

5

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

IBA/647/2020

*(Filed under Section 9 of the Insolvency and Bankruptcy Code, 2016
r/w Rule 6 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016)*

**SRI KARTHIKEYA SPINNING & WEAVING
MILLS PVT. LTD**

.....Operational Creditor

V/s

SAHELI EXPORTS PVT. LTD.

.....Corporate Debtor

Order pronounced on 4th February 2022

CORAM:

**R. SUCHARITHA, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)**

*For Operational Creditor: Mr. Rahul Bajaj, Advocate
For Corporate Debtor: Mr. Nithyaesh Natarajan, Advocate*

ORDER

Per : SAMEER KAKAR, MEMBER (TECHNICAL)

IBA 647/2020 is filed by Sri Kartihikeya Spinning & Weaving Mills P. Ltd. (hereinafter referred to as Operational Creditor or OC) u/s 9 of the IBC, 2016 for initiation of Corporate Insolvency Resolution Process on Saheli Exports P. Ltd. (hereinafter referred to as Corporate Debtor or CD).

2. The said application was heard on 28.01.2022 on the issue of maintainability. The admitted facts in the case are as under :-

SL. No.	PARTICULARS	DATE OF EVENT
1.	OC and CD entered into a Power Purchase Agreement (PPA). Under the PPA CD was to supply electricity to the OC for a period of 6 years	21.6.2004
2.	CD terminates the PPA	03.02.2009
3.	Arbitral Award whereby CD was to pay a sum of Rs. 2,71,41,169 to OC	04.06.2016
4.	Challenge to Arbitral Award dismissed by Hon'ble Madras High Court, amount of debt crystalized	22.01.2020
5.	Appeal u/s 37 of Arbitration and Conciliation Act 1996 filed before Hon'ble Madras High Court through e filing, however same not yet numbered	20.03.2020
6.	Issue of Demand Notice by OC on CD	18.03.2020
7.	Date of filing of present application in electronic form claiming amount of Rs. 7,95,55,601 comprising of Rs. 2,71,41,169 as amount awarded and Rs. 5,24,14,431.69 as interest on the amount awarded	23.07.2020

3. The question before us is regarding the maintainability of the above application i.e. "whether this Tribunal can entertain the present application u/s 9 of the IBC pending disposal of Appeal u/s 37 of Arbitration and Conciliation Act 1996?".

4. Section 9 (5) of the IBC, 2016 is extracted below :-

"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.

5. It is admitted fact that the proceedings under the Arbitration and Conciliation Act 1996 are presently going on between the parties and that Appeal u/s 37 of Arbitration and Conciliation Act 1996 though filed in the year 2020 is yet to be numbered and taken up by the Hon'ble Madras High Court. Reliance is placed on **Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, (2018) 1 SCC 353, para 51** which is reproduced below :-

"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."

6. Our attention was drawn to Judgment of Hon'ble Supreme Court in the matter of **K. Kishan V/s Vijay Nirman Company Pvt. Ltd. Civil Appeal No. 21824 of 2017.**

Para 1 of the said Judgment is reproduced below :-

"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."

The facts of this case are almost similar to the above.

1. **Para 18** of the said Judgment is reproduced below :-

"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

18

the Award, at least till the final adjudicatory process under Sections 34 & 37 has taken place."

In the ultimate result, appeal was allowed.

7. Plea was raised by the Learned Counsel for the Applicant that the Appeal filed u/s 37 was barred by Limitation, the Learned Counsel for the Respondent was quick to point out that Hon'ble Supreme Court Suo Motu Writ Petition (C) NO. 3 of 2020 on 23.03.2020 extended the period of limitation in all proceedings before Courts/Tribunals including Hon'ble Supreme Court w.e.f. 15.03.2020 till further orders. The Limitation has been further extended from time to time and the last being on 10.01.2022 under which extension was granted till 28.02.2022.

ORDER

- i. We must bear in mind that the object of the IBC Code is not to replace debt adjudication and enforcement under other Acts including Arbitration and Conciliation Act 1996.
- ii. Appeal u/s 37 of Arbitration and Conciliation Act, 1996 is presently pending before Hon'ble Madras High Court which clearly indicates that there is a Pre-Existing dispute between both the parties.
- iii. The present matter is squarely covered under the Judgments of Hon'ble Supreme Court in the matters of **Mobilox Innovations Private Limited vs.**



**Kirusa Software Private Limited and K. Kishan
V/s Vijay Nirman Company Pvt. Ltd. (supra).**

- iv. Since a pre-existing dispute exists between the parties, this Application is **dismissed**. No order as to costs.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-

R. SUCHARITHA
MEMBER (JUDICIAL)

Raymond