

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1239 of 2022

(Arising out of the Order dated 23rd September, 2022 passed by the
Learned Adjudicating Authority (National Company Law Tribunal,
Mumbai Bench, Court – I), in CP (IB) 973/MB/C-I/2019)

IN THE MATTER OF:

Mr. Satish Chinnadurai

Director of DB Group India Pvt. Ltd.
Having his address at 5th Floor Sangeet Plaza,
Marol Maroshi Road, Opposite Marol Fire Station,
Mumbai – 400 059.

...Appellant

Versus

1. Mr. Ravindra Hirasingh Rawat

B-44, Himalaya Parvatiya CSHL
Govind Nagar, NSS Road,
Asalpha Ghatkopar West, Mumbai – 400 084.

...Respondent No. 1

2. Mr. Pankaj Ramandas Majithia

Interim Resolution Professional
Of DB Group India Pvt. Ltd.
Having his address at Suite Nos. 301, 304,
Metro Avenue, Opposite Gurunanak Petrol Pump,
Near Magicbricks WEH, Metro Station,
Andheri (East), Mumbai – 400 069.

...Respondent No. 2

Present

For Appellants:

**Mr. Abjjeet Sinha, Mr. Sohan Kinkhafwala,
Mr. Utsav Trivedi, Ms. Shivani Bhushan, Ms.
Manini Roy, Ms. Heena Kochar & Ms. Kanjani
Sharma, Advocates.**

For Respondent No. 1:

**Mr. Rishabh Tripathi, Mr. D.S. Mehta & Mr.
Jaivijay Thakur, Advocates for R-1.**

J U D G E M E N T
(11th August, 2023)

[Anant Bijay Singh (J)]

1. The instant Appeal bearing *Comp. App. (AT) (Ins.) No.1239/2022* has been preferred by the Appellant – ‘Mr. Satish Chinnadurai’, who is aggrieved and dissatisfied by the Order dated 23.09.2022, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – I), filed under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as ‘The Code’), whereby and whereunder the Company Petition preferred by ‘Mr. Ravindra Hirashingh Rawat’ (Respondent No. 1 herein) under Section 9 of the Code was admitted and further ‘Mr. Pankaj Ramandas Majithia’ (Respondent No. 2 herein) was appointed as Interim Resolution Professional (‘IRP’) in the Corporate Insolvency Resolution Process (‘CIRP’) Proceedings.

2. The brief facts giving rise to the instant Appeal are as follows:

- i. That the Appellant herein is the Director of DB Group India Private Limited (Corporate Debtor). On 06.11.2006, the Corporate Debtor appointed by the Respondent No. 1 as a Senior Manager - Finance and Administration, effective from 06.12.2006.
- ii. On 30.09.2013, the Corporate Debtor issued a promotion and increment letter to the Respondent No. I promoting him to the position of Deputy General Manager.
- iii. On 01.04.2016, the Corporate Debtor issued a promotion letter and increment to the Respondent No. 1 to be promoted to the position of General Manager India.

- iv. On 01.02.2017, the Corporate Debtor issued an increment letter to the Respondent No. 1 and increased his salary to Rs. 1,50,000 per month.
- v. On 22.01.2018, the Respondent No. 1 addressed an email submitting his resignation to the Corporate Debtor.
- vi. On 22.01.2018, the Corporate Debtor issued a relieving letter and relieved the Respondent No. 1 immediately.
- vii. On 22.01.2018, the Respondent No. 1 and the Corporate Debtor entered into a Non-Disclosure Agreement ('NDA'). Under this NDA, the Corporate Debtor and the Respondent No. 1 agreed upon themselves that they would comply with their respective obligations as more particularly set out therein. For better understanding of the case, the relevant clauses of the NDA are reproduced as under:

"1 (a) Following your resignation, the corporation will pay you a monthly salary at the Gross rate of 150,000 INR as Notice of discharge.

1 (b) You will be available to give information and collaborate with local Authorities for any legal cases related to the company and opened before your resignation at the cost of corporation with prior intimation.

2 (e) In consideration of the execution of this Agreement, you shall receive a gross sum of 150,000 INR; also, the corporation undertakes not to divulge, for any reason, any information concerning the conclusion of the work with D.B. Group.

2 (f) If you or Board of Directors of D.B. Group spa (President, Vice President, CEO) and D.B. Group India Pvt. Lid (General Manager) violates directly or indirectly the obligations contained in this Agreement, defaulting amount received for a one year employment period in consideration of the execution of this Agreement, for a total amount of 400,000 INR. The Company and you also reserves the right to obtain additional damages and injunctive relief.

2 (i) Salary will be paid every month along with other employees till March 21st 2018, and Full & Final and Gratuity payments will be done within 30 days from March 21st, 2018.”

- viii. On 17.06.2018, the Respondent No. 1 addressed an email to the Corporate Debtor alleging non-payment of Rs. 1,50,000 towards the Notice of discharge and the gross amount of Rs. 1,50,000 in consideration of the execution of the NDA, which were the subject matter of the Application filed before the Adjudicating Authority. This email was controverted and disputed by the Corporate Debtor on immediate next day vide its email dated 18.06.2018 *inter alia* stating that no amounts were payable to Respondent No. 1. In the said email, the Corporate Debtor through Appellant, categorically and explicitly stated and clarified that:

“Dear Mr. Ravindra,

I have already checked the same and there is no such pending from our side.”

- ix. By email dated 19.06.2018, the Respondent No. 1, once again made a demand for the said sum of Rs. 1,50,000 towards the Notice of discharge and the gross amount of Rs.1,50,000 in consideration of the execution of the NDA. Immediately, the next day, i.e., on 20.06.2018, the Corporate Debtor replied to the said email of Respondent No. 1, once again denying and disputing the claim of the Respondent No. 1, and stated as hereunder:

“Dear Luca.

Below email received from Mr. Ravindra for your ref.

CC: Ravindra

The NDA was prepared by Italy and per their instructions I have processed your dues. Nothing is pending from our side. For clarifications on the below clause, you need to speak to Mr. Luca.”

- x. Hence, the claim made by the Respondent No. 1 in the Application was disputed by the Corporate Debtor, in series of correspondence, at the relevant time, and therefore there was a clear “Pre-Existing Dispute” between the parties since 2018, which is much prior to the issuance of Demand Notice by Respondent No. 1 on 31.12.2018.
- xi. The Corporate Debtor states that the Corporate Debtor has made the following payments to the Respondent no. 1 in compliance with its obligations under the NDA:

S. No.	Date	Amount	Description
1.	21.02.2018	123,662/-	January, 2018 Salary
2.	15.03.2018	123,562/-	February 2018 Salary
3.	10.05.2018	319,219/-	Salary for 22 days for March 2018 and other dues
4.	15.06.2018	380,769/-	Gratuity
5.	27.10.2018	24,990/-	Bonus

- xii. Learned Counsel for the Appellant stated that between January 2018 and until 17.06.2018, no claim for Rs.1,50,000 towards the Notice of discharge and the gross amount for Rs.1,50,000 in consideration of the execution of the NDA, was made by Respondent No. 1, and it was simply an afterthought, after receiving his gratuity, to claim more monies from the Corporate Debtor, to which the Respondent No. 1 was not entitled to. Counsel for the Appellant has placed on record the correspondence

exchanged between Respondent No. 1 and the Corporate Debtor, between January 2008 and 17.06.2018.

- xiii. On 14.07.2018, the Respondent No. 1 addressed a Notice claiming an amount of Rs.43 Lakhs from the Corporate Debtor and further alleged that the Corporate Debtor had breached the terms of NDA. The Respondent No. 1 issued Demand Notice dated 31.12.2018 to the Corporate Debtor.
- xiv. The Corporate Debtor vide reply to Demand Notice dated 29.01.2019, disputed the monies as claimed by the Respondent No. 1 in the Demand Notice.
- xv. On or about 08.03.2019, the Respondent No. 1 filed the Application before the Adjudicating Authority.
- xvi. The Corporate Debtor filed its Affidavit in Reply dated 05.11.2019 to the Application. A perusal of the Affidavit in Reply demonstrates the following:
 - a. The Respondent No. 1 joined the Corporate Debtor in or about December 2006 and worked with the Corporate Debtor up to January, 2018.
 - b. The Corporate Debtor made payments to the Respondent No. 1 as per the terms and conditions agreed in the NDA and that there was no breach by the Corporate Debtor of the NDA.
 - c. No monies whatsoever were due and payable to the Respondent No. 1 by the Corporate Debtor.
 - d. The monies as claimed by the Respondent No. 1 were all throughout disputed by the Corporate Debtor.

- e. There was no breach or default on the part of the Corporate Debtor and the claim made by the Respondent No. 1 was only to arm-twist the Corporate Debtor.
 - f. The Respondent No. 1 never made references to monies claimed in its correspondences prior to 17.06.2018.
 - g. The penalty clause in the NDA cannot be construed as an admitted liability, and
 - h. The claim of damages does not come within the purview of the disputes adjudicated under the IBC.
- xvii. On 13.11.2019, Learned Counsel for the Respondent No. 1 had filed a Rejoinder denying the assertions made by the Corporate Debtor in its Reply Affidavit.
- xviii. The Application was heard on 14.07.2022 and thereafter reserved for Orders. During the hearing, both parties argued at length, and the Adjudicating Authority had in fact orally indicated that the Petition is not maintainable as it is premised on damages. However, on 23.09.2022, the Impugned Order was passed without even considering the arguments made and contentions raised by the Corporate Debtor.
- xix. Being aggrieved and dissatisfied by the Impugned Order, *Comp. App. (AT) (Ins.) No.1239/2022* was preferred by the Appellant who is one of the Director of DB Group India Private Limited on 10.10.2022.
- xx. The Impugned Order is unreasoned, renders findings contrary to the record, and shockingly disregards the settled position of law. The Impugned Order gravely prejudices the Appellant and the Corporate Debtor.

3. And after hearing the Parties, the Adjudicating Authority passed the Impugned Order. Hence this Appeal.

4. From the perusal of the Order dated 14.01.2022, since IRP had appeared and accepted the Notice then Notice was also issued to Respondent No. 1 and further the Impugned Order dated 23.09.2022 has been stayed by the Bench comprising Hon'ble Mr. Justice Ashok Bhushan, Chairperson and Mr. Barun Mitra, Member (Technical). Thereafter this matter was directed to be listed on several dates i.e., 30.11.2022, 16.01.2023 and thereafter the matter was directed to be transferred to this Bench on 15.02.2023 by fixing the date in this case, then it was heard on 24.07.2023 and the Judgement was reserved.

5. Counsel for the Appellant during the course of the arguments in their Written Submissions filed before this Tribunal on 31.07.2023 while assailing the Impugned Order submitted as follows:

- i. The Adjudicating Authority in its Impugned Order, failed to consider the correspondence exchanged between the Corporate Debtor and Respondent No. 1, which clearly bear out a "pre-existing dispute", with respect to the claims of the Respondent No. 1. Respondent No. 1, after receiving all his payments under the NDA, addressed an email dated 17.06.2018 to the Corporate Debtor, alleging non-payment of a sum of Rs. 3,00,000/- under the NDA. On the very next day, the Corporate Debtor, vide its email dated 18.06.2018, and subsequent email dated 20.06.2018, outrightly and specifically rejected/disputed the claims of the Respondent No. 1 and specifically informed Respondent No. 1 that

- the Corporate Debtor had made all payments to the Respondent No. 1, under the NDA and no dues were pending from the Corporate Debtor.
- ii. The correspondences from the date 17.06.2018 to 22.06.2018, wherein the Corporate Debtor had explicitly disputed and denied the claims of Respondent No. 1 which clearly established 'Pre-Existing Dispute' amongst the parties, much prior to the issuance of the Demand Notice dated 31.12.2018, has not been considered at all by the Adjudicating Authority, despite the same being on record.
 - iii. It is a well settled law that the Adjudicating Authority has to look into the correspondences wherein a 'debt' has been disputed, and that a proceeding under Section 9 of the Code with respect to the disputed 'debt' cannot be initiated. The Operational Creditor can only initiate CIRP against a Corporate Debtor in case where there are no real disputes existing between the parties.
 - iv. In the instant case, the Corporate Debtor had all throughout disputed the claims of the Respondent No. 1 and as such the Adjudicating Authority ought not to have initiated the CIRP against the Corporate Debtor. The principles governing dismissal of an Application filed under Section 9 of the Code on the grounds of 'Pre-Existing Disputes', has been recently reiterated by this Tribunal.
 - v. At this juncture, Learned Counsel placed reliance on the Judgement of this Tribunal in the matter of '**Om Prakash' Vs. 'Wipro Enterprises Pvt. Ltd.'**' in **Comp. App. (AT) (Ins.) No. 31 of 2023** dated 04.05.2023. The relevant paras of the judgment are being reproduced as under:

“29. Perusal of the impugned order makes it clear that the Adjudicating Authority simply relied on the email dated 09.01.2019 to come to the conclusion that there was debt and default and admitted the Section 9 petition. The satisfaction of the Adjudicating Authority is sans consideration of the reply to the demand notice and the voluminous exchange of correspondences which has taken place between the two parties relating to supplies, delay in completion of project, pendency of risk and cost account of BHEL and LD related issues. The tone and tenor of these protracted correspondences clearly manifest existence of dispute prior to the date of Section 8 demand notice on 16.09.2019. We also notice that these disputes were raised much before the issue of the issue of Demand Notice. For such disputed operational debt, we are of the considered view that Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor.

30. Though there is no need to enter into final adjudication with regard to existence of dispute between the parties regarding operational debt, but the contents of these emails/ letters/ minutes of meetings ought to have been factorized to arrive at a finding whether the defence taken by the Corporate Debtor is moonshine defence unsupported by evidence. Surprisingly none of these emails and letters establishing the existence of pre-existing disputes between the parties have been taken into cognisance by the Adjudicating Authority. These being pertinent factors for consideration, to our mind the Adjudicating Authority has committed an error in side-stepping these aspects and admitting Section 9 application.

31. Where operational creditor seeks to initiate insolvency process against a Corporate Debtor, it can only be done in clear cases where no real dispute exists between the two parties which is, however, not so borne out given the facts of the present case.

(Emphasis supplied)

- vi. It is further contended by the Learned Counsel for the Appellant that Respondent No. 1 in his Application which was filed before the Adjudicating Authority had claimed (a) Rs. 1,50,000/- towards salary as per clause 1(a) of the NDA, (b) Rs. 1,50,000/- as per Clause 2(e) of

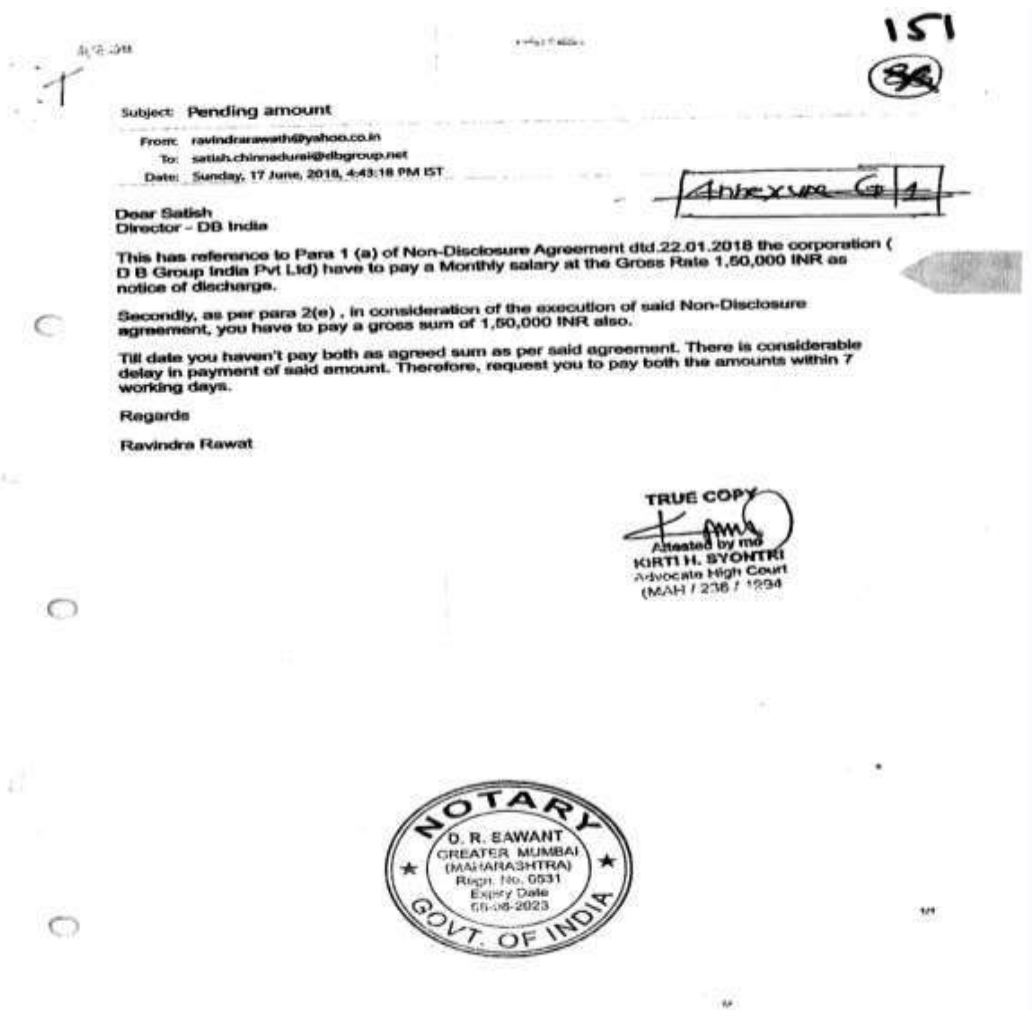
the NDA and (c) Rs. 40,00,000/- as penalty towards alleged violation of the NDA. It is evident that Respondent No. 1 had himself admitted in his Application that he has received two payments each for the sum of rupees; (a) Rs. 1,50,000/- and (b) Rs. 1,50,000/-, being the only payments required to be made by the Corporate Debtor under the NDA. Despite receipt of the said payments under the NDA, the Respondent No. 1 has mala fide claimed a sum of Rs. 40,00,000/- from the Corporate Debtor, as a penalty towards alleged violation of the NDA.

vii. It is a settled principle of law that Operational Debt does not include penalty or liquidated damages. It is also submitted that a claim for penalty does not become an Operational Debt until the liability is adjudicated upon by a Civil Court, and the damages/claims are assessed and crystallised. It has also been succinctly laid down in the Judgement of the Hon'ble Supreme Court in the matter of '**Kailash Nath Associates' Vs. 'DDA'**', reported in **(2015) 4 SCC 136**, wherein the Hon'ble Apex Court has laid down as follows:

“43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.”

(Emphasis Supplied)

- viii. Learned Counsel further submits that the sum of Rs. 40,00,000/- claimed by the Respondent No. 1 is not payable by the Corporate Debtor to Respondent No. 1, since the Corporate Debtor made all payments under the NDA and therefore the question of payment of any penalty does not arise.
- ix. He further contended that the said claim by Respondent No. 1 is disputed by the Corporate Debtor under correspondences dated 17.06.2018 to 22.06.2018. At this juncture we find it relevant to reproduce the correspondences from 17.06.2018 to 22.06.2018 as under:



152



Subject: Re: Pending amount

From: Satish.Chinnadurai@dbgroup.net

To: ravindrarawath@yahoo.co.in

~~Annexure G/2~~

Cc: Antonio.Fasano@dbgroup.net; Luca.Pozzobon@dbgroup.net;
Dbgroupindia.Hr@dbgroup.net; Kiran.Parde@dbgroup.net

Date: Monday, 18 June, 2018, 12:48:25 PM IST

Dear Mr. Ravindra,

I have already checked the same and there is no such pending from our side. We have cleared all your dues. In case if you want to have further clarification you can directly write to Mr. Luca and Mr. Antonio.

cc: Mr. Luca,

Below mail from Mr. Ravindra for your ref. We have paid him the complete salary of till Feb 18. March we paid the salary till 22nd March 18. We have also cleared his gratuity.

Regards,

Satish Chinnadurai
Director - India D B Group India Pvt Ltd
Head Office - Mumbai
5th Floor, Sangeet Plaza, Marol Maroshi Road,
Opp Marol Fire Brigade, Andheri (East),
Mumbai, India 400 059.
CIN NO. - U63000MH2006PTC158759
E sash.chinnadurai@dbgroup.net T +91 22 44215215
F +91 22 29204415
M +91 9967003011
W www.dbgroup.net

TRUE COPY

Attested by me
KIRTI H. SYONTRI
Advocate High Court
(MAH / 236 / 1994)



153
X

Subject: Pending amount
From: ravindrarawath@yahoo.co.in
To: satish.chinnadurai@dbgroup.net
Cc: antonio.fasano@dbgroup.net
Date: Tuesday, 19 June, 2018, 8:48:31 PM IST

~~Annexure G/S~~

Satish,

Noted, As I stated in my below mail, I haven't received Rs. 1,50,000 INR as notice of discharge as per para 1 (a) & Rs. 1,50,000/- in consideration of the execution of said Non-Disclosure agreement as per para 2(e).

If you are sure that you paid above amount then provide me date, cheque no & amount or UTR no, date & Bank account details in which you have transferred / paid.

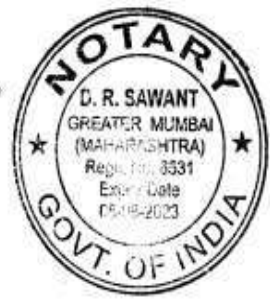
Secondly, in below mail I did not ask for Salary & gratuity as I have already acknowledged receipt of it. I did not understand Mr. Luca role in said payment I am not obliged to ask him since you are primarily responsible to settle my dues.

Regards

Ravindra Rawat

TRUE COPY

Attested by me
KIRTI H. SYONTRI
Advocate High Court
(MUMBAI) 1994



154

~~86~~

~~ANNEXURE G/4~~

On 20-Jun-2018, at 10:14 AM, Sathish.Chinnadurai@cbgroup.net wrote:

Dear Luca,

Below mail from Mr. Ravindra for your ref.

cc: Ravindra,

The NDA was prepared by Italy and per their instructions I have processed your dues. Nothing is pending from our side. For clarifications on the below clause you need to speak to Mr. Luca.

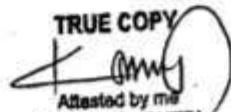
Regards,

Sathish Chinnadurai
Director - India

CB Group India Pvt Ltd
Head Office - Mumbai
5th floor, Sargent Plaza, Marol Maroshi Road, Opp Marol Five Brigade, Andheri (East), Mumbai, India 400 022.
CIN No. - U62000MH12000PTC110729

E sathish.chinnadurai@cbgroup.net
T +91 22 46215235
F +91 22 26204415
M +91 9867003021
W www.cbgroup.net

TRUE COPY



Attested by me
KIRTI H. SYONTRI
Advocate High Court
(MAH 1115 / 1994)



x. He further submitted that the sum of Rs. 40,00,000/- claimed by Respondent No. 1, claimed in the nature of a “penalty” and not a

crystallised amount and, therefore, is not in nature of an admitted `debt'. The same is therefore not claimable under the jurisdiction of the Adjudicating Authority under the Code.

6. Learned Counsel for the Appellant based on his submissions submitted that the instant Appeal may be allowed and the Impugned Order be set aside.

7. Counsel for the Respondent No. 1 on the other hand while opposing the submissions made by the Counsel for the Appellant, submitted as follows:

- i. Learned Counsel for the Respondent strenuously argued that the Appellant has not approached before this Tribunal and has filed the instant Appeal with false, tempered and distorted submissions, made by the Appellant in his Reply Affidavit before the Adjudicating Authority on 05.11.2019, to mislead this Tribunal which is as follows:

Date	Amount	Particular
10.05.2018	Rs.3,19,219/-	Salary for 22 days for the month of March, 2018 (additional one month salary for serving the company for a long time) and other dues.

- ii. Further he also submitted that the Appellant had made alleged false submissions in the present Appeal. For better understanding, the said table is being reproduced as hereunder:

Date	Amount	Particular
10.05.2018	Rs.3,19,219/-	Payment as provided for in clause 2(e) of the NDA in the form of Salary for March 2018 and other dues.

- iii. It is further contended that the above alleged submissions made by the Appellant in the present Appeal is contrary to his own submissions made in his Reply filed before the Adjudicating Authority and the

Appellant has thereby attempted to mislead this Tribunal as and by way of a false declaration in the present Appeal.

- iv. In support of his submissions, he placed reliance on the Judgement of the Hon'ble Supreme Court in the matter of '**Kishore Samrite' Vs. 'State of U.P. & Ors.'**' in **Criminal Appeal No. 1406 of 2012**, whereby in Para 29, it has been observed as follows:

"29. Now, we shall deal with the question whether both or any of the petitioners in Civil Writ Petition Nos. 111/2011 and 125/2011 are guilty of suppression of material facts, not approaching the Court with clean hands, and thereby abusing the process of the Court. Before we dwell upon the facts and circumstances of the case in hand, let us refer to some case laws which would help us in dealing with the present situation with greater precision. The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

(i) Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

(ii) The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

(iii) The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

(iv) Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.....”

- v. He further relied on para 24 of the Impugned Order dated 23.10.2022 passed by the Adjudicating Authority in C.P. (IB) No.973/MB/C-I/2019, whereby the Adjudicating Authority has observed as follows:

“We note that on a plain reading of the Non-Disclosure Agreement, it is clear that the Corporate Debtor had agreed to make two payments as mentioned in Clause 2(e) and Clause (i). There is nothing to suggest any connection of 2(e) with Clause (i). Whereas we construe that clause 2(i) is in reference to clause 1(a) and thus the same has been discharged with. Hence, the payment made for the months of February and March, 2018 cannot be construed to be in discharge of the liabilities rising out of Clause 2(e). Thus, the Corporate Debtor has failed to comply with the terms of Clause 2(e) of the Agreement and has committed default.”

- vi. It is further contended that the Settlement Letter had been addressed by the Appellant on 27.02.2023, unilaterally offering Rs.1,50,000 as full and final settlement of all claims of Respondent No.1. For ready reference, the said letter is being reproduced as hereunder:



T A S · L A W

ADVOCATES & SOLICITORS

Address : TAG LAW Advocates & Solicitors,
No. 10, I Link Road,
New Delhi - 110014, INDIA
Phone : +91 70426 23388 | +91-11-44759134
Email : admin@taslaw.in

71

ANNEXURE- 2

71

DATE: 27.02.2023

WITHOUT PREJUDICE

MR. KIRTI H. SYONTRI
Advocate for Respondent No. 1
LG-11, Hanuman Compound,
Netaji Palkar Road, Ghatkopar (w)
Mumbai- 400 084
PH. NO. 9987484299
Email ID: syontrikirti@yahoo.co.in

Dear Sir,

**RE: IN THE HON'BLE NATIONAL COMPANY LAW APPELLATE
TRIBUNAL**

APPELLATE JURISDICTION

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1239/2022

Mr. Satish Chinnadurai vs Mr. Ravindra Hirasingsh Rawat & Anr.

We are concerned for our client, Mr. Satish Chinnadurai, the Appellant in the captioned matter.

We refer to the hearing of the captioned matter, before the Hon'ble National Company Law Appellate Tribunal, New Delhi, on 15 February 2023.

Under instructions, we state that, strictly without prejudice to all the rights and contentions of our client and D B Group India Pvt. Ltd. in the captioned matter and only with a view to amicably resolve the captioned matter with your client, our client is ready and willing to pay to your client, a sum of Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand Only), in full and final settlement of all the claims of your client, against D B Group India Pvt. Ltd. and our client.

TRUE COPY

Page 1 of 2

Kindly note that our client's without prejudice offer, as made under this letter, shall remain open for acceptance by your client, for a period of 7 (seven) days from receipt of this letter, whereafter it shall automatically stand revoked.

Needless to state, nothing contained in this letter, shall be construed as an admission of any liability by our client and/or D B Group India Pvt. Ltd. and is issued only for the purposes of amicable resolution of the captioned matter.

Yours Faithfully,


FOR TAS LAW
ADVOCATES FOR MR. SATISH CHINNADURAI


TRUE COPY

vii. It was submitted by the Learned Counsel for the Respondent that he was employed with the Corporate Debtor for a period of about 11-12 years and his last designation was that of General Manager and after submission of his resignation letter, the Corporate Debtor had entered into the NDA on 22.01.2018 to confirm the terms of the end of the contract of employment with the Respondent No.1 and the same was signed by the Appellant and the Respondent No.1. The Appellant had agreed to pay Respondent No.1 the following amounts, as detailed in the following Clauses of the NDA:

“Clause 1 - Resignation: (a) Following your resignation the corporation will pay you a monthly salary at the Gross Rate of 150,000 INR as notice of discharge.

Clause 2(e): Covenant of Confidentiality: “In consideration of the execution of this Agreement, you shall receive a gross sum of INR 150,000; also, the corporation undertakes not to divulge, for any reason, any information concerning the conclusion of work with D.B. Group.

Clause 2 (f) :If you or Board of Directors of D.B. Group spa (President, Vice-President, CEO) and D.B. Group India Pvt. Ltd. (General Manager) violates, directly or indirectly the obligations contained in this Agreement, defaulting party shall pay, upon request, as a penalty, a sum equal to twice the gross amount received for a one year employment period in consideration of the execution of this Agreement, for a total amount of 400,000 INR The company and you also reserves the right to obtain additional damages and injunctive relief.

Clause 2 (i): Salary will be paid every month along with other employees till March 21st, 2018, and full & final and Gratuity payments will be done within 30 days from March 21st, 2018.”

(Emphasis Supplied)

- viii. It is further submitted that the Notice-reply by the Appellant dated 29.01.2019 which had been received by Respondent No.1 on 08.02.2019 i.e., after 37 days from service of the Demand Notice wherein the Appellant had falsely and frivolously contended in Para 4 of his Reply that *‘the company had never admitted to make payment of the said penalty as claimed by you, and that being so, the amount of Rs.40,00,000/- is a disputed amount’* and as such the claim amount falls within the Definition of Claim under Section 3 (6) which defines “claim” to mean a right to payment even if it is disputed.
- ix. From the above averments, it gets cleared that it is not the liability but payment of the said penalty amount of Rs.40,00,000/- which is not

admitted and disputed by the Appellant that too after receipt of the Demand Notice.

- x. In view thereof, Learned Counsel for the Respondent submitted that the present Appeal as filed by the Appellant is liable to be rejected, dismissed and set aside on the ground that the Claims of the Respondent No.1 constitute as an “Operational Debt” as defined under sub-Section (21) of Section 5 of the Code; that there was no ‘Pre-Existing Dispute’ between the Corporate Debtor and the Respondent No.1; and that the Appellant failed to provide the proof of payment for the claim amount as demanded by Respondent No.1 in the Demand Notice.
- xi. At the outset, Learned Counsel for the Respondent placed reliance on Para 27 of the Judgement of the Hon’ble Supreme Court in the matter of **‘Innoventive Industries Ltd.’ Vs. ‘ICICI Bank and Anr.’** reported in **(2018) 1 SCC 407**, wherein the Apex Court has held as follows:

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been

defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.”

8. With the aforesaid submissions, Counsel for the Respondent submitted that the instant Appeal is devoid of merit and it deserves to be dismissed.

9. After hearing the parties and going through the pleadings made on behalf of the parties, we are of the considered view that there are uncertain forces in the submissions on behalf of the Counsel for the Appellant that the Adjudicating Authority while passing the Impugned Order failed to consider the correspondences between the Appellant and Respondent No. 1 dated 17.06.2018 to 22.06.2018. Further, the Adjudicating Authority has also not considered paras 5 & 6 of the Reply Affidavit filed by the Respondent (Appellant herein) before the Adjudicating Authority in correct perspective.

10. Keeping in view of the aforesaid facts and also the Judgement of this Tribunal in '**Om Prakash**' (*Supra*), we are of the view that the Impugned Judgement passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court-I) dated 23.09.2022 in CP (IB) No.- 973/MB/C-I/2019, cannot be sustained in the eye of law and we hereby allow this Appeal and set aside the Impugned Order passed by the Adjudicating Authority initiating CIRP of the Corporate Debtor and all other Orders issued pursuant to the Impugned Order. The Corporate Debtor is released from the rigours of CIRP and is allowed to function independently through its Board of Directors with immediate effect. The Resolution Professional shall however be

paid his fees/expenses by the Operational Creditor. It shall however be open for the Operational Creditor to seek alternative legal remedy for its dues, if any, before the appropriate legal forum as permissible in law.

11. Hence, this Appeal is allowed and the Order passed by the Adjudicating Authority is set aside.

12. The Office of the Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court-I) forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Mr. Naresh Salecha]
Member (Technical)**

**New Delhi
11.08.2023**

ha