

Union Of India vs Oriental Bank Of Commerce on 22 May, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
NEW DELHI
Company Appeal (AT) (Insolvency) No. 1417 of 2019

IN THE MATTER OF:

Union of India,
Ministry of Corporate Affairs
A Wing, 5th Floor, Shastri Bhawan
New Delhi-110001.

....Appellant

Vs.

Oriental Bank of Commerce
Plot No.5, Institutional Area
Sector-32, Gurgaon - 122001.

....Respondent

Present:

For Appellant: Mr. Sanjay Sorie, Director Legal MCA,
Mr. Gopal Singh and Mr. A.K. Sahoo,
Advocates for DROC.

For Respondent: Mr. Vishal Yadav, Advocate.

JUDGMENT

Venugopal M., J:

The Appellant has projected the present Company Appeal being aggrieved against the order dated 22.11.2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench.

2. The Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench while passing the impugned order on 22.11.2019 in (IB)-939(PB)/2018 had observed the following: -

"In pursuance of our direction, Mr. Manjeet Singh, Deputy ROC is present in the Court. He seeks and is granted one week time to file affidavit on the following issues:-

a) The direction issued in numerous orders of admission of petition under Section 7, 9 & 10 of the Insolvency and Bankruptcy Code have not been complied with wherein we have asked the ROC to update the master data of the Corporate Debtor so as to inform the public at large about the status of the company which has come under Corporate Insolvency Resolution Process.

b) By virtue of imposition of moratorium under Section 14, the board of directors is suspended and why the uploading by RP who represent the Board of Directors/ management of the company is not permitted. In the alternative the mechanism for uploading the data like annual accounts etc. on the website of the ROC, may be clarified.

2. The needful shall be done within a week with a copy in advance to the counsel for the applicant.

3. The parawise reply to the present company application may also be filed.

4. We further direct that in all cases of Insolvency & Bankruptcy Code and Company Petition, the Union of India, Ministry of Corporate Affairs through the Secretary be impleaded as a party respondent so that authentic record is made available by the officers of the Ministry of Corporate Affairs for proper appreciation of the matters. This shall be applicable throughout the country to all the benches of National Company Law Tribunal. The Registrar shall send a copy of this order to all NCLT benches so that respective Deputy Registrar may ensure that proper parties are impleaded." and directed the matter to be listed for further consideration on 11.12.2019.

3. It is the contention of the Appellant that the impugned order bristles with numerous infirmities and that the Adjudicating Authority does not possess the powers to pass an order, which was in the 'nature of rule' under the guise of an 'order'.

4. According to the Appellant, the 'rule making power' is the exclusive domain of the Central Government (being a subordinate legislation) and the same is required to be placed after notification before the August House of the Parliament.

5. It is represented on behalf of the Appellant that the Adjudicating Authority before passing the impugned order ought to have issued notice to the Union of India, since the subject matter in issue concerns about the imposition of a new rule, which the said Authority has no power to make especially its direction to implead.

6. It is the stand of the Appellant that the Hon'ble Supreme Court of India in the decision of "Antonio S.C. Preria v. Ricardina Noronha (D) By Lrs. - (2006) 7 SCC 740" had answered the issue, whether a 'third person' to the dispute should be heard and held that the third person must be heard in the same dispute if he or she has suffered or is likely to suffer any substantial injury by the decision of the Hon'ble Court.

7. In this connection, on behalf of the Appellant it is brought to the notice of this Tribunal that the Appellant had issued diligently, the 'Office Memorandum' to all the concerned parties by directing them to furnish a list of companies under 'CIRP, Liquidation and Master Data' for the same. Moreover, the ingredients of Section 399(2) of the Companies Act, 2013 were taken into account.

8. Mr. Sanjay Sorie, Director Legal MCA points out that a separate application is to be filed before the 'Tribunal' or 'Court' for production of documents from the 'Registrar of Companies' by virtue of Section 399(2) of the Companies Act, 2013 stands unenforceable and not as per Law. Apart from this, the direction issued in the impugned order to the effect that 'Corporate Insolvency Resolution Professional' is bound to produce the record, which can be viewed or accessed by any public person for analyzing and scrutinizing from the 'Ministry of Corporate Affairs 21 Portal'.

9. It is brought to the notice of this Tribunal on behalf of the Appellant that the Central Government had implemented Companies (Registration of Offices and Fees) Rules, 2014 and Section 399(1) (a) & (b) of the Companies Act, 2013 had provided for inspection and furnishing the certified copies of the documents kept by the Registrar on payment of requisite fees. Added further, the Tribunal was not acting as an 'Adjudicating Authority' in terms of Section 60 of the Insolvency and Bankruptcy Code, 2016. Further, the impugned order has a devastating effect, since the Adjudicating Authority (Tribunal) lacks inherent jurisdiction to pass the same.

10. Per contra, it is the contention of the Learned Counsel for the Respondent/ Bank that in the impugned order no direction was issued to the Bank and that the impugned order was passed in an Application No.2024 of 2019 filed by the Resolution Professional relating to the difficulties faced by him in carrying out the compliance of the provisions of the Companies Act, 2013 and other relevant provisions of Law. That apart, the general direction issued in the impugned order has no bearing on the Respondent and that the present Appeal is filed against the wrong Respondent. Hence, the Appeal is liable to be dismissed, in the interest of justice.

11. It is to be pertinently pointed out that if a certain thing is to be performed in a particular manner, then the same is to be done in that way. In fact, a procedural wrangle cannot be allowed to be shaken or shackled with.

12. It is axiomatic principle in law that if a third party is concerned with a dispute, that party is to be arrayed as a necessary or proper party to the adjudication of main issue centering around the dispute. Besides this, an opportunity of hearing is to be given to a third party to explain its stand. Suffice it for this Tribunal to make a pertinent mention that the rules of 'principles of Natural Justice' are to be adhered to by the Tribunal because of the latent and patent fact that the act of Tribunal/ Court/ Competent Authority shall cause no harm to any person.

13. Of course, the 'principles of natural justice' are not the edicts of a statute. The 'principles of natural justice' are not to be imprisoned in a straight-jacket cast-iron formula. Notwithstanding the same, observing the tenets of natural justice is of paramount importance in the considered opinion of this Tribunal.

14. A necessary party is a person who ought to have been arrayed as a party and in whose absence no effective order can be passed by a Court of Law/ Tribunal/ Appropriate Authority. A proper party is a party who although not a necessary party is a person whose presence will enable the Authority to effectively, efficaciously, comprehensively and adequately adjudicate upon all the controversies centering around a given case.

15. In fact, 'impleadment of parties' is only a matter of fact and not a matter of Law. Addition of parties/ striking out parties of course, is a matter of discretion to be exercised by a Tribunal/ Court based on sound judicial principles. The said discretion can be exercised either on the application of a Petitioner/ Respondent or suo-motu or on the application of a person who is not a party to any pending proceedings. However, the said discretion cannot be exercised in a cavalier and whimsical fashion.

16. Whether a party is a proper/ necessary party for an effective and efficacious adjudication of the controversy involved in a given case, although it is for the concerned Tribunal/ Court/ Authority to subjectively consider the same based on facts and circumstances of a case, which float on the surface. In this regard, with an utmost care, caution and circumspection a finding has to be rendered by passing necessary orders in a objective and dispassionate manner for impleading a party to take part in the main arena of proceedings. Undoubtedly, a notice will have to be issued to the newly impleaded party and a just, fair and final order can only be passed after hearing the Objections/ Reply of the said party. In the instant case on hand, this Tribunal on going through the impugned order dated 22.11.2019 passed by the National Company Law Tribunal, New Delhi, Principal Bench in (IB)-939(PB)/2018, is of the considered opinion that the Appellant was not provided with an adequate opportunity of being heard in the subject matter in issue, except directions being issued in regard to the filing of affidavit on the issues therein and the filing of parawise reply. The time was sought for and one week's time was granted by the Tribunal. Because of the fact that the impugned order passed by the Tribunal wherein direction was issued in all cases of the 'Insolvency & Bankruptcy Code' and Company Petition, the Union of India, Ministry of Corporate Affairs through Secretary be impleaded as a party respondent so that authentic record is made available by the officers of Ministry of Corporate Affairs for proper appreciation of the matter and this being applicable throughout the country to all the Benches of National Company Law Tribunal etc., such a wholesale, blanket and omnibus directions cannot be issued in single stroke, as opined by this Tribunal. Whether the Appellant through the Secretary, Ministry of Corporate Affairs be impleaded as a necessary Party/ even as proforma Respondent before the Tribunal is to be determined only on a case to case basis when the need of a given case arises for rumination of issues, which comes up before the respective Tribunals and when an order like the impugned one is passed by the 'Tribunal' or 'Competent Authority' without hearing the party concerned, by not following the 'principles of Natural Justice' by not initially ordering notice and not taking into consideration of the objections of that party, certainly, it will result in serious miscarriage of justice, besides causing undue hardship.

17. As a matter of facts, there is no necessity to array the Appellant/ Union of India, Ministry of Corporate Affairs, New Delhi as a party in respect of the applications filed under Section 7, 9 or 10 of IBC for the purpose of reliable record or for appreciation of the matter. Even for the purported violation under Section 68 to 77 of IBC and for taking action as per Section 236(2) of the Code whether to implead the Central Government as a proforma Respondent it is for the individual applicant to take a call because he is the 'dominus litus' although, when no relief is claimed against the Union of India, it need not even be a proforma party in an application filed under IBC, since it is an Otiose one. In public interest/ criminal offences being taken up before the special Court under Section 435 of the Companies Act, 2013 in a Company Petition/ Appeal before the Tribunal, the Union of India through any authorized officer/ person can be added as a party and in other cases it

is for the Applicant/ Appellant or for the Tribunal to take an ultimate decision for showing a person as a necessary or proper party. In case of misjoinder of a party, the Applicant/ Appellant/ the Tribunal has always the option to strike out/ remove the name of Union of India from the array of parties, in the proceedings pending before it.

18. In the present case, the 'Ministry of Corporate Affairs' was neither arrayed as a party nor impleaded in the subject matter before the Adjudicating Authority. Also, that the 'Registrar of Companies' had not filed any response/ reply/ counter (in respect of the clarification sought for) prior to the passing of the impugned order. An Adjudicating Authority (National Company Law Tribunal) has a quasi-judicial one is to abide by the principles of 'Natural Justice'. After providing a reasonable opportunity of being heard to the other side, the Tribunal can pass appropriate orders. If an order is passed by the Tribunal, without affording an opportunity of hearing to the parties, the same is unsustainable in Law as per decision *Sree Metaliks Ltd. v. Union of India* (2017) 203 Com Cases 442 : (2017) 140 CLA 30 (Cal).

19. Be that as it may, after going through the impugned order, this Tribunal comes to an inevitable and irresistible conclusion that the directions issued in respect of Application No.2024/ 19 filed by the Resolution Professional to implead the 'Secretary of Ministry of Corporate Affairs' as party Respondent in all cases of I&B Code is nothing but beyond the power of the Tribunal and it tantamounts to imposition of a new rule in a compelling fashion. In short, the impugned order making it applicable throughout the country to all the Benches of the National Company Law Tribunal is untenable one and the said order suffers from material irregularity and patent illegality in the eye of Law. As a logical corollary, this Tribunal, this Tribunal set aside the impugned order dated 22.11.2019 in (IB)-939(PB)/2018 in furtherance of substantial cause of justice. Consequently, the present Appeal succeeds.

20. In fine, the Company Appeal No.1417 of 2019 is allowed. The impugned order dated 22.11.2019 in (IB)-939(PB)/2018 passed by the National Company Law Tribunal, New Delhi, Principal Bench is set-aside for the reasons ascribed by this Tribunal in this Appeal. However, there shall be no order as to costs. I.A. No.4056 of 2019 is closed with a direction being issued to the Appellant to file the certified copy of the impugned order dated 22.11.2019 within one week from today.

[Justice Venugopal M.] Member (Judicial) [V. P. Singh] Member (Technical) [Alok Srivastava] Member (Technical) NEW DELHI 22nd May, 2020 Ash