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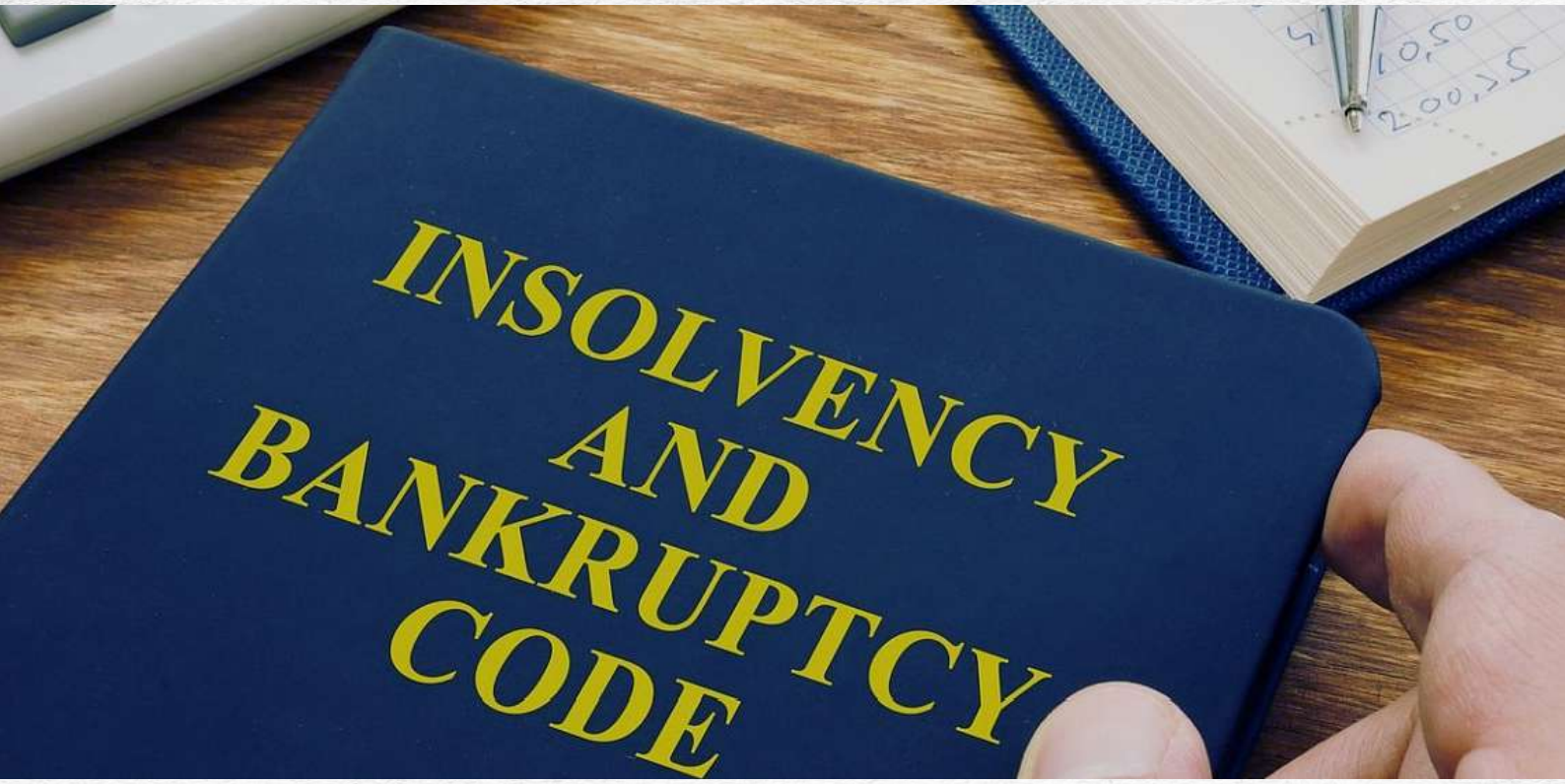

DECREE-HOLDERS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The issue regarding the decree-holders having unenforceable rights as creditors under the Insolvency and Bankruptcy Code, 2016 ("IBC"/"Code") needs some light by the legislature or the Apex Court in terms of their participation under the Code. IBC which is a resolution law for maximising the value of the Corporate Person faces the brunt of recovery when it comes to decree-holders enforcing their rights under the Code.

The dilemma arises from the fact that definition of 'creditor' as per Section 3(10) of the IBC includes a decree-holder, however for putting into effect the provisions of the Code relating to corporate person, a person needs to be a Financial Creditor ("FC") or an Operational Creditor ("OC") or the Corporate Debtor ("CD") which nowhere include decree-holders.

WHAT'S INSIDE THIS ISSUE:

Thus, their plight is almost similar to a lion with no jaws as they have been recognised as creditors, however can't exercise their rights as the Code only identifies between two types of creditors as stated above and them falling nowhere.

Various NCLTs and the NCLAT having diverse opinions have made their observations on this aspect, however, there is no binding precedent by the Supreme Court or clarification from the legislature or the regulator as to what treatment is to be given to these creditors. In the case of Digamber Bhondwe v. JM Financial Asset Reconstruction Company Limited, the NCLAT had observed that the definition of the FC and OC doesn't include a decree-holder to initiate the application under the Code. Further, the NCLT in M/s Biogenetic Drugs Private Limited v. M/s Themis Medicare Limited referred to the various decisions of the NCLAT and had observed that the decree-holder will not fall within any of the class of creditors defined under the Code and thus, cannot initiate a CIRP against the CD. It further observed that the IBC cannot be used as a mechanism to enforce a decree as the same will lead to recovery and not resolution.

Contrary to the above-laid principle, NCLAT in the case of M/s Urgo Capital Limited v. M/s Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd, had observed that any application initiated under the Code by the decree-holder cannot be rejected on the ground of it not being filed for the execution before a civil court. Also, the same Appellate Tribunal in Ashok Agarwal v. Amitex Polymers Pvt. Ltd. had considered the decree-holder as an OC considering the fact that the dues for which the decree was passed were w.r.t. non-payment for the provision of goods.

Hence, considering the polarity of opinions, the issue requires immediate consideration and clarification from the legislature or the higher judiciary or the regulator as the position of decree-holders under the Code is undefined. However, the author believes that the issue can be best resolved by taking into consideration the nature of the claim and facts and circumstances of the case, provided the objective of resolution and reorganisation over recovery is given paramount importance during the adjudication of the matter. The suggestion holds ground when Regulation 7, Regulation 8 or Regulation 9A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are taken into consideration which provides for the OC and the FC to provide for the proof of claims by attaching relevant documents

INSOLVENCY TRIVIA

1 Who shall bear the cost of proving the claims under the liquidation process?

a) Claimant
b) Liquidator
c) Corporate Debtor
d) Creditors

2)What is the available time period with the liquidator for verification of claims?

a) within 7 days from the last date for receipt of claims
b) within 15 days from the last date for receipt of claims
c) within 30 days from the last date for receipt of claims
d)within 60 days from the last date for receipt of claims

3) In which bank shall the liquidator open a bank account of the corporate debtor under the liquidation process?

a) Any Bank
b) Any Commercial Bank
c) Any Scheduled Bank
d) Any Nationalized Bank

4)Disciplinary Committee shall endeavour to dispose of the show-cause notice on an Insolvency Professional within a period of _____ months of the assignments.

a) 3
b) 9
c) 6
d) 12

which also includes an order of the court or tribunal adjudicating upon the non-payment of dues by the CD. Thus, a holistic approach towards the nature and origin of the claim could best resolve the plight of the decree-holders as creditors under the Code.

LATEST JUDGEMENTS AND NEWS

SUPREME COURT JUDGEMENTS

1.Section 29A(h) requires guarantee that needs to be invoked along with the CIRP against the CD.

The Hon'ble Supreme Court in the case of Bank of Baroda & Anr. v. MBL Infrastructures Limited & Ors. (Civil Appeal No. 8411 of 2019) discussed the legality of Section 29A(h) of the Code.

The Appellant in the present case is challenging the eligibility of the Resolution Applicant (RA) on the basis of its liability existing as a guarantor as per the unamended Section 29A(h) which was prevailing on the day of the application and has also challenged the approval of the resolution plan by the AA.

The Respondent, on the contrary, argued that since the decision of approving the resolution plan was the commercial decision of the COC, the same cannot be challenged. It was also argued that the RA was not ineligible to submit the resolution plan as the provision of Section 29A(h) requires an invocation of guarantee against the guarantor along with the pendency of the insolvency proceedings against the CD, which was not invoked in the present case.

The Apex Court discussed the objective of the said section which is to avoid unwarranted elements entering the resolution process and prevent the entry of certain categories of people who are not in the position to lend credence to the resolution process because of their disqualifications. It further observed that the scope of clause (h) of Section 29A covers the ineligible guarantor against whom the guarantee has been invoked by the creditor along with the requirement of admission of CIRP proceedings against the CD in whose favour the guarantee was given. Hence, both the requirement for making the guarantor ineligible was satisfied and thus, the RA was held to be ineligible to submit the resolution plan. However, the Court took notice of the fact that the Respondent had infused the money into the CD and had made it run as a going concern, thus, reversing the decision based on eligibility will affect the interest of the shareholders and employees.

ANSWER KEY FOR THE PREVIOUS QUIZ

1.(C) **Pari passu with secured creditors and employees**
2.(A) **60**
3.(D) **Seven**

Further, on the issue of the RA earlier eligible and later ineligible, the Court observed that if the eligibility of the RA changes by the operation of law which then continues till the plan is been approved by the COC and later by the AA, then the subsequently amended provision shall govern the eligibility of the RA to submit the resolution plan.

HIGH COURT JUDGEMENTS

1.Effect of moratorium over proceeding under Section 138 of NI Act

In the matter of Mr. A. R Asaithambhee vs S. Thangavel, the petition is filed before the Hon'ble High Court of Madras, to quash the proceedings initiated by the Respondent under Section 138 of the Negotiable Instruments Act, 1882.

Facts of the Case:

In the present case the petitioners are the directors of the company, and in charge of the day to day affairs of the company. They borrowed an amount of Rs.27,00,000/- from the complainant in the year 2016 and issued cheques in the year 2018 i.e., on 19.04.2018. When the cheques were presented for collection the same were dishonoured.

Contentions of the Petitioner:

The petitioner submitted that the present petition is not maintainable against them as the insolvency proceedings i.e Corporate Insolvency Resolution Process was initiated against the company and the moratorium was declared under Section 13 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code). The complaint under Section 138 of Negotiable Instrument Act is filed after the declaration of Moratorium by the Adjudicating Authority.

It was further contended that as per the provisions of Section 17 of the Code, the powers of the board of directors or the partners of the corporate debtor shall stand suspended and be exercised by the interim resolution professional only. Similarly, Section 33 of the Insolvency and Bankruptcy Code, 2016 makes it clear that once the order of liquidation is passed and such order shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor.

Contentions of the Respondent:

The respondents in their arguments submitted that the cheques in question were issued in the year 2016. Even the Petition filed before this Court to quash the proceedings itself indicate that the cheque was issued prior to the Corporate Insolvency Resolution process. Hence, submitted that bar under Section 14 of the Code, 2016 will not apply.

Further, the respondent stated even if moratorium is there against the company, same shall not be applicable on the promoters or directors of the company

Decision of the Hon'ble High Court:

While quoting the judgement of the Hon'ble Supreme Court in *P. Mohanraj and*

Others vs. Shah Brothers Ispat Pvt. Ltd., [2021 SCC Online SC 152] wherein the NCLAT in this matter held that the moratorium effect will subsist on the corporate debtor (company) however, the promoters or directors of the company cannot avail the benefit of moratorium under IBC.

NCLAT Judgements

1.Key observations from 63 Moons Technologies Limited v. Administrator, Dewan Housing Finance Corporation Limited:

1.The recoveries out of avoidance transaction, if any, should go to the creditors of the Corporate Debtor and not to the resolution applicant in the manner laid down under Section 53 of the Code.

2.COC under the garb of commercial wisdom cannot decide anything which is in contrast with the explicit provisions given under the IBC. Thus, any decision of the COC approving the resolution plan wherein the benefits of the recoveries from avoidance transactions is given to the resolution applicant in exchange for an increased upfront payment is in contrast to the provision of the law.

3.The absence of similar provision like Regulation 37A of the Liquidation Regulations in the CIRP Regulations providing for NRRA suggests the very fact that the recoveries from avoidance transactions cannot be transferred to a resolution applicant in the CIRP process.

4.The decision of the COC providing for benefits to the resolution applicant of the avoidance transactions is an unjust enrichment to the SRA at the cost of the creditors. Also, the same is vitiated by illegalities and material irregularities and thus, can't be pursued by the COC on the pretext of their commercial wisdom. Hence, the COC cannot incorporate any term in the resolution plan which is contrary to the law or which makes the resolution plan otherwise illegal.

5.If few members of a class represented through ARs challenge the process, then they cannot be deprived of making a challenge, even if the class as a whole has approved a particular resolution, on account of being estopped as it is presumed that the party had no choice but to act in a particular manner to avoid the risk of being out of the fray. However, if it is proved otherwise that the members have surrendered their rights to take the legal recourse, then in such a situation doctrine of estoppel shall be applied.

2.AA does not have the power to recall its order unless the same was obtained from fraud.

NCLAT in the case of Mr Vineet Khosla v. M/s Edelweiss Asset Reconstruction Company Ltd. (Company Appeal (AT) (Ins) No. 1124-1125 of 2020) held that the Adjudicating Authority (AA) under the Code does not have the power to recall its judgement, except in cases of fraud

The ex-director has filed the present appeal when the liquidation order was granted by the AA for the Corporate Debtor (CD) stating the petition under Section 7 to be barred by limitation and based on fraud and misrepresentation. He argued that the AA is competent to recall its judgement if the order has been obtained by misrepresentation or fraud by placing reliance on the judgements by the Supreme Court. He further stated that the petition is barred by limitation as the date of default is of the year 2000 and 3 years have been elapsed since then. Lastly, he contended that Section 420 of the Companies Act grants power to the AA for rectifying its order if any mistake is apparent from the record has been noticed by the parties.

On the contrary, the Respondent stated that the order of the AA was not based on any fraud or misrepresentation as the CD from time to time has been acknowledging its debts and thus, the AA does not have the right to recall its order.

Further, it was contended that Section 420 comes into play when the order has not been appealed, however, in the present case the order was appealed to the NCLAT.

The Appellate Tribunal referred to the case of AV Papayya Sastry by the Supreme Court which provides that the order obtained from fraud is null and void. It further referred to the order passed by the AA which categorically mentions that the Appellant and CD from time to time had acknowledged the debts and thus, it was observed that there was no unfair or undeserved benefit by the Respondent.

Hence, taking into consideration the above observation made by the NCLAT, it further held that the AA does not have the power to recall its order unless the same was obtained from fraud. Thus, the appeal was dismissed.

3.Brief outcome of NCLAT judgement in the case of Air Force Group Insurance Society v. Administrator, Dewan Housing Finance Corporation Limited

1.Money deposited with banks or financial institutions is not held in trust for the depositor. It becomes a contractual obligation to pay the sum deposited by the depositor and such relationship between the parties is of creditor and debtor.

2.Treating fixed deposit holders as a separate class and giving preferential treatment in terms of payment to them during the CIRP will violate the provisions of Section 14.

3.NCLAT and NCLT cannot act as a court of equity or exercise plenary powers. Thus, even if the fixed deposit holders were members of the air force or senior members or were poor will have no consequence on the commercial wisdom of the COC and the recoveries shall be made as per the approved resolution plan.

4.Once the CD is admitted to insolvency, the IBC shall govern the whole process &

and thus, the applicability of the National Housing Bank Act or the Reserve Bank of India Act will not have any consideration on the process.

4.CD has to be an MSME for availing benefit under Section 240A of the Code

NCLAT in the case of Anil Kumar Dudalal Kaneriya v. CA Vineeta Maheshwari (Company Appeal (AT) (Insolvency) No. 909 of 2020) has held that for Corporate Debtor (CD) to take benefit under Section 240A of the Code, it has to be registered as MSME prior to the filing of insolvency application.

The Appellant in the present case is challenging the admission of the liquidation petition by the Adjudicating Authority (AA) on the following grounds:

- That the insolvency application admitted under Section 7 of the Code is barred by limitation as the date of NPA is 30.03.2015 and the application was filed on 03.07.2018 which is more than 3 years from the date of default.
- That the CD falls into the amended criteria for MSMEs and is eligible for exemption under Section 240A of the Code. He further contended that until the resolution plan is approved, there is no bar availing exemption under Section 240A.
- That the commercial wisdom of sending the CD to liquidation cannot be questioned, apart from the case wherein there was material irregularity or fraud in the process.
- That MSME notification dated 01.06.2020 categorically mentions that it shall come into effect from 01.07.2020 and shall be prospective in nature. Thus, as on the date of filing of the application or the commencement date, the CD was not an MSME and hence, benefit under Section 240A of the Code cannot be claimed.
- That the application is not barred by limitation as the CD has acknowledged the debt various times, the last being on 28.11.2015, hence the application is well within the limitation period.

The Appellate Tribunal observed that the application was filed within the limitation period of 3 years and is not barred by limitation. It also held that the commercial wisdom of the COC cannot be challenged.

It was further observed that the notification relating to the MSMEs was prospective in nature and thus, the Appellant cannot take advantage of the same as the insolvency process has already commenced and the CD was not an MSME as on the date of insolvency petition or commencement date.

Hence, the appeal was dismissed.

5.Date of decree shall be the new date of default

NCLAT in the case of Gulabchand Jain v. Punjab National Bank & Anr. (Company Appeal (AT) (Insolvency) No. 416 of 2020) has held that the issuance of a decree by the DRT shall serve as a fresh cause of li-

-mitation and the application filed within three years from the same was admitted.

The Appellant has challenged the impugned order of the Adjudicating Authority (AA) which has admitted the application.

Contentions of the Appellant:

The Appellant contended that since the date of NPA was in the year 2009 and the insolvency petition was made in the year 2018, there is a delay in filing of the application, thus the same is liable to be dismissed.

Contentions of the Respondent:

On the contrary, the Respondent argued that the petition is well within the limitation period as Section 14 of the Limitation Act shall extend the limitation period and will exclude the period which got consumed in the litigation in the DRT.

It was further contended that the OTS proposals submitted by the Corporate Debtor in 2011, 2012 & 2016 shall extend the limitation period as per Section 18 of the Limitation Act. Lastly, the Respondent Bank submitted that as per the case of Dena Bank v. C. Sivakumar Reddy (Supreme Court), the decree passed by the DRT shall give a fresh cause of limitation.

NCLAT's Observations:

The NCLAT rejected the first argument of the Respondent and observed that Section 14 of the Limitation Act shall not be made applicable in the present case as the DRT is the competent forum to deal with the matters related to the default and recovery of NPAs and Section 14 will extend the limitation only when the court with which the matter was pending does not have the adequate jurisdiction.

On the second argument of the Respondent, the Appellate Tribunal admitted the same and observed that the OTS proposals made by the CD shall be considered as acknowledgement as under Section 18 of the Limitation Act.

Lastly, on the final issue, the NCLAT observed that since the decree was granted in favour of the Respondent in the year 2017, the fresh period of limitation got initiated and the application was duly filed within 3 years of 2017.

Hence, the appeal was dismissed.

6. Extension of limitation to file Section 9 application due to Meditation order not allowed.

In the matter of Ravi Iron Ltd. Vs. Jia Lal Kishori Lal & Ors., the NCLAT decided whether a Mediation Order and dishonored cheques shall give an extension or not on the limitation for the Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) for the initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor (CD).

In the present case the appeal is filed against the impugned order passed by the Adjudicating Authority dismissing the Application filed by the Appellant under Section 9 as barred by time.

The Appellant has filed Application under Section 9 claiming as an Operational Creditor claiming for payment of principal amount of Rs. 14,01,320/- with interest upto 31.12.2019. Further, in Part-IV of the Application, the Applicant himself has given the date of default as 10.01.2008. Learned Adjudicating Authority has dismissed the Application as barred by time.

The Appellant stated that although the date mentioned in the Part-IV of the application is 10.01.2008 however, there was District Court Mediation on 16.11.2015 wherein the Respondent accepted their liability and the post-dated cheques issued were also dishonored. Last cheque was dishonored on 31.12.2016. Hence, the Application filed was within time.

The Appellate tribunal heard the arguments of the parties and stated that when the Application comes with date of default and no other reasons given in the Application or any details for extension of limitation, we see no ground to hold that Application was well within time.

The submission of the Counsel for the Appellant is that there was Mediation Order of the Court on 16.11.2015 under which Mediation, post-dated cheques were given. The Mediation which was ordered on 16.11.2015 shall not give any extension of limitation to the Appellant.

Hence, NCLAT held that Application was clearly barred by time and no error has been committed by the Adjudicating Authority rejecting the Application and accordingly application was dismissed.

7.AA has to provide opportunity to the creditor to rectify the defects before rejecting the application.

NCLAT in the case of Mr Hardik Fakirchand Shah v. Male Square Retail Pvt. Ltd. (Company Appeal (AT) Insolvency No. 210 of 2021) has held that the petition under Section 9 of the Code cannot be rejected outrightly without giving the opportunity to the Operational Creditor (OC) to amend the same.

In the present appeal, the OC has challenged the rejection of his application by the Adjudicating Authority (AA). The OC claims that he has supplied goods to the Corporate Debtor (CD) and has raised 10 invoices out of which the OC has received only payments for the three invoices, latest on 26.11.2018.

Against such default, the OC filed an application under Section 9. The AA rejected the application stating it to be barred by limitation observing that the last invoice was of the year 2015 and the application was filed in the year 2019 which is more than 3 years from the date of default. The NCLT also stated that the invoice dated 08.07.2017 was having a different format than the rest of the invoices and hence the creditability of the same was doubted.

The OC in his appeal argued that the AA failed to take notice of the invoice dated 26.11.2018 which was also the date of default upon which no observations were .

made by the AA. Further, the Appellant contended that the mere fact of the invoice having a different format cannot be a ground for not considering the validity and authenticity of the invoice.

The Appellate Tribunal observed that even if there were more requirements of documents to support the claim of the OC, the AA was under obligation to allow rectifying the defect by giving notice. Further, it was held that the AA failed to justify the finding of not admitting the 2017 invoice having a different format than the rest.

Lastly, the NCLAT also observed that the last invoice dated 26.11.2018 was mistakenly left by the AA which ought to be considered for the calculation of the limitation and hence, the petition was well within the limitation period. Thus, the appeal was admitted and the impugned order was set aside.

8.Extension of Limitation for filing CIRP due to ongoing matter under Arbitration & Conciliation Act not allowed.

In the matter of Ozone Builders and Developers Pvt. Ltd. Vs. Omway Buildestate Pvt. Ltd.. the NCLAT decided whether the Arbitration proceedings which was undertaken under Arbitration & Conciliation Act 1996 shall give any extension of limitation for filing application for initiation of CIRP or not.

In the instant matter, the appeal is filed before the Appellate Tribunal against the impugned judgement and order passed by the Adjudicating Authority (AA).

The AA rejected the application filed by the Appellant under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“Code”) for initiation of Corporate Insolvency Resolution Process (CIRP). The appellant here is a financial creditor and has several claims due from the Corporate Debtor.

Further, the appellant approved the Arbitrator claiming that he was a partner in the business in which award was given on 01.04.2013 rejecting his claim and observations were made that it was a loan transaction as was contended by the Corporate Debtor. Against the said Award, Application under Section 34 was filed which has been dismissed on 07.12.2016 and first Appeal was also dismissed on 08.05.2017.

Hence, the AA also dismissed the application under Section 7 due to expiration of limitation period.

The appellant stated that although the loan was received in 2005-2006 however, the same has been declared default on 01.04.2013. Therefore, the application shall not be barred by time-limit and appellant will get benefit of the said finding which became final on 08.05.2017 when the Appeal was dismissed.

After hearing the arguments of the counsels, the NCLAT stated that from the materials on record, it is clear that the last repayment was made on 01.09.2006.The limitation under Article 137 of the Limitation Act shall be three years from the date when right to sue accrue. The submi-

-ssion of the Counsel for the Appellant is that in view of the Award which was given on 01.04.2013 dismissing the claim of the Appellant and noticing the case of the Corporate Debtor that it was a loan, hence, he got right to file proceeding thereafter and he submits that the said finding became final only on 08.05.2017 when the first Appeal was dismissed hence, he should get benefit of that period.

The Arbitration proceedings which was undertaken under Arbitration & Conciliation Act 1996 and the Award on 01.04.2013 shall not give any extension of limitation to the Appellant The right to sue accrued on 01.09.2006 and the limitation being only three years, the Application under Section 7 filed in the year 2019 was highly barred by time and no error has been committed in the impugned order by the Adjudicating Authority in rejecting the said Application.

9. Superseded directors are not entitled to receive documents and participation in the Committee of Creditors.

NCLAT in the case of Dheeraj Wadhawan v. The Administrator of Dewan Housing Finance Corporation Limited (Company Appeal (AT) (Insolvency) No. 785 of 2020 & 647 of 2021) has held that the superseded directors under RBI Act, 1945 and suspended directors under IBC/Code are not same and the superseded directors shall not be allowed to participate in the COC and access various documents.

The appeal is filed by the erstwhile superseded director of the Corporate Debtor challenging the impugned order of the Adjudicating Authority (AA) in rejecting the application filed for accessing the documents as passed by the COC and being a part of the same. The Appellant contends that the doctrine of election will bind the Administrator and once the latter has proceeded to take action under the Code, then he can't choose to take a remedy under the RBI Act. Also, he stated that the Code doesn't differentiate between a suspended and a superseded director and the effect of both things is similar. It was also argued that as per the judgement of the Supreme Court in the case of Vinay Kumar Jain v. Standard Chartered Bank, the suspended directors have the right to participate in the meetings of the COC and shall have the right to access every document which is been circulated to its members.

On the contrary, the Respondent argued that since the directors were superseded by the Administrator under Section 45 IE of the RBI Act before the commencement of the CIRP, the CD was in the hands of the Administrator at the time of initiation of insolvency petition and there were no directors present in the company. Further, the Code in Section 24 provides for the suspended directors to participate in the COC and it nowhere talks about the superseded director. Lastly, it was argued that since at the time of commencement of CIRP there were no directors which were suspended because of the appointment of Administrator, the superseded directors which vacated their position before the initiation of the insolvency should not be considered as suspended directors and

accordingly they will not have the right to receive documents or notice of the COC meetings and access to resolution plan unless it is admitted by the AA.

The NCLAT observed that Section 45IE of the RBI Act provides for the vacation of the office of the directors which attain finality as soon as the Administrator takes over the charge of the company and if the same is to be reappointed their appointment shall be a fresh appointment and not the continuation of the previous one. Hence, it was observed that on the day of commencement of CIRP, there were no directors in the CD and all the powers of the board of directors were vested with the Administrator.

Thus, there arises no question of any power of the directors getting suspended as per Section 17 of the Code upon admission of the insolvency petition and accordingly there arises no question of Appellant being a suspended director of the CD.

Further, the Appellate Tribunal observed that Section 24(3) of the Code provides for notice of each meeting of the COC to be given to the suspended directors. In a situation wherein the directors were superseded under the RBI Act cannot be said to be suspended directors and thus, the notice and other documents which are distributed to each participant of the COC cannot be given to such directors.

Lastly, it was held that 'suspension' and 'supersession' are different concepts, where in the former the right to attend the meeting of the COC arises and in the latter, it does not arise.

10.Key takeaways from the case of Union Bank of India v. Mr. Kapil Wadhwan

Following are the key points passed by the NCLAT in the said judgement:

1.Once the resolution plan is passed by the COC and is pending approval by the Adjudicating Authority, the same cannot be questioned except apart from the grounds mentioned under Section 30(2) of the Code.

2.The plan once approved by the COC is a binding contract that has attained finality and no further negotiations can be made between the parties.

3.If the promoter submits a proposal after the approval of the plan by the COC, even though having more than 1.5 times of the value submitted by the successful resolution applicant and also more than the amount of the total debt, the same cannot be admitted on the ground of a plan submitted by the successful resolution applicant has attained finality.

4.The proposal has to conform with Regulation 30A/Section 12A of the Code or as per the RFRP & evaluation matrix as issued by the RP.

5.Once the plan is pending approval by the AA, the principles of the Contract Act involving negotiations do not find a place and would be against the intent of the Code.

10. Key takeaways from NCLAT judgement in the case of Vinay Kumar Mittal v. Dewan Housing Finance Corporation Ltd. (through its Administrator)

1.That the National Housing Board Act or the Reserve Bank of India Act does not mandate for the full payment to the Fixed Deposit holders and the same are to be treated as Financial Creditors under the Code.

2.The extinguishment of claims of the fixed deposit holders as per the resolution plan is as per the provisions of the Insolvency and Bankruptcy Code.

3.The deposits shall not be considered as money deposited in trust but as credit extended unless otherwise proved.

4.Fixed deposit getting matured during the continuation of the CIRP shall not be repaid as it will not fall under ordinary course of business.

5.Payments if made during the CIRP by the Administrator to the deposit holder shall be considered as preferential payment which is not allowed as per the Code.

6.Deposit holders (in the present matter) can be considered as a class of creditors who can be represented by Authorised Representatives.

7.Commercial wisdom of the COC cannot be challenged and the Adjudicating Authority can only interfere if the resolution plan affects the going-concern status of the Corporate Debtor or interest of the stakeholders or value of the assets and other provision as mentioned under Section 30(2) of the Code.

NCLT JUDGEMENTS

1. Whether the Co-operative societies can initiate an insolvency resolution process?

In the matter of the Solapur Dist. Central Co – Operative BankLimited vs Sangola Taluka Sahakari Sakhar Karkhana Limited, the NCLT Mumbai decided whether Co-operative society is a ‘Corporate Person’ or not under Insolvency and Bankruptcy Code, 2016 (IBC/Code).

Under Section 3(7) of the Code is Corporate Person is defined as a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.

In the instant case the application is filed under Section 7 of the Code by the Financial Creditor who is a is a Co-Operative Society incorporated under the Maharashtra State Co-Operative Societies Act, 1960 for initiation of Corporate Insolv-

-ency Resolution Process against the Corporate Debtor (CD).

The Financial Creditor had extended credit facilities to the tune of Rs. 8236.25 Lakhs/- (Rupees Eight thousand three hundred thirty-nine lakhs only) had been sanctioned for setting up of plant for production of sugar, cutting of sugarcane, transport advance, machinery repair, pre–seasonal purchase & other expenses.

The petitioner stated that the purpose of IBC was always to include registered co-operative societies within the purview of the Code, 2016.

The Insolvency and Bankruptcy Code, 2016 was created for the sole purpose of completely subsuming a plethora of legislation on resolving Insolvency and Bankruptcy in the Country, and thus to bring about a single, comprehensive and exhaustive framework.

To further substantiate the argument, the petitioner gave several references to the judgments of the Supreme Court and the references under Banking Law Reforms Committee.

The NCLAT had stated the till now the he Central Government has not issued notification with respect to the CIRP of the Co-Operative Societies.

In view of this, it is not admissible to initiate the CIRP of the Co-Operative Society as the Corporate Debtor is registered/incorporated under the Maharashtra State Co-Operative Societies Act, 1960 or any other Legislation in this respect.

News and Updates

1. Approval for setting up of Bad Banks granted.

Approvals for setting up of National Asset Reconstruction Company Ltd (NARCL) and India Debt Resolution Company Ltd (IDRCL) including from Reserve Bank of India (RBI).

- NARCL, also popularly known as the Bad Bank, will acquire and aggregate the identified NPA accounts from Banks while IDRCL under an exclusive arrangement will handle the debt resolution process.

- This exclusive arrangement will be as per the scope defined in the ‘Debt Management Agreement’ to be executed between the 2 entities.

- This arrangement will be on a ‘Principal-Agent’ basis and final approvals and ownership for the resolution shall lie with NARCL as the Principal.

- This arrangement will also be in full conformity with provisions of SARFAESI Act as well as Outsourcing guidelines of Reserve Bank of India. Both the companies will comply with applicable Regulatory guidelines at all times.

- Public Sector Banks have taken a majority ownership in NARCL and IDRCL will be majorly owned by Private Sector Banks.

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