

(2024) 04 NCLAT CK 0010

National Company Law Appellate Tribunal New Delhi

Case No: Company Appeal (AT) (Insolvency) No. 1485 Of 2022

Raj Radhe Finance Limited

APPELLANT

Vs

Shrinathji Spintx Pvt. Ltd

RESPONDENT

Date of Decision: April 3, 2024

Acts Referred:

- Insolvency and Bankruptcy Code, 2016 - Section 7, 61

Hon'ble Judges: Ashok Bhushan, Chairperson; Barun Mitra, Member (T); Arun Baroka, Member (T)

Bench: Full Bench

Advocate: Honey Satpal, Nipun Singhvi, Vishal J. Dave, Anshula Grover, Nitika Grover

Final Decision: Allowed

Judgement

Barun Mitra, Member (Technical)

1. The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('IBC' in short) by the Appellant arises out of the Order dated 10.10.2022 (hereinafter referred to as 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Court-II) in I.A. No. 660 of 2020 in CP (IB) 574 of 2018. By the Impugned Order, the Adjudicating Authority rejected the said I.A. No. 660 of 2020 filed by Raj Radhe Finance Limited/Appellant to restore the CP(IB) No. 574 of 2018 which had been filed by Bank of Baroda, the original applicant and dismissed for non prosecution. Aggrieved by this impugned order, the present appeal has been preferred by the Appellant.

2. Coming to the factual matrix of the matter, we notice that the Bank of Baroda, the original petitioner, had given a loan to the Corporate Debtor. The Bank of Baroda-Present Respondent No.2 filed a Section 7 application vide Company Petition

No. 574/2018 against Corporate Debtor-Present Respondent No. 1 before the Adjudicating Authority. Bank of Baroda had in the meantime assigned the loan to the Appellant which is a Non-Banking Finance Company vide an assignment agreement dated 30.09.2019. Bank of Baroda as the original petitioner filed a pursis on 26.06.2020 before the Adjudicating Authority bringing on record the assignment of the debt to the Appellant. The Appellant had filed I.A. No 779/2019 in the main company petition. The I.A. No. 779/2019 came up for hearing before the Adjudicating Authority on 03.08.2020 but was adjourned. Thereafter I.A. No. 779/2019 was taken up for hearing again by the Adjudicating Authority on 25.08.2020 on which date the main company petition was also heard. The main company petition was dismissed for non-prosecution. The I.A. No. 779/2019 was also dismissed as infructuous since the main company petition stood dismissed. The Appellant had also filed another I.A. with the NCLT Registry seeking substitution of the Appellant in place of the Bank of Baroda in the main company petition which application was however numbered as I.A. No. 887/2020 after dismissal of the main company petition and remained unheard. After the main company petition was dismissed, the Appellant filed I.A. No. 660/2020 on 28.09.2020 seeking restoration of the main company petition. The restoration application has been rejected by the Adjudicating Authority vide impugned order dated 10.10.2022. Aggrieved by the impugned order, the present appeal has been preferred.

3. Making her submissions, the Learned Counsel for the Appellant stated that the loan of the Corporate Debtor along with underlying security had been assigned to the Appellant vide an assignment agreement entered into with the Bank of Baroda. It was submitted that this position in respect of debt assignment had been correctly appreciated by the Adjudicating Authority. Yet when the main company petition of Section 7 of IBC filed by the Bank of Baroda was dismissed by the Adjudicating Authority for non-prosecution, the Appellant in spite of being a valid assignee was deprived from seeking restoration of the main company petition on the ground that the name of the Appellant was not brought on record during the pendency of the main company petition and hence ineligible to file the restoration application. It was emphatically asserted that the Appellant was all along pursuing its interests in the right earnest having initially filed I.A. No 779/2019 in the main company petition and also filed a substitution application and cannot be blamed of negligence in enforcing their legal rights. It is also their case that they have the right to pursue their legal remedies under IBC and unless the restoration application is allowed their interests would be prejudicially affected. Assailing the impugned order, it was vehemently contended that the decision of the Adjudicating Authority is contrary to established principles of law. In support of their contention, reliance has been placed on the judgement of this Tribunal in the matter of Siti Networks Ltd vs Assets Care and reconstruction Enterprises Ltd in CA (AT)(Ins)No.1499/2022 wherein it has been held that there is no prohibition in the IBC or any of the Regulations from continuation of proceedings by an assignee once

the assignee steps into the shoes of the assignor by virtue of assignment.

4. Refuting the submissions made by the Appellant, the Learned Counsel for the Respondent No.1 submitted that though there was admittedly an assignment agreement between Bank of Baroda and the Appellant, however, no steps were taken by the Appellant to bring on record the assignment agreement or for substitution of the Appellant in place of Bank of Baroda during the pendency of the main company petition. It was also contended that the substitution application was filed on 28.08.2020 which was after the hearing of the main company petition had concluded. Thus, when the Adjudicating Authority was unaware of any substitution application, it did not commit any error in rejecting the restoration of the main company petition which had been dismissed on grounds of non-prosecution by the original applicant. Moreover, since the main company petition had already been disposed of, the I.A. filed for substitution had become infructuous. It was also pressed hard that since the Appellant was not a party to the main company petition, the Appellant was not eligible to file an application for restoration under Rule 48 of the NCLT Rules, 2016. Furthermore, the substitution application having been moved after delay of 11 months, the restoration application was rightly not allowed in the absence of sufficient cause explaining the delay.

5. We have heard Learned Counsel of both parties and perused the records carefully.

6. We notice from the material placed on record that the main company petition came up for hearing for the first time on 19.08.2019. The Bank of Baroda did not appear before the Adjudicating Authority on any hearings after 25.02.2020. It is an undisputed fact that before the Section 7 application could be adjudicated by the Adjudicating Authority, the original petitioner, Bank of Baroda had assigned the loan to the Appellant by way of a registered assignment agreement dated 30.09.2019 as placed at page 65 of Appeal Paper Book ('APB' in short). In terms of the Clause 2.1 of the assignment agreement, the entire debt had been assigned in favour of the assignee with all rights, title and interest in the financing documents, all agreements, deeds and documents related thereto and all collateral and underlying security interest and/or pledges created to secure and/or guarantees issued in respect of repayment of the loans which the assignee is entitled to. This assignment agreement also stipulated at Clause 6.1 that the assignor would cooperate with the assignee in any legal proceedings for enforcement of the loans or the underlying security interest and/or pledges created to secure and/or guarantees and in any recovery proceedings.

7. It is also an undisputed fact that Bank of Baroda as the original petitioner had filed pursis on 26.06.2020 before the Adjudicating Authority in the main company petition bringing on record the fact of assignment of debt to the present Appellant. Thus, in our considered opinion, there is no reason to believe that the Adjudicating Authority was

unaware of the assignment of the debt by the original applicant, Bank of Baroda.

8. That the Appellant in turn was keen and vigilant about protecting its own interests as an assignee is also evident from the factum that the Appellant had filed I.A. No 779/2019 in the main company petition. When the I.A. No. 779/2019 came up for hearing before the Adjudicating Authority on 03.08.2020, we also notice that it was brought to the knowledge of the Adjudicating Authority by the Corporate Debtor that the original applicant, Bank of Baroda, had already assigned the debt to the Appellant and that a pursis had been filed to that effect by them. The relevant extracts of the orders of the Adjudicating Authority is as follows:

"Learned lawyer, Mr. Arjun Sheth appeared on behalf of Applicant and submitted that the Respondent/Original Petitioner has already assigned his debt, to that effect he has filed a pursis. However, as a last chance, the matter is adjourned.

Meanwhile, the Applicant is directed to inform the Respondent along with copy of order of CP(IB) 574/2018.

List the matter on 25.08.2020."

9. The Adjudicating Authority after noting the submission made by the Corporate Debtor with respect to the pursis filed by the Bank of Baroda, adjourned the matter, since Bank of Baroda was not present. Thereafter I.A.No. 779/2019 came up next for hearing by the Adjudicating Authority on 25.08.2020 on which date the main company petition was also heard and separate orders were passed. At the time of hearing the main company petition, Learned Counsel for the Corporate Debtor again made a submission that Bank of Baroda had assigned its debt to the Appellant and that a copy of the letter of the Bank of Baroda showing that they had assigned and transferred the account to the Appellant had been annexed. However, the Adjudicating Authority after taking note of the fact that Bank of Baroda was not present during the hearing, in spite of notice having been issued to them, decided to dismiss the Section 7 application. As regards I.A. No.779/2019, though the Learned counsel for the Appellant was present during the hearing, the I.A. was dismissed as infructuous on the ground that the main company petition had been dismissed for non-prosecution.

10. This brings us to the question whether the Appellant had taken appropriate steps to substitute itself in place of the original applicant, Bank of Baroda. It is the case of the Appellant that their counsel was present during the hearing of the main company petition who informed the Adjudicating Authority that pursuant to the assignment agreement they had already filed an I.A. with the NCLT Registry seeking substitution of the Appellant in place of Bank of Baroda in the main company petition but the said IA was yet to be numbered and notified for hearing. Nonetheless, when we peruse the order sheet, no such presence of the Counsel for the Appellant has been recorded by

the Adjudicating Authority in their order dated 25.08.2020. Since no presence is recorded on the order sheet and there is nothing to show that any steps were taken by the Appellant to mark their attendance or to move any application for correction of the said omission, we would prefer to go by the court records which does not take note of the presence of the Learned counsel for the Appellant.

11. However, even if we discount the presence of the Counsel of the Appellant on 25.08.2020 when the main company petition was heard, we cannot lose sight of the fact that an I.A. for substitution had been filed by the Appellant though undeniably the physical filing of the same seems to have taken place on 28.08.2020 which was post dismissal of the main company petition. The said application which got subsequently numbered as I.A. No. 887/2020 has been placed on record at pages 96-98 of the APB wherein it has been inter-alia prayed by the Appellant that the Adjudicating Authority may permit the substitution of the name of Bank of Baroda with that of Appellant in the main application.

12. This clearly shows that the Appellant was diligent and vigilant in pursuing the main company application and had taken steps to file the substitution application. Want of diligence or wilful inaction is attributable only when something that is required to be done is not done at all or not done in a timely manner. We do not find any such delay or negligence on the part of the Appellant to deprive him of his statutory and legitimate right to prosecute the main company petition.

13. That the Appellant was not negligent or slack in protecting its interests is also borne out from the fact that after the main company application was dismissed, the Appellant filed I.A. No. 660/2020 on 28.09.2020 seeking restoration of the main company petition as placed at pages 141-149 of APB.

The prayers in IA 660/2020 were for recall of the order dated 25.08.2020 passed by the Adjudicating Authority in main company petition 574/2018 and for restoration of main company petition. In I.A. 660/2020, averment was made that the Appellant had filed an I.A. for substitution in the main company petition as Bank of Baroda had already assigned the debt, which assignment had already been brought to the notice of Adjudicating Authority by filing a pursis. It was also submitted that if the main company petition is not restored, it would cause grave prejudice to the Appellant.

14. The Adjudicating Authority however dismissed the restoration application after hearing IA 660/2020. We notice that the Adjudicating Authority in the impugned order, on the one hand, has held that the Appellant had stepped into the shoes of the Bank of Baroda and had the same right against the Corporate Debtor as that of Bank of Baroda including all rights exercisable under the IBC. Yet, on the other hand, it has dismissed the restoration application on the ground that since the main company petition was not filed by the Appellant, it was not eligible to file the restoration application. It was

also held that the Appellant was not a party in the main company petition at any point of time nor was it a party to the said proceedings until its dismissal. Hence, Appellant cannot be treated as the original applicant of the main company petition and hence the said petition cannot be restored by the Appellant. The Adjudicating Authority further held that in terms of Rule 48 of NCLT rules, 2016, only the original applicant can approach or file an application before the Adjudicating Authority for restoration of the application. The original application has been dismissed on ground of non-appearance of the Bank of Baroda and since in this application, the Appellant was not a party, it could not have filed the restoration application.

15. When we analyse the facts on record, we find that it is an undisputed fact that the Bank of Baroda had assigned the debt to the Appellant during the course of pendency of the main company petition. The Bank of Baroda being the original petitioner had filed a pursis to the effect that the debt had been assigned to the Appellant. The above mentioned pursis was also brought to the notice of the Adjudicating Authority on 03.08.2020 by the Corporate Debtor which was prior to the dismissal of the main company petition. More significantly, we need to take cognisance of the affidavit filed by the Bank of Baroda in IA 660/2020 as placed at page 192-193 of APB wherein it has stated:

“2. I state that I am filing this short affidavit for limited purpose of stating and declaring before this Hon’ble Adjudicating Authority that the Bank of Baroda has been lender in relation to the debts which are not assigned under the deed of assignment dated 30.09.2019 read with the correction of Assignment Deed dated 30.03.2021 in favor of Raj Radeh Finance Limited is the Assignee of the entire financial debt together with underlying securities in relation to present Corporate Debtor.

3. I say that as Bank of Baroda has already assigned its debts together with underlying securities in favor of the Assignee viz the present applicant, the present application for restoration is made by the applicant.

4. I say that in the facts and circumstances, this Hon’ble Adjudicating Authority may be pleased to consider to grant the prayers in the present application.”

The Adjudicating Authority in the impugned order has also unequivocally held that the assignment of debt of the Corporate Debtor in favour of the Appellant is not disputed. When Rule 48 of the NCLT Rules, 2016 does not act as a bar on Bank of Baroda as the original petitioner to file an application seeking restoration of the main company petition, given the terms of the assignment agreement which also assigned the Appellant the legal right to file suits etc, to our minds it is absurd to deny this right to the Appellant when his status as an assignee is undisputed.

16. It also a fact that an I.A. had been filed by the Appellant vide IA No.779/2020 in the main company petition. The Appellant had also made appearance before the Adjudicating Authority in respect of the I.A. No.779/2020 on 12.12.2019, 27.01.2020, 25.02.2020, 17.03.2020, 03.08.2020. Each time the matter was adjourned as placed on record at pages 92, 279-282 of APB. It is also an undisputed fact that an I.A. was filed by the Appellant seeking substitution of the Appellant as the petitioner in place of Bank of Baroda though the said application was not numbered until dismissal of main company petition. This has also been conceded by the Corporate Debtor in their reply affidavit to I.A. 887/2020 that an application seeking substitution that been filed by the Appellant on the date of dismissal of the main company petition. The relevant portion of the said affidavit reads as follows:

"6. During the pendency of the CP (IB) No. 574 of 2018, the Original Petitioner/Opponent No. 2 Bank of Baroda (erstwhile Dena Bank) CD received on letter dt. 08.11.2019 issued by BOB to the CD and has informed that the account of the CD with the BOB had purportedly come to be assigned to applicant herein. Hereto annexed and marked as Annexure A is a copy of the letter dated 08.11.2019 issued by BOB to CD. In this regard, the Applicant moved an Application for substituting the Original Petitioner i.e. Bank of Baroda with the Applicant on 25.08.2020."

17. When we come to the definition of the word "applicant" in the NCLT Rules, 2016 we find that Rule 2(4) defines "applicant" to mean a petitioner or an appellant or any other person or entity capable of making an application including an interlocutory application or a petition or an appeal under the IBC. Tested against this definition of an "applicant", let us now see whether the Appellant fits into this definition of an "applicant". We have before us an Appellant who by virtue of an assignment agreement has already stepped into the shoes of the original petitioner. This assignment has not only been endorsed by the assignor but the assignment agreement between them has also been acknowledged by the Corporate Debtor who has also chosen to place the agreement on record before the Adjudicating Authority on 25.08.2020. The Adjudicating Authority has also expressly acknowledged this position by stating that following the assignment agreement, the Appellant had stepped into the shoes of the original applicant, Bank of Baroda. The Adjudicating Authority has further opined in the impugned order that the Appellant enjoyed the same right against the Corporate Debtor as that of Bank of Baroda. It also held that the Appellant as an assignee was entitled to all rights exercisable under the IBC. That being the case, we are of the considered view that the Appellant clearly qualifies to be an "applicant" under the NCLT Rules and therefore enjoys the locus to file the restoration application before the Adjudicating Authority.

18. When an application which is dismissed for non-appearance of the petitioner can be restored on satisfying the Tribunal that he was prevented by some sufficient cause

from appearing before the Tribunal, likewise, in the present facts of the case, opportunity ought not to be denied to the Appellant from seeking restoration of the main company petition which has been dismissed for non-prosecution by the original applicant. It is not in the interest of justice to deny a person the opportunity to file an application for restoration for no ostensible lapses.

19. Having considered the entirety of facts as on record, we are of the view that the Adjudicating Authority was not correct in dismissing the application for restoration. In the wake of the above discussion, the impugned order is set aside. We feel that the main company petition should have been heard and decided on merits. The matter is remitted to the Adjudicating Authority which shall restore the main Company Petition and proceed to decide the same on merits expeditiously after giving an opportunity of hearing to all concerned. The appeal is allowed in these terms. No costs.