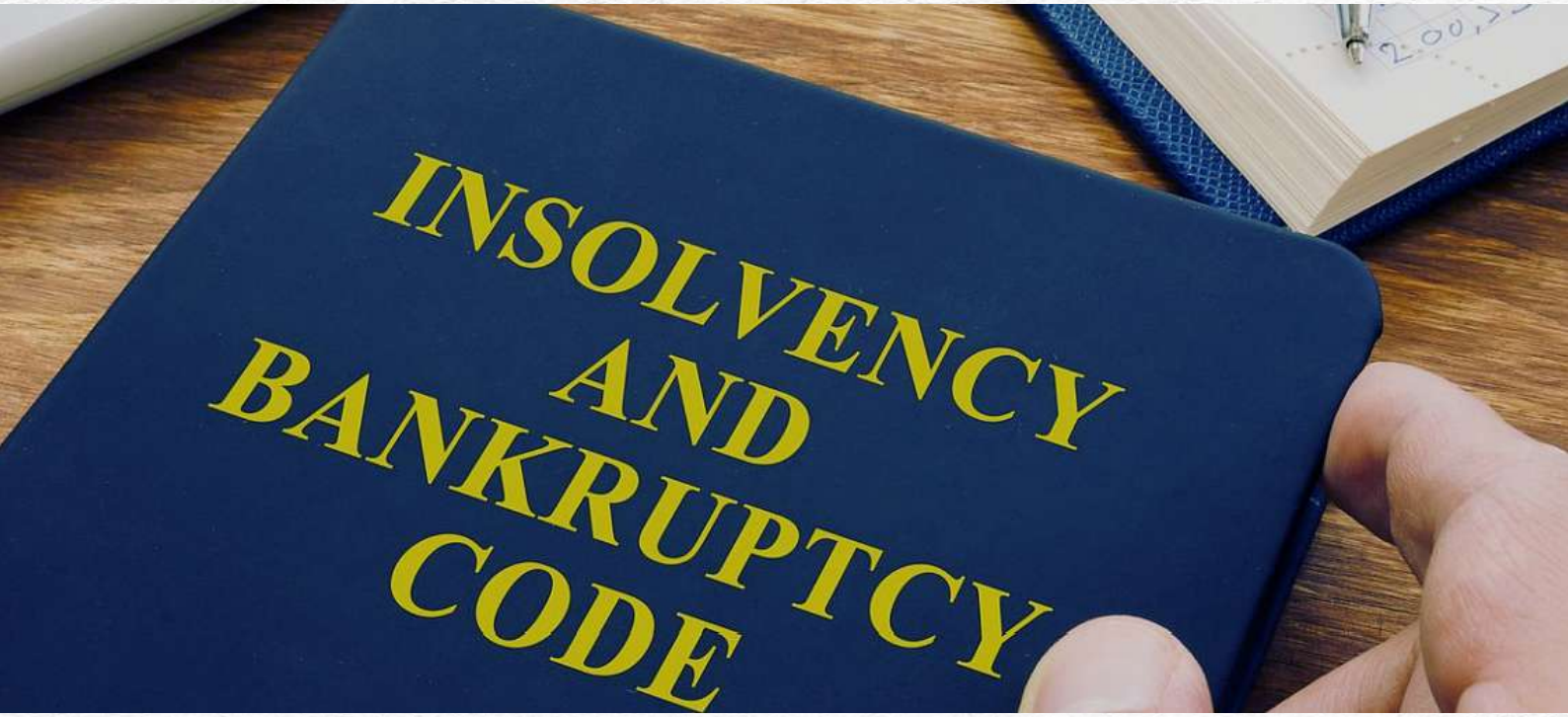
AVM RESOLUTION PROFESSIONALS

RESOLUTION TIMES

Newsletter of a Premier Insolvency Professional Entity

16 OCT 2021, ISSUE 6



IN FOCUS: UNDERSTANDING THE PENDENCY OF CASES BEFORE THE NCLT

With the introduction of IBC, pendency of cases in NCLT has increased tremendously. Being the designated Adjudicating Authority in CIRP matters under the code, around two-third of the cases in NCLT are IBC related. Some of the prevalent causes of delay are inadequate infrastructure, non-adherence of the mandated timeline, technical nature of the matter and several other issues. It is pertinent to look for other options, which include both informal and formal methods of restructuring and revival of corporates to ensure efficient and expeditious completion of the resolution process. The Government has been actively looking to devise methods to address this issue. However, the reality of pending cases demonstrates that there is a requirement modification in the entire ecosystem to ensure faster resolution.

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WHAT'S INSIDE THIS ISSUE:

Background

The establishment of the National Company Law Tribunal (hereinafter referred to as 'NCLT') wasn't easy. Provision for the establishment of such tribunal was incorporated through the Companies Amendment Act, 2002 of the erstwhile Companies Act, 1956. NCLT replaced the Company Law Board and has jurisdiction in matters related to the company and allied disputes. However, their establishment took a halt due to the impending litigation challenging the constitutionality of these tribunals.

The Hon'ble Supreme Court settled the constitutionality of NCLT and the Central government through a notification dated 1st June 2016 constituted NCLTs. As per Section 408 of the Companies Act, 2013 *"The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, a Tribunal to be known as the National Company Law Tribunal consisting of a President and a such number of Judicial and Technical Members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or maybe, conferred on it by or under this Act or any other law for the time being in force."*

At present NCLTs have been bestowed with jurisdiction in disputes related to companies under the Companies Act, 2013 like approving the scheme of arrangements, class action suits, share transfer restriction issues along with certain real estate matters; additionally, the NCLT has been designated as Adjudicatory Authority under Insolvency and Bankruptcy Code, 2016 (IBC /Code).

Interplay of NCLT and IBC

Indian courts have always been overburdened with a plethora of cases and the delay in adjudication is ever-increasing without any immediate recourse. NCLT is no exception to this particular problem. As mentioned NCLT is the adjudicating authority under IBC and the applications for the corporate insolvency resolution process (CIRP) are admitted by the NCLT. NCLT is one of the key pillars of IBC, as the decision on admission or rejection for the initiation of the CIRP is taken by it.

INSOLVENCY TRIVIA

1) After commencement date of bankruptcy, the bankrupt shall submit the statement of his financial position to bankrupt trustee within:

a) 7 Days
b) 5 Days
c) 3 Days

2) In case of replacement of liquidator upon the recommendaton of IBBI, within how many days IBBI has to propose another name of an Insolvency Professional to the Adjudicatng Authority:

a) within 15 days of the directon issued by the Adjudicatng Authority
b) within 30 days of the directon issued by the Adjudicatng Authority
c) within 45 days of the directon issued by the Adjudicatng Authority

3) The Insolvency and Bankruptcy Board governs the functioning of:

(a) Insolvency Professionals
(b) Insolvency professionals, Agencies and Information utilities
(c) Information utilities

Although the scheme of the IBC propagates timely resolution, which currently is 270 days for any resolution to be finalised, however, the reality is far from the timeline provided under the code. For instance, as per the official data posted by the Insolvency and Bankruptcy Board of India (IBBI) total of 4376 CIRPs have commenced by the end of March 2021. Of these, 2653 have been closed. Of the CIRPs closed, 617 have been closed on appeal or review or settled; 411 have been withdrawn; 1277 have ended in orders for liquidation and 348 have ended in approval of resolution plan. Interestingly more than 86 % of the cases admitted have gone beyond the timeline prescribed under the code for resolution. Further, the average time taken from the Insolvency commencement date to approval of the resolution plan by the adjudicating authorities is 433 days as against the 270 days statutory mandate.

Sticking to the statutory timeline is of umpteen importance, and the adjudication process has always stayed behind the timeline. This delay creates further two evident problems

(i) delays are hampering the objective of the code as initially envisaged of the timely resolution, it was one of the key reforms distinguishing it from earlier recovery-focused laws, by stopping the erosion of the value of the enterprise
(ii) being an economic legislation and technical nature of the matters, it is further increasing the overloaded pending cases status of these tribunals, which is having an adverse impact on efforts by banks and financial institutions to recover non-performing assets (NPAs)

With the suspension on the filing of an application for initiation of CIRP for over a year due to the COVID pandemic being lifted, the cases under IBC for resolution are expected to further increase. As per the information provided by the Ministry of Corporate Affairs, out of 19,844 cases pending in NCLT 12,438 cases are under IBC, that's roughly 63 percent of the total pending cases. Therefore, a large chunk of these pending cases is under IBC and reforms are needed to put stop cork on the ever-increasing share of pending cases.

Necessary changes

Although CLTs were touted as the change required for the swift adjudication of the cases with technical and judicial expertise.

ANSWER KEY FOR THE PREVIOUS QUIZ

1. (a) **The National Company Law Tribunal.**
2. (a) **Workmen's dues for a period of 24 months prior to liquidation commencement date**
3. (c) **Appointment of bankruptcy trustee**

However, as mentioned already reality is still far from the intended object. These delays can be attributed to multiple factors including infrastructural problems, nature of the cases involved especially multidisciplinary approach in the insolvency matters, usual delaying tactics by the professionals, fewer appointments and vacancies of officials and members and of the tribunals, etc. Let us look into certain issues and potential reforms which can deal with the surging problem of the increasing cases.

Infrastructural woes

NCLTs were initially established to adjudicate matters mentioned under company law legislation, but since the introduction of IBC in 2016, the majority of the matters pertain to IBC. This added jurisdiction has increased the workload and the infrastructure available is inadequate to deal with a high number of litigations. For a long now RBI has been vocal on the need to ramp up the infrastructure to deal with the increasing number of cases.

At present, there are sixteen benches of these tribunals including the Principal bench at New Delhi constituted by the Central Government. Although the government is trying to ramp up the infrastructure to deal with this problem as five benches of NCLT have been recently constituted in Jaipur, Cuttack, Kochi, Indore, and Amaravati along with the NCLAT bench at Chennai. Infrastructural upgradation must go on with the technological and human resource up-gradation as well. As during the pandemic hit timeframe i.e. from 24th March 2020 to 31st March 2021, NCLTs were practically non-operational for a longer duration compared to other courts due to the non-availability of technical infrastructure. Furthermore, there was also a shortage of both judicial members and technical members. Since the nature of cases requires domain expertise, sufficient and regular appointments of the members shall be made, until the recent appointment of the new NCLT members there were only 39 NCLT members against the sanctioned strength of 63 for the longest time. Even Supreme Court, understanding the gravity of the situation, directed the central government to expedite the appointments of members to ensure faster adjudication.

Moving beyond NCLTs ambit to ease off the burden

There are several initiatives which are taken in order to ease off the burden of NCLT along with the intention of timely resolutions of companies under economic distress. RBI Prudential framework was notified in June 2019 and the Sashaskt Asset Management Company are some of the frameworks devised to ensure resolutions are done without the interference of the NCLT. Although they have their own limitations. Unlike IBC, where any company established can go or be taken up for resolution if there is minimum default occurred, RBI's prudential framework for resolution of stressed assets is very limited. RBI-approved creditors, which are mostly scheduled commercial banks or NBFCs, can take part in this bank-led resolution process.

If a similar system for a class of creditors other than RBI registered is made, it can ease off the pressure on NCLT.

On similar lines, the Pre-packaged Insolvency Resolution Process (PRIRP) was notified through an Amendment recently which is also a faster mode of resolution for MSME as compared to the CIRP process under the code. Although there is the involvement of NCLTs in PRIRPs however, due to the mix of informal and formal setup of the Prepacks, the timeframe to resolve a distressed enterprise is less as compared to CIRP, plus the involvement of the tribunals is limited.

Conclusion

As India, along-with the world, is going through economic stress; regulatory changes must be thoughtful, somewhat-flexible, and reasonable. With the Covid pandemic worsening the adjudication process, it can be foreseen that the pendency of cases in NCLT will only increase. It would be also wrong to say that reforms are not taking place. The government is actively contemplating the issue of pendency of cases in these tribunals and certain measures have been taken up by the authorities like the Bank led resolution process, the lesser formal version like Prepack Insolvency mechanism for MSMEs, the creation of asset trading platforms which are similar to an exchange will create a market for trading if distressed assets and easing off the burden. These changes along with other infrastructural changes can help reduce the deficit and ultimately uphold the objective of both the code and the tribunals

LANDMARK JUDGEMENT FOR AVM

1. CIRP NEED NOT TO BE PENDING AGAINST THE CD FOR INITIATING INSOLVENCY AGAINST THE PG.

Case Details

Case Name:
PNB Housing Finance Ltd. v. Mr. Mohit Arora Managing Director of Supertech Ltd.

CP IB No. :
395(ND) 2021

Bench :
NCLT Delhi, Bench- II

Section:
95(1) of IBC, 2016

Judgement date :
29.09.2021

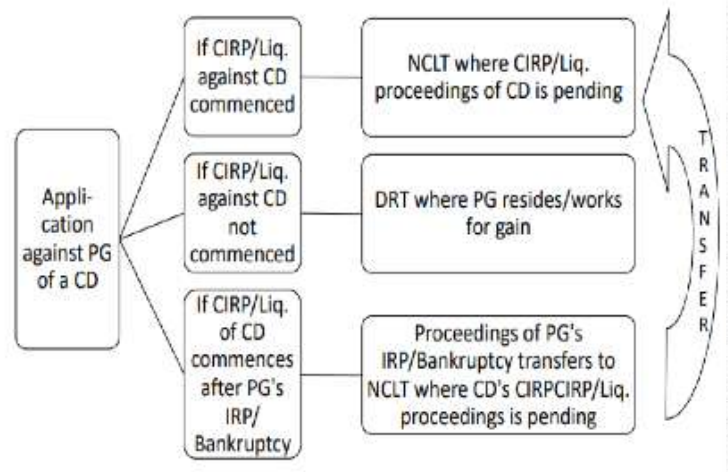
Appointed RP:
Mr. Rakesh Prasad Khandelwal

The present application was moved by the applicant/ creditor to initiate insolvency proceedings against the personal guarantor to the corporate debtor (Supertech Ltd.). An irrevocable deed of guarantee was executed in favour of the creditor, agreeing to pay all the amounts payable under the loan agreement and the loan account was declared as NPA on 31.07.2019.

The application under section 95 was filed before the NCLT, Delhi Bench-II, where multiple IBC proceedings were already pending against the Corporate Debtor. The counsel for the personal guarantor had opposed the maintainability of the applicati-

-on on the ground that, “As per section 60, if an individual is a personal guarantor to the corporate debtor and CIRP/liquidation process is pending against such corporate debtor, then the NCLT shall be the Adjudicating Authority for such personal guarantor to corporate debtors, However, if CIRP/Liquidation is not pending in terms of pendency of a CIRP pursuant to an admission order, then, by virtue of the provisions of Section 179, such personal guarantors being individuals, the jurisdiction to entertain an application for insolvency resolution of such personal guarantors shall lie with the DRT.”

The Personal Guarantor has placed a diagrammatic chart in his written submissions to convey his understanding regarding jurisdiction



Further, the Personal Guarantor placed reliance on the decision of Mumbai Bench of NCLT dated 09.07.2021 passed in the matter of **Altico Capital India Ltd. Vs. Rajesh Patel & Ors**. in I.A No. 1062/2021 in C.P. No. 293/2020, which held, *“the Corporate Debtor for which the personal guarantee has been given is not under CIRP, Hence, the application is dismissed.”*

Further reliance was also placed on para 118 and 123 of Judgment dated 21.05.2021 of the Hon’ble Supreme Court passed in the matter on **Lalit Kumar Jain v. Union of India & Others,** (2021) SCC OnLine SC 396.

Furthermore, the Personal Guarantor submitted that that the DRT-II, Chennai in the matter of **KEB Hana Bank vs. Mr. Rohit Nath** (IBC SR. No. 2643/2020), initiated the Insolvency Proceedings against the Personal Guarantor to the Corporate Debtor, who was not undergoing CIRP /Liquidation.

Thus, the appropriate forum for the application against Personal Guarantors to Corporate Debtors, which are not undergoing CIRP/Liquidation, is the DRT and not the NCLT.

In response to the arguments raised by the Personal Guarantor, the Applicant submitted that a bare perusal of Section 60 of the Code shows that this Section has following three limbs/situations, under which an application can be entertained before this Adjudicating Authority:

a) Section 60(1) deals with the situation where the Adjudicating Authority will be NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located. {fresh filing}

b) Whereas Section 60(2) deals with a situation where, the Adjudicating Authority would be NCLT where CIRP or liquidation proceedings of a Corporate Debtor is pending. {pending CIRP against CD}

c) Section 60(3) which deals with the situation where the Adjudicating Authority would be NCLT which was seized of the matter against the Corporate Debtor and the insolvency resolution process or liquidation or bankruptcy proceeding is already pending against the Corporate Guarantor or Personal Guarantor in any Court or Tribunal shall be transferred to such NCLT dealing with CIRP or liquidation process of such Corporate Debtor(Transfer)"

The judgement passed by the Hon'ble Apex Court in the matter of Lalit Kumar Jain Vs UOI submitted that all the three sub-sections of Section 60 are independent of each other and come into effect in three different situations. Further, Para 99 & 100 of the judgement was referred, where the apex court held that

"*Section 179, which defines what the Adjudicating Authority is for individuals is "subject to" Section 60. Section 60(2) is without prejudice to Section 60(1) and notwithstanding anything to the contrary contained in the Code, thus giving overriding effect to Section 60(2) as far as it provides that the application relating to insolvency resolution, liquidation or bankruptcy of personal guarantors of corporate debtors shall be filed before the NCLT, where proceedings relating to corporate debtors are pending".*

Thus, the applicant contended that the Parliamentary intent was to treat the personal guarantor differently from other categories of individuals.

Further, reliance was placed on the judgement passed by the Hon'ble NCLAT in the matter of **Ferro Alloys Corporation Limited vs. Rural Electrification Corporation Limited** which held that it is not necessary to initiate CIRP process against the principal borrower before initiating CIRP against the Corporate Guarantor.

Furthermore, the applicant added that the Hon'ble Supreme Court in the matter of Bank of Bihar Limited vs. Dr. Damodar Prasad & Anr. (1969) 1 SCR 620, held that, "Under Section 128 of the Indian Contract Act, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The surety became thus liable to pay the entire amount. His liability is immediate. It cannot be deferred until the creditor exhausted his remedies against the principal debtor.

Therefore, the Bench noted that the issue which needs adjudication is:

"Whether initiation of the Corporate Insolvency Resolution Process of the Corporate Debtor is a prerequisite for maintainability of an application under Section 95 of the IBC, 2016 filed for initiating IR Process of the Personal Guarantor of that Corporate Debtor before the National Company Law Tribunal?"

The Hon'ble Tribunal analysed the provisions of section 60 (1) (2) & (3) of the code and deduced that the contents of Section 60(1), 60(2) and 60(3) indicate three different situations/circumstances with regard to the jurisdiction of this Adjudicating Authority to entertain the application for init-

-iating IR process against the Personal Guarantor:

a) That Section 60(1) depicts a situation, where the CIR process or Liquidation process has not been initiated. The same can be inferred from the words “in relation to” insolvency resolution and liquidation for corporate persons, which includes the Pre-CIRP Period.

b) That Section 60(2) depicts a situation, where the Corporate Insolvency Resolution Process or Liquidation process is already initiated and pending. The same can be inferred from the words “is pending”

c) That Section 60(3) deals with the provision of transfer of proceedings from DRT to NCLT in case the CIR Process and Liquidation is pending against the Corporate Debtor.

The bench further analysed the following definitions:

- “Guarantor” means a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part.
- “Personal guarantor” means an individual who is the surety in a contract of guarantee to a corporate debtor
- “Corporate debtor” means a corporate person who owes a debt to any person

“Corporate person” means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2019), 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.

On examining the section 60 and other provisions of the code the Hon’ble Tribunal held that the moment the IB application in relation to Insolvency resolution of the Corporate Debtor is pending before the Adjudicating Authority, the provisions of Section 60(1) get attracted and the jurisdiction to entertain insolvency process against the personal guarantor would, therefore, lie with the NCLT.

Hence, the Bench concluded that in a situation where Application(s) in relation to the Corporate Debtor for initiation of CIRP is pending at National Company Law Tribunal (NCLT) (initiation of CIRP of the Corporate Debtor is not a prerequisite) an application under Section 95 of the IBC, 2016 filed for initiating IR Process against the Personal Guarantor of that Corporate Debtor before the NCLT is maintainable.

The application under section 95 was admitted and Mr. Rakesh Prasad Khandelwal has been appointed as the Resolution Professional under section 97 of the code.

2. IN CASES OF INSOLVENCY AGAINST PERSONAL GUARANTORS, NO TIMELINE HAS BEEN PRESCRIBED FOR SUBMISSION OF REPORT BY THE RESOLUTION PROFESSIONAL. HENCE, THE RP WAS DIRECTED TO FILE THE REPORT WITHIN A DEFINITE PERIOD.

In the recent case of Surendra B. Jiwrajka v. Omkara Assets Reconstruction Pvt. Ltd. (Writ Petition (L.) No. 21271 of 2021 and Writ Petition (L.) No. 21272 of 2021), the High Court of Bombay has held that the parties are required to be heard in an application filed under 95 of the Code before the Adjudicating Authority takes any decision with respect to admission or rejection of the application.

The Petitioner in the present case has challenged the impugned order passed by the Debt Recovery Tribunal which has observed that no objections can be entertained till the time the resolution professional submits its report under Section 97 of the IBC. It was further contended that the order imposing interim moratorium on the Petitioner is against the principles of natural justice as no hearing was afforded to him before appointing the resolution professional.

On the contrary, the Respondent (originally the Applicant) submitted that the jurisdiction of a writ court doesn't arise when it comes to Section 95-Section 99 of the Code which only provides for the collection of evidence. It was argued that the question w.r.t. giving the chance of hearing to the Petitioner shall arise only in the case wherein the resolution professional has submitted his report. Reference was made to the case by the NCLAT (Ravi Ajit Kulkarni v. State Bank of India).

The Court referred to the provisions of the Code from Section 95-99 and observed that the Code provides for timelines for each stage of the proceedings except the time within which the resolution professional has to submit its report to the AA.

Thus, the Court upheld the decision of the Hon'ble DRT and directed the resolution professional to submit the report within a definite time period of six weeks from the date of receipt of the order after which the DRT shall decide the application within 14 days after giving both the parties the opportunity of being heard.

NCLAT Judgements

1. INHERENT POWER UNDER RULE 11 OF NCLAT RULES, 2016 WILL NOT BE EXERCISED IF THE ALTERNATE REMEDY IS AVAILABLE.

In the recent matter of Mr. Harish Raghavji Patel Vs. Shapoorji Pallonji Finance Pvt. Ltd., the NCLAT delved into the question of exercising of inherent powers of NCLAT under Rule 11 of the National Company Law Tribunal Rules, 2016. Rule 11 provides that the inherent power of the Appellate Tribunal can be exercised to make any orders as may be necessary for meeting the ends of the justice or to prevent abuse of process of the Appellate Tribunal.

Earlier, the respondent filed for the initiation of the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor (CD) under Section 7 of the Insolvency and Bankruptcy Code, 2016. The Adjudicating Authority admitted the application for initiation of CIRP. Before the constitution of CoC, the settlement arrived at between the parties and the terms of the settlement are filed along with this Application. Therefore, it is prayed that the

terms of settlement may be taken on record.

The Appellant stated that the Appellate Tribunal exercising the inherent power under Rule 11 of NCLAT, Rules, 2016 can set aside the impugned order and quash the CIRP against the Corporate Debtor in terms of the settlement. In support of the arguments, he placed reliance on the landmark judgments of the Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors wherein the Hon'ble Supreme Court said that "We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in the exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case."

Further, the respondent concurring with the argument of the appellant stated that in case the Application for withdrawal of the Petition is filed, it will take time to decide before the Adjudicating Authority, consequently, the CIRP costs may be increased, therefore, it is requested that this Appellate Tribunal may take on record the terms of the settlement and set aside the impugned order.

The NCLAT after hearing the arguments said that it is well settled that inherent power can be exercised only when no other remedy is available to the litigant and nowhere a specific remedy is provided by the statute.

If an effective alternative remedy is available, inherent power will not be exercised, especially when the applicant may not have availed of that remedy. It is also settled law that inherent power cannot be invoked which intends to bypass the procedure prescribed.

Hence, in the facts of the present case exercising the inherent power under Rule 11 of NCLAT Rules amounts to abuse of process of this Appellate Tribunal.

2. NO FRESH PLAN/PROPOSAL CAN BE ENTERTAINED POST APPROVAL OF THE RESOLUTION PLAN

In the recent case of Amanat Randhawa Hotels Pvt. Ltd. v. Shashi Kant Nemani RP of Aryavir Buildcon Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 701 of 2021 & 785 of 2021), the Appellate Tribunal has held that the expression of interest cannot be submitted post the approval of the resolution plan by the Adjudicating Authority (AA) under Section 31 of the Code.

The Appellant in the present case has challenged the impugned order of the NCLT dismissing the application of the Applicant/Unsuccessful Resolution Applicant stating that the resolution plan submitted by it was after the stipulated time. The Appellant contended that the RP has not publicised the invitation for the Expression Of Interest (EOI) dated 19.02.2021 as required under Regulation 36A of the Insol-

-vency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the Appellant via email dated 13.06.2021 has sent the EOI for participating in the CIRP for which the last date was 06.03.2021. The Appellant further sent an email to the RP to consider the proposal submitted by it but the RP didn't reply to it and was aggrieved by the same, the Appellant had filed an application.

The Respondent contended that the RP made a public announcement as under Section 15 of the Code inviting claims from the creditors. Further, the IRP collated the claims received and constituted the COC as per the Code, thus, the contention of the Appellant that the Respondent didn't publicise stands incorrectly. Also, the RP stated that the COC extended the last date for submission of plans till 10.05.2021 and till then also the Respondent had not sent his proposal. Moreover, in the COC meeting, the creditors approved the resolution plan submitted by the successful resolution applicant by 100% voting and then the plan was submitted to the NCLT for its approval.

The NCLAT observed that the proposal submitted by the Appellant was much later than the original date of submission and also beyond the extended date which was 10.05.2021. It also observed that Regulation 36 A of the Regulations stipulates that the EOI received after the time specified shall be rejected. The Appellate Tribunal referred to the case of Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors. (2019 SCC ONLine SC 1478) It also referred to the case of Ghanshyam Mishra & Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Ltd. & Ors (Civil Appeal No. 8129 of 2019) where the Court has held that there is no power of judicial review against the plan which is been approved by the COC unless as stipulated under Section 31 and the same shall be binding on all the stakeholders of the Corporate Debtor. Lastly, it referred to the case of Ebix Singapore Pvt. Ltd. v. Committee of Creditors of Educomp Solution Ltd. & Anr. (2021 SCC ONLine SC 707) wherein the Court has held that the AA should not entertain unsolicited bids and should always adhere to the timelines.

Thus, on the above reasoning, the NCLAT dismissed the appeal of the Appellant and observed that no fresh plans can be entertained post-approval of the resolution plan.

3. INTER CORPORATE ADVANCE CANNOT BE CONSIDERED AS FINANCIAL DEBT

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 has rejected the application of the Appellant filed under Section 7 of the Code stating the claims not to be a financial debt as under the IBC.

The Appellant has filed the present appeal to challenge the impugned order and submit-

-ted that the Appellant should be considered as Financial Creditor (FC) and its claim should be recognized by the AA. Stating further, the Appellant submitted that it had disbursed Rs 10 crore to the Respondent in the year 2007 and the latter has only repaid half of the principal amount. It was contended that the loan should always not be preceded by a written agreement and is also not a ground to qualify a debt as financial debt. It was stated that the requirement of the board resolution for disbursing the inter-corporate loan was not present in the Companies Act, 1956 as can be seen from Section 372A of the same Act. Also, the loan amount given was not for a definitive period and the same was recalled in the year 2018 vide notice thus, the claim is within the limitation period.

Countering this, the Respondent stated that the Appellant has failed to produce any evidence or any specific pleadings as to under which clause of Section 5(8) of the IBC does his claim falls in the definition of the Financial Debt. It was also stated that the Appellant in his balance sheet has mentioned the particular transaction as disbursal against the purchase of trucks and thus, the same cannot be stated to be as disbursal against the consideration for the time value of money. Further, it was submitted that the Appellant is using the term "loan and deposit" to bring it within the ambit of Section 5(8), however, the same is the "inter-corporate advance", thus, it can be concluded that the Appellant was not sure about the nature of the transaction. Lastly, the Respondent contended that the 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.

The NCLAT after hearing to the parties has observed that the amount of Rs 5 crore is not in dispute, however, as per the balance sheet of the FC 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.

NCLT Judgements

1. SMALL INDUSTRIES DEVELOPMENT BANK OF INDIA (SIDBI) VS SUKHINDER SINGH

In the matter of Small Industries Development Bank of India (SIDBI) vs Sukhinder Singh, the application was filed before the NCLT, Chandigarh under Section 95 of the Insolvency and Bankruptcy Code, 2016 (IBC/ Code) read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors

to Corporate Debtors), Rules, 2019 (Rules) to initiate the Insolvency Resolution process against the Personal Guarantor(PG).

In the instant matter, the PG has provided a guarantee in respect of the loans availed by the Principal Borrower i.e M/s International Mega Food Park Limited (Corporate Debtor). Corporate Debtor (CD) has failed to repay the loans and ultimately defaulted leading to the initiation of Corporate Insolvency Resolution Process (CIRP) against them. Further, the Applicant asked the PG to repay the loan defaulted by the CD, however, the PG failed to do so.

The Applicant further stated that the demand notice was duly served by the Creditor to the PG as per Rule 7 of the Rules along with the evidence of proof of the same was duly put forth before the Bench. The Tribunal on the satisfaction of the default and failure to pay against the guarantee provided by the PG admitted the application for initiation of the insolvency resolution process and imposed the interim moratorium as per the provisions under Section 96(1) of the Code in relation to all the debts of the Personal Guarantor. During the Interim Moratorium period: (i) any pending legal action or proceedings in respect of any debt shall be deemed to have been stayed; and (ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt. Also, the appointment of Resolution Professional under Section 97 of the Code is made.

2. THE CONTRACTOR IS NOT AN OPERATIONAL CREDITOR UNDER THE CODE.

In the case of South Delhi Municipal Corporation v. MEP Infrastructure Developers Limited (IA 1670 of 2021 in CP (IB) 246/MB/2021), the NCLT Mumbai has held that the debts owed by the contractor shall not be considered as Operational Debt and the entity owning such debts shall not be considered as Operational Creditor (OC) under the Code.

The Applicant has filed this application under Section 9 of the Code for initiating Corporate Insolvency Resolution Process (CIRP) against the Respondent/Corporate Debtor (CD) for the default in repayment of the monies arising out of contract awarded to the CD for the collection of toll. The applicant also contended that the CD tried to dishonour the statutory dues available to the Petitioner by filing malicious petitions in civil courts and Delhi High Court.

The Respondent, on the other hand, contended that the Petitioner is not the OC and the debts in question is not an Operational Debt and therefore the AA doesn't have the jurisdiction to entertain the present application. The Respondent buttressed its argument by stating that for a debt to be an operational debt it has to satisfy two essential conditions, i.e., provision of goods or services or debt arising under any statute and payable to government/local authority. It further submitted that there is no case of provision of goods or services being rendered by the Petitioner and further stated that the claim is also not arising from any statute.

The CD then submitted that there exist pre-existing disputes w.r.t. the present debt in question as the amount was not crystallised yet by the civil court and thus, the application under Section 9 stands liable to be dismissed. The Respondent furthermore argued on various aspects, few of which were related to the application being barred by limitation, unnecessary clubbing of various claims under this petition, breach of contract by the Petitioner etc.

The Applicant in the rejoinder stated that the power to collect the debts was arising from Section 113 of the Delhi Municipal Corporation Act, 1957 (Act) and under Section 455 of the Act the Corporation has the power to recover any monies due to the Municipal Corporation under the Act or any bye-laws. It further submitted that the Commissioner under Section 156 of the Act has the power to recover such dues and the same was stated in the agreement between the parties. Hence, the amount due from the Respondent is arising out of a statute and thus, the same shall be classified as operational debt.

The NCLT observed that the claim of the Petitioner is based out of a contract and the Petitioner is the Contractor to collect the toll tax. Thus, it was concluded that the Applicant is not an OC as it was not providing any goods or services to the Respondent. The AA referred to the case of Kavita Anil Taneja v. ISMT Limited wherein the NCLAT has observed that the party has not supplied any goods or services and thus, the same cannot be classified as OC. The NCLT further stated that just because the Petitioner has entered into a contract, the same shall not mean that the dues arose under the statute. Also, there exist the pre-existing disputes w.r.t. the claim amount and the same is pending adjudication before the civil court.

Thus, for the reasons stated above the NCLT had dismissed the application under Section 9.

Latest Updates and News

1. IBBI DEVISED AN E-PLATFORM FOR HOSTING PUBLIC NOTICES OF AUCTIONS OF LIQUIDATION ASSETS.

The Insolvency and Bankruptcy Board of India came up with another reform. IBBI in order to facilitate the liquidation asset auction process vide its Circular No. No. IBBI/LIQ/44/2021 dated 30th September 2021. In its assessment report on Corporate Insolvency and Resolution Timeline, it said the platform can be prepared on similar lines as investindia.gov.in specifically for stressed assets undergoing insolvency with more user-friendly filters such as debt size, location, and sectors.

The said circular said that as per the provisions of Sub-Regulation (3) of Regula-

-tion 12 of the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Pr-

ocess Regulations) a liquidator is required to issue public notice of auctions on the website designated by IBBI.

Further, the circular discusses the current scenario and the reason behind this circular. It states that Liquidators are presently auctioning liquidation assets on various auction platforms. The information regarding such auctions is not available in a centralized place. A centralized platform hosting all public notices of auctions of liquidation assets of ongoing liquidation processes would improve visibility for the liquidation assets being sold, and may expedite the process and lead to better realization.

With this step, the IBBI is fulfilling its objective as a regulator by creating information symmetry by bringing all information related to liquidation asset sale through public notices of the auction under one umbrella.

2. IBBI HOSTED ITS FIFTH ANNUAL DAY ON 01ST OCTOBER 2021

Recently, the Insolvency and Bankruptcy Board of India (IBBI), organized its fifth Annual day at the Indian Habitat Center, New Delhi. The event was graced by several luminaries including Dr. Bibek Debroy, Chairman, Economic Advisory Council to Hon'ble Prime Minister graced the occasion as the Chief Guest. Shri Rajesh Verma, Secretary, Ministry of Corporate Affairs, and Dr. Krishnamurthy Subramanian, Chief Economic Adviser, Ministry of Finance were Guests of Honour. Dr. M. S. Sahoo, Former Chairperson, IBBI graced the occasion as a special invitee.

Krishnamurthy Subramanian, CEA, in his speech stated that IBC has ended feudalism of the promoters in a capitalist society to a great extent. He noted the significant improvements which IBC has achieved over the other debt resolution mechanisms like SARFAESI, DRT, etc. He also drew certain comparisons with the insolvency and restructuring regimes of the USA and UK among many. Dr. Debroy delivered an engaging session on 'From No Exit to Easy Exit: A Case Study of IBC' which is also uploaded on the IBBI Website

As part of the Annual Day celebrations, dignitaries released IBBIs annual publication, "Quinquennial of Insolvency and Bankruptcy Code, 2016". This publication presents the thoughts and perspectives of practitioners, policymakers, subject matter experts and academicians, that elucidate and stimulate thoughts around the journey of the Insolvency and Bankruptcy Code, 2016 (Code) thus far and the road ahead. It is an attempt to contribute to the scholarly and policy discourse around insolvency law. Lastly, the dignitaries also released a stamp, 'My Stamp' on the "Insolvency and Bankruptcy Code, 2016 which shall be made available to the Insolvency Professional Agencies.

3. RESERVE BANK OF INDIA REFERS TWO COMPANIES OF SREI GROUP FOR THE INSOLVENCY RESOLUTION PROCESS.

In a major development, the Reserve Bank of India (RBI) had last week 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. 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 ordered 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.

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