# NATIONAL COMPANY LAW TRIBUNAL
## BENGALURU BENCH
## COURT NO.1

ATTENDANCE CUM ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, BENGALURU BENCH, BENGALURU, HELD ON 13.03.2020

## CAUSE LIST-1

PRESENT: 1. Hon'ble Member (J), **Shri Rajeswara Rao Vittanala**
2. Hon'ble Member (T), **Shri Ashutosh Chandra**

| CP/CA No. | Purpose | Sec | Name of Petitioner | Petitioner Advocate | Name of Respondent | Respondent Advocate |
|---|---|---|---|---|---|---|
| CP(IB) No. 117/BB/2017 | For pronoun-cement of orders | Sec 9 of I&B code 2016 | Sri G.V. Sudhindra | T.K. Vishwajit / M.N. Srikanth | American Road Technology & Road Solutions Pvt. Ltd | Mandgi Associates Advocates& others |

ADVOCATE FOR PETITIONER/s:

ADVOCATE FOR RESPONDENT/s:

ORDER

CP (IB) No. 117/2017 is dismissed by separate order. Pending IAs, if any, also stand disposed of

Member (T)

Member (J)

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

C.P. (IB) No.117/BB/2017
U/s 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

**IN THE MATTER OF:**

Shri G. V. Sudhindra
Residing at B-2102, Elita Promnade,
18th Main, 7th Phase, J. P. Nagar,
Bangalore – 560 078. - Applicant/Operational Creditor

**Versus**

M/s. American Road Technology &
Solutions Private Limited
Regd. Off: No. 302, 3rd Floor Sterling
Heights No. 139, Infantry Road,
Bangalore – 560 001. - Respondent/Corporate Debtor

**Order Pronounced on: 13th March, 2020**

**Coram:** 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

**Parties/Counsels Present:**

| | | |
|---|---|---|
| For the Petitioner | : | Shri Manu Kulkarni with Shri Archishman Chaudhury |
| For the Respondent | : | Shri M.M. Swamy |

**ORDER**

***Per: Ashutosh Chandra, Member (Technical)***

1. This Petition has been filed by Shri G. V. Sudhindra (hereinafter referred to as 'Applicant/Operational Creditor') U/s 9 of the I&B Code, 2016 R/w Rule 6 of the I&B (Application to Adjudicating Authority) Rules, 2016 by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s. American Road Technology & Solutions Private Limited (hereinafter referred to as 'Respondent/Corporate Debtor') on the ground that it has committed default for a total outstanding amount of Rs.47,07,371/- (Rupees

Forty Seven Lakh Seven Thousand Three Hundred and Seventy One Only) as on 31.10.2014 including interest @ 18% per annum.

2. Brief facts of the case, as mentioned in the Company Petition, which are relevant to the issue in question, are as follows:

(1) Shri G.V. Sudhindra (hereinafter referred to as 'Applicant/Operational Creditor') has Aadhar Number 2366 3104 9959 and his address is B-2102, Elita Promnade, 18th Main, 7th Phase, J.P. Nagar, Bangalore – 560078. M/s.American Road Technology & Solutions Private Limited (hereinafter referred to as 'Respondent/Corporate Debtor') is a Private Ltd. Company incorporated on 07.05.2012 under the provisions of Companies Act, 1956 with CIN: U45203KA2012PTC063868 and having its registered office situated at No.302, 3rd Floor Sterling Heights No. 139, Infantry Road Bangalore–560001.

(2) It is stated in the petition that along with Mr. B K Purushothama, Financial Creditor 1, M.G Mohan Kumar were named as Directors of the Company and Subscriber to the Memorandum of Association.

(3) It is further stated that shortly after incorporation, Mrs.Bhanu Prabha Krishna Hebbar, a Non-Resident Indian, the promoter of the Company was inducted as an additional director and later her appointment was regularized in the next Annual General Meeting as per the procedure prescribed in the Companies Act, 1956. The Operational Creditor, Mr. G.V. Sudhindra was appointed as Vice President (operations) to manage the day to day affairs of the Corporate Debtor. The Operational Creditor, V P (Operations) with the support of Mr. M.G. Mohan Kumar, Director of the Corporate Debtor approached the Public Works Department of Karnataka State Government and Bruhat Bangalore Mahanagara Palike (BBMP) for introducing the new technology for read maintenance particularly pothole repairs on the road. Several meetings were held with PWD, BBMP, Task Force for Quality Assurance in Public Works, etc., to promote the new technology.

(4) It is also stated that the Operational Creditor, G.V. Sudhindra was issued a letter of appointment, appointing him as Vice President (Operations).

The remuneration payable was w.e.f 01.04.2012 as follows: 01.04.2012 to 31.03.2013, @ Rs.1,50,000/- per month and w.e.f. 01.04.2013 to 31.03.2014, @ Rs.2,00,000/- per month and thereafter, the increment was to be considered on the basis of performance. The employment was terminated without notice on 22.10.2014. The amount payable, paid and due during the tenure of employment are as below:

| Financial Year | Amount Payable (Rs.) | Amount Paid (Rs.) | Amount due – (Rs.) |
|---|---|---|---|
| 2012-13 | 18,00,000 | 5,75,000 | 12,25,000 |
| 2013-14 | 24,00,000 | 18,00,000 | 6,00,000 |
| 2014-15 | 19,81,481 | 9,69,000 | 10,12,481 |
| **TOTAL** | **61,81,481** | **33,44,000** | **28,37,481** |

The amount due has been claimed with an interest of 18% p.a.

3. The Respondent has filed the Statement of Objections dated 14.12.2017 by *inter alia* contending as follows:

(1) It is contended that the instant petition is baseless, vexatious, does not provide any evidence that discloses the default of a legally enforceable debt, and a blatant attempt by the Petitioner to harass and arm-twist the Company and to jeopardize and misguide the ongoing police investigation against him with respect to embezzlement of funds in the Company (among other actions) initiated by the current majority shareholder and Director of the Company Ms. Bhanuprabha Hebbar ('Ms. Hebbar'). The investigation in the ongoing case is at an advanced stage and is being held up solely on account of the fact that the Accused therein (including the Petitioner) are absconding.

(2) Further, the ongoing criminal investigations into the embezzlement of funds constitute a 'dispute' in terms of Section 5 of the Code with respect to moneys owed between the Petitioner and the Company and hence this Petition is barred by law and must be dismissed *in limine*. Furthermore, it is submitted that the petition, on the face of the record, does not provide adequate evidence proving the creation or existence of any valid and due

operational debt, and is not substantiated by adequate documentation as required under law.

(3) It is contended that currently a petition for winding up (under Sections 434(1)(a) and 439 of the Companies Act, 1956) against the Company is pending adjudication before the High Court of Karnataka. The petition has been filed by A.V. Balasubramanya on 18 November 2015 in Co.P. 215/2015 on the ground of alleged default of an alleged debt owed to him by the Company. The petition is at the stage of preliminary hearing and has not yet been admitted. Without prejudice to the Company's stand in the aforesaid petition (which is *inter alia*, that A.V. Balasubramanya has been set up by the Petitioner to make false claims), it is humbly submitted that when a superior court of the State has been seized of the issue of the solvency of the Company, these proceedings, which are also later in time, cannot be maintained.

(4) It is contended that as per Section 9(5)(2)(d) of the Code, this Tribunal must reject an application filed under Section 9 if the Operational Creditor has received notice of the 'existence of a dispute' between the parties as to the operational debt. As held by the Hon'ble Supreme Court in *Mobilox Innovations Private Limited v. Kirusa Software Private Limited 2017 SCC OnLine SC 1154*, this Tribunal, in determining whether there is an adequate 'existence of dispute', is only required to determine the following: Whether there is a plausible contention which requires further investigation; and whether the dispute is **not** a patently feeble legal instrument or an assertion of fact unsupported by evidence. The Hon'ble Tribunal is **not** to examine: Whether the defence or contentions of dispute raised by the operational debtor are likely to succeed, and the merits of the dispute.

(5) It is further contended that there is a clear existence of a dispute that predates the issuance of the Form 3 notice in the instant case, which the Company has brought to the notice of the Petitioner in its reply to the Form 3 Notice. The Petitioner has deliberately supressed the existence of the reply by the Company, to his Form 3 Notice raising 'existence of a dispute'

with a view to deliberately evading the automatic bar under Section 9(5)(2)(d) to filing this application.

(6) It is contended that the Petitioner has also suppressed a notice that was issued by him, through his counsel, dated 10 April 2017 to which the Company replied vide reply notice dated 02 June 2017. Although, all these replies have been suppressed by the Petitioner, the fact that he was well aware of them is evident from the affidavit verifying the petition, on 24 November 2017 where-under he acknowledges the replies received. Further, it has also been claimed in the notice dated 10 April 2014 that the Petitioner is due an amount of Rs.18,25,000/- towards salary due whereas in the present petition he has claimed a sum of INR 28,37,481/- as arrears of salary.

In the said reply notices, the Company has brought to fore that: a. The Petitioner is not entitled to any payments from the Company and his appointment is not in accordance with law; b. The Petitioner, while discharging his responsibility had colluded with other employees of the Company to fraudulently siphon off huge sums of money as revealed by an independent audit report commissioned by Ms. Hebbar; c. Listed out, briefly, the summary of the findings of the auditor's report; and d. Alluded to the various proceedings initiated against the Petitioner, including a criminal case. Material facts have been deliberately suppressed by the Petitioner with a view to fraudulently evading the bar on filing of the instant application placed by Section 9 of the Code.

(7) It is submitted that in 2012, one Mr. MG Mohan Kumar (who, incidentally has filed two frivolous insolvency applications against the Company in CP(IB) 99/BB/2017 and CP(IB) 116/BB/2017 through the same counsel) and Ms. Hebbar decided to jointly start the Company which would mainly be in the business of constructing, developing, maintaining, repairing, excavating, renovating and operating all types of Roads, Expressways, Highways, Bridge, Fly-overs, Terminals, Subways, Ports, Airports, Waterways, Public Works and such other infrastructural projects and activities and to provide solutions and to render related consultancy. On

the basis of her trust in Mr. MG Mohan Kumar, agreed to promote the Company and induct herself into the shareholding of the Company, initially being offered Additional Directorship and later on full-fledged Directorship along with majority shareholding of about 98% shares of the Company.

(8) The Company was incorporated on 7 May 2012 with Mr. M G Mohan Kumar and one Mr. Purushothama B Kalachari as the First Directors and Subscribers to the MOA and Articles of Association '**AoA**' of the Company. Mr. MG Mohan Kumar, at this point, held 999 shares in the Company while Mr. Kalachari held 1 share in the Company. The two were appointed as promoters and Directors with a view to running the operations of the Company on behalf of Ms. Hebbar, who had conceptualized the vision behind the business – but lived in the United States. Ms. Hebbar was thereafter appointed as Director of the Company on 12 May 2012 and allotted 2,03,000 shares in the Company (*vide* two tranches – 4,000 shares on 28 August 2012 and 1,99,000 shares on 31 October 2012). Mr. MG Mohan Kumar, however, was needed to provide operational and administrative support to the Company in fulfilment of business contract and agreements if so awarded. In that regard, as the director in charge of the affairs of the Company, Mr. MG Mohan Kumar was responsible to ensure that the Company runs smoothly.

(9) Upon her return to India, she found that Mr. MG Mohan Kumar had embezzled all funds from the Company, had failed to repay loans, maintain company books and had defaulted on several statutory filings and payments. The Petitioner had not held board meetings or maintained the minutes. Not one of the financial decisions were taken with board or shareholder approval and none of the transactions were recorded and approved *via* resolutions. Mr. MG Mohan Kumar had saddled the Company with several unnecessary liabilities.

(10) Mr. MG Mohan Kumar had achieved this fraudulent mismanagement in collusion with other employees of the Company, all of whom had been hired by him. The Petitioner was one such employee. He was hired by Mr. MG Mohan Kumar as Vice President (Operations) with a view to facilitating

the embezzlement of funds earmarked for the operations of the Company for the unjust enrichment of MG Mohan Kumar, other key employees of the Company and the Petitioner himself. As such, given the nature of embezzlement, it is evident that the Petitioner played a critical role in facilitating the same and was hired to the Company for this illegal purpose.

(11) Ms. Hebbar then revoked the cheque signing authority of Mr. MG Mohan. The second step was to commission an independent forensic investigation of the Company. These material facts have been suppressed with a view to obtaining orders from this Hon'ble Tribunal. Bringing these facts on record would reveal that no operational debt has been created against the Company.

(12) It is stated that Mr. MG Mohan Kumar was in charge of the overall control and management of operations, administration and finances of the Company from incorporation until 17 April 2015, and in this period he had a free rein in running the Company as he saw fit. All key employees hired by him in this period reported directly to him. The Petitioner was one such employee. He claims to have been appointed as the Vice President (Operations) of the Company by the Company on 02 May 2012 with effect from 01 April 2012 i.e. even prior to the incorporation of the Company! The plan to run the Company to the ground is evident from this very fact that without even the company being incorporated the Petitioner and Mohan Kumar were already conspiring.

(13) Upon returning as the primary Director in the Company, and noticing un-explicable liquidity crunch, Ms. Hebbar ordered the conduct of a forensic investigation of the Company by an independent entity. As a first step, the Company conveyed to its Bankers to stop accepting cheques signed by Mr. MG Mohan Kumar *vide* letter dated 22 April 2015. Despite this Mr. MG Mohan Kumar issued cheques, purportedly on behalf of the Company, with respect to which separate proceedings are pending. Mr. MG Mohan Kumar refused to assist any investigation and resigned from the Directorship of the Company and also surrendered his shareholding taken

at the time of incorporation. As per records of the Company, he is yet to surrender the original share certificates to the office of the Company.

(14) The forensic investigation, conducted by *V. Raghavan and Co., Chartered Accountants* revealed distressing facts as to the way in which the Company had been managed by Mr. MG Mohan Kumar, the Petitioner and their associates: a. Records and documentation of the Company had not been maintained properly. In substantial heads of expenditures, payments were made in cash and not through verifiable bank payments. In a large number of transactions, the Bills/Vouchers/Invoices and Receipts were missing. The raw materials stock/inventory register was not maintained during the period between 12 May 2012 and 31 December 2014; b. Standard accounting policies had not been adhered to. The Company had therefore failed to compute accurate revenue figures. The sales/revenue invoices are not recognized and accounted for on a monthly basis as per the terms of the contract, but were recognized and accounted on a yearly basis at the year-end; c. There was huge working capital mis-management on account of not following up on the payments from BBMP and also the incurring of additional interest on term loans taken out by the Company due to delay in procuring of machinery to implement the works that the Company had been contracted for; d. There had been severe misuse of powers by the senior management of the Company – which included the Petitioner; e. There had been statutory non-compliances with the Income Tax Act, State Labour Laws, and Karnataka State Commercial Tax etc.; f. Unsecured loans had appeared to have been availed from various individuals, HUF and Corporate entities in the form of cash and cheques and in direct contravention of the Companies Act, 2013; and g. There had been ***misappropriation of funds*** from the Company whereby the Company had lost a minimum of INR 3,76,18,983/- (*i.e.,* over Rupees 3.7 crores) on account of various fraudulent actions undertaken by Mr. MG Mohan Kumar, the Petitioner and their associates.

(15) A true copy of the investigation report prepared by *V Raghavan and Co, Chartered Accountants* along with accompanying summary letter, write-up

summarizing the misappropriation of funds and e-mail from auditor which had enclosed the aforesaid report are produced herewith as **Annexure R5 series.** The full extent of fraud and misappropriation is yet to be determined and will only come to light after a thorough police investigation and trial.

(16) It is evident that the Petitioner had, therefore, grossly abused his statutory and fiduciary responsibilities as a key employee of the Company for the pecuniary benefit of himself and his acquaintances, by misusing funds of the Company. This abuse has caused huge losses to the business operations of the Company. As such, the Petitioner has failed to even remotely discharge his fiduciary obligations as a key employee to the Company and cannot be said to be entitled to any payments from the Company in view of the blatant embezzlement of funds (which, it is relevant to note, far exceeds the total amounts being claimed by the Petitioner in the instant petition).

(17) It is submitted that Ms. Hebbar has filed a criminal complaint against him with respect to the various crimes committed by him against the Company (incidentally, Ms. Hebbar had filed an earlier criminal complaint against MG Mohan Kumar and one AV Balasubramanya before the Malleswaram Police Station – the details of which have been provided in the Statement of Objections filed by the Company in CP (IB) 99/BB/2017 and CP (IB) 116/BB/2017. The *criminal complaint* was filed with the High Grounds Police Station *vide* written complaint dated 02 June 2017 against the Petitioner, MG Mohan Kumar and K Rajendra (Manager - Finance and Administration of the Company) for offences under Sections 406, 402, 465, 468, 477A and 120(B) of the Indian Penal Code, 1860 ('**IPC**') for misappropriation of Company funds to the tune of INR 3,76,18,983 (Rupees Three Crores Seventy Six Lakhs Eighteen Thousand Nine Hundred and Eighty Three only). The High Grounds Police registered an FIR on the same day which was numbered as Crime No.87/2017.

(18) As is evident, this criminal complaint was filed much prior to the present petition which leads to the inescapable conclusion that the present petition

is merely created as an attempted distraction from the pending criminal investigation. It is submitted the Petitioner is in fact absconding and avoiding the police authorities who have not been able to trace him for the purposes of investigation. Interestingly, it appears he is available to confer with his advocate to file this petition before this Tribunal. It is therefore requested that this Tribunal may be pleased to direct Petitioner to be physically present before this Court so that investigations against him can be concluded.

(19) Rapid progress was being made in the investigation being conducted by the High Grounds Police Station in respect of Crime No.87/2017. Apprehending their imminent arrest for the purposes of investigation, the Petitioner and the other Accused moved the Hon'ble City Civil and Sessions Court, Bengaluru under Section 438 of the Code of Criminal Procedure, 1972 seeking anticipatory bail in the event of their arrest in connection with Crime No. 87/2017. The anticipatory bail petition was filed on 7 October 2017 and was numbered as Crl. Misc. 8005/2017.

(20) After taking on record objections by the Ld. Public Prosecutor and conducting a full hearing of both sides, the Hon'ble Sessions Court was pleased to pass an order dated 19 October 2017 rejecting the petition for anticipatory bail filed by the Petitioner and his co-accused. It is pertinent to note that, in the judgement rejecting the petition, the Hon'ble Sessions Judge has found that there exist incontrovertible circumstances that make out *prima facie* that the Petitioner and his co-accused were guilty of offences alleged in the criminal complaint in Crime No. 87/2017.

(21) When considering the nature of criminality and fraud evident from the actions of the Petitioner as described above, it is evident that the instant application has been filed at his behest, on the basis of documents created by him and his accomplices with a view to providing a counter blast to the criminal investigation pending against him. Such actions amount to an abuse of the process and law and this Tribunal must take strong exception to the same. It is submitted that the above-mentioned investigation, based on the report of an independent auditor, constitute sufficient evidence of

facts which constitute a dispute in terms of Section 9 of the Code. While police continue to investigate the complaint, the Sessions' Court's *prima facie* finding as to the reliability of the allegations of the auditor's report and subsequent denial of anticipatory bail indicates that the dispute raised is not illusory in nature and is not a feeble legal ruse by the Company to evade repayment of alleged operational debts. This investigation clearly indicates that the independent auditors report has raised serious contentions that require further investigation. The notice of existence of this dispute was clearly brought to the attention of the Petitioner prior to lapse of 10 days from the Company receiving the Form 3 Demand Notice. Therefore, in view of the provisions of Section 9(5)(2)(d) of the Code, the instant application deserves to be dismissed *in limine*

(22) It is pertinent to note that the amounts alleged to be embezzled far exceed the amounts of operational debt being claimed by the Petitioner and therefore it is the Petitioner who owes the Company, rather than the other way around. It is humbly submitted that this Hon'ble Tribunal cannot be party to perpetuating fraud committed by the Petitioner and his associates.

(23) It is, therefore, clear that the pending proceedings against the Petitioner initiated by Ms.Hebbar, on the basis of an independent auditor investigation, constitute sufficient conditions for the 'existence of a dispute' in relation to the alleged operational debt.

(24) As the Hon'ble National Company Law Appellate Tribunal has held on multiple occasions, it is *mandatory* for any application under Section 9 of the Code to be accompanied by a copy of a 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. The Petitioner has failed to provide such a certificate with the instant petition. In view of the same it is submitted that the instant petition deserves to be dismissed *in limine* for non-compliance with the mandatory requirement of certificate stipulated under Section 9(3)(c) of the Code.

(25) The Petitioner claims that the alleged arrears of salary are due to him for the years 2013-2015. At the outset, these claims are barred by limitation

and also hit by delay and laches. No explanation has been provided for the delay in making these alleged claims. The timing of the petition, right around the time when the police are investigating them makes it clear that these have been filed as a counterblast to the criminal actions raised by the Company.

(26) Regarding the merits of the case it is submitted that as per the provisions of Section 9 of the Code, the following conditions must necessarily be met for admission of an application for initiation of insolvency resolution process: a. There must be an ***existence of an operational debt*** owed by the corporate debtor to the operational creditor; b. There must be ***a default*** of the operational debt; c. The operational creditor must have served on the corporate debtor a demand notice or invoice demanding payment under Section 8 of the Code at least 10 days prior to making the application under Section 9; d. The operational creditor making an application must, along with the application, furnish: i. A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor; ii. An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt; iii 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 iv. Any such other information as may be specified.

(27) If any of the above conditions are not met, the present application must be rejected. It is humbly submitted that the Petitioner has failed to furnish adequate record or evidence to prove the existence of a valid operational debt or any default thereof. Further, they have not supplied any affidavit to state that the Company **has not** given a notice in respect of existence of a dispute in relation to the operational debt. Finally, the Petitioner has provided no evidence to show that the Bank Certificate annexed to the Petition is from an account in which he was regularly receiving payments from the Company. In the absence of any such evidence or necessary documentation, the instant application deserves to be dismissed *in limine*.

(28) The first document produced by the Petitioner to prove the existence of the operational debt is an 'Appointment Letter' dated 02 May 2012 addressed by Mr. MG Mohan Kumar to the Petitioner purporting to employ the Petitioner as 'Vice President (Operations)' with effect from 01 April 2012! At the outset, this 'Appointment Letter' has been issued prior to the incorporation of the Company (which was on 07 May 2012) and seems to record that the Petitioner was an employee of the company and being paid a salary (allegedly) a full five weeks even before it was incorporated! This alleged 'Appointment Letter' is therefore *void ad initio* and clearly a concocted document. At no point in time has this contract been ratified by the Company, either by way of a Board resolution or Shareholder resolution.

(29) Further, it is stated that this letter, being addressed by a co-accused of the Petitioner in a pending criminal investigation for crimes cannot be relied upon and create any validly enforceable debt as against the victim of these crimes i.e. the Company and its current shareholders. No-one can be seen to take the advantage of his own wrong.

(30) In any event, without prejudice to the aforesaid, it is submitted that as per Clause 17 and 18 of the said appointment letter, the Petitioner was bound by the 'Code of Conduct' of the Company and any other rules and regulations pertaining to discipline and conduct laid down by the management from time to time. It is submitted that the Petitioner's subsequent conduct – in colluding with MG Mohan Kumar and others – to illegally embezzle company funds for personal pecuniary gain amounts to a gross violation of the Code of Conduct of the Company and is an act of sever indiscipline. As such, the Petitioner has committed a wholesale breach of the terms of the said 'Appointment Letter' and is not, under any circumstances, entitled to any payments that may have become due as per the said 'Appointment Letter'.

(31) It is submitted that the manner in which the debts have been claimed by the Petitioner show that they have been baselessly concocted. A combined reading of the collusive petitions filed in CP (IB) No.99/BB/2017

and CP (IB) No.116/BB/2017 and the present petition seem to portray that the financial health of the Company was perilous and M G. Mohan Kumar had to personally lend money to the Company, along with raising funds from friends in order to tide over the financial crisis. The petitions also claim that the Company had not even commenced operations till end of 2013 when the first machine was imported successfully. Nevertheless, the alleged monthly salary of the Petitioner (who was notably the VP (Operations)) are as follows: FY 2012-2013: INR 1,50,000/- per month, starting from before incorporation of the Company or the start of operations; FY 2013-2014: INR 2,00,000/- per month which represents a 33% increase in pay – despite the company's finances and operations allegedly floundering; FY 2014-2015: Not specified and unsupported by any document but approximately INR 2,80,000/- per month which represents 40% increase in pay.

(32)As per the information available with the Company, the Petitioner is not even qualified to draw such high salaries, that too from a Company that had barely started operations. Per contra, Ms. Hebbar, the majority shareholder and director of the Company never paid herself any salary (much less a salary of lakhs a month) given that they were financed by banks and the Company did not have a revenue stream.

(33)The Petitioner has sought to rely upon *'Form 26AS'* of his PAN Number to show that there were salary arrears payable to him as claimed. However, a perusal of the document and a consideration of the background facts detailed above would reveal otherwise. The *Form 26AS* statements relied upon by the Petitioner would reveal that all the TDS bookings were performed in July 2015, subsequent to Ms. Hebbar taking over the affairs of the Company. As stated above, when Ms. Hebbar took over the affairs and daily management of the Company in 2015 (subsequent to her return from abroad) she found the Company in utter disarray with business having come to a grinding halt and the Company in grave financial distress. In taking steps to revive the Company into a going concern, she was advised to fulfil all relevant TDS demands at that point in time, regardless of the bona fides of the salary amounts paid in the past for which the TDS demands had been raised.

(34) In that regard, Ms. Hebbar made all pending statutory payment including TDS as a preliminary step towards reviving the Company, even prior to investigating thoroughly the affairs of the Company. Any further delay in statutory filings and payments would have resulted in civil and criminal action being taken against the Company. The payments were therefore made prior to the auditor's report which was received only in October 2015. It is submitted that the TDS deductions made by the Company were not an affirmation of the validity of the salary claims of the Petitioner but rather a procedural formality performed to avoid the Company being sunk into regulatory or penal proceedings. In fact, the Company is in the process of taking steps towards filing fresh returns for the relevant years with a view to claiming back arrears for false transactions entered into by the Petitioner and his accomplices including the bogus salary claims made by the Petitioner herein. There are criminal investigations under way to determine the extent of embezzlement of fraud perpetrated by the Petitioner and his associates. If the embezzlement were to be proven then the amounts deducted as TDS would be recoverable from the Petitioner.

(35) Further, the Petitioner has claimed that in his petition that he has been paid some of these dues in part, though no such document has been produced to prove this. Even otherwise, the Form 26AS produced for the year 2014-15 on which the Petitioner seeks to rely suggest that an amount of INR 12,00,000/- was paid to him whereas in the petition he claims that only a sum of INR 9,69,000/- has been paid to him. Such inconsistencies strike at the root of the matter and make it very clear that the petition ought to be dismissed *in limine. (If part payments made thus this is only recovery proceedings.)*

(36) Therefore the Form 26AS statements do not further the Petitioner's case in any manner. In fact they raise a doubt as to why the Petitioner had not made any claims against the Company and MG Mohan Kumar prior to 2017 since evidently TDS had not been paid to the authorities for the FY

2012-13 or 2013-14 and was only paid in 2015. This must have necessarily resulted in a huge tax burden on the Petitioner about which he did not speak a word for two years!

(37) It is stated that the Company enjoys a good reputation in the market and is seeing an upswing of its business. The Company has now ensured that all its statutory filings and obligations (both past and present) are fulfilled and has maintained all its records accurately. Thus, while, for example Canara Bank, issued a SARFAESI Notice to the Company in July 2016 the same Canara Bank proceeded to renew the terms of the loan arrangement it had with the Company *vide* loan extension letter. The fact that a reputed financial institution would renew a generous credit agreement with the Company is a testament to the business acumen of Ms. Hebbar, the viability of the Company as a going concern and the confidence in the Company's solvency.

(38) The solvency of the Company is further evidenced by its repayment of its entire term loan taken from Karnataka Bank Ltd. The Company was able to repay the loan of Rs.2,00,00,000 (Rupees Two Crores only) sanctioned by Karnataka Bank Ltd. *vide* sanction reference GMS(RFD) 182 dated 21.09.2012 to the full and final satisfaction of Karnataka Bank Ltd. The letter from Karnataka Bank Ltd. dated 10.11.2017 evidencing the full and final repayment of the aforesaid loan is produced herewith as **Annexure R14.** It is submitted that the aforesaid letter mistakenly reflects the loan as being for Rs.2,00,000 (Rupees Two Lakhs only) on account of a typographical error. The Company has applied for a corrected copy of the loan closure letter and craves liberty to produce the same before this Hon'ble Tribunal at a later date.

(39) It is evident that, in view of the above circumstances – whereby the Petitioner has failed to prove the existence of the operational debt or default of the operational debt by the Company and whereby the Petitioner is guilty of embezzling funds from the Company and creating the very situations he is now seeking redressal from. The Company is a viable going concern enjoying the backing of a reputable financial institution and

the prospect of tremendous future business. Therefore, the instant Petition is liable to be rejected for lack of disclosure of a default of an operational debt by the Company, lack of disclosure of existence of dispute and also for the immense damage it would cause to a booming going concern.

(40) This is therefore a fit case for invocation of Section 65 (*Fraudulent or malicious initiation of proceedings*) of the Insolvency and Bankruptcy Code, 2016 which empowers this Hon'ble Tribunal penalize any person who initiates insolvency resolution process fraudulently or with malicious intent for any purpose other than for the resolution of insolvency. The cases decided by the Principal Bench of this Hon'ble Tribunal in Company Petition No.IB-39(PB)/2017 in the matter of *Unigreen Global Private Limited* has, by an order dated 8 May 2017, and by the Hyderabad Bench of this Hon'ble Tribunal in CP IB No. 96/7/HDB/2017 in the matter of *Asset Advisory Services India Private Limited* v. *VSS Projects Private Limited* has, by an order dated 8 September 2017, have been cited in support.

4. Heard Shri Archishman Chaudhury, learned Counsel for the Applicant and Shri M.M. Swamy, learned Counsel for the Respondent. We have carefully perused the pleadings of the parties and the extant provisions of Code and Rule made thereunder.

5. We must observe at the very beginning that these proceedings under the Code are summary proceedings, where even if there was a debt, the same should be clear and undisputed and the default, as defined under section 3(12) of the Code should be clearly established. There is no scope for investigation under the Code, further than what has been brought on record. Further, it is a settled position of law that the provisions of Code cannot be invoked for recovery of outstanding amount but can be invoked to initiate CIRP for justified reasons as per the Code. The Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*[1], has inter alia, held that I&B Code, 2016 is not intended to be a substitute to a recovery forum and cannot be used to jeopardize the financial

[1](2018) 1 SCC 353

health of an otherwise solvent company by pushing it into insolvency. The Hon'ble Supreme Court in the case of *K. Kishan Vs. Vijay Nirman Company Pvt. Ltd.* clarified that the Petitioners cannot use IBC either prematurely or for extraneous considerations or as substitute for debt enforcement procedures. In *Transmission Corporation of A.P. Ltd. Vs. Equipment Conductors and Cables Ltd.,*[2] Hon'ble Supreme Court of India has inter alia held that existence of an undisputed debt is sine qua non of initiating CIRP. The facts of the case as obtaining in the present petition and the legal position on the issue have, therefore, to be understood in the light of these decisions. Unless a case is made out that there is a clear and undisputed debt, there is default, and also that the respondent is insolvent and has lost its ability to pay its debts, the proceedings become mere recovery proceedings which is not the intent of legislature in introducing the IBC.

6. The amounts claimed by the Operational Creditor in the present petition are stated to be on account of arrears of salary payable by the Corporate Debtor, which is claimed to be constituting the 'debt' owed to him. Debt, as defined under the Code in section 3(11) means a liability or obligation in respect of a claim which is due from any person, and includes a financial debt or an operational debt. Such a debt would arise from a claim, as also defined in section 3(6), i.e. from a right to payment in the hands of the Creditor. Such a right could arise from some prior terms and conditions agreed to by the concerned opposite parties, in the shape of a Contract or an Agreement or Resolution, prior to the transaction, if any, so that the same could be enforced.

7. It is seen that the Operational Creditor was appointed as VP (Operations) of the Company on 02.05.2012, w.e.f. 01.04.2012 i.e. even prior to this appointment and also prior to the incorporation of the Company itself. This Appointment Letter was issued by Mr. M.G. Mohan Kumar who was in charge of the overall control and management of operations, administration and finances of the Company since incorporation until 17 April 2015. In that period the Petitioner reported directly to Mr. M.G. Mohan Kumar, against whom also

[2](CA No.9597 of 2018) dated 23rd October, 2018, (2018) 147 CLA 112 (SC)

cases for misappropriation and siphoning off of funds etc. have been filed by the Corporate Debtor, along with the Operational Creditor, and which are mentioned in our order in C.P. (IB) No.116/BB/2017, in which Mr. M.G. Mohan Kumar is the Petitioner.

8. The Appointment Letter is placed on record. Since the appointment was made even prior to the incorporation of the Corporate Debtor, it is evident that there could not have been any Board Resolution to discuss, propose or confirm such an appointment. Nothing has been brought on record to indicate that any such confirmation was done subsequently by the Board. In this situation, it cannot be said that any right to payment or claim arose in the hands of the Operational Creditor against the Corporate Debtor, in the absence of any decision from the Board. Even if it is so assumed, this right was not absolute, and was subject to various clauses in the said Appointment Letter. Para 8 of the said Appointment Letter clearly states that the *"Salaries will be reviewed annually. The review of your salary and your career advancement will depend upon your performance and merit and will be as decided by the Company Management at its discretion."* Thus, it is clear that payments due to the Operational Creditor depended upon his performance and merit, and at the discretion of the Management. Clauses 17 and 18 of the Appointment Letter also mention a Code of Conduct and binding rules regarding the discipline and conduct of the Petitioner during the course of his employment with the Corporate Debtor.

9. The above referred clauses in the Appointment Letter clearly bring into the arena of dispute any right to payment or claim made by the Petitioner towards salary arrears, when the Independent Auditor's Report and the Criminal cases filed against him are taken into account. In fact there are counter claims by the Corporate Debtor of amounts due from him due to alleged acts of misappropriation, siphoning off etc. These are dealt with later to examine if the debt, if any, was clear or disputed. Hence, we are of the view that no debt arose as per the provisions of the Code, on the facts of the case, and was in any case in dispute.

10. As regards the dispute between the Operational Creditor and the Corporate Debtor, headed by Ms.Bhanu Prabha Hebbar after her return from the USA in 2015, it is stated by the Corporate Debtor that Ms Hebbar noticed that Mr MG Mohan Kumar (Petitioner in C.P. (IB) No.116/BB/2017) had indulged in embezzlement of funds, not repaid loans, defaulted in statutory payments, not held Board meetings etc., thus saddling the Company with huge liabilities and losses. To facilitate all this he hired his own men, including the Petitioner in the instant Petition. She ordered a forensic audit by an Independent Auditor, V Raghavan & Co., Chartered Accountants. The detailed report has been placed on record and are summarised in the Respondent's objections at Para 3(14), wherein in conclusion it is mentioned that the Company had lost a minimum of Rs.3,76,18,983/- on account of various fraudulent actions undertaken by Mr. M.G. Mohan Kumar, the Petitioner and their associates.

11. Pursuant to these findings of the Independent Auditor the Corporate Debtor, filed Criminal cases against the Petitioner and Mr. M.G. Mohan Kumar and his associate. The Petitioner, as an accused, moved the Hon'ble City Civil and Sessions Court, Bengaluru under Section 438 of the Code of Criminal Procedure, 1972 seeking anticipatory bail in the event of their arrest in connection with Crl. No.87/2017. The anticipatory bail petition was filed on 07.10.2017 being Criminal Misc.8005/2017. The Hon'ble Sessions Court passed an Order dated 19.10.2017 rejecting the petition for anticipatory bail filed by the Petitioner and his co-accused. The Hon'ble Sessions Judge found that there existed incontrovertible circumstances that make out *prima facie* that the Petitioner and his co-accused were guilty of offences alleged in the criminal complaint in Crime No. 87/2017. He concluded, at Para 13, that:

> *"On careful perusal of the entire complaint, the complainant has made some serious allegations of cheating and misappropriation of funds to the tune of several crores, with regard to sudden increase of salary of petitioner no. 2, foreign travelling expenses of Petitioner, purchase of consumables and amount due from BBMP etc. When the entire allegations are observed, there are serious allegations of misappropriation and cheating to the tune of crores of rupees. I am*

*of the opinion that, since complaint is based upon the* ***audit report****, furnished by the auditors and there are serious allegations of cheating and misappropriation, the police need the accused for interrogation in this case. The advocate for Petitioners have vehemently canvassed his arguments that, the Petitioner is reputed chartered accountant, who has promoted several famous company like Air Deccan etc. However, merely because a person is reputed and promoted several companies, it cannot be a ground to allow this petition. On a careful perusal of the complaint, objections of learned PP and report of IO,* ***I am of the opinion that, there are serious allegations of misappropriation and cheating to the tune of several crores of rupees****. If the accused are enlarged on bail, they are likely to abscond and hamper the investigation. I am of the opinion that, Petitioners are not entitled to bail." (emphasis added)*

The Petition filed by Petitioner as accused no.2, along with Mr MG Mohan Kumar was thus rejected. These events clearly indicate that there were pre-existing disputes which were too grave to be ignored for the purpose of these proceedings, especially as the Audit report was referred to in coming to that conclusion. They are substantial and not a feeble legal ruse by the Corporate Debtor to evade repayment of debts, if any.

12. Further, it is seen that the Operational Creditor had served a Notice dated 10.04.2017 also demanding an amount of Rs.18,25,000/- towards arrears of salary. Notably, this amount is different from the amount mentioned in the Demand Notice sent later on 08.09.2017 under the provisions of the Code (mentioned in this Petition), being Rs.28,37,481, indicating that there was no clarity on the debt even by the calculations of the Petitioner. This would also mean that either there was no valid Demand Notice or there is a defective Petition before us, which should be dismissed on this ground alone. In the reply to this notice of 10.04.2017, the Corporate Debtor while denying any payments due to the Operational Creditor, opposed his appointment, charged him with collusion with Mr. M.G. Mohan Kumar and fraudulent siphoning off of funds of the Company, apprised him of the findings of the Independent

Auditors Report and made a reference to the criminal cases filed against him. This again shows that there was a pre-existing dispute about the debt in question, much prior to the Demand Notice issued by the Operational Creditor, not merely on the quantum but on the existence of the debt itself.

13. At this point we may mention that in C.P. No.43/BB/2018 we dealt with a petition filed under section 131 of the Companies Act 2013, wherein the Corporate Debtor had sought revision of its Financial Statements and Board Reports for the FYs 2012-2013 to 2014-15. The revision was sought on the basis of the same Independent Auditor's report as is mentioned in the preceding paras, and which brought out issues of misappropriation, siphoning off of Company funds, statutory non-compliances etc., apart from several accounting deficiencies, and which had led to the filing of Criminal cases against the Petitioner and other co-accused. Taking cognisance of the Independent Auditor's Report, and the subsequent events, this Bench allowed the Petition permitting the revision of accounts for the FYs 2012-13 to 2014-15. Apart from the legal issues in the matter, detailed reference was also made to the criminal cases filed by the Corporate Debtor against Mr. MG Mohan Kumar, along with the Petitioner in the instant case, as referred to in the preceding paras. Mr. MG Mohan Kumar and others had impleaded himself in that matter, and had objected to the revision of accounts, but his plea was not accepted. We may also emphasise that in the Petition u/s 131, since the issue was merely revision of accounts for certain years in which misappropriation etc. was reported, emphasis was laid on the accounting discrepancies in the Financial Statements. However, in the present proceedings the grave nature of the criminal proceedings cannot be overlooked, as they have a bearing on the very existence of the dispute, even if only a prima facie case if made out, regarding the debt claimed by the Operational Creditor and the dispute surrounding the same.

14. It is further seen that the Petitioner's claim relates to FY 2012-13 onwards. The Code came into effect in 2016 and this Petition was filed on 25.10.2017. As per our findings above, the debt does not exist, and in any case the same is disputed and the same is also not borne out of the Accounts maintained by

the Corporate Debtor. In this situation there is no case of continuing default or a continuing cause of action. Defaults arising 3 years prior to the filing of the Petition are therefore barred by limitation. In fact part of the alleged debt was barred by limitation even prior to the commencement of the Code, and it is well settled that the IBC cannot be used for reviving a time barred debt. Also, the long delay in filing a petition u/s 9 of the Code itself leads us to believe that the intent is to defend its position in the criminal cases rather than recovery of any genuine debt.

15. The Petitioner's claim that his salary arrears are proved by the TDS Certificates, Form 26AS, of the Income Tax Department also does not hold ground. It is seen from the Form 26AS brought on record that the TDS amounts were booked on 15.05.2015 and 29.07.2015, whereas the payments of salary relate to the period from April 2013 to October 2014. Even assuming that salaries were payable for this period, after the conduct of Independent Audit in 2015 instances of misappropriation and siphoning off of funds came to light and cases were filed against the Petitioner and his co-accused, these claims came into dispute. Mere TDS cannot revive his claim looking at the totality of circumstances.

16. Lastly, these proceedings are not recovery proceedings. However, we find that the Petitioner has approached this forum only for recovery. He has not made out any case that the Corporate Debtor is insolvent and unable to repay its debts because of which CIRP should be initiated against it. We find that the Company is seeing an upswing in its business. Earlier Canara Bank had issued a SARFAESI Notice to the Company in July 2016 but has now proceeded to extend loans to it showing confidence in the Company's solvency. It is engaged in important task of road repairs and has tied up with important government departments like BBMP. The Work Orders placed on the Company by BBMP show that the Company's business is continuing well and that it is a more than viable going concern. The Company was able to repay the loan of Rs.2,00,00,000/- (Rupees Two Crore only) sanctioned by Karnataka Bank Ltd. *vide* sanction reference GMS(RFD) 182 dated 21.09.2012 to the full and final satisfaction of Karnataka Bank Ltd. Thus the

Corporate Debtor is fully solvent and is therefore not a fit case for initiation of CIRP for this reason as well.

17. In view of and for the reasons discussed above, we are of the considered view that there was no debt, and/or in any case the same was substantially disputed by the Corporate Debtor with the Petitioner/Operational Creditor, before different forums, as well as per its own records, much prior to the Demand Notice. The Company Petition in C.P. (IB) No.117/BB/2017 is accordingly dismissed along with pending IA, if any. No order as to costs.

**ASHUTOSH CHANDRA**
**MEMBER, TECHNICAL**

**RAJESWARARAO VITTANALA**
**MEMBER, JUDICIAL**

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