REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 21824 OF 2017

K. KISHAN …APPELLANT

VERSUS

M/S VIJAY NIRMAN COMPANY PVT. LTD. ...RESPONDENT

WITH

CIVIL APPEAL NO. 21825 OF 2017

J U D G M E N T

R.F. Nariman, J.

1. The present appeals raise an important question as to whether the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") can be invoked in respect of an operational debt where an Arbitral Award has been passed against the operational debtor, which has not yet been finally adjudicated upon.

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Reason:

2. The brief facts necessary to appreciate the controversy at hand are as follows:-

i) In the present case, M/s Vijay Nirman Company Pvt. Ltd. (the Respondent) entered into a sub-Contract Agreement with one M/s Ksheerabad Constructions Pvt. Ltd. (for short 'KCPL') on 01.02.2008, to undertake 50% of Section 2 work of 'Construction and widening of the existing two lane highway to four lanes on NH 67 at KM 190000 to KM 218215 admeasuring a total of 28.215 KM for and on behalf of KCPL.'

ii) Apart from this Agreement, a separate agreement of the same date was entered into between the said KPCL and one M/s SDM Projects Private Limited, Bangalore, as a result of which, a tripartite Memorandum of Understanding was entered into on 09.05.2008 between KCPL, M/s SDM Projects Pvt. Ltd. and the Respondent.

iii) During the course of the project, disputes and differences arose between the parties and the same were referred to an Arbitral Tribunal, which delivered its Award on 21.01.2017. One of the claims that was allowed by the said Award was in favour

of the respondent for a sum of Rs.1,71,98,302/- which arises out of certain interim payment certificates. Another claim that was allowed related to higher rates of payment in which a sum of Rs.13,56,98,624/- was awarded. Three cross claims that were made by the Respondent were rejected.

iv) It is pertinent to note that, at this stage, a notice dated 06.02.2017 was sent by the Respondent to KCPL to pay an amount of Rs. 1,79,00,166/-. This notice was stated to be a notice under Section 8 of the Code. Within 10 days, by a letter dated 16.02.2017, KCPL disputed the invoice that was referred to in the said notice, stating that the said amount was, in fact, the subject-matter of an arbitration proceeding, and as per KCPL's accounts, the Respondent was liable to pay larger amounts to them.

v) It may be noted that after the notice and reply, on 20.04.2017, a Section 34 petition was filed by KCPL under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") challenging the aforesaid Award. Needless to add,

this petition was filed within the period of limitation set down in Section 34(3) of the Act.

vi) It is only thereafter that a petition was filed under Section 9 of the Code, on 14.07.2017. In the gist of the case presented to the National Company Law Tribunal ('NCLT'), it was clearly stated as follows:-

> "The above amount was included in the Statement of Claims filed before the Arbitral Tribunal duly constituted on 17.8.2014 along with other claims. The Tribunal gave its award on 21.1.2017 and upheld the above claim of VNCPL and awarded the above amount in favour of VNCPL and against KCPL. (Award copy enclosed)
>
> Thus, the above amount has become an 'Operational Debt' to be paid by the corporate debtor M/s KCPL as defined u/Sec. 3(11) of the I&B Code 2016.
>
> A notice in Form-3 U/Sec. 8(1) of the I&B Code 2016 has already been served on the Corporate Debtor, M/s KCPL and a reply received from KCPL is also enclosed herewith for ready reference."

In the Counter Affidavit before the NCLT, it was stated:

> "10. I respectfully submit that the case of the petitioner in short is that since an award has been passed against the respondent here in an arbitration proceeding, though a petition U/Sec 34 of the Arbitration and Conciliation Act, has been filed by the respondent

> before the competent court challenging the award the present application is maintainable U/Sec. 9 of the code though the respondent had raised a dispute in its replies dated 06-02-2017 & 05-06-2017 to the notice issued U/Sec.8(2) of the code by the applicant.
>
> 11. I respectfully submit that a dispute had been raised by the respondent company even before the present application has been filed, in the arbitration proceedings by way of a counter claim and presently the same is sub judice before the Hon'ble Commercial Court cum XXIV Additional Chief Judge, City Civil Court at Hyderabad in petition filed U/Sec. 34 of the Act. Copy of the section 34 application filed and pending before the Hon'ble Court is enclosed herewith as Annexure R-6."

vii) The NCLT, by its order dated 29.08.2017, referred to the aforestated facts, and also referred to the fact that the Award which was challenged under Section 34 specifically stated that learned counsel for the first Respondent (i.e. the corporate debtor) was fair enough to admit that the claimant is entitled to the said sum of Rs.1,71,98,302/-. According to the NCLT, the fact that a Section 34 petition was pending was irrelevant for the reason that the claim stood admitted, and there was no stay of the Award. For these reasons, therefore, the Section 9 petition was admitted.

viii) An appeal filed to the Appellate Tribunal met with the same fate, as according to the Appellate Tribunal, the non-obstante clause contained in Section 238 of the Code would override the Arbitration Act. Also, according to the Appellate Tribunal, since Form V of Part 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 requires particulars of an order of an arbitral panel adjudicating on the default, this would have to be treated as "a record of an operational debt", as a result of which the petition would have to be admitted, as was correctly done by the NCLT. The appeal was, accordingly, dismissed.

3) Mr. Gourab Banerji, learned Senior Advocate, appearing on behalf of the appellant has relied upon certain observations made in our judgment in ***Mobilox Innovations Private Limited*** vs. ***Kirusa Software Private Limited***, (2018) 1 SCC 353 and argued that the object of the Code is not to replace debt adjudication and enforcement under other Acts including the Arbitration Act, 1996. He has relied, in particular, on para 51 under which, according to him, the moment there is a real

dispute between the parties, which need not be a "*bona fide* dispute" which is likely to succeed in point of law, the Insolvency Code cannot be applied. In the present case, according to him, the very fact that a Section 34 petition is pending is reflective of a real dispute between the parties, which was pre-existing, and which culminated in an Arbitral Award which has yet to attain finality. Also, according to the learned Senior Advocate, the cross-claims that were rejected by the learned Arbitral Tribunal far exceeded the amounts awarded against his client, and if any one of them were to be held to be wrongly dismissed, in particular, counter claim No.3 of Rs. 19,88,20,475/-, it is obvious that his client would not owe any sum of money to the operational creditor. He also relied upon certain judgments, which we will discuss later. To further buttress his submissions, he argued that all that is necessary is that there be a dispute in some form which would include cross claims made by the corporate debtor against the operational creditor. According to him, the Appellate Tribunal was wholly in error in applying Section 238 of the Code as, according to Mr. Banerji, there is nothing inconsistent between the adjudication

and enforcement process under the Arbitration Act and the application of Sections 8 & 9 of the Code. In fact, according to the learned Senior Advocate, the fact of pending proceedings, whether they be proceedings culminating in an Award, or challenge proceedings thereafter, would, in fact, show that there is a dispute insofar as an operational debt that is stated to be owed, and that therefore, the Arbitration Act can be relied upon for this purpose, there being nothing inconsistent between it and the Code.

4) Dr. P.V. Amarnadha Prasad, learned Advocate, appearing on behalf of the respondent has argued in reply that according to the law in the United Kingdom, and Practice Directions thereunder, an insolvency process does not get stultified because an application to set aside the judgment, order or decision is pending in an appeal or otherwise. He also referred to the law in Singapore, and relied upon a judgment of the Singapore High Court to the effect that once it is found that there is a primary adjudication between the parties which indicates the existence of a debt, any further dispute which may

be pending in appeal or otherwise over the debt could not be said to be *bona fide* disputed by the debtor. According to him, the Appellate Tribunal was absolutely correct in applying Section 238 of the Code, as there would be a direct inconsistency between the application of the Code and a Section 34 proceeding which was said to be pending, and which, according to him, was not relevant in view of the law that he has cited.

5) Having heard learned counsel for both parties, it is important to first advert to Section 9(5) of the Code which states as follows:-

> "**9(5)** The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order-
>
> (i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,-
>
> (a)the application made under sub-section (2) is complete;
>
> (b) there is no repayment of the unpaid operational debt;
>
> (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if-

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority."

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 21.07.2017 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 16.02.2017 to the notice given under Section 8 was within 10 days, and raised the existence of a dispute, also cannot be doubted.

6) However, 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, counter claims 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 Act. It is important to note that unlike counter claim Nos. 1 and 2, which were rejected by the Arbitral Tribunal for lack of evidence,

counter claim 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.

7) Our recent judgment in ***Mobilox Innovations (supra)*** throws considerable light on the issue at hand. While referring to the legislative history of the Code, this Court referred to the Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law. One of the things the Legislative Guide spoke about was whether the debt is subject to a legitimate dispute or set-off, in an amount equal to or greater than the amount of the debt. Another thing spoken of was that improper use of the insolvency process would occur in cases where a creditor uses insolvency as an inappropriate substitute for debt enforcement procedures, even though they may not be well developed. (see para 13 of the judgment)

8) The Notes on Clauses annexed to the Bill of the Insolvency Code were also referred to by this Court in para 27

of the judgment. The important sentence in these Notes on Clauses needs to be reproduced, which is done herein below:-

> "This ensures that operational creditors, whose debt claims are usually smaller, are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations."

9) This Court also noticed that the original Bill which ultimately became the Code had the expression "*bona fide* dispute" contained in an inclusive definition. It is significant to note that by the time the Code was enacted the expression "*bona fide*" was dropped. (See para 32 of the judgment)

10) After referring to Section 8, the judgment 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.

11) The Adjudicating Authority, therefore, when examining an application under Section 9 of the Act, will have to determine the following:-

(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) 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. (Para 34).

12) In para 38, this Court cautioned:

“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:-

> "**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."

13) 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.

14) Mr. Banerji referred us to certain judgments of the English and Singapore Courts. In ***Re A Company - Victory House General Partner Ltd.*** vs*.* ***RGB P & C Ltd.*** [2018] EWHC 1143 (Ch), the Chancery Division of the High Court, in a situation where a debt has to be "*bona fide"* disputed in order to attract the winding up jurisdiction of the Courts in the UK, made it clear that even in a case where a judgment debt is no longer a disputed debt, as it has been finally adjudicated upon, yet if there be a cross-claim which is being adjudicated upon, or which may not even have reached the adjudicatory process at all, would be sufficient to stave off a winding up order. The learned Judge referred to the judgment in ***Re Bayoil SA*** [1999] 1 WLR 147 as follows, and concluded:-

> "**27.** This, of course, is not a case of a disputed debt. There is a judgment debt and it can be enforced immediately. However, Mr. Chivers draws attention to *Re Bayoil SA* [1999] 1 WLR 147, which deals with a case not involving a disputed debt but involving a cross-claim by the company, the subject of the petition or the intended petition, where the amount of the cross-claim exceeds the petition debt. The headnote to *Re Bayoil* recites the essential facts. The petitioner claimed for freight. The established law is there is no defence of set-off available in relation to a claim to freight. The claim

went to arbitration and the arbitrators made an award in favour of the petitioner. The petitioner then presented a petition on the basis of the sum determined by the arbitration award. The company applied for the petition to be dismissed or stayed on the ground that it had a genuine and serious counterclaim in an amount which exceeded the petition debt. It was a matter of detail in that case, which the company put forward to advance its case, that it had not been able to litigate that counterclaim. Later cases discussing *Re Bayoil* make it clear that the ability, or inability, to litigate the counterclaim is not of the essence of the principle in this case. So I put that on one side……"

"**32**. I therefore have to ask whether the nascent cross-claim, the claim in restitution which MrChivers has explained to me, is a bona fide cross-claim on substantial grounds. I have no doubt it is a bona fide claim. I have also no doubt it is on substantial grounds. At the moment it seems to me that it is a claim that would succeed but I need not go that far……"

"**34**. Nothing which I have said detracts in any way from the binding character of the judgment which has been made. It may appear to be a strong thing to say that the employer, having failed to comply with a judgment against it, should nonetheless escape the consequences involved in a winding up, but it seems to me that that is the very thing which was considered to be appropriate in the *Bayoil* case and, on the facts of this case, I also consider it is a more just result that the alternative contended for by the petitioner."

15) A recent judgment of the Singapore High Court, contained in ***Lim PohYeoh (alias Lim Aster) and TS Ong Construction***

Pte Ltd. [2016] SGHC 179, was also referred to by Mr. Banerji. Again, in a situation which demands a far higher threshold that has to be crossed before the Insolvency Law can be said not to apply, the Singapore High Court referred to Rule 98(2)(a) of the Rules made under the Bankruptcy Act. The said Rule states that where a debtor appears to have a valid counter claim or cross-demand which is equivalent to or exceeds the amount of debt, the insolvency process will not be put against such debtor. It also referred to the Supreme Court Practice Directions to the same effect. (see paras 43 & 45 of the said judgment)

16) We now come to some of the judgments referred to by learned counsel for the respondent. It is important to note that both the Practice Directions referred to in the U.K. judgment and the Singapore High Court judgment, referred to in ***LKM Investment Holdings Pte Ltd.*** vs. ***Cathay Theatres Pte Ltd.*** [2000] SGHC 13, are in situations where the debt needs to be *bona fide* disputed, which is not the situation under our Code. For this reason, it is not possible to agree with learned counsel for the Respondent that a pending proceeding challenging an

award or decree of a tribunal or Court would not make the debt contained therein a debt that is disputed.

17) The Australian High Court judgment also relied upon by the respondent in ***Ramsay Health Care Australia Pty Ltd*** vs. ***Adrian John Compton*** [2017] HCA 28 was relied upon to show, in para 111 thereof, that where a judgment debt has been obtained after testing of the merits in adversarial litigation, then in the absence of some evidence of fraud, collusion, or miscarriage of justice, a court exercising bankruptcy jurisdiction will rarely have substantial reasons to investigate whether the debt which emerged in the judgment was truly owed. With respect to the High Court of Australia, we may only state that following ***Mobilox Innovations (supra)***, it would be very difficult to incorporate the Australian law into our law. This is for the reason that our judgment in ***Mobilox Innovations (supra)*** has made it clear that the insolvency process, particularly in relation to operational creditors, cannot be used to bypass the adjudicatory and enforcement process of a debt contained in other statutes. We are, therefore, of the view that the higher

threshold of fraud, collusion, or miscarriage of justice laid down by the Australian High Court will have no application to the situation under our Code.

18) 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.

19) 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.

20) 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.

21) 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.

22) 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.

23) We are also of the view that the Appellate Tribunal, when it relied upon Form V Part 5 of the 2016 Rules to state that the operational debt would, therefore, be said to have been proved, missed the vital sub-clause (iii) in para 34 of ***Mobilox Innovations (supra)***. Even if it be clear that there be a record of an operational debt, it is important that the said debt be not disputed. If disputed within the parameters laid down in

Mobilox Innovations (supra), an insolvency petition cannot be proceeded with further.

24) For all these reasons, we are of the view that the judgment of the Appellate Tribunal needs to be set aside and is therefore reversed.

25) The appeals are, accordingly, allowed in the aforesaid terms.

26) Consequently, the bank guarantees that have been furnished, pursuant to our order dated 15.12.2017, stand discharged.

……J.
(R.F. Nariman)

……J.
(Indu Malhotra)

New Delhi;
August 14, 2018.