THE CIFL NEWSLETTER

August 2021

VOL. 1 | ISSUE 3

Published By:

Centre for Insolvency and Financial Laws
Maharashtra National Law University Mumbai

A Knowledge Initiative By:

PSL Advocates & Solicitors

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SUPREME COURT PRONOUNCEMENTS

'Financial debt' includes interest-free loans

ORATOR MARKETING P. LTD. v. SAMTEX DESINZ PVT. LTD

Court	Supreme Court of India
Judgement Dated	July 26, 2021
Bench	Justice Indira Banerjee and Justice V. Ramasubramanian
Relevant Sections	Insolvency and Bankruptcy Code 2016- Section 3, Section 4, Section 5, Section 7, Section 8, Section 9 and Section 62.

Brief Background

Sameer Sales Pvt. Ltd, the original lender, had advanced a loan of 1.6 crores to the Corporate Debtor. This interest-free loan was later assigned by the original lender to the Appellant. The loan was due to be repaid by 1st Feb 2020. The Corporate Debtor had paid a few instalments; however, an outstanding of 1.56 crores was remaining. Appellant had filed a petition under Section 7, but it was rejected by both NCLT and NCLAT on the ground that the loan was interest-free and was not issued against any consideration for time value of money. Thus, as per NCLT and NCLAT, the debt did not classify as financial debt within the meaning of Section 5(8).

Issue

Can a person who advances an interest free loan be classified as a financial creditor competent to initiate the corporate insolvency resolution process ("CIRP") under Section 7 of the IBC?

Decision

The Hon'ble Supreme Court held that NCLAT, as well as NCLT, had misinterpreted the definition of financial debt as under Section 5(8). The phrase '*time value of money*' cannot be read in isolation and out of context. When a default occurs, i.e., when a debt becomes due and is not paid, the insolvency resolution process initiates. While admitting or rejecting the application, the Adjudicating Authority ("AA") has to merely see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. Financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. The Court emphasised on the term *'if any'* and observed that loans without interest could also be classified as financial debt. If there is no interest payable on the loan, only the outstanding principal would qualify as financial debt. Furthermore, the usage of the term '*includes*' implies that the definition is illustrative and not exhaustive. The moment the AA is satisfied that a default has occurred, the application must be admitted unless it is incomplete.

The primary focus of the legislation is to ensure the continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. Therefore, the appeal was allowed and the NCLAT order was set aside.

Comments

The Hon'ble Supreme Court rightly decided that interest free loans also qualify as 'financial debt' by giving a purposive interpretation to the letters of law. A financial creditor should not be precluded due to the lack of interest on the amount lent. This is in congruence with one of the main objectives of the IBC, which is balancing the interests of all stakeholders and revival of the Corporate Debtor. Therefore, this judgment has far-reaching positive repercussions as it expands the scope of 'financial debt' under the IBC.

"Renuka Nevgi

Fair and equitable under S. 30(2)(b) of the IBC means what is fair and equitable between the Operational Creditors as a class, and not between different classes of creditors

PRATAP TECHNOCRATS (P) L. & ORS v. MONITORING COMMITTEE OF RELIANCE INFRATEL LIMITED & ANR

Court	Supreme Court of India
Judgement Dated	August 10, 2021
Bench	Justice D. Y. Chandrachud and Justice M. R. Shah
Relevant Sections	Insolvency and Bankruptcy Code 2016- Section 24, Section 30, Section 31, Section 53 and Section 61

Brief Background

The appeal was preferred by the Operational Creditors against the NCLT order approving the resolution plan and the NCLAT upholding the same. The resolution plan was approved unanimously by the Committee of Creditors ("CoC"). According to the resolution plan, the Operational Creditors were paid back 19.62% of their debt while the Financial Creditors were paid 10.32% of their debt. This was challenged by the Operational Creditors on various grounds, mainly that the appellants had not received fair and equitable treatment, and that, the fair market value and the liquidation value of the Corporate Debtor had not been taken into account.

Issue

Was the resolution plan in compliance with the IBC and were the Operational Creditors receiving less value than they would have if the Corporate Debtor was liquidated? Further, were the Operational Creditors treated fairly and equitably?

Decision

The Court first addressed the factual matter of the fair market value and the liquidation value of the Corporate Debtor. As per *Swiss Ribbons (P) Ltd.* v. *Union of India*[1], the resolution plan needs to maximize the value of the company, which is the fair market value. In the given case, the Court concluded the valuation carried out to be fair and also observed that in case of liquidation, "*in terms of the priority contained in Section 53(1) of the Code, the liquidation value due to the appellants would still remain at nil*." Hence, the question of the resolution plan breaching *Swiss Ribbons'* ratio did not arise and the resolution plan awarded the Operational Creditors with more value than they would get in case of liquidation.

On the second issue regarding fair and equitable treatment of Operational Creditors, the Court held that the proposed resolution plan must comply with the norms given in Explanation-1 to Section 30(2)(b), which is clarificatory in nature. Further, it interpreted the phrase "shall be fair and equitable" to mean what is fair and equitable between the Operational Creditors as a class, and not between different classes of creditors. It further observed, "*as long as the payment under the resolution plan is fair and equitable amongst the operational creditors as a class, it satisfies the requirements of Section 30(2)(b)*."

It also went on to observe that the Indian insolvency regime appears to have made a conscious choice not to confer any independent equity-based jurisdiction on the AA other than the statutory requirements laid down under sub-Section (2) of Section 30 of the IBC. Furthering this observation, it held the AA or the NCLAT, when tasked with reviewing a resolution plan, only need to look at its compliance with the IBC. Once the requirements of the IBC have been fulfilled, the Adjudicating Authority and the Appellate Authority are duty-bound to abide by the discipline of the statutory provisions.

Lastly, as was held in *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta*[2], the Court reiterated that the wisdom of the CoC can only be challenged on two grounds, (i) non – maximization of the value of assets of the Corporate Debtor and (ii) not adequately balancing the interest of all stakeholders, including operational creditors. In the current case, the Court held neither of the two infirmities was present in the resolution plan and hence, it dismissed the appeal.

[1] **(2019) 4 SCC 17.**

[2] **(2020) 8 SCC 531.**

Comment

This judgment settles the much-litigated question of equitable and fair treatment of operational creditors and hence settles the jurisprudence around the IBC. It further establishes the scope of judicial review of a resolution plan by the AA and the Appellate Authority and rightfully limits it to merely checking compliance with the IBC. Furthermore, the commercial wisdom and economic decision-making of the CoC cannot be questioned, as has been held in many cases, most notably in *K. Sashidhar* v. *Indian Overseas Bank and Ors*[3].

Hence, if the operational creditors get more than the liquidation value, which is an economic and commercial decision of the CoC, it cannot be questioned or reviewed on grounds other than those provided in the IBC. The NCLT and NCLAT have to follow this precedent as it is an extension of *Swiss Ribbons* and *Essar Steel*.

"
Sriram Prasad

[3] **2019 SCCOnLine SC 257.**

In case of the existence of a dispute, the Application of an Operational Creditor under Section 8 will be rejected, if the dispute is not spurious, illusory or not supported by any evidence

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

Court	Supreme Court of India
Judgement Dated	August 10, 2021
Bench	Justice B. R. Gavai and Justice R. F. Nariman
Relevant Sections	Insolvency and Bankruptcy Code 2016 - Section 8 and Section 9

Brief Background

The appeal was preferred by the Appellant, Kay Bouvet Engineering Ltd (hereinafter Kay Bouvet) against the order of NCLAT. The NCLAT, while overturning the order of NCLT, held the Respondent, Overseas Infrastructure Alliance (India) Private Limited (hereinafter Overseas) to be an Operational Creditor.

In the given case, the Government of India (hereinafter GOI) extended a Line of Credit (hereinafter LoC) of USD 150 million to the Republic of Sudan through Exim Bank of India (hereinafter Exim Bank) for carrying out Mashkour Sugar Project in Sudan. To facilitate the project, Mashkour Sugar Company Limited, Sudan (hereinafter Mashkour) entered into an agreement with Overseas. As per the agreement, Mashkour was to nominate a subcontractor to construct the project. Kay Bouvet was given the tender and accepted as the sub-contractor. Subsequently, a tripartite agreement was entered into by all the parties, where Kay Bouvet was designated as the sub-contractor. Soon after, Overseas coordinated with Mashkour that under the Tripartite Agreement, Mashkour was to release payment of the first tranche of LoC to Overseas and the Overseas, in turn, was to release payment of USD 10.62 Million to Kay Bouvet.

This was carried out and Kay Bouvet was paid in Rupees, but Kay Bouvet had claimed it received less payment keeping in mind the exchange rate as on the date of payment. This discrepancy escalated to a discussion between GOI and the ambassador of Sudan who advised the termination of the contract of Mashkour with Overseas and in turn to appoint Kay Bouvet as a contractor. GOI's reply to this communication stated that a contract between Mashkour and Kay Bouvet was needed. The Ambassador of Sudan informed Mashkour to enter an agreement with Kay Bouvet as a direct contract for the unutilized portion of GOI's LoC for USD 150 Million. Therefore, Mashkour terminated the contract with Overseas for failure on its part to perform the duties. Overseas then filed a Civil Suit before the High Court of Bombay seeking specific performance of the contract and an order of injunction from appointing Kay Bouvet as a Contractor in the Mashkour Project. The prayer for injunction and other interim relief was rejected by the High Court.

Further, a Demand Notice under Section 8 of the IBC was served upon Kay Bouvet by Overseas alleging default under the Tripartite Agreement and claiming the amount of USD 10.62 Million, paid by Overseas to Kay Bouvet, had to be returned in light of the termination of the agreement. Kay Bouvet denied the claim of Overseas and specifically pointed out that the amount which was paid to Kay Bouvet by Overseas, was received on behalf of Mashkour and it was only routed through Overseas. This argument was accepted by NCLT, Bombay bench but was later rejected by NCLAT, which held Overseas to be an Operational Creditor. Hence, the appeal was preferred by Kay Bouvet.

Issue

Whether Kay Bouvet, the appellant, was in a position to make a case for the existence of a dispute?

Decision

The Court referred to its decision in *Mobilox Innovations Private Limited* v. *Kirusa Software Private Limited*[4] where it had held that mere existence of a dispute is enough to stave off the Operational Creditor's application under Section 8, as the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent. It furthered referred to *Mobilox* on the limited ground of the judicial review of the "existence of dispute" which could only examine if the dispute was

[4] **(2018) 1 SCC 353.**

spurious, illusory or not supported by the evidence placed on record. The Court concluded that, as per the ratio laid down in the case of *Mobilox*, it cannot examine the merits of the dispute under Section 8.After examining the facts in-depth in the given case, the Court further concluded that in the case of Kay Bouvet, the amount of USD 10.62 million which was paid to it by Overseas, was paid on behalf of Mashkour from the funds released to Overseas by Exim Bank on behalf of Mashkour, cannot be said to be a dispute which is spurious, illusory or not supported by the evidence placed on record.

Hence, the Court allowed the appeal and held that NCLT had rightly rejected the application of Overseas after finding that there existed a dispute between Kay Bouvet and Overseas and that NCLAT had patently misinterpreted the factual as well as legal position and erred in reversing the order of NCLT.

Case referred

Mobilox Innovations Private Limited v. *Kirusa Software Private Limited*[5]: The Court referred to *Mobilox* in order to refer to the interpretation and requirements of a Section 8 application by an Operational Creditor. The *Mobilox* judgement held that under Section 8(2)(a), "*the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent.*" In *Mobilox*, the Court further went to examine the scope of judicial review of the "*existence of dispute*" at this stage and held that "*In our view a "genuine" dispute requires that: (i) the dispute be bona fide and truly exist in fact; (ii) the grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived."*

The Court, in this case, extended the reasoning in *Mobilox* and concluded that "*We will have to examine as to whether the claim of Kay Bouvet with regard to the "existence of dispute", can be considered to be the one which is spurious, illusory or not supported by any evidence*" to understand the existence of the dispute and the scope of judicial review at the stage of an application under Section 8 and 9.

Comments

If a dispute exists on the claim of an Operational Creditor, that claim cannot be the basis of an application under Section 8 and 9. Further, as per *Mobilox*, the dispute merely has to exist and not necessarily be under litigation or dispute resolution. The Supreme Court in the current case determined a dispute to exist on the claim which served as the basis of the Operational Creditors application. Hence applying *Mobilox*, the Court rightly rejected the claim.

"Sriram Prasad

[5]**(2018) 1 SCC 353.**

There is no bar in law to the amendment of pleadings in an application under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 of the IBC

DENA BANK (NOW BANK OF BARODA) v. C. SHIVAKUMAR REDDY AND ANR.

Court	Supreme Court of India
Judgement Dated	August 4, 2021
Bench	Mrs. Justice Indira Banerjee and Mr. Justice V. Ramasubramanian
Relevant Sections	Insolvency and Bankruptcy Code 2016 - Section 7.

Brief Background

The Appellant Bank had sanctioned Term Loan and Letter of Credit Cum Buyers' Credit with an upper limit of Rs.45.00 Crores. The Loan Account of the Corporate Debtor was declared a NPA. Hence the Appellant Bank filed an application under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter RDB Act) before the Debt Recovery Tribunal Bangalore (hereinafter DRT) for recovery of its outstanding dues. While proceedings were pending in the DRT, the Corporate Debtor gave a proposal for one time settlement ("OTS") of the Term Loan Account. The proposal was, however, rejected by the Appellant Bank.

The DRT passed a final judgment and decree against the Corporate Debtor for recovery of the dues with future interest at the rate of 16.55% per annum, from the date of filing the application till the date of realization. The DRT issued a Recovery Certificate, in favour of the Appellant Bank for recovery of dues from the Corporate Debtor. The Appellant Bank filed the Petition before the AA under Section 7 of the IBC. About three months thereafter, Central Government amalgamated Vijaya Bank, Dena Bank and Bank of Baroda.

The Appellant Bank filed an application before AA under Rule 11 of the NCLT Rules 2016, read with Rule 4 of the 2016 Adjudicating Authority Rules, for permission to place on record additional documents, including the final judgment and order of the DRT and the Recovery Certificate issued by the DRT. The AA allowed the application of the Appellant Bank, and directed the Appellant Bank to file an amended petition enclosing the documents referred to in the Application. The Registry was directed to permit the Counsel for the Appellant Bank to amend the Company Petition accordingly.

The Appellant Bank filed another application under Rule 11 of the NCLT Rules, before the AA for permission to place on record additional documents, including the letter of the Corporate Debtor to the Appellant Bank proposing a OTS, the Annual Report of the Corporate Debtor for the years 2016-2017, the Financial Statement of the Corporate Debtor for the period from April 01, 2016 to March 31, 2017 and the Financial Statement of the Corporate Debtor, for the period from April 01, 2017 to March 31, 2018.

The Appellant Bank was permitted to file the documents in the Registry. The AA admitted the Petition under Section 7 of the IBC and appointed an Interim Resolution Professional ("IRP"). The objection of the bar of limitation, raised on behalf of the Corporate Debtor was considered at length, but was rejected by the AA. This was further appealed by the Corporate Debtor.

The NCLAT set aside the order passed by the AA and dismissed the Petition filed by the Appellant Bank under Section 7 of the IBC, holding that the said application was barred by limitation. An Appeal under Section 62 of the IBC was filed by the respondents against the judgment passed by the NCLAT which set aside the order passed by the AA.

Issue

i. Whether the Petition filed by the Appellant Bank under Section 7 of the IBC was barred by limitation?
ii. Whether a final judgment and decree of the DRT in favour of the Financial Creditor, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action to the Financial Creditor to initiate proceedings under Section 7 of the IBC within three years from the date of the final judgment and decree, and/or within three years from the date of issuance of the Certificate of Recovery?
iii. Whether there is any bar in law to the amendment of pleadings, in a Petition under Section 7 of the IBC, or to the filing of additional documents, apart from those filed initially, along with the Petition under Section 7 of the IBC in Form-1?

Decision

The Apex Court while setting aside the order of the NCLAT held that if the Corporate Debtor acknowledges the debt before the three-year limitation period expires,

an application under Section 7 of the IBC will not be barred by limitation because it was filed beyond the three-year period from the date of declaration of the loan account of the Corporate Debtor as NPA. In such a case the period of limitation would get extended by a further period of three years.

Further, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC. This can be done within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid.

The Court further stated that there is no prohibition in law against amending pleadings in an application under Section 7 of the IBC or filing additional documents other than those originally filed with the application under Section 7 of the IBC in Form-1. The AA did not commit any illegality or error in allowing the Appellant Bank to file additional documents because there is no specific provision prohibiting or setting a time restriction for filing additional documents. However, according to the facts and circumstances of the case the AA, at its discretion, might decline the request of an applicant to file additional pleadings and/or documents, when there is inordinate delay, and proceed to pass a final order.

Comments

The judgement is in accordance with the provisions of the IBC and judicial precedents. As per the legal maxim *"vigilantibus non dormientibus Jura subveniunt"*, the law will assist only those who are vigilant with their rights and not those who sleep upon it. The law of limitation bars the judicial remedy. However, in the present matter the Apex Court clarified that if the Corporate Debtor acknowledges the debt before expiry the three-year limitation period expires in such a case the period of limitation would get extended by a further period of three years. Also, a final judgment and decree of the DRT or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action to the Financial Creditor to initiate proceedings under Section 7 of the IBC. It is imperative that the IBC as well as the Rules and Regulations enacted under it, be interpreted liberally and purposefully to achieve the statute's objectives, rather than being given a restrictive, technical reading that negates the purpose of the Act.

"Megha Kamboj

NCLT PRONOUNCEMENTS

The Prayer for Dissolution can't be accepted if there is no Order of Liquidation as Liquidation is a pre-requisite to the Dissolution

OM LOGISTICS LIMITED & ANR. v. RYDER INDIA PVT. LTD.

Forum	National Company Law Tribunal- Delhi Bench
Order Date	July 29, 2021
Bench	Justice Abni Ranjan Kumar Sinha, Member (Judicial), and L.N Gupta, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 9, Section 19(2), Section 60(5), Section 65(1)

Brief Background

The Applicant in the present case is the IRP of Ryder India Pvt. Ltd. (the 'Corporate Debtor'). The Applicant has filed an application under Section 60(5) of IBC to close the CIRP against the Corporate Debtor and consider the Dissolution of the Corporate Debtor. Two claims were filed against the Corporate Debtor by Om Logistics Ltd. and Excise & Taxation Officer, Bahadurgarh (hereinafter referred to as 'ETO Bahadurgarh'). CoC was constituted with ETO Bahadurgarh having 98.88% voting share and Om Logistics Ltd. having 1.12% voting share in the CoC. The meetings of the CoC were scheduled multiple times, but Om Logistics Ltd. was not attending the meeting, and ETO Bahadurgarh abstained from voting. On 17/02/2020, ETO Bahadurgarh withdrew its claim against the Corporate Debtor. The IRP filed an application under Section 19(2) wherein the Bench had directed the Ex-Directors to cooperate with the IRP and provide all the documents to the IRP. But they failed to comply with the Bench's order, due to which a bailable warrant was issued against Ex-Directors. Subsequently, they submitted the Books of Accounts to the IRP.

Issue

Whether the prayer of dissolution of the Corporate Debtor can be accepted when there is no Liquidation order?

Decision

On the issue of Dissolution of the Corporate Debtor, the Bench was of the view that the IRP's prayer for dissolution of the Corporate Debtor cannot be granted since Liquidation is a pre-requisite to dissolution and, in this case, no order of Liquidation has been given due to the absence of any such proposal and the CoC's non-functioning. The Tribunal was of the view that –

"It is not the duty of the IRP to run after the Members of CoC to attend the meeting and pursue the CIR Process."

As per the Tribunal, when the Applicant cannot carry forward the CIRP due to a lack of cooperation/participation from the sole member of the CoC, it is appropriate to terminate the Corporate Debtor's CIRP. Thus, the Bench, under Section 60(5) of IBC and inherent power under Rule 11 of the NCLT Rules, 2016, terminated the CIRP of the Corporate Debtor and released the Corporate Debtor from the rigors of the CIRP and moratorium. Further, the absence of Om Logistics Ltd. from the CoC meetings shows that the intention of the Operational Creditor was not to resolve the insolvency of the debtor. Instead, the Operational Creditor has utilized this forum for recovery and initiated the CIRP with malicious intent for a purpose other than the settlement of the Corporate Debtor's bankruptcy, which is prohibited under the IBC 2016. Thus, the Bench directed the 'Registrar NCLT' to issue a show-cause notice under Section 65(1) of the IBC read with Rule 59 of the NCLT Rules, giving the directors of Om Logistics Ltd. fifteen days to submit in writing as to why the penalty under Section 65(1) shall not be imposed on them.

Comments

As per the provisions of the IBC, Liquidation should have commenced, and IRP should have been made the 'Liquidator.' This is not desirable because, in this case, NCLT is using its inherent power to terminate the CIRP. As per the Rules and Regulations, NCLT cannot use its inherent power to close a CIRP. The NCLT cannot just terminate the CIRP and release the Corporate Debtor from the rigors of the moratorium. The matter should have been referred to the Supreme Court, which could have used its power mentioned under Article 142 of the Constitution of India, to terminate the CIRP. Thus, the NCLT terminating the CIRP using its inherent power is patently illegal as they do not have any inherent authority under the IBC to terminate the CIRP.

"Anubhav Singh

One time settlement with employees cannot do away Insolvency Proceedings

DINESH GUPTA v. ROLTA INDIA LIMITED

Forum	National Company Law Tribunal, Mumbai Bench
Order Dated	August 6, 2021
Bench	Justice Suchitra Kanuparthi (J), Chandra Bhan Singh (T).
Relevant Section	Insolvency and Bankruptcy Code, 2016 – Section 9, Section 12-A, Section 53.

Brief Background

The applicant/petitioner, Dinesh Gupta, is the former employee of Rolta India Limited, the Corporate Debtor. The applicant worked as an employee of the Corporate Debtor from March 2013 to June 2019, and was relieved from the services without settlement of arrears of salary, leave encashment and gratuity. Accordingly, the applicant also being an operational creditor initiated the CIRP against the Corporate Debtor under Section 9 of the IBC which was admitted by the NCLT, Mumbai Bench, in May 2021 and an IRP was appointed for the Corporate Debtor.

Later, negotiations took place and ultimately a settlement was agreed upon between the parties. As per the agreement, the applicant requested the IRP to file a withdrawal application under Section 12-A of the IBC. However, the IRP did not file the withdrawal application immediately and did not co-operate, therefore the applicant, on their own motion, filed the Section 12-A withdrawal application before the NCLT. The Section 12-A withdrawal application was strongly opposed by the Financial Creditors and some of the ex-employees, who had not filed any petition before the Tribunal.

Issue

Whether it is appropriate for the Bench to allow withdrawal of the CIRP under Section 12-A or to exercise its discretion to reject the present application under Section 12-A?

Decision

The IRP in its submission stated that she had received claims worth Rs 5523.81 Crores from financial creditors, operational creditors and employees of the Corporate Debtor. Even if we narrow it down to Employees' claim there were about 567 employees whose claims had been put together by the IRP. Out of these, the corporate debtor reached a Joint Settlement Agreement with only 32 of its former employees. The settlement which was proposed by the promoter, Mr. Kamal Singh, on behalf of the Corporate Debtor ignored a majority of the employees' claim which had been brought out by the IRP. Furthermore, the proposed settlement agreement between the employees and the Corporate Debtor under the Joint Settlement Agreement was to be executed and acted upon only after they withdraw the petition.

The Bench observed that CIRP proceedings are in rem and therefore, any decision regarding the continuation or otherwise of CIRP has to be decided in the interest of all stakeholders and not just a handful of employees. The Tribunal relied on Section 53 of the IBC where the debts of the workmen rank equally with the financial debt owed to the secured/unsecured creditors. Apart from this, the Tribunal while deciding the ambit of Section 12-A, also relied on the Supreme Court's decision in *Swiss Ribbons Pvt Ltd.* v. *Union of India*[6], wherein it was clearly stated that the interest of all stakeholders have to be considered while accepting or disallowing an application for withdrawal.

With claims worth Rs. 5000 Crores plus, in itself is a sufficient ground to disallow the withdrawal application under Section 12-A. The Tribunal opined that, even if the withdrawal application was allowed, all the claims made by the employees against the Corporate Debtor would not be settled. Only a handful of claims were being settled by the Corporate Debtor, therefore the purpose of such a settlement did not seem bona fide. Consequently, the Bench dismissed the withdrawal application filed under Section 12-A of the Code and the CIRP against the Corporate Debtor continued.

Comments

In the present case, an appropriate decision was given by the tribunal. The observations of the NCLT are in absolute alignment with the facts; that it was only a fraction of operational creditors, with whom the debt was settled, while ignoring that a 90% resolution is to be passed by the CoC in order to clear the proceedings instituted against the corporate debtor. Although application of Rule 11 of the NCLT provides it the discretion to allow the withdrawal of an application before the constitution of the CoC, it is pertinent to note that once an application is admitted, the withdrawal shall take place in accordance with the procedure laid down in Section 12-A of the Code and not through

[6] **(2019) 4 SCC 17**

inherent provisions that have been given to fill the gaps in the IBC. Also, all the claims made by the employees against the Corporate Debtor were not being settled, only a handful of claims were being settled by the Corporate Debtor, therefore such settlement lacks bona fide intentions. The decision of the Tribunal to not allow the withdrawal of application, on the grounds that the admission of an application is enough to render the proceedings as proceedings in rem, is the most relevant course of action in the given scenario.

"Anushka Fuke

Once the application has been triggered in the NCLT, it cannot allow withdrawal because of settlement with an Operational Creditor using the inherent power granted by Rule 11 of NCLT Rules

MILAN SANYASI v. ROLTA BI & BIG DATA ANALYSIS PVT. LTD.; NITIN ARORA v. ROLTA DEFENCE TECHNOLOGY SYSTEMS PVT. LTD.

Forum	National Company Law Tribunal.
Order Dated	August 6, 2021
Bench	Hon'ble Smt. Suchitra Kanuparthi, Member (J); Hon'ble Shri. Chandra Bhan Singh, Member (T)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 8, Section 12A; NCLT Rules, 2016 – Rule 11

Brief background

This case concerns two separate applications filed by the Applicant and the Operational Creditor respectively under Section 12A of the IBC r/w Rule 11 of the NCLT Rules, 2016 seeking withdrawal of a Company Petition, after having signed a settlement agreement. The applicant was made to give up his job from February 04, 2019 without settlement of arrears of salary and other dues. He, then, issued a demand notice under Section 8 of the IBC, pursuant to which, the CIRP was admitted on May 13, 2021. Taking cognizance of the CIRP, the parties executed a settlement agreement on May 25, 2021 agreeing to forthwith withdraw the company petition. In view of this agreement, the IRP requested to file a withdrawal application before the NCLT in accordance with Regulation 30A of the IBC. However, there were several hyper-technical objections raised by the IRP, so the parties executed another settlement agreement on May 27, 2021, identical to that of May 25, 2021, and listed an appeal before the NCLAT on May 31, 2021, relying on the former. The NCLAT left it to the AA to make a decision as per the relevant provisions under Section 12A of the IBC and ordered that the CoC may not be constituted till the next date. Hence, the applicant has filed the present application. There were, however, objections raised by the RP and other financial creditors in separate applications for withdrawal filed by Milan Sanyasi and Nitin Arora respectively.

Case 1: Milan Sanyasi v. Rolta BI & Big Data Analysis Pvt. Ltd.

The counsel for RP, referring to *Jai Kishan Gupta* v. *Green Edge Buildtech LLP*[7], submitted that the NCLT must not allow the application for withdrawal when there are objections being raised by creditors. The report of the Bankruptcy Law Committee on withdrawal of the settlements was also referred and it was submitted that the CoC be given ultimate authority to consider, approve or reject the application filed for withdrawal under section 12A.

Case 2: Nitin Arora v. Rolta Defence Technology Systems Pvt. Ltd.

In the instant case, the financial creditors filed an Interim Application to intervene and oppose the withdrawal of the CIRP against the Corporate Debtor under Section 12A of the IBC. The Financial Creditors are the consortium of public sector banks comprising Union Bank of India, Bank of India, Central Bank of India, Bank of Baroda and Canara Bank. These creditors prayed for considering that they are public sector lenders engulfing enormous public interest and public money. Also, given the fact that a huge financial debt of almost Rs. 8000 Crores is concerned, this would not be a fit case to exercise discretion under Section 12A of the IBC.

Issue

Whether the withdrawal of the CIRP can be permitted with the given facts that the IRP has received the claim of Rs. 8,595.65 Crores post admission of the CIRP in all the three Petitions?

Decision

The NCLT ruled that the withdrawal of the CIRP in the instant case will jeopardize the interest of all stakeholders since once a Court gets triggered by admission of the creditors, the petition under Section 7 or 9, the proceedings before the AA is a collective proceeding and stands as proceedings in rem. The Court relied on a similar contention in the case of *Swiss Ribbons* v. *Union of India & Ors*[8]. and *Indus Biotech* v. *Kotak India*[9]. The Tribunal opined that though it is the discretion of the AA under Rule 11 upon it to take a judicious view of the matter, it is important that they

[7] **2019 SCC OnLine 916**
[8] **(2019) 4 SCC 17**
[9] **2019 SCC OnLine SC 268**

consider the magnitude of the claims of all the creditors then determine if such settlement would, or not, prejudice the rights of the creditors. In the present case, the outstanding debt of the Corporate Debtors in all the three company petitions amounts to Rs. 8,595.65 crores which implies that the company is in huge financial debt. This makes it improper to order withdrawal of the said petition and therefore the prayer for withdrawal is disallowed.

Comments

The judgement in question, is an appropriate decision put together by the Tribunal. The observations of the NCLT are in absolute compliance with the facts; that it was only a fraction of operational creditors, with whom the debt was settled, while ignoring that a 90% resolution is to be passed by the CoC in order to clear the proceedings off the corporate debtor. Although Rule 11 of the NCLT provides an inherent power to the AA to exercise discretion in allowing the withdrawal of an application before the constitution of the CoC, it is pertinent to note that once an application is admitted, the withdrawal shall take place in accordance with the procedure laid down in Section 12A of the IBC and not through inherent provisions that have been given to fill in the gaps of the statute. Therefore, the decision of the tribunal to not allow the withdrawal of application, on the ground that the admission of an application is enough to render the proceedings as proceedings in rem, is the most relevant course of action in the given scenario.

"Divya Prabha Singh

NCLAT PRONOUNCEMENTS

Time taken by the Court in adjudicating the I.A cannot be included in time period

MANISH KUMAR GUPTA (RESOLUTION PROFESSIONAL FOR THREE C PROJECTS PVT. LTD.)

Forum	National Company Law Appellate Tribunal (NCLAT), New Delhi
Order Dated	5 August, 2021
Bench	Justice Anant Binay Singh (Member, Judicial), Ms. Shreesha Merla (Member, Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 60 (5)

Brief Background

On June 01, 2021, NCLT, New Delhi passed an order where it granted exclusion of the period of lockdown of 83 days i.e., from March 18, 2020 to July 07, 2020, from the CIRP on the grounds that his office had been sealed due to the country-wide lockdown imposed on March 24, 2020 by the government till July 07, 2020. This exclusion was granted. Appellant is aggrieved by the fact that the time period of 101 days i.e., from May 25, 2020 to September 03, 2020 which was consumed in filing and adjudication of the I.A. No. 3421 of 2020 before the AA, have not been excluded.

Issue

Can the time period consumed in filing an Interlocutory Application (I. A.) due to lockdown be excluded for the purpose of calculating the time for the CIRP?

Decision

It was decided that the period of 101 days i.e., from May 25, 2020 to September 03, 2020 consumed in filing and adjudication before the AA shall be excluded as prayed by the Appellant, and the appeal was accordingly allowed. Further, having 101 days not being excluded was found to not be in accordance with the law. Thus, the time taken by the Court in adjudicating the I.A. cannot be included in the time period. Therefore, NCLAT ordered to set aside the impugned order of NCLT.

Comments

The Courts have decided that the time taken by the Courts to determine the matter at hand should be excluded in calculation of the deadline under IBC. While this is not a good practice and undermines the deadlines set by the IBC, this was done so as not to penalise the parties involved. On lapsing of the deadline set by the IBC, the company would go under automatic liquidation, hence penalising the parties involved in the CIRP process for the delay by the Court. Hence, while not efficient or desirable, the Court's reasoning is understandable. In the given case, the Court merely needed to determine the time taken by the Court which was to be excluded. Once it determined 101 days to be taken by the Court in adjudicating the petition, it is in line with earlier precedents, excluded the time taken.

"Aashka Vora

A creditor can't direct the Liquidator to consider the offer of the Creditor to buy out the Factory Premises and Sale in its favor

VIJISAN JEWELS PVT. LTD v. CIMME JEWELS LIMITED AND ANR.

Forum	National Company Law Appellate Tribunal
Order Dated	August 13, 2021
Bench	Justice Jarat Kumar Jain, Member (Judicial), and Ashok Kumar Mishra, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016– Section 9, Section 47(1), Section 61

Brief Background

The Appellant in the present case has filed an application under Section 61 of the IBC against the order of the NCLT Mumbai Bench, being the AA. The Appellant requested the NCLAT to direct the Liquidator to consider their offer to buy out the factory premises and the sale agreement in Appellant's favor. In the present case, the Appellant had initiated CIRP against Cimme Jewels Limited (the Corporate Debtor) under Section 9 of the IBC. The meeting of CoC resolved, with 100% majority, to liquidate the Corporate Debtor, and the AA passed the liquidation order on March 25, 2019.

The Appellant had applied to the AA for permission to acquire the factory premises and to continue its occupancy until completion of its sale. However, the AA had rejected the application and had asked the Appellant to pay Rs. 10 lakhs on account of the outstanding rental dues that had not been paid since January 2020. Additionally, no reasons for the rejection of the application were provided. In its ruling dated February 02, 2021, the AA allowed the Liquidator to proceed with the e-auction and ordered the Appellant to give up control of the premises. The Respondent (being the Liquidator in this case) contended that the Appellant lacks *locus standi* since he is neither a stakeholder nor a bidder in the Liquidator's auction. It was also argued that the Appellant was merely an unlawful resident of the premises interfering with the liquidation process to acquire the property without adhering to the IBC.

Issue

Whether the Appellant can direct the Liquidator to consider their offer to buy out the factory premises and the sale agreement in Appellant's favor?

Decision

The NCLAT rejected the claim of the Appellant. It held that the Appellant was forcing the Liquidator to sell the property to them, which is impermissible under the IBC. The Tribunal concurred with the Respondent that since the Appellant lacks *locus standi*, they cannot pursue the exclusive sale of the premises. The Tribunal also noted that the Appellant had been filing the same application repeatedly, having the effect of circumventing the timelines provided under the IBC. The Appellant is re-filing the same case before the AA on multiple occasions, and IBC is a time-bound process. The Bench held that if such frivolous actions are allowed, the Liquidation process would take a lot of time and consequently defeat the purpose of the statute. Thus, the Tribunal held that the Appellant's claim was frivolous and devoid of any merits. It upheld the order of NCLT and dismissed the appeal.

Comments

Section 29-A of the IBC lays down a list of ineligible persons to submit a resolution plan. It also states that connected persons are ineligible to submit a resolution plan. In this case, the Appellant (who is an Operational Creditor) is linked to the Corporate Debtor, and the property that he wishes to buy as part of the Liquidation process, which is in itself makes this application contrary to the spirit of Section 29-A. Additionally, even though the Appellant's lease was terminated in December 2019, it continued to remain in illegal possession of the same. Due to this, the Appellant has no *locus standi* to approach the AA. This was also affirmed in the case of *D & I Taxcon Services Pvt Ltd* v. *Mr. Vinod Kumar Kothari*[10], wherein it was held that - "*being a tenant does not confer any locus under Section 47(1) of the Code to seek any direction against the Liquidator*".

Thus, the Tribunal rejecting the contention of the Appellant is a good decision upholding principles of the IBC and its allied Regulations. In my opinion, the Bench could have imposed a fine on the Appellant to stop such frivolous appeals and serve as a deterrent to similar applications that may be filed in the future.

"Anubhav Singh

[10]**Company Appeal (AT) (Ins) No. 1347 of 2019 NCLAT.**

Corporate Debtor can compensate from professional fees of IRP, if any error performed on his/her part.

PARAG SHETH IRP OF M/S DIGJAM LIMITED v. SUNIL KUMAR AGARWAL RP FOR DIGJAM LIMITED

Forum	National Company Law Appellate Tribunal, Principal Bench, New Delhi
Order Dated	August 13, 2021
Bench	Justice Jarat Kumar Jain (J), Dr. Ashok Kumar Mishra (T).
Relevant Section	Insolvency and Bankruptcy Code, 2016 – Section 9, Section 20(2)(b).

Brief Background

One of the operational creditors, M/s Oman Inc ("HUF"), filed an Application under Section 9 of the IBC for initiation of the CIRP against the Corporate Debtor, M/s Digjam Ltd. Ld. Adjudicating Authority i.e., NCLT Ahmedabad Bench admitted the Application to initiate CIRP and appointed Mr. Parag Sheth as the IRP. The IRP took control over the situation and hired CS Mr. Jignesh Shah to seek legal opinion and engaged CA Mr. Hiten Parikh. The CoC had not approved the appointment of CS Mr. Jignesh Shah and CA Mr. Hiten Parikh. Furthermore, while renewing the insurance for Corporate Debtor, the IRP had paid excess insurance premium amount of Rs. 4,19,719 to United India Insurance Company Limited, again without prior approval of CoC.

Consequently, IRP Mr. Parag Sheth was replaced by the Resolution Professional ("RP") Mr. Sunil Kumar Agarwal. IRP Mr. Parag Sheth received a cheque of Rs. 11,06,081 (after deducting TDS and the excess amount paid for insurance premium Rs. 4,19,719) from the Corporate Debtor towards the full and final payment of his professional fees. IRP Mr. Parag Sheth filed the Application before the NCLT Ahmedabad with the prayer that the RP and the financial creditors, who are the members of the CoC, shall be directed to pay outstanding professional fees and expenses to him and professional fees of CS Mr. Jignesh Shah and CA Mr. Hiten Parikh. The NCLT rejected the application on account of non-maintainability.

Now, the Appellant Mr. Parag Sheth, erstwhile IRP of M/s Digjam Ltd., filed this Appeal against the order directed by NCLT Ahmedabad Bench.

Issue

Whether it is justified for a Corporate Debtor to deduct the excess insurance premium amount from IRP's professional fees whatsoever?

Decision

The IRP in its submission stated that the three quotations from insurance companies were circulated amongst the members of CoC along with comparison of their premium amount. As the insurance of the assets of the Corporate Debtor was lapsing on December 10, 2019, the IRP recognized the urgent need to get it renewed in order to safeguard the assets of the Corporate Debtor, therefore, the Appellant decided to go with United India Insurance Company Ltd. The decision taken by the Appellant was in due discharge of his duties and was fair and for the benefit of the Corporate Debtor to maintain it as a going concern. The Appellant has a statutory authority under Section 20(2)(b) of the IBC to take the aforesaid action, assuming without the prior consent of the CoC. Furthermore, the IRP with reference to the appointment of CS Mr. Jignesh Shah and CA Mr. Hiten Parikh stated that this was done under the course of employment to seek legal opinion which is very well covered under the scope of Section 20 of the IBC.

The NCALT observed that Mr. Parag Sheth, erstwhile IRP, went ahead without the approval of the CoC and has taken the decision to go with United India Insurance Company to renew the insurance by paying higher insurance premium. The Bench appreciated the scope of Section 20(b)(1) of the IBC which authorizes the IRP to take such a decision, but at the same time Section 20 (2)(b) of the IBC authorizes the IRP to enter into such contracts which were entered into before the commencement of the CIRP. In this case, there was a new contract of insurance after the commencement of CIRP. The Appellant was aware with this situation that he cannot take such a decision, therefore, he has circulated the quotations amongst the members of the CoC along with comparison of their premium amount. Thus, the tribunal was of the view that the aforesaid provision did not authorize the IRP to renew the insurance policy without approval of the CoC at a higher premium rate.

The NCLAT further observed that the Appellant has engaged CA Mr. Hiten Parikh and CS Mr. Jignesh Shah against the decision taken by the CoC. It is also pertinent to note that CA Mr. Hiten Parikh and CS Mr. Jignesh Shah have not authorized the Appellant to file Application on behalf of them. Thus, the Appellant cannot pursue their claims before the NCLT.

In such circumstances, the NCLT Ahmedabad Bench had rightly dismissed the Application. Therefore, the Appeal was dismissed.

Comments

Section 20 of the IBC lays down the foundation upon which IRP should work. In the present case, IRP Mr. Parag Sheth, as part of discharging the duties attributed to him in terms of Section 20 of the IBC, did nothing wrong. IRP takes control over the company in order to keep it going. In the present case also, the IRP took control and acted with due diligence. IRP is appointed by the operational creditors and the CoC comprises financial creditors, this in itself becomes a problem while laying down interest of respective creditors. Deducting the professional fees of IRP is not seen as a good practise in insolvency law as it will deter people from pursuing this role ahead. Corporate Debtor has to pay the fees of IPR, for the period he has functioned and delivered his service on priority basis. Therefore, this decision should be reconsidered.

"Anushka Fuke

The appellant shall approach the concerned adjudicating authority before filing an appeal.

DHARAM PAL & ORS. v. ASHOK KUMAR GULLA (LIQUIDATOR/RP OF LOTUS AUTO ENGINEERING LTD.) & ORS.

Forum	National Company Law Appellate Tribunal, New Delhi Bench
Order Dated	July 27, 2021
Bench	Justice Jarat Kumar Jain Member (Judicial) and Dr. Ashok Kumar Mishra Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 Section 60(5)

Brief Background

The liquidator has liquidated the property of the Corporate Debtor which was below the liquidation value and hence, caused material irregularities. The counsel for the Appellant has submitted an appeal in the NCLAT without submitting it in front of the NCLT.

Issue

Whether the present appeal, filed directly before the NCLAT, is admissible?

Decision

The counsel of the Respondent calls into question why has the Appellant not raised the above dispute before the appropriate Adjudicating Authority under Section 60(5) and its admissibility before NCLAT.
The NCLAT accepted the contention and disposed of the appeal in the above case as the appeal should have been filed before the NCLT.

Comments

The principle of *stare decisis* has been followed and the NCLAT has rightly disposed of the case. The Appellant has directly filed for an appeal before the NCLAT which is not the appropriate Adjudicating Authority under Section 60(5). The decision protects sanctity associated with hierarchy of tribunals.

"Animish Dighe

NCLAT stays Resolution Plan for Videocon Industries Group

BANK OF MAHARASHTRA AND ORS. v. VIDEOCON INDUSTRIES LTD. & ORS.

Forum	National Company Law Appellate Tribunal
Order Dated	July 19, 2021
Bench	Justice A.I.S. Cheema (The Officiating Chairperson) and Dr. Alok Srivastava, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 - Section 30, Section 30(2), Section 53

Brief Background

The Appellant, i.e., the Bank of Maharashtra, is a dissenting financial creditor. According to the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC), they could not have been paid less than the liquidation value. The Appellant argued that the order of the NCLT mandating the resolution plan did not abide by Section 30(2)(b) of IBC. Several documents were relied upon to demonstrate that the proposed value to be paid was less than the liquidation value. The Appellant also argued that what was proposed to be paid was also only partly in cash, while a substantial part was in the form of Non-Convertible Debentures (NCDs). The question that was thus raised was whether NCDs could be issued to the Appellant instead of paying cash. The Appellant also pointed out breaches in the confidentiality clause with regards to the liquidation value.

The Respondents are the successful Resolution Applicant ("RA") and the Resolution Professional ("RP") who supported the order of the NCLT and specified that the Resolution Plan itself had provisions that the payments would be in conformity with Section 30(2)(b) of the IBC. Further, the Respondent averred that although the NCDs were stated in the resolution plan, as instructed by the NCLT, the payment could be via cash.

Issue

Whether, instead of paying cash, non-convertible debentures (NCDs) could be issued to the Appellants?

Decision

The NCLAT observed that a primary reading of the record demonstrates that the liquidation value was stated to be Rs. 22568.13 crores. It further emphasised on the payment proposed under the resolution plan, the manner of payment proposed under the resolution plan by the successful RA to the financial creditors and the NCLT's Order.

The NCLAT noted that the Corporate Debtors in the consolidated proceedings had Rs. 2200 crore in cash, while the successful RA would bring in just an additional 2262 crores. Even from this cash, the first payment of Rs. 2200 crores would be brought within 25 Months. The NCLAT also noted that beyond Rs. 2262 crores, the rest was being brought in only by way of NCDs, which to be paid over next six years.

The NCLAT took into account these observations and stayed the order of the NCLT till the next date (September 7, 2021), directing status quo ante as before passing of the NCLT's Order to be maintained.

Comments

The resolution of 13 out of 15 companies of the Videocon group is the first group insolvency resolution completed under the IBC. Presently, the Code does not envisage a framework to harmonise corporate insolvency resolution process and liquidation proceedings of group companies. Though, in the CIRP of numerous corporate debtors, the necessity of group insolvency came up due to interconnections within associated companies – resulting in the IBBI instituting a working group to recommend enablement of group insolvency and liquidation process. In the Indian framework, there have already been cases, where courts have felt the need of group insolvency for maximisation of asset value of companies. In past, the courts have used their inherent powers to initiate group insolvency of such companies. For instance, in the case of *Edelweiss Asset Reconstruction Co. Ltd. v. Sachet Infrastructure*[11], NCLAT ordered a single insolvency professional to be appointed and a consolidated resolution plan to be proposed for restructuring five companies working as a consortium. The NCLAT has stayed Videocon's resolution in a matter that has been dragging on for around three years. The IBC was passed so that there would be time-bound resolution of stressed assets. Yet, the Videocon resolution is a typical circumstance where even the case has been settled, the

[11] **Company Appeal (AT) (Insolvency) Nos. 377 to 385 of 2019**

creditors are recovering only a miniscule portion of their dues.

Moreover, the order of NCLT approving the resolution plan is bad in law and contrary to the established provisions of the IBC. In the numerous CoC meetings, lenders brought up apprehensions concerning the distribution mechanism for the dissenting financial creditors. Notwithstanding this, the RP dismissed the concerns and proceeded with voting on the plan. The resolution plan provided for payment to the dissenting financial creditors by issuing NCDs and equities, which is not permissible under Section 30(2)(b) of IBC, as "payment" under the said provision could, in this situation, refer only to payment of money and not anything of its equivalent. The same rationale was held by the Supreme Court in the *Jaypee Kensington Boulevard Apartments Welfare Association & Ors* v. *NBCC Limited & Ors*.[12] Although the NCLAT directed the CoC to make payments according to liquidation value to all dissenting creditors in cash upfront before any payment is made to the assenting financial creditors, it failed to address the fact that such directions lead to modifications in the resolution plan, which is impermissible according to the Supreme Court.[13]

"Manisha Sarade

[12] **Civil Appeal No. 3395 of 2020**

[13] **Ibid.**

Benefit of any orders passed in the avoidance application filed or to be filed by the Administrator under Sections 43 to 51 or under Section 66 of the IBC shall be for the benefit of Successful Resolution Applicant or Creditors of Corporate Debtor.

63 MOONS TECHNOLOGIES LIMITED v. THE ADMINISTRATOR OF DEWAN HOUSING FINANCE CORPORATION LIMITED

Forum	National Company Law Appellate Tribunal, New Delhi
Order Dated	July 23, 2021
Bench	Mr. Justice A.I.S. Cheema (Judicial) and Mr. Dr. Alok Srivastava (Technical)
Relevant Sections	Insolvency and Bankruptcy Code 2016 – Section 43 - 56, Section 66

Brief Background

The NCLT had approved the resolution plan of Piramal Capital & Housing Finance Ltd for the debt-ridden DHFL. 63 Moons, a debenture holder of DHFL, filed a petition challenging it before NCLAT. Before this, they had also filed a case against Piramal in NCLT for ascribing '₹1' value to the assets or transactions of DHFL, because they were of the view that these have a recovery potential of more than ₹40,000 crore. The Appellant further accused Piramal of trying to illegally pocket the money that is likely to be recovered from the debtors of DHFL. It has approvals given by the CoC and the RP to Piramal before the NCLT.

The Appellant had prayed before the NCLT that any term in the resolution plan states that the benefit of any orders passed in the avoidance application filed or to be filed by the Administrator under Section 43 to 51 or 66 of the IBC shall be for the benefit of Piramal Capital & Housing Finance Ltd. (Successful Resolution Applicant) and not for the benefit of the creditors of DHFL, be declared as contrary to law. This Appeal was filed against the impugned order passed by the NCLT, according to which the Interlocutory Application of the Administrator under Section 30(6) and Section 31 of the IBC was approved and the resolution plan of Respondent No.2- 'Piramal Capital & Housing Finance Limited' was accepted by the NCLT. These appeals had been filed for stay of the respective impugned orders. The counsel for the Appellant submitted that if the Resolution Plan, as has been approved, is implemented, the position of all stakeholders would be irreversibly altered and it will amount to fait accompli.

Issue

Whether the interim relief as sought in the Appeals should be granted?

Decision

The NCLAT, while dismissing the appeal stated that as the application has been made at a very initial stage, it will not appropriate to make detailed observations as it may be treated as a finding in the Appeals. The NCLAT was not satisfied with the arguments advanced and hence, couldn't find any reason to pass interim order for the grounds being raised by the Appellant.

It further said that the rival claims are questions of law and thus, would require deliberation and decision at the appropriate stage. When the averments made by the Appellant were compared with averments made by Respondents, the NCLAT did not find it a fit case to pass interim orders as sought. The Learned Counsel for the Appellant argued that the execution of the resolution plan should be subject to the outcome of these Appeals. The NCLT had initially observed that it is a matter of law for which there is no need to pass specific orders.

Comments

The NCLAT rightly dismissed the appeal as the application was made at a very preliminary stage. The arguments of the counsels are completely a matter of law which was not the point of discussion in the present matter.

"Megha Kamboj

The I&B Proceedings is not a recovery proceeding

SUNITA AGARWAL & ANR. v. ANKIT GOYAT

Forum	National Company Law Appellate Tribunal, New Delhi
Order Dated	August 12, 2021
Bench	Justice Anant Bijay Singh (Judicial) and Ms. Shreesha Merla (Technical)
Relevant Sections	Insolvency & Bankruptcy Code 2016 – Section 7

Brief Background

On September 17, 2019, the NCLT New Delhi Bench, passed an order where it allowed the application filled under Section 7 of the IBC. Since no one appeared on behalf of Corporate Debtor 'M/s Antriksh Infratech Pvt. Ltd.' during the proceedings, the NCLT proceeded ex-parte.

This order was then challenged in the NCLAT. It was argued by the counsel of the Appellant that no 'Affidavit of Service' was filled by the Respondent. Appellant claimed that service was not affected at all. It was further argued that the Respondent is a speculative investor and has triggered the Code with malicious intentions. The counsel placed reliance on the ratio of the Hon'ble Supreme Court in '*Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India*',[14] wherein it was observed that the real estate developer can point out that the insolvency resolution process has been invoked fraudulently, with malicious intent or any other purpose other than the resolution.

The counsel for Respondent pointed out that a demand noticed was sent to Corporate Debtor before filling the application. The notice was returned with remarks 'the Addressee refuses to accept', but the email did not bounce back. In compliance of the NCLT order, a complete paper book was served by hand and service was also affected via email on May 7, 2019.

Issue

Whether 'Service of Notice' on the 'Corporate Debtor' was served?

Whether the respondent is a speculative investor and the IBC is triggered with malicious intent?

Decision

After considering the facts and timeline of the events, the bench was of the view that 'Service of Notice' was completed in compliance of Rule 38 of NCLT Rules. 2016. With regards to the second issue, the NCLAT referred to decision in the case of *Subha Sharma* v. *Mansi Brar Fernandes & Ors.*[15] where the issues were in similar context. It was held that entering a 'lucrative agreement' makes the investor a 'speculative investor'. The bench was convinced that in the present case the allottee i.e., respondent entered in a 'lucrative agreement' based on the facts. it was held that the Respondent sought to benefit from this 'lucrative agreement' and is squarely covered by the ratio of the Hon'ble Supreme Court in *'Pioneer Urban Land and Infrastructure Ltd.*[16]*''* The bench placed reliance on the ratio of the decision of this Tribunal in '*Binani Industries Limited'* v. *'Bank of Baroda & Anr*[17]*.* wherein it was observed that the IBC is not a recovery proceeding. The Order of Admission under Section 7 was set aside. The 'Corporate Debtor' was released from all the rigours of law. The appeal was allowed and impugned order was set aside however keeping in mind the peculiar facts of the case, the IRP fees was to be borne by the 'Corporator Debtor'

Comments

This is a good decision in law. The decision has very categorically held that the Code is not a debt recovery mechanism for speculative investors. In this case, the bench has further established and reaffirmed the principles founded in the *'Pioneer Urban Land and Infrastructure Ltd.*[18]*'* and '*Binani Industries Limited'* v. *'Bank of Baroda & Anr'*[19]*.* The NCLAT has extended and followed the precedents set by the Hon'ble Supreme Court, which is a good practise.

"Omkar Chaudhari

[14] **(2019) 8 SCC 416**
[15] **2020 SCC Online NCLAT 1104**
[16] **2019) 8 SCC 416**
[17] **2018 SCC OnLine NCLAT 457**
[18] **2019) 8 SCC 416**
[19] **2018 SCC OnLine NCLAT 457**

Interim Resolution Professional: A Central Figure

RAJESH GOYAL v. BABITA GUPTA & ORS.

Forum	National Company Law Appellate Tribunal (NCLAT)
Order Dated	13 August 2021
Bench	Justice Jarat Kumar Jain, Dr. Ashok Kumar Mishra
Relevant Sections	Insolvency & Bankruptcy Code 2016 - Section 7

Brief Background

Ms. Babita Gupta, the respondent, along with two others, all three of whom are financial creditors, moved an Application under Section 7 of the IBC for initiation of Corporate Insolvency Resolution Process (CIRP) against the Rajesh Project Pvt. Ltd. (Corporate Debtor) an Infrastructure Company. This Application was accepted by the NCLAT. Post this acceptance, the applicant appealed against this decision which was dismissed. The Applicant then filed an application asking for an extension of timeline owing to the COVID-19 crisis. However, this request was also dismissed, albeit after a long period. Simultaneously, the IRP tendered his resignation.

The applicant then filed another application seeking an extension due to a delay in the previous order, as well as asking for an IRP to be appointed in a timely fashion – this forms the subject matter of the case.

Issues

i. Whether an extension on the timeline may be provided to the applicant?

ii. Whether the Hon'ble Adjudicating Authority may decide on the application for the replacement of an IRP in a time bound manner?

Decision

With respect to the first issue, the NCLAT held that an extension may be granted as the applicant could not have started the work in absence of permission granted by the NCLT, the order for which was delayed by 48 days. As regards the second issue, the NCLAT held that pursuant to the resignation of the first IRP, the Tribunal appointed a second IRP in a timely fashion.

Comments

This is a positive decision by the NCLAT. This judgement marks the acknowledgment of the NCLAT's responsibility with regard to appointing an IRP, vis-à-vis recognising the indispensable role that an IRP plays in such proceedings.

"Pia Tripathi

The Debtor is entitled to be heard only after submission of report by RP u/s 99 of IBC

RAVI AJIT KULKARNI (PERSONAL GUARANTOR OF PRATIBHA INDUSTRIES LIMITED) v. STATE BANK OF INDIA

Forum	National Company Law Appellate Tribunal, New Delhi
Order Dated	August 12, 2021
Bench	Justice AIS Cheema and Dr. Alok Shrivastava
Relevant Sections	Insolvency and Bankruptcy Code 2016- Section 95, Section 96, Section 97, Section 98, Section 99, Section 100

Brief Background

SBI initiated insolvency resolution process against the corporate debtor under Section 95 of IBC. The Adjudicating Authority allowed the petition and also appointed a RP. The appellant, who is a personal guarantor of the Corporate Debtor, contended that the NCLT could not proceed to hear and adjudicate the case on merits without issuing a notice under Rule 44 of National Company Law Tribunal Rules, 2016. The Appellant was served an advance copy of the application. However, it was not served through the Court's process. The RP had already submitted the report under Section 99 of IBC and the debtor did not get an opportunity to seek his replacement.

Issues

Whether the Adjudicating Authority failed to issue notice to the Appellant thereby violating the principles of natural justice?

Whether the corporate debtor was entitled to seek replacement of the RP under Section 98 before submission of the report under Section 99?

Decision

A limited notice conveying the filing of the application is required to be served. However, the notice of date, as to when the matter would come before the NCLT is not required before the submission of the report by the RP. The notice of demand as per Rule 7(1) of NCLT Rules 2016 has to be in Form C and the service of notice has to be affected as per Rule 3(1)(g). Service is defined as "sending any communication by any means, including registered post, speed post, courier or electronic means, which is capable of producing or generating an acknowledgement of receipt of such communication". It can be concluded that after submission of application, the creditor served a copy to the Corporate Debtor and to its guarantor/s, which is considered as a limited notice. The interim moratorium automatically kicks in when an application is filed and no adjudication is involved at this stage. Section 98 (replacement of RP) is not stage-specific and can be resorted to even at the stage of implementation of the repayment plan. When an application proving debt is registered with the information utility, it would be deemed as conclusive evidence and the personal guarantor is not entitled to dispute its validity [Section 99(3)]. Thus, prior to the appointment of a resolution professional, the IBC or Rules do not provide for any hearing as such to be given to the debtor. Under Section 99 of the IBC, the RP gives an opportunity to the Corporate Debtor while examining the application. To prevent the abuse of process by double hearings, the merits will be adjudicated only after the receipt of the report from the RP. Moreover, the personal guarantor's concurrence is not required to be taken before the appointment of RP. The Bench also noted that the Adjudicating Authority had erred by confirming "default" at the stage of the application under Section 95 of IBC. Therefore, the premature observations of the Adjudicating Authority regarding the "default" along with the subsequent report were set aside and the matter was remitted back.

Comments

This is a good decision by NCLAT because the requirement of notice under NCLT Rules 2016 cannot be interpreted in a manner detrimental to the provisions of the IBC. The proceedings should not be rendered invalid merely due to a technicality. Substance is given primacy over form, and thus a limited notice is also deemed to be sufficient. At the time of adjudication, the debtor shall indeed be given a fair opportunity to be heard. Moreover, Section 98 dealing with the replacement of RP is analogous to Section 27 which can be invoked at any stage. The Bench while partially allowing the appeal rightly remitted the matter back owing to the premature affirmation of 'default' by the NCLT which was bound to have an influence on the report submitted by the resolution professional.

"Renuka Nevgi

Commercial wisdom of the COC to be respected by the Court

M/S. UNICON BUILDTECH v. AISHWARYA MOHAN GAHRANA

Forum	National Company Law Appellate Tribunal, New Delhi
Order Dated	August 12, 2021
Bench	Justice A.I.S. Cheema (Chairperson), V.P. Singh (Technical)
Relevant Sections	Insolvency and Bankruptcy Code 2016 - Section 7

Brief background

There was an Appeal against an Order of NCLT that allowed the application by the Resolution Professional seeking liquidation of the Corporate Debtor, the Appellant in this case.

The Appellant was a prospective resolution applicant who argued that in the 6th Committee of Creditors Virtual Meet the Appellant wanted to present a revised resolution plan but couldn't do so as the team which was supposed to present the minutes was unavailable

The appellant claimed that the CoC still met and rejected the resolution plan. The appellant also argued that the CoC and IRP wrongly rejected the plan which promised a compensation of 77 crore Rupees against 52 Crore Debt and filed an application for liquidation.

Issues

Whether the Order passed by the NCLT directing liquidation of the Corporate Debtor is wrongful?

Whether the CoC and the IRP Inequitably Rejected the Appellant's Resolution Plan against the Objectives of the IBC?

Decision

The Court, while taking into observation the minutes of the CoC Meeting on 28th January 2021 Dismissed the Appeal because the meeting logs Clearly Stated that Mr. Suresh Kumar Gupta, the Partner of Unicon Buildcon was made available over the phone call made by the Resolution Professional, which was a clear indication of the fact that Appellant had been participating in the CIRP.

The CoC also mentioned 18 reasons as to why the plan was rejected which include among others: A revenue model under which it will earn revenue and therefrom proposes to pay creditors from revenue so generated, In case of no revenue or failure of their model, no creditors will receive any amount, nothing to make sure of the performance, low marks in evaluation matrix and lack of business experience in running Hospitals. A section 7 Application was admitted on 8th November, 2019 and the order of liquidation came to be passed on 31st May, 2021. Keeping section 12 of the IBC in view and the time frame within which CIRP should be completed, the court dismissed the appeal.

Comments

This decision of the NCLAT is a fair decision, true to the spirit of the IBC. The wisdom of the CoC is seen to be respected by the court as is seen in the court's judgement. The court decided upon the impugned order only after ensuring that there was an equal opportunity to the appellants to present their resolution plan.

"Rohan Phadke

Rule 11 powers in withdrawal of CIRP

KASINATHAN LAKSHMI SRINIVASAN v. MASSTRANS TECHNOLOGIES PVT. LTD. & ANR.

Forum	National Company Law Appellate Tribunal, New Delhi
Order Dated	July 26, 2021
Bench	Justice Jarat Kumar Jain (Chairperson), V.P. Singh (Technical)
Relevant Provisions	Rule 11 of NCLAT Rules

Brief Background

The operational creditor and the Corporate Debtor entered into a settlement and the parties agreed to settle the matter with a payment of Rs. 1.56 Crores as full and final settlement for the claim of the operational creditor. The Corporate Debtor also paid 1.56 Cr to the operational creditor.

However, because of erroneous legal advice, a Section 12A petition was filed by the operational creditor before the NCLT, even before the CoC was constituted.

An application was also filed for exemption of notarized affidavit and the operational creditor agreed to pay the IRP fees and the CRIP costs

Issue

Whether the tribunal, by exercising inherent powers under Rule 11 of NCLAT Rules and terminating the CIRP, should revive the corporate debtor?

Decision

As the parties have settled the matter and Respondent No. 1 has received the total amount of settlement i.e., Rs. 1 Cr. 56 lacs, and the Appellant is ready to pay IRP's fees and CIRP Costs, The NCLAT, thought it to be a case to be a fit one for exercising it's "inherent powers" under Rule 11 of NCLAT Rules, set aside the order dated 09.07.2021 for initiation of CIRP and terminated the CIRP against the Corporate Debtor. The IRP was directed to hand over the charge of the Company to the Directors of the company.

Comments

This decision of the NCLAT cannot be said to be fair because the two parties settled the final amount among themselves without the Committee of Creditors even being formed. As far as application of Rule 11 of the NCLAT Rules goes, it is expected to be applied after keeping in mind the interests of the concerned parties. Had the CoC been formed, a better decision would have been made by the CoC and that would have ensured Complete Justice.

"Rohan Phadke

It is the settled law that to meet the justice the Appellate Tribunal can exercise its inherent powers under Rule 11 of NCLAT Rules, 2016 to terminate CIRP.

LALIT KUMAR KESARIMAL JAIN v. JM FINANCIAL TRUSTEE COMPANY PVT. LTD. & ORS

Forum	National Company Law Appellate Tribunal, New Delhi
Order Dated	July 19, 2021
Bench	Justice Jarat Kumar Jain (Judicial), Dr Ashok Kumar Mishra (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 - Section 7, Rule 11 of NCLAT Rules, 2016.

Brief Background

Financial creditor (Respondent No. 1) filed Company Petition No. 960-961 of 2020 before the NCLT under Section 7 of the IBC for initiating CIRP against the Corporate Debtor (Kumar Urban Development Pvt. Ltd.). The NCLT, Mumbai through an order dated April 20, 2020 admitted the Application. The Appellant was a Promoter/Director of the Corporate Debtor aggrieved by this order. On June 30, 2021, the parties amicably settled the dispute between them and entered into a settlement agreement. As per the agreement, the CIRP costs and fees of the IRP were to be borne by the Corporate Debtor.

Issue

Whether the NCLAT can exercise its inherent powers under Rule 11 of NCLAT Rules, 2016 and terminate CIRP to "meet the ends of justice"?

Decision

The application was allowed and the CIRP was terminated through exercise of the NCLAT's inherent powers under Rule 11 of the NCLAT Rules, 2016. The Corporate Debtor was exempted from the rigours of the CIRP and the settlement agreement was taken on record. The terms and conditions of the settlement agreement were held as being binding on the parties as part of the Order.

Comments

The application was allowed and the CIRP against the Corporate Debtor was terminated. This judgement allows the CIRP to be terminated even before the constitution of the CoC and it undermines the entire process of CIRP. While it may be argued that Rule 11 of the NCLT Rules gives the Adjudicating Authority the inherent right to allow the withdrawal of an application prior to the formation of the CoC; nevertheless, it is important to remember that once an application is allowed, it cannot be withdrawn unless this is done in accordance with the method outlined in Section 12A of the IBC. Frequent use of Rule 11 by the NCLAT is likely to encourage applicants to file for withdrawal of applications through this provision, and circumvent the IBC entirely. The proper way of withdrawing the CIRP proceeding would have been filing an application under Section 12A of the IBC after the appropriate requirements are satisfied. Therefore, the judgement is not good in the eyes of the law. Hence, allowing the Appeal is not correct.

"Samarth Garg

Liquidator required to process and determine the claim of the Creditor

NTPC LIMITED BARH SUPER THERMAL POWER PROJECT v. RAM RATAN MODI, LIQUIDATOR OF DC INDUSTRIAL PLANT

Forum	National Company Law Appellate Tribunal
Order Dated	July 19, 2021
Bench	Justice A.I.S. Cheema and Dr Alok Srivastava
Relevant Sections	Insolvency and Bankruptcy Code, 2016- Section 42, Section 7, Section 38, Section 39; Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 - Regulations 20, 23 and 25

Brief Background

The Corporate Debtor (DC Industrial Plant Services Pvt. Ltd.) had entered into two contracts with the Appellant. The contracts signed between the appellant and the Corporate Debtor were not carried by the Respondent which later on resulted in the termination of the contract. The Appellant had to get the remaining work done by a third party, for which they sought damages and compensation. This dispute was decided through arbitration in the Appellant's favour, but the exact amount due to them was not finalized. The Arbitrator held that the same had to be assessed at the risk and cost of the Corporate Debtor. Thus, the counter claim by the corporate debtor was rejected.

Meanwhile, the Appellant filed an application under Section 7 of the IBC against the Corporate Debtor and RP published list of creditors. Subsequently, a liquidation order was passed against the corporate debtor. The Appellant filed a proof of claim as an "other creditor" under Form F (Proof of claim by any other stakeholder, Under Regulation 19 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) to back the claim. Later, during liquidation, the Appellant filed the claim to the liquidator under Form G (Proof of claim by any other stakeholder. (Under Regulation 20 of the Insolvency and Bankruptcy Board of India (Liquidation Process). The Liquidator rejected the claim via an email stating that the Appellant's claims were inadmissible since the books of the Corporate Debtor did not reflect the said claims by the Appellant. In response to the liquidator's decision, the Appellant contended that it was an issue of calculation because the liquidators had to observe the difference between the actual expense that the Appellant had to endure and the original expense from the project. The latter was to be used as a point of comparison because the project was initially supposed to be given to the M/s MELCO.

Issue

Whether the liquidator's rejection of the claim was valid or invalid?

Decision

NCLAT held that the decision made by the liquidator was inappropriate. The Bench stated that the liquidator was supposed to process the claims filed by the Appellant in Form 'G' as claimed by any 'other stakeholder' per the IBC. The Bench further stated that the Liquidator should have referred to various regulations. The liquidator possessed the authority to call for the documents when required and determine the quantum of the claim. Various regulations mentioned by the bench were:

- Regulation 20 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 for processing the claims of the stakeholder.
- Section 39 of the IBC for the verification of the claims made.
- Regulation 23 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 gives authority to the liquidator to call for the documents or evidence for the clarification as he deems fit from the claimant.
- Regulation 25 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 is responsible for determining the quantum of the claim.

The NCLAT in decision concluded that there was avoidance and ignorance on the part of the liquidator since he avoided performing his duty under the IBC and its regulations. In the decision, the appeal was disposed by quashing the Liquidator's decision and directing him to process the claim by the Appellant as 'other creditor.' The Bench further directed that the liquidator may reach the best estimate of the amount claimed and provide necessary benefit to the Appellant

Comments

The liquidator in the Liquidation process has some inherent powers, and he acts as a 'quasi-judicial' body. The liquidator must act as a prudent man and take

action as a reasonable person by abiding with all the provisions of the IBC and regulations therein. In the present case, the liquidator acted with avoidance and ignorance by failing to execute his duties under the IBC and its rules. The liquidator erred in informing the Appellant that the Corporate Debtor had contested the amount and did not appear in the Corporate Debtor's records. It was the liquidator's responsibility to examine the claim in accordance with the Liquidation Regulations, specifically Regulation 25 to arrive at the best estimate of the amount and provide the benefit to the Appellant. It is clear that the liquidator failed to perform the duty as required by the Code and the Regulations. Thus, the Appellate Tribunal has made a good decision by quashing the liquidator's decision.

"Yashi Singh