NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 2264 of 2024

(Arising out of Impugned Order dated 30.10.2024 passed by the National Company Law Tribunal, Kolkata Bench in CP NO. IB-21/KB/2024)

IN THE MATTER OF:

RENU LALIT AGARWAL
Suspended Director of AS Infracon Pvt. Ltd.
Having Address At: Flat No. E/412, 4th Floor,
E Tower, Shripal Residency, City Light Road, ... Appellant
Surat - 345 007

VERSUS

SMALL INDUSTRIES DEVELOPMENT BANK OF INDIA
Having its headquarters at SIDBI Tower, ... Respondent No.1
15, Ashok Marg,
Lucknow - 226001, Uttar Pradesh

MR. AJIT GYANCHAND JAIN
Interim Resolution Professional of
AS Infracon Pvt. Ltd.
Having address at: 204, Wall Street-I, Ellisbridge, ... Respondent No.2
Near Gujarat College,
Ahmadabad, Gujarat 380006

PRESENT

For Appellant	Mr. Arpit Singhvi, Advocate
For Respondents	Mr. Amit Dayal, Advocate for R-1 Ms. Nikita Gupta, Ms. Yashna Ahuja, Mr. Vaibhav Kumar, Mr. Milind Garg & Mr. Yaksh Garg, Advocates for R-2

J U D G E M E N T

(21.08.2026)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal is filed by the Appellant i.e., Renu Lalit Agarwal, who is the Suspended Director of AS Infracon Private Limited under Section 61 of the Insolvency and Bankruptcy Code, 2016, ("**Code**") arising out of Impugned Order dated 30.10.2024 passed by the National Company Law Tribunal, Kolkata Bench ("**Adjudicating Authority**") in CP No. IB 21/KB/2024.

Small Industries Development Bank of India is the Respondent No.1 herein.

Mr. Ajit Gyanchand Jain, who is the Interim Resolution Professional of AS Infracon Pvt. Ltd. is the Respondent No.2 herein.

2. The Appellant submitted that the Appellant is the suspended Director of AS Infracon Pvt. Ltd. ("Corporate Debtor"), which was incorporated on 17.08.1998. The Appellant stated that no business activities have been carried on from the registered office of the Corporate Debtor for more than five years, a fact that was well within the knowledge of Respondent No. 1. The Appellant contended that despite such knowledge, Respondent No. 1 deliberately failed to effect proper service of notices and proceeded against the Corporate Debtor in violation of the principles of natural justice.

3. The Appellant submitted that Respondent No. 1 had sanctioned financial assistance of Rs. 7,00,00,000/- under a Secured Business Loan to MSMEs in favour of Kosas Exports Ltd. vide Sanction Letter dated 24.02.2014 for meeting various business requirements, including capital expenditure, servicing new orders, renovation of assets, reimbursement of self-financed assets, funding of intangibles, brand building, research and development, inorganic business growth, and other bona fide business needs. The Appellant stated that a Loan Agreement dated 26.02.2014 was executed between Respondent No. 1 and Kosas Exports Ltd. for availing the said financial assistance, and on the same date the Corporate Debtor executed an unconditional and irrevocable Deed of Guarantee securing the loan advanced to the Borrower.

4. The Appellant contended that although Respondent No. 1 disbursed the entire loan amount of Rs. 7 Crores to the Borrower and subsequently classified the loan account as a Non-Performing Asset (NPA) with effect from 08.11.2015, followed by issuance of a recall notice dated 08.03.2016, the alleged invocation of the Corporate Debtor's guarantee vide notice dated 27.07.2016 was never served upon the Corporate Debtor. The Appellant submitted that the Corporate Debtor had never received the alleged notice invoking the guarantee demanding payment of Rs. 7,28,75,463/- together with further interest. The Appellant stated that Respondent No. 1 has failed to establish valid service of the said notice and is put to strict proof thereof. Consequently, the Appellant contended that the initiation of proceedings under Section 7 of the Code, is barred by limitation since the alleged invocation notice, forming the very basis of the claim against the Corporate Debtor as guarantor, was never served.

5. The Appellant further submitted that even after the alleged default, the Borrower along with Kosas Industries Private Limited made sincere efforts to settle the outstanding dues by submitting One Time Settlement (OTS) proposals dated 08.06.2019 offering Rs. 12 Crores and again on 05.11.2020 offering Rs. 7.50 Crores towards full and final settlement of the loan account. The Appellant contended that Respondent No. 1 failed to respond to these settlement proposals, thereby demonstrating that negotiations were continuing even after the alleged invocation of guarantee.

6. The Appellant submitted that Respondent No. 1 was throughout aware that the registered office of the Corporate Debtor had remained closed and non-functional for more than five years. The Appellant contended that despite having complete knowledge of this fact, and despite being in regular contact with the Directors of the Borrower Company who had personally met the officials of Respondent No. 1 on several occasions, Respondent No. 1 deliberately refrained from serving the alleged notice of invocation of guarantee dated 27.07.2016 either upon the Directors of the Corporate Debtor or at the address of the Borrower. The Appellant stated that this deliberate omission clearly establishes the mala fide conduct of Respondent No. 1 in depriving the Corporate Debtor of an opportunity to contest the proceedings.

7. The Appellant further submitted that Respondent No. 1 thereafter instituted Company Petition No. 21 of 2024 before the Adjudicating Authority without ensuring service of the petition upon the Corporate Debtor. The Appellant contended that no notice of the insolvency petition was ever served either upon the Corporate Debtor or upon any of its Directors, and as reflected from the orders of the Adjudicating Authority itself, the entire proceedings were conducted ex parte. The Appellant stated that the complete absence of notice resulted in denial of any effective opportunity of hearing and constitutes a gross violation of the principles of natural justice.

8. The Appellant submitted that the Appellant remained completely unaware of the filing and pendency of the insolvency proceedings and acquired knowledge of the impugned order dated 30.10.2024 only when Respondent No. 2, by communication dated 12.11.2024**,** forwarded a copy of the impugned order. The Appellant contended that immediately upon becoming aware of the order admitting the Section 7 application, the present appeal was preferred before this Appellate Tribunal challenging the legality and correctness of the impugned order.

9. The Appellant submitted that the principal issues arising for consideration are whether the Corporate Debtor was ever served with the alleged notice invoking the guarantee dated 27.07.2016, whether the Corporate Debtor received notice of CP (IB) No. 21 of 2024, whether the proceedings before the Adjudicating Authority were conducted in violation of the principles of natural justice by proceeding ex parte, whether Respondent No. 1 was fully aware that the registered office of the Corporate Debtor was non-functional, and whether Respondent No. 1 was under an obligation to serve the notices upon the Directors of the Corporate Debtor and/or the Borrower.

10. The Appellant contended that the impugned order suffers from serious legal infirmities as it has been passed in complete violation of the principles of natural justice. The Appellant submitted that the insolvency proceedings are barred by limitation inasmuch as the alleged invocation notice dated 27.07.2016 was never served upon the Corporate Debtor. The Appellant further stated that Respondent No. 1 acted with mala fide intention by intentionally avoiding service upon the Directors despite having full knowledge that the registered office was non-functional. The Appellant also contended that the ex parte admission of the Section 7 petition without proper service of notice has caused grave prejudice to the Corporate Debtor and renders the impugned order dated 30.10.2024 unsustainable in law and liable to be set aside.

11. Concluding the arguments, the Appellant requested this Appellate Tribunal to set aside the Impugned Order and allow the appeal.

12. Per contra, the Respondent No.2 denied all the averments made by the Appellant as misleading and baseless.

13. The Respondent No. 2 submitted, by way of preliminary objections, that the entire grievance raised by the Appellant pertains to the period prior to the commencement of the CIRP and in any case are misleading and without any substance.

14. The Respondent No. 2 submitted that CIRP Form-I was filed on 06.11.2024 and thereafter communications were sent through e-mails to statutory auditors, creditors, the Registrar of Companies and related parties informing them about the initiation of CIRP and inviting claims. The Respondent No. 2 stated that further communications dated 08.11.2024 and 22.11.2024 were issued requesting the Suspended Management to furnish all relevant records, books of account, financial statements and statutory documents necessary for carrying out the CIRP. It was further submitted that on 18.12.2024 a claim was received from Respondent No. 1, being the Financial Creditor, which was duly verified and admitted in accordance with law.

15. The Respondent No. 2 submitted that since the Suspended Management was not cooperating and had failed to provide crucial books, records and statutory documents necessary for conducting the CIRP, an application under Section 19(2) of the Code was filed on 19.12.2024 before the Adjudicating Authority against the Appellant, other members of the Suspended Management and the Statutory Auditor seeking appropriate directions for production of all essential records.

16. The Respondent No. 2 contended, that the allegations of the Appellant are baseless in view of the findings recorded by the Adjudicating Authority in Paragraph 8 of the Impugned Order, wherein it has been observed that the Corporate Debtor failed to appear despite service of notice.

17. The Respondent No. 2 reiterated that the allegations of the Appellant relate entirely to the period prior to commencement of the CIRP and concern proceedings in which the Respondent No. 2 had no participation whatsoever. It was contended that those allegations cannot be attributed in any manner. The Respondent No. 2 also further reiterated that the Adjudicating Authority had specifically recorded that the Corporate Debtor did not appear despite service of notice.

18. Concluding the arguments, the Respondent No.2 requested this Appellate Tribunal to set aside the present appeal.

Findings

19. We have considered the Appeal together with the annexures thereto, and have perused the impugned order dated 30.10.2024, as well as the Attendance-cum-Order Sheets recording the proceedings before the Adjudicating Authority between 07.02.2024 and 18.09.2024.

20. By the impugned order, the Adjudicating Authority admitted the application filed by SIDBI/Respondent No. 1 under Section 7 of the Code, against Corporate Debtor, initiated CIRP against the Corporate Debtor, and appointed Respondent No. 2 as the IRP. The Corporate Debtor stood as a corporate guarantor, having executed a Deed of Corporate Guarantee dated 26.02.2014 in favour of SIDBI, securing a term loan of Rs. 7,00,00,000/- sanctioned by SIDBI in favour of Kosas Exports Limited ("Principal Borrower").

21. The following issues arise for determination:

(I)Whether the impugned order is vitiated by violation of the principles of natural justice;

(II)Whether the petition under Section 7 of the Code was barred by limitation;

(III)Whether the Appellant has disclosed any bona fide defence on the merits of debt and default?

We address each of these issues in turn.

ISSUE I: Whether the impugned order is vitiated by violation of the principles of natural justice;

22. The principal grievance of the Appellant is that the Corporate Debtor was never served with notice of CP (IB) No. 21/KB/2024, and the entire proceedings before the Adjudicating Authority were conducted ex-parte, and that the Appellant learnt of the impugned order only on 12.11.2024, when Respondent No. 2 issued a communication in that regard.

23. We are unable to accept this contention, for the following reasons.

A) (i) First, the record of proceedings before the Adjudicating Authority discloses a sustained and repeated effort, spanning more than seven months, to effect service upon the Corporate Debtor:

(a)By order dated 07.02.2024, the Registry was directed to issue notice to the Corporate Debtor by speed post and e-mail;

(b)By order dated 12.03.2024, it was recorded that the notice sent by the Registry had been returned with the endorsement *"Item returned, Addressee cannot be* *located."* Learned Counsel for the Financial Creditor thereupon sought, and was granted, one week's time to file fresh particulars of the Corporate Debtor with the Registry, and the Registry was directed to issue fresh notice thereafter;

(c)By order dated 19.04.2024, it was recorded that fresh particulars had been furnished, and the Registry was directed to issue fresh notice to the Corporate Debtor on that basis, again by speed post and e-mail, with tracking information to be placed on record;

(d)By order dated 10.06.2024, it was recorded that, despite service of notice, none appeared for the Corporate Debtor and no reply-affidavit had been filed; a last chance was given to file a reply-affidavit, failing which appropriate orders would follow;

(e)The matter was adjourned on 10.07.2024 for want of time;

(f)By order dated 21.08.2024, notwithstanding the last chance already afforded, the Adjudicating Authority directed the Registry to issue notice to the Corporate Debtor once again, by speed post and e-mail, and further directed that the Corporate Debtor would have two weeks from receipt of that notice within which to file a reply; and

(g)By order dated 18.09.2024, it was recorded that *"despite repeated notice, none appears for the Corporate Debtor,"* and the matter was reserved for orders, culminating in the impugned order dated 30.10.2024.

(**ii**) This chronology does not, in our view, disclose an Adjudicating Authority proceeding in haste or without affording adequate opportunity. To the contrary, it discloses that the Adjudicating Authority, on encountering an initial failure of postal service, called for fresh particulars, issued a second round of notice on that basis, and thereafter extended not one but two further opportunities, on 10.06.2024 and again on 21.08.2024, expressly cautioning that appropriate orders would follow in default. It was only after this cumulative and repeated exercise, extending from 07.02.2024 to 18.09.2024, that the Adjudicating Authority proceeded to reserve, and thereafter pronounce, its order. We find no infirmity in this course.

B) Second, and in any event, the postal returns relied upon by the Appellant must be viewed in light of the Appellant's own case. The Appellant's own pleadings (Memorandum of Appeal, paragraphs 7.1 and 7.7) admit, in terms, that the registered office of the Corporate Debtor *"was closed since more than 5 years."* The maintenance of a registered office, at all times capable of receiving communications, is a continuing statutory obligation under Section 12 of the Companies Act, 2013, for the compliance of which the directors of a company including a suspended director in office during the relevant period, who carries personal responsibility. It is a well-settled principle that a party cannot be permitted to found a grievance of denial of natural justice on a default of its own making. Having admittedly allowed its registered office to remain non-functional for several years in breach of its statutory obligations, it is not open to the Corporate Debtor, through the Appellant, to contend that notice sent to that very address, the address recorded with the Registrar of Companies, and the address of record available to Respondent No. 1 and the Registry amounted to inadequate service.

C) Third, we note that on each occasion notice was directed to be issued not merely by post but also by e-mail. The Appellant's pleadings are conspicuously silent on the e-mail mode of service: there is no averment, still less any material, to show that the e-mail address used was incorrect, that it was inaccessible to the Corporate Debtor or its directors, or that any e-mail notice failed to reach its destination. Service by e-mail, at the address furnished in the application, is a recognised and independent mode of service under Rule 38(1) of the National Company Law Tribunal Rules, 2016 (*"NCLT Rules"*). Where service has been attempted through more than one mode, it does not suffice for a party to impugn service by demonstrating the failure of one mode while remaining silent as to the other.

D) Fourth, sub-rule (4) of Rule 38 of the NCLT Rules empowers the Adjudicating Authority, where service in the ordinary modes proves impossible, to direct service "in any other manner, including any manner of substituted service, as it appears to the Tribunal just and convenient." The Adjudicating Authority, on encountering the initial failure of postal service, did not mechanically persist with the same defective particulars; it called for, and thereafter acted upon, fresh particulars furnished by the Financial Creditor. In the absence of any material placed by the Appellant to show that these fresh particulars were themselves incorrect, or that the Corporate Debtor remained undiscoverable notwithstanding due diligence, we see no reason to hold that the Adjudicating Authority fell short of the standard contemplated by Rule 38.

E) Fifth, Rule 37(2) of the NCLT Rules provides that where a respondent does not appear on the date fixed for hearing, the Tribunal, after according reasonable opportunity to the respondent, "shall forthwith proceed ex-parte to dispose of the application." On the facts before us, an opportunity extending to seven hearings over more than seven months, including two express grants of a further/last opportunity, satisfies and indeed exceeds the standard of "reasonable opportunity" contemplated by this Rule.

F) Sixth, we have considered the specific allegation, at paragraph 7.7 of the Memorandum of Appeal, that Respondent No. 1 was at all times aware that the registered office was non-functional and, with a mala fide intention, omitted to serve the Directors or the Principal Borrower at any alternative address. An allegation of mala fide is a serious one, and the burden of establishing it rests squarely on the party making it; it cannot rest on bare assertion. The Appellant has placed no material before us — no correspondence, no record of the meetings referred to, no proof that Respondent No. 1 was in fact in possession of any alternative address which it consciously chose not to use to substantiate this allegation. We are accordingly unable to accept it.

24. We take into account the Impugned Order dated 10.06.2024 which proceeds on the express finding that "despite service of notice, none appears" a finding of fact recorded upon the material before it, which this Appellate Tribunal has no reason to disturb in the absence of any material to the contrary placed by the Appellant. We note further that, upon commencement of CIRP, Respondent No. 2 was able to trace and address correspondence to a Director of the Corporate Debtor at a Surat residential address within a matter of days of the impugned order a circumstance which, if anything, suggests that the Directors' whereabouts were, with reasonable diligence, ascertainable, and that the difficulty in securing appearance before the Adjudicating Authority lay in the Corporate Debtor's own default in responding to repeated notice, rather than in any want of diligence on the part of Respondent No. 1 or the Registry.

For the foregoing reasons, we find no violation of the principles of natural justice. Issue I is answered against the Appellant.

ISSUE II: Whether the petition under Section 7 of the Code was barred by limitation;

25. It is not in dispute that:

(a)SIDBI sanctioned a term loan of Rs. 7,00,00,000/- to the Principal Borrower vide sanction letter dated 24.02.2014;

(b)the Corporate Debtor executed a Deed of Corporate Guarantee dated 26.02.2014 in favour of SIDBI, securing the said facility;

(c)the loan was disbursed on 11.03.2014;

(d)the account of the Principal Borrower was classified as a Non-Performing Asset with effect from 08.11.2015, and a recall notice was issued to the Principal Borrower on 08.03.2016;

(e)SIDBI issued a notice dated 27.07.2016 purporting to invoke the guarantee and demanding Rs. 7,28,75,463/- from the Corporate Debtor — a notice which the Appellant contends was never served on, or received by, the Corporate Debtor;

(f)the Principal Borrower, jointly with an associate entity, addressed a OTS proposal to SIDBI dated 08.06.2019, offering Rs. 12,00,00,000/- in full and final settlement of both loan accounts; and

(g)the Principal Borrower again addressed an OTS proposal to SIDBI dated 05.11.2020, offering Rs. 7,50,00,000/- in full and final settlement.

Clause 3 of the Deed of Corporate Guarantee dated 26.02.2014 provides that *"In the event of any default on the part of the borrower ... the guarantor shall, upon demand forthwith pay to SIDBI ... all the accounts payable by the borrower."* This is, in substance, a guarantee payable on demand. In ***Syndicate Bank v. Channaveerappa Beleri & Ors., [(2006) 11 SCC 506]***, the Supreme Court held that, in the case of such a guarantee, the guarantor's liability to pay arises, and limitation begins to run, upon a demand being made (and refused), provided the claim against the principal debtor is not itself, at that point, time-barred.

Clause 22 of the Deed of Corporate Guarantee further provides that *"A balance confirmation and/or acknowledgment of debt and security execute[d] by the borrower shall be treated as balance confirmation and/or acknowledgment of debt or security ... by the guarantor(s) for the purpose of this guarantee."* This is a valid and specific contractual stipulation, freely entered into between the Corporate Debtor and SIDBI, by which the Corporate Debtor agreed in advance that an acknowledgment of the debt made by the Principal Borrower would enure to bind the Corporate Debtor, as guarantor, for limitation purposes as well. We see no reason to treat this clause as anything other than fully binding on the Corporate Debtor and, in these proceedings, on the Appellant.

Section 18 of the Limitation Act, 1963, provides that where an acknowledgment of liability, in writing signed by the party against whom the right is claimed (or its duly authorised agent), is made before expiry of the prescribed period, a fresh period of limitation is computed from the date of such acknowledgment. This principle has been held by the Supreme Court, ***in Laxmi Pat Surana v. Union Bank of India, [(2021) 8 SCC 481]***, to apply to applications under Section 7 of the Code, including as against a corporate guarantor, whose liability is coextensive with that of the principal borrower under Section 128 of the Indian Contract Act, 1872, by virtue of the definition of "corporate guarantor" under Section 5(5A) of the Code.

26. Applying these principles:

(a)Even taking 27.07.2016 as the date from which limitation is to be computed (being the date of the notice alleged to invoke the guarantee), the prescribed period of three years under Article 137 of the Limitation Act, 1963, applicable to applications under Section 7 of the Code, as held in *B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates*, (2019) 11 SCC 633 would ordinarily have expired on or about 27.07.2019.

(b)However, before expiry of that period, the Principal Borrower addressed a written OTS proposal dated 08.06.2019, acknowledging and offering to settle the outstanding liability. By operation of Clause 22 of the Deed read with Section 18 of the Limitation Act, this acknowledgment, though made by the Principal Borrower, is deemed, by the Corporate Debtor's own contractual undertaking, to be an acknowledgment by the Corporate Debtor as guarantor, and a fresh period of three years accordingly commenced from 08.06.2019.

(c)Before expiry of that fresh period, the Principal Borrower addressed a further written OTS proposal dated 05.11.2020, again acknowledging the outstanding liability. This, for the same reasons, extended limitation by a further period of three years, expiring on or about 05.11.2023.

(d)The petition under Section 7 of the Code was filed on 12.05.2023, as recorded in paragraph 2 of the impugned order which is well within limitation period.

27. We have separately considered the Appellant's specific grievance that the notice dated 27.07.2016 was never served on, or received by, the Corporate Debtor, and that proof of such service is wanting. Even proceeding on the footing most favourable to the Appellant, namely, that service of the 27.07.2016 notice is not established, this does not, in our view, assist the Appellant's case on limitation, because the subsequent acknowledgments of 08.06.2019 and 05.11.2020 furnish an independent and sufficient basis for computing limitation, without reference to whether the earlier notice was served. Indeed, were the 27.07.2016 notice to be left out of account altogether, the position would, if anything, be more favourable to Respondent No. 1: the three-year period would then fall to be reckoned from the recall notice (08.03.2016) or the date of NPA classification (08.11.2015), both of which were, in any event, overtaken by the acknowledgments of 2019 and 2020 for the same reasons set out above.

28. Nor is it open to the Appellant to contend, on the one hand, that the debt became time-barred for want of service of the 27.07.2016 notice, while remaining silent on the effect of the two subsequent, undisputed, written OTS proposals — themselves placed on the record by the Appellant as Annexure A-4 (Colly) — by which the Principal Borrower, in terms binding on the Corporate Debtor under Clause 22 of the Deed, unequivocally acknowledged a subsisting liability considerably in excess of the amount now sought to be recovered. A party cannot rely on documents evidencing a live and acknowledged debt for one purpose (to demonstrate bona fide settlement efforts) while disowning the same documents' legal consequence (extension of limitation) for another.

29. We accordingly find, in agreement with the Adjudicating Authority, that the application under Section 7 of the Code was not barred by limitation. Issue II is answered against the Appellant.

ISSUE III: Whether the Appellant has disclosed any bona fide defence on the merits of debt and default?

30. It is well settled that an Adjudicating Authority, on an application under Section 7 of the Code, is required to satisfy itself only of the existence of a financial debt and a default in respect thereof; it is not a recovery forum, and disputed questions going beyond this limited inquiry do not, ordinarily, arise for consideration. We nonetheless record, that the Appeal does not deny: (a) the sanction and disbursement of the term loan of Rs. 7,00,00,000/- to the Principal Borrower; (b) the due execution of the Deed of Corporate Guarantee dated 26.02.2014 by the Corporate Debtor, which bears the signature of a Director for and on behalf of the Corporate Debtor; (c) the classification of the account as a Non-Performing Asset; or (d) the two subsequent OTS proposals acknowledging the outstanding liability. The Appeal, in substance, is confined entirely to procedural objections going to service and limitation; no defence is taken that the debt has been discharged, that the guarantee stood revoked or was otherwise unenforceable, or that the amount claimed is incorrect. In these circumstances, we find no error in the Adjudicating Authority's satisfaction, on the material before it, that a financial debt and a default in respect thereof, within the meaning of Sections 5(8) and 3(12) of the Code, stood established.

Conclusion

31. For the reasons recorded above, we find no merit in the Appeal. The impugned order dated 30.10.2024 does not call for any interference by this Appellate Tribunal. The Appeal fails, is accordingly dismissed. No order as to costs. IA, if any, stand closed.

[Justice Mohammad Faiz Alam Khan]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

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