

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Insolvency) No. 443 of 2022

IN THE MATTER OF:

**Surender Modi
Suspended Director of J.R. Modi
Associates Ltd.**

...Appellant

Versus

**Kaliber Associates Pvt. Ltd.
Through Its Liquidator Mohan Lal Jain & Anr.**

...Respondents

With

Company Appeal (AT) (Insolvency) No. 523 of 2022

IN THE MATTER OF:

**Surender Modi
Suspended Director of J.R. Modi
Associates Ltd.**

...Appellant

Versus

**Mohan Lal Jain, Liquidator of Kaliber Associates
Pvt. Ltd. Anr.**

...Respondents

Present:

For Appellant:

**Mr. Sumesh Dhawan and Mr. Lokesh Mishra,
Advocates.**

For Respondent:

**Mr. Anirban Bhattacharya, Mr. Dhruv Sachdeva,
Advocates for R-1.
Mr. Nipun Gautam and Mr. Rajiv Bajaj, Advocates
for R-2.**

**O R D E R
(Virtual Mode)**

27.05.2022: This order shall dispose of two Appeals bearing CA (AT) (Ins) No. 443 of 2022 and CA (AT) (Ins) No. 523 of 2022 as both the Appeals are interconnected. However, the facts are being taken from CA (AT) (Ins) No. 443 of 2022.

The precise grievance of the Appellant (Corporate Debtor) is that they had filed their Reply on 12.08.2021 within the time provided by the Tribunal

on 03.08.2021 with an advance copy to the Appellant and also paid the cost but some how the Reply was not attached with the main file and as such the following order was passed on 23.09.2021:-

“The order dated 3rd August, records that the Corporate Debtor was given last chance to file Reply subject to cost of Rs. 10,000/-. Today, none appears for Corporate Debtor neither any reply is filed or uploaded. The Ld. Counsel for the Applicant states that though prior to this, they were given time to file reply and they had served the copy to which their application is filed rejoinder, the rejoinder is on record Corporate Debtor is proceeded ex-parte. Heard, Learned Counsel for the ex-parte.

Order Reserved.

The Ld. Counsel for the Applicant is at liberty to file Written submissions of not more than three pages within a week.”

After the aforesaid order was passed, the Appellant had filed an application for setting aside the said ex-parte order but the application was dismissed on 21.02.2022 with the following orders:-

“I.A. No. 4932/ND/2021:

None appears for the Applicant. This Application has been filed by Corporate Debtor seeking to set aside the ex-parte order dated 23.09.2021.

In the main matter IB-1122/ND/2020 the order is already reserved on 23.09.2021. Hence, no such application can be entertained at this stage.

I.A. No. 4932/ND/2021 is rejected and disposed of.”

The order dated 21.02.2022 has been challenged by the Appellant in CA (AT) (Ins) No. 523 of 2022. We are not touching the merits of the case, therefore, we are not going into the details because the only submission made by the Appellant is that he should have been granted at least one opportunity to present its case before the Tribunal on the basis of the Reply filed.

Whereas Counsel for Respondent has submitted that sufficient time was granted to the Appellant on 03.08.2021 when last chance was given to

file the Reply subject to payment of cost of Rs. 10,000/- but still the Appellant did not appear on the next date of hearing i.e on 23.09.2021 and the Tribunal had proceeded against the Corporate Debtor ex-parte and reserved the order.

He further submitted that the conduct of the Appellant has been very casual because he did not appear on 21.02.2022 when the application filed by them to set aside the ex-parte order was being heard and hence, the Adjudicating Authority has dismissed the application.

Counsel for the Respondent has pointed out that in the said order dated 21.02.2022, the presence has been wrongly recorded by the Tribunal as no one had put in appearance on behalf of the Applicant and only the Respondent had actually appeared.

Be that as it may, Counsel appearing on behalf of the RP has submitted that after the impugned order was passed, Corporate Insolvency Resolution Process (CIRP) was initiated on 31.03.2022 and Committee of Creditors (COC) was constituted on 21.04.2022. He has further submitted that one meeting of CoC has already been held. Counsel for the RP has further submitted that this Tribunal had otherwise stayed the further proceedings before the CoC vide its order dated 10.05.2022 and therefore it has not proceeded thereafter.

We have heard Counsel for the parties and perused the record. The issue involved in this case, de hors the merits, is as to whether, the Appellant (Corporate Debtor) contesting the application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) should be given one more opportunity to present its case before the Tribunal after setting aside ex-parte proceedings? It is well known that the proceedings under Section 7 of the Code has serious repercussions and it is also well known that equal chance

should be given to the parties to contest the litigation before the Court. In this regard, the Tribunal was magnanimous enough to have granted one last opportunity to the Appellant vide its order dated 03.08.2021 to file their Reply subject to cost of Rs. 10,000/- within a period of one week and we have found from the record that the Appellant herein had actually filed the Reply and paid the cost to the Respondent herein who had accepted the same. But the said Reply could not be made part of the paper book. It is also noted that the Appellant could not appear before the Tribunal on the adjourned date i.e 23.09.2021 and the Tribunal recorded that the Reply was not filed or uploaded, therefore, the Appellant herein was proceeded against ex-parte and the order was reserved. As soon as, it came to the notice of the Appellant that the order has been reserved, an application was moved seeking a direction to set aside the ex-parte proceedings but unfortunately again they could not appear on 21.02.2022 and the application was dismissed for want of prosecution.

However, the fact of the matter is that the said order dated 03.08.2021 was duly complied with by the Appellant by filing their reply in the Registry of the Tribunal and paying the cost, determined by the Tribunal, to the Respondent, which was admittedly received. It is apparent from the order dated 23.09.2021 that the receipt of the cost has not been brought to the notice of Tribunal otherwise, the Tribunal would have presumed that if the cost is paid then the Reply must have been filed.

In these circumstances, we are of the view that the order dated 23.09.2021 is not in accordance with the factual position available on record and therefore, the same deserves to be set aside. Once the order dated

23.09.2021 is set aside by which the Appellant was proceeded against ex-parte, the order dated 21.02.2022 also deserves to be set aside.

In view of the aforesaid discussions, CA (AT) (Ins) No. 523 of 2022 is allowed and order dated 21.02.2022 is set aside and consequently, the order dated 23.09.2021, whereby the Appellant was proceeded against ex-parte is also set aside. In the order dated 31.03.2022, challenged in CA (AT) (Ins) No. 443 of 2022, the Adjudicating Authority has recorded in Para 6 of the impugned order that “the Corporate Debtor has not filed any Reply nor appeared and hence the Corporate Debtor was proceeded against ex-parte vide order dated 23.09.2021”. Keeping in view that CA (AT) (Ins) No. 523 of 2022 is allowed, the impugned order dated 31.03.2022 is also set aside and the matter is remanded back to the Adjudicating Authority, NCLT, New Delhi to decide CP(IB) No. 1122/ND/2020 afresh taking into consideration the Reply filed by the Appellant on 12.08.2021 and decide the matter as expeditiously as possible. The parties are directed to appear before the Tribunal on **05th July, 2022**.

It is made clear that we have not expressed any opinion on the merits of the case. Both appeals are allowed with the aforementioned direction. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

Sheetal/md/rr