IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

MISC. CIVIL APPLICATION NO.374/2020	
APPLICANT	M/s. Sunflag Iron & Steel Co. Ltd. Having its Registered Office at 33, Mount Road, Sadar, Nagpur Pin – 40001.
...Versus...	
RESPONDENT	M/s. J. Poonamchand & Sons Having its Registered offce at 303, Creative Industrial Centre 3rd Floor, NM Joshi Marg Lower Parel (East) Mumbai – 400011.
Shri Ashutosh Dharmadhikari, Advocate for applicant Shri Rahul Bhangde, Advocate for respondent	

CORAM : AVINASH G. GHAROTE, J.

Date of reserving the judgment : 28/04/2023
Date of pronouncing the judgment : 05/06/2023

1. Heard Mr. Ashuthosh Dharmadhikari, learned counsel for the applicant and Mr. Rahul Bhangde, learned counsel for the respondent. Rule. Rule made returnable forthwith with the consent of the learned counsel for the rival parties. Advocate Mr. Rahul Bhangde waives service of notice for the respondent on merits.

2. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (A & C Act, for short hereinafter) for appointment of an Arbitrator in view of an arbitration clause no.15 in the agreement dated 30/08/2019 (pg.16) between the parties hereto, the existence and invocation of which is not disputed.

3. Mr. Ashutosh Dharmadhikari, learned Counsel for the applicant, submits that once the above two conditions are admitted to exist, there is no other option than to appoint an arbitrator and the opposition by the respondent, is really without any merit. It is also contended that no order as yet has been passed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short "IB Code", hereinafter), in proceedings initiated by the respondent and therefore mere initiation of proceedings does not injunct this Court from entertaining and deciding this application. It is also contended that the matter is covered by the judgment of this Court in ***Jasani Realty Pvt. Ltd. Vs. Vijay Corporation (Commercial Arbitration Application (L) No.1242/2022, Decided on 25/04/2022),*** in which a similar issue has been decided. The applicant is a solvent company and the proceedings by the respondent before the National Company

Law Tribunal (for short "NCLT", hereinafter) under the IB Code are clearly not tenable at all.

3.1. Mr. Ashutosh Dharmadhikari, learned counsel for the applicant, in support of his contention, relies upon the following decisions :-

(i) Sanjiv Prakash Vs. Seema Kukreja and others (2021) 9 SCC 732 ;

(ii) DLF Home Developers Limited Vs. Rajapura Homes Private Limited and another 2021 SCC Online SC 781;

(iii) Vidya Drolia and others Vs. Durga Trading Corporation (2021) 2 SCC 1 ;

(iv) Indus Biotech Private Limited Vs. Kotak India Venture (Offshore) Fund (Earlier Known as Kotak India Venture Limited) and others, (2021) 6 SCC 436 ;

(v) Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353;

(vi) Transmission Corporation of Andhra Pradesh Limited Vs. Equipment Conductors and Cables Limited (2019) 12 SCC 697 ;

(vii) K. Kishan Vs. Vijay Nirman Company Private Limited (2018) 17 SCC 662;

(viii) Mrs. Parmod Yadav W/o Sh. Ram Chander Yadav and another Vs. Divine Infracon Pvt. Ltd. 2017 SCC OnLine NCLT 11263;

(ix) M/s. Maruti Udyog Ltd. Vs. Ram Lal and others AIR 2005 SC 851;

(x) Millennium Education Foundation Vs. Educomp Infrastructure and School Management 2022 SCC OnLine Del 1442;

(xi) VGP Marine Kingdom Pvt. Ltd. and another Vs. Kay Ellen Arnold 2022 SCC OnLine SC 1517;

(xii) Reliance Communications Limited Vs. Ericsson India Private Limited and others [Commercial Arbitration Petition (L) No.253 of 2018, High Court of Bombay, Decided on 08/03/2018].

4. The ground for opposition by Mr. Rahul Bhangde, learned counsel for the respondent, is that since the respondent has approached the NCLT under the provisions of the IB Code, the provisions of Section 11(6) of the A & C Act, would become inapplicable and therefore it would be impermissible to appoint an arbitrator. He contends that once the NCLT is seized of the matter upon the respondent having approached it for measures under the provisions of the IB Code, it would have an overriding effect on Section 11(6) of the A & C Act which then cannot be invoked, for which reliance is placed upon Section 238 of the IB Code and ***Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta and others (2021) 7 SCC 209***, *and* ***KSL and Industries Limited Vs. Arihant Threads Limited and others, (2008) 9 SCC 763***. Relying upon ***Indus Biotech***

Private Limited Vs. Kotak India Venture (Offshore) Fund (Earlier Known As Kotak India Venture Limited) and others (2021) 6 SCC 436 it is submitted that Section 7 of the IB Code has primacy and therefore the present application which has been filed merely with the purpose to obviate the proceedings before the NCLT are not maintainable.

4.1. On the fact of the matter he submits that in fact there is no dispute at all as there is an admission by the applicant as to its liability to pay, for which he invites my attention to the e-mail dated 23/10/2019 (pg.239), in which, the applicant has stated that due to financial crunch they will pay the dues later. According to him, only when the respondent expressed its intention to invoke the provisions of the IB Code by its notice dated 25/08/2020, the dispute was first created by the applicant by its reply dated 15/09/2020 after which the present application under Section 11 of the A & C Act came to be filed on 23/10/2020, consequent to which, a petition under Section 9 of the IB Code was filed by the respondent before the NCLT on 22/01/2021. It is, thus, submitted that though no dispute existed, it was now sought to be created solely for the purpose of invoking Section 11 of the A & C Act, claiming variation in test sample for which already a credit-note stood issued by the

respondent, for which, reliance is placed on ***Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Private Limited (2021) 5 SCC 738.*** It is also contended that whether a dispute exists or not is an issue to be determined by the NCLT, for which reliance is placed on ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353.***

4.2. Relying upon ***Vidya Drolia and others Vs. Durga Trading Corporation (2021) 2 SCC 1*** it is submitted that the scope of interference by this Court under Section 11 of the A & C Act, is extremely limited and the application ought not to be entertained. ***Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority (1988) 2 SCC 338*** is also relied upon to contend that the application was beyond the period of limitation as contemplated by Article 137 of the Limitation Act.

4.3. He further contends that the view taken in ***Jasani Realty Pvt. Ltd.*** (supra) [G. S. Kulkarni, J.) is not the correct view and ought not to be followed and in case this Court agrees with this proposition, then the matter would be required to be referred to a learned Division Bench for opinion.

5. The question is whether the provisions of the IB Code interdict the appointment of an arbitrator by invoking Section 11(6) of the A & C Act.

5.1. Sections 7 to 9 of the Insolvency and Bankruptcy Code (Amended) read as under :

> *"**Section 7. Initiation of corporate insolvency resolution process by financial creditor.** - (1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*
>
> *Provided that for the financial creditors, referred to in clauses (1) and (b) of sub-section (6-A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:*
>
> *Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less.*
>
> *Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and*

second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second provisos within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish — (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified; (b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

Provided that if the Adjudicating Authority has not ascertained the existence of default and passed and order under sub-section (5) within such time, it shall record its reasons in writing for the same.

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending

against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.

Section 8. Insolvency resolution by operational creditor.- *(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor 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.

Section 9. Application for initiation of corporate insolvency resolution process by operational creditor. *- (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.*

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that

there is no payment of an unpaid operational debt by the corporate debtor, if available;

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available and

(e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(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 payment 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 payment 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.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

5.2. Section 238 of the Insolvency and Bankruptcy Code, reads as under :

*"**238. Provisions of this Code to override other laws.** - The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

5.3. At the outset, it is necessary to note that there is no provision in the A & C Act, giving the provisions of the Act an overriding effect as is contemplated by Section 238 of the I B Code. However, it is equally trite that the A & C Act, is a special Statute, governing the field of Arbitration, and all other Statutes governing the filed earlier thereto, stood repealed in view of Section 85 of the A & C Act.

5.4. What will have to be considered is whether there is anything inconsistent in the A & C Act, to what has been provided for in Section 7 to 9 of the IB Code, so that it can be said that Section 7 to 9 of the I B Code would prevail.

5.5. Section 7 of the IB Code grants a right to a financial creditor to initiate insolvency proceedings against a corporate debtor. However, the mere filing of such an application by itself, does not mean that the Adjudicating Authority, has taken cognisance of the matter. This is so for the reason that sub-section 4 of Section 7 of the IB Code, casts a duty upon the Adjudicating Authority, within fourteen days of the receipt of such application to, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section 3 of Section 7 of the IB Code. The proviso to Section 7(4) of the IB Code further enjoins the Adjudicating Authority to record reasons for not ascertaining the factors, as contemplated by Section 7(4), within the time frame stipulated therein. Further Section 7(5) of the IB Code enjoins upon the Adjudicating Authority to record its satisfaction that the default has occurred and there is no disciplinary proceedings pending against the proposed resolution

professional and upon such satisfaction permits admission of such application. In my considered opinion, the admission of an application after recording its satisfaction as contemplated by Section 7(5) of the IB Code would be the starting point where the bar under Section 238 of the IB Code can be said to be capable of being invoked and the mere filing of an application under Section 7(1) of the IB Code cannot be said to be enough to invoke the bar. This is clearly apparent from the language of Section 7(4) r/w Section 7 (5) of the IB Code. What is also material to note is that Section 7(5)(b) of the IB Code permits the Adjudicating Authority to reject the application where it is of the opinion that default has not occurred, thereby indicating that the mere filing of an application under Section 7(1) of the I B Code, would not act as a bar to any proceedings under other statutes, until and unless the satisfaction as contemplated by Section 7(4) r/w Section 7(5)(a) of the IB Code is recorded by the Adjudicating Authority and the application is admitted.

5.6. This position has been considered by the Hon'ble Apex Court in ***Indus Biotech*** (supra), in the following words :

> *"17. The procedure contemplated will indicate that before the adjudicating authority is satisfied as to whether the default has*

occurred or not, in addition to the material placed by the financial creditor, the corporate debtor is entitled to point out that the default has not occurred and that the debt is not due, consequently to satisfy the adjudicating authority that there is no default. In such exercise undertaken by the adjudicating authority if it is found that there is default, the process as contemplated under sub-section (5) of Section 7 of IB Code is to be followed as provided under sub-section (5)(a); or if there is no default the adjudicating authority shall reject the application as provided under sub-section (5)(b) to Section 7 of IB Code. In that circumstance if the finding of default is recorded and the adjudicating authority proceeds to admit the application, the corporate insolvency resolution process commences as provided under sub-section (6) and is required to be processed further. In such event, it becomes a proceeding in rem on the date of admission and from that point onwards the matter would not be arbitrable. The only course to be followed thereafter is the resolution process under IB Code. Therefore, the trigger point is not the filing of the application under Section 7 of IB Code but admission of the same on determining default.

21. In such circumstance if the adjudicating authority finds from the material available on record that the situation is not yet ripe to call it a default, that too if it is satisfied that it is profit making company and certain other factors which need consideration, appropriate orders in that regard would be made; the consequence of which could be the dismissal of the petition under Section 7 of IB Code on taking note of the stance of the corporate debtor. As otherwise if in every case where there is debt, if default is also assumed and the process becomes automatic, a company which is ably running its administration and discharging its debts in planned manner may also be pushed to the corporate insolvency resolution process and get entangled

in a proceeding with no point of return. Therefore, the adjudicating authority certainly would make an objective assessment of the whole situation before coming to a conclusion as to whether the petition under Section 7 of IB Code is to be admitted in the factual background. Dr Singhvi, however contended, that when it is shown the debt is due and the same has not been paid the adjudicating authority should record default and admit the petition. He contends that even in such situation the interest of the corporate debtor is not jeopardised inasmuch as the admission orders made by the adjudicating authority are appealable to NCLAT and thereafter to the Supreme Court where the correctness of the order in any case would be tested. We note, it cannot be in dispute that so would be the case even if the adjudicating authority takes a view that the petition is not ripe to be entertained or does not constitute all the ingredients, more particularly default, to admit the petition, since even such order would remain appealable to NCLAT and the Supreme Court where the correctness in that regard also will be examined."

After considering ***Vidya Drolia*** (supra) it has been held that :

"26. The underlying principle, therefore, from all the abovenoted decisions is that the reference to the triggering of a petition under Section 7 of the IB Code to consider the same as a proceedings in rem, it is necessary that the adjudicating authority ought to have applied its mind, recorded a finding of default and admitted the petition. On admission, third-party right is created in all the creditors of the corporate debtors and will have erga omnes effect. The mere filing of the petition and its pendency before admission, therefore, cannot be construed as the triggering of a proceeding in rem. Hence, the admission of

> *the petition for consideration of the corporate insolvency resolution process is the relevant stage which would decide the status and the nature of the pendency of the proceedings and the mere filing cannot be taken as the triggering of the insolvency process."*

5.7. In my considered opinion, ***Jasani Realty Pvt. Ltd.*** (supra) therefore records the correct position and the contrary argument in this regard by Mr. Rahul Bhangde, learned counsel for the respondent, is therefore rejected.

5.8. It would also be material to note that there does not appear to be anything inconsistent between the provisions of the A & C Act and the IB Code, inasmuch as the provisions of Section 238 of the IB Code would come into play only upon an order having been passed by the Adjudicating Authority under Section 7(5) of the IB Code and therefore an application under Section 11(6) of the A & C Act, till such time cannot be said to be not maintainable.

6. Insofar as the plea, that there is no dispute between the parties altogether, in view of the admission as claimed to have been made by the applicant in the e-mail dated 23/10/2019 (pg.239), it would be material to note that the position has to be considered in totality and not on the basis of a singular communication. The other

communication between the parties show that the quality of the goods supplied have been questioned by the applicant and therefore what is the effect of the e-mail dated 23/10/2019, in the totally of the circumstances will have to be considered by the Arbitrator, on the basis of material which may come before him. ***Nortel Networks India Private Limited*** (supra) therefore, in my considered opinion, does not assist Mr. Rahul Bhangde, learned counsel for the respondent in his contention of absence of any dispute. Even otherwise, in case the Adjudicating Authority comes to a conclusion that there was a default then the position would squarely be governed by Section 238 of the IB Code, however, till such time it is so done, the entertaining of an application under Section 11 (6) of the A & C Act, would not stand prevented and ***Mobilox Innovations Private Limited*** (supra) therefore would not come in the way of such consideration.

7. Insofar as the issue of limitation is considered, though reliance is placed upon ***Major (Retd.) Inder Singh Rekhi*** (supra) by Mr. Rahul Bhangde, learned counsel for the respondent to contend that the application is beyond the period of limitation, it is however material to note that the arbitration clause was invoked only in the reply dated 15/09/2020 by the applicant, in pursuance to which, the

present application has been filed on 23/10/2020, considering which, it cannot be said that the application is beyond time. A plea that the dispute/claim itself would be beyond time, is one which will have to be considered by the Arbitrator.

8. In view of what has been held in ***Indus Biotech*** (supra) that, the triggering of a petition under Section 7 of the IB Code to consider the same as a proceeding in rem, it is necessary that the Adjudicating Authority ought to have applied its mind, recorded a finding of default and admitted the petition, ***Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta and others (2021) 7 SCC 209*** and ***KSL and Industries Limited Vs. Arihant Threads Limited and others, (2008) 9 SCC 763*** are of no assistance, for a contrary argument, to be acceptable.

9. No doubt there is very narrow scope of judicial consideration in an application under Section 11 (6) of the A & C Act, however, in light of what has been held in ***Indus Biotech*** (supra) in which ***Vidya Droila*** (supra) has been considered and ***Jasani Realty Pvt. Ltd.*** (supra), in my considered opinion, cover the issue.

10. The application is, therefore, allowed and **Mr. Justice Z. A. Haq**, Former Judge of this Court, is hereby appointed as an Arbitrator, to adjudicate the disputes between the parties hereto. The

parties shall appear before him on 12/06/2023 at 11:00 a.m. The processing charges shall be paid as a condition precedent.

11. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

(AVINASH G. GHAROTE, J.)

Wadkar