

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

RST. APPL. (IBC)/16(MB)2022 IN

CP (IB) No. 3213/MB-VI/2018

[Under Rule 48 and Rule 11 of the National Company Law Tribunal Rules, 2016 r/w Section 424 of the Companies Act, 2013]

IN THE MATTER OF:

ONE97 COMMUNICATIONS LIMITED

[CIN-L72200DL2000PLC108985]

Registered Office: First Floor, Devika Tower

Nehru Place, New Delhi -110019.

... Restoration Applicant/Operational Creditor

V/s

RELIANCE WEBSTORE LIMITED

[CIN- U72900MH2000PLC128101]

Registered Office: H Block, First Floor

Dhirubhai Ambani Knowledge City

Navi Mumbai- 400710, Maharashtra.

...Respondent/Corporate Debtor

Pronounced: 16.01.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearance: Hybrid

Operational Creditor : Adv. Astad Randeria a/w Adv. Aditi Palnitkar
and Adv. Shruti Dasondi i/b Khimani &
Associates

Corporate Debtor : Adv. Tushad Kakaria a/w. Adv. Raghav
Sharma i/b Mulla & Mulla

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. Background

1.1 This RST.APPL.(IBC)/16(MB)2022 (Restoration Application) in CP (IB) No.3213/MB-VI/2018 (Main Application) was filed on 19.08.2022 by One97 Communications Limited, the Operational Creditor (Restoration Applicant/OC), under Rules 48 and 11 of the National Company Law Rules, 2016 (NCLT Rules) r/w Section 424 of the Companies Act, 2013, for restoration of the Main Application, which came to be dismissed for non-prosecution *vide* Order dated 28.07.2021 (Impugned Order). The Main Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Reliance Webstore Limited (Respondent/CD) was filed for debts due and payable by the CD to the OC amounting to Rs. 7,59,64,413/- (Seven Crore Fifty-Nine Lakhs Sixty-Four Thousand Four Hundred and Thirteen Rupees).

2. Contentions of Restoration Applicant/OC

2.1 The Restoration Applicant/OC is a company engaged in the business of providing services such as value-added services, mobile recharge services, DTH recharge services, ticket booking services, etc., under the brand name 'PayTM' and also provides services for campaigning and advertisement / promotional services through SMS push services,

as well as portal display amongst other ancillary businesses. The OC also provides various services, etc., to the CD, which, in turn, were provided by the CD to the subscribers of Reliance network. On 16.08.2018, the OC filed the Main Application under Section 9 of the IBC for initiating CIRP against the CD, for debts due and payable by the CD amounting to Rs. 7,59,64,413/-.

2.2 Thereafter, the Main Application was listed from time to time before this Adjudicating Authority, when the OC appeared regularly on all hearings and complied with the directions passed thereon by the Bench. On 04.03.2020, when the Main Application was taken up for hearing, the Advocate for the OC was present and after hearing the submissions, the matter was adjourned to 21.04.2020. However, due to COVID-19 pandemic and national lockdown, the matter was not listed and taken up on 21.04.2020. It is the submission of the Ld. Counsel for the Restoration Applicant/OC that, thereafter, when the Restoration Applicant/OC proactively made enquiries with the Registry of this Tribunal for the next date of hearing, it was informed that the next date was not assigned by the Bench. Upon enquiry regarding the dates of hearing, the Restoration Applicant/OC learnt that after 04.03.2020, the Main Application was virtually taken up for hearing on 10.06.2021; however, the OC was not aware of such listing, and, hence, was unable to remain present for the hearing. On 10.06.2021, since none of the parties were present for the hearing, the Bench directed the Court Officer to intimate both the parties regarding the

next date of hearing with a further direction to the parties to complete their pleadings before the next date of hearing, being 28.07.2021.

Then Bench thus adjourned the Main Application to 28.07.2021.

2.3 Ld. Counsel for OC states that since the OC did not receive any intimation regarding the next date of hearing for a long time, it made a general search on the website of the Tribunal and was surprised to learn that the Main Application was listed on 10.06.2021, and thereafter, on 28.07.2021, on which date the Main Application was dismissed for non-prosecution as there was no representation for the OC on that day. However, it did not have any information regarding the date of posting on 28.07.2021 at all. The OC has, therefore, preferred this Restoration Application, *inter alia*, to set aside the Impugned Order dated 28.07.2021 and restore the same.

2.4 The Restoration Applicant/OC submits that it was ready to be proceeded with for final arguments. In the event the Main Application is not restored, the Restoration Applicant/OC will be deprived of its lawful rights of fair chance to present its case before this Tribunal. It prays that it is imperative in the interest of justice that the Restoration Application be allowed and the Impugned Order dated 28.07.2021 be set aside. The Restoration Applicant/OC further submits that the Restoration Application has been filed after a delay of 387 days and prays for condonation of the delay. The Restoration Applicant/OC obtained the certified copy of the Order of dismissal dated 28.07.2021, on 05.08.2022, and it filed the Restoration Application on 19.08.2022.

In the circumstances, it further prays that the Restoration Applicant/OC be given an opportunity of fair hearing before the Main Application is disposed of.

3. Contentions of Respondent/CD

3.1 The Respondent/CD *vide* its Reply dated 25.08.2023 to the Restoration Application, contended that the Restoration Application deserves to be rejected on the following grounds that–

- A) It is barred by limitation- The Main Application was dismissed for non-prosecution on 28.07.2021. Rule 48 of the NCLT Rules provides that when an application is dismissed for default, application for restoration can be considered only if: (a) the application has been filed within 30 days of the date of dismissal; and (b) there is sufficient cause for non-appearance of the applicant. The Restoration Application therefore, ought to have been filed not later than 27.08.2021 but has, however, been filed on 19.08.2022.
- B) The Restoration Applicant/OC is not entitled to the reliefs as prayed for even on merits. It is submitted that the Restoration Applicant/OC made enquiries about the next date in the matter from time to time, but received no information from the Registry. The Respondent/CD states that no material whatsoever, by way of e-mails or letters to the Registry have been produced by the Restoration Applicant/OC to evidence any enquiry. The matter was listed on 10.06.2021 and 28.07.2021, when the Restoration

Applicant/OC's Advocates did not appear when this Adjudicating Authority proceeded to dismiss the Main Application for non-prosecution.

- C) The remedy available to the Restoration Applicant/OC, was, thus, by way of an appeal, which, pertinently, would also be barred by limitation. The Respondent/CD further states that it is well settled that a court ought not to take away a right which has accrued to a party by lapse of time. Further, the Respondent/CD submits that litigant who is not vigilant about the rights must explain every day's delay. The Respondent/CD thus prays that this Restoration Application is to be dismissed.

4. Analysis & Findings

- 4.1 We have perused all the documents on record and the arguments advanced by both the Ld. Counsel for the Restoration Applicant/OC and the Respondent/CD. On a perusal of the daily order sheet dated 10.06.2021, it is seen that the matter was taken up through Virtual Hearing. That day, none of the parties were present for the hearing. The Bench thus adjourned the Main Application to 28.07.2021 and had specifically directed the Court Officer to intimate the next date of hearing to both the parties. The parties were also directed to complete their part of pleadings well before the next date of hearing if already not completed. The matter was then listed to 28.07.2021. On 28.07.2021, when the matter was taken up for hearing (again

through Virtual Hearing), none appeared from either side. The Bench then recorded the order as follows:

“On perusal of the order dated 10.06.2021, it is evident that on that day when the matter was listed before this bench none appeared.

Parties were intimated by issuing court notice the next date of hearing also. *Today when the matter was called upon for hearing neither the Operational Creditor nor the Corporate Debtor are present. It appears that the Operational Creditor is not interested to prosecute the matter. Hence the CP(IB)-3213(MB)/2018 is dismissed for non-prosecution.”* (Emphasis Supplied).

However, there is nothing on record to show that the parties were ever intimated by the Court Officer or any court notice was by the Registry regarding the next date of hearing (again through Virtual Hearing) as directed by the Bench. It is also seen that on both these dates, viz., 10.06.2021, when the Bench directed the Court Officer to intimate the next date of hearing, and on 28.07.2021, when the matter was dismissed for non-prosecution, both the Operational Creditor/OC and the Corporate Debtor/CD were absent. Hence, it can only be inferred that it was not only the Operational Creditor but the Corporate Debtor also never got any intimation from the Court Officer or a notice from the Registry as to the next date of hearing. We have checked the website of the Tribunal to find out if the daily orders of 10.06.2021 and 28.07.2021 were published but found that these are unavailable online. However, original copies signed by both

the Hon'ble Members are available on record. Hence, we cannot infer that these daily orders were actually uploaded at all on the website. Interestingly, all daily orders from 20.10.2022 are now available on the Tribunal's website. From all these, the only inference that can be drawn is that the absence of the Restoration Applicant/OC and the Respondent/CD on both the above dates were not attributable to any of their laches. The absence of the parties could only be attributable to an inadvertent error by the Court Officer to intimate the parties the next date of hearing and an oversight of non-issuance of fresh court notice by the Registry.

- 4.2 The Applicant submits that it became aware of the order dated 28.07.2021 only on 01.08.2022. Upon learning about the order, the Applicant immediately instructed its Advocates to take a search of the papers and proceedings in the matter. One Mr. Kiran Patil, the clerk at the office of the Advocates for the Restoration Applicant/OC, has filed an Affidavit dated 13.10.2023, that upon instructions of the Restoration Applicant/OC, he took search of the papers and proceedings in the matter on 03.08.2022 and found out that no intimation from the Registry had been sent to the Restoration Applicant/OC, and upon his request, the Registry checked the website and confirmed that even the orders of the hearings held on 10.06.2023 and 28.07.2021 were not uploaded on the website.
- 4.3 In the light of the above, we are of the considered view that owing to the absence of any intimation by the Court Officer and non-issuance

of court notice to the Restoration Applicant/OC by the Registry, its legal rights to pursue an application under Section 9 cannot be compromised. We are also conscious of the fact that during the relevant period, hearings were mostly conducted virtually due to COVID-19 pandemic, and only urgent and important matters were listed and heard. Other matters were being adjourned on a routine basis for want of time and availability of Court Staff as also convenience of the Courts and litigants.

- 4.4 It is well established legal principle that an act of Court shall not prejudice the litigant. The Hon'ble Supreme Court, other Courts and tribunals have held in a catena of judgements based on the principle of *Actus Curiae Neminem Gravabit* that an unintentional mistake of the Court, which may prejudice the cause of any party, must only to be rectified. Interest of justice warrants to provide reasonable opportunity to the applicant to complete its pleadings and hear and decide the issues on merits, especially when the Restoration Applicant/OC is willing to advance its case. We feel that a fair hearing is to be afforded to the Restoration Applicant/OC to meet the ends of justice. As reported in (1987) 2 SCC 107, in the matter of *Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors.*, the Hon'ble Supreme Court observed that refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. Further, the Hon'ble Court stressed that when substantial justice and technical considerations are pitted

against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. We feel that a justice-oriented approach should be adopted in matters relating to condonation of delay. When convincing reasons are displayed by the restoration applicant, it shall be sufficient cause to explain the delay.

4.5 In view of the foregoing discussions, we do not find any reason to seek any evidence from the Restoration Applicant/OC to substantiate its contention that it took continuous follow-ups with the Registry regarding the next dates of hearing. The OC has produced a certified copy of the order dated 28.07.2021 obtained by it on 05.08.2022. The Restoration Applicant/OC filed the present Application on 19.08.2022. Since the reasons for delay in filing the present Application is sufficiently understandable by this Bench, the Restoration Applicant/OC does not have the burden to explain each day's delay, especially when the delay is not attributable to any laches on the part of the Restoration Applicant/OC.

4.6 Under Rule 48 of the NCLT Rules, 2016, the Restoration Applicant/OC had limitation period of 30 days commencing from the date of order of dismissal, i.e., 28.07.2021, to file application for restoration. As a result, the Applicant could file the present Application latest by 27.08.2021. We find that the said date i.e., 27.08.2021 falls within the extended period of limitation excluded in view of the Supreme Court's *suo motu* order for the periods between

15.03.2020 to 28.02.2022. It was held in the matter that, *“in cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.”* The same has been reiterated by the Hon’ble Supreme Court in *Babasaheb Raosaheb Kobarne & Anr. Vs. Pyrotek India Private Limited & Ors. in (SLP (C) No. 2522/2022*. Therefore, the Restoration Applicant/OC could have filed the said Application on or before 30.05.2022, considering the 90 days’ time allowed *vide* the said order. It was further clarified in the above matter that the period from 15.03.2020 till 28.02.2022 shall have to be excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings. The NCLT Rules have been made in exercise of the Companies Act, 2013 and hence, the direction of the Hon’ble Supreme Court is applicable to Rule 48 of the NCLT Rules as well as regards exclusion of the above period.

- 4.7 In view of the above discussions, we have no reason to believe that the Restoration Applicant/OC deliberately delayed the filing of the restoration application. The Restoration Applicant/OC filed the present application on 19.08.2022, i.e. 14 days after obtaining the certified copy of the order after its knowledge of dismissal.

We are, therefore, clear that the intention of the Restoration Applicant/OC was to get the Main Application revived as soon as it learned about the order dated 28.07.2021. The Restoration Applicant/OC could not have known when the matter would be listed, without intimation or notice regarding the next date of hearing. The Restoration Applicant/OC's right to a fair hearing must be preserved keeping in mind the principles of natural justice, especially when *prima facie* the circumstances of the case are different and peculiar and that the delay is unintentional. The Restoration Applicant/OC never got an opportunity to advance its case on merits. It is a fundamental right of every litigant to have a fair hearing before any adverse order is suffered. In the light of the above findings, we are inclined to allow the present Restoration Application.

ORDER

This Application bearing RST. APPL. (IBC)/16(MB)2022 in CP (IB) No. 3213/MB-VI/2018 filed by One97 Communications Limited, the Restoration Applicant/OC, under Rule 48 and Rule 11 of the National Company Law Tribunal Rules, 2016 r/w Section 424 of the Companies Act, 2013, is **Allowed and CP (IB) No. 3213/MB-VI/2018 is restored on file.**

Let CP (IB) No. 3213/MB-VI/2018 (as restored) be listed on
19.01.2024 for hearing and consideration on merits.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

//LRA/Akshata Shah//

Sd/-
K. R SAJI KUMAR
MEMBER (JUDICIAL)