National Company Law Appellate Tribunal, New Delhi

Principal Bench

COMPANY APPEAL (AT) (INSOLVENCY) No. 888 of 2020

(Arising out of Order dated 30th September, 2020 passed by National Company Law Tribunal, Kolkata Bench, Kolkata, in CP(IB) No.- 676/KB/2020 & CP(IB) No. 688/KB/2020).

IN THE MATTER OF:

Mr. D.K. Mohanty,
Managing Director,
Orissa Minerals Development Company Ltd.,
Office at: Main Administration Building,
Vishakhapatnam Steel Plant,
Vishakhapatnam-530031. **...Appellant**

Versus

1. M/s. Jai Balaji Industries
Office: 5, Bentinck Street,
Kolkata – 700001 **...Respondent No. 1**

2. Orissa Minerals Development Company Ltd.,
Represented by the Interim Resolution Professional – Mr. Santosh Choraira
Registration No. IBBI/IPA-001/IP/P00549/2017-2018/10797
Office at: P-41, Princep street, Room No. 222,
Kolkata – 700072. **...Respondent No. 2**

Appellant:	**Mr. Tushar Mehta (Solicitor General of India), Sr. Advocate alongwith Ms. Surekha Raman & Mr. D.K. Mohanty, Advocates.**
Respondents:	**Ms. Pratiksha Mishra, Mr. Diwakar Maheshwari & Mr. Aditya V. Singh, Advocates for R-1.** **Mr. Santosh Choraria, Advocate for IRP.** **Mr. Kumar Anurag Singh & Mr. Zain A. Khan, Advocates.**

WITH

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J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in these Appeals is to the common Impugned Order dated 30.09.2020 passed by the Learned Adjudicating Authority, (National Company Law Tribunal, Kolkata Bench) in CP(IB) No. 676/KB/2020 & CP(IB) No. 688/KB/2020. By this Impugned Order, the Adjudicating Authority, has allowed CP(IB) No. 688/KB/2020 preferred by M/s. Jai Balaji Industries Ltd. (hereinafter referred to as the **'Operational Creditor'**) against M/s. Orissa Minerals Development Company Ltd. (hereinafter referred to as the **'Corporate Debtor'**). CP(IB) No. 676/KB/2020 was disposed off with a liberty to the 'Operational Creditor' to submit its claim in the CIRP proceedings, to the IRP. While admitting the Section 9 Application, the Adjudicating Authority observed as follows:

> *"10. It has been held by the Apex Court that if it is shown that the application under Section 34 of the A & C Act, 1996 is pending or Appeal under Section 37 of the Act is pending, then insolvency proceedings cannot be initiated. In this case, on the date of filing of this Application under Section 9 of Insolvency and Bankruptcy Code, 2016 i.e. on 29.02.2020, no proceeding under Section 34 or Appeal under Section 37 of the Act was then pending against the Operational Creditor (although restoration application of Appeal was pending). So on the facts, we hold that above ruling is in favour of the Operational Creditor rather than the Corporate Debtor. In short, 'Operational Debt' become 'due and payable' on 29.02.2012 i.e. on the date of which the Learned District Judge confirmed the award under Section 34 of A & C Act. The Corporate Debtor filed Appeal under Section 37 of the Act. It was dismissed in default. 90 days thereafter, on 14.02.2020, Operational Creditor gave the Corporate Debtor*

notice under Section 9 of the Insolvency and Bankruptcy Code, 2016. On 28.02.2020.

11. What we gathered from the above facts is that the operational creditor sent a Demand Notice three months after the corporate debtor's appeal was dismissed by Hon'ble High Court. As soon as the Corporate Debtor received the Demand Notice, its officers swung into action and get the appeal restored. Meantime, the operational creditor had filed this application. It appears from record that the officers of the Corporate Debtor using the proceedings under the law either to delay or to avoid the legitimate dues of the Corporate Debtor on one or the other ground.

12. For all above reasons, we hold that Operational Creditor has established that the Corporate Debtor committed default in paying the 'Operational Debt' of Rs. 5,62,01.258/- in spite of receipt of Demand Notice. There was no dispute (by way of arbitral proceeding or otherwise) on the date on which the default occurred or on the date on which the application is filed to initiate Corporate Insolvency Resolution Process of the Corporate Debtor.

13. We also note that no disciplinary proceeding is pending against the proposed Insolvency Resolution Professional. It is not in dispute that the Corporate Debtor did not pay the 'Operational Debt's. Hence, we allow this application and proceed to pass following order."

(Emphasis Supplied)

2. **Submissions of the Learned Solicitor General appearing for the Appellant/ Corporate Debtor:**

- Learned Counsel appearing for the 'Corporate Debtor' submitted that the Adjudicating Authority has erred in initiating the Insolvency Proceedings against the 'Corporate Debtor', despite the fact that there

was a pre-existing ongoing dispute pending Adjudication in an Appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as **'A&C Act 1996'**) between the parties before the Hon'ble High Court at Kolkata.

- The Adjudicating Authority has failed to appreciate the law laid down by the Hon'ble Supreme Court in ***'Mobilox Innovations Pvt. Ltd.' Vs. 'Kirusa Software Pvt. Ltd.' (2018) 1 SCC 353*** which holds that the moment that there is a dispute between the parties, which need not be a 'bonafide dispute', any Application under Section 9 cannot be admitted.
- The 'Operational Creditor' has already filed execution proceedings being EC No. 61 of 2010 for enforcing the said Arbitral Award before the Learned Second Court of the Civil Judge, Senior Division at Barasat, North 24 Parganas. The 'Operational Creditor' by filing parallel proceedings for execution of the Arbitral Award was in fact abusing the process of Law.
- Filing of a Petition under Section 34 of the A&C Act, 1996 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 under Sections 34 and 37 has taken place. It is contended that the Adjudicating Authority has ignored the fact that the steps taken for the challenge of the Arbitral Award would indicate that the 'Operational Debt', is a disputed one.

- It is submitted that the Section 9 Application was affirmed on 29.02.2020 and was filed only on 02.03.2020; on which date the Appeals stood restored; the finding of the Adjudicating Authority that there was no dispute pending on the date on which the Application was filed, is factually incorrect; the Appeal under Section 37 stood restored and since upon restoration it relates back to the date of filing i.e. August 2012, there was a Pre-Existing ongoing Dispute pending Adjudication when the Demand Notice under Section 8 of the Code was issued on 14.02.2020 and also on 02.03.2020.
- The Learned Counsel placed reliance on the Judgment of the three Judge Bench of the Hon'ble Supreme Court in the case of ***'Vareed Jacob' Vs. 'Sosamma Geevarghese & Ors.' reported in (2004) 6 SCC 378,*** in which it was held that:

> *"if the court dismisses the suit for default, without any reference to the ancillary orders passed earlier, then the interim orders shall revive as and when the suit is restored. However, if the court dismisses the suit specifically vacating the ancillary orders, then restoration will not revive such ancillary orders."*

- The reliance was also placed on the Judgment of the Hon'ble Supreme Court in the case of ***'K. Kishan' Vs. 'Vijay Nirman Company Pvt. Ltd.' reported in (2018) 17 SCC 662,*** in which the first Respondent was barred from initiating proceedings under Section 9 of the Code as the debt would be a disputed one as long as the Appeal under Section 37 of the A&C Act, 1996 is pending. Demand Notice sent by the first Respondent during the period when the Appeal stood dismissed in

default, but restoration was pending, would have no meaning at all in view of the restoration. In fact, it did not matter whether there was a stay in the proceedings or not, the pendency of Appeal is good enough for the purpose of pleading that the debt is a disputed one in view of Judgement of ***'K. Kishan' (Supra).***

- It was strenuously argued that the Application under Section 9 was barred by limitation based on the following dates.

15.02.2010 as modified on 11.05.2010	*Arbitral Award passed against Corporate Debtor.*
August 2010	*Objections under Section 34 of A&C Act, 1996 filed by Corporate Debtor.*
December 2010	*Execution case 61/2020 filed by the Operational Creditor before the Learned District Judge, which is pending.*
29.02.2012	*Section 34 objections filed by Corporate Debtor is dismissed. Award becomes a decree enforceable in law.*
11.05.2013/01.03.2015	*Limitation to file application u/s 9 expired on 11.05.2013 or 01.03.2015 i.e. 3 years from the date when 'Operational Debt' became 'due and payable' by the Corporate Debtor i.e. 11.05.2010 (date of award)/ 29.02.2012 (date of dismissal of Section 34 under A&C Act, 1996)*
28.05.2016	*IBC came into force.*
02.03.2020	*Application under Section 9 of the Code filed on the basis that date of default was 22.11.2019 i.e. date of dismissal of the Appeal under Section 37 of the A&C Act, 1996.*

- It is submitted that the date of default would be the date when the Learned District Judge confirmed the Award under Section 34 of the

A&C Act, 1996 i.e. 29.02.2012. It is correctly mentioned by the 'Operational Creditor' that the 'Operational Debt' became 'due and payable' on 11.05.2010 but has purposely mentioned a wrong date of default as 22.11.2019. Hence, the Application is clearly time barred as the same ought to have been filed on 11.05.2013 or on 01.03.2015 i.e. three years from the date when the 'Operational Debt' became 'due and payable' by the Corporate Debtor i.e. 11.05.2010 (date of Award) 29.02.2012 (date of dismissal of Section 34 of the A&C Act, 1996). The Learned Counsel placed reliance on the Judgment of the Hon'ble Supreme Court in ***'Vashdeo R. Bhojwani' Vs. 'Abhyudaya Co-operative Bank limited and Anr.' (2019) 9 SCC 158',*** and in the Judgement of ***'V. Padmakuamr' Vs. 'Stressed Assets Stabilisation Fund & Anr.' CA (AT) (Insolvency) No. 57 of 2020.***

3. **Submissions of the Learned Counsel appearing for the Operational Creditor:**

- Since the Corporate Debtor failed to comply with the terms of the two MoU's entered into on 13.08.2003 and on 11.03.2004. Arbitral proceedings were initiated by the 'Operational Creditor' against the 'Corporate Debtor', which culminated in passing of two separate Arbitral Awards under the respective MoU's on 15.02.2010 and 22.02.2010, in favour of the 'Operational Creditor'. Both the Awards were assailed by the 'Corporate Debtor' under Section 34 of the A&C Act, 1996 which also stood dismissed by separate Orders dated 27.02.2012 and 29.02.2012 respectively. Thereafter the Corporate Debtor filed two separate Appeals (F.M.A. 939 of 2012 and F.M.A. 941

of 2012) under Section 37 of the A&C Act, 1996, before the Hon'ble Calcutta High Court in 2012, which remained pending until 22.11.2019, on which date, the said Appeals were dismissed for non-prosecution due to non-appearance of the 'Corporate Debtor'. Therefore, the date of default being 22.11.2019 and no dispute was pending in terms of Section 8(2)(a) of the Code, the 'Operational Creditor' on 14.02.2020 issued two separate Demand Notices.

- The said Demand Notice was responded to by the 'Corporate Debtor' on 25.02.2020 that no 'Operational Debt' was due as the 'Corporate Debtor' has filed a restoration Application after dismissal of the Appeals under Section 37 of the A&C Act, 1996.
- It was only post the issuance of the Demand Notice under Section 8 of the Code that the Application for restoration was filed on 17.12.2019 and was allowed on 02.03.2020.
- On 30.09.2020, the Adjudicating Authority admitted the Application under Section 9, it is vehemently contended by the Learned Counsel that the dispute must pre-exist as on the date of the Demand Notice and not by any inference or reference or any other fact Post facto development or any deeming fiction. The Learned Counsel placed reliance on the ratio of the Hon'ble Supreme Court in ***'State of Jharkhand & Ors.' Vs. 'Ambay Cements & Anr.' (2005) 1 SCC 368,*** that *'...where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way.'*

- It is argued that the Code does not acknowledge doctrine of "relation back" upon restoration of the Appeal.
- Learned Counsel submitted that the issue to be determined in ***'Vareed Jacob' Vs. 'Sosamma Geevarghese & Ors.' (2004) 6 SCC 378*** is evident from para 5 wherein,

> *"In view of the aforestated arguments, the point which arises for determination is: whether there is automatic revival of interlocutory orders with the restoration of the suit unless the circumstances occurring during the interregnum or the orders passed by the court speak to the contrary."*

- It is submitted that the Judgement does not deal with the doctrine of "relation back" and is only limited to the effect of the Interim Orders upon the restoration proceedings. The majority view of (Hon'ble Justice V.N. Khare and Hon'ble Justice S.H. Kapadia) opined that upon restoration, Interlocutory Orders would stand revived, unless the Court expressly directs to the contrary. It is submitted by the Learned Counsel that, while differing with the majority's conclusion regarding automatic revival of Interlocutory Orders, Hon'ble Justice S.B. Sinha had given a separate view and had importantly discussed below the aspects with respect to which no views were expressed by the majority:

> *"62. It is also of some importance that there exists a view that an order of dismissal of a suit does not render an order of attachment void ab initio as a sale of property under order of attachment would be invalid even after the date of such sale and the order of attachment is withdrawn.*
>
> *63. A converse case may arise when the property is sold after the suit is dismissed for*

> *default and before the same is restored. Is it possible to take a view that upon restoration of suit the sale of property under attachment before judgment becomes invalid? The answer to the question must be rendered in the negative. By taking recourse to the interpretation of the provisions of the statute, the court cannot say that although such a sale shall be valid but the order of attachment shall revive. Such a conclusion by reason of a judge-made law may be an illogical one.*
>
> *64. A construction which preserves the rights of the parties pending adjudication must be allowed to operate vis-à-vis the privilege conferred upon a plaintiff to obtain an interlocutory order which loses its force by dismissal of suit and thus, may not revive, unless expressly directed, on restoration of the suit."*

- The Learned Counsel placed reliance on the Judgment of the Hon'ble Supreme Court in the case of ***'Sampath Kumar' Vs. 'Ayyakannu and Anr.' [2002] SUPP 2 SCR 397,*** wherein the Hon'ble Apex Court while, holding that the doctrine of "relation back" cannot have universal application even in the context of Amendment and pleadings held as follows:

> *"... An amendment once incorporated relates back to the date of the suit. However, the doctrine of "relation back" in the context of amendment of pleadings is not one of universal application and in appropriate cases the court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by its shall be deemed to have been brought before the court on the date on which the application seeking the amendment was filed.*
>
> *...The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for*

amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant…"

- The Learned Counsel based on the above legal discussions, submitted that four Principles emerge from the doctrine of "relation back" which are detailed as here under:

  (i) The said doctrine is not an absolute one and has been consistently applied with applicable limitations in law and fact.

  (ii) There is no uniformity and straight- jacket formula on the applicability of this doctrine as the same is required to be construed on a case-to-case basis.

  (iii) This doctrine does not impact the rights accrued in the interregnum period.

  (iv) No statutorily accrued/vested rights can be disturbed by the use of this doctrine.

- It is strenuously argued that Section 238 of the Code has an overriding affect and the only defence available with the 'Corporate Debtor' is that the dispute needs to be pre-existing on the date of issuance of Demand Notice.

- The Learned Counsel also further submitted that filing of an Execution Petition for a decree and filing of an Application under Section 9 of the Code are alternate legal remedies and can proceed concurrently. It is

an accepted legal position that recovery of money through civil suit is distinct from the statutory mechanism provided under the Code.

Assessment:

4. It is not in dispute that an MoU was entered into between the parties on 13.08.2003 pertaining to *Company Appeal (AT) (Insolvency) No. 888 of 2020* and on 11.03.2004 pertaining to *Company Appeal (AT) (Insolvency) No. 889 of 2020,* in terms of which, the 'Corporate Debtor' had agreed to supply Iron Ore to the tune of 1 Lakh metric tons per month under the MoU dated 13.08.2003 and 7 Lakhs metric tons per month under the MoU dated 11.03.2004. Disputes arose between the parties, as a result of which the 'Operational Creditor' invoked the Arbitration clause as per the terms of MoU. Two separate Arbitral Awards under the respective MoUs were passed on 15.02.2010 and on 22.02.2010 in favor of the 'Operational Creditor'. Aggrieved by these Awards, the 'Corporate Debtor' preferred Appeals under Section 34 of the A&C Act, 1996, which were dismissed vide Orders dated 27.02.2012 (Misc. Case No. 159 of 2010) and on 29.02.2010 (Misc. Case No. 173 of 2010), respectively. Two separate Appeals (FMA 939 of 2012) and (FMA 941 of 2012) were preferred by the 'Corporate Debtor' under Section 37 of the A&C Act, 1996, before the Hon'ble High Court of Kolkata in 2012, which remained pending till 22.11.2019, on which date, the Appeals were dismissed for non-prosecution on the ground that the 'Corporate Debtor' did not choose to appear.

5. While the matter stood thus, the 'Operational Creditor' on 14.02.2020 issued two separate Demand Notices under Section 8 of the Code, with the

date of default being 22.11.2019. On 25.02.2020, the 'Corporate Debtor' replied to the Demand Notice stating as follows:-

> *"…(f) Although the said appeal No. FMA 939 of 2012 was dismissed for default on 22.11.2019 as there was a communication gap for the reason of administrative changes in the office of OMDC Ltd. but such dismissal was not on merits and the OMDC Ltd. within the period of 30 days duly filed the application for restoration vide CAN No. 12333 of 2019 upon service of the same upon the Advocate for the Jai Balaji Industries Ltd. and the said restoration application is still pending for disposal.*
>
> *(g) The dismissal of the appeal was for default and not on merits and as such the above dismissal cannot be treated as permanent closure of the proceeding of the OMDC for setting aside the Award, particularly when the application for restoration filed within time is still pending for disposal.*
>
> *(h) Even on 24th February 2020 the appellant OMDC Ltd. mentioned the said restoration application before the Hon'ble Appeal Court upon notice to Advocate for the Jai Balaji Industries Ltd. and the Hon'ble Appeal Court has been pleased to direct that the said application will appear in the list on 25.02.2020 and thus the whole matter is sub Judice before the Hon'ble Appeal Court of the Hon'ble High Court at Calcutta.*
>
> *(i) It is also a fact that Jai Balaji Industries Ltd. even filed a Money Execution Case bearing No. 61 of 2010 before the learned 2nd Court of the Civil Judge, Senior Division at Barasat, North 24- Parganas and during pendency of the appeal the said Execution Application remains stand still as per the provisions contained in section 36 of the Arbitration and Conciliation Act 1996 as it originally stood when the appeal was filed.*
>
> *(j) Jai Balaji Industries Ltd. cannot proceed with multifarious proceeding in different proceedings for executing the same award."*

6. Subsequently, the Application for restoration, filed on 17.12.2019 was restored on 02.03.2020. It is the case of the 'Operational Creditor' that *'as*

on the date of the issuance of the Demand Notice' under Section 8 of the Code i.e. on 14.02.2020 there was no Arbitration proceeding pending, as the Appeal under Section 37 was restored only on 02.03.2020. As against these submissions, Learned Solicitor General representing the 'Corporate Debtor' submitted that once the Application for restoration is allowed, it relates back to the original date of filing. It is also submitted that the Section 9 Application was affirmed on 29.02.2020 but was actually filed on 02.03.2020 and therefore as on the date of filing of the Application, the Appeal was already restored.

7. At the outset, we address ourselves to the rival contentions of both parties with respect to whether the Dispute Pre-Exists as on the date of issuance of the Demand Notice in view of the restoration of the Appeal under Section 37 of the A&C Act, 1996. We are of the view that what is relevant to be seen in this case is not whether any Dispute was pending, exactly on the cut-off date of Section 8 Notice, but whether any Dispute was 'Pre-Existing' as on the date of issuance of the Demand Notice under Section 8 as per the ratio laid down by the Hon'ble Supreme Court in ***'Mobilox Innovations Pvt. Ltd.' Vs. 'Kirusa Software Pvt. Ltd.' (2018) 1 SCC 353,*** which reads as hereunder:-

> *"…. What is important is that the existence of the dispute and/or the 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."*

Further, in the same judgment, the Hon'ble Supreme Court lucidly laid down the legal principles in this regard by directing that:

> *Therefore, the adjudicating authority, while 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?*
> *(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 anyone of the aforesaid conditions is lacking, the application would have to be rejected…"*
>
> *(Emphasis Supplied)*

8. The Appeal under Section 37 of the A&C Act, 1996, was restored on 02.03.2020. The majority view of the three Judge Bench in ***'Vareed Jacob' (Supra)*** reads as follows:-

> *"17. In the case of **Shivaraya v. Sharnappa** it has been held that the question whether the restoration of the suit revives ancillary orders passed before the dismissal of the suit depends upon the terms in which the order of dismissal is passed and the terms in which the suit is restored. If the court dismisses the suit for default, without any reference to the ancillary orders passed earlier, then the interim orders shall revive as and when the suit is restored. However, if the court dismisses the suit specifically vacating the ancillary orders, then restoration will not revive such ancillary orders. This was a case under Order 39.*
>
> *18. In the case of **Saranatha Ayyangar v. Muthiah Moopanar** it has been held that on restoration of the suit dismissed for default all interlocutory matters shall stand restored, unless the order of restoration says to the contrary. That as a matter of general rule on restoration of the suit dismissed for default, all interlocutory orders shall*

stand revived unless during the interregnum between the dismissal of the suit and restoration, there is any alienation in favour of a third party.

19. A similar view has been taken by the Patna ***High Court in the case of Bankim Chandra v. Chandi Prasad*** *in which it has been held that orders of stay pending disposal of the suit are ancillary orders and they are all meant to supplement the ultimate decision arrived at in the main suit and, therefore, when the suit, dismissed for default, is restored by the order of the court all ancillary orders passed in the suit shall revive, unless there is any other factor on record or in the order of dismissal to show to the contrary. This was also a matter under Order 39.*

20. In the case of ***Nandipati Rami Reddi v. Nandipati Padma Reddy*** *it has been held by the* ***Division Bench of the Andhra Pradesh High Court*** *that when the suit is restored, all interlocutory orders and their operation during the period between dismissal of the suit for default and restoration shall stand revived. That once the dismissal is set aside, the plaintiff must be restored to the position in which he was situated, when the court dismissed the suit for default. Therefore, it follows that interlocutory orders which have been passed before the dismissal would stand revived along with the suit when the dismissal is set aside and the suit is restored unless the court expressly or by implication excludes the operation of interlocutory orders passed during the period between dismissal of the suit and the restoration.*

21. In the case of ***Nancy John Lyndon v. Prabhati Lal Chowdhury*** *it has been held that in view of Order 21 Rule 57 CPC it is clear that with the dismissal of the title execution suit for default, the attachment levied earlier ceased. However, it has been further held that when the dismissal was set aside and the suit was restored, the effect of restoring the suit was to restore the position prevalent till the dismissal of the suit or before dismissal of the title execution suit. We repeat that this judgment was under Order 21 Rule 57 whose scheme is similar to Order 38 Rule 11 and Rule 11-*

A CPC and therefore, we cannot put all interlocutory orders on the same basis."

9. What can be gleaned from the majority decision is that upon restoration of Appeal to its original number, the Appellant is restored to the position when the Court has initially dismissed the Appeal for default, unless the Court expressly or by implication excludes the operation of any Orders passed during the period between the dismissal of the restoration.

10. The minority view relied upon by the Learned Counsel appearing for 'Operational Creditor' is not applicable to this case. The binding Judicial Precedent is the view taken by the majority. That constitutes the Rule of the Court. Having regard to the interpretation of the ratio laid down in the aforenoted Judgement that once an Appeal is restored to its original number, the fact that Interlocutory Orders would stand revived unless otherwise directed, further strengthens the case of the Appellant herein. We are of the considered view that the ratio of majority view of ***'Vareed Jacob' (Supra)*** is applicable to the facts of this case and hence, we hold that once an Appeal under Section 37 of the A&C Act, 1996, is restored it relates back to the original date of filing.

11. Having observed so, we are of the view that the contention of the Learned Solicitor General that the Application under Section 9 is barred by Limitation cannot be sustained as the Pre-Existing Dispute was an ongoing one continuing from the date when the Arbitration Clause was invoked by the 'Operational Creditor' themselves. Additionally, the fact remains that the Appeals under Section 37 were dismissed for default only on 29.11.2019. Hence, the Appeal cannot be stated to be barred by Limitation.

12. Whether pendency of a proceeding for execution of an Award or a Judgement/decree bar an 'Operational Creditor' to prefer a Petition under the Code. The Judgement of ***'M/s. Annapurna Infrastructure Pvt. Ltd. & Anr.' Vs. 'M/s. SORIL Infrastructure Resources Ltd.' in Company Appeal (AT) (Insolvency) No. 32 of 2017*** relied upon by the Learned Counsel is not applicable to the facts of this case as the 'Dispute' in this instant case is still pending as Arbitration under Section 37 Appeal is still pending till date. If the Appeal under Section 37 had been decided, then 'Execution' comes into the picture. 'Money Recovery' and 'Triggering of Insolvency' are not parallel proceedings.

13. We rely on the ratio of the decision of this Tribunal in ***'Binani Industries Ltd.' Vs. 'Bank of Baroda & Anr.' Company Appeal (AT) (Insolvency) No. 82 of 2018*** wherein it is observed that the IBC is not a recovery proceeding. In fact, I&B Code prohibits and discourages recovery in several ways. The practice of using this Code towards execution of decree or recovery, is deprecated.

14. At this juncture, it is relevant to reproduce Section 8 of the Code which reads as hereunder:-

> ***"8. Insolvency resolution by operational creditor.–****(1) An operational creditor may, on the occurrence of a default, deliver a Demand Notice of unpaid 'Operational Debt'or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.*
>
> *(2) The corporate debtor shall, within a period of ten days of the receipt of the Demand Notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—*

*(a) existence of a dispute, **[if any, or]** record of the pendency of the suit **or** arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;*

(b) the [payment] of unpaid 'Operational Debt'—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.— For the purposes of this section, a "Demand Notice" means a notice served by an operational creditor to the corporate debtor demanding [payment] of the 'Operational Debt' in respect of which the default has occurred."

(Emphasis Supplied)

15. Section 8(2)(a) provides that ***Existence of a Dispute, [if any, or]*** **record of** the pendency of the suit ***or*** Arbitration Proceedings ***filed before the receipt of such*** *Notice* or invoice in relation to such Dispute. At the outset, what has to be seen is *'whether there is any Existence of Dispute', 'if any or'* record of the pendency of the suit or Arbitration Proceedings. In the instant case, it is an admitted fact by both the parties that disputes arose way back in the year 2003 and 2004, and based on the terms of MoU entered into, the 'Operational Creditor' themselves invoked the Arbitration Proceedings. Both the Arbitral Awards were assailed by the 'Corporate Debtor' under Section 34 of A&C Act, 1996 and were dismissed by separate Orders dated 27.02.2012 and 29.02.2012 respectively. The Appeals preferred by the 'Corporate Debtor' under Section 37 of A&C Act, 1996, stood pending till 22.11.2019 on which date they were dismissed for non-

prosecution. So even if 22.11.2019 is taken as the date of NPA as contended by the Learned Counsel for the 'Operational Creditor', the fact remains that till that date there is an ongoing Dispute. It can be safely construed that there was a 'Dispute' in Existence prior to the issuance of the Demand Notice. Subsequently, the Appeal under Section 37 was restored on 02.03.2020. The Application for restoration CAN No. 12333 of 2019 was filed by the 'Corporate Debtor' on 17.12.2019 with an advance Notice to the 'Operational Creditor'. Thereafter the Demand Notice was issued on 14.02.2020. The Application was filed on 02.03.2020. We have already observed that upon restoration, the Appeal relates back to the original date of filing and therefore we note that there was a Pre-Existing Dispute **prior** to the date of issuance of the Demand Notice.

16. **To view it in a narrow compass and interpret Section 8(2)(a) *that an Arbitral Award ought to be pending as on the exact date of the issuance of the Demand Notice,* amounts to mistaking/misconstruing the said Section.** The Hon'ble Supreme Court in ***'Mobilox Innovations Pvt. Ltd.' (Supra)*** has clearly laid down that *'the test for determination for the Adjudicating Authority is to see at the stage of Admitting/rejecting the Application 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'*. It is observed that the Adjudicating Authority does not need to be satisfied whether the defence is likely to succeed so long as a Dispute truly Exists in fact and is not spurious, hypothetical or illusory. In the instant case, the

Existence of a 'Dispute' is evident in the Arbitration Proceedings pending from 2004 till 29.11.2019. The Hon'ble Supreme Court in ***'K. Kishan' (Supra)*** has held as follows:-

> *"…. 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 jeopardise 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. The code cannot be used in terrorem to extract this sum of money of rupees two lakhs even though it may not be finally payable as adjudication proceedings in respect thereto are still pending. 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.*
>
> *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353 : (2018) 1 SCC (Civ) 311, followed*
> *LKM Investment Holdings (Pte Ltd. v. Cathay Theatres Pte Ltd., 2000 SGHC 13, distinguished Ramsay Health Care Australia Pty Ltd. v. Adrian John Compton, 2017 HCA 28 (Aust), disapproved*
> *Victory House General Partner Ltd. v. RGB P&C Ltd., 2018 EWHC 1143 (Ch); Lim Poh Yeoh v. TS Ong Construction Pte Ltd., 2016 SGHC 179, referred to*
> *Bayoil S.A., In re. (1999) 1 WLR 147 (CA), cited*
>
> *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 A&C Act 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 and 37 of the A&C Act has taken place.*

There may be cases where a Section 34 A&C Act 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 of the A&C Act has been filed. It is only in such clear cases that the insolvency process may then be put into operation.

There may also be other cases where a Section 34 A&C Act 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 A&C 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.

With regard to the submission that the amount of Rs. 1.71 crores stood admitted, 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 A&C Act petition challenging the said award. The very fact that there is a possibility that 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.

Section 238 of the Code would apply in case there is an inconsistency between the Code and the A&C Act in the present case. No such inconsistency is seen. On the contrary, the award passed under the A&C 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."

(Emphasis Supplied)

17. The ratio in the aforenoted Judgement is squarely applicable to the fact of the instant case as it can be seen from the record that the entire basis for the Section 8 Notice is that the Appeals preferred by the 'Corporate

Debtor' under Section 37 of the A&C Act, 1996 were dismissed for default on 22.11.2019. The issue that was determined in the aforenoted Judgement ***'K. Kishan' (Supra)*** is that the Code cannot be invoked in respect of an 'Operational Debt' where an Arbitral Award has been passed against the 'Corporate Debtor' but which has not yet been finally adjudicated upon. Further, the filing of the Sections 34 & 37 of A&C Act, 1996 against an Arbitral Award shows that a Pre-Existing Dispute which culminates at the first stage of proceeding in an Award, *continues even after the Award, at least till the final adjudicatory process under Sections 34 & 37 is completed.* In the instant case, the 'Corporate Debtor' filed an Application for restoration on 17.12.2019, the Demand Notice was issued on 14.02.2020 and the Section 37 Appeal has been restored to its original number on 02.03.2020. We observe that the Arbitration Proceedings are still pending before the Hon'ble High Court of Kolkata and therefore we have no doubt in holding that there is a Pre-Existing Dispute between the parties, prior to the issuance of the Section 8 Demand Notice.

18. There is a possibility that the 'Corporate Debtor' may succeed on any claim or part of the claim. Hence, it is apposite to observe that the 'Operational Debt' herein, could not be said to be an 'undisputed debt'. Following the ratio in ***'Mobilox Innovations Pvt. Ltd.' (Supra)*** wherein it was *inter alia* held that so long as a dispute truly exists in fact and is not spurious, the Adjudicating Authority ought to have dismissed the Application. Hence, for all the aforenoted reasons these Appeals are allowed and the Impugned Order is set aside. No Order as to costs.

19. In effect, Order(s) passed by the Ld. Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account and all other Order(s) passed by Adjudicating Authority pursuant to the Impugned Order, are set aside. The Adjudicating Authority will now close the proceedings. The 'Corporate Debtor' is released from all the rigours of law and is allowed to function independently through its Board of Directors with immediate effect. Needless to add, the IRP fees would be paid by the 'Operational Creditor'.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
17th August, 2021

ha/sr