

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

Company Appeal (AT) (Insolvency) No. 879 of 2023

&

I.A. No. 4048 of 2023

IN THE MATTER OF:

Krystal Stone Exports Ltd.

...Appellant

Versus

Stressed Assets Stabilization Fund & Ors.

...Respondents

Present:

For Appellant: Sr. Advocate Sudhir K. Makkar, Advocate Shashank Deo Dudhi, Advocate Saunya Gupta, Advocate Aru Prakash, Advocate Yashovardhan Suri

For Respondent: Mr. Anand Varma, Ms. Apoorva Pandey, Mr. Ayush Gupta, Advocates for R-1
CMA Sandeep Kr. Bhatt, RP
CMA Kamal Deep Tyagi, for R-2

ORDER

26.09.2023: Heard Learned Counsel for the parties.

2. This Appeal has been filed against the Order dated 21st June, 2023 by which Order I.A. filed by the Appellant to recall the Order dated 24th September, 2019 has been dismissed.

3. An Application under Section 7 was filed by the Respondent-Stressed Assets Stabilization Fund against the Corporate Debtor-Krystal Stone Exports Ltd. in which Application notices were issued at the registered address of Corporate Debtor which was returned with postal remark left. The Adjudicating Authority on 2nd July, 2019 passed an Order to serve notice by Email as well as Publication in Newspapers i.e. Times of India and Local Vernacular Newspaper. In pursuance of the Order of the Tribunal dated 2nd

July, 2019, publication was made in the two newspapers one in Times of India and another in Vernacular Local Marathi Newspaper. The Adjudicating Authority thereafter proceeded with the matter and no one having appeared on behalf of the Corporate Debtor admitted Section 7 Application by Order dated 24.09.2019. The Appellant has thereafter filed an I.A. No. 522 of 2020 praying for recall of the said Order which application came to be dismissed by the Adjudicating Authority. The Adjudicating Authority in paragraph 6 and 7 of the Order made following observation:

6. It is also appropriate to mention the relevant para regarding the service of notice on the corporate debtor in the impugned order dated 24.09.2019 of this tribunal is extracted as under:

Para-7: The Corporate Debtor chose not to appear or file an objection against the admission of this application. By order dated 02.07.2019 it was informed vide affidavit of service, that the notice issued on the corporate Debtor is returned with postal remark "left". Further, on 17.09.2019 we have recorded that the Corporate Debtor did not appear before this Tribunal even after service of notice by way of publication of notice in the newspaper. There are no objections filed by the Corporate Debtor even after ample opportunities to do the same.

7. Therefore, it is very clear from the above para 14 of the order of Hon'ble NCLAT that the Hon'ble NCLAT has set aside the CIRP admission order on the ground that the adjudicating authority has committed a procedural error in passing an order without effecting service of notice on the

Corporate Debtor. However in the present case on hand, as rightly contended by the Resolution Professional, the notice was served on the Corporate Debtor through substituted service through paper publication in two leading newspapers as per the procedure prescribed by law and therefore this tribunal is of the view that there was no procedural irregularity or illegality committed by this tribunal and this tribunal has no power to set aside such admission order and the remedy of the Corporate Debtor if at all is only to file an appeal against the above order and not filing the above application. As stated above, the above case law relied upon by the Corporate Debtor of the Hon'ble NCLAT is distinguishable from the facts of the present case on hand and is not applicable. This tribunal is also of the considered opinion that the adjudicating authority has power to withdraw the CIRP order only under two circumstances namely:

i. Through an application filed under section 12A by the IRP with Form-A submitted by the Financial Creditor/ Operational Creditor before constitution of COC.

ii. With 90% mandate of COC after constitution of COC and not under any other circumstances.”

4. Learned Sr. Counsel for the Appellant challenging the Order contends that it is true that registered office of the Corporate Debtor is at Mumbai however the said office is in the possession of official assignee since the year 2013 hence any notice issued to the said office in the name of Corporate Debtor has never been served. It is further submitted that Appellant has another office at Jaipur which address was also well-known to the Financial

Creditor since the OTS Proposal which was sent by the Corporate Debtor on 04th May, 2016 was responded by the Financial Creditor on 08th June, 2016 at the Jaipur Address. It is submitted that by the Order of the Adjudicating Authority dated 2nd July, 2019, the Financial Creditor was directed to serve the Appellant by Email as well as Publication although the newspaper publication was made but no service was effected by email. It is submitted that the Appellant was not served nor any email was sent whereas Financial Creditor was well aware of the office situated at Jaipur hence the Adjudicating Authority committed error in rejecting Application. It is further submitted that the Adjudicating Authority also has erroneously observed that against the admission order, remedy of the Corporate Debtor is to file an Appeal.

5. Learned Counsel appearing for Financial Creditor opposing the submissions of Learned Sr. Counsel for the Appellant submits that registered address of the Corporate Debtor has been throughout at Mumbai which has been reflected in the proceedings undertaken by the Appellant itself and no error was committed in serving notice at the registered address at Mumbai and the Appellant never took steps for change of their registered address. It is further submitted that email address in the MCA Website is not functional and emails sent by Financial Creditor have been bounced back although there is no material on record that the email was sent to Corporate Debtor. It is further submitted that Appellant having not challenged the original order dated 24.09.2019 this Appeal is not maintainable. He submits that unless the original order is challenged, no relief can be obtained by the Appellant by challenging order dated 21st June, 2023. Learned Counsel for the Respondent *Company Appeal (AT) (Insolvency) No.879/2023*

has placed reliance in **T.K. David Vs. Kuruppampady Service Cooperative Bank Limited and Ors., (2020) 9 SCC 92.**

6. We have considered the submissions of Learned Counsel for the parties and have perused the record.

7. From the facts which has been brought on record it does appear that notice which was sent by the Financial Creditor to the Corporate Debtor pre filing of Section 7 Application and post filing of section 7 application returned with the remark "left". Affidavit which was filed on behalf of Financial Creditor also clearly mentioned this fact which has been brought on record at page 85 of the Appeal Paper Book. Further another affidavit was filed on behalf of Financial Creditor dated 25th June, 2019 in which Affidavit following was stated in paragraph 1 to 3 at page 91:

"1) I state that pursuant to the order passed by NCLT-II, the Financial Creditor has served the NCLT Notice upon the Defendant at their registered address by Speed Post.

<i>Sr. No.</i>	<i>Name of the Defendants</i>	<i>Date of Service and R.D. Slip Number</i>	<i>Remarks</i>
<i>1)</i>	<i>Krystal Stone Exports Limited</i>	<i>EM834489559IN</i>	<i>Addressee Moved</i>

I hereto annex and mark Exhibit A and B are the Copies of Postal Slip and Track Report.

2) I state that the Defendant is served Copy of NCLT Notice on 19th June 2019 on its registered address by registered post.

3) I state that the packet containing NCLT Notice was returned with remark 'Left' to the Applicant. Hereto annexed and marked Exhibit C is the Original packet returned."

8. It appears that due to non-service effected on the corporate debtor, the Adjudicating Authority has passed an order for paper publication on 2nd July, 2019. There is no dispute that paper publication was made at Mumbai. In support of submission of the Appellant that registered office of the Corporate Debtor is in the possession of the official assignee since 2013, the Appellant has brought on record the letter issued from Official Assignee's Office High Court, Bombay 30th July, 2021 (Page 77) which indicates that in pursuance of the Order Notice of Motion No. 1 of 2013, order dated 3rd June 2013 official assignee has asked for handing over the documents.

9. Learned Counsel for the Appellant has referred to the correspondence regarding OTS between the Financial Creditor and Appellant. It is further submitted that financial creditor was aware of both address i.e. Mumbai Address and Jaipur Address which is clear from Letter dated 30th June, 2008 at page 101 of the Appeal Paper Book which was sent by Financial Creditor which was statutory demand notice under N.I. Act. Further OTS Proposal was sent by the Appellant to Financial Creditor in response to which letter dated 08th May, 2014 was written by Financial Creditor to the Managing Director of

the Corporate Debtor at Jaipur which letter is at page 104 which is to the following effect:

“SASF/KR YST AL/81

May 8, 2014

WITHOUT PREJUDICE

To

The Managing Director

Krystal Stone exports Limited

SP-2, IJICO Industrial Area

Shivdaspura, Jaipur, India

Dear Sir,

Sub: OTS Proposal for Settlement of Dues

Please refer to your letter dated May 05,20 14 on the above subject. We have carefully examined your proposal towards settlement of dues to SASF. The OTS amount offered by you is only Rs.31 0 lakhs. The proposal offered by you to SASF is not acceptable to SASF.

Yours Faithfully

(V. Viswanthan)

DGM, SASF”

10. From the facts stated above, it is clear that registered office at Mumbai was not in the possession and control of the Corporate Debtor and after 2013 correspondence was made by the Corporate Debtor from Jaipur Address which was also responded by the Financial Creditor on 08th May, 2014. Learned Counsel for the Appellant has also submitted that Order dated 2nd July, 2019 also directed to serve through email but no service was effected by email. In *Company Appeal (AT) (Insolvency) No.879/2023*

the record, there is no proof that any step was taken for serving the email nor any affidavit was filed by the Financial Creditor before the Adjudicating Authority that both the modes were adopted for service as directed vide Order dated 2nd July, 2019.

11. We thus are of the view that present is a case where corporate debtor was unaware of the proceedings and publication at Mumbai was not effective since registered office was not under the control and possession of the Corporate Debtor.

12. The Adjudicating Authority has further in paragraph 7 has stated that admission order cannot be set aside and the remedy of the Corporate Debtor is to file an Appeal.

13. Submission of Learned Counsel for the Respondent is that when the original order is not challenged, the Appeal is not maintainable. The present Appeal has been filed against the Order which was passed by the Adjudicating Authority rejecting recall application. The recall application was filed by the Appellant under Rule 49 of NCLT Rules, 2016 which is a statutory remedy provided for paying for recall of the Order.

14. The Judgment which has been relied on by Learned Counsel for the Respondent in **T.K. David** (Supra) was a case where Hon'ble Supreme Court was examining the maintainability of the SLP against an order of dismissal of review when original order is not challenged. The principal for challenging the review orders on merits when original order was not challenged is entirely

different issue and the judgment of the Hon'ble Supreme Court as relied by Learned Counsel for Respondent has no application in the facts of the present case where recall was a statutory remedy provided under Rule 49 of NCLT Rules, 2016 which was availed.

15. We thus are of the view that objection of the Respondent that Appeal is not maintainable has no legs to stand. We are satisfied that sufficient cause was made out by the Appellant for recall of the Order dated 24.09.2019 in result we allow the Appeal, set aside the Order dated 21st June, 2023, allow I.A. No. 522 of 2020. The result is CP(IB) No. 903(MB)/2019 is revived before the Adjudicating Authority to be heard and decided at an early date. We further allow the Appellant to file a Reply to Section 7 Application within two weeks from today and thereafter Adjudicating Authority may fix a date after two weeks and may decide the matter expeditiously as the same is pending for last several years.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

[Mr. Arun Baroka]
Member (Technical)

Basant/nn