NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)

PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 15.03.2022 AT 10.30 AM

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP (IB) No.42/9/AMR/2020		9 of IBC	Balaji Durairaj Vs LEPL Projects Ltd - Air Costa

Counsel for Petitioner(s):
Ries

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):
Ries

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

CP (IB) No.42/9/AMR/2020 is dismissed, vide separate orders.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT HYDERABAD

CP (IB) No.42/9/AMR/2020

Petition 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
M/s. LEPL PROJECTS LIMITED

BETWEEN:

Mr.Balaji Durairaj,
T-1, 3rd Floor, Sindur Palace Apartments,
No.10, Thirumurthy Street, T.Nagar,
Chennai, Tamil Nadu - 600017

.... Operational Creditor

AND

M/s.LEPL Projects Limited,
59-14-10, Ramachandra Nagar,
NH- 5, Ring Road,
Vijayawada, Andhra Pradesh – 520008,

.... Corporate Debtor

Orders pronounced on: 15.03.2022

***Coram*:**

Justice TelaproluRajani, Member Judicial.

Parties/Counsels Present:

For the Operational Creditor: Mr.K.Gaurav Kumar, PCS

For the Corporate Debtor : Mr.Tarun G Reddy, Advocates

Ilaw

ORDER

1. This application is filed in Form-5 by Mr.Balaji Durairaj ("hereinafter referred to as Operational Creditor") seeking initiation of Corporate Insolvency Resolution Process in respect of M/s. LEPL Projects Limited ("hereinafter referred to as Corporate Debtor") mentioning that the principal amount of debt is Rs.**22,69,899/**- and Rs.1,72,498/- which is an interest amount is due. The total amount of debt is Rs.24,42,397/- and the details of the transaction are that non-payment of salary and salary due from January, 2017 to June, 2017 i.e., Rs.2,99,424/- non-payment of salary for the month of January, 2017 and February, 2017. Rs.32,142/- towards TDS. Rs.30,000/- non-payment of salary from 01.03.2017 to 06.03.2017. Rs.4,50,000/- towards 3 months notice period. Rs.1,72,498/- towards interest on salary for the months of January, February and March, 2017. Rs.14,58,333/- for the pending training to be given for one year 3 months. Except mentioning these facts no facts are mentioned pertaining to the nature of employment, and the details of the reasons for which the amounts became due.

2. The Corporate Debtor filed counter denying the liability and from which the facts of the case can be understood:

   i. The Operational Creditor was employed as a pilot in the airlines of the Corporate Debtor Company vide Employment

Agreement dated 15.05.2014 and took charge of his duties and has been fulfilling the same.

ii. The operations of the Corporate Debtor Company were suspended indefinitely on 28.02.2017 due to reasons beyond the control of the Corporate Debtor Company. But the Corporate Debtor inspite of the same regularly paid the salaries of the Operational Creditor.

iii. The conditions of the Employment Agreement are not violated by the Corporate Debtor Company. It is only because of the reasons beyond the control of the Corporate Debtor Company that their airline operations got suspended w.e.f. 28.02.2017 and a letter was issued to the Operational Creditor on 06.03.2017 relieving him from the Corporate Debtor Company w.e.f. 28.02.2017.

iv. The Operational Creditor have approached this Tribunal claiming salaries, TDS amount and salary for the notice period of 3 months and amount paid for the training.

v. The termination of employment is due to the terms of Clause 12 of the Employment Agreement, which incorporates a Force Majeure Clause.

vi. The Operational Creditor is not entitled to any sums for the period of March, 2017 as the employment came to an end by

28.02.2017. The Operational Creditor had accepted and acknowledged the relieving documents wherein it is clearly mentioned that his employment came to an end w.e.f. 28.02.2017. Hence, the question of payment of amounts does not arise.

vii. The Corporate Debtor Company at the time of termination issued a full and final settlement to the Operational Creditor stating that the salaries of January and February would be paid in full settlement of the claims of the Operational Creditor. The Corporate Debtor Company contacted the Operational Creditor multiple times in order to make the payments. But the Operational Creditor did not respond and has not accepted the payment of the sums.

viii. The claim for the TDS is opposed on the ground that the Corporate Debtor Company has deposited the TDS and the statement is annexed.

ix. At the time of the employment of the Operational Creditor, Clause 5 (F) (i) of the Employment Agreement provided that the Operational Creditor would bear the costs of training required under the DGCA Rules and Regulations for being certified to fly the aircraft. The actual cost of the training was about Rs.45 Lakhs, out of which the Operational Creditor was required to pay a sum of Rs.35 Lakhs and was paid by him. It was not paid as a security of any sort for the employment of the Operational Creditor.

x. The Operational Creditor completed his training and has gained the benefit from the same and is now licensed to fly an EMBRAER aircraft. Hence he is not entitled to any refund of the amount.

xi. The Operational Creditor executed an Indemnity Bond stating that he would be in employment of the Corporate Debtor's Company for a period of 3 years after his training was completed. The Operational Creditor completed his training and was released as a First Officer on 25.05.2015 and was subsequently, provided with 3-fold increase in his salary from Rs.45,000/- to Rs.1,50,000/- per month. The Operational Creditor received the benefit of the training in the form of an increment in his salary. The Indemnity Bond was executed for the purpose of securing his employment with the Corporate Debtor Company for a period of 3 years, and not for the purpose of providing training.

xii. The Operational Creditor did not produce the letter dated 06.03.2017 issued by the Corporate Debtor to the Operational Creditor whereby 2 cheques of Rs.5 Lakhs each, were returned to the Operational Creditor.

xiii. The amount of Rs.14,58,333/- has not been crystallised and is disputed and hence the Petition is not maintainable.

xiv. The Operational Creditor did not respond to receive the payment of salaries of Rs.24,42,397/-, hence he cannot file this Petition.

xv. The employment of the Operational Creditor was terminated w.e.f. 28.02.2017. After a gap of 3 years, he issued a demand notice dated 20.02.2020 claiming amounts. Hence, this petition is not maintainable.

3. Operational Creditor filed rejoinder, contending that the Corporate Debtor Company did not explain the reasons for issuing the relieving letter and denying the payment of salaries. The Corporate Debtor did not notify that the event of Force Majeure has ever happened leading to suspension of operations. It is denied that the Corporate Debtor tried to contact the Operational Creditor for payment of salary.

4. Heard the arguments of both sides and perused the written submissions filed by the either side. From the pleadings and the arguments, the points that have to be decided by this tribunal are as follows:

I. Whether the amount paid by the Operational Creditor towards the training is to be returned and whether the amount to be returned is crystallised.

II. Whether the notice of the termination issued to the Operational Creditor by the Corporate Debtor is valid and whether the Operational Creditor is entitled for the salary pertaining to the period of notice.

III. Whether there is any debt due from the Corporate Debtor to the Operational Creditor and whether default has occurred in terms of Section 3 (12) of IBC, 2016.

IV. To what result.

I. **Whether the amount paid by the Operational Creditor towards the training is to be returned and whether the amount to be returned is crystallised.**

The terms of the Employment Agreement dated 15.05.2014 can be looked into in order to understand whether the training as agreed under the said agreement is imparted to the Operational Creditor or whether any training is yet to be imparted and whether, since the employment is terminated at the instance of the Corporate Debtor, the Operational Creditor is entitled for refund of the proportionate amount that is paid by him, for the period for which training is not imparted.

Clause-F of the said agreement pertains to the training. It specifies that:

(i) The Pilot shall undertake training courses on simulator, aircraft, classroom, etc., within India or Abroad as deemed necessary by the Company at his own costs. The responsibility of maintaining the travel documents and visa restrictions is on the Pilot.

(ii) The Company may require the Pilot to execute adequate Indemnity Bond before undertaking such training and the Pilot shall not refuse to undergo the required training.

(iii) At the time of joining the employment of the Company or prior to the commencement of a Pilot's flying duties with the Company he may be required to undergo specialized training. In such case, the Pilot may be asked to enter into a suitable agreement, with the Company, which shall be primarily intended to offset the expenses incurred by the Company towards such training and the said agreement shall be considered as an integral part of the employment agreement. The provisions of such agreement shall prevail over the employment agreement in case of conflict.

(iv) The training costs shall be paid by the Pilot. If the Pilot fails any such training and the appropriate authority advises remedial recommendations, such additional costs shall be borne by the Pilot and if the Company pays any such costs, it will be recovered from the Pilot.

From the above it can be seen that no specific period is mentioned for the training that has to be undergone by the Pilot.

The contention of the Operational Creditor is that the training is agreed to be for three years and since the termination was within the period of three years, the amount pertaining to the rest of the period has to be refunded. But the petitioner does not succeed in showing that it is specified in the Employment Agreement that the training is for three years. Rs.35,00,000/- was paid by the pilot admittedly. The contention of the Corporate Debtor that actually Rs.45,00,000/- has to be paid but only Rs.35,00,000/- was collected is not supported by any document hence, the same can be dismissed. However, the admitted case is that Rs.35,00,000/- is paid for the training.

The Operational Creditor's Counsel relies on the Indemnity Bond where it is mentioned that in terms of the agreement and in consideration of Air Costa arranging the infrastructure required for the training, the pilot has agreed to continuously serve Air Costa for a period of minimum three years commencing from the date on which he successfully completes training and obtains the requisite licence from the DGCA. The said clause does not show that the training has to be imparted for three years. Moreover it shows that the service of the pilot with Air Costa would commence from the date on which he successfully completes the training and obtains requisite license from the DGCA. It is not disputed that the Operational Creditor was designated as First Officer vide letter dated 25.05.2015 and hike was given in his salary and later another hike was given after completing 750 flying hours.

The contention of the Operational Creditor's Counsel that the training would be in a phased manner and that it is not imparted completely cannot be accepted unless evidence is taken on that aspect. The Employment Agreement as it is does not spell such mode of training. The claim towards the training costs is on proportionate calculation of the employment period. Unless it is shown that the training has to be imparted for three years or in a phased manner during the employment, the said quantification done by the Operational Creditor cannot be accepted.

The Counsel for the Corporate Debtor relies the judgments reported in **1954 SCR 310: AIR 1954 SC44** between ***Satyabrata Ghose Vs. Mugneeram Bangur & Co. and*** *Ano*ther to rely on the findings of the Supreme Court that "in asserting the meaning of the contract its application to the actual occurrences, the court has to decide, not what the parties actually intended but what as reasonable men they should have intended". In this case the Employment Agreement, as already observed, does not reflect the intention of the parties. What should have been intended can be understood only by taking evidence pertaining to the usual course adopted by Air Costa while recruiting pilots and the manner in and the period for, which the training would be imparted. Hence, the said judgment does not help this Tribunal in deciding this point. The other judgment is reported in ***(2021) 6 SCC 718 in Civil Appeal No.9273/2019 with 9274/2019 between Bangalore Electricity Supply Company Limited (BESCOM) vs. E.S.Soloar Power Private Limited and Others***, which is contrary to the earlier judgment wherein, it is held that it is well-settled that in interpreting a contract court must consider the underlying purpose and intent of the contract. As already observed the intent of the contract as can be understood from the plain reading of the Employment Agreement is to provide training for the pilots and to collect the costs pertaining to the training from the pilots. The costs were admittedly collected, the training was also admittedly imparted. But the dispute is with regard to the period of the training which is not evidenced by the contract and for which evidence is felt as required. Hence, as the amount claimed by the Operational Creditor is not a crystallized amount, the same cannot be held as being due from the Corporate Debtor.

II. **Whether the notice of the termination issued to the Operational Creditor by the Corporate Debtor is valid and whether the Operational Creditor is entitled for the salary pertaining to the period of notice**.

The contention of the Operational Creditor's Counsel is that salary for the three months of the notice period is not paid as per Clause 10(II) of the Employment Agreement. A look at Clause 10(II) of the Employment Agreement would show that the Company or the pilot may terminate the agreement at any time upon giving three months' notice in writing to the other side without assigning any reason. In the case of termination of services, by the Company and at the Company's discretion, payment for the notice period may be made in lieu of salary for that period. Hence if, no notice is given by the Corporate Debtor Company it would be liable to pay the three months' salary.

In this case the contention is that the termination notice dated 06.03.2017 was admittedly served on the Operational Creditor but the effect of termination was mentioned as coming into operation from 28.02.2017, which is a date prior to the date of issuance of the notice. Such termination with an antedated effect would not be valid. But the contention of the Counsel for the Corporate Debtor is that the Operational Creditor has acted on the said termination notice and hence, cannot now question the validity of such notice. I find some force in the said contention. The amount paid under the Indemnity Bond was returned to the Operational Creditor and evidence pertaining to the said return is also filed by the Corporate Debtor, wherein, two security cheques given by the Operational Creditor for Rs.5,00,000/- each were acknowledged as received. The Counsel for the Corporate Debtor contends that the said fact is suppressed by the Operational Creditor. Be that as it may, the letter dated 06.03.2017 shows that the cheques were received by the Operational Creditor without any grudge and grievance. Hence, when the said termination letter was acted upon and the obligations that have to be fulfilled at the time of termination have been fulfilled by the employer, the same cannot be agitated at a later point of time, that too after three years of the termination. The date of termination is 06.03.2017 while this application is filed on 12.03.2020 i.e., after lapse of 3 years. Hence, it can be concluded that notice as required by the Employment Agreement is served on the Operational Creditor and hence, salary for the notice period need not be paid by the Corporate Debtor.

III. Whether there is any debt due from the Corporate Debtor to the Operational Creditor and whether default has occurred in terms of section 3 (12) of IBC, 2016.

The other claims are with regard to the non-payment of salary for the months of January & February, 2017 as per full and final settlement of the accounts letter dated 06.03.2017. The contention of the Counsel for the Corporate Debtor is that they were always ready to pay the said salaries and the full and final settlement account also mentions the salaries. The Corporate Debtor's Counsel contends that inspite of calling upon the Operational Creditor to receive the said salaries he never accepted the same, while the contention of Counsel for the Operational Creditor is that he was never called upon to receive the salaries. It can be seen that the full and final settlement of accounts as approved by the Corporate Debtor is filed along with the application. Hence, the fact of filing copy of the same along with the application by itself would imply that the Operational Creditor is in know of the said fact. Merely because there is no receiver's signature on the same it cannot be said that the same is not in the notice of the Operational Creditor. Apart from the above, the fact that, the amount under the Indemnity Bond was received under due acknowledgment would support the contention of the Corporate Debtor's Counsel that the Operational Creditor did not come forward to receive the salaries that they were ready to pay for the months of January & February, 2017. The Counsel for the Corporate Debtor has all through been expressing his readiness to pay the salaries. Hence, the contention that the salaries are not paid purposefully and that the same would amount to default cannot be accepted.

The next claim is with regard to the TDS dues for the month of January & February, 2017. Since the salaries are not paid to the Operational Creditor, the TDS amounts are not credited to the account is the argument of the Corporate Debtor's Counsel, which is cogent. When it is found that no salaries are due, the question of paying interest would not arise. Hence, claim for interest is also rejected. There is no dispute that except for the months of January & February, 2017 the salaries pertaining to the period prior to the date of termination are paid.

When there are disputed question of facts pertaining to the manner and period of training, this Tribunal does not have the jurisdiction to decide the same. The said reasoning is supported by the judgment of the NCLAT, New Delhi in ***2018 SCC Online NCLAT 414 between Laina Power Engineering vs. Sokeo Power Private Limited in Company Appeal (AT) (Insolvency) No.452/2018.***

As regards the delay in filing the application the judgment of the Supreme Court Cases ***(2021) 7 SCC 352 between Reliance Asset Reconstruction Company Limited vs. Hotel Poonja International Private Limited in Civil Appeal No.4221/2020,*** relied upon by the Corporate Debtor's Counsel it to the effect that the Article-137 of the Limitation Act gets attracted to the applications filed under Section 7 & 9 of IBC and the right to sue accrues when a default occurs, and if that default has occurred over 3 years prior to the date of filing of an application under Section 7 of IBC, the application would be barred under Article-137 of the Limitation Act. In the considered opinion of this Tribunal the same would apply to an application under Section 9 of IBC. As already observed, this application is filed beyond three years from the date of the alleged default. Hence, it is liable to be rejected on that ground.

The judgments relied upon by the Counsel for the Operational Creditor do not have any bearing on the issues involved in this case. The first judgment is rendered by the ***National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No.715/2018 between Rajeev K Aggarwal Vs. Panipat Texo Fabs Pvt. Ltd. & Another***, which pertains to the pre-existing dispute. Admittedly no reply is issued for the demand notice issued by the Operational Creditor. The contention of the Corporate Debtor is not that there is any dispute with regard to the payments that have to be made to the Corporate Debtor. The contention is that there is no due at all to the Corporate Debtor. Form the material brought before the Tribunal it is found that no amount is due to the Operational Creditor and that the amount due towards the salaries for the months of January & February, 2017 are agreed to be paid by the Corporate Debtor prior to the filing of the application and after the filing of the application.

The second judgment also pertains to the same issue and is rendered by the ***National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No.214/2020 between Gaurang Nipinbhai Nagarsheth Vs. Posco-India Pune Processing Center Pvt Ltd., and Another***. The third judgment which is rendered by the National Company Law Appellate Tribunal, New Delhi in Company

Appeal (AT) (Insolvency) No.98/2019 between M/s.Next Education India Pvt. Ltd., vs. M/s.K12 Techno Services Pvt.Ltd., is on the issue of defective services provided by the Appellant therein. In this case the dispute is not with regard to any services. Hence, the same is considered as irrelevant.

The conclusion is that there is no debt due from the Corporate Debtor and Corporate Debtor has not committed any default with the meaning of Section 3 (12) of IBC. The Operational Creditor is at liberty to receive the salaries for the month of January and February, 2017. The Operational Creditor shall pay the same.

IV. <u>To what result.</u>

In view of the findings under point No. I to III the Petition is dismissed.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu