NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 256 of 2017

[arising out of Orders dated 11th July, 2017 by NCLT, Mumbai Bench, Mumbai in Case Nos. CP No. 37/I&BP NCLT/MB/MAH/2017]

IN THE MATTER OF:

AVON Capital,
through Proprietor of
Ravindra Gopal,
801, Gemini Spaces,
Malhotra Chambers,
Deonar,
Mumbai – 400 088. **...Appellant**

Versus

M/s. Tattva & Mittal Lifespaces Pvt. Ltd.
B-48, TODI Estate,
Sunmill Compound,
Lower Parel (W),
Mumbai – 400 013. **...Respondent**

Present:

For Appellant : **Mrs. Avnish Ahlawat, Advocate**

For Respondent : **Shri Aditya Thakkar and Shri Ranjit Shetty, Advocates**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The appellant preferred an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') for

initiation of 'corporate insolvency resolution process' against M/s. Tattva & Mittal Lifespaces Pvt. Ltd. (Corporate Debtor); the Adjudicating Authority (National Company law Tribunal), Mumbai Bench by the impugned order dated 11th July, 2017 rejected the same on two grounds namely:

(i) That the appellant do not come within the meaning of 'Operational Creditor'; and

(ii) There is an 'existence of dispute'.

2. The question arises for consideration in this appeal is whether the appellant comes within the meaning of 'Operational Creditor' as defined in Section 5(20) r/w (21) of the I&B Code and whether there is an 'existence of dispute' between the 'appellant' and the 'Corporate Debtor'.

3. The appellant has brought on record the application under Section 9 of the I&B Code which is in Form 5 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to suggest that the appellant comes within the meaning of 'Operational Creditor'. The relevant evidence in support of the claim is enclosed with Form 5. The claim of appellant, in fact, is based on the letter dated 7th January, 2016 issued by the 'Corporate Debtor'. According to learned counsel for the appellant, by the letter aforesaid, the 'Corporate Debtor' engaged the appellant to provide services in lieu of which retainer fee was chargeable; for advisory and ancillary services separate fees were chargeable on receipt of the term-sheet from the investor. The appellant was also entitled for success fee once the funds were remitted into the accounts of the appellant by the parties.

4. The case of the respondent is that no debt is due to the appellant and there is no default; the debt has been disputed by the appellant.

5. Learned counsel appearing on behalf of the respondent submitted that merely production of invoices will not suggest that the appellant has provided services to the respondent. The burden of proof to show that the appellant rendered services is squarely on the appellant, which he failed to prove.

6. Further, according to the learned counsel for the respondent no new facts have been brought to the notice of this Appellate Tribunal by the appellant. Reliance has also been placed on the decision of the Hon'ble Supreme Court in "*Modern Insulators Ltd. vs. Oriental Insurance Co. Ltd. – (2000)2 SCC 734"*.

7. However, such submission cannot be accepted as the appeal under Section 61 cannot be treated to be continued suit or proceeding pending before the Court of law, as no decision on merit is required to be passed by the Adjudicating Authority for admitting or rejecting an application under Section 7 or 9 or 10 of the I&B Code. It is also settled law that initiation of a 'corporate insolvency resolution process' is not an adversary litigation nor is a money claim. If the application is complete and the Adjudicating Authority is satisfied that there is a 'debt' and 'default' on the part of the 'Corporate Debtor', the application is to be admitted. On the other hand, if the application is incomplete, the applicant should be asked to remove the defects failing which the application under Section 7 or 9 or 10 can be rejected.

8. In an application under Section 9, it is open to the 'Corporate Debtor' to point out that the applicant is not an 'Operational Creditor' or there is an

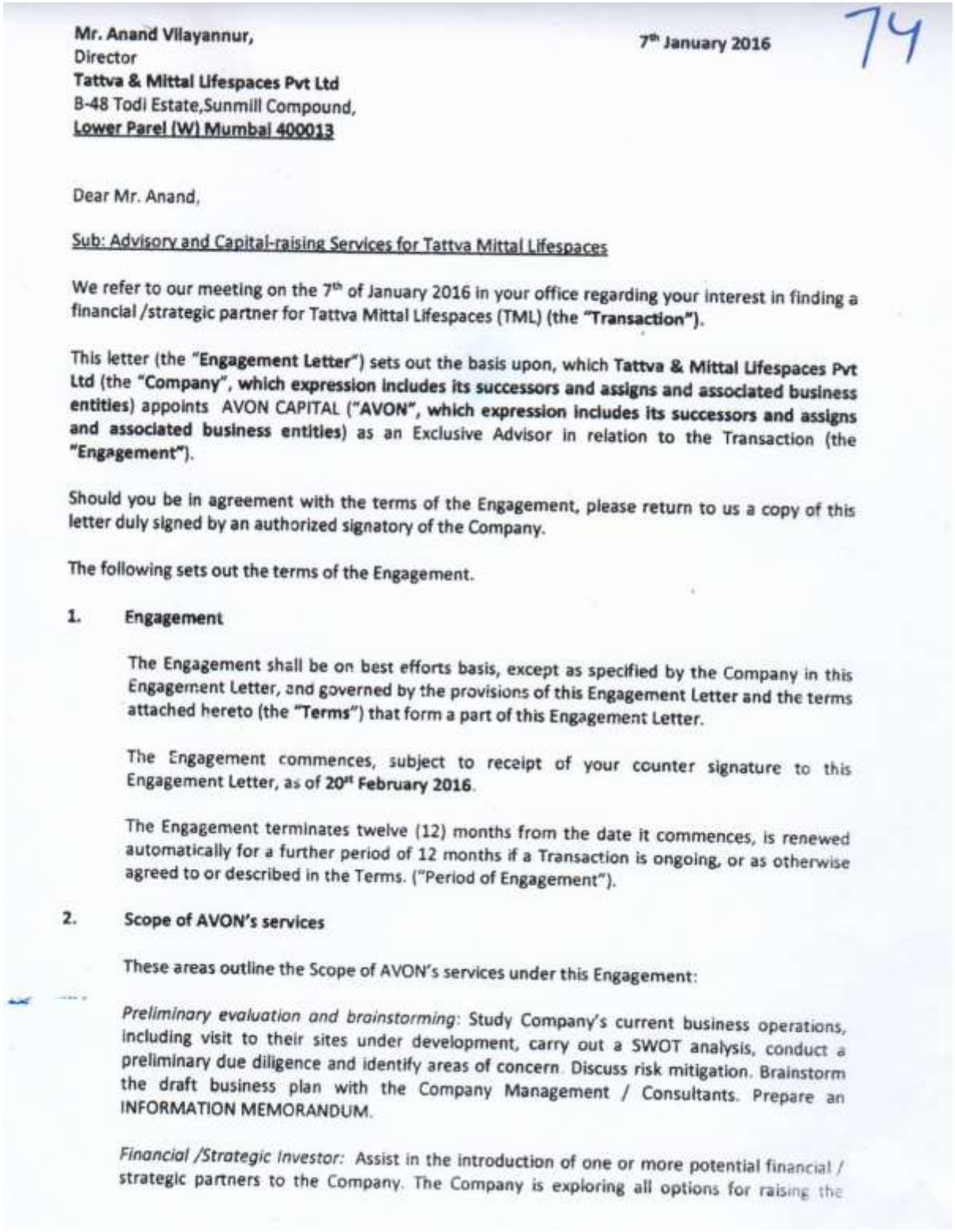
'existence of dispute' or there is no 'debt' or there is no 'default'. No other issues can be raised required for determination by the Adjudicating Authority, having no such jurisdiction.

9. To determine the question as to whether the appellant comes within the meaning of 'Operational Creditor' it is relevant to refer Section 5(20) and Section 5(21), which reads as follows:

> *"5. In this Part, unless the context otherwise requires,—*
>
> *(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;*
>
> *(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;"*

10. It is not the case of the appellant that he has supplied any goods. According to the appellant, it has rendered services for which 'operational debt' is owed to him by the 'Corporate Debtor' and therefore, the appellant come within the meaning of 'Operational Creditor'.

11. The argument is based on letter dated 7th January, 2016 by the 'Corporate Debtor', relevant of which reads as follows:



Mr. Anand Vilayannur,
Director
Tattva & Mittal Lifespaces Pvt Ltd
B-48 Todi Estate,Sunmill Compound,
Lower Parel (W) Mumbai 400013

7th January 2016

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Dear Mr. Anand,

Sub: Advisory and Capital-raising Services for Tattva Mittal Lifespaces

We refer to our meeting on the 7th of January 2016 in your office regarding your interest in finding a financial /strategic partner for Tattva Mittal Lifespaces (TML) (the **"Transaction"**).

This letter (the **"Engagement Letter"**) sets out the basis upon, which **Tattva & Mittal Lifespaces Pvt Ltd** (the **"Company", which expression includes its successors and assigns and associated business entities**) appoints AVON CAPITAL (**"AVON", which expression includes its successors and assigns and associated business entities**) as an Exclusive Advisor in relation to the Transaction (the **"Engagement"**).

Should you be in agreement with the terms of the Engagement, please return to us a copy of this letter duly signed by an authorized signatory of the Company.

The following sets out the terms of the Engagement.

1. **Engagement**

The Engagement shall be on best efforts basis, except as specified by the Company in this Engagement Letter, and governed by the provisions of this Engagement Letter and the terms attached hereto (the **"Terms"**) that form a part of this Engagement Letter.

The Engagement commences, subject to receipt of your counter signature to this Engagement Letter, as of **20st February 2016**.

The Engagement terminates twelve (12) months from the date it commences, is renewed automatically for a further period of 12 months if a Transaction is ongoing, or as otherwise agreed to or described in the Terms. ("Period of Engagement").

2. **Scope of AVON's services**

These areas outline the Scope of AVON's services under this Engagement:

Preliminary evaluation and brainstorming: Study Company's current business operations, including visit to their sites under development, carry out a SWOT analysis, conduct a preliminary due diligence and identify areas of concern. Discuss risk mitigation. Brainstorm the draft business plan with the Company Management / Consultants. Prepare an INFORMATION MEMORANDUM.

Financial /Strategic Investor: Assist in the introduction of one or more potential financial / strategic partners to the Company. The Company is exploring all options for raising the

necessary resources, including private equity, mezzanine, collateralised debt, unsecured loans, structured obligations and preference capital from appropriate Indian or International investors / lenders.

Investor Marketing: Advise in respect of the appropriate message to deliver to the potential investor/ lender regarding the Engagement.

Documentation: Assist, together with the Company's Senior Management and other professional advisors, in the preparation of business presentation materials and other related documentation for marketing to potential investors / strategic partners to the Engagement.

Due diligence: If requested assist (together with the Company's other professional advisors) to coordinate due diligence of the Company by potential investors, including as to task allocation and timing, and identification of data required for due diligence purposes.

Structuring: Work with the Company's legal counsel and other professional Consultants to advice on the structure of the Engagement.

Negotiations, etc: Assist with negotiations on pricing, deal structure and other terms of the Engagement.

Completion: Together with the Company's other Consultants, advise on the steps required to complete the Engagement, including conditions precedent and to coordinate the completion process as may be required by the Company.

Any other services, which the Company may require AVON to perform, will be subject to mutual agreement.

AVON shall not be responsible for preparing any materials (including any valuation or other financial analysis) that may be required by any law or regulation or by any person (including shareholders or investors) other than the Board of the Company.

Remuneration and Expenses

The Company shall provide the following remuneration to AVON:
Appointment Fee: INR 3 Lakhs (plus service tax @14%) payable on Introductions & Interest letter/Term sheet from Investors/lenders/Funds/Institutions.
Retainer fee : INR 5 lakhs (plus service tax @14%) payable in advance on the 1st of every quarter for a period of 1 year or extended period as mutually agreed. Quarter starts 1st February 2016.
Fixed Success Fee: 3.0 % of amounts raised by AVON from those parties to be determined, payable as follows:

- 25% on signing of MOU with any of the investors / lenders
- Balance 75%to be paid pro rata at each disbursement

Success fee: For Business introduction / Marketing Alliance, as per mutual agreement

Reimbursements: All out-of-pocket expenses will be reimbursed at actual. However, expenses in excess of USD 1,000 will be with prior oral / written approval. 76

Specific assignments: Fees for specific assignments other than the above will be discussed and agreed to and form an extension of this engagement letter. Expectations of company will be reduced in writing and milestone payments defined

4. **Survival**

If at any time in the 24 months or such extended period as may be mutually agreed, following the written commitment by any party approached by AVON on behalf of the Company, that party agrees and enters into an investment agreement with the Company, then the Company shall pay to AVON a fee on that additional funding calculated on the same basis as the fee for the original commitment as defined in this Engagement Letter.

If the Engagement terminates (other than at AVON's election or due to a material breach of this Engagement by AVON) prior to the Engagement being completed, due to any deficiency or disability of the company, whether previously known or otherwise, then the Company shall pay to AVON, by way of Break fees / Drop dead fees, an amount equal to USD 100,000.

References to completion or closing of the Engagement shall be to any definitive agreement issued by the Investor on terms generally agreed by the Company or shares or assets being transferred, issued, or disposed, or any investment provided or disbursement of fund by the Investor / lender to the Company.

5. **Exclusions:**

The company will disclose the list/names of Institutions/Funds/Arrangements that the company has already initiated talks with including those through Altfort and Avon will be paid no Success Fee on closure of funding with or through such disclosed names. The drop dead fee will be applicable in the case as above

We look forward to a long and mutually beneficially relationship.

Yours faithfully,
AVON CAPITAL

Ravindra Gopal, Proprietor

Accepted and Agreed to as of the date first written below:
For and on behalf of
Tattva & Mittal Lifespaces Pvt Ltd

MITTAL LIFESPACES PVT. LTD. MUMBAI TATTVA

Anand Vilayannur, Director

12. The terms of 'engagement' and 'payments' enclose with the said letter, which is as follows :

Terms of Engagement

Advisory Services to Tattva & Mittal Lifespaces Pvt Ltd:

These terms form part of the Engagement Letter.

1. **The Engagement**

AVON's duties under the Engagement are to the Company only and shall be performed with due skill and care in accordance with market practice. The Company authorises AVON to do what AVON considers reasonable or necessary to carry out the Engagement and to comply with laws, regulations or market practices. AVON will consult with the Company wherever practicable.

The Company shall obtain appropriate legal, tax and accounting advice relevant to the Transaction and the Engagement. AVON will be promptly informed of such advice, may rely on it, and shall neither incur nor be susceptible to liability for doing so.

Save as expressly provided in the Engagement Letter, including Section 2 ("Scope of AVON Services"), AVON is not required to (i) provide specialist advice (such as legal, regulatory, accounting, tax or commercial), (ii) seek any required consents or approvals (regulatory, corporate or otherwise) or (iii) conduct any verification or due diligence.

The Company shall be responsible for the decision to proceed or not to proceed with the Transaction and on what terms.

AVON will not make any commitment on behalf of the company unless otherwise authorised by the Company.

The Engagement does not commit AVON to participate in any financing of the Transaction.

2. **Payments**

AVON shall be paid all fees in INR by the Company. Reimbursements for overseas travel or other incidental expenses will be paid in USD. Service Tax, VAT or any other tax/ cess/ levy imposed on the service provided by AVON, will be paid by the Company over and above the fees charged by AVON. If any deduction is required by law, other than withholding tax, the amount payable shall be grossed up so that AVON receives the full amount which would have been received but for the deduction. The Company will provide proof of payment of tax and a certificate of such deduction and payment within 90 days of such deduction / payment.

For the purpose of determining Transaction Value, non-cash consideration shall be valued at its fair market value at the time such consideration is passed. The Company and AVON shall mutually agree to this in good faith.

13. Further, the term of 'agreement' relates to 'termination' of engagement. In Clause 9 'miscellaneous' shown that the appellant is engaged as an independent contractor not as an agent or representative, which is as follows :

9 Miscellaneous

AVON is engaged as an independent contractor. AVON, its Affiliates and their respective officers shall not be deemed the agent, representative or employee of the Company or its Affiliates. AVON cannot assign any of its obligations hereunder without the prior written consent of the company.

These Terms are subject to the provisions of the Engagement Letter, which constitutes the entire agreement between AVON and the Company concerning the Engagement, and any modification shall be in writing and signed by the Company and AVON. The Engagement Letter may be executed in counterparts.

Terms defined in the Engagement Letter shall have the same meaning when used in these Terms. References to a company's **"Officers"** shall be to such company's directors, officers, employees and agents from time to time. References to **"Affiliates"** shall be to the subsidiaries and to companies under the same control as such entity from time to time. References to **"Information"** shall include information in whatever form transmitted or stored including any advice, analysis, letter, memorandum, accounts, publication, announcement, notice, circular, prospectus, offering document, company record, contract or otherwise.

14. There is a 'dispute resolution' prescribed under Clause 11 therein. The aforesaid letter dated 7th January, 2016 is part of Form 5. The invoices dated 1st August, 2016 and 27th September, 2016 have also been enclosed with the application filed under Section 9 in Form 5. Plain reading of the letter dated 7th January, 2016 including the 'terms of engagement' enclosed therein shows that the appellant – 'Avon Capital' was engaged as an independent contractor and not as an agent or representative or employee of the company. The appellant was so engaged to study company's current business operations including visiting of their sites under development, carry out a SWOT analysis, conduct a preliminary

due diligence and identify areas of concern. It was also engaged to discuss risk mitigation, brainstorm the draft business plan with the company management and prepare information memorandum. Clause 2 of the letter dated 7th January, 2016 further shows that the appellant was also to assist in the introduction of one or more potential financial/strategic partners of the company which was exploring all options for raising the necessary resources including private equity etc.

15. In terms of Clause 3, the appellant was entitled for following remuneration:

(i) Towards the 'Appointment Fee' : Rs. 3 Lakhs plus service tax @ 14% payable on introductions & interest letter/term sheet from investors/lenders/funds institutions

(ii) Towards the 'Retainer Fee' : Rs. 5 Lakhs plus service tax @ 14% payable in advance on the 1st of every quarter for a period of one year or may be extended period if mutually agreed.

(iii) Towards the 'Fixed Success Fee' : 3.0% of amount raised by 'AVON' from those parties to be determined. 25% for signing a memorandum of understanding and 'Success Fee' for business introduction/marketing alliance, as per mutual agreement.

This apart, 'reimbursements': all out-of-pocket expenses was provided therein excess of USD 1,000 with the prior oral and written approval. The appellant was also entitled for 'specific assignment fee' other than the fees aforesaid.

16. From the aforesaid Clause 3, it is clear that certain amount is payable on performance of specific job like introductions of parties and interest letter from investors/lenders/funds/institutions etc. Apart for the same there are independent fee such as retainer fee @ Rs. 5 Lakhs plus service tax @ 14% in advance on the 1st of every quarter for a period of one year.

17. The appellant while raised 'professional fee' in the invoice of 1st May, 2016 had raised 'retainer fee' for quarter beginning 1st May, 2016 plus @14.5% service tax apart from 'retainer fee' for the quarter beginning 1st August, 2016 along with 15% service tax. By another invoice dated 1st August, 2016 'appointment fee' has been raised on issue of term sheet by 'Milestone Advisors' which was accepted by TM Group on 30th July, 2016. By another invoice dated 27th September, 2016 'break fees' or 'break drop dead fees' in US$ 1 lakh plus @ service tax @ 15% as per clause 4 of para 2 of Engagement Agreement has been raised. All those invoices are independent to 'appointment fee' or 'fixed fee' or 'successors fee'. The Adjudicating Authority has noticed the 'engagement letter' dated 7th January, 2016 including the invoices receipt. However, without appreciating the relevant facts, the Adjudicating Authority like a Trial Court observed as under:

> *"The evidences such as the work done by the professional or any due diligence report submitted to the Respondent Company are missing in this case. The Petitioner has not filed a single evidence to demonstrate that by his effort a Corporate Financer has factually invested in the*

Respondent Company" are missing in this case. The petitioner has not file the evidence to demonstrate that by his effort a corporate financer had factually invested in the respondent company.

18. Then the Adjudicating Authority went on presumption that the appellant is a 'financial creditor' and thereby discuss the evidence of investment made by the appellant with the respondent 'Corporate Debtor' which was not the claim. Thereby, the Adjudicating Authority failed to appreciate that the appellant has claimed himself to be an 'operational creditor' having rendered services on the basis of said letter dated 7th January, 2016 and not as a 'Financial Creditor'. The subsequent letter of cancellation of retainer-ship by company has been treated to be as notice of dispute on the ground that the 'Corporate Debtor' has categorically raised the objection by disputed claim.

19. In '*Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd.' (2018) 1 SCC 353*, the Hon'ble Supreme Court while discussing the provisions of Section 9 observed as follows:

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

xxx xxx xxx

37. It is now important to construe Section 8 of the Code. The operational creditors are those creditors to whom an operational debt is owed, and an operational debt, in turn, means a claim in respect of the provision of goods or services, including employment, or a debt in

respect of repayment of dues arising under any law for the time being in force and payable to the Government or to a local authority. This has to be contrasted with financial debts that may be owed to financial creditors, which was the subject-matter of the judgment delivered by this Court on 31-8-2017 in Innoventive Industries Ltd. v. ICICI Bank [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407] (Civil Appeals Nos. 8337-38 of 2017). In this judgment, we had held that the adjudicating authority under Section 7 of the Code has to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor within 14 days. The corporate debtor is entitled to point out to the adjudicating authority that a default has not occurred; in the sense that a debt, which may also include a disputed claim, is not due i.e. it is not payable in law or in fact. This Court then went on to state: (SCC p. 440, paras 29-30)

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first

deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of 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 or the record of the pendency of a suit or arbitration proceedings, which is pre-existing — i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

xxx *xxx* *xxx*

38. *It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10*

days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an Arbitral Tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an Arbitral Tribunal or a court for up to three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has

it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties."

20. The reply letter dated 25th January, 2017 written by the 'Corporate Debtor' cannot be taken into consideration having issued in reply to demand notice dated 14th January, 2017 given by the appellant under Section 8(1) of the I&B Code. The dispute raised on imaginary facts and circumstances while replying to the demand notice cannot be treated to be an 'existence of dispute' for rejecting the application under Section 9. In absence of any evidence relating to pre-existence dispute i.e. prior to issuance of notice dated 14th January, 2017 under Section 8(1) of the I&B Code we hold that there was no dispute in existence. Further, in view of letter of engagement and terms and condition of engagement as discussed above we hold that the appellant comes within the meaning of 'Operational Creditor' as defined under Section 5(7) r/w Section 5(8). There being a 'debt' due to the appellant and in absence of any evidence of payment, it is to be accepted that there was a 'default'. In such background it was the duty of the Adjudicating Authority to admit the application.

21. For the reasons aforesaid, we set aside the impugned order dated 11th July, 2017 passed in C.P. No. 37/I&BP/NCLT/MB/MAH/2017 and remit the case to the Adjudicating Authority, Mumbai Bench to admit the application and pass appropriate order in presence of the parties. All the plea taken by the parties, having discussed no further opportunity of hearing is required to be given to any of the parties for admission the application under Section 9 of the I&B Code.

18. However, it will be open to the respondent to settle the claim before admission of the application under Section 9. In such case, the appellant may withdraw the application before its admission. The appeal is allowed with the aforesaid observations. However, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

New Delhi

9th August, 2018

/ns/