Adish Jain vs Sumit Bansal & Anr on 3 February, 2021

National Company Law Appellate Tribunal, New Delhi
Review Application No. 13 of 2020
in
COMPANY APPEAL (AT) (Insolvency) No. 379 of 2020

IN THE MATTER OF:

Adish Jain S/o Mohinder Jain
Shareholder of Corporate Debtor,
M/s. J.P. Engineers Pvt. Ltd.
A Private Limited Company having
Its registered office at 3/8, IInd Floor,
Asaf Ali Road, New Delhi - 110002. .....Applicant

Versus

1. Sumit Bansal
Insolvency Resolution Professional
of Corporate Debtor,
M/s. J.P. Engineers Pvt. Ltd.,
Preeti Sumit Bansal and Co.
Chartered Accounts,
B-11, 1st Floor, RDC Rajnagar Court Road,
Ghaziabad, Uttar Pradesh - 201002 ...Respondent No.1.

2. Worldwide Metals Private Limited
A Public Limited Company
Having its registered office
at 404, 4th Floor, Aditya Tower,
Laxmi Nagar, District Centre,
Vikas Marg, Delhi - 110092
Through its Director ...Respondent No. 2.

Appellants: Shri Sakesh Kumar and Ms. Gitanjali N. Sharma, Advocates
Respondent: None.

ORDER

[Per; Shreesha Merla, Member (T)]

1. This Review Application is filed under Section 22 of the Recovery of Debts and Bankruptcy Act, 1993 (RDBA in short) and Rule 11 of the NCLAT Rules seeking review of the Order dated 10.08.2020, passed by this Tribunal in Company Appeal AT (Ins.) No. 379 of 2020, whereby this Tribunal had dismissed the Appeal preferred by the Applicant/Appellant challenging the Order of the Learned Adjudicating Authority, which had admitted the Application under Section 9 of

Insolvency and Bankruptcy Code, 2016 (IBC in short) preferred by Respondent No. 2/Operational Creditor.

2. Learned Counsel appearing for the Review Applicant submitted that this Tribunal did not consider that the genuineness of the signature of one Mr. Vikas Gandhi, who had left employment of the Company, could only be proved by leading evidence in a Civil Court; that the reconciled accounts signed by the Operational Creditor for the period 04.11.2016 to 31.03.2017 (pages 361 to 364 of the original Appeal) and for the period 01.04.2017 to 31.03.2018 (pages 365 to 380) were not considered; that the confirmatory letters exchanged between the Applicant and the sister concerns of both the Applicant and the Respondent No. 2/ Operational Creditor for the period 21.10.2017 to 30.04.2018 (pages 429 to 460 and 464 to 466) and the journal entries mentioned in the replies dated 28.08.2018 and 05.11.2018 were also not considered by this Tribunal.

3. Learned Counsel for the Review Applicant drew our attention to the grounds raised before this Tribunal with respect to his submissions that there was a 'Pre-Existing Dispute';

> "v. Because the NCLT has failed to appreciate that notice of dispute need not contain the entire gist of dispute as long as it is mentioned that there have been journal entries have been passed, reconciliation statements made and that no amount is due and payable by the Corporate Debtor to the Operational Creditor.
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> viii. Because the Hon'ble NCLT has erred in holding that disputes raised by the Corporate Debtor is Company Appeal (AT) (Insolvency) No. 379 of 2019 illusory and moonshine specially when the ledger of the Corporate Debtor has been reconciled and admitted by the Operational Creditor by signing the same. Further, these accounting entries in the ledger of the Corporate Debtor have been backed by inter se letters exchanged between the Operational Creditor, Corporate Debtor and sister concerns of the Corporate Debtor.
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> xii. The Hon'ble NCLT has erred in relying on the bank statement of the Operational Creditor and ought to have questioned the Operational Creditor's narration of payment which is misleading. Under such scenario the NCLT ought to have called upon the Corporate Debtor to produce its bank account before confirming the bank statement of the Operational Creditor".

It is the case of the Review Applicant that the accounts were reconciled with the sister concerns and therefore no amount was 'due and payable' and hence there is an 'error apparent on the face of record' and sought for remanding the matter to the Learned Adjudicating Authority for a de novo consideration.

4. It is pertinent to mention that on an Appeal preferred by the Review Applicant/Appellant before the Hon'ble Supreme Court of India in Civil Appeal No. 2960 of 2020, the Hon'ble Apex Court dismissed the Appeal on 04.09.2020, observing as follows;

> "Heard the learned Senior Counsel appearing for the appellant. We do not find any reason to interfere with the impugned order dated 10.08.2020 passed by the National Company Law Appellate Tribunal, New Delhi.
>
> Accordingly, the appeal is dismissed.
>
> Pending applications stand disposed of."

Thereafter a Review Petition/Civil No. 1824 of 2020 was preferred by the Review Applicant/Appellant and the Hon'ble Supreme Court while rejecting the Review Petition on 03.11.2020, ordered as follows;

Company Appeal (AT) (Insolvency) No. 379 of 2019 "Review Petition is rejected as it is always open to the petitioner to file a review petition before the National Company Law Appellate Tribunal, if it is otherwise permissible in law."

(Emphasis Supplied)

5. This Tribunal has no inherent power to review its own Order. We have heard this Review Applicant at length considering the directions of the Hon'ble Supreme Court. Question is, whether it is otherwise permissible in law for this Tribunal to "Review" its Judgement passed in Appeal.

6. The Learned Counsel for the Review Applicant filed this Application under Section 22 of the RDBA and Rule 11 of NCLAT Rules and submitted that this Tribunal is bound by the provisions under the Code of Civil Procedure, 1908. This Tribunal is not constituted by RDBA. It is established under Companies Act 2013, and conferred with jurisdiction as per provisions of IBC. It is a well settled proposition that a Court or Tribunal has no Jurisdiction to review its Orders unless authorized by a statute as per the decision 'Fernandes' V/s. 'Ranga Nayakulu' AIR 1953 Mad. 236.

7. On the question of power to 'Review' under Order 47 Rule 1, C.P.C. 1908, in its earlier decision, the Hon'ble Supreme Court in 'Satyanarayan Laxmi Narayan Hegde & Ors.' v. 'Mallikarjun Bhavanappa Tirumale', MANU/SC/0169/1959 : 1959 (SLT Soft) 10 : (1960) 1 SCR 890, made certain observations, which was followed by Hon'ble Supreme Court, in 'State of Punjab' v. 'Darshan Singh', MANU/SC/0843/2003 : VI (2003) SLT 582 : IV (2003) CLT 375 (SC) : AIR 2003 SC 4179, relevant portion of which is quoted herein :-

> "An error which has to be established by a long drawn process of reasoning on point where there may conceivably be two opinions can hardly be said to be Company Appeal (AT) (Insolvency) No. 379 of 2019 an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the power of the Superior Court to issue such a writ."

(Emphasis Supplied)

8. In 'Bijay Kumar Saraogi' v. 'State of Jharkhand' (supra), the Hon'ble Supreme Court dealt with provision of Section 152 of the Code of Civil Procedure and held as follows;

> "3. We find no reason to interfere with the order of the High Court because a mere perusal of Section 152 makes it clear that Section 152 CPC can be invoked for the limited purpose of correcting clerical errors or arithmetical mistakes in the judgement. The section cannot be invoked for claiming a substantive relief which was not granted under the decree, or as a pretext to get the order which has attained finality reviewed. If any authority is required for this proposition, one may refer to the decision of this Court in State of Punjab v. Darshan Singh."

9. In 'State of Punjab' v. 'Darshan Singh' (Supra), the Hon'ble Supreme Court dealt with provisions of Section 152 of the Code of Civil Procedure and observed as follows:

> "Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very Court or the Tribunal cannot, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The Company Appeal (AT) (Insolvency) No. 379 of 2019 powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the Court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which the proper remedy for the aggrieved party if at all is to file appeal or revision before the higher Forum or review application before the very Forum, subject to the limitations in respect of such review. It implies that the section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the Courts below have been liberally construing and applying the provisions of Sections 151 and 152 of Code even after passing of effective orders in the list pending before them. No Court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order."

(Emphasis Supplied) Inherent Powers

10. Rule 11 of the 'National Company Law Appellate Tribunal' Rules, 2016 speaks of 'inherent powers' and the same is reproduced as hereunder;

> "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 directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal".

Companies Act, 2013

11. Section 420(2) of the Companies Act, 2013 reads as under;

> "(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any Company Appeal (AT) (Insolvency) No. 379 of 2019 order passed by it and shall make such amendment, if the mistake is brought to its notice by the parties:-
>
> Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act."

12. This Appellate Tribunal while dealing with the scope of power conferred under Rule 11 in 'Action Barter Private Limited V/s. SREI Equipment Finance Limited & Anr.' I.A. Nos. 811/2020, 917/2020, 962/2020 & 1587/2020 in Company Appeal (AT) (Insolvency) No. 1434 of 2019 held as under;

> "6. ..... Rule 11 is merely declaratory in the sense that this Tribunal is armed with inherent powers to pass orders or give directions necessary for advancing the cause of justice or prevent abuse of the Appellate Tribunal's process. Even in absence of Rule 11 this Appellate Tribunal, being essentially a judicial forum determining and deciding rights of parties concerned and granting appropriate relief, has no limitations in exercise of its powers to meet ends of justice or prevent abuse of its process. Such Powers being inherent in the constitution of the Appellate Tribunal, Rule 11 can merely be said to be declaring the same to avoid ambiguity and confusion. Having said that, we are of the firm view that the Rule cannot be invoked to revisit the findings returned as regards the assertion of facts and pleas raised in the appeal and it is not open to re-examine the findings on questions of fact, how-so-ever erroneous they may be. The mistake/error must be apparent on the face of the record and must have occurred due to oversight, inadvertence or human error. Of course it would be open to correct the conclusion if the same is not compatible with the finding recorded on the issues raised. We accordingly decline to entertain any plea in regard to the merits of the matter involved at the bottom of the appeal and confine ourselves to the interpretation of the findings recorded and the conclusions derived therefrom as regards fate of the application under Section 7 of I&B Code filed by the Financial

> Creditor and the disposal of appeal."

Company Appeal (AT) (Insolvency) No. 379 of 2019

13. It is significant to mention that in the NCLAT Rules, 2016 there is no express provision for 'Review' and the contention of the Review Applicant that Rule 11 of the NCLAT Rules, 2016 is applicable and therefore this Application is maintainable, is untenable as the power vested in this Tribunal under Rule 11 can only be exercised to enhance cause of justice or prevent abuse of process. To reiterate, Power of Review has to be granted by statute and the 'power of Review' is not an inherent power and therefore cannot be exercised unless conferred specifically or by necessary implications.

14. The error must be a 'patent error' which is 'manifest' and 'self-evident'. The submissions of the Review Applicant in this case would amount to re- appraisal of evidence and findings of fact cannot be revisited within the limited scope of exercise of powers under Rule 11. This Tribunal has also discussed the Power of 'Review' in detail in 'Anubhav Anilkumar Agarwal' V/s. 'Bank of India and RNA Corp. Pvt. Ltd. in Review Application (AT) No. 15 of 2020 in Company Appeal (AT) (Insolvency) No. 1504 of 2019. This Appellate Tribunal in Company Appeal (AT) Nos. 105, 107, 108 and 110 to 112 of 2018 decided on 08.08.2018, agreed with the conclusion of the Ld. NCLT which in turn had referred to Judgements in the matter of 'Assistant CIT' V/s. 'Saurashtra Kutch Stock Exchange Ltd.' reported in [2008] 305 ITR 227 (SC) and observed 'It is well-settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. No provision in the Act was brought to (our) notice from which it could be gathered that the Government had power to review its Company Appeal (AT) (Insolvency) No. 379 of 2019 own orders. If the Government had no power to review its own order, it is obvious that its delegate could not have reviewed its order.'

15. Dealing with the scope of review in 'Lily Thomas and Ors. Vs. Union of India & Ors.' reported in (2000) 6 SCC 224, the Hon'ble Apex Court summed up its conclusions as under:-

> "56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review...."

16. We are of the considered view that the decision of the Hon'ble Supreme Court in 'Lily Thomas and Ors. Vs. Union of India (Supra) applies. The correction of the Judgement sought for in the present Review Application is impermissible in Law.

17. Be that as it may, we have considered the submissions of the Learned Counsel for the Review Applicant and find no substantial grounds warranting our interference in our limited Jurisdiction drawn from Section 420 of the Companies Act, 2013. We had in our Judgement dated 10.08.2020 observed in Paras 5 & 6 as under;

"5. A perusal of the letters, journal entries relied upon by the Counsel for the Appellant show several discrepancies. One such transaction received from M/s Oyster Steel and Iron Pvt. Ltd. alleged to have been signed by one Mr. Vikas Gandhi is dated 30.04.2018, whereas the material on record evidences that the said Mr. Gandhi had already resigned on 22.01.2018 and was paid all his emoluments and therefore the submission of the Learned Counsel for the Appellant that the said sister concern M/s. Oyster Steel and Iron Pvt. Ltd. had confirmed the accounting entries in the ledger, inspires no confidence. This is apart from the fact that signatures purporting to be of Mr. Gandhi being pointed out by Appellant do not match even on bare reading of his service record. We find force in the contention of the Learned Counsel appearing for the Company Appeal (AT) (Insolvency) No. 379 of 2019 Operational Creditor that the Articles of Association of the Company mandate the presence and signature of the Director wherever the stamp of the Company is used and he placed reliance on the ratio laid down by the Hon'ble Supreme Court, in Kotla Venkataswamy V/s Chinta Ramamurthy, AIR MAD 579. Additionally, the material on record shows that the ledger which the Appellant is relying upon and states that they have been signed by the Operational Creditor and M/s Oyster Steel and Iron Pvt. Ltd. are dated 01.04.2019 whereas the Operational Creditor had demanded the same debt from the Corporate Debtor in the notices dated 17.08.2018 and 27.10.2018. Further, there are no substantial reasons given as to why only the ledger of the Corporate Debtor depict these entries and the same are not reflected in the ledger of the Operational Creditor when it is the specific case of the Appellant that both sides have confirmed these accounts.

6. The submission of the Counsel for the Appellant that amounts of Rs. 1,95,79,294/- and Rs. 1,95,34,823/- dated 21.10.2017 and 10.11.2017 respectively are reflected in the journal entries in the ledgers of the sister concern M/s Olympus Metal Private Limited is unsustainable specially keeping in view the evidence on record and the specific pleading by the Operational Creditor in their Rejoinder that these amounts have been paid to them through RTGS Bank transfer. There are no substantial reasons given by the Corporate Debtor for having sent a letter authorising the transfer of the same amount in favour of a third Party, when the same amounts have admittedly been paid to the Operational Creditor itself. Hence, we find force in the contention of the Learned Counsel appearing for Operational Creditor that these two amounts were never claimed as 'Operational debt' as they have already been paid. In the reply to the legal notice, the Corporate Debtor has specifically stated that as on 31.03.2018 all amounts have been reconciled between both the Parties, but remain silent about any subsequent transactions. Even in the reply to the demand notice dated 05.04.2018 there is no specific pleading with respect to any dispute regarding quality, quantity, price of the goods and services per se. It is significant to mention that in the statement of 'Confirmation of Accounts', relied upon by the Appellant, is dated 01.04.2019 and is for the period subsequent to 31.03.2018. This document date is subsequent to the issuance of the demand notice and there are no tenable grounds to explain the reasons for the Operational Creditor to have signed this document,

> specially keeping in view that the 'Confirmation of Accounts' shows 'Nil' balance. To reiterate, there is no documentary evidence filed by the Appellant to substantiate their plea that all accounts have been reconciled and signed by both the Parties except for filing these confirmatory letters which portray so many Company Appeal (AT) (Insolvency) No. 379 of 2019 discrepancies and therefore, inspire no confidence. Both the defences raised by the Appellant's Counsel are mutually exclusive and cannot co-exist as a debt cannot be disputed and discharged at the same time. We are of the considered view that the Appellant did not raise any plausible contention requiring further investigation and the argument raised is not substantiated by any evidence. Hence, we are of the opinion that the 'dispute' does not truly exist in fact and is spurious and the principle laid by the Hon'ble Supreme Court in Mobilox Innovations Pvt. Ltd. (Supra) is squarely applicable to the facts of this case."

Considering the above with the Application now filed and considering the submissions made, it appears to us that the Appellant is trying to have a re-hearing which is not permissible.

18. We observe that there is no 'mistake apparent from the record' and the Applicant cannot be permitted to seek re-hearing of the Appeal in regard to any finding which would amount to sitting in an Appeal in disguise. In the garb of this Review Application, the Applicant seeks to re-argue the matter.

For all the aforenoted reasons, this Review Application is dismissed as impermissible in Law and as no mistake apparent from the record is made out. No order as to costs.

[Justice A.I.S. Cheema] Member (Judicial) [Justice Anant Bijay Singh] Member (Judicial) [Ms. Shreesha Merla] Member (Technical) NEW DELHI 03rd February, 2021 ha Company Appeal (AT) (Insolvency) No. 379 of 2019