

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH AT HYDERABAD**

CP (IB) No. 9/9/HDB/2017

Date Of Order: 21.02.2017

Between:

K.K.V. Naga Prasad
8/2/293/82/HE/16/A/1
Plot No.16, Unit No.9,
HUDA Enclave, Road No.70, Jubilee Hills,
Hyderabad – 500 034.

... Petitioner

And

M/s Lanco Infratech Limited
Plot No.4, Software Units Layout,
HITEC City, Madhapur,
Hyderabad – 500 081.



.... Respondent

Counsels for the Petitioner : Sri A.Venkatesh and C.Tulasi Krishna
Counsel for the Respondent : Mr. C.V.Narasimham, Mr.Avinash Desai
Alekhya Tadasina and Nikhil Khadkikar

CORAM:

Hon'ble Mr. Rajeswara Rao Vittanala, Member (Judicial)

ORDER

(As per Rajeswara Rao Vittanala, Member (Judl))

1. The present Company Petition (referred to as 'Company petition' hereunder) bearing No. CP(IB)/9/9/HDB/2017 is filed by Sh. K.K.V. Naga Prasad, an operational creditor, 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, by interalia seeking directions to put Lanco Infratech Limited(Referred to as "Company" hereunder) under Corporate Insolvency Resolution process, in accordance with the provisions of IBC, 2016; appoint Interim Resolution professional , award cost etc.

2. The brief facts of the case, as set out in Company petition, are as follows:
- M/s Lanco Infratech Limited(Which is referred to as Company) is a Company incorporated under the provisions of Companies Act, 1956 with an Authorised Capital of Rs.1,20,00,00,00,000/- divided into 1,20,00,00,00,000 shares of Rs.1/- each and paid up capital of Rs.2,74,93,26,655/- It is a listed Company on the Bombay Stock Exchange with 30% public shareholding.
 - The Petitioner has worked for various group companies of the Company from January, 2003 till January, 2014 at various positions/designations, and the last being “Chief Executive Officer” of the Company posted at corporate office in Gurgaon. He had resigned from the Company, vide his letter dated 23.12.2013, after properly serving notice to the Company. So he was relieved from service in the month of January, 2014. He claimed that he was entitled to emoluments consists of pending salary, HRA, local allowance, attire allowance, special allowance, child education allowance etc. and also entitled for Leave Encashment, gratuity etc., at the time of relieving his duties.
 - Since the Company did not pay dues due to him, the petitioner issued demand notice on 2nd January, 2017, as per Form-3 under section 8(1) of IBC, 2016 R/w Rule 5 of Insolvency and Bankruptcy (application to the Adjudicating Authority) Rules, 2016 demanding Rs.1,22,22,969.34 along with interest of 24% p.a. from the Company by giving the Company 10 days’ notice to repay the same. The details of his employment and his entitlements are mentioned below:-



Name of the Employee	KKV Naga Prasad(the petitioner)	Employee ID	00105826
Designation	Chief Executive Officer	Date of Joining	23.01.2003
Department	Business Development	Date of Resignation	23.12.2013
Company Code	Lanco Infratech Limited	Date of Relieving	31.01.2014
Location	Gurgaon	Paid days	31

Monthly Emoluments				
Emoluments	Entitlement	Earnings	Deductions	Amount
Basic	687500.00	687500.00	EE PF Contribution	780.00
House Rent Allowances	343750.00	343750.00	Mobile Bills	16632.00
Child Education Allowance	200.00	200.00	Income Tax	4064951
Attire Allowance	2500.00	2500.00		
Location Allowance	206250.00	206250.00		
Special Allowance	337720.00	337720.00		
Total Earnings (A)		1577920.00	Total Deductions (F)	4082363.00
Leave Encashment	No. of Leaves Encashed	Amount	Notice Period Calculation	In Days
SL	94.50	4331249.69	Available SL Balance	94.50
EL	105.00	4812499.65	Available EL Balance	105.00
Total Leave Encashment (B)		9143749.34	Notice Period	60
Other Re-imbursments	Entitlement	Earnings	Notice Period Served	40
Food Coupons	1300.00		Notice Period Shortfall	20
Annual Gift	0.00		Notice Period waived off	20.00
Annual LTA	0.00		Notice Period adjusted against Leaves	0.00
Annual Medical	12500.00		Leave Bal. (EL & SL)	199.50



Total Reimbursement (C)			
Additional Payments		Amount	Remarks
Gratuity Payment		1500000.00	
Tax Food Bal. Payment		1300.00	
Total Additional Payments (D)		1501300.00	
Total Payable (E) = (A+B+C+D)		12222969.34	
Net Amount payable to Employee = (E-F)		8140606.34	

d) The Petitioner has sent a demand notice/invoice dated 02.01.2017 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, to the Chairman of Company by requesting it to repay the amount due within 10 days from the receipt of this letter, failing which he informed that he would initiate a Corporate Insolvency Resolution process in respect of the Company.

e) In pursuance to the above notice, M/s Chandhiok & Associates, Advocates on behalf of Company sent a reply dated 11.01.2017 by email to Mr. Deva Vrat Anand, Advocate for the Petitioner with a copy to the Petitioner by inter-alia stating that the contents in the Demand Notice was nothing but a cohesive means to harass and agonise the Company, and pressurize it to give into his unjust demands by threatening insolvency of Company. It is also stated that the demand notice was issued under Section 7 of the IBC, which shall be given by a financial creditor, whereas the petitioner is not a financial creditor and thus Demand Notice was also incorrect and erroneous and not tenable. And this response was given as a notice under Section 8(2) of IBC, 2016.

3. The petitioner was not paid his dues even though the said Demand Notice was given to the Company. In support of his contention, the Petitioner has produced a Certificate from Axis Bank, Begumpet Branch, and Hyderabad.

4. A reply dated 10.02.2017 was filed on behalf of the Company by inter-alia stating as follows:-



- a) The petitioner has filed the Company Petition only with ulterior motive of defaming, harming the reputation and goodwill, and to pressurize the Company to give into his unjust and unlawful demands by making frivolous claims against Company.
- b) M/s Lanco Infratech Limited is a Company incorporated under the provisions of Companies Act, 1956 with an Authorised Capital of Rs.1,20,00,00,00,000/- divided into 1,20,00,00,00,000 shares of Rs.1/- each and paid up capital of Rs.2,74,93,26,655/- And it is a listed Company on the Bombay Stock Exchange with 30% public shareholding. It is one of the India's leading business entities, driving growth in the domains of Engineering Procurement and Construction, Power, Solar, Natural Resources and Infrastructure over the last two and half decades. The Lanco Group of Companies provides employment to more than 3400 employees, and it is involved in building large civic and urban infrastructure projects and thermals, hydro and solar power projects of national importance.
- c) A preliminary objection was also raised on the maintainability of the petition by stating that, under Section 9(3)(b) of the Insolvency and Bankruptcy Code, 2016, the Operational Creditor is required to furnish an affidavit to the effect that there is no notice of dispute given by the Corporate Debtor, relating to a dispute of the unpaid operational debt. The Petitioner submitted a certificate from Axis Bank, which relates to 02.01.2017 to 21.01.2017. As per the requirement of Code, the petitioner is required to provide a certificate from all financial institutions with whom he holds an account. Moreover, it is not the case of the petitioner that Axis Bank is only financial institution, in which he was maintaining his accounts. The Company had already paid INR Rs.5, 00,000 to the Petitioner in January, 2015, and this fact was also not brought to the notice of the Tribunal.
- d) It is not the case of the Petitioner that the Company is insolvent to pay the alleged claim in question, on the contrary that the petitioner himself was liable to pay Rs.3,81,943/- to the Company. The petitioner, being a Senior Management employee and CEO of the Company, has enjoyed



wide discretionary powers and those powers were misused by using Company policies. Except the Petitioner herein, no other creditor of the Company has made a demand on the Company, and approached the Tribunal. It is further stated that the petitioner was not interested for honest settlement of alleged claims, and in fact, the Petitioner was asked by the Company to come forward, and make full and honest declaration of actual leaves availed by the petitioner, and to settle the alleged claims.

- e) The Tribunal cannot be misused to settle and determine the cases of disputed claims. Once a dispute is raised in respect of operational debt, the Tribunal does not any have jurisdiction to settle such disputes, which necessary should be settled by Civil Court through a process of adjudication by leading evidence on the disputed questions of fact.
- f) The IBC does not have a retrospective effect, and its provisions will apply to cases, where non-payment of an operational debt arises after its promulgation. The Code came into operation on 28th May, 2016. The alleged default relates to non-payment in question, arose prior to 28th May, 2016. The Insolvency proceedings cannot be exploited as a normal alternative to the ordinary mode of debt realisation.
- g) The contention of the petitioner that he was constantly following up the issue in question was not correct and denied and further contended that a case cannot be decided by hearsay and self-serving statements.
- h) The FFS in question was a SAP GENERATE DOCUMENT dated 14.07.2015 which was sent by one Shri Ch.V. Nanda Kishore to the petitioner. However, Sh.Ch.V.Nanda Kishore did not take the Company into confidence, while sending the said FFS, and he himself resigned from the Company, after sending the said FFS. The petitioner himself has recruited him and is also a relative to him.
- i) The definition of dispute in the Code in an inclusive (and not an exhaustive) definition and cannot be limited to existence of the Suit or Arbitration proceeding. This is evident from reading of the definition of “dispute” in the code, which states that “Dispute includes a suit or arbitration proceedings”. All cases of dispute do not and need not



necessarily result in a suit or an arbitration proceeding prior to the notice. If the intent of the legislature was to limit dispute to a suit or arbitration proceeding, it would have used the term “means” instead of “includes” in the definition of “dispute”. The language in one of the forms under Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (as relied by the Petitioner) cannot supersede or override the definition of dispute in the Code.

- j) It is contended that the Company is not at all liable to pay any amount to the Petitioner and no debt has been established by the Petitioner and it was never ascertained, definite or un-disputed as contended. Therefore, the petitioner prayed the Tribunal to allow the petition as prayed for.

5. I have heard Shri A.Vekatesh, the Learned Counsel for the Petitioner, and Shri C.V.Narasimham the Learned Counsel for the Respondent, and also perused all the pleadings along with material papers filed by the respective parties.

6. The Learned Counsel for the petitioner reiterated various averments made in the Company petition and subsequently filed written gist of arguments dated 13.02.2017 and his primary submissions are as under :

a) The petitioner was appointed as an employee to execute and manage the functioning of the Company. He was transferred to various inter-company transfers due to reorganisation of business of Company commencing from January, 23, 2003 till his last day of service i.e., January, 31, 2014.

b) After pursuing the issue in question for more than 17 months, after the date of relieving from the Company, he received full and final settlement (FFS) by an e-mail dated 14.07.2015 through electronically generated document with the caption as “SAP GENERATED DOCUMENT, NEEDS NO SIGNATURE”. He stated that the total amount of Rs.122,055,57.30/- subject to statutory deductions/taxes as on 31.01.2014, and it was not paid till date. The Petitioner relied upon SAP generated document, and it



cannot be disputed at this stage, and the same will be against the doctrine of indoor management.

- c) The Company failed to raise valid dispute before the issue of demand notice, but replied on 11.01.2017 via e-mail stating that the Applicant (Petitioner) was not a corporate debtor and has raised frivolous issues with regard to leave encashment, travel bills for previous years, etc. He also disputed various contentions of the Company with regard to claims in respect of leave encashment, travel plans etc. The Company could have raised all the issues and could have demanded and recovered the alleged amounts due to them.
- d) The Petitioner has contended that mere existence of any frivolous, baseless and superficial disputes do not full fill the requirement of section 8(2) of Insolvency Bankruptcy Code. The Corporate Debtor should have disputed the debt before receipt of demand notice under section 8(1) of IBC. So the alleged dispute notice issued by the Company is not at all tenable under the law. The Company could have initiated appropriate legal action/remedy to recover the alleged amounts due to them as the applicant worked with the company for about 10 years. He has reiterated that the debt in question is established, ascertained, definite and undisputed.
- e) He relied upon Section 8 (2) of IBC, 2016 and clause 5 of Form No.3 under Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Section and Rule reads as under:



Section 8(2) of IBC: “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, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.”

Clause 5 of Form 3: “If you dispute the existence or amount of unpaid operational debt (in default) please provide the undersigned,

within ten days of the receipt of this letter, of the pendency of the suit or arbitration proceedings in relation to such dispute filed before the receipt of this letter/notices.”

In view of the above provisions, the Learned Counsel contends the dispute in question should be raised by the corporate debtor before the receipt of the demand notice, and it cannot be raised subsequent to the issue of demand notice. So there is no existence of dispute as contended by the Company.

f) The Company petition is maintainable as per law and facts and thus prayed that the Tribunal may be pleased to admit the case and initiate Insolvency process as prayed for.

7. Sh.C.V.Narsimham, the Learned Counsel for the Respondent, while reiterating various averments made in counter, has further submitted as under :

a) That the present Petition is liable to be rejected on the ground that the Company has already issued a notice of dispute vide letter dated 11.01.2017 to the Petitioner under Section 8(2) of the Code within a prescribed time frame by explaining as to why the Petitioner was not entitled for payment of any dues. The subject FFS was a disputed one and it was not authenticated and unauthorised to issue.

The claim of the Petitioner for encashment of 199.5 unavailed leaves amounting to INR 91,43,749,34 is baseless and untenable as the Petitioner himself being a CEO was under a fiduciary duty to declare his leaves and then claim un-availed leaves. However, during the entire tenure of petitioner for about 9 years, not a single self-declaration of the leave was made by the Petitioner. If the leaves were declared, the HR department would have to input the availed leaves into the SAP system from time to time. SAP system was adopted in the Company till the date of his resignation. SAP statement reflects all the earned leaves (15 days per year) and all sick leaves (12 leaves per year) which an employee is entitled for encashment. However, for the reasons best known to the Petitioner, he is claiming and



insisting on encashment of entire 199.5 leaves as if the Petitioner did not take any leave. The Petitioner cannot take advantage of his own illegal action.

- c) The Learned Counsel for the respondent also disputed the claim of the Petitioner for his working in Gurgaon Corporate Office and used to stay for only 2 -3 days in a week. He used to stay at Hyderabad much of the time though he was supposed to work at Gurgaon Office. Same is the case in respect of his assignment at Perth, Australia. So the Petitioner's unauthorized absence, during October, 2010 – February 2013, during which the Petitioner was required to be present either in Gurgaon or Australia was around 208 days. The Company got the above information based on the internal audit reports and travel information retrieved thereafter. Since the Petitioner is making false and baseless claims with regard to the leave encashment, travel allowance, etc., the Company was still in the process of retrieving additional information relating to the travels made by the Petitioner.
- d) It is further submitted that it is with malafide intention and by taking advantage of his own mistakes, the Petitioner is trying to misuse/abuse the process of law under IBC on untenable grounds that he did not take any sick leave or earned leave during his entire tenure with the Company. The Petitioner has not approached this Tribunal with clean hands to seek any relief. Moreover, in collusion with Ch. Nandakishore, who was hired by the Lanco group on the recommendation of Petitioner has created the FFS in question and started making false claims on that basis. In fact, Sh. Nanda kishore is a very junior employee in HR department of the Company and has no authority to issue/send full and final settlement statements. He did not mark the e-mail (FFS) to any department of management of the Company. So the basis of FFS in question was fraudulently taken by the Petitioner, who was admittedly working in higher executive position in the Respondent Company.
- e) The learned counsel relied upon judgement of Hon'ble Principal Bench, NCLT in the case of Nikhil Mehta & Sons(HUF) & Ors Vs.



M/s AMR Infrastructures Limited. However, the case was instituted, under Section 7 of IBC, 2016, and the issues considered in the case were; who is 'Financial Creditor and what is financial debt. And several winding up petitions and Company Petitions No. 477 of 2014, 689, 691, 692,693, 694,695,700 etc were pending before the Hon'ble High court of Delhi. The facts and issue raised in that case has no bearing in the present case.

f) The Learned Counsel for the Respondents, therefore, submits that petition is liable to be dismissed.

8. I have carefully considered all the above contentions of both the parties.
9. The Insolvency and Bankruptcy Code, 2016 was enacted by the Parliament in the 67th year of Republic of India and the main object of the Act is as follows:

“An Act to consolidate and amend the law relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alternation in the order of priority of payment of Government dues and to establish an Insolvency Bankruptcy Board of India, and for matters connected therewith or incidental thereto”.



10. The Company Petition has been filed under section 9(3) (b) of Insolvency Bankruptcy Code, 2016 read with Rule 6 of Insolvency Bankruptcy (Application to Adjudicating Authorities) Rules, 2016 by inter-alia seeking to put the Company under Corporate Insolvency Resolution Process, and to appoint interim resolution professional etc.

As per section 9 of IBC, the operational creditor can file an application before the Adjudicating Authority for initiating a Corporate Insolvency Resolution Process. Along with the

application/petition, the operational creditor has to furnish the following documents:

- (a) A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor.
- (b) An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- (c) A copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and
- (d) Such other information as may be specified.

11. As per Section 8(1) IBC, 16, an Operational Creditor, on the occurrence of a default, has to deliver a demand notice of unpaid operation debtor copy of an invoice demanding payment of the amount involved in default to the Corporate debtor in such form and manner as may be prescribed. .

Section 3(12) of IBC defines a '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 be

Section 3(11) 'debt' means liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt

By reading of the above definitions, it can be inferred that default arise out of non-payment of debt, "which is due and payable

In the instant case, as explained supra, due in question is totally in dispute as the petitioner claim was not only rejected by the Company but also filed a statement showing that the petitioner himself was due to the Company. Moreover, the petitioner having worked for more than 9 years in the Company as senior Executive ie from 19.11.2005 to 23.12.2013 and keeping quiet for a long time,



make a demand basing on un-authentic and un-authorized FFS in question, is not at all tenable to invoke the provisions of IBC, which is meant for protection of bonafide stakeholders of a Company as per the objects of IBC as extracted above. The petitioner failed to show his bonafides to approach this Tribunal except technically contending that he has not received the notice of dispute in question from the Company before receipt of demand notice in question.

12. It is not in dispute that the resignation of the Petitioner was accepted on 23.12.2013. A sum of Rs. 5 lakhs was credited by the Company to the Applicant on 15.01.2015. The petitioner failed to explain suitably that FFS in question was an authenticated document. However, the Company suitably explained vide their responses dated 11.01.2017 and 23.01.17 proving that there was a clear dispute with regard to the claim in question and there are no dues from the Company to the Petitioner. The Petitioner kept quiet for a long period from 23.12.2013 i.e., from the date of resignation till January, 2017 and it indicates that the Petitioner did not make any claim with respect to the alleged due before making the present issue. By creating FFS as explained above, started the present issue. Moreover, the Company asked the petitioner to come forward and make full and honest declarations of actual leaves availed by the petitioner and to settle his alleged claims. Without availing the said opportunity, he has rushed to this Tribunal.



13. The Tribunal cannot go into roving enquiry into the disputed claims of parties as the object of IBC, as explained above, is to ensure reorganisation and insolvency resolution of Corporate persons, individuals, etc., in a time bound manner for maximisation of value of assets persons to promoted entrepreneurship etc. As stated above, the Learned Counsel for the Respondents not only denied the claims in question but also explained with cogent reasons as to how the Petitioner is un-justified in filing the present petition by invoking the jurisdiction of this Tribunal under IBC, 2016.

14. For the reasons stated above, I am of the considered opinion that it is not a fit case to initiate Insolvency Resolution Process as prayed for by the Petitioner. Hence, I hereby reject CP(IB) No. 9/9/HDB /2017 with no order to costs.

However, this rejection order will not preclude both the Petitioner and Respondents to settle the alleged issue, and the Company may also extend its offer for the Petitioner to come forward to settle the alleged issue as stated in its counter as mentioned above, and further it will also not preclude the Petitioner from taking recourse to any other legal remedy available under any law, with reference to the subject matter.



**CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL**

Sd/-

**RAJESWARA RAO VITTANALA
MEMBER (J)**

V. Annapoorna
V. ANNA POORNA
Asst. DIRECTOR
NCLT, HYDERABAD - 68