

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II

(IB) 3285/ND/2019

IN THE MATTER OF:

SHRI SAMIR PRASAD CHEITRI

EX- EMPLOYEE OF ISCHOLAR EDUCATION SERVICE PRIVATE LIMITED

IN THE POST OF - REGIONAL MANAGER - SALES

S/O SHRI KRISHNA BAHADURCHETTRI

R/O, FLAT NO 2A, 61/A/1 BANGAL PARA 2TM BYE LANE

HOWRAH — 711104

WEST BENGAL

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

1. ISCHOLAR EDUCATION SERVICE PRIVATE LIMITED

THROUGH ITS MANAGING DIRECTOR

FLAT NO. 257, DDA COMMERCIAL COMPLEX-L,

CYCLE MARKET,

JHANDEWALAN EXTN.

NEW DELHI — 110055

INDIA

ALSO AT:

ISCHOLAR EDUCATION SERVICE PRIVATE LIMITED

THROUGH ITS MANAGING DIRECTOR

HAVING ITS CORPORATE OFFICE AT:

NO. 50, 51, 3RD FLOOR,

LASKARHOSUR ROAD,

ADUGUDI, BANGALORE — 560030

2. UNION OF INDIA,

MINISTRY OF CORPORATE AFFAIRS



**THROUGH SECRETARY
A-WING, SHASTRI BHAWAN,
RAJENDRA PRASAD RPAD,
NEW DELHI-110001**

...RESPONDENT/CORPORATE DEBTOR

SECTION: U/S 9 OF IBC, 2016

Order Delivered on: 03.02.2022

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. L. N. GUPTA, MEMBER (TECHNICAL)

PRESENT:-

**For the Applicant/Operational Creditor: Adv. Mohammad Ali and
Adv. Mutiur Rehman**

For the Respondent/Corporate Debtor: Adv. Pradeep Kumar Mishra


ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

The present petition has been filed under Section 9 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency Resolution Process of the Respondent/Corporate Debtor on the grounds of their inability to liquidate the applicant's operational debt.

2. The facts mentioned in the application in brief are as follows: -

- i. That the Applicant had joined as the Regional Manager Sales of the Respondent Company vide appointment letter dt. 16.03.2018 for a Gross Annual Salary of Rs. 12,54,000/- including the Annual Performance Incentive.



- ii. That the Applicant had sent his resignation to the Respondent Company vide email dt. 03.11.2018 which was accepted vide email dt. 06.11.2018.
- iii. That the Respondent Company had defaulted in the payment of salary since the month of August, 2018. As on 30.11.2018, the Respondent Company was in default of Rs. 2,66,001/-.
- iv. That the Applicant had also worked as Consultant for the Respondent Company during the month of February, 2019 and issued an Invoice being Bill No. 001 dt. 28.2.2019 for the amount of Rs. 82,500/- which is unpaid.
- v. That the Applicant issued a demand notice dt. 20.05.2019 for the payment of total outstanding sum of Rs. 3,35,916/- which was served via speed post on 21.05.2019. However, till date, neither any payment has been made nor any dispute has been raised.

3. That the Corporate Debtor has filed its reply and submitted the following:

- i. That the Applicant was appointed vide appointment letter dt. 16.03.2018 on probation period of 6 months from the date of joining of the Respondent Company, which might be extended or deemed completed earlier, on the basis of performance.
- ii. That the Applicant and Mr. Sanjoy Roy alongwith 15 members team were given the sales target for the year 2018-19 and they were paid the 1st month salary alongwith reimbursements. The target was not achieved within 3 months and the company had faced a loss of Rs. 11 lakhs.
- iii. That the Respondent Company has terminated the services of the Applicant due to non-performance.



Therefore, the claim of the applicant is not acceptable as the Applicant was under probation period.

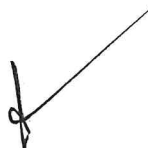
4. That the Operational Creditor has filed written submissions and the scanned copy of which is reproduced hereunder:

1. That the instant application/petition has been filed by the Applicant/Petitioner under section 9 of the Insolvency and Bankruptcy Code, 2016 (“the Code”) against M/s iScholar Education Service Pvt Ltd (“Respondent/Corporate Debtor”) owing to default by the Corporate Debtor in payment of Salary and Consultation Fee of the Petitioner/Applicant. Total default amount is Rs. 3,35,916/-. Please see tabular computation at Page No. 16.

2. That the Applicant/Petitioner is an ex-employee of the Corporate Debtor. He joined the Corporate Debtor vide appointment letter dated 16.03.2018 (See Page No. 17 – 18) as Regional Manager Sales for a fixed salary of Rs. 95,000/- per month along with annual performance incentive of Rs. 1,14,000/-.

3. That the Corporate/Debtor paid full Salary to the Applicant/Petitioner from the month of April, 2018 to July, 2018. However, the Corporate /Debtor started default in payment of Salary to the Applicant/Petitioner from the month of August, 2018 onwards. Complete Account Statement of the Applicant/Petitioner in which Salary was credited is filed with the petition (See Page No. 37-41).

4. That after waiting for some time, the Applicant/Petitioner started demanding dues Salary from the Corporate Debtor. Few demand E-mails dated 09.10.2018 and 02.11.2018 sent by the Applicant/Petitioner to the concerned person of the Corporate Debtor Mr R.P. Nadella is filed with the Petition (See Page No. 32). After repeated reminder and phone call, the part payment of Rs.



38,000/- is received by the Applicant/Petitioner on dated 18.10.2018. Thereafter, no payment has been paid by the Corporate Debtor till date.

5. That due to continuous default in payment of Salary, the Applicant/Petitioner was constrained to resign from the Corporate Debtor vide e-mail dated 03.11.2018, which was accepted by the Corporate Debtor vide e-mail dated 06.11.2018. Thereafter, vide e-mail dated 02.05.2019, 04.05.2019 and 06.05.2019, the Applicant/Petitioner repeatedly demanded his dues Salary (See Page No. 26-27).

6. That on insistence of the Corporate Debtor, the Petitioner/Applicant has also worked as Consultant for the Corporate Debtor during the month of February, 2019 and issued an invoice of Rs. 82,500/- dated 28.02.019 (See Page No. 25). However, this invoice was also not paid by the Corporate Debtor.

7. That vide order dated 07.01.2020, the Corporate Debtor was proceeded ex-parte. However, it has filed its Reply along with an application to recall the order dated 07.01.2020. In the Reply, the Corporate Debtor has duly admitted that the Petitioner/Applicant was working as Regional Manager. However, it is the case of the Corporate/Debtor that the Petitioner/Applicant could not achieve the sales target and therefore, his full Salary was not paid. However, not a single document has been filed by the Corporate Debtor in support of their submission.

8. It is submitted despite repeated demand including demand notice dated 20.05.2019 (See Page No. 47 – 52), the Corporate Debtor is unable to make payment to the Applicant/Petitioner towards his full and final settlement after his resignation dated 03.11.2018. This is clear proof that the Corporate Debtor is not in a position to pay even salary of its employee and therefore, it is most respectfully prayed that this Petition under section 9 may be admitted in the interest of justice. It is prayed accordingly.

5. We have heard the Ld. counsels appearing for the Applicant and the Respondent and perused the averments made in the application as well as in the reply filed by the Respondent. On perusal of the averments made in the application as well as the reply filed by the respective parties, it is an admitted fact that the Applicant is an Ex-employee of the




Respondent, who was appointed vide letter dated 16.03.2018 on the post of Regional Manager, Sales. We further notice that the Applicant has enclosed the Appointment Letter dated 18.03.2018, Pay Slips from the month of April, 2018 to September, 2018 as well as Resignation Letter dated 03.11.2018. As per the calculation chart, at page 16 of the application, the Applicant has claimed that he has received the salary till August, 2018 and has not received the payment for the month of September, October and partly for November 2018 and as such, he has claimed that Rs. 2,66,001/- is due and payable towards salary. Apart from that, he has also claimed the commission, which he is entitled to receive as per the invoice raised in the month of February, 2019. The total amount of Commission is Rs. 69,915/- after adding the commission amount as per the averments made in Part-IV of the application, the defaulted amount is of Rs. 3,35,916/- and according to him the date of default is 31.08.2018.


6. We further notice that by filing the reply, the contention of the Respondent is that the probation period is of six months from the date of joining and since the performance of the Applicant was not satisfactory, therefore, the Applicant was terminated. The Respondent further claimed that due to the performance of the Applicant, the Respondent company had incurred a loss of Rs. 15,00,000/-. It is also the case of the Respondent that the company had given the Applicant three months' time to perform and when the performance was not improved then the company took the decision to terminate the Applicant from the service as per the terms & conditions of the appointment letter dated 16.03.2018.

7. In the light of the aforesaid facts, firstly, we consider, whether the Demand Notice was duly delivered upon the Respondent or not? The Applicant at page 47-53 of its application has enclosed the Demand Notice, Postal Receipts and the Delivery Receipt. Therefore, we would like to examine this issue at first. As per the MCA data enclosed at page 46 of the application, the registered address of the Respondent is "Flat No. 257, DDA Commercial Complex-I, Cycle Market, Jhandewalan Extn., New Delhi DL-110055 IN".



8. The Applicant has enclosed the tracking report at page 53 of the application and the same is reproduced below:-



 You are here Home >> Track Consignment

Track Consignment
Quick help

* Indicates a required field.

* Consignment Number
ED217033873IN


Track More

Booked At	Booked On	Destination Pincode	Tariff	Article Type	Delivery Location
Gopal Nagar SO	13/11/2019 12:46:32	110077	17.70	Speed Post	Raj Nagar II S.O


Event Details For : ED217033873IN

Current Status : Item Despatched

Date	Time	Office	Event
14/11/2019	05:21:30	Delhi NSH	Item Despatched
14/11/2019	03:30:42	Delhi NSH	Item Bagged
13/11/2019	22:00:17	Delhi NSH	Item Received
13/11/2019	15:21:17	Gopal Nagar SO	Item Despatched
13/11/2019	15:17:07	Gopal Nagar SO	Item Bagged
13/11/2019	12:46:32	Gopal Nagar SO	Item Booked



ED217033873IN (VR:6968217033873)
 SP 30603101 MADAD NO (110077)
 Counter No.: 21/05/2019, 12:24
 To: S EOU SER, BARR
 PIN: 560038, Adugudi S.O
 From: S JAB, NO
 Wt: 130gms
 Vat: 79.84(Cash)/55:Tax:10.84
 <Track on www.indiapost.gov.in>
 <Call 1800 265 6868>



ED2170338873IN (VR:6968217033887)
 SP 30603101 MADAD NO (110055)
 Counter No.: 21/05/2019, 12:24
 To: S EOU SER, NO
 PIN: 110055, Sanki Rao Birth Nagar SO

On perusal, we notice that this tracking report is related to Pin Code No. 110077 and not with respect to the Pin Code No. 110055, therefore, we are of the considered view that the Demand Notice was not delivered on the registered address of the Respondent. Even the tracking report shows that it was though



dispatched but not delivered. We further notice that though the applicant has placed on record the postal receipt that some document was dispatched on 21/05/2019 but the tracking report of that post is not produced by the applicant. Therefore, in the absence of that, it cannot be presumed that demand notice was delivered on 21/05/2019, as averred in the application.

9. In view of the aforesaid facts, we are of the considered view that as per Section 8 (1) of IBC, 2016, the Applicant is required to deliver the Demand Notice before filing an application under Section 9 of IBC, 2016. Since, the Applicant has failed to deliver the demand notice to the Respondent before filing the Application under Section 9 of IBC, 2016, therefore, the present application is not maintainable. Hence, the same is liable to be dismissed on this ground alone.

10. **Accordingly, the same is dismissed, being not maintainable.**

-sd-

(L. N. GUPTA)
Member (T)

-sd-

(ABNI RANJAN KUMAR SINHA)
Member (J)

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