NATIONAL COMPANY LAW APPELLATE TRIBUNALPRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1100 of 2019

IN THE MATTER OF:

MR. HARRISH KHURANA **....Appellant**
M/s Harrish Khurana & Associates
Having its registered office at
G-1 /208-209, 2nd Floor,
Sector16, Rohini,
New Delhi-110089.

Vs.

M/s One World Realtech Private Limited **....Respondent**
Registered Office:
107, 1st Floor, Khasra No. 369-370,
Centrum Mall, MG Road,
Sultanpur, New Delhi-110030.

Present:-

For Appellant:- Mr. Ashish Middha, Advocate.
For Respondent:- Mr. Amandeep Singh and Ms. Sulakshana Yadav, Advocates

J U D G M E N T
(Date: 30.11.2021)
(Virtual Mode)

[Per: Dr. Alok Srivastava, Member (Technical)]

1. This appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called IBC) by the Appellant, who is aggrieved by the order of the Adjudicating Authority in Company Petition No. (IB) – 1197/ND/2018 passed by

the Adjudicating Authority (National Company Law Tribunal, New Delhi) on 6.9.2019. The Adjudicating Authority has held in the order that there was no privity of contract between the Appellant Harrish Khurana and Respondent M/s One World Realtech Private Limited (Corporate Debtor) and, therefore, their relationship as Operational Creditor and Corporate Debtor is not established as is required under Section 9 of IBC.

2. The Appellant has stated and argued that he was engaged by the Corporate Debtor through its Statutory Auditor for rendering professional services with regard to matters pertaining to the Companies Act, 2013 and conversion of financials into Extensible Business Reporting Language (XRBL) and Delhi Stamp Act and had raised four bills/tax invoices to the Corporate Debtor for the professional services so rendered from 11.5.2017 to 5.1.2018 amounting to total Rs. 1,81,000/-(Rupees One Lakh and Eighty One Thousand Only). These invoices were not paid by the Corporate Debtor and therefore, he served notice under section 8 of the IBC upon him. Since the Corporate Debtor did not reply to the said demand notice nor paid any amount towards the said outstanding debt, he filed application under section 9 of IBC before the Adjudicating Authority. This application was dismissed without consideration of law and facts, and hence aggrieved by the Impugned Order he has filed this application.

3. In his arguments, the Learned Counsel for Appellant has referred to e-mail dated 21.4.2021 (attached at pp. 54-55 of the Appeal Paperbook) sent by the Appellant to Arjun Rishi, Director of the Corporate Debtor stating that he was engaged by the Auditor of the Corporate Debtor Mr. Arun Kishore to provide services relating to resolution of some compliance issues and defect in finalizing balance sheets for financial years 2012-2013 and 2013-2014. He, therefore, engaged with Mr. Arun Kishore and another team and made some suggestions for resolving the compliance issues relating to Corporate Debtor. He has claimed that four invoices dated 11.5.2017 of amount Rs. 69,000/-, dated 17.10.2017 for 47,200/-, dated 23.10.2017 for Rs.35,400/- and dated 5.1.2018 for Rs. 29,500/-, totaling Rs. 1,81,000/- were sent by him to the Corporate Debtor vide e-mail dated 21.4.2018, and he sought payment for pending invoices. The Learned Counsel for Appellant has further stated that details of the pending invoices were annexed with the demand notice as Annexure 1 in column 2 of the demand notice (attached at pp.68-71 of Appeal Paperbook). As a proof of providing services to the Corporate Debtor, the Learned Counsel for Appellant has shown letter dated 15.5.2017 of the Corporate Debtor addressed to the Chief Controlling Revenue Authority, Delhi and letter dated 23.7.2017 addressed to Secretary, Ministry of Corporate Affairs (attached at pp.72-73 and

76-77 respectively in the Appeal Paperbook) to show that he was authorized by Arjun Rishi, Director of the Corporate Debtor to appear before concerned authorities on behalf of the Company in related matters for providing explanation etc. The Learned Counsel for Appellant has also referred to the affidavit of Arun Kishore, partner of Arun Kishore and Company, Chartered Accountant, who is the Statutory Auditor of the Corporate Debtor to show that he was engaged by Arun Kishore to execute the said assignment (attached at pp 88-89 of Appeal Paperbook).

4. The Learned Counsel for Respondent has argued that there was no privity of the contract of the Respondent with the Appellant and claimed that the appeal has been filed on the basis of fabricated invoices which were neither received nor acknowledged by the Respondent. He has further stated that the Respondent never engaged the Appellant for rendering any service and even if in any circumstance, the Appellant was engaged by Mr. Arun Kishore, the Statutory Auditor for Corporate Debtor for any work, advice or consultancy, the same does not mean his engagement by the Corporate Debtor and does not create any privity of contract between the Appellant and the Respondent. He has further argued that apparently there was a dispute between Arun Kishore and the Appellant. The Respondent has submitted an affidavit regarding Mr. Arun Kishore's relationship with the Appellant (pp. 84-89 of

Appeal Paperbook) and the work done by him and therefore, the liability, if any, fell on Arun Kishore. The Learned Counsel for Respondent has therefore urged that the appeal be dismissed looking to the circumstances of the case.

5. We have perused the pleadings of the parties and the documents submitted therein and considered oral arguments advanced by the parties.

6. The findings recorded in the Impugned Order are as follows:-

> *"11. Hence, in view of the aforesaid facts and on hearing the Learned Counsels of both the sides and on perusal of the record, a conclusion can be drawn that the statements of the applicant is self-contradictory as in the application by the applicant it has been averred that the applicant was engaged by statutory auditor whereas in the affidavit, the applicant has claimed to render the services upon the request of corporate debtor. Further, the statutory auditor on affidavit has admitted that the applicant was personally engaged by statutory auditor and was never engaged directly by the corporate debtor. Therefore, it can be inferred that there was no privity of contract between applicant and respondent. Further the corporate debtor has dispute of locus of the applicant.*
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> *12. In view of the above discussion the present application is dismissed. It is very essential to understand that the intent of the legislature is to be kept mind that this CIRP can be triggered only where the prima facie debt is payable and default has occurred. In the application under section 9 the 'existence of dispute' has to be developed and in and only on satisfaction that corporate debtor is unable to pay debt, then the CIRP can be trigged and not that simply any amount being crystallized as payable. Therefore, in the present case there is no recovery proceeding payable and cannot be*

used as debt and brought under umbrella of this Code. Hence the application is rejected and dismissed."

7. The four invoices are supposed to have been raised by the Appellant, mentioned hereinbefore, amounting to Rs. 1,81,000/-, whose receipt has been denied by the Respondent in his reply. Be that as it may, and assuming such invoices were indeed sent by the Appellant to the Respondent, it is necessary for us to examine whether there exists a relationship between the Appellant and the Respondent as that of Operational Creditor with the Corporate Debtor. It is also necessary to see whether the debt pending for payment according to the Appellant falls in the category of operational debt.

8. Some relevant definitions of 'Corporate Debtor', 'Operational Creditor' and 'Debt' and 'Operational Debt' appear in the IBC which are as follows:-

Section 3(8) "corporate debtor" means a corporate person who owes a debt to any person.

Section 3(11)"debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

Section 5(20)"operational creditor" means a person to whom an operational debt is owed and includes any person to *whom such debt has been legally assigned or transferred.*

Section 5(21)"operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

9. A reading of the definition of 'operational debt' makes it clear that it is a claim in respect of provision of goods or services including employment. This should be based on a contract duly entered between the Corporate Debtor and the Operational Creditor and Operational Creditor is a person to whom an operational debt is owned. Therefore, for a relationship of Operational Creditor and Corporate Debtor to exist between two parties under the IBC, the Operational debt must be owed to the Operational Creditor by the Corporate Debtor.

10. We now turn our attention to examine whether the Appellant and Respondent are connected with each other in the relationship of Operational Creditor and Corporate Debtor. The Appellant has produced no document in the form of a contract to establish such a relationship. An e-mail dated 21.4.2018 is the first such communication sent by the Appellant to the Respondent, which the Appellant has used to show such a relationship with the Corporate Debtor. This e-mail contains the claim of Appellant that

he was engaged to provide services by the Statutory Auditor of Corporate Debtor Mr. Arun Kishore, and on such a request he agreed to provide requisite services to the Corporate Debtor. He has further explained in this email the work carried out by him for the Corporate Debtor and also mentioned raising of four invoices amounting to Rs. 1,81,000/- to the Corporate Debtor on account of services rendered by him. The affidavit of Mr. Arun Kishore, owner of Arun Kishore Company, Chartered Account, who are statutory auditor of One World Realtech Private Limited (Corporate Debtor) dated 22.01.2019 (pp.88-89 Appeal paperbook) mentions in, para 2 that Mr. Arun Kishore was assigned the work of 'filing of annual record with Registrar of Companies, EBRL form of Annual Accounts, filing application with RoC seeking condonation of delay, if any, in filing annual returns and getting the amount of stamp duty for allotment of equity shares adjudicated' by the Corporate Debtor. In the affidavit (supra), Mr. Arun Kishore further states in para 3 'that in order to execute the above said assignment I had engaged in the Applicant herein to execute the above said assignment in my personal capacity as principal and invoices, if any, were required to be raised only after the professional fees was agreed between me and the Applicant.' Mr. Arun Kishore has further stated in the affidavit that the Applicant raised direct bills on the Respondent which was without his consent and knowledge and not in keeping with what was decided earlier that the invoices, if any, were to be raised only after the professional fees was agreed between him and Appellant.

11. On juxtaposing the definition of 'Operational Creditor' and 'Operational Debt' as included in IBC with the work relationship as is evidenced in the e-mail dated 21.4.2018 (supra) sent by the Appellant to the Respondent and the affidavit of Arun Kishore (supra), we find that the Applicant was employed by Mr. Arun Kishore, Statutory Auditor of Corporate Debtor to provide certain services. Therefore, the Appellant did not have the relationship of Operational Creditor with the Corporate Debtor for provision of any services. The Adjudicating Authority has thus found absence of privity of contract between the Applicant and the Respondent in the Impugned Order. This is also supported by the fact mentioned in para 3 of affidavit of Mr. Arun Kishore, wherein he has stated that 'I had engaged the Applicant herein to execute the above said assignment in my personal capacity as principal and invoices, if any, were required to be raised only after the professional fees was agreed between me and the Applicant'.

12. Thus the Appellant has not been able to establish or show evidence of his engagement or employment by the Corporate Debtor. We are therefore, unable to accept the plea of the

Appellant that he provided services to the Corporate Debtor and so the debt with respect of invoices pending for payment cannot be defined as operational debt under the IBC which should be paid by the Corporate Debtor. In the result, we do not find any reason to interfere with the Impugned Order. The appeal is, therefore, dismissed. No order as to costs.

(Justice Ashok Bhushan)
Chairperson

(Justice Jarat Kumar Jain)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi

30th November, 2021

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