

(2020) 01 CAL CK 0080

In the Calcutta High Court

Case No : Arbitration Petition (AP) No.550 Of 2008

Sirpur Paper Mills Ltd

APPELLANT

Vs

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

RESPONDENT

Date of Decision : 10-01-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 31, 32, 33, 34

Insolvency And Bankruptcy Code, 2016 — Section 12, 14, 14(a), 17, 18, 21, 25, 30, 31

Citation : (2020) 01 CAL CK 0080

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Syamantak Banerjee, Prasanta Dutt, Susanta Dutt, Sudip Deb, Deepak Jain, Riju Ghosh

Judgement

Moushumi Bhattacharya, J

1. The petitioner prays for setting aside of an Award dated 7th July, 2008 and contends that the present application under Section 34 of The Arbitration and Conciliation Act, 1996 (the Act) cannot be proceeded since Corporate Insolvency proceedings under the Insolvency and Bankruptcy Code, 2016 (the IBC) has been initiated against the petitioner as the Corporate Debtor.

2. The question which arises therefore is whether the present application under Section 34 of the Act should be kept in abeyance by reason of the provision of the IBC being invoked by operational creditors against the petitioner.

3. Learned counsel for the petitioner places a bunch of orders of the National Company Law Tribunal (NCLT), Hyderabad Bench in applications by various Operational Creditors against the petitioner (Corporate Debtor). Counsel places the relevant portions of the order which are set out below;

"40. This Adjudicating Authority hereby declare that the Resolution Plan is binding on the Corporate Debtor, employees of the Corporate Debtor, members

of the Corporate Debtor, creditors of the Corporate Debtor, guarantors of the Corporate Debtor and other stakeholders involved in the Resolution Plan.

41. This Adjudicating Authority hereby declare that the moratorium order passed by this authority u/s 14 shall cease to have effect."

4. Counsel submits that the Management of the corporate debtor/petitioner has been taken over by JK Paper Limited, who was the Resolution Applicant before the NCLT. It is further submitted that the present application for setting aside of the Award cannot continue since the respondent has not taken steps to include its claim before the Resolution Professional (RP).

5. Learned counsel for the respondent (award-holder) seeks to continue with the hearing of the present application for setting aside of the impugned Award. Counsel relies on paragraph 41 of the Order of NCLT which declares that the moratorium under Section 14 of the IBC shall cease to have effect from 19th July, 2018 onwards. Counsel relies on K. Kishan Vs. Vijay Nirman Company Pvt. Ltd. reported in (2018) 17 SCC 622 in which the court relying on Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. reported in (2018) 1 SCC 353 held that Operational Creditors cannot use the Insolvency Code either prematurely or as a substitute for debt enforcement procedures.

6. Upon considering the submissions of learned counsel appearing for the parties, certain relevant facts are required to be stated at the outset;

(i) the Reference was made on 18th June, 2001 and the Arbitrator was appointed on 2nd March, 2006.

(ii) the arbitral Award was delivered on 7th July, 2008 for a sum of Rs.3,21,927.70/- at 9% per annum in favour of the respondent/claimant

(iii) the present application for setting aside of the Award was filed on 31st

(iv) Operational Creditors initiated proceedings under the IPC against the petitioner (Corporate Debtor) in September 2017.

(v) By an order dated 19th July, 2018, the adjudicating authority declared that the moratorium order under Section 14 shall cease to have effect

(vi) the application under Section 34 of the 1996 Act was taken up for hearing by this court on 11th December, 2019.

7. For understanding the scope of the order passed by the NCLT on 19th July, 2018, the sequential stages which are of significance as contemplated under the IBC from Sections 8 to 33 are stated in brief. An operational creditor delivers a demand notice to the corporate creditor demanding payment of the amount of the default after the expiry of the period stipulated under the IBC and if the operational creditor does not receive the payment from the corporate creditor, the former has the option to apply before the adjudicating authority for initiating a corporate insolvency resolution process. The corporate insolvency resolution

process is to be completed within a period of 180 days from the date of admission of the application (under Section 12 of the IBC) upon which the adjudicating authority may declare a moratorium under Section 14 or make a public announcement of the initiation of the insolvency resolution process or appoint an Interim Resolution Professional (IRP) (Section 13). Subject to the aforesaid, the adjudicating authority shall declare a moratorium for prohibiting the institution of a suit or continuation of a pending suit or proceedings against the corporate debtor including execution of any judgement, decree or order in a Court of Law, Tribunal, Arbitration Panel etc. From the date of appointment of the Interim Resolution Professional, management of the affairs of the corporate debtor shall base in the IRP and the powers of the Board of Directors shall stand suspended and be exercised by the IRP (Section 17). The IRP has been provided with certain powers and duties under the IBC including receiving and collating of the claims submitted by the creditors pursuant to the public announcement (Section 18). After collation of all the claims received against the corporate debtor and after determining the financial position of the corporate debtor, the IRP shall constitute a Committee of Creditors which shall comprise of all the financial creditors of the corporate debtor (Section 21). The Committee of Creditors may resolve to appoint a Resolution Professional (RP) under Section 22. The duties of the Resolution Professional is to preserve and protect the asset of corporate debtors including the continued business operation of the corporate debtor as well as maintain an updated list of claims (Section 25). A resolution applicant may submit a resolution application to the RP which shall be confirmed on the fulfillment of the conditions under Section 30. The resolution application approved by the Committee of Creditors shall be binding on the corporate debtors and its employees, corporate debtor stakeholders etc. under Section 31.

8. The respondent before the Supreme Court in K. Kishan was the award-holder whose attempts for initiation of corporate insolvency resolution process as an operational creditor under Section 9 of the IBC had been allowed by the NCLT and upheld by the NCLAT. The appellant Award debtor opposed such initiation of the provisions of the IBC before the Supreme Court upon which the Supreme Court examined whether the IBC can be invoked in respect of an operational debt where an Arbitral Award has been passed against the operational debtor and is pending adjudication. On considering the relevant dates on which the parties made their respective moves, the Supreme Court cautioned against the improper use of the insolvency process as a substitute for debt enforcement procedures. Relying on the decision in Mobilox, the court placed emphasis on the existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the Demand Notice of the unpaid operational debt in relation to such dispute and disapproved of the practice of putting corporate debtors into the insolvency resolution process either prematurely or for extraneous considerations. In the words of the Supreme Court, "so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the Adjudicating Authority has to reject the application" where there

was a pre-existing dispute. The Supreme Court also found that the factum of challenge to an Award under Section 34 of the Arbitration and Conciliation Act, 1996 would be sufficient to show that the Award has been disputed and would amount to a case of a "pre-existing ongoing dispute between the parties". It was further held that the object of the IBC insofar as operational creditors are concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist. From this decision, it is evident that the view of the Supreme Court was that the IBC cannot be used in *terrorem* to extract a sum of money when that sum is a subject-matter of a pending adjudication. Although the facts of the present case are different on at least two fronts, namely, the award-holder (respondent before this court) seeks to proceed with the present application for setting aside of the Award while the petitioner/Award debtor (also the corporate debtor before the NCLT) seeks to take recourse to the insolvency proceedings by contending that the respondent must first file its claim before the NCLT before it can contest the proceedings for setting aside of the Award. The intended object of *K. Kishan* was that the corporate insolvency proceedings cannot be used in cases where there is a pre-existing and an ongoing dispute between the parties. It is undisputed that the Arbitral Award delivered on 7th July, 2008 was in existence for nine years prior to initiation of the proceedings under the IBC against the petitioner in 2017. The challenge to the Award was of 31st October, 2008 which additionally made the "debt" (to borrow a term from the IBC) uncertain and subject to the adjudication of the Section 34 proceedings. The question of the respondent approaching the NCLT for filing a claim in 2017 at the time of initiation of the insolvency proceedings, could not, therefore, arise. Both *K. Kishan* and *Mobliox* make it clear an earlier dispute or notice of a suit or an arbitration must be given precedence to the insolvency proceedings.

9. Although the facts of the present case are different from *K. Kishan* since in that case it was the award-holder who had sought to resort to the corporate insolvency process and the award debtor had sought to rely on the arbitration pending between the parties, the caution sounded by the Supreme Court in that decision finds an echo in the present case. Here it is the award-holder who seeks to go on with Section 34 application while the award debtor (petitioner before this court) takes the plea of the proceedings before the NCLT. Further in *K. Kishan*, both the parties before the Supreme Court were before the NCLT and the NCLAT. In this case, the award-holder/respondent is admittedly not before the NCLT. The contentions of the petitioner/award debtor assume significance since the petitioner seeks to take refuge in the insolvency proceeding where the applicants/operational creditors are third parties who are in no way connected with the arbitration between the petitioner and the respondent. Whatever be the factual differences between the present case and *K. Kishan*, the intention of the Supreme Court was that corporate insolvency resolution proceedings cannot be used to defeat a claim or a dispute which existed prior to the initiation of the insolvency proceedings. The insolvency proceedings have admittedly been

admitted on 18th September, 2007 which is long after the reference and the appointment of the Arbitrator on 2nd May, 2006.

10. It would be evident from the dates since above that the impugned Award of 7th July, 2008 is a culmination of a dispute between the parties which existed before the initiation of corporate insolvency proceedings against the petitioner. It is also true that once the Award was challenged by the petitioner (Award Debtor) in 2008, the debt became disputed and subject to a decision in the Section 34 proceedings). This court is not inclined to agree with the contentions of the petitioner that the challenge to the Award cannot be considered by reason of the proceedings under the IBC. This is by reason of the fact that the respondent award-holder could not have filed a claim before the NCLT/IRP since the Section 34 proceedings had not been decided in favour of the said respondent in 2017 and hence there was no final or adjudicated claim as on that date. Further, once the stage under Section 14 of the IBC, namely, moratorium with regard to continuation of pending proceedings against the Corporate Debtor has been declared to be over, no further embargo remains for continuing to hear suits and other proceedings to which the Corporate Debtor (the petitioner in this case) is a party. In any event, Section 14(a) contemplates suits or continuation of pending proceedings "against" the Corporate Debtor and it is only the other sections which create roadblocks for transferring or disposing of any assets of the Corporate Debtor. In this case, the petitioner being the Corporate Debtor/Award Debtor cannot be permitted to take refuge under the provisions of the IBC for relegating the claim of the respondent award-holder to a limbo for an indefinite period of time on the specious plea of the respondent not having gone before the NCLT.

11. For the reasons as stated above, this Court finds no basis for relegating the Section 34 to the backburner. Although, no formal application has been made, this Court deemed it fit to pass this order since detailed submissions have been made by Counsel appearing for the parties.

12. Counsel for the petitioner seeks to file its affidavit in reply. Let affidavit in reply be filed within a week from date.

13. List the A.P. No.550 of 2008 on 21st January, 2020.