

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

COMPANY APPEAL (AT)(INSOLVENCY) NO.290/2020

(Arising out of order dated 20.09.2019 passed by the Adjudicating Authority, National Company Law Tribunal, Jaipur in CP No.(IB)-205/7/JPR/2019 titled PNB Vs Atlas Alloy India Pvt Ltd)

In the matter of :

Girish Baduni
S/o Mr. Gopal Dutt Baduni
Ex Director,
Atlas Alloy (India) Pvt Ltd,
E-59, RIICO Housing Colony,
Beawar,
Distt. Ajmer 305901

Appellant

Vs

Punjab National Bank
Plot No.4, Sector 10, Dwarka
New Delhi 11075

Also at

B.O. Agrasen Market,
Inside Ajmeri Gate,
Beawar, Distt. Ajmer

2. Mr Satyendra Prasad Khorania
IRP
402, 4th floor, OK Plus, DP Metro,
Opp Pillar No.94,
New Sanganer Road,
Jaipur 302019.

Respondent

Ms Aparna Iyer, Advocate for appellant.

Mr PBA Srinivasan, Sr. Advocate with Mr. Avinash Mohapatra, Advocate for R1.

Mr Amol Vyas, Advocate for R2.

JUDGEMENT
(27th August, 2020)

MR. BALVINDER SINGH, MEMBER (TECHNICAL)

The present appeal has been filed by the appellant under Section 61 of the Insolvency & Bankruptcy Code, 2016 (in short "I&B Code") against the impugned order dated 20.09.2019 passed by the Adjudicating Authority, National Company Law Tribunal, Jaipur in CP No.(IB)-205/7JPR/2019 vide which the Adjudicating Authority had admitted the application filed by the 1st Respondent and initiated Corporate Insolvency Resolution Process against the Corporate Debtor by appointing Interim Resolution Professional.

2. Being aggrieved by the impugned order dated 20.09.2019 the appellant, ex-Director of Corporate Debtor-M/s Atlas Alloy (India) Pvt Ltd, has preferred the present appeal.

3. The brief facts of the case are that the Corporate Debtor availed various credit facilities from the Financial Creditor/1st Respondent in the shape of Cash Credit Facility, Bills Discounting, Term Loan in the year 2005 and the said facilities were renewed and the limits have been enhanced from time to time by the 1st Respondent as per request of the Corporate Debtor. For availing the credit facilities the Corporate Debtor had executed various documents such as Hypothecation Agreement dated 9.11.2011 to secure the Term Loan. The Corporate Debtor has also executed various other loan and security documents.

4. Since the Corporate Debtor did not maintain the financial discipline, the account of the Corporate Debtor was classified as NPA by the 1st Respondent on 30.09.2017 and recall notice dated 03.10.2017 was issued to

the Corporate Debtor and Guarantors under the SARFAESI Act, 2002 and demanded outstanding amount of Rs.11,25,09,298.94 but the outstanding amount was not paid. The Financial Creditor filed Original Application before the DRT, Jaipur and is pending till the date of filing of Application before the NCLT, Jaipur.

5. The Financial Creditor filed application under Section 7 of the Insolvency & Bankruptcy Code, 2016 before the NCLT, Jaipur for initiating corporate insolvency proceedings against the Corporate Debtor. Notice was served upon the Corporate Debtor but despite receipt of notice the Corporate Debtor did not appear before the NCLT, Jaipur and the NCLT Jaipur was constrained to proceed ex parte against the Corporate Debtor and admitted the application of the Financial Creditor and appointed IRP.

6. Being aggrieved by the said impugned order the appellant has filed the present appeal. The appellant has stated that the application filed under Section 7 of I&B Code was never served on the Corporate Debtor or the erstwhile Directors of the Corporate Debtor.

7. The appellant stated that the letter dated 26.8.2019, informing about the filing of the application under Section 7 of the Insolvency and Bankruptcy Code, 2016, was served on the wrong addresses.

8. The appellant stated that the email Id gbincoeatlas@rediffmail.com is not the email ID of the company reflected on the MCA website and was being used by the erstwhile employees of the Corporate Debtor. The said email ID has not been in use since early 2018 and was never used by the erstwhile Directors of the Corporate Debtor.

9. The appellant stated that the email ID girishbaduni@yahoo.in was not in use since June 2018 and the 1st Respondent was very well aware about the said fact.

10. The appellant stated that the 1st respondent was aware of the functional email ID of the erstwhile Director and the 1st Respondent had sent an email dated 9.1.2020 directing removal of household items from one of the immovable properties mortgaged with it.

11. That the postal receipt of the registered speed post dated 26.8.2019 and the Tracking Report in respect of the same reflect that the application under Section 7 of the I&B Code filed by 1st Respondent was not served on the respective addresses.

12. The appellant stated that the impugned order has been passed by the Adjudicating Authority without notice to the Appellant against the principle of rules of natural justice, as stipulated under Section 424 of the Companies Act.

13. The appellant prayed that the impugned order dated 20.09.2019 may be set aside and the matter may be remanded back to NCLT, Jaipur for adjudication and the operation of the impugned order may be stayed.

14. Reply has been filed on behalf of 1st Respondent. 1st respondent stated that the appellant has failed to establish that there is any infirmity in the impugned order dated 20.9.2019. 1st respondent stated that the appellant has nowhere denies about the default and also has not submitted any documents to establish the absence of a default.

15. 1st respondent stated that the appeal is hopelessly time barred and the same deserves to be rejected at the very outset.

16. 1st respondent stated that they have received the confirmation the from 2nd Respondent that the suspended Directors of the Corporate Debtor, including the appellant were duly served with the copy of the order by way of a letter to the Appellant at the registered address, as available in the records of Ministry of Corporate Affairs, and an email was also sent by the 2nd Respondent on the registered email address of the Corporate Debtor. 1st respondent stated that the 2nd respondent had also sent an email to the statutory auditor of the Corporate Debtor to provide information, documents and records of the Corporate Debtor. 1st respondent stated that on 4.12.2019, 2nd Respondent filed an application under Section 19(2) of I&B Code which was with regard to the non-cooperation of the erstwhile directors and statutory auditors of the Corporate Debtor.

17. 1st respondent stated that since the appellant was evading service of the Notice, he was additionally served on the address Plot No.125-128, Shree Radhvalabh Industrial Area, Village Piplaz, Tehsil Beawar, Ajmer, Rajasthan.

18. 1st respondent stated that notices were pasted on 'Grand Batteries Pvt Ltd' as the erstwhile Director of the Corporate Debtor also happened to be a director in 'Grand Batteries Pvt Ltd'. 1st respondent stated that there was proper service of notice to the appellant. 1st respondent further submitted that an email was also sent to cs.shubham@gmail.com, which was mentioned on MCA website as the email of erstwhile Director of Grand Batteries Pvt Ltd. 1st respondent also submitted that One Time Settlement (OTS) was received from the appellant.

19. 1st respondent stated that after passing of the impugned order dated 20.09.2019, five meetings of Committee of Creditors have been held and the appellant has attended the 3rd, 4th and 5th Meeting of Committee of Creditors.

20. 1st respondent stated that the prayers made by the appellant may be disallowed.

21. Reply on behalf of 2nd Respondent has been filed. 2nd Respondent stated that the appeal is not within limitation. 2nd respondent stated that he has served copy of the impugned order as well as the minutes of CoC Meeting to the suspended Directors on the email given on MCA portal as well as on the personal mail ID of the suspended Directors. 2nd respondent stated that the statutory auditors of the Corporate Debtor became aware of the order of the insolvency in the month of November, 2019, therefore, there is no force in the contention of the appellant that they became aware of the impugned order dated 20.09.2019 only in the month of January, 2020.

22. 2nd respondent stated that various email were sent to appellant to provide complete record whether electronic or manual, books of accounts details regarding assets, finances and operation of the Corporate Debtor, however, the appellant has not co-operated with the 2nd Respondent, therefore, the 2nd Respondent/Resolution Professional having been left with no alternative filed an application under Section 19(2) of I&B Code and the same is pending.

23. 2nd respondent has stated that they have incurred a sum of Rs.11,98,144/- as CIRP expenses till the date of filing his reply i.e. 24.06.2020.

24. Lastly the 2nd Respondent prayed that the appeal may be dismissed.

25. Learned counsel for the appellant argued that the 1st respondent did not serve the application filed under Section 7 of I&B Code and/or the notice at the correct address of the erstwhile directors of Corporate Debtor. Learned counsel for the appellant further argued that the 1st respondent deliberately made service by way of email to gbincoatl@rediffmail.com which email was being used by the erstwhile employees of the Corporate Debtor. Learned counsel for the appellant argued that the postal receipts of the registered speed-post dated 26.8.2019 and the Tracking Report establishes that the application were even otherwise not served on the respective addresses. Learned counsel for the appellant argued that the Respondent No.1 has concealed the factum of the One Time Settlement (OTS) proposed by the Corporate Debtor before the Adjudicating Authority. Learned counsel for the appellant argued that the impugned order passed being violative of principle of natural justice and is liable to be set aside.

26. Learned counsel for the 1st respondent argued that the appellant has admitted that the notice pertaining to the proceedings before the NCLT Jaipur was duly served upon the email address gbincoeatlas@redifmail.com. Learned counsel for the 1st respondent further argued that the nowhere the appellant has denied the knowledge pertaining to the service of the notice of the proceedings before the NCLT Jaipur. Learned counsel for the 1st respondent argued that the appellant has merely made a vague argument that the said email was used by the erstwhile employees of the Corporate Debtor. Learned counsel for the 1st respondent argued that the appellant has not placed an affidavit of the said employee to substantiate his claim. Learned counsel for the 1st respondent argued that the Notice dated 25th August, 2019

was also sent to email ID cs.shubham@gmail.com. The said email cs.shubham@gmail.com is mentioned on MCA website as the email of erstwhile Director of 'Grand Batteries Pvt Ltd'. Learned counsel for the 1st Respondent argued that the NCLT, after satisfying itself, has also recorded in its impugned order dated 20.09.2019 that the Corporate Debtor was duly served. Learned counsel for the 1st respondent argued that notices were also pasted on the premises of 'Grand Batteries Pvt Ltd' in which the appellant happened to be Director. Learned counsel for the 1st respondent further argued that the Notice under Section 13(2) of SARFEASI Act was served upon the Corporate Debtor and its sister concern, M/s Nihan Batteries Ltd, (Page 86 and 94 of Appeal Paper Book) at the common address. Learned counsel for the 1st respondent further argued that the appellant was aware of publication dated 26.8.2019 of theft in the registered address of the Corporate Debtor but the argument of the appellant that he was unaware with regard to commencement of Corporate Insolvency Resolution Process of the Corporate Debtor is not acceptable. Learned counsel for the 1st respondent argued that the appeal is hopelessly time barred. Lastly learned counsel for 1st respondent prayed that the appeal may be dismissed and impugned order dated 20.09.2019 may be upheld.

27. Learned counsel for 2nd Respondent/RP argued that the copy of the order as well as minutes of the COC Meeting were served to the suspended Directors on the email given on MCA portal as well as on the personal email ID of the suspended Directors. 2nd respondent further argued that the statutory auditors of corporate debtor was first informed about the initiation of CIRP on 23.9.2019 when IRP sent him an email and thereafter reminders

have been sent on 18.10.2019, 22.10.2019 and 01.11.2019 and the IRP sought information with regard to books of accounts and other records of the Corporate Debtor. 2nd Respondent further argued that the statutory auditor of corporate debtor replied to the aforesaid email on 04.11.2019 and the statutory auditors sent ITR IV, computation income audit report and has audit report. 2nd respondent argued that the fact of Statutory Auditor being informed of initiation of CIRP in first week of November, 2019 has not been controverted by the Appellants. 2nd Respondent argued that due to non-cooperation of the corporate debtor and its suspended director, the RP filed an application under Section 19(2) of I&B Code before the Adjudicating Authority. 2nd Respondent further argued that in reply to application under Section 19(2) of I&B Code, the appellant himself has annexed minutes of COC Meeting dated 17.10.2019 wherein "*Any other Matter*" category the fact of sending of email to the auditor has been mentioned. 2nd respondent further argued that it is difficult to believe that the statutory auditor of corporate debtor informed the appellant only in January, 2020, when the records clearly shows that the auditor became aware of the CIRP proceedings on 4.11.2019. 2nd Respondent argued that the present appeal has been filed by the appellant only after application under Section 19(2) was filed before the Adjudicating Authority. 2nd Respondent further argued that the IRP made a public announcement and thereafter Form G was published on 1.11.2019 and thereafter on 21.12.2019. 2nd Respondent argued that the appellant has not approached this Appellate Tribunal with clean hands and has not been able to explain the day to day delay caused in filing of the appeal and therefore, the appeal deserves to be dismissed on the issue of limitation.

OUR OBSERVATIONS/CONCLUSION

28. It is not in dispute that the Corporate Debtor availed credit facilities and could not maintain financial discipline and there is litigation between the parties and the Corporate Debtor admitted that they sent OTS proposal to Financial Creditor which proves that there is 'debt' and 'default'.

29. The main issue raised by the appellant is that the application filed by the Financial Creditor is not served on the correct address and the notice has also been served upon him. We have heard the parties on this issue and perused the record. We have observed from the Appeal at Pages 292 to 300 and note that the email ID gbincoeatlas@redifmail.com is printed on the letterhead of the Corporate Debtor, therefore, there is no force in the argument of appellant that the said Email ID was used by the staff. This is an after thought. Further it is the duty of the Corporate Debtor to access to his emails and can not take excuse that the same was not in use. Financial Creditor has duly served the Corporate Debtor. We also note that the Notice dated 25th August, 2019 (Page 27 of Reply of Respondent No.1) was also sent to email ID cs.shubham@gmail.com in addition to email ID gbincoeatlas@redifmail.com of appellant. We note that the email cs.shubham@gmail.com is the email of erstwhile Director of 'Grand Batteries Pvt Ltd'. We also note notices were also pasted on the premises of 'Grand Batteries Pvt Ltd' in which the appellant happened to be Director. We also note that Notice under Section 13(2) of SARFEASI Act was served upon the Corporate Debtor and its sister concern, M/s Nihan Batteries Ltd, (Page 86 and 94 of Appeal Paper Book) at the common address. We also note that the appellant was aware of publication dated 26.8.2019 of theft in the registered address of the Corporate Debtor.

Thus the argument of the appellant that he was unaware about commencement of Corporate Insolvency Resolution Process of the Corporate Debtor is not credible and has no force.

30. We also note that Corporate Debtor and suspended directors were served by IRP on the email given on MCA portal as well as on the personal email ID of the suspended Directors. We also note that the 2nd respondent sent an email to statutory auditors and thereafter sent reminders on 18.10.2019, 22.10.2019 and 01.11.2019 and the IRP sought information with regard to books of accounts and other records of the Corporate Debtor. We note that the statutory auditor of corporate debtor replied via email dated 04.11.2019 and the statutory auditors sent ITR IV, computation income audit report and has audit report to the IRP and this has not been denied by the appellant. We also note that 2nd Respondent has to file an application under Section 19(2) of I&B Code before the Adjudicating Authority due to non-cooperation of the corporate debtor and its suspended director. We note that the IRP made a public announcement on 1.11.2019 as per Rule 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016. In this Public Announcement the name of the Corporate Debtor, Insolvency commencement date in respect of corporate debtor, Corporate Identification No. of corporate debtor etc. is given. This public announcement is for public at large. Even if it is presumed that the appellant was not served at the correct address or at the correct email, this public announcement is made known to each and every citizen of country and the appellant cannot deny it. Therefore, the appellant should have filed the appeal within 45 days from the date of public announcement i.e.

1.11.2019. But the appellant has not done this and taking the irrelevant pleas that the email is not being used by them for the last three years or the email was for the staff etc. We find no force in his arguments. All the above establishes that the Corporate Debtor was duly served, as also observed by the NCLT Jaipur, but did not appear before the NCLT Jaipur and also deliberately filed the appeal before this Appellate Tribunal after a delay of 110 days to delay the process of insolvency of corporation debtor. Further the appellant has also not disclosed that they have attended the 3rd, 4th and 5th COC Meeting.

31. In view of the foregoing discussions and observations we find no merits in the appeal and it is accordingly dismissed. No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Mr. V.P. Singh)
Member (Technical)

New Delhi

Bm

