



# 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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**JASANI REALTY PVT. LTD. VS. VIJAY CORPORATION**  
**COMMERCIAL ARBITRATION APPLICATION (L) NO. 1242 OF 2022**  
**DATE OF HIGH COURT'S JUDGMENT: 25<sup>TH</sup> APRIL 2022**

### Facts of the Case: -

This Appeal was preferred by Jasani Realty Pvt. Ltd. (Applicant) under Section 11 of the Arbitration and Conciliation Act (ACA), 1996, wherein the Respondent (Vijay Corporation) failed to appoint an arbitral tribunal for which the Applicant had invoked an arbitration agreement through a notice dated 10<sup>th</sup> December 2021 and called upon the Respondent to agree to appoint an arbitral tribunal to adjudicate the disputes and differences between both the parties under the loan agreements. The Respondent had provided financial assistance to the Applicant of an amount of approximately Rs 4.5 crore in the usual course of business for which a loan agreement referred to as "Agreement No.1", dated 23<sup>rd</sup> April 2015, was signed by both the parties. However, the business scenario got changed, thereby, creating a negative impact during the subsistence of Agreement No. 1. Consequentially, another agreement, "Agreement No. 2", dated 5 July 2016, was executed between the parties, under which the repayment of the borrowing was extended from 30<sup>th</sup> June, 2015, to 31<sup>st</sup> March, 2017.

Earlier, there were defaults on the part of the Applicant in the payment of the loan installments. In discharge of the liability towards the Respondent, the Applicant had issued a cheque, dated 7<sup>th</sup> September 2021, to the Respondent of an amount of approximately Rs 31 crore. The cheque was dishonoured when it was presented for payment which led to the Respondent approach the NCLT to initiate proceedings on 12<sup>th</sup> October 2021, against the Applicant under Section 7 of the IBC, 2016. Eventually, the Applicant appeared in the proceedings and adjournments were also sought. However, no order was passed by the NCLT admitting the petition as per the provisions of the sub-section (5) of Section 7 of the IBC. The Respondent had also filed an affidavit opposing the petition filed by the Applicant on the ground that the application is an afterthought and an attempt on the part of the Applicant to dilute the prior proceedings before the NCLT. It is to be considered, whether a mere filing of a proceeding under Section 7 of the IBC, 2016, would amount to an embargo on the Court considering an application under Section 11 of the Arbitration and Conciliation Act, 1996, to appoint an arbitral tribunal?



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### High Court's Observations: -

In view of the observations of Hon'ble Supreme Court (SC) in the matter of *Indus Biotech Private Limited Vs. Kotak India Venture (Offshore) Fund ("Indus Biotech")*, the High Court was of the view that Section 8 of the ACA application was not filed by the Applicant in the present case before the NCLT. It is in the context of Section 8 application being filed by *Indus Biotech*, for referring the dispute to arbitration, the Supreme Court observed that though the Corporate Debtor files for an application under Section 8 of the ACA an independent consideration of the same by the NCLT *de hors* the application filed under Section 7 of the IBC and the material produced with it will not arise. The Adjudicating Authority (NCLT) is duty bound to advert to the material available before it, along with the application under Section 7 of the IBC filed by the Financial Creditor to indicate the default along with the version of the Corporate Debtor.

The court was not convinced with the respondent's contention that necessarily the Applicant ought to have filed an application under Section 8 of the ACA before the NCLT and having not filed such application, the present Section 11 application ought to be held to be not maintainable. It further observed that accepting such a submission would lead to an anomalous situation that a mere filing of the Section 7 application would be required to be construed to oust remedy which the law has otherwise provided to enforce an arbitration agreement and redress its claims under the agreed arbitration procedure. Thereafter, if the Section 7 IBC proceedings are admitted, the provisions of Section 238 of the IBC would get triggered to override the application of all other laws wherein the CIRP would commence against the Corporate Debtor as per the provisions of Section 13 of the IBC which would be proceedings *in rem*.

**Order: -** The High Court in view of the above observations allowed the application by appointing an arbitral tribunal for adjudication of the disputes and differences arisen between the parties under the agreements in question. Further, a formal order appointing an arbitral tribunal would not be required to be made as after the judgment was reserved, the parties had settled the disputes stating an arbitration was not warranted.

**Case Review: -** *Disposed Of.*