

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)

CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 02.05.2024 AT 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP(IB) No.132/9/HDB/2020
NAME OF THE COMPANY	Nagarjuna Fertilizers and Chemicals Ltd
NAME OF THE PETITIONER(S)	M.Ramakanth
NAME OF THE RESPONDENT(S)	Nagarjuna Fertilizers and Chemicals Ltd
UNDER SECTION	9 of IBC

ORDER

Orders pronounced, recorded vide separate sheets. In the result, this petition is dismissed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – II**

CP(IB) No.132/7/HDB/2020

*Under Section 60(5) of the Insolvency and Bankruptcy
Code, 2016 read with Rule 11 & 32 of NCLT Rules, 2016*

In the matter of :

Mr.M.Ramakanth,
No.2-2-1075/21/A,
Mahalakshmi Bagh,
Amberpet,
Hyderabad – 500 013.

....Applicant/Operational Creditor

V e r s u s

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

....Respondent/Corporate Debtor

Date of Order: 02.05.2024

CORAM :

Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)
Sri Sanjay Puri, Hon'ble Member (Technical)

Counsels present:

For the Applicant : Mr.Ramakanth, Party-in-Person.
For the Respondent : Ms.Anjali, Advocate.

Per : [Rajeev Bhardwaj, Member(Judicial)]

ORDER

1. This Application has been filed under Section 7 of the Insolvency & Bankruptcy Code by Mr.M.Ramakanth (**hereinafter called as Applicant/Operational Creditor/OC**), former employee of M/s.Nararjuna

Chemicals & Fertilizers Limited (**hereinafter referred as Corporate Debtor**), for initiation of Corporate Insolvency Resolution Process (CIRP).

2. Briefly, the OC has put up the case:

2.1. The OC was appointed as Assistant Company Secretary by M/s.Nagarjuna Group on 16.01.1986, and was later on appointed as Company Secretary on 12.09.1994 in M/s.Nagarjuna Fertilizers & Chemicals Limited.

2.2 It is claimed that the OC was entitled to receive Performance Pay at 15 per cent of Cost to Company (CTC) in terms of letter dated 04.08.2017 (**Annexure 4 – page 17A of the Application**). However, he has not been paid the Performance Pay till his superannuation on 30.04.2018, despite raising this issue many times including vide e-mail dated 28.04.2018 (**Annexure 6 – page No.19 of the Application**).

2.3 Therefore, the OC is entitled to a sum of Rs.18,06,861/- including interest @ 24% per annum upto 31.01.2020 and the date of default is 01.04.2018. Notice under Section 5 of the IBC was also issued to the Corporate Debtor for payment of unpaid operational debt on 27.01.2020. (**Annexure 10 – page No.24 of the Application**).

3. The Respondent by filing the Counter has not disputed that the OC was its employee, but submitted that:

3.1. The Performance Pay depends upon various variables and such payment was never confirmed to the OC. Reference has been made to various letters of Corporate Debtor dated 06.01.1999, 21.11.2005, 20.06.2006, 30.07.2007, 05.06.2013 and 30.04.2018 to

bring home the point that the Performance Pay was not part of the salary.

- 3.2. The notice under section 8 IBC is defective because the OC has also submitted all the relevant documents including Annexure - 4 with the notice. Therefore, the said notice is not valid in the absence of providing complete information.

4. In the Rejoinder, the contentions put forward in the Application are reaffirmed and reiterated. It is denied that the Performance Pay depends upon the sole discretion of the Corporate Debtor. On the other hand, Performance Pay was part of various components of the remuneration of the employee. Now the Corporate Debtor cannot deny that the said part of remuneration is not payable, particularly when Performance Pay was paid during the previous years without any demur. In the relevant letter, the OC has been assessed as a valuable employee and nowhere it is mentioned that Performance Pay is not payable.

5. We have heard the Learned Counsels for both the parties and have also gone through the entire records.

6. There is no dispute about the status of employer and employee between the OC and the Corporate Debtor and the latter got superannuated on 30.04.2018 as per the Service Certificate. **(Annexure – 5 – page No.18 of the Application)**. The dispute is about payment of the Performance Pay @15 per cent of CTC. The relevant period for which the OC has claimed Performance Pay is w.e.f., 01.04.2017 in consequence of letter dated 04.08.2017 **(Annexure 4 – page No.17A of the Application)** in which Performance Pay is included as 15 per cent of the CTC.

7. Therefore, Performance Pay has been made part of CTC, the full form of which is Cost-to-Company, by the Respondent. CTC is the yearly expenditure that a company spends on an employee, which includes basic salary, allowances, group insurance, provident fund and other benefits. If a company provides an annual performance based variable payout (also known as a bonus or commission), this will also get included in the CTC.
8. The Performance Pay is an internal matter of the company. The Performance Pay is based on how an employee performs his duties, which may be in the form of merit pay, or one of a variety of variable pay programs.
9. As to what variables are to be considered in assessing the Performance Pay, have been detailed in various letters which are part of **Annexure 1 of the Counter**. It has been specifically mentioned in letter dated 06.01.1999 that increase in remuneration is linked to employee's performance, competencies and potential. In addition, the lumpsum is granted on the basis of average and outstanding performance. In the compensation structure, w.e.f., 01.09.2005 of the OC, Performance Pay has been mentioned as 15.58 per cent of CTC. However, it is specifically mentioned that this pay is payable on the basis of performance of the employee. Similarly, in the compensation structure of the OC, w.e.f., 01.04.2006 has been detailed in letters dated 20.06.2006, 30.07.2007 and 05.06.2013. It is crystal clear that the Performance Pay has been made as part of salary, but it was to be paid after the assessment of the performance of the OC.

10. Accordingly, Performance Pay was to be paid later on when the assessment was done. It is for this reason, the OC was not paid the Performance Pay with the monthly salary and it would be admissible at the end of the year after the assessment of the performance of the employee. When the performance of the Respondent has not been assessed on the matrix of the Company, the Applicant can't claim himself as operational creditor.
11. Apart from above, the Applicant has also not sent proper demand notice to the Respondent. The operational creditor can send the demand notice either in Form 3 or Form 4 under Section 8 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 5 provides the manner in which the demand notice under Section 8(1) has to be delivered.
12. The applicability of Form 3 or Form 4 depends on whether the invoices were generated during the course of transaction or not. In case the demand notice is sent in Form 3, then the submission of a copy of the invoice along with the application in Form 5 is not a mandatory requirement, provided the documents to prove the existence of operational debt and the amount in default is attached with the application. Here we rely upon the decision in *Neeraj Jain Director of M/s Flipkart India Private Limited versus Cloudwalker Streaming Technologies Pvt. Ltd. [2020] ibclaw.in 221 NCLAT*.
13. The applicant has sent the notice in Form 3 (**Annexure 10, page 24 of the Application**) as well as in Form 4 (**Page 29 of the Application**). It shows that the Applicant is himself confused about the alleged debt as actually

the notice is to be given in Form 3. However, he has not attached appointment letter and pay revision letter dated 04.08.2017 on the ground of confidentiality, but there is no question of confidentiality when the matter is in between the employee and employer. Thus, valid and legal notice has not been sent.

14. In view of the aforesaid discussions, **CP(IB) No.132/7/HDB/2020 is dismissed.**

SD/-

(Sanjay Puri)
Member(Technical)
Vinod

SD/-

(Rajeev Bhardwaj)
Member(Judicial)