NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI

(APPELLATE JURISDICTION)
Comp App (AT) (CH) (Ins) No.162/2023

For Delay in refiling (IA No.531 of 2023)

(Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 23.06.2022 in IA(IBC)/98(KOB)/2022 IN IBA/11(KOB)/2020 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench,)

In the matter of:

Michael Meenator **...Appellant**

V

PT Joy, Insolvency Resolution Professional
Mir Realtors Pvt. Ltd. **...Respondent**

Present :

For Appellant : Mr. Arjun R. Naik, Advocate
for Mr. Ashok Shenoy, Advocate

For Respondent : No appearance

ORDER
(Virtual Mode)

19.06.2023:

IA No.531 of 2023

Heard the Learned Counsel appearing for the 'Petitioner'/'Appellant' in I.A. No.531 of 2023 in Comp App (AT) (CH) (Ins) No.162 of 2023 [condone delay in representing the material papers of the instant 'Appeal'].

The reason assigned on behalf of the 'Petitioner'/'Appellant' is that there has occasioned delay of 89 days in representing the 'Appeal' Material Paper(s) because of the fact that the 'Petitioner'/'Appellant' and his related Counsel, being stationed in Kochi, Kerala, where informed of the order dated 24.12.2022 and 21.02.2023 only by 27.02.2023 and added further, because of the fact that the 'Petitioner'/'Appellant', aged 70 years was laid-up, due to severe fever and caused for over a week until 06.03.2023 and could not meet his Learned Counsel to make suitable arrangements, to file the 'Appeal' Papers by means of 'Representation' before the 'Office of the Registry'.

This 'Tribunal', on being subjectively satisfied as of the reasons ascribed on behalf of the 'Petitioner'/'Appellant' and also by not adopting a pedantic approach or hyper technical approach but by taking a lenient and liberal view especially keeping in mind another prime fact that delay in 'Representation' is a matter between the 'Petitioner'/'Appellant' and this 'Tribunal', in the interest of justice, 'allows' the I.A. 531 of 2023 but without cost.

Comp App (AT) (CH) (Ins) No.162/2023

Heard the Learned Counsel for the 'Appellant'.

According to the Learned Counsel for the 'Appellant', the instant Company Appeal (AT)(CH)(Ins) No.162 of 2023 is preferred before this 'Appellate Tribunal', in respect of the 'Impugned Order' dated 23.06.2022 in IA(IBC)/98(KOB)/2020 in IBA/11(KOB)/2020 passed by the 'Adjudicating Authority' [National Company Law Tribunal, Kochi Bench, Kochi].

The 'Adjudicating Authority' [National Company Law Tribunal, Kochi Bench, Kochi], while passing the 'Impugned Order' in IA(IBC)/98(KOB)/2020 in IBA/11(KOB)/2020 filed by the 'Appellant'/ 'Petitioner' at paragraph No.9 had observed the following:-

"*We have heard the Learned Counsel Shri. Ashok B Shenoy appearing for the applicant and Shri. Sankar P Panicker appearing for the RP and have gone through the pleadings and documents produced by the applicant. The only question to be considered in this application is whether during the period of CIRP, the relief sought by the applicant to handover possession of four Apartments to the applicant can be allowed. In this connection, it is profitable to quote Section 43(2)(b) of the IBC, 2016 which is as under:*

> *"**43.(1)** Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in*
>
> ***(2)** A corporate debtor shall be deemed to have given a preference, if –*
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> *(a) there is a transfer of property or an interest t hereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on*

account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53."

and resultantly dismissed the 'Application' by making an observation that the 'Resolution Professional' 'cannot handover' the possession of the 'four Apartments' to the 'Applicant' and however, the 'Appellant'/'Applicant' was directed to wait till the 'CIRP' was concluded.

In the instant case, it comes to be known that IA(IBC)/98(KOB)/2020 in IBA/11(KOB)/2020 was filed by the 'Appellant'/'Applicant'/'Intervenor' [under Section 60(5) of the Insolvency and Bankruptcy Code, 2016] seeking permission from the 'Adjudicating Authority'/'Tribunal', to 'purchase' four separate Residential Apartments from the 'Corporate Debtor'.

The Learned Counsel for the 'Appellant' contends that the 'Impugned Order', passed by the 'Adjudicating Authority'/'Tribunal' is an incorrect and invalid one because of the fact that the 'Tribunal' had not taken into account the relevant facts, law evidenced and circumstances besides the probabilities of the present case, which float on the surface.

According to the 'Appellant'/'Petitioner', the 'Adjudicating Authority'/ 'Tribunal', should have seen that as regards the 'four Apartments', pertaining to which the subjects 'interlocutory Application' was preferred, the 'Corporate Debtor' had only contracted to construct the 'four Apartments' for and on behalf of the 'Appellant'/'Applicant' and that too, at the cost of the 'Appellant'/'Petitioner'/'Applicant', and in fact, the 'Appellant' had paid the cost, thereto, 'as consideration' agreed in terms of the Agreements thereof to the 'Corporate Debtor' etc.

The Learned Counsel for the 'Appellant'/'Petitioner', advancing his arguments points out that the 'Corporate Debtor', has no legal rights or beneficial interest and that the 'Adjudicating Authority'/'Tribunal' should have seen that by grant of the Interlocutory Application in directing the Respondent to handover the possession of the 'four Apartments', to the 'Appellant'/'Applicant', there would be no infringement or breach of either 'Moratorium' under Section 14(b) or of Sections 43(2)(a) or 53 of the Insolvency and Bankruptcy Code, 2016.

Lastly, it is the contention of the Learned Counsel for the 'Appellant' that the reliefs sought for in the 'Impugned Order' passed by the 'Adjudicating Authority' is quiet in consonants with the relevant ingredients of the Insolvency and Bankruptcy Code, 2016, but these facts were not looked into by the 'Adjudicating Authority'/'Tribunal' in a proper and real perspective.

This 'Tribunal' has 'Heard' the Learned Counsel for the 'Appellant'/'Petitioner' in the present Company Appeal (AT)(CH)(Ins) 162 of 2023 and disposes of the same at the 'Admission' Stage itself, to meet the 'ends of justice'.

It cannot be gain said that Section 43(2)(b) of the Insolvency and Bankruptcy Code, 2016 reads as under:

"*We have heard the Learned Counsel Shri. Ashok B Shenoy appearing for the applicant and Shri. Sankar P Panicker appearing for the RP and have gone through the pleadings and documents produced by the applicant. The only question to be considered in this application is whether during the period of CIRP, the relief sought by the applicant to handover possession of four Apartments to the applicant can be allowed. In this connection, it is profitable to quote Section 43(2)(b) of the IBC, 2016 which is as under:*

> *"**43.(1)** Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in*
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> ***(2)** A corporate debtor shall be deemed to have given a preference, if –*
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> *(a) there is a transfer of property or an interest t hereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and*
>
> *(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53."*

A mere running of the eye over the contents of the ingredients of Section 43(2)(b) of the Insolvency and Bankruptcy Code, 2016, as cited supra, points out latently and patently that if the reliefs sought by the 'Appellant'/'Petitioner' is granted by this 'Appellate Tribunal', it will be in the form of 'Alienating'/'Disposing'/'Transferring' of the 'Corporate Debtor' in relation to any of its 'Assets' or 'Beneficial Interest' or any 'Legal Rights' arising thereto.

By so doing, the ‘assets’ of the ‘Corporate Debtor’ undoubtedly, in the considered subjective opinion of this ‘Tribunal’ will change in ‘diametrical term’ and it will also has to effect of placing such ‘Creditor’ or ‘Surety’ or ‘Guarantor’ in the advantageous position than it would have been at the time of distribution of assets being made, in the teeth of ingredients of Section 53 of the Insolvency and Bankruptcy Code, 2016.

It is to be remembered that ‘Moratorium’ was ordered in terms of Section 14 of the Insolvency and Bankruptcy Code, 2016 at the time of ‘Admission’ of the ‘Application’ and that is also not a favourable circumstance to in favour of the ‘Appellant’/‘Petitioner’, as opined by this ‘Tribunal’.

In view of the above backdrop and forgoing, this ‘Tribunal’ comes to a resultant conclusion that the conclusion arrived at by the ‘Adjudicating Authority’/‘Tribunal’ in Dismissing the IA(IBC)/98(KOB)/2020 in IBA/11(KOB)/2020 (preferred by the ‘Appellant’/‘Applicant’) by making an observation that the ‘Appellant’/‘Applicant’ is to wait till the ‘CIRP’ is over and also that the ‘Resolution Professional’ cannot handover possession of the ‘four Apartments’ to the ‘Appellant’/‘Applicant’ are fee from any legal infirmities or does not suffer from any material irregularities. Accordingly, the instant Company Appeal is ‘devoid of merits’ and it fails.

In fine, the instant Company Appeal (AT)(CH)(Ins) No.162 of 2023 is dismissed. No costs.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

SE/NG