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

C.P (IB)No.159/BB/2017
U/s 9 of IBC, 2016
R/w Rule 6 of I&B(AAA) Rules, 2016

In the matter of:

Rajeev Shetty

Flat No.401, "Rathnagiri Residency"
No.272, 3rd Main Road, ISRO Layout,
Bangalore - 560 111.

- Petitioner/Operational Creditor

Versus

M/s.Skyline Construction & Housing Pvt. Ltd

No.407, 4th Floor, Devatha Plaza,
Residency Road,
Bangalore - 560 025.

- Respondent/Corporate Debtor

Date of Order: 27th November, 2019

Coram:

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

Parties/Counsel Present:

For the Petitioner : Shri Ashish Krupakar

For the Respondent : Shri Deepak B.

ORDER

Per: Rajeswara Rao Vittanala, Member (Judicial)

1. C.P.(IB)No.159/BB/2017 is filed by Rajeev Shetty ('Petitioner/Operational Creditor') U/s 9 of the IBC, 2016, R/w Rule 6 of the I&B (AAA) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s.Skyline Construction & Housing Pvt. Ltd ('Respondent/Corporate Debtor'), on the ground that it has committed default for an amount of



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Rs.58,68,768/- (Rupees Fifty Eight Lakhs Sixty Eight Thousand Seven Hundred and Sixty Eight Only) with 18% interest from 10.06.2015.

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

(1) M/s.Skyline Construction & Housing Pvt. Ltd., (herein referred to as 'Respondent/Corporate Debtor') was incorporated on 14.07.1980, bearing CIN: U45201KA1980PTC003879 and its authorized Share Capital is Rs.1,00,00,000/- consisting of 29,225, Equity Shares of Rs.100 each. The issued and subscribed capital is Rs.94,61,396/- consisting of 64,433, Equity Shares of Rs.100 each fully paid up.

(2) Rajeev Shetty (herein after referred to as 'Petitioner/Operational Creditor') was initially appointed as an 'Associate Vice President-Projects' vide letter dated 03.10.2008, and was subsequently confirmed vide letter dated 20.08.2009. His initial package was Rs.1,87,250/- per month, which was subsequently revised to Rs.1,59,160/- per month, vide letter dated December 3rd, 2008, and again it was revised to Rs.4,42,260/-per month, vide letter dated 12th January, 2015. Thereafter, he has resigned for the post on 08.04.2015, which was accepted, and thus he was relieved from the employment at closing hours of 10.06.2015, vide certificate dated 07.07.2015. He had worked in the office of Corporate Debtor from 03.10.2008 to 10.06.2015. However, his dues were not settled. The Petitioner started sending several emails by asking the Respondent to settle his pending salary and other settlement benefits. Ultimately, Shri Sanjay / Shri H. S. Raghava have issued a statement of dues vide email dated 11.01.2017 by certifying total dues as Rs.58,68,768/- towards LTA, Bonus, leave encashment , salary etc. fell due from the date



of appointment i.e. 03.10.2008 till the date of his relieving from the Employment.

- (3) However, the Respondent in their statement of objection dated 07.05.2019, denied their liability to clear the dues by raising moonshine defense and there was no single document filed in support of its defense. The Petitioner has produced a certified copy of the Order passed by the Hon'ble High Court of Karnataka in *CoP No.55/2011* in which 16 former employees of the Respondent Company, similar to the Petitioner, were compelled to file Petition seeking to winding up when the Respondent Company failed to clear their dues. The Respondent, after realizing that an order of winding up was inevitable, and thus cleared dues with interest in respect of all the Petitioners therein. It is alleged that modus operandi of the Respondent Company is crystal clear, that it shall not clear the dues unless compelled by the Adjudicating Authority to do so, come what may.
- (4) It is stated that MD of the Respondent Company, who did not deny the liability, has directed the Petitioner to contact HR Department, instead of bothering him. The financial department by virtue of an email dated 11.01.2017 along with a tabular from responded to the Petitioner with the total amount pending as on date, which is a part of the records. The Respondent Company is now taking a moonshine defense, without filing any documents in its support. The statement of objections is liable to be ignored by this Adjudicating Authority for want of supporting documents. The memo dated 24.06.2019 purportedly issued by their Auditor stating no dues from the Company, as per the office records, in respect of the petitioner is not all tenable. And such document by a third party to the proceedings is not sustainable in law.



3. The Company petition is opposed by the Respondent by filing Statement of Objections dated 07.05.2018 by inter alia contending as follows:

(1) It is alleged that the petition is nothing but a pure abuse of the process of the Adjudicating Authority. It is alleged that the petition is filed only to harass the Respondent, and make wrongful gain in one or the other way. The Petitioner had earlier filed a similar Application before this Adjudicating Authority against the Respondent vide C.P.(IB)No.12/BB/2017. When the Respondent entered appearance and filed its preliminary objections, the Petitioner withdrew the application only to fill in the lacunae on his part. The present Application is yet another attempt to harass the Respondent despite knowing the fact that the Petitioner is not entitled to any relief.

(2) It is stated that Section 3(8) of the IBC, 2016 defines the terms "Corporate Debtor" as a corporate person, who owes a debt to any person. Further, Section 5(20) defines Operational Creditor as a person to whom an Operational Debt is owed and includes any person to whom such debt has been legally assigned or transferred. The Corporate Debtor does not owe any debt whatsoever to the Petitioner. In fact, there is no debt much less an operational debt owed to the so called Operational Creditor. Such being the case, there is no question of Corporate Debtor having defaulted in paying the debt that has become due and payable but not repaid to the Operational Creditor. It is contented that, as per Section 6 of the Code, only when a Corporate Debtor defaults in paying a debt that has become due and payable but not repaid, CIRP, under Part II of the Code may be initiated by the Petitioner against the Respondent. The same being applicable to be present case, the application filed by the Operational Creditor is liable to be rejected.

(3) It is stated that the claims of the Petitioner for recovery of monies alleged to be unpaid Operational Debts is seriously disputed by the



Respondent. The Respondent is a solvent and profit making Company. The Respondent has been in the business of constructing residential apartments and development of properties for several years and has built up a reputation in the market. The net worth of the Company is positive and the Corporate Debtor is possessed of several assets, and is fully capable of meeting any debt as and when they fall due. The Respondent, at present is in the process of executing several projects of constructing residential apartments, in and around Bangalore City. Therefore, the Petitioner is estopped from seeking CIRP at the hands of this Tribunal as there are no debt much less operational debt payable to the Petitioner as alleged. There is absolutely no basis for Operational Creditor to initiate CIRP against the Corporate Debtor.

- (4) It is stated that the Petitioner was appointed as an "Associate Vice-President - Projects" of the Corporate Debtor vide Letter of Appointment dated 03.10.2008. The services/appointment of Petitioner was confirmed by the Corporate Debtor vide a letter of confirmation dated 20.08.2009. Thereafter, on 08.04.2015, the Petitioner tendered his resignation to the Respondent and the same was accepted and the Petitioner was relieved from employment at the closing hours of 10.06.2015 vide letter dated 07.07.2015. The present application is filed in the year 2017, that too claiming various amounts under the head LRA, Bonus, and Leave Encashment from the date of appointment, i.e., 03.10.2008 till the date of relieving from the employment. Not only there is an inordinate delay but also the said claims are purely imaginary and are made without any basis.
- (5) It is stated that the Petitioner has relied upon alleged e-mails dated 11.01.2017 and 22.12.2016 said to have been sent by one Mr. Sanjay and Mr. H.S. Raghava, respectively, along with an attachment/tabular form. It is based on these alleged e-mails, the



Petitioner claims that the alleged debt is accepted and acknowledged by the Respondent vide the aforesaid e-mails. The Petitioner claimed that said Mr. Sanjay and Mr. H.S. Raghava are the employees of the Respondent having sent the said e-mails and thus the debt in question is deemed to be accepted. However, they are not part of administration of Corporate Debtor at the relevant point of time. Mr. Sanjay, who was working as Chief Financial Officer of the Respondent, was relieved from the employment vide Relieving order dated 22.12.2016. Likewise, Mr. H.S. Raghava, working as head of Human Resource Department with the Corporate Debtor, was also relieved from the employment vide Relieving order dated 01.08.2016. In other words, as on 22.12.2016 Mr. Sanjay was no longer in employment with the Respondent and as on 01.08.2016 Mr. H.S. Raghava was also not working in employment with the Respondent. Such being the case, the alleged e-mails dated 11.01.2017 and 22.12.2016 along with alleged attachments of a tabular form claimed to have sent by the Respondent are all cooked up and created only for the purpose of the present case. It is alleged that Mr. Sanjay and Mr. H.S. Raghava have misused the Company e-mail account only to stealthily aid the Petitioner. In fact, Mr. Sanjay and Mr. H.S. Raghava have joined hands with the Petitioner and all the three have hatched a conspiracy against the Corporate Debtor with an intention to make unlawful gain at cost and expense of the Corporate Debtor.

- (6) It is stated that from a bare perusal of the alleged tabular sheet produced by the Petitioner, it can be seen that the Operational Creditor is basing his claim for Rs.58,68,768/- under three heads, firstly, LTA (Leave Travel Allowance) @ 8.33% of the basic, secondly, Bonus @ 10% of Gross and thirdly, leave encashment for the period 03.10.2008 till 10.06.2015. Assuming for a moment but not conceding that the Petitioner is entitled to the aforesaid amounts,



it is surprising as to why the Petitioner kept quiet from 03.10.2008, i.e., the date of his appointment till 10.06.2015 i.e., the date he was relieved from the employment claiming the said amounts for more than 7 years. What is further surprising is the fact that the Petitioner has not at all claimed the alleged amounts, while he was in employment with the Respondent. The alleged claims are made only after the Petitioner was relieved from the employment. If the Petitioner is really entitled to the amounts claimed under the aforesaid three heads, he would not have certainly waited until the date he was relieved. In fact, the Petitioner is aware that the amounts claimed under the aforesaid three heads cannot be claimed as a matter of right, as the same are at the discretion of the management/directions of the Company for good and bona fide service rendered.

4. Heard Shri Ashish Krupakar for the Petitioner and Shri Deepak B. learned Counsel for Respondents. We have carefully perused the pleadings of both the parties, and extant provisions of the Code and the law on the issue.
5. The Learned Counsels for both parties, have once again reiterated their pleadings as briefly mentioned supra and thus they are not reiterating again in order to avoid repetition.
6. The Petitioner issued a legal notice dated 07.11.2017 to the Corporate as well as Mr. Avinash Prabhu, the Managing Director of the Corporate Debtor, wherein a detailed facts of the case are furnished to the Corporate Debtor, and also pointed out the debt of Rs.58,68,768/- was admitted by the Corporate Debtor vide email dated 11.01.2017 issued by the Financial Department of the Company. It is also pointed out that he was relieved on 10.06.2015 without any adverse remarks. Even though, notice was acknowledged by the Corporate Debtor and the



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Company, they did not reply to the legal notice. Aggrieved by that non-payment and non-reply of the legal notice, the Petitioner has earlier filed C.P.(IB)No.12/BB/2017 by inter alia seeking to initiate CIRP in respect of Corporate Debtor namely M/s.Skyline Construction and Housing Pvt. Ltd. Accordingly, the Respondent has filed Preliminary Statement of Objections dated 31.08.2017 by raised few technical grounds on the format of demand notice issued to the Corporate Debtor. Therefore, the Petitioner herein, instead of rectifying the mistakes of the Company Petition .has filed memo dated 26.10.2017 by praying to the Adjudicating Authority to permit him to withdraw the Company Petition with a liberty to file fresh Company Petition in the interest of justice and equity. Accordingly, the Adjudicating Authority passed an order dated 26.10.2017 by granting permission to withdraw the case with a liberty to file fresh Company Petition. Therefore, the present Company Petition is filed duly following the prescribed procedure under the provisions of the Code. Therefore, the contentions made by the Respondent contrary to it are not tenable.

7. As stated supra, the working of Petitioner in Respondent Company during 03.10.2008 to 10.06.2015 is not in dispute. The certificate dated 07.07.2015 issued by Managing Director of the Respondent, did not say anything with regard to settlement of dues. It is relevant to extract email dated 20th August, 2015 , which reads as under:

“Dear Sir,

I would like to bring to your kind information that the following amount is pending for the service done in your esteemed organization from 03.10.2008 to 10.06.2015 details are as below.

- a. Till 31.03.2013 as discussed and reconciliation done by Mr. Raghava (including leave encashment up to 31.03.2013)- Rs.2029927/-
- b. LTA and bonus for 2013-14 and 2014-15 – Rs.1285048/-
- c. Pending salary 5 months – Rs.1890000/- (gross)



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- d. June 2015, 10 days salary - Rs.147333/-
- e. Balance EL from 01.04.2013 to 10.06.2015, 45 days encashment - Rs.663000/-
- Total pending=Rs.6015308/-
- Received earlier= Rs.1500000/-
- Net balance-Rs.4515308/- (Rupees Forty Five Lakhs Fifteen Thousand Three Hundred Eight only)
- Apart from this gratuity payable-Rs.1100000/- (Rupees Eleven Lakhs Only)
- Also other documents pending are two years of form 16 and PF clearance document.pl come back and tell me how to go about it.
- Awaiting your reply and suggestion on above points.
- Thanks and Regards,
- Rajeev Shetty.
- Mob-9591054054"

It is evident that all the salaries claimed by the Operational Creditor had been paid by the Corporate Debtor there are no amounts due and payable towards the salaries for the month's March 2014, April 2014, October 2014, November 2014, part salary for December 2014 and salary for June 2015. The Operational Creditor had filed this petition with a mala fide intention to cheat and defraud the Corporate Debtor. The Operational Creditor had not approached this Tribunal with clean hands and hence this petition needs to be dismissed only on this ground alone."

8. The Operational Creditors have filed Joint Memo dated 25.10.2019 in both the Company Petitions bearing C.P.(IB)No.159/BB.2017 & C.P.(IB)No.43/BB/2018 by inter alia furnishing that there are 61 Appeals are pending before Karnataka State Consumer Dispute Redressal Commission Bangalore, 98 Complaints are pending before Karnataka State Consumer Dispute Redressal Commission Bangalore, 46 Execution Petitions are pending before Karnataka State Consumer



Dispute Redressal Commission Bangalore, 32 Complaints are pending before Karnataka District Consumer Forum Bangalore, 16 Complaints are pending before Karnataka District Consumer Forum Bangalore (Bangalore 2nd Additional), 12 Complaints are pending before Karnataka District Consumer Forum Bangalore (Bangalore 3rd Additional), 5 Complaints are pending before Karnataka District Consumer Forum Bangalore (Bangalore 4th Additional). There are more than 25 Cheque bounce, 30 civil cases and 28 Criminal cases against the Corporate Debtor and the Director namely Shri Avinash Prabhu and his brother Shri Deeraj Prabhu for cheating home buyers, vendors, Land owners, Banks, Employee etc.

9. In pursuant to the said memo dated 25.10.2019, the Corporate Debtor has filed Objections dated 13.11.2019 by inter alia contending as follows:

(1) The Corporate Debtor is a Private Limited Company registered under the Companies Act, 1956, and is a reputed Company in the field of construction and development of residential projects in the city of Bangalore. The Corporate Debtor has complete construction and handed over possession of more than 4500 apartments/flats in the city of Bangalore. The Corporate Debtor is a solvent Company and is capable of discharging all its debts.

(2) It is stated that the Operational Creditor has filed a joint memo alleging that 278 cases are pending against the Operational Creditor for deficiency of service before District Consumer Forum, State Consumer Forum and National Consumer Dispute Redressal Commission. Appeals in Sl. No.1 to 48 of the joint memo are the Appeals which are filed by the Corporate Debtor and these Appeals are pending consideration before the Hon'ble State Commission of Karnataka. Appeals in Sl. No.49 to 61 are the appeals in which the



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Corporate Debtor, is the Respondent and the aggrieved parties preferred an appeal against the order of District Consumer Forum.

(3) Complaint Nos.50/2015 to 54/2015 are subject matter of SLP bearing No.2071/2019 and other cases referred in Sl. No.2 are part of execution proceedings stated in Sl. No.3 of the joint memo. All these Complaints are also part of SLPs Nos.14224, 11851, 11928 to 11933/2019 pending before the Hon'ble Supreme Court. This clearly goes shows that the many of the case referred by the Operational Creditors are either Complaints, which are pending consideration before the Hon'ble Supreme Court are part of the Execution Petitions in Sl. No.3 of the Joint Memo or Complaints in Sl. No.2 are dismissed by the District Consumer Forum and are pending consideration in the aforementioned SLPs before the Hon'ble Supreme Court. The Execution Petitions in Sl. No.3 of Joint Memo are pending before State Forum are part of the SLPs pending consideration before the Hon'ble Supreme Court. All these case pertain to one single project namely 'Beverly Hills'. The Corporate Debtor had constructed 240 apartment in this project and has handed over 140 apartments to various parties in 2014 and only 40 agreement holders have refused to pay certain parties in 2014 and only 40 agreement holders have refused to pay certain Taxes and are claiming penalties have challenged the same before the Consumer Forum and State Commission. These 40 cases filed by unscrupulous consumers are pending consideration in the SLPs mentioned above.

(4) It is further stated that all these cases referred by the Operational Creditor have got no bearing on the facts of this case. The Directors of the Company are free citizens and are not in the custody of any authority. The facts of these case which are mentioned above are entirely different from the facts on hand.

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10. The Petitioner has filed an Affidavit dated 18.12.2017, U/s 9(3) of the Code, by inter alia stating that statutory notice dated 09.11.2017 was issued to the Respondent by electronic mail and also by Registered Post and after acknowledging it, they have not responded. Therefore, it is to be deemed that there is no pre/post existing dispute with regard to the claim made by the Petitioner. The Petitioner has also filed his Bank (HDFC) statement dated 14.12.2017 wherein it is certified that there is no credit entry of Rs.58,58,768/ in the Account of Petitioner/s SB A/c 05231141204915 during period 09.11.2017 to 13.12.2017. Moreover, the defence raised in the statement of objections are not all tenable and they are liable to be rejected. Another C.P.(IB)No.43/BB/2018 is pending against the Corporate Debtor. Since there is no dispute raised with regard to the outstanding amount in question and its default, and Corporate Debtor claimed that it is solvent Company, the Adjudicating Authority has granted sufficient time to resolve/settle the issue raised in the instant Company petition, in the light of several cases pending against it. However, the Respondent failed to avail the opportunity given by the Adjudicating Authority , even though several adjournment have been granted to them right from 2017 till date and thus there is no other alternative for us except to consider the matter as per its merits and pass appropriate orders. It is not in dispute that the Respondent is facing several cases filed by Homebuyers/vendors etc. As stated supra, the Respondent has not filed any single document to substantiate its contentions raised in it. It has not filed its balance sheet to substantiate its contention that it is solvent Company and its net worth is positive. Law provide protection to genuine Companies from misusing provisions of the Code by un-scrupulous elements. Therefore, provisions of Code and the rules made thereunder, mandate Operational Creditors to cause statutory demand notice to Corporate Debtor so as to put their defence by way of reply. In the instant case, as stated supra, the basic facts of employment of Petitioner in the Company is not dispute and the



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Respondents has not produced any evidence to show that the claims of Petitioner is settled prior/post issue of Demand notice. Moreover, they have started raising frivolous defences in the instant case, when notice was given to them. All the post allegations like service of petitioner was poor, not contributed for the welfare of the Company etc. are afterthoughts. As stated supra, it is not case of Respondent that services of Petitioner was terminated but he himself has voluntarily resigned for the reasons stated above. The Operational Creditors has filed a memo dated 01.04.2019 by inter alia stating that the Managing Director of the Company (Corporate Debtor) was arrested by the Central Crime Branch (CCB) for cheating several people and he is still in jail and not yet release in bail. A paper cutting is showing the arrest of said Managing Director filed along with memo.

11. The Contention of the Respondent that the case is barred by laches and limitation is not borne by facts of case, and the debt and default in question is admittedly not in dispute. The Respondent is facing another case as mentioned supra, apart from several cases before several Courts. Therefore, it prima facie show that the Company is not solvent Company as claimed. The instant Company Petition is filed in accordance with law, and also suggested a qualified Resolution Professional namely Mr. S. Viswanathan, with Registration No.IBBI/IPA-001/IP-P00538/2017-18/10963, who has also filed written Consent in Form-2 dated 03.09.2019, who is eligible to be appointed as IRP. It is settled position of law that once debt and default in question is proved, and there being no dispute raised by the Corporate Debtor, in an Application/Petition filed U/s 9 of Code, it is mandatory for the Adjudicating Authority to initiate CIRP, appoint IRP, impose moratorium etc. Therefore, we are convinced that there is a debt and default in question, which is not in dispute and thus it is fit case to admit by initiating CIRP in respect of Corporate Debtor.



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03.09.2019, who is eligible to be appointed as IRP. It is settled position of law that once debt and default in question is proved, and there being no dispute raised by the Corporate Debtor, in an Application/Petition filed U/s 9 of Code, it is mandatory for the Adjudicating Authority to initiate CIRP, appoint IRP, impose moratorium etc. Therefore, we are convinced that there is a debt and default in question, which is not in dispute and thus it is fit case to admit by initiating CIRP in respect of Corporate Debtor.

12. In view of the above facts and circumstances of the case and the law on the issue, by exercising powers conferred on the Adjudicating Authority, U/s 9 (5)(i) of the Code, the Company petition bearing C.P.(IB) No.159/BB/2017 is hereby admitted by initiating Corporate Insolvency Resolution Process (CIRP) in respect of Respondent/Corporate Debtor with the following consequential directions:

- 1) **Mr. S. Viswanathan**, bearing **Registration No.IBBI/IPA-001/IP-P00538/2017-18/10963**, who is qualified Resolution Professional, is hereby appointed as Interim Resolution Professional, in respect of the Respondent/Corporate Debtor to carry out the functions as mentioned under the Insolvency and Bankruptcy Code, 2016 and various rules issued by IBBI from time to time;
- 2) The following moratorium is declared prohibiting all of the following, namely:
 - a) the institution of suits or continuation of pending suits or proceedings against the Respondent/Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;



- e) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period;
- f) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process;
- h) The IRP should follow all extant provisions of IBC, 2016 and the rules including fees rules as framed by IBBI. The IRP is hereby directed to file his report in the Tribunal from time to time.
- 3) The IRP is directed to follow all extant provisions of the IBC, 2016 and all extant rules including fees rules as framed by IBBI from time to time. The IRP is hereby directed to file progress reports to the Tribunal from time to time.
- 4) The Board of Directors and all the staff of Respondent/Corporate Debtor are hereby directed to extend full co-operation to the IRP, in carrying out his functions as such, under the Code and Rules made by IBBI.
- 5) Post the case for report of IRP on **30.12.2019**.


(ASHUTOSH CHANDRA)
MEMBER, TECHNICAL


(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

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