

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.313 of 2018

[Arising out of order dated 31.07.2018 passed by National Company Law Tribunal, Mumbai Bench, Mumbai in C.P.-1864/241/(MB)/2018]

IN THE MATTER OF:

Dominic Thomas Karipaparambil
19-A, Flat No.22, Takshila,
Mahakali Caves Road, Andheri (East),
Mumbai – 400093

...Appellant
(Original Petitioner)

Versus

1. Xact Data Discovery India Private Limited
Level 2, Raheja Centre point,
294, CST Road, Off Bandra-Kurla Complex,
Santacruz (E), Mumbai – 400098 India.
2. Xcellence Inc.
5800 Foxridge Drive, Suite 406 mission
Kansas 66202, United States of America,
3. JLL XDD Holdings LLC.
245 Park Avenue, Suite 1601, New York,
NY 10167, United States of America
4. Mr. Robert Michael Polus
R/o 15344, Knox Street Overland Park,
Kansas 66221, United States of America
5. Mr. Kranthi Kumar Singamsetty
Flat No.401, Uma Residency,
Block 2, Matrusri Nagar, Miyapur,
Opposite Street of DAV Public School,
Hyderabad – 500 049, TG, India
6. Mr. Purnachandra Rao Dasi
R/o Plot No.825, Flat No.301,
Sai Siri Residency Mathrusri Nagar,
Miyapur, DAV Public School,
Hyderabad – 500049, TG, India

7. Deloitte Touche Tohmatsu India LLP
Indiabulls Finance Centre, Tower – 3,
27th – 32nd Floor, Senapati Bapat Marg,
Elphinstone Road (West), Mumbai,
Mumbai City MH – 400013, India
8. JLL Partners Fund VII, L.P.
C/o. JLL Partners Inc.
Michael Schwartz, 450 Laxington Avenue,
31st Floor, New York,
New York – 10017.

...Respondent
(Original Respondents)

For Appellant: Shri Samar Bansal, Shri Anshu Bhanot, Shri Anuj Mirdha, Mr. Tushar Gupta, Shri Manan Shishodia and Ms. Devahuti Pathak, Advocates

For Respondents: Shri Malak Bhatt, Advocate (Respondent Nos.1 to 6 & 8)

Shri Arun Kathpalia, Senior Advocate with Shri Pranaya Goyal, Shri Aman Raj Gandhi and Shri Yash Badkur, Advocates (Respondent No.7)

ORAL JUDGEMENT
31.10.2018

A.I.S. Cheema, J. : This Appeal has been filed by original Petitioner against deleting of Respondent No.7 – Deloitte Touche Tohmatsu India LLP from the array of Respondents in the Company Petition.

2. The learned Counsel for the Appellant has submitted that as Interim Order dated 12.06.2018 – Annexure - 2 of the Appeal shows the Company Petition had come up before National Company Law Tribunal, Mumbai Bench, Mumbai ('NCLT' in short) and the matter had been adjourned to 31.07.2018 with a direction to place on record minutes of

the meeting and such information connected with the issue of removal of the Director through a Praecipe at any convenient date; the Respondents had been directed to file the Reply by the end of the month to be circulated on the other side and thereafter, Rejoinder, if any, was to be filed by 15th July, 2018; and, Petition was listed on 31.07.2018 for further hearing. Thus, according to the learned Counsel, the Petition was basically listed for getting the pleadings completed and for further hearing on 31.07.2018. Counsel submitted that Respondent No.7 filed his Reply on 11.07.2018, copy of which is at Page – 77. It is short Affidavit in Reply which reads as under:-

“I, Tehmasp Rustomjee, Designated Partner of Respondent No.7, having office at Indiabulls Finance Centre, Tower 3, 27th 32nd Floor, Senapati Bapat Marg, Elphinstone Road, (West) Mumbai 400013, do hereby solemnly affirm and declare as under:-

1. I have read a copy of the captioned Company Petition and am filing the present affidavit for the limited purpose of placing on record the fact that Respondent No.7 has been wrongly impleaded as a party in the captioned Company Petition for the reasons set out hereafter, and thus, the instant Petition ought to be dismissed as against Respondent No.7 *in limine*.
2. Respondent No.7 has been added as a party by the Petitioner purportedly on the basis that Respondent No.7 was purportedly appointed by Respondent No.1 Company for the purpose of financial advisory and compliance management. Respondent No.7, however, has never been engaged by Respondent No.1 Company, whether for financial advisory and/or compliance management as mentioned by the Petitioner. Therefore, no remedy or relief

as mentioned in the Petition can be claimed against the Respondent No.7.

3. It is, thus, evident that Respondent No.7 has been incorrectly and wrongfully impleaded as a party to the instant proceedings, when in fact, it is not concerned with or has any interest in the instant disputes for the reasons set out above.
4. Respondent No.7 has, by way of its advocates' e-mail dated 21st June 2018 addressed to the Petitioner's advocate, informed the Petitioner's advocate of the wrongful impleadment and requested the Petitioner to drop Respondent No.7 from the captioned Company Petition, Annexed hereto and marked as **Exhibit 1** is a copy of the said email dated 21st June 2018 addressed by Respondent No.7's advocates to the Petitioner's advocate.
5. The Petitioner, however, has not even replied to the aforesaid email by Respondent No.7's advocates.
6. In view of the above, I submit that the instant Company Petition ought to be dismissed as against Respondent No.7 *in limine*, and the Petitioner ought to be directed to compensate Respondent No.7 for needlessly having to bear legal costs."

3. The learned Counsel of Appellant submits that after such Affidavit-in-Reply dated 11.07.2018 was filed and the matter came up on 31.07.2018 before the NCLT for some reason, the Counsel for the Appellant could not reach in time when the matter was called and the NCLT immediately proceeded to pass the Impugned Order. The Impugned Order dated 31.07.2018 reads as under:-

ORDER

1. The Legal Representative of the Respondent is present.

2. When the case was called none from the side of the Petitioner is present.
3. The Respondent has placed on record a Praecipe on 19.06.2018. Listed therein the commencement of the EOGM and also annexed the minutes wherein it is mentioned that the Petitioner declined to present its case.
4. None is present from the side of the Petitioner.
5. From the side of R7 Learned Representative has placed on record the Affidavit in Reply and stated that R7 has wrongly been impleaded. Para 2 of the Affidavit reproduced below.:-

“Respondent No.7 has been added as a party by the Petitioner purportedly on the basis that Respondent No.7 was purportedly appointed by Respondent No.1 Company for the purpose of financial advisory and compliance management. Respondent No.7, however, has never been engaged by Respondent No.1 of Company, whether for financial advisory and/or compliance management as mentioned by the Petitioner. Therefore, no remedy or relief as mentioned in the Petition can be claimed against the Respondent No.7.”
6. Considering the statement affirmed on oath that R7 has never been engaged by the Respondent Company and in the absence of any objection from the side of the Petitioner; R7 is hereby recused from the proceeding of this Petition. Additional Affidavit disposed of accordingly.
7. Further, it is stated that Reply on receiving Petition has been filed by the Respondent.
8. However, no Rejoinder is on record from the side of the Petitioner.
9. Last chance to the Petitioner to file the Rejoinder on 27.08.2018 and serve a copy to

the other side, otherwise the Right to file the Rejoinder be forfeited.

10. The matter is listed for next date of hearing on **28.09.2018 at 2.30 PM.**”

The learned Counsel submits that on first instance itself and when the matter was basically for completing pleadings, only because the Counsel had not reached, NCLT proceeded to delete Respondent No.7 from the array of parties without giving opportunity to the Appellant – original Petitioner to show NCLT that there was material to show that the Respondent No.7 was necessary party in the litigation. The Company Petition relates to oppression and mismanagement. According to the Counsel, the Respondent No.7 is an accountancy and consultancy service provider who was engaged by the Respondent No.1 Company through its Directors for financial advisory and compliances management of the Company and whose services were being accordingly taken. According to the Counsel, the Petitioner had corresponded with Respondent No.7 through its employees and there were number of e-mails showing as to how the Petitioner was systematically kept away from the affairs of the Company. The Counsel submitted that involvement of Respondent No.7 in the affairs was pleaded in detail in the Company Petition.

4. Counsel made reference to the pleadings of the Petitioner in the Company Petition and has read out the pleadings to us. The copy of the Company Petition is available with the Reply of the Respondent No.7

(Diary No.7713). The learned Counsel referred to para 3.7.2, paragraphs – 18, 25, 26, 28, 29, 32, 33 and 36 to show that the original Petitioner had made various averments against Respondent No.7 including averment of collusion between Respondent No.7, Respondent No.2 and Respondent No.4. Para – 33 of the Company Petition reads as under:-

“33. It is fairly obvious from the conduct displayed by the Executive Directors, Respondent No.7 Company and Respondent No.2 Company’s representative and Respondent No.4, that all of them were colluding together to intentionally exclude Petitioner from participating in the affairs of the Respondent No.1 Company or exercising his lawful rights as a promoter, director and the managing director.”

Prayer 1(a) of the Company Petition seeks relief against Respondent No.7 also.

5. The learned Counsel for the Appellant submitted that in answer to such Company Petition, the Respondent No.1 Company had filed response and in para - 18 of the Reply filed in NCLT (Copy at Page – 108 of Appeal) and made averments regarding connection of Respondent Nos.2 and 4 with Respondent No.7. Para – 18 reads as under:-

“18. The contents of the corresponding paragraph are denied as the ‘gradual’ and ‘systematic takeover’ that the Petitioner mentions was, as is evident from the documents placed on record, actually inconsistencies and lapses on part of the Petitioner that were being sought to be rectified by the Respondent No.2 and Respondent No.4 with the assistance of the Respondent No.7, a professional organisation assisting in its professional capacity.”

According to the learned Counsel, in Reply filed by the Company, it did not claim that the Respondent No.7 had nothing to do with the Company – Respondent No.1. Thus, according to the learned Counsel, there was sufficient material available before NCLT to see that Respondent No.7 was a necessary party. Counsel has referred to various e-mails which have been tabulated in para – F of the Appeal and annexed as Annexure – 14 and which it is stated were filed before NCLT, to show that one Mr. Kishore and one Mr. Satish had been corresponding on behalf of Respondent No.7 and which e-mails show that Respondent No.7 was connected with the affairs of the Company and there was no reason to delete the Respondent No.7 from the array of parties.

6. Counsel for Respondents 1 to 6 and 8 has submitted that the portion from para -18 referred to by the Appellant would not be a complete statement and further sentence of the same paragraph is also material. The further sentence from para – 18 of the Reply in NCLT reads as under:-

“As is evident from the email dated 30 August 2016 from Respondent No.7 to Mr. Jim Roger and the trailing emails reproduced therein, Respondent No.1 suffered a service tax liability of approximately INR 26,00,000 (Rupees Twenty Six Lacs).”

Thus, according to the learned Counsel for Respondents 1 to 6 and 8, the connection of Respondent No.7 with the Company was limited to

resolving service tax liability and that Respondent No.7 was otherwise not relevant.

7. Learned Counsel for Respondent No.7 submitted that the e-mails being relied on by the Appellant are all relating to Mr. Satish of Deloitte Haskins & Sells LLP which is a different entity and has nothing to do with the Respondent No.7. The learned Counsel referred to the copies of e-mails filed in this regard. Counsel pointed out Page – 499 and Page – 564 of the Appeal filed with the Reply of Respondent No.7 which e-mail shows correspondence from Satish on behalf of Deloitte Haskins & Sells LLP. (e-mail address - “ssatish@DELOITTE.com”). According to the counsel, this Satish is not employee of Respondent No.7. Respondent No.7 is named Deloitte Touche Tohmatsu India LLP. Reference is made to Page – 562 as an instance to show that Kishore is employee of Respondent No.7 and when he sent correspondence (e-mail – “kishoreuvk@DELOITTE.com”), it was on behalf of Deloitte Touche Tohmatsu India Private Limited. The Counsel submitted that Page – 562 of the copy of e-mail filed with the Reply makes it clear that when Kishore entered into correspondence by e-mail, the subject was service tax registration. The learned Counsel submitted that in the set of e-mails, there are hardly 2 – 3 e-mails which are from Kishore and those e-mails are on behalf of Respondent No.7 and they relate to service tax issues and it is stated that Respondent No.7 was unnecessarily arrayed as party in the Company Petition and the Counsel defended the

Impugned Order to say that the Respondent No.7 was rightly deleted from the array of parties.

8. Counsel for the Appellant in the course of arguments referred to Judgement in the matter of **“S. Sukumar v. The Secretary, Institute of Chartered Accountants of India & Ors.”** reported in 2018 SCC OnLine SC 158 and referred to para – 50 of that Judgement. That matter was under the Chartered Accountants Act and was in relation to breach of Code of Professional Conduct and initiation of investigation which was sought against Multinational Accounting Firms (MAFs) and Indian Chartered Accountancy Firms (ICAF). The Judgement dealt with the issue of MAFs operating in India in violation of law in force in a clandestine manner. In para – 50 of the Judgement, there is discussion of Expert Committee Report which found compliance by MAFs only in form and not in substance, by having got registered partnership firms with the Indian partners, the real beneficiaries of transacting the business of chartered accountancy remain the companies of the foreign entities. In this context, lifting of corporate veil was discussed. The Counsel submitted that in that context in para – 50, the Hon’ble Supreme Court had observed as under:-

“If the premises are same, phone number/fax number is same, brand name is same, the controlling entity is same, human resources are same, it will be difficult to expect that there is full compliance on mere separate registration of a firm.”

On such basis, the learned Counsel submitted that the e-mails show that the e-mail address “@DELOITTE.com” is common for Respondent No.7 as well as for Deloitte Haskins & Sells LLP. The learned Counsel submitted that when common e-mail was being used, the Appellant – Petitioner should not be found fault with for arraying Respondent No.7 as a party Respondent, as Respondent No.7 held itself out as part of same group.

9. Against this argument of learned Counsel for the Appellant, learned counsel for Respondent No.7 submitted that the Judgement in the matter of S. Sukumar was in totally different context. Chartered Accountants Act cannot be applied here where the facts are totally different and the present matter be appreciated on its own facts.

10. We have gone through the material which has been brought before us. The various paragraphs referred to from the Company Petition contain various averments against Respondent No.7 and we have also noted the response given by the Company to the pleadings with regard to Respondent No.7. The Respondent No.7 is trying to distinguish between itself and Deloitte Haskins & Sells LLP. We are keeping in view observations of Hon’ble Supreme Court in the Judgement referred. We note the e-mail addresses which are from same domain name “@DELOITTE.com”. The domain name appears to have been taken from Data Naming Server Authority by person/persons having commonality of interest. What appears is that different employees are putting their

names using same domain name to do correspondence. This is not a matter where at present stage itself of the Petition, the Reply of Respondent No.7 should have been hurriedly accepted that Respondent No.7 had nothing to do with regard to services provided to Respondent No.1 Company. We find that at the stage of pleadings, it was material to see the averments in the Company Petition. The Petitioner made averments against Respondent No.7 on its own risk and consequences. Merely because Respondent comes and makes statement that I have nothing to do, is not enough to immediately delete the concerned Respondent from the array of parties This is especially so in the present matter where even allegation of collusion is made by the original Petitioner against Respondent No.7. For such reasons, we do not think that the learned NCLT was justified in deleting Respondent No.7 from the array of parties.

11. We pass the following Order:-

A) The Appeal is allowed. The name of Respondent No.7 is restored to the array of parties in the Company Petition.

B) Respondent No.7 would be at liberty to file detailed Reply in the Company Petition. The original Petitioner will be given opportunity to file the Rejoinder to the Reply to be filed by the Respondent

No.7 and Rejoinder to Replies filed by other Respondents, if not yet already filed.

C) Parties would be at liberty to raise whatever issues they want to raise but the same be decided at the time of final disposal of the Company Petition.

D) The observations made by us in this Appeal will not come in the way of NCLT to take final decision at the time of final disposal to the Company Petition.

E) The Appeal is disposed accordingly. No orders as to costs.

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

[Balvinder Singh]
Member (Technical)

/rs/nn