NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 353 of 2020

[Arising out of the Order dated January 29, 2020, passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi) in C.P(IB) No.1972(ND)2019]

IN THE MATTER OF:

Akhilesh Kulshrestha
5/101, East End Apartments,
Mayur Vihar Phase-1 Extension,
New Delhi – 110096 **...Appellant**

Versus

M/s SAAB India Technologies Private Limited
7th Floor, DLF Centre, Sansad Marg,
New Delhi, Central Delhi,
New Delhi – 110001 **...Respondent**

Present:

For Appellant : Mr. Anshit Aggarwal, Mr. Vishal Ganda, Mr. Ayandev Mitra and Ms. Charmi Khurana, Advocates

For Respondent : Mr. Ritin Rai, Sr. Advocate with Mr. Shankh Sengupta, Mr. Sujoy Sur and Mr. Shreyash Sharma, Advocates

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

The present Company Appeal (AT) (Ins.) No. 353 of 2020 ("Appeal") was filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("Code"), challenging the order of the Hon'ble National Company Law Tribunal, New Delhi ("Ld. Adjudicating Authority"), dated January 29, 2020, in C.P. (IB) 1972 of 2019 ("Company Petition"). The Appeal was allowed by this Appellate Tribunal on August 25, 2022, and the case was remanded back to AA for necessary orders post-admission of the Section 9 Application. The

Respondent assailing the order dated August 25, 2022, filed a Civil Appeal No. 5923 of 2022 ("Civil Appeal") before the Hon'ble Supreme Court of India, which vide its order dated August 14, 2024 remanded the case to this Appellate Tribunal for consideration as to whether after the relinquishment of the position of CFO, the Appellant was entitled to the same emoluments and perks in his capacity as a Director of the Respondent. The Hon'ble Supreme Court directed the parties to reagitate before this Appellate Tribunal with supporting documents.

2. Accordingly, this matter was taken up by us. Before proceeding further, we note the relevant orders of the Adjudicating Authority of 29th January 2020, which are instructive to be extracted as below:

> "14. In the lights of aforesaid provision, when we shall consider the case in hand, then we find, in response to the demand notice, notice of dispute has been raised by the Corporate Debtor's and that was duly delivered to the Operational Creditor. When we have gone through the reply to the demand notice, which is available at Page 51 Annexure 9 then we find that in the reply to demand notice, it is specifically mentioned that upon termination, the Corporate Debtor has made full and final payment of Rs. 43,73,704/- on 20% March, 2019. We further find that the Operational Creditor has also challenged the termination before the Hon'ble Delhi High Court in writ petition number W P (c) 4407/2019, which was dismissed on 26.04.2019 and on the basis of these facts we can say that prior to the delivery of demand notice, there was a dispute regarding the appointment and termination of the petitioner as a director and herein the case, the petitioner claimed the amount on the basis of that he was working as an Whole Time Director of the Corporate Debtor as there was a dispute pending before the Hon'ble Delhi High Court in writ jurisdiction, on the basis of that, it can be said that the dispute has been raised under section 8(2) of the Code within

the period of 10 days of receipt of demand notice. Therefore, in view of Section 9 (5)(ii)(d) of the Code, if the notice of dispute has been received by the Operational Creditor then in that case the application filed by the Operational Creditor is not liable to be admitted.

15. So, on this ground alone, in our considered view, the present application is liable to be rejected under Section (9)(5)(ii)(d) of the Code, so, in our opinion, it is needless to discuss the other issues. Hence, accordingly, we hereby dismiss the application."

[emphasis supplied]

3. The appeal before this Appellate Tribunal was allowed vide order dated August 25, 2022, and the case was remanded back to the Adjudicating Authority for necessary orders post-admission of the Section 9 Application. The relevant orders are extracted as follows:

"....

16. We, thus, reach the conclusion that the Adjudicating Authority has erroneously inferred the existence of a dispute merely because a Writ Petition bearing WP (C) 4407/2019 was filed by the appellant, even though there is no such reference or mention is made in the order dismissing the writ petition and no inference of dispute can be drawn from what is stated in the said order. We also find that the Appellant was appointed as a WTD of the corporate debtor on 29.9.2015 while he was already working as CFO, and continued as WTD till 20.5.2019. Since he was paid his total emoluments and termination benefits till 31.3.2019 for his work as CFO, he is entitled to receive payment for the period 1.4.2019 till 20.5.2019 for his work as WTD, which is an operational debt in default and payable by the corporate debtor.

17. On the basis of aforementioned detailed discussion, we are of the view that the Adjudicating Authority has erroneously dismissed Appellant's application under section 9. We, therefore, set aside the Impugned Order and order admission of the section 9 application. The case is sent to the Adjudicating Authority for passing necessary order after the admission of section 9

application. The appeal is accordingly disposed of with these directions."

4. The Respondent assailing the order dated August 25, 2022, filed a Civil Appeal No. 5923 of 2022 ("Civil Appeal") before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court of India vide its order dated August 14, 2024 noted as follows:

> "1. The instant appeal is directed against the judgment dated 25.08.2022 passed by the National Company Law Appellate Tribunal, New Delhi (in short, the "Appellate Tribunal"), whereby claim of the respondent for payment of emoluments for the period from 01.03.2019 (wrongly mentioned as 01.04.2019) till 20.05.2019 as a whole-time Director of the Appellant-Company, has been held to be an operational debt and consequently liable to be paid by the appellant.
>
> 2. It is not in dispute that the respondent joined the Appellant-Company as Chief Financial Officer (CFO) with effect from 10.03.2014. He was thereafter designated as Additional Director on 11.03.2015 followed by his appointment as Director with effect from 29.09.2015. It is pertinent to mention that the respondent continued to hold the assignment of CFO during this period.
>
> 3. The employment of the respondent as CFO was terminated with effect from 01.03.2019. He was, however, relieved from the position of Director of the Company only after a shareholder's resolution, with effect from 20.05.2019, It is also not in dispute that while relieving the respondent from the position of CFO, all his dues were paid.
>
> 4. The question that falls for consideration is whether the respondent is entitled to the same set of emoluments while continuing as Director from 01.03.2019 till 20.05.2019, which he was drawing in his dual capacity as CFO-cum-Director?
>
> 5. We find from paragraph 16 of the impugned judgment that the Appellate Tribunal has proceeded on the premise that the respondent was a whole-time Director or that there was an obligation on the Appellant-Company to pay the same emoluments to him which were admissible to him in his capacity as CFO. The documents placed on record by both the sides do not substantiate such claim. There is nothing on record to indicate that the respondent was entitled to payment of any salary/emoluments as a Director or whether such an assignment was given to him by virtue

of his substantive rank of CFO. The impugned judgment does not address these issues.

6. However, we are not inclined to cause any prejudice to the respondent and, therefore, deem it appropriate to accord opportunity to both the parties to reagitate the issue before the Appellate Tribunal along with supporting documents. The Appellate Tribunal shall determine as to whether after the relinquishment of the position of CFO, the respondent was entitled to the same emoluments and perks in his capacity as a Director of the Company.

7. Consequently, the appeal is allowed in part. The impugned judgment dated 25.08.2022 is set aside, and the matter is remitted to the Appellate Tribunal for re-determination of the claim.

8. It is clarified that we have not expressed any Opinion on the merits of the case. The Appellate Tribunal will decide the issue(s) as per their own merits and on consideration of the records, as may be relied upon by the parties."

[emphasis supplied]

5. As noted above in the orders of Hon'ble Supreme Court, the impugned judgment dated 25th August 2022, passed by this appellate tribunal was set aside and as per the orders of the Hon'ble Apex Court, we are taking up redetermination of the claim of the Appellant. The counsels of both sides were heard and we have also perused the additional affidavit on behalf of the Appellant, which was filed post the orders of Hon'ble Supreme Court and the reply on behalf of the Respondent to the additional affidavit filed by the Respondent.

6. The issue for our determination emerges from the following observations of Hon'ble Supreme Court which are extracted as follows:

"We find from paragraph 16 of the impugned judgment that the respondent was a whole-time Director or that there was an obligation on the appellant-Company to pay the same emoluments to him which were admissible to him in his capacity as CFO. The documents placed on record by both the sides do not substantiate such claim. There is nothing on record to indicate that the respondent was entitled to payment of any salary/emoluments as a Director or whether such an assignment was given to him by virtue

of his substantive rank of CFO. The impugned judgment does not address these issues.....

Xxx

The <u>Appellate Tribunal shall determine as to whether after the relinquishment of the position of CFO, the respondent was entitled to the same emoluments and perks in his capacity as a Director of the Company</u>."

[emphasis supplied]

7. The matter was re-heard by this Appellate Tribunal on various dates on 06.09.2024, 23.10.2024, 05.12,2024, 23.12.2024, 31.01.2025 and 11.03.2025 and materials placed on record were perused. For better appreciation of the issues at hand, briefly we recapitulate the sequence of events relating to Appellants' initial appointment and termination.

8. In 2014, the Respondent employed the Appellant as the CFO with effect from 1 May 2014. The terms of the Appellant's employment as a CFO were governed by the letter of appointment dated 10 March 2014 (employment contract). The relevant clauses of the employment contract are set out below for ease of reference:

> "We are pleased to offer you employment with Saab India Technologies Pvt Ltd ("Company") as the Chief Financial Officer with effect from May 1, 2014. Your employment with the Company shall be governed by the following terms and conditions"
> ...
> 3. DUTIES AND OBLIGATIONS OF THE EMPLOYEE
> ...
> 3.6 Additionally, it is the Company's prerogative to decide the scope/nature of duties to be performed by the Employee. The Company shall be free to make additions thereto, and/or make changes, modifications, alterations, or amendments thereto ("Modifications") which Modifications, shall not be questioned, disputes or challenged by the Employee under any circumstances.
> ...
> 8. TERMINATION OF EMPLOYMENT
> 8.1 <u>The Company or Employee can terminate the employment by giving three month notice or salary in lieu of notice.</u>

...

8.3 Upon termination of employment, the Employee shall forthwith:
(a) deliver to the Company all property including any vehicle, computer, mobile phone, subscriptions for phone and internet, office stationery, books and documents etc, entrusted to his/her for care and charge. The Company reserves the right to deduct the money value of such property from the money payable to the Employee or take such action as may be deemed proper, in the event of the Employee fails to account for such property to the satisfaction of the Company.
(b) return to the Company all lists of clients or customers, correspondence and all other documents, papers, records, software programs, media and any other properties including any copies/ duplicates thereof in any form which may have been prepared by him/her or may have come into his possession during the term of his/her employment and shall not retain any copies.
...

9. GOVERNING LAW AND JURISDICTION

The provisions of this Appointment Letter shall be governed and construed in accordance with laws of India. Any controversy or claim arising out of, or relating to, this Agreement, or the breach hereof, shall be settled by binding arbitration to be held in English language in New Delhi, India, in accordance with the Arbitration and Conciliation Act, 1996, and conducted by a sole arbitrator mutually appointed by the Company and the Employee."

[emphasis supplied]

9. Further the Appellant was appointed as an Additional Director of the Respondent on 11 March 2015 and, thereafter, vide board meeting of the Respondent held on 28 September 2015 and Annual General Meeting held on 29 September 2015, the Appellant was appointed as a whole-time director of the Respondent on 29 September 2015. Respondent claims that as per the practice with the Respondent Company, the Appellant was not paid any remuneration for his services as a Whole-Time Director and he was appointed as a whole-time director only by virtue of his employment as the CFO.

10. The resolution dated September 29, 2015 appointing him as whole time director is extracted as below:

"SAAB

CERTIFIED COPY OF THE EXTRACTS FROM THE MINUTES OF THE MEETING OF THE BOARD OF DIRECTORS OF SAAB INDIA TECHNOLOGIES PVT. LIMITED HELD ON 28 OF SEPTEMBER 2015 AT 10 AM AT THE REGISTERED OFFICE OF THE COMPANY.

ITEM NO 2

"RESEOLVED that since Mr. Akhilesh Kulshrestha whose proposal for appointment as Director is being forwarded to the Annual General Meeting, being already in employment of the company shall be appointed as a whole-time Director subject to approval by the general meeting."

RESOLVED FURTHER that required compliances with Companies Act. 2013 be taken up and completed and authority is granted to any Director of the Company to file the required documents or take any other action which may be required in this connection.
This is certified is that above is true and correct copy of the resolutions passed at the abovementioned meeting of the Board of Directors.

For Saab India Technologies Pvt. Limited."

[emphasis supplied]

The above resolution clearly notes that Appellant *"being already in employment of the Company shall be appointed as a Whole Time Director."*

11. Thereafter, as per the claims of the Respondent, it underwent a restructuring of the organisation. The Appellant's scope of duties and role as CFO became redundant for the Respondent. The Respondent informed the Appellant about the redundancy of his position and, thereafter, terminated the employment, in accordance with Clause 8.1 of the employment contract vide termination letter dated 1 March 2019 (termination letter). In the termination letter, the Respondent assured the Appellant that he will receive all salary and benefits as set out in the employment contract up to the date of termination i.e. 1 March 2019 (termination date), [@78 APB], including three-months' salary in lieu of the notice period, which was paid.

12. But as per the Act's[1] requirements he was removed as a Whole-Time Director vide a resolution passed at the extraordinary general meeting on May 20, 2019. The relevant extracts of the letter by which he was removed as Chief Financial Officer is also extracted as below:

> "As you know following our recent discussions, it has been decided that your employment with SAAB India Technologies Private Limited (the Company) will terminate with effect from 1 March 2019 (Termination Date) by reason of redundancy of your position. The Company is restructuring the organization structure to reflect the country unit structure and size of the company.
>
> 1. In accordance with the terms of the letter of appointment dated 10 March 2014 signed and accepted by you on 12 March 2014 (employment Contract), the Company will pay you 3 months' salary in lieu of notice.
>
> .....
>
> 7. You are reminded that even though your employment will end on the Termination Date, you will still be required to comply all your obligations which are intended to continue even after termination of your employment, including obligations with respect to confidential information, trade secrets, intellectual property and data, non-complete and non-solicitation. Confidential information for the purposes of your confidentiality obligations will also include the terms of this letter and any release agreement executed between the Company and you.
>
> 8. You must do all things necessary to assist the Company to comply with any relevant statutory or other obligations in connection with your employment and its termination."
>
> (emphasis supplied)

13. The Appellants' claims that the Respondent has failed to pay the salary and other dues for the period from March 2, 2019 to May 20, 2019, amounting to ₹ 30,01,999/-, during which period, he claims that he was working as a Director, post termination of his services as CFO. The Appellant contends that the documents of the Respondent, which were filed by the Respondent before various statutory authorities indicate that the Appellant was receiving the salary in dual capacity as the Whole-Time Director and Chief Financial

[1] Company Act 2013

Officer. He specifically relies on e-form MR-1 which is a return of the appointment of key managerial personnel dated 14th October 2015 filed by the Respondent. This document is filed under Sections 196 and 197 of the Companies Act 2013, which is a document to notify the Registrar of Companies about the appointment and remuneration of the Managing Director or Whole Time Director (WTD). Per contra the Respondent claims that the Appellant was only liable to be paid the salary of ₹9,50,000 per month as the Respondent's CFO, in accordance with the Employment Contract, and no remuneration was separately payable to the Appellant for the position of a Whole-time Director. It is also claimed that as a company policy, Respondent's employees are not paid any additional remuneration for sitting on the board. Accordingly, the Appellant was not paid any remuneration for his role as the Whole-time Director - either for holding the position as a Whole-Time Director or a sitting fee for attending a board meeting, as is evident from the minutes of the board meeting and AGM appointing the Appellant as Whole-Time Director - which mention no remuneration to be paid to the Appellant. Minutes of the AGM meeting are at @ Pg. nos. 147-148 of VoL I of the APB.

14. It is on record that Schedule I of the termination letter provided the below details of the payout to the Appellant.

S. No	Head	Amount (in Rs)
1.	Payment of accrued but unpaid salary	31,666/-
2.	Payment of wages in lieu of notice	2,850,000/-
3.	Payment in lieu of accrued but untaken annual leave as on the termination date	To be confirmed before 15 March 2019

4.	Payment of gratuity calculated in accordance with Payment of Gratuity Act, 1972.	1,370,192.31/-

The above amounts were not disputed by the Appellant at the time of payment or even in the Petition. The termination letter was issued in full compliance with the employment contract and law. The Appellant has tried to indirectly claim that although his employment as CFO was terminated on 1 March 2019, yet from 2 March 2019 to 20 May 2019, he continued to be a Whole-Time Director of the Respondent, for which he had to be paid salary and other dues. We also note that Form No. MR-l is a statutory requirement that the Respondent is mandated to file under the Companies Act, 2013 as a company upon appointment of a director. We note that the said form nowhere states that the Appellant was being paid any compensation separately for his position as a 'Whole-time Director'. We are, therefore, inclined to agree with the submissions of the Appellant that in Form No. MR-I, the Appellant's designation was selected as 'Whole-Time Director' amongst other designations including the CFO, for a payment of an annual salary of ₹ 86,49,6001-, because Form No. MR-1 only allows a selection of a single choice for designation of the Appellant. Further, MR-1 is a disclosure form, which discloses all monies paid to the Appellant, who was a director in the company and does not prove that the monies were paid to him for being a director.

We also find that the Appellant has not been able to produce furnish a single document showing that the Appellant or any other employee serving as a director at the Respondent company is paid remuneration separately, or over and above their salaries, for being a director/sitting on the board. Further, there is no bank statement or other such document on records demonstrating

that the Appellant was paid the same salary twice in the same month for being a CFO and a director in the Respondent Company. However, we note that the Appellant has failed to specify the salary heads under which these 'other dues' could have been paid to him. We do not find any remaining heads under which any dues are payable.

15. Appellant relies heavily upon Article 48 of the Articles of Association (AoA) which is instructive to be noted as below:

> "Remuneration of Directors
> 48. Each Director shall be entitled to receive out of the funds of the Company for his services in attending meeting of the Board, such amount as Board may decide but not exceeding the maximum limits prescribed by the Act. Each Director, as the Board may approve, shall be entitled to be paid his reasonable travelling hotel and other expenses incurred by him for attending the meetings of the Board of Directors or otherwise incurred in the execution of his duties as Director, provided that the payment of any fees and expenses to any Director who is not a resident of India shall be subject to the approval of the concerned authorities in India."

16. We find that as per this article, the payment of remuneration to the Appellant as a Whole-time Director had to be approved by way of a resolution passed by the Board of Directors. However, no such resolution passed by the Board is placed on record, which can help the Appellants' case. We also do not find any other document on record demonstrating that the Board had approved payment of remuneration to the Appellant for his position as a Director. Appellant's reliance on Article 49 of the AoA, is also misplaced as Article 49 does not provide for payment of remuneration to a Whole-time Director as a matter of course, but makes it subject to other articles in the AoA. It is instructive to note this article as extracted below:

> "…
> 49. All other remuneration, if any, payable by the Company to a Director, whether in respect of his services as a Director in the

> whole time or part time employment of the Company, shall be determined in accordance with and subject to the provisions of the Act and these Articles"

Thus, we find that Article 49 clearly states that payment of any remuneration to a director has to be approved by the Board and no such board resolution appears to be on record which was passed, approving payment of additional remuneration to the Appellant for being a Whole Time Director.

17. Thus, with respect to reliance of the Appellant on the AoA-Articles of Association, the Respondent a Whole-Time Director will be paid for his/her services such an amount that has been decided by the board of the Respondent. We also note that the board of the Respondent had not approved or passed any resolution entitling the Appellant to any remuneration for his services as a Whole-Time Director. Further don't find any no policy, by which any director of the Respondent has been made payments separately for acting as director of the Company. The Appellant should have been well aware of that having been a CFO of the Respondent. The Appellant has also not produced any documents in support of this alleged entitlement. Therefore, we can conclude that the Respondent is not liable to pay any amount to the Appellant, apart from what has already been paid.

18. It is also claimed by the Appellant he had continued to perform his duties as a director till 20 May 2019, even after the termination of his employment as CFO on 2 March 2019. However, it is notable that the Appellant was removed as a whole-time director by following due process on 20 May 2019, i.e., about 2 months and 20 days after termination of his Employment Contract. We find that, while the termination of employment was

effective immediately by paying 3 months' salary in lieu of notice, Appellant's removal as a director was done by way of a Board resolution as per the requirements of the Act. We also note that that the Appellant did not perform any directorial responsibilities during this tenure and is not entitled to any additional compensation. The termination letter also notes that *"you [Appellant] must do all things necessary to comply with any relevant statutory or other obligations in connection with your employment and is terminating."*

19. The Appellant has also sought to rely on the financial statements of the Respondent for the years 2014-15 to 2020-21 to contend that he was a director of the Respondent and was paid remuneration for being a director in the Respondent company. However, the said financial statements only provide disclosure of any and all remuneration or monies that are paid to a director and they do not establish that these monies were paid to a director for their directorship in the company.

20. The Appellant was last drawing a monthly salary of ₹ 9,50,000 as the CFO at the time of termination of his employment. The Appellant was appointed as the Whole-time Director of the Respondent by way of board resolution dated 28 September 2015 and Annual General Meeting (AGM) dated 29 September 2015. The Appellant's employment as the CFO was terminated in accordance with Clause 8.1 of the Employment Contract vide Termination Letter dated 1 March 2019. Thereafter, by Payment Letter dated 20 March 2019, the Respondent informed the Appellant about the details of the full and final payment of ₹ 43,72,704 (after making necessary deductions of PF, income tax, etc.) that was paid to the Appellant as the final payment in

connection with his employment. We find that Respondent while conveying the termination benefits on 31st March 2019, pointed out in this letter that the respondent has received a notice from Mr Santosh Kumar Giri on behalf of the Appellant and it will be responded in detail in due course. [@100 APB]. Immediately thereafter, on 15th March 2019 the Appellant issued a notice for revocation of the termination of the Appellant from the services of the Respondent Company. Apart from various other issues the Appellant raised the issue of Section 169 of the Companies Act 2013 which allegedly had not been followed in the removal of the Appellant as a Director of the Company. [@152 APB]. The Respondent replied to this notice on 30th March 2019, wherein it was clearly brought on record that the Appellant was an employee of the Respondent Company and in terms of contract of employment, statutory compensation has been handed over to him by the Respondent. Further, it was also brought on record that the Respondent is in the process of removing the Appellant from the Board of Directors, which is a separate matter altogether and all steps for the removal from the board of directors will be undertaken in accordance with applicable law and was also advised by the Respondent that the Appellant may resign from the Board of Directors of the respondent as he was no longer employed with the Respondent. It was also brought on record that termination of the Appellants' employment is an executive decision which was taken by the Chairman and Managing Director and this decision was not a matter that required discussion at a board meeting.

21. Thereafter, the Appellant chose to file a writ petition before Hon'ble Delhi High Court, which heard the matter and vide its orders of 26.04.2019

dismissed the petition as premature. The relevant extract of the orders are as follows:

> "Vide the present petition the petitioner seeks restraining the respondent number 2 [registrar of companies] from accepting or admitting form DIR 12 or any other forms, that might be filed with the respondent number 2 by the respondent No 4 company [the respondent] pursuant to the illegal termination of the petitioner who has been a whole-time director of the respondent number 4 company.
>
> Counsel for respondent No 4 who appears on advanced notice admitted that the petitioner is a director as on date and there is no process started for removing him as a whole time director from respondent No 4 company. He further submits that if in future the respondent No. 4 decides that the petitioner shall be removed from the post of the director the due process under the companies act shall be taken. Since the petition is at premature stage the same is not maintainable and dismissed accordingly"
>
> *[emphasis supplied]*

22. Later on, when Appellant's demand Notice under Section 8 of the Code was sent to the Respondent on July 23, 2019, the Respondent denied liability, raising disputes that the Appellant's claims are baseless. Consequently, the Appellant initiated insolvency proceedings. However, the NCLT dismissed the Petition, holding that there were pre-existing disputes between the parties. Aggrieved by this decision, the Appellant had approached the National Company Law Appellate Tribunal (NCLAT) seeking to set aside the Impugned Order, which was allowed but was appealed by the Respondent before Hon'ble Apex Court and this matter is being heard as per the remand back by Hon'ble Apex Court.

23. After hearing counsels of both sides and perusing materials placed on record, we find that the Appellant was appointed as Chief Financial Officer (CFO) w.e.f. 01.05.2014 by an employment contract dated 10.03.2014. Later

on the Appellant was appointed as the Whole Time Director (WTD) of the Respondent by way of Board Resolution dated 28.09.2015 along with the Annual General Meeting (AGM) dated 29.09.2015. It is to be noted that the Appellant was appointed as WTD because he was working as the CFO. The employment of the Appellant was terminated as per Clause 8.1 of the employment contract between the two parties. All the dues, which included three months' notice or salary in lieu of the notice were paid to the Appellant. Once he ceases to be CFO, it is inconceivable that he could have continued as a WTD. It is worth noticing that the Appellant was not appointed as a WTD and there is no material to show any separate remuneration was payable to the Appellant for the position as a WTD. Further, from the materials on records, it is noted that there are no documents which suggest that the Appellant was being paid in the exclusive capacity as a WTD. The Appellant relies on the returns filed by Respondent in the e-form No. MR-l in which Appellant is being shown as WTD of the Respondent with a salary of ₹86,10,000/- per annum in the capacity as WTD. Per contra the Respondent claims that the MR-1 is a statutory requirement to file under law as a company upon appointment as a director. In this form the Appellants' designation was selected as a WTD amongst other designations including the CFO, because MR-1 only allows a selection of single choice for the designation of the Appellant. This form nowhere states the Appellant was being paid any compensation separately for his position as a WTD. Further, MR-1 is a disclosure form, which discloses all monies paid to the Appellant, who was a director in the Company and this does not prove that the money is were paid to him for being a Director. We are inclined to agree with the contention of the

Respondent for the reasons that he was appointed as a CFO and designated as WTD for being along with CFO and we cannot rely on the declarations on MR-1 for payment of salary exclusively as a WTD.

24. Furthermore, Article 48 of Articles of Association of the Company provides that if Appellant had to be paid as a WTD, it had to be approved by a resolution passed by the Board of Directors and there was no such resolution passed by the board. There is nothing on record to demonstrate that the board had approved payment of remuneration to the Appellant for his position as a director. Furthermore, Article 49 of the Article of Association (AoA) does not provide for payment of remuneration to a WTD as a matter of course but makes it subject to other articles in the AoA. We are inclined to agree with the contention of the Respondent that since Article 48 provides that the remuneration to a Director has to be approved by the board and no such board resolution was passed, the Respondent is not liable to pay any amount to the Appellant.

25. We also agree with the arguments of the Respondent that the Appellant has been paid salary till 31 May 2019 for the notice period. We note that the Respondent was already paid salary in lieu of three-months' employment to the Appellant (i.e. salary for the period 1 March 2019 to 31 May 2019), whereas the Appellant was removed from the Board of the Respondent much prior to 31 May 2019. Even if any amount from the previous salary payments were due to him for being a director of the Respondent, all such amounts up to the date of his removal were already paid. And therefore, Appellant cannot

claim any additional amounts from the Respondent other than the amount that has already been paid and accepted by the Appellant.

26. The Appellant has relied on various documents which show him as a WTD in the MCA master data, salary increment letter and salary slips for the month of February and March 2019. As has been discussed earlier, he was designated as a WTD for being CFO. From the material on record, it cannot be concluded that he was working exclusively as a WTD, without being a CFO. Once his employment has been terminated, he no longer remains the WTD. Since he was appointed as a WTD by the board resolution it could be revoked only by the Board's resolution, which was done after few days on 20.05.2019. The Appellants' reliance on the financial statements of the respondent, from the years 2014-15 to 2020-21 may not be of any help as these financial statements only provides disclosures of remuneration paid to a director just for their directorship in the company. From the materials on record, it is noted that the Appellant, during his employment, never claimed that any amounts were payable to him on account of him being a Whole-Time Director.

27. The Appellant relies on Section 169(4) read with Section 202 of the Companies Act, 2013 and claims that provisions of 169 were not followed. It further claims that since he was not removed as WTD under Section 169 of the Act for fraud, breach of fiduciary obligations, breach of trust etc. and neither the Appellant was an officer in default under Section 2(60) of the Act, therefore, he is entitled to compensation for the loss of office as the WTD of the Respondent. Such claims are unfounded as we have noted earlier that his Whole Time Directorship was dependent on his being a Chief Financial

Officer, which was terminated along with salary for the notice period. Therefore, he no longer could have worked as WTD. Necessary procedural requirements as per the company law had to be completed, which took some time and during this interim period from 02.03.2019 till 20.05.2019, he could not have been paid just exclusively as a WTD. Moreover, there is nothing on record to suggest that he was performing his directorial responsibilities during this tenure and therefore, we cannot agree with the claims of the Appellant that he is entitled to additional compensation.

28. From the above, we find that the Respondent was not a WTD exclusively but was CFO-cum-WTD. There was no obligation on the Respondent to pay the same emoluments to him, which were admissible to him in his capacity as CFO. The Appellant has not been able to provide any additional documents for us to determine as to whether after relinquishment of the position of CFO, the Appellant was entitled to the same emoluments and perks in his capacity as a Director of the Company. We also do not find any documents on record, which substantiate the claim of the Appellant that he was liable to be paid the same emoluments as a CFO for the short period, till his appointment as a WTD was formally revoked as per the Act.

29. From the above analysis, we conclude that the Appellant was initially appointed as a CFO. Later on, being a CFO he was designated as WTD. On his termination, all terminal benefits were paid to him. The required formalities to remove him as a Director of the Company needed some approvals of the board as well as AGM which took time. During this interim period from 01.03.2019 till 20.05.2019, he was not working as CFO and

therefore Appellants' claim that he was working as a WTD is not based any material on record. Therefore, his claim for same emoluments and perks in his capacity as a Director of the Company is devoid of any basis. We therefore cannot accept the claim of the Respondent that he is liable to be paid as a Director of the Company.

30. Furthermore, there has been a dispute regarding his termination which he had raised immediately after his services were terminated on 01.03.2019. The Respondent had sent a notice to the Appellant on 15.03.2019 challenging the validity of termination of his employment and demanded that he was a key managerial person and he is entitled to severance pay of 18 months in addition to a 6 months' notice period, which effectively meant 24 months' salary. This was replied by the Respondent on 30.03.2019. But the Appellant had filed a writ petition before the Hon'ble High Court of Delhi challenging his termination as an employee and pre-emptively challenging his removal as a Director. The High Court of Delhi heard the Appellants' writ petition and dismissed it on 26.04.2019. Thereafter, on 2019 the Appellant was removed from the position of WTD of the Company in an extraordinary general meeting as prescribed under law. Therefore, we find that the Appellant had raised a dispute with respect its demand for payment of salary and this has been noted by the Adjudicating Authority to be a pre-existing dispute.

31. We note that the Appellant had raised a dispute immediately upon his termination of employment. This was even mentioned in the Respondent's letter dated 31st March 2019. Notice from the legal representative of the Appellant was duly replied by the Respondent later in March 2019 itself.

Further, the Appellant raised the issue before Hon'ble High Court of Delhi in a Writ Petition, which was dismissed as premature. In such a situation, we find that there was a pre-existing dispute regarding the Appellant's termination as the Respondent's WTD.

32. The Respondent also claims that the relationship between the Appellant and the Respondent arises out of the employment contract and the dispute raised by the Appellant before the NCLT was one arising out of the employment contract and was therefore purely contractual in nature and ought to be resolved in terms of the dispute resolution process agreed by the parties in the employment contract. The employment contract, under Clause 9, provides for resolution of disputes through arbitration by a sole arbitrator. Accordingly, the NCLT and this Tribunal are not the appropriate for adjudication of a contractual dispute. Therefore, the Petition was not maintainable in any case. Without going into further details on this issue, we only note that there is a pre-existing dispute for deciding the case in hand.

33. Basis the facts and the circumstances in the present case, we find that there is a pre-existing dispute between the parties and this could not have been resolved by the NCLT under the Code. The law is very clear that as per Section 9(5)(ii)(d) of the Code, on an existence of pre-existing dispute, the Application is not maintainable. Furthermore, the law has been clearly enunciated by Hon'ble Supreme Court in ***Mobilox Innovation Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) 1 SCC 353*** at para 40 held as under:

> "40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application…"

Orders

34. We, therefore, agree with the finding of the Adjudicating Authority in rejecting the claim of the Appellant. Accordingly, the Appeal is dismissed as the present dispute arises out of the employment contract and is contractual in nature and cannot be raised under the Code. Accordingly, the Appeal is dismissed. No orders as to costs.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

New Delhi.
May 07, 2025.

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