

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Ins) No. 409 of 2020

IN THE MATTER OF:

MR. AROON KUMAR AGGARWAL

Ex-Employee of Respondent

S/o, Sh. Megh Raj Aggarwal,

Age, 40 years, R/o, J-42, Saket,

New Delhi – 110017

...Appellant

Versus

M/S ABC CONSULTANTS PRIVIATE LIMITED

Having Registered Office Address At:

3, Decres Lane, Koklata, 7000069

...Respondent

Present:

For Appellant: Mr. B.R. Sachdeva, Mr. Parvesh Khanna, Mr. Akhilesh Suresh, Advocates

For Respondent: Ms. Gunjan Mittal, Adv.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 18.12.2019 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) dismissing the application filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') on the ground of a pre-existing dispute.

2. In short, the Appellant is an ex-employee of the Respondent. He was appointed as an Associate-CRS of the Respondent Company w.e.f. 10.07.2003

and was responsible for man power resourcing and recruitment from the date of his appointment and till the date of termination of his service on 16.08.2016. He was promoted as Executive Director on 01.04.2014. Admittedly, the service of the Appellant was terminated on 16.08.2016. The Respondent has levelled allegations of fraud and breach of trust against the Appellant and also registered FIR No. 0544 dated 17.08.2016 under Section 420 and 406 of IPC and disassociated itself from the Appellant w.e.f. 16.08.2016 by way of public notice in the newspaper. The charge sheet in the FIR No. 0544 of 2016 has also been framed against the Appellant under Section 408/420/468/471/120B of the IPC. The service of the Appellant was terminated by the Respondent on account of fraudulent activities which has caused damage to the Company.

3. After the termination of his service, the Appellant, as an Operational Creditor served a notice under Section 8 of the Code and claimed an amount of Rs. 33,42,002/- calculated as under:

S.No.	Work	Date	Due amount in Rupees
1.	Salary	01/08/2016 to 16/08/2016	Rs.1,56,077/-
2.	Flexible Pay Basket	01/04/2016 to 16/08/2016	Rs.3,57,803/-
3.	Gratuity	12/06/2003 to 16/08/2016	Rs.10,28,123/-
4.	Performance Bonus and Business Development Bonus	01/10/2016 to 16/08/2016	Rs.18,00,000/-
Total			Rs.33,42,002/-

4. The Respondent though received the notice dated 05.01.2019 but did not choose to file reply to it. Thereafter, the Appellant, after expiry of statutory period provided in Section 8 of the Code, filed an application under Section 9 of the Code, claiming an amount of Rs. 33,42,002/- assigning the date of default as 16.08.2016 (date of termination of service). After the notice was issued in the Application, in which reply was filed by the Respondent contesting the application, inter alia, on the ground that since the Appellant has played fraud and was guilty of breach of trust, therefore, in view of the pendency of criminal proceedings against him triggered by registration of FIR No. 0544 of 2016, Police Station, Kalka Ji in which charge has also been framed, there is a pre-existing dispute between the parties and the application is not maintainable in view of Section 8(2)(a) of the Code.

5. Counsel for the Appellant has submitted that the Adjudicating Authority has dismissed the application only on the ground that since the service of the Appellant was terminated on the ground of fraudulent activities, forgery etc. therefore, the amount claimed by him cannot be termed as an Operational Debt. It is also observed that violation of agreement by either of the parties was bound to create a dispute between them which had actually happened before the termination of service by the Corporate Debtor. It is submitted that the claim of the Appellant has nothing to do with the registration of FIR because the Appellant has claimed his salary, flexible pay basket, gratuity, performance bonus and business development bonus which is not the subject matter of pre-existing dispute.

6. On the other hand, Counsel appearing on behalf of the Respondent vehemently argued that not only the service of the Appellant has been terminated because of his fraudulent activities and breach of trust but also criminal case is pending against him, he has been disassociated from the activities of the Respondent Company and that he had also tendered an apology, therefore, there is a pre-existing dispute between the parties, therefore, the Appellant is not entitled to maintain the application under Section 9 of the Code for the alleged amount.

7. Counsel for the Appellant, in support of his submissions, has referred to following decisions passed by the Hon'ble Supreme Court and this Appellate Tribunal in the cases of M/s Innovative Industries Ltd. Vs. ICICI Bank & Anr., Civil Appeal No. 8337-8338 of 2017, M/s S.S. Engineers Vs. Hindustan Petroleum Corporation Ltd. & Ors., Civil Appeal No. 4583 of 2022, Thothappa Nainar Mohamed Sirajdheen Vs. Intex Technologies (India) Ltd., CA (AT) (Ins.) No. 462 of 2018, Naveen Kumar Dixit Shareholder of M/s Callina Care Overseas Pvt. Ltd. Vs. Jaswant International Pvt. Ltd. & Anr., 2019 SCC Online NCLAT 324, Shapoorji Pallonji and Company Pvt. Ltd. Vs. M/s. Shore Dwellings Pvt. Ltd., CA (AT) (CH) (Ins.) No. 08 of 2021 and Amit Wadhwani Vs. Global Advertisers & Anr., 2021 SCC Online NCLAT 325.

8. We have heard Counsel for the parties and perused the record with their able assistance.

9. In so far as, the facts are concerned there is no dispute. The Appellant was appointed by way of an employment agreement dated 19.06.2003 and his service was terminated by the letter of termination dated 16.08.2016. Since,

it is the case of the Respondent that the service of the Appellant has been terminated in terms of employment agreement, therefore, it would be relevant to refer to the clause of termination of employment provided in the employment agreement and also the context of termination of the service dated 16.08.2016, which are reproduced as under:-

3. Termination of Employment

3.1 At-Will Employment: Mr. Aroon K. Aggarwal and ABC Consultants acknowledge that Mr. Aroon K. Aggarwal's employment is for no specific term and that their employment relationship is at will, thereby allowing Mr. Arron K. Aggarwal or ABC Consultants to terminate the employment relationship with or without cause at any time and for any reason. His confirmed employment will be subject to a probationary period of six months. On satisfactory completion of the six months probationary period, your appointment will be confirmed in writing. If for some reason, either party does not wish to continue during the probationary period, the party may terminate the relationship hereunder giving one days notice.

3.2 Notice of Termination: Each party agrees to provide the other party with one month prior notice of termination or payment of one months salary in lieu of notice of termination, provided, however, that ABC Consultants may terminate Mr. Aroon K. Aggarwal's employment at any time without notice or payment in lieu of notice if such termination arises as the result of Mr. Aroon Kr. Aggarwal's misconduct, negligence and/or breach of any express or implied term of his employment. Notwithstanding the provisions of this Clause 3.2, the procedure for termination of employment and any associated payments will be subject to Indian Laws and government regulations."

August 16, 2016

“To, Aroon Kr. Aggarwal
Emp. ID. 10041
New Delhi

Termination of Service

Aroon,

As part of an investigation which included hearing your point of view as well, you have been found to have indulged in fraudulent activities that have caused irreparable damage to the company, in terms of reputation, as well as financially. Your actions amount to a breach of trust and are a direct violation of the terms and conditions of your employment with the company.

During the investigation, you have accepted various counts of misconduct and breach of trust while in service of the company and agree that it is in direct violation of your association with us.

Consequently, your services with the company are terminated and you stand relieved from your duties with immediate effect on August, 16, 2016.

We will be in touch regarding your exit formalities.”

10. It is also not in dispute that there is a criminal case registered against the Appellant in which charge has been framed. The Appellant tendered apology also and the Respondent has disassociated itself from the Appellant by way of notice published in the newspaper. This is also not in dispute that the Appellant is claiming his salary and other perks which is attached with the salary like gratuity bonus etc. The order of termination is based upon alleged fraudulent activities on the part of the Appellant. Clause 3.2 pertaining to the termination of employment provided in the employment agreement says that in case of termination each party shall provide the other party with one month prior notice of termination or payment of one months

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salary in lieu of notice of termination but the Respondent may terminate the service of the Appellant at any time without notice or the payment in lieu of notice if such termination arises as the result of misconduct, negligence and/or breach of any express or implied term of his employment.

11. The Appellant has not claimed one months pay as provided in clause 3.2 rather he has asked the Respondent to pay the amount of his salary and other perks attached with it which already become due before the order of termination was passed. Therefore, it is the case of the Appellant that there is no dispute about the said amount. Section 8 of the Code deals with the necessity of issuing demand notice by the Operational Creditor to the Operational debtor before embarking upon his remedy of filing of application under Section 9 of the Code. Section 8 is reproduced as under:-

“8. (1) An [operational creditor](#) may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the [default](#) to the corporate debtor in such form and manner [as may be prescribed](#).

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) [existence of a dispute](#), 1[if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the 2[payment] of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding 2[payment] of the operational debt in respect of which the default has occurred.”

12. The Respondent has tried to take advantage of Section 8(2)(a) to contend that the application is not maintainable because of the existence of a dispute before filing of the application and because of that dispute the service of the Appellant was terminated and that the Respondent had to register FIR also against the Appellant which is pending trial. Careful reading of Section 8(2)(a) of the Code provides that the existence of dispute has to be in respect of the amount so claimed and it is not referable to any kind of dispute such as the one which is highlighted in the present controversy. In this regard, decision in the case of Thothappa Nainar Mohamed Sirajdheen (Supra) has been relied upon by the Appellant in which the Application filed under Section 9 of the Code was admitted and was challenged before this Tribunal on the ground that there exist a dispute because of a criminal case lodged against Mohammed Sirajuddin, MD of the CD who had purchased certain material which has no concern with the business of the CD and the cheques issued by him were bounced and criminal case was lodged against him. It was held by the Adjudicating Authority that criminal liability is pending consideration before a court of competent jurisdiction but since there was no suggestion that the CD had raised any dispute about the supply or quality of goods prior to issuance of demand notice, the Adjudicating Authority had rightly held that there was no pre-existing dispute and admitted the application. In the case of Sudhi Sachdev (Supra) an application under Section 9 was admitted. The Appellant therein, in order to challenge the admission order raised the existence of dispute on the ground that

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Respondent had instituted a case under Section 138/441 of Negotiable Instruments Act, 1881, pending in the court. The said contention was not accepted by this Tribunal holding that it is not the dispute about the payable debt to the Operational Creditor and default on the part of the Corporate Debtor. The pendency of the case under Section 138/441 of NI Act, 1881 even if accepted as recovery proceedings, cannot be held to be a dispute pending before a court of law. Further it was held that the pendency of the case amounts to admission and not an existence of dispute. In the case of Shapoorji Pallonji and Company Pvt. Ltd. (Supra) it has been held that no dispute has been raised prior to the issuance of demand notice whereas in the present case no reply has been filed to the demand notice.

13. Thus, from the resume of the aforesaid facts and circumstances, one thing is clear that the plea of pre-existing dispute has to co-relate with the amount claimed by the Operational Creditor or if a suit or arbitration proceedings is pending then the same should also be related to such dispute. In the present case, however, no dispute ever has been raised by the Respondent that the Appellant is not entitled to the salary for the period from 01.08.2016 to 16.08.2016, flexible pay basket from 01.04.2016 to 16.08.2016, gratuity from 12.06.2003 to 16.08.2016 and performance bonus and business development bonus from 01.10.2016 to 16.08.2016. The only issue raised is about the services having been terminated on account of misconduct etc. on the part of the Appellant. It has been mentioned in the employment agreement that in case of termination on account of misconduct, the Appellant would not be entitled to one month notice pay and nothing beyond that. The Appellant has not claimed one month notice pay about

which the Respondent could have raised a dispute on the basis of the terms and conditions contained in the employment agreement.

14. Thus, in view of the aforesaid facts and circumstances, the appeal is allowed. The impugned order is patently illegal and the same is hereby set aside. However, without any order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Kanthi Narahari]
Member (Technical)

New Delhi

01st December, 2022

Sheetal