

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
COMPANY APPELLATE JURISDICTION

Company Appeal (AT) (Insolvency) No. 14 of 2017

(arising out of Order dated 02.03.2017 passed by the National Company Law Tribunal, Principal Bench, New Delhi in CP (IB) No. 03(PB)/ 2017)

IN THE MATTER OF:

Philips India Limited

...Appellant

Vs

Goodwill Hospital & Research Centre Ltd.

...Respondent

Along with Company Appeal (AT) (Insolvency) No. 15 of 2017

Philips India Limited

....Appellant

Vs.

Karina Healthcare Private Limited

....Respondent

Present: For Appellant: - Mr. N.Mahabir and Mr. P.C.Arya, Advocates

**For Respondent: - Mr. S.N.Jha, Sr. Counsel, Mr. Atul T.N. and
Mr. Harsh Raghuvanshi, Advocates.**

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA,J.

As both the appeals have been preferred against common order dated 2nd March 2017 passed by 'Adjudicating Authority' (National Company Law Tribunal), Principal Bench, New Delhi, the appellant is common and common question of law is involved, they were heard together and disposed of by this common judgement.

2. Appellant, Philips India Limited (hereinafter referred to as 'Operational Creditor') had preferred two separate applications for initiation of Corporate Insolvency Resolution Process invoking provisions of Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I & B Code') against one Respondent – Corporate Debtor "Goodwill Hospital and Research Centre Limited" and another Corporate Debtor, "Karina Healthcare Private Limited". Both the applications under Section 9 were rejected by impugned common judgement passed by 'Adjudicating Authority' with observations that the remedy of the Appellant/Applicant lies elsewhere and not under the provisions of 'I & B Code'.

3. The brief fact of the case are as follows: -

The appellant entered into a Comprehensive Annual Maintenance Contract with respondent 'Goodwill Hospitals and Research Centre' on 2nd August 2011 and 11th May 2012 for the period from 1st September 2011 to 31st August 2012 and 1st September 2012 to 31st August 2013 respectively in respect of maintenance of Allum FD 20C.

4. Another Comprehensive Annual Maintenance Contract was reached between Appellant and the Respondent 'Karina Healthcare Private Limited' on 14th March 2010 for maintenance of installed machine Brilliance 64 without MRC tube coverage but with UPS, battery, injector for the period from 15th March 2010 to 14th March 2013.

5. In both the cases the grievance of the appellant is that the Respondent – Corporate Debtor defaulted to make payment of debts giving rise to filing of the petitions under Section 9 of 'I & B Code'.

6. A perusal of the impugned order would show that the 'Adjudicating Authority' noticed the work order placed by the 'Corporate Debtor' primarily related to maintenance of equipments. A bare perusal of invoices would show that it has included the charges of material and labour apart from CST, service tax, operational cess, small and secondary and higher education cess. The Learned Adjudicating Authority also noticed that there was no document placed on record certified by the 'Corporate Debtor' or its authorised representative or a medical technician that the work has been done satisfactorily in accordance with the standard of norms/quality stipulated in the agreement. The Adjudicating Authority noticed the aforesaid factors and in view of the objections raised by both the 'Corporate Debtors', pursuant to a notice issued by Appellant – 'Financial Creditor' under Section 433 and 434 of the Companies Act 1956, rejected the applications with following observations: -

“The reliance of the applicant on the provisions of Section 9 of IBC is not meritorious. The applicant has claimed and has classified itself as ‘operational creditor’ and has prayed for triggering of the Insolvency Process. A bare perusal of Section 9 of IBC would inter alia, reveal that this Tribunal is vested with the powers to reject the application of the operational creditor under Section 9(5) (d) of IBC in case it is found that notice of

dispute has been received by such an operational creditor, or there is a record of dispute with the information utility. We have been informed that no 'Information Utility' has so far been set up and we are per force to rely on the notice of dispute as sent by the respondent operational debtor to the applicant in the notice of dispute, the liability to pay has been completely denied."

7. The 'Corporate Debtors' have taken plea that there was an existence of dispute which they brought to the notice of the 'Operational Creditor' in reply to notice under Section 8 of the 'I & B Code' read with Section 9 of 'I & B Code'.

8. At this stage it is desirable to state that the Appellant – Operational Creditor issues a notice under Section 433(e) read with Section 434(1)(a) of the Companies Act on 9th March 2016 to the respondent 'Goodwill Hospital and Research Centre Ltd'. Referring to earlier notice it was pointed out that 'Operational Creditor' will be left with no alternative but to call upon the said 'Corporate Debtor' to forthwith and without any further delay make the outstanding payment or otherwise the 'Operational Creditor' have been constrained to initiate appropriate proceedings, both under Civil and Criminal law, including winding up. Similar notice under Section 433(e) read with Section 434(1)(a) dated 9th March 2016 was issued on respondent Karina Healthcare (P) Limited.

9. Learned Adjudicating Authority to appreciate the nature of the dispute while noticed the aforesaid facts, also noticed the reply dated 30th march 2016

filed by both 'Corporate Debtors' with similar plea, as apparent from impugned order and quoted below: -

"To appreciate the nature of dispute, it would be profitable to read the following part of the reply dated 30.3.2016: -

"At the outset the allegations levelled under your notice dated 9.3.2016 are being denied in its entirety for being false and concocted. It appears from the tone and tenor of your notice that your client had not apprised you with the correct facts and circumstances of the matter at hand, leading to the issuance of the misconceived and ill-founded notice dated 9.3.2016. It is brought to your kind notice that dues as claimed by your notice were never outstanding against my clients and the demand notice for the same is hopelessly barred by laws of limitation and hence untenable under law.

It is brought to your notice that our clients entered into a Comprehensive Annual Maintenance Contract with your client for the maintenance of installed Allura Xper FD 20C at its hospital to keep the same in a good and

proper working condition. It was agreed under the clause 2 of the contract that the service will be provided by your clients for the upkeep of the above mentioned medical equipment at the site of my client but your client in the most unprofessional manner failed to keep up with the contractual obligation taken by it vide contract dated 11.5.2012. It is further important to mention herein that the officials of your client had failed to visit the premises of my client in a periodic manner for the upkeep of the medical equipment due to which the functioning of the equipment was majorly effected.

It is further important to mention herein that the Allura Xper FD 20C installed at the hospital of my client was left unattended at the hospital of my client for several days due to minor problems which were to be repaired by your client but were never repaired in time causing severe financial loss due to non activity of the machine of my client. The unprofessional approach by the officials of your client has caused major loss of

reputation for my client and caused severe inconvenience to the patient awaiting their treatment at the Hospital of my client due to which the payment was deducted by my client and the same was informed to the officials of your client.

10. The Adjudicating Authority then proceeded to discuss the provisions of law including the expression 'dispute' as defined and inclusive definition as could be seen from sub-section (6) of Section 5 of the 'I & B Code' and observed: -

"dispute" includes a suit or arbitration proceedings relating to—

- (a) The existence of the amount of debt;*
- (b) The quality of goods or service; or*
- (c) The breach of a representation or warranty;*

A bare perusal of the above provision of the 'IBC' shows that a dispute could be proved by showing that a suit has been filed or Arbitration proceedings are pending. It further elaborates that the suit or arbitration should be in respect of the existence of the amount of debt, quality of goods or services, or for a breach of a representation or a warranty. Obviously, it is not an exhaustive definition but an illustrative one. It becomes evident from the expression 'includes' which immediately succeeds the word 'dispute'. Moreover, under Section 8(1) of the Code adequate room has been provided for the 'NCLT' to ascertain

the existence of a dispute. A demand notice by 'operational creditor' to an 'operational debtor' must be sent who has not paid operational dues and has committed default. Sub-section (2) of Section 8 further clarifies that the corporate debtor is obliged to bring to the notice of the 'operational creditor, within 10 days of the receipt of notice, the existence of a dispute and show the record of the pendency of the suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute. The other option is to pay the demanded amount. In the instant case, the applicant sent a demand notice which was duly received by the respondent. A reply has also been duly filed where serious dispute has been raised."

11. On perusal of the documents submitted before the Adjudicating Authority and in view of the discussions, part of which were noticed above, the Adjudicating Authority held that it was unable to fathom any material on record to dislodge the stand of the respondents that there is existence of dispute between the parties.

12. Learned counsel for the Appellant – Operational Creditor referred to sub-section (6) of Section 5 and sub-section (2) of Section 8 of 'I & B code' made the following submissions: -

Section 5(6) :

12.1 Dispute under S. 5(6) is limited to a 'proceeding' or 'lis'. The word proceeding has been qualified to be a suit or Arbitration proceeding.

- 12.2 The word 'dispute' has to be read in conjunction with Suit or Arbitration. The word 'include' is a *limitation* to 'dispute'. The word 'include' connotes 'comprise' or 'consist'. The word 'includes' ought to be read as 'means and includes'.
- 12.3 The word 'include' is used because the proceedings could be of various other nomenclature and cannot be listed by an exhaustive definition. Proceedings could include a Writ petition, Consumer Court, Rent tribunal, Labour court, mediation, conciliation etc.
- 12.4 'Dispute; connotes a claim made and denied by the other party. A suit or arbitration would ordinarily be covered by 'Dispute'. Therefore, construing 'Dispute' to situations other than a proceedings/lis would render the words 'suit or arbitration' in S. 5(6) otiose.

Section 8(2):

- 12.5 Use of the word AND envisages a lis/proceeding regarding the dispute.
- 12.6 It would not be an appropriate construction that there are two parts in Section 8(2) with the first part bring 'existence of a dispute' and the second part being 'record of the pendency of suit or arbitration...' by reading the conjunctive 'and' as disjunctive 'or'. Such a reading would render the second part otiose for the following reasons:

- (i) There is no limitation of time for the first part i.e. to notify 'existence of a dispute'. Whereas a limitation is prescribed for the second part i.e. to notify 'record of suit or arbitration', by the words 'filed before the receipt of notice'.
- (ii) The second part 'suit or arbitration' is ordinarily covered by the first part 'dispute' rendering the second part surplus age.
- (iii) It creates this discrimination without any reasonable basis.

13. Reliance was also placed on meaning of 'dispute' as per Oxford English Dictionary means a dis-agreement or argument.

14. Learned counsel for the appellant made much stress on the word 'includes' and placed reliance on decision of Hon'ble Supreme Court in *Namboodripad vs. Union of India*, (2007) 4 SCC 502; *Godfray Phillips Ltd. vs. State of UP & Others* (2005) 2 SCC 515; *The South Gujarat Roofing Tiles Manufacturers Association & Anr. Vs. The State of Gujarat*, (1976) 4 SCC 601 wherein the Hon'ble Supreme court held that there could not be inflexible rule that the word 'include' should be read always as a word of extension without reference to the context...

15. It was further contended that general word 'dispute' has to be restricted to a lis/proceedings by applying the principles of *Noscuntur a Sociis* and *Ejusdem generis*. When a general word is qualified by specific words of

narrower construction, the legislative intent is clear that the general word should be read and limited to characteristics of the specific words. Therefore, according to learned counsel for the appellant the specific words 'suit or arbitration' is ordinarily understood and covered by the general word 'dispute'.

16. Per contra, according to Learned Senior counsel for the respondents the definition provided under the sub-section (6) of section 5 of the Code is illustrative in nature and it enumerates three types of disputes that the operational creditor can have with the corporate debtor but it does not rest here. It was submitted that there could be various other types of disputes which have not been mentioned in the present definition so as such the list in the body of the definition is not exhaustive and the term **"includes"** used by the legislature cannot be read down to include only these three types of dispute and has to be assigned a wider meaning by this Hon'ble Tribunal. The conjoint meaning of the definition with the section 8(2) (a) of the Code enlarges the scope of the definition as provided in the section 5(6) of the Code and gives illustration of a pending suit or arbitration. It was submitted that after the rendering of defective services by operational creditor, to avoid the rigors of section 9 of the Code, the Corporate Debtor would, if the term dispute has to give a narrow meaning of a Suit or Arbitration proceeding be constraint to approach the Court seeking a negative declaration of non-payment which is prohibited under the Specific Relief Act. Hence, as per the submission of the respondent herein, a dispute would mean communication of a denial or repudiation of the claim of the operation creditor at first instance either when

the invoice has been raised and duly communicated to the Corporate Debtor, a Recovery Notice has been received by a Corporate Debtor or a statutory notice under section 8(2) (a) has been received by a Corporate Debtor. Further as per submission of the Respondent, no negative burden of filing a suit or arbitration could be casted upon operational creditor in view of the above submission. The word 'includes' is a very wide term and creates extensive meaning to the word and covers within its ambit all other aspects as well apart from the ones mentioned in the section 5(6) of the IBC Code 2016.

17. The question as to what does "dispute" and "existence of dispute" means for the purpose of determination of an application under Section 9 of the 'I & B Code' fell for consideration before this Appellate Tribunal in "Kirusa Software (P) Limited Vs. Mobilox Innovations Pvt. Ltd. - Company Appeal(AT)(Insol.) 06/2017". By judgement dated 24th May 2017, the Appellate Tribunal observed and held as follows: -

"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 debt 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.”

18. In the present case the Respondent – Corporate Debtor much prior to issuance of notice under Section 8 of ‘I & B code’, raised a dispute relating to quality of service/maintenance pursuant to notice under Section 433(e) and 434 (1)(a) of the Companies Act 2013 to the notice of the ‘Operational Creditor’. In that view of the matter, it can be safely being stated that there is ‘existence of dispute’ about the claim of debt.

19. Objection raised by Respondent – ‘Corporate Debtor’, not raised for the first time while replying to the notice issued by ‘Operational Creditor’ under Section 8 of the ‘I & B code’. The objection cannot be called to be mere objection raising a dispute for the sake of ‘dispute’ and/or unrelated to Clause (a) or (b) or (c) of sub-section (6) of Section 5 of ‘I & B code’. For the said reason if the Adjudicating Authority has refused to entertain the application under Section 9 of ‘I & B code’, no ground is made out to interfere with such orders.

20. We find no merit in both the appeals. They are accordingly dismissed. However, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
31st May, 2017

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