NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Comp. App (AT) (CH) (INS.) No. 246 / 2021

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016,

(Arising out of the Impugned Order dated 27.04.2021 in CP (IB) No. 276 / BB / 2019, passed by the `Adjudicating Authority', National Company Law Tribunal, Bengaluru Bench)

In the matter of:

M/s. KK Ropeways Limited
Registered Office : Jabli
Kasauli, Solan,
Himachal Pradesh,
Represented by its Authorised Signatory
Mr. Vinod Surha ..... **Appellant / Petitioner / Operational Creditor**

v.

M/s. Billion Smiles Hospitality
Private Limited
Registered Office: No. 14
Brunton Cross Road,
Richmond Town,
Bengaluru - 560025 **..... Respondent/Respondent/ Corporate Debtor**

Present:

For Appellant : Mr. Manu Kulkarni, Advocate
For Mr. Madhur A. Kalyanshetty, Advocate

For Respondent : No Appearance (Notice Served)

J U D G M E N T
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

Comp. App (AT) (CH) (INS.) No. 246 / 2021 :

Introduction:

The `Appellant' / `Petitioner' / `Operational Creditor', has preferred the instant Comp. App (AT) (CH) (INS.) No. 246 / 2021, as an `Affected Person', pertaining to the `impugned order', dated 27.04.2021 in CP (IB) No. 276 / BB / 2019, passed by the `Adjudicating Authority' (`National Company Law Tribunal', Bengaluru Bench).

2. The `Adjudicating Authority' (`National Company Law Tribunal', Bengaluru Bench), while passing the `impugned order' dated 27.04.2021 in CP (IB) No. 276 / BB / 2019 (Filed by the `Petitioner' / `Appellant' / `Operational Creditor', under Section 9 of the Insolvency and Bankruptcy Code, 2016, R/w. Rule 6 of the I & B (AAA) Rules, 2016), wherein, at Paragraphs 5 to 10, it is observed as under:

> *5. ``Shri Rohan Kothari, learned Counsel for the Respondent, has filed Objections dated 17.04.2021 by inter alia contending as follows:*
>
> > *(1) The present Petition is wholly misconceived, not maintainable in law or on facts, and is liable to be dismissed in limine. The alleged operational debt claimed herein is not an undisputed or admitted liability, and hence this Petition ought not to be admitted. The Petition does not make out an intelligible claim in respect of the total amount of outstanding debt and is inconsistent in the specific amount claimed. The defaulted amount alleged to have arisen in the Award dated 29.11.2018 passed in arbitration proceedings, bearing case reference No. DAC/1854/12-17, by the Ld. Arbitrator, Delhi International Arbitration Centre (DIAC). And the Award was passed ex-parte. When the Respondent was notified of the ex-parte award passed against it, the Respondent filed an Appeal u/s 34 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi,*

impugning the award, which is still pending. Further, the Respondent herein has sought to procure documents pertaining to the said appeal as well as documents necessary to rebut the claim of the Petitioner herein. However, the said documents are presently in New Delhi and due to the present Covid-related situation, the said appeal and documents connected therewith could not be produced along with the present reply.

(2) It is settled law that a Petition u/s 9 of the Code is not maintainable when the arbitral award in question is disputed by way of a Section 34 appeal and the said appeal is pending. They have relied upon the Judgment rendered by Hon'ble Apex Court in K. Kishan v. Vijay Nirman Co. (P) Ltd., (2018) 17 SCC 662.

(3) The amount claimed under the present Petition by the Operational Creditor is more than the amount claimed in Demand Notice issued by the Petitioner to the Respondent under Rule 5 of the IBC Rules, 2016. The Petitioner, in its demand notice dated 21.02.2019, has alleged that the total amount of debt (or amount claimed to be in 'default') is Rs.22,39,927.43/-. However, the total amount of debt claimed under Part IV of the present Petition is Rs.23,02,523/-. A further discrepancy is present in the Record of Default with the Information Utility produced by the Petitioner along with Affidavit dated 09.03.2021. In this record of Default, the amount of default appearing due is Rs.28,75,314.58/-. The discrepancies in the amounts claimed by the Petitioner show that the Demand Notice invoking the provisions of the Code is defective, as is the present Petition. Therefore, the Petition must be dismissed.

6. As stated supra, the basic facts with reference to leasing of premises, default arise out of Lease Agreement, not paying awarded amount, etc. are prima facie are not in dispute. Only short point for consideration in the instant Petition is whether the Petition is maintainable for execution of Award in question. The Award was passed out of rental dispute, and in the normal circumstances, such disputes have to be settled by approaching Rent controller Courts/Authorities constituted for said purpose. However, they have invoked Arbitration Clause available in their Agreement and got exparte Award in question. Aggrieved by the said Award, the Respondent is stated to have filed an Appeal, which is stated to be pending before the Hon'ble Delhi High Court. In this regard, it is relevant to point the recent judgement rendered by the Hon'ble Supreme Court, in Gujarat Urja Vikas Nigam Ltd Vs. Mr. Amit Gupta and others (2021) SCC Online, SC 194, wherein, it is inter alia clarified about

general jurisdiction of NCLT/NCLAT, under Section 60(5)(c) of IBC in the following terms:

> *"67. The institutional framework under the IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple fora……., Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, in doing so, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other Courts, Tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of Corporate Debtor. The nexus with the insolvency of the Debtor must exist."*
>
> *Therefore, the Petitioner, invoking of provisions of the Code for implementation of Award and to recover awarded amount is against object of the Code. The Petitioner has not furnished any data prima facie showing that the Respondent has become insolvent, so as to get defence/response from the Respondent.*

7. As stated supra, aggrieved by the Award in question, the Respondent has taken steps to carry the matter to the Higher Judicial forum, whereas, the Petitioner failed to take appropriate legal steps to execute the Award in question, except invoking provisions of Code by issuing Demand Notice dated 21.02.2019, wherein, the Petitioner had demanded the Respondent to repay the un-paid operational debt in default, within 10 days. However, the Present Petition has been filed only on 20th June, 2019, after a period of lapse of about 4 months from the date of demand notice that too for implementation of Award dated 29th November, 2018. Therefore, the Petitioner has invoked provisions of the Code, which are supposed to be invoked for bonafide and genuine/justified reasons, in a casual way. And the Petitioner has not explained reasons for delay in not taking appropriate legal steps for implementation of Award, as per law, and it is not the case of Petitioner that there is no other legal remedy available except invoking the provisions of the Code.

8. As detailed supra, both the Learned Counsels relying on the same judgement in support of their case, viz., K. Kishan Vs. Vijay Nirman Company Private Limited (2018) 17 SCC 662. By reading of this judgement, what we understand is that operational dispute in question cannot be called un-disputed as long as Arbitration Award is under challenged U/s 34 of Arbitration and Conciliation Act, 1996. Wherein it is inter alia held that the

object of Code, in so far as Operational Creditors are concerned, to put the insolvency process against Corporate Debtor only in clear cases where a real dispute between the parties to debt owed does not exist.. Further filing of S. 34 of Act against an arbitral award shows that a pre-existing dispute which culminates at the first stage of proceedings in an award, continues even after the award at least till the final adjudicatory process U/s 34 & 37 of Act has taken place. Therefore, the operational debt in question deemed to be a dispute, as the Respondent stated to have filed Appeal against the Award in question, as detailed supra. Though material papers with regard to filing of Appeal are not furnished due to Covid situation, we took into consideration of the statement of the Respondent that they have filed Appeal against the Award and it is still pending adjudication.

9. So far as the contentions of Respondent that there is discrepancy in the amount claimed in demand notice, in the instant Petition, in service Record of Default with the Information Utility produced by the Petitioner along with Affidavit dated 09.03.2021 etc. are concerned, they are un-tenable as amount awarded in award is not in dispute, and the interest accrues on award amount due to passage of time.

10. For the aforesaid reasons, circumstances of the Case, and the law on the issue, we are of considered opinion that filing of the instant Petition is filed on misconception of fact and law, and it is solely filed for recovery of amount awarded in Arbitration, and thus it is liable to be dismissed.''

and resultantly, `dismissed' the main `Petition', without Costs.

Appellant's Contentions:

3. Challenging the `validity', `propriety' and `legality' of the `impugned order', dated 27.04.2021 in CP (IB) No. 276 / BB / 2019, the `Adjudicating Authority' (`National Company Law Tribunal', Bengaluru Bench), the Learned Counsel for the `Appellant / Petitioner / Operational Creditor', submits that the `impugned order' of `dismissal', suffers from `legal infirmities', and the same is `unsustainable in Law'.

4. According to the Learned Counsel for the `Appellant / Petitioner / Operational / Creditor', the `Respondent / Corporate Debtor', was desirous of occupying and operating a `Food Court', under the name and style of `UPSOUTH', in the Complex, owned by the `Appellant', situated at `Savoy Greens'.

5. It is represented on behalf of the `Appellant', that the `Respondent / Corporate Debtor', had approached the `Appellant', and entered into a `Lease / Rent Agreement', dated 09.03.2015 (`Lease Agreement') with the `Appellant', and undertook to occupy space of approximately 250 sq. ft. built up area translated to 1125 sq. ft. of super area to be called `Shop 2' at the ground floor along with an additional area of approximately 200 sq. ft. of super area in the basement along with 92 sq. ft of washing area in semi-open condition of the complex, situated at `Savoy Greens'.

6. The Learned Counsel for the Appellant points out that the `Obligations' and `Covenants', were set out under the terms of the `Lease Agreement' and the Respondent was obligated to pay the Appellant a minimum guarantee of Rs.40,000/- per month upon sales of Rs.6,00,000/- per month on or before the 10th working day of each calendar month in advance in terms of Clause 2.1 and 2.4 of the agreement.

7. The Learned Counsel for the Appellant, by referring to Clause 5.4 of the `Terms of the said Agreement', contends that the `Respondent', was obligated, to pay charges of water and electricity within 10 days of receipt of bill from the Appellant and further the `Respondent', was obligated to pay `CAM Charges' of Rs.39,375/- per month, with effect from the `opening' of the `Food Counter'.

8. The Learned Counsel for the Appellant, takes a plea that the `Respondent', from the `Inception of the Agreement', `Defaulted', in payment of `charges', within the stipulated period and failed to `honour', its commitment from the beginning and despite several reminders, issued by the `Appellant', the `Respondent', had failed to pay the `Outstanding Dues', to the `Appellant'.

9. The Learned Counsel for the Appellant submits that, on 20.06.2017, the `Appellant', was in receipt of a Letter from the `Respondent', stating that they were `desirous' of `Terminating, the said `Agreement', and moving out of the premises on or before 22.09.2017, and further requested the `Appellant', for the `Adjustment' of the `Rent', and `Arrears', from the `Security Deposit'.

10. The Learned Counsel for the Appellant points out that the `Appellant', had issued `several mails', requiring the Respondent's to clear all the `Outstanding Dues', before moving out of the premises, but the `Respondent', had failed to clear its `Dues'. Hence, the `Appellant'(after adjusting the `Security Deposit'), had issued a `Letter' / `Notice', dated 25.08.2017, invoking `Clause 13' of the said `Agreement'.

11. According to the Appellant, the Respondent, had issued a `Letter' dated 14.09.2017 (responding to the `Letter' / `Notice' of the `Appellant', dated 25.08.2017), admitting its `Dues', and agreed to pay the `Outstanding Sum', along with `Interest'. That apart, the Respondent, through Letter dated 14.09.2017, had offered an `Unreasonable Payment Methods', which were not feasible and the Appellant, was perforced to move the `Hon'ble High Court of Delhi, as per Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking for an `Appointment' of an `Arbitrator'.

12. The Learned Counsel for the Appellant takes a plea that the Respondent, had not produced any `details / documents', showing the pendency of the `Application', under Section 34 of the Act, but the `Adjudicating Authority', after `Hearing' the `Parties', had `adjourned'

the matter, reserving it `For Orders', and gave the `Respondent', an `opportunity', to file its `Objections', after the conclusion of `arguments', without providing an `opportunity', to the `Appellant', to respond to the `Objections'.

13. The Learned Counsel for the Appellant, advances an argument that the `Adjudicating Authority', had wrongly concluded that the Appellant, had invoked the Provisions of the I & B Code, 2016, for implementing the `Award', passed by the `Arbitral Tribunal', and this was against the `Object' of the `Code'.

14. The Learned Counsel for the Appellant submits that, it is apparent that the `Award', passed in favour of the `Appellant', is in the nature of the `Operational Debt', which entitles the `Appellant', to initiate `Proceedings', under Section 9 of the I & B Code, 2016. Also that, the `Adjudicating Authority', had placed an `erroneous reliance', upon the `decision' of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited v. Mr. Amit Gupta & Ors. (2021) SCC OnLine SC 194, to dismiss the Petition, when the said Judgment, only `Fortifies', the Appellant's case.

15. The Learned Counsel for the Appellant points out that the amount owed by the `Respondent', has not been disputed and has crystalised, in

short, the `impugned order', is in `Violation' of the `Principles of Natural Justice', as the `Adjudicating Authority', had not provided an `Opportunity', to the `Petitioner / Operational Creditor', to respond to the `Objections', filed by the `Respondent / Corporate Debtor'.

16. The Learned Counsel for the Appellant points out that the language employed in Section 8 (2) (a) of the Code, should have been taken into consideration by the `Adjudicating Authority / Tribunal', as it `Prima Facie', places an `Obligation', on the `Corporate Debtor', to demonstrate by way of documents', the `Existence of a Dispute', namely the `Petition under Section 34 of the Act', and hence the `impugned order', is in negation of the ingredients of the I & B Code, 2016.

17. The Learned Counsel for the Appellant forcefully comes out with a plea that as long as the `Debt', is not `barred', by `Limitation', an `Operational Creditor', can institute `proceedings', under Section 9 of the `Code'. Besides this, an `Arbitral Award', can be treated as an `Operational Debt', and that the `Respondent', has failed to `prove', any `grounds', as are mentioned in Section 9(5)(ii) of the I & B Code, 2016, to pray for `dismissal' of the `Petition', filed by the `Appellant'.

18. According to the Appellant, the language employed under Section 9 (5) (i) of the I & B Code, 2016, is mandatory, and hence, the `Petition', should have been `admitted', by the `Adjudicating Authority'.

19. Continuing further, the Learned Counsel for the Appellant submits that the I & B Code, 2016, does not specify an `Outer Limit', within which, an `Application', under Section 9 of the `Code', is to be filed.

20. The Learned Counsel for the Appellant, while rounding up, prays for the instant `Appeal', being `allowed', by this `Appellate Tribunal', by setting aside the `impugned order', dated 27.04.2021, passed by the `Adjudicating Authority' (`National Company Law Tribunal', Bengaluru Bench) in Comp. App (AT) (CH) (INS.) No. 246 / 2021.

Appellant's Decisions:

21. The Learned Counsel for the Appellant, refers to the decision of the Hon'ble Supreme Court in K. Kishan v. Vijay Nirman Company Private Limited (vide Civil Appeals No. 21824 of 2017 with 21825 of 2017 dated 14.08.2018), reported in 2018, 17 SCC Page 662, at Spl. Pgs.670, 671-673, 675 and 676, wherein, at Paragraphs, 14, 15, 19 to 22, 27 to 31, it is observed as under:

> *14. ``A reading of Section 9(5)(ii)(d) would show that an application under Section 8 must be rejected if notice of a dispute has been received*

by the operational creditor. In the present case, it is clear on facts that the entire basis for the notice under Section 8 of the Code is the fact that an arbitral award was passed on 21-7-2017 against the Appellant. As has been pointed out by us, this clearly appears from the gist of the case that was filed along with the insolvency petition. The fact that the reply of 16-2-2017 to the notice given under Section 8 was within 10 days, and raised the existence of a dispute, also cannot be doubted.

15. However, the learned counsel appearing on behalf of the Respondent strongly relied on the fact that this is not an ordinary case inasmuch as the amount of Rs.1.71 Crores which was awarded was admitted by Mr. Banerji's client in the arbitral proceedings to be a debt due, and that this being so, there can be no dispute regarding the same. We are afraid that we are unable to agree. As was correctly pointed out by Mr. Banerji, counterclaims for amounts far exceeding this were rejected by the learned Arbitral Tribunal, which rejection is also the subject-matter of challenge in a petition under Section 34 of the A & C Act. It is important to note that unlike Counterclaims Nos. 1 and 2, which were rejected by the Arbitral Tribunal for lack of evidence, Counterclaim No.3 which amounts to Rs.19,88,20,475 was rejected on the basis of a price adjustment clause on merits. Therefore, it is difficult to say at this stage of the proceedings, that no dispute would exist between the parties.

19. After referring to Section 8, the judgment in Mobilox Innovations case[3] went on to hold that what is important is that the existence of the dispute and/or a suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.

20. The Adjudicating Authority, therefore, when examining an application under Section 9 of the Act, will have to determine the following: (Mobilox Innovations Case[3], SCC p. 394, Para 34)

> *``34. ... (i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh? (See Section 4 of the Act.)*
>
> *(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
>
> *(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding*

filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5), and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5).''

21. In para 38, this Court cautioned: (Mobilox Innovations case[3], SCC p. 396)

"38. ... We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.''

Finally, the law was summed up as follows:- (SCC p. 403, para 51)

"51. 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."

22. Following this judgment, it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The alarming result of an operational debt contained in an arbitral award for a small amount of say, two lakhs of rupees, cannot possibly jeopardize an otherwise solvent company worth several crores of rupees. Such a company would be well within its rights to state that it is challenging the Arbitral Award passed against it, and the mere factum of challenge would be sufficient to state that it disputes the Award. Such a case would clearly come within para 38 of Mobilox Innovations (supra), being a case of a pre-existing ongoing dispute between the parties. The Code cannot be used in terrorem to extract this sum of money of Rs. two lakhs even though it may not be finally payable as adjudication proceedings in respect thereto are still pending. We repeat that the object of the Code, at least insofar as operational creditors are concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist.

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.

30. With regard to the submission of learned counsel for the respondent, that the amount of Rs.1.71 Crores stood admitted by Mr. Banerji's client, as was recorded in the arbitral award, suffice it to say that cross-claims of sums much above this amount has been turned down by the Arbitral Tribunal, which are pending in a Section 34 petition challenging the said Award. The very fact that there is a possibility that Mr. Banerji's client may succeed on these cross-claims is sufficient to state that the operational debt, in the present case, cannot be said to be an undisputed debt.

31. We also accept Mr. Banerji's submission that the Appellate Tribunal was in error in referring to Section 238 of the Code. Section 238 of the Code would apply in case there is an inconsistency between the Code and the Arbitration Act in the present case. We see no such inconsistency. On the contrary, the Award passed under the Arbitration Act together with the steps taken for its challenge would only make it clear that the operational debt, in the present case, happens to be a disputed one.''

22. The Learned Counsel for the Appellant, cites the decision in Pacific Gulf Shipping (Singapore) Pte. Ltd. v. S.R.K. Chemicals Ltd., 2019 SCC Online, NCLT 22232, wherein, at Paragraphs 20 to 23, it is observed and held as under:

20. `Since, in the present case, an award has been passed in favour of the Petitioner, his status is as good as of a decree holder. Hence, he can come within the scope of the Operational Creditor and the Arbitral amount which is unpaid, can be treated as a default of debt has occurred. For the sake of convenience, the relevant provisions of Section 3 (10) and 3 (11) are reproduced herein below:

``Section-3: In this code, unless the context otherwise requires,-
(1) …….

xxxxxx

(10) ``creditor'' means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder;

(11) ``debt'' means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

xxxxxx

21. Further, the Section 5(21) define the Operational Debt which reads as under:

Section 5

xxxxxx

(21) ``operational debt'' means a claim in respect of the provision of goods or services 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.''

22. By following the above stated legal provisions and perusal of the material available on record, it is evident that the Petitioner / Operational-Creditor has provided its services of cargo by transporting and shipping the goods of Corporate Debtor, i.e. bulk salt from Kandla Port (India) to Chittagong Port (Bangladesh). Since, the Corporate Debtor has failed to pay the due amount towards demurrage and transporting charges, which lead to an Arbitration Proceedings and thereby an Arbitral Award has been passed in favour of the Petitioner and against the Corporate Debtor. Hence, we are of the view that the claimed amount of demurrage which has been awarded is still unpaid. Hence, it has become due and payable and a default of Arbitral amount can be treated as good as an Operational Debt. Thus, the default of debts has been occurred and is well established. Hence, a Corporate Insolvency Resolution Process (``CIRP'') can be triggered in respect of the Corporate Debtor Company. That apart, the present L.B. Petition is filed through its authorised signatory, Mr. Rohit

Parmar of the Petitioner Company. Hence, its filing is found to be in order and well within the limit.

23. For the above stated reason, the present IB petition filed under Section 9 of the code is found complete to trigger the Corporate-Insolvency-Resolution-Process (``CIRP'') in respect of Corporate-Debtor-Company. The present I.B. Petition deserve for admission under the I.B. Code.''

Dispute:

23. Be it noted, that a `Dispute', in `existence', means and includes raising a `Dispute', before a `Court of Law' or an `Arbitral Tribunal', before receipt of `Notice', under Section 8 of the I & B Code, 2016. Further, `Dispute', continues at stage, where challenge to an `Arbitral Award', in an `Appeal', is projected by a `Party', as opined by this `Tribunal'.

24. So long as a `Dispute', truly exists in fact and it is not `spurious' or an `imaginary', and not a `hypothetical' one, an `Adjudicating Authority' / `Tribunal', is to `reject', the `Petition / Application', filed under the I & B Code, 2016.

25. It is to be remembered, that an `Arbitration Proceedings', and `I & B Code Proceedings', cannot go on together, in the considered opinion of this `Tribunal'.

Evaluation:

26. Before the `Adjudicating Authority', the `Appellant' / `Petitioner' / `Operational Creditor', in Part-IV of the `Application CP (IB) No. 276 / BB / 2019 (filed under Section 9 of the Insolvency and Bankruptcy Code, 2016, r/w. Rule 6 of the I & B (AAA) Rules, 2016), had claimed a `Total Sum of Debt' i.e., Rs.23,02,523/-, being the amount `due', from the `date of filing of the Claim', namely 19.01.2018 as per the `Arbitral Award', pronounced on 29.11.2018 till 30.04.2019, in the arbitration reference DAC / 1854 / 12-17, between K.K. Ropeways Limited Versus Billion Smiles Hospitality Pvt. Ltd. The award was pronounced on 29.11.2018 in favour of K.K. Ropeways Limited for recovery of Rs.26,33,022/- along with interest @ 15% pa. The award was made on account of non-payment of lease rentals as per the `Lease / Rent Agreement', dated 09.03.2015, water and electricity charges, Common Area Maintenance charges, diesel generator charges and TDS to K.K. Ropeways Limited. The date from which such `Debt', fell `Due', was 19.01.2018.

27. It comes to be known that the `Arbitral Award', was passed by the `Arbitrator, on 29.11.2018, under the `Arbitration and Conciliation Act, 1996', between K.K. Ropeways Limited v. Billion Smiles Hospitality Pvt. Ltd.

28. Before the `Adjudicating Authority', the `Respondent / Corporate Debtor', filed its `Objections', by taking a stand that the `Defaulted Sum', purportedly arose from the `Award', dated 29.11.2018, made in `Arbitration Proceedings', in reference No. DAC/1854/12-17, by the `Arbitrator', Delhi International Arbitration Centre, and the `Award', came to be passed in an `*Ex-parte*' manner.

29. The Respondent / Corporate Debtor, preferred an `Appeal', before the `Hon'ble High Court of Delhi' (as per Section 34 of the Arbitration and Conciliation Act, 1996), assailing the `Award'.

30. The primordial question that arises for determination in the instant `Appeal', is that whether the main CP (IB) No. 276 / BB / 2019 (filed by the `Appellant' / `Petitioner' / `Operational Creditor'), is per se `maintainable', for the purpose of `executing' the `Award'.

31. By virtue of the `Arbitration Clause', as per `Agreement', the Appellant', had secured the `Ex-parte Award', and as against the same, the `Respondent / Corporate Debtor', filed an `Appeal', in terms of Section 34 of the Act. The very fact that an `Appeal', was filed against the `Ex-parte Award', by the Respondent, `Prima Facie', there exists a `Pre-existing Dispute'.

32. As far as the present case is concerned, this `Tribunal' points out that the `Award', came to be passed, based on the `Rental Dispute', and when the `Appeal', was filed by the `Respondent', against the `Award', the `Operational Debt', can only considered to be under `Dispute', in the considered opinion of this `Tribunal'.

33. It cannot be gainsaid that, for `initiating' a `Corporate Insolvency Resolution Process', against the `Corporate Debtor', there ought to be `no real dispute', existing between the respective `Parties', to the `Debt', owed in question. So long as the `Arbitration Award', was challenged under the relevant Section of the Arbitration and Conciliation Act, 1996, the `Operational Debt', in the instant `Appeal', is considered to be under `Dispute', as opined by this `Tribunal'.

34. The other candid fact that weighs against the `Appellant / Petitioner / Operational Creditor' is that, the main `Petition', before the `Adjudicating Authority', in CP (IB) No. 276 / BB / 2019, was filed on 20.06.2019, ofcourse, after a gap of about four months from the date of `Demand Notice', dated 21.02.2019, and no `reasons', were assigned for the `delay in not taking the diligent steps by the `Appellant', towards the implementation of the Award, in accordance with Law'.

35. In so far as the amount awarded in `Award', is not `Disputed', and in reality, due to `efflux of time', the `Interest', gets added on the `Award Due Amount'. As such, the difference in the `Amount', mentioned in the `Demand Notice', dated 21.02.2019, in the main `Petition', and in service `Record of Default', with the `Information Utility', produced by the `Appellant' with `Affidavit', dated 09.03.2021, `will not exhibit any incompatibility', so as to be of any assistance, to the `Respondent / Corporate Debtor'.

36. In the light of foregoing detailed discussions, on a careful consideration of the contentions advanced on the side of the `Appellant', and keeping in mind of the facts and circumstances of the case, in a conspectus fashion, this `Tribunal', comes to an `inescapable', `inevitable' and irresistible' conclusion that the view arrived at by the `Adjudicating Authority' (`National Company Law Tribunal', Bengaluru Bench), in `dismissing' the main CP (IB) No. 276 / BB / 2019 (filed by the `Appellant / Petitioner / Operational Creditor', for `recovering the Sum', awarded in `Arbitration Proceedings'), is free from any `Legal Errors'. Consequently, the `Appeal' sans merits.

Conclusion:

In fine, the instant Comp. App (AT) (CH) (INS.) No.246 of 2021 is `Dismissed'. No costs. The connected pending `Interlocutory Applications', if any, are `Closed'.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

12 / 06 / 2023

SR / TM