A INDUS BIOTECH PRIVATE LIMITED

v.

KOTAK INDIA VENTURE (OFFSHORE) FUND (EARLIER KNOWN AS KOTAK INDIA VENTURE LIMITED) & ORS.

B (Arbitration Petition (Civil) No. 48 of 2019)

MARCH 26, 2021

[S. A. BOBDE, CJI, A. S. BOPANNA AND V. RAMASUBRAMANIAN, JJ.]

C *Insolvency and Bankruptcy Code, 2016 – s. 7 – Arbitration and Conciliation Act, 1996: s. 8 – Dispute between petitioner and respondents as regards calculation and conversion formula to be applied in converting the preference shares of respondent no. 1 to 4 invested in petitioner company, into equity shares – Respondents sought certain sum, on redemption of Optionally Convertible* D *Redeemable Preference Shares-OCRPS, but the petitioner company failed to redeem the OCRPS – Respondent sought initiation of Corporate Insolvency Resolution Process u/s. 7 of the Code – In the said petition, application u/s. 8 of the 1996 Act filed by the petitioner seeking direction to refer the parties to the arbitration –* E *NCLT allowed the application filed by the appellant u/s. 8 of the 1996 Act – Justification of – Held: Justified – Dispute will be non-arbitrable when a proceeding is in rem and a IB Code proceeding is to be considered in rem only after it is admitted – If there is default and the debt is payable, due to which the Adjudicating Authority proceeds to admit the application u/s. 7, the proceeding is in rem* F *and the arbitrability of the insolvency proceeding would not arise – If the Adjudicating Authority is satisfied that there is no default committed by the company, the petition u/s.7 would stand rejected and the parties can secure appointment of the Arbitral Tribunal in an appropriate proceedings – In the instant case, petition u/s. 7* G *was yet to be admitted, thus, had not assumed the status of proceedings in rem – Conclusion reached by NCLT cannot be faulted in view of the document produced by the petitioner indicating that the allotment of equity shares against the OCRPS was still a matter of discussion between the parties and no conclusion had been arrived at so as to term it as default – Thus, since the conclusion by*

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the NCLT is that there is no default, the dismissal of the petition u/s 7 of IB Code at this stage is justified – Though application u/s. 8 of the Act, 1996 is allowed, subject to the consideration of the petition filed u/s.11 of the Act, 1996 – Said disputes to be resolved by the Arbitral tribunal consisting of same members but separately constituted in respect of each agreement.

Dismissing the appeal and allowing the Arbitration Petition, the Court

HELD: 1.1 In a fact situation of the instant nature when the process of conversion had commenced and certain steps were taken in that direction, even if the redemption date is kept in view and the clause in Schedule J indicating that redemption value shall constitute a debt outstanding is taken note; when certain transactions were discussed between the parties and had not concluded since the point as to whether it was 30 per cent of the equity shares in the company or 10 per cent by applying proper formula had not reached a conclusion and thereafter agreed or disagreed, it would not have been appropriate to hold that there is default and admit the petition merely because a claim was made by the respondent as per the originally agreed date and a petition was filed. In the process of consideration to be made by the Adjudicating Authority the facts in the particular case is to be taken into consideration before arriving at a conclusion as to whether a default has occurred even if there is a debt in strict sense of the term, which exercise in the instant case has been done by the Adjudicating Authority. [Para 20][130-F-H; 131-A]

1.2 In such circumstance if the Adjudicating Authority finds from the material available on record that the situation is not yet ripe to call it a default, that too if it is satisfied that it is profit making company and certain other factors which need consideration, appropriate orders in that regard would be made; the consequence of which could be the dismissal of the petition under Section 7 of IB Code on taking note of the stance of the corporate debtor. As otherwise if in every case where there is debt, if default is also assumed and the process becomes automatic, a company which is ably running its administration and discharging its debts in planned manner may also be pushed to the Corporate Insolvency Resolution Process and get entangled in a proceeding with no point of return. Therefore,

the Adjudicating Authority certainly would make an objective assessment of the whole situation before coming to a conclusion as to whether the petition under Section 7 of IB Code is to be admitted in the factual background. It was submitted that when it is shown the debt is due and the same has not been paid the Adjudicating Authority should record default and admit the petition; that even in such situation the interest of the corporate debtor is not jeopardised inasmuch as the admission orders made by the Adjudicating Authority is appealable to the NCLAT and thereafter to the Supreme Court where the correctness of the order in any case would be tested. It cannot be in dispute that so would be the case even if the Adjudicating Authority takes a view that the petition is not ripe to be entertained or does not constitute all the ingredients, more particularly default, to admit the petition, since even such order would remain appealable to the NCLAT and the Supreme Court where the correctness in that regard also will be examined. [Para 21][131-B-F]

1.3 The question would be as to whether a grave error as contended on behalf of respondent is committed by the Adjudicating Authority by observing in the course of the order that the invocation of arbitration in a case like this seems to be justified. The stage of the proceedings at which the said observation was made will be relevant. If the case has reached the stage to the status of a proceeding in rem, then such observation would not be justified and sustainable but not otherwise. In the instant case, the petition was yet to be admitted and, therefore had not assumed the status of a proceedings in rem. [Para 22][131-G-H; 132-A]

1.4 The tests to be applied to determine as to when the subject matter is not arbitrable and on applying such test, actions in rem is not arbitrable. A dispute will be non-arbitrable when a proceeding is in rem and a IB Code proceeding is to be considered in rem only after it is admitted. In the instant case the position is otherwise. [Para 23][132-B; 133-G]

Vidya Drolia and Others vs. Durga Trading Corporation **(2021) 2 SCC 1 – relied on.**

1.5 The reference to the triggering of a petition under Section 7 of the IB Code to consider the same as a proceedings in rem, it is necessary that the Adjudicating Authority ought to have applied its mind, recorded a finding of default and admitted the petition. On admission, third party right is created in all the creditors of the corporate debtors and will have erga omnes effect. The mere filing of the petition and its pendency before admission, therefore, cannot be construed as the triggering of a proceeding in rem. Hence, the admission of the petition for consideration of the Corporate Insolvency Resolution Process is the relevant stage which would decide the status and the nature of the pendency of the proceedings and the mere filing cannot be taken as the triggering of the insolvency process. [Para 24][134-G-H; 135-A-B]

1.6 The issue which is posed for consideration is arising in a petition filed under Section 7 of IB Code, before it is admitted and therefore not yet an action in rem. In such application, the course to be adopted by the Adjudicating Authority if an application under Section 8 of the Act, 1996 is filed seeking reference to arbitration is what requires consideration. The position of law that the IB Code shall override all other laws as provided under Section 238 of the IB Code needs no elaboration. In that view, notwithstanding the fact that the alleged corporate debtor filed an application under Section 8 of the Act, 1996, the independent consideration of the same dehors the application filed under Section 7 of IB Code and materials produced therewith would not arise. The Adjudicating Authority is duty bound to advert to the material available before him as made available along with the application under Section 7 of IB Code by the financial creditor to indicate default along with the version of the corporate debtor. This is for the reason that, keeping in perspective the scope of the proceedings under the IB Code and there being a timeline for the consideration to be made by the Adjudicating Authority, the process cannot be defeated by a corporate debtor by raising moonshine defence only to delay the process. In that view, even if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority has a duty to advert to contentions put forth on the application filed under Section 7 of IB Code, examine the material placed before it by the financial creditor and record

a satisfaction as to whether there is default or not. While doing so the contention put forth by the corporate debtor shall also be noted to determine as to whether there is substance in the defence and to arrive at the conclusion whether there is default. If the irresistible conclusion by the Adjudicating Authority is that there is default and the debt is payable, the bogey of arbitration to delay the process would not arise despite the position that the agreement between the parties indisputably contains an arbitration clause. That apart if the conclusion is that there is default and the debt is payable, due to which the Adjudicating Authority proceeds to pass the order as contemplated under sub-section 5(a) of Section 7 of IB Code to admit the application, the proceedings would then get itself transformed into a proceeding in rem having erga omnes effect due to which the question of arbitrability of the so-called inter se dispute sought to be put forth would not arise. On the other hand, on such consideration made by the Adjudicating Authority if the satisfaction recorded is that there is no default committed by the company, the petition would stand rejected as provided under sub-section 5(b) to Section 7 of IB Code, which would leave the field open for the parties to secure appointment of the Arbitral Tribunal in an appropriate proceedings as contemplated in law and the need for the NCLT to pass any orders on such application under Section 8 of Act, 1996 would not arise. [Paras 25, 26][135-B-H; 136-A-C]

1.7 To sum up the procedure, it is clarified that in any proceeding which is pending before the Adjudicating Authority under Section 7 of IB Code, if such petition is admitted upon the Adjudicating Authority recording the satisfaction with regard to the default and the debt being due from the corporate debtor, any application under Section 8 of the Act, 1996 made thereafter will not be maintainable. In a situation where the petition under Section 7 of IB Code is yet to be admitted and, in such proceedings, if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority is duty bound to first decide the application under Section 7 of the IB Code by recording a satisfaction with regard to there being default or not, even if the application under Section 8 of Act, 1996 is kept along for consideration. In such event, the natural consequence of the consideration made therein on Section 7 of

IB Code application would befall on the application under Section 8 of the Act, 1996. [Para 27][136-C-E]

1.8 A perusal of the order dated 09.06.2020 would indicate that the Adjudicating Authority, NCLT though has taken up the application filed under Section 8 of the Act, 1996 as the lead consideration, the petition filed under Section 7 of the IB Code is also taken alongside and made a part of the consideration in the said order. A further perusal of the order would disclose that the Adjudicating Authority was conscious of the fact that consideration of the matter before it any further would arise only if there is default and the debt is payable. This is evident from the observation contained in para 5.13 of the order. The further narration made in para 5.14 would indicate that the Adjudicating Authority, from the material available on record had arrived at the conclusion that the issue involved has not led to a stage of the default having occurred and has rightly, in that context held that the claim of the company by invoking the arbitration clause is justified but the Adjudicating Authority has rightly done nothing with regard to arbitration and has left it to this Court. Accordingly, the Adjudicating Authority in para 5.15 has categorically recorded that they are not satisfied that a default has occurred. [Para 28][136-F-H; 137-A]

1.9 NCLT was conscious that there should be judicial determination by the Adjudicating Authority as to whether there has been a default within the meaning of Section 3(12) while considering a petition under Section 7 of the IB Code. The NCLT after having recorded such finding took note of the arbitration petition pending before this Court and, accordingly concluded the proceedings. [Para 29][137-B; 138-A]

1.10 The conclusion reached by the Adjudicating Authority, NCLT in the instant case cannot be faulted if reference is made to the documents produced by the petitioner along with an application. It indicates that the allotment of equity shares against the OCRPS in view of the QIPO was still a matter of discussion between the parties and no conclusion had been arrived at so as to term it as default. [Para 30][138-B-C]

A **1.11 In the letter dated 21.11.2018 addressed by the petitioner to respondent no.4, it was mentioned with regard to the fundamental issue that needs to be addressed regarding conversion and convertible securities into equity shares since the exist process initiated cannot move forward without such**
B **conversion. The letter dated 17.12.2018 addressed to the petitioner by respondent no.4 in fact refers to the stake in conversion and the dispute being as to whether it should be 10 per cent of the share capital of the company as offered by the petitioner 30 per cent as claimed by KIVF. It is that aspect of the matter, which is still contended to be in dispute between**
C **the parties regarding which the arbitration is sought by the petitioner which was also noted by Adjudicating Authority. [Para 31][138-F-H; 139-A]**

1.12 In such situation, it would be premature at this point to arrive at a conclusion that there was default in payment of any
D **debt until the said issue is resolved and the amount repayable by the petitioner to respondent no.4 with reference to equity shares being issued is determined. In the process, if such determined amount is not paid it would amount to default at that stage. Therefore, if the matter is viewed from any angle, not only the**
E **conclusion reached by the Adjudicating Authority, NCLT insofar as the order on the petition under Section 7 of the IB Code at this juncture based on the factual background is justified but also the prayer made by the petitioner for constitution of the Arbitral Tribunal as made in the petition filed by them under Section 11 of the Act, 1996 before this Court is justified. [Para 32][139-A-D]**

F **1.13 In that circumstance though in the operative portion of the order dated 09.06.2020 the application filed under Section 8 of the Act, 1996 is allowed and as a corollary the petition under Section 7 of the IB Code is dismissed; in the facts and circumstances of the instant case it can be construed in the**
G **reverse. Hence, since the conclusion by the Adjudicating Authority is that there is no default, the dismissal of the petition under Section 7 of IB Code at this stage is justified. Though the application under Section 8 of the Act, 1996 is allowed, the same in any event would be subject to the consideration of the petition**

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filed under Section 11 of the Act, 1996 before this Court. [Para 33][139-D-F]

1.14 In the present position the parties would be left with no remedy if the process of arbitration is not initiated and the dispute between the parties are not resolved in that manner as the proceedings before the NCLT has terminated. In the circumstance the only remedy for the parties being resolution of their dispute through arbitration, it is considered appropriate to take note of the substance of the arbitration clause and constitute an appropriate Tribunal. [Para 34][139-G-H; 140-C-D]

1.15 A perusal of the arbitration agreement indicates that the arbitration shall be held at Mumbai and be conducted by three arbitrators. For the purpose of appointment KIVF I, KEIT and KIVL are to jointly appoint one arbitrator and the promoters of petitioner company, to appoint their arbitrator. In the second agreement, 'KMIL' as the Investor is on the other side. In the third agreement 'KIVFI' as the Investor is on the other side and in the fourth agreement it has the same clause as in the first agreement. The two arbitrators who are thus, appointed shall appoint the third arbitrator who shall be the Chairperson. The recital (c) in the different agreements though refers to each of the entity in the KIV and amount invested in shares is referred to, it is provided therein that the equity shares and preference shares subscribed by KMIL, KIVF I, KEIT and KIVL are collectively referred to as the 'Financial Investors Shares'. If the said aspect is taken into consideration keeping in view the nature of the issues involved being mainly with regard to the conversion of preference shares into equity shares and the formula to be worked thereunder, such consideration in the instant facts can be resolved by the Arbitral Tribunal consisting of same members but separately constituted in respect of each agreement. It will be open for the Arbitral Tribunal to work out the modalities to conduct the proceedings by holding separate proceedings in the agreement providing for international arbitration and by clubbing the domestic disputes. [Para 36][141-E-H; 142-A-B]

1.16 Since petitioner company had nominated Mr. Justice V.N. Khare, former Chief Justice of India through their letter the

said Arbitrator is treated as having been proposed jointly by the Company and the promoters. Mr. Justice R.M. Lodha, former Chief Justice of India is appointed as the second arbitrator since the respondents had failed to nominate. The said arbitrators shall mutually nominate a third arbitrator to be the Chairperson of the Arbitral Tribunal. [Para 37][142-C-D]

*Innoventive Industries Limited vs. ICICI Bank and Anothe*r **(2018) 1 SCC 407: [2017] 8 SCR 33;** *Swiss Ribbons Private Limited and Another vs. Union of India and Others* **(2019) 4 SCC 17: [2019] 3 SCR 535;** *Booz Allen and Hamilton INC. vs. SBI Home Finance Limited and Others* **(2011) 5 SCC 532:[2011] 7 SCR 310;** *Booz Allen and Hamilton vs. SBI Home Finance Ltd. & Others* **(2011) 5 SCC 532:[2011] 7 SCR 310;** *A.Ayyasamy vs. A. Paramasivam & Others* **(2016) 10 SCC 386: [2016] 11 SCR 521;** *Pioneer Urban Land and Infrastructure Limited vs. Union of India & Ors.* **[2019] 10 SCR 381;** *M/S Duro Felguera S.A vs. M/S. Gangavaram Port Limited* **(2017) 9 SCC 729 : [2017] 10 SCR 285 – referred to.**

Case Law Reference

[2017] 8 SCR 33	**referred to**	**Para 15**
[2019] 3 SCR 535	**referred to**	**Para 16**
[2011] 7 SCR 310	**referred to**	**Para 16**
(2021) 2 SCC 1	**relied on**	**Para 23**
[2011] 7 SCR 310	**referred to**	**Para 23**
[2016] 11 SCR 521	**referred to**	**Para 23**
[2019] 3 SCR 535	**referred to**	**Para 24**
[2019] 10 SCR 381	**referred to**	**Para 24**
[2017] 10 SCR 285	**referred to**	**Para 35**

CIVIL ORIGINAL JURISDICTION: Arbitration Petition (Civil) No. 48 of 2019

Petition under Section 11(3) read with Sections 11(4)(a) and 11(12)(a) of the Arbitration and Conciliation Act, 1996 seeking the appointment of an Arbitrator.

With

Civil Appeal No. 1070 of 2021.

Shyam Divan, Mukul Rohtagi, Ritin Rai, C.A. Sundaram, Sr. Adv., Mohitt Kapoor, Ms. Sanam Tripathi, Ms. Anuradha Agnihotri, Ms. Radhika Gautam, Zafar Inayat, Ms. Gunjan Mathur, Ms. Kritika Bhardwaj, Advs. for the Petitioner.

Dr. Abhishek Manu Singhvi, Darius Khambata, Atmaram NS Nadkarni, Neeraj Kishan Kaul, Nakul Dewan, Iqbal Chagla, Sr. Advs., Avishkar Singhvi, Jatin Pore, Ms. Ankita Agrawal, Chandra Prakash for M/S. DSK Legal, Vineet Malhotra, Mohit Paul, Abhishek Srinivasan, Vishal Gohri, S.S. Rebello, Ms. Sunaina Phul, Aditdya Dewan, Ms. Udita Singh, Somesh Chandra Jha, Salim M. Saiyed, Praveen Chandra, Rahul Narang, Nitin Mishra, Ms. Mitali Gupta, Pawan Jit Bindra, Ms. Aastha Mehta, Ms. Vishakha, Ms. Deepanwita Priyanka, Advs. for the Respondents.

The following Judgment of the Court was delivered:

JUDGMENT

1. Leave granted in Special Leave Petition.

2. The Arbitration Petition is filed by 'Indus Biotech Private Limited' under Section 11(3) read with Sections 11(4)(a) and 11(12)(a) of the Arbitration and Conciliation Act, 1996 ('Act, 1996' for short) seeking the appointment of an Arbitrator on behalf of the respondent Nos. 1 to 4 so as to constitute an Arbitral Tribunal to adjudicate upon the disputes that have arisen between the petitioner and the respondent Nos. 1 to 4 herein. The petition filed before this Court is due to the fact that the respondent No.1 is a Mauritius based Company and the dispute qualifies as international arbitration. The respondents No. 2 to 4 though are Indian entities, they are the sister ventures of respondent No.1. Further, according to the petitioner the subject matter involved is the same, though under different agreements, the arbitration could be conducted as a single process, by a single Arbitral Tribunal. Hence a common petition is filed before this Court, instead of bifurcating the causes of action and availing

A their remedy before the High Court in respect of similar disputes with respondents No.2 to 4.

3. The petition seeking constitution of the Arbitral Tribunal emanates from the Share Subscription and Shareholders' Agreements ('SS and SA' for short) dated 20.07.2007, 12.07.2007, 09.01.2008 and
B the Supplemental Agreements dated 22.03.2013 and 19.07.2017. Through the said agreements the respondent Nos. 1 to 4 subscribed to equity shares and Optionally Convertible Redeemable Preference Shares ('OCRPS' for short) in the company i.e. Indus Biotech Private Ltd. In the process of business, a decision was taken by the petitioner company to make a Qualified Initial Public Offering ('QIPO' for short). However,
C under Regulation 5(2) of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements), Regulations 2018 ('SEBI Regulations' for short), a company which has any outstanding convertible securities or any other right which would entitle any person with an option to receive equity shares of the issuer is not entitled to make QIPO.

D 4. In that view, it had become necessary for the respondents No.1 to 4 to convert their respective preference shares invested in Indus Biotech Private Ltd., into equity shares. In that context the petitioner company proposed to convert the OCRPS invested by the respondents No. 1 to 4, into equity shares. In the said process of negotiation, a dispute is stated
E to have arisen between the petitioner company and the respondents No. 1 to 4, with regard to the calculation and conversion formula to be applied in converting the preference shares of the respondents No. 1 to 4, into equity shares. As per the formula applied by the respondent Nos. 1 to 4, it was claimed by them that they would be entitled to 30 per cent of the total paid up share capital in equity shares. The petitioner company, by
F relying on the reports of the auditors and valuer contended that the respondents No. 1 to 4 would be entitled to approximately 10 per cent of the total paid up share capital paid by the respondent as per their conversion formula.

5. The dispute in question, according to the petitioner company is
G with regard to the appropriate formula to be adopted and to arrive at the actual percentage of the paid-up share capital which would be converted into equity shares and the refund if any thereafter. Until an amicable decision is taken there is no liability to repay the amount. Therefore, there is no 'debt' or 'default', nor is the petitioner company unable to
H pay. The petitioner company is a profit-making company and is engaged

in its day-to-day activity. Since the parties themselves had not resolved the issue, the petitioner company contends that the said dispute is to be resolved through Arbitration by the Arbitral Tribunal.

6. On the said issue, the respondents No. 1 to 4 would however contend that the fact of the respondents No. 1 to 4 herein having subscribed to the OCRPS is not in dispute. In such event, on redemption of the same, the amount is required to be paid by the petitioner company. The respondents No. 1 to 4 contend that on redemption of OCRPS, a sum of Rs. 367,08,56,503/- (Rupees Three Hundred Sixty-Seven Crore Eight Lakh Fifty-Six Thousand Five Hundred Three) became due and payable. The respondents No. 1 to 4 having demanded the said amount and since the same had not been paid by the petitioner company, it is contended that the same had constituted default. It is contended that as the debt had not been paid by the company it had given a cause of action for the respondents No. 1 to 4 herein to invoke the jurisdiction of the Adjudicating Authority, NCLT by initiating the Corporate Insolvency Resolution Process ('CIRP' for short) provided under the Insolvency and Bankruptcy Code, 2016 ('IB Code' for short).

7. Accordingly, the respondent No.2 herein filed the petition under Section 7 of IB Code before the NCLT in IBC No.3077/2019 dated 16.08.2019 seeking appointment of Resolution Professional. In the said petition, the petitioner company herein filed a Miscellaneous Application No.3597/2019 under Section 8 of the Act, 1996 seeking a direction to refer the parties to arbitration, for the reasons indicated therein which is as noted above and is similar to the contention in the arbitration petition. The respondent No.2 herein objected to consideration of the said application.

8. The NCLT, Mumbai Bench-IV through its order dated 09.06.2020 has taken note of the rival contentions and has allowed the application filed by the petitioner herein under Section 8 of the Act, 1996. As a consequence, the petition filed by the respondent No.2 herein under Section 7 of the IB Code is dismissed. The respondent No.2 herein claiming to be aggrieved by the said order dated 09.06.2020 passed by the NCLT is before this Court in the connected SLP.

9. Since the rank of the parties is different in the above noted, two petitions, for the ease of reference and clarity, the parties would be referred to by their name and the respondents No. 1 to 4 in the Arbitration Petition will be collectively referred to as 'Kotak India Venture'.

A 10. In the above backdrop, we have heard Mr. Shyam Divan, Mr. Aryama Sundaram, Mr. Mukul Rohatgi and Mr. Ritin Rai respective learned senior counsel on behalf of Indus Biotech Private Limited, Dr. Abhishek Manu Singhvi, learned senior counsel on behalf of Kotak India Venture as also Mr. Khambhatta, Mr. Neeraj Kishan Kaul, Mr. Nakul Dewan, Mr. ANS Nadkarni for the other parties and perused the petition B papers.

11. As a matter of fact, the transaction entered into between the parties arising out of the SS and SA dated 20.07.2007, 12.07.2007, 09.01.2008 and the supplemental agreements dated 22.03.2013 and 19.07.2017 is not in dispute. The further fact that the SS and SA dated C 20.07.2007, 12.07.2007 and 09.01.2008 vide Clause 20.4 provides for arbitration in the event of any dispute, controversy or claim arising out of, relating to or in connection with the said agreement is also not in dispute. Further the supplemental agreements vide Clause 13 and 19 respectively provides that the provision for arbitration in Clause 20.4 of D the SS and SA agreement dated 20.07.2007 shall apply to the supplemental agreement is also evident. If in that context the matter is looked at, there would be no need for this Court to advert to any other aspect in the petition filed under Section 11 of the Act, 1996 since in the normal circumstance, on constitution of the Arbitral Tribunal all other issues are to be gone into by the Arbitral Tribunal relating to the above noted dispute E between the parties. However, the nature of Arbitral Tribunal will have to be considered since one is international arbitration and the other are domestic.

12. Despite the said position, before concluding on the Arbitration Petition filed by Indus Biotech Private Limited, keeping in perspective F the objection raised by the Kotak India Venture relating to the petition having already been instituted before the NCLT under Section 7 of the IBC and also keeping in perspective the order dated 09.06.2020 passed by NCLT disposing of the application filed under Section 8 of the Act, 1996; the matter requires deeper consideration on that aspect since Dr. G Abhishek Manu Singhvi, the learned senior counsel for the Kotak India Venture has contended with regard to a serious error said to have been committed by the NCLT in entertaining an application under Section 8 of the Act, 1996 in the backdrop of the legal duty cast on NCLT to proceed strictly in accordance with the procedure contemplated under Section 7 of IB Code. It is further contented that Indus Biotech Private Limited H having defaulted, the event enabling the petition under Section 7 of IB

Code has occurred and the dispute sought to be raised is not arbitrable after the insolvency proceeding is commenced.

13. Before adverting to the contentions in this regard, it is to be taken note that against the order dated 09.06.2020 assailed in the special leave petition, Kotak India Venture in the normal course if aggrieved, ought to have availed the remedy of appeal by filing an appeal in the NCLAT as provided under Section 61 of IB Code. Having not done so, in a normal circumstance we would have chosen to relegate Kotak India Venture to avail the alternate remedy of appeal. The contention on behalf of Kotak India Venture that they do not have the remedy of appeal as it is an order disposing an application filed under Act, 1996 and not an order under the part as provided in Section 61 of IB Code is noted only to be rejected. The order dated 09.06.2020 is certainly an order passed by the Adjudicating Authority under IB Code and petition under Section 7 of that Code is also disposed. However, as noted from the narration made above, the order dated 09.06.2020 passed by the NCLT is while taking note of petition under Section 7 of IB Code, in the backdrop of Indus Biotech seeking for the resolution of dispute through arbitration and the Arbitration Petition to that effect was already pending before this Court as on the date the order was passed by the NCLT. It is only in this special circumstance we have proceeded to entertain the petition and examine the matter on merits.

14. In order to arrive at a conclusion on the correctness or otherwise of the impugned order, at the outset it is necessary for us to take note of the scope of the proceedings under Section 7 of the IB Code to which detail reference is made with reference to the definitions in Section 3(6), 3(8), 3(11), 3(12) and 5(7) of the Code. It provides for the 'financial creditor' to file an application for initiating Corporate Insolvency Resolution Process against a 'corporate debtor' before the Adjudicating Authority when 'default' has occurred. The provision, therefore, contemplates that in order to trigger an application there should be in existence four factors: (i) there should be a 'debt' (ii) 'default' should have occurred (iii) debt should be due to 'financial creditor' and (iv) such default which has occurred should be by a 'corporate debtor': On such application being filed with the compliance required under sub-Section (1) to (3) of Section 7 of IB Code, a duty is cast on the Adjudicating Authority to ascertain the existence of a default if shown from the records or on the basis of other evidence furnished by the financial creditor, as contemplated under sub-Section (4) to Section 7 of IB Code.

A 15. This Court had the occasion to consider exhaustively the scheme and working of the IB Code in the case of ***Innoventive Industries Limited vs. ICICI Bank and Another*** (2018) 1 SCC 407. The proceeding under Section 7 of the IB Code and the scope thereof is articulated in paras 27 to 30 which read hereunder,

B "27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-
C payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default
D is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under
E Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

F 28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to *any* financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application
G is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the
H applicant in Part I, particulars of the corporate debtor in Part II,

particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy

A itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

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(Emphasis supplied)

16. Dr. Singhvi, learned senior counsel while seeking to repel the contention put forth on behalf of the Indus Biotech Private Limited seeks to emphasise that a proceeding under Section 7 of IB Code is to be C considered in a stringent manner. Referring to the Preamble to the IB Code, it is contended that the same has evolved after all the earlier processes like civil suit, winding up petition, SARFAESI proceeding and SICA have failed to secure the desired result. The provision under the IB Code is with the intention of making a debtor to seek the creditor. In that regard, Dr. Singhvi has referred to the decisions in the case of ***Swiss*** D ***Ribbons Private Limited and Another vs. Union of India and Others*** (2019) 4 SCC 17 and ***Booz Allen and Hamilton INC. vs. SBI Home Finance Limited and Others*** (2011) 5 SCC 532 to contend that the proceeding under Section 7 of IB Code is an action *in rem.* As such insolvency and winding up matters are non-arbitrable. In that background, E the nature of transaction under the SS and SA was referred. It is in that regard contended that the agreement provides for the manner of redemption as also the redemption value. The date of redemption is fixed as 31.12.2018. The OCRPS when redeemed is payable, within 15 days from the date of redemption. In such situation, there is no other issue which require resolution by arbitration. Further, it is contended Clause F 5.1 and 5.2 in Schedule J to the agreement provided that the redemption value shall constitute a debt outstanding by the Company to the holder. Hence the amount being debt on the redemption date, if not paid within 15 days of redemption constituted default. In that background, when the petition under Section 7 of IB Code was filed the Adjudicating Authority G ought to have looked into that aspect alone and the consideration of an application filed under Section 8 of the Act, 1996 is without jurisdiction is the contention.

17. The procedure contemplated will indicate that before the Adjudicating Authority is satisfied as to whether the default has occurred H or not, in addition to the material placed by the financial creditor, the

corporate debtor is entitled to point out that the default has not occurred and that the debt is not due, consequently to satisfy the Adjudicating Authority that there is no default. In such exercise undertaken by the Adjudicating Authority if it is found that there is default, the process as contemplated under sub-Section (5) of Section 7 of IB Code is to be followed as provided under sub-Section 5(a); or if there is no default the Adjudicating Authority shall reject the application as provided under sub-Section 5(b) to Section 7 of IB Code. In that circumstance if the finding of default is recorded and the Adjudicating Authority proceeds to admit the application, the Corporate Insolvency Resolution Process commences as provided under sub-section (6) and is required to be processed further. In such event, it becomes a proceeding *in rem* on the date of admission and from that point onwards the matter would not be arbitrable. The only course to be followed thereafter is the resolution process under IB Code. Therefore, the trigger point is not the filing of the application under Section 7 of IB Code but admission of the same on determining default.

18. In that circumstance, though Dr. Singhvi has referred to the evolution of IB Code after all earlier legal process had failed to give the rightful place to the creditor; which is sought to be achieved by the IB Code, it cannot be said that by the procedure prescribed under the IB Code it means that the claim of the creditor if made before the NCLT, more particularly under Section 7 of IB Code is sacrosanct and the corporate debtor is denuded of putting forth its version or the contention to show to the Adjudicating Authority that the default has not occurred and explain the circumstance for contending so. In fact, in the very decision relied on by both the parties in the case of ***Innoventive Industries Limited*** (supra), this court while considering the scope of the various provisions under the Act and while referring to the procedure contemplated in a petition under Section 7 of the IB Code, which is also extracted supra reads thus: -

> "It is at the stage of Section 7(5), where the Adjudicating Authority is to be satisfied that default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the 'debt', which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact."

A 19. In the instant case, Dr. Singhvi, as noted earlier has referred to clause 5.1 and 5.2 contained in Schedule J to the agreement to contend that the OCRPS would become due within 15 days from the redemption date and the parties are agreed that it shall constitute a debt outstanding by the company to the Holder. The question would be; whether that alone was sufficient to come to a conclusion that there was default as
B well in the fact situation of the present nature. It is no doubt true that the original period of the OCRPS was up to 31.12.2018, on which date it could be redeemed. In that background, Mr. Shyam Divan, learned senior counsel for Indus Biotech Private Limited has drawn our attention to Clause 4 and 6 of the very same document to indicate that it provides for
C early redemption under the circumstances stated therein. Vide clause 6 thereof it has provided that the OCRPS could be converted into equity shares of the company in the circumstances provided therein, which is also on the occurrence of QIPO or Strategic Sale, provided that the OCRPS shall be converted in the manner indicated. Regulation 5(2) of
D SEBI – ICDR Regulations mandated the same. In that regard, Mr. Divan has also referred to the Board meeting held on 14.03.2018 wherein QIPO related matters were taken into consideration and the conversion of the preference shares was discussed, to which the Nominee Director representing the Kotak India Venture Group was also a party. The said issue was also discussed in the subsequent meeting dated 06.04.2018
E and 10.04.2018. Therefore, the said events *prima facie* indicate that the process of converting the OCRPS into equity shares and the allotment thereof was an issue which had already commenced a while before the redemption date agreed upon i.e., 31.12.2018 had arrived.

20. Therefore, in a fact situation of the present nature when the
F process of conversion had commenced and certain steps were taken in that direction, even if the redemption date is kept in view and the clause in Schedule J indicating that redemption value shall constitute a debt outstanding is taken note; when certain transactions were discussed between the parties and had not concluded since the point as to whether
G it was 30 per cent of the equity shares in the company or 10 per cent by applying proper formula had not reached a conclusion and thereafter agreed or disagreed, it would not have been appropriate to hold that there is default and admit the petition merely because a claim was made by Kotak Venture as per the originally agreed date and a petition was filed. In the process of consideration to be made by the Adjudicating Authority

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the facts in the particular case is to be taken into consideration before arriving at a conclusion as to whether a default has occurred even if there is a debt in strict sense of the term, which exercise in the present case has been done by the Adjudicating Authority.

21. In such circumstance if the Adjudicating Authority finds from the material available on record that the situation is not yet ripe to call it a default, that too if it is satisfied that it is profit making company and certain other factors which need consideration, appropriate orders in that regard would be made; the consequence of which could be the dismissal of the petition under Section 7 of IB Code on taking note of the stance of the corporate debtor. As otherwise if in every case where there is debt, if default is also assumed and the process becomes automatic, a company which is ably running its administration and discharging its debts in planned manner may also be pushed to the Corporate Insolvency Resolution Process and get entangled in a proceeding with no point of return. Therefore, the Adjudicating Authority certainly would make an objective assessment of the whole situation before coming to a conclusion as to whether the petition under Section 7 of IB Code is to be admitted in the factual background. Dr. Singhvi, however contended, that when it is shown the debt is due and the same has not been paid the Adjudicating Authority should record default and admit the petition. He contends that even in such situation the interest of the corporate debtor is not jeopardised inasmuch as the admission orders made by the Adjudicating Authority is appealable to the NCLAT and thereafter to the Supreme Court where the correctness of the order in any case would be tested. We note, it cannot be in dispute that so would be the case even if the Adjudicating Authority takes a view that the petition is not ripe to be entertained or does not constitute all the ingredients, more particularly default, to admit the petition, since even such order would remain appealable to the NCLAT and the Supreme Court where the correctness in that regard also will be examined.

22. In the above backdrop the question would be as to whether a grave error as contended on behalf of Kotak Venture is committed by the Adjudicating Authority by observing in the course of the order that the invocation of arbitration in a case like this seems to be justified. In our view, the stage of the proceedings at which the said observation was made will be relevant. If the case has reached the stage to the status of a proceeding *in rem*, then such observation would not be justified and

A sustainable but not otherwise. In the instant case, the petition was yet to be admitted and, therefore had not assumed the status of a proceedings *in rem*.

23. The tests to be applied to determine as to when the subject matter is not arbitrable and on applying such test, actions *in rem* is not B arbitrable is laid down by this Court in the case of ***Vidya Drolia and Others Vs. Durga Trading Corporation*** (2021 2 SCC 1) which reads as hereunder:

> "**76**. In view of the above discussion, we would like to propound a fourfold test for determining when the subject matter of a dispute C in an arbitration agreement is not arbitrable:
>
> **76.1** (1) when cause of action and subject matter of the dispute relates to actions *in rem,* that do not pertain to subordinate rights *in personam* that arise from rights *in rem.*
>
> **76.2** (2) when cause of action and subject matter of the dispute D affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;
>
> **76.3** (3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of E the State and hence mutual adjudication would be unenforceable; and
>
> **76.4** (4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).
>
> **76.5** (5) These tests are not watertight compartments; they dovetail F and overlap, *albeit* when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.
>
> G **76.6.** However, the aforesaid principles have to be applied with care and caution as observed in *Olympus Superstructures (P) Ltd.* [*Olympus Superstructures (P) Ltd.* v. *Meena Vijay Khetan*, (1999) 5 SCC 651] : (SCC p. 669, para 35)

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"*35*. … Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (*Keir* v. *Leeman* [*Keir* v. *Leeman*, (1846) 9 QB 371 : 115 ER 1315]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter.

77. Applying the above principles to determine non-arbitrability, it is apparent that insolvency or intracompany disputes have to be addressed by a centralised forum, be the court or a special forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions in rem. Similarly, grant and issue of patents and registration of trade marks are exclusive matters falling within the sovereign or government functions and have *erga omnes* effect. Such grants confer monopoly rights. They are non-arbitrable. Criminal cases again are not arbitrable as they relate to sovereign functions of the State. Further, violations of criminal law are offences against the State and not just against the victim. Matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights, etc. are not arbitrable as they fall within the ambit of sovereign functions and do not have any commercial and economic value. The decisions have *erga omnes* effect. Matters relating to probate, testamentary matter, etc. are actions in rem and are a declaration to the world at large and hence are non-arbitrable."

In view of the exhaustive consideration made in Vidya Drolia and our clear understanding that a dispute will be non-arbitrable when a proceeding is *in rem* and a IB Code proceeding is to be considered *in rem* only after it is admitted it is seen that in the instant case the position is otherwise. The decisions relied on behalf of Kotak India Venture in the case of ***Booz Allen and Hamilton Vs. SBI Home Finance Ltd. & Others*** (2011) 5 SCC 532 and ***A. Ayyasamy Vs. A. Paramasivam & Others*** (2016) 10 SCC 386 need not be referred in detail and overburden this

judgment since they have been referred in Vidya Drolia which also explain the same situation.

24. In the case of ***Swiss Ribbons Private Limited vs. Union of India*** (2019) 4 SCC 17 and ***Pioneer Urban Land and Infrastructure Limited vs. Union of India & Ors.*** (W.P.(C) No.43/2019) relied on behalf of Kotak Venture, the entire scope and ambit of the IB Code was considered and the validity of the provisions were upheld. The said decisions have also been relied on to contend that when the petition under Section 7 of IB Code is triggered it becomes a proceedings *in rem* and even the creditor who has triggered the process would also lose control of the proceedings as Corporate Insolvency Resolution Process is required to be considered through the mechanism provided under the IB Code. The principles as laid down in Swiss Ribbons (supra) was also referred to in detail in the case of ***Pioneer Urban Land and Infrastructure*** (supra) wherein the observations contained in para 39 though in the case of Real Estate Development was laid down. The relevant portion which has been referred to, reads as follows:-

> "Thus, any allottee/home buyer who prefers an application under Section 7 of the Code takes the risks of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developers. Under the Code, he may never get refund of the entire principal, let alone interest. This is because, the moment a petition is admitted under Section 7, the resolution professional must first advertise for and find a resolution plan by somebody, usually another developer which has then to pass muster under the Code, i.e. that it must be approved by at least 66 per cent of the Committee of Creditors and must further go through challenges before NCLT and NCLAT before the new management can take over and either complete construction or pay out for refund amounts."

The underlying principle, therefore, from all the above noted decisions is that the reference to the triggering of a petition under Section 7 of the IB Code to consider the same as a proceedings *in rem,* it is necessary that the Adjudicating Authority ought to have applied its mind, recorded a finding of default and admitted the petition. On admission, third party right is created in all the creditors of the corporate debtors and will have erga omnes effect. The mere filing of the petition and its pendency before admission, therefore, cannot be construed as the

triggering of a proceeding in *rem.* Hence, the admission of the petition for consideration of the Corporate Insolvency Resolution Process is the relevant stage which would decide the status and the nature of the pendency of the proceedings and the mere filing cannot be taken as the triggering of the insolvency process.

25. As noted, the issue which is posed for our consideration is arising in a petition filed under Section 7 of IB Code, before it is admitted and therefore not yet an action *in rem*. In such application, the course to be adopted by the Adjudicating Authority if an application under Section 8 of the Act, 1996 is filed seeking reference to arbitration is what requires consideration. The position of law that the IB Code shall override all other laws as provided under Section 238 of the IB Code needs no elaboration. In that view, notwithstanding the fact that the alleged corporate debtor filed an application under Section 8 of the Act, 1996, the independent consideration of the same dehors the application filed under Section 7 of IB Code and materials produced therewith will not arise. The Adjudicating Authority is duty bound to advert to the material available before him as made available along with the application under Section 7 of IB Code by the financial creditor to indicate default along with the version of the corporate debtor. This is for the reason that, keeping in perspective the scope of the proceedings under the IB Code and there being a timeline for the consideration to be made by the Adjudicating Authority, the process cannot be defeated by a corporate debtor by raising moonshine defence only to delay the process. In that view, even if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority has a duty to advert to contentions put forth on the application filed under Section 7 of IB Code, examine the material placed before it by the financial creditor and record a satisfaction as to whether there is default or not. While doing so the contention put forth by the corporate debtor shall also be noted to determine as to whether there is substance in the defence and to arrive at the conclusion whether there is default. If the irresistible conclusion by the Adjudicating Authority is that there is default and the debt is payable, the bogey of arbitration to delay the process would not arise despite the position that the agreement between the parties indisputably contains an arbitration clause.

26. That apart if the conclusion is that there is default and the debt is payable, due to which the Adjudicating Authority proceeds to pass the order as contemplated under sub-section 5(a) of Section 7 of IB Code to admit the application, the proceedings would then get itself

A transformed into a proceeding *in rem* having erga omnes effect due to which the question of arbitrability of the so-called *inter se* dispute sought to be put forth would not arise. On the other hand, on such consideration made by the Adjudicating Authority if the satisfaction recorded is that there is no default committed by the company, the petition would stand rejected as provided under sub-section 5(b) to Section 7 of IB Code, which would leave the field open for the parties to secure appointment of the Arbitral Tribunal in an appropriate proceedings as contemplated in law and the need for the NCLT to pass any orders on such application under Section 8 of Act, 1996 would not arise.

C 27. Therefore, to sum up the procedure, it is clarified that in any proceeding which is pending before the Adjudicating Authority under Section 7 of IB Code, if such petition is admitted upon the Adjudicating Authority recording the satisfaction with regard to the default and the debt being due from the corporate debtor, any application under Section 8 of the Act, 1996 made thereafter will not be maintainable. In a situation D where the petition under Section 7 of IB Code is yet to be admitted and, in such proceedings, if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority is duty bound to first decide the application under Section 7 of the IB Code by recording a satisfaction with regard to there being default or not, even if the application under Section 8 of Act, 1996 is kept along for consideration. In such event, the natural E consequence of the consideration made therein on Section 7 of IB Code application would befall on the application under Section 8 of the Act, 1996.

F 28. In the above background, on reverting to the fact situation in this case, a perusal of the order dated 09.06.2020 would indicate that the Adjudicating Authority, NCLT though has taken up the application filed under Section 8 of the Act, 1996 as the lead consideration, the petition filed under Section 7 of the IB Code is also taken alongside and made a part of the consideration in the said order. A further perusal of the order would disclose that the Adjudicating Authority was conscious of the fact G that consideration of the matter before it any further would arise only if there is default and the debt is payable. This is evident from the observation contained in para 5.13 of the order. The further narration made in para 5.14 would indicate that the Adjudicating Authority, from the material available on record had arrived at the conclusion that the issue involved has not led to a stage of the default having occurred and has rightly, in H that context held that the claim of the company by invoking the arbitration

clause is justified but the Adjudicating Authority has rightly done nothing with regard to arbitration and has left it to this Court. Accordingly, the Adjudicating Authority in para 5.15 has categorically recorded that they are not satisfied that a default has occurred.

29. It would be appropriate to extract the relevant findings recorded by the NCLT which demonstrates that NCLT was conscious that there should be judicial determination by the Adjudicating Authority as to whether there has been a default within the meaning of Section 3(12) while considering a petition under Section 7 of the IB Code. The relevant finding taken note above read as hereunder: -

> "5.13 Therefore, in a section 7 petition, there has to be a judicial determination by the Adjudicating Authority as to whether there has been a 'default' within the meaning of section 3(12) of the IBC.
>
> 5.14 In the present case, the dispute centres around three things –(1) The valuation of the Respondent/Financial Creditor's OCRPS; (2) The right of the Respondent/Financial Creditor to redeem such OCRPS when it had participated in the process to convert its OCRPS into equity shares of the Applicant/Corporate Debtor; and (3) Fixing of the QIPO date. All of these things are important determinants in coming to a judicial conclusion that a default has occurred. The invocation of arbitration in a case like this seems to be justified.
>
> 5.15 Looking at the contention raised, and that the facts are not in dispute, we are not satisfied that a default has occurred. We note Mr. Mustafa Doctor's statements that the Applicant/Corporate Debtor is a solvent, debt-free and profitable company. It will unnecessarily push an otherwise solvent, debt-free company into insolvency, which is not a very desirable result at this stage. The disputes that form the subject matter of the underlying Company Petition, viz., valuation of shares, calculation and conversion formula and fixing of QIPO date are all arbitrable, since they involve valuation of the shares and fixing of the QIPO date. Therefore, we feel that an attempt must be made to reconcile the difference between the parties and their respective perceptions. Also, no meaningful purpose will be served by pushing the Applicant/ Corporate Debtor into CIRP at this stage."
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> (emphasis supplied)

A The NCLT after having recorded such finding has taken note of the arbitration petition pending before this court and has accordingly concluded the proceedings.

30. The conclusion reached by the Adjudicating Authority, NCLT in the instant case cannot be faulted if reference is made to the documents B produced by Indus Biotech Private Limited along with an application and referred to by Mr. Shyam Divan, learned senior counsel are noted. It indicates that the allotment of equity shares against the OCRPS in view of the QIPO was still a matter of discussion between the parties and no conclusion had been arrived at so as to term it as default. The said issue was initiated in the 121st meeting of the Board of Directors wherein the C Nominee Director representing Kotak India Venture Fund was also present. The IPO related matters were discussed as item No.6 and at 6(c). The discussion and decision that the conversion of the outstanding preference shares would take place after issuance of bonus shares as per the provisions of the Shareholders Agreement was recorded. In the D 122nd meeting of the Board of Directors wherein the Non-Executive Director and Nominee Director representing Kotak India Venture were also present, the issue was considered at item No.7. It was resolved that the Board has accorded approval to the allocation of such percentage of the offer as may be determined by the Board to any category. Further, though in the Extraordinary General Body meeting dated 10.04.2018, E the Representative Directors of the Kotak India Venture had obtained leave of absence, the resolution adopted in the said meeting had indicated that the equity shares of the company proposed to be issued and allotted as bonus equity shares shall be subject to the provisions of the memorandum of association and articles of association of the company. F The Company Secretary was authorised to do all such acts in that regard.

31. In the letter dated 21.11.2018 addressed by Indus Biotech Private Limited to Kotak India Venture, it was mentioned with regard to the fundamental issue that needs to be addressed regarding conversion and convertible securities into equity shares since the exist process initiated G cannot move forward without such conversion. The letter dated 17.12.2018 addressed to Indus Biotech Private Limited by Kotak India Venture in fact refers to the stake in conversion and the dispute being as to whether it should be 10 per cent of the share capital of the company as offered by Indus Biotech Private Limited or 30 per cent as claimed by Kotak India Venture Fund. It is that aspect of the matter, which is still H contended to be in dispute between the parties regarding which the

arbitration is sought by Indus Biotech Private Limited, which was also noted by Adjudicating Authority. We express no opinion on the merits of the rival contention relating to the dispute.

32. In such situation, in our opinion, it would be premature at this point to arrive at a conclusion that there was default in payment of any debt until the said issue is resolved and the amount repayable by Indus Biotech Private Limited to Kotak India Venture with reference to equity shares being issued is determined. In the process, if such determined amount is not paid it will amount to default at that stage. Therefore, if the matter is viewed from any angle, not only the conclusion reached by the Adjudicating Authority, NCLT insofar as the order on the petition under Section 7 of the IB Code at this juncture based on the factual background is justified but also the prayer made by Indus Biotech Private Limited for constitution of the Arbitral Tribunal as made in the petition filed by them under Section 11 of the Act, 1996 before this Court is justified.

33. In that circumstance though in the operative portion of the order dated 09.06.2020 the application filed under Section 8 of the Act, 1996 is allowed and as a corollary the petition under Section 7 of the IB Code is dismissed; in the facts and circumstances of the present case it can be construed in the reverse. Hence, since the conclusion by the Adjudicating Authority is that there is no default, the dismissal of the petition under Section 7 of IB Code at this stage is justified. Though the application under Section 8 of the Act, 1996 is allowed, the same in any event will be subject to the consideration of the petition filed under Section 11 of the Act, 1996 before this Court. The contention as to whether payment of investment in preferential shares can be construed as financial debt was raised in the written submissions. However, we have not adverted to that aspect since the same was not the basis of the impugned order passed by the Adjudicating Authority.

34. Since we have arrived at the above conclusion, the next aspect relates to the appointment of the Arbitral Tribunal as sought in the petition. Essentially the main contention that has been urged is with regard to the proceedings before the NCLT and, therefore, the dispute not being arbitrable. However, in the present position the parties would be left with no remedy if the process of arbitration is not initiated and the dispute between the parties are not resolved in that manner as the proceedings before the NCLT has terminated. Mr. Shyam Divan, learned senior counsel

A for Indus Biotech Private Limited has contended that the transaction between the parties is a common one and as such it would be efficient if the dispute is resolved by a single Arbitral Tribunal. Further in view of the objection raised on behalf of the respondent No.4 (Kotak India Venture) that the arbitration clause has not been invoked in accordance with the requirement therein, since the promoters have to suggest one B arbitrator and not the Company, Mr. ANS Nadkarni, learned senior counsel representing the promoters who are arrayed as respondent Nos.5 to 11 in the arbitration petition has pointed out that the affidavit has been filed supporting the petition seeking arbitration and, therefore, the Tribunal be constituted. Though Mr. Neeraj Kishan Kaul, learned senior counsel C and Mr. Nitin Mishra, learned counsel had in their argument opposed the reference to arbitration by pointing out lacunae in the manner the clause was invoked and the name of the arbitrator was suggested, in the circumstance the only remedy for the parties being resolution of their dispute through arbitration as indicated above, we consider it appropriate to take note of the substance of the arbitration clause and constitute an D appropriate Tribunal.

35. In that regard it would be necessary to consider as to whether the matter is to be referred to a Single Tribunal or the Tribunal be appointed in respect of each of the agreements. Mr. Nitin Mishra in his written submission has contended that there cannot be composite arbitration. In E that regard the decision in the case *of* ***M/S Duro Felguera S.A vs M/S. Gangavaram Port Limited,*** (2017) 9 SCC 729 is relied upon with specific reference to paragraphs 38 and 55 therein, while Mr. Ritin Rai has pressed para 44 of the same decision into service seeking common Tribunal. In the said case there were five separate contracts each having F independent existence with separate arbitration clauses and in that light, it was held that there cannot be a single Arbitral Tribunal for International Commercial Arbitration and domestic arbitration and bifurcated accordingly. In the instant case also four separate agreements have been entered into between the parties. The provision for arbitration contained in clause 20.04 is similar in all the agreements and the supplemental G agreements have also adopted the same. Clause 20.4.1 reads as hereunder:

> "20.4.1 Except as provided in Section 20.4.2, the parties hereto irrevocably agree that any dispute, controversy or claim arising out of, relating to or in connection with this Agreement (including

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any provision of any exhibit, annex or schedule hereto) or the existence, breach, termination or validity hereof (a "Dispute") shall be finally settled by arbitration. The arbitration shall be conducted in accordance with the international arbitration rules of the Arbitration and Conciliation Act, 1996. The arbitration shall be held at Mumbai and shall be conducted by three (3) arbitrators. For purpose of appointing such arbitrators, KIVF I, KEIT and KIVL shall jointly, on the one hand, and the Promoters, as a group, on the other hand, shall each appoint one arbitrator, and the third arbitrator, who shall be the chairperson, shall be selected by the two party-appointed arbitrators. In the event that any party fails to appoint an arbitrator within fifteen (15) days after receipt of written notice of the other party's intention to refer a Dispute to arbitration, or in the event of the two party-appointed arbitrators failing to identify the third arbitrator within fifteen (15) days after the two party-appointed arbitrators are selected such arbitrator shall be appointed by a Court of competent jurisdiction on an application initiated by any party. An arbitral tribunal thus constituted is herein referred to as a "Tribunal". In the event an appointed arbitrator may not continue to act as an arbitrator of a Tribunal, then the party (or the two appointed arbitrators, in the case of the third arbitrator) that appointed such arbitrator shall have the right to appoint a replacement arbitrator in accordance with the provisions of this Section 20.4.1."

36. A perusal of the arbitration agreement indicates that the arbitration shall be held at Mumbai and be conducted by three arbitrators. For the purpose of appointment KIVF I, KEIT and KIVL are to jointly appoint one arbitrator and the promoters of Indus Biotech Private Limited, to appoint their arbitrator. In the second agreement dated 20.07.2007, 'KMIL' as the Investor is on the other side. In the third agreement dated 20.07.2007, 'KIVFI' as the Investor is on the other side and in the fourth agreement dated 09.01.2008 it has the same clause as in the first agreement. The two arbitrators who are thus appointed shall appoint the third arbitrator who shall be the Chairperson. The recital (c) in the different agreements though refers to each of the entity in the Kotak Investment Venture and amount invested in shares is referred to, it is provided therein that the equity shares and preference shares subscribed by KMIL, KIVF I, KEIT and KIVL are hereafter collectively referred to as the 'Financial Investors Shares'. If the said aspect is taken into consideration keeping

A in view the nature of the issues involved being mainly with regard to the conversion of preference shares into equity shares and the formula to be worked thereunder, such consideration in the present facts can be resolved by the Arbitral Tribunal consisting of same members but separately constituted in respect of each agreement. It will be open for the Arbitral Tribunal to work out the modalities to conduct the proceedings by holding B separate proceedings in the agreement providing for international arbitration and by clubbing the domestic disputes. All other issues which have been raised on merits are to be considered by the Arbitral Tribunal and therefore they have not been referred to in this proceedings.

C 37. Since Indus Biotech Private Limited had nominated Mr. Justice V.N. Khare, former Chief Justice of India through their letter dated 15.10.2019 the said learned Arbitrator is treated as having been proposed jointly by the Company and the promoters. Mr. Justice R.M. Lodha, former Chief Justice of India is appointed as the second arbitrator since the respondents had failed to nominate. The said learned arbitrators shall D mutually nominate a third arbitrator to be the Chairperson of the Arbitral Tribunal.

38. In the result, the following order;

(i) Civil Appeal arising out of SLP(C)No.8120 of 2020 is dismissed.

E (ii) Arbitration Petition No.48 of 2019 is allowed.

(iii) Parties to bear their own costs in these proceedings.

Nidhi Jain Appeal dismissed and Arbitration allowed.