Surendra Trading Company vs Juggilal Kamlapat Jute Mills Company ... on 19 September, 2017

Equivalent citations: AIR 2018 SC 186, 2017 (16) SCC 143, 2018 (1) AKR 663, AIR 2018 SC (CIV) 997, (2018) 4 ALLMR 462 (SC), (2018) 1 MAD LW 813, (2018) 1 BANKCAS 436, (2017) 11 SCALE 634, 2018 (128) ALR SOC 48 (SC), 2018 (185) AIC (SOC) 2 (SC), 2018 (2) KCCR SN 124 (SC), AIR 2018 SUPREME COURT 186, 2018 (2) ABR 324, AIR 2018 SC (CIVIL) 997

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Bench: Ashok Bhushan, A.K. Sikri

REPO

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8400 of 2017

M/S. SURENDRA TRADING COMPANY .....APPELL

VERSUS

M/S. JUGGILAL KAMLAPAT JUTE MILLS
COMPANY LIMITED AND OTHERS .....RESPONDEN

WITH

CIVIL APPEAL NOS.15091-15091 OF 2017
(ARISING OUT OF DIARY NO. 22835 OF 2017)

JUDGMENT

A.K. SIKRI, J.

Permission to file the appeal is granted and delay condoned in Diary No. 22835 of 2017.

2) Though this case has a past history as well, in the instant appeal, we are concerned with the correctness of the order dated May 01, 2017 passed by the National Company Law Appellate Tribunal (hereinafter referred to as, the 'NCLAT') whereby it is held that 10:13:37 IST Reason:

the time of seven days prescribed in proviso to sub-section (5) of Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short, the 'Code') is mandatory in nature and if the defects contained in the application filed by the 'operational creditor' for initiating corporate insolvency resolution against a corporate debtor are not removed within seven days of the receipt of notice given by the adjudicating authority for removal of such objections, then such an application filed under Section 9 of the Code is liable to be rejected. The precise question of law which was framed by the NCLAT for its decision is to the following effect:

"Whether the time limit prescribed in Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as Code 2016) for admitting or rejecting a petition or initiation of insolvency resolution process is mandatory?"

3) Chapter II of Part II of the Code deals with corporate insolvency resolution process. Under Section 7 of the Code, financial creditor (as per the definition contained in Section 5(7)) can initiate corporate insolvency resolution process. Section 8, on the other hand, deals with insolvency resolution by operational creditor. Operational creditor is defined in Section 5(2) of the Code to mean a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. This Section provides that if 'default' has occurred in payment of the said debt within the meaning of Section 2(12), such an operational creditor may send a demand notice to the corporate debtor demanding payment of the amount involved in the default, in the prescribed manner, giving ten days notice in this behalf. The corporate debtor is given ten days time to bring to the notice of the operational creditor about the existence of a dispute, if any, however, send requisite proof for repayment of unpaid operational debt. However, in case the payment is not received or notice of dispute is not received, operational creditor can file an application under Section 9 for initiation of corporate insolvency resolution process. Since we are concerned with this provision, the same is reproduced below in its entirety:

"9. Application for initiation of corporate insolvency resolution process by operational creditor. – (1) After the expiry of the period 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 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 for initiating a corporate insolvency resolution process.

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

(3) The operational creditor shall, along with the application furnish — "(a) a copy of the invoice demanding payment or demand notice delivered by the operational

creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-

section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,— "(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if— "(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

> Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause
>
> (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date 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) of this section."
>
> 4) A reading of the aforesaid provision would reflect that time limits for taking certain actions by either the operational creditor or adjudicating authority are mentioned therein. As per sub-section (1) of Section 9, application can be filed after the expiry of period of ten days from the delivery of notice or invoice demanding payment, which is in tune with the provisions contained in Section 8 that gives ten days time to the corporate debtor to take any of the steps mentioned in sub-section (2) of Section 8. As per sub-

section (2) of Section 9, the operational creditor is supposed to file an application in the prescribed form and manner which needs to be accompanied by requisite/prescribed fee as well. Sub- section (3) puts an obligation on the part of the operational creditor to furnish the information stipulated therein. Once such an application is filed and received by the adjudicating authority, fourteen days time is granted to the adjudicating authority to ascertain from the records of an information utility or on the basis of other evidence furnished by the operational creditor, whether default on the part of corporate debtor exists or not. This exercise, as per sub-section (5), is to be accomplished by the adjudicating authority within fourteen days. Sub-section (5) provides two alternatives to the adjudicating authority while dealing with such an application. In case it is satisfied that conditions mentioned in clause (i) of Section 9(5) are satisfied, the adjudicating authority may pass an order admitting such an application. On the other hand, if the adjudicating authority finds existence of any eventuality stated in sub-section (2), it may order rejection of such an application.

5) One of the conditions, with which we are concerned, is that application under sub-section (2) has to be complete in all respects. In other words, the adjudicating authority has to satisfy that it is not defective. In case the adjudicating authority, after the scrutiny of the application, finds that there are certain defects therein and it is not complete as per the provisions of sub-section (2), in that eventuality, the proviso to sub-section (5) mandates that before rejecting the application, the adjudicating authority has to give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice.

6) Sub-section (5) of Section 9, thus, stipulates two time periods. Insofar as the adjudicating authority is concerned, it has to take a decision to either admit or reject the application with the period of fourteen days. Insofar as defects in the application are concerned, the adjudicating authority has to give a notice to the applicant to rectify the defects before rejecting the application

on that ground and seven days period is given to the applicant to remove the defects.

7) The question before the NCLAT was as to whether time of fourteen days given to the adjudicating authority for ascertaining the existence of default and admitting or rejecting the application is mandatory or directory. Further question (with which this Court is concerned) was as to whether the period of seven days for rectifying the defects is mandatory or directory.

8) The NCLAT has held that period of fourteen days prescribed for the adjudicating authority to pass such an order is directory in nature, whereas period of seven days given to the applicant/ operational creditor for rectifying the defects is mandatory in nature. Conclusion in this behalf is stated in paragraphs 43 and 4 of the impugned order and these paragraphs read as under:

> "43. Thus, in view of the aforementioned unambiguous position of law laid down by the Hon'ble Apex Court and discussion as made above, we hold that the mandate of sub-section (5) of section 7 or sub-section (5) of section 9 or sub-section (4) of section 10 is procedural in nature, a tool of aid in expeditious dispensation of justice and is directory.

44. However, the 7 days' period for the rectification of defects as stipulated under proviso to the relevant provisions as noticed above is required to be complied with by the corporate debtor whose application, otherwise, being incomplete is fit to be rejected. In this background we hold that the proviso to sub- section (5) of section 7 or proviso to sub-section (5) of section 9 or proviso to sub-section (4) of section 10 to remove the defect within 7 days are mandatory, and on failure applications are fit to be rejected." On the basis of the aforesaid findings, the NCLAT directed rejection of the application filed by the operational creditor in the following manner:

> "51. Further, we find that the application was defective, and for the said reason the application was not admitted within the specified time. Even if it is presumed that 7 additional days time was to be granted to the operational creditor, the defects having pointed out on 16th February 2017 and having not taken care within time, we hold that the petition under section 9 filed by respondent/operational creditor being incomplete was fit to be rejected.
>
> 52. For the reasons aforesaid, we direct the Adjudicating Authority to reject and close the Petition preferred by Respondents. After we reserved the judgment if any order has been passed by the Adjudicating Authority, except order of dismissal, if any, are also declared illegal."
>
> 9) Before we pronounce as to whether the aforesaid rendition by the NCLAT is justified or not, it would be apposite to take stock of certain essential facts.

10) Before the enactment of the Code, the relevant legislation dealing with such subject matters was the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'SICA'). Under this Act, an industrial undertaking, on becoming sick (i.e. where its net worth got eroded),

could file a reference under Section 15(1) of SICA, before the Board for Industrial and Financial Reconstruction (for short, 'BIFR') constituted under SICA. BIFR, on admitting such a reference, was supposed to undertake the exercise whether such a sick company can be revived or not. For this purpose, BIFR would appoint an Operating Agency (OA) which was supposed to explore the possibility of revival plan in consultation with the other stakeholders, particularly the creditors. If such reconstruction/revival scheme prepared by the OA was found to be feasible by the BIFR, after ascertaining the views/objections of the concerned parties, BIFR would sanction such a scheme. If that was not possible, BIFR would recommend winding up of sick company by making reference in this behalf to the jurisdictional High Court. There was a provision of appeal before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR). This scheme is stated in brief for the purposes of clarity of the matter though we are not concerned with any of the provisions of SICA. Another aspect which needs to be mentioned is that on admitting the reference, all other legal proceedings by creditors or other persons initiated against the said sick industrial company had to be put on hold by virtue of the protection granted under Section 22(1) of SICA.

11) Respondent No.1 herein, namely, Juggilal Kamlapat Jute Mills Company Limited, became a sick industrial company in the year 1994 and because of this reason it filed its reference under Section 15(1) of SICA. It was declared as a sick industrial company by the BIFR on December 16, 1994 as a result whereof it came under the protective umbrella of Section 22(1) of SICA.

According to the appellant (who is the operational creditor in this case), which is a jute trader, it had supplied raw jute to respondent No.1 (the corporate debtor) in the years 2001, 2002 and 2003 in respect of which the corporate debtor owned a sum of Rs.17,06,766.95 p. Further, according to the operational creditor, the corporate debtor had issued Certificate dated October 24, 2004 acknowledging the aforesaid debt. However, it was not in a position to recover this debt because of the pendency of proceedings which resulted in stay of proceedings in view of Section 22(1) of SICA. In the year 2007, one Kolkata based company, known as Rainey Park Suppliers Private Limited (hereinafter referred to as 'Rainey Park'), invested in corporate debtor and took over its management from its erstwhile promoters, i.e. J.K. Singhania Group. The operational creditor had sent notices to Rainey Park to pay the aforesaid amount. However, it was not paid. Legal notices were also sent and applications were also filed before the BIFR in this behalf. It led to various events which are not required to be mentioned for the sake of brevity. Fact remains that the aforesaid debt was not honoured or liquidated by the corporate debtor or Rainey Park. While the matter was pending with BIFR, Sick Industrial Companies Repeal Act was passed on the enactment of the Code with effect from May 28, 2016. Resultantly, all proceedings before BIFR and AAIFR stood abated. With this embargo, Section 22(1) of SICA also vanished.

12) In these changed circumstances, the operational creditor served another demand notice dated January 06, 2017, in the statutory format prescribed under the Code, upon the corporate debtor calling up it to pay the outstanding dues. As it was not paid, the operational creditor filed application for initiation of corporate insolvency resolution process under Section 9 of the Act. The chronology of events which took place from the date of filing of the said application till the passing of the impugned order by the NCLAT are mentioned herein below:

10.02.2017 ☐The appellant filed the application under Section 9(2) of the Code, being CP No. 10/ALD/2017, before the adjudicating authority under the Code.

14.02.2017 ☐The registry of the adjudicating authority pointed out some procedural defects on the basis of the check list prepared for scrutiny of the petition/application/ appeal/reply as per Order No. 25/2/2016-

NCLT dated 28.07.2016 and listed the application for hearing before the adjudicating authority on 16.02.2017.

16.02.2017 ☐The adjudicating authority granted time to the appellant for removal of the said procedural defects on 28.02.2017 and also wanted to know about the stage of the proceedings before BIFR when the proceedings stood abated.

28.02.2017 ☐The appellant removed the procedural defects. As inquired by the adjudicating authority, the appellant's counsel sought for some more time for filing formal memo by providing/furnishing the latest order passed by BIFR before the Code came into force.

03.03.2017 ☐The appellant filed its formal memo/additional documents/orders arising in/out of the pending BIFR's proceedings which stood abated. On 03.03.2017, the respondent No. 1 debtor appeared before the Adjudicating Authority and sought liberty to raise its objections qua the maintainability of the application.

09.03.2017 ☐The Corporate debtor/respondent No.1 company filed its written objections before the Adjudicating Authority disputing the maintainability of the application filed on various grounds like time barred debt; the defective demand notice; civil suit filed against the appellant being Civil Suit No. 225 of 2017 before the District Court and embargo created by Section 252 of the IB Code, 2016 the proceedings cannot be initiated for a period of six months after abatement of SICA.

One JK Jute Mill Mazdoor Morcha, Kanpur i.e. respondent No. 2 herein moved an application seeking intervention in the mater and brought on record various orders including the judgment dated 13.11.2014 passed by this Court in the matter of Ghanshyam Sarda v. Shiv Shankar Trading Company & Ors., reported in (2015) 1 SCC 298 wherein this Court has found that the sale of assets without BIFR's permission as questionable before the BIFR and also an order dated 18.11.2016 passed by this Court in the case of Ghanshyam Sarda v. Sashikant Jha (i.e. contempt petition (civil) No. 338 of 2014), wherein the Director(s) of the have been held guilty of contempt. It is also said that the corporate debtor i.e. respondent No. 1 also failed to clear the legitimate dues of the workmen of jute mill which are worth more than 100 crores in rupees.

09.03.2017 ☐In light of the foregoing scenario, the Adjudicating Authority for providing substantial justice inter alia directed the respondent No. 1/Corporate Debtor to maintain status quo in respect of its immovable property until further orders. 21.03.2017 ☐The interim order passed by the Adjudicating Authority, Allahabad Bench on 09.03.2017 was challenged by the respondent No. 1/Corporate Debtor under Section 61 of the IB Code, 2016 before the National Company Law

Appellate Tribunal (NCLAT) being Company Appeal No. 9 of 2017. The NCLAT on 21.03.2017 issued notice in the said appeal inter alia observing that question of law is involved in this case and directing the Adjudicating Authority not to admit the application filed under the IB Code, 2016 by the appellant.

01.05.2017 The NCLAT has allowed the AT No. 09/2017 on the ground that the application and Section 9 petition filed by appellant herein was incomplete, defected and was fit to be rejected.

Hence, the NCLAT was pleased to direct NCLT to reject and close the application filed by the appellant under Section 9 of the IB Code, 2016 passed in the impugned order inter alia rejecting the application filed by the appellant under Section 9 of the IB Code, 2016 read with IB (Application to Adjudicating Authority) Rules, 2016 being CP No. (IB)10/ALD/ 2017.

13) We may point out at the outset that the learned senior counsel appearing for the appellant had submitted that in the instant case the defects which were pointed out were not of the nature mentioned in the Code but were in terms of the Companies Act, 2013. For this purpose, he had referred to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as 'Rules 2016') and on that basis it was argued that Section 9(5) of the Code did not apply in the instant case inasmuch as there has to be difference between 'defective' application and 'incomplete' application. He also submitted that the respondent had been violating interim orders passed by BIFR in the proceedings pending before it under SICA. However, we make it clear at the outset that since we are dealing with the substantial issue as to whether seven days period provided for removing the defects is mandatory or not, it is not necessary to touch upon these mundane aspects. Instead, it would be better to concentrate on the substance of the matter.

14) As mentioned above, insofar as prescription of fourteen days within which the adjudicating authority has to pass an order under sub-section (5) of Section 9 for admitting or rejecting the application is concerned, the NCLAT has held that the same cannot be treated as mandatory. Though this view is not under challenge (and rightly so), discussion in the impugned order on this aspect has definite bearing on the other question, with which this Court is concerned. Therefore, we deem it apposite to discuss the rationale which is provided by the NCLAT itself in arriving at the aforesaid conclusion insofar as first aspect is concerned.

15) It is pointed out by the NCLAT that where an application is not disposed of or an order is not passed within a period specified in the Code, in such cases the adjudicating authority may record the reasons for not doing so within the period so specified and may request the President of the NCLAT for extension of time, who may, after taking into account the reasons so recorded, extend the period specified in the Code, but not exceeding ten days, as provided in Section 64(1) of the Code. The NCLAT has thereafter scanned through the scheme of the Code by pointing out various steps of the insolvency resolution process and the time limits prescribed therefor. It is of relevance to mention here that the corporate insolvency resolution process can be initiated by the financial creditor under Section 7 of the Code, by the operational creditor under Section 9 of the Code and by a corporate applicant under Section 10 of the Code. There is a slight difference in these provisions insofar as criteria for admission or rejection of the applications filed under respective provisions is concerned.

However, it is pertinent to note that after the admission of the insolvency resolution process, the procedure to deal with these applications, whether filed by the financial creditor or operational creditor or corporate applicant, is the same. It would be relevant to glance through this procedure.

16) On admission of the application, the adjudicating authority is required to appoint an Interim Resolution Professional (for short, 'IRP') in terms of Section 16(1) of the Code. This exercise is to be done by the adjudicating authority within fourteen days from the commencement of the insolvency date. This commencement date is to reckon from the date of the admission of the application. Under sub-section (5) of Section 16, the term of IRP cannot exceed thirty days. Certain functions which are to be performed by the IRP are mentioned in subsequent provisions of the Code, including management of affairs of corporate debtor by IRP as well as duties of IRP so appointed. One of the important functions of the IRP is to invite all claims against the corporate debtor, collate all those claims and determine the financial position of the corporate debtor. After doing that, IRP is to constitute a committee of creditors which shall comprise of financial creditors of the corporate debtor. The first meeting of such a committee of creditors is to be held within seven days of the constitution of the said committee, as provided in Section 22 of the Code. In the said first meeting, the committee of creditors has to take a decision to either appoint IRP as Resolution Professional (RP) or to replace the IRP by another RP. Since term of IRP is thirty days, all the aforesaid steps are to be accomplished within this thirty days period. Thereafter, when RP is appointed, he is to conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the said period. It is not necessary to state the further steps which are to be taken by the RP in this behalf. What is important is that the entire corporate insolvency resolution process is to be completed within the period of 180 days from the date of admission of the applicant. This time limit is provided in Section 12 of the Act. This period of 180 days can be extended, but such extension is capped as extension cannot exceed 90 days. Even such an extension would be given by the adjudicating authority only after recording a satisfaction that the corporate insolvency resolution process cannot be completed within the original stipulated period of 180 days. If the resolution process does not get completed within the aforesaid time limit, serious consequences thereof are provided under Section 33 of the Code. As per that provision, in such a situation, the adjudicating authority is required to pass an order requiring the corporate debtor to be liquidated in the manner as laid down in the said Chapter.

17) The aforesaid statutory scheme laying down time limits sends a clear message, as rightly held by the NCLAT also, that time is the essence of the Code. Notwithstanding this salutary theme and spirit behind the Code, the NCLAT has concluded that as far as fourteen days time provided to the adjudicating authority for admitting or rejecting the application for initiation of insolvency resolution process is concerned, this period is not mandatory. For arriving at such a conclusion, the NCLAT has discussed the law laid down by this Court in some judgments. Therefore, we deem it proper to reproduce the discussion of the NCLAT itself in this behalf:

> "32. In P.T. Rajan Vs. T.P.M. Sahir and Ors. (2003) 8 SCC 498, the Hon'ble Supreme Court observed that where Adjudicating Authority has to perform a statutory function like admitting or rejecting an application within a time period prescribed, the time period would have to held to be directory and not mandatory. In the said

case, Hon'ble Apex Court observed:

> "48. It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. (See Shiveshwar Prasad Sinha v. The District Magistrate of Monghur & Anr. AIR (1966) Patna 144, Nomita Chowdhury v. The State of West Bengal & Ors. (1999) CLJ 21 and Garbari Union Co-operative Agricultural Credit Society Limited & Anr. V. Swapan Kumar Jana & Ors. (1997) 1 CHN 189).
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> 49. Furthermore, a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused."
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> 33. That the Hon'ble Apex Court has on numerous occasions interpreted the word 'shall' to mean 'may'.

An analogous position can be found in the context of the time prescribed for filing Written Statements by Defendants to a suit, wherein the Hon'ble Apex Court was faced with the question of a Court's power to take on record Written Statements that were filed beyond the period of 90 days, as prescribed under Order VIII Rule 1 of the Code of Civil Procedure, 1908. In this regard, the Hon'ble Supreme Court in Kailash Versus Nanhku and Ors (2005) 4 SCC 480 held as under:

> "27. Three things are clear. Firstly, a careful reading of the language in which Order 8 Rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Secondly, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order 8 Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried."
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> 34. Further, Hon'ble Supreme Court in the matter of Smt. Rani Kusum vs Smt. Kanchan Devi (2005) 6 SCC 705, concurring with the ratio laid down in Kailash Versus Nanhku (supra) held that:
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> "10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that

> the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.
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> 11. The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.
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> 12. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in the judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive. (See Sushil Kumar Sen v. State of Bihar [(1975) 1 SCC 774] .)
>
> 13. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode.

(See Blyth v. Blyth [(1966) 1 All ER 524 :

> 1966 AC 643 : (1966) 2 WLR 634 (HL)] .) A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See Shreenath v. Rajesh [(1998) 4 SCC 543 : AIR 1998 SC 1827] .)
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> 14. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice." xx xx xx
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> 41. Further, nature of the provisions contained in sub-

section (5) of section 7 or sub-section (5) of section 9 and sub-section (4) of section 10 of the 'Code' like Order VIII Rule 1 being procedural in nature cannot be treated to be a mandate of law.

42. The object behind the time period prescribed under sub-section (5) of section 7, sub-section (5) of section 9 and sub-section (4) of section 10, like Order VIII, Rule 1 of CPC is to prevent the delay in hearing the disposal of the cases. The Adjudicating Authority cannot ignore the provisions. But in appropriate cases, for the reasons to be recorded in writing, it can admit or reject the petition after the period prescribed under section 7 or section 9 or section 10.

43. Thus, in view of the aforementioned unambiguous position of law laid down by the Hon'ble Apex Court and discussion as made above, we hold that the mandate of sub-section (5) of section 7 or sub-section (5) of section 9 or sub-section (4) of section 10 is procedural in nature, a tool of aid in expeditious dispensation of justice and is directory."

18) The NCLAT has also held that fourteen days period is to be calculated 'from the date of receipt of application'. The NCLAT has clarified that date of receipt of application cannot be treated to be the date of filing of the application. Since the Registry is required to find out whether the application is in proper form and accompanied with such fee as may be prescribed, it will take some time in examining the application and, therefore, fourteen days period granted to the adjudicating authority under the aforesaid provisions would be from the date when such an application is presented before the adjudicating authority, i.e. the date on which it is listed for admission/order.

19) After analysing the provision of fourteen days time within which the adjudicating authority is to pass the order, the NCLAT immediately jumped to another conclusion, viz. the period of seven days mentioned in proviso to sub-section (5) of Section 9 for removing the defect is mandatory, with the following discussion:

> "44. However, the 7 days' period for the rectification of defects as stipulated under proviso to the relevant provisions as noticed above is required to be complied with by the corporate debtor whose application, otherwise, being incomplete is fit to be rejected. In this background we hold that the proviso to sub- section (5) of section 7 or proviso to sub-section (5) of section 9 or proviso to sub-section (4) of section 10 to remove the defect within 7 days are mandatory, and on failure applications are fit to be rejected." There is no further discussion on this aspect.
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> 20) We are not able to decipher any valid reason given while coming to the conclusion that the period mentioned in proviso is mandatory. The order of the NCLAT, thereafter, proceeds to take note of the provisions of Section 12 of the Code and points out the time limit for completion of insolvency resolution process is 180 days, which period can be extended by another 90 days.

However, that can hardly provide any justification to construe the provisions of proviso to sub-section (5) of Section 9 in the manner in which it is done. It is to be borne in mind that limit of 180 days mentioned in Section 12 also starts from the date of admission of the application. Period prior thereto which is consumed, after the filing of the application under Section 9 (or for that matter under Section 7 or Section 10), whether by the Registry of the adjudicating authority in scrutinising the application or by the applicant in removing the defects or by the adjudicating authority in admitting the application is not to be taken into account. In fact, till the objections are removed it is not to be treated as application validly filed inasmuch as only after the application is complete in every respect it is required to be entertained. In this scenario, making the period of seven days contained in the proviso as mandatory does not commend to us. No purpose is going to be served by treating this period as mandatory. In a given case there may be weighty, valid and justifiable reasons for not able to remove the defects within seven days. Notwithstanding the same,

the effect would be to reject the application.

21) Let us examine the question from another lens. The moot question would be as to whether such a rejection would be treated as rejecting the application on merits thereby debarring the application from filing fresh application or it is to be treated as an administrative order since the rejection was because of the reason that defects were not removed and application was not examined on merits. In the former case it would be travesty of justice that even if the case of the applicant on merits is very strong, the applicant is shown the door without adjudication of his application on merits. If the latter alternative is accepted, then rejection of the application in the first instance is not going to serve any purpose as the applicant would be permitted to file fresh application, complete in all aspects, which would have to be entertained. Thus, in either case, no purpose is served by treating the aforesaid provision as mandatory.

22) Various provisions of the Code would indicate that there are three stages:

> (i) First stage is the filing of the application. When the application is filed, the Registry of the adjudicating authority is supposed to scrutinise the same to find out as to whether it is complete in all respects or there are certain defects. If it is complete, the same shall be posted for preliminary hearing before the adjudicating authority. If there are defects, the applicant would be notified about those defects so that these are removed. For this purpose, seven days time is given. Once the defects are removed then the application would be posted before the adjudicating authority.
>
> (ii) When the application is listed before the adjudicating authority, it has to take a decision to either admit or reject the application. For this purpose, fourteen days time is granted to the adjudicating authority. If the application is rejected, the matter is given a quietus at that level itself.

However, if it is admitted, we enter the third stage.

(iii) After admission of the application, insolvency resolution process commences. Relevant provisions thereof have been mentioned above. This resolution process is to be completed within 180 days, which is extendable, in certain cases, up to 90 days. Insofar as the first stage is concerned, it has no bearing on the insolvency resolution process at all, inasmuch as, unless the application is complete in every respect, the adjudicating authority is not supposed to deal with the same. It is at the second stage that the adjudicating authority is to apply its mind and decide as to whether the application should be admitted or rejected. Here adjudication process starts. However, in spite thereof, when this period of fourteen days given by the statute to the adjudicating authority to take a decision to admit or reject the application is directory, there is no reason to make it mandatory in respect of the first stage, which is pre-adjudication stage.

23) Further, we are of the view that the judgments cited by the NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while

interpreting proviso to sub- section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.

24) Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like to enter a caveat.

25) We are also conscious of the fact that sometimes applicants or their counsel may show laxity by not removing the objections within the time given and make take it for granted that they would be given unlimited time for such a purpose. There may also be cases where such applications are frivolous in nature which would be filed for some oblique motives and the applicants may want those applications to remain pending and, therefore, would not remove the defects. In order to take care of such cases, a balanced approach is needed. Thus, while interpreting the provisions to be directory in nature, at the same time, it can be laid down that if the objections are not removed within seven days, the applicant while refiling the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes up for admission/order before the adjudicating authority, it would be for the adjudicating authority to decide as to whether sufficient cause is shown in not removing the defects beyond the period of seven days. Once the adjudicating authority is satisfied that such a case is shown, only then it would entertain the application on merits, otherwise it will have right to dismiss the application. The aforesaid process indicated by us can find support from the judgment of this Court in Kailash v. Nanhku & Ors., (2005) 4 SCC 480, wherein the Court held as under:

> "46. (iv) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away.
>
> (v) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied.

Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."

26) In fine, these appeals are allowed and that part of the impugned judgment of NCLAT which holds proviso to sub-section (5) of Section 7 or proviso to sub-section (5) of Section 9 or proviso to sub-section (4) of Section 10 to remove the defects within seven days as mandatory and on failure applications to be rejected, is set aside.

No costs.

.....J. (A.K. SIKRI) .....J. (ASHOK BHUSHAN)
NEW DELHI;

SEPTEMBER 19, 2017.

ITEM NO.1501 COURT NO.6 SECTION XVII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s).8400/2017

SURENDRA TRADING COMPANY Appellant(s)

VERSUS

JUGGILAL KAMLAPAT JUTE MILLS COMPANY LTD & ORS. Respondent(s)

WITH
Diary No(s). 22835/2017 (XVII)

Date : 19-09-2017 These appeals were called on for pronouncement of judgment today.

For Appellant(s) Mr. Sunil Fernandes, AOR Mr. Gaurav Kejriwal, AOR Mr. Sujit Keshri, Adv.

For Respondent(s) Mr. Kailash Chand, AOR Mr. Satish Vig, AOR Ms. Kanika Singh, Adv.

Ms. R.K. Mohit Gupta, Adv.

Ms. Sangram Singh Hooda, Adv.

M/s. Coac, AOR Mr. Akshat Kumar, AOR Hon'ble Mr. Justice A.K. Sikri pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr.Justice A.K. Sikri.

The appeals are allowed in terms of the signed reportable judgment.

(B.PARVATHI)
COURT MASTER

(MALA KUMARI SHARMA)
COURT MASTER

(Signed reportable judgment is placed on the file)