

Rights of Employees under the Insolvency and Bankruptcy Code, 2016



Ganesh Prasad Pandey

Assistant Professor,
Deptt. of Law,
Chanakya National Law
University,
Patna, Bihar, India

Abstract

Recovery of unpaid salaries by employees is an area where the process and legal procedure is usually very time taking. Owing to such rigours of law most employees do not go for recovery proceedings through suits or complaints before labour commissioner. However, with the enactment of Insolvency and Bankruptcy Code, 2016, employees now have the option to effectively recover their unpaid and due salaries from their employer company in a time bound manner. This article analyses the provisions of the Insolvency and Bankruptcy Code, 2016 which empowers the employees to recover their dues from the defaulting companies.

Keywords: Rights of Employees; Status of Employees under IBC; Recovery of Dues by Employees.

Introduction

The Insolvency & Bankruptcy Code, 2016 is aimed at recognition of early signs of poor financial conditions of a Company and then to provide for its timely insolvency resolution.¹ In order to recognize the early signs of deteriorating financial health of the Company, the benchmark provided under the Code is a default of more than Rupees One Lakh.² Once the Company defaults in making payment of an amount of more than Rupees one Lakh, insolvency resolution process can be initiated by creditors³. The Code differentiates between Financial and Operational Creditor⁴ and an employee is included in the definition of Financial Creditor.

An employee is an operational creditor for the purposes of the Code as the definition of operational debt in of the Code⁵ includes debt in relation to employment. The said definition is reproduced below:

“5(21)- “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the 1 [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”

So, it is clearly established that an employee falls into the category of an operational creditor and can initiate insolvency resolution process against its previous employer company, if the dues are more than one lakh rupees.

However, before filing a case for initiation of insolvency, as per Section 8 of the Code, it is required that such an employee who falls into the category of Operational Creditor serves a demand notice to the company to show, *inter alia*, proof of payment or pre existing dispute regarding the dues claimed by the employee. Such a notice has to be sent in the prescribed format under the Code and its Regulations.

As per Section 8, a demand notice has to be replied within 10 days from the date of service of the demand notice or the payment has to be made within 10 days. If the payment is made by the company within 10 days from the date of service of the demand notice, then there is no need for any further proceeding.

However, if the Company does not reply to the demand notice or fails to show any ‘proof of payment’ or ‘pre existing dispute’, the insolvency petition can be filed before NCLT. The Code provides for a time line of 180 days for the completion of insolvency proceedings and hence an insolvency proceeding is bound to move at a much faster pace than a normal litigation.

Aim of the Study

The author in this article aims to analyse the provisions related to the rights of employees under the Code to recover their unpaid wages and salaries from the defaulting companies and to bring out a picture about how such provisions can be helpful to the employees of the Companies.

Meaning of 'Employees' under the Code

An employee is a person who is hired by the employer to perform a particular job or specific labour of the employer. The employee is entitled to a specific wage or salary and performs the work under the control or regulation of the employer. Section 3 (36) of this Code mentions that the term "workmen" shall have the same meaning as provided under the Industrial Disputes Act, 1947 which under its Section 2(s) defines a workman as a person who is employed in any industry to do any "manual, unskilled, skilled, technical, operational, clerical or supervisory work, for hire or reward, terms of employment be express or implied and includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of dispute."⁶

Willful Default by the Company

In case, a company is willfully not paying the remuneration dues of its employee, he/she can initiate the insolvency resolution process against such company by sending a demand notice under the Code and demanding the payment of the dues which has become due and payable. These provisions of the Insolvency and Bankruptcy Code, 2016 are very effective to act as a deterrent against the companies who are willfully not clearing the dues of the employees.

In most of the cases, where the company is not suffering from any financial constraints, the employee can get the monies paid by simply sending a demand notice under the case as no company with sound financial condition would in any way invite an insolvency proceeding under it.

Priority of Payment to Employees

The Code contains provisions for priority of payment of debts from the proceeds from the sale of the liquidation assets⁷. It reads that notwithstanding anything to the contrary to any law for the time being in force, while distributing the assets, the order of priority as mentioned in Section 53 has to be followed. Sub-section (1) clause (b) mentions that the workmen's dues for the period of twenty four months preceding the bankruptcy commencement date shall be treated equally with the debts owed to secured creditors. Clause (c) provides priority to wages and unpaid dues owed to employees other than workmen of the bankrupt for the period of twelve months preceding the bankruptcy commencement days over the dues unpaid to Central or State Governments and unsecured debts. Unless the first category is paid in full, the second or subsequent category does not get any amount if the assets of the bankrupt company are insufficient to meet them. The claimants as specified in the same category or rank will be taking it *pari passu*.

Judicial Decisions on rights of employees under the Code

The important decisions concerning the rights of employees under the Code are being discussed hereunder:

Filing of Suit by Company after demand notice

*Mr. N Subramanian vs. M/s Aruna Hotels Limited*⁸ was the first case where the employee

approached the adjudicating authorities under this Code for recovery of their dues against the former employer. The employee had left his job in the year 2013 and in spite of multiple assurances by the respondent company regarding the payment of the dues, the amount had not been settled. The applicant attached a letter by the respondent company along with his petition where the respondent company has assured the payment of the salary, a list or arrears and an interest of 9 per cent for late payment.

The employee sent a demand notice to the respondent company on 29.06.2017 and the respondent company replied to it on 06.07.2017 stating that the salary had been paid by it and only a gratuity amount of Rs. 5, 85, 577/- was due as on that date. The respondent company in this case approached the City Civil Court in Chennai on 06.07.2017 and filed a suit against the operational creditor to declare the previous letter and notice communications as null and void and also grant a permanent injunction on the operational creditor for relying on those letters.

The Adjudicating Authority rejected this plea on the ground that the Suit had been filed after the delivery of the Demand Notice by the operational creditor to the respondent company. Therefore the court held that such a suit was instituted by the respondent company in order to circumvent the initiation of the CIRP by the operational creditor against the corporate debtor. Therefore the claim of the operational creditor was admitted by the adjudicating authority for the payment of the unpaid due against the corporate debtor.

Part admission of Claim

In the case of *Nitin Gupta vs. M/s Applied Electro-Magnetic Pvt. Ltd.*⁹ an application had been filed by an employee of the respondent company under Section 9 of the Code for non-payment of salary amounting to Rs. 46, 77, 124/-. The respondent company accepted the non-payment of salary amounting to Rs. 28, 84, 160/- but raised objections regarding the balance amount.

The Court admitted the application by the employee on the ground of the part admission of the unpaid salary by the respondent company. It held that the dues in this case fall under the definition of operational debt as mentioned under Section 5 (21) of the Code and in such a case the employee is an operational creditor as mentioned under Section 5 (20). The Code provides for admission of claim of Rs 1, 00, 000/- and thus the current claim in this case was much above the provided limit and hence it was liable to be admitted.

The NCLT while admitting the application rejected the issue of existence of dispute' as contended by the respondent company as it could not substantially prove a case which was pending before the Deputy Labor Commissioner. Therefore the adjudicating authority held that mere repudiation of the claim in the reply by the respondent company without material evidence cannot be used as a tool for evasion of liability. The Court admitted the application on the grounds that firstly, the claim is above the

prescribed limit, secondly, there is existence of a default and lastly, the manner of application as provided under Section 9 had been complied with.

Joint Application by the Employees

In *Mr. Suresh Narayan Singh vs. Tayo Rolls Ltd.*¹⁰ an appeal was filed by Mr. Suresh Narayan Singh, who was an Authorized Representative of 284 workers of "Tayo Rolls Limited" (hereinafter referred to as the "corporate debtor") against an order dated 03.01.2018 passed by the NCLT, Kolkata. The NCLT had rejected an application filed by the appellant under Section 9 of the Code against the corporate debtor on the ground that the application under Section 9 of the Code has to be filed individually and not jointly.

The NCLT also noted that it is not practicable for more than one operational creditor to file a joint petition as they will have to issue individual demand notices under Section 8 of the Code. The learned counsel appearing on behalf of the appellant contended that even if the individual claim of the workmen is taken into consideration, the amount of dues which remain unpaid to each individual worker would amount to more than Rs 1, 00, 000 and even then, an individual workman in this case would have the right to file a separate application under Section 9 of the Code. If Section 8 and 9 of the code are read with Form 5, it becomes clear that the person authorized to act on behalf of the operational creditor is entitled to file an application under Section 9.

The NCLAT held that there is a clear existence of all the required factors, i.e., a debt and a default, which were not disputed by the corporate debtor, and the application made under section 9 was complete, therefore, the adjudicating authority should have admitted the application instead of rejecting it on a technical ground that it was filed by the authorized representative on behalf of 284 workmen. It held that as it is evident that the unpaid due to each workman is more than the minimum amount of Rs 1, 00, 000

and there is a default on part of the corporate debtor, the application under section 9 is fit to be admitted for the initiation of CIRP against the corporate debtor.

Conclusion

The Insolvency and Bankruptcy Code, 2016 surely acts as a deterrent to the Companies who willfully do not pay the dues of the employees. Empowered with the provisions of the Code, the Employees now can expect to recover their dues from the Defaulting Companies in a time bound manner. The role of company law tribunal in empowering the employees as operational creditor under the Code can also not be denied. The Adjudicating Authority (NCLT) and the Appellate Authority (NCLAT) have further empowered the employees by allowing them to file a joint application through their authorised representative.

Footnotes

1. See *BLRC Report, 2015*
2. *Section 4 of the Insolvency and Bankruptcy Code, 2016*
3. *Section 6 of the Insolvency and Bankruptcy Code, 2016*
4. *Section 7 & 9 of the Insolvency and Bankruptcy Code, 2016*
5. *Section 5(21) of the Insolvency and Bankruptcy Code, 2016*
6. *See Section 2(s) of Industrial Disputes Act, 1947*
7. *Section 53 of the Insolvency and Bankruptcy Code, 2016*
8. *NCLT New Delhi, Mr. N Subramanian vs. M/s Aruna Hotels Limited, Company Appeal (AT) j/Insolvency) No. 59 of 2017*
9. *NCLT (New Delhi Bench) : In Nitin Gupta vs. Applied Electro-Magnetic (P.) Ltd., [2018] 142 CLA 527 (NCLT)*
10. *Mr. Suresh Narayan Singh vs. Tayo Rolls Ltd (Company Appeal (AT) (Insolvency) No. 112 of 2018, NCLAT*