O.P.No.377 of 2021 and O.A.No.363 of 2020

N. SATHISH KUMAR, J.

O.P.No.363 of 2020 is filed for an interim injunction restraining the 2nd Respondent, its agents, men, representatives, assigns or such other persons claiming through or under the 2nd Respondent from canceling the allotment of Flat No.406 ad measuring an extent of 885 Sq.ft.in Kodai Block, Innova Project situated at Addision Nagar Main Road, Narasimhan Street, Mangadu-600122 pending adjudication of the arbitration dispute.

2. O.P.No.377 of 2020 is filed to appoint a Sole Arbitrator as per Clause in Page 12 under the Memorandum of Agreement entered between the Petitioner and 1st Respondent on 29.08.2013 and subsequently assigned to 2nd Respondent by Resolution Plan approved by National Company Law Tribunal, Chennai on 13.12.2019 for the purpose of adjudication of the dispute that arose between the Petitioner and the Respondents under Section 11(6) of the Arbitration & Conciliation Act, 1996.

3. It is the case of the Petitioner that 1st Respondent is a real estate promoter

and builder, entered into an agreement with Petitioner to construct a flat bearing No.406 of about 885 sq.ft. for a sale consideration of Rs.18,42,540/- including the cost of Rs.75,000/- for one reserved car park. The above figure is inclusive of consideration for sale deed at Rs.3,63,000/-, cost of construction at Rs.12,16,500/- and Rs.2,63,040/- towards stamp duty, registration charges, amenities, corpus fund etc., the Petitioner has paid the entire sale consideration and had even got Sale Deed dated 19.11.2012. Under the sale deed an extent of 330 sq.ft.undivided share of land was conveyed. Thereafter Memorandum of Agreement was entered into between the parties on 29.08.2013.

4. As per the Memorandum of Agreement, the 1st Respondent has to complete the construction of the apartment and handover the possession of flat to the Petitioner within a period of 30 months from the date of getting building plan approved from CMDA with a grace period 3 months in total 33 months. However, the petitioner delayed in handing over the possession. When the matter stood thus, Insolvency Proceedings initiated against the 1st Respondent under the Insolvency and Bankruptcy Code (IBC) in Application CP/193/(IB)/CB/2018 on 13th July 2018 and ordered commencement of Corporate Insolvency Resolution Process

(CIRP). The Insolvency Resolution Professional (IRP) appointed by the National Company Law Tribunal (NCLT) invited claims from Creditors through public announcement on 28.07.2018 and vide amended public announcement dated 02.08.2018. Accordingly, the Petitioner submitted his claims on 06.08.2018 for Rs.19,75,290/-. Thereafter, there was no communication from IRP with regard to the Petitioner's claim. The Petitioner sent various communication to the Resolution Professional. But no communication or reply of any sort from the RP. However, the Petitioner came to know that NCLT vide its order dated 13.12.2019 has approved the Resolution Plan submitted by the 2nd Respondent. The Second Respondent claimed excessive amount of Rs.8,50,949/- and sent e-mail to the Petitioner to pay the amount within a period 60 days. The Petitioner issued legal notice on 27.08.2020 invoking Arbitration Clause in Page No.12 of the Arbitration Agreement dated 29.08.2013 and suggested to appoint Mr.R. Vishnu, Advocate as Sole Arbitrator to arbitrate the dispute.

5. The above Petition was opposed by the 2nd Respondent. It is the contention of the 2nd Respondent that the Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor the 1st Respondent on

13.07.2018 and claims also invited. If it is the contention of the Petitioner that the alleged claim filed before the Resolution Professional (RP) was not communicated to him, the Petitioner ought to have approached the National Company Law Tribunal (NCLT) for seeking direction against the RP to accept the claim. Since the Petitioner had failed to do so, his claim was accepted to the tune of Rs.3,63,000/-. Hence it is the contention of the 2nd Respondent that the resolution plan filed by the successful Resolution Petitioner, however, was challenged by way of several applications. Ultimately the NCLT dismissed their objection and affirmed the Resolution Plan under Section 31(1) of the IB Code. Hence, it is his contention that the petition is not maintainable.

6. The learned counsel for the Petitioner submitted that the claim of Rs.19,75,290/- was not considered by the IRP, before the NCLT proceedings. Hence, it is his contention that since the Petitioner has participated in the Resolution Process and his claim is also recognized to some extent and the remaining claim has not been considered by the adjudicated authority, second Respondent being the assignee is bound by the Arbitration clause governing the parties to the original agreement. Hence, learned counsel submitted that the

application for referring the matter to the arbitration is very well maintainable. In support of his contention, he relied upon the following judgments:

1. *Tata Steels BSL Ltd. vs. Varsha & another* ***[W.P.No.8620 of 2018 Bombay High Court Dt.28.03.2019]***

2. *Committee of Creditors of Essar Steel Indian Ltd., Vs. Sathish Kumar Gupta & Ors.* ***[(2020) 8 Supreme Court Cases 531]***

7. Whereas, learned counsel appearing for the Respondents submitted that once the Resolution Plan is duly approved, any person aggrieved said order, the remedy lies before the NCLT under Section 32 r/w 61 of the IBC. In such a view of the matter, the Petitioner's claim has already decided. Even assuming that it has not been decided, subsequent proceedings is not maintainable to refer the dispute for Arbitration. Hence submitted that the Petition itself is not maintainable. In support of his contention, he relied upon the following judgments:

1. *Chennai Metro Rail Ltd., vs. Lanco Infratech Limited and others* ***[2020 (6) CTC 777]***

2. *Ghanashyam Mishra and Sons Pvt. Ltd., vs. Edelweiss Asset Reconstrcution Company Limited* ***[Civil Appeal***

No.8129 of 2019 Supreme Court Dated 13.04.2021]

3. *Sheenlac Noroo Coatings India Pvt. Ltd., vs. Tata Steel BSL Ltd.,* ***[2020 (2) CTC 487]***

8. It is not disputed that the Corporate Insolvency Resolution Process (CIRP) was initiated against the first Respondent and Insolvency Resolution Professional (IRP) was also appointed. It is also admitted by the Petitioner that he has also submitted claim before the IRP. However, his only grievance is that the entire claim has not been considered by the IRP and no communication was sent to him. It is also to be noted that the Corporate Insolvency Resolution Process was commenced and Insolvency Resolution Professional (IRP) was also appointed, IRP invited claims from Creditors though public announcement made under Section 13 and 15 of the IBC. After collation of all claims the Interim Resolution Professional shall form a committee of Creditors which shall consists of all Financial Creditors.

9. In ***Swiss Ribbons vs. Union of India [2019(2) CTC 168 (SC)*** the Honourable Apex Court has held that once CIRP proceedings are initiated, it is no

longer a proceeding between the Applicant-Creditor and the Corporate Debtor but is envisaged to be a proceeding involving all Creditors of the debtor.

10. The Three Judges Bench of the Honourable Apex Court in ***Ghanashyam Mishra and Sons Pvt. Ltd., vs. Edelweiss Asset Reconstrcution Company Limited [Civil Appeal No.8129 of 2019 Supreme Court Dated 13.04.2021]*** has held as follows:

> *"95. In the result, we answer the questions framed by us as under:*
>
> *(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."

11. Since the claim has already decided and accepted only to the minimum extent, the Petitioner cannot initiate or continue any proceedings at that stage. If the Resolution Plan is approved, any person aggrieved for such order, he can file an appeal before the National Company Law Tribunal under section 32 r/w 61 of the IBC. But such process has not been taken by the Petitioner herein. Once the Plan is approved the Claim has been accepted partly, the contention of the Petitioner that he can pursue for remaining amount by a separate proceedings

cannot be countenanced. If such contention is accepted, it will amount to open the Pandora Box to disturb the settled process. Hence, this Court is of the view that the contention of the Petitioner cannot be countenanced.

12. In ***Tata Steel BSL Ltd., case,*** (supra) the learned single judge of Bombay High Court has held that the pending civil suit before the Trial Court cannot be extinguished merely because the resolution plan came into existence. The relevant paragraph of the judgment is as follows:

> *"28. The emphasis placed on sections 63 and 238 of the IBC by the learned counsel for the petitioner to claim that the suit filed by respondent No.1 deserves to be dismissed, is wholly misplaced because the jurisdiction of the Civil Court is barred under section 63 of the IBC in respect of any matter on which the National Company Law Tribunal or the National Company Law Appellate Tribunal have jurisdiction under the IBC. The said jurisdiction necessarily pertains to the corporate insolvency resolution process and the Civil Court can obviously not encroach upon the same. Section 238 of the IBC is also to be read in that context to mean that when the question of corporate insolvency resolution process*

arises, IBC would have an overriding effect. As noted above in the present case, respondent No.1 did participate KHUNTE WP8620.18-Judgment 42/52 in the resolution process due to which, the claim of respondent No.1 as an operational creditor stood recognized in the resolution plan dated 03/02/2018 and the suit pending before Trial Court would certainly survive and it would be relevant for determining the amount due from the petitioner, to be satisfied from the amount of Rs.1200 crore set apart under the resolution plan as the operational creditors settlement amount. It cannot be held that the Adjudicating Authority or the Appellate Authority under the provisions of the IBC would be equipped to decide the objection raised on behalf of the petitioner before the Trial Court regarding alleged sub-standard quality of goods supplied by respondent No.1 for denying its liability to pay the dues. Therefore, the civil suit pending before the Trial Court cannot be extinguished merely because the resolution plan came into existence, which stood approved by the Adjudicating Authority as well as the Appellate Authority."

13. The Bombay High Court has dismissed the petition mainly on the ground that the Respondent recognized as operational creditor in the Resolution

Plan that would be relevant for determining the amount due from the petitioner, to be satisfied from the amount of Rs.1200 crores set apart under the resolution plan as the operational creditors settlement amount. Only in such situation, the pending suit is allowed to continue. The above judgment is not applicable to the facts of the present case.

14. In ***Essar Steel Indian Ltd., case,*** (supra) deals with extension of time for conclusion of the Resolution Process. The same is not applicable to the fact of the present case. In such a view of the matter Original Petition No.377 of 2020 is liable to be dismissed.

15. Accordingly, O.P.No.377 of 2020 is dismissed. Consequently, O.P.No.363 of 2020 is closed.

15.04.2021

N. SATHISH KUMAR, J.
ggs

O.P.Nos.363 and 377 of 2020

15.04.2021