

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, PRINCIPAL BENCH
NEW DELHI**

Company Application No. (I.B.)07/PB/2017

Company Application No (I.B.)08/PB/2017

Present: CHIEF JUSTICE (Retd.) SHRI M.M.KUMAR, HON'BLE PRESIDENT

& SHRI R.VARADHARAJAN, MEMBER (JUDICIAL)

In the matter of:

Section 9 and other applicable provisions of the Insolvency and Bankruptcy Code, 2016 read with the Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

1. **M/s.One Coat Plaster**
182/183, Indra Bhawan,
V.P.O. Sikhrali, Sector-17a,
Gurgaon-122 001

.....Operational Creditor/Applicant

2. **M/s.Ambience Private Limited**
Company registered under the Companies Act, 1956
Having Registered Office at:
L-4, Green Park Extension,
New Delhi-110016

CIN: U51503DL1986PTC023886

..... Corporate Debtor



AND

In the matter of:

1. M/s.Shivam Construction Company

Plot No.SO-110, Khasra No.1965

Iqbal Colony, Garima Garden,

Ghaziabad-201 005

.....Operational Creditor/Applicant

2. M/s.Ambience Private Limited

Company registered under the Companies Act, 1956

Having Registered Office at:

L-4, Green Park Extension,

New Delhi-110016

CIN: U51503DL1986PTC023886

..... Corporate Debtor

Counsel for the Petitioners: (i) Shri Dushyant K. Mahant, Advocate

(ii) Shri Gaurav Dubey, Advocate

Counsel for the Respondent: Shri Sushant Kumar, Advocate



COMMON ORDER

The above petitions have been filed by the petitioners seeking to set in motion the Corporate Insolvency Resolution Process (IRP) as contemplated under Section 9 of the Insolvency and Bankruptcy Code, 2016 in relation to one M/s. Ambience Private Limited (for brevity hereinafter referred to as the 'Company') however described in the petition as 'Corporate Debtor'. Brief facts as can be discerned from the petition filed by the petitioners describing themselves as an "Operational Creditor" against the Company giving rise to the filing of the petition are as follows:-

In relation to CA No.(I.B.)07(PB)/2017.

- a) That the Company is engaged in real estate business including real estate development and in pursuance of its business had initially issued a work order dated 01.10.2015 bearing No. Ambience/15-16/363 for a specified sum of Rs.204, 000/- in favour of the Operational Creditor which happens to be a partnership firm carrying its business under the name and style of One Coat Plaster. Subsequently it is averred that two more work orders dated 13.10.2015 and 13.11.2015 were also placed on the Operational Creditor by the Company as works contract for Gypsum Plaster for the Walls/Ceiling at their site at Noida and the payment in relation to the same was to be made as per actual work measurement at site. Further, the payments to be released against bills. All the work orders placed by the Company on the Operational Creditor, have been annexed.

(Annexure B, colly).



b) It is claimed that the Operational Creditor pursuant to the work orders had executed the work subsequent to which bills were raised. It is contended that in relation to the work carried out at a site named 'Pushpanjali' out of the total billing of Rs.2,69,507.44 a sum of Rs.1,00,085/- has been paid thereby leaving a balance of Rs.1,69,422.44 and that in relation to the site at Noida where the work had been carried out and as against the billed amount of Rs.55,60,242.74 the Company has paid only Rs.24,68,832/- leaving a balance of Rs.30,91,410.74. Thus in aggregate the Company owes the Operational Creditor a sum of Rs.32,60,833.18 it is claimed and despite reminders have failed to pay the balance outstanding.

c) That the non-payment of the balance outstanding since July 2016 forced the Operational Creditor to serve a notice of demand as contemplated under Section 8 of the Code through its counsel on 25.01.2017 at the registered office of the Company as well as through e-mail and till the date of filing of the above petition on 08.02.2017, no reply has been received despite service nor any payment has been made. This has given rise to the above petition being filed under the Code for unleashing the Corporate Insolvency Resolution Process as against the Company.

In relation to Company Application No. (I.B.)08/PB/2017, the following fact emerges:

d) That the company engaged in real estate business including real estate development and in pursuance of its business had initially issued a work order dated 25.11.2015 bearing No. Ambience/15-16/480-A for a specified sum in favour of the Operational Creditor which happens to be a sole proprietary concern carrying business under the



name and style M/S.Shivam Construction Company. Subsequently, it is averred that one more work order dated 25.11.2015 bearing No. Ambience/15-16/480-B was also placed on the Operational Creditor by the company as work contract for Gypsum Plaster for the Walls/Ceiling without supply of material at their site at Noida and the payment in relation to the same to be made as per actual work measurement at site and payments to be released against bills. All the work orders placed by the Company on the Operational Creditor it is averred by the Counsel for the Operational Creditor has been annexed as Annexure B (colly).

- e) That the Operational Creditor pursuant to the work orders had executed the work subsequent to which bills were raised. It is contended that in relation to the work carried out at Noida, out of the total billing of Rs.16,79,646.66 a sum of Rs.7,83,746/- has been paid thereby leaving a balance of Rs.8,95,900/-. Thus in aggregate the Company owes the Operational Creditor a sum of Rs.8,95,900/-. It is claimed that despite reminders the company has failed to pay the balance outstanding.
- f) That the non-payment of the balance outstanding since 10.06.2016 forced the Operational Creditor to serve a notice of demand as contemplated under Section 8 of the Code through its counsel on 25.01.2017 at the registered office of the Company as well as through e-mail and till the date of filing of the above petition on 09.02.2017, despite service no reply has been received nor any payment has been made. This has given rise to the above petition being filed under the Code for unleashing the Corporate Insolvency Resolution Process against the Company.



The above petitions came to be listed before us on 17.02.2017 on which date the Counsel for the Company entered appearance and sought time for response and the hearing was deferred to 20.02.2017. On 20.02.2017 when the petitions were taken up, the Counsel for the Company submitted that the Company had sent a reply to the notice of demand sent by the Counsel for the Operational Creditor dated 04.02.2017. The Company has taken the stand that due to defective and poor quality of work on the part of the Petitioners no payment has been made and have completely denied the claim of the Operational Creditor. In view of the representation of the Counsel for the Company that a reply had been sent to the legal notice of the Operational Creditor, the parties were directed to file the reply as sent by the Company through its Counsel and the petitions were fixed for hearing on 22.02.2017 for compliance.

Since the issues involved in both the Company Petitions are similar and concerning the company named as "Corporate Debtor", the matter is taken up together and disposed off as follows:

On 22.02.2017 we heard learned counsel for both the parties. The Counsel for the Operational Creditors/Petitioners took us through the typed set of documents filed along with the petitions. A perusal of the record shows that the work order placed by the company primarily relates to works contract predominantly concerning labour contract and the rate for the execution of the works contract seems to be fixed on square feet basis. Further it is seen that the bills/invoices raised by the petitioners annexed as Annexure C 'Colly' is computed on sq.feet basis for ascertaining the



quantum of work done and the amount payable for carrying out the work. However when the Counsel for the Petitioners was asked as to whether the Company or its authorized representative or architect had certified the quantum of work done by the Petitioners in relation to the works contract awarded to them, no such document was produced wherein the quantum of work might have been certified or in relation to quality. This is the norm adopted in building contracts of considerable value which ordinarily constitute the basis for raising the bills. The engagement of the petitioners to execute the work cannot be denied in view of the work order placed by the Company which is further reinforced by payment in a sum of **Rs.25,68,917/-** to the Petitioner in C.A. No.07/PB/2017 and Rs. 7,83,746/-. However in relation to the balance amount claimed by the petitioners as due from the Company, we are unable to agree in view of lack of materials submitted before us by the Petitioners and also taking into consideration the fact that the debt sought to be fastened on the company has been vehemently disputed as is evident from the reply to the notice sent by the Company, which is dated 04.02.2017 but dispatched on 08.02.2017 to the counsel for the petitioners.

Reference to the provisions of the Code, more particularly Section 9 thereof clearly discloses that this Tribunal has the power, interalia also to reject the Application of the Operational Creditor under Section 9(5)(d) in case of notice of dispute has been received by the operational creditors or there is record of dispute with the information utility. In the absence of information utility, we are perforce to rely on the notice of dispute as sent by the Company to the petitioners denying the liability based on which the entire edifice of the petitioner's claim crumbles which constitutes basis of the present



application. It is pertinent to note that the expression 'dispute' has been defined and it seems to be an inclusive definition as seen from Section 5(6) of the Code which reads as follows:-

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

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

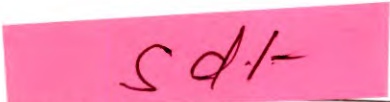
A bare perusal of Section 5(6) of the Code show that a dispute could be proved by showing that a suit has been filed or arbitration are pending. It further elaborates that suit or arbitration should be in respect of the existence of the amount debt, quality of goods or services; or a breach of a representation or a warranty. It is not an exhaustive definition but an illustrative one. It becomes evident from the expression 'includes' which immediately succeeds the word 'dispute'. Moreover, under Section 8(1) of the Code adequate room has been provided for the 'NCLT' to ascertain the existence of a dispute. A demand notice by an 'operational creditor' to an 'operational debtor' must be sent who has not paid operational dues and has committed default. Section 8 (2) further clarifies that the corporate debtor is obliged to bring to the notice of the 'Operational Creditor' within 10 days of the receipt of notice, the existence of a dispute and record of the pendency of the suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute. The other option is to pay the demanded amount. In the instant case the Petitioner sent a demand notice which was duly received by the 'company' but the reply was also filed which has been delayed by four days where dispute has been raised. As such on a perusal of documents submitted

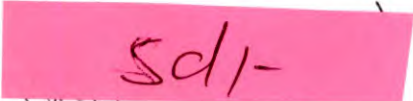
before us by the petitioners, we are unable to fathom any material on record to dislodge the same as already discussed in paragraph supra. Hence we are inclined to reject the above petitions.

Hence the remedy of the Petitioners above named lies elsewhere and not under the provisions of the Code. Before parting we make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of controversy as we have refrained from entertaining the application at the initial stage itself. Therefore, the right of the applicants before any other forum shall not be prejudiced on account of dismissal of instant applications.

For the reasons afore stated we reject the applications/petitions filed by the petitioners/operational creditors without any costs.

March 1st, 2017


(CHIEF JUSTICE M.M.KUMAR)
PRESIDENT


(R.VARADHARAJAN)
MEMBER (JUDICIAL)