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CASE LAWS

SUPREME COURT PRONOUNCEMENTS

Unitholder of a mutual fund is different from a homebuyer and cannot be categorized as a Financial Creditor

FRANKLIN TEMPLETON TRUSTEE SERVICES Pvt. Ltd. & Anr. V AMRUTA GARG & Ors.

Court	Supreme Court of India
Order date	14 July 2021
Bench	Justice S. Abdul Nazeer and Justice Sanjiv Khanna
Relevant sections	Section 10 of the IBC

Brief background
By the order dated 12th February 2021, interpreting Regulation 18(15)(c) of the Securities and Exchange Board of India (Mutual Page 2 of 77 Funds) Regulations, 1996 (hereafter referred to as 'Regulations') and accepting the poll results, the Supreme Court directed winding up of six mutual fund schemes which were run by Franklin Templeton.

Issue
The constitutionality of the Regulations which placed unit holders below creditors in the winding up of the mutual fund was challenged based on *Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others*[1] where homebuyers were treated as financial creditors under the Insolvency and Bankruptcy Code.

Decision
The Court held the distinction drawn by the Regulations to be constitutional and correct. The Court differentiated homebuyers from unitholders based on the risk undertaken. It held home buyers to not be risk takers or partakers in gains or losses like investors in mutual funds. It observed unitholders to be risk-takers who invest in the mutual funds without any guarantee of returns and know that the investment, including the principal, were subject to market risks.

The Court also held the differentiation between creditors and unitholders in the winding-up mechanism to be correct. It rejected the argument of the *pari passu* treatment of unitholders and creditors observing even the Insolvency and Bankruptcy Code to give primacy to the dues of creditors over shareholders.

The Court concluded, "To equate the unit holders with either the creditors or the home buyers will be unsound and incongruous."

Comments
This is a good judgment by the Supreme Court which denotes winding-up to be an economic process thus governed by economic laws. In holding the unitholder to be different from the home buyer, the Court has virtually signaled the treatment of home buyers as financial creditors to be an exception to the rule. Furthermore, the Court in holding the discrimination between creditors and unitholder constitutional signaled non-interference in the economic scheme designed by the legislative for winding up and bankruptcy.

Regardless, the fact this was litigated upon is due to the stance taken by the Court in *Pioneer*. In *Pioneer*, the Court held home buyers to be financial creditors, the jurisprudence of which can be questioned. The Code is purely economic and hence ought to be interpreted as such, keeping aside any welfare notions that were reflected in *Pioneer* while holding home buyers to be financial creditors

"Sriram Prasad

[1] (2019) 8 SCC 416

HIGH COURT PRONOUNCEMENTS

Writ petition against an order of NCLT not maintainable before the High Court

IDEAL SURGICALS & Ors. V. NATIONAL COMPANY LAW TRIBUNAL KOCHI BENCH & Ors.

Forum	High Court of Kerala, Ernakulam
Order Date	02 July 2021
Bench	Justice V.G. Arun
Relevant Sections	Constitution of India - Article 226; Insolvency And Bankruptcy Code, 2016 - Section 30(6), Section 31(1), Section 61, Section 62

Brief Background

The proceedings began at the request of two Operational Creditors. Ext. P1 order was issued by the NCLT appointing the second respondent as Interim Resolution Professional (IRP). The IRP was redesignated as the Resolution Professional (RP) by the members of the Committee of Creditors. In conformity with the procedure laid down by the Insolvency and Bankruptcy Code, 2016, an application under Sections 30(6) and 31(1) was filed by the RP, seeking approval of the Resolution Plan submitted by the third respondent; Resolution Applicant. By Ext. P2 order dated 22 February 2021, the NCLT approved the Resolution Plan and made it effective from the date of order. Being aggrieved by Ext. P2 order, the petitioners, who are Operational Creditors, preferred appeals before the National Company Law Appellate Tribunal (NCLAT). These writ petitions were filed on the proposition that the appeals and stay petitions are not being taken up by the NCLAT. The Court granted an interim stay of further proceedings pursuant to Ext. P2 order while admitting the petition. The third respondent and the additional 5th respondent challenged the maintainability of the writ petition.

Issue

Whether the writ petitions under Article 226 against an order of the NCLT are maintainable before the High Court or not?

Decision

The Court, while admitting the writ petition, had granted an interim stay of further proceedings of the order. The maintainability of these writ petitions was challenged on the ground that the Petitioners have a constructive alternative remedy of appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC). The Petitioners submitted that their appeals were accepted by the NCLAT, but are yet to be numbered and posted for admission. The Petitioners further contended that if the resolution process is continued in the meantime, in accordance with the order, the appeals would be pronounced unfruitful. Various judgments of the Supreme Court of India were cited by the Court, concerning the maintainability of the writ petition under Article 226 against an order of the NCLT, namely, *Sulochana Gupta and others v. RBG Enterprises Pvt. Ltd. and others*[2], wherein the Division Bench of the Hon'ble High Court of Kerala answered the same issue by holding that the Writ Jurisdiction of the High Court under Article 226 cannot be invoked to challenge an order passed by National Company Law Tribunal. The Court also cited *M/s. Innoventive Industries Ltd. v. ICICI Bank*[3], wherein it was pronounced that the IBC, 2016 is a *"Single Unified Umbrella Code"*. Further, the Court took note of *Swiss Ribbons Pvt. Ltd. and another v. Union of India and others*[4], wherein the Supreme Court, while upholding the constitutional validity of the IBC, 2016, stated that the Code is an economic legislation and that as far as legislation on economic matters is concerned, leeway should be given to the legislature as no economic law can be foolproof on its inception. On that account, the High Court, in light of the judgments of the Supreme Court with reference to the objective of the Code, dismissed these writ petitions as being not maintainable under Article 226 of the Constitution.

[2] (2020) SCC Ker 4153
[3] AIR (2017) SC 4084
[4] (2019) 4 SCC 17

Comments

The order unjustifiably narrows the range of NCLT orders against which a writ is a proper remedy, which should be avoided as it is manifestly bad in law. The Supreme Court dealt with a similar issue in the case of *Embassy Property Developments v. State of Karnataka*[5], wherein it was held that the NCLT is a quasi-judicial body that has been created by a statute and hence, it cannot be elevated to the status of a superior court which will have the power of judicial review and that the High Court can intervene with the orders passed by the NCLT if the matter pertains to public interest governed by statutory rules. If the NCLT, even while exercising its appropriate jurisdiction, gives its pronouncement in bad faith, or fails to conform with the requisites of natural justice, or grounds its decision on some matter which under the provisions setting it up it had no right to take into consideration, there is still no proper reason as to why a writ should not be maintainable. In earlier cases where an alternate remedy was available against a tribunal's order, the Court has upheld the right to file a writ against orders that are not in accordance with the enactment in question or contravene the principles of natural justice. Hence, there is no reason why the NCLT should be any different.

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"Manisha Sarade

[5] (2019) SCC SC 1542

NCLAT PRONOUNCEMENTS

Despite fulfilling all conditions of Section 7 of the Code, an insolvency application can be rejected if it is filed collusively

HYTONE MERCHANTS Pvt. Ltd. V. SATABADI INVESTMENT CONSULTANTS Pvt. Ltd.

Forum	National Company Law Appellate Tribunal
Order Date	30 June 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairman and Mr. V.P. Singh, Member (Technical**)**
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 7, Section 65

Brief Background

The Appellant, an unsecured financial creditor, had given a loan of Rs. 3 lakhs (for 6 months at 15% p.a. interest) to the respondent (Corporate Debtor), on which the respondent had defaulted. Eventually, the appellant had filed an application before the Adjudicating Authority ("AA") under Section 7 of the IBC. The corporate debtor had issued a corporate guarantee of Rs. 482,42,00,000 and had a net worth of Rs. 15,36,39,015 in the FY 2018-19. The AA found it hard to believe that a company having such net worth couldn't pay back a debt of Rs. 3 lakhs. Despite holding that the application was complete as per Section 7, the same was rejected on the ground that it was filed in collusion with the corporate debtor. The said appeal has been filed against the said order.

Issue

Whether an Application, complying with all requirements of Section 7(5) of the IBC, appears to have been filed collusively or with malicious intent and not with the intention of Resolution of Insolvency, can be rejected relying on Section 65 of the Code?

Decision

The NCLAT upheld the decision of the Adjudicating Authority. It held that the AA doesn't need to admit an application even if the same fulfils all the criteria given under Section 7. Referring to Section 7(5) of the IBC where the word 'may' have been used, the NCLAT noted that the AA has the scope to exercise discretion while rejecting an application based on Section 65, even though the same complies with all the requirements of Section 7. It has already been laid down by the SC in *Swiss ribbons (P) Ltd* v. *Union of India*[6] that Section 65 is there so that the AA can apply discretion while admitting or rejecting applications in order to prevent initiation of CIRPs that are not for resolution of insolvency but fraudulent or mala fide intent.

Looking at the net worth of the corporate debtor and the hefty amount of the corporate guarantee it had extended, NCLAT added that a strong possibility that the corporate debtor had colluded with the appellant financial creditor so as to evade its liability under the corporate guarantee could not be discarded. Based on the same, the NCLAT upheld the findings of the AA in rightfully rejecting the application of the appellant.

Cases referred by NCLAT

1. Innoventive Industries Limited v ICICI Bank[7]

NCLAT read this case in conjunction with Swiss Ribbons. It highlighted the portion which discussed the Courts power to accept or reject an Application under Section 7 (5). The portion highlighted by NCLAT is as follows "*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*."

2. Swiss Ribbons (P) Ltd. v. Union of India[8]

NCLAT, after a reading of *Innoventive Industries* and *Swiss Ribbons* in conjunction, NCLAT concluded itself to have the power to reject an

[6] (2019) 4 SCC 17

[7] (2018) 1 SCC 407

[8] (2019) 4 SCC 17

application that meets all requirements under Section 7 is there is mala fide intent and the CIRP is being used for any other purpose than envisaged by the Code. NCLAT quoted the following extract from *Swiss Ribbons* to support its conclusion, "*What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process mala fide, the Code prescribes penalties. Thus, Section 65 of the Code reads as follows…*"

3. *Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta*[9]

NCLAT used *Arcelor Mittal* to provide reasons the corporate veil may be lifted. NCLAT observing *Arcelor Mittal* stated, "*The corporate veil may be lifted when a statute itself contemplates lifting the veil, or improper conduct is intended to be prevented, or a taxing statute or beneficial statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern*."

Such observations did not materialize into any substantive part of NCLAT's judgment and hence one wonders what its presence signifies

Comments

This order of NCLAT is not good and rather unsettles a basic feature of the Code, reverting it to the pre-IBC era. The order rejects default as a criterion and reverts to the pre-IBC criterion, "the ability to pay". This virtually undoes a conscious legislative decision of keeping default the criteria to initiate insolvency and overrules the Code. Furthermore, the decision does not follow precedents set by the Supreme Court.

While rejecting the Application, NCLAT held the Application to meet all the requirements under Section 7, which predominantly is default by the Corporate Debtor among other procedural requirements. NCLAT even cited *Innoventive Industries Ltd. v. ICICI Bank*,[10] where the Supreme Court held "*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.*"[11]

A bare reading of *Innoventive Industries* instructs the Courts to accept an Application as soon as the Court is satisfied that a default has occurred. In the given case, NCLAT had accepted the default to occur and the Application to be in compliance with all the requirements to initiate a Corporate Insolvency Resolution Process.

Regardless, NCLAT rejected the Application on the grounds that (i) the corporate debtor had the ability to pay and therefore there was collusion and mala fide intent in filing a Section 7 Application and (ii) Section 7 (5) provides discretion to the Court in either accepting or rejecting an Application even after default is proved, as it uses the term "may, by order, admit such Application." Both these grounds are erroneous.

The first ground can be broken down into four missteps by NCLAT. The first misstep as already argued is NCLAT conflating the concepts of default and the ability to pay. Default as defined by the Code is non-payment of debt when debt becomes due. It does not include the ability or inability to pay the debt.

The second misstep was the framing of the issue by NCLAT. The question framed by NCLAT was "*Whether the petition complying with all requirements of Section 7(5) of the Insolvency and Bankruptcy Code, 2016, but if it appears that the Application is filed collusively, not with the intention of Resolution of Insolvency, and so with malicious intent, or malafides, then whether the Application can be rejected relying on Section 65 of the Code?*"

The deficiency in the question is the Court did not determine the standard of evidence which would be required to reject an Application on grounds of collusion but merely held the standard to be "*if it appears"*. This was the subsequent standard used by NCLAT to determine collusion where it held "*there is a plausible contention to form such an opinion of collusion*". Furthermore, NCLAT invoked Section 65 of the Code in its question framed, which is a penal Section and would require a higher burden of proof, but ignored it in its order.

The third misstep by NCLAT was accusing the parties including the Corporate Debtor of mala fide intent. In interpreting *Swiss Ribbons (P) Ltd v Union of India*,[12] NCLAT held, "*even if the Application filed under Section 7 meets all the requirements, then also the Adjudicating Authority has exercise discretion carefully to prevent and protect the Corporate Debtor from being dragged into the Corporate Insolvency Resolution Process mala fide… Therefore, it is not mandatory to admit the Application to save the Corporate Debtor from being dragged into Corporate Insolvency Resolution*

[9] (2019) 2 SCC 1
[10] (2018) 1 SCC 407
[11] *Ibid*, para 28
[12] (2019) 4 SCC 17

Process with mala fide." Assuming this interpretation to be true, the discretion with NCLAT only lies to the extent to protect the Corporate Debtor from a mal-intended Application. In the given case, the Corporate Debtor itself contented the default to be true and professed its inability to pay its debts and dues. Hence, NCLAT was not saving the Corporate Debtor from a "mala fide Application" as the Corporate Debtor itself validated the Application.

The fourth misstep was not considering relevant evidence. NCLT and NCLAT heard the case in 2021 but referred to the 2018-19 balance sheet of the Corporate Debtor. Also, balance sheets and corporate guarantees are not a sign of the company not being in distress or insolvent, hence the criteria of default was brought by the Code. Regardless, the Corporate Debtor's repeated plea's as to it being in even more adverse financial conditions due to the passage of two years fell onto deaf ears. Such lack of crucial evidence as to the Corporate Debtor's plight shows a lack of application of mind by NCLAT.

Furthermore, NCLAT dedicated a part of its order to explain the doctrine of "piercing the corporate veil", which may occur to prevent improper conduct. This doctrine is not relevant in the given case, but merely shows NCLAT's bias and pre-supposition against the parties. This culminated in NCLAT holding it was "*plausible*" there was collusion and hence rejecting the Application on said grounds.

The second ground of rejection of the Application is a total misinterpretation of the Supreme Court's holding in *Swiss Ribbons* read along with *Innoventive Industries*. NCLAT held S*wiss Ribbons* to allow for discretion under Section 7 (5), when *Swiss Ribbons* rather allowed for the discretion, not in the admission of the Application, but the determination and the validity of the default. This interpretation is to be read with *Innoventive Industries*, which instructs the Courts to admit the Application as soon as the Court is satisfied default has occurred. This results in a harmonious interpretation where both the judgments of the Supreme Court supplement each other. NCLAT misinterpreted these judgments to hold the Courts have the discretion to reject an Application after fulfilment of the criteria of default.

Unfortunately, in the given order, NCLAT has changed the criteria for default to the ability to pay and then built upon certain vague observations such as the possibility of collusion to reject the Application, after conceding that the Application fulfilled all the requirements under Sections 7.

As a consequence, of this order, any Application for insolvency will now have to pass the test of "ability to pay". Such a test will most affect Section 10 Applications where the Court will have to test the Application against the newly formed criteria of the ability to pay, for which the finances of the Corporate Debtor will be examined. Such an examination at the admittance of the application stage after a default it confirmed is ill-suited. This will only lengthen the time lost to litigation and will only serve to increase the litigation around admitting an insolvency Application. Such an impact is adverse for the insolvency regime as greater is the time lost, lesser are the chances of a successful resolution.

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"Abhismita Goswami, Sriram Prasad

NCLAT upheld the decision of AA of appointing new IRP by invoking Rule 11 of NCLT Rules, 2016

ANIL KUMAR, Ex IRP OF KSL & INDUSTRIES LIMITED V. ALLAHABAD BANK

Forum	National Company Law Appellate Tribunal
Order date	20 July 2021
Bench	Justice Anant Bijay Singh, Member (Judicial) and Ms. Shreesha Merla, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 7, Section 22, Section 27, Section 60(5); NCLT Rules, 2016 – Rule 11.

Brief Background

On admission of the application under Section 7 of the IBC, the appellant was appointed as the IRP. It was alleged that the appellant had constituted the CoC and had allotted voting shares to the creditors without proper verification of the claims of the majority of the creditors, which led to a stalemate between the secured and unsecured financial creditors. Thereby NCLT, in an interlocutory application filed by respondent no. 1 under Section 60(5) to appoint a new IRP in place of the appellant, passed an order appointing a new IRP, in the exercise of its inherent power under Rule 11 of the NCLT Rules, 2016. The present appeal has been filed against the said order.

Issue

Whether the Adjudicating Authority ("AA") can appoint a new IRP/RP directly by invoking the inherent powers prescribed under Rule 11 of NCLT Rules, 2016, bypassing the provisions of Section 22 and 27 of IBC?

Decision

NCLAT, while agreeing to the findings of the AA, upheld its decision in rightfully appointing a new IRP in place of the appellant. It noted that, since there was a standoff between the secured and the unsecured financial creditors and no decision could be reached by the creditors holding a majority of the voting share to appoint the appellant as IRP/RP, the AA was right in invoking the inherent powers under Rule 11. Also, taking into consideration the fact that the appellant had failed in providing proper leadership to the CIRP and that the CIRP had made substantial progress under the newly appointed IRP despite lack of cooperation from the appellant and the suspended management, it was only correct on part of the AA to have exercised its inherent jurisdiction to appoint the new IRP/RP.

The very objective of the IBC of conducting the CIRP in a time-bound manner was being defeated in the present case, where due to the clash between the creditors, the CIRP proceeding had already gone beyond the statutory timeline. Further, the Tribunal observed that as far as Sections 22 and 27 are concerned, both the provisions can be invoked only when the ingredients of the respective provisions are satisfied. But in the present matter, where the ingredients of Section 22 and 27 were not made out, the AA had rightly exercised its power under Rule 11.

Comments

The judgement is bad in law and holds bad implications in the future. The AA shouldn't have invoked Rule 11 of NCLT Rules to appoint a new IRP when it is the prerogative of the financial creditor submitting the application to propose the name of the IRP and thereby, change it by filing an application under Section 22 of the IBC. It is not for the AA to decide which IRP is best suited as the RP for a particular CIRP against a corporate debtor and rather, it is for the CoC to decide if the IRP would continue as the RP or a new RP should be appointed.

The concern raised regarding the previous IRP was that he had not verified the claims of all the creditors properly and allotted the voting shares without that. However, if a particular creditor feels that the IRP has wronged in allotting the voting share, it always has the option to appeal against such a decision instead of filing an application to change the IRP, disregarding the statutory provision of Section 22.

Exercise of inherent powers under Rule 11 ought to be the last resort when all the existing remedies get frustrated. But in the present case, the AA jumped the gun and instead of remedying the situation, straightaway invoked Rule 11 and passed a blanket decision on an issue which is the prerogative of

CoC to decide upon and is integral to the process of CIRP.

The framing of the issue by the Tribunal itself is highly problematic. The SC as well as the Tribunals have time and again held that the commercial wisdom of the CoC should not be questioned. However, in this case, the Tribunal has framed an issue which in itself is based on questioning the wisdom of the CoC. It blatantly bypasses the statutory provisions of Section 22 and 27, wherein the power has been given to the CoC to confirm or replace the appointment of an IRP/RP.

CoC functions as a democracy where the majority decision rules. But here, the CoC hasn't even been allowed to exercise its wisdom to adjudge upon a matter it has the right to decide and a decision passed by the AA based on one of the minority creditors' claims, has been imposed on the CoC. Another interlocutory application was also filed by one of the unsecured financial creditors asking the NCLT to pass directions to convene the meeting of CoC for the appointment of RP. NCLT, while ignoring the same, made a presumption of a possible stalemate between the creditors and afterwards, by an impugned order in another IA appointed a new RP itself in the exercise of Rule 11.

As has been held in the matter of *Bank of India* v. *M/ s. Nithin Nutritions Pvt. Ltd*., that the relationship between the IRP/RP and the CoC is that of confidence. If there is a loss of confidence and the combination is continued, the corporate debtor would be put to loss because of the bad relationship between IRP/RP with CoC. For the same reason, resolution of confirmation or replacement of IRP as RP is very crucial since it involves the authorisation of the CoC to the IRP to function as RP. In the present case, due to the exercise of Rule 11, the appointment of IRP hasn't been given any authorisation of the CoC, thereby, giving rise to a lack of confidence between the IRP/RP and the CoC.

Again, in the case of *Axis Bank Ltd*. v. *Sixth Dimension Project Solution Ltd*., the NCLAT had held that IBC hasn't given any power to the AA to exercise any sort of discretion in the appointment or change of the RP and that it is the right of the CoC to decide upon. It had further added that Sections 22 and 27 of the I&B Code do not require the CoC to give reasons for a resolution of replacement and the AA is not required to decide on such reasons. It is amply clear that the CoC has been given complete power to make decisions on the appointment of IRP/RP. However, the same has been blatantly disregarded by the AA in the present case.

Not to lose sight of, the decision was passed based on an interlocutory application filed by one of the minority creditors holding a very small percentage of voting share in the CoC. It is a strong possibility that the creditor wanted a change in the IRP for its benefit. It wasn't right on part of the AA to decide based on the claim of one creditor that the IRP wasn't fulfilling its duty properly and questioned the wisdom of the CoC. Further, if it is to be assumed that the IRP had committed a grave error in performing its duty so as to be in a position to be replaced by another IRP, a disciplinary proceeding should have been initiated against him. But no order of that sort has been passed in the impugned judgement.

Nowhere in the judgement has it been mentioned even once that the IRP was grossly wrong in his conduct or had committed any fraud. Rather the reason why the IRP was changed was that the CoC could not confirm the appointment of the IRP as the RP. This shows how the AA and the NCLAT went ahead to pass a decision by questioning the wisdom of the CoC. Instead of allowing the CoC to decide on the matter, the AA jumped the gun and invoked Rule 11, which is not ideal.

"Abhismita Goswami

Bank Guarantee can be released to its full extent while the Corporate Debtor is under CIRP, but only after subtracting the Margin Money provided to the banker as a Bank Guarantee

C&C CONSTRUCTION LIMITED V. POWER GRID CORPORATION OF INDIA Ltd.

Forum	National Company Law Appellate Tribunal
Order Dated	19 July 2021
Bench	Justice Jarat Kumar Jain, Member (Judicial), and Ashok Kumar Mishra, Member (Technical)
Relevant Section	Insolvency and Bankruptcy Code, 2016(hereinafter IBC) – Section 3(31), Section 14, Section 61, Section 65, Section 238

Brief background

The Appellant in the present case is the Resolution Professional of the Corporate debtor who has filed this Appeal under Section 61 of the IBC against the order of the NCLT (Delhi- Principal Bench). The Appellant is dissatisfied with the Adjudicating Authority's decision because it revoked an "ad-interim" injunction that it had previously given against the encashment of a bank guarantee issued on behalf of Appellant to many clients, including the Respondent. The Appellant contends that it is settled law that a court may intervene in the encashment of bank guarantees and grant an interim injunction in the presence of mounting inequities. The current case involves the bank guarantee issued to the Respondent and 20 other Appellant agencies.

The Appellant argued that if the present injunction is removed, it will lead to the liquidation of the Corporate Debtor, which is against the aim of IBC as it is not only mere recovery legislation for creditors, but it puts the Corporate Debtor back on its feet. On the other hand, the Respondent argued that the Bank Guarantee is not an asset of the Corporate Debtor. Still, the money will be deducted from the Issuing Bank's account rather than the Corporate Debtor's. The Corporate Debtor will lose only margin money if the bank guarantee is encashed. As per the Respondent, the injunction on the bank guarantee can only be applied if it is affected by fraud or any particular cause. If this Appeal is allowed, it will affect the completion of various contracts of the Respondent.

Issue

Whether the bank guarantee issued on behalf of the corporate debtor be encashed while the moratorium is in place? If so, to what extent?

Decision

The Tribunal believed that the surety's assets are separate from those of the Corporate Debtor, and proceedings against the Corporate Debtor may not be seriously impacted by the actions against assets of the third party like surety. They referred to the case of *SBI Vs. Rama Krishnan*[13] wherein the issue of surety, as well as the status of surety in a contract of guarantee for a corporate debtor, is discussed, and according to Section 14 (3) (b) of the Code, the requirements of this section do not apply to a surety under a contract of assurance to a corporate debtor.

The Tribunal held that-

"Banks can release the fund to the extent of full value of the bank guarantee minus margin money provided by the corporate debtor to the banker for the bank guarantee."

The Bench was of the view that if a bank guarantee is liquidated to keep the corporate debtor alive during the moratorium, it can be limited to the full value of the guarantee minus margin money provided by the corporate debtor to the banker for taking that bank guarantee, keeping in mind the provisions of Section 14 (1) (C) read with Section 14 (3) (b) of the Code.

Comments

The primary objective of the IBC is to secure the resuscitation and continuance of the Corporate Debtor by safeguarding the Corporate Debtor from its management and corporate death *via* liquidation. When the moratorium is in place, the bank guarantee under certain conditions can be released, and ultimately it would lead to the liquidation of the Corporate Debtor, which is antithetical to the goal and objective of CIRP. Thus, the decision of the Tribunal to subtract the margin

[13] (2018) 17 SCC 394.

money provided by the Corporate Debtor while releasing the bank guarantee is perfect as it would keep the Corporate Debtor alive during the moratorium.

“Anubhav Singh

Before approval of the Resolution Plan, the Adjudicating Authority can entertain or dispose of the question of priorities or any question of law or facts, arising out of or in relation to CIRP or Liquidation proceedings.

DWARKADHISH SAKHAR KARKHANA Ltd. V. PANKAJ JOSHI, RP OF KGS SUGAR & INFRA CORPORATION Ltd.

Forum	National Company Law Appellate Tribunal
Order dated	28 June 2021
Bench	Mr. Jarat Kumar Jain, (Judicial) and Mr. Kanthi Narahari, (Technical)
Relevant Sections	Insolvency & Bankruptcy Code 2016 – Section 31, Section 60 (5) (c)

Brief background

On 18.01.2020 the resolution professional invited expression (EOI), according to which the deadline for submission of EOI was 10.02.2020 and for Resolution Plan was 05.04.2020. Out of the 14 received Prospective Resolution Applicants, only four including GIACL met the eligibility criteria. DSKL submitted its EOI by email dated 12.03.2020. The RP on the same day informed DSKL that EOI cannot be considered as it was received after the deadline. However, on 23 March 2020, DSKL through an email to CoC Members requested that they should be allowed to submit an EOI. The Adjudicating Authority as per the suggestion of the CoC replaced the Resolution Professional on May 27, 2020, and assumed charge on the same day. After which the CoC granted permission to DSKL to submit an EOI.

Aggrieved by the decision of CoC, GIACL which was in the Prospective Resolution Applicant list filed an application against the RP before the Adjudicating Authority. The Adjudicating Authority set aside the decision of CoC in accepting the EOI of DSKL after the due date and including it in the list of Prospective Resolution Applicants. The Adjudicating Authority held that the list of Prospective Resolution Applicants prepared by earlier RP on 06.03.2020 was valid and condemned the conduct of the new appointed RP. Aggrieved by the order DSKL and the new RP filed an appeal against the order.

Issue

Whether allowing a party to file EOI after the due date is a commercial decision of CoC?

Decision

The Appellate Authority while dismissing the appeal held that Adjudicating Authority has exercised the jurisdiction under Section 60(5) (c), which empowers to decide "*any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor or Corporate Person under this Code*". Thus, before approval of the Resolution Plan, the Adjudicating Authority can entertain or dispose of the question of priorities or any question of law or facts, arising out of or in relation to CIRP or Liquidation proceedings.

It was further held that allowing DSKL to file EOI after the due date is not a commercial decision. Also, Regulation 36-A (6) itself provides that EOI received after the time specified shall be rejected. The Appellate Tribunal stated that according to Section 30, the decision of the CoC on approving a Resolution Plan is a commercial decision but a decision to allow an entity to file EoI after the due date is not a commercial decision.

The Appellate Tribunal stated that the request for submitting EoI after the due date had already been rejected by the CoC in an earlier meeting and later was approved of his own accord by a new RP immediately after his appointment. The appellate body stated that the RP must act in a fair and balanced manner without getting influenced by the conflicting interests of the parties. The new RP suppressed the material facts and misguided the members of CoC to achieve the desired decision in favour of DSKL.

Comments

The new Resolution Professional, with the approval of CoC, should have invited a fresh invitation for EoI for submission of Resolution Plan, after the expiry of the deadline. As a result, all other Prospective Applicants would have had a fair chance to engage in the process, resulting in more healthy

competition. However, it is well established that accepting a resolution plan is a commercial decision of CoC.

"Megha Kamboj

NCLAT held that the provisions of The Limitation Act, be applicable to the proceedings under the IBC; pleadings can be amended even at the NCLAT stage

VIVEK MALIK, SUSPENDED DIRECTOR OF AMZEN MACHINES Pvt. Ltd. V. PUNJAB NATIONAL BANK

Forum	National Company Law Appellate Tribunal
Order Dated	30 June 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairman, and Dr. Alok Srivastava, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016(hereinafter IBC) – Section 7, Section 238A Limitation Act, 1963- Section 3, Section 18, Section 19

Brief Background

The appellant in the present case is the suspended director of the Corporate Debtor who has filed this appeal against the order of NCLT (Division Bench, New Delhi), wherein the NCLT has admitted the application of the financial creditor under Section 7, IBC. The bank declared the account of the corporate debtor to become a non-performing asset (hereinafter NPA) on 15th March 2016, and they sent a notice under Section 13(2) of the SARFAESI Act demanding the money back. The corporate debtor acknowledged the outstanding debt to the bank in 2018. NCLT held-

"The application filed is within the period of limitation as it gives fresh lease of limitation from the date of such acknowledgement"

The appellant has challenged the validity of section 18 of the Limitation Act, 1963 in the section 7 IBC application as they argued that the acknowledgement dated July 10, 2018, could not have been relied upon by the adjudicating authority as the date of default should not be shifted. The appellant was aware that the Hon'ble Supreme Court had already clarified the law, they did not attempt to submit the applicability of section 18 of the Limitation Act, 1963, which was the ground on which the current appeal was filed, at the time of arguments. The appellants argued that these appeals deserve to be remanded to the NCLT, with the parties having the chance to modify their pleadings.

Issue

Whether the provisions of the Limitation Act are applicable under Section 7 proceeding of IBC?

Whether the Appeal deserves to be remanded to the NCLT giving an opportunity to the parties to amend their pleadings**?**

Decision

1. ***On the question of applicability of Limitation Act,1963***

The Tribunal rejected the claim of the appellant that section 18 of the Limitation Act, 1963 does not apply to an application under Section 7, IBC. The NCLAT believed that the applicability of the provisions of the Limitation Act, 1963 is now well-settled. The Tribunal referred to the *Sesh Nath Singh & Anr. vs. Baidyabati Sheoraphuli Co-Operative Bank Ltd. & Anr.*[14] and *Asset Reconstruction Company (India) Ltd. vs. Bishal Jaiswal & Anr*[15] wherein it was held that provisions of the Limitation Act,1963 do not apply to an application under section 7 of the 'I&B Code' is misconceived. Thus, the Tribunal held that sections 18 and 19 of the Limitation Act, 1963, and the other provisions of the Limitation Act apply to proceedings under the IBC.

2. *On the question of amendment of pleadings at the NCLAT stage*

The appellant also contended to remand back the appeal to the NCLT to amend the pleadings. They have referred to the cases of the Supreme Court wherein the court passed orders of remand and the

[14] Civil Appeal No. 9198 of 2019.
[15] Civil Appeal No. 323 of 2021.

opportunity to amend the pleadings even imposed costs. The Tribunal rejected the contention of the appellant and held that-

"If there was a deficiency in pleading, the same could be corrected by giving opportunity before this Appellate Tribunal to amend the pleadings."

The Tribunal referred to Asset Reconstruction Company (India) Ltd. vs. Bishal Jaiswal & Anr.[16] wherein the apex Court held that the pleadings can be brought on record or amended even at the NCLAT stage. The Tribunal believed that the adjudicating authority in the impugned judgment examined the question of limitation, and it is not a situation where no foundation has been established because there were pleadings before the adjudicating authority.

Comments

The conflict related to the applicability of the provisions of the Limitation Act, 1963 in the proceedings of IBC has been clarified by the Apex court in various cases, such as *Asset Reconstruction Company (India) Ltd. vs. Bishal Jaiswal & Anr. and Sesh Nath Singh & Anr. vs. Baidyabati Sheoraphuli Co-Operative Bank Ltd. & Anr.* This is now a well-settled principle that the provisions of the Limitation Act are applicable under Section 7 proceeding of IBC. This Judgement is very sound judgment as it upheld the applicability of Section 18 of the Limitation Act in the Section 7 proceedings. By way of the present Judgement, the Tribunal has also clarified that if there is deficiency in pleadings it can be amended even at the NCLAT stage and, there is no need to remand it back to the NCLT. The objective underlying the Limitation Act's application to most legislation is to guarantee that previous debts that have been laid to rest are not resurrected after their time has passed. Thus, the Tribunal through its judgment has plugged the lacuna under IBC and brought IBC in line with the law of limitation.

"Anubhav Singh

[16] Id.

Fixed Deposit holder can be paid any amount as per the COC's "Commercial Wisdom"; NCLAT refuses to entertain appeal on procedural grounds

Dr. ANEES AHMAD & Ors. V. AMIT JAIN & Ors.

Forum	National Company Law Appellate Tribunal
Order Dated	02 July 2021
Bench	Justice AS Cheema (Officiating Chairperson), Dr. Alok Sharma (Member, Technical)
Relevant Sections	61(3) and 61(3)(i) of the Insolvency and Bankruptcy Code, 2016

Brief Background

This case is an Interlocutory Application challenging the decision of the Ahmedabad Bench of the NCLT which arose out of the Corporate Insolvency Resolution Process (CIRP) against a Corporate Debtor named *Neesa Leisure Ltd.* A Resolution Plan was accepted by the Committee of Creditors (CoC), and presently it is before the Adjudicating Authority (NCLT Ahmedabad), pending decision. Certain applicants claiming to be Fixed Deposit holders in *Neesa Leisure Ltd*. raised a contention through an I.A. in the NCLT that it is impermissible for the Resolution Professional to clear the Resolution Plan and place it before the CoC. They claim that since they are FD holders, this debt cannot be reduced or varied by way of a Resolution Plan, and such a reduction or variation is in contravention of the Companies Act. NCLT Ahmedabad rejected the claim of the applicants and held that the inclusion of FD holders in the CIRP is permissible, and any amount as per the "commercial wisdom" of the CoC is allowed to be disbursed to them. The applicants thus challenged this decision in the NCLAT**.**

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Issue

The issues for the NCLAT's consideration were two-fold. First, it had to decide whether the IA was premature, considering that the decision on the legal validity of the Resolution Plan was still pending before the Adjudicating Authority. Only if the answer to this question was in the negative, could it decide on the broader issue- whether the claim of Fixed Deposit holders in a company going through the CIRP under the IBC can be reduced or varied by way of a Resolution Plan.

Decision

Concerning the first issue, the NCLAT decided that the instant IA was indeed premature as the NCLT was yet to pronounce its decision on the validity of the Resolution Plan submitted by the CoC. Hence, the NCLAT refused to decide upon the core issue of this case at this stage. The NCLAT examined the claims of both the parties with respect to the legal validity of the haircut taken by the FD holders but opted not to evaluate these claims on their merits. However, the NCLAT did not preclude the applicants from filing an appeal on the merits of the case after the NCLT had given its verdict on the Resolution Plan. The NCLAT also remarked that it would have been more appropriate for the NCLT to have decided on the Resolution Plan and the IAs together, presumably to facilitate a smoother process of appeal for the applicants.

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Comments

The NCLAT rightly refused to entertain this appeal, because it is indeed procedurally impermissible under the IBC for the applicants to move to the NCLAT at this stage. This conclusion can be reached by reading Section 61(3) of the IBC which provides for appeals against orders of the NCLT under certain grounds only after the Resolution Plan has been approved by the NCLT. The ground taken by the applicants is that this order is in contravention of the Companies Act and hence is violative of Section 61(3)(i). However, this ground can only be used when the Resolution Plan has been approved by the NCLT.

While the NCLAT has refused to comment upon the merits of the case, the NCLT has relied on the judgement of the Supreme Court in *K Shashidhar v.*

Indian Overseas Bank and Ors.[17] to reaffirm that the CoC is authorized to reduce the amount due to Fixed Deposit holders by way of a Resolution Plan. The applicants argue that, since the claims of the FD holders are contractual in nature, they are protected under the Companies Act. This is a facetious claim, as all debts are contractual in nature and the applicants have provided no reasons as to why Fixed Deposits are peculiar in nature. Thus, it is highly unlikely that the order of the NCLT will be successfully challenged in the NCLAT if the applicants so wish to pursue this case on such grounds. The applicants are financial creditors, and their claims can be challenged by the Resolution Plan. Whether or not they should be treated as financial creditors is something that needs to be decided by the court.

"Aashka Vora, Avanish Kar

[17] (2019) 12 SCC 150

NCLAT can exercise powers under Rule 11 to allow an application of withdrawal if parties have reached a settlement prior to the constitution of CoC

ANUJ TEJPAL DIRECTOR OF THE SUSPENDED BOARD OF FIRECTORS OF OYO HOTELS AND HOMES Pvt. Ltd. V. RAKESH YADAV

Forum	National Company Law Appellate Tribunal
Order Dated	07 July 2021
Bench	Justice Anant Bijay Singh, Member (Judicial) and Ms. Shreesha Merla, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 12A; NCLAT Rules – Rule 11; CIRP Regulations – Regulation 30A

Brief background

The application under Section 9 of the IBC, filed by the respondent operational creditor, was admitted. The appellant had filed this appeal against the impugned order of admission, seeking a direction to set it aside by invoking inherent jurisdiction under Rule 11 r/w Rule 31 of the NCLAT Rules, considering that the parties had reached a settlement. The Tribunal noted that all the disputes and claims payable to the operational creditor were settled to the full and final satisfaction. Thereby NCLAT, relying on *Swiss Ribbons Pvt. Ltd*. v. *Union of India*[18], allowed the withdrawal of the insolvency application against the corporate debtor, in exercise of Rule 11 of NCLAT Rules, 2016. Meanwhile, several intervention applications were filed by proposed intervenors opposing the said order of withdrawal of the application.

Issue

The issues before NCLAT were threefold. First, whether NCLAT has the jurisdiction to invoke Rule 11 to entertain applications seeking withdrawal, prior to the constitution of CoC? Second, whether the present application falls within the ambit of Regulation 30A of the CIRP Regulations? Lastly, whether, considering the settlement between the appellant and the respondent, the intervention applications can be allowed during the pendency of the appeal?

Decision

NCLAT, while allowing the appeal, disallowed the intervention of external parties during the pendency of the appeal. Relying on various judgements like *Jogender Kumar Arora Vs. Dharmendar Sharma and Ors.*[19], *Avishek Roy Vs. Diamond Steel Enterprise and Ors.*[20], *Vishal Gupta Vs. M/s. Anav Construction & Anr.*[21], wherein NCLAT had exercised inherent powers under Rule 11 to set aside admission order, this Tribunal held that considering that the parties had reached a settlement prior to the constitution of the CoC, it has the power to invoke Rule 11 to allow an application of withdrawal. NCLAT further added that both NCLAT and NCLT can exercise the inherent powers under Rule 11 in the interest of justice and may allow or disallow an application of withdrawal based on the facts of the case and interest of the parties concerned.

It is amply clear from Section 12A that it deals with the withdrawal of an admitted application post constitution of CoC, while Regulation 30A deals with situation pre-constitution of CoC. Moreover, substantive law takes precedence over a regulation. It has also been held in *Brilliant Alloys Pvt. Ltd. Vs. Mr. S. Rajagopal & Ors.*[22] that Regulation 30A is not mandatory but merely directory in nature. Taking this into account along with the ratio of *Swiss Ribbons Pvt. Ltd. and Ors.* that prior to constitution of CoC, any party can approach NCLT directly, and in exercise of inherent powers under Rule 11, NCLT may allow or disallow an application of withdrawal, NCLAT noted that the present application shouldn't be mandatorily dealt under Regulation 30A(1)(a) and the said regulation is not applicable to the present case.

[18] (2019) 4 SCC 17
[19] I.A. 312 & 336 of 2019 in Company Appeal (AT) (Insolvency) No. 94 & 95 of 2019
[20] Company Appeal (AT) (Insolvency) No. 794 of 2018
[21] Company Appeal (AT) (Insolvency) No. 1016 of 2019
[22] Petition(s) for Special Leave to Appeal (C) No(s). 31557/2018

Cases referred to by the NCLAT

1. Jogender Kumar Arora v. Dharmendar Sharma and Ors.[23]

In this case, NCLAT had held that under Rule 11 as per *Swiss Ribbons* it could allow withdrawal of an application as the parties had settled and consented to withdrawal of the application. In this case, the CoC was yet to be formed and hence NCLAT allowed for withdrawal of application under Rule 11 regardless of many intervening applications by creditors who had submitted a claim to the IRP, as those creditors did not have any powers or say before the formation of the CoC.

2. Avishek Roy v. Diamond Steel Enterprise and Ors.[24]

In the given case, NCLAT set aside the Admission Order under Section 9 passed by the Adjudicating Authority, holding that the parties agreed to a settlement prior to the Constitution of the CoC. This was before the amendment inserting Section 12-A and was confirmed by the Supreme Court which dismissed an appeal arising out of this order *Ashok*

3. Kumar Tibrewala' v. 'Diamond Steel Enterprise & Ors.

Vishal Gupta v. M/s. Anav Construction & Anr.[25]

In the given case, NCLAT, pursuant to the settlement between the parties, exercised power conferred by Rule 11 of NCLAT Rules, 2016 and set aside the Admission Order under Section 9 of the Code.

4. Mr. Vivek Verma' v. 'M/s. IRPO Sugar Engineering Pvt. Ltd[26]

In this case, a three Member Bench of NCLAT allowed the Appeal preferred by the Suspended Director of the 'Corporate Debtor', exercising powers under Rule 11 to deem the application withdrawn and the CIRP process over as it accepted the terms of settlement between the Applicant and the Corporate Debtor stating "*in exercise of inherent powers conferred upon this Appellate Tribunal under Rule 11 of the NCLAT Rules 2016, we accept the Terms of Settlement and set aside the impugned order dated 3rd September, 2019 and release the 'Corporate Debtor' from rigour of 'Corporate Insolvency Resolution Process'*."

Comments

A reoccurring theme observed in the Judgments cited was the reliance placed on Swiss Ribbons by the NCALT, hence, the NCLAT exercised powers conferred under Rule 11 on a case-to-case basis in view of the settlement reached prior to the formation of CoC. This is a good order as it allows for the Corporate Debtor to be released from CIRP once it pays the amount due or settles with the applicant before the formation of CoC. As there is no collar in the IBC to allow for withdrawal, Rule 11 is used by NCLAT. The only concern is the possible misuse of Rule 11, hence Rule 11 ought to be used judiciously, as directed by Swiss Ribbons.

"Abhismita Goswami, Sriram Prasad

[23] I.A. 312 & 336 of 2019 in Company Appeal (AT) (Insolvency) No. 94 & 95 of 2019
[24] Company Appeal (AT) (Insolvency) No. 794 of 2018
[25] Company Appeal (AT) (Insolvency) No. 1016 of 2019
[26] Company Appeal (AT) (Insolvency) 967 of 2019

Goods owned by a Creditor which is in possession of the Corporate Debtor if consumed after CIRP begins from CIRP costs

CONCAST STEEL AND POWER LIMITED V. MSRTC LIMITED

Forum	National Company Law Appellate Tribunal
Order dated	05 July 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairperson and Justice Anant Bijay Singh, Member (Judicial)
Relevant Sections	Section 17 (1), 77 of the Companies Act 2013, Section 3 (31), 17 (1), 18, 25, 53 of the IBC

Brief Background

An appeal was filed by the Corporate Debtor 'Concast Steel and Power Limited' (CSPL) through the Liquidator against the order of NCLT Kolkata Bench declaring the Respondent MSTC Limited (MSTC) a secured creditor. Some important facts to note are the agreement between CSPL and MSTC was a tripartite cash and carry agreement where the supervising agent (third party) was the custodian of the material pledged to MSTC. Therefore, the goods were in possession of CSPL and were pledged to MSTC. After default and the start of the Corporate Insolvency Resolution Process (CIRP), to inventory the goods, MSTC carried out two rounds of inspection. The results of the two rounds showed a huge discrepancy in the inventory of goods, where goods were depleted. This discrepancy is being investigated as fraud by the appropriate authorities and MSTC also filed an FIR in this regard.

Issue

There were numerous issues present before the NCLAT. The main issue was regarding MSTC being a secured creditor. A connected issue was the pledge not being registered as a charge before the Registrar of Companies under Section 77 of the Companies Act, and hence the charge formed being inadmissible. Another issue was factual in nature; the validity of the first inspection of inventory by MSTC was challenged as being inadmissible.

Decision

With regards to the main issue, NCLAT upheld the NCLT order to declare MSTC a secured creditor. NCLAT held MSCT to be the owner of the goods which depleted in the possession of CSPL. NCLAT held the arrangement between CSPL and MSTC to fall under the definition of "Security Interest" under Section 3 (31) as "agreements or arrangements securing payment or performance of any obligation of any person" fall within the ambit of security interest.

In deciding the connected issue of the charge formed not being appropriately registered under Section 77(3) of the Companies Act 2013, NCLAT harmoniously interpreted Section 77(4) of the Companies Act to hold the arrangement and the agreement between CSPL and MSCT to form a valid charge and did not revisit the interpretation of charge due to a factual reason.

The factual reason was the depletion of goods, owned by MSCT and in possession of CSPL. NCLAT held the first inventory report to be valid and therefore accepted the claim of MSCT with regards to the depletion of goods. NCLAT observed the depletion of goods had occurred after the CIRP was initiated and the plant was functional. It, therefore, concluded the goods to be utilized by the plant to keep the Corporate Debtor a going concern. NCLAT further pointed out the value of the goods utilized should be termed 'CIRP costs' under Section 53, as the goods were used to keep the Corporate Debtor a going concern. However, the NCLAT decline to interfere in the NCLT order holding MSCT to be a secured creditor as MSCT did not claim the depletion of goods to be CIRP costs.

Furthermore, NCLAT observed the depletion of goods between the two inventories to be a grave oversight on the part of the Interim Resolution Professional (IRP) or the Resolution Professional (RP) and observed, "When the provisions require taking control and custody of the assets, it would be necessary for the IRP/ RP to show steps taken on such count." It also observed, under Sections 17 and 18, it would be the responsibility of IRP/RP, who has taken over the management, to return the goods if they do not belong to the Corporate

Debtor. If such goods are used to keep the Corporate Debtor a going concern, then it will be covered under CIRP costs.

Comments

This order is bad in law for two main reasons. One, it terms CIRP costs as a secured debt due to the factual scenario. In doing this, NCLAT digresses from the Code. As per the Code, the debt in question is CIRP costs, but the creditor wanted to be declared a secured creditor and did not plead before either NCLT or NCLAT to declare the debt as CIRP costs. Due to this anomaly, NCLAT refused to examine the law and its interpretation and allowed the creditor to claim the debt, which was a tier lower, as secured debt. In doing so, NCLAT ignored the definitions under the Code.

The other reason is NCLAT did not conclusively answer the issue of registration of a charge under Section 77 of the Companies Act due to the reasons above. The Code is a creditor friendly legislation and whenever NCLAT has an opportunity to settle the law surrounding the Code, it ought to. In the current case, by choosing to ignore all the legal questions due to the peculiar factual scenario, NCLAT missed an opportunity to settle the law. Now, such issues would be re-litigated upon, wasting precious time which could have been used to ensure the debtors' survival**.**

“Sriram Prasad

RP can obtain financial statement with the help of the Registration of the Companies/MCA website

Mr.VENUGOPAL DHOOT INDIVIDUAL INDIAN INHABITANT V. Mr. PRAVIN R. NAVANDAR RP

Forum	National Company Law Appellate Tribunal
Order dated	05 July 2021
Bench	Justice Jarat Kumar Jain (Judicial Member) and Dr. Ashok Kumar Mishra (Technical Member)
Relevant Sections	Insolvency and Bankruptcy Code 2016- Section 61, Section 18, Section 19, Section 20, Section 43, Section 44, Section 49, Section 66, Section 70 and Section 236.

Brief background

The Corporate Debtor (CD) VOVL is a wholly-owned subsidiary of Videocon Industries Ltd. (VIL). Both the companies are undergoing the CIRP. When the RP demanded a certain list of documents, the appellants stated that CD was only a Special Purpose Vehicle (SPV) and requested the RP to get in touch with RP of VIL for obtaining the information. Videocon Hydrocarbon Holdings Ltd. was a step-down subsidiary of CD incorporated in Brazil. The RP also insisted on the documents from this foreign subsidiary as they were required to link up their transactions.

Issue

Whether the Appellants can be exempted from filing certain documents unavailable with them? Whether the Resolution Professional can insist on submission of the documents of foreign subsidiaries of the Corporate Debtor?

Decision

RP is a competent professional to re-construct the book showing cash flow for the given period in the Code. RP can take assistance from the Registrar of Companies / MCA website to obtain the annual return. As stipulated in the explanation to Section 18, the term “assets” does not include assets of any Indian or foreign subsidiary of the corporate debtor. Therefore, the appellants are not fully liable for the non-availability of documents. Thus, the order of adjudicating authority (AA) was set aside and remanded back. The Bench also observed that CD should have been under group insolvency, however, there is no specific provision to enforce this action.

Comments

The corporate debtor has a duty to comply with the instructions made by the Resolution Professional with regard to the submission of the required documents. As rightly decided by NCLAT, the Resolution Professional is empowered to access all the relevant information under Sec. 25 of Insolvency and Bankruptcy Code 2016.

“ Renuka Nevgi

Liquidation should be seen as a last resort especially to safeguard the interest of homebuyers

LOTUS CITY PLOT BUYERS WELFARE ASSOCIATION V. THREE C HOMES Pvt. Ltd & Ors.

Order Dated	08 July 2021
Forum	National Company Law Appellate Tribunal, Principal Bench, New Delhi
Bench	Justice Jarat Kumar Jain (Judicial) Justice Jarat Kumar Jain (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section Section 25(2)(i) and Section 61.

Brief background

Three appeals were filed under Section 61 of the IBC, before National Company Law Tribunal, Division Bench New Delhi against the common order dated 08.02.2021 passed by the 'Adjudicating Authority' and accordingly, all the appeals are been clubbed for disposal. These three appeals were filed for seeking the common reliefs of setting aside the impugned order dated 08.02.2021 passed by the 'Adjudicating Authority' and connected consequential reliefs. The 'Adjudicating Authority' rejected the Resolution Plan and directed the RP to file an appropriate application for seeking liquidation order of the Corporate Debtor – M/s. Three C Homes Pvt. Ltd & Ors. The 'Adjudicating Authority' concluded that the Resolution Plan did not have any future potential for homebuyers (Financial Creditors) and the Resolution Plan proposed Rs. 95 crores which is too low in comparison with the liquidation value of Rs. 480.70 crores. It also felt that the resolution plan was inconsistent with the IBBI (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2020.

Issue

Whether the order dated 08.02.2021 passed by the NCLT Division Bench New Delhi is justified on account of rejecting the Resolution Plan and directed the company into liquidation**.**

Decision

The Appellant - Lotus City Plot Buyers Welfare Association contented that the 'Adjudicating Authority' did not consider the impact of certain calculations while considering Rs. 95 crores released by the Resolution Applicant. Furthermore, the decision of the CoC in respect of the commercial issues could not be challenged by the NCLT i.e the 'Adjudicating Authority'.

Whereas the Respondents – M/s. Three C Homes Pvt. Ltd & Ors. contented that the Resolution Plan did not comply with the provisions of the Code like a violation of Section 25(2)(i) of the IBC and the related Regulation like non-submission of 'compliance certificate'. Furthermore, there has been certain infirmity in not providing priority to 'Operational Creditor' over 'Financial Creditor" as required under the Regulation 38 of IBBI (Insolvency Resolution Process for Corporate Person) Regulation, 2016. The bench after going through both the contending side pointed out the following- There stands a difference of CoC when 'Banks' and 'Institutional Lenders' are members, while the CoC in the case of Homebuyers is not considered to be experts in finance and related valuations. Therefore, the CoC in the case of the commercial organisations will have different expertise and perspective whereas in case of Real Estate projects the CoC are totally comprising of homebuyers who may not have the required expertise and perspective to decide on the matter.

Additionally, the bench concluded that the Resolution Plan would generally provide a higher value than the liquidation value but in the case of the Real Estate Project, it may not be the case always as it is not feasible and homebuyers are in urgent need of getting their homes at the earliest. Thereby the bench set aside the liquidation order of the NCLT and remanded the matter back with a direction to review the programme in full along with the relevant provisions of the Code and Regulations while commenting that, liquidation should be seen as a last resort and this programme of homebuyers needs some proper evaluation and calibration**.**

Comments

The law clearly defines the extend up to which the NCLT can exercise its power. In fact, Supreme Court restricted the role of NCLT to only adjudicate whether the CoC has complied with the objects of the Code that is, the corporate debtor needs to be kept as a going concern during CIRP. The Code intends to leave the commercial aspects in the hands of the COC consisting of the financial

creditors, relying on their commercial and technical wisdom. Unless the resolution plan violates the Code/Regulations/objectives, the AA shall be exceeding its jurisdiction if it chooses to go into the merits of the plan. Therefore, this case is not standing in accordance with Code and thereby does not give a good example in law.

“Anushka Fuke

Value determined by the two Registered Valuers is simply an estimate based on a variety of considerations, and certainly there will be differences in each Valuer's reports. Such estimates can at best be an aid to the Committee of Creditors, to take a call on commercial decisions, which cannot anyway stifle them in any manner

Dr. VIJAY RADHAKRISHNAN V. BIJOY P PULIPRA, RP PVS MEMORIAL HOSPITAL Pvt. Ltd.

Forum	National Company Law Appellate Tribunal, Chennai
Order Dated	09 July 2021
Bench	Mr. Justice Venugopal M., (Judicial) and Mr. V. P. Singh (Technical)
Relevant Sections	CIRP Regulation 35(1)(a)(b); Insolvency & Bankruptcy Code 2016 - Section 30(2).

Brief background

The Appellant has filed this Appeal being aggrieved by the Order passed by the 'Adjudicating Authority'. The Appellant contested that there is a variance of 15.62% in the Valuation by the two registered valuers which was approved by CoC. Owing to such difference a third valuer should be appointed

Issue

Whether the difference of 15.62% between the two Registered Valuers in regard to the Valuation made is substantial to warrant an appointment of a third Valuer as per CIRP Regulation 35(1)(a)(b)?

Decision

The Appellate Authority while upholding the decision of the Adjudicating Authority held that the 'Appellants' claim for rejection of 'Resolution Plan' could not be entertained at the stage when 'Resolution Professional' had filed the 'Resolution Plan' before it, and also when the Plan was to be approved. The Tribunal while rejecting the plea of the Appellant to appoint a third Valuer for the purpose of Valuation stated that the value determined by the two registered Valuers is simply an estimate based on a variety of considerations and that such a disparity is inevitable. The difference of 15.62% between the two registered Valuers in regard to the Valuation made is not a substantial/material one so as to warrant an appointment of a third Valuer as per Regulation 35(1)(a)(b) and (c) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Estimated Values provided by the two registered Valuers can only serve as a guide for the Committee of Creditors in making a Commercial Decision, and they cannot be used to constrain them in any way.

The 'Resolution Professional' had resorted to the agreed 'International Valuation Standards' to verify the Corporate Debtor's fixed assets physically. As a result, the issue of appointing a 'third Valuer' on the alleged basis of a 15.92% difference in the 'Fair Value' does not arise. The 'Resolution Plan' had satisfied the requirements of the ingredients of Section 30(2) of the Code, prior to the submission of the 'Resolution Plan' for approval of the 'Adjudicating Authority'. The ambit of 'Judicial Review' to be undertaken by the 'Adjudicating Authority' revolves around a narrow and restricted compass, which is a fundamental principle in law. Neither the 'Adjudicating Authority' nor the 'Appellate Tribunal' can substitute their own 'Wisdom' for the 'Commercial Wisdom' of the 'Committee of Creditors.' According to Section 30(4) of the Code, the 'Appellate Tribunal' has no jurisdiction to question the distribution determined by the 'Committee of Creditors.' Be it noted, that Section 30(2)(b) of the Code refers to Section 53 of the Code, not in the context of priority of payment of Creditors, but only to provide for a minimum payment to the 'Operational Creditors'

Comments

It is a good judgment in the eyes of law as the estimated values are only a guide for the Committee of Creditors in making a Commercial Decision. In the end, it is the discretion of the CoC to take into consideration the values that they deem fit.

"Megha Kamboj

Parallel proceedings against Borrower and Guarantor are maintainable as per Section 60 of the IBC

EMERALD REALTORS Pvt. Ltd. (SHAREHOLDERS OF SAPPHIRE LAND DEVELOPMENT Pvt. Ltd.) V. SURAKSHA ASSET RECONSTRUCTION Ltd.

Forum	National Company Law Appellate Tribunal,
Order Dated	09 July 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairperson and Dr. Alok Srivastava, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 - Section 7, Section 60(2)

Brief Background

The Appellant, shareholder of Sapphire Land Development Pvt Ltd. (principal borrower) had filed this appeal against the order of the Adjudicating Authority admitting the application of respondent no. 1, financial creditor under Section 7 of IBC. It involved the issue of a parallel proceeding filed against the principal borrower when CIRP was already initiated against the Corporate Guarantor, Housing Development and Infrastructure Limited (HDIL) wherein the claim of the financial creditor had already been accepted in full. It had been submitted that the NCLT did not refer to the issue of parallel proceeding in its impugned order.

Issue

The issue involved in this Appeal is with regard to parallel proceedings filed against the 'Principal Borrower' when already CIRP had been initiated against the 'Corporate Guarantor' and the claim of the 'Financial Creditor' had already been accepted in the CIRP for the whole amount.

Decision

NCLAT ruled that parallel proceedings against the borrower and guarantor are maintainable under Section 60(2) of IBC. The bench noted that Section 60(2) explicitly mentions that if CIRP or liquidation proceeding of a corporate debtor is pending before an NCLT, an application relating to insolvency resolution of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor shall be brought before the NCLT. Such parallel proceedings against the borrower and guarantor are maintainable.

Comment

It is a sound judgement. The judgement is good in the eyes of law as NCLAT while issuing the order reproduced Section 60(2) of IBC which deals with the issue of parallel proceedings. Keeping in mind the IBC the order is in line with the statute and has rightfully dismissed the appeal.

"Samarth Garg

Delay should only be condoned in exceptional cases and the deadline to file an Appeal ought to be respected

NEW BOILERS ENGINEERING V. IDBI BANK LIMITED & Ors.

Forum	National Company Law Appellate Tribunal Principal Bench, New Delhi
Order Dated	13 July 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairperson and Dr. Alok Srivastava, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 - Section 7, Section 61(2)

Brief Background:

The petition filed by IDBI Bank under Section 7 against Corporate Debtor EPC Constructions India Ltd. was admitted on 29.12.2017. Subsequently, the Resolution Plan of Royale Partners Investment Fund Ltd. (RPIFL) was approved by an impugned order dated 25.11.2019. The Appellant, claiming to be an 'Operational Creditor', had filed this appeal, against the impugned order on 09.04.2021. It was argued that the appellant did not have the knowledge of the said order and requested for condonation of the delay in filing the appeal.

Issue:

Whether the delay in filing the appeal be condoned by the NCLAT?

Decision:

NCLAT denied condoning the delay. It held that although as per Section 61(2) of the IBC, an appeal should be filed within 30 days, a delay of 15 days beyond the period of appeal may have been condoned. It added that even if NCLAT was to entertain the appeal, no document could prove the claim of the appellant. The claim was rejected before and when no appeal was filed during the course of CIRP against such rejection, any belated effort by the appellant cannot be considered.

Comments:

The decision of the NCLAT to not condone the delay is much appreciated. The deadline to file an appeal should be respected as has been done in the above decision.

"Animish Dighe

Delay should only be condoned in exceptional cases and the deadline to file an Appeal ought to be respected

BHASKAR BISWAS, SUSPENDED DIRECTOR OF OXFORD FACILITIES MANAGEMENT V. AVAANI OXFORD OWNER'S ASSOCIATION

Forum	National Company Law Appellate Tribunal
Order Dated	13 July 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairman, and V.P. Singh, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 5(8)(f), Section 4, Section7

Brief Background:

The appellant in the present case is the suspended director of the corporate debtor who was entrusted with the money deposited by the financial creditors (Flat Owners) for the maintenance of the society and was required to hand back the money to the financial creditors when the society was established. The corporate debtor had filed an application challenging the validity of the section 7 proceedings before the NCLT (Kolkata bench) as they argued that the default amount is not a "Financial Debt." The NCLT rejected the contention of the corporate debtor and admitted the application. The corporate debtor filed an appeal against the order of NCLT, contending that the default amount does not fall within the meaning of "Financial Debt" and the CIRP under section 7 is not maintainable.

Issue:

The issue before the Tribunal was whether the default of the amount deposited as maintenance fund could be termed as "Financial Debt"? If so, whether the CIRP under Section 7 can be initiated in the default of the said amount?

Decision:

The appellate tribunal accepted the claim of the respondent that there was a sale agreement and the amount deposited was for the maintenance of the society. The corporate debtor was required to safeguard the amount and transfer it back to the flat owners as soon as the society was formed. The corporate debtor defaulted and did not return the amount. The tribunal rejected the claim of the appellant that the debt is time-barred and referred to *Sesh Nath Singh & Anr. vs. Bidyabati Sheoraphuli Co-operative Bank Ltd. & Anr.*[27] and held that this is not a situation in which the financial creditors slept on their rights as they pursued their rights in the consumer forum and pursued the developer and the corporate debtor to get back the money deposited by flat buyers.

The Tribunal rejected the view of the appellant, that "*the debt is not a "Financial Debt" and the CIRP can't be initiated".* According to the explanation to section 5(8)(f), any money acquired from an allottee under a real estate project is treated as an amount with the commercial impact of a loan. The Tribunal accepted the claim of the respondent that the default amount is the financial debt, and this default amount is more than the amount stated in Section 4. Thus, the Tribunal upheld the order of the NCLT and held that section 7 proceeding against the corporate debtor is maintainable.

Comments:

The present decision taken by the Tribunal was absolutely right. It can be observed here that the financial debt in the present case is a time value money hence, the proceedings under Section 7 against the corporate debtor is maintainable. It was clearly stated that in this case, the Financial creditors were not sleeping over their rights. There was no error in the challenged order to vide which the CIRP initiated.

"Yashi Singh

[27] Civil Appeal No. 9198 of 2019 dated 22nd March, 2021.

Resolution Plan approved are a binding on the Central Government, State Government, any local authority, guarantors and other stakeholders

DEPUTY COMMISSIONER, CGST KALOL, GUJRAT V. M/S GOPALA POLYPLAST Ltd.

Forum	National Company Law Appellate Tribunal
Order Dated	16 July 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairperson and Dr. Alok Srivastava, Member (Technical)
Relevant Section	Insolvency and Bankruptcy Code, 2016 – Section 31(1)

Brief Background:

On 07.08.20 the NCLT at the Ahmedabad Bench approved the Resolution Plan for corporate debtor M/s Gopala Polyplast Ltd. An Appeal was later filled by the Appellant i.e., Deputy Commissioner, CGST Kalol, Gujrat against the impugned NLCT order. The Appellant had submitted that there was a claim filed for the outstanding GST dues recoverable from the Corporate Debtor- M/s Gopala Polyplast Ltd. during its corporate Insolvency Resolution Process (CIRP). The claim was admitted to the extent of ₹2,36,67,282. The Resolution Plan approved by the Committee of Creditors (CoC) has made provision of only ₹ 1,18,336 as the final settlement of the dues. The Appellant submits that the amount approved is too insufficient considering the outstanding claim.

Issue

The issue here was regarding the provision made for the full and final settlement by the Resolution Plan approved by the Committee of Creditors for the outstanding GST dues. The amount approved for the Appellant – Operational Creditor is too insufficient considering the outstanding claim.

Decision

NCLAT dismissed the appeal while referring to the *Ghanashyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited &. Others*[28] wherein the Hon'ble Supreme Court dealt with the issues in this context held that all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval. Based on this judgement of the Hon'ble Supreme Court, the bench declined to accept the appeal. The bench concluded that the sufficiency or insufficiency of the amount is a matter of Commercial Decision of the Committee of Creditors

Comment:

Statutory dues are operational debts as defined under the definition of operational debts and also decided in this case and other cases like *Pr. Director-General of Income Tax (Admn. & TPS) vs M/s. Synergies Dooray Automotive Ltd. & Ors*. So there is no question of a Resolution plan being challenged on the ground that it doesn't satisfy the entire operation debt of any nature. Once it has been approved by the CoC as far as there are no legal infirmities then the Resolution Plan is final and binding on all authorities including state authority. Therefore, this is a good decision,

"Omkar Chaudhari

[28] 2019 SCC OnLine NCLAT 691

The Liquidator of the Principal Borrower may be appointed as the Resolution Professional of the Corporate Guarantor when they face simultaneously CIRPs

STATE BANK OF INDIA V. M/S ATHENA ENERGY VENTURES Pvt. Ltd.

Forum	National Company Law Appellate Tribunal
Order Dated	05 July 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairman, and V.P. Singh, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 16(1)

Brief background

The Principal Borrower, in this case, is M/s. Athena Chhattisgarh Power Ltd., which is currently undergoing liquidation. The Corporate Guarantor Athena Energy Ventures Pvt. Ltd. was the Corporate Guarantor and was undergoing insolvency proceedings under IBC at the NCLT Bench at Hyderabad.

In the interlocutory appeal at hand, the applicant filed an appeal demanding that C. Bala Mouli be removed as the insolvency resolution professional for Athena Energy Ventures Pvt, Ltd. upon his wishes (the primary reason being his age) and that a Kumar Ranjan, who had been made the liquidator in the case of the principal borrower be made the insolvency resolution professional.

The respondents in this case agreed and upon ensuring that the respondents had no problems with the same, the appealing authority gave directions to the Hyderabad bench of the NCLT where the resolution proceedings had been filed under the IBC.

Issue

The Liquidator of the Principal Borrower may be appointed as the Resolution Professional of the Corporate Guarantor when they face simultaneous CIRPs.

Decision

The NCLAT ordered that the professional be appointed as Liquidator of the Principal Borrower- M/s. Athena Chhattisgarh Power Ltd. (Mr. Kumar Ranjan) to be the Resolution Professional of Athena Energy Ventures Pvt. Ltd.-the Corporate Guarantor.

The court also stated that this was in the spirit of ensuring that there should be the convenience of making corresponding revisions when a particular claim amount is recovered.

Comments

While there is no substantial question of law, this order deals with a very practical aspect of insolvency resolution, which is substantial when there are parallel insolvency proceedings against the Principal Borrower as well as the Corporate Guarantor.

“Rohan Phadke

Ruling of NCLAT in the matter of Jain Irrigation Systems Limited v. Empee Sugars and Chemicals Limited.

JAIN IRRIGATION SYSTEMS Ltd. V. EMPEE SUGARS & CHEMICALS Ltd.

Forum	National Company Law Appellate Tribunal
Order Dated	15 July 2021
Bench	Venugopal M(J)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – 9, 238-A. Companies Act,1956 - 43(a) & (f), 439. Companies (Court) Rules, 1959 – 9t Limitation Act, 1963 – 5.

Brief background

The applicant, an operational creditor, filed a Company Petition bearing no.200 of 2013 before the Hon'ble High Court of Andhra Pradesh u/s 43(a) & (f) and 439 of the Companies Act, 1956, r/w Rule 9t of the Companies (Court) Rules, 1959 against the corporate debtor (M/s. Empee Sugars and Chemicals Limited) being due of Rs. 4,73,08,766 as on 21.3.2011. On 20.7.2015, the hon'ble High Court transferred the case to BIFR under the Sick Industrial Companies (Special Provision) Act, 1985. An implead application was filed before the hon'ble BIFR in December 2015. While the proceedings were afoot, BIFR was dissolved (as a consequence of SICA being repealed); transferring all its cases to NCLT Hyderabad on 1.12.2016. NCLT, vide its order dated 4.03.2021 dismissed the application the ground that Section 5 of the Limitation Act, 1963, is not applicable where there are cases filing Company Petition beyond the limitation period. The present appeal in NCLAT is filed on the ground that Section 238 A of the Insolvency and Bankruptcy Code, 2016 provides that the Limitation Act, 1963 shall apply as far as may be to the proceedings under the Code before the Adjudicating Authority or the Appellate Tribunal and that the delay occurred due to change in law and dissolution of BIFR. The appeal is to condone the delay of 241 days from 2.12.2016 to 1.12.2019, excluding the COVID period for the reason mentioned herewith.

Issue

1. Whether Section 5 of the Limitation Act applies to cases filing company petitions.
2. Whether the 'Condonation of Delay' u/s 5 of Limitation Act is a right accrued to the pleaders or a mere matter at hands of the Court's subjective discretion.

Decision

The appeal was dismissed by NCLAT, since it failed to provide with a good enough explanation, so much as to satisfy the parameters of 'sufficient cause', mentioned in Section 5 of the Limitation Act. The Tribunal observed 'condonation of delay' cannot be claimed as a matter of right, rather it is a matter of 'discretion' of the Court and doesn't come into picture unless the Court decides to apply its discretion. In the present appeal, the appellant itself agrees on a delay of 241 days, it cannot be denied that this, in any case, has a possibility of being omitted. However, the explanation provided by them doesn't subjectively satisfy the Court, as to the occurrence of the long and inordinate delay of 241 days and therefore, "is not inclined to extend its 'helping hand of judicial arm of generosity', based on the facts and circumstances of the case which float on the surface."

Comments

The Sick Industrial Companies Act was enacted in 1985 on the recommendations given by T. Tiwari Committee Report. This purpose of bringing this act in function was to keep check on the then ongoing industrial crisis, by taking requisite steps in time with respect to potentially sick companies owning industrial undertakings. The act defined 'sick companies' as the ones those had existed at least five years and had incurred losses equal to or exceeding its entire net worth at the end of the financial year. An important feature of the act was the constitution of two quasi-judicial bodies – the adjudicating authority, Board for Industrial and Financial Reconstruction (BIFR) and the Appellate Authority for Industrial and Financial Reconstruction

(AAIFR). However, SICA was repealed in 2003, with the enaction of Sick Industrial Companies (Special Provisions) Repeal Act, with the motive of fixing loopholes in the former. It was fully repealed in the year 2016, with most of its provisions overlapping with the Companies Act 2016. Analogous to the resolution process in the IBC, SICA provided with a reorganization method, generally focused on restructuring the loan. However, the absence of a time bound resolution and liquidation process caused the companies to get caught in the proceedings. IBC, providing a solution, provided with an initial process of resolution; failing which, led to liquidation. Another problem with SICA was the ambiguity of jurisdiction, with the overlapping authority of DRT, Company Law Board and High Court; resolved through a clear and defined jurisdiction provided by the IBC. This way SICA was finally and fully replaced the IBC, that not only makes the process comprehendible but also increases the transparency.

“Divya Singh

The guaranteed minimum royalties to be paid by the Corporate Debtor as a consideration to grant of license and right to use the trademark of the Operational Creditor on its licensed product (for manufacture and sale purpose is an operational debt)

KNIGHT RIDERS Pvt. Ltd. V. GLOBAL FRAGRANCES Pvt. Ltd.

Forum	National Company Law Tribunal, New Delhi
Order Dated	05 July 2021
Bench	Dr. Deepti Mukesh, (Judicial) and Ms. Sumita Purkayastha, (Technical)
Relevant Sections	Insolvency & Bankruptcy Code 2016 – Section 9 r/w rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016

Brief Background

The Operational Creditor (Licensor) had entered into a licensing agreement with the Corporate Debtor (Licensee) and Invision Brand Consulting by way of the Licensing Agreement, the Operational Creditor granted the Corporate Debtor exclusive rights and license to use its trademark, being the 'KKR Kolkata Knight Riders' brand logo; to manufacture, have manufactured, sell, distribute and advertise the licensed products and to use, in any other permitted manner. In consideration of having exclusive licensing rights under the licensing Agreement, the Corporate Debtor agreed to pay to the Operational Creditor, as compensation, the Minimum Guaranteed Royalties towards the use of the Trademark.

Further, it is stated that the Corporate Debtor shall pay all the Minimum Guaranteed Royalties to the Operational Creditor, becoming due and payable for each calendar quarter, no later than 15 (fifteen) days following the last day of such calendar quarter, failing which, the Corporate Debtor will be liable to pay to the Operational Creditor, late charge interest at the contractual rate of 1.5% per month or the maximum rate permitted by law, whichever is less, on such outstanding royalty amounts.

The payments with respect to the third quarter invoices were not made to the Applicant. Even after a show-cause notice of delay of payment, the payment was not made. The Applicant issued a legal notice to the Corporate Debtor terminating the Licensing Agreement with effect from and called upon the Corporate Debtor to pay the amount of Rs 22,99,312 with an interest at the contractual rate of 1.5% per month within 15 days of the receipt of the notice. The Applicant filed this application dated 30.08.2018 as an Operational Creditor praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor for its inability to liquidate their claim

Issue

Whether the Guaranteed Minimum Royalties to be paid quarterly by the Corporate Debtor as a consideration to grant of license and right to use the Trademark of the Operational Creditor on its Licensed Product (for manufacture and sale purpose) is an Operational Debt or not?

Decision

The tribunal while relying on the judgment *Vikas Sales Corporation vs. Commissioner of Commercial Taxes*[29], held that incorporeal rights like trademarks, copyrights, patents and rights in personam capable of transfer or transmission are included in the ambit of "goods". Further, the Adjudicating Authority stated that that for a claim to fall within the definition of 'operational debt', the operational creditor must establish that it has a "right to payment" in respect of the provision of "goods or services" and held that Corporate Debtor has committed a "default" towards its "liability or obligation in respect of such outstanding claim".

Further, the Adjudicating Authority referred to the judgment *Broadcast Audience Research Council V.*

[29] AIR 1996 SC 2082

Mi Marathi Media Limited[30] and stated that in the present case, the MGR was a fixed payment due and payable by the Corporate Debtor to the Operational Creditor under the Agreement and the non-payment by the Corporate Debtor, for using the "Trademark" which is the Licensed "Product" of the Operational Creditor, amounted to an "operational debt" under the IBC.

The Corporate Debtor has admitted its liability be it by way of making a part payment (first and second quarter payment) or by submitting before the Adjudicating Authority that admittedly the claim of the Applicant arises out of failure to pay the Minimum Guaranteed Royalties and were not paid on the condition that the Operational Creditor under the obligation to promote the brand for the Corporate Debtor. This is a clear admission of default.

Comments

It is a sound judgment in the eyes of law and is in accordance with the previous judicial precedents.

"Megha Kamboj

[30] [C.P. I 688/IBC/NCLT/MB/MAH/2018]