

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT NEW DELHI**

COMPANY APPEAL (AT) (INSOLVENCY) NO. 6/2017

IN THE MATTER OF:

Kirusa Software Pvt. Ltd.

...Appellant

Versus

Mobilox Innovations Pvt. Ltd.

...Respondent

**ADVANCE WRITTEN SUBMISSION BY MR. DEVANSH A. MOHTA &
DESAI & DIWANJI, ADVOCATES ON BEHALF OF THE RESPONDENT**

INTRODUCTION

1. The present matter raises question of substantial importance involving interpretation of section 8 and 9 of The Insolvency and Bankruptcy Code, 2016 [**“hereinafter referred as the Code, 2016”**] and in particular relating to: *firstly* the obligation of corporate debtor under section 8(2), and the manner in which it is discharged; *secondly* the true purport and scope of the expression “notice of dispute” under section 9(5)(ii)(d) and *lastly* the nature of jurisdiction of the Adjudicating Authority- the National Company Law Tribunal- under section 9(5)(ii)(d).
2. These questions have also assumed significance due to the divergent views taken by the Adjudicating Authorities while deciding applications under section 9 of the Code, 2016. Upon these views the Respondent have made their comment in the later part of this “Written Submission”. Therefore, it is respectfully submitted that a judgment by this Hon’ble Tribunal is invited upon true purport and scope of section 8 and 9 of the Code, 2016.

FACTUAL BACKGROUND

3. The Appellant has filed the present appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 challenging the order dated 27.01.2017 (hereinafter referred as the **“Impugned Order”**) passed by National Company Law Tribunal, Mumbai Bench (hereinafter referred as **“NCLT Mumbai”**).
4. The present matter arises pursuant to an application for initiation of corporate insolvency which was made by the Appellant under Section 8 of the Code 2016. By the Impugned Order , the NCLT Mumbai rejected the aforesaid application for the reason that the claim of the Appellant was “.... *hit by section 9(5) (ii) (d) of the Insolvency and Bankruptcy Code ,.....”*

Sr. No.	Date	Particulars	Ref.																																				
1.	14.10.2013, 29.10.2013 & 12.12.2013	Purchase orders issued by CEO of the Mobilox, Mr. Rohit Kaul to run televoting campaign for Star TV (Nach Baliye).	Pg 79-81 Annexure D																																				
2.	3.12.2013-5.11.2014	<p>Invoices raised by the Appellant are tabulated below:</p> <table border="1"> <thead> <tr> <th>Sl. No.</th><th>Invoice No. – Date</th><th>Invoice raised for the month</th><th>Amount</th></tr> </thead> <tbody> <tr> <td>1</td><td>015/MIPL /1314 - 3.12.13</td><td>Nov. 2013</td><td>4,87,957/-</td></tr> <tr> <td>2</td><td>015/MIPL /1314 - 20.12.13</td><td>Dec 2013</td><td>5,16,076/-</td></tr> <tr> <td>3</td><td>015/MIPL /1415 – 4.2.14</td><td>Jan 2014</td><td>9,68,736/-</td></tr> <tr> <td>4</td><td>015/MIPL /1415 – 3.9.14</td><td>August, 2014</td><td>11,810.05/-</td></tr> <tr> <td>5</td><td>015/MIPL /1415 – 8.10.14</td><td>Sept 2014</td><td>11,806.55/-</td></tr> <tr> <td>6</td><td>015/MIPL /1415 – 5.11.14</td><td>October, 2014</td><td>11,816.95/-</td></tr> <tr> <td colspan="3">Total</td><td>20,08,202.55</td></tr> <tr> <td colspan="4">Rupees Twenty lacs eight thousand two hundred two and paise fifty five only.</td></tr> </tbody> </table>	Sl. No.	Invoice No. – Date	Invoice raised for the month	Amount	1	015/MIPL /1314 - 3.12.13	Nov. 2013	4,87,957/-	2	015/MIPL /1314 - 20.12.13	Dec 2013	5,16,076/-	3	015/MIPL /1415 – 4.2.14	Jan 2014	9,68,736/-	4	015/MIPL /1415 – 3.9.14	August, 2014	11,810.05/-	5	015/MIPL /1415 – 8.10.14	Sept 2014	11,806.55/-	6	015/MIPL /1415 – 5.11.14	October, 2014	11,816.95/-	Total			20,08,202.55	Rupees Twenty lacs eight thousand two hundred two and paise fifty five only.				Pg.82-91 Annexure E
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3.	26.12.2014	<p>Mutual Non-Disclosure Agreement was executed between the Appellant and the Respondent. This agreement was effective from 1.11.2013.</p> <p>Note:</p> <p><i>Firstly</i> it is pertinent to note that the above invoices are covered by the NDA, as they are raised after 1st November, 2013.</p> <p><i>Secondly</i> Clause 8 provides the Remedies available for breach and Clause 9 provides that the NDA “contains the entire agreement between the parties with respect to subject matter hereof. [see: pg. 97]</p>	Pg. 94-98 Annexure G																																				

Sr. No.	Date	Particulars	Ref.
		<i>Thirdly</i> the purpose of the NDA as specified in Clause 1 <i>inter alia</i> includes “IVR, Miss Call” within the purview of which would fall the services specified in the PO. [see: pg 94]	
4.	30.1.2015	<p>By an email the Respondent informed the Appellant about the breach of the above NDA. In the email, it was clearly stated that the Respondent are <u>withholding all amounts due to the Appellant for the reason of breach of the above NDA.</u></p> <p>Note:</p> <p><i>Firstly</i>, the appellant has neither denied that NDA was breached nor contesting the withholding of amounts for a period of two years.</p> <p><i>Secondly</i>, emails dated 10.2.2015 and 19.9.2015 addressed by the Appellant to the Respondent are admissions of the above breach. In that email the appellant has disclosed corrective measures taken by them to avoid any loss of business or damage to the Respondent. [see: para 5 (k) to (q), pages 175-179]</p>	Pg. 99 Annexure H
5.	12.12.2016	<p>Appellant issued notice u/s 271 (1) (a) 271 (2) (a) of the Companies Act for winding up of the Respondent.</p> <p>Note:</p> <p>It is pertinent to note that on this date section 271(1) (a) did not to exist on the statute book. It was substituted with effect from 15.11.2016 by the Insolvency and Bankruptcy Code, 2016.</p>	Page 106, Annexure I.
6.	23.12.2016	<p>The Appellant issued “demand notice” in the prescribed format – Form 3 of the Code.</p> <p>Note:</p> <p>The said notice was delivered upon the Respondent on 26 December 2016.</p>	Page 109-110 Annexure I
7.	27.12.2016	The Respondent brought to the notice of the appellant, the <u>existence of a dispute in respect of amount claimed in the demand notice.</u>	Page 117 Annexure J

Sr. No.	Date	Particulars	Ref.
		<p>Note:</p> <p>The said notice was received by the Appellant on 27 December 2017 by email. Further, Sr No. 4 also demonstrates that the dispute has been in the knowledge of the Appellant.</p>	
8.	30.12.2016	<p>The Appellant filed Company application (Main) No.2/I & BP/ NCLT/MAH/ 2017.</p> <p>Note:</p> <p>It is pertinent to note that the Appellant had not disclosed the above notice of dispute in their company application. (see: page 140)</p> <p>However, <u>at page 150</u>, the Appellant had made reference to the notice of dispute at Sl. No. 7.</p> <p><u>At para 9.16 pg 151</u>, the Appellant also stated that the “alleged breach of NDA” was not a “valid dispute” for refusal of payment.</p>	Page 126 Annexure K
9.	19.1.2017	NCLT directed the appellant to remove all defects in the Application and file an additional affidavit in relation to “alleged dispute” raised by their Respondent citing purported breach of NDA and other relevant documents before next date of hearing.	Page 69
10.	24.1.2017	<p>In compliance with the above direction, the Appellant filed the additional affidavit (of Mr. Jasmit Singh).</p> <p>It is pertinent to note that the Appellate for the first time, in the last two years, disputed the connection between the NDA and the PO. It stated thus –</p> <p>“In substance, admittedly the claim for unliquidated damages under the NDA is unconnected to the provision of Services under the POs. In fact, it is relevant to state that the POs does not contain any condition in relation to non-disclosure and the NDA was executed after provision of Services by the Applicant under the POs and after the Applicant, had inserted on its website, their</p>	Pg. 153 Annexure L

Sr. No.	Date	Particulars	Ref.
		<p>participation in the Campaign. Copies of the Reply and the NDA have been annexed as Annexure I (Colly) and Annexure 2 respectively. [see: page 159]</p> <p>17. Therefore, the entire charade of the Corporate Debtor of executing the NDA and making it retrospectively effective proves the malafide intention of the Corporate Debtor of not making good the pending payments due to the Applicant/Operational Creditors under the pretext of the breach of NDA. The surreptitious weaving of the events to manoeuvre the execution and the effective dates of the NDA by Corporate Debtor never intended on releasing the pending payments to the Applicant/Operational Creditor. [see: page 163]</p> <p>In respect of the debt, the appellant status thus –</p> <p>“18. Furthermore, assuming without admitting that the Applicant Operational Creditors had breached the NDA, the same has no relation to the provision of the Services under the POs, and does not fall within the scope of ‘default’, under the Code. At the highest, the purported breach of the Appellant/Operational Creditors, can only give rise to independent rights to the Corporate Creditor, to seek unliquidated damages from the Appellant and institute civil proceedings, in a Civil Court, having jurisdiction. It is relevant to state that till date, the Corporate Creditor, had not initiated any proceedings against the Applicant, in this regard. Also, it is relevant to be noted that it has no connection whatsoever insofar as provision of services and payment of outstanding payment of operational debt. The Corporate Debtor has never raised any ‘dispute’ within the meaning of dispute, under Code, including in connection with the quality of comprehensiveness of the services</p>	

Sr. No.	Date	Particulars	Ref.
		<p>provided under the POs or the genuineness of invoices raised in connection with the Campaign, et al. [see: pg 163]</p> <p>19. Moreover, it is to be noted that the payment for the services rendered by Applicant/Operational Creditors under the POs became due in 30 days from the date of raising of the respective Invoices. Therefore, the payment under the first invoice became due on 3.1.2014 and so on. The Corporate Debtor had admitted to ‘withholding’ payments due to the Applicant/Operational Creditor on the alleged breach of the NDA as stated in its Reply to the Demand Notice. This shows that the Corporate Debtor, being fully aware of its obligations of making the payment, deliberately chose not to fulfil its obligations on the baseless ground of the alleged breach of the NDA. Withholding payment for more than a year on the pretext of a NDA (which was not even binding on the parties at the time the services were provided) is not just and equitable in the eyes of law. [see:pg 164]</p> <p>20. In this regard, the Applicant refers to Section 9(3) of the Code which states as follows:</p> <p>“An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt.”</p> <p>The Applicant was advised that in terms of Section 9(3) (b) of the Code, ‘dispute’ would only be in relation to the unpaid operational debt. Any other dispute, which does not have a nexus with the subject matter, cannot be used by the corporate debtor as a tool to avoid the payment of the operational debt to the operational creditor. In view thereof, the Applicant had not filed a copy of the Reply received from the Corporate Debtor; however, reference to the same has been made in paragraph 9.12</p>	

Sr. No.	Date	Particulars	Ref.
		<p>under point 6 of Part V in the Application, of the Applicant. Copies of the Reply received from the Corporate Debtor, has been filed as Annexure I to this affidavit. [see: pg 165]</p> <p>21. In light of above, it is submitted that the Corporate Debtor has not raised any ‘dispute’ within the scope of the definition under the Insolvency Code and the claim for unliquidated damages raised by the Corporate Debtor, for purported violation of NDA, is unconnected and has no relevance to the operational debt, claimed by the Applicant/Operational Creditors, in the present proceedings. An alleged breach of an NDA which was executed after a year of the operational debt becoming due to the Applicant/Operational Creditor cannot be held to be a ‘dispute’ in relation to the pending payment of the services provided to the Corporate Debtor. Furthermore, it is also submitted that the execution of the NDA with retrospective effect was in fact pre-determined plan of the Corporate Debtor with a solitary motive to avoid making the payments due to the Applicant/Operational Creditor under the POs. That the matter regarding the alleged breach of NDA by the Applicant/Operational Creditor is not a valid ‘dispute’ under the Code and only a cover up for the refusal of the payments due to the Applicant/Operational Creditor per the Invoices. [see:pg 165-66]</p>	
11.	24.1.2017	<p>The Respondent filed their affidavit in reply (of Mr. Abhijit Saxena). In respect of the dispute it stated thus –</p> <p>“In view of the above campaign and on account of the fact that the Operational Creditor was in possession of the Corporate Debtor’s Confidential Information, the parties mutually agreed to execute a non-disclosure agreement. However, it would be pertinent to highlight that the Operational Creditor, had intentionally and for reasons best known to it, delayed the execute of such non-disclosure agreement for a period of 1 year. However, after a several</p>	Pg. 168 Annexure M

Sr. No.	Date	Particulars	Ref.
		<p>persuasions by the representatives of the Corporate Debtor, a Mutual Non-Disclosure Agreement dated 26.12.2014 (“NDA”) was executed between Operational Creditor and the Corporate Debtor. At this juncture, it would be important to note that the said NDA were to be read in consonance with the purchase orders raised by the Corporate Debtor on the Operational Creditor including the aforementioned POs.</p> <p>As stated in the NDA, the purpose of the NDA was to enter into a business relationship for ‘conceptualizing development and execution of mobile solutions using Apps, WAP, Games, SMS, IVR, Miss Call, Short codes, interactive walkthrough etc. and other related services for projects of the Corporate Debtor to Operational Creditor i.e. the ‘Purpose’ as defined in the NDA. In connection with the Purpose, the Disclosing Party could disclose certain Confidential Information and the Receiving Party was bound to not disclose such information. In fact, the Receiving Party has further obligations under the NDA in relation to the Confidential Information and more specifically, under Clause 3 (iii) of the NDA, the Receiving Party is prohibited from approaching directly and/or via any third party or otherwise, the client of the Disclosing Party. [see: page 171]</p>	
12.	27.1.2017	<p>The NCLT rejected the above application preferred by the Appellant in its order the tribunal held the following:</p> <p>“When this bench has directed the petition to furnish the requisite documents as described u/s 9 of the Code, the Petitioner filed the notice of dispute raised by the Corporate Debtor disclosing the Corporate Debtor disputing the claim made by the Petitioner.</p> <p>..... In compliance of it, the Petitioner filed the notice of dispute issued by the Corporate Debtor disclosing the corporate debtor the claim made by the</p>	Pg 68.

Sr. No.	Date	Particulars	Ref.
		<p>Petitioner. On perusal of this sub-section (5) of Section 9 of this Code, it is evident that notice of dispute has been received by the Operational Creditor.</p> <p>On perusal of this notice dated 27.12.2016 disputing the debt allegedly owed to the Petitioner, this Bench, looking at the Corporate Debtor disputing the claim raised by the Petitioner in this CP, hereby holds that the default payment being disputed by the Corporate Debtor, for the petitioner has admitted that the notice of dispute dated 27.12.2016 has been received by the operational creditor, the claim made by the Petitioner is hit by Section 9(5) (ii)(d) of The Insolvency and Bankruptcy Code, hence this Petition is hereby rejected.”</p>	
13.	4.3.2017	<p>Present appeal u/s 61 preferred for the reliefs at page 61.</p> <p>Prayer (b) reads thus: “Direct National Company Law Tribunal, Mumbai Bench at Mumbai to consider the petition filed by the Appellant on merits.</p> <p>The grounds of appeal are at page 51.</p> <p>The primary ground on which appeal is preferred is at page 53.</p> <p>See also question of law at page 49 and 50.</p>	Pg 26

LEGAL SUBMISSION

(A) The obligation of a corporate debtor under section 8(2)

5. For ready reference **section 8 of the Code, 2016** is reproduced below:

“Insolvency resolution by operational creditor-(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) the repayment of unpaid operational debt—
 - (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
 - (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

6. It is respectfully submitted that the obligation of a corporate debtor, under Section 8(2) of the Code, 2016, is to bring to the notice of an operational creditor, existence of a dispute cannot be confined only to furnishing record of a pending suit or arbitration proceedings filed before the receipt of the demand notice. Such construction would render the expression “*existence of dispute, if any*”, in Section 8(2) (a) of the Code, 2016 *otiose*. The obligation stands fulfilled when the corporate debtor demonstrates in any form – not limited to record of a pending litigation (i.e. a suit or arbitration) - an existing dispute with respect to the operational debt which is the subject matter of the demand notice.

Meaning of “dispute”

7. Section 5(6) of Code, 2016 is an interpretation clause and is intended by the legislation to be taken in to account while construing the expression “*dispute*” occurring in Section 8(2) of the Code, 2016.
8. Section 5(6) of the Code, 2016 reads thus:

“*Dispute includes a suit or arbitration proceedings relating to –*

 - (a) *the existence of the amount of debt;*
 - (b) *the quality of goods or service; or*
 - (c) *the breach of a representation or warranty;*”
9. Considering that the expression “*dispute*” is relevant to the scheme of law governing initiation of corporate insolvency by operational creditor, only the definition of “*dispute*” must be read along with the expression “*operational debt*”:
10. An “*operational debt*” is defined in Section 5(21) of the Code, 2016, to mean “a claim in respect of the provision of goods or service 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”.

11. Thus, juxtaposing the definition of “*dispute*”, “*operational debt*” with Section 8(2) of the Code, 2016, it is respectfully submitted that it was the intention of the legislature to lay down the nature of disputes that can be raised by the corporate debtor in response to the “*operational debt*” identified in the “*Demand Notice*”.

Second part of the definition “dispute”: “relating to”

12. A closer analysis of the definition would reveal that the definition of “*dispute*” has two parts -
- (i) *the first part* of the definition which deals with forms in which such dispute can be raised, where the Parliament/Legislature has consciously used the word “*includes*” before “*suit or arbitration proceeding*”; and
 - (ii) *the second part* which deals with the nature of dispute have been qualified with the expression “*relating to*”.
13. The Major Law Lexicon explained the meaning of the expression “*relating to*” in the following manner:
- (i) “*includes documents which may directly or indirectly enable a party to advance his own case or damage his opponents*” [see: pg 5812]
 - (ii) The expression is of widest amplitude which includes even the question as to existence validity and scope [see: pg 5812]
14. The Major Law Lexicon explains the meaning of dispute in the following:
- (i) “*Dispute. A conflict or contest; sometimes used in the sense of controversy. “Controversy, debate, heated contention, quarrel, difference of opinion.”*”
 - (ii) “*The meaning of the word “dispute” is, “a controversy, having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.” Canara Bank v. National Thermal Power Corporation, 2001 (1) SCC 43.*”
 - (iii) “*The term “dispute” occurring in the Act is used in general meaning. It means dispute of any nature between the parties. [Agri Gold Exams Ltd. v. Sri Lakshmi Knits of Wovers, (2007) 3 SCC 686, 690, paras 18 & 19) (arbitration and conciliation Act (26 of 1996)]*”
 - (iv) “*The term “dispute” in its wider sense may mean the wrangling’s or quarrels between the parties, one party asserting and the other denying the liability. P. Neelakanteswararaju v. J. Mangamma, AIR 1970 APPLICATION 1 at 7 (FB). [Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari Act) (26 of 1948), S. 56(1)]*”
 - (v) “*A dispute means that one party has a claim and the other party says, for some specific reasons, that this is not a correct claim. This is a dispute. A dispute of this type requires that there should be a statement of proposition made by one side and there should be a denial or refutation of that proposition by the other side on the basis*”

of agreement in question. Then only there can be a dispute.”
[Salecha Cables (P) Ltd. v. Himachal Pradesh State Electricity Board, 1995 (1) Arb LR 422]

(vi) *“A mere failure to pay is not necessarily a difference, and the mere fact that the party could not or would not pay does not in itself amount to a dispute, unless the party who chooses not to pay raises controversy regarding, for instance, the basis of payment or the time or manner of payment.”* [Dawoodbhai Abdulkader v. Abdulkader Ismailji, AIR 1931 Bom 164]”¹⁹.

15. It is respectfully submitted that a dispute under the Code, 2016 must relate to the specified nature in clause (a), (b) or (c). However, it is capable of being discerned not only from pleadings [in a suit or arbitration] but from documents also. For example: in case a Corporate Debtor has issued notice under section 80 of the Code of Civil Procedure, 1908 prior to initiation of Suit against a Government Operational Creditor. It cannot be the intention of the Parliament to exclude from the purview of section 8(2) this dispute only for the reason that a suit is not pending.

First part of the definition “dispute”: “includes”

16. It is respectfully submitted that by using the phrase “includes a suit or arbitration proceedings” in the *first part* the Legislature could have never intended to restrict the meaning of dispute in specified forms namely suit or arbitration. Infact, the Legislature intended to expand the form from which the specified nature of dispute is capable of being discerned.
17. In *Ramanlal Bhailal Patel v. State of Gujarat* (2008) 5 SCC 449 the Court held as follows:

“23. The word “person” is defined in the Act, but it is an inclusive definition, that is, “a person includes a joint family”. Where the definition is an inclusive definition, the use of the word “includes” indicates an intention to enlarge the meaning of the word used in the statute. Consequently, the word must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. Thus, where a definition uses the word “includes”, as contrasted from “means”, the word defined not only bears its ordinary, popular and natural meaning, but in addition also bears the extended statutory meaning (see S.K. Gupta v. K.P. Jain following Dilworth v. Commr. of Stamps and Jobbins v. Middlesex Country Council).”

18. In *Ramanlal* (supra), the Hon'ble Supreme Court was considering the scope of the following definition of person: “Person includes a joint family”. the Hon'ble Supreme Court held as follows:

“24. The ordinary, popular and natural meaning of the word “person” is “a specific individual human being”. But in law the word “person” has a slightly different connotation and refers to any entity that is recognised by law as having the rights and duties of a human being. Salmond defines “person” as “any being whom the

law regards as capable of rights and duties” or as “a being, whether human or not, of which rights and duties are the attributes” (Jurisprudence, 12th Edn., p. 299). Thus the word “person”, in law, unless otherwise intended, refers not only to a natural person (male or female human being), but also any legal person (that is an entity that is recognized by law as having or capable of having rights and duties). The General Clauses Act thus defines a “person” as including a corporation or an association of persons or a body of individuals whether incorporated or not. The said general legal definition is, however, either modified or restricted or expanded in different statutes with reference to the object of the enactment or the context in which it is used. For instance, the definition of the word “person” in the Income Tax Act, is very wide and includes an individual, a Hindu Undivided Family, a company, a firm, an association of persons or body of individuals whether incorporated or not, a local authority and every other artificial juridical person. At the other extreme is the Citizenship Act, Section 2(f) of which reads thus: “‘Person” does not include any company or association or body of individuals whether incorporated or not.’ Similarly, the definition under Section 2(g) of the Representation of People Act, 1950, is “person” does not include a body of persons.

25. Both definitions of the word “person”, in the General Clauses Act and the Ceiling Act, are inclusive definitions. The inclusive definition of “person” in the General Clause Act applies to all Gujarat Acts unless there is anything repugnant in the subject or the context. The inclusive definition of “person” in Section 2(21) of the Ceiling Act, does not indicate anything repugnant to the definition of “person” in the General Clauses Act, but merely adds “joint family” to the existing definition. Therefore the definition of person in the Ceiling Act, would include the definition of person in Section 3(35) of the General Clauses Act. The resultant position can be stated thus: the definition of person in the General Clauses Act, being an inclusive definition, would include the ordinary, popular and general meaning and those specifically included in the definition. The inclusive definition of “person” in the Ceiling Act, in the absence of any exclusion, would have the same meaning assigned to the word in the General Clauses Act, and in addition, a “joint family” as defined. Thus, the word “person” in the Ceiling Act will, unless the context otherwise requires, refer to:

- (i) a natural human being;*
- (ii) any legal entity which is capable of possessing rights and duties, including any company or association of persons or body of individuals (whether incorporated or not); and*
- (iii) a Hindu Undivided Family or any other group or unit of persons, the members of which by custom or usage, are joint in estate and residence.”*

19. Thus, it is respectfully submitted that for the purpose of section 8(2) “a dispute” must be capable of being discerned from the notice of the

Corporate Debtor. And the meaning of “existence of a dispute, if any” must be understood in the above context.

First Part of clause (a) of section 8(2): “existence of a dispute, if any”

20. The Shorter Oxford English Dictionary gives the following meaning of the word “**existence**”:
 1. Reality, as opp to appearance. Only in LME.
 2. The fact or state of existing; actual possession of being. Continued being spe. continued being as a living creature, life, esp. under adverse conditions.

Something that exists; an entity, a being. All that exists. (**Page 894 – Oxford English Dictionary**)”
21. It is respectfully submitted that, ordinarily, a dispute is not confined only to pleadings in a litigation. Moreover, the language of neither Section 5(6) of Code, 2016 nor Sections 8 and 9 of Code 2016 restrict the right of the corporate debtor to assert their claim only in form a pending suit or arbitration in relation to the operational debt which is subject matter of a “*demand notice*”.
22. A contrary interpretation would render lead to anomalous result in commercial dealings between the corporate persons. [See: Samee Khan v. Bindu Khan (1998)7 SCC 59.
23. An illustration of a commercial anomaly and which disregards commercial/business interactions would be as follows:

In day-to-day commercial operations, a corporate entity (“**Customer**”) usually identifies vendors for providing various goods and services (“**Vendor**”). During the supply of such goods or services, a specific Vendor supplies goods or services which are sub-standard in quality or do not meet with the quality criteria of the Customer; in such an event, the Customer will, in practice, communicate such a failure of quality standards to the Vendor and state that it will not pay for such goods or services unless the goods or services are replaced with the desired quality. A Customer will not ordinarily initiate a suit or an arbitration or any type of proceeding against the Vendor for supply of such defective goods or services since the defect is not the Customer’s fault and the Customer simply does not pay for such defective goods or services.

If the interpretation of the Appellant is accepted then, in the above illustration, it will be incumbent upon the Customer to initiate suit or arbitration or any other type of proceedings (immediately upon becoming aware of the quality of goods or services) against the Vendor for the supply of defective goods or services so that the Customer is not under a threat of being subjected to proceedings under section 8 of the Code, 2016 by the Vendor for failure to pay for such defective goods or services. If this

interpretation of the Appellant is upheld, then the wheels of day-to-day commerce will be impeded and customers will always be under a threat of proceedings by the Vendor under Section 8 of the Code, 2016, in situations where it is not the customer's fault.

Legislative intent was not to confine existence of dispute only in form of a suit or arbitration proceeding

22. It is respectfully submitted that the entire exercise of determining whether the usage of “*includes*” in a definition is to derive due to intent of the legislature. In the present case, the legislative intent is clearly brought out by substitution of the original definition which use the word “*means*” with the present definition which use the word “*includes*”. The above reading of the provision is consistent with the legislative intent as demonstrated herein after:
23. The original definition proposed by the Bankruptcy Law Reforms Committee of dispute reads thus:

“(4) “dispute” means a bona fide suit or arbitration proceeding regarding (a) the existence or the amount of debt; (b) the quality of a good or service; or (c) the breach of a representation or warranty;”
24. However, the above definition was modified by the Parliament. The replacement of the word ‘*include*’ in place of ‘*means*’ and removal of the expression “*bonafide suit or arbitration*” is a clear indication that existence of dispute can be demonstrated in forms other than pending litigation or proceedings.
25. Thus, reading the expression “*a dispute*” under clause (a) of Section 8(2) of the Code, 2016 to mean “*record of pendency of the suit or arbitration proceedings*” would- do violence to section 5(6) of the Code, 2016, be contrary to the express legislative intent and would render the expression used in Section 9 of the Code, 2016 superfluous.

Second part of clause (a) of section 8(2): “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

26. And, in the event, there is a pending proceeding then it is the corporate debtor is required to bring to the notice of the operational creditor the “record” of such litigation.
27. In *Lalit Mohan Pandey v. Puran Singh* (2004) 6 SCC 626 the Hon'ble Supreme Court held thus:

“54. It is now well settled that object of the Act must be given effect to. The object of the Act being to elect an Adhyaksha, construction of the Rules should be made in such a manner which would not negate the same. An interpretation of the Rules which would lead to election of one of the candidates should be adhered to and for that purpose, if necessary, the doctrine of purposive construction may be taken recourse to.

55. *It is trite that for the purpose of interpretation a statute is to be read in its entirety and all efforts must be made to give effect to the statutory scheme. [See High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat, Indian Handicrafts Emporium v. Union of India, Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd, Ashok Leyland Ltd. v. State of T.N., State of W.B v. Sujit Kumar Rana, Deepal Girishbhai Soni v. Union of India Insurance Co. Ltd. and Secy. Deptt. of Excise & Commercial Taxes v. Sun Bright Marketing (P) Ltd.]*

56. *The object underlying the statute is required to be given effect to by applying the principles of purposive construction.*

57. *Francis Bennion in his treatise Statutory Interpretation, at p. 810 described purposive construction in the following manner:*

“A purposive construction of an enactment is one which gives effect to the legislative purpose by-

(a) Following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this Code called a purposive-and-literal construction), or

(b) Applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a purposive-and-strained construction).”

60. *A statute must be construed having regard to the legislative intent. It has to be meaningful. A construction which leads to manifest absurdity must not be preferred to a construction which would fulfil the object and purport of the legislative intent.*

63. *It is furthermore that unreasonable result or result which creates uncertainty has to be eschewed.*

64. *In Mahadeo Oil Mills v. Sub-divisional Magistrate it was held: (AIR p. 90, para 5)*

“It was stated in this way by Parke, B.: ‘It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.’ ‘If,’ said Brett, L. J. ‘the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning’.”

65. Even a construction which would make the provisions more effective and workable must be adopted and to see if it is possible to be done without doing too much violence to the language used.

66. Every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute.

67. This would be more so if literal construction of a particular clause leads to manifest absurdity or anomalous results which could not have been intended by the legislature. “An intention to produce an unreasonable result”, said Danckwerts, L. J., in Artemiou v. Procopiou (All ER p. 544 I) “is not to be imputed to a statute if there is some other construction available”. Where to apply words literally would “defeat the obvious intention of the legislation and produce a wholly unreasonable result” we must “do some violence to the words” and so achieve that obvious intention and produce a rational construction.”

28. It is respectfully submitted that the language of the provisions does not give any indication that right of the corporate debtor to dispute the demand of operational debt was confined only to institution of a suit or arbitration proceedings and that to before receipt of a “*demand notice*”. Thus institution of a suit or arbitration proceedings, has no bearing on demonstration of existence of dispute in relation to operational debt.
29. Therefore, “and” occurring in section 8(2)(a) of the Code, 2016 after the phrase “existence of dispute, if any” must be read as “or” in other words, disjunctively.
30. A perusal of Sections 8 and 9 of the Code, 2016 brings out the following legislative usage with respect to dispute in relation to an operational debt.
 - (i) “*bring to the notice of the operational creditor-existence of dispute*” [see: **Section 8 (2) of the Code 2016**].
 - (ii) “*Notice of the dispute u/s 8 (2)*”. [see: **Section 9(1) of the Code 2016**]
 - (iii) “*notice given by corporate debtor relating to a dispute of the unpaid operational debt.*” [see: **Section 9(3) of the Code 2016**]
 - (iv) “*Notice of dispute*” [see: **Section 9(5) (i) (d) and Section 9(5) (ii) (d) of the Code 2016**]
31. It is clear that the Parliament has not restricted the forms of notice of dispute only to the record of a pending litigation. The right of corporate debtor to initiate action against an operational debtor is governed by different statutes including Statutes of Limitation and thus, absence of any litigation on the date of “*demand notice*” can never dilute the factum of “*existence of a dispute*”.

[B] Meaning of “notice of dispute” under section 9(5) (ii) (d)

32. A “demand notice” is defined in *Explanation* to section 8 to mean “a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.” However, there is no definition of notice of dispute in the Code, 2016. It is settled law that if a statute does not contain the definition of a particular expression employed in it, it becomes the duty of the courts to expound the meaning of the undefined expressions in accordance with the well-established rules of statutory interpretation. (*Keshavlal Khemchand & Sons (P) Ltd. v. Union of India, (2015) 4 SCC 770, at page 796*)
 33. In view of the above, it is submitted that the mandate of section 8(2) is to bring to the notice of the operational creditor, in any discernible form that “a dispute”- of the nature specified in section 5(6) of the Code, 2016- is existing in relation to the operational debt which is the subject matter of the demand notice. This would be the harmonious construction of the section 8(2)(a) with section 5(6) as well as section 9. Moreover, would constitute a valid “**notice of dispute**” for the purpose of section 9(5)(ii)(d) of the Code, 2016.
- [C] **Adjudicating Authority only to ascertain if “notice of dispute” has been received.**
34. It is respectfully submitted that the language of the provisions clearly bring out that the legislative intent relating the nature of jurisdiction of the Adjudicating Authority under Section 9(5)(ii)(d) of the Code 2016. This is highlighted when the provisions of Section 9 of the Code 2016 are compared with those of Section 7 of the Code 2016.
 35. Section 7 of the Code 2016 declares the law relating to “*Initiation of Corporate insolvency resolution process by Financial Creditor*”. Sub-section (4) of Section 7 of the Code 2016 provides that upon receipt of the application the Adjudicating Authority is required to “ascertain existence of default” based upon evidence and information. Sub-section (5) of Section 7 of the Code 2016 provides that where the Adjudication Authority is “satisfied” that “a default has not occurred” reject the application.
 36. In contrast, Section 9(5)(ii)(d) of the Code 2016 provides the Adjudicating Authority shall, by an order, reject the application made under section 9(1) of the Code 2016 “if notice of dispute has been received by the operational creditor”.
 37. Therefore, it is respectfully submitted, the corporate debtor has fulfilled the mandate of Section 8(2) (a) of the Code 2016; when it has demonstrated in any form that a dispute is existing in respect of the operational debt which is subject matter of the “*demand notice*”. And such document would constitute a valid “*notice of dispute*” for the purpose of Section 9(5) (ii) (d) of the Code 2016. The Adjudicating Authority would have to only determine where the Corporate Debtor has given the notice of dispute, in relation to the operational debt which is subject matter of the “*demand notice*” served by the operational creditor and reject the application.

38. In this background, the Respondents respectfully submit that Annexure J **(Sr. No.7)** to the present Paper Book constitutes a notice of dispute for the purpose of Section 9(5) of the Code 2016. Upon determination and reaching the conclusion that the same was received by the Appellant the adjudicating authority rightly rejected the application of the Appellant in exercise of its power under Section 9(5)(ii)(d) of the Code 2016.

[C] Divergence of views of the NCLT

Sl No.	Particulars	Comments
1.	<p>M/s Essar Projects India Ltd. v. M/s MCL Global Steel Pvt. Ltd.</p> <p>At Para 8 the Court held as follows:</p> <p>“8. On perusal of definition of dispute u/s 5(6) and on perusal of section 8(2)(a), it is evident that “dispute in existence” means and includes raising dispute in court law or Arbitral Tribunal before receipt of notice u/s 8 of the Code.”</p>	<p>It is respectfully submitted that the Tribunal has misread the provisions of Section 5(6) and Section 8(2)(a) of the Bankruptcy Code as the expression dispute in existence does not find any place in the provisions of Section 5(6) or 8(2). Further, the Tribunal ignored the distinction between “include” and “means and include” and proceeded upon an erroneous basis that the definition of dispute was fell in the category of “means and includes”.</p> <p>In view of the above, the reasoning of the Tribunal does not deserve acceptance.</p>
2.	<p>In re: One Coat Plaster and Ors. The Ld. Tribunal held as follows:</p> <p>“5. 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 of the Code adequate room has been provided for the ‘NCLT’ to ascertain</p>	

	<p>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.”</p>	
3.	<p>In M/s DF Deutsche Forfait AG and Anr. V. M/s Uttam Galva Steel Ltd.</p> <p>The Ld. Tribunal held thus:</p> <p>23. We respectfully disagree with this view; definition has always to be harmonized with the context in which it is said in the substantive section, not otherwise. This caution is very much implicit in section 2 itself saying it has to be understood as defined unless context otherwise, therefore two things are clear, one-defining section will not govern the substantive section, two- definition has to be construed in the context of substantive</p>	<p>This judgment is contrary to the clear intention of the Parliament which had expressly substituting the word “means” with the word “includes”, further elaborated in para 22-25 above. Therefore, the Tribunal has failed to consider this aspect.</p> <p>In view of the above, the reasoning of the Tribunal does not deserve acceptance.</p>

	<p>section, not otherwise. When a word is defined, it has to be understood meaningfully, if definition is only to say dispute includes suit or arbitration, no definition needs to be given, because pendency of suit or arbitration always connotes dispute, this need not be said separately, indeed dispute is genesis, pendency of suit or arbitration is species. No doubt it is true that word “includes” is normally considered as extensive, but there are situations to read “includes” as “means” to enable the courts to achieve the purpose of legislation. If reply is given denying the claim despite default occurrence is clear, does it mean that no application can be filed by any operational creditor even though the operational creditor makes the case of default occurrence? If that is so, it will be virtually ousting operational creditor filing any case under section 9. If this scenario emerges, then it will be nothing but throwing this law into dust bin. We all know how much time is taking for logical end to winding up proceedings, by the time company liquidation happens, not even bones remain to creditors. All this exercise under new Code is to maximization of value of assets in a time bound manner to promote entrepreneurship and availability of credit, to balance the interests of all the stake holders.</p> <p>24. If we start looking at this as draconian law gobbling the companies and branding orders under this law as harsh, then we remain where we are, perhaps will go down further, yes, one can understand to get conversed to new law and to see fruits of it, it will take time, but just for the sake of this reason, we cannot wish away the mandate of this nation come through Parliament.</p> <p>25. In this situation, we cannot resist ourselves from giving an illustration</p>	
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	<p>that is aptly similar to the present controversy. It is like a snake charmer playing out a cobra without fangs for entertaining people, tomorrow, if a claim under Section 8 is considered as “dispute” by looking at bare denial, sections 8 and 9 will become exactly like a cobra without fangs in the basket of a snake charmer. But I strongly believe, it is not the idea of Parliament to make this law to mere show up, had it been so, the Parliament would not have wasted its valuable time in including sections 2(6), 8 and 9 in the statute book.</p> <p>26. Though there are many decisions of the Hon'ble Supreme Court holding that the word “includes” is extensive in nature, there are equally many number of cases saying that this word has to be understood in the context it is applied.”</p>	