

# K. Kishan vs M/S Vijay Nirman Company Private Limited – Case Analysis

**Appellant:** K. Kishan

**Respondent:** M/S Vijay Nirman Company Private Limited

**Case No.:** Civil Appeal No. 21824 of 2017

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**For Judgement:** [Click Here](#)

## **Legislation:**

- Section 8, 9, 238 of Insolvency and Bankruptcy Code 2016
- Section 34, 37 of Arbitration And Conciliation Act, 1996
- Section 14 of Limitation Act 1963

## **Facts:**

M/s Vijay Nirman Company Private Limited and M/s Ksheerabad Constructions Private Limited (KCPL) entered into a sub-contract agreement for the purpose of constructing and expanding a highway. Disputes arose between the parties, leading to the reference of the matter to an arbitral tribunal as per their agreement. The arbitral tribunal rendered an award on 21 January 2017 (Award), allowing certain claims in favour of the Respondent (Allowed Claims) and rejecting KCPL's counterclaims. Based on the adjudication of debt in the Award, the Respondent issued a notice to KCPL under Section 8 of the Insolvency and Bankruptcy Code (Code) demanding payment of the

## Allowed Claims.

KCPL responded to the notice within 10 days, contending that the Allowed Claims were subject to arbitration proceedings and that the Respondent, in fact, owed larger amounts to KCPL. Subsequently, KCPL filed a petition under Section 34 of the Arbitration and Conciliation Act to challenge the Award. However, the Respondent initiated corporate insolvency resolution proceedings (CIRP) against KCPL by filing an application under Section 9 of the Code. The National Company Law Tribunal (NCLT) admitted the application, stating that the pendency of the Section 34 petition was irrelevant since there was no stay on the Award by the court. KCPL appealed to the National Company Law Appellate Tribunal (NCLAT), arguing that the pendency of the Section 34 petition constitutes an "existence of a dispute," making the application for CIRP not maintainable. The NCLAT dismissed the appeal.

## **Issues:**

Whether the Code can be invoked for an operational debt claim when a Section 34 petition challenging an arbitral award is pending and not yet finally adjudicated upon.

## **Arguments from the Appellant:**

The Appellant presented two main arguments. Firstly, they contended that the purpose of the Code was not to replace the debt adjudication and enforcement process under the Arbitration and Conciliation Act or any other statutes. They argued that the pendency of a Section 34 petition reflected a genuine dispute between the parties. Additionally, they highlighted that if their counterclaims, which were rejected by the arbitral tribunal, were ultimately held valid, they would not owe any money to the Respondent.

### **Arguments from the Respondent:**

The Respondent argued that insolvency proceedings should not be stalled due to pending applications to set aside judgments or decisions. They cited insolvency laws from foreign jurisdictions, such as Singapore and Australia, to support their contention. Furthermore, the Respondent relied on Section 238 of the Code, which is a non-obstante clause, asserting that it would override the provisions of the Arbitration and Conciliation Act.

### **Ratio Decidendi:**

The Supreme Court, in reference to its significant ruling in the case of Mobilox Innovations Private Limited v. Kirusa Software Private Limited, highlighted the importance of ensuring that the insolvency process, specifically regarding operational creditors, is not exploited as a means to circumvent the legal procedures and debt enforcement mechanisms established by other statutes. The Court opined that the filing of a Section 34 petition against an arbitral award indicated the existence of a “pre-existing ongoing dispute” between the parties that arose during the initial stage of the arbitral proceedings. This dispute may continue to exist even after the award until the final adjudicatory process under Sections 34 and 37 of the Arbitration and Conciliation Act concludes.

The Court further emphasised that, regarding operational debts, the only determination required by the Adjudicating Authority is whether the debt can be said to be disputed. The Court held that the pendency of a Section 34 petition indeed signifies a dispute, and therefore, the operational debt cannot be considered undisputed. The Court gave significant weight to the fact that KCPL’s counterclaims were for amounts

far exceeding the award given in favour of the Respondent. The possibility of KCPL succeeding on these cross-claims indicated that the operational debt could not be considered undisputed.

Moreover, the Supreme Court held that there were no inconsistencies between the provisions of the Code and the Arbitration and Conciliation Act. Consequently, the application of the non-obstante clause under Section 238 of the Act did not come into play.

### **Obiter Dictum:**

The Supreme Court made an important observation. It stated that the Code should not be utilised in terrorem (as a means of intimidation) to extract small amounts from corporate debtors, potentially jeopardising the fate of an otherwise solvent company worth several crores of rupees. Even if the disputed amount may not be finally payable due to pending adjudication proceedings, the Court cautioned against misusing the Code in such cases.

### **Final Judgment:**

The Supreme Court concluded that the initiation of CIRP for an operational debt claim is not maintainable when a Section 34 petition challenging an arbitral award is pending and the debt is disputed. Therefore, the Court set aside the order of the NCLAT and held that the application for CIRP against KCPL was not valid in this case.