

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH

Company Appeal (AT) (Ins) No. 955 of 2020

[Arising out of Order dated 17.09.2020 passed by the Adjudicating Authority/National Company Law Tribunal, New Delhi Bench, Court No. IV in CP (IB) No. 699/ND/2018]

IN THE MATTER OF:

**Captain S.P. Singh
S/O Late Shri Sham Singh
R/O 166, Army Enclave Dheena,
P.O. Jallandhar Cantt.,
Punjab-144005**

...Appellant

Versus

**Himalayan Heli Services Pvt. Ltd.
Through its Director
203, Allied Chamber 9,
Local Shopping Centre Lal,
Bahadur Shastri Marg,
Madangir, New Delhi- 110062**

...Respondent

Present:

**For Appellant : Mr. Soayib Qureshi & Ms. Dilsheen Kaur,
Advocates**

For Respondent : Mr. Vivek Malik, Advocate.

J U D G M E N T
(23.08.2022)

NARESH SALECHA, MEMBER (TECHNICAL)

Preamble:

The Present Appeal is filed against the Impugned Order dated 17th September, 2020 passed in IB No. 699/ND/2018 by the National Company Law Tribunal, Delhi Bench, Court No. IV (Adjudicating Authority) whereby the Adjudicating Authority has dismissed the petition of the Appellant- Captain S.P. Singh i.e. Operational Creditor (**in short OC**), filed

under Section 9 of Insolvency & Bankruptcy Code, 2016 (**in short IBC**) read with Rule 6 of IBC to initiate CIRP Proceedings against the Respondent M/s Himalayan Heli Services Pvt. Ltd., which is the Corporate Debtor (**in short CD**).

Brief Facts:

2. Appellant- Captain S.P. Singh is a certified Pilot and was engaged by Respondent to fly helicopter for BSF. Appellant was offered employment by the Respondent, a private limited company, engaged in the business of Aviation Consultancy and Helicopter Services. On 27.11.2012 the appointment letter was issued to the Appellant. The appointment letter is annexed as A-4 in the 'Memo of Appeal'. The said appointment letter contains the terms and conditions, mainly consolidated salary of Rs. 2,50,000/- per month with mediclaim policy for Rs. 2.50 Lakhs. The Appellant has claimed that in addition to salary, the Appellant is also entitled for benefits like leave encashment, reimbursement of mess bill, telephone bills, travel bill, journey expenditure etc. It is further mentioned that he has worked sincerely during the period 2012-2014. The Appellant also states that the Respondent, vide letter dated 22nd March, 2014 'letter of offer for the post of Pilot' has altered the terms of his employment and salary was revised to Rs. 1,70,000/- per month with mediclaim policy of Rs. 1.5 Lakh. This letter also mentions about payment of extra amount of Rs. 15,000/- per day if the Appellant is required to fly more than the day mentioned i.e. 15th or 16th consecutive days (depending upon the days) in a given month. The Appellant further stated

that the Respondent, vide email dated 09.06.2018, again revised his salary to Rs. 2.5 Lakh per month which was in response of his email dated 12.06.2014 asking hike of salary to Rs. 3 lakh per month along with leave encashment. The Appellant has mentioned that it is evident from the reply i.e. e-mail dated 12.06.2014 (annexure A-7) that his salary was raised to Rs. 2,50,000/- per month and given leave encashment of 25 days @15,000/- per day against his claim of salary of Rs. 3 lakh per month.

3. The MoU to provide helicopter services dated 27th November, 2012, between the BSF & the Respondent had expired on 27th November, 2014. The Appellant claims to have continuously provide services to the Respondent even after expiry of MoU between, the BSF & the Respondent. However, the services of the Appellant came to an end vide termination letter dated 30.06.2015. After giving two months' notice. The Appellant claimed his outstanding dues of Rs. 1,66,268/- against monthly salary of notice period and Rs. 1,16,691/- against imprest amount, Rs. 855000/- against leave encashment for year 2014 and Rs. 1,80,000/- against leave encashment for the year 2015. Thus, total amount of Rs. 13,17,959/- claimed but due to non-response by Respondent, legal notice was issued on 3rd August, 2017 (Annexure A-13) and subsequently demand notice was issued dated 16th March, 2018 (Annexure A-14) Respondent denied the statement of claims of Appellant (Annexure A-16).

4. The Appellant filed the petition with the Adjudicating Authority on 7th May, 2019 but the Learned Adjudicating Authority, vide Impugned Order dated 17th September, 2020, dismissed the petition on ground of pre-existing disputes and hence the Appellant has filed this Appeal.

Appellant's Submissions:

5. The Learned Counsel for Appellant has briefly apprised all the facts of the employment, contractual history and outstanding debt amount of Rs. 13,17,959/- along with various correspondence between him and the Respondent. It is submitted that there was no dispute whatsoever about the quality of service of the Appellant but the Adjudicating Authority has erred in dismissing the petition of the Appellant. It is also stated that the Adjudicating Authority did not consider the leave encashment entitlement of the Appellant and the termination letter was only an afterthought which has been done despite his clean record. It is argued that the termination of service was due to the termination of contract of Respondent with BSF and not due to poor quality of services of Appellant.

6. Learned Counsel has accepted the receipt of the emails dated 22nd March, 2014 and up to 7th May, 2016 which were referred to by the Adjudicating Authority as a pre-existing dispute but stated that only due to ill health, the Appellant could not fly. Learned Counsel has stated that the e-mail of the Respondent dated 12.06.2014 clearly mentions about the Appellants entitlement for leave encashment. Learned Counsel has assailed

the Impugned Order dated 17.09.2020 citing the case of Hon'ble Supreme Court in ***Mobilox Innovation Pvt. Ltd. vs. Kirusa Software Pvt. Ltd.*** (2018 1 SCC 253) on the issue that the dispute need to exist prior to the issuance of demand notice.

7. Learned Counsel has cited the cases of ***Pedersen Consultants India Pvt. Ltd. vs. Nitesh Estates Limited*** 2019 SCC OnLine NCLAT 422 and ***Ahluwalia Contracts (India) Limited Raheja Developers Limited*** 2019 SCC OnLine NCLAT 942 to buttress the point that the dispute needs to exist prior to issuance of demand notice and not otherwise. Learned Counsel has also alleged that the Respondents correspondence is merely to frustrate legitimate claims and to deny the debt dues and has requested to set aside the Impugned Order passed by the Adjudicating Authority.

Respondent's Submissions:

8. Learned Counsel for Respondent has stated that the present appeal is completely devoid of any ground and not maintainable. Learned Counsel has alleged that the Appellant has not come with clean hands and is not entitled to any relief. He assailed the demand notice dated 16.03.2018 and the petition filed under Section 9 of IBC. Learned Counsel has further stated that the Respondent has always disputed the frivolous claims of the Appellant. In fact, the Respondent used to request the Appellant to reconcile various claims and statement on several occasions. However, since the Appellant allegedly himself owed money to the Respondent hence, the Appellant never came

forward. Learned Counsel has mentioned that the basic requirement of petition under Section 9 of IBC is debt due and default thereafter. He mentioned that there was no debt due as such the Appellant cannot be classified as Operational Creditor under Section 9 of the IBC.

9. Learned Counsel for Respondent has stated that the demand notice was issued on 16.03.2018 and the Appellant had raised all his claims subsequent to his termination from employment on 30th August, 2015 (Annexure A-10). The Appellant for the first time, raised claims on 7th May, 2016 and the Respondent replied to it immediately on 10th May, 2016.

10. As regards the Appellant's claim regarding leave encashment, Learned Counsel has stated that there was no stipulation of alleged leave encashment clause in the employment letter. The Respondent has also dismissed the claim of Appellant wherein it was alleged that the Respondent had paid leave encashment for the year 2013 at the rate of Rs. 15,000/- (per day) for unavailed leave. The Respondent has categorically stated that no such payment was even made.

11. The Respondent also refuted the claims of the Appellant, being informed about leave regulation of company, according to which 30 days of earned leave and 12 days of Casual leave were admissible. Learned Counsel for the Respondent also mentioned that this averment was not there in Insolvency Petition and has been raised for the first time in the present appeal. Various

claims of the Appellant of Rs. 1,66,268/- of salary dues Rs. 66,000/- for ferry flight payment and Rs. 1,16,691/- towards imprest amount were not even claimed in Appellant's own email dated 10.05.2017 and these claims were raised only after termination. As regards Appellants claim regarding no deficiency of services, the Learned Counsel has mentioned that the Appellant did not disclose that he was not flying for a period of two years prior to joining. According to Learned Counsel, Appellant did not follow the instructions of Respondent and also taken many unsanctioned leaves. Learned Counsel also brought out that Appellant did not vacate additional accommodation taken which caused problem to fellow pilots who were employed as substitute for the Appellant due to Appellant's non availability for flying. Learned Counsel also highlighted the Appellant unprofessional attitude while referring to the e-mail dated 18.03.2014 and 22.03.2014 of the Respondent. It is also claimed that Appellant was declared medically unfit for flying via medical certificate dated 07.03.2014 for four weeks.

12. Learned Counsel stated that demand notice dated 16.03.2018 was replied refuting claims of Appellant. Learned Counsel also mentioned that there was no default as defined under Section 3(12) of IBC and therefore, appellant do not fall within the definition of Operational Creditor in terms of Section 5(20) of IBC. Finally, Learned Counsel requested that the present appeal may be dismissed.

Analysis

13. We have heard Learned Counsel for the Parties and perused the record made available. We have also gone through the relevant provisions of IBC and the precedents. The following issues are required to be addressed to come to the final conclusions about the case.

- a. Whether any debt was due and not paid by Respondent to Appellant .
- b. Whether any pre-existing disputes were pending before issue of demand notice.

Issue No. a)- Whether any debt was due and not paid by Respondent to the Appellant.

Appellant has claimed total outstanding amount of Rs. 13,17,959/- as debt due which was not paid and therefore, default had occurred.

The debt has been defined in Section 3 (11) of IBC which is as hereunder:-

“3(11). “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”

Since, the term claim is mentioned in the above definition of debt, we need to refer to definition of claim under Section 3(6) of IBC which as under:-

“3(6). “claim” means-

- (a) *A right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
- (b) *Right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;*”

The other relevant definition of IBC with reference to this Appeal are ‘Operational Debt’ and ‘Operational Creditor’ which are as under:-

“operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

“operational creditors” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;”

Similarly, default is also define under Section 3(12) of IBC which as under:-

“3(12). “default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;

14. The Appellant has claimed an outstanding amount of Rs. 1,66,268/- against monthly salary of notice period and Rs. 1,16,691/- against imprest

amount, Rs. 8,55,000/- against leave encashment for year 2014 and Rs. 1,80,000/- against leave encashment for year 2015. Thus, total dues claimed by the Appellant against respondent was Rs. 13,17,959/-. We have perused the appointment letters dated 27.12.2012 & 22.03.2014 by which the Appellant was offered the post of pilot by the Respondent. The appointment letter dated 27.12.2012 mentions the emolument of Rs. 2,50,000/- per month and provision of mediclaim policy for the Appellant for Rs. 2.50 Lakh along with insurance. This appointment letter also includes the clauses related to place of posting, flying duties, duty and responsibility, medical examination and termination. Thus, there are no mention of leave encashment and imprest account as claimed by the Appellant.

15. We have also perused the appointment letter dated 22.03.2014 which has mentioned a consolidated fee of Rs. 1,70,000/- per month for flying 15 or 16 consecutive days (depending on the days in a given month). This letter also mentions that in addition the Appellant will be entitled to extra amount of Rs. 15000/- per day in case the Appellant fly more than 15/16 days in a month. The said appointment letter further mentions about medical expenses limit of Rs. 1200/- per month on reimbursement basis on production of actual bills. This offer letter further include clause like place of posting, duties and responsibilities, medical examination, termination. We do not find any provisions or clause which entitle the Appellant for claims like leave encashment and imprest account.

16. We have also taken note of the Respondent email dated 09.06.2014 wherein the Appellant wages were revised as per previous wage structure of Rs. 2,50,000/- per month. We note that this communication of Respondent also does not mention various types of emoluments claimed by Appellant including leave encashment.

17. We have further perused the subsequent correspondence between Appellant and Respondent and noted that for the first time on 12.06.2014 the Appellant had asked for the salary hike to Rs. 3 Lakh per month and encashment of leave and the same was replied by the Respondent for not agreeing to hike in salary. However, the Respondent vide his reply to email dated 12.06.2014 gave a counter offer for leave encashment for 25 days at the rate of Rs. 15,000/- per day subject to not availing any leave along with the then existing emolument structure. Appellant further claimed on his own for leave encashment of 57 days in a year rejecting the counter offer of Respondent contained in email dated 12.06.2014 and as such there was no consensus or agreement on leave encashment at all. On perusal of records available with us, we do not find any letter of appointment or communication which establishes the claims made by the Appellant for leave encashment and imprest account, etc.

18. Admittedly, all other dues have been settled between the parties. We also note that Respondent has made a counter claims of Rs. 88,000/- regarding accommodation dispute and Rs. 2,25,000/- for excess leave availed.

On this issue, we find that the Adjudicating Authority is right in rejecting the claims of appellant for any debt due which has been defaulted.

Issue No. b):- Whether any pre-existing disputes were pending before issue of demand notice.

The Respondent has mentioned that there were pre-existing disputes prior to issue of demand notice by Appellant on 16.03.2018. The Appellant, however, has denied any such pre-existing disputes.

We need to see the definition of dispute as given in Section 5 (6) of IBC which is as under:-

“5(6) “dispute” includes a suit or arbitration proceedings relating to-

- (a) The existence of the amount of debt;*
- (b) The quality of goods or service; or*
- (c) The breach of a representation or warranty;”*
- (d)*

The Hon’ble Supreme Court in ***Mobilox Innovations Private Limited vs. KirusaSoftware Private Limited*** has settled the law regarding pre-existing dispute very clearly. The relevant portion is as under:-

“The adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an “operational debt” as defined exceeding Rs. 1 Lakh ? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or*

arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

19. We find that the Appellant has claimed the amount for leave encashment, imprest account etc. which were not forming part of appointment letter as discussed earlier. We also note that such claims were denied by Respondent.

20. We have perused the demand notice in Form-3 for Rs. 13,17,959/- dated 16.3.2018. Hence, it is prudent to refer to the correspondence between the parties regarding any pre-existing dispute with reference to the amount of debt or quality of services as elaborated in Section 5(6) of IBC (Supra).

21. We have already discussed earlier about the claims made by the Appellant and denial of such claims by the Respondent. We have also seen that counter offer of Respondent and correspondence between the parties for the same which were not agreed mutually on common grounds. We observe that all such correspondence were prior to demand notice dated 16.03.2018.

22. We also note the pre-existing disputes regarding quality of service from communication between respondent and the Appellant. From email dated 10.05.2016 of the Respondent to the Appellant, we observe that there were disputes. The email mentions ***“The main dispute is due to the sudden levying of leave encashment dues which as per our record are neither valid nor justified”***. This clearly demonstrate existence of pre-existing dispute prior to issue of demand notice on 16.03.2018. Similarly, we observe from the record regarding non availability of the Appellant for flying due to medical fitness. We have also taken note of Respondent email dated 30.06.2015 regarding accommodation issues for which subsequently, counter claim of Rs. 88,000/- was made by Respondent against Appellant. It is significant to observe that vide Respondent email dated 22.03.2014, Appellant was reminded to become responsible. The relevant line of the said emails reads as *“Your becoming unreachable is not professional therefore is not acceptable”*.

23. We observe from the Impugned Order where the Learned Adjudicating Authority came to conclusion that Respondent’s claims regarding pre-existing dispute prior to issue of demand notice dated 16.03.2018 did exist and accordingly, the petition of application under Section 9 was rejected. We do not find any error in the Impugned Order.

24. Based on above discussions, we are of considered view that there is no ground for any interference with Impugned Order dated 17.09.2020 passed by the Adjudicating Authority.

Thus, we do not find any merit in the appeal and have the same is dismissed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

[Mr. Naresh Salecha]
Member (Technical)

Sim