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Section 9 of the IBC cannot be invoked to execute an arbitral award during the pendency of an 'appeal' under Section 34 of the Arbitration Act

The National Company Law Appellate Tribunal at Chennai (“NCLAT”) has in *M/s. KK Ropeways Limited v. M/s Billion Smiles Hospitality Private Limited*¹ *inter alia* held that an arbitral award cannot be enforced under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“IBC”) when a challenge under Section 34 of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”) has been preferred against such an award.

Brief Facts

On March 9, 2015, M/s Billion Smiles Hospitality Private Limited (“**Respondent**”) entered into a rent agreement with M/s. KK Ropeways Limited (“**Appellant**”) for the purpose of occupying and operating a food court out of a complex owned by the Appellant (“**Agreement**”). As per the Agreement, the Respondent was obligated to make monthly payment towards certain charges, including water, electricity, and common area maintenance. However, the Respondent defaulted in making payments since the inception of the Agreement.

Consequently, the Appellant issued a notice invoking arbitration in terms of the Agreement and approached the Delhi High Court (“**Delhi HC**”) to seek the appointment of an arbitrator under Section 11(6) of the Arbitration Act. An *ex-parte* arbitral award was passed in favour of the Appellant for recovery of INR 26,33,022 (Indian Rupees twenty six lakh thirty three thousand twenty two only) along with interest from the Respondent (“**Impugned Award**”). The Respondent filed a petition under Section 34 of the Arbitration Act challenging the Impugned Award (“**Appeal**”).

During the pendency of the Appeal before the Delhi HC, the Appellant sought to execute the Impugned Award by issuing a demand notice (for an operational debt) under the IBC (“**Demand Notice**”). By the Demand Notice, the Appellant called upon the Respondent to pay the operational debt within 10 (ten) days from receipt. 4 (Four) months after issuing the Demand Notice, the Appellant filed a petition against the Respondent under Section 9 of the IBC (“**Section 9 Petition**”).

The National Company Law Tribunal, Bengaluru (“**NCLT**”) passed an order dated April 27, 2021 *inter alia* holding that the operational debt in question was deemed to be in dispute on account of the pendency of the Appeal. Consequently, the Section 9 Petition was dismissed (“**Impugned Order**”).

Aggrieved by the Impugned Order, the Appellant filed an appeal before the NCLAT *inter alia* contending that the amount owed by the Respondent had not been disputed and had accordingly been crystallised in the form of the Impugned Award (which was an operational debt). The Respondent *inter alia* contended that the Impugned Award

¹ Comp. App (AT) (CH) (INS.) No. 246/2021

(which formed the basis of the Appellant's claim for operational debt) was disputed and pending adjudication in the Appeal before the Delhi HC.

Issue

Whether a petition filed under Section 9 of the IBC is maintainable for the purpose of executing an arbitral award?

Findings and Analysis:

The NCLAT upheld the Impugned Order and dismissed the appeal while *inter alia* observing the following:

1. Arbitration proceedings and proceedings under the IBC cannot go on in parallel.
2. A dispute in existence includes raising a dispute before a court of law or an arbitral tribunal prior to receipt of a demand notice under Section 8 of the IBC. Further, the existence of the dispute continues at the stage where a party challenges an arbitral award.
3. To initiate the corporate insolvency resolution process against a corporate debtor, there ought to be no real dispute existing between the parties in relation to the debt owed.
4. In the present case, the Appellant had filed the Section 9 Petition after a lapse of 4 (four) months from the date of the Demand Notice. The Appellant had not assigned any reasons for the delay in failing to take diligent steps towards implementation of the Impugned Award in accordance with law.

JSA Comment

This judgment confirms that a challenge or an appeal in an arbitral award under the relevant provisions of the Arbitration Act would be construed as a 'pre-existing dispute' under the IBC. As such, an arbitration award which has been challenged under the relevant provisions of the Arbitration Act cannot be enforced as an 'operational debt' under the provisions of the IBC.

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