

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

Company Appeal (AT) (Insolvency) No. 232/2023

IN THE MATTER OF:

Punit Goenka

...Appellant

Versus

Indusind Bank Ltd. & Anr.

...Respondents

Present:

For Appellant: Mr. Mukul Rohtagi, Sr. Advocate with Mr. Arun Kathpalia, Sr. Advocate, Mr. Abhijeet Sinha, Ms. Bindi Dair, Mr. Aditya Shukla, Mr. Aman Raj Gandhi, Mr. Nikhil Rohatgi, Ms. Heena Kochar, Mr. Vaidaan Bajaj, Mr. Parth Bose, Mr. P. Tutija, Diksha Gupta, Advocates

For Respondent: Mr. Rajiv Nayyar, Sr. Advocate, Mr. Diwakar Maheshwari, Ms. Pratiksha Mishra, Mr. Vishnu Shriram, Mr. Karun Mehta, Advocates for R-1
Mr. Sanjev Kumar, Mr. Anshul Sehgal, Mr. Divyanshu Jain, Advocates for R-2

ORDER

24.02.2023: Heard Learned Sr. Counsel for the Appellant as well as the Learned Sr. Counsel for the Respondent No. 1. Learned Counsel for Respondent No. 2 is present and accepts notice on behalf of Respondent No. 2.

2. This Appeal has been filed by the Suspended Director of the Corporate Debtor challenging the Order dated 22.02.2023 passed by the National Company Law Tribunal, Mumbai Bench, Court III, in I.A. No. 742 of 2022 and CP(IB) No.

221/MB/2022. By the impugned order, the Adjudicating Authority has admitted Section 7 Application filed by the Financial Creditor-Respondent No. 1.

3. Learned Sr. Counsel for the Appellant challenging the Order submits that in the CP(IB) No. 221(MB)/2022, an Order was passed by the Adjudicating Authority on 01st March, 2022 where court directed the Corporate Debtor to file a Reply. It is submitted that subsequently an Application was filed by the Corporate Debtor being I.A. No. 742 of 2022 for rectification of the Order dated 01st March, 2022. Another application being I.A. No. 594 of 2022 came for hearing before the Adjudicating Authority on 11th July, 2022 and order was passed by the Adjudicating Authority where application filed by the Corporate Debtor being I.A. No. 594 of 2022, time was granted to the Financial Creditor to file a Reply. Subsequently the application was heard on several dates and thereafter on 04th January, 2023, orders were reserved in I.A. No. 1378 of 2022 and I.A. No. 742 of 2022 and thereafter the Judgement has been delivered on 22.02.2023 admitting Section 7 Application of I&B Code, 2016 rejecting I.A. No. 1378 of 2022 and I.A. No. 742 of 2022. It is submitted that the Section 7 Application was not heard and what was heard and reserved were I.A. No. 1378 of 2022 and I.A. No. 742 of 2022 and without hearing the Section 7 Application, the Adjudicating Authority has admitted Section 7 Application. It is submitted that the Adjudicating Authority has wrongly construed the Order dated 11th July, 2022 as an Order by which the right to file reply of the corporate debtor was forfeited. It is submitted that in view of the aforesaid error committed by the Adjudicating Authority, the Adjudicating Authority proceeded to admit Section 7 Application without granting opportunity

to the Appellant to file a Reply or address arguments on Section 7 Application. It is further submitted that I.A. No. 1378 of 2022 filed by the Corporate Debtor was an Application praying for dismissal of Section 7 Application barred by Section 10A. It is submitted that the Default on behalf of the Corporate Debtor was committed only after receipt of the letter dated 21st April, 2020 from the Financial Creditor and prior letters which have been relied on by the Section 7 Application can not be treated to be default on the part of the Appellant. It is further submitted that in view the Hon'ble Delhi High Court Order dated 25.02.2021 and subsequent orders passed therein, the Adjudicating Authority ought not to have admitted Section 7 Application without obtaining the leave of the Hon'ble Delhi High Court.

4. Submissions made by Learned Sr. Counsel for the Appellant has been refuted by Learned Sr. Counsel appearing for the Financial Creditor. It is submitted that on 01st March, 2022 when time was allowed to the Corporate Debtor to file a Reply it was open for them to file a Reply which opportunity was not availed. It is submitted that even if the Order dated 11th July, 2022 incorrectly noticed that their right to file reply has been closed that is inconsequential. It is further submitted that Application seeking rejection under Section 10A was rightly rejected since in the present case, date of default was much before 5th March, 2020 and the letters were issued to the Corporate Debtor on 05th March, 2020 and earlier thereto which clearly indicates that in the Application under Section 10A, there was no substance. It is further submitted that in so far as the Order of the Delhi High Court dated 25.02.2021 is concerned subsequently this

Order was clarified and in the clarification it was clearly mentioned that there was no prohibition for filing Section 7 Application by the Financial Creditor. It is submitted that against the Order of Delhi High Court, SLP was filed, which was dismissed, in view of the aforesaid, rejection of I.A. No. 594 of 2022 cannot be faulted. It is further submitted that the submission which was raised by the Corporate Debtor under Section 10A application as well as in I.A. No. 594 of 2022 were also submission on merits opposing the Section 7 Application and there was nothing more to be heard and decided by the Adjudicating Authority and the Adjudicating Authority has rightly admitted Section 7 Application.

5. We have considered the submissions of Learned Counsel for the parties and have perused the record.

6. The first order which need to be noticed passed by the Adjudicating Authority is order dated 01st March, 2022 which is to the following effect:

“Mr Janak Dwarkadas, Senior Advocate, a/w Ms Rishika Harish, Mr. Ravitej Chillumuri i/b Khaitain and Co. for the Petitioner/Financial Creditor and Mr. Arun Kathpalia, Senior Advocate; Mr. Navroz Seervai, Senior Advocate, i/b Wadia Ghandy & Co. for the Corporate Debtor are present through virtual hearing.

Mr. Navroz Seervai, Senior Advocate undertakes to file Vakalatnama and reply on behalf of Corporate Debtor.

Corporate Debtor is directed to file Reply by serving an advance copy on the other side. List this Matter on 30.03.2022.”

7. The Corporate Debtor after passing of the Order dated 01st March, 2022 has filed I.A. No. 742 of 2022 where following prayers were made:

“a. that this Hon’ble Tribunal be pleased to rectify the said order dated 1st march, 2022 by deleting the following:-

“Mr. Navroz Seervai, Senior Advocate undertakes to file Vakalatnama and reply on behalf of Corporate Debtor. Corporate Debtor is directed to file reply by serving an advance copy on the other side.”

b. for such other order(s) as this Hon’ble Tribunal may deem fit and appropriate in the facts and circumstances of the case.”

8. The said application was kept pending and the I.A. No. 594 of 2022 already filed by the Corporate Debtor where prayer was made that the application under Section 7 deserves to be rejected in view of the orders passed by the Delhi High Court thereafter the Corporate Debtor filed an Application being I.A. No. 1378 of 2022 on 19th May, 2022 praying that application under Section 7 is barred by Section 10A of the Code and deserved to be dismissed on this ground alone. The Application No. 742 of 2022 has been dismissed by the Impugned Order, vide paragraph 3 of the judgment where I.A. No. 742 of 2022 has been rejected. The Adjudicating Authority heard I.A. No. 1378 of 2022 and I.A. No. 742 of 2022 and on 2nd January, 2023, I.A. No. 594 of 2022 came for consideration and following order was passed:

“Mr. Ravi Kadam a/w Mr. Ashish Kamat, Mr. Vishnu Shriram, Ms. Pratiksha Agrawal i/b Khaitan & Co., Senior counsel for the Financial Creditor IndusInd Bank

Ltd. and Mr. Zal Andhyarujina a/w Ms Bindi Dave, Mr. Raghav Gupta, Mr. Karan Bhide, Ms. Treesa Benny i/b Wadia Ghandy & Co., counsel for the Corporate Debtor in C.P (IB)-221(MB)/ 2022 and the Applicant in I.A. 1378 of 2022 are present through virtual hearing.

I.A. 1378/2022

Heard the arguments of the counsel appearing for the Applicant. List this matter on 04.01.2023 high on board for reply arguments by Respondent/ Financial Creditor.

I.A. 594/2022

*The above Interlocutory Application is filed by the Corporate Debtor for dismissal of the Company Petition in view of not obtaining leave from the Hon'ble Delhi High Court by the Financial Creditor. In view of the subsequent clarificatory order passed by the Hon'ble Delhi High Court, the above Interlocutory Application has become **infructuous and accordingly stands disposed of.***

9. On I.A. No. 1378 of 2022, matter was fixed for 04.01.2023 for reply arguments by Respondent/Financial Creditor. The Adjudicating Authority reserved the Orders in I.A. No. 1378 of 2022 and I.A. No. 742 of 2022 on 04th January, 2023 which order is to the following effect:

“Counsel for the Petitioner, Mr. Ravi Kadam and counsel for the Respondent, Mr. Zal T Andhyarujina are present through virtual hearing.

I.A. 1378/2022

*Heard, the arguments of Respondent/FC and rejoinder by petitioner. **Order is reserved.***

I.A. 742/2022

*Heard both sides and **order is reserved.***

Both parties are at liberty to file their brief written submissions within two days."

10. After reserving the Order on 04th January, 2023, impugned Order has been passed on 22.02.2023. In paragraph 2 and 3 of the order, the Adjudicating Authority has stated following:

"2. The Corporate Guarantor i.e. ZEEL vide order dated 01.03.2022 is directed to file reply by serving an advance copy on other side. Thereafter, the Corporate Guarantor did not choose to file any reply and filed separate application bearing I.A. 1378/2022 challenging the maintainability of the present Company Petition virtually raising all the available legal pleas in opposing the above Company Petition which is dismissed on merits by this Tribunal simultaneously today. Since the Respondent is not filing reply, a conditional order directing the Respondent to file reply within two weeks failing which their right to file reply stands forfeited was passed on 11.07.2022. Despite the above conditional order, the Corporate Guarantor did not choose to file any reply and on the other hand refused to file reply contending that they need not file reply till their maintainability application is decided. On the other hand, the Respondent filed another I.A. 742/2022 praying this Tribunal to delete the following order dated 01.03.2022.

"Mr. Navroz Seervai, Senior Advocate undertakes to file Vakalatnama and reply on behalf of the Corporate Debtor. Corporate Debtor is directed to file reply by serving an advance copy on the other side. "

3. In view of the dismissal of I.A. 1378/2022 on merits, the above I.A. 742/2022 is also liable to be dismissed also on

the ground that the remedy of the Respondent if at all aggrieved against the order dated 01.03.2022 is by way of an appeal and not through filing the above I.A. 742/2022. Hence, I.A. 742/2022 is also rejected.”

11. When we look into the Order sheets and the orders passed by the Adjudicating Authority, it is clear that on 04th January, 2023, orders were reserved by the Adjudicating Authority in I.A. No. 1378 of 2022 and I.A. No. 742 of 2022 however when Order has been delivered, the said order after rejecting both these I.As, has admitted Section 7 Application.

12. The principal submission which has been made and advanced by Learned Sr. Counsel appearing for the Appellant is that CP(IB) No. 221(MB)2022 was not heard hence no order could have been passed since neither hearing was made on Section 7 Application nor parties advanced their submissions.

13. The submission of Learned Sr. Counsel for the Respondent on the other side is that what submissions have to be made on behalf of Corporate Debtor were already made or advanced in I.A. No. 1378 of 2022 and I.A. No. 742 of 2022 hence there was nothing more to be heard for deciding Section 7 Application and Appellant did not avail the opportunity which was allowed by the Adjudicating Authority to file a Reply.

14. We have noticed the submissions of Learned Counsel for the parties. It is true that on 01st March, 2022, the Adjudicating Authority passed an Order where Sr. Advocate undertakes to file Vakalatnama and Reply after serving the advance copy on the other side. After the said order, application was filed by the Corporate

Debtor for correction of Order dated 01st March, 2022 which has been noticed above which application came to be dismissed only by the Impugned Order.

15. The Order dated 11th July, 2022 which has been referred to by the Adjudicating Authority forfeiting right of the reply of the Appellant has been noticed above. The said Order was passed on I.A. No. 594 of 2022 is again quoted for ready reference:

“I.A.594/2022

Counsel appearing for the Respondent/Financial Creditor requested time for filing reply on the ground that the matter before the Hon’ble Delhi High Court is listed on 29.07.2022. Respondent/ Financial Creditor shall file reply within two weeks from today by serving an advance copy on the other side, failing which their right to file reply shall stands forfeited.”

16. When we look order dated 11th July, 2022, it is clear that the application was filed by the Corporate Debtor who was applicant and Financial Creditor, the Respondent herein was granted time to file a Reply. The said order has been read by the Adjudicating Authority as order forfeiting right of the Corporate Debtor to file a Reply and relying on the said Order, adjudicating authority proceeded to observe that corporate debtor did not chose to file a Reply and rather refuses to reply hence the Adjudicating Authority has no option and proceeded to admit the Section 7 Application.

17. We are of the view that Order dated 11th July, 2022 has been wrongly interpreted and relied on by the Adjudicating Authority. The said Order never forfeited right to file Reply of the Corporate Debtor and in fact by the said order,

time was granted to the Financial Creditor to file a reply to I.A. No. 594 of 2022 which can not be treated any forfeiting the right of the corporate debtor to file a reply. As noted above, from the Order dated 04th January, 2023 what was reserved by the Adjudicating Authority was order in I.A. No. 1378 of 2022 and 742 of 2022. Rejection of the above applications cannot be treated to be automatic admission of Section 7 Application. Although Learned Sr. Counsel for the parties have raised various submissions with regard to the order passed by the Adjudicating Authority in I.A. No. 1378 of 2022 and I.A. No. 742 of 2022 but at present we need not enter into those submissions which need closure scrutiny and hearing by the parties. We thus are of the view that sufficient grounds have been made out to issue notice to the Respondents. Notice is accepted by both Learned Counsel appearing for the Respondents. Two weeks time is allowed to file Reply-Affidavits. Rejoinder, if any, may be filed within two weeks, thereafter.

List this Appeal on **29th March, 2023**. In the meantime, order passed by the Adjudicating Authority on 22/02/2023 shall remain stayed. Learned Counsel for the Respondent submits that there are huge dues on the Appellant and appellant be directed to deposit certain amount. Learned Counsel for the Appellant may obtain instruction on the said submission.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Basant/nn