

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP 1664/I&BP/NCLT/MAH/2018

Under Section 9 of the I&B Code, 2016

In the matter of

Sanjay Jijaba Landge

....Operational Creditor
v/s.

CORE Energy Systems Private Limited

.... Corporate Debtor

Order Delivered on 16.11.2018

Coram: Hon'ble Shri V.P. Singh, Member (Judicial)
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Petitioner: Sanjay Balakrishnan, Advocate

For the Respondent: Burzin Bharucha, Advocate and Arti Deodher,
Advocate i/b Nilesh Tribhuvan, Advocate

Per V P Singh, Member

ORDER

1. It is a Company Petition filed u/s 9 of Insolvency & Bankruptcy Code, 2016 (**IBC**) by Sanjay Jijaba Landge, Operational Creditor against CORE Energy Systems Private Limited, Corporate Debtor, to initiate Corporate Insolvency Resolution Process (**CIRP**) against the Corporate Debtor on the grounds that, as on 30.12.2017, Corporate Debtor has defaulted in making payment of salary and other employment dues amounting to ₹24,63,319/-.
2. The brief facts of the case are that Mr Sanjay Jijaba Landge, the Petitioner herein was employed for his services as Executive Director from 01.08.2016 vide an appointment letter dated 01.09.2016 at an annual salary (including other benefits) of

₹60,22,204/-. Dispute arose between the parties when the performance of the Petitioner was found to be dis-satisfactory by the Respondent, and at the same time, the Respondent also suffered financially difficult times.

3. The Petitioner states that to support the Respondent during its financial hardship, he voluntarily **offered to be paid partial salary for a month, of around ₹1,75,000/- in May 2017**. This reduced payment, as alleged by the petitioner was **with an express understanding vide email dated 04.05.2017 that the remaining amount would be paid when the cash flow situation of the company is improved**. The Petitioner further states that eventually from June 2017 to October 2017 he was paid delayed and reduced payment for his salary of only ₹2,00,000/- per month as against his monthly payment of ₹3,24,540/- per month.
4. The Petitioner was asked to resign from the Corporate Debtor company on 27.10.2017 to which he agreed and asked for his full and final settlement of arrears as per the terms agreed in the appointment letter dated 01.09.2016.
5. It is the case of the petitioner that Mr Nagesh N. Basarkar, falsely alleged that the Petitioner voluntarily agreed to a reduction in salary and was reluctant to follow the termination of services procedure as per the appointment letter whereby the petitioner would be entitled to either three months' prior written notice or three months' salary in lieu thereof. The Petitioner has alleged that the Respondent started harassing him by diverting all the work from the Petitioner, stopping all the communication with the Petitioner and by snooping on him. The Petitioner has alleged that the Respondent has created the resignation letter of the Petitioner.

The Petitioner submits that he agreed to discontinue his services and that the period from 01.11.2017 to 31.12.2017 would be his notice period provided he would be paid his full and final settlement. However, the Petitioner states that the Respondent avoided and/or delayed in making the full and final settlement of the Petitioner's account as well as failed to take possession of the company articles like Laptop, mobile, data card, visiting card and employee I.D. The Petitioner states that he was informed by his colleagues that he has been relieved from his services on 27.11.2017 and that on 28.11.2017, while the Petitioner was present in the office, a relieving letter dated 25.11.2017 was sent to his residence stating that the Petitioner is relieved w.e.f. 27.11.2017. The Petitioner has further alleged that the Respondent falsely accused the Petitioner of occupying the office cabin even after being relieved from his services and unauthorized utilization of company properties and infrastructure. It is alleged that the Respondent took the possession of the Company Laptop without informing the Petitioner. In short the Petitioner's contention is that the Respondent did not pay his arrears for salary for the period of June 2017 to October 2017 and salary for the notice period from November 2017 to January 2018, unpaid travel voucher expenses, car expenses, unpaid LTA bills, variable pay, and LIC term insurance.

6. The Petitioner sent a demand notice dated 23.02.2018 to the Respondent seeking payment of ₹24,63,319/- along with interest thereon @18% p.a. **The Respondent received the Demand notice on 03.03.2018 and replied vide its letter dated 09.03.2018 disputing the subject matter of the Petition.**

7. **The Respondent in its reply has submitted that the Petition is liable to be dismissed as there exists prior dispute about the subject matter of the Petition**, and the same dispute was also raised in its reply to the Demand notice vide letter dated 09.03.2018. The Respondent has alleged that the Petitioner's performance was not satisfactory and he was provided multiple opportunities to improve the same. The Respondent states that the reduction in the salary of the Petitioner was mutually and amicably negotiated with the Petitioner under his under-performance as well as the Respondent Company also not doing well. The Respondent further states that on 24.10.2017 it was amicably decided that applicant should resign from his post as executive director of the Respondent Company and pursuant to this discussion an email, annexed with the affidavit in reply, from the official mail Id of the Petitioner was received by Mr Nagesh Basarkar on 01.11.2017 expressing his decision to resign from the Respondent Company. The Respondent has alleged that after tendering his resignation on 01.11.2017, the Petitioner deliberately failed to perform his duties during the notice period and eventually the Respondent Company had to decide to relieve the Petitioner early. The decision of early relieving of the Petitioner was informed to the Petitioner on 25.11.2017, and the Respondent vide its email dated 27.11.2017 attached the relieving letter and accepted the resignation of the Petitioner. The Respondent alleges that in spite of informing the Petitioner about his relieving on 27.11.2017 the Petitioner arrived for work and occupied his cabin on 28.11.2017 and therefore the Respondent vide its email dated 28.11.2017, annexed to the affidavit in reply, informed the Petitioner to refrain from utilising the Company infrastructure, property and data. There are further correspondence annexed to the affidavit in reply of the

Respondent, asking petitioner to refrain from coming to the office of the Respondent Company. The Respondent along with its letter dated 01.12.2017 has given a cheque of ₹2,02,670/- to the Petitioner for the vouchers pending for payments until October 2017 and part of the Petitioner's annual benefit LTA. In the said letter dated 01.12.2017, the Respondent has stated that they are still calculating the outstanding amounts due to the Petitioner. Further, vide an email dated 08.12.2017, sent to the Petitioner, the minutes of the meeting held on the same day states that the computation list of full and final settlement was presented and explained to the Petitioner who did not agreed to it.

8. The Respondent in its affidavit in reply has relied upon its letter dated 30.12.2017 addressed to the Petitioner giving his full and final settlement calculation sheet along with the cheque for full and final payment. The Petitioner vide his letter dated 08.01.2018 refused to accept the cheque and disputed the full and final settlement sheet sent to him on 30.12.2017.
9. The Respondent has relied upon the Judgment of Hon'ble Supreme court in Mobilox Innovations Private Limited vs Kirusa Software Private Limited, 2018 1 SCC 353, to state that the correspondence between the parties shows the existence of dispute upon the subject matter of the Petition.
10. Before going into the merits of the case, it is pertinent to discuss what the Hon'ble Supreme Court has held in the Mobilox case (*Supra*) about existence of dispute. The Hon'ble Supreme Court has held that the Adjudicating Authority will have to reject a petition under section 9 if the three conditions are not satisfied viz. if there is operational debt exceeding ₹1,00,000/-; the documentary evidence furnished with the petition shows that the

debt is due and payable and existence of dispute between the parties before the receipt of the demand notice with respect to unpaid operational debt. The relevant paragraph of the judgment is extracted below:

"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 ₹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 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."

11. The Hon'ble Supreme Court has further settled the law that the Adjudicating Authority must reject a Petition under section 9(5)(2)(d) if a notice of dispute is received by the Operational Creditor that brings to his notice the existence of a dispute. At this stage, the Adjudicating Authority have to determine whether it is a plausible contention requiring further investigation and is not merely a patently feeble legal argument or fact without any supportive evidence. The relevant paragraph of the judgment is reproduced below:

"It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

12. In the light of the aforesaid judgment of the Hon'ble Supreme Court, it is now well settled that in order to determine if there exists a dispute, the Adjudicating Authority has to decide if the correspondence between the parties show that the Operational Creditor has a notice of dispute with regard to the subject matter

of the petition and that the dispute is not a "*patently feeble legal argument or an assertion of fact unsupported by evidence*" without examining the merits of the dispute.

13. Coming to the facts of the present petition, the Petitioner has sent the demand notice dated 23.02.2018 to the Respondent who had received the same on 03.03.2018 and replied on 09.03.2018. The Respondent in reply to the demand notice under section 8 has raised dispute upon the conduct of the Petitioner as well as the amount claimed by him. The dispute so raised by the Respondent relates to the conduct of the Petitioner dated as far back as October 2016. Further, there are correspondence dating 04.05.2017 to show that the reduction in salary of the Petitioner was agreed by the Petitioner. Both the sides have relied upon this letter of 04.05.2017 to support their story. In the letter of the Petitioner dated 08.01.2018 the petitioner has denied to accept the full and final settlement amount calculation and a cheque of ₹2,66,951/- that he has received from the Corporate Debtor vide their letter dated 30.12.2017 stating it to be not in line with appointment letter/employment contract. The letters and e-mails dated 30.12.2017, 08.01.2018, 14.01.2018, 17.01.2018, 19.02.2018 and 22.02.2018 annexed to petition/affidavit in reply to the petition and mentioned in reply to the demand notice which was received by the Operational Creditor, clearly shows that there was a dispute regarding the full and final settlement amount between the parties.
14. On listening to the arguments advanced by the counsels appearing for both the sides and on perusal of the submissions by both the parties, we are of the view that there is a dispute, about the unpaid operational debt, between the parties which is supported by

abundant evidence. This dispute existed before the serving of demand notice under section 8, and the Operational Creditor had notice of existence of such dispute. Further, this dispute truly exists in fact and is not spurious, hypothetical or illusory, as has been stated in the judgment of the Hon'ble Supreme Court in Mobliox case (*supra*).

15. For the reasons mentioned above, we hereby reject this petition as, under section 9(5)(2)(d), the notice of dispute has been received by the Operational Creditor.
16. The Registry is hereby directed to immediately communicate this order to the Operational Creditor and the Corporate Debtor even by way of email or whatsapp.

SD/ -

RAVIKUMAR DURAISAMY
Member (Technical)

SD/ -

V.P. SINGH
Member (Judicial)

16th November 2018