

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1749 of 2024

[Arising out of order dated 14.05.2024 passed by the Adjudicating Authority
(National Company Law Tribunal, New Delhi Bench, Court – IV) in C.P. (IB)
No. 538/ND/2023]

IN THE MATTER OF:

Gagan Chhabra

...Appellant

Versus

SMS Vishwa JV

...Respondent

Present:

For Appellant : Mr. Nizam Pasha, Ms. Awstika Das and Ms. Riya Dhawan, Advocates.

For Respondent : Mr. Abhishek Anand, Mr. Karan Kohli and Ms. Palak Kalra, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This appeal has been filed by the appellant challenging the order dated 14.05.2024 passed by the adjudicating authority (National Company Law Tribunal, New Delhi Bench, Court IV), rejecting a Section 9 application filed by the appellant.

2. Brief facts of the case necessary to be noticed for deciding the appeal are:

- i. The appellant, a lawyer by profession provided legal services to the respondent – SMS Vishwa JV in arbitration proceeding which took place between the respondent and Thane Municipal Corporation.

- ii. A Joint Venture Agreement dated 28.08.2008 was entered between SMS Paryavaran Limited, M/s. Vishwa Infrastructures & Services Private Limited and M/s. GSJ Envo Limited. On 20.08.2008 mutual agreement among the parties was that they would jointly prepare and submit the tender in the name of joint venture namely; SMS Vishwa JV. SMS Paryavaran Limited was appointed as lead member. Joint Venture, i.e., SMS Vishwa JV submitted tender with Thane Municipal Corporation.
- iii. Arbitration dispute arose between the SMS Vishwa JV and Thane Municipal Corporation in which arbitration proceeding, appellant provided his professional services to SMS Vishwa JV.
- iv. SREI Equipment Finance Limited filed a Section 7 application against M/s. SMS Vishwa Infrastructures and Services Private Limited, one of the members of SMS Vishwa JV before the NCLT Hyderabad, which was admitted on 31.08.2018.
- v. A Section 7 petition was filed before the NCLT Delhi against SMS Paryavaran Limited, which was admitted vide order dated 03.01.2020.
- vi. The appellant filed a claim in 'Form-C' as financial creditor for an amount of ₹2,49,00,000/- in the Corporate Insolvency Resolution Process (CIRP) of the SMS Paryavaran Limited dated 05.08.2020, which claim was not admitted by the Resolution Professional (RP). Communication dated 26.09.2020 was sent to the appellant by the RP. Rejection of claim was not further agitated by the appellant. Appellant thereafter filed its claim as an operational creditor in 'Form-B' dated

05.10.2020 for an amount of ₹13,07,060/- to the RP of SMS Paryavaran Limited, which claim was admitted.

- vii. Liquidation proceeding of the corporate debtor M/s. Vishwa Infrastructures and Services Private Limited was completed and was allowed by order dated 01.07.2022 by the NCLT Hyderabad.
- viii. In the CIRP of the SMS Paryavaran Limited, resolution plan was approved in which appellant was also proposed certain payment as an operational creditor.
- ix. A demand notice dated 12.06.2023 has been issued by the appellant to the SMS Vishwa JV claiming a debt of ₹2,49,00,000/-. The SMS Vishwa JV replied the demand notice vide letter dated 11.07.2023. The claim of ₹2,49,00,000/- raised by the appellant was refuted and was stated to be frivolous and malicious.
- x. The details of CIRP of the M/s. Vishwa Infrastructures and Services Private Ltd. and SMS Paryavaran Limited was stated in the reply, the appellant filed Section 9 application before the NCLT, New Delhi on 18.07.2023.
- xi. Adjudicating authority passed an order on 06.10.2023 requiring the appellant to file an affidavit on the maintainability of the application. Appellant filed an affidavit dated 26.10.2023 titled as "affidavit on the maintainability". The adjudicating authority heard the arguments of the appellant on the maintainability of the Section 9 application and by impugned order rejected the application as non-maintainable.

- xii. Aggrieved by the order of the NCLT dated 14.05.2024, this appeal has been filed.
- xiii. In the present appeal, notices were issued on 22.11.2024. The respondent appeared and prayed time to file reply on 22.11.2024. Reply has been filed by the respondent. The respondent in the reply, has questioned the very maintainability of the application against SMS Vishwa JV.

3. We have heard learned Counsel Mr. Nizam Pasha appearing for the appellant and learned counsel Mr. Abhishek Anand appearing for the respondent.

4. Learned counsel for the appellant submits that adjudicating authority committed error in rejecting Section 9 application holding that application which has been filed on the strength of Memorandum of Understanding (MoU) having been filed for recovery of settled amount which is governed by the MoU dated 09.06.2018, hence the outstanding debt is not an operational debt. It is submitted that the ground given by the adjudicating authority for rejecting Section 9 application is misplaced. The appellant has provided professional services to the respondent SMS Vishwa JV and has issued two invoices and the MoU dated 09.06.2018 was only manner of agreement between the parties for payment of only one of the bills of ₹2.5 crore, hence the nature of debt was never changed and the debt was operational debt arising from invoices issued for professional services provided by the appellant. It is submitted that

rendering legal services is an operational debt within meaning of Section 5(21) of the Code.

5. Mr. Abhishek Anand learned counsel appearing for the respondent submits that application filed by the appellant was not maintainable against SMS Vishwa JV, which was a joint venture. SMS Vishwa JV was never incorporated as a corporate entity, and it was joint venture as per agreement dated 20.08.2008. Joint Venture Agreement was entered between SMS Paryavaran Limited, SMS Vishwa Infrastructures and Services Private Limited and M/s. GSJ Envo Limited. SMS Vishwa JV is not a corporate person within meaning of the IBC. Proceeding under Section 9 can be initiated only against the corporate debtor, who is a corporate person who owes a debt to any person. SMS Vishwa JV not being corporate person no application under Section 7 was maintainable. It is submitted that the said objection was raised by the SMS Vishwa JV in the reply to demand notice. Adjudicating authority conscious of the maintainability issued had directed appellant to file affidavit on maintainability. Adjudicating authority, however, did not deal with the said maintainability issue and rejected application on other ground. However, the application filed by the appellant not being against the corporate person was clearly not maintainable and was liable to be thrown on this ground alone. It is further submitted that against two Members of joint venture i.e., SMS Paryavaran Limited and M/s. Vishwa Infrastructures and Services Private Limited, CIRP has already been completed. In the CIRP of M/s. SMS Paryavaran Limited, appellant has also filed its claim of for same amount for ₹2,49,00,000/- which was not admitted by the RP and issue was not further

agitated. Demand notice as well as the filing of Section 9 application was clearly without jurisdiction and contrary to the IBC.

6. We have heard counsel for the parties and perused the records.

7. Learned counsel for the respondent at very outset having raised the question of maintainability of Section 9 application by the appellant, we first proceed to examine the objection raised by the respondent regarding maintainability of Section 9 application. The appellant has issued a demand notice dated 12.06.2023 claiming an operational debt of ₹2,49,00,000/- arising out of MoU dated 09.06.2018 entered between appellant and SMS Vishwa JV. The demand notice was replied by the SMS Vishwa JV refuting the claim raised by the appellant. At very outset the reply stated that notice is issued to unincorporated joint venture and notice is not served under the terms of the IBC Code 2016. At very outset in the reply following was pleaded by the respondent:

“To,

Gagan Chhabra,

6116, Green Meadows,

DLF City, DLF Phase —IV,

Gurugram 122 002

(Haryana, India)

Ref. : Your Notice dated 12.06.2023

Sub. : Reply to the Notice on behalf of SMS Vishwa JV.

Sir,

At the outset, we would like to bring to your kind attention that the notice sent by you is firstly not only untenable in law but is also frivolous and maliciously issued.

In the notice under reply you have claimed payment in respect of unpaid operation debt (Professional Fees) due

from M/s. SMS Vishwa JV. It is imperative to make it abundantly clear to you at the outset that the notice is issued to an unincorporated Joint Venture and the notice is not served independently to the Companies registered under the Companies Act, 1956 or Companies Act, 2013. The notice in terms of the Insolvency & Bankruptcy Code, 2016 is thus itself not tenable and deserves no cognizance...”

8. The reply to demand notice has further pleaded that the CIRP against two Members of the joint venture, namely SMS Paryavaran Limited and SMS Vishwa Infrastructures and Services Private Limited have been held and completed and the claim of ₹2,49,00,000/- was raised by the appellant in the CIRP of SMS Paryavaran Limited. It is useful to extract following part of the reply to the demand notice:

“...It is also relevant to note that the two entities in the Joint Venture namely SMS Paryavaran Ltd. & Vishwa Infrastructures & Services Pvt. Ltd. have both undergone the CIRP process and the details thereof are as under:

A. SMS PARYAVARAN LTD

1. CIRP commenced on 03.01.2020.
2. Resolution Plan approved on 21.02.2023.

B. VISHWA INFRASTRUCTURES & SERVICES PVT LTD

1. CIRP Commenced on 31.08.2018
2. Liquidation process commenced on 14.06.2019
3. Resolution Approved vide order dated 30.06.2021.
4. Liquidation process closed on 01.7.2022.

In this backdrop itself it is necessary to note that the claim as raised by you is not maintainable against the Corporate Entities which have undergone the resolution process and the claim is thus not tenable in law.

At the same time, it is also necessary to bring to your kind attention that the same claim of Ra 2,49,00,000.00, insofar as SMS Paryavaran Ltd is concerned was raised by your goodself during the CIRP process and was dealt with by the Resolution Professional before acceptance of the Resolution Plan.

Even under the Resolution Plan the amount of claim admitted and the payments made pursuant thereto to your goodself are already accepted by you and the instant claim now raised is nothing but an extortionate attempt on your part.

An amount of Rs. 28,393/- was paid to your goodself under the Resolution Plan towards your claims of Rs 13,07,060. At the same time insofar as Vishwa Infrastructures & Services Pvt. Ltd. is concerned, there has never been raised any claim by your goodself throughout the CTRP process or then the Liquidation proceedings and your claim at this belated stage is not maintainable...”

9. Section 3(7) & Section 3(8) defines corporate person and corporate debtor. Section 3(7) & Section 3(8) are as follows:

“3. Definitions

In this Code, unless the context otherwise requires,—

(7) “**corporate person**” means a company as defined in clause (20) of [section 2](#) of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of [section 2](#) of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

(8) “**corporate debtor**” means a corporate person who owes a debt to any person;”

10. The proceeding under Section 9 can be initiated against the corporate debtor who owes a debt to any person. Definition under Section 3(8) provides that corporate debtor means a corporate person, thus precondition of entity to be treated as corporate debtor within the meaning of IBC is that it should be a corporate person. Corporate person has been defined in Section 3(7) which means a company defines under Clause 2 of the Companies Act 2013, limited liability partnership or any other person incorporated with limited liability under any law. It is the case of the appellant itself that respondent SMS Vishwa JV is a joint venture. The first item of the list of date refers to

Joint Venture Agreement dated 20.08.2008 in Section 9 application, which is as follows:

“20.08.2008 : The Corporate Debtor is a Joint Venture emanating from Joint Venture Agreement dated 20.08.2008 between three Companies namely "SMS Paryavaran Limited, M/s Vishwa Infrastructures & Services Private Limited and MIs GSJ Envo Limited". Under this Joint Venture Agreement M/s SMS Paryavaran Limited was the Lead Company out of the Three legal entities.”

11. The above indicates that a Joint Venture Agreement was entered on 20.08.2008 between the three companies, namely; (i) SMS Paryavaran Limited (ii) M/s. Vishwa Infrastructure and Services Private Limited and (iii) M/s. GSJ Envo Limited. Joint venture known as SMS Vishwa JV is not an incorporated entity. As noted above in the reply to the demand notice the issue of non-maintainability of the demand notice against the SMS Vishwa JV was raised by the respondent at very outset as noted above. Appellant in the appeal has brought the copy of the affidavit on maintainability as Annexure-3 to the appeal which indicates that adjudicating authority vide its order dated 06.10.2023, directed the appellant to explain the maintainability of the application. Paragraph 15 of the affidavit sought to deal with the objection of unincorporated joint venture. Paragraph 15 of the affidavit is as follows:

“15. That the Operational Creditor is dealing with the contentions objections of the Corporate Debtor in seriatim as follows;

REPLY TO THE OBJECTION OF UN-INCORPORATED JOINT VENTURE-

a. The Corporate Debtor/Respondent has taken an Objection that the Joint Venture is an Un-Incorporated Entity and the present Application filed by Operational Creditor is therefore, not maintainable. The Operational Creditor contends that such an objection is against the settled principles of law and is therefore, liable to be rejected.

The operational Creditor places reliance on the Judgement of the Hon'ble NCLAT wherein, it has been held that section 69 (2) of the Partnership Act is not attracted where an Application u/s 9 IBC is filed since, Application Under Section 9 of IBC, 2016 is not a Suit so as to apply Section 69(2) of the Partnership Act. Thus, this Application under BC Code, 2016 is maintainable in law.

The Operational Creditor further relies on the Judgement of the Hon'ble NCLT, New Delhi Bench-VI in **CP(IB)-300/ND/2021 titled as "Preet Shuttering Store versus M/s. M.I Buildtech Private Limited"** wherein it has been held that

"10. Section 69(2) of the Indian Partnership Act, 1932, reads as follows: -

"No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

11. It is clear from the above that the provision would apply only to a 'suit' and not to proceedings.

Applications filed under IBC are not 'suits' but only proceedings, and therefore, we hold that the bar in terms of Section 69(2) of the Indian Partnership Act, 1932, would not apply to applications filed under the IBC."

b. Additionally, the Operational Creditor relies on the judgement of the Hon'ble High Court of Delhi in **OMP(Enf.) (Comm.) 188/2021, CCP(0) 46/2022 titled as "ITD Cementation India Limited versus SSJV-ZVS Joint Venture & Ors."** wherein it has been held that the Petitioner/aggrieved party is entitled in law to proceed against the Respondents jointly and severally.

The Operational Creditor has an MOU with the Corporate Debtor/Respondent, which has made Part Payment to the Operational Creditor against its Admitted Debt. The Operational Creditor therefore, need not implead all three Companies separately in the Application (**Refer Judgement passed by the Hon'ble NCLAT, New Delhi in Company Appeal (AT) (Insolvency) No. 155/2018 titled**

as "Mrs. Mamatha versus AMB Bulldtech Pvt. Ltd. & Ors.)

Copies of the Judgements relied upon by the Operational Creditor are annexed as **ANNEXURE-2 ,3 & 4 respectively."**

12. The above affidavit of the appellant filed by the appellant replying the objection regarding maintainability of the application under Section 9 against SMS Vishwa JV clearly admits that SMS Vishwa JV is not an incorporated entity and it was only unincorporated joint venture, which came together for a purpose and is not an incorporated entity. The three companies which came together to enter into agreement on 20.08.2008 to form a joint venture are not the party to Section 9 application. SMS Vishwa JV being not incorporated entity, application under Section 9 was clearly not maintainable.

13. It is also relevant to notice that with respect to 2 companies of the joint venture, i.e., SMS Paryavaran Limited and M/s. Vishwa Infrastructures and Services Private Limited, CIRP had already been initiated which had come to an end. In CIRP of SMS Paryavaran Limited, which was lead Member of the joint venture. Appellant has filed its claim on 05.08.2020 in 'Form-C' for the same amount of ₹2,49,00,000/- relying on the MoU dated 09.06.2018, which claim was not admitted by RP. Appellant in the appeal itself has brought on record the copy of claim form in 'Form-C' at page 343 of the paper book which claim was not admitted by the RP on 26.09.2020 which by email dated 26.09.2020 which is at page 349 of the paper book. The rejection of the claim of same amount against the lead member was not even pursued by the appellant and the appellant in the CIRP of SMS Paryavaran Limited filed

another claim in 'Form-B' for amount of ₹13,00,000/- which was admitted and has been dealt in the resolution plan.

14. We, thus find sufficient substance in the objection raised by the respondent regarding very maintainability of Section 9 application. The issue of maintainability before the adjudicating authority against unincorporated joint venture was very much there which is reflected from the affidavit of maintainability filed by the appellant itself as noted above. However, adjudicating authority without adverting to the said objection rejected Section 9 application on different grounds. We, however, are satisfied that application under Section 9 was not maintainable against the SMS Vishwa JV which is not a corporate person.

15. We, thus sustain the objection raised by the respondent hold that Section 9 application filed by the appellant was not maintainable against SMS Vishwa JV. We dismiss the appeal upholding the order of the adjudicating authority, although on the grounds as noted above.

Parties shall bear their own costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Arun Baroka]
Member (Technical)**

NEW DELHI

30th June, 2025

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