

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-206

IB-1079/PB/2020

IA/1657/2021

IN THE MATTER OF:

Dalmia Family Office Trust

Vs.

Almond Infrabuild Pvt. Ltd.

.....Respondent

....Applicant

SECTION

U/s 7 IBC

Order delivered on 29.08.2023

CORAM:

**SHRI P.S.N PRASAD,
HON'BLE MEMBER (JUDICIAL)**

**DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)**

PRESENT:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open Court vide separate sheets.

IA/1657/2021 in IB-1079/PB/2020 is **disposed off.**

Sd/-

**(DR. BINOD KUMAR SINHA)
MEMBER (T)**

Sd/-

**(P.S.N PRASAD)
MEMBER (J)**

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH, COURT-V
I.A.1657/2021
IN
COMPANY PETITION NO. (IB)-1079/PB/2020

Application under section 8 of the Arbitration and Conciliation Act, 1996 on behalf of the Corporate Debtor.

In The Matter of:

DALMIA FAMILY OFFICE TRUST

Address: 04, Scindia House, Connaught
Place, New Delhi-110001

... Financial Creditor/Respondent

Versus

ALMOND INFRABUILD PRIVATE LIMITED

Address: 711/92, Deepali Nehru Place,
New Delhi- 110019

... Corporate Debtor/Applicant

CORAM

SHRI. P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

PRESENT

For the Applicant :Adv.Mr. Ajay Bhargaya,

For the Respondent :Adv. Krish Kalra

Order Pronounced on: 29.08.2023

ORDER

PER: SHRI P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL),

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

1. This IA/1657/2021 has been filed by Almond Infrabuild Private Limited under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter refer as the Act, 1996) with the following prayers;
 - i. Refer the parties to the arbitration and arbitral proceedings that have already commenced in terms of the Order of the Hon'ble Delhi High Court dated 08.01.2021 and in the term of the Arbitration Agreement *inter alia* embodied in clause 14 of the Loan Agreement and;
 - ii. Stay the proceedings in the titled main proceedings/petition purportedly under section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") till the final disposal of the present Application.
2. The main petition IB-1079/PB/2020 was filed by Dalmia Family Office Trust seeking initiation of Corporate Insolvency Resolution Process

against Almond Infrabuild Private Limited, who is the Respondent in this present IA/1657/2021.

Averment by the Applicant

3. It was averred in the Application that the Applicant is *inter alia* engaged in business of construction and development of residential group housing projects respondent in the usual course of its business provided financial assistance and the Applicant is part of the ATS Group of Companies, a group including ATS Infrastructure Ltd., ATS Housing Private Limited, Anand Divine Developers Private Limited, and Domus Greens Private Limited (hereinafter together referred to as 'ATS Group'). a leading real estate developer in the Delhi NCR Region. Whereas, the present Application is being filed through Mr. Samman Prakash who is duly authorized to verify, sign, and file the present Application.
4. Further, the Applicant averred that the alleged Financial Creditor is a trust namely Dalmia Family Office Trust. It is a part of Dalmia Group which comprises Dalmia Family Offices Trust, Dalmia Family Holdings LLP, and Rasbehari Traders (hereinafter referred to as 'Dalmia Group').
5. The Applicant further submitted that there were several agreements along with the Loan Agreement dated 11.06.2015 ("it was further

renewed vide the Supplemental Agreement dated 18.12.2018”) entered into between the ATS Group and Dalmia Group entities. These agreements were entered into as part of one umbrella transaction between the Dalmia Group and ATS Group, pursuant to which the alleged Financial Creditor invested certain sums in the Applicant Company.

6. It is submitted by the Applicant that with respect to the payment, certain difference arose between the ATS Group and the Dalmia Group in related to the aforesaid agreed transaction as the alleged payments was not ascertained, nor was there a definite time period for the payment and the payments to be made were subject to various other terms and obligations in the Agreements and was conditional upon happening of various events and as such it cannot be said that there was any ascertained or admitted debt payable by the alleged Corporate Debtor/Applicant.
7. As contended by the applicant that thereafter, the both Groups entered into a global and holistic settlement of inter-se commercial issues on 17.08.2020. whereas, it was agreed between the two Groups that ATS Group would allot certain units/ apartments total worth Rs. 75 Crores to the Dalmia Group, as per RERA complied formats at agreed prices and also agreed that the ATS Group would sell these units/apartments and

pay the entire sale proceeds to the Dalmia Group. Further submitted that, towards the said holistic settlement the ATS Group issued the PDCs of Rs. 150 crores. However it was agreed that said amount was not payable by the ATS Group till 31.08.2021, unless any *force majeure* circumstances were present.

8. Applicant further submitted that, in pursued to that the post-dated cheques had been issued with a date of 31.08.2021 (which now stands extended to atleast 31.08.2022 owing to continuation of force majeure events/ frustration etc.) by the Applicant. Therefore, no sums can be stated to be due before 31.08.2022 (subject to further extensions on account of continuation of force majeure events).

9. Further submitted by the Applicant that the Applicant under the previous agreements stood novated by this settlement and pursuant to abovesaid settlement it was clear that there were and are no sums payable to the alleged Financial Creditor at the present.

10. It was submitted by the Applicant that , despite the foregoing settlement, Rasbehari Traders, an entity forming part of the Dalmia Group sought to act contrary to the settlement and claim sums from ATS Infrastructure Limited. In light of the Dalmia Group seeking to act contrary to the

settlement, the Applicant invoked arbitration against the Financial Creditor on 13.10.2020 to which the Financial Creditor responded on 15.10.2020, disputing the Applicant's contentions. Also filed petitions under Section 11 of the Arbitration and Conciliation Act 1996 in respect of the agreements between the Parties. However, as a counter-blast, the Financial Creditor also filed petitions under Section 9 of the Arbitration and Conciliation Act, 1996 seeking certain ad-interim and interim reliefs. Subsequently, the ATS and Dalmia Group (including the Parties to the present proceedings) mutually agreed to refer all their pending disputes to arbitration.

11. Applicant submitted that accordingly, vide its order dated 08.01.2021, the Hon'ble Delhi High Court appointed Mr. Justice (Retd.) Swatanter Kumar as the Ld. Sole Arbitrator and referred all disputes between the Parties to arbitration (i.e Arbitration Case No. 7/2021). It is submitted that the Hon'ble Court has referred all disputes between the Parties, including any and all disputes arising out of the Loan Agreement to arbitration and the said arbitral proceedings are currently pending adjudication. Therefore the proceedings initiated by the Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code

2016 are not maintainable and ought to be referred to arbitration under Section 8 of the Arbitration and Conciliation Act 1996

Reply of the Respondent

12. The Respondent of this application filed the reply and in its written submission it was submitted that the Corporate Debtor's contention that the present Application is not maintainable on account of the ongoing arbitration between the parties, and on account of the dispute raised by the Corporate Debtor with regard to the crystallisation of the debt, is wholly misplaced. Further the Respondent placed the reliance on the recent Judgment passed by the Hon'ble Supreme Court in *Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund (earlier known as Kotak India Ventures Limited) & Ors. [Arb Pet (Civil) No. 48/2019]*, whereby it has been held that an ongoing arbitration does not preclude admission of an Application under Section 7 of IBC. A pre-existing dispute is also not a criterion for the same, unlike an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016.

13. Further, the respondent submitted that the nature of relief sought by the Financial Creditor before this Adjudicating Authority under Section 7 of the Code, being initiation of insolvency proceedings against the

Corporate Debtor is entirely separate and distinct from the relief sought by the Financial Creditor before the Arbitral Tribunal which is in the nature of recovery of dues. Reliance in this regard is placed on the judgement of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532*; where it was held that the ‘insolvency’ and ‘winding up’ matters are non-arbitrable, and as such, the same cannot be referred to arbitration.

14. It is submitted by the Respondent that the no such modification of the Loan Agreement took place, except the Supplemental Agreement as averred by the Applicant in the instant application. Further submitted that the no default having occurred on account of the extension till August 2022, due to Force Majeure events and/or Frustration of contract under section 56 of the Contracts Act, 1872, because of the COVID-19 pandemic also deserve to be rejected at the threshold as an afterthought as firstly, the default occurred on 30 June 2019, much prior to the COVID-19 pandemic; Secondly, none of the Agreements between the parties even contain a Force Majeure Clause; Thirdly, the Corporate Debtor never raised this plea of Force Majeure/ Frustration due to COVID-19 in any communications.

Analysis and Findings

15. We have heard the parties and perused the case records, averments made in the application and reply filed by the parties. The relevant documents annexed with the respective submissions have also been examined. The main issue before this Adjudicating Authority herein is that, whether an application filed under section 8 of Arbitration & Conciliation Act, 1996 can be said to be maintainable in a proceeding initiated under Insolvency and Bankruptcy Code, 2016. In the present Application, it is important to refer the Hon'ble Supreme Court's judgment in *Indus Biotech Private Limited Vs. Kotak India Venture (Offshore) Fund and Ors.* (Arbitration Petition (Civil) No. 48/2019, Supreme Court of India) wherein, it was held that in every proceeding pending before the Adjudicating Authority under Section 7 of the IBC, if such petition is admitted upon the Adjudicating Authority recording the satisfaction with regard to the default and the debt due from the corporate debtor, any application pursuing reference to arbitration under Section 8 of the Arbitration Act will be dismissed. However, if the application under Section 7 of the IBC has not yet been admitted and an application under Section 8 of the Arbitration and Conciliation Act, 1996 is made in the meanwhile, the application for referral to arbitration may

be maintainable, depending on whether or not there is a default under the provisions of IBC.

16. We also observe through judicial precedents in case of “*Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd, AIR 2011 SC 2507*” that if the subject matter of a dispute forms part of a proceeding *in rem*, then the same is not Arbitrable. Hence, once an insolvency proceeding is commenced, it becomes non-arbitrable. In this regard, reference may be made to the Hon’ble Supreme Court’s decision in the case of *Vidya Drolia & Ors. vs. Durga Trading Corporation, 2021 2 SCC 1*.

17. Also, the Supreme Court in *Innoventive Industries Ltd. v. ICICI Bank* had carved out the scope of applicability of section 7 of the IBC, held that while adjudicating upon a section 7 of IBC Application, the adjudicating authority has to merely satisfy itself that a default has occurred, by assessing the records produced by the financial creditor. Thus, the scope of enquiry before the adjudicating authority is very limited. Hence, the moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted.

18. Further, the Hon’ble Supreme Court in *Indus Biotech Private Limited Vs. Kotak India Venture (Offshore) Fund and Ors* having noticed other relevant judgements, have observed in Para 25, 26 and 27 as follows:

“25. As noted, the issue which is posed for our consideration is arising in a petition filed under Section 7 of IB Code, before it is admitted and therefore not yet an action in rem. In such application, the course to be adopted by the Adjudicating Authority if an application under Section 8 of the Act, 1996 is filed seeking reference to arbitration is what requires consideration. The position of law that the IB Code shall override all other laws as provided under Section 238 of the IB Code needs no elaboration. In that view, notwithstanding the fact that the alleged corporate debtor filed an application under Section 8 of the Act, 1996, the independent consideration of the same dehors the application filed under Section 7 of IB Code and materials produced therewith will not arise. The Adjudicating Authority is duty bound to advert to the material available before him as made available along with the application under Section 7 of IB Code by the financial creditor to indicate default along with the version of the corporate debtor. This is for the reason that, keeping in perspective the scope of the proceedings under the IB Code and there being a timeline for the consideration to be made by the Adjudicating Authority, the process cannot be defeated by a corporate debtor by raising moonshine defence only to

delay the process. In that view, even if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority has a duty to advert to contentions put forth on the application filed under Section 7 of IB Code, examine the material placed before it by the financial creditor and record a satisfaction as to whether there is default or not. While doing so the contention put forth by the corporate debtor shall also be noted to determine as to whether there is substance in the defence and to arrive at the conclusion whether there is default. 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 arise despite the position that the agreement between the parties indisputably contains an arbitration clause.”

“26. That apart if the conclusion is that there is default and the debt is payable, due to which the Adjudicating Authority proceeds to pass the order as contemplated under sub section 5(a) of Section 7 of IB Code to admit the application, the proceedings would then get itself transformed into a proceeding in rem having erga omnes effect due to which the question of arbitrability of the so called inter se dispute sought to be put forth would not arise. On the other hand, on such

consideration made by the Adjudicating Authority if the satisfaction recorded is that there is no default committed by the company, the petition would stand rejected as provided under subsection 5(b) to Section 7 of IB Code, which would leave the field open for the parties to secure appointment of the Arbitral Tribunal in an appropriate proceedings as contemplated in law and the need for the NCLT to pass any orders on such application under Section 8 of Act, 1996 would not arise.”

“27. Therefore, to sum up the procedure, it is clarified that in any proceeding which is pending before the Adjudicating Authority under Section 7 of IB Code, if such petition is admitted upon the Adjudicating Authority recording the satisfaction with regard to the default and the debt being due from the corporate debtor, any application under Section 8 of the Act, 1996 made thereafter will not be maintainable. In a situation where the petition under Section 7 of IB Code is yet to be admitted and, in such proceedings, if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority is duty bound to first decide the application under Section 7 of the IB Code by recording a satisfaction with regard to there being default or not, even if the application

under Section 8 of Act, 1996 is kept along for consideration. In such event, the natural consequence of the consideration made therein on Section 7 of IB Code application would befall on the application under Section 8 of the Act, 1996”.

19. Thus, for cases, where section 7 of IBC application is yet to be admitted, in the *Indus* judgement supra, Hon’ble Supreme Court have laid down the following principles:

- I. An application filed under Section 8 of the Arbitration and Conciliation Act, 1996 has to be kept along the Section 7 application filed under IBC to ascertain if any default has been committed by the Corporate Debtor;
- II. However, the application filed under Section 7 of the IBC has to be taken up first to ascertain, if there is default or not;
- III. If default is ascertained, the Adjudicating Authority shall admit the Insolvency application, which will then become proceedings in *remand* cease to be arbitrable;
- IV. However, if the Adjudicating Authority concludes that there is no default committed on the part of the Corporate Debtor, the application filed under Section 7 of the IBC shall be rejected, and parties may be referred to the Arbitral Tribunal.

20. In the instant case, the applicant has sought a prayer to refer the parties to Arbitral Tribunal, before ascertaining the default under section 7 of the IBC, which is not in accordance with the principles laid down by Hon'ble Supreme Court in *Indus Biotech Private Limited Vs. Kotak India Venture (Offshore) Fund and Orssupra*. Therefore, prayer (i) is rejected as non-maintainable.

21. As regards prayer (ii), it is clear from the judgement of Hon'ble Supreme Court in *Indus Biotech Private Limited Vs. Kotak India Venture (Offshore) Fund and Ors*, that the Application under section 7 of the IBC has to be taken up first to ascertain the default, before taking a view on the prayer for arbitration. Therefore the proceeding under section 7 of IBC cannot be stayed as prayed by the applicant herein. Prayer (ii) also is, therefore, answered in the negative.

22. As regards to the arbitration clause contained in Clause 14 of the Loan Agreement and appointment of a Sole Arbitrator after both Parties jointly consented and ordered by the Hon'ble Delhi High Court vide the aforesaid order dated 08.01.2021, the same would be maintainable only if, this Adjudicating Authority will be satisfied with the non-existence of default in Petition i.e IB-1079/PB/2020 filed under section 7 of the

IBC by the Financial Creditor leading to the dismissal of the application filed under section 7 of IBC.

23. Accordingly, subject to the aforesaid observation, the present Application i.e., I.A./1657/2021 in (IB)-1079/(PB)/2010 filed by the Applicant under Section 8 of the Arbitration and Conciliation Act, 1996 on behalf of the Corporate Debtor, stands dismissed.

Let a copy of order be served to parties

Sd/-

(DR. BINOD KUMAR SINHA)

MEMBER (TECHNICAL)

Sd/-

(SHRI P.S.N. PRASAD)

MEMBER (JUDICIAL)



IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-513
IB-1079/PB/2020

IN THE MATTER OF:

Dalmia Family Office Trust

....Applicant

Vs.

Almond Infrabuild Pvt. Ltd.

.....Respondent

SECTION

U/s 7 IBC

Order delivered on 29.08.2023

CORAM:

**SHRI MAHENDRA KHANDELWAL,
HON'BLE MEMBER (JUDICIAL)**

**SHRI RAHUL BHATNAGAR,
HON'BLE MEMBER (TECHNICAL)**

PRESENT:

For the Applicant : Mr Ajay Bhargava, Ms Wamika Trehan and
Ms Raddhika Khanna, Advocates

For the Respondent :

ORDER

Ld. Counsel on behalf of the Financial Creditor is present and submitted that the order in IA-1657/2021 is listed for pronouncement today. In view of this, arguments in this matter is deferred to **19.09.2023**.

Sd/-

**(RAHUL BHATNAGAR)
MEMBER (T)**

Sd/-

**(MAHENDRA KHANDELWAL)
MEMBER (J)**