



INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

(Company formed by ICAI under Section 8 of the Companies Act 2013)

IBC Case Law Capsule

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KAY BOUVET ENGINEERING LIMITED VS. OVERSEAS INFRASTRUCTURE ALLIANCE (INDIA) PRIVATE LIMITED

CIVIL APPEAL NO 1137 OF 2019

DATE OF SUPREME COURT JUDGMENT: AUGUST 10, 2021

“AN APPLICATION TO INITIATE A CORPORATE INSOLVENCY RESOLUTION PROCESS HAS TO BE REJECTED IF A DISPUTE TRULY EXISTS IN FACT, AND IS NOT SPURIOUS, HYPOTHETICAL OR ILLUSORY.”

Facts of the Case: -

This appeal was filed by Kay Bouvet Engineering Ltd. (Kay Bouvet) under Section 62 of the IBC, 2016, against the order of the NCLAT, which had set aside the NCLT order rejecting the application filed by Overseas Infrastructure Alliance (India) Private Limited (Overseas) seeking initiation of CIRP against the appellants. This CIRP application was filed by Kay Bouvet Engineering Ltd. in its capacity as Operational Creditor (OC).

The facts of the case are that Overseas were awarded an engineering construction contract by Mashkour Sugar Mills, Sudan which funded by Government of India's Dollar credit through Exim Bank. Subsequently, Kay Bouvet was appointed as the sub-contractor through a tripartite agreement. On the advice of Mashkour, Overseas paid an amount of Rs.47.12 crore to Kay Bouvet. There were certain disputes with regard to exchange rate, on account of which, Kay Bouvet informed Mashkour that it ought to have been paid more in Indian Rupees.

In the meantime, there was certain exchange of communications between the Ministry of External Affairs, Government of India (GOI) and the Sudan Government. In pursuance to such exchange of communications, on 17th April 2017, the Ambassador of Sudan to India addressed to the GoI and advised to terminate the contract of Mashkour with Overseas and in turn to appoint Kay Bouvet as a Contractor. On 15th June 2017, Mashkour terminated the contract with Overseas for failure on its part to perform the duties. A Demand Notice under Section 8 of the IBC was served upon Kay Bouvet by Overseas alleging default under the Tripartite Agreement.



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Supreme Court's Observations: -

It has been held that however, at this stage, the Court is not required to be satisfied as to whether the defense is likely to succeed or not. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the Adjudicating Authority has no other option but to reject the application. *The Court also referred the Mobilox Innovations Private 18 Limited (supra)*, wherein the Supreme Court has considered the terms “existence”, “genuine dispute” and “genuine claim”.

The material placed on record amply clarifies that the initial payment which was made to Kay Bouvet as a Subcontractor by Overseas who was a Contractor, was made on behalf of Mashkour and from the funds received by Overseas from Mashkour. It was also clear that when a new contract was entered into between Mashkour and Kay Bouvet directly, Mashkour had directed the said amount of Rs.47 crore to be adjusted against the supplies to be made to Mashkour Sugar Company Ltd. for the purpose of completing the Project. On the contrary, the documents clarify that the termination of the contract with Overseas would not absolve Overseas of any liability for the balance of the LoC 1st tranche of 25 million disbursed to them other than USD 10.62 paid to Kay Bouvet.

Order: -

The Apex Court upheld the decision of the NCLT stating that it had rightly rejected the application of the respondent seeking initiation of CIRP against the appellant. Hence the NCLAT had patently misinterpreted the factual and legal position and had erred in reversing the order of NCLT by allowing admission of proceedings under section 9.

Case Review: - Appeal Allowed.