

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court - I)
KOLKATA**

IA (IB) No. 1493/KB/2023
in
CP (IB) No. 257/KB/2022

An application under Rule 11 of the National Company Law Tribunal Rules, 2016

In the matter of

India Resurgence ARC Private Limited

... *Financial Creditor*

Versus

Kundan Suppliers Private Limited

... *Corporate Debtor*

-And-

In the matter of

Manmohan Mall as Karta of Manmohan Mall HUF

... *Applicant*

Versus

India Resurgence ARC Private Limited

... *Respondents*

Order pronounced on: 23.02.2024

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (through video conferencing):

Ms. Shreya Choudhary, Adv.

Mr. Ajay Kr. Agrawal, RP in person] For RP

Mr. D. N. Sharma, Adv.

] For applicant in IA/1493/2023

Ms. Urmila Chakraborty, Adv.

] For R1 & R2 in IA/415/2023 &

Ms. Meenakshi Manot, Adv.

For R1 & R2 in IA/1030/2023

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court - I)
KOLKATA**

IA (IB) No. 1493/KB/2023
in
CP (IB) No. 257/KB/2022

Mr. Abhishek Jain, Adv.

ORDER

Per: Balraj Joshi, Member (Technical)

1. This Adjudicating Authority convened through hybrid mode.
2. This application has been filed under Rule 11 of the National Company Law Tribunal Rules, 2016 by Mr. Manmohan Mall as Karta of Manmohan Mall HUF, the applicant against the respondents (1) India Resurgence ARC Private Limited, Financial Creditor and (2) Mr. Ajay Kumar Agarwal, RP, seeking following reliefs:
 - a) *Condonation of delay in filing the instant application by the applicant;*
 - b) *Recalling the order of admission dated 11/01/2023 in CP(IB)/257(KB)2022, thereby dismissing the Company Petition and all Interlocutor Applications filed therein;*
 - c) *Ad-interim order of stay of operation of the impugned order dated 11/01/2023 till disposal of the instant application;*
 - d) *Pass any other order or orders, direction or directions which this Adjudicating Authority may deem fit and proper.*

This application is supported by an affidavit duly affirmed by Manmohan Mall as Karta of Manmohan Mall HUF, the applicant.

3. Brief Facts of the Case

- 3.1 CP(IB)/257(KB)2022 came up for consideration first on 28/09/2022 and direction was given to issue notice to the respondent (Corporate Debtor). Accordingly, the Registry duly issued notice dated 30/09/2022, which was duly received by the Corporate Debtor on 06/10/2022 as per the Track Consignment Report obtained/downloaded from the Postal Authorities. The Financial Creditor also filed an affidavit-of-service, proving service of notice upon the Corporate Debtor. Despite service of notice, the Corporate Debtor did not appear on 04/11/2022 and file any reply affidavit. Accordingly, the Corporate Debtor was set *ex parte* on 04/11/2022.
- 3.2 On the next date of hearing on 07/12/2022 the matter was reserved for orders and the order was pronounced on 11/01/2023 appointing Mr. Ajay Kumar Agrawal as

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court - I)
KOLKATA**

IA (IB) No. 1493/KB/2023
in
CP (IB) No. 257/KB/2022

- Interim Resolution Professional. The said order dated 11/01/2023 was duly served upon the Corporate Debtor by e-mail as well as by speed post.
- 3.3 In terms of regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons Regulations, 2016 ("CIRP Regulations") Public Announcement in Form A was published and Committee of Creditors ("CoC") was duly formed with the sole petitioning Financial Creditor.
- 3.4 Despite several requests, the suspended members of the Board of Directors of the Corporate Debtor did not handover books of account and related records to the Resolution Professional, Therefore, an application being IA(IBC)/415(KB)2023 was filed u/s. 19(2) and 19(3) of the Code on 17/02/2023. The said IA(IBC)/415(KB)2023 was came up for hearing on 25/04/2023, 30/06/2023, 11/07/2023, 28/07/2023 and 25/08/2023 respectively when the Learned Counsel for the suspended members were present. However, the instant IA was filed only on 28/08/2023 by the applicant.
- 3.5 The CoC at its 2nd meeting held on 14/03/2023, in its commercial wisdom has decided to initiate liquidation process against the Corporate Debtor since there are no other asset other than the commercial unit. Accordingly, an application being IA(IBC)/627(KB)2023 was filed and the said application was disposed of vide order dated 24/04/2023 remitting back to the CoC to consider afresh, keeping in view the objective of the Code.
- 3.6 In compliance of the said order dated 25/04/2023, Form G was published on 05/05/2023 in "*Financial Express*" (English) and "*Duranta Barta*" (Bengali) inviting Expression of Interest ("Eol") from prospective resolution applicants ("PRA"). Though four enquiries were received from PRAs but none has submitted any Eol. In view of the four enquiries received by the RP, the CoC at its 5th meeting held on 13/06/2023 has resolved to re-publish Form G once again. Accordingly, Form G was again published on 15/06/2023 in the same newspapers. In response, only one Eol was received from one Nakshatra Corporate Advisors Limited. However, the said Nakshatra Corporate Advisors Limited vide its e-mail dated 01/08/2023 requested refund of EMD of Rs. 5 Lakhs deposited by them.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court - I)
KOLKATA**

IA (IB) No. 1493/KB/2023
in
CP (IB) No. 257/KB/2022

3.7 Accordingly, the CoC at its 7th meeting held on 23/08/2023 has passed a resolution unanimously recommending initiation of liquidation process against the Corporate Debtor due to non-receipt of any resolution plan. Hence, an application being IA(IBC)/1574(KB)2023 has been filed before this Adjudicating Authority for initiation of liquidation process against the Corporate Debtor, which is reserved for orders.

4. Submissions of the Ld. Counsel for the applicant.

- 4.1 Ld. Counsel for the applicant submits that a family separation of the business and assets of the Mall family had been taken place in the year 2018-2019 and under the said family separation and/or arrangement, the business of the corporate debtor was to vest upon the applicant. However, the present suspended members of the board of directors of the corporate debtor did not comply with the terms of the family settlement. Therefore, control and management of the corporate debtor could not vest upon the applicant as per the family separation, as such, the applicant was kept in dark and not aware of the pendency of section 7 IBC proceeding.
- 4.2 The corporate debtor was not in active business since the family separation took place due to the internal problems and disputes between the family members. Also, the corporate debtor is not functioning from 1, Hindustan Park, Ground Floor, Kolkata 700029. There are disputes relating to the ownership and possession of the registered office of the corporate debtor as such the corporate debtor has not been able to function from its registered office as shown in the Company Master Data. E-mail id. as shown in the Company Master Data was not accessed and updated also.
- 4.3 The alleged claim of respondent no. 1 arose on account of a purported Deed of Assignment dated 05/11/2019 with respect to a loan granted by Religare Finvest Limited ("Religare") to one H. R. International Limited under a sanction letter dated 30/06/2014 along with Facility Agreement dated 30/06/2014. On perusal of the said sanction letter dated 30/06/2014, it appears that a commercial loan for a sum of Rs.70,70,000/- was granted to H.R. International Limited and one Mr. Ronak Mall was co-applicant. As per the disbursal report, the entire loan was disbursed to H.R.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court - I)
KOLKATA**

IA (IB) No. 1493/KB/2023
in
CP (IB) No. 257/KB/2022

International Limited and the repayment obligation was also with H. R. International Limited.

- 4.4 Ld. Counsel for the applicant submits that no amount was disbursed in favour of the Corporate Debtor nor did the Corporate Debtor borrow any money from the respondent no. 1/Financial Creditor, the transaction cannot be construed as a "financial debt" under section 5(8) of the Code, hence there could not be any default committed on the part of the Corporate Debtor. Though the Corporate Debtor was referred to as the co-applicant but as per the specific sanction conditions, Ronak Mall was the co-applicant.
- 4.5 Ld. Counsel for the applicant further submits that the Corporate Debtor was neither a borrower nor a guarantor in respect of the said loan granted by the original lender/Religare and, as such, question of assignment in favour of the Financial Creditor against the Corporate Debtor does not and cannot arise. There is no financial debt within the meaning of the Code, which could lead to the commencement of CIRP of the Corporate Debtor.
- 4.6 Ld. Counsel for the applicant also submits that the original lender does not have any cause of action against the Corporate Debtor, and hence, whatever purported it does not have, it cannot assign to its assignee. In any event, the purported Deed of Assignment is an unregistered document, whereby many loan accounts have been sought to be assigned to the present Financial Creditor as such alleged deed of assignment is thus invalid, void and cannot be relied upon for the purpose of filing of section 7 petition under the Code. This vital fact has been suppressed by the present Financial Creditor, while approaching this Adjudicating Authority for initiation of CIRP against the Corporate Debtor.

5. Analysis and Findings

- 5.1 It is asserted that pursuant to Rule 11 of the NCLT Rules, 2016, the Tribunal possesses expansive authority to issue orders as deemed essential to serve the interests of justice or to forestall any misuse of the Tribunal's proceedings.
- 5.2 We have considered the rival contentions and perused the records.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court - I)
KOLKATA**

IA (IB) No. 1493/KB/2023
in
CP (IB) No. 257/KB/2022

- 5.3 It is to be emphasized that pursuant to the explicit provisions delineated in Rule 11 of the NCLT Rules, 2016, unquestionably and indisputably, this Tribunal retains the authority to vacate an *ex parte* proceeding against the Respondent in an application and schedule the matter for subsequent hearing, particularly in situations such as where the opportunity for a hearing was foreclosed by an order due to non-availing of granted opportunities.
- 5.4 However, it should be noted that this Tribunal is not endowed with the authority to recall an *ex parte* order when a decision has been made *ex parte* but based on the merits of the case.
- 5.5 In the case of ***Printland Digital (India) Pvt. Ltd. Vs. Nirmal Trading Company passed in Company Appeal (AT) (Insolvency) No. 504 of 2022***, the Hon'ble NCLAT held as under:

“There is a difference between recalling of an order and review on merits of the issue decided by the Adjudicating Authority. No doubt that the Adjudicating Authority has no jurisdiction to review its order after deciding a substantial issue but it has the jurisdiction to recall the order of the kind in dispute i.e. where the right to Reply was closed by an order on the ground that the opportunities granted were not availed. In this regard, we rely upon a decision of this Tribunal rendered in the case of CA(AT)(Ins) No. 271 of 2022 in which it has been held that if there is an adjudication by the Adjudicating Authority on merits of the issues then it would not have the jurisdiction to review its order but insofar as the dispute with regard to right to file the Reply which is closed by an order, it certainly has the jurisdiction to recall it in terms of the Rule 11 of NCLT Rules, 2016”.

- 5.6 Further in the case of ***Union Bank of India (Erstwhile Corporation Bank) Vs. Dinkar T. Venkatasubramanian & Ors. I.A. No. 3961 of 2022 in Company Appeal (AT) (Ins.) No. 729 of 2020***, the Hon'ble NCLAT held in verbatim:

“Power of recall is not power of the Tribunal to rehear the case to find out any apparent error in the judgment which is the scope of a review of a judgment. Power of recall of a judgment can be exercised by this Tribunal when any procedural error is committed in delivering the earlier judgment;”

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court - I)
KOLKATA**

IA (IB) No. 1493/KB/2023
in
CP (IB) No. 257/KB/2022

- 5.7 Therefore, it is well-established, fundamental, and settled legal principle that this Adjudicating Authority lacks the power to review the merits of any issue already decided. Consequently, the claim is unsustainable.
6. Accordingly, **IA (IB) No. 1493/KB/2023** in **CP (IB) No. 257/KB/2022** is **rejected**.
7. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 23rd day of February, 2024.

AJS [L.R.A]