

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**

**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 477 of 2020**

**In the matter of:**

**Rahul Kumawat**

**...Appellant**

**Vs.**

**Bank of India & Anr.**

**...Respondents**

**Present**

**For Appellant:** Mr. Krishnendu Datta, Sr. Advocate along with Mr. Sanyat Lodha, Ms. Varsha Himmatsingka and Ms. Hima Bhardwaj, Advocates.

**For Respondents:** Mr. Namit Suri, Ms. Surabhi Sinha & CS Mona Rawat, Advocates for R-1.

**ORDER**

**14.11.2022:** This Appeal is directed against the Order dated 05.03.2020, by which, an Application filed by Respondent No. 1 ('Bank of India') under Section 7 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code') for initiation of the CIRP Proceedings against the 'Corporate Debtor' ('MP Agro BRK Energy Foods Limited') has been admitted. The Appellant in this case is a suspended Director whose primary concern is that the Tribunal has not passed a speaking Order while admitting the Application, in as much as, the objections taken by Respondent No. 2 ('Corporate Debtor') in Reply to the Application filed under Section 7, though have been mentioned (repeated) in the Impugned Order from paragraph 15.1 to 15.5 have not been discussed while making observations in para 23.1 to 23.4 and while passing the Order in para 24 of the Impugned Order

made the reference of the paragraph 23, 23.1, 23.2, 23.3 and 23.4 for recording its satisfaction that it is a fit case in which the Application filed under Section 7 has to be admitted.

2. Shorn of unnecessary details, the Respondent No. 1 ('Financial Creditor') filed the Application in Form-1 of the Code on 22.10.2018 and mentioned in Part IV of the Application that the default had occurred on 30.09.2017 when the account of Respondent No. 2 ('CD') was declared as an NPA. Counsel for the Appellant has submitted that the Appellant is a MSME. Before the Application under Section 7 could have been filed, the Reserve Bank of India ('RBI') issued a circular to all the Banks NBFCs which are regulated by the RBI that it has been decided that the exposure of Banks/NBFCs classified as Micro Small Medium Enterprise under the Micro Small Medium Enterprise Development ('MSME Act, 2006'), shall continue to be classified as a standard Asset in the books of the Banks and NBFC subject to certain conditions in which one of the conditions was that the account of the Borrower was standard as on 31.08.2017 and that the aggregate exposure including Non Fund Based Institutes of the Banks and NBFC to the Borrowers does not exceed 250 Million as on 31.08.2018. According to the Appellant, the Borrower's account was standard on 31.08.2017 as it was declared NPA on 30.09.2017 and that the Borrowing was only to the extent of Rs.11Cr./- approximately which is far less than the threshold of 250Million as on 31.08.2018.

3. It is further submitted that the account of the Appellant was made operational and a certificate was issued by Respondent No. 1 on 17.04.2018 which read as hereunder:

*“This is to certify that M/s. MP AGRO BRK Energy Foods bearing A/c No. 890130110000135 is operational and banking with our branch.*

*The account can transact, receive or withdraw maximum INR of Rs.99999999999999.99 on a single transaction as per RBI guidelines and adhering to KYC norms through clearing/transfer/RTGS/NEFT.*

*This certificate is issued on a special request.”*

4. According the Appellant, the Respondent No. 1, even though, declared the account of the Appellant as NPA on 30.09.2017 but still it allowed the Appellant to transact, receive and withdraw the maximum sum of Rs.9.99Cr./- in a single transaction in terms of the RBI guidelines from the said account which was made operational.

5. It is further submitted that this aspect of the matter has been raised in the Reply to the Application filed under Section 7 and was noticed by the Tribunal in the Impugned Order in para 15 yet when the decision was ultimately taken, none of the objections or the submissions made in writing by the Appellant were taken into consideration as not a single word has been mentioned in the chapter of observations which is contained in paragraph 23 that the objections raised by the Appellant are either flimsy, frivolous or are not made out.

6. It is thus submitted that the Impugned Order suffers from the vice of non-Application mind and is not a speaking Order, therefore, the prayer made by the Appellant is that the present Appeal may be allowed, the Impugned Order be set aside and the matter may be remanded back to the Learned Tribunal for the purpose of taking a decision after taking into consideration the objections/contentions raised by the Appellant in their Reply.

7. On the other hand, Learned Counsel appearing on behalf of the Respondent has vehemently argued that even if the contentions, for the sake of arguments, are not taken into consideration by the Learned Tribunal while making observations in paragraph 23 of the Impugned Order and the Order recorded in para 24 of the Impugned Order is based on the observations made in para 23 yet the Tribunal has not committed an error because it is well settled that the Tribunal has to consider only two factors at the time of Admission of an Application filed under Section 7 that there is a 'debt' and 'default' in non-payment of the said debt on the part of the 'Corporate Debtor'.

8. In this regard, he has relied upon a decision of the Hon'ble Supreme Court in the case of '**Rajendra Narottamdass Seth and Anr.**' Vs. '**Chandra Prakash Jain & Anr.**' **Civil Appeal No. 4222 of 2020** decided on 30.09.2021. He has further submitted that even if the Order is, presumed to be non-speaking, not giving the reasons as to why the Tribunal is not satisfied with the objections raised by the Appellant yet after expiry of two years of the pendency of this Appeal, it will not

be justified to remand the case back to the Learned Tribunal rather this Tribunal should take a decision about the merit of the case. In this regard he has relied upon a decision of Madras High Court in the case of '**Prabhakaran & Ors.**' Vs. '**Lakshmi & Ors.**' MANU/TN/1198/2021 decided on 01.03.2021.

9. In rebuttal, Learned Counsel for the Appellant has submitted that in any case the date of default is a *sine-qua-non* for the purpose of filing and maintaining an Application under Section 7 which cannot be shifted at any cost. In this regard he has relied upon the decision in the case of '**Next Education India Private Limited**' Vs. '**K12 Techno Services Private Limited**', 2021 SCC OnLine NCLAT 105, '**Jagdish Prasad Sarada**' Vs. '**Allahabad Bank**' 2020 SCC OnLine NCLAT 621 and '**M/s. Innoventive Industries Ltd.**' Vs. '**ICICI Bank & Anr.**' (2018) 1 SCC 407 decided on 31.08.2017.

10. We have heard Learned Counsel for the parties and peruse the record with their assistance.

11. The facts are not much in dispute but the dispute in this case is as to whether the decision taken by the Tribunal in admitting the Application filed under Section 7 by Respondent No. 1 without touching/discussing even an Iota of the objection raised by the Appellant in its decision, is a non-speaking Judgement and deserves to be set aside and remanded.

12. The objections raised by the Appellant have been duly noticed by the Learned Tribunal in its Impugned Order and for the sake of convenience we may also reproduce the same:

*“15.1. It is submitted that the petition preferred by the Petitioner under Section 7 of Insolvency and Bankruptcy code, 2016 unless anything expressly admitted herein below nothing shall be construed to be deemed as admission for want of traverse.*

*15.2. It is submitted that the present petition is required to be dismissed inasmuch as there is no ‘default’ as described Under Section 3(12) of the Code. It is submitted that as per dictum of law enunciated by the Hon’ble Supreme Court in the case of Innoventive Industries Limited Vs. ICICI Bank and another, reported at 2008 (2) SCC 134, existence of ‘default, as per provisions of the Code is essential before petition under Section 7 of the Code can be admitted. The sole premise for instituting the present petition and considering default by the petitioner is on the premise that the Account of the corporate debtor is classified as NPA on 30.09.2017. The said classification is not only incorrect but also illegal and untenable on facts as well as in law, that is demonstrated hereinafter. In view of the fact that ‘default’ on the part of corporate debtor is not established within the meaning of Section 3(12) of the Code, the present petition deserves to be dismissed.*

*15.3. It is submitted that the corporate debtor was established as proprietorship concern in the year 1991. Thereafter, Corporate debtor was converted into a partnership Firm in the year 2006, incorporated as a Private Limited Company in the year 2007. In the year 2009, the Corporate Debtor was converted into a Public Limited Company.*

*15.4. It is further stated by the Respondent that the sole premise on which default is described in Form No. 1 is*

*classification of credit facility of Respondent as non-performing asset (NPA). Refer Part IV (item 2) in Form 1. Reference be also made to Annexure E. The applicant has unequivocally stated that credit facility has become NPA on 30.09.2017. As demonstrated hereinafter classification of credit facility of Respondent is not in compliance of Circular issued by Reserve Bank of India dated 07.02.2018 and therefore classification of credit facility of Respondent as NPA is not only bad in law, but also terming “default” based on wrong classification is also incorrect. It is stated that except classification of Respondent’s credit facility as NPA, no other contention is pressed by the Petitioner to support the contention of “default” under the provisions of “the Code”.*

*15.5. It is further submitted that the perusal of Circular issued by RBI dated 07.02.2018 (produced at page - 517) clearly demonstrates that classification of credit facility of Respondent is erroneous. Condition No. II of the said circular reveals that if non-fund based facilities of banks vis-à-vis borrower do not exceed 250 million rupees on 31.01.2018 and coupled with the fact that the borrower is a MSME unit with further condition that the account of borrower was “standard” as on 31.01.2017, the account cannot be classified as NPA based on 90 day and 120 day delinquency norms.”*

**13.** The observations made by the Learned Tribunal is contained in para 23 also deserves to be reproduced for a quick reference and is reproduced as hereunder:

*23. The Petitioner Bank has submitted the documents duly executed by the Corporate Debtor and guarantors along with a Certificate under the Banker's Book of Evidence Act, 1891, in support of its IB Petition for initiation of C.I.R.P.*

*23.1. The Cash Credit and Term Loan facilities were sanctioned by the Petitioner Bank and the same*

were availed by CD, M.P. Agro BRK Energy Foods Limited. The Charges have been filed by the CD with RoC and the Financial Creditor has filed valuation report and search report.

23.2. The CD has defaulted in making repayment of loan/credit facilities to the Petitioner Bank and the date of default is 30.09.2017. The Statement of accounts and the CIBIL Reports submitted by the applicant Bank confirm the debt is due and default has been committed by the Corporate Debtor.

23.3. The Petitioner Bank has filed the petition within the period of limitation, as the last credit has come to the account on 31.08.2018 when this application has been filed on 22.10.2018 which is within 3 years of last payment.

23.4. The present I.B. Petition is filed by the duly authorised official of the Applicant Bank in a prescribed format under Section 7 of the I.B. Code annexing copies of loan documents confirming the existence of debt due and defaulted and proposed a name of Resolution Professional to act as an Interim Resolution Professional (IRP).”

**14.** And the ultimate Order that has been passed by the Tribunal is also required to be reproduced which is as follows:

“24. Considering the material papers filed by the Petitioner Bank, arguments of the counsels of both parties and the facts mentioned in the Para No.23, 23.1, 23.2, 23.3 & 23.4 this Adjudicating Authority is satisfied that; .....

**15.** It is clear from the aforesaid facts and circumstances, that the objections of the Appellant were not taken into consideration while passing the Impugned Order.

It is pertinent to mention that if the Tribunal was not satisfied with the objections,

it could have at least say a word that the objections are flimsy or frivolous. The Tribunal is performing judicial functions, therefore, it is required to give its findings after taking into consideration the pleadings, evidence and contentions of both the parties but if the pleadings, evidence and contentions of one of the parties are conspicuous by its absence in the observations which forms part of the Order then the said Order is called non-Speaking. Though, the Adjudicating Authority has to record its satisfaction about the existence of 'debt' and 'default' but it has to take into consideration the case of both the parties in recording its satisfaction while admitting the Application filed under Section 7. The Judgement relied upon by the parties deciding the issue involved in those cases and has no relevance to the controversy at hand. The absence of even one line in regard to the objections raised by the Appellant shows that the Tribunal has not applied mind in the facts and circumstances of the case. In the case of *'State Of Orissa' Vs. 'Dr. (Miss) Binapani Dei & Ors'* 1967 AIR 1269, decided on 7 February, 1967, the Hon'ble Supreme Court has held that even an Administrative Order cannot be passed in violation of Principle of Natural Justice and a reasoned or its Speaking Order is the part of the Natural Justice.

16. Thus, in view of the aforesaid discussion, the present Appeal is allowed. Impugned Order is set aside and the matter is remanded back to the Tribunal to consider the objections raised by the Appellant and decide the same as early as possible but not later than a period of two months from the date of the receipt of

the certified copy of the Order. Both parties are directed to appear before the Tribunal on 24.11.2022.

17. The Registry is directed to inform the Tribunal about this Order and also send a copy of this Order to it. It is made clear that we have not expressed any opinion on the merits of the case.

**[Justice Rakesh Kumar Jain]**  
**Member (Judicial)**

**[Ms. Shreesha Merla]**  
**Member (Technical)**

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