

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-503

IB-1587/ND/2019

(1) New IA/1038/2021

(2) IA/43/2021

IN THE MATTER OF:

M/s. JC Enterprises Pvt. Ltd.

...Applicant

V/s

M/s. M.K.S Oil Pvt. Ltd.

...Respondent

SECTION

U/s 9 IBC

Order delivered on 02.03.2021

CORAM:

SHRI ABNI RANJAN KUMAR SINHA
HON'BLE MEMBER (JUDICIAL)

SHRI K.K. VOHRA,
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant

: Adv Kanvi Nagpal, For Directors/Applicants

For the Respondent

:

ORDER

IA/43/2021 & I.A 1038/2021

As per Hon'ble Member (T)

The prayer in IA- 1038/2021 filed on 17.02.21 is to cancel the non-bailable warrant (NBW) issued on 3.12.20 (for non-cooperation with RP) and cancel the NBW issued as per order of Member (T) dated 29.01.2021 (which repeated NBW issued on 3.12.20). The reason given by Petitioner is that ex Directors have furnished the information required to RP. Counsel for RP stated that he received copy of petition on previous evening and case may be fixed when other related case will be heard on 23.03.21.

In the order dated 29.01.2021 (IA-43/2021), two Members had different views and the case is already being reviewed by Hon'ble President NCLT and no fresh NBW was issued as per order of 29.01.21. Therefore, it will be appropriate that a consolidated view is taken and this





matter (IA/1038/2021) is also referred to Hon'ble President, NCLT to take appropriate decision. Accordingly, this matter is being referred to Hon'ble President, NCLT for an appropriate decision.

Sd/-
(K.K. VOHRA)
MEMBER (T)

As per Hon'ble Member (J)

I have had the occasion to go through the order dictated in open Tribunal by Hon'ble Member (Technical) regarding the referring the matter to the Hon'ble President, NCLT. I would like to add the following facts in addition to the order dictated and pronounced by the Hon'ble Member (Technical).

The IA no. 43/2021 is listed for hearing today and during the pendency of this IA, another application has also been filed on behalf of the applicant of this IA/43/2021, which is numbered as IA/1038 /2021 and the same is listed today.

In IA 1038 of 2021, the applicant has also made a prayer to cancel the order dated 29.01.2021 passed by the Hon'ble Member (Technical). Therefore, I would like to consider at first the position of law, if there is difference of opinion on certain point/points between the Members.

Earlier the position of law was not considered because the order dated 29.01.2021 was dictated and pronounced in the open Tribunal by Member (Judicial) and application was dismissed. But subsequently when the order was duly signed and sent to the Hon'ble Member (Technical) for signature then Hon'ble Member (Technical) vide email dt. 01/02/2021 communicated the Member (Judicial) the following message:-

“Dear Brother,

Greetings. Thanks for summing- up the developments so far in an excellent manner in Item 512 listed on 29.01.21. Generally, conclusion follows the facts; you take good care of that. In the attached case, a few lines have

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been added respectfully to make conclusion in line with facts and more logical to facts. Perhaps these got skipped inadvertently earlier.

Appropriately, these lines can be merged with original draft prepared and signatures of both Members can be at end. Attachment 5 is soft copy of text added by me. Alternatively, these lines can be in the name of Member Tech. Choice will be yours. Date of next Hearing can be changed, if you so like. I am sending hard copies duly signed to your PS for final view by you before putting on web-site.

Rgds,”

Alongwith the aforesaid message dt. 01/02/2021, Hon'ble Member (Technical) also returned the order, which was dictated and pronounced in open Tribunal on 29/01/2021 and duly signed by me and dissenting order passed by him.

Since the dissenting order was received by me on 01/02/2021, that is why on that day, i.e. on 29/01/2021 the order u/s 419 (5) of the Companies Act 2013, on the point of referring the matter on the ground of difference of opinion between the two Members could not be passed and matter could not be referred on that day. We further notice the Hon'ble Member (Technical) in his order directed the registry to list the matter on 23.02.2021.

But on that day Registry did not list the matter. Registry lists the matter on 25/02/201 but could not be taken up due to paucity of time and again it is listed today. Hence, Section 419 (5) of the Companies Act, 2013 is being considered today.

At this juncture, I would like to refer the position of law. In the similar situation the Hon'ble Supreme Court in a case of ***“Surendra Singh in Criminal Appeal No. 34 of 1953 reported in Manu SC0032/1953”*** considered what is the position of judgment pronounced by the Court. The Hon'ble Supreme Court in para 7 of the decision deals the four different situations in which the judgments are pronounced.

“These rules provide for four different situations: (1) for judgments which are pronounced at once as soon as the case has been heard; (2) for those which are pronounced on some future date; (3) for judgments which are oral, and (4) for



those which are written. These rules use the word "pronounced" in some places and "delivered" in others. Counsel tried to make capital out of this and said that a judgment had to be both "pronounced" and "delivered" and that they were two different things."

After considering the matters in para 18 Hon'ble Supreme Court held;

"After the judgment has been delivered provision is made for review. One provision is that it can be freely altered or amended or even changed completely without further formality, except notice to the parties and a rehearing on the point of change should that be necessary, provided it has not been signed. Another is that after signature a review properly so called would lie in civil cases but none in criminal; but the review, when it lies, is only permitted on very narrow grounds. But in this case the mere fact that a Judge is dead and so cannot review his judgment does not affect the validity of the judgment which has already been delivered and has become effective. For this reason, there is a distinction between judgments which have not been delivered and so have not become operative and those which have. In the former case, the alteration is out of court. It is not a judicial act. It is only part of a process of reaching a final conclusion; also there is no formal public declaration of the Judges' mind in open court and consequently there is no "judgment" which can be acted upon. But after delivery the alteration cannot be made without notice to the parties and the proceedings must take place in open court, and if there is no alteration there is something which is final and conclusive and which can at once be acted upon. The difference is this. In the one case, one cannot know, and it would be against public policy to enquire, whether the draft of a judgment is the final conclusion of the Judge or is only a tentative opinion subject to alteration and change. In the second case, the Judge has publicly declared his mind and cannot therefore change it without notice to the parties and without hearing them afresh when that is necessary; and if there is no change the judgment continues in force. By change we mean an alteration of the decision and not merely the addition or subtraction of part of the reasoning."

In view of that decision, we consider the case in hand. Here in the case, the Member (Judicial) has dictated and pronounced the order in the open Tribunal and dismissed the application. But on that day in the open Tribunal no dissenting order was dictated and pronounced by the Hon'ble Member (Technical). When the order dictated in the open Tribunal duly signed by the Member (Judicial) was sent for signature of Hon'ble Member (Technical) then instead of signing the order he sent a dissenting order duly signed by him through mail on 01/02/2021(**said mail is referred in aforementioned paragraph**), by which a fresh non-bailable warrant of arrest against the Suspended Board of Director through SP was ordered to be issued and a direction was given to list the matter on 23.02.2021. Since in its order Member (Technical) fixed the date on 23/02/2021, therefore, record could not be placed earlier.

Now, the question is whether the order which is dictated and pronounced in the open Court/ Tribunal that can without giving opportunity to the other side be changed by any of the Member of the Bench and that is the reason, we think it proper to refer the matter to the Hon'ble President, NCLT u/s 419 Sub-Section 5 to consider these points.

1. When an order is dictated and pronounced in the open Court by one of the Member, and no dissenting order was dictated and pronounced on that day by another Member, can it be changed, which change the nature of order, subsequently by sending the e mail alongwith dissenting order on the next day?
2. While considering the application of bail or recalling the order of non-bailable warrant of arrest, whether the Adjudicating Authority/Tribunal is empowered to give direction for issuance of fresh non-bailable warrant of arrest in that matter or it can be passed only in the original matter, in which warrant of arrest was earlier issued?

Accordingly, u/s 419(5) of the Companies Act, the matter is being referred to the Hon'ble President, NCLT for hearing on the aforesaid points.

Before parting with the order, at this juncture, I would like to refer the E mail received from the Registrar, NCLT, which shows that the matter was placed before the Hon'ble President, NCLT and I notice in para 3, the Registrar, NCLT has referred the order dated 20.11.2017 "***Company Appeal (AT) No. 271 of 2017 and Company Appeal (AT) No. 385 of 2017***" titled as "***Pankaj Khandelia & Anr. Vs. Khandelia Oil and General Mills Pvt. Ltd. & Ors.***" has laid down the guideline of the cases wherein the Members have different opinions. On going



through the aforementioned orders passed by the Hon'ble Members of the NCLT, New Delhi Bench, it seems that they have not adhered to the guidelines laid by the Hon'ble NCLAT. The orders have not been forwarded to the Hon'ble President, NCLT under Rule 16 Sub Rule 3 of the NCLT Rules, 2016.”

At this juncture, before making any comments on the notes submitted by the Registrar, NCLT, we would like to refer the powers of the Registrar under Rule 17 of the NCLT Rules, 2016 and the same is quoted below:-

17. Functions of the Registrar.-

(1) The Registrar shall have the following functions namely:-

- (a) registration of appeals, petitions and applications;*
- (b) receive applications for amendment of appeal or the petition or application or subsequent proceedings.*
- (c) receive applications for fresh summons or notices and regarding services thereof;*
- (d) receive applications for fresh summons or notices and for short date summons and notices;*
- (e) receive applications for substituted service of summons or notices;*
- (f) receive applications for seeking orders concerning the admission and inspection of documents;*
- (g) transmission of a direction or order to the Civil Court as directed by Tribunal with the prescribed certificates for execution etc., and*
- (h) such other incidental or matters as the President may direct from time to time.*

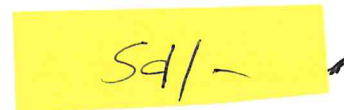
(2) All adjournments shall normally be sought before the concerned Bench in court and in extraordinary circumstances, the Registrar may, if so directed by the



Tribunal in chambers, at any time adjourn any matter and lay the same before the Tribunal in chambers.

Mere plain reading of the aforesaid Rule shows that nowhere the Registrar is vested with the power to make any comment on the judicial order passed by the Bench. Which seems to me that the Registrar has exceeded his powers, which is not vested under the law/ Rule. Which in my opinion amounts to the interference in the judicial functions of the Bench/Tribunal and also comes under the purview of contempt of Court, **because in view of Section 408 of Companies Act 2013, National Company Law Tribunal consisting of a president and such number of Judicial and Technical Members, as the central Government may deem necessary.** Since, the Hon'ble President is the administrative head of the Tribunal, therefore, I left the matter upon the Hon'ble President to decide the issue, whether the Registrar is competent to make comment on the order passed by the Tribunal or not?

Let the copy of order be placed before the Hon'ble President for information and needful.



(ABNI RANJAN KUMAR SINHA)
MEMBER (J)