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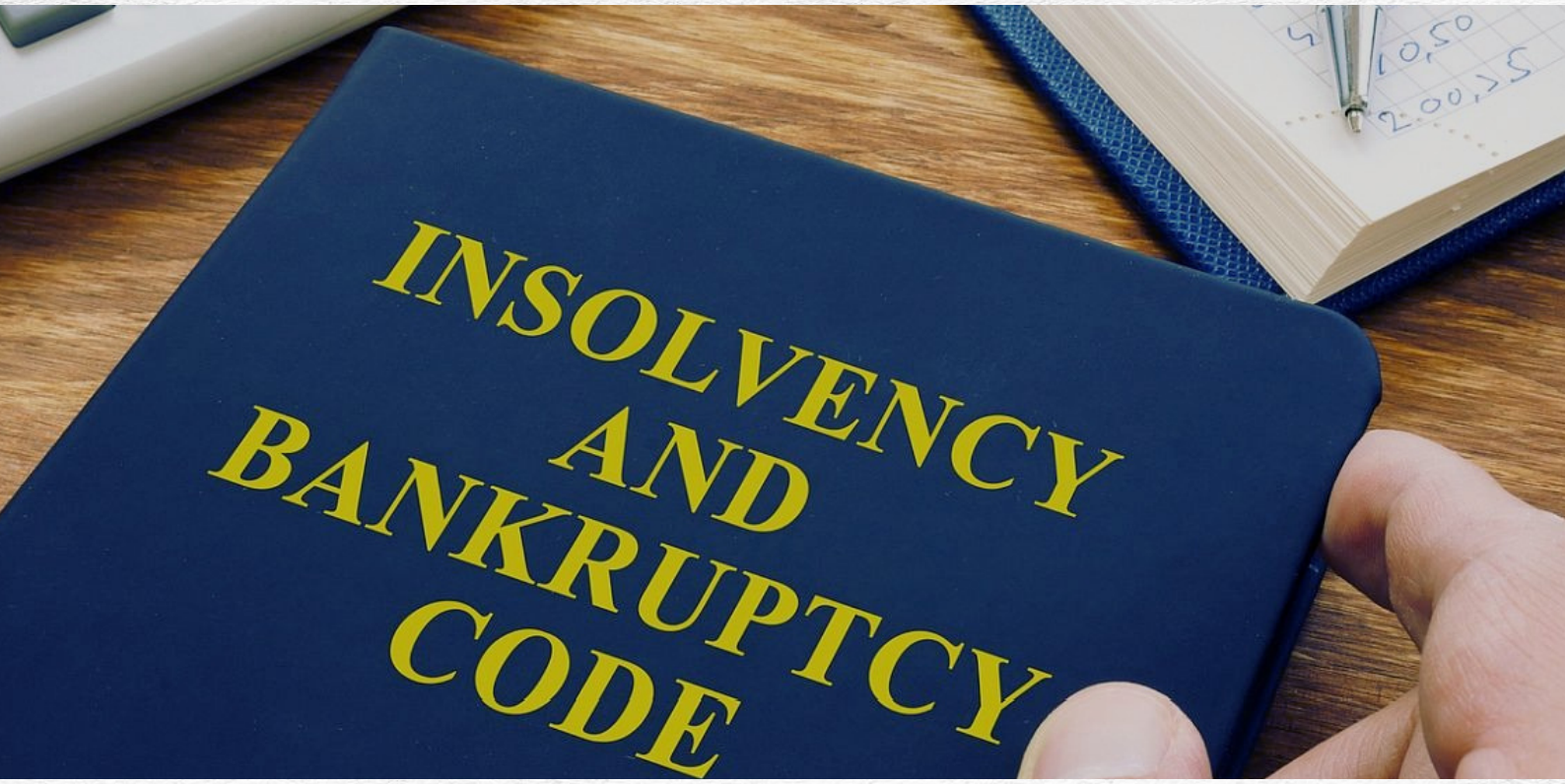

EFFECT OF MORATORIUM UNDER IBC ON PARALLEL PROCEEDINGS

Insolvency and Bankruptcy Code, 2016 ("IBC/Code") which received presidential assent on 25th May, 2016 is considered as the game changer in the 'debt recovery of the distressed entities' regime. The Code subsumed several insolvency laws which were considered redundant and had several flaws in them. The present Code came into force with an objective to realise the maximum value of any distressed entity through expertise and strategies.

One of the most important features of the Code is the concept of 'moratorium'. Section 14 of the Code talks about the moratorium and its effect on any proceeding. Moratorium has been put on a very high pedestal as it suspends several parallel proceedings which are filed against the company und-

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-er insolvency proceedings. Section 14 (1) of the IBC says that:

Subject to provisions of sub- sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:--

(a) the institution of suits or continuation of pending suits or proceedings against corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority.

The moratorium provides the 'calm period' which is to ensure that the already economically distressed corporate debtor maximises realisation of the assets. Further, the moratorium should also ensure a fruitful resolution without worrying the disbursal of further assets in parallel proceedings, if any.

This article shall discuss and analyse several such proceedings which are suspended during the enforcement of a moratorium. Before indulging into the different types of proceedings a basic understanding of the concept and objective of moratorium is necessary.

Objective of Moratorium

The Hon'ble Supreme Court referring to the Report of Insolvency Law Committee of February 2020 reiterated the objective of the moratorium which is to provide a defense to the corporate debtor by creating a bar on several parallel proceedings and allowing corporate debtor to maximise the value of the company without further encumbrances. Further the legislative intent behind introducing the provision of moratorium was to bar termination or suspension of several grants such as licenses, permits, quotas, concessions by the Government authorities as these grants are fundamental to the operation of any company and to realize the maximum value of any company as a going concern. As we discuss the importance of moratorium in any insolvency proceeding, a careful look at the effect of moratorium on parallel proceedings under different legislations is required.

Proceedings under Section 138 of Negotiable Instruments Act ("NI Act"), 1881

Until recently, proceedings under Section 138 of NI Act, 1881 was an exception to the moratorium when the NCLAT in the case of ***Shah Brothers Ispat Pvt Ltd vs P Mohanraj & Ors***, allowed Section 138 of NI Act proceedings to continue during the moratorium.

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

However on appeal to the Supreme Court, the Apex Court in a three judge bench ruling, held that where an order of moratorium is passed by the Adjucating Authority in an insolvency petition, in such cases parallel proceedings under Section 138 of the Negotiable Instrument Act,1881 shall be suspended. The Supreme Court of India gave emphasis on the legislative intent of moratorium behind such a decision and stated that it is now a settled position that the parallel proceedings under Section 138 of NI Act shall not be allowed to continue. In an explanation of Chapter XVII of the Negotiable Instruments Act, 1881, the apex court held that it is clear that a quasi-criminal proceeding that is contained in Chapter XVII of the Negotiable Instruments Act would, given the object and context of Section14 of the IBC, amount to a "proceeding" within the meaning of Section14 (1) (a), the moratorium therefore attaching to such proceeding".

Thus, the Supreme Court deferred from the NCLAT's reasoning and interpretation of Section 138 of NI Act in Shah Brothers judgement and settled the conflicting position on effect of moratorium on Section 138 of NI Act proceedings.

Proceedings under Prevention of Money Laundering Act, 2002 (PMLA)

PMLA was enacted keeping in mind the international commitments to ensure prevention of money laundering for illegal activities. Interestingly, both PMLA and IBC provides for the non-obstante clauses which provides for the overriding effect over other laws applicable inconsistent with them. Hence, a peculiar contention came up with IBC vis-à-vis PMLA. In the case of ***Sterling Sez Infrastructure Ltd. vs. Deputy Director, Directorate of Enforcement, Prevention of Money Laundering Act,*** NCLT Mumbai discussed the conflict between the two acts, wherein the property of the Corporate Debtor was attached by the authorities vide the powers of PMLA. Later, application for initiation of corporate insolvency resolution process was filed by the financial creditorunder Section 7 of IBC. The NCLT upheld the primacy of IBC by relying on the interpretation of the objective and purport of IBC which is the resolution of the Corporate Debtor by maximizing the value that can be received by the creditors and stakeholders and thereby upholding the importance of moratorium under section 14 of the code. The importance of moratorium was also emphasized in the case of ***Punjab***

ANSWER KEY FOR THE PREVIOUS QUIZ

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

National Bank vs Deputy Director, Directorate of Enforcement, *Raipur* where it was held that if a moratorium under IBC is in effect then the attachments of assets of the corporate debtor under PMLA cannot be made.

Proceedings under Arbitration & Conciliation Act

Bar on arbitration proceeding during the moratorium period under IBC has long been a bone of contention. With divergent views of High Courts, the position of suspension of arbitral proceedings was fairly ambiguous. Let us look at the relation between several arbitral proceedings and moratorium under IBC.

1.Bar on Section 34 of Arbitration and Conciliation Act, 1996 Proceedings

The position of suspension of arbitral proceedings under Section 34 of the Arbitration and Conciliation Act,1996 was ambiguous. In a Delhi High Court judgement, it was held that the Section 34 proceeding for an application for setting aside arbitral award shall not be barred due to moratorium. The court stated that by reading of Section 14(1) of IBC it is evident that 'proceedings' shall not include every proceeding.

Careful exclusion of the term 'by or against the corporate debtor' implies that awards which benefits the corporate debtor shall not be hit by the Section 14 of IBC provisions. Therefore, continuation of proceedings under section 34 of the Arbitration and Conciliation Act,1996 which do not result in endangering, diminishing, dissipating, or adversely impacting the assets of corporate debtor are not prohibited under section 14(1) (a) of the code.

The Supreme Court of India in the case of ***P Mohanraj & Ors vs Shah Brothers Ispat Pvt Ltd.*** held that the position in Delhi High Court judgement "does not state the law correctly as it is clear that a Section 34 proceeding is certainly a proceeding against the corporate debtor which may result in an arbitral award against the corporate debtor being upheld, as a result of which, monies would then be payable by the corporate debtor." Thus it is now a settled position that Section 34 of the Arbitration and Conciliation Act, 1996 shall be barred during the continuance of moratorium against the corporate debtor.

2. Bar on counter claims proceedings

This peculiar question on the sustainability of counter claims in an arbitration during moratorium came before the NCLAT in the case of ***Jharkhand Bijli Vitran Nigam Ltd. vs IVRCL (Corporate Debtor) & Anr.*** wherein the question arises whether a counter claim can proceed during the continuance of moratorium especially when the adjudicating authority under the Code allowed the corporate debtor to pursue the claim.

The appellate tribunal held that the claims can be proceeded however the tribunal held that if, on determination, it is found that the Corporate Debtor is liable to pay certain amount, in such case, no recovery can be made during the period of moratorium.

Interestingly this judgement differs from the views taken in cases like P Mohanraj and K.S Oils Ltd where a general bar on arbitral proceedings during the continuation of moratorium was placed. Therefore it can be easily concluded that the clear position of law on arbitration proceedings vis-à-vis moratorium under IBC is not available.

Proceedings under Writs

Usually moratorium places a suspension on most of the parallel proceeding which is by or against the corporate debtor but when it comes to writ petitions either under Article 32 or Article 226 of the Constitution of India for the Supreme Court and the High Courts respectively a clear exception is created. Although the bare reading of the provision doesn't not provide for any such exception. However, the nature of such petitions as interpreted by the courts that the constitutional powers and rights are immune to the moratorium provisions.

The same was held in the case of Canara Bank vs. Deccan Chronicle Holdings Limited where the appellant filed an appeal to the NCLAT against the impugned order passed by the adjudicating Authority for creating a bar on the proceedings for the recovering of amount. Appellant contended that Adjudicating Authority does not have authority to exclude the jurisdiction of courts including the High Court and the Supreme Court. NCLAT held that 'moratorium' shall not affect any suit or case which is pending before the Supreme Court of India pursuant to Article 32 of the Constitution of India or pursuant to Article 136 of the Constitution of India. The ju-

-risdiction of the High Court under Article 226 of the Constitution of India would also not be impaired by the moratorium.

Conclusion

The intent behind inclusion of moratorium under IBC and non obstante clause under section 238 of IBC is to provide a breathing space to the distressed corporate debtor and to put a cork on further depletion of the debtor's resources and assets.

The period of moratorium also allows the corporate debtor to formulate the best suitable resolution plan as the provisions of IBC and to realise the maximum value of company's assets.

Keeping in mind the same reasoning courts have upheld the supremacy of moratorium under IBC in various parallel proceedings. There are few lacunas and conflicts still pending which needs to be addressed by the courts however the current position puts moratorium provisions on higher pedestal as compared to several other legislations.

LATEST JUDGEMENTS AND UPDATES

SUPREME COURT JUDGEMENTS

1.Settling the conundrum over Wages/Salaries as part of the CIRP Cost.

The Supreme Court in the matter of Sunil Kumar Jain and others v. Sundaresh Bhatt and others (Civil Appeal No. 5910 of 2019) has settled the dust by categorically stating that the wages/salaries for the Corporate Insolvency Resolution Process (CIRP) period shall only become part of the CIRP cost, only and only when the worker/employee has actually worked for the Corporate Debtor (CD) which was running as a going concern at that point of time.

The present appeal was filed on behalf of workmen/employees of the CD against the impugned order of the NCLAT which has upheld the order of the NCLT dismissing the application filed by the Appellants for providing them with the claims related to salaries/wages for the period before and after CIRP. Feeling aggrieved by the impugned decision, the Appellants have filed the present appeal before the Apex Court.

Contentions of the Appellants:

1.The employees and workmen were on the payroll of the CD for the period CIRP and their employment contracts were not terminated by the Resolution Professional (RP).

2.CD was managed as a going concern during the CIRP and the proposal for suspension of operations & giving paid leaves to employees at one plant of the CD was rejected by the Committee of Creditors (COC) of the CD thereby making workers regularly attending the office. Also, RP under Section 19 of the Code is duty-bound to manage the CD as a going concern and thus, the workers/employees are entitled to the remuneration during the CIRP of the CD.

3. Workmen dues such as provident fund, gratuity and pension fund which are the asset of the workers/employees are to be paid in priority over and above the other dues, at par with the secured debt.

4. Liquidator vide circular dated 12.06.2018 had included workmen/employee cost under the head “other services in running the business” in Form I, II and III submitted by RP w.r.t. the CIRP cost incurred by him. Hence, taking reference from the same, employee/workmen cost during the CIRP period qualifies to be a CIRP cost under Section 5(13) of the Code and is thus required to be paid under Section 53(1) (a) and not under Section 53(1) (b) or (c).

Contentions of the Respondents:

1.Claims of workers/employees who have not worked or assisted the RP/Liquidator during the CIRP shall not fall within the ambit of CIRP cost as per Section 5(13).

2. As per Section 5(13)(c) r/w Regulation 31 and 33 of the CIRP Regulations, 2016 no cost other than the cost which was incurred by the RP in running the CD “as a going concern” is to be ratified by the COC. In the present case, only a few employees actually worked and were required to work for running the CD during the CIRP period, thus, COC rightly didn’t approve the payment as CIRP cost for these workers/employees.

3.RP since the beginning of the CIRP and also in the COC meetings has categorically stated that one of the workp-

-laces of the CD was fully non-operational since 2015 and another since 2017, thence, it cannot be said that the CD was a going concern during the CIRP and RP has incurred any costs.

4. There exist no documentary proof that the workers/employees have worked during the CIRP period, thereby submitting that the Appellants are not entitled to any wages/salaries for the period during the CIRP as CIRP cost.

5. Claims filed by the Appellants cannot be termed as CIRP cost and cannot be paid under Section 53(1)(a) but only under Section 53(1)(b) or (c) of the Code.

Observations of the Apex Court:

The Supreme Court observed that the CIRP cost shall include the cost of running the business of the CD and the employees/workers who have actually worked in running the CD's business during the CIRP period when the CD was a going concern, their claims shall be treated as a component of the CIRP cost under Section 53(1) (a) of the Code and shall be entitled to priority payment.

Thus, the Court laid down two conditions for considering such claims, i.e., firstly, during the CIRP CD should be a going concern and secondly, the concerned workers/employees should have actually worked for the CD during the CIRP.

Further, it was observed that any other claims w.r.t. employees/workmen should be dealt with as per Section 53(1)(b) or (c) of the Code.

Dealing with the facts of the present case, the Court stated that as per the contentions made by the RP/Liquidator, the CD was not a going concern and the Appellants have not actually worked during the CIRP period.

However, it directed the Liquidator to verify the claims received by him in light of the above two conditions and if on adjudication the claims made satisfy both the conditions, then the same has to be admitted as CIRP cost.

Further, it held that as per Section 20 of the Code, the IRP has to make every endeavour to run the CD as a going concern, thus the argument of the Appellant for assuming the going concern status of the CD during the CIRP was rejected.

Lastly, it was held that the provisions of Section 36(4) provide for keeping out the workmen dues, of which the CD is not the owner, outside the liquidation estate which shall have to be paid from the available funds in priority and the liquidator shall not have any claim over such funds.

2.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 A*mtek Auto Ltd. through Corporation B-*

-ank 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 the 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. However, 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, 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.

HIGH COURT JUDGEMENTS

1.Decree-holders under the Code are not discriminated and Section 3(10) of the Code is constitutional.

The Hon'ble Tripura High Court in the case of Sri Subhankar Bhowmik v. Union of India & Anr. (WP(C) (PIL) No.04/2022) has held that the decree-holders under the Code are not discriminated and Section 3(10) of the Code is constitutional.The Petitioner has challenged the vires of Section 3(10) of the IBC r/w Regulation 9A and sought to either strike down the section or the inclusion of decree-holders in the term "other creditors". It was also contended that the decree-holders should be treated at par with the financial creditors to save them from unconstitutionality. He submitted that the decree-holders as a class do not fall under the two types of creditors recognised to file an application and claims under the Code and the same affect their claim which is arbitrary and in violation of Article 14 of the Constitution.

The Court observed that decree-holders get a statutory status of being a creditor under the Code and since the decree cannot be executed once the moratorium is in effect. So to protect their interests, the Code has recognised them as creditors.

Further, it was observed that the interest recognised is in the decree and not in the dispute that leads to the passing of the decree and thus, they are kept separated from the financial or operational creditors as a separate class.

Hence, once the decree-holder is recognised as a creditor, all the provisions applicable to a creditor apply to decree-holders including Section 53. Lastly, it was held that the Resolution Professional is not required to look behind the decree and should treat the same as an admitted claim. Thus, the claim of the decree-holder is free from all rigours of the resolution process and has to be satisfied along with other claims which are not classified as operational or financial.
Hence, the writ petition was dismissed.

NCLAT JUDGEMENTS

1.Decision of putting CD into liquidation cannot be challenged even if the same has been approved by a sole FC having 100% voting share.

NCLAT in the case of Vishal Harish Choudhary v. Arihant Nenawati (company Appeal (AT) (Insolvency) No. 170 of 2022) has held that the decision for liquidation cannot be challenged on the ground that the same was taken by a sole creditor having 100% of the voting rights.

The Appellant in the present case has challenged the order for admitting Corporate Debtor (CD) into liquidation and contended the same to be prejudiced against the Appellant. It stated that the entire COC of the CD was controlled only by one creditor which has 100% voting rights and has decided to liquidate the CD without even giving the opportunity to the suspended directors of the CD.

The Appellate Authority took notice of the fact that the CD cannot be sold as the same is not a going concern as decided by the COC. Further, the NCLAT also observed that even if only one Financial Creditor (FC) is there in the COC having a 100% voting share, the same cannot be a ground for challenging the decision of the COC. Lastly, it was also observed that the Suspended Directors are not entitled to receive an opportunity for a hearing by the NCLT before passing the order of liquidation. Hence, the NCLAT upheld the decision of the NCLT and dismissed the appeal.

2.Promoter investing in the Corporate Debtor shall not be considered as a Financial Creditor.

NCLAT in the case of M/s Jagbasera Infratech Private Ltd. v. Rawal Variety Construction Ltd. (Company Appeal (AT) (INSOLVENCY) No. 150 of 2019) has held that the promoter who has given money to the Corporate Debtor (CD), being a real estate company, shall not be entitled to file a claim as a financial creditor (FC).

The Appellant in the present case is the promoter of the CD whose application for Section 7 has been rejected by the NCLT stating the debt to be a non-financial debt as it was not having the time value of money.

It submitted that the promoter and the CD entered into an MoU and a JVA under which the amount was transferred to the CD for developing the flats. Hence, the same should be considered as a forward sale or purchase agreement having the commercial effect of borrowing which was disbursed against the consideration for the time value of money.

On the contrary, the CD submitted that as per the MoU, the promoter has to bear the cost of the land and the same would be treated as a part of the project. Further, it was argued that the promoter was engaged in the business of the forward sale and had invested monies only in the capacity of a promoter. Hence, the Petitioner does not fall within the ambit of FC.

The NCLAT referred to the MoU and observed that the same provides for raising the loan in the name of the promoter for whi-

-ch there shall be no liability on the part of the CD. Thus, the NCLAT concluded that the promoter is having ownership over the project and thus, the amount invested can in no manner be held to be financial debt. Thus, the promoter was not held to be an allottee.

3.Commercial decision of the CoC to approve the plan cannot be challenged.

In the present case of Steel Strips Wheels Ltd. v. Shri Avil Menezes, Resolution Professional of AMW Autocomponent Ltd. & Ors an appeal before the NCLAT is filed under Section 61 of the Code against the order of the AA. Earlier, CIRP was commenced against the CD and the resolution plans were invited by the RP.

The Appellant submitted its plan and it was approved by the CoC. RP filed an application before the AA for the approval of the resolution plan. During the pendency of this application an I.A. was preferred by another party (Respondent No.3) seeking an intervention of the AA by directing the RP and the CoC to consider their resolution plan and further prayed to not to accept the resolution plan of the appellant.

The AA allowed this application. Hence, appellant preferred this appeal. The appellant states that the plan is already approved by the CoC and submitted for approval before the AA. Further, AA acted outside its jurisdiction by directing the CoC and RP to consider the plan of the Respondent No.3. Whereas, the RP states that CoC is now willing to consider the plan of the Respondent No.3. It was also contended by the Respondent No.3 that the plan submitted by them better maximises the value of the assets of the corporate debtor.

Also, the decision of the CoC to consider the plan is a commercial decision and hence it cannot be challenged. NCLAT stated that in this matter CoC already exercised their commercial wisdom by approving the plan of the appellant. IBC is a time-bound process and already several extensions have been provided in this matter. Further, the contention of the Respondent No. 3 that their plan provides better value does not stand as CIRP period has already been expired and plan is submitted for approval for the AA. Hence, the order of AA is unsustainable and liable to be set aside.

4. Acknowledgement under the Balance sheet is sufficient for extension of Limitation under Section 18 of the Limitation Act.

In the case of Mr. G. Eswara Rao v. Stressed Assets Stabilisation Fund the appeal emanates from the order of the Supreme Court, where the SC remanded back the matter to the NCLAT to decide afresh. Hence, in compliance to the SC order this appeal is filed. CD availed certain loan from IDBI bank. CD defaulted on the repayment and was declared NPA in 2002. Bank filed an application before the DRT under SICA. Bank assigned all its debt to Stressed Assets Stabilisation Fund (SASF) in 2004.

In 2018, DRT passed a decree in favour of FC and directed the CD to pay the dues.

FC filed an application under Section 7 of the Code for initiation of CIRP against the CD in March 2019. Whereas, a Recovery Certificate was issued by DRT in favour of Financial Creditor in June 2019. Major contention before the NCLAT was that whether gap of 17 years i.e from the date of the declaration of NPA in 2002 to the date of filing of application before NCLT is time-barred debt or not.

Respondent submitted the balance sheet and the Auditors Report of the CD for the F.Y 2016-2017 which reflected the borrowings taken by the CD. Thus, the acknowledgment in the balance sheet would amount to invocation of Section 18 of the Limitation Act. NCLAT, referring to the SC judgement of Asset Reconstruction Company (India) Ltd. Vs. Bishal Jaiswal & Anr wherein the SC considered the acknowledgment under Balance Sheet as the acknowledgment for the purpose of extension of limitation, held that the balance sheet acknowledgement is sufficient and the debt is due and payable in law. Accordingly, the NCLAT dismissed the appeal.

5. Power to Issue Non-Bailable Warrant.

NCLAT in the matter of **Vikram Puri (Suspended Director) & Anr. v. Universal Buildwell Private Limited & Anr.**, decided whether the Adjudicating Authority is vested with the power to issue non-bailable warrant against the promoters of the corporate debtor.

An appeal is filed under Section 61 of the Code against the impugned order of the AA, wherein the AA rejected the application filed for cancellation of non bailable warrant for arrest issued against the appellant.

Earlier, application under Section 7 of the Code was admitted against the CD and the CIRP was initiated. Subsequently, an application was preferred by the Resolution Professional under Section 19 of the Code to ensure the co-operation of the suspended management. AA in this application ordered for the co-operation of the suspended management and also issued non-bailable warrant against such persons.

Aggrieved by the order Suspended Directors moved an Application for cancellation of the Non-Bailable Warrants which Application was dismissed by the Adjudicating Authority and were also directed to handover all the documents. Hence, appellant preferred this appeal.

Appellant in this appeal stated that majority of documents as asked for by Resolution Professional have been supplied by the Appellants and their appearance and surrender was not necessary and their Application to cancel Non-Bailable Warrants has been wrongly rejected.

Further, the Adjudicating Authority does not have any jurisdiction to issue Non-Bailable Warrants and the AA is not bound by procedures laid down under the Civil Procedure Code. It is further submitted that in event non-compliance with Section 19 of the Code, the defaulting party may be liable for punishment in terms of Section 70 of the Code but due to non-compliance, non-bailable warrant cannot be issued.

After hearing the arguments of the appellant, the NCLAT held that the National Company Law Appellate Tribunal Rules 2016 clearly allows the NCLAT to apply provisions of the CPC in cases pertaining to summons and enforcing the attendance of any person.

It stated that the CPC empowers courts to issue warrants which may be either bailable or non-bailable, against any person who fails to cooperate by evading repeated summons. In this case, the NCLAT justified the AA's actions by pointing out that the suspended directors had been given several opportunities to cooperate and they did not.

Therefore, the AA was well within its jurisdiction to issue non-bailable warrants against the suspended directors for failing to cooperate even after repeated opportunities.

NCLT JUDGEMENTS

1.For a debt to be proven as a financial debt, the same should be based on a written contract.

Kolkata NCLT in the case of Narendra Promoters & Fincon Private Limited v. Vinline Engineering Private Limited (CP (IB) No. 749/KB/2020) has held that for a debt to be proven as financial debt, the same has to be in writing.

In the present case, the Applicant/NBFC has filed a Section 7 application against the Corporate Debtor (CD) on the grounds of defaulting on a loan that was disbursed based on an oral contract between the parties. The Applicant contended that the CD was regularly depositing TDS on interest with the IT department.

The Adjudicating Authority (AA) observed that there are three requirements for a debt to be financial debt, i.e., disbursement of the loan, against consideration for the time value of money and loan to be due and payable. It further observed that although the Financial Creditor (FC) has disbursed the loan, however, the same cannot be construed as disbursal until the same is backed by a written contract which was not there in the present case.

Further, the NCLT relied upon the RBI guidelines on Fair Practices Code for NBFCs and stated that the NBFC was ought to provide the borrower with a written contract, which the NBFC has failed to do so. Moreover, the AA relied upon the judgement of Phoenix ARC v Pvt. Ltd. v. Spade Financial Services Ltd & Ors. and observed that for the success of the insolvency regime, the real nature of the transaction has to be unearthed which can only be possible if the parties have a written contract. Lastly, it was also held that the mere fact of deducting TDS shall not be sufficient to conclude that there was a financial debt. Hence, the application was rejected.

2.For smooth transition of CD, the Liquidator is required to obtain waivers and concessions for the SRA.

NCLT Kolkata in the case of Meti Finance Private Limited v. Crystal Cable Industries Limited (I.A. (IB) No. 73 of 2022 in C.P. (IB) No. 1348/KB/2019) has observed that for the successful running of Corporate Debtor

(CD) by the Successful Resolution Applicant (SRA) as acquired on sale on going concern basis and for a smooth transition, the Liquidator (in the present case) has to provide for all the clearances as required.

The Applicant/SRA in the present case had requested the Liquidator to take steps regarding the issuance of fresh shares and reconstitution of the board and for the same has sent a letter intimating requirement for some reliefs and concessions for a smooth transition. Responding to the same, the Liquidator informed the Applicant to approach the Adjudicating Authority (AA) for the reliefs.

To which the SRA replied, that the entire consideration amount has been paid to the liquidator and if the reliefs sought are not granted the same would affect the going concern of the CD.

The Applicant vehemently argued that it will not be able to successfully run the CD provided the waivers/reliefs are not granted to the SRA and also submitted that for maximising the value of the CD the same is necessary.

Reliance was placed on the case of Maithan Alloys Limited v. Samir Kumar Bhattacharya, wherein the AA had granted concessions and waivers to the SRA in respect of the CD sold on a going concern basis.

The NCLT agreed to the arguments laid down by the Applicant and observed that for paving way for the smooth transition of the CD, the grant of appropriate concessions and waivers was necessary. Hence, prayer was allowed.

3. Liquidator has the right to initiate legal actions on behalf of the CD provided the same is benefitting the CD.

Mumbai NCLT in the matter of Queztal Endeavour Pvt. Ltd. v. Abhijit Guthatakurtha (IA 269/2022 in CP(IB)-1832/MB/2017) has observed that the liquidator is entitled under the Code to initiate arbitration, insolvency or other proceedings on behalf of the Corporate Debtor (CD) for the benefit of the CD.

In the present case, the liquidator under proviso of Section 33(5) r/w Section 35(1)(k) of the Code has filed the present petition seeking permission from the Adjudicating Authority (AA) to initiate arbitration proceedings against the debtors of the CD as the same would be in the beneficial interest of the CD. The Applicant stated that the recovery of the amount will form part of the liquidation estate of the CD and thus cannot be left out.

Responding to the submissions made, the AA permitted the Liquidator to invoke arbitration proceedings.

Further, in another IA filed by the Liquidator wherein, he submitted that the amount lent by the CD is a financial debt owed to the debtor company and hence, sought a request for filing an insolvency petition. The same was allowed by the AA.

Thus, it was concluded that the Liquidator under the Code has the right to initiate legal actions on behalf of the CD provided the same is benefitting the CD.

4.Promoter investing in the Corporate Debtor shall not be considered as a Financial Creditor

NCLAT in the case of M/s Jagbasera Infratech Private Ltd. v. Rawal Variety Construction Ltd. (Company Appeal (AT) (INSOLVENCY) No. 150 of 2019) has held that the promoter who has given money to the Corporate Debtor (CD), being a real estate company, shall not be entitled to file a claim as a financial creditor (FC).

The Appellant in the present case is the promoter of the CD whose application for Section 7 has been rejected by the NCLT stating the debt to be a non-financial debt as it was not having the time value of money.

It submitted that the promoter and the CD entered into an MoU and a JVA under which the amount was transferred to the CD for developing the flats. Hence, the same should be considered as a forward sale or purchase agreement having the commercial effect of borrowing which was disbursed against the consideration for the time value of money.

On the contrary, the CD submitted that as per the MoU, the promoter has to bear the cost of the land and the same would be treated as a part of the project.

Further, it was argued that the promoter was engaged in the business of the forward sale and had invested monies only in the capacity of a promoter. Hence, the Petitioner does not fall within the ambit of FC.

The NCLAT referred to the MoU and observed that the same provides for raising the loan in the name of the promoter for which there shall be no liability on the part of the CD. Thus, the NCLAT concluded that the promoter is having ownership over the project and thus, the amount invested can in no manner be held to be financial debt. Thus, the promoter was not held to be an allottee.

5. RP for the CD cannot act as the RP for the personal guarantor of the CD.

NCLT Chennai in the case of S.A Premkumar & Anr. (IA/148(CHE)/2022 in CP(IB)/80(CHE)/2021) has held that the Insolvency Professional who acted as a Resolution Professional (RP) for the CD cannot act as the RP for the personal guarantor of the CD.

The present petition is filed by the Applicant/Creditor under Rule 154 r/w Rule 11 of the NCLT Rules, 2016 for the removal of the current RP and replacement of the same by the new one. He referred to Regulation 4(1) of Insolvency Resolution Process for Personal Guarantors to Corporate Debtor Regulations, 2019 which in explanation provides that the RP shall be considered independent when he has not acted or is acting as an IRP/RP/Liquidator in respect of the CD. The Adjudicating Authority (AA) observed that the application against PG is filed under Section 95 as per Rule 7(2) in Form-C in which the details in respect of Part IV is only required when the same is filed through an Insolvency Professional. It was further observed that in the main company petition the AA has observed that the same was filed through an IP.

Moreover, it was observed that as per Regulation 4(1) of the PG to CD Regulations, 2019 the IP as found in Part IV of the application cannot be appointed as IP in respect of the PG. Thus, using Rule 154 of the NCLT Rules, the NCLT rectified its order and allowed the application for change in the RP.

6. RP is duty-bound to adhere to the timelines as prescribed under Regulation 35A.

Kolkata NCLT in the matter of Jai Balaji Industries Ltd. v. SPS Steels Limited (I.A. (IB) No. 1200/KB/2019 in CP(IB) No. 1342/KB/2018) has observed that the Resolution Professional (RP) is duty-bound to make an observation as required under Regulation 35A of the CIRP Regulations under the specified timelines prescribed.

The present application has been filed by the RP of the Corporate Debtor (CD) stating certain transactions incurred by the CD as preferential. He submitted that the management of both the beneficiary company and the CD is the same and the former has received considerations that has put the same in a beneficial position as compared to other creditors of the CD. On the contrary, the Respondent submitted that the RP has not submitted any proof to show that the transactions alleged are preferential in nature and has put the alleged beneficiary in a beneficial position. It was further contended that the transaction was in an ordinary course of business and financial affairs of the CD. Lastly, it was argued that the RP failed to form an opinion within 75 days or make a determination within 115 days of the insolvency commencement date.

The Adjudicating Authority (AA) observed that the report forming an opinion by the RP on certain transactions alleged to be preferential is baseless as there was nothing to support this contention of the RP. Further, the AA held that the RP has not formed an opinion or made a determination w.r.t. the transactions. Lastly, it was observed that the CD has made payments to the creditor alleged to be the beneficiary along with other creditors also. Hence, the same will not make the transaction in hand preferential.

7.Withdrawal of the CIRP within 24 hours of its admission will not allow the IRP to claim its fees.

NCLAT in the case of Sh. Manoj Kumar Singh v. M/s EBPL Ventures Pvt. Ltd. (Company Appeal (AT) (Ins.) N0. 294 of 2022) has observed the withdrawal of the CIRP within 24 hours of its admission will not allow the IRP to claim its fees.The Appellant has filed an I.A. in the main C.P. to bring on record the settlement agreement that has been reached between the parties as per which the dispute has been settled and payment has been made. It was argued by the IRP that he should be entitled to miscellaneous expenses.

The NCLAT observed that since the order of initiating CIRP was quashed within 24 hours of its admission wherein no action of formulation of COC nor any other action was taken by the IRP apart from the publication of the public notice, hence he shall not be entitled to any fees apart from the expenses incurred for the public announcement. Thus, the appeal was disposed of by way of aforesaid direction.

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