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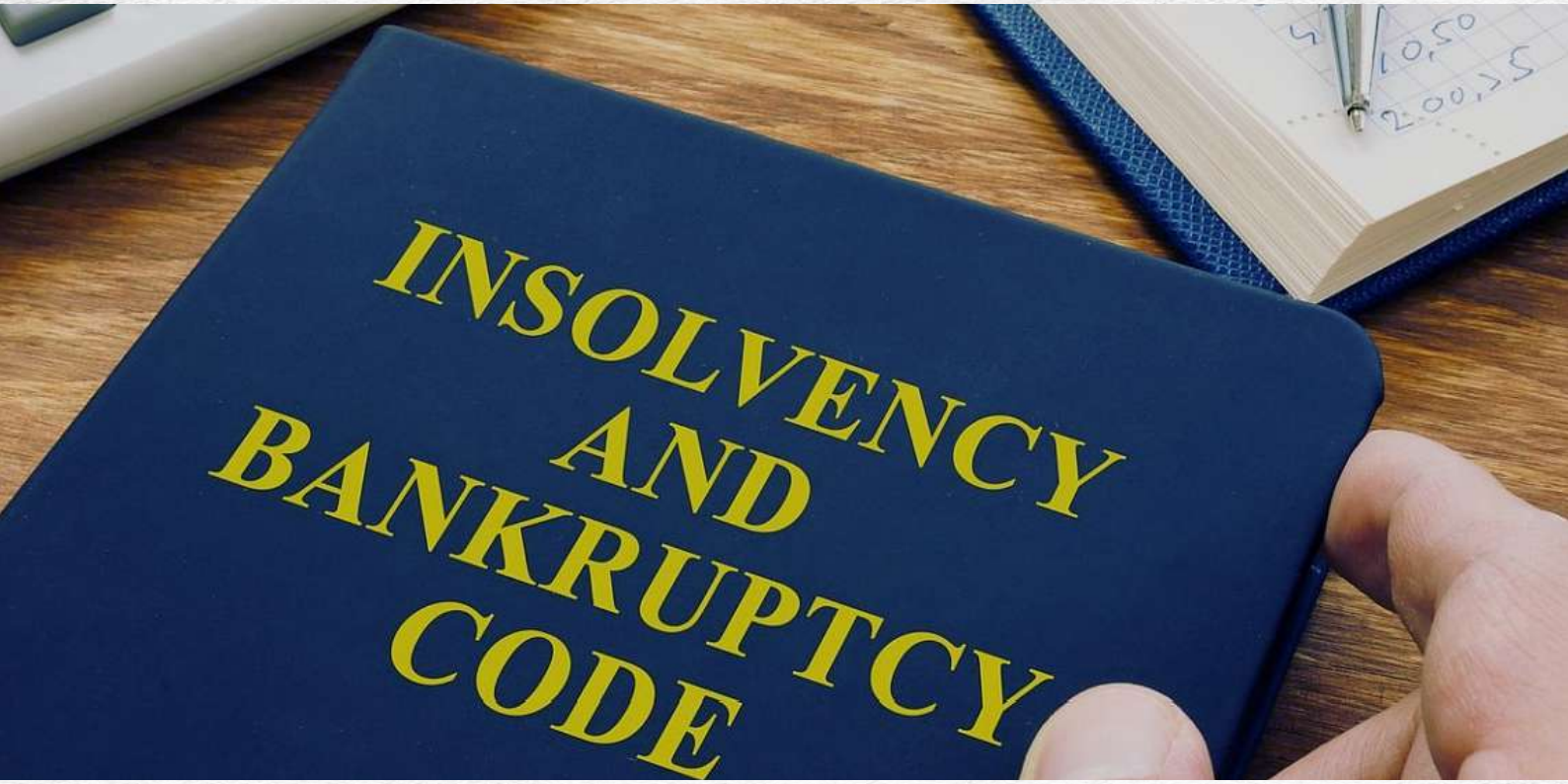

IN FOCUS: UNDERSTANDING THE JURISDICTION DILEMMA IN PERSONAL GUARANTOR INSOLVENCY RESOLUTION PROCESS

Indian Insolvency regime had a very fragmented, time-consuming, and archaic personal insolvency laws. Two major laws on personal insolvency before the enactment of Insolvency and Bankruptcy Code, 2016 (IBC/Code) were (i) The Presidency Towns Insolvency Act, 1909 dealing with insolvency cases in Presidency towns (Bombay, Madras, Calcutta) and (ii) Provincial Insolvency Act, 1920 which was applicable elsewhere. Due to persistent and continuing issues with the provisions of these Act, the need for a more structured and updated insolvency framework was felt. Acting upon it, the enactment of IBC in 2016 came into the picture.

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WHAT'S INSIDE THIS ISSUE:

The provisions dealing with personal insolvency are provided under Part III of the Code. The Code comprehends three categories of individuals under Part III, i.e. (i) Personal Guarantors to corporate debtors; (ii) Individuals with partnership firms or sole proprietorships, and (iii) other individuals.

However, the Code notified the insolvency resolution process in respect of Companies initially and recently, the insolvency resolution process of the Personal Guarantors came into existence on the recommendations of the Report of Reconstituted Working Group on Individual Insolvency (RWG).

The RWG suggested that the phased implementation of Part III is essential as the market dynamics, stakeholders, transactions, and nature of the proceedings may not adjust under a single umbrella procedure. Thus following the suggestion, a piecemeal approach was preferred and the rules and regulations thereof for the insolvency resolution process of Personal Guarantors were brought into existence.

Understanding Personal Guarantor to Corporate Debtor insolvency process

Before moving on to the jurisdictional dilemma on the Personal Guarantor to Corporate Debtor, the understanding of the concept of Personal guarantor as envisaged under the Code is imperative. Personal Guarantor as defined under Section 5 (22) of the Code states that a personal guarantor is an individual who is the surety in a contract of guarantee to a corporate debtor. To put it simply, any person who promises to pay a borrower's debt in the event that the borrower defaults in respect of their obligation. Under the mechanism of the Code, the Personal Guarantors provide guarantees for the loan or any other type of facility availed by the Corporate Debtor from the principal borrower. Consequently, when a corporate debtor defaults on the payment of such facilities the liability of the personal guarantor comes into existence.

Parallel Proceedings against the Personal Guarantor- A Distinct Category

The rationale of parallel proceeding against the Personal guarantors has its genesis in the fundamental principle of co-extensive liability of

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

the surety (Personal guarantor) against the creditor or principal borrower. As far as the applicability of this principle under the Insolvency and Bankruptcy Code, 2016 is concerned, the Supreme Court in the case of Lalit Kumar Jain v. Union of India held that the approval of a Resolution Plan for the resolution of Corporate Debtor does not ipso facto discharge a Personal Guarantor (of a Corporate Debtor) of her/his liabilities under the Contract of Guarantee.

The scheme of the Code for designated Adjudicating Authority to adjudicate matters is clear and unambiguous. For the insolvency processes under Part II of the Code, which deals with the insolvency resolution and liquidation process for the corporate persons, the Adjudicating Authority shall be the National Company Law Tribunals (NCLT). Whereas, for the insolvency resolution and bankruptcy for individual and partnerships firms , which includes personal guarantors, the Debt Recovery Tribunals (DRT) will be the designated Adjudicating Authority.

Therefore, on a bare perusal of the statutory provisions, the distinction is discrete without any ambiguity. However, with the introduction of the Insolvency and Bankruptcy Code (Second Amendment), 2018 the conflict and overlapping of the jurisdiction in the case of personal guarantor arose.

Personal Guarantor by nature is classified as individual insolvency and hence is a subject matter of Part III of the Code. However, in this amendment, a distinct category was created for personal guarantors as originally they were subject under Part III of the Code for resolution but with the said amendment personal guarantors are now treated under Part II of the Code. Such a distinction does not align with the scheme of the Code and their insolvency resolution plan shall be dealt with under Part II of the Code.The constitutionality of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (2019 Rules) was challenged in the case Lalit Kumar Jain v. Union of India. The Hon'ble Supreme Court upheld the 2019 Rules and thus a distinct category for Personal Guarantor is now firmly established.

The Jurisdictional Anomaly on Personal Guarantors Insolvency Resolution Process

Therefore, the said Amendment and the rules inter alia enabled the provisions of Section 60 of the Code which envisaged four situations

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**

under which the exclusive jurisdiction in Personal Guarantor applications rests with the NCLT.

1. The Adjudicating Authority in relation to insolvency and resolution for personal guarantors shall be the NCLT having territorial jurisdiction.
2. Instances where the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor is pending.
3. In an instance where the CIRP is in the process against the Corporate Debtor, the application against the Personal Guarantor shall be transferred before such NCLT
4. The powers provided to DRT in matters of the personal guarantor shall be vested with NCLT.

Here, we have a situation where an application against the Corporate Debtor is either initiated, pending, or in the process (admitted) in such a case the application for initiation of insolvency resolution process against the Personal Guarantor shall be the NCLTs.

On a harmonious construction of Sections 94 & 95 and Section 60 of the Code, it can be construed that special provisions have been provided to vest NCLT with the jurisdiction in Personal Guarantors to Corporate Debtors Cases. The intent of these provisions of the Code is manifested to allow the creditor to initiate and maintain proceedings against both the corporate debtor and the guarantor simultaneously and before the same forum.

However, different NCLTs have taken a different view on this aspect. For instance, the NCLT New Delhi in the case of ***PNB Hou-sing Finance Ltd. Vs. Mr. Mohit Arora (Managing Director of Supertech Ltd.)*** discussed the scope of the Amendment enabling Section 60 of the Code. NCLT stated that whenever Section 60 is attracted, the provision of Section 179(1) of IBC, 2016 shall not be applicable and the jurisdiction shall vest with NCLT.

Further, the Tribunal held that in a situation where Application(s) in relation to the Corporate Debtor for initiation of CIRP is pending at NCLT then, initiation of CIRP of the Corporate Debtor is not a prerequisite for maintainability of an application under Section 95 of the IBC filed for initiating insolvency resolution process against the Personal Guarantor of that Corporate Debtor before the NCLT.

Recently, the NCLT in the recent matter of ***PNB Housing Finance Ltd. Vs. Mr. Goldy Gupta (Partner of M/s. Star Raison Landmarks and Directors of Star Realcon Pvt. Ltd)*** held that the commencement of CIRP against the Corporate Debtor is not a condition precedent for maintaining an application under Section 95 of the Code filed for initiating insolvency resolution process against the Personal Guarantor of the Corporate Debtor before the NCLT.

This rationale was not taken by the NCLT Mumbai in the case of ***Insta Capital Pvt. Ltd. Vs. Ketan Vinod Kumar Shah*** where the issue for consideration is whether a Financial Creditor can initiate CIRP against the personal guarantor in the absence of any resolution process/liquidation process against the corporate debtor.

The Tribunal held an application for insolvency for a resolution against the personal guarantor is not maintainable unless that CIRP or liquidation application is ongoing against the Corporate Debtor. It is further observed that filing of applications seeking resolution of personal guarantors without the Corporate Debtor undergoing CIRP, would be tantamount to the vesting of jurisdiction on two courses one is NCLT and another is the Debts Recovery Tribunal.

The NCLTs have a diverse opinion on the initiation of the insolvency resolution process against the Personal Guarantor during the initiation or pendency of CIRP application against the Corporate Debtor. Such a situation is not been resolved as the NCLAT (Appellate Tribunal) has not yet dealt with this anomaly.

Concurrent Jurisdiction with Debt Recovery Tribunals

As pointed, the Debt Recovery Tribunals (DRTs) are designed Adjudicating Authority in proceedings related to insolvency matters of individuals and firms, which also includes Personal Guarantors and having territorial jurisdiction over the place where the individual debtor actually and voluntarily resides or carries on business or personally works for gain. It can be stated the Original Jurisdiction for personal guarantors rests with the DRTs.

However, a peculiar situation which Section 60 of the Code does not comprehend is that where an application for initiation of CIRP against the Corporate Debtor is neither initiated, pending nor admitted in such cases who shall have the jurisdiction. This situation further builds up to the existing dilemma.

Following the strict interpretation of the provisions of the Code, in such situations, DRTs are best suited to entertain the application. The reason being, they have the original jurisdiction to deal with personal guarantors under the Code. Further, the Amendment of 2018 and rules thereof are enabling provisions that created a special case for Section 60 provisions. However, the Amendment and Rules are silent on the deprivation of jurisdiction with the DRTs.

In addition to that the RWG stated that *"In cases where there a corporate insolvency process is not pending against the corporate debtor, the jurisdiction in respect of Insolvency and Bankruptcy of personal guarantor is Debt Recovery Tribunal".*

DRT taking up the Jurisdiction in Personal Guarantors Insolvency Proceedings

The Debt Recovery Tribunal, Chennai in the case of KEB Hana Bank vs Mr. Rohit Nath has taken a step further and entertained an application under Section 95 of the Code wherein the CIRP against the Corporate Debtor is already initiated.

The Tribunal in reply to the contention of the Respondent on non-applicability of the application on grounds of lack of jurisdiction stated *"in our view that this contention is unfounded as section 60 deals with proceedings initiated against the corporate debtor whereas having a separate forum is clothed with the power to adjudicate. The present proceedings are against the guarantor to the corporate*

debtor alone. As far as the proceedings before this Tribunal is concerned under section 60 of IBC code have no application."

Conclusion

On a concurrent reading of provisions under section 60 and 95 of the Code, even NCLT have concurrent jurisdiction. Therefore, the provisions here clearly outlined the anomaly where two different forums have assumed jurisdiction for overlapping matters. Unfortunately, the concrete answer and resolution to this problem are not yet provided as the higher courts or tribunals have not yet entertained this anomaly. The assumptive rationale behind this could be that both NCLT and DRT have assumed jurisdiction as per their interpretations under the Code and has added to the existing dilemma.

Although, it is clear from the provisions, amendments, and the Supreme Court ruling in the Lalit Kumar Case that DRT has original jurisdiction along with a special situation where CIRP is not even initiated against the Corporate Debtor or Principal Borrower. Whereas NCLT is vested with jurisdiction through an enabling Amendment. Such a jurisdiction can be termed as 'exceptional jurisdiction' to streamline the CIRP process against the Personal Guarantor and the Corporate Debtors.

IBC is still in its nascent stages and its jurisprudence is evolving throughout. The anomaly highlighted in this article shall sooner be knocking on the doors of the higher courts for interpretation. Hence, a ruling with the Appellate Tribunal and ultimately the Supreme Court will settle this jurisdictional challenge.

LATEST JUDGEMENTS AND UPDATES

SUPREME COURT JUDGEMENTS

1.Time-bound implementation of the Resolution Plan is the fundamental objective of the Code

One of the fundamental objectives of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) is the time-bound resolution of the company under distress. The Hon'ble Supreme Court in the recent case of *CoC of Amtek Auto Ltd. through Corporation Bank Vs. Dinkar T. Venkatsubramanian and Ors* interpreted the effect of Section 12 of the Code and reiterated the fundamental objectives of the Code.

Facts of the Case

The appellant has preferred this application against the impugned order of the NCLAT. Before, an application under section 7 of the Code was filed for the initiation of the Corporate Insolvency Resolution Process against the Corporate Debtor (CD). In furtherance of the same two resolution plans were considered by the CoC. The first was Deccan Value Investor LP (hereinafter referred to as the 'DVI') and the second was submitted by M/s Liberty House Group Private Limited (hereinafter referred to as the "Liberty"). Later DVI withdrew its plan, and the resolution plan of 'Liberty' was approved.

However, Liberty was faulted in the implementation of the plan. Accordingly, an application under Section 60 (5) was filed by the CoC against the Liberty and also prayed for the reinstation of the CoC and allow resolution professionals to restart the process.

Interestingly, Adjudicating Authority did not accede to the request for carrying out a fresh process by inviting the plans again but directed the reconstitution of the COC for re-consideration of the Resolution Plan submitted by DVI.

CoC filed an appeal against such order of AA before the NCLAT. Meanwhile, the Resolution Professional invited the bids and DVI again submitted the bid. CoC declared the plan of DVI ineligible against which they filed an appeal before the NCLAT and NCLAT ordered in favor of DVI and directed CoC to consider all the plans submitted in fresh invitation. Further, the appellate authority by the impugned judgment and order disposed of the appeal filed by the COC and rejected the prayer for the exclusion of time. Consequently, virtually ordered the liquidation of the Corporate Debtor.

Before the Hon'ble Supreme Court

Aggrieved by the order of the appellate tribunal, the CoC filed an appeal before the Supreme Court and stated that Corporate Debtor is a financially viable entity and there is enough interest in the market for submission of a resolution plan for the Corporate Debtor. Further, the objective of the Code is revival and rescue of the viable companies and liquidation to be taken as a last resort.

The Supreme court provided a stay on the order of the Liquidation and also permitted the resolution professional to invite fresh offers within a period of 21 days. The Apex court further passed an order that within two weeks thereafter, the COC shall take a final call in the matter, and the decision of the COC and the offers received to be placed before this Court. The Supreme Court also observed that the time spent before the adjudicating authority and before this Court be excluded for calculating long stop date.

As per the order of the Supreme Court, DVI also submitted the resolution plan and the same was approved by the CoC and later by the Adjudicating Authority for its implementation.

Later, the CoC filed a contempt petition against the DVI for non-implementation of the plan and on the other hand, DVI filed an I.A before the Hon'ble Supreme Court for the withdrawal of the resolution plan.

The Supreme Court on hearing rejected both the applications filed by CoC and DVI respectively and directed DVI to comply with the implementation process of the plan and not indulge in such devious practices.

Finally, the Supreme Court interpreted Section 12 of the Code and stated that the timeline under this section is mandatory and shall be complied with to upload the objectives of the Code. Further, Supreme Court stated that the approved resolution plan has to be implemented at the earliest and that is the mandate under the IBC.

2.Section 34 of SARFAESI Act does not allow jurisdiction of any civil court.

The Supreme Court in the case of Electrosteel Castings Limited v. UV Asset Reconstruction Company Limited & Ors. (Civil Appeal No. 6669 of 2021) has upheld that the provision of Section 34 of the SARFAESI Act does not allow the jurisdiction of any civil court apart from the DRT.

The Appellant is the mortgagor for the loan agreement between Respondent No. 2 & 3 and had given a guarantee in favour of Respondent No. 2 for availing the financial assistance of Rs 500 crores by Respondent No. 3. Owing to the default on the loan provided, Respondent No. 2 in the insolvency petition initiated under 7 of the IBC had submitted its claims of worth Rs 923 crores, out of which Rs 241 crores were admitted along with 67 lakh equity shares of the CD in the approved resolution plan. Thereafter, Respondent No. 2 had assigned the loan to Respondent No. 1 in the year 2018 by assigning all the rights, titles and interest in the loan given. Post this, Respondent No. 1 issued a letter to all the interested parties about such assignment and later had initiated proceedings against the Appellant under Section 13(2) of the SARFAESI Act, 2002 by issuing a notice demanding payment of Rs 587 crores.

The Appellant had challenged the notice stating that pursuant to the approval of the resolution plan all the claims and liabilities have been settled and thus, no claims sustain as on the date on the guarantor.

Further, the Appellant had challenged the possession notice issued by Respondent No. 1 before the single bench and division bench of the High Court of Madras which got dismissed for the reason that the civil court does not have the power to entertain matters related to the SARFAESI Act as per Section 34. Further, the Appellant had filed an application under Section 17(1) of the SARFAESI Act in 2019 against the possession notice praying for two reliefs, firstly, to hold that assignee have acquired no rights, and secondly, that assignee is not a secured creditor vis-a-vis the Appellant and thus, the possession notice should be declared null and void. Thus, the present appeal was filed before the Supreme Court.

The Appellant argued before the Apex Court that there exists an element of fraud in the assignment agreement as to the proceedings w.r.t. such loan has already been completed and there has been a resolution plan which is already been approved by the Adjudicating Authority. Thus, the High Court has erred in observations of barring the appeals before it under Section 34 of the SARFAESI Act, It was further submitted that even the assignee of the agreement cannot be termed as a secured creditor as there exist no legally enforceable debts and thus, the application by the Respondent No. 1 under SARFAESI Act is null and void.

The appeal was vehemently opposed by the Respondent which stated that the allegations of fraud are nothing but clever

drafting to bring the suit maintainable before the civil court under Section 34 of the Act. It further pleaded that only allegations were made by the Appellant, however, no evidence w.r.t. such allegations were provided by the Appellant. Thus, the Respondent concluded by stating that the appeals were rightly rejected by the High Court.

The Apex Court after hearing the parties observed that the Appellant has used the term 'fraud' so as to bring the present matter within the jurisdiction of the civil court and there does not exist any element of fraud. Further, the court also rejected the argument of the Appellant regarding the discharge of the CD post-approval of the plan will automatically discharge the guarantor and also noted that the assignment deed cannot be held to be fraudulent. Lastly, the Court observed that the issue regarding the assignee being the secured creditor or not is to be dealt with by the DRT under SARFAESI Act. Thus, it was concluded that the suit filed by the Appellant was not maintainable given the bar contained under Section 34 of the Act.

3.Power of attorney holder shall be the authorised person under the Code, if a general authorisation has been made.

The Supreme Court in the case of Rajendra Narottamdas Sheth & Anr. v. Chandra Prakash Jain & Anr. (Civil Appeal No. 4222 of 2020) has upheld the principle w.r.t. the fact that the document granting power of attorney shall be construed in a way to grant the authorization for filing of the application under the Code.

The brief facts of the present case are, that the Appellant is the erstwhile director of the Corporate Debtor (CD) against whom an application under Section 7 has been admitted by the NCLT and later upheld by the NCLAT. The Appellant contended that the application is barred by limitation as the default was of the year 2014 and the application was filed in the year 2019. Also, he submitted that the application was filed on behalf of the Financial Creditor (FC) by the power of attorney and as per the judgement in the case of Palogix Infrastructure Private Limited v. ICICI Bank Limited by the NCLAT, the said power of attorney holder cannot be termed as an authorised person as against the requirements of Section 7 of the Code.

Responding to the second issue first, the FC contended that the NCLT & NCLAT both concluded that the power of attorney holder is the authorised person to file the application and referred to the Palogix Infrastructure case and stated that the person authorised by way of power of attorney can file an application under Section 7 of the Code. It was further stated that the authorisation was pursuant to the resolution passed in the year 2008 and executed in the year 2011 as per which the power of attorney holder was made competent to conduct, manage and assist in the business of the FC and do all such things necessary for carrying on the business.The Court referred to the NCLAT judgement and observed that the power of attorney is not competent to file an applica-

-tion under 7 of the IBC on behalf of the FC however if the same is a general authorisation made by any FC, OC or any Corporate Applicant in favour of its officers to do the needful in legal proceedings against the CD, then mere use of words such as "power of attorney" shall not take away the authority of such person and hence, the same shall be treated as "authorisation" by the FC, OC or Corporate Applicant. Further, the Court observed that as per the NCLAT judgement, an officer authorised to sanction loans does not require specific authorisation for the recovery of such loans and hence, the plea of the CD was dismissed by the Supreme Court.

W.r.t. the second issue, the Appellant argued that the date of default was of the year 2014 and the application was filed in the year 25.04.2019, thus, the application was barred by limitation. He further argued that even if the debit balance confirmation letter dated 07.04.2016 is to be taken into account, then also a period of 3 years has been elapsed and thus, protection under Section 18 of the Limitation Act, 1963 can't be granted.

To this, the FC submitted that the orders of the NCLT and the NCLAT are error-free and rightful in admitting the petition. It stated that the CD had acknowledged the debt by way of letters, written in and after 2018, by giving details of the amount repaid and asking for consideration of a one-time settlement. Hence, considering the arguments of the FC, the Supreme Court observed that Section 18 of the Limitation Act shall extend the period of limitation in the present case and thus, upheld the decision of the NCLT and NCLAT.

NCLAT JUDGEMENTS

1. Application can't be rejected on account of failure of signature.

NCLAT in the case of Prokash Datta v. Indian Bank (Erstwhile Allahabad Bank) & Anr. (Company Appeal (AT) (Insolvency) No. 976 of 2021) has rejected the appeal of the appellant stating that since the disbursed amount was actually received by the appellant hence, his assertion that the Loan document does not contain his signatures are not acceptable.

The Appellant had filed. an appeal against the impugned order of the Adjudicating Authority which has rejected the interim application filed by the Appellant. The Appellant submitted that he has filed an application under Section 340 r/w 195(1)(b) of Code of Criminal Procedure, 1973 r/w Sections 193, 199, 200, 463 and 471 of Indian Penal Code, 1860 r/w Rule 11 of the NCLT Rules, 2016 for issuing directions against the Financial Creditor and its Authorised Signatories. The Appellant contended that the term loan agreement-III does not contain his signature and further to base this argument he furnished a report of a handwriting expert.

The NCLAT noted the fact that the Bank owns a financial debt that was claimed by way of three-term loans. The Appellate Tribunal noted that the amount was disbursed on various dates under term loan III and the same was received by the Appellant. Hence, he is just trying to harper upon the fact that the agreement does not contain his signature and thus, the appeal was dismissed.

2. For extending the limitation under Section 25(3), the document needs to be written and registered.

NCLAT in the case of State of West Bengal v. Keshav Park Private Limited (Company Appeal (AT) (Insolvency) No. 330-331 of 2020) has held that to apply the benefit of Section 18 of the Limitation Act, it is necessary that before the expiry of the prescribed period of limitation for suit or Application, such acknowledgment must be in writing.

The principal issue in the present case was that whether a reply to the demand notice issued in the year 2017 asking for the parties to meet for a discussion regarding the settlement of the dues amounts to the acknowledgment or not and whether the provision of section 25(3) of contract act extends the limitation or not.

Appellant in the present case, Corporate Debtor (CD), had entered into an agreement with the Operational Creditor (OC)/ Respondent for completion of a project and for the same the former had raised three bills in the year 2012. The Appellant contended that Adjudicating Authority has mistakenly admitted the petition under Section 9 of the Code against the CD and the same should be dismissed. The CD further stated that the petition is barred by limitation as the default was of the year 2012 and the application was filed in the year 2019. Further, it contended that the reply dated December 2017 was issued by the CD as a goodwill gesture for the purpose of entering into a discussion with the OC for settling the grievance and hence in no manner it can be construed as acknowledgment under Section 18 of the Limitation Act or Section 25(3) of the Indian Contracts Act.

Lastly, it contended that the AA failed to appreciate the fact that there exist a pre-existing dispute before the issuance of notice under Section 8 of the Code and hence, the application under Section 9 of the Code ought not to have been admitted.

The Respondent stated that the reply dated December 2017 had the intention to pay the debts as it was a promise to pay and thus, the same is to be construed as an acknowledgment of debts.

The Appellant Authority observed that the reply dated December 2017 was for calling the representatives of the OC for a discussion to settle the claims and thus, the same cannot be said to be an acknowledgement of debts for the invocation of Section 25(3) of the Contract Act as the same was not in writing and registered. Further, the NCLAT noted that the CD did not dispute the claim shall not be equated with the acknowledgement of liability to pay the time-barred claim and hence, the same shall be considered as an extension of the limitation period under Section 18 of the Limitation Act.

Thus, the appeal was admitted and the CIRP was dismissed.

3.NCLAT decided on the Limitation of the application under Section 7 of the Code.

In the matter of M/s. Invent Assets Securitisation & Reconstruction Pvt. Ltd. Vs. M/s. Girnar Fibres Ltd, the NCLAT decided on the limitation of the application filed under Section 7 of the Insolvency and Bankruptcy Code,2016 (IBC /Code).

In the present matter, an appeal is filed against the impugned order of the Adjudicating Authority rejecting the Section 7 application of the Code for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor on grounds of limitation.

Submission of Appellant

The Appellant stated that Corporate Debtor (CD) has failed to repay the amount of the loan facilities availed by them and such facilities were declared as NPA in 2002. Later on, reference to the BIFR was made in 2003 and 2004 which were collectively heard dismissed as non-maintainable in 04.05.2016. Hence, the appellant stated that the period from 2004 to 2016 should be excluded for calculating the limitation. Further, Appellant states that the Application under Section 7 of the Code was filed within three of the years of the date of cause of action i.e. 05.05.2016.

Submission of Respondent

Respondent stated that the period from 25.04.2006 to 2016 cannot be excluded for computing the limitation period. Section 22(5) of SICA, 1986 is not attracted to the present case since the period of limitation i.e. 3 years had already expired before the BIFR reference was made by the Corporate Debtor.

Further, the respondent stated that admission in the balance sheet cannot extend limitation as to the unsigned pages without any authentication also demonstrates that SBI is still the charge holder.

Judgement

The NCLAT held that in the instant case, it is clear that the right to sue accrued when the default occurred way back on 28.02.2002. The material on record does not evidence any acknowledgment of liability under Section 18 of the Limitation Act, 1963 to extend the limitation period. The dismissal of the BIFR reference, relied upon by the Appellant, is also dated 04.05.2016 which is beyond three years from the date of default. The Application under Section 7 was filed on 04.06.2019 for an amount which even according to the Appellant, fell due on 14.02.2008 and cannot revive a debt that is no longer due as it is time-barred. The tribunal further stated that the facts of the present case are squarely applicable to the Hon'ble Supreme Court judgement of Dena Bank wherein it was stated that IBC is not a recovery proceeding and a strict time-bound process.

Hence, considering the arguments and the references to the Supreme Court NCLAT held that Adjudicating Authority has rightly

dismissing the Application filed under Section 7 of the Code, as barred by limitation. Accordingly, the Appeal is dismissed.

4. Whether Liquidator possess better title than Corporate Debtor over assets held with Custom bonded warehouse

In the matter of Central Board of Indirect Taxes and Customs Vs. Sundaresh Bhatt the Liquidator of ABG Shipyard, the NCLAT decided whether the good in possession with the Custom Bonded warehouse are assets of the Corporate Debtor (CD) or not.

In the instant case an appeal is filed against the order of the Adjudicating Authority (AA) wherein the AA disposed of the application by directing the Respondents to allow the liquidator to remove the goods, which is lying in the Customs Bonded Warehouses without any condition, demur and/or payment of Customs Duty.

Contentions by the Appellant

The Appellant states that the CD has not filed the bill of entry for several years and has not paid the Customs Duty and other charges for the imported goods. Hence, the importer was deemed to have lost his title to the imported goods, in terms of Section 48 & Section 72 of the Customs Act. Thus the Custom Authorities are empowered to sell the goods and to recover the government dues. Further, the Appellant stated that the Liquidator had no power to take into the possession of those goods in respect of which the Corporate Debtor itself had relinquished its Claim and left it abundant without taking any steps for clearance of the goods for home consumption by paying the customs duty and other applicable charges. The Appellant gave the rationale that liquidator cannot possess a better title than the Corporate Debtor itself does not possess.

Contentions by the Respondent

Whereas, on the other hand the Respondent stated that the by filing the Claim before the Liquidator, the Appellant admits the ownership of the Corporate Debtor and accepts the authority of the Liquidator to decide the Claim about the Government Dues, which shall be decided in terms of Sec 53 of the Code

In reply to this the NCLAT stated that the Appellant has filed its Claim before the Liquidator in response to the Notice issued by the Liquidator. Given the law laid down by the Hon'ble Supreme Court in the ICICI Bank Ltd vs SIDCO Leather Ltd, it is clear that by submission of Claim in response to the Notice issued by the Liquidator, it cannot be presumed that the Appellant had relinquished its right over the property and submitted to the jurisdiction of the Liquidator.

Decision by the Appellate Tribunal

The NCLAT stated that as per the provisions cited under Customs Act, the Liquidator has no right to take into possession over those goods for which the

Corporate Debtor's title is deemed relinquished by implication of law.

Further, the non-obstante clause under Section 238 of the Code does not apply in this situation as because the goods imported by the Corporate Debtor were imported much before the initiation of the CIRP, and the Corporate Debtor never claimed them after import.

Hence, the Appellate Tribunal allowed the appeal and modified the impugned order of AA.

5. NCLAT decided whether limitation can be allowed till the copy under Rule 50 of NCLT Rules is provided.

The NCLAT in M/s. Hasmukh N. Shah & Associates Vs. M/s. Victoria Entertainment Pvt. Ltd. dealt with another matter related to question of limitation period. The jurisprudence regarding the law of limitation is evolving and even after landmark decisions of the Hon'ble Supreme Court in V Nagarajan Vs. SKS Ispat and Power Ltd. & Ors and Ms. Sagufa Ahmed & Ors. Vs. Upper Assam Plywood Products Pvt. Ltd. & Ors. and several others the position on limitation is evolving.

In the present matter cumulative Appeals are preferred under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) challenging the judgment and order dated 20.07.2018 passed in four different Section 9 Applications filed by the Appellant. The Office has remarked the appeal 'as delayed' and same has become the contention for admission of the appeal.

Appellant's Submission

The appellant contends that the that the copy of the order was applied on 27.07.2021 and received on 29.07.2021 and the Appeal was filed within the time from the said date. Further, the Appellant states that the Appeal is within time and also relied on Rule 50 of the NCLT Rules, 2016 which entrusts a duty upon the Registry to send a certified copy of the final order passed to the parties concerned free of cost. The said rule is procedural in nature and requires the registry to provide a certified copy of the parties.

Decision by the Appellant Tribunal

The question which has been raised before the Appellate Tribunal is that since free-of-cost copy as required by Rule 50 has not been received by the Appellant, the period of limitation shall not begin to run and the Appeals filed by the Appellant on 20.09.2021 are well within time.

The NCLAT stated the limitation to file Appeal under Section 61 cannot be treated to be under suspension till free of cost copy is received by party as enjoined by Rule 50. Any such interpretation shall not dwell with the statutory scheme. The Code has been enacted to speed up Insolvency Resolution Process and there is a timeline fixed for different steps filing Appeal within 30 days to the Appellate Tribunal is also part of the same thread of timeline which run through different provisions of the Code.

HIGH COURT JUDGEMENTS

1. Winding Up order for Spice Jet under Companies Act, 2013

Madras High Court has ordered the winding up of airline company Spice Jet under Section 448 of the Companies Act, 1956 for contravention of Section 433(e) of the same act. Spice Jet owes unpaid dues to the tune of USD 24.01 million to the Swiss stock cooperation- Credit Sussie AG for engine, repair, maintenance and overhaul services provided by SR Technic.

The company argued that the SR Technics did not possess the approval from the Director-General of Civil Aviation (DGCA) from 2009-2015 and made a 'fraudulent misrepresentation' of having the same which is against the applicable laws of the land. The Single judge bench of the Madras High Court however, held that since SpiceJet chose not to terminate the services even though they knew that the appellant company was in violation of the Aircraft Act and the C.A.R rules it cannot now claim that their liability has ceased. And thus, are liable to be wound up under Section 433(e) of the Companies Act, 1956. The court directed the respondent company to be wound up and appointed an Official Liquidator to take over the assets of SpiceJet.

The order, however, was stayed on the same day, for there weeks after SpiceJet moved a plea to deposit USD 5 million with the court in two weeks' time.

LATEST NEWS AND UPDATES

Application for insolvency filed against Reliance Capital Ltd.

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

The provisions provide for an interim moratorium which shall commence from the date of filing of the application till the time of its admission or rejection and shall have the same effect as that of provision enlisted under Section 14 of the Code.

Anil Ambani led Reliance Capital Ltd. to become the third NBFC after DHFL and SREI Infra Companies Group to be resolved under the Insolvency and Bankruptcy Code, 2016.

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