

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 2909 OF 2022

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016 r/w Rule 11 of
NCLT Rules, 2016

Indian Bank

...Applicant

Vs.

Dev Land and Housing Pvt. Ltd.

...Respondent

I.A. 1845 OF 2022

Dev Land and Housing Pvt. Ltd.

...Applicant

Vs.

Indian Bank & others

...Respondent

In the matter of

C.P.(IB) No. 1399/MB/2017

Bank of India

Financial Creditor

Vs.

Mandhana Industries Limited

Corporate Debtor

Order delivered on: 27.02.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances

For the Applicant : Mr. Prakash Shinde, Advocate
For the Respondent : Mr. Deep Roy a/w Mr. Shwetank Nigam,
Advocate

ORDER

Per: V.G. Bisht, Member (Judicial)

1. This Application IA 2909/2022 was filed by the Indian Bank ("Applicant") in IA 1845/2022, filed by M/s Dev Land and Housing Private Limited in CP 1399/2017, in the matter of Mandhana Industries Limited (Corporate Debtor) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("Code"). The Applicant seeks recall/modification of ex-parte order dated 20th September, 2022 vide which the IA 1845 of 2022 was allowed in favour of Applicant directing the Applicant Bank to handover the title deeds and other requisite documents to the Successful Resolution Applicant and to issue no-dues certificate. Further, the Applicant has also sought an opportunity to place its affidavit in reply and hear the IA 1845 of 2022 and impose heavy costs on the Respondent for misrepresenting this Tribunal and obtaining the order dated 20th September, 2022 despite status quo being put in effect by the Hon'ble Supreme Court in relation to the Resolution Plan submitted by the Respondent.

1.1. The Applicant submits that the Applicant has been deprived of an opportunity to place its Reply on record and opportunity to be heard. The Applicant further submits that the Respondent has not apprised this Tribunal of the entire facts and has concealed the fact of pendency of Appeal before the Hon'ble Supreme Court of which they were fully aware and the Order dated 16.9.2022 passed in the same and as such has misled this Tribunal.

1.2. The Applicant states that the said IA was filed by the Respondent on 23rd June, 2022 and was registered on 8th July, 2022 and came up for hearing before the Tribunal for the first time on 11th July, 2022 on which date the matter could not reach due to paucity of time. The Applicant states and submits that no court notice has been served on the Applicant as the Respondent No. I therein which is a mandatory compliance as per the Rule 37 of the NCLT Rules, 2016, produced hereinbelow for easy reference:

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

1.3. The Applicant further submits that Rule 37 of the NCLT Rules, 2016 further provides as under:

(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.

1.4. The Applicant submits that the Applicant was neither served with a copy of the Court Notice along with the copy of the Application nor the Applicant was accorded reasonable opportunity before proceeding ex parte and therefore the said order dated 20th September, 2022 must be recalled on this very ground alone.

1.5. That the matter again came up for hearing on 5th August, 2022 wherein the matter was placed for hearing high on board on next date i.e 11 August, 2022, on which date also the matter did not reach due to paucity of time and was adjourned to 30th August, 2022. When the matter was listed for hearing on 30th August, 2022, the matter again did not reach due to paucity of time and was adjourned to 20th September, 2022 retaining the position of high on board. The Applicant submits that without a proper and effective service of the notice of the application and without being given an opportunity to be heard, this Tribunal proceeded exparte and disposed of the said IA which is contrary to the principles of natural justice causing grave prejudice to the Applicant. Even otherwise in view of the Hon'ble Supreme Court order dated 16th September, 2022, the order dated 20th September, 2022 could not have been passed and thus the order is liable to be recalled/modified. Further, this Tribunal may be pleased to grant leave to file Affidavit in

Reply to IA 1845 of 2022 and hear the Applicant herein for passing appropriate orders on merits.

7. The Applicant for the sake of easy reference has herein reproduced Rule 49(2) of the NCLT Rules, 2016, which sets out the procedure for Ex-parte Hearing and disposal

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.

1.6. The Applicant submits that when the matter came up for hearing on 20th September, 2022, the Advocates for the Applicant could not appear due to technical glitches on the part of the Applicant and could not seek time from this Tribunal to file its Vakalatnama and to place the Affidavit in Reply on behalf of the Applicant.

1.7. The Applicant submits that during the course of the hearing, the Applicant has deliberately not placed certain material facts before this Bench with an intention to maliciously obtain orders from this Tribunal. The Applicant states and places it on record that the Applicant is a dissenting financial creditor and was aggrieved by the distribution that was proposed to the dissenting creditors under the Resolution Plan submitted by the

Respondent herein which was also approved by the NCLT on 19th May, 2021. The Applicant craves leave to produce the order dated 19th May, 2021 passed by this Tribunal, approving the Resolution Plan of the Respondent.

1.8. The Applicant had filed an appeal against the NCLT order dated 19th May, 2021 before the National Company Law Appellate Tribunal ("Hon'ble NCLAT") in Company Appeal (AT) (Ins.) No. 644 of 2021, in which order dated 6 May, 2022 was passed against the Applicant herein dismissing the Company Appeal.

1.9. Aggrieved by the order of the Hon'ble NCLAT, the Applicant filed a Civil Appeal before the Hon'ble Supreme Court in Civil Appeal No. 6358 of 2022 ("said Civil Appeal") inter alia against the Respondent herein who is Respondent No. 2 in the Civil Appeal. The appeal was heard by the Hon'ble Supreme Court on 16 September, 2022 and Mr Rony Jophn accepted notice on behalf of the respondent. The Hon'ble Supreme Court directed the parties to maintain status quo, as it exists today. The Applicant submits that in view of the order of the Hon'ble Supreme Court dated 16 September, 2022, ("status quo order") no further steps could be taken in pursuance of the Resolution Plan until the adjudication of the said Civil Appeal. Berati annexed and marked as Exhibit-C copy of the order of the Hon'ble Supreme Court dated 16 September, 2022 where parties including the respondent were directed to maintain status quo

- 1.10. The Applicant further states and submits that the advocates appearing on behalf of the Respondent in the Civil Appeal before the Hon'ble Supreme Court as evident from the order of the Hon'ble Supreme Court wherein the Advocates took notice of the status quo imposed on 16th September, 2022 are also on record and appearing before the Tribunal in IA 1845 of 2022 in which the order dated 20th September, 2022 was passed which is subsequent to the status quo order passed by the Hon'ble Supreme Court. The Applicant submits that despite being aware and took notice of the status quo order, the Respondent have deliberately chosen not to disclose such a material and adverse fact with an intention to misrepresent and maliciously obtain orders from this Tribunal and also took undue advantage of the absence of representation by the Advocates of the Applicant on 20 September, 2022. The Applicant submits that for this reason alone, the impugned order ought to be recalled/modified with heavy costs imposed on the Respondent.
2. The Respondent filed affidavit in reply dated April 2023 stating that the Applicant herein, being a dissenting financial creditor, had filed an appeal against the Approval Order, before the Hon'ble National Company Law Appellate Tribunal ("NCLAT), challenging the distribution of the resolution proceeds inter-se the lenders. The Hon'ble NCLAT vide its order dated May 06, 2022 disposed of the said appeal and held that distribution mechanism as approved by the CoC, is ultimately the prerogative of the CoC, which cannot be interfered with by this Tribunal or by the NCLAT.

2.1. It is pertinent to highlight that the Hon'ble NCLAT has categorically recognized that the issue pertains to the distribution of resolution proceeds, and that there are no grounds whatsoever, to interfere with the approved Resolution Plan. In furtherance to the NCLAT Order, the Applicant has filed an before the Hon'ble Supreme Court, which is still pending adjudication SC Appeal.

2.2. It is important to note that pursuant to the Approval Order and the NCLAT Order, the Respondent has fully implemented the Resolution Plan and disbursed the entire resolution proceeds amounting to over INR 175 Crores, as stipulated under the Resolution Plan, out of which a sum of INR 41,42,22,664/- has been paid to the Applicant, as per the approved Resolution Plan, which has been duly accepted by the Applicant without any objections or demur. Accordingly, the Respondent, having fully implemented the Resolution Plan, paid all the stakeholders as per the Resolution Plan, taken over the management and affairs of the Corporate Debtor and is now working towards turning around the company and providing employment. Despite having accepted all the relevant payments under the Resolution Plan, the Applicant has failed to adhere to the provisions of the Resolution Plan for release of title deeds and other documents in relation to the assets of the Corporate Debtor and issuance of no dues certificate. In the light of such breach on the part of the Applicant, the Respondent approached this Tribunal seeking appropriate reliefs for release of the title deeds and other documents in relation to the assets of the Corporate Debtor and issuance of

no dues certificate ("RA Application), which were duly granted by this Tribunal vide its order dated September 20, 2022.

2.3. The contention of the Applicant that a copy of the IA or a notice for hearing was not provided to it, is completely baseless and misconstrued. It is submitted that contrary to all the allegations and contentions of the Applicant, the Respondent, vide its e-mail dated June 23, 2022 had duly served a copy of the IA. Further, the Respondent had also provided the Applicant with a notice indicating the next date of hearing of the matter, vide email dated August 05, 2022.

2.4. It is pertinent to note that rule 37 of the National Company Law Tribunal Rules, 2016 ("NCLT Rules) requires that the respondent must be informed regarding the matter through a notice, so that it can show cause against the application. In the instant case, as already mentioned hereinabove, the Respondent, vide its e-mail dated August 05, 2022 has clearly indicated the next date of hearing and requested the Applicant to be present for the same. Therefore, the Applicant had been informed of the matter and has had sufficient opportunity to show cause.

2.5. There were sufficient opportunities provided to the Applicant to appear or file a reply, but the Applicant willingly chose not to do so. Further, the Hon'ble NCLAT in *T.V. Sandeep Kumar Reddy vs State Bank of India & Ors* held that in case a private notice has been served and sufficient opportunities have been granted to avail defences available in law, there is no question of violation of natural justice, it is pertinent to note that the Bench in Impugned Judgement recorded the fact that the

Respondent has duly served the notice of hearing to the Applicant.

2.6. Further, the Applicant has contended that no opportunity to file reply or show cause against the RA Application was given in light of the above, it is pertinent to note that rule of the NCLT Rules 2016 stipulates that the respondent may file a reply in an application along with copies of the relevant documents. However, it is important to highlight that filing of a reply in an application is a right that may be exercised by the respondent and not a pre-condition to the hearing of an application. In this case, it is important to note that in the case the above IA was listed for hearing on numerous occasions.

2.7. The arguments of the Applicant stating that the Impugned Judgement could not have been delivered in case of a pending appeal before the Supreme Court are frivolous and baseless. As stated above the status quo order of the Supreme Court would effectively mean that the last status or the existing state of things should to be maintained. The existing state of things was that the Resolution Plan was approved and completely implemented. This is substantiated from the Impugned Order, of this NCLT, qua directing the Applicant to issue no dues and deliver title deeds to the Respondent. In the light of this, the Resolution Plan as per section 31 of the Code ought to be binding on all parties and that the Applicant is bound under law to issue no-dues and the title deeds to the Respondent. If the Applicant believes that the Hon'ble NCLT could not have passed the Impugned Order due to the status quo imposed by

the Hon'ble Supreme Court, then it is a substantive grievance and a subject matter of an appeal. The Applicant should have filed an appeal rather than seeking a recall of the Impugned Order. It is submitted that the entire Application is flawed, as the right fora for the present Application should have been the Hon'ble NCLAT, as it is a correct case for an appeal rather than a review or recall.

3. Heard learned counsel for both sides and perused the materials available on record.

3.1. On perusal of the daily order file, it is noticed that the Applicant herein who is respondent in IA 1845/2022 had not appeared on that day. The Respondent had also not appeared on 30.08.2022, 11.08.2022, 05.08.2022, despite this matter having been placed high on board. In view of consistent non-appearance, the Applicant herein had chosen not to attend the proceedings and this Bench after taking due notice of these facts proceeded to pass an *ex parte* order directing the applicant to handover the title deeds documents to the Resolution Applicant within a period of 10 days.

3.2. It is the contention of the Applicant that no such order could have been passed by this Bench considering that Hon'ble Supreme Court had passed an order dated 16.09.2022 directing the status-quo. The Applicant has contended that the said status-quo order applies to whole process.

3.3. Per contra the Respondent herein has contended that the Applicant herein in an appeal before Hon'ble Supreme Court in relation to the issue of distribution of the Resolution

Proceeds amongst them as the dispute merely pertains to intercreditor distribution. Accordingly, the Respondent herein who is SRA does not have any further obligation even if a relief is granted to the Applicant herein by the Hon'ble Supreme Court. Since, the Respondent herein has fulfilled its obligation under approved Resolution Plan and order sought to be recalled mandates the applicant herein to handover the title documents, such order ought not to be recalled.

3.4. We find that this Bench could not have passed any other order except to direct the Applicant herein to handover the title documents as is done in order dated 20.09.2022, even if the Applicant would have appeared and presented its case. In the present case, the order dated 20.09.2022 came to be passed on account of failure of the Applicant herein to represent. Since, the order was in relation to handing over of the title documents and has not dealt with the issue in appeal before Hon'ble Supreme Court, we are of considered view that the status-quo direction vide order dated 16.09.2022 passed by Hon'ble Supreme Court does not apply to the issue dealt in order dated 20.09.2022.

3.5. In view of above, we are of considered view that there is no infirmity in the order dated 20.09.2022 so as to necessitate its recall. Accordingly, the IA 2909/2022 is dismissed and disposed of.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)