

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

In CP No. (IB)-49/9/JPR/2020

UNDER SECTION 9 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

IN THE MATTER OF:

Harsh Vyas

12-A, Uma Colony,

Waghodiya Road, Vadodara – 390 019

...Operational Creditor/Applicant

VERSUS

Hindustan Zinc. Ltd.

Having its registered address at: -

Yashad Bhawan,

Udaipur – 313 004

...Corporate Debtor/Respondent

For the Applicant : Harsh Vyas, Present in person

For the Corporate Debtor: U.N. Tiwari, Adv.

Order Pronounced On: 12.08.2022

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This Application has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('Code' / 'IBC') read with Rule 6 of Insolvency and

Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules') by the Sh. Harsh Vyas ('Applicant') claims to be an Operational Creditor with a prayer for initiating the Corporate Insolvency Resolution Process ('CIRP') against Hindustan Zinc. Ltd. ('Corporate Debtor').

2. The Applicant is a resident of 12-A, Uma Colony, Waghodiya Road, Vadodara – 390 019 and was an employee of the Corporate Debtor. The Application has been filed in Form 5 as prescribed in Rule 6(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

3. The Respondent is a Public Limited Company incorporated under the Companies Act on 10.01.1966, duly registered with the Registrar of Companies, bearing CIN: L27204RJ1966PLC001208. The Registered Office of the Respondent is at Yashad Bhawan, Udaipur – 313 004 (Rajasthan). The company's nominal share capital is Rs. 10,000,000,000/- (Rupees One Thousand Crore Only), and the paid-up share capital is Rs. 8,450,000,000/- (Rupees Eight Hundred Forty-Five Crore Only).

4. The facts of the case, as stated in the Application, show that Applicant had joined the Vedanta Group on 21.05.2012 at Goa. Thereafter, he got transferred internally to Hindustan Zinc. Ltd (Part of Vedanta Group) on 20.12.2016 without issuing any separate Employment Contract.

5. The Applicant resigned from the Vedanta Group on 23.1.2017, and after serving 60 days notice period, he was relieved from his duties on 24.03.2017. The Operational Creditor, in his petition, stated that in the Performance Pay

Scheme ('PPS') as per the ground rules in Clause 5 under the heading of separation and retirement, the serial number 'C' mentioning 'Resignation- not on rolls on 31st March' whereby if an employee left the organisation on or after 30th September of the FY he is not eligible for PPS for the year. If the employee left the organisation on or after 30th September of the Financial Year, he is eligible for PPS, and pay-out is to be made proportionately from 01st April till the date of leaving, and performance rating to be considered as awarded during the last Annual appraisal process.

6. He further stated that his performance for 2015-16 was excellent; as per PPS Scheme, he is liable to get 6.54 Lacs (Performance Pay) from the Corporate Debtor. In this regard, he has also written some emails to the Officials of Vedanta Group, which are Annexed on Page 36 to 41 of the main petition.

7. The Corporate Debtor filed his reply vide diary No. 2723/2021 dated 14.12.2021. In its reply, the Corporate Debtor submitted that all the dues owed and payable to the Operational Creditor were duly paid, and there is no amount due and payable by the Corporate Debtor to the Operational Creditor. The Corporate Debtor has annexed a copy of the Statement of Full and Final Settlement Account as Annexure – R-1.

8. The Corporate Debtor further submitted that the Performance Pay incentive is based on an assessment and evaluation by the Corporate Debtor Management under three distinct sets of performance factors, viz., (i)

Organisational Parameters (the respondent entity as a whole), (ii) Business Entity Parameters (the business entity as a whole), and (iii) Personal Performance (individual performance) with grade wise weightage. Accordingly, the assessment and evaluation of the Operational Creditor were conducted under the Performance Pay Scheme, and he was rated as “Needs Improvement”. Therefore, given Clause 3.4 of the Performance Pay Scheme, no Performance Pay was payable to the Operational Creditor. On 28.03.2018 (prior to the demand notice dated 03.11.2018), the Operational Creditor sent a legal notice to the Corporate Debtor demanding the claimed amount of Rs. 6,54,208/- towards the Performance Pay incentive. In paragraph 5 of the legal notice, it is admitted that the Corporate Debtor had rated the Applicant as “Needs improvement” for the relevant period. Furthermore, the Corporate Debtor disputed the Operational Creditor’s claim before receiving the Demand Notice dated 03.11.2018 under Section 8 of the IBC. Therefore, the petition deserves to be rejected under Section 9(5)(ii)(d) of the IBC.

9. The Applicant submits that he joined the Vedanta Group on 21.05.2012 at their Company in Goa, where he got an excellent rating in the last annual appraisal ratings. The Applicant got an internal transfer to Hindustan Zinc Ltd. (Part of Vedanta Group) on 20.12.2016. Since no separate employment letter was issued as an internal transfer within the company group, the employment contract dated 18.05.2012 was continued.

10. The Applicant resigned from the Vedanta Group on 23.01.2017 and got a clear exit from the company after serving 60 days' notice period on 24.03.2017. It was also submitted that the employees are eligible for performance pay as per the Performance Pay Scheme 2016-17. On perusal of the Performance Pay Scheme 2016-17, it is seen that the objective of the scheme is to sustain and further enhance the High-Performance culture across units of HZL and align the individual and team performance with business objectives and motivate and incentivise the managerial teams for achieving higher levels of business performance consistently.

11. Para 3.4 of the Performance Pay Scheme provides the ratings based on which the pay-out payment was payable to an employee, which provides as under:-

Rating	Percentage
Exceptional	100%
Valued	80%
Consistent	60%
Needs Improvement	Nil

Employees rated "Needs Improvement" will not be eligible for any pay-out under any parameter of the scheme.

12. It is contented by the Applicant that there is a separate provision in the scheme which covers the separations and retirements and Clause “C” of the separations and retirements is applicable in the Applicant’s case “*Resignation – not on rolls on 31st March*” according to which if the employee left the organisation on or after 30th September of the Financial Year he is eligible for PPS and pay-out is to be made proportionately from 01st April till the date of leaving.

13. The Applicant was on the Grade M5 for which, per the PPS Scheme, the target eligibility was Rs. 6.67 lacs. Since the Applicant left the organisation on 24.03.2017, so proportionately, the Corporate Debtor is liable to pay Rs. 6.54 lacs to the Applicant.

14. Ld. Counsel for the Respondent has submitted that the Applicant joined the Respondent Company on 06.12.2016; therefore, the Applicant’s statement that he joined the Vedanta Group on 21.05.201 is misleading. The Applicant had joined Sesa Goa Ltd in 2012, not the Respondent Company. It is well settled in *Indowind Energy Vs. Wescare, (2010) 5 SCC 306* (Para 17) that “*each company is a separate and distinct legal entity and the mere fact that the two companies have common shareholders or common Board of Directors, will not make the two companies a single entity. Nor will the existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other*”.

15. The Respondent introduced the Performance Pay Scheme on 17.02.2017 for the FY 2016-17. The Respondent carried out the appraisal and rated the Applicant as “Needs Improvement”. The appraisal in another company, Sesa Goa Ltd., and that too for the previous FY, i.e. 2015-16, is irrelevant for the Respondent’s assessment for FY 2016-17. The Respondent assessed FY 2016-17 under its incentive scheme, and the Applicant was not found entitled to the performance pay incentive. Even assuming without admitting that the Applicant was eligible for the incentive, he could claim it only for the period 16.12.2016 to 24.03.2017 and not from 01.03.2016. A claim for Performance Pay is not maintainable under the IBC, and in support of his contention, Ld. Counsel for the Respondent has submitted the following case laws:-

1. *Gaurav Kishor Shinde Vs. Uday Yashwant Nayak, C.A. (AT) (Ins.) No. 1107/2019* decided by NCLAT on 16.03.2020 (Para 16)

In this matter, the Applicant filed an application under Section 9 of the IBC where there was a pre-existing dispute between the parties before the notice was sent to the Respondent/Corporate Debtor. The Hon’ble NCLAT held that the claim for Rs. 6 lacs against the Respondent without showing that the performance was found up to the mark is a dispute with regard to the service, and the Hon’ble NCLAT could not enter into settling these disputes.

2. *Manganese Ore (India) Ltd. vs. Chandil Lal Saha, 1991 Supp (2) SCC 465.*

3. *Swiss Ribbons (P) Ltd. Vs. Union of India (2019) 4 SCC 17.*

4. *Transmission Corp. of AP Vs. Equipment Conductors & Cables Ltd. (2019) 12 697.*

16. The Hon'ble Supreme Court in Civil Appeal No. 4583 of 2020 in the matter of *M/s S.S. Engineers Vs. Hindustan Petroleum Corporation Ltd. & Ors.* held that there was a pre-existing dispute with regard to the alleged claim of the Appellant against the Respondent/Corporate Debtor. It is not for this Court to adjudicate the dispute between the parties and determine whether, in fact, any amount is due from the Appellant to the Respondent or vice-versa. The NCLT exercising its powers under Sections 7 or 9 of IBC is not a debt collection forum. The IBC tackles and/or deals with Insolvency and Bankruptcy. It is not the object of the IBC that the CIRP should be initiated to penalise solvent companies for non-payment of disputed dues claimed by an Operational Creditor. On reading Sections 8 & 9 of the IBC, it is clear that an Operational Creditor can only trigger the CIRP when there is an undisputed debt and default in payment. If the claim of the Operational Creditor is undisputed and the Operational Debt remains unpaid, CIRP must commence, for IBC does not countenance dishonestly or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the Application of the Operational Creditor for initiation of CIRP must be dismissed.

17. In the case in hand, the Respondent has pointed out that the performance incentive was not payable to the Applicant in view of the ratings given "Needs

Improvement” in the present performance parameters of the scheme, including in reply to the Section 8 notice.

18. The claim of the Applicant arises out of the incentive claimed under the Performance Pay Scheme, which the Respondent introduced on 17.02.2017 for the FY 2016-17. For the year 2016-17, the Respondent carried out an appraisal with respect to Applicant and rated the Applicant as “Needs Improvement”.

19. It is contended by the Applicant that he joined the Vedanta Group on 21.05.2012 at their Company in Goa and then got an internal transfer to Hindustan Zinc. According to the Applicant, Ltd. (Part of Vedanta Group), on 20.12.2016 was an internal transfer within the Group Companies.

20. The Applicant further contends that he got an excellent rating in performance appraisal for the year 2015-16, which is also applicable for payment of performance pay under the Performance Pay Scheme, wherein his eligibility stands at Grade M5, and Annual Target Eligibility for Target Incentive Amount stands for Rs. 6.67 lacs.

21. Respondent has disputed all the contentions raised by the Applicant before receipt of notice under Section 8 of the IBC. Moreover, the incentive claimed under the Performance Pay Scheme appears to be a service matter based on the years’ performance appraisal of the employee.

22. This Adjudicating Authority finds that there was a pre-existing dispute with regard to the alleged claim of the Appellant against the Respondent.

Hence, we have no option but to reject the prayer of the Operational Creditor to initiate proceedings under Section 9 of IBC, 2016.

23. Accordingly, the Application under Section 9 of the Applicant is rejected. The Order in the present matter is made in terms of Section 9 (5) (ii) of IBC, 2016 and based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority.

24. Let the copy of the Order be served to the parties and IBBI.

DEEP
CHANDRA
JOSHI

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**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

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**PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER**