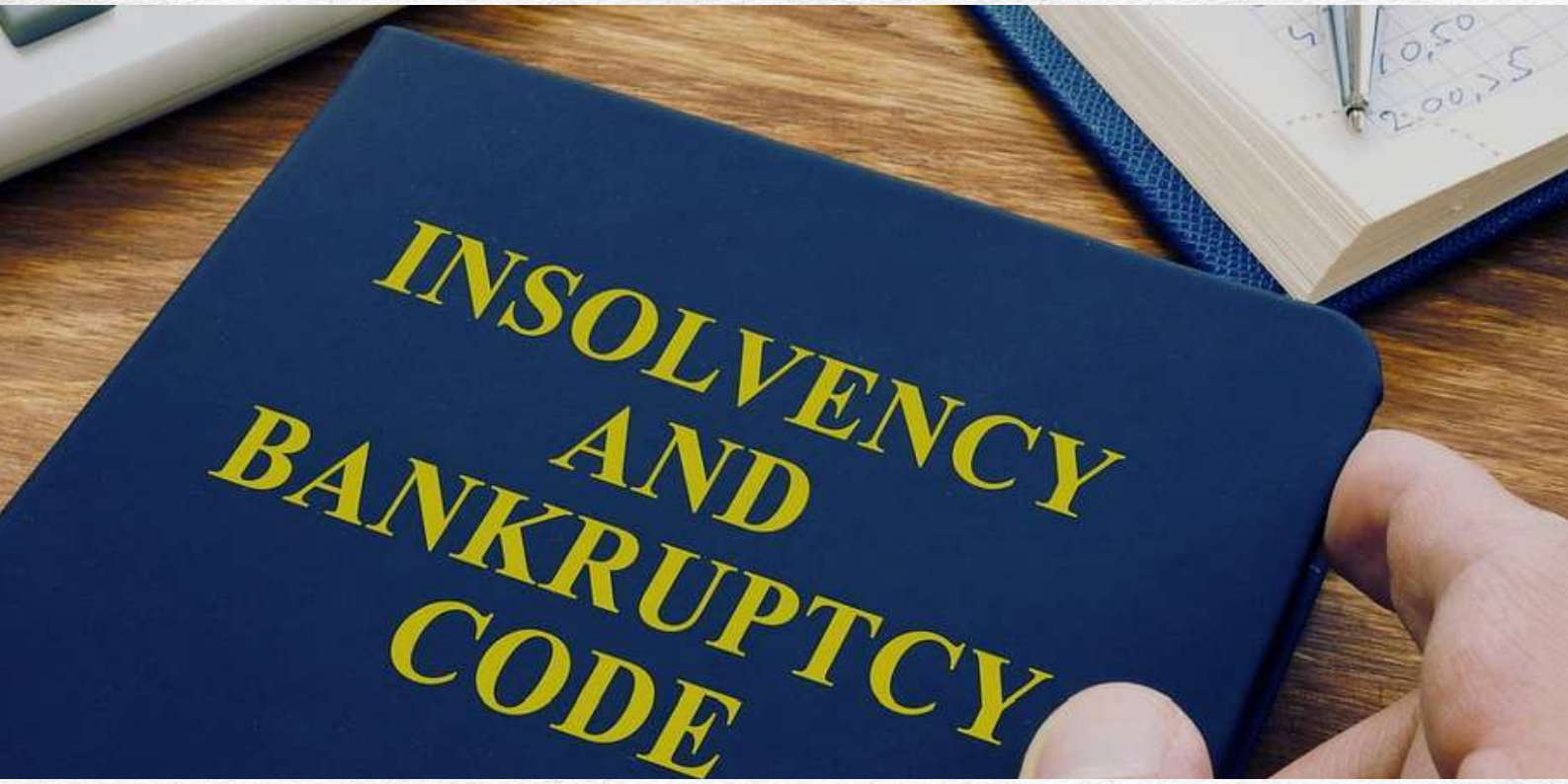
AVM RESOLUTION PROFESSIONALS

RESOLUTION TIMES

Newsletter of a Premier Insolvency Professional Entity

01 December 2022, ISSUE 32



LATEST JUDGEMENTS AND UPDATES

NCLAT JUDGEMENTS

1.Anubha Sinha v/s. JN Hotels Pvt. Ltd. & Anr.

Background

The Respondent Operational Creditor has been a lessor under two leases. The Corporate Debtor has taken the premises on lease for business purposes, one deed was executed in the year 2013 and another in 2016. The Application was filed claiming operational debt of Rs.1,22,61,890/. Prior to application, demand notice was issued under Section 8, IBC 2016.

However, the demand notice was not replied by the CD and thereafter Section 9 Application was filed claiming the operational debt. Reply was filed by the CD opposing Section 9 Application. The Adjudicating Authority, after considering the submissions of the parties and the grounds, admitted Section 9 Application under IBC,2016.

WHAT'S ~~INSIDE THIS~~ ISSUE:

Thus, Appeal has been filed against the order passed by the Adjudicating Authority admitting Section 9 application under IBC, 2016.

Contentions:

The Appellant contends that the amount which was claimed have not adjusted to the amount paid by the Corporate Debtor does not meet the threshold. Further, no proper calculation was given in the Application and the letter which was earlier sent by the Operational Creditor demanding the rent was replied by the Corporate Debtor. Further, the Appellant contend that the maintenance of the premises was the liability of the respondent.

The Respondent in response, contended the calculation of all the claims, was already calculated which was specifically mentioned and the statement which was sought to be referred and relied by the appellant.

Further, all the payments towards rent have already adjusted by the Operational Creditor and the amount claimed meets the threshold. Application was filed in the year 2019 and at that time the threshold was only Rs.1 Lakhs.

Held:

The submission of the Appellant is erred wherein that the incorrect computation of the amount outstanding has been given. Further, the letter on which reliance has been placed by the Appellant does not amount to any dispute with regard to the entitlement of lease rental and on that basis it cannot be contended that debt was disputed.

Further, the Appellant contend that the maintenance of the premises was the liability of the Operational Creditor in which there is certain lapses and the issues cannot be a ground to deny the claim of the rental as was agreed between the parties. Thus, the Appeal was dismissed.

2. Tribhuwan Singh v/s. State Bank of India & Anr.

Background:

Financial facility of Rs. 178 Crore was sanctioned by the Financial Creditor out of which Rs.95 Crore was disbursed, over default committed, the Financial Creditor filed Section 7 Application in which Application the Corporate Debtor objected to the admission of the

INSOLVENCY TRIVIA

1. The RP shall consolidate claims under the Individuals and Partnerships Insolvency resolution process within …. Days of public announcement

(a) 21
(b) 30
(c) 45
(d) 60

2. The public notice calling claims from creditors under the bankruptcy process shall be given by

(a) IBBI
(b) NCLT
(c) Bankruptcy Trustee.
(d) Bankrupt Person

3) Repayment Plan shall be prepared by

(a) Debtors and creditors
(b) Debtors
(c) Debtor in consultation with the Resolution Professional
(d) Resolution Professional

4) What Reports are to be prepared and submitted by the Liquidator

(a) Progress Report
(b) Final Report
(c) Preliminary Report
(d) All of the above

Application raising various grounds including the ground of limitation, Section 10A and also that the Corporate Debtor has been taking steps to settle the matter with the Bank. The Adjudicating Authority, considered the submissions and admitted the Application. Thus, Appeal has been filed against the order passed by the Adjudicating Authority admitting Section 7 IBC, 2016.

Contention:

The Appellant contended that the notice was issued and seven days were required for payment, hence, the period of default occurred in between the period under Section 10A.Thus , Application is not barred by limitation.

Further, Appellant has to receive payment from government which having not been received, the Corporate Debtor could not make the payment and it is expected that the amount shall be received soon so that non-payment is not reason to send the Corporate Debtor to CIRP. Further, Financial creditor defaulted committing in not disbursing the full amount.

Held:

The event of default has occurred as per the Agreement between the Financial Creditor and the Corporate Debtor; we do not find any illegality in filing Section 7 Application by the Financial Creditor for initiation of CIRP. The Adjudicating Authority has not committed any error in admitting Section 7 Application.

3. Greater Noida Industrial Development Authority v/s Mr. Prabhjit Singh Soni, Resolution Professional, M/s. JNC Construction Private Limited

Background:

The Appellant filed an appeal, against an impugned order passed by the Adjudicating authority, wherein, on the ground that appellant has not taken any action for seven months when it is their case that the RP had not taken any decision over the 'Claim Application' filed by them and that the CoC had already approved the Plan and post its approval, appellant had approached the Adjudicating Authority.

Contentions:

The appellant contended that, it has submitted the claim as the 'FC' but

ANSWER KEY FOR THE PREVIOUS QUIZ

1.(a) Financial Service Providers like Banks

2. (C) The whole of India.

3.(d) All of the above

4. (a) Charge may include a mortgage subject to the consent of the mortgage

the RP has treated their claim as an 'Operational Creditor'. The Lease in question ought to be classified as a 'Financial Lease' as the land has been allotted to the 'Corporate Debtor' with a right of mortgage of the said Leasehold Property to raise buildings and subsequently executed sale deeds in favour of the Homebuyers vide Tripartite Transfer Deeds.

Under the Lease Deed, the consideration by which in lieu of grant of Leasehold Rights consist of two components i.e., premium to be paid by the Lessee either in instalments along with interest or as an annual Lease Rent to be paid every year or to pay Lease Rent equivalent to 11 years at 1% per year equivalent to the 11% of the total premium of the plot has One Time Lease Rent. The premium payable by the Lessee is equivalent to the fair value of the Leasehold Rights. Therefore, the claim made by the Appellant ought to be treated as a 'Financial Debt'.

The Respondent responded that Resolution Professional on 06.02.2020 informing the Appellant that they had been treated as an 'Operational Creditor' and to send their claim in Form-'B' and calculate their interest after the date of Admission of the CIRP.

However, no modifications was done executed over the claim nor replied the email sent by RP for the same. Thus, claims of appellant post approval of plan was erred on this.

Further, it has been contended that since because the matter New Okhla Industrial Development Authority v/s Anand Sonbhadra wherein Hon'ble Supreme Court considered Lease Deeds executed by Noida are 'Operational Leases' under the Indian Accounting Standards, therefore, the appellants are Operational Creditor.

Held:

The Appellant erred in not modifying the claim from being the financial creditor to operational creditor, and thus, the Appellant did not exercise its right in filing its 'Claim' on time and has belatedly challenged the rejection after the approval of the Resolution Plan. Additionally, there has been no material irregularity in the approval of the provisions of the Resolution Plan and hence find no legal or substantial grounds to interfere with the decision of the CoC.

4. Varrsana Employee Welfare Association v/s Versus Anil Goel, The Liquidator

Background:

The Appellant in the present appeal raised that that the Liquidator mandatorily had to include one of the representatives of the Workmen/Employees of the 'Corporate Debtor' in the Stakeholders Consultation Committee ('SCC') of the 'Corporate Debtor' irrespective of Regulation 31- A(2) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, which was rejected by the adjudicating authority.

Contentions:

The Appellant contended that the Workers and Employees duly filed their Claims before the Respondent/Liquidator towards the Notice Period but the Liquidator illegally and unlawfully rejected the Claim for Notice Period on the ground that the Employees/Workmen were discharged by virtue of Liquidation Order.

Further, however S.33(7) of the IBC, 2016, states g that the Workers are discharged by the Liquidation Order, but when the business of the 'Corporate Debtor' is continued during the Liquidation Process, the Order for Liquidation shall not amount to Notice of discharge to the Employees and Workmen of the 'Corporate Debtor'.

Thus appellant has a claim against the Corporate Debtor and hence entitled to a seat in the SCC, through an appointment of representatives.

Further, Liquidator has shown bias by including six 'Financial Creditors' in the SCC, whereas per Regulation 31-A of the Regulation, the Liquidator can at maximum allow only four 'Financial Creditors'.

Further, according to the Regulation 19(4) of the Liquidation Process, Regulations, 2016 even if the Workers have not filed claim; the same has to be incorporated by the Liquidator, and since there are more than 600 permanent Employees and the 'Corporate Debtor' is 'a Going Concern', the Employees will have gratuity claims.

The respondents in response, contended that post to the verification of Claims, filed a list of Stakeholders in accordance with Regulation 31 of the Liquidation Process, Regulations 2016. In compliance of Regulation 5(1)(a) & 5(1)(b) read with Regulation 13, a report was filed along with the list of Stakeholders before the NCLT. The first Meeting was conducted on 05.10.2019 based on the list of Stakeholders. Claim was received from the Appellant through the Authorised Representative representing 16 Employees claiming their Leave Encashment and one month salary for the Notice Period; that 'Claim' was received and verified wherein, no unpaid Claim of the Appellant with the Liquidator there.

Further, if a company is 'a Going Concern', employee can receive gratuity payment after 5 years of service of superannuation on retirement or resignation or in the case of death and accident or occurrence of any such event. However, the 'Corporate Debtor' though operated as 'a Going Concern', the gratuity of the said Employee would be paid as a priority subject to verification of the document, if the event arises.

Held:

The Claims made by the 16 Employees with respect to the one-month Notice Period was rejected and the same was not challenged vide an Appeal. Further, Regulations 31 & 31-A specify that when the Employees have no subsisting Claim, they cannot be included in the list of Stakeholders, thereby meaning that if the Workers are not specifically includes in the list of Stakeholders, under Regulation 31, they cannot be made a part of the SCC under Regulation 31-A(1).

Apart from this, Claim of Gratuity is payable only at a future date in the happening of any even as mentioned in the contentions submitted by the respondent, thus, it cannot be inferred as 'Claim subsisting' to be included in the list of Stakeholders and seek a place in SCC.

5. Revolution Infocom Private Limited Through its Authorised Representative Mr. Rajesh Katyal v/s Sandwoods Infratech Projects (P) Limited Through Mr. Ravinder Kumar Goel (RP)

Background:

In the present matter, the CIRP is against the Corporate Debtor - Sandwoods Infratech Projects (P) Limited.

Pursuant to the public announcement and receival of claims, appellant also filed the claim as Financial Creditor. Thereafter, first Committee of Creditors was held in which meeting the Appellant was invited to participate as Member of CoC on the strength of his claim. Further, in the minutes, an objection was raised by a Member of CoC that Appellant being 'related party' cannot be part of the CoC. Clarification via email was also sought by IRP for the same, but no reply was filed.

Thereafter, IRP filed application seeking direction to take action against the Appellant Company under Section 235A of the Insolvency and Bankruptcy Code, 2016 for making willful and false disclosure and concealment of facts in Claim Form-C. Furthermore, The Resolution Plan was approved by the CoC. Thereafter, IA was filed by the Appellant, seeking a direction to include the Appellant as CoC Member, which had been rejected by the adjudicating authority and thus the appeal has been filed addressing the same.

Contentions:

The Appellant contended that s that they do not have control over the Corporate Debtor nor they have any kind of representation on the Board of Directors. The Appellant is also not a shareholder or Director of the Corporate Debtor, and thus do not fall in the ambit of 'related party' within the meaning of Section 5(24) IBC, 2016. Further, IRP have jurisdiction to review the claim by holding the Appellant as 'related party' to the Corporate Debtor.

The Respondent in response contended The Appellant is an associate Company of the CD being the Joint Venture on the basis of Memorandum of Understanding executed between the Appellant and the Corporate Debtor, and the terms and conditions of the MoU indicate that Appellant has control over the Corporate Debtor. Thus, Appellant is covered under the definition of 'associate company' under Section 2(6) of the Companies Act, 2013.

Further, the Appellant was communicated that it is a 'related party' by the respondents, but they waited for more than six months and filed application only after Resolution plan was approved by CoC, thus application was filed with a malafide intention.

Held:

The clauses of the MoU clearly indicate that the MoU was nothing but a Joint Venture between the parties. Further, the clauses of the MoU shows, clearly that decision pertaining to pricing has to be taken with the mutual consent. Thus, there is sufficient control of the Appellant as envisaged in provisions of law. The Appellant being Joint Venture Company of the Corporate Debtor was clearly 'related party' and no error has been committed by IRP in declaring the Appellant as 'related party.

Furthermore, no error in the decision of the IRP, changing the category of the Appellant from Financial Creditor to related Financial Creditor has been found. Hence, the appeal was dismissed.

6. Sanjeev Mahajan v/s Indian Bank

Background:

Application under Section 7 filed by the Respondent had been admitted, the Appellant, an suspended Director of the Corporate Debtor challenged the Order.

The Appellant submitted a Settlement Proposal under Section 12-A of the Code. Subsequent to submission of Settlement Proposal, the Committee of Creditors held its 06th CoC Meeting Appellant was present in the Meeting stated that he has not submitted any plan and abiding the 12-A Proposal which is pending before the Committee of Creditors. Thereafter, 07th CoC Meeting was held wherein contents of Resolution Plan be disclosed so they can take decision on Settlement Proposal of Sanjeev Mahajan.

The Appellant was also present and submitted that there was no objection in opening of the Resolution Plan. Resolution Professional took the view that plan cannot be discussed and disclosed to Committee of Creditors. The interpretation put by the Resolution Professional to the Judgement of this Tribunal was strongly opposed by the CoC Member.

In the 08th CoC Meeting held on 02nd September, 2022, were Mr. N.C. Mehra on behalf of CoC informed that competent authority has decided to cast the dissenting vote and rejected the Settlement Proposal submitted by the Promoter.

Contentions:

The appellants contended that Judgement passed by this Tribunal has not been correctly understood both by the Resolution Professional and CoC in its true spirit. Judgement of this Tribunal contemplated that CoC shall consider the proposal submitted by the Appellant under Section 12A as well as Resolution Plans received in the CIRP.

The Respondents contended that, they being the sole Member of CoC there is no question of any violation on behalf of CoC of the Order passed by the tribunal and CoC is proceeding in accordance with the directions issued by the tribunal.

Further, Appellant was very much present when the plans which were received in the CIRP, were discussed and the Appellant is also aware of the value which was offered in two plans. Hence, it is not necessary to give any further opportunity to the Appellant in the process.

Thereafter, Appellant has not submitted EMD or Rs. 5 Crores which was submitted by other two Resolution Applicants and thus cannot claim consideration of his settlement proposal along with the Resolution Plans received by the two Resolution Applicants.

Held:

The proposal of Applicant under section 12A for Settlement has naturally to be weighed against the Resolution Plans received in the process unless the Resolution Plans are opened and deliberated side by side with the proposal of settlement submitted by the Appellant, hence, that the CoC to weigh the Resolution Plans as well as Settlement Proposal together.

Therefore, Appellant is entitled to participate in deliberation and negotiation undertaken by the CoC. CoC can very well ask the RAs to revise their plans similarly the Appellant can always be asked to revise his proposal to match the RA's Offer. The CoC is to deliberate on the two Resolution Plans received in the CIRP as well as Settlement Proposal under Section 12A submitted by the Applicant and thereafter to take a final decision.

7. The Cosmos Co-op Bank Limited v/s M/s Crystal Clear Veg Oil Refinery Private Ltd

B**ackground**:

The Appellant initiated proceedings under Section 7 of the I&B Code, 2016 against the Respondent / Corporate Debtor before the Adjudicating Authority, and admitted the Application and initiated Corporate Insolvency Resolution Process (in short 'CIRP') and appointed IRP. Thereafter, IRP prepared the list of creditors and constituted the CoC and convened the meetings of CoC from time to time.

The Appellant decided to withdraw the CIRP proceedings against the Respondent / Corporate Debtor. Accordingly, the Appellant issued Form-A seeking withdrawal of application against the Corporate Debtor, and IRP filed an Application for withdrawal under Section 12A of the Code before the Adjudicating Authority.

Held:

The law permits the Applicant through IRP/RP to file an Application under Form-FA seeking withdrawal of proceedings initiated against the Corporate Debtor either under Section 7, 9 or 10 of the I&B Code, 2016.

Regulation 30-A is applicable, since the Adjudicating Authority admitted the Application under Section 7 and initiated CIRP and the IRP constituted the Committee of Creditors. Once the CIRP proceedings initiated and the Committee of Creditors constituted, the Adjudicating Authority under Section 12-A of the Code, may allow withdrawal of application made by the Applicant i.e. IRP/RP where the Committee of Creditors approves with 90% voting share.

8. DD Real Estate Private Limited v/s . Mr. Sajeve Bhushan Deora and Ors.

Background:

The Appellant herein is the Holding Company of M/s. Forgings Private Limited/the 'Corporate Debtor.Appeal has been filed to against the order passed by NCLT, whereby dismissed the Application imposing costs of Rs.1,00,000/- to be paid to the Corporate Debtor.

Simultaneously, another appeal was also filed by the appellant against the Liquidator, the Financial Creditor (Indiabulls Housing Finance Ltd.), the SRA (Mars Infraengineering Private Limited), the Municipal Corporation Faridabad/MCF seeking a direction to the Liquidator to get fresh valuation conducted for the land sold to the bidder under Regulation 35(2) of the Insolvency and Bankruptcy Board of India, (Regulation Process) Regulations, 2016, whereby valuers were appointed for ascertaining the value of the land of the 'CD'.

Contentions:

The appellants the ex-Director of the 'CD', Mr Karan Gambhir had earlier changed the Valuation Report and Sale Notice filed by the respondents in the one of the applications, which was dismissed by the NCLT stating that there was no sufficient evidence to prove that the land has been converted to 'Industrial Use'. Further, separate Appeals were preferred and the NCLAT herein before NCLT, and the tribunal upheld the Order of the NCLT only on account of lack of evidence stating that the land is agricultural in nature, even though it is used for industrial purposes, however, the use of land was not changed.

Thereafter, civil appeal was then preferred by Mr. Karan Gambhir and the Appellant herein before the Hon'ble Supreme Court wherein it was directed that Shahari Vikas Pradhikaran ('HSVP') and Department of Town and Country Planning, Chandigarh to file affidavits, indicating whether permission is been given for conversion of land use. However, HSVP and Department of Town and Country Planning, Chandigarh not being the appropriate authority, the direction was given to Municipal Corporation of Faridabad ('MCF'), one of the respondents, for carrying on the conversion process of the said land.

The Respondents in response contended that on the basis of the order filed an affidavit expressly stating the change of land use of the land from agricultural to industrial had been allowed. Thus, the land was converted from agricultural to industrial and the valuer chosen by respondents, in his revaluation, has stated the fair value of the land to be approximately Rs.150Crs./- and the Liquidation Value of the land to be 105.45Crs./-.

The same was filed before the Hon'ble Apex Court, however the Hon'ble Court refused to interfere further, but had accepted the affidavit of MCF which was filed before it as false and irrelevant and therefore it has to be construed that the land is 'Industrial' in nature and hence the value of the same is more than what has been ascertained.

Further, since the MCF was not party before the Tribunal and therefore occasion for this Tribunal to look into the stand taken by MCF before the Hon'ble Apex Court. The Affidavits and subsequent communication from MCF is fresh evidence.

Held:

Regarding the nature of land use, has already attained finality right upto the Hon'ble Supreme Court, and there is no point of question further to be discussed upon

Regarding the objections in regard to the valuation of land in question and that of the Sale of Notice, and it was observed that the Sale Notice was in accordance with the provisions of Regulations 35(3) & (4) of the IBBI (Liquidation Process) Regulations, 2016 and there is no defect in the Valuation Report and that as per the Rules in the Sale Notice, it is mentioned that sale is on an 'as is where is basis' and it is nowhere mentioned that the conversion fees for the land in question to 'Industrial Use' is Rs.110Crs./-.

It was held that the Appellant has filed this Appeal only to delay the proceedings, which practice is deprecated. And hence appeal is dismissed and costs of Rs.1,00,000/- imposed by the Adjudicating Authority was conformed.

9. Amardeep Singh Bhatia v/s Abhishek Nagori, Liquidator for Asian Natural Resources (India) Ltd.

Background:

Appeal was filed against the Impugned Order, passed by Adjudicating authority, wherein it as held that a look-back period has been provided for undervalued transactions under section 46, there is no limitation period for fraudulent transactions covered under sections 49 and 66 of the Code. Thus, it was directed to the liquidator to investigate the 'Transactions' beyond two years.

Contentions:

The appellants contended that Section 43 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code') deals with Preferential Transactions, similarly, Section 46 of the Code which deals with Avoidable Transactions. Both the sections shows hat the 'relevant time' is either two years for a 'Related Party' or one year for any party other than a 'Related Party', prior to ICD.

Further, Fraudulent Transactions prior to 2 years of the ICD cannot be investigated by the Liquidator and therefore the Adjudicating Authority has erred in permitting the investigation of the 'Transactions' beyond two years.

Thus, the Liquidator cannot investigate a 'Corporate Debtor' beyond two years from the ICD, the personnel of the 'Corporate Debtor' under Section 19 of the Code cannot be expected to cooperate beyond this period.

Further, there is no look back period stipulated with fraudulent or wrongful trading, under Section 66 of the Code, and thus Liquidator can finds that there is a fraud committed by the 'Corporate Debtor' at any time, then he can approach the Adjudicating Authority by filing an Application and seeking directions under Section 66(2) of the Code.

Held:

There is no look back period specified under Section 66 of IBC, which refers to Fraudulent Transactions and unless the Liquidator scrutinises the documents, the liquidator would not be able to finalise or conclude whether the transaction also falls under Sections 43 or 46 of the Code.

NCLT JUDGEMENTS

1.M/s. Lucky Holding Pvt. Ltd. Vs. Nitin Jain (Liquidator of PSL Ltd.)

Background and Contentions

In the present matter, the application was filed by M/s. Lucky Holdings Private Limited – Successful Auction Bidder of M/s. PSL Limited – the Corporate Debtor for seeking permission to withdraw from the e-auction process being held by the respondent – the liquidator.

The applicant offered to purchase the CD as a going concern as per the sale notice dated 08.04.2021 wherein its bid was for four operational plants of the CD, which are currently closed down. The situation is not at all attributable to the applicant because the assets/plants are still in possession of the liquidator.

Being aware of the fact that proceeding under the PMLA Act, 2002 was initiated and the assets of the CD were likely to be attached, still, the liquidator held the e-auction. When the sale notice was published and bids were called, ED had not attached any assets. The e-auction was held on 09.04.2021 whereas provisional attachment came to be passed thereafter on 02.12.2021 which is a situation not attributable to the applicant who is the successful bidder. Further, the applicant tried to withdraw from the process.

Held:

With reference to the order passed in, Agarwal Coal Corporation Pvt. Ltd. vs. Sun Paper Mill Ltd. (2021), the applicant had filed the application before the Hon'ble NCLAT to recall its order dated 16.10.2019 invoking provisions under Rule 11 of the NCLAT Rules,

2016 on the ground that the earlier order was sought by fraud. That application was rejected by Hon'ble NCLAT holding that power to recall its own order is not with the Appellate Forum. However, the facts in the present proceeding are altogether different. In this case, the applicant filed the application under section 60(5)(c) of the IBC, 2016 permitting him to withdraw from the e-auction process because the liquidator is not in a position to give possession of the CD as a going concern.

In this connection, NCLAT stated that they are dealing with this application under section 60(5)(c) of the IBC, 2016 because it is a question of fact and the law relating to the process of liquidation of the CD. The stark facts on record are that the liquidator is not in a position to give the custody of assets of the CD to the applicant or give possession of the CD as a going concern to the applicant in spite of him being declared as a successful bidder and in this regard, the applicant deposited a sum of Rs. 30 crores with the liquidator. The Liquidator cannot withhold the amount for an indefinite period till proceeding under PMLA Act, 2002 is concluded before the Hon'ble Delhi High Court. Keeping in mind of the current situation, the Hob'ble NCLAT allowed the present application.

2. AVANT Garde Clean Room & Engg. Solutions Pvt. Ltd. Vs. HLL Biotech Ltd.

In the present case, the application was filed for restoration by the petitioner; without obtaining any liberty to file such petition. The difference appeared from the relief sought in the memo filed by the petitioner and the relief granted by the Hon'ble NCLT.

It was discussed during the hearing by the Hon'ble NCLT that the Financial/ Operational creditor can withdraw the petition either before the admission or after the admission into CIRP. As regards, the revival or restoration of disposed applications, only Rule's (48) and (49) in the NCLT Rules,2019, are applicable. Rule (48) permits restoration of an application dismissed for default or decided on merits in the absence of the applicant; and, Rule (49) permits restoration of an application which was decided as ex-parte.

In the IBC 2016 or in NCLT Rules 2016, there is no provision available to grant liberty to restore the finally disposed of petition as withdrawn. Not only in IBC, 2016 there is no such provision available in any other Act, In this situation it is better to see the provisions available in Code of Civil Procedure,1908. Further, CPC is not applicable to the proceedings under IBC, 2016 but an analogy enshrined in Code of Civil Procedure 1908 can be applied. Order XXIII CPC deals with recording of compromise and withdrawal of suits and the relevant Rules therein are Rules (1) and (3A).

Thus, the petitioner was not entitled to any liberty under Order XXIII, Rule 3A, since the Settlement Deed dated 11.01.2021 was voluntarily executed between the OC and CD on mutually agreed conditions without alleging any fraud, coercion or misrepresentation. Further, the Settlement Deed was analogous for passing a money decree directing its payment by instalments as provided in Order XX, Rule 11, CPC, but even the said provision does not provide for restoration of the disposed suit in the event the judgment Debtor commits default.

Basis above, it is clear that there is no legal backing to grant liberty to restore the petition which was finally disposed of as withdrawn.

The petitioner/applicant relied upon the Apex court Judgment of Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited wherein it was held that pre-existing dispute means dispute exist before the receipt of demand notice. Further, it relied upon NCLAT Order Passed in Prashant Agarwal Vs. Vikash Parasrampuria and Anr wherein it was held that threshold amount includes both principal debt amount as well as interest on delayed payment which clearly stipulated in the invoices itself.

These two citations deals with merits of the main petition. Hon'ble NCLT restricted the discussion limited to this restoration Application and not extended to the points relating to main petition since the main petition was not on file. Accordingly, these two citations were not relevant to decide this restoration application. Thus, all the citations relied by the Applicant was not helpful to improve the case of the applicant.

In conclusion, it was to be observed by the NCLT that in the present application, the applicant stated that the disposed petition to be revived for the recovery of the outstanding operational debt due from the CD. Time and again it has been expressed and explained by the Apex Court that the Provisions of IBC, 2016 is not of money recovery proceeding; but here the intent of applicant reveals that the applicant invoices the provisions of IBC,2016 so as to enforce recovery against the CD; Hence, the same cannot not be allowed.

3. SBI vs. Setubandhan Infrastructure Limited

n this matter, the Petitioners/Applicant viz. 'State Bank of India' sought the Corporate Insolvency Resolution Process of 'M/s. Setubandhan Infrastructure Limited' (formerly Known as Prakash Constrowell Ltd) on the ground, that the CD committed default in repayment of facilities granted to the Corporate Debtor to the extent of Rs. 95,60,36,160.13/- along with interest. The date of default was stated to be 05.04.2019, under Section 7 of the Code.

The Petition revealed that the CD availed certain credit facilities from the Petitioner Bank and the same were sanctioned and granted to the CD from time to time. Further, the account of the CD became NPA on 03.07.2019.

Ld. Counsel on behalf of the Corporate Debtor submitted that the said Petition was incomplete and did not raise any serious legal issue opposing the petition of SBI.

The NCLT stated that the objection of the Corporate Debtor with regard to the incompleteness of the Petition was very trivial and technical in nature and no credence can be given to such objection when once the debt and default are established in a Section 7 Application filed by the Financial Creditor.

After hearing the submissions and upon perusing the documents relied by the Petitioner including the Balance sheet, the Hon'ble NCLT held that the Petitioner has successfully established the existence of "debt" and "default" in this present case.

The above company petition filed by SBI was well within limitation since the Corporate Debtor has acknowledged the liability not only by means of executing the revival letter but also by showing the same in their Balance sheet and thus, it was within limitation. Hence, the aforesaid petition was admitted.

4. Vijender Kumar Jain Vs. M/s. Atlas Cycles (Haryana) Ltd.

In this case, an operational creditor filed a petition under Section 9 of IBC, 2016 for initiation of CIRP against Atlas Cycles (Haryana) Ltd. However, during the said proceedings, Mr. Vijender Kumar Jain expired intestate leaving behind 5 legal heirs. The four legal heirs have executed relinquishment deed in favour of the applicant. It was further stated that the said application was filed with limitation i.e. 90 days of the death.

The respondent has stated that legal heirs are not covered under the definition of the operational creditors as defined under Section 5(20) of IBC, 2016. The applicant filed a rejoinder wherein it was stated that the applicant was Class I legal heir of the deceased has subrogated into his shoes, so the applicant has become the operational creditor.

The very definition under Section 5(20) of IBC, 2016 as relied upon by the Respondent clearly provides that the Operational creditor includes a person to whom the debt was assigned or transferred. Here, the debt has been transferred in the name of the applicant by operation of law and hence the applicant has to be the OC.

In the present case, it was observed by NCLT that the applicant was a legal heir along with four other legal heirs (daughters) of Vijender Kumar Jain, who was running a proprietorship concern under the name of Arihant Cycles.

In this regard, reliance was placed on the judgment of Hon'ble Supreme Court of India in case of Ashok Transport Agency vs. Awadhesh Kumar and Ors dated 31.03.1998.

Thus, judgment of M/s. Double Seven Enterprises Vs. M/s. Vijay Fine Art Press (Supra) relied by learned counsel for respondent was not applicable to the present case. To conclude, in the present case, the applicant had stepped into the shoes of the petitioner being the legal heir/wife of Vijender Kumar Jain (since Deceased). Thus, the present application was allowed and the applicant has to continue the proceedings in the present petition and the amended memo of parties was also taken on record. Hence, the present application was disposed of accordingly.

ARBITRATION

1. Bell Finvest India Ltd. & Ors Vs. AU Small Finance Bank Ltd.

The petition was filed under Section 11 of the Arbitration & Conciliation Act, 1996 (A&C Act), the petitioners seek appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Rupee Facility Agreement.

Contentions:

The petitioners submitted that, the same is a Non-Banking Finance Company ('NBFC') registered with the Reserve Bank of India, and is a 'financial institution' within the meaning of section 2(1)(m)(iv) of the SARFAESI Act, which entitles the petitioners to invoke arbitration under section 11 of the SARFAESI Act.

Further, since the dispute is between petitioner and respondent, which are NBFC and Bank respectively, therefore, they are entities between Section 11 of the SARFAESI Act.

Further, respondents which had filed petition before the Debt Recovery Tribunal, after declaring the petitioners as NPAs and further consequential and related proceedings cannot stand by the way of invoking the arbitration proceedings. Further, the respondent has failed to agree to the appointment of a sole arbitrator from a panel of three arbitrators proposed by the petitioners in the invocation notice; the present petition seeking court intervention for seeking such appointment is maintainable.

The Respondents in response to the contentions, argued that respondent's claim against the petitioners is simply for recovery of a debt due by petitioner, and the dispute is a simple debtor-creditor dispute, with petitioner, being a “borrower” within the meaning of section 2(1)(f) of the SARFAESI Act. Even though the petitioner are “financial institutions” under the Act, but still comes under the ambit of a “borrower” since the respondent has extended financial assistance to petitioner.

The respondent has invoked proceedings under section 13 of the SARFAESI Act for enforcement of a 'security interest' created by petitioner, in its favour, by reason of petitioner having defaulted in payment of installments due against an outstanding loan. The remedy available to petitioner No. 1 against such proceedings initiated by the respondent is under section 17 of the SARFAESI Act, which remedy would lie before the learned DRT.

Further, distinction between the proceedings pending before the learned DRT, Jaipur and the disputes sought to be referred to arbitration, is a false distinction, inasmuch as both disputes arise from the same Rupee Facility Agreement and from the same transaction, under which the respondent had advanced to petitioner.

Held:

The arbitral mechanism contemplated under section 11 is applicable to financial institutions for their inter-se disputes but not to a dispute with a borrower, even if the borrower is a financial institution. Though petitioner is a financial institution, for the purposes of the present petitions between the parties, petitioner dons the hat of a borrower within the meaning of section 2(1)(f) of the SARFAESI Act, which definition takes within its fold “any person”, thus would also mean and include a borrower which happens to be a financial institution.

Further, section 11 conspicuously omits the word borrower from its text, hence, a financial institution which happens to be a borrower vis-a-vis the institution with which a dispute arises, cannot resort to arbitration as a remedy.

The remedy of arbitration provided in section 11 of the SARFAESI Act cannot override the special remedies stipulated under the set of special laws, viz. the SARFAESI Act and the RDB Act; and therefore even statutory arbitration cannot derogate from a remedy available to a lender for enforcing a security interest.

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