IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION

Company Appeal (AT) (Insolvency) 6 of 2017

(arising out of order dated 27.01.2017 passed by the National Company Law Tribunal, Mumbai Bench in Company Petition 02/I&BP/NCLT/MAH/2017)

IN THE MATTER OF:

Kirusa Software Private Ltd. **...Appellant**

Vs

Mobilox Innovations Private Ltd. **...Respondent**

Present: **Mr Amar Gupta, Mr. Sanjeev Jain, Ms Apoorva Agrawal, Mr Alok Dhir, Ms Varsha Banerjee, Mr. Milan Negi and Mr. Kunal Godhwani, Advocates for the appellant.**
Mr. Devansh Mohta, Mr. Shyam Pandya, Mr. Puneet Singh Bindra and Mr. Rohan Kaushal, Advocates for the respondent.

JUDGEMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

The appellant – operational creditor filed petition under section 9 of the Insolvency & Bankruptcy Code 2016 (hereinafter referred to as 'I & B Code' 2016) which was rejected by the 'Adjudicating Authority'. Mumbai Bench by the impugned order dated 27th January 2017, with following observations: -

"When this Bench has directed the petitioner to furnish the requisite documents as described u/s 9 of the Insolvency & Bankruptcy Code, the Petitioner

filed the Notice of dispute raised by the Corporate Debtor disclosing the Corporate Debtor disputing the claim made by the Petitioner.

Though the petitioner filed all the invoices raised on the Debtor Company aggregating debt to Rs.20,08,202, details of transaction on account of which debt fell due, default thereof and demand notice served upon the Debtor, for this Bench having noticed that notice of dispute raised by Respondent side has not been annexed to the CP, this Bench hereby directed to furnish the documents as prescribed u/s 9 of the I&BP Code. In compliance of it, the Petitioner filed the notice of dispute issued by the Corporate Debtor disclosing the corporate debtor disputing the claim made by the Petitioner. On perusal of this sub-section (5) of Section 9 of this Code, it is evident that notice of dispute has been received by the Operational Creditor.

On perusal of this notice dated 27.12.2016 disputing the debt allegedly owed to the petitioner, this Bench, looking at the Corporate Debtor disputing the claim raised by the Petitioner in this CP, hereby holds that

the default payment being disputed by the Corporate Debtor, for the petitioner has admitted that the notice of dispute dated 27th December, 2016 has been received by the operational creditor, the claim made by the Petitioner is hit by Section (9)(5)(ii)(d) of The Insolvency and Bankruptcy Code, hence this Petition is hereby rejected."

3. The plea taken by the appellant is that mere disputing a claim of default of debt cannot be a ground to reject the application under Section 9 of 'I & B Code', till the corporate debtor refer any dispute pending.

4. The only question arises for considered in this appeal is what does "dispute" and "existence of dispute" means for the purpose of determination of a petition under section 9 of the 'I & B Code'?

5. Unlike Section 7 of the Code, before making an application to the Adjudicating Authority under Section 9 of the Code, the requirements under Section 8 of the Code are required to be complied with, which reads as under: -

"8. Insolvency Resolution by operational creditor

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the

corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. —For the purposes of this section, a "demand notice" mea ns a notice served by an operational creditor to the corporate debtor

demanding repayment of the operational debt in respect of which the default has occurred."

6. In sub-section (1) of Section 8 of the 'I & B Code', though the word "may" has been used, but in the context of Section 8 and Section 9 reading as a whole, an 'Operational Creditor,' on occurrence of a default, is required to deliver a notice of demand of unpaid debt or get copy of the invoice demanding payment of the defaulted amount served on the corporate debtor. This is the condition precedent under Section 8 and 9 of the 'I & B Code', before making an application to the Adjudicating Authority.

7. Under sub-section (2) of Section 8 of the 'I & B Code', once the demand notice is served on the corporate debtor by the 'operational creditor', the corporate debtor has to bring to the notice of the operational creditor the payment of debt or dispute if any, with respect to such operational debt within 10 days of the receipt of demand notice/invoice.

8. Under Section 9 of the Code, as quoted below, a right to file an application accrues after expiry of ten days from the date of delivery of the demand notice or copy of invoice as the case may be, demanding payment under sub-section (1) of Section 8 of the 'I & B Code'. The 'operational creditor' would receive either the payment or a 'notice of dispute' in terms of sub-section (2) of Section 8 of the 'I & B Code':

"9. Application for initiation of corporate insolvency resolution process by operational creditor: *(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.

(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"

9. Thus it is evident from Section 9 of the 'I& B Code' that the Adjudicating Authority has to, within fourteen days of the receipt of the application under sub-section (2), either admit or reject the application.

10. Section 9 has two-fold situations in so far as notice of dispute is concerned. As per sub-section (5)(1)(d) of Section 9, the Adjudicating Authority can admit the application in case no notice raising the dispute is received by the operational creditor (as verified by the operational creditor on affidavit) and there is no record of a dispute is with the information utility.

12. On the other hand, sub-section (5)(ii) of Section 9 mandates the Adjudicating Authority to reject the application if the operational creditor has received notice of dispute from the corporate debtor. Section 9 thus makes it distinct from Section 7. While in Section 7, occurrence of default has to be ascertained and satisfaction recorded by the Adjudicating Authority, there no similar provision under Sections 9. The use of language in sub-section (2) of Section 8 of the 'I & B Code' provides that the *"corporate debtor shall, within a*

period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1), 'bring to the notice of the operational creditor... the existence of a dispute....".

13. Under Section 7 neither notice of demand nor a notice of dispute is relevant whereas under Sections 8 and 9 notice of demand and notice of dispute become relevant both for the purposes of admission as well as for and rejection.

14. It may be helpful to interpret Sections 8 and 9 and the jurisdiction of the Adjudicating Authority being akin to that of a judicial authority under Section 8 of the Arbitration & Conciliation Act, 1996 amended up to date, which mandates that the judicial authority must refer the parties to arbitration if the matter before it is subject to an arbitration agreement Section 8 as amended in 2015 contemplates the judicial authority to form a prima facie view in relation to existence of a valid arbitration agreement, thereby conferring limited jurisdiction.

15. Though the words 'prima facie' are missing in Sections 8 and 9 of the Code, yet the Adjudicating Authority would examine whether notice of dispute in fact raises the dispute and that too within the parameters of two definitions – 'debt' and 'default' and then it has to reject the application if it apparently finds that the notice of dispute does really raise a dispute and no other factual ascertainment is required. On the other hand, if the Adjudicating Authority finds that the notice of dispute lacks in particulars or does not raise a dispute, it may admit the application but in either case, there is neither an ascertainment of the dispute, nor satisfaction of the Adjudicating Authority.

The role of Adjudicating Authority may become easier once the information utility starts functioning for it is a record of dispute that would then be sufficient to reject the application of the operational creditor.

16. The terms "Claim", "Debt" and "Default" are define under Part I of the Code.

Section 3(6) of the Code defines "claim" to mean a right to payment and included within its ambit disputed and undisputed, legal, equitable, secured, including arising out of breach of contract. Therefore, "right to payment" is the foundation for making a claim under the Code.

Section 3(11) defines "debt" to mean, the liability or obligation in respect of a claim which is due from any person. Thus, claim transforms into a debt, financial & operational, once liability or obligation to pay gets attached to the claim.

Section 3(12) defines "default" to mean "non-payment of the debt" once it has become due and payable and the same is not repaid by the debtor. "Default" occurs on fulfilment of twin conditions:

(a) debt becoming due and payable and

(b) non-payment thereof.

17. For the purposes of Part II only of the Code, some terms/words have been defined.

Sub Section (6) of Section 5 defines "dispute", to include, unless the context otherwise requires, a dispute pending in any suit or arbitration proceedings relating to:

(a) existence of amount of the debt;

(b) quality of good or service;

(c) breach of a representation or warranty.

The definition of "dispute" is "inclusive" and not "exhaustive". The same has to be given wide meaning provided it is relatable to the existence of the amount of the debt, quality of good or service or breach of a representation or warranty.

18. Once the term "dispute" is given its natural and ordinary meaning, upon reading of the Code as a whole, the width of "dispute" should cover all disputes on debt, default etc. and not be limited to only two ways of disputing a demand made by the operational creditor, i.e. either by showing a record of pending suit or by showing a record of a pending arbitration.

The intent of the Legislature, as evident from the definition of the term "dispute", is that it wanted the same to be illustrative (and not exhaustive). If the intent of the Legislature was that a demand by an operational creditor can be disputed only by showing a record of a suit or arbitration proceeding, the definition of dispute would have simply said dispute means a dispute pending in Arbitration or a suit.

20. The Hon'ble Supreme Court in *P. Kasilingam Vs PSB College of Technology 1995 Supp.(2) SCC 348* was dealing with the question what expression 'College' includes as used in the relevant Rule. The Hon'ble Supreme Court observed what is the intent of the of the Legislature when the expression used in the definition is 'means' and when the expression used is 'includes'. At page 356 para 19 it observed as under:

> *"a particular expression is often defined by the Legislature by using the word 'means', or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word 'means' indicates that "definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition". (See: Gough V Gough: Punjab Land Development and Reclamation Corpn. Ltd Vs. Presiding Officer, Labour Court.) The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include."*

21. Admittedly in sub-section (6) of Section 5 of the 'I & B Code', the Legislature used the words '*dispute includes a suit or arbitration proceedings'*. If this is harmoniously read with Section (2) of Section 8 of the 'I & B Code', where words used are '*existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings,'* the result is disputes, if any, applies to all

kinds of disputes, in relation to debt and default. The expression used in sub-section (2) of Section 8 of the 'I & B Code' '*existence of a dispute, if any,*' is disjunctive from the expression '*record of the pendency of the suit or arbitration proceedings*'. Otherwise, the words '*dispute, if any*', in sub-section (2) of Section 8 would become surplus usage.

22. Sub-section (2) of Section 8 of the 'I & B Code' cannot be read to mean that a dispute must be pending between the parties prior to the notice of demand and that too in arbitration or a civil court. Once parties are already before any judicial forum/authority for adjudication of disputes, notice becomes irrelevant and such an interpretation renders the expression '*existence of a dispute, if any,*' in sub-section (2) of Section 8 itiose.

23. The Hon'ble Supreme Court in *Mithlesh Singh Vs. Union of India* (2003) 3 SCC 309 observed that the Legislature is deemed not to waste its words or to say anything in vain. If the intent of the legislature was to limit the dispute to only a pending suit or arbitration proceedings, sub-section (2) of Section 8 (a) would have required a notice of dispute to only refer to a record of pendency of the suit or arbitration proceedings and not to '*existence of a dispute, if any*'. In the said case, the Hon'ble Supreme Court at page 316 para 8 observed as under:

> *"It is not a sound principle of construction to brush aside word (s) in a statute as being inapposite surplusage: if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In the interpretation of statutes the*

Courts always presume that the Legislature inserted every part of the statute for a purpose and the legislative intention is that every part of the statute should have effect. The Legislature is deemed not to waste its words or to say anything in vain"

24. The statutory requirement in sub-section (2) of Section 8 of the 'I & B Code' is that the dispute has to be brought to the notice of the Operational Creditor. The two comes post the word 'dispute' (if any) have been added as a matter of convenience and/or to give meaningfulness to sub-section (2) of Section 8 of the 'I & B Code'. Without going into the grammar and punctuation being hapless victim of pace of life, if one discovers the true meaning of sub-section (2)(a) of Section 8 of the 'I & B Code', having regard to the context of Sections 8 and 9 of the Code, it emerges both from the object and purpose of the 'I & B Code' and the context in which the expression is used, that disputes raised in the notice sent by the corporate debtor to the Operational Creditor would get covered within sub-section (2) of Section 8 of the 'I & B Code'.

25. The true meaning of sub-section (2)(a) of Section 8 read with sub-section (6) of Section 5 of the 'I & B Code' clearly brings out the intent of the Code, namely the Corporate Debtor must raise a dispute with sufficient particulars. And in case a dispute is being raised by simply showing a record of dispute in a pending arbitration or suit, the dispute must also be relatable to the three conditions provided under sub-section (6) of Section 5 (a)-(c) only. The words 'and record of the pendency of the suit or arbitration proceedings' under sub-section (2)(a) of

Section 8 also make the intent of the Legislature clear that disputes in a pending suit or arbitration proceeding are such disputes which satisfy the test of sub-section (6) of Section 5 of the 'I & B Code' and that such disputes are within the ambit of the expression, 'dispute, if any'. The record of suit or arbitration proceeding is required to demonstrate the same, being pending prior to the notice of demand under sub-section 8 of the 'I & B Code'.

26. It is a fundamental principle of law that multiplicity of proceedings is required to be avoided. Therefore, if disputes under sub-section (2)(a) of Section 8 read with sub-section (6) of Section 5 of the 'I & B Code' are confined to a dispute in a pending suit and arbitration in relation to the three classes under sub-section (6) of Section 5 of the 'I & B Code', it would violate the definition of operational debt under sub-section (21) of Section 3 of the 'I & B Code' and would become inconsistent thereto, and would bar Operational Creditor from invoking Sections 8 and 9 of the Code.

27. Sub-section (6) of Section 5 read with sub-section (2)(a) of Section 8 also cannot be confined to pending arbitration or a civil suit. It must include disputes pending before every judicial authority including mediation, conciliation etc. as long there are disputes as to existence of debt or default etc., it would satisfy sub-section (2) of Section 8 of the 'I & B Code'.

28. Therefore, as per sub-section (2) of the 'I & B Code', there are two ways in which a demand of an Operational Creditor can be disputed:

i. By bringing to the notice of an operational creditor, 'existence of a dispute'. In this case, the notice of dispute will bring to the notice of the creditor, an 'existence of a dispute' under the Code. This would mean disputes as to existence of debt or default etc,; or

ii. By simply bringing to the notice of an operational creditor, record of the pendency of a suit or arbitral proceedings in relation to a dispute. In this case, the dispute in the suit/arbitral proceeding should relate to matters (a)-(c) in sub-section (6) of Section 5 and in this case, showing a record of pendency of a suit or arbitral proceedings on a dispute is enough and to intent of the Legislature is clear, i.e. once the dispute (on matters relating to 3 classes in sub-section (6) of Section 5 of the 'I & B Code') is pending adjudication, that in itself would bring it within the ambit of sub-section (6) of Section 5 of the 'I & B Code'.

29. The definition of 'dispute' for the purpose of Section 9 must be read alongwith expression operational debt as defined in Section 5(21) of I&B Code, 2016 means :

(21) "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;"

Thus the definition of 'dispute', 'operational debt' is read together for the purpose of Section 9 is clear that the intention of legislature to lay down the nature of 'dispute' has not been limited to suit or arbitration proceedings pending but includes other proceedings "if any".

30. Therefore, it is clear that for the purpose of sub-section (2) of Section 8 and Section 9 a 'dispute' must be capable of being discerned from notice of corporate debtor and the meaning of "existence" a "dispute, if any", must be understood in the context.

31. 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. However, it is capable of being discerned not only from in a suit or arbitration from any document related to it. For example, the 'operational creditor' has issued notice under Code of Civil Procedure Code, 1908 prior to initiation of the suit against the operational creditor which is disputed by 'corporate debtor. Similarly notice under Section 59 of the Sales and Goods Act if issued by one of the party, a labourer/employee who may claim to be operation creditor for the purpose of Section 9 of I&B Code, 2016 may have raised the dispute with the State Government concerning the subject matter i.e. existence of amount of debit and pending consideration before the competent Government. Similarly, a dispute may be pending in a Labour Court about existence of amount of debt. A party can move before a High Court under writ jurisdictions against Government, corporate debtor (public sector

undertaking). There may be cases where one of the party has moved before the High Court under Section 433 of the Companies Act, 1956 for initiation of liquidation proceedings against the corporate debtor and dispute is pending. Similarly, with regard to quality of foods, if the 'corporate debtor' has raised a dispute, and brought to the notice of the 'operational creditor' to take appropriate step, prior to receipt of notice under sub-section (1) of Section 8 of the 'I & B Code', one can say that a dispute is pending about the debt. Mere raising a dispute for the sake of dispute, unrelated or related to clause (a) or (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. The scope of existence of 'dispute', if any, which includes pending suits and arbitration proceedings cannot be limited and confined to suit and arbitration proceedings only. It includes any other dispute raised prior to Section 8 in this in relation to clause (a) or (b) or (c) of sub-section (6) of Section 5. It must be raised in a court of law or authority and proposed to be moved before the court of law or authority and not any got up or malafide dispute just to stall the insolvency resolution process.

32. There may be other cases such as a suit relating to existence of amount of debt stands decided and decree is pending for execution. Similarly, existence of amount of debt or quality of goods or service for which a suit have been filed and decreed; an award has been passed by Arbitral Panel, though petition under Section 34 of Arbitration and Reconciliation Act, 1996 may be pending. In such

case the question will arise whether a petition under Section 9 will be maintainable particularly when it was a suit or arbitration proceeding is not pending, but stand decided? Though one may argue that Insolvency resolution process cannot be misused for execution of a judgement and decree passed in a suit or award passed by an arbitration Tribunal, but such submission cannot be accepted in view of Form 5 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016 wherein a decree in suit and award has been shown to be a debt for the purpose of default on non-payment.

33. Thus it is clear that while sub-section (2) of Section 8 deals with "existence of a dispute", sub-section (5) of Section 9 does not confer any discretion on adjudicating authority to verify adequacy of the dispute. It prohibits the adjudicating authority from proceeding further if there is a genuine dispute raised before any court of law or authority or pending in a court of law or authority including suit and arbitration proceedings. Mere a dispute giving a colour of genuine dispute or illusory, raised for the first time while replying to the notice under Section 8 cannot be a tool to reject an application under Section 9 if the operational creditor otherwise satisfies the adjudicating authority that there is a debt and there is a default on the part of the corporate debtor.

34. The onus to prove that there is no default or debt or that there is a dispute pending consideration before a court of law or adjudicating authority shift from creditor to debtor and operational creditor to corporate debtor.

35. In view of the aforesaid discussions we hold 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, the word 'includes' ought to be read as "means and includes" including the proceedings initiated or pending before consumer court, tribunal, labour court or mediation, conciliation etc. If any action is taken by corporate debtor under any act or law including while replying to a notice under section 80 of CPC, 1908 or to a notice issued under Section 433 of the Companies Act or Section 59 of the Sales and Goods Act or regarding quality of goods or services provided by 'operational creditor' will come within the ambit of dispute, raised and pending within the meaning of sub-section (6) of Section 5 read with sub-section (2) of Section 8 of I&B code, 2016.

36. In the present case we find that the notice in Form 'D' under the I&B Code,2016, Application to Adjudicating Authority Rules, 2016, was given by appellant-'operational creditor' on 23rd December, 2016 under the said rules was also forwarded. One M/s Desai & Diwanji, Advocates, Solicitors and Notaries vide letter dated 27th December, 2016 replied to the same on behalf of respondent-corporate debtor- M/s Mobilox Innovations Private Limited, relevant of which reads as follows:

"1. At the outset, we say that you on behalf of your Client have engaged yourselves into a protracted correspondence

with our Client on the issues raised in the Notices. Our Client disputes and denies each of the statements and allegations made in the said Notices as being absolutely false, frivolous, misconceived, devoid of merits and erroneous. Nothing stated in the said Notices should be deemed to have been admitted by our Client, unless specifically admitted herein, and the same be treated as specifically set out herein and denied. Each of the contentions hereinafter contained, are in the alternative and/or without prejudice to one another.

2. At the further outset, it is respectfully submitted that the Notices are liable to be disregarded at the threshold and does not deserve to be entertained as the same are not maintainable in law.

3. It is stated that the claim on behalf of your Client as stated in the Notices are not contractually due and payable to your client, as there exist serious and bonafide dispute between your client and our client; and neither a winding up notice is maintainable nor any application before the Adjudicating Authority (as defined in the Code) for initiating a corporate insolvency resolution process under the Code.

4. The Notices are not only misconceived but also mala fide in nature and has been colourable issued as a "pressure-inducing tactic" to realise a purported debt which is not due and payable to your client by our client. The purported debt is seriously and bonafide disputed by our client and the same is not liable to be paid for reasons more specifically mentioned herein. It is well settled that neither winding up notice nor any insolvency resolution process is a legitimate means of seeking to enforce payment of an amount that is bona fide disputed by a party. A disputed sum can neither be termed as 'inability to pay' the same so as to incur the liability under Section 271(2)(e)read with Section 271(1)(a) of the Companies Act, 2013 nor can it be termed as a "default" as defined under section 3(12) of the Code read with other applicable provisions of the Code."

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e) In and around 30 January, 2015, it had come to the knowledge of our client that your client in flagrant breach of the terms and conditions of the NDA, had divulged our client's Confidential Information and approached certain clients of our client; further, your client had indulged in breach of trust and breach of the NDA by displaying our

client's confidential client information and client campaign information on a public platform i.e. at http://kirusal.pairserver.com/ ?page_id=34 and https://in.linkedin.com/ pub/vikram-agarwal/7/3al/83b.

Your client should note that any client information of any party carries intrinsic confidentiality obligations (including under the NDA) and your client's breach of the NDA violated the basic keystone of a business relationship."

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g) With respect to paragraph no.8 of the 12 December, 2016 Notice, it is denied that an amount of Rs.20,08,202.55 is an admitted debt on the part of our client based on the contracts in the form of POs placed by our Client and the corresponding Invoices raised by your client for effecting the required services for the campaign under the POs. Our client deny that it had failed to discharge its admitted liability; therefore, it is evident that it is not unable to pay its debt. It is pertinent to highlight that our client has, at no point of time, confirmed or admitted its liability towards your client to pay an amount of Rs.20,08,202.55. In this regard, our client repeats and reiterates the contents of paragraph number 6 of this reply."

37. Apart from the quoted portion, if reply dated 27th December, 2016 is read in totality, we find that the respondent-corporate debtor has not raised any dispute within the meaning of sub-section (6) of Section 5 or sub-section (2) of Section 8 of I&B Code, 2016 and in that view of the matter, merely on some or other account the respondent has disputed to pay the amount, cannot be termed to be dispute to reject the application under Section 9 of the I&B Code, 2016 as was preferred by appellant-operational creditor.

38. The requirement under sub-section (3)(c) of Section 9 while independent operational creditor to submit a certificate from the financial institution as defined in sub-section (4) of section 3 including Schedule Bank and public financial institution and like which is a safeguard prevent the operational creditor to bring a non-existence or baseless claim, similarly the adjudicating authority is required to examine before admitting or rejecting an application under Section 9 whether the 'dispute' raised by corporate debtor qualify as a 'dispute' as defined under sub-section (6) of Section 5 and whether notice of dispute given by the corporate debtor fulfilling the conditions stipulated in sub-section (2) of Section 8 of I&B Code, 2016.

39. In the present case the adjudicating authority has acted mechanically and rejected the application under sub-section (5)(ii)(d) of Section 9 without examining and discussing the aforesaid issue. If the adjudicating authority would have noticed the provisions as discussed above and what constitute and as to what constitute 'dispute' in relation to services provided by operational creditor then

would have come to a conclusion that condition of demand notice under sub-section (2) of Section 8 has not been fulfilled by the corporate debtor and the defence claiming dispute was not only vague, got up and motivated to evade the liability.

40. For the reasons aforesaid we set aside the impugned order dated 27.1.2017 passed by adjudicating authority in CP No.01/I &BP/NCLT/MAH/2017 and remit the case to adjudicating authority for consideration of the application of the appellant for admission if the application is otherwise complete.

41. The appeal is allowed with the aforesaid observations. However, in the facts and circumstances there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

New Delhi

24th May, 2017

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