

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1719 of 2024

&

I.A. No. 6230 of 2024

[Arising out of order dated 10.07.2024 passed by the Adjudicating Authority
(National Company Law Tribunal, Division Bench, Court – II, Kolkata), in
I.A. (IBC) No. 542(KB)2024 in C.P. (IB) No. 142(KB)2023]

IN THE MATTER OF:

Century Aluminium Company Limited,

Having its Registered Office at:

Raja Road, P.O. Sukchar, 24 Parganas (North),

Kolkata, West Bengal – 700 115.

...Appellant

Versus

Religare Finvest Limited,

(CIN: U74999DL1995PLC064132),

Having its Registered Office at:

1407, 14th Floor,

Chiranjiv Tower, 43, Nehru Place,

New Delhi – 110019.

...Respondent

Present:

For Appellant : Mr. Joy Saha, Sr. Advocate with Ms. Saumya Datta, Mr. Avishek Guha, Mr. Kriti Gera, Mr. Siddhant Upmanyu and Ms. Tanya Malhotra, Advocates.

For Respondents : Mr. Sanjeev Singh, Ms. Taniya Bansal, Mr. Sandipa Bhattacharjee and Ms. Meenakshi S., Advocates.

O R D E R

ASHOK BHUSHAN, J.

This Appeal has been filed challenging the Order dated 10.07.2024 passed in I.A. IBC No. 542(KB)2024 filed by the Appellant. The Adjudicating

Authority by the Impugned Order rejected the I.A. 542/2024 against by which Order the Appeal has been filed.

2. Brief facts of the case, giving rise to the Appeal are:

- i. In the Year 2015, Century Aluminium Manufacturing Company Limited, the Corporate Debtor approached the Financial Creditor, seeking financial assistance, by sanction letter dated 26.08.2015, loan against the Property for an amount of ₹12,50,00,000/- was sanctioned.
- ii. Corporate Debtor created Security Interest by hypothecation of assets and equitable mortgage in favour of the Financial Creditor, State Bank of India and Canara Bank, being factory, land 9.34 acres, building and other constructions.
- iii. Corporate Debtor failed to maintain financial discipline and made several defaults. First default occurred on 01.05.2019, last part payment was made on 10.02.2020. Corporate Debtor expressed its acknowledgement of outstanding liability vide letter dated 22.08.2019 and 25.05.2022.
- iv. An Application under Section 7 was filed by the Financial Creditor for Financial Debt of ₹16,89,54,976.03/-. Financial Creditor, unilaterally appointed an Arbitrator to adjudicate dispute between the Parties on 26.07.2019. Sole Arbitrator vide Order dated 26.10.2021 terminated the Arbitration Proceeding, taking the view that appointment of Arbitrator is contrary to the law laid down by

the Hon'ble Supreme Court. On 23.06.2023, Financial Creditor filed an Application under Section 7 against the Corporate Debtor before the Adjudicating Authority Kolkata bench.

- v. On 20.12.2023, Corporate Debtor filed its Reply to the Section 7 Application. After filing of the Reply by the Corporate Debtor, an Application was filed being I.A. 542/2024 on 12.03.2024, seeking reference to Arbitration under Section 8 of the Arbitration and Conciliation Act, 1996. The Application filed by the Corporate Debtor was opposed by the Financial Creditor.
- vi. Adjudicating Authority heard Counsel for the Parties and by Impugned Order rejected the Application. Adjudicating Authority held that Section 7 Application need to be decided, the commencement of the Arbitration Proceeding before or after filing of Section 7 Application is immaterial.

3. Aggrieved by the Order of the Adjudicating Authority, rejecting the I.A., this Appeal has been filed.

4. We have heard, Learned Sr. Counsel, Mr. Joy Saha appearing for the Appellant and Learned Counsel Mr Sanjeev Singh appearing for the Respondent.

5. Learned Counsel for the Appellant challenging the Order of the Adjudicating Authority contends that Arbitration Proceedings were initiated by Financial Creditor, 4 years prior to filing of the Section 7 Petition. The Financial Creditor consciously chose to refer the dispute to Arbitration.

Having opted for arbitration, the Financial Creditor cannot initiate Section 7 proceeding, Arbitration Proceedings between the Parties is still pending and in subsistence. By Order dated 26.10.2021, Arbitrator merely recused himself. Termination of Arbitration Proceeding takes place under Section 32 of the Arbitration and Conciliation Act, 1996 and no Order was passed within meaning of Section 32. Provisions of Section 5 and Section 8 of the Arbitration and Conciliation Act, 1996, are mandatory in nature and it is the duty of the Court to refer the Parties to Arbitration in the event an Agreement for Arbitration exists. The Judgment of the Hon'ble Supreme Court in '**Indus Biotech Pvt. Ltd.' Vs. 'Kotak India Venture (Offshore) Fund, (Earlier known as Kotak India Venture Limited) & Ors.'**' reported in **(2021) 6 SCC 436**, is distinguishable since in the '**Indus Biotech Pvt. Ltd.' (Supra)**, case there was no prior reference to Arbitration and it was after proceeding under Section 7 have been commenced the Corporate Debtor sought to invoke Arbitration. In the present case, Financial Creditor itself has initiated the Arbitration Proceeding. The observation of the Adjudicating Authority that default *per se* is not arbitrable is unsustainable. Arbitral tribunal is not powerless to determine whether default in payment has occurred or not. Reliance on the Judgment of the Hon'ble Supreme Court in the matter of '**Booz Allen & Hamilton INC' Vs. SBI Home Housing Finance Ltd. & Ors.**', reported in **Civil Appeal No. 5440 of 2002**, is not applicable. Adjudicating Authority committed error in rejecting the Application filed by the Appellant.

6. Learned Counsel for the Respondent refuting the submission of the Counsel for the Appellant submits that Application seeking reference to

Arbitration was not maintainable. Appellant had already filed a Reply to the Petition under Section 7 on 28.12.2023, whereas Application was filed under Section 8 of the Arbitration Act on 12.03.2024. Application was filed by the Corporate Debtor only to delay the proceeding under Section 7. Arbitration Proceeding which was initiated by the Financial Creditor were terminated by the Arbitrator, and even if for the sake of argument, it is assumed that Arbitration initiated in 2019 is still alive, same could not create any bar on the Adjudicating Authority to decide the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016, (for short 'The Code' or 'The IBC'). In view of the Law laid down by the Hon'ble Supreme Court in '**Indus Biotech Pvt. Ltd.**' (**Supra**) Adjudicating Authority is duty bound to advert to the material available along with the Petition under Section 7 to indicate default and record satisfaction as to whether there is a debt and default or not. In case the conclusion is reached that there is debt and default payable then the Adjudicating Authority has to first decide Petition under Section 7 of the Code. Laid down by the Hon'ble Supreme Court in the '**Indus Biotech Pvt. Ltd.**' (**Supra**) was clearly applicable and submission of the Appellant that said Judgment is distinguishable is not acceptable. The Corporate Debtor in its proposal for One Time Settlement (OTS) dated 22.08.2019 and 25.05.2022 has acknowledged the Financial Debt and default. The debt having acknowledged by the Corporate Debtor on 25.05.2022 of ₹8.09 Cores. Default is an acknowledged fact and need no adjudication by Arbitrator with regard to default.

7. We have considered the submission of the Counsel for the parties and perused the record.

8. We have noticed above that Reply to Section 7 Application was filed by the Corporate Debtor on 28.12.2023 and the Application I.A. 542/2024 was filed on 12.03.2024. Copy of the Reply Affidavit by Corporate Debtor has been brought by Appellant as Annexure–C which is dated 28.12.2023. I.A. No. 542/2024 is also brought on record as Annexure–E to the Appeal, which Application, Notice of Motion was given on 07.03.2024. In the Application, following reliefs have been sought by the Corporate Debtor:

“(g) An order and/or direction be made referring the disputes between the parties to arbitration;

(h) An order thereby dismissing the said petition being CP(IB) No.142/KB of 2023;

(i) An order thereby staying the present proceeding being CP(IB) No.142/KB of 2023 till disposal of the present application;

(j) Ad-interim orders in terms of Prayers above;

(k) Costs;

(l) Further and/or other orders and/or directions as this Hon’ble Tribunal may deem fit and proper.”

9. Section 8 of the Arbitration and Conciliation Act, 1996, provides that a Party to the Arbitration Agreement, not later than date of submitting his first statement on the substance of the dispute may file the Application. Section 8 of the Arbitration Act is as follows:

“8. Power to refer parties to arbitration where there is an arbitration agreement.— [(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than

the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

10. In the present case, the Reply to Section 7 was filed in December 2023, whereas Application under Section 8 has been moved on 07.03.2024. We, thus, find substance in the submission of the Appellant that right to move Section 8 Application was forfeited since Corporate Debtor did not choose to file the Application.

11. We may first notice the acknowledgement of debt as is claimed by the Financial Creditor in Section 7 Petition which was filed by the Financial Creditor. In Section 7 Application, it was pleaded that Corporate Debtor has expressed its acknowledgement of the outstanding liability vide letter dated 22.08.2019 and 25.02.2022, which pleadings were made under the heading

“Limitation”. It is useful to extract the aforesaid pleadings from Section 7 Application:

“LIMITATION

- *That the Corporate Debtor failed to maintain financial discipline and made several delayed/partial payments and in some occasions failed to make certain instalments. The **first default in failure to repay the EMI due arose on 01.05.2019** and thereafter, the Corporate Debtor continued to intermittently make certain partial payments. It is further relevant to mention that said part payments (though not as per agreed loan repayment schedule) were made before expiry of limitation of 3 years and each such payment created a fresh period of limitation.*
- *That the **last successful part payment was made on 10.02.2020**, and no payment was made thereafter. It is submitted that fresh period of limitation shall be computed from the date of part payments in the light of Section 19 of the Limitation Act. Further, it is a settled position of law that the Financial Creditor is entitled to take benefit of 3 years period of limitation from the date of last payment.*

11. Furthermore, the Corporate Debtor has expressed its acknowledgment of the outstanding liability vide letter dated 22.08.2019 and 25.05.2022 wherein, the Corporate Debtor has inter alia proposed resolution for settling the outstanding debt which clearly shows that intent, acknowledgment, and continuance of debt on part of the Corporate Debtor. It is relevant to mention that said acknowledgments were made before expiry of limitation of 3 years and in terms provisions 18 of the Limitation Act, 1963 a fresh period of limitation shall be computed from the date of last acknowledgment i.e., 25.05.2022.”

12. Application under Section 7 was filed by the Financial Creditor in the Year 2023. The thrust of submission of the Appellant is that Financial Creditor itself has initiated Arbitration Proceeding by unilaterally appointed an Arbitrator on 26.07.2019, hence Section 7 Application ought not to have been proceeded and the Adjudicating Authority ought to have allowed the

Application filed by the Corporate Debtor under Section 8 of the Arbitration Act. There is no dispute to the fact that Financial Creditor has unilaterally appointed a sole Arbitrator and sole Arbitrator, however, terminated the Arbitration Proceeding on 26.10.2021 holding that appointment of Arbitrator is contrary to the law laid down by the Hon'ble Supreme Court in '**Perkins Eastman Architects DPC & Anr.' Vs. 'HSCC (India) Limited'**' reported in **Arbitration Application 32/2019**. The Counsel for the Appellant submits that the termination of the Arbitration can be done only under Section 32 and recusal of Arbitrator from proceeding is not a termination of Arbitration. Corporate Debtor has also referred to Notice given by the Corporate Debtor subsequent to initiation of Section 7 Application for initiating the Arbitration Proceeding.

13. Learned Counsel for both the Parties have referred to the Judgment of the Hon'ble Supreme Court in '**Indus Biotech Pvt. Ltd.' (Supra)** where the Hon'ble Supreme Court had occasion to consider the provisions of Arbitration and Conciliation Act, 1996, and the provision of Section 7 of the IBC. The ratio of the Judgment of '**Indus Biotech Pvt. Ltd.' (Supra)** can be culled out by Paragraph 29 of the Judgment, which is as follows:

***"29.** 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 1996 Act 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 1996 Act 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 the 1996 Act 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 1996 Act.”

14. From the law laid down by the Hon'ble Supreme Court, it is clear that if an Application under Section 8 of the Arbitration and Conciliation Act, 1996, is filed, the Adjudicating Authority is duty bound to proceed first to decide the Application under Section 7 by recording a satisfaction with regard to their being default or not. The fact that whether Arbitration Proceedings are pending on the date when Section 7 Application is filed or it is sought to be initiated subsequent to filing of Section 7 Application is immaterial. The remedy under Section 7 is a special remedy, keeping the object and purpose of the IBC Code. When it is brought in the notice of the Adjudicating Authority that a Corporate Debtor needs a resolution it having committed default in payment of debt, the Court is obliged to consider the Section 7 Application to find out as to whether there is a debt and default. The Insolvency Resolution of a Corporate Debtor which needs Insolvency Resolution can await adjudication of Arbitration Proceedings nor the Application under Section 7 can be kept pending till the adjudication of Arbitration Proceeding is completed. Allowing the Application under Section 8 filed by the Corporate Debtor amounts to asking the Adjudicating Authority to wait till Arbitration Proceedings are decided which is not in accord with the scheme of the IBC and shall defeat the entire purpose and object of the IBC. Adjudicating Authority in the Impugned Order has rightly rejected Application under

Section 8 filed by the Corporate Debtor for referring to the dispute between the parties to the Arbitrator.

15. As noted above, the Application under Section 8 was filed much subsequent to the filing of the Reply by the Corporate Debtor.

16. Learned Counsel for the Respondent has referred to the Judgment of Hon'ble Delhi High Court in the matter of '**Assam Petroleum Ltd. & Ors.**' **Vs. 'China Petroleum Technology Development Corporation & Ors.'** reported in **2024 SCC OnLine DL 1832**, where in Paragraphs 19 and 20 following has been observed:

“19. The issue of reference under Section 8 after the period of filing the Written Statement has expired qua the jurisdiction of Civil Courts, came up for consideration in the case of SPML Infra Ltd. v. Trisquare Switchgears (P) Ltd., (2022) 4 HCC (Del) 249. While considering an appeal against the order of the Commercial Court which rejected the appellant's application filed under Section 8 of the Arbitration and Conciliation Act, 1996, the Coordinate Bench of this Court held that the scheme of the Act, 1996 clearly stipulates a framework of time within which an application can be pursued under Section 8(1) of the A&C Act.

20. Consequently, if a party fails pursue an application under Section 8(1) of the Act, 1996 for referring the parties to arbitration within the time available or granted for filing the first statement on the substance of the dispute, including a Written Statement, the party would forfeit its right to apply under Section 8(1) of the A&C Act. Thus, once the defendant has submitted himself to the jurisdiction of the Court, he cannot seek referral of the disputes to arbitration under Section 8 of the Arbitration & Conciliation Act, 1996 having abandoned the application after filing.”

17. We, thus find substance in the submission of the Counsel for the Respondent that by not filing of Application under Section 8 at the time of filing of a Reply to Section 7, Corporate Debtor has forfeited his right to file his Application under Section 8. In Paragraph 25, Hon'ble Delhi High Court dismissed the Application under Section 8 filed by the Appellant. Paragraph 25 is as follows:

“25. The defendant had a right to invoke arbitration at that stage as well as had a right to seek the referral of the disputes to Arbitration under Section 8 Arbitration & Conciliation Act, 1996 in the present suit, but as discussed above, he submitted to the jurisdiction of the Court by seeking time to file the written Statement and therefore, his application under Section 8 of the Act, 1996 is held to be without merit as having been abandoned and is hereby, dismissed.”

18. Counsel for the Appellant has much emphasised that the earlier Arbitration Proceedings cannot be treated to have been terminated when the Arbitrator recused himself and termination of the Arbitration Proceedings has to be as per Section 32 of the Arbitration Act. Even for arguments sake, we accept the submission of the Appellant that Arbitration Proceeding which were initiated by Financial Creditor are still pending, that neither preclude the Financial Creditor from filing a Section 7 Application nor preclude the Adjudicating Authority to proceed to consider the debt and default in Section 7 Application.

19. As noted above, in the present case, debt and default is admitted by Corporate Debtor in its One Time Settlement offers issued twice in the Year 2019 and 2022.

20. We, thus are satisfied that no error has been committed by the Adjudicating Authority in rejecting the I.A. No. 542/2024, filed by the Appellant.

There is no merit in the Appeal. The Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

NEW DELHI

29th October, 2024

himanshu