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AVM RESOLUTION PROFESSIONALS

RESOLUTION TIMES

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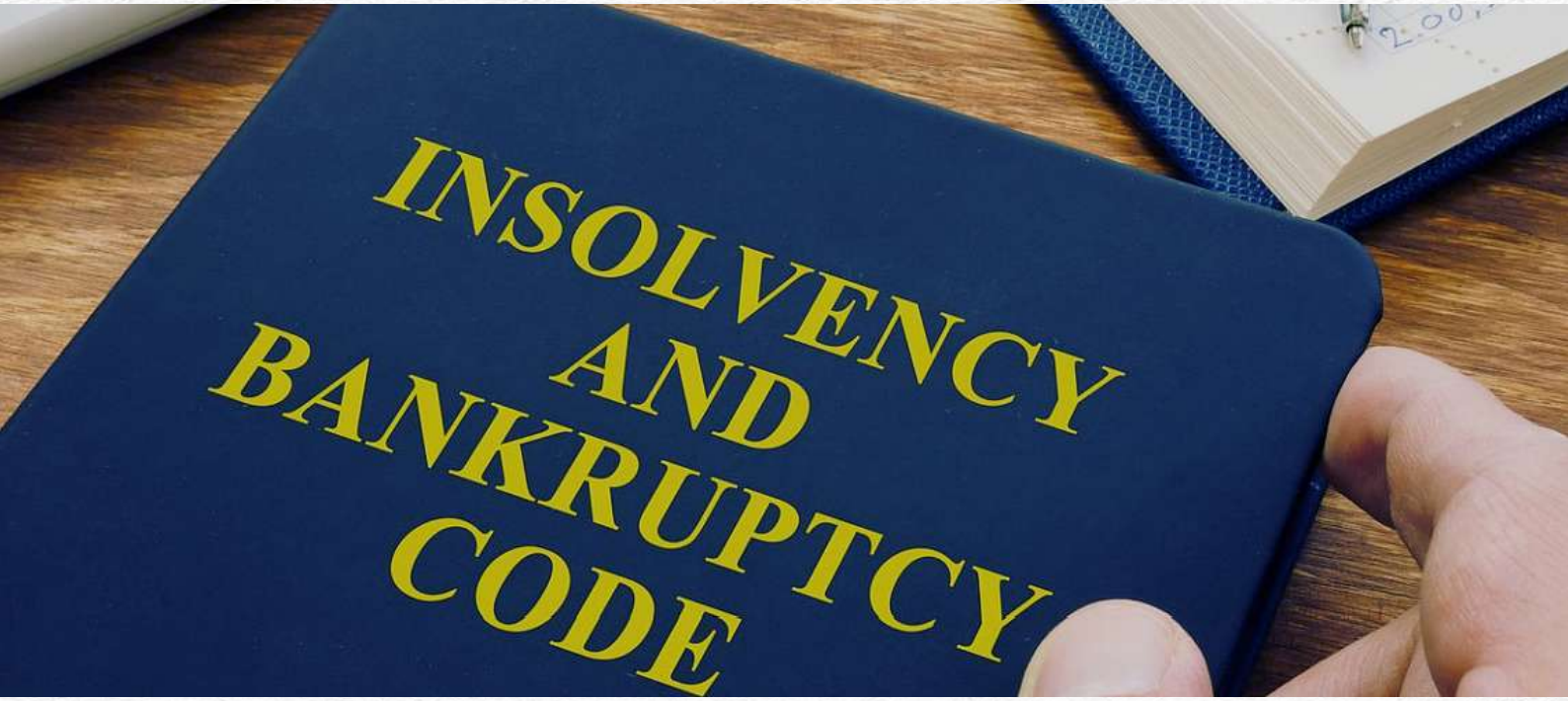

IN FOCUS: LIMITATION FOR APPEAL UNDER THE IBC: STRICT OR DISCRETIONARY?

The Insolvency and Bankruptcy Code, 2016 (IBC/Code) came into force in December, 2016 with the assent of the President of India. 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 instil faith in the investors for speedy disposal of their claims. It consolidated the then existing laws relating to insolvency of corporate entities and individuals under one umbrella legislation.

One of the main objectives of this legislation is the time-bound resolution and hence, the emphasis on the strict adherence to the prescribed timeline has been stressed several times. The Banking Law Reforms Committee and the Supreme Court has reiterated on multiple occasions the imperative nature of time-

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-bound completion of the insolvency resolution process.

This objective further led to the inclusion of Section 238A of the Code which provides for the applicability of the Limitation Act, 1963 on the proceedings under the Code. The interpretation of the applicability of the Limitation Act to the provisions is an evolving jurisprudence. These questions have time and again knocked the doors of the Supreme Court for its intervention. The latest addition to this list is the case of ***V Nagrajan v. SKS Ispat and Power Ltd. & Ors., Civil Appeal No. 3327 of 2020***. This article shall dissect and analyse V Nagrajan's case.

Brief facts of the case

An appeal was filed under Section 62 of the IBC against the impugned order of the NCLAT wherein the NCLAT has dismissed the appeal filed by the Appellant against the order of the NCLT. The Appellant had challenged the invocation of bank guarantee by one of the Respondents against the Corporate Debtor (CD) in the liquidation proceedings. The Appellant/ Resolution Professional (RP) stated that since there was a fraudulent transaction and for which the bank guarantee was given, the invocation of the same during the liquidation proceedings cannot be allowed.

The Adjudicating Authority (AA) in the open court pronounced the order and concluded that since the performance guarantee given does not constitute a "Security Interest" as defined under Section 3(31) of the Code, the same cannot be invoked. The Appellant didn't challenge the order but has challenged the non-delivery of the certified copy of the order to him. The RP submitted that the copy of the impugned order delivered on December 31, 2019, was uploaded on the website on March 12, 2020, and also the same was having deficiencies w.r.t. the correct name of the judicial member. Further, he contended that the corrected order got uploaded on March 20, 2020, and the free copy of the same was sought on March 23, 2020.

The Appellant further submitted that owing to the pandemic the appeal was filed in the NCLAT on June 8, 2020, and an application for the exemption from attaching the certified copy was also filed.

The NCLAT dismissed the appeal filed by the Appellant stating it to be barred by the limitation period as prescribed under Section 61(2)

INSOLVENCY TRIVIA

1Which of the following is an Information Utility?

(a) National e-Governance Services Limited
(b) NSDL e-Governance Infrastructure Limited
(c) TransUnion CIBIL

2) Who among the following has the highest priority in distribution of sale proceeds of liquidation estate in a liquidation process?

(a) Workmen
(b) Employees
(c) Government
(d) Taxdues

3) Essar Steel India Limited, one of the 12 large accounts referred to by the RBI for resolution under the Insolvency and Bankruptcy Code 2016, was successfully resolved and taken over by _____.

(a**)** Reliance Industries Ltd.
(b) Vedanta Ltd.
(c) Tata Steel Ltd.
(d) Arcelor Mittal India Pvt. Ltd.

of the Code and also observed that since the condonation application has also not been filed, the delay cannot be condoned. Lastly, the Appellate Tribunal observed that the appeal filed was without the certified copy of the impugned order the same cannot be admitted and further went on to state that even if the appeal is to be seen on merits, then also there arises no case for interference with the impugned order as performance guarantees are specifically excluded from the scope of security interest as defined under the Code.

Contentions on behalf of the Appellant

The Appellant argued on the following grounds:

- That the appeal has been filed within the limitation period as enshrined under Section 61 of the Code as the same aligned with the suo moto order on the extension of limitation w.r.t. the pandemic situation. The Appellant stated that since the corrected impugned order was uploaded on March 20, 2020, and the suo moto order of the Supreme Court extending limitation was in effect from March 15, 2020, the appeal filed on June 8, 2020, stands within the limitation period as the limitation starts from the date when the order was uploaded on the website, i.e., March 20, 2020.

- The Appellant submitted that although Rule 22 of the NCLAT Rules (hereinafter referred to as Rules) provides for the attachment of certified copy along with the filing of the appeal, the same can be waived off by Rule 14 of the Rules which provides for the grant of waiver by NCLAT from the compliance of any of the rules. Also, the Appellant stated that the application for a waiver for filing of the certified copy was duly met and hence, the appeal should be stated to be as defective.

- The RP further stated that Section 420(3) of the Companies Act, 2013 r/w Rule 50 of the NCLT Rules provides for the mandatory free copy of the order to every party. Hence, the requirement of the section provides for the necessary disposal of the certified copy to the party, if an appeal is to be filed. Thus, the period of limitation under Section 61 of the Code shall start from the date the free copy is issued to the party. Reference was made to the

ANSWER KEY FOR THE PREVIOUS QUIZ

1. (a) **7 Days**
2. (b) **Within 30 days of the directon issued by the Adjudicatng Authority**
3. (b) **Insolvency professionals, Agencies and Information utilities**

- case of ***Sagufa Ahmed v. Upper Assam Plywood Products Pvt Ltd., (2021 (2) SCC 317),*** wherein the Supreme Court had observed that the limitation shall run from the date on which the aggrieved party was provided with the impugned order and thus, the Appellant submitted that the delay in applying for the certified copy also won't kill the limitation period wherein the statute mandates for the certified copy.

- Continuing further with the argument, the RP stated that the omission of the words "from the date on which a copy of the order of the Tribunal is made available to the person aggrieved" as under Section 61 of the IBC when compared with Section 420 of the Companies Act, 2013 should not be considered as intentionally done by the legislature as the appeal cannot be filed without the copy of the order. The Appellant finally submitted that the law cannot mandate a person to do any act which is legally impossible to do as in the present case as an appeal cannot be filed without an order.

- The RP then contended that the explanation to Section 12(2) of the Limitation Act, 1963 won't be attracted in the cases wherein the free copy has been mandated by the statute. He further stated that in any other event apart from what has been submitted above, the time taken from the date of order to it becoming available shall be excluded.

- The Appellant concluded by contending that the present case does not require an application for condonation as the appeal was instituted within the time prescribed.

Contentions on behalf of the Respondent

The Respondent argued on the following grounds:

- The Respondent submitted that the statute provides for the filing of an appeal within 30 days of the order of the NCLT and the maximum extension of 15 days can be given, but on the discretion of the Tribunal, which got expired on February 15, 2020.

- The Respondent countering the submission made by the Appellant, stated that Section 61(2) of the Code does not provide for the order to be made available to the aggrieved party, instead, it provides for the right to appeal from the date the order was made available. Since, IBC is a special statute for the time-bound resolution of the CD, the phrase "made available" cannot be construed to be an indefinite period until the free certified copy is received. Further, reference was made to ***Pr. Director-General of Income Tax. Spartek Ceramics India Ltd. (2018 SCC OnLine NCLAT 289)*** wherein the NCLAT observed that the period of appeal shall begin from the date as soon as the order comes to the knowledge of the Appellant.

- Further, the Respondent referred to Section 12 of the Limitation Act, 1963 and submitted that in order to be under the limitation period, the application has to be filed for obtaining the certified copy within the limitation period. Thus, in the present case, the limitation period shall start from December 31, 2019, i.e., the date on which the order was passed, or

the date of filing an application for the certified copy.

- Lastly, the Respondent stated that as per Rule 22 of the Rules the appeal has to be accompanied by the certified copy of the impugned order which the Appellant has failed to file. Hence, the Appellant should have filed the appeal after seeking exemption from filing a certified copy or should have sought the condonation for the delay. Thus, basing the above arguments, the Respondent contended that the appeal should be dismissed.

Apex Court's Observations

The Supreme Court identified that the major contention in the present matter is limited to the determination of whether the appeal before the NCLAT under Section 61(1) of the IBC was barred by limitation. The Court delved into the overriding effect of IBC over the Limitation Act by stating the intent of the legislature under Section 238 of the Code which provides for the non-obstante clause.

This overriding effect distinguishes provisions of Section 421(3) of the Companies Act, 2013 and Section 61 (2) of the IBC. The omission of words "from the date on which a copy of the order of the Tribunal is made available to the person aggrieved" from Section 61(2) indicates the legislative intent to ensure the time-bound process.

IBC being special legislation will have primacy over the company legislation in such a scenario. Substantiating on the strict time-line and the purpose of this legislation, the Court reproduced the landmark judgement of ***Essar Steel India Ltd v. Satish Kumar Gupta, RP of Essar Steels India P. Ltd.*** which provides that the law on limitation with respect to the IBC is settled and emphatic in its denunciation of delays and the power to condone delay is tightly circumscribed and conditional upon showing sufficient cause, even within the period of delay which is capable of being condoned.

Analysis: Taking the cue from the NSEL's case.

Another important case of the Supreme Court which deals with the strict applicability of limitation period mentioned in the Code itself is of ***National Spot Exchange Limited (NSEL) v. Mr. Anil Kohli, RP for Dunar Foods Limited,*** (Civil Appeal No. 6187 of 2019) it was held that the period of limitation for filing the appeal under Section 61 of the Code/IBC is fixed and cannot be extended under no circumstances.

The appellant in the present case was a depository who had filed the appeal arguing that its claims were not admitted by the IRP in the CIRP filed against the Corporate Debtor (CD). It had also challenged the impugned order of the NCLAT, wherein the NCLAT had rejected the appeal filed by the Appellant, against the order of the NCLT, because the appeal was filed after 44 days from the last date of the limitation period as prescribed under Section 61 of the Code. Appellant prayed that even though it was out of the limitation period, as prescribed, still the Hon'ble Supreme Court under Article 142 of the Constitution of India can condone the delay and can allow the appeal of the Appel-

-lant in the interest of justice.

The Respondent vehemently countered the arguments made by the Appellant and submitted that the power to condone the delay under Section 61(2) of the Code of the NCLAT is maximum for the period of 15 days post the completion of 30 days from the receipt of the order. Hence, the NCLAT was justified in not extending the limitation as the same would have gone against the spirit of the provision prescribed.

The Respondent referred to the case of ***New India Assurance Company Limited v. Hilli Multipurpose Cold Storage Private Limited ((2020) 5 SCC 757)*** and submitted that once a particular statute provides for a limitation period and the condonation period then the courts does not have the power to extend such limitation even if the hardship is caused to the party. Further, referring to the case of ***Oil & Natural Gas Corporation Limited v. Gujarat Energy Transmission Corporation Limited (AIR 2017 C 1352)*** the Respondent submitted that the power of the Supreme Court as under Article 142 of the Constitution is restricted, i.e., the Court under its inherent power cannot extend the limitation beyond the period to what is prescribed under the statute as the same would be against the legislative intent and would interfere with the powers of the legislature. Hence, taking recourse to Article 142 of the Constitution of India a party cannot indirectly do acts that are not permitted to be done directly.

The Supreme Court observed that the appeal under Section 61(2) of the Code must be mandatorily filed under 30 days which can be extended by 15 days provided there was a sufficient cause for not filing and hence, the Appellate Tribunal was justified in rejecting the appeal of the Appellant.

Another important facet noted in this regard is Section 64 of the Code, which creates an onus on the NCLT and NCLAT to expeditiously dispose of applications pending before it, along with the recording of reasons for any delay from the prescribed limit to the President of the NCLT/NCLAT, who can then extend the period, not exceeding ten days.

Therefore, in a scenario where timelines are provided in two different legislations having concurrent applicability, the primacy shall be accorded to the special legislation. The non-obstante nature and the objectives of the Code and its exclusivity to deal with restructuring and resolution in a time-bound manner makes it a special enactment.

Conclusion

The Supreme Court has categorically stated that even though Rule 22 of the NCLAT Rules provides for the attachment of certified copy along with the filing of the appeal and such requirement can be exempted by the Tribunal such discretionary exemption does not act as an automatic exception where litigants make no efforts to pursue a timely resolution of their grievance. In furtherance of the same, the Hon'ble Supreme Court in this matter held that the appellant having failed to apply for a certified copy, rendered the appeal filed before the NCLAT as clearly barred by limitation and hence, the present appeal under Section 62 of the IBC stands dismissed.

LATEST JUDGEMENTS AND UPDATES

Supreme Court Judgements

1. APPLICATION FILED UNDER SECTION 7 OF THE CODE CANNOT BE REJECTED ON THE GROUND THAT NO SEPARATE SPECIFIC AUTHORISATION LETTER HAS BEEN ISSUED BY THE FINANCIAL CREDITOR IN FAVOUR OF SUCH OFFICER

The Supreme Court in the recent case of Rajendra Narottamdas Sheth & Anr. v. Chandra Prakash Jain & Anr (Civil Appeal No. 4222 of 2020) has held that if a person has the power of authority then the same has the right to file an application under Section 7 of the IBC.

The appeal was filed mainly on 2 grounds, first being that the power of attorney in favour of the individual who has signed the application under Section 7 of the Code had been granted prior to the Code coming into force without any specific authorisation to initiate proceedings under the Code, and therefore, the application was not maintainable, secondly, Section 18 of the Limitation Act is also not applicable to the facts of this case and hence, is barred by limitation.

For the issue regarding the validity of the power of attorney the apex code approved the view taken by the Hon'ble NCLAT in Palogix Infrastructure Private Limited v. ICICI Bank Limited- "If the officer was authorised to sanction loans and had done so, the application filed under Section 7 of the Code cannot be rejected on the ground that no separate specific authorisation letter has been issued by the financial creditor in favour of such officer. In such cases, the corporate debtor cannot take the plea that while the officer has power to sanction the loan, such officer has no power to recover the loan amount or to initiate corporate insolvency resolution process, in spite of default in repayment." Hence, the objection on the grounds of Power of attorney was untenable.

Speaking on the limitation aspect, the Court observed that the debit balance confirmation and CD's acknowledgement of debts by way of letters has extended the limitation period as per Section 18 of the Limitation Act, thus, the application filed is not barred by limitation.

NCLAT Judgements

1.APPLICATION UNDER SECTION 9 IS NOT MAINTAINABLE ON ACCOUNT OF PRE-EXISTING DISPUTE

In the present matter of M/s. Oriental Coal Corporation Vs. M/s. Decore Exxoils Pvt. Ltd. the appeal is preferred under Section 61 of the Insolvency and Bankruptcy Code, 2016, (IBC/ Code) challenging the Impugned Order dated 20.03.2020 passed by the Adjudicating Authority wherein the AA dismissed the application filed under Section

9 of the Code for initiation of Corporate Insolvency Resolution Process (CIRP) on the ground of pre-existing dispute between the parties.

Contentions by the Appellant:

The Appellant contended that goods were last supplied by the Appellant to the Respondent Company on 14.11.2013 to Mandideep Plant and on 18.11.2014 to the Nagpur Plant and the alleged Debit Note is dated 01.04.2017 and 24.03.2017 for the respective Plants which is more than two years after the last supplies and therefore by no stretch of the imagination should it be construed that after such a long period, the Respondent had rejected the goods.

Further, the Appellant stated that the goods were not returned nor any intimation regarding the same was made, making it even a stronger argument that the goods were not rejected by the respondent. Also, the ledger of the Respondents indicates the payment to be due and settled in 2017.

Further, the appellant stated that the averments made by the respondent before the AA regarding the quality of goods do not stand as there was not any dispute regarding the quality or quantity of the supply of steam coal and that any Test Report was stated that the quality was substandard.

Contentions by the Respondent:

The Respondent contended that the Debit Note dated 24.03.2017, the copies of Goods Received Note and copy of Laboratory Test Report of goods demonstrate that the goods supplied were of inferior quality and hence the Adjudicating Authority was right in observing that there was a 'Pre-Existing Dispute' prior to the issuance of the Demand Notice under Section 8 of the Code. Further, the respondent claimed that the last payment received from the Respondent was dated 25.11.2014 and the Application under Section 9 was filed on 09.05.2018 and as three years have elapsed, the Adjudicating Authority has rightly observed that the Application was barred by Limitation.

Decision:

The NCLAT after hearing the arguments stated that on perusal of the Debit Note dated 24.03.2017 read together with the Goods Received Notes and the Laboratory Test Report of the goods supplied to show that there is a 'Pre-Existing Dispute', prior to the issuance of the Notice under Section 8 of the Code. The defence raised by the 'Corporate Debtor' is not a sham defence and not a feeble or unsupported assertion. The record shows that there is documentary evidence filed in support of the defence.

2. ORDER OF NCLT UPHELD AND TRANSFER OF FUNDS BY CD AMOUNTING TO RS. 65 LACS IS FRAUDULENT AS PER SECTION 66 OF THE CODE.

NCLAT, Principal Bench Delhi in the case of P R Venkatesh v. Sripriya Kumar and others has held that having failed to prove Bonafide transaction, parties to a related party transaction are jointly and severally liable to

repay the Corporate Debtor (CD). The appeal in the present case is pursued by the Appellant who is the erstwhile promoter and managing director of the CD and has challenged the impugned order by the NCLT, special bench Chennai(MA/987/2019); deciding upon the veracity of the preferential and fraudulent transactions between the Appellant and the Respondent as questioned by the appointed Resolution professional (RP) (also Respondent no. 1 in the present appeal).

The Appellant contended that the NCLT failed to appreciate that the part of the transaction in question took place outside the lookback period. The Appellant submitted that the elements of Section 43 and Section 66 under which the RP had moved its application are completely distinct. The Appellant also contradicted the finding of the NCLT that there was no material to support that the payments were in exchange for consultancy services as there was no entries in the books of account to support the contention.

Pleading further, the Appellant submitted that the Adjudicating Authority erred by placing a negative burden on the Appellant of proving the transaction to be not fraudulent and divulging from the well settled principle that fraud must be pleaded and proved and not presumed.

The Contentions of the Appellant were countered by the Respondent no. 1 by stating the payment in question was not supported by any commercial transaction and there was no invoice, no GST/service tax or any deduction of tax to support the sa-

-id payment. Also, the respondent submitted that the agreements relied on by the appellant depicting the exchange of services were ante dated agreements. The Respondent No.1 also highlighted that the appellant and the Respondent 2 & 3 share common interest in a company called Udveka Engineering Private Limited.

The NCLAT after hearing the parties observed as under:

- Books of account reflected the transaction in question as an advance to R-2 & R-3.
- Office of R-2 is located at Residence of the appellant.
- The Appellant, Respondent No. 2 & 3 share common interest in a company, where the R-2 and R-3 are shareholders and Appellant is Director acting on instructions of the R-2 and 3.
- The transaction was not supported by any invoice or any tax implication and the agreements to be relied were suspicious and cannot be relied upon.

Thus, on the above grounds, the Appellate Authority upheld and affirmed the order of the adjudicating authority and dismissed the appeal.

3. SECURITY DEPOSIT FALLS WITHIN THE DEFINITION OF FINANCIAL DEBT UNDER THE CODE

In the recent case of Sach Marketing Pvt. Ltd. v. RP of Mount Shivalik Industries Ltd. (Company Appeal (AT) (Insolvency) No. 180 of 2021), the NCLAT has held that the money deposited as a security deposit is of the nature of financial debt as defined under

Section 5(8) of the IBC.

An appeal was filed under Section 61 of the Code read with Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 against the impugned order of the Adjudicating Authority (AA) upholding the decision of the Resolution Professional (RP) by which the RP has categorised the claims of the Appellant under the head of Operational Debts. The Appellant contended that as per the contract between the parties, the Appellant was required to deposit Rs 53,15,000/- with the Corporate Debtor (CD) at a 21% interest rate. The Appellant submitted that the CD had adjusted the said amount in the security deposit account to the loan account in the year 2015-16 and had also admitted the interest liability of Rs 18 lakhs on it upon which the Appellant has paid tax. It relied on the Insolvency Law Committee Report and stated that any transaction which is structured as a tool or means of raising finance is included as the Financial Debt under Section 5(8)(f) of the Code. The Appellant further referred to the case of Rishab Jain v. S.S. Enterprises & Anr. (Company Appeal (AT) (Ins.) No. 1383 of 2019) wherein the NCLAT has observed that the intent of the parties must be seen while interpreting the MoU and this depicts that the amount given was received by way of financial assistance by the CD.

The Respondent vehemently argued that the Security Deposit does not fall within the definition of Financial Debt and further submitted that the agreement between the parties was basically for the promotion of the sale of beer and this doesn't constitute any financial contract.

The Successful Resolution Applicant argued that the security deposit does not include the component of the time value of money in it and also the contract doesn't have the constituents of being a financial contract as stated under Rule 3 (1)(d) of Insolvency and Bankruptcy (Application to the AA) Rules, 2016.

The Appellate Tribunal framed the issue as "Whether the security deposit and interest thereon will fall within the ambit of financial debt?" The NCLAT observed that as per the agreement between the parties, the Appellant was required to arrange funds for the meeting of daily expenditures of the CD and also as per another agreement the Appellant was required to promote the sales of the beer manufactured by the CD. Further, the NCLAT observed that the CD had paid interest to the tune of Rs 18 lakhs which was credited in the books of accounts of the CD.

It further referred to the case of Ram Janki Devi & Ors. v. Juggilal Kamlapat (AIR 1971 SC 2551) wherein the Supreme Court had observed that the case of the deposit is more than mere lending of money as a loan and the transaction's character can be identified by the intention of the parties. It then referred to the definition of financial debt and concluded that for a debt to be financial debt it has to have an element of consideration against the time value of money and commercial effect of borrowing.

The NCLAT concluded security deposit in the present case carries 21% interest and

was mentioned under the head of other financial liabilities. Also, in the financial year 2015-16, the amount was shown as long term loans and advances and other long term liability in 2016-17. It was also concluded that the amount was paid in specific terms and tenure as per the agreement thus making it a payment against consideration for the time value of money. Hence, the Appellant was held to be a Financial Creditor and the claim owned by it against the CD was held to the financial debt as under the Code.

4. ADVANCE GRANTED FOR PURCHASE OF TRUCK DOES NOT FALL WITHIN THE PURVIEW OF "FINANCIAL DEBT" AS THE 'DEBT' IS NOT DISBURSED AGAINST THE CONSIDERATION FOR THE TIME VALUE OF THE MONEY AND DOES NOT MEET ANY OF THE CRITERIA AS STATED UNDER THE CODE

The NCLAT in the case of Starlog Enterprises Ltd. v. Anil Menezes IRP for AMW Motors Ltd (Company Appeal (AT) (Insolvency) No. 156 of 2021) has upheld the impugned order of the Adjudicating Authority (AA) which had rejected the application of the Appellant, while noting that the claim of the applicant is not a financial debt as under the IBC.The appellant raised a plea that the claim of the Appellant is a financial debt and he should be considered as Financial Creditor.

Submission by the appellant:

a) The amount of Rs.10 Crores was disbu-

-rsed to the Corporate Debtor and a part of the amount i.e. 5 crores remains unpaid till date. This is a loan and it is not always possible to have written agreement as the same is not mandatory for a debt to qualify as a 'Financial Debt'.

b) There is no requirement of a 'Board Resolution' under the Companies Act to disburse inter corporate loan as per relevant provisions, particularly, Section 372 A of the 'Companies Act, 1956'.

c) This is a case of intercorporate loan / deposit in business and is carrying an interest element.

Submission by the Respondent IRP

a)Appellant has failed to produce any agreement, or even specified pleadings or argued the specific clause under section 5(8) of the Code under which the amount can be classified as a Financial Debt.

b)Appellant has in its ledger account stated that the amount disbursed was towards purchase of trucks, therefore, there was admittedly no element of 'disbursal against the consideration for time value of money'.

c)Appellant has been using the term "loan and deposit" interchangeably in its pleadings to bring it within the ambit of Section 5(8) of the Code. Therefore, it is clear that the Appellant itself is not sure of the nature of the transaction.

d)Appellant's reliance on the Orator's case stands invalid as in the present case there was no written agreement which was not the case in the Supreme Court's judgement.

Decision:

The amount disbursed was disbursed as advance which was recoverable in cash or time or for value to receipt but not as a loan to any outsider. Thus, the same cannot be stated to be as Financial Debt as it was not disbursed against the consideration for the time value of money. Also, the Appellate Tribunal observed that the Appellant was in the business of crane rental and infrastructure solutions provider and not banking or financial services, the maximum it can be considered as Operational Creditor and thus, the debt cannot be considered as Financial Debt. Hence, the impugned order of the AA was upheld.

5. APPLICATION FILED FOR THE DEBTS PRIOR TO 24.03.2020 SHALL ALSO HAVE THE MINIMUM DEFAULT LIMIT OF RS 1 CRORE.

In the case of Jumbo Paper Products v. Hansraj Agrofresh Pvt. Ltd. (Company Appeal (AT) (Ins.) No. 813 of 2021), the NCLAT has held that the application filed for the debts prior to 24.03.2020 shall have the minimum default limit of Rs 1 crore, even if the filed on or after 24.03.2020. The Appellant/ Operational Creditor (OC) in the present case is challenging the impugned order of the NCLT by which the application of the OC was dismissed. The Applicant claims that the Corporate Debtor (CD) has purchased goods, the payment of which is due, from the OC and has never raised any disputes w.r.t. the quality or quantity of the goods. The OC has also sent a demand notice to which the CD has replied by seeki-

-ng time for clearing the dues. The Appellant stated that the debt was of the period between 27.05.2018 to 23.06.2018 when the limit of default for bringing the case under IBC was Rs 1 lakh.

The Appellant also submitted that the notification increasing the threshold limit dated 24.03.2020 is to be applied prospectively as held by the NCLAT in the previous cases. The OC also cited the judgement of Madhusudan Tantia v. Amit Choraria & Anr (CA (AT) (Ins) No. 557 of 2020) and stated that the ratio of the judgement should be applied and thus, the increase in the default limit should not be applied retrospectively.

The NCLAT referred to the Madhusudan case and observed that the demand notice and the application under Madhusudan's case were sent before the notification and thus the threshold limit of debt prevailing at that time was applied. The Appellate Tribunal observed that the case is present does not have any such thing as both the application and the demand notice were sent post the notification date.

Further, the NCLAT observed that the notification dated 24.03.2020 leaves it unambiguous that the default limit for filing the application under the Code is not Rs 1 crore.

Hence, the Appellate Tribunal concluded that the threshold limit of Rs 1 crore shall be made applicable even if the debt is of the date prior to the notification date. Thus, the appeal filed was dismissed.

NCLT Judgements

1.FINE LEVIED DURING MORATORIUM BY NSEL ON THE CORPORATE DEBTOR FOR THE DELAY IN MAKING CERTAIN COMPLIANCES IS CONDONED.

In the matter of Bohra Industries Limited (through its Resolution Professional) vs National Stock Exchange of India Ltd. (Through its Senior Manager) the NCLT Jaipur Bench upheld the imposition of moratorium u/s 14 of IBC and condoned the fines imposed on the CD by NSEIL during the ongoing CIRP.

The matter was brought before the bench by the Resolution Professional of the CD when the National Stock Exchange of India Ltd imposed the fines on the CD for non-compliance to Regulations 7 and 31 of the SEBI (LODR). The argument of the RP of CD was solely based on the fact that moratorium has been brought into force as per the provisions of section 14 of IBC.

The respondents contended that the fines for non-compliances were imposed before the initiation of CIRP and therefore the non-compliance is out of the ambit of moratorium.

The bench observed that the RP, after the initiation of CIRP had complied with certain terms as required by the Respondents, and further burdening the CD with fines for slight delay is against the very objective of the code.

Thus the instant application by the RP of CD is allowed, however the NCLT has directed the RP to, either himself or through the CD, after the removal of certain impediments (as he claimed of), comply with the regulations of SEBI.

2. CLAIM BACKED BY AN AWARD PASSED BY THE MSME FACILITATION COUNCIL CANNOT BE REJECTED ON THE GROUND THAT THERE WAS NO DUE SHOWN IN THE BOOKS OF THE CORPORATE DEBTOR.

NCLT Chandigarh in the matter of Phoenix Arc Pvt. Ltd. v. GPI Textiles Ltd. (CA Nos. 259/201 in CP (IB) No. 35/Chd/HP/2018) has observed that the award passed by the MSME Facilitation Council is a public document and the right of claim as given to the creditor under it shall constitute a valid claim against the Corporate Debtor (CD).

The Applicant in the present case is the Operational Creditor (OC) who has filed an application under Section 60(5) of the Code challenging the impugned order passed by the Respondent- Resolution Professional (RP) rejecting the claims of the OC. The Applicant submitted that it had obtained the award from MSME Facilitation Council, Bhopal on 26/11/2014 against which the appeal is filed by the Respondent under s 34

of the Arbitration and Conciliation Act, 1996 which is lis pendens and even though no stay was granted on the said award, still the Respondent had arbitrarily rejected the claims.

On the contrary, the Respondent did not countered the submissions made by the Applicant but submitted that the books of accounts of the CD did not show the presence of the claims and thus, the claims cannot be admitted.

The AA allowed the application and observed that once it is shown that the claim of the applicant is backed by an award passed by the MSME Facilitation Council and that there was no stay against the same the action of the Resolution Professional in rejecting the claim of the applicant on the ground that there was no due shown in the books of the corporate debtor against the applicant is unsustainable. Award passed by the MSME Facilitation Council is a public document and on the face of it the rejection of the claim of the applicant is not tenable.

3. TERMS AND CONDITIONS OF THE BANK GUARANTEE NEED TO BE HONORED IRRESPECTIVE OF THE INTERNAL CIRCULAR.

In the matter of Mr. Atul Kumar Kansal, RP, Universal Buildwell Pvt. Ltd. vs. State Bank of India, the NCLT, New Delhi, decided on the nature of the contractual obligation of the terms and considered of a Bank Guaran-tee. In the instant matter, the Resolution Professional has filed an Application under Section 14 read with Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) seeking direction against the Respondent for release of Fixed Deposit Receipts (FDR) held against the Bank Guarantees issued by the Respondent Bank which stood expired.

In this matter, the Appellant contended that Fixed Deposit Receipts (FDR) held against the Bank Guarantees issued by the Respondent Bank stands expired without being invoked and the Respondent had conveyed no objection to releasing the FDRs. In furtherance of the same, the RP wrote emails to the bank seeking the release of the FDRs. In response to the same, the Respondent stated that the bank cannot refund the money kept as the original Bank Guarantees are not returned.

The NCLT on hearing the arguments stated that even if it is mentioned in the internal e-circular that BGs are to be refunded/released only after return of the original guarantee document, that cannot prevent a person to act as per the terms and conditions mentioned in the bank guarantee document itself. Also, as per the terms and conditions mentioned in the additional bank guarantee document, the return of the original bank guarantee is not a condition precedent to release the FDs in favor of a person. Rather, it is specifically mentioned that "all your rights under the said guarantee shall stand forfeited and/or extinguished irrespective of whether the guarantee in original is received back by the bank or not".

Hence, the Tribunal stated that the SBI/ Applicant herein cannot retain the FDs after the expiry of the periods of the bank guarantees.

4. NCLT HYDERABAD RULED SALE AS A GOING CONCERN AS A PREFERRED MECHANISM THAN A PART SALE

In the matter of Nimmagadda Surya Pradeep Bio-Tech Pvt. Ltd. Vs. M/s. Kamineni Steel and Power India Pvt. Ltd. Represented by Mr. Racharla Ramakarishna Gupta Liquidator, the NCLT Hyderabad stated the sale as a going concern is a preferred option than the part sale or the piecemeal sale of the assets of the company.

The present application is filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016.

In the instant matter, the Applicant is the private company and is the successful bidder in the e-auction conducted by the Liquidator. The applicant is the sole bidder in the auction and the final bid settled was INR 351 Crores against which the earnest money of INR 5 Crore was deposited with the liquidator. The remaining amount shall be deposited within 90 days of the date of the Auction.

The applicant stated the onset of the pandemic as a reason for the delay in paying the balance amount and filed an I. A before the tribunal for an extension. The AA provided the extension considering the circumstances. However, even after a lapse of 250 days and repeated reminders by the liquidator the applicant did not oblige with the orders. Against such actions of the Applicant, the Liquidator proceeded with the cancellation of the sale and also forfeited the Earnest Money deposited with the liquidator. Aggrieved by the actions of the Liquidator, the Applicant has preferred this application.

The Tribunal, after hearing the arguments of the Applicant stated that Sale as a going concern is always a better resolution of the Corporate Debtor than permitting part sale therefore allowing one final extension to the applicant to submit the 25 % remaining amount on or before 30th November, 2021.

5. NCLT DECIDED THAT WHETHER THE APPELLANTS BEING CONSULTANT DOCTORS OF THE CORPORATE DEBTOR COMES UNDER THE PURVIEW OF WORKMEN.

In the instant matter of Dr. Manjula Ramachandran vs. C.A Mahalingam Suresh Kumar, Liquidator of Raihan Healthcare Pvt. Ltd, the NCLT, Kochi Bench, decided whether the Appellants who are the consultant doctors of the Corporate Debtor (CD) would come under the purview of the definition of workmen as per Industrial Disputes Act, 1947. Application was filed by

the applicants who were stated to be workmen/ employees of Raihan Healthcare Private Limited, under Section 42 of the Code, aggrieved by the decision dated 23.07.2020 of the Liquidator intimating them that their claims are partly admitted and remaining claims are rejected.

The Appellant in the present appeal contended that they are the workmen of the company as the consultant doctors of the Corporate Debtor and monthly remuneration is fixed as minimum consolidated professional charges for a period of one year. Further, the appellants stated that the liquidator treated the appellants as Operational Creditors. The liquidator asked the appellants to file a claim petition in Form C. But the appellants filed the claim petition in Form E. Without considering the facts and circumstances and the subsequent rulings of the Apex Court, the Liquidator categorized the claim of the appellant as an operational creditor.

NCLT after hearing the arguments held that the Appellants could not prove, that they are full-time employees of the Corporate Debtor and that their names are entered in the muster rolls of the Corporate Debtor as “Employee”. Also, as per the contract agreement, it can be seen that the appellants were not registered as a part of the corporate debtor’s Employee Provident Fund Scheme and no agreement to show that provident fund can be deducted from their professional fees. There is no employment contract between the appellants and the Corporate Debtor and a clear demarcation between the Doctors who are the employees and the doctors who are consultants. Therefore, they cannot be considered as workmen/ employees of the Corporate Debtor.

6. AN OPERATIONAL DEBT INCLUDES THE DEBTS PAYABLE TO THE GOVERNMENT ARISING UNDER ANY LAW IN FORCE STILL THE DUES PAYABLES TO THE GOVERNMENT CAN ONLY BE CLAIMED BY THE GOVERNMENT IN THE CAPACITY OF THE OC.

In the recent case of Transit Geo System Integrators Private Limited v. Stahl Tecniks Private Limited (C.P. (IB)- 265/ND/2021) the NCLT Delhi has observed that the dues payable to the Government under a statutory obligation will be termed as Operational Debt (OD) and can only be claimed by the Government in the capacity of the Operational Creditor (OC).

The Applicant/OC in the present case has filed an application under Section 9 of the Code for initiating CIRP against the Corporate Debtor (CD). The Applicant based its claim on the order passed by the Sales Tax Department which was paid by the OC on behalf of the CD. The Adjudicating Authority (AA) referred to the definition of Operational Debt (OD) under the Code and observed that the OD includes three types of debts:

-claim in respect of goods and services,

-claim in respect of employment, and
-dues arising out of any law in force and payable to the Government.

Further, the AA observed that the tax demand raised was against the OC and not against the CD by the Sales Tax Department.

The NCLT concluded that even if the definition of OD includes the debts payable to the Government arising under any law in force still the dues payables to the Government can only be claimed by the Government in the capacity of the OC. It further concluded that the tax payment made by the OC shall not result in the automatic assignment of the debts and thus, the OC cannot claim such amount as OD.

Hence, the petition under Section 9 of the Code was dismissed as the same was not in respect of the provision of goods or services nor in respect of claims arising out of employment nor shall be considered as dues payable to the Government.

Latest Updates and News

1. DR. NAVRANG SAINI, WHOLE TIME MEMBER, IBBI IS GIVEN ADDITIONAL CHARGE AS CHAIRPERSON, IBBI

The Central Government vide a Notification dated 13th October , 2021 assigned additional charge of Chairperson, Insolvenc

Insolvency and Bankruptcy Board of India (IBBI) to Dr. Navrang Saini, Whole Time Member, IBBI, in addition to his existing duties for a period of three months from the date of notification or till the joining of a new incumbent to the post or until further orders, whichever is earlier.

After the successful completion of the tenure of IBBI's first chairperson, Dr M.S Sahoo, the search for the next chairperson started with the invitation of application by the Government.

2. GOVT SEEKS APPLICATIONS FOR 20 JUDICIAL, TECHNICAL MEMBERS AT NCLT, NCLAT

The Central Government has sought applications for 20 positions of judicial and technical members at the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT).

As many as 15 posts, including that of 9 judicial members and 6 technical members, are to be filled up at the NCLT. Besides, applications have been invited for 3 positions of judicial members and 2 of technical members at the NCLAT. The last date for submission of the applications online is November 12, as per notices issued by the Ministry of Corporate Affairs.

Before this notification month, at least 31 people were appointed as judicial, technical and accountant members at NCLT and ITAT.

Notification for the same can be accessed **here.**

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