

In the National Company Law Tribunal
Mumbai (Special) Bench.

MA 168, 169, 170, 171, 173 of 2017 in
CP 64, 65, 66, 67 & 68 / (59&397-398)/CLB/MB/MAH/2015

Under Section 59, 397 & 398 of Companies Act, 1956

In the matter of

Mr. Fidaali Moiz Mithiborwala : Petitioner

V/s

Aceros Fortune Industries Pvt. Ltd. : Respondent

Heard on : 25.04.2018
Order delivered on: 26.04.2018

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)
Hon'ble Shri Ravi Kumar Duraisamy, Member (Technical)

For the Petitioner(s): : 1. Mr. Sujit Gupta, Advocate.

For the Respondent(s): : 1. Mr. Satyam Israni, Advocate.
2. Ms. Minakshi Nimbalkar, Advocate.

Per : M.K. Shrawat, Member (Judicial).

ORDER

1. Petitioner of the main Company Petition is the Applicant of these five Miscellaneous Applications, all submitted on 08.05.2017, respectively for each Company Petition. These Applications are more or less identically worded with the similar Prayer hence consolidated and herein below decided by this Common Order.

The only Prayer reads as under :-

" PRAYER

It is humbly prayed that this Hon'ble Court may be pleased :-

(a) *Pass appropriate orders or modify the order passed on 02.05.2017 to ensure that Petition Nos TC nos. 64 to 68 of 2015 are listed for hearing before the Hon'ble Tribunal after the Appeals filed by the Petitioner before the Hon'ble Supreme Court are heard. "*

2. **ARGUMENTS Of Petitioner / Applicant :-** The Learned Counsel of the Applicant has clarified at the outset that in fact the Prayer is to **recall the impugned Order of NCLT Mumbai dated 02.05.2017**. He has narrated that on 02nd May, 2017 the cases enlisted before NCLT Mumbai were large in number. To

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represent the Petitioner, one of the Associate Advocate appeared and sought deferment of hearing for few days. It was informed by the said Associate Advocate that there was an Appeal filed before the Hon'ble Supreme Court which was likely to be listed on 08th May, 2017 as per the "Case Status" published by the Registry of S.C. Now in this Application it is alleged that the said Associate Advocate was present in the Court up to 4.30 pm and at that time still there were 10 cases remained to be called for hearing. He had stepped out of the Court Room for few minutes, however, on his return, the Court had risen and the dates of adjournment were communicated. On the next day, the said Associate went to find out the adjourned - date, however, the Daily Cause List of 02nd May, 2017 was uploaded to inform the fate of each case enlisted on that date. About this case it was remarked as "**Dismissed for Default**". Learned Counsel has pleaded that the impugned ex-parte decision is bad in law because the Respected NCLT Bench had not discussed the merits of the case. The Petitioner had attended the hearing regularly in the past and co-operated for quick disposal of the Petitions, however, on that date because of the very heavy Board the Hon'ble Members have adjourned most of the cases but decided the impugned Petitions ex-parte without discussing the merits of the case. Learned Counsel has thus pleaded that such an Order, being passed by the Respected NCLT dismissing a Petition for default of appearance, is therefore to be restored for hearing on merits. In support of this argument he has cited **Rule 48 of NCLT Rules 2016**. He has vehemently pleaded that the impugned decision was not on merits and the main Petitions were not disposed of either after hearing the Petitioner or the Respondent. **Under Rule 48** it is prescribed that where a case is disposed of on 'merits', the said decision shall not be reopened, otherwise if an Order is passed dismissing a Petition for 'default of non-appearance' and the Petitioner has demonstrated sufficient cause for such non-appearance when the Petition was called for hearing, then the Tribunal shall pass an Order restoring the main Petitions. He has, therefore, concluded that one of the Representatives of the Petitioner was present, still ex-parte dismissal was pronounced, hence pleaded that the said decision deserves "Restoration".

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3. **ARGUMENTS OF RESPONDENT :** - From the side of the Respondent a Reply has been filed raising objection for restoration of the impugned order dated 02.05.2017. Learned Counsel has informed that vide an order dated 06.02.2017 the Hon'ble Tribunal had rejected an Application of Amendment moved by the Petitioner. That order was challenged before the Hon'ble NCLAT and vide order dated 06.04.2017 (Company Appeal (AT) No. 83 to 87/2017) it was partly dismissed in few cases with a direction to the parties **to conclude the hearing and pass the final order by 31.05.2017**. The last paragraph of the said order for ready reference is reproduced below :

"For the reasons aforesaid, we are not inclined to interfere with the impugned order. The parties are directed to appear before the Tribunal on the next date and conclude their hearing. The parties may rely on their pleading and other documents placed on record(s) by parties. The Tribunal will conclude the hearing and pass final order by 31st May, 2017. The appeals are dismissed. No cost"

3.1 The matter had come up before the NCLT on 24.04.2017 but the Petitioner sought an adjournment. On one hand, the Petitioner kept on seeking adjournment, but on the other hand the direction of the respected NCLAT was to be carried out that the order be passed by NCLT by 31.05.2017. It is therefore pleaded that under the fitness of circumstance as existed at that point of time, the respected NCLT passed the impugned order on 02.05.2017 dismissing the Petition. Such an order which had been passed under the instructions of an Appellate Authority must not be considered as an ex-parte dismissal but a compliance order. It is pleaded that all these applications have been filed to increase the litigation hence deserves dismissal.

3.2 Learned Counsel has also informed that in these Misc. Applications (submitted on 08.05.2017) the applicant has purposely with *malafide* intention has raised frivolous allegations vide para 8 reproduced below :

"That the above facts give rise to a serious doubt about the status of the petitions filed by the Petitioner, especially when they were not heard on 02.05.2017, clearly because the Hon'ble Tribunal was still taking up the first list

at 4.30 pm. Moreover, the manner in which the status of the case has been uploaded, without the order being signed and uploaded on the website, also raises various doubts as the Respondents have been openly bragging that they have 'managed' things at the Tribunal."

3.3 The above paragraph thus, proves the conduct of this Petitioner. The learned Advocate of the Petitioner has signed this application raising allegations against the Hon'ble Member maligning the reputation of the prestigious institution.

3.4 Vide an order of 01.09.2017 the **Hon'ble Members of NCLT have recused themselves** and reported the matter to Hon'ble President of NCLT. As a consequence, a fresh NCLT Bench was constituted, now seized of this matter.

4. **FINDINGS :-** Heard both the side at some length. This case has a lengthy and chequered past history. However, keeping brevity in mind without going in to the detail of the protracted litigation as happened in the past, we confine ourselves within the narrow compass of the issue that 'whether under the facts and circumstance an order passed on 02.05.2017 can be recalled within the parameters prescribed under Rule-48 of NCLT Rules?'. The impugned order of 02nd May 2017 reads as under :-

" COMMON ORDER "

TCP 64/58, 397-398/NCLT/MB/MAH/2015
TCP 65/58, 397-398/NCLT/MB/MAH/2015
TCP 66/58, 397-398/NCLT/MB/MAH/2015
TCP 67/58, 397-398/NCLT/MB/MAH/2015
TCP 68/58, 397-398/NCLT/MB/MAH/2015

The Petitioner Counsel is absent. Some Counsel was present on the last date of hearing seeking time on the ground appeal on the Order dated 6.4.2017 passed by the Hon'ble National Company Law Appellate Tribunal has been appealed to Honorable Supreme Court, on that request, this Bench as there is a direction from Honorable Appellate Tribunal to this Bench to dispose of this Company Petition by 31st May, 2017, directed the petitioner side either to file stay order or to argue the case without fail on the next date of hearing i.e., on 3.5.2017. Whereas that Counsel has not appeared today to argue this matter.

Today, a Junior appeared on behalf of the Petitioners repeating that since an appeal has already been filed before the Hon'ble Supreme Court, he has again sought time for making their submissions in this Company Petition.

Though the Junior has stated that an appeal has been filed, but he has not stated that any stay has been granted by Hon'ble Supreme Court, whereby this Bench, following the directions given by the Hon'ble NCLAT, passed over the matter insisting upon that Junior to argue the case after sometime, but by the time the matter is reached, the Junior was not present, henceforth this Bench could not get any occasion for hearing the matter from the Petitioner side, since nobody is present from the Petitioner side to argue the matter, recording the absence from the petitioner side, the Company Petitions are dismissed for default.

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Since the order has been passed by Hon'ble NCLAT to dispose of this Application within one month hereof i.e. by the end of this month, for there being vacation from 4.5.2017 to 4.6.2017, it has to make clear from our side that this Bench will remain closed for vacation from 4.5.2017 to 4.6.2017."

4.1 Earlier an order was passed on 06.02.2017 by NCLT, Mumbai in C.A. No. 144/2016 in C.P. No. 64/2015 & others ,wherein the Amendment Applications moved by the Petitioner(s) were dismissed . The said order was challenged before the Hon'ble NCLAT and as noted above vide order dated 06.04.2017 it was directed to NCLT to conclude the hearing and pass the final order by 31.05.2017. As a consequence, those Petitions were fixed for hearing. On 24.04.2017 the respected Coordinate Bench has noted down as under :-

"TCP No. 64 to 68/58, 397-398/NCLT/MB/MAH/2015

For having the Respondent Counsel reported that the Petitioner side, despite there is a direction from the Appellate Tribunal, has not complied with filing amended Company Petitions therefore, in view of the directions given by Appellate Tribunal, this Bench directs the Petitioner side to file the amended Company Petitions by 26.04.2017. Thereafter, the Respondent side to file their replies to those amended Petitions by 28.04.2017, rejoinder, if any, to those replies, the Petitioner side is at liberty to file the same on or before 02.05.2017.

As to the unamended Petitions, reply having already come on record, the Petitioner side is hereby directed to file rejoinder on or before 02.05.2017.

List this matter for hearing on 02.05.2017."

4.2 Thereafter, the Petition was listed on 02.05.2017 and the impugned order was passed as reproduced *supra* now under challenge. The Coordinate Bench had made it clear that the summer vacations were starting from 4.5.2017 to 4.6.2017. and the directions were to hear and pass the order by 31.5.2017. Hence, in compliance with the directions of the Hon'ble NCLAT , the coordinate bench passed the order.

5. The legal position is that a Rule is framed under NCLT Rules, 2016 to deal the '**Consequence of non-appearance of applicant**' per **Rule-48**, which prescribes that where on the date fixed for hearing of a Petition and the Petitioner/Applicant does not appear when called for hearing, the Tribunal in its discretion either dismiss for default or hear and decide on merits. Where a Petition is i) **dismissed for default**, the Petitioner/Applicant can file an application and if the Tribunal is satisfied

that there was sufficient cause for his non-appearance when the Petition was called for hearing, the Tribunal shall pass an order restoring the said order and where ii) **disposed of on merits** that decision shall not be recalled for restoration of hearing.

For ready reference Rule-48 is reproduced below :-

"48. Consequence of non-appearance of applicant.- (1) Where on the date fixed for hearing of the Petition or application or on any other date to which such hearing may be adjourned, the applicant does not appear when the petition or the application is called for hearing, the Tribunal may, in its discretion, either dismiss the application for default or hear and decide it on merit.

(2) Where the Petition or application has been dismissed for default and the applicant files an application within thirty days from the date of dismissal and satisfies the Tribunal that there was sufficient cause for his non-appearance when the petition or the application was called for hearing, the Tribunal shall make an order restoring the same:

Provided that where the case was disposed of on merit the decision shall not be re-opened."

6. On careful reading of this Rule it emerges that consequence of non-appearance of an Applicant the NCLT Bench can pass either (i) Order of Dismissal for default of non-appearance, or (ii) hear the Respondent and decide it on merits. Precisely the wordings in this Rule are, *quote* "the applicant does not appear when the Petition or the application is called for hearing, the Tribunal may, in its discretion, either dismiss the application for default or hear and decide it on merit" *unquote*. Two types of Orders thus can be passed as elaborated by us.

6.1. In the present case, an Order was passed undisputedly without having discussion on merits. The Company Petitions were dismissed for default. The vital question is that in a situation when the Litigant is non-cooperative and adamant to prolong the hearing up to the last stage by putting the Judges / Members in an awkward or embarrassing situation, then such an Order whether be recalled merely on the ground that it was dismissed- in- default of non-appearance without having discussion on merits? Such conduct of the Petitioner cannot/must not be welcomed and an adverse view had to be taken. When the case was listed for hearing on 24th of April, 2017 it was clearly noted that despite directions the Petitioner had not complied with filing of amended Company Petition, already reproduced *supra*. The Petitioner had deliberately avoided the compliance so that if under compulsion an Order would be passed the same could be challenged on the ground of insufficient

opportunity. This tactic of the Litigants ought to be checked, curtailed and by all means, be stopped. This manoeuvring has become a menace in the judicial system, thus the Honourable Higher Courts have often expressed anguish and concern.

6.2. About the conduct of the Applicant/Petitioner an observation of the NCLT Bench made in an earlier order is also worth mentioning. In the order pronounced on 23rd Aug.2016 in the last para it was noted that the Petitioner had purposely dragged the matter by filing application after application. Relevant portion is reproduced below :-

"30. However, since the Petitioner has been purposely dragging out execution of consent order by filing application after application, this Petitioner is hereby directed to nominate a member from his side as stated in the order dated 12.05.2016 within 15 days after the order is been communicated to the Petitioner or the petitioner counsel, or else the chairman is at liberty to proceed with sale of the assets with the assistance of Respondent side and also ensure that sale proceeds are put in an escrow account till the same is paid towards one time settlement agreed upon. The chairman is also suggested to ascertain the real value of the property before confirming the sale if any takes place."

6.3. Facts and events of the case have explicitly demonstrated that the Petitioner himself never wanted to participate in the hearing, so avoided that the merits of the case could not be decided, reasons best known to him. In this situation when the Petitioner himself is not keen to get an Order on merits then no blame should be casted upon the Court of not deciding the case on merits. If the Hon'ble Courts are expected to give justice to the Litigants, then in return it is also expected from the Litigants to be justified in their conduct before the Hon'ble Courts. We have noticed that sometimes the Litigants watch the progress of a case and if dismissed, move Application for restoration. It is unfortunate that such Litigants adopt every possible technique to delay the hearing of a case on merits. This type of practice is a real road-blocking in prompt dispensation of pending cases. Because of number of Interim Applications, one after another, the cases get piled up and the Litigation appears to be unending. The time has come to discourage, rather stop, such delay tactics because the heavy pendency is a worrying problem, a known anguish expressed by several quarters. The cause of 'natural justice' need not required to be stretched to the breaking point but to be provided who deserves.

6.4. Rule 48 prescribes that where a Petition is dismissed for default of appearance, an Application can be filed within 30 days from the date of dismissal challenging the said Order. If the Tribunal is satisfied that there was "**sufficient cause**" for non-appearance when the Petition was called for hearing an Order can be passed restoring the said dismissal Order. For the purpose of restoration of a dismissal Order, the requirement of the Statute is that there should exist a "sufficient cause". The expression "sufficient cause" as used by the Legislature is an important yardstick to decide the fate of a dismissal Order passed for non-appearance. This legal expression is used in other Statutes as well by using the words "prevented by sufficient cause from appearing". **Sufficiency** of the cause of absence is of prime importance. Therefore, the sufficiency of non-appearance is an important feature for application of this provision. There should be a convincing reason for non-appearance. It must not be a stingy or thrifty reason for non-appearance but ought to be a sufficient reason for non-appearance. In the present case the Petitioner/Applicant has not demonstrated a convincing sufficient cause for not cooperating in deciding these Petitions on merits. The Petitioner has not demonstrated that why the directions of the Respected NCLAT of filing amended Petition not carried out by him ? Time was granted but on the date of hearing again a Prayer was made for seeking time on some flimsy ground. Even if an Appeal was filed before the Hon'ble Supreme Court, in the absence of any Stay and in the presence of directions of NCLAT, the request of adjournment was *ab initio* illegal and uncalled for. A Junior Advocate had appeared and a question was raised but he had not stated that any Stay was granted by the Hon'ble Supreme Court. Rest of the story as narrated in the impugned Applications are irrelevant and do not demonstrate a reasonable cause for not arguing the case on merits on the date assigned. Even there was no convincing reason, what to say a sufficient cause, for not filing amended Petitions. Reasonableness for not cooperating with the proceedings is altogether wanting. It is a clear case where the Litigant or Legal Representative had deliberately avoided appearance in order to let the matter be proceeded ex-party so that the said ex-party order could thereafter be recalled on the pretext of natural

justice or insufficient opportunity. In spite of knowing fully well that a time schedule was granted by NCLAT, which was about to exhaust by 30th May, 2017, again an adjournment was sought. Therefore, this is not a case where it can be argued that there was sufficient cause from not appearing on the date of hearing. As a consequence, no injustice was caused to the Applicant. It was his own creation and not once but on number of occasions in the past. The Bench had asked the Representative present in the Court to make the submissions on merits. But it was not availed, that too, deliberately. On the part of the Petitioner/Applicant it was a deliberate and clear defiance of the directions of the Respected NCLAT. The directions were, "*The parties are directed to appear before the Tribunal on the next date and conclude their hearing. The parties may rely on their pleading and other documents placed on record(s) by parties. The Tribunal will conclude the hearing and pass final order by 31st May, 2017.*" We, therefore, hold that considering the conduct of the Applicant the Prayer for recalling Order dated 02nd May, 2017 is ill founded thus having no legal force hence deserves to be rejected.

7. Generally in such circumstances when a litigant is non-cooperative and on top of it levelled frivolous allegation, the courts impose a cost on the litigant while rejecting Interim Application, but in this case the Ld. Counsel has submitted an unconditional apology through an affidavit withdrawing the allegation, therefore, we restrain ourselves.

8. To conclude, in the light of the trite doctrine, we hereby hold that each case is to be decided on its own circumstances, because the circumstances differ from case to case. Sometimes, the facts are strangely peculiar. Therefore, those peculiar facts and circumstances lead towards a dissimilar Judgment, which otherwise might not be passed in normal facts and circumstances. This decision of ours falls under this category of peculiar situation when the Petitioner himself had created circumstances due to which an ex-parte dismissal Order was compelled to be pronounced as it was next to impossible to decide the merits of the cases. The directions of the Hon'ble NCLAT were unambiguous and almost mandatory hence strictly to be followed. Hence all the Petitions, being identical, were disposed of as dismissed after taking

into cognizance the defaults of the Petitioner. The Petition being dismissed under peculiar circumstances therefore do not fall under the category of Sub-Rule 2 of Rule 48, but fall under the category of the First Proviso annexed to Sub-Rule 2 of Rule 48. The said decision dated 02nd May, 2017 cannot be recalled due to the reason that there is no justifiable ground to re-fix for hearing because the Petitioner is not willing or cooperative to decide those Petitions on merits, which is established from the facts and his conduct. Considering the position of law as discussed *supra* coupled with the overall circumstances we find no force in these Miscellaneous Applications. All dismissed. No orders as to cost.

Sd/-

RAVIKUMAR DURAISAMY
Member (Technical)

Sd/-

M.K. SHRAWAT
Member (Judicial)

Date : 26.04.2018
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