

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT)(Ins.) No. 1545 of 2022

&

IA No. 1325. 1447 of 2023

IN THE MATTER OF:

Mahesh Paricharak

...Appellant

Versus

Indian Overseas Bank

...Respondent

Present:

For Appellant : Mr. Anupam Lal Das, Sr. Advocate with Mr. Sinha Shrey Nikhilesh, Mr. Swastik Verma, Mr. Nayan Raj Dubey Md. Faraaz Khan and Ms. Shraddha Swaroop, Advocates.

For Respondent : Mr. Prakhar Tandon, Advocate for R-1. Mr. Sanyam Mehdirutta proxy for Mr. Aatraya Singh Mr. Ramchandra Madan, Advocate for Intervenor.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 16.12.2022, passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court II), admitting the application bearing CP No. (IB) 1083/MB/2022 filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') by Indian Overseas Bank (Financial Creditor) against M/s Utopian Sugars Limited (Corporate Debtor) for the resolution of an aggregate amount of Rs. 23,16,19,975/- which includes principal amount of Rs. 17,81,96,000/- and interest of Rs. 5,34,23,975/-. Moratorium was declared and Ritesh R. Mahajan was appointed as the Interim Resolution Professional (in short 'IRP').

2. In brief, notice in the application was issued by the Adjudicating Authority on 11.10.2022. At that time, the following order was passed :-

“NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH, COURT-II 1.

C.P.(IB)-1083(MB)/2022

CORAM:

SHRI SHYAM BABU GAUTAM JUSTICE P. N. DESHMUKH (Retd.)

HON'BLE MEMBER (T) HON'BLE MEMBER (J)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 11.10.2022

NAME OF THE PARTIES: - Indian Overseas Bank V/s Utopian Sugars Limited

APPEARANCES: -

FOR FINANCIAL CREDITOR: Adv. Mr. Prakhar Tandon

FOR CORPORATE DEBTOR: Absent

Section:

7 of Insolvency and Bankruptcy Code, 2016

ORDER

The matter is taken up through Virtual Hearing (VC). Registry is directed to issue notice to the Corporate Debtor intimating the next date of hearing and file compliance report. In addition to Court notice, Financial Creditor is also directed to issue notice to the Corporate Debtor intimating the next date of hearing by all available means (i.e. Speed Post, Email, etc.) and file affidavit of service enclosing therewith the proof of service well before the adjourned date. Counsel appearing for the Financial Creditor is directed to place on record two sets of hard copies of the Petition before the adjourned date. List this matter on 07.11.2022.”

3. On the adjourned date i.e. 07.11.2022, the following order was passed by the Adjudicating Authority:-

“NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH, COURT-II

23. C.P.(IB)-1083(MB)/2022

CORAM:

SHRI SHYAM BABU GAUTAM JUSTICE P. N. DESHMUKH (Retd.)

HON'BLE MEMBER (T) HON'BLE MEMBER (J)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 07.11.2022

NAME OF THE PARTIES: Indian Overseas Bank V/s Utopian Sugars Limited

APPEARANCE :

FOR THE FINANCIAL CREDITOR : Adv. Rohit Gupta

FOR THE CORPORATE DEBTOR : None present

Section: 7 of Insolvency and Bankruptcy Code, 2016

ORDER

The Court is convened through Virtual Hearing (VC). None present for the Corporate Debtor. Counsel appearing for the Financial Creditor seeks time to file affidavit of service. Time granted. The same be done within a period of one week from today. List this matter on 21.11.2022.”

4. In compliance of the order dated 07.11.2022, the Financial Creditor filed an affidavit of service dated 18.11.2022 which is also reproduced as under:-

MUMBAI BENCH
COMPANY PETITION (IB) NO. 1083 OF 2022

IN THE MATTER OF:
Indian Overseas Bank
Vs.
Utopian Sugars Limited

...FINANCIAL CREDITOR
...CORPORATE DEBTOR

AFFIDAVIT OF SERVICE

I, Prakhar Tandon, aged about 26 years, practicing Advocate for the Financial Creditor having address at A-1403, Akansha Heights, Worli, Mumbai - 400018 do hereby solemnly affirm and say as follows:-

1. That the copy of the advance service of the copy of the company petition has been served to the Corporate Debtor on 24th August 2022. Hereto annexed and marked **Annexure - A** is the copy of the e-mail dated 24th August 2022.
2. That the copy of the hearing notice dated 11th October 2022 has been sent to the Corporate Debtor on 12th October 2022 on the registered address Gat no. 64, Karad Road, Near Government Warehouse, Isabavi, Pandharpur - 413304 by Registered Post through "India Post" which has been "**DELIVERED**" on 14th October 2022. Hereto annexed and marked **Annexure - B** is the copy of the Tracking Report and postal receipt.
3. I say that the abovementioned facts and details are true, correct and best of my knowledge.

Solemnly Affirmed at Mumbai
On this 18th November, 2022

NOTARY
GOVT. OF INDIA
SUDHIR MADHUKAR NIRPHARAKE
PUNE
Regd.No. 691
Exp. Date 12/01/2028
GOVT. OF MAHARASHTRA

BEFORE ME
S. M. H. ZAIDI
NOTARY
Government of India
Mumbai & Thane Dist.
18 NOV 2022

Before me
NOTA
GOVT. OF INDIA
S. M. H. ZAIDI
18 NOV 2022

Deponent

5. Thereafter, the case was listed on 21.11.2022 and on that date the following order was passed:-

“NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH, COURT-II

24. C.P.(IB)-1083(MB)/2022

CORAM:

SHRI SHYAM BABU GAUTAM JUSTICE P. N. DESHMUKH (Retd.)
HON'BLE MEMBER (T) HON'BLE MEMBER (J)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE
NATIONAL COMPANY LAW TRIBUNAL ON 21.11.2022

NAME OF PARTIES: Indian Overseas Bank V/s Utopian Sugars
Limited

APPEARANCE :

FOR FINANCIAL CREDITOR : Adv. Rohit Gupta

FOR CORPORATE DEBTOR : Absent.

Section: U/s 7 of Insolvency and Bankruptcy Code, 2016

ORDER

The matter is taken up through Virtual Hearing (VC).

Counsel appearing for the Financial Creditor is present and submits that despite of various opportunities granted to the Corporate Debtor by this Bench, the Corporate Debtor has failed to remain present even today. The Order Sheet dated 11.10.2022 reads that the Registry as well as Financial Creditor were directed to issue notice to the Corporate Debtor intimating the next date of hearing by all available means i.e. Speed Post, Email, etc. and place on record the Affidavit of service enclosing therein the proof of service well before the adjourned date. On 17.10.2022 Registry issued Court Notice and compliance report is also on record. Even after service upon the Corporate Debtor by the Registry as well as Counsel, appearing for the Financial Creditor the Corporate Debtor has neither filed Reply nor has caused appearance. Consequently, this Bench has no option except to hear the Arguments of the Counsel for the Financial Creditor. Heard the submissions of the Counsel appearing for the Financial Creditor for a considerable time. Reserved for Orders.”

6. The order reserved on 21.11.2022, was pronounced on 16.12.2022. The relevant paragraph in regard to the findings is Para 7 of the impugned order which is reproduced as under:-

“We have heard the submissions of the Counsel appearing for the Financial Creditor. Having perused various records and Order sheets, we note that the Corporate Debtor failed to appear before this Tribunal on multiple occasions despite notice. It is noted that the date of default is 23rd August 2021 and this Petition is not barred by limitation. The Financial Statements attached to this Petition clearly demonstrate the total amount of loan disbursed to the Corporate Debtor. It is also evident that the Corporate Debtor committed several defaults in repayments and did not reply to the Notices and reminders issued by the Financial Creditor. Meanwhile, the admission of the Corporate Debtor's liability to

repay the said loan is well evidenced by the "Confirmation of Balance and Security" dated 9th October 2020."

7. This Appeal is filed by the suspended board of directors of the Corporate Debtor assailing the validity of the impugned order dated 16.12.2022 by which the application filed under Section 7 of the Code has been admitted. The appeal filed on 22.12.2022 was listed for preliminary hearing on 23.12.2022 in which the following order was passed by this Tribunal:-

"23.12.2022: Learned Counsel for the Appellant submits that the order passed by the Adjudicating Authority is ex-parte order. The Adjudicating Authority in its order observed that the Corporate Debtor failed to appear on multiple occasions whereas after issuance of notice 07.11.2022 was the first date on which date the Financial Creditor was granted time to file affidavit of service. Thereafter on the next date on 21.11.2022 the order was reserved. Submissions needs scrutiny.

Issue Notice.

Let reply be filed within two weeks. Rejoinder be filed within two weeks. In the meantime the order dated 16.12.2022 shall remain stayed. List this matter on 31.01.2023.

Learned Counsel for the Appellant submits that the Corporate Debtor shall not be alienating any assets."

8. Counsel for the Appellant has submitted that the Adjudicating Authority has committed an error in recording the finding that the Corporate Debtor failed to appear before the Adjudicating Authority on multiple occasions despite notice, as it is contrary to the record. In this regard, he drew our attention to the first order passed by the Adjudicating Authority on 11.10.2022. On that date a formal notice was issued by the Adjudicating Authority to the Corporate Debtor. However, in the column of appearance, absence of the Corporate Debtor was recorded though by that time the Corporate Debtor could not have been present because the notice was itself issued on 11.10.2022 and on 11.10.2022 the case was adjourned to 07.11.2022 and on 07.11.2022, the Adjudicating Authority recorded that no one appeared on behalf of the Corporate Debtor but at the same time it asked

the Financial Creditor to file an affidavit of service for which one week time was granted. It is submitted that till that time the Adjudicating Authority was not sure about the service of the Corporate Debtor and therefore, the affidavit by the Financial Creditor was asked to be filed. The affidavit of service was to be filed by 14.11.2022 but the affidavit was attested by the Financial Creditor on 18.11.2022. It is further submitted that it is recorded on the next date i.e. 21.11.2022 that the Corporate Debtor was absent but Counsel appearing on behalf of the Financial Creditor made a submission that the Corporate Debtor is not appearing despite various opportunities granted by the Adjudicating Authority and the order was reserved on the same day. It is argued that ultimately in the impugned order which pronounced on 16.12.2022, the Adjudicating Authority recorded that the Corporate Debtor failed to appear despite various opportunities granted. Counsel for the Appellant has thus vehemently argued that the Appellant was absent only on one day i.e. on 21.11.2022 and on the same day the order was reserved and later on pronounced. It is therefore submitted that the Adjudicating Authority has shown an unholy haste in proceeding against the Appellant and no proper opportunity to defend was granted.

9. In this regard, Counsel for the Respondent (Financial Creditor) has submitted that after the service was effected, the Corporate Debtor was required to appear before the Adjudicating Authority and therefore, in the case of his absence, the Adjudicating Authority has adopted the right procedure in proceeding against the Corporate Debtor ex-parte and passing an ex-parte order.

10. Besides the aforesaid facts and circumstances, during the pendency of this appeal, something more has happened, because after the order dated

16.12.2022 was stayed an application for intervention was filed by Union Bank of India claiming itself to be the creditor, alleged to have submitted its claim for an amount of Rs. 22,27,81,187.21/- with the IRP (Respondent No. 2) allegedly before the order of stay passed by this Tribunal. However, during the course of hearing, it is not disputed by Counsel appearing on behalf Intervenor that an application has separately been filed before the Adjudicating Authority in respect of the aforesaid amount which is alleged to be without prejudice to its right to Intervene in this appeal.

11. Besides the application for intervention, there were out of court of settlement between the Financial Creditor and the Corporate Debtor. This fact is recorded in the order dated 10.04.2023 passed by this Tribunal, which is reproduced as under:-

“The ‘Indian Overseas Bank’ filed an application under Section 7 of the ‘Insolvency and Bankruptcy Code, 2016’ (hereinafter referred as to ‘the Code’) against M/s. Utopia Sugars Limited. It was admitted on 16.12.2022. The Corporate Debtor has challenged the admission order, inter alia, on the ground that it has been passed behind their back as no service was affected upon them.

2. The following order was passed on 23.12.2022:

“23.12.2022- Learned Counsel for the Appellant submits that the order passed by the Adjudicating Authority is ex-parte order. The Adjudicating Authority in its order observed that the Corporate Debtor failed to appear on multiple occasions whereas after issuance of notice 07.11.2022 was the first date on which date the Financial Creditor was granted time to file affidavit of service. Thereafter on the next date on 21.11.2022 the order was reserved. Submissions needs scrutiny.

Issue Notice.

Let reply be filed within two weeks. Rejoinder be filed within two weeks. In the meantime the order dated 16.12.2022 shall remain stayed. List this matter on 31.01.2023.

Learned Counsel for the Appellant submits that the Corporate Debtor shall not be alienating any assets.”

3. Thereafter, the parties entered into an out of court settlement. The Appellant has undertaken to pay the amount of settlement to the Respondent (Financial Creditor) in tranches and the last payment has to be made on 31.03.2023.

4. Counsel for the Respondent Bank has submitted that so far part payment has been received but as per the settlement between the

parties, the concerned Branch of the Bank will not withdraw the legal cases, DRT Cases until and unless full amount of settlement is paid.

5. Keeping in view in the aforesaid facts and circumstances, hearing of this case is, thus, adjourned to 12.07.2023.”

12. The Appellant also filed an application bearing I.A. No. 1325 of 2023 for taking OTS on record under Rule 11 of the NCLAT Rules, 2016. It is averred that out of the court settlement (OCS) was sanctioned by the Financial Creditor as per which the Appellant had to pay Rs. 24 Crore i.e. 6 Crore upfront amount and 6 Crore each in three tranches. It is submitted that the amount of Rs. 24 Crore has already been paid as against the total claim of the Financial Creditor of Rs. 23,16,19,975/- set up in the application filed under Section 7 of the Code. However, Counsel for the Financial Creditor has submitted that the OCS was not only in regard to the amount involved in the present appeal but also regarding the amount of KCC account where the borrower company is a corporate guarantor. In its reply to this application, it is submitted that the amount involved in the KCC loan account of Rs. 12.40 Crore which was to be paid by the Appellant in four tranches of Rs. 3.10 Crores. It is submitted that the Appellant has already paid two tranches of Rs. 3.10 Crores i.e. Rs. 6.20 Crores but rest of the amount has not been paid, therefore, this settlement cannot be pushed forward.

13. During the course of hearing, it also transpired that the Respondent (Financial Creditor) has also filed a separate legal proceeding in respect of the KCC account which is pending adjudication.

14. Counsel for the Appellant has submitted that the amount which has been claimed in Part IV of the application filed in Form 1 is Rs. 23,16,19,975/- against which the Appellant has already paid Rs. 24 Crores which has not been disputed by the Respondent (Financial Creditor), therefore, the present

case deserves to be closed as regards the amount is concerned and in this regard Section 12A of the Code would not come to play because the CoC has not been constituted in view of the fact that the impugned order was passed on 16.12.2022, the appeal was filed on 22.12.2022 and stay was granted on 23.12.2022. It is further submitted that the interest of the Intervenor can easily be watched by relegating it to pursue its remedy already availed before the Adjudicating Authority by filing an application under Section 7 of the Code and in so far as the balance amount of KCC is concerned that can also be taken care of in the legal proceedings already pending, initiated at the instance of the Financial Creditor. In support of his submissions, Counsel for the Appellant has relied upon the following decisions of this Tribunal in the case of Bhagwandas R. Bhattad Vs. Bhattad Brother Realty Pvt. Ltd. CA (AT) (Ins) No. 95 of 2022, Vishwajeet Subhash Jhavar Vs. IDFC First Bank Limited & Anr. CA (AT) (Ins) No. 08 of 2023 and Jogendra Kumar Arora Vs. Dharmender Sharma & Anr. I.A. No. 312 & 336 of 2019 in CA (AT) (Ins.) No. 94 & 95 of 2019.

15. We have heard Counsel for the parties and perused the record with their able assistance.

16. As we have given the facts in the earlier part of this order about the manner in which the ex-parte proceedings have been carried out by the Adjudicating Authority against the Corporate Debtor making observation in the impugned order that the Corporate Debtor failed to appear on multiple occasion despite notice. This fact is not borne out from the record because the notice for the first time was issued by the Adjudicating Authority on 11.10.2022 (order Supra) for 07.11.2022 (order Supra) and on 07.11.2022, the case was adjourned to 21.11.2022 (order supra) in which the Adjudicating

Authority was not sure about the service having been effected by the Financial Creditor on the Corporate Debtor, therefore, it asked the Financial Creditor to file an affidavit of service within a week of the Corporate Debtor. However, it is pertinent to mention that both in the order dated 11.10.2022 and 07.11.2022, in the column of appearance, absence of the Corporate Debtor has been mentioned which in fact is a wrong recording of fact of absence.

17. Be that as it may, in compliance of the order dated 07.11.2022, though the affidavit of service was not filed in time yet the same was filed on 18.11.2022 and when the case was taken up on 21.11.2022, the Corporate Debtor has been shown absent and the ex-parte arguments were heard and the order was reserved as well.

18. As an abundant caution, the Adjudicating Authority should have passed the order of proceeding against the Respondent ex-parte and should have listed the case for ex-parte hearing but the case was heard on the same day and the order was reserved.

19. Thus, the observations made by the Adjudicating Authority in the impugned order that the Appellant (Corporate Debtor) remained absent on many occasions is patently erroneous and is not borne out from the record.

20. At this stage, it is made clear that we can allow this appeal for this reason alone and remand the case back to the Adjudicating Authority for deciding it again on merits but for the fact that the Appellant/Corporate Debtor has already made the entire payment of the amount which has been sought to be resolved in the application filed under Section 7 of the Code, nothing survives for adjudication either by the Adjudicating Authority or by this Appellate Tribunal because ultimately the aim is to get the resolution of the amount which is stated to be a debt in default.

21. Thus, in these facts and circumstances, in our considered opinion, nothing survives for the Respondent to recover in the application filed under Section 7 of the Code therein. The present appeal succeeds and the impugned order is hereby set aside.

22. However, before parting, we would also like to mention that in so far as the claim of the Intervenor is concerned, it has already filed a separate application under Section 7 of the Code before the Adjudicating Authority which it may pursue and the Adjudicating Authority shall decide the same without being influenced by any of the observations made in the present case. Similarly, the legal proceedings initiated by the Financial Creditor in regard to the KCC account, it may pursue the same before the Court concerned and it is observed that the said Court shall decide the same in accordance with law without being influenced by any of the observations made in the present appeal as it is restricted to the dispute between the parties in regard to the amount involved in the application filed under Section 7 of the Code in Part IV of Form 1 which has already been paid by the Corporate Debtor during the pendency of this appeal.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

New Delhi
29th August, 2023
Sheetal