

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.87/2023
(IA Nos.310 & 309/2023)

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 03.01.2023 in
IA No.1547/2022 in CP(IB) No.205/2021, passed by the
‘Adjudicating Authority’ (National Company Law Tribunal,
Hyderabad Bench)

In the matter of:

State Bank of India ... Appellant

V

India Power Corporation Limited ...Respondent

Present :

For Appellant : Mr. P.H. Arvind Pandiyan, Sr., Adv

For Respondent : Mr. R. Sankaranarayanan, Sr., Adv

WITH

Company Appeal (AT) (CH) (Ins) No.69/2023
(IA No.252/2023)

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 30.01.2023 in
IA No.1547/2022 in CP(IB) No.205/7/HDB/2021, passed by
the ‘Adjudicating Authority’ (National Company Law
Tribunal, Hyderabad Bench)

In the matter of:

India Power Corporation Limited ... Appellant

V

State Bank of India ...Respondent

Present :

For Appellant : Mr. R. Sankaranarayanan, Sr. Adv

For Respondent : Mr. P.H. Arvind Pandiyan, Sr. Adv

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This order shall dispose of two appeals i.e. CA (AT) (Ins) No. 69 of 2023 titled as India Power Corporation Limited Vs. State Bank of India (hereinafter referred as ‘first appeal’) and CA (AT) (Ins) No. 87 of 2023 titled as State Bank of India Vs. India Power Corporation Limited (hereinafter referred as ‘second appeal’) as both the appeals have been filed to challenge the order dated 30.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench) in I.A. No. 1547/2022 in C.P. (I.B.) No. 205/7/HDB/2021 by which I.A. No. 1547 of 2022 filed by the Financial Creditor (State Bank Of India) to take on record the rejoinder filed by it to the counter filed by the Corporate Debtor (India Power Corporation Limited) and condone the delay in filing of their rejoinder, if any, has been allowed but subject to the following observations “any additional factual assertions that were not pleaded in the main petition, if found to have been introduced under the Rejoinder, the same will not be taken into consideration and will be eschewed.”

2. The first appeal is filed by the Corporate Debtor being aggrieved against the order by which the rejoinder has been taken on record and the second appeal has been filed by the Financial Creditor being aggrieved of the observation contained in the impugned order that “any additional factual assertions that were not pleaded in the main petition, if found to have been introduced under

the Rejoinder filed on 16.03.2022 the same will not be taken into consideration and will be eschewed.”

3. In brief, the Financial Creditor filed a petition bearing C.P. (IB) No. 205/7/HDB/2021 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short ‘Code’) to initiate the Corporate Insolvency Resolution Process (in short ‘CIRP’) of the Corporate Debtor. In the application, notice was issued and case was posted for hearing on 24.09.2021.

4. On 24.09.2021, the Adjudicating Authority passed the following order:-

“Learned Counsel for petitioner appeared.

Learned Counsel Shri. Siddhivardhana Rao for respondent appeared. He stated that he is filing his vakalat today and prayed time for filing counter.

We direct him to file the counter with all the pleas available in law within a week by serving copy on the other side and other side to file his rejoinder within a week thereafter.

Matter stands adjourned to 03.11.2021.”

5. However, the Corporate Debtor filed two applications on 28.09.2021 i.e. I.A. No. 586 of 2021 seeking recusal of Shri Veera Brahma Rao Arekapudi, Member (T) from hearing Section 7 application. The said application was dismissed on 15.11.2021. Another application i.e. I.A. No. 567 of 2021 filed for seeking deferment of the hearing of Section 7 application till the Hon’ble Supreme Court decide the Civil Appeal No. 3307 of 2020 and Civil Appeal No. 3309 of 2020. This I.A. is stated to be pending.

6. The Adjudicating Authority passed the following order on 15.11.2021 which is as under:-

“The applicant is directed to file counter alongwith documents, if any, by 23.11.2021 and shall serve copy of the same to the financial creditor. In default, the opportunity to file counter stands forfeited. The rejoinder, if any, to the same shall be filed by the financial creditor within 7 days thereafter.”

7. On 03.12.2021, the Adjudicating Authority granted two weeks’ time to Financial Creditor to file the rejoinder to the reply filed by Corporate Debtor.

The order read as under: -

“At request of the learned counsel for financial creditor, two weeks’ time is granted for filing rejoinder, lest opportunity stands closed”

8. The period of two weeks expired on 21.12.2021, however, on 14.12.2021, the Corporate Debtor filed an application TP (IBC)-81 (PB)/2021 before the Principal Bench, New Delhi for transfer/assignment of Section 7 Petition to NCLT, Kolkata inter alia, on the ground that “the atmosphere standing completely vitiated and in view of the repeated prejudicial and unintelligible orders passed by the Ld. NCLT, Hyderabad.

9. On 16.12.2021, the Principal Bench, New Delhi passed the order that “in the meanwhile bench No. 1, NCLT, Hyderabad is requested to defer the hearing of the matter till the final order is passed in this application”.

10. The Corporate Debtor filed Money Suit bearing M.S. No. 1 of 2022 before the Commercial Court, Alipore, Kolkata on 03.01.2022 in which, vide its order dated 24.01.2022, the Commercial Court, Alipore restricted lenders from initiating any recovery proceedings on the basis of deed of guarantee. The order of injunction dated 24.01.2022 was further expanded on 11.02.2022, the Commercial Court allowed I.A. No. 12 of 2022 and included 'any proceeding' instead of only recovery proceedings. The said order was challenged before the Hon'ble High Court at Kolkata.

11. It is pertinent to mention that in the order dated 22.04.2022, passed by the Principal Bench, New Delhi in the Transfer Petition it has been noted that "the petitioner/corporate debtor in the Section 7 Petition will cooperate for early disposal of the matter on merits and will not hinder/or delay the hearing of the matter under any circumstances". The Transfer Petition was ultimately disposed of on 29.04.2022 and on 13.06.2022, the Financial Creditor filed its rejoinder.

12. It is also pertinent to mention that Hon'ble High Court vide its order dated 03.08.2022 disposed of FMAT 128 of 2022 and FMAT 142 of 2022 and set aside the order dated 11.02.2022 on the ground that substantial reliefs could not be granted in the garb of correction of typographical errors and the Alipore Court vide its order dated 09.09.2022 vacated the ex-parte stay granted by order dated 24.01.2022 and dismissed the injunction application filed by the Corporate Debtor. The said order was challenged in appeal by the Corporate

Debtor before the Kolkata High Court which was dismissed on 16.05.2023 and the order dated 09.09.2022 was upheld.

13. For the first time on 05.12.2022, the Corporate Debtor challenged/opposed the rejoinder filed by the Financial Creditor on being taken on record. Accordingly, on 09.12.2022, the Financial Creditor filed an application I.A. No. 1547 of 2022 under Rule 11 of NCLT, Rules, 2016 seeking direction to take the rejoinder on record and condone the delay, if any, to which reply was filed by the Corporate Debtor on 30.12.2022. This application has ultimately has been allowed by the impugned order on 30.01.2023 by which the rejoinder has been taken on record but at the same time an observation has been made which is allegedly against the interest of the Financial Creditor. Hence, both the parties have filed their respective appeals.

14. While arguing the first appeal, Counsel for the Appellant for India Power Corporation Limited has submitted that the application per se is not maintainable after the closer of the opportunity to file the rejoinder. It is also submitted that as per Rule 55 of the Rules no pleadings, subsequent to the reply, is permissible except by the leave of the Tribunal.

15. On the other hand, Counsel for the Respondent has submitted that contention of the Appellant that the rejoinder should have been filed under Rule 55 of the Rules is mis-leading because Rule 55 of the Rules provides for seeking leave of the Tribunal whereas in the present case, exercising powers

under Rule 42 of the Rules, the Adjudicating Authority vide order dated 03.12.2021 had already suo motu given leave to the Respondent to file the rejoinder.

16. We have heard Counsel for the parties in this regard.

17. This aspect of the matter has thoroughly been dealt with by the Adjudicating Authority by specifically framing an issue and has referred to various provisions of the Rules which are reproduced as under:-

“Rule 2 (19) “pleadings” means and includes application including interlocutory application, petition, appeal, revision, reply, rejoinder, statement, counter claim, additional statement supplementing the original application and reply statement under these rules and as may be permitted by the Tribunal;

Rule 11. Inherent Powers.- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

Rule 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.

Rule 55. Pleadings before the Tribunal.- No pleadings, subsequent to the reply, shall be presented except by the leave of the Tribunal upon such terms as the Tribunal may think fit.

Rule 153. Enlargement of time.- Where any period is fixed by or under these rules, or granted by Tribunal for the doing of any act, or filing of any document or representation, the Tribunal may, in its discretion from time to time in the interest of justice and for reasons to be recorded, enlarge such period, even though the period fixed by or under these rules or granted by the Tribunal may have expired.”

18. The Adjudicating Authority while referring to various judgments referred to by both the sides has recorded the following findings:

“20. Having heard the Ld. Counsels, upon taking into consideration the factual matrix of this case besides the rulings in re, Grand Arch Resident Welfare Association and in Printland Digital (India) Pvt. Ltd. supra, we reject the argument that the present application is in the nature of Review of the earlier orders of this Tribunal. We hereunder state the reasons for the above conclusion of ours.

(a) This Tribunal has granted further extension of time for filing the Rejoinder vide order dated 03.12.2021 on the request of the Ld. Counsel for the Applicant. Thus, no adjudication on merits of the plea of the Applicant for extension of time took place while passing the impugned order dated 03/12/2022.

(b) Prior to the same, this Tribunal Suo motu' granted opportunity, to file rejoinder vide order dated 24.09.2021 within a time frame.

(c) The respondent has not even opposed either the 'Suo motu' order or the order extending time to the applicant to file the Rejoinder.

(d) Hon'ble NCLAT, in re, Printland Digital (India) Pvt. Ltd, supra, explained the deference between "Review" and the "recall" of its own order by this Tribunal, as below:

"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. In view of the aforesaid discussions, we therefore, allow this appeal and remand the case back to the Adjudicating Authority to consider the application on merits and decide the same in accordance with law."

(e) So much so, when the basic ingredient of 'Review', namely, "an adjudication by the Adjudicating Authority on merits of the issues", it self is lacking, the argument that, the present application is in the nature of 'Review' and as such this Tribunal has no power, shall fail invariably.

(f) That apart, the emphatic submission of the Ld. Counsel for the respondent that, "the present application is simply not maintainable, since there exists a specific remedy under Rule 55 of the NCLT Rules, which provided for seeking leave of this Tribunal for filing

pleading subsequent to the reply" also disentitles the respondent from contending that the applicant is per se, not maintainable, as but for invoking Rule 11 of NCLT Rules the application is maintainable under Rule 55 of NCLT Rules, even according to the respondent.

21. We, therefore, emphatically hold that the present application is not in the nature of 'Review Application', and as such this Tribunal has jurisdiction to decide and dispose of the present application on its merits.

22. Having already held in the preceding paras of our discussion, that invoking Rule 55 of NCLT Rules is obviated due to our suo motu order in the facts and circumstances of this case, we now refer to Rule 153 of NCLT Rules, supra, which provides for enlargement of time which is reproduced herein below:

Rule 153: Enlargement of time:

"Where any period is fixed by or under these rules, or granted by Tribunal for the doing of any act, or filing of any document or representation, the Tribunal may, in its discretion from time to time in the interest of justice and for reasons to be recorded, enlarge such period, even though the period fixed by or under these Rules or granted by the Tribunal may have expired."

19. Counsel for the Appellant has also argued that the time could have been enlarged during the currency of the period but in this regard, the Adjudicating Authority has recorded a detail finding in the impugned order with which we do not find any fault and approve the same.

20. Thus, in view thereof, the first appeal is found devoid of any merit and the same is hereby dismissed. No costs.

21. In so far as the second appeal is concerned, Counsel for Appellant appearing on behalf of State Bank of India has submitted that the Adjudicating Authority has committed an error in recording the finding in Para 31 of the impugned order while observing that "additional factual assertions that were not

pleaded in the main petition, if found to have been introduced under the rejoinder filed on 16.03.2022 the same will not be taken into consideration and will be eschewed.”. In this regard, he has argued that Rule 42 of the Rules which deals with filing of the rejoinder says that where the respondent states such additional facts as may be necessary for the just decision of the case, the Bench may allow the petitioner to file a rejoinder to the reply filed by the respondent, with an advance copy to be served upon the respondent. He has also relied upon various decisions of the High Court in which it has been held that whenever a new plea is introduced by the defendant in the written statement, contingency of filing the rejoinder arises clarifying their position.

22. On the other hand, Counsel for the Respondent has submitted that Rule 41 and 42 of the Rules deals with the filing of reply and rejoinder. It is submitted that in Rule 41 it has been specifically provided that the Respondent can state such additional facts as may be found necessary in his reply but as far Rule 42 only the additional facts which are alleged by the Respondent are required to be answered to but there is no provision for alleging new additional facts by the Applicant/Petitioner in rejoinder.

23. We have heard Counsel for the parties in this regard and are of the considered opinion that when the Appellant/Petitioner sets up a case in the application filed either under Section 7, 9 or 10 of the Code then as per Rule 41 of the Rules, the Respondent shall specifically admit, deny or rebut the facts

stated by the Applicant in his petition or application and state such additional facts as may be found necessary in his reply whereas it is provided in Rule 42 of the Rules that where the respondent states such additional facts as may be necessary for the just decision of the case, the Bench may allow the petitioner to file a rejoinder to the reply pertaining to those additional facts but it cannot set up a new case altogether which has not been set up by the Applicant in the main application as it would again require a reply by the Respondent and further rejoinder by the Applicant and the process will go and shall never come to end.

24. In any case, the petitioner cannot enlarge the scope of the petition by adding a new ground in the rejoinder, as the purpose of a rejoinder is not to fill in the gaps left by the petitioner in their pleadings.

25. Therefore, in such circumstances, we do not find any merit in this appeal as well filed by State Bank of India and the same is hereby dismissed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

New Delhi

04th October, 2023

Sheetal