

NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III

2. C.P.(IB)-678(MB)/2020

CORAM: SHRI H.V. SUBBA RAO, MEMBER (J)
SHRI CHANDRA BHAN SINGH, MEMBER (T)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE NATIONAL
COMPANY LAW TRIBUNAL ON **12.05.2022**

NAME OF THE PARTIES: Sandesh Naik

V/s

MT Educare Limited.

SECTION 9 OF INSOLVENCY AND BANKRUPTCY CODE, 2016

ORDER

Mr. Nausher Kohli a/w Umang Mehta, counsels appearing for
Respondent/Corporate Debtor is present through virtual hearing.

Order pronounced in the open court vide separate order. In the result, the
above Company Petition is dismissed.

Sd/-
CHANDRA BHAN SINGH
Member (Technical)

/RKS/

Sd/-
H.V. SUBBA RAO
Member (Judicial)

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

C.P. No. 678/IBC/MB/2020

Under Section 9 of the Insolvency and
Bankruptcy Code, 2016 read with
Rule 6 of the Insolvency and
Bankruptcy (Application to
Adjudication Authority) Rule 2016)

In the matter of

SANDESH NAIK

Having registered office at: C/o., Adv.
Pratik Amin 41-B, Khatau Building,
2nd Floor, A.D. Modi Street, Near
Bombay Stock Exchange, Fort,
Mumbai- 400001

.....Operational Creditor

Vs

MT EDUCARE LTD.

(CIN: L80903MH2006PLC163888)

Registered office at: 220, 2nd Floor,
“FLYING COLOURS”, Pandit Din
Dayal Upadhyay Marg, L.B.S Cross
Road, Mulund (W), Mumbai- 400080

.....Corporate Debtor

Order delivered on: 12.05.2022

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Applicant: Adv. Pooja Batia

For the Respondent: Adv. Nausher Kohli

Per: Shri H.V. Subba Rao, Member (Judicial)

The above Company Petition is filed by Sandesh Naik hereinafter called as Operational Creditor seeking to initiate of Corporate Insolvency Resolution Process (CIRP) against M/s. MT Educare Ltd called as Corporate Debtor by invoking the provisions of Section 9 Insolvency and Bankruptcy code (hereinafter called "Code" read with rule 6 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of Operational Debt of Rs. 22,41,735/-.

The brief facts of the petitioner are as follows;

1. On 30.11.2017, Operational Creditor was employed as Chief Financial Officer of the Corporate Debtor Company. The Annual CTC compensation was fixed at Rs. 46,00,008/- per annum and a performance linked incentive of Rs. 4,00,000/-. The Operational Creditor was also entitled for Leave Encashment on monthly gross salary as per the Corporate Debtor's Leave Policy and Leave Travel Amount.
2. On 14.11.2019, Operational Creditor resigned from the job prior to Board meeting and the Notice Period to be served ends on 12.2.2020. The Operational Creditor despite sending several e-mails seeking dues owed by the Corporate Debtor, the Corporate Debtor failed to respond.
3. On 13.12.2019, by email, Corporate Debtor informed the Operational Creditor that the Operational Creditor is ceased to be the Chief Financial Officer and Key Management Personnel of the Corporate Debtor w.e.f from 14.11.2019 and that the last working day of the Operational Creditor would be 13.12.2019. Further, by attached letter to the email, Corporate Debtor acknowledged the liability whereby it assured the

Operational Creditor that it would settle the full and final dues.

4. Being left with no other option, the Operational Creditor issued Demand Notice under Section 8 of the Insolvency Code which is duly received by the Corporate Debtor on 31.1.2020.
5. The Corporate Debtor issued a Reply letter to the Demand Notice. The Corporate Debtor admitted and acknowledged dues owed to the Operational Creditor to the tune of Rs. 7,26,626/- and sent a cheque for the said amount along with the Reply letter. The Corporate Debtor however wrongly denied the balance dues that are due and payable to the Operational Creditor.
6. The Operational Creditor through his lawyer's email, reiterated his demand for the entire dues and informed the Corporate Debtor that the cheque was being retained under protest as the Corporate Debtor had failed to pay the entirety of the due sought in the Demand Notice issued by the Operational Creditor.

The brief facts of the Corporate Debtor are as follows;

1. Affidavit of Reply was filed by authorised representative of the Corporate Debtor Mr. S. Ayyappan and said that the Operational Creditor is guilty of suppressing correspondences exchanged between the Operational Creditor and the Corporate Debtor, prior to filing the present Company Petition for initiation of CIRP against the Corporate Debtor and on this ground alone this Petition ought to be dismissed.
2. That the appointment letter as relied and produced by the Operational Creditor on the basis of which the Operational Creditor is trying to establish his alleged claim is a forged

and a fabricated document. The Operational Creditor is guilty of habitual absenteeism, wilful misconduct and gross negligence in performance of duties.

3. For the reasons above the present petition deserves to be dismissed in limine with cost. It is said that the Operational Creditor has not represented the true and correct facts before the Hon'ble Tribunal and in view thereof the true, correct and complete facts in respect of the above captioned matter are set out as under:
 - a. By virtue of an appointment letter dated 30th November, 2017 ("Original Appointment Letter") the Operational Creditor was appointed as an employee of the Corporate Debtor w.e.f. 30th November, 2017 designated as Chief Financial Officer of the Corporate Debtor. Thereafter in pursuance of the resignation letter dated 14th November 2019 addressed by the Operational Creditor to the Corporate Debtor, the Operational Creditor expressed his intention to resign from the office of the Corporate Debtor.
 - b. It is said that, the Corporate Debtor conducted a board meeting as on 14th November 2019, wherein the Operational Creditor was present. In the said meeting his resignation was accepted by the Board and it was clarified that as per the clause 7 of the Original Appointment Letter dated 30th November, 2017 and as per the standard resignation policy of the Corporate Debtor, the Operational Creditor's term would expire within period of 30 days (Notice Period) and shall be only entitled to the Salary of the said period. The relevant portion of the clause 7 of

the original appointment letter is more particularly reiterated as under “...*After confirmation, it can be terminated by either side by giving one month written notice or salary in lieu of the notice...*” Hence, it was clarified and deliberated that the Operational Creditor shall be on a payroll only till 13th December 2019.

- c. That the Corporate Debtor vide a letter issued as and by way of an email dated 13th December, 2019 intimated the Operational Creditor that, as per the stock exchange filings the last working day of the Operational Creditor with the Corporate Debtor shall be 13th December, 2019 and thereby requested the Operational Creditor to cease from his services and return the assets of the Corporate Debtor. Also it came to the notice of the Corporate Debtor that the Operational Creditor was either substantially absent or has only worked for half days in the months of November – December, 2019.
- d. It is said that in the meantime, to the shock and surprise of the Corporate Debtor, the Operational Creditor served a Demand Notice dated 30th January, 2020 upon the Corporate Debtor wherein the Corporate Debtor has claimed an alleged sum to the tune Rs.24,86,533/- (Rupees Twenty-Four Lakh Eighty-six Thousand Five Hundred and Thirty – Three Only) thereby claiming salary in lieu of the Purported notice period of 3 months from the date on which he had resigned. The said sum also includes an alleged performance incentive of Rs 4,00,000/- (

Rupees Four Lakhs Only). The Operational Creditor in the said Demand Notice has produced and relied upon a fabricated and a tampered appointment letter dated 10th November, 2017, wherein it has been incorrectly and wrongly mentioned that the Operational Creditor is entitled to a notice of three months or a salary in lieu of the said notice. The Corporate Debtor denies the contents of the Demand Notice as well as the fabricated appointment letter produced by the Corporate Debtor in toto and thereby puts the Operational Creditor to strict proof thereof.

- e. Said that immediately in reply to the false representation made by the Operational Creditor in the Demand Notice dated 30th January 2020, the Corporate Debtor issued a letter dated 10th February 2020 clarifying that the Original Appointment Letter in the records of the Company states that the Operational Creditor shall be entitled to 1 month's notice only and not 3 months' notice as alleged at all. Be that as it may, merely to put an end to the dispute and without prejudice to the rights and contentions, the Corporate Debtor offered an amount of Rs 7,26,626/- (Rupees Seven Lakh Twenty Six Thousand Six Hundred and Twenty Six Only) to the Operational Creditor towards his alleged entitlement. A cheque for the said Amount was enclosed along with the letter dated 10th February, 2020 towards his full and final settlement. It was further clarified that, upon receipt of the consideration of the aforesaid Cheque, the Operational Creditor shall affirm and

agree that he has received the full and final settlement amount from the Corporate Debtor and hence the Corporate Debtor shall be relieved from all the alleged dues/claims/liabilities/obligations whatsoever.

- f. That despite accepting the said Amount of Rs.7,26,626/- to the Corporate Debtor's shock and surprise, the Operational Creditor as and by way of an email dated 18th February 2020 contented that he is accepting the said Cheque under protest and further called upon Operational Creditor to make the payment of the alleged outstanding dues.
- g. That pursuant to 3 months of filing the Petition the Operational Creditor in or around 16th April 2020 has proceeded and encashed the Cheque which was paid towards Full and Final Settlement thereby accepting the Full and Final Settlement. Without Prejudice to the Corporate Debtor's rights and contentions, the encashment of the aforesaid sum also establishes that the alleged Claim amount could not still be Rs 22,41,735/-(Rupees Twenty Two Lakhs Forty One Thousand Seven Hundred and Thirty Five Only) as alleged in the Company Petition as the acceptance of Rs.7,26,626/-(Rupees Seven Lakh Twenty Six thousand six hundred and twenty six Only) has been after the filing of the Petition which disclose the final claim amount. Thereby, by no stretch of imagination the entire alleged claim amount can be considered as outstanding amount. In view thereof, it is clear that the dispute is only for the purported balance amount which arises only

subsequent to his acceptance in the month of April, 2020.

4. In view of the above, without prejudice and without admitting any liability of the Corporate Debtor, it is explicit on the face of record that there is a dispute in respect of the alleged claim raised by the Operational Creditor. Such disputes ought to be adjudicated by following the procedure of leading evidence and conducting trials before the Courts of Competent Jurisdiction. Hence, the Operational Creditor cannot abuse the Insolvency code for extraneous considerations and or as substitute of debt enforcement procedures.
5. That the dispute with respect to the alleged liability of the Corporate Debtor due to the alleged discrepancies in the appointment letter is in existence prior to the date of issuance of the Demand Notice. Hence, in such cases it is a settled law that *“So long as a dispute exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject such Applications”* Further, it is also settled that *“IB Code cannot be used in terrorem to extract the money. The object of the code, atleast in so far as the Operational Creditors are concerned, is to put to the insolvency process against the Corporate Debtor only in cases where a real dispute between the parties as to the debt owned does not exist”*. In view of the above circumstances, it is very well established that there is an existing alleged dispute between the parties prior to the filing of the above captioned Company Petition and thereby leading to

triable issues can in no manner be a ground for admission of the present Company Petition.

6. In view of the aforesaid, the Company Petition should be dismissed with exemplary costs.

FINDINGS

1. Heard Ms. Pooja Bhatia, counsel appearing for the Operational Creditor and Mr. Nausher Kohli, counsel appearing for the Corporate Debtor. After hearing the submissions on both sides and upon perusing the material available on record, this Bench is of the view that the only issue that needs to be decided in the above matter is;
 - a. *Whether the notice of termination of the employment of the Operational Creditor is three months or one month? And whether it would amount to a pre-existing dispute between the parties.?*
2. Before deciding both the above issue, it is important to mention here that there is no dispute between the parties with regard to the employment nor the salary and perquisites of the Operational Creditor. Similarly, there is no dispute with regard to receipt of one month notice period salary by the Operational Creditor through a cheque issued by Corporate Debtor. Therefore, the present Company Petition is being pressed by the Operational Creditor only in respect of salary for the remaining two months' notice period. In this regard, the Operational Creditor relied upon the letter of appointment dated 30.11.2017 at Page No.21 to the Company Petition annexed under Exhibit B in which the relevant conditions regarding the termination and resignation are clearly mentioned in the para 7 that reads as hereunder;

Para 7

During the probation period, the services may be terminated by either side by giving 30 days' notice or salary in lieu of notice, in writing. After confirmation, it can be terminated by either side by giving three month's written notice or salary in lieu of notice except dismissal, discharge or termination for Cause when you will not be entitled to any such notice or salary thereof ("Cause" for the purpose of this clause shall mean an act of dishonesty or misconduct or theft or misappropriation or commission of act or acts amount to fraud against the Company or failure to perform duties or wilful misconduct or gross negligence in performance of duty or habitual absenteeism or chronic alcoholism or any other form of addiction which prevents performance of duties, or conviction of a felony or any crime involving fraud or breach of representation or warranty, or breach of material obligations, which is not cured within 30 days following receipt of notice from the Company).

3. Similarly, the Corporate Debtor annexed copy of appointment letter of the same date namely, 30.11.2017 annexed at page no. 15 to their reply under Exhibit B in which para 7 deals with the termination/resignation and the notice period that reads as follows;

Para 7

During the probation period, the services may be terminated by either side by giving 30 days' notice or salary in lieu of notice, in writing. After confirmation, it can be terminated by either side by giving one month

written notice or salary in lieu of notice except dismissal, discharge or termination for Cause when you will not be entitled to any such notice or salary thereof ("Cause" for the purpose of this clause shall mean an act of dishonesty or misconduct or theft or misappropriation or commission of act or acts amount to fraud against the Company or failure to perform duties or willful misconduct or gross negligence in performance of duty or habitual absenteeism or chronic alcoholism or any other form of addiction which prevents performance of duties, or conviction of a felony or any crime involving fraud or breach of representation or warranty, or breach of material obligations, which is not cured within 30 days following receipt of notice from the Company). Apart from the above appointment letter, the Corporate Debtor also annexed copy of the letter dated 14.11.2019 addressed by them to the National Stock Exchange of India Limited, Mumbai intimating the SEBI Authorities that the Operational Creditor Mr. Sandesh Naik has ceased to be the Chief Financial Officer (CFO) of the Company with effect from 14.11.2019. In addition to this, the Corporate Debtor also sent reply dated 25.02.2020 in response to the demand notice wherein they have clearly mentioned as if the Operational Creditor has sent an email communication to the HR of the Company in response to the appointment letter relied upon by the Corporate Debtor which contains one month notice period.

4. Therefore, it is very clear from the respective stands taken by the parties and the above two appointment letters of the same

date that there exists a dispute with regard to the notice period between the parties that needs thorough investigation and detailed evidence. Therefore, the genuineness of the appointment letter relied by Corporate Debtor is at a stake in this case and that *ispso facto* is a dispute.

5. In this context, It is appropriate to mention here that as per the law laid down by the Hon'ble Supreme Court in *Mobilox Innovations Private Limited Versus Kirusa Software Private Limited*, the Supreme Court clearly held that *what 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.*
6. In addition to the above admittedly the present Company Petition is filed for resolution of salary of two months purported notice period which amounts to specific performance of the appointment letter dated 30.11.2017 which in the considered opinion of this Bench does not fall within the definition of "Operational Debt" as it was not for the salary for the actual work done by the Operational Creditor. Therefore, this Bench is of the considered opinion that the remedy of the Operational Creditor is to initiate necessary

legal proceedings for recovery before appropriate legal forum and not through the route of IBC.

7. For the aforesaid reasons, this Bench is of the view that there is no merit in the above Application and the same is liable to be dismissed on both the above grounds.
8. Accordingly, the above Company Petition is dismissed.

Sd/-

**CHANDRA BHAN SINGH
MEMBER (TECHNICAL)**

Sd/-

**H.V. SUBBA RAO
MEMBER (JUDICIAL)**