IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION APPLICATION (L) NO. 1242 OF 2022

Jasani Realty Pvt.Ltd. ... Applicant

V/s.

Vijay Corporation ... Respondent

Dr. Birendra Saraf, Senior Advocate a/w. Anshul Anjarlekar i/b. Raval-Shah & Co., Advocate for the Applicant.

Mr.Yusuf Iqbal Yusuf i/b. Y. and A Legal, Advocate for the Respondent.

CORAM : G.S.KULKARNI, J.

RESERVED ON : 1 February 2022

PRONOUNCED ON: 25 April 2022

JUDGMENT:

1. A short but interesting question arises for consideration in this application filed under Section 11 of the Arbitration and Conciliation Act,1996 (for short "the ACA"). The question being, whether mere filing of a proceeding under Section 7 of the Insolvency and Bankruptcy Code, 2016, would amount to any embargo on the Court considering an application under Section 11 of the Arbitration and Conciliation Act,1996, to appoint an arbitral tribunal?

2. Briefly the facts are:

It is the case of the applicant that the respondent in the usual course of its business provided financial assistance to the applicant of an amount of Rs.4,50,00,000/- for which a loan Agreement dated 23 April 2015 was entered between the applicant and the respondent referred as "**Agreement No.1**".

3. As contended by the applicant, the business scenario had undergone a change and created a negative impact during the subsistence of Agreement No.1. In such situation, another agreement dated 5 July 2016 referred to as "**Agreement No.2**" was executed between the parties, under which, the date of repayment of the borrowing was extended from 30 June 2015 to 31 March 2017. Except for such variation, it is contended that the terms and conditions in such agreement are similar to the ones as contained in "Agreement No.1".

4. Nonetheless, there were defaults on the part of the applicant in the payment of the loan installments. It is the case of the applicant that in discharge of its liability towards the respondent under such agreements, the applicant issued a cheque dated 7 September 2021 to

the respondent, of an amount of Rs.31,08,33,457/- being the repayment of the respondent's dues upto 31 August 2021, which according to the respondent, was in accordance with the terms and conditions of the loan agreement dated 5 July 2016. It is not in dispute that such cheque was dishonoured when presented for payment. In these circumstances, the respondent approached the National Company Law Tribunal (for short '**the NCLT**") by intiating proceedings against the applicant under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short "**the IBC**"). Such proceedings were filed on 12 October 2021. The applicant has appeared in such proceedings and at its instance adjournments were also sought. So far no order has been passed by the NCLT admitting the petition as per the provisions of sub-section (5) of Section 7 of the IBC.

5. In the proceedings before the NCLT, it is the case of the applicant that both the agreements entered between the parties dated 23 April 2015 and 5 July 2016 being interconnected, when read together, contain an arbitration agreement between the parties, as contained in Clause 16. The Court's attention is drawn to such arbitration clause, which reads thus :-

> "16. **Arbitration**

> Any claim, dispute or difference between the Parties hereto arising out of this Agreement and which cannot be settled by mutual agreement and shall be decided by arbitration in accordance with the provisions of the Arbitration and Conciliation Act,1996 and the rules made thereunder. The place of arbitration shall be Mumbai, and Indian law shall apply."

6. On the above backdrop, the applicant by its Advocate's notice dated 10 December 2021, issued to the respondent, invoked the arbitration agreement and called upon the respondent to agree to appoint an arbitral tribunal to adjudicate the disputes and differences between the parties under the said loan agreements. The applicant also suggested the name of the proposed sole arbitrator as set out in paragraph 23 of the said notice. As the respondent failed to agree to appoint an arbitral tribunal, the present application has been filed under Section 11(6) of the Arbitration and Conciliation Act,1996 (for short '**the ACA**') praying, that an arbitral tribunal be appointed.

7. A reply affidavit has been filed on behalf of the respondent opposing the petition. At the outset, an objection is raised to the maintainability of the present application on the ground that the application is an afterthought and an attempt on the part of the applicant to dilute the prior proceedings filed by the respondent before the NCLT. It is contended that the respondent's proceedings before the

NCLT pertain to the admitted liability of the applicant and as the applicant has no defence before the NCLT, the present application has been filed to escape the rigors under the IBC.

8. It is the respondent's case that the record is replete with petitioner's admission of liability and its failure to clear the outstanding amounts payable to the respondent under the loan agreements. It is contended that an offer was made by the applicant by forwarding an allotment letter dated 23 April 2015 of a flat in the upcoming project of the applicant named "Gyan Ghar" to secure the amounts payable to the respondent. It is stated that also the Director of the Applicant had executed a deed of guarantee dated 23 April 2015 guaranteeing repayment of the loan/borrowing from the respondent. The respondent contends that in discharge of the liability, the applicant had also issued a cheque of Rs.31,08,33,457/- towards payment of the respondent's dues upto 31 August 2021, which was in accordance with the terms and conditions of the loan agreement dated 5 July 2016, which was dishonoured.

9. Thus, the primary contention of the respondent is to the effect that as the liability of the applicant towards the respondent of a

financial debt was clearly an admitted liability, the respondent has already set into motion, the proceedings before the NCLT, Mumbai, under Section 7 of the IBC on 12 October 2021. It is the respondent's contention that in this situation, the present proceedings which are intended to evade the consequences which may arise under the IBC ought not to be entertained. Such contention is supported by referring to the decision of the Supreme Court in "**Indus Biotech Private Limited vs. Kotak India Venture (Offshore) Fund**"[1] (for short "**Indus Biotech**") has contended that the proceedings initiated by the respondent under Section 7 of the IBC, being filed prior to the applicant filing the present proceedings, such proceedings ought to be adjudicated first and the same will supersede the present proceedings filed by the applicant. On this sole ground it is contended that the present application is liable to be dismissed. The reply affidavit deals with the merits of the disputes between the parties, which, in my opinion, may not be relevant so far as exercise of jurisdiction of this Court under Section 11 of the ACA is concerned.

10. Having heard the learned Counsel for the parties and having perused the record, at the outset it needs to be observed that there is

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no dispute in regard to the arbitration agreements between the parties which is contained in Clause 16 of the agreement as noted above. There also appears to be no dispute in regard to the invocation of the arbitration agreement. Thus the primary consideration for this Court to exercise jurisdiction under Section 11(6) are certainly present.

11. However, as noted above, the question which would be required to be determined, is on the objection as raised on behalf of the respondent to the maintainability of this petition. The objection is on the ground that once prior in time to the present proceedings, when a recourse is taken by the respondent to the provisions of Section 7 of the IBC, by initiating proceedings against the applicant before NCLT, whether the Court in such event, would be precluded from exercising jurisdiction under Section 11 of the ACA to appoint an arbitral tribunal ?

12. The common bone of contention, as urged on behalf of the parties is referring to the law as laid down by the Supreme Court in **Indus Biotech** (supra). On one hand Dr.Iqbal, learned Counsel for the respondent referring to such decision of the Supreme Court would submit that a holistic reading of such decision, would bring about a

position in law that the IBC proceedings are required to be given primacy, that is, till the NCLT passes an order under sub-section (5) of Section 7, the Section 11 ACA application, ought not to proceed, so as to appoint an arbitral tribunal.

13. On the other hand Dr.Saraf, learned Senior Counsel for the applicant would submit that once the IBC proceedings are at the pre-admission stage or in other words, once no order is passed by the NCLT admitting the Section 7 proceedings filed by the respondent against the applicant, there is no embargo on the powers of the Section 11 Court to adjudicate the Section 11 application. Dr.Saraf would contend that such position in law is clearly derived from the observations of the Supreme Court wherein a distinction has been made in regard to the pre-admission stage of the Section 7 proceedings and the post admission stage, for the reason that post admission of the Section 7 proceedings, the proceedings would become proceedings *in rem*.

14. Dr.Iqbal has raised another contention that this is a clear case where the applicant had clearly accepted its liability and towards its satisfaction also had issued a cheque of Rs.31,08,33,457/- in favour of the respondent which was dishonoured, hence, the present proceeding

is nothing but an outrageous moonshine defence undertaken only to delay the proceedings adopted by the respondent before the NCLT, hence, on such ground also the present application deserves to be dismissed.

15. Before examining these questions as canvassed on behalf of the parties, it needs to be noted that the respondent had filed the proceedings under Section 7 of the IBC against the applicant before the NCLT on 12 October 2021. It is also clear that till date the NCLT has not passed an order admitting the proceedings of the respondent filed under Section 7 of the IBC.

16. Now the rival contentions of the parties, relying on the decision of the Supreme Court in **Indus Biotech** (supra) can be examined. In such case an arbitration petition was filed before the Supreme Court by Indus Biotech under Section 11(3) of the ACA read with Section 11(4)(a) and Section 11(12)(a) of the ACA praying for appointment of an arbitrator on behalf of respondent Nos.1 to 4 for constituting an arbitral tribunal, to adjudicate the disputes which had arisen between the petitioner and respondent Nos.1 to 4. The disputes between the parties had arisen under a Share Subscription and Shareholders'

Agreement. Indus Biotech had contended that disputes and differences had arisen between the parties in regard to an appropriate formula to be adopted to arrive at the actual percentage of the paid up share capital to be converted into equity shares and refund if any, thereafter, and that until an amicable decision was to be taken in this regard, there was no liability of Indus to repay any amount claimed respondent nos.1 to 4. Indus Biotech accordingly contended that, as the parties themselves could not resolve the disputes, the same be referred to arbitration and for such reason a proceedings before the Supreme Court were filed. Respondent Nos.1 to 4, however, contended that they having subscribed to the optionally convertible redeemable preference shares of Indus Biotech, and on redemption of the same, the amount was required to be paid by Indus Biotech to respondent Nos.1 to 4, being an amount of Rs.367,08,56,503/- which had become due and payable to respondent nos.1 to 4. It was contended that when such amount was demanded, the same was not paid to them by Indus Biotech, and hence, there was default on the part of Indus Biotech. In such situation as the debt had not been paid by Indus Biotech, respondent Nos.1 to 4 had invoked the jurisdiction of NCLT by initiating the Corporate Insolvency Resolution Process under the IBC. Respondent No.2 had also filed a petition under Section 7 of the IBC

seeking appointment of a resolution Professional. It was contended that in such proceedings, Indus Biotech had filed a Miscellaneous Application under Section 8 of the ACA, praying for a direction to refer the parties to arbitration. Respondent No.2 therein had objected to the said application. The NCLT, however, considering the rival contentions had allowed the application filed by Indus Biotech under Section 8 of the ACA, and as a consequence, the petition filed by respondent No.2 therein under Section 7 of the IBC was dismissed. Such order was assailed by respondent No.2 by filing a separate Special Leave Petition before the Supreme Court. It in on such conspectus, the Supreme Court considered as to what would be the legal status of the proceedings under Section 7 of the IBC on its filing and the position which would emerge, once an order is passed under sub-section (5) of Section 7 of the IBC of admitting the Section 7 proceedings on the NCLT.

17. The Supreme Court interpreting the provisions of Section 7 of the IBC culled out a distinction as to a position prior to the admission of the proceedings under Section 7 and the position post-admission of the proceedings. It was observed that once the proceedings under Section 7 of the IBC are admitted, then such proceedings would assume the status of proceedings *in rem*. It was observed that on admission of

the Section 7 petition, third party rights are created in all the creditors of the corporate debtor and the proceedings will have an *erga omnes* effect. It was also held that hence, by mere filing of the petition and its pendency before admission, cannot be construed as triggering of a proceeding *in rem.* The Court held that the admission of the petition for consideration of the Corporate Insolvency Resolution Process (**CIRP**) is the relevant stage to decide the status and the nature of the pendency of the proceedings, and mere filing of the Section 7 proceedings by a creditor, cannot be taken to be any triggering of the insolvency process. In such facts, the Supreme Court held that as the Section 7 proceedings were yet to be admitted, such proceedings were not an action *in rem*. The relevant observations of the Supreme Court relevant in the context of the present proceedings are contained in paragraphs 22 and 24 of the said decision, which read thus:-

> "22. In the above backdrop the question would be as to whether a grave error as contended on behalf of Kotak Venture is committed by the Adjudicating Authority by observing in the course of the order that the invocation of arbitration in a case like this seems to be justified. In our view, the stage of the proceedings at which the said observation was made will be relevant. If the case has reached the stage to the status of a proceeding in rem, then such observation would not be justified and sustainable but not otherwise. **In the instant case, the petition was yet to be admitted and, therefore had not assumed the status of a proceedings in rem.**
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> 24. In the case of Swiss Ribbons Private Limited vs. Union of

India (2019) 4 SCC 17 and Pioneer Urban Land and Infrastructure Limited vs. Union of India & Ors. (W.P.(C) No.43/2019) relied on behalf of Kotak Venture, the entire scope and ambit of the IB Code was considered and the validity of the provisions were upheld. The said decisions have also been relied on to contend that when the petition under Section 7 of IB Code is triggered it becomes a proceedings in rem and even the creditor who has triggered the process would also lose control of the proceedings as Corporate Insolvency Resolution Process is required to be considered through the mechanism provided under the IB Code. The principles as laid down in Swiss Ribbons (supra) was also referred to in detail in the case of **Pioneer Urban Land and Infrastructure** (supra) wherein the observations contained in para 39 though in the case of Real Estate Development was laid down. The relevant portion which has been referred to, reads as follows:

> "Thus, any allottee/home buyer who prefers an application under Section 7 of the Code takes the risks of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developers. Under the Code, he may never get refund of the entire principal, let alone interest. This is because, the moment a petition is admitted under Section 7, the resolution professional must first advertise for and find a resolution plan by somebody, usually another developer which has then to pass muster under the Code, i.e. that it must be approved by at least 66 per cent of the Committee of Creditors and must further go through challenges before NCLT and NCLAT before the new management can take over and either complete construction or pay out for refund amounts."

26 **The underlying principle, therefore, from all the above noted decisions is that the reference to the triggering of a petition under Section 7 of the IB Code to consider the same as a proceedings in rem, it is necessary that the Adjudicating Authority ought to have applied its mind, recorded a finding of default and admitted the petition. On admission, third party right is created in all the creditors of the corporate debtors and will have *erga omnes* effect. The mere filing of the petition and its pendency before admission, therefore, cannot be construed as the triggering of a proceeding in rem. Hence, the admission of the petition for consideration of the Corporate Insolvency Resolution Process is the relevant stage which would decide the status and the nature of the pendency of the proceedings and the mere filing cannot be taken as the triggering of the**

insolvency process."

(emphasis supplied)

18. The contention of Dr.Iqbal is emphasizing the observations of the Supreme Court in paragraph 25 which are in the context of an application which was made by respondent nos.1 to 4 under Section 8 of ACA.

19. It may be observed that in the present case, a Section 8 of the ACA application was not filed by the applicant before the NCLT. It is in the context of a Section 8 application being filed by Indus Biotech, for referring the dispute to arbitration, the Supreme Court in paragraph 25 observed as to what should be the course to be adopted by the adjudicating authority (NCLT), when the application under Section 8 of the ACA is filed seeking reference to arbitration. Reiterating the legal position that before the Section 7 proceedings are admitted, it would not be an action *in rem,* the Supreme Court observed that notwithstanding the fact that the corporate debtor files an application under Section 8 of the ACA, an independent consideration of the same by the NCLT *de hors* the application filed under Section 7 of the IBC and the material produced therewith will not arise. It was observed that the adjudicating authority (NCLT) is duty bound to advert to the

material available before it, alongwith the application under Section 7 of the IBC, by the financial creditor to indicate the default alongwith the version of the corporate debtor. The Court emphasized that this would be keeping in perspective the scope of the proceedings under the IBC and there being a timeline for the consideration to be made by the adjudicating authority, as also for the reason that such process as set into motion cannot be defeated by a corporate debtor by raising moonshine defence only to delay the process. Thus, in the context that even if an application under Section 8 of the ACA is filed, it was observed that the adjudicating authority has a duty to advert to the contentions put forth under an application filed under Section 7 of the IBC by examining the material placed before it by the financial creditor and record a satisfaction as to whether there is default or not. At the same time while doing so, the contention being put forth by the corporate debtor is to be noted to determine as to whether there is substance in the defence and to arrive at the conclusion whether there is default. It was categorically observed that if the irresistible conclusion of the adjudicating authority (NCLT) is that there is default and the debt is payable, the bogey of arbitration to delay the process would not arise despite the position that the agreement between the parties contains an arbitration clause.

20. Thus, in Indus Biotech (supra) the situation before the Supreme Court was that both the Section 7 IBC and Section 8 ACA proceedings were before the NCLT. In such context the Supreme Court held that when an application under Section 8 was filed by a corporate debtor in a pending Section 7 proceedings filed by the creditor, which were at the pre-admission stage, in such event, it would be the duty of the NCLT in considering the Section 7 proceedings to determine as to whether there is a default and if the NCLT is satisfied that there is a default, in that case, any Section 8 ACA application which possibly may be filed with an intention to delay the process before the NCLT is rendered inconsequential. However, in making such observation in paragraph 25, there is no dilution of the principle which has been reiterated earlier that before the Section 7 proceedings are admitted, the character of the Section 7 proceedings does not get converted into proceedings *in rem*. Thus, Dr.Iqbal would not be correct in emphasizing the observations as made in paragraph 25 to contend that mere pendency of the Section 7 proceedings and that too at pre-admission stage would be an embargo for the Court, not to entertain a petition filed under Section 11 of ACA. This conclusion would be fortified by noting the observations as made by the Supreme Court in paragraphs 25, 26 and 27 of the decision in Indus Biotech

(supra), thus:

> "25. As noted, the issue which is posed for our consideration is arising in a petition filed under Section 7 of IB Code, before it is admitted and therefore not yet an action in rem. In such application, the course to be adopted by the Adjudicating Authority if an application under Section 8 of the Act, 1996 is filed seeking reference to arbitration is what requires consideration. The position of law that the IB Code shall override all other laws as provided under Section 238 of the IB Code needs no elaboration. In that view, notwithstanding the fact that the alleged corporate debtor filed an application under Section 8 of the Act, 1996, the independent consideration of the same dehors the application filed under Section 7 of IB Code and materials produced therewith will not arise. The Adjudicating Authority is duty bound to advert to the material available before him as made available along with the application under Section 7 of IB Code by the financial creditor to indicate default along with the version of the corporate debtor. This is for the reason that, keeping in perspective the scope of the proceedings under the IB Code and there being a timeline for the consideration to be made by the Adjudicating Authority, the process cannot be defeated by a corporate debtor by raising moonshine defence only to delay the process. **In that view, even if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority has a duty to advert to contentions put forth on the application filed under Section 7 of IB Code, examine the material placed before it by the financial creditor and record a satisfaction as to whether there is default or not. While doing so the contention put forth by the corporate debtor shall also be noted to determine as to whether there is substance in the defence and to arrive at the conclusion whether there is default. If the irresistible conclusion by the Adjudicating Authority is that there is default and the debt is payable, the bogey of arbitration to delay the process would not arise despite the position that the agreement between the parties indisputably contains an arbitration clause.**
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> 26. That apart if the conclusion is that there is default and the debt is payable, due to which the Adjudicating Authority proceeds to pass the order as contemplated under sub section 5(a) of Section 7 of IB Code to admit the application, the proceedings would then get itself transformed into a proceeding in rem having erga omnes effect due to which the question of arbitrability of the so called *inter se* dispute sought to be put forth would not arise. On the other hand, on such consideration made by the Adjudicating Authority if the satisfaction recorded is that there is no default committed by the company, the

> petition would stand rejected as provided under subsection 5(b) to Section 7 of IB Code, which would leave the field open for the parties to secure appointment of the Arbitral Tribunal in an appropriate proceedings as contemplated in law and the need for the NCLT to pass any orders on such application under Section 8 of Act, 1996 would not arise.
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> 27. **Therefore, to sum up the procedure, it is clarified that in any proceeding which is pending before the Adjudicating Authority under Section 7 of IB Code, if such petition is admitted upon the Adjudicating Authority recording the satisfaction with regard to the default and the debt being due from the corporate debtor, any application under Section 8 of the Act, 1996 made thereafter will not be maintainable. In a situation where the petition under Section 7 of IB Code is yet to be admitted and, in such proceedings, if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority is duty bound to first decide the application under Section 7 of the IB Code by recording a satisfaction with regard to there being default or not, even if the application under Section 8 of Act, 1996 is kept along for consideration. In such event, the natural consequence of the consideration made therein on Section 7 of IB Code application would befall on the application under Section 8 of the Act, 1996."**
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> (emphasis supplied)

21. The above observations as made by the Supreme Court would lead this Court to come to an inevitable conclusion that mere filing of the proceedings under Section 7 of the IBC cannot be treated as an embargo on the Court exercising jurisdiction under Section 11 of the ACA, for the reason that only after an order under sub-section (5) of Section 7 of the IBC is passed by the NCLT, the Section 7 proceedings would gain a character of the proceedings in rem, which would trigger the embargo precluding the Court to exercise jurisdiction under the ACA, and more particularly in view of the provisions of Section 238 of

the IBC which would override all other laws. In the facts of the present case as the Corporate Insolvency Resolution Process as initiated by the respondent under Section 7 of the IBC is yet to reach a stage of the NCLT passing an order admitting the said proceedings, the Court would not be precluded from exercising its jurisdiction under Section 11 of the ACA, when admittedly, there is an arbitration agreement between the parties and invocation of the arbitration agreement has been made, which was met with a refusal on the part of the respondent to appoint an arbitral tribunal.

22. It is also Dr.Iqbal's contention that necessarily the applicant ought to have filed an application under Section 8 of the ACA before the NCLT and having not filed such application, the present Section 11 application ought to be held to be not maintainable. I am not persuaded to accept this submission of Dr.Iqbal in view of the above discussion, and more particularly, in view of the observations of Supreme Court in Indus Biotech. Accepting such submission would lead to an anomalous situation, so as to bring about a consequence that mere filing of the proceedings under Section 7 of IBC would be required to be construed to mean ousting the remedy which the law has otherwise provided and made available to a party to enforce an

arbitration agreement and redress its claims under the agreed arbitration procedure. Such right/remedy would certainly be available to a party till the proceedings under the IBC are admitted as noted above. Once the Section 7 IBC proceedings are admitted, the provisions of Section 238 of the IBC would get triggered to override the application of all other laws, as in such event, the Corporate Insolvency Resolution Process would commence, against such corporate debtor as per the provisions of Section 13 of the IBC which would be proceedings *in rem*.

23. In the above circumstances, the Court would be required to allow this application by appointing an arbitral tribunal for adjudication of the disputes and differences which have arisen between the parties under the agreements in question. However, a formal order appointing an arbitral tribunal is not required to be made as after the judgment was reserved, the parties just two days back, have settled the disputes stating that an arbitration is not warranted.

24. Petition is accordingly disposed of.

(G.S.KULKARNI, J.)