

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1690 of 2023

(Arising out of Order dated 12.12.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-III in IA-3216/2023 in (IB)/761/(ND)/2018)

IN THE MATTER OF:

Srigopal Choudhary
Having Office At:
Flat No. 7J, Tower 3
South City, Kolkata-700068

... Appellant

Vs

SREI Equipment Finance Limited
Having Office At:
Vishwakarma, 86 C,
Topsia Road (South), Kolkata-700046

... Respondents

Present:

For Appellant: Mr. Abhishek Anand and Mr. Kushal Bansal,
Advocates.

For Respondents: Mr. Anirban Bhattacharya and Mr. Rajeev
Chowdhary, Advocates for R-1.
Mr. Ranjan Chakraborti and Mr. Vinod Chaurasia,
Advocates for RP.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 12.12.2023 passed by National Company Law Tribunal, New Delhi, Court-III, by which order IA No.3216 of 2023 filed by the Appellant to recall order dated 07.06.2023 was rejected.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:

- (i) The Corporate Insolvency Resolution Process (“**CIRP**”) of the Corporate Debtor M/s Ortel Communications Limited commenced on an Application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”) by M/s Sony Pictures Networks Ltd. by order dated 27.11.2018. The Appellant Srigopal Choudhary was confirmed as Resolution Professional (“**RP**”) by order dated 01.02.2019.
- (ii) On 20.08.2019, the Committee of Creditors (“**CoC**”) in 14th Meeting approved the Resolution Plan of M/s SREI Multiple Asset Investment Trust Vision India Fund by a voting percentage of 69.21%. The RP filed IA No.576 of 2019 under Section 31, sub-section (1) seeking approval of the Resolution Plan.
- (iii) SREI Equipment Finance Limited (Respondent No.1 herein) is the Financial Creditor of the Corporate Debtor having 53.41% vote share. On 10.08.2021, Respondent No.1 sent an email to the RP to convene a Meeting of the CoC. Another Financial Creditor of the Corporate Debtor – Karnataka Bank (having 16.76% vote share) also wrote on 10.08.2021 to the RP to convene a Meeting of the CoC. The RP on 11.08.2021 communicated that Code, do not in any manner provide for or for that matter contemplate any CoC Meeting in respect of the

Corporate Debtor, till the approval of the Resolution Plan by the Adjudicating Authority. On 18.10.2021, Respondent No.1 again requested the RP to convene a Meeting to discuss the deteriorating financial health of the Corporate Debtor and other issues. The RP did not respond to the request.

- (iv) An IA No.2121 of 2023 was filed by Respondent No.1 under Rule 11 of the NCLT Rules, 2016 praying for removal of Appellant as the RP of the Corporate Debtor. In IA No.2121 of 2023 an order was passed by Adjudicating Authority on 25.04.2023 issuing notice and asking the RP to file a reply within 10 days. The next date fixed was 12.05.2023. On 02.05.2023, the Appellant claimed to have received a notice from Counsel for Respondent No.1 informing that IA No.2121 of 2023 was listed on 25.04.2023, where the Adjudicating Authority has directed to issue notice. It is stated that notice mentioned the next date as 03.05.2023. On 03.05.2023, the case was not listed, however, Appellant being aware that 12.05.2023 is fixed, appeared before the Adjudicating Authority through his Counsel, but due to paucity of time, the case could not be taken up.
- (v) The case of the Appellant is that the Counsel of the Appellant noted next date as 08.06.2023 and when the case was not shown on 08.06.2023, he enquired and came to know that

order has been passed on 07.06.2023 allowing IA No.2121 of 2023.

- (vi) The Appellant filed IA No.3216 of 2023 on 08.06.2023 for recall of the order dated 07.06.2023, which was dismissed by order dated 12.12.2023. Aggrieved by which order this Appeal has been filed.

3. We have heard Shri Abhishek Anand learned Counsel appearing for the Appellant; Shri Anirban Bhattacharya appearing for Respondent No.1 and Shri Ranjan Chakraborti, learned Counsel appearing for RP.

4. Shri Abhishek Anand learned Counsel for the Appellant submits that Appellant in his Application – IA No.3216 of 2023 has shown cause for recall of the order dated 07.06.2023, which was *ex-parte* to the Appellant. It is submitted that Rule 49 of the NCLT Rules clearly contemplates recall of such order, which has been passed *ex-parte*. It is submitted that IA No.2121 of 2023 had been filed not in accordance with Section 27 of the Code, there being no resolution of the CoC and the Application having been filed only by one Financial Creditor, could not have been entertained. It is submitted that Counsel for the Appellant wrongly noted the date as 08.06.2023 in place of 07.06.2023, due to which no one could appear on 07.06.2023. It is submitted that the Appellant came to know about the order dated 25.04.2021 regarding filing of reply by the Appellant and the reply was being prepared, but before it could be filed, the order was passed.

It is submitted that the Adjudicating Authority committed error in rejecting IA No.3216 of 2023.

5. The learned Counsel appearing for Respondent refuting the submissions of learned Counsel for the Appellant contends that the Application filed by the Appellant under Rule 49 of the NCLT Rules was not maintainable and only remedy available to the Appellant was to file an Appeal against the order dated 07.06.2023. The order dated 07.06.2023 removing the Appellant as RP has become final. The Appellant having not filed the Appeal against the said order, he cannot be allowed to challenge the order dated 07.06.2023. It is submitted that no sufficient cause was made out in the Application – IA No.3216 of 2023. The Appellant was duly served with the notice of the Application and was well aware of the order dated 25.04.2023. The Appellant having appeared on 12.05.2023, the mentioning of the date 03.05.2023 in the Notice becomes insignificant. The present Appeal is not maintainable under Section 61, since Section 61 contemplate the Code only for a mechanism to challenge the order passed by the Adjudicating Authority under Part II of the Code. The order passed by the Adjudicating Authority under Rule 49, is not an order passed under Part II, hence, the order is not appealable under Section 61, sub-section (1) of the Code. It is submitted that the Appellant does not have any vested right to continue as RP of the Corporate Debtor.

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

7. The IA No.2121 of 2023 was filed by the Financial Creditor (Respondent No.1) seeking removal of the Appellant as RP. Copy of the Application has been brought on record by the Appellant at page 67 of the Appeal paper book. The Appellant has stated in the Application that the Financial Creditor/ Respondent No.1 has sent an email dated 10.08.2021 to RP to convene the Meeting and again on 18.10.2021, a request was made to convene the Meeting of the CoC. Another Financial Creditor – Karnataka Bank has also sent an email dated 10.08.2021 for convening a meeting, which was replied by the RP on 11.08.2021. The reply of the RP has been quoted in paragraph 14 of the Application, which is to the following effect:

“14. The R.P. in its response dated 11.08.2021 to the communications dated 10.08.2021 issued by Karnataka Bank, one of the members of the CoC categorically stated that:

“Kindly note that the provisions of the Insolvency and Bankruptcy Code, 2016, do not in any manner provide for or for that matter contemplate any COC meeting in respect of the Corporate Debtor, till the approval of the Resolution Plan by the Hon’ble Adjudicating Authority.”

A copy of the response dated 11.08.2021 preferred by the Resolution Professional is annexed herewith and marked as Annexure-6”

8. The Financial Creditor has filed the Application on the ground that RP in spite of request has not convened the meeting, hence he may be

removed. The RP has also relied on order passed by this Tribunal in **Company Appeal (AT) (Ins.) No.1443 of 2022 – Srigopal Choudary vs. SREI Equipment Finance Ltd.** dated 10.01.2023, which order was with regard to another Corporate Debtor and had upheld the removal of Appellant on an Application filed by Financial Creditor.

9. The Application- IA No.3216 of 2023 was filed by the Appellant under Rule 49 of the NCLT Rules, 2016. Rule 49 delas with ‘Ex-parte Hearing and disposal’, which is as follows:

“49. Ex-parte Hearing and disposal.- (1) *Where on the date fixed for hearing the petition or application or on any other date to which such hearing may be adjourned, the applicant appears and the respondent does not appear when the petition or the application is called for hearing, the Tribunal may adjourn the hearing or hear and decide the petition or the application ex-parte.*

(2) *Where a petition or an application has been heard ex-parte against a respondent or respondents, such respondent or respondents may apply to the Tribunal for an order to set it aside and if such respondent or respondents satisfies the Tribunal that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing (when the petition or the application was called) for hearing, the Tribunal may make an order setting aside the ex-parte hearing as against him or them upon such terms as it thinks fit.*

Provided that where the ex-parte hearing of the petition or application is of such nature that it cannot be set aside as against one respondent only, it may be set

aside as against all or any of the other respondents also.”

10. Rule 49, sub-rule (2) entitles the Respondent to apply to the Tribunal for an order to set aside the order of *ex-parte* hearing, if such Respondent satisfies the Tribunal that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing, the Tribunal may make an order setting aside the *ex-parte* hearing against him or them, upon such terms as it thinks fit. Although, submissions have been advanced by the Respondent that no Application could have been filed for recall of the order dated 07.06.2023, by which order Adjudicating Authority proceeded *ex-parte* against the Appellant and passed the order of removal, for the purpose of this case, we need not enter into the said issue and the further submission of the Respondent that Appeal against the order dated 12.12.2023 is not maintainable needs no consideration in facts of the present case.

11. When we look into Rule 49, sub-rule (2), it is clear that *ex-parte* order can be recalled on two grounds, firstly, when notice was not served or that the Respondent/ Applicant was prevented by any sufficient cause from appearing when the Application was called for hearing. The Adjudicating Authority in the impugned order, rejected the Recall Application holding that no sufficient case was shown for exercising the power under Rule 49 of the NCLT Rules, 2016. In paragraphs 23 and 24 of the order, following have been held:

“23. According to our considered view, the only cause shown by the Applicant for non-appearance on 07.06.2023 is that the Applicant noted a wrong date in the diary. It is not denied that the the Applicant’s counsel appeared and was present on 12.05.2023.

24. We do not consider it to be a sufficient cause for exercising the power under the provisions of Rule 49 of the NCLT Rules, 2016 for recalling of the order dated 07.06.2023. We further may note that on 07.06.2023 this Adjudicating Authority has appointed Mr. Ranjan Chakraborti, as a new RP in place of Mr. Srigopal Choudhary, RP.”

12. We need to consider, as to whether the reasons given by the Adjudicating Authority for rejecting the Application can be sustained. For the purpose of this case, we need not enter into other issues raised by the learned Counsel for the Respondent that Application under Rule 49 of the NCLT Rules, 2016 was not maintainable and even this Appeal also is not maintainable against the order dated 12.12.2023.

13. The Adjudicating Authority on Application filed by Respondent No.1 being IA No.2121 of 2023 issued notice on 25.04.2023 and granted 10 days’ time to file reply. The order dated 25.04.2023 is as follows:

“New IA-2121/2023:-

Heard Mr. Rajeev Chaudhary, Ld. Counsel appearing for the Applicant namely (SREI Equipment Finance Limited).

Issue notice to the Respondents. The Applicant shall serve a copy of the application to the Ld. Counsel appearing for the Resolution Professional and file proof of service and affidavit of service within one week.

The Resolution Professional is directed to file reply affidavit within ten days.

List the matter on 12.05.2023.”

14. The notice which is sent to the Appellant mentions about the order passed on 25.04.2023. According to the Appellant the said notice wrongly mentions that the case is listed on 03.05.2023, whereas the case was not listed on 03.05.2023. The Appellant has annexed the copy of the cause list, which indicates that case was not listed on 03.05.2023. The Appellant's case is that on 12.05.2023, which was the date as fixed by order dated 25.04.2023, he entered appearance through Counsel through video conferencing. In paragraph 7 of the Application, following has been stated:

“7. The Applicant through its counsel diligently ensured to keep track of the order dated 25.04.2023 passed by this Hon'ble Tribunal. The Applicant came to know the said application filed by Respondent is listed for hearing on 12.05.2023. The Applicant through its counsel ensured that that the Applicant enters appearance through video-conferencing. On 12.05.02023, the application filed by Respondent was unable to be taken by the Hon'ble Tribunal and adjourned by this Hon'ble Tribunal due to paucity of time. Despite the Applicant's counsel attending the hearing in the said matter through video-conferencing and entering attendance in the chat box of the video conferencing app, the attendance of

Applicant's counsel was not recorded in the order dated 12.05.2023. It is pertinent to note that the Applicant's counsel had at that day noted the next date of hearing as 08.06.2023.

A screenshot of the matter diary of counsel of the Applicant is marked and annexed as ANNEXURE 3.”

15. From the above, it is clear that the Appellant was well aware that case was listed for hearing on 12.05.2023 and he entered appearance through Counsel, who inspite of entering his attendance in chat box, is not shown to be present. The relevant fact to be noticed is that the Appellant was well aware of the date 12.05.2023. On 12.05.2023, according to the Appellant himself, the case could not be taken up due to paucity of time and next date was fixed. The Appellant's case is that his Counsel wrongly noted the date as 08.06.2023 instead of 07.06.2023, hence, on 07.06.2023, he could not appear and the order was passed *ex-parte* against him.

16. When a party appears on a date which is fixed before the Court, it is presumed that the party is well aware of the proceedings, which was taken up by the Court on the said date. On 12.05.2023, the next date fixed was 07.06.2023.

17. We may also notice the fact that Appellant was well aware that he has to file reply in IA No.2121 of 20223. In paragraph 8 of the Application, the Appellant has also stated that he commenced preparation of the reply, but he could not file the reply in time. In paragraph 8 of the Application, following has been stated:

“8. *Subsequently, the order dated 25.04.2023 was uploaded/available on the website of this Hon’ble NCLT on/and around 27.05.2023 i.e., after 1 month after passing of the order of this Hon’ble Tribunal. Upon perusal of the order dated 25.04.2023, the Applicant noted that this Hon’ble Tribunal had directed the Applicant to file reply in the said application filed by Respondent. The Applicant being a Respondent in the said application filed by Respondent being then apprised of the said directions of this Hon’ble Tribunal immediately commenced preparation of the reply to be filed in the said application filed by Respondent. It is submitted that the Applicant was unable to file the reply in time as the Applicant is placed out of Kolkata and there was a delay due to logistical reasons.”*

18. The fact that reply could not be filed even before 08.06.2023, indicates that the Appellant was not in compliance of the order dated 25.04.2023 and the Appellant filed the Application on next day, i.e., 08.06.2023, taking the pretext that his Counsel has wrongly noted the date as 08.06.2023. The Adjudicating Authority has not accepted the cause shown by the Appellant for non-appearance on 07.06.2023. The observation of the Adjudicating Authority that no sufficient cause to exercise the jurisdiction under Rule 49, is a decision taken by the Adjudicating Authority, which is based on relevant materials and facts brought before it, which does not suffer from any error warranting interference by this Appellate Tribunal in this Appeal.

19. In the present case, the Appellant is not denying that he was not served with the copy of the IA No.2121 of 2023, nor he denies the service of copy of Application. The fact remains that he did not file reply within the time allowed and also did not appear on 07.06.2023, when the case was taken up. We are of the considered view that Adjudicating Authority did not commit any error in rejecting IA No.3216 of 2023. The Adjudicating Authority being satisfied that no sufficient cause has been shown for non-appearance passed the impugned order dated 12.12.2023.

20. We do not find any good ground or reasons to interfere with the impugned order in this Appeal. The appeal is dismissed. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

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

NEW DELHI

3rd January, 2024

Ashwani