NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 903 of 2023

[Arising out of order dated 02.03.2023 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench Court-III in CP.IB-1108/ND/2019]

IN THE MATTER OF:

Vishal Sethi
Address- RZ-33, 1st Floor, Gali No. 2,
Subash Park Extension-2, Uttam Nagar,
New Delhi-110059 **...Appellant**

Versus

M/s Collage Group Infrastructure Pvt. Ltd.

Through its Directors

Address-Somdatt Builders House, 56-58,

Community Centre, East of Kailash,

New Delhi-110065 **...Respondent**

Present:

Appellant: **Mr. Shashwat Parihar, Mr. Shashwat Anand, Mr. Dhruva Viz, Mr. Deepanshu Oadiwal, Ms. Shruti Goyal and Mr. Gunjan Rathore, Advocates.**

For Respondents: **Appearance not marked.**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 02.03.2023 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, Court-III) in CP(IB) No.1108/ND/2019. By the Impugned Order, the Adjudicating Authority has dismissed the Section 9 petition filed by the Appellant seeking to bring the Corporate Debtor under the rigours of Corporate Insolvency Resolution Proceedings ('**CIRP**' in short). Aggrieved by this impugned order, the present appeal has been preferred.

2. Making his submissions, the Learned Counsel for the Appellant stated that the Appellant/Operational Creditor was appointed as General Manager in the Corporate Debtor company-M/s Collage Group Infrastructure Private Limited ('**Collage**' in short) on 10.10.2014. The Corporate Debtor also issued a confirmation of appointment letter which shows that the Appellant was an employee of the Corporate Debtor. In due course of time, the Corporate Debtor failed to release timely payments of salary and eventually salary payments came to a halt from 2015 onwards. The Appellant submitted his resignation on 26.01.2016 on the behest of the Corporate Debtor and sent an email to the Corporate Debtor on the same date indicating balance of his arrear salary and requested the Corporate Debtor to pay the same as soon as possible. Following this email, a full and final settlement statement was provided by the Corporate Debtor admitting an outstanding amount of Rs. 9,28,972/- as debt due and

payable. It was therefore contended that the Appellant remained an employee of the Corporate Debtor all through until his resignation and hence the Corporate Debtor was liable to clear the operational dues.

3. It was submitted that the Corporate Debtor also made limited part payments of the outstanding dues, but when some cheques issued by the Corporate Debtor were dishonoured and further payments were not forthcoming, the Appellant sent a Section 8 demand notice on 06.03.2019. However, neither any reply was received nor any payments received, and therefore a Section 9 IBC application was filed on 30.04.2019 for default of debt amounting Rs.9,97,747/- only.

4. Advancing their case further, it was pointed out that subsequently a settlement was arrived at between the Appellant and Corporate Debtor which was brought on record before the Adjudicating Authority on 27.02.2020 and the Section 9 application was withdrawn with the liberty to revive the same in the event of failure of settlement between the parties. Owing to breach caused in the terms of settlement by the Corporate Debtor, the matter was reopened before the Adjudicating Authority, by the Appellant. However, the Adjudicating Authority wrongly rejected the Section 9 application by wrongly holding that the Appellant was working with a separate company, namely, MNT Infrastructure Private Limited ('**MNT**' in short) and not with the Corporate Debtor and hence the Corporate Debtor was not liable to pay the dues claimed.

5. Assailing the impugned order, it has been contended that Clause 2 of the letter of appointment clearly shows that the Appellant was under the

employment of the Corporate Debtor and not of any separate entity. It was strenuously contended that there is no document to show any appointment/transfer letter of the Appellant to MNT. No documentary evidence has been brought on record by the Corporate Debtor to support the contention that the Appellant was not an employee of the Corporate Debtor.

6. Further keeping in view that the Corporate Debtor had given a full and final settlement statement and thereby agreeing to clear the entire outstanding debt due to the Appellant, it was clear from this wilful admittance of debt that the Appellant was working with the Corporate Debtor and not with any separate entity. While admitting that the settlement agreement was signed by one of the representatives of MNT, it was clarified that the latter was governed and operated by the same staff/management of the Corporate Debtor and that there existed 100% shareholding between the two entities. It was further submitted by the Appellant that the Adjudicating Authority should have considered all relevant facts and evidence and pierced the corporate veil to find out the real status of MNT that it was not actually a separate entity.

7. The Learned Counsel for the Respondent refuting the submissions made by the Appellant submitted that the period for which the Appellant worked with the Corporate Debtor, that is, from October 2014 to March 2015, he got paid his monthly salary regularly by the Corporate Debtor. Subsequently, when the Appellant got transferred to MNT, there remained no privity of contract between the Appellant and the Corporate Debtor.

8. Consequent upon his transfer to MNT, all his dues thereafter could have been raised only against MNT. This is also borne out by the fact that the full and final statement of settlement that was signed by the Appellant was with MNT and the Corporate Debtor is not a signatory therein. Even the part payments made from time to time towards the full and final settlement were made by MNT and not by the Corporate Debtor as is borne out from the bank account details of the Appellant. Appellant has incorrectly claimed to be an employee of the Corporate Debtor at the time of his resignation.

9. It was further contended that when the Appellant sent a legal notice on 11.04.2017, it was clearly stated by the Corporate Debtor in their reply on 10.05.2017 that the Corporate Debtor did not owe any money to the Appellant. When the Appellant yet again sent another legal notice on 25.04.2018, the Corporate Debtor again reiterated that they did not owe any money to the Appellant. The legal notices and the replies thereto clearly show that there was a dispute existing between the Appellant and the Corporate Debtor and this dispute had its roots prior to the date of the issue of Section 8 demand notice. The Learned Counsel for the Corporate Debtor has relied on the **Mobilox** judgement of the Hon'ble Apex Court that since there was a pre-existing dispute, the Section 9 application cannot be admitted.

10. We have duly considered the arguments advanced by the Learned Counsels for both parties and perused the records carefully.

11. It is the case of the Appellant that the contractual relationship between the Corporate Debtor and the Appellant as that of an employer and employee continued from the date of appointment till the resignation of the Appellant

from the management of Corporate Debtor. The Appellant was an employee of the Corporate Debtor for the period for which dues have been claimed by the Appellant. MNT was therefore never in the picture insofar as the employment of the Appellant was concerned. It has also been further contended that the Corporate Debtor is evading its liability to clear the outstanding operational debt under the guise of the Corporate Debtor having a distinct and separate legal identity from MNT, when both of them are controlled by the same management and hence the liability to clear dues cannot shift on this flimsy ground.

12. It has been the counter submission of the Respondent that the settlement deed to which the Appellant has adverted attention to had been correctly noticed by the Adjudicating Authority to have been signed between the Appellant and MNT and not with the Corporate Debtor. The Corporate Debtor was not obligated to honour the terms of a settlement deed which was signed between the Appellant and some entity other than the Corporate Debtor. Emphatically asserting that the doctrine of privity of contract is a settled principle of law under which a third party cannot be made liable under contract unless he is a party to the said contract and applying this principle, the Corporate Debtor was not liable in any manner to discharge the liability of a different legal entity. It was therefore contended that the Adjudicating Authority in the impugned order reached the correct finding that there exists no rightful claim of the Appellant against the Corporate Debtor as he was not an employee of the Corporate Debtor.

13. When we have a look at the impugned order, we notice the Adjudicating Authority has analysed in details the tenability of the contention of the Corporate Debtor that the Appellant was not its employee and therefore no dues were payable by the Corporate Debtor to the Appellant. The Adjudicating Authority in the impugned order after noticing the full and final settlement document has observed that the same was executed between the Appellant and MNT and not between the Appellant and the Corporate Debtor. The Adjudicating Authority has thereafter concluded while passing the impugned order that the settlement agreement clearly shows that the Appellant rendered services to MNT which was a separate company from the Corporate Debtor. The Adjudicating Authority has further gone a step ahead to examine whether in such circumstances the Corporate Debtor can be said to owe any liability to the Appellant in the backdrop of their contention that the Corporate Debtor and the MNT shared the same the management.

14. The Adjudicating Authority after referring to the decision of the Hon'ble Supreme Court in the matter of ***Vodafone International Holdings BV vs Union of India and Anr. (2012) 6 SCC 613*** ('***Vodafone***' in short) has relied thereon to hold that the holding company and subsidiary company are to be considered as separate legal entities and merely because their management was the same, raising of claims by the Appellant against the Corporate Debtor was not tenable. The relevant excerpt of the impugned order is as reproduced below:

> *"7. ……. It is advantageous at this juncture refer the decision of Hon'ble Supreme Court in the matter of Vodafone International*

Holdings v. Union of India & Anr. (Civil Appeal No. 733 of 2012). The relevant para of the decision is reproduced below:-

> *'(PARA-56) Companies Act in India and all over the would have statutorily recognised subsidiary company as a separate legal entity.*
>
> *(PARA-59) Holding company and subsidiary company are, however, considered as separate legal entities, and subsidiary are allowed decentralized management. Each subsidiary can reform its own management personnel and holding company may also provide expert, efficient and competent services for the benefit of the subsidiaries.*
>
> *(PARA-75) Further, as stated above, a company is a separate legal persona, and the fact that all the shares are owned by one person or a company has nothing to do with the existence of a separate company. Therefore, though it may be advantageous for a parent and subsidiary companies to work as a group, each subsidiary has to protect its own separate commercial interests.'*

8. In the light of the decision referred to supra, the Hon'ble Supreme Court held that the legal relationship between a holding company and its subsidiary is that they are two distinct legal persons, and the holding company does not own the assets/liabilities of the subsidiary. It is clear from the perusal from the Full & Final Settlement Agreement executed between the parties that, applicant rendered his services to M/s MNT Infratech Private Limited working under the same management. Therefore, it appears to us that the services of the Operational Creditor was placed with M/s MNT Infratech Private Limited, with is a separate Company and Operational Creditor continued his services with the side Company.

9. Taking into consideration all the aforesaid facts, we are of the view that, the Operational Creditor has failed to prove existence 'Operational Debt' which is payable by the Corporate Debtor. Thus, we have no hesitation to hold that, the claims raised by the Operational Creditor against the Corporate Debtor

i.e. M/s Collage Group India Private Limited are neither tenable in the eyes of law nor on facts."

15. We are of the considered opinion that the reliance placed upon the ***Vodafone*** judgment supra by the Adjudicating Authority in the present facts of the case does not suffer from any infirmity and is very much in order. In this judgement the Hon'ble Supreme Court has carved out the basic legal principle with regard to relationship between subsidiary company and holding company by holding that the legal relationship between a holding company and its subsidiary is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary. The business of a subsidiary cannot therefore ordinarily be treated to be the business of the holding company.

16. The Indian Companies Act, 1956 has also statutorily recognised subsidiary companies as a separate legal entity. A subsidiary is a separate legal entity for tax and liability purposes. A subsidiary being a distinct legal personality is also allowed to have decentralised management. Mere ownership, parental control, management of a subsidiary by the holding company therefore does not constitute sufficient and adequate ground to justify piercing the status of their relationship as has been urged by the Appellant in the present case. Further, wherever public interest necessitates lifting of the corporate veil in the interests of justice, there always has to be some specific proof and evidence of fraud, wilful breach of trust, or some sham at play leading to avoidance or limiting the liabilities of the subsidiary company. In such cases of inextricably inter-linked corporate entities, the Court can always exercise caution and choose to lift the corporate veil.

However, to hold the parent company liable, there is need of specific and detailed information, but no such credible information has been provided by the Appellant. In the present case, there are no sustainable grounds placed on record for holding the Corporate Debtor company liable for the acts of its subsidiary and hence we affirm the findings recorded by the Adjudicating Authority in the impugned order.

17. At this stage we may also analyse as to whether payment to the Operational Creditor was due from the Corporate Debtor and if so, whether any default was committed by the Corporate Debtor in respect of payment of such operational debt and whether there was any pre-existing dispute prior to the issue of Section 8 Notice. This examination would be in line with the test which has been laid down by the Hon'ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018)*** in ***C.A. No.9405 of 2017*** (hereinafter referred to as '***Mobilox***'). It is relevant to refer to para 56 of ***Mobilox*** supra which is extracted as hereunder: -

> *"56. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability."*

18. It is the case of the Respondent that the Appellant had sent a legal notice on 11.04.2017 as placed at page 40 of Reply Affidavit of the

Respondent. The legal notice was duly replied to by the Corporate Debtor on 10.05.2017 as placed at page 44 of Reply Affidavit of the Respondent. We notice that in their reply, the amount claimed as operational debt has been unequivocally disputed by the Corporate Debtor and no liability has been admitted on this count. In the said reply, the Corporate Debtor has also stated that the Appellant was working for some other organisation and hence denied their claim. From the tone and tenor of the said reply, we have no hesitation in recording our view that ingredients of dispute between the two parties are distinctly etched out. More significantly, this reply to the legal notice clearly predates the Section 8 Demand Notice of 06.03.2019. It can thus be safely concluded that the disputes between them were pre-existing in nature. Further, the defence cannot be held to be spurious, bluster, frivolous or vexatious. The present is therefore not a case where there is an undisputed debt for which Corporate Debtor can be brought under the rigors of CIRP. Therefore, we are of the considered view that in the attendant circumstances, the ratio of the judgement of the Hon'ble Supreme Court in the case of ***Mobilox*** squarely applies to the facts of this case. When any Operational Creditor seeks to initiate insolvency process against a Corporate Debtor, it can only be done in clear cases where no real dispute exists between the two which is not so borne out from the present factual matrix. We are also constrained to point out that the provisions of IBC cannot be manipulated and the process of law allowed to be misused such as to turn IBC into a debt recovery proceeding as it would frustrate the basic intent and objective of this special code to bring the Corporate Debtor back on its feet.

19. In view of the foregoing discussion, we are satisfied that the Adjudicating Authority did not commit any error in rejecting the Section 9 application. We find no reasons to disagree with the findings of the Adjudicating Authority. There is no merit in the Appeal. Appeal is dismissed. We however make it clear that it will remain open to the Appellant to resort to other remedies that may be available to it under any other law. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Indevar Pandey]
Member (Technical)

Place: New Delhi

Date: 20.03.2024

Ram N.