

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 909 of 2023

[Arising out of order dated 26.06.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Kolkata Bench I, Kolkata in IA (IBC) 1184/KB/2022 and CP(IB) No. 367/KB/2021]

IN THE MATTER OF:

Sanjeev Kumar Sharma
Shareholder and suspended Director of
Dadheech Infrastructures Private Limited,
CK-271, Salt Lake City, Sector-II,
Kolkata 700091

...Appellant

Versus

SREI Equipment Finance Ltd.
Viswakarma, 86C, Topsia Road (South),
Kolkata – 700046, West Bengal

...Respondent No.1

Mr. Soumendra Poddar
Interim Resolution Professional of
Dadheech Infrastructure Private Limited
1/427, Gariahat Road (South),
4th Floor, Kolkata, West Bengal – 700 068

...Respondent No.2

Present:

For Appellant: **Mr. Joy Saha, Sr. Advocate with Mr. Nikunj Berlia,**
Mr. Dhruv Surana, Mr. Arya Hardik, Mr. Rajeev
Ahuja, Advocates

For Respondent: **Mr. Sanjiv Sen, Sr. Advocate with Mr. Ankit Kohli,**
Ms. Anjali Singh, Mr. Mridul Suri, Advocates for R-2
Mr. Gaurav Sethi, Mr. Deeptanshu Chandra,
Advocates

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) by the Appellant arises out of the Order dated 26.06.2023 (hereinafter referred to as “**Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench I, Kolkata) in CP(IB) No. 367/KB/2021 and IA (IBC) No. 1184/KB/2022. By the impugned order, the Adjudicating Authority has admitted the petition under Section 7 of the IBC and allowed the initiation of Corporate Insolvency Resolution Process (“**CIRP**” in short) of the Corporate Debtor - M/s Dadheech Infrastructures Private Limited. Aggrieved by this impugned order, the present appeal has been preferred by the suspended Director of the Corporate Debtor.

2. Putting briefly the facts of the case, the Corporate Debtor had a business relationship with the Financial Creditor, SREI Equipment Finance Ltd. - Respondent No.1 since 2007. The Financial Creditor was a non-banking financial company which was admitted under CIRP on 08.10.2021 following which an Administrator was appointed. During the course of their business relationship, several loan agreements were signed following which funds were transferred by the Financial Creditor to the Corporate Debtor. Claiming that an amount of Rs.131,35,08,475/- was due from the Corporate Debtor and remained unpaid as on 12.08.2021, a Section 7 application was filed by Mr. Projoy Chatterjee on behalf of the Financial Creditor vide CP(IB) No. 367/2021 (hereinafter referred to as the ‘**main petition**’) showing date of default as 23.08.2021. The Financial Creditor in the meantime was admitted into CIRP and was taken over by the Administrator. Later when Mr. Projoy Chatterjee, the authorized signatory of the

Financial Creditor, in respect of the main petition retired from service, the Administrator appointed another person, Mr. Sohan Kumar Jha by a special PoA and IA(IB) No.430/2022 was filed by the Financial Creditor to re-sign, re-verify and make formal amendments to the main petition. This was allowed by the Adjudicating Authority on 01.07.2022. However, vide the same order, the Corporate Debtor was also permitted to take all available defences including the maintainability of the main petition. IA No. 1184/2022 was then filed by the Corporate Debtor before the Adjudicating Authority to decide on the maintainability of the main petition on the broad ground that despite the amendments made, the main application continued to remain defective, invalid and not maintainable. The matter came up for hearing before the Adjudicating Authority on 05.12.2022 and was reserved for orders. The orders were pronounced on 26.06.2023 in which the main petition CP(IB) No. 367/2021 was allowed and the Corporate Debtor was admitted to CIRP. The Corporate Debtor is aggrieved that though hearing was done only in respect of IA No1184/2022 regarding the maintainability of the main petition and not for the main petition but surprisingly the order was passed on the main petition admitting the Corporate Debtor to the rigours of CIRP. Hence the Corporate Debtor has invoked the appellate jurisdiction of this Tribunal.

3. The Learned Senior Counsel for the Appellant submitted that in the course of their business relationship, a sum of Rs.90,67,72,108/- was transferred by the Financial Creditor to the Appellant against which a sum of Rs. 99,91,99,247/- was already repaid. However, the Financial Creditor by making certain fraudulent entries on blank agreements have dishonestly claimed that an amount of Rs.131,35,08,475/- was due and filed a Section 7 application. It

was asserted that no dues were payable and that a sum of Rs 9 crore had been paid in excess.

4. It was further contended that the main petition was not maintainable because of discrepancy in the Power of Attorney ("**PoA**" in short). It was stated that the main petition was signed and verified by Mr. Projoy Chatterjee on the basis of a PoA dated 31.03.2021 executed by the Financial Creditor. However, since the Financial Creditor had been admitted to CIRP and was taken over by the Administrator, the PoA signed by the erstwhile management had become non-maintainable. It was further pointed out that acknowledging the fact that the main petition was not maintainable, Respondent No.1 have themselves instituted IA(IB) No.430/2022 to re-sign and re-verify the main petition. While admitting that the Adjudicating Authority while deciding this matter passed an order on 01.07.2022 and allowed formal amendments to be made by the Financial Creditor, it was emphatically asserted that the same order also allowed the Appellant to take all available defences, and pursuant thereto, IA No. 1184/2022 was filed by the Appellant before the Adjudicating Authority to decide on the maintainability of the main petition.

5. It is the contention of the Appellant that despite the amendments, the cause-title of the main application continued to remain defective. The main petition which was affirmed by Mr. Projoy Chatterjee was not maintainable and therefore re-signing of the application by Mr. Sohan Kumar Jha without prior written instruction of the Administrator rendered the main petition illegal. No power had been given the Administrator to Mr. Sohan Kumar Jha to rectify or cure any proceeding already instituted. It was also contended that a PoA holder

is not competent to file an application on behalf of the Financial Creditor. Hence, the main petition continued to be null and void.

6. It was pointed out by the Learned Senior Counsel for the Appellant that the IA 1184/2022 came up for hearing on 05.12.2022 and got reserved for orders. During this hearing, the main petition was never heard but when the orders were pronounced on 26.06.2023, the main petition was allowed. Since the main petition was not heard by the Adjudicating Authority, the Appellant was denied the opportunity of defending his cause which vitiates the principle of natural justice. Emphasizing that the Section 7 application was wrongly admitted without having been heard, the impugned order has also been assailed on the ground that it is in contravention of Rule 150(1) of the NCLT Rules, 2016 since the order was pronounced after a gap of more than six months and that too without hearing the main petition.

7. The Learned Senior Counsel for the Respondent No.1 contesting the submissions made by the Appellant stated that the debt has been clearly established from the loan agreements. Since the Corporate Debtor failed to repay the debts despite several demands made by the Financial Creditor, both the necessary ingredients of debt and default having been met, it was a fit case for admitting Section 7 application.

8. Submission was made by the Learned Senior Counsel for the Respondent No.1 that the Appellant is merely trying to clutch on to hyper-technical pleas of maintainability of the main petition to stonewall the admission of Section 7 application. Claiming that the main petition was legally valid, it was stated that the Financial Creditor in its board meeting of 15.01.2018 had permitted the Chairman to execute a PoA on 31.03.2021 in favour of Mr. Projoy Chatterjee to

pursue legal matters. When the Board of the Financial Creditor was superseded on 08.10.2021, the RBI appointed an Administrator. Mr. Projoy Chatterjee's authority to pursue legal matters on behalf of the Financial Creditor was affirmed by the Administrator on 25.10.2021 which preceded the filing of the main petition on 22.11.2021. When Mr. Projoy Chatterjee resigned, the Administrator executed another PoA on 01.04.2022 in favour of Mr. Sohan Kumar Jha. After execution of the second PoA, the Adjudicating Authority on 04.04.2022 had directed the Financial Creditor to obtain proper instructions from the Administrator to make necessary amendments to the pleadings in the company petition. Accordingly, IA No.430/2022 was filed by the Financial Creditor which was allowed by the Adjudicating Authority on 01.07.2022 and thereafter the main petition was re-signed and re-verified. It has been strongly contended that the institution of the main company petition and continuance of the proceedings on behalf of the Financial Creditor has been done by duly authorized persons at all points of time. It was also added that in order to avoid an order of CIRP from being passed, the Corporate Debtor had filed IA No. 1184/2022 raising frivolous grounds.

9. Refuting the contention of the Appellant that principles of natural justice had been violated, it was asserted the Corporate Debtor was given due opportunity to file pleadings and Appellant had also filed the affidavit in opposition to the main petition on 13.10.2022. These submissions were duly considered by the Adjudicating Authority while recording its findings. It has been vehemently contended that several hearings took place and the Adjudicating Authority had heard both parties on merits in the IAs as well as the main petition.

10. We have duly considered the arguments advanced by both the parties and perused the records carefully. The short point for our consideration is whether there was any denial of justice and fair opportunity of hearing suffered by either of the parties before the Adjudicating Authority and whether the impugned order suffers from any infirmity on the count of natural justice or on merits.

11. To get a balanced perspective on whether there was any violation of principles of natural justice, at the very outset, it may be prudent to map the significant date of hearings in respect of the main petition and the related IAs before the Adjudicating Authority. On perusal of the orders passed from time to time by the Adjudicating Authority, we notice that when the main application came up before the Adjudicating Authority for the first time on 25.01.2022, in view of ongoing Covid pandemic, four weeks' time was given to the counsel of Corporate Debtor to file reply affidavit and next hearing was fixed on 04.04.2022. On 04.04.2022, the Financial Creditor sought time to seek instructions from the Administrator to make necessary amendments to the main application. This was allowed and the related IA 430/2022 for re-signing and re-verifying the main petition which was filed by the Financial Creditor came up for hearing on 30.06.2022 where both parties were present. It is clear from the orders that the amendments sought to be made by the Financial Creditor were held to be formal in nature and was allowed. The counsel of Corporate Debtor was also given the liberty to take all available defences including maintainability of the main petition. We notice at this stage that the orders of the Adjudicating Authority in IA 430/2022 were however not challenged and therefore attained a finality.

12. Thereafter the main petition came up for hearing on 11.07.2022 when the counsel of Corporate Debtor sought two weeks' time to file reply affidavit which

was allowed and next hearing fixed for 08.08.2022. The counsel of Corporate Debtor was absent on 08.08.2022 but time to file reply affidavit was enlarged by another two week's as a last opportunity. On the next date of hearing on 12.09.2022, the counsel of Corporate Debtor was present but had not filed reply affidavit. The Corporate Debtor's right to file reply affidavit was closed and matter fixed for arguments on 13.10.2022 and accorded priority listing. Again on 13.10.2022, though counsel of Corporate Debtor was present, he was not ready for argument and sought time to prepare arguments on the maintainability of the main petition. The matter was adjourned to 19.10.2022 with costs. It is significant to note that the Adjudicating Authority had accorded priority listing to this matter. On the next date of hearing on 19.10.2022 it is pertinent to note that both parties were present and the Adjudicating Authority in IA 1200/2022 allowed recall of its order dated 12.09.2022 and gave an opportunity to the counsel of Corporate Debtor to file reply affidavit. Thus, at this stage, three distinctive developments are noteworthy, first, that the Corporate Debtor's right to file reply affidavit to the main petition was restored; secondly, Corporate Debtor's challenge to the maintainability of the main petition was filed vide IA1184/2022 and thirdly and most importantly, the Adjudicating Authority clearly directed the listing of the main petition together with IA 1184/2022 on 21.11.2022. The third development pointed out above made it clearly understood to both parties that the main petition and IA 1184/2022 will be heard together. The relevant order of 19.10.2022 is reproduced below:

*"DIVISION BENCH
COURT - I*

*NATIONAL COMPANY LAW
TRIBUNALKOLKATA BENCH
KOLKATA*

**C.P.(IB)/367(KB)2021
IA(I.B.C)/1184(KB)2022
IA(I.B.C)/1200(KB)2022**

CORAM: 1. HON'BLE MEMBER(J), SHRI ROHIT KAPOOR.
2. HON'BLE MEMBER(T), SHRI BALRAJ JOSHI

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING ON 19TH OCTOBER, 2022, 10:30 A.M

IN THE MATTER OF	SREI EQUIPMENT FINANCE LIMITED VS DADHEECH INFRASTRUCTURES PRIVATE LIMITED
UNDER SECTION	IBC UNDER SEC 7

Appearances (via video conferencing/ physical)

Mr. Reetobroto Kr. Mitra, Adv. : For Financial Creditor
Mr. Sankarsan Sarkar, Adv.
Mr. Aditya Kanodia,
Adv. Mr. Indradeep
Basu, Adv. Mr.
Tanmoy Sett, Adv.

Mr. Joy Saha, Sr. Adv. : For Corporate Debtor
Mr. Nikunj Berila, Adv.
Mr. R. Lakhmani, Adv.

O R D E R

1. Ld. Sr. Counsel/ Counsel for the parties present.

2. IA(I.B.C)/ 1200(KB)2022

- i. This IA has been filed for seeking one days' time for filing reply affidavit. The right to file reply affidavit was closed on 12th of September, 2022. Reasons to recall order dated 12th of September, 2022 mentioned in para 4 and 5 of this IA which is duly supported by an affidavit.
- ii. We have considered the averments contained in this IA and heard the counsel for the parties.
- iii. In view of the position stated in this IA, we allow the Corporate Debtor to file reply affidavit by tomorrow. Rejoinder, if any, be filed within two days.
- iv. IA is accordingly allowed and disposed of

3. IA(I.B.C)/ 1184(KB)2022

- i. Reply affidavit, if any, be also filed. List this IA on 21/11/2022.

4. List the main CP along with IA (I.B.C)/1184(KB)2022 on 21/11/2022

(Emphasis supplied)

13. We take notice that several hearings had taken place and the Adjudicating Authority had heard both parties on merits in respect of the IAs as well as the main petition. The Appellant was also been given opportunity to file pleadings which was also availed by the Appellant having filed the affidavit in opposition on 13.10.2022 as at page 768 of Appeal Paper Book (“**APB**” in short) putting forth its objections. These submissions have been duly considered by the Adjudicating Authority while recording its findings. Thus, we have no doubt in our minds that both parties were fully aware that the Adjudicating Authority had clubbed together for hearing the main petition and IA 1184/2022 for conjoint disposal which got deferred from 21.11.2022 to 05.12.2022. That the Adjudicating Authority having allowed the counsel of Corporate Debtor to file reply affidavit, there can be no room for complaining that pleadings could not be made. The submission made by the Learned Senior Counsel of the Appellant that they were under the impression that only IA 1184/2022 was being heard on 05.12.2022 does not appeal to us. Prima-facie, there is no valid ground to find any fault in the conduct of proceedings by the Adjudicating Authority on grounds of denial of any opportunity of hearing to either party. We are also inclined to believe that both the matters being integral to each other were heard together.

14. It is however the case of the Appellant that their contention that the main petition was not heard by the Adjudicating Authority is validated by the fact that the Respondent No.1 had filed IA No. 657/2023 on 06.04.2023 where they have mentioned that hearing of IA 1184/2022 was concluded on 05.12.2022 but

remained silent about hearing on the main petition. We are not persuaded by the logic and reasoning proffered by the Appellant since they have tried to visualize the statement from their perspective for their own benefit. We must see in what context and what circumstances the above statement was made by Respondent No.1 and the underlying intent. It is important to note that the IA 657/2023 was filed nearly 4 months after the Adjudicating Authority had reserved the orders and the Financial Creditor had become aware that taking advantage of the pendency of the matter, the promoters of the Corporate Debtor had started to siphon out funds and remove the assets of the Corporate Debtor beyond the reach of the creditors. Thus, the intent of the Respondent No.1 in filing IA 657/2023 was to draw the attention of the Adjudicating Authority to the fact that IA No. 1184/2022 which raised frivolous grounds so as to delay the CIRP being integral to the main petition and both having already been heard, an interim injunction be passed till the orders reserved are pronounced.

15. This now brings us to the issue of tenability and maintainability of the main petition in the eyes of law. It is the contention of the Learned Senior Counsel for the Appellant that this Tribunal in ***Palogix Infrastructure Pvt. Ltd. Vs. ICICI Bank Ltd. 2017 SCC OnLine NCLAT 266*** has held that a company petition could not be instituted on the basis of a PoA which view has also been affirmed by the Hon'ble Supreme Court in ***Rajendra Narottamdas Sheth vs. Chandra Prakash Jain (2022) 5 SCC 600***. We entirely agree with the proposition of law laid down in the above two judgments. But we must add that the Learned Senior Counsel for the Appellant has missed out the point that mere use of the word PoA does not take away the power to file a section 7 application as long as a general authorization has been made for its officers to do the needful in legal proceedings which authorization are present on record in the present

matter. That being the case, the above judgements do not come to the avail of the Appellant.

16. We find that Adjudicating Authority has dwelled at length on the maintainability aspect of the main petition at para 11.2 of the impugned order and come to a definitive conclusion at para 11.3 that the main petition is maintainable which is as reproduced below:

“11.3 Therefore, we have no hesitation in holding that the Administrator had lawful authority to execute the Power of Attorney in favour of Mr. Sohan Kumar Jha and further that Mr. Sohan Kumar Jha was duly authorized to continue/contest the present petition on behalf of the Financial Creditor before this Adjudicating Authority and to file further document perform other acts and deeds required for pursuing/contesting the instant petition. The amendments carried out in cause title are in pursuance of the Power of Attorney in favor of Mr. Sohan Kumar Jha and therefore the Corporate Debtor’s plea regarding the defective cause title is incorrect and untenable. Based on facts and documents as indicated above, the filing of this petition and its continuation subsequently do not suffer any defects as alleged. As such contentions of respondent are found to be in-correct and untenable.”

17. The above findings recorded by the Adjudicating Authority are in order when we test it on the factual matrix. The Financial Creditor, before entering into CIRP, being a non-banking financial company, in its board meeting held on 15.01.2018 authorized the Chairman to execute a PoA on 31.03.2021 in favour of Mr. Projoy Chatterjee to pursue legal matters as at page 91-95 of APB. Thereafter, when the Board of the Financial Creditor was superseded on 08.10.2021, the RBI had appointed one Mr. Rajneesh Sharma, as the Administrator as seen at pages 107-113 of APB. The Administrator vide letter dated 25.10.2021 had acknowledged and continued to initiate recovery actions against debtors during the CIRP period of the Financial Creditor as may be seen at page 97 of APB. It was under the signature of Mr. Projoy Chatterjee that the

main petition was filed before the Adjudicating Authority on 22.11.2021. Mr. Projoy Chatterjee's authority to carry on legal matters on behalf of the Financial Creditor was acknowledged and affirmed by the Administrator on 25.10.2021 which was anterior to the filing of the main company petition on 22.11.2021. When Mr. Projoy Chatterjee resigned from the services of the Financial Creditor, the Administrator had executed another PoA on 01.04.2022 in favour of Mr. Sohan Kumar Jha, and he was empowered to contest legal proceedings on behalf of the Financial Creditor as at pages 1969-1973 of APB. After execution of the second PoA, the Adjudicating Authority on 04.04.2022 had directed the Financial Creditor to obtain proper instructions from the Administrator to make necessary amendments to the pleadings in the company petition. Accordingly, IA No.430/2022 was filed by the Financial Creditor which was allowed by the Adjudicating Authority on 01.07.2022. Thus, Mr. Sohan Kumar Jha had re-signed and re-verified the main company petition and this order was not challenged by the Appellant and had therefore attained finality. That being the case, we are of the considered view that the institution of the main petition and continuance of the proceedings on behalf of the Financial Creditor has been done by duly authorized persons at all points of time and therefore the Adjudicating Authority did not commit any error in finding the main petition to be maintainable and valid.

18. This brings us to the question whether the admissibility of Section 7 application has been considered by the Adjudicating Authority in the impugned order. It is the case of the Appellant that the Adjudicating Authority had failed to consider the fact that the Corporate Debtor had repaid the total sum lent to him and that the claim of the Financial Creditor is based on several agreements which have been barred by limitation on the date of filing of the main petition.

Further the Adjudicating Authority had mistakenly and erroneously held that the Corporate Debtor had acknowledged an outstanding liability by relying on an email dated 05.08.2022 which could not have been held to be an admission of debt or liability. Further, the Adjudicating Authority has also failed to appreciate that the Corporate Debtor is a going concern presently executing various government contracts. Hence, the admission of the Corporate Debtor into CIRP runs contrary to the decision of the Hon'ble Supreme Court in ***Vidarbha Industries Power Ltd. vs. Axis Bank Ltd. (2022) 8 SCC 352***. It was also submitted that the Financial Creditor having been admitted to CIRP at the behest of RBI in CP(IB) No.294/2021 and RBI being a Corporate Debtor itself is barred from initiating CIRP against the Corporate Debtor.

19. It is the case of the Respondent No. 1 that once existence of debt and default is established, the Adjudicating Authority has no scope to exercise discretion and must admit Section 7 application. It was also pointed out that the Hon'ble Apex Court had clarified in the ***Vidarbha*** judgment that it was limited to the facts of that case and was not to be applied as a general rule. It was also pointed out that the Hon'ble Supreme Court in the case of ***Manish Kumar vs. Union of India (2021) 5 SCC 1*** has held that Section 11(a) has to be read with Explanation II appended to that provision. The purpose of Section 11 is not to hinder the resolution of a Corporate Debtor and the Corporate Debtor is allowed to undertake recovery action against its own debtors.

20. This aspect of debt and default has been dwelt at length by the Adjudicating Authority in the impugned order and the relevant paragraphs have been extracted below:

"11.7 Upon perusal and careful consideration of the above documents, other documents referred to and relied upon by

financial creditor in its petition, rejoinder filed by Financial Creditor, averments along with documents in reply/rebuttal by Corporate Debtor, a debt was due from the Corporate Debtor to the Financial Creditor and the Corporate Debtor has committed a default in the payment of the same.

11.8 Now, coming to the plea of Corporate Debtor the Financial Creditor had obtained signatures of the Corporate Debtor on blank paper and Financial Creditor fraudulently, incorrectly, unilaterally inserted in the agreement dated 16.06.2017, we have perused and considered the averments, rebuttal to it and the said agreement dated 16-06-2017. This Adjudicating Authority is of a considered opinion that such allegations made by the Corporate Debtor on the face of it are without any basis, merely a rhetoric/attempt to wriggle out of its obligations in law to pay its debt due to the Financial Creditor. We may, while rejecting this plea from the corporate debtor, reiterate reference to E-mail dated 5-08-2022 seeking restructuring of debt by Corporate Debtor.

11.9 Considering the above-mentioned documents, facts and circumstances and the law laid down and cited above, this Adjudicating Authority is satisfied that a debt was due from the Corporate Debtor to the Financial Creditor and the Corporate Debtor has committed a default in the payment of the same. Based on record/documents, we find the instant petition has been filed within the period of limitation. The debt due and in default is more than One crore Rupees. As such, the instant petition deserves to be **admitted** and is hereby admitted.”

(Emphasis supplied)

21. We are satisfied with the above findings recorded by the Adjudicating Authority in that debt and default above the threshold limit having been established, there is sufficient reason for admission of the main petition and admitting the Corporate Debtor into the rigours of CIRP. We however add that procrastinated pronouncement of order has given fodder to the Appellant in making the absurd claims of having not been heard. At this point, we cannot restrain ourselves from observing that such unreasonable and unexplained delays in delivering verdicts are not desirable. Be that as it may, the hyper-

technical and opportunistic pleas raised by the Appellant to stymie the admission of CIRP of the Corporate Debtor cannot be countenanced either.

22. For the foregoing reasons, we are of the considered view that there are no sufficient and plausible grounds made which warrant any interference with the impugned order. There is no merit in the appeal. The appeal is dismissed. No costs.

**[Justice Ashok Bhushan]
Chairperson**

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

Place: New Delhi

Date: 17.08.2023

PKM