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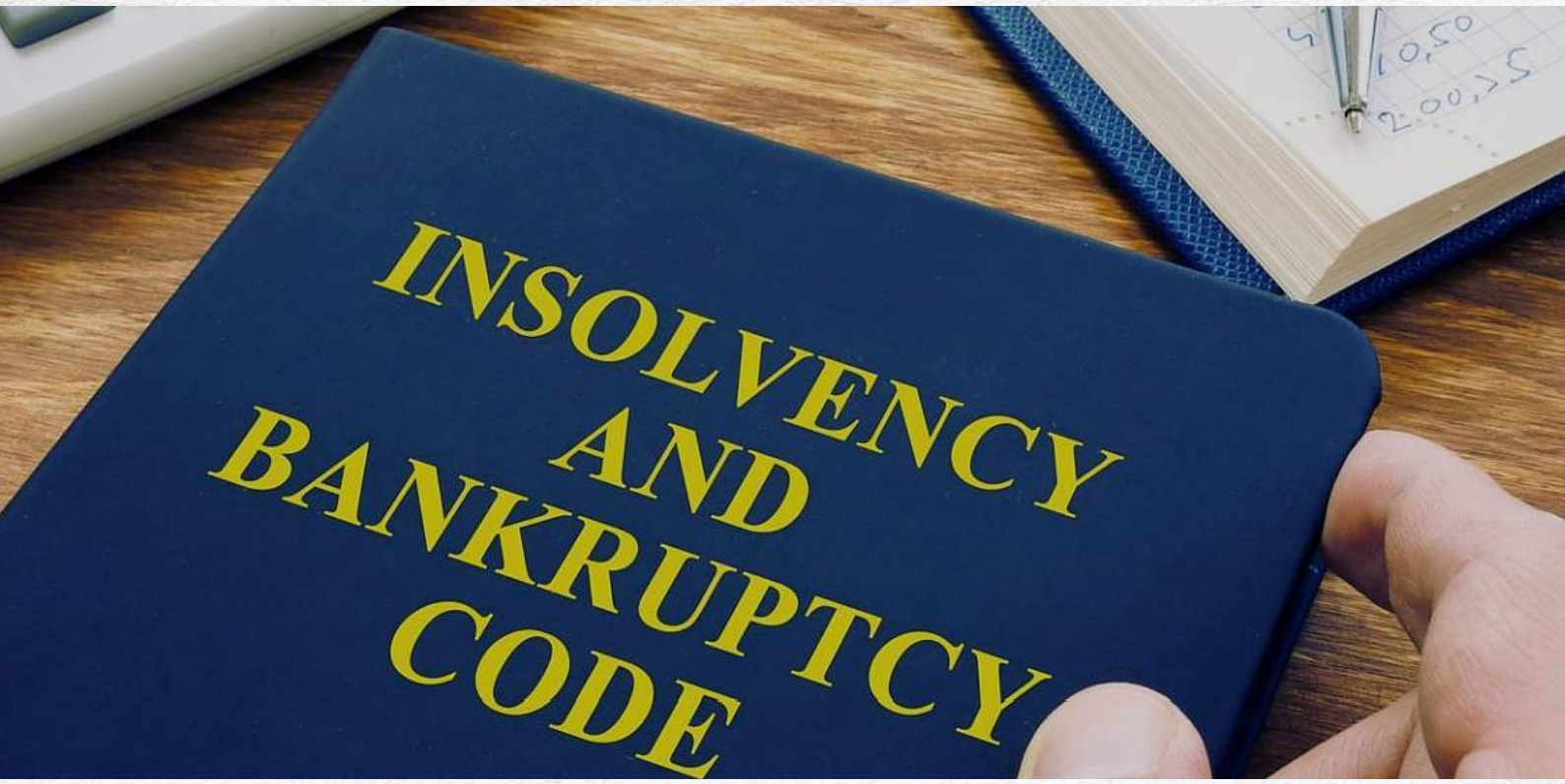

ANALYSIS OF IMPACT & EFFECT OF TRADE UNIONS AS AN OPERATIONAL CREDITOR ON RIGHTS OF WORKMEN

The decision by the Hon'ble Supreme Court in the case of **JK Jute Mill Mazdoor Morcha vs. Juggilal Kamlapat Jute Mills,** CIVIL APPEAL NO.20978 of 2017, is to be seen as a positive step towards the upliftment and betterment of the social and welfare rights of the workers.

Facts:

A Demand Notice was issued by the trade union on behalf of approximately 3000 workers under section 8 of IBC, stating their claims of the outstanding salaries to the respondent against whom proceedings were pending under the Sick Industrial Companies Act, 1985. The NCLT & NCLAT on hear-

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-ing both the parties held that the trade union will not be covered under the head of "operational creditor" and held that each worker is allowed to file an individual application before the NCLT. The issue which was raised was "Whether a trade union could be said to be an operational creditor for the IBC?"

Decision:

The Supreme Court took into consideration the definitions of 'trade union' as given in the Trade Unions Act (TU Act) and 'person' under IBC. It further observed that as per Section 2 (h) of the TU Act, a “Trade Union” shall mean “any combination, whether temporary or permanent, formed primarily to regulate the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business and includes any federation of two or more Trade Unions” and the term “Person” includes “any other entity established under a statute” as given under section 3(23) of the IBC. Therefore, the court concluded that a trade union will fall under the definition of “person” under the IBC.

The court further looked into section 15 (c) & (d) of the TU Act and inferred that the general fund of the trade union can be spent for the purpose prosecution or defence of a legal proceeding to which the trade union is a party and the conduct of trade disputes on behalf of the Trade Union or any member thereof. This certainly will include the due amount, in the present case wages, from the employer to employees and therefore will be classified as an “operational debt” under section 5 (21) of IBC. Hence, any person who is duly authorised to make such claim of dues as against the Corporate Debtor shall be classified as an Operational Creditor. The court lastly by acknowledging section 13 of TU Act stated that the trade union is entitled to sue and be sued as a body corporate and set aside the impugned judgment of the NCLAT.

Impact:

The major impact of the judgement will be that from now onwards instead of submitting individual claims under the IBC one consolidated petition by a trade union representing several workmen will be allowed. This will reduce the burden on each workmen filing individual petitions as each of them would thereafter have to pay insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers, etc. under the provisions of the Code.

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

Thus, looking from each perspective, it leaves no doubt that a registered trade union which is formed to regulate the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members.

Further, this shall also mean that trade unions can co-jointly make an application under section 9 of the Code on behalf of one or more workers. This will serve justice to the workers in the form that they will have another option available under this Code, apart from labour legislations, to get their claims satisfied, i.e., they can go for a resolution of the company if the latter is not paying their wages and get their claims satisfied or for liquidation in case the latter is not in a position to get revived.

Similar Provisions under other Labour Laws

- Payment of Wages Act, 1936

Section 3 & 5 of the Act says that it will be the responsibility of the employer to pay the wages of all the employees employed by him and that wage should be paid after the last day of the wage period in respect of which the wagers are to be paid respectively. Further, Section 15 of the Act talks about the "Claims", which is the amount unpaid as of the wages to the workers or any arbitrary deductions from the same or any delay in payment of wages, which needs to be submitted to the authorities created under the Act through an application. If accepted and employer found guilty then the employees shall get their claim amount along with the compensation as given under the Act. Lastly, Section 16 of the Act also provides for the joint application on behalf of all the workers whom wages are not paid or delayed or some unduly deductions have been made.

- Minimum Wages Act, 1948

Section 20 of the Act talks about the "Claims" which needs to be duly submitted by the workers in case the minimum wages of the workers are not paid on time or is paid less. This application can be submitted either individually or on behalf of all the workers who have been denied the right to minimum wage as given under Section 21 of the Act.

- Trade Unions Act, 1926

Section 15 of the Act provides for the objects for which the general fund may be used and once such objective is the usage of the funds for defending or prosecuting in legal proceedings.

ANSWER KEY FOR THE PREVIOUS QUIZ

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

Limitation for Filing the Case

- Payment of Wages Act, 1936

The application under the Act needs to be submitted within 12 months from the date on which the unduly deductions were made or from the date the payment of wages was due as given under Section 15 of the Act.

- Minimum Wages Act, 1948

The application under this Act needs to be submitted within a period of 6 months from the date on which the minimum wages became due and payable as given under Section 20 of the Act.

- Insolvency and Bankruptcy Code, 2016

The application under this Code can be made within 3 years from the date of default or if the period of limitation has been extended, then within 3 years from the date it was extended, but this extension should comply with Section 18 of the Limitation Act.

Period for Settlement of the Case

- Payment of Wages Act, 1936

The claim under this Act shall be disposed off within 3 months of the registration of the claim. This period is further extendable to such period as deem fit for the authorities to dispose off the case.

- Insolvency and Bankruptcy Code, 2016

Under the provision of the Code, the claim arising out of the application under this Code is liable to be disposed off within 180 days of the commencement of Corporate Insolvency Resolution Process, subject to extension of a period of 90 days and additional 60 days for the time consumed in the legal proceedings.

Effect:

This effect of this judgment is that now since the trade unions are covered under the ambit of operational creditors under the IBC, they can have a timely, effective and speedy remedy if they submit their claims in the form of application under section 9 of the Code. For example, the claim arising out of the application under this Code is liable to be disposed off within 180 days of the commencement of the Corporate Insolvency Resolution Process.

Also, the workers or trade unions will get more time to file their cases under IBC as the application under this Code. It can be made within 3 years from the date of default as given under Section 238A of the IBC. This limitation period under the IBC can be extended if there is an acknowledgment of debts within the limitation period as per Section 18 of the Limitation Act, 1963, or by condonation of delay as per Section 5 of the Limitation Act. The Limitation under different labour laws is not more than the time limit given under IBC.

Further, this right can be maliciously misused by the trade unions to get their unauthorised demands fulfilled by the company. Section 65 of the IBC prevents this problem. It states that if any malicious or fraudulent proceedings are initiated by the Applicant under the Code, then the person shall be penalised with not less than 1 lakh rupees which may extend to 1 crore rupees. Hence, the company/ employer is also very well secured from malicious complaints. Also, the remedy for

the same under Section 15(4) of the Payment of Wages Act and Section 20(4) of the Minimum Wages Act is not sufficient and considerable.

Conclusion

The above analysis would go on to show that the Trade Union, for and on behalf of its members can certainly prefer a CIRP as contemplated under section 9 of the IBC.

This is for the simple reason that if the workmen have not been paid their wages and/or salary by the company, they would certainly be a creditor or creditors as contemplated under section 5 (20) of the Code.

Further, submitting their claims under the IBC will effectively give a remedy as one just only needs to show that there is a debt of 1 Lakh rupees or more which is due and payable and upon which default has been made. This amount can be both a person's amount or a collective amount of the employees as the Code is not clear on the same.

Earlier also, the workers or the trade unions had the right to get the companies wound up, in cases where their claim was not satisfied, under section 439 of the Companies Act, 1956 r/w Section 433 & 434, but the winding up was a long & tedious process thereby involving a lot of time and money.

Lastly, more limitation period, timely resolution of debts, more compensation than other labour laws etc. make the filing of an application under IBC a lucrative option for the Trade Unions. Hence, this will protect the rights of the workers and will give them an effective remedy.

LATEST JUDGEMENTS AND UPDATES

NCLAT JUDGEMENTS

1.AA has the power to maintain the decorum of the Tribunal under Section 425 of Companies Act, 2013.

The National Company Law Appellate Tribunal-New Delhi, in the matter of **Prakash K. Pandya Vs. National Company Law Tribunal, Mumbai Bench,** held that the Adjudicating Authority (AA) has ample power under Section 425 of the Companies Act, 2013 to deal with the maintenance of decorum.

The present appeal was filed by the appellant against the order dated 09.02.2022 passed by the AA, NCLT-Mumbai Bench, Court II, wherein the matter was directed to be listed on 04.04.2022.

The appellant contended that the Corporate Insolvency Resolution Process (CIRP) was in its fifth year and the Resolution plan has already been approved by the Committee of Creditors. It was further contended that due to the happening of certain events and arguments between the Counsels of both the parties during the hearing of the matter before the AA, the AA was not inclined to hear the matter and adjourned the same.

The NCLAT held although there was no record of any arguments between the Counsels in the order passed by AA, it was

held that the AA had the power vested with itself to deal with the maintenance of decorum in the court, both by the parties and Counsel, under Section 425 of the Companies Act, 2013. The appeal was thus dismissed by the NCLAT. It was further observed that the AA must endeavour to dispose of the matter on the date fixed by it as the matter has been going on for years.

2.Requirement of Notice on Personal Guarantor under the Code.

In the matter of **Dheeraj Wadhawan vs Union Bank of India**, the NCLAT decided whether the service of Demand Notice under the Code is required on the personal guarantor or not.

In the instant matter an application was filed under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 for initiation of insolvency resolution process against the personal guarantor. Previously, the personal guarantee was executed by the PG in favour of the credit facilities availed by the Corporate Debtor.

The lender invoked the deed of guarantee on account of default by the corporate debtor. Subsequently, Demand Notice was sent to the PG on his residential address.

When the Application under Section 95 came for consideration before the Adjudicating Authority on 07.12.2021, a submission was raised before the Adjudicating Authority that Demand Notice issued by the Bank having not been served on the Appellant Application need not be entertained.

Appellant's Contention:

It was submitted that at the time when notice is claimed to be served, the Appellant was in judicial custody. Hence, it was incumbent on the Bank to serve notice at Taloja, Navi Mumbai. It is submitted that statutory rules require personal service and personal service having not been effected on Appellant the Company Petition is not maintainable.

Further, the personal service of the notice is mandatory and without personal service of notice Company Petition cannot be entertained and the Adjudicating Authority committed error in entertaining the Application under Section 95 by directing the Resolution Professional to submit report under Section 99. Notice on the Appellant was required to be served as per provisions of Order 5 Rule 24 of the Civil Procedure Code.

Respondent's Contention:

The Bank, who is a Respondent , contended that Demand Notice under Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (hereinafter referred to as '2019 Rules') has been duly served by post at the residential address of the Appellant which was received by adult member of the family of the Appellant i.e. his nephew Mr. Karthik Wadhawan, therefore service is complete and Application filed under Section 95 be entertained.

Decision of the Tribunal:

The NCLAT stated that Order 5 Rule 24 of the CPC shall not be applicable for effecting services under the Personal Guarantor Rules. In this particular case, it is also on the record that after service of the demand notice when Company Petition was filed under Section 95, notices were issued by the Adjudicating Authority which were also duly served on the Appellant through his counsel on 19.01.2021. Company Petition under Section 95(1) was taken up by the Adjudicating Authority on 07.12.2021 before which date the Appellant was served and represented before the Adjudicating Authority.

Hence, the Demand Notice was duly served on the appellant.

3.Treatment of Provident Fund dues under the Resolution Plan.

In the matter of **Nitin Gupta Vs. Applied Electro Magnetics Pvt. Ltd.**, the NCLAT New Delhi decided whether the Successful Resolution Applicant (SRA) is liable to pay full amount towards the provident fund dues in accordance with the Employee's Provident Fund and Miscellaneous Provident Act, 1952.

Facts:

In the instant matter Appeal has been filed by the Appellant under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('IBC/Code') against the impugned order passed by the Adjudicating Authority. In the said order the AA approved the Resolution Plan submitted by the SRA. As per the Appellant there are certain legal infirmities in the Resolution Plan including the inadequate allocation for salary, pension and gratuity amounts of workmen/employees in the approved Resolution Plan.

Contentions of the Appellant:

Appellant stated that amount of pending gratuity, pension and Provident Fund dues of the employees/workmen of the Corporate Debtor were incorrectly shown in Resolution Plan, the workmen filed a petition under Section 7A of EPF and MP Act, 1952 for correct assessment which was decided by the Provident Fund Authority and the Provident Fund amount was assessed at Rs. 1,35,06,391 in presence of the legal representative of the Corporate Debtor. However, the SRA did not make any change in the resolution plan

Further, the appellant stated that the approved Resolution Plan does not comply with Section 30(2)(e) as the workmen/employees have not been paid their dues in accordance with the provisions of the IBC but have been allocated only 15% out of the 24 months" dues of the period preceding the date of insolvency commencement dues for payment.

He has also claimed that the dues of employees of the past 12 months preceding the date of insolvency commencement have not been paid in full but only 10% of the amount admissible was paid to them.

He has also stated that only 20% of the gratuity amount was paid qua the Successful Resolution Plan whereas under the provisions of IBC no reduction can be done in payment of the full due amount.

Contentions of the Respondent:

Respondent argued that the AA had to merely see whether the approved Resolution Plan was in accordance with Section 30(2)(e) of the IBC. He has further argued that since the liquidation value which was admissible to the operational creditor would have been nil, hence, the amount payable to workmen/employees on account of salary, PF and gratuity dues had to be reduced.

Further, it was argued that since the plan was approved by 100% voting in the CoC, the commercial wisdom of the CoC in approving such a Resolution Plan cannot be questioned and the distribution therein to various stakeholders cannot be changed by either the Adjudicating Authority or the Appellate Tribunal.

Decision of the Tribunal:

After hearing the arguments the NCLAT stated that there are several contentious issues with the resolution plan hence the tribunal directed the plan to be modified to the extent it cures the defect in the resolution plan.

4.Secured Creditor not relinquishing security requires to contribute to the Liquidation Costs.

In the matter of **State Bank of India Vs. Navjit Singh,** the NCLAT decided on the liability of the secured creditor not relinquishing their security interest during liquidation to contribute to the liquidation proceeding costs.

In the instant matter, an appeal is filed against the impugned order of the Adjudicating Authority in the Interim Application filed by the Secured Creditor, wherein the AA disposed of the application with the direction to make payment of Liquidator's fees and ensure compliance of Regulations 2(ea), 2A, 21A, 37 of the IBBI (Liquidation Process) Regulations,2016 and Section 52 & 53 of the Insolvency and Bankruptcy Code 2016, and act as per the provisions of law.

As per the appellant the AA has failed to adjudicate on one of the prayers where claim of Rs. 29,34,54,879.59/- was raised and further the Appellant was not liable to pay any fee with regard to the securities which are out of Liquidation Process as opted by the Appellant. As per the appellant they have not relinquished the security and opted out of the priority mechanism mentioned under Section 53 of the Code.

In reply, the Liquidator submitted that the claim of Rs. 29,34,54,879.59/- of the Appellant has already been admitted by the Liquidator hence no further adjudication was required with regard to the said claim. It is further submitted that even if the securities which are out of Liquidation Process, the Appellant is liable to pay fee as per Regulation 21Aas well as 2(ea) of the Liquidation Regulations.

NCLAT after hearing arguments stated that the order passed by the Adjudicating Authority does not warrant any interference. Direction has been made as per Liquidation Regulation 21A where even if the secured

creditor proceeds to realise its security interest it is liable to pay fee as contemplated under Regulation 21A(2)(a).

NCLT JUDGEMENTS

1.Sale of CD as a going concern means sale of assets and liabilities of the CD on “as is where is basis” basis.

The National Company Law Tribunal- Division Bench II- Chennai in the matter of **M.S Viswanathan v. Pixtronic Global Technologies Pvt. Ltd.** (CP/699/IB/2017) approved the application filed by the Applicant herein the Liquidator of Gemini Communications Ltd. regarding the sale of Corporate Debtor (CD) as a going concern.

The Corporate Insolvency Resolution Process (CIRP) was ordered by the Tribunal vide order dated 20.06.2018 and since no Resolution Plan was received by the Resolution Professional, the Tribunal vide order dated 26.02.2019 passed an order for Liquidation of the CD and appointed S. Kasi Viswanathan as the Liquidator after which, due to the express inability of Mr. Kasi to continue, the Applicant was appointed as the Liquidator.

It has been contended that an advertisement in 'Business Standards' and 'Makkal Kural' was published on 22.02.2021 for the sale of CD as a going concern and an e-auction was conducted on 10.03.2021, however, no bidders participated. It was further submitted that another notice was published on 30.03.2021 where the date for e-auction was fixed as 16.04.2021, wherein, the Respondent participated as a sole bidder and was successful.

The respondent deposited 255 of the bid amount on 19.04.2021 and filed an application under Regulation 47A of the IBBI (Liquidation Process) Regulation, 2016 for an extension of time for the remaining payment, which was duly approved by the NCLT vide order dated 14.09.2021 and granted 90 days extension for the payment of balance amount. It was submitted that the Respondent paid the balance amount in the allocated time, whereafter, a sale certificate was issued to the Respondent. Furthermore, the bid amount is lying in the Liquidation account of CD which will be dispersed as per Section 53 of the IBC.

It is also submitted that an application under Section 66 of IBC which was filed by the RP is pending before the Tribunal. Thus, this application has been filed under Regulation 32(e) of the IBBI (Liquidation Process) Regulations, 2016, seeking approval for the sale of CD as a going concern.

The Tribunal defined 'going concern' as all such assets and the liabilities, which constitute an integral business or the Corporate Debtor, that must be transferred together, and the consideration must be for the business or the CD.The

Tribunal further drew the difference between the sale of 'CD as a going concern' and sale of 'business of CD as a going concern' which are provided under Regulation 32(e) and Regulation 32(f)of IBBI (Liquidation Pr-

-ocess) Regulations, 2016, respectively. Concerning Regulation 32(e), the CD will not be dissolved and only the interests and rights will be transferred to the acquirer. The existing shares of the Corporate Debtor will not be transferred and shall be extinguished.

Whereas with respect to Regulation 32(f), everything is transferred except the CD, thus, the CD is dissolved. It was concluded by the Tribunal that the Sale as a 'Going Concern' means a sale of assets as well as liabilities and not assets sans liabilities. Therefore, the sale of a Company as a 'Going Concern' means a sale of both assets and liabilities, if it is stated on 'as is where is basis'. Thus, the Tribunal allowed the application filed by the Applicant for the sale of CD as a going concern. It was further held that, after distributing the proceeds to the stakeholders as per Section 53 of IBC, 2016 the applicant may file an application under Regulation 45(3) of the IBBI (Liquidation Process) Regulations, 2016 for closure of the Liquidation process.

2.Successful Bidder in Liquidation can be granting Relief, Concession, and Waiver.

The National Company Law Tribunal, Kolkata Bench, in the matter of **Dekon Enterprises Pvt. Ltd. Vs. Anil Anchalia**, approved the interim application filed by the Respondent, Liquidator of Crystal Cable Industries Limited ('Corporate Debtor'), seeking relief and concessions to ensure the smooth running of the business of Corporate Debtor (CD).

The Corporate Insolvency Resolution Process (CIRP) was initiated against the CD wherein the Adjudicating Authority (AA) passed an order for liquidation and the respondent was appointed as liquidator. The offers for sale of assets of the CD as a going concern were fixed at Rs. 18.39.00,000/- only. The applicant participated in the auction and was declared a successful bidder as he was the sole bidder. A Letter of Intent was issued by the Liquidator on 27.09.2021. Subsequently, the possession assets of the CD were handed over to the applicant. The applicant requested the respondent for issuance of fresh shares and reconstitution of the board along with the grant of certain reliefs and concessions for a smooth transition. The respondent conveyed to the applicant that they can approach AA as per sub-clause (g) of clause (l) on page no. 22 of the Process Information Document for any specific relief.

The applicant contended that they have already paid the full consideration amount to Liquidator and acquitted CD as a going concern and reliefs sought are necessary as only the purchase of CD as a 'going concern' is insufficient to run the operations of the CD. It was further contended that the reliefs sought are for the successful running of operations of CD.

The reliance was also put on Maithan Alloys Limited v. Samir Kumar Bhattacharya, Liquidator of Impex Metal & Ferro Alloys Limited wherein the AA granted reliefs and concessions and waivers in the context of the sale of a corporate debtor as a going concern under the Liquidation Process Regulations.

There were no objections raised by the respondent. Hence, the AA in this particular matter approved the reliefs and concessions and waivers, that was sought by the applicant.

3.IRP of CD cannot act as IP of the personal guarantor of the concerned CD.

The National Company Law Tribunal – Chennai Bench, in the matter of **S.S Premkumar & Anr.** (CP(IB)/80(CHE)/2021) held that Interim Resolution Professional who is appointed in respect of the Corporate Debtor (CD) cannot ac as Insolvency Professional (IP) of Personal Guarantor of the concerned CD.

The present interim application was by the applicant who is the Creditor of the CD for rectification of the order passed by the Adjudicating Authority (AA) on 04.02.2022.

It was contended that vide order dated 04.02.2022, Mr. Amier Hasma Ali Abbas was appointed as the Resolution Professional (RP). Explanation to Regulation 4(1) of the Insolvency and Bankruptcy Board of India (Insolvency Regulation Process for Personal Guarantor to Corporate Debtor) states that Interim Resolution Professional who is appointed in respect of the CD cannot ac as IP of Personal Guarantor of the concerned CD and hence it was contended to replace the RP by another IP. Further, it was contended that an error was committed by the Applicant while filling in Part-IV of Form-C. It was further submitted that paragraph 4 stated that the company petition was filed by IP whereas, it was filed by the applicant and thus, it was an inadvertent error.

The Tribunal in this case held that an application filed under Section 95 of IBC is to be filed in accordance with Rule 7(2) of Insolvency & Bankruptcy (Application to the Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) wherein it has been stated that the Part-IV of Form-C is required to be filled only when the Application is filled via IP.

Since in the present case the applicant filled the part-IV also, the AA observed that the petition was filed by the IP.

The filling of Part -IV of Form C by the applicant made it superfluous. As per Rule 154 of NCLT Rules which empowers the Tribunal to rectify its orders, the AA rectified the order and clarified that the company petition was filed by the creditor and not the IP.

Furthermore, concerning the replacement of RP, it was held that RP in respect of Personal Guarantor violates IBBI Regulation and not the provisions of IBC, hence the order is not to be recalled as IBBI Regulations act as a guideline and not as a mandatory provision and the AA under Rule 154 rectified the error and appointed G. Ramachandran as IP for the Personal Guarantor of the CD.

4.Suspended BOD not barred from objecting to the act of Resolution Professional

The National Company Law Tribunal-Kolkata Bench in the matter of **Anand Kariwala Vs. Mr. Partha Pratim Ghosh, Resolution Professiona**l held that suspended BOD can object to the act of the Resolution Professional (RP) if the act of RP is anyway prejudicial to CD or in violation of the procedural requirement.

The interim application was filed by the suspended member of the Board of Directors (BOD) under Section 60(5) of IBC. The CD was admitted into CIRP vide order dated 24.10.2019 by the AA.

It was contended by the applicant that he received only three notices for the meeting of CoC and not any further. The applicant submitted that it came to his knowledge about the conduction of several meetings of CoC when he received a notice for handing over the vehicle of CD.

The applicant came to know about the Resolution Plan being under consideration before CoC and the Respondent 1 denied the applicant to share the Resolution Plan thereafter when the applicant approached the AA, he was provided with the Resolution Plan. It is further submitted that Resolution Plan has not in any way maximized the value of the assets of the CD and also did not balance the interests of all shareholders. Also, it was submitted that the Resolution Applicant has no prior knowledge of the business of CD.

Respondent 1 contended that the Applicant's son attended the first CoC meeting and since he was not a member of suspended BOD, he was not permitted to attend the same.

It was also contended that the notices were duly sent to other suspended BOD and also to the registered email address of the CD. Concerning the sharing of the Resolution Plan, it was contended that as soon as the Non-Disclosure Agreement was submitted by the applicant, the Resolution Plan was shared.

It was further contended that Resolution Plan need not match the liquidation value as was contended by the applicant.

Respondent 2 submitted that since the Resolution Plan was approved by the CoC, the commercial wisdom of the CoC cannot be questioned by the applicant. That the notices of the meetings of CoC were given to the suspended BOD and the applicant himself chose not to attend the same. Furter the email address provided was of Applicant's son who was not a member of the BOD and hence the notice was not sent to him. Reliance was placed on Burdwan Central Cooperative Bank & Anr. v. Asim Chatterjee & Ors, wherein it has been held that unless a person is deprived of his rights the principle of natural justice is not violated. Furthermore, with regards to insufficient prior knowledge of the business of CD with the Resolution Applicant, it was contended that CD was a trading and retailing unit of sarees and no technical expertise was required.

The AA held that the suspended BOD can object to the act of the Resolution Professional (RP) if the act of RP is anyway prejudicial to CD or in violation of the procedural requirement.

As soon as the CD is admitted to CIRP, the rein of the company is transferred to Interim Resolution Professional (IRP) as envisaged in section 17(1)(b) of IBC for management of the CD, and the functions of suspended BOD is limited to assisting and cooperating with the IRP/RP for the smooth functioning of the CD.

The BOD under its limited function is empowered to question the act of RP if it is prejudicial to the CD. Furthermore, the AA held that the commercial wisdom of the CoC cannot be questioned. Also, the Resolution Plan was held to comply with Section 30(2) of IBC and hence it was approved.

It was further held by the AA that the main objective of the IBC is to provide new lease of life to the CD and is not only limited to the maximization of the asset of the CD. That is why the stress is given to reviving the Corporate Debtor as a going concern, if possible and the liquidation followed by the dissolution is supposed to be the last resort.

5.No Appeal can be filed by the Revenue Department during the Moratorium period

The Income Tax Appellate Tribunal- Mumbai Bench, in the matter of **Dy. Commissioner of Income Tax Vs. Global Softech Ltd**. held that under Section 14 of IBC, the Revenue cannot institute suit against the Corporate Debtor after the imposition of the moratorium. Also, it was held that Section 31 of IBC prevents State Authorities from questioning the resolution plan.

In the present case, the cross-appeals were filed by both the parties challenging the order of the Commissioner of Income Tax- Mumbai dated 27.04.2015.

The application for initiation of CIRP was filed by the financial creditors under Section 7 of IBC before NCLT- Ahmedabad Bench and subsequently the Interim Resolution Professional (IRP). The matter is pending before the Insolvency Professional (IP) and a moratorium has been imposed under Section 14 of IBC. The proceedings were conducted ex-parte as the assessee did not appear for the hearing and no adjournment was sought.

The Tribunal held that appeal filed by the Revenue is prohibited under section 14 of IBC as the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel or other authority shall be prohibited during the moratorium period. Reliance was placed on Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan (P.) Ltd wherein it was held that even an arbitration clause cannot be invoked during the moratorium period.

Further, it was held that as per Section 31 of the Code, the resolution plan as approved by the Adjudicating Authority shall be binding on the corporate debtor and its employees, members, creditors, guarantors, and other stakeholders involved in the resolution plan. Thus, this will prevent State authorities, Regulatory bodies including Direct & Indirect Tax Departments from questioning the resolution plan. Thus, the appeal filed by Revenue was dismissed.

The Tribunal furthermore dismissed the appeal filed by the assessee on the ground that neither there was any permission obtained by the NCLT nor there was any letter of authority issued by IRP in favor of the assessee.

Hence, both the appeals were dismissed by the Tribunal.

6.Once an Application under Section 95 is filed, the tribunal has to proceed further with the compliance.

The National Law Company Tribunal – Chennai Bench in the matter of **Tata Capital Financial Services Pvt. Ltd. Vs. Mr. Boothalingam** ordered for appointment of Mrs. Balasubramanian Mekala as the Interim Resolution Professional (IRP) in respect of the Personal Guarantor.

CIRP was initiated against the Corporate Debtor (CD) via order dated 04.03.2020 by the Tribunal. The present application was filed by the Financial Creditor to the CD under Section 95(1) of IBC to initiate proceedings against the Respondent. The agreement of guarantee was executed by the personal guarantor. A demand notice was issued to the personal guarantor under Rule 7 of IBC (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rule, 2019 on 28.06.2021.

The Tribunal in the present case referred to the case of Mr. Ravi Ajit Kulkarni v SBI, wherein, the NCLAT held that once an application under section 95 of IBC is filed, the Tribunal has to act on it, and limited notice is to be served upon the personal guarantor to appear referring to the Interim Moratorium which has been imposed under Section 96 of the IBC and subsequently proceeds with the next step under section 97 of IBC of appointing Resolution Professional. Hence, referring to the same, the Tribunal ordered for appointment of Mrs. Balasubramanian Mekala as the Interim Resolution Professional (IRP) in respect of the Personal Guarantor. The applicant was further directed to serve the copy of the order to IRP for preparing a report under section 99 of IBC. furthermore, the RP was also directed to review the application and recommend the acceptance or rejection in the report within 10 days as envisaged under Section 99(1) of IBC.

7.CIRP cannot be initiated against Financial Service Providers.

The National Company Law Tribunal-Delhi Bench, in the matter of **Parveen Chawla Vs. MCF Finlease Pvt. Ltd.** held that Financial Service Providers falls out of the purview of the Corporate Debtor/Corporate Person.

In this present case the applicant (Operational Creditor)) was an employee of the respondent (Corporate Debtor-CD). An application under Section 9 of IBC was filed by the applicant against the respondent for the alleged default of Rs. 16,44,231/-.

The applicant contended that she was an employee of the respondent for approximately 12 years. The respondent which is a Non-Banking Financial Company did not pay her salary for a period starting from 01.05.2018 to 31.07.2019, which was a cumulative amount of 11,25,000. It was further contended that the respondent withheld the Gratuity amount of Rs. 5,19,231/- for 12 years of services. Demand

notice stating the dispute was served to the respondent under section 8 of IBC on 24.09.2019. The reply denying the alleged amount was served on the applicant on 5.10.2019 by the respondent which was beyond the expiration of 10 days and was received by the applicant on 09.10.2019.

The respondent contended that CIRP cannot be initiated as they do fall under the definition of Corporate Person as defined under section 3(7) of the IBC. Reliance was also placed on the case of Randhiraj Thakur v M/s Jindal Saxena Pvt. Ltd., wherein it has been held that financial service providers are being kept outside the purview of IBC.

It was also contended that the disputed amount raised in the Demand Notice was different from what was claimed in the application and hence the present application was not maintainable based on wrong facts. Furthermore, it was submitted that the applicant did not disclose that she was a shareholder of the company of the respondent and the application was thus not maintainable as was held by the NCLAT in the case of Lalit Mishra v Sharon Bio Medicine.

It was further contended that another company petition about the matter of oppression and mismanagement was filed by the applicant which is pending before the Tribunal and thus it constitutes a dispute under Section 5(6) of IBC.

Furthermore, it was submitted that the reply to the Demand Notice was duly given within the time frame of 10 days. It was also contended that the applicant worked only till 22.03.2018 and the salary for the same was paid by the respondent after that a criminal complaint was filed against the applicant on 31.05.2018 after which the payment of gratuity was forfeited.

The court in this case observed that the respondent company is a Non-Banking Financial Company (NBFC) falls out of the purview of the definition of Corporate Person as defined under Section 3(7) of the IBC as it states that financial service providers will not be included under the sad definition.

Section 3(17) which defines Financial Service Providers envisages that any person engaged in the business of providing financial services falls under its ambit.

Thus, the respondent being an NBFC does not come within the ambit of Corporate Person/Corporate Debtor. The application was thus dismissed by the Tribunal.

8.Treatment of property purchased in the name of Promoters under the Liquidation Estate.

In the matter of **CMA. Suresh Kumar vs Indian Bank,** an application is preferred under Section 60(5) and Section 35 (1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11,13 & 14 of the NCLT Rules, 2016 by the Liquidator before the NCLT Chennai.

The major relief sought in this application by

is to declare the property purchased (“Property”) in the name of the promoters from the funds of the corporate debtor to be added as part of the liquidation estate and to allow the property to be sold as a whole in one go to maximize the value of the assets.

Previously, CIRP was initiated against the Corporate Debtor and admitted. However, no resolution plan was received for the company hence the order of liquidation was passed by the Adjudicating Authority.

In this case, Respondent no.1 holds exclusive charge over the Property on over 150 Acres of the land out of 170 Acres. Over the rest 20 Acres of the land the Respondent No.1 holds pari passu charge along with other respondents.

Respondent no.1 has relinquished the security over the exclusive charge on the property as per the provision of Section 52 of the Code with the condition that such relinquishment will only be made if the whole property of the Corporate Debtor is sold in one go.

Further, the Liquidator sent the correspondences to the other Respondents to relinquish their right of the property of their part.

The other respondents did not raise any objection to the above-mentioned condition put forth by the Respondent No.1. Liquidator further submitted that the property purchased in the names of individual promoters but from the funds of the corporate debtor shall be added to the liquidation estate and further the whole assets of the corporate debtor to be sold in one go.

The Adjudicating Authority after hearing the arguments stated that the pertinent pointed out to be noted is that there is no objection from the other respondents over the condition placed by the Respondent No.1 for relinquishment of security interest. Further, the maximization of the value of the assets can be done with the single sale of the property as against piecemeal sale in this case. Hence, the AA allowed the property in the names of individual promoters to be placed under the Liquidation estate and allowed the Liquidator to sell the company in one go.

Supertech Limited goes under insolvency process

On an application filed by the Union Bank of India, the NCLT admitted the Corporate Insolvency Resolution Process against the real estate giant. Supertech Limited have several real estate projects ongoing in DelhI-NCR region.

As per the application the amount of default was INR 420 Crores was due to the financial creditor. It is estimated that more than 25000 home buyers are effected by this decision.

As of now homebuyers are required to submit their claims as per the last date mentioned in the Public Announcement released by the IRP.

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