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**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

IBA/187/2020

(Filed under Section 9 Rule 6 of the Insolvency and Bankruptcy
(Application to adjudicating Authority) Rules, 2016)

In the matter of **SMART Training Resources India Pvt Ltd.**

NARESH KUMAR

No.17/34, 1st Floor,
10th Street, 6th Main Road,
Anna Nagar, Chennai – 600 040

...Applicant/Operational Creditor

- Vs -

SMART TRAINING RESOURCES INDIA PRIVATE LIMITED

Registered Office at
No.1/5, Sivaganga Road,
(Off Sterling Road),
Nungambakkam,
Chennai – 600 040

...Respondent/Corporate Debtor

Along with

IA/1310/CHE/2021 in IBA/187/2020

SMART TRAINING RESOURCES INDIA PRIVATE LIMITED

Registered Office at
No.1/5, Sivaganga Road,
(Off Sterling Road),
Nungambakkam,
Chennai – 600 040

...Applicant

Vs

NARESH KUMAR

No.17/34, 1st Floor,
10th Street, 6th Main Road,
Anna Nagar, Chennai – 600 040

...Respondent

Order pronounced on 2nd June 2022

CORAM:

R. SUCHARITHA, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

For Petitioner: Mr.Ambili Menon, Advocate

For Respondent: Ex-Parte

ORDER

***Per:* SAMEER KAKAR, MEMBER (TECHNICAL)**

IA/1310(CHE)2021 in IBA/187/2020

IA/1310(CHE)/2021 is an application filed under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 seeking to set aside the ex-parte order dated 13.08.2021 passed by this Tribunal. This Application was filed on 28.10.2021. At this juncture, it is seen that this Tribunal has given sufficient opportunity to the Corporate Debtor to file the counter. Despite several opportunities granted to the Corporate Debtor, they have failed to do so and hence they were set- exparte. It is seen that the set aside ex-parte application was beyond 30 days. Thus, we are constrained to proceed the main application on merits and accordingly this IA/1310/CHE/2021 stands **closed**.



IBA/187/2020

2. Under consideration this Petition is filed by Mr.Naresh Kumar, Chief Operating Officer of the Corporate Debtor Company under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor namely SMART Training Resources India Private Limited.

3. The Corporate Debtor herein bearing CIN No.U80300TN2010PTC076262 registered under Companies Act, 1956 having its registered office at No.1/5, Sivaganga Road (Off Sterling Road), Nungambakkam, Chennai - 600 034.

4. From, Part- III of the Application it can be seen that the Operational Creditor had not proposed the name of the IRP and had left it to the discretion of this Tribunal. Further from Part IV of the Application it can be seen that, the Operational Creditor had claimed Rs. 3,11,538/-(Rupees Three Lakhs Eleven Thousand Five Hundred and Thirty Eight only) as gratuity dues to be the total debt amount claimed. The date of default as mentioned in Part IV of the application is 02.08.2019. The present Application is filed before this Tribunal on 13.01.2020.



5. From, Part- V of the Application it can be seen that the Applicant has placed the following list of documents:

- a) Appointment Letter dated 23.12.2013
- b) Salary Increment Letter from the Respondent dated 10.06.2017
- c) Minutes of the Meetings of the Corporate Debtor dated 02.08.2019
- d) Letter sent by the Petitioner to the Corporate Debtor dated 30.08.2019
- e) Letter from the Corporate Debtor to the Petitioner dated 16.08.2019
- f) Letter sent by the Petitioner to the Corporate Debtor dated 09.09.2019
- g) Letter sent by the Petitioner to the Corporate Debtor along with the "Returned Cover" dated 13.011.2019.
- h) Letter sent by the Petitioner to the Corporate Debtor
- i) Show Cause Notice sent by the Corporate Debtor dated 22.11.2019
- j) Demand Notice dated 03.12.2019
- k) Reply to Show Cause Notice sent by the Petitioner dated 05.12.2019

6. It was averred in the application that the Petitioner was an employee of the Corporate Debtor and this application was filed claiming gratuity benefits of the employee while in service with the Corporate Debtor and the said amounts are admitted by the Corporate Debtor vide relieving Order dated 16.08.2019.

7. It was further averred that the Corporate Debtor was engaged in the business of Imparting Corporate Training and placements. The Applicant was appointed as the General Manager in Respondent Company on 23.12.2013 and was in charge of the overall administration of the Company under the Management of the then Directors, Mr. Ram R V and Ms. Archana J. Later the Applicant was promoted and made chief Operating Officer (COO).

8. The Applicant submitted that he resigned from his position as Chief Operating Officer on 22.03.2019 and served a notice period of more than 120 days until he was relieved on 02.08.2019 and the Company has issued an Acknowledgment of Resignation Letter dated 02.08.2019 signed by the then Managing Director Ms. Archana Ram, which has been counter signed. The Applicant further submitted that the Company has issued a Relieving Letter dated 16.08.2019 acknowledging receiving all necessary documents from the Petitioner and also admitting the Claim of gratuity and his salary dues.

9. The Applicant further submitted that his last drawn basic salary was Rs. 90, 000/- and completed six years for the purpose of computation of gratuity and hence is eligible to a gratuity amount of Rs. 3, 11, 538/-. The Applicant stated that he has duly sent the Gratuity Application Form I, dated 14.11.2019 by registered post to the Respondent Company and had also sent the same electronically by e-mail to the concerned authorized representatives of the Company.

10. It was submitted by the Learned Counsel for the Operational Creditor that since no payment was forthcoming from the Corporate Debtor, the Operational Creditor has issued a Demand Notice under

Section 8 of IBC, 2016 to the Corporate Debtor on 03.12.2019, which was delivered to the Corporate Debtor on 04.12.2019. Further, the Operational Creditor has also filed an Affidavit as mandated under Section 9(3)(b) of IBC, 2016 stating that the Corporate Debtor after the receipt of the Demand Notice has failed to pay the unpaid 'operational debt' nor raised any dispute in relation to the same. Under such circumstances, the Operational Creditor has filed the present Application before this Tribunal on 13.01.2020 seeking initiation of CIRP as against the Corporate Debtor.

11. In relation to the Corporate Debtor, it is seen from the records that there was no appearance on the part of the Corporate Debtor and this Tribunal passed ex-parte order dated 13.08.2021 against the Corporate Debtor.

12. Heard the submissions made by the Learned Counsel for the Operational Creditor. From the records it is seen that the Corporate Debtor has raised a dispute by way of a show cause notice dated 22.11.2019 issued to the Operational which is much before the Demand Notice and the extract of the Show case notice is reproduced hereunder:



22-NOV-2019

SHOW CAUSE NOTICE

Kind attention: Mr Naresh Kumar

We hereby issue this show cause notice seeking your explanation on or before 30/11/2019 failing which the Company will take appropriate action against you at your cost.

1. As per the Board Resolution passed on 02/08/2019 in which your presence was recorded, you agreed to hand over the entire accounts details to the management at the time of your resignation but have not done the same till today. Please explain why the Company should not take action against you for the loss incurred!
2. The management has come to know that you have transferred the official marketing mobile no 9940650388 to your personal name. As you are aware, the Company has spent huge amount of money on advertisement, marketing materials, study materials, etc on which the said mobile number was printed for business development. The management has also come to know that you have forged the signature of the then Director of the Company Ms. Archana Jayaraj to get the official mobile number (which was given to you by the Company) in your personal name. The Company is asking you to return the same on or before 25th November 2019 and pay Rs.3.00 Crore (Rupees Three Crore Only) to the Company towards the damages and loss incurred by the Company so far on account of transferring the mobile number to your personal name, failing which you have to face the legal consequences.
3. The management has also found that you have been promoted from Manager to Chief Operating Officer (COO) of the Company and to our surprise there is no letter of offer or promotion with HR Department and we came to know that you forcibly made yourself as COO of the Company and doubled your salary after colluding with the former director of the Company. Even to our surprise your appointment was not even ratified in any of the shareholders meeting as required under the Companies Act, which is against the interest of shareholders and also in contravention of the provisions of the Companies Act. Why the Company should not take legal recourse for the recovery of money and loss incurred to the Company.
4. As you were handling part of Companies Operations, and, as per the relieving norms you are supposed to handover the client contact details, current and upcoming programmes, which till today you have not done. Why the Company should not take action against you for the loss of revenue approximately to the tune of Rs.5.00 Crores (Rupees Five Crore Only).
5. As COO, holding a responsible position, it is your duty to maintain all outstanding Payables / Receivables of the Company and handover the same as recorded in the Board Resolution dated 02/08/2019. But you have not handed over the details of the same as agreed at the time of your relieving from the service. Why the Company should not take action against you for the same, which resulted in financial loss of Rs.2.50 Cores (Rupees Two Crore and Fifty Lakhs Only) to the Company.

6. The Company has come to know that you have taken a copy of the Company's Course Contents, Client Contact Details, Company's Vendors Contacts such as freelancers, etc and working against the Company along with former employees / Directors by way of starting similar nature of business in your supervision with the help of SMART data, mobile number, business network, goodwill and name. By doing so, you are damaging the Company's reputation and goodwill in the society and also causing pecuniary loss to the Company for the tune of Rs 100 Crore (Rupees One Hundred Crore Only). Why the Company should not be taking action against you for the same. (40)
7. We have noticed from the accounts submitted by you that you have travelled to Switzerland in the month of September 2018 and booked all the related expenses amounting to Rs 1,59,035/- (Rupees One Lakh Fifty Nine Thousand Six Hundred and Thirty Five Only) in the Companies Account. We also came to know that the Company has not sponsored your trip, as well as the trip was not related to Company's nature of business and the trip was purely your personal. We ask you to return the entire amount along with interest or else the Company will file criminal and civil case for misuse of Companies funds as you were the COO of the Company at that time.
8. We came to know upon scrutinizing the books of accounts of the Company that there are several other expenses claimed by you on various occasions which were purely of your personal expenses and why the Company should not file a criminal and civil case for misuse and misappropriation of Company's fund.
9. We have seen from the Books of Accounts that after you have made yourself COO of the Company you allowed many of the former Managing Director personal expenses in the Company accounts by way of using your COO designation. Why the Company should not accuse you that you colluded with the former Managing Director to swindle the Companies money and file criminal and civil case against you for punishment and recovery.
10. We have also come to know that you have made payments towards your salary and that of Ms Archana, the then director of the Company, without deducting TDS for the last five months. As you were the person designate, responsible for making the TDS and all other statutory dues and as you have not done so, the Company incurred loss on account of non-deduction of TDS. Hence the Company asks you to return the TDS amount not deducted on your salary with interest and that of the former directors i.e Ms. Archana, failing which the Company will initiate legal proceedings against you to recover the same with interest and all other damages incurred by the Company.
11. We came to know that you have created an email id namely smart.nareshm@gmail.com which portrays that you are part of SMART TRAINING RESOURCES INDIA PVT LTD and using the goodwill and brand name of the Company for your business benefits. By doing similar business of the Company which causes monetary loss and reputation damages to the Company to the tune of Rs.50 Crore (Rupees Fifty Crore Only). Why the Company should not be taking action against you for the same.
12. As COO of the Company you were the person designated to implement and supervise the company policies regarding the norms to be followed by an employee while in service. To our

α Ganesh Ramkumar

utter shock and amazement we found that rather than overseeing the adherence of the norms, yourself started a start-up of your own 'Vishwabodhi Foundation' while you were still in employment with the Company and you were garnering business for your company 'Vishwabodhi Foundation' by promoting it to SMART Clients thereby blatantly abusing your employment terms. Your actions have contravened the Company's employment norms; please explain why the company should not take appropriate action against you for the same. (50)

13. We have also noticed from the Company accounts that you have transferred Rs 11,00,000/- to your wife account from July 2017 to Jan 2017 and booked the same as consultancy charges in the Company books. We have verified and found that Mrs.Kavitha is not all related with the Company. It was only you have swindled the Company money by forging your wife as consultant of the Company. The Company asks you to return the amount along with interest @ 24% or the Company will take appropriate action to recover the same from you.
14. We have also found that you have claimed your personal expenses to the extent of Rs.85,673.50/- consisting of your personal travels expenses from the Company accounts. We ask you to return the amount along with 24% interest or else the Company will take appropriate action against you to recover the same.
15. We have seen from the Company books that you have made payments from Company accounts for Rs.40,000/- to one Mr.Rajasekar. It was found that he was of your own business consultants and not related with the Company. Hence we ask to return the same along with interest @ 24% else the Company will take appropriate action against you to recover the same.

The Company strictly states that if your explanation is not satisfactory and not beyond reasonable doubt, it would be concluded that you have committed the stated offence and you will be liable to be prosecuted for the offence committed for: criminal conspiracy U/s. 120 A of IPC, Criminal breach of trust U/s. 405 of IPC, theft U/s. 378 of IPC, cheating U/s 420 of IPC, fraud U/s. 17 of Indian Contract Act 1872, Accessing the computer and data U/s. 29 of Information Technology Act, penalty for damage to computer, computer system etc., U/s. 43 of Information Technology Act, Tampering with computer source document U/s. 65 of Information Technology Act, Penalty for breach of confidentiality and privacy U/s. 72 of information Technology Act, Infringement of copyright U/s. 63 of The Copyright Act 1957, Knowingly using infringing copy of computer program U/s. 63B of The Copy Right Act.

Mr. Sivakumar K
Director
SMART TRAINING RESOURCES INDIA PVT LIMITED

a Ganpantay

13. The Learned Counsel for the Applicant has replied to the Allegations made in the above Show cause Notice by the Advocate of the Applicant herein, we find no substance in the reply. The entire case which has been presented before us is based on the letter heads of the company has been used by the Operational Creditor. Some of the signatures of the Respondents and the capacity of the person who has signed the letters was not clear.

14. Further this Tribunal cannot rule out any misuse of the letterheads of the Company especially in the circumstances when the applicant was acting as COO and had in his control the letterheads of the Company.

15. From the above show cause notice it is manifestly clear that the Corporate Debtor has raised various disputes against the Operational Creditor which clearly shows that there is a pre-existing dispute between the parties.

16. It is required to be noted that the Hon'ble Supreme Court of India in the matter of M/s. **'Mobilox Innovations Pvt. Ltd.' Vs. 'Kirusa Software Pvt. Ltd.'** (2018) 1 SCC 353 has clearly laid down that 'the test for determination for the Adjudicating Authority is to see at the stage of Admitting/rejecting the Application 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'. Thus, it is not required for this Adjudicating Authority to enter into the gravity of the dispute which exists between the parties and is only required to see that whether the dispute as raised by the Respondent requires further investigation and that the dispute is not patently feeble legal argument or an assertion of fact unsupported by evidence.

17. It is required to be noted that the Hon'ble NCLAT in the matter of ***Kishore K. Lonkar VS Hindustan Antibiotics Ltd.*** (COMPANY APPEAL (AT) (INSOLVENCY) No. 934 of 2021) in Para 9 of the Judgement it was held that :

9 Section 3(36) of the Code states that the term 'workmen' shall have the same meaning as provided under Section 2(s) of the Industrial Disputes Act, 1947. For the purpose of the Code, the term 'workmen dues' has to be interpreted in terms of explanation to Section 326 of the Companies Act, 2013. As per the definition incorporated therein, the dues would cover wages and salary, accrued holiday remuneration, workmen compensation, and all sums due from Provident Fund, Pension, Gratuity Fund or any other fund for the welfare of the workmen, maintained by the employer. Generally speaking, the 'Claims' of the workmen/employees may be classified as 'service claims' which arise during the terms of employment, in lieu of service rendered by the employee, salary, wages, bonus, dues etc., and 'welfare claims' which arise after cessation of employment, like 'Gratuity', 'Leave Encashment', Superannuation Dues, Workmen Compensation for closure of the entity which all depend on the tenure of the employment.

Subsequent to the Company going into the Insolvency, all such claims may be submitted in Form D under Regulation 9 of the (Insolvency and Bankruptcy) CIRP Regulations, 2016. But seeking to initiate CIRP on the ground that 'LTC' and 'EL Encashment' has not been paid, which fall within the ambit of service benefits/welfare benefits cannot be said to be the intent and objective of the Code.

18. Further this Tribunal being an Adjudicating Authority under the IBC, 2016 and the proceedings before this Tribunal being summary in nature, this Tribunal unlike a Civil Court cannot indulge in the luxury of taking evidence and that the debt and default on the part of the Corporate Debtor is required to be proved by the Operational Creditor beyond reasonable doubt.

19. Thus, from the aforesaid facts and judgements cited supra, we are of the view that there exists a dispute between the parties and hence the Application filed by the Applicant / Operational Creditor under Section 9 of the IBC, 2016 stands **dismissed**. No costs.

— Sd —

SAMEER KAKAR

MEMBER (TECHNICAL)

— Sd —

R. SUCHARITHA

MEMBER (JUDICIAL)

Sriram Ananth.V