

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1064 of 2021

(Arising out of Order dated 30.11.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, Court-III in C.A. No.405/2019 in IB-195(ND)/2019)

IN THE MATTER OF:

M/s Hacxad Infotech Private Limited
A-12, Naraina Industrial Area,
Phase – 1, New Delhi – 110028.

.... Appellant

Vs

M/s Skootr Global Private Limited
Flat No.402, 4th Floor Kailash Building,
26 Kasturba Gandhi Marg, New Delhi-110001.

... Respondent

Present:

For Appellant:

**Mr. Gaurav Mitra, Mr. Adarsh Rai,
Mr. Sidhant Saraswat, Advocates.**

For Respondent:

**Mr. Varun Sharma, Ms. Vanshika
Gupta, Mr. Raunak Jain, Mr. Buddy
Ranganadhan, Advocates.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by the Corporate Debtor through its Ex-Management, challenging the order dated 30th November, 2021 passed by the National Company Law Tribunal, New Delhi Bench, Court III rejecting the Application filed by the Appellant to recall ex-parte order dated 8th February, 2019 and admission order dated 10th April, 2019 passed by Adjudicating Authority.

2. Brief facts of the case and sequence of events necessary to be noticed in this Appeal are:

- (i) The Corporate Debtor entered into Facility Management Agreement dated 23rd May, 2018 with the Respondent (Operational Creditor), under which the Respondent has provided facility and workspace to run office operation by the Corporate Debtor.
- (ii) The Corporate Debtor opted out of the Facility Management Agreement in September, 2018 and shifted his registered office from C 6B/59, IInd Floor, Janakpuri, New Delhi to A-12, Naraina Industrial Area, Phase-1, New Delhi with effect from 20th September, 2018. The Corporate Debtor vide email dated 19th September, 2018 informed the Operational Creditor about the issues which arose regarding operation at the space provided by the Operational Creditor.
- (iii) The Operational Creditor claimed to have issued notice under Section 8 to the Corporate Debtor on the registered email IDs as available on the portal of Ministry of Corporate Affairs and Demand Notice dated 3rd October, 2018 by Speed Post on the registered address of the Corporate Debtor as well as on its registered email IDs. The email did not bounce back or returned, but no reply was filed to the notice dated 3rd October, 2018.

- (iv) An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Code') has been filed by the Operational Creditor. The Adjudicating Authority issued notice of appearance vide order dated 25th January, 2019, but the Corporate Debtor did not appear. An affidavit of service was filed by the Operational Creditor before the Adjudicating Authority dated 6th February, 2019 wherein it was mentioned that notices issued by Registered Post as well as Speed Post have not been delivered and returned with the endorsement "Addressee left without instruction", whereas email sent to the Corporate Debtor on email IDs as provided in the Ministry of Corporate Affairs data base was sent. The Adjudicating Authority after the receipt of the affidavit of service held that notices are served and directed to proceed ex-parte against the Corporate Debtor by its order dated 8th February, 2019. The Application under Section 9 was taken up for ex-parte hearing and by order dated 10th April, 2019 it was admitted.
- (v) After admission of Section 9 Application, the Director of the Appellant received an email dated 03.05.2019 on its personal email ID from one Shri Vimal Grover claiming to be Interim Resolution Professional (IRP). The Appellant after coming to know about the initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor filed an

Application on 10th June, 2019 being CA No.405 of 2019 for setting aside ex-parte order and impugned order dated 8th February, 2019 and 10th April, 2019 on the ground of non-service of notice and petition under the Code. The Application filed by the Appellant for recall of the order, came to be opposed by the Operational Creditor.

- (vi) The Adjudicating Authority by impugned order dated 30th November, 2021 rejected the Application. The Adjudicating Authority took the view that order dated 8th February, 2019 and 10th April, 2019 have been passed after due consideration, which cannot be recalled/ reviewed by the Tribunal. The Tribunal followed the judgment of Allahabad High Court in the matter of ***Khan Enterprises vs. National Company Law Tribunal & Ors.*** to the effect that there is no provision in IBC for review of order admitting a petition filed under Section 9. Aggrieved by the order dated 30th November, 2021, this Appeal has been filed.

3. We have heard Shri Gaurav Mitra, learned Counsel for the Appellant and Shri Varun Sharma, learned Counsel for the Respondent.

4. The learned Counsel for the Appellant submits that the Adjudicating Authority has committed error in observing that it has no jurisdiction to recall/ review order dated 8th February, 2019 and 10th April, 2019. It is submitted that Rule 49 of NCLT Rules, 2016 (hereinafter referred to as the “NCLT Rules”) specifically empowers the Adjudicating Authority to recall an

ex-parte order under Rule 49, sub-rule (2). The Adjudicating Authority was well within its jurisdiction to recall the order on the ground that both orders were passed ex-parte. It is submitted that in the order dated 8th February, 2019 itself it was recorded that notices sent to Corporate Debtor vide Speed Post were received back unserved, with the report that addressees have left the premises. Learned Counsel for the Appellant further submits that the Corporate Debtor has already informed the Operational Creditor vide email dated 19th September, 2018 that he has to shift his premises and in pursuance of Board Resolution passed by Board of Directors of the Corporate Debtor on 20th September, 2019, the Corporate Debtor has shifted his office to Naraina Industrial Area, which fact is fully proved by the notices sent at the registered office having been returned with the endorsement that addressee has shifted the premises. It is further submitted that the domain services, which was being provided by the service provider had informed the Corporate Debtor on 27th July, 2018 that official domain and email services are going to expire and by the end of September 2018, email services provided by the third-party service provider expired hence, no email could be received by the Appellant at email domain service. The learned Counsel was well aware of the personal email IDs of the Directors and notices were deliberately sent to the domain email IDs, which were not in use by the Corporate Debtor.

5. The learned Counsel for the Appellant further submits that as soon as the order dated 10th April, 2019 was passed, the Director of the Appellant received an email on his person email ID on 3rd May, 2019 from one Shri

Vimal Grover claiming to be IRP. Several emails after the aforesaid date have also been sent by Operational Creditor on the personal email IDs of the Directors. It is further submitted that the service provider, who was providing domain service informed regarding expiry of the domain service, which having not been renewed in September, 2019, the emails claiming to be sent by Operational Creditor on the registered email IDs were not received by the Corporate Debtor. The Adjudicating Authority itself having noted that Registered Post notice sent by Registered Post returned back with the endorsement that Corporate Debtor left the premises, hence service was not complete and Corporate Debtor having made sufficient ground in the Application No.405 of 2019, the ex-parte orders dated 8th February, 2019 and 10th April, 2019 deserve to be recalled. The Adjudicating Authority committed error in not considering the reasons and grounds given for ex-parte order on misconceived notion that Appellant is asking review of its order.

6. The learned Counsel for the Respondent refuting the submissions of the Appellant contends that notices issued under Section 8 demand notice and notice for Application under Section 9 were all sent on the registered address as well as registered email IDs of the Corporate Debtor as available on the portal of Ministry of Corporate Affairs. The emails did not bounce back, which clearly proves that Demand Notice as well as notices sent under Section 9 were received by the Corporate Debtor, but no reply was filed by the Corporate Debtor. The Adjudicating Authority did not commit any error in rejecting the Application. The Adjudicating Authority is not

vested with power to review/ recall/ set-aside its own ex-parte order after the constitution of Committee of Creditors (“CoC”). The learned Counsel for the Respondent also relied on the judgment of this Appellate Tribunal in ***Suspended Management of Jay Polypack Pvt. Ltd. vs. SGV Foils Pvt. Ltd. & Anr. – [Company Appeal (AT) (Ins.) No.362 of 2021***. The learned Counsel further submits that notices sent by emails are in accordance with the rules of service and Corporate Debtor cannot complain that notices were not served on him. The learned Counsel for the Respondent further submits that even after initiation of CIRP by an order dated 10th April, 2019, the Directors of the Corporate Debtor have withdrawn an amount of Rs.56 lakhs from the account of the Corporate Debtor on 4th February, 2021, which was against the provisions of the Code.

7. We have considered the submission of learned Counsel for the parties and have perused the record.

8. In IA No.405 of 2019, the prayer of the Corporate Debtor was to recall order dated 8th February, 2019 by which the Appellant was set ex-parte and further to set aside the order dated 10th April, 2019 qua the Corporate Debtor. The Application was filed by the Appellant on the ground that notices issued in Section 9 Application were not served on the Corporate Debtor nor Demand Notice under Section 8 was served on the Corporate Debtor and order dated 8th February, 2019 passed by the Adjudicating Authority to proceed ex-parte was an order without service of notice on the Corporate Debtor and hence deserves to be recalled. We may first notice the certain averments, which was made in the Application being IA No.405

of 2019 by the Appellant. In paragraphs 9, 13, 14, 16 and 17 are the pleadings of the Corporate Debtor in his Application to recall the ex-parte order, which are to the following effect:

- “9. *That along with the above, the Corporate Debtor had also taken a management decision to shift its registered office from Janakpuri to Naraina, pursuant to a resolution of the Board of Directors. Copy of the Board Resolution dated September 20, 2018 along with copy of Form INC-22 attesting to change of registered office by the Corporate Debtor is annexed herewith and marked as Annexure – 2. It is stated that the determination to change the registered office was passed in September 2018, around the same time as the outsourcing work was being shifted out from the premises of the Operational Creditor.*
13. *That thereafter, from September onwards, till May 2019 there was no word whatsoever from the Operational Creditor, and the Corporate Debtor was getting its BOP services managed from another third-party entity at immense cost to itself, and its foreign partners.*
14. *That however, sometime in May 2019, an email dated 03.05.2019 was received from one Mr. Vimal Grover, who identified himself as Chartered Accountant, and furthermore, as the Interim Resolution Professional for the Corporate Debtor, which email was received for the first time, to the utter surprise of one of the Directors of the Corporate Debtor. It is stated that it was only pursuant to this email, that the Director of the*

Corporate Debtor was made aware that there was some alleged proceedings which had been commenced and concocted at the behest of the Operational Creditor, and without notice to the Corporate Debtor, which is fundamental requirement under the mandate of the Insolvency and Bankruptcy Code, 2016. Copy of the email dated 03.05.2019 is annexed herewith and marked as Annexure – 3.

16. *It is stated that neither the demand notice, nor any copy of the subsequent petition was ever served upon the Corporate Debtor, which is highly suspicious, since even if there was no address matching in the Speed Post, due notice was served to the Operational Creditor that the Corporate Debtor would be shifting its office, and all the representatives within the management of Operational Creditor had several email addresses of all the relevant officers of the Corporate Debtor. Hence, by not sending the copy of the Section 8 Demand Notice by email and choosing to issue the email to one email address, which found mention in the MCA records, clearly points out to the duplicitous conduct of the Operational Creditor.*
17. *It is stated that the present CIR process was deliberately rendered ex-parte by the Operational Creditor, since it wanted to hide its malafide conduct and did not want the Corporate Debtor to become aware of the fact that such a proceedings was contemplated to be underway.”*

9. Rule 49, sub-rule (2) of the NCLT Rules, 2016 specifically deals with proceedings, which have been ex-parte heard and disposed of. Rule 49 is as follows:

“49. Ex-parte Hearing and disposal.- (1) Where on the date fixed for hearing the petition or application or on any other date to which such hearing may be adjourned, the applicant appears and the respondent does not appear when the petition or the application is called for hearing, the Tribunal may adjourn the hearing or hear and decide the petition or the application ex-parte.

(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 or them upon such terms as it thinks fit.

Provided that where the ex-parte hearing of the petition or application is of such nature that it cannot be set aside as against one respondent only, it may be set aside as against all or any of the other respondents also.”

10. We may further notice that in order dated 8th February, 2019 by which Adjudicating Authority decided to proceed ex-parte against the Appellant, itself noted that notices sent by Speed Post have been received back unserved. On 8th February, 2019, following order was passed by the Adjudicating Authority:

“As per the Affidavit filed by the petitioner, steps for service were taken vide e-Mail at the e-Mail of the Corporate Debtor registered with the MCA, which has not bounced. Steps were also taken to serve the Corporate Debtor through its Directors vide ‘Speed Post’ but these have been received back unserved, with the report that the addressees have left the premises. As the Corporate Debtor has been served vide e-Mail, and none is present on their behalf, they are proceeded ex-parte.

To come up for final arguments on 01.03.2019.”

11. The order dated 8th February, 2019 passed by the Adjudicating Authority on the basis of affidavit of service filed by the Operational Creditor dated 6th February, 2019. In paragraph 4 of the affidavit, it has been pleaded that Operational Creditor has tried to serve the copy of the order (Order dated 25th January, 2019 by which notices were issued to the Corporate Debtor), which letter was not delivered. The registered letter sent by Speed Post service were also not delivered and returned with the endorsement “addressee left without instruction”. Thus, the notices, which were sent by the Adjudicating Authority to the Corporate Debtor, both by Registered Post and Speed Post were not served, which fact is also noticed in the order dated 8th February, 2019. In the Application No.405 of 2019, the Appellant has come up with a case that registered email IDs of the Corporate Debtor and its Directors through the domain service was no more in operation after September 2019 as the domain service provided by the third-party had expired. It is also the case of the Corporate Debtor that immediately after passing of the order dated 10th April, 2019, an email

was received on the personal email ID of the Director dated 3rd May, 2019, which was duly received. The Operational Creditor was well aware of the personal email IDs of the Directors and notices were not sent on the personal email IDs of the Directors. The Corporate Debtor has made sufficient ground to prove that order dated 8th February, 2019 as well as order dated 10th April, 2019 were passed without serving any notice. In the order which was passed on 10th April, 2019, admitting Section 9 Application, the Adjudicating Authority itself has noticed in paragraph 11 that notices sent by Speed Post have been received back unserved. Paragraph 11 of the order is as follows:

“11. It is seen from the order dated 08.02.2019 of this tribunal that as per the affidavit filed by the petitioner, steps for service were taken vide e-mail at the e-mail id of the Corporate Debtor registered with the MCA, which has not bounced. This is an adequate service. Steps were also taken to serve the Corporate Debtor through its Directors vide ‘Speed Post’ but these have been received back unserved. However none appeared on the behalf of Corporate Debtor and the Corporate Debtor was proceeded ex-parte.”

12. The present is a case where Corporate Debtor was asking for recall of the order dated 8th February, 2019 and 10th April, 2019. Both the orders were passed ex-parte and no notices were served. The Adjudicating Authority committed error in holding that the Appellant was asking for review of the admission order. In the impugned judgment dated 30th

November, 2021, learned Adjudicating Authority have relied on a judgment of Allahabad High Court in the matter of ***Khan Enterprises vs. National Company Law Tribunal & Ors.*** for forming an opinion that Rule 11 of NCLT Rules cannot be used seeking recall/ review of the orders. We have noticed above that what Corporate Debtor was seeking, was to recall the ex-parte order, which power was specifically conferred on the Adjudicating Authority under Rule 49, sub-rule (2). When power is specifically conferred under the Rule, there was no question of exercising any review jurisdiction in the facts of the present case. The Adjudicating Authority was fully competent to recall ex-parte order in exercise of its jurisdiction under Rule 49, sub-rule (2). In paragraph 8 of the impugned order, the judgment of *Khan Enterprises vs. National Company Law Tribunal & Ors.* has been referred to. We may notice the observations made by Adjudicating Authority in paragraph 8, which is to the following effect:

“8. Further, we are in agreement with submissions made by Counsel for the Operational Creditor that the powers under Rule 11 of NCLT Rules cannot be used seeking recall/ review of the orders, for which alternate effective remedy is provided under the IBC, 2016. The Hon’ble Allahabad High Court in the matter of *Khan Enterprises Vs. National Company Law Tribunal and Ors* in C.M.W.P. No.32675 of 2018 has inter alia, held that “it is admitted that there is no provision in I.B.C. for review of the order admitting a petition filed under Section 9 of the I.B.C. It is also not disputed in law that the power to review cannot be exercised unless there is specific provision for the same.”

Similar views have been propounded in various other case laws by the Hon'ble NCLAT and relied upon by the Operational Creditor.”

13. The Adjudicating Authority by noticing the observation of the Allahabad High Court has noted only one part of the observation, whereas omitting the next part of the order in the same paragraph. In Allahabad High Court in the matter of *Khan Enterprises Vs. National Company Law Tribunal and Ors in C.M.W.P. No.32675 of 2018*, the Hon'ble Court has made following observation:

“It is admitted that there is no provision in IBC for review of the order admitting a petition filed under Section 9 of the IBC. It is also not disputed in law that the power to review cannot be exercised unless there is specific provision for the same.

As far as power to recall an order is concerned, it is nothing but a procedural review which can be availed only if there is any procedural defect in passing the order or the order has been obtained by playing fraud in any manner.”

14. In the second part of the observation, it was clearly mentioned that the procedural review can very well be availed, if there is any procedural defect in passing the order. The present was a case where there was procedural defect, since service was not effected on the Corporate Debtor. Thus, the judgment of the Allahabad High Court, which has been relied by the Adjudicating Authority for non-suiting the Corporate Debtor also does not support the view taken by the Adjudicating Authority. In view of the

foregoing, we arrive at a conclusion that orders dated 8th February, 2019 as well as 10th April, 2019 were passed without service of any notice on the Corporate Debtor and both the orders being ex-parte, deserve to be set aside by the Adjudicating Authority by exercising the power under Rule 49, sub-rule (2).

15. The learned Counsel for the Respondent has relied on judgment of this Tribunal in **Company Appeal (AT) (Ins.) No.362 of 2021 in Suspended Management of Jay Polypack Pvt. Ltd. vs. SGV Foils Pvt. Ltd. & Anr.** The learned Counsel for the Respondent placed reliance on paragraph 20 and 21 of the above judgment to the following effect:

“20. With the aforesaid preposition of law, it is settled that once the Application under Section 7 or 9 is admitted and CIRP initiated, such proceeding is in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. Before a CoC is constituted, a party can approach the Adjudicating Authority directly and the Adjudicating Authority may in exercise of its powers under Section 12A of the IBC r/w Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 allow or disallow an application for withdrawal or settlement. Similarly, before constitution of CoC if the Adjudicating Authority is satisfied that the notice was not duly served on the Corporate Debtor the Adjudicating Authority may make an order for setting

aside the ex-parte order for initiating CIRP upon such terms as it thinks fit. However, after constitution of CoC the Adjudicating Authority cannot set aside even ex-parte admission order and in such a situation the Corporate Debtor has to file the Appeal under Section 61 of the IBC.

21. Now, we have considered the facts of this case, the Application under Section 9 was admitted on 27.05.2020 and the Appellant (Corporate Debtor) has filed the Application for setting aside the ex-parte admission order on 06.11.2020 whereas the CoC has been constituted thereafter on 20.11.2020. In such a situation before constitution of CoC the Ld. Adjudicating Authority can consider the Application for setting aside ex-parte admission order but after constitution of the CoC the Ld. Adjudicating Authority cannot in exercise of power under Rule 49(2) of the NCLT Rules, 2016 set aside the ex-parte admission order. Ld. Adjudicating Authority has passed the impugned order after constitution of CoC i.e. on 23.03.2021, therefore, we find no illegality in the impugned order.”

16. The aforesaid observations were made by this Tribunal while considering the powers under Section 12A of the Code r/w Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as ‘CIRP Regulations 2016’) where this Tribunal held that before constitution of CoC, if Adjudicating Authority is satisfied that notice was not duly served on the Corporate Debtor, the Adjudicating Authority can

make an order for setting aside ex-parte order. The learned Counsel for the Respondent has placed reliance on the observation of this Tribunal in paragraph 20 that after constitution of CoC, the Adjudicating Authority cannot set-aside even ex-parte order and in such situation the Corporate Debtor has to file an Appeal under Section 61 of the Code. We are of the view that observations of this Tribunal in the above case have to be confined to consideration pertaining to Section 12A of the Code and 30A of the CIRP Regulations 2016. This Tribunal was not called to consider the case for recall of ex-parte order, which was passed without service of notice on the Corporate Debtor. In the present case, the Adjudicating Authority has not rejected the Application of the Corporate Debtor on the ground that it has been passed after constitution of CoC. In the facts of the present case, the Appellant has clearly pleaded that although admission order under Section 9 was passed on 10th April, 2019, but CoC was constituted only in March 2021 that is much after filing of CA 405 of 2019. In paragraph 7.37 of the Appeal, following has been pleaded:

“7.37 It is pertinent to note that there was no substantial progress in the CIRP and the CoC was constituted only in March 2021 much after the filing of CA 405 of 2019 and after the filing of the urgent Application in it on 22.02.2021. It is also stated that the matter was Respondent is the only member in the CoC constituted by the RP.”

17. Thus, the present is a case where Application to recall of order was filed much before the constitution of CoC. Hence, the aforesaid judgment relied by the learned Counsel for the Respondent is not attracted in the facts of the present case and is clearly distinguishable.

18. There is one more aspect, which needs to be noticed. The learned Counsel for the Respondent submits that after the order dated 10th April, 2019, the Directors of the Appellant transferred to their account Rs.56 lakhs from the Corporate Debtor's account claiming to be payments made by them on behalf of the Corporate Debtor. On a pointed query on this submission, learned Counsel for the Appellant submits that Appellants are ready and willing to deposit the amount of Rs.56 lakhs. The learned Counsel for the Appellant, however, submits that he should be permitted to deposit the amount before the Adjudicating Authority and not in the account of Corporate Debtor. The amount having withdrawn by the Directors to their accounts, from the account of the Corporate Debtor, we are of the view that Directors may deposit back the said amount into the account of the Corporate Debtor. Let the aforesaid deposit be made within 30 days from today by the Appellants.

19. In view of the foregoing discussions, we set-aside the order dated 30th November, 2021 passed by the Adjudicating Authority in C.A. No.405/2019 in IB-195(ND)/2019. The Appeal is allowed and the order dated 8th February, 2019 as well as 10th April, 2019 are also set-aside. Application IB-195(ND)/2019 is revived before the Adjudicating Authority, to be heard and decided after hearing the parties. The Appellants are also allowed 30

days' time to file reply to Section 9 Application before the Adjudicating Authority. The Adjudicating Authority after hearing the parties may decide the IB-195(ND)/2019 on merits and in accordance with law. The Appeal is allowed accordingly. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI

10th March, 2022

Ash/NN