

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.213/2024

(Arising out of the 'Impugned Order' dated 02.05.2024 in
CP (IB) No. 132/09/HDB/2020, passed by the 'Adjudicating Authority',
(National Company Law Tribunal', Division Bench, Hyderabad)

In the matter of:

M Ramakanth,
2-2-1075/21/A, Mahalakshmi
Bagh Amberpet,
Hyderabad – 500 013.

.... Appellant

v.

M/s. Nagarjuna Fertiliser and Chemicals Limited,
D.No.8-2-248, Nagarjuna Hills,
Panjagutta, Hyderabad – 500 082

... Respondent

Present:

For Appellant : Mr. M. Ramakanth, Party-in-person

For Respondent : Mr. Avinash Desai, Senior Advocate
For Ms. Vala Srihitha, Advocate

JUDGMENT
(Hybrid Mode)

[Per : Justice Sharad Kumar Sharma, Member (Judicial)]

The brief backdrop of the controversy, as involved consideration in the instant Company Appeal, being Comp App (AT) (CH) (Ins) No.213/2024 as submitted by the Appellant/Operational Creditor is that the Respondent, that is, the alleged Corporate Debtor (CD), is a company which stands registered under the name and style of M/s. Nagarjuna Group, which consists of various other subsidiary entities.

The Appellant was appointed, as an Assistant Company Secretary, as back as on 16.01.1986, in a group company, Nagarjuna Hire Purchase Ltd. He was later on transferred to the holding company i.e., M/s. Nagarjuna Investment Trust Limited, as Assistant Company Secretary and later was appointed as its Company Secretary, and he was transferred to yet another unit of the group, that is, M/s. Nagarjuna Fertilisers and Chemicals Limited, which is the alleged Corporate Debtor, where he continues to work till he superannuated on 30.04.2018

The case of the Operational Creditor, the Appellant, herein is that by an office memorandum dated 08.09.1994, and consequent to the order of transfer, the Operational Creditor was appointed as the Assistant Company Secretary of the Corporate Debtor vide appointment order dated 12.09.1994. The Appellant contends that, he would be entitled for the payment of performance pay @ 15% of the CTC in terms of the letter dated 04.08.2017 of the Corporate Debtor and hence, his performance pay ought to have been determined and paid as per the policy of the corporate debtor.

According to the service certificate as it was issued on 30.04.2018, he contends that, he would be entitled for the remittance of the performance pay in accordance with the conditions of the communication made by the Corporate Debtor on 04.08.2017 and thus he contended that, for the financial year of 2017-18, he would be entitled for the remittance of the performance pay, which

according to his assessment made as per the correspondence made by the Operational Creditor would be amounting to Rs.18,06,861/- which would be payable along with the interest claimed on it @ 24%; interest as on 31.01.2020. The Operational Creditor has submitted that prior to the initiation of the proceedings under Section 9 of the I & B Code, he had issued notices under Section 8 of the I & B Code on 27.01.2020, by way of issuance of Form 3 & Form 4, raising a demand with regards to the anticipated performance pay for the financial year 2017-18. He contends that after issuance of the notice when the said amount was not paid to him within the prescribed time, he was constrained to initiate a proceeding under Section 9 of the I & B Code, by filing the same on 13.02.2020, which stood adjudicated by the Impugned Order dated 02.05.2024, in the order, which is under challenge before this Tribunal, as it has been rendered in CP(IB) No.132/09/HDB/2020 by the National Company Law Tribunal, Division Bench, Hyderabad, whereby the application preferred by the Operational Creditor, (the Appellant herein) under Section 9 of the I & B Code has been rejected.

The Appellant herein apart from the facts which have been narrated herein above with regards to his credentials, has submitted that as far as the Respondent CD is concerned, it stood incorporated as back as on 07.11.2006, and that the authorized share capital of the Corporate Debtor was Rs. 8,01,00,00,000/- having paid-up share capital of Rs.59,80,65,003/-, as per the data provided on the company master data system as available with the Ministry of Corporate Affairs website, of the Corporate

Debtor, which he had relied upon during the course of the proceedings before the Learned Adjudicated Authority. He has submitted that, on account of the fact that he had performed his official duties with utmost perfection during his period of employment with the Corporate Debtor, he would be entitled for the payment of performance pay, which was wrongfully denied to him despite of various notice communications issued by him; and therefore he raised a demand for remittance of the amount in Form 3 and Form 4 as per Section 8 of the I & B Code. The claim raised by the Appellant before the Learned Adjudicating Authority was vehemently opposed by the Respondent, (Corporate Debtor) contending thereof that in fact, the claim as raised by the Appellant, the Operational Creditor, would not fall to be a **“debt” or a “operational debt”** as defined under the I & B Code and, since it will not be forming to be a **“debt or a operational debt”**, within the meaning of operational debtors defined under Section 5 (21) of the Code, the Appellant would not be entitled for the amount as claimed by him in the notices, as it was issued by him on 27.01.2020. The definition as contained under Sub-Section 21 of Section 5 dealing with the operational debt is extracted hereunder: -

“operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”.

He argues that the claim of performance pay in respect of which the Appellant has raised the claim will not fall within the ambit of definition of operational debt, as it was not a payment due to him arising out of provision of his services to the corporate

debtor, or a payment which was due arising under any law for the time being in force. He further submitted that the Appellant would not be falling within the definition of the Operational Creditor, as he does not satisfy the criterion of an Operational Creditor as defined under Section 5(20), because no debt was owed to him by the corporate debtor or has been legally assigned or transferred to him.

The Learned Counsel for the Corporate Debtor has stressed upon the implications of the use of the word '**debt**' and has submitted that if the term 'debt', is taken into consideration as it has been defined under Sub-Section 11 of Section 3, it means a liability or an obligation in respect of a claim which is due from any person and would be inclusive of the financial debt and the operational debt. The definition of debt as contained under Sub-Section 11 of Section 3 is extracted hereunder: -

““debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt”.

The Learned Counsel for the Respondent has submitted that on a harmonious construction of the definitions of "**debt**" and "**operational debt**" it can be seen that, the claim raised by the Appellant herein in relation to the performance pay, will not be falling within the ambit of the definition of the '**debt**', as defined under Sub-Section 11 of Section 3 of the Act, because it will not be falling to be part of the financial debt or the operational debt, as it has been dealt with herein above. Any debt or an amount which is legally due to be paid to an employee has to fall within and satisfy the definition of debt, as it has been described under Sub-Section 11 of Section 3 of the Act, which would mean to be any amount, which has fallen due to be paid as per law.

In response, the Appellant/Operational Creditor, who appears in person submits that if the definition of Sub-Section 21 of Section 5 of the I & B Code, is taken into consideration, where it deals with the definition of operational debt, it includes within in a claim in respect of the provisions of goods or services including **“employment”**. He submits that since the definition of operational debt is inclusive of the word employment as used therein, his claim as it has been raised in the notices issued under Section 8 of the I & B Code will be falling well within the ambit of the claim, which could be satisfied by the initiation of proceedings under Section 9 of the I & B Code.

In response, the Learned Counsel for the Respondent, has submitted that the claim raised by the Operational Creditor in respect of performance pay for the year 2017-2018 by the issuance of the notices under Section 8 of the I & B Code, will not be falling to be under the category of an operational debt, because it was not payable to him, that performance pay will be an amount payable under a policy, under which the quantum of “performance pay” payable is determined every year based on the assessment of performance of the employee, the performance of the group division he is working in and the overall performance of the company based upon the parameters prescribed under the policy herein, as it finds place as in Annexure B to the memorandum supplied by the Counsel for the Respondent on 28.10.2024, dealing with the scope and ambit of performance assessment of the financial year 2017-18 and the goal setting for the financial year 2018-19. The said office memorandum of 24.04.2018, prescribes various parameters based on which performance of an employee is to be assessed and rated. He has further argued that even if performance

of an individual is outstanding, the performance pay may not be payable in case the group performance or the company performance is below par.

To this, the Appellant has replied that performance pay was being paid at the prescribed percentage to him in the previous years, even though the company was not doing well and therefore there is no logic as to why it should have been denied to him for the year 2017-2018 and therefore it is a due to be paid to him which has been denied. The Respondent's Counsel has replied to this by stating that in 2017-2018 the company was misusing loss and therefore performance pay was not paid to employees except those who were in critical positions.

We are of the view that claim thus raised by the Operational Creditor, in fact by way of repetition is submitted, that the basic rationale for raising an objection by the Corporate Debtor is that since 'performance pay' claimed, will not be similar to an operational debt, coupled with the fact that since it will not be falling to be within the definition of "debt" as defined under the I & B Code. The Appellant would not be entitled for the claim as raised by him by the issuance of notice under Section 8 of the I & B Code. Owing to the fact that if any amount which is claimed to be due to be paid and which is required to be determined based upon the analytical criteria and arithmetical analysis which has got variable factor to be adopted, and considered, where different parameters and measures were required to be adopted to be assessed for the purposes of quantification of benefit, which is to be paid towards the performance pay that, will not be falling well within the ambit of 'debt' has defined under Sub-Section 11 of Section 3

and debt cannot be made to be quantified to be considered for the purposes of deciding the controversy at hand and arrive as to what would be performance pay. Owing to the fact that, according to the Appellant, he has tried to bring his claim within the ambit of Sub-Section 21 of Section 5 which includes the word **‘employment or a debt’**. The employment herein will have to be read independently in a very limited sense because the employment dues, which will fall within the ambit of the definition of debt as covered under Sub-Section 21 of Section 5, would be only those amounts, which are settled and predetermined and are these which are not to be assessed according to the service laws as applicable with the Respondent governing service conditions of the Appellant. The Appellant has submitted that the denial of the same is absolutely arbitrary, because according to his expectation, the amount thus assessed by him in the notice issued under Section 8 of the I & B Code, that itself will suffice the purpose and the classification that, it is variable factors which requires an analytical determination to be made by the Corporate Debtor, is not acceptable.

However, the claim thus raised by the Appellant by the issuance of Section 8 notice and drawing of proceedings under Section 9 of the I & B Code on 13.02.2020, when it was taken into consideration on its merit, the Learned Adjudicating Authority by the Impugned Judgment of 02.05.2024, after considering the rival contentions and particularly, as to how the entitlement and the aspect of the determination of performance pay, is required to be determined

and particularly also from the perspective of the entitlement of interest on it, which would be payable on the same, in the absence of any contract to the contrary including the interest clause. The Learned Adjudicating Authority has observed that, the dispute and the status of the employee i.e., Operational Creditor and the Corporate Debtor upon his superannuation on 30.04.2018, as would be apparent from the service certificate enclosed as Annexure V to the proceedings. Based on it, it was observed that, the dispute is about the payment of performance pay, which relates to the relevant period for which the Operational Creditor has claimed his performance to be outstanding with effect from 01.04.2017 in the consequences of this letter dated 04.08.2017, where he has raised the claim of interest at the rate of 15%.

It is relevant to observe that the performance pay is not a prefixed criteria or a settled service benefit, which a person could be entitled to receive only subject to satisfying the criteria, which we have already observed, which has to be determined upon performance of work, based upon the criteria of performance assessment provided in the policy for the financial year 2017-18 dated 24.04.2018, where itself various classifications have been made with regards to the percentage of entitlement of performance pay and that to it is not a strait jacketed formula which could be invariably applied under all situations for determining the performance pay until or unless, the various parameters

prescribed therein pertaining to the various heads of quality assessment as we have already observed in the Judgment itself has to be assessed.

We are of the view that where a payment of a financial debt owing to the employment, if it is required to be arithmetically determined during the proceedings based upon a subjective satisfaction and application of criteria of performance pay, based upon the policy as referred to by the Learned Counsel for the Respondent i.e., 06.01.2019, that has to be read with the criteria of assessment of performance pay dated 24.04.2018, the amount claimed by the Appellant in his notice issued under Section 8, will fall to be a variable factor and that will not fall to be within the definition of the “**operational debt**” or even a “**debt**” as defined under the I & B Code and thus the denial of the same by the Learned Adjudicating Authority cannot be said to be irrational or without an application of mind.

Apart from it, there is yet another aspect which is required to be taken into consideration, its that at the stage of initiation of proceedings the issuance of demand notices under Section 8 of the I & B Code, which is a condition precedent for raising a determined demand for the claim, which is falling within the purview of debt or an operational debt herein, the Appellant admittedly has issued Form 3 and Form 4. In fact, the two forms provided under rules, of the raising of a demand they altogether intend to meet a distinct objective accordingly it classifies the demand itself. The rules prescribe that the

Operational Creditor can send a demand notice, either in Form 3 or in Form 4 as contemplated under Section 8 of the I & B Code, which is to be read with Rule 5 of the I & B Code, as well as the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. The Learned Adjudicating Authority had observed and rightly so, that the two formats of demand they deal with different aspects and nature of demand altogether. For example, that has observed in the case for demand notices which are issued in Form 3, then the submission of the copy of the invoice along with the application is mandatory, whereas in Form 5 is not mandatory, provided that the documents itself justifying demand raised are available thereon record to prove the existence of operational debt and the amount in default is attached with the application. This aspect was not satisfied by the Operational Creditor while issuing the notices under Section 8 of the I & B Code and thus the analogy which has been drawn by the Learned Adjudicating Authority while rejecting the claim. The ratio laid down by the NCLAT in the matters of ***Neeraj Jain Director of M/s. Flipkart India Private Limited*** was taken into consideration for the purposes of determination of the nature of claim raised by the Appellant by the issuance of Form 3. The reference of the Judgment of ***Neeraj Jain Director of M/s. Flipkart India Private Limited Vs Cloudwalker Streaming Technologies Pvt. Ltd. and Ors., as reported in 2020 ibclaw.in221*** NCLAT had been elaborately considered by NCLT, which are not being reiterated.

The Learned Adjudicating Authority while considering the claim has further observed, that the sending of the notices under Form 3, as well as under Form 4, that itself depicts that the Appellant was not very sure about the nature of the claim and its classification, under which he was raising because he himself has not been able to classify as to under which form of debt, would his claim towards the performance pay, would lie and thus issuance of two forms, i.e., Form 3 and Form 4, since they intend to meet a difference objective, as it has been dealt with in the Impugned Judgment, the claim raised by the Appellant Operational Creditor will not fall to be payable by the issuance of multiple formulated notices under Section 8 of the I & B Code and it cannot be taken as to be an operational debt for the purposes of invocation of the proceedings under Section 9 for drawing a CIRP proceedings against the Corporate Debtor and hence the reason which has been assigned by the Learned Adjudicating Authority while dismissing the claim is absolutely justified and particularly in the context as already observed and by way of repetition is hereby submitted that the claim raised by the Appellant since it was a variable claim, which will depend upon a subjective satisfaction and its quantification, as was based upon the determination, which has to be made on a computation of a right based on the criteria, the claim as raised by the Operational Creditor, in the proceedings of the Company Petition, will not be an operational debt and hence drawing of a proceedings by invocation of Section 9 will not be justified, to bring a Corporate Debtor to face the CIRP proceedings and particularly when the Appellant

himself was not very sure enough, that it was not a determined claim of a debt, which was being raised before the Learned Adjudicating Authority and hence the rejection of the claim by virtue of the Impugned Order, which is under challenge i.e., dated 02.05.2024, as it has been rendered in CP(IB) No.132/09/HDB/2020, do not suffer from any apparent illegality which may call for an interference in the exercise of ours Appellate Jurisdiction under Section 61 of the I & B Code, 2016 and thus the reason which has been assigned by the Learned Adjudicating Authority is absolutely justified. Hence, this Appeal lacks merit and the same is accordingly dismissed.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

21.11.2024
VG/TM/MS