

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

**Company Appeal (AT) (Insolvency) No. 209 of 2023 & I.A. No. 757 of
2023**

IN THE MATTER OF:

Bhimsen Apat

...Appellant

Versus

Kalinga Enterprises Pvt. Ltd. & Anr.

...Respondents

Present:

For Appellant: Mr. Adhish Srivastava, Mr. Avdhesh Bairwa,
Advocates

For Respondent: Mr. Akshay Goal, Advocate for R-1
CS Gaurav Joshi, For RP
Mary Mitzy, For R-3

ORDER

19.10.2023: Heard Learned Counsel for the parties.

2. This Appeal has been filed against the Order passed by the Adjudicating Authority dated 31st October, 2022 by which order the Adjudicating Authority has admitted Section 9 Application filed by the Operational Creditor.

3. Learned Counsel for the Appellant challenging the Order contends that the Adjudicating Authority did not issue any notice to the Appellant and without issuance of any notice to the Appellant, direction to proceed ex-parte was passed and when the Appellant came to know, he instructed an Advocate to file Vakalatnama which was filed only in November, 2022. It is submitted that the Order passed is ex-parte and deserves to be set aside.

4. Learned Counsel appearing for the Respondent refuting the submissions of the Appellant submits that advance notice was sent to the Appellant which was duly served and which was also noted by the

Adjudicating Authority. It is further submitted that the Appellant has filed an Application to recall Order dated 31st October, 2022 by which the Adjudicating Authority proceeded ex-parte against the Appellant which was dismissed on 31st January, 2023 which order has not been challenged.

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

6. The Adjudicating Authority first took the Section 9 Application on 24th August, 2022 and following order was passed:

“Ld. Authorised representative CS Mr. Rahul Agarwal appears on behalf of the Petitioner/Operational Creditor i.e., Kalinga Enterprises Pvt. Ltd. Despite Service of notice, there is no representation for Corporate Debtor i.e., Maa Manasha Devi Alloys Pvt. Ltd.

Respondents are directed to file Vakalatnama, authorisation, board resolution and reply affidavit within ten days’ time. Copy thereof shall be served on the counsel on record for the opposite party who shall have three days’ time to file rejoinder, if they so desire, by following the procedure prescribed under law.

List the matter on 19.09.2022.”

7. The Adjudicating Authority has not issued any notice to the Appellant-Corporate Debtor and on the statement of the counsel for the Operational Creditor that despite service of notice there is no representation, the Adjudicating Authority proceeded to grant time to file Reply and Vakalatnama.

Subsequently, on 19th September, 2022, the Adjudicating Authority directed to proceed ex-parte by following order:

“Ld. Authorised Representative CS, Mr. Rahul Agarwal appears on behalf of the Petitioner/Operational Creditor i.e., Kalinga Enterprises Pvt. Ltd. Despite service of notice, nobody appears for the Respondent/Corporate Debtor. Even on the previous date of hearing nobody appeared for the respondent. Respondent set ex-parte. List the matter for hearing on 18.10.2022.”

8. Learned Counsel for the Appellant has relied on Rule 37 of the NCLT Rules, 2016 which provides that the Adjudicating Authority shall issue notice to the opposite party. Rule 37 is as follows:

“37. Notice to Opposite Party.-

(1) The Tribunal shall issue notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the Notice. Such notice in Form No. NCLT 5 shall be accompanied by a copy of the application with supporting documents.

(2) If the respondent does not appear on the date specified in the notice in Form No. NCLT 5, the Tribunal, after according reasonable opportunity to the respondent, shall forthwith proceed ex-parte to dispose of the application.

(3) If the respondent contests to the notice received under sub-rule (1), it may, either in person or through an authorised representative, file a reply accompanied with an affidavit and along with copies of such documents on which it relies, with an advance service to the petitioner or applicant, to the Registry before the date of hearing and

such reply and copies of documents shall form part of the record.”

9. Service of notice prior to filing of the Application is requirement of the NCLT Rules and even if the advance notice was served by the Operational Creditor the requirement of rule 37 is not dispensed with unless the party itself appears before the Adjudicating Authority and in event the corporate debtor itself appears there is no requirement of any notice under Rule 37 but when a party does not appear notice has to be issued to show cause and fix the date for appearance in NCLT Form 5.

10. The present is a case where no notice was issued by the Adjudicating Authority and only on the statement of Learned Counsel for the Operational Creditor that Corporate Debtor has not appeared despite service, the Adjudicating Authority proceeded to direct ex-parte hearing.

11. When this appeal was heard, following order was passed on 22.02.2023:

“22.02.2023: Learned Counsel for the Appellant submits that Appellant is ready to deposit the amount of Rs. 1,16,25,583.01/- for which the proceeding under Section 9 of I&B Code, 2016 was initiated.

2. Let the amount be deposited in the form of ‘Demand Draft’ in favour of “Pay and Accounts Officer, Ministry of Corporate Affairs” in the Court within three days.

3. Issue notice to the Respondents through Speed Post as well as Email. Requisites along with process fee, if not filed, be filed within two days. Respondents to file Reply-

Affidavits. Rejoinder, if any, may be filed within one week, thereafter.

4. List this Appeal on 21st March, 2023. In the meantime, in pursuance of the Order dated 31st October, 2022, no final step shall be taken regarding the resolution of the Corporate Debtor however IRP shall ensure that corporate debtor runs as a going concern with the cooperation of the suspended management.”

12. Appellant in compliance of said order has deposited the amount in favour of “Pay and Accounts Officer, Ministry of Corporate Affairs” in the court. Learned Counsel for the Respondent has submitted that Order dated 31st January, 2023 by which the Adjudicating Authority has rejected the application challenging the order to proceed ex-parte against the Appellant has not been challenged hence the Appellant cannot be allowed to question the findings in the Impugned Order.

13. The present Appeal was filed by the Appellant in this Tribunal on 28th November, 2022 i.e. much before passing of the Order dated 31st January, 2023 rejecting his application to recall the ex-parte. When notice required under Section 37 which was not issued and the Adjudicating Authority proceeded against the Corporate Debtor, we are of the view that the Order admitting section 9 Application suffers from error and need to be interfered with. However, looking to the fact that Appellant has deposited the amount as indicated above before this Tribunal, we permit the Appellant to withdraw the said Bank Draft and deposit it before the NCLT which shall abide by the order passed by the NCLT in proceedings under Section 9. The Order impugned is

set aside. The Appellant is allowed two weeks' time to file Reply before the Adjudicating Authority. Rejoinder, if any, may also be filed by the Operational Creditor within two weeks, thereafter. The Adjudicating Authority shall fix a date after four weeks for hearing Section 9 Application afresh.

14. In view of the fact that the CIRP is set aside, the Resolution Professional may hand over the records and assets of the Corporate Debtor which however shall be subject to any further order passed by the Adjudicating Authority.

15. IRP submits that initially payment as directed by the Adjudicating Authority for payment of fee and expenses has been made however no further payments have been made towards fee and expenses. It shall be open for the IRP to make an application before the Adjudicating Authority for his fee and expenses on which appropriate orders may be passed by the Adjudicating Authority in accordance with law.

The Appeal is disposed of, accordingly.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

Basant/nn

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