

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 09.05.2019

PRESENT: 1. Hon'ble Member (J) Shri Rajeswara Rao Vittanala

CP/CA No.	Purpose	Sec	Name of Petitioner	Petitioner Advocate	Name of Respondent	Respondent Advocate
CP(IB)No. 175/BB/2018	For admission	Sec 9 of I&B code 2016	M/s Naresh P Mathur	Arnab Dutta Advocate	M/s Avesthagen Limited	J Hudson Samuel & Partners, Advocates

ADVOCATE FOR PETITIONER/s:

Vivek Mishra

ADVOCATE FOR RESPONDENT/s:

*CHRISTOPHER.E
9844068311*

*Adv for
Respondent*

ORDER

Heard Shri Vivek Mishra, learned Counsel for the Petitioner and Shri Christopher. E, learned Counsel for the Respondent. CP(IB) No. 175/BB/2018 is disposed of by separate order.

hss
MEMBER(J)

Puja

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

C.P. (IB) No.175/BB/2018
U/s 9 of the I&B Code, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

In the matter of:

Shri Naresh P. Mathur
F 8. 1, NBCC Towers, New Town,
Rajarhat,
Kolkata- 700 156.

- Applicant/Operational Creditor

Versus

M/s. Avesthagen Limited
No.43/39, 4th Floor
Ward No. 91, Promenade Road,
Second Cross,
Bangalore- 560 005.

- Respondent/Corporate Debtor

Date of Order: 09th May, 2019

Coram: Hon'ble Shri Rajeswara Rao Vittanala Member (Judicial)

Parties/Counsels Present:

For the Applicant : Shri Vivek Mishra

For the Respondent : Shri Christopher. E

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P. (IB) No.175/BB/2018 is filed by Shri Naresh P.Mathur ('Applicant/Operational Creditor') under Section 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.Avesthagen Limited (Respondent/Corporate Debtor) on the ground that the

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Corporate Debtor has committed a default of Rs.46,59,991/- (Rupees Forty Six Lakhs Fifty Nine Thousand Nine Hundred and Ninety One only).

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 Naresh P. Mathur ('Applicant/Operational Creditor') bearing PAN AHYPM8893Q is residing at F 8.1, NBCC Towers, Near Town, Rajarhat, Kolkata-700156.
- (2) M/s.Avesthagen Limited (Respondent/Corporate Debtor) was incorporated on 06.01.1999, CIN No: U73100KA1998PLC030671. Its Authorised Share Capital is Rs.14,00,00,000/- and Paid up Capital of Rs.7,60,75,251/-.
- (3) Shri Naresh P. Mathur, the Operational Creditor, was appointed as the Company Secretary of the Corporate Debtor with effect from 17.05.2010, wherein he provided his services to the Company for salary of Rs.191,729/- CTC and he was subsequently promoted to the post of "Vice President- Company Secretary" on 01.12.2011 for the salary to Rs.3,600,061/- per month and he performed his duties diligently during his tenure. Since the Respondent failed to pay his salary from the month of January, 2011, he resigned on 08.03.2013 and thus he was relieved from his services w.e.f. 31.03.2013. However, the Corporate Debtor had failed to make payment of the salary of the Operational Creditor on and from January, 2011. By a letter dated 31st March, 2013 the Director & CCA had accepted the said resignation and advised the Operational Creditor to contact the Finance team for the full and final settlement and he was issued experience certificate wherein the Operational Creditor had appreciated for his conduct.

- (4) The Operational Creditor also preferred a winding up petition being COP No. 12 of 2014, which is still pending before the Hon'ble High Court of Karnataka at Bangalore, wherein, the Corporate Debtor had also admitted the claim of the Operational Creditor by submitting the Statements of Account in three separated formats of "admitted claim, disputed claim and settled claim". The Operational Creditor had issued a demand notice as prescribed under the Insolvency and bankruptcy Code, 2016 on 16.07.2018 to the Corporate Debtor and its Directors both by speed post and e-mail. The said demand notice has been duly delivered to the Corporate Debtor and its directors except one Mr.Anoop Swarup. Although the e-mail containing the said notice has been duly delivered to the said Director.
- (5) It is stated that on 20.07.2018 one of the Director of the Corporate Debtor namely Mr.Anoop Swarup sent an e-mail to the Operational Creditor requesting to withdraw the said demand notice as he is no more designated as Director of the Company. The Operational Creditor duly replied the said e-mail by an e-mail dated 23.07.2018 reiterating his contention as enumerated in the demand notice. The Operational Creditor also stated that the name of the Mr.Anoop Swarup is still showing on the Website of the MCA. Therefore his attempt to wriggle out his liability of not being a director does not and cannot arise.
- (6) The Corporate Debtor has sent an e-mail dated 11th October, 2017 containing a memorandum of settlement wherein the Corporate Debtor had proposed and unacceptable offer to the Operational Creditor. The Petitioner also issued Legal Notice dated 16.07.2018, U/R 5 of the I&B (AAA) Rules, 2016, by inter alia demanding to pay total amount of Rs.89,67,819.84/- that there is a 15% p.a. which comes aforesaid amount of Rs.43,07,828.84/-. The same was replied



by the Corporate Debtor dated 25th August, 2018, by inter alia stating that the alleged demand, is the subject matter before the Hon'ble High Court of Karnataka in C.P. No.12/2014.

(7) Learned Counsel for the Petitioner has also relied on the following judgments:

a. *Jaipur Metals & Electricals Employees Organization Vs. Jaipur Metals and Electricals Ltd.*¹

b. *Jotun India Private Limited and Ors. Vs. PSL Limited*².

3. The Corporate Debtor has filed Statement of Objections dated 21.12.2018, by inter alia contending as follows:

(1) The instant Petition is not maintainable either on law or on facts and it is barred by the Law of Limitation. Section 238 A of the IBC makes the Limitation Act, 1963, applicable to proceedings under the IBC. Admittedly, in a case for recovery of money, the proceedings would have to be instituted within three years from the date the cause for action accrues. In the instant case, the claim of the Petitioner is based on the allegation that Salary was not paid for the months October to December 2011 and November, December 2012 till March 2013, when he has resigned. Therefore, the cause for action for each month's salary would be from the date of non-payment of salary. Assuming but not admitting that no salary was paid in March 2013, i.e., on or before March 2016. Admittedly, the present proceeding has been filed in August 2018 which is a delay of over 2½ years. The period of Limitation has lapsed, even prior to the commencement of the IBC. The amended provision of Section 238 A was brought in with effect from 06.06.2018 and the present proceedings has been filed in August 2018. Therefore, it is hopelessly barred by time. It is

¹ SC Civil Appeal No.12023 of 2018

² MANU/MH/005/2018 dated 05.01.2018

not the intention of the legislature that Section 9 could be pressed into play to convert the Tribunal into a money recovery Court or a Court to realize bad debts. Admittedly, law prescribed a minimum period to apply for recovery of dues. Though the term debt is defined under IBC, such liability or claim which is due, should be a live and subsisting debt/claim. It is an abuse the process of law/Court.

- (2) It is further stated that the present proceedings are not maintainable as the Petition on the same cause of action admittedly pending vide CP No.12 of 2014, before the Hon'ble High Court of Karnataka, seeking for winding up of the Company. And the Petition is clubbed with other company Petitions and the matter are in an advanced stage of hearing. Notwithstanding, the pendency of the above proceedings, the Hon'ble High Court appointed the Official Liquidator as the provisional Liquidator in respect of one of the asset of the Company. Further, since the said Company Petitions have been filed by the employees, the Hon'ble High Court had also referred the matter for Mediation and many matters have also been settled in Mediation. In so far as the Applicant is concerned, the Applicant being the Company Secretary still holds on to the Company's properties and has not returned the same, to the Company and his failure in discharging his professional duties has resulted in the Company substantial losses, which cannot be compensated, in terms of money. The Petitioner by suppressing several facts has filed the instant Petition.
- (3) The present proceedings cannot be entertained in view of the various disputed questions of facts, including disputes on breach of Confidentiality Agreements, breach of the terms of employment, withholding of Company properties, including data pertaining to the statutory compliances filed by the Company through the Applicant



with the Statutory Authorities, such as Ministry of Corporate Affairs, Reserve Bank of India etc. Therefore, the present proceeding is not maintainable.

- (4) The Corporate Debtor is engaged in the business of Research & Development, and Innovation in Life Science resulting in novel Seeds, Pharmaceuticals and Nutraceuticals. The Corporate Debtor is a pioneer in the field of Biotechnology, with a paid up capital of Rs.7.5 Crores, with blue chip investors such as ICICI Ventures, TATA Industries, Fidelity, New York Life, Godrej Industries, Cipla Danone, Limagrain, Institute Merieux etc. The Corporate Debtor has contributed to the world of modern Life Science based medicines and agriculture. The Corporate Debtor continues to research and develop advanced molecular based medicines to treat various diseases and its products address healthcare, wellness and environment. The employee's strength of the Corporate Debtor is approximately about 700 employees of which 90% were Scientists involved in the Research and Development of Molecular Medicines. Today, many of the Scientists act as Consultants for the Company and are not on the Payroll. However, the Company is in the process of commercialization of its large Patents and Knowhow portfolio forming global alliances to commercialize its important technology and products.
- (5) It is further stated that the Petitioner was appointed as the Company Secretary and he had entered into a Non-Disclosure/Confidentiality Agreement with the Corporate Debtor, on 23.03.2010. The Applicant was entrusted with valuable research material and information pertaining to the inventions and developments created by the Company. Further, the Applicant was entrusted with the responsibility of ensuring that all statutory and



other compliances pertaining to the Corporate Debtor, was complied with in accordance with the requirement of law. The Applicant was provided with a Laptop of the Company that was installed with certain exclusive software and with valuable data, including Financials and all statutory records. This laptop was the only and exclusive Laptop, that contained the information pertaining to the Company that was handed over to the Applicant from which he had carried out all current and future compliances. In order to secure this exclusive information stored in soft formats, the Applicant had entered into the Non-Disclosure/Confidentiality Agreement.

- (6) The Applicant having exclusive control over the aforesaid information and all future statutory filings of the Company, had indicated his intention to leave the Company for better prospects and accordingly he had tendered Letter of Resignation on 08.03.2013. However, the Applicant in order to keep control over the confidentiality data and Financials of the Company, had induced the Company to enter into a Consultancy Agreement in the name of his wife, so that he could continue to provide Company Secretarial Assistance and hold on to the property of the Company which contained valuable data, are continue to receive amounts from the Company. Being misled by the Operational Creditor, the Corporate Debtor entered into an Agreement dated 01.04.2013 with one Mrs. Kamini Mathur for providing such services, as was provided by the Operational Creditor. The Corporate Debtor transferred funds under the said Agreement to the Account of Kamini Mathur under instructions from the Operational Creditor.
- (7) The Applicant subsequent to leaving the Corporate Debtor for better prospects, and operating under the Consultancy Agreement in the name of his wife, had flouted the terms of the Confidentiality



Agreement and was negligent in performing his duties to the Company, under the said Consultancy Agreement. This led to the Corporate Debtor demanding return of the properties of the Company, that were in the possession of the Operational Creditor, more so, to enable the Corporate Debtor to engage the services of the Company Secretary to carry forward the Statutory Compliances, and to oversee the financials of the Corporate Debtor. The Applicant not only having withheld the Company's property did not share the necessary codes to access the software/portals pertaining to the Financials and Corporate compliances, he also did not carry out the necessary filings for and on behalf of the Corporate Debtor. This led to the Corporate Debtor issuing an e-mail dated 12.09.2013 demanding return of the Company's property. The Applicant despite receipt of the said e-mail, did not return the Company's property which contained all vital records of the Company in the electronic form. The strength of the Corporate Debtor largely consisting of Scientists depended on the Applicant to ensure compliances, as they were not familiar or accustomed to corporate secretarial practices, the position which he misused even after being paid a handsome remuneration. The Corporate Debtor received various notices from the Registrar for Companies, stating that there was failure in Corporate Compliances during the tenure of the Operational Creditor.

- (8) The Hon'ble High Court, vide order dated 28.07.2015, appointed a Provisional Liquidator to take possession of certain land properties of the Corporate Debtor on behalf of the Company Court/High Court. The Corporate Debtor spent substantial amount to recreate the Data and collating the necessary information of the last 20 years, which is still in process. The corporate Debtor has demanded



a sum of Rs.5 Crores from the Operational Creditor, being the loss sustained by the Corporate Debtor on account of the conduct of the Operational Creditor.

4. Heard Shri Vivek Mishra, learned PCS for the Petitioner and Shri Christopher.E, learned Counsel for the Respondent. I have carefully perused the pleadings of both the parties and extant provisions of the Code.
5. Shri Vivek Mishra, learned PCS for Petitioner, while reiterating the various averments made in the Company Petition, has further submitted that it is true that they have filed a Writ Petition before the Hon'ble High Court of Karnataka in C.P. No.12/2014 by seeking for winding up of the Company Petition on the ground that the Respondent has failed to pay the amount of Rs.46,59,991/-.
6. Shri Christopher, the learned Counsel for the Respondent, while reiterating various averments made in reply, as briefly stated supra, has further submitted that the instant Petition is not at all maintainable and the same is filed by misusing the process law.
7. It is not in dispute that the Petitioner being a former employee of the Corporate Debtor had resigned his post on 08.03.2013 on the ground of non-payment of salary and thus he was relieved from his services from 31.03.2013. It is not in dispute that the Petitioner has already invoked the jurisdiction of Hon'ble High Court for the same cause of action and the same is pending as detailed supra. And the instant matter along with

other matters also referred for mediation and pending. Therefore, the instant Petition is mis-conceived and it is also barred by principles of res judicata. And it is clear case of dispute too. Therefore, it is liable to be dismissed.

8. In the result, C.P. (IB) No.175/BB/2018 is hereby dismissed. However, this dismissal will not come in the way of Petitioner to prosecute the Writ Petition pending before the Hon'ble High Court of Karnataka. No orders as to costs.



(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

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