

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

C.P. (IB) 2482/2018

Under section 9 of the IBC, 2016

In the matter of

Harsh Pinge

32/1, Sahajanad Society, Kothrud, Pune

- 411038

...Petitioner

v/s.

Hindustan Antibiotics Limited

Survey No. 200A and 203A, Old Mumbai-

Pune Highway, Pimpri, Pune - 411018

...Corporate Debtor

Order delivered on: 16.07.2019

Coram: Hon'ble Shri Bhaskara Pantula Mohan, Member (Judicial)

Hon'ble Shri V. Nallasenapathy, Member (Technical)

For the Petitioner: Mr. Akshay Petkar, Advocate

For the Respondent: Mr. D. Debabrata Ray Choudhari, Senior Counsel a/w Mr.
D. G. Dhanure, Advocate.

Per: Bhaskara Pantula Mohan, Member (Judicial)

ORDER

1. This Company Petition is filed by Harsh Pinge (hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Hindustan Antibiotics Limited (hereinafter called "Corporate Debtor") alleging that the Corporate Debtor committed default in making payment to the extent of Rs. 17,16,442/- along with interest by invoking the provisions of Section 9 of Insolvency and Bankruptcy Code (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The Petitioner submits that he was employed with Corporate Debtor from 19.07.1991 to 31.08.2016, he was drawing a monthly gross salary of Rs. 84,463/- at the time of retirement and the said dues were acknowledged by the Deputy General Manager (Finance) of the Corporate Debtor by his

letter dated 12.10.2016. The following is the content of the letter dated 12.10.2016 written by the Corporate Debtor to the Petitioner.

FIN/ESTB/2016

DATE: 12/10/2016

H. S. PINGE, EX-DMG(QA) SR.No.5429/419

Sub: Pending dues

Sir,

With reference to your note dated 29/08/2016 we are furnishing the information required by you, as follows

1. Dues towards Gratuity as on 31/08/2016 – Rs. 1000000/-
2. Dues towards pending salary (Month wise) as on 31/08/2016

month	Sal. Includes med. reimb.	Med. Reimb.	Net Salary
Jul, 2014	53930		53930
Nov, 2014	68180	2093	66087
Dec, 2014	67080		67080
Jan, 2015	67730		67730
Feb, 2015	67640		67640
Mar, 2015	67740		67740
Apr, 2015	67830		67830
May, 2015	67830		67830
Jun, 2015	69360	1652	67708
Jul, 2015	70140	248	69892
Aug, 2015	69890		69890
Sep, 2015	69890		69890
Oct, 2015	71540		71540
Nov, 2015	31540		31540
Dec, 2015	31420		31420
Jan, 2016	32960		32960
Feb, 2016	35220	2367	32853
Mar, 2016	20860		20860
Apr, 2016	33860	910	32950
May, 2016	33390	574	32816
Jun, 2016	29210	685	28525
Jul, 2016	29400	172	29228
Aug, 2016	31930	2878	29052
Total		11579	1176991

3. Dues towards Earned Leave Encashment as on 31/08/2016 – Rs. 616888/-

4. Dues towards pending Medical bills (to be reimbursed) as on 31/08/2016 Given as above

statement – Rs. 11579/-

5. Dues towards Wages revision up to May – 2009 – Not calculated will be informed you latter on.
6. LTC Encashment : Rs. 13104/-
7. Difference of 25 years service increment from 01.08.2016 to 31.08.2016 – Rs. 1450/-
Dues as per NDC if any shall be recoverable from above pending payments.

Sd/-

DGM (Fin)

3. The Petitioner enclosed the letter received from the Authority under the Payment of Gratuity Act, 1972 and the Regional labour Commissioner (Central Pune) addressed to the General Manager of the Corporate Debtor on 31.01.2017, to show that the gratuity due is pending.

Tel 020-26451461 by REGD A. D.

GOVERNMENT OF INDIA
MINISTRY OF LABOUR & EMPLOYMENT
OFFICE OF THE REGIONAL LABOUR COMMISSIONER (C)
1, Kaul Bldg. Gurunanak Nagar, Shankarseth Road,
Pune – 411002

No. RLCP/36/(78)/2016

Dated : 31.01.2017

FORM-'R'

(See Rule (1) of Rule 11)

Notice for payment of gratuity

To,

The General Manager,

M/s. Hindustan Antibiotics Ltd.

Pimpri, Pune – 411018

WHEREAS Shri Harsh Srinivas Pinge, an employee under you has filed an application under Section 7 of the Payment of Gratuity Act, 1972 before me.

And whereas the application was heard in your presence on various dates and after the hearing, I have come to the findings that Shri Harsh Srinivas Pinge, is entitled to payment of gratuity of Rs. 10,00,000/- as gratuity under the Payment of Gratuity Act, 1972.

Now, therefore, I hereby direct you to pay the said sum of Rs. 10,00,000/- (Rupees Ten Lakhs only) with simple interest @6% per annum with effect from date of entitlement of gratuity till the actual date of payment to Shri Harsh Srinivas Pinge within 30 days of receipt of this notice with an intimation thereof to the undersigned.

Given under my hand and seal on this day, the 31st of January 2017

(REMIS TIRU)

Authority under Payment of Gratuity Act, 1972

And

Regional Labour Commissioner, (Central), Pune

Copy to

Shri Harsh Srinivas Pinge, Sukhada, 32/1, Sahajanand Society, Behind Gandhi Bhavan, Kothrud, Pune – 411038. He is advised to contact the employer for collecting the payment.

SD/-

Regional Labour Commissioner, (Central), Pune

4. With the above letters the Petitioner claims that Corporate Debtor is liable to pay the Petitioner his retirement dues and the payment of gratuity as the same is their statutory liability in terms of Payment of Gratuity Act, 1972.

5. The Petitioner issued Demand Notice to the Corporate Debtor u/s 8 of the Code on 20.07.2017 demanding a sum of Rs. 16,86,442/-. The Petitioner further issued another Demand Notice to the Corporate Debtor on 22.01.2018 demanding a sum of Rs. 17,16,442/-.

6. The Petitioner filed Bank Certificate as required u/s 9(3)(c) of the Code to say that the has not received the payment from the Corporate Debtor after 17.09.2016. The Petitioner also filed affidavit u/s 9(3)(b) of the Code stating that no dispute has been raised by the Corporate Debtor.

7. The Ld. Senior Counsel for the Corporate Debtor filed reply dated 04.12.2018 and made the following contentions:

- a. The Corporate Debtor was declared as a Sick Company within the meaning of Sick Industrial Company Special Protection Act, 1985 and a scheme for revival sanctioned with IDBI as the operating agency to prepare a rehabilitation scheme. After the repeal of SICA Act and the commencement of Insolvency and Bankruptcy Code all the creditors started taking various coercive measures like execution, attachment, etc. The Corporate Debtor could not pay the salary and wages of the workmen for about 30 months and the Government gave some loan which was utilized for payment of salary and wages but still salary dues for the last 19 months is pending.
- b. The Corporate Debtor is having vast land bank to the extent of 263.57 of acres of factory land and the Government of India permitted the Corporate Debtor to sale 87.7 acres of surplus land to pay the salary, wages, statutory dues, etc. It is submitted that the said land sale is still pending and some litigations are going on in this respect.
- c. It is submitted that the Hon'ble Bombay High Court has appointed Hon'ble retired Judge of the Supreme Court to arbitrate the dispute relating to sale of 65 acres of land valued at about Rs. 152 crores and when the dispute is settled the payment will be made to the officers and the workmen's who are not paid.
- d. It is further submitted that writ petition no. 1700/2016 pertaining to payment of wages and salaries and other dues of all of the workmen's

and officers of the Corporate Debtor is pending before the Hon'ble Division Bench of the Bombay High Court and therefore the present Company Petition may be kept in abeyance till the above Writ Petition is disposed of by the Hon'ble Bombay High Court.

8. Thereafter, the Ld. Sr. Counsel relied on the following judgments: -
- i. **Akadasi Pradhan Vs State of Orissa (AIR 1963 SC 1047)**, which talks about liberal interpretation of Article 19 (6) of the Constitution, State Monopoly in respect of trade or business must be presumed to be reasonable and in the interests of general public so far as Art. 19 (1) (g) is concerned.
 - ii. **Rajasthan State Electricity Board Vs Mohan Lal and Others (AIR 1967 SC 1857)**, which says that Electricity Board of Rajasthan is "State" within the definition of Article 12, under the expression "other authorities", wherein interpretation of Rule of *ejusdem generis* is not applicable.
 - iii. **Indian Airlines Corporation Vs Sukhdeo Rai (AIR 1971 SC 1828)**, this judgment laid down that, organizations like ONGC, LIC and etc are "Authorities" within the meaning of Article 12. Furthermore, rules and regulations framed by these statutory corporations have the force of law, their employees have statutory status and are entitled to declaration of being employed when their dismissal or removal is in contravention of statutory provisions.
 - iv. **Sukhdeo Singh and Others Vs Bhagatram Sardar Singh Raghuvanshi and Another (AIR 1975 SC 1331)** herein, question was raised whether order for removal from service contrary to regulations framed under Act of 1959, Act of 1943 and Act of 1956 would enable employees to declaration against statutory corporation of continuance in service or would give rise to claim damages, it was held that rules and regulations framed by appellants have force of law and statutory bodies have no free hand in framing conditions and terms of services of their employees, and that they are bound to apply terms and conditions as laid down in regulations. Furthermore, employees are entitled to declaration of being in

employment when dismissal or removal is in contravention of statutory provisions.

- v. **Shambhu Nath Goyal Vs Bank of Baroda (1978 2 SCC 353)**
- vi. **State of Punjab Vs State of Jalandhar &Ors (AIR 1979 SC 1981)**
- vii. **RD ShettyVs The Indian International Airport Authority of India and others (AIR 1979 SC 1628)** this judgment said that the Government which represents the executive authority of the State, may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. In the early days, when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge governmental functions, which were of traditional vintage.
- viii. **Excel Wear Vs Union of India (AIR 1979 SC 25)** this judgment dealt with the concept of Concept of socialism or a socialist state has undergone changes from time to tune from country to country and the concept of state ownership.
- ix. **Fertilizer Corporation Kamgar Union Sindri & Others Vs Union of India and others (AIR 1981 SC 344)** in this case plants which were initially advertised for sale, went through variation, and therefore, once after sale was adjourned, thereby requests were received by F.C.I. from other public sector undertakings stating, that they were in need of part of equipment which was advertised for sale. This led to substantial reduction in goods advertised for sale. However, officers regarding sale had attracted criticism that during course of negotiations original bid was reduced without justifying cause. It was observed by the court that, reduction in price was necessary and fair consequence of reduction in quantity of goods later offered for sale. Thus, one could not exclude possibility that better price might have been realized in fresh public auction, but such possibilities could not vitiate sale or justify allegation

of mala fide. Therefore, it was held that sale was not vitiated by any unfairness or arbitrariness.

- x. **Executive Committee of U.P. State Warehousing Corporation Vs Chandra Kiran Tyagi (AIR 1970 SC 1244)**In this case, the question was whether order terminating Respondent (Employees) services was nullity. It was held that employees had their rights safeguarded by Insurance Act with order issued by Central Government and it cast statutory obligation on Life Insurance Corporation to adopt particular procedure if services of those employees were to be terminated. Therefore, by not complying with provisions of Clause 10 of order of Central Government, which was really related to Section 11 of Act, Life Insurance Corporation should be considered to had acted in gross violation of mandatory provisions of statute .
- xi. **Ajay Hasia Vs Khalid Mujib Sehravadi and Others (AIR 1981 SC 487)**, in this case, the Apex Court answered the question as to whether a Society Registered under the Society Registration Act is an "Authority" described under Article 12 of the Constitution.
- xii. **Western Coalfield Limited (BACL) Vs Special Area Development Authority, Korba (1981 DGLS SC 469)**In this case the issue was raised that, whether the demand for Property-tax made by respondent 1 on the appellant Companies legal and justified? It was held that the agreement which was entered into between the appellant Companies and respondent 1, the respondent 1 had waived its power of taxation. The Chairman of respondent 1, had acted beyond the scope of his authority in entering into the agreement with the appellant Companies, under which respondent 1 bound itself not to impose any tax. Hence the imposition of property tax was invalid and appeal is dismissed.
- xiii. **The Gujrat State Finance Corporation Vs M/s Lotus Hotel Pvt ltd (AIR 1982 Guj 198)**
- xiv. **SK Verma Vs Mahesh Chandra and Others (1983) 4 SCC214**this case talks about maintainability of reference should not be questioned especially by Public Sector Corporations on mere technical grounds.

- xv. **The Gujrat State Finance Corporation Vs M/s Lotus Hotel Pvt Ltd (AIR 1983 SC 848)**
- xvi. **D.P. Maheshwari Vs Delhi Administration (1983 DGLS SC 262)** this case laid down the principle that High Court under Article 226 of the Indian Constitution is not justified in disturbing the findings obtained by the tribunal after examining evidence in a service dispute.
- xvii. **Deokinanadan Prasad Vs State of Bihar and Others (AIR 1987 SC 1560)**
- xviii. **A.L Kalra Vs Project & Equipment Corporation of India Ltd (1984) 3 SCC 316**, this case talked about Government Undertakings to be referred as "Other authorities" under Article 12 of the Constitution of India and that employees to such bodies are entitled to get protection under Part III though not under Part II.
- xix. **P.K Ramchandra Iyer & Others Vs Union of India and Others (AIR 1984 SC 541)**, according to this judgment Indian Council of Agricultural Research (ICAR) is "other authorities" under Article 12 of the Indian Constitution.
- xx. **Ram & Shyam Co. Vs State of Haryana and others ((1985) 3 SCC 267)**, as per this judgment, it was laid down by the Hon'ble Supreme Court that, while disposing of public property, state must give equal opportunity to all concerned and also endeavor to fetch the best available price in public interest.
- xxi. **Shankar Dass Vs Union of India and others (AIR 1985 SC 772)**, this judgment refers to usage of Article 311 (2) (a) in case of dismissal on ground of misconduct, which further led to conviction on criminal charge.
- xxii. **Shree Chamundi Mopeds Ltd Vs Church of South India Trust Association (1992) 3 SCC 1**
- xxiii. **Real Value Appliances Ltd. Vs Canara Bank and others (1998) 5 SCC 1**
- xxiv. **Gujrat Steel Tube Co. Ltd. Vs Virchandbhai B. Shah & Others (1999) 8 SCC 11**
- xxv. **Solidaire India Vs Fairgrowth Financial Services**
- xxvi. **Mardia Chemicals Pvt Ltd and Others Vs Union of India** and Others, thus judgment refers to "Lenders Liability", it referred to financial transactions governed

under the Security Interest (Enforcement) Rules, 2002, it says that such transactions cannot be a one way affair, shutting out all possible remedies to borrowers and permitting assumptions of all drastic powers for speedy recovery of NPA's on part of banks.

- xxvii. Union of India and Naveen Jindal & Others (AIR 2004 SC 1559)**
- xxviii. **NGEF Limited Vs Chandra Developers and Others (2005) 8 SCC 219**, this judgment says that Section 536 (2) ipso fact does not confer any power or jurisdiction to the Company Court for sale of assets of sick companies.
- xxix. Morgan Securities & Credit Ltd. Vs Modi Rubber Ltd.**
- xxx. Jay Engineering Works Ltd. Vs Industry Facilitation Council and Others. (2006) 8 SCC 677**
- xxxi. Tata Motors Limited Vs Pharmaceuticals Products of India Ltd and others (2008) 7 SCC 617**
- xxxii. Union of India Vs R. Gandhi, President, Madras Bar Association**
- xxxiii. Raheja Universal Limited Vs NRC Limited and Others (2012) 4 SCC 148**
- xxxiv. M/s Salem Textiles limited Vs Phoenix ARC Ltd (2013 Madras 229)**
- xxxv. KSL and Industries Limited Vs Arihant Threads Limited & Others (2015) 1 SCC 166**

9. I have heard the contentions raised by both the sides. In fact on various occasions I have requested the Sr. Counsel appearing for the Corporate Debtor to throw light on the character/nature of the Company against which this Petition is filed. I have given the said suggestion for the reason that the Corporate Debtor is a Government company and the entire shareholding of the same is held with the Govt. of India. Apart from that there is a very noble reason behind the incorporation of the above undertaking and that is when the cost of Antibiotic medicines was not within the affordable reach of the common man, this company was incorporated with the assistance of WHO/UNICEF to ensure the availability of life saving drugs at an affordable prices to the weaker section of the society and a joint venture was entered into Max India with Royal Gist Brocades, Netherlands. The Royal Gist Brocades, Netherlands which took up the shares of Max India merged with the Dutch multinational pharmaceutical group, DSM thereby

forming the joint venture to DSM Anti-Infectives India Ltd. Right to proper healthcare being enshrined as a fundamental right in our constitution, this policy by the Government Company was in consonance to that of the Government of India. In simple language the object behind the incorporation is to serve the public interest. It is to be noted that the Govt. of India, under the guidance and control of Bureau of Public Enterprise which actually monitors the working of these Govt. Companies, also takes care of the same when they become sick. In most of the cases even though, there is no funds for the working of the company, the Govt. infuses lot of funds either by way of further capital or by way of additional working capital to see the company sustains so that the Public Purpose is served. In this particular case, the Corporate Debtor has got huge assets and number of employees still working for the same. Admittedly, the amounts as claimed by the Petitioner are payable. Now the questions that arises for consideration are as follows :-

- (i) Whether CIRP can be initiated against a Govt. Company which is an instrumentality of the state as covered by many judgments of the Hon'ble Apex Court under Article 12 of the Constitution of India;
- (ii) Whether the IBC is an answer for the Petitioner and whether the admission of the Petition serves the objective for which the IBC is enacted;
- (iii) Whether the preamble of the Constitution of India which includes the word "socialistic" has any bearing on this petition and;
- (iv) Whether the admission of the Petition defeats the public purpose.

After listening to the arguments of the both the sides and on perusal of all the documents placed on record, following are answers to the above

QUESTION 1 & 2:

10. The concept of instrumentality of state has been very elaborately explained in the judgment of the Hon'ble Apex Court titled as *R.D. Shetty Vs. International Airport Authority of India* (AIR 1979 SC 1628) in the following lines:

"13. Now, it is obvious that the Government which represents the executive authority of the State, may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. In the early days, when the Government had limited functions, it could operate

effectively through natural persons constituting its civil service and they were found adequate to discharge governmental functions, which were of traditional vintage. But as the tasks of the Government multiplied with the advent of the welfare State, it began to be increasingly felt that the framework of civil service was not sufficient to handle the new tasks which were often of specialised and highly technical character. The inadequacy of the civil service to deal with these new problems came to be realised and it became necessary to force a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need that the public corporation came into being as the third arm of the Government. As early as 1819 the Supreme Court of the United States in *Mac Cullough v. Maryland* 4 Wheat 315 held that the Congress has power to charter corporations as incidental to or in aid of governmental functions and, as pointed out by Mathew, J., in *Sukhdev v. Bhagat Ram* (supra) such federal corporations would ex-hypothesis be agencies of the Government. In Great Britain too, the policy of public administration through separate corporations was gradually evolved and the conduct of basic industries through giant corporations has now become a permanent feature of public life. So far as India is concerned, the genesis of the emergence, of corporations as instrumentalities or agencies of Government is to be found in the Government of India Resolution on Industrial Policy dated 6th April, 1948 where it was stated inter alia that "management of State enterprises will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this." It was in pursuance of the policy envisaged in this and subsequent resolutions on Industrial Policy that corporations were created by Government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by Government departmentally through its service personnel, but the instrumentality or agency of the corporations was resorted to in these cases having regard to the nature of the task to be performed. The corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though in the eye of the law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through the instrumentality or agency of corporations should equally be subject to the same limitations. But the question is how to determine whether a corporation is acting as instrumentality or agency of Government. It is a question not entirely free from difficulty.

14. A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act 1956 or the Societies Registration Act 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a corporation incorporated under law is managed by a board of directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the

Corporation by Government enough or is it necessary that in addition, there should be a certain amount of direct control exercised by Government and, if so, what should be the nature of such control? Should the functions which the corporation is charged to carry out possess any particular characteristic or feature, or is the nature of the functions immaterial?

Now, one thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.”

(Emphasis Supplied)

In view of the above findings, I am of the considered view that the CIRP process cannot be initiated against an instrumentality of the state. To say these words I have made an attempt to lift the corporate veil of the Corporate Debtor to see who is behind the same and I found that it is none other than Govt. of India, in the name of President of India. Initiating CIRP process against the Corporate Debtor practically amounts to initiating CIRP process against the Govt. of India which is impermissible under the Constitution/Law. The law makers while enacting the IBC appears to have not envisaged such a situation otherwise they would have exempted Govt. Companies from the CIRP process as the application of the Code on the said Govt. Companies would create a chaos and defeat the very intent for which IBC is brought into existence. At the same time there is also another way looking at it and that is, there is no reason even to expressly exempt the Govt. Companies because it is an instrumentality of the state and de-horsing the corporate character and independent entity, there is everything to say that the Govt. Companies are an instrumentality of the state or rather we can say that there an alter ego of the state itself and the result of the same is that the IBC cannot interfere with the state owned undertakings. In view of the above the point No.(i)& (ii)are answered against the Petitioner as the Petitioner can have an alternate remedy in a civil court or by way of proceeding under Article 226 or 32 of the Constitution of India in an appropriate forum if so advised.

QUESTION (iii)& (iv)

11. It is also important to note that the preamble of the constitution included the word “socialistic” at the time of 42nd Amendment to the Constitution. The Hon’ble Apex Court in its judgment titled “*Excel Wear and Ors Vs Union of India and Ors*” said the following:

"24. We now proceed to deal with the rival contentions. But before we do so, we may make some general observations. Concept of socialism or a socialist state has undergone changes from time to time from country to country and from thinkers to thinkers. But some basic concept still holds the field.

In the case of Akadasi Padhan v. State of Orissa the question for consideration was whether a law creating a State monopoly is valid under the latter part of Article 19(6) which was introduced by the (first Amendment) Act, 1951. While considering that question, it was pointed out by Gajendragadkar J., as he then was, at page 704:

With the rise of the philosophy of Socialism, the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the rationalist, nationalisation or State ownership is a matter of expediency dominated by considerations of economic efficiency and increased output of production. This latter view supported nationalisation only when it appeared clear that State ownership would be more efficient, more economical and more productive. The former approach was not very much influenced by these considerations, and treated it a matter of principle that all important and nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output. The difference pointed out between the doctrinaire approach to the problem of socialism and the pragmatic one is very apt and may enable the courts to lean more and more in favour of nationalisation and State ownership of an industry after the addition of the word 'Socialist in the Preamble of the Constitution. But so long as the private ownership of an industry is recognised and governs an overwhelmingly large proportion of our economic structure, is it possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely or to a very large extent the interests of another section of the public namely the private owners of the undertakings? Most of the industries are owned by limited companies in which a number of shareholders both big and small, holds the share. There are creditors and depositors and various other persons connected with or having dealings with the undertaking. Does socialism go to the extent of not looking to the interests of all such persons? In a State owned undertaking the Government or the Government Company is the owner. If they are compelled to close down, they probably may protect the labour by several other methods at their command, even, sometimes at the cost of the public exchequer. It may not be always advisable to do so but that is a different question. But in a private sector obviously the two matters involved in running it are not on the same footing. One part is the management of the business done by the owners or their representatives and the other is running the business for return to the owner not only for the purpose of meeting his livelihood or expenses but also for the purpose of the growth of the national economy by formation of more and more capital. Does it stand to reason that by such rigorous provisions like those contained in the impugned sections all these interests should be completely or substantially ignored? The questions posed are suggestive of the answers."

(Emphasis Supplied)

From the above it is clear that irrespective of the fact whether a company is earning profits or not and has the ability to pay debts or not, the survival of

the company cannot be put in jeopardy and in view of the fact that the CIRP process virtually creates a situation where the activities of the company goes into the hands of a Resolution Professional. Here is a case merely because an employee who served the company for several years and had grown from the bottom to the top level not winding his long association with the Company which provided him bread and butter for so many years, had filed the above petition just because the undertaking is not presently in a position to pay his dues? Does it mean that there is some Debt and there is a Default and the CIRP can be initiated against a Government Company which is catering to the requirements poor people at large by producing medicines at an affordable price? The answer has to be no. The reason for the same is that the Govt. Companies though incorporated as a corporate entity are not wholly created for the intent of making Crores and Crores of profit by creating huge industrial facilities. The real object is to serve the public purpose even at the cost of incurring losses. The Govt. of India takes the call at the appropriate time and would make all the possible efforts to revive the company and pay dues to all its employees. Therefore, the admission of the petition would defeat the provisions of Constitution of India which is impermissible under Law. The Constitution of India and its preamble partakes and prevails over the provisions of IBC and hence the Petition thoroughly fails on the above ground. In view of the above, the points No. (iii) & (iv) are answered against the Petitioner as the Respondent is a Government Undertaking and initiating insolvency process against it would be against public interest. Another important point that requires to be seen from another angle is that several important Government Companies, like, Mazagon Dock Shipbuilders, Bharat dynamics Limited, Hindustan Aeronautics Limited, Bharat Heavy Electricals Limited, and Bharat Electronics Limited which produces highly sensitive, military products. If at all a Petition under IBC is allowed to be maintained against any of these Companies, very sensitive data or information will be leaked out and the same would create chaos. Therefore, the constitutional law doesn't permit any Insolvency Petition being maintained against a Government Undertaking owned by the President of India.

12. Herein it is important to mention that the Respondent is a Government Company as defined under section 2 (45) of the Companies Act, 2013, wherein 100% of its shares are being held by the President of India. Therefore, if upon filing of an Application under Sections 7, 8 and 9, and the same were to be admitted, recovery proceedings then would be said to have

been initiated against the President of India, which cannot be allowed under the procedure of IBC.

13. The State, we have seen on various occasions, has either tried treating Financially Sick Companies or made sure that dues of the all its Creditors are duly paid. In a Welfare State like India, allowing Insolvency proceedings against an Agency of the State is like proceeding against the state itself and the same will set out a wrong precedent.

14. Hence the Petition is dismissed.

SD/-
Bhaskara Pantula Mohan
Member (Judicial)

Per: V. Nallasenapathy, Member (T)

I have gone through the order of my Ld. Brother and I respectfully disagree with his views for the following reasons:

1. The contentions of the Corporate Debtor referred in para 7 supra cannot come in the way of admission of the Petition in view of the fact that debt and default is writ large in the Petition and the Corporate Debtor has not raised any dispute with regard to the liability. The Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (MANU/SC/1196/2017)* held as below:

"25. Therefore, the adjudicating authority, when examining an application Under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs. 1 lakh?

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

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

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

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

2. The Corporate Debtor filed additional reply dated 26.03.2019 and raised the following issues:

- a. on reference under SICA Act a scheme was approved by BIFR for revival of Hindustan Antibiotics Ltd. and the scheme is under implementation w.e.f. 01.12.2016. Subsequently the Code came into operation and the SICA Act was repealed already under the Sick Industrial Companies (Special Provisions) Repeal Act, 2003.
- b. the Corporate Debtor is a wholly owned Government Company through his Excellency President of India, the government company is quite different and cannot be compared with the public sector undertaking or a private limited company as contemplated under the Code, the Government of India is ultimate controlling authority though it is managed by Independent Board, etc., and the government retains the control by appointing nominee directors.
- c. under Article 12 of the Constitution of India this Corporate Debtor is a 'State' and coming under the purview of 'other authorities' as mentioned in Article 12 of the Constitution of India, which is as below:
"In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."
- d. under the doctrine of immunity of instrumentalities of the State, provided under the constitution of India, the properties of Union of India are exempted even from taxation and other charges. Applying the same analogy the properties of the Corporate Debtor cannot be interfered as provided under the Code.
- e. though it is a Government Company incorporated under the Companies Act but the status and Statute are different, all government companies are financed by government, Government Company is audited by the agencies appointed by the government etc., the

Corporate Debtor is a state and hence the provisions of the Code cannot be applied to this Corporate Debtor.

- f. the Corporate Debtor is trying to sell the land owned by it for payment of unpaid salary of employees and the Hon'ble Bombay High Court directed the company to sell the access land for payment of salary dues and the same is an assistance by the Central Government to dilute the company which proves that the government has full control over the authority of the Corporate Debtor.
- g. the extreme step of appointing of Insolvency Professional as contemplated in the code is not applicable to Government Companies and hence this petition has to be dismissed.
- h. the payment of Gratuity Act, Bonus Act, and other Industrial Acts are self contained code and if the Bankruptcy code is allowed to prevail over those acts, they are required to be amended and /or scraped.
- i. Government of India infused funds to the extent of Rs. 100 crores to the Corporate Debtor to pay the salary arrears of employees which shows that the Central government is looking after its employees like its children.
- j. in spite of all difficulties the Corporate Debtor has paid the dues of the Petitioner, however if there is any genuine claim by the petitioner the same would be sorted out.
- k. the employees of the Corporate Debtor in case of any dispute or for other issues always approach the Hon'ble Bombay High Court for their remedies and this petitioner should done the same thing and should not have filed this petition.

3. Discussion:

- a. Article 12 of the Constitution of India provides as below:

"12. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India". Going by this Article, it may be said that a writ petition may lie against the Corporate Debtor on the guise of instrumentality of State. But that doesn't mean that provisions of the Code are not applicable to the Corporate Debtor herein. This is a statutory remedy provided to the creditors under the Code and the creditors have every right to exercise that

statutory right. Neither the Constitution of India nor the Code excludes the operation of the provisions of the Code in respect of the Corporate Debtor.

Let us examine the provisions of the Code to know whether the Corporate Debtor can be kept out of the purview of the Code.

Section 3(7) of the Code provides that

"'corporate person' means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;"

Section 3(8) of the Code provides that

"'corporate debtor' means a corporate person who owes a debt to any person;",

Section 2(20) of the Companies Act, 2013 provides that

"Company means a company incorporated under this Act or under any previous company law"

Section 4 of the Code provides that

"This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees: Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.",

Section 5(20) of the Code provides that

"operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Section 5(21) of the Code provides that

"operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force

and payable to the Central Government, any State Government or any local authority;

Section 9 of the Code provides that

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process. (2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed. (3) The operational creditor shall, along with the application furnish— (a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor; (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt; (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and (d) such other information as may be specified. (4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional. (5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order— (i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,— (a) the application made under sub-section (2) is complete; (b) there is no repayment of the unpaid operational debt; (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor; (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and (e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any. Application for initiation of corporate insolvency resolution process by operational creditor. (ii) reject the application and communicate such decision to the operational creditor and the

corporate debtor, if— (a) the application made under sub-section (2) is incomplete; (b) there has been repayment of the unpaid operational debt; (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor; (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or (e) any disciplinary proceeding is pending against any proposed resolution professional: Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority. (6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

An ordinary scanning of the above provisions clearly reveals that the Corporate Debtor herein, being a company incorporated under the Companies Act, is a corporate person who owes operational debt to the Petitioner and hence the petition is maintainable against the Corporate Debtor under Section 9 of the Code. It is to be noted that the only exception given under Section 3(7) of the Code is for financial sector regulator. The legislature in its wisdom has not given any exception or exclusion to the public sector/Government undertakings. Further the intention of the legislature is very clear that the Government companies also fall within the ambit of the Code. This Adjudicating Authority cannot travel beyond the provision of law. Hence, the answer to the question supra is a big no.

The contentions of the Corporate Debtor that the payment of gratuity act overrides the provisions of the Code cannot be accepted in view of the provisions of Section 238 of the Code, which is a subsequent legislation enacted in the year 2016 when compared to the Payment of Gratuity Act, 1972. The other contentions raised as above will not come in the way of admission of this Petition. In view of this all the contentions of the Corporate Debtor stated above from (a) to (k) does not hold water.

- b. The Ld. Senior Counsel for the Corporate Debtor relied on umpteen number of judgments to say that writ jurisdiction is amenable against the Corporate Debtor and the same is not an issue before

this Bench and hence the reliance on those judgments is of not of any assistance to the Corporate Debtor.

- c. In the following cases, CIRP Petition was entertained against the Public Sector undertakings/ Govt. Companies by the NCLTs across the country.
- i. Kolkata Bench of NCLT, in the case of "Gulf Oil Lubricants India Ltd. vs. Eastern Coalfields Ltd. (CP (IB) No. 228/KB/2018)"
 - ii. Hyderabad Bench of NCLT, in the case of "Andhra Pradesh Power Generation Corporation Ltd vs. Southern Power Distribution Company of Telangana Ltd. (CP (IB) No. 58/9/HDB/2018)", in which the Government Company filed this petition against the Government Company. (In fact this case has travelled up to the Hon'ble Supreme Court).
 - iii. It is to be noted that the Hon'ble NCLAT by an order dated 29.05.2019 approved the liquidation order passed by the New Delhi Bench of NCLAT in the case of "*Hindustan Paper Corporation Officers & Supervisor Association & Ors. Vs Hindustan Paper Corporation Ltd. & Ors (Company Appeal (AT) (Insolvency) No. 585 of 2019)*", wherein the Corporate Debtor is a public sector undertaking/ Govt. Company.
 - iv. The Hon'ble NCLAT in the case of "*Industrial Services vs Burn Standard Company Ltd. & Anr. (Company Appeal (AT) (Insolvency) No. 141 of 2018)*" set aside the order of closure of the Company and the order of retrenchment dated 6th March, 2018 and remitted back the matter to NCLT, Kolkata for fresh consideration in accordance with law. Here also the Corporate Debtor is a public sector/Government undertaking.
Hence there is no rhyme or reason to exclude the public sector/Government undertaking.
- d. The Adjudicating Authority under the Code is given a limited power to decide whether the Corporate Debtor is liable to pay the debt and defaulted in making the same. When the debt and default is proved the petition has to be admitted. The Corporate Debtor neither denied liability nor the default nor raised any dispute. The documents produced by the Petitioner clearly prove that the Corporate Debtor defaulted in making the payment of retirement benefits to the Petitioner. The Hon'ble Supreme Court has already upheld the Constitutional Validity of the Code in entirety in the case

of "*Swiss Ribbon Private Limited and Anr. vs Union of India and Anr. (2019 4 SCC 17)*". This Adjudicating Authority is mandated only to look into three things before admitting a petition under Section 9, first debt, second occurrence of default and third the existence of dispute and nothing more. When these are looked into the petition deserves admission. There is no question of testing the constitutional validity of any provision of the Code by this Adjudicating Authority in the given circumstance and the same will be beyond the jurisdiction of this Tribunal.

- e. It is to be noted that the Government of India, on 09.11.2015 vide notification No. 16(25)/2004-Fin., had abolished the Board for Reconstruction of Public Sector Enterprises (BRPSE) which was established in December 2004 as an advisory body to advise the Government on the strategies, measures and schemes related to strengthening, modernizing, reviving and restructuring of public sector enterprises. In view of this development, now there is no mechanism to deal with the restructuring or resolving the financial issues faced by Public Sector Undertakings and the application of the Code to this Corporate Debtor is in the best interest of the Corporate Debtor.
 - f. If the contentions raised by the Ld. Senior Counsel on behalf of the Corporate Debtor is accepted, it tantamount to the situation where the Public Sector Companies can borrow money left, right and centre or create liabilities and the creditors have to be left in lurch compelling them to approach the civil courts or the writ court for getting relief, where the system is already suffering from docket explosion, which will ultimately hurt the economic interest of the nation and the ease of doing business.
 - g. The code is a major economic reform undertaken by the Government to overcome the bottleneck in the economic development of the country and the present situation is that the economic activity awaits at the doorsteps of the NCLTs, and hence the spirit of the Code shall not be spoiled by diluting and tinkering the Code.
4. In view of the above discussion, the Petition is admitted.

SD/-
V. Nallasenapathy
Member (Technical)