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(Cases Referred: 21st October - 29th November, 2021)

Supreme Court Pronouncements

1. V. NAGARAJAN v. SKS ISPAT AND POWER LTD.& ORS.

NCLAT Pronouncements

3. DRIP CAPITAL INC. v. CONCORD CREATIONS (INDIA) P. LTD.

5. BIMALESH BHARDWAJ & ORS. v. VALUE INFRATECH INDIA PVT LTD & ORS.

7. AGARWAL COAL CORPORATION PVT. LTD. v. SUN PAPER MILL LTD

9. ASSET RECONSTRUCTION COMPANY INDIA LIMITED v. MANGESH KEKRE & ORS.

11. GUNDEEP GURDEEP SINGH SOOD & ORS. v. CORPORATION BANK & ANR.

13. ANANTA CHARAN NAYAK v. STATE BANK OF INDIA & ORS.

14. INTEC CAPITAL LIMITED v. EASTERN EMBROIDERY COLLECTIONS PRIVATE LIMITED

15. THE COMMISSIONER OF CENTRAL TAXES GOODS & SERVICE TAX v. C.S. ASHISH SINGH & ORS.

16. BHATPARA MUNICIPALITY v. NICCO EASTERN PVT. LTD.

17. MR. MANMOHAN SINGH JAIN v. STATE BANK OF INDIA

19. RAJMEE POWER CONSTRUCTION LIMITED v. JHARKHAND URJA SANCHARAN NIGAM LIMITED

20. COMMITTEE OF CREDITORS OF MEENAKSHI ENERGY LTD v. CONSORTIUM OF PRUDENT ARC LIMITED & VIZAG MINERALS AND LOGISTICS P LTD

21. JUMBO PAPER PRODUCTS v. HANSRAJ AGROFRESH PVT. LTD

22. ASEEM SRIVASTAV v. ICICI BANK LIMITED & ANR.

24. HEMANSHU JAMNADAS DOMADIA SHAREHOLDER & DIRECTOR OF M/S SILVER PROTEINS PVT LTD v. CENTRAL BANK OF INDIA & ANR.

25. M/S EMAAR HILLS TOWNSHIP PRIVATE LIMITED v. MR. SRINIVAS MANTHENA & ANR.

26. S. RAVINDRANATHAN, EX-DIRECTOR OF CORPORATE DEBTOR MPL PARTS AND SERVICES PVT. LTD. v. SUNDARAM BNP PARIBAS HOME FINANCE LTD.

NCLT Pronouncements

26. JALDHI OVERSEAS PTE. LTD. v. STEER OVERSEAS PRIVATE LIMITED

27. SATIQ BUHARI v. PLATINO CLASSIC MOTORS (INDIA) PVT. LTD

Sr. No.	Title	Abbreviation
1.	Adjudicating Authority	AA
2.	Committee of Creditors	CoC
3.	Corporate Insolvency Resolution Process	CIRP
4.	Goods and Services Tax	GST
5.	IBBI (Insolvency Resolution of Corporate Person) Regulations, 2016	CIRP Regulations, 2016
6.	IBBI (Liquidation Process) Regulations, 2016	Liquidation Regulations, 2016
7.	Insolvency and Bankruptcy Board of India	IBBI
8.	Insolvency Professional(s)	IP(s)
9.	Interim Resolution Professional(s)	IRP(s)
10.	National Company Law Appellate Tribunal	NCLAT
11.	National Company Law Tribunal	NCLT
12.	Regulation	Reg.
13.	Reserve Bank of India	RBI
14.	Resolution Professional(s)	RP(s)
15.	Section	Sec.
16.	Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act	SARFAESI Act
17.	The Insolvency and Bankruptcy Code, 2016	The IBC, 2016
18.	Versus	v.

SUPREME COURT PRONOUNCEMENTS

The period of limitation for an appeal filed under Section 61 commences from the date of passage of the order, and not the date of receipt of the order by the parties.

V. NAGARAJAN v. SKS ISPAT AND POWER LTD.& ORS.

Court	Supreme Court of India
Judgement Dated	October 22, 2021
Bench	Justice Dhananjaya Y Chandrachud, Justice Vikram Nath and Justice BV Nagarathna
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 – Section 3(31), Section 61, Section 62, Section 63, Section 238; The Companies Act, 2013 – Section 420 (3); NCLAT Rules – Rule 14, Rule 22, Rule 50; The Limitation Act, 1963 – Section 12(2), Section 29(2); The Code of Civil Procedure, 1908 – Section 9

Brief Background

This civil appeal before the Supreme Court of India ("Court") arose out of a NCLAT's order dated 13 July 2020. The NCLAT, in its order, dismissed an appeal from an NCLT Chennai's order (dated 31 December 2019) as being barred by limitation. In the proceedings before the NCLT Chennai, the appellant had filed a miscellaneous application in the liquidation proceedings, seeking interim relief against the invocation of a bank guarantee. However, this request for injunctive relief until the conclusion of the liquidation proceedings was rejected because performance guarantees do not fall within the scope of the term 'security interest' under Sec. 3(31) of the IBC.

After the order was passed by the NCLT on 31 December, 2019, it was uploaded on the NCLT's website on March 12, 2020. However, the uploaded order set out an incorrect name of the judicial member who had passed the order, due to which it required correction and was re-uploaded on March 20, 2020. After this, the appellant requested for a free copy of the order on March 23, 2020 by virtue of Sec. 420 (3) of the Companies Act 2013 read with Rule 50 of the NCLT Rules 2016. This free copy was never issued to the appellant. During this entire time period, the period of appeal available under Sec. 61 of the IBC (30 days extendable by another 15 days) elapsed. Nevertheless, the appellant filed an appeal before the NCLAT on June 8, 2020 seeking exemption from the requirement of producing the certified copy owing to the country-wide lockdown.

The NCLAT relied on Sec. 61(2) of the IBC and held that since the limitation period had elapsed without an application for condonation of delay, the appeal was barred by limitation. It also noted that Rule 22 prescribed a mandatory, non-waivable requirement of producing the certified copy, which had not been done. Lastly, it concurred with the view of the NCLT on merits and also refused interference on equitable grounds.

Issue

Apart from assessing the NCLAT's order to check whether the appeal needed to be allowed, the Court dealt with the following two issues:

When does the limitation period commence with respect to appeals filed under Sec. 62 of the IBC?

Is the requirement of a certified copy for an appeal to the NCLAT against an order passed under the IBC waivable?

Decision

The Court initially restricted the scope of its determination to whether the NCLAT appeal was barred by limitation. Whilst holding that the IBC is a complete code in itself, it noted that Sec. 238A of the IBC invokes the Limitation Act to the extent applicable, which meant that provisions of the Limitation Act would have to be read in conjunction with those of the IBC. The IBC would assume precedence in the event of a conflict between these provisions.

It then examined the nature of an appeal and highlighted that an appeal is a statutory right, making it different from the right to file a suit under Sec. 9 of the Code of Civil Procedure, 1908. While an appeal needs to be specifically permitted by law, the right to bring a suit of a civil nature is inherent unless barred by law. Shifting its focus back to the dispute resolution process under the IBC, the Court remarked that this framework is comprehensive and ousts the jurisdiction of civil courts. Since the right to appeal emerges from the IBC, the specific period of limitation applicable to such appeals will also have to arise from the IBC.

With respect to the first issue, the Court relied on *Sagufa Ahmed* v. *Upper Assam Plywood Products Pvt Ltd*. [2021 (2) SCC 317] to hold that in circumstances where no special law confers jurisdiction on the NCLT, the general principle for the computation of limitation for filing an appeal is found within Sec. 420 (3) of the Companies Act read with Rule 50 of the NCLT Rules. Thus, a party can compute the period of limitation from the date of receipt of the certified copy without having to file its own application for receipt of such an order. However, since the IBC is a special law with a specific overriding provision, its regime is to be referred to in the instant case. The Court observed that there is a major difference between Sec. 61 of the IBC and Sec. 420 (3) of the Companies Act, per which the words "from the date on which a copy of the order of the Tribunal is made available to the person aggrieved" are absent in the former. Thus, the intent behind this omission is in line with the objective of the IBC to streamline the insolvency resolution process with minimal delays. To trace such intent, the Court examined various statutory timelines, the obligation on the AA to discharge applications expeditiously under Sec. 64, and case laws such as *Mobilox Innovations Private Ltd* v. *Kirusa Software Private Ltd* [(2018) 1 SCC 353] and *Ebix Singapore Private Ltd* v. *Committee of Creditors of Educomp Solutions Ltd* [2021 SCCOnLine SC 707]. It concluded that the requirement of an order being made available under a general enactment (Sec. 420 of the Companies Act) would do injustice to the intent behind provisions of the IBC that prioritise speedy timelines for ensuring maximum recovery. Thus, the Court held that the absence of this phrase was a deliberate move by the legislature to encourage proactive steps on behalf of parties.

For the second issue, the Court referred to Sec. 12 of the Limitation Act which discusses the time to be excluded during legal proceedings. According to this provision, time taken by a party to obtain certified copy of the order it seeks to appeal is excluded from limitation. The Court held that when read with the omission in Sec. 61, the purpose of importing this provision within the scheme of the IBC is to ensure that parties themselves apply for certified orders. Therefore, this system removes the right of a party to receive a free copy under Sec. 420(3) of the Companies Act. The Court further noted that the mere presence of Rule 14 of the NCLAT Rules does not provide an automatic right to parties to do away with the compliance and render Rule 22(2) purposeless. The purpose of placing this responsibility on parties is to indicate their diligence towards pursuing the case in a timely manner.

Lastly, the court rejected the appellant's argument that the Supreme Court's previous order on the extension of the period of limitation for cases [*In re: Cognizance of Extension for Lockdown* (Miscellaneous Application No. 665 of 2021)] is applicable to their appeal. This extension was granted only to cases where the period of limitation had not ended before March 15, 2020. Since this appeal was barred by the limitation timeline within Sec. 61(1) and 61(2) of the IBC, the said order was inapplicable in the instant case. Here, the period of limitation began once the order was pronounced, and not when the order was to be received by the parties, because the responsibility to obtain the certified copy was on the appellant itself.

Comments

This pronouncement from the apex court is an extremely positive development for insolvency jurisprudence in India. There are a few reasons for this. First, this judgment respects the *lex specialis* nature of the IBC and streamlines the interpretation of the applicable provisions of the Limitation Act in sync with the objectives of the regime. It also distinguishes this regime from the general law of limitation laid down within the Companies Act. Whilst doing so, it makes detailed academic observations on various provisions, case laws and committee reports to demonstrate the legislative intent to prioritise timelines. Second, it clarifies the scope of Sec. 61 and clearly demarcates obligations on parties with respect to appeals. It settles the debate on the application of the period of limitation from the date of passage of the order, regardless of its receipt by parties. Lastly, the Court cautions parties against the assumption that Rule 14 of the NCLAT Rules can be invoked as a matter of right, which is important to prevent misuse of this provision by parties disrespecting statutory timelines for frivolous reasons.

"PARINA MUCHHALA

NATIONAL COMPANY LAW APELLATE TRIBUNAL

It cannot be gainsaid that an initiation of CIRP does not amount to recovery proceedings and that the 'Adjudicating Authority' at the time of determination as to whether to admit or reject an application u/s 7 of the 'I&B' Code is not to take into account the reasons for the Corporate Debtor's default.

DRIP CAPITAL INC. v. CONCORD CREATIONS (INDIA) P. LTD.

Court	National Company Law Appellate Tribunal, Chennai Bench
Judgement Dated	November 8, 2021
Bench	Justice M. Venugopal, KanthiNarahari (Technical Member)
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 – Section 7

Brief Background

The appellant and financial creditor, Drip Capital Inc. (*hereinafter*, Drip Capital), had granted an Export Finance Facility to Concord Creations (India) P. Ltd (*hereinafter* Concord Creations) under the Receivables Purchase Factoring Agreement (RPA) and an irrevocable Undertaking for Recourse against the corporate debtor on December 12, 2018. Concord Creations also issued a Demand Promissory Note in favour of Drip Capital.

Under the RPA r/w the undertaking, the receivables under three invoices of purchase were sold and assigned by Concord Creations in favour of Drip Capital on a recourse basis. The goods shipped under the invoices were purchased by Aquarius USA Inc. An amount to the tune of USD 36,532.00 was remitted by Drip Capital to Concord Creations on account of the purchase and assignment of the invoices. On a reminder of repayment on due dates, Aquarius US Inc. denied its obligations on account of the invoices being disputed. Drip Capital thereafter demanded repayments under the 'Recourse Undertaking' but Concord Creations failed to pay the amount due under the three invoices assigned. Drip Capital thereafter served a Notice of Default cum Demand regarding the outstanding receivables on the due date of USD 37,585, together with interests, default interest, overdue fees and all other charges to be repaid within three days from the date of the demand letter.

On the persistent failure of Concord Creations to repay the amount and respond to the demand notice, Drip Capital sought to initiate the CIRP under Sec. 7 of the IBC against Concord Creations on account of its default on financial debt. The NCLT denied the admission of the application, citing Concord Creations' financial health and ability to repay, not being an insolvent company, and allowed it to have more time to repay the debt. Drip Capital has thus, challenged this order of the NCLT in the current appeal.

Issue

Whether the Adjudicating Authority is within its jurisdiction while evaluating the financial health of the corporate debtor for the purpose of admitting CIRP against the corporate debtor?

Decision

The NCLAT, while allowing the appeal, ordered the restoration and admission of Drip Capital's application to initiate the CIRP against Concord Creations. The court affirmed that since the advances made by Drip Capital were supported by the 'Irrevocable Undertaking for Recourse', Concord Creations was under an obligation to repay the amount and such advances squarely come within the definition of 'financial debt' under Sec. 5(8)(e) of the IBC, 2016. It also held that the NCLT had exceeded its jurisdiction by taking the defence of the corporate debtor, especially in the absence of any reply or objections projected by them and the Order suffered from patent infirmities as it was also contrary to the judgement of the Hon'ble Supreme Court in *Innovative Industries Ltd. Vs. ICICI Bank* [(2018) 1 SCC 407] which requires that "*Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred*."

Comments

The purpose of enacting the IBC was to remedy the economic situation of corporate debtors that were in distress. This resolution of their financial instability or ill-health warrants less judicial interference to ensure that decisions are taken by stakeholders possessing relevant financial knowledge and interest. Here, the NCLT has erred in undertaking an analysis of the

financial health of the corporate debtor and overstepped its role under the IBC, which was rightly remedied by the NCLT in light of the identified "patent infirmity".

Therefore, the judgement is sound and in accordance with the settled position of law with respect to the role of the NCLT and the factors to be taken into account for admission of an application under Sec. 7 of the IBC.

"PAVIT KAUR

It was the RP's responsibility to fix financial creditors' claim amounts and vote shares properly and in accordance with law.

BIMALESH BHARDWAJ & ORS. v. VALUE INFRATECH INDIA PVT LTD & ORS.

Court	National Company Law Appellate Tribunal
Judgement Dated	November 29, 2021
Bench	Justice Jarat Kumar Jain, Dr. Alok Srivastava
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 – Sections 7, 19(2), 29, 61.

Brief Background

This appeal arises out of the order of liquidation of the corporate debtor, Value Infratech India Pvt. Ltd. (hereinafter "Value Infratech"), delivered by the NCLT, New Delhi.

The appellants are homebuyers in the project "SKYWALK RNE" developed by Value Infratech and therefore, financial creditors. Value Infratech, along with two other sister companies from the same group, Value Infracon India Pvt. Ltd. and Value Infrabuild Pvt. Ltd. (all co-borrowers), executed a common loan agreement with Capri Global Capital Limited (hereinafter "Capri Global") for providing a loan facility to all the three aforementioned companies in lieu of mortgage/ hypothecation of properties of all the three borrowers. On failure to repay their dues, the application under Sec. 7 of the IBC was admitted by the NCLT to initiate the CIRP against Value Infratech. The CoC was constituted with Capri Global and the homebuyers as the financial creditors. In the third meeting of the CoC, which was convened soon after the appointment of the Authorised Representative (hereinafter "AR") of the homebuyers, the decision to liquidate Value Infratech was taken despite the objections put forth by the AR. The order of liquidation submitted by the RP and passed by the CoC was objected to by the AR. The Appellants challenged the order on the grounds that the RP had shown undue favour to Capri Global by adding up all the loans provided by Capri Global to Value Infratech, Value Infracon and Value Infrabuild, thereby giving Capri Global inflated vote share in the CoC when its claim should be based on the loan disbursed only to Value Infratech. It is further alleged that the RP did not follow the procedure prescribed in the IBC for inviting expressions of interest for submission of a resolution plan for insolvency resolution. Hence, the present appeal.

Issues

(i) Whether the CoC was constituted by the RP in accordance with IBC provisions?

(ii) Whether the recommendation for liquidation of the corporate debtor was taken by the CoC in contravention of IBC provisions

Decision

The NCLAT found that the information memorandum, which helps achieve workable resolution plans, thereby resulting in the successful resolution of the corporate debtor, was not prepared by the RP with full and correct details of assets and liabilities of Value Infratech is in violation of Sec. 29 of the IBC. It ruled that it was the RP's responsibility to fix financial creditors' claim amounts and vote shares properly and in accordance with the law, specifically when the NCLAT had already given its verdict in *Capri Global Capital Limited* v. *Value Infracon India Pvt. Ltd* [CA(AT)(Ins) No. 29 of 2019]. Since the CoC consisted of two members- Capri Global and the homebuyers- and one of them was given voting rights much in excess of its real and correct share, its decision was blotted and incorrect.

The RP circumvented its duties under the IBC for preparation of the information memorandum, exclusion of time to extend the CIRP period and inviting the Expression of Interest for the Resolution Plan for the corporate debtor. In the absence of the financial records, disappearance of ex-directors of Value Infratech, the inappropriate allocation of voting shares in the CoC, and the lack of adequate opportunity to the AR to consult the homebuyers or challenge the constitution of the CoC and the admission of claim amounts, the NCLAT held that the CoC was not constituted in accordance with the provisions of the IBC and the decision of sending it into liquidation was hasty and malafide. The NCLAT further held that since the RP did not act with fairness and due diligence, he cannot be absolved of his prejudicial actions of omission and commission, that his conduct be investigated by the IBBI and that a suitable RP be appointed by the AA to carry out the CIRP of Value Infratech.

Comments

The judgement of the NCLAT is welcome as it correctly highlights the role and responsibilities of the RP, while pointing out the errors committed in constituting the CoC. The RP disregarded his statutory obligations in not pursuing the application under Sec. 19(2) as well as in not preparing the information memorandum with due regard to the process under IBC. Further, the judgement of the AA in other matters concerning the sister companies, wherein it was clarified that the sum total of the amount given as a loan to the three companies could not be utilized to calculate the liability of an individual unit, was disregarded, and the voting share was unduly calculated on the basis of the total amount lent.

"PAVIT KAUR

Re-appraisal of materials is impermissible in review.

AGARWAL COAL CORPORATION PVT. LTD. v. SUN PAPER MILL LTD

Court	National Company Law Appellate Tribunal, Principal Bench, New Delhi
Judgement Dated	October 25, 2021
Bench	Justice M. Venugopal, Acting Chairperson, Mr. V.P. Singh, Member (Technical), Dr.-Ashok Kumar Mishra, Member (Technical)
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 – Section 9, Section 62 The National Company Law Appellate Tribunal Rules, 2016 – Rule 11, The Companies Act, 2013 – Section 425.

Brief Background

Agarwal Coal Corporation Private Limited, the operational creditor and the appellant in this case, filed a claim before the resolution professional. A sum of Rs. 2173 was allowed in favour of the operational creditor in the resolution plan submitted by the corporate debtor, as against the claim of Rs. 2,39,33,935. The resolution plan was later approved. The appellant challenged the order passed by the NCLT, Division Bench, Chennai, and filed an appeal with the NCLAT, New Delhi. The NCLAT did not interfere with the order passed by the NCLT and stated that even if the claim amount is disputed and is more than Rs. one lakh, the NCLT is not required to venture into the details of verification of the claim which is required to be made by the resolution professional. Hence, even if some record exhibits that claim amount is rupees one lakh, it is open to the resolution professional to collate the claim. The appellant then preferred the instant appeal in order to place on record the fraudulent acts of the respondents and prayed for an exercise of inherent power by the NCLAT in allowing the application.

The main contention advanced by the appellant was that the suspended board of directors of Sun Paper Mill Ltd. (first respondent) had continued to hold the management of the company's affairs, carried out its functions, and unlawfully took all the decisions during the CIRP with regard to the company and implemented them. The appellant submitted that, if fraudulent acts of the respondents are allowed and the order passed previously by the NCLAT is not recalled, and if the appeal is not set for a fair hearing on merits, it will cause a severe damage not only to the applicant but also to the entire structure laid down by the IBC, 2016. According to the first respondent, throughout the proceedings, the corporate debtor was maintained as a going concern and the acts performed as a going concern were assumed to be fraudulent by way of re-agitation. The respondent further submitted that the appeal filed by the applicant is not maintainable either in law or in facts. The second respondent, i.e., Mrs J. Karthiga, RP of Sun Paper Mill Ltd, contended that the appellant is a review applicant, which is not maintainable, *ex facie*, before the NCLAT, and that the allegations made in the application against her were earlier dismissed by IBBI.

Issue

How was the application under Sec. 9 of IBC admitted if the amount was found to be Rs.2173, which is much less than Rs. One Lakh?

Decision

The Tribunal deliberated upon the meaning and the ambit of the term 'review'. It reiterated the settled proposition of the law that in the absence of any power of review vested with the NCLT, an order passed by it cannot be either reviewed or recalled. Taking note of the 2013 decision of the Jharkhand High Court in *JiuraOraonv. The State of Jharkhand* [2014 SCC Jhar 2819], the Tribunal restated that review is not an appeal in disguise and re-appraisal of materials is not permissible in review. The arguments brought up and decided in the main proceedings are not to be reopened in the name of 'review petition'. On the point of recall application, the Tribunal noted that, as per the contents of the application, it is only an application praying for review and not a 'recall application' *per se*.

The Tribunal pointed out that the appellant did not prefer an appeal to the Hon'ble Supreme Court as per Sec. 62 of the IBC. Thus, it is certain that the previous judgment passed by the NCLAT is "conclusive, final and binding". The Tribunal further mentioned that the appellant cannot fall back upon Rule 11 of the NCLAT Rules, 2016 which provides for inherent powers, as Rule 11 is not a substantive rule which confers any power upon the tribunal. With these points into consideration, the Tribunal held that recalling the judgment passed previously by the NCLAT is impermissible in law and the adequate avenue for the applicant would be to approach the Hon'ble Supreme

Court. Subsequently, declaringthe application devoid of merit, the Tribunal dismissed the appeal.

Comments

This is a welcome judgement as it reiterates the position on two vital aspects, i.e., the 'Ambit of Review' and the 'Power to Recall'. More importantly, as the Tribunal attempts to concretize the existing jurisprudence, it heavily relies upon landmark cases; such as the case of *Lily Thomas* v. *Union of India* [(2000) 6 SCC 224 (SC)], in order to opine that the "Power of Review" is a creature of statute and not an 'inherent power', and that it must be provided by law either specifically or by necessary implication. The established principle is that a judgment delivered by the Court is conclusive and any digression from that principle is acceptable only when conditions of a considerable and persuasive character make it absolutely essential to do so. In case there is a failure to draw the attention of the Court to a material statutory provision during the primary hearing, the Court will review its decision. Hence, the NCLAT rightly observed that a review cannot be comprehended as an appeal in disguise.

Further, on the issue of 'inherent powers' under rule 11 of the NCLAT Rules, 2016, the Tribunal succinctly held that it is not a substantive Rule which confers any power upon the Tribunal and therefore, it is impermissible to conduct an act which is barred by law. While deciding the same, it concurred with the ratio of *NUI Pulp and Paper Industries Private Limited* [Company Appeal (AT) (Insolvency) No. 664 of 2019], which observed that under Rule 11 it was within the NCLT's jurisdiction to pass any order if it was necessary for meeting the ends of justice or to curb abuse of the process of the Tribunal. The Rule has restricted scope and cannot be expanded to revisit and substitute the judgment delivered. This further solidifies the already established law.

"MANISHA SARADE

A sleight of interpretation of procedural rules cannot be used to defeat the substantive objective of the legislation that has an impact on the economic health of a nation.

ASSET RECONSTRUCTION COMPANY INDIA LIMITED v. MANGESH KEKRE & ORS.

Court	National Company Law Appellate Tribunal
Judgement Dated	October 26, 2021
Bench	Justice M. Venugopal, Acting Chairperson; Mr. V.P. Singh & Dr. Ashok Kumar Mishra, Members (Technical)
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 - Section 31, 61; Limitation Act, 1963 – Section 5

Brief Background

The present appeal was filed by Asset Reconstruction Company India Limited, the financial creditor [hereinafter "Appellant"] after the NCLT, Ahmedabad Bench [hereinafter "AA"] approved the 'Resolution Plan' of Maruti Koatsu Cylinders Limited [hereinafter "corporate debtor"], under Sec. 31 of the IBC. The appeal was filed along with an appeal under Sec. 5 of the LimitationAct, 1963 [hereinafter "Limitation Act"] seeking condonation of delay from the NLCAT. Mr Pankaj NanalalSanghrajka [hereinafter "Respondent"] was the successful Resolution Applicant of the corporate debtor.

According to the appellant, the impugned order, passed by the AA on October 22, 2019, which approved the resolution plan, was not the last order. After the AA passed the impugned order dated October 22, 2019, the appellant had raised contentions with the Registrar of the AA with regards to the erroneous recording of facts by the AA in orders dated August 16, 2019 and October 22, 2019.

It is the appellant's contention that since those contentions were heard and disposed of finally on 19th December 2019, the cause of action was alive till 19th December 2019. Due to this, the present appeal that was filed on January 29, 2020 was contended to be within the period of limitation as per Section 61(2) of the IBC. The appellant has also contended, on the basis of time on two occasions, that there was a delay since he got the certified copies of both the impugned order dated 22.10.2019 and the order dated 19.12.2019 almost after a month, and the appellant had filed an appeal immediately after getting the certified copy of the order dated 19.12.2019.

It is the respondent's contention that since the impugned order on 22.10.2019, the resolution plan has been fully implemented. All the payments were made, composition of the Board of Directors was recast, etc. Further, since the appeal filed on January 28, 2020 was filed with a delay of 68 days, even after the grace period of 30 days as per Sec. 61(2) of the IBC, the present appeal is liable to be dismissed at the threshold. The Respondent contended that the NCLAT cannot condone the delay in filing the appeal beyond 15 days (after the prescribed 30 days) per Sec. 61(2) of the IBC, and that this was settled law. One of the case laws on which the appellant placed reliance, *National Spot Exchange Limited* v. *Anil Kohli, Resolution Professional ForDunar Foods Limited* [2021 SCC OnLine SC 716] [hereinafter "National Spot Exchange"], was heavily relied on by the NLCAT.

Issue

Can the NCLAT condone a delay in filing of appeal beyond the time period prescribed under Sec. 61(2) of the IBC?

Decision

The present appeal for condonation of delay was rejected by the NCLAT. The NCLAT relied on *National Spot Exchange* to hold that the NCLAT has no power to condone the delay in filing an appeal under section 61(2) of the Code beyond the period of 15 days from the date of completion of 30 days as provided under the IBC. Relying on *Union of India* v. *Popular Construction Co*[Appeal (Civil) 6997 of 2001], *National Spot Exchange* also observed that the provision of Sec. 5 of the Limitation Act will not be applicable as the legislature has prescribed a special law 'with a specific limitation period for the purpose of appeal' under that law.

The NLCAT observed that it was not the case that the appellant had filed an application for clarifications/modification of the impugned order, and pursuant to an order from the same, the present appeal had been filed. Therefore, the appellant's contention about the cause of action being alive was baseless and not sustainable. Further, the NLCAT relied

on *V Nagarajan* v. *SKS Ispat Powers Limited* [Civil Appeal No.3327 of 2020] [hereinafter "V Nagarajan"] to hold that the limitation period under Sec. 61 of the IBC starts after the pronouncement of an order. According to it, if a person aggrieved by an order under the IBC waits for the receipt of the free certified copy, the person does not prevent the limitation period from starting.

Comments

The following judgment has reaffirmed two recent pathbreaking judgments of the Supreme Court, i.e., *National Spot Exchange* and *V Nagarajan.* It has affirmed the established law regarding condonation of delay under Sec. 61 of the IBC and the start date of the limitation period. The reliance placed on these case laws by the NCLAT is a positive step in recognizing the validity of these case laws.

"SHUBHAM DHAMNASKAR

One Time Settlement Offer amount to acknowledgement of debt.

GUNDEEP GURDEEP SINGH SOOD & ORS. v. CORPORATION BANK & ANR.

Court	National Company Law Appellate Tribunal, Principal Bench, New Delhi.
Judgement Dated	October 29, 2021
Bench	Justice Anant Bijay Singh Member (Judicial) and Ms. ShreeshaMerla, Member (Technical)
Relevant Sections	The Insolvency and Bankruptcy Code, 2016- Section 7

Brief Background

The appeal was preferred by the directors of Kromme Glass Pvt. Ltd., the corporate debtor, who was dissatisfied by the NCLT Kolkata Bench judgement dated January 17, 2020. Where, the respondent 1 filed an application under Sec. 7 of the IBC, 2016 and the CIRP commenced.

The corporate debtor had been engaged in the business of manufacturing and trading in processed glass and allied goods since 2011. They approached respondent 1 to obtain credit facilities in the form of cash credit, term loans and bank guarantees. On January 16, 2012 they received 7.2 crore rupees as cash credit, 1.32 crore and 90 lakh rupees in the form of term loans and 1.5 crore rupees as bank guarantees. A consortium was formed between the respondent No. 1 and Union Bank of India, after respondent No. 1 took consent from the consortium, they amended the terms of the credit facilities and the amended letter with the modified repayment terms was sent to the corporate debtor on February 6, 2012.

On March 23, 2012, a working capital consortium agreement was made, which was entered into by the respondent no. 1, Union Bank of India and the corporate debtor. They paid over a sum of 17.4 crore to the corporate debtor to acquire the assets and liabilities of Pabanso India Pvt. Ltd. They entered into an agreement stating that respondent No. 1 is the leading bank of the consortium. Thereafter, two term loan agreements were made over to the corporate debtor by respondent No. 1 with the sum of 90 lakh and 1.32 crore rupees. The corporate debtor asked to revise the credit facilities, which the respondent revised to the extent of 11.5 crore rupees.

The corporate debtor could not repay the credit, resulting in defaulting in repayments and was declared a non-performing asset with effect from June 30, 2014. The respondent No. 1 made a consolidated notice under Sec. 13(2) and 13(3) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to the corporate debtor. A proceeding was initiated against the corporate debtor under Sec. 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 before the Debts Recovery Tribunal – II, Ahmedabad. The respondent did not proceed with the O.A. No. 239 of 2015 before the Debts Recovery Tribunal – II, Ahmedabad and filed an application under Sec. 7 of the IBC before NCLT Kolkata Bench. The corporate debtor was declared a non-performing asset on June 30, 2014, and the respondent filed an application on February 14, 2019 which was barred by limitation and was delayed by way more than 3 years. Hence, the application under Sec. 7 of the IBC is barred by limitation.

The respondents contended that the signature of the Appellants in the financial statements and the audit report of the corporate debtor were not an acknowledgement to be made within the limitation period and the respondent No. 1 would not be entitled for fresh period to a limitation.

The corporate debtor sent an offer titled “Offer for One Time Settlement (OTS) in NPA A/c, of Kromme Glass Pvt. Ltd. with your Banks” in which it was proposed to settle the account with both the banks at a total offer value of 8.75 crore rupees, which amounts to an acknowledgment of debt.

The CIRP had been completed and the resolution plan had been submitted to the NCLT, Kolkata Bench for approval. It was admitted fact that in the letter dated January 4, 2020 the appellants stated that they were ready to settle the amount with both the banks at the total value of Rs. 8.75 Crores. This OTS amounts to acceptance of the debt and in view of the law laid down in the judgment passed by *Asset Reconstruction Company (India) Limited* v. *Bishal Jaiswal & Anr*. [2021 (6) SCC 366] the application under Sec. 7 of the IBC is not barred by limitation.

Issue

Whether the application under Sec. 7 of the IBC is barred by limitation?

Decision

Because the resolution plan had been submitted before the NCLT Kolkata Bench for approval, and because the corporate debtor had sent a letter dated January 4, 2020 to the respondents in order to settle the debt with both of the banks at a value of 8.75 crore rupees, and because this one-time settlement offer amounted to an acknowledgement of debt as laid down in the judgement passed by the Honourable Supreme Court of India *in Asset Reconstruction Company (India) Limited* v. *Bishal Jaiswal &Anr*. Hence, the Bench held that the CIRP application filed under Sec. 7 of the IBC would stand.

The appeal by the corporate debtor was dismissed in this case and the application was not barred by limitation.

Comments

The enigma of what constitutes an "acknowledgement of debt" has long persisted in insolvency jurisprudence; thus, this decision provides additional clarity on the subject. Relying on the ratio of the Hon'ble Supreme Court in the judgment of Asset Reconstruction Company (India) Limited, the Hon'ble NCLAT held that filing financial statements, balance sheet in the Annual Report and One Time Settlement, all duly signed by the appellants will amount to acknowledgment of debt. This further aided the Tribunal in upholding the NCLT's Order and concurring to the fact that the said application, was in fact and in law, barred by limitation.

"ANIMISH DIGHE

The IBC does not provide for keeping the proceedings in abeyance and the application for admission has to be decided in a stipulated time frame.

ANANTA CHARAN NAYAK v. STATE BANK OF INDIA & ORS.

Court	National Company Law Appellate Tribunal
Judgement Dated	November 10, 2021
Bench	Justice Jarat Kumar Jain Member (Judicial) and Dr Alok Srivastava Member (Technical)
Relevant Sections	The Insolvency and Bankruptcy Code, 2016- Section 7, Section 12(A)

Brief Background

The appellant in the present case is the suspended director of the corporate debtor (M/s. Nayak Infrastructure Private Limited). He is a shareholder and a promoter of the corporate debtor as well. In the present case, the appellant is aggrieved by the impugned order passed by the AA (NCLT, Guwahati Bench) under Sec. 7 of the IBC, 2016. It is claimed by the appellant that the loan was taken from the State Bank of India (respondent no. 1) was wrongly stated, but that the notice issued by the State Bank of India does comprise the alleged default in it. Furthermore, it was stated by the appellant that the hearing before the Debt Recovery Tribunal took place in 2020, and the request to restructure the loan at that time was made on the appellant's part to the respondent no. 1. Hence, it was not agreed upon, and there was no concrete response to the one-time settlement (OTS) either. And after this, an application under Sec. 7 of the IBC, 2016 was filed against the corporate debtor.

Later, the application filed by the financial creditor, State Bank of India (respondent no.1) was challenged regarding the maintainability of the application due to the defects in it. The appellant stated that all the directors and guarantors were made parties in the application by the respondent and hence a defective application must not be adjudicated upon, and no such application was filed by the respondent to eliminate the defects, and nor did the AA issue any direction to that effect. Later, it was claimed by the appellant that, before the application was filed under sec. 7, the appellant wanted to settle the dispute by offering a one-time settlement (OTS) to the financial creditor, but before any decision could be made, the AA passed the order. And further, there was no affidavit filed by the respondent to remove the names of the personal guarantors from the application, and thus requirements under sec. 7 of the IBC were not complied with strictly.

Issue

Whether the acceptance of the settlement proposal falls under the ambit of the financial creditor (SBI) and whether the IBC provides any provision to keep the proceeding in reserve.

Decision

It was held that the IBC does not provide for keeping the proceedings in abeyance and the application has to be decided in a stipulated time frame, hence the contentions made by the appellant are not sustainable.

"The Innovative Industries judgment (supra) of the Hon'ble Supreme Court does not put any bar on the admission of an application under section 7 if the defects as pointed out to the petitioner have been cured."

Hence, relying on the decision above, it is clear to state that the impugned order does not require any interference. The appeal is, therefore, dismissed at the stage of admission.

Comments

In the given case, the NCLAT rightly held that there is no provision under the IBC, 2016 which empowers the AA to reserve the process. If a debtor wishes to settle its dues with a creditor, it can do so before the initiation of the CIRP. After the initiation of the CIRP, the only remedy available to the debtor is Sec. 12A of the IBC. There is no mandate on the AA to ask a creditor to settle its claim outside the purview of the IBC. The IBC, 2016 provides a time bound framework for the resolution of corporate debts. It does not provide for keeping the proceedings in abeyance. Thus, NCLAT rightly rejected the argument of the appellant.

"YASHI SINGH

A corporate giving guarantee of a partnership firm will be a corporate guarantor for the IBC 2016.

INTEC CAPITAL LIMITED v. EASTERN EMBROIDERY COLLECTIONS PRIVATE LIMITED

Court	National Company Law Appellate Tribunal – New Delhi
Judgement Dated	October 26, 2021
Bench	Justice M. Venugopal, V. P. Singh (Technical Member) &Dr. Ashok Kumar Mishra (Technical)
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 – Sec. 3(7), Sec. 7, Sec. 95.

Brief Background

The appeal was preferred against the Impugned Order of the NCLT – Delhi, rejecting the Sec. 7 application filed by the financial creditor ("Intec Capital Ltd"). As per the financial creditor, M/s 'Eastern Overseas', a partnership firm, approached it for loan facilities and M/S 'Eastern Embroidery Collection Private Limited', a private limited company, provided a corporate guarantee for the same. The partnership firm failed to pay a total sum of Rs. 2,10,57,036/- to the financial creditor. In response, the financial creditor filed the Sec. 7 application to initiate the CIRP against the M/S Eastern Embroidery Collection Private Limited (the guarantor).The NCLT, via the Impugned Order, held that a corporate giving guarantee on behalf of a partnership firm does not become a 'corporate debtor' but remains a 'personal guarantor'. Thus, the NCLT rejected the Sec. 7 application.

Issue

Whether the Eastern Embroidery Collections Private Limited is a 'Personal Guarantor' or a 'Corporate Guarantor' of the Principal Borrower 'Eastern Overseas'?

Decision

The NCLAT allowed the appeal and set aside the Impugned Order. The NCLT, in its order, held that a guarantor to a partnership firm cannot be called a 'corporate debtor' under the IBC, 2016. As per the NCLT, the financial creditor should have approached the AA under Sec. 95 (1) of the IBC 2016, instead of the Sec. 7.The appellant relied upon the Supreme Court's decision in the case of *Laxmi Pat Surana* v. *Union Bank of India* [2021 SCC OnLine SC 267], where the Supreme Court held that even if the loan was offered to a proprietary firm (not a corporate person), an action under Sec. 7 of the IBC, 2016 cannot be initiated against the corporate person who had offered Guarantee in respect to that transaction.

The NCLAT accepted the appellant's argument and rejected the reasoning of the NCLT. As per the NCLAT, even if the principal borrower is a partnership firm, the fact remains that the Guarantor is a 'corporate person' for the IBC, 2016. The NCLAT further held that a corporate person can't be called a personal guarantor, even if it has given a guarantee for a non-corporate entity. Therefore, the NCLAT set aside the Impugned Order.

Comments

The NCLAT rightly held that the Guarantor is the 'corporate guarantor' and not the 'personal guarantor'. The difference between the 'personal' and the 'corporate' guarantor is not contingent on the legal personality of the principal borrower. Even if the principal borrower is a proprietary/partnership firm, a corporate person giving a guarantee for such a borrower would be considered as a 'corporate guarantor' for the IBC. In instances of default by such a corporate guarantor, the CIRP can rightly be initiated.

"SHIV KUMAR SHARMA

Can a Creditor Appeal Against Resolution Plan, when whey had not filed any claim U/S 7 And 8 of the IBBI Regulations?

THE COMMISSIONER OF CENTRAL TAXES GOODS & SERVICE TAX v. C.S. ASHISH SINGH & ORS.

Court	National Company Law Appellate Tribunal, Principal Bench, New Delhi
Judgement Dated	November 10, 2021
Bench	Justice Jarat Kumar Jain (J); Dr. Alok Srivastava (T).
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 – Section 61(3) (i) to (iii); Section 31; Section 17(2)(d). The IBBI (Insolvency Professionals) Regulations, 2016 – Regulations 7, 8, 36(2)(h)

Brief Background

The present appeal was filed under Sec. 61(3) (i) to (iii) of the IBC, 2016 challenging the Impugned Order of the NCLT, New Delhi, by which the NCLT had approved a resolution plan submitted by Respondents No.2 and 3 with respect to Fourth Dimension Solutions Limited (Corporate Debtor) under Sec. 31 of the IBC. The appellant had submitted that the pending dues relating to GST had appeared on the balance sheet of the corporate debtor. It referred to Sec. 17 (2)(d) of the IBC, which authorizes the RP to access all books of accounts, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified. It also averted to Sec. 18(1)(a) of the IBC, wherein the IRP is enjoined with the duties to collect information relating to assets, finance and operations of the corporate debtor. Furthermore, it referred to Reg. 36 (2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016, wherein it is stated that details of all material litigation and an ongoing investigation or proceeding initiated by government and statutory authorities has to be included in the Information Memorandum.

Issue

Whether claims can be admitted after approval of the Resolution Plan when GST dues show cause notice was issued?

Decision

The NCLAT, after taking into account the facts of the case, observed that the appellant hadn't filed any claim before the RP regarding its dues. The appellant had stated in the appeal that his claim of GST dues arose from a showcausenotice issued on June 19, 2019, which was available in the record of the corporate debtor, which was taken over by the IRP. Therefore, the statutory dues of the Department of Central Taxes, automatically considered by the RP in the Information Memorandum, should have been accounted for in the Resolution Plan, which was approved by the NCLT vide the Impugned Order.

The Appellate Tribunal stated that, as per the CIRP Regulations, 2016, the financial and operational creditors have to file claims in accordance with Regs. 7 and 8 respectively in a specified format and stipulated time period. In the records submitted by the Appellant, it was nowhere mentioned as to when and in what form, the claim of pending dues of GST was filed by the Appellant.

The NCLAT referred to the decision of the Apex Court in the matter of *Ghanshyam Mishra and Sons Private Limited through the Authorised Signatory* v. *Edelweiss Asset Reconstruction Company Limited through the Director &Ors.*[2021 SCC OnLine SC 313],wherein it was held that once the resolution plan has been approved and implemented, no further claims will lie or can be considered. In light of the same, the NCLAT observed that the claim of the appellant could not be considered and dismissed the appeal at the stage of admission. It noted that there was no reason to interfere with the Impugned Order, vide which the resolution plan was approved.

Comments

The decision is in line with the object of the IBC, which is to revive a corporate debtor who is on the verge of becoming insolvent. Further, the decision reiterates what was already held in the *Ghanashyam* case, giving finality to a resolution process whereby a creditor, whether financial or operational or even government departments, shall be completely prohibited from agitating or initiating any proceeding in respect of a claim which was not part of the resolution plan or was not preferred at the relevant time. Besides, a successful resolution applicant has also been granted protection from unnecessary litigation after completion of CIRP and approval of the resolution plan by the AA, which is a very significant step.

"ANUSHKA FUKE

The outstanding dues of the property tax relating to period prior to sale confirmation are thus dues that are akin to claim of an unsecured creditor and should be discharged in terms of the properties regarding distribution of assets given in section 53 of IBC.

BHATPARA MUNICIPALITY v. NICCO EASTERN PVT. LTD.

Court	National Company Law Appellate Tribunal, New Delhi
Judgement Dated	September 20, 2021
Bench	Mr. Justice M. Venugopal (Judicial), Dr. Alok Srivastava (Technical) and Dr. V. P. Singh(T)
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 - Section 60.

Brief Background

The property, Shyam Nagar Cable Manufacturing Unit, was sold by the liquidator of the corporate debtor, Nicco Corporation Limited, which is undergoing liquidation. The sale was carried out in accordance with the terms and conditions stipulated in the invitation for Expression of Interest wherein, in clause 12.1, it was stated that the proposal would be conducted on an "As is Where is and Whatever There is Basis" and "No Recourse Basis". The purchaser of the said property, after the auction and confirmation of sale, applied to the appellant for obtaining a trading licence and mutation of the said property in its name.

In response to these applications, the appellant issued a demand notice to the auction-purchaser to liquidate outstanding dues of property tax on the properties from the1st quarter of 2015-2016 to the 4th quarter of 2020-2021. The AA (NCLT, Kolkata) rejected the claim of the appellant in respect of past dues of property holdings which are in the possession of the respondent and quashed the related demand notice for pending dues of property tax issued by the appellant to respondent. Aggrieved by this decision, the appellant filed an appeal under Sec. 61(1) of the IBC, 2016.

The appellant argued that the respondent was not party to the proceedings under the IBC before the AA, but was only an auction-purchaser, and therefore, he could not claim any protection under the IBC. The appellant had claimed that the AA had exceeded its jurisdiction by adjudicating a dispute regarding municipal tax on a third party.

Issues

Whether the respondent being an auction-purchaser claim any protection under the IBC?

Decision

The Tribunal rejected the appeal, quashed the demand notice and upheld the Impugned Order passed by the AA. It stated that the liquidator had a duty to prepare an asset memorandum containing the value of the assets. Clause (f) of Reg. 34(2) of the IBBI (Liquidation Process) Regulations, 2016 stipulates the inclusion of "any other information that may be relevant for the sale of the asset". Regulation 13 enjoins upon the liquidator to submit a preliminary report to the AA with the Asset Memorandum. Therefore, the liabilities with respect to the assets should have been brought to the notice of the AA by the liquidator.

The outstanding dues of the property tax relating to the period prior to sale confirmation are thus dues that are akin to claims of an unsecured creditor and should be discharged in terms of the properties regarding distribution of assets given in Sec. 53 of the IBC. The auction purchaser cannot be held liable to pay any such dues relating to the period prior to the confirmation of sale.

Comments

The Tribunal has rightly passed its decision by upholding the order of the NCLT. It tried to protect the interests of the third party while holding the liquidator responsible for not fulfilling its duty as laid down under the IBBI (Liquidation Process) Regulations. An auction-purchaser shouldn't be held liable to pay any dues relating to the period prior to confirmation of sale. Not protecting the interests of such third parties would lead to lack of faith in the liquidation process. However, to bring discipline among the liquidators and to further ensure that they fulfil their duties laid down under the statute and the regulations therein, the NCLAT should've imposed some sort of fine on the liquidator who didn't bring the liabilities with respect to the assets to the notice of the AA.

"MEGHA KAMBOJ

CIRP application cannot be rejected on a technical ground like non-specification of date of default in Form 1 if other documentary evidence has been placed on record to show the date of default.

MR. MANMOHAN SINGH JAIN v. STATE BANK OF INDIA

Court	National Company Law Appellate Tribunal, Chennai
Judgement Dated	November 22, 2021.
Bench	Justice M. Venugopal and Ms. KanthiNarahari
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 - Section 7 and 238. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) – Section 13(2). The Limitation Act, 1963 – Article 137, Section 18.

Brief Background

The appeal was filed by the shareholder and suspended Director of corporate debtor against the creditors. The State Bank of India had initiated CIRP under Sec. 7 of IBC as the corporate debtor had defaulted in payment of INR 52,28,93,796. The working capital facilities availed by the corporate debtor from Consortium of Banks led by SBI had turned into Non-Performing Assets (NPA). Earlier, SBI had issued a notice under Sec. 13(2) of SARFAESI Act, 2002 and demanded the repayment of debt amounting to INR .128,45,69,581.34. The appellant had contended that, whereas the actual date of default when the account turned aNPA was February 10, 2017, the date mentioned by the respondentin the notice was November 27, 2018. Even when the AA gave an opportunity to correct it, the respondent did not rectify this defect.

While admitting the CIRP application, the AA had observed that Axis Bank, which was a part of Consortium of Banks, had claimed the date of default to be on or before November 12, 2016. The claimant had contended that respondent had intentionally suppressed this fact to recover the afore-mentioned time-barred debt. The instant dispute arose due to different contentions as to the date of default. On one hand, the appellant had argued that default occurred on November 12, 2016. On the other hand, the respondent had contended that the date of default for NPA was November 27, 2018. However, the AA had noted that although the date of default had been specified in the pleadings, it should also have been mentioned in Part IV of the application according to the NCLT Rules, 2016.

Issue

Whether the application for CIRP filed by the respondent was defective and should not have been admitted by the NCLT?

Decision

NCLAT dismissed the appeal because the admission of CIRP application could not be rejected merely because of a technical defect in one of the forms. The NCLT Rules, 2016 stipulate that a financial creditor may file an application under Form I attaching the relevant documents and records. The respondent had filed Part IV of the said Form relating to particulars of financial debt as follows: *"Amount defaulted by the Corporate Debtor is Rs.52,28,93,796 as on 30th November 2019"*. Although respondent had specified the amount of default, the date of occurrence of default was not mentioned in the Form. However, the 8th Column in Part V of Form I provides a list of other documents which are required to be attached for proving the existence of debt, date of default and the amount due. All these required documents had been attached by the respondent which successfully proved the default by corporate debtor. Therefore, the requirement under Form I could be deemed to have been complied with.

Further, the CIRP application was complete because sufficient proof was there indicating the date of default had been taken into account by the AA while admitting the instant application. Insofar as the Limitation Act, 1963 was concerned, Art. 137 became applicable. The date of default was not the date of NPA. Even though the first date of NPA in relation with Axis Bank was February 10, 2017, the RBI Circulars demonstrate that an independent application can be filed by a financial creditor before the NCLT. The omission to specify date of default in Form I was not fatal to the application because other documentary evidence had been submitted to establish the default. There was no illegality in this application. Art. 137 of the Limitation Act, 1963 was applicable to Section 7 for the purpose of initiation of CIRP against the corporate debtor and therefore, three years period from the date when the right to apply accrues. The date of default was not the date of NPA. Moreover, the corporate debtor

subsequently issued an acknowledgement of the debt dated August 16, 2018 which led to the extension of the limitation period under Sec. 18 of the Limitation Act, 1963.

Comments

NCLAT rightly held that a mere technical impediment should not result in rejection of a CIRP application. This is a good decision because sufficient documents evidencing default had also been placed on record. Reliance was placed on the case of *Innovative Industries Ltd*. v. *ICICI Bank & Anr.* to hold that if the AA is satisfied that default has occurred the application must mandatorily be admitted unless it is shown to be incomplete. If applications like this are rejected, then legitimate claims can be disallowed from invoking benefits under IBC.

"RENUKA NEVGI

For the application to be barred by time limitation it is important to take into cognizance the finality of the order.

RAJMEE POWER CONSTRUCTION LIMITED v. JHARKHAND URJA SANCHARAN NIGAM LIMITED

Court	National Company Law Appellate Tribunal, Principal Bench New Delhi
Judgement Dated	November 18, 2021
Bench	Justice Anant Bijay Singh Member (Judicial), Ms. Shreesha Merla. Member (Technical)
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 - Sections 8 and 9; The Companies Act, 2013 - Section 423; Limitation Act, 1963 – Section 19, Article 137.

Brief Background

Ramjee Power and the JUSNL (previously Jharkhand State Electricity Board) had a disagreement about the payment to be made for the transmission works in Santhal Pargana. The dispute was brought to arbitration, which ruled in favour of the electricity company on February 14, 2008. JUSNL did not contest the ruling and paid the firm Rs 11 crore on May 10, 2008. However, on January 11, 2011, the JUSNL board resolved to dispute the arbitral ruling but made no recovery. The final decision to proceed with the recovery was made only on January 29, 2016, although it was never communicated to M/s Ramjee Power. The electricity company had submitted an RTI application, and the file notings had revealed that a Board resolution was made on January 29, 2016, and the sum to be deducted was listed as less Arbitration– Rs.11 Crores. After deducting Rs. 11 Crores, the total payable amount was Rs.2,47,16,999. Consequently, the award challenge was denied in 2018 (March 18, 2020 in CP (IB) No. 1040/KB/2019).

The power company was issued a cheque for INR 2,47,16,999 on March 31, 2016, and because it had no information why the sum was so inadequate, it wrote multiple letters, but received no answer. Only because of the information obtained through RTI did the company realize the internal decisions. Following that, the power corporation filed a complaint with the NCLT in Kolkata, which rejected it due to a time limitation. Thus, the present appeal.

Issue

Whether the Application filed on June 04, 2019 was barred by Limitation.

Decision

The Appeal was allowed, and the Impugned Order was set aside. The Hon'ble NCLAT, relying on the judgment of Hon'ble Supreme Court in the matter of *Dena Bank (now Bank of Baroda)* v. *C. Shivakumar Reddy &Anr.*, [2021 SCC OnLine SC 543], observed that once a recovery certificate is issued authorising the creditor to realise its decretal dues, a fresh right accrues to the creditor to recover the amount of the final Judgement/Order/decree. The challenge to the arbitral award was dismissed on October 06, 2018, and hence had attained finality, the part payment was made on March 31, 2016 and therefore the Appellate Authority were of the considered view that the application filed on June 04, 2019 was not barred by Limitation.

Comments

The present order is in accordance with the legal regime and judicial precedents. Through this order the NCLAT has made it clear that when an application will be barred by limitation. NCLAT through *Dena Bank* case has rightfully taken cognizance of dates of payments made, application filed, internal noting's and other important timeline which are critical in this case.

The order sets the right precedent for future cases where applications barred by limitation are in dispute. NCLAT, in the order, emphasised the importance of finality date because it becomes the foundation for analysing whether or not the application is barred by limitation. The limitation period pertaining to insolvency matters follows this rule which was discussed in *Dena Bank (now Bank of Baroda)* v. *C. Shivakumar Reddy &Anr.* [2021 SCC OnLine SC 54]. NCLAT has rightly applied the rule in the particular case.

"SAMARTH GARG

The CoC cannot step into the shoes of the AA and increase the time period for Request for Resolution Plan beyond 330 days under the guise of exercising commercial wisdom to maximize the value of the company.

COMMITTEE OF CREDITORS OF MEENAKSHI ENERGY LTD v. CONSORTIUM OF PRUDENT ARC LIMITED & VIZAG MINERALS AND LOGISTICS P LTD

Court	National Company Law Appellate Tribunal, Chennai Bench.
Judgement Dated	October 25, 2021
Bench	Justice M. Venugopal (Acting Chairperson), KanthiNarahari, Member (Technical)
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 - Section 12, 28, 30, 31 and 60; The IBBI (Insolvency Resolution Process for Corporate Persons Regulations), 2016 - Regulation 36.

Brief Background

In this case, an order of the NCLT Hyderabad was appealed. The facts of the case were – the CoC of Meenakshi Energy (the corporate debtor) had extended the time period for RFRP (Request for Resolution Plans) beyond 330 days and had received a resolution plan from Vedanta Limited. This was challenged by another resolution applicant, Consortium of Prudent ARC Limited & Vizag Minerals and Logistics P Ltd, the respondent in this appeal.

NCLT had formed two issues which were (i) Whether the CoC can extend the timelines for RFRP while two resolution plans submitted before the CoC as per the earlier timelines are for consideration before them? (ii) Whether the CoC is empowered to keep on extending timelines beyond 330 days in the guise of maximization of value?

NCLT came down heavily on the CoC finding against the CoC on both counts stating that the CoC could not extend the time limit of 330 days invoking value maximization and allowing the respondent's Interlocutory Application to bar the resolution plan submitted by Vedanta to be considered.

However, the CoC of the corporate debtor appealed the decision on the main grounds that a resolution applicant whose application was under consideration had no *locus standi* to challenge the decision of the CoC.

Issue

Whether a resolution applicant whose resolution plan is under consideration have *locus standi* to challenge a decision of the CoC in the given circumstances?

Decision

The NCLAT focused on two main factors. One was the relief sought by the respondent which asked the Tribunal to merely enforce the law and direct the CoC to exclude any resolution plan received after the period of 330 days. The other factor relied on by NCLAT to allow for locus was confidentiality of a resolution plan. In the given case, NCLAT observed that "*the 'Resolution Plan' furnished by one or the other 'Resolution Applicant' is a 'confidential' one and it cannot be disclosed to any 'Competing' 'Resolution Applicant*". However, in the given case, some details of the respondent's resolution plan were disclosed to Vedanta Limited after which it submitted a resolution plan. Hence, NCLAT found the respondent to have *locus* in the given case.

Furthermore, NCLAT upheld NCLT's decision stating that the maximization of value ought to occur with respect to the time period and hence directed the CoC to only consider the two resolution plans submitted before the expiry of the period of 330 days to complete the CIRP process. However, NCLAT also struck from the record comments against the CoC and the RP by the NCLT which NCLAT felt were not warranted and set those comments and observations aside to prevent an 'aberration of justice' and to promote 'substantial cause of justice'.

Comments

In the given case, the CoC tried to extend the time period beyond 330 days which is not permissible. Furthermore, the CoC also circumvented the rules of confidentiality of a resolution plan by disclosing the details of a resolution plan to a competitor who then submitted a resolution plan after the expiry of the period of 330 days. Hence, NCLAT, in not allowing the resolution plan introduced later to be entertained, followed the letter of the law. However, expunging from records certain valid observations made by NCLT against the CoC and the RP was strange and not well reasoned.

"SRIRAM PRASAD

While deciding upon the admissibility of an application, it is the date of filing that is taken into account, and not the date of default.

JUMBO PAPER PRODUCTS v. HANSRAJ AGROFRESH PVT. LTD

Court	National Company Law Tribunal, Principal Bench, New Delhi
Judgement Dated	October 25, 2021
Bench	Justice Jarat Kumar Jain, Member (Judicial) and Dr. Alok Srivastava, Member (Technical)
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 – Section 4 and 9; Ministry of Corporate Affairs – S.O 1205(E) dated March 24, 2020.

Brief Background

The appellant in the case, Jumbo Paper Products, was an operational creditor who supplied corrugated paper products to Hansraj Agrofresh Pvt. Ltd. (hereinafter respondent). The appellant had filed an Application under Sec. 9 of the IBC, which was dismissed by the AA and hence this appeal.

The appellant had sent a demand notice under Sec. 9 to the CD on September 13, 2020 which was for a debt that was in default from May 27, 2018 to June 23, 2018 amounting to INR 13,46,278/-. In response to the same, the corporate debtor did not dispute any claims made by the appellant but sought time to settle the dues. The AA had dismissed the Sec. 9 Application, citing S.O 1205 (E) dated March 24, 2020 issued by the Ministry of Corporate Affairs (hereinafter Ministry) which increased the minimum amount of default required to file an application under Sec. 7 or Sec. 9 from INR 1 lakh to INR 1 crore. The appellant's contention was that the notification of the Ministry would not be applicable retrospectively and hence the claims made by the operational creditor would be unaffected by the same.

Issue

Whether the Sec. 9 Application at hand would be affected by the Notification issued by the Ministry?

Decision

The appellant's primary submission was that the default period in the case was from May 27, 2018 to June 23, 2018, which was prior to the publication of the Notification by the Ministry. The claim made by the Appellant was that because the Notification was published at a later date (June 23, 2020), it would not affect the claim made by the appellant.

The Appellant relied on the Judgement in the case of *Madhusudan Tantia*v. *Amit Choraria*[(2020) SCC OnLine NCLAT 713], which held that the Notification by the Ministry would only have a prospective effect, and not retrospective. Reliance was also placed on *Union of India &Ors.* v. *M/s. G.S. Chatha Rice Mills &Anr* [(2021) 2 SCC 209] and *Union of India v. M.C. Ponnose*[(1969) 2 SCC 351].

The AA was of the view that the facts of the *Madhusudhan Tantia* case were not applicable to the case at hand, as the application in that case was made prior to the Notification of the Ministry. All the other cases cited by the appellants were sufficient to prove that the Notification was not applicable retrospectively, but it was not of essence in the given case.

The AA stated that the threshold limit that was mentioned in the Notification was for the filing of an application under Sec. 9, and not for the default period. In this case, the Notification was published after the default period but prior to the date on which the Application was filed (September 13, 2020). Due to the fact that the Application was filed after the date of the Notification, the revised minimum limit was rightly applied to the case. For the above stated reasons, the AA dismissed the Appeal.

Comments

Through this decision, the AA has cleared all ambiguities relating to the admissibility of applications and has made it clear that it is the date of filing that is of the essence, and not the date of default. The decision by the AA was prompt and the appeal was dismissed at the stage of admission itself.

"ISHAAN WAKHLOO

Adjudicating Authority is not obliged to consider that restructuring outside the purview of IBC would be beneficial to the financial creditors.

ASEEM SRIVASTAV v. ICICI BANK LIMITED & ANR.

Court	National Company Law Appellant Tribunal
Judgement Dated	November 29, 2021
Bench	Justice Jarat Kumar Jain, Member (Judicial) and Dr. Ashok Kumar Mishra, Member (Technical)
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 – Section 7, 9, 10A and 61(1).

Brief Background

Aseem Srivastav (appellant no. 1) is the Suspended Director of Mc NallySayaji Engineering Limited (corporate debtor). The present appeal was filed by appellant no. 1 on behalf of the corporate debtor after the NCLT, Kolkata Bench admitted the application filed by the ICICI Bank Ltd. (financial creditor) [hereinafter, "respondent"] under Sec. 7 of the IBC and initiated CIRP against the corporate debtor. In this case, there were two appeals to the impugned order of the AA, with the second appeal from Kotak Mahindra Bank (another financial creditor) [hereinafter, "appellant no. 2"].

The respondent had sanctioned three loans i.e., Working Capital facility, Rupee Term Loan Facility I and Rupee Term Loan facility II to appellant no. 1. For these loans, the dates of default were January 28, 2019, January 31, 2019 and January 31., 2019 respectively. For these defaults, the respondent had sent a loan recall/demand notice dated January 03, 2020 to the corporate debtor, in which it was mentioned that the account of appellant no. 1 was classified as NPA on March 31, 2019.

It was appellant no.1's contention that there was a misjoinder of cause of action as dates of default were different, the debt owed was not payable in fact and law and the debt was time barred. According to appellant no. 1, the dates of default i.e., January 28, 2019 and January 31, 2019 were different, so they could not be clubbed together as they had a separate cause of action. Appellant no. 1 relied on *International Road Dynamics South Asia Pvt. Ltd.* v. *Reliance Infrastructure Limited* [CA (AT) (Ins) No. 72 of 2017. Appellant no. 1 also contested that the debt owed was not payable in fact and law, since the date of repayment of these debts (June 17, 2020 and December 17, 2020) were different from the date of default. According to these dates of repayment, the debt was not bound to be paid as per Sec. 10A of the IBC. Appellant No. 1 relied on *Ramesh Kymalv. M/s Siemens Gamesa Renewable Power Pvt. Ltd.* [Civil Appeal No. 4050 of 2020] where it was held that Sec. 7 application is barred for default on or after Marc 25, 2020. Further, appellant no. 1 had also contended that the debt was time barred. For this, it stated that the default for Working Capital facility was December 17, 2015 which was more than three years to the date of filing of the Sec. 7 application on January 09, 2020.

The respondent contended that the application did not suffer for a misjoinder of cause of actions as under Sec. 7, a joint application could be filed on behalf of other financial creditors. It also contended that *International Road Dynamics* would not be applicable since it was about an application for CIRP made by operational creditors under Sec. 9 of the IBC. According to the respondent, the date of repayment of these debts i.e., June 17, 2020 and December 17, 2020 were not relevant to the present matter and therefore, Sec. 10A of the IBC was not applicable. The respondent had contended that the timeline started when the account of the corporate debtor was classified as NPA on March 31, 2019. However, even if the letter of acknowledgement of debt dated October 26, 2018, issued by the corporate debtor concerning Working Capital facility was considered, from October 26, 2018 to January 09, 2020 (date of filing of Sec. 7 application), the application was filed within 3 years from the date of acknowledgement of debt.

It was appellant no. 2's contention that even though in the joint Lender's meeting of all the financial creditors, a beneficial proposal was decided upon by the Lenders where none of them would have to take huge haircuts on their debts, appellant no. 2 had gone ahead and filed a Sec. 7 application. To this, the respondent contended that appellant no. 2 had no locus standi since it did not fall within the gambit of 'aggrieved person' as per Sec. 61 of the IBC. The respondent emphasised on the fact that it had rejected the restructuring proposal vide email dated January 08, 2021 and the decision was communicated to all the lenders. The respondent had also contended that appellant no. 2 was aware of the pendency of its Sec. 7 application, however, it did not file impleadment or intervention applications before the AA.

Issues

(i) Whether there is a misjoinder of cause of actions?
(ii) Whether the debt is not payable in fact?
(iii) Whether the debt is barred by limitation?
(iv) Whether the application under Sec. 7 of the IBC is not maintainable as a bar has been created by the provisions of Section 10A of the IBC?
(v) Whether filing of an application under Sec. 7 of the IBC despite opposition by all other creditors and during the pendency of the restructuring proposal is unsustainable in law?
(vi) Whether impugned order is against the very spirit of IBC as the AA fails to consider that restructuring outside the purview of the IBC would be beneficial to the Respondent?
(vii) Whether appellant no. 2 can maintain the appeal under Sec. 61(1) of the IBC?

Decision

The appeals were dismissed by NCLAT. To simplify the case, the NCLAT formed 7 issues and dealt with each one of them separately. Following is the issue-wise rationale given by the Tribunal:

I. With respect to appellant no.1's plea of misjoinder of cause of actions, the Tribunal analysed *International Road Dynamics* since appellant no.1 had placed reliance on it. Rejecting the plea, the Tribunal observed that *International Road Dynamics* was in respect to Sec. 9 of the IBC and it differentiated between Sec. 7 and Sec. 9 of the IBC. It stated that Sec. 7 allowed for any financial creditor to file an application for CIRP against the corporate debtor however that was not the case with Sec. 9. Further, the Tribunal relied on *Gaurav Hargovind Bhai Dave* v. *Asset Reconstruction Company (India) Limited & Anr.*[(2019 10 SCC 572]to hold that date on which the bank has declared the account of the corporate debtor as NPA i.e. March 31, 2019 was the date of default.

ii. In case of appellant no.1's plea of debt not being payable in fact, the Tribunal analysed the meaning of default under Sec. 3(12) of the IBC. In light of the aforesaid definition, the Tribunal held that the date of repayment of these debts i.e., June 17, 2020 and December 17, 2020 did not qualify as the default date (since the default date was March 31, 2019). Hence, the debt was payable.

iii. With respect to appellant no. 1's plea of debt being barred by time, the Tribunal stated that December 17, 2015 wasn't the default date of the loan of Working Capital facility but it was a letter of balance confirmation issued by the corporate debtor to the respondent. Further, such a letter of confirmation was last issued on October 26, 2018, in which the corporate debtor had confirmed the debt. So, even if the letter dated October 26, 2018was considered as the default date, the application was filed on January 09, 2020 i.e., within the three-year limitation period from October 26, 2018. Therefore, the debt was not barred by limitation.

iv. The question of a bar being created by Sec. 10A of the IBC was answered in negative. The Court stated that this was because the date of default (March 31, 2019) was much before March 25, 2020, the start date for Sec. 10A to be applicable.

v. With respect to the validity of filing of an application under Sec. 7 of the IBC despite opposition by all other creditors, during the pendency of the restructuring proposal, the Tribunal held that as per the provisions of Sec. 7, the respondent had validly filed the application. It also noted that the respondent had informed the rejection of the proposal to other Lenders before filing the Sec. 7 application.

vi. As for the question, if the impugned order was against the spirit of IBC as the AA failed to consider that restructuring outside the purview of the IBC would be beneficial to the respondent (and other financial creditors), the Tribunal held that the AA was not obliged nor did it have any duty to consider if such restructuring would be beneficial. However, as the application met the criteria under Sec 7 of the IBC, the Tribunal observed that the AA had no choice but to admit the application.

vii. Finally, with respect to whether Appellant No. 2 can maintain the appeal under Sec. 61(1) of the IBC, the Tribunal accepted the Respondent's contention that appellant no. 2 had no valid ground to challenge the impugned order and that it had failed to point out any legal or factual flaw in the impugned order. Furthermore, it did not qualify as an 'aggrieved person' under Sec. 61(1) of the IBC. Therefore, appellant no. 2 couldn't maintain the appeal.

Comments

In this case, the AA has followed the law to the letter and there is no fallacy in the judgment. However, this case highlights an important issue of the lack of a restructuring mechanism beyond the provisions of the IBC. Taking note of this, the legislature should amend the IBC suitably to either accommodate the restructuring process which operates outside the IBC or either amend the IBC to include a restructuring process which precludes the CIRP.

"SHUBHAM DHAMNASKA

The period of limitation for an appeal filed under Section 61 commences from the date of passage of the order, and not date of receipt of the order by the parties.

HEMANSHU JAMNADAS DOMADIA SHAREHOLDER & DIRECTOR OF M/S SILVER PROTEINS PVT LTD v. CENTRAL BANK OF INDIA & ANR.

Court	National Company Law Appellant Tribunal, New Delhi
Judgement Dated	November 10, 2021
Bench	Justice Jarat Kumar Jain and Mr. V P Singhm Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 7

Brief Background

The appellant is the former Director and Shareholder of the corporate debtor, who had availed credit facilities worth INR 19,12,50,000/- from the respondent Bank for many years, and it was lastly renewed on March 2015. However, the corporate debtor was facing a liquidity crunch and had defaulted to repay the loan amount, subsequent to which the respondent Bank had classified the account of the corporate debtor as a 'Non-Performing Asset' ("NPA") on July 01, 2015 and had filed a petition under Sec.7 of the IBC, 2016.

This Appeal emanates from the impugned Order passed by NCLT Ahmedabad, wherein the Tribunal had admitted the petition against the corporate debtor.

Issue

Apart from assessing the NCLAT's order to check whether the appeal needed to be allowed, the Court dealt with the following two issues:

I. Whether the Application/petition is filed by a person having proper authorisation?

ii. Whether the Application/Petition is barred by limitation?

Decision

With respect to the first issue, the Tribunal heavily relied on the Supreme Court judgment of *Rajendra NarottamdasSheth and Anr.* v. *Chandra Prakash Jain and Anr.*[2021 SCC OnLine SC 843], and held that the application under section 7 was filed by the Assistant General Manager, who happened to be the principal officer of respondent number 1 Bank. Accordingly, the said officer was duly authorized through a General Power of Attorney which was still valid and effective. By the said Power of Attorney, the said officer of the bank was authorized to grant the loan, execute documents for and on behalf of the bank, recover loans, if necessary and further, entitled to initiate proceedings under the IBC.

As for the second issue, the corporate debtor had contended that the date of default mentioned in the application was July 01, 2015, while the same was filed on October 22, 2018. Thus, the application was filed after the prescribed limitation period, i.e., three years, under Article 137 of the Limitation Act, 1963. It further argued that the AA had given the benefit of Sec. 19 of the Limitation Act based on the last payment made by the corporate debtor, i.e., on December 30, 2015. The Tribunal took reference of the ratio held in the Supreme Court case of *Dena Bank (now Bank of Baroda)* v. *C Shivkumar Reddy &Anr.*[2021 SCC OnLine SC 543], wherein the Apex Court held that "*an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years*."

After considering the facts of the case and relying on case laws, consequently, the Tribunal found that the AA had rightly admitted the application filed under Sec. 7 of the IBC, and dismissed the appeal.

Comments

This judgment may come across as a positive development towards the insolvency jurisprudence in India. The conundrum pertaining to confluence of Limitation law and IBC has been an on-going one, and this pronouncement shall demystify on the aspect relating to when an application under Sec. 7 may be barred under Limitation. As the Tribunal relies on the recent Supreme Court case of *Shivkumar Reddy*, it goes on to concretise the existing judicial stance on the same, leaving little scope for any further ambiguity on this subject.

"DIYA DUTTA

The NCLT cannot allow clubbing of petitions filed separately by financial creditors when they are not in compliance with 2nd proviso of Section 7 of the I&B Code.

M/S EMAAR HILLS TOWNSHIP PRIVATE LIMITED v. MR. SRINIVAS MANTHENA & ANR.

Court	National Company Law Appellant Tribunal
Judgement Dated	November 4, 2021
Bench	Justice M. Venugopal
Relevant Sections	The Insolvency and Bankruptcy Code, 2016 –Section 7

Brief Background

The present appeal before the NCLAT arose against the impugned order dated June 18, 2021 passed by the AA (NCLT, Hyderabad Bench) in CP(IB) No. 394/7/HDB/2020. The two applications in question were filed separately prior to the amendment in 2020 which inserted three proviso clauses in Sec. 7 of the IBC, 2016. NCLT, referring to the judgement by Supreme Court in *Manish Kumar* v. *Union of India & Anr*[Writ Petition(C) No.26 of 2020], ruled that single allotee's application filed prior to amendment cannot be rejected and that the allotees in same project against same corporate debtor are allowed to pursue their applications jointly, which shall further be heard jointly. The counsel for the appellant had alleged that neither the respondent nor other purported allottees of the appellant had filed any application seeking modification of their affidavit as envisaged under the Amended Sec. 7 of the IBC, 2016 but for clubbing all pending applications against the appellant. It was contended in the appeal that the said filing of an affidavit was contrary to the Amendment Act.

Issue

Whether the NCLT can allow clubbing of petitions filed separately by financial creditors when they are not in compliance with 2nd proviso of Sec. 7 of the IBC?

Decision

The Appellate body ruled that the impugned order dated June 18, 2021 passed by the AA suffered from legal infirmities in the eyes of law and was set aside. It issued directions to the AA to pass de novo orders on the issue of maintainability pertaining to clubbing of all matters in accordance with Law, after providing due opportunities to both parties to raise all factual and legal pleas, if they so desired. The reasoning laid down by the Tribunal was based on the stand of the appellant's counsel that AA have not been given any scope across the country to pass an order clubbing the pending applications as per decision of the Hon'ble Supreme Court in *Manish Kumar* case especially when they are not in compliance with 2nd proviso of Sec. 7 of the IBC, 2016.

It was observed that neither the respondent nor any other alleged allottees had filed any application to modify their petitions to comply with Sec. 7 of the IBC, 2016 and that it was only two allottees, viz. Mr Sunder K Sundaresan and Mr P.V. Rao, who had filed their affidavit for clubbing of all petitions against the appellant. It mentioned that Sec. 7(1) of the IBC mandates that for financial creditors who are allottees under a Real Estate Project, an application for initiating CIRP against the corporate debtor shall be filed jointly by not less than 100 of such allottees under the same Real Estate Project or not less than 10% of the total number of such allottees under the same Real Estate Project whichever is less. The tribunal also commented that the impugned order did not contain any direction being issued to the respondents and other purported allottees to amend their application as laid down under Sec. 7 of the IBC, 2016. The Appeal was allowed accordingly and subsequent directions were issued to the AA.

Comments

The position of home buyers was not envisaged in the IBC when it was drafted in 2016 as to whether they are creditors or not. However, the cases over the years helped to confirm their position as financial creditors. Prior to the amendment, any home allottee could theoretically file an application against a real estate company, which was absurd. To deal with in absurdity, the legislation called for the said amendment in 2020 and inserted certain proviso clauses in Sec. 7 of the IBC, 2016. It is now a stated proposition that if the financial creditor is a home buyer, they are obliged to file the application jointly along with other 10% Creditors or 100 of them, whichever is less. This order of the NCLAT played a major role in defining that it is the responsibility of the allottees to look after the filing of the application under Sec. 7 in compliance with the provisos and not the NCLT.

"DIVYA SINGH

There is no impediment for an applicant to prefer an application under Sec. 7 of IBC when already the proceedings under SARFAESI Act, 2002 are pending.

S. RAVINDRANATHAN, EX-DIRECTOR OF CORPORATE DEBTOR MPL PARTS AND SERVICES PVT. LTD. V. SUNDARAM BNP PARIBAS HOME FINANCE LTD.

Forum	National Company Law Appellate Tribunal
Order date	September 20, 2021
Bench	Justice Venugopal M. (Acting Chairperson), Mr. Kanthi Narahari, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 7

Brief background

The appellant, suspended Member of the Board of Directors of second respondent/corporate debtor had preferred the appeal being aggrieved against the order passed by the AA where CIRP had been initiated against the corporate debtor. The corporate debtor in the counter (before the AA) had taken a plea that the financial creditor could sell the secured assets of which were taken possession as per the SARFAESI Act, 2002 and realise the money alleged due and payable by the company and set-off the same, in respect of the outstanding loan. Further, it was further argued by the corporate debtor that they could not have taken shelter under IBC to speed up recovery or to terrorise the corporate debtor.

Issue

Whether an applicant can prefer an application under Sec. 7 of the IBC when proceedings under SARFAESI Act, 2002 are already pending?

Decision

The Appellate Tribunal held that thereis no impediment for an applicant to prefer an application under Sec. 7 of IBC when already the proceedings under SARFAESI Act, 2002 are pending. It was observed that the requirement for maintaining an application under Sec. 7 is that, an applicant is to establish the existence of a debt, which is due from the corporate debtor. Referring to *R.B. Synthetics* v. *Bee Ceelene Textile Mills Ltd. [Company Appeal (AT) (Insolvency) No. 106 of 2018]*, the Tribunal noted that in fact, the issue of whether there is debt and default can be looked into only if the corporate debtor disputes the debt or takes a plea that there is no default though there is debt. It cannot be forgotten that in Law, it is always open to a financial creditor in a given case to take all possible steps that are available to him / it to recover the money lent to the borrower. Indisputably, the ingredients of the IBC, 2016 will have an overriding effect in respect of the SARFAESI Act, 2002, by means of Section 238 of the IBC. Further, it was pointed out that once the AA is satisfied as to the existence of the default and has ensured that the application is complete, and no disciplinary proceedings are pending against the proposed RP, it shall admit the application. The AA is not required to look into any other criteria for admission of the application. In the present case, the existence of debt of the corporate debtor and default was committed and thus, the Tribunal was of the considered view that the Sec. 7 application was complete and that the AA was right in admitting the application by way of its impugned order.

Comments

The Tribunal has rightly noted that inability to pay debt is not sufficient to initiate the process of insolvency resolution. It has accurately followed the criteria of 'default', as laid down under the statute, while considering the admission of the application. The NCLAT has carefully delved into the definition of 'claim', 'debt' and 'default' in detail and rightly made its observations. Under the IBC, CIRP is not an adversarial litigation, like the Court of Law and thus, an AA is not deciding a money claim in a civil suit. The duty of the AA is only confined to the act of deciding whether the application is complete, and whether there is any debt or default. In the present case, the AA had precisely fulfilled that duty and the NCLAT has, thus, correctly upheld the impugned order of the AA.

"ABHISMITA GOSWAMI

NATIONAL COMPANY LAW TRIBUNAL

Mere production of a foreign award is not enough to constitute debt and directly initiate proceedings under the IBC.

JALDHI OVERSEAS PTE. LTD. v. STEER OVERSEAS PRIVATE LIMITED

Court	National Company Law Tribunal, Cuttack Bench
Order Dated	November 17, 2021
Bench	Shri. P. Mohan Raj, Member (Judicial), Shri. Satya Ranjan Prasad, Member (Technical)
Relevant Provisions	The Insolvency and Bankruptcy Code, 2016 – Section 9.

Brief Background

Jaldhi Overseas Pvt. Ltd., the operational creditor in the case, was rendering international transportation services to the corporate debtor. While transporting the goods from India to China, certain charges became payable at the ports and there was a dispute between the corporate debtor and the operational creditor regarding the payment of the same.

The parties had resorted to arbitration for resolving the dispute, and a partial foreign award was passed in favour of the operational creditor. The applicant had submitted that the claim was backed by a foreign award and stated that the High Court of Singapore rejected all claims made by the corporate debtor. The applicant had stated that a demand notice was issued in furtherance of the arbitral award and the corporate debtor had failed to settle the dues.

The corporate debtor had objected to the applicant's claims on multiple grounds. It was submitted that the domestic legislation does not provide for enforcement of a foreign award through the NCLT and that CIRP could not be initiated on the basis of a foreign award. In addition, the corporate debtor had also stated that there was a pre-existing dispute between the parties and that the claim by the operational creditor was not an "operational debt".

Issue

Whether a foreign award is sufficient for the initiation of CIRP against a corporate debtor under the IBC?

Decision

While deciding, the NCLT relied on the Supreme Court's decision in the case of *Government of India* v. *Vedanta Limited* [(2020) SC 479] which held that a foreign award does not become a foreign decree at any stage of the proceedings and that the enforcement of the foreign award takes place only after the court is satisfied that the foreign award is enforceable under Chapter 1 in Part II of the Arbitration Act, 1996. Relying on this, the NCLT reiterated that mere production of a foreign award is not enough to constitute debt and directly initiate proceedings under the IBC.

It was also stated by the NCLT that the High Courts alone have the jurisdiction to deal with foreign awards and to enforce them domestically. It was clarified that enforcement of a foreign award was subject to approval by a High Court and would be deemed as a Section 49 decree only after such approval. The NCLT also pointed out that in a similar case, *Usha Holdings LCC & Anr.* v. *Francorp Advisors Pvt. Ltd*, [Company Appeal (AT) (Insolvency) No. 44 of 2018], the NCLAT held that the AA not being a Court or "tribunal" has no jurisdiction to decide whether a foreign decree is legal or not.

In view of the same, the NCLT rejected the applicant's claims and the application was dismissed without costs.

Comments

The case at hand was not one with any complexities, and the decision by the NCLT was apt as it further reiterated what had been held by the Supreme Court in the case of *Government of India* v. *Vedanta Limited*, that the enforcement of a foreign award in the domestic sphere is contingent to the approval of the same by a High Court.

"ISHAAN WAKHLOO

The Resolution Professional cannot skip the provisions given under the Code.

SATIQ BUHARI v. PLATINO CLASSIC MOTORS (INDIA) PVT. LTD

Court	National Company Law Tribunal, Kochi
Order Dated	November 18, 2021
Bench	Justice Ashok Kumar Borah
Relevant Provisions	The Insolvency and Bankruptcy Code, 2016 –Section 21 and 33(2).

Brief Background

The Tribunal accepted an application filed by the Financial Creditor, Federal Bank Limited to initiate CIRP against the corporate debtor Platino Classic Motors India Pvt Ltd. Hence, the applicant was appointed as the IRP to carry out the CIRP process. A public announcement in the newspaper was made by the applicant and he verified the claims received and formed the CoC which consisted of two Financial Creditors as its members.

The corporate debtor was acting as a dealer of BMW cars manufactured and marketed by BMW India under a dealership agreement. The corporate debtor was not doing any business and the establishment was closed down for more than one and half years.

The CoC met thrice and unanimously resolved to liquidate the corporate debtor without endeavouring to invite the expression of interest.

Issue

Whether the IRP/RP can skip the provision of inviting resolution plans?

Decision

The Tribunal relied on the decision in *Jayanta Banerjee* v. *Shashi Agarwal* [CA (AT) (Ins.) No. 348 of 2020], wherein it was discussed that the statutory provisions for the conduct of CIRP are interconnected, and hence they do not leave any scope to the IRP/RP to skip any of the provisions. For example, during CIRP, after receiving and collating the claims, the IRP has to form the CoC. However, ongoing through the averments in this IA, it was found that the claim filed by BMW India Pvt. Ltd. in Form C was rejected by the IRP stating that it did not fall within Section 5 (8) of IBC.

It was also found that during the CIRP, only three meetings of the CoC took place and without publishing Form- G on the 75th day, the CoC resolved to file an application for liquidation as per the advice of the IRP. The procedure adopted by the IRP was against all the statutory provisions, fully knowing well that compliance with the statutory requirements of the IBC was mandatory. Further, it was noticed that the IRP/RP had not prepared the Information Memorandum.

The Tribunal stated that the minutes of the three CoC meetings made it clear that the CIRP process was completed even without any valuation of the corporate debtor. Without complying with the provisions, the CoC resolved to liquidate the corporate debtor, ignoring the requirements of determination of fair market value, liquidation value and preparation of Information Memorandum.

The provisions of the IBC are unambiguous and the scope of the same has already been upheld by the Hon'ble Supreme Court in the case of *Swiss Ribbons Pvt Ltd.* V. *Union of India* [Writ Petition (Civil) No. 99 of 2018]. The CoC does not appear to be clothed with the powers to stop the IRP/RP from issuance of the Expression of Interest. Liquidation is like a death knell for the corporate entity/corporate person. It is also pertinent to mention that when the constitution of the CoC itself is found to be tainted, then the decision of that CoC cannot be validated on the pretext of exercise of commercial wisdom.

Hence, the AA directed the IRP/RP to proceed with the issuance of the Expression of Interest expeditiously to complete the CIRP and CoC members were directed to cooperate with the IRP/RP.

Comments

The NCLT has rightly held that the CoC does not have the power to stop the RP from issuing the expression of interest. This decision is in line with various judgements wherein the courts have held that compliance with the statutory requirements of the IBC was mandatory. The CoC cannot compel the IRP/RP to divert from the given provisions of the code.

"MONIKA SAINI

CIFL NEWSLETTER

MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

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MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI
[Established under the Maharashtra Act VI of 2014]
Post Box No: 8401
Adderss: Powai, Mumbai – 400 076
Tel: 022-25703187, 022-25703188
Email: nlumumbai@mnlumumbai.edu.in