

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1**
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
30-01-2023 AT 05:00 PM THROUGH VIDEO CONFERENCE

**IA (IBC) 567/2021, IA (IBC) 1046, 1047, 1048/2022, IA (IBC) 45/2023 & IA
(IBC) 1547/2022 in Company Petition IB/205/2021**
u/s. 7 of IBC, 2016

IN THE MATTER OF:

State Bank of India

...Financial Creditor

Vs

India Power Corporation Ltd

...Corporate Debtor

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)**

ORDER

Order in IA (IBC) 1547/2022 in Company Petition IB/205/2021

Orders pronounced as recorded vide separate sheets. In the result, the application is allowed by enlarging the time that has expired for filing the Rejoinder by the Financial Creditor and considering the peculiar facts and circumstances of this case, and as a special case we hereby grant liberty to the respondent/Corporate Debtor to file its brief additional pleading, if any, within 7 days from the date of this order. In default, the liberty granted shall stand revoked automatically.

Company Petition IB/205/2021

Ld. Senior Counsel Shri. Vivek Reddy for the Financial Creditor and Ld. Counsel Shri. Deepak Khosla along with Shri. Anirban Bhattacharya for the Corporate Debtor present.

This company petition being heard in part and long pending, we suggest that the matter be heard on daily/weekly basis. With the consent of Ld. Counsel for the Financial Creditor as well as Corporate Debtor, we fix 16.02.2023 as the next date of hearing. Meanwhile, both the Ld. Counsels may examine the feasibility of taking up the matter on daily/weekly basis.

List all the pending applications also on 16.02.2023.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**NATIONAL COMPANY LAW TRIBUNAL
BENCH, HYDERABAD**

**IA No.1547 of 2022
CP (IB) NO. 205/7/HDB/2021**

IN THE MATTER OF

State Bank of India & Ors.

... Applicant/Financial Creditor

AND

India Power Corporation Limited

...Respondent/Corporate Debtor

Date of order: 30.01.2023

Coram:

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE
MEMBER (JUDICIAL)**

DR. BINOD KUMAR SINHA, HON'BLE [MEMBER TECHNICAL]

Appearance:

**For Applicant: Shri Vivek Reddy, Senior Counsel, Shri D.Narendar
Naik, Shri Vikram C Puttapaga, Shri Srinivas Gowd, and
Shri Vishal Porandla, Counsels.**

**For the Respondent: Shri Deepak Khosla, Shri Anirban Bhattacharya, and
Shri I. V. Siddhivardhana, counsels.**

[PER BENCH]

O R D E R

1. This is an application filed by the financial creditor (SBI) under Rule 11 of NCLT Rules, 2016 seeking direction to take on record the rejoinder filed by financial creditor on June 13th, 2022 to the counter filed by the corporate debtor, to condone the delay in filing the rejoinder and to pass any other orders(s) as this Adjudicating Authority may deem fit and proper in the facts and circumstances of this Case.

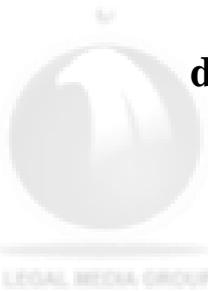
2. Averments in brief by the Applicant:

a. It is averred that SBI (financial creditor herein) has filed the petition under Section 7 of IBC against the Corporate debtor (India Power Corporation Limited).

b. It is averred that this Tribunal vide order dated 24.09.2021, directed the corporate debtor “to file counter with all the pleas available in law within a week”. However, corporate debtor instead of filing counter filed multiple applications (IA No.586/2021 and IA No.567/2021) and delayed almost 3 months in filing its counter.

c. It is further averred that this Tribunal vide order dated 03.12.2021, granted two weeks’ time to SBI for filing

rejoinder. Meanwhile, corporate debtor on 13.12.2021, filed transfer application before NCLT, Principal Bench seeking transfer of Company Petition to NCLT, Kolkata on various grounds. Thereafter, Hon'ble NCLT, Principal Bench vide its order dated 16.12.2021, stated that " NCLT Hyderabad Bench 1 is requested to defer the hearing of the matter till final order is passed in this Application". Thus the Company petition is adjourned from time to time by this Adjudicating Authority from 17.12.2021 till 08.04.2022.

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- d.** It is averred that the transfer petition has been disposed of vide order dated 22.04.2022 with the undertaking given by the corporate debtor " will cooperate for early disposal and will not hinder delay in hearing the matter".
- e.** Further in view of the injunction granted by the Hon'ble Commercial Court at Alipore, vide order dated 24.01.2022 and 11.02.2022, the hearing on petition was adjourned between 05.05.2022 till 01.09.2022. Thus there was no effective hearing between 03.12.2022 and June 2022.

- f. It is averred that rejoinder was filed by the Applicant on 13.06.2022. Since the Company Petition could not progress during the period from December 2021 to June 2022, no prejudice would be caused to corporate debtor if the rejoinder is taken on record. Further, averred that after filing of the rejoinder, the matter has been listed on numerous occasions but corporate debtor has never raised objection for filing rejoinder until the hearing of 05.12.2022. Further submitted that there is no bar in filing additional documents, apart from those initially filed along with the application under Section 7 petition.
- g. Thus the applicant prayed the Tribunal to consider the rejoinder and further prayed to condone the delay in filing the rejoinder.

3. Reply in brief on behalf of the Respondent:

- a. Respondent denied the averments made by the Applicant/financial creditor. Respondent has raised 12 preliminary objections with regard to the filing of rejoinder which are mentioned below:

1. Improper procedure and no leave sought under Rule 55. Rule 55 of the NCLT Rules provides that “*No pleadings, subsequent to the reply, shall be presented except by the leave of the Tribunal upon such terms as the Tribunal may think fit.*”

2. Consent order cannot be varied. As per Section 96(3) of CPC prohibits appeals against a consent order, similarly when the party gave consent and asked two weeks’ time for filing rejoinder, it does not lie in its mouth to seek recall, given that the recall is as much of a ‘challenge’ to the aforesaid consent order as an appeal is. Therefore, since the letter of the law prohibits the latter, the spirit of the law equally prohibits the former.

3. Application seeks ‘review’ - *there is no statutory power of review conferred upon NCLT:* This Adjudicating Authority vide order dated 03.12.2022, closed the opportunity to file rejoinder. It is averred that by conscious legislative intendment, Hon’ble NCLT has not

been conferred the power of ‘review’. Hence the Application is liable to be dismissed.

4. Question of condonation of delay arises only if the order dated 03.12.2021 and 05.12.2022 did not exist- but they do exist – but no recall has been sought of such orders: It is averred that the Applicant has not sought to recall the orders dated 03.12.2021 & 05.12.2022. Thus if the rejoinder filed by the Applicant herein is taken on record, then the same shall amount to ‘review’ or ‘recall’ of the order.

5. Specific number of days of delay not disclosed: The Applicant prayed to condone the delay in filing rejoinder but has not mentioned, how many days of delay. Therefore, such a bald and unspecific prayer cannot be entertained by the Adjudicating Authority.

6. No application for condonation of delay filed with the rejoinder on 13.06.2022: It is averred that if the present application is considered, in the manner permissible under law, first, an application seeking condonation of delay in filing

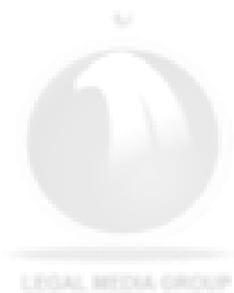


the application has to be filed. The Applicant is required to take leave under Rule 55.

7. Mala fide motive- decision to file a rejoinder only came about when the non-filing was pointed out in Money Suit No.01 of 2022 and in these proceedings: It is averred that applicant has been constantly criticising the respondent for delay in proceedings, but the Applicant himself delayed in filing rejoinder. Thus there is no scope for this Tribunal to accommodate a tardy litigant.

8. Contemptuous defiance of the direction of 29-04-2022 passed by the Principal Bench: Once again the applicant has submitted by citing the order dated 29.04.2022, that respondent is delaying the matter, whereas the truth is that the Applicant is delaying the matter by inappropriate tactics.

9. Encouraging commission of perjury: It is averred that the contents of the rejoinder affidavit are in direct contradiction of the legal position that the applicant stands foisted in, it would be a travesty of justice if this Tribunal allowed the



rejoinder to come on record and its contents to be argued. Further this Tribunal would be encouraging commission of criminal contempt of its own court, something which is anathema to any court or Tribunal. Even for this reason the rejoinder can't be taken on record.

10. Encouraging commission of admitted

contempt of court: It is insinuated by the Applicant in its para-6 of its application that the injunction granted by the learned Commercial Court at Alipore served as a constraint against filing of the rejoinder affidavit, lest the act of filing the rejoinder affidavit constitute contempt of Court. Even if the assumption that filing rejoinder on 13.06.2022 is contempt of the learned Commercial Court at Alipore, the stay remained in force till 09.09.2022.

11. Constant refrain underlying the

application is that no prejudice shall be caused to the Respondent-untrue: Firstly it is denied that no prejudice would be caused to the respondent if the rejoinder is taken on record. A

valuable right has accrued to the respondent by operation of law, as a consequent of non-traverse of the contentions raised in the counter. The right can't be taken away, and the taking away be described as non-pre judicial to the respondent. Secondly, if this in itself can't transform itself into some kind of sanction and to thereby confer a right upon the opposite party to do something which is otherwise prohibited by law.

12. Additional factual assertions have been made in the garb of rejoinder that fall outside a rebuttal to the counter-affidavit, and which were not there in the original petition: It is averred that petitioner holds no higher position than the respondent, when it comes to pleadings and it is in very specific and conditional circumstances that the petitioner is allowed to file a rejoinder, meaning getting 2 bites of pleadings when compared to the respondent. Therefore this cannot be allowed and if additional facts were required to be introduced at the stage of rejoinder



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affidavit, it should be taken under Rule 55 of the NCLT Rules.

- b.** It is further averred that the Applicant has not furnished any real and satisfactory explanation and 'sufficient cause' for its delay in filing the rejoinder.
- c.** It is averred that Hon'ble NCLT, Principal Bench vide order dated 16.12.2021, stated to stay the hearing of the matter and never issued any direction to the parties to stay their hands in so far as completion of pleadings is concerned.
- d.** It is averred that despite the transfer petition being disposed of on 29.04.2022, the applicant did not file its rejoinder within a reasonable time, and took as much as 45 days more to file its rejoinder. Thus it shows that the pendency of transfer petition cannot be touted by the Applicant as grounds to justify the inordinate delay in filing its rejoinder.
- e.** It is further submitted that under the grab of the settled position of law, the Applicant cannot violate the timelines imposed by this Tribunal for completion of pleadings.

- f. Thus it is submitted that the present application has been filed on the basis of vexatious pleas, and has been filed by the Applicant to make good its own wrong of belatedly filing the rejoinder, thereby attempting to achieve through the ‘backdoor’ that which is prohibited to be achieved by the ‘front door’.
- g. In view of the facts the Applicant is not entitled to any relief sought in the application and liable to be dismissed.

4. Point.

Whether the present application to condone the delay and to receive the Rejoinder filed post closure of opportunity is in the nature of Review Application and as such not maintainable? If no, whether the application can be considered under any other applicable provision of law or rules?

- 5. We have heard learned Sr Counsel Shri Vivek Reddy for the Financial Creditor and Shri Deepak Khosla, learned Counsel for the Corporate Debtor. Perused the Record.
- 6. At the outset it may be stated that the *default* on the part of the present applicant in complying the order of this Tribunal dated 03/12/2022, where under it was ordered that, “ *At request of the Learned counsel for the financial creditor two weeks’ time is granted for filing rejoinder, lest opportunity stands closed*’,

has led to filing of this application under Rule 11 of NCLT Rules, to condone the delay in filing and to receive the Rejoinder of the applicant filed on 13.06.2022.

7. The application has been strongly, resisted by the respondent corporate debtor, contending, *inter alia*, that:

- the inherent power of the Tribunal in terms of Rule 11 of NCLT Rules can be exercised only when no *specific remedy* is provided by the Statute.

-the relief as sought for by the applicant being in the nature of Review of the Order of this Tribunal dated 3/12/2022 which power the Adjudicating Authority does not have, the application is *per se*, not maintainable.

- assuming that the present application is maintainable, in the absence of the express prayer to recall of the impugned orders the application does not lie under law.

- no application to condone the delay has been filed along with the Rejoinder.

- the very entertaining of this application is nothing but encouraging a commission of contempt of the court.

-additional factual assertions were made under the garb of the rejoinder, which is impermissible under law.

8. Before we proceed to decide the point above, we feel it useful to refer herein, certain rules under NCLT Rules 2016, which we felt relevant for the effective and proper disposal of this Application.

Rule 2 (19) pleadings *“pleadings” means and includes application including interlocutory application, petition, appeal, revision, reply, rejoinder, statement, counter claim, additional statement supplementing the original application and reply statement under these rules and as may be permitted by the Tribunal;*

Rule 11. Inherent Powers. - *Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.*

Rule 51. Power to regulate the procedure. - *The Tribunal may regulate its own procedure in accordance with the rules of natural justice and equity, for the purpose of discharging its functions under the Act.*

Rule 55 Pleadings before the Tribunal. - *No pleadings, subsequent to the reply, shall be presented except by the leave of the Tribunal upon such terms as the Tribunal may think fit.*

Rule 153: Enlargement of time- *Where any period is fixed by or under these rules, or granted by Tribunal for the doing of any act, or filing of any document or representation, the Tribunal may, in its discretion from time to time in the interest of justice and for reasons to be recorded, enlarge such period, even though the period fixed by or under these Rules or granted by the Tribunal may have expired.”*

9. Ld. Sr. Counsel for the Applicant Shri Vivek Reddy, at the outset, placing reliance on the Ruling of Hon’ble NCLAT,

Principal Bench, *in re, Grand Arch Resident Welfare Association Versus Ireo Pvt. Ltd*, in Company Appeal No.3884 of 2022, wherein, the Hon'ble NCLAT, while dealing with an order restoring the right of the Corporate Debtor to file its counter passed by the Adjudicating Authority, held that,

“The Present is not the case where the Adjudicating Authority has exercised its power of review on merits of any issue decided by the Adjudicating Authority. Present is the case where with regard to the pleading i.e. accepting the Reply, inherent power has been exercised by the Adjudicating Authority under Rule 11 of the NCLT, Rules, we are of the view that substantial justice has been done by the Adjudicating Authority in taking the Reply on record”, strongly contended that there is no bar to consider the present application by invoking the inherent power of this Tribunal, enshrined in Rule 11 of NCLT Rules, however if the Tribunal is of the opinion that Rule 11 of NCLT Rules, is not the correct provision, the application cannot be dismissed on a mere ground that the provision of law has been quoted wrongly and the Tribunal is fully competent to pass such order as it deems fit and proper under any of the provisions of I&B Code, or under NCLT Rules, 2016.

10. However, Shri Deepak Khosla, Ld. Counsel for the respondent/corporate debtor questioned the maintainability of this application contending that Rule 11 only provides for *inherent power* of this Tribunal and the settled law being that inherent power can be exercised only when there is no other remedy available to the litigant and when nowhere a *specific* remedy is provided by the statute. In support of the said plea, learned counsel placed reliance on the following rulings, of *Hon'ble NCLAT in case of Mr.Harish Raghavji Patel Vs Shapoorji Pallonji Finance Pvt Ltd. And Anr. In Company Appeal(AT) (Ins) No.391 of 2021 dated 06.10.2021 and Hon'ble Supreme Court in the case of Paddam Sen Vs State of UP(AIR 1961 SC 2018) and Manohar Lal Chopra Vs Rai Bahadur Rao Raja Seth Hiralal (AIR 1962 SC 527(1))* where under, Hon'ble Supreme Court of India, and Hon'ble NCLAT, have categorically held that, the “inherent power of Tribunal/Court of law, cannot be exercised in violation or in conflict with, or upon ignoring the express and specific provision of law made”.
11. In the light of the above case law placed before us, while accepting the contention of the learned counsel for respondent that the present application can't be filed under

Rule 11 of NCLT rules, *supra*, we do find sufficient force in the submission of the Ld. Sr. Counsel for the Applicant, that merely because the provision of law relied on or quoted by the applicant is wrong/not applicable, the same by itself shall not result in dismissal of the application if the application is otherwise maintainable under any of the other provisions of the statute.

12. Reliance in this regard can be placed, apart from the ruling in Grand Arch Resident Welfare Association, *supra*, besides on the ruling of Hon'ble High court of Delhi, in Vijay Kumar Nagpal Vs Parveen Kumar Nagpal, in CS (OS) 441/2020 Pronounced on: January 03, 2022, www.livelaw.in CS (OS) 441/2020, wherein, in an identical situation, it was held that,

“Regarding the objection raised by the learned counsel for defendant that the present application is filed under Section 151 CPC instead of under Order IX of CPC. However, under Section 151 of CPC, this Court has inherent power to consider an application wherein a wrong provision is mentioned. It cannot be an obstacle for granting the relief as made out from the contents of the application as held in Gotham Entertainment Group LLC & Ors. Vs. Diamond Comics Pvt. Ltd. 2009 SCC OnLine. It is trite that quoting a wrong statutory provision does not create a bar and stand in the way of considering the application,

as held in Nitish Arora (supra). Thus, on this aspect, this Court is not convinced by the contention of learned counsel for defendant.”(Emphasis is ours).

13. Moreover, in the reply filed by the of the respondent under the sub caption Preliminary Objection No1, the respondent has stated as below:

“Under Rule 11 of the NCLT Rules 2016, taking Rejoinder on record is simply not maintainable, since there exists a specific remedy under Rule 55 of NCLT rule, which provides for seeking leave of this Tribunal for filing pleadings subsequent to the reply.

14. Therefore, the argument that the present application is liable to be dismissed as the same was filed under Rule 11 of NCLT Rules, is liable to be rejected, we accordingly reject the same, and proceed to decide the maintainability of the application on other provisions of I&B Code, or under NCLT Rules, 2016.

15. Admittedly, this Tribunal vide its order dated 24.09.2021, while directing the respondent/corporate debtor to file its counter with *all pleas available in law* within a week also, ordered the financial creditor (applicant herein) to file *rejoinder* within two weeks thereafter. Here we pause, only to refer to the submission of the Ld. Counsel for the

respondent that, in terms of Rule 55 of NCLT rules “ *no pleadings subsequent to reply, shall presented except by the leave of this Tribunal, upon such terms the Tribunal may deem fit*”, as such the present application is simply not maintainable, since there exists a specific remedy under Rule 55 of the NCLT Rules, which provided for seeking leave of this Tribunal for filing any pleading subsequent to the reply”, and the applicant has failed to obtain the same. In our considered view this plea is not available to the respondent, since this Tribunal, ‘*Suo motu*’, ordered filing of rejoinder within two weeks from the date of filing the counter in the company petition, as such the requirement of complying the Rule 55 in so far as the same relates to filing of rejoinder is concerned stands dispensed with. At the same time it also needs to be noted that, a pedantic approach in interpreting Rule 55, *supra*, would drive the parties to seek leave even for filing every interlocutory application, *post filing of the counter*, in as much the definition of ‘pleadings’ under sub rule 19 of Rule 2 of NCLT Rules, *supra*, means and includes interlocutory applications, petition as well.

16. Be that as it may, admittedly the applicant/financial creditor failed to file the Rejoinder within the time frame fixed by

this Tribunal, and as a *sequel* to thereof, its opportunity to file the counter was lost. Thereafter, the Applicant on 13/06/2022 filed its *Rejoinder* to the Counter of the corporate debtor which was filed on 22.11.2021. Thus, the Rejoinder which was supposed to have been filed within two weeks from 22.11.2021 has been filed only on 13/06/2022 in the Registry and only upon being objected by the respondent for taking the same on record on the ground that the opportunity to file rejoinder stood closed already, the present application has been filed for the reliefs stated supra.

17. Thus, the above indisputable *factual matrix*, reveals that the opportunity to file the Rejoinder was closed due to failure on the part of the applicant in doing the act, *namely, filing of rejoinder, within the time allowed to the petitioner*, hence the applicant came up with the present application to condone the delay in complying the order of this Tribunal dated 03/12/2022 and to receive the Rejoinder.

18. However, according to the Learned counsel for the respondent taking the rejoinder on record would tantamount to 'Review' of the orders of this Tribunal dated 03.12.2021 and 05.12.2021, which power this Tribunal does not possess, as such the application *per se*, is not maintainable and is

liable to be dismissed. In support of this plea Ld. Counsel placed reliance on the following ruling of Hon'ble NCLAT in *Agarwal Coal Corporation Pvt Ltd. Vs Sun Paper Mill Ltd., Company Appeal(AT)(Ins.) No.412/2019 dated 25.10.2021, wherein it was held that: "It is the well laid down proposition of law that 'in the absence of any power of 'Review' or 'Recall' vested with the 'Adjudicating Authority' – 'Appellate Authority', an order/judgment passed by it cannot be either Reviewed or Recall as opined by this Tribunal."*

19. Refuting the said submission, Learned Senior Counsel for applicant, placing reliance on the *ruling* of Hon'ble, NCLT, *in re, Grand Arch Resident Welfare Association, supra*, which was upheld by Hon'ble Supreme Court of India, in Civil Appeal No.3884 of 2022 wherein it was held that, *"Present is not the case where the Adjudicating Authority has exercised its power of review on merits of any issue decided by the Adjudicating Authority. Present is the case where with regard to the pleading i.e. accepting the Reply, inherent power has been exercised by the Adjudicating Authority under Rule 11 of the NCLT, Rules, we are of the view that substantial justice has been done by the Adjudicating Authority in taking the Reply on record"*, (Emphasis is ours), besides on the ruling of Hon'ble NCLAT, in *Printland Digital (India) Pvt. Ltd. Versus Nirmal Trading Company*,

Company Appeal (AT) (Insolvency)No. 504/2022 wherein it was held that;

“We have heard Counsel for the parties and perused the record. There is a difference between recalling of an order and review on merits of the issue decided by the Adjudicating Authority. No doubt that the Adjudicating Authority has no jurisdiction to review its order after deciding a substantial issue but it has the jurisdiction to recall the order of the kind in dispute i.e. where the right to Reply was closed by an order on the ground that the opportunities granted were not availed. In this regard, we rely upon a decision of this Tribunal rendered in the case of CA (AT) (Ins) No. 271 of 2022 in which it has been held that if there is an adjudication by the Adjudicating Authority on merits of the issues then it would not have the jurisdiction to review its order but insofar as the dispute with regard to right to file the Reply which is closed by an order, it certainly has the jurisdiction to recall it in terms of the Rule 11 of NCLT Rules, 2016. In view of the aforesaid discussions, we therefore, allow this appeal and remand the case back to the Adjudicating Authority to consider the application on merits and decide the same in accordance with law”, Vehemently contended that granting the reliefs as prayed for, does not amount Review of the earlier order dated 03.12.2021 and 05.12.2021.

20. Having heard the Ld. Counsels, upon taking into consideration the *factual matrix* of this case besides the rulings in re, *Grand Arch Resident Welfare Association* and in *Printland Digital (India) Pvt. Ltd. supra*, we reject the argument that the present application is in the nature of Review of the earlier orders of this Tribunal. We hereunder state the reasons for the above conclusion of ours.

- (a) This Tribunal has granted further extension of time for filing the Rejoinder vide order dated 03.12.2021 on the request of the Ld. Counsel for the Applicant Thus, no adjudication on merits of the plea of the Applicant for extension of time took place while passing the impugned order dated 03/12/2022.
- (b) Prior to the same, this Tribunal '*Suo motu*' granted opportunity, to file rejoinder vide order dated 24.09.2021 within a time frame.
- (c) The respondent has not even opposed either the '*Suo motu*' order *or the order extending time* to the applicant to file the Rejoinder.
- (d) Hon'ble NCLAT, *in re*, Printland Digital (India) Pvt. Ltd, supra, explained the deference between "Review" and the "recall" of its own order by this Tribunal, as below:

"if there is an adjudication by the Adjudicating Authority on merits of the issues then it would not have the jurisdiction to review its order but insofar as the dispute with regard to right to file the Reply which is closed by an order, it certainly has the jurisdiction to recall it in terms of the Rule 11 of NCLT Rules, 2016. In view of the aforesaid discussions, we therefore, allow this appeal and remand the case

back to the Adjudicating Authority to consider the application on merits and decide the same in accordance with law.”

(e) So much so, when the basic ingredient of ‘Review’, namely, “an adjudication by the Adjudicating Authority on merits of the issues”, *it self is lacking, the argument that*, the present application is in the nature of ‘Review’ and as such this Tribunal has no power, shall fail invariably.

(f) That apart, the emphatic submission of the Ld. Counsel for the respondent that, *“the present application is simply not maintainable, since there exists a specific remedy under Rule 55 of the NCLT Rules, which provided for seeking leave of this Tribunal for filing pleading subsequent to the reply”* also disentitles the respondent from contending that the applicant is *per se*, not maintainable, as but for invoking Rule 11 of NCLT Rules the application is maintainable under Rule 55 of NCLT Rules, even according to the respondent.

21. We, therefore, emphatically hold that the present application is not in the nature of ‘Review Application’, and as such this Tribunal has jurisdiction to decide and dispose of the present application on its merits.

22. Having already held in the preceding paras of our discussion, that invoking Rule 55 of NCLT Rules is obviated due to our suo motu order in the facts and circumstances of this case, we now refer to Rule 153 of NCLT Rules, *supra*, which provides for enlargement of time which is reproduced herein below:

Rule 153: Enlargement of time:

“Where any period is fixed by or under these rules, or granted by Tribunal for the doing of any act, or filing of any document or representation, the Tribunal may, in its discretion from time to time in the interest of justice and for reasons to be recorded, enlarge such period, even though the period fixed by or under these Rules or granted by the Tribunal may have expired.”

- 23 A bare perusal of the above provision categorically confirms that where any period is fixed by or under these rules or granted by the Tribunal for doing an act or filing of any document or representation, discretionary power is conferred on the Tribunal to extend the same in the interest of justice even though the period fixed by or under the rules or granted by this Tribunal may have expired.

24. A similar provision for enlargement of time, however restricting the upper time limit of extension, can be found in Code of Civil Procedure, which is as below;

Section 148 of CPC-Enlargement of Time. -

“Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period *not exceeding thirty days in total*, even though the period originally fixed or granted may have expired.

Hon’ble Supreme Court of India, in Chinnamarkathian *alias* Muthu Gounder and Anr. v. Ayyavoo *alias* Periana Gounder and Ors., (1982) 1 SCC 159, dealing with the above provision, held that;

“It is a well-accepted principle statutorily recognised in Section 148 of the Code of Civil Procedure that where a period is fixed or granted by the court for doing any act prescribed or allowed by the Code, the court may in its discretion from time to time enlarge such period even though the period originally fixed or granted may expire. If a court in exercise of the jurisdiction can grant time to do a thing, in the absence of a specific provision to the contrary curtailing, denying or withholding such jurisdiction, the jurisdiction to grant time would inhere in its ambit the jurisdiction to extend time initially fixed by it. Passing a composite order would be

acting in disregard of the jurisdiction in that while granting time simultaneously the court denies to itself the jurisdiction to extend time. The principle of equity is that when some circumstances are to be taken into account for fixing a length of time within which a certain action is to be taken, the court retains to itself the jurisdiction to re-examine the alteration or modification of circumstances which may necessitate extension of time. If the court by its own act denies itself the jurisdiction to do so, it would be denying to itself the jurisdiction which in the absence of a negative provision, it undoubtedly enjoys...." (Emphasis is ours).

25. As regards the upper time limit prescribed under Section 148 CPC, *supra*, Hon'ble Supreme Court of India. in Salem Advocates Bar Association, T.N. vs. Union of India (2005) 6 SCC 344, held as under:

"The amendment made in Section 148 affects the power of the court to enlarge time that may have been fixed or granted by the court for the doing of any act prescribed or allowed by the Code. The amendment provides that the period shall not exceed 30 days in total. Before amendment, there was no such restriction of time. Whether the court has no inherent power to extend the time beyond 30 days is the question. We have no doubt that the upper limit fixed in Section 148 cannot take away the inherent power of the court to pass orders as may be necessary for the ends of justice or to prevent abuse of process of the court. The rigid operation of the section would lead to absurdity. Section 151 has, therefore, to be allowed to operate fully. Extension beyond maximum of 30 days, thus, can be permitted if the act could not be performed within 30 days for reasons beyond the control of the party. We are not dealing with a case where time for doing an act has been prescribed

under the provisions of the Limitation Act which cannot be extended either under Section 148 or Section 151. We are dealing with a case where the time is fixed or granted by the court for performance of an act prescribed or allowed by the court.”

26. Therefore, in the back drop of our discussion as above and the ruling *in re, Chinnamarkathian, supra*, besides the undeniable fact being the *default* on the part of the applicant in complying the direction of this Tribunal vide dated 03/12/2022 , has led to the closure of the opportunity to file the Rejoinder, the essential factor behind filing of this application is the *default* on the part of the Applicant in adhering to the time line fixed by the Tribunal and not the *consequences* that followed in terms of our order dated 03/12/2022. Therefore, we are of the view that the reliefs sought for by the applicant can be considered under NCLT Rule153 in the interests of justice. In view of our above finding, the submission of the Ld. Counsel for the Respondent that, if all it was the *bona fide* intent of the applicant to seek condonation of delay in filing the Rejoinder, it would have, like any other litigant filed an application for *condonation of delay* with its Rejoinder, pales into insignificance.

27. Further, we would like to point out herein that, we are not dealing with a case where time for doing an act has been prescribed under the provisions of the Limitation Act, which cannot be extended either under Rule 11 or Rule 153 of NCLT Rules. We are dealing with a case where the time is fixed or granted by this Tribunal for performance of an act, namely, filing of Rejoinder by the Applicant, under I&B Code and the NCLT Rules. Therefore, it would be a wrong to treat the present application for condonation of the 'delay caused' in doing the act ordered by this Tribunal, on par with an application filed to condone the delay in filing a Petition/Appeal etc, for which the period of limitation has been prescribed in the limitation Act. There is a basic difference between Section 5 of the limitation Act and Rule 153 of NCLT Rules, as for exercise of power under Section 5 of the Limitation Act, the *onus*, is on the applicant to satisfy the court that there was *sufficient cause* for condonation of the delay, whereas Rule 153 of NCLT Rules enjoins a duty on the Tribunal only to examine whether it is *expedient in the interests of justice* to extend the time for doing an act even though the time fixed for doing the act may have expired or refuse extension of time.

28. A careful perusal of the record placed before us reveals that despite direction of this Tribunal vide order dated 24.09.2021 to file the counter with all the pleas available in law within *a week*, the respondent had filed the counter only on 22.11.2021. Likewise, the Applicant though required to file rejoinder within a week from 22.11.2021, filed, the same only on 13.06.2022. In the present application which was filed on 12.12.2022 (post filing of the Rejoinder) the petitioner states that, soon after passing the order dated December 3, 2021 , granting time of two weeks to the Applicant to file its rejoinder, the respondent on December 13, 2021, filed a Transfer Application before the Hon'ble National Company Law Tribunal, Principal Bench, seeking transfer / assignment of the captioned Petition to the National Company Law Tribunal's Bench at Kolkata ("Transfer Petition"), *inter alia*, on the ground that "the atmosphere of this Bench at Hyderabad stands completely vitiated in view of the repeated prejudicial and even unintelligible orders passed and the registered office of Respondent corporate debtor is located in Kolkata and on the ground that the then Hon'ble Ld. Member (Technical) had not recused himself. The Hon'ble NCLT, Principal Bench vide its order dated December 16,

2021 noted that the Transfer Petition had been filed and stated that "In the meanwhile, Bench No. 1, NCLT Hyderabad is requested to defer the hearing of the matter till the final order is passed in this application. " This direction of the Hon'ble NCLT, Principal Bench was noted by this Tribunal in its order dated December 17, 2021 for the hearing captioned Section 7 petition. In light of the pendency of the transfer petition, the hearing in captioned Section 7 petition was adjourned by this Hon'ble Tribunal from time to time from December 17, 2021 till April 8, 2022. It is further stated that the Transfer Petition was disposed of vide order dated April 22, 2022 read with order dated April 29, 2022 wherein the Respondents undertaking that it "will cooperate for early disposal of the matter on merits and will not hinder/or delay the hearing of the matter under any circumstance." was categorically noted by the Hon'ble NCLT, Principal Bench. It is further contended that, in view of the injunction granted by the Hon'ble Commercial Court at Alipore, vide order dated January 24, 2022 and February 11, 2022, the hearing in the captioned Section 7 petition was adjourned between May 5, 2022 till September 1, 2022 and during the hearing dated May 5, 2022, Respondent prayed for adjournment of the Section 7

proceeding sine dine in view of the restraint order passed by the Ld. Commercial Court at Alipore, Kolkata, against the Respondent, from invoking or pressing its alleged right under the contract of Guarantee. Therefore, according to the Ld. Sr. Counsel for the Applicant, as there was no effective hearing between December 3, 2022 and June, 2022, no prejudice will be caused to the respondent, if the Rejoinder which was filed on June 13, 2022 is taken on record. Further, it is also submitted that after the filing of the Rejoinder, the matter has been listed on numerous occasions for hearing of the Section 7 petition and not even once has the respondent raised any objection to the filing of the rejoinder until the hearing of December 5, 2022. Lastly, it is contended that it is settled position that there is no bar in law to filing of additional documents, apart from those initially filed along with the application under Section 7 petition.

29. The above submissions are stoutly denied by the Ld. Counsel for the respondent, contending, inter alia, that the proceedings under IB Code are time bound and that there is no scope for 'afterthoughts' under IB Code and no scope to accommodate a tardy litigant. Ld. Counsel further submitted that that there is a *mala fide* motive behind filing the rejoinder was the non-

filing of the reply in the money suit NO.01/2022, besides the defence taken is contemptuous of the direction of the Principal Bench dated 29.04.2022 and also, encouraging perjury. Ld. Counsel further submitted that there was no stay ever of the proceedings before this Tribunal, from any Tribunal/Court, as such the reference to the preceding before the Hon'ble Principal Bench and the Civil Court at Alipore, do not justify either the default of the order of this Tribunal dated 03/12/2022 or the delay in filing the Rejoinder. Ld Counsel further contended that petitioner holds no higher position than the Respondent, when it comes to pleadings, and it is very specific and conditional circumstances that the petitioner is allowed to file a rejoinder, meaning, getting 2 bites of the pleadings' cherry, as compared to 1 bite by the respondent. According to the Ld. Counsel, the whole purpose of an exchange of pleadings is to sequentially allow the petitioner to state its case in terms of the complete set of facts, herein described as facts A-B-C, to thereafter enable the Respondent to rebut the facts A-B-C and, if necessary, adduce additional facts D-E-F, at which point liberty is granted to the petitioner to file a rejoinder, the purpose of the rejoinder being not to reiterate facts A-B-C already stated, but

only to rebut the facts D-E-F. If, in the purpose of rejoinder, the petitioner introduces new facts G-H-I, apart from being prohibited (as such facts ought to be introduced in the petition at the time of presentation, as part of A-B-C), this then gives cause to the respondents to file a sur-counter affidavit, which means that there will be no end to the exchange of pleadings in basic rules are not followed. Thus, submitting Ld. Counsel reiterated that the rejoinder is filed with additional factual assertions that were not there in the main petition. Therefore, this cannot be allowed even for that reason, because if additional facts were required to be introduced at the stage of a rejoinder affidavit, leave primarily was required to be taken under Rule 55 of the NCLT Rules.

30. Having carefully considered the rival submissions, it may be stated that the proceedings in this Company Petition filed under Section 7 of IB Code, though are undoubtedly time bound is limping, not on account of non-filing of the Rejoinder by the applicant, but due to various other reasons which we have noted in our daily order sheets. The issue relating to Receiving the Rejoinder came to *focus* only during the proceedings dated 5/12/2022. It is also a fact that there was no effective hearing between December 3, 2022 and

June, 2022. The submission in the main application though commenced very recently (post filing of the Rejoinder) could not be continued due to filing of some interlocutory application filed by the corporate debtor. Thus, it is evident that though there was delay in filing the Rejoinder the same has no bearing in taking forward the proceedings in the main Petition by either of the parties. Therefore, in that view of the matter it cannot be said that the delay caused in filing the Rejoinder is *inordinate*.

Hon'ble Supreme Court of India, in Dena Bank (Now Bank Of Baroda) vs C. Shivakumar Reddy, held that,

“There is no bar in law to the amendment of pleadings in an application under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 of the IBC in Form-1. In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority committed any illegality or error in permitting the Appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the Adjudicating Authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view,

the decision of the Adjudicating Authority to entertain and/or to allow the request of the Appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal”.(Emphasis is ours).

31. In so far as the plea of the Respondent that, rejoinder is filed with additional factual assertions that were not pleaded in the main petition is concerned, we accept the submission of the Ld. Counsel for the Respondent that, any factual assertions that were not pleaded in the main petition cannot be allowed to be pleaded in the Rejoinder. We therefore, hereby order that any *additional factual assertions that were not pleaded in the main petition, if found to have been introduced under the Rejoinder filed on 16/03/2022 the same will not be taken into consideration and will be eschewed.*
32. We also find force in the submission of the Ld. Sr. Counsel that that respondent will not be prejudiced if the Rejoinder which has been filed on 13/06/2022 is received.
33. Therefore, in the light of our discussion as above, we are of the view that, this Application can be allowed by enlarging the time that has expired for filing the Rejoinder by the

Applicant in terms of the Order of this Tribunal dated 03/12/2022. Accordingly, this Application is allowed and the Rejoinder to the Counter filed on 16/03/2022 is received subject to our observation in the preceding paragraph. Considering the peculiar facts and circumstances of this case, and as a special case we hereby grant liberty to the respondent to file it's brief *additional pleading*, if any, within 7 days from the date of this order. In default the liberty granted shall stand revoked automatically.

34. In the result, the application is accordingly allowed and disposed of, however without costs.

Sd/-

Dr. Binod Kumar Sinha
Member Technical

Sd/-

Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial

Pavani