

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI

(APPELLATE JURISDICTION)

TA (AT) No. 258/2021
Comp App (AT) (Ins) No.83/2021

(Arising out of the 'Impugned Order' dated 26.11.2020 in
IA No.187/KOB/2020 in IBA/30/KOB/2020, passed by
the 'Adjudicating Authority', (National Company Law Tribunal',
Kochi Bench)

In the matter of:

Inkel Limited,
Having its registered office at Door No.7/473,
ZA-5 & 6, 2nd Floor, Ajiyal Complex,
Kakkanad, Ernakulam - 682 030
Represented by its Managing Director Appellant
v.

Shaji Mathew
No.10, ten huts, Divine park,
CSEZ Post, Kakkanad,
Kochi - 682 037 ... 1st Respondent

Seguro Foundations and Structures Pvt. Ltd.,
Door No.27/635, IInd Floor,
Chakkappan Centre,
Kalamassery, Ernakulam – 682 024
Represented by its Authorized Representative ... 2nd Respondent

Present:

For Appellant : Mr. Aditya Venugopalan, Advocate

For Respondent No.1 : Mr. Harikumar G Nair, Advocate

JUDGMENT
(Hybrid Mode)

[Per : Sharad Kumar Sharma, Member (Judicial)]

Brief Facts : The instant Company Appeal arises out of the Impugned Order dated 26.11.2020, which has been rendered by the Learned Adjudicating Authority of NCLT, Kochi Bench, in IA No.187/KOB/2020, in IBA/30/KOB/2020. As a consequence of the Impugned Order the Appellant has been directed to be impleaded in proceedings, which have been held under section 60(5) of the I & B Code for the purpose of initiation of the CIRP Proceedings. Primarily the grievances of the Appellant is that he would not be the necessary party to the proceedings and that he is not at all required to be impleaded for the reason being that:-

- (i) No demand notice was ever issued to the applicant.
- (ii) That he was not a party to the proceedings.
- (iii) There is no cause of action against the appellant.
- (iv) That the order of impleadment of the Appellant was passed without the prior notice to be issued to the Appellant.

It is contended by the Appellant M/s. Inkel Limited, that it had come to know of the Impugned Order of 26.11.2020, only when he received the notice on 03.12.2020 based on regards the order passed by the Learned Adjudicating

Authority whereby he was directed to be impleaded as party in the Company Petition praying for initiation of the CIRP Proceedings.

The Appellant has further contended that when he received the notice dated 03.12.2020, calling him to participate in the proceedings by the Learned Adjudicating Authority, only then he could learn from the Registry of the NCLT, Kochi Bench, that he has been impleaded as a party in the proceedings in IBA/30/KOB/2020 by the Impugned Order as rendered in IA/187/KOB/2020. On receipt of the notice, he immediately procured the Certified Copy of the Impugned Order, and therein he found that the Impugned Order wherein he has been impleaded in the proceedings as an “Additional Corporate Debtor”, is an order which has been passed exparte without issuing any prior notice to him, prior to impleadment and hence he contended that the order would suffer being in violation of the principle of natural justice, because if a litigation is imposed upon a person who is being sought to be impleaded without being heard, the order would be vitiated in the eyes of law.

He submitted that CIRP proceedings were first sought to be initiated by the Operational Creditor Mr. Shaji Mathew, Respondent No.1 herein by filing an application under section 9 of the I & B Code, seeking an order to initiate CIRP Proceedings against the Corporate Debtor namely M/s. Seguro Foundations and Structures Private Limited, i.e., Respondent No.2 herein, who as contended by the Appellant is one of its subsidiaries. Now the Appellant is being impleaded

as an Additional Corporate Debtor in proceedings under section 9 by the Impugned Order. The Appellant contends that it materially prejudices his rights and that the Impugned Order impleading him as the party to the proceedings, has been passed in an absolute disregard to the procedure prescribed under Rule 34, 37, 44 & 150 of the National Company Law Tribunal Rules, 2016, apart from being in violation of the principles of Natural Justice.

On scrutiny of the Impugned Order impleading the Appellant as the party in the proceedings under section 9, it shows that the Appellant has been impleaded as an Additional Corporate Debtor for two reasons, namely: -

- (1) He happens to be one of the major share holders of the Corporate Debtor
- (2) He is managing, controlling and operating the affairs of the company of Respondent No.2.

The Impugned Order makes a reference to the ratio as propounded the Judgment rendered in the matters of Mamatha Vs AMB Infrabuild Private Limited and Ors., by this Tribunal by which it comes to a conclusion that the Appellant assumes the status of being an Additional Corporate Debtor in the instant case and therefore becomes a necessary party.

The case of the Appellant is that these two parameters which have been propounded as to be the basis of conclusions drawn by the Impugned Order of 26.11.2020, cannot be sustained since being in absolute divergence to the rules

and basic norms of the principles of Natural Justice. Elaborating further, he has submitted that the Appellant cannot be treated as to be an “Additional Corporate Debtor”, for the purposes of proceedings under section 9 for the principal Corporate Debtor, until and unless the Operational Creditor is able to establish by evidence on record that the affairs of the Respondent No.2 herein, that is the Corporate Debtor, was controlled and managed by the Appellant, and that, in the absence of the establishment of the said fact by the Operational Creditor, the Appellant ought not to have been permitted to be impleaded in the proceedings as an Additional Corporate Debtor by the Learned Adjudicating Authority, merely on the basis of the fact that he was a majority shareholder of the Corporate Debtor.

He further submits that the issue of impleadment of an Additional Corporate Debtor in a CIRP Proceedings has been quite elaborately considered in the matters of **Vodafone International Holdings BV Vs Union of India**, where it has been emphasized that the subsidiary companies are separate legal entities, when they are vested with their own managerial and operational rights. By this reasoning, the Corporate Debtor, that is, Respondent 2 being a subsidiary of the Appellant cannot be taken as to be the part and parcel of the Appellant being the holding company and therefore even though Respondent 2 being a subsidiary has been sought to be proceeded with the proceedings under section 9,

the Appellant should not be automatically made a necessary party to the proceedings as an Additional Corporate Debtor.

If has been admitted by the Learned Counsel for the Appellant is that, the appellant happens to be a major shareholder with regards to the Respondent No.2, and he holds 65% of the shares. However, the defense taken by the Learned Counsel of the Appellant was that mere holding of 65% of shares of the Corporate Debtor, may not be taken as to be the hard-drawn principle to implead him as a party, because it does not establish that he was holding the affairs of the CD. He has contended that the Appellant has been forced to invest in the Company of Respondent No.2 as it was running into a heavy loss. He submitted that the Appellant, started an investigation into the affairs of the Managing Director of Respondent No.2, during the latter half of 2018 and in 2019 and reports arising out of such inquiries which were submitted before the Appellant's board categorically established various acts of malpractices & mismanagement and siphoning of funds by Mr. Rajeev C Vijayan, MD of Respondent No.2 in collusion with the Operational Creditor, Respondent No.1 and therefore Appellant had to acquire majority shares and certain amount of over sight on the Respondent No.2. The Appellant has further submitted that in its capacity of the shareholder, he had nothing to do in the internal administration and malpractices resulting into a loss incurred by the Respondent No.2.

The Appellant submitted that the erstwhile Managing Director Mr. Rajeev C Vijayan, in fact, had generated and had projected a false financial picture to induce the Appellant to invest in Respondent No.2 by misleading him and the same is being addressed by way of initiation of criminal complaint, against the management of Respondent No.2 and also by way of invocation of the arbitration clause available in the Share Purchase Agreement, dated 08.11.2017 and the subsequent Share subscription agreement of 16.11.2017. He contended that while he is taking steps to proceed as against the Managing Director of Respondent No.2 for his misdeeds, both on the criminal side and also on the civil side by the initiation of the arbitration proceeding and when the same were being undertaken, the Appellant has been sought to be impleaded by referring him as to be an Additional Corporate Debtor, by the Impugned Order. This has resulted into a situation where many of the investors of the Appellant, in their own independent undertaking are stated to have lost faith in the Appellant's Company and this has severely / adversely affected the functioning of the Appellant in its business and in other several allied matters.

He has submitted that owing to the initiation of the CIRP Proceedings under section 9, as sought for by the Operational Creditor, if the Appellant is permitted to be impleaded as an Additional Corporate Debtor, there will be a material loss to the multiple projects, which are being undertaken by the Appellant in the state of Kerala, where huge public money is at stake. And further

all those businesses and the other projects in which the Appellant is involved may be affected.

Materially he has submitted that the Operational Creditor cannot be permitted to take the liberty to make the Appellant liable for the default, if any, which has been committed by the Respondent No.2 Company, because in the capacity of being merely the shareholder and having invested his funds in the project of Respondent No.2 as a shareholder, the Appellant cannot be impleaded in the proceedings under section 9 of the I & B Code, as it has been laid down in the matters of **Axis Bank Vs Lotus Three Developments Limited & Ors.**, the Judgment rendered in **CA(AT) (Ins) No.246/2018**.

Primarily he has submitted that he cannot at a later stage be directed to be impleaded as an Additional Corporate Debtor, until and unless he is intimated of the fact of initiation of the CIRP Proceedings against him by invoking provision under section 9 by the Operational Creditor by virtue of prior notice issued to him under section 8 of the I & B Code raising a demand of the default or amount due which could have been claimed as a debt payable at the behest of the Appellant. Thus he contends that in the absence of notice under section 8, there is no financial debt payable by him. He has contended that the Learned Adjudicating Authority by the Impugned Order as delivered on 26.11.2020 particularly while dealing with IA187/KOB/2020 filed by Shaji Mathew the Respondent herein and the Applicant to the Impleadment Application, has erroneously come to the

conclusion that since the Respondent Company (Respondent No.2), that is, M/s. Seguro Foundations and Structures Pvt. Ltd., happens to be a subsidiary of the Appellant company and besides that since the Appellant is the holder of 65% of the shares which was considered to be a major shareholding, and since he has major managerial control over the affairs of the Respondent No.2 / Corporate Debtor, thus for an effective Adjudication of proceedings under section 9 he ought to have been a necessary party to the proceedings.

Apart from the reasoning which has been assigned by the Learned Adjudicating Authority, it has been observed that the Appellant was having a major control over the affairs of the Corporate Debtor, apart from that he was in charge of day to day affairs of the company and hence he would be responsible for the debt and liabilities, which has been incurred on behalf of the Corporate Debtor. The Respondent No.1 / Applicant to the Impleadment Application has placed before the Learned Adjudicating Authority and has heavily placed reliance upon the Judgment of **M/s. Mamatha Vs AMB InfraBuild Pvt. Ltd.** as rendered in **Comp App (AT) (CH) (Ins) No.155/2018** to push forward his case for impleading M/a. Inkel Ltd. in the CIRP Proceedings. While drawing its reasoning from Para 14 & 15 of the said Judgment, the Learned Adjudicating Authority has come to the conclusion that in view of the directors' report given to the shareholders, as part of the annual returns filed by the proposed Corporate Debtor for the Financial Years 2018 & 2019, M/s. Inkel holds a 65% share in M/s. Seguro

Foundation and Structures Pvt. Ltd., and the latter is only a subsidiary of M/s. Inkel and in view of the fact that the Managing Director is only a minority shareholder, applying the ratio of the Judgment of M/s. Mamatha as referred to herein above, the present Appellant having acquired the major shareholding of the Corporate Debtor to the tune of 65% and having a major control over the affairs of the Corporate Debtor ever since 1st December 2017, he would have to be the necessary party to be impleaded as an Additional Corporate Debtor the Company Petition. Ultimately, the Learned Adjudicating Authority based on the aforesaid logic has passed the following orders: -

“Registry is directed to carryout necessary impleadment in the IBA and issue notice to them though e-mail in addition to normal procedure. Applicant is also directed to serve notice to the newly impleaded additional Corporate Debtor along with a copy of IBA and produce proof of service with an affidavit before next date fixed. Additional Corporate debtor shall file its Counter within two weeks”.

If Para 19 of the Impugned Judgment, is scrutinized, it is observed that after allowing of the Impleadment of the present Appellant, the notices have been issued to him along with the copy of the proceedings and that the notice herein as issued by the Learned Adjudicating Authority has been for the purposes of ascertaining the status and stand of the Appellant with regard to the necessity to be impleaded as an Additional Corporate Debtor.

In this context, it is being argued by the Respondent No.1 that, the argument extended by the Appellant during the Appeal Proceedings that he was

not noticed prior to the passing of the impugned order of impleading him and therefore the Impugned Order lacks merit, may not be a justified reason, because the prior notice is not required and that whatsoever the defence the Appellant has at his command against his being impleaded as an Additional Corporate Debtor, it was still open to be agitated before NCLT upon acceptance of notice as directed in para 19 of the Impugned Judgment. He has argued that prior notice is not a condition precedent for being impleaded in a proceeding under section 9 of I & B Code, and based on the evidence on record, the Appellant is having a major shareholding and managerial control over the Corporate Debtor and since the Corporate Debtor is a subsidiary of the Appellant, he will be necessary party to CIRP Proceedings and that the decision has been taken by the Learned Adjudicating Authority after an elaborate consideration of the financial and managerial status of the Appellant in the management of the Corporate Debtor.

Ultimately, the point of determination as put forth by the Learned Counsels for the parties emerges before this Tribunal as to whether at all a prior notice, prior to allowing of the Impleadment Application, was required to be issued or not.

Thus, ultimately the controversy as raised by the Learned Counsel for the Appellant in his arguments, would be confined as to whether the Impleadment Application, as it has been preferred by the Respondent No.1 could at all have been allowed without there being a notice issued to him, who was sought to be

impleaded in order to enable him to put forth his views on whether at all he happens to be the necessary party to the proceedings or not. Hence, primarily the contentions of the Appellant is that in the absence of their being any notice prior to the Impleadment, that itself would vitiate the Impugned Order.

This contention of the Learned Counsel for the Appellant is being vehemently refuted by the Learned Counsel for the Respondent contending that if the vital principles of Order I, Rule 10 of CPC are taken into consideration, it is an exclusive prerogative of the Court / Tribunal to come to a conclusion as to whether, any particular entity or a person, is at all required to be made as a party in a proceedings. It will exclusively depend upon the rationales and determination to be made by the Court / Tribunal, prior to passing any order on the Impleadment Application. He has further argued that the power of determination, as to whether the subject matter in the Judicial proceedings could have been effectively decided after impleadment of a particular party to the proceedings, has been exclusively left open to be determined by the Court before whom the proceedings are pending. It is contended by the Learned Counsel for the Respondent that no pre-impleadment notice was required to be issued particularly in the context of the instant case, where after allowing the Impleadment Application by the Impugned Order, the Learned Counsel for the Appellant has been issued with the notices to make submissions on the merits of the matter. Relying on the observations which has been made in the Impugned

Order, it is argued by the Learned Counsel for the Respondent, that the basic objective of the necessity of impleadment stands satisfied with the operative portion of the Impugned Judgment and yet an opportunity has been reserved for the Appellant to be availed of to put forward his contention about the necessity of him being a party to the proceedings and that has not yet been exhausted by the Appellant.

He submits that issue of notice and hearing the party prior to impleadment is not mandatory even as per the language used under Order I, Rule 10 of CPC and for the aforesaid purpose the Learned Counsel for the Respondent refers to the Judgment rendered by the Hon'ble Delhi High Court in **Co. A. (SB) 98/2011 & Co. Appl. Nos.2542-43/2011 is Star Light Credit (India) Ltd., Vs. Robin Gupta and Ors.**, wherein Hon'ble Delhi High Court has dealt with the issue in Para 10 & 11 of the said Judgment, where the single Judge of the Hon'ble Delhi High Court, has laid down that notice prior to the impleadment of a person in judicial proceedings is not mandatory and since it is exclusively an aspect to be considered by the court regards the necessity of a person sought to be impleaded, a prior notice is not required. The relevant para 11 is extracted hereunder:-

“11. So far as the grievance of the appellant that it should have been put to notice of an application seeking the impleadment, whereby it was proposed to implead the appellant is concerned, I again find no merit in the appellant's submission. The Division Bench of this Court in Walchandnagar Industries (supra) held:

...In the normal course, it is a contradiction in terms to issue notice of an application seeking the impleadment of a party to the party proposed to be so impleaded. If the Court is convinced by the Plaintiffs submission of the necessity and expediency of impleading the proposed parties, the proposed party should be impleaded and notice would thereafter be issued to it. There is no scope, nor is this practice, for obvious reasons, at the very first instance and at the very initiation of the suit to show cause why it should be arrayed as a defendant. Of course, it is always open to the defendant as it would be available to a party impleaded in the course of litigation to file an application under Order I Rule 10(2) of the CPC for striking it out of the array of parties”.

He further refers to yet another Judgment rendered by the Hon’ble High Court of Bombay at Goa in the matters of **Zavier Fernandes & Anr., Vs. State of Goa & Ors.**, wherein the person who was impleaded had contended in a proceeding before the Hon’ble High Court, that in the absence of there being any notice issued prior to his impleadment therein as a party, the notice or the order of the impleadment itself would violate the principles of natural Justice. Though this order was in the context of the provision of Lokayukta’s Act, but still the Hon’ble High Court of Bombay at Goa, had drawn a conclusion that since the mandatory scheme for the purposes of impleading a person as the party to the proceedings do not prescribe for a prior notice and thus the impleadment could be at the instances of the party to the proceedings or Suo motu by the Court itself, no notice is required to be given. The primary principle was considered by the Hon’ble High Court of Bombay at Goa, in Para 36, 41, 42 & 47 of the Judgment which are extracted hereunder which in its composite analysis has settled the

controversy as derived in Para 61 that no notice prior to passing any order of impleading a person as a party to the proceedings is required. Thus, the basis of the aforesaid reasons, the contention of the Appellant as argued in the instant case about the necessity of issuance of notice to him prior to its impleadment is turned down and is not accepted by this tribunal.

“36. According to Walchandnagar Industries, Order I Rule 10 of the CPC permits a person’s impleadment of his presence is essential for the court to determine the real matter in dispute. In other words, the necessary party’s absence will have a deleterious consequence: it non-suits the plaintiff for non-joinder of the necessary party. Walchandnagar Industries, as I understand, pursued the plaintiff’s perspective; it has not dealt with why the proposed party need not be put on notice before it is brought on record. A party would safely expect to be notified, as the petitioners contend, before he was pushed into the arena of litigation, gratuitously

41. In a suit for partition, the petitioner was impleaded as 175th respondent. As the trial court did not notify him before the impleadment, the petitioner challenged the order. The High Court of Karnataka, per S. Sujatha J., in Gunadhar Muttin v. Shantinath [¹⁰], has held that under Order I, Rule 10 of CPC, “it is hardly required to be stated that the proposed defendant has to be put on notice before passing any order on the application filed by the plaintiff for impleadment of such parties.” Thus, Gunadhar Muttin has treated the order of impleadment as irregular for want of pre-impleadment notice. This decision, too, I may respectfully note, has supplied no reasons to read into Order I, Rule 10 the necessity of a pre-impleadment notice.

(e) Mumbai International Airport:

42. In Mumbai International Airport Pvt. Ltd., the Supreme Court per R. V. Raveendran J, has distinguished between the necessary party and

property party. It has considered the scope and ambit of Order I of Rule 10(2) CPC and held that the “sub-rule is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding”. The discretion under the sub-rule, according to it, can be exercised either suo motu or on any party’s application. The court can strike out any party who is improperly joined; it can also add anyone as a plaintiff or as a defendant if it finds he is a necessary or proper party. “Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose”. In exercising its judicial discretion under Order I Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice.

47. Finally, the icing on the cake is found in paragraph 26 of the Judgment. Ashwani Kumar aptly observes that Order I, Rule 10 of the code expressly does not provide that a proposed party must be heard before his impleadment. But, then, the provision does not also mandate that under no circumstance or situation should any notice go to the proposed party. Harmoniously construed, the provision, according to Ashwani Kumar, allows the court to exercise its discretion to decide whether it should issue a pre-impleadment notice to the proposed party. That is, it depends on the “facts of the lis itself”. With respect, I agree with Ashwani Kumar”.

As far as the aspect of impleadment is concerned from the perspective of the Appellant, that there was no prior notice given to him, it is an aspect which has already been dealt with, coupled with the fact since the issue of impleadment being exclusive prerogative of the court because it is the court which has to determine the necessity of the party to be introduced in the proceedings as to

whether if at all it is the necessary party to decide the case effectively, we find no error in the Impugned Judgment under challenge allowing the Impleadment Application. Thus, the Appeal lacks merits and the same is accordingly dismissed.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranatha Swain]
Member (Technical)

24.07.2024
VG/TM