



Supreme Court holds that NCLT can consider an application filed under Section 8 of Arbitration Act in a petition under Section 7 of IBC¹

Brief Facts

Indus Biotech (“**Petitioner**”) filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (“**Act**”) in the Supreme Court of India for appointment of the arbitral tribunal to adjudicate its disputes with Respondent Nos. 1–4 (“**Respondents**”). Respondent No. 1 is a Mauritius based company, whereas Respondent Nos. 2 – 4 are Indian companies and sister ventures of Respondent No. 1. The dispute sought to be referred to arbitration arose between the parties under different share subscription and shareholders’ agreements. The Respondents sought to convert their preference shares they held in the Petitioner into equity shares. As the conversion formula to be applied in converting the shares was disputed, the Petitioner did not pay the Respondents the redemption amount. Terming this as ‘default’, Respondent No. 2 filed a petition under Section 7 of the Insolvency & Bankruptcy Code, 2016 (“**IBC**”) before the National Company Law Tribunal (“**NCLT**”). The Petitioner argued that as the subject matter of the arbitration is same, although under different agreements, the arbitration could be conducted by a single arbitral tribunal as an international arbitration. The Petitioner filed an application under Section 8 of the Act in the Section 7 petition, seeking a direction to refer the parties to arbitration.

The NCLT, *vide* its order, dismissed the petition under Section 7 of the IBC and allowed the application under Section 8 of the Act.

The Supreme Court (“**Court**”), while hearing the matter under Section 11 of the Act, also heard the connected Special Leave Petition challenging the NCLT’s order.

Issues

Issue (i): Whether the NCLT erred in passing an order under Section 8 of the Act in a petition under Section 7 of the IBC?

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Issue (ii): Whether one arbitral tribunal can be appointed if there are separate arbitration agreements and one of the respondents is a foreign company?

Judgment

At the outset, the Court clarified that it would have normally relegated the order passed by the NCLT under Section 7 of the IBC to the National Company Law Appellate Tribunal (“**NCLAT**”); however, as the Section 11 petition was already pending before the Court when the NCLT passed its order, the Court is hearing the matter on merits in such special circumstances.

Issue (i): The Court, relying on its decision in **Vidya Drolia v. Durga Trading Corporation**,² held that a petition under Section 7 of the IBC only becomes a proceeding *in rem* only once the Adjudicating Authority has recorded a finding of default and admitted the petition, from which point onwards the matter would not be arbitrable. The Court held that on admission, a third party right is created in favour of all creditors of the corporate debtor and will have an *erga omnes* effect. Therefore, the mere filing of a petition before admission cannot be considered as proceedings *in rem*, as was the case in the instant proceedings. The Court clarified that any application filed under Section 8 of the Act after a Section 7 petition is admitted would not be maintainable. However, if an application under Section 8 of the Act is filed before a Section 7 petition is admitted, the Section 7 petition will be heard first and the application under Section 8 of the Act would be kept along for consideration, as the decision in the Section 7 petition would have a direct bearing on the Section 8 application. The Court lastly observed that although the NCLT allowed the application under Section 8 of the Act in this case, the same would be subject to the petition filed under Section 11 of the Act.

Issue (ii): The court held that as the petition under Section 7 of the IBC had been rightly dismissed, the petition under Section 11 of the Act is maintainable as otherwise, the parties would be left with no remedy if the process of arbitration is not initiated. Further, relying on its judgment in **M/s Duro Felguera v. M/s Gangavaram Port Ltd.**,³ the Court held that when there are separate arbitration agreements entered into by parties, there cannot be a single arbitral tribunal. However, keeping in mind the similarity in the nature of disputes under all the agreements, the Court held that the members comprising the tribunal will be the same for all the arbitrations, but separately constituted in respect of each agreement. The Court lastly held that the arbitral tribunal should keep the international arbitration proceedings separate and club the domestic disputes.

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The Court came to the conclusion that if a petition under Section 7 of the IBC is dismissed, no proceedings *in rem* would exist and therefore, an application under Section 8 of the Act would be maintainable. The Court justified why it did not relegate the matter to the NCLAT and invoked its inherent powers to grant an order, which would result in doing complete justice between the parties. It will be interesting to see whether this decision will encourage parties to file an application under Section 8 of the Act once a company is dragged to court under the IBC. Nevertheless, the judgment undoubtedly saves parties from years of protracted litigation and unnecessary delays. Moreover, recognising that there existed separate arbitration agreements between the parties and that the nature of disputes is similar, the Court has correctly followed the judgment in ***Duro Felguera*** (*supra*) and constituted separate arbitral tribunals, albeit consisting of the same members.

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- 1 Authored by Siddhartha Datta, Partner, Surabhi Binani and Sejal Agarwal, Associates; *Indus Biotech Private Ltd. v. Kotak India Venture (Offshore) Fund. & Ors.*, Arbitration Petition (Civil) No. 48/2019, Supreme Court of India, 2021 SCC OnLine SC 268, judgment dated 26 March 2021.
Coram: S.A. Bobde, A.S. Bopanna, V. Ramasubramanian, JJ.
- 2 (2021) 2 SCC 1.
- 3 (2017) 9 SCC 729.

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