NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.903 of 2020

IN THE MATTER OF:

Victor Vanya Bandlamudi …Appellant
C-004, Stellar Kings Court,
F Block, Sector 50,
Noida,
Uttar Pradesh – 0203201

Versus

Mercados Energy Markets India Private Limited …Respondent
A2, 2nd Floor,
Block-E, International Trade Tower,
Opposite Satyam Cinema,
Nehru Place,
Delhi – 110019

For Appellant: **Shri Arun Saxena and Ms. Nalini Singh, Advocates**

For Respondent: **Shri Sourav Roy, Shri Kaushal Sharma and Shri Prabudh Singh, Advocates**

O R D E R
(Virtual Mode)

12.02.2021 Heard Counsel for both sides. This Appeal arises out of Impugned Order dated 28th February, 2020 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench – VI) in IB-3006/ND/2019. By the Impugned Order, the Adjudicating Authority dismissed the Application filed by the Appellant under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC – in short), holding that there was pre-existing dispute.

2. The Appeal claims and the learned Counsel for the Appellant has submitted that the Appellant had joined the Respondent Company as Senior Manager in January, 2017. On 31st October, 2018, the Appellant had sent e-mail (Page -97) to the Respondent – Corporate Debtor informing that he was resigning and may be relieved by 31st January, 2019. Counsel submitted that the Appellant was relieved w.e.f. 31st March, 2019 which can be seen from the letter dated 8th April, 2019 (Page – 98) where the Respondent Company has accepted the resignation and even stated that the contributions of the Appellant in the Company were appreciated. Thus, it is stated, there was no dispute. It is argued that the Appellant had responded to the Respondent Company when the Respondent Company informed regarding full and final settlement vide e-mail dated 18th April, 2019 (Page -116), that the bonus payment pertaining to the Financial Year 2018 – 2019 is pending. The learned Counsel submits that thereafter the Appellant sent three reminders to the Respondent Company but the bonus was not paid. It is then the submission of the learned Counsel for the Appellant that the Appellant had then sent a legal Notice on 1st August, 2019 (Page -121) calling upon the Respondent – Corporate Debtor to release the amount due of the bonus – Rs.10,35,700/- with interest or the Appellant would file Criminal Case as well as Civil Suit against the Respondent Company. It is stated that thereafter on 2nd August, 2019, the Respondent Company sent Reply dated 2nd August, 2019 (Page 123) and for the first time, started raising disputes which in substance, were based on the desire of the Respondent Company that the Appellant should extend the retainership with the Company. The learned Counsel submits that the disputes raised in the letter dated 2nd August, 2019 which was followed by a

legal Reply through Advocate on 23rd August, 2019 (Page -127), was not in the context of the liability to pay the bonus and it was rather the other disputes the Respondent Company wanted to raise regarding retainership.

3. The learned Counsel for the Appellant has relied on the Judgement in the matter of **"Mobilox Innovations Private Limited Versus Kirusa Software Private Limited"** reported as (2018) 1 SCC 353 (Diary No.24491) where in para – 51, the Hon'ble Supreme Court observed as under:-

> "**51.** 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."

Relying on the above paragraph, the learned Counsel submits that the dispute which is raised has to be a dispute existing in fact and it should not be spurious, hypothetical or illusory. The learned Counsel submits that in the present matter, the dispute raised is not real dispute with regard to the bonus

claimed and thus, the Adjudicating Authority wrongly observed in para – 4 of the Impugned Order as under:-

> "4. We have gone through the details of the documents filed by both the parties. It is apparent from the letters dated 02.08.2019 and 23.08.2019 sent by the Respondent to the Applicant that there existed a dispute between the parties with regard to payment of bonus to the Applicant. The Respondent has claimed in the above letters that according to discussion between the parties the bonus was to be given to the Applicant if certain conditions were fulfilled by the Applicant. The conditions related to extension of the notice period and execution of a retainership agreement between the parties. The Respondent claims in the letters that since these conditions were not fulfilled the bonus is not payable to the Applicant. In light of this pre-existing dispute between the parties and present application is dismissed with no cost."

4. The learned Counsel for the Respondent, however, submits that the Section 8 Notice is dated 9th September, 2019 (Page -133) to which also, the Corporate Debtor had sent Reply on 25th September, 2019 which is on record. It is submitted that even before this date of 9th September, 2019, the exchange of correspondence as well as e-mails on record show that there were serious disputes regarding bonus between the Appellant and the Respondent. The learned Counsel referred to the communication dated 2nd August, 2019 as well as the legal Reply which was sent through Advocate on 23rd August, 2019 to submit that the dispute was real between the parties and that the Appellant was found as not entitled to bonus which was performance related as the Respondent had found that the Appellant had not only gone back from entering into the further retainership contract but had also entered into competitive business during the course of his employment with Respondent

and thus was not entitled to the bonus. The learned Counsel has taken us to the contents of the Reply dated 2nd August, 2019.

5. The learned Counsel for Respondent further referred to e-mail sent by the Respondent Company to the Appellant on 30th March, 2019 (Page – 104 at 105) to submit that the disputes concerned had been communicated to the Appellant much before the Notice under Section 8.

6. Having heard Counsel for both sides, keeping Judgement in the matter of Mobilox in view, the short point for us to consider whether there was pre-existing real dispute regarding bonus between parties. Some of the contents of the Reply dated 2nd August, 2019 sent by the Respondent may be reproduced:-

> "Further, w.r.t. the extended Notice Period up to 31st March, 2019, Mercados had agreed to pay Variable Pay (bonus) to you albeit with the following conditions:
>
> 1) Mr Victor Vanya B, would enter into a Retainership contact with Mercados for a period of 6 months.
>
> 2) The Fixed Monthly Retainer fee (GST and OPE in addition) of INR 180,000/- would be payable to Mr. Victor Vanya B.
>
> 3) The services rendered under the Retainer contract shall be Support and Advisory services for Energy Trading and Risk Management (ETRM) in respect of Portfolio Management Services and on Power Markets to Mercados' Clients.
>
> 4) Mr. Victor Vanya B cannot join any rival consulting firm for the period up to Retainership period and for 1 year thereafter.
>
> 5) The said Agreement shall be irrevocable unless either parties stop performing the roles and

responsibilities envisaged under the Agreement. In that case the other party can terminate because of breach of contract.

6) Mr. Victor Vanya B or any of his associates or any of its client cannot poach any employees of Mercados during the period of Retainership and for a period of 1 year thereafter.

The above was communicated to you by Managing Partner, Mercados vide email dated 2nd February, 2019, 9:28 am and email dated 3rd February 2019, 11:27 am.

Subsequently, vide email dated 12th March, 2019, 12:11 hrs, you intimated to Mercados that you have incorporated a company named EMA Solutions Pvt. Ltd. **It is pertinent to mention here that the said company as incorporated by you while being in full time employment with Mercados which was in violation of the Code of Ethics Policy of Mercados.**

Subsequently, on 19th March, 2019, 4:42 pm, you had emailed to us from email ID titled: victor@energymarketanalytics.com with a copy to your official Mercados ID i.e. victor@mercadoseemi.in wherein you circulated the Draft Retainership Agreement for our inputs. Subsequently, considering our initial comments, an updated version of Draft Retainership Agreement was submitted by you vide email dated 25th March, 2019, 2:49 pm. Subsequently, Mercados had replied vide email dated 26th March, 2019, 8.07 am."

[Emphasis supplied]

It is further mentioned in the Reply dated 02.08.2019:-

"Thus, it is evidently clear from the above communications that Mercados had agreed for full Variable Pay (bonus) payout in lieu of extended notice period up to 31st March 2019 and signing of Retainership contract for a period of 6 months including adherence of the conditions communicated vide email dated 2nd February 2019, 9:28 am and email dated 3rd February 2019, 11:27 am. However, you have decided not to sign the Retainership contract with Mercados and just decided to walk away from Mercados. This was

communicated by you vide email dated 30th March 2019, 10:57 am.

Further, please have reference to you email dated 16th May, 2019, 6:41 pm and 19th July 2019, 9:58 pm, wherein you have already reminded Mercados towards your Variable Pay (bonus) payout. Here you have selectively attached an email from Mercados management dated 1st February, however, you have not attached the more relevant and subsequent emails reproduced hereinabove which aptly demonstrate how you have gone back on your promise of signing the Retainership Agreement although you had agreed towards the same.

You have unilaterally decided to not to sign the Retainership contract with Mercados which you had earlier agreed in the month of January 2019. Your Variable Pay (bonus) was linked with the signing of the Retainership contract. Hence your claim towards the Variable Pay (bonus) under the current situation is not tenable. Mercados had to face severe financial and other consequences towards your last minute refusal to sign the Retainership contract.

It is also pertinent to mention that while being in full time employment with Mercados, you have incorporated a company named EMA Solutions Pvt. Ltd. and became its director and shareholder which is also another full time position. As per the main objects clause of EMA Solutions Pvt. Ltd. it is evident that the products and solutions of your company are in direct competition with Mercados while you were in employment and drawing compensation from Mercados. The Objects clause of EMA Solutions Pvt. Ltd. is reproduced below:

"The company caters to Power Sector and associated participants by providing Data Analytics and Data Management solutions, which includes associated Software and Consultancy services associated with market and their associated strategic aspects."

Further you failed to perform any of the tasks assigned to you during the extended notice period. You delayed the completion of key deliverables at each stage which was not in line with the professional code of conduct. It has also come to our notice that while you were in full time employment with Mercados, key experienced person had approached you seeking employment with

> Mercados. But you had deliberately withheld such key information from us and either discouraged them from joining Mercados or conveyed to them that there were no vacancy in Mercados which was contrary to truth. Additionally, some of our existing employees have reported to us that while you were in full time employment with us, you had encouraged them to leave Mercados and join your new organisation. We have sufficient evidence to prove this in a court of law through their personal testimony.
>
> This is violation of your employment contract with Mercados and also in violation with the Code of Ethics Policy of Mercados. Mercados reserves its rights to pursue appropriate legal action against you in a court of law for such violation and the consequences which you may face due to such court action would be solely attributable to your actions."

The learned Counsel for Respondent submits that there was violation of the terms on which extended Notice period was given. It is stated that Respondent had communicated these disputes, with regard to variable pay (bonus). The communication in the e-mail dated 30th March, 2019 (Page 104 @ 105) also is relevant which reads as under:-

> "……
>
> 1. We have already clarified that scope would be provided before start of each month.
>
> 2. We don't even know other constituents of EMA, what services they provide, are they conflicting with what we do. Etc. we only know Victor Vanya. Hence, accepting second bullet is not possible.
>
> 3. It is incorrect for you to state that full bonus payout was proposed for extension of services. It was in fact proposed for extension of service upot 31st March + Retainer Contract for 6 months. What happens in a scenario where EMA terminates contract after bonus payout. Alternately, you can agree for bonus payout at the end of the completion of Retainer contract period. Then we can remove the Termination penalty."

7. Going through the above, it does not appear to us that it was a spurious or hypothetical dispute raised by the Respondent.

8. We do not find that the observations of the Adjudicating Authority in para – 4 of the Impugned Order which have been reproduced above, are out of place. The Appellant may be able to pursue his remedies in any other Forum if enforceable under law. However, as far as provisions of IBC are concerned which are more concerned with the resolution of the Company, we do not find that there is error in the Impugned Order so as to interfere in Appeal.

ORDER

There is no substance in the Appeal. The Appeal is dismissed.

[Justice A.I.S. Cheema]
Member (Judicial)

[V.P. Singh]
Member (Technical)

rs/md