AVM RESOLUTION PROFESSIONALS

RESOLUTION TIMES

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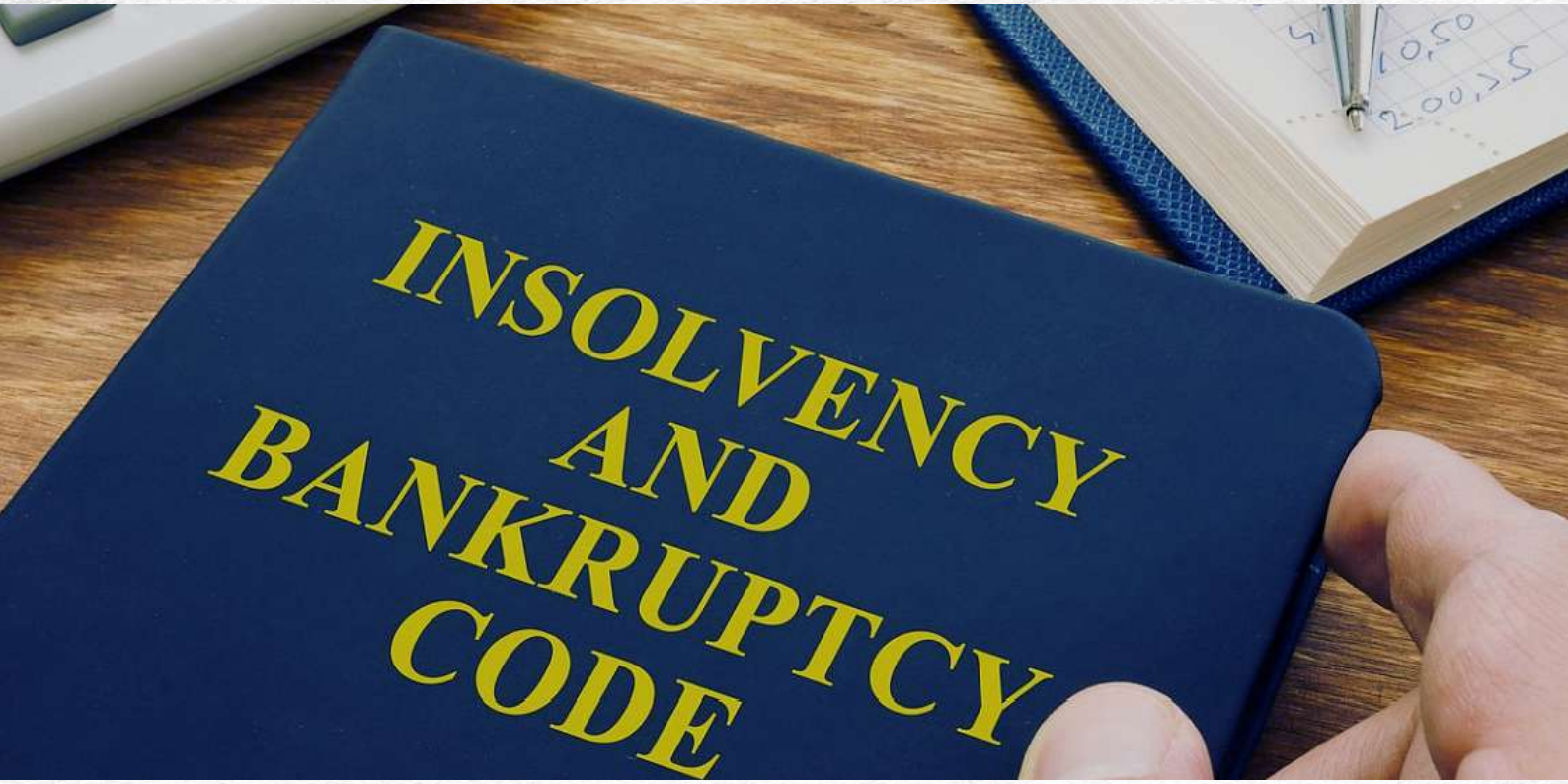

IN FOCUS: TREATMENT OF 'NOT READILY REALISABLE ASSETS' UNDER IBC

Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC or Code) was enacted to consolidate the laws relating to reorganisation and insolvency in India. It's objective is to maximise the value of the assets of the Corporate Debtor which might be a corporate person, partnership firms or individuals in a time-bound manner.

The Code aims at providing a comprehensive reform of the fragmented regime of the insolvency framework, in order to allow free flow of credit and instill faith in the investors for speedy disposal of their claims. Further, Section 6 of the Code provides for the persons who may initiate the Corporate Insolvency Resolution Process (CIRP) under the IBC.

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WHAT'S INSIDE THIS ISSUE:

Though the Code promotes resolution over liquidation, however, there are certain circumstances as given under Section 33 of the IBC wherein CD can be liquidated.

Regulation 44 of the Liquidation Regulations, 2016 stipulates that the CD should be liquidated within one year from the date of commencement of the liquidation and the valuation of the assets should comply with Regulation 35. However, in practicality, this is not followed and the liquidation processes are breaching the statutory timeline of one year. It further reduces the realisble value of several assets owing to certain factors, one of which is depreciation. Also, there are various assets, such as sundry debts, contingent receivables, disputed assets, potential recoveries from the preferential, undervalued and fraudulent transactions etc, in the liquidation estate, the value of which is difficult to realise in the definite time period. These are referred to as "Not Readily Realisable Assets" (NRRA).

Problem with NRRA

The IBBI in its discussion paper on the 'Corporate Liquidation Process' identified NRRA as a significant problem hindering the liquidator in achieving the objectives set out in the Code. It highlighted that there is a twofold problem during the liquidation process if the liquidation doesn't get completed within the stipulated time period. Firstly, it will undermine the objectives of the Code owing to the non-completion of the liquidation process within one year of its commencement and also the creditors will get less realisable value for their debts given. Secondly, it will increase the liquidation cost and will lead to the depreciated value of the assets. Even, the Bankruptcy Law Reforms Committee (BLRC) highlighted a similar issue in their report. Further, BLRC mentioned certain rules to close the liquidation in which a trade-off is to be introduced. wherein a liquidation trust is to be created after the closing of the liquidation process to realise the value of the unsold assets. Subsequently, it will be distributed amongst the relevant stakeholders to settle their claims.

Solutions provided by the IBBI

IBBI suggested a viable solution through the assignment of NRRA. It provided two options, first, through absolute assignment, in which the

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

assignment of the assets will be for an absolute amount by transferring all the legal rights, remedies and powers attached to the assets and, secondly, through recompense facility in which the assignment of assets will be for an initial price and any subsequent profit shall be shared by the liquidator and the assignees proportionately. However, the loss shall be borne by the liquidator only.

Regulation 37A and its possible impacts

In furtherance of this discussion paper, IBBI made an amendment through IBBI (Liquidation Process) (Fourth Amendment) Regulations, 2020 wherein a new regulation, i.e., Regulation 37A was inserted. The said regulation allows liquidators to assign or transfer an NRRA in consultation with the Stakeholders' Consultation Committee (SCC) as under Regulation 31A, in a transparent manner to the persons who are eligible under Section 29A of the Code to submit a resolution plan. However, the advice of the SCC is not binding and the liquidator may deviate from it after providing reasons for such contrary views. The liquidator is bound to act in the best interest of the liquidation estate, seeking maximum consideration for the NRAA, through an auction in a fair & reasonable manner and if an auction method is not feasible then on the arm's length basis**.**

The amendment shall have a positive effect in reducing the time for the completion of the liquidation process as the assignment of NRRA will allow the liquidator to readily distribute the assigned amount and hence there shall be no delay in the completion of the liquidation process. Further, it will help in maximising the value of the assets of the CD as well as help in increasing the net realisable value in the hands of the creditors.

Concluding Remarks

Closure of a business is as important as setting up of a business, therefore, insertion of Regulation 37A is a positive step towards the closure of the liquidation process in a time-bound manner, which will help in improving the Ease of Doing Business index. The said regulation will also have a positive impact on the asset market as the assignee generally has the expertise and economies of scale through which he can realise the NRRA at a much lesser cost and possibly earlier than the liquidator. It might also help in creating a market for NRAAs over the period of time which in turn will lead to business creation, employment generation and increased price for the NRAAs.

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**

LATEST JUDGEMENTS AND UPDATES

SUPREME COURT JUDGEMENTS

1. THIRD PARTY CONTRACT CAN BE TERMINATED DURING THE CIRP IF TERMINATION IS NOT ON ACCOUNT OF INSOLVENCY OF THE COMPANY.

The Hon'ble Supreme Court in the case of Tata Consultancy Services Limited v. Vishal Ghisulal Jain, RP, SK Wheels Private Limited (Civil Appeal No. 3405 of 2020) has held that Section 14 of the Code only provides non-termination of provision of goods and services to the Corporate Debtor (CD) at the time of its CIRP and not the termination of goods and services by the CD.

The Appellant in the present case has challenged the interim order which had stayed the termination of the contract (facilities agreement) between the CD and the Appellant. Clause 11(b) of the agreement provides that either of the party is entitled to terminate the agreement with a written notice to the other party provided the breach is not cured within 30 days of the receipt of the notice. The Appellant submitted that the CD has defaulted on various occasions in fulfilling its contractual obligations for which the Appellant time and again had notified the CD via emails. Further, it stated that the information regarding the initiation of CIRP against the CD had come to its notice after one month of the commencement date. Also, after non-fulfilment of the contractual obligations and inefficiency in providing the services resulted in the termination of the contract between the parties.

The CD submitted that it had from time to time complied with the request of the Appellant and has cured the defects immediately. It contended that there was no material breach of contract and also the CD was not given a period of 30 days to cure the defects before terminating the contract.

The NCLT had granted an ad-interim stay on the termination notice and directed the Appellant to continue with the contract to afloat the CD as a going concern. It was also observed that the contract was not terminated with the notice period. The NCLAT on appeal had upheld the order of the AA and stated that the operations of the CD should not be disturbed during the CIRP. It further referred to Section 14 of the IBC to highlight the fact that the moratorium is imposed to ensure the smooth functioning of the CD.

The Appellant then argued on the following:

- That the AA misread the provisions of Section 14 and stated that only provision of goods and services is not to be terminated during the CIRP to the CD and not from the CD.
- The RP's duty should not determine the jurisdiction of the NCLT and such duty should not be stretched to make the determinable contract into a non-terminable thereby overlooking the man-

-date of Section 14 of the Specific Relief Act, 1963.

- The termination did not happen because of the initiation of insolvency of the CD but because of the material breaches by the CD.
- The agreement in hand is not the only contract of the CD, termination of which would lead to its corporate death.
- NCLT cannot invoke its residuary power where it does not have the same and the Code does not provide for a blanket override of all the contracts entered by/with the CD.
- That, in the case of Gujarat Urja Vikas v. Amit Gupta & Ors ((2021) 7 SCC 209), the Supreme Court has specifically held that the third party is injuncted from terminating a contract with the CD if the contract is the sole contract of the CD and termination of it was arising out of initiation of CIRP of the CD. But, in the present case, the termination was a result of the material breaches, deficiency in services and inefficiency in performing the contract by the CD.

The Respondent countered the Appellant by the following arguments:

- NCLT has the jurisdiction under Section 60(5)(c) to adjudicate upon the issues relating to the CIRP of the CD. It further stated that the dispute arising out of the contract will only be decided by the Arbitration provision given in the contract and not the Indian Contract Act or Specific Relief Act.
- In the Gujarat Urja case, the Supreme Court has held that the AA under the Code has the residuary power and can decide upon the questions arising from or in relation to the CIRP of the CD and if the status of the CD is affected as a going concern then the NCLT has the power to exercise its jurisdiction.
- That the CD was not given 30 days notice and all the allegations w.r.t. material breaches is incorrect. Also, the agreement was terminated as soon as the Appellant became aware of the initiation of the CIRP.
- That on the date of the commencement of the CIRP, the CD was having only the business arising out of the present agreement and the same was the only source of the revenue generation. Thus, if the same does not stay then it will materially affect the going concern status of the CD which is not the intention of the Code.

The Supreme Court observed that the presence of the arbitration clause will not oust the jurisdiction of the NCLT to exercise the residuary power as per Section 60(5)(c) of the Code to adjudicate upon the issues arising out of the insolvency of the CD. It further observed that the duties of the RP are entirely different from the jurisdiction of the NCLT which cannot be conflated and when disputes arise which is not related to the insolvency of the CD then the RP must approach the relevant competent authority.

Further, the Apex Court held that the present agreement is neither for supplying

the goods or any services to the CD nor for taking possession of the property which is with the CD as given under Section 14. Hence, the contention of the Appellant was admitted as the provision of Section 14 was not made applicable to the facts of the case in hand. Also, taking into account the factual matrix of the present case, the Court held that the Code allows for the jurisdiction of the NCLT w.r.t. matters in relation or arising out of the insolvency of the CD, however, in the present case the same cannot be invoked as the termination of the contract is based on the grounds unrelated to the insolvency of the CD. Conclusively, the Supreme Court observed that the termination of third party contracts should result in the corporate death of the CD and then only the same would not be terminated during the CIRP of the CD which was not present in the case in hand.

NCLAT JUDGEMENTS

1.WHETHER CLAIMS CAN BE ADMITTED AFTER THE APPROVAL OF THE RESOLUTION PLAN.

In the recent matter of The Commissioner of Central Taxes Goods & Service Tax Vs. C.S. Ashish Singh & Ors., the NCLAT decided whether the claim can be admitted after approval of the Resolution Plan even the GST dues Show Cause Notice was issued or not.

In this case, the appeal is preferred under Section 61(3)(i) to (iii) of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) against the impugned order of the Adjudicating Authority. the Adjudicating Authority approved a resolution plan submitted by the Respondents with respect to Fourth Dimension Solutions Limited (Corporate Debtor) under Section 31 of IBC.

Appellant's Submissions

The Appellant has submitted that the pending dues relating to Goods and Service Tax appeared in the balance sheet of the Corporate Debtor. He has referred to Section 17 (2)(d) of IBC which authorizes the Resolution Professional to access all books of accounts, records, and other relevant documents of Corporate Debtor available with Government authorities, statutory auditors, accountants, and such other persons as may be specified.

Further, the Appellant certain provisions of the Code which states the duties of the Resolution Professional. Under the provisions of Section 18(1)(a) of the IBC, 2016 wherein the Interim Resolution Professional is enjoined with the duties to collect information relating to assets, finance, and operations of the Corporate Debtor for determining the financial position of the Corporate Debtor, including information relating to business operations, financial and operational payments, assets and liabilities and such other matter as may be specified. He has also pointed out the provision under section 29 (1) of IBC wherein the Resolution Professional has been given the duty of preparing the Information Memorandum containing such relevant information as may be specified by the Insolvency and Bankruptcy Board of India.

Respondent's Submissions (Successful Resolution Applicant)

Respondent in their reply stated that the SRA has stepped into the shoes of the Corporate Debtor after the approval of the Resolution Plan. Further, Section 31 of the Code states that once the Resolution Plan is approved by the Adjudicating Authority, it is binding on all the stakeholders including the Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law is owned. The reliance was placed on the landmark judgement of the Supreme Court in Ghanshyam Mishra and Sons Private Limited through the Authorised Signatory Vs. Edelweiss Asset Reconstruction Company Limited through the Director & Ors

Decision of the Appellate Tribunal

On perusal of the appeal memo, the tribunal did not find that the Appellant had filed any claim before the Resolution Professional regarding his dues. Further, According to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, financial and operational creditors have to file claims in accordance with Regulations 7 and 8 respectively of the aforementioned Regulations (supra) in a specified format and stipulated time period. In the records submitted by the Appellant and in the arguments presented by the Appellant, it is nowhere pointed out as to when and in what form, the claim of pending dues of GST was filed by the Appellant. Hence, the claim of the Appellant cannot be considered at this stage.

2. REMOVING DIRECTOR ON ACCOUNT OF ALLEGATIONS OF UNNECESSARY WITHDRAWAL AND MISAPPROPRIATION OF MONEY WILL CONSTITUTE A DISPUTE UNDER THE CODE.

NCLAT in the matter of Hukum Singh v. Adaab Hotels Ltd. (Company Appeal (AT) (Insolvency) No. 905 of 2021) has held that the issue w.r.t. removal from directorship on account of allegations regarding unnecessary withdrawal and misappropriation of money will constitute a dispute and thus, an application under Section 9 of the Code cannot be admitted.

The Appellant is the Operational Creditor (OC) and has challenged the impugned order passed by the Adjudicating Authority (AA) which has dismissed the Section 9 application filed by the OC. The Appellant submitted that the notice as per Section 8 was sent to the CD for claiming the dues to the tune of Rs 20,74,313.

The CD replied and disputed the claims w.r.t. the amounts claimed. It was also contended that there was a consensus that till the situation improves the directors shall not receive any salary and interests on deposits. Also, it was submitted that the director was removed on account of his actions, i.e., on allegations of withdrawal and misappropriation of money.

The AA referred to the case of Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd. ((2018) 1 SCC 353) and observed that the dispute raised w.r.t. the amount claimed

existed before the receipt of demand notice and not after, as the termination from directorship and agreement on no payment of salary constitutes 'disputes' under the Code.

JUSTICE ASHOK BHUSHAN TAKES CHARGE AS NCLAT CHAIRPERSON

Former Supreme Court judge Justice Ashok Bhushan on Monday took over as the chairperson of the National Company Law Appellate Tribunal.

After taking the oath of office on Monday, Justice Bhushan was scheduled to preside over 10 matters that were listed before a three-member NCLAT bench headed by the chairperson of the appellate tribunal.

NCLAT has got a permanent head after a gap of almost 20 months following the retirement of its first Chairperson Justice S J Mukhopadhaya.

Last Month, the Appointments Committee of Cabinet had approved Justice Bhushan's name as NCLAT Chairperson for a tenure of four years.

Justice Mukhopadhaya retired on March 14, 2020, and since then NCLAT had been functioning with Acting Chairpersons. In the last 20 months, NCLAT had three Acting Chairpersons, with two of them getting several extensions.

3. DATE OF COMMUNICATION OF THE ORDER SHALL BE THE EFFECTIVE DATE FOR CALCULATING THE LIMITATION PERIOD.

The National Company Law Appellate Tribunal, New Delhi bench in the case of Committee of Creditors of Educomp Solutions Limited v. Mr Mahendra Kumar Khandelwal (Company Appeal (AT) (INSOLVENCY) No. 587 of 2020) has held that if the date of the order passed is not known to the party, then the date of communication of the same, i.e., actual or constructive, should be taken for computing the limitation period.

Facts of the Case:

The Appellant in the present case is the Committee of Creditors (COC) challenging the impugned order of the Adjudicating Authority (AA) which has dismissed the request for approval of the resolution plan.

The Appellant contended that the order for withdrawal of the application has already been dismissed by the NCLAT and thus, the request for approval of the resolution plan should be denied. It was also submitted that the present appeal is also not barred by limitation as the Appellant was the third party to the proceedings before the AA and was made aware about the outcome of it later and thus, the period of limitation for filing the appeal should start from the time when the Appellant was made aware about the same.

The AA agreed to the contentions of the Appellant and observed that the limitation, in this case, will start from the time when the order was brought into the knowledge of the Appellant and hence, the appeal is not barred by limitation.

Also, the NCLT observed that once the resolution plan is approved by the COC, all the parties including the resolution applicant also get bound with the same and thus, the application cannot be withdrawn nor the plan can be withdrawn at this stage.

Hence, the appeal was allowed.

4. CLAIMS RELATED TO PRIOR PERIOD OF THE APPROVAL OF THE RESOLUTION PLAN SHALL NOT BE ADMITTED AFTER SUCH APPROVAL FROM THE COC.

NCLAT in the case of The Commissioner of Central Taxes Goods & Service Tax v. C.S. Ashish Singh & Ors. (Company Appeal (AT) (Ins.) No. 854 of 2021) has held that the GST claims related to the prior period of the approval of the resolution plan won't be admitted even if there was a show-cause notice issued by the competent authority.

The Appellant has filed an appeal under Section 61(3)(i) of the Code w.r.t. its claim not being admitted in the approved resolution plan been approved by the Adjudicating Authority (AA). It submitted that Section 17(2) provides for the duty of Resolution Professional to access all the books of accounts and other records of the Corporate Debtor (CD) and thereafter to collate the claims, however, the RP has failed to do so in the present case.

Furthermore, Regulation 36(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for the inclusion of details in the Information Memorandum of all the material litigation or any ongoing investigations pending before the government or any statutory authority which in the present case was not done by the RP.

The Successful Resolution Applicant (SRA) referred to Section 31 of the IBC which provides that once the resolution plan is approved the same shall be binding on all the stakeholders including the government. It further referred to the case of Ghanshyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited (2021 SCC OnLine SC 313) to buttress his argument.

The Appellate Tribunal after hearing the parties observed that the Appellant had not filed any claim before the RP regarding his dues. Also, the NCLAT observed that the claim of the GST department was arising out of show cause notice which was available in the records of the CD which was taken by the RP, hence, the RP must have taken an account of the same. Thus, the NCLAT taking into reference the Ghanshyam Mishra's case has observed that the SRA should not be faced with undecided claims once the resolution plan is submitted by him and hence, basing this the claims of the Appellant were rejected.

5. IF ALL THE PRE-REQUISITES HAVE BEEN MET, THEN THE NCLT HAS TO ADMIT THE PETITION UNDER THE CODE.

NCLAT in the case of Ananta Charan Nayak v. State Bank of India & Ors. (Company Appeal (AT) (Ins) No. 870 of 2021) has held that the provisions of the Code do not provide for the proceedings to be kept in abeyance and thus, any application under the IBC fulfilling the requirements has to be completed within the stipulated time period.

The Appellant in the present case is the suspended director of the Corporate Debtor (CD) and is challenging the impugned order of the NCLT wherein the Adjudicating Authority (AA) has admitted the petition for the initiation of CIRP against the CD. The Appellant stated that the account of the CD was wrongly declared as NPA and there was no alleged default mentioned in the notice which was sent to the CD. Further, it was submitted that the Appellant has requested the Respondent for the OTS, however, the proposal for the same was not materialised.

Also, the Appellant contended that the application admitted is not defect-free as the guarantors and the directors of the CD were made a party to it and hence, the same should not have been adjudicated upon by the AA. Moreover, a period of 7 days was granted to the Respondent for filing an affidavit for deletion of the names of the personal guarantors from the application filed which was not complied with by the Respondent.

The AA observed that due to inadvertence the names of personal guarantors were inserted in the application, however the same was deleted from the instant application and hence, the contention of the Appellant of not complying with the directions of the AA was not admitted. Further, it observed that the acceptance of OTS settlement is under the ambit of the FC and for the same, the proceedings under the Code cannot be brought to a halt. It was further held that the proceedings under the IBC cannot be kept in abeyance and the application has to be decided without delay in the stated timeframe and thus, this contention of the Appellant was also rejected. Hence, the appeal was dismissed.

6. CLAIMS SUBMITTED AFTER STIPULATED TIME SHALL NOT BE CONSIDERED BY THE LIQUIDATOR.

NCLAT in the case of The Assistant Commissioner of Commercial Taxes v. Right Engineers & Equipment India Pvt. Ltd. (Company Appeal (AT) (CH) (Insolvency) No. 255 of 2021) has held that the claims submitted after the stipulated time during the liquidation of the Corporate Debtor (CD) shall not be considered by the Liquidator as per Regulation 16(1) of the Insolvency & Bankruptcy (Liquidation Process) Regulations, 2016.

The Appellant in the present case has challenged the impugned order of the Adjudicating Authority (AA) which has dismissed the petition filed by it under the

provisions of Section 42 & 60 of the Code. The Appellant contended that there was a delay in the submission of claims and the same was submitted after a period of 52 days which was not verified, admitted and processed by the liquidator. It was submitted that in the interest of justice the appeal filed should be allowed as the public money was involved.

The Appellate Tribunal referred to Regulation 16(1) of the Liquidation Regulations and observed that the claims can only be submitted till the last date mentioned in the public announcement and the same shall be backed up by the proof of claims for the debts or dues to the person. NCLAT further observed that the Tribunal is bound to consider the sufficiency of cause if the same is reasonably looking to all the facts of the matter which is to be determined based on the facts and circumstance of the case.

It further held that the liquidator has rightly rejected the claim which was submitted after the stipulated period and cannot be admitted even if the Appellant was not aware of the Liquidation/CIRP process of the CD. Hence, the appeal was dismissed and the impugned order was upheld.

NCLT Judgements

1.NCLT CAN WAIVE OFF CERTAIN REQUIREMENTS IN CASE OF REVERSE CIRP IF REQURIED.

In the case of AU Small Finance Bank Limited v. Coral Infragold Private Limited (IA No. 48/JPR/2021 In CP No. (IB)-170/7/JPR/2019), the Adjudicating Authority (AA) has allowed for the Resolution Professional (RP) to waive off the compliances w.r.t invitation of information memorandum (IM), the appointment of registered valuers and the need of the Committee of Creditors (COC) to evaluate the Resolution Plan.

The Applicant/ RP has filed the present application under Section 60(5) of the Code seeking relaxation from some of the compliances under the IBC and also directions concerning the treatment of claims of the existing Operational Creditors (OC). The Applicant stated that the CIRP was initiated under the reverse CIRP mechanism against the Corporate Debtor (CD) being a real estate company and the RP was given the liberty to revive the company. It was further submitted that the Appellant should not be allowed to comply with certain provisions of the Code as they are not required in the reverse CIRP mechanism. Lastly, it was contended that the OCs should be paid in priority over the Financial Creditors as they are the suppliers to the project and without them, the project cannot continue as a going concern.

The AA held that the treatment of the OCs is to be done as per Section 53 of the Code which provides for the waterfall mechanism. It observed that in cases of reverse CIRP there is no occasion of the company going into liquidation and thus, the requirement of

RP appointing a registered valuer and the COC to evaluate the resolution plan can be waived. Further, the NCLT waived the requirement for obtaining the NDA from the allottees as in cases of reverse CIRP, there is no need for Information Memorandum which is used for formulating Resolution Plan. Hence, the interim application was allowed.

2. NCLT CAN REVIVE OF THE OLD CIRP ON ACCOUNT OF DEFAULT OF THE SETTLEMENT DEED.

NCLT in the matter of Intec Capital Limited v. Jagtar Singh & Sons Hydraulic Private Limited (I.A. No. 2096/2021 in IB-619(ND)/2019) has observed that if the Corporate Debtor (CD) has not adhered to the settlement provisions then the old application filed against it can be revived/restored by the Adjudicating Authority (AA).

The Applicant in the present case is the Financial Creditor (FC) whose application for initiation of CIRP was admitted by the AA in the year 2019. Post which through mediation between the parties a settlement was reached out as per which the CD will repay the debt amount and the applicant shall withdraw the application admitted.

The Applicant contended that the CD has breached the provision for the settlement deed and requested for the recall of the previous order admitting the CIRP. Lastly, it was submitted that the CD didn't pay anything till the date of filing of the current application and hence, the CIRP may be reviewed against the CD with the liberty of filing fresh claims with the Insolvency Resolution Professional.

The AA after hearing to both the parties observed that there is a breach of terms of settlement deed of 2019 and hence, in terms of order of the Appellate Tribunal (previous order), the AA revived/re-stored the CIRP of the CD

3. NCLT CONDONED THE DELAY OF 452 DAYS TREATING IT AS A SPECIAL CASE UNDER THE CODE.

NCLT in the case of Suraj Products Limited v. Krishna Ferro Products Limited (IA (IB) No. 67/CB/2021 in CP (IB) No. 23/CTB/2019) has condoned the delay of 452 days for the submission of claims.

The Applicant in the present case is the Joint Commissioner of Commercial Taxes & GST who is seeking the condonation of delay in submission of the claims amounting to Rs 75,35,372/-. The Applicant submitted that they had issued various demand notices to the place of business of the Corporate Debtor (CD) during the period 2013-2019 but had received no payment. Also, it was contended that various recovery proceedings were initiated and order of attachments have been made against the Applicant. Further, the AO has also issued notice on 20.10.2020 at the desired place of business of the CD which got returned un-served and after this only from the local

inquiry the Applicant was made aware about the CIRP against the CD.

The Applicant pleaded that the RP of the CD had invited claims and the last date for the submission of the same was 18.10.2019 which the Applicant was not aware of. Post this, due to the nationwide lockdown the Applicant was not able to know about the CIRP of the CD. Further, the Applicant had lodged the claims with the RP on 15.01.2021 which was after a delay of 452 days and requested the RP to consider the same to which the RP did not object, if the delay was condoned by the NCLT.

Considering the submissions by the parties, the NCLT condoned the delay owing to the Covid pandemic and corresponding lockdowns and also in the interest of the revenue of the Exchequer as a special case. Hence, the AA allowed this petition.

However, in a similar case filed by the Assistant Commissioner Central Tax, CGST & CX against Avishek Gupta (RP) (in Company Appeal (AT) (Insolvency) No. 869 of 2021), the Appellate Tribunal was faced with an appeal wherein there was a delay of more than one year in the submission of the claims. The Appellant pleaded to condone this delay and further stated that it was the duty of the RP to see all the records and notice the claims. The AA has dismissed the application to which the Appellant has filed an appeal.

Hon'ble NCLAT after hearing the parties observed that there was a gross delay in filing of the claims by the Appellant and thus, the AA was justified in rejecting the claims.

4. NCLT DECIDES WHETHER A DEL CREDERE AGENT IS OPERATIONAL CREDITOR?

In the matter of M/s. Alturas Trading Corp. Vs. M/s VRMX Concrete India Pvt. Ltd., the NCLT Chennai decided whether a 'Del Credere Agent' can be an Operational Creditor. The Applicant has preferred an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 for the initiation of the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

Who is a Del Credere Agent?

Before moving on to the facts of the case, understanding a Del Credere Agent is relevant. A del credere is an agent who guarantees the solvency of third parties with whom the agent contracts on behalf of the principal. As a token for the guaranty given, the agent receives an additional commission for sales. The difference between the other Agent and the Del credere Agent is that the Del credere Agent guarantees to make the payment to the Principal even if the buyer fails to make payment to the Principal before the due date while the ordinary agent does not guarantee recovery of dues from Debtor.

Hence, Del Credere Agency refers to the relationship between the agent and the seller wherein the seller acts as the principal and the agent not only acts as the broker of the principal but at the same time he also undertakes the guarantee of the credit which is extended to the buyer.

Facts and Judgement by the Tribunal

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In the instant case, the Operational Creditor is a partnership firm and is acting as an agent for the Principal Company namely, M/s. Bharat Cement Corporation Private Limited and as such as per the terms of the Agreement, the alleged Operational Creditor herein would be entitled to a certain commission only upon realization of the sale proceeds from the parties.

The NCLT after the perusal of the application and the documents submitted to prove the nature of the applicant as Operational Creditor stated that from the Agreement entered into between the Operational Creditor and M/s. Bharat Cement Corporation Private Limited, there is no nexus between the Operational Creditor and the Corporate Debtor. Also, as per the averments made in the Application, it is seen that the Invoices are raised by M/s. Bharat Cement Corporation Private Limited against the Corporate Debtor and not by the Operational Creditor and under the said circumstances, the Applicant herein cannot be considered as an Operational Creditor in relation to the Corporate Debtor.

Latest Updates and News

1.RBI SUPERSEDED BOARD OF RELIANCE CAPITAL.

RBI has decided to supersede the board of Reliance Capital Ltd., a company promoted by Anil D. Ambani's Reliance Group, owing to the defaults on various payments obligations which the company had to its creditors. The decision was made under Section 45-IE (1) of the Reserve Bank of India Act, 1934 and Shri Nageswar Rao Y is appointed as Administrator of the company as under Section 45-IE(2) of the Act.

The RBI also based its decision on the serious corporate governance issues in the company and has also decided to initiate Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 and for the same will approach NCLT, Mumbai for appointing the Administrator as the Insolvency Professional.

In June 2019, the auditors (PwC) of the company had raised several red flags w.r.t. the company's fourth quarterly results along with the ambiguity in the accounting methodology used. Since then the company has defaulted and has failed to oblige its debt payments. The auditors also resigned stating that they were not allowed to carry on their independent audits and make an independent judgement. Recently, the company's auditors had revealed that the recoverables of the company were just inter-corporate deposits of other Reliance group companies which were being diverted.

Earlier this year, the RBI had moved against the Srei Infrastructure Finance Ltd. and Srei Equipment Finance Ltd. following the same procedures. With this, Reliance Capital will

become the third non-banking financial company to go for CIRP under the IBC apart from DHFL and Srei Group companies.

2. LENDERS OF SREI GROUP CONTEMPLATING JOINT INSOLVENCY PROCEEDINGS.

Creditors of the SREI Group are contemplating joint insolvency proceedings. It is being assumed that A consolidated insolvency proceeding may garner more interest among potential bidders than individual companies and thereby ensuring maximum value maximisation for stakeholders involved. a consolidated proceeding will allow the discovery of true value of assets which are stacked in different companies. Moreover, with one resolution professional the decisions will be more holistic and symmetrical. For the same, the creditors have to seek the approval of the Adjudicating Authority

Background of CIRP against two SREI Group companies

Earlier, the Reserve Bank of India (RBI) had superseded the boards of Srei Infrastructure Finance Limited (SIFL) and Srei Equipment Finance Limited (SEFL) for their failure to repay debts. The Adjudicating Authority ordered for the initiation of proceeding of Corporate Insolvency Resolution Process (CIRP) against both the companies of SREI as per the provisions of under Section 227 read with Section 239(2) (zk) of the Insolvency and Bankruptcy Code, 2016 (IBC/ Code).

The special case of Financial Service Providers

Financial service providers ("FSPs") were initially kept outside the purview of the IBC. FSPs have been defined in section 3(17) of the IBC and would include non-banking financial companies, microfinance institutions, etc.

The Central Government retained the power to notify FSPs whose insolvency and liquidation proceedings would be conducted under IBC. Such power of the Central Government is under Section 227 of the IBC ("Section 227"). It is under this provision that the Central Government notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 ("FSP Rules").

Unlike in the case of a corporate debtor where a financial creditor or an operational creditor or the corporate debtor itself can initiate a CIRP, in the case of an FSP, an application for initiation of a CIRP of an FSP can be made only by the 'appropriate regulator'.

In the present matter, both the companies of the Srei Group are FSPs and have been referred by the RBI for the initiation of CIRP proceedings against them. The RBI stated before the AA that as per the credit information available, both the SIFL and SEFL have committed defaults of a significant amount in relation to the financial debt availed by it from various financial

creditors. Further, the UCO bank had intimated RBI vide a letter for the defaults of payment in both the companies to the tune of Rs.737,76,00,000/ (SEFL) and Rs.165,56,30,967.99 (SIFL).

The Adjudicating Authority on being satisfied with the petition of RBI order for the initiation of CIRP proceedings against the said companies as per Section 227 and Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.

3.IBBI MADE CERTAIN CHANGES IN THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016 ('CIRP REGULATIONS').

Recently, Insolvency and Bankruptcy Board of India (IBBI/ Board) issued a circular vide powers under clause (aa) of sub-section (1) of section 196 of the Insolvency and Bankruptcy Code, 2016. The Board made changes in the CIRP Regulations, 2016. Under the said Regulations, an Insolvency Professional is required to file list of creditors on the electronic platform of the Board for dissemination on its website. This requirement was mandated vide a Circular No. IBBI/CIRP/36/2020 dated 27th November, 2020 directing the IP to file the list of creditors and modification thereof in the stipulated format on electronic platform.

Under such requirements "Identification No." for seeking identification details of creditors is mentioned. It has come to notice that in few instances, details such as Aadhaar, PAN card, etc., are being filled therein. Such information being sensitive personal information is prone to misuse and hence is not to be revealed on public platforms.

The General Guidelines for securing Identity information and Sensitive personal data or information in compliance to Aadhaar Act, 2016 and Information Technology Act, 2000 issued by the Ministry of Electronics and Information Technology also provides that any personal identifiable data including Aadhaar should not be published in public domain. As a corrective measure modification was made by deleting the "Identification No.' column from the from the particulars of the format stipulated therein.

Effect of this Circular

In effect of this circular, Insolvency Professionals are directed to file the list of creditors of the respective corporate debtor and modification thereof, in the revised format placed in Annexure, within three days of the preparation of the list or modification thereof, as the case may be. The rest of the contents of the above said Circular shall remain same.

Pdf of the Circular and updated format can be accessed **here**

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