

Agarwal Coal Corporation Private ... vs Sun Paper Mill Limited & Anr on 25 October, 2021

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

I.A. No.265/2019 in

Company Appeal (AT)(Ins.) No.412/2019

[Application filed by the Applicant/Appellant to Recall the judgment dated 16.10.2019 passed by the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT)(Ins.) No.412/2019]

In the matter of :

Agarwal Coal Corporation Pvt Ltd.

Regd. Office:

Matra Kripa, Chameli Park Near Goyal Nagar,

Indore,

Madhya Pradesh - 452001.

Applicant/Appellant

Vs.

Sun Paper Mill Ltd.

Regd. Address At:

Survey No.-11/6, Ratnapuri,

2nd Street, Koyambedu,

Chennai,

Tamil Nadu - 600107.

Respondent No. 1

Mrs. J. Karthiga

Resolution Professional

Sun Paper Mill Ltd.

Srinivas, Old No. 1052, New No. 1, 41st Street,

Korattur, Chennai,

Tamil Nadu - 600080.

Respondent No. 2

Present:

For Appellant: Mr.V.N. Dubey, Mr. Amit Dubey and Mr Rohit Dubey,
Advocates and Mr. Alam Khan, PCS

For Respondent: Mr. E. Om Prakash, Sr. Advocate with Ms Madhusmita
Bora and Mr. G. Ashokpathy, Advocates for R1.
Ms Pratishtha Vij, Advocate for R2(IRP).

ORDER

(Virtual Mode) Background:

The 'Applicant/Appellant' has preferred the instant 'I.A. No.265/ 2019' in 'Comp. App. (AT)(Ins) No.412/2019' seeking to place on record the IA No.265/2019 in Company Appeal(AT)(Insolvency) No.412/2019 1 submissions relating to the "fraudulent acts" of the "Respondents" and prays for an exercise of an "inherent power" by this Tribunal in allowing the "Application".

2. Earlier, this Tribunal, in its Judgement dated 16.10.2019 in Comp. App. (AT)(Ins) No.412/2019 (filed by the Appellant/Operational Creditor) at paragraph 10 and 11 had observed the following:-

"10. The only question arises for consideration is as to how Section 9 application was admitted if the amount is found to be Rs.2173 which is much less than Rupees One Lakh.

11. In this regard we may only mention that at the stage of admission of application under Section 9, the Adjudicating Authority is required to notice whether the record is complete and there is a 'debt' and 'default' as per decision of the Hon'ble Supreme Court in 'Innoventive Industries Ltd. v. ICICI Bank; (2018) 1 SCC 407). Even if the claim amount is disputed and is more than Rupees One Lakh, it is to be admitted, the Adjudicating Authority is not required to go into the details of verification of the claim which is required to be made by the 'Resolution Professional' and IA No.265/2019 in Company Appeal(AT)(Insolvency) No.412/2019 2 therefore, even if some record shows that claim amount is Rupees One Lakh, it is always open to the 'Resolution Professional' to collate the claim."

and had not interfered with the impugned order dated 14.03.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Division Bench, Chennai) and dismissed the 'Appeal' without costs. Applicant/Appellant's submissions:

3. According to the Learned Counsel for the Applicant/Appellant the Respondents had submitted before this Tribunal that the claim amount of the Applicant was verified by the 2nd Respondent, based on the 'Report' of one independent Chartered Accountant and on record, the said "Report" was also placed. In fact, the said Report provides that all the invoices relating to the year 2013-2014 were paid and a sum of Rs. 2173/- was outstanding. Besides this, the said 'Report' mentioned that the 1st Respondent had withheld the payment for the invoices of the year 2012-2013 and for which alleged three 'Debit Notes' No.126, 127 and 128 were issued. However, the independent 'Chartered Accountant' had not examined the validity of the aforesaid three 'Debit Notes' and the purported letter dated 06.07.2013.

4. The stand of the Applicant/Appellant is that in order to play 'Fraud' for securing favourable order had submitted the cooked up, frivolous 'Debit Notes'. As a matter of fact, the Applicant at all forum had explained the fraud played by the 1st Respondent (including to the 2nd Respondent). But the 2nd IA No.265/2019 in Company Appeal(AT)(Insolvency) No.412/2019 3 Respondent had not listened to the submissions of the 'Applicant', but accepted the erroneous 'Report' of the 'Chartered Accountant'.

5. The Learned Counsel for the Applicant points out that the 1st Respondent was engaged in manipulation of 'Books of Accounts' by means of fraudulent practices. Apart from this, the alleged custom duty obligation based on which alleged "Debit Notes" were purportedly issued was never reported even as the contingent liability in the 'Audited Financial Accounts' of the 1st Respondent furnished to the "Ministry of Corporate Affairs" for the year 2013-2014 or even thereafter till the last

'Annual Report' available on 'MCA Portal'.

6. It is represented on behalf of the Applicant that the independent 'Chartered Accountant' and the 2nd Respondent had ignored the aforesaid 'Annual Financial Statements' of the 1st Respondent available with Ministry of Corporate Affairs. Apart from this, the Applicant/Appellant has suspicion that the "CIRP" in the matter was never conducted in actual and the 2nd Respondent had only attempted to create an illusion, thereby playing fraud. Added further, notwithstanding the moratorium imposed by the Adjudicating Authority on 15.11.2017 under the I&B Code, the Suspended Board had mortgaged the Assets of the 1st Respondent/Company and created "Charge" in favour of the "Consortium of Banks" consisting of one Bank of Maharashtra (2) Allahabad Bank and (3) Union Bank of India (Charge ID No.100191948) created on 26.8.2018 (coming under the strict moratorium period and during 'CIRP') in order to obtain the loan of Rs.1,01,05,00,000/-. IA No.265/2019 in Company Appeal(AT)(Insolvency) No.412/2019 4

7. The Learned Counsel for the Applicant/Appellant submits that the Suspended Board of Directors of the 1st Respondent/Company in violation of law held a Board Meeting on 15.06.2018 at the Registered Office of the 1st Respondent/Company and resolved for mortgaging the land of Respondent No.1 admeasuring 10.10 acres situated at Aralvaimozi, Nagercoil on NH- 4TB (Chennai Nagercoil Highway), Kanyakumari Registration District, Thovalai Taluk, Thovalai Sub-registrar's Saragam, Aralvaimozhi Village, Tamil Nadu. Indeed, the 2nd Respondent had not objected to the conduct of 'Suspended Board of Directors' and passing of such 'Resolution'.

8. The plea of the Applicant is that one of the Directors of the "Suspended Board of Directors" of the 1st Respondent/Company pursuant to the aforesaid Resolution dated 15.06.2018 of the "Suspended Board of Directors" had executed the Mortgage Deed dated 28.06.2018 for mortgaging the said land of 1st Respondent.

9. The core contention advanced on behalf of the Applicant/Appellant is that the Suspended Board of Directors of 1st Respondent/Company had continued to hold the Management of the affairs of the Company and carried out its functions and decision making process, during the course of CIRP and illegally took each and every decision during CIRP in regard to the 1st Respondent/Company and executed them.

10. Further, on behalf of the Applicant, it is brought to the notice of this 'Tribunal' that Mr. Pratik Mahendra Mewada, Company Secretary of the 1st Respondent/Company had addressed his resignation letter dated 30.04.2018 IA No.265/2019 in Company Appeal(AT)(Insolvency) No.412/2019 5 to the Suspended Board of Directors of the 1st Respondent/Company, and pursuant to that, the Suspended Board of Directors had conducted an illegal Board Meeting dated 30.04.2018 had considered and allowed the same. Moreover, Mr. Chandrahas Moolya, Member of the Suspended Board of Directors had signed the appointment letter dated 01.06.2018, for the appointment of Ms Kalpana Jhalani as Company Secretary of the 1st Respondent/Company in pursuance to the illegal Board Resolution passed by the Suspended Board of Directors in their illegal Meeting held on 28.05.2018.

11. The Learned Counsel for the Applicant proceeds to point out that Ms. Kalpana Jhalani had addressed the resignation letter dated 30.08.2018 to the Suspended Board of Directors of the 1st Respondent/Company and pursuant to this, the Suspended Board of Directors held an illegal Board Meeting on 30.08.2018, considered and allowed the same. Apart from that, Mr. Vaithyalingam Anbalagan, Member, of the Suspended Board of Directors of 1st Respondent/Company filed Form No.DIR-11 at the MCA Portal on 03.08.2018 together with his resignation letter dated 28.07.2018 addressed to the Suspended Board of Directors of 1st Respondent/Company.

12. The pivotal submission made on behalf of the Applicant/Appellant is that 'Fraud' vitiates the 'entire judicial proceedings' and that if such fraudulent acts of the Respondents are permitted and the order dated 16.10.2019 passed by this Appellate Tribunal is not recalled and if the 'Appeal' is not set for 'Hearing' it will cause a huge irreparable loss not only to the Applicant but also to the whole structure established through the I&B Code.

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13. The Learned Counsel for the Applicant/Appellant while rounding up prays for allowing of IA No.265/2019 in Comp App (AT)(Ins) No.412/2019, by this Appellate Tribunal, in exercise of its inherent power, to recall the judgment dated 16.10.2019 passed by this 'Tribunal' in Comp App (AT)(Ins) No.412/2019 and to set down the 'Appeal' for fair 'Hearing' on merits. First Respondent's Contentions:

14. The Learned Counsel for the 1st Respondent submits that the main Comp App (AT)(Ins) No.412/2019 on the file of National Company Law Appellate Tribunal, New Delhi was disposed of on 16.10.2019 whereby and where under the 'Appeal' was dismissed and the same had attained finality, without there being no further proceedings against the order dated 16.10.2019.

15. The Learned Counsel for the 1st Respondent contends that the Appellant/Applicant's original claim before the Resolution Professional was allowed only to an extent of Rs.2173/-, as against the false claim of Rs.2,39,33,935/-. In reality, the Applicant/Appellant had preferred an MA No. 677/2018 on the file of the National Company Law Tribunal, Chennai against the said rejection of its claim and the said MA No.677/2018 was dismissed on 14.03.2019, against which Comp App (AT)(Ins) No.412/2019 was filed by the Appellant/Applicant and the same came to be dismissed on 16.10.2019, resting on the reason that the Applicant's claim of Rs.2,39,33,935/- was not related to the period of transaction between November, 2013 to February, 2014, and on other grounds, affirmed after IA No.265/2019 in Company Appeal(AT)(Insolvency) No.412/2019 7 going through the 'Auditors' Report that Rs. 2173/- was alone payable to the Applicant/Appellant.

16. The Learned Counsel for the First Respondent points out that the 'IBC proceedings' had culminated in an 'Approval of the Resolution Plan' and the same was complied with. Further, throughout the proceedings, the Corporate Debtor was maintained as a 'going concern' and the acts as a 'going concern' are alleged as fraudulent by way of re-agitation.

17. The Learned Counsel for the 1st Respondent refers to the decision of the Hon'ble Supreme Court in K.N. Rajkumar Vs V. Nagarajan and Ors (15.09.2021) reported in MANU/SC/0648/2021 wherein the applicability of the 'Doctrine of Functus Officio' to the IBC proceedings was upheld.

18. The Learned Counsel for the 1st Respondent points out that after the claim of the Applicant/Appellant was admitted to an extent of Rs.2173/-, MA No.677/2018 and Comp/1/2019 in CP/616/IB/CB/2018 (under Section 425 of the Companies Act, 2013) were filed. In fact, Comp/1/2019 was preferred by the Applicant as regards the purported fraud/contempt which was dismissed by the Adjudicating Authority on 14.3.2019, which had become final.

19. The Learned Counsel for the 1st Respondent submits that IA No. 265/2021 in Comp App (AT)(Ins) No.412/2019 filed by the Applicant/Appellant is not maintainable either in 'Law' or on 'Facts' and that the Applicant/Appellant falls back upon the 'inherent powers' of the 'Appellate Tribunal'.

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20. The Learned Counsel for the 2nd Respondent contends that IA No.265/2019 filed by the Applicant/Appellant is indeed a "Review Applicant" which is not maintainable ex facie before this 'Tribunal'. Also that, the allegations projected in the Application against the 2nd Respondent were earlier dismissed by IBBI.

21. The Learned Counsel for the 2nd Respondent submits that the Applicant/Appellant has not preferred any Appeal before the Hon'ble Supreme Court of India as against the order dated 16.10.2019 passed by this Tribunal in Comp App (AT)(Ins) No.412/2019 whereby, the Appeal was dismissed and that the Applicant is indulging in 'Forum Shopping' and litigating with an 'ulterior motive' and prays for the dismissal of the Application with exemplary costs.

Assessment

22. The Applicant/Appellant in IA No.265/2019 in Comp App (AT)(Ins) No.412/2019, has prayed for an exercise of inherent powers by this 'Tribunal' and to recall (Simpliciter) of the order dated 16.10.2019 pass by this Tribunal in Comp App (AT)(Ins) No.412/2019, on the ground of 'Fraud' played by the Respondents. Apart from this, a relief is sought for by the "Applicant" for setting down the Appeal for 'Hearing' on its merits, after allowing of the "Application".

23. It comes to be known that the Applicant/Appellant in IA No. 265/2019 Comp App (AT)(Ins) No.412/2019 on the file of this 'Tribunal' has sought (a) IA No.265/2019 in Company Appeal(AT)(Insolvency) No.412/2019 9 the relief to place on record the submissions pertaining to the fraudulent acts of the Respondents, besides other reliefs as mentioned Supra.

24. The Applicant/Appellant has preferred IA No.265/2019 in Comp App (AT)(Ins) No.412/2019 seeking necessary reliefs as referred to earlier obviously under Rule 11 "Inherent Powers" of National Company Law Appellate Rules, 2016 (although the relevant Rule was not mentioned by the

Applicant/Appellant at the time of filing of the Application). In this connection, it is useful to refer to Rule 11 of NCLAT Rules which runs to the following effect:-

"11. Inherent powers- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary in meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal."

Ambit of Review:

25. It is to be noted, the dictionary meaning of the term 'Review' is the act of looking, over something again with a view to correction or improvement as the case may be. It must be borne in mind that the "Power of Review" is a creature of Statute and it is not an 'inherent power' as per decision of the Hon'ble Supreme Court in Lily Thomas V. Union of India reported in AIR 2000 Supreme Court Page 1650 at Special Page 1652. In fact, "Review" is not an 'Appeal' in disguise. In "Review" re-appraisal of materials is IA No.265/2019 in Company Appeal(AT)(Insolvency) No.412/2019 is impermissible as per decision in Jiura Oraon V. The State of Jharkhand, 2014 (3)JCR 100 (Jhar).

26. Resting upon 'Review' the "Tribunal" would not rehear the parties on 'Facts' and 'Law'. No wonder, a re-appraisal of evidence on record for unearthing an error will amount to an exercise of 'Appellate Jurisdiction'

which is not permitted in Law. A "Review" is not to be sought for a 'Fresh Hearing' or 'Arguments' or 'Correction of an erroneous view' taken earlier. To put it precisely, the contentions raised and determined in main proceedings are not to be reopened/re-agitated under the garb of "Review Petition" as per decision Sharada Bai V. Padamlal, 2003 All India High Court Cases 1756 (1757) (Andhra Pradesh). Also for correcting an erroneous decision, "Review"

will not lie, as opined by this "Tribunal". Further, the Hon'ble Supreme Court in Patel Narshi Thakershi vs. Pradyumansinghji Arjunsinghji reported in AIR 1970 Supreme Court 1273 had observed and held that 'power of Review' is not an 'inherent power'.

Power to Recall

27. It is the well laid down proposition of law that 'in the absence of any power of 'Review' or 'Recall' vested with the 'Adjudicating Authority' - 'Appellate Authority', an order/ judgment passed by it cannot be either Reviewed or Recall as opined by this Tribunal.

28. As far as the present case is concerned, it is to be pointed out pertinently that the Applicant/Appellant filed MA No.677/2018 on the file of the National Company Law Tribunal, Chennai against the rejection of its claim. As a matter of fact, before the Resolution Professional the IA No.265/2019 in Company Appeal(AT)(Insolvency) No.412/2019 11 Appellant/Applicant's claim

was permitted to a sum of Rs.2173/- as against the claim of Rs.2,39,33,935/- and that the said MA No.677/2018 came to be dismissed on 14.03.2019, as against the said dismissal order, Comp App (AT)(Ins) No.412/2019 was preferred by the Appellant before this Tribunal, which resulted in dismissal on 16.10.2019.

29. It is not in dispute that as against the judgment dated 16.10.2019 in Comp App (AT)(Ins) No.412/2019 (in the matter of Agarwal Coal Corporation Pvt Ltd V Sun Paper Ltd & Anr) passed by this "Appellate Tribunal" dismissing the Appeal, the Applicant/Appellant has not preferred an "Appeal" to the Hon'ble Supreme Court of India as per Section 62 of the I&B Code, 2016. Therefore, it is crystalline and clear that the judgment dated 16.10.2019 passed by this Tribunal in Comp. Appl. (AT)(Ins) No.412/2019 between the parties inter se has become 'conclusive', 'final' and 'binding'.

30. A mere reading of the contents of IA No.265/2021 in Comp App. (AT)(Ins) 412/2019 indicates latently and patently that although in the preamble it is mentioned as "Recall Application" yet it is only an "Application" praying for "Review" of the Order dated 16.10.2019 passed in Comp App (AT)(Ins) No.412/2019 by this Tribunal, in stricto sense of the term.

31. It cannot be gainsaid that there is no express provision for "Review" under the National Company Law Appellate Tribunal Rules, 2016. Moreover, the Applicant/Appellant cannot fall back upon Rule 11 of the NCLAT Rules, 2016 which provides for "inherent powers". In fact, Rule 11 of NCLAT Rules, 2016 is not a substantive Rule which showers any power or jurisdiction upon IA No.265/2019 in Company Appeal(AT)(Insolvency) No.412/2019 12 the "Tribunal". Undoubtedly, the "Tribunal" has no power to perform an act which is prohibited by Law.

32. In view of the upshot, this Tribunal taking note of the prime fact that the Applicant/Appellant has sought for "recalling" the judgement dated 16.10.2019 passed by this Appellate Tribunal in Comp App (AT)(Ins) No.412/2019 etc., which is impermissible in Law and that this 'Tribunal' is of the earnest opinion that the appropriate course of action open to the Applicant / Appellant is to approach the Hon'ble Supreme Court of India as against the judgement in Comp App (AT)(Ins) No.412/2019 dated 16.10.2019 passed by this "Tribunal" if it so desires/advised. Looking at from that perspective, the I.A. No.265/2019 in Comp App (AT)(Ins) No.412/2019 is devoid of merits and it fails.

Conclusion:

In fine, the IA No.265/2019 in Comp App (AT)(Ins) No.412/2019 is dismissed. No order as to costs.

[Justice M. Venugopal] Acting Chairperson [Mr. V.P. Singh] Member (Technical)
[Dr. Ashok Kumar Mishra] Member (Technical) 25th October, 2021 Shashi IA
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