

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1455 of 2019

[Arising out of Order dated 14th November, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in Company Petition (IB) No.3008 (MB) of 2019]

IN THE MATTER OF:

Anubhav Anilkumar Agarwal
Having its Registered office at:
601, Khatau, Condominium,
J.M. Mehta Road,
Off. Nepean Sea Road,
Malabar Hill, Mumbai – 400 006.

....Appellant

Vs

1. Om Prakash Rohra,
605, Mahan Apartment,
Near Lassi Hall,
Ulhasnagar – 421001.
2. M/s. AA Estate Private Limited
Through the Interim Resolution Professional
Mr. Gaurav Khurana
Having its Registered Office at:
RNA Corporate Park,
Next to Collectors Office,
Kalanagar, Bandra (East),
Mumbai – 400 051.

....Respondents

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Mahesh Agarwal,
Mr. Divyang Chandiramani, Mr. Shaishir Divatia,
Mr. Arnav Behari, Mr. Saikat Sarkar and
Mr. Kamesh Vedula, Advocates**

For Respondents: **Mr. Amritpal Singh Khalsa, Advocate for R-1
Mr. John Mathew, Advocate
Mr. Satendra K. Rai and Mr. Gaurav Khurana,
Advocates for RP**

J U D G M E N T

Venugopal M., J:

The Appellant/ Promoter (Erstwhile Director) of the Corporate Debtor has preferred the Appeal, being dissatisfied with the impugned order dated 14th November, 2019 passed by the Adjudicating Authority (National

Company Law Tribunal), Mumbai Bench in admitting the Application filed by the 1st Respondent under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the '**I&B Code**').

2. The Adjudicating Authority (National Company Law Tribunal) on 14th November, 2019 while passing the impugned order at paragraph 12 had observed that‘that the disputes raised by the Corporate Debtor are spurious, illusory and the contentions does not require any further enquiry and will not fall within the ambit of Section 5(6) of the Code’ etc. Challenging the impugned order dated 14th November, 2019 passed by the Adjudicating Authority, the Learned Counsel for the Appellant submits that the Adjudicating Authority had not appreciated the fact that there were ‘pre-existing disputes between the parties and further an application under Section 9 of the I&B Code can be admitted where there is no notice of dispute’.

3. Advancing his argument, the Learned Counsel for the Appellant contends that the 1st warning letter dated 26.10.2018 and second letter dated 25.03.2019, which were placed on record, would in a clear cut manner, point out that the 1st Respondent had admitted his default of not attending the office regularly and of providing deficient services and furnishing an undertaking that he would attending the work on a regular basis and completing job responsibilities assigned to him. The Learned Counsel for the Appellant consorting with a legal plea that the two letters dated 26.10.2018 and 25.03.2019 were addressed prior to the receipt of demand notice, in accordance with Section 5(6) of the I&B Code. Furthermore, the 1st Respondent absenteeism and conduct was in breach of the employment terms as mentioned in the Appointment Letter dated 02.03.2019.

4. Expatiating his contention, the Learned Counsel for the Appellant emphatically points out that in the final 10-12 months of his services, the 1st Respondent had remained absent for most of his tenure, resulting in grossly deficient service, which caused huge loss to the Corporate Debtor and because of the 1st Respondent’s negligence and absenteeism, several informal

warnings were issued to him and one such warning letter was dated 26.10.2018 complaining of his deficient services.

5. It is repeated on behalf of the Appellant that 1st Respondent left the service without any formal relieving letter from the Corporate Debtor and without any full and final settlement being entered into between the parties, which in itself amounted to dispute between the parties as per Clause 8 of the Appointment Letter, which runs to the effect: -

“In the event of any failure to comply with the above you shall be liable to make good the consequent damage or less caused, of which the management shall be the sole judge and you shall not be entitled to receive any dues or arrears or terminal benefits from the company.”

6. The Learned Counsel for the Appellant takes a stand that the 1st Respondent neither paid three months' salary in lieu of his services and also not provided a notice to the Corporate Debtor and it is evident that as per HR Guidelines and policies of the Corporate Debtor, any Senior Level Staff planning to quit the services of the Company shall provide a notice period and that the 1st Respondent had not adhered to the same, which unerringly point out to a dispute precluding him from filing an application under Section 9 of the I&B Code.

7. The Learned Counsel for the Appellant strenuously contends that the Adjudicating Authority should not have allowed the 1st Respondent to rely on the Promotion Letter dated 29.01.2019 and in fact the letter dated 14.03.2019 was issued with the *mala fide* intention and without any authority from the Corporate Debtor, which was failed to be appreciated by the Adjudicating Authority.

8. It is the submission of the Learned Counsel for the Appellant that the Adjudicating Authority had failed to appreciate that 'insolvency proceedings' ought not to be used as a weapon for enforcing recovery and in short the IBC

is not intended to be a substitute to a recovery forum when there is real existence dispute', seeking the aid of the Code is impermissible.

9. The Learned Counsel for the Appellant brings to the notice of this Appellate Tribunal that Mr. Nilesh Kadam is also a disgruntled employee of the Corporate Debtor, who acted in a *mala fide* manner with malice and without any authority from the Management of the Corporate Debtor and the draft template emailed to the said Nilesh Kadam on 13.03.2019 by the 1st Respondent establishes that the letter dated 14.03.2019 was sent by Mr. Kadam at the behest of and in concert with the 1st Respondent.

10. The Learned Counsel for the Appellant submits that the observation of the Adjudicating Authority in the impugned order that there was no 'pre-existing dispute' between the parties is in violation of Hon'ble Supreme Court judgment in **"Captain Anant Bewan's case, Special Leave Petition (Civil) No.31644/19 dated 18.10.2019"**. Also, the said Authority had not considered the decision of the Hon'ble Supreme Court in **"Mobilox Innovation Pvt. Ltd. vs. Kirusa Software (P) Ltd., reported in (2017) SCC Online SC 1154"**.

11. The Learned Counsel for the Appellant refers to the judgment of this Appellate Tribunal in **"Company Appeal (AT) (Insolvency) No. 105 of 2020 - Gouri Prasad Goenka vs. Surenda Kumar Agarwal & Anr., dated 30.01.2020"**, whereby and whereunder, the application preferred by the Respondent therein under Section 9 of the I&B Code was disposed of as withdrawn.

12. Lastly, it is the plea of the Appellant that the Promotion Letter dated 29.01.2019, relied on by the 1st Respondent has no value in the eye of law because of the simple reason that the said letter is an 'internal memorandum' of the 'Corporate Debtor', which was not signed by the 1st Respondent, showing that there was no acceptance of the said promotion. In this regard, it is the contention of the Appellant side that the said letter dated 29.01.2019

does not in any case prove that there was no dispute between the Corporate Debtor and the 1st Respondent.

13. In Reply, the Learned Counsel for the 1st Respondent contends that the 1st Respondent because of his sincere, hard-work commitment, dedication for work was promoted six times within a period of 10 years of his tenure in Corporate Debtor.

14. It is the stand of the 1st Respondent that the 'Corporate Debtor'/ Company had defaulted in payment of salary from March 2018 for the past 15 months, against the 1st Respondent services rendered to the Corporate Debtor/ Company more than a decade of his sincere, honest, hardworking service to the 2nd Respondent Company.

15. The Learned Counsel for the 1st Respondent points out that the 1st Respondent addressed two letters dated 31.05.2019 and 17.06.2019 and the Appellant had not even bothered to read the said letters and the said letters would reflect the pain and agony of the non-payment of salary to the 1st Respondent for a period of 15 months.

16. It is a version of the 1st Respondent that the Corporate Debtor's Company had failed to deposit 'Tax Deducted at Source' (TDS) with the Government after the same being duly deducted from the salary of the 1st Respondent and also had not issued Form 16-A for the Assessment Year 2014-15 till date and the same was not reflected in Form 26-AS. Therefore, the 1st Respondent could not file his IT returns till date.

17. The Learned Counsel for the 1st Respondent refers to the letter dated 02.10.2019 in C.P. No.3962 of 2018 & M.A. 3007 of 2019 wherein the Adjudicating Authority (National Company Law Tribunal), Mumbai made observations that the said authority directed the Police to lodge First Information Report against Mr. Gokul Agarwal, brother of Appellant & JMD of AA Estate, Respondent No.2 herein for plotting a larger conspiracy in not handing over the books of accounts and in destruction of assets. Also that

in Contempt Petition No.28 of 2017 in Notice of Motion (L) No.553 of 2015 the Bombay High Court had passed adverse strictures against the Appellant.

18. The Learned Counsel for the 1st Respondent submits that there are 50 employees approximately had not received their salaries from the 2nd Respondent for the past two or 2½ years and about 250 employees in other Group Companies are yet to receive salaries for the same period. The Learned Counsel for the 1st Respondent contends that default in respect of salary of the 1st Respondent arose in March 2018 and 14 months' salary is yet to be paid and in fact the Adjudicating Authority had rightly admitted the application, which is free from any error.

19. It is to be pointed out that the Appointment Letter issued by 2nd Respondent (AA Estate Private Limited) addressed to the 1st Respondent shows that the 1st Respondent was appointed as "Sr. Executive – Estimation & Contract" subject to terms and conditions. A perusal of the said Appointment Letter indicates that the date of joining of the 1st Respondent was 02.03.2009 and that the probation period will be that of six months from the date of joining. Further, the salary of the 1st Respondent was mentioned as Rs.54,166/- per month subject to/ less statutory levies/ deductions etc. The 1st Respondent was entitled to 21 days paid leave in a year. Clause-8 of the Appointment Letter under the caption 'Cessation of Services' specifies that the 1st Respondent services were liable to be terminated at any time by the Corporate Debtor without prior notice or reason and further required the 1st Respondent to give his resignation with one month's notice etc. In this connection, it may not be out of place for this Appellate Tribunal to make a pertinent mention that during the final 10-12 months of services, the 1st Respondent, according to the Appellant had remained absent for most of his tenure, resulting in grossly deficient services, which resulted in huge losses to the Corporate Debtor. The categorical stand of the Appellant is that the 1st Respondent in his reply affidavit on his own admission, admitted about his absence and further that the letter of the 1st Respondent dated 25.03.2019 is placed heavy reliance on the Appellant side that he will be

attending office henceforth regularly and complete his job responsibility as assigned to him by HOD/ Reporting Manager within the time frame given to him etc.

20. It cannot be ignored that no disciplinary proceedings were initiated against the 1st Respondent/ Applicant/ Financial Creditor and that the Appellant cannot take advantage of the plea of 'absenteeism' as claimed by the Corporate Debtor. Even the 'absenteeism of the 1st Respondent cannot be construed as a dispute' pertaining to the salary arrears claimed in the application by the 1st Respondent. It cannot be forgotten that after issuance of the warning letter, no further proceedings were initiated by the Corporate Debtor against the 1st Respondent. The application filed by the 1st Respondent (under Section 9 of the IBC) before the Adjudicating Authority on 30.07.2019 shows that the date on which the debt fell due was on 10.04.2018 and that a total sum of Rs.19,23,795/- was due from the Corporate Debtor (Rs.17,40,375/- towards principal together with interest @ 15% per annum amounting to Rs.1,83,420/-). In respect of interest claimed amounting to Rs.1,83,420/- by the 1st Respondent, this Appellate Tribunal is of the earnest opinion that the Interim Resolution Professional is to take into account of the same at the time of considering/ collating the claim.

21. In the case on hand before issuance of demand, admittedly, no explanation was obtained from the 1st Respondent in regard to his discontinuance of service without informing the Corporate Debtor and when the application was projected before the Adjudicating Authority by the 1st Respondent, the non-submission of resignation letter by the 1st Respondent cannot be taken advantage of by the Corporate Debtor or the Appellant and in law, the proceedings under Section 9 of the I&B Code cannot be put to break under some pretext or the other. In fact, the Adjudicating Authority after looking into the letter dated 14.03.2019 produced by the Learned Counsel, issued by the Corporate Debtor was of the view that that due to certain business situations, the 1st Respondent salary

was not credited from the month of December 2018 till date and that Form-16 was not issued to him since Financial Year 2014-15 and further this letter pointed out that the 1st Respondent was Deputy General Manager – Contracts and was employed on a permanent full time basis working with the Corporate Debtor from 02.03.2009. In pith and substance, the plea of the 1st Respondent is that the letter dated 14.03.2019 issued by the Corporate Debtor establishes ‘default’ on the part of the Corporate Debtor.

22. Section 5(6) of the I&B Code defines ‘dispute’ including a suit or arbitration proceedings – (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty and in the present case the disputes projected by the Corporate Debtor or the Appellant are only moonshine and they are only feeble assertion of facts and the same do not require any further examination because of the latent and patent reason that such contentions/ pleas in the considered opinion of this Appellate Tribunal do not fall within the parameters of ‘dispute’ under Section 5(6) of the I&B Code.

23. In view of the detailed qualitative and quantitative discussions and also this Appellate Tribunal keeping in mind the facts and circumstances of the instant case in an encircling and integrated manner, comes to an inevitable conclusion that the impugned order dated 14.11.2019 passed by the Adjudicating Authority in admitting the Section 9 application of the 1st Respondent is free from any legal infirmity. Resultantly, the Appeal is devoid of merits and the same is dismissed, but without costs.

24. The Appellant is directed to file certified copy of the impugned order within one week from today and accordingly I.A. No.4149 of 2019 stands disposed of.

25. I.A. Nos.4148 and 4150 are closed.

26. In I.A. No. 220/2020, I.A. Nos.221 of 2020, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526 & 554 of 2020 seeking to implead the Applicant(s) as Respondents

and to partake in the main Appeal are not entertained and are accordingly closed, with a direction to approach the Interim Resolution Professional for seeking redressal of their grievances, if any, if they so desire/ advised, of course in accordance with law.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI

24th February, 2020

Ash