NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 353 of 2020

In the matter of

Shri Akhilesh Kulshrestha
5/101, East End Apartments,
Mayur Vihar Phase – 1 Extension,
New Delhi-110096. **... Appellant**

Versus

Saab India Technologies Pvt. Ltd.
7th Floor, DLF Centre,
Sansad Marg,
New Delhi-110001. **...Respondent**

Present

For Appellant:	**Mr. Virendra Ganda, Sr. Adv. with Mr. Vishal Ganda, Ms. Akanksha Mathur, Ms. Tanya H and Mr. Anand Singh Sengar, Advocates**
For Respondent:	**Ms. Vatsala Kumari, Mr. Shankh Sengupta, Mr. Sujoy Sur, Advocates**

Judgment
(Date: 25.08.2022)

(Per: Dr. Alok Srivastava)

This appeal has been preferred by the Appellant under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called 'IBC') aggrieved by the Order dated 29.1.2020 passed by the National Company Law Tribunal New Delhi (Adjudicating Authority) in CP(IB) No. 1972 (ND) of 2019 (hereinafter called 'Impugned Order') whereby the Adjudicating Authority dismissed the insolvency petition.

2. Stated in brief, the case of the Appellant is that he was appointed as a Whole Time Director (in short 'WTD') in the corporate debtor-company vide a Board Resolution dated 28.9.2015 which was ratified in the Annual General Meeting (AGM) of the corporate debtor on 29.9.2015. Subsequently the corporate debtor filed form MR-1 along with the Board Resolution dated 28.9.2015 on the portal of Ministry of Corporate Affairs stating the fact and terms of appointment of the Appellant as a WTD of the corporate debtor. The Appellant has further stated that before his appointment as a WTD of the corporate debtor, he was appointed as Chief Financial Officer (in short 'CFO') of the corporate debtor vide appointment letter dated 10.3.2014, and later as an Additional Director of the corporate debtor in March, 2015. The appellant has further stated that on the reason of redundancy of the position of CFO, he was served a notice for termination of his employment vide letter dated 1.3.2019 and a formal letter of termination was issued by the corporate debtor on 20.3.2019, which was in regard to his employment as CFO of the corporate debtor.

3. The Appellant has further stated that after termination of his employment as CFO, he continued to function as a WTD of the corporate debtor, and in apprehension that he might be removed from the position of WTD, he filed a Writ Petition bearing WP(C) No. 4407/2019 in the Hon'ble High Court of Delhi, which was dismissed as being pre-mature as the counsel for respondent No. 4 (corporate debtor) admitted before the High Court that the Appellant was a Director as on date of hearing, i.e. 26.4.2019 and no process had been started for removing him from the position of WTD and whenever it may be done in the future, it would be done in accordance with the provisions of the Companies Act. The appellant has, therefore, claimed that he has not disputed his termination as CFO of the corporate debtor and the aforementioned writ petition was dismissed as being pre-mature and not on the basis of any dispute between the Appellant and Respondent. The Appellant has claimed that the Adjudicating Authority has, therefore, erred in presuming the action through WP No. WP(C) 4407/2019 was in relation to some dispute prior to delivery of demand notice, and rejected the section 9 application on such basis.

4. We heard the arguments advanced by learned counsels of both the parties and perused the record.

5. The learned counsel for appellant has submitted that he was appointed as CFO of the corporate debtor on 10.3.2014 and later as Additional Director of the company in March, 2015, and also as a WTD after approval in the AGM on 29.9.2015. She has claimed that in such a situation, the appellant started to function as WTD from 29.9.2015 in addition to already working as CFO. She has further submitted that the appointment letter dated March 10, 2014 (attached at pp. 138-146 of the appeal paperbook) relates to Appellant's appointment as CFO and the letter of termination dated March 20, 2019 (attached at pg. 149 of the appeal paperbook) relates to termination of his appointment only as CFO of the corporate debtor-company, and there is no mention in the termination letter of the Appellant's work as a WTD. She has further argued that the Writ Petition bearing WP (C) No. 4407/2019 was filed by the appellant apprehending termination of his services as WTD, and when both the parties (the respondent and the appellant in this appeal) appeared before the Hon'ble Delhi High Court on 26.4.2019, the counsel of respondent no. 4 (respondent in this appeal) admitted that the 'appellant was a Director as on date and continues to be so and he shall be removed from the post of Director after following the due process under the Companies Act, if in future it decides so', and on this basis the petition was found to be pre-mature and dismissed accordingly.

6. The Learned Counsel for appellant has further submitted that the Appellant had started working as WTD from 29.9.2015 as is evident in Form MR-1 (attached at pp. 75-77 of the appeal paperbook) filed by the corporate debtor on the portal of the Ministry of Corporate Affairs with his total remuneration fixed as Rs.86,49,600 p.a which is mentioned in Form MR-1. She has further submitted that vide letter dated 2.7.2018, an annual salary increment for the year 2018-19 was given to the Appellant, with his revised salary fixed at Rs. 9,50,000 p.m. for the period 2018-19. It is her contention that the appellant was paid his due salary and termination benefits for his work as CFO till March 2019 whereas he continued to work as WTD till 20.5.2019, when he was removed as WTD through a board resolution in an Extraordinary General Meeting of the corporate debtor. She has argued that the appellant was not paid any remuneration of working as WTD for the period 1.4.2019 till 20.5.2019, and a total amount of Rs. 30,01,999 is due for payment to him which is in default as per particulars in page 90 of the appeal paperbook, vol. I.

7. The learned counsel for appellant has referred to clauses 48 and 49 of the Articles of Association of the corporate debtor (at page

227 of the appeal paperbook, vol.II) to claim that a WTD is entitled to remuneration for his services.

8. The learned counsel for Respondent has explained the context of the case, and argued that the appellant was first appointed as CFO, and later appointed as Additional Director and WTD, which was on the basis of his employment as CFO of the corporate debtor. He has further argued that though the Articles of Association (in clauses 48 and 49) of the company provide for payment of remuneration, the Appellant has not shown any record in support of his claim that he was to be provided extra remuneration for his work as WTD. He has submitted that the Appellant's services as WTD could be terminated on 20.5.2019 as due procedure had to be followed as provided in the Companies Act for his removal, but all his dues for services rendered as a WTD has also been paid by the corporate debtor.

9. In rejoinder, the learned counsel for appellant has referred to the salary slip (attached at page 102 of the appeal paperbook, vol.I) to emphasize that the appellant was given his full and final payment alongwith gratuity, leave encashment, notice pay and other benefits

in March, 2019 only after termination of his services as CFO, whereas no payment has been made for the period 1.4.2019 till 20.5.2019 when the Appellant continued to work as WTD. She has clarified that the emoluments of the WTD are included in the form MR-1 which was filed by the corporate debtor after Appellant's appointment as WTD, and the calculation for the debt due for payment is given in the calculation sheet (attached on page 113 of the appeal paperbook, vol.I.)

10. It is noted that the appellant was employed as CFO of the corporate debtor vide appointment letter dated 10.3.2014 (attached at pp.138-146 of the appeal paperbook, Vol.I). A perusal of this letter of appointment makes it clear that it does not include any duties to be rendered by the Appellant as WTD. Hence this letter of appointment pertains to appellant's employment as CFO of the corporate debtor. Later the appellant was appointed as WTD of the company vide a resolution of the Board of Directors in meeting held on 28.9.2015, which was subsequently ratified by the AGM on 29.9.2015. The effective date of appointment as WTD i.e. 29.9.2015 is contained in form MR-1 (attached at pp. 75-77 of the appeal paperbook, vol.1).

11. We also note that the appellant's services as CFO were terminated vide letter dated 20.3.2019 (attached at pg. 101 of the appeal paperbook, vol.I) and his termination payout was calculated and paid to him in March 2019. The details of the full and final payment after termination as CFO is given in pay slip for March, 2019 (attached at pg. 102 of appeal paperbook, Vol.I). The appellant continued to provide services as WTD to the corporate debtor, a fact admitted by the corporate debtor before Hon'ble High Court of Delhi, and he continued to work as a WTD till 20.5.2019, whereafter his services as WTD were terminated consequent to a resolution of the Board of Directors vide minutes of the Extraordinary General Body meeting dated 20.5.2019 (attached at page 194 of the appeal paperbook, vol. I). Thus, it becomes quite clear that the Appellant continued to work as WTD till 20.5.2019 even after his termination as CFO, whereas he received payment till the month of March, 2019 which was for his work as CFO of the company.

12. In the order in WP (C) 4407/2019, the Hon'ble High Court of Delhi has held as follows:-

> ***"W.P.(C) 4407/2019 & CM APPL. 19626/2019 & 19628/2019***

Vide the present petition, the petitioner seeks restraining the respondent no. 2 from accepting or admitting Form DIR-12 or any other forms, that might be filed with the respondent no. 2, by the respondent no. 4-Company, pursuant to the illegal termination of the petitioner, who has been a whole time director of the respondent no.4-Company.

Counsel for respondent no. 4, who appears on advance notice, admitted that the petitioner is a Director as on date and there is no process started for removing him as a whole time Director from respondent no.4-company. He further submits that if in future, the respondent no.4 decides that the petitioner shall be removed from the post of Director, the due process under the Companies act shall be taken. Since the petition is at pre-mature stage, the same is not maintainable and dismissed accordingly.

Pending applications are also stand disposed of."

13. It is clear from reading of the order of the Hon'ble Delhi High Court (supra) that there is no reference to any dispute between the parties and the writ petition is dismissed as being at pre-mature stage. Further, the order records the statement of the Counsel for respondent 4-company that the petitioner is a Director as on 26.4.2019, and he shall be removed only after adopting the due process under the Companies Act from the post of WTD.

14. We follow the dictum laid down by Hon'ble Supreme Court in the matter of **Mobilox Innovations Pvt. Ltd. v. Kirusa Software**

Private Limited [Civil Appeal No. 9405 of 2017, (2018) 1 SCC 353] that the pre-existing dispute must be a real one, and not a spurious, hypothetical or illusory one. The relevant extract from this judgment is reproduced below:-

> *"40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."*

15. From the record of the EGM dated 20.5.2019, we note that the Appellant continued to function as a WTD and was entitled to a remuneration as stipulated in the clauses 48 and 49 of the Articles of Association, and the figure of remuneration of the Appellant as

WTD can be seen from the Form MR-1 filed by the corporate debtor wherein a remuneration of Rs.86,49,600 p.a. is shown as Appellant's remuneration (attached at pp.75-77 of appeal paperbook, vol. I). Further an increment was given to the Appellant as CFO and WTD vide letter dated 2.7.2018 (attached at pg. 81 of appeal paperbook, vol.I).

16. We, thus, reach the conclusion that the Adjudicating Authority has erroneously inferred the existence of a dispute merely because a Writ Petition bearing WP (C) 4407/2019 was filed by the appellant, even though there is no such reference or mention is made in the order dismissing the writ petition and no inference of dispute can be drawn from what is stated in the said order. We also find that the Appellant was appointed as a WTD of the corporate debtor on 29.9.2015 while he was already working as CFO, and continued as WTD till 20.5.2019. Since he was paid his total emoluments and termination benefits till 31.3.2019 for his work as CFO, he is entitled to receive payment for the period 1.4.2019 till 20.5.2019 for his work as WTD, which is an operational debt in default and payable by the corporate debtor.

17. On the basis of aforementioned detailed discussion, we are of the view that the Adjudicating Authority has erroneously dismissed Appellant's application under section 9. We, therefore, set aside the Impugned Order and order admission of the section 9 application. The case is sent to the Adjudicating Authority for passing necessary order after the admission of section 9 application. The appeal is accordingly disposed of with these directions.

18. There is no order as to costs.

(Justice M. Satyanarayana Murthy)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
25th August, 2022

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