IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION

Company Appeal (AT) (Insolvency) No. 167 of 2017

(Arising out of Order dated 29th August, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in Company Petition (IB) No.100/9/HDB/2017)

In the matter of :

M/s. Ksheeraabd Constructions Pvt. Ltd. ... Appellant

Vs.

M/s. Vijay Nirman Company Pvt. Ltd. ... Respondent

Present : For Appellant : Shri Arun Kathpalia, Senior Advocate with Shri D. Abhinav Rao, Shri D. Bharathi Reddy, Shri Somaksh Goyal, Shri Swaroop George and Shri George Thomas, Advocates.

For Respondent : Shri Sanjay Kumar Chhetry and Shri Vijayshree Pattnaik, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Respondent- M/s. Vijay Nirman Company Pvt. Ltd. ('Operational Creditor') filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of 'Corporate Insolvency Resolution Process' against the Appellant- M/s. Ksheeraabad Constructions Pvt. Ltd. ('Corporate Debtor'). By impugned order dated 29th August, 2017 passed by

Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in CP(IB) No.100/9/HDB/2017, the application having been admitted, order of moratorium having been passed and in view of appointment of 'Insolvency Resolution Professional', present appeal has been preferred by the 'Corporate Debtor'.

2. The main plea taken by the Appellant-'Corporate Debtor' is that there is an 'existence of a dispute' and therefore, the petition under Section 9 of the 'I&B Code' was not maintainable.

3. Learned counsel appearing on behalf of the Appellant-'Corporate Debtor' submitted that the 'Corporate Insolvency Resolution Process' cannot be initiated and decided when notice of dispute is issued to the 'Operational Creditor' under sub-section (2) (a) of Section 8 of the 'I&B Code' bringing to its attention an 'existence of a dispute' or 'pendency of arbitration proceedings'.

4. Learned counsel appearing on behalf of the Appellant-'Corporate Debtor' further submitted that after Arbitral Award passed by the Arbitral Tribunal, the application under Section 34 of the Arbitration and Conciliation Act, 1996 having been preferred, it amounts to pendency of a case and 'existence of a dispute'. It was submitted that the aforesaid fact was brought to the notice of the Adjudicating Authority but in spite of the same, impugned order of admission and moratorium has been passed.

5. Learned counsel for the Appellant-'Corporate Debtor' relied on Hon'ble Supreme Court judgment in ***'Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (2017) SCC OnLine SC 1154'*** wherein the Hon'ble Supreme Court held:-

> *"54. 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."

6. It was submitted that the Adjudicating Authority has erred in not considering that the Appellant while opposing the claims raised by the Respondent has also raised a counter claim of Rs. 19 crores before the Arbitral Tribunal. That fact that the counter claim was raised by the Appellant is itself sufficient to show that there is an 'existence of dispute' as brought to the notice of the 'Operational Creditor' pursuant to reply under sub-section (2)(a) of Section 8 of the 'I&B Code'. It was submitted that the Arbitral Award dated 21st January, 2017 cannot be termed to be 'decree', till it is enforceable and cannot be regarded as a 'debt' before it is final, if challenged under Section 34 of the Arbitration and Conciliation Act, 1996. It was further submitted that as per Section 36 of the Arbitration and Conciliation Act, 1996, an Arbitral Award is enforceable in the same manner as if there is a decree of the Court but only on the expiry of the time to make an application to set aside the award under Section 34 of the Arbitration and Conciliation Act, 1996. Reliance has been placed on Hon'ble Supreme Court's decision in ***'Fiza Developers and Inter-trade P. Ltd. Vs. AMCI (I) (P) (Ltd.) – 2009 (7) SCC 796'.***

7. On the other hand, according to counsel for the Respondent-'Operational Creditor', the Award having been passed, the dispute stand decided and the award amount is a debt payable to the 'Operational Creditor'.

8. It was submitted that the Appellant never raised any dispute prior to notice under sub-section (1) of Section 8 of the 'I&B Code', therefore, it cannot be termed as dispute in existence. Reliance has been placed on decision of this Appellate Tribunal in ***'M/s. Annapurna Infrastructure Pvt. Ltd. and Anr. Vs. M/s. SORIL Infra Resource Ltd – Company Appeal (AT) (Insolvency) No. 32 of 2017'*** wherein the Appellate Tribunal held: -

> *"38. From the impugned order dated 24th March, 2017, we find that the learned Adjudicating Authority noticed the aforesaid plea at paragraph 6 of the impugned judgment, as quoted below:*
>
> > *"6. In order to buttress his stand that applicant is an 'Operational Creditor' learned counsel has placed reliance on a portion of para 3.2.2 of the report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design and has argued that the report clearly brings out that the obligation to pay rent is certainly cover by the definition of expression 'Operational Creditors'. According to the*

learned counsel the expression 'Operational Creditor' used in section 5(20) and 5(21) of the Code must be construed to include the obligation to pay rent to the applicant as an 'Operational Creditor'. According to the learned counsel the definition of 'Operational Creditor' as adopted in section 5(20) of the Code is not exhaustive but it is illustrative as it is evident from the use of word 'include'. Mr. Nair has submitted that it is well settled principle of law that wherever the expression 'include' is used to define an expression then it has room to imply many other things as the definition is not exclusive."

39. However, we find that the aforesaid issue has not been decided by the learned Adjudicating Authority, having not entertained the application under Sec. 9, on other ground of 'existence of dispute'.

40. For the reason aforesaid, while we hold that the finding of the learned Adjudicating Authority insofar as it relates to 'award', 'default of debt' and the 'alternative remedy', are not based on sound principle and against the provisions of law, we refrain

to decide the question as to whether the 1st appellant is an 'operational creditor' or not which is first required to be decided by learned Adjudicating Authority.

41. For the aforesaid reasons, we set aside the impugned order dated 24th March, 2017 and remit the case to the learned Adjudicating Authority, Principal Bench, New Delhi to decide as to whether the 1st appellant is an 'operational creditor' and if so, whether the application under Sec. 9 preferred by the appellants is complete for admitting and initiation of corporate insolvency resolution process. If the first question relating to status of appellant as 'operational creditor' is decided in affirmative, in favour of the appellant, then learned Adjudicating Authority will decide the issue whether the application is 'complete or not' and if not complete may grant seven days' time to the appellants to complete the record as per the proviso to Sec. 9 of the I&B Code."

9. We have heard learned counsel for the parties and perused the record.

10. In ***'Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.' (supra)*** the Hon'ble Supreme Court referred to the facts is to be

considered by the Adjudicating Authority for admitting an application under Section 9 of the 'I&B Code' and held as follows: -

> *"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*
>
> *(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?*
>
> *35. If any one of the aforesaid conditions is lacking, the application would have to be rejected.*
>
> *36. 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) of the Act, and admit or reject the application, as the*

case may be, depending upon the factors mentioned in Section 9(5) of the Act."

11. The question arises for consideration, whether pendency of a case before a Court under Section 34 of the Arbitration and Conciliation Act, 1996 can be termed to be 'dispute in existence' for the purpose of sub-section (6) of Section 5 of the 'I&B Code'.

12. It is true that under Section 36 of the Arbitration and Conciliation Act, 1996, an Arbitral Award is executable as a decree. It can be enforced only after the time for filing the application under Section 34 has expired and/or if no application is made or such application having been made has been rejected. Therefore, for the purpose of Arbitration and Conciliation Act, 1996, an Arbitral Award reaches its finality after expiry of enforcement time or if the application under Section 34 is filed and rejected. However, for the purpose of 'I&B Code' no reliance can be placed on Section 34 of the Arbitration and Conciliation Act, 1996, for the reasons stated below.

13. The 'I&B Code' being a Complete Code will prevail over all other Acts including Arbitration and Conciliation Act, 1996. As per Section 238, provision of 'I&B Code' is to override other laws, including Arbitration Act, 1996, as quoted below: -

"238. Provisions of this Code to override other laws. *— The provisions of this Code shall have effect, notwithstanding anything inconsistent*

therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

14. Therefore, the provision under the 'I&B Code' with regard to finality of an Arbitral Award for initiation of 'Corporate Insolvency Resolution Process' will prevail the provisions of the 'Arbitration and Conciliation Act, 1996'.

15. For the purpose of Section 9 of the 'I&B Code', the application to be preferred under Form-5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "Rules, 2016") as per which, the order passed by Arbitral panel/Arbitral Tribunal has been treated to be one of the documents/records and evidence of default, as apparent from Part V of Form 5, as quoted below:

"FORM 5

Part-V

PARTICULARS OF OPERATIONAL DEBT
[DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]

1.	*PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR.* *ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)*

2.	*DETAILS OF RESERVATION / RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS*
3.	***PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)***
4.	*RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)*
5.	*DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)*
6.	*PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH OPERATIONAL DEBT HAS BECOME DUE*
7.	*A STATEMENT OF BANK ACCOUNT WHERE DEPOSITS ARE MADE OR CREDITS RECEIVED NORMALLY BY THE OPERATIONAL CREDITOR IN RESPECT OF THE DEBT OF THE CORPORATE DEBTOR (ATTACH A COPY)*
8.	*LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT"*

16. The aforesaid provisions made in the Form-5 if read with sub-section (6) of Section 5 and Section 9 of the 'I&B Code' it is clear that while pendency of the suit or Arbitral Proceeding has been termed to be an 'existence of dispute', an order of a Court, Tribunal or Arbitral Panel adjudicating on the default (commonly known as Award), has been treated to be a "record of Operational Debt".

17. In view of the aforesaid provisions of law and mandate of 'I&B Code', we hold that no person can take advantage of pendency of a case under Section 34 of the Arbitration and Conciliation Act, 1996 to stall 'Corporate Insolvency Resolution Process' under Section 9 of the 'I&B Code'.

18. In view of the findings above, no interference is called for against the impugned order dated 29th August, 2017. In absence of any merit, the appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member (Judicial)

(Balvinder Singh)
Member(Technical)

NEW DELHI
20th November, 2017
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