IN THE NATIONAL COMPANY LAW TRIBUNAL
SINGLE BENCH
NEW DELHI

No.IB-209/ND/2017

Section: Section 9 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. **Mrs Parmod Yadav,**
   W/o Sh. Ram Chander Yadav

2. **Mrs. Sneha Yadav,**
   W/o Sh. Siddharth Yadav

   Both resident of :-

   E-2134, Palam Vihar,
   Gurgaon, Haryana **... Operational Creditors/Applicants**

1. **Divine Infracon Pvt. Ltd.**
   (CIN No.U45200DL2006PTC154040)
   Plot No.4, Sector-13, Dwarka City Centre,
   Dwarka, NEW DELHI -110 078

..... Corporate Debtor

Coram:

R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)

Counsel for the Petitioners: (i) Shri SakalBhushan, Advocate
(ii) Shri Surendra Kumar, Advocate
(iii) Shri Akash Jandial, Advocate

Counsel for the Respondents :(i)Shri Inayat Ahmed, Advocate
(ii) Ms. Rehana Ahmed, Advocate.

Order delivered On:

ORDER

The factual matrix for filing this application under Insolvency & Bankruptcy Code, 2016 (IBC,2016) by the Applicant is stated to be as follows:-

2. The Applicants being mother and daughter state that they are owners of service apartment bearing No. 915-A, 9th Floor, Soul City Service Apartment Complex situated at Plot N.4, Sector-13, Dwarka, New Delhi-110078. According to the Applicants, the built up area of the Service Apartment is 34 mtrs. and the super built area is of 68 sq.mtrs. It is further stated that in relation to the said property a lease agreement was entered into between the owners being the Applicants as 'Lessors' with the 'Corporate Debtor' being the 'Lessee' on

16.8.2014. However, lease was made effective retrospectively on and from 10.1.2012 correlating with certain agreement having nomenclature of Hotelier-Buyer agreement. The duration of the lease it is claimed is for a period of 15 years effective from 10.1.2012 and the monthly rental payable being Rs.1,37,250/- plus service tax, if any, applicable. The lock-in period in relation to both the parties of the property described as above, it is claimed is for a period of 15 years. While so, it is claimed by the Applicants/ landlords that the Lessee namely the 'Corporate Debtor' had chosen to issue the termination notice dated 4.4.2016 terminating the agreement entered into between the parties before the expiry of lease time period of 15 years, in other words within the lock-in period specified in the agreement. It is also stated that at the time of terminating the same, Rs.12,62,700/- was due by way of rentals and interest was also due for the defaulted amount @12% per annum which comes to around Rs.1,95,718.03. In addition to the non-payment of rentals for the period in which the 'Corporate Debtor' was in occupation of the premises, the Applicant has also put forth a claim w.e.f. 10.4.2016 to 9.1.2027 in relation to monthly rentals for the unexpired period of lock-in to the extent of Rs.2,60,05,539.74 which it is claimed is also payable along with the interest at 12% p.a. The aggregate amount thereby it is claimed by the Operational Creditor is in a sum of Rs.2,74,63,957.77 and in relation to the said sum Applicants state that the notice of demand as required to be issued under Section 8(1) of Insolvency & Bankruptcy Code, 2016 dated 22.4.2017 had been

sent which the Applicants claim was also served by courier on the 'Corporate Debtor' on 24.4.2017. In view of the fact that no payment of the amount claimed in default has been remitted nor the notice of demand being replied to, which it is stated to have made the Operational Creditor to file under Section 9 of IBC, 2016 this Petition for invoking the Corporate Resolution Process (CIRP) against the 'Corporate Debtor'.

3.The Respondent/Corporate Debtor named in the application has filed a counter/reply denying the claim as put forth by the Petitioner on the following grounds:

a) That the claim is based on the lease agreement dated 16.8.2014 which has been terminated w.e.f. 04.04.2016 and hence the amount which is claimed to be in default is not right and therefore non-maintainable as the amounts which are claimed have not even accrued to the Applicants and which it has been pointed out as an instance of blatant misuse of the provisions of the Code on the part of the Applicants.

b) The 'Corporate Debtor' also contends that the Applicants do not fall under the definition of 'Operational Creditor' and that the amount claimed is not an 'Operational Debt' and the Respondent cannot be categorized as the 'Corporate Debtor' under the Code and in the circumstances prima facie the Petition should be rejected.

c) In support of the contention with respect to 'Operational Debt' the Respondent seeks to rely on Section 5(21) of the Code and contends that the transaction pertaining to immovable property cannot be categorized as 'Operational Debt' as the purported claim does not arise in respect of provision of goods or services or dues on account of employment or in relation to any amount payable to Government authorities.

d) Since the definition of 'Operational Debt' is not satisfied, the Applicant cannot be categorized as an 'Operational Creditor' under Section 5(20) of IBC, 2016.

e) It is also contended that the Application is nothing but counter blast to the claim of the Respondent Company incurred by it on behalf of the Applicants towards maintaining the premises in a sum of Rs.3, 60,841 /- required to be paid for the period between April, 2016 to June, 2017 and the same remains unpaid.

f) It is also contended that the Respondent Company in view of the arbitration clause contained in the Hotelier –Buyer Agreement followed up by the lease agreement has invoked the said clause and to this effect notice under Section 21 of the Arbitration Conciliation Act, 1996 issued by the Corporate Debtor dated 17.1.2017 mandated the naming of Sole Arbitrator for resolution of all disputes arising out of the agreement entered into between the parties including the sale deed and hence under Section 21 of the Arbitration and Conciliation Act, 1996 it is deemed that the

commencement of proceedings of arbitration has taken place from the said date being 17.1.2017 and hence in view of the existence of a prior dispute this Petition is not maintainable. The respondent company also avers that similar arbitration proceedings for termination of lease agreement are also pending in respect of other owners of the property as similarly placed as the Applicant and the same are also pending before the Ld. Arbitrator.

3. An opportunity was provided to the Petitioner to file rejoinder to the counter affidavit filed on behalf of Respondent/'Corporate Debtor' but however the said opportunity was not availed by the Petitioner and hence this Tribunal proceeds to dispose of this matter without the same. Be that as it may, taking into consideration the pleadings of the respective parties and elaborate submissions made by the ld. Counsel for the respective parties, this Tribunal is called upon to decide whether the lease agreement entered into for the lease of the immovable property will or will not fall within the definition of 'Operational Debt' as defined under the provisions of Section 5(21) of IBC,2016 and whether the Applicant can be categorized as an 'Operational Creditor'.

4. At the time of oral submissions the Ld. Counsel for Petitioner strenuously took us through the notice of arbitration alleged to have been issued on 17.1.2017 by the 'Corporate Debtor' and contends that in

the said notice no attributable dispute has been detailed as required under the provisions of Arbitration and Conciliation Act, 1996 which is required to be referred to the Arbitrator other than merely pointing out the arbitration clause in the agreement as reproduced from clause No. 32 of the Hotelier-Buyer Agreement dated 10.1.2012. Merely citing the clause or arbitration without mentioning the nature of dispute which is required to be referred to the Arbitrator cannot be considered as notice and in the circumstances it is contended by the Ld. Counsel for the Petitioner that there is no commencement of proceedings as portrayed by the Respondent Company under Section 21 of the Arbitration and Conciliation Act, 1996 as amended. Even though names of the proposed Arbitrators has been given in the notice dated 17.1.2017, in the absence of describing the nature of dispute, the same cannot be considered as the notice of arbitration. It is also pointed out by the Ld. Counsel for the Petitioner that even though the Respondent Company claims that even though names of proposed Arbitrators has been mentioned in the notice, the sole Arbitrator who is required to be appointed for adjudicating the dispute as claimed to be existing between the parties has not been done. Further no such dispute has been defined and mentioned and in the circumstances, the notice dated 17.1.2017 should not be taken into consideration by this Tribunal as the commencement of arbitration proceedings. Ld. Counsel for Petitioner also in this connection pointed out

to the preamble of the Arbitration and Conciliation Act, 1996 and represents that since the United Nations Commission on International Trade Law (UNCITRAL) has been adopted as the model law and in view of UNCITRAL Arbitration Rules providing for the matter which are required to be treated as a notice of arbitration for initiating recourse to arbitration by the claimant wherein it has been provided that brief description of the claim and an indication of the amount involved are required to be stated and that a dispute to be referred to arbitration along with relief or remedy is required to be also clearly specified and since notice dated 17.1.2017 contains none of the above particulars and not being in compliance with the provisions of Arbitration and Conciliation Act, 1996 (as amended) read along with UNCITRAL Model, no credence should be given to the said notice and this Tribunal should not treat this as a pre-existence of a dispute between the parties and that hence the Petition is maintainable.

5. The facts in brief as stated above and the rival contentions of the parties raises an important question as to whether the transaction of lease of immovable property can be brought within the definition of "Operational Debt" and the petitioner herein can be categorized as an "Operational Creditor" for the purposes of IBC, 2016. References in this regard is first made to the definition clause as contained under Section 3 as well as under Section 5 of IBC, 2016 and if necessary to other provisions of IBC, 2016 to gather, if possible from IBC, 2016 to ascertain whether the applicant petitioner can

categorize itself as an 'Operational Creditor'. Since it is the act of default which triggers a reaction, the definition of "default' as given under Section 3(12) of IBC, 2016 is first taken note of as below:

3(12) "**default**" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.

6.The above definition of "default" makes it evident that it is pre-dominantly hinged on the term "debt" as the non-payment of debt which has become due and payable by the debtor or the corporate debtor give rise to a default and "debt" as defined under Section 3(11) is as follows: -

3(11) "**debt**" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

From the above definition, it can be discerned that while the term "debt" is sought to be given a wide amplitude but it also signifies the intention of the legislature to name two kinds of debt specifically within its sweep, i.e a "financial debt" and an "operational debt". Thus we find from the above inclusive definition of debt that while it encompasses a "financial debt" or "operational debt" the term is much wider as it contemplates other kinds of debt as well apart from the two specifically named as above by use of the word 'claim'. The definition of "Claim" as given under Section 3(6) of IBC, 2016 is to the following effect:-

3(6) "claim" means –

(a) A right to payment, whether or not such right is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) Right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgement, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

While considering the definitions under Section 3 of Part I of IBC, 2016 it will be of significance to also consider the definition of "transaction" as defined under Section 3(33) which is to the following effect, namely:

3(33) "**transaction**" includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor

7. While the definitions as given in Part I of IBC,2016 is applicable to the Code as such, turning to the definitions as contained under Section 5 Part II of IBC, 2016 as made specifically applicable to Insolvency Resolution and Liquidation for Corporate Persons we find the definitions of 'financial debt' and 'operational debt' and what constitutes the same. Since in the instant case we are concerned with an application as filed by an Operational Creditor we are confining ourselves to the definition of an "Operational Debt" and "Operational Creditor" which is to the following effect: -

5(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.

5(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.

While creditor has been defined under Section 3(10) of Part I of IBC, 2016 which is as follows:

3(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder.

8. However the word "operational" or for that matter "operation" or "operations", despite being repeatedly mentioned in Part II of IBC, 2016 has not been defined anywhere in IBC, 2016 and in particular Part I or Part II of the Code in which it seems to assume significance as in Part III of the Code as applicable to Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms such a classification of Debt as `Financial Debt' and `Operational Debt' nor creditors based on the said classification of debt has been made applicable and the classification of debts there under seems to stand on an entirely different footing and hence Part III also does not offer much help in ascertaining the nature or meaning of the term "operational" as found in the above definitions.

We also do not find the term being defined under the General Clauses Act, 1897 and hence the term has to be given the meaning as ordinarily understood.

The dictionary meaning of 'operational' is given as `of or relating to operation or to an operation' (Merriam Webster). Similarly, the meaning of 'operation' is given as `ready for use or able to be used'.

9. It is also required to be noted that even though the classification of creditor either as a financial creditor or operational creditor assumes significance in relation to Corporate Insolvency Resolution Process, however in relation to Liquidation Process as contemplated under IBC, 2016, the classification of Operational Creditor completely loses its significance as in the waterfall process, no distinction is sought to be drawn under Section 53 of IBC, 2016 wherein Distribution of Assets following order of priority is detailed. Even though the financial debts owed to unsecured creditors seems to get a priority as it is as such categorized under Section 53(1)(d), the term operational debt does not find even a mention and at best can be classified under Section 53(1)(j) of IBC, 2016 under the head "any remaining debts and dues" and hence the above classification of Operational Creditor at the stage of Insolvency Resolution Process gets totally obfuscated at the stage of liquidation process and does not get any priority as compared to say a financial debt.

10. Rather than looking at the provisions of the Code, two of the rules framed there under throws some light in relation to this important aspect giving a pointer that there can be other types of debt apart from financial and operational debt in relation to a corporate debtor and these Rules also throws some light relating to the usage of the term `goods or services' as given under Section 14(2) of the Code which can give a pointer to the meaning of goods or services as used in the definition of operational debt under Section 5(21) of IBC,2016.

Section 14(2) of IBC, 2016 contemplates on admission of the application under Section 7, 9 or 10 and a declaration of moratorium and that the supply of `essential goods or services' to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period. What constitutes essential goods or services is provided under the rules titled as Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 (for brevity Insolvency Regulations) wherein under Regulation 32 the following has been detailed as essential supplies and the said Rule is reproduced in full hereunder for ready reference:-

Regulation 32: The essential goods and services referred to in section 14(2) shall mean –

(1) Electricity;
(2) Water;
(3) Telecommunication services; and
(4) Information technology services,

to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

From the above usage of the term "goods or services" relating to Section 14(2) and what constitutes or do not constitute or in other words qualifies to be considered as `essential goods or services', we are able to discern that the term `goods or services' used in the definition of operational debt must relate to direct input to the output produced or supplied of the corporate debtor. Thus any debt arising without nexus to the direct input to the output produced or supplied cannot in the context of IBC,2016 be considered as an 'operational debt' and even though it can be a claim amounting to a debt, it cannot be categorized as an operational debt.

Thus for an amount to be classified as an "operational debt" under IBC, 2016 a sort of filtration process is provided:

Firstly the amount should fall within the definition of "claim" as defined under Section 3(6) of the Code;

Next such a Claim should fall within the confines of the definition of a "debt" as defined under Section 3(11) meaning it should be by way of a liability or obligation due from any person;

Thirdly such a "debt" should fall strictly within the scope of an "operational debt" as defined under Section 5(21) of the Code, i.e., the claim should arise in respect of

(i) provision of goods or services including employment or

(ii) A debt in respect of the repayment of dues arising under any law for the time being in force and payable either to the Central Government, any State Government or any local authority.

While in relation to Government or local authority and the dues owed to it has been given a wide platform, it is a moot point whether persons other than Government or Local Authority can claim benefit that any debt owed should be construed as an 'operational debt' other than those classified as 'financial debt'. We are afraid such a wide interpretation cannot be given particularly in view of the Code and regulations framed there under also envisaging other type of debts in relation to a corporate person. Reference may be had in this connection to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (for brevity Liquidation Regulations)

wherein under Regulation 20 claims by other stake holders has been given thereby envisaging other claims as well of the corporate person.

11. To sum up thus only if the claim by way of debt falls within one of the three categories as listed above can such a claim be categorized as an operational debt. In case if the amount claimed does not fall under any of the categories mentioned as above, the claim cannot be categorized as an operational debt, and even though there might be a liability or obligation due from one person, namely Corporate Debtor to another, namely Creditor other than the Government or local authority, such a creditor cannot categorize itself as an "operational creditor" as defined under Section 5(21) of IBC, 2016 unless it is established that such goods or services has direct relationship to input-output operations of the Corporate Debtor and hence disentitles such a person from maintaining an application for CIRP against the corporate debtor as an Operational Creditor. There seems to be some rationale in restricting only to Operational Creditors for initiating a CIRP against a Corporate Debtor other than a Financial Creditor. Default committed to operational creditors in relation to payment of their debt definitely connotes that the Corporate Debtor is not even in a position to service their dues and run the day to day operations of the Corporate Debtor which is a clear pointer to its commercial insolvency warranting the process of insolvency being initiated and restructuring process being put in place. Before proceeding further this Tribunal is refraining from going into the aspect where the immovable property in itself constitutes stock-in-trade of the corporate person and has a direct nexus to its input-output and being an integral part of the operation. In the instant case no such specific pleading to support such a contention has been placed on record by the petitioner. In fact even the Memorandum and Articles of Association of the Corporate

Debtor has not been filed from which atleast the object for which the Corporate Debtor has been incorporated can be gathered.

Thus, this Tribunal is of the view that lease of immovable property cannot be considered as a supply of goods or rendering of any services and thus cannot fall within the definition of `operational debt'

12. The Hon'ble Principal Bench in relation to transaction involving immovable property in the matter of Col. Vinod Awasthy vs. AMR Infrastructures Ltd. vide order dated 20.02.2017 in C.P.No: (IB)-10(PB) 2017 looking from another angle has also held that transactions relating to immovable property cannot be held as an "Operational debt" and the said decision has an effect of binding precedent on this Tribunal.

Even otherwise it is seen that predominantly out of total amount claimed in a sum of Rs.2,74,63,957.77, a sum of Rs.2,60,05,539.74 is claimed in relation to the termination of the lease agreement dated 16.8.2014 entered into between the parties which provided for the duration of lease as 15 years commencing from 10.1.2012 and ending on 9.1.2027. In other words, the above amount is claimed more by way of damages for wrongful termination of the lease agreement, rather than the amount has become due and payable. The question here is whether the provisions of IBC,2016 can be invoked to lay such a claim on the part of the petitioner and that the non-payment of such a claim resulting virtually as a claim for damages of future rents has not been paid and hence the CIRP should be invoked. We are afraid we cannot subscribe

to such a claim as sought to be projected by the Ld. Counsel for the Petitioner. In this we seek aid from the decisions rendered by the Courts in India while interpreting the provisions of Companies Act, 1956 relating to winding up. However, we are fully aware and conscious that IBC,2016 is a Code by itself and the provisions must not be interpreted in light of the provisions of the 1956 Act. However, general principles as laid down by the superior Courts will definitely have a bearing whether the claim as made by the Petitioner/Applicant herein can be categorized as a debt or should be treated as a claim for damages for breach of agreement against the 'Corporate Debtor'. In this regard, reliance is placed on the decision of the Hon'ble High Court of Karnataka rendered in Greenhills Exports (Private) Limited, Mangalore and Others vs. Coffee Board, Bangalore (2001) 106 Comp. Cas 391 (Kar) wherein after a detailed discussion of the authorities on the point including that of the Hon'ble Supreme Court, of what constitutes a 'debt' giving rise to an action under the erstwhile provisions of Companies Act, 1956 seeking winding up and whether claim to damages, whether liquidated or not will constitute one, the High Court of Karnataka at paragraph 14 of the aforesaid Judgement has summed up as follows:-

(i) A 'debt' is a sum of money which is now payable or will become payable in future by reason of a present obligation. The existing obligation to pay a sum of money is the sine qua nan of a debt.

"Damages" is money claimed by, or ordered to be paid to, a person as compensation for loss or injury. It merely remains as a claim till

adjudication by a Court and becomes a 'debt' when a Court awards it.

(ii) In regard to a claim for damages (whether liquidated or unliquidated), there is no 'existing obligation' to pay any amount. No pecuniary liability in regard to a claim for damages, arises till a Court adjudicates upon the claim for damages and holds that the defendant has committed breach and has incurred a liability to compensate the plaintiff for the loss and then assesses the quantum of such liability. An alleged default or breach gives rise only to a right to sue for damages and not to claim any 'debt'. A claim for damages becomes a 'debt due', not when the loss is quantified by the party complaining of breach, but when a competent Court holds on enquiry, that the person against whom the claim for damages is made, has committed breach and incurred a pecuniary liability towards the party complaining of breach and assesses the quantum of loss and awards damages. Damages are payable on account of a fiat of the Court and not on account of quantifications by the person alleging breach.

(iii) When the contract does not stipulate the quantum of damages, the Court will assess and award compensation in accordance with the principles laid down in Section 73. Where the contract stipulates the quantum of damages or amounts to be recovered as damages, then the party complaining of breach can recover reasonable compensation, the stipulated amount being merely the outside limit.

(iv) When a contract provides that on default by a buyer to pay for and take delivery of goods, the seller is entitled to recover the loss incurred on resale, interest on delayed recovery of the price, godown charges, insurance charges and other expenses incurred by the seller till resale, it cannot be said the buyer incurs the liability to pay those amounts automatically, when he fails to take delivery. Failure to take delivery may be due to several valid or lawful reasons which may show that the failure to take delivery is not a 'default' or 'breach' in which event, no pecuniary liability may fasten on him.

(v) Even if the loss is ascertainable and the amount claimed as damages has been calculated and ascertained in the manner stipulated in the contract, by the party claiming damages, that will not convert a claim for damages into a claim for an ascertained sum

> due. Liability to pay damages arises only when a party is found to have committed breach. Ascertainment of the amount awardable as damages is only consequential.

Again at paragraph 16, the Hon'ble High Court of Karnataka gives the position in a nutshell:

> In the absence of a decision by a competent Civil Court (or Arbitrator, as the case may be) that the appellant has committed breach and has incurred a pecuniary liability, no amount can be said to be due to the Board merely on its claim that the Company has committed breach and that it (the Board) has quantified the loss in terms of the contract. As the amount claimed is not a 'debt' but damages, we hold that the petition for winding up of a Company is not maintainable, even though the amount claimed is calculated in terms of the contract. The only ground urged by the Board was that the Company is unable to pay its debts. No other ground is urged.

13. As compared to the earlier regime prevalent under the provisions of Companies Act, 1956, the present regime in relation to insolvency are more stringent, in the sense that all debts as noticed and dealt with in paragraphs supra cannot lead to a claim for invoking the provisions of IBC,2016 and only two types of debt, namely financial and/or operational debt qualify to be considered. Further as already seen the position of operational creditor under IBC,2016 is also attendant with certain mandatory obligations, including that of the production of certificate from financial institution as provided under Section 9(3)(c) of IBC,2016.Thus even though the amount claimed is in a sum of

Rs.2,74,63,957.77 as unpaid liability the certificate from the Bankers of the Operational Creditor, obviously does not correlate with the above amount claimed as obviously it does not include the claim for breach and resultant damages. Thus in the absence of any quantification of damages, even though it might be claimed on the part of the Petitioner as an ascertained/liquidated sum as detailed in the subject lease agreement, unless it is quantified by a competent civil court or by an Arbitrator it cannot be treated as even a debt leave alone 'Operational Debt' in view of the above enunciated position of law. Looking from another angle also, it is evident that Corporate Debtor has sought to invoke the Arbitration clause vide letter dated 17.01.2017 much prior to the notice of default sent by the Petitioner to the Corporate Debtor on 22.04.2017. It is seen that while the Petitioner lay their claim based on the lease agreement dated 16.08.2014 for renting out the service apartment (between the parties) duly registered, the Corporate Debtor is invoking the Arbitration Clause as provided in Hotlier-Buyer Agreement dated 10.01.2012 for referring the disputes, and this Tribunal in the exercise of limited jurisdiction as well as limited time frame available cannot afford to indulge itself in an exercise to ascertain as to under which of the several agreements entered into between the parties the claim arises of the Petitioner and its non-payment for default invoking the insolvency process against the Corporate Debtor. From facts it is also evident that a counter claim has also been raised by the Corporate Debtor as against the Petitioner which definitely connotes that the

dispute between the parties is not a sham or illusory. In this regard, the Hon'ble Supreme Court in its Judgement rendered in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited on September 21st, 2017 has held as follows in Paragraph 40 of the said Judgement:

> Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

Again at paragraph 45 of the said Judgement in relation to 'existence of dispute' it has been observed as follows:

> Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability.

14. In the light of the above Judgement the contentions of the Learned Counsel for the Petitioner relating to dispute may not be of much effect. Hence, taking into consideration all the above including facts and position of law, we are not inclined to admit this Petition and hence the Petition is dismissed, but without costs.

Sd/-

28/7/17

(R.VARADHARAJAN)
MEMBER(JUDICIAL)

U.D.Mehta