

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

CP No. (IB)- 329/9/JPR/2019

(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:

SHASHI KANT VARMA

...Applicant/Operational Creditor

Versus

PSP DYNAMIC PVT LTD & ORS.

...Respondent/Corporate Debtor

Memo of Parties

Shashi Kant Varma

S/o Sohan Ji Varma

R/o E-85, New Ashok Nagar, New

Delhi- 110096.

...Operational Creditor/ Applicant

VERSUS

Tonk Water Supply Limited

R/o: 401, Wonder Excellency 23,

Manu Marg, Alwar, Rajasthan-

301001

...Corporate Debtor/ Respondent

For the Operational Creditor

: Mr. Nikhil Yadav, Adv.

For the Corporate Debtor

: Ms. Akansha Noval, Adv.

Order Pronounced On: - 29.09.2022

ORDER**Per: Shri Deep Chandra Joshi, Judicial Member**

1. This Application has been filed by Shri Shashi Kant Sharma ('Applicant') to initiate Corporate Insolvency Resolution Process ('CIRP') against PSP Dynamic Private Limited ('Corporate Debtor') under Section 9 of IBC, 2016 for alleged default of repayment of Operational Debt amounting to Rs. 1,62,926/- (Rupees One Lakh Sixty-Two Thousand Nine Hundred and Twenty-Six Only).
2. The Corporate Debtor is a private company incorporated under the provisions of the Companies Act, 2013 on 18.02.2014 and duly registered with the Registrar of Companies, Jaipur having CIN: U25209RJ2014PTC045143. The registered office of the Corporate Debtor is situated at 401, Wonder Excellency 23, Manu Marg, Alwar, Rajasthan. The authorized share capital of the company is Rs. 2,00,00,000/- (Rupees Two Crores Only) and the paid-up share capital is also Rs. 2,00,00,000/- (Rupees Two Crores Only).
3. The details of the transactions leading to the filing of the Application as averred by the Applicant are as follows:
 - a. The Corporate Debtor made an offer of employment to the Operational Creditor and he started working with the Corporate Debtor w.e.f. 15.06.2017 on a monthly salary of Rs. 50000/- ('CTC'). In furtherance

of the appointment, an appointment letter dated 20.09.2017 was issued which is annexed with the Application as Annexure-3.

- b. Pursuant to the same, the Applicant discharged his duties diligently. Thereafter, the Applicant requested for reimbursement of the expenses incurred by him for official purposes of the Corporate Debtor as per set format prescribed. Copy of the expenses sheet has been attached as Annexure-4 of the Application. The Applicant has also attached his bank statement evidencing the receipt of salary and time to time payment of expenses from the Corporate Debtor as Annexure- 5.
- c. The Applicant submits that the Corporate Debtor has not paid the salary for the month of September, 2018 and 6 days of October 2018. In addition to the unpaid salary, the Corporate Debtor has failed to disburse expenses incurred by the Applicant from June, 2018 to October, 2018. The Applicant furnished various e-mails to the Corporate Debtor requesting them to pay the unpaid salary and expenses incurred during the course of employment.
- d. Upon seeing the unprofessional and illegal conduct of the Corporate Debtor, the Applicant tendered his resignation on 09.10.2018 w.e.f. 06.10.2018. The Applicant served a legal notice dated 11.02.2019 to the Corporate Debtor with respect to the outstanding salary and unpaid expenses to which the Corporate Debtor replied vide Letter dated 11.03.2019, denying the payment of outstanding salary or expenses.

- e. Finally, the Operational Creditor/Applicant served a demand notice dated 05.11.2019 upon the Corporate Debtor for unpaid salary which was delivered to the Corporate Debtor on 05.11.2019. The Corporate Debtor has not furnished reply to the said demand notice, hence the present application has been filed.
- f. The details of the amount of debt due and the date from which such debt due has been mentioned in Part- IV of the application which is as follows: -

PART IV PARTICULARS OF OPERATIONAL DEBT										
1.	Total amount of debt. Details of transactions on account of which debt fell due, and the date from which such debt fell due	<u>Total amount of debt:</u> Rs. 1,62,926/- (Rupees One Lakh Sixty-Two Thousand Nine Hundred and Twenty-Six Only) calculated upto 01.10.2018. The breakup of the amount is as follows: <table style="width: 100%; border: none;"> <tr> <td style="width: 70%;">Salary</td> <td style="text-align: right;">Rs. 60,000/-</td> </tr> <tr> <td>Expenses</td> <td style="text-align: right;">Rs. 83,086/-</td> </tr> <tr> <td>Interest @ 12%</td> <td style="text-align: right;">Rs. 19,840/-</td> </tr> <tr> <td>Total</td> <td style="text-align: right;">Rs.1,62,926/-</td> </tr> </table>	Salary	Rs. 60,000/-	Expenses	Rs. 83,086/-	Interest @ 12%	Rs. 19,840/-	Total	Rs.1,62,926/-
Salary	Rs. 60,000/-									
Expenses	Rs. 83,086/-									
Interest @ 12%	Rs. 19,840/-									
Total	Rs.1,62,926/-									
2.	Amount claimed to be in default and the date on which the default occurred	<u>Amount claimed to be in default:</u> Rs. 1,62,926/- (Rupees One Lakh Sixty-Two Thousand Nine Hundred and Twenty-Six Only). The Debt fell due from 01.10.2018.								

4. Consequent to the notice issued by the Adjudicating Authority, the Corporate Debtor filed its reply as well as Written Submissions vide Diary

No. 2205/2021 dated 26.10.2021 and Diary No. 2707/2022 dated 09.09.2022 respectively whereby following has been stated:

- a. The Corporate Debtor has submitted that this Application has been moved despite being aware of the fact that there is a pre-existing dispute *interse* the parties. There is no shed of documentary evidence placed on record to prove the alleged claim of the Applicant.
- b. The Corporate Debtor has averred that the Applicant was employed with the Non-Applicant as Vice-President vide Appointment Letter dated 20.09.2017. The Applicant abruptly resigned from the Respondent Company on 09.10.2018 vide mail w.e.f. 06.10.2018 and failed to serve one month notice as per the Appointment Letter. Since the applicant failed to serve the aforementioned notice period before tendering his resignation, he was required to deposit his one month's salary i.e. Rs. 50,000/- in lieu hereof which was not done.
- c. Further, the Corporate Debtor has submitted that the Applicant has not attached any documentary evidence depicting the incurred expenses whereas as per the Respondent Company's Travel Policy dated 01.01.2018, the employee is required to compulsorily fill up a tour approval form to be sent to Human Resources and attach the same with the Expense sheet with the Travel Expenses; which was not done. According to the Corporate Debtor, the Applicant is trying to recover

the money from the Corporate Debtor under the garb of this Application.

- d. The Corporate Debtor has further relied on the word dispute whereby it has been alleged that the e-mails dated 09.05.2019 and 20.05.2019 sent to the Applicant by the Respondent stating that nothing was pending from the end of the Respondent clearly depicts a pre-existing dispute. The Corporate Debtor further states that the Applicant has failed to act in accordance with the conditions of the Appointment Letter, Rules, Regulations and Working Policy of the Corporate Debtor.
5. This Adjudicating Authority has perused all the relevant papers and found them in order. The registered office of the Respondent is situated in Jaipur; therefore, this Adjudicating Authority has jurisdiction to entertain and try this application. The Applicant has alleged the date of default in Part IV is 01.10.2018; this Application was filed vide Diary No. 2880/2019 dated 06.12.2019. Hence, the Application has been filed within limitation.
6. It has been admitted by both the parties herein that the Applicant was an employee of the Corporate Debtor. It is seen that the Applicant was appointed at the post of Vice President vide Appointment Letter dated 20.09.2017 and the date of joining as mentioned in the Appointment Letter was '*on or before 17.06.2017*'. Furthermore, conjoint reading of the probation and confirmation clause indicates that the Applicant will be on

probation for a period of one year from the date of joining and after successful completion of the probation period; the services of the Applicant will be confirmed. Therefore, it is clear that the services of the applicant were confirmed as no letter regarding extension of the probation period was given by the Corporate Debtor.

7. The first question that comes before us is whether there is an operational debt in the present matter. The Applicant admittedly tendered its resignation vide letter dated 09.10.2018 w.e.f. 06.10.2018. The term as mentioned in the Appointment Letter regarding termination reads that '*After confirmation the service is terminable by giving one month notice or salary in lieu thereof, by either side without assigning reason.*'. As observed earlier, the services of the Applicant were confirmed and hence the Applicant falls within the bracket of confirmed employee. Therefore, at the time of termination of services, the Applicant was required to give notice of termination one month prior to the resignation. This clearly infers that if the Applicant wished to discontinue its services w.e.f. 06.10.2018, it ought to have given its notice of termination on or before 06.09.2018. In failure of notice, the Applicant shall forego salary for the same. From this we can conclude that no salary is due in light of the Appointment Letter dated 20.09.2017 to the Applicant by the Corporate Debtor.
8. The Applicant has attached certain expenses in Form No. F/ADM/001 and Form No. F/ADM/001 which were allegedly undertaken by the Applicant

during the course of its service with the Applicant. The Corporate Debtor has attached the Inland Travel Policy which reads '*3.3 Employees should fill up a Tour Approval Form in Format No. F/ADM/003 (Director exempted) before proceeding on Tour. One copy of this Form should be sent to HR Department at Alwar to account for absence of reckoning attendance. This Approval Form should be attached with Travel Expenses format (Format No. F/ADM/002).*' The Applicant has attached sheets which lack authenticity as there is no Tour Approval Form in reference of which the said expenses have been incurred. Furthermore, the said expense sheets are mere scribbles on a format; neither the Applicant has attached bills of the same nor any acknowledgment or seal by the Corporate Debtor which can prove that the expenses were incurred against an approved trip. Hence, there is no operational debt which has become due and payable by the Corporate Debtor.

9. We also take into consideration the e-mail correspondence which took place between the parties to the matter whereby the Applicant has time and again requested the Corporate Debtor to clear the pending dues to which the Corporate Debtor has vide e-mail dated 20.05.2019 submitted that there are no pending dues.
10. In Mobilox Innovations Private Limited Vs Kirusa Software Private Limited, para 34, the Hon'ble Supreme Court laid down what the

Adjudicating Authority has to examine in an Application under Section 9.

Para 34 is as follows:-

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
- (iii) Whether there is existence of a dispute between the parties or the record of the 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

However, the defence has to be plausible and while not examining it on merits, it must not appear as a moonshine defence.

11. In the present matter at hand, there appears to be no operational debt which has become due and payable by the Corporate Debtor. The conditions laid down under Section 9 of the Code are not fulfilled in the present application. In light of the judgment of the Hon’ble Supreme Court in *M/s S. S. Engineers vs. Hindustan Petroleum Corporation Ltd. & Ors.*, this Adjudicating Authority is not inclined to commence CIRP against the Corporate Debtor as envisaged under the provisions of IBC.

12. Accordingly, CP No. (IB)- 329/9/JPR/2019 is dismissed.

(DEEP CHANDRA JOSHI)
JUDICIAL MEMBER

(PRASANTA KUMAR MOHANTY)
TECHNICAL MEMBER