

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

R.A. No. 04/2017 in CP 1060/2017

Under Rule 48(2) of NCLT Rules, 2016
in CP 1060/IB&C/2017 filed u/s 9 of
IBC, 2016

In the matter of

Gupta Rajbhadur

....Applicant

v/s.

Larsen & Toubro Ltd.

....Respondent

Order delivered on 17.01.2018

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Applicant : Mrs. Shruti Sardesai, Mr. Shrey Sancheti &
Mr. Gurumurthy V. Iyer, Advocates

For the Respondent: Mr. Rashid Boatwalla a/w Lipsa Unadkat i/b
Manilal Kher Ambalal & Co.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Order pronounced on 10.08.2017

It is an application filed under Rule 48(2) of the NCLT Rules, 2016 for restoration of the Company Petition dismissed for default on 13.6.2017 by this Bench for the Petitioner consecutively remained absent on 9.6.2017 and 13.6.2017.

2. By looking at this application, it appears that this applicant filed this Company Petition on 5.6.2017 for recovery of the operational debt u/s 9 of Insolvency and Bankruptcy Code, 2016. He says that ever since he filed this petition, he kept on visiting the website of NCLT from 7.6.2017 but by inadvertence, he was unable to find listing of this company petition until before he noticed on 14.6.2017 that his case was posted to 13.6.2017 on 9.6.2017 ordering that if

the applicant again remained absent on 13.6.2017, his Petition would be dismissed for default on 13.6.2017. As soon as he came to know of this fact, on coming over to NCLT to know what happened on 13.6.2017, he was apprised that his company petition was dismissed for default.

3. On hearing the submission from the petitioner side and the corporate debtor side on restoration application filed, this Bench has ascertained the fact of this matter coming for hearing on 9.6.2017, thereafter posting this matter on 9.6.2017 recording the absence of the petitioner with a further direction that this matter would be dismissed for default if the petitioner remained absent on 13.6.2017 and on 13.6,2017 when the petitioner remained absent, the company petition was dismissed for default on 13.6.2017. For this Petitioner has consecutively remained absent for two hearings, this Bench dismissed this company petition for default on 13.6.2017. Thereafter, this Petitioner filed this Application for Restoration on 23.6.2017 stating that this Petitioner failed to appear owing to inadvertence therefore, the Petitioner seeks restoration of this Company Petition.

4. Since this Company Petition has been filed by an advocate on the petitioner behalf, his counsel would be in know of the fact that the petition filed by the creditor/debtor would come for hearing within 14 days from the date of filing, therefore the Petitioner as well as the Petitioner Counsel should remain alert to find out as to whether the company petition is numbered, if numbered, then to see what date is given for hearing. It can't be thrown on this Bench that obligation is cast upon this Bench to inform the petitioner on what date petition would come for hearing. Since the parties filing cases and the Advocates appearing on behalf of the parties are very much aware that cause of list come on daily basis, there could not be any chance for either of them to say that NCLT failed to notify date of hearings to the parties. It could be understood if one date of hearing is missed out, the party has to remain alert what is the next date of hearing given, but this Petitioner consecutively remained absent for two hearings, the petitioner hence could not have said that out of

inadvertence he failed to appear before this Bench. It is known to everybody that progress of this case has to happen in the timelines given in the Code.

5. To submit as to why this petition should not be restored, the Corporate Debtor Counsel has relied upon an order dated 14.3.2017 passed by this Bench in between **J. J. Plastalloy Pvt. Ltd. vs. Miltech Industries Pvt. Ltd. (CP No.04/2017)** in a similar application filed mentioning the paras of the said order which are as follows:

"9. Ever since, Insolvency and Bankruptcy Code has been notified, this Bench has been taking up the matters and passing orders as and when the matter has come up before this Bench unless and until parties seek adjournment either on the ground of short of compliance or for making further submissions in relation to this case. That adjournment is also hardly for one or two days because this Code mandates this Bench to pass orders under sections 7,9 and 10 of the Code within 14 days from the date of filing of filing the Petition.

10. This Bench also makes it clear that when matter showing up in the cause list reflecting on the Website of NCLT, it has to be considered as a judicial notice to the parties to appear before this Bench on the date the matter is listed, here, for the sake of convenience of the Applicant, though the party remained absent on 18.1.2017, this Bench posted this matter to the following day hoping that the Applicant would appear on the following day, but on the following day also, the Applicant Counsel remained absent. It is understandable if a case is heard and passed orders against Respondent side in his absence without notice, then the Respondent could come complaining order has been passed against him behind the back of him, because there would not be any occasion to presume that a case would be heard against Respondent without being informed of, here no such presumption could be raised in favor of the applicant, because the applicant being the person filed case, he/she/it has to remain diligent to pursue when would his case be posted for hearing.

11. If this Bench restores this Company Petition basing on Rule 48 (2) of NCLT Rules, then it will be in violation of the time lines given under I&B Code. This Court makes it clear that order has to be passed within 14 days from the date of filing of CP either under Sec.7 or Sec.9 or Sec.10 of I&B Code, if today this

petition filed on 12.01.2017 is restored, it would be undoubtedly beyond 14 days of the life given in the statute. In view of this predicament, this Bench is doubtful as to whether Rule 48(2) is to apply for restoring the CP dismissed for default. If it is restored, it will become repugnant to the time period given under the Code. If it is not restored, then it will be non-application of the restoration power given to this Bench under Rule 48(2) of NCLT Rules. Since the former action i.e. restoration of this Company Petition being repugnant to the Code itself, this bench is of the view that the procedure always being subservient to the substantive law, as quoted by the Applicant Counsel, this Bench has to go by the Sections of Law rather than the procedural Rules mentioned under Rule 48(2) of NCLT Rules.

12. Once Company Petition is filed under any of the provisions namely Sections 7 to 10 of the I&B Code, the parties and the Advocates appearing on behalf of the parties must be diligent to appear on the dates given and it is not possible for any Court to inform the parties about the date of hearings. Since Cause-List has been timely uploaded, it is the duty of the parties filing cases to find out as to whether their matters are listed in the cause list or not.

13. This Bench, notwithstanding the cause shown in the Application for Restoration, holds that restoration of a petition dismissed for default is against the letter and spirit of the Code, hence this application is hereby dismissed. The Petitioner is always at liberty to opt for other remedies available in accordance with the law."

6. In view of the same, the Debtor Counsel submits that this application shall also be dismissed for there is a precedent dismissing the Restoration Application.

7. To which the Petitioner Counsel has come out with an argument saying that by virtue of Section 424 (2) (g) of the Companies Act, 2013, NCLT is vested with the same powers as are vested in the Civil Procedure Code under the code of CPC, for this reason, this Bench shall entertain and decide an application for restoration in case of dismissal of a Petition for default. Since section 424(2)(g) was amended on 15.11.2016, inserting the words "Insolvency & Bankruptcy Code, 2016" it has to be construed that Section 424 (2) (g) is equally applicable to Insolvency & Bankruptcy Code, 2016.

8. The Petitioner Counsel submits that this Application has been taken out under Rule 48 (2) of the NCLT Rules, 2016 in exercise of power under Section 469(1) of the Companies Act, he says, if conjoined reading has been given to IBC and NCLT Rules, this case deserves restoration for the petitioner filed restoration application within 30 days from the date of dismissal of the case for default.

9. On hearing the submissions of both sides, it appears that no provisions have been earmarked in IBC either for restoration or for setting aside ex-parte order, it can't be said that the Adjudicating Authority Rules permit this petitioner to invoke jurisdiction for restoration of the Company Petition dismissed for default. But one point that is additionally appearing in the arguments of the petitioner counsel is that since Section 424(1) of the Companies Act 2013 is made applicable to Insolvency & Bankruptcy Code, 2016 through an amendment dated 15.11.2016, the right of restoration of Company Petition dismissed for default available under Companies Act shall be extended to the petitions dismissed for default under IBC as well.

10. Though Adjudication Authority Rules have come into existence subsequent to the amendment to Section 424 of the Companies Act, 2013, the application of NCLT Rules to IBC is limited only to filing applications and application fee in accordance with Rules 20, 21,22,23,24 and 26 of Part II of NCLT Rules, not Rule 48 of NCLT Rules. Therefore, it can't be said that NCLT Rules are ipso facto applicable to the proceedings under Insolvency & Bankruptcy Code, 2016. Since timelines have been given in the Code itself, if at all NCLT Rules which have come into existence without timelines are applied to the proceedings under Insolvency & Bankruptcy Code, it will become repugnant to the provisions of the Code itself. We must say that when any Rule, is repugnant to the Code itself, then the provisions of the Code will prevail over the Rules but not otherwise. Therefore, unless there is a specific Rule permitting restoration as mentioned in the CPC, it can't be said that restoration is permissible by virtue of NCLT Rules.

11. Therefore, inadvertence of the Petitioner Counsel in remaining absent to the hearings cannot be considered as a sufficient cause to restore the petition dismissed for default, besides this, when time is the essence of passing orders, this Adjudicating Authority shall remain stick to the timelines given, not as in the cases falling under CPC, henceforth this application is hereby **dismissed** without costs.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B. S.V. PRAKASH KUMAR
Member (Judicial)

Note: It is pertinent to mention though this order was dictated and pronounced on 10.08.2017, we regret to say that for this order being mistakenly misplaced, it could not be delivered on time, therefore, we have released this order today.