IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

In the matter of
Application under section 8 of the
Arbitration & Conciliation Act, 1996

In the matter of
Indus Biotech Private Limited
[CIN: U24231MH1995PTC085656]

IA No.3597/2019
in
CP (IB) No.3077/2019

Indus Biotech Private Limited	…	Applicant/ Corporate Debtor
	Versus	
Kotak India Venture Fund-I	…	Respondent/ Financial Creditor

CP (IB) No.3077/2019

Kotak India Venture Fund-I	…	Financial Creditor
	Versus	
Indus Biotech Private Limited	…	Corporate Debtor

Order pronounced on: 09 June, 2020

Coram:

Mr Rajasekhar VK	:	Hon'ble Member (Judicial)
Mr Ravikumar Duraisamy	:	Hon'ble Member (Technical)

Appearances:

For the Applicant/ Corporate Debtor	:	Mr Mustafa Doctor, Sr Advocate Mr Chaitanya D Mehta Ms Sonali Aggarwal

		Ms Sairica Raju i/b Dhruve Liladhar & Co, Advocates
For Respondent/ Financial Creditor	:	Mr Fredun E DeVitre, Sr Advocate Mr Sharan Jagtiani Mr Jatin Pore Ms Ankita Agrawal, i/b DSK Legal, Advocates

COMMON ORDER

(covering both IA No.3597/2019 & CP (IB) No.3077/2019)

Per: Rajasekhar VK, Member (Judicial)

1. Preamble

1.1. The single-point reference in the Interlocutory Application (IA) is that this Adjudicating Authority refer the parties in the main CP (IB) No.3077/2019 to arbitration for settling their disputes. The IA has been filed under section 8 of the Arbitration & Conciliation Act, 1996.[1]

1.2. The underlying Company Petition has been filed by Kotak India Venture Fund-I under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Indus Biotech Private Limited

[1] ***8. Power to refer parties to arbitration where there is an arbitration agreement.—***

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued, and an arbitral award made.

[CIN: U24231MH1995PTC085656], on the ground that the Corporate Debtor had failed to redeem the Optionally Convertible Redeemable Preference Shares (OCRPS) on or before 15.04.2019 in terms of the Share Subscription and Shareholders Agreement (SSSA) dated 20.07.2007. Schedule 'J' of the SSSA is at p.272 of the Paper Book details the terms of the OCRPS.

1.3. The Petitioner has alleged that there was a default on the part of the Respondent in redeeming the OCRPS, which, according to the Petitioner, works out to ₹367,07,50,000/- (Rupees three hundred and sixty-seven crore seven lakh and fifty thousand only). The date of default is stated to be 16.04.2019.

1.4. The facts germane to the determination of the present Application is as follows:

(a) In 2007-08, the Kotak Private Equity Group showed interest in subscribing to the share capital of Indus Biotech Private Limited. The Kotak Group consisted of the following:-

(1) Kotak India Venture Fund-I (the Petitioner herein);

(2) Kotak India Venture (Offshore) Fund;

(3) Kotak Mahindra Investments Limited whose shares were subsequently transferred to Kotak Securities Limited; and

(4) Kotak Employees Investment Trust.

(b) The Respondent entered into separate Share Subscription & Shareholders Agreements (SSSAs), with each of the four Kotak Group entities, as follows: -

(1) Agreement dated 20.07.2007 with Kotak India Venture Fund-I;

(2) Agreement dated 20.07.2007 with Kotak India Venture (Offshore) Fund;

(3) Agreement dated 12.07.2007 with Kotak Mahindra Investments Limited, whose shares were subsequently transferred to Kotak Securities Limited; and

(4) Agreement dated 09.01.2008 with Kotak Employee Investment Trust.

Although there were four SSSAs, the terms and conditions were materially identical to one another. In all, the Kotak Group have subscribed to a share capital of ₹27,00,00,000/- (Rupees twenty-seven crore only), including both equity and preference share capital.

(c) In 2007, under the said SSSAs, the Petitioner subscribed to equity shares and Optionally Convertible Redeemable Preference Shares (OCRPS) issued by Respondent.

(d) Under regulation 5(2) of the Securities and Exchange Board of India (Issue of Capital & Disclosure Requirements) Regulations, 2018 [SEBI ICDR Regulations], any company which has any outstanding convertible securities or any other right which would entitle any person with any option to receive equity shares of the issuer, is not entitled to make a Qualified Initial Public Offering (QIPO). Accordingly, it was imperative for the Kotak Group entities to convert their respective preference shares into equity shares. Therefore, the Petitioner opted for and chose to convert the OCRPS into equity shares.

(e) During the QIPO process, a dispute arose between the Respondent and the Petitioner and the other entities of the Kotak Group with regard to the calculation and conversion formula to be followed while converting the respective entities' preference shares into equity shares of the Respondent. The Kotak Group entities sought to apply a calculation formula

which would give them approximately thirty percent of the total paid-up share capital of the Respondent, whereas according to the Respondent and in line with the reports of the auditors, independent valuer and agreed conversion formula, the Kotak Group would be entitled to approximately ten percent of the total paid-up share capital of the Respondent.

(f) Some months after this dispute emerged and was ongoing, the Petitioner contended that they were entitled to trigger provisions relating to early redemption of OCRPS in a sum of ₹367,08,56,503/-.

(g) Since this was the gist of the dispute, the Respondent invoked the arbitration agreement under the SSSA by its letter dated 20.09.2019, seeking to refer the disputes between the parties to arbitration. The Respondent contends that the arbitral proceedings are deemed to have commenced on that date, *i.e.,* 20.09.2019, by virtue of section 21 of the Arbitration & Conciliation Act, 1996.[2]

1.5. Mr Mustafa Doctor and Mr Fredun E DeVitre, learned Senior Counsel appeared for the Applicant/Corporate Debtor and the Respondent/Financial Creditor respectively. They advanced their arguments without prejudice to their contentions in the main CP.

2. Arguments advanced by Mr Mustafa Doctor, learned Senior Counsel for the Applicant/Respondent

2.1. Mr Mustafa Doctor took us through the provisions of the SSPA dated 20.07.2007.[3] Article 20.4 thereof contains the Arbitration

[2] ***21. Commencement of arbitral proceedings.***— Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

[3] Annexure 'A' to the IA, at p.13

clause. A reading of the arbitration clause of the Agreement reveals that the parties bound themselves to settle any dispute, controversy or claim arising out of, relating to or in connection with the agreement to be finally settled by arbitration. The arbitration was to be conducted in accordance with the international arbitration rules of the Arbitration & Conciliation Act, 1996. The seat of arbitration was to be Mumbai, and the arbitral tribunal was to consist of three arbitrators, one each to be nominated by the Applicant/Corporate Debtor and the Respondent/Financial Creditors' Group, and the third to be selected by the two party-appointed arbitrators. In case either of the parties failed to nominate an arbitrator within fifteen days of receipt of notice in writing from the other party, then the arbitrators were to be appointed by a court of competent jurisdiction.

2.2. Mr Mustafa Doctor submitted that the Respondent/Financial Creditor has claimed a sum of approximately ₹367.09 crore as redemption value of the OCRPS held by it in the Applicant/Corporate Debtor. The dispute in essence pertains to –

(a) The valuation of the Respondent/Financial Creditor's OCRPS;

(b) The right of the Respondent/Financial Creditor to redeem such OCRPS when it had participated in the process to convert its OCRPS into equity shares of the Applicant/Corporate Debtor;

(c) Fixing of the QIPO date.

The parties have exchanged extensive correspondence from August 2018 onwards in this regard.[4]

[4] pages 578-685 in Vol.II of the Reply to the Main CP

2.3. Mr Mustafa Doctor submitted that it is not in dispute that for the purposes of a public listing, the Respondent/ Financial Creditor opted for and chose to convert the OCRPS into equity shares of the Company, in line with the requirements of the SEBI ICDR Regulations. The conversion of the outstanding preference shares was to take place according to the Conversion Formula defined in Schedule J of the SSSA.[5] Depending on the valuation, the converted stake would range between ten and thirty percent of the equity share capital of the Applicant/Corporate Debtor post conversion. While it is not in dispute that the parties agreed to go for an IPO, the dispute pertains only to the calculation and conversion formula to be followed.

2.4. Mr Mustafa Doctor contended that the Kotak Group entities sought to apply a calculation formula which would give them approximately thirty percent of the total paid-up equity share capital of the Applicant/Corporate Debtor. However, this is at variance with the value arrived by two different, independent auditors and valuers, who have relied on the SSSA and prepared the audited financials for the years 2017-18 and 2018-19 on the basis that the Kotak Group would be entitled to approximately ten percent of the total paid-up equity share capital of the Applicant/Corporate Debtor. Mr Mustafa Doctor submitted that the QIPO process itself was stalled as a result of this dispute, which is reflected in over eighty-five correspondences exchanged between the parties.

[5] Page 85 of the IA.

2.5. Even while the parties were engaged in correspondence with regard to the dispute pertaining to conversion, the Respondent/Financial Creditor, *vide* its letter dated 07.12.2018,[6] unilaterally proposed to fix a new QIPO date of 30.12.2018, and called upon the Applicant/ Corporate Debtor to provide the Respondent/Financial Creditor with an exit as on that date, *i.e.,* 30.12.2018. The Applicant/Corporate Debtor replied *vide* letter dated 24.12.2018,[7] denying the right of the Respondent/Financial Creditor to fix the QIPO date unilaterally, and to demand the redemption of the OCRPS. This was on the basis that the option to exercise their option to redeem the OCRPS was available from 2011 onwards but was exercised only in 2019.

2.6. On 31.03.2019, the Respondent/Financial Creditor issued a Redemption Notice to the Applicant/Corporate Debtor, *inter alia* calling upon the latter to pay a sum of approximately ₹367.09 crore to the Respondent/Financial Creditor. Mr Mustafa Doctor contends that this is the basis on which the underlying CP has been filed. Therefore, there exits more than one *bona fide* and substantial dispute between the parties under the SSSA since August 2018.

2.7. Mr Mustafa Doctor further submitted that the Applicant/Corporate Debtor is a highly profitable, debt-free company. The Respondent/ Financial Creditor has itself benefited from the Applicant/Corporate Debtor by receiving dividends in excess of ₹13 crore on an investment of approximately ₹19 crore. Hence, the Applicant/

[6] Annexure 'O' at p.617 of the Reply to the main CP.

[7] Annexure Q at p.631 of the Reply to the main CP

Corporate Debtor is clearly not in need of resolution in the first place.

2.8. Mr Mustafa Doctor further submitted that the investment by the Respondent/ Financial Creditor was in the share capital of the company, by way of preference shares. This is also reflected as such in the financial statements of the Respondent/Financial Creditor.

On law

2.9. On the point of law, Mr Mustafa Doctor, learned Senior Counsel appearing for the Applicant/Respondent, drew our attention to the provisions of section 8 of the Arbitration & Conciliation Act, 1996,[1] and stated that it is mandatory in nature. The undisputed fact is that the SSSA contains an arbitration clause which is wide enough to cover the dispute between the parties. This is in the nature of a commercial dispute. It is settled law that courts must always lean in favour of enforcing arbitration agreements, since that is the bargain struck by the parties. He submitted that the Hon'ble Supreme Court has reiterated this legal principle in a number of judgments.

2.10. Mr Mustafa Doctor submitted that the underlying Company Petition is in the nature of a *'dressed-up'* Petition, inasmuch as the real dispute between the parties is with regard to matters pertaining to the agreement reached between the parties and interpretation of its various clauses. The Respondent/Financial Creditor is not a Financial Creditor of the Applicant. The claim of the Respondent/ Financial Creditor is only a misconceived attempt to pressurise the Applicant/Corporate Debtor to succumb to extortionate demands, and the claim can be determined by arbitration. The provisions of

the IBC ought not to be used as a pressure tactic to extort money from profitable companies. The Applicant/Corporate Debtor has a right under section 8 of the Arbitration & Conciliation Act, 1996, to make an application at the first available opportunity before a judicial forum, to seek a reference to arbitration, Mr Mustafa Doctor submitted. The present IA is in this context.

2.11. In support of his contention regarding 'dressed up' petition, Mr Mustafa Doctor relied on the judgment of the Hon'ble Bombay High Court in ***Rakesh Malhotra vs Rajinder Kumar Malhotra,***[8] wherein it was held that the power to refer the disputes in a petition that is mischievous, vexatious, *mala fide* and 'dressed up' to arbitration is always retained.

3. Arguments of Mr Fredun E DeVitre, learned Senior Counsel for the Respondent/Financial Creditor

3.1. Mr Fredun E DeVitre, learned Senior Counsel for the Respondent/ Financial Creditor, submitted that the only issue to be decided in the present is this:

"Are the reliefs claimed in the petition capable of being referred to arbitration or being granted by an arbitral tribunal?"

If the answer is no, then the present IA should be dismissed, and the underlying Company Petition should be heard on merits.

3.2. Mr Fredun E DeVitre submitted that a section 7 IBC petition belongs to that class of litigation which are incapable of being referred to arbitration. These are matters *in rem,* as stated by the Hon'ble Supreme Court in ***Pioneer Urban Land and Infrastructure***

[8] 2014 SCC OnLine Bom 1146, decided on 20.08.2014

Limited & another v Union of India & others.[9] Matters *in rem* are inherently incapable of being referred to arbitration. Examples are probate, criminal matters, matrimonial matters, winding up etc. The initiation of CIRP cannot be granted by an arbitrator. A section 7 petition is not for recovery of debts. The IBC is a code for dealing with insolvency, either for revival or for liquidation. Once there is a debt and default based on a claim, then the court should decide to admit. It is the exclusive mandate of this court. The existence of an arbitration clause can never affect a section 7 application, which has to be decided independently by this Authority, Mr Fredun DeVitre submitted.

3.3. Mr Fredun DeVitre invited attention to the judgment of the Hon'ble Supreme Court in ***Haryana Telecom v Sterlite Industries (India) Limited.***[10] The *ratio decidendi* of that judgment was that while deciding the scope of a section 8 petition under the Arbitration & Conciliation Act, 1996, was that only such disputes or matters which an arbitrator is competent or empowered to decide, can be referred to arbitration, Mr Fredun DeVitre submitted.

3.4. Mr Fredun DeVitre also drew the court's focus to the judgment of the Hon'ble Supreme Court in ***Booz Allen and Hamilton Inc v SBI Home Finance Limited & others,***[11] in support of his argument that only where the subject matter of the suit is 'arbitrable' can the parties be referred to arbitration (para 20 of the judgment). He also

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9 (2019) 8 SCC 416, decided on 09.08.2019

10 (1999) 5 SCC 688, decided on 13.07.1999

11 (2011) 5 SCC 532, decided on 15.04.2011

submitted that para 34 of the judgment lays down the test for arbitrability, which are as follows: -

(a) Whether the disputes are capable of adjudication and settlement by arbitration?

(b) Whether the disputes are covered by the arbitration agreement?

(c) Whether the parties have referred the disputes to arbitration?

If the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration under section 8 of the Arbitration & Conciliation Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

3.5. Mr Fredun DeVitre also drew strength from para 51 of the ***Booz Allen*** judgment, in support of his line of argument that if there are some matters which are arbitrable and some matters which are non-arbitrable, even in those cases, it should not be referred to arbitration. The judgment also goes on to quote with approval the view in ***Sukanya Holdings (P) Ltd v Jayesh H. Pandya,***[12] that bifurcation of the subject matter of an action brought before a judicial authority is not allowed (para 52-*Booz Allen* judgment).

3.6. The second aspect of Mr Fredun DeVitre's argument was on the 'dressed up' petition argument advanced by Mr Mustafa Doctor.

3.7. Mr Fredun DeVitre stated that the understanding was that the Financial Creditor would get an IRR of thirty percent on his investment of ₹19.98 crore. Hence, when the Respondent/ Financial Creditor asks for a return of thirty percent, it is really not

[12] (2003) 5 SCC 531, at p.536, para 16

seeking any gratuity, it is only asking for what is due, he submitted. The investment was made in two trances on 10.08.2007 (₹17,48,08,300/-) and 13.08.2007 (₹1,50,45,900/-),[13] when the turnover was about ₹6 crore.

3.8. The third aspect of Mr Fredun DeVitre's argument centred on the QIPO date. He submitted that in terms of the SSPA, the date was to be December 2011 or a date which is approved by three investors. The principal argument in the present IA is that the Respondent/Financial Creditor has not redeemed the OCRPS by 2011. In this regard, there was an amendment made to the SSPA in 2017, in terms of which the life of the agreement was extended by another ten years. The amendment retains the QIPO definition from the original document, since all other terms and conditions were retained. Therefore, Mr Fredun DeVitre argues, a fresh right of redemption by agreement was conferred on the respondent.

3.9. Further, in March 2018, there were discussions between the parties for a QIPO. The agreement provided that the range of conversion would be between ten and thirty percent, dependent on the valuation which the agreement itself provides. The agreement further provides that if the QIPO does not take place by the QIPO date, then a fifteen-day notice period shall be given. At the end of this fifteen-day period, the investment will be redeemable at the IRR of thirty percent. If not redeemed, then it will be treated as a 'debt.'[14] It is normal that a ₹19 crore investment for twelve years compounded annually will come to that figure.

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[13] Page 9 of the main Company Petition

[14] Pages 271-272 of the main Company Petition.

3.10. Mr Fredun DeVitre next submitted that for a section 7 IBC petition, the claim itself may be disputed. The fact of the dispute is irrelevant for a section 7 petition, though it may assume significance for a petition under section 9 of the IBC. It is the contention of the Respondent/Financial Creditor that there is a right of redemption under the contract if the investment is not redeemed by the QIPO date. Further, the QIPO date was to be on a mutually agreed valuation. The valuation failed. Therefore, the Respondent/ Financial Creditor exercised the right of redemption.

3.11. Mr Fredun DeVitre further submitted that the notice for redemption was given on 31.03.2019.[15] At that point of time, there was no reference to arbitration. The first reference to arbitration came only on 20.09.2019, after the filing of the section 7 petition on 16.08.2019. Therefore, the present IA is only an attempt to get out of the clutches of section 7. This is a diversionary tactic to prevent the main Company Petition from being argued.

4. Arguments of Mr Mustafa Doctor, learned Sr Counsel for the Applicant/Corporate Debtor in reply

4.1. Mr Mustafa Doctor, in his arguments in reply submitted that in ***Malhotra,*** the Hon'ble Bombay High Court created a window after considering both ***Booz Allen*** and ***Haryana Telecom*****.** The only question is whether the case of Applicant/Corporate Debtor falls within the that window.

[15] Page 196 of the main Company Petition.

5. Findings

5.1. We have given anxious thought to the skilful arguments of the learned Senior Counsel appearing for the parties. We have also perused the pleadings in this behalf.

5.2. At the outset, we must say that the subject matter of this IA – seeking a reference to arbitration in a petition filed under section 7 of the IBC – is something that is *res integra.* The facts of the case are, however, undisputed, and therefore, we seek to address the points of law that need to be addressed. In our endeavour to arrive at a decision, we have tried to be guided by the decisions of the constitutional courts under other laws, and the underlying reasons in arriving at those decisions. The case law cited by both Senior Counsel is a good starting point in this quest.

5.3. ***Booz Allen*** lays down three tests of arbitrability of a dispute in para 34 of the judgment –

(a) Whether the disputes are capable of adjudication and settlement by arbitration?

(b) Whether the disputes are covered by the arbitration agreement?

(c) Whether the parties have referred the disputes to arbitration?

In para 36 thereof, the well-recognised examples of non-arbitrable disputes have been laid down to be –

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;

(iii) guardianship matters;

(iv) insolvency and winding-up matters;

(v) testamentary matters (grant of probate, letters of administration and succession certificate); and

(vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

In para 38, the judgment further notes that *"generally and traditionally, all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable."*

5.4. The Hon'ble Supreme Court added a seventh category to the six categories of cases in ***Booz Allen,*** *vide* its judgment in ***Vimal Kishor Shah & others v Jayesh Dinesh Shah & others***.[16] The Hon'ble Court held that cases arising out of trust deed and Trusts Act cannot be decided by arbitration (para 54 of the judgment).

5.5. Be that as it may, the question that really needs to be answered is this: Will the provisions of the Arbitration & Conciliation Act, 1996 prevail over the provisions of the Insolvency & Bankruptcy Act, 2016? If so, in what circumstances?

[16] (2016) 8 SCC 788, decided on 17.08.2016

5.6. It is settled law that *generalia specialibus non derogant* – special law prevails over general law.

5.7. In ***Gujarat Urja Vikas Nigam Limited v Essar Power Limited,***[17] the Hon'ble Supreme Court held that the Arbitration & Conciliation Act, 1996 is a general law. The court in that case was considering a question under the Electricity Act. It held that the Electricity Act being a special statute would have overriding effect over the Arbitration & Conciliation Act, which was the general statute. However, this decision was overturned by the Hon'ble Supreme Court in ***Consolidated Engineering Enterprises v Principal Secretary, Irrigation Department & others,***[18] wherein the Hon'ble Court held that the Arbitration & Conciliation Act is a special law, consolidating and amending the law relating to arbitration and matters connected therewith or incidental thereto.

5.8. In ***Hindustan Petroleum Corporation Limited v Pinkcity Midway Petroleums,***[19] the Hon'ble Supreme Court held that where an arbitration clause exists, the court has a mandatory duty to refer dispute arising between the contracting parties to arbitrator. It quoted with approval the decision of the same court in ***P Anand Gajapathi Raju & others v PVG Raju (dead) & others,***[20] wherein it was held that the language of section 8 of the Arbitration & Conciliation Act, 1996, is peremptory and the court is under an obligation to refer parties to arbitration.

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17 (2008) 4 SCC 755, decided on 13.03.2008

18 (2008) 7 SCC 169 decided on 03.04.2008

19 (2003) 6 SCC 503 decided on 23.07.2003

20 (2000) 4 SCC 539 decided on 28.03.2000

5.9. The Preamble of the IBC reads that it is an Act to *"consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons … in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, available of credit and balance the interests of all the stakeholders …."* The Preamble of the Arbitration & Conciliation Act, 1996, reads that *"it is an Act to consolidate and amend the law relating to domestic arbitration … as also to define the law relating to conciliation …."*

5.10. Section 238 of the IBC reads as follows: -

"238. 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."

5.11. The rules of interpretation are fairly well-settled: -

(1) When a provision of law regulates a particular subject and a subsequent law contains a provision regulating the same subject, there is no presumption that the later law repeals the earlier law. The rule making authority while making the later rule is deemed to know the existing law on the subject. If the subsequent law does not repeal the earlier rule, there can be no presumption of an intention to repeal the earlier rule.

(2) When two provisions of law - one being a general law and the other being special law govern a matter, the court should endeavour to apply a harmonious construction to the said provisions. But where the intention of the rule making authority is made clear either expressly or impliedly, as to which law should prevail, the same shall be given effect.

(3) If the repugnancy or inconsistency subsists in spite of an effort to read them harmoniously, the prior special law is not presumed to be repealed by the later general law. The prior special law will

continue to apply and prevail in spite of the subsequent general law. But where a clear intention to make a rule of universal application by superseding the earlier special law is evident from the later general law, then the later general law, will prevail over the prior special law.

(4) Where a later special law is repugnant to or inconsistent with an earlier general law, the later special law will prevail over the earlier general law.

5.12. In ***Innoventive Industries Limited v ICICI Bank & another,***[21] The Hon'ble National Company Law Appellate Tribunal (NCLAT) held that sub-section (5) of section 7 of the IBC provides for admission or rejection of application of a financial creditor where the adjudicating authority is ***satisfied*** that the documents are complete or incomplete. The Adjudicating Authority, post ascertaining and being satisfied that such a default has occurred, may admit the application of the financial creditor. In other words, the statute mandates the Adjudicating Authority to ascertain and record satisfaction as to the occurrence of default before admitting the application. Mere claim by the financial creditor that the default has occurred is not sufficient. The same is subject to the Adjudicating Authority's summary adjudication, though limited to 'ascertainment' and 'satisfaction' (paras 57 & 58).

5.13. Therefore, in a section 7 petition, there has to be a judicial determination by the Adjudicating Authority as to whether there has been a 'default' within the meaning of section 3(12) of the IBC.

[21] 2017 SCC OnLine NCLAT 70, decided on 15.05.2017

5.14. In the present case, the dispute centres around three things – (1) The valuation of the Respondent/Financial Creditor's OCRPS; (2) The right of the Respondent/Financial Creditor to redeem such OCRPS when it had participated in the process to convert its OCRPS into equity shares of the Applicant/Corporate Debtor; and (3) Fixing of the QIPO date. All of these things are important determinants in coming to a judicial conclusion that a default has occurred. The invocation of arbitration in a case like this seems to be justified,

5.15. Looking at the contention raised, and that the facts are not in dispute, we are not satisfied that a default has occurred. We note Mr Mustafa Doctor's statements that the Applicant/Corporate Debtor is a solvent, debt-free and profitable company. It will unnecessarily push an otherwise solvent, debt-free company into insolvency, which is not a very desirable result at this stage. The disputes that form the subject matter of the underlying Company Petition, *viz.,* valuation of shares, calculation and conversion formula and fixing of QIPO date are all arbitrable, since they involve valuation of the shares and fixing of the QIPO date. Therefore, we feel that an attempt must be made to reconcile the differences between the parties and their respective perceptions. Also, no meaningful purpose will be served by pushing the Applicant/Corporate Debtor into CIRP at this stage.

5.16. We further note that the Arbitration Petition bearing Arbitration Case No.48/2019 filed by the Applicant/Corporate Debtor is pending consideration before the Hon'ble Supreme Court for appointment of an arbitrator.

6. Order

6.1. For all the above reasons, the present **IA No.3597/MB.I/2019** is allowed.

6.2. As a natural corollary**,** the underlying Company Petition bearing **CP No.3077/MB.IV/2019** is incapable of being admitted at this stage, and is, accordingly, **dismissed.**

6.3. Ordered accordingly.

Sd/-
Ravikumar Duraisamy
Member (Technical)

Sd/-
Rajasekhar VK
Member (Judicial)

09.06.2020