

**National Company Law Appellate Tribunal, New Delhi**

**Principal Bench**

**COMPANY APPEAL (AT) (Insolvency) No. 178 of 2021**

(Arising out of Order dated 09<sup>th</sup> December, 2020 passed by National Company Law Tribunal, Guwahati Bench, Guwahati in IA No. 45 of 2020 in Company Petition (IB) No.- 04/GB/2020

**IN THE MATTER OF:**

**Ms. AKJ Fincap Limited  
Through its Authorised Representative  
Registered Office at: C – 8,  
Greater Kailash – I,  
New Delhi – 110048  
Email: [aftabktr@gmail.com](mailto:aftabktr@gmail.com)**

**.....Appellant**

**Versus**

**Bank of India  
Registered Head Office at:  
C – 5, G Block, Bandra Kurla Complex  
Bandra East, Mumbai – 400051**

**Also at:  
Guwahati SME Branch, Killa Building  
1<sup>st</sup> Floor, Christian Basti, GS Road, Guwahati  
PO Dispur and District Kamrup (M)  
Pin – 781005  
Email: [subratadutta.guwahati@gmail.com](mailto:subratadutta.guwahati@gmail.com)**

**...Respondent**

**WITH**

**COMPANY APPEAL (AT) (Insolvency) No. 179 of 2021**

(Arising out of Order dated 18<sup>th</sup> March, 2020 passed by National Company Law Tribunal, Guwahati Bench, Guwahati in Company Petition (IB) No.- 04/GB/2020

**IN THE MATTER OF:**

**Ms. AKJ Fincap Limited  
Through its Authorised Representative  
Registered Office at: C – 8,  
Greater Kailash – I,  
New Delhi – 110048  
Email: [aftabktr@gmail.com](mailto:aftabktr@gmail.com)**

**.....Appellant**

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**Registered Head Office at:**  
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**Pin – 781005**  
**Email: [subratadutta.guwahati@gmail.com](mailto:subratadutta.guwahati@gmail.com)**

**...Respondent**

**Appellant: Mr. Abhinav Hansaria, Advocate.**  
**Respondent: Mr. Nipun Dave and Mr. Aditya Kumar, Advocate.**

## **J U D G E M E N T**

**[Per; Shreesha Merla, Member (T)]**

1. Aggrieved by the Impugned Order dated 09.12.2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Guwahati Bench, Guwahati) in I.A. No. 45 of 2020 in CP (IB) No. 04/GB/2020 filed by *M/s. AKJ Fincap Limited*, Appellant herein, *inter alia* seeking setting aside of the ex-parte Order dated 18.03.2020, preferred these Appeals. The Adjudicating Authority dismissed the IA on the ground that the Tribunal *has no power to review or set aside its own Company Petition Admission Order as per settled proposition of law.*

2. An Application was filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in Short the ‘**IBC**’) filed by M/s. Bank of India (the ‘Financial Creditor’) and an ex-parte Order was passed by the Adjudicating Authority on 18.03.2020 observing that Notice was served on the ‘Corporate Debtor’, but there was no appearance.

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**Submissions on behalf of the Learned Counsel for the Appellant:**

3. Learned Counsel submitted that the Section 7 Application came up for hearing for the very first time on 10.02.2020 and Notice was issued to the Appellant returnable on 25.02.2020; on 25.02.2020 the Adjudicating Authority observed that the Notice sent to the Appellant, had returned with an endorsement 'insufficient address' and directed issuance of fresh Notice and also directed the Respondent to serve copy of the same upon the Appellant and the matter was posted for Hearing on 18.03.2020. While so, on 15.03.2020, the Adjudicating Authority had directed that apart from matters which require urgent Hearing, it would not take up matters listed from 16.03.2020 to 27.03.2020 on account of the Covid situation; the Appellant became aware of the pendency of the Section 7 Application only when the Counsel came across the same on the website; the Appellant was proceeded ex-parte on 18.03.2020 solely on the basis of the submissions of the Respondent that the Notice has been served upon them; aggrieved by that Order the Appellant filed I.A. No. 45 of 2020 seeking a direction to set aside the ex-parte Order, which was taken up for Hearing on 07.10.2020 and a Notice was issued to the Respondent to file their Reply; on 11.11.2020 the matter was listed again for hearing on 25.11.2020 and the I.A. was dismissed without considering the provisions under Rule 49(2) of the NCLT Rules, 2016.

4. Learned Counsel for the Appellant strenuously argued that the Adjudicating Authority has the power to set aside this ex-parte Order, but

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has erroneously dismissed the I.A. on the ground that the Order dated 18.03.2020 dealt with 'Admission of the Application' filed under Section 7.

**Submissions on behalf of the Learned Counsel for the Respondent:**

5. Learned Counsel appearing for the Respondent contended that service was effected twice by e-mail; that the address mentioned in Company Master Data is C – 8, Greater Kailash – 1, New Delhi, South Delhi – 110048 IN, is the same address mentioned in the Memo of Parties provided in this Appeal; that the 'Corporate Debtor' was dodging receipt of Notice; that the Appellant had never disclosed as to when, according to them service was actually effected upon them, which itself demonstrates that they are deliberately avoiding service; that though the Appellant was set ex-parte on 18.03.2020, they are not precluded from arguing the matter and filing brief Written Submissions in support of their arguments and that the Appellant was aware of the fact that Section 7 Application was listed on 18.03.2020 but did not chose to appear and therefore the Learned Adjudicating Authority has rightly passed the ex-parte Order.

**Assessment:**

6. The Learned Counsel for the Appellant drew our attention to the Notice dated 15.03.2020 whereby the Learned Adjudicating Authority had noted that the matters listed from 16.03.2020 to 27.03.2020 would be adjourned except for those which required urgent Hearing on a request made by the concerned parties.

7. Annexure-3 is the postal receipt and postal track report filed as proof of service on the 'Corporate Debtor' in compliance with the Order dated

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10.02.2020, passed by the Learned Adjudicating Authority. A perusal of this Annexure shows that the Notice sent on 21.02.2020 to the registered address was not delivered on account of 'insufficient address'. On 25.02.2020 fresh Notice was ordered to be issued on furnishing correct address of the Appellant and the matter was posted to 18.03.2020. The Order dated 18.03.2020 is reproduced as hereunder;

*"Mr. S. Dutta, advocate appearing for the FC is present and filed service affidavit stating that the service of notice on the CD is affected through speed post and also through email dated 28.02.2020. Service is held sufficient. None appeared for the CD. Cd is set ex-parte.*

*2. Call on for hearing on 31.03.2020."*

8. While dismissing the I.A. preferred by the Appellant herein seeking to set aside the ex-parte Order 18.03.2020, the Learned Adjudicating Authority has observed as follows;

*"11. We have heard both the sides and perused the records. The respondent herein i.e. the learned Counsel for the FC has informed that they had also sent the copy of the petition to the respondent (petitioner here) through email. Further, in the Reply Affidavit on behalf of the FC/respondent to this application, it is stated that the notice has been duly served upon the applicant herein at the correct and recorded address of the applicant that had been reflected in the Master Data of the applicant Company procured from the Ministry of Corporate Affairs which has been annexed as Annexure – IAB.1 at page 283 of the Section 7 petition. Hence, the contention of the applicant that notice was not served upon the applicant is correct.*

*12. After perusal of the records, finding that there was no response at all from the side of the present applicant even after service of notice at the address recorded in the applicant Company Master Data, this Tribunal admitted the main **Company Petition being***

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**CP (IB) NO.04/GB/2020 by passing an ex-parte Order on 18.03.2020.**

13. It is pertinent to mention here that the CD has conveniently omitted to deal with the receipt of the notice sent by the FC to the email of the CD to suit their convenience. As per law laid down by the Hon'ble Supreme Court as well as by various High Courts, service of notice to email and/or whatsapp is considered as valid mode of service and, therefore, there is no force in the contentions raised by the applicant/CD and the applicant/CD has not approached this Tribunal with clean hands.

14. This Tribunal, being a Quasi-Judicial Authority, has no power to review or set aside its own Company Petition Admission Order as per settled proposition of Law. Hence, the prayer made in this IA to set aside the Order of Admission of the Application filed under Section 7 of the IBC by this Bench on 18.03.2020, is not legally sustainable and accordingly stands rejected.”

*(Emphasis Supplied)*

9. Learned Adjudicating Authority has dismissed the I.A. on the ground that they do not have powers to review or set aside the Order of Admission under Section 7. At this juncture, we find it relevant to reproduce Rule 49(2) of the NCLT Rules, 2016;

**“49. Ex-parte Hearing and disposal.-**

(1) ....

(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 upon such terms as it thinks fit.”*

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10. From the aforementioned Order dated 18.03.2020 reproduced in Para 7, it is evident that no Order of Admission has been passed and it was only an Order setting the Appellant herein ex-parte.

11. Having regard to the fact that 18.03.2020 falls during the Covid-19 period and the restrictions imposed by the Government read together with the Notice issued by the Learned Adjudicating Authority on 15.03.2020 that matters posted during the period 16.03.2020 to 27.03.2020 would be adjourned, except for urgent matters, keeping in view Principles of Natural Justice, we are of the considered opinion that an opportunity may be given to the Appellant herein to file his Reply and take part in the proceedings. Further, it is an admitted fact that the Appellant before the Adjudicating Authority is a guarantor of Agnipa Energo Private Limited whose Petition is already pending before the Adjudicating Authority. Therefore, the Order setting the Appellant herein ex-parte is set aside. Though we are of the considered view that the Adjudicating Authority had the power to set aside an ex-parte Order provided, it is satisfied that there was sufficient cause with respect to service of Notice, as provided in Rule 49(2) of the NCLT Rules, 2016, it is noted that the Appellant herein is silent about the service of Notice which was affected upon them by e-mail. Hence, we find it a fit case to impose costs of Rs. 25,000/- on the Appellant to be paid to the Respondent before the next date of Hearing.

12. In the result, this Appeal is allowed and the Order of the Adjudicating Authority is set aside. Both parties are directed to appear before the Learned Adjudicating Authority on 26<sup>th</sup> April, 2021 and the Appellant shall pay to the

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Respondent the costs on or before 26<sup>th</sup> April, 2021. Keeping in view the timelines provided for in the Code, Learned Adjudicating Authority shall dispose of the Application as expeditiously as practicable.

13. *Company Appeal (AT) (Insolvency) No. 179 of 2021* has been filed against the Impugned Order dated 18.03.2020 passed by the Adjudicating Authority in CP (IB) No. 04/GB/2020 with a delay of 334 days. For reasons cited in I.A. No. 412 of 2021, the Application seeking condonation of delay is allowed. As *Company Appeal (AT) (Insolvency) No. 178 of 2021* is allowed and the Order of the Learned Adjudicating Authority in I.A. No. 45 of 2020 in CP (IB) No. 04/GB/2020 is set aside, this Appeal is disposed of as infructuous.

**[Justice Anant Bijay Singh]**  
**Member (Judicial)**

**[Ms. Shreesha Merla]**  
**Member (Technical)**

**NEW DELHI**  
**16<sup>th</sup> April, 2021**

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