

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

Company Appeal (AT) (Insolvency) No. 314 of 2023

[Arising out of order dated 02.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court V in CP (IB) No. 1136(MB)2022]

IN THE MATTER OF:

Sachin Gosar

Navkar Heights, Flat No. 903,
Odhav Nagar plot No. 06, near
Nensey Colony beside Ganpati Mandir,
Landmark National Park, Borivali East – 400066.

...Appellant

Versus

1. Piramal Capital & Housing Finance Ltd.

601, 6th floor, Amiti Building, Agastya Corporate Park,
Kamini Junction, Opp. Fire Station, L.B.S. Marg,
Kurla (west), Mumbai-400070.

2. Navkar Groups Private Limited

Through its Resolution Professional
601, Vastu Residency, Behind Nancy Colony,
Borivali (east), Mumbai – 400066.

3. Mr. Ravindra Chaturvedi

The Resolution Professional of the Corporate Debtor
Having its registered office at
BKC Center, 31-E Laxmi Industrial Estate,
New Link Road, Andheri (West), Mumbai – 400053.

...Respondents

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Anvi Tiwari, Mr. Aditya Shukla, Mr. Saurabh Mishra, Mr. Rahul Kumar, Mrs. Tuhina Mishra, Mr. Nikhil Anand, Advocates**

For Respondent: **Mr. Vikas Mehta, Mr. Adith Nair, Advocates for Respondent No.1**

Ms. Switi Sahay, Advocate for Respondent No. 3.

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by a suspended Director of the Corporate Debtor has been filed against the order dated 02.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court – V, admitting Section 7 application filed by the Respondent – Piramal Capital & Housing Finance Limited. Brief facts of the case are:

- i. Dewan Housing Finance Corporation Limited (now Piramal Capital & Housing Finance Limited) by sanction letter dated 22.08.2018 has sanctioned a loan of Rs.20 Crores to the Corporate Debtor.
- ii. On 30.08.2018, the Corporate Debtor was disbursed an amount of Rs.10 Crore. Dewan Housing Finance Corporation Limited (DHFL) was taken over by an Administrator. At the instance of Reserve Bank of India, insolvency proceedings were initiated against the DHFL in CP(IB) No. 4258/MB/C-II/2019, in which petition an application was filed by the Corporate Debtor seeking a direction to disburse the balance loan amount of Rs.10 Crore. In the application, the Corporate Debtor has pleaded that the entire project being mortgaged with the DHFL, the Corporate Debtor is suffering due to non-disbursement of the balance

amount of loan. The said application remained pending and ultimately resolution plan in the proceedings submitted by Piramal Capital & Housing Finance Limited was approved and the DHFL was taken over by the Piramal Capital.

- iii. Piramal Capital, on 28.09.2022, has filed an application for initiating the Corporate Insolvency Resolution Process against the Corporate Debtor, in which amount claimed was Rs.16,37,29,496/-. In the application notices were issued by the Adjudicating Authority on 01.11.2022, fixing next date on 02.12.2022.
- iv. On 02.12.2022, counsel appeared on behalf of the Corporate Debtor before the Court and prayed for time to file Vakalatnama and reply. The Adjudicating Authority on 02.12.2022 granted time to the Corporate Debtor to file a reply and fixed 03.01.2023 as the next date.
- v. On 03.01.2023, none appeared on behalf of the Corporate Debtor. The Adjudicating Authority proceeded ex-parte on 03.01.2023 and reserved for orders.
- vi. On 02.03.2023, orders has been pronounced admitting Section 7 application.

2. Learned counsel for the Appellant challenging the order contends that although the Corporate Debtor had appeared and taken time on

02.12.2022 and had instructed the counsel to file reply but the counsel for the Appellant neither appeared nor filed reply, due to which the Adjudicating Authority has proceeded ex-parte and passed the order. It is submitted that the Adjudicating Authority passed the order admitting Section 7 application observing that the Corporate Debtor having not filed the reply averments made in the petition has to be treated to be admitted. It is submitted that there were several materials which were required to be brought into the notice of the Court. The Corporate Debtor has been complaining against the Financial Creditor regarding non-disbursement of the loan due to which severe prejudice was caused. It is also contended that although Rs.10 Crores were disbursed but processing fee @ 4.5% was charged by Financial Creditor for entire Rs.20 Crores. It is submitted that the Corporate Debtor in the proceedings which was initiated against the DHFL had already filed an I.A. seeking appropriate direction which remained pending. It is submitted that the Corporate Debtor is ready to file the reply, if only three days' time is allowed to the Corporate Debtor. Corporate Debtor is also ready to pay any cost for such indulgence.

3. Shri Vikas Mehta, learned counsel appearing for the Respondent refuting the submissions of learned counsel for the Appellant contends that the Appellant although took time to appear on 02.12.2022 but neither appeared on the next date nor filed any reply, hence, the Adjudicating Authority has not committed any error by proceeding ex-parte and reserving the order. It is submitted that the Adjudicating Authority has proceeded ex-parte on 03.01.2023 and the order was delivered on 02.03.2023, there was

sufficient time for the Appellant to file application under Rule 49 of the NCLT Rules, 2016, if it had any grievance against the Adjudicating Authority proceeding ex-parte. There is no sufficient cause shown by the Appellant to prove that he is entitled for giving any opportunity to file the reply. It was clearly mentioned in the order dated 02.12.2022 that the right to file the reply shall be forfeited if no reply is filed. It is submitted that the Adjudicating Authority has considered the facts stated in the Section 7 application and has not passed the order merely on the ground of non-filing of reply by the Corporate Debtor. The debt and default being proved under Section 7 application, no other issue need to be examined. It is submitted that the IBC Proceedings are proceedings which have to be decided in timelines, the statute provide 14 days' time to ascertain the existence of default, hence, the Adjudicating Authority did not commit any error in admitting Section 7 application.

4. Learned counsel for both the parties have relied of judgments of this Tribunal in support of their respective submissions, which shall be referred to while considered the submissions in detail.

5. From the facts brought on the record, it is clear that notices were issued by the Adjudicating Authority to the Corporate Debtor on 01.11.2022. On next date i.e. 02.12.2022, the Corporate Debtor appeared and following order was passed by the Adjudicating Authority:

“ORDER

Mr. Aniket Kharote a/w. Ms. Soniya Putta and Ms. Rohini Hirwane i/b Solomon & Co. Advocate appearing for the Petitioner/ Financial Creditor is present through virtual hearing. The Corporate Debtor is present in person/ physically.

Counsel appearing for the Corporate Debtor undertakes to file Vakalatnama and seeks time to file reply. Counsel for the Corporate Debtor is directed to file reply within two weeks' time by serving an advance copy to the other side failing which the right to file reply will stand forfeited.

*List this matter on **03.01.2023.***

6. The next date, when the matter was listed was 03.01.2023 on which date following order was passed:

“ORDER

*“Mr. Aniket Kharote a/w Ms. Soniya Putta and Ms. Rohini Hirwane i/b. Solomon & Co., Advocates appearing for the Petitioner are present through virtual hearing. None appeared on behalf of the Corporate Debtor despite the undertaking was given on the previous occasion. Also, no reply has been filed by the Corporate Debtor. Thus, the Corporate Debtor is proceeded ex-parte. Heard the Counsel appearing for the Petitioner. **Reserved for order.**”*

7. Appellant has filed an Additional Affidavit where in Paras 11, 12 and 13 following has been pleaded:

- “11. The Appellant submits that non-filing of reply or non-appearance on 03.01.2023 was not intentional. It is humbly submitted that the Corporate Debtor did give instructions to prepare and file reply to its counsel, however the same could not be prepared and filed on 03.01.2023.
12. The Appellant submits the non-appearance on part of the Respondent No. 1 was not at all intentional. The Appellant also submits that the on 03.01.2023, the Petition under Section 7 of the Code was not even listed for hearing, but only for "further consideration", as evident from the cause list dated 03.01.2023. Thus, there was no occasion for the matter to be reserved for order.
13. It is further submitted that 03.01.2023 was the only occasion when the Corporate Debtor did not appear after issuance of notice, and the Ld. Adjudicating Authority did not even provide a single opportunity to the Corporate Debtor. A copy of cause list dated 03.01.2023 is annexed hereto and marked as Annexure A5.”

8. The Adjudicating Authority in the impugned order has observed that the Respondent despite having undertaken to file reply has not responded, hence, he has been proceeded against as ex-parte. The Adjudicating Authority has returned its findings in Paras 10, 11 and 12, which are to the following effect:

- “10. As per Clause 3.1 of the Loan Agreement dated 27.08.2018, the loan was repayable by way of monthly instalments from the date of first disbursement, the Petitioner has referred to Exhibit-O which shows that the Corporate Debtor paid interest only up to 16.06.2019 and thereafter stop making payment. Therefore, the date of default in this case is 15.07.2019 as rightly claimed in Part-IV of the Petition. Thereafter, the Petitioner served a recall notice (Exhibit-P) dated 11.11.2019 but despite the receipt of the default notice, the Corporate Debtor failed to make the payment. The Respondent has not come forward to contest the present Petition and has been proceeded against ex-parte vide order dated 03.01.2023. Since, no reply has been filed on behalf of the Corporate Debtor, by necessary implication, the averments made in the Petition have not been controverted.
11. Therefore, practically since the Corporate Debtor has not denied the averments made in the Petition, the same by necessary implication are deemed to have been admitted by the Corporate Debtor. Resultantly, it stands proved that there has been a debt and the Corporate Debtor has committed default in payment of the said Financial Debt, the Petition is otherwise within the period of limitation.

12. *Therefore, in our considered view, it is a fit case for admission under Section 7, accordingly, the Petition is admitted in the following terms.”*

9. The Appellant has not denied that he has appeared on 02.12.2022 and has taken time to file reply and Appellant has given instructions to the counsel to file reply but the counsel failed to file reply on the next date and on the next date the Adjudicating Authority proceeded ex-parte and reserved the order. Learned counsel for the Appellant in support of his submission that it was not obligatory for the Adjudicating Authority to proceed ex-parte on 03.01.2023 and reserve the order and one more opportunity could have given to the Appellant, placed reliance on the judgment of this Tribunal in **“Company Appeal (AT) (Ins.) No. 434 of 2022, Ashok Tiwari vs. DBS Bank India Limited (DBIL) & Anr.”**, in which case on the date fixed for hearing, the counsel appearing for the Corporate Debtor made a request to the Adjudicating Authority for granting time to file reply which prayer was refused and the Adjudicating Authority proceeded to admit the application by the order of the same date. The said order was challenged in appeal, where this Tribunal made following observations in Para 10, 11 and 12:

“10. The Rules thus, contemplates filing of reply by the Corporate Debtor, who has received notice and who appears before the Adjudicating Authority and contest the matter. Sub-rule (3) of Rule 27, however, is silent as to what shall be the course of action to be adopted by the Adjudicating Authority in event the reply is not filed by the Corporate Debtor before the date of hearing. The submission of learned Counsel

for the Respondent is that when notice grants time to file a reply and no reply is filed by the Corporate Debtor on the first date of hearing, he shall have no right to claim any time for filing a reply. In event we accept the submission of the Respondent, sub-rule (3) of Rule 37 has to be read to mean that in the event on the date of hearing, no reply is filed by the Corporate Debtor and it has been served with the notice of filing reply, its right to file reply shall be forfeited. As noted above, sub-rule (3) of Rule 37 does not provide for any consequence in event of non-filing of reply before the next date of hearing. Rule 37 is procedural Rule and procedural Rules are there to assist the adjudication of the dispute by Adjudicating Authority. Rule 37, sub-rule (3) cannot be read to mean that on non-filing of reply by the Corporate Debtor before the date of hearing, he can neither ask for any time, nor can be granted any time by the Adjudicating Authority to file the reply.

*11. In the above reference, we may notice sub-rule (2) of Rule 37, which provides that if the Respondent does not appear on the date specified in Company Appeal (AT) (Insolvency) No. 464 of 2022 8 the notice in Form No.NCLT-5, then the Tribunal **after according reasonable opportunity** to the Respondent, shall forthwith proceed ex-parte to dispose of the application. Thus, in event Corporate Debtor does not appear on the date specified in the notice, the Tribunal is obliged to accord reasonable opportunity to the Respondent before proceeding ex-parte to dispose of the application. Thus, on non-*

appearance of Corporate Debtor on the next date of hearing, Adjudicating Authority is not to mechanically proceed to dispose of the Application ex-parte. When a Corporate Debtor, who does not appear on the date fixed, is entitled to a reasonable opportunity before proceeding ex-parte, a Corporate Debtor who appeared on the first date of hearing cannot be put to in worse position than a Corporate Debtor who does not appear. The NCLT Rules, 2016 namely – Rule 34 as well as Rule 51 entitles the Tribunal to regulate its own procedure in accordance with the rules of natural justice. Rule 34 and Rule 51 are as follows:

“34. General Procedure. - (1) *In a situation not provided for in these rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice.*

(2) *The general heading in all proceedings before the Tribunal, in all advertisements and notices shall be in Form No. NCLT. 4.*

(3) *Every petition or application or reference shall be filed in form as provided in Form No. NCLT. 1 with attachments thereto accompanied by Form No. NCLT.2 and in case of an interlocutory application, the same shall be filed in Form No. NCLT. 1 accompanied by such attachments thereto along with Form No. NCLT. 3.*

(4) *Every petition or application including interlocutory application shall be verified by an affidavit in Form No. NCLT.6. Notice to be issued by the Tribunal to the opposite party shall be in Form NCLT-5.*

51. Power to regulate the procedure:- *The Tribunal may regulate its own procedure in accordance with the rules of natural justice and*

equity, for the purpose of discharging its functions under the Act.”

12. The procedure, which is to be adopted by the Tribunal has to be in consonance with the rules of natural justice and equity as required by the rules itself. Unless, it is held that due to non-filing of the reply before the date of hearing by the Corporate Debtor, the Adjudicating Authority is obliged to decide the application under Section 7, the Adjudicating Authority has ample jurisdiction to consider any request for reasonable time by a Corporate Debtor for filing a reply. The Tribunal is fully entitle to grant time for filing a reply asked for by the Corporate Debtor on the first date of hearing. Rejecting the request of the Corporate Debtor on the very first day for grant of time to file a reply, cannot be said to be in consonance with the principles of natural justice. There can be no dispute that in appropriate case, if the Adjudicating Authority is satisfied that the Corporate Debtor is deliberately delaying the matter, the request for grant of any further time to file a reply can be refused. But present is not a case where it can be said that Corporate Debtor was delaying the disposal of the case, since 29.03.2022 was the first date of hearing as indicated in the notice served on the Corporate Debtor on 07.03.2022.”

10. The above is a case where the Adjudicating Authority did not grant any time to the Corporate Debtor on the first date of hearing, hence, this Tribunal held that rejecting the request of the Corporate Debtor for time to file reply on the very first day of hearing is denial of principles of natural

justice. In the present case, the Adjudicating Authority did grant time to the Appellant to file reply when the Corporate Debtor appeared on 02.12.2022, hence, when on the next date none appeared on behalf of the Corporate Debtor, the Adjudicating Authority proceeded ex-parte and reserved orders. There was no lack of jurisdiction in the Adjudicating Authority to proceed ex-parte on 03.01.2023 when none appeared for the Corporate Debtor.

11. We may also notice the judgment of this Tribunal relied by learned counsel for the Respondent i.e. judgment in **“Company Appeal (AT) (CH) (Ins.) No. 446 of 2022, DCB Bank Limited vs. Mr. R. Sadasivsan & Ors.”**. In the above case, the DCB Bank Limited has filed the appeal against order dated 03.03.2022 passed by the Adjudicating Authority, where the Adjudicating Authority has directed the bank to refund a sum of Rs.11,30,40,034/- to the Corporate Debtor’s account. In the order dated 03.03.2022 the Bank was proceeded ex-parte. The submission of the Appellant before this Tribunal was that the Bank had failed to appear due to Covid-19 pandemic and non-appearance was neither wilful nor wanton. This Tribunal in the above case has held that the Bank was duly served notice on 17.07.2021 and 22.07.2021. This Tribunal has also noticed that after service of notice to the Bank matter was listed on seven times and order was passed on 03.03.2022. In Para 15 following observations were made:

“15. At this stage, this ‘Tribunal’, on going through the ‘Counter’ of the 1st Respondent is of the view that the 1st Respondent in its ‘Counter’, has clearly mentioned that the IA(IBC)/ 1341(CHE)/2020 in IBA/243/2019

was listed before the 'Adjudicating Authority', 'Tribunal', on numerous dates viz., 1) 05.08.2021; 2) 16.09.2021; 3) 30.09.2021; 4) 08.11.2021; 5) 06.12.2021, 6) 21.12.2021 and 7) 01.02.2022 and finally order was passed on 03.03.2022."

12. In the facts of the above case, this Tribunal held that there was no sufficient cause shown by the Bank to interfere with the order dated 03.03.2022. The present is a case where after giving opportunity to file a reply on 02.12.2023, on the next date itself, the Adjudicating Authority proceeded ex-parte and reserved order due to non-appearance of the Appellant. The judgment of this Tribunal in **"DCB Bank Limited vs. Mr. R. Sadasivsan & Ors."** was on its own facts and sufficient reasons were there to not interfere with the order dated 03.03.2022.

13. The question which needs to be considered in the facts of the present case is whether Appellant has made out any cause to grant one more opportunity to file its reply before the Adjudicating Authority. As noted above, the Corporate Debtor does not deny that it had appeared with his counsel on 02.12.2022 before the Adjudicating Authority and prayed for time for filing reply. Appellant has also stated in Additional Affidavit dated 06.04.2023 filed in this Tribunal that counsel was given instructions to file reply, however, same could not be prepared and filed on 03.01.2023. This Tribunal in **Ashok Tiwari's Case** has laid down that the Adjudicating Authority is fully empowered to proceed and pass appropriate order if it is satisfied that the Corporate Debtor is delaying the proceeding. We may further notice that in

the present case, the Adjudicating Authority has admitted Section 7 application and it has much weighed with the Adjudicating Authority that the Corporate Debtor having not filed any reply, averments made in the petition are being deemed to be admitted by the Corporate Debtor.

14. We have noticed above that the loan was taken by the Corporate Debtor from DHFL against which insolvency resolution process was initiated and under the Resolution Plan the DHFL was taken over by the Piramal Capital & Housing Finance Limited. In CIRP proceedings of DHFL, an I.A. was filed by the Corporate Debtor bringing subsequent facts after disbursement of Rs.10 Crores by DHFL. The Corporate Debtor's case and grievances regarding non-disbursement of balance amount and its adverse effect on the Corporate Debtor was highlighted in the application filed in the CIRP process of DHFL, which application is also part of the record in the present case. Admittedly, order passed by the Adjudicating Authority is ex-parte and Appellant could not get an opportunity to place its say and the facts and subsequent event after disbursement of loan of Rs.10 Crores could not be brought before the Adjudicating Authority for consideration. The Appellant has undertaken to file reply within three days.

15. We, taking note of the overall facts and circumstance, are of the view that ends of justice be served in allowing three days' time to the Corporate Debtor to file reply before the Adjudicating Authority subject to payment of cost of Rs.1,00,000/- (Rupees One Lakh only) to the Financial Creditor. In result, we set aside order dated 02.03.2023 and grant three

working days' time to the Corporate Debtor to file reply before the Adjudicating Authority. Company Petition CP (IB) No. 1136(MB)2022 is revived before the Adjudicating Authority to be heard afresh and decided in accordance with law. Alongwith the reply, the Appellant shall also annex the proof of payment of Rs.1,00,000/- to the Financial Creditor.

16. We make it clear that we have not expressed any opinion on the claim of the either of the parties and it is for the Adjudicating Authority to consider all aspects of the matter and decide the application in accordance with law. The Section 7 application being pending for last more than one year, we further observe that the Adjudicating Authority shall proceed to dispose of the application at an early date preferably within a period of three months from the date copy of order is produced.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

21st April, 2023

Archana