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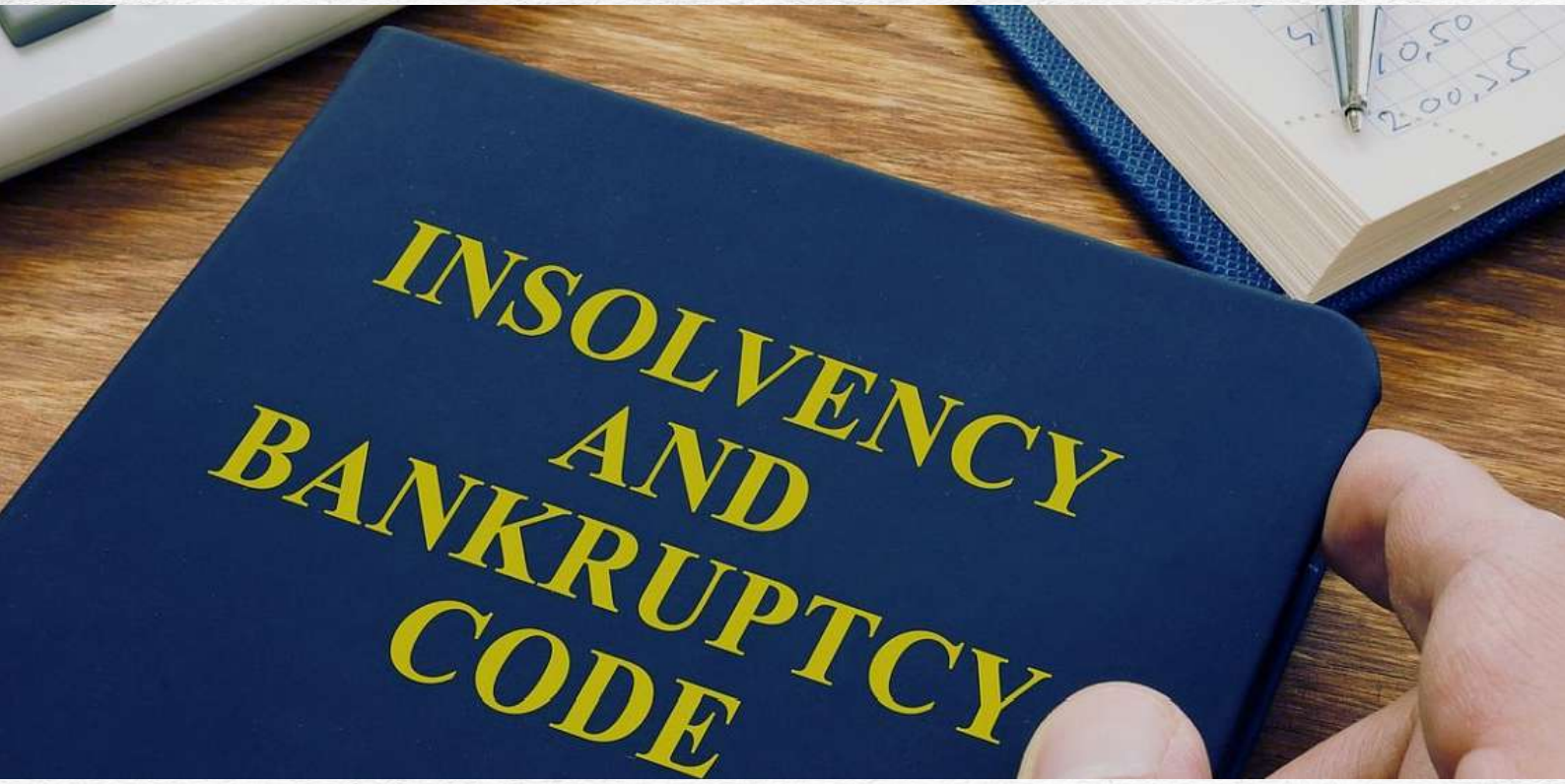

INTERPLAY OF THE INSOLVENCY & BANKRUPTCY CODE, 2016 AND SARFAESI ACT,2002 - A JUDICIAL TREND

There has been a lot of debate on the overriding provision of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as IBC/Code) as given under Section 238 of the Code. The Adjudicating Authority and the Appellate Tribunal has witnessed a humongous rise in the cases relating to the interplay of Section 238 of the IBC and SARFAESI Act which shall be discussed further in this article. This section runs as follows:

"*Provisions of this Code to override other laws – The provisions of this Code shall have an effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*"

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WHAT'S INSIDE THIS ISSUE:

This means that the provisions of IBC shall be preferred as compared to other laws in case if there arises any inconsistency between both the laws as laid down in the case of ***M/s. Unigreen Global Private Limited v. Punjab National Bank***. The NCLAT in the case held that the proceedings under Section 13(4) of the SARFAESI Act, 2002 and Section 19 of the DRT Act, 1993 before the Debt Recovery Tribunal shall not proceed once the application under the Code is accepted and the moratorium is imposed.

Further, while referring to the above-mentioned case, the NCLAT in the case of ***Antrix Diamond Exports Pvt. Ltd. v. Bank of India*** set aside the decision of the Adjudicating Authority and accepted the petition of the Corporate Debtor under Section 10 of the Code stating the decision of the Adjudicating Authority to be based on extraneous factors which were unrelated to the Corporate Insolvency Resolution Process (CIRP). The NCLT laid its decision on the ground that the Corporate Debtor to evade its liabilities has approached the NCLT under Section 10 so that he gets the benefit of the moratorium under the Code so that the proceedings under SARFAESI Act be stalled.

Moreover, the Appellate Tribunal in the case of ***Encore Asset Reconstruction Company Pvt. Ltd. v. Ms. Charu Sandeep Desai & Ors***. brought out another important facet of the overriding provision of the Code. The NCLAT held that Section 18 of the IBC which provides for powers and duties of the Insolvency Resolution Professional (IRP) will prevail over Section 13(4) of the SRFAESI Act due to the applicability of Section 238 of the Code. The facts of the case were that the Applicant was assigned the debt held by the Dena Bank to the Respondent. The Dena Bank initiated the proceedings under Section 13(4) of the SARFAESI Act to recover the debts by taking the physical possession of the properties of the Corporate Debtor. IRP meanwhile pressurised the Applicant to give back the properties of the Corporate Debtor taken by way of procedure under the SARFAESI Act. The NCLAT referred to the judgement of the Supreme Court as placed by the Appellant in this regards and held that since the Code was enacted in the year 2016 and the judgement was delivered in the year 2008 when the Code was not in existence, hence, the provisions of the Code will supersede the provisions of the SARFAESI Act and thus, the action of IRP for claiming back the property of the Corporate Debtor for which Corporate Debtor is the owner was justified.

Furthermore, the NCLAT while dismissing an appeal in the case of

INSOLVENCY TRIVIA

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

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

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

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

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

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

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

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

Rakesh Kumar Gupta v. Mahesh Bansal held that the proceedings pending in the DRT under SARFAESI Act or RDDBFI Act will not hinder the admission of the application under Section 7 of the Code.

The Appellant argued that since the Financial Creditor (Punjab National Bank) has initiated various proceedings under the RDDBFI Act and SARFAESI Act, thus its proceedings under the Code should not be accepted. The NCLAT brought in the provision as laid down under Section 238 of the Code and stated that Section 14 of the IBC will override all other provisions of other statutes.

In addition to the above-mentioned case, NCLAT pronounced its verdict on the similar lines in the case of ***Punjab National Bank v. M/s Vindhya Cereals Pvt. Ltd.*** The Appellate Authority set aside the decision of the NCLT which provided for rejection of the application by the Appellant on the grounds of forum-shopping as the proceedings against the Corporate Debtor was pending under the SARFAESI Act. The NCLAT held that simultaneous proceedings under the Code as well as SARFAESI Act can be proceeded by the Financial Creditor and thus, the Financial Creditor has not done forum shopping and can't be held liable under Section 65 of the Code as all the material facts have been disclosed to the Corporate Debtor through a notice under 13(2) of the SARFAESI Act.

Besides cases relating to the overriding provision of the Code, the Adjudicating Authority has also witnessed many cases on the aspect of limitation period wherein both the laws were involved, i.e., IBC and SARFAESI Act. The law on limitation period has been settled by the Supreme Court in the case of ***B.K. Educational Services Pvt. Ltd. v. Parag Gupta & Associates*** wherein the court laid down that the provisions of Limitation Act, 1963 are applicable on the Code and right to apply to the IBC accrues from three years from the date of default.

First of such cases is the case of ***Corporation Bank v. M/s SJN Energy Infrastructure Pvt. Ltd***. wherein the NCLAT was faced with the issue of "Whether the proceedings under DRT will extend the limitation period under the Code?" Section 14 of the Limitation Act states that the limitation period will get extended in the cases wherein the proceedings under good faith and belief has been initiated under some other forum having no jurisdiction. The NCLAT took the reference of the said section and held that the application filed by the Financial Creditor under Section 7 of the Code is barred by limitation as the period of three years has been elapsed from the date of default (date of declaring the account of Corporate Debtor as NPA).

ANSWER KEY FOR THE PREVIOUS QUIZ

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

The Tribunal further stated that since the pending proceeding under the DRT has competent jurisdiction to take cognizance of the matter, the Financial Creditor will not get an extension of the limitation period as prescribed under the Code and thus the application will stand barred by limitation. The same was held in the case of Ishrat Ali v. Cosmos Cooperative Bank Ltd. & Anr. wherein the NCLAT was of the view that the proceedings under Section 13(2) of the SARFAESI Act will not be counted while extending the limitation period under Section 14 of the Limitation Act.

Another case on similar lines is the case of ***Bimalkumar Manubhai Savalia v. Bank of India*** wherein the NCLAT observed that the initiated or the pending proceedings under SARFAESI can't be taken for counting limitation under IBC as both the proceedings are independent of each other and Section 238 of the Code has the overriding effect on the other laws. The brief facts of the case are that the date of the mortgage was observed by the NCLT as 18/11/2010 and the OTS was offered on 01/06/2016 which was rejected by the Financial Creditor. Further, the proceedings under SARFAESI started in the year 2017 and the amount from the guarantor of the Corporate Debtor was received on 31/03/2017. The Appellate Tribunal held that the application by the Financial Creditor is barred by limitation as it was filed after the expiry of three years from the date of default. Further, applying Section 18 & 19 of the Limitation Act, the failed OTS and payment received from the guarantor will not extend the limitation period as it was done after the expiry of the limitation period.

Further, the Appellate Authority in the case of ***Digamber Bhondwe v. JM Financial Asset Reconstruction Company Limited*** has observed that the recovery certificate received in the year 2016 under SARFAESI Act for the debts due to the Financial Creditor will not extend the limitation period for initiating an application under Section 7 of the Code in the year 2019. The NCLAT was of the view that since the period of 3 years have been elapsed from the date of default which was in the year 2013, the petition under Section 7 of the IBC cannot be accepted.

Lastly, in the recent landmark case of ***Mr Srikanth Dwarakanath Liquidator of Surana Power Limited v. Bharat Heavy Electricals Limited*** the NCLAT was of the opinion that since the secured creditor of the Corporate Debtor was not having the required (votes) value of the total loan amount given to the Corporate Debtor jointly/individually by several creditors as required under Section 13(9) of the SARFAESI Act, the liquidation process cannot be stalled by the liquidator on the request of the creditor who was having a total share of approximately 24% of the total loan amount as it would be detrimental to the interest of other secured creditors.

Hence, through various cases as discussed above, it can very well be concluded that the later law, i.e., IBC will prevail over prior law, i.e., the SARFAESI Act. Further, the overriding provision of the IBC, i.e., Section 238 will make the provisions of IBC to prevail over all other

laws. Also, since IBC is independent of SARFAESI, proceedings under any other law will not affect the Creditor's right to file an application under IBC.

LATEST JUDGEMENTS AND NEWS

HIGH COURT JUDGEMENTS

1.Purpose of Moratorium under Section 96 is different to that of Section 14 of IBC.

In the matter of Adarsh Jhunjhunjwala Vs. State Bank of India & Anr. the petitioner has filed a writ petition before the Hon'ble Calcutta High Court against the order of the Reviewing Authority under the wilful defaulter proceedings.

In the instant matter, an application was filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor i.e M/s. JVL Agro Industries Ltd. However, the resolution process failed and the order for liquidation was passed by the company.

The bank issued a show-cause to the petitioner under the Wilful Defaulter Guidelines on 7th November, 2019. During the pendency of the said proceedings, an application under Section 95 of the IBC was filed by the Bank against the writ petitioner around 4th October, 2021. Thereafter the final order of the review committee was passed on18th October, 2021 declaring him a wilful defaulter.

The Appellant in this petition contended that the proceeding under wilful defaulter proceeding cannot be initiated against the promoter of the Corporate Debtor as there was a moratorium declared under Section 96 of the Code. The Appellant also placed reliance on the case of Ayan Mallick & Anr. vs State Bank of India. It was further argued that if the order of the Review Committee is at large or given effect to, it would defeat the object and purpose of the IBC proceedings against him.

Whereas, the respondent stated that the proceedings under wilful defaulter guidelines are not those that are covered under the moratorium under Section 96 of the Act. It was further submitted that that moratorium in Sectioin 96 operates only against the "debt" of a respondent co-obligant. Reliance was placed on a decision of the Supreme Court in the case of SBI vs V.Ramakrishnan & Ors. where the distinction between a moratorium under Section 96 and the moratorium under Section 14 have been clearly indicated. Therefore, the petitioner cannot get the benefit of the decision of the Ayan Mallick in the facts of the case. The distinction between the two categories of moratorium and was not subject matter of the said decision.

The High Court after hearing the arguments of both the court stated that the argument of the petitioner that a wilful defaulter proceeding cannot be instituted during the moratorium does not stand. The purpose of the two proceedings is completely different. It is essentially for a creditor to take a call when and what proceedings it wants to take against a borrower constituent.

Recovery proceedings or proceedings under Section 96 of the IBC, 2016, or the borrower's success therein, would not absolve the borrower who has been found to be a wilful defaulter. The willful defaulter proceedings only aims at dissemination of information. Hence, the court dismissed the writ petition.

2..Statutory timeline of 3 days within which the public announcement is to be made is not mandatory.

Telangana High Court in the case of M/s Mantena Laboratories Limited & Anr. v. Union of India & Ors. (Writ Petition No. 23816 of 2021) has dealt with the question, "whether the statutory timeline given for public announcement by the Interim Resolution Professional (IRP) under the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 is mandatory or not".

The brief facts of the case were that the CD was inducted into the CIRP as under Section 7 of the Code and IRP was appointed to carry the operations of the CD on 06.08.2021. The IRP made the public announcement dated 12.08.2021. The claim of the Petitioner is that since there was a breach in adhering to the statutory timeline of making the public announcement within three days of the appointment of IRP, the insolvency proceedings is vitiated.

The High Court took notice of the fact that the public announcement is to be made within 3 days of the appointment, however, the said regulation does not provide for it to become a nullity if not done within 3 days. Also, the Court observed that the Code provides for efficacious and alternative remedy in form of Section 60(5) which provides for appeal in case of any matter relating to or arising out of insolvency resolution of the CD.
Hence, on the basis of these arguments the petition was dismissed.

NCLAT JUDGEMENTS

1.Committee of Creditors (COC) has the power to consider the eligibility of the Resolution Application under Section 29(A)(e) of the Code

The National Company Law Appellate Tribunal-Chennai Branch in the matter of Everest Organics Ltd. v Leesa Lifesciences Pvt. Ltd & Ors. (Comp App (AT) (CH) (INS) No. 228 of 2021) has held that the Committee of Creditors (COC) has the power to consider the eligibility /ineligibility of the Resolution Application under Section 29(A)(e) of the Code.

The Appellant filed the present appeal challenging the order passed by the Adjudicating Authority (AA), whereby the AA directed the COC to consider the ineligibility of the Resolution Applicant, i.e., 3rd Respondent. The Appellant contended that vide order dated 18.08.2020, the promoters of 3rd Respondent were declared disqualified under Section 29A of the Code by AA, which was further challenged by the Respondent to AA whereby the AA directed the COC to take a call on the ineligibility. The main contention of the Appellant is that COC has no power to

consider the eligibility of the Resolution Applicant. The further contention was that the AA did not consider the application of Appellant challenging the rejection of its Resolution Plan was pending. Furthermore, the lead Financial Creditor did not give any basis on which it decided that the 3rd Respondent was not disqualified under Section 29A of the Code.

The 1st Respondent on the other hand contended that as soon as it became aware that the 3rd Respondent was ineligible as a Director on Board, as the actions were held to be illegal by the NCLT for contravention of Section 397, 398 of the Companies Act, informed the COC and the Resolution Plan so submitted by the 3rd Respondent was not considered. Furthermore, the revised Resolution Plan that was submitted by the Appellant was rejected by the COC in their 11th meeting and 1st Respondent on the direction of COC applied for initiation of the liquidation process. After the directions from AA to reconsider the eligibility of the 3rd Respondent, the revised Resolution Plan was accepted by the COC. The 3rd Respondent contended that the reasons that were given by Resolution Professional (RP) regarding the disqualification were devoid of any merit. Further, the Resolution Plan was submitted as a company and not as an individual, thus, were eligible under Section 29A of the Code.

The NCLAT after hearing to the parties referred to Section 30 of the Code read with Regulation 39. Section 30 empowers the Resolution Applicant to submit the Resolution Plan and RP examine the plan submitted to him to confirm that all the plans adhere to the procedure. Furthermore, proviso to Section 30(4) of the Code provides that the COC must not approve the plan wherein the Resolution Applicant is ineligible under section 29A of the Code.

Regulation 39 envisages the approval of the Resolution Plan. Therefore, the NCLAT in accordance with the above provisions laid down that COC has the power to approve the Resolution Plan and also consider the Resolution Applicant's ineligibility under Section 29A. The COC not only has the power regarding approval of the Resolution Plan but also has the power to evaluate the plans received by the RP. Further, the COC also can consider the eligibility/ineligibility of the Resolution Applicants under Section 29(A)(e) of the Code. Thus, the order passed by AA was held to be legal and the appeal was dismissed.

2. CoC has the power to consider the eligibility of the RA under Section 29A.

The National Company Law Appellate Tribunal-Chennai Branch in the matter of Everest Organics Ltd. v Leesa Lifesciences Pvt. Ltd & Ors. (Comp App (AT) (CH) (INS) No. 228 of 2021) has held that Committee of Creditors (COC) has the power to consider the eligibility /ineligibility of the Resolution Application under Section 29(A)(e) of the Code and thus, the appeal was dismissed being devoid of any merits. The Appellant filed the present appeal challenging the order passed by the Adjudicating Authority (AA), whereby the AA directed the COC consider the ineligibility of the Resolution Applicant i.e, 3rd Respondent.

The Appellant contended that vide order dated 18.08.2020, the promoters of 3rd Respondent were declared disqualified under Section 29A of the Code by AA, which was further challenged by the Respondent to AA whereby the AA directed the COC to take a call on the ineligibility. The main contention of the Appellant is that COC has no power to consider the eligibility of the Resolution Applicant. The further contention was that the AA did not consider the application of Appellant challenging the rejection of it's Resolution Plan was pending. Furthermore, the lead Financial Creditor did not give any basis on which it decided that the 3rd Respondent was not disqualified under Section 29A of the Code.

The 1st Respondent on the other hand contended that as soon as it became aware that the 3rd Respondent being ineligible as a Director on Board, as the actions were held to be illegal by the NCLT for contravention of Section 397, 398 of the Companies Act, informed the COC and the Resolution Plan so submitted by the 3rd Respondent was not considered. Furthermore, the revised Resolution Plan that was submitted by the Appellant was rejected by the COC in their 11th meeting and 1st Respondent on the direction of COC filed an application for initiation of liquidation process. After the directions from AA to reconsider the eligibility of the 3rd Respondent, the revised Resolution Plan was accepted by the COC. The 3rd Respondent contended that the reasons that were given by Resolution Professional (RP) regarding the disqualification were devoid of any merit. Further the Resolution Plan was submitted as a company and not as individual, thus, were eligible under Section 29A of the Code.

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Therefore, the NCLAT in accordance with the above provisions laid down that COC has the power to approve the Resolution Plan and also consider the Resolution Applicant's ineligibility under Section 29A. The COC not only has the power regarding approval of the Resolution Plan, bit also has the power to evaluate the plans received by the RP. Further, the COC also can consider the eligibility/ineligibility of the Resolution Applicants under Section 29(A)(e) of the Code. Thus, the order passed by AA was held to be legal and the appeal was dismissed.

3.NCLAT reiterated the commercial wisdom of the CoC in approving the Resolution Plans.

In the matter of Canara Bank Vs. Ms. Mamta Binani, RP of Aristo Texcon Pvt. Ltd before the NCLAT, the Appellate tribunal discussed the role of the Resolution Professional and reiterated the commercial wisdom of the CoC in approving the resolution plan provided they are in consonance with the

provisions of the Insolvency and Bankruptcy Code, 2016 (IBC / Code).

Facts of the Case:

In the instant case, the Committee of Creditors (CoC) approved the Resolution Plan in its 11th meeting of M/s Jagannath Financial Advisory Pvt. Ltd. because the required period for CIRP was about to come to an end. Under the provisions of the plan the distribution of the Resolution Fund was decided as follows:

- Canara Bank- 24-30%
- North Eastern Development Financial Corporation- 47.77%
- Punjab National Bank – 27.93%.

Subsequently, the RP applied to the Adjudicating Authority under Section 30(6) & 31 of the Code for the approval of the Resolution plan approved by the CoC. The AA approved the Resolution Plan.

Later, aggrieved by the order of the AA, the appellant filed this application stating the distribution of the resolution fund is arbitrary and stated that there is no equal treatment between the Financial Creditors while distributing Funds under the Resolution Plan.

The decision of the Appellate Tribunal

The NCLAT after hearing the arguments of the appellant opined that the distribution of the amount was made by the CoC resting on the total dues of individual Creditor and the same is not either whimsical or arbitrary in any manner. To put it differently, the 'distribution of the amount' between the Creditors provides equal treatment to all of them. Also that the Appellant was provided with a fair value as per the decision of the CoC and the value proportionate to the dues was allotted the same as that of other Financial Creditors.

Further, the commercial decision and matters pertaining to it solely come within the ambit of the Committee of Creditors who in the present case had approved the Resolution Plan with a majority of 75.70% affirmative votes.

Hence, the appeal was duly dismissed due to the aforementioned reasons.

4.Order shall be deemed to be operative from the date of pronouncement and not when it was uploaded

The NCLAT, Delhi in the matter of Rishi Kapoor v Kashi Vishwanathan Sivaraman held that the order shall be deemed to be implemented on the date of its pronouncement and not on the date it was uploaded on the website of the NCLT.

An application was filed against the Corporate Debtor (CD) under Section 7 of the IBC after which notice was issued to the Respondents. The proceedings were conducted ex-parte by the Adjudicating Authority (AA) since no one appeared on behalf of Respondents. Thereafter, the order was passed by the AA admitting the application under Section 7. The IRP on 03.08.2018 made public announcements to which the Appellant filed his claim in Form-B on 09.07.2019. Further, an I.A was also filed

by him for seeking directions for IRP to accept his claim which was disposed off by the AA on 26.07.2021. Later, the Appellant filed another application to amend the former application claiming that he was an allottee in pursuance of MoU dated 19.04.2018. The application was rejected by the AA and aggrieved by the same the appeal was filed.

The Appellant contended that the application for making the amendment was wrongfully rejected. and further contended that even though he earlier filed his claim as Operational Creditor, by virtue of MoU dated 19.04.2018, he became an allottee and thus, a Financial Creditor. It was also claimed that the application under Section 7 was admitted on 09.03.2018 but the order was uploaded on 22.06.2018, thus the CIRP must be treated to have commenced on 22.06.2018 since no one before that day knew about its commencement. Furthermore, the IRP in the public announcement also mentioned 22.06.2018 as the commencement date of CIRP and the Board of directors were also entitled to function till that day, thus, 22.06.2018 must be treated as the date for commencement of CIRP.

The Respondent, on the other hand, contended that the order was pronounced by AA on 09.03.2018 and it must be treated as the commencement date of the CIRP. The Respondent further contended that only because IRP in the public announcements mentioned the date of commencement to be 22.06.2018, it must not change the legal position per se.Furthermore, the status of Appellant to be categorized as a Financial Creditor instead of an Operational Creditor is wholly unjustified as the CIRP commenced on 09.03.2018 and the Appellant could not have entered into MoU with the CD post-CIRP, hence, the MoU dated 19.04.2018 was inoperative and void as per Section 14 of the Code. It was further contended by the Respondent that an appeal was filed against the order dated 09.03.2018 wherein the order was upheld by the Appellate Tribunal, thus the contention of Appellant that the order stands inoperative till 22.06.2018 stands void.

The NCLAT after hearing to the parties referred to Rule 150 of the NCLT Rules which envisages for the “pronouncement of order”, according to which the AA passed the order dated 09.03.2018. It was also observed that the order not only accepted the application but also appointed the IRP and directed the moratorium in terms of Section 14 of the Code. The NCLAT held that effect and consequence of the order dated 09.03.2018 shall not remain suspended only on the ground that the order was not uploaded on the website. It was further observed that if the date on which the order is received by the IRP and the general public is considered then it will give rise to uncertainty which was not the purpose of the Code as such interpretation will give an opportunity to the CD to defy the orders of AA. Furthermore, the change of nature of claim from Operational Creditor to Financial Creditor on the basis of MoU signed on 19.04.2018 is wholly unjustified as the CIRP was already in existence on 09.03.2018 and thus, MoU stands void.

Thus, it was held that the order dated 09.03.2018 become operative on 09.03.2018 when it was pronounced in the Court.

5.Principle of stare decisis is applicable to the NCLAT and the NCLTs.

NCLAT in the case of Rajeev R Jain v. Aasan Corporate Solutions Private Limited (Company Appeal (AT) (Insolvency) No. 1085 of 2021) has held that the principle of stare decisis is applicable to the NCLAT and the NCLTs.

The suspended director of the CD had filed an appeal against the decision of the AA of admission of the petition under Section 7 of the Code. The Appellant contended that the petition admitted ought not to have been admitted owing to the reason that as per the mortgage deed, the value of assets given as security was more than the default amount. It further referred to the case of Beacon Trusteeship Limited v. Neptune Ventures and Developers Private Limited wherein the AA had rejected the Section 7 application holding the alternative remedy available with the secured creditors in terms of realisation of secured assets. Hence, the Appellant contended that the NCLT has erred in not following the decision of the co-ordinate bench.

The Respondent, on the contrary, submitted that as per the terms of the mortgage deed the Respondent is not disentitled to avail any other remedy apart from the realisation of the security.

The Appellate Tribunal observed that it is the choice of the mortgagee to choose any mechanism in recovering the dues.It further observed that since the mortgage deed does not have inconsistency with the provisions of the Code, hence, the mortgagee have the right to pursue any remedy available. The NCLAT on the issue of binding itself with the precedents observed that the principle of stare decisis is applicable on the judgements delivered by the NCLT and the NCLAT. Adding further, it also held that the precedent becomes binding on an NCLT only of the NCLT having the same jurisdiction, however, the judgement delivered by the other NCLT will only have the persuasive value. Hence, the Appellate Tribunal held that the AA had not erred in admitting the application.

6.Statutory timeline given under the Code can be extended if there occurs possibility of resolution.

In the case of Whispering Tower Flat Owner Welfare Association v. Abhay Narayan Manudhane (RP of CD), the NCLAT has upheld the objective of IBC of resolution over liquidation and has extended the time period for the CIRP beyond 330 days, citing it as a special case.

The Appellant has challenged the impugned order of the AA rejecting the application filed by the RP for the extension of the CIRP. The Appellant stated that the CD was inducted into the CIRP but was not able to secure a resolution plan for the whole of the projects.It was submitted that in the 18th COC meeting it was decided by the COC on September 8, 2021, to re-run the CIRP in a project-wise manner and explore the possibility of piecemeal resolution.It was further submitted that approximately 25 EOIs were received by the RP post the deci-

-sion taken on September 8, however, the CIRP period was only till September 30, 2021. Hence, an application for extension was filed by the RP for the successful resolution of the CD. However, this application was rejected by the AA stating that the CIRP has been extended to over 730 days and there exists no sight for the successful completion of the CIRP.

The Appellant categorically contended that if the CD is thrown into the rigours of liquidation, the whole purpose of the Code would be defeated and also the homebuyers which are in majority would be affected. It was also submitted that only after the decision in the 18th COC meeting held on September 8, 2021, the RP had received 25 EOIs, hence, the RP should be given more time for the successful resolution of the CD.

The NCLAT referred to the judgement by the Supreme Court in the case of Committee of Creditors of Essar Steels India Ltd. v. Satish Kumar Gupta and Ors. and observed that the AA ought to have given reasonable extension for proceeding further with the resolution of the CD in a project wise manner for which the RP had received 25 EOIs. Hence, a period of 90 days was granted as an extension to the RP and the decision of the AA was set aside.

7.Time barred claims of a creditor cannot be admitted.

NCLAT in the case of Ome Prakash Verma v. Amit Jain (Company Appeal (AT) (Insolvency) No. 827 of 2020) has held that the time-barred claims of a creditor cannot be admitted in the insolvency petition filed by another creditor.

In the present case, the appeal is filed by the suspended director of the Corporate Debtor (CD) against the impugned order of the Adjudicating Authority (AA) which has rejected the IA filed by the Appellant. It was stated on behalf of the erstwhile director that Respondent No. 2 to whom the debt was legally assigned by the ICICI bank is the asset reconstruction company and has filed the application for the Corporate Insolvency Resolution Process (CIRP) which has been admitted by the AA. The Appellant submitted that Respondent no. 2 was again assigned with the debt by the United Bank which became NPA in the year 2015 and thus, by the time of CIRP of the CD has become time-barred. Thus, it was contended that the time-barred debt admitted by the RP is against the provision of Section 238A of the IBC as the period of limitation for such debt ended in the year 2018.

On the contrary, Respondent no. 1 who is the RP in the present case stated that Section 238A of the IBC shall only be applicable in the case of proceedings before the AA and not w.r.t. the admission of the claim by the RP. Further, it was submitted that the provisions of the Code empower the RP to collect and collate the claims and thus, the RP has correctly admitted the claims assigned to Respondent no. 2 by the United Bank.

The NCLAT after listening to both the parties had observed that since the application under Section 7 cannot be entertained for a debt that is time-barred thus, any claim which falls under the same category cannot be admitted. Thus, the Appellate Tribunal admitted the appeal and set aside the impugned order.

8.AA under the Code has the power to pass any order related to the insolvency of the CD

NCLAT in the case of Radius Infratel Pvt. Ltd. v. Jaiprakash Associates Limited (Company Appeal (AT) (Insolvency) No. 494 of 2021) has held that the Adjudicating Authority (AA) does have the power to stop the implementation of the order passed by the District Magistrate exercising jurisdiction under National Disaster Management Act, 2005 unless the order is related to the insolvency proceedings of the Corporate Debtor (CD).

Fact of the Case:

Brief facts about the case if that the Appellant is the CD against whom liquidation proceedings have been admitted. The CD and Respondents 1 & 2 had entered into an agreement in the year 2013 as per which it will provide internet services to the residents located in projects by the Respondent. Certain complaints were received by the District Magistrate, Noida regarding the monopolistic practice been adopted by the Appellant in providing internet services through the CD whereas the residents wanted to have internet services by other internet service providers (ISPs).

The District Magistrate in the exercise of his power passed an order dated August 22, 2020, by which guidelines were issued for allowing other ISPs to provide internet services and on consumer's freedom to choose the ISPs.

Subsequently, an interim application was filed before the AA for quashing the orders of the District Magistrate and restraining the Respondents to contravene with the agreement dated 2013, which was allowed.

by the AA by order dated October 27, 2020. Furthermore, the interim application was filed by the Appellant was taken up by the AA for consideration on July 05, 2021, wherein the AA observed that the residents were facing difficulties because of the poor internet connection and observed that the CD had breached the agreement terms and thus, the application was dismissed with the liberty to the Respondents to provide internet services through other ISPs.

The Appellate Tribunal framed the issue as "whether the AA has the jurisdiction to pass the interim order in the application filed by the Appellant by which the implementation of the order by the District Magistrate will be stopped".

NCLAT referred to the Supreme Court case of Embassy Property Developments Private Ltd. v. the State of Karnataka ((2020) 13 SCC 308 and observed that the NCLT (AA) does not have the jurisdiction to adjudicate upon the dispute arising under other laws. Further, the NCLAT observed that the act of permitting the residents to avail the internet services of other ISPs did not enamate from the insolvency resolution process of the CD and thus, the AA will not have the jurisdiction to deal with the matter. Lastly, the Appellate Tribunal observed that the order dated October 27, 2020, passed by the AA was outside its jurisdiction, however, the wrong was made good by passing the order dated July 05, 2021, hence, the impugned order was upheld by the NCLAT.

NCLT JUDGEMENTS

1.Issuance of PDCs by the CD won't confer the status of Financial Creditor to a person.

NCLT Chennai in the case of M/s N.R.G. Tex v. M/s The National Sewing Thread Company Limited (IA(IBC)/1108 (CHE)/2021 in IBA/622/2019) has held that merely issuance of cheques by the Corporate Debtor (CD) in favour of any person won't categorise such person as the Financial Creditor (FC).

The present application was filed by the Applicant under Section 60(5) of the Code against the decision of the RP in rejecting the claims. The Petitioner claims that he worked as a Del Credere agent for the CD and had financed the supplies made to the CD by the third parties. It was submitted that the CD had paid the interest to the creditor in the year 2018 as against the consideration for the time value of money. Further, the Applicant claimed that the CD had issued post-dated cheques dated 26.09.2019 in favour of the creditor which when presented was returned with the endorsement "account blocked" owing to the CIRP of the CD. Thereafter, the Petitioner filed the claim with the RP of the CD, however, the claim was rejected and the Applicant was asked to file it in Form-B.

The Respondent, on the contrary, stated that the CIRP of the CD was initiated on 29.08.2019 whereas the post-dated cheques issued were dated 26.09.2019, hence, there won't arise any creation of the liability against the CD. Also, the RP contended that the application was filed after the expiry of 15 months from the liberty to amend the earlier application and also when the resolution plan for the CD was approved by the COC, thus, in such circumstances, the claim is liable to be rejected.

The Adjudicating Authority (AA) had observed that there was no written agreement between the parties w.r.t. the financing of the loan amount for the purchase of goods by the CD and hence, the contention of the Applicant of stating itself to be an FC was set aside. Also, the NCLT observed that the issuance of cheques in the discharge of the liability by the CD won't confer the status of an FC upon the Applicant. Further, the AA noted that mere deduction of TDS by the CD and remittance of the same to the Applicant won't confer the status of FC.

Hence, the AA upheld the decision of the RP and set aside the application of the Petitioner.

2.Section 238A of IBC shall override Section 25(3) of Contract Act.

NCLT Delhi in the case of M/s Ravi Iron Limited v. Jia Lal Kishori Pvt. Ltd. (C.P. IB No. 630/ND/2020) has held that the provision w.r.t. limitation under the IBC shall override the provision under Section 25(3) of the Indian Contract Act, 1972.

The Applicant in the present case has filed an application under Section 9 of the Code. The Petitioner submitted that the invoices were raised in the year 2008, post which after the mediation the matter was settled

and post-dated cheques (PDCs) were issued in favour of the Applicant. It was contended that the PDCs given will amount to acknowledgement and hence, Section 25(3) of the Indian Contract Act will be applied and not the provision w.r.t. limitation under the Code. The Adjudicating Authority (AA) referred to the provisions given under Section 238 and Section 238A of the IBC and further observed that the IBC is a complete code in itself and has an overriding effect on any other law if the provisions of such law are inconsistent with the Code. The NCLT also observed that the IBC provides for specific provisions w.r.t. limitation and hence, the provision given under Section 25(3) was not be made applicable.

Thus, the petition was dismissed being barred by limitation.

3.Whether Share Purchase agreement with Put Option can be termed as a financial debt?

In the matter of Hubtown Limited vs GVFL Trustee Company Pvt. Ltd., NCLT Mumbai whether the share purchase with Put Option can be considered as a debt which is disbursed against the consideration of time value of money or not. In the instant case FL Trustee Company Pvt Ltd (GVFL) is an Applicant who have filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process against Hubtown Limited for a debt by way of equity investment in shares of Hubtown Bus Terminal (Mehsana) Pvt Ltd for a total amount of Rs.4,30,54,200/- as principal and Rs.9,96,95,800/- as Internal Rate of Return (IRR) calculated at 26% of the principal up to 31.08.2018.

As per the pleadings of the petitioner there is a default under Section 7 of IBC, 2016 as its “put option” was not entertained when the said demand notice dated 02.01.2018 was sent to the Respondent M/s. Hubtown Limited demanding exit by way of “put option”. The NCLT on the perusal of the application stated that “whether the claim of GVFL as a Shareholder of HBT Mehsana in exercise of its ‘put option’ tantamount to a financial debt.” The Adjudicating Authority stated that a shareholder is different from a lender. The shareholder undertakes the risk by investing in shares and derives its return by way of profits in the form of dividends and appreciation in the value of shareholding, i.e., capital gains. In contrast, the Lender gives loans for which the payment is by way of Interest.

As per the Share Subscription and Shareholders Agreement(SSA), GVFL invested in HBT Mehsana by purchasing the shares of ILFS group. This cannot be termed as an investment of GVFL by way of a loan. The money paid by GVFL to acquire the share of HBT Mehsana cannot be construed as a consideration for time value of money and it was solely for the purchase of shares of HBT Mehsana held by ILFS group to become a shareholder in the Company. Equity is not a debt and as such any contract for acquisition of shareholding in a body corporate can never result in the formation of a debt. Hence, the maintainability of Section 7 application was not found.

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