



**In the National Company Law Tribunal
Kolkata Bench, (Court-II), Kolkata**

IA(IB) No. 1092 / (KB) /2023

In

CP (IB) No. 1092 / (KB) /2020

An Application under Companies Act, 2013 read with Rule 11 of the NCLT Rules, 2016;

In the Matter of:

M/s. Omm Constructions Limited;

... Operational Creditor

Versus

Tuaman Engineering Ltd;

....Corporate Debtor

And

In the matter of:

1. Rinku Choudhary W/O Amit Choudhary residing at 400, Block G, New Alipore, Kolkata – 700 053.

... Applicant

Versus

1. M/s. Omm Constructions Limited having its Registered Office at Lane No. L-4/A4, Jagannath Mandir Colony, Budharaja, Sambalpur, Odisha – 768 004.
2. Tuaman Engineering Ltd through Mr. Uttam Kumar Agarwal, IRP, R/O- 101b, Rastraguru Avenue, Clive House, Kolkata, West Bengal – 700 028.

.... Respondents

Date of Hearing: 23.06.2023

Date of Pronouncement of order: 29.08.2023

Coram:

Smt Bidisha Banerjee

: Member (Judicial)

Shri Balraj Joshi

: Member (Technical)



Counsel appeared physically / through video Conferencing

For IRP:

1. Mr. Rahul Parasrampur, PCS
2. Mr. Uttam Kumar Agarwal, IRP in person

For the Operational Creditor

1. Mr. Deepnath Roy Chowdhury, Adv.
2. Mr. Hareram Singh, Adv.
3. Mr. Bhaskar Dwivedi, Adv.

For the Corporate Debtor

1. Mr. Anirban Ray, Adv.
2. Mr. Amit Kumar Nag, Adv.
3. Ms. Shrivalli Kajaria, Adv.

ORDER

Per Bidisha Banerjee, Member (Judicial):

1. This application has been preferred to seek recall of the order dated 15.06.2023 passed by this Adjudicating Authority in CP (IB) No. 1092/KB/2020 and rejection of the Application filed by the Operational Creditor under Section 9 of the code.
2. Further, stay of operation of the order dated 15.06.2023 has been sought for till dismissal of the Application.

3. Grounds for seeking recalling:

- A. That the application filed under Section 9 of the Code by the Respondent No. 1 was defective and not in form as per Rule 26(2) of the National Company Law Tribunal Rules, 2016 read with the Uniform Checklist provided under the Order No. 25/02/2016-NCLT dated 28th July, 2016 of the National Company Law Tribunal for which the said Section 9 application is liable to be dismissed.



- B. As per Rule 26(2) of the National Company Law Tribunal Rules, 2016 read with the Uniform Checklist provided under the Order No. 25/02/2016-NCLT dated 28th July, 2016 of the National Company Law Tribunal, the Respondent No. 1 is required to sign at the foot of each page of the said application filed under Section 9 of the Code and this being a mandatory provision for the purpose of filing, anything contrary would render the application so filed as defective and liable to be rejected.
- C. That the said application filed under Section 9 of the Code is also defective and not in form in view of the fact the Respondent No. 1 being an **unregistered partnership firm** cannot maintain the application without the partners of the Respondent No. 1 being party to the application. The Respondent No. 1 is not a registered partnership firm and does not have any registration number, as a result of which the Respondent No. 1 could not provide any identification number in paragraph 2 of Part I of the said application filed under Section 9 of the Code.
- D. That this Tribunal has committed a procedural error in accepting, entertaining and proceeding with the said application filed under Section 9 of the Code and delivering the order dated 15th June, 2023 in C.P. (IB) No. 1092/KB/2020 in view of the defects.
4. It has been urged that the order of admission dated 15.06.2023 suffers from inherent lack of jurisdiction due to the following reasons:
- i. Existence of pre-existing disputes between the parties;
 - ii. Bills shown as unpaid relate to period older than 3 years, and the same have been raised by the Corporate Debtor long before the purported defective demand notice issued by the Operational Creditor which was indicated in the Reply to the Demand Notice dated 21.10.2020.
 - iii. No amount was due and payable from the Corporate Debtor. Purported Acknowledgement of debt signed on 01.01.2017 is a fabricated and forged document in connection whereof complaint was lodged before police authorities.



- iv. Respondent No. 1 has played fraud on this Tribunal. As such this Tribunal has placed reliance upon a **fraudulent document** placed by the Operational Creditor / Respondent No. 1 herein. Hence, the order deserves a recall.
- v. This Adjudicating Authority was supposed to merely examine whether there was a possible contention of pre-existing dispute raised by the Corporate Debtor which required further investigation and the dispute is not a feeble and legal argument. In this regard attention is drawn to Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited [(2018) 1 SCC 353 : (2018) 1 SCC (Civ) 311], where the Apex Court held:
- “34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*
- “(i) Whether there is an “operational debt” as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debit in relation to such dispute?*
- If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9 (5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9 (5) of the Act.”*
- vi. Attention is also drawn to para 38 of Mobilox Innovations (supra), that
- “ 38. Being a case of a pre-existing ongoing dispute between the parties. The Code cannot be used in terrorem to extract this sum of money of rupees two lacs even though it may not be finally payable as adjudication proceedings in respect thereto are still pending. We repeat that the object of the Code, at least insofar as operational creditors are*



concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist....”

5. Ld. Counsel Mr. Anirban Ray, appearing for the Corporate Debtor / Applicant in the present application would submit that Section 9 of the IBC mandates that an application under Section 9 for initiation of corporate Insolvency Resolution Process by Operational Creditor is entertainable only if no payment is received by the Operational Creditor after expiry of 10(ten) days from the date of the Notice or Invoices Demanding payment under sub-Section (1) of Section 8 or No Notice of dispute under Section 8(2) is raised by the Corporate Debtor. Ld. Counsel would raise the following contentions:

A. Sub-Section 2 in Section 9 of IBC mandates that the Application under Section 9 (1) shall be filed in such form and manner as may be prescribed, AND Rule 26(2) of NCLT Rules prescribes that:

“(1) At the foot of every petition or appeal or pleading there shall appear the name and signature of the authorised representative.

(2) Every petition or appeal shall be signed and verified by the party concerned in the manner provided by these rules.”

That is not followed. This being a mandatory provision for the purpose of filing, anything contrary would render the application so filed as defective and liable to be rejected.

B. Further, Sub-Section 5 (a) mandates that this Adjudicating Authority shall within 14 days of receipt of the Application under sub-Section (2), by an order of admit the application made under Sub-Section (2) if,

i. It is Complete

ii. No payment of unpaid operational debt is made.

iii. Invoices or notices have been delivered by the Operational Creditor.

iv. No notice of dispute has been received by Operational Creditor or there is no record of dispute in the information utility etc.

C. Section 9 of the Code mandates that Section 9 petition is required to be filed complete in all respects. Therefore, this Tribunal has committed a procedural error in accepting, entertaining and proceeding with the said application filed



under Section 9 of the Code and delivering the order dated 15th June, 2023 in C.P. (IB) No. 1092/KB/2020 in view of the fact that the said application filed under Section 9 of the Code **was not signed by the Respondent No. 1 at every page of the application** in conformity with Rule 23(2) of the National Company Law Tribunal Rules, 2016 read with the Uniform Checklist provided under the Order No. 25/02/2016-NCLT dated 28th July, 2016 of the National Company Law Tribunal.

- D. Section 9 (5) sub-para 2 further mandates that Adjudicating Authority shall reject the application if the application made under Sub-Section (2) is incomplete. Ld. Counsel would vociferously argue that the said application under Section 9 was incomplete from the very beginning hence deserved to be rejected.
- E. Drawing our attention to **Rule 23 of the NCLT Rules, 2016** Ld. Counsel would submit that the provision requires every Petition / Application to be presented by the Applicant or Petitioner in person or by his duly authorized representative or by an advocate duly appointed in this behalf in the prescribed form. In the instant case, the Petition was **neither signed by the Advocate nor by any Authorized Representative of the company**. That the company being partnership firm the application was required to be filed by **all the partners** which was not done.
- F. Further, in terms of **Section 69** of the Indian Partnership Act, no suit can be preferred by one of the partners on behalf of the partnership firm.
- G. That procedural irregularities go to the root of the matter and since the provisions of Code as well as Rules are mandatory in nature, this Section 9 application ought not to have been entertained being defective from the date of its filing.
- H. That partnership firm is not legal entity and since two pages of the Petition has been signed by the partners and rest are not, the defect persisted. The Petition as such was not to be admitted.
- I. That there is **no estoppel against law** and legal objections can be raised at any stage of proceedings. Since Section 9 of the Code and applicable Rules mandate



a pre-condition to entertain an application unless complete such application should be summarily rejected.

- J. That para 28(2), of NCLT Rules require that every petition or appeal preferred shall be scrutinized by the person engaged in filing counter and if on scrutiny, the application is found to be defective, a notice shall be sent to the party for compliance and if there is a failure to comply within 7 days from the date of return, the same shall be placed before the Registrar who may pass an appropriate order. Whereafter, Registrar may return the same document for rectification and in the event, the parties fail to take any step for removal of the defect within time fixed by the Registrar, the Registrar may for reasons to be recorded in writing decline to register the pleading or documents which provision has been given a complete go bye.
6. Per contra, the Ld. Counsel for the Operational Creditor / the Respondent No. 1 herein would submit that the Petition was duly signed by the concerned Advocate who held the Vakalatnama and therefore had an authority to act on behalf of the Company. The Petition was signed and verified by the concerned Advocate in the manner provided. That Section 69 (2) debars initiation of a suit by one partner of a partnership firm and the present application is not a suit. Therefore, bar under Section 69 will not apply to a proceeding before this Tribunal. Reference to that effect is made to a decision of NCLT, Mumbai [2020 SCC Online, NCLT 6].
7. While Ld. Counsel Mr. Ray would request that express provision of Code could not be overridden referring to (1964) 5 SCR 946 : (AIR) 1964 Supreme Court 993.
8. We have considered the rival contentions and attempted to discern the following:
- i. Whether the petition has been presented by an authorized representative and the person is duly authorized
 - ii. Whether the procedural bar makes this application a non-starter.
 - iii. Whether this Tribunal has the power to recall its own order dated 25th May, 2023 on sufficient grounds as held by NCLAT in Union of India Versus Dinkar T. Venkatasubramanian & Ors., Company Appeal (AT) (Ins.) No. 729 of 2020.

9. Analysis and Findings:



A. The Legal Position

- i. It is noted that, the Hon'ble NCLAT has recognized the power of this Tribunal to recall its order on sufficient grounds. The Extract of the decision would be as under:

Paragraph 26 of that judgment: *“In view of the law laid down by Hon'ble Supreme Court which holds that the Tribunal has inherent power to recall its judgment on appropriate grounds, the three-member bench judgment in “Agarwal Coal Corporation Private Limited” and “K.L. J Resources Ltd. & Anr.” Observing that the Tribunal does not have power to recall cannot be approved. The three-member bench judgments of this Tribunal insofar as observation that this Tribunal has no power to review, no exception can be taken to that part of the judgment. We, however, hold that the judgment laying down that this Tribunal has no power to recall the judgment does not lay down correct law.”*

Paragraph 27 of that judgment: *“In view of the foregoing discussion, we answer the questions referred to this Bench in following manner:*

I: *This Tribunal is not vested with any power to review the judgment, however, in exercise of its inherent jurisdiction this Tribunal can entertain an application for recall of judgment on sufficient grounds.*

II & III: *The judgment of this Tribunal in “Agarwal Coal Corporation Private Limited vs Sun Paper Mill Limited & Anr.” And “Rajendra Mulchand Varma & Ors vs K.L. J Resources Ltd & Anr.” observing that this Tribunal cannot recall its judgment does not lay down the correct law.”*

- ii. The aforesaid view of the Hon'ble NCLAT stands affirmed before the Hon'ble Apex Court. **S. Nagaraj Vs. State of Karnakta 1993 Supp (4) SCC 595** lays down that,
“the power to rectify an order stems from the fundamental principle that justice is above all and is to be exercised to remove the error and not for disturbing finality and that even when there is no statutory provision in



this regard such power is to be exercised to avoid abuse of process or miscarriage of justice.”

- iii. In Budhia Swain Vs. Gopinath Deb (1999) 4 SCC 396, it was held that,
“the Courts have inherent power to recall and set aside an order inter alia obtained by fraud practiced upon the Court or when the Court is misled by a party or when the Court itself commits a mistake which prejudices a party.”
- iv. In United India Insurance Co. Ltd. Vs. Rajendra Sing (2000) 3 SCC 581, it was held that,
“the remedy of moving the Motor Accident Claims Tribunal for recalling the order on the basis of newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation – no Court or Tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.”
- v. In Google Inc. & Ors Vs. Competition Commission of India & Ors. Dated 27th April, 2015, it was held that,
“(ii) that a power to recall is different from a power of review and merely because by deletion of Section 37 of the Act, the power of review has been taken away does not mean that the power of recall the order also has been taken away;
(iii) that the power of recall exists irrespective of whether the jurisdiction being exercised is judicial, quasi-judicial or administrative;”



B. The factual position:

- i. A police complaint was lodged before the concerned police authority on 23.01.2017 which strengthens their claim that the acknowledgment was obtained by force or coercion.
- ii. That a strong denial was made that no amount as alleged is due or payable and that Omm Constructions has abandoned the site in October, 2015 and falsely raised claim in 2016. However, it could not be established that the acknowledgment was a voluntary one. Therefore, in all fairness, the order should be recalled.

C. On the allegations that the Petition could not be maintained by one partner, we noticed the following,

Section 69 (2) of the Partnership Act, enjoins that “No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.”

The debtor says that the Applicant, are of the partners of an unregistered firm cannot maintain the application on behalf of the firm. All the partners have to joint. In response, the creditor has not denied that it is an unregistered firm.

While considering the contentions made and objections raised, we deciphered the following:

- i. Page 20 of the Petition, CP (IB) No. 1092 / (KB) /2020 contains an authorization purportedly by one “Bijay Kumar Mishra” and “Anusuya Mishra” partners of M/s. Omm Constructions authorizing “Bijay Kumar Mishra” to execute the application / documents and to do acts with respect to filing of the application before the NCLT under IBC Code, 2016.
- ii. The name of “Bijay Kumar Mishra” in his signature appears to be “**Bijaya Kumar Mishra**”. Similarly, the one of the partners namely “Anusuya Mishra” puts her signature as “**Anasuya Mishra**”. This



strengthens the doubt of the applicant that the petition was not an authorized one.

- iii. The Petition to be signed by Bijay Kumar Mishra at page 17 is purportedly done by “**Bijya Kumar Mishra**” as the signature appears to be.
- iv. The signature at the end of the Petition at page 17 and the authorization letter dated 05.10.2020 of “Bijay Kumar Mishra” at page 20 are also in different handwritings. Such being the position, it cannot be said that the requirements of law have been fulfilled as one of the partners has signed the petition on behalf of the other partners claiming that he is authorized to do so but the signatures do not tally.
- v. Further, an advocate is entitled to maintain a petition on behalf of his client but that the client has to duly authorize the Ld. Advocate and here the authorization itself seems to be doubtful. This Adjudicating Authority cannot be oblivious to an alleged fraud attempted on it.
- vi. The petition cannot be said to be defect free and this Adjudicating Authority need not go into the merits to discern the defects in filing. A defective petition cannot be allowed to succeed.

10. It is settled law that when an express provision exists which is not fulfilled, and such express provision mandates a particular act to be done in a particular way and the same is not done, the Application deserves to be dismissed. In the instant case the question whether the application is complete in all respects, including proper authorization etc., probably remained unanswered. This Tribunal cannot shut its eyes to the defects that have been found out.

11. In view of the above, we would direct the following:

- A. Order dated 15.06.2023 passed by this Adjudicating Authority in CP (IB) No. 1092/KB/2020 is recalled.
- B. The signature at page 17 and 20 of this CP of “**Bijay Kumar Mishra**” be sent to a handwriting expert for opinion, whether both the signatures are by one and



the same person and a report to that effect be filed to Registry of this Tribunal at the earliest.

C. Upon recalling of the order and having noted the defects pointed out above the applicant shall be at liberty to rectify the defects.

D. List the matter on **14.09.2023** by putting it back on board for further hearing.

12. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.

13. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee,
Member (Judicial)

Signed on this the 29th day of August, 2023

M. Jana, PS