IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

C.P. (IB) No.65/BB/2019
U/s 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

In the matter of:

Mr. AROUNANE.P
Flat No.102,
Skyline Surabhi Apartments,
14/P, Vidyapeetha Road,
Banashankari 3rd stage,
BANGALORE- 560 085 - Applicant/Operational Creditor

Versus

ONE BILL SOFTWARE INDIA PVT LTD
(Formerly Tarshan Software Services Pvt. Ltd.)
No.10, Grey Rock Building,
4th Floor, 24th Main Road,
1st Phase, JP Nagar,
BANGALORE- 560 078 - Respondent/Corporate Debtor

Date or Order: 28th August 2019

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

2. Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

Parties/Counsels Present:

For the Petitioner : (1) Shri Vishruth C, Advocate
(2) Ms. Anita Patil, Advocate
(3) Ms. Uma Arya, Advocate
(4) Ms. B.J Ragini, Advocate

For the Respondent : (1) Shri S. Vivekananda, Advocate
(2) Shri Theerthesh.B.S, Advocate
M/s VGB Associates

ORDER

Per: Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

1. C.P.(IB) No.65/BB/2019 is filed by Mr. Arounane. P, U/s 9 of the IBC, 2016 R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016, by inter alia, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against M/s. One Bill Software India Private Limited on the ground that the Corporate Debtor committed a default for total outstanding amount of Rs.33,79,425/- (Rupees Thirty Three Lakhs Seventy Nine Thousand Four Hundred and Twenty five Only) as on 30.04.2015.
2. Brief facts of the case, as mentioned in the Company Petition, which are relevant to the issue in question, are as follows:
   a) M/s. One Bill Software India Private limited (hereinafter referred to as 'Respondent'/'Corporate Debtor') is a Private Limited Company incorporated under the Companies Act, 1956 on 17.09.2009 registered vide CIN: U72200KA2009PTC050973 and having its Registered Office at No.10, Grey Rock Building, 4th Floor, 24th Main Road, 1st Phase, JP Nagar, Bangalore – 560 078. The Authorised Share Capital of the Company is Rs.1,00,000/- (Rupees One lakh Only)). The name of the Corporate Debtor was M/s Tarshan Software Services Private Limited which was changed to the present name being M/s. One Bill Software India Private limited.
   b) It is stated that M/s Tarshan software Services Private Limited was a company incorporated by Operational Debtor on 17.09.2009 as per the request of Mr. Jayakumar Chelladurai and the Operation Creditor was appointed as Managing Director. Major shares were held by Jayakumar Chelladurai and his wife Mrs. Barathi Balakrishnan.
   c) It is stated that Tarshan Software had two divisions namely product division and consultancy division. On 30.01.2012, all the employees who had delivered exemplary services were granted

Employee Stock Option (ESOP) wherein the Operational Creditor was also awarded 30,000 shares.

d) It is stated that in the month of May 2014, a Canadian company by name Enabil Solutions bought Tarshan's consulting division which was generating major revenue. In June 2014, a meeting was held at Hotel Ambient Turret, wherein it was announced that every employee who was allotted ESOP's would be paid Rs.180/- per share. As per the said announcement, ESOP letter issued by company was withdrawn and instead company issued cash reward letter on 21.08.2014 with additional shares worth 2970 totalling to 32970. All employees were given two modes of encashment i.e., Option A and Option B.

e) It is submitted that Option A allowed the employees to encash 50% of allotted shares at Rs.180/- each and to retain remaining 50% of remaining shares. They could also encash remaining 50% at Rs.25/- each. Option B allowed employees to retain 100% of their allotted shares with company.

f) It is stated that Operational Creditor opted for Option A as per which he received a letter assuring payment schedule dated 30.09.2014, 31.12.2014, 30.06.2015 and 31.12.2015 in equal instalments. Those employees who had opted for Option 'A' like Operational Creditor got their payments on assured dates except for the Operational Creditor himself.

g) It is stated that in the month of February 2015, the Operational Creditor was asked to leave the company with two months notice i.e., 30.04.2015 and on 16.03.2015 the Operational Creditor was assured by Mr. Jayakumar Chelladurai in writing that he would get payment of four instalments as per cash reward letter wherein the first and second instalment would be paid along with full and final settlement and the third and fourth instalments would be paid by January 2016 i.e., the time when the buyer (i.e Enabil) would release final payment to the Corporate Debtor.

h) After relieving the Operational Creditor, he received his full and final settlement from Corporate Debtor but encashment of 1st and 2nd instalments were withheld. When the Operational Creditor approached the Corporate Debtor regarding the same in the month of January 2016, he was told that the buyer (i.e. Enabil) had not paid full amount and hence he would be paid only after the company make sufficient profit.

i) It is submitted that the Operational Creditor wrote to buyer Enabil Solutions on 09.02.2016 and got a confirmation mail that they are not entitled to pay any more dues to the Corporate Debtor. The Operational Creditor exchanged many e-mails with Corporate Debtor wherein he was assured the payment but did not receive the same till 18.01.2018. In spite of communicating the same by many e-mails, Operational Creditor did not receive the assured sum but on 05.04.2018, he received a reply from Mr. Jayakumar Chelladurai that he would pay lesser amount than actual due.

j) It is stated that the Operational Creditor has not received any payments with regard to cash reward points till date and a demand notice dated 15.11.2018 was sent to the Corporate Debtor claiming dues amounting to Rs. 33,79, 425/- (Rupees Thirty Three Lakhs Seventy Nine Thousand Four Hundred and Twenty-five). The Respondent had sent a reply dated 24.11.2018 to the above demand notice dated 15.11.2018 of the Petitioner.

3. The Respondent has also filed statement of objection dated 01.07.2019, by inter alia contending as follows:

a) The Respondent states that the above petition is filed by Mr. Arounane. P S/o Parasuraman, former member of the Board of Directors & the Managing Director of M/s. One Bill Software India Private Limited which was formerly known as Tarshan Software Services Private limited, under Section 9 of the Insolvency and Bankruptcy Code, 2016 seeking the initiation of the Corporate Insolvency Resolution Process under the Code against the Respondent Company. The above application is false, frivolous and made with a malafide intention. It is pertinent to note that the Petitioner has opted unfair tactics to threaten the Respondent Company and its Directors by filing an application under Insolvency and Bankruptcy Code, 2016. Further all the directors have been made a party in order to threaten and harass them.

b) The Respondent states that the averments made in the application are not maintainable in law and liable to be dismissed in limine. Further, the Petitioner has no locus standi to file this application under Section 9, since Section 9 deals mainly with operational debt, which means a claim in respect of provision of goods or services. The claim with regard to cash reward in lieu of ESOP does not come under the definition of Operational Debt under Section 5(21) of Insolvency and Bankruptcy Code, 2016. Further the Petitioner has approached this Tribunal after 4 years which itself is sufficient to reject the application on the grounds of limitation.

c) The Respondent states that it is pertinent to note that amount claimed in demand notice i.e., Form 3 and in Form 5 reflect different figures. The amount claimed in Form 3 is 59,34,600/- whereas, the amount claimed in Form 5 is 33,79,452/- (Rupees Thirty Three Lakh seventy nine thousand four hundred and fifty two only).

d) It is submitted that One Bill Software India Private Limited which was formerly known as Tarshan Software Service India Private Limited was founded in the year 2009. The Company presently has 4 directors and 40 employees. One Bill software is mainly into software development and consulting. The Company had two divisions i.e., consulting division and product division. The company was initially formed by Mr. Jayakumar Chelladurai, who is the present Managing Director and Mrs. Barathi Balakrishnan. Subsequently Mr. Arounane Parusuraman, the Petitioner herein was appointed by the Board as Managing Director and was given substantial power to manage the affairs of the Company. The

Petitioner held the position as a Managing Director from 2009 to 2015 i.e., till the time he left the company.

e) It is stated that during the tenure as a Managing Director, the Board, on 30.01.2012 decided to issue ESOPs to all the employees who were working with the company at that point in time. As a result of above issue the Managing Director too was entitled to the ESOP of 30,000 shares. In the year 2014 Consulting business of the company was sold to Canadian Company by name Enabil. The transaction was an asset sale, it was structured in following manner:

(a) *Total purchase price of the asset sale (Tarshan) was $5,800,000*

(b) There were 3 parts to this purchase price

(i) Payout at the time of closing ($1,750,000)

(ii) Hold-back amount in Escrow ($1,250,000)

(iii) Earn – out ($2,800,000)

(c) The Hold-back amount ($1,250,000) was held in Escrow subject to collecting all the pending receivables and committed revenue through January 2015. Out of this $1,250,000, $250,000 was held back in Escrow due to receivables from Kasapa Telecom (aka Espresso) and the committed revenue $392,000 (till Jan 2015).

f) It was Petitioner's responsibility, since he was the Managing Director and was under obligation to collect the receivable and get the amount of $250,000 released from Escrow. However, the Petitioner herein neither collected the pending receivables nor met the committed revenue target, hence the company ended up forfeiting the entire $250,000.

g) It is stated that in pursuance of above deal, the company was supposed to achieve Minimum Revenue Threshold (MRT) of $9,500,000 by end by December 2015. However, the Petitioner conveniently left the company without meeting his target, hence the company couldn't even achieve the MRT to qualify for any Earn – out. So, in total the company lost a total payout of $3,050,000

($250,000 in Hold-back money and $2,800,000 in Earn-out money).

h) It is stated that during the time of asset sale to Enabil in year 2014, the earlier ESOPs which were issued to employees were withdrawn and cash reward was given. The existing employees who were other than the part of Enabil were given two options as Plan A and Plan B keeping the base of earlier ESOPs allotment. As per Plan A the employees could take the cash reward in four tranches in the month September 2014, December 2014, June 2015 and December 2015 and the balance cash reward at the time when employees leave the company. The employees were eligible to claim this balance reward only if the employee stays with the company at least till July 2016. The Plan B gave an option for upfront payment of cash reward if the employee stays with the company at least till July 2016.

i) It is stated that the Petitioner opted for Plan A and accordingly he was eligible for the amount in four tranches which become due in the month of September 2014, December 2014, June 2015 and December 2015 and the balance after July 2016. The Petitioner left the company on 13.04.2015 after causing severe losses which amounts to crores of rupees. As per clause 5 of the cash reward program the Company forfeited the amount and a Resolution too was passed to this effect. It is further submitted that the Petitioner had responsibility of managing and ensuring the growth in the business in India. The Petitioner did not discharge his responsibility and bring in any business, which impacted the performance of the company. On account of poor performance the Company did not achieve the targets and consequently did not get any Earn-out amount from Enabil. For getting the Earn-out amount the company was required to achieve the following:

- Revenue for the Earn-out period meets or exceeds US$ 12,100,000/-

- Revenue for the Earn-out period meets of exceeds US$ 9,500,000/-
- Revenue for the Earn-out period is less than UD$ 9,500,000/- in which case no Earn-out payment is due to the company

j) It is stated that during the Earn-out period the Respondents could only generate revenue of US$6,767,017.59 and was not eligible for the Earn-out payment from Enabil. The Petitioner failed to collect the payment due from Expresso and other customers. This resulted in severe loss to the company. After driving the company into losses the Petitioner left the company and miserably failed in taking responsibility for the aforesaid loss.

k) The Respondent submits that the Petitioner claim that he had been given assurance by Mr. Jayakumar Chelladurai that he would be paid the 4 instalments of the cash reward; the first and the second paid along with full and final settlement and the third and fourth in January 2016, is misleading. Since Enabil did not make such a payment and the company did not receive any payment from Expresso, the payment to Petitioner was forfeited. However, Mr. Jayakumar Chelladurai, still offered to pay some money if he would discharge his responsibility by collecting the amount due from Expresso.

l) It is submitted that the Petitioner in turn is liable to pay the company for making the company run in to doldrums. Inspite of the losses caused by the Petitioner, the company paid the amount of Rs. 55,176/- and Rs. 2,07,478/- as a leave encashment and gratuity at the time of his resignation as a full and final settlement. It is pertinent to note that at the time of his exit he was drawing the CTC of Rs. 20,55,000/- per annum. Further the reply notice to the demand notice explains the complete factual position. The Petitioner herein has resorted this option as a threatening tactics. The Petitioner has approached wrong forum for adjudication of his issue.

m) The Respondent states that the Petitioner also lodged police complaint alleging that the amount due from the Company. The Police after due investigation declined to take up the matter and instructed him to approach the civil court. The Petitioner herein instead of approaching civil court for redressal of his grievance has approached this Hon'ble Tribunal under Insolvency and Bankruptcy Code, as a threatening tactics.

n) It is stated that the Petitioner in turn is liable to pay the company for making the company run into doldrums.

4. Heard the learned Counsel for the Petitioner and the learned Counsel for Respondent. We have carefully perused pleadings along with material papers filed in support of the case and the extant provisions of Code and Law.

5. It is a settled position of law that the provisions of Code cannot be invoked for recovery of outstanding amount but it 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 IBC, 2016 is not intended to be substitute to a recovery forum. In another latest judgment rendered in *Transmission Corporation of A.P.Ltd. Vs. Equipment Conductors and Cables Ltd.,*[2] The Hon'ble Supreme Court of India has, inter alia, held that existence of undisputed debt is sine qua non of initiating CIRP. As per para 25 of judgment in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*, it is stated that Adjudicating Authority, while examining an application filed under Section 9 of Code, will have to determine:

i. Whether there is an 'operational debt' as defined exceeding Rs.1 Lakh?

ii. Whether documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?

[1](2018) 1 SCC 353
[2](CA No.9597 of 2018) dated 23rd October, 2018, (2018) 147 CLA 112 (SC)

iii. Whether there is existence of dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before receipt of demand notice of the unpaid operational debt in relation to such dispute?

If any one of aforesaid conditions is lacking, the application would have to be rejected.

6. In light of the above, we have perused the reply dated 24.11.2018 to the Demand Notice of the Petitioner, the legal notice dated 18.03.2016 issued by the Petitioner on the same grounds raised herein and a response to the same by the Respondent dated 27.04.2016. Further, we have also noted the contention of the Respondent that the non-payment of the alleged cash reward for ESOPs was on account of the Petitioner not discharging his responsibility and the fact that the Petitioner herein has lodged police complaints alleging the amount due from the Respondent.
7. Given the above, we are satisfied that there exists a credible dispute with regards to the payment of the alleged Operational Debt.
8. In view of the above facts and circumstances, and law as cited above, we are of the considered view that the present case is not a fit case to admit and thus the Company Petition bearing C.P. (IB) No. 65/BB/2019 is hereby rejected. However, this order will not come in the way of Petitioner to invoke any other remedy available under any other law so as to get the grievances redressed. No order as to cost.

(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL

(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

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