

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH-III
NEW DELHI**

C.P.No.IB-220/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:

**M/s Explo Media Pvt. Limited
78(A), First Floor,
Zamrudpur, Greater Kailash-I,
New Delhi-110 048**

... Operational Creditor/Applicant

**M/s Ambience Pvt. Ltd.
L-4, Green Park Extension,
New Delhi-110 016**

..... Corporate Debtor



Coram:

**R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)**

**Counsel for the Petitioners: : Mr.Avadh Kaushik, Advocate
: Mr.Pawan Verma, Advocate
: Mr.Devashish Maharishi, Advocate**

Counsel for the Respondents : Ms.Tanya Sharma, Advocate

Order delivered On: 11.2017

ORDER

This is an Application which is filed by an Operational Creditor namely M/s Explo Media Private Limited having its registered office at 524-525, Paras Trade Centre, Gurgaon-Faridabad Toll Road, Gurgaon (Haryana)-122009. From Part-II of the Application filed the particulars of the Corporate Debtor is given as under:

- (i) The Corporate Debtor is Respondent above named, namely, Ambience Private Limited.



- (ii) The Corporate Debtor is stated to have been incorporated on 14.4.1986.
- (iii) The authorized capital of the Corporate Debtor is stated to be Rs.4,00,00,00,000/-.
- (iv) The paid-up capital of the Corporate Debtor is stated to be to the extent of Rs.3,02,83,76,000/-.
- (v) Registered office of the Corporate Debtor is stated to be situated at L-4, Green Park Extension, New Delhi-110 016.

2. Part IV of the Application as filed by the Applicant/Operational Creditor gives details of the operational debt which has arisen out of transaction between the Operational Creditor and the Corporate Debtor in the course of their respective business. It is averred therein that the Corporate Debtor had placed an order to the Operational Creditor for outdoor display campaign vide purchase order dated 14.06.2014 and that the Operational Creditor had successfully carried out the outdoor display campaign for the Corporate Debtor as per the



locations selected by the Corporate Debtor. Later, on successful completion, seven invoices, it is claimed by the Operational Creditor had been raised for a total sum of Rs.75,85,400/-. The period in relation to the advertising material/campaigns displayed it is stated to be between July, 2014 to November, 2014. Operational Creditor admits it has received a sum of Rs.14.00 lakhs as against the said invoices and that a balance sum of Rs.61,85,400/- remains unpaid. The invoices raised against the Corporate Debtor in relation to the services provided contains a clause that the payment is required to be made on expiry of 60 days and since the Corporate Debtor has failed to make the payment, the Operational Creditor has claimed interest @ 18% per annum. In addition to payment of Rs.61,85,400/- as the balance invoice amount payable, the Corporate Debtor, it is contended by the Petitioner is also liable to pay interest quantified based on the above premise which amounts to Rs.29,63,983/- and thus the total amount in default on the part of the Corporate Debtor it is averred aggregates to Rs.91,49,383/-. Despite repeated assurances about payment, the



Corporate Debtor it is claimed could not pay the due amount to the Operational Creditor. Further numerous correspondence/requests, also did not yield any result and in the circumstances the Operational Creditor was forced to issue notice as provided for under Section 8 of IBC, 2016 on 19.4.2017 demanding payment in respect of unpaid operational debt for the sum of Rs.91,71,988/- which it is averred includes a sum of Rs.61,85,400/-payable under the invoices and the rest in relation to interest as of April/2017. The Operational Creditor avers that the said notice was duly issued under the hand of one Mr.Sunjoy Daadhicch, Director of the Operational Creditor. The above notice was served on the Corporate Debtor as evidenced by the tracking report, it is averred by the Operational Creditor, on 21.4.2017. It is also stated by the Operational Creditor that despite the receipt of demand notice dated 19.4.2017, the Corporate Debtor has not made any payment to the Operational Creditor. Subsequent to the failure of the Corporate Debtor to make payment in relation to the unpaid debt, it is claimed by the Operational Creditor that this Petition has been preferred for



initiating the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor as the Corporate Debtor is unable to pay the amount due and thereby has committed a default.

3. The matter was duly listed before this Tribunal on 19.7.2017 and subsequently on 21.7.2017 on which date the Petitioner/Operational Creditor was directed to produce the certificate from Bankers as required under Section 9(3) (c) and also an affidavit in relation to notice of dispute, if any, received from the Corporate Debtor and for the above compliances a week's time was granted. In addition, the Petitioner was also directed to issue notice to the registered office of the Corporate Debtor and the matter was to be listed on 2.8.2017. The Corporate Debtor entered appearance subsequently and in compliance with the directions of this Tribunal a reply has been filed after failure of settlement talks between the Operational Creditor and the Corporate Debtor.



4. Perusal of the reply as filed by the Corporate Debtor shows that the Operational Creditor while taking up the outdoor display campaign at the approved locations had assured to provide bright lights on the hoardings to the satisfaction of the Corporate Debtor. There was according to the Corporate Debtor deficiency in service in as much as there was no bright light display in relation to the said hoardings. Further due to very frequent electrical problems which was not regularly rectified in time by the Operational Creditor the quality of display suffered. It is also brought to the notice of this Tribunal that prior to approaching this Tribunal under the provisions of IBC,2016, a statutory notice was also issued by the Operational Creditor under Sections 433 and 434 of the Companies Act, 1956 to which it is stated by the Corporate Debtor was also duly replied and which it is claimed by the Corporate Debtor has not been disclosed before this Tribunal in the Application Filed by the Operational Creditor. It is also contended by the Corporate Debtor that a notice of dispute was also sent. In relation to the statutory notice dated 11.3.2017 it is contended by respondent that it had sent reply to the



Operational creditor under the hand of the Counsel for the Corporate Debtor wherein it is claimed it was pointed out that the Corporate Debtor has not provided the services as per the agreement and that the flexes placed was not of high quality and the Operational Creditor have not rectified electrical problems of damaged/non-working halogen bulbs.

5. Further the demand of Rs.61,85,400/- made vide notice dated 6.3.2017 had also been disputed as illegal, misconceived and untenable. It is the contention of the Respondent at the time of the arguments that the notice of dispute in relation to the statutory notice has not been brought to the notice of the Hon'ble Tribunal as is required to be stated by way of an affidavit under Section 9 (3) (b) of IBC,2016 and in the circumstances the material particulars had not been stated in the affidavit filed by the Operational Creditor and on this ground alone the Petition is liable to be dismissed. It is also contended by the Learned Counsel for the Respondent that a certificate from the bankers as



directed to be produced vide order dated 21.7.2017 has not been produced within the timeframe, as provided under the provisions of IBC,2016 or in compliance of the said order. There has been delay in the production of certificate from the bankers and hence the Petition is liable to be dismissed also on this ground. In any case, it is also submitted by the Learned Counsel for the Respondent during the course of the arguments that the certificate which has been produced, though belatedly from the bankers, is also not in compliance with the provisions of Section 9(3) (c) which is mandatory and to be produced within time in view of the decision rendered by Hon'ble NCLAT in Smart Timing Steel Ltd. -vs- National Steel and Agro Industries Ltd. Taking into consideration the above non-compliances and since there is a pre-existing dispute, even prior to issue of Section 8 notice being the notice of default, between the Operation Creditor and the Corporate Debtor, the Petition is liable to be dismissed.



6. We have carefully considered the plea of the rival parties. Perusal of the affidavit of compliance dated 13.7.2017 nor the Application per se basically discloses the fact of issue of winding up notice by the Operational Creditor and the reply received therefor from the Corporate Debtor which is in contravention under the provisions of Section 9(2)(b) as there has been a pre-existing dispute between parties which is evident from the fact that even after a period of close to three years, the parties have not been able to resolve the said dispute. The dispute which has been raised as can be discerned upon the perusal of reply to the winding up notice as issued by the Corporate Debtor seems to be a plausible dispute as the main contention which is raised by the Corporate Debtor vis-à-vis Operational Creditor is with respect to the hoardings which are required to be displayed and properly lighted or illuminated to be visible to passers by.

7. In the exercise of summary jurisdiction, this Tribunal, that too after more than 3 years or close to it, cannot examine the



veracity of the rival claims in relation to lighting and display of hoardings. Further no certificate has been produced by the Operational Creditor from any independent authority or body to sustain prima facie that the services rendered by it was of requisite standard comparable to market standards/yardstick for similar flexes/hoardings displayed for advertisement purposes and thus the claim cannot be decided in a summary manner. Sufficient to say that in relation to dispute this Tribunal is guided by the judgment as passed by Hon'ble Supreme Court in Mobilox Innovations Private Limited-vs- Kirusa Software Private Limited in Civil Appeal No.9405 of 2017 where it has been held after a detailed study of the enactment of IBC,2016 and its back ground by the Hon'ble Supreme Court at paragraph 45 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.

Thus it is enough that a plausible dispute is shown to exist as between the parties to stave of the insolvency process by the Corporate Debtor, as contemplated under the provisions of IBC,2016.In addition, it is also noticed that the certificate from the bankers is not in conformity as per section 9(3) (c) of IBC, 2016 in as much as the certificate does not disclose the amount of unpaid liability. Thus, taking into consideration the above facts and circumstances of the case, we are constrained to dismiss this Petition but without costs.

A copy of this order shall be duly communicated to the Operational Creditor at the address disclosed in the Petition.


- Sd/-
09/11/17
(R.VARADHARAJAN)
MEMBER(JUDICIAL)

U.D.Mehta
.11.2017