

Kirusa Software Private Ltd vs Mobilox Innovations Private Ltd on 24 May, 2017

oat "ENAH THE NAT IONAL COMPANY LAW APPELLATE TRIBUNAL
oe 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/A&BP/NCLT/MAH/2017)

IN THE MATTER OF:

"Kirusa Software Private Ltd. . . . Appellant |
: "hii pniraton Private Lid. | ..- Respondent -

Present: Mr Amar Gupta, Mr. Sanjeev Jain, Ms Apoorva Agrawal, Mr

=... . Alok Dhir, Ms Varsha Banerjee, Mr. Milan Negi and Mr. Kunal

/ i» 4Godhwani, Advocates for the appellant.

_ Mr. Devansh Mohta, Mr. Shyam Pandya, Mr. Puneet Singh :
'Bindra and Mr. Rohan Kaushal, Advocates for the respondent.

HAN SU JYOTI MUKHOPADHAYA, J.

we The. appellant --- operational creditor filed petition under section 9 of the -

"anveney & Bankruptcy Code 2016 (hereinafter referred to as q &B Code' oe 2016)
which was rejected by the 'Adjudicating Authority'. Mumbai Bench by the pugned
tier dated 27* January 2011, 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 a fi fed the
Notice of dispute raised by the Corporate . ~ Debior disclosing the Corporate Debtor
di. sputing the . - elaim made by the Petitioner. : | a Though the petitioner filed all the
invoices raised on % the Debior Company aggregating, debt .

Rs, 20, 08, 202, detail s of transaction on account of : . which debi fell dine 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 . s hereby
directed fo furnish the documents as : : prescribed u/s 9 of the I&BP Code. in
compliance of : i the Petitioner fi led the notice of disgnite 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 - . Colle, 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 __. Waived 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 27" December, 2016 has been : received by the operational creditor, the claim made by the Petitioner is hit by Section OY) (5. Mii Wd) of The , Insolvency and Bankruptcy Code, hence this Petition __ ds hereby rejected. "

lea taken by the appellant is that mere disputing a claim of default of __ be.a ground to reject the: application under Section 9 of y & B Code'; ' rate debtor refer any disptite pending. | : 2 only question arises for considered in this appeal is what does "dispute" -

; xistence of dispute" means for the purpose of determination of a petition ' on 9 of the 'I & B Code'? - | . Section 7 of the Code, before making an application to thes:

ud cating A Authority under Section 9 of the Code, the requirements under 18 of the Code are required to be complied with, which reads as under: -

. B. "Insolvency Resolution by operational creditor-

- | (Dan operational creditor may, on the occurrence: -

ee - of a defiuult deliver a demand notice of unpaid : 'operational debtor copy of an invoice demanding ote 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 shail, within a period of :

| ten days of the receipt of the demand notice or copy | of the invoice. mentioned in sub-section (7) bring to"

the notice of the operational creditor-- .

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

{bj the repayment of unpaid operational debt-- (i by sending an attested copy of the: | record of 'electronic transfer of the unpaid amourit 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
"means a notice. served by an .

operational creditor to. the. corporate debtor~.

respect at which the default has occurred."

Sub-section a of Section 8 of the 'Insolvent and Bankrupt Code' "though the word "may" is used, 'but in the context of Section 8 and Section. 9 reading as a 'whole, rational Creditor,' on occurrence of a default, is required to deliver a.

. notice of demand of »f unpaid debt or get copy of the invoice demanding payment 2 at 'the. defaulted amount served on the corporate debtor. This is the condition, set! Section 8 and 9. of the 'Insolvent and Bankrupt Code', before making an application : | cating Authority.

Under sub-section (a) of Section 8 of the 'Insolvent and Bankrupt Code', once the demand :

served on the corporate debtor by the 'operational creditor', the corporate debtor to bring to the notice of the operational creditor the payment of debt or.

"any with respect to such operational debt within. 10 days of the receipt of 4a i notice of invoice 7 | Under Section 9-of the Code, as quoted. below, a right to file an application Step "expiry of ten days from the date of delivery of the demand notice of 7 vide as the case > may be, demanding payment under sub-section (a) --

Application for initiation of corporate insolvency resolution . (c):

"process by operational creditor: (1) After the expiry of the period "

ten days from the date of delivery of the notice or invoice and payment under sub-section (1) of section 8, if the rational. creditor does not receive payment from the 'corporate debtor' or notice of the dispute under sub-section (2) of | tion 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 (1d) shall be filed in .

form and manner and accompanied with such fee as may be . GB The. operational creditor shall, along with. the.

Application furnish--

s "notice delivered by the operational creditor to the "corporate debtor;

°46) an affidavit to the effect that there is no notice given by 12 corporate debtor relating to a dispute of the unpaid "operational deb;

ya copy of the certificate from the financial institutions eo maintaining accounts of the operational creditor . <"eonfirming that there is no payment of an. unpaid operational debt by the corporate debtor; and (dy such Other information.as may be specified.

{4) An operational creditor initiating a corporate

-ctnsolvency resolution process under this section, may propose a *~ solution professional to act -as an interim resolution . (3) The Adjudicating Authority shall, within fourteen days ofthe application under sub-section (2), by ant fi) 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;

(o) there is no repayment of the unpaid operational * debt:

(¢) the invoice or notice for payment to -the corporate debtor has been delivered by the operational creditor:

ti d) no notice of dispute has been received by the _ operational creditor or there is no record a édismnite inthe infor mation ularity; and ~ / eo there is no | o disciplinary proceeding pending "

against any resolution professional Pr oposed under -.

sub-section Ab), if any. _ ick) reject the application and communicate such decision * t6-the operational creditor and the corporate debtor, if--

_ fajthe application made under sub-section (2). is: ~ : incomplete; .

| @)there has been repayment of the unpaid"

- operational debt; | __ (¢) thé creditor has not delivered the invoice or notice | for payment to the corporate debtor;

oe @ notice of dispute has been received by the.

'operational creditor or there is arecoi rd of tis spute ;

. in the information utility; or _ (@any disciplinary proceeding is pending against | " any proposed resolution professional:

ovided that Adjudicating Authority shall before rejecting. :

oh application iuicler sub clause fa) of clause fii) give a notice ae applicant to rectify the defect in his application within severt :

ny days of the date of receipt of such notice from the adjudicating (@ 'The corporate insolvency resolution. process shall : 'commence from ithe date of admission of the application under.

. sub-section t Sor this section"

has to, ither: admit or reject the application.

is with the information utility.

x Authority to reject the application if the operational creditor' t i 'evident from Section 9 of the 'I& B Code' that the Adjuaicating h within fourteen days of the receipt of the application int 'a der sub Hon 9 has two- fold situations in so far as notice of dispute is concerned. a b-section XE) of Section 9, the Adjudicating Authority. can. admit on in case no notice raising the dispute is received by the operational -

5 verified by the operational creditor on affidavit) and there is no-record-

he other 'hand, 'sub-section (S)Gi) of Section 9 mandates: the 8 of dispute from the corporate debtor. Section 9. thus makes ri Section 7. While in Section 7, occurrence of default has © be . and. satisfaction recorded by the Adjucicating Authority, there: BO lar: pr vision under Sections 9. The use of language i in sub-section @. 'of.

ofthe 1é& B B Code' provides that the "corporaie debtor shal, 'within a.

of ten days of the receipt of the demand notice or copy. of thé inoice -

in sub-section (1), 'bring to the notice of the operational creditor s:. the.

dicial authority -must refer the parties to arbitration if the matter before.

"to.van arbitration agreement 'Section 8 as amended in 2018.

tes. the judicial authority to. forma a prima facie view in relation Ss alid arbitration agreement, thereby conferring limited jurisdiction. | sh the words 'prima facie' are missing in Sections 8 and 9.of the Code, idicating Authority would examine whether notice of dispute in fact ~ ses, the dispute and that too within the parameters of two definitions = 'debt' atid then it has to reject the application if it. apparently finds that the .

dispute does really raise a dispute. and no other factual ascertainment igs. -

"On the other hand, if the Adjudicating Authority finds that the notice of ~ articulators or does not raise-a dispute, it may admit the application.

¢ Case; there is neither an ascertainment of the dispute, nor satisfaction' _ ing Authority.

© "of ' Adjudicating Authority may become easier ohee 'ithe® jon lity starts functioning for it is a record of dispute that would then to reject the application of the operational creditor.

e terms "Claim", "Debt" "and "Default" are define under Part I of the .

étion #0) of the Code defines "claim" to- mean a sight to payment. and Ain | its ambit disputed and undisputed, legal, 'equitable, secured, .

ng out-of 'breach of contract. Therefore, "right to payment" is the.

on for making'a claim under the Code.

ion 3G 1) defines "debt" to mean; the Hability or obligation in 'respect ° which is due. from any person. Thus, claim transforms into a-debt;

operational, once liability or obligation to pay gets attached 40 the © on3(4 2) define g "default" to mean "non- payment of the debt" once it :

ue and payable and the same is not cepaid 'by the debtor, "Default" : rent of twin: conditions: | | se b eoming due and payable and (b on-payment thereof. | i & purposes of Part II only of the Code, some terms/words have been.

ection (6) of Section 5 defines "dispute", to include, unless the.

herwise requires, a dispute. pending in any 'suit -or. arbitrati stence of amount of the debt _ | quality of good or service;

_ (epbreach of a representation or warranty. hé-definition-of "dispute" is "inclusive" and not "exhaustive". The same.

én wide meaning provided it is relatable to the existence of the ie Legislature was 'that a demarid by an operational creditor can n be uly by' showing 'a record of a suit or arbitration proceeding, the:

'ispute would have simply said dispute means a dispute pending i in le : tasuit. at

43.

ata'19 it Observed as under:

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:

effron'. a (See: Gough V Gough: Punjab Land Development and Reclamation + Compn Ltd Vs. Presiding Officer, Labour Court) The.

"enum that they shall include."

Admittedly in sub-section (6) of Section 5 of the 'I & B Code', "the Supreme Court in P. Kasilingam Vs. PSB College. reported 1995. Supp. (2) SCC 348 was dealing with the question "whether 'includes' as used in the relevant Rule. The Hon'ble Supreme Court said that it is the intent of, that of the Legislature when the expression 'means' the definition is 'means' and when the expression used is 'includes' 'At.

re used 'the words 'dispute includes a suit or arbitration proceedings'. : Fomiously read with Section (2) of Section 8 of the: 'I & B Code' the words used are 'existence of a dispute, if any, and record of the pendency of suit or arbitration proceedings, the result is disputes, if any, applies to all debts, in relation to debt and default, The expression used in sub-

of section 8 of the 'I & B Code' 'existence of a dispute, if any'.

in: the expression 'record of the pendency of the suit or arbitration proceedings' ; the Supreme Court in Mithiesh Singh Vs. 'Union of India (2003) . 3 'observed that the Legislature is deemed not to waste its words or: to .

in vain. If the intent of the legislature was to limit the dispute: the :

"suit or arbitration proceedings, sub-section (2) of Section 8(a), required a notice of dispute to only refer to a record of pendency of arbitration proceedings and not to 'existence of a dispute if any' but the Hon'ble Supreme Court at page 316 para 8 observed as under:

on a sound principle of construction to brush aside words of a statute as being inapposite surplusage: if they can have proper application in circumstances conceivably within the scope of the provision of the statute. in the interpretation of statutes the courts always presume that the Legislature inserted every part. :

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? statutory requirement. in sub-section (2) of Section 8. of the T& B S 1S. that the dispute | has to be brought to the notice of the Operational "

Let two comes post | the word "spate a any) have been. added as se :

& B Code'. _ Without going into the grammar and punctuation being, .

sv: victim of pace of life, if one discovers the true meaning of sub-section .

Section 8. of the T&B Code', having regard to the context of Section , 8 of the Code, it emerges. both from the object and purpose of the 4 & BL.

the context in which the. expression is used, that disputes: raised in: in the . :

by the = corporate, debtor to the 'Operational Creditor would get contention (2) of: Section 8 of the T&B Code'.

the meaning of sub-section (a) of Section 8 read. with sub-section 1 Section 3 of the 'T & B Code' clearly brings out the content. of. the code, a Corporate Debtor must raise a dispute with sufficient particulars: And .

note is being raised by simply showing a record of dispute in a pending, but, 'the dispute must also: be relatable to the three conditions "Under sub-section (6) of Section 5 (a)-(c) only. The words 'and record :

by of the suit or arbitration proceedings' under sub-section (2)(a) of * » see in: of the Legislature clear that dispute is:

the 'expression, "dispute, if any', The record of suit "or in Section 18 of the 4 & B Code', it would violate the 'definition of me inconsistent thereto, and would bar Operational Creditor 6 :

Sections 8 and 9 of the Code.

a section 6) of Section 5. read with sub-section (a) of Section 5 disputes a as to existence of debt or default etc., 1 would satisfy 3 ; 7 Section 8 of the 'T & B. Code'.

Therefore, as per sub-section (2) of the T & B Code', there are two ways no demand of an Operational Creditor can be disputed:

47.

. By bringing to the notice of an operational creditor; 'existence of . ~ a dispute'. In this case, the notice of dispute will bring to thie notice oe 'of the creditor, an 'existence of a dispute' under the Code. This. tm - would mean disputes as to existence of debt or default cic, or :

- "x By simply bringing to the notice of an operational creditor, record - of ti the pendency of a suit 'or. arbitral proceedings i An lesion fea a : dispute In this case, the e dispute in the suit/arbitral proceeding should oe 7 relate to matiers fa)-{c) i in sub-section (6) of 'Section Sanid-id th | '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, Tess | ~ ~ nee 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" ss itself would bring it within the ambit of sub-section (6) of Section's "of the 'I & B Code'.

definition of "dispute" for the purpose of Section - gy must be read : goods o or services including employment ora debt in respect of | "repayment of dues arising under any law for the time being i force 2 'and payable to the Central Government, any State Government or 'gity Toéal authority:"

| > definition of 'dispute', 'operational debt' is read together fe ection 48 clear that the intention of legislature to lay down the ature .

"aot been limited to suit or arbitration proceedings pending bit"

er proces "af. any".

operation. creditor for the: purpose of Section 9 of 1&B Code, 2 "ati L sed the dispute with the State Government concerning 'the suibjedi istence of amount of debit.and pending consideration before 'the * Jovetnment. Similarly,,a dispute may be pending in a Labour Court' stence of amount of debt. A party can move before a High Court under:

isdictions "against Government, "corporate debtor: (public. "geetor -

41s ding). Thete may be cases where one of the party has moved before the Oo:

Oure. under 'Section 433 of the Companies Act, 1956 for initiation of, ati on proceedings against the corporate debtor | and dispute is pending. a y. with regard to quality of foods, 'if the * corporate debtor' has raised a a ha ought to the notice of the operational creditor' to take appropriate 2 tor receipt of notice under sub-section (1) of Section 8 of the y & B ssin'as say that a. dispute j is spending about the debt: Mere raising a dispute e sf dispute, unrelated or related. to clause (a) or (by or x (c) of Sub-Lo (6).of§ Section 5, af not raised prior to application and not pending before | OF

petent co court of law or authority cannot be relied upon to hold that there a spruts raised by the corporate debtor. The scope of existence of * dispute' :

A hi includes pending suits and. arbitration proceedings cannot be limited ' ed, to sitit: and arbitration proceedings only. he includes: any: of her. :

3 é prior to 'Section 8 in this'in relation to clause (a) or &) or ©) of on { 8) of Section 5. It must be raised i in a court of law-or. authority and 8 sed to be moved before the court of law or authority and not: any got up OF 3 ide: dispute just to stall the insolvency resolution process.

may "be: other cases such as a suit relating to existence ofa amount of wg?

id decided and decree i is pending for execution. 'Similarly, existence f _ dete or quality of goods or service for which a suit have been 5 led ad | AF. dbase and Reconciliation Act, 1996 may be pending. Tn Ch.

2°.

zi estion: will arise whether a petition under Section... wi : ularly when: it was a suit or arbitration proceeding. j nd decided? T hough one may arcue that insolvency resolutio cutority "to > verify adequscy of the dispute: tt prohibits om .

"and arbitration proceedings. Mere a dispute giving a colour. of.

default on the part o of the coiporate debtor.

yt us toy prove that there. is no: default or debt.or that there j is a di spat = vside ation before a court of law or adjudicating authority shift ve 1 | o- debtor and operational creditor to corporate debtor. --

in view.of the aforesaid discussions we hold that the dispute as defined in ae a) of Séction.5 cannot be limited to a pending proceedings or "lis, innited ambit of suit or arbitration. proceedings, the word "includes"

! a "means and includes" including the proceedings initiated or -

ngb sfore c consumer court, tribunal, labour court or mediation, conciliation:

action 3 is taken by corporate debtor under any act or law including . 'hile replying to a. notice under section 80 of CPC, 1908 « or toa notice issued -

Se ion 433 of the Companies Act or Section 59 of the Sales and. Goods . arding quality of goods or services provided by | "operational creditor" . in ¢ within the ambit of

dispute, raised and pending within the meaning of Section 5 read with sub-section (2) of Section 8 of I&B code, < 1! ie: present Gabe we find that the notice in Form. 'pe under the Iap * ' lication to Adjudicating Authority Rules, 2016, was given aby = eben creditor' on 23rd December, 2016 under the said rules was .

forwarded. 'One. M/s Desai & Diwanii, "Advocates, Solicitors and Notaries.

lated 278 December, 2016 replied to the same on behalf of respondents debtor: Mis Mobilox Innovations Private Limited, relevant of which'.

have changed yourselves: into a protracted correspondence.

ith o our Client on the issues raised in the Notices. Our . Client disputes and denies each of the statements and false, - frivolous, misconceived, devoid of merits: and "ervoncons. Nothing stated i in 1 the said Notices "should be , deemed to have been - admitted by our Client... unless * specifically admitted herein and the same be treated as :

Notices are liable to be disregarded at the threshold and :

does not deserve to be entertained as the same are not --

- 2 'maintainable in law.

3-H is stated that the claim on behalf of your Client is stated | ; 7 the Notices are not contractually due and payable to you lent, as there exist serious and bonafide dispute between us

- your client and our client; and neither a winding up notice is "é

- : maintainable nor any application before the Adjudicating. -

Authority (as defined in the Code) for initiating a 'corporate :

| "insolvency resolution process under the Code;

'as Seriously and bonafide disputed by our client and the same

-with other applicable provisions of the Code."

knowledge of our client that your client in a flagrant breach of our 'client: further, your client had indulged in .

search: of trust-and breach of the NDA by displaying our"

4: The Notices are not only misconceived but also mala fide in nature and has been colourable issued as. a "pressure is not liable to be paid for reasons more specifically notice nor any insolvency resolution process is a legitimate bona fide disputed by a party A disputed sum can neither be termed as 'inability to pay' the said SO as 101 incur the of the: Companies Act, 2013 nor can it be termed as: 'a : oft the terms and conditions of the NDA, had divulged our mo client's Confidential Information and approached certain | atin 10 your client by ont client. "Phe piped deb We :

"mentioned herein. It is well settled that neither winding up"

means of seeking to enforce payment of an amount that is liable under Section 271 OMe freed with Section 271 a a , .

7 "default" as defined under section 3(12) of the Code read :

ejln and around 30 January, 2015, it had come to the ~ oe

- cites confidential - ghent: information and client...

sep: dfeisal pui server com! page _id=34-- vend .

. https://www.linkedin.com/pub/vikram-agarwal/77.3al/83b.. . Your client should note that any client information of 'any-

- party & carries intrinsic: confidentiality obligations (including es under the NDA o and your client's 5 | breach of the NDA + violated the basic keystone of a business relationship."

. : Notice it is. denied that a an amount of Rs. 20,08, 202. \$5 is. aint .

é x admitted debt on the part of our client based On the : "contracts in the form of POs placed by our Client and the -

2 corresponding Invoices raised by your client for Bene -

Oe the required services for the campaign under the POs. Our -

os client deny: that it had. failed to discharge its admitted \ a liability; : therefore, it is evident that it is not unable to pay : . as debt. It is pertinent to highlight that our client has, at the point of time, confirmed or admitted its liability towards

- your. client to pay an amount of Rs. 20,08, 202.55. In this:

regard otir - client repeats and reiterates the contents: of. o ve - paragraph number 6 of this reply. ° from the quoted portion, if reply dated 27" December, 2016 ig read we find that the respo ndent-corporate debior has not raised any dispu eaning of sub-section (6) of Section \$ or sub-section (2) of Sectix &, 2016 and in that : view of the maitér,' merely on some oF 6 ber.

ewéspondent has. dgputed to. pay, the amount, cannot be termed to be nd ie which is a safeguard prevent the. operational creditor to b Age ceo or baseless claim, similarly the ailjudicating authority. i is required .

ine s before admitting or rejecting an: application under Section 9 wheth ape raised by corporate debtor qualify asa 'dispute" as. defined under: -

10 (6) of Section 5 and. whether notice of dispute given by the corporate vs filling the conditions stipulated in sub-section (2) of Section 8 of RB: * present case the adjudicating authority has acted mechanically and Be 'the' application 'under. sub-section (8\GiNd)- of Section. 9 We and discussing the aforesaid issue. Ifthe adjudicating authority woul a | edithe provisions as s discussed above and what constitute arid ast dispute' in relation to services provided by operational creditor then.» ome: to a 'conclusion that condition of demand notice unde of Section 8 has not been fulfilled by the corporate debtor. and the claiming dispute was not only vague, got up and motivated to evade the.

rhe reasons aforesaid we set. aside the iinpugned order dated 27, 1 2017 - y adjudicating eutherity in cP No.o &BPINCLTIMAHV2017 and- , to adjudicating authority for consider ation of the application of the. admission if the application i is otherwise complete, . . | & appeal i is allowed with the aforesaid observations, However, in p the:

'itnstandes there shall be no order as to cost.

echnical)" es a "Chsepeson