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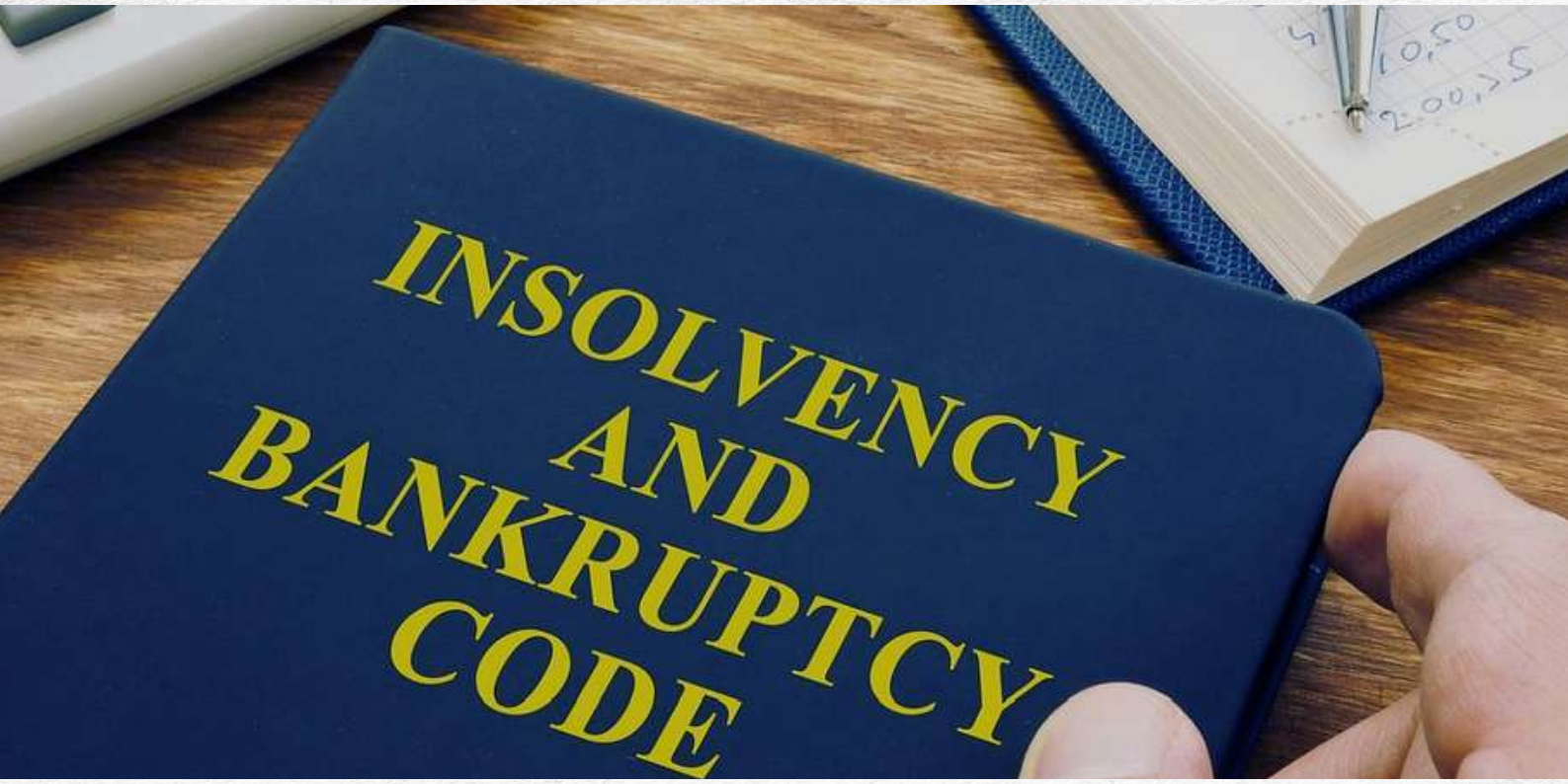

LATEST JUDGEMENTS AND UPDATES

SUPREME COURT JUDGEMENTS

1.Vallal RCK v. M/s Siva Industries and Holdings Limited and Others

Supreme Court in the case of Vallal RCK v. M/s Siva Industries and Holdings Limited and Others (Civil Appeal Nos. 1811-1812 of 2022) has held that the NCLT and the NCLAT cannot sit in appeal over the commercial wisdom of the Committee of Creditors (COCs).

Brief facts of the case are:

IDBI Bank had filed an application under Section 7 of the Code against the default made by the Corporate Debtor (CD) which got admitted by the NCLT. Thereafter, the Resolution Professional (RP) had called for a resolution plan against which one plan was received which was presented before the COC.

WHAT'S INSIDE THIS ISSUE:

The said plan was not passed as it received only 60.90% votes of the COC.

Thereafter the RP initiated an application under Section 33(1)(a) of the IBC to seek liquidation of the CD. Meanwhile, the promoters of the CD filed an application under Section 60(5) for a one-time settlement (OTS) upon which deliberations in the COC meetings took place. Initially, the OTS plan received 70.63% votes against the minimum requirement of 90%, however, one of the FC having a voting share of 23.60% decided to approve the said OTS plan. Consequently, RP conducted the COC meeting pursuant to the directions of the NCLT wherein the plan received 94.23% votes. Thereupon, the RP sought for withdrawal application of the CIRP initiated.

NCLT rejected the application and held that the settlement plan was not a settlement simpliciter but a business restructuring plan. Aggrieved by the order of NCLT, the Appellant filed an appeal to the NCLAT which also got rejected. Thus, the present appeal.

The Appellant contended that the Adjudicating Authority (AA) or the Appellate Authority cannot sit in appeal over the commercial wisdom of the COC. It was argued that since the COC has accepted the settlement plan with the required percentage as given under Section 12A, the NCLT & NCLAT has committed gross errors in rejecting the settlement plan. Further, it was submitted that Section 12A is a stringent provision as compared to Section 30(4) which requires a minimum of 66% for approval of the resolution plan.

Observations of Supreme Court:

The Apex Court observed that where 90% & above creditors permit a settlement plan, the AA or the Appellate Authority cannot sit in an appeal over the commercial wisdom of the COC which is of paramount importance. It further stated that where the COC arbitrarily rejects a settlement plan or withdrawal claim, the NCLT & the NCLAT have the power to set aside such a decision. Hence, it held that the decision approving the settlement plan by 94.23% is taken exercising the commercial wisdom and hence, the interference by the NCLT and the NCLAT was held to be erred in law.

INSOLVENCY TRIVIA

1 Once the application is received, the adjudicating authority shall confirm the existence of default within?

a) 7 days
b) 14 days
c) 21 days
d) 7 days

2) Who shall determine the amount of claim due to a creditor??

a) Committee of Creditors
b) Resolution Professional
c) Adjudicating Authority
d) Corporate Debtor

3) What is the time limit for appeal to NCLAT under this Code?

a) 15 days from the date of receipt of order of Adjudicating Authority
b) 30 days from the date of receipt of order of Adjudicating Authority
c) 45 days from the date of receipt of order of Adjudicating Authority
d) 60 days from the date of receipt of order of Adjudicating Authority

4)The liquidator shall apply to ____ for securing orders in respect of preferential transactions

a) NCLAT
b) IBBI
c) NCLT
d) IPA

2. Indian Overseas Bank v. M/s RCM Infrastructure Ltd. and Another

Supreme Court in the case of Indian Overseas Bank v. M/s RCM Infrastructure Ltd. and Another (Civil Appeal N0. 4750 of 2021) has held that the sale under SARFAESI shall only be completed only when it is effected as per Rule 8 & 9 of the Security Interest Enforcement Rules and if it remains incomplete and proceedings under IBC is initiated, then the asset has to be protected as per Section 14 of the Code.

In the present case, the Appellant had extended certain credit facilities to the CD which was defaulted by the latter and subsequently its account was classified as NPA in the year 2016. Thereafter, the Bank took steps as per Section 13 of the SARFAESI Act and issued the notice for e-auction of the assets on September 27, 2018. Meanwhile, on October 22, 2018, the CD filed a Section 10 application which got admitted by the NCLT on January 3, 2019. The bank conducted the first e-auction of the properties which got failed and then later conducted another e-auction on December 12, 2018, in which the value to be received for such asset was Rs. 32.92 cr of which 25% was paid upfront by the auction purchasers as EMD against which a sale certificate was issued to the purchasers. However, the purchasers failed to deposit the rest amount within 15 days and requested depositing the same by March 8, 2019.

Thus, the NCLT imposed the moratorium post admission of the petition. Further, during the pendency of the application in the NCLT, the Appellant Bank received the balance amount, against which an application was filed by the promoter for setting aside the security realization and to cancel the impugned transaction. This application was admitted by the NCLT against which an appeal was filed before the NCLAT which also received the same fate. Thus, the present appeal.

The Appellant submitted that the act of initiating a Section 10 application is malafide and should be dealt with as per Section 65 of the Code as it was only done to stall the sale proceedings. It was contended that the sale was completed as the Bank has already received 25% of the bid amount. Further, it was argued that Section 14 only interdicts any action relating to the security interest, however, it does not provide for undoing the completed actions.

ANSWER KEY FOR THE PREVIOUS QUIZ

1.(a) Form AA

2.(c) Form A of Schedule II

3.(c) Rs. 5,000

4.(a) Narasimhan committee

Respondent on the contrary submitted that the title of the property shall only be transferred only after receipt of full consideration and issuance of sale certificate as provided under Rule 8 and 9. Hence, the continuation of proceeding under SARFAESI against the express provision under Section 14(1)(c) is illegal.

The Court referred to Section 14(1)(c) of the Code which provides for a moratorium on any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act and observed that once the CIRP is initiated and the moratorium has imposed any action as provided under Section 14(1)(c) shall be prohibited. Furthermore, it was observed that the provisions of IBC shall have an overriding effect over SARFAESI. Lastly, the Apex Court held that the sale stood completed on March 8, 2019, whereas the moratorium was imposed in January 2019, hence, the Bank could not have continued the proceedings under SARFAESI.

3. New Delhi Municipal Council v.. Minosha India Limited

Supreme Court in the case of New Delhi Municipal Council v. Minosha India Limited (Civil Appeal No. 3479 of 2022) has held that Section 60(6) of the IBC/Code provides for exclusion of time period even for those suits and proceedings which have been initiated by the Corporate Debtor (CD) itself.

Issues at hand:

Whether Section 60(6) of the Code gives rise to a new lease of life to a proceeding at the instance of the CD on the basis of a moratorium?

Whether the CD can apply under Section 11(6) of the Arbitration and Conciliation Act, 1996 for taking advantage under Section 60(6) of the Code?

Contentions:

Appellant: Section 14 of the Code doesn't puts an embargo against the CD launching a proceeding. Also, Section 25(2)(b) of the Code gives powers to the RP for initiating proceedings on behalf of the CD. Hence, there should be no warrant for exclusion of the period for a suit or proceeding by the CD and thus, the application filed under Section 11(6) is time barred.

Respondent: Even during the moratorium the existence of CD was not vanished, thus, the Appellant could have taken steps as per Section 11(6), i.e., the period of moratorium will stand excluded from even for the suits or applications by the CD.

Decision:

The Court held that there cannot be slightest of doubt that the period of moratorium is excluded even in the case of a suit or application brought by a CD. Further, the Court didn't went to the question of checking the legality of the appointment of arbitrator under Section 11(6) as the Appellant was held to be debarred from raising the plea of limitation.

4. Safire Technologies Pvt. Ltd. v. Regional Provident Fund Commissioner & Anr.

Supreme Court in the matter of Safire Technologies Pvt. Ltd. v. Regional Provident Fund Commissioner & Anr. (Civil Appeal No. 2212 of 2021) has held that the period of appeal to NCLAT under the Code is fixed and is not directory.

Brief facts of the case are such that the Respondent filed an appeal against the Resolution Professional (RP) not admitting its claim. The appeal was filed after 14 months of non-admission of the claim by the RP.

The Appellant contends that the appeal has to be filed within 45 days from the passing of the order. Reference was made to the case of Kalpraj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr. On the contrary, Respondent submitted that the period of limitation shall start from the date of knowledge. It further contended that it was not made the party in the order which approved the resolution plan. Reference was made to the case of Raja Harish Chandra Raj Singh v. Dy. Land Acquisition Officer wherein the Apex Court observed that the provision relating to limitation should be given a liberal construction.

The Court referred to its earlier judgment in the case of Kalpraj Dharamshi and observed that the appeal against an order of NCLT shall be preferred within 30 days from the date on which the order was passed by the NCLT. At the max, the NCLT has the power to condone the delay of 15 days. Hence, the action of sending notice of appeal to the Appellant by the NCLAT after a delay of 338 days was condemned.

Brief Facts of the Case:

In the Civil Appeal No. 2222 of 2021, the Appellant, i.e., NOIDA submitted the claims in 'Form B' as an Operational Creditor ("OC") and later revised the same and had filed 'Form C' for claiming the dues arising out of the lease as a Financial Creditor ("FC"). The NCLT after considering the matter observed that the Appellant cannot be considered as an FC as there was no financial lease as per Indian Accounting Standards ("IAS") which is essential for making a lease as financial debt. The order of NCLT was upheld by the NCLAT which the Appellant has challenged in the present appeal.

In the Civil Appeal No. 2367-2369, the challenge has been made to an order of the NCLAT putting up a stay on the NCLT order which observed that the Appellant is an FC and its claim was to be admitted in full.

Considering the commonality in the matters, the case was taken conjointly.

Issues:

1)Whether NOIDA is to be treated as an FC under the Insolvency and Bankruptcy Code, 2016 ("IBC"/"Code")?

Sub-Issues:

a)Whether lease in the present case is a financial lease or not as under Section 5(8)(d) of the IBC?

b)Whether disbursement is necessary for a debt to be a financial debt and is it required to be unilateral?

c)Whether the transaction at present has the commercial effect of borrowing as is required under Section 5(8) (f) of the Code?

Background:

The Appellant/lessor is the Authority under the Uttar Pradesh Industrial Area Development Act, 1976 ("UPIAD") and is providing leasehold property for the development of the urban and industrial township. As per the lease deed, the shareholding of the lessor shall remain the same until the completion/occupation certificate of the 1st phase of the project and thereafter the lessee shall only have the right to transfer 49% of the shareholding subject to conditions. The consideration of about 10% has been paid and the balance of 90% shall be paid after the moratorium in 16 half-yearly installments along with the interest. Further, the lease deed provides for a moratorium for a period of 2 years from the date of allotment during which an interest of @7% p.a. compounded half-yearly shall be made payable in equal half-yearly installments.

A few clauses of the lease deed are as follows:

- The lessee shall have the right to mortgage the property subject to the consent of the lessor.
- The lessor shall reserve the right to all the benefits arising from the land.
- The lessor reserves the right to make alterations in the lease deed from time to time.
- The lessee shall not be allowed to assign or change his role otherwise the lease deed will be cancelled.
- The lessor reserves the right to take back the land in the larger public interest.

NCLAT's Observations:

The Appellate Tribunal observed that the lease deed does not contemplate any transfer of an underlying asset, i.e., land. It further stated that the lease was not classified as a financial lease by the Appellant and went on to state that for a lease to be a financial lease, there should be a substantial transfer of risks and rewards incidental to the ownership of the underlying asset which was not present in the case in hand as the Appellant was in a controlling position for all the aspects and was also keeping the rewards arising out of the land. Only the risks related to the asset were transferred to the lessee. Also, it was observed that the right to mortgage and the use of flats only for the residential purpose was also restricted.

Thus, after carefully going through the lease deed the NCLAT and the IAS, it was concluded that for a lease to be classified as a financial lease, there should be a transfer of ownership of the property by the end of the lease term or the bargain purchase option and also must have the transfer of risks and rewards incidental to the asset.

Hence, the lease was not held to be a financial lease and accordingly Appellant as FC.

Supreme Court's Decision:

W.r.t. the sub-issue (a), the Court observed that Section 5(8) (d) of the Code requires a lease or hire-purchase contract to be deemed as finance or capital lease under IAS to become a financial debt.

It referred to various rules of IAS such as Rule 61 which requires the lessor to categorise the lease as a financial or operational lease, Rule 62 which requires that in the case of the financial lease there must be a substantial transfer of risks and rewards incidental to ownership, Rule 63 which requires that it is the substance which matters and not the form of the lease, Rule 64 which requires that the lessee should have the right to cancel the lease along with the lessor, Rule 66 which requires that the categorization of the lease as financial lease should be at the inception date and Rule 67 which requires the lessor to recognize the lease as a finance lease as on the commencement date which is the date of commencement of the lease.

It was observed that there was no categorization of lease done by the lessor neither at the commencement date nor at the inception date, the right to purchase/transfer the asset was not given to the lessee, the rewards were not transferred to the lessee, the lease did not form part of the major economic life of the asset as there was no option for renewal after the period of the lease, the payment of 10% made and the premium does not represent substantially all the fair value of the underlying asset, the lessee does not have power to cancel the lease and the major controlling power over the leased property rest with the lessor and not the lessee. Thus, the Supreme Court observed that none of the rules was followed by the lessor thereby holding the lease not to be a financial lease and debt to be a financial debt under Section 5(8) (d) of the Code.

W.r.t. the sub-issue (b), the Apex Court held that disbursement is an essential component to constitute a financial debt and the same should be from creditor to debtor and not vice-versa. The Appellant, in the present case, had put the argument that there was disbursement from the debtor to the creditor, i.e., lessee to the lessor, and the same can be bilateral as the Code does not put an embargo on the same. The Court quashing the arguments laid observed that the meaning of disbursement under Section 5(8) shall be the payment of money which is to flow from the creditor, i.e., unilateral payment. Thus, as per the factual matrix of the case, the lease in hand was not financial as there was no disbursement of debt from the Appellant lessor to the Respondent lessee and accordingly the same cannot be financial debt.

W.r.t. the sub-issue (c), the Court observed that for a debt to be a financial debt under Section 5(8) (f), it needs to have a commercial effect of borrowing. The case of the Appellant is that since the homebuyers are treated as FCs under the Code, they should also be given the same status. It was further contended that the transaction between the parties involved interest which is to be paid by the lessee to the lessor apart from the premium amount.

The Apex Court observed that since the Appellant had placed its reliance earlier on Section 5(8) (d) which is a specific provision, it will preclude invocation of Section 5(8) (d) which is a general provision. Further, it also held that since there was no disbursement under the lease deed, the case of the Appellant does not fall under the definition of financial debt under the Code. Lastly, on the point of the transaction having a commercial effect of borrowing, the Court held that as a statutory authority and a public authority, the

transaction undertaken by such authority cannot have a commercial effect of borrowing, i.e., the authority cannot work with a profit motive which is essential for constituting a transaction having the commercial effect of borrowing. Thus, the contention of the Appellant that the transaction falls within the ambit of Section 5(8) (f) having the commercial effect of borrowing was rejected by the Court.

Conclusion

The Appellant was held not to be an FC but an Operational Creditor ("OC").

NCLAT JUDGEMENTS

1. IBC cannot be used for forum shopping

In the present matter of Partha Paul Vs. Kotak Mahindra Bank Ltd, NCLAT, New Delhi set aside the CIRP admission order of Adjudicating Authority and held that the Bank is involved in forum shopping to the multiple Courts/Tribunals just to harass the Guarantor as it has moved the Hon'ble High Court of Calcutta at Calcutta to coerce the trust into paying of its debts and involving the Appellant in time consuming and expensive litigation at the behest of this concerned branch of the Bank.

It is a settled law that the practice of Forum Shopping be condemned as it is an abuse of law. This case is beyond doubt falls under the category of Forum Shopping as it is a classic example of Forum Shopping when the Respondent Bank has approached one Court for relief but does not get the desired relief and then approached another court for the same or similar relief.

The Hon'ble Supreme Court has already settled the matter that the provision of the Code is not intended to be a substitute to be a recovery forum. The Hon'ble Supreme Court in Transmission Corporation of Andhra Pradesh limited Vs. Equipment Conductors and Cables Limited has already held that IBC is not intended to be a substitute to a recovery forum and also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked. The Code cannot be used whenever there is existence of real dispute and also whenever the intention is to use the Code as a means for chasing of payment or building pressure for releasing the payments. Reliance was also being placed on the celebrated case of Swadeshi Cotton Mills Vs. UOI (1981). The Hon'ble Madras High Court has also in Shree Krishna Educational Trust Vs. Government of TN 2016 succinctly laid down the components of a fair hearing which have not been complied with in the present case. The principles of natural justice are embedded in the Indian Legal jurisprudence.

Considering all the aspects, the NCLAT held that it is fit and proper to remand back the matter to the Adjudicating Authority to give a patience hearing also to the Appellant and the Respondents including the RP and then to decide the matter considering the fact of the case as well as the provisions of applicable laws on the issue and then to finally pass appropriate order in accordance with law. Hence, they set aside the order of the Adjudicating Authority and remanded back the matter to the Adjudicating Authority.

2. Treatment of leave encashment during CIRP Period

NCLAT in the case of Ranjeet Kumar Burnwal v/s Committee of Creditors, through Mr. Supriyo Kumar Chaudhuri decided on the issue of compensation to the appellant due to termination of his office and treating Leave encashment amount payable to the applicant as CIRP cost.

Brief Facts of the case: The appellant joined as Head (Commercial) in Rohit Ferro Tech Limited (Corporate Debtor) and was posted at the Jajpur Plant, Orissa. Later on, the Appellant was promoted as Executive Director (Work) of the Corporate Debtor, with monthly salary of Rs. 2,14,000/-

The petition was filed by State Bank of India (SBI) as financial Creditor of the Corporate Debtor, and Supriyo Kumar Chaudhuri was appointed as Interim Resolution Professional (IRP). After the initiation of CIRP, the resolution professional terminated his appointment, by invoking Clause No. 13 of the Agreement dated 30.04.2020.

Contentions: The Appellant claims for compensation (along with interest of 6%) for loss of his office as Executive Director. Further, he claims the termination to be arbitrary and unfair, as he is neither related to promoters not part of promoter's groups whose employment would affect the CIRP. Further, he supported his contentions taking the reference of Section 202, Companies Act,2013 and various precedents of NCLAT on this issue.

Appellant, on the other issue ascertains that he has received remuneration till 30.04.2020, but has not been paid the leave encashment amount of Rs. 5,67,100/-.

To the response of these Contentions the Respondent No. 2 submitted, appellant has been holding office of Director of Corporate Debtor and falls with the purview of 'related party' and therefore, all payments made to the Appellant including salary has to be made with the approval of CoC. Further, he submitted that upon his taking over as IRP, he witnessed various instances of mismanagement at the said plant, and according to the agreement he was entitled to terminate the service of the appellant (with one month notice period), this was accordingly approved by COC.
In relation to issue of leave encashment amount to be paid to appellant, NCLT has directed to take it as a part of CIRP cost, however COC has approved the Resolution Plan and same is pending before the AA. Therefore, the Leave encashment amount of Rs. 5,67,100/- being a part of CIRP cost is secured and would be considered as soon as Resolution Plan is approved.

Respondent No. 2 contended that Section 202 is not applicable as IBC is complete code and has an overriding effect. Further, Appellant has suppressed the provisions contained under sub-rule 3 of Rule 17 Companies (Meetings of Board and its Powers) Rules, 2014 which proscribes such payment of compensation under Section 202 in certain cases. Hence, it is contended that t Section 202 is only enabling provision and it does not mandatory necessary payment of compensation of a managing or whole-time director or manager of a company under all or any circumstances.

Findings: NCLAT has upheld the decision of considering the leave encashment amount to be treated as CIRP cost, and has directed to paid to the appellant upon the approval of resolution plan by AA.

Compensation of Rs. 25,68,000/- along with interest demanded by the appellant upon the termination of his office is not payable as the Respondent has complied with the terms of the agreement, further sub-rule 3 of Rule 17 Companies (Meetings of Board and its Powers) Rules, 2014, nowhere stipulates payment of compensation upon such circumstances.

3. Whether the Adjudicating Authority has the power to recall its order of closing of right to file the Reply?

In the matter of ***Printland Digital (India) Pvt. Ltd. vs. Nirmal Trading Company***, the appeal arose out of impugned order of the Ld. AA wherein the application of the appellant for recalling its order of closing the right to file Reply was dismissed by the impugned order, inter alia, on the ground that not only the Tribunal is not vested with any power to recall or review its own order but also sufficient opportunities had already been granted to the Appellant to file the Reply which were not availed.

The issue at hand was whether the Adjudicating Authority has the power to recall its order of closing of right to file the Reply?

It was contended that the Tribunal had the jurisdiction to recall its order in terms of the Rule 11 of NCLT Rules, 2016 because it had not decided any substantial issue on merits.
The Hon'ble NCLT observed that there is a difference between recalling of an order and review on merits of the issue decided by the Adjudicating Authority. No doubt that the Adjudicating Authority has no jurisdiction to review its order after deciding a substantial issue but it has the jurisdiction to recall the order of the kind in dispute i.e. where the right to Reply was closed by an order on the ground that the opportunities granted were not availed.

4. Whether direction of the Adjudicating Authority to deposit the unpaid TDS amount within the period of 15 days ought to have been issued by the Adjudicating Authority?

In the matter of Rolta Defence Technology Systems Pvt Ltd. vs. Mr. Anant Sadekar & Ors., the Appeal arose out the impugned order passed by Ld. NCLT by which the Appellant has been directed to deposit the unpaid TDS amount within the period of 15 days.

The issue at hand was whether direction of the Adjudicating Authority to deposit the unpaid TDS amount within the period of 15 days ought to have been issued by the Adjudicating Authority?

The Appellant entered into a Settlement Agreement with ex-employees who had filed Section 9 Petitions including the Respondents, wherein it was agreed that on receipt of Settlement Amount, ex-employees would withdraw their respective Petitions.

The Joint Settlement Agreement also provided that the Appellant shall make payment of the settlement amount by way of demand drafts and that the payment of statutory dues such as the payment of TDS would be made directly to the relevant authorities subject to outcome of the pending proceedings before the relevant income tax authorities.

The AA observed while permitting withdrawal directing the Corporate Debtor to deposit TDS amounts deducted from the employee, if not already paid to the Central Government Account within a period of 15 days.

This was appealed before the Hon'ble NCLAT, which opined that Adjudicating Authority ought not to have been directed to deposit the TDS amounts by the Corporate Debtor within 15 days. However, the Corporate Debtor in the Settlement Agreement has agreed to deposit the amount but the Income Tax Department shall take its own course for recovery of the TDS amount.

The Hon'ble NCLAT further stated that while permitting withdrawal of Section 9 Application, the Adjudicating Authority could have passed an order taking into consideration the Settlement entered between the parties. Hence, the direction to the Appellant to deposit the deducted amount of TDS cannot be faulted. However, the direction to deposit the amount within 15 days is set aside with liberty to Appellant to deposit the amount within the period as provided by the Income Tax Authorities.

NCLT ORDERS

1. Default of payment of settlement agreement does not come under the definition of Operational Debt under IBC

NCLT, New Delhi Bench in the matter of M/s Ahluwalia Contracts (India) Ltd. Vs. M/s Logix Infratech Pvt. Ltd, observed that as per part IV of the application, the claim of the Applicant is based upon a settlement agreement dated 30th September, 2019. First instalment was due for payment on 25th October, 2019 but the amount was not paid, therefore, the Applicant has filed an application to initiate CIRP for the violation of terms and conditions of the settlement agreement arrived between the parties.

The NCLT referred to section 5(21) of the "Operational Debt" where it means a claim in respect of the provision of goods or services including employment or a debt in respect of the dues arising under any law for the time being enforce and payable to the Central Government or any State Government or any local authority. In terms of the definition, the submissions of the Applicant whether terms and conditions of the Settlement comes within the purview of Operational Debt or not?

As per the definition, Operational Debt means a claim in respect of provision of goods or services including employment. NCLT observed that the claim of the applicant do not fall either under the category of the supply of the goods or service rendered by the Corporate Debtor. Rather the claim of the Applicant is based on the breach of terms and conditions of the settlement agreement, on the basis of which the Applicant has claimed that there is default in payment of the amount as referred to part IV of the application. The part of the Operational Debt says a debt in respect of payment dues arising under any law for the time being enforce. Admittedly, the claim of the Applicant also does not fall under the part of definition of the Operational debt.

The NCLT also referred the decision of NCLT Allahabad Bench in M/s Delhi Control Devices (p) Limited Vs. M/s Fedders Electric and Engineering Ltd. (2019) and a similar view was followed by the Bench in in the matter Of Nitin Gupta vs International Land Developers Private Limited.

Therefore, the NCLT held that the case of the Applicant is covered with the aforesaid decision. Therefore, in view of the same, the default of payment of settlement agreement does not come under the definition of Operational debt. Accordingly, the NCLT did not allow the prayer of the Applicant and the prayer to initiate CIRP against the Corporate Debtor was rejected.

2. Are PF authorities entitled to the satisfy its full claim in relation to the PF including interest?

In the case of the Regional Provident Fund Commissioner ("RPFC") Vs. R.L. Logistics Pvt. Ltd. – NCLT Chennai Bench, The Applicant RPFC filed its revised supplementary claim before the Liquidator which was rejected by the Liquidator on the ground that the order passed by the EPF Authority under Section 7A of the EPF Act, 1952 was in violation and beyond jurisdiction. In this context, it is reiterated that in so far as the dues of the Provident Funds are concerned, the same does not form part of the Liquidation Estate and that the Liquidator in these cases, are only put on notice, about the claim of the PF authorities.

The liquidator can exercise his rights only over the assets which are forming part of the Liquidation Estate and the Liquidator has no control over the assets that are NOT forming part of the Liquidation estate. In other words, the Liquidator cannot reject the claim of the PF authorities because, the dues to the PF authorities do not form part of the Liquidation Estate and hence, does not form part of the waterfall mechanism.

The Hon'ble NCLAT in the matter of Regional Provident Fund Commissioner Ahmedabad -Vs- Ramachandra D. Choudhry (2019) while PF authorities are entitled to a claim of interest charged by the said authority during the course of CIRP of the corporate debtor, in addition to the principal amount of provident fund due which has been fully taken care of in the approved Resolution Plan, negating the contention of the successful resolution applicant that Sections 7Q and 14B of the EPF & MP Act, 1952 cannot be relied upon, as the provisions of IBC, 2016 has an overriding effect on the same in terms Section 238 of the Code, it was held that no provisions of EPF & MP Act, 1952 and IBC, 2016 are in conflict and on the other hand in terms of Section the provident fund and gratuity funds are not the assets of the corporate debtor, there being specific provisions, the application of Section 238 of the Code will not arise. In the circumstances, the successful resolution applicant was directed to release full provident fund and interest thereof in terms of EPF& MP Act, 1952 and the appeal of PF authorities was thereby allowed.

In conclusion, the NCLT held that the PF authorities are entitled to the satisfaction of the full claim in relation to the PF including interest. Further, it is to be taken note that the entire amount of claim do not form part of the Liquidation estate.

3. Period of limitation does not commence when the debt becomes due but only when a default occurs

In the matter of Sterling and Wilson Pvt. Ltd. Vs. Bridge and Roof Company (India) Ltd, a Company Petition was filed under section 9 of the the Code by Sterling and Wilson Private Limited (Operational Creditor), for initiation of CIRP against Bridge and Roof Company (India) Limited (Corporate Debtor).

The NCLT referred section 3(11) which envisages on the definition of a debt which is a liability or obligation against a claim which is due from any person, whereas, a default occurs when there is a non-payment of such debt, partly, or wholly, by the debtor. To identify such default the most pivotal point that comes into picture is the 'date of default' i.e., the date on which the debtor has failed to pay the debt. The date of default is crucial to determine the date when the cause of action aroused because the right to sue under the Code occurs only when the default occurs. Further, it is a settled law now that limitation does not commence when the debt becomes due but only when a default. However, in this case, there is no date of default given by the Operational Creditor. Nevertheless, even if the date of the final invoice i.e., 30 December, 2013 is to be taken as the date of default then also it is clear that as per Article 137 of the Limitation Act, three year would end in 2016. Further, on a toothcomb reading of the letter of 2017 by the Corporate Debtor nothing in the said letter would construe as an acknowledgement of debt.

Further, the NCLT with respect to the pre-existing dispute mentioned that an arbitration proceeding was already initiated by the Operational Creditor in the year 2020. Further, upon perusal of the record of Supplementary Affidavit filed by the Corporate Debtor duly notarized on 04 January, 2022, it was apparent that one of the issues framed by the Ld. Sole Arbitrator is whether the Operational Creditor defaulted in performing its obligations under the contract or not? In light of the above facts and circumstances, the C.P (IB) No. 987/KB/2020 was dismissed. However, the NCLT granted liberty to the petitioner to pursue its remedy under the law available, if any. Further, the observations made in the instant case shall not in any way prejudice the arbitration proceedings pending between the parties.

4. Can an attachment containing accounts statement annexed with an e-mail without any signature and date or/and Company Seal be held authenticated or valid in terms of Section 18 of Limitation Act for extending the period of Limitation?

In the present matter, a section 9 petition under IBC 2016 was filed by M/s. G. L. Shoes (Applicant/Operational Creditor), with a prayer to initiate the CIRP against M/s. Action Udhyog Pvt. Ltd. (Respondent/Corporate Debtor).

The Corporate Debtor had raised an objection that the present Application has been filed after 03 years from the date of default. Hence, the Application is barred by limitation. It is further argued by the Corporate Debtor that the email dated 05.05.2017 along with its attachment cannot be relied to extend the limitation, since the same is not signed by the Corporate Debtor or any person authorized by it.

The Adjudicating Authority held that:

- The main body of the e-mail does not contain any statement regarding acknowledgement of the debt by the corporate debtor and the attachment relating to Accounts attached therewith is neither signed by any authorized person nor bears the Company Seal. Further, the Applicant, for the acknowledgement of debt, has referred to and relied on the

attachment containing Accounts statement of the Corporate Debtor, which is not duly authenticated.

- There is no requirement or scope to sign the main body of the e-mail and at the same time, there is no possibility of tampering the date and time of the main body of e-mail, which is a major factor while considering the issue of limitation. Per contra, if acknowledgement of debt is made basing on the contents of an attachment, which is an external file exported/attached with the mail and if that attachment is not duly authenticated by signature of the authorized person and date or/and Company Seal, it is not possible to ascertain beyond doubt to which date the document is generated or belongs to.

- Further, sending a communication by way of an attachment with an email can be understood like sending a communication by a virtual speed envelope. At the end, what matters is what is there inside the virtual envelop/ attachment. Just like an unsigned document sent via physical post cannot be construed a valid acknowledgement of debt in terms of Section 18 of the Limitation Act 1963, the same way in today's technologically advanced world (where with the scanning software available, one can easily ask for / transmit a signed and stamped document from one recipient to another without any difficulty), the necessary condition of signing/authenticating a document sent/received as an attachment with an e-mail cannot be dispensed with for treating it as a valid acknowledgement in terms of Section 18 of the Limitation Act, 1963.

- Further, the decision of the Hon'ble High Court of Karnataka in the Sudarshan Cargo Pvt. Ltd. vs M/S Techvac Engineering Pvt. Ltd. CO.P.NO. 11/2013 dated 25.06.2013 brings no guidance for us when the acknowledgement of debt is relied upon an external file of the attachment. Hence, the decision would be applicable in a situation, where the acknowledgement of debt is made in the main body of the e-mail and not in case of a document/file sent through an attachment.

Hence, the attachment containing accounts statement annexed with the e-mail dated 05.05.2017 without any signature and date or/and Company Seal cannot be

RECENT UPDATES

- IBBI invites suggestions/inputs from public including the stakeholders, for effective and expeditious resolution of Real Estate Projects for need for any separate regulatory framework for Homebuyers in the corporate insolvency resolution process (CIRP) of real estate projects or some modifications in the existing regulations, within the existing framework of the Code.

- For the purpose of Improvement to the scheme of examinations, IBBI issued a circular dated 06.06.2022 on frequency of attempt in an LIE or valuation examination, as the case may be. That is for every candidate, it shall be determined after taking into account a cooling off period of 2- months between each consecutive attempts of such candidate, thereby making a total of 6 attempts in a period of 12 months.

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