

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Ins) No. 739 of 2021

IN THE MATTER OF:

Jangsher Singh Choudhary

...Appellant

Versus

Ram Kripal Singh Construction Pvt. Ltd.

...Respondents

Present:

For Appellant: Ms. Saloni Nagoria and Mr. DK Bhalla, Advocates

**For Respondents: Mr. Sameer Rastogi, Mr. Dhruvajit Saikia and
Ms.Suigdha Verma Advocates**

ORDER

08.08.2022: Heard Ms. Saloni Nagoria, learned counsel for the Appellant and Mr. Sameer Rastogi, learned counsel for the sole Respondent.

2. The present Appeal has been preferred under Section 61 of ‘the Insolvency and Bankruptcy Code, 2016’ (hereinafter referred to as ‘the IBC’) against an order dated 26.02.2020 passed by the National Company Law Tribunal, Kolkata Bench (hereinafter referred to as ‘the Adjudicating Authority’) in CP(IB) No. 722/KB/2019. By the said order the ‘Adjudicating Authority’ has rejected the petition filed under Section 9 of the IBC on behalf of Appellant for initiating ‘Corporate Insolvency Resolution Process’ (hereinafter referred to as ‘CIRP’). The ‘Adjudicating Authority’ dismissed the petition filed under Section 9 of the IBC primarily on the ground that there was pre-existing dispute. The ‘Adjudicating Authority’ placing reliance on Hon’ble Supreme Court Judgment in Mobilox Innovations Pvt. Ltd Vs. Kirusa

Software Pvt. Ltd., has rejected the same. It would be better to reproduce the impugned order dated 26.02.2022 as follows:

1. *Sh. Jangsher Singh Choudhary, proprietor of M/s Capital Fire Engineering Co., the Operational Creditor filed this application under Section 9 of Insolvency and Bankruptcy Code, 2016 against M/s Ram Kripal Singh Construction Private Limited (Corporate Debtor) to start Corporate Insolvency Resolution Process (in short "CIRP") of the Corporate Debtor as the Corporate Debtor committed default in paying operational debt of Rs. 1,38,63,233.65 (Rupees One Crore Thirty-Eight Lakh Sixty-Three Thousand Two Hundred and Thirty-Three and Sixty Five Paise Only).*

2. *The following facts are not in dispute:*

2.1 On the basis of contract to set up the fire and safety system, the Operational Creditor sold and supplied the required items to the Corporate Debtor and also set up the fire fighting system at the site of the Corporate Debtor. He then raised total bill of Rs. 1,25,28,196/ (Rupees One Crore Twenty-Five Lakh Twenty-Eight Thousand One Hundred and Ninety-Six Only). As the Corporate Debtor did not pay the debt, the Operational Creditor filed suit for recovery of the above amount in the Court of Additional District Judge, Gurugram District Courts, Haryana. The suit was filed in the year 2014 (Civil Suit No. 111 of 2014). On 07.12.2018,

Ld. Judge decreed the suit. On the basis of that decree and the decretal amount, this proceeding is initiated. It is also not in dispute that prior to filing of this application, Operational Creditor has delivered the Corporate Debtor notice under Section 8 IBC.

3. The Corporate Debtor appeared and filed affidavit in reply. It has strongly disputed the claim and further contended that appeal against the decree is filed which is still pending for consideration of Hon'ble Punjab & Haryana High Court (RFA-COM. No.10 of 2019).

4. On the basis of above admitted facts, Ld. Counsel for the Corporate Debtor submitted that the debt is yet to become due and payable under the law and facts. He submitted that the Hon'ble Apex Court in the case of K Kishan Vs. Vijay Nirman Company Pvt. Ltd. ([2018] 8 MLJ 177) held that if the dispute about the claim is existing, an insolvency proceeding will not be maintainable.

5. We also heard Ld. Counsel for the Operational Creditor. She submitted that though Appeal is filed but Hon'ble High Court did not stay the execution of decree. Hence, the debt is due and payable.

6. It has been held by Hon'ble Apex Court in the Ruling cited supra relying its earlier Ruling in Mobilox Innovations

Private Limited Vs. Kirusa Software Private Limited that "it is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. 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 defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence 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."

7. In this case, Appeal against the decree of recovery of amount is Med and pending. It is settled law that Appeal is continuation of the original suit. Hence, we hold that there is a preexisting dispute about Opearational debt still pending in between the parties. This Application is not maintainable. We pass the following order:-

i)The application filed by the Operational Creditor under section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, M/s Ram Kripal Singh Construction Private Limited is hereby rejected.

ii) CP(IB)No.722/KB/2019 is rejected and disposed off.

iii) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.”

3. The Ld. Counsel for the Appellant while pressing the present Appeal, has emphatically argued that Corporate Debt was of Rs. 1,38, 63,233.65 on the basis of Judgment and Decree passed by the ‘Additional District Judge-Cum-Presiding Judge, Special Commercial Court at Gurugram’ in ‘Civil Suit No. 111 of 2014’. On the strength of Judgment and Decree, the Appellant, in view of the non-payment of dues amount issued notice under Section 8 of the IBC which remained unanswered. The said notice was issued on 06.02.2019. Since ‘debt’ was not paid nor any reply was filed showing any pre-existing dispute, on 18.04.2019, an application was filed under Section 9 of the IBC

before the 'Adjudicating Authority' in which notice was received by the Respondent on 15.05.2019. Till the date of receipt of notice, no objection was raised by the Respondent as to whether against the judgment and decree an Appeal was preferred or not. According to the Ld counsel for the Appellant for filing appeal against the judgment/decreed dated 07.12.2018 under the provisions of Section 13 of 'The Commercial Courts Act, 2015, period of limitation expired on 05.02.2019. However, after about more than four months from the date of filing of application under Section 9 of the IBC, the Respondent informed the 'Adjudicating Authority' regarding filing of an appeal only by referring to Diary No. 3028419. It was argued that, before the 'Adjudicating Authority', the Respondent even did not disclose the date of filing appeal or about condonation of delay in filing the appeal. According to the Ld counsel for the Appellant, despite the fact that all those facts were brought to the notice of the 'Adjudicating Authority', the 'Adjudicating Authority' ignoring all those facts only on the plea of pendency of an Appeal, in which delay was obviously not condoned, the 'Adjudicating Authority' has come to the conclusion that there was 'pre-existing dispute' and relying on Mobilox Innovations case (as stated supra) has passed the impugned order, which is liable to be set aside.

5. The Ld. Counsel for the Appellant has relied upon the Judgment of this Appellate Tribunal in 'Ahluwalia Contracts (India) Ltd. Vs. Raheja Developers Limited' in CA(AT)(Ins) No. 703 of 2018 held in para 22, it would be profitable to reproduce the same:

“22. The Adjudicating Authority wrongly rejected the claim on the ground that the claim raised by the Appellant falls within the ambit of disputed claim. Merely disputing a claim cannot be a ground, as held by Hon’ble Supreme Court in “Innoventive Industries Ltd. v. ICICI Bank and Anr.” wherein it is observed that “claim means a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4).”

6. The Ld counsel for the Appellant has also referred to an another judgment of the Hon’ble Supreme Court in K.Kishan Vs. Vijay Nirman Company Pvt. Ltd – Civil Appeal No. 21824 of 2017 held in para 18 & 19 which are quoted herein below:

“18) We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process under Sections 34 & 37 has taken place.

19) We may hasten to add that there may be cases where a Section 34 petition challenging an Arbitral Award may

clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition under Section 34 has been filed or a belated petition under Section 34 has been filed. It is only in such clear cases that the insolvency process may then be put into operation.”

7. Ld. Counsel for the Appellant further submits that, of course, the ‘Adjudicating Authority’ has referred to the judgment of Hon’ble Supreme Court in ‘Mobilox Innovations case’ (supra) on which ld counsel for Respondent has also placed reliance, in the facts of the circumstance of the present case, the Respondent may not get any benefit from the Judgment of Mobilox Innovations (supra). She further submits that in the case before the Hon’ble Supreme Court in Mobilox Innovations (supra), notice under Section 8 of the IBC was replied and pre-existing dispute was shown whereas in the present case notice issued by the Appellant under section 8 of the IBC was not at all replied nor on the date any dispute was existing. Since there was already judgment and decree passed by the ‘Court of Competent jurisdiction’ in Civil Suit No. 111 of 2014 and no appeal was filed before filing application under Section 9 of the IBC, though period of limitation had already expired, it can be said that there was no pre-existing dispute.

On aforesaid ground it has been argued that the ‘Adjudicating Authority’ has committed error in rejecting the application under Section 9 of the IBC.

8. Learned counsel for the Respondent has vehemently opposed the prayer and he submits that once against judgement and decree passed in Civil Suit No. 111 of 2014, an appeal was filed by the Respondent, pendency of Appeal will be termed as continuation of the suit and as such without final adjudication by the Appellate court, it would not be appropriate for this court to interfere with the impugned order.

9. The Ld counsel for the Respondent has further submitted that the Respondent Company is a viable company which is ongoing concern and as such it is not appropriate to allow 'CIRP' in respect of Respondent. He further submits that IBC may not be invoked as its recovery proceedings which has been settled by the numerous judgments of Hon'ble Supreme Court of India.

Ld. Counsel for the Respondent has also placed reliance on K.Kishan Vs. Vijay Nirman Company Pvt. Ltd (2018) 17 SCC 662 (supra) and he has specifically referred para 27 to 29 of the said judgment which are quoted hereinbelow:

"27. We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process under Sections 34 & 37 has taken place.

28) We may hasten to add that there may be cases where a Section 34 petition challenging an Arbitral Award may clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition under Section 34 has been filed or a belated petition under Section 34 has been filed. It is only in such clear cases that the insolvency process may then be put into operation.

29) We may hasten to add that there may also be other cases where a Section 34 petition may have been instituted in the wrong court, as a result of which the petitioner may claim the application of Section 14 of the Limitation Act to get over the bar of limitation laid down in Section 34(3) of the Arbitration Act. In such cases also, it is obvious that the insolvency process cannot be put into operation without an adjudication on the applicability of Section 14 of the Limitation Act.”

10. According to the Id. Counsel for the Respondent, it is true that Appeal against the judgment and decree dated 07.12.2018 has been filed belatedly but Appeal has been filed with a petition for condonation of delay. He submits that once Appeal is pending before the Appellate Court, this court may not interfere with the impugned order.

11. Besides hearing learned counsel for the parties, we have minutely perused the entire material available on record. In present appeal, it is not dispute that notice under Section 8 of IBC was issued in the light of judgment

and decree dated 07.12.2018 passed in Civil Suit No. 111 of 2014. It is also not in dispute that even after issuance of notice which was issued on 06.02.2019, the Respondent did not raise any point regarding pre-existing dispute nor notice was replied by the Respondent. The fact regarding non-reply of notice can be gathered on perusal of affidavit sworn in compliance of Section 9 of IBC before the Adjudicating Authority. On perusal of para 4 & 5 appearing at page no. 220 of the Appeal paper book, it is evident that the claimed amount as in demand notice was not received by the Appellant nor Appellant received any notice of dispute over the unpaid operational debt. Meaning thereby that before the Adjudicating Authority, there was nothing on record for coming to the conclusion as to whether the debt was paid or any dispute was existing on that debt. Even though application under Section 9 of the IBC was filed notice of which was received on 15.05.2019 by the Respondent, neither the Appellant was intimated regarding the pre-existing dispute nor filing of any appeal. Meaning thereby that on the date of filing of application under Section 9 of the IBC or till before 19.08.2019, there was nothing on record to show as to whether the judgment and decree was assailed before the Appellate Court or not. In such situation, it can be inferred that the Appellant was under an impression that the said judgment and decree has attained its finality. If there was any dispute in respect of judgment and decree obviously the Respondent would have immediately filed appeal against the judgment and decree which was not done and it was done after about expiry of more than 4(four) months from the date of filing of application under Section 9 of the IBC. In such situation the 'Adjudicating Authority' was required to consider that before the Tribunal, there was no pre-existing

dispute. Of course reliance has been placed on Mobilox case (supra) but there is no straight jacket formula to fit in all the cases in the said category. In the facts and circumstances of the present case, we are of the view that Mobilox case (supra) has got no application.

12. In the facts and circumstances of the present case, it is evident that on the date of filing of the application under section 9 of the IBC, there was no dispute nor at the stage of notice under Section 8 of the IBC any dispute was raised. In such circumstances, we are of the considered opinion that the Adjudicating Authority has committed error in outrightly rejecting the application under Section 9 of the IBC.

13. In view of the fact and circumstances we have no option but to set aside the impugned order and the appeal is remitted back to the Adjudicating Authority to re-examine the same and pass appropriate order in accordance with law.

The Appeal stands allowed.

Interim order, if any, passed by this Appellate Tribunal, stands vacated.

No order as to costs.

[Justice Rakesh Kumar]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

Raushan/gc