

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

**Company Appeal (AT) (Insolvency) No.349 of 2023**

[Arising out of order dated 09.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in CP (IB) No.814/MB-IV/2021]

**IN THE MATTER OF:**

**Sarath Kumar**

No. 78/6, Ayyakovil Street,  
Sivagnanapuram, Avaraikulam,  
Radhapuram, Palavoor,  
Tirunelveli, Tamil Nadu- 627133.

**...Appellant**

**Vs.**

**1. Suzlon Gujarat Wind Park Ltd.,**

Having its registered office address at:  
5, Shrimali Society, near Shri Krishna Complex  
Navrangpura, Ahmedabad- 380009.

**2. Nitin Om Kothari,**

5A/301 Alica Nagar, Lokhandwala Township,  
Kandivali (east), Mumbai City  
Maharashtra- 400101.

**...Respondents**

**Present:**

**For Appellant:** Mr. Aslam Ahmed and Mr. Abhishek Dwivedi, Advocates.

**For Respondent:** Mr. Sandeep Bajaj, Mrs. Amruta Thakur, Mr. Swetab Kumar, Mr. Vipul Jai, Advocates for R-1.  
Mr. Dhananjaya Sud, Advocate for R-2 (RP).

**J U D G M E N T**

**ASHOK BHUSHAN, J.**

This Appeal has been filed against order dated 09.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV by which order Section 9 application filed by the Respondent, Operational Creditor has been admitted. Brief facts of the case necessary to be noticed for deciding this Appeal are:

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- (i) On 13.07.2021, Operational Creditor filed Section 9 application seeking to initiate Corporate Insolvency Resolution Process against the Corporate Debtor on the ground that the Corporate Debtor failed to make required payment as per the Demand Notice.
- (ii) On 17.09.2021, the Adjudicating Authority directed to issue notice to the Corporate Debtor and 15.11.2021 was the date fixed for next hearing.
- (iii) The Operational Creditor took steps for service by email as well as Registered Post. Notice by email was sent at the email address reflected in the Ministry of Corporate Affairs, Company Master Database.
- (iv) On 15.11.2021, the Adjudicating Authority directed for substituted service of notice in two local newspapers. In pursuance to order dated 15.11.2021, notices were issued twice.
- (v) On 22.02.2022, the Adjudicating Authority noticed the publication of notice and Corporate Debtor having not appeared directed the case to proceed ex-parte.
- (vi) On 09.07.2022, the Corporate Debtor filed an IA for recall of order dated 22.02.2022.
- (vii) On 11.07.2022, the Adjudicating Authority notices that counsel for the Corporate Debtor submits that an IA has already been filed for condoning delay which is not listed on the said date. The

Adjudicating Authority directed the IA to be listed with the Company Petition on 08.09.2022. Reply was to be filed by the Operational Creditor. The Operational Creditor filed its reply.

- (viii) On 08.09.2022, matter could not be heard and matter was adjourned to 23.11.2022.
- (ix) On 23.11.2022, counsel for the Operational Creditor appeared but none was present for Respondent. The Adjudicating Authority heard the Operational Creditor and reserved the order.
- (x) The Adjudicating Authority proceeded to consider the application on merits and admitted Section 9 application, aggrieved by which this Appeal has been filed.

2. Learned counsel for the Appellant submits that the order passed by the Adjudicating Authority is in violation of Principles of Natural Justice. The Adjudicating Authority did not give opportunity to the Appellant to make its submissions. An IA was filed to recall order dated 22.02.2022, by which order the Adjudicating Authority directed to proceed ex-parte, which application was not listed due to some defects. Learned counsel for the Appellant was present on 23.11.2022 when the matter was heard but he was not heard since neither the IA nor vakalatnama was on the record. It is submitted that the Appellant could not appear earlier since summons which were issued to the Appellant were inadvertently misplaced, hence, there was delay in appointment of the counsel.

3. Learned counsel for the Respondent refuting the submissions of learned counsel for the Appellant submits that Appellant was served with papers and proceedings on four different occasions. The Adjudicating Authority proceeded ex-parte against the Corporate Debtor when it did not appear on several occasions. The application filed for recall of the order was filed in July, 2022 after which application was kept in defect. Vakalatnama filed alongwith the application was also kept in defect. Learned counsel for the Applicant (Corporate Debtor) delayed the clearing of defects to prolong the Section 9 application. Paper publication was also made twice in pursuance of order dated 15.11.2021. Even prior to filing of Section 9 application, copy of the complete set of the Company Petition was sent to the Corporate Debtor to the email address. Publication in newspaper was made twice, first on 22.12.2021 and then on 05.01.2022. The Corporate Debtor deliberately did not appear and filed application for recall of order which was kept in default to prolong the issue. Even in the application filed for recall, there is no sufficient ground, except ground that summons received were misplaced. It is further submitted that advance payment was made to the Corporate Debtor to the tune of Rs.2,83,60,000/-, however, the Corporate Debtor failed to return it, hence, the agreement was terminated. Appellant in its audited accounts has admitted advance received from the Operational Creditor.

4. We have considered the submissions of learned counsel for the parties and perused the record.

5. The first order which was passed by the Adjudicating Authority on 17.09.2021 is as follows:

**“ORDER**

**The Court is convened through Video Conference.**

1. *Counsel for the Petitioner is directed to issue notice to the Corporate Debtor as well intimate the next date of hearing.*
2. *Court Notice addressed to the Corporate Debtor has been handed over to the Counsel for the Petitioner for effecting service on the Corporate Debtor by all available means, viz., Speed Post, Registered Post, Hand Delivery, Email delivery to the registered email ID of the Corporate Debtor as available on the MCA Company Master Database within 7 days from today. Counsel for the Petitioner shall file necessary affidavit in compliance on the next date of hearing.*
3. *List this matter on **15.11.2021.**”*

6. In pursuance of the order dated 17.09.2021, notices were sent by email as well as by Registry of NCLT. Packet was returned with remark “addressee left without instructions”. Email was sent after order dated 17.09.2021 to the email address of the Corporate Debtor as reflected in the website of MCA. On 15.11.2021, the Adjudicating Authority permitted for substituted service which paper publication was made on 22.12.2021 and 05.01.2022. Despite that none appeared on behalf of the Corporate Debtor. On 22.02.2022, the Adjudicating Authority passed following order:

**“ORDER**

**The Court is convened through Video Conference.**

1. *Ms. Prachi Wazalwar a/w Mr. Manvendra Kane and Ms. Amruta Thakur i/b M/s. W.S. Kane and Co., Ld. Counsel for the Petitioners present. None for the Corporate Debtor.*
2. *Vide order dated 15.11.2021, this bench had directed the Operational Creditor to carry out paper publication. The same has been done in "Times of India" and "Maharashtra Times" on 22.12.2021 and 05.01.2022. Irrespective of the substituted service by way of paper publication, the ' ' Corporate Debtor choose not to appear. The Corporate Debtor is set ex-parte.*
3. *List this matter on **20.04.2022** for final hearing. Counsel for the Operational Creditor will ensure that two sets of petition in hard copy are available with the Bench on the next date of hearing.”*

7. It was on 09.07.2022 that the Corporate Debtor filed an application to recall the order dated 22.02.2022. The reason given for recall of the order is mentioned in Paras 2 to 5 of the application, which is to the following effect:

- “2. *It is submitted that the summons issued to the Corporate Debtor by this Ld. Tribunal were inadvertently misplaced and hence, there was delay in appointment of a counsel for representing the Corporate Debtor in the present proceedings.*

3. *It is submitted that the Corporate Debtor is solvent and the present proceedings filed against it are false, frivolous and all claims of outstanding dues against the Corporate Debtor made by the Operational Creditor are denied in toto. Accordingly, the Corporate Debtor craves the leave and indulgence of this Ld. Tribunal to allow it to file a written reply in detail to the Petition filed against it by the Operational Creditor.*
4. *As per the order sheets obtained from the NCLT website, the Corporate Debtor has not appeared on 15.11.2021, 20.01.2022, 22.02.2022 and 20.04.2022 before this Ld. Tribunal in the present proceedings due to the legitimate and genuine reason as stated in the above para. It is submitted that the present proceedings have not reached the stage of appointment of IRP and hence, the Operational Creditor will therefore not be in any way prejudicially affected by setting aside/ recalling the ex parte order.*
5. *It is submitted that the Corporate Debtor does not have a copy of the Petition along with annexures filed by the Operational Creditor and hence, humbly prays that this Ld. Tribunal may be pleased to pass relevant orders to make the same available to the Corporate Debtor.”*

8. On 11.07.2022, which was the next date in the matter, counsel appeared on behalf of the Corporate Debtor and submitted that an IA has

been filed, which is not listed. The Adjudicating Authority on 11.07.2022 passed following order:

**“ORDER**

**The Court is convened through Video Conference.**

1. *Ms. Prachi Wazalwar, Ld. Counsel for the Petitioner present. Mr. Aslam Ahmed, Ld. Counsel for the Applicant/ Corporate Debtor present.*
2. *On going through the order file, it has been observed that the matter was listed on 22.02.2022, the Corporate Debtor is set ex-parte.*
3. *Counsel for the Applicant/ Corporate Debtor submit that the IA has already filed for condoning of delay, which is not listed today.*
4. *Counsel for the Applicant is directed to serve a copy of Application to the other side. Counsel for the Respondent is directed to file reply within 14 days in IA by duly serving a copy to the other side.*
5. *List IA along with main Company Petition for hearing on 08.09.2022.”*

9. 08.09.2022 was the next date. Thereafter, date was fixed for 23.11.2022. On 23.11.2022, the Adjudicating Authority passed following order:

**“ORDER**

**The Court is convened through Video Conference.**



1. *Ms. Prachi Wazlwar a/w Mr. Manvendra Kane,  
Ms. Amruta Thakur i/b . W.S. Kane & Co., Ld.  
Counsel for the Operational Creditor present.  
None for the Respondent.*
2. *Heard Ld. Counsel for the Operational Creditor  
and perused the records. **Reserved for Orders.***

10. The submission of learned counsel for the Appellant is that since IA was filed for recall of the order 22.02.2022 which could not be listed due to defects, the Adjudicating Authority ought not to have proceeded to admit the Section 9 application without deciding the said recall application. It is submitted that counsel for the Appellant was present on 23.11.2022 but he was not heard since the Adjudicating Authority observed that there is no vakalatnama on behalf of the Corporate Debtor.

11. From the sequence of the events it is clear that the Adjudicating Authority has fixed several dates in Section 9 application after issuance of notice to the Corporate Debtor. On non-appearance of the Corporate Debtor on 22.02.2022, the Adjudicating Authority directed for ex-parte proceedings. The order dated 22.02.2022 was sought to be recalled by the Corporate Debtor by filing an application dated 09.07.2022 which application admittedly was not listed on the date when the Adjudicating Authority heard the Operational Creditor and reserved the matter. The application under Section 9 was filed in the year 2021, where repeatedly notices were issued to the Corporate Debtor.

12. Appellant's submission is that the Adjudicating Authority ought to have first considered the application filed by the Corporate Debtor for recall of order dated 22.02.2022 and thereafter proceeded to decide the Section 9 application. Application for recall being not listed could not be heard by the Adjudicating Authority although application for recall has been brought on the record by the Appellant as Annexure 3 to the appeal. To satisfy ourselves of the bonafide of the Appellant, we proceed to examine reasons given in the application for recall of the order dated 22.02.2022.

13. In Para 2 of the application, it has been stated that summons issued to the Corporate Debtor were inadvertently misplaced, hence, there was delay in appointment of counsel for representing the Corporate Debtor. The summons was issued to the Corporate Debtor by order dated 17.9.2021 and substituted service by publication was directed on 15.11.2021. The above statement makes it clear that summons was received by the Corporate Debtor before 15.11.2021, when substituted service was directed. There is no reason given for non-appearance of the Appellant on the dates which were fixed on 15.11.2021. In Para 4 of the application only reason given by the Corporate Debtor is the reason given in Para 2. In the application it is not even mentioned when the summons was received and when the Corporate Debtor came to know about the order dated 22.02.2022. Application to recall the order dated 22.02.2022 was filed only on 09.07.2022. It was kept in defect and it was never listed before the Court.

14. In the facts of the case and sequence of the events, we do not find any bonafide reason which can explain the non-appearance of the Corporate Debtor before the Adjudicating Authority. It is true that on 11.07.2022, the counsel appearing on behalf of the Corporate Debtor informed the Court that an application for recall has been filed and the Adjudicating Authority on that date has ordered the application to be listed with the Company Petition but the application stood in defect and could not be listed and the matter was heard by the Adjudicating Authority. Even the vakalatnama of counsel for the Corporate Debtor was in defect and was not before the Court.

15. In the facts of the present case, we do not agree with submission of the counsel for the Appellant that there was violation of Principles of Natural Justice in passing the impugned order and adequate opportunity was not given to the Corporate Debtor. Section 9 application is pending since July, 2021. In view of what we have observed, we find it unnecessary to direct the Adjudicating Authority to pass order on I.A. dated 09.07.2022 filed by the Corporate Debtor to recall order dated 22.02.2022, which was never listed before the Adjudicating Authority. The Adjudicating Authority in Para 9 and 10 of the impugned order made following observations:

*“9. It is observed by the Bench that the matter was listed on 17.09.2021, the Corporate Debtor was issued Court Notice to appear and filed the reply in the matter. The said Court Notice along with the copy of Petition was served upon the Corporate Debtor vide Email on 02.11.2021. Then after the matter was listed on 15.11.2021, the Operational*

*Creditor was directed to take out substituted service of publication of notice in two local newspapers. The said substituted service was made by the Operational Creditor on 22.12.2021 to calling upon the Corporate Debtor to appear and file the reply in the matter. After giving reasonable opportunity to Corporate Debtor to appear, the Corporate Debtor failed to appear in the matter. Hence, vide order dated 22.02.2022 the Corporate Debtor set ex-parte and the matter was listed on 20.04.2022 for final hearing.*

10. *Again, the matter was listed on 20.04.2022, the Corporate Debtor did not appear in the matter. On 11.07.2022, Mr. Aslam Ahmed, Ld. Counsel for the Corporate Debtor and submitted that the Corporate Debtor has filed IA for condoning the delay of filing the reply in the matter. This Bench has observed that the IA filed by the Corporate Debtor was never listed. Hence, after giving several reasonable opportunities to the Corporate Debtor, the Corporate Debtor did not file the reply and the matter was Reserved for Orders on 23.11.2022. The Corporate Debtor again did not appear on 23.11.2022.”*

16. It has clearly been held that opportunity was given to the Corporate Debtor to appear and file reply and when after giving reasonable opportunity Corporate Debtor did not appear, order was passed to proceed ex-parte. I.A. filed by the Corporate Debtor having not listed, as observed in Para 10, no fault can be found with the order passed by the Adjudicating Authority. The

Adjudicating Authority has given reasons for admitting Section 9 application. We do not find any error in the order of the Adjudicating Authority warranting interference in exercise of our appellate jurisdiction. Appeal is dismissed.

**[Justice Ashok Bhushan]**  
**Chairperson**

**[Barun Mitra]**  
**Member (Technical)**

**NEW DELHI**

**29<sup>th</sup> September, 2023**

*Archana*