April 07, 2017
R.C.

W.P. 7144 (W) OF 2017
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
APPELLATE SIDE

Sree Metaliks Limited and another
Vs.
Union of India and Anr.

For the Petitioners : **Mr. P.C.Sen, Sr. Advocate**
Mr. Anirban Roy, Advocate
Mr. Sanjib Dawn, Advocate
Mr. Nupur Jalan, Advocate

For the Respondent No. 2 : **Mr. A. Malhotra, Advocate**
Mr. Soumya Majumder, Advocate
Ms. Neelina Chatterjee, Advocate
Ms. Mukta Rani Singha, Advocate

For the Union of India : A.S.G. **Mr. Kausik Chandra, Ld.**
Mr. Asit Kumar De, Advocate

Debangsu Basak, J:-

The petitioner assails the vires of Section 7 of the Insolvency and Bankruptcy Code, 2016 and the relevant Rules under the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016. The challenge is premised upon and revolves around the contention that the Code of 2016 does not afford any opportunity of hearing to a corporate debtor in a petition filed under Section 7 of the Code of 2016.

The learned senior advocate appearing for the petitioner submits that, the first petitioner had received a notice from a firm of Company Secretaries dated January 21, 2017 intimating that, an application under section 7 of the Code of 2016 read

with Rule 4 of the Rules of 2016 had been filed before the National Company Law Tribunal, (NCLT) Kolkata Bench. He submits that, the letter does not inform the petitioners about the date when such application would be taken up for consideration by the (NCLT). He submits that, the NCLT had registered such application as Company Petition No. 16 of 2017. An order dated January 30, 2017 was passed on a hearing conducted on such Company Petition on January 25, 2017. The order was passed exparte. The petitioner was not informed of the date of hearing. The petitioner was not afforded an opportunity of hearing by the NCLT prior to the passing of such order of administration of the petitioner and appointment of Interim Resolution Professional. The petitioner had preferred an appeal from such order. Such appeal being Company Appeals (AT) (Insolvency) No. 3 of 2017 was disposed of by an order dated February 21, 2017. He submits that, pursuant to the disposal of the appeal, proceedings have taken place in the Company Petition. At no stage has the petitioner been heard by the NCLT. He submits that, the petitioner is entitled to a right of hearing under the principles of natural justice. He submits that, the Code of 2016 is silent as to the grant of hearing by the NCLT. In such circumstances, the right of hearing, on the principles of natural justice, has to be read into such Statute. He submits that, the claim of the respondent under the Company Petition is not such that the Bankruptcy Code of 2016 can be invoked. The NCLT has assumed jurisdiction under the Code of 2016 where none exists.

The learned advocate appearing for the respondent no. 2 submits that, the respondent no.2 is an award holder. The award remains unsatisfied. The respondent no. 2 was advised to invoke the provisions of Code of 2016. The respondent no. 2 had

filed a petition being Company Petition no. 16, 2017 under the provisions of Section 7 of the Code of 2016 read with Rule 4 of the Rules of 2016. An order dated January 30, 2017 was passed by the NCLT. The petitioner being aggrieved had preferred an appeal therefrom before the National Company Law Appellate Tribunal (NCLAT). In such appeal the first petitioner had submitted that, the first petitioner had no objection to the admission of the insolvency petition but objects to the appointment of the Interim Resolution Professional (IRP) under the Code of 2016. The first petitioner, therefore, cannot canvass, breach of principles of natural justice by NCLT. Such appeal was disposed of by replacing the IRP appointed by the order dated January 30, 2017. He submits that, the challenge to the vires of the Code of 2016 and the Rules of 2016 are misplaced as the application under Section 7 of the Code of 2016 is required to be heard by the NCLT established under the provisions of the Companies Act, 2013. He refers to Section 424 of the Act of 2013 and submits that, NCLT is required to follow the principles of natural justice in deciding an application taken up for consideration by it. Therefore, the challenge to the vires must fail. In the factual matrix of the present case, in spite of notice, the first petitioner did not appear before the NCLT. The first petitioner had preferred an appeal against the order dated January 30, 2017 before the NCLAT. Such appeal has since been disposed of. It did not press such point in the appeal. Therefore, it cannot be said that there is a breach of principles of natural justice.

The learned Additional Solicitor General appears in terms of the notice issued to the learned Attorney General in view of the challenge to the vires to the Code of 2016 and the Rules 2016. He refers to the Rules 2016, particularly Rule 4 thereof

which contemplates a service of notice of the application by the financial creditor on the financial debtor. He refers to Rule 10 of the Rules of 2016 and submits that, such Rules contemplate that, the provisions of Rules 20 to 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016 will be applicable. He refers to Rule 24 of the National Company Law Tribunal Rules, 2016 which contemplates service of notice of the application upon the respondent. He submits that, the proceedings before the NCLT are to be conducted keeping in view the provisions of Section 424 of the Companies Act, 2013. Section 424 of the Act of 2013 contemplates the NCLT applying the principles of natural justice in the proceedings. He submits that, the NCLT is not bound by the Code of Civil Procedure, 1908 and that, it can regulate its own procedure subject to the provisions of the Act of 2013 and the Insolvency and the Bankruptcy Code of 2016. He submits that, the Code of 2016 does not debar the applicability of the principles of natural justice in proceedings under consideration by the NCLT when it is considering an application under Section 7 of the Code of 2016. Therefore, the challenge to the vires to the provisions of Section 7 of the Code of 2016 and Rule 4 of the Rules 2016 should fail.

I have considered the rival contentions of the petitioner and the materials made available on record.

The respondent no. 2 had filed an application under section 7 of the Code of 2016 against the first petitioner, before the NCLT Kolkata Bench, which was registered as Company Petition No. 16 of 2017. The first petitioner is the respondent therein. The first petitioner claims to have received a notice from a firm of practicing company Secretaries with regard to the filing

of such Company Petition by the second respondent before the NCLT against the first petitioner. Such notice does not contain any information as to the date of hearing of the company petition.

NCLT had passed an order dated January 30, 2017 in such Company Petition filed by the respondent no.2. The first petitioner was not heard by the NCLT before passing such order. NCLT had proceeded to admit the company petition. It had done so without affording any opportunity of hearing to the first petitioner. It had acted in breach of the principles of natural justice in do so. NCLT had proceeded to appoint an IRP by such order. Such order was assailed by the first petitioner before the NCLAT. In such appeal, the first petitioner did not press the point of breach of the principles of natural justice. Rather, it had stated that, it had no objection to the admission of the company petition. The NCLAT records in its order that, the first petitioner has no objection to the admission of the Insolvency petition. Such appeal was disposed of by the order dated February 21, 2017. The personnel of the IRP appointed by the order dated January 30, 2017 was replaced.

In the facts of the present case, Section 7 of the Code of 2016 is relevant. Section 7 is as follows:

> "**7. Initiation of corporate insolvency resolution process by financial creditor**
>
> (1)A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.
>
> Explanation.—For the purposes of this sub-section, a default includes a default in respect of a

financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3)The financial creditor shall, along with the application furnish —

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section(2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

PROVIDED that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be."

Section 7 of the Code of 2016 contemplates filing of an application by a financial creditor before an adjudicating authority. An adjudicating authority is defined in Section 5 (1) of the Code of 2016. It is as follows:

5. Definitions:

In this Part, unless the context otherwise requires,-

(1) "Adjudicating Authority", for the purpose of this Part, means National Company Law Tribunal constituted under Section 408 of the Companies Act, 2013.

Section 7 of the Code of 2016 allows a financial creditor either by itself or jointly with other financial creditors to file an application to initiate corporate insolvency resolution process against a corporate debtor before the adjudicating authority when a default has occurred. Sub-section (2) of Section 7 states that, an application under Sub-section (1) will be made in such form and manner and accompanied with such fee as may be prescribed. Sub-section (3) of Section 7 requires the financial creditor to furnish the details as specified therein. Sub-section (4) of Section 7 mandates the adjudicating authority to ascertain an existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under Sub-section (3) within 14 days from the receipt of the application under Sub-section (2). Sub-section (5) of Section 7 allows the adjudicating authority to admit an application under Sub-section (2) where a default has occurred and the application is complete and there is no disciplinary

proceedings pending against the proposed resolution professional. It also allows the adjudicating authority to reject such an application if no default has occurred or the application under Sub-section (2) is incomplete or where any disciplinary proceedings is pending against the proposed resolution professional. However, if the adjudicating authority is proceeding to dismiss an application, on the ground of defect in the application, then the adjudicating authority will give a notice of such defect to the applicant to rectify such defect within 7 days from the date of receipt of the notice. Sub-section (6) of Section 7 stipulates that, the corporate insolvency resolution process shall commence from the date of admission of the application under Sub-section (5). Sub-section (7) of Section 7 mandates the adjudicating authority to communicate its orders within 7 days of admission or rejection of the application, as the case may be, to the financial creditor and the corporate debtor.

Section 61 of the Code of 2016 allows an appeal to be filed before the appellate authority. It is as follows:-

> "61. Appeals and Appellate Authority
> (1) Notwithstanding anything to the contrary contained under the Companies Act, 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.
> (2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:
>
> PROVIDED that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.

(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.

(4) An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order."

Any person aggrieved by an order passed by the adjudicating authority under the Code of 2016 in respect of an application under Section 7 of the Code of 2016 is entitled to prefer an appeal to the National Company Law Appellate Tribunal (NCLAT). Sub-section (2) of Section 61 allows such an appeal to be filed within 30 days with the provision that, an appeal may be filed later, if the appellants show sufficient cause for not filing the appeal but such period of extension shall not exceed 15 days. Sub-section (3) of Section 61 recognizes some of the grounds on which an appeal may be filed. Sub-section (4) of Section 61 recognizes that, an appeal against an order of liquidation passed under Section 33 may be filed on the grounds of material irregularity or fraud committed in relation to an order of liquidation.

In the scheme of the Code of 2016, therefore, an application under Section 7 of the Code of 2016 is to be first made before the NCLT. An appeal of the order of NCLT will lie before the NCLAT. NCLT and NCLAT are constituted under the provisions of the Companies Act, 2013. The procedure before the NCLT and the NCLAT is guided by Section 424 of the Companies Act, 2013. It is as follows:

> "424. Procedure before Tribunal and Appellate Tribunal.-(1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908(5 of 1908), but shall be guided by the principles of natural justice, and, subject to the other provisions of the Act 1[or of the Insolvency and Bankruptcy Code, 2016] and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.
> (2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act [or under the Insolvency and bankruptcy Code, 2016] the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—
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> (a) summoning and enforcing the attendance of any person examining him on oath;
> (b) requiring the discovery and production of documents;
> (c) receiving evidence on affidavits;
> (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document from any office;
> (e) issuing commissions for the examination of witnesses or documents;
> (f) dismissing a representation for default or deciding it ex parte;

(g) setting aside any order of dismissal of any representation for default or any other passed by it ex parte; and
(h) any other matter which may be prescribed.
(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,—
(a) in the case of an order against a company, the registered office of the company is situate; or
(b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.
(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860), and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)."

NCLT acting under the provisions of the Act, 2013 while disposing of any proceedings before it, is not to bound by the procedure laid down under the Code of Civil Procedure, 1908. However, it is to apply the principles of natural justice in the proceedings before it. It can regulate it own procedure, however, subject to the other provisions of the Act of 2013 or the Insolvency and Bankruptcy Code of 2016 and any Rules made thereunder. The Code of 2016 read with the Rules 2016 is silent on the procedure to be adopted at the hearing of an application under section 7 presented before the NCLT, that is to say, it is

silent whether a party respondent has a right of hearing before the adjudicating authority or not.

Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of the natural justice above anything else. It also allows the NCLT and NCLAT the power to regulate their own procedure. Fretters of the Code of Civil Procedure, 1908 does not bind it. However, it is required to apply its principles. Principles of natural justice require an authority to hear the other party. In an application under Section 7 of the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read into in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application. The NCLT is, therefore, obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document as the NCLT may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under Section 7 of the Code of 2016. Section 7(4) of the Code of 2016 requires the NCLT to ascertain the default of the corporate debtor. Such ascertainment of default must necessarily involve the

consideration of the documentary claim of the financial creditor. This statutory requirement of ascertainment of default brings within its wake the extension of a reasonable opportunity to the corporate debtor to substantiate by document or otherwise, that there does not exist a default as claimed against it. The proceedings before the NCLT are adversarial in nature. Both the sides are, therefore, entitled to a reasonable opportunity of hearing.

The requirement of NCLT and NCLAT to adhere to the principles of natural justice and the fact that, the principles of natural justice are not ousted by the Code of 2016 can be found from Section 7(4) of the Code of 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 4 deals with an application made by a financial creditor under Section 7 of the Code of 2016. Sub-rule (3) of Rule 4 requires such financial creditor to despatch a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor. Rule 10 of the Rules of 2016 states that, till such time the Rules of procedure for conduct of proceedings under the Code of 2016 are notified, an application made under Sub-section (1) of Section 7 of the Code of 2017 is required to be filed before the adjudicating authority in accordance with Rules 20, 21, 22, 23, 24 and 26 or Part-III of the National Company Law Tribunal Rules, 2016.

Adherence to the principles of natural justice by NCLT or NCLAT would not mean that in every situation, NCLT or NCLAT is required to afford a reasonable opportunity of hearing to the respondent before passing its order.

In a given case, a situation may arise which may require NCLT to pass an exparte ad interim order against a respondent.

Therefore, in such situation NCLT, it may proceed to pass an exparte ad interim order, however, after recording the reasons for grant of such an order and why it has chosen not to adhere to the principles of natural justice at that stage. It must, thereafter proceed to afford the party respondent an opportunity of hearing before confirming such exparte ad interim order.

In the facts of the present case, the learned senior advocate for the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The respondent was not heard by the NCLT before passing the order.

It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.

In such circumstances, the challenge to the vires to Section 7 of the Code of 2016 fails.

W.P. 7144 (W) of 2017 is disposed of without any order as to costs.

Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the requisite formalities.

(DEBANGSU BASAK, J.)