

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.623 of 2019

[Arising out of Order dated 28th March, 2019 passed by National Company Law Tribunal, Single Bench, Chennai in CP/763/IB/2018]

IN THE MATTER OF:

Before NCLT

Before NCLAT

D. Sathish Babu
Shareholder & Director,
Indus Mobile Distribution
Private Limited
83/38,
Bishop Garden,
R.A. Puram,
Chennai – 600 028

Appellant

Versus

1. Optiemus Infracom
Limited
K-20, Second Floor,
Lajpat Nagar – II,
New Delhi – 110 024

Applicant
Operational Creditor

Respondent No.1

2. Mr. B.Ramana Kumar
Resolution Professional
A-1, Ground Floor,
Sarada Apartments,
17/6,
Sringeri Mutt Road,
Mandaveli,
R.A. Puram,
Chennai – 600 028

Respondent No.2

For Appellant:

Shri V. Ramakrishnan, Sr. Advocate with Shri K.S. Mahadevan, Ms. Swati Bansal and Shri Ankit Gussain, Advocates

For Respondents:

Shri Mudit Sharma and Shri Parves A. Khan, Advocates (Respondent No.1)

J U D G E M E N T
(29th November, 2019)

A.I.S. Cheema, J. :

1. Respondent – Optiemus Infracom Limited (**“Optiemus” or “Operational Creditor”** – in short) filed Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the Adjudicating Authority (National Company Law Tribunal, Single Bench, Chennai) against M/s. Indus Mobile Distribution Pvt. Ltd. (**“Indus” or “Corporate Debtor”** – in short). The same was registered as CP/763/IB/2018 and the Application came to be admitted by Adjudicating Authority on 28th March, 2019. The present Appeal has been filed by D. Sathish Babu claiming to be shareholder and Director of the Corporate Debtor taking up the cause of the Corporate Debtor (Appellant – in short). This Appeal is against the Order admitting Section 9 Application under IBC.

2. Operational Creditor – Optiemus in the Application filed before Adjudicating Authority claimed Rs.27,79,59,587.21 as outstanding against Corporate Debtor – Indus for the period 25th February, 2015 to 20th March, 2018 which relates to mobile handsets sold to the Corporate Debtor, and for the period 1st April, 2015 to 20th March, 2018 with regard to accessories. Operational Creditor claimed that there were dues on this count which were not paid and there was default. Operational Creditor – Optiemus claims that it is distributor of mobile handsets of Samsung brand and as per the arrangement, mobile sets were supplied to the Corporate Debtor – Indus. Operational Creditor placed on record invoices

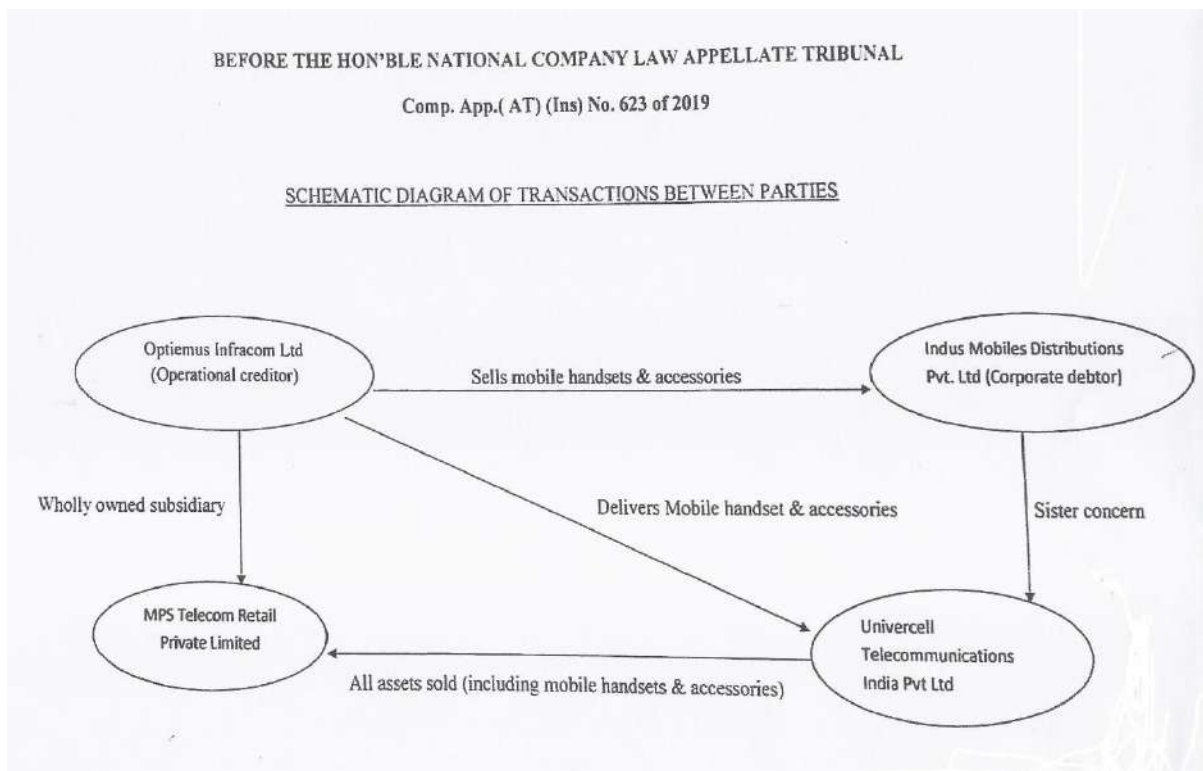
as well as documents to show delivery of the goods. It is claimed that the goods were sold to Corporate Debtor – Indus and as per the arrangement between the parties, “delivery” was made to “Univercell Telecommunications India Private Limited” (**Univercell – in short**) which is stated to be the sister concern of Corporate Debtor – Indus. Parties have pointed out one tax invoice from the tax invoices (Appeal Page – 299) in this regard and at the time of arguments, there was no dispute that the goods were “sold” to Indus and “delivered” to Univercell – the sister concern of Corporate Debtor as per the arrangement.

3. The case of the Respondent – Operational Creditor (Optiemus) is that as per the closing balance as on 30th September, 2015, there was an amount of Rupees Forty Four Crores Eighty Nine Lakh Eighty Three Thousand and Eighty Four outstanding which was confirmed by the Corporate Debtor through authorized signatory on Letter Head. Operational Creditor claimed that cheque dated 1st November, 2017 had been issued by the Corporate Debtor for Rs.27,79,59,587/- which bounced. Operational Creditor claimed that it had issued Notice under Section 8 of IBC for the outstanding amount which was delivered to the Corporate Debtor on address as per Master Data, MCA which was placed on record. The Notice was sent on the given address through Blue Dart Courier and Postal Department and delivery reports were placed before the Adjudicating Authority.

4. Operational Creditor points out, when the matter was before Adjudicating Authority, the Corporate Debtor accepted that Operational Creditor used to deliver mobile handsets and accessories to sister concern of the Corporate Debtor and to different branches of the sister concern as was appearing from the invoices raised by Operational Creditor as per the arrangement between the Operational Creditor and Corporate Debtor.

At the time of arguments before us, the learned Senior Counsel for the Appellant for the sake of convenience and understanding the arguments tendered a diagram of connection and transactions between the parties and related entries. The same is as under:-

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5. The learned Senior Counsel submitted that Operational Creditor – Optiemus was selling mobile handsets and accessories to Indus – Corporate Debtor as can be seen in the Diagram. He stated that Univercell is sister concern of Corporate Debtor – Indus as can be seen from the diagram. The deliveries of mobile handsets and accessories were made to Univercell. The Counsel added that MPS Telecom Retail Pvt. Ltd. is wholly owned subsidiary (Which is disputed by learned Counsel for Operational Creditor who claimed that it is not wholly owned) of Optiemus – Operational Creditor. It is argued that all assets including the goods which were delivered to Univercell have been, by an agreement, sold by Univercell to **MPS Telecom Retail Pvt. Ltd. (MPS – in short)**. Thus, it is argued that the goods sold to Corporate Debtor have landed up with the subsidiary of Operational Creditor and thus liability is not there. There is, however, no dispute with regard to the fact that the Asset Purchase Agreement between Univercell and MPS which is dated 29th July, 2015 (Page – 83) is in trouble and already their dispute is before Arbitrator. It is claimed by the learned Counsel for Operational Creditor that the said Agreement did not include stock transferred.

6. Case was put up before Adjudicating Authority and it has also been argued before us that by deed of assignment dated 7th April, 2015 (Page – 56) which was a document between Corporate Debtor – Indus and MPS Telecom, the Intellectual Property Rights in Trade Mark were transferred to the sister concern of Operational Creditor. Counsel for the Appellant referred to one Mutual Tripartite Agreement dated 07.04.2015 (Page – 80)

which is stated to have been entered into between Corporate Debtor – Indus, MPS (the entity linked with Operational Creditor) and the Operational Creditor. However, (as the document itself shows) the Operational Creditor did not sign the document and thus the document remained incomplete. Even otherwise, it is stated that by the document, adjustment of Rs.4 Crores out of Rs.5 Crores of the amount of loan, which was due and payable by Corporate Debtor to the Operational Creditor was confirmed by Corporate Debtor and consideration which was to be paid between MPS and Univercell was sought to be adjusted, out of liability of the Corporate Debtor. The incomplete document would leave huge liability still due, even if one sits down to consider it.

7. The learned Senior Counsel for the Appellant referred to Judgement in the matter of **“Arcelormittal Private Limited vs Satish Kumar Gupta & others”** (2019) 2 SCC 1. It is argued that in the said Judgement, the Hon’ble Supreme Court dealt with Section 29A(c) of IBC. It is stated that as per Section 29A(c), relevant time to consider ineligibility to submit Resolution Plan is the time of submission of the Resolution Plan but in the above Judgement, the Hon’ble Supreme Court found that antecedent facts reasonably proximate to this point of time can always be seen, to determine whether the persons referred to in Section 29A are, in substance, seeking to avoid the consequences of the proviso to Sub-Clause (c) before submitting a Resolution Plan. The learned Counsel stated that what is found by the Hon’ble Supreme Court is that even in IBC matter, generally and broadly speaking, the Corporate Veil may be lifted where a statute

itself contemplates lifting the veil, or fraud or improper conduct is intended to be avoided, or where companies are inextricably connected so as to be, in reality, part of one concern. The learned Senior Counsel submitted that in the present matter also, in the facts of the matter, it is necessary to lift the veil and see that there are cross dealings between the parties and thus liability to pay was under dispute.

8. The other submission of the learned Senior Counsel for the Appellant is that the building in which the office of the Corporate Debtor is situated is predominantly in possession of the Operational Creditor and only one room in the building is in possession of the Corporate Debtor. It is thus claimed that although Section 8 Notice was duly addressed and sent and the Operational Creditor has shown tracking report of delivery, still it is the case of the Corporate Debtor that the Notice was not actually served on the Corporate Debtor. It is argued that Section 8 Notice is mandatory to invoke Section 9 proceedings and thus service of Notice only on the Corporate Debtor requires to be proved and the same is not proved.

9. Learned Senior Counsel for the Appellant claims that for such reasons, the Section 9 Application should not have been admitted by the Adjudicating Authority.

10. The learned Counsel for the Operational Creditor submitted that the present matter is admitted case of sale of mobile handsets and accessories to the Corporate Debtor which under the arrangement between the parties, were delivered to Univercell. It is argued that goods sold to Corporate

Debtor is not in dispute. Corporate Debtor is liable to pay when there is default. The argument is that the deed of assignment referred has nothing to do with the present transaction between the parties and the said deed related to Trade Mark which is not relevant for the present issue. Even regarding the Mutual Tripartite Agreement (Page – 80), it is stated that the Operational Creditor admittedly did not join the document and it cannot be read against the Operational Creditor. Alternatively, the Counsel submitted that even if one was to go into this document, the Corporate Debtor admits liability to pay. Referring to the Asset Purchase Agreement (Page – 83), the Counsel submitted that the Operational Creditor was not party to this document which agreement was between Univercell and MPS, which may be sister concerns of the Corporate Debtor and Operational Creditor, respectively. It is argued that they are independent entities for the law and if their transaction is in dispute before arbitration, that would have no connection with the present transaction of sale of mobile handsets and accessories between Operational Creditor and the Corporate Debtor, and the dues. Those transactions cannot be referred to claim cross dealings to create “pre-existing dispute”.

11. It is argued that Section 9 Application was filed on 4th May, 2018 and the arbitration proceedings started on 26.09.2018 with regard to the Asset Purchase Agreement dated 29.07.2015, and it is thus argued that even this fact could not be relied on to state that there is any pre-existing dispute. The Counsel stated that MPS is not “wholly owned subsidiary” of the Operational Creditor.

12. With regard to Section 8 Notice, the Counsel submitted that the fact is not in dispute that Section 8 Notice was duly addressed to the registered address of the Corporate Debtor and there is no dispute that tracking report shows delivery at the given address. The Counsel has pointed out copy of the photo of the registered office taken from outside. It is stated that the said copy was filed by the Operational Creditor before the Adjudicating Authority. The copy of the same filed by the Appellant is at Page – 162. The Counsel stated that the document before the Tribunal is not very legible and so at the time of arguments, he tendered a more legible copy and submitted that it is apparent from the document that on the spot in front of the office of the Corporate Debtor, there is a big board with “Indus” written on it and the address is also written on the front of the office along with CIN number of the Corporate Debtor. The Counsel referred to Section 27 of the General Clauses Act to submit that when the Notice has been duly addressed and sent, service of Notice is presumed. Reference has been made to Page 136 – the tracking report from Blue Dart as well as Page 137 – the postal receipt and Page 138 – the tracking report from website of Department of Posts, Ministry of Communications which shows that the item was delivered at the given address.

13. Having heard Counsel for both sides, we first dispose of the objections with regard to service of Notice. As the documents just referred above by the learned Counsel for Operational Creditor show, the Section 8 Notice item was delivered not only by Blue Dart but also by the Postal Department. There is no dispute that the address of the Notice was proper

address of the registered office of the Corporate Debtor. The Operational Creditor did what was expected from it under the law and Corporate Debtor merely by putting up hands and saying that “I did not receive”, would not be sufficient. The Adjudicating Authority also dealt with this aspect and found that Notice was duly served. We also hold that the Notice was duly served as required by the law.

14. Apart from above, if we peruse the provisions of IBC, in response to Section 8 Notice, what the Corporate Debtor could have done is provided in Sub-Section (2) of Section 8 which reads as follows:-

“(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, or] 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 [payment] 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.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding [payment] of the operational debt in respect of which the default has occurred.”

15. Before Adjudicating Authority or before us, what Corporate Debtor could do is to show that there is a pre-existing dispute or that the dues are not payable in law or in fact. It is not the case of the Appellant – Corporate Debtor that the Corporate Debtor was or is ready to pay the dues claimed in default and if Section 8 Notice had been received, it would have paid the dues and avoided the invoking of IBC. There is no material to show any pre-existing dispute. What the Corporate Debtor is trying to say is that there were certain transactions between the Operational Creditor and Corporate Debtor along with Univercell and MPS and thus the Adjudicating Authority should look into all those transactions and on such basis, it is tried to be said that the dues are not payable. We have gone through the documents referred by the learned Counsel for the Appellant and even after considering those documents (in what is referred as lifting of veil), we are unable to see any record to show that there is pre-existing dispute. Rather what we see from record is that there is debt outstanding which is more than Rs.1 Lakh and there is default. Even if a transaction between Univercell – the sister concern of Corporate Debtor and MPS Telecom which is said to be wholly owned subsidiary (which is disputed), is in trouble as regards to assets sold, that by itself would be no reason to say that the Corporate Debtor is not liable for the debt outstanding. The attempt of the Corporate Debtor to push through Mutual Tripartite Agreement (Page – 80) did not succeed as Operational Creditor did not join the same. If anything, the document would rather show acceptance of liability by the Corporate Debtor. Even if the parties and/or their sister

concerns are indulging in various transactions and deals, when there is an independent transaction of sale giving rise to dues and there is default in payment of the same, that independent transaction cannot be doubted or put into shadows due to other dealings between the parties and/or their sister concerns.

16. We do not find any substance in the present Appeal. We have gone through the Impugned Order which has dealt with the various issues raised by the Appellant and we find ourselves in agreement with the Adjudicating Authority for discarding the arguments which are being raised by the Corporate Debtor. The Section 9 Application was properly admitted.

The Appeal is dismissed. No costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

rs/md