NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)

PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 05.05.2022 AT 10.30 AM

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP(IB) No.9/9/AMR/2022	IA(IBC)/33/2022, IA(IBC)/34/2022	9 of IBC	Baisetty Ajaykumar Vs. Apex Meadows Private Limited

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

IA (IBC)/33/2022 is dismissed, vide separate orders.

IA (IBC)/34/2022:

List the matter on 03.06.2022.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH

IA(IBC) No.33 of 2022
IN
CP (IB) No.9/9/AMR/2022

Under Rule 49(2) Read with Rule 11 of the National Company Law Tribunal Rules, 2016

In the matter of
M/s. APEX MEADOWS PRIVATE LIMITED

BETWEEN:

Suspended Management of
M/s. Apex Meadows Private Limited,
S.No.104/2, Opp. S.B.T. Hotel, NG 16,
Gajuwaka, Visakhapatnam,
Rep. by Mr.Manish karsija,
S/o. Mr.R.K.Karsija, aged about 39 years,
R/o.Visakhapatnam.

.... Applicant

AND

1. Mr.Baisetty Ajay Kumar,
   S/o. Late B.Subba Rao,
   Aged about 53 years,
   R/o.Flat No.2, D.No.49-54-16/3,
   4th Floor, Madhuri Residency Apartments,
   Balayya Sastry Layout, Visakhapatnam,
   Andhra Pradesh – 530013.

   ...Respondent No.1/Operational Creditor

2. M/s.Apex Meadows Private Limited,
S.No.104/2, Opp. S.B.T. Hotel, NG 16,
Gajuwaka, Visakhapatnam,
Rep. by Mr.Immaneni Eswara Rao, IRP,
40-26-22, Mohiddin Street, Opp: BSNL Exchange, Labbipet,
MG Road, Vijayawada, Krishna District,
Andhra Pradesh-520010.

...Respondent No.2/Corporate Debtor

Orders pronounced on: 05.05.2022

***Coram*:**

Justice Telaprolu Rajani, Member Judicial.

Parties/Counsels present:

For the Applicant : Mr.S.Ravi, Senior Counsel &
Ms.Sarvani Desiraju, Advocate.

For the Respondents: Mr.Niranjan Reddy, Senior Counsel &
Mr.D.Narendra Naik, Advocate

ORDER

1. This Application is filed under Rule 49(2) Read with Rule 11 of NCLT Rules, 2016 (NCLT Rules) seeking to set aside the ex-parte order dated 17.03.2022 and 21.03.2022.

2. The grounds on which the said order is sought to be set aside are as follows:

   a) The Corporate Debtor Company did not receive the attempted service of notice, as it seems the office was closed on account

of Covid and thereafter it is possible that the notice went back. Further no notice was served by the Operational Creditor through email to the Corporate Debtor. The management of the Corporate Debtor was completely unaware of the proceedings and therefore was unable to present its case before this Tribunal. No advance service was also made to the Corporate Debtor by the Operational Creditor prior to filing the main Company Petition. Emails from the registry, notifying the date, while now found, were not viewed prior to the date.

b) The Operational Creditor has instituted the Petition and proceeded with completely mala fide intentions and has obtained an ex-parte order in its favour. The Corporate Debtor came to know of the proceedings when on 23.03.2022, the Resolution Professional arrived at their office, which was a complete shock.

c) If the Applicant was made aware of the captioned proceedings, it would have certainly approached this Tribunal to represent itself. The Applicant did not attempt to avoid any legal proceedings and it is incorrectly noted that the Applicant has refused service of notice in any manner whatsoever. Perhaps, the notice was not received, as the office of the Applicant was closed due to Covid-19 pandemic. In fact, the Corporate Debtor

responded to the notice under Section 8 of the Code, vide reply dated 06.01.2022.

d) The dispute between the parties is a contractual dispute and the Corporate Debtor has consistently denied that any amount is payable. Grave prejudice and irreparable loss will be caused to the Applicant if the orders dated 17.03.2022 and 21.03.2022 are not set aside.

e) The other facts mentioned are on the merits of the case. With regard to the demand notice and reply notice, it is stated that the Operational Creditor sent a demand notice dated 21.12.2021 which was received on 27.12.2021 by the Corporate Debtor. The Operational Creditor has never issued any invoice with respect to the purported default in question. The Corporate Debtor issued reply dated 21.12.2021 on 06.01.2022 reiterating that no amounts are payable, while detailing the reasons for the same. Since, the non-appearance of the Corporate Debtor was inadvertent, the orders dated 17.03.2022 and 21.03.2022 are sought to be set aside.

3. The Respondents filed reply (Counter) contending that the Operational Creditor issued demand notices and reminders calling upon the Corporate Debtor to pay the outstanding amount. Since no amounts are paid, the Operational Creditor was constrained to issue Form-3 notice dated 21.12.2021, pursuant to which the Captioned

Company Petition was filed on 07.01.2022. An advance copy of the Company Petition was also sent by email on 08.01.2022 and by speed post on 13.01.2022. Hence, by any stretch of imagination, it cannot be said that the Applicant was not aware of the filing of the above Company Petition. The carefree and callous attitude of the Corporate Debtor is further clear from the fact that after taking notice of filing of Company Petition through the email, they have then issued a back dated rely notice dated 06.01.2022, which was received after filing of the Company Petition, which shows that they are very much aware of the proceedings. The adamant attitude of the Corporate Debtor is further apparent from the fact that the physical copy of the Company Petition was not accepted by them and was returned to the Advocate and the notice of hearing was actually refused by the Corporate Debtor. The Suspended Management of the Corporate Debtor came running to the Tribunal upon realizing the seriousness of IBC proceedings and that once Insolvency Resolution Professional (IRP) was appointed, the Board of the Corporate Debtor gets suspended and the IRP takes over the Management of the Corporate Debtor. Therefore, the Suspended Management has now filed the IA by cooking up absolutely false stories that "it seems as the office was closed on account of Covid". The Corporate Debtor is a construction Company and is undertaking construction activities day and night. All the offices and Companies are functioning normally and there are no more Covid restrictions as is falsely claimed by the Suspended Management. A caveat was filed by the Operational Creditor before

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the NCLAT after the admission of the Petition. Therefore, on 24.03.2022, with a clear and dishonest intention to avoid the Caveats, this Application is filed instead of approaching the NCLAT. In their enthusiasm to file a set aside Petition, the Suspended Management has also committed perjury by making false statements while on oath. They have made wrong submissions that they had no advance notice of the Company Petition prior to filing and that they are completely unaware of the proceedings. All the actions of the Suspended Management, including the blatant lies in the above IA, would only prove that it is not even apologizing to the Tribunal about their adamant attitude. It is an admitted fact that on 23.03.2022, when the IRP arrived at the office of the Corporate Debtor, it was open. Hence, there can be no excuse whatsoever that on two dates and in two different months, the Corporate Debtor's office which is a construction Company and construction was not stopped, was allegedly closed in 2022 due to Covid-19 pandemic. A plain reading of Rule 49 of the NCLT Rules, especially sub-section 2 of Rule 49, would show that the Tribunal may set aside the ex-parte order only in circumstances where the party is able to show that the notice was not duly served or that they were prevented by sufficient cause from appearing for the hearing. The present Application is devoid of any of the above mentioned reasons. The averments made in the Petition with regard to the merits are all denied. It is further stated that as per Section 27 of the General Clauses Act and as confirmed by the

judgment of the Supreme Court, an endorsement "refused" or even "House Locked" or "Shop Closed", service has to be presumed.

4. An additional affidavit was filed by the Petitioner on 11.04.2022, in response to a document which was shown across the bench by the Respondent/Operational Creditor, which shows that registrations, executions and presentations of documents were done on the date when the notice sent by the Operational Creditor was refused, which is on 18.02.2022. The affidavit was filed by the Petitioner in respect of limited functioning of the Corporate Debtor on account of Covid-19. It is stated that the Applicant i.e., the Management of the Corporate Debtor was completely unaware of the subject proceedings until 23.02.2022, when the Resolution Professional came to their office. Omicron variant of Covid-19 was prevalent in the months of January & February. In the month of January itself the Employees of Corporate Debtor started showing symptoms of Covid-19, which necessitated the management of the Corporate Debtor to purchase self-test kits for its employees as a matter of precaution. From the 2nd week of January till the end of February as many as eight managerial staff of the Corporate Debtor out of total staff of about 30 tested positive. In order to curtail the outbreak of Covid in their office, the Corporate Debtor adopted a policy of work from home till further notice. The Office of the Corporate Debtor was largely closed and everyone was advised and encouraged to work from home as far as possible. Only very limited physical functioning

of the office with skeleton staff, comprising of cleaning staff, was allowed, only certain employees who were authorized by the Corporate Debtor had limited access, only to obtain necessary urgent files and documents. Thereafter, it is only from early March onwards that the physical functioning of the registered office of the Corporate Debtor Company has resumed to some extent. It is in the aforesaid circumstances, unsuccessful attempted service of Insolvency Petition was made, which cannot be construed as affective service. The Corporate Debtor also has never been served the notice via email by Respondent No.1. The emails from the Registry, notifying the date of hearing were inadvertently missed and not viewed prior to the date. With respect to the aforesaid, the Supreme Court is cognizant and has taken judicial notice of how the Covid-19 pandemic, especially the period during and around the three waves, has barely affected the normal functioning of all the offices and courts of the Country and suo-moto took cognizance of the difficulties faced by the litigants and extended limitation period by excluding the pandemic period. In the light of the above, it cannot be the case of the Operational Creditor that service of the notice can be presumed. The Operational Creditor has suppressed the reply dated 06.01.2022 issued on behalf of the Corporate Debtor. The said reply was dispatched via courier on 06.01.2022. As per the tracking report, it was successfully delivered on 08.01.2022. It was also sent to the Counsel of the Operational Creditor via email dated 06.01.2022. No bounce back report was received with respect to the delivery of the

said email. The Operational Creditor falsely stated that no notice of dispute was received to the demand notice, though the same was served on the email. From the order of the Tribunal it is clear that only the previous notice dated 20.08.2021 and the reply given by the Corporate Debtor on 04.10.2021 were brought to the notice of the Tribunal but not the reply dated 06.01.2022. In view of the above, this Application is filed, seeking to set aside the ex-parte orders.

5. After filing the said affidavit, an additional affidavit was filed on behalf of the Petitioner stating that after filing the affidavit dated 11.04.2022, it has come to their knowledge that due to an inadvertent error, the reply notice dated 06.01.2022 was sent by the Counsel for the Corporate Debtor vide email to the email ID **apexmeadows@thecelest.com**. Since, the email sent to the incorrect address also did not bounce back, the deponents and the Counsel for the Corporate Debtor were under the bonafide impression that the reply notice was duly served on the Operational Creditor. The error was inadvertent and the same was not discovered by the Petitioners until after filing of the affidavit dated 11.04.2022. However, a hard copy of the said reply notice was sent through courier and was received on 08.01.2022.

6. Heard both the Counsel. In the first instance, the argument of the Petitioner's Counsel has been that the office of the Corporate Debtor was closed due to Covid-19 pandemic and that only a watchman was

present and the watchman might have refused the notice, due to which an endorsement of refusal came to be made on the notice issued by the Operational Creditor. The Counsel for the Operational Creditor filed a document which showed that on the date of the service of notice dated 18.02.2022, certain transactions took place in the office of the Corporate Debtor, which are execution and presentation of documents which were registered on 19.02.2022. The Senior Counsel then sought time to get instructions with regard to the said transactions and later the affidavit dated 11.04.2022 got to be filed, stating that the office was largely closed and only certain employees who have been authorized by the Corporate Debtor had limited access only to obtain necessary and urgent files & documents. This submission is in response to the document which evidenced certain transactions which have taken place presumably at the office of the Corporate Debtor. The affidavit however, does not state that no transactions took place on 18.02.2022. It appears that in order to explain the fact of the transactions having been taken place on 18.02.2022, the affidavit states that the office was not completely closed down but few people were given access. The affidavit shows that only very limited functioning of the office, with skeleton staff, mainly comprising of cleaning staff, was allowed. It amounts to admitting that though most of the staff present on 18.02.2022 would have been cleaning staff, some other staff who were competent to execute and present the documents were also present in the office. Even assuming that only cleaning staff were present, the notice

cannot be assumed as having refused by those staff. They would at best inform the postal authorities that they are not authorized to take delivery of the notice and that they would inform the same to the concerned staff, which in all probability is expected to be done by the cleaning staff. The correspondence coming to an office running such huge business, would not be taken lightly by even the cleaning staff of the office. Moreover when the affidavit is filed in explanation of the transactions that are evidenced by the document filed by the Respondent, it amounts to admitting, that those persons who carried out those transactions were present in the office. Hence, the affidavit does not in any manner answer the contention made by the Respondents, along with the supporting documents, that the office was functioning, though may be with skeleton staff who could have received the notice. The words "it seems" and "perhaps" used in the Applications and affidavit would reflect the uncertainty in the stand taken by the Applicant

7. The Counsel for the Applicant raises another contention on the basis of the non-filing of the reply notice issued by the Corporate Debtor. He contends that if the reply notice was filed, perhaps that the order of the Tribunal could have been different. The Counsel for the Respondent, in answer, submits that the reply notice was not received by the date of filing the application and it was admittedly received on the next day of filing the application, for which the Counsel for the Petitioner contends that it is the duty of the Operational Creditor to

bring to the notice of the Tribunal, before passing the order of admitting the Petition, that a reply notice was received and to place reply notice on record, facilitating the Tribunal to adjudicate the matter effectively by considering the contents of the reply notice. The Counsel for the Respondent submits that the dispute that could have been found as a pre-existing dispute was however, placed before the Tribunal by placing the reply notice which was issued by the Corporate Debtor on 04.10.2021.

8. The Counsel for the Petitioner contends that the said notice is only a transactional notice, while the reply notice issued to the demand notice under Section 8 would be a jurisdictional notice, on the basis of which the Tribunal has to pass an order.

9. The Counsel for the Applicant, by reading Section 8 (2) of IBC contends that the Corporate Debtor shall issue notice within a period of 10 days of receipt of the demand notice and hence till lapse of 10 days from the date of receipt of the demand notice by the Corporate Debtor, the Tribunal would not have jurisdiction. Hence the suppression of the reply notice issued to the demand notice would vitiate the proceedings. Sections 8 & 9 of IBC can be read together in order to understand as to when the right would accrue to Respondent No.1/ Operational Creditor to file an application under Section 9 of IBC.

Section 8 of IBC is as follows:

" (1) *An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.*

(2) *The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—*

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor."

Section 9 (1) of IBC is as follows:

"Section 9 (1): After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the

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> *corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.*"

10. According to Section 8 of IBC, a demand notice shall be delivered on the occurrence of default and the Corporate Debtor shall within a period of 10 days issue reply notice. Section 9 (1) of IBC, prescribes that after the expiry of the period of 10 days from the "date of delivery of the notice" or invoice, demanding payment, if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute, under Section 8(2) of IBC, he may file an application. Hence for filing an application, the 10 days' time starts from the date of delivery of notice to the Corporate Debtor, which in this case expired by 07.01.2022, which is the date of filing the application since admittedly, the notice is delivered on 27.12.2021.

11. The Counsel for Respondent No.1, however, argues that the Applicant would not have right to argue on the aspect of reply notice, since it would be amounting to touching upon the merits of the case and the merits of the order and he needs only to satisfy the Tribunal, that either the notice was not delivered or that he could not appear due to reasons beyond his control. He relies on a judgment of NCLAT in ***Company Appeal (AT) (Insolvency)No.54/2021 between Ravinder Kumar Kalra (Director of Suspended Board of Evershine***

Solvex Pvt. Ltd.) vs. Ricela Health Foods Limited & Ors. In the said case, the ground taken was non-service of the notice and the track record showing the delivery of notice upon the Corporate Debtor. It was held in those circumstances, that since admittedly the factum of tracking report, confirming delivery of notice upon the Corporate Debtor was not disputed and no allegation in the nature of fabrication, forgery or fraud came forth from the Corporate Debtor, the Adjudicating Authority was justified in declaring service of notice having been effected on the Corporate Debtor. It was also observed that since, the Corporate Debtor did not put in his appearance and raise any issue in regard to maintainability of the Application, it is futile on the part of the Appellant to contend that the Adjudicating Authority did not decide the issue of maintainability of the application. It was further observed that the Adjudicating Authority is obligated under law to issue a limited notice to the Corporate Debtor at the pre-admission stage of the Application filed under Section 9 of the IBC and it shall pass an order of admission on being satisfied about completion of application and there being an unpaid operational debt and default in its payment. It was further held that the object of limited notice is to enable the Adjudicating Authority to satisfy itself that there is no pre-existing dispute qua the operational debt and no suit or arbitration proceeding in relation to such dispute was pending before the receipt of demand notice by Corporate Debtor as contemplated under Section 8(1) of the IBC. It was further observed that if the Corporate Debtor did not choose to

appear in response to the notice issued upon it and did not take stand as regards a pre-existing dispute qua the operational debt, it cannot be heard to say that no opportunity of being heard has been provided to it and viewed in this perspective, consideration of issue of maintainability by the Adjudicating Authority would be of no consequence if the same were neither raised in reply to the demand notice nor in reply to notice served upon the Respondent. But however it was observed in the said judgment that the issue of maintainability would be of no consequence if it was not raised in reply to the demand notice or in reply to the notice served upon the Respondent. Hence, it would mean that if from the reply notice, an issue of maintainability comes forth, the suppression of the reply notice would be relevant.

12. In the impugned order, it can be seen that this Tribunal considered the reply notice dated 04.10.2021 wherein it was stated that the Operational Creditor failed to perform his duties as prescribed under the agreements and that the term of 4 years elapsed as per contract dated 31.12.2011 and was not renewed and that the project did not materialize during the term in question, and observed that no evidence was produced in that regard, since the Corporate Debtor did not choose to appear and contest the case and prove the contentions made in the reply notice.

13. A perusal of the reply notices dated 04.10.2021 and 06.01.2022 would be beneficial. Both the notices do not spell that there is any pre-existing dispute, except raising certain contentions with regard to contractual obligations and denying the due. The allegation that is made is that Respondent No.1/Operational Creditor has failed to perform his duties and the contractual term of Respondent No.1 has expired. Hence even if the reply notice dated 06.01.2022 was placed on record, the same conclusion, as was drawn in respect of the reply notice dated 04.10.2021, could have been drawn in respect of the said notice, since, no document in support of the proof of the contents of the notice dated 06.01.2022 also came forth.

14. A judgment of the NCLT, Division Bench, Chennai in ***IA/707/CHE/2021 in IBA/140/2020 between Ramji Venkatraman (Suspended Director of Ad Mart Pvt Ltd) vs. M/s.ACI Wonderwood Products & Another***, was relied upon wherein it was held that ex-parte order can be set aside only on the ground of the notice not being duly served, or that they were prevented by any sufficient cause from appearing in the proceedings and the refusal to receive the notice cannot be stated as a sufficient cause for the Corporate Debtor for non-appearance.

15. A judgment of the Supreme Court in ***2021 SCC OnLine SC 828 between Vishwabandhu vs. Sri Krishna & Another***, was relied upon in support of the contention that as per Section 27 of the General

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Clauses Act, 1897, a presumption has to be drawn that service of notice has been effected when it is sent to the correct address by registered post and if a notice is returned with a postal endorsement as refused, it has to be deemed as proper service.

16. In answer to the contention raised with regard to the powers of the Tribunal in going in to the merits of the case in an application filed, seeking to set aside the order setting the Corporate Debtor ex-parte, the Counsel for the Applicant, relied on three judgments. A reading of the judgments shows that none of the judgments did lay any ratio on the said aspect. The first judgement is rendered by the NCLAT, New Delhi between ***Ms.Bhaskar vs. Sai Precious Traexim Pvt. Ltd.*, *in CA(AT)(Insolvency) No.531 of 2020.*** This is a judgment rendered by the NCLAT in an appeal brought to it by the Applicant/Corporate Debtor, assailing the order passed by the NCLT therein, in the circumstances of none appearing for both the parties. In those circumstances, the NCLAT discussed about the merits of the case and remanded the matter. But it can be noted that even in the said judgment, NCLAT observed that where a Petition or an Application has been heard ex-parte against a Respondent or Respondents, such Respondent or Respondents may apply to the Tribunal for an order to set it aside and if such Respondent or Respondents satisfies the Tribunal that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing (when the petition or the application was called) for hearing, the Tribunal may make an

order setting aside the ex-parte hearing as against him or them upon such terms as it thinks fit. Hence from the above judgment also it is clear that the two aspects that have to be proved by the Respondent or Respondents are that either the notice was not duly served or that he was prevented by any sufficient cause from appearing.

17. The next judgment is rendered by the NCLAT, New Delhi between ***Ms.AKJ Fincap Limited vs. Bank of India in CA (AT) (Insolvency) No.178 of 2021***, wherein the order of the Adjudicating Authority therein, which dismissed an Interlocutory Application on the ground that the Tribunal has no power to review or set aside its own Company Petition admission order as per settled proposition of law, was set aside. The NCLAT set aside the said order considering that the appellant there in is silent about the service of notice which was effected upon them by an email. The notice taken to the Corporate Debtor in that matter was returned on the ground that insufficient address and later a fresh notice was ordered on furnishing correct address and the impugned order recorded that service of notice on the Corporate Debtor was done through speed post and also through an email dated 28.02.2020. Considering that the appellant is silent about the service of notice which was effected by email, the order setting the Corporate Debtor ex-parte, is set aside.

18. The third judgment is rendered by the High Court of Calcutta, between ***Credence Trexim Private Limited & Ors. vs. The Registrar***

of Companies, the facts of which reveal that there was a suppression of material fact. Considering that if a plea is taken that material is suppressed or fraud practiced, the order can be recalled, the order therein was recalled. In this case, there is no plea in the application that the order was obtained by playing fraud on the court. Hence none of the above judgements would answer the question, whether the merits of the case, while hearing the application seeking to set aside the order, setting the Applicant ex-parte, can be gone into.

19. The Counsel for the Respondent relied on a judgement of NCLAT in ***CA (AT) (Insolvency) No.54 of 2021 between Ravinder Kumar Kalra vs. Ricela Health Foods Limited & Ors.***, in support of his contention that the merits of the case cannot be gone into while deciding an application seeking to set aside the ex-parte order. It was held that the object of limited notice is to enable the Adjudicating Authority to satisfy itself that there is no preexisting dispute qua the operational debt and no suit or arbitration proceeding in relation to such dispute was pending before the receipt of demand notice by Corporate Debtor as contemplated under Section 8 of the IBC. It was held that if the Corporate Debtor did not choose to appear in response to the notice issued upon it and did not take stand as regards a pre-existing dispute qua the operational debt, it cannot be heard to say that no opportunity of being heard has been provided to it. It also observed that consideration of issue of maintainability by the Adjudicating Authority would be of no consequence if the same were

neither raised in reply to the demand notice nor in reply to notice served upon the Respondent. In the said case also the impugned order was limited to dismissal of I.A seeking to set aside the order of ex-parte, which culminated in passing the order of admission. Another judgment of the NCLAT in ***I.A.No.265/2019 in CA(AT)(Ins.) No.412/2019 between Agarwal Coal Corporation Pvt Ltd., vs. Sun Paper Mill Ltd. & Another***, which relates to an appeal preferred seeking to place on record the submission relating to the fraudulent acts of the Respondents therein, is also relied upon. However, the said judgment is rendered in an appeal and is not a considered as relevant to decide the issues involved in this Application.

20. From the conspectus of the judgements and the relevant provisions of law, it can be understood that in an application seeking to set aside the order of ex-parte, the Applicant needs to either prove that the service of notice is not effected on him or that he was prevented by sufficient cause not to appear before this Tribunal inspite of such service. In this case the pleas taken in the application are none of the above two. The plea taken is that the notice was refused as the Office was not functioning or that the office was functioning limitedly with skeleton staff, which can be held as not proved in the light of above discussion. The reply notices do not spell existence of pre-existing dispute in terms of section 8 of IBC. It is only the contentions in the demand notices that are disputed. According to section 8 of IBC a dispute should be existing by the date of demand notice or there

should be pending a suit or arbitration proceedings which are filed before the receipt of such notice, which is not made out in this case.

21. In view of the above, the Application is dismissed.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu