

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Civil Appellate Jurisdiction)

Wednesday, the Ninth day of August Two Thousand Seventeen

PRESENT

THE HON'BLE MR JUSTICE M.GOVINDARAJ

CRP.PD.No.2864 of 2017

AND CMP.NO.13521 OF 2017

M/S. CAPE INFRASTRUCTURE PVT [PETITIONER IN BOTH THE PETITIONS]
LTD., REP BY ITS GENERAL MANAGER,
3/9 JAWAHAR STREET, RAMAVARMAPURAM,
NAGERCOIL.

Vs

M/S. NUPOWER RENEWABLES PVT [RESPONDENTS IN BOTH THE PETITIONS]
LTD., REP BY ITS MANAGING DIRECTOR,
NO.7 ESSAR HOUSE, 3RD FLOOR,
ESPLANADE, CHENNAI - 1.

(i) Petitions Under Section 227 of the Constitution of India Act against the orders dated 07/07/2017 made in TCP/3(IB)CB/2017 on the file of the National Company Law Tribunal, Chennai Bench. (in CRP.PD.No.2864/17)and;

(ii) To stay the operation of the order dated 07/07/2017 made in TCP/3B)/2017passed by the National Company Law Tribunal, Chennai Bench in CMP.NO.13521/17 pending disposal of the above CRP.PD.No.2864/17 respectively.

Order : These petitions coming on for orders upon perusing the petitions and the respective affidavits filed in support thereof and upon hearing the arguments of Mr.KRISHNAN, Senior Counsel for M/S.D.VEDA, Advocate for the petitioner in both the petitions the court made the following order:-

The petitioner is a Corporate Debtor, challenges the appointment of Interim Resolution Professional on the very same day i.e., on the date of admission of the petition, without giving notice to them.

2. The learned counsel appearing for the petitioner would also submit that the vires of the Act is under challenge by way of Writ Petitions and the same are pending. Petition was admitted on 19.07.2017 and immediately, notice was served on the respondent. On receipt of the information, immediately, the counsel for the

petitioner has approached the Tribunal. He would submit that the procedure required to be followed under Forms 3 and 5 under Section 9 were also not properly followed.

3. Considering the submissions made by the learned counsel for the petitioner, this Court is of the view that prima case is made out for granting interim orders. Accordingly, there shall be an order of interim stay of order dated 07.07.2017 made in TCP/3(IB)/CB/2017, by the National Company Law Tribunal, Division Bench, Chennai, for a period of two weeks. The petitioner is directed to serve a copy of this order on the respondent. Notice returnable in two weeks. Private notice is also permitted.

-sd/-

09/08/2017

/ TRUE COPY /

VLR, Chandrasekar 11.8.17
For Sub-Assistant Registrar (Statistics / C.S.)
High Court, Madras - 600 104.

TO

THE NATIONAL COMPANY LAW
TRIBUNAL DIVISION BENCH,
CHENNAI TCP/3(IB)/CB/2017.

C.C. to M/S.D.VEDA Advocate SR.No.10513
The Government Advocate, High Court, Madras - 104.

Order

in

CRP.PD.No.2864 of 2017

AND CMP.NO.13521 OF 2017

Date :09/08/2017

From 26.2.2001 the Registry is issuing certified
copies of the Interim Orders in this format
SDR 11.08.2017 (IT)

BB0076533

CRP PD NO.2864/2017

&

CMP NO.13521/2017

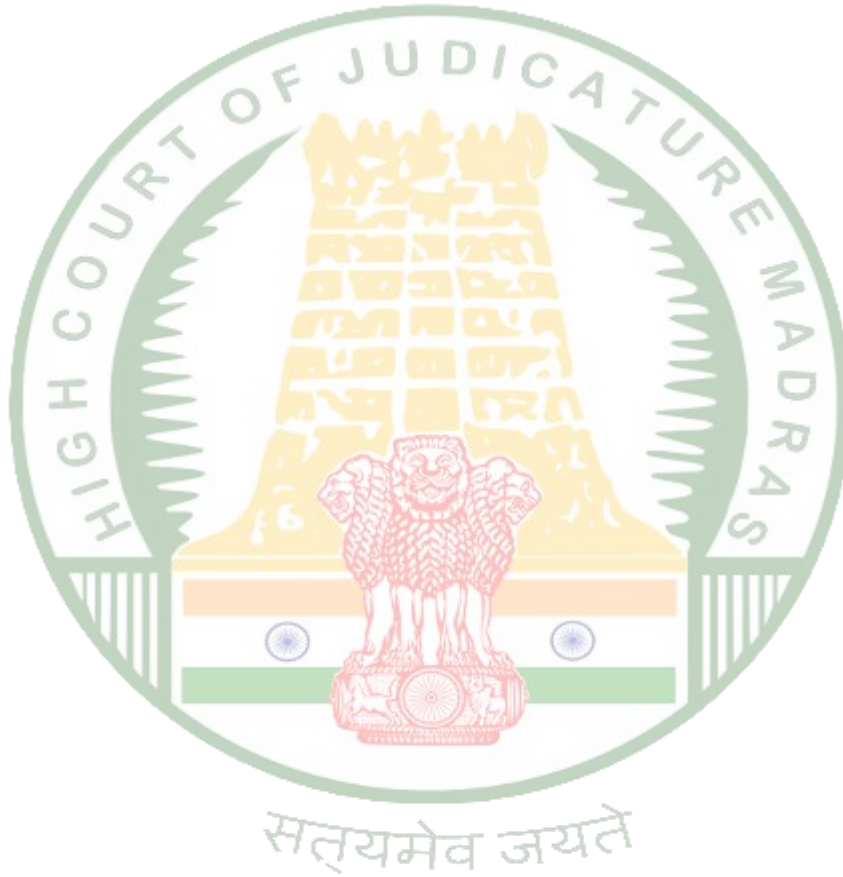
MGRJ

Post the matter on 04.09.2017.

Interim order already granted is extended till then.

30.08.2017

rts/sk



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

DATED :: 24.11.2017

CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.R.P.PD.No.2864 OF 2017

M/s.Cape Infrastructure Private Ltd.,
rep.by its General Manager.

... Petitioner

-vs-

M/s.Nupower Renewables Private Ltd.,
rep.by its Managing Director.

... Respondent

PRAYER: Petition under Article 227 of the Constitution of India, against the order, dated 07.07.2017, passed in TCP/3(IB)/CB/2017, on the file of the National Company Law Tribunal, Chennai.

For petitioner	:	Mr.M.S.Krishnan
		Senior Counsel for Mrs.D.Veda
For respondent	:	Mr.M.Velmurugan

O R D E R

This Civil Revision Petition is directed against the order passed by the National Company Law Tribunal, DB, Chennai, in TCP/3(IB)/CB/2017 dated 07.07.2017, admitting the application, without notice.

2. The petitioner is the Corporate Debtor. The respondent has initiated action before the National Company Law Tribunal on the default for the payment committed by the petitioner / Corporate Debtor. The operational creditor has sent notice to the branch office of the respondent at Chennai. The Tribunal has admitted the matter and passed consequential orders. Challenging the non adherence of the mandatory provisions of the rules by the National Company Law Tribunal, the petitioner is before this Court.

3. Mr.M.S.Krishnan, learned Senior Counsel, appearing for the petitioner, would argue that as per Section 8 of the Insolvency and Bankruptcy Code,2016, hereinafter, "the Code", an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor, a copy of an invoice, demanding payment of the amount involved in the

Db 0069899

default to the corporate debtor in such form and manner, as may be prescribed. He would also contend that the manner in which the notice is to be sent has been prescribed in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, in short, "the Rules". As per Rule 4 (3) of the Rules, the applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor. As per Rule 5 (2), the demand notice or the copy of the invoice, demanding payment referred to in sub-section 2 of Section 8 of the Code, may be delivered to the corporate debtor, (a) at the registered office by hand, registered post or speed post, with acknowledgement due. As per Rule 6 (2), an operational creditor shall dispatch the application with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor in Form 5 under Section 9 of the Code. According to the learned Senior Counsel, in the instant case, the operational creditor has admittedly not sent notice to the registered office, but the Tribunal below, without considering the said fact, admitted the application by the order impugned and, therefore, it is liable to be set aside.

4. Per contra, Mr. M. Velmurugan, learned counsel for the respondent/operational creditor, would submit that the notice has been sent to the city office of the petitioner/corporate debtor and, therefore, there is no infirmity in the order passed by the Tribunal below. He would also submit that the pre-litigation notice was also sent to the petitioner, which was received by them, and, in fact, a reply was also given thereto and, in such circumstances, the petitioner cannot feign ignorance of the proceedings, as they have deliberately failed to appear before the Tribunal, having received the notice.

5. Learned counsel for the respondent would vehemently contend that the jurisdiction conferred under Article 227 of the Constitution of India is not original, but is only supervisory, in nature. In other words, according to him, the power under Article 227 is intended to be used very sparingly and, only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have; (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction. Therefore, according to him, the interference on a factual issue of service of notice is not warranted. In support of his contention, the learned counsel

Db 0069900

relied upon a judgment in *Sneh Gupta v. Devi Sarup and Others*, 2009 (6) SCC 194, wherein, it is held that interference on disputed question of fact shall not be made under Article 227 of the Constitution of India. Para 41 of the said judgment is relevant in this regard and it reads as under :

"41. The High Court moreover was exercising its jurisdiction under Article 227 of the Constitution of India. While exercising the said jurisdiction, the High Court had a limited role to play. It is not the function of the High Court while exercising its supervisory jurisdiction to enter into the disputed question of fact. It has not been found by the High Court that the findings arrived at by the learned Additional District Judge were perverse and/or in arriving at the said findings, the learned Additional District Judge failed and/or neglected to take into consideration the relevant factors or based its decision on irrelevant factors not germane therefor. It could intervene, if there existed an error apparent on the face of the record or, if any other well-known principle of judicial review was found to be applicable."

He would also rely upon another judgment of the Supreme Court in *Narender v. Pradeep Kumar*, 2005 (5) SCC 372, wherein, it is held that under Article 227 of the Constitution of India, the question of facts shall not be interfered with, when the tribunal below has given a clear finding on the same. Further, the learned counsel would argue that the order impugned is passed on merits and there is an effective appeal remedy available to the petitioner and, in such circumstances, this Court has no jurisdiction to interfere with the order passed by the original authority.

6. Learned Senior Counsel appearing for the petitioner would rely on the following judgments :

- | | | |
|------------|-------|--|
| Council | (i) | <i>Nazir Ahmad v. King Emperor</i> , 16.03.1936, Privy |
| State of | (ii) | <i>Rao Shiv Bahadur Singh and Another v. The Vindhya Pradesh</i> , AIR 1954 SC 322 |
| Others | (iii) | <i>State of Uttar Pradesh v. Singhara Singh and Others</i> , AIR 1964 SC 358 |
| Kerala and | (iv) | <i>Babu Verghese and Others v. Bar Council of Others</i> 1999 (3) SCC 422 |
| | (v) | <i>Chandra Kishore Jha v. Mahavir Prasad and Others</i> 1999 (8) SCC 266 |

Db 0069901

(vi) Captain Sube Singh and Others v. Lt. Governor
of Delhi and Others 2004 (6) SCC 440
(vii) Indian Banks' Association v. Devkala
Consultancy Service 2004 (11) SCC 1
(viii) Hindustan Petroleum Corpn.Ltd. v. Darius
Shapur Chennai and Others 2005 (7) SCC 627, and
(ix) Danish Aarathi v. M.Abdul Kapoor,
CRP.NPD.MD.Nos.475 and 476 of 2004, dated 28.01.2009,
of this Court.

7. I have heard the learned counsel for the parties and also gone through the records.

8. On perusal of the records filed by the operational creditor, it is seen, that the registered office of the corporate debtor is at Nagercoil, whereas, notices were served at the office at Chennai. When the corresponding rules to Sections 8 and 9 of Code clearly specify that the application can be filed after expiry of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8, if the operational creditor does not receive any payment from the corporate debtor or notice of the dispute under sub-section (2) of Section 8, the operational creditor may file an application before the Adjudicating Authority. Also, when Sections 8 and 9 of the Code clearly specify the delivery of demand notice on the unpaid operational debtor in such form and manner as may be prescribed, it has to be followed in its true spirit. The corresponding rule to Section 9 of the Code is Rule 6. It clearly specifies that the operational creditor shall dispatch forthwith a copy of the application by registered post or speed post to the registered office of the operational debtor. Rule 5 also would mandate that the demand notice in Form 3 shall be delivered at the registered office of the corporate debtor. When it is mandatory to deliver the demand notice prior to filing the application, the same cannot be violated. The Tribunal below has not noticed the non-service of the mandatory notice at the registered office, which is a preliminary requirement for presenting the application for adjudication.

9. Section 8 of the Code clearly mandates that the demand notice shall be delivered in such form and manner, as may be prescribed, and Rules 5 and 6 of the Rules mandate that the notice shall be served at the registered office of the corporate debtor. This is a mandatory requirement and it cannot be violated, as held by the Supreme Court, in State of Jharkhand v. Ambay Cements, 2005 (1) SCC 368, in paragraph 26, as under :

"26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to

Db 0069902

comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way...."

10. This Court, in C.R.P.D.MD.Nos.475 and 476 of 2004, referred to above, has also held that when a statute prescribes to do a particular thing in a particular manner, the same shall not be done in any other manner than prescribed under the law.

11. It is clearly held by the Supreme Court in *Surya Dev Rai v. Ram Chander Rai*, 2003 (6) SCC 675, that this Court can exercise the power under Article 227 when grave injustice is caused; when the Court below fails to exercise the jurisdiction which it does have, such failure occasioning a failure of justice; and the jurisdiction though available is being exercised in a manner, which tantamounts to overstepping the limits of jurisdiction.

12. When a statute prescribes a particular thing to be done in a particular manner, not adhering to the said mandatory provision would cause serious prejudice to a person and he will be deprived of his valuable right to defend the case in time. In the case on hand, the operational creditor is expected to serve notice on the corporate debtor, at the registered office. The language employed in Rules 4, 5 and 6 of the Rules that the notice shall be served at the registered office of the corporate debtor will be meaningless, if it is served at any office of the corporate debtor, as contended by the respondent. The Tribunal, before admitting the application on 07.07.2017, has lost sight of the mandatory requirement, which, if not followed, will cause serious prejudice to the corporate debtor.

13. Failure to comply with the mandatory requirement by the operational creditor so also the Tribunal failing to exercise its jurisdiction while admitting the application, which was very much available with it, would cause a sea of change and serious prejudice to the petitioner overnight. Moreover, the procedure laid down by the Companies Act in Section 424 clearly mandates that the tribunals and the appellate tribunals shall be guided by the principles of natural justice. However, in the case on hand, the same is lacking. Admittedly, the documents clearly show that the notice was served at the branch office, but not at the registered office. In the given situation, this Court can very well interfere with the failure of the Tribunal, in exercising its jurisdiction. It cannot be said that it is a factual dispute. The Tribunal below ought to have exercised its

Db 0069903

power vigilantly, as, non-exercise of the same in this case has resulted in miscarriage of justice. Hence, on this occasion of failure of justice, this Court has ample power to interfere with the order passed by the Tribunal below. Accordingly, the impugned order in TCP/3(18)/CB/2017, dated 07.07.2017, passed by the Tribunal is set aside. It is open for the operational creditor to pursue his remedies in the manner known to law, after complying with the mandatory requirements, and it is also open for the corporate debtor to contest the case on merits before the Tribunal.

14. Civil Revision Petition is allowed. No costs. Consequently, the connected C.M.P.No.13521 of 2017 is closed.

Sd/-
Assistant Registrar(CS-)

//True Copy//

Sub Assistant Registrar

dixit/tk

To

National Company Law Tribunal,
Chennai.

J. Prabavats 18/12/17.
Superintendent
Copyist Department

+lcc to Mr.D.VEDA Advocate, S.R.No. 84241

C.R.P.(PD) NO.2864 OF 2017

GMR(CO)
TR(07/12/2017)

Db 0069904