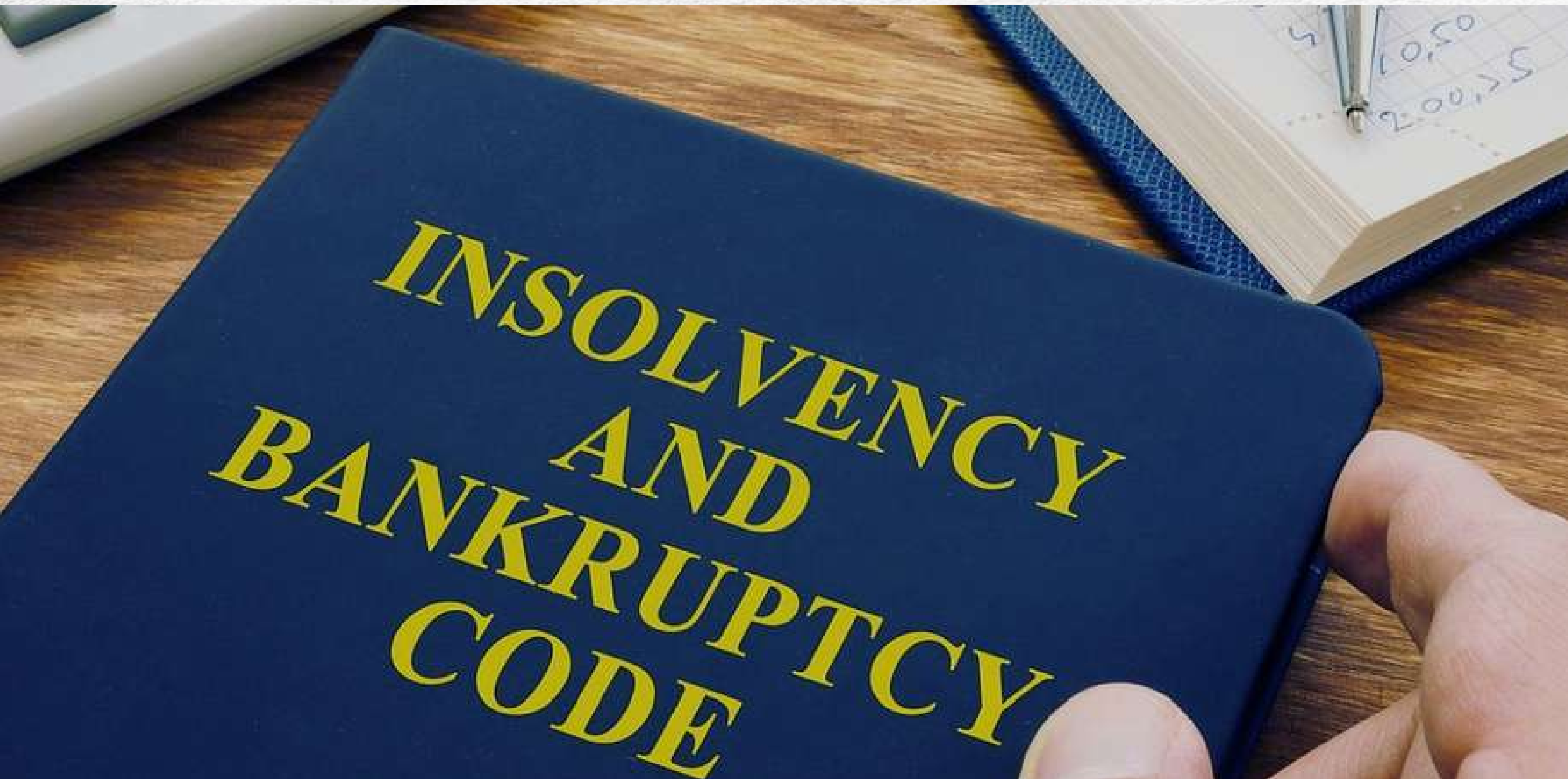
AVM / RESOLUTION PROFESSIONALS

RESOLUTION TIMES

Newsletter of a Premier Insolvency Professional Entity

16 December 2022, ISSUE 33



LATEST JUDGEMENTS AND UPDATES

NCLAT JUDGEMENTS

1.Mr. Aroon Kumar Agarwal vs. ABC Consultants Private Limited

Background

The Appellant is the ex-employee of the respondent, wherein he was acting as an executive director. However, the services of the appellant were terminated by the respondent on the account of the fraudulent activities which has caused damage to the Company, and simultaneously, filed a FIR under Section 420 and 406 of IPC and disassociated itself from the Appellant by way of public notice.

After the termination of his service, the Appellant, as an Operational Creditor served a notice under Section 8 of the Code and claimed an amount of Rs. 33,42,002/-. However, the respondent did not responded to the notice sent by the appellant and thereafter, after expiry of statutory period

WHAT'S ~~INSIDE THIS~~ ISSUE:

- *NCLAT* Judgements 1-10
- *NCLT Judgements* 10-14
- *Contact us* 15

period provided in Section 8 of the Code; the appellant filed an application under Section 9 of the Code, claiming the amount.

Contentions:

The appellants contended that violation of agreement by either of the parties was bound to create a dispute between them which had actually happened before the termination of service by the Corporate Debtor. Hence, the claim of the Appellant has nothing to do with the registration of FIR because the Appellant has claimed his salary, flexible pay basket, gratuity, performance bonus and business development bonus which are not the subject matter of pre-existing dispute.

The respondent contended that since the Appellant has played fraud and was guilty of breach of trust, therefore, in view of the pendency of criminal proceedings, hence there is a pre-existing dispute between the parties and the application is not maintainable.

Held:

The Appellant was appointed by way of an employment agreement, and the service was terminated in terms of employment agreement, therefore there is no dispute. Further, dispute cannot be considered just on the basis that the Appellant is claiming his salary and other perks which is attached with the salary like gratuity bonus etc.

Also, as per the agreement, in case of termination one month prior notice of termination or payment of one month prior notice of termination or payment of one month, would be provided but the Respondent may terminate the service of the Appellant at any time without notice or the payment in lieu of notice if such termination arises as the result of misconduct, negligence and/or breach of any express or implied term of his employment.

The plea of pre-existing dispute has to co-relate with the amount claimed by the Operational Creditor or if a suit or arbitration proceedings is pending then the same should also be related to such dispute. In the present case, however, no dispute ever has been raised by the Respondent that the Appellant is not entitled to the salary, flexible pay basket, or gratuity and performance bonus or business development bonus, but the issue raised is about the services having been terminated on account of misconduct etc. on the part of the Appellant.

INSOLVENCY TRIVIA

1. What is the voting requirement for approval of resolution plan by creditors

(a) 75%
(b) 51%
(c) 66%
(d) 90%

2. Who is the Regulator under IBC:

(a) IBBI
(b) NCLT
(c) RBI
(d) Insol India

3) Who shall declare a moratorium

(a) Insolvency Professional
(b) IBBI
(c) NCLT
(d) IPA

4) Who is an applicant under Section 10 of IBC:

(a) Financial Creditor
(b) Operational Creditor
(c) Insolvency Professional
(d) Corporate Applicant

Appellant has not claimed one month's pay rather he has asked the Respondent to pay the amount of his salary and other perks attached with it which already become due before the order of termination was passed. Therefore, it is the case of the Appellant that there is no dispute about the said amount. The Appeal was therefore allowed.

2. Agarwal Coal Corporation Pvt. Ltd. v/s. Nilkanth Concast Pvt. Ltd.

The appeals has been filed against the order passed by adjudicating authority, in order to dismiss the application filed under Section 9, on the ground of maintainability.

Background:

The Appellants had offered Respondent (Corporate Debtor) for supply of Indonesian imported coal from Kandla Port, for supply of Indonesian Coal of 2000 MT at Rs. 5620/- PMT and 9000 MT at Rs. 5620/- PMT, on certain terms and conditions with clear understanding regarding the quality analysis report, non- deduction after supply the material etc.

The Respondent categorically agreed with the quality of the Indonesian Imported Coal being supplied by the Appellant in terms of the offer, and the necessary and compliance to that the Appellant provided the certificate of sampling and analysis of the coal, to be issued by the Independent Surveyors.

The Appellant made several supplies thereafter, however, in one of the supplies Appellant further claimed that it made the supplies of 1770.340 MT of coal vide 48 trucks for the value of Rs. 1,05,35,307/-, even after the said dispute prevailing, the appellant carried out various supplies, leading to total outstanding balance to be paid by respondent to be f Rs. 2,12,69,451.56. However, the respondent paid an amount aggregating to Rs. 1,23,90,000/- against the outstanding dues of Rs. 2,12,69,451/-. Subsequently the Respondent started evading the balance payment of Rs. 88,79,452/- by raising irrelevant issues in respect of supplies accepted by the Respondent without any demure and protest.

Despite several request and reminder towards the payments, the respondents did not replied back and in consequence the appellant issued a demand notice under Section 8 of the code demanding payment of Rs. 88,79,452/-.However, the same was not addressed from the side of respondents, and therefore Section 9 Application was filed, however the same was dismissed and hence the appeals has

ANSWER KEY FOR THE PREVIOUS QUIZ

1.(b) 30 days

2. (b) NCLT

3.(c) Debtor in consultation with the RP

4. (d) All of the above

been filed against the order passed by adjudicating authority, in order to dismiss the application filed under Section 9, on the ground of maintainability.

Contentions:

The Appellant contends that before filing application under Section 9 of the Code demand notice under Section 8 of the Code was issued duly supported with the authorization by the Board and the Adjudicating Authority has incorrectly recorded in its order that no proper authorization was filed along, with the application filed under Section 9 of the Code. Further, as an evidence several documents shows that there has been, no actual pre-existing dispute in between the parties, and the Respondent had raised a dispute regarding quality of the coals supplied by the Appellant. The said objection was raised on the basis of an inspection report which itself indicates that the coal was inspected at the plant of the Appellant not at discharge port. Further, inspection report was prepared only in the presence of Respondent not in presence of the Appellant or his representative. Hence, the Adjudicating Authority has failed to exercise its jurisdiction and primarily rejected the application filed by the Appellant under Section 9 of the Code.

The respondent argued that despite specific agreement for supply of the same grade of coal, the supplied coal by the Appellant was not of the quality as offered and hence the respondent was constrained to get the coal inspected by the Independent Inspecting Agency. Even, the Appellant was request to get the same inspected. However, the report that came in was never neither questioned nor challenged by the appellant.

Further, demand notice under Section 8 IBC by an unauthorized person is having no entity and there is no reason for filing application under Section 9 IBC.

Held:
It has been observed that demand notice issued under Section 8 was signed and issued by one Mr. Surendra Prasad Shukla , in the capacity of whole-time Director and authorized signatory of the Applicant company, without there being any authorization, and hence, absence of proper authorization for issuance of demand notice under Section 8 of the code such demand notice may not be termed as if it was in accordance with the provision contained in the code for admitting an application under Section 9.

3. Krishna Hi-Tech Infrastructure Pvt. Ltd v/s. Bengal Shelter Housing Development Ltd.

Background:

Appeal has been filed against order dated 22.09.2022 by which order the Adjudicating Authority has rejected the Section 9 application filed by the Appellant. Appellant was awarded work on contract by the Respondent and in pursuance of the said contract the Appellant proceeded with the work. There has been several correspondences between the parties and payments were also made from time to time.

However, when the Appellant could not receive the payment as per the contract he gave a notice under Section 8 IBC on 13.07.2019 and thereafter filed the application under Section 9 for claiming a debt of Rs.1.39 Crores.

Contentions:

The Appellants contended there have been no payments made on the due dates since it was provided that within 15 days all bills shall be paid. There was delay in making payment and certain payments were made beyond 15 days.

Further, with regard to the emails regarding slow progress of work it was the Respondent who themselves have to be blamed and not the contractor. The emails which were sent by the Corporate Debtor cannot be said to be reason for rejecting the application on the ground that there is pre-existing dispute.

The contractual dispute between the parties if arise, during the contract provisions are made in all contracts for resolution of such disputes. The dispute between the parties are not supposed to be decided, examined and adjudicated in IBC proceeding. Only question to be looked in Section 9 Application is as to whether the objection raised by the Corporate Debtor opposing claim of the Operational Creditor is not a moonshine defence.

Held:

The Adjudicating Authority did not commit any error in rejecting Section 9 application filed by the Appellant, and there is always option on the part of the appellant to take remedy under law.

Therefore the issues raised are not moonshine defence, the issues regarding quality of work were raised much prior to the issuance of Section 8 notice.

4. M/s Indo World Infrastructure Private Limited v/s . Shri Mukesh Gupta

Background:

M/s Rohtas Projects Limited, the Corporate Debtor was allotted a plot of land in Sector 140, Noida in 2007 by the Noida Authority for construction and setting up of an Information Technology Enabled Services (IT & ITES) commercial complex. The lease deed in favour of Corporate Debtor was executed, by which the Corporate Debtor came to have possession of the said plot of land.

The Corporate Debtor later entered into an Agreement to Sell (“Agreement” in short) on 14.04.2015 with M/s Indo World Infrastructure Private Limited, the present Appellant by virtue of which the Appellant got rights for construction and development of 6,00,000 sq. ft. therein (hereinafter referred to as the ‘Project land’). The Appellant in turn had entered into a sub-contract with Antriksh Real Estate Builders Private Limited to carry out the construction and development of the project on the said plot of land.

Subsequently, the Corporate Debtor got admitted for Corporate Insolvency Resolution Process (‘CIRP’ in short) by the Adjudicating Authority and the Resolution professional took over the possession of the said plot of land of the Corporate Debtor including the 6,00,000 sq. ft. of project land.Pursuant to the process, the Resolution Plan was submitted by M/s Wing Construction and Developers Private Limited 2 and consortium of M/s Antriksh Infradesign Private Limited and Shri Rajbir Goyat, which was subsequently, approved by the Adjudicating Authority.

However, the appeal was filed by the appellant, asking the tribunal to exclude the said property to form the part of the assets of the Corporate Debtor.

Contentions:

The appellants contended that the Agreement gave unfettered rights to the Appellant to sell the allotted area of 6,00,000 sq. ft. to customers. . Hence, the dispossession of the Appellant from the project land by the Respondent No.1/Resolution Professional was illegal. Further, project land could not have been included in the pool of assets of the Corporate Debtor by the Resolution Professional, as according to Section 18(1)(f) IBC, specifically prohibits the Resolution Professional to take control and custody of any asset which is owned by the third party though under possession of the Corporate Debtor under contractual agreements. The appellants have acquired the right to develop, construct and undertake sale of the saleable area of the said project land by virtue of the Agreement it was asserted that the Appellant had acquired substantial ownership rights over the said saleable area. Therefore, Corporate debtor was not the owner of the said property, at time of the initiation of CIRP.

The respondents responded that the Agreement does not grant any ownership rights to the Appellant. The said project land was obtained from the Noida Authority, and the clauses of the agreement provide that sub-lease can be done by the Corporate Debtor only with the prior approval of Noida Authority being the lessor. Thus separation of the plot could not have been done without prior permission of Noida Authority, and in the present case the Appellant had failed to provide any No Objection Certificate from the Noida authority in this regard. Hence, the Agreement executed between the Corporate Debtor and the Appellant in the absence of any permission from Noida authority is null and void and the Agreement cannot be the basis for the Appellant to claim ownership of the said project land.

Further, the clauses of the agreement provides that documents for transfer of the title will be executed after the completion of the development on the project land, and since the Appellant was able to complete the construction of the said project nor any occupancy certificate was granted in favour of the Appellant and hence the Corporate Debtor continued to remain the owner of the project land. The said plot being the asset of the Corporate Debtor, the Respondent No.1/Resolution Professional was duty bound to take possession of the same in terms of Section 18 of the IBC and cannot be faulted for having included it in the pool of assets of the Corporate Debtor.

Held:

According to the Appellant, by their entering into the “Agreement to Sell” with the Corporate Debtor and also having paid certain amounts on behalf of the Corporate Debtor to the Noida Authority, there has taken place a transfer of ownership of the project land from the Corporate Debtor to them. However, settled proposition of law that an Agreement to sell does not convey a property from one person to another, either in present or even in future, An agreement to sell an immovable property is therefore a bilateral contract under which the two parties, i.e. the buyer and the seller, agree to certain terms and conditions, subject to which the property in question would be transferred by the seller to the buyer for a decided sale consideration. It is only after such bilateral obligations are discharged that the execution of the sale shall be executed.

Plain reading of Explanation clause to Section 18 makes it amply clear that the term “assets” will not include the assets owned by a third party in possession of the Corporate Debtor under Trust or Contractual Agreement, and since Agreement to Sell between the Corporate

Debtor and the Appellant which conferred construction, development and sale rights on the Appellant on the project land did not confer ownership rights on the Appellant.

Further, the Appellant did not file any claim before the Resolution Professional when the Information Memorandum was being firmed up, now at such a belated stage when CoC has already approved the Resolution Plan, they cannot clamour that their interests have been jeopardised. Thus, being the case there are no grounds to find faults or illegality on the part of the Resolution Professional in including the project land in the pool of assets of the Corporate Debtor under CIRP.

5. R N Khemka Enterprises Private Limited & Anr. v/s Persuasive Realcon Private Limited

Background:

The appellants who are the financial creditors , filedappeal against order the Adjudicating Authority who had dismissed the Application preferred by the 'Financial Creditors' under Section 7 of the Code, on the ground that it is 'barred by Limitation'.

.

The second appellant M/s. Satsai Finlease Private Limited had agreed to sanction a loan amount of Rs. 1.75 Cr. on 03.10.2014 on terms and conditions reflected in the Loan Agreement. M/s. R N Khemka Enterprises Private Limited had agreed to sanction a loan amount of Rs. 2 Cr. On 10.10.2014, the Second Appellant disbursed the first tranche of the unsecured loan amounting to Rs. 30 lakhs vide RTGS to the Respondent/ 'Corporate Debtor' Company.

The First Appellant disbursed the tranche of unsecured loan of Rs. 13,00,000/- on 29.10.2014 to the 'Corporate Debtor'. It is submitted by the Learned Counsel that the last tranche was disbursed by the First Appellant vide RTGS on 28.03.2017 for an amount of Rs. 85,00,000/- . On 29.03.2017 the Second Appellant had disbursed the last tranche for an amount of Rs. 60,00,000/-. he 'Corporate Debtor' Company defaulted on the terms of the Loan Agreement and reminders were sent, and h
enceforth, the Section 7 Application was filed.

Contentions:

The appellant contended that, despite there being an acknowledgment of debt under Section 18 of the Limitation Act, 1963 as the debt was reflected in the Balance Sheets and in the annual returns filed by the company; the Adjudicating Authority has not considered the same. Learned Counsel drew our attention to the latest audited amount had already been re-paid in parts over a period of time and that no amount remains payable any more. Also, even if Respondent had failed to repay the loan amount, since the first part payment was made the fact that the recall Notice was sent after, 3 years and 9 months, clearly shows that the Petition was 'barred by Limitation'.

Inference/Held:

This is established fact that the acknowledgement in the Balance Sheet squarely falls under 'acknowledgment of debt' as provided for under Section 18 of the Limitation Act, 1963. Therefore, in the case, Appellants had disbursed the last tranche of the loan on 28.03.2017 and on 29.03.2017 respectively and have filed the Section 7

Application in the month of February, 2021, and the Balance Sheet of the FY 2019-20 reflects these amounts. Therefore, Section 7 Application is not 'barred by Limitation' and hence this Appeal is allowed.

6. M/S Elica Hospitality LLP v/s Rajasthan State Industrial Development And Investment Corporation Ltd.

B**ackground**:

RIICO allotted institutional land admeasuring 5,740 square meters situated on plot no. CC-11, Industrial Area Neemrana, Alwar to Neesa Leisure Ltd. vide allotment letter dated 11.07.2007 and executed a lease deed. The RIICO also issued no objection certificate (NOC) to the Neesa Leisure Ltd. (Corporate Debtor) for creation of equitable mortgage over the land to avail financial assistance.

The Neesa Leisure Ltd. (Corporate Debtor) availed various loan facilities from various Banks and developed a hotel under the name and style of 'Cambay Sapphire' over the land under the lease. However, RICCO cancelled the lease deed The Corporate Debtor challenged the said order by way of an appeal provided under Rule 24(2) of the RIICO Disposal of Land Rules, 1979 before the Managing Director of RIICO which was dismissed on 19.05.2017.

Subsequently, the Corporate Debtor in the meantime was declared as Non-performing Asset (NPA) and proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) were initiated. Symbolic possession was taken by the secured creditors on 09.03.2017. Axis Bank executed an assignment agreement in favour of Asset Care & Reconstruction Enterprises Ltd. (ACRE) on 27.03.2017 who sent a letter on 08.06.2018 to the unit head of RIICO for restoration of allotment, cancelled on 01.12.2015. The said letter was rejected on 27.06.2018 and ACRE challenged that order dated 27.06.2018 by way of an appeal before the Managing Director, RIICO which was dismissed on 03.06.2019.

ACRE filed an application under Section 7 of the Code before the Adjudicating Authority against the Corporate Debtor which was admitted, and various resolution plans were submitted by the prospective resolution applicants which were discussed and negotiated in the 12th, 13th and 14th CoC meetings but in the 14th CoC meeting, held on 19.10.2020, the CoC approved the final revised resolution plan submitted by Express Resorts and Hotels Limited (Express) on 24.10.2020 by a majority of 67.85%.

The RP received a notice, issued by the RIICO to handover the premises of hotel within 30 days which was challenged by way of Writ Petition, which was disposed of by the High Court on 18.09.2021 giving liberty to the RP to approach the Adjudicating Authority.

Contentions:

The appellant contended that, The Appellant has submitted that it had entered into a Management Contract Agreement/Lease Agreement dated 01.04.2017 with the Corporate Debtor as per which the possession of the hotel handed over to it for its operation for a period of seven years. It is alleged that RIICO had taken over the possession of the property, and hence appellant is praying for repossession.

The respondent, has taken a stand that the Appellant has no locus standi to file application as RIICO has never entered into an agreement with the Appellant and that the action taken by

RIICO was against the Corporate Debtor for the breach of terms and conditions of the lease deed and if the Appellant was aggrieved of loss caused then it may register its claim with the RP but cannot claim its damages from a third party i.e. from RIICO for the breach of contract by the Corporate Debtor and that under the lease deed, Corporate Debtor was given right of possession of the demise premises who had never approached RIICO for taking permission for creating third party rights.

Held:

The Corporate Debtor had no right or interest in the demised premises much less for the purpose of creating a third-party interest by entering into an agreement of management with the Appellant. Hence, the Corporate Debtor, in its appeal, has not been found entitled to the protection of Section 14(1)(d) of the Code, therefore, there is no merit in the present appeal as well.

7. Shailja Vaibhav Patil v. CMA Harshad S. Deshpande.

Background:

An application under Section 9 of the Code was filed by an Operational Creditor (M/s Ultratech Cement Ltd.) against the Corporate Debtor (Silveroak Commercial Ltd.) which was admitted, and Rajendra Kumar Khandelwal was appointed as an IRP. However, in the 3rd CoC meeting Alkesh Rawka was appointed as Resolution Professional (RP) and his appointment was approved by the Adjudicating Authority. Post, publication of inviting expression of interest (EOI) in Form-G, the RP received four EOI from, Nashik Merchant Cooperative Bank Ltd. (CoC Member), Galactico Cooperative Services Ltd., Mr. Prakash Adke, and Mr. Amar Patil (Suspended Director).

Out of the four, only two submitted the resolution plan i.e. M/s Galactico Cooperative Services Ltd. and Prakash Adke. The Prospective Resolution Applicants did not satisfy the eligibility criteria and both were rejected by the CoC, having two members, namely, City Co-Operative Credit And Capital Limited, having 18.55% voting share and Nashik Merchant Cooperative Bank Ltd., having 81.45% voting share.

In the 10th CoC meeting, the CoC accorded for Liquidation of Corporate Debtor, because there was no chance of revival of the Corporate Debtor. Pursuant to it, Adjudicating Authority passed the order of liquidation and f Harshad Deshpande, was appointed as a liquidator. However, application was filed against the order, wherein it has been prayed to put halt on liquidation process and direct the liquidator may carry on the process but shall not sell the liquidation estate till next date.

Contentions;

The Appellant contended that there was dissenting view of CoC in the 10th Meeting and Nashik Merchant Cooperative Bank Ltd. was having a major voting share, therefore, resolution was passed to appoint liquidator to proceed with the liquidation but post the 10th Meeting of CoC and passing of the order, the Appellant has purchased the share of Nashik Merchant Cooperative Bank Ltd. by way of an assignment deed and has thus 100% voting share. Thus there has been change of situations and hence the appellants are interested to in approving the plan submitted by P.L Adke.

Further, it was argued that Appellant authority still can pass an order of turning the clock back even after the CoC has become funcutous officio under Rule 11 of the NCLAT Rules, 2016, as genuine attempts should be made for revival of the Corporate Debtor and liquidation should be the last resort.

The respondent in response argued that the Code has not provided any express power to appellant authority to set aside the order of liquidation.

Inferences /Held:

Rule 11 the NCLAT Rules 2016 is not applicable in the present case, as it operate in altogether different sphere, which is not at all same in the present case, and the Authority cannot pass an order for the same.

8. Employees' Provident Fund Organisation Vs. Dommeti Surya Rama Krishna Saibaba

In the present matter, the Appellant sought 'Leave' to prefer the instant Comp. App. (AT) (CH) (INS) No.215/2022, after being dissatisfied with the `impugned order' passed by the NCLT Hyderabad. After hearing the both parties, the NCLAT held that the it is the duty of RP to ensure that a Resolution Plan, is complete, in all respects, and to conduct a due diligence, with a view to Report, to the Committee of Creditors, whether or not it is in Order.

NCLAT further stated that it is an axiomatic principle, in Law, that before approving the Resolution Plan, the NCLT has to apply its mind and then, come to a conclusion that the same satisfies the requirements adumbrated under Section 30 (2) of the I&B Code, 2016. Undoubtedly, an approval of Resolution Plan, has to be judged, with due diligence, by NCLT. In fact, the Resolution Plan is not a Sale / Auction / Not Recovery / Not Liquidation and the Creditors will be bound by the sums, stated to be Payable, under the Resolution Plan, in accordance with Section 31, of the Code.

The object of the Resolution is maximisation of the value of Assets, of the Corporate Debtor and, thereby for to all Creditors, for promoting an Entrepreneurship, availability of Credit; and balancing the interest of all Stakeholders.

Further, the Code is for reorganisation and insolvency resolution of Corporate Persons, Partnership Firms and Industries, in a time bound manner and speed being the gist of the Code.

The pros and cons of the Resolution Plan, has to be thoroughly scrutinised, regarding a subjective satisfaction, being arrived at, by the NCLT. A RP has to find out, whether the Resolution Plan of a Resolution Applicant, satisfies the requirements, as mentioned in Section 30 (2) of the Code.

Hence, the NCLT is empowered to turn down the Resolution Plan, when it does not satisfy the parameters mentioned in Section 30 (2) of the Code, 2016. A Judicial Review, of the approved Resolution Plan, by the Committee of Creditors is limited, by the NCLT.

NCLT JUDGEMENTS

1.Ushdev International Limited, filed by Subodh Kumar Agarwal, Resolution Professional of, Ushdev International Limited

Background:

The application was filed the Applicant ce of preferential and undervalued transactions entered into by the Corporate Debtor with the Respondents 1-4 under Sections 25(2) (i) read with Sections 43-48 and 66 of the Insolvency and Bankruptcy Code, 2016 (the Code) during the relevant period, being the period from April 1, 2013 to May 13, 2018 seeking contributions amounting to Rs. 332.12 Lakhs, from Respondent Nos. 5-8 to the assets of the Corporate Debtor.

Contentions:

The applicant contended that it received the report from the forensic auditor and placed it before the CoC for discussion, wherein it was observed that t the payments were made to the suppliers, related parties owing to which the receivables are stuck which led to liquidity crunch and hence the Corporate Debtor was unable to discharge its obligations. Hence, the Corporate Debtor has failed to adopt standard procedure and above transactions are not conducted in usual course of business.

The respondents denied allegations made by the Applicant. The Respondent states that the Applicant has relied upon the Forensic Audit report dated 13.10.2018 and has failed to take into account final findings of the Supplementary Forensic Report dated 03.01.2019. According to this report, it clearly indicated that there are no instances of frauds or siphoning of the funds or transactions from the Corporate Debtor or its promoters or its directors. The report further stated that the nature of the transaction entered is in normal course of the business. It is clear from the report that there has been no fraudulent, undervalued or preferential transaction in the business of the Corporate Debtor.

F**indings/Held:**

The findings of the Supplementary Forensic Report cannot be ignored as the report gives a complete clean chit with respect to the transactions entered into by the Corporate Debtor are prima facie in normal business operations, The transactions under section 43 in form of loans and also the repayment thereof are part of ordinary course of business. The Respondent has satisfactorily proved the treatment/nature of the alleged fraudulent/preferential transactions which do not fall within the stipulated exceptions under section 43, 45, 66 of the Code.

Further, the Resolution Plan of the Corporate Debtor has been approved by this Bench on 03.02.2022 and hence once the Resolution Plan is approved, the Corporate Debtor is managed by a new management and the RP becomes functus officio. An Application for avoidance of preferential transaction cannot be carried on by the Resolution Professional on behalf of the Corporate Debtor.

2. Mrs. Arohi V. Shah v/s Pinnacle Nexus Limited

Background:

The applicant financial creditor, filed the application seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Pinnacle Nexus Limited (hereinafter called “Corporate Debtor”) alleging that the Corporate Debtor committed default in making payment to the Financial Creditor. This Petition has been filed by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code, 2016.

Brief Facts/Submission:

he Corporate Debtor failed to make payment of an aggregate amount of Rs. 1,52,72,225/- ,

including the outstanding Principal amount of Rs. 93,75,000/- and interest @12% amounting to Rs. 61,78,134/- as on 31st May 2018 forming part of the Financial Debt.

The Directors of the Corporate Debtor approached the Financial Creditor, with whom they enjoyed cordial relations, for availing a certain amount of Loan on the payment of interest pursuant to which the Financial Creditor advanced a Loan of Rs. 1,25,00,000/- (Rupees One Crore Twenty-Five Lakhs Only) at the rate of interest of 12% per annum on mutual understanding between the parties. However, part payments to amount of 18,25,000/- and 13,00,000/- was done. Further, FC called upon the the Corporate Debtor to repay the outstanding Principal amount and the interest pending on it thereon within seven days but no payment was received. . The Corporate Debtor has neither replied to the Letters addressed by the Financial Creditor nor has filed a Reply to this Petition. The Corporate Debtor was subsequently set ex-parte by this Bench.

Finding/Held:

The Corporate Debtor failed to appear before this Tribunal on multiple occasions despite notice. Further, financial debt was disbursed on 12th March 2014 and the last repayment was made by the Corporate Debtor on 20th January 2015. Additionally, Statement of Confirmation of Accounts dated 1st April 2015 addressed to the Financial Creditor by the Corporate Debtor confirming the balance amount including interest due and payable. Thus, fresh period of Limitation started operating from 1st April 2015, the date of acknowledgement of the debt and liability to repay the debt and ended on 1st April 2018, and since the current Petition was filed on 13th November 2018, hence it is barred by Limitation. The petition was dismissed.

3. Excise and Taxation Commissioner, Haryana Sales Tax Department Vs. Jalesh Kumar Grover, RP

The present application was filed under Section 60(5)(b) of the IBC, by Excise and Taxation Commissioner, Haryana Sales Tax Department through its Excise and Taxation Officer as Applicant against Mr. Jalesh Kumar Grover- RP, Sanjay Satrodia and Anoop Singh- Resolution Applicants (Respondents) for seeking acceptance of claim/ revise claim regarding statutory dues of the department by the RP and for modifying/ setting aside the Resolution Plan as approved by Committee of Creditors.

Accordingly, after considering the facts of the case, the NCLT held that in the present case, the claim was submitted after a period of more than one year after the approval of the resolution plan by the NCLT. Further, NCLT stated that they are aware of the fact that the claim of the Haryana Sales Tax Department has the first charge under Section 26 of Haryana Value Added Tax, 2003 and the Bench was also conscious of the decision of the Hon'ble Supreme Court in the case of State Tax Officer Vs. Rainbow Papers. However, the facts of the case at hand are distinguishable from those of the Rainbow Papers as the claim by the Sales Tax Officer, in that case, was rejected by the NCLT in its order approving the Resolution Plan, whereas in the present case, the claim was made more than one year after the approval of the Resolution Plan by NCLT. Therefore, the NCLT with due deference to the decision of Hon'ble Supreme Court in the Rainbow Papers considered the view that ratio laid down in the said case is not applicable to the facts and circumstances of the present case. Further, it stated that it has no jurisdiction to review its own order.

Moreover, allowing a claim well after the approval of the Resolution Plan would derail the entire post-CIRP process and will negate all the efforts put at the Insolvency Resolution of the Corporate Debtor. The CIRP is a strict time-bound process with the objective of maximizing the value of the Corporate Debtor and thus, any admission of a claim after the approval of the plan by the NCLT is in the teeth of the objectives of the Code. In the result, the application was dismissed and disposed of accordingly.

4. Mr. Mukesh Verma for SAB Global Entertainment Media Pvt. Ltd

The present Interlocutory Application was filed by Resolution Professional on the orders of COC, for seeking under Section 33 of the Code, wherein following reliefs were sought:

- That the exclusion of the lockdown as applicable to Mumbai, where the registered Office of the Corporate Debtor is located, i.e. for the period starting 25th March 2020 to 31st October 2020 be allowed, as per the orders of NCLAT vide Suo Moto Appeal;
- That the Corporate Debtor be ordered and directed to be liquidated as per Section 33(2) of the Code;
- That the Committee of Creditors may be directed to pay the CIRP cost to the RP immediately;
- That the reduction of the professional fees of the RP for the lockdown period may not be allowed and directions be given to the CoC to make payment of full fees for the lockdown period;
- That the Applicant may be granted permission to file Avoidance Transactions Report once the Transaction Auditors report is received and discussed in the CoC;
- For such other and further reliefs as the Tribunal may deem fit in the facts and circumstances of the present case.

Accordingly, the NCLT granted the exclusion of 221 days from 25th March, 2020 to 31st October, 2020 due to COVID-19 situation, in terms of prayer made in clause (a) of the prayer clause by the RP.

Further, it was observed from the records that in the 5th CoC meeting, the CoC after discussing and deliberating the affairs of the Corporate Debtor, unanimously, in its commercial wisdom decided/voted to recommend liquidation of the Corporate Debtor after considering that there were no EOIs received from any eligible Prospective Resolution Applicant. Thus, taking into consideration the provisions of Section 33 of the Code and also guided by the decision of the Hon’ble Supreme Court in the matter of Mr. K. Sasidharan Vs. Indian Overseas Bank, the NCLT ordered for the liquidation of Corporate Debtor, in terms of prayer made in clause (b) of the prayer clause by the RP.

The Applicant has rightly placed reliance on CIRP Regulation 34 and in accordance of the same the fees to be paid to the Resolution Professional was fixed by the Committee. Once the fees have been approved, it cannot be reduced without the consent of the RP. The NCLT therefore directed the CoC to make payment of full CIRP costs as agreed in the 1st and 3rd CoC meetings and ordered that the reduction of the professional fees of the RP for the lockdown period shall not be allowed, in terms of prayer made in clause (c) and (d) of the prayer clause by the RP.

Further, the Applicant was granted the permission to file Avoidance Transactions Report once the Transaction Auditors report is

received and discussed in the CoC, in terms of prayer made in clause (e) of the prayer clause by the RP. Having considered the facts stated as aforesaid and totality of the circumstances the NCLT was of the view that there is no alternative but to order that the Corporate Debtor to be liquidated.

5. RP of Jogma Laminates Industry (P) Ltd. Vs. COC Jogma Laminates Industry (P) Ltd.

In the present matter, the issue arised in the I.A whether the Resolution Professional is entitled for the same fee as was fixed by the COC without doing any work?

In this regard, the NCLT held that the only contention of the RP was that even though the COC has resolved to replace the RP in the third COC meeting, no such application was filed by the COC for change of RP and therefore the present RP was entitled for the agreed fee till the RP was discharged through an order of the NCLT. In the present application, the RP claimed an amount @ 3.75 lacs per month both for himself and his team besides expenses in a sum of Rs. 1,68,60,372/- without doing any work. The RP cannot claim fee by taking advantage of the inaction of the COC in filing an application for his replacement nor on certain observations made in MA which was filed for fee and expenses during the active period of CIRP. NCLT made certain observations in M.A since the COC objected for payment of fee and expenses of the team of RP even during the active CIRP period.

The Applicant cannot claim the same amount for subsequent period even without considering Covid circumstances etc. by taking advantage of certain observations in M.A.

The RP had already claimed his fee and expenses till 31.08.2019 in the earlier M.A and in the present I.A, he claimed fee and expenses from 24.04.2019 to 24.04.2022. The RP has already claimed the expenses of Rs. 1,50,000/- for preferring M.A. which was allowed by the NCLT. Surprisingly, he claimed another 7,95,407/- towards legal fee and expenses for moving the present I.A. for the same relief of payment of fee. It is an admitted fact that human life was completely paralyzed, business activities, production, transport everything has come to standstill all over globe due to COVID from 25.03.2020 till the end of 2021 due to three waves of COVID. NCLT was unable to understand how the RP can claim fee not only for himself but also his team for the COVID more so by creating a tussle between the COC and himself with regard to way forward of the CIRP. The Bench also observed that the RP filed an application for liquidation orally opposed for passing an order of liquidation contending that the CD is viable for resolution. COC member alleged that the RP handed over interim custody of the CD to the members of the suspended board which was not denied by RP. NCLT took a note about the conduct as well as the way of charging fee by RP without doing any work.

Therefore, for the aforesaid reasons, NCLT held that the RP is merely entitled for his fee of Rs. 1,00,000/-+GST per month as fairly agreed by major COC member incurred by RP for protecting the property against production of bills till the property is handed over to liquidator as certified by COC. COC was also given liberty to approve any other expenses incurred by RP as it deems fit without being influenced by any of the above observations made in this order. CoC was directed to act accordingly. With the above observations and directions, the above I.A was disposed of.

CONTACT US

AVM RESOLUTION PROFESSIONALS

DELHI NCR - CORPORATE OFFICE
8/28, (3rd Floor), WEA, Abdul Aziz Road, Karol Bagh, New Delhi-110005
011-41486026 / 27
Mr. Manohar Lal Vij
+91 9811029357
Info@avmresolution.com/ mlvij@avmresolution.com

Mr. Pawan Kumar Singal
+91 9560508482
pawansingal@avmresolution.com
Mr. Jagdish Singh Nain
+91 9873088243
jsnain@avmresolution.com

KARNATAKA (BANGLORE)
No. 8, 2nd Main, 9th Cross, Indiranagar I stage, Bangalore 560038

MAHARASHTRA (MUMBAI)
Nucleus House, Saki Vihar Road, Andheri (E),
Mumbai, Maharashtra 400072
022- 28583450.
Mr. Mukesh Verma
+91 9820789105
mukeshverma@avmresolution.com

TAMIL NADU (CHENNAI)
5/5, Iswaryas Essodammai Aptts.,
#5 Madhava Mani Avenue, Velachery, Chennai,
Tamil Nadu- 600042
Mr. Mahesh Ananthachari
+91 9566124770
mahesh@avmresolution.com

ODISHA (BHUBANESWAR)
15 C Jaidurga Nagar, Cuttack Road, Bhubaneswar, 751006
Ph: 0674-
CA Tulsi Bhargava +91-9437028557

GUJARAT (AHMEDABAD)
Asit C. Mehta Financial Services Ltd.,
2nd Floor, Ambalal Avenue, Stadium Chaar Rasta, Off C G Road, Ahmedabad
Ms. Purvi Ambani
+91 9987066111
asit.mehta@avmresolution.com

WEST BENGAL (KOLKATA)
Diamonds Prestige Building
41A, AJC Bose Road, 6th Floor
Suite No. 609, Kolkata 700017

CHANDIGARH / PANCHKULA
H. No. 402, GH – 23, Sector 20, Panchkula, Haryana – 134116
Mr. Inder Jeet Khattar
+91 9729452255
khattarinderjeet@avmresolution.com

MADHYA PRADESH (INDORE)
911, Apollo Premier,
Near Vijay Nagar Sq. Indore-452010
Ms. Chaya Gupta
+91 9827022665
chayagupta@avmresolution.com

RAJASTHAN (BHILWARA)
E-5, Shraman Basant Vihar, Gandhi Nagar, Bhilwara,
Rajasthan -311001
Mr. RC Lodha
+91 7042527528
rishabhlodha@avmresolution.com

MADHYA PRADESH (BHOPAL)
120 , Jharneshwar Colony, Madhuban Vihar, Hoshangabad Road, Bhopal – 462047, Madhya Pradesh
Dr. Vichitra Narayan Pathak
+91 9920166228
vnpathak@avmresolution.com

HARYANA (FARIDABAD)
301, Tower Gracious, SPR Imperial Estate, Sector 82, Faridabad, Haryana – 121004
Mr. Madan Mohan Dhupar
+91 9915031322
dhuparmm@avmresolution.com

UTTAR PRADESH (LUCKNOW)
B – 13, Basement, Murli Bhawan, 10-A, Ashok Marg, Hazratganj, Lucknow, Uttar Pradesh- 226001
0522-4103697
Mr. Bhoopesh Gupta
+91 9450457403
bhoopesh@avmresolution.com

RAJASTHAN (JAIPUR)
E-194, Amba Bari,
Jaipur, Rajasthan – 302039.
Ms. Anuradha Gupta
+91 9414752029
anuradhagupta@avmresolution.com

https://www.avmresolution.com