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

**(IB)-262(PB)/2017**

**IN THE MATTER OF:**
**M/s. Ahulwalia Contracts (India) Limited .....Petitioner**
**v.**
**M/s. Ascot Estates (Manesar) Private Limited .....Respondent**

**SECTION : UNDER SECTION 9**

**AND**

**(IB)-263(PB)/2017**

**IN THE MATTER OF:**
**M/s. Ahulwalia Contracts (India) Limited .....Petitioner**
**v.**
**M/s. Ascot Hotels Nad Resorts Private Limited.....Respondent**

**SECTION : UNDER SECTION 9**

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**IN THE MATTER OF:**
**M/s. Ahulwalia Contracts (India) Limited .....Petitioner**
**v.**
**M/s. Ascot Innes Private Limited .....Respondent**

**SECTION : UNDER SECTION 9**

**Order delivered on 17.11.2017**

**Coram:**
**CHIEF JUSTICE M.M. KUMAR**
**Hon'ble President**

**Deepa Krishan**
**Hon'ble Member (T)**

**For the Petitioner(s):** **Mr. Satish Rai, Advocate**

**For the Respondent(s):** **Mr. P. Nagesh, Advocate**

**ORDER**

This order shall dispose of a set of three petitions as similar issues of law and facts have been raised.

2. These set of three petitions have been filed by the same Operational Creditor alleging default on the part of the respective Corporate Debtors of three different group companies.

3. At the outset Mr. P. Nagesh learned counsel for the Corporate Debtor has raised a preliminary objection with regard to maintainability of these petitions. According to the reply affidavit filed by the Corporate Debtor a specific averment has been made asserting that there are arbitration proceedings pending between the parties after revival by the petitioner and the aforesaid fact has not been disclosed in the petition filed by the Operational Creditor. The aforesaid objection has been raised in the following manner:

> "i) That, the operational creditor had with malafide intentions failed to disclose to this Hon'ble Tribunal that it had revived the Arbitral Proceedings pending before Hon'ble Mr. Justice R.C. Chopra (Rtd.), claiming the very same amount (excluding the other claims) claimed herein, wherein the joint settlement application was filed by the parties and the Hon'ble Arbitral Tribunal was pleased to pass its order dated 14.05.2016. A copy of orders passed by Hon'ble Arbitral Tribunal in the year 2017, constituted by Hon'ble Delhi High Court vide its

order dated 14.05.2014 are annexed hereto and marked as **Annexure-1 (colly).**" (emphasis added)

4. It has further been pointed out that the arbitral proceeding commenced in the year 2014 where even the counter claim was filed by the Corporate Debtor which culminated into a settlement agreement dated 14.05.2016. According to the clauses of the settlement agreement the arbitration proceedings were to revive in case payment as per terms of settlement was not made. A total claim of more than Rs. 28.00 crores was made before the Arbitral Tribunal and it was settled for a sum of Rs. Four crores. Accordingly post dated cheques were issued and a payment of Rs. 2 crores has been made as against Rs. 4 crores. The cheques for balance two crores were dishonoured on account of insufficient funds. The arbitral proceeding at the instance of the Operational Creditor were revived as per the provisions of settlement agreement. The aforesaid factual position can be captured from para D (v) of the affidavit filed by Corporate Debtor which reads as under:-

"v) It is submitted that the said settlement agreement dated 14.05.2016 was neither executed for supply of goods not to avail any services from the Applicant. As per the petition filed by the applicant the alleged debt flows

from the said agreement dated 14.05.2016. It is submitted that the alleged debt flowing from the said agreement does not fulfils the conditions enumerated under Section 5 (21) of IBC to become an operational debt. Thus, in view of the fact that the Arbitral Proceedings stands revived by the Operational Creditor before the Ld. Arbitrator duly constituted by Hon'ble Delhi High Court, wherein the alleged claim of the operational creditor is yet to be adjudicated therefore the alleged debt claimed herein by the operational creditor is not even a debt/ liability at the is stage."

5. It is thus obvious that the Corporate Debtor is even disputing the nature of debt and has asserted that it cannot be regarded as operational debt within the meaning assigned to it by Section 5 (21) of the Insolvency and Bankruptcy Code, 2016.

6. The Corporate Debtor has also placed on record copies of the orders concerning the arbitral proceeding. The order dated 03.03.2017 (Annexure-1) would undoubtedly show that the Arbitral Tribunal is seized of the disputes between the parties.

7. The respondent has also highlighted active concealment on the part of Operational Creditor-petitioner in part-C of the application. The facts regarding concealment have been stated as under:-

> "i) That, the operational creditor had with malafide intentions failed to disclose to this Hon'ble Tribunal that it had revived the Arbitral Proceedings pending before Hon'ble Mr. Justice R.C. Chopra (Rtd.), claiming the very same amount (excluding the other claims) claimed herein, wherein the joint settlement application was filed by the parties and the Hon'ble Arbitral Tribunal was pleased to pass its order dated 14.05.2016. A copy of orders passed by Hon'ble Arbitral Tribunal in the year 2017, constituted by Hon'ble Delhi High Court vide its order dated 14.05.2014 are annexed hereto and marked as **Annexure-1 (colly)."** (emphasis added)

8. Having heard the learned counsel for the parties we are of the view that the provisions of Section 8 (2) (a) of the Code would need to be examined first as those provisions are essentially relevant to the issue raised and the same read as under:-

**"Insolvency resolution by operational creditor.**

8.(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) .....

9. A perusal of the aforesaid provisions would show that there is an obligation on the Operational Creditor-petitioner to deliver a demand notice of unpaid operational debt along with a copy of invoice demanding payment of the amount involved in default to the Corporate Debtor. The Corporate Debtor is obliged to bring to the notice of the Operational Creditor within a period of ten days

the factum of existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice. It has come on record that a notice dated 23.06.2017 under Section 8 of the Code was served upon the Corporate Debtor. It is pertinent to mention that in pursuance of direction issued by Hon'ble Delhi High Court a dispute between the parties was referred to the sole arbitration of Hon'ble Mr. Justice R.C. Chopra (Rtd.). On 14.05.2016 a settlement agreement was reached between the parties for a sum of Rs. 4 crores as against the claim of over Rs. 28 crores and the Corporate Debtor had issued post dated cheques for the agreed amount of Rs. 4 crores. However, there was a clause in the terms of settlement that in case the Corporate Debtor commits default in making the payment then the Operational Creditor-petitioner was entitled to revive the proceedings. The present petition was filed by the Operational Creditor-petitioner on 04.08.2017 and on account of bouncing of cheques for a sum of Rs. 2 crores the Operational Creditor-petitioner filed the application before the Sole Arbitrator alleging breach of the terms of the compromise and prayed for date of hearing of all four matters by reviving the arbitral proceedings. In the arbitration proceedings numerous orders have been passed which are 03.03.2017, 23.03.2017, 05.04.2017, 12.04.2017,

24.04.2017 (Annexure-1 Colly) and so on and so forth. These proceedings have not been disclosed by the Operational Creditor-petitioner. The fact remains that the arbitration proceedings are in progress before the Arbitrator. According to Section 8 (2) (a) of the Code if the arbitration proceedings are pending before the receipt of notice of demand under Section 8 of the Code then it would be regarded as an existence of a dispute. The issue is no longer *res integra* and Hon'ble the Supreme Court in the case of ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited***, Civil Appeal No. 9405/2017 (decided on 21.09.2017) has laid down the law. In that case there was a program on Star TV known as "Nach Baliye" and Mobilox Innovations Private Limited was engaged for conducting tele-voting. There was a clause in the agreement for non-disclosure of the identity of the Mobilox. The correspondence between the parties reveal that the non-disclosure agreement was breached and the Kirusa Software Private Limited who was to pay the amount refused to honour the demand notice. Hon'ble the Supreme Court in the aforesaid case after referring to Section 5 (6), 8 and 9 of the Code traced the history of Insolvency and Bankruptcy Code and observed as under:-

> "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 upto 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." (emphasis added)

10. A perusal of the aforesaid para would show that the existence of a dispute is material not that it must be shown to have been highlighted in reply to the notice for demand. It is suffice if it existed.

11. In the present case arbitration proceeding were restarted by the Operational Creditor-petitioner on 03.03.2017 which are in progress. A series of orders dated 03.03.2017, 23.03.2017, 05.04.2017, 12.04.2017, 24.04.2017, 26.05.2017 and so on and so forth have been attached with the affidavit of the Corporate Debtor. It will be interesting to note the proceedings dated 27.07.2017 the matter was posted for recording of evidence which read as under:-

"This matter was fixed for 03 dates continuously with a view to complete the remaining cross-examination of CW-1 Shri Vinay Pal, who is present today.

Learned counsel for the Respondent submits that Shri P. Nagesh, Advocate who has to further cross-examine the

witness is not available on these dates and as such the matter may be adjourned.

In addition, during discussion with both the Parties, it appears that there is still a possibility of resolution of their disputes. It is made clear that in case the parties are unable to arrive at some settlement before the next date of hearing, the matters shall be proceeded further and no request for adjournment on any ground whatsoever shall be entertained.

The further cross-examination of CW-1 is likely to take two more hearings whereas the respondent's evidence is likely to take 03 hearings. This matter is therefore being fixed for 05 hearings today itself, so that, the matters get concluded and in case there is no settlement, an Award may be made in accordance in law.

The matter now to come up for recording Claimant's evidence on 28th and 29th September, 2017 at 11.00 AM on both the dates.

The Respondent's evidence will be recorded on 26th, 27th and 30th October, 2017 at 11.00 AM on all the dates.

The hearings fixed for tomorrow and day after stand cancelled.

Fee for 05 hearings be deposited as directed."

12. A perusal of the aforesaid order does not leave any manner of doubt that arbitral proceedings are in progress.

13. However, the Operational Creditor-petitioner has adopted novel method to infuse life in the present petition and has moved an application (annexed with the rejoinder filed on 09.10.2017) after filing of objections before the Arbitral Tribunal on 25.09.2017 which makes the following statement:-

> "We have been advised to inform your good-self for adjudication of our net claim of Rs. 24.86 Crores only instead of Rs. 28.86 Crores (i.e. original claim) in view of fact that Rs. 2 Crores have already been credited in the account of the Claimant by the Respondent and the cheques of Rs. 2 Crores given by the Respondent have been dishonoured by Bank due to inadequate fund. That with respect to cheques of Rs. 2 Crores that were dishonoured, appropriate proceedings were initiated by the Claimant and to sustain the maintainability of these proceedings taken under NI Act & IBC Code 2016, it

would be appropriate that Claimant does not claim this amount before the Ld. Sole Arbitrator and accordingly reduce the Claim amount from Rs. 28.86 Crores (i.e. original claim) to Rs. 24.86 Crores only.

For the foregoing reasons, this letter may be taken on record to enable us to file the same before the Hon'ble National Company Law Tribunal & District Court Saket."

14. In reply to the preliminary objections Mr. Satish Rai learned counsel for the Operational Creditor has argued that the claim of the Operational Creditor/petitioner before the Arbitral Tribunal was Rs. 28 crores and the settlement was reached for a sum of Rs. 4 crores. The post dated cheques were issued and the amount of Rs. 2 crores has been paid to the Operational Creditor. The Arbitral Tribunal is not to take any cognizance in respect of Rs. 4 crores and therefore, the claim is reduced before the Arbitral Tribunal to Rs. 24 crores plus. The default claim in the present petition therefore, is different than the one pending in the arbitration proceedings.

15. Firstly, the original claim was settled for a sum of Rs. 4 crores and we are constrained to observe that it is inseparable from the

settled amount. That, in any case it is an afterthought in order to devise an argument of separate claim before this Tribunal than the one pending in Arbitral proceeding.

16. It is also appropriate to mention that in cases where the Operational Creditor-petitioner has concealed information from the Tribunal which was in its knowledge then the Code has provided remedy to check these types of misadventures. According to Section 65 (1) of the Code if there is any malicious initiation of proceedings then the Code provides that a penalty may be imposed by the Adjudicating Authority-NCLT which shall not be less then Rs. 1 lakh but may extend to Rs. 1 crore. As there is concealment of facts concerning revival of proceedings before the Arbitral Tribunal and the same was pointed out only by the Corporate Debtor in the affidavit filed on 19.09.2017 we are of the view that there is an attempt on the part of the Operational Creditor/petitioner to overreach this Court. Therefore, we impose minimum penalty of Rs. 1 lakh in respect of each of the petition.

17. We also wish to make it clear that some other objections taken by the Corporate Debtor-respondent have not been gone into as the aforesaid objections were considered sufficient.

18. With the aforesaid observations all three set of petitions fail and the same are dismissed.

Sd/-

**(CHIEF JUSTICE M.M. KUMAR)**
**PRESIDENT**

Sd/-

**(DEEPA KRISHAN)**
**(MEMBER TECHNICAL)**

17.11.2017
Vineet