the Hon’ble Supreme Court has passed the following order:

“After hearing the learned Solicitor General, Mr. Tushar Mehta and Mr. Sudipto Sarkar, learned senior counsel, we deem it appropriate to remit the appeal to the NCLAT for final hearing

and disposal, preferably within three months from today. The order dated 06/03/2020 whereby this Court had granted stay of operation and implementation of order of the NCLT shall continue till the disposal of the appeal.”

4. In compliance of the aforesaid order of the Hon’ble Supreme Court, Hon’ble NCLAT vide order dated 10/01/2022 in Company Appeal (AT) (Insolvency) No. 332 of 2020 has passed the following order:

“This Appeal is allowed and the Order of the Adjudicating Authority dated 12.02.2020 is set-aside. The Adjudicating Authority will now close the proceedings. The Corporate Debtor is released from all rigor of law and is allowed to function independently through its Board of Directors with immediate effect.”

5. Vide order dated 09/03/2022, this Adjudicating Authority in compliance of the order of the Hon’ble NCLAT had closed the CP(IB)/1422(KB)2018.

6. IRP has filed Final Progress Report on 08/03/2022 wherein in Annexure – I, he has claimed CIRP costs of Rs.4,64,815.00 which is inclusive of IRP fees of Rs.3,00,000/- + GST of Rs.54,000/- on IRP fees.

7. So far as IRP fees is concerned, we reduce it to Rs.1,00,000/-. Therefore, total amount to be paid to the IRP is Rs.2,65,000/-, which is in full and final settlement of IRP’s fees and CIRP costs. Therefore, the Operational Creditor in CP(IB)/1422(KB)/2018 is hereby directed to pay a sum of Rs.2,65,000/- within two weeks from today. If there is no compliance of the order, the applicant may make an application to this Adjudicating Authority with advance notice to the Operational Creditor.

8. IA shall stand disposed of

4. It is submitted by the applicant that on a previous occasion i.e. on 9th March, 2022 when CP No. 1422/2018 was disposed of having noted that the Hon’ble NCLAT

order dated 10/01/2022,the following was recorded:-

“4. Ld.Counsel for the RP, however, submits that the CIRP cost and fees have not been paid by the Operational Creditor. We direct the Ld. Counsel for the RP to make an application with advance copy to the Operational Creditor for hearing on this application on 20/04/2022.”

5. Final Progress Report filed by the RP is taken on record.

6. IA(IBC) 417/KB/2021- This IA shall be tagged along on 20/04/2022”.

5. However, without IRP/RP having been made an application detailing the fees that are due and payable, the order dated 23rd May, 2022 was passed, that too *ex parte* in an application filed by the IRP and in absence of the respondent/ Operational Creditor of the CP, who would be liable to make such payments.
6. It is urged that in terms of Rule 11 of the NCLT Rules, 2016, this Tribunal has wide powers to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.
7. Rule 49(2) of the said Rules enjoin the following;

“ (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 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 thinks fit.”

It is submitted that in view of the explicit provisions permitting this Tribunal to

recall its own order where orders have been passed *ex parte* without hearing the respondents but against them, the present applicant seeks modification of the order in as much as it has been issued *ex-parte* against them.

8. Ld. Counsel for the applicant also desires that upon recalling of the order the applicant in IA 417/2022 namely the RP may be asked to furnish details of his claim to justify raising an amount of Rs.2,65,000/- as his fees and a claim of Rs.4,65,815/- inclusive of IRP fees of Rs.3,00,000/- + GST of Rs.54,00,000/- of IRP fees in full and final settlement of IRP fees and CIRP cost.
9. Ld. Counsel for the Respondent vehemently opposes the recalling of the order on the ground that such power is not vested to this Tribunal.
10. We have considered the rival contentions and perused the records.
11. We would note that in view of explicit provisions as contained in Rule 49(2), 2016 read with Rule 11 of the NCLT Rules, 2016 inarguably and irrefutably, this Tribunal can set aside an *ex parte* hearing against the Respondent in an application and list the matter for further hearing, in given cases, for eg. where a right to hearing has been closed by an order on the ground that opportunities granted were not availed of.
12. Nevertheless, this Tribunal is not vested with the power of recall of an *ex parte* order where a decision has been taken *ex parte* but on merits.
13. In the case of ***Printland Digital (India) Pvt. Ltd. Vs. Nirmal Trading Company passed in Company Appeal (AT) (Insolvency) No. 504 of 2022***, the Hon'ble NCLAT held as under:

“There is a difference between recalling of an order and review on merits of the issue decided by the Adjudicating Authority. No doubt that the Adjudicating Authority has no jurisdiction to review its order after deciding a substantial issue but it has the jurisdiction to recall the order of the kind in dispute i.e. where the right to Reply was closed by an order on the

ground that the opportunities granted were not availed. In this regard, we rely upon a decision of this Tribunal rendered in the case of CA(AT)(Ins) No. 271 of 2022 in which it has been held that if there is an adjudication by the Adjudicating Authority on merits of the issues then it would not have the jurisdiction to review its order but insofar as the dispute with regard to right to file the Reply which is closed by an order, it certainly has the jurisdiction to recall it in terms of the Rule 11 of NCLT Rules,2016”.

14. It is, therefore, almost trite, axiomatic, and settled law that this Adjudicating Authority lacks power of review on merits of any issue decided. As such the claim is unsustainable.
15. Accordingly, **IA(IBC)/889/KB/2022** is **rejected** .
16. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order signed on the 7th day of February, 2023

P.J.