

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**Coram: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER**

**SHRI RAGHU NAYYAR,
HON'BLE TECHNICAL MEMBER**

CP IB-213/9/JPR/2019

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

MR. SOHAN LAL

Resident of: Flat No. 802, 8th floor,
A-Wing, Arch Gardens 1 Survey
No. 109/1, Phase 1, Village
Ghodbunder, Thane, Maharashtra-
401107

...Applicant/Operational Creditor

Versus

JAIPUR SCIENTIFIC AGRICULTURE SOLUTIONS PVT. LTD.

Registered Office at: 2, Durga
Vihar, Ram Mandir Sita Bari, Tonk
Road, Jaipur, Rajasthan- 302029

...Respondent/Corporate Debtor

Counsel for Applicant : Mr. Ajatshatru Mina, Adv.
Ms. Aishwarya Sharma, Adv.

Counsel for Respondent : Mr. Nikhil Yadav
Mr. Anand Sharma, Adv.

Order Pronouncement Date:28.04.2022

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ORDER

Per: Shri Raghu Nayar, Technical Member

1. This is an Application filed by Mr. Sohan Lal ('Applicant/Operational Creditor') to initiate Corporate Insolvency Resolution Process ('CIRP') against Jaipur Scientific Agriculture Solutions Private Limited ('Respondent/Corporate Debtor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC/Code') for the alleged default on the part of the Respondent in settling an amount of Rs. 5,40,000/- (Rupees Five Lacs Forty Thousand Only) in lieu of the employment services of the Applicant. The details of the transactions leading to the filing of this application as averred by the Applicant are as follows:
 - i. The Applicant was appointed to the post of Senior Engineering Manager in the Respondent Company on 24.09.2018. An Employment Agreement dated 24.09.2018 stating the terms of employment was executed between the Applicant and the Respondent.
 - ii. The Applicant stated that as per Clause 10 of the Employment Agreement, either party could terminate the agreement upon giving sixty(60) days written notice to the other party. The Applicant further states that he was promoted vide Appraisal Letter dated

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01.04.2019 and along with that his salary was also revised w.e.f. 01.04.2019.

- iii. On 26.06.2019, the Respondent terminated the services of the Applicant through a telephonic conversation and the alleged reason was financial crisis being faced by the Respondent Company. The Applicant further submits that during that telephonic conversation the Respondent assured the Applicant that the Respondent will give the full amount of two-months' salary in lieu of two-months' notice period.
- iv. However, the Respondent vide email dated 27.06.2019 refused to pay the severance amount to the Applicant and thereby terminated the employment of all the employees w.e.f. 30.06.2019.
- v. The Applicant alleged that aforesaid act of the Respondent amounts to breach of clause 10 of the Employment Agreement dated 24.09.2019, thereby making his employment termination illegal. Along with the same the Respondent defaulted in making the payment with respect to the two-months' notice period for the month of July and August, 2019.
- vi. The Applicant submitted that he issued the Statutory Demand Notice dated 24.07.2019 under section 8 of IBC, 2016 to the Respondent claiming the outstanding debt of Rs. 5,40,000/- which was duly served on the Respondent on 25.07.2019. The Respondent vide

Letter dated 02.08.2019 replied to the aforementioned notice, stating that the Applicant was on probation period and his employment was not confirmed by the Respondent, therefore no advance notice of 60 days was required to be served upon the Non-Applicant/Operational Creditor herein.

2. As a consequence of the aforementioned default, the present Application has been filed seeking initiation of CIRP against the Corporate Debtor. The Applicant claims that the Corporate Debtor is liable to pay an aggregate amount of Rs. 5,40,000/- (Rupees Five Lacs Forty Thousand Only) as reflected in Part IV of the Application:

Part IV

S. No.	Particulars of Operational Debt					
1.	<p>Total amount of Debt, Details of Transactions on Account of which Debt fell Due</p> <p>Date of which such Debt fell Due</p>	<p><u>Total Amount of Debt</u> INR 5,40,000/- (Rupees Five Lacs Forty Thousand Only)</p> <p><u>Date from which Debt fell due:</u> The debt became due on and from 10 July 2019 being the day when the last salary was received by the Operational Creditor from the Corporate Debtor for the month of June, 2019.</p>				
2.	<p>Amount claimed to be in default and the date on which the default occurred</p>	<p><u>Amount In Default:</u> INR 5,40,000/- (Rupees Five Lacs Forty Thousand Only)</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: center;">MONTH</td> <td style="text-align: center;">SALARY</td> <td style="text-align: center;">DUE</td> </tr> </table>		MONTH	SALARY	DUE
MONTH	SALARY	DUE				

		July	2,70,000	2,70,000
		August	2,70,000	2,70,000
		Total	5,40,000	5,40,000
		<p><u>Date on which Default Occurred:</u> 10.07.2019 being the day on which last salary was received by the Operational Creditor.</p>		

3. Before we examine the matter further, it is apposite to consider Clause 10 of the Employment Agreement dated 24.09.2018 which reads as follows:

“10. Termination. Either party at any time and without cause may terminate this Agreement upon giving sixty (60) days’ written notice (except no advance notice is required if the termination of your employment is for cause or for improper issues relate to work, wilful misconduct, non-performance or violation; or within the probation period) to the other party. In the event of this, the Agreement can immediately be terminated. Employee shall be entitled to the payment of compensation as incurred prior to the effective date of such termination, unless termination is within the first 30 days of initial hire, in which case there would be no payment made to the Employee. Upon termination of this Agreement, Employee will cease all activity on behalf of the Company and shall promptly provide to the Company, without cost, all work product and files developed by Employee under this Agreement and all materials provided to Employee by the Company in connection with this Agreement.”

4. Consequent to the Notice issued by this Tribunal, the Respondent filed its reply vide Diary No. 2228/2019 dated 10.10.2019 whereby the following was submitted:

- i. The Respondent submitted that for a debt to become an operational debt it should be in respect of goods and services including employment whereas, in the present petition the alleged amount

claimed by the Applicant as operational debt is towards the notice period not served by the Applicants therefore, the alleged amount can neither be treated as Debt nor Operational Debt under the Code.

- ii. The Respondent further submitted that the Applicant does not fall within the ambit of definition of Operational Creditor under Section 5(21) of the Code, as the Code enables only a person who has provided goods or rendered services, which in the present case is not available. According to the Respondent, the Applicant has not rendered any services. Moreover, the Respondent relied upon the case of *Innoventive Industries Ltd. Vs. ICICI Bank and Ors., AIR 2017 SC 4084* whereby it has been observed that:

“27. The Code schemes to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(72) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt; we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a 'claim" and for the meaning of 'claim", we have to go back to Section 3(6) which defines 'claim' to mean a right to payment even if it is disputed. The code gets triggered the moment defaults of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined Under Section 5(7) as a person to whom a financial debt is owed, and financial debt is defined in Section 5(8) to mean a debt which is disbursed against the consideration for time value

of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt Under Section 5 (21) means a claim in respect of the provision of goods or services.”

The Respondent stated that for a claim to be recovered under the Code as Financial or Operational debt, it has to fall within the brackets of definitions of default, debt and claim under IBC, 2016; whereas, in the present case amount sought as operational debt does not qualify the basic criteria of becoming a debt.

- iii. The Respondent submitted that as per the Employment Agreement dated 24.09.2018, the Applicant has alleged breach of contract which has given rise to a ‘right to payment’. However, Clause 10 of the Employment Agreement dated 24.09.2018 states that in the event of termination, the employee gets entitled to payment of compensation. The Respondent relied upon the decision of the Hon’ble Bombay High Court in the case of *Iron & Hardware (India) Co. Vs. Shamlal [MANU/MH/0115/1954: ILR 1954 BOM 739]*, wherein it was observed that “*damages are compensation which a court of law gives to a party for the injury which he has sustained*”. Accordingly, this application is not a claim for providing goods or services but for claim of damages/compensation which cannot be said to fall within the scope of Section 9 of the Code. Further the Respondent has relied on judgments by NCLT,

Mumbai Bench in the matter of *Tata Chemicals Limited Vs. Raj Process Equipments and Systems Private Limited CP 21/I&BP/NCLT/MAH/2018 Order dated 30.11.2018* and *Gujarat Urja Vikas Nigam Limited Vs. Nitash Co-generation Private Limited CP No. 1356/IBC/NCLT/MB/MAH/2017 Order dated 08.05.2019*.

- iv. The Respondent has also contended that the damages arise on a breach of contract for which a suit is filed. The claim of damages is adjudicated by the Competent Authority before awarding compensation and adjudication of damages is the subject matter of a Civil Suit. Whereas in the present case, it has been presumed that the employee is entitled to an amount equivalent to 2 months' salary which does not constitute an Operational Debt and secondly requires adjudication by the Adjudicating Court. The Respondent has placed reliance on the case of the Hon'ble Bombay High Court in *E-City Media Pvt. Ltd. Vs. Sadhrta Retail Ltd., [CP 367/2009]*.
- v. The Respondent stated that the insolvency proceedings cannot be made recovery proceedings and therefore such claim of compensation/damages is entitled to be dismissed with cost at the threshold. It is merely an alternate measure employed by the Applicant to make the Respondent settle by virtue of the strict provisions and wrongfully dragging the present claim of

damages/compensation under the purview of the Code. The Respondent has referred to the judgement of the Hon'ble Supreme Court in *Swiss Ribbons Private Limited and Anr. Versus Union of India and Ors. (2019) 4 SCC 17* whereby the following has been observed-

“12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.....”.

- vi. The Respondent has submitted that at the time of appointment the applicant was required to serve a probation period of 6 months initially, upon satisfactory performance of which, the application could get confirmed. Accordingly, such confirmation was never provided to the Applicant and therefore, at the time of the termination, the Applicant was a probationer. By virtue of Clause 10 of the Employment Agreement dated 24.09.2018, the Respondent was under no obligation to serve a notice of 60 days to the Applicant before termination if the employee was in probation period. Therefore, the claim of 2 months' salary cannot be relied upon.
5. We have heard the Ld. Counsels for the Operational Creditor and the Corporate Debtor and perused the averments made in the Application as well as the Reply to the Application along with the documents. The

Registered office of the Respondent/Corporate Debtor is situated in Jaipur and therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. Also, the matter is within the purview of Law of Limitation as the last payment was made on 10.07.2019, which indicates that the application has been filed within limitation.

6. As per the Details of Employment Letter, every employee has to go through a probation period of six months from the first of the calendar month following the date of joining. If the employee's work is found to be satisfactory during this period, the employment will be confirmed. From the documents produced before us it is evident that the Applicant got an appraisal in appreciation of his hard work and satisfactory performance vide Appraisal Letter dated 01.04.2019. Consequently, he was promoted. The company never explicitly confirmed the employment or communicated extension of the probation period to the Applicant herein but inherently confirmed the appointment on a higher grade.
7. The Employment Agreement is a standardized format. The Respondent submits an interpretation of non-confirmation and termination during probation. The factual situation points to the contrary. Hence, it is important to refer to the *Doctrine of Contra Proferentem* in the present matter according to which the decision should be against the favoring party, i.e. the respondent company who made the agreement. Therefore,

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in view of the *Doctrine of Contra Proferentem*, the Letter dated 01.04.2019 is a clear indication towards permanent employment.

8. The Termination clause of the Employment Agreement dated 24.09.2018 clearly states that either party at any time and without cause may terminate the agreement upon giving sixty (60) days' written notice (except no advance notice is required if the termination of employment is for cause or for improper issues related to work, willful misconduct, non-performance or violation, or within the probation period) to the other party. The Applicant has alleged that the Respondent terminated the services on 26.06.2019 through a telephonic conversation and further assured that the Respondent would give full amount of two-months' salary in lieu of 2 months' notice period for the services that the Applicant would have rendered. On perusal of the email communication between parties on 27.06.2019, it is clear that the Corporate Debtor admits that it overpromised severance to various employees as it was not thinking clearly which substantiates the fact that the Operational Creditor was promised the aforesaid 2 month's salary on 26.06.2019. Also, employees were asked to come for work to finish their tasks. Further in the Reply to Demand Notice under Section 8 dated 02.08.2019, the Corporate Debtor has submitted that in the event of the Applicant becoming a permanent employee, the natural corollary would be to serve a 2 months' notice on him before terminating and naturally he would have been paid his 2

months' salary. Therefore, in our view, the Applicant is entitled to 2 months' salary from the Respondent/Corporate Debtor.

9. The present Application is filed under section 9 of IBC, 2016 which necessitates the existence of an operational debt and default. As per Section 5(21) of IBC Operational Debt means *a claim in respect of the provision of goods and 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. Other relevant definitions under Section 3 are as follows:

“(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 judgement, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;*

(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;*

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

10. Bare perusal of the definitions shows that operational debt is a claim in respect of provisions of goods and services including employment. Claim includes right to remedy for breach of contract that gives rise to right to payment, which in the present case is plainly apparent from the

documents perused. It is clear that there is a breach of employment agreement dated 24.09.2019, between the appellant and respondent and the same gives rise to the right of payment in favor of the applicant, thereby fortifying the claim of the applicant. Therefore, there exists an operational debt between the parties to the case.

11. The Applicant preferred a Demand Notice under Section 8 of the Code to the Respondent Company demanding a payment of Rs. 5,40,000/- (Rupees Five Lacs Forty Thousand Only) after the debt fell due i.e. 10.07.2019. The Respondent replied vide letter dated 02.08.2019 stating that the Applicant was never enrolled as a permanent employee, therefore the Corporate Debtor was not required to serve 2 months' notice against the alleged termination. As observed earlier, this bench is of the view that the Applicant was confirmed promoted in accordance with the Appraisal Letter dated 01.04.2019. Hence, the Applicant ought to have been paid 2 months salary in lieu of termination. The applicant has attached bank statements whereby it is clear that the last payment for the Salary of June, 2019 was made on 10.07.2019. The aforesaid clearly establishes default on part of the Corporate Debtor/Respondent Company.
12. The present debt comprises of the necessary elements to establish it as an operational debt, and consequently the applicant as the Operational Creditor. In respect of the claim of the Applicant, the company was also obligated to pay the applicant two months' salary in lieu of the notice

period. It has been shown that the Corporate Debtor has failed to make payment of the aforesaid amount due as mentioned in the statutory notice till date. Though the Respondent has strived to present a multi prong defense, it appears to be stretched.

13. For the reasons discussed above, we conclude that the Corporate Debtor failed to pay the aforesaid amount which was due to the Operational Creditor. It is also observed that the conditions under Section 9 of the code stand satisfied. Hence, this Adjudicating Authority is inclined to commence CIRP against the Corporate Debtor as envisaged under the provisions of IBC, 2016.
14. Under sub-section (4) of Section 9 of the Code, the Operational Creditor may propose the name of a Resolution Professional to be appointed as Interim Resolution Professional ('IRP') but it is not obliged to do so. In the instant case, the Operational Creditor has not proposed the name of IRP.
15. In view of this Mr. Sudhir Bhansali, duly registered with the Insolvency and Bankruptcy Board of India, with Registration No. IBBI/IPA-001/IP-P01109/2017-18/11799 (email: sbhansalico@gmail.com ; mobile no.: +91-9413801080), is hereby appointed as the IRP. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15, 17, 18, 19, 20 and 21 of the Code and transact proceedings

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with utmost dedication, honesty and strictly in accordance with the provisions of the Code, and Rules and Regulations thereunder.

16. Consequences of initiation of CIRP shall be inter-alia as follows:

- I. The IRP appointed by the Adjudicating Authority, Mr. Sudhir Bhansali, is directed to take over the affairs of the Corporate Debtor and duties as required to be performed by him under the provisions of Code including issue of publication in widely circulated Newspapers as contemplated under the provisions of the Code and calling for claims from the creditors of the Corporate Debtor; and collation of the same shall be done.
- II. Further, as a sequel of admission, moratorium as envisaged under Section 14 of the Code is invoked in relation to the Corporate Debtor which will be in vogue during the CIRP of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of the Code in relation to the Corporate Debtor.
- III. The said IRP shall act strictly in accordance with the provisions of the Code and with a view to defray his expenses to be incurred and fees on account, the Applicant is directed to deposit a sum of Rs. 1,00,000/- (One Lakh Only) to the account of IRP within seven days from the date of this order. This amount shall be proportionately contributed and reimbursed to the Applicant upon

formation of the Committee of Creditors. The IRP shall duly file a status report apprising this Adjudicating Authority about the progress of CIRP as unfolding in relation to the Corporate Debtor. In terms of Section 17 and 19 of the Code all personnel of the Corporate Debtor including promoters and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

- IV. In terms of Section 9 of the Code, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor as well as the IRP appointed by this Adjudicating Authority to carry out CIRP. A copy of this order shall also be communicated to IBBI for its records.
- V. Accordingly, CP No. (IB)-213/9/JPR/2019 is admitted.

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**SHRI DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

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**SHRI RAGHU NAYYAR,
TECHNICAL MEMBER**