NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

C.P NO. (IB)-03(PB)/2017
CA NO.

CORAM: **PRESENT: CHIEF JUSTICE M. M. KUMAR**
Hon'ble President

SH. R.VARADHARAJAN
Hon'ble Member (J)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF PRINCIPAL BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 02.03.2017

NAME OF THE COMPANY: Philips India Ltd.
Vs
Goodwill Hospital and Research Centre Ltd

SECTION OF THE COMPANIES ACT: U/s 7 of Insolvency And Bankruancy Code 2016

S.NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE
1.	**Harsh Raghuvanshi**	**Advocate**	**Respondent**	
2.	**N. Mahabir**	**Advocate**	**Petitioner**	
3.	**P.C. Arya**	**Advocate**	**Petitioner**	

FINAL ORDER

01.3.2017

This Order shall dispose of CP (ISB) No.03 (PB) of 2017 & CP (ISB) No.04 (PB) of 2017. Both the applications have been filed by M/s. Philips India Limited invoking the provisions of Section-9 Insolvency and Bankruptcy Code 2016 (for brevity *IBC).*

Facts may be noticed from the first Petition i.e. CP (ISB)03(PB) of 2017. The applicant has claimed that the Respondent Goodwill Hospital and Research Centre Limited is a 'Corporate Debtor' as it owe a sum of Rs.1,119,869.00 to the applicant as the principal amount plus interest. The applicant is engaged in manufacturing, distribution and maintenance of various health care equipments, it entered into a Comprehensive Annual Maintenance contract with the respondent on 2.8.2011 and 11.5.2012, in respect of the Allum FD20C for the period from 1.9.2011 to 31.8.2012 & 1.9.2012 to 31.8.2013, respectively. The applicant had agreed to provide plant, maintenance of the installed machine, Allum FD 20C etc. During the period of contract, the applicant promised to keep the equipment in good working condition. The applicant asserts that respondent had agreed to make the payment in accordance with the provisions made in Clause 6 of the contract which reads as under :

"(i) the amount of material, service or maintenance charges together with applicable taxes (if any) shall be payable in full within 30 days of the Contract, and

(ii) if the payment is not received within 30 days as specified above, Philips shall be at liberty to terminate the Contract and recover the

amount towards charges for services, if any rendered at their standard rates.

The applicant has stated that it has provided maintenance during the relevant period and fulfilled all its obligations in accordance with the provisions of the contract. However, the respondent has failed to make full payment to the applicant. It is claimed that the respondent never denied the factum of performing its obligation by the applicant in accordance with the terms of the contract. The following amount has been claimed against the invoices :

Date of the invoice	Invoice Number	Amount pending	Original invoice value
24.3.2013	950198391	381,958.59	477,786.94
23.1.2013	950197821	380,291.40	476,119.75
27.9.2012	950196954	357,619.02	453,447.37
	Total principal Due	1,119,869.00	

According to the averments made in the application, a number of meetings took place and the respondent made a payment of Rs.94,000/- on 16.1.2014 which was adjusted as partial payment of the dues owed by the respondent and its sister concern Karina Health Care Private Ltd. equally in the ratio of 50% who is the respondent in the second application. After the partial payment, the corporate debtor still owed a sum of Rs.11,19,869.00 to the applicant who claims to be operational creditor. A payment notice was sent by the applicant to the respondent on 19.3.2014 with a request to clear its outstanding dues. Again on 09.3.2016, another notice demanding payment under the hand of Legal

Counsel for the petitioner had been sent and the respondent sent a reply on 30.3.2016 and refused to make any payment.

The applicant also sent a notice under Section 8 of the IBC to the respondent in Form 3 as provided by the IBC Rules. The notice has been returned undelivered. Like-wise, notice issued at other places also received back undelivered as the registered office of the respondent was found locked. Eventually, a notice was issued by email on the address of the responsible officer of the respondent on 2.1.2017. It refused vide letter dated 9.1.2017 to pay the debt. The applicant has asserted that the respondent is in default and the applicant has become entitled to recover a sum of Rs.11,19,869.00 along with interest @ 18% p.a. Accordingly, a sum of Rs.17,16,314/- has been claimed as the total amount due which includes the principal and interest calculated @ 18% p.a.. A copy of the contract dated 11.5.2012 has been placed on record (Annexure-I). A copy of the each unpaid invoice has also been placed on record (Annexure-II colly). A sum of Rs.47,000/- as paid on 16.1.2014 has been reflected in the accounts statement. The receipt of the amount has also been placed on record (P-III). It is claimed that the corporate debtor in its letter dated 30.3.2016 has admitted the outstanding amount of debt and it has not intentionally paid the same.

We have heard the Learned Counsel for the parties at length and have perused the Paper Book with their able assistance. Ld. Counsel for the applicant has taken us 'through various documents filed along with the Application. A perusal thereof would show that the work order placed by the corporate debtor primarily relates to maintenance of the equipments. A bare perusal of the invoices would show that it has included the charges for material and labour apart from CST, service tax,

operational cess & secondary and higher education cess. There is no document placed on record certified by the respondent or its authorized representative or a medical Technician that the work has been done satisfactorily in accordance with the standard of norm/quality stipulated in the agreement. The issuance of certificate is the norm adopted in all such contracts where the work of maintenance is executed.

There is no other material on record to acknowledge the satisfactory completion of work in terms of the provisions of the contract dated 2.8.2011 and 11.5.2012 . It is also not understood as to why the applicant has maintained blissful silence over the claim to be made for such a long period after 16.1.2014.

A sum of Rs.47,000/- in respect of each of the petition has been paid on 16.1.2014. It is also asserted that the claim has been made within three years and it is within the limitation. A reference has been made to Section 19 of the Limitation Act to argue that once part payment has been made, then the period of limitation would commence from the date of part payment.

The reliance of the applicant on the provisions of Section 9 of IBC is not meritorious. The applicant has claimed and has classified itself as 'operational creditor' and has prayed for triggering of the Insolvency Process . A bare perusal of Section 9 of IBC would inter alia, reveal that this Tribunal is vested with the powers to reject the application of the operational creditor under Section 9 (5) (d) of IBC in case it is found that notice of dispute has been received by such an operational creditors, or there is a record of dispute with the information utility. We have been informed that no 'Information Utility' has so far been set up and we are per force to rely on the notice of dispute as sent by the respondent

operational debtor to the applicant. In the notice of dispute, the liability to pay has been completely denied. To appreciate the nature of dispute, It would be profitable to read the following part of the reply dated 30.3.2016:

> "At the outset the allegations levelled under your notice dated 9.3.2016 are being denied in its entirety for being false and concocted. It appears from the tone and tenor of your notice that your client had not apprised you with the correct facts and circumstances of the matter at hand, leading to the issuance of the misconceived and ill founded notice dated 9.3.2016. It is brought to your kind notice that dues as claimed by your notice were never outstanding against my clients and the demand notice for the same is hopelessly barred by laws of limitation and hence untenable under law.
>
> It is brought to your notice that our clients entered into a Comprehensive Annual Maintenance Contract with your client for the maintenance of installed Allura Xper FD 20C at its hospital to keep the same in a good and proper working condition. It was agreed under the clause 2 of the contract that the service will be provided by your clients for the upkeep of the above mentioned medical equipment at the site of my client but your client in the most unprofessional manner failed to keep up with the contractual obligation taken by it vide contract dated 11.5.2012 . It is further important to mention herein that the officials of your client had failed to visit the premises of my client in a periodic

manner for the upkeep of the medical equipment due to which the functioning of the equipment was majorly effected.

It is further important to mention herein that the Allura Xper FD20C installed at the hospital of my client was left unattended at the hospital of my client for several days due to minor problems which were to be repaired by your client but were never repaired in time causing severe financial loss due to non activity of the machine of my client. The unprofessional approach by the officials of your client has caused major loss of reputation for my client and caused severe inconvenience to the patient awaiting their treatment at the Hospital of my client due to which the payment was deducted by my client and the same was informed to the officials of your client."

A perusal of the aforesaid paras of the notice makes it patent that the operational debtor has disputed the satisfactory performance and maintenance of the medical equipment at the site in accordance with the contractual obligation undertaken by the applicant vide contract dated `11.12.2012 . The reply specifically states that the officials of the applicant had failed to visit the premises of the operational creditor in a periodical manner to upkeep and maintain the medical equipment, as a result of their negligence, the functioning of equipment has been adversely affected. It has in fact caused major loss of reputation of the respondent operational debtor in addition to severe inconvenience to the patients waiting for the treatment at the Hospital. Accordingly, the payment was deducted by the respondent operational Debtor and intimation was sent to the applicant.

It is pertinent to note that the expression dispute has been defined and it is an inclusive definition as could be 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 the above provision of the 'IBC' shows that a dispute could be proved by showing that a suit has been filed or Arbitration proceedings are pending . It further elaborates that the suit or arbitration should be in respect of the existence of the amount of debt, quality of goods or services, or for a breach of a representation or a warranty. Obviously, 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 (i) 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 show the 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 applicant sent a demand notice which was duly received by the respondent. A reply has also been duly filed where serious dispute has been raised.

As such, on a perusal of documents submitted before us by the applicant, we are unable to fathom any material on record to dislodge the stand of the respondent as already discussed in the preceeding paras. Hence, we are inclined to reject the above Petitions. We have taken the same view in our judgment dated March 1, 2017 rendered in Company Application No. (I.B) 07/PB/2017 and Company Application No. (I.B)08/PB/2017/ titled as M/s. One Coat Plaster Vs. M/s. Ambience Pvt. Limited.

Hence, the remedy of the applicant above named lies elsewhere and not under the provisions of the IBC, 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 aforestated, we reject both the applications filed by the applicant operational creditors. However, owing to tenderness of the IBC, we leave the parties to bear their own cost.

Sd/-

CHIEF JUSTICE M.M. KUMAR
PRESIDENT

2nd March, 2017

Sd/-

(R. VARADHARAJAN)
MEMBER (JUDICIAL)