IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION

Company Appeal (AT) (Insolvency) No. 29 of 2017

(arising out of Order dated 6th March 2017 passed by NCLT, Mumbai Bench in C.P.No. 20/I & BP/NCLT/MAH/2017)

M/s MCL Global Steel Pvt. Ltd. & Anr. ...Appellants

Vs.

M/s Essar Projects India Ltd. & Anr. .... Respondents

Present: For Appellants: Mr. Alok Dhir, Ms. Versha Banerjee, Mr. Milan Singh Negi with Mr. Kunal G.Advoates for the appellants

For Respondents: Mr. Ankoosh Mehta with Mr. V.Tandon and Mr. Karan Khanna, Advocates

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA,J.

This appeal has been preferred by appellant M/s MCL Global Steel Pvt. Ltd. & Anr. (hereinafter referred to as 'Corporate Debtor') against order dated 6th March 2017 passed by 'Adjudicating Authority' (National Company Law Tribunal), Mumbai Bench in C.P.No. 20/I & BP/NCLT/MAH/2017, whereby the application preferred by Respondents M/s Essar Projects India Limited and Anr. (hereinafter referred to as 'Operational Creditor') under section 8 and 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I & B Code') read with Rule 6 of the Insolvency and bankruptcy (Application to Adjudicating Authority), Rules 2016 (hereinafter referred to as 'Adjudicating Authority') Rules 2016 for initiation of Corporate Insolvency Resolution Process has been admitted. The Adjudicating Authority while

declaring moratorium also passed certain directions, ordered to issue public announcement of the corporate insolvency resolution process and appointed an Interim Resolution Professional to carry the function of the company in terms of 'I & B Code'.

2. Learned counsel for the appellant while assailing the impugned order taken following plea and grounds: -

(i) The impugned ex parte order was passed by 'Adjudicating Authority without prior notice or intimation of hearing to the Appellants-Corporate Debtors against the principles of rules of natural justice.

(ii) Learned 'Adjudicating Authority' has failed to notice that existence of dispute between the parties which 'Operational Creditor' did not brought to the notice of the 'Adjudicating Authority' while getting an ex parte order. If notice would have been served on 'Corporate Debtor' this fact would have been highlighted.

(iii) The Respondents - Operational Creditors concealed the material fact that it issued a winding up notice under Section 433 of Companies "Act 1956 which was duly replied by Appellant – Corporate Debtor vide reply dated 21st November 2016 disputing the entire claim. Even before issuance of notice under Section 8 of 'I & B Code', the Appellant – Corporate Debtor by its email dated 5th March 2014, 20th

August 2013, 27th October 2014, 29th October 2014, 15th November 2014, 16th November 2014 and 30th November 2014 had specifically raised its concern with regard to quality of construction work and non-completion of the work within time frame. The aforesaid correspondences clearly demonstrate the existence of dispute between the parties.

3. Learned counsel appearing on behalf of the Appellant submitted that the word "includes" as mentioned in sub-section (6) of Section 5 of 'I & B Code' though is not exhaustive but an illustrative one. The word "includes" connote other dispute, if any, raised apart from the dispute mentioned in Section 8 of the 'I & B Code'.

4. It was further contended that under sub-section 5(2)(d) of Section 9, the 'Adjudicating Authority' is independent to reject an application if notice of dispute has been replied by the 'Corporate Debtor' and the same is not brought to the notice of the 'Adjudicating Authority'. The 'Adjudicating Authority' on wrong assumption of non-pendency of suit for arbitration proceedings accepted the plea taken by the operational creditor.

It was also contended that the dispute raised by Appellant is bonafide and fall within the meaning of 'dispute' under sub-section (6) of Section 5 of 'I & B Code'.

5. Learned counsel appearing on behalf of the Respondent – Operational Creditor while contended that the appeal is not maintainable at the instance of 1st Appellant and that the 2nd Appellant has no legal authority whatsoever

to initiate a proceeding on behalf of the 'Corporate Debtor' after appointment of Interim Resolution Professional, further contended that the Appellants themselves have concealed material facts by making false and baseless submissions. It was submitted that the e-mails as referred to above, were addressed in the year 2014, however, based on the instructions of the Directors, one Mr. Arvind Pujari an Officer working in the Accounts Department of 'Corporate Debtor' by e-mail dated 21st November 2015 intimated the 'Operational Creditor' that he will be paid its dues for its services. Moreover, no such payment was made. The 'Corporate Debtor' had agreed to make part payment by 1st December 2015 which again it failed to pay and all the time the 'Corporate Debtor' neglected to repay the unpaid amount to the 'Operational Creditor'.

6. Learned counsel for the respondent while submitted that demand notice under sub-section (1) of Section 8 was sent in Form-3/Form-4 of the Rules on 28th December 2016, as per the Rule, the 'Corporate Debtor' failed to provide a record of the pendency of legal proceedings with regard to alleged dispute. On the other hand, upon receipt of Demand Notice, the 'Corporate Debtor' addressed a letter dated 3rd January 2017 and, inter alia, admitted that the 'Corporate Debtor' is presently under distress and seeking its rehabilitation and restructuring of loans given by the banks and financial institutions.

7. It was contended that as per the scheme of the Code particularly sub-section (2) of Section 8, there should be an "existence of a dispute, if any," and a record of pendency of the suit or arbitration proceedings filed before

receipt of such notice or invoice in relation to such dispute the 'Corporate Debtor' has to meet the dual threshold of: -

(a) identifying the existence of a dispute; and

(b) providing a record of the pendency of a suit or arbitration proceedings in relation to such dispute.

It was further submitted that the aforesaid scheme of the Code and Rules are reinforced twice i.e. at the time of sending the demand notice and at the time of receipt of the reply from a 'Corporate Debtor'. The notice of dispute has to disclose pendency of the proceedings which the Appellant – 'Corporate Debtor' failed to bring on record. Learned counsel referred to the "notice of dispute" as mentioned in Section 9 and submitted that the same necessarily be read as a notice under sub-section (1) of Section 8.

8. It was contended that as per Rule 24 of the National Company Law Tribunal, a copy of the application was provided to the 'Corporate Debtor' and a copy of the same was served by letters dated 16th February 2017 and 28th February 2017 respectively. The Code does not envisage any other notice to be provided to the 'Corporate Debtor' except for service of the application at the time of filing. Therefore, it was contended that under the 'I & B Code' the 'Corporate Debtor' has no right of hearing at the stage of admission of an application filed under the Code. The detailed arguments were advanced on the question but as such issues have already been decided by this Appellate Tribunal, we are not reproducing the detailed arguments.

9. It was further contended that there is no adverse civil consequences for the 'Corporate Debtor' at the stage of admission which may attract the principles of natural justice.

10. From the impugned order passed by the 'Adjudicating Authority' it is clear that the 'Corporate Debtor' was not heard before the admission of the application. The Respondent – Operational Creditor has also not disputed the aforesaid facts.

11. The 'Adjudicating Authority' in impugned order, noticed the submission made on behalf of the Respondent – Operational Creditor and observed as follows: -

> "6. *The Petitioner Counsel submits, to say that dispute is in existence, mere mentioning in the notice that dispute is in existence in relation to impugned debt is not sufficient, the corporate debtor has to prove that the Company already raised such dispute either in court proceeding or Arbitration before receipt of notice u/s 8 of the Code, here no such proceeding being pending before any court of law or in Arbitration proceeding before receipt of the notice supra, the debtor company merely mentioning dispute in the reply to the notice u/s. 8 will not amount to dispute in existence, hence the counsel for the petitioner prays this Bench to admit the petition by construing no dispute is in existence against the debtor as on the date of receipt of notice u/s. 8 of the Code.*

7. *Since the Corporate Debtor, as stated by the Petitioner, admitted issuing invoices in relation to the amount mentioned, the grievance remained in the reply would be regarding quality of construction, the timeline of construction, loss due to delay in construction etc. Since the same is not disputed before any court of law before receipt of notice issued u/s. 8 of the Code, the dispute raised in the corporate debtor reply to the notice u/s. 8 of the Code cannot be treated as dispute in existence at the time of receipt of the notice u/s 8 for two reasons, one — due to admission of raising invoices and two — due to raising it as dispute in the reply only after notice u/s 8 has been issued.*

8. *On perusal of definition of dispute u/s 5(6) and on perusal of section 8 (2)(a), it is evident that "dispute in existence" means and includes raising dispute in court of law or Arbitral Tribunal before receipt of notice u/s 8 of the Code.*

12. The question as to whether a prior notice before admission of an application for Corporate Insolvency Resolution Process is required or not was considered by this Appellate Tribunal in "M/s Innoventive Industries Ltd., Company Appeal (AT) (Insolvency) Nos. 1 and 2 of 2017" decided on 15th May 2017.

13. In the said case the Appellate Tribunal after detailed deliberations with regard to the provisions of the Act particularly amended Section 424 of the Companies Act, as amended vide XIth Schedule of Article 32 of Section 255 of the 'I & B Code' and held as follows:-

"49. As amended Section 424 of the Companies Act, 2013 is applicable to the proceeding under the I&B Code, 2016, it is mandatory for the adjudicating authority to follow the Principles of rules of natural justice while passing an order under I&B Code, 2016. Further, as Section 424 mandates the 'Tribunal' and Appellate Tribunal, to dispose of cases or/appeal before it subject to other provisions of the Companies Act, 2013 or I&B Code 2016 such as, Section 420 of the Companies Act 2013 was applicable and to be followed by the Adjudicating Authority.

50. One "Sree Metaliks Limited & Anr." moved before the Hon'ble Calcutta High Court in Writ Petition 7144 (W) of 2017 assailing the vires of Section 7 of the Code, 2016 and the relevant rules under the Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 (hereinafter referred to as I&B Rules, 2016). The challenge was premise upon the contention that the Code, 2016 does not afford any opportunity of hearing to a corporate debtor in a petition under Section 7 of I&B Code, 2016. The Hon'ble High Court noticed relevant provision of Section 7 of the I&B Code 2016, the definition of 'adjudicating authority' as defined under Section 5(1), Section 61 of the I&B Code, 2016

relating to appeal and amended Section 424 of the Companies Act, 2013 and by judgment dated 7th April, 2017 held as follows: -

> *"..... However, it is to apply the principles of natural justice in the proceedings before it. It can regulate it own procedure, however, subject to the other provisions of the Act of 2013 or the Insolvency and Bankruptcy Code of 2016 and any Rules made thereunder. The Code of 2016 read with the Rules 2016 is silent on the procedure to be adopted at the hearing of an application under section 7 presented before the NCLT, that is to say, it is silent whether a party respondent has a right of hearing before the adjudicating authority or not.*
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> *Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of the natural justice above anything else. It also allows the NCLT and NCLAT the power to regulate their own procedure. Fetters of the Code of Civil Procedure, 1908 does not bind it. However, it is required to apply its principles. Principles of natural justice require an authority to hear the other party. In an application under Section 7 of*

the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read into in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application. The NCLT is, therefore, obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document as the NCLT may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under Section 7 of the Code of 2016. Section 7(4) of the Code of 2016 requires the NCLT to ascertain the default of the corporate debtor. Such

ascertainment of default must necessarily involve the consideration of the documentary claim of the financial creditor. This statutory requirement of ascertainment of default brings within its wake the extension of a reasonable opportunity to the corporate debtor to substantiate by document or otherwise, that there does not exist a default as claimed against it. The proceedings before the NCLT are adversarial in nature. Both the sides are, therefore, entitled to a reasonable opportunity of hearing.

The requirement of NCLT and NCLAT to adhere to the principles of natural justice and the fact that, the principles of natural justice are not ousted by the Code of 2016 can be found from Section 7(4) of the Code of 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 4 deals with an application made by a financial creditor under Section 7 of the Code of 2016. Sub- rule (3) of Rule 4 requires such financial creditor to despatch a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor.

Rule 10 of the Rules of 2016 states that, till such time the Rules of procedure for conduct of proceedings under the Code of 2016 are notified, an application made under Sub-section (1) of Section 7 of the Code of 2017 is required to be filed before the adjudicating authority in accordance with Rules 20, 21, 22, 23, 24 and 26 or Part-III of the National Company Law Tribunal Rules, 2016.

Adherence to the principles of natural justice by NCLT or NCLAT would not mean that in every situation, NCLT or NCLAT is required to afford a reasonable opportunity of hearing to the respondent before passing its order.

In a given case, a situation may arise which may require NCLT to pass an ex-parte ad interim order against a respondent. Therefore, in such situation NCLT, it may proceed to pass an ex-parte ad interim order, however, after recording the reasons for grant of such an order and why it has chosen not to adhere to the principles of natural justice at that stage. It must, thereafter proceed to afford the party respondent an opportunity of hearing before confirming such ex-parte ad interim order.

In the facts of the present case, the learned senior advocate for the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The respondent was not heard by the NCLT before passing the order.

It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.

In such circumstances, the challenge to the vires to Section 7 of the Code of 2016 fails."

14. The Appellate Tribunal in the said case of "M/s Innoventive Industries Limited" also noticed Clause (3) of Rule 4 of Insolvency and bankruptcy (Application to Adjudicating Authority), Rules 2016 and observed :-

"51. As per clause (3) of Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the financial creditor is required to despatch forthwith a copy of the application filed with the

'adjudicating authority' to the corporate debtor as quoted below:-

> *"4(3) The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor."*

Thus it is clear that sub-Rule (3) of Rule 4 of I&B (Application to Adjudicating Authority) Rules, 2016, mandates the applicant to dispatch forthwith, a copy of the application "filed with the Adjudicating Authority". Thereby a post filing notice required to be issued and not as notice before filing of an of application. The purpose for the same being to put corporate debtor to adequate impound notice so that the Corporate Debtor may bring to the notice of Adjudicating Officer "mitigating factor/records before the application is accepted even before formal notice is received."

52. The insolvency resolution process under Section 7 or Section 9 of I&B Code, 2016 have serious civil consequences not only on the corporate debtor - company but also on its directors and shareholders in view of the fact that once the application under Sections 7 or 9 of the I&B Code, 2016 is admitted it is followed by appointment

of an 'interim resolution professional' to manage the affairs of the corporate debtor, instant removal of the board of directors and moratorium for a period of 180 days. For the said reason also the Adjudicating Authority is bound to issue limited notice to the corporate debtor before admitting a case under section 7 and 9 of the 'I & B Code', 2016.

53. In view of the discussion above, we are of the view and hold that the Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the financial creditor and to find out whether the application is complete and or there is any other defect required to be removed. Adherence to Principles of natural justice would not mean that in every situation the adjudicating authority is required to afford reasonable opportunity of hearing to the Corporate debtor before passing its order.

15. In the aforesaid case of "M/s Innoventive Industries Limited", the Appellate Tribunal also noticed the purpose of issuance of notice and held: -

"55. Process of initiation of Insolvency Resolution process by a financial creditor is provided in Section 7 of the I & B Code. As per sub-section (1) of Section 7 of the

I & B Code, the trigger for filing of an application by a financial creditor before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Sub-section (2) of Section 7 provides that the financial creditor shall make an application in prescribed form and manner and with prescribed documents, including:

i. "record of the default" recorded with the information utility or such other record or evidence of default as may be specified;
ii. the name of the resolution professional proposed to act as an interim resolution professional; and
iii. any other information as may be specified by the Board."

16. In view of the decision of Appellate Tribunal in "M/s Innoventive Industries Limited", while we accept the submissions made on behalf of the Appellant that the principle of rules of natural justice was violated, also reject the contention made by learned counsel for the respondents that no such notice is required or that there is no civil consequences, if any such application for initiation of Corporate Insolvency Resolution Process is initiated.

17. The next question arises for consideration is what does "dispute" and "existence of dispute" means for the purpose of initiation of Insolvency Resolution Process pursuant to application under Section 9 of the 'I & B Code'. The aforesaid issue was considered by this Appellate Tribunal in

"Kirusa Software Private Limited Vs. Mobilox Innovations Private Limited, Company Appeal (AT) (Insolvency) No. 06 of 2017". Having noticed different provisions of the 'I & B Code' including meaning of "dispute" as defined under sub-section (6) of Section 5, the expression "existence of dispute", if any", used in sub-section (2) of Section 8 of 'I & B Code'. This Appellate Tribunal observed and held as follows: -

"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.

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.

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'."

18. The Appellate Tribunal also noticed various natures of "existence of dispute in "Kirusa Software Private Limited Vs. Mobilox Innovations Private Limited" and held:-

"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.

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."

19. What appears from the present case is that much before enactment of the Insolvency and Bankruptcy Code 2016, in or around 2013, the Appellant

– Corporate Debtor' entered with respondent M/s Essar Projects India Limited and Another Memorandum of Understanding for construction of work at 0.2MTPA Steel Melt Shop Complex at Pithampur, Dist. Dhar, Madhya Pradesh. For one or other reason the outstanding dues in connection with construction work were alleged to have not been paid by appellant to the Respondent - Operational Creditor. The respondent by a notice dated 26th October 2016 while referred to a Memorandum of Understanding dated 27th June 2013 mentioned :-

> *"7. We state that the Work Orders issue by MCL in connection with the Project were duly completed by our Client as per the work set out in each of such Work Orders. It is extremely pertinent to note that our Client has successfully completed the Project within the contractual period i.e. on November 30, 2014 as per the terms of the Work Orders and has handed over possession of the plant to MCL by December 31, 2014. As MCL is aware, after the completion of certain additional work i.e. by January 2015, the plant has been in operation. We further state that our Client has also removed its machinery and other objects from the Project premises in furtherance of the completion of the Project as per the Work Orders.*
>
> *8. The aforesaid clearly evinces that our Client has performed its entire obligation in accordance with*

the terms and conditions agreed upon with MCL and completed the project within the defined time period.

9. As per the terms of the MOU and the work Order, our Client regularly raised the requisite invoices with respect to work carried out and the invoices were received and accepted by MCL (the "Invoices"). We state that a substantial portion of the Invoices currently remain outstanding (the "Unpaid Invoices"). We further state that an amount aggregating to INR 6,83,06,077 (Indian Rupees Six Crores EightyThree Lakhs Six Thousand Seventy Seven only) along with interest at the rate of 18 (eighteen) percent per annum is due and payable to our Client under such Unpaid Invoice (collectively referred to as, the "Debt")."

20. In the light of the above, the appellants were called upon by Respondent – Operational Creditor to repay the dues of Rs. 6,83,06,077 (Rupees Six Crores Righty Three Lakhs Six Thousand Seventy-Seven only) along with interest @ 18%. It was mentioned that the said notice issue under Section 433(e) read with Section 434 of the Companies Act 1956.

21. Referring to the aforesaid notice dated 26th October 2016 (received on 29th October 2016) by letter dated 21st December 2016 the Corporate Debtor opposed the contentions and disputed the claim, relevant to which are quoted below: -

"1. At the outset contents of notice under reply are incorrect, misleading, therefore denied. Contents of notice are not to be deemed to have been admitted unless admitted specifically.

2. Provisions contained in Section 434 of Companies Act, 1956 are not available to your client to institute a proceeding for winding up of Company for the following reasons:

i. My client seriously dispute the amount sought to be recovered by your client under the terms of MOU dated 27.06.2013.

ii. There are very serious disputes between your client and my client about the outstanding amount sought to be recovered by your client.

iii. There are serious disputes between your client and my client regarding qualify of construction and time line within which construction was to be completed.

iv. My client has made huge payments in-between 30.10.2012 to 03.11.2014. Accounts of your client have not been reconciled with my client.

v. Due to delayed construction, my client has suffered losses. No completion certificate is issued. Outstanding bills are not verified and certified.

vi. There are very serious disputes about enforceability of the Contract between my client and your client.

vii. Amount sought to be recovered is not admitted by my client as alleged by you.

3. In addition to above issues there are various other issues which are involved in the matter which are seriously opposed by my client. My client opposes the endeavour/effort on the part of your client to recover money from my client.

4. It is submitted that the issue-area of dispute between your client and my client is of recovery of contract amount and those issues and area of disputes are yet to be finally settled.

5. It is submitted that by issuing the notice under reply your client is misusing the provisions contained in Companies Act, 1956. Winding up notice in the aforementioned back ground of the facts and circumstances is nothing but arms twisting which is not permissible in law.

8. Without prejudice to above, please note that recovery of contract amount sought by your client is under dispute and said dispute cannot be resolved by the Company court. The dispute between your client and my client can be resolved by alternative dispute resolution mechanism.

10. Please note that dispute raised by your client is in persona and is covered by Arbitration Clause. Dispute

raised by your client is not in rem therefore not required to be adjudicated by courts and public tribunals."

22. From the aforesaid notice dated 26th October 2016 issued by Respondent – Operational Creditor under Section 433(e) and 434 of the Companies Act 1956 and the reply thereto given by Appellant – Corporate Debtor by this letter dated 21st November 2016 it is clear that there is an "existence of a dispute" between the parties regarding: -

(i) Quality of construction

(ii) Tying time line within its construction was to be completed, but not completed.

(iii) a huge amount has been paid by 'Corporate Debtor' to the 'Operational Creditor' in between 30th December 2012 to 3rd November 2014.

23. This fact was also highlighted by the Appellant – Corporate Debtor while it filed a reply to the notice issued by the 'Operational Creditor' under sub-section (2) of Section 8 of the 'I & B Code'.

24. The e-mail issued by Appellant – Corporate Debtor as referred to above and not disputed by the Respondent – Operational Creditor also relates to the quality of work and non-completion of work within time.

25. In "Kirusa Software Private Limited", this Appellate Tribunal held that for the purpose of sub-section (2) of Section 8 and Section 9 "dispute" can be of being discerned from notice of 'Corporate Debtor' and meaning of "existence of a dispute", if any, must be understood in the context of the dispute of 'I & B Code' 2016 must relate to satisfy nature of clause (a), (b) or (c) of sub-section

(6) of Section 5 i.e. existence of amount of debt or quality of goods or services or breach of representation or warranty. It can be of being discerned not only from a suit or arbitration from documents related to it but form other factors like notice issued under Section 8 of Code of Civil Procedure, 1908 prior to initiation of suit against 'Operational Creditor' which is disputed by 'Corporate Creditor' etc.

26. In the present case as admittedly a notice was issued by Respondent – Operational Creditor under Section 433(e) and 434 of the Companies Act 1956 in 28th October 2016 which was disputed by Appellant – 'Corporate Debtor' objecting quality of service and non-completion of the work within time which is much prior to enactment of 'I & B Code', 2016, and notice under Section 8 of the 'I & B code', we hold that there is an "existence of dispute" for which the petition under Section 9 preferred by Respondent – Operational Creditor was not maintainable.

27. Further, as the impugned order dated 6th March 2017 was passed by 'Adjudicating Authority without notice to the Appellant – Corporate debtor in violation of principle of natural justice and the Adjudicating Authority failed to notice the relevant facts that there was a dispute raised and replied by the Corporate Debtor, the impugned order passed by Adjudicating Authority cannot be upheld.

28. We, accordingly, set aside the impugned order dated 6th March 2017 passed by the Adjudicating Authority, Mumbai Bench in C.P.No. 20(I) & BP/NCLT/MAH/2017 and make the Appellant – Corporate Debtor free from all rigour of Corporate Insolvency Resolution Process.

29. In the result the order of Moratorium, freezing of bank accounts, appointment of Interim Resolution Professional, advertisement issued notice to the persons about initiation of 'Corporate Insolvency Resolution Process etc. all stand set aside.

30. It will be open to the Board of Directors to take over the possession and function of the Appellant company with immediate effect. The Tribunal is directed to close the proceedings and dismiss the application in view of the order passed by Appellate Tribunal and determine the fees of Interim Resolution Professional to which he will be entitled for the period he has performed the duty to be borne by the respondent – Operational Creditor.

31. The appeal is allowed with the aforesaid observations and directions. 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
31st May, 2017

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