

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.1107 of 2019

[Arising out of Order dated 10.10.2019 passed by National Company Law Tribunal, Mumbai Bench in CP 4538 (IB)/MB/2018]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Gourav Kishor Shinde
GAT no.612613, Post.
Chipri – 416 101,
Tal – Shirol,
Dist – Kolhapur,
Maharashtra, India

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Appellant

Versus

1. Uday Yashwant Nayak,
Flat No. A-1404,
Exotica, Casa Rio Gold,
Kalyan – Shil Road,
Palava,
Dombivali – 421204

Operational Creditor/
Applicant

Respondent No.1

2. Godawat Consumer
Product LLP,
Through Mr. Anurag
Jain,
Plot No.438,
A/P – Chipri,
Via – Jaysinghpur,
Kolhapur,
MH 416101

Corporate Debtor/
Respondent

Respondent No.2

For Appellant:

**Shri Sourabh Kalia, Ms. Syheena Taqui and Ms.
Bina Gupta, Advocates**

For Respondents:

**Ms. Udit Singh, Advocate (R-1)
Ms. Sowmya Saikumar, Advocate (R-2)
CA Vishal Jain, Representative of RP**

J U D G E M E N T**(16th March, 2020)****A.I.S. Cheema, J. :**

1. This Appeal has been filed by the Appellant against Impugned Order dated 10th October, 2019 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench in CP 4538 (IB)/MB/2018. The Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) was filed by Respondent No.1 – Uday Yashwant Nayak – Operational Creditor (hereafter referred as ‘Operational Creditor’) against Respondent No.2 - Godawat Consumer Product LLP (hereafter referred as ‘Corporate Debtor’). The Corporate Debtor is now arrayed through the IRP.

2. In short, the claim of the Operational Creditor before the Adjudicating Authority was that he was appointed Head of Sales and Marketing – Rice Division (Grade – National Sales Head B-1) on a pay scale of Rs.36,00,000/- per annum, split up of which is with the Appointment Order dated 11th April, 2016 (Annexure A-2 – Page 36 at Page 41). The Operational Creditor claimed to have resigned vide e-mail dated 11th March, 2017 (Annexure A-5 – Page 44). The resignation was accepted vide reply e-mail from the Corporate Debtor dated 4th March, 2017 (Annexure A-6 – Page 46). The Operational Creditor claimed before the Adjudicating Authority that in the Reply e-mail dated 14th March, 2017, the Company had put conditions which were not possible to perform. The Appellant

worked out his dues as under:-

“

Gross salary for March 2017, dues on 10.04.2017	₹ 2,50,000/-
Gross Salary for April 2017 due on 10.05.2017	1,25,000/-
Annual performance Incentive due on 10.05.2017	6,00,000/-
Liquidated Damages, 3 months basic pay @ 1,00,000/- or part thereof. (Part= Ratio of 14 days short served to 60 days notice period (25 days short served less 11 days PL)	70,000/-
Total amount in default	9,05,000/-

”

3. The Operational Creditor claimed that he had sent various reminders and then a Notice under Section 8 was sent on 12th November, 2018 (Annexure A-10 – Page 59). It was claimed that the Corporate Debtor sent Reply dated 23rd November, 2018 (Annexure A-11 – Page 63). The Operational Creditor claimed that the Reply was invalid. It was claimed that the Corporate Debtor raised flimsy and spurious grounds in the Reply.

4. Before the Adjudicating Authority, the Corporate Debtor claimed that the Notice period was required to be of two months and the Operational Creditor served only 1 month 5 days period and that Corporate Debtor was not liable to make payments as claimed. The Corporate Debtor claimed that because of the Operational Creditor, it had rather suffered losses.

5. The Adjudicating Authority heard the parties and on 10th October, 2019 passed following Order:-

“Heard the argument of the Ld. Counsel for the parties.

The petition is admitted. Detailed Judgement later on.”

6. Later on, it appears that reasoned Order was passed, copy of which has been filed at Page – 30 of the Appeal. The Appeal claims that such Order came to be uploaded only on 18th October, 2019 when the IRP (Interim Resolution Professional) came to be appointed and who started taking actions thereafter. It is stated that before this, the Corporate Debtor on 14th October, 2019 authorised the Appellant who is employed as “Service (Manager Operations)” with the Corporate Debtor. Copy of the Resolution adopted by the Corporate Debtor is filed with the Appeal at Page – 115.

7. This Appeal has been filed raising various grounds to show that there was already pre-existing dispute which according to the Appellant, was brought to the notice of the Adjudicating Authority but the Adjudicating Authority did not discuss anything and simply admitted the Application of individual employee putting into jeopardy the profit making Corporate Debtor whose turnover in the earlier year was of Rs.90 Crores. The Appeal claims that the Operational Creditor was in a Senior Post and within a year of joining the service, the resignation was tendered and as per the requirements of the Corporate Debtor, certain formalities were required to

be completed which were not complied and there were disputes and the Operational Creditor who had tendered the resignation on 11th March, 2017 walked away before completing 60 days period as required by the service conditions by sending e-mail dated 15th April, 2017 (Annexure A-7 – Page 47).

8. We have heard Counsel for both sides and perused the Appeal and its Reply.

9. One objection raised to the Appeal by the Operational Creditor, is that the Appellant has no authority to file the Appeal as the Appellant is only an employee of the Corporate Debtor. The Appellant has pointed out that the authority was given to him by the Corporate Debtor. The authority is questioned by the Operational Creditor on the basis that it was a decision taken on 14th October, 2019 by Corporate Debtor and the Application under Section 9 was admitted on 10th October, 2019. The Order reproduced by us above, shows that on 10th October, 2019, a brief Order was passed without detailing the Judgement. The reasoned Judgement appears to have come only subsequently which the Appellant claims was of 18th October, 2019 which, before us, is not disputed as such by the Operational Creditor. In our view, admission of an Application under Section 7, 9 or 10 entails serious trigger of the provisions of IBC and it is improper for the Adjudicating Authority to pass such cryptic Order like “The Petition is admitted. Detailed judgement later on.” It is another thing if the complete Judgement is dictated in open Court which can be

transcribed and signed later but not to dictate the Judgement itself and admit the Petition like one under Section 9 proceeding under the IBC, should not have been done. On 10.10.2019 when the two line Order was passed, no IRP had been appointed and no directions were issued. Learned Counsel for the Corporate Debtor referred to Section 5(12) to submit that where Interim Resolution Professional (IRP) is not yet appointed while admitting the Application, the commencement date gets scheduled to the date on which Interim Resolution Professional is appointed. This is yet another reason why we have just observed that it is quite inappropriate to pass cryptic Order as was done in this matter and then a subsequent Judgement giving reasons is passed. We, however, do not enter into this technicality as in our view even if on day one, even if IRP was to have been appointed, the suspended Board of Directors would have a right to challenge the Order of admission in the capacity of Directors. They naturally have capacity to give power of authority to employee like Appellant to represent them in an Appeal.

10. If the Impugned Order is perused, as far as reasons are concerned for admitting the Application, it is brief as can be seen from Para – 12 of the Impugned Order which reads as under:-

“12. On perusal of the appointment Letter of the Applicant along with the Salary Structure; the Resignation relating Email; the Reply Email and the Email reminders issued by the Applicant seeking his dues; it appears that the Corporate Debtor has spurious defence to show an existing dispute, which

is an attempt to deny an employee his legitimate dues.”

Thus without discussing the defence, it was branded as spurious.

11. The Adjudicating Authority then referred to Judgement in the matter of “**Mobilox Innovations Private Limited v. Kirusa Software Private Limited**” reported as (2018) 1 SCC 353, reproduced a paragraph from therein and observed that there was no dispute in existence before receipt of admission Notice.

12. The Counsel for the Appellant has pointed out that the Operational Creditor was in a senior position working as employee of the Corporate Debtor and was given handsome pay which was for a purpose. The Appointment Order (Annexure A-2) shows that if the Operational Creditor wanted to resign, he had to give a notice of 60 days and in default a sum equivalent to 3 months’ basic pay was to be given by the employee, by way of liquidated damages which the Company could appropriate against dues payable to the employee. The learned Counsel states that the Corporate Debtor had on 11th January, 2017 sent e-mail (Annexure A-4 – Page 43) to the Operational Creditor and others which is in the nature of “standard operating procedure” relating to Left/Resigned/Terminated Employees’ Full and Final Settlement. It was informed that one of the requirements was that for Sales employees, it is mandatory to obtain field NOC from all Superstockists, Dealer distributors towards no payable/receivable transactions. It is stated that the standard operating procedure was

required to be issued so as to have security with regard to making full and final payments to employees when they Leave, Resign or are Terminated. The argument is that the Operational Creditor was aware of such operating procedure which was sent to senior officials like Appellant for implementation. Record shows, that when the Operational Creditor sent e-mail at 8.21 P.M. tendering his resignation on 11th March, 2017 (as at Page – 45), the partner of the Corporate Debtor sent reverse e-mail at 11.32 P.M. and sought reasons for the same and at the same time called upon the Operational Creditor (see Page 44) as under:-

- “1) Clear all the outstanding from all distributors
- 2) Clear all the communication with MT’s and hand over to Rakesh Somaya on his joining
- 3) Complete the tasks in hand like listing with Spar/ Reliance/Walmart/DMart
- 4) Please close the pending issues with Grofers
- 5) Please clear all issues and grievances of existing Distributors
- 6) Need to clear all the formalities of CPC/CSD and handover to new joinee
- 7) Please continue till appropriate replacement has been found”

13. On 14th March, 2017, the management conveyed formal acceptance vide Annexure A-6 repeating the above and informing the Operational Creditor that he will be relieved from organization post clearing above points after proper handover and settlement of dues, if any.

14. On behalf of the Corporate Debtor, Counsel pointed out Annexure A-7 (Page – 47) (which are trial of) e-mails dated 15th April, 2017 exchanged between the Operational Creditor and the Corporate Debtor. In the e-mail dated 15th April, 2017 at 3.43 P.M., it was conveyed to Operational Creditor:-

“With reference to our talk and your discussion with management at Rice Plant about your relieving I would want to bring to your notice that for the Level & Designation you hold, officially you have to serve the Notice Period of two months. You have submitted your resignation on 11th of Mar 2017 hence you need to stay back in operation till 11th of May 2017. It is expected from your end during this tenure to obtain field NOCs from all the parties you have dealt with and also seek clarities from your reporting team ZSM, RSM, ASM level. This is in line to set off all the accounts with parties and F&A Dept.

Failing to serve the notice period in full you need to pay to the company the difference amount of Salary for number of days of shortfall in Notice Period.

Apart earlier referred pending cases you are directed to obtain clearance from all the concerned departments, field-Clients, Parties, Sales force & submission of all office assets issued to you to be returned to concerned authorities and only after that the management will then take a call of your relieving from the system.”

The Operational Creditor replied at 4.05 P.M. as under:-

“This reference to my discussions with the management in the afternoon regarding my relieving on 15th April 2017. As per my appointment letter, I need to serve 2 months’ notice and as on date I served one month and 5 days. I do have 11 days of PL with me which can be adjusted against my notice period. The difference of 14 days, you may adjust against my basic salaries. As on today, I still need to get March

2017 salary and 1st to 15th April 2017. As it was committed by you and the management, Rs.6 Lakhs is also pending towards my Variable Pay. Please do my full & final settlement adjusting the notice period difference. If at all I need to pay, I will pay the same to the company without any delay.

The clarity was already given to the management regarding during ZSMs meeting on 7th & 8th April 2017. I wish to inform you that I am available on 9619997006 for any further clarification and also assure you and the management that will provide all the possible support & help if required at any time.

As discussed, I will hand over all the company's asset to Mr. Prashant Mane and will obtain his acknowledgement and send you all the details.”

In another e-mail of the same date of 15th April, 2017 at 6.32 P.M., the Corporate Debtor informed the Operational Creditor that his relieving from the system and F&F is subject to clearance from all concerned departments on realisation to settlement of all due recoveries. Referring to all this, the learned Counsel for the Appellant submitted that apparently and clearly there were responsibilities to be discharged by the Operational Creditor before he could really walk away after the resignation. The learned Counsel further referred to e-mails exchanged between the Operational Creditor and Corporate Debtor, copies of which are at Pages – 68 to 71 of the Reply (Diary No.16834). This exchange of e-mails appears to be between 24th January, 2017 to 2nd October, 2017 with the parties making averments against each other. Although Operational Creditor claims that the conditions put to relieve were not possible to perform, fact remains that Operational Creditor was no ordinary employee. He was Head of Sales and

Marketing. Record shows disputes regarding requirement and need to hand over detail charge to save Company from losses. Even articles were to be handed back.

15. Apart from the above, record shows that the Operational Creditor had earlier sent a Notice under Section 8 of IBC on 26th March, 2018 (Annexure A-8) and the Corporate Debtor had raised similar disputes in Reply dated 24th April, 2018 (Annexure A-9). Various disputes had been raised already till 24th April, 2018. The Operational Creditor gave up the earlier Notice sent under Section 8 and on 26th March, 2018, the Operational Creditor sent yet another Notice under Section 8 of IBC on 12th November, 2018 (Annexure A-10) and on basis of that Notice filed Application under Section 9 before the Adjudicating Authority. Reason stated in the synopsis of that Application for not acting on the earlier Notice, was that the Operational Creditor is a person with limited means.

16. The Application under Section 9 of IBC based on Notice under Section 8 dated 12th November, 2018 was thus instituted. There is more than sufficient record that there were pre-existing disputes regarding handing over of the charge and the entitlements before the Notice dated 12.11.2018 was sent. The learned Counsel for the Appellant has pointed out Leave Policy (Page – 68 of the Appeal) to say that the employee is not allowed to use balance unutilised leave while serving the Notice period. Disputes were raised even regarding performance incentive. The Appellant himself in the Notice (Annexure A-10) dated 12th November, 2018 stated

that the Annual Performance Incentive was due on 10th May, 2017. He having resigned by Notice dated 11th March, 2017 and admittedly stopped attending after 15th April, 2017, has claimed Rs.6 Lakhs against this head, without showing that the performance was found to be up to the mark. These are service disputes and we cannot enter into settling these disputes.

17. The record shows that there were pre-existing disputes between the parties when Notice (Annexure A-10) was sent and Application under Section 9 of IBC was filed. In this view of the matter, the Application under Section 9 should not have been admitted as the disputes are service disputes which do not appear to be mere bluster.

18.(A) For above reasons, the Appeal is allowed. The Application under Section 9 of IBC filed by Respondent No.1 – Operational Creditor before the Adjudicating Authority is dismissed.

(B) The Impugned Order is quashed and set aside. Actions taken by IRP/RP in consequence of the Impugned Order are quashed and set aside. The Corporate Debtor is released from the rigour of law and is allowed to function independently through its Board of Directors. The IRP/RP will hand back the records and management of the affairs of Corporate Debtor, to the Board of Directors.

(C) The IRP/RP will place particulars regarding CIRP costs and fees before the Adjudicating Authority and the Adjudicating Authority after examining

the correctness of the same, will direct the Operational Creditor to pay the same in time to be specified by the Adjudicating Authority.

The Appeal is disposed accordingly. No costs.

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

[Kanthi Narahari]
Member (Technical)

/rs/md