NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 17 of 2022

[Arising out of order dated 11.10.2021 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench, Court No.VI in CP(IB) No.1840(ND) of 2019.]

IN THE MATTER OF:

Ashish Gupta,
61/62, Model Basti,
Karol Bagh, New Delhi – 110005
India **....Appellant**

Vs.

1. **Delagua Health India Pvt. Ltd.**
   119/120, Model Basti,
   New Delhi – 110005, India **....Respondent No.1**

2. **Delgua Health Limited (Grand Bahamas)**
   Poinciana House, West Main Poinciana Drive,
   PO Box F-42614 Freeport, Grand Bahamas **....Respondent No.2**

3. **Delgua Water Testing Limited,**
   The Old Diary, Lower Fyfield, Marlborough,
   SN8 1PY, United Kingdom **....Respondent No.3**

Present:

For Appellant: **Mr. Nilotpal Shyam, Advocate.**

For Respondents: **Ms. Swati Dalmia, Mr. Indranil Ghosh, Mr. Orijit Chatterjee and Mr. Palzer Moktan, Advocates for R-2 & R-3.**

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 11.10.2021 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Court – VI) in CP (IB) No. 1840(ND) of 2019. By the Impugned Order the Adjudicating Authority has rejected the Section 9 application filed by the Appellant. Aggrieved by this impugned order, the present appeal has been preferred by the Appellant/Operational Creditor.

2. Placing before us the brief factual background of the case, the Learned Counsel for the Appellant/Operational Creditor submitted that the Appellant started working with Delagua Health India Pvt. Ltd./Corporate Debtor ("**DHIPL**" in short) since 11.02.2014 as Director of the Corporate Debtor and tendered his resignation from the position of Director of the said DHIPL on 02.07.2017 with immediate effect. He has not been paid salary from January 2016 till June 2017 amounting to Rs.40,50,000/- and further submitted that the said operational debt of the Corporate Debtor fell due on 30.06.2017. Not having received the said payment, a demand notice was sent to the Corporate Debtor/Respondent No. 1 on 15.06.2019. It was added that the demand notice was duly despatched at the address of the Corporate Debtor. Submitting further, it was mentioned that the Appellant did not receive any

response from the Corporate Debtor by way of any notice of existence of dispute nor any payment was received and hence an application under Section 9 of IBC was filed before the Adjudicating Authority.

3. The Learned Counsel for the Appellant making his submissions stated further that the Corporate Debtor/Respondent No. 1 did not appear before the Adjudicating Authority. Instead Delagua Health Limited (Grand Bahamas)/Respondent No. 2 and Delagua Water Testing Limited/Respondent No. 3 constituting 98.98% stake-holder of the Corporate Debtor subsequently filed an intervening application though they did not have any locus in the matter. Furthermore, it has been contended that the Adjudicating Authority while adjudicating on the matter relied upon the contents of the intervention application though it had noted that application of the intervenor did not need examination of the Section 9 of the IBC. The Adjudicating Authority on 11.10.2021 however wrongly proceeded to dismiss the petition filed by the present Appellant by holding it to be a collusive petition without giving any reasons. It was also submitted that while dismissing the petition, the Adjudicating Authority had directed the 98.98% stake-holder that a new management of the Company be put in place within one month from the date of the order for its smooth running in accordance with the provisions of the Companies Act which has not been acted upon so far by them. Challenging the Impugned Order, it was submitted that the dues claimed by the Operational Creditor is lawful and there being no pre-existing disputes thereto, Section 9 application should have been admitted.

4. Advancing the rival contentions, the Learned Counsel for Respondents No. 2 and 3 submitted that that the Appellant and Respondent No. 2 had signed a Consultancy Agreement on 04.11.2013 by virtue of which the Appellant had agreed to provide certain services to Respondent No.2 to assist them in setting up an entity in India and for overseeing its operations. However, this fact had not been deliberately disclosed by the Appellant before the Adjudicating Authority. The Corporate Debtor/Respondent No. 1 had been subsequently incorporated on 11.02.2014 with 98.98% of the paid-up share capital of the Corporate Debtor/Respondent No.1 being held by Respondents No.2 and 3. Post incorporation of Respondent No. 1 company, the Appellant along with one Mr. K.K. Vashishtha (**"KKV"** in short) were appointed as Directors of the Corporate Debtor/Respondent No.1 and thereafter their fees/remuneration were paid directly by the Corporate Debtor. Both the Directors including the Appellant resigned from the Directorship of the Corporate Debtor company with effect from 02.07.2017 without sending proper intimation to the shareholders of the Corporate Debtor. The abrupt resignation of both Directors had caused a void in the Board of the Corporate Debtor company. Further, because of the said void on the Board, the Appellant continued to remain in control of all modes of communications in respect of Corporate Debtor company and hence by design ensured that the demand notice never actually got served upon the Corporate Debtor. In this way the Appellant intentionally and deliberately shut the opportunity for the Corporate Debtor to respond to the Section 8 notice.

5. Furthermore, though the Appellant and KKV had submitted their respective resignations on the same day and the Appellant had full knowledge of the resignation of KKV, he acted in collusion with KKV and chose to serve Section 8 demand notice upon KKV with an ulterior motive. And KKV even though he had already resigned as Director of the Corporate Debtor, presented himself before the Adjudicating Authority on behalf of Corporate Debtor/Respondent No.1 and unauthorisedly expressed inability to pay the amount claimed by the Appellant in the demand notice when the Section 9 application came up for hearing. The Adjudicating Authority having observed this act of connivance between the Appellant and KKV, it therefore correctly dismissed the petition as collusive.

6. It was further argued by the Learned Counsel for the Respondents that the Corporate Debtor having been denied opportunity to respond to the collusive Section 8 notice or to defend their interests before the Adjudicating Authority in the context of subsequent Section 9 application, the Respondents No.2 and 3 had filed an intervention application vide IA No. 60 of 2019 in CP (IB) No.1840/ND/2019 before the Adjudicating Authority. It was strenuously contended that the Corporate Debtor/Respondent No.1 being a subsidiary of Respondent No.2, they were fully entitled to file the intervention application to protect the interest of the share-holders of the Corporate Debtor Company.

7. It was further pointed out that the Appellant had breached the terms and conditions of the aforesaid Consultancy Agreement of 04.11.2013. Elaborating further, it was stated that the Corporate Debtor company was

engaged in the business of water testing and sanitation products and services related purchase, the Appellant violated various clauses of the Consultancy Agreement having engaged himself in the activities of a competing entity thus causing loss to the business of the Corporate Debtor. In addition, the Appellant had made excess withdrawals from the accounts of the Corporate Debtor aggregating to Rs.19,33,418/- purportedly on account of tour and travelling without supporting documents to substantiate such withdrawals. Pointing out at these pre-existing disputes, it was submitted that the present Section 9 application is not maintainable.

8. We have duly considered the detailed arguments and submissions advanced by the Learned Counsel for both the parties and perused the records carefully.

9. The main issues before us for our consideration are as follows: -

(i) Whether the Section 9 petition filed before the Adjudicating Authority was a collusive petition;

(ii) Whether in the given facts and circumstances of the present case the Respondents No. 2 and 3 are entitled to defend the interests of Respondent No.1; and

(iii) Whether there is any pre-existing dispute surrounding the operational debt.

10. Since the issues at items 9 (i) and (ii) above are interlinked, we proceed to examine both these issues conjointly. It is noted that the Section 8 demand notice dated 15.06.2019 was addressed by the Appellant to DHIPL at the

address 119/120, Model Basti, New Delhi – 110005 as well as to KKV as placed at Page 70 of Appeal Paper Book ("**APB**" in short). It is the submission of the Appellant that according to Company Master Data as on 21.07.2019 as placed at Page 86 of the APB, the registered address of the Corporate Debtor company is 119/120, Model Basti, New Delhi-110005 with email ID being ashish.gupta@delaguahealth.com. It is also submitted by the Learned Counsel for the Appellant that proof of service of the said demand notice to both the addressees have been placed at page 75 of the APB alongwith tracking receipt placed at page 76-78 of the APB. The Learned Counsel for the Appellant has placed reliance on the judgment of this Tribunal in ***Alloys Min Industries Vs. Raman Casting Pvt. Ltd., in Company Appeal (AT) (Ins.) No. 684 of 2018 (2019 SCC OnLine NCLAT 492)*** to contend that since the demand notice had been sent at the registered address of the Corporate Debtor company, there was no infirmity in the service of the demand notice.

11. The Learned Counsel for the Respondents have, however, submitted that owing to the sudden resignation of both the Directors, there was a complete vacuum in the Board of the Corporate Debtor company and led to a situation whereby the Appellant remained in control all modes of communications in respect of the Corporate Debtor company including the official email address- ashish.gupta@delaguahealth.com. The registered office premises of the Corporate Debtor company being in the control of the Appellant, the Demand Notice dated 15.06.2019 in effect remained under the control and possession of the Appellant and not with the Respondent No.1/Corporate Debtor company. Thus, it is the case of the Respondents that

the Appellant had intentionally and deliberately denied opportunity to the Corporate Debtor company as such to respond to the Section 8 notice. It was, however, argued by the Learned Counsel for the Appellant that the Appellant had taken efforts to delete his name and email address from the Company Master Data besides taking initiative for a new Board of the Corporate Debtor company by calling extraordinary meeting of the Corporate Debtor in 2018 but was not allowed to do so by the majority shareholders. Be that as it may, on the date of issue of the said demand notice, the Appellant having admitted that both KKV and he had already tendered their respective resignations from the position of Director of the Corporate Debtor company with effect from 02.07.2017, it defies logic as to why the Appellant sent the demand notice at the given address at a time when the Board of Corporate Debtor had ceased to exist.

12. The other copy of the demand notice has admittedly been addressed to KKV who at that point of time had also resigned from the position of Director of the Corporate Debtor. The Appellant in spite of having full knowledge of the fact that KKV had already resigned, yet, addressed the demand notice to him which puts question marks on the bona-fide of the Appellant. Furthermore, we notice that when the Section 9 application was filed before the Adjudicating Authority, at which time KKV had already resigned as a Director, he still appeared before the Adjudicating Authority, not only recording his presence but also making a statement expressing inability on the part of the Corporate Debtor to pay the amount claimed by the Appellant as may be seen at page 93 of APB. This lends force to the contention of the

Respondents that the Appellant had connived with KKV to manipulate the Section 9 proceedings in his favour by making KKV unauthorisedly represent on behalf of the Corporate Debtor company. We are therefore of the considered view that the Adjudicating Authority had not committed any mistake in observing that the Section 9 application was collusive and dismissed it on the same grounds.

13. The Learned Counsel for the Appellant submitted that intervention on the part of shareholders of the Corporate Debtor company is not permissible while adjudicating a matter under Section 9 of the IBC. Further, it was submitted that since the shareholders and the Corporate Debtor had status of separate legal entities, hence, Respondent No.2 and 3 being shareholders, did not enjoy locus to participate in the Section 9 proceedings taken up by the Appellant against the Corporate Debtor company. In support of this contention, reliance has been placed by the Learned Counsel for the Appellant on the judgement delivered by the Hon'ble Supreme Court in ***Pratap Technocrats (P) Ltd. v. Monitoring Committee of Reliance Infratel Ltd., (2021) 10 SCC 623*** and ***E S Krishnamurthy and Ors. v. Bharath High Tech Builders Pvt. Ltd. Civil Appeal No. 3325 of 2020 (2022) 3 SCC 161*** to state that the IBC does not provide for equity jurisdiction. This however cannot come to the aid of the Appellant since the facts of the present case are clearly distinguishable. In view of the peculiar circumstances of the present case where the Section 8 Demand Notice could not be responded to by the Corporate Debtor company for reasons beyond their control and a collusive petition having been filed, Respondents No.2 and 3 being majority

shareholders of the Corporate Debtor Company deserve to be heard. It is a well settled canon of natural justice that anything which eludes or frustrates the recipient of justice should be avoided and reasonable opportunity of hearing be allowed to advance the cause of justice. We are of the view that Respondents No.2 and 3 being majority shareholders holding 98.98% share of the Corporate Debtor company, they deserve a chance to safeguard the rights and interests of the Corporate Debtor and their respective stakeholders given that the Appellant and KKV had in collusion foisted an abnormal situation by their resignation from the Corporate Debtor company causing a void and leaving none on the Board of Directors to defend the interests of Respondent No.1/Corporate Debtor company. To add to this, KKV was unauthorisedly representing the Corporate Debtor company before the Adjudicating Authority even after having submitted his resignation thus causing serious miscarriage of justice for the Respondent No.1. Hence, in the interest of justice, we are of the view that the present appeal filed before this Tribunal by Respondents No.2 and 3 deserves to be considered on merit.

14. Having answered items 9 (i) and (ii), we now proceed to examine whether there was any pre-existing dispute between the Appellant and the Corporate Debtor company. It has been submitted by Learned Counsel for the Respondents No. 2 and 3 that the Appellant had deliberately withheld information from the Adjudicating Authority about the Consultancy Agreement which had been signed between the Appellant and Respondent No. 2 on 04.11.2013. The Learned Counsel for the Respondents in support of their assertion that the Appellant had suppressed information about Consultancy

Agreement have further submitted that this Consultancy Agreement was placed on record much later by the Appellant and that too only after directions were issued on 06.09.2019 by the Adjudicating Authority to produce the original documents. It is also the contention of the Respondents that this agreement constituted the basis of relationship between the Appellant and the Corporate Debtor company and that this continues to subsist. On the other hand, it is the contention of the Appellant that this Consultancy Agreement was superseded by an Employment Agreement dated 01.08.2014 and since their dues arise from this Employment Agreement, only the Employment Agreement was mentioned in their Section 9 application. Thus, there is no attempt on their part to suppress the Consultancy agreement and it is the Respondents who are misleading this Tribunal by making a mention of the Consultancy agreement which has been superseded by the Employment Agreement.

15. It is an admitted fact by both parties that the Consultancy Agreement is dated 04.11.2013 while the Employment Agreement is dated 01.08.2014. The Appellant was appointed as Director in the Corporate Debtor company on 11.02.2014 which was before the Employment Agreement was signed. Based on the chronological sequencing of the two agreements, it is the contention of the Appellant that the Employment Agreement supersedes the terms and conditions of the said Consultancy Agreement. However, the Learned Counsel for the Respondents have questioned the validity of the Employment Agreement since it was a document signed only between the Appellant and KKV. The Corporate Debtor or the shareholders or their authorised

representative do not figure anywhere in the document as signatories and therefore not binding on them. It has also been submitted that the Employment Agreement is not a registered document and hence legally untenable. On the other hand, the Consultancy Agreement was signed between the Appellant and Mr. James Beaumont on behalf of Delagua Health Limited/Respondent No.2. A copy of this agreement has been placed at pages 20-30 of the Reply Affidavit.

16. The Learned Counsel for the Respondents have submitted that the said Consultancy Agreement at Clause 9.1 stipulated that without the prior written consent of the Corporate Debtor company, the Consultant could not accept any engagement or employment or have any concern in any business which is similar to or in any way competitive with any of the businesses of the company or any group company. Further Clause 8.2 of the same agreement stipulated that the Consultant would indemnify the Respondent No.2 against loss and liabilities arising out of disregard by the Consultant of their duties and responsibilities. It may be useful to reproduce the said clause which is to the effect:

> *"8.2 The Consultant hereby agrees to indemnify the Company and all Group Companies against all costs, claims, actions, demands, penalties and liabilities incurred in respect of or arising in connection:*
>
> ***** ***** *****
>
> *8.2.3 any intentional and conscious or reckless disregard by the Consultant of his duties or responsibilities.*
>
> ***** ***** *****

9.1 During the Term the Consultant shall not, without the prior written consent of the Company, accept any engagement or employment or have any concern in any business which is similar to or in any way competitive with any of the businesses of the Company or any Group Company.

9.2 The Consultant shall promptly disclosure to the Company in writing the nature and extent of any actual or potential conflict of interest which arises in relation to the provision of the Services as a result of any present or future engagement, employment or other concern."

17. It is the contention of the Respondents No. 2 and 3 that in breach of the said terms and conditions of the Consultancy Agreement, the Appellant while still serving as Consultant with Respondent No. 1 company started engaging himself in the activities of a competing entity, Caya Constructs ("**Caya**" in short). In support of their contention, we notice that they have submitted on record, at pages 37-51 of the Reply Affidavit, few e-mails dated 16.02.2016, 08.03.2016 and 22.06.2016 which purportedly indicate the direct involvement of the Appellant in generating business for Caya the competing entity while still serving as Consultant in Respondent No. 1 company.

18. The Appellant has not denied their association with Caya but it has been submitted by the Learned Counsel for the Appellant that Caya dealings being in the field of toilet construction while the Respondent No. 1 company

is engaged in water testing services, Clauses 9.1 and 9.2 of the Consultancy Agreement is not attracted. Since both these areas constitute different domains of specialisation, there was no violation of the agreement. As regards the emails produced by the Respondents linking the Appellant to Caya, without denying these emails, it has however been contended by the Appellant that if the Respondents were aware of such a breach, they should have raised this much earlier and stand estopped from raising this issue at this juncture. Further they have accused the Respondents of having unauthorized access of their emails. Countering this the Learned Counsel for the Respondents submitted that the Section 8 notice not having been delivered to Respondent No.1/Corporate Debtor or any of its stake-holders the Appellant had deliberately by design precluded Respondent No.1 from responding to the Section 8 notice. Further, reliance has been placed upon the judgement of this Tribunal in ***M/s Brand Realty Services Ltd. v. M/s Sir John Bakeries India Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 958 of 2020 (2022 SCC OnLine NCLAT 290)*** wherein it has been held that it is now a settled principle of law that even in absence of notice of dispute, the Adjudicating Authority can reject the Section 9 Application if there is a record of dispute.

19. We are of the considered view that given the framework of Section 9 of IBC, the remit of this Tribunal is summary in nature and it therefore does not behove this Tribunal to undertake either the comparative examination of the areas of specialisation of Caya and the Corporate Debtor company or to enquire into the veracity of the emails. All that we observe at this stage is that a dispute centering around breach of fiduciary duty by the Appellant in the

context of Consultancy Agreement has been raised by the Respondents as their defence against the claim of the Appellant which is evidenced from the material placed on record.

20. It has been further submitted by the Learned Counsel for the Respondent that the Appellant without prior authorisation had made excess withdrawals aggregating to Rs.19,33,418/- purportedly on account of tour and travelling without supporting documents to substantiate such withdrawals. The Appellant has contended that these averments have been made without any basis and valid proof. However, we see that material has been placed on record to show that the Respondents No.2 and 3 had requested the Appellant to provide necessary proof to substantiate such withdrawals vide their emails dated 29.03.2017 and 01.04.2019 which remained unresponded. Copies of the email are seen at page 102-103 of Reply Affidavit. An additional affidavit has also been submitted in this regard by the Learned Counsel for the Respondents to show that certain expense vouchers have not been submitted, which is reproduced below, as extracted from Page 3 of their additional affidavit.

"DelAgua Health India Private Limited
Missing Information Summary

	May-16	*Jun-16*	*Jul-16*	*Aug-16*	*Sep-16*	*Oct-16*	*Nov-16*	*Dec-16*	*Jan-17*	*Feb-17*
3. ICICI bank statement	*Yes*	*Yes*	*Yes*	*Yes*	*Yes*	*Yes*	*Yes*	*No*	*Yes*	*No*
.....	...	...	...	...	...	...	...	...	...	...
20. Referenced Expense Vouchers	***Part***	***Part***	***No***	***No***	***No***	***No***	***No***	***No***	***No***	***No***
.....	...	...	...	...	...	...	...	...	...	..."

Based on the foregoing material, it has been contended by the Respondents that the claims by the Appellant is disputed. Further they have denied that

any amount is due and payable by the Corporate Debtor to the Appellant. In the light of the submissions and pleadings made by the Learned Counsel for Respondent No.2 and 3 and after seeing the material on record we are satisfied that dispute raised on behalf of the Corporate Debtor company is not a moonshine dispute or a bluster. In respect of issue delineated at item 9 (iii) our answer is therefore in the affirmative.

21. In sum, we are of the view that the Adjudicating Authority has rightly dismissed the Section 9 application of the Appellant and that the impugned order does not warrant any interference. There being no merit in the appeal, the appeal stands dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 01.02.2023

PKM