

**THE NATIONAL COMPANY LAW TRIBUNAL  
“CHANDIGARH BENCH, CHANDIGARH”  
(Exercising powers of Adjudicating Authority under  
the Insolvency and Bankruptcy Code, 2016)**

**CP (IB) No. 505/Chd/Hry/2019  
Under Section 9 of Insolvency  
and Bankruptcy Code, 2016 read  
with Rule 6 of the Insolvency and  
Bankruptcy Rules, 2016**

**In the matter of:**

**Mr. Mayank Bhagya,**  
At 94/159, Vijay Path,  
Mansarovar,  
Jaipur-302020 (Rajasthan)

...Petitioner-Operational Creditor

vs.

**Managing Director  
APUS APPS Private Limited**  
having its registered office at  
Unit No. 513, 5<sup>th</sup> Floor, Tower A,  
Spaze I-Tech Park, Sohna Road  
Sector 47, Gurgaon, Haryana-122002  
CIN No.U72900HR2016PTC065797

...Respondent-Corporate Debtor

**Judgment delivered on: 20.02.2024**

**Coram: Hon'ble Mr. Harnam Singh Thakur, Member (Judicial)  
Hon'ble Mr. Umesh Shukla, Member (Technical)**

For the Petitioner-Operational Creditor : Mr. Pulkit Goyal, Advocate  
For the Respondent-Corporate Debtor : Mr. Ankush Chowdhary, Advocate

**Per: Harnam Singh Thakur, Member (Judicial)  
Umesh Shukla, Member (Technical)**

**JUDGMENT**

The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**for brevity 'IBC'/ 'Code'**), by Mr. Mayank Bhagya (**for brevity**

**‘Operational Creditor’/ ‘Petitioner’**), with a prayer to initiate Corporate Insolvency Resolution Process (**CIRP**) in case of APUS APPS Private Limited (**for brevity ‘Corporate Debtor’/ ‘Respondent’**).

2. The Corporate Debtor, namely, APUS APPS Private Limited, is a Company incorporated on 16.09.2016 under the provisions of the Companies Act, 2013 with CIN No. U72900HR2016PTC065797 with its registered office at Gurgaon, Haryana. Hence, the territorial jurisdiction lies with this Adjudicating Authority. A copy of the master data of the corporate debtor is attached with the main petition and marked as Annexure-1.

### **FACTS OF THE CASE**

3. The facts of the case, briefly, as stated in the petition are as below:

- (i) The Petitioner- Operational Creditor was offered the employment by the Corporate Debtor and appointed as a ‘Senior Engineer Manager’ on the terms and conditions contained in the offer letter dated 25.12.2016 issued to him along with Employment Agreement. The Petitioner joined the company and started performing his duties diligently and thus by virtue of his employment with the Corporate Debtor on the basis of stipulated terms and conditions contained in the offer letter and employment agreement was entitled to all statutory and such other benefits, which are expressly mentioned in the employment agreement.
- (ii) The Petitioner discharged his duties honestly, earnestly and put in hard work in the work assigned to him and exceeded at his work to the best of his abilities. However, a letter dated 22.09.2017 was received by the

Petitioner from the Corporate Debtor, whereby the employment of the Operational Creditor was terminated with effect from 25.09.2017. The operational creditor requested again and again to the corporate debtor to pay his outstanding salary and other dues, however corporate debtor did not pay any heed.

- (iii) As per Form 5, Part IV, the amount claimed to be in default is Rs.8,94,443/- (Rupees Eight Lakhs Ninety Four Thousand Four Hundred Forty Three Only) principal plus interest @ 12% per annum i.e. Rs.2,06,511/- from 26.09.2017 to 31.07.2019). The principal amount comprises of Rs.4,27,777/- on account of salary for August & 25 days of September, 2017 at Rs.2,33,333/- per month and Rs.4,66,666/- in lieu of 60 days of notice period. The date of default as mentioned is 01.08.2017 as the salary has not been paid from the month of August 2017. Copy of statement of computation of interest (page-14(A)), employment agreement (Annexure-2), letter dated 22.09.2017 (Annexure-3), a certificate from bank and bank receipts (Annexure-5) are attached with the main petition.
- (iv) A demand notice under Section 8(1) of the Code is stated to be issued by the operational creditor on 15.05.2018, however, the corporate debtor did not reply to the said notice. The petitioner after serving the notice had communications with the corporate debtor to make the payments of his legitimate dues, but the efforts went in vain.
- (v) The petitioner issued again a demand notice on 30.05.2019 to the corporate debtor, but the said demand notice was also not replied to.

Demand notice, postal receipt along with tracking report are attached at Annexure-4 of the petition.

#### **REPLY OF THE RESPONDENT**

4. The notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted. The affidavit of service was filed vide Dairy No. 6795 dated 03.12.2019. The corporate debtor has filed a reply vide diary No.00088/02 dated 20.01.2021 and was refiled on 02.02.2021, wherein it is stated that no amount is due or payable by the respondent to the petitioner. There is suppression and misrepresentation of facts as along with the Employment Agreement dated 26.12.2016, a 'Joining Bonus Agreement' was also entered between the parties wherein petitioner was appointed as a Senior Engineering Manager for the creation of codes. The duration of the employment was for 9 months and petitioner failed to perform his assigned duties. From the email trail between 04.09.2017 to 06.09.2017, the respondent came to know that no tasks were completed by the petitioner and was not attending the office. Further, no code was committed by the petitioner for the month of August 2017, respondent informed that the salary for August month will be performance-based. Vide email dated 08.09.2017, the respondent requested the petitioner to provide the work status. The petitioner replied to the email dated 12.09.2017 admitting that he had not committed any codes from 04.08.2017. Therefore, a show because notice dated 14.09.2017 was issued. In response to it, the petitioner vide email dated 19.09.2017 denied having failed to come to the office or deliver the expected/promised work. Thereby, his services were terminated. In response to the termination letter, a legal notice dated 23.09.2017 was sent by the petitioner alleging the employment dues including salaries and bonus. The reply dated

09.10.2017 sent by the respondent to the petitioner stating the termination of the petitioner legitimate shows that there was a pre-existing dispute between the parties as regards to the (salary) debt amount. There is a gross abuse of law as the insolvency proceedings are summary proceedings distinct from the recovery proceedings.

5. The short written submissions have been filed by the respondent corporate debtor vide Diary No.00078/3 dated 28.07.2023 reiterating the above-mentioned facts.

### **REJOINDER BY THE PETITIONER**

6. The rejoinder was filed by way of an affidavit by the operational creditor vide Dairy No. 00078/01 dated 02.05.2022 and was refiled on 26.05.2022, wherein it is stated that the operational creditor was required to work as 'Senior Engineering Manager', it was not in the job profile to commit codes. Moreover, no clause in the Employment Agreement provides for creation of codes. The operational creditor discharged its duties honestly, earnestly and had put in hard work in the duties assigned to him. The operational creditor had taken permission to work from home since June 2017 and hence, attendance in office premises was not required. The corporate debtor did not attach the complete email communication. The corporate debtor was appointing new employees and was laying off the existing employees. The work assigned to the petitioner was submitted to Mr. Changlu.

7. The short written submissions have been filed by the petitioner vide Diary No.00078/2 dated 31.05.2023.

## **ANALYSIS AND FINDINGS**

8. We have heard the learned counsel for the petitioner and corporate debtor and have perused the records.

9. The first issue for consideration is “**Whether the demand notice dated 30.05.2019 was properly served**”. A demand notice dated 30.05.2019 was delivered to the corporate debtor vide registered post as the delivery report and postal receipts are attached at Annexure-4 of the petition. The corporate debtor did not reply to the demand notice till date. Therefore, the demand notice was duly served upon the corporate debtor.

10. The other issue for consideration is “**Whether this application is filed within limitation:**”. The petitioner has mentioned the date of default as 01.08.2017, as the salary has not been paid from the month of August 2017. However, it is noted that the salary for the month of August, 2017 would become due after completion of August i.e. on 01.09.2017 and the period of limitation would begin from 01.09.2017. This application has been filed vide Diary No. 4402 on 28.08.2019. Therefore, this Adjudicating Authority finds that this application is filed within the prescribed period of limitation for 3 years. Further, the issue of limitation has not raised by either of the parties.

11. The next issue for consideration is “**Whether the operational debt was disputed by the corporate debtor**”. It is deposed by way of the affidavit under Section 9(3)(b) by learned counsel for the operational creditor that he has not received any reply to the demand notice nor has received any notice to the dispute. Further, it

is deposed that no payment has been received from the Corporate Debtor pursuant to the demand notice.

12. However, Ld. counsel for respondent-corporate debtor contended, the dispute existed between the parties much before the issuance of the demand notice dated 30.05.2019, as the services were terminated by issuing the termination letter dated 22.09.2017. In response to the termination letter, a legal notice dated 23.09.2017 was sent by the petitioner alleging the employment dues including salaries and bonus. The reply dated 09.10.2017 had been sent by the respondent to the petitioner stating the termination of the petitioner as legitimate and moreover there was pre-existing dispute between the parties regarding the debt amount. The reliance can be placed upon the judgment of Hon'ble Supreme Court **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353** wherein it was held that:

*“40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.*

*43. ....We have seen that a “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6).*

*45. Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not*

*ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability”.*

(Emphasis Supplied)

13. The definition of a ‘dispute’ has been provided in sub-section 6 of section 5 of the Insolvency and Bankruptcy Code, 2016 is as follows-

*“5. Definitions. – In this Part, unless the context otherwise requires, –*

*.....*

*(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;”*

14. The case in hand, there is cogent evidence present in the records that there was pre-existing dispute between the parties from October 2017 before the demand notice was issued on 30.05.2019. Apart the claim filed by the petitioner it is also exaggerated that there is an email trail between 04.09.2017 to 06.09.2017 wherein the respondent came to know that no tasks were completed by the petitioner and was not attending the office. Further, it is submitted that no code was committed by the petitioner for the month of August 2017 and respondent informed that the salary for August month will be performance based vide email dated 04.09.2017. The extracts of the emails are extracted as below: -

Email dated 04.09.2017 at 12:05 sent by the corporate debtor-

*“Hi Mayank,*

*No code was committed by you from Aug 4. I told you before that the salary of August would be paid based on your performance. If there are code which were written in Aug and not committed, pls commit the code soon”.*

Email dated 04.09.2017 at 14:37 sent by the corporate debtor-

*“Hi, Mayank,*

*What's your job this month? we allow you to work from home without affecting your daily work. But now it's obvious that you haven't finished the work you should have*

*done. no code was committed by you from 4 ago, Can we make sure that you have no job since then?"*

Email dated 06.09.2017 at 14:42 sent by the corporate debtor-

*"Hi, Mayank,*

*So far, we have not received any information about your attendance and work in August. you have no attendance records in August and also no code was committed, according company regulations, you have be away from work for long time.so we can definitely lift the labor contract. Later, we will have a lawyer to give you a lawyer's letter".*

Vide email dated 08.09.2017, the respondent requested the petitioner to provide the work status.

Email dated 12.09.2017 at 16:16 sent by the operational creditor-

*"On Saturday 09 September 2017 09:02 AM, Mayank wrote:*

*Lisa, I explained to you everything the other day on WhatsApp.*

*Anyway, I'll repeat what I said:*

*1. I sent daily status of what I was working on until Aug 15th. Please check with Changlu on that.*

*2. On Aug 16th, I sent out an email asking whether i can work on our current terms without signing the new terms and I still haven't heard back on that. So I stopped sending any further status emails and continued to work in partial capacity along with running around to the lawyers.*

*3. After that, in an email dated 30th of August, Echo mentioned "if you need to work at APUS, sign a new labor contract" and I stopped working until Echo further explained what she meant.*

*So for two days in August, Aug 30th and 31st, I didn't work because of what Echo wrote to me.*

*Let me know if you need any more details.*

*Wang Yan Feng, if APUS wants to terminate the agreement, you have a full right to do that".*

Experts from the email dated 12.09.2017 at 17:42 sent by the petitioner are as below: -

*"Yes Wang Yan Feng, I agree to the fact that I didn't commit anything after Aug 4. And it doesn't imply that I wasn't working. You can verify that with Changlu".*

15. The petitioner replied to the email dated 12.09.2017 on the same day admitting that he had not committed any codes from 04.08.2017 shows that the operational creditor has admitted the fact that there was non-fulfilment of duties and work assigned to him. More so, email dated 04.09.2017 reveals that the salary for month of August 2017 will be performance based. Subsequent email dated 14.09.2017 by Corporate Debtor to the Petitioner terminating his employment also supports the

existing of disputes between the parties. The operational creditor in his petition has stated to have discharged his duties honestly, earnestly and putting in hard work in the duties assigned to him. However, this contention of learned counsel for the petitioner is devoid of legal force, because if there is any pre-existing dispute, then the petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 cannot be admitted to recover any amount due towards the petitioner. Therefore, it can be concluded that there was a pre-existing dispute between the parties.

16. It is a settled proposition that the National Company Law Tribunal is not a recovery forum. If at all, there is any dispute between the parties regarding the said claim then the parties are at liberty to approach the appropriate Forum.

17. As a sequel to the above discussion and the facts as well as circumstances, since there is a pre-existing dispute between the parties regarding the amount claimed by the petitioner, the petition is liable to be rejected, being not maintainable in terms of Section 9 of IBC, 2016. The petition consequently stands dismissed, however, with no order as to costs.

-Sd-

**(Umesh Kumar Shukla)**  
**Member (Technical)**

-Sd-

**(Harnam Singh Thakur)**  
**Member (Judicial)**

February 20, 2024  
PKA/TBG