



Guest Column

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Is Insolvency Resolution Process barred if a challenge to an Arbitral award is pending?

Section 34 of the Arbitration and Conciliation Act, 1996 provides recourse for challenge to an arbitral award. Sub section (4) provides that "on receipt of an application under sub section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award." The contention is whether this challenge under section 34 can form the basis for action under section 9 of the Insolvency and Bankruptcy Code, 2016, section 9 being the application for initiation of corporate insolvency resolution process by an operational creditor.

In an earlier judgement, M/s Ksheeraabd Constructions Private Limited versus M/s Vijay Nirman Company Private Limited, the National Company Law Appellate Tribunal (NCLAT) had held that arbitral proceedings pending under section 34 of the Arbitration and Conciliation Act does not constitute a dispute as defined by section 8 of the Insolvency and Bankruptcy Code, 2016 and therefore this could not constitute any challenge to the Corporate Insolvency Resolution Process (CIRP) under the Code. On an application by the Operational creditor, Vijay Nirman Company, the NCLAT had admitted the application whilst passing a moratorium and appointing an Insolvency Resolution Professional (IRP). The Appellant submitted that there was the existence of a counter claim as well as the fact that the arbitration award was not final there being no decree. The counter claim could be said to be a proof of existence of a dispute and besides this fact was highlighted to the operational creditor. The main contention of the Respondent was that no dispute was raised by the Appellant prior to the notice under section 8 of the Code which goes to prove that there was no existence of a dispute. The NCLAT ruled, that the pending proceedings under section 34 cannot be considered to be an existing dispute under the Code. The NCLAT relied upon section 238 of the Code which reads "The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of such law."

This Judgement of the Adjudicating Authority (AA) was over-

turned by the Hon'ble Supreme Court. The Apex Court had to consider whether the Code can be invoked for an operational debt wherein an application under section 34 of the Act has been filed against an award in favour of the creditor and the award has not been fully adjudicated upon. It was held that the pendency of an application under section 34 of the Arbitration and Conciliation Act, 2016 constitutes a dispute under section 8 of the Code and in effect bars the initiation of the CIRP under section 9 of the Code. The Supreme Court relying upon the landmark judgment in Mobilox Innovations Private Limited v. Kirusa Software Private Limited held that for an operational debt the AA has only to determine whether such debt is disputed or not. Further, there was no reason to believe that the counter claim of the Appellants which was substantially higher than the award in favour of the Respondents would not succeed. The Supreme Court also ruled that the non-obstante clause under section 238 of the Code does not come into play there being no inconsistencies between the provisions of the Act and the Code. The Code may also not be misused in that it cannot be used to extract small amounts from a corporate debtor whilst the Company may very much be solvent and such amount may not be finally payable as it is yet disputed.

The Hon'ble Supreme Court has vide this judgement and in its intent tried to reconcile the two legislations. Keeping the spirit of the Code alive, the Supreme Court has conveyed that the Code needs to be treated with care and caution and that the non-obstante clause should be used only where there exist clear inconsistencies between the provisions of the Code and another Act. This judgment may have put the operational creditor to some disadvantage especially in genuine cases as he will now have to wait until the entire process under arbitration including any challenges is completed which may in turn lead to operational delays. For the corporate debtor, the judgment spells good news as it cannot now be pulled up frivolously and the Code used as an end to a means. In short there is a clear conclusive message sent out by the Hon'ble Supreme Court that this legislation was set up for a purpose and should accordingly evolve to reflect this goal.