MOBILOX INNOVATIONS PVT. LTD. VS. KIRUSA SOFTWARE PVT. LTD.

Written by ***Shashank Shekhar Pandey***

4th Year BBA LLB, Symbiosis Law School Noida , Symbiosis International (Deemed University), Pune

Parties: Mobilox Innovations Pvt. Ltd. (Appellant) / Kirusa Software Pvt. Ltd. (Respondent)

Forum: Supreme Court of India

Coram: Justice Rohinton Fali Nariman and Justice Sanjay Kishan Kaul

Date of Judgment: 21st September 2017

Issue: What is the meaning of word "dispute" and "existence of dispute" for the purpose of determining the admissibility of petition filed by the operational creditor under Section 9 of the Code?

Previous Decisions: Initially the application was filed by Kirusa before NCLT, which was dismissed and thus gave rise to an appeal from Kirusa, which was filed before NCLAT. While adjudicating on the matter NCLAT decided to remit the matter to NCLT and quashed the dismissal order, which was given earlier by the adjudicating authority i.e. NCLT

Equivalent Citation: MANU/SC/1196/2017

Relevant Section: Insolvency and Bankruptcy Code, 2016 – Sec. 8 & Sec. 9

Cases Referred:

- **Madhusudan Gordhandas v. Madhu Woollen Industries Pvt. Ltd.** [(1972) 2 SCR 201]

- **Innoventive Industries Ltd. v. ICICI Bank and Anr.** [Civil Appeal No.8337-8338 /2017]
- **Samee Khan v. Bindu Khan** [(1998) 7 SCC 59]
- **Ishwar Singh Bindra v. State of U.P.** [MANU/SC/0344/1968]
- **Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.** [(2008) 4 SCC 755]
- **Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P.** [MANU/SC/0644/2013]
- **Director of Mines Safety v. Tandur and Nayandgi Stone Quarries (P) Ltd**. [(1987) 3 SCC 208]
- **Spencer Constructions Pty. Ltd. v. G & M Aldridge Pty. Ltd.** [(1997) FCA 681]
- **Eyota Pty. Ltd. v. Hanave Pty. Ltd.** [(1994) 12 ACSR 785]
- **Eng Mee Yong v. Letchumanan** [(1980) AC 331]
- **South Australia v. Wall** [(1980) 24 SASR 189]
- **Mibor Investments Pty. Ltd. v. Commonwealth Bank of Australia** [(1993) 11 ACSR 362]
- **Moyall Investments Services Pty. Ltd. v. White** [(1993) 12 ACSR 320]
- **John Holland Construction and Engineering Pty. Ltd. v. Kilpatrick Green Pty. Ltd.** [(1994) 12 ACLC 716]
- **Aquatown Pty. Ltd. v. Holder Stroud Pty. Ltd.**
- **Scanhill Pty. Ltd. v. Century 21 Australasia Pty. Ltd.** [(1993) 12 ACSR 34]
- **Chadwick Industries (South Coast) Pty. Ltd. v. Condensing Vaporisers Pty. Ltd.** [(1994) 13 ACSR 37]
- **Greenwood Manor Pty. Ltd. v. Woodlock** [(1994) 48 FCR 229]
- **In Re: Morris Catering (Australia) Pty. Ltd.** [(1993) 11 ACLC 919]
- **Hayes v. Hayes** [(2014) EWHC 2694]

Facts:

Mobilox hired Kirusa for the purposes of conduting televoting for a show which was being broadcasted on star plus and with respect to the same a Non disclosure agreement was executed between the parties. Under the agreement Kirusa owed certain obligations towards Mobilox. Kirusa used to raise invoices against the services provided. In due course of time Mobilox

informed Kirusa that payments are being withheld because of the breach of NDA by Kirusa. On 23 December 2016, Kirusa sent a Demand Notice to Mobilox under Section 8 (1) of the IBC. Mobilox responded to the Demand Notice stating, that there was existence of dispute between the parties, which was already brought to Kirusa's notice long ago. Even after receiving the reply from Mobilox, Kirusa filed an application before the NCLT, Mumbai for initiation of CIRP against the Mobilox. Said application was dismissed however, an appeal against the NCLT order was filed by Kirusa before the National Company Law Appellate Tribunal (NCLAT) where the order came in favor of Kirusa and the case was remitted back to NCLT. Against the said order of NCLAT, Mobilox went in appeal before the apex court.

Judgment:

While Interpreting the expression "existence of a dispute" occurring in Section 8(2)(a) of the IBC, the apex court upheld the contentions raised by Mobilox except for the fresh argument related to the point of Kirusa not furnishing the certificate from IDBI of nonpayment of the sum due, holding that infact there was a dispute in existence which was sufficient to defeat the CIRP application filed by Kirusa. Thus, quashing the order issued by NCLAT.

Analysis:

The highlight of the ruling is that the word "and" given in Section 8(2)(a) of the IBC must be read as "or". The court for this referred to the previous judgments stating the same and further went on to cite the judgments from other common law jurisdictions. The issue really was, that the word "and" as provided in Section 8 (2)(a) of IBC prima facie gives an impression that a dispute between the operational creditor and the corporate debtor will be in existence only if a suit or an arbitration proceeding on the dispute is pending before receipt of Demand Notice. The Supreme Court held that such an interpretation will defeat the whole purpose of the code as it will cause difficulties to a corporate debtor as the debtor would then be able to stave off the bankruptcy process only if a dispute is already pending in a suit or arbitration proceedings and not otherwise. Furthermore the bench went on to illustrate the same using an example of any dispute which arises just a few days befor IRP is triggered as, there would be no time to approach either an arbitral tribunal or a court even though a dispute exists and is also covered under law of limitations as well. The Supreme Court notes that if "and" occurring in Section

8(2)(a) of the IBC will not be read as "or", it will create a scenario where certain situations will be excluded from the ambit of Section 8(2) of the IBC, which in the normal circumstances must be covered and thus it will defeat the purpose of the law and intent of the legislature.

Furthermore, Supreme Court reviewed the entire IRP scheme and held that existence of the dispute is a necessary element and/or it must be "pre existing" in the sense that it must exist before the receipt of the demand notice. Also, the Supreme Court rejected the "bona fide" test which was earlier an element of winding up proceedings on the ground of 'inability' or 'neglect' to pay debts under the Companies Act, 1956. For this the bench elaborately discussed the history of the code and shed light on the changes made in the draft bill before finally passing it and while doing it the court observed that the word 'bona-fide' was dropped and thus the law laid down in ***Madhusudan*** was explicitly made inapplicable under IBC. The bench further said that importing the word 'bona fide' while interpreting section 8(2)(a) and determining any sort of "existence of dispute" is not possible and thus the court resultanly evolved a new test of "plausible contention" for determination of an "existence of a dispute".

The Supreme Court held that while determining "existence of a dispute", all that the NCLT must see is whether there is "a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence." While opining that "a spurious defence which is mere bluster" should be rejected, the bench further cautioned that NCLT is not required to satisfy itself that the defence is likely to succeed or to examine the merits. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the application of an operational creditor must be rejected by the NCLT.

Supreme Court further decided upon what exact questions that the adjudicating authority must decide before admitting any application u/s 9 of the IBC and if even one of the conditions mentioned above is found to be lacking, the NCLT must reject the application. Following the points which are to be considered by the NCLT:

1. Whether there is an "operational debt" as defined, exceeding Rs. 1,00,000/- ?
2. Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And

3. Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding on the dispute filed before the receipt of the Demand Notice?

Also , the court decided on when to apply the three conditions as given in Section 5(6) as one of the arguments advanced by Kirusa was that "dispute" between the parties must relate to one of the three sub-clauses mentioned in Section 5(6) of the IBC i.e. it must relate to existence of the amount of the debt; or quality of goods or services; or breach of a representation or warranty. The court out rightly rejected this contention on the basis that the definition of "dispute" was not exclusive in nature rather it is an inclusive one and that the present case was not one where a suit or arbitration proceeding had been filed before receipt of Demand Notice, only in which case the dispute must "relate to" the three sub clauses of Section 5(6).

As far as the facts are concerned there were evidences which proved that the dispute was not freshly cooked in light of the receipt of demand notice and there was prior history attached to the claim of Mobilox. Hence the court was entirely satisfied of the pre existence of the dispute between the parties it ruled in favor of the appellant i.e. Mobilox.