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SUPREME COURT PRONOUNCEMENTS

Is a scheme of rehabilitation under SICA binding: Analyzing the SC's order in Modi Rubber Ltd

MODI RUBBER LTD V. CONTINENTAL CARBON LTD

Court	Supreme Court of India
Judgement Dated	March 17, 2023
Bench	M.R. Shah, & Sudhanshu Dhulia JJ.
Relevant Sections	SICA, 1985– Sec. 18, 22

Brief Background

The present case involves a batch of appeals preferred to the Supreme Court ("SC"), all of them involving a common question of law which forms the subject matter of this decision. Modi Rubber Ltd ("Petitioner/Appellant") has sought an appeal against a decision passed by the High Court of Delhi ("Delhi HC"). The impugned decision of the Delhi HC allowed Continental Carbon Ltd ("Respondent"), an unsecured creditor, to not accept the scaled down value of the dues payable to it under the scheme of rehabilitation prepared by the operating agency and sanctioned by the Board of Industrial and Financial Reconstruction ("BIFR") under the Sick Industrial Companies Act, 1985 ("SICA"). The decision in question emanates from a challenge preferred by the petitioner to this decision of the Delhi HC.

Issues

The chief question that arose for the SC's consideration concerned whether an unsecured creditor, after the approval of a scheme of rehabilitation by the BIFR, is permitted to decline the scaled down value of its dues as provided under the scheme and if the creditor may wait till the revival of the distressed entity, while reserving the possibility of recovering the outstanding amounts from the debtor post revival.

Decision

Advertising to the intent and object of SICA, the SC reasoned that the primary rationale behind the conception and introduction of an insolvency law like SICA was to provide for the revival of sick companies and to effectively deal with the clogging up of valuable and investible funds that were otherwise lying idle with distressed entities. The fulfillment of these foundational attributes necessitated the need for salvaging the productive assets lying idle with sick and distressed entities, either by preparing a scheme of rehabilitation or liquidation (mainly as a last resort).

The SC noted the centrality of an effective scheme of rehabilitation given SICA's focus on providing for the revival of a distressed entity and saving it from winding up. Relying on this premise, the SC, while referring to Section 18(8) of the SICA stated that the role of a scheme of rehabilitation in the process of reviving a company in the red is of utmost importance and that the concerned scheme may resort to any mode of financial reconstruction, as the operating agency and the BIFR deem fit, if it aids in fulfilling the foundational tenet of the SICA, that is, reviving a distressed entity. In this context, the SC observed that any scheme of rehabilitation prepared for a distressed company by an operating agency, upon receiving the BIFR's assent, is final and binding on the entity and all its stakeholders (including creditors).

The SC also declined to accept the contention that a creditor, in such cases, should be allowed to wait till the distressed company gets back on its feet while also reserving the possibility of reserving its outstanding dues. The primary argument against this observation was that allowing this would mean discouraging creditors from offering any financial assistance which would otherwise aid in the recovery and revival of the distressed company. The SC also reasoned that allowing the creditors to recover the pending amounts from the distressed entity after the revival might put considerable financial strain on the entity which might plunge it once again into a debt trap, setting the entire recovery process at naught.

Comment

The judgment settles the position concerning the binding nature of a scheme of rehabilitation which has approved the BIFR's sanction under SICA on a distressed company and all its stakeholders. It is likely to reduce confusion in similar matters where such rehabilitation schemes have been executed only partially, being challenged by creditors pertaining to the adequacy of their dues. This ruling would reduce such protracted litigation, lead to greater asset recovery and an improved chance of entities reviving as a result of the scheme's reconstruction. Therefore, the judgment, in this regard, is in accordance with the aims and object of the SICA is a boon for many debtors embroiled in a tussle with creditors about the restructuring plan, thereby hindering a swift and effective recovery.

However, the SC's categorical observation pertaining to the binding and inviolable nature of the rehabilitation

plan might be misused by other well-placed stakeholders at the detriment of vulnerable parties like unsecured creditors. The SICA has no provision which creates an obligation on the parties offering financial assistance and drawing up a scheme of rehabilitation (mostly secured creditors) from obtaining consent from unsecured creditors while preparing a scheme under Section 18 or even during its implementation. The only "consent" which the SICA mandates is one that needs to be obtained from entities providing financial assistance (secured creditors) as per Section 19. Therefore, the absence of any express provision mandating the consent of unsecured creditors coupled with the binding and unalterable nature of a scheme of rehabilitation might empower secured creditors to construct a scheme where the dues of unsecured creditors are unreasonably scaled down to provide secured creditors with a higher profit margin.

A critical distinction between modern insolvency legislations like IBC and earlier ones like the SICA mainly pertain to the layer of protection afforded to unsecured creditors. The IBC, in the event of an entity's liquidation, expressly provides for a defined order of priorities under Section 53 (waterfall mechanism) which protects (to some extent) the interests of otherwise weak and vulnerable stakeholders like unsecured creditors. Similarly, taking a more analogous parallel, Section 30(2) read with Section 30(4) and Section 31(2) of the IBC necessitate a resolution plan, in order to be legally sound and enforceable, must not provide operational creditors (usually unsecured) and dissenting financial creditors with amounts less than what they would have otherwise received during a company's liquidation under Section 53. However, all these protections are not offered to unsecured creditors (and other similarly vulnerable stakeholders) which necessitate a greater vigil on the part of the courts. While it may not be legally (and commercially prudent) to examine every scheme of rehabilitation, the court must at least examine whether the exercise of scaling down the dues of stakeholders like unsecured creditors is not vitiated by ulterior motives. A mandatory and unqualified observation (as made in this case) might give secured creditors a chance to defraud unsecured creditors without being accountable for the loss.

The SC also failed to provide adequate clarification about the nature and scope of the moratorium enjoyed by a sick entity under Section 22 of the SICA. In the present case, the BIFR discharged the entity from the purview of BIFR after its net worth turned positive. This implies that following this discharge, the provisions of the SICA would not ordinarily be applicable to such an entity. If the SC's prohibition on the respondent from initiating any action for recovery citing the final and binding nature of the scheme is an indicator, then such an observation also runs contrary to Section 22 as the bar created by it is only applicable to entities where the preparation or execution of a scheme of rehabilitation is pending.

"Shalin Ghosh

Is Section 53 of the IBC violative of the constitution with respect to payment of dues of workmen

MOSER BAER KARAMCHARI UNION V. UNION OF INDIA

Court Supreme Court of India
Judgement Dated May 2, 2023
Bench M.R. Shah, & Sanjiv Khanna JJ.
Relevant Sections Constitution of India,1951- Art 14 and 21, IBC, 2016- Section 53, Companies Act 2013, Section 326 and 327.

Brief Background

The petitioner filed a writ petition seeking the writ of mandamus to quash section 327(7) of the Companies Act of 2013, further praying that the same is arbitrary and violative of Article 21 of the constitution of India. Moreover, the petitioner prayed to issue the writ of mandamus so as to leave the statutory claims of the "workmen's dues" out of the purview of waterfall mechanism under Section 53 of the IBC, 2016. The fundamental argument of the petitioners was that that distribution of the workmen's due as envisaged under Section 53(1)(b)(i) of the IBC, be declared as unreasonable and violative of Article 14 of the Constitution of India, as Section 53(1)(b)(i) of the IBC limits the workmen's dues payable to workmen to twenty four months only preceding the date of order of Liquidation and then rank the said workmen's dues equally with the secured creditors in the events such secured creditors has relinquished security in the manner set out in Section 52 of the IBC. Thus, the petitioners wanted the workmen's dues to be decided in accordance with the reasonable principles laid down in section 326 of the Companies Act of 2013. The petitioners thereby prayed before the apex court to apply the waterfall mechanism mentioned in the Companies Act of 2013 under the IBC of 2016 as well to provide workman's due.

While on the other hand, the government in the present case stated that the interest of the workmen was very well protected under the IBC and the constitutionality of multiple sections of the IBC, 2016 were challenged but not of the petitions sustained and the apex court in those cases had held that the provisions of IBC were not unconstitutional in nature.

Issues

Whether section 53 of IBC is against Article 14 and 21 of the constitution?

Decision

The Supreme Court held that section 53 of the IBC, 2016 is not unconstitutional in nature. Moreover, the court also stated that Section 327(7) of the Companies Act of 2013 was not violative of article 21 of the Constitution of India. Moreover, the court also stated that in case of the liquidation of a company under the IBC, the distribution of the assets shall have to be made as per Section 53 of the IBC subject to Section 36(4) of the IBC, in case of liquidation of the company under IBC. Thus the court reiterated the stand that in case of conflict between the sections of Companies Act of 2013 and the IBC, the latter would prevail especially in cases where liquidation of companies is the primary issue.

Comment

The Supreme court has rightly protected the ultimate interest of the workmen and the employees of the company. It has also clarified that the IBC will prevail over Companies Act of 2013 in cases of conflict because the objective of the latter is to improve the ease of doing business and facilitate more investments, leading to higher economic growth and development. Moreover, it is important to state that in either case that is of relinquishment or non-relinquishment of the security by the secured creditor, the interest of the workmen is protected under the IBC, 2016. In addition to providing a period of 24 months prior to liquidation commencement date to the workmen, the Pension Fund, Gratuity Fund and Provident Fund are also left out of the liquidation estate, in a bid to protect the social safety net of the workmen. Additionally, in the Jet Airways insolvency case, the Apex court had rightly stated that if there exists a separate fund for the workmen, the same will be preferred, otherwise the discourse through section 53 of IBC will be followed. Thus, the Supreme Court through this judgment has thereby protected the interest of the workmen of the company.

"Sameer Mahajan

Application for withdrawal of CIRP under Sec 12A before the constitution of CoC shall be decided without standing on technicalities. An application for withdrawal of CIRP on account of settlement, shall not affect the claims of other parties.

ABHISHEK SINGH V. HUHTAMAKI PPL LTD. & ANR.

Court	Supreme Court of India
Judgement Dated	March 28, 2023
Bench	B.R. Gavai J. and Vikram Nath J.
Relevant Sections	IBC, 2016– Sec. 12A; IBBI Regulations 2018- Sec 30A

Brief Background

The present case is an appeal by a suspended CD. The CD was engaged in the business of distribution fruit beverages The operational creditor used to supply packaging material to the CD and filed a claim of 1,31,00,825 which was admitted by NCLT on 01.03.2021 and CIRP was initiated. On 03.03.2021 the OCs and the CD entered into a settlement wherein CD was required to pay 95.72 lakhs, which happened before the constitution of the CoC. On 04.03.2021 the OC received the balance amount according to the agreement and the IRP moved an application under Regulation 30A of IBBI Rules, 2018 seeking withdrawal of CIRP. In the meantime, an appeal was preferred against admission order of the NCLT which was disposed of considering the settlement.

The NCLT rejected the settlement and fixed the matter for disposal under 30A of IBBI Regulations. Subsequent to the order of the NCLT a CoC was constituted and multiple claims were filled. NCLT held that since the transfer occurred from the account of the CD and not the company, which was not conclusively proved. Since the CIRP had been initiated the proceedings were in rem and gave all stake holders right to participate. It alos observed that Regulation 30A was not binding on it.

Issues

Whether an alternative remedy was available?

Whether there was a violation of the moratorium by the CD?

Whether claims of the OCs should be considered while allowing withdrawal?

Whether IRP is entitled to claim expenses?

Decision

The hon'ble Supreme Court in this case held that the court had heard an SLP in this matter in 2021 and keeping in mind the commercial nature of the dispute the rule of alternative remedy was not imposed. It was held that the transaction from the account of the CD would not be illegal but wrongful at best and any other matter where CIRP has been initiated the money could be recovered under Sec. 66 of IBC. The court held that the claims of the other creditors are not impacted if the proceedings are allowed to be withdrawn. The claim for expenses by the IRP can be recovered in the same proceedings and NCLT has power to clear the same. Since 30A of IBBI regulations do not contain a provision for withdrawal before constitution of the CoC and the same was flagged in the case of Swiss Ribbons Private Limited & Anr. V. UOI. The court held that the NCLT made an error in holding that Regulation 30A does not have a binding effect and the court held that Regulation 30A does not conflict or violates Sec 12A of the IBC, it only furthers the objective of Sec. 12A. The order of the NCLT was sustained and application for withdrawal of CIRP was allowed but will not affect the claim of other creditors

Comment

The Court was right in allowing the withdrawal of the CIRP under 30A of IBBI regulations, 2008. The clarification provided by Court on the overlapp between 30A of IBBI Regulations, 2008 and Sec 12A of the IBC shall be helpful in future cases. The case also brings forward a void in 30A of IBBI Regulations, 2008, where no procedure is prescribed in case an application for withdrawal is filled before the formation of the CoC after the CIRP has begun. The MCA should formulate necessary regulation for the same. This was also examined in the case of Swiss Ribon Pvt. Ltd. V. UOI & Anr.

"GNANITH K HUNSUR

Declaration regarding ownership rights of trademarks by an adjudicating body shall be considered a modification of the resolution plan.

SREI MULTIPLE ASSET INVESTMENT TRUST VISION INDIA FUND V. DECCAN CHRONICLE MARKETEERS & OTHERS

Court Supreme Court of India
Judgement Dated March 13, 2023
Bench J. Ajay Rastogi, J. Bela M. Trivedi
Relevant Sections IBC, 2016– Section 14, Section 30(2), Section 30(4), Section 60(5), Section 238, Section 134 of the Trademarks Act, 1999

Brief Background

Deccan Chronicle Holdings Ltd. (DCHL) is a company engaged in the printing and distribution of newspapers under the trade names, "Deccan Chronicle" (English) and "Andhra Bhoomi" (Telugu) since 2002. A CIRP proceeding was initiated against DCHL by Canara Bank in the NCLT, resulting in a moratorium being imposed to stay all proceedings, which was subsequently extended by 90 days. Subsequently, a resolution plan was submitted and approved by the Committee of Creditors (CoC) on 10th Dec, 2018 with 81.39% of voting rights. The resolution plan was found to be compliant with the mandatory provisions of Section 30(2) of the IBC and was approved on 3rd June, 2019, subject to pending clarifications regarding the ownership of trademarks held by DCHL and the treatment of such trademarks as part of the company's assets. The adjudicating authority later confirmed that DCHL has exclusive rights to use the trademark and declared that the trademarks belonged to DCHL. This decision became the subject of contention and was subsequently brought before the NCLAT for further adjudication

Issues

Whether the declaration by the NCLT regarding the ownership rights of the Corporate Debtor over the trademarks "Deccan Chronicle" and "Andhra Bhoomi" be considered a modification or alteration of the previously approved Resolution plan?

Decision

At the outset, it was observed that the approved Resolution plan was compliant with the provisions of Section 30(2) and 30(4). Upon examining the relevant Clause 11.12 of the resolution plan, it was noted that it solely pertains to the perpetual exclusive right of the Corporate Debtor to use the brand names "Deccan Chronicle" and "Andhra Bhoomi," and there is no indication of ownership of the trademarks by the Corporate Debtor/DCHL. However, the adjudicating authority determined in Para 38 of its decision on I.A. No.155 of 2018 that the trademarks belong to the Corporate Debtor, this decision does not align with the resolution plan ratified by the CoC.

After analyzing the available evidence, the NCLAT concluded that the finding of ownership by the Corporate Debtor equates to a modification/alteration of the approved Resolution plan, and is not consistent with Section 60(5) of the IBC. Additionally, it was expounded that any modification based on commercial wisdom is not subject to judicial review unless it violates the IBC Code's mandate. The NCLAT held that modifications are "unquestionably impermissible in law" and that the adjudicating authority had overstepped its jurisdictional boundaries. The decision in Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited & Another was cited, which affirmed that permitting a modification after approval of a resolution plan would result in "degraded resolution amount of the corporate debtor and/or a delayed liquidation with depreciated assets which frustrates the core aim of IBC." Consequently, the appeal was dismissed as having no merit.

Comment

NCLAT is right in holding NCLT exceeded jurisdiction while modifying the resolution plan at its own accord however it took 3 years to reach this verdict which defeats the purpose of IBC that is speedy resolution. The non-inclusion trademarks "" as an asset is a procedural irregularity. Resolution applicant should have clarified the asset to be included in the resolution plan at time of approval. Failure to do so resulted in unsuitable interpretation and a legal case that dragged on for 3 years halting the entire process The draft could have been sent back to the Committee of Creditors for a revaluation and modification. Subsequently the voting on the Resolution plan would have led to swift disbursement of the Corporate Insolvency Resolution Process reducing the burden on NCLT.

Resolution applicant should have clarified the asset to be included in the resolution plan at time of approval. Failure to do so resulted in unsuitable interpretation and a legal case that dragged on for 3 years halting the entire process.

"MEGHNA JAIN

Right Of Resolution Professional In Taking Control Over The Assets Of A Corporate Debtor Licensed To A Third Party

VICTORY IRON WORKS LTD. Vs. JITENDRA LOHIA & ANR.

Court	Supreme Court of India
Judgement Dated	March 14, 2023
Bench	V. Ramasubramanian, J and Pankaj Mithal, J
Relevant Sections	IBC, 2016- 3(27), 18(f), 25(2)(a) and Regulation 30 of IBBI (CIRP) Regulations, 2016

Brief Background

Avani Towers Private Ltd., corporate debtor, funded the purchase of a land of 10.19 acres from UCO Bank to Energy Properties, the 'ostensible owner' of that land. Both also entered into an agreement for the joint development of the said property wherein the CD had the exclusive rights related to the development of the property along with the CD also had 40% of the share capital in Energy Properties. On 19.08.2011, a Leave and License Agreement was executed by the CD and signed by Energy Properties, which granted a license to M/s Victory Iron Works Ltd (Appellant), for the use of 10,000 sq. ft. land out of the 10.9 acres.

On 15.10.2019, an application of CIRP under section 7 of IBC was filed by M/s Sesa International Ltd., a financial creditor, against Avani Towers Private Ltd. (corporate debtor). The Adjudicating authority admitted this appeal for CIRP. An application was filed by the RP under section 25 of IBC read with Regulation 30 of IBBI (CIRP) Regulations, 2016, when the suspended Board of Directors of the CD informed the RP about Energy Properties forcefully removing security from the property. Upon this, the Adjudicating authority directed the Energy Properties and the Appellant not to obstruct the possession of the property of CD and any activities of the RP. It was also held that the appellant wasn't prevented from carrying out their activities in the part of the land given to them.

Aggrieved by the order of the NCLT, both M/s Energy Properties and the Appellant filed independent appeals before the NCLAT. On 08.04.2021 these appeals were dismissed by the Adjudicating Authority and it was confirmed that the Appellant must continue to use the 10000 sq. ft. land without any interference from the RP. Dissatisfied by this, the Appellant filed an appeal before The Supreme Court challenging the order dated on 08.04.202. The Appellant claimed the entire property to be theirs and argued whether the RP cannot claim custody of the assets belonging to the third parties by the virtue of Section 25 of IBC. The jurisdiction of the Adjudicating Authorities was questioned under section 18 of IBC.

Issues

(i) What is the nature of interest of the Corporate debtor over the property?

(ii)Whether NCLT and NCLAT exceeded their jurisdiction by attempting to retrieve the possession of the corporate debtor?

Decision

1. The apex court held that the development rights granted to the CD are considered "property" under Section 3(27) of the IBC, and the term "asset" in common language is understood as "property of any kind". Thus, the bundle of rights held by the CD pertaining to specific property can be regarded as an "asset" under the Section 18(f) and Section 25(2)(a) of the IBC. Therefore, the RP, under its obligation, can incorporate the said property in the CIRP, can assume its custody, and exercise control over it.
2. Referring to the judgment of Rajendra K. Bhutta vs. Maharashtra Housing and Area Development Authority & Anr. (2020), the Apex Court held that there is no evidence suggesting that the Appellant owned or occupied any land beyond the limits permitted under the Lease and License Agreement. Thus, both NCLAT and NCLT were correct in exercising their jurisdiction

Comment

The supreme court was right in holding that the said property in this case belonged to the CD, and hence, RP under its obligation, within the ambit section 25 of IBC, the RP was entitled to take control of the assets of the CD, which were licensed to Victory Iron Works Ltd., a third party. The judgement rightly explains how a licensee does not have any rights or interest over the property of a CD, and hence NCLT and NCLAT rightly exercised their jurisdiction following the judgement of the SC case of Rajendra K. Bhutta vs. Maharashtra Housing and Area Development Authority & Anr. (2020) by ensuring the interests of both parties by ensuring the ownership of the land of the CD and also by

safeguarding the interests of Victory Iron Works Ltd., over the extend of the land occupied by them.

"NEHAL PENDAM

HIGH COURT PRONOUNCEMENTS

Insolvency Profession as a Public Servant under the Prevention of Corruption Act 2018.

SANJAY KUMAR AGARWAL V. CENTRAL BUREAU OF INVESTIGATION, ANTI CORRUPTION BUREAU, DHANBAD.

Court High Court of Jharkhand, Ranchi
Judgement Dated April 5, 2023
Bench M.R. Justice Gautam Kumar Choudhary
Relevant Sections Section 16, Section 22, Section 23, Section 27 of the IBC 2016, Section 2(c) of the Prevention of Corruption act 2018, Section 21 of the IPC, section 197 of Cr.PC.

Brief Background

A petition was filed to squash the criminal proceedings, including an FIR against the Interim Resolution Professional (IRP). The petitioner was appointed by the Committee of Creditors (CoC) and was accused of demanding a bribe for showing leniency in insolvency process , extending the CIRP process from 9 months to 2 years, obtaining a favorable forensic audit/valuation report from his chosen Forensic Auditor/Valuer and helping in repossession of plant/company. This complaint was discreetly verified and the petitioner was caught red-handed in the presence of independent witnesses accepting illegal gratification from the complainant. Criminal charges were lodged against the petitioner under Prevention of Corruption act 2018 (P.C. act).

Issues

1. Does Insolvency Professional come under the meaning of Public Officer/ Servant under Section 2(C) of P.C act or under Section 21 of the Indian Penal Code. (IPC)?
2. What constitutes 'Public Duty' within the definition of a 'Public Servant', under P.C act and under IPC ?
3. Whether persons under the ambit of the Insolvency Bankruptcy Code 2016, being a self-containtained Code, are subject to provisions under P.C.act.

Arguments

The petitioner argues that:

1. The petitioner is neither a public servant nor is he appointed by any court, since he is appointed by the Committee of Creditors (CoC) under Section 22 of the IBC.
2. The duty of the IP professional detailed in Section 25 of the code is not in the nature of duty of a public servant as contemplated under Section 2(c)(viii) of the P.C act.
3. IBC being a self-contained act has specific provision for redressal of grievance of any party under Chapter VI and under Section 217, for complaints against insolvency professionals (IP) or members of information utility (IU).
4. Section 233 of the IBC provides a list of authorities deemed to be public servants within the meaning of Section 21 of the IPC. This list of authorities does not include Insolvency professionals. Section 233 protects Resolution Professional (RP), IPs from any criminal prosecution or other legal action for acts done in good faith.

The Respondent argues that:

1. The IRP was caught red handed while accepting a bribe, by the Trap team constituted by CBI.
2. On behalf of the CBI, it was submitted that the Adjudicating Authority (AA) shall appoint the IRP under section 16 of the code. His appointment was further made by the CoC and communicated to the AA, under section 22 of the IBC. Even replacement of the RP is communicated via AA. Hence, it cannot be said that the AA has no role in appointment of an RP.
3. Since the appointment is made before the Company law tribunal, the duty is discharged in connection with the administration of justice. Thus his office will come under the meaning of section 2(c) of the P.C. act.

Decision

The court rejected the petition to squash the criminal proceedings against the IRP, under section 2(c) of the P.C. act on the grounds that,

A] The IRP is a Public Servant.

1. The meaning of 'Public Servant' under section 2(c) of the P.C. act is wide and expansive. It is not limited to those serving under the government or its instrumentalities and drawing salary from a public exchequer. It lays down functional criteria of discharging 'public duty' or any duty authorized by the court of justice in connection with the administration of justice.

2. The petitioner was appointed by the AA under section 16 of the IBC code, and later confirmed by the COC under section 22 of the code.
3. Even if the RP appointed under section 22 is replace by the CoC under section 27, the proposed RP to be appointed is to be forwarded to the AA under section 23(3), and thereafter the AA is to forward the name of the proposed RP to the Board for its confirmation in the same manner laid down in section 16. The AA has a role in appointment of RP, the plea is not sustainable.
4. The appointment of the RP is with the approval of the Company Law Tribunal, and therefore he will be a 'Public Servant' within the meaning under Section 2(3) of P.C.act.

B] The functions of RP partake the character of a 'Public Duty'.

5. The functions of the RP under Section 208 of IBC are public in nature because these actions are intimately related to matters relating to loans extended by Banks, which are investments from the public at large, and therefore, will come within the meaning of 'public duty' under 2(c) of P.C. act.

6. Even if the RPs enjoy immunities under section 233 of IBC, from IPC offenses under section 197 of Cr.P.C, it does not refer to any immunity from criminal prosecution for offenses committed under P.C.act. Such immunity is subject to act done in good faith. In the present case the IRP was caught red-handed while accepting a bribe.

7. IBC code is self contained with respect to matter provided therein. It does not cover matters where P.C.act is applicable. Section 233 does not exclude applicability of P.C.act.

8. The RPs are appointed by the National Company Law Tribunal (NCLT) via the AA for Insolvency Resolution Process of the companies under IBC 2016. The nature of duty dispensed by the IP comes within the meaning of 'Public servant' and the duty of the IP pertakes the character of ' public duty', under section 2(c) of P.C.act and under IPC.

Thus the plea that Petitioner is not a Public Servant was rejected on the grounds mentioned above.

Comment

A] Advantages

If an Insolvency Professional is treated as a Public Servant under this precedent, it will increase accountability in the decision making process. There will be direct enforcement of disciplinary actions against any misconduct of the Insolvency Professional. Considering that such interpretation retains the autonomy of the IP, it safeguards the interest of CoC and Corporate debtors with increased accountability. Provided the power of removal and appointment vests with the CoC. The IP and RPs are immune to criminal liabilities / charges under Section 233 of IBC, Section 21 of IPC and Section 197 of the Cr.PC. However, they are vulnerable to acts which are not excluded from the IBC code and can be squarely applied. This makes IP liable for criminal charges.

B] Disadvantages.

There should be a clear line drawn between Jurisdiction of one statute from the other. The IBC has pre- existing provisions to deal with the misconduct of an IP. Relying on P. C. act not only challenges the self- contained nature of the code but also creates a space for provision of other statues to infiltrate. Position of an IP now becomes insecure mainly because there might be a conflict of interest. Assuming that the character of being a Public servant contracts the autonomy of the IP, the IP might be subject to government interests. Primarily the duty of the IP is to secure the interests of the CoC and the Corporate Debtor, however the decision making power of the IP would be subject to government interest. The protection of sensitive information may come under scrutiny. The other question arises whether the decision of the court can be influenced by other provisions of acts not excluded from IBC. This creates a large loop hole with the IBC code which can challenge its Self-contained nature, especially when it lacks any provision against those pre-existing in different statutes. Lastly, when this case opens room for interpretation, the question arises is whether all liabilities of Public servants will be extended to IP. Such liabilities include, public service conduct, vicarious liability of state, service deliverance, financial and legal liabilities etc. This challenges the nature of character of an IP as visualized under the Code.

"VAISHALI KANEKAR

The grievances of the home buyers can be redressed in the NCLT under the IBC.

COURT ON ITS OWN MOTION V. GOVT OF NCT OF DELHI AND ORS.

Court	Hight Court of Delhi
Judgement Dated	March 14, 2023
Bench	Subramonium Prasad, J.
Relevant Sections	Banking Regulation Act, 1949, Sec. 25 and 35A.

Brief Background

This case involves a letter of the complainant, Sh. Vinod Kumar Nagain, which was converted into the writ petition, in a Public Interest Litigation. The Complainant, through the letter addresses the grievances of home buyers, who are availing home loans, as there is often delay in construction and delivery of possession of flats. Besides, home buyers, who haven't been given possession of their flats, are still paying monthly instalments and are unable to claim tax benefits. It is further alleged that the banks, government and builders have built a nexus against public interest, and are unaccountable to the public since builders misuse the provisions of IBC, by resorting to declaration of insolvency in order to escape payment of dues to their creditors, who include home buyers. He thereby seeks the formulation of a scheme addressing the problems of these home buyers for extending tax benefit vis-à-vis the payment of interest and principal amount of EMI. Further, it is suggested that the banks should be charged and held for the excessive delay in real estate projects. Responding to the grievances in the Counter Affidavit, the Reserve Bank of India (hereinafter, RBI) submits that the borrowers including home buyers who are facing financial constraints may approach their lending banks with requests for restructuring of their loans, as per extant norms in the master circulars. The sanctioning of loans and their subsequent recovery are de-regulated activities according to RBI directions, i.e., the Board of Directors of every bank may discharge these functions at their own discretion. The master circular on housing finance extends the liberty to each commercial bank's board of directors to frame their own guidelines for loan policies and ensure its implementation, based on principles of commercial prudence so that the housing sector receives more credit and people have more direct financing options.

Issues

1. Whether the court can hold the banks liable for the inordinate delay in Real Estate projects?

2. Whether the court can formulate a scheme, addressing the problems of the home buyers, to extend tax benefits vis-a-vis the interest payment and EMI amount?

Decision

It was held that RBI, being a regulatory body is equipped with requisite expertise to advise on and to formulate economic policies, that have a binding effect on the banking system which is backed by statutory force. It was further held that as pointed out in *Small Scale Industrial Manufacturers Association (Registered) v. Union of India* and *Peerless General Finance and Investment Co. Ltd. v. RBI*, the courts ought not to replace government expert authorities who are fully competent in the domain of economic and fiscal policy, which in this instance is the RBI. Statutory directives issued by RBI are done in exercise of powers under Sec. 21 and 35A of the Banking Regulation Act, 1949. Further, referring to the Sec. 35-A of the Banking Regulation Act, 1949, it was held that amongst performing its multifaceted role as a regulator, the RBI is also tasked with ensuring that commercial banks facilitate circulation of credit in the housing sector and that it has a well-structured regimen that sets out guidelines or framework for scheduled commercial banks to follow and implement.

The RBI can only guide the banks to frame their loan policies with the approval of their boards and advices that the policies must be within the framework/guidelines issued by the RBI. Further, it was observed that it cannot be said that it is the banks' responsibility to get the project completed and the bank cannot assume the role of the builder to complete the project. Besides, it is always open for the banks to approach the NCLT under the IBC for getting an IP appointed and to take measures to ensure that project is revived and the project is completed because the banks are also anxious to recover their money. Therefore, the Honourable court dismissed the petition as there is a proper regimen available to redress the grievances of a home buyer in the form of the remedies of NCLT in IBC as well as the Real Estate Regulatory Authority (RERA).

Comment

It was rightly held by the Hon'ble Delhi High Court that the courts should not replace government expert authorities who are fully competent in the field of economic and fiscal policy. While, the IBC is a self-

contained code, the remedies are already available for addressing the home buyers' grievances in the form of NCLT in IBC and in the Real estate Regulatory Authority.

"AYUSHI ANKITA

NCLAT PRONOUNCEMENTS

Disputed Operational Debt: Court Sets Aside CIRP Initiation and Upholds Pre-existing Disputes

YASH NACHRANI V. PARDESI CONSTRUCTION PVT. LTD. (RESPONDENT NO.1), COPPERTUN BREWING PRIVATE LTD. (RESPONDENT NO.2)

Court	National Company Law Appellate Tribunal, Principal Bench, New Delhi
Judgement Dated	2022
Bench	Justice Ashok Bhushan
Relevant Sections	IBC, 2016- Sec.8,9

Brief Background:

An appeal filed by the suspended director of Coppertun Brewing Pvt. Limited, the corporate debtor, under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC). The appeal is against one order passed by the Adjudicating Authority, which admitted the petition filed by the operational creditor, Pardesi Construction Private Limited, under Section 9 of the IBC. The order allowed the initiation of the Corporate Insolvency Resolution Process (CIRP) against the corporate debtor. Coppertun Brewing, a restaurant/micro-brewery business, rented premises from Pardesi Construction. Disputes arose due to non-compliance with lease and service agreement terms, as well as default in payment.The lease period expired, but the corporate debtor continued to occupy the premises. The corporate debtor denied liability to pay rent or service charges.Communications, arbitration notices were exchanged and a criminal complaint was filed by the debtor.The operational creditor issued a demand notice under Section 8 of the IBC.The corporate debtor denied liability based on non-fulfillment of necessary compliances by the operational creditor.The operational creditor filed a Section 9 petition, leading to the initiation of CIRP.The suspended director challenges the order, citing the absence of an admitted claim and a genuine pre-existing dispute.

Analysis:

The corporate debtor took possession of a premises on the 6th floor to operate a microbrewery/restaurant, based on the operational creditor's assurance of having all necessary approvals. However, it was later discovered that the operational creditor lacked the required permissions, including fire safety approvals, and the building did not have permission for the 6th floor. The operational creditor failed to obtain the necessary approvals and sanctions for the premises, resulting in a prolonged dispute between the parties. Despite the operational creditor's inability to fulfill the required compliances, they sent a notice to the corporate debtor to vacate the premises due to non-payment of rent. The corporate debtor responded, stating that they were unable to use the premises as intended and therefore had no obligation to make payments. Further notices and replies followed, with the corporate debtor accusing the operational creditor of misrepresentation and fraudulent inducement. The corporate debtor incurred significant expenses for equipment and suffered financial loss due to the lack of operating licenses, resulting in a counterclaim of Rs. 7 crore. The operational creditor chose to issue an arbitration notice instead of resolving the regulatory compliance issues, indicating pre-existing disputes. The corporate debtor filed a criminal complaint against the operational creditor.

The corporate debtor's mention of the absence of building sanction for the 6th floor is seen as an attempt to mislead. The corporate debtor rejected the arbitration clause and cannot now claim a pre-existing dispute. The story of disputes is believed to be created to avoid payment. The court examined the arguments and considered whether there was a pre-existing dispute and default in payment. They referred to the *Mobilox* case((MANU/SC/1196/2017)) and stated that the existence of a dispute or legal proceeding must predate the demand notice.

We now need to determine if there was a dispute regarding the dues owed by the corporate debtor to the operational creditor under the lease and license agreement (LLA) and service agreement (SA). the adjudicating authority's finding that there was a default is flawed because it did not consider that the corporate debtor never acknowledged the operational debt. The corporate debtor argues that they rented the premises to run a restaurant/microbrewery based on the operational creditor's misleading information that the necessary approvals were in place. The clauses in the LLA state that the premises have been sanctioned for commercial use, but in reality, these sanctions were not obtained, preventing the corporate debtor from

obtaining the required license for the microbrewery. Therefore, the corporate debtor contends that they are not obligated to pay license fees and service charges since they couldn't use the premises for the intended purpose.

It is important to note that the corporate debtor consistently denied any liability to pay the dues claimed by the operational creditor. This denial was communicated in various replies, including responses to the notice to vacate the premises, the notice for arbitration, and the Section 8 demand notice. These correspondences clearly indicate that both parties were in disagreement regarding the rental and service charges for the premises, and this dispute existed prior to the issuance of the Section 8 demand notice. In their reply to the Section 9 application, the corporate debtor explicitly stated that there was no enforceable debt outstanding against them. This reply constituted a clear notice of dispute. In simpler terms, the appellant argues that the service charges are not owed because the agreements are interconnected, and there are disputes regarding the services provided. The respondent claims that since the arbitration proceedings did not start due to the rejection of the arbitration clause, the dispute should not be considered. Overall, it is evident that there was a longstanding dispute between the parties regarding compliance and certificates.

Judgment

The Adjudicating Authority made a mistake by accepting the Section 9 application without considering the extensive correspondence between the Corporate Debtor and Operational Creditor, which clearly showed significant pre-existing disputes regarding compliance and certificates from competent authorities. The defense raised by the Corporate Debtor is valid and not hypothetical. In cases of disputed operational debt, the Operational Creditor cannot initiate Section 9 proceedings under the IBC. It is concluded that the Adjudicating Authority erred in admitting the Section 9 application. The impugned order initiating the CIRP, along with all subsequent orders was set aside. The Corporate Debtor is released from the burdens of CIRP and is allowed to operate independently through its board of directors immediately. This judgment maintains that the merits of the disputes are not addressed, and the Operational Creditor has the option to pursue alternative legal remedies, such as raising their claims in appropriate legal forums.

Comments

It is important to note that the objective of the IBC, as established by the Hon'ble Supreme Court, is not to serve as a debt recovery mechanism but to revive struggling Corporate Debtors. Initiation of insolvency proceedings against a Corporate Debtor by an operational creditor can only occur when no real dispute exists between the parties, which is not the case here. Prior to starting the insolvency procedure, the court emphasized the importance of an existing disagreement which should be resolved first in the Mobiflox case.

"KARTIKEYA KOTHARI

Analyzing rejected plea under sec 9 of Fossil Business Solution Pvt. Ltd

M/S. Fossil Business Solution Pvt Ltd. Vs. Bharat Sanchar Nigam Ltd.

Court	National Company Law Appellate Tribunal, Principal Bench, New Delhi
Judgement Dated	March 1, 2023
Bench	Bachu Venkat Balram Das J., Atul Chaturvedi Hon'ble Member (Technical)
Relevant Sections	IBC, 2016– Sec. 8, 9 MSME Act: Sec. 15,, Arbitration and Conciliation Act, 1996: Sec. 36

Brief Background

M/s. Fossil Business Solution Pvt. Ltd, an operational creditor, filed an application under Section 9 of the Insolvency and Bankruptcy Code against Bharat Sanchar Nigam Limited (BSNL), a government-owned telecommunication service provider. The applicant had entered into seven agreements with BSNL for various works in Sikkim and had issued invoices amounting to Rs. 17,85,88,953. BSNL made partial payments but failed to clear the remaining dues. The applicant initiated proceedings under the Micro and Small Enterprises Facilitation Council (MSEFC) and obtained an award in their favor. Despite the award, BSNL did not make the payment. The applicant filed a statutory notice under Section 8 of the IBC and demanded Rs. 14,79,43,404. BSNL made further partial payments, leaving a balance due. BSNL argued that the amount involved was below the threshold for the IBC and that the penal interest awarded by the arbitrator was not an operational debt. The applicant contended that the threshold was met, and the present petition was based on contractual dues, not the arbitral award.

Issues

Whether dispute pre existing is grounds to reject plea under sec 9 and can plea will be rejected if applicant went MSME before hand

Decision

The court examined the factual matrix of the case and acknowledged that BSNL had indeed issued seven work orders to the applicant, who had rendered the services and raised invoices accordingly. It was undisputed that BSNL had defaulted on payment of the pending invoices, leading the applicant to seek redressal through the MSEFC. The MSEFC had passed an arbitral award in favor of the applicant, which was pending enforcement in the High Court.Regarding the applicant's contention that the interest on delayed payment should be considered part of the operational debt, the court found no evidence of any covenant regarding interest in the work orders or invoices. The applicant had also not provided any documentation to establish their registration as a Micro, Small, and Medium Enterprise (MSME). Therefore, the court rejected the applicant's argument to include interest as part of the operational debt.

Based on these considerations, the court concluded that the principal outstanding amount of Rs. 85,19,796 was below the pecuniary threshold of Rs. 1 crore as specified in Section 4 of the Insolvency and Bankruptcy Code. The court also referred to the Supreme Court's observation in the "Swiss Ribbon Pvt. Ltd. V. Union of India" case, where it was stated that the IBC is not meant for mere recovery proceedings Considering the facts and circumstances of the case, the court dismissed the application filed by the applicant under Section 9 of IBC, stating that it was non-maintainable. The court did not award any costs in this matter.

Comment

As the operational debt is Rs. 85,19,796/- being the principal amount outstanding, is below the pecuniary threshold limit of Rs. 1 Crore as envisaged under Section 4 of the Code, 2016 plea under sec 9 of the code was rejected.

Section 5(6) only deals with suits or arbitration proceedings which must "relate to" one of the three sub clauses, either directly or indirectly. A "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6). Hon'ble Supreme Court in Mobilox Innovations Private Limited V. Kirusa Software Private Limited [2017] ibclaw.in 01 SC, held that the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility – The adjudicating body must deny the application if there is a genuine issue that is not created. When there is a genuine disagreement on anything, a "dispute" is said to exist between the parties that would fall within the inclusive definition contained in Section 5(6). Dues remained by the corporate debtor gave rise to this genuine dispute among the parties, also the definition of "dispute" was not exclusive in nature rather it is an inclusive one and that the case of Mobilox was not one where a suit or arbitration proceeding had been filed before receipt of Demand Notice, only in which case the dispute must "relate to" the three sub

clauses of Section 5(6). The court was entirely satisfied of the pre existence of the dispute between the parties it ruled in favor of the appellant i.e. Mobilox. In the present case scenario the dispute arose after the 1st demand notice which states that there was genuine dispute between two.thus the appeal was accepted by hon'ble court under IBC 2016 to debt owned. In our case the application to initiate CIRP under sec 9 was rejected as the court felt just to have incurred debt petitioner is filing the appeal but relying on the facts of the case there was genuine dispute arising between both the parties and rejecting the plea by petitioner was erroneous from the court.

In iValue Advisors Pvt. Ltd. V. Srinagar Banihal Expressway Ltd. (2020) ibclaw.in 369 NCLAT NCLAT held that the dispute raised by the Appellant(Operational Creditor) before the MSME was that it had dues to recover and that the Respondent had not paid. This by itself does not mean that there is a pre-existing dispute as far as the Respondent is concerned. The context of the word "dispute" in Section 18 of MSME Act takes color from Section 17 of MSME Act. It is different from the context of Section 5(6) of IBC read with Section 8 of IBC. At present, nothing is shown that there was any pre-existing dispute raised by the Respondent with regard to the services rendered by the Appellant. When this is so, only because the Appellant went to the MSME Authorities was no ground for the Adjudicating Authority to reject the Application under Section 9. Similarly mere fact as Applicant went to MSME does not make any ground to reject its plea under sec 9 of IBC to initiate CIRP as the meaning of dispute in MSME act is different from sec 5(6) of IBC.

SAHIL SALVE