

**In the National Company Law Tribunal,
“Chandigarh Bench, Chandigarh”
(Exercising the powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No.32/Chd/Hry/2018

**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:

Nisheet Ranjan (Operational Creditor),
aged 43 years, resident of 3067,
SBI Society, Sector 49 D,
Chandigarh – 160047.

....Petitioner-Operational Creditor.

Versus.

Letstrak Tech Private Limited (Corporate Debtor),
having its registered office at Basement,
Dawar Tower, Plot No.1354/1355, Sector 16,
Namastey Chowk, G.T.Road, Karnal
Haryana – 132001.

....Respondent Corporate Debtor.

Judgment delivered on: 31.05.2018.

**Coram: HON’BLE MR. JUSTICE R.P.NAGRATH, MEMBER (JUDICIAL)
HON’BLE MR. PRADEEP R.SETHI, MEMBER (TECHNICAL)**

For the petitioner: Mr.Gaurav Mankotia, Advocate

For the respondent: 1. Mr. Pradeep Nauharia, Advocate
2. Mr. Vaibhav Narang, Advocate
3. Ms. Sapna Narang, Advocate.

Per: R.P.Nagrath, Member (Judicial):

JUDGMENT

The petitioner as operational creditor has filed this petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred here-in-after as the 'Code') to initiate the insolvency resolution process against the respondent-corporate debtor. The petitioner stated himself to have been employed by the respondent-corporate debtor and the claim is made in respect of the non-payment of the due salary.

2. The respondent is a company incorporated under the Companies Act, 2013 on 31.03.2016 with the authorized and paid-up share capital of ₹1,00,000/- having been allotted CIN U72900HR2016PTC063685. Annexure A-10 is the copy of the master data of the corporate debtor. It has its registered office at Karnal in the State of Haryana and therefore, the matter falls within the territorial jurisdiction of this Tribunal.

3. The petition has been filed by the petitioner in Form No.5 as prescribed in Rule 6 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity the 'Rules').

4. It is stated that the petitioner-operational creditor remained employed with the corporate debtor from 15.07.2016 to 01.12.2016 as the National Sales Head of the corporate debtor. The operational creditor had been doing the work as required of him in the course of his employment. The corporate-debtor, however, terminated the service of the petitioner w.e.f.

01.12.2016 without any prior notice. However, the salary from the period from 01.09.2016 to 01.12.2016 was not paid.

5. It is further stated that the operational creditor during the course of his employment incurred certain expenditure as part of his work such as travel which were reimbursed for the period of June, 2016 to October, 2016. Moreover, the operational creditor is also to be paid salary in lieu of a 6 months' notice period for termination. The amount in default is claimed to be ₹40,79,529/- and the date of default is 12.05.2017. The petitioner has also attached the copy of the computation of the working of the operational debt as at Annexure A-3 which states that the actual salary @ ₹4,00,000/- per month for the months of September, October and November, 2016 has been claimed with interest @ 12% per annum till December, 2017, travel expenditure ₹99,419/-, the reimbursement in lieu of notice period of 6 months, which is ₹24,00,000/- with interest @ 12 per annum ₹2,64,000/- upto December, 2017 and the receivable reimbursement for terminating the employment with his previous employer payable on 01.07.2016, which is ₹1,65,420/- along with interest reducing the aforesaid amount by ₹2,47,101/- deducted towards TDS by the corporate debtor.

6. The petitioner has relied upon the following documents in the demand notice:-

- i) Annexure A-1 copy of employment letter issued by the corporate debtor;

- ii) Copy of the termination letter at Annexure A-2;
- iii) Copy of the summary statement/working of outstanding payment from 01.09.2016 to 01.12.2016 along with interest as at Annexure A-3; and
- iv) The TDS statement for the financial year 2016-17 as at Annexure A-4.

7. Before filing this petition, the petitioner also sent a demand notice dated 18.12.2017 in Form 3 as prescribed in clause (a) of Rule 5(1) of the Rules, copy of which is at Annexure A-5. This notice was addressed to the corporate debtor as well as to its Directors claiming total debt due to be ₹40,79,529/-. Along with the demand notice, the petitioner has attached the aforesaid documents and also the table showing expenditure incurred by the operational creditor during the course of his employment. Copy of the calculation of the travel expenses was attached as Annexure I-A with the said notice.

8. It is stated that the demand notice along with the aforesaid documents was sent by speed post as per the postal receipt Annexure A-6 on 22.12.2017 and the same was delivered to the corporate debtor on 26.12.2017 as per the tracking report at page 36 of the paper book.

9. According to the petitioner, before sending of demand notice, the petitioner had also sent a legal notice on 30.08.2017 to the corporate debtor

claiming the unpaid debt to which the respondent corporate debtor sent a reply dated 24.10.2017. Copy of the legal notice is at Annexure A-8 and the reply sent by the corporate debtor is at Annexure A-9.

10. At the time of filing of this petition, the petitioner also dispatched copy of the application along with the entire paper book to the corporate debtor as required by Rule 6(2) of the Rules, which was also statedly delivered to the corporate debtor.

11. Apart from the documents relating to the debt claimed from the corporate debtor, the petitioner has also relied upon the employment letter issued by the previous employer TATA TELESERVICES LIMITED dated 24.08.2016 as at Annexure A-12. It is also stated that the petitioner has not received any notice of dispute from the corporate debtor. The application has been filed after the expiry of 10 days of the delivery of the demand notice.

12. Notice of this petition was issued to the respondent-corporate debtor. The respondent-corporate debtor has contested the petition by filing reply through Sanjay Dawar, Director, who is authorized by the respondent-corporate debtor to represent the respondent in this petition vide resolution dated 12.02.2018.

13. It is averred that the applicant has suppressed the material facts such as; (i) he never performed his duties diligently and acted against the interest of the company causing breach of trust; (ii) he stopped coming to the office without giving any notice and explanation was sought from the petitioner

regarding his activities which were against ethics of the company; (iii) the petitioner was guilty of misconduct and insubordination to the management for which several messages were sent to him; (iv) the petitioner has not returned the property of the company and retained the same in his possession illegally; (v) he did not complete his exit formalities by submitting all the necessary documents; and (vi) at the time of leaving the respondent company, the petitioner poached other employees working in the respondent to leave with him.

14. It is further stated that the petitioner is guilty of misrepresentation and concealment of material facts and the documents, which he should have explained in his petition. The petitioner has hand-picked those documents only which suit him in order to mislead the Tribunal.

15. Despite the above behavior of the petitioner, the respondent wanted to settle the matter and call upon him to complete the exit documents and take his dues whatever, if payable to him. It is denied that there is any default for basing claim under Section 9 of the Code.

16. On merits, it is admitted that the petitioner was appointed vide employment letter relied upon by the petitioner Annexure A-1 w.e.f. 01.07.2016 in position of National Sales Head (India) and was to approach from the regional office, Delhi. As per the understanding between the parties, the work place of the petitioner was at Delhi, where he was required to shift, which was specifically agreed by the petitioner-operational creditor. He was to work from Monday to Friday at the Branch office of the company located at Ranjeet Nagar, New Delhi

and would return to his residence at Chandigarh at late night and come back on Monday morning. This is evident from the WhatsApp messages exchanged between the parties, copy of which are at Annexure R-2.

17. It is admitted that the petitioner was on probation for a period of three months w.e.f. 01.07.2016, where after he was to be confirmed based on his performance. It was further agreed that on completion of the probation period in case of termination, there would be notice of six months.

18. The dispute between the parties began early in the employment, when the petitioner deliberately refrained from coming for work and would leave the work in the middle of the week, failing to attend himself and to achieve the target. He was also indulging in insubordination towards the management.

19. In the end of November, 2016, the respondent informed the petitioner that due to his failure in achieving his target, the gross annual additions in the B2B side were not being duly achieved for which the respondent was suffering monetary loss. Copies of the emails dated 21.11.2016, 23.11.2016 and 24.11.2016 are annexed as Annexure R-3 (Colly).

20. However, the petitioner stopped coming to the office due to which vide his email dated 01.12.2016, he communicated his wish to terminate his employment. The letter of termination dated 01.12.2016 has also been referred. Till the filing of the reply and despite a week's time granted to the petitioner, he has not furnished the details and even the confidential data and

equipment i.e. laptop, phone, etc. which reflects the callous attitude to his work. The instant petition is said to have been filed simply to blackmail the respondent. Therefore, it is stated that there is clearly a dispute raised by the respondent a way back on 24.10.2017 in reply to the legal notice dated 30.08.2017.

21. With regard to the claim for the travel allowance the reimbursement sheet Annexure 1 shows that the travel expenses have been claimed for the trips made from Delhi to Chandigarh, which is the residential place of the petitioner and not for the official duty. With regard to the claim for reimbursement in lieu of six months' period notice to the tune of ₹26,64,000/-, it is stated that the respondent is not liable to pay as the petitioner vide his email dated 01.11.2016 terminated his employment without serving any notice to the respondent-corporate debtor. On the with regard to the reimbursement receivable by the operational creditor for terminating the employment with his previous employer to the tune of ₹1,93,541/-. It is stated that the respondent company is not liable to pay this amount in the absence of any condition contained in the letter of appointment.

22. We have heard the learned counsel for the parties and carefully perused the record.

23. Learned counsel for the petitioner vehemently contended that the particulars furnished by the petitioner in Form No.5 under which the application has been filed as per Rule 6(1) of the Rules, being complete and that the petitioner being an operational creditor is not obliged to propose the name

of Resolution Professional to be appointed as Interim Resolution Professional, the application deserves to be admitted.

24. The question in the instant case basically center around the issue as to whether there is any '**existence of dispute**' for disentitling the petitioner for an order of admission.

25. Learned counsel for the petitioner would refer to the terms of the employment Annexure A-1 fixing the pay package of ₹48,00,000/- per annum with start date from 01.07.2016. In the termination letter Annexure A-2, dated 01.12.2016, it is admitted by the respondent that the salary for the months of September to November, 2016 i.e. for three months, shall be paid to him. It was also admitted that with regard to the travelling bills for 4 ½ months, the same shall also be paid, but the petitioner was directed to submit all the details in respect of the travelling bills and other expenses along with the company property, company's documents, information in hard and soft copy available with him within one week. With regard to the reimbursement for the notice period, the petitioner was further directed to submit the details of deduction from the last organization against the notice period and same would be decided amicably.

26. It was, therefore, submitted that part of the liability of the corporate debtor is admitted as far as the balance amount of the salary for actual services rendered is concerned. Learned counsel for the petitioner would rely upon the judgment of NCLT, New Delhi in "**Company Petition No.(IB)-334 (ND)/2017, decided on 26.10.2017, titled "Nitin Gupta Vs. Allied Electro-**

Magnetic Pvt. Ltd.” In that case, the operational creditor claimed the amount of default to the tune of ₹46,77,124/- towards unpaid salary. Apart from raising various objections, the respondent-corporate debtor had enclosed Annexure-5 with the reply disclosing the year-wise statement of the amount payable, amount to be deducted for late coming, amount actually paid, TDS deposited, net amount due from the year 2008 to 2017 ₹28,84,160/-. That petition of the operational creditor was admitted observing that with regard to the objections of quantum of the claim, the Adjudicating Authority was not the forum to examine as to which portion of the claim is admissible as due and recoverable. In case, the corporate debtor would be entitled to raise objection of any mismatching of claim, it can be made before the committee of creditors/resolution professional.

27. In view of this finding in the said case, learned counsel for the petitioner submitted vehemently that in the instant case also, the dues of the petitioner with regard to the salary for the months of September, October and November, 2016 are admitted and for the travel expenses for 4 ½ months, the same were also to be paid with the condition that the details of the travel expenses and other expenses are furnished. Learned counsel further contended that the rest of the issue can be decided by the committee of creditors or resolution professional once the petition is admitted.

28. The judgment of Hon'ble Supreme Court in “**Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited**” (2018) 1 **Supreme Court Cases 353** was not referred before the National Company Law Tribunal, New Delhi Bench in **Nitin Gupta's case (supra)**. The objects of the

Code and the relevant provisions thereof have been discussed in the judgment of the Hon'ble Supreme Court and the principle of law laid down, which has to be looked into.

29. The Hon'ble Supreme Court referred to the Bankruptcy Law Reforms Committee (BLRC) set up by the Department of Economic Affairs, Ministry of Finance, which submitted its interim report in February, 2015 and final report in November of the same year.

30. In paragraph 22 of the judgment, the Hon'ble Supreme Court observed that the Code differentiates two categories of creditors: 'financial creditors' where the liability to the debtor arises from a solely financial transaction, and 'operational creditors' where the liability to the debtor arises in the form of future payments **in exchange for goods or services already delivered.**

31. The Hon'ble Supreme Court referred to in para 29 of the judgment, the relevant provisions of the Code in so far as operational creditors and their corporate debtors are concerned. Section 3 (12) of the Code defines "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.

32. Then the reference is made to the definition of the term 'dispute' as defined in Section 5 (6) of the Code, which reads as under:-

"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”.*

33. Therefore, there will be a clear dispute, if there is the existence of dispute relating to the **amount of debt due**. We thus find that existence of amount of dispute, which is the bone of contention of the corporate debtor in this case would be covered within the aforesaid term ‘dispute’ disentitling the operational creditor for order of admission. So far as the claim for reimbursement of six months’ notice period is concerned, that cannot be considered at all as the demand in respect of the **services already rendered**, but for reimbursement for breach of the terms of the contract. Such a claim can be made either before the Civil Court or before the other appropriate forum and not before the adjudicating authority under the provisions of the Code.

34. In **Mobilox Innovations Pvt Ltd case (supra)**, the Hon’ble Supreme Court also referred to Rule 5 of the Rules relating to the issuance of the demand notice by the operational creditor. In the instant case, the demand notice has been sent by the corporate debtor in Form 3 as prescribed in clause (a) of Rule 5 (1) of the Rules. The Hon’ble Supreme Court referred to the requirements of Form 3. Serial No.3 of this proforma says that if the corporate debtor disputes the existence or **Amount** of unpaid operational debt (in default) the operational creditor is required within 10 days of the receipt of this letter to intimate about the pendency of the suit or arbitration proceedings in relation to such dispute filed **before** the receipt of this letter/notice.

35. In part IV of Form 5, in which the application is to be filed, the corporate debtor is required to mention the total amount of debt, details of transactions on account of which, the debt fell due and the date from which such debt fell due. Serial No.2 of part IV requires the operational creditor to mention the **Amount claimed to be in default**.

36. It is contended by learned counsel for the petitioner that termination of service without notice period of six months entitles the petitioner to claim the salary for a period of six months being severance pay but the same is not laid down under the provisions of the Code. Moreover, as already discussed, the claim towards the 'operational debt' can be made only in respect of the **services already rendered** and not by way of compensation for termination without notice, for which the remedy lies elsewhere.

37. Bare perusal of the employment letter shows that the notice period after the expiry of three months of the completion of the probation would be six months, but the contract does not state in so many words specify the amount to be paid in case the six months period notice is not given.

38. The learned counsel for the petitioner referred to the terms and conditions of his employment with the previous employer TATA TELE SERVICES LIMITED as at Annexure A-12. His previous employer was paying ₹3,970,000 per annum to the operational creditor as the pay package. At page 51 of the paper book, there is a certificate issued by the previous employer of the petitioner, in which it is stated that the petitioner was designated as Deputy General Manager in the Distribution function of the said company. The

employment letter in the instant case Annexure A-1 does not contain any term to the effect that in case the petitioner is terminated prematurely without service of requisite notice, the respondent-corporate debtor would be liable to pay for the reimbursement for leaving his previous employer. Any such claim may also be maintainable before the Civil Court or the other appropriate forum.

39. The Hon'ble Supreme Court in **Mobilox Innovations Private Limited case (supra)** laid down the principle of law in respect of the petitions filed by the 'operational creditors' as under:-

"51. 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."

40. In that case, the correspondence between the parties showed that on 30.01.2015, the corporate debtor clearly informed the operational creditor that they had displayed the appellant's confidential client information and client campaign information on a public platform which constituted a breach of trust and a breach of NDA between the parties. They were further told that all amounts that were due to them were withheld till the time the matter is resolved. Further, on 10.02.2015, the respondent-operational creditor referred to NDA on 26.12.2014 and denied that there was a breach of NDA.

41. The matter can be looked into from any angle. The petition filed by the operational creditor can be admitted or rejected in terms of the provisions of Section 9 (5) of the Code. Sub-clause (d) of clause (i) and sub clause (d) of clause (ii) of Section 9 (5) of the Code says that if there is no notice of dispute received by the operational creditor or there is record of dispute in the information utility, the petition is to be admitted. In the instant case despite having received reply to the notice, raising dispute in response to the legal notice, the petitioner-operational creditor had the courage to state in his affidavit Annexure A-7 that there is no dispute of unpaid operational debt pending between the parties in any court of law or authority as on date. The requirement of law is not that to constitute a dispute, there should be pending suit or arbitration proceedings between the parties, as held by the Hon'ble Supreme Court in **Mobilox Innovations (P) Ltd. case (supra)**. In any case, the petitioner could be asked to file a fresh affidavit to comply with the requirement of Section 9 (3) (b) of the Code, which makes it mandatory for the operational creditor to

file the affidavit to the effect that no notice of dispute given by the corporate debtor relating to the dispute of operational debt, but in the facts and circumstances of the case, that would have been a futile exercise, as the corporate debtor already raised the dispute in response to the legal notice, by way of reply dated 24.10.2017 relied upon by the petitioner. This dispute was raised much before sending of the demand notice, dated 18.12.1017. In reply to the said notice, the respondent-corporate debtor stated as under in paras 2 to 4 (at page 45 & 46 of the paper book):

“2. That the contents of para No.2 of the notice are admitted to the extent that your client joined the services with my client. As far as, the matter of the payment of salary of September 2016 is concerned, it is clarified that your client has neither submitted the originals documents nor handed over the charge for which your client has been advised time and again through emails and letters to complete all the exit formalities, but all the efforts of my client are in vain. Though even now being a professional colleague, I suggest you please advise your client to visit the office of my client and settle the issue amicably.

3. That the contents of para No.3 of the notice are emphatically denied to the extent that the services of your client were never terminated, whereas your client did not discharge his duty as per the commitments to which your client was reminded through telephonic conversations and emails. Moreover, your client also started keeping the official meetings and tours to which your client was reminded through email. Instead of clarifying the situation and submitting the reasons of non-performance of your client, your client tendered his

resignation stating that he does not want to continue with the company vide email. The resignation tendered by your client was accepted and your client was further advised to collect the full and final payment after completing the exit formalities and submitting the property of my client and other confidential information in his possession which he has not done till date.

4. That the contents of para No.4 of the notice are denied. In fact, you have not submitted the bills to my client and not completed the exit formalities till date, i.e. why the payment has not been done to you till date. However, the payment or your other team members has been processed, as they have completed the stipulated full and final procedure. That in fact your client is not submitting the information and other documents along with the company property and is seeking time and again, whereas my client has not denied the full and final payment in any of the email and communication done to your client. Therefore, I again suggest you to guide your client to settle this issue amicably by visiting my client and completing the exit formalities.”

42. When the matter was listed on 14.05.2018, learned counsel for the petitioner referred to the email dated 01.12.2016 sent by the petitioner to the corporate debtor. It is stated in the said email that it is very unfortunate that, if the petitioner could not attend internal routine meeting on Monday, on the next day which is Tuesday around 1.31 p.m., the respondent could see the petitioner having decided not to work with the corporate debtor and started informing the team that the petitioner has decided amicably that he would leave the organization without the knowledge of petitioner and consent to leave the same.

That decision is stated to be clearly one sided and biased to suit the interest of the corporate debtor. The petitioner further stated that it is very unfortunate that his salary for the last three months and travel bills in the past 4 ½ months have not been paid. The petitioner has got the salary credited once only in the entire period of his working. The petitioner claimed the pending salary for the past three months, his travel bills to the tune of ₹99,419/- and reimbursement of ₹1,65,420/- for leaving his last organisation.

43. Responding to the aforesaid contention, learned counsel for respondent handed over another copy of the same email dated 01.12.2016 sent by the petitioner which contained last sentence that the petition still intends to work in the respondent, but will be able to discuss that in future only after his dues are cleared. Learned counsel for the petitioner sought adjournment to have the instructions, how the last sentence was missing in the email filed by the petitioner.

44. When the matter was listed on 18.05.2018, the learned counsel for the petitioner submitted on instructions that copy of the email dated 01.12.2016, which was handed over by the learned counsel for the respondent containing the last sentence as reproduced above, was correct. When such was the conversation between the parties in the year 2016 i.e. on 01.12.2016 the date on which the termination letter was issued, it can be deduced that there arose the dispute between the parties.

45. In view of the aforesaid discussion, we find that there is existence of dispute in respect of the claim made by the petitioner as defined

under the provisions of the Code and the petition deserves to be rejected. The petition is, therefore, rejected.

copy of this order be communicated to both the parties.

Sd/-
(Pradeep R.Sethi)
Member (Technical)

Pronounced in
open Court.

Sd/-
(Justice R.P.Nagrath)
Member (Judicial)

May 31, 2018.
Ashwani