NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 570 of 2018

IN THE MATTER OF:

Mr. Anmol Tekriwal ...Appellant

Vs.

M/s. M.N. Auxichem & Anr. ...Respondents

Present: For Appellant: - Mr. P. Nagesh and Mr. Dhruv Gupta, Advocates.
Mr. Videh Vaish and Mr. Shashank K. Lal, Advocates.

For Respondents: -Mr. Ankit Jain (PCS) for R.P.
Mr. Anmol Vyas, Advocate for R.P
Mr. Satyendra, R.P

Mr. Naresh Kumar Sejvani, Advocate for Intervenor.

O R D E R

22.01.2019– This appeal has been preferred by the Appellant against the order dated 8th June, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-III, whereby and whereunder, the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) preferred by 'M/s. M.N. Auxichem' ('1st Respondent' herein) for initiation of 'Corporate Insolvency Resolution Process' against 'M/s. BTM Industries Limited' ('Corporate Debtor') has been admitted.

2. The appeal has been filed after some delay which has been explained by the Appellant- Mr. Anmol Tekriwal, Shareholder of 'M/s. BTM Industries Limited' ('Corporate Debtor').

3. On 20th September, 2018, we noticed the submissions made on behalf of the Appellant both with regard to application for condonation of delay and on merit, as quoted below:

> *"**20.09.2018:** Learned counsel for the Appellant (shareholder of the Corporate Debtor) submits that the Shareholder came to know of the impugned order dated 8th June, 2018 on 12th August, 2018, when the Operational Creditor forwarded the same to the Appellant. The Corporate Debtor – 'M/s BTM Industries Ltd.' had no knowledge of the filing of the application under Section 9 of the I&B Code, no notice having issued by the Adjudicating Authority (National Company Law Tribunal) New Delhi Bench, Court No. III. He further submitted that notice under section 8(1) was properly served on the Corporate Debtor on the address as shown in the application filed under Section 9 but the impugned order shows that notice retuned as Appellant 'left', which is incorrect. In fact, the Corporate Debtor having come to know of the same is willing to settle the matter with the Operational Creditors.*
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> *Let notice be issued on Respondents by speed post. Requisites alongwith process fee, if not already*

filed, be file by 24th September, 2018. If the Appellant provides email address of the Respondents, let notice be also issued through email.

Place the case 'for admission' on ***9th October, 2018****."*

4. On notice, the Respondents- 'Operational Creditor' has appeared and taken plea that the parties have settled and the 'Settlement Deed' dated 11th January, 2019 along with copy of the Demand Draft and Certificate dated 12th February, 2018 has been enclosed with the supplementary affidavit.

5. It has not been disputed that the Appellant came to know of the impugned order when the 'Operational Creditor' forwarded the impugned order. The certified copy has not been forwarded. The appeal was thereafter filed on 13th September, 2018 and thereby delay of about 6 days in preferring the appeal. Taking into consideration the stand taken by the parties and being satisfied with the grounds, we condone the delay of 6 days in preferring the appeal.

6. The Appellant has pleaded and brought to our notice that the notice under Section 8(1) was properly served on the 'Corporate Debtor' in the address shown in the application under Section 9 but when notice was issued to the 'Corporate Debtor', it was returned with note 'left', which according to him is incorrect. However, it is not in dispute that no

notice before admission of application under Section 9 was served by the Adjudicating Authority on the 'Corporate Debtor'.

7. An Intervention Application has been filed by 'Samarpan Synthetics Private Limited' who claimed to have some settlement with the 'Corporate Debtor'.

8. Learned counsel appearing on behalf of the Intervener submits that during the 'Moratorium' two 'Memorandum of Understanding(s)' have been entered and, therefore, the Appellant has wrongly stated that he came to know of the order subsequently. However, such submission cannot be accepted for the reason that the Intervener has no locus at the stage of admission to make any objection and, therefore, he cannot file Intervention Application, if any appeal is preferred against the order of admission.

9. This apart, there is nothing on the record to suggest that the copy of the impugned order was forwarded to the Appellant by the Adjudicating Authority or by the 'Resolution Professional'. Even if it is accepted that certified copy is not sent to all the shareholders, but the date of knowledge is to be taken into consideration counting the period of limitation. It is not disputed by the 'Operational Creditor' that he forwarded the copy of the impugned order to the Appellant and therefore, we have accepted the period of the date of knowledge as pleaded by the Appellant, and condone the delay.

10. There is nothing on the record to suggest that the Adjudicating Authority has issued notice to the 'Corporate Debtor' and it was served on them.

11. Learned counsel for the 'Resolution Professional' submits that the notice for admission was issued by the Adjudicating Authority on 28th November, 2017. However, none of the Respondents have enclosed the copy of the order dated 28th November, 2017 nor anything on the record to suggest that it was served on the 'Corporate Debtor'.

12. Similar issue fell for consideration before this Appellate Tribunal in '***M/s. Starlog Enterprises Limited vs. ICICI Bank Limited*** *– 2017 SCC Online NCLAT 13'*, wherein this Appellate Tribunal held as follows:

> *"5. The aforesaid issue now stands decided by decision of the Appellate Tribunal in "M/s. Innoventive Industries Limited vs ICICI Bank & Anr. in CA (AT) (Insolvency) No. 1 & 2 of 2017" wherein the Appellate Tribunal observed and held :-*
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> *"43. There is no specific provision under the I&B Code, 2016 to provide hearing to Corporate debtor in a petition under Section 7 or 9 of the I&B Code, 2016."*
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> *"53. In view of the discussion above, we are of the view and hold that the Adjudicating*

Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the corporate debtor and to find out whether the application is complete and or there is any other defect required to be removed. Adherence to Principles of natural justice would not mean that in every situation the adjudicating authority is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order."

In this connection we may state that the vires of Section 7 of I&B Code was considered by Hon'ble Calcutta High Court in " Sree Metaliks Limited & Ann" in writ petition 7144 (W) of 2017, wherein Hon'ble High Court by its judgment dated 7th April, 2017 held as follows:-

"……However, it is to apply the principles of natural justice in the proceedings before it. It can regulate it own procedure, however, subject to the other provisions of the Act of 2013 or the Insolvency and Bankruptcy Code of 2016 and any Rules made thereunder. The Code of 2016

read with the Rules 2016 is silent on the procedure to be adopted at the hearing of an application under section 7 presented before the NCLT, that is to say, it is silent whether a party respondent has a right of hearing before the adjudicating authority or not.

Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of the natural justice above anything else. It also allows the NCLT and NCLAT the power to regulate their own procedure. Fetters of the Code of Civil Procedure, 1908 does not bind it. However, it is required to apply its principles. Principles of natural justice require an authority to hear the other party. In an application under Section 7 of the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read

into in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application. The NCLT is, therefore, obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document as the NCLT may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under Section 7 of the Code of 2016. Section 7(4) of the Code of 2016 requires the NCLT to ascertain the default of the corporate debtor. Such ascertainment of default must necessarily involve the consideration of the documentary claim of the financial creditor. This statutory requirement of ascertainment of default brings within its wake the extension of a reasonable opportunity to the corporate debtor to substantiate by document or otherwise, that there does not exist a default as claimed against it. The proceedings before the NCLT are

adversarial in nature. Both the sides are, therefore, entitled to a reasonable opportunity of hearing.

The requirement of NCLT and NCLAT to adhere to the principles of natural justice and the fact that, the principles of natural justice are not ousted by the Code of 2016 can be found from Section 7(4) of the Code of 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 4 deals with an application made by a financial creditor under Section 7 of the Code of 2016. Sub-rule (3) of Rule 4 requires such financial creditor to despatch a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor. Rule 10 of the Rules of 2016 states that, till such time the Rules of procedure for conduct of proceedings under the Code of 2016 are notified, an application made under Sub-section (1) of Section 7 of the Code of 2017 is required to be filed before the adjudicating authority in accordance with Rules 20, 21, 22, 23, 24 and 26 or Part-HI of the National Company Law Tribunal Rules, 2016.

Adherence to the principles of natural justice by NCLT or NCLAT would not mean that in every situation, NCLT or NCLAT is required to afford a reasonable opportunity of hearing to the respondent before passing its order.

In a given case, a situation may arise which may require NCLT to pass an ex-parte ad interim order against a respondent. Therefore, in such situation NCLT, it may proceed to pass an ex-parte ad interim order, however, after recording the reasons for grant of such an order and why it has chosen not to adhere to the principles of natural justice at that stage. It must, thereafter proceed to afford the party respondent an opportunity of hearing before confirming such ex-parte ad interim order.

In the facts of the present case, the learned senior advocate for the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The respondent was not heard by the NCLT before passing the order.

It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in

accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.

In such circumstances, the challenge to the vires to Section 7 of the Code of 201 6 fails."

6. Therefore, it is clear that before admitting an application under Section 9 of the MB Code it is mandatory duty of the 'adjudicating authority' to issue notice."

13. In the present case, as nothing on the record to suggest that notice was served on the 'Corporate Debtor' and the impugned order has been passed in violation of natural justice, we set aside the order dated 8th June, 2018.

14. In effect, order (s), passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the 'I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate

Debtor' (company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

15. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' and the 'Corporate Debtor' will pay the fees of the 'Interim Resolution Professional', for the period he has functioned. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

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