

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

IA(IBC)/350(CHE)2022

IN

CP/IB/28(CHE)/2022

*(filed under Section 8 of the Arbitration and Conciliation Act, 1996
r/w Rule 11 of the NCLT Rules, 2016)*

In the matter of M/s. Virgo Properties Private Limited

M/s. Virgo Properties Private Limited,
"PLAZA HOUSE",
New No. 5, Old No. 3, Thirumurthy Street,
T. Nagar, Chennai-600 017

... Applicant / Financial Creditor

-Vs-

M/s. L&T Finance Limited,
62, 6th Floor, KGN Towers,
Ethiraj Salai,
Egmore, Chennai-600 008

... Respondent / Corporate Debtor

Order Pronounced on 16th June, 2023

CORAM:

**SANJIV JAIN, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)**

*For Applicant : Mr. P.C. Harikumar, Advocate
Mr. Sriram Venkatavaradan, Advocate
Mr. Saai Sudharsan Sathiyamoorthy, Advocate
For Respondent : Mr. E. Om Prakash, Sr. Advocate
Ms. Sachin Priya Daniel, Advocate*

ORDER

Per: SANJIV JAIN, MEMBER (JUDICIAL)

This application under Section 8 of the Arbitration and Conciliation Act, 1996 read with Rule 11 of the NCLT Rules, 2016



has been filed by **M/s. Virgo Properties Private Limited**, Applicant/Financial Creditor herein for referring the matter to the Arbitral Tribunal comprising of the Sole Arbitrator, Hon'ble Mr. Justice (Retd.) N. Paul Vasantha Kumar, Former Chief Justice, High Court of J&K, constituted pursuant to the order passed by the Hon'ble High Court of Judicature at Madras dated 16.02.2022 in Arb O.P. (Comm.Div.) No. 4 of 2022.

2. The case of the Applicant in brief is that pursuant to the disputes between the Applicant and L&T Finance Limited, Respondent herein under the Loan Agreement dated 23.06.2017, the Applicant vide Notice of arbitration dated 12.11.2021 invoked Clause 17.10 i.e. the Arbitration Clause in the Loan Agreement seeking for reference of disputes to the arbitration. However, in the light of disagreement between the parties in relation to the arbitrator's appointment, the Applicant approached the High Court under Section 11 of the Arbitration and Conciliation Act, 1996 for an appointment of an arbitrator. In the meantime, the Respondent also approached the High Court under Section 9 of the Arbitration and Conciliation Act, 1996 seeking interim reliefs in relation to the debts. The High Court with the consent of the parties, referred the disputes to the Sole Arbitrator vide common order dated 16.02.2022. The Sole Arbitrator vide notice dated 26.02.2022,



entered upon the reference and directed the first meeting to be held on 11.03.2022.

3. It is stated that since the disputes have already been referred to the arbitration based on the Respondent's consent, the Respondent be estopped from raising the same dispute before this forum. It is stated that there is no default as alleged and the default, if any, can be determined only when the disputes are adjudicated by the Arbitral Tribunal.

4. Notice of the application was directed to be served on the Respondent. Vide order dated 30.03.2023, the Counsel for the Applicant was also directed to submit the Judicial Pronouncements where Section 7 IBC matter which have been referred to arbitration. Pursuant thereto, the Applicant filed some Judicial Pronouncements vide memo under S.R No.1836 dated 27.04.2023.

5. We have heard Ld. Counsel for the parties and perused the record and the judicial pronouncements.

6. It is seen from the record that parties had entered into a loan agreement dated 23.06.2017 which contained an Arbitration Clause i.e. Clause 17.10 for referring the disputes to arbitration. The Applicant invoked the Arbitration Clause and sent a Notice of Arbitration dated 12.11.2021 for referring the disputes to the arbitration. The parties did not reach to a consensus as to the



appointment of an Arbitrator which made the parties approach the High Court under Section 11 of the Arbitration and Conciliation Act for appointment of an Arbitrator. The Respondent also filed an application under Section 9 of the Arbitration and Conciliation Act seeking interim reliefs in relation to debts. The High Court vide Common Order dated 16.02.2022, appointed the Sole Arbitrator and referred the disputes to the arbitrator who entered upon the reference vide notice dated 26.02.2022 and held a meeting on 11.03.2022. The parties submitted their claims and counterclaims before the arbitrator which are pending adjudication before the Arbitral Tribunal.

7. Admittedly, in the present case, arbitral proceedings have commenced but commencement of the arbitration proceedings would not bar the Respondent from initiating the Corporate Insolvency Resolution process against the Applicant. It is seen that often, a corporate debtor tries to defend an application under section 7 of the IBC by stating that the debt for which default is alleged is a disputed debt and therefore, the debt cannot be the basis of an application under section 7 of IBC, 2016. This concept of a disputed debt, although relevant to the IBC in the context of an application by an operational creditor, under section 9 of the IBC, is not applicable or relevant to an application under section 7



of the IBC. The Hon'ble Supreme Court in "**Innoventive Industries v ICICI Bank, (2018) 1 SCC 407**" has observed as under:

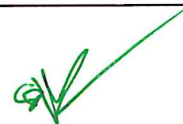
On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the Adjudicating Authority, has merely to see the records of the information utility or order evidence produced by the financial credit to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e., payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the Adjudicating Authority that the Adjudicating Authority may reject an application and not otherwise.

Relying upon the said observations of the Supreme Court, the NCLAT in "*Vinees Khosla v Edelweiss Asset Reconstruction Co Ltd.*" held as under:

From the above citation, it is clear that at the stage of admission of Application under Section 7, the requirement is to give limited Notice and the considerations would be to see whether or not satisfaction by Adjudicating Authority could be reflected on the basis of Sub-Section (5) of Section 7. If there is a financial debt, which is more than Rs.1 Lakh and there is a default and if the application is complete, the Application would have to be admitted. The Corporate Debtor is entitled to point out that a default has not occurred in the sense that the 'debt' which may include a disputed claim is not due. Corporate Debtor may point out that the debt is not due by showing that it is not payable in law or in fact.

Thus, it is settled law that "dispute" *vis a vis* a financial debt, is not a bar to admission of an application under section 7 of the IBC, if the ingredients required for admission of such an application are satisfied, *de hors* such a dispute.

8. In the present case, the loans were availed by the Applicant from the Respondent which the Applicant failed to repay and committed the default. The Applicant had also submitted a settlement proposal to the Respondent which was not accepted by the Respondent. It was held in the case of "*Indus Biotech Private Limited v. Kotak India Ventrue (Offhsore) Fund (2021) SCC 46*" that





even if an application under Section 8 of the Arbitration and Conciliation Act, 1996 is filed, the Adjudicating Authority has a duty to advert to the contention put forth on the application filed under Section 7 of IBC, 2016, examine the material placed before it by the Financial Creditor and record a satisfaction as to whether there is a default or not. If the irresistible conclusion by the Adjudicating Authority is that there is default and the debt is payable. the bogey of arbitration to delay the process would not be permitted despite the position that the agreement between the parties indisputably contains an arbitration clause.

9. In the present case, the Financial Creditor has alleged default on the part of the Corporate Debtor. That being the position, the application filed by the Applicant under Section 8 of the arbitration and Conciliation Act, 1996 is not maintainable and deserves to be dismissed.

10. Before we part, the Applicant herein was explained the position as per law, however, the Applicant insisted on adjudication in the matter, whereby wasting the time of this Tribunal.

11. In the light of the above discussions, the application is **dismissed**. Cost of Rs.1,00,000/- to be paid by the Applicant to the "**Prime Minister's National Relief Fund**" within a period of 10 days from the date of this order.





12. List the matter for compliance on **07.07.2023**.

— Sd —

SAMEER KAKAR
MEMBER (TECHNICAL)

Suguna

— Sd —

SANJIV JAIN
MEMBER (JUDICIAL)