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Bombay High Court holds that mere pendency of a Section 7 application under IBC does not bar appointment of an arbitrator under Section 11 of the Arbitration Act

A single bench of the High Court of Bombay (“**Bombay HC**”) in *Sunflag Iron & Steel Co. Ltd. v. M/s Poonamchand & Sons*¹ has held that appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) cannot be prevented on account of initiation of proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”)².

Brief Facts

M/s Sunflag Iron & Steel Co. Ltd. (“**Applicant**”) filed an application under Section 11 (6) of the Arbitration Act for appointment of an arbitrator in terms of its agreement with M/s Poonamchand & Sons (“**Respondent**”). The Applicant submitted that the application under Section 11(6) of the Arbitration Act ought to be allowed since the 2 (two) conditions necessary for appointment of the arbitrator i.e., the existence and validity of the arbitration agreement required under Section 11 (6) of the Arbitration Act were duly satisfied and not disputed by the Respondent.

On the other hand, the Respondent contended that since it had already approached the National Company Law Tribunal (“**NCLT**”) under Section 7 of the IBC, the application under Section 11 of the Arbitration Act for appointment of the arbitrator was not maintainable. In support of this contention the Respondent relied on Section 238 of the IBC and submitted that the provisions of the IBC had an overriding effect on Section 11 (6) of the Arbitration Act. The Respondent further contended that the proceedings under Section 11(6) of the Arbitration Act were initiated by the Applicant despite there being no dispute pending between the parties and merely to obviate the proceedings filed by the Respondent before the NCLT.

In response, the Applicant submitted that no orders had been passed by the NCLT in the proceedings instituted by the Respondent under the IBC. Therefore, mere initiation of the proceedings by the Respondent under the IBC did not prevent the Bombay HC from deciding the application filed under Section 11 (6) of the Arbitration Act filed by the Applicant.

Issue

Whether the provisions of the IBC interdict the appointment of an arbitrator by invoking Section 11(6) of the Arbitration Act.

¹ Misc. Civil Application No. 374 of 2020.

² Section 7 of the IBC refers to the initiation of corporate insolvency resolution process by a financial creditor.

Analysis and findings:

The Bombay HC after considering submissions of the parties and the relevant provisions under the Arbitration Act and the IBC, *inter alia* made the following observations:

1. Despite not having an overriding provision akin to Section 238 of the IBC, the Arbitration Act is a special statute governing the field of arbitration in India.
2. The starting point for the bar under Section 238 of the IBC to be invoked would be the admission of the Section 7 application by the NCLT in terms of Section 7(4) read with Section 7(5) of the IBC and mere filing of an application under Section 7 of the IBC cannot by itself be said to be enough to invoke the bar under Section 238 of the IBC.
3. Further, in terms of Section 7(5) of the IBC, until and unless the NCLT is satisfied that there has been a default and admits the application on such ground, the mere filing of an application under Section 7 of the IBC would not act as a bar to any other proceedings under any other statute.
4. There is no inconsistency between the provisions of the Arbitration Act and that of the IBC, and the IBC would come into play only after an order under Section 7(5) of the IBC has been passed by the NCLT.
5. Till such time that the NCLT decides on the issue of occurrence of default in terms of Section 7(4) read with Section 7(5) of the IBC, an application under Section 11(6) of the Arbitration Act would be maintainable.
6. Referring to *Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund & Ors.*³, it was held that for an application under Section 7 of the IBC to be considered as a proceeding *in rem*, it is necessary that the NCLT applies its mind to the application, records its findings on default and admit such application.

In light of the above, the Bombay HC allowed the application under section 11(6) of the Arbitration Act and appointed a sole arbitrator for adjudication of disputes between the parties.

JSA Comment

This judgment of the Bombay HC *inter alia* clarifies the position on appointment of an arbitrator and initiation of arbitration proceedings under Section 11(6) of the Arbitration Act, during the pendency of an application under Section 7 of the IBC. This judgment affirms and crystallises the findings of the Bombay HC in *Jasani Realty Pvt. Ltd. v. Vijay Corporation*⁴. Moreover, this judgment is also in consonance with the findings of the Delhi High Court in *Millennium Education Foundation v. Educomp Infrastructure and School Management Limited*⁵ wherein the Delhi High Court *inter alia* held that the mere filing / pendency of Section 9 application before NCLT cannot be an embargo on the proceedings under the Arbitration Act.

³ (2021) 6 SCC 436.

⁴ 2022 SCC OnLine Bom 879.

⁵ Arb. Pet. 326 of 2022.

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