IN THE NATIONAL COMPANY LAW TRIBUNAL

BENCH – V, NEW DELHI

C.P (IB)/717(ND)2021

An application under section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

MR. MOHIT NAMAN

S/o Sh. P.C. Bhartiya
Registered Office: SKA-305,
Shipra Krishm, Vista Apartment,
Plot. No. 14, Ahinsa Khand-1,
Indirapuram, Ghaziabad.

....OPERATIONAL CREDITOR

Versus

M/s KARVY DIGIKONNECT LIMITED

Erstwhile Known as DigiCall Teleservices Pvt. Ltd.

Registered Office: Flat Nos. 502 & 503,

5th Floor, Arunachal Building, 19,

Barakhamba Road, New Delhi-1 10001.

....CORPORATE DEBTOR

Order Delivered on: 08.01.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Sudhir Kumar Dash, CA

For the Respondent : Mr. Raghav Kohli

ORDER

PER: RAHUL BHATNAGAR, MEMBER (TECHNICAL)

1. The instant application is filed by Mohit Naman, former employee of M/s Karvy Digikonnect Limited and Authorized Representative of Mr. Sanjay Gupta, Prateek Hajela, Mr. Sarvjit Sharma, Mr. Sandeep Saini, Ms. Deep Sikha, and Mr. Penny Munde, Deepshika vide Authority Letter dated 20.09.2021 (hereinafter referred as 'Applicants'/'Operational Creditors'/' Former Employees') on 24.11.2021 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code/IBC') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process ("CIRP") against M/s Karvy Digikonnect Limited (hereinafter referred as 'Respondent'/'Corporate Debtor') for failing to make the payment amounting Rs. 1,60,98,712 (Rupees One Crore Sixty Lacs Ninety Eight Thousand Seven Hundred and Twelve Only).

2. The Respondent Company M/s Karvy Digikonnect Limited was incorporated on 13.07.1992 under the provisions of the Companies Act, 1956 having its registered office situated at Flat Nos. 502 & 503, 5th Floor, Arunachal Building, 19, Barakhamba Road New Delhi-110001. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under subsection (1) of Section 60 of the Code.

Averments of the Applicants:

3. Briefly stated the facts of the present case as averred by the applicants are that the Corporate Debtor is in the business of providing telephone voice and data communications services and for the smooth running of its business the Corporate Debtor had hired and issued appointment letters to the Operational Creditors on the basis of interviews held at the office premises of the Corporate Debtor. Applicant further submitted that the Operational Creditors were working for and under overall supervision of the Corporate Debtor from time to time and have performed all their duties as per the satisfactions to their superiors and as per responsibilities assigned to them time to time.

4. Applicants submitted that the Operational Creditors kept on working with the Corporate Debtor and used to get the salaries and conveyance reimbursement and other benefits regularly but subsequent to February 2020 the Corporate Debora did not disburse the salaries and other benefits to the employees and hence from March 2020 the Corporate debtor stopped payment of the salary and all other benefits to the operational creditor. Further the Applicant submitted that the Operational Creditors again and again requested the Corporate Debtor to clear all their dues and despite numerous promises of the Corporate Debtor, it failed to clear all dues of the Operational Creditors/employees.

5. Applicant submitted that during the COVID-19 pendemic period, salaries of the Operational Creditors were cut down by the Corporate Debtor without any intimation or discussions and salary slips containing details of revised amount were issued till February, 2021. Further from the month of March 2021 no salary slip were generated/issued to the Operational Creditors/employees by the Corporate Debtor and hence the Operational Creditors have right to demand the salary and other statutory benefits under the terms of the offer/Appointment letter & increment letter as a practice what has been given to Operational Creditors. Therefore a total amount of Rs. 1,60,98,712 (Rupees One Crore Sixty Lacs Ninety Eight Thousand Seven Hundred and Twelve Only) is payable by the Corporate Debtor to the Operational Creditors.

6. Further the Applicant submitted that the Operational Creditors through their legal counsel issued Form 3 "Demand Notice" dated 04.10.2021 via lndian post on 05.10.2021 and through email on 04.10.2021 under the section 8 of the IBC for the outstanding amount i.e Rs. 1,60,98,712 payable till 04.10.2021 payable by the Corporate Debtor to the Operational Creditors and the Demand Notice was duly served upon the Corporate Debtor on 0611012021 and upon the directors of the Corporate Debtor on 08/1012021, However, neither been any response from the Corporate Debtor nor any payment to Operational Creditors received. Hence the present Application under section 9 of IBC is filed.

Reply of the Respondent/Corporate Debtor:

7. Per contra, the respondent through his reply admittted the due amount presented by the employees, includes alleged dues other than outstanding salary such as dues towards bonus, PF, TDS, and gratuity. However, the Respondent stated that the amount for former employees/Applicants which are collectively due is Rs.79,99,846/- and not the amount of Rs. 1,60,98,712 as alleged in the instant Application against the Respondent towards service claims (excluding welfare claims such as provident fund, gratuity, leave encashment, etc.) which is an amount less than Rs.1 crore and therefore, the present petition is not maintainable as it does not meet the minimum threshold as stipulated under Section 4 of the IBC. A copy of the ledger statements of the Corporate Debtor pertaining to the former employees are annexed as Annexure R-1 (Colly.) with the reply of the present Application.

8. The Respondent in their reply have not raised any defence in repespect of section 10A of the IBC, however during course of arguments Ld. Council for the Corporate Debtor, and also in their written submission has raised the issue of applicability of section 10A of IBC, and argued that the petition is barred in terms of section 10A of IBC.

9. The Respondent through its written submission submitted that the alleged date of default as per the Operational creditors contention in Annexure F, (at pages no. 158-160) of the instant Application occurs between 25.03.2020 - 25.03.2021 as shown below:

S. No	Name	Date of Default as per Annexure F (@pp. 158) of the Instant Application
1.	Sarvjjit Sharma	July 2020 (@pp. 158)
2.	Sanjay Gupta	August 2020 (@pp. 161)
3.	Sandeep Kumar Saini	May 2020 (@pp. 159)
4.	Mohit Naman	July 2020 (@pp. 161)
5.	Deepshikha Singh	June 2020 (@pp. 158)
6.	Prateek Hajela	July 2020 (@pp. 158)
7.	Penny Munde	June 2020 (@pp. 160)

10. Respondent further submitted that the Operational Creditor has deliberately misrepresented the date of default and mentioned different dates at different places to circumvent the bar imposed under Section 10A of the IBC. Therefore, the instant application is liable to be dismissed at the threshold.

11. Further the Respondent submitted that the CIRP ought not be permitted to be initiated against the Respondent on the ground of the payment 'LTC' and 'EL Encashment'. To support its contention the Respondent placed the judgment passed by the Hon'ble NCLAT on 10.05.2022 in Company Appeal (AT) (Insolvency) No.934/2021 entitled Kishore K. Lonkar v. Hindustan Antibiotics Ltd., wherein it has observed that while an employee may be entitled to receive dues towards service claims such as salary and LTC as well as welfare claims such as PF, gratuity, leave encashment, etc. from the employer: however, CIRP ought not to be initiated on the ground that 'LTC' and 'EL Encashment' have not been paid.

12. Respondent further submiited that the non-payment of TDS is also not a ground for initiating CIRP under Section 9 of the IBC, as held by the NCLAT vide Order dated 8.05.2022 in Company Appeal (AT) Insolvency) No.274/2022 entitled Amitabh Roy v. Master Development Management (India) Pvt. Ltd.

Rejoinder by the Applicants

13. The Operational Creditor through its rejoinder has submitted that the the corporate debtor has admitted that the claim amount of Rs. 1,60,98,712/- (Rupees One Crore Sixty Lakhs Ninety-Eight Thousand Seven Hundred and Twelve Only) includes the outstanding salary and conveyance as well as other statutory benefits as per the CTC structure policy, and no dispute has been raised by the corporate debtor. Further the Applicant submitted that the Corporate Debtor has relied on one document purported to be full and final document of all the employees, wherein the fact is that no full and final has been done to any of the employees/Petitioner. Further the Applicant submitted that the Document as place by the Corporate Debtor is a bogus document created by the corporate debtor itself as nothing has been placed on record to show that the said Full and final had been given to the employees or there had been any resignation or termination of any of the Applicants/employees.

14. Applicants submitted that the alleged ledger statements of the Corporate Debtor pertaining to the Operational Creditors are forged and fabricated and the Corporate Debtor has prepared the ledger statements, which are annexed as Annexure R-l (Colly) with his reply without considering the current status of its employees and just to mark the claim of the Operational Creditors under the threshold limit of Rs. 1 crore as given under section 4 of the IBC.

15. Applicants submitted that the corporate Debtor purposefully and deliberately did not include the calculation of Ms. Deepshika's pending salary and statutory benefits in its tabular calculation, as stated in para 5 of the reply in the instant Application, which clearly indicates that the Affidavit in reply filed by the Corporate Debtor is nothing but the tactics of the corporate Debtor to linger on the matter without any merit and has been made just for the sake of denial, whereas the corporate Debtor very well knows that it is liable to make the payment of Rs. 1,60,98,712/- (Rupees One Crore Sixty Lacs Ninety Eight Thousand seven Hundred and Twelve only) to the operational Creditors.

16. Further the Applicants denied that the CIRP ought not to be initiated on the ground that 'LTC' and 'EL' Encashment' have not been paid by the Corporate Debtor as the Corporate Debtor has not only defaulted in making payment towards the statutory benefits but also towards the salaries of the Operational Creditors. It is further submitted by the Applicant that the Corporate Debtor is liable to pay the due amount as claimed by the Operational Creditors as per the CTC structure policy and it is also denied that the TDS cannot be part of the

Salary structure when the same has been deducted from the salaries of the Applicants.

Analysis and Findings

17. We have heard Ld. Counsel for all the parties and perused the averments made in the application, reply and rejoinder filed by the parties. The Respondent has objected that certain amount of salaries dues are barred by Section 10A of IBC, 2016 and if those amount of salaries dues are excluded, the present Application would not be able to meet the minimum threshold limit of Rs.1 Crore.

18. Before examining the other aspects it would be appropriate to examine whether certain amount of salary dues which are claimed in the present Application are barred by Section 10A of IBC, 2016?

19. From perusal of Part IV of the Application it is observed that the applicant has mentioned date of default begins from 22.09.2021 and still continuing. However, we have to examine the issue in the light of other material available on record regarding when the debt became due and payable.

20. It is observed that the claim of the applicants is based on due amount of salary which is to be paid to the Applicants every month by the Respondent. It is also seen through salary slips (annexed as annexture-E Colly with the present Application) that the salary is payable to the Applicants on a monthly basis. As per the contention in the Application (annext at Page 26-27 of the Application), we find that the Applicants have not been paid their salary from March 2020 till 04.10.2021 by the respondent. The said fact is also confirmed from the Demand notice dated 04.10.2021 in which the Applicants had demanded Rs. 1,61,69,525 from the Respondent against the dues of salaries from March 2020 to outstanding amount payable till dated 04.10.2021.

21. We further observe that in view of the provisions under Section 10A, in case of a default, which occurred during the period excluded under Section 10A, no application under Section 7, 9 or 10 could ever be filed. Section 10A of the Code reads as:

Suspension of initiations of corporate insolvency resolution process.

"10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020."

22. This provision was subsequently extended to 24.03.2021 vide notification No. S.O. 4638(E) dated 22.12.2020 issued by the MCA. Therefore, the period under Section 10A would be from 25.03.2020 to 24.03.2021. Thus any default occurring during the above period, no application shall ever be filed under section 7, 9 and 10 of IBC, 2016.

23. The Hon'ble NCLAT in the case of *Plus Corporate Ventures Pvt. Ltd Vs Transnational Growth Fund Ltd, Company Appeal (AT) (Insolvency) No. 1270 of 2022* held that monies which fell in default during the section 10A period, cannot be clubbed with monies falling in default beyond such period, to determine threshold in terms of section 4 of the IBC.

24. Further, in Ramesh *Kymal v. Siemens Gamesa Renewable Power (P) Ltd., (2021) 3 SCC 224*, the Hon'ble SC while dismissing section 9 appeal in para 23 has clarified-

"23 Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of Section 10A. The onset of the Covid-19 pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25 March 2020 as the cut-off date. The proviso to Section 10A stipulates that "no application shall ever be filed" for the initiation of the CIRP "for the said default occurring during the said period". The expression "shall ever be filed" is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25 March 2020 for a period of six months, extendable up to one year as notified. The explanation which has been introduced to remove doubts places the matter beyond doubt by clarifying that the statutory provision shall not apply to any default before 25 March 2020. The substantive part of Section 10A is to be construed harmoniously with the first proviso and the explanation. Reading the provisions together, it is evident that Parliament intended to impose a bar on the filing of applications for the commencement of the CIRP in respect of a corporate debtor for a default occurring on or after 25 March 2020; the embargo remaining in force for a period of six months, extendable to one year. Acceptance of the submission of the appellant would defeat the very purpose and object underlying the insertion of Section 10A. For, it would leave a whole class of corporate debtors where the default has occurred on or after 25 March 2020 outside the pale of protection because the application was filed before 5 June 2020."

25. In the above para, it has been held that there should be harmonious construction of the substantive part of section 10A with the first proviso and the explanation. Hence, Acceptance of the submission of the appellant would defeat the very purpose and object underlying the insertion of Section 10A.

26. The claim of the Applicant that the date of default begin from 22.09.2021 and still continuing is not substantiated. As explained above, the date of default begins from March 2020 when the Corporae Debtor for first time stopped paying the salaries to the Applicants till date of Demand Notice i.e 04.10.2021 anexed at Page 170-171 of the Application. There is no document to show that the payment of salaries was rescheduled.

27. Therefore, after excluding the amount of salaries due i.e Rs. 67,27,456 against the total amount claim i.e Rs. 1,61,69,525, whose due dates are falling under the Section 10A period, the amount of default would be Rs. 94,42,069 which is less than one crore.

28. In view of the above, we conclude that since the principal due amount of operational debt claimed by the Applicant is less than Rs.1 Crore, the Application is not maintainable under Section 4 of IBC.

29. We further observe that the application under section 9 is not maintainable as the section 9 application has included those amounts of Applicants salaries which are falling under section 10A period for which no CIRP can initiated. It is made clear that we have not examined and commented upon the other issues raised by the parties.

30. The Application is accordingly, dismissed.

Let copy of the order be served to the parties.

Sd/-

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

Sd/-

(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)