

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No 464 of 2022

(Arising out of Order dated 29.03.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in C.P. (IB)/91(PB)/2022)

IN THE MATTER OF:

Mr. Ashok Tiwari
S/o Late Hridayanand Tiwari,
E-4/6 (SF), Vasant Vihar,
New Delhi – 110057.

.... Appellant

Vs

1. DBS Bank India Limited (DBIL)
Capital Point, Baba Kharak Singh Marg,
Cannaught Place, New Delhi-110001.
2. M/s Abhisar Impex Private Limited,
Thapar House, 124 Janpath,
New Delhi – 110001.
Through
Ms. Ritu Rastogi
(Interim Resolution Professional)

.... Respondents

Present:

**For Appellants: Mr. Siddharth Bhatnagar, Sr. Advocate with
Mr. Shashwat Anand, Mr. Kumar Ayush, Mr.
Ashutosh Thakur, Mr. Prabhat Ranjan Raj, Mr.
Sidharth Sarthi, Mr. Anil Kumar and Mr. Gunjesh
Ranjan, Advocates.**

**For Respondents: Mr. Dhruv Malik, Ms. Palak Nenwani and
Ms. Mannat Sabharwal, Advocates for R-1.**

Ms. Ritu Rastogi, Advocate for R-2.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 29.03.2022 passed by National Company Law Tribunal, Principal Bench, New Delhi by which

order, Section 7 Application filed by Respondent - DBS Bank India Limited has been admitted.

2. Brief facts of the case necessary for deciding this Appeal are:

- (i) The Application C.P. (IB)/91(PB)/2022 has been filed by the Respondent under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”) on 18.01.2022 alleging default of Rs.49,55,93,696.48.
- (ii) The Adjudicating Authority on the said Application issued notice to the Corporate Debtor (Appellant herein) on 11.02.2022, fixing the date as 29.03.2022. The copy of the notice was served on the Appellant on 07.03.2022. On 29.03.2022, which was the first date of hearing after service of notice on the Appellant – Corporate Debtor, the Counsel appearing on behalf of the Appellant made a request to the Adjudicating Authority for grant of time to file a reply. The Adjudicating Authority refused to grant any time to file reply and proceeded to admit the Application by order of the same date, that is, 29.03.2022. The Appellant aggrieved by the said order has come up in this Appeal.

3. This Appeal was entertained by this Tribunal on 27.04.2022, on which date, this Tribunal passed an interim order that no further steps shall be taken in pursuance of the impugned order dated 29.03.2022. The Financial Creditor has appeared and filed reply and rejoinder to the reply has also been filed by the Appellant.

4. We have heard Shri Siddharth Bhatnagar, learned Senior Advocate for the Appellant and Shri Dhruv Malik, learned Counsel appearing for the Respondent.

5. Learned Senior Counsel for the Appellant submits that the Adjudicating Authority while refusing to grant any time for filing reply on the first date of hearing has denied natural justice to the Appellant. Not even one opportunity was granted to the Appellant to file a reply. Learned Senior Counsel for the Appellant referring to Rule 37 of National Company Law Tribunal Rules, 2016 (“**Rules**”) submits that the rule envisage that in event the Respondent does not appear on the date specified in the notice, Tribunal after according reasonable opportunity to the Respondent, shall forthwith proceed to *ex-parte* disposal of the Application. Whereas, when the Respondent appears on the first date of hearing, the Rules does not envisage that no reasonable opportunity should be given to the Respondent. A Corporate Debtor, who appears on the first date of hearing and seeks a reasonable opportunity to file a reply cannot be worse off than a Respondent who does not appear on first date of hearing. Further, the Rules does not provide for any consequence for non-filing of the reply on the first date of hearing, in the event notice is served. The provisions of Rules 37 are only procedural provisions, which are ‘directory’ and non-filing of reply on the first date does not result in forfeiting the right of the reply of the Appellant. The Rules 34 as well as Rule 51 of the NCLT Rules, 2016 empower the Tribunal to regulate its own procedure in accordance with the Rules of natural justice. Thus, even though Rules are silent on whether a

Corporate Debtor can pray for time for filing the reply on the first date of hearing, the Court has to adopt a procedure with the consonance of principles of natural justice. The order passed by Adjudicating Authority on the first date of hearing, rejecting the request of the Appellant to grant some time to file reply, is in violation of the principles of natural justice and deserves to be set-aside. Order of Adjudicating Authority admitting the Application has serious consequences, hence, the Tribunal ought to have given opportunity to the Corporate Debtor to file a reply.

6. Shri Dhruv Malik, learned Counsel for Respondent No.1 refuting the submissions of learned Senior Counsel for the Appellant submits that Corporate Debtor had ample opportunity to file a reply before the next date of hearing. The notices were issued on 11.02.2022, which was served on 07.03.2022. Hence, the Corporate Debtor could have filed the reply before the first date of hearing. It is submitted that Adjudicating Authority has rightly refused to grant any time to the Corporate Debtor to file a reply, since it had ample time to file a reply and when it chooses not to file a reply, it has to face the consequences. The IBC proceedings are to be completed in a timeline as is prescribed in the Code and the Rules. Hence, the Adjudicating Authority did not commit any error in rejecting the prayer for grant of time to file a reply. Further, the Adjudicating Authority has noticed the earlier proceedings before the Debt Recovery Tribunal and has rightly observed that Corporate Debtor was well versed with the facts of the case since long. The learned Counsel for the Respondent submitted that the

Appellant having chosen not to file a reply cannot be heard in alleging violation of principles of natural justice.

7. We have heard learned Counsel for the parties and have perused the records.

8. There is no dispute between the parties regarding facts of the case and sequence of events. The notice was issued by the Adjudicating Authority to the Corporate Debtor in Section 7 Application filed by the Financial Creditor on 11.02.2022, which notice was served on the Appellant – Corporate Debtor on 07.03.2022. 29th March 2022, was the first date of hearing before the Adjudicating Authority, when the Corporate Debtor was required to appear. On the first date of hearing, the Corporate Debtor appeared through Counsel and made a request for time to file a reply, which request was turned down by the impugned order and Adjudicating Authority proceeded to admit the Application by order of the same date, that is, 29.03.2022. Paragraph 6 of the impugned judgment notices the relevant facts and the prayer made by the Corporate Debtor for grant of time. Paragraph 6 is as follows:

“6. Vide order date 11.02.2022 of this Adjudicating Authority, notice was issued to the Respondent through process dasti as well as through all modes. The same was served on the party on 07.03.2022 which was admitted by the Ld. Advocate for the Corporate Debtor (Corporate Guarantor) who appeared today and sought time for filing reply IBC proceedings being time bound and the notice of Section 7 application has been served upon the Corporate Debtor on 07.03.2022.

Further, the Corporate Guarantor was a party in the MA No.135/2017 in OA No.466/2015 before the Debt Recovery Tribunal which issued recovery certificate no. 347/2019 dated 16.07.2019, and hence is well versed with the facts of the case since a long time.”

9. 29th March, 2022, was the first date of hearing before the Adjudicating Authority and as per Rules, that is, National Company Law Tribunal Rules, 2016, when notice is issued in Form No.NCLT-5, by the Adjudicating Authority, the Corporate Debtor is to file a reply accompanied with an affidavit, along with copies of such documents on which it relies before the next date of hearing. Rule 37 is as follows:

“37. Notice to Opposite Party.- (1) The Tribunal shall issue notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the Notice. Such notice in Form No. NCLT.5 shall be accompanied by a copy of the application with supporting documents.

(2) If the respondent does not appear on the date specified in the notice in Form No. NCLT.5, the Tribunal, after according reasonable opportunity to the respondent, shall forthwith proceed ex-parte to dispose of the application.

(3) If the respondent contests to the notice received under sub-rule (1), it may, either in person or through an authorised representative, file a reply accompanied with an affidavit and along with copies of such documents on which it relies, with an advance service to the petitioner or applicant, to the Registry before the date of hearing

and such reply and copies of documents shall form part of the record.”

10. The Rules thus, contemplates filing of reply by the Corporate Debtor, who has received notice and who appears before the Adjudicating Authority and contest the matter. Sub-rule (3) of Rule 27, however, is silent as to what shall be the course of action to be adopted by the Adjudicating Authority in event the reply is not filed by the Corporate Debtor before the date of hearing. The submission of learned Counsel for the Respondent is that when notice grants time to file a reply and no reply is filed by the Corporate Debtor on the first date of hearing, he shall have no right to claim any time for filing a reply. In event we accept the submission of the Respondent, sub-rule (3) of Rule 37 has to be read to mean that in the event on the date of hearing, no reply is filed by the Corporate Debtor and it has been served with the notice of filing reply, its right to file reply shall be forfeited. As noted above, sub-rule (3) of Rule 37 does not provide for any consequence in event of non-filing of reply before the next date of hearing. Rule 37 is procedural Rule and procedural Rules are there to assist the adjudication of the dispute by Adjudicating Authority. Rule 37, sub-rule (3) cannot be read to mean that on non-filing of reply by the Corporate Debtor before the date of hearing, he can neither ask for any time, nor can be granted any time by the Adjudicating Authority to file the reply.

11. In the above reference, we may notice sub-rule (2) of Rule 37, which provides that if the Respondent does not appear on the date specified in

the notice in Form No.NCLT-5, then the Tribunal **after according reasonable opportunity** to the Respondent, shall forthwith proceed *ex-parte* to dispose of the application. Thus, in event Corporate Debtor does not appear on the date specified in the notice, the Tribunal is obliged to accord reasonable opportunity to the Respondent before proceeding *ex-parte* to dispose of the application. Thus, on non-appearance of Corporate Debtor on the next date of hearing, Adjudicating Authority is not to mechanically proceed to dispose of the Application *ex-parte*. When a Corporate Debtor, who does not appear on the date fixed, is entitled to a reasonable opportunity before proceeding *ex-parte*, a Corporate Debtor who appeared on the first date of hearing cannot be put to in worse position than a Corporate Debtor who does not appear. The NCLT Rules, 2016 namely – Rule 34 as well as Rule 51 entitles the Tribunal to regulate its own procedure in accordance with the rules of natural justice. Rule 34 and Rule 51 are as follows:

“34. General Procedure. - (1) In a situation not provided for in these rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice.

(2) The general heading in all proceedings before the Tribunal, in all advertisements and notices shall be in Form No. NCLT. 4.

(3) Every petition or application or reference shall be filed in form as provided in Form No. NCLT. 1 with attachments thereto accompanied by Form No. NCLT.2 and in case of an interlocutory application, the same

shall be filed in Form No. NCLT. 1 accompanied by such attachments thereto along with Form No. NCLT. 3.

(4) Every petition or application including interlocutory application shall be verified by an affidavit in Form No. NCLT.6. Notice to be issued by the Tribunal to the opposite party shall be in Form NCLT-5.

51. *Power to regulate the procedure.- The Tribunal may regulate its own procedure in accordance with the rules of natural justice and equity, for the purpose of discharging its functions under the Act.”*

12. The procedure, which is to be adopted by the Tribunal has to be in consonance with the rules of natural justice and equity as required by the rules itself. Unless, it is held that due to non-filing of the reply before the date of hearing by the Corporate Debtor, the Adjudicating Authority is obliged to decide the application under Section 7, the Adjudicating Authority has ample jurisdiction to consider any request for reasonable time by a Corporate Debtor for filing a reply. The Tribunal is fully entitled to grant time for filing a reply asked for by the Corporate Debtor on the first date of hearing. Rejecting the request of the Corporate Debtor on the very first day for grant of time to file a reply, cannot be said to be in consonance with the principles of natural justice. There can be no dispute that in appropriate case, if the Adjudicating Authority is satisfied that the Corporate Debtor is deliberately delaying the matter, the request for grant of any further time to file a reply can be refused. But present is not a case where it can be said that Corporate Debtor was delaying the disposal of the

case, since 29.03.2022 was the first date of hearing as indicated in the notice served on the Corporate Debtor on 07.03.2022.

13. Hon'ble Supreme Court had occasion to consider the Section 9(5) proviso, Section 7(5) proviso and Section 10(4) proviso of IBC in **(2017) 16 SCC 143 - Surendra Trading Company vs. Juggilal Kamalapat Jute Mills Company Ltd. and Ors.** Section 9, sub-section (5) provides:

“9. Application for initiation of corporate insolvency resolution process by operational creditor. –

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order–

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, -

(a) the application made under sub-section (2) is complete;

(b) there is no payment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if -

(a) the application made under sub-section (2) is incomplete;

(b) there has been payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.”

The question before NCLT in a proceeding under Section 9 is as to whether fourteen days' time prescribed for the Adjudicating Authority to pass the order is 'directory' or 'mandatory'. The Appellate Tribunal has held the said provision as 'directory'. However, Appellate Tribunal held proviso to sub-section (5) of Section 7 or proviso to sub-section (5) of Section 9 and Section 10 (4) to remove the defect within seven days as mandatory, and on failure, application is fit to be rejected. The Hon'ble

Supreme Court considered the proviso of Section 7 and 9 and did not approve the view of the Appellate Tribunal that time provided to remove the defects within seven days under proviso to sub-section (5) of Section 7 and under proviso to sub-section (5) of Section 9 are mandatory. Hon'ble Supreme Court held that the said provisions are 'directory' in nature. It further held that procedural provisions are generally 'directory'. The Hon'ble Supreme Court has quoted with approval an earlier judgment of the Supreme Court ***Kailash v. Nanhku (2005) 4 SCC 480***, which was a case where Hon'ble Supreme Court has considered the provision of Order 8 Rule 1 of CPC, which provided for time to file a written statement. Hon'ble Supreme Court had held the provision of Order 8 Rule 1 CPC as 'directory' and not mandatory and the Court can extend the time for filing of written statement beyond the time schedule. Paragraph 27 of the judgment in ***Surendra Trading Co.*** is as follows:

*“27. The aforesaid process indicated by us can find support from the judgment of this Court in *Kailash v. Nanhku* [*Kailash v. Nanhku, (2005) 4 SCC 480*], wherein the Court held as under: (SCC pp. 500-01, para 46)*

“46. (iv) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any

penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away.

(v) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case.”

14. The learned Senior Counsel for the Appellant has also placed reliance on a judgment of this Tribunal in ***Zee Entertainment enterprises Limited v. Invesco Developing Markets Fund and Ors. – Company Appeal (AT) No.121 of 2021 - (2021) 229 Company Cases, 13***, where this Tribunal held that Rule 37 provides for grant of reasonable and sufficient time to file a reply. In the above case, the Adjudicating Authority has granted only two days' time to file a reply, which was held to be in violation of principles of natural justice. It is relevant to note paragraphs 22 and 23 of the judgment, which is to the following effect:

“22. It is also important to mention that Rule 37 of NCLT Rules provides a grant for reasonable and sufficient time to file a reply/counter. Rule 37 of NCLT Rules, 2016 is quoted below for ready reference:

“37. Notice to Opposite Party.—(1) The Tribunal shall issue Notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the Notice. Such Notice in Form No. NCLT. 5 shall be accompanied by a copy of the application with supporting documents.

(2) If the respondent does not appear on the date specified in the Notice in Form No. NCLT. 5, the Tribunal, after according reasonable opportunity to the respondent, shall forthwith proceed ex-parte to dispose of the application.

(3) If the respondent contests to the Notice received under sub-rule (1), it may, either in person or through an authorised representative, file a reply accompanied with an affidavit and along with

copies of such documents on which it relies, with an advance service to the Petitioner or applicant, to the Registry before the date of hearing and such reply and copies of documents shall form part of the record.

23. *Therefore, it is clear that the Learned NCLT has committed an error in not granting reasonable and sufficient time for filing a reply, which is a complete violation of Rule 37 of NCLT Rules and Principles of Natural Justice.*

Therefore, in the circumstances, as stated above, we are of the opinion that reasonable and sufficient opportunity should be given to the Appellants for filing a reply. After hearing both the parties, the Learned NCLT should proceed further. The appeal is disposed of accordingly—no order as to costs.”

15. In view of the above, we find that Adjudicating Authority did not grant reasonable opportunity to the Corporate Debtor to file its reply as is envisaged by Rule 37 of the NCLT Rules and rejecting the request of the Corporate Debtor for time to file reply on the very first day of hearing is denial of principles of natural justice. We, thus, are of the view that order impugned cannot be sustained. However, we are of the view that Appellant – Corporate Debtor be allowed time to file a reply, so as to obviate any further delay in proceedings before the Adjudicating Authority. We, thus, allow two weeks’ time to the Appellant to file a reply before the Adjudicating Authority. The Financial Creditor shall also be entitled to file its rejoinder within two weeks thereafter, if so advised.

16. In the result, we allow the Appeal, set-aside the impugned order dated 29.03.2022. As observed above, Appellant will file a reply within two weeks from the date of this order and rejoinder to the same, if any, may be filed within two weeks thereafter. The Application under Section 7 is revived before the Adjudicating Authority and shall be listed before the Adjudicating Authority after four weeks for proceeding further in the matter in terms of law. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Justice M. Satyanarayana Murthy]
Member (Judicial)**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

14th July, 2022

Ashwani