

SL. No.2

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI.RAJEEV BHARDWAJ- HON'BLE MEMBER (J)

CORAM: SHRI.SANJAY PURI, - HON'BLE MEMBER (T)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 02.01.2024 AT 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	Company Petition IB/90/2023
NAME OF THE COMPANY	APITCO Limited
NAME OF THE PETITIONER(S)	Nethi Jagadish Reddy & others
NAME OF THE RESPONDENT(S)	APITCO Limited
UNDER SECTION	9 of IBC

Order

Orders pronounced, recorded vide separate sheets. In the result, this petition is dismissed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – II**

CP No.90/9/HDB/2023

*[Section 9 of the Insolvency and Bankruptcy Code, 2016 read with
Rule 6 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016]*

Between:

- 1. Mr. Nethi Jagadish Reddy,**
11-12-305, Road No.5,
Sri Rama Krishna Puram,
Saroornagar,
Hyderabad – 500 035.
- 2. Mr. Palnati Venkata Srinivas Rao,**
H.No.7-275 B, Sujatha Nagar,
2nd Line, Ongole,
Prakasam District.
- 3. Mr. Reddy Imam Patel,**
H.No.1-650, 2nd Road,
Ananthapur – 515 004.
- 4. Mr. Musku Raji Reddy,**
H.No.4-1/A, Galipally Village,
Illanthakunta Mandal,
Rajanna Sircilla District – 505 530.
- 5. Mr. Mohd. Zaheeruddin Baber,**
H.No.22-1-711, Darulshifa,
Hyderabad – 500 024.
- 6. Mr. Mohd Khaja Hussain,**
R/o.23-2-238/SF2,
Diamond Residency,
2nd Floor, Moghul Pura,
Hyderabad – 500 002.

7. Ms. K.Sarada Devi,
H.No.30-265/20, F-G5, First Floor,
Susheel Mansion,
Sainathapuram,
Secunderabad.

8. Mr. T.Srinivas,
Flat No.302,
Kousthubham Apartments,
Sai Nagar, Street No.5,
Nagole,
Hyderabad – 500 068.

9. Mr. Md Khaja Masioddin,
H.No.3351, Road No.4,
MIG, Phase -II (Vidyuthnagar),
Tellapur, RC Mandal,
Sanga Reddy – 502 032.
**(2 to 9 are being represented by GPA
Mr.Nethi Jagadish Reddy)**

.... Operational Creditors/Applicants

A n d

M/s.APITCO Limited,
5-9-58/B, 8th Floor,
Parisram Bhawan,
Basheerbagh,
Hyderabad – 500 001.

.... Corporate Debtor/Respondent

Coram:

Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)

Sri Sanjay Puri, Hon'ble Member (Technical)

Counsel/Parties present:

For the Operation Creditor : Mr.Yogesh Kumar, Advocate

For the Corporate Debtor : Dr.S.V.Ramakrishna, Advocate

Date of Order : 02.01.2024

Per: Rajeev Bhardwaj, Member (Judicial)

ORDER

1. The Applicants through their General Power of Attorney, GPA (Applicant No.1) approached this Authority under Section 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate Corporate Insolvency Resolution Process (CIRP) in respect of their employer, i.e., M/s.APITCO (hereinafter referred as Corporate Debtor).
2. The case of the applicants is that:
 - 2.1 All the applicants were the employees of the Corporate Debtor, but they have not been paid their salaries for different period and most of them from October, 2019 onwards. Due to non-payment of dues, some of the applicants resigned and remaining were superannuated.
 - 2.2 The total amount due from the Corporate Debtor was Rs.2,44,49,237/- This amount includes Rs.2,12,62,484/- towards principal and Rs.31,86,753/- towards interest @18% from 01.01.2021 to 31.10.2022.
 - 2.3. When the amount was not paid, the applicants served a demand notice dated 01.12.2022 on the Corporate Debtor. In reply dated 13.12.2022 to the demand notice, the Corporate Debtor raised various grounds and asked the applicants to come to office to reconcile the amount. Thereupon, the applicants again sent reply alongwith the demand notice with annexures, which was received by the respondent on 22.12.2022. To this, the respondent sent a reply dated 09.01.2023 again raising the issue of reconciling the dues.

- 2.4 Then the applicants sent e-mails asking the respondent to fix the dates for reconciliation of the accounts on 19.01.2023 or 23.01.2023 or any other date for this purpose. However, no reply has been given to this e-mail nor the record was made available for reconciliation.
- 2.5 To prove that the amount claimed through demand notice is due, the applicants have furnished the appointment letter, promotion letter, resignation letter, statement of dues, bank statements etc., of all the applicants. The respondent has admitted about the non-payment of the salaries of the employees of the company in the 45th Annual Report of the company for the year 2020-21 and also in letter dated 15.03.2023 addressed by the respondent to the Regional Provident Fund Commissioner regarding the observations in the audit report for the year 2021-22.
3. The case of the respondent is that:
- 3.1 The applicants have misused the process of law and the claims made by them are untenable and fanciful, which cannot be treated as debt. This application which has been filed through the GPA is defective as the same has been executed by the vendor and the contents of the same show that it is for the purpose of recovery of disputed financial claims.
- 3.2 All the employees' dues have been clubbed to show an aggregate amount of Rs.1 crore for the threshold purpose, while each of the employee was required to file separate and not joint petition for claim of above Rs.1 crore. The respondent has relied upon the judgement in *M/s.Sadashiv Nomaya Naik and other versus M/s.Gammon Engineers & Contractors Private Limited in Company Appeal No.218 of 2023* to contend that if claim of operational creditor (OC) is below the threshold limit, it can be rejected being not maintainable.

This judgement was upheld as appeal filed against the said order has also been dismissed by the Hon'ble Supreme Court.

4. We have heard the learned counsels for the parties and gone through the entire records.
5. Section 9 r/w Section 8 of the IBC lays down the procedure and formalities for initiation of CIRP by an Operational Creditor. These provisions require a strict proof of debt and default. Hon'ble Apex Court in *M/s.Mobilox Innovations Private Limited versus M/s.Kirusa Software Private Limited 2018(1) SCC 353* explained as what the Adjudicating Authority has to examine in an application under Section 9:-

34. Therefore, 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.

6. Learned counsel for the applicants has argued that there existed a relationship of employee and employer between the parties as it was never denied. It is also urged that the contentions of the respondent that there is pre-existing dispute is fallacious and the respondent has never come forward to say that it was not the demanded amount, but something else which is due to the applicants.

7. On the question of threshold limit of Rs.1 crore for filing the application, learned counsel has referred to Note under Form No.5 in Rule 5 of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority Rule, 2016) which says that the application may be made either in individual or joint capacity by one of them, who is duly authorised for the purpose.
8. Per contra, learned counsel for the respondent submitted that to determine the threshold limit, the applicants cannot club the claimed amount of all the applicants together and in this regard has relied upon the decision of the Hon'ble NCLAT in *M/s.Sadashiv Nomaya Naik and other versus M/s.Gammon Engineers & Contractors Private Limited in Company Appeal No.218 of 2023 decided on 07.03.2023*.
9. The respondent has not disputed the status of the applicants as employees of the Corporate Debtor in reply to demand notice (**Annexure B of the application – page nos. 37-39**), but stated that the dues are required to be reconciled as per the rules & regulations and this position was again reiterated in letter dated 09.01.2023. (**Annexure D of the application – page nos.42-48**).
10. The applicants have placed on record their appointment letter, resignation letter with their assessment of salary and other allowances (**Annexure D of the application – page nos.42-48**). In the statement of the total outstanding dues (**Annexure G of the application – page no.61**), the amount consists of DA arrears, EL Encashment, PF, EPF, contribution to the employees' cooperative society. The applicants have also claimed that they were promoted at particular dates and their salary and allowances were

accordingly enhanced. Therefore, the exact amount cannot be determined in the absence of the authentic record.

11. In response to the demand notice (**Annexure A dated 01.12.2022 of the application**), the respondent asked the applicants to reconcile their version with the records available with the respondent as the exact amount has been disputed, particularly relating to DA arrears, EL Encashment, PF and EPF. Para 4 of the reply (**Annexure B dated 13.12.2022 of the application**) is material, which is reproduced below:

- a) That our Client received an alleged FORM 3 showing date as "1/12/2022" but on perusal of the postal receipt it is found that the same was despatched on "06/12/2022" and received on next day on "07/12/2022" which may be noted.
- b) You have claimed to have sent the said notice on your own behalf and as GPA of 2. Ex-employees and showing in the first and second pages that you are also a GPA holder of 8 ex-employees shown therein. However, there is no such GPA found attached to your notice under reply.
- c) Further, a self-created alleged consolidated excel sheet of salaries due along with interest was shown in Annexure-A and other statements of self-claims for various employees shown at pages 8-17 of the book under FORM 3 are not signed by any of those employees and not even signed by you as GPA holder but only they are printouts with bald claims unverified and not supported by any admitted claims of our Client Company.
- d) Further, you have not enclosed any contractual obligations for payment of alleged principal amounts and also interest 18% pa on various amounts claimed under various heads including "DA arrears", "Earned Leave Encashment", "Employees Coop. Society", "PF", "EPS" etc. without reconciling the dues as per the rules and regulations of our Client Company but all these amounts are arbitrary, fanciful and self-serving claims and our Client stoutly denies the same as payable.
- e) In the circumstances, our Client observes that the purpose and intent of the extraordinary legislation ie., Insolvency and Bankruptcy Code, 2016 is a special Act for 'insolvency resolution' and 'not for recovery of unascertained and unadmitted salaries of ex-employees who left the organization on their own and NOT INTERESTED to reconcile the alleged dues with the employer company (our Client) but straight away invoke provisions of Sec. 8 of IBC, 2016 only to threaten/blackmail our Client by malicious invocation of provisions of IBC, 2016 without sufficient cause of action for vague and false claims as observed from your notice under reply.
- f) Our Client also advises you that the Legislature anticipated the abuse of process of law and amply provided remedy in Sec. 65 of IBC, 2016 and provided penalties/punishments for initiating insolvency resolution process fraudulently or with

malicious intent for any purpose other than for the resolution of insolvency with penalty which shall not be less than Rs.1.00 lakh but may extend to Rs.1.00 crore. Our Client strongly feels that your FORM 3 NOTICE UNDER REPLY aptly falls within the ambit of the said Sec. 65 of IBC, 2016 as you are claiming false amounts arbitrarily calculated with clear intent of defraud/exploit our Client under the garb of invoking proceedings under the said Act

- g) However, as a responsible Employer, our Client advises you and each of those named in the notice may come with their personal records to our Client's office, reconcile the records, ascertain the amounts and get them confirmed by authorized officer of our Client and finally arrive at proper amounts, if at all, payable by our Client.
- h) In the circumstances, our Client advises you to withdraw unconditionally the notice in FORM 3 under reply which is untenable, unwarranted and patently illegal and come clean in the matter. If you proceed with the threatened action further in the matter, the same shall be met with full weight and force of law solely to your costs and consequences.

12. The applicants again sent letter by annexing Form No.3 (**Annexure C of the application – page nos.40-41**) and in response to this, the respondent in reply (**Annexure D dated 09.01.2023**) has again raised dispute in para Nos.3, 4, 6 and 8.
13. No doubt, non-payment of employees' salaries and other dues have been admitted by the respondent in the 45th Annual Report for the year 2020-21 (**page nos.47-103 of the rejoinder**) and further in letter dated 15.03.2023 (**page no.38 of the rejoinder**) addressed to the Regional Provident Fund Commissioner, but the question still remains as what is the due amount when there is no credible record showing the period of outstanding salary, date of promotion of the applicants, EL Encashment, PF, Cooperative Society etc.
14. In *Ahluwalia Contracts Ltd. v. Raheja Developers Company Appeal (AT) (Insolvency) No. 703 of 2018 decided on 23.07.2019*, the following parameters have been fixed to ascertain as to whether there is a dispute or otherwise, can be summarized as below:
 1. The dispute should be prima facie bona fide and exists naturally in a given fact;

2. The grounds for alleging the existence of a dispute should not be spurious, hypothetical, illusory or misconceived.
 3. The existence of a dispute need not require further to be proved.
 4. The dispute should be natural and not made to believe dispute.
15. Hon'ble Supreme Court in *M/s.Mobilox Innovations Private Limited versus M/s.Kirusa Software Private Limited supra* has also laid down certain tests to determine the genuine dispute.
16. In view of the decisions cited above and the facts of the case, we are of the opinion that there is bonafide and genuine dispute about the existence of the operational debt.
17. The respondent has also raised the question of filing the application through GPA (**Annexure R of the application – page nos.324-327**). There is some mistake in the GPA as who executed the same, though it appears that the executant has been inadvertently mentioned as vendor. The tone and tenor of the document is clear that the applicant Nos. 2 to 9 have authorized applicant No.1 to pursue the present application. As such, there is no force in this plea of the respondent that the GPA is defective.
18. Now, the question is whether the applicants can appoint GPA to represent themselves in the present application. In this regard, there is Note under Form 5 of Rule 5 of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority Rule, 2016), which reads as hereunder:
- “When workmen/employees are operational creditors, the application may be made either in an individual capacity or in a joint capacity by one of whom who is duly authorised for the purpose.”*
19. The right to file an application under Section 9 is subject to Section 4 which provides that the IBC insofar as it relates to a corporate person, shall apply

to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one crore. This application is as per Rule 6(1) of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority Rule, 2016). In terms of Rule 6(1), the operational creditor presents its application in the prescribed Form 5. Thus, this Note creates special category of operational creditors whereby employees/workmen are entitled to file a claim in joint capacity. The object behind this is to cover small workmen or employee like in the case of Section 7 IBC which specifically provides that a financial creditor either by itself or jointly may file an application and Rule 4 of the Insolvency and Bankruptcy Code (Application to Adjudicating Authority Rule, 2016 makes it further clear that in such case any one of the applicants can be nominated to represent them. Here, we may also refer to the decision of the Apex Court in *Macquarie Bank Limited versus Shilpi Cable Technologies Ltd. Civil Appeal Nos. 15135, 15481 and 15447 of 2017 decided on 15.12.2017*. About the requirements of demand notice, it was held in *J.K. Jute Mills Mazdoor Morcha versus J.K. Jute Mills Co. Ltd (2019) 11 SCC 332* by the Hon'ble Supreme Court that there was no need for individual claim/cause of action/date of default to be separately set out. Accordingly, the applicants are entitled to file joint application through applicant No.1.

20. Filing of joint application raises the question as to whether the threshold requirement of Rs.one crore under Section 4 is in individual or joint capacity. Section 4 of the IBC says that:

Section 4: The Insolvency and Bankruptcy Code, 2016

Application of this Part

- a) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees.

- b) PROVIDED that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.
- c) PROVIDED FURTHER that the Central Government may, by notification, specify such minimum amount of default of higher value, which shall not be more than one crore rupees, for matters relating to the pre-packaged insolvency resolution process of corporate debtors under Chapter III-A.

21. Under Section 7, this limit is to read in joint capacity as otherwise there is no need to give opportunity to file joint application. However, in case of application under Section 9, there is decision of the Hon'ble NCLAT after considering the Note 5 under Rule 5 in the case of ***Mr.Suresh Narayan Singh versus M/s.Rolls Limited Company Appeal(AT) Ins.No.112 of 2018***, that representational application can be filed but on the question of threshold limit, it was held that "only if in an individual claim of 'operational creditor' the amount of debt is less than one lakh rupees, it can be rejected being not maintainable".
22. Therefore, claim of each individual workman/employee needed to meet Section 4 threshold requirements. The judgement in ***Mr.Suresh Narayan Singh*** supra has been followed in ***M/s.Sadashiv Nomaya Naik and other versus M/s.Gammon Engineers & Contractors Private Limited*** supra, wherein the issue involved was as to whether the claim set up by all three appellants, namely, the appellant No. 1 of an amount of Rs. 87,69,909/-, the appellant No. 2 of Rs.9,49,377/- and appellant No. 3 of Rs.25,35,830/- together can be taken to cross the threshold of Rs. 1 crore as provided under Section 4 of the Code for maintaining the application under Section 9 of the Code. It was held that each individual has to meet the requirements of Section 4.

23. The above mentioned dismissal order was challenged before the Hon'ble Supreme Court of India by filing Civil Appeal No. 3220 of 2023 and vide order dated 15.05.2023, the Hon'ble Supreme Court has held that-
- “1. We are not inclined to interfere with the impugned order of the National Company Law Appellate Tribunal dated 7 March 2023 in Company Appeal (AT) (Ins) No. 218 of 2023.
2. The Appeal is accordingly dismissed.”
24. The facts in the present case are also similar to *M/s.Sadashiv Nomaya Naik and other versus M/s.Gammon Engineers & Contractors Private Limited* supra. The applicants individually do not cross the minimum amount of Rs. one crore in view of Section 4 of IBC.
25. On the basis of the above discussions, we come to the conclusion that there is not only bonafide dispute, but the applicants have also failed to meet the requirements of Section 4 of IBC as none of the applicants' is able to meet the pecuniary limit of Rs.1 crore individually, which is sine qua non for maintaining an application under Section 9 of the Code and therefore, CP(IB) No.90/9/HDB/2023 is dismissed.

SD/-

**SANJAY PURI
MEMBER (TECHNICAL)**

Vinod

SD/-

**RAJEEV BHARDWAJ
MEMBER (JUDICIAL)**