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**BEFORE THE AJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

C.P. (I.B) No. 50/9/NCLT/AHM/2017

Coram:

**Present: Hon'ble Mr. BIKKI RAVEENDRA BABU
MEMBER JUDICIAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL 01.08.2017**

Name of the Company: Ajay Sadana
V/s.
Acteon India Pvt. Ltd.

Section of the Companies Act: Section 9 of the Insolvency and Bankruptcy
Code

S.NO. NAME (CAPITAL LETTERS) DESIGNATION REPRESENTATION SIGNATURE

1. RUTVIK H. MODI

AJAY SADANA

R.H. Modi

2. MOIZ K. RAFIQUE

AJAY SADANA

3. Hemang M. Shah

Acteon.

MS

ORDER

Learned Advocate Mr. Rutvik Modi with Learned Advocate Mr. Moiz Rafique present for Operational creditor/ Applicant. Learned Advocate Mr. Hemang Shah present for Respondent.

Order pronounced in open Court. Vide separate sheet.

B. Raveendra Babu 1.8.17
**BIKKI RAVEENDRA BABU
MEMBER JUDICIAL**

Dated this the 1st day of August, 2017.

**BEFORE ADJUDICATING AUTHORITY (NCLT)
AMEDABAD BENCH
AHMEDABAD**

CP NO. (IB) 50/9/NCLT/AHM/2017

In the matter of:

1. Mr. Ajay Sadana
A – 621 Privy Legal Service LLP,
Sidhi Vinayak Towers
Beside Kataria Arcade,
New Corporate Road
Off. S.G. Highway
Ahmedabad 380 051

: Applicant
: Operational Creditor

VERSUS

1. M/s. Acteon India Private Limited.
B-94, GIDC Electronic Estate
Sector 25,
Gandhinagar 382 023
Gujarat

: Respondent
: Corporate Debtor

Order delivered on 1st August, 2017

CORAM: SRI BIKKI RAVEENDRA BABU, MEMBER JUDICIAL

Appearance:

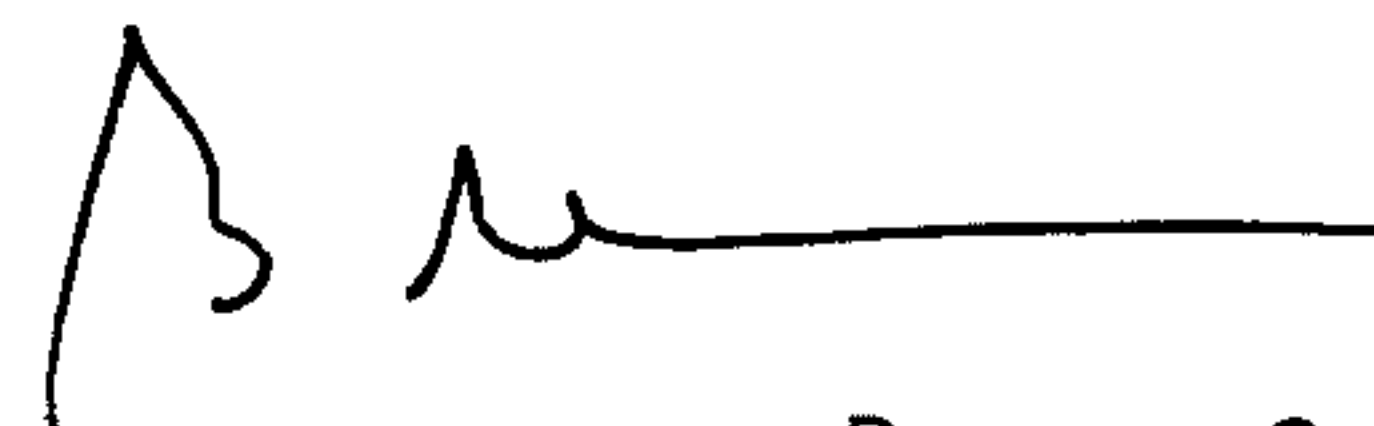
For the petitioner : Learned Advocate Mr. Sandeep Bajaj with learned advocate Mr. Soayib Quereshi with learned advocate Mr. Moiz Rafique with learned advocate Mr. Rutvik Modi.



For the respondent : Learned advocate Mr. Ravi Verma
with learned advocate Mr. Yash
Srivastava with learned advocate
Mr. Hemang Shah

ORDER

1. This application to initiate Corporate Insolvency Process in respect of M/s. Acteon India Private Limited. (hereinafter called as respondent/ corporate debtor) under section 9 of The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 6 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "the Rules") is filed by Mr. Ajay Sadana (hereinafter called as applicant/ operational creditor) who is an ex-employee of respondent corporate debtor M/s. Acteon India Pvt. Ltd.
2. The facts in brief that are necessary for disposal of this application are as follows: -
3. The respondent operational debtor is a company registered under the Companies Act, 1956 engaged in the business of import, sales and service of electronic goods comprising of dental and medical equipment. The applicant was working with the corporate debtor since last 22 years i.e. since September, 1994. In 2009 the corporate debtors promoted

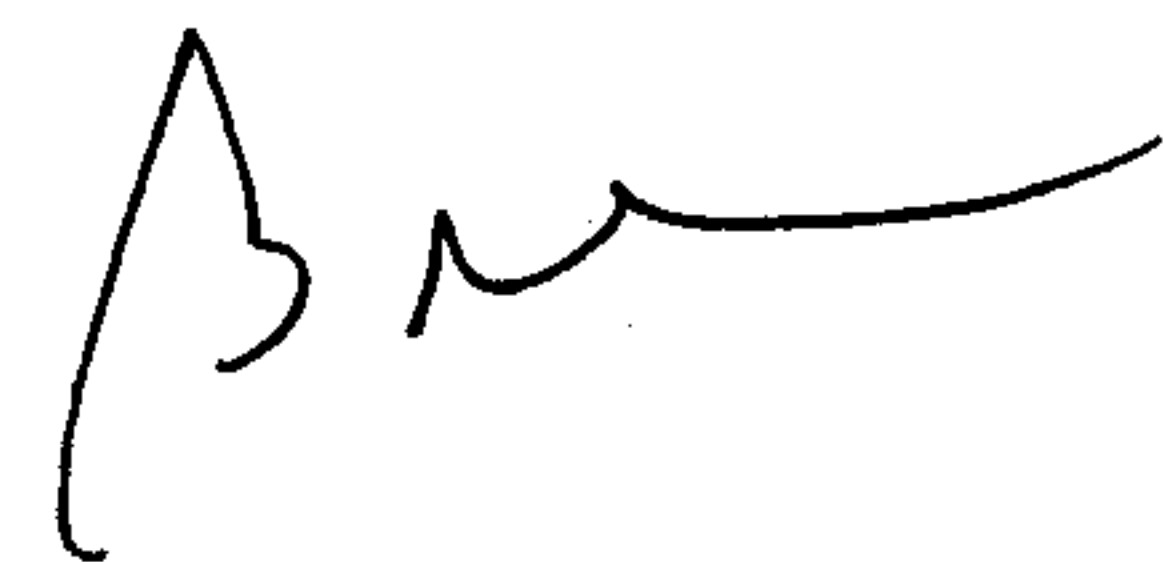


the applicant to the post of Managing Director and the tenure of the applicant as Managing Director was extended on various occasions by the corporate debtors. On 28.04.2017, the corporate debtors illegally terminated the applicant contra to the manner and procedures set out under the Employment Agreement read with the Companies Act, 2013. The applicant was receiving a salary of Rs. 6,87,670/- per month excluding annual incentives, gratuity and superannuation benefits, as per the terms and conditions incorporated in the employment agreement dated 18.11.2015 read with Remuneration Agreement dated 07.04.2016.

4. It is stated by the applicant that he is entitled for remuneration for the month April 2017 to the tune of Rs. 6,87,670/- in accordance with the Remuneration Agreement dated 07.04.2016, incentives for the year 2016 to the tune of Rs. 22,15,400/- and remuneration for twelve months to the tune of Rs. 92,06,840/-. In all, according to the applicant, he is entitled for a cumulative sum of Rs. 1,21,09,910/- from the corporate debtors. In fact, the applicant is also entitled for interest and reserves his right to claim interest at the rate of 18% per annum on the principal sum.
5. Since April 2017, the operational creditor have been regularly demanding the corporate debtor to pay operational debt due to him.



6. The operational creditor issued demand notice dated 25.05.2017 under Section 8 of the Insolvency and bankruptcy Code, 2016 by way of mail, courier and speed post to the corporate debtors. Corporate debtors received the demand notice on 25.05.17, 27.05.17 and 29.05.17 respectively. Corporate debtor replied the demand notice on 25.05.2017 to the operational creditor within a period of ten days but it does not amount to a notice of dispute contemplated under section 8 of the Code. Hence, the operational creditor filed this application with a prayer to trigger Corporate Insolvency Resolution process in respect of M/s. Acteon India Private Limited., the corporate debtor.
7. This application is filed before this authority on 21.06.2017 and it is listed before the authority for the first time on 13.07.2017.
8. Applicant despatched a copy of the petition on the respondent by speed post on 21.06.2017.
9. Respondent appeared before this authority on 13.07.2017 through his counsel and requested for time to file objections. Respondent filed objection on 21.07.2017.



10. The first and foremost plea of the respondent is that in view of the agreement dated 18.11.2015, this application is void and un-enforceable in terms of Section 196 (2) read with Section 6 of the Companies Act, 2013.

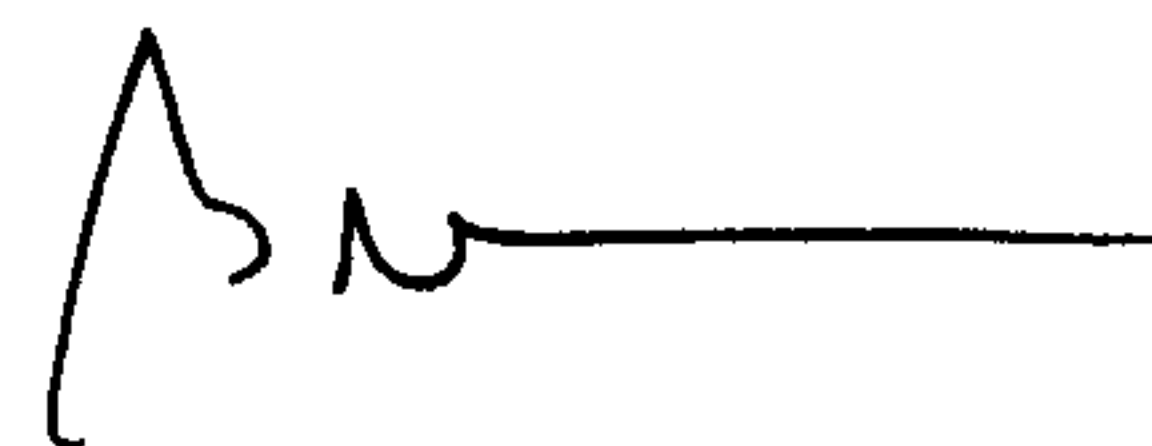
11. Since the agreement dated 18.11.2015 is void the employment of applicant as Managing Director in the respondent company is governed by agreement dated 14.09.2012, which is valid till 30.09.2017. It is further stated that, clause 12 of the agreement dated 18.11.2015 provides that the Managing Director shall not be entitled to any compensation for loss of the office if removed from the office for gross negligence, breach of duty or breach of trust. It is the specific case of the corporate debtor that the applicant has been removed from the position of Managing Director on account of his fraudulent actions of embezzling the funds and assets of the corporate debtor for illegal personal gains constituting gross breach of fiduciary duty and trust. In the letter dated 23.03.17 issued by the respondent to the applicant, it is clearly expressed its intention to terminate the applicant in terms of agreement dated 14.09.2012. Further, it is stated that Section 166 of the Companies Act, 2013 provides that a director who illegally profits from breach of its duties shall be liable to pay an amount equal to gain it has illegally bestowed upon and also liable for punishment. Section 202 (2) (d) of the Companies Act, 2013 provides that no payment for compensation for loss of office shall be made to a Director in case of removal on account of



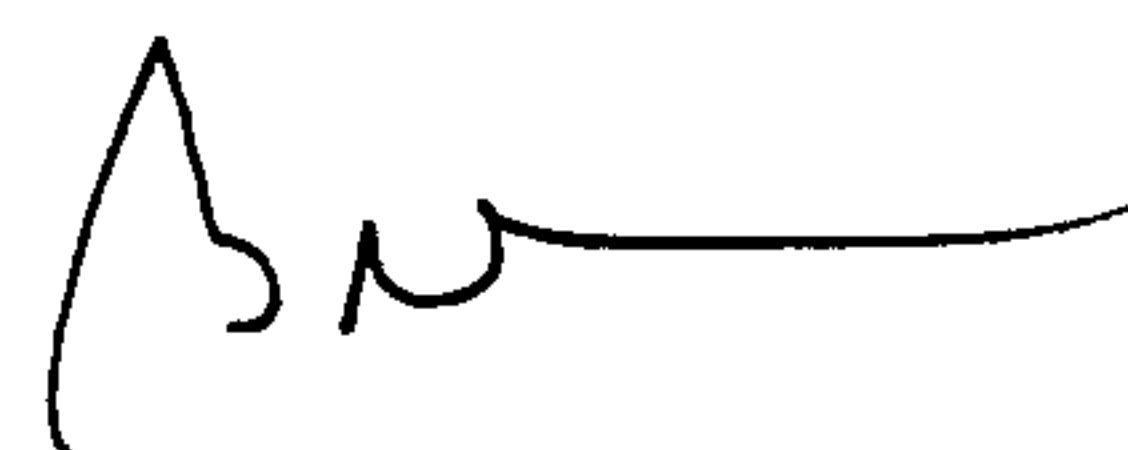
fraud or breach of trust or negligence or gross mismanagement in the conduct of a company or a subsidiary or holding company thereof. Clause 9 read with Clause 8 (b) of the agreement dated 18.11.2015 read with Section 166 and Section 202 (2) (d) of the Companies Act disentitles the applicant to claim any amount from the Company.

12. Respondent further pleaded that dispute in terms of Section 8 and 9 of the Code was in existence even prior to issuance of notice dated 25.05.2017 under Section 8 of the Code. The removal of applicant as Managing Director of the respondent company on account of fraudulent acts of embezzlement of funds and assets of the respondent company is prior to the notice dated 25.05.2017.

13. Respondent company in the month of March 2017 engaged the services of KPMG, auditors to investigate into the affairs of the respondent company. The applicant was asked by e-mail dated 17.03.2017 to co-operate with the investigation undertaken by KPMG by asking the applicant to handover all company devices like laptop, mobile phones etc. Financial investigations were conducted much prior to the notice dated 25.05.2017. After conclusion of the financial investigation by KPMG, the following acts of embezzlement of funds and assets of the respondent company came to light.: -

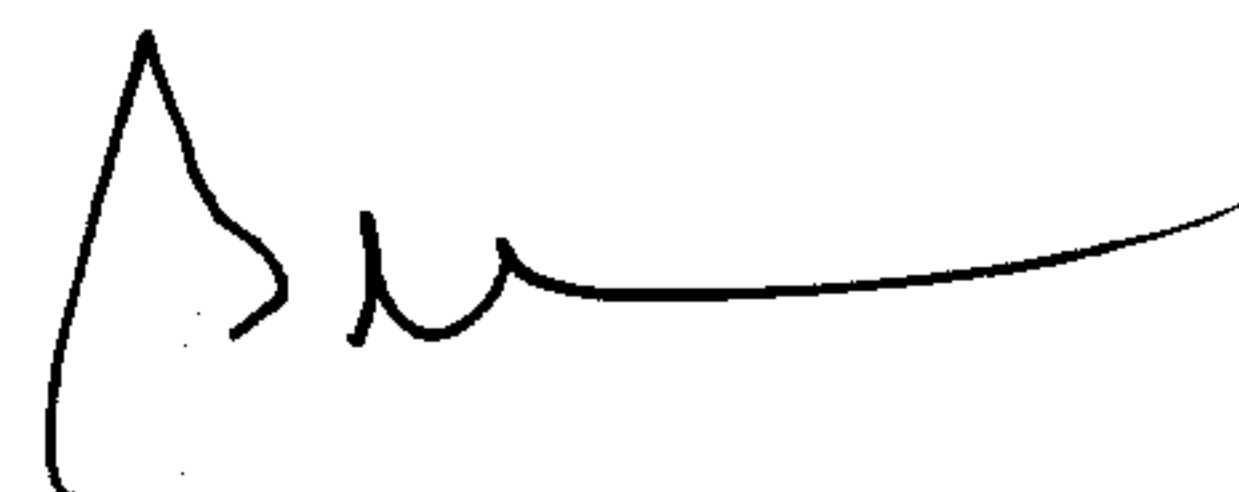


- (i) Upon scrutiny of the sales register, it was found that even when no dealer commission was approved or indicated in the original sales order form, the applicant subsequently modified the physical sales order form to include dealer commission for his own illegitimate personal gains.
- (ii) Despite no approval by the sales team, the applicant subsequently modified/fabricated the sales documents by including laptops as promotions therein for illegitimate personal gains. It was further discovered that laptops bought for sales promotion were illegally appropriated by the applicant for his personal use and also personal use of his family members. The applicant also illegally appropriated other IT infrastructure including printers, anti virus etc. which are assets of the respondent.
- (iii) The applicant disposed of assets of the respondent including IT infrastructure by selling the same at nominal or very low scrap value far below their market price



and without any corresponding entry in the books of accounts.

- (iv) The applicant sold off the products of the respondent company including dental equipment for cash and illegally appropriated huge amounts of such sale proceeds.
- (v) The applicant appropriated huge amounts of money towards expenses for organizing fictitious lunch/dinner parties for doctors/members of Indian Dental Association which never took place. The applicant also failed to inform the location of such event or even the attendees for such event to the respondent. Also, the bills submitted by the applicant in this reference do not contain the name, address, tax registration or other relevant details for the vendors, which show that these invoices/bills were fabricated and were made by or under the instructions of the applicant.
- (vi) The applicant had appropriated huge amounts of money towards expenses as



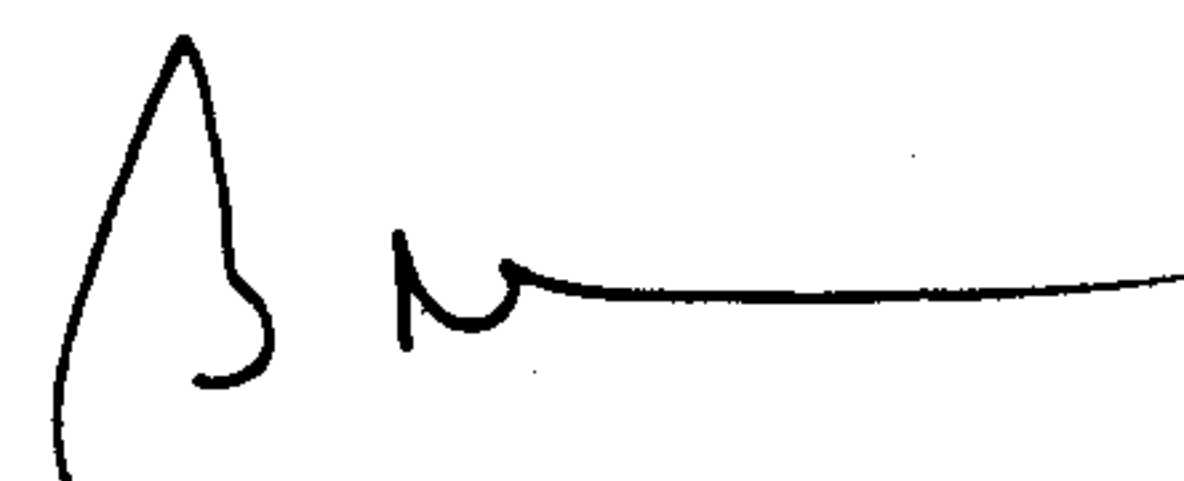
gifts to the members of Indian Dental Association which were shown as sales promotion expenses. Such gift items comprised of electronic items, jewellery, alcohol, perfumes etc. for which no approval was given nor sought and were strictly against the respondent company's policy.

(vii) The applicant while abusing his dominant position as Managing Director had two cars namely Ford Endeavour and Toyota Fortuner of the ownership of the respondent in his possession for his personal use even when only one car was officially assigned to the applicant for official work. The applicant appropriated funds of the respondent by claiming personal expenses which are not allowed in terms of the company policy including maintenance expenses of his personal car.

(viii) The applicant appropriated huge sums of amounts towards brokerage paid for office premises in Delhi and Mumbai of the respondent as the receipts submitted for the same did not appear to be genuine.

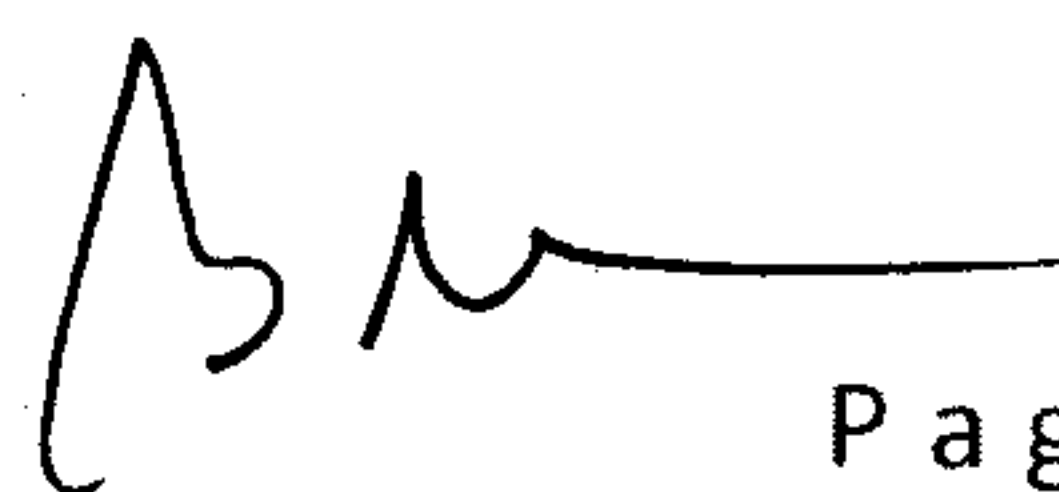


14. The respondent company after financial investigation by KPMG communicated the aforesaid illegal actions to the applicant. Based on the findings of KPMG, respondent issued notice dated 23.03.2017 to the applicant expressing its intention to terminate the agreement dated 14.09.2012. In the said notice, applicant was given an opportunity of being heard by scheduling a meeting on 28.03.2017. The applicant refused to attend the meeting scheduled on 28.03.2017 by letter dated 26.03.2017. The final report of KPMG was given to the respondent company on 07.07.2017.
15. Shareholders of the respondent company vide letter dated 10.04.2017 requisitioned an Extra-Ordinary General Meeting of the respondent company in terms of Section 100 of the Companies Act, 2013 wherein one of the proposed resolution was removal of the applicant as the Director and consequently also the Managing Director. A special notice dated 11.04.2017 was also issued expressing intention to move resolution in connection with removal of the applicant as Director in terms of Section 169 (2) and (5) read with Section 115 of the Companies Act, 2013. The respondent company sent a notice to the applicant requesting him to send his representation under Section 169 (4) of the Companies Act, 2013. Respondent company after considering the representation of the applicant dated 20.04.2017, in the Extra-ordinary General Meeting held on 28.04.2017, removed the applicant as



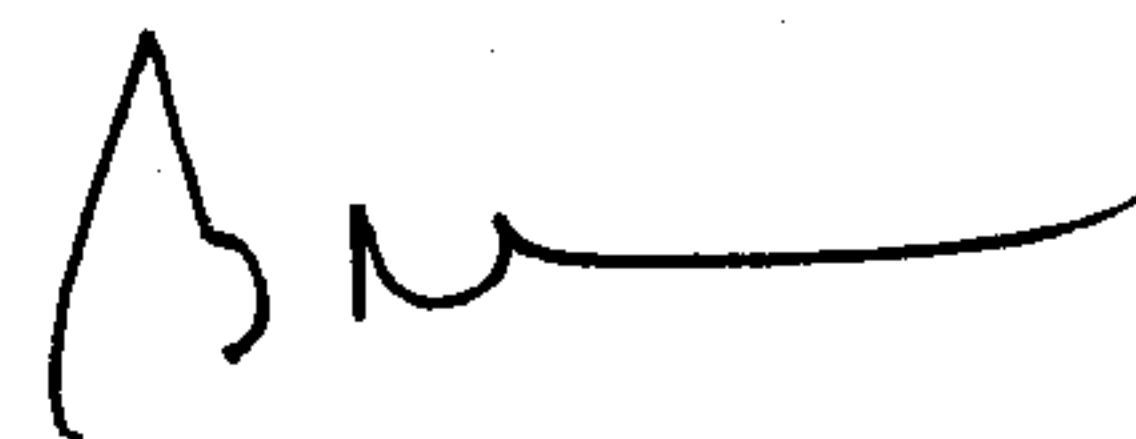
Director and consequently as Managing Director of the respondent company. According to the respondent there was a dispute even prior to the issuance of demand notice and therefore this application is a gross abuse of the process of law. In the notice dated 23.03.2017, the respondent company expressed its intention to remove the applicant from the respondent company. Respondent further stated that the applicant approached this Tribunal with uncleaned hands. It is said that the applicant is still holding assets of the company including two cars, mobile phones, laptop, printers etc. Respondents states that the applicant is liable for punishment for wrongful withholding of property of the respondent company and the respondents are not liable to pay alleged operational debt.

16. The respondent company engaged the services of the applicant in the year 1994 and ultimately made him Managing Director of the Company. There is no dispute about the fact that there are employment agreements dated 14.19.2015, 18.11.2015 and remuneration agreement dated 07.04.2016. There is no dispute about the fact that the applicant was removed as Director and consequently as Managing Director of the respondent company on 28.04.2017.
17. According to the applicant he was removed on false allegations. According to the respondent company, the applicant was removed on the basis of alleged fraudulent acts

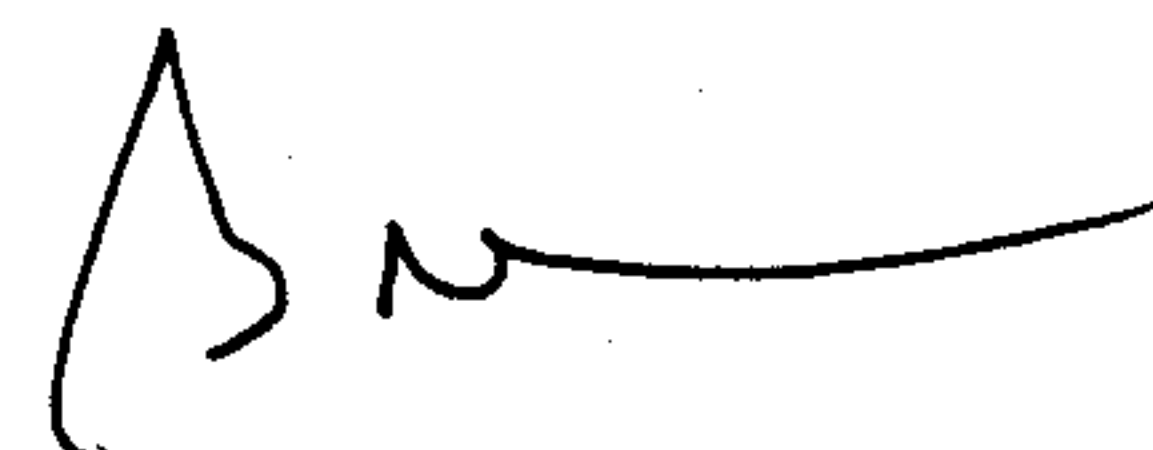


of embezzlement of funds, breach of trust etc. There is no dispute about the fact that the respondent company engaged the services of KPMG to investigate into the affairs of the applicant. No doubt the financial report of investigation was submitted by KPMG to the respondent company only on 07.07.2017. But it is a fact that even before the financial report of KPMG was received, in the month April 2017, applicant was removed as Director in the Extra-ordinary General Meeting held on 28.04.2017. A perusal of e-mail dated 17.03.2017 issued by the respondent show that the applicant was asked to handover the laptop, mobile phones and other company devices to KPMG for the purpose of investigation. Therefore, it is obvious that KPMG started preliminary investigation even by 17.03.2017 i.e. much prior to the notice dated 25.05.2017.

18. Main contention of the respondent is that the agreement dated 18.11.2015 is void and contra to the provisions of the Companies Act. This point has been raised by the respondent in the reply to the demand notice. In the reply notice itself the respondent mentioned the alleged illegal acts committed by the applicant and misappropriation of huge amount. The material on record show that after following the procedure laid down in the Companies Act, the respondent removed the applicant as Director and consequently as Managing Director of the company.



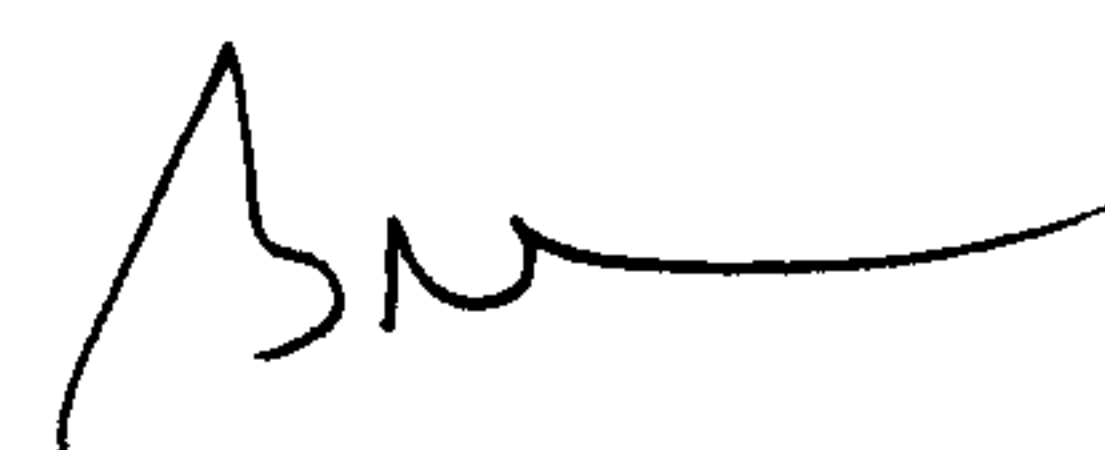
19. All these facts clearly indicate that there is a controversy regarding removal of the applicant as Managing Director of the Company. According to the applicant, he was illegally removed as Managing Director and, therefore, he is entitled for certain amounts as compensation of salary etc. etc. According to the respondent because of the illegal acts committed by the applicant he was removed from the post of Managing Director and, therefore, he is not entitled for any benefit. Genesis for this dispute is the removal of the applicant in the EOGM held on 28.04.2017. Therefore, much prior to the issuance of demand notice u/s 8 of the Code, on 25.05.2017, the dispute arose between the respondent company and applicant.
20. This Tribunal has no jurisdiction to decide the validity or otherwise of the agreement dated 18.11.2015. It is not the function of this adjudicating authority to interpret the terms and conditions mentioned in the agreement dated 14.09.2012 coupled with the remuneration agreement dated 07.04.2016 and decide whether the applicant is entitled for the amount or not, more so in the light of the disputes raised by the respondent much prior to the issuance of demand notice under Section 8 of the code.
21. In this context it is necessary to refer to the decision of Hon'ble National Company Law Appellate Tribunal in Company Appeal



(AT) (Insolvency) 6 of 2017 in the matter of Kirusa Software Pvt. Ltd. v/s Mobilox Innovations Pvt. Ltd. held as follows: -

"The dispute under I & B code, 2016 must relate to specified nature in clause (a), (b) or (c) i.e. existence of amount of debt or quality of goods or service or breach of representation or warranty."

22. It is further held in that judgement by Hon'ble Appellate Tribunal that mere raising dispute for the sake of dispute unrelated or related to clause (a) (b) or (c) of Sub-section (6) of Section 5, if not raised prior to application and not pending before any competent court of law or authority cannot be relied upon to hold that there is a dispute raised by the corporate debtor. It is also held in the judgement that the dispute as defined in sub-section (6) of Section 5 cannot be limited to a pending proceedings or lis within the limited ambit of suit or arbitration proceedings and it can be any other proceedings.
23. In the case on hand the dispute raised relate to services rendered. The dispute was raised much before the issuance of demand notice. The dispute appears to be bona fide dispute. After removal of the applicant, KPMG submitted a detailed report which indicate several allegations with material against the applicant. However, it is not for this adjudicating



authority to go into the merits or demerits of the report given by KPMG.

24. In light of the aforesaid facts and in view of the judgement of National Company Law Appellate Tribunal in Kirusa Software Private Ltd. V/s Mobilox Innovations Private Ltd. there are no grounds to admit this application in order to trigger Corporate Insolvency Process in respect of the respondent company M/s. Acteon India Private Limited. In the result, the application is dismissed. No order as to costs.


BIKKI RAVEENDRA BABU
ADJUDICATING AUTHORITY
MEMBER JUDICIAL

Pronounced by me in open court on the 1st day of August, 2017.