ORDER SHEET OC-49

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION

AP-COM/847/2024
NURIT PROPERTIES PVT.LTD.
VERSUS
SREI EQUIPMENT FINANCE LTD. & OTHERS

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 13th February, 2025.

Appearance:

Mr. Suddhasatva Banerjee, Advocate
Ms. Asia Hasan, Advocate
...for petitioner.

Mr. JishnuSaha, Sr. Advocate
Mr. Sankarsan Sarkar, Advocate
Mr. Aditya Kanodia, Advocate
Ms. Shreya Trivedi, Advocate
... for respondent Nos.1 and 2.

The Court:- This is an application for appointment of a learned arbitrator on the strength of Clause 10.4.1 of the Master Debt Restructuring Agreement [hereinafter referred to as 'Master Agreement'] entered into between the petitioner and the respondent Nos.1 and 2. The petitioner also relies on Clause 2 of the Arbitration Agreement dated September 23, 2019 entered into between the petitioner, the proforma respondent and the respondent Nos.1 and 2. According to the petitioner, both these agreements form part of the same transaction. Thus, the respondent No.3 has been added as a proforma party. The petitioner contends that only the signatories to the Master Agreement and the subsequent agreement dated September 23, 2019 have been impleaded as parties.

Mr. Banerjee, learned Advocate for the petitioner submits that, the objection raised by the respondent Nos.1 and 2 in their affidavit in opposition with regard to non-joinder of parties, is misconceived. The scope of the referral court is to enquire as to whether the parties impleaded were parties to the arbitration agreement and whether there was a relationship between the parties arising out of such agreement i.e. whether there was a privity between the parties. The contention of the respondents that another party had acquired interest in some shares from the proforma respondent, can be validly urged before the learned arbitrator and the learned arbitrator can decide the issue of non-joinder. The interested parties can also appear before the learned arbitrator and file application(s) for their addition. The respondent Nos.1 and 2 can also pray for such addition. The eye of the needle test or the prima facie test which the referral court is required to undertake is limited to ascertaining whether the agreement contains an arbitration clause and whether a notice invoking arbitration had been properly issued. The contention of the respondents that a business transfer agreement between the respondents having been executed, the respondent No.2 ceased to have any connection in respect of the loan transaction with the petitioner is a matter which needs adjudication. Whether the respondent No.2 has any further role to play insofar as, the claim of petitioner is concerned, is a matter which will be decided by the learned arbitrator.

It is next contended that the claim is a live claim. The Master Agreement was entered into between the parties sometime in 2019. As per the terms of the said agreement, the loan was restructured and the repayment would commence after five years from the date of the execution. Thus, the liability of the borrower to pay back the money as per the master agreement did not mature until September, 2024.

With regard to not impleading Infrastructure Resurrection Funds (IRF) as a respondent, Mr. Banerjee submits that IRF was not a signatory to either the Master Agreement or the subsequent arbitration agreement. It is open to the respondents to raise such issue before the learned arbitrator.

With regard to the contention of Mr. Jishnu Saha, learned senior advocate, that the proceeding under Section 7 of the Insolvency and Bankruptcy Code, 2016 [for short, 'IBC'] would debar the learned arbitrator from proceeding with the matter as the said proceeding was also a civil proceeding, Mr. Banerjee submits that the law does not prohibit appointment of an arbitrator by the referral court in exercise of power under Section 11 of the Act of 1996. Pendency of an application under Section 7 of the IBC is not a proceeding in rem. Had the application been admitted, the situation would have been otherwise. In support of his contention as to the scope of enquiry by the referral court under Section 11 of the Act of 1996, Mr. Banerjee relies on a decision of the Hon'ble Apex Court in Vidya Drolia v. Durga Trading Corporation reported in (2021) 2 SCC 1.

Mr. Jishnu Saha, learned Senior advocate for the respondent Nos. 1 and 2 submits that the fact that the respondent No. 3 had pledged its shares to IRF was well known to the petitioner. In spite of such knowledge, IRF was not impleaded as a respondent. Mr. Saha contends that in the decision in Vidya Drolia (supra), Hon'ble Apex Court has held that the scope of enquiry by a referral court was whether the parties to the agreement had been impleaded and whether there was privity between the parties. Thus, IRF is a necessary party. It is next contended by Mr. Saha that the agreements referred to by Mr. Banerjee do not form a part of the same transaction. The other contention of Mr. Saha is that the respondent No. 2 does not have any further liability arising out of the loan transactions, after a business transfer agreement between the respondents Nos. 1 and 2 had been entered into with retrospective effect. The most important point urged by Mr. Saha is that, an application under Section 7 of the IBC had been filed by the respondent No. 1 before the National Company Law Tribunal (NCLT), which was pending. As the petitioner defaulted in repayment of the debt owed to the respondent No. 1 by violating the repayment schedule contained in the Master Agreement, a demand notice had been issued claiming payment of the debt amounting to Rs. 11 crore. As the corporate debtor failed and neglected to clear the dues, the financial creditor filed the application for initiation of Corporate Insolvency Resolution Process (CIRP).

The contention of the petitioner that, no debt was payable, on the ground that the repayment schedule would set in only after five years from the execution of the Master Agreement, will also be considered by the NCLT. The dispute raised by the petitioner in the notice under Section 21 of the Act of 1996 and in the application before this Court is also that, the petitioner was not required to repay the loan as claimed by the respondent No.1 until the expiry of 5 years from the date of execution of the Master Agreement. According to Mr. Saha, when the issues to be referred to arbitration and the issues to be adjudicated by the NCLT were one and the same, it would serve no purpose for the referral court to refer the dispute until adjudication of the application under Section 7 of the IBC. The provisions of IBC have an overriding effect over all other statutes and the arbitration proceeding cannot proceed, even if a reference is made. Reliance has been placed on Section 231 and Section 238 of the IBC in support of the contention that the jurisdiction of a civil court is barred under the law and the provisions of IBC will supersede all laws, including the Arbitration and Conciliation Act, 1996. Reference has been specifically made to paragraph 14 of the decision in Indus Biotech Pvt. Ltd. v. Kotak India (Offshore) Fund & Others reported in (2021) 6 SCC 436 wherein the Hon'ble Apex Court specifically held that the scope of adjudication under Section 7 of the IBC will be whether there is a debt due by the corporate debtor or not.

Considered the submissions of the respective parties. The Hon'ble Apex Court has time and again held that the scope of enquiry by a referral court is restricted to determination as to whether there is an existing arbitration clause and whether the invocation has been properly made. With regard to issues of non-arbitrability, jurisdiction etc., the Hon'ble Apex Court was of the firm view that those issues should be raised before the learned arbitrator. The learned arbitrator was authorized by law to even rule on his own jurisdiction. Section 16 of the Act of 1996 is based on the principle of Komptenz-Komopetenz. The objections raised by Mr. Saha with regard to non-joinder of IRF, cessation of liability of the respondent No.2 after the business transfer agreement, can be raised before the learned arbitrator and the learned arbitrator can adjudicate on the same. The question which has been forcefully urged by Mr. Saha with regard to the bar under Sections 231 and 238 of the IBC, on the referral court and the learned arbitrator to proceed, this Court is of the view that mere filing of an application under Section 7 of the IBC cannot be treated as an embargo on this court to exercise jurisdiction under Section 11 of the 1996 Act. Whether the arbitration can proceed with the matter, can be left to be decided by the learned Arbitration.

The proceeding before the learned NCLT will become a proceeding in rem only when NCLT applies its mind, considers the records and submissions of the parties and arrives at a finding that there is a debt due. There must be an adjudication. An order under Section 7 (5) of the IBC must be passed. Only then, with the embargo will be triggered. In my opinion, Section 238 of the IBC will not come into operation at this stage. That mere filing of an application under Section 7 of the IBC cannot be treated as an embargo on the Court exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act. In the facts of the present case, as the Corporate Insolvency Resolution Process as initiated by the respondent under Section 7 of the IBC is yet to reach a stage of the NCLT passing an order admitting the said proceedings, this Court is not be precluded from exercising its jurisdiction under Section 11 of the Arbitration and Conciliation Act, when admittedly, there is an arbitration agreement between the parties and invocation of the arbitration agreement has been made.

Under such circumstances, the application is allowed. The issues raised by Mr. Saha can be raised before the learned arbitrator at the appropriate stage.

This Court appoints Mr. Mainak Bose, learned Senior Advocate, Bar Library Club, as the arbitrator to arbitrate upon the disputes between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996. The learned arbitrator shall fix his own remuneration as per the Schedule of the Act.

(SHAMPA SARKAR, J.)

S. Kumar / R.D. Barua