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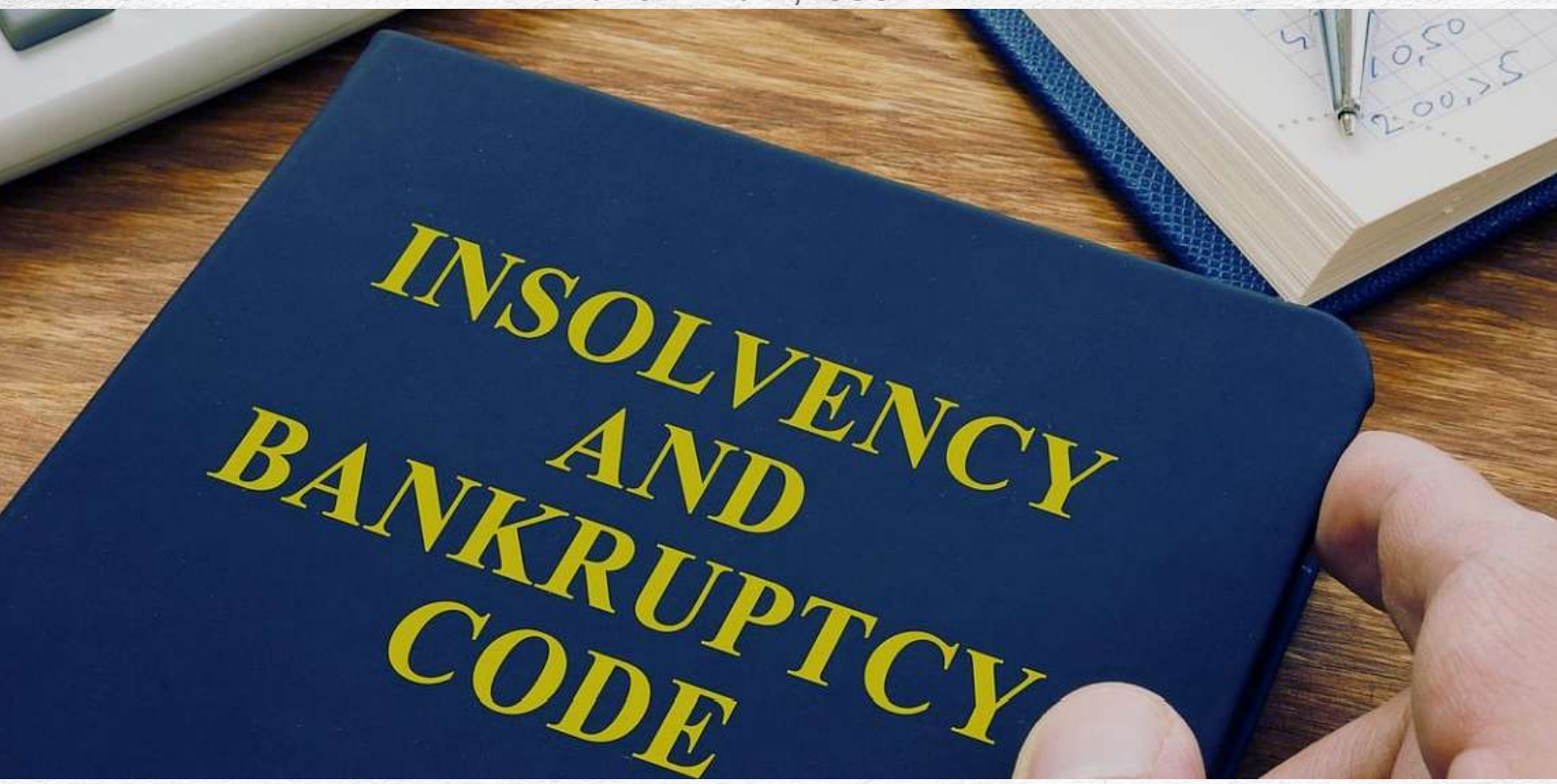

IN FOCUS: INTERIM FINANCE UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The enactment of IBC was envisioned with an intention of reviving distressed companies and ensuring that they remain as a going concern. Interim financing lies at the focal point for such measure.

As per section 5(15) of the Insolvency and Bankruptcy Code, 2016 (“Code”), "interim finance" means any financial debt raised by the resolution professional during the insolvency resolution process period. In simple words the term refers to the funds that the Resolution Professional (RP) raises during the CIRP so as to retain the going concern nature of the entity and to carry out regular expenditure required for the same, until a resolution plan is approved by the CoC and subsequently by the NCLT.

WHAT'S INSIDE THIS ISSUE:

Need for such financing.

While the CIRP is under process, the RP has to ensure the going concern status of the corporate debtor. While doing so, the RP has to make certain payments including for appointments made under the Code and payments which may be critical for carrying out the corporate debtor as a going concern eg payment to professionals appointed (valuers, RPs fees etc), payment to the workmen, payment to the security personnel, cost of insurance of corporate debtor etc, which are vital and cannot be kept on hold until the approval of the resolution plan.

It is only logical to assume that the cash flows of the corporate debtor may have dried up completely or may be insufficient to make such outlays. To make such payments, the RP would require funds.

What is the priority of repayment of interim fund under waterfall mechanism?

As per section 53 read with section 5(13), “the amount of any interim finance and the costs incurred in raising such finance” being a part of insolvency resolution process cost takes the first priority under sec 53 (1) (a). This is true for both the repayment of principal as well as payment of interest on interim financing. Both of these qualify, along with other insolvency resolution and bankruptcy process costs for the first layer of payment to be made in the waterfall, in priority to any payments to any other stakeholders.

Major change through the 2018 Amendment in IBBI (Liquidation Process) Regulations, 2016

The Insolvency and Bankruptcy Board of India (‘IBBI) vide Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2018 dated 28th March 2018, has provided, that wef 1st April 2018, liquidation cost includes interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is earlier.
This implies that interest on the interim finance till the date of order of liquidation shall form part of the CIRP cost, and the interest on the funds for a period of 12 months or period of liquidation (that is, period from liquidation commencement order date till the actual realisation of the assets to pay off the financier), whichever is lower, shall now form a part of the liquidation cost.

INSOLVENCY TRIVIA

1)What is the priority of payment to workmen dues in case of liquidation?

a) Pari passu with secured creditors and employees
b) Pari passu with secured creditors and insolvency costs
c) Pari passu with secured creditors
d) Pari passu with financial creditors

2)Board shall within _____ days, after due process as it deems fit grant certificate of Registration to the Insolvency Professional.

a) 60
b) 45
c) 30
d) 15

3) The Governing board of Insolvency Professional agencies shall have minimum ..... directors.

a) Three
b) Four
c) Five
d) Seven

Asset classification

Interim finance disbursed by the bank during the CIRP period shall be classified as a 'standard asset' as under:

a. Interim finance is disbursed during CIRP, and resolution plan approved – Interim finance including interest accrued and the costs incurred in raising such finance shall be treated as a standard asset till three months after the appointed date for payment of the interim finance as per the approved resolution plan.

b. Interim finance is disbursed during CIRP, and the corporate debtor is ordered for liquidation by the AA - Interim finance including interest accrued and the costs incurred in raising such finance shall be treated as a standard asset till completion of CIRP period.

Conclusion:

Interim finance is one of the essential requirement for any company under resolution to be maintained as ' a going concern'. Availability of credit for running these distressed companies would ultimately help in achieving the objectives of the Code especially keeping the corporate debtor as ongoing and maximising its value.

LATEST JUDGEMENTS AND UPDATES

SUPREME COURT JUDGEMENTS

1. Jurisdiction of the AA does not cover giving directions to the parties for the settlement of the debts.

The Supreme Court in the case of E. S. Krishnamurthy & Ors. v. M/s Bharat Hi-Tech Builders Pvt. Ltd. (Civil Appeal No. 3325 of 2020) has held that the scope of the NCLT and the NCLAT's jurisdiction under Section 7 of the IBC is only limited to either admitting, or rejecting a petition filed thereunder and hence, it was observed that the Adjudicating Authority's (AA) decision to dispose of the petition, and directing the parties therein to settle the disputed debts within the prescribed time limits is ultra-vires.

An appeal was filed against the order of the NCLAT which upheld the NCLT's disposition of a petition filed under Section 7 of the IBC while directing the Corporate Debtor (CD) to arrive at a settlement within 3 months from the passing of that order.

ANSWER KEY FOR THE PREVIOUS QUIZ

1.(a)**Financial Creditor and Operational Creditor**

2.(a) **Rs. 1 lakh extendable to Rs. 1 crore**

3.(c) **45 days from the date of receipt of order of Adjudicating Authority**

The Appellants (Creditors) herein argued that the AA had acted beyond their jurisdictional scope, as Section 7 only allows the admission or rejection of the petition; and that the same is bound to be admitted upon satisfaction of the AA with regards to the existence of a default. Moreover, the Appellate Authority's observation pointing out that the petition has been disposed by the AA at a pre-admission stage is a complete error as no such option is available to the NCLT under the provisions of the IBC.

The Respondents countered the claims and stated that the Appellants have utilized the process established under the IBC to facilitate their recovery, which is contrary to the IBC's primary objective of ensuring revival, resolution and going-concern of the CD. Moreover, it was also highlighted about the positive outcomes arising out of the settlements, and therefore the CD shall be refrained from being pushed into CIRP.

The Supreme Court referred to the Innoventive Industries case wherein it has been held that the ambit of Section 7 is only limited to determining the occurrence of 'default'. On such basis, the Apex Court held that the AA had outrightly acted beyond their jurisdiction, and thereby allowed the appeal presented to them, and set aside the impugned order of the NCLAT.

HIGH COURT JUDGEMENTS

1.Moratorium under Section 96 will not impede the wilful defaulter proceedings.

Calcutta High Court in the case of Adarsh Jhunjhunwala v. State Bank of India (WPO 1548 of 2021) held that the scope of moratorium under the Corporate Insolvency Resolution Process (CIRP) and individual insolvency is very different and the principles of both should not be mixed. The Court held that the purpose of the moratorium under CIRP is to protect the Corporate Debtor (CD) from unnecessary litigations and to increase the value of the CD whereas the objective of the moratorium in the case of individual insolvency is to facilitate repayment/ resolution of the debts to the creditors.

A writ petition was filed by the Petitioner who is the erstwhile director of the CD and against whom a petition under Section 95 of the IBC has been admitted. The Petitioner is challenging the order passed by the review committee of the bank declaring him as the wilful defaulter. The Petitioner contends that the order passed by the review committee should stay in light of the moratorium under Section 96 of the Code. He further referred to the case of Ayan Mallick & Anr. v. SBI (WPO No. 23 of 2021) and stated that if the order of the review committee is given effect then it will defeat the purpose of the Code.

The Respondent, on the contrary, contended that the proceedings under wilful defaulter guidelines are not covered under Section 96 of the Code as the latter only operates against the 'debts' and hence, will not be given the same effect as is given to the moratorium under Section 14.Further, the reliance was placed on the case of SBI v. V. Ramakrishnan & Ors.

((2018) 17 SCC 394) which had differentiated between the moratoriums applicable under Section 14 and Section 96 of the IBC. It was also stated that the proceedings for wilful defaulter have nothing to do with the recovery of debts and for the same reference was made to the case of Suresh Kumar Patni & Ors. v. SBI.

The High Court after hearing both the parties observed that the contention of the Petitioner stating the wilful defaulter proceedings as barred is fallacious and further observed that the purpose of both the law is different and hence, there exists no bar in the in proceeding parallelly under both the law. The Court further went on to check the scope of moratorium under both the sections and concluded that the moratorium under Section 14 applies to the CD and the purpose for the same is to revive the CD whereas moratorium under Section 96 is applied to the debts and is applied to facilitate the repayment of the debts.

Lastly, the Court observed that to stay wilful defaulter proceedings, criminal proceedings or quasi-criminal proceedings will defeat the object and purpose of the Code and hence, the contentions of the Petitioner was rejected and accordingly the petition was dismissed.

2.New claims cannot be filed basing the reopening of the returns filed in the previous year by the IT Department after approval of the Resolution Plan.

Bombay High Court- Nagpur Bench in the matter of Murli Industries Ltd. v Assistant Commissioner of Income Tax and Ors. (Writ Petition No. 2948 of 2021) has held that the claims which were not part of the resolution plan including the dues of statutory authority cannot be recovered once the resolution plan is approved by the Adjudicating Authority (AA).

The Petitioner filed the return for income declaring a loss of Rs. 2,80,30,74,365 for the A.Y. 2014, after which the scrutiny was done and order was passed by the appropriate authority in the year 2016. The Respondents under Section 148 of the Income Tax Act reopened the completed assessment of the Petitioner by issuing notice which was challenged in the present case. The petitioner contended the said notices were in contravention to the decision of the Supreme Court in the Ghanashyam Mishra case as the Respondents being the creditors had already submitted the claim for Rs. 50,23,770/- in response to the public announcement made by the RP when the petitioner was undergoing CIRP. The Resolution Applicant accordingly submitted its plan which was approved by the AA and Rs. 4,00,000/- was paid to the Income Tax Department as the settlement amount.

Thus, the main contention of the Petitioner is that the Respondents cannot issue notices after the approval of the Resolution Plan by the AA. The Respondents, on the other hand, contended that the notices issued under Section 148 of the Act were on the ground that Petitioner escaped the assessment for the year 2014-15 and was thus, called upon to submit the return for the same.

Further, it was submitted that the claim was not crystallized at the time of approval of the resolution plan and thus, could not have been claimed before.

The High Court after hearing the parties referred to the case of Ghanashyam Mishra in which the Supreme Court had categorically barred the filing of the subsequent claims after approval of the Resolution Plan by the AA as this would undermine the Resolution Applicant and further held that once the plan is approved by AA, it becomes binding on all the stakeholders including statutory bodies.

The Court in the present case relied upon the above-mentioned judgement and held that claims in respect of dues arising under any law, including Income Tax Act, will come within the ambit of operational debt and thus, all claims made after approval of resolution plan will stand extinguished.

NCLAT JUDGEMENTS

1.IBC cannot be used to resolve the bills of contract as it's not a recovery law.

NCLAT in the case of Ria Constructions Ltd. v. Blessings Resorts Pvt. Ltd. (Company Appeal (AT) (Ins) No. 1056 of 2021) has observed that the IBC cannot be used to resolve the bills of the contractor which are not admitted as the proceedings under the Code is not a recovery proceeding.

The Appellant has filed an appeal challenging the rejection of the application filed under Section 9 of the Code. Brief facts of the case are such that the Appellant and the Corporate Debtor (CD) had an agreement in the year 2013 for carrying out some construction work. The Appellant had given some money to the CD during the pendency of the contract, on which the CD had defaulted, against which the application was filed under Section 9. Further, a civil suit was filed by the CD making a counterclaim against the OC.

The Respondent further stated that the bills upon which the case of the Appellant is based are unverified and unauthenticated. Further, it was also contended that the contract upon which the Appellant is basing its claim is terminated long back. Lastly, the Respondent submitted that the application filed not should be admitted as there exist pre-existing disputes between the parties.

The Adjudicating Authority observed that the email exchanges between the party make it clear that there was a delay of 1.5 years from the scheduled completion of the project and thus, this will constitute a pre-existing dispute. The NCLT further referred to the case of Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd. (Civil Appeal No. 9405 of 2017) in which it was held that if there exists a pre-existing dispute between the parties, the application under Section 9 of the Code cannot be admitted.

Lastly, the AA observed that the Appellant was trying to use the IBC forum as a reco-

-very forum which is not the intent of the legislation. In the same line, it was also observed that the IBC does not provide for resolving the bills of the contractor which were not admitted. Hence, on all these grounds the appeal was rejected and the order of the NCLT was upheld.

2.Balance Sheet signing shall be acknowledgment of debt under Section 18 of the Limitation Act

Since the inception of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) the question of acknowledgement of debt under Section 18 of the Limitation Act and its applicability on IBC has been a contentious issue. The same question once again came up in the matter of G.S. Buildtech Pvt. Ltd. Vs. Ardee Infrastructure Venture Pvt. Ltd. wherein NCLAT held that Balance sheet signing date is date of acknowledgment under Section 18 of the Limitation Act, 1963.

In the instant case an appeal has been preferred under Section 61 of the Code against the impugned order of the Adjudicating Authority who denied the maintainability of petition under Section 7 of the Code.

Briefly, AA gave two reasons for the rejection of such petition. Firstly, the last repayment having been made on 15.03.2016 and the Application under Section 7 having been filed on 20.03.2020 i.e. beyond three years, Application is barred by time. Secondly, the Appellant/ Applicant does not come within the definition of Financial Creditor since there is no document to show any interest has ever been paid to the Applicant by the Corporate Debtor in lieu of the amount.

The Appellate tribunal after the perusal of the arguments put forth stated that the Balance Sheet for the Financial Year 2016-17 having been signed on 01.09.2017 and the Application having been filed on 20.03.2020, it is well within three years' period from acknowledgment of debt as claimed by the Appellant. It is now well settled that acknowledgment in the Balance Sheet is sufficient acknowledgment under Section 18 of the Limitation Act, 1963. The Tribunal also relied on the ruling of the Supreme Court in the matter of *Asset Reconstruction Company (India) Limited vs. Bishal Jaiswal and Anr.*

Accordingly, the NCALT set aside the order of the Adjudicating Authority and remit the matter to the Adjudicating Authority for fresh consideration of the Application under Section 7 after issuing fresh notice to the Corporate Debtor and after giving opportunity to the Corporate Debtor also.

3.Listing Fees are Regulatory Dues

In the matter of BSE Ltd. Vs. KCCL Plastic Ltd., the NCLAT decided whether the Listing Fees are operational dues or regulatory dues. The present application is filed against the impugned of the Adjudicating Authority, wherein the AA rejected the application of appellant filed under Section 9 of the Insolvency and Bankruptcy Code, 2016.

The Appellant (Operational Creditor) is a Company incorporated under the provisions of the Companies Act, 1956 and is a recognized stock exchange duly recognised .

by the Central Government/Securities and Exchange Board of India ("SEBI") under the provisions of the Securities Contracts (Regulations) Act, 1956 ("SCRA")

A Listing Agreement was executed between the Appellant and the Respondent As per the Listing Agreement, more particularly Clause 38 of the said Agreement, in clear and unequivocal terms casts an obligation upon the Respondent to pay the requisite Annual Listing fees ("ALF") on or before the 30th day of April, every year. the Respondent, even while being listed on the Appellant's trading platform, failed to make any further payments towards the obligatory ALF.

Further the Appellant raised several invoices periodically calling upon the Respondent to pay to the Appellant is compliance with the clauses of the Listing Agreement and listing requirements, the ALF with arrears and such invoices that were duly served upon the Respondent.

The Appellant stated that Adjudicating Authority had made error in its impugned order and failed to appreciate that failure to pay ALF by itself constitutes a continuous cause of action and is intrinsically linked to the services enabled and provided by Appellant.

Observation

NCLAT after hearing the arguments stated that AA was right in rejecting the application of the Appellant as there was no valid agreement between the parties. Further, the Appellate tribunal stated that Listing Fees comes under the ambit of 'Regulatory dues' which SEBI is entitled to recover. The dues so said are not 'Operational Dues' but 'Regulatory Dues'. The Insolvency Law Committee suggests that Regulatory Dues are not to be recovered under 'Operational Debt'.
Hence, the appeal was dismissed.

NCLT JUDGEMENTS

1.Withdrawal application filed before constitution of the COC will only require approval from the NCLT.

Mumbai NCLT in the case of Ask Energy Solutions Private Limited v. Shri Saikrupa Sugar & Allied Industries Limited (I.A. 1990 and 2440 of 2021 in C.P. (IB) 2390/MB/2019) has observed that even if the petition for initiating CIRP was admitted by the NCLT but the application for withdrawal was filed before the constitution of the COC, the NCLT has the right to allow the withdrawal application without requiring to satisfy the condition requiring 90% of the approval from the COC.

As per the facts of the present case, the IRP had filed for withdrawal of the application and had received the admission order from the NCLT prior to the constitution of the COC. Post which the IRP made a public announcement for the invitation of the claims.

The issue which the AA framed was whether the withdrawal application under Section 12A of IBC will be allowed or not?

The AA observed that the IRP was informed about the settlement between the parties &

he constituted the COC post-filing of the withdrawal application. It further referred to the case of Swiss Ribbons Pvt. Ltd. v. Union of India (WP (Civil) 99 of 2018) wherein the Apex Court had observed that if the application for withdrawal is filed before the constitution of the COC, then the NCLT has the power to allow for such withdrawal as per Rule 11 of the NCLT Rules, 2016.

The AA further observed that the mandate requirement of 90% of the approval from the COC will not be required in this case as the withdrawal application was already been filed before the constitution of the COC.

2. Inter-Corporate Deposits will be considered as Financial Debts if there is an interest component attached to it.

NCLT in the case of Seaview Merchants Private Limited v. Ashish Vincom Private Limited (C.P. (IB) No. 2011/KB/2019) has held that the inter-corporate deposits will not be considered as a financial deposit until it has an interest component attached to it and hence, will not come under the definition of financial debt.

The petition is filed by the Applicant who claims to be a financial creditor (FC). The Petitioner had provided inter-corporate deposits to the Corporate Debtor (CD) to the tune of Rs 20 Lakhs. The FC contended that the amount was granted as unsecured loans along with the interest @12% and further stated that the TDS was deducted on interest. The Petitioner submitted that the CD had time and again acknowledge the debts by way of acknowledgement in the balance sheet and had defaulted upon the same.

The CD contended that the FC had granted the loans in violation of Section 186(2) of the Companies Act, 2013. It further submitted that the FC was not able to prove that the TDS deducted was on the interest and thus, it cannot be sufficient ground to conclude that the TDS deducted was a financial debt.

The AA concluded that the inter-corporate deposits will be the financial debt, however, in a transaction of a deposit of money, the mere transfer will not make a deposit a financial debt, unless it is a financial contract setting out the terms of the financial debt between the parties.

Hence, the AA observed that the FC was not able to prove any existence of the financial contract between the parties including the rate of interest charged from the CD. Thus, the petition was rejected and the Petitioner was directed to pursue any other remedy available.

3.Financial Contract under I&B (Application to Adjudicating Authority) Rules, 2016 is a mandatory requirement

In the matter of Karmal Garment Exports vs. M/s. Jai India Weaving Mills Pvt. Ltd. the petition has been filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for the initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor (CD) i.e Jai India Weaving Mills Pvt. Ltd.

The Adjudicating Authority (AA) after hearing the parties, stated that the onus is upon the Financial Creditor while filing the petition for initiation of CIRP to place on record before the AA, the Financial Contract and demonstrate without any ambiguity from the financial contract, the amount disbursed as per the loan/debt, the tenure of the loan/debt, the interest payable and the conditions of repayment.

It would be pertinent to represent the definition of “financial contract” which is provided under Rule 3 (d) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AAA Rules) which says that “a contract between a corporate debtor and a financial creditor setting out the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment.”

Whereas, in the instant matter there was no ‘financial contract’ which was placed on record before the AA. Further, the AA held that the petitioner only provided the ledger of the Financial Creditor maintained in the books of accounts of Corporate Debtor under Part V of the application under Section 7 of the Code read with Rule 4 of the AAA Rules. Hence the AA, finally held that due to the absence such a contract between the parties the petition stands dismissed.

4. Suspension of powers of the board shall not mean the suspension of their duties and responsibilities too.

In the matter of Wittur Elevator Components India Pvt. Ltd. Vs. Axiomata Elevators Pvt. Ltd., the NCLT Kochi, interpreted the provisions of Section 17 of the Insolvency and Bankruptcy Code. The provisions specifies that the power of the board shall be suspended during the period of Corporate Insolvency Resolution Process however, that does not imply that duties and responsibilities of the board shall also be suspended during the said period.

In the present matter the Corporate Debtor has alleged that the Resolution Professional(Respondent) has failed to take over the affairs of the Corporate Debtor and to immediately take over custody and control of the assets without taking necessary steps to ascertain the financial position of the Corporate Debtor. On the other hand the Resolution Professional in his reply stated that he has taken symbolic possession of the Registered Office and records of the Corporate Debtor. For the purpose of the resolution, the control and custody of the assets from the corporate debtor is taken over by the resolution professional as per Section 18(f) of the Insolvency and Bankruptcy Code, 2016.

The Adjudicating Authority on hearing the arguments of the parties stated that the corporate debtor has interpreted the provisions of the Section 17 of the Code. As per the tribunal the provisions of the Section 17 are unambiguous to the effect that the suspension of powers of the board of directors and not their duties and responsibilities. The Tribunal stated stated

that *"the Board is fastened with the responsibility of running and managing the company's affairs. If the powers of the board are suspended and the management of the affairs of the Corporate Debtor vests with the Interim Resolution Professional after his appointment, then the responsibility also lies with the Interim Resolution Professional. The suspension of the powers of the Board of Directors means suspension of the role of directors, and responsibilities emanating from such role."*

Further, Section 18 clearly mandates the power of the RP to take control and custody of any property which the Corporate Debtor has complete ownership. This power of the Resolution Professional extends to properties that are part of the court proceedings.

However, in the present matter even though the RP is empowered to take possession of the Registered Office and records of the Corporate Debtor, he has taken only symbolic possession of the same and allowed the suspended Directors to enjoy for their benefits.

Several meeting and agendas were conducted by the Applicants themselves without the approval of the RP. Further, on verification of records of this case by the tribunal it is seen that only one meeting of Committee of Creditors took place with the presence of Resolution Professional, and without making any endeavour for inviting Expression of Interest, the CoC unanimously resolved to liquidate the Corporate Debtor. This exercise is against the scheme and mandate of the Code.

The Tribunal after the perusal of the Application stated that RP has called for xpression of Interest (EoI) and without following the mandates, accepted the approval of a CoC member to liquidate the Corporate Debtor and file this application hurriedly, this application for liquidation cannot be entertained now. The Resolution Professional is allowed to continue with the CIRP from the stage of reconstitution of CoC and proceed with the CIRP as per the Regulations.

5.Whether Share Purchase agreement with Put Option can be termed as a financial debt?

In the matter of Hubtown Limited vs GVFL Trustee Company Pvt. Ltd., NCLT Mumbai whether the share purchase with Put Option can be considered as a debt which is disbursed against the consideration of time value of money or not.

In the instant case FL Trustee Company Pvt Ltd (GVFL) is an Applicant who have filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process against Hubtown Limited for a debt by way of equity investment in shares of Hubtown Bus Terminal (Mehsana) Pvt Ltd for a total amount of Rs.4,30,54,200/- as principal and Rs.9,96,95,800/- as Internal Rate of Return (IRR) calculated at 26% of the principal up to 31.08.2018.

As per the pleadings of the petitioner there is a default under Section 7 of IBC, 2016 as its "put option" was not entertained when the

said demand notice dated 02.01.2018 was sent to the Respondent M/s. Hubtown Limited demanding exit by way of “put option”.

The NCLT on the perusal of the application stated that “whether the claim of GVFL as a Shareholder of HBT Mehsana in exercise of its ‘put option’ tantamount to a financial debt.” The Adjudicating Authority stated that a shareholder is different from a lender. The shareholder undertakes the risk by investing in shares and derives its return by way of profits in the form of dividends and appreciation in the value of shareholding, i.e., capital gains. In contrast, the Lender gives loans for which the payment is by way of Interest.

As per the Share Subscription and Shareholders Agreement(SSA), GVFL invested in HBT Mehsana by purchasing the shares of ILFS group. This cannot be termed as an investment of GVFL by way of a loan. The money paid by GVFL to acquire the share of HBT Mehsana cannot be construed as a consideration for time value of money and it was solely for the purchase of shares of HBT Mehsana held by ILFS group to become a shareholder in the Company. Equity is not a debt and as such any contract for acquisition of shareholding in a body corporate can never result in the formation of a debt. Hence, the maintainability of Section 7 application was not found.

6.Ngaitlang Dhar Vs. Panna Pragati Infrastructure Pvt. Ltd. & Ors.

An application was filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) for initiation of CIRP in respect of Meghalaya Infratech Ltd. (“the Corporate Debtor”) by the Allahabad Bank (“the Allahabad Bank”). The NCLT admitted the petition and the CIRP was initiated the Corporate Debtor.

Four Resolution Applicants submitted their Resolution Plans. In the CoC meeting, the appellant Ngaitlang Dhar emerged as H1 bidder, whereas Mr. Abhishek Agarwal emerged as H2 bidder. The CoC, with a 100% voting share, approved the Resolution Plan of the appellant Ngaitlang Dhar (H1 bidder), which was further approved by the NCLT vide order

Respondent No.1 in the present matter contended in the CoC meeting to file a revised resolution plan within two days. Respondent No.1filed an I.A before the Adjudicating Authority to direct Resolution Professional to take their revised plan on record. However, the AA rejected the application filed by such respondent.

The Resolution Professional thereafter filed an I.A. seeking approval to the Resolution Plan submitted by the appellant Ngaitlang Dhar. The said I.A. was allowed by the NCLT. The order of the NCLT came to be challenged before the NCLAT by way of aforesaid Company Appeal by the respondent No.1 i.e. PPIPL.The NCLAT allowed the appeal of such Respodent. Aggrieved by such action the appellant filed an application to the Hon’ble Supreme Court.

Contentions of the Appellant

Appellant contended that NCLAT erred in this matter and failed to take into account the commercial wisdom of the CoC. Further, appellant stated that RP has provided equal opportunity to all the prospective resolution applicants and the respondent no.1 failed to submit its revised plan on the stipulated time.Appellant further submits that the Resolution Plan of Ngaitlang Dhar now stands implemented, inasmuch as the dues of all the Banks (financial creditors) have been repaid and now the Corporate Debtor, i.e., Meghalaya Infratech Ltd. is an ongoing concern.

Contentions of the Respondent

On the other hand, the Respondent stated that there was irregularity on the part of RP. The revised plan was submitted within two days and the same was accepted by the RP to be placed on record.Further Respondent stated that though the final decision of the CoC would not be challenged on the ground that the 'commercial wisdom' of the CoC should not be interfered with, it is only the process of decision making, which can be challenged if there is any material irregularity in the said proceedings.

Decision

Supreme Court stated that it is trite law that 'commercial wisdom' of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the processes within the timelines prescribed by the IBC. It has been consistently held that it is not open to the Adjudicating Authority (the NCLT) or the Appellate Authority (the NCLAT) to take into consideration any other factor other than the one specified in Section 30(2) or Section 61(3) of the IBC.

This has been reiterated in a catena of case of the Supreme Court itself.

However, Supreme Court did not any irregularity in this matter. Further the apex court stated that if the CoC would have permitted the PPIPL to participate in the process, despite it assuring the other three prospective Resolution Applicants in its meeting held on 1112th February, 2020, that the absentee prospective Resolution Applicant (PPIPL) would be excluded from participation, it could have been said to be an irregularity in the procedure followed.

When the NCLT itself provided an extension of 90 days then there was no need of hastingly approve the plan of H1 Bidder without taking on record the revised resolution plan of the Respondent.

Hence, the appeal was dismissed.

LATEST NEWS AND UPDATES

Application for insolvency filed against Reliance Capital Ltd.

Recently, an application has been filed for the initiation of the application of Corporate Insolvency Resolution Process (CIRP) against Reliance Capital Ltd. under Section 227 r/w Section 239(2)(zk) of the Code r/w Rules 5 & 6 of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019. The application has been filed at the Mumbai Bench of NCLT.

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