IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

A.P. 550 of 2008

Sirpur Paper Mills Limited

Vs.

I.K. Merchants Pvt. Ltd. (Formerly Known as I.K. Merchants)

For the Petitioner	:	Mr. Jishnu Saha, Sr. Adv. Mr. Sakabda Roy, Adv. Ms. Trisha Mukherjee, Adv.
For the Respondent	:	Mr. Sudip Deb, Adv. Mr. Deepak Jain, Adv. Mr. R. Ghosh, Adv.
Last Heard on	:	04.05.2021.
Delivered on	:	07.05.2021.

Moushumi Bhattacharya, J.

1. This is an application for setting aside of an Award dated 7th July, 2008 passed by a learned Sole Arbitrator in arbitration proceedings between the respondent (claimant in the arbitration) and the petitioner herein. The

petitioner before this court is the Award-debtor and the respondent before the learned Arbitrator.

2. According to the petitioner, the present proceeding under Section 34 of The Arbitration and Conciliation Act, 1996, has become infructuous by reason of the management of the petitioner company (the Award-debtor) being taken over by a new entity following the approval of a Resolution Plan of the petitioner company by the National Company Law Tribunal (NCLT) under The Insolvency and Bankruptcy Code, 2016 (IBC). The petitioner's case is that by reason of the subsequent developments after the impugned Award, the application for setting aside of the Award is not maintainable any more.

3. Mr. Jishnu Saha, Senior Counsel appearing for the petitioner relies on the provisions of the IBC, particularly Section 31 thereof, which provides that an approved Resolution Plan is binding on the corporate debtor and its employees, members and other stakeholders and relies on a decision of the Supreme Court in *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta; (2020) 8 SCC 531*. Counsel contends that a successful Resolution applicant cannot be faced with undecided claims after the Resolution Plan has been accepted. Counsel places strong reliance on *Essar* to urge that the debts of the corporate debtor (the petitioner before this court) hence stands extinguished save to the extent of the debts which have been taken over by the resolution applicant under the approved Resolution Plan. Counsel cites *Gaurav Dalmia vs. Reserve Bank of India & Ors.; 2020 SCC Online Cal 668, Axis Bank Limited vs. Gaurav Dalmia;*

MANU/WB/0739/2020; Sumitra Devi Shah & Ors. vs. Tata Steel BSL Limited; 2021 SCC Online Cal 114 in support of the aforesaid contention. Counsel further relies on Section 3(11) of the *IBC-"Debt"*- which includes a financial debt and an operational debt and on Section 3(6)(a) of the IBC to contend that the word "claim" – which has been defined as a right to payment, whether or not such right is reduced to judgment leaves no room for doubt that a claim would also include a disputed claim and a right to payment whether such right is reduced to judgment. Counsel places the scheme of the IBC and submits that Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016 ("CIRP Regulations") provides that a Resolution Plan must mandatorily contain the amount payable under it including the amount payable to the operational and financial creditors. Counsel submits that in the event a creditor fails to submit his claims before the RP, it forfeits its rights to the claim.

4. Counsel relies on *Board of Control for Cricket in India vs. Kochi Cricket Private Limited & Ors.; (2018) 6 SCC 287* to urge that Section 36 of the 1996 Act, as amended, would apply to pending Section 34 applications on the date of commencement of the Amendment Act of 2016. Counsel argues that the Arbitral Award does not survive and no purpose will be served by pursuing the application for setting aside the Award and relies on *Shipping Corporation of India Limited vs. Machado Brothers & Ors.; (2004) 11 SCC 168* and *Soumik Sil vs. Subhas Chandra Sil; (2015) 5 SCC 732* for the aforesaid submission. Counsel submits that the question of maintainability of the

Section 34 application has not been finally decided by the judgment dated 10th January, 2020.

5. Mr. Sudip Deb, counsel appearing for the respondent/Award-holder submits at the very outset that the submissions of the petitioner Award-debtor have been raised and argued on two earlier occasions. Counsel submits that, the issue was finally decided in the orders passed and that such orders have not been challenged by the petitioner. Counsel relies on *Satyadhyan Ghosal vs. Deorajin Debi (Smt); AIR 1960 SC 941* and *Arjun Singh vs. Mohindra Kumar; (1964) 5 SCR 946* for the proposition that *res judicata* can apply to different stages of the same proceeding. Counsel submits that upon filing of the application under Section 34 of 1996 Act in October 2008, the Award was automatically stayed and the respondent could not approach the NCLT for lodging its claim. Counsel relies on *Board of Control for Cricket in India vs. Kochi Cricket Private Limited; (2018) 6 SCC 287* and *Government of India vs. Vedanta Limited (Formerly Cairn India Limited); (2020) 10 SCC 1* for the proposition that amendments will only have prospective application. Counsel submits that with the filing of an application under Section 34 is filed, the dispute raised by the party amounts to a pre-existing dispute which takes the respondent/Award-holder outside the purview of the IBC; *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited; (2018) 1 SCC 353* and *K. Kishan vs. Vijay Nirman Company Private Limited; (2018) 17 SCC 662.* On the factual aspect, counsel submits that the petitioner continues to exist and is hence under an obligation to pay the dues of the respondent Award-holder. Counsel

reiterates that the respondent Award-holder could not have lodged its claim before the NCLT by reason of the impugned Award being stayed upon filing of the Section 34 application. Counsel further submits that the petitioner has not addressed the Section 34 application on merits.

6. Counsel relies on *Swiss Ribbons Pvt. Ltd. vs Union of India; (2019) 4 SCC 17* for the proposition that a default would occur only when a debt, arising from a claim becomes due and payable and is not paid by the debtor. Counsel submits that in the present case, the respondent being the operational creditor does not have any claim since nothing is due from the petitioner (corporate debtor) in view of the pendency of the Section 34 application.

7. Upon hearing learned counsel appearing for the parties, the question which has to be answered in the present proceeding is whether the claim of an Award-holder can be frustrated on the approval of a Resolution Plan under Section 31 of The Insolvency and Bankruptcy Code, 2016. The related issue is whether a court sitting in a Section 34 (of the 1996 Act) jurisdiction can recognize and accept the futility of the Section 34 proceedings on the claim of the Award-holder being extinguished upon approval of the Resolution Plan and a resolution applicant taking over the management of the Award-debtor.

8. This court must however travel the road to the adjudication of the above issues by first dealing with the roadblock of the two earlier orders by

which the contentions of the Award-debtor on the relevance of the IBC were rejected.

The Orders:

9. By a judgment dated 10th January, 2020 on the question whether the present application under Section 34 of the Act should be kept in abeyance following invocation of the provisions of the IBC against the petitioner/Award-debtor, this Court held that corporate insolvency resolution proceedings (CIRP) cannot be used to defeat a dispute which existed prior to initiation of the insolvency proceedings. It was further held that the respondent Award-holder could not have filed a claim before the National Company Law Tribunal since there was no final or adjudicated claim on the date of initiation of the CIRP against the Award-debtor.

10. The Award-debtor applied for recalling of the judgment which was rejected by this court by an order dated 3rd February, 2020. In rejecting the application, it was clarified that the question on which the judgment was pronounced was whether the Section 34 application can be proceeded with in view of the Award-holder not having filed a claim in the resolution proceedings before the NCLT. The court also held that the apprehension of the Award-debtor that it may risk the effect of the observations made by the Court at the time of enforcement of the Award was misplaced since the Court had not gone into the merits of the application.

11. This is the second round in the recourse against the Arbitral Award dated 7th July, 2008 where the petitioner/Award-debtor has urged that the application for setting aside of the Award cannot be proceeded with after approval of the Resolution Plan in relation to the petitioner (corporate debtor before the NCLT). The petitioner has relied upon *Essar* in respect of its renewed plea before the court. This court is of the view that the three-member Bench decision of the Supreme Court in *Essar* constitutes a significant -and subsequent- development of the law in relation to the fate of existing claims during and after corporate insolvency resolution proceedings which, in turn, would constitute a sufficient reason for this court to re-visit the judgment dated 10th January, 2020. It should be stated that the order dated 3rd February, 2020 rejecting the application for recalling of the judgment made it clear that the court had refrained from expressing any views on the maintainability of the Section 34 application since the matter under consideration was wholly on a different aspect. The reason for having a re-look at the judgment at this stage is the pronouncement of the law by the Supreme Court in *Essar* and more recently in a judgment delivered on 13th April, 2021 in *Ghanshyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited*; *2021 SCC OnLine SC 313*, wherein it was held that once a Resolution Plan is approved, a creditor cannot initiate proceedings for recovery of claims which are not part of the Resolution Plan.

12. A decision-making process must be attuned to a dynamic legal landscape shaped by legislative intervention and judicial pronouncements.

The most predictable aspect of law is its constant evolution. It would hence be judicial short-sightedness, even stubbornness, to hold on to a view when the law, in the meantime, has transformed into a different *avatar*.

13. The contentions of the respondent with regard to the principles of *res judicata* applying to different stages of the same proceedings must therefore be read down in fit cases where orders are capable of being altered or varied on the emergence of new facts or situations. The principle essentially is to guard the court from abuse of process where the same matter in issue, which had been heard and finally decided by a court, is urged again between the same parties. This is unlike the present case as the question of maintainability of the application under Section 34 of the 1996 Act can be considered at any point of time on the legal aspect and particularly on the pronouncement of a decision relevant to the matter.

14. Since this court is of the view that the earlier orders would not stand in the way in considering the maintainability of the present application, the decision of the Supreme Court in *Essar* needs to be dealt with in some detail.

15. In *Essar*, the Supreme Court held that a Resolution Plan, once approved under Section 31 of the IBC, is binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders, as emphasized in paragraph 107 of the report which is reproduced below;

> "*107. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the*

> *Resolution Professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the Resolution Plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the Resolution Professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count."*

16. In this decision, the Supreme Court considered questions relating to the role of resolution applicants, Resolution Professionals and the Committee of Creditors constituted under the IBC as well as the jurisdiction of NCLT and the NCLAT with regard to Resolution Plans that have been approved by the Committee of Creditors. In the facts of that case, NCLAT had allowed admission of certain additional and belated claims of operational creditors and had held that claims which have been decided by the Adjudicating Authority or the Appellate Tribunal on merits may be decided by an appropriate forum under Section 60(6) of the IBC. In answer to the issue of undecided claims, the Supreme Court expressed its view in paragraph 107 of the Report which has been set out above. The view of the Court was that the successful resolution applicant who takes over the business of the corporate debtor must start running the business of the corporate debtor on a "*fresh slate*". This view has been reiterated in the

recent three-member decision of the Supreme Court in *Ghanshyam Mishra vs Edelweiss Asset Reconstruction Company Limited*. This decision considered Section 31 of the IBC and held that once the Resolution Plan is approved by the Adjudicating Authority, it shall be binding on the corporate debtor and its employees, members etc. since revival of the corporate debtor is one of the dominant purposes of the IBC. The Court was of the view that any debt which does not form a part of the approved Resolution Plan shall stand extinguished. The conclusions of the Supreme Court in paragraph 95 of the Report reiterates that once the Resolution Plan is duly approved by the Adjudicating Authority, claims which form part of the Resolution Plan shall stand frozen and would be binding on the corporate debtor. More significantly, the Court opined that claims which are not part of the Resolution Plan shall stand extinguished and no person will be entitled to initiate or continue any proceeding in respect to a claim which is not a part of the Resolution Plan. The relevant paragraph reiterating the aforesaid is reproduced below:-

> *"95.....*
>
> *(i) That once a Resolution Plan is duly approved by the Adjudicating Authority under sub-section (1) of Section 31, the claims as provided in the Resolution Plan shall stand frozen and will be binding on the Corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of Resolution Plan by the Adjudicating Authority, all such claims, which are not a part of Resolution Plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the Resolution Plan;*

> *(ii) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;*
>
> *(iii) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the Resolution Plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued."*

The opinion of the Court culminates in:-

> *"As held by this Court, the successful resolution applicant cannot be flung with surprise claims which are not part of the Resolution Plan."*

17. The fate of undecided or pending claims such as the one of the respondent before this court can also be gleaned from Sections 25, 29, 30 and 31 of the IBC. Section 25-"*Duties of Resolution Professionals"*- which contemplates maintenance of an updated list of claims by the Resolution Professional [25(2)(e)]. Section 29-"*Preparation of information memorandum"*- provides for the Resolution Professional preparing an Information Memorandum containing relevant information for formulating a Resolution Plan. "Relevant information" has been explained as the information which would be required by the resolution applicant to make the Resolution Plan for the corporate debtor and which shall include the financial position of the corporate debtor including all information related to disputes by or against the corporate debtor. Section 30-"*Submission of Resolution Plan"*-provides for the payment of the debts of operational creditors in the manner as may be specified by the Board which shall not be less than the amount to be paid

to the operational creditors in the event of liquidation of the corporate debtor. Section 31 comes at the stage of approval of the Resolution Plan and mandates that upon the Resolution Plan being approved by the Adjudicating Authority, it shall be binding on the corporate debtor and its employees, members and other stakeholders. The aforesaid provisions of the IBC read with *Essar* and *Edelweiss* makes it evident that for a claim to be considered by the Resolution Professional and later by the Committee of Creditors for approval of the Resolution Plan, the said claim must feature in the Information Memorandum prepared by the Resolution Professional and provided to the resolution applicant which will ultimately take over the business of the corporate debtor.

18. On a specific question put to counsel for the petitioner, it has been submitted – one day before delivery of this judgment - that the Information Memorandum mentioned the amount demanded by the respondent as on 31st March, 2014 under the heading "SUPPLIERS & SERVICE CONTRACTS AS ON MARCH 31, 2015". This fact should be explored further including whether it would have any bearing on the petitioner's contention that the respondent's claim does not survive anymore.

19. The IBC contemplates of several stages where an operational creditor is given notice of the commencement of the CIRP against a corporate debtor. The provisions also take into account claims of parties who have not initiated proceedings against the corporate debtor as operational creditors. The arrangement of the sections are conducive not only to making all

creditors aware of the CIRP but also to invite claims and include them as part of the list of claims which are collated by the Resolution Professional and approved in the Resolution Plan by the Committee of Creditors and finally by the Adjudicating Authority. The sequence of stages would be evident from :-

- Section 8 - Insolvency resolution by operational creditor
- Section 9 - Application for initiation of creditor insolvency resolution process by operational creditor
- Section 15 - Public announcement of corporate insolvency resolution process
- Section 21 - Committee of Creditors: collation of claims received by the Interim Resolution Professional
- Section 25 - Maintaining an updates list of claims by the Resolution Professional
- Section 29 - Preparation of Information Memorandum
- Section 30 - Submission of resolution plan
- Section 31 - Approval of resolution plan.

20. Regulation 7 under Chapter IV- "*Proof of claims*"- of the CIRP Regulations, 2016, provides that an operational creditor shall submit the claim with proof to the Interim Resolution Professional on or before the last date mentioned in the "Public Announcement" (Regulation 12). In the present case, the public announcement was made by the interim Resolution Professional on 25th September, 2017. Regulation 6 of the CIRP Regulations mandates that an Insolvency Professional shall make a public announcement immediately on his appointment as an Interim Resolution Professional. These facts would show that from the date of the admission of the application of initiation of the CIRP against the petitioner namely 18th September, 2017 until approval of the resolution plan on 16th May, 2018,

the respondent, as an Award-holder had sufficient opportunity to approach the NCLT for appropriate relief. Second, the amount demanded by the respondent/ Award-holder as on 31st March, 2014 featuring in the Information Memorandum does not really help the respondent since the IBC and the CIRP regulations provide for specific procedural provisions for submission of claims (Ref: Regulations 7 and 12 read with Form B of the Schedule to the CIRP Regulations, 2016). The Award-holder hence was under an obligation to take active steps under the IBC instead of waiting for the adjudication of the application under Section 34 of the 1996 Act.

21. The next issue which would naturally fall for consideration is whether the respondent could have lodged and pursued its claim before the NCLT when the impugned Award was challenged by the Award-debtor/petitioner in this Court on 31st October, 2008. The respondent/ Award-holder contends that there was no scope for the respondent to approach any other forum since the impugned Award was automatically stayed upon filing of the Section 34 application. The respondent has relied on Section 34 of the 1996 Act as it stood prior to amendment of 2016 which came into effect from 23rd October, 2015. The merit of the stand taken must be seen in the light of Section 36 which has been modified and added by the 2016 amendment. The new Section 36 and sub-section (2) thereunder requires the Court to grant an order of stay of the operation of the Arbitral Award in accordance with Section 36(3) on a separate application for stay taken out by the Award-debtor. Section 36(2) marks a significant departure from the erstwhile provision in clarifying that filing of an application for setting aside

of an Award under Section 34 shall not by itself make the Award unenforceable unless the Award is stayed by an order of Court in an application made in the manner provided under Section 36(3) of the Act. In *Board of Control for Cricket in India vs Kochi Cricket Pvt. Ltd.; (2018) 6 SCC 287* the Supreme Court held that Section 36, prior to the amendment, can only be seen as a "clog" on the right of a decree-holder who is unable to execute the Award in his favour in the absence of the conditions set forth in Section 36. The Supreme Court further clarified that the aforesaid does not translate to a corresponding right in the judgment debtor to stay the execution of the Award. The most significant clarification of the Supreme Court in *Kochi Cricket* was expressed in the following words:-

> *"Since it is clear that execution of a decree pertains the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the amendment Act."*

The dictum hence is clear with regard to Section 34 applications which were pending at the time of the judgment in *Kochi Cricket*; namely that such pending applications would also be governed by the new Section 36, as amended. In other words, the petitioner/Award-debtor would not have the benefit of the Award being automatically stayed upon filing of the application and the Award-holder would be free to enforce the Award against the Award-debtor in the absence of an application for stay of the award under the amended Section 36 of the Act. The opinion of the Supreme Court in *Kochi Cricket* would also militate against the argument that the Award-holder/Respondent before this Court was rendered immobile in the matter

of pursuing its claim in respect of the Award under the 1996 Act or before a forum contemplated under the IBC or otherwise. The decisions cited on behalf of the respondent in *Swiss Ribbons Pvt. Ltd. vs Union of India; (2019) 4 SCC 17* has therefore to be seen in the context as discussed above.

22. Since this court had placed reliance on *K. Kishan* in the judgment dated 10th January, 2020, the said decision should be referred to at this stage. The thrust of the decision in *K. Kishan* was that the provisions of the IBC should not be used *"in terrorem"* (in the words of the Supreme Court) against a corporate debtor where there was a pre-existing ongoing dispute between the parties. The concern of the Supreme Court was against the use of the IBC by an operational creditor to extract its due despite an adjudication pending for setting aside of an Award under Section 34 of the 1996 Act on the date of initiation of the corporate insolvency resolution process. The Supreme Court relied on paragraphs 38 and 51 of *Mobilox Innovations* to opine that one of the objects of the IBC is to ensure that the amount of an operational debt does not enable operational creditors to put the corporate debtor prematurely into the insolvency resolution process or initiate the same for extraneous considerations. The Supreme Court sought to create a protective barrier around corporate debtors in cases where the provisions of the IBC were invoked by an operational creditor by jettisoning an ongoing and pending dispute for setting aside of an Arbitral Award under the 1996 Act. The facts of the present case are quite the opposite to that of *K. Kishan*. The corporate debtor/Award-debtor before this court seeks to take recourse in the culmination of the CIRP and the approval of the

Resolution Plan whereas the Award-holder/operational creditor seeks to proceed with the application for setting aside of the Award. As stated above, the view of this court as to a "pre-existing dispute" in the judgment of 10th January, 2020 must be revisited -and revised- in the light of both *Essar* and *Edelweiss*.

23. The view of the Supreme Court as crystallized in *Essar* and *Edelweiss* is that pre-existing and undecided claims which have not featured in the collation of claims and consequent consideration by the Resolution Professional shall be treated as extinguished upon approval of the Resolution Plan under Section 31 of the IBC. This can be seen as a necessary and an inevitable fallout of the IBC in order to prevent, in the words of the Supreme Court, a *"hydra head popping up"* and rendering uncertain the running of the business of a corporate debtor by a successful resolution applicant. In essence, an operational creditor who fails to lodge a claim in the CIRP literally missed boarding the claims-bus for chasing the fruits of an Award even where a challenge to the Award is pending in a Civil Court.

24. Every litigant has a right to argue that an action commenced in a court of law or a statutory forum is not maintainable by reason of the law existing as on that date. A challenge to maintainability of an action must be considered by the court before the substance of the dispute is adjudicated on merits. A court must also decide whether the argument pertaining to maintainability is such that the entire proceeding is rendered infructuous.

The present proceeding is precisely such a case where deciding on the merits of the application, i.e. whether the Award should be set aside or sustained, would be a complete waste not only of judicial time as well as of the parties since the claim of the Award-holder has been extinguished upon approval of the Resolution Plan under Section 31 of the IBC. Further adjudication on the legality of the impugned Award cannot lead to its logical conclusion and would hence be irrelevant. The parties would only be compelled to travel the road to further proceedings (appeal, enforcement etc.) without an end-point in the resolution to the dispute or any consequent relief to either of the parties. This surely cannot be the objective of any proceedings before any court of law.

25. In view of the above discussion, A.P. 550 of 2008 is disposed of as being rendered infructuous. There shall be no order as to costs.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)