NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Review Application (AT) No. 15 of 2020 in
Company Appeal (AT) (Insolvency) No. 1504 of 2019

IN THE MATTER OF:

Anubhav Anilkumar Agarwal
RNA Corp. Pvt. Ltd.
601, Khatau, Condiminium,
J.M. Mehta Road, Off. Nepaean
Sea Road, Malabar Hill,
Mumbai – 400 006.

....Appellant

Vs

1. Bank of India,
Andheri Large Corporate Branch,
MDI Building, 1st Floor, 28 SV Road,
Andheri (W),
Mumbai – 400 058.

2. RNA Corp. Pvt. Ltd.,
RNA Corporate Park Next to Collectors Office,
KalanagarBandra (E),
Mumbai – 400 051.

....Respondents

Present:

For Appellant: Mr. Ranjit Kumar, Senior Advocate with Mr. Abhijeet Sinha, Mr. Himanshu Satija and Mr. Shaishir Devatia, Advocates.

For Respondents: Mr. Jayant K. Mehta, Senior Advocate with Mr. Sumesh Dhawan, Ms. Savita Nangare, Ms. VatsalaKak, Mr. Aditya Dewan and Mr. Siddharth Chechani, Advocates for R-1.

Mr. Sumant Batra, Mr. Shashwat Anand and Ms. Niharika Sharma, Advocates for R-2.

Mr. Debashish Nanda, IRP.

J U D G M E N T

BANSI LAL BHAT, J.

Company Appeal (AT) (Insolvency) No. 1504 of 2019 titled 'Anubhav Anilkumar Agarwal Vs. Bank of India & Anr.' came to be dismissed in terms of judgment rendered by this Appellate Tribunal on 7th February, 2020 with observations that the application filed under Section 7 of I&B Code by the Financial Creditor – Bank of India seeking initiation of Corporate Insolvency Resolution Process against 'RNA Corporation Ltd.' (Corporate Debtor), who was the Guarantor was not barred by limitation and that the dictum of law laid down in 'Dr. Vishnu Kumar Agrawal Vs. Piramal Enterprises Ltd.', Company Appeal (AT) (Insolvency) No. 346/2018 was not attracted to the case of the Appellant. The instant Application has been filed by the Appellant under Rule 11 of NCLAT Rules, 2016 to review the judgment dated 7th February, 2020 on the ground that this Appellate Tribunal has made an inadvertent error in Para 14 of the Judgment ignoring various documents placed on record by both the parties which included the Deed of Guarantee executed by Chamber Constructions in favour of Respondent No. 1 on 9th December, 2013 and consequent to this error there is no debt due payable in law by the Corporate Debtor as Respondent No. 1 has claimed the same amount pertaining to the same debt in the Corporate Insolvency Resolution Process of the Guarantor viz. M/s Chamber Constructions Pvt. Ltd. It is submitted that the amount in question has been admitted by the

Resolution Professional of Chamber Constructions in its entirety. It is submitted that this Tribunal ought not to have upheld the order of the Adjudicating Authority admitting the application under Section 7 which was with respect to the same claim and the same default of the Corporate Debtor since the same has the effect of simultaneously claiming the same amount twice over. It is further submitted that the case was fit for application of ratio of this Appellate Tribunal in the judgment in case of ***"Dr. Vishnu Kumar Agarwal Vs Piramal Enterprises Ltd. – Company Appeal (AT) (Insolvency) No. 346 of 2018"***, where it was held that once a claim is admitted for a set of claim against one Corporate Debtor in an application under Section 7, a second application by the same financial Creditor against another Corporate Debtor, be it a Guarantor or Principal Borrower, would not be maintainable. It is submitted that the error that has crept in Para 14 of the Judgment is an error apparent on the face of record. Para 14 is reproduced hereinbelow:-

> *"14. The other plea taken by the Appellant is that 'Corporate Insolvency Resolution Process' has been initiated against one of the Guarantor for same set of claim, i.e., M/s Chamber Constructions Pvt. Ltd. in C.P. No.3962/IBC/NCLT/MB/MAH/2018. There is nothing on the record to suggest that with regard to the same very debt, M/s Chamber Constructions Pvt. Ltd. had issued any guarantee. The Appellant has enclosed certain Bank Guarantee, which has been issued by certain individual.*

Therefore, the Appellant has failed to make out a case to get relief in terms of decision of this Appellate Tribunal in ***"Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd. – Company Appeal (AT) (Insolvency) No.346 of 2018"****.*

We find no merit in this Appeal. It is accordingly dismissed. No costs."

2. Learned counsel for Applicant/Appellant submits that while dismissing the appeal this Appellate Tribunal inadvertently took the view that there was nothing on record to suggest that a particular entity, one 'M/s Chambers Constructions', has issued a Deed of Guarantee in respect of the debt in question. It is submitted that it is the admitted factual position that a Deed of Guarantee was actually issued by 'M/s Chamber Constructions' in respect of the debt and same was also on record. It is submitted that the observation in the judgment that there was nothing on record to suggest that with regard to the very same debt 'M/s Chamber Constructions Pvt. Ltd.' had issued any guarantee, constitutes an error apparent on the face of the record causing grave miscarriage of justice. Reference is made to the Deed of Guarantee dated 9th December, 2013, reply affidavit of Respondent No. 1, report certifying constitution of CoC of 'M/s Chamber Constructions Pvt. Ltd.' and the list of admitted creditors of 'M/s Chamber Constructions Pvt. Ltd.' which, it is claimed, established that a Deed of Guarantee had been executed by 'M/s Chamber Constructions Pvt.

Ltd.' as Guarantor for the Corporate Debtor. It is further submitted that in terms of the dictum of this Appellate Tribunal in *'Dr. Vishnu Kumar Agarwal' (supra)*, which continues to be a binding precedent, claim of Respondent No. 1 in respect of the debt stood extinguished in view of same being admitted in CIRP of 'M/s Chamber Constructions Pvt. Ltd. and the Adjudicating Authority, (National Company Law Tribunal) Mumbai Bench could not have admitted its claim filed under Section 7 of the I&B Code in respect of the same debt. It is further submitted that no one can be forced to suffer because of mistake of the Court and the error apparent on the face of the record is required to be corrected. It is further submitted that Section 420 of the Companies Act, 2013 and Rule 11 of NCLAT Rules, 2016 vest inherent powers in this Appellate Tribunal to rectify such mistakes. It is lastly submitted that the error pointed out being manifest and self-evident is required to be corrected and this Appellate Tribunal would not be required to travel beyond the record to see whether the judgment is correct or not.

3. Per contra it is submitted by learned counsel for Respondent No. 1 that this Appellate Tribunal has not been specifically conferred with the power to review its decisions beyond the inherent powers to correct arithmetical/ typographical errors. It is further submitted that this Appellate Tribunal does not enjoy power of review under Rule 11. It is submitted that the power of review is not an inherent power and in absence of a power conferred either specifically or by necessary implication, power of review cannot be exercised.

4. Learned counsel for the Resolution Professional submits that it is a settled position of law that this Appellate Tribunal does not have the power of review. It is submitted that inherent powers cannot be invoked to review the judgment. It is submitted that the inherent powers cannot be invoked to seek a rehearing of the appeal and/or reconsideration of judgment passed by this Appellate Tribunal. It is submitted that judgment rendered in *'Dr. Vishnu Kumar Agarwal' (supra)* cannot be applied on an assumption as the issue would require appreciation of material on record and elaborate discussion and arguments by the parties before taking any view in the matter and an error which requires elaborate discussion of evidence cannot be said to be an error apparent on the face of the record. It is submitted that reappreciation of evidence for finding out an error would amount to an exercise of Appellate Jurisdiction which is impermissible in law.

5. Rule 11 of the NCLAT Rules, 2016, relevant for the purposes of disposal of instant application, is reproduced as under:-

> *"**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 for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal"*

This Appellate Tribunal, while dealing with the scope of power conferred under Rule 11 in ***'Action Barter Private Limited Vs. 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 reexamine 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."

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. ..... 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."

6. Admittedly, power of review has not been expressly conferred on this Appellate Tribunal and the power vested in this Appellate Tribunal under Rule 11 can only be exercised for correction of a mistake. This Appellate Tribunal does not enjoy power of review under Rule 11. The power of review is not an inherent power which cannot be exercised unless conferred specifically or by necessary implication. Exercise of inherent powers under Rule 11 has limitations and same cannot be enlarged to review the decisions

and substitute a view. The error apparent on the face of record must be manifest and self-evident and it is impermissible to travel beyond record to see whether the judgment is correct or not. The inherent power cannot be exercised in a manner that it would amount to sitting in appeal over the findings recorded on appreciation of evidence. Reappraisal of evidence for examining correctness or otherwise of the finding would amount to sitting in appeal in disguise. Findings of fact, how-so-ever erroneous they may be, cannot be revisited and substituted within the limited scope of exercise of powers under Rule 11. Applicant cannot be permitted to seek rehearing of the appeal or reconsideration of the judgment in regard to a finding, even when the same is erroneous. It would be appropriate to refer to provisions of Section 420 of the Companies Act, 2013 dealing with orders of the Tribunal as this Appellate Tribunal is a creation of the statute. Relevant portion of Section 420 reads as under:

> *"420 (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 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."*

A mere glance at Section 420 of the Companies Act, 2013 would reveal that the powers thereunder are exercisable by the 'Tribunal' defined under Section 2(90) which means the 'National Company Law tribunal, constituted under Section 408'. This power is not specifically conferred on the Appellate Tribunal. That apart, power to rectify a mistake apparent from the record cannot be construed to confer a power on the Appellate Tribunal to reappraise material on record to substitute a finding. This would amount to usurping the jurisdiction vested in a court of appeal. The finding of fact may be erroneous but if the same is based on appreciation of evidence, reappraisal of material on record to arrive at a different finding changing the decision rendered on merit would be impermissible. Elaborating it to avoid confusion, it can be stated without any fear of contradiction that misreading of evidence / material or drawing of a wrong conclusion from it which involves application of mind, would not justify invoking of inherent powers to substitute that findings and alter the judgment.

7. In the instant case, Applicant is primarily aggrieved of the finding recorded by this Appellate Tribunal in para 14 of the judgment that there was nothing on record to suggest that with regard to the very same debt 'M/s Chamber Constructions Pvt. Ltd.' had issued any Guarantee. Assuming that such finding is erroneous and there is material in the form of Deed of Guarantee, admission of Respondent No. 1 and other material on record to justify a finding contrary to the one recorded by this Appellate Tribunal in para 14 of the judgment, it would be impermissible for this Appellate Tribunal to substitute the finding within the scope of powers

exercisable under Rule 11 of NCLAT Rules, 2016. We are of the considered opinion that acceding to the prayer of Applicant would result in substituting the observations and finding recorded in para 14 of the judgment, which is beyond the ambit and scope of Rule 11 of NCLAT Rules and would amount to substituting of finding by reappraisal of evidence, a power only exercisable by a competent court while sitting in appeal.

8. For the aforesaid reasons, we are of the considered opinion that Rule 11 of NCLAT Rules, 2016 cannot be invoked in the instant case. The application is accordingly dismissed.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Shreesha Merla]
Member (Technical)

NEW DELHI
7th December, 2020

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