

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 431 of 2022**

[Arising out of Order dated 06.04.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench, in IA No. 5608(PB)/2021 in CP No. (IB)- 965(PB)/2020]

In the matter of:

**M/s. Entertainment City Limited
Through its Authorised Representative
Ms. Lekha Mriga
Vs.**

...Appellant

Simran Kaur & Ors.

...Respondents

For Appellants: Mr. Siddharth Batra, Ms. Shivani Chawla, Mr. Chinmay Dubey, Advocates.

For Respondents: Mr. Piyush Singh, Ms. Aditi Sinha, Advocates for R1-R42.

J U D G M E N T

Ashok Bhushan, J.

1. This Appeal has been filed against order dated 06.04.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench, by which order the Application filed by the Appellant in the matter of Simran Kaur and Ors. Vs. Entertainment City Limited has been rejected. Brief facts necessary to be noticed for deciding this Appeal are:

The Hon'ble Supreme Court passed an order dated 20.01.2020 in Civil Appeal No. 10856/2016- Bhupinder Singh Vs. Unitech Limited by which order the management of the Unitech Limited stands superseded and as

proposed by the Union Government, a new Board of Directors was constituted by the order of the Hon'ble Supreme Court. The Hon'ble Supreme Court further directed that pending further orders, there shall be Moratorium against the institution of proceedings against Unitech Limited and its subsidiaries. By subsequent order dated 24.03.2021, certain further directions were given by the Hon'ble Supreme Court.

An Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" for short) was filed by the Respondent No.1 to Respondent No.14 before the Adjudicating Authority on 27.08.2020 to initiate Corporate Insolvency Resolution Process (CIRP) against the Appellant. In the said Application, I.A No. 5608 of 2021 was filed by the Appellant praying that proceedings in Section 7 Application be adjourned sine die in view of the Moratorium passed by the Hon'ble Supreme Court vide order dated 20.01.2020 and order dated 24.03.2021 in Bhupinder Singh Vs. Unitech Limited. The Adjudicating Authority heard the Counsel for the parties and by impugned order has rejected the Application.

This Appeal has been filed against the order dated 06.04.2022.

2. Learned Counsel for the Appellant submits that the orders passed by the Hon'ble Supreme Court dated 20.01.2020 and 24.03.2021 imposed a Moratorium which was also applicable on the Appellant which was a joint venture holding of Unitech Holdings Limited. It is submitted that under the orders of the Hon'ble Supreme Court, Board of Directors of Unitech Limited has appointed Directors in the Appellant Company. The Board of Directors of Unitech Limited has control over the Appellant, hence, the Moratorium was

fully attracted and the Adjudicating Authority committed error in holding that the Appellant having failed to prove that it is a subsidiary of Unitech Holdings Limited has rejected the Application. It is submitted that the Adjudicating Authority has also committed error in observing that the Corporate Debtor has failed to present that new Board of Unitech Limited has taken over the management and control of the Corporate Debtor. It is submitted that in compliance of order of Hon'ble Supreme Court, Unitech Limited has nominated two Directors on behalf of the Unitech Holdings Limited, a wholly owned subsidiary of Unitech Limited, vide a Resolution dated 16.04.2021 which clearly proves that Unitech Holdings Limited exercises its control over the Appellant and is also entitled for the benefit of Moratorium.

3. Learned Counsel for the Respondents refuting the submissions of the Appellant supports the order of the Adjudicating Authority and submits that no benefit of the orders of the Hon'ble Supreme Court dated 20.01.2020 and 24.03.2021 can be claimed by the Appellant since the said order was applicable only on the Unitech Limited and its subsidiaries whereas Appellant is only a joint venture of Unitech Holdings Limited. The order of Moratorium does not apply to the joint venture. The Appellant is neither subsidiary nor affiliate or trusts of the Unitech Limited, hence, Adjudicating Authority has rightly applied the Moratorium on Section 7 Application. The Appellant is joint venture of Unitech Holdings Limited with 41.95% minority equity and International Amusement Limited with 53.15% majority equity. The Respondent has filed Section 7 Application in the year 2020 and the

Application has not yet been admitted which is causing great hardship to the Respondents, many of whom are senior citizens.

4. We have considered the submissions of the Learned Counsel for the parties and perused the record.

5. We may first notice the order of the Hon'ble Supreme Court dated 20.01.2020 as well as order dated 24.03.2021 passed in Civil Appeal No. 10856/2016- Bhupinder Singh Vs. Unitech Limited. By the said order, the Hon'ble Supreme Court issued various directions which directions also included direction to notify the new Board of Directors of Unitech Limited. Direction No.(vii) which is relevant for the present case is as follows:-

“(vii) Pending further orders of this Court, there shall be a moratorium against the institution of proceedings against Unitech Limited and its subsidiaries. The moratorium shall also extend to existing proceedings against the company as well as the enforcement of orders that may have been passed against the company.”

6. The next order of the Hon'ble Supreme Court which need to be noticed is order dated 24.03.2021 where in para 2, the Hon'ble Supreme Court issued following directions:-

“2. The Learned Additional Solicitor General has explained the import of the directions which have been sought in respect of the above categories. Certain directions have been sought from this Court to facilitate the work of the new Board of Management. Having considered the proposed directions, we are of the view that at this stage, the following directions can be issued to facilitate the control and management of the new Board of Management;

(1) The new Board shall be responsible for the management and control of the Unitech Group (including all its affiliates, trusts, subsidiaries etc.). The Order passed by this Court dated 20 January 2020 is applicable to all group entities of Unitech Ltd. The management is authorized to appoint and remove Directors/ Trustees of its subsidiaries/ trusts etc.”

7. In the Application which was filed by the Appellant before the Adjudicating Authority, it was contended that by virtue of Moratorium as imposed by the Hon’ble Supreme Court orders dated 20.01.2020 and 24.03.2021, Section 7 Application filed against the Appellant which is a joint venture of Unitech Holdings Limited cannot proceed and Section 7 Application was deserved to be adjourned sine die due to Moratorium imposed by the Hon’ble Supreme Court.

8. The said Application has been rejected taking the view that Appellant is not entitled to the benefit of Moratorium and the Moratorium is not applicable on the Appellant. The subsequent order of the Hon’ble Supreme Court dated 24.03.2021 makes it clear that the Moratorium dated 20.01.2020 is applicable on Unitech Group (including all its affiliates, trusts, subsidiaries etc.). The Hon’ble Supreme Court clarified that the order dated 20.01.2020 is applicable to all group entities of Unitech Limited. The Group entities of Unitech Limited were already explained as all its affiliates, trusts, subsidiaries etc. The Appellant does not claim to be subsidiary of Unitech Holdings Limited rather it claims to be joint venture of Unitech Holdings Limited. The Appellant in the Appeal has given the details regarding its constitution. Appeal clearly mentioned that Appellant is joint venture of a wholly owned subsidiary of

Unitech Limited and International Amusement Limited and thus, the entity of Unitech Group. Equity shareholding pattern of the Appellant has been stated in Appeal which is International Amusement Limited with 53.15% and Unitech Holdings Limited with 41.95%. The Appellant in the Appeal has pleaded that in pursuance of the order of the Hon'ble Supreme Court, new Board of Directors of the Unitech Limited nominated directors of the Board of Directors of the Appellant. In the Appeal, letter dated 17.06.2021 written by the Chairman and Managing Director of the Board of Directors of the Unitech Limited has been brought on the record which clearly mentions the appointment of new Directors in the Appellant. Paragraph 5 of the letter is as follows:-

*“5. Now, in exercise of the powers vested in me, emanating from the Order dated 24.03.2021 passed by the Hon'ble Supreme Court and authority vested in me by the resolution passed by the Board of Directors of Unitech Group in its meeting held on 28.01.2020, I, Y.S. Malik, IAS (Rtd.), Chairman & Managing Director, Unitech Group Companies, hereby order removal of the Directors nominated by the erstwhile Management on the Board of Directors of **M/s. Entertainment City Limited** and nominate the following persons in their place:*

Existing Directors	Newly appointed Directors
Mr. Vinod Hingorani	Mr. Ashok Gupta, IPS (Rtd), formerly Director General of Police, Tamil Nadu
Mr. Gaurav Puri	Mr. Ashok Kumar Yadav, IAS (Rtd), Chief Operating Officer, Unitech Group

9. Extra-ordinary General Meeting of the Appellant was also held on 28.07.2021 where approval of shareholders was also accorded to the

appointment of Directors, who has consented to act as Director of the Company.

10. The order of the Hon'ble Supreme Court referred to expression **“including all its affiliates, trusts, subsidiaries etc.”** The earlier order dated 20.01.2020 had mentioned Unitech Limited and its subsidiaries. Appellant cannot claim to be subsidiary of Unitech Limited rather it claims to be affiliate of Unitech Group. Appellant has brought on the record the Shares Subscription-cum-Shareholders Agreement between several parties which including Unitech Limited, Unitech Holdings Limited, International Amusement Limited where different expressions have been defined. In paragraph 1 which deals with 'Definitions and Interpretation' "Affiliate" has been defined in following words:-

***“Affiliate”** means in relation to any party, (i) any person that directly or indirectly Controls, is Controlled by, such party; or (ii) any person, the legal and beneficial ownership of at least 26% of which is directly or indirectly held (including through one or more persons) collectively or severally by such party; (iii) any trust in respect of which such party is a direct or indirect a beneficiary; and (iv) in the case of a natural person, any Relative of such person. **“Control”** or **“Controls”**, **“is Controlled by”** means, with respect to any party, the possession, directly or indirectly of the power to direct or cause the direction of the management or policies or actions, whether through the ownership of or any beneficial interest in the shares or by contract or otherwise and includes the right and/or ability to appoint (a) a director on the board of directors of such party or (b) the senior management of such party or (c) the managing trustee or a majority of trustees of such party if such party is a trust.*

*Without limiting the generality of the foregoing, with respect to the Investor, the term **“Affiliate”** shall*

include (i) any fund, collective investment scheme, trust, partnership (including without limitation any co-investment partnership), special purpose or other vehicle or any subsidiary or Affiliate of any of the foregoing, in which any member or subsidiary of Investor is a general or limited partner, shareholder, investment manager or advisor, member of a management or investment committee, nominee, custodian, trustee or unit holder and (ii) Infrastructure Development Finance Corporation Limited and any fund, collective investment scheme, trust, partnership (including without limitation any co-investment partnership), special purpose or other vehicle or any subsidiary or Affiliate of any of the foregoing, in which any member or subsidiary of Infrastructure Development Finance Corporation Limited is a general or limited partner, shareholder, investment manager or advisor, member of a management or investment committee, nominee, custodian, trustee or unit holder.”

11. From the facts of the present case, it is clear that Unitech Holdings Limited a wholly owned subsidiary of Unitech Limited has shareholding to the extent of 41.95% in the Appellant.

12. In view of the definition given above, the Appellant is clearly an ‘affiliate’. Thus, subsequent events which have been brought on the record by Appellant clearly indicate that Unitech Holdings Limited exercises control over the Appellant and Board of Directors of the Unitech Limited has nominated Directors in the Board of Directors of the Appellant. In view of the order dated 20.01.2020, the Resolution Plan with regard to Unitech Limited was to be filed in the Hon’ble Supreme Court. Learned Counsel for the Appellant submitted that the Resolution Plan with regard to group entities of Unitech are also being filed before the Hon’ble Supreme Court which is under consideration. Learned Counsel for the Appellant has brought on record Minutes of Meeting of the New Board of Directors of Unitech Limited held on 27.04.2022 which indicate

that Appellant has been clearly mentioned as affiliate of Unitech Group and project of the Appellant has also been captured in the minutes. Learned Counsel for the Appellant has referred to paragraph 8.1 of the minutes where Appellant has mentioned as affiliate of Unitech Group.

13. In view of the above, we have no doubt that the Appellant is an affiliate of Unitech Group and Moratorium imposed by the Hon'ble Supreme Court by order dated 20.01.2020 as clarified by further order dated 24.03.2021 was applicable on the Appellant who was also entitled for the benefit of the said orders. Learned Adjudicating Authority committed error in holding that orders dated 20.01.2020 and 24.03.2021 are not applicable to the Appellant who is a joint venture of Unitech Holdings Limited. The new Board of Directors of Unitech Limited has also taken steps for appointment of Nominee Directors of Board of Directors of the Appellant as noted above. The Adjudicating Authority held that Appellant has failed to prove that it is subsidiary of Unitech Limited. Appellant has not taken up any case that it is subsidiary of Unitech Limited. Learned Counsel for the Respondent during submission has submitted that Application for clarification of the order passed by the Hon'ble Supreme Court has already been filed by some Financial Creditors before the Hon'ble Supreme Court which are pending consideration.

14. In view of the foregoing discussions, we are of the view that the order dated 06.04.2022 passed by the Adjudicating Authority in I.A No. 5608 of 2021 cannot be sustained and is set aside. I.A No. 5608 of 2021 is allowed. Section 7 Application filed by the Respondent stands adjourned sine die till the currency of Moratorium as imposed by the orders of the Hon'ble Supreme

Court dated 20.01.2021 and 24.03.2021. We further observe that this order shall be subject to any further order passed by the Hon'ble Supreme Court or any clarification order issued in this regard.

Parties shall bear their own cost.

**[Justice Ashok Bhushan]
Chairperson**

**[Justice M. Satyanarayana Murthy]
Member (Judicial)**

**[Barun Mitra]
Member (Technical)**

**NEW DELHI
25th July, 2022**

Anjali