

**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 13.02.2020

CAUSE LIST - 2

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. 156/BB/2017	For hearing IA 689/19 - Liquidation	Sec 10 of I&B code 2016	Triumph India Software Services Pvt Ltd	Girish Kumar M.S,	Corporation Bank	Shri Venkata Subbarao Kalva Liquidator, Vivekananda for Liquidator

ADVOCATE FOR PETITIONER/s: VENKATA SUBBARAO KALVA

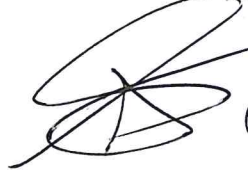
Liquidator - 8147238639

S. Vivekananda & Theerthesh B.S - for Liquidator

ADVOCATE FOR RESPONDENT/s:

S. Viswanathan

for Directors. M/s. ...

 (S. VISWANATHAN)
13.02.2020

D

ORDER

Heard Shri Venkata Subbarao Kalva, learned Liquidator and Shri S. Vivekananda along with Shri Theerthesh B.S, learned Counsel for Liquidator and Shri S. Viswanathan, learned Counsel for Respondents/Directors.

I.A.No.689/2019 in C.P(IB)No.156/BB/2017 is disposed of by separate order. CP is posted on 26.03.2020

MEMBER (T)


MEMBER (J)

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

I.A.No.689/2019 in
C.P. (IB)No.156/BB/2017
U/s. 66 of the IBC, 2016
R/w Section 213 (b) of the Companies Act, 2013

Between:

*Mr. Venkata Subbarao Kalva, Liquidator of
M/s. Triumph India Software Services Private Limited
Company under Liquidation*

No.113, 3rd Cross, P&T Colony,
R.T.Nagar, 2nd Block,
Bengaluru – 560 032

- Applicant/Liquidator

And

1. Mr. Mohan Ramanathan
Director
No.523, R.S.Mansion,
4th Cross, 2nd Block,
R.T.Nagar,
Bengaluru – 560 032

2. Ms. Usha Ramanathan Mohan
Director
No.523, 4th Cross, 2nd Block,
R.T.Nagar,
Bengaluru – 560 032

- Respondents

Date of Order: 13th February, 2020

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



Parties/Counsels Present:

For the Applicant/Liquiditor : Shri S. Vivekananda

For the Respondents : Shri S. Viswanathan

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. I.A.No.689/2019 in C.P.(IB)No.156/BB/2017 is filed M/s. Triumph India Software Services Private Limited ('Applicant') U/s. 66 of the IBC, 2016 R/w Section 213 (b) of the Companies Act, 2013, by inter-alia seeking to direct the Respondent Nos.1 & 2 to make contributions to the assets of the Corporate Debtor to the extent of the amount of Rs.2,94,26,350/- of which Rs.2,28,93,500/- due from M/s. Vinsha Technology Solutions India Pvt. Ltd., and Rs.65,32,850.00 due from M/s. Triad Software Services; to direct the Central Government to refer the matter for investigation into Company Affairs/s 213 (b) of the Companies Act, 2013, as the business of the Company was conducted with intent to defraud creditors etc .
2. Brief facts of the case, which are relevant to the issue in question, as mentioned in the Application, are as follows:
 - (1) Initially C.P.(IB)No.156/BB/2017 filed by M/s. Triumph India Software Services Private Limited, was admitted by the Adjudicating Authority, vide Order dated 05.04.2018, by initiating Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor, appointing Mr. Motappa Thimmaraya Swamy, as IRP, imposing moratorium etc.



Subsequently, the IRP was replaced with the Applicant as Resolution Professional, which was approved by the Adjudicating Authority vide Order dated 19th July, 2018. Subsequently, by initiating liquidation proceedings against the Corporate Debtor, the Adjudicating Authority, has appointed the RP as Liquidator vide order dated 04th June, 2019 passed in IA No. 306 of 2018.

- (2) It is stated that the Applicant, during the process of CIRP, has examined various transactions entered into by the Corporate Debtor, and thus had a reason to believe that the Directors did not exercise due diligence in minimizing the potential loss to the creditors of the Corporate Debtor being fully aware of the financial stress the Corporate Debtor was undergoing. From the forensic Audit report and the correspondence received, it is found that the Directors have not exercised due diligence in carrying on its business. There are few suspicious transactions which warrant investigation.
- (3) The Corporate Debtor claims to have rendered certain services relating to sale of e-books on MS Windows Platform to M/s. Vinsha Technology Solutions India Pvt. Ltd., having its registered office at No.10, Nagarjuna Nagar, 2nd Street, Rangarajapuram, Chennai – 600 024 to the extent of Rs.2,28,93,500 during the financial year 2013-14. Invoice dated 01.03.2014 for Rs.1,96,23,000/- and invoice dated Rs.32,70,500/- raised against M/s. Vinsha Technology Solutions Pvt. Ltd. shows pending receivables in the Financials of Corporate Debtor. However, there is no documentary proof to say that the Directors have made efforts to collect the above payment. When the Resolution



Professional sent a letter M/s. Vinsha Technology Solutions India Pvt. Ltd., intimating the due payable by them, the Company surprisingly denied the liability stating that they had cancelled the invoices with Corporate Debtor as no products had been delivered. However, the Company failed to furnish any correspondence for cancelling the invoice. Further, from the forensic report, it can be seen the above invoices were raised to mislead the investors & Creditors. On bare perusal of the transactions it can be observed that the Corporate Debtor and the M/s. Vinsha Technology Solutions India Pvt. Ltd. worked hand in glove to dupe the creditors of Corporate Debtor. The Resolution Professional could not get any records of M/s. Vinsha Technology Solutions India Pvt. Ltd since the Company was struck off.

- (4) It is stated Corporate Debtor claims to have rendered Professional services to M/s. Triad Software Services having its registered office at 109, Golf Park Offices, AI Garhaud, Dubai (UAE), Post Box No. – 114531 for USD 145,103.48 in Rs.65,32,850.00 excluding Foreign Exchange Gain/Loss. The list of invoices. which were raised against the M/s. Triad Software Services are hereunder:

Invoice Date	Amount in Rs.	Amount in USD
28.02.2009	27,003.00	532.32
31.03.2009	954.00	18.76
31.08.2010	13,792.00	293.00
17.10.2010	2,75,820.00	6000.00
12.01.2011	1012.00	22.40
12.01.2011	11,09,220.00	24562.00

28.02.2011	3,97,584.00	8800.00
28.02.2011	20,27,678.00	44880.00
17.03.2011	86,068.00	1905.00
31.03.2011	3,68,363.00	8250.00
31.03.2011	5,35,800.00	12000.00
31.03.2011	16,89,556.00	37,840.00
Total	65,32,850.00	1,45,103.48

- (5) It is submitted that only 30% of the payment has been received from the M/s. Triad Software Services and rest 70% which constitute Rs.65,32,850.00 is pending due. Further, there are no documentary proof actions taken/have made effort to say the Directors to collect the above payment. When the Applicant demanded M/s. Triad Software Services to pay dues, the Company denied the liability stating they have written off the balance because of the poor quality of services by the Corporate Debtor. From the forensic audit, it can be seen that Ms. Usha Ramanathan Mohan, the Respondent No.2 brother in law i.e., Sister's Husband is the owner of Traid Software Services. Further, there are no documents with the Corporate Debtor with respect to payments terms etc. From the bare perusal of the above, one can sense the fraud by Respondents by colluding with Traid Software Services. There is iota of doubt that the Respondent and Triad Software Services have worked hand in glove to dupe the investors/creditors. Further, the conclusion in the forensic report clearly states that the above transaction is to mislead the investors and other stakeholders. As such the above invites thorough investigation. Though the dues are



outstanding from Vinsha Technology Solutions India Pvt. Ltd. from March 2014 onwards and in case of Triad Software Services from 2009-11 onwards, no efforts have been made by the Directors of the Corporate Debtor to collect the receivables. Therefore, the transactions in question amount to fraud.

(6) The Applicant has appointed M/s. Venu and Vinay, Chartered Accountants, to conduct Forensic Audit vide Appointment letter dated 9th September, 2019 to get clarity on fraud and misappropriation done by the Respondents. The scope of work was as hereunder:

- i. Commencing on transactions of substantial amount, which seems not to be normal trade transaction at arm's length.
- ii. Movements in Bank overdraft and unsecured loans during the specific period.
- iii. Verifying receivables – Doubtful debts.

Accordingly, Forensic Audit report issued by M/s. Venu & Vinay, Chartered Accountants, dated 18th November, 2019 uncovered many issues and gave more clarity on the Corporate Debtor was being run by the Respondents.

The relevant extract of the Forensic Audit report, which arises for consideration are hereunder:

- a. Directors of Triumph India Software Services Private Limited are also Directors of Triad Enterprise Consulting Services Private Limited.
- b. The revenue of the Company in the Financial Year 2014-15 has substantially gone down to Rs.1,30,52,316 from Rs.6,05,91,610 in the Financial Year 2013-14.

- c. With respect to transaction with M/s. Vinsha Technology India Private Limited, the project sign off date is on 10th January, 2014 and invoice is on 31.03.2014, it indicates invoices is done for showing higher revenue to the investors. It indicates misleading the investors and other stakeholders.
- d. With respect to transaction with Triad Software Services, Ms. Usha Ramanathan, the Respondent No.2' sister's husband is the promoter of the aforesaid Company which is based out in Dubai and which is in the business of SAP implementation. Outstanding receivables as on 31st March 2018 as per books is Rs.65,32,850.00 excluding Foreign Exchange Gain/Loss.
- (7) It is stated that Private Complaint Register (PCR) has been filed by Mr. Chandu Nair – Financial Creditor of the Corporate Debtor on 31st January 2018 before 4th Additional Chief Metropolitan Magistrate at Bangalore under Section 200 of CrPC read with Sections 406, 420, 464 read with Section 34 of IPC, by alleging that Respondents 1 & 2 (Directors of Corporate Debtor) had called for investors to invest in the Corporate Debtor assuring growth and good returns in the market. The Respondents have taken investment from the various people by way of unsecured loan and by way of allotment of preference shares promising high returns. The investors have been shown a healthy balance and other expenses. They have alleged fraud on the part of Respondents.



- (8) The Applicant has relied upon the following judgments passed in support of his case.
- i. Smt. Ramanathan Bhuvaneshwari, RP, Bhuvana Infra Private Limited Vs. Pratap Kunda & Ors. – I.A.No.446 of 2018 in C.P.(IB)No.122/BB/2017 passed by Hon'ble NCLT Bengaluru Bench.
 - ii. Lagadipathi Ramesh Vs. Smt. Ramanathan Bhuvaneshwari – Company Appeal (AT) (Insolvency) No.592/2019.
3. The instant Interim Application is opposed by the Respondents by way of reply dated NIL, by inter-alia contending as follows:
- (1) Firstly, it is to be stated the Respondents are very casual in filing reply to the instant IA. The Instant Reply bears no number, and all pages are not even signed by the Respondents and only last page is signed by the Respondents.
 - (2) At the outset, it is clear that the instant Application under consideration cannot be viewed in isolation and should be taken in conjunction with the revival process that was attempted for several years between the investors (who greatly outnumber, as well as occupy a predominant position w.r.t the conduct of affairs of Triumph as compared to creditors, especially the bankers) the resolution process that was thwarted, ab initio, leading to the close of the Resolution stage of the CIRP and moving inevitably to the Liquidation stage.
 - (3) At this stage to revisit the basic premise of Triumph that led it to attempt the growth from fledging organization to the entity that merited admission to CIRP and to the current proceedings, first under the revival stage and thereafter under



the liquidation phase. In 2008-09 or thereabouts, Triumph, was a Company serenely coasting along with content and documentation with a couple of marquee clients, clocking around Rs.10 Cr., in revenue and with a comfortable GM of about 30%. Thereafter, Triumph attempted as was and is wont with many such similar organizations, to scale up into exciting new areas: in this case it was education and engineering services. The organization was ramped up between 2008-2012 with the help of several investors, who were in tune with aspirations of Triumph. During this period, they invested Rs.7.51 Crores.

- (4) The inherent uncertainties present in any business, hit them with a wallop and they suddenly found themselves with declining business prospects and performance much below that envisaged in the growth plans. The reasons for this are many, they have been discussed threadbare in several investor meetings and need not be delved into here since they are not germane to the current I.A. and proceedings. Suffice it to say that, following an oft repeated maxim in the Start Up folklore, on a macro scale it is very well known, documented and accepted that less than one in 10 of funded entities achieve success and less than 1 in 10 get funded.
- (5) The Promoters thereafter made several attempts to get the investors and the major bank, Corporation Bank, to support them in the revival of the Company through further infusion of funds or through other support measures. But to no avail. Fatigued and with a consequent mindset of not willing to increase their exposure further, some of the investors (about 2 or 3 out of 23) looked for other causes for the debacle. The



Promoters took a positive view of the matter and sought the help of IBC in moving towards a resolution plan by initiating CIRP through invoking Sec.10 of the Act. Much to their dismay, however, the entire focus of the CIRP thereafter was in finding fault, stymying the ongoing processes as a going concern and in working towards liquidation instead of a Resolution Plan.

- (6) It is amply clear from the audit report that it has started with a conclusion and derived the grounds on which the conclusion is based thereafter. And this without much of a finesse. To give example of such intent in para G of the report and page 107 of the IA, the audit report states "Project sign off is on 10th Jan 2014 and invoicing is on 31st March, 2014.... Indicating misleading of investors. (And) the Company has issued preference shares to the new investors in the financial year 2011-12 amounting to Rs.21,12,740". The main plaint of the instant Application is also prepared with such inconsistent statements and wayward and unsubstantiated allegations following the audit report.
- (7) It is stated that Vinsha billing was for products that was based on the IP created and shown in the balance sheet. This product required customization at an estimated cost of Rs.20 to 30 L and they are very confident to deliver this and kept the invoice with a hope to raise the additional funds. This possibility was also extensively discussed with the investors at various points. This content which was part of a larger content repository created by the Company was later valued



by an independent professional engaged by the RP at a value of Rs.8 Cr.

- (8) It is alleged that the entire I.A. has been drawn up with malafide intent to malign the pristine reputation of the promoters and with a view to convert NCLT into a criminal and recovery court. Therefore, they have sought to dismiss the Application
4. Heard Shri S. Vivekananda, learned Counsel for Applicant and Shri S. Viswanathan, learned Counsel for the Respondents. We have carefully perused the pleadings of both the parties and extant provisions of the Code and Rules made thereunder and the law on the issue.
5. Shri S. Vivekananda, learned Counsel for the Liquidator, while pointing out various averments made in the Application has further submitted that there is an ample evidence in support of the case and thus it is a fit matter to direct the Central Government to refer the matter for investigation into the Company affairs U/s. 213 (b) of the Companies Act, 2013, as the business of the Company was conducted with an intention to defraud its creditors etc.
6. Shri S. Viswanathan, learned Counsel for the Respondents, on the contra, while reiterating various contention made in the Petition, has further submitted that the issue raised in the case barred by laches and limitation and it is based on surmises without showing any substantial evidence. And Forensic report too is vague in its findings and it would not give any right for the Applicant to file the instant Application, which is abuse the process of law. Moreover,

the issue in question is relates to the years 2009-11 and 2014. The Applicant is resorting to frivolous litigation by filing the instant Application on un-tenable grounds and thus it is liable to be dismissed.

7. The instant Application is filed by Liquidator U/s 66 of Code, R/w Section 213(b) of Companies Act, 2013. It is relevant to extract relevant provision of Section 66 of the Code, which reads as under:

*“66. (1) If during the CIRP or a liquidation process, **it is found** that any business of the Corporate Debtor has been carried on with intent to defraud creditors of the Corporate Debtor or for any fraudulent purpose, the Adjudicating Authority may on the Application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the Corporate Debtor as it may deem fit.*

(2) On an Application made by a resolution professional during the CIRP, the Adjudicating Authority may by an order direct that a director or partner of the Corporate Debtor, as the case may be, shall be liable to make such contribution to the assets of the Corporate Debtor as it may deem fit, if –

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a CIRP in respect of such Corporate Debtor; and



(b) Such director or partner did not exercise due diligence in minimizing the potential loss to the creditors of the Corporate Debtor.”

Similarly, provisions of Section 213 of the Companies Act, 2013, empowers the Tribunal, being Adjudicating Authority under the Code, to direct the Central Govt to investigate into the affairs provided prima facie case is made out: Section 213(b) is relevant here, which reads as under:

*“213(b) On an Application made to it by any other person or otherwise, **if it is satisfied that there are circumstances suggesting that***

(i) The business of the Company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the Company was formed for any fraudulent or unlawful purpose;

(ii) persons concerned in the formation of the Company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the Company or towards any of its members; or

(iii) the members of the Company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the Company, order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the Company ought to be investigated by an inspector or inspectors appointed by the



Central Government and where such an order is passed the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the Company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct:- Provides that if after investigation it is proved that:

(i) The business of the Company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the Company was formed for any fraudulent or unlawful purpose;

Or

(ii) any person concerned in the formation of the Company or the management of its affairs have in connection therewith been guilty of fraud, then every officer of the Company who is in default and the person or persons concerned in the formation of the Company or the management of its affairs shall be punishable for fraud in the manner as provided in Section 447.”

8. Therefore, primary issue to be examined in an Application filed under section 66 of Code, is whether prima facie case is made out by the Applicant or not, in order to pass appropriate order(s) as sought for.
9. As stated supra, CP is filed U/s 10 of code to initiate CIRP in respect of the Corporate Debtor on the ground that it has committed default for total sum of Rs 13,59,88,797/- Accordingly, CP is admitted by an order dated 5th April, 2018 initiating CIRP against it. Ultimately, the Corporate Debtor is placed under the Liquidation process under the extant provisions of the Code.

Subsequently, the present Applicant is appointed as RP and then Liquidator for Corporate Debtor. And thereafter, on examination of various documents in respect of affairs of the Corporate Debtor, **he has reason to believe that** the Directors did not exercise due diligence in minimizing the potential loss to the creditors of the Corporate Debtor being fully aware of the financial stress the Corporate Debtor was undergoing. From the forensic Audit report and the correspondence received, it is found that the Directors have not exercised due diligence in carrying on its business. There **are few suspicious transactions**, which warrant investigation. Therefore, the Present Application is filed.

In support of his above contentions **viz. he has reason to believe and few suspicious transactions**, he has appointed M/s Venu & Vinay as Chartered Accountants vide letter dated 09.09.2019 for conducting Forensic Audit of Corporate Debtor. Accordingly, the Chartered Accountants have submitted their report dated 18th November, 2019. As per Report, scope of assigned is restricted to Trade Receivables and period covered is 1st April, 2011 to 31st March, 2018. And the material relied upon in support of their Report is data collected from Tally backups and Bank statements shared/extracted by Mr. Jadish, a part-time Accountant, and they have further stated that assignment does not involve physically verification of documents, records, etc to comment on genuinity. They have further opined substantial amount seems not to be normal trade transactions at arm's length receivables in question are doubtful debts

10. So in order to initiate action under section 66 of Code R/w 213 of Companies Act, 2013, it is bounden/statutory duty of Applicant to satisfy the Adjudicating Authority by producing substantial



evidence in support of their case to order further investigation. In the normal circumstances, mere suspicious circumstances and Reports un-supported by tenable evidence, would not automatically lead to further investigation, unless public interest is involved. In this regard, the Applicant failed to place even prima facie evidence in support of his case to satisfy the Tribunal pass appropriate orders as prayed for. As stated supra, even the Forensic Report in question also based on un-corroborated evidence. Principles of natural justice ordains that concerned party should associate/involve with enquiry ordered to investigate. Forensic report merely rely on date from Tally and Bank Statements shared/extracted by Jagadish, A Part -time Accountant, he is not even former Statutory Chartered Accountant of Corporate Debtor. And there is no further physical verification taken to corroborate the statements. Since the Respondents are not involved in the Forensic Audit in question, and they were not furnished a copy of Report for their comments, it would be just and proper for the Applicant to furnish a copy of Forensic Report to the Respondents for their comments on it and thereafter, the Applicant, being experienced Resolution Professional, has to analyze the issue in question basing on evidence and then he has to come to definite finding about the allegations and thereafter, he can approach the Statutory Authorities(like SFIO or RD in this regard through proper channel(Central Govt.) seeking further investigation, as the proceedings under the provisions of Code, are summary in nature, and thus it cannot investigate into various disputed questions of facts. The facts and circumstances of cases cited are not covered in the instant case.

11. Since the Corporate Debtor is in liquidation by an order dated 4th June, 2019 passed in IA No.306 of 2018, and already passed 10




months since then, it would be just and proper to direct Liquidator to file Application to Adjudicating Authority for early dissolution of Corporate Debtor, in terms of Rule 14 of IBBI(Liquidation) Regulations, 2016.

12. In the result, I.A.No.689 of 2019 in C.P.(IB)No.156/BB/2017 is hereby disposed of with the following directions:

- (1) The Applicant/Liquidator is hereby directed to furnish a copy of Forensic Audit Report dated 18th September, 2019 to the Respondents, within a period of two weeks from the date of receipt copy of order giving them two weeks' time to respond on finding given in the Report.
- (2) After receipt of Reply from the Respondents, the Applicant is directed to examine the entire issue basing on evidence, and thereafter, if he is of the Opinion that there is prima facie case for further investigation, he can approach the Central Government with supporting evidence, seeking for further investigation into the matter through SFIO or other Authority. The Applicant is granted liberty to approach the Adjudicating Authority, basing on findings on such investigation.
- (3) In the meanwhile, the Applicant is directed to file necessary Application for early dissolution of Corporate Debtor, in terms of Rule 14 of IBBI (Liquidation) Regulations, 2016.


ASHUTOSH CHANDRA
MEMBER, TECHNICAL


RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL