



INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

(Company formed by ICAI under Section 8 of the Companies Act 2013)

IBC Case Law Capsule

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(February 13, 2023)

Ashish Gupta vs Delagua Health India Pvt. Ltd. & Ors.
Company Appeal (AT) (Ins.) No. 17 of 2022
Date of NCLAT's Judgements: February 01, 2023

Facts of the Case: -

An Appeal has been filed by Mr. Ashish Gupta (hereinafter as “Appellant”) after being aggrieved by the AA order dated 11.10.2021 wherein the AA dismissed its petition u/s 9 of IBC by holding it to be a collusive petition without giving any reasons. The Appellant was working as a Director of Delagua Health India Pvt. Ltd (hereinafter as “CD”) since 11.02.2014 and tendered his resignation on 02.07.2017. The Appellant sent a Demand Notice to the CD for clearing his estimated salary of Rs.40,50,000 but since no response was received from the CD, the Appellant filed the petition u/s 9 of the IBC.

Meanwhile, Delagua Health Limited (Grand Bahamas) and Delagua Water Testing Limited, (collectively hereinafter as “Respondent”), holding 98.98% stake in CD filed an intervening application.

The Appellant citing the judgement in “*Pratap Technocrats (p) Ltd v, Monitoring Committee of Reliance Infratel Ltd.*” contended that IBC does not provide for equity jurisdiction and the Respondent filed the intervening application even though they did not have any locus in the matter.

The Respondent submitted that Appellant and Respondent had signed a Consultancy Agreement on 04.11.2013 for assisting the Respondent in setting up an entity in India. After incorporation of the company (i.e., CD), the Appellant along with Mr. K.K. Vashishtha were appointed as the Directors. The Respondent asserted that both the Directors resigned on same day and acted in collusion to serve Section 8 notice with an ulterior motive. The Respondent stated that the Appellant still had the control over all modes of communications related to CD and hence demand notice never actually got served.

The Respondent submitted that the Section 9 Application is not maintainable and contended that the Appellant violated clauses of the Consultancy Agreement by engaging himself in the activities of a competing entity thus causing loss to the CD. Further, the Respondent claimed that the Appellant had made excess withdrawals of Rs.19,33,418/- from the accounts of the CD purportedly on account of tour and travelling without submitting the supporting documents.

The question raised before the Appellate Tribunal is:-

1. Petition filed before AA u/s 9 of code is collusive petition or not?
2. Whether the Respondent are entitled to defend the interests of CD?
3. Whether there is any pre-existing dispute surrounding the operational debt.



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NCLAT Observations:

The Appellate Tribunal held that in spite of having full knowledge of the fact that Mr. K.K. Vashishtha had already resigned from the post of director, the Appellant addressed the demand notice to him which puts question marks on the bona-fide of the Appellant. Appellate Tribunal further stated that 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. The Respondent, being the majority shareholders holding 98.98%, deserves a chance to safeguard the rights and interests of the CD and therefore, the submission filed by Respondent deserves to be considered on merit.

While citing the Judgement of *“M/s Brand Realty Services Ltd. v. M/s Sir John Bakeries India Pvt. Ltd.”* the Appellate Tribunal upheld that it is a settled principle of law that even in absence of notice of dispute, the AA can reject the Section 9 Application if there is a record of dispute. Excess cash withdrawals from company’s account by the Appellant on account of tour and travelling without any valid proof proves that the claims by the Appellant is disputed.

Order/Judgement: The Appellate Tribunal held that the AA has rightly dismissed the Section 9 application of the Appellant and that the impugned order does not warrant any interference as there is no merit in appeal.

Case Review: The Appeal is dismissed. No cost.