IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

CP (IB) No.112/BB/ 2018 &
I.A. No.409/2018
U/s 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

In the matter of:

Shri Jagan Pampapathy
#24/20, New Temple Land Hudco,
Hosur,
Tamil Nadu – 635 109.
(Through his PoA holder & Mother Dr. D. Sornambigai) - Applicant/Operational Creditor

Versus

M/s. Wipro Limited
Doddakannelli,
Sarjapur Road,
Bengaluru – 560 035. - Respondent/Corporate Debtor

Date of Order: 31st December, 2018

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

Parties/Counsel Present:

For the Applicant : Ms. Anupama Hebbar along with Shri Aditya Patel
For the Respondent : Shri Manmohan P.N. along with Shri Datta Prasad G.

ORDER

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

1. C.P.(IB) No.112/BB/2018 is filed by Shri Jagan Pampapathy (through his mother and power of attorney holder, Dr. D. Sornambigai) U/s 9 of the IBC, 2016 R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against M/s.Wipro Limited, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) for defaulting an amount of Rs.1,37,115/- in respect of part of salary for April, May and June 2017.

2. The various submissions made by the Applicant are as follows:

a. The Applicant is an ex-employee of the Respondent and his services had been engaged by the Respondent in terms of an Appointment Letter dated 10.02.2014. He was a "Senior Domain Consultant" with the Respondent, and was entitled under the contract with the Respondent to a monthly salary of Rs.1,62,134/- (fixed cash entitlements). He has submitted the details of his bank account and pay slips, copy of Demand Notice issued on 16.01.2018 and a reply notice dated 25.01.2018, 15.02.2018 issued on behalf of the Respondent to the Applicant including Power of Attorney dated 05.01.2018 executed by the Applicant in favour of his mother Dr.D.Sornambigai authorising her to file the present Petition.

b. The Demand Notice issued by the Applicant to the Corporate Debtor i.e. Wipro Limited dated 16.01.2018 is also mentioning about the due amount of Rs.1,37,115/- as the amount of default for the period stated in the Demand Notice, and the same amount has become due and payable under the Appointment Letter dated 10.02.2014. This is the shortfall amount which the Applicant is claiming.

3. The Corporate Debtor has responded to the Demand Notice on 25.01.2018 stating various issues including the following apart from other submissions:

a. That the Application is not in accordance with the Insolvency and Bankruptcy Code, 2016 and related Rules, 2016, and has also alleged that the Applicant is not an Operational Creditor for the Respondent.

b. In the reply notice M/s. Wipro Limited has further stated that the Applicant has entered the hours of work in the time sheet without swiping in and out and there was unauthorised absence on the Applicant part, and accordingly a show cause notice was issued to the Applicant on 18.04.2017 followed by enquiry notice dated 25.04.2017 alleging various irregularities. They are also alleging that the Applicant has violated values espoused by the Company in the Code of Business Conduct and has levelled various other charges. The Applicant has failed to attend the enquiry and was unauthorizedly absent from the work. The Respondent Company has asked the Applicant to handover the laptop to his HR/TCOE team as soon as possible.

c. It is also stated that he has submitted his resignation thereafter, and the Respondent Company has also alleged that the Applicant has sent the laptop by mail which the company refused to accept it as per their standing instruction. The employee is supposed to hand over the laptop in person to IMG Team and after inspection of both data sensitivity and hardware if the system is intact and undamaged the laptop will be accepted and tagging can be released from the employee. They have also alleged that the Applicant have dishonestly taken the laptop belonging to the Respondent without the consent, which amounts to 'Theft' under Section 378 of Indian Penal Code. They have filed a Police complaint too. Being a large software company and has several sensitive and proprietary data stored in its laptop, the Applicant is supposed to return the laptop on termination of the employment and accordingly, the Respondent has claimed a damage of Rs.50,00,000/- from the Applicant under the various provisions of law.

4. I.A. No.409/2018 is filed by M/s.Wipro Limited (Respondent herein) U/s 9(5)(ii)(d) of the IBC, 2016, R/w Rule 11 of the NCLT Rules, 2016, seeking rejection of the application filed by the Applicant and also made the following submissions:

a. It is stated that this amount is already not yet debt, but it is a claim and it is a disputed claim. They have also alleged that the Power of Attorney holder of the Applicant has no personal knowledge of the facts of the case, and the same Power of Attorney was executed on 05.01.2018, whereas the alleged claim of the Applicant is in respect of period of April, May and June, 2017, i.e. much prior to the execution of the power of attorney.
b. The Applicant has filed multiple applications for recovery of his claims including the present one. The Applicant has filed CP(IB)No.40/BB/2017, CP(IB)No.57/BB/2018 and the instant Application invoking the provisions of the Code. The matter is in respect of the employment and filing multiple applications for same cause of action is not maintainable in law and on facts and is an abuse of the process of the Code.
c. The Respondent submits that on returning of the laptops by the Applicant on 25.05.2018, the Accounts Team of the Respondent have credited Rs.39,600/- to bank account of the Applicant. The Respondent is also making an observation that the Applicant had entered the hours of work in the time sheet without swiping in and out and there was unauthorised absence on the part of the Applicant and he was issued a show cause notice on 18.04.2017. A copy of this said notice is also produced before the Tribunal and enquiry notice was issued to the Applicant on 25.04.2017. The Respondent submits that the Applicant was absent from work since 10.04.2017, without prior leave approval/email confirmation, which is a clear violation of the values espoused by the Company in Code of Business

Conduct. The Applicant failed to report back to work and to share explanation of irregularities noticed in his leave and attendance records. And as such the Respondent called upon the Applicant to attend an enquiry scheduled before the enquiry officer Mr. Pritam Diwakar Shetty and the Applicant was directed to appear in person. However, the Applicant did not choose to attend the enquiry and hence, there is a "dispute in existence" with the Applicant much before the Demand Notice was issued to the Respondent.

d. The email dated 16.01.2018 issued by the Applicant neither had any invoice of demand nor adequate calculations. It is mandatory that the notice must be issued to the persons as mentioned in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, and non-compliance of the same will render the Demand Notice void.

e. The Respondent submits that it has filed a petition U/s 43 of the Information Technology Act against the Applicant seeking compensation of Rs.50,00,000/- from the Applicant for having illegally retained the possession of the Respondent's laptop with a malafide intention to misuse the data unauthorizedly. The Respondent has also filed a PCR U/s 200 Cr.PC against the Applicant for the offences under Sections 378 and 406 of Indian Penal Code. Hence, it is clear that there are several disputes between the parties and the fact that there are "disputes in existence", both before and at the time of issuance of the demand notice cannot be disputed.

f. The Respondent relied on the judgment of the Apex Court in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*[1], *at Paragraph 51 it has been held as follows:*

"It is clear, therefore, that once the Operational Creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the Operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the Operational Creditor the "existence" of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a

[1] (2018) 1 SCC 353

<u>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.</u> It is important to separate the grain from the chaff and to reject a spurious defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. <u>So long as a dispute truly exits in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.</u>"

g. The Respondent further submits that the Applicant was unauthorizedly absent from work during the period in question i.e. April to June 2017, the details of which are extracted below:

(i) April 2017:

a) 01.04.2017 to 02.04.2017 – Weekly off (Saturday and Sunday)

b) 03.04.2017 to 20.04.2017 – It is borne out from the records available with the respondent that the applicant had not punched-in his attendance at work and therefore this period was treated as absence from work and accordingly his leaves were deducted from the leave balance.

c) 21.04.2017 to 30.04.2017 – Since the applicant had exhausted his leaves, and as he did not report to work for the said period from 21.04.2017 to 30.04.2017, he was put on loss of pay ("Loss of Pay") for this duration. However, since the pay roll cut off happens on 19th of every month and he was on leave till 20.04.2017, the automated payroll system assumed that the applicant was working and erroneously authorized a salary credit to his account.

(ii) May 2017:

(a) 01.05.2017 to 31.05.2017 – The Applicant continued to remain unauthorizedly absent from work and therefore he continued to remain on loss of pay for the said duration. The payroll processing system in the company is configured in a manner where if an employee has not applied for a leave (annual/medical), the payroll system will treat that particular day of absence as LOP. For the system to treat that particular day of absence as LOP, a period of 15 days must lapse from each such day of absence without leave. Applying this methodology, the payroll processing system has treated the applicant as having been present at work for the

period from 05.05.2017 to 31.05.2017 and therefore, on this reason alone his salary was erroneously authorized for the credit. (This credit of salary, while it was authorized by the payroll crediting system, was not credited to the applicant's account since he was unauthorizedly absent) and taxes were deducted at source. It is pertinent to mention that the applicant was never entitled for this salary since he remains unauthorizedly absent. And therefore, whatever taxes have been deducted at source is essentially an expense at the company's end. Therefore, the claim of the Applicant that he is entitled to be paid, because taxes have been deducted at source is devoid of merits and is baseless.

(b) In April 2017, 10 days' salary amounting to Rs.53,418/-, was paid in excess because the applicant was unauthorizedly absent for the period between 21.04.2017 and 30.04.2017. Therefore, the same was recoverable from the salary of the month of May 2017 and accordingly the said amount was recovered.

(iii) June 2017:

(a) 1.06.2017 to 30.06.2017: The applicant continued to remain unauthorisedly absent from work and therefore he continued to remain on loss of pay for the said duration. The payroll processing system in the company is configured in a manner where if an employee has not applied for leave (annual/medical) the payroll system will treat that particular day of absence as LOP. For the system to treat that particular day of absence as LOP, a period of 15 days must lapse from each such day of absence without leave. Applying this methodology, the payroll processing system has treated the applicant having been present at the work for the period from 05.06.2017 to 29.06.2017 and therefore, on this reason alone the applicant's salary erroneously authorized for credit (This credit of salary, while it was authorized by the payroll crediting system, was not credited to his account since he were unauthorisedly absent) and taxes were deducted at source. It is pertinent to mention that the applicant was never entitled for this salary since he remained unauthorizedly absent. And therefore, whatever taxes have been deducted at source is essentially an expense at the company's end.

(b) *In May 2017, 21 days' salary was paid in excess because the applicant was unauthorizedly absent for the period between 05.05.2017 and 31.05.2017. Therefore, the same was recoverable from the salary of the month of June 2017 and accordingly the said amount was recovered.*

h. The Respondent also submits that the Applicant miserably failed to discharge his duty and was unauthorizedly absent from work and as such the Applicant was placed on loss of pay. When such is the case, the applicant is not entitled for any salary. The deduction of taxes was made automatically by the software installed by the Respondent and the same does not confer any right on the Applicant to claim salary.

i. The Applicant had failed to return two laptops which were given to him in the course of his employment with the Respondent. The said laptops contained sensitive, proprietary and confidential data of the Respondent and the hardware which is the exclusive property of the Respondent. By email dated 18.05.2017 the Respondent requested the Applicant to hand over the assets (including the laptop) to his HR/TCOE team as soon as possible. By email dated 29.06.2017 the Applicant informed the Respondent that he is tendering his resignation with immediate effect. The Respondent by email dated 03.07.2017 called upon the Applicant to immediately return the laptop. Since the laptop has been sent by Ms.Sheethal by post, Mr. Unnikrishnan of Wipro refused to accept it. The Respondent informed the Applicant and Ms. Sheethal that they cannot accept the laptop sent by post. It was further pointed out that the process followed by the Respondent is that the employee is supposed to hand over the laptop in person to IMG Team and after inspection of both data sensitivity and hardware if the system is intact and undamaged the laptop will be accepted and tagging can be released from the employee. It was also pointed out that Mr. Unnikrishnan is not the authorized person to accept the laptop and that the Applicant was well aware of the process of returning the laptop to the Respondent.

j. The Respondent issued legal notices dated 26.09.2017 and 19.03.2018 to the Applicant calling upon him to return the laptops but the applicant failed to do so. As the Applicant did not comply with demand made in the legal notice, the respondent filed a complaint before the police dated 06.12.2017. As the police did not register FIR, the respondent filed PCR No.6275/2018 before the court of The IV ACMM at Bengaluru.

k. The Respondent filed IT petition U/s 43 of the Information Technology Act, 2000 seeking for a direction against the applicant to return the laptop and to pay compensation of Rs.50,00,000/-to the respondent. The competent authority vide order dated 17.04.2018 directed the applicant to return the laptop to the respondent within a period of seven days. However, the Applicant belatedly returned the laptops to the Respondent on 25.05.2018.

l. It is alleged that the Applicant is not an Operational Creditor. The Code does not enable the operational creditor to put the corporate creditor into the insolvency resolution process prematurely or initiate the process for extraneous considerations and that it is not means of debt recovery. It is evident from the application filed by Applicant that it is nothing but an attempt to take undue advantage of the provisions of the Code in a manner wholly impermissible in law.

m. It is submitted that the fundamental requirements to initiate an insolvency resolution process are that there should be a "default" in payment /repayment and there should be a "debt". A bare reading of the Section 6 of the Code shows that a financial creditor, operational creditor or the corporate debtor itself may initiate the insolvency resolution process only where any corporate debtor commits a default. Section 3(11) & 3(12) are respectively extracted for reference:

> ***"debt"*** *means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt*;
>
> ***"default"*** *means non-payment of debt in whole or any part of or installment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;*

The Respondent submits that, there is no salary/wage that are due or payable to the Applicant and therefore there is no debt that is owed by the Respondent to the Applicant. Further, there is no default i.e. non-payment to the applicant as alleged or at all. It is pertinent to mention that the Applicant failed to comply with the Respondent's direction with respect to his conditions of employment and failed to report to work and finally resigned from the services of the Respondent to escape disciplinary action. It is also submitted that the Applicant is not entitled to any payment at all and has approached the Hon'ble Tribunal with unclean hands and is abusing the process of law. Assuming but not admitting that any amount was due to the applicant, the respondent submits that it has released the payment of Rs.39,600/- with respect to the salary of the applicant for the months of May and June 2017. The amount as provided in the final settlement has been duly credited to the bank account of applicant and the same was informed to the applicant vide email dated 26.06.2018. Therefore, the application is liable to be rejected in limine.

n. The Respondent also submits that since the existence of the debt, which is fundamental to the initiation of the proceeding under the Code itself is disputed, this Hon'ble Tribunal lacks jurisdiction to determine whether a debt exists or not. Assuming but not admitting that there is any salary or wages that is due and payable to the Applicant, the same has to be first determined by the authority under Payment of Wages Act and not by this Hon'ble Tribunal.

o. The Respondent has drawn the attention of this Tribunal to the Black's Law Dictionary meaning of the word "Insolvency". It is defined as the condition of being unable to pay debts as they fall due or in the usual course of business. It is evident from the prima facie material submitted by the Respondent that it is nowhere close to situation of insolvency.

p. It is the intention of the legislature to protect the rights of workman and employees of those companies who have been declared as insolvent and consequently bankrupt. The Applicant is not a workman, has no debt to claim and more so the Respondent has not defaulted in making any payments and there is a dispute in existence.

q. It is submitted that the respondent is a responsible corporate and an existing company within the meaning of Companies Act, 2013. The Respondent Company is also publicly listed on BSE, NSE and NYSE. The Respondent has a workforce of 1,81,482 people across the globe. The Respondent, on a month on month basis processes salaries/wages to its workforce on a specified date of the calendar month. A bare reading of the annual report is sufficient to find and rely on the fact that the Respondent is neither an insolvent or anywhere close to insolvency or bankruptcy and on this ground alone, the application filed by the Applicant is liable to be rejected.

r. The respondent submitted that there is no existing relationship between the Respondent and the Applicant. Admittedly, the Applicant voluntarily resigned from the services of the Respondent Company on 29.06.2017. The definition of a "workman" as per Section 3(36) of the Insolvency Bankruptcy Code, 2016 does not include such persons who voluntarily resigned from the services. The said definition is extracted below for ease of reference.

*"**workman**" shall have the same meaning as assigned to it in the clause (s) of section 2 of the Industrial Dispute Act, 1947.*

Section 2(s) of the Industrial Disputes Act, 1947:

*"**workman**" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-*

(i) *Who is subject to Air Force Act,1950 (45 of 1950), or the Army Act,1950 (46 of 1950) or the Navy Act, 1957(62 of 1957); or*

(ii) *Who is employed in the police service or as an officer or other employee of a prison; or*

(iii) *Who is employed mainly in a managerial or administrative capacity; or*

(iv) *Who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of duties attached to the office or by reason of the powers vested in him, functions mainly of managerial nature.*

s. The Respondent further submits that it has filed a petition under section 43 of the Information Technology Act against the Applicant seeking compensation of Rs.50,00,000/- from the Applicant for having illegally retained the possession of the Respondent's laptops with a malafide intention to misuse the data unauthorizedly. The Respondent has also filed a PCR under section 200 Cr.P.C. against the Applicant for the offences under section 378 and 406 of Indian Penal Code.

5. It is not in dispute that the Applicant has lodged some claim, matter is pending in enquiry within the Company and he has to choose to file the instant Application before the

Tribunal lodging the claim as debt which is still in dispute. The Company has even filed claim for damages.

6. The Hon'ble Supreme Court of India has already clarified in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*[2] that IBC, 2016, is not intended to be substitute to a recovery forum. And the same was referred by the Hon'ble Supreme Court in recent case namely *Transmission Corporation of A.P. Ltd. Vs. Equipment Conductors & Cables Ltd.*[3]

7. This Act is not meant for chasing the payment, which the Applicant is doing and hence, the Application is liable to be dismissed. After considering various submissions made by the Applicant and the Respondent, this Tribunal is of the considered opinion that the present Application, which is a part of multiple application needs to be dismissed. Accordingly, CP (IB) No.112/BB/2018 along with I.A. No.409/2018 are dismissed.

No order as to costs.

(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL

(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

Krishna

[2] (2018) 1 SCC 353
[3] (2018) 147 CLA 112(SC)