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Centre for Insolvency and Financial Laws
Maharashtra National Law University Mumbai

About Us

The Centre for Insolvency and Financial Laws (CIFL) is one of Maharashtra National Law University Mumbai's flagship Centres'. The Centre aims to act as a platform to further its objective of raising awareness about insolvency and financial laws, in theory and practice. We aim to advise and analyse current policy approaches to financial law, as well as advocate for financial law reform and policy implementation. Because of our unique role, we focus on a multi-disciplinary approach to identifying insolvency and financial law problems and hope to engage in research, dialogue, and negotiation to facilitate systemic changes in the field. The Centre is premised on the objective of establishing a culture of financial laws by educating the next generation of lawyers and law students. The Newsletter is a means to achieve this. The objective of CIFL Newsletter is to keep the members of the legal world across the globe up-to-date with the recent developments in the sphere of insolvency and bankruptcy laws.

The CIFL Newsletter is a monthly initiative with the vision to bridge the information gap and provide the latest updates on Insolvency and Bankruptcy laws to its readers. It sheds light on the crucial judgments and orders passed by the Supreme Court, High Courts, National Company Law Appellate Tribunals and various benches of the National Company Law Tribunal, on substantive question of law under the IBC and the Regulations thereunder. It strives to offer critical comments on the interpretations and decisions adjudged by the Courts and Tribunals on such questions of law. The contents of the Newsletter have been curated by the editorial team, from reliable databases, with the utmost care and passion.

A Foreword

The Insolvency and Bankruptcy Code, 2016 recently completed half a decade in force amidst the aftermath of the Covid-19 pandemic. Many experts have criticized the effectiveness of the Code in realizing its cardinal objectives owing to systemic issues that have marred the regime. Recent official data reflects that the overall recovery rate in 348 cases where a resolution plan was approved is just about 37 percent, and only 48 percent of the 2650 closed cases, went into liquidation, and 79 percent of the pending cases have been languishing over the statutorily prescribed 270 days. Frankly speaking, it's too soon to render a judgment on its success or failure as there has been definitive improvement along the way through legislative and judicial intervention. It is true that the Code has not emerged as a panacea for the commercial and financial woes faced by corporate India under the erstwhile regime, it continues to inspire optimism and stakeholders are sanguine about its prospects.

The IBC jurisprudence has witnessed a constant state of flux in its short journey since implementation. Several contentious issues have been authoritatively put to rest after arduous litigation before appellate forums providing much needed clarity for adjudicating forums as well as stakeholders. However, parties and practitioners continue to grapple with several grey areas, which creates conundrum in adjudication and ultimate realization of the objects envisaged under the IBC. Thus, an updated stream of knowledge about the ever-evolving jurisprudence is imperative to ensure smooth functioning and success of the insolvency regime in India. A symbiotic alliance between a well-informed student body aspiring to keep abreast with latest developments in the arena with guidance from young professionals shaping the dynamics of insolvency practice, presents itself as a highly welcome proposition. The CIFL Newsletter, a knowledge initiative of PSL Advocates and Solicitors in collaboration with students at Maharashtra National Law University, Mumbai is an embodiment of this endeavor to disseminate knowledge with pragmatic analysis. Simply put, it's an attempt to create synergy between law students demonstrating keen interest in insolvency practice in future and young professionals through timely discussion and deliberation. We firmly believe that the enthusiasm and curiosity of students coupled with nuanced guidance under aegis of expert lawyers would set a unique platform for a fruitful discourse on the subject matter, and benefit students, lawyers, and academicians alike. The monthly newsletter will assimilate significant judicial and policy developments and provide a crisp analysis of the judicial pronouncements rendered recently. We hope that this earnest initiative meets the desired upshot and translates into a robust knowledge resource in the coming times.

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CASE LAWS

HIGH COURT PRONOUNCEMENTS

Wilful defaulter proceedings are beyond the purview of Section 14 of the IBC

GOURI PRASAD GOENKA V. STATE BANK OF INDIA

Court	Calcutta High Court
Order date	21 June 2021
Bench	Justice Sabyasachi Bhattacharyya
Relevant sections	Insolvency and Bankruptcy Code, 2016 – Section 14

Brief background
State Bank of India had issued two show cause notices asking the petitioner to show cause as to why he shall not be declared as a wilful defaulter. They were sent to the petitioner, the first, in the capacity of guarantor of Duncans Industries Ltd. (Corporate Debtor undergoing CIRP) and the second, in the capacity of Whole-time Director and Promoter (since suspended after imposition of moratorium under Section 14) of Duncans Industries Ltd. The petitioner had challenged both the notices in the present writ petition.

Issue
The issue before the HC was whether any proceeding could be instituted or continued for declaration of wilful defaulter in respect of the Corporate Debtor company while moratorium has been declared under Section 14 of the IBC.

Decision
The HC held that "*a wilful defaulter proceeding does not come within the contemplation of Section 14 of the IBC, which primarily pertains to legal actions to foreclose, recover or enforce security interest, or recovery of any property or the debt-in-question.*"

The contention of the petitioner that, while CIRP is pending, the suspended directors cannot be proceeded against prematurely for declaration of wilful defaulter, has been rejected by the Court. It has time and again been affirmed by the SC in various judgements that Section 14 of the IBC creates no hindrance to a wilful defaulter declaration proceeding since its aim is to "*disseminate credit information pertaining to wilful defaulters for cautioning banks and financial institutions so as to ensure that further bank finance is not made available to them*" and not recovery of debts or assets of the corporate debtor, which could obstruct the CIRP. The HC noted that Section 14 does not give protection to the whole-time directors and promoters who were in charge of the affairs of the defaulting company during the relevant period when the default was committed. It does not absolve them of their acts of wilful default, committed before final approval and acceptance of a resolution plan. A guarantor of the Corporate Debtor can also be proceeded against for committing such acts, since Section 14(3)(b) carves out an exception for a surety in a contract of guarantee to a corporate debtor from the purview of such moratorium. Likewise, an OTS for settlement of the debt, *ipso facto,* cannot obliterate the wilful default of a promoter/director or guarantor, if committed.

Comments
The position is already settled in law that a proceeding could be instituted for declaration of wilful defaulter when moratorium is in place in respect of the corporate debtor under Section 14 of the IBC. The primary logic behind this being that moratorium is imposed against the debtor and not on the debt, thereby, creating no obstruction in instituting a wilful defaulter proceeding, for, its purpose is not to recover the debt from the assets of the corporate debtor. The position has been reiterated by the SC in previous judgements and has once again been affirmed by the HC in the present case, giving it a finality.

"Abhismita Goswami

NCLAT PRONOUNCEMENTS

Once ineligibility under Section 29A is proved, the approved Resolution Plan becomes null and void

NAVNEET JAIN V. MANOJ SEHGAL AND ORS., RP OF SARBAT COTFAB PVT. LTD.

Forum	National Company Law Appellate Tribunal
Order Date	01 June 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairman and Dr. Alok Srivastava, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 - Section 29A, Section 30, Section 30(1), Section 30(2), Section 30(4), Section 60(5)

Brief Background

The Appellant had contended that the Tejinder Singh Kocher, Resolution Applicant (Respondent No. 2) and Bhupinder Singh Mann suspended Director of Sarbat Cotfab Pvt. Ltd., the Corporate Debtor (Respondent No.3), were partners in two businesses and worked together during the CIRP and the Respondent No. 2 had submitted a resolution plan. The Adjudicating Authority had approved the plan while accepting the eligibility of Tejinder Singh as the resolution applicant. This decision of the Adjudicating Authority was challenged in the present appeal, contending that, Tejinder Singh, being a related party to the Corporate Debtor, is ineligible to submit a resolution plan as per Section 29A of IBC.

Issue

Whether the resolution applicant and the corporate debtor are related parties? If so, what is the validity of the resolution plan filed by the resolution applicant concerning the corporate debtor?

Decision

The Appellate Tribunal observed that the GST and income tax returns submitted by the Appellant, which are matters of public record, show the relation between the resolution applicant and the corporate debtor. The validity of the retirement deeds, presented by the applicant, in the face of a continuing connection as evidenced by Income Tax and GST filings, is questionable. Thus, the Tribunal rejected the case cited by the Respondent of *Arcelormittal India Private Limited* v. *Satish Kumar Gupta &Ors*[1], as the retirement deeds are not found authentic and reliable. The NCLAT, thereby, held that Tejinder Singh is a related party of the corporate debtor, and hence, under Section 29A IBC, he is ineligible to submit a resolution plan. It added that the resolution plan, which was approved by the Adjudicating Authority is bad in law and declared the same as null and void. Therefore, once the ineligibility under Section 29-A is proved, the approved resolution plan will become void and every action and implementation taking place in furtherance will not be valid.

Comments

As per the provisions of the Code, a related party cannot submit a resolution plan and it is a well settled principle now after the insertion of Section 29A of IBC. If a related party is allowed to submit a resolution plan, it becomes the fault of the Resolution Professional ("RP"), who is appointed for smooth functioning of the CIRP, while conforming to the provisions under the Code and the Regulations thereunder. In such an event, the RP must be held accountable for his/her actions in violation of the provisions.

"Anubhav Singh

[1] (2019) 2 SCC 1

Notification changing criteria for classification of MSMEs under MSMED Act, 2006, is applicable to the Corporate Debtor under liquidation and the Promoters are eligible to file a Scheme u/s 230 of the Companies Act, 2013

MR. RAKESH KUMAR AGARWAL V. MR. DEVENDRA P. JAIN LIQUIDATOR OF M/S ASIS LOGISTICS LIMITED

Forum	National Company Law Appellate Tribunal
Order Date	01 June 2021
Bench	Justice Bansi Lal Bhat, Acting Chairperson and Justice Anant Bijay Singh, Member (Judicial)
Relevant Sections	Section 10 of Insolvency and Bankruptcy Code, 2016, Section 230 of the Companies Act 2013, Section 7 of MSMED, Act 2006.

Brief Background

On January 11, 2018, the corporate debtor had submitted an application under Section 10 of the Code, which was accepted by the Adjudicating Authority. Due to the absence of prospective resolution applicants submitting resolution plans, the corporate debtor did not qualify within the category of MSME, and thus the promoter could not file a resolution plan. The appellant/promoter submitted a plan under Section 230 of the Companies Act 2013 to sell. This plan was accepted by the corporate debtor's stakeholders, and an application for approval of arrangement was filed with the Adjudicating Authority.

Meanwhile, on June 1, 2020, the Government of India released a notification in which an amendment was made to Liquidation Regulation 2B, as a result of which the appellant became qualified to submit a scheme under Section 230 of the Companies Act 2013. Also, the Notification contained certain changes as to the criteria for classifying as MSME. Hence, the appellant filed an application before the Adjudicating Authority seeking permission to propose a scheme in the light of the recent amendment.

It was held by the Adjudicating Authority that the corporate debtor cannot claim to be classified as MSME because on the date of filing of application, the corporate debtor did not qualify as MSME and thus, the corporate debtor is not allowed to take advantage of MSME due to its retrospective effect. The Adjudicating Authority denied the application as bad in the eyes of law. The decision of the Adjudicating Authority was challenged in the present appeal.

Issue

Whether the appellant is eligible to submit a scheme by virtue of the amendment to section 7 of MSMED, Act 2006 by the notification dated 01.06.2020?

Decision

NCLAT, while setting aside the order of the Adjudicating Authority, held that it is well settled as per various decisions of Hon'ble Supreme Court such as the *Swiss ribbons Pvt. Ltd. & Anr.* v. *Union of India and Ors*[2], that according to the Preamble of IBC, liquidation is only the last resort. The primary objective of the Code is to resolve corporate insolvency and not just the recovery of monies due and outstanding.

NCLAT held that as per the Notification dated 01.06.2020, changes in criteria for classification of MSME issued under MSMED Act, 2006 is applicable to the Corporate Debtor which is still under liquidation and further, promoters are eligible to file a scheme u/s 230 of the Companies Act, 2013. It allowed the appellant to submit a scheme of arrangement to the liquidator of the Corporate Debtor and added that the liquidator shall consider the scheme of arrangement in accordance with the law.

Comments

This judgment upholds the core values of IBC, as liquidation is always considered to be the last resort. The main objective is to ensure revival and continuation of the corporate debtor. The decision indorses the spirit of the Code.

"Megha Kamboj

[2] (2019) 4 SCC 17.

Once CIRP is commenced, provisions prevailing on the date of admission of petition would continue to apply

MARTIN S.K GOLLA V. WIG ASSOCIATES PVT. LTD. AND ORS.

Forum	National Company Law Appellate Tribunal
Order date	04 June 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairman and Mr. Kanthi Narahari, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 - Section 10, Section 240A, Section 29-A, Section 29-A(c), Section 29A, Section 29A(c), Section 30(4), Section 31, 2016 Section 33, Section 7, Section 9

Brief Background

CIRP was filed under Section 10 of IBC by the Wig Associates (Corporate Debtor). The Bank (Financial Creditor) had asked the RP, the appellant in the present case, the option of treating One-time Settlement Offer ("OTS") issued by the Corporate Debtor as of the Resolution Plan, which was approved by the CoC and later by the Adjudicating Authority. It was contended that while approving the Resolution plan, the Adjudicating Authority was aware of the insertion of Section 29A of IBC, which laid down certain conditions that make a person ineligible to be Resolution Applicants. Despite agreeing that the Corporate Debtor is a connected party under the provisions of Section-29A, the Adjudicating Authority examined the resolution plan, which is the OTS, and accepted the resolution plan.

The Appellant claimed that after this Tribunal had given orders, he had sought clarification from IBBI and pleaded that the Impugned Order may be quashed. In the earlier appeal, filed by IBBI against the Impugned Order, this Tribunal had passed orders holding that IBBI does not have locus to file the Appeal. The NCLAT had further directed IBBI to ask the RP to file the present appeal.

Issue

Would Section 29A of IBC be applicable with retrospective effect in Section 10 proceedings initiated before Section 29A came into force?

Decision

The NCLAT held that ineligibility to submit a resolution plan under Section 29A of IBC attaches when the resolution applicant submits the resolution plan. The bench held that the Bank of Baroda had also accepted Section 29A from 23-11-2017 in one of its arguments. The bench cited the case of *Swiss Ribbons* v. *Union of India*[3], wherein the insertion of Section 29A with retrospective effect was upheld. Thus, the introduction of Section 240A of IBC will not eradicate the ineligibility while submitting a Resolution plan, which is basically an OTS-cum-Resolution Plan, that is not allowed under the IBC. The Tribunal believed that Resolution Plan submitted by the Respondent could not have been acted upon, and the Appellant made an error in presenting the same before the CoC. Hence, NCLAT rejected the Resolution Plan while setting aside the Impugned Order of the Adjudicating Authority. The matter was remitted back to the Adjudicating Authority, and they were requested to pass the order of liquidation under Section 33 of the IBC.

Comments

The very purpose of IBC is to protect the company and avoid the company's liquidation. So, if there are two possible interpretations of some provision, such that one is preventing the liquidation and the other one is facilitating the same, then the former one must be adopted. The present case was filed under Section 10, IBC, and the withdrawal of the process under Section 12-A had come in the year 2019. Therefore, the option of withdrawal was not available to the promoter. Consequently, the benefit of doubt must have been given to them to save the company from liquidation; otherwise, it would defeat the purpose of induction of this Code.

"Manisha Sarade, Anubhav Singh

[3] (2019) 4 SCC 17

Decision of a COC, apprehended to be tainted, cannot be validated on the pretext of commercial wisdom

JAYANTA BANERJEE V. SHASHI AGARWAL, LIQUIDATOR OF INCAB INDUSTRIES LTD.

Forum	National Company Law Appellate Tribunal
Order Dated	04 June 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairperson and Mr. V. P. Singh, Member (Technical)
Relevant Section	Insolvency and Bankruptcy Code, 2016 – Section 5(24)(f), Section 21(2) and Regulation 12(3) of the CIRP Regulations.

Brief background

A resolution to liquidate INCAB Industries Ltd. ("Corporate Debtor") was adopted by the CoC. The appellant filed an opposition against it before NCLT, Kolkata. The Appellant had also filed an application under Section 60(5) of the IBC to remove the respondent as the RP, working in collusion with the majority of the creditors of the Corporate Debtor. Further, Mr. Ramesh Ghamandiram Gowani, one of the directors of the Corporate Debtor, who managed and owned Kamla Mills Private Limited and Fasqua Investment Private Limited (which cumulatively held 77.20 % voting share of the CoC), had resigned from the management of the Corporate Debtor after the initiation of CIRP. Both the applications were rejected by NCLT. Consequently, the present appeal was filed.

Issue

There were twofold issues before the NCLAT. First, whether Kamla Mills Pvt. Ltd. and Fasqua Investment Pvt. Ltd. who were made part of CoC were related parties in terms of proviso to Section 21(2) of the IBC? Second, whether IRP/RP can constitute CoC based on submission of claims only, without verifying and admitting or rejecting the claims?

Decision

NCLAT, while setting aside the NCLT order, concluded that Kamla Mills Pvt. Ltd. and Fasqua Investment Pvt. Ltd. were related parties of the Corporate Debtor according to Section 5(24)(f) and first proviso to Section 21(2) of the IBC. It further ordered the appointment of another IRP/RP on the ground that the RP in the present case failed to act impartially and discharge his duties and responsibilities as per the IBC and the Regulations.

Mr. Ramesh Ghamandiram Gowani had a substantial shareholding of 99.74% in Kamla Mills Pvt. Ltd. and was also director and shareholder of the Fasqua Investment Pvt. Ltd. While dealing with the first issue, the NCLAT referred to the recent judgement of the Hon'ble SC in the case of *Phoenix ARC Private Limited* v. *Spade Financial Services Limited*[4], where it was held that the related party Financial Creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2) should also be considered as being covered by the exclusion thereunder. Mr. Ramesh's resignation from the Corporate Debtor's Board, much after the initiation of the CIRP, did not circumvent the exclusion under the first proviso to Section 21(2). Thus, Kamla Mills Pvt. Ltd. and Fasqua Investment Pvt. Ltd. were related parties of the Corporate Debtor in terms of Section 5(24)(f) and first proviso to Section 21(2); and hence, were not entitled to represent, participate and vote in the CoC of the Corporate Debtor.

Regarding the second issue, it was noted that there were grave irregularities in the conduct of the CIRP. The CoC had resolved to liquidate the Corporate Debtor even without the valuation of the Corporate Debtor. The IRP/RP had constituted the CoC without admitting/rejecting the claims of the financial creditors and determined their voting percentage without any basis. All the mandatory requirements of determination of fair market value, liquidation value and preparation of information memorandum were ignored. The Appellate Tribunal, thus, noted that without verification and admission of a claim, the IRP could not have assigned the voting share to a creditor, and without that, there could not have been a meeting of the CoC.

In light of the above issues, the NCLAT found that the CoC was constituted in violation of the first

[4] 2021 SCC OnLine SC 51

proviso to Section 21(2) read with Regulation 12(3) of CIRP Regulations. Therefore, the constitution of the CoC was a nullity in the eye of law that vitiated the entire CIRP. The impugned order of liquidation passed by the NCLT was thus set aside considering that the liquidation was based on the resolution of the CoC, which consisted of related party Financial Creditors having 77.20 % voting share. It further added that all the statutory provisions for the conduct of CIRP are intertwined; it doesn't leave any scope to the IRP/ RP to skip any of the provisions.

Comments

In the words of the Appellate Tribunal, "*liquidation is like a death knell for the corporate entity/corporate person*". By setting aside the liquidation order of NCLT, NCLAT has provided the Corporate Debtor with a chance to revive, which is in the spirit of the IBC. Further, conducting the CIRP strictly in terms of provisions of the Code, and Regulations made thereunder, is an essential element of the CIRP. Skipping any statutory process would have serious consequences and impact on the entire CIRP. Thus, affirming that the IRP/RP cannot skip any of the provisions during the conduct of the CIRP has been a welcome move.

The RP has a responsibility to act in good faith, perform as per the provisions of the IBC and the Regulations thereunder; and not work in any manner that would hamper the CIRP. The NCLAT has taken a good step by forwarding the order to IBBI so that disciplinary action can be taken against the RP, who has worked in collusion with the majority of the creditors. The RP should be held accountable for his acts. It would set a good example and hopefully, prevent recurrence of similar incidents in future.

"Abhismita Goswami

Collusive and sham transactions do not qualify as Financial Debt under the IBC

EARTH GRACIA BUILDCON PVT. LTD. V. EARTH INFRASTRUCTURE LTD. THROUGH ITS RESOLUTION PROFESSIONAL

Forum	National Company Law Appellate Tribunal
Order dated	08 June 2021
Bench	Justice Jarat Kumar Jain, Member (Judicial) and Mr. Kanthi Narahari, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 5(8).

Brief background

Both Earth Infrastructure Ltd. ("Corporate Debtor") and Earth Gracia Buildcon Pvt. Ltd. ("Financial Creditor") are undergoing CIRP. The Financial Creditor was the wholly owned subsidiary of the Corporate Debtor till 2014, post which, owing to change in the shareholding, the companies had common shareholders. The Financial Creditor had given loan to the Corporate Debtor from 2012 to 2017.The RP of the Financial Creditor had filed a claim, along with the ledger and bank account statement of the Financial Creditor and loan account summary of the Corporate Debtor, which was rejected by the RP of the Corporate Debtor. It was rejected on account of absence of a loan agreement. The Adjudicating Authority had held the transactions to be sham and not one falling within the definition of 'financial debt' and thus, was not eligible to be accepted as a claim. The present appeal was filed against the decision of the Adjudicating Authority.

Issue

Whether the claim filed by the Financial Creditor is a 'financial debt' as per Section 5(8) of the IBC?

Decision

The Appellate Tribunal while upholding the findings of the Adjudicating Authority held that the claim does not fall within the ambit of Section 5(8) and thus, was rightly rejected by the RP of the Corporate Debtor. As per the definition of 'financial debt' given in Section 5(8), the essential element to qualify as a financial debt is of disbursement and consideration for time value of money. This Appellate Tribunal in the case of *Mack Soft Tech Pvt. Ltd* v. *Quinn Logistics India Ltd*.[5] and *Shailesh Sangani* v. *Joel Cardoso*,[6] had held that such disbursement of debt should be against the consideration for time value of money and that, to pay interest is not the only consideration. But the Financial Creditor had failed to prove the presence of any sort of consideration at all for the alleged debt and the element of 'disbursement' was also missing. Referring to the landmark SC judgement in *Anuj Jain IRP for Jaypee Infratech Ltd.* v. *Axis Bank Ltd*[7]., the NCLAT noted that it could not be inferred from the ledger entries of the Financial Creditor that the money is disbursed with the lender company to the borrower company. Further, the transactions in question did not have backing of the board resolution and no record showed that the Corporate Debtor was in need of the money. There was no agreement of loan and interest and the period of repayment was unstipulated. The Tribunal, placing reliance on the SC judgement in *Phoenix Arc Pvt. Ltd.* v. *Spade Financial Services Ltd. & Ors*.[8], which held when the transactions can be held collusive and sham, concluded that the transactions in question are sham in nature and do not qualify as a 'financial debt'.

Comments

It is a novel decision and the fact that NCLAT considered 'disbursement' as an additional essential element to qualify as a 'financial debt' is an important development. For the same, it referred to the Black's Law Dictionary, which defines 'disbursement' as "*1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose.*" The term 'disbursal' has been interpreted properly in the case of *Pioneer Urban Land and Infrastructure Ltd* v. *Union of India*[9], which held that the 'disbursal' must be money and must be against consideration for the 'time value of money'. Such money should no longer be with the lender, but with the borrower, who then utilizes the money.

"Abhismita Goswami

[5] 2017 SCC OnLine NCLAT 474
[6] 2019 SCC OnLine NCLAT 52
[7] SCC Online SC 237
[8] 2021 SCC OnLine SC 51
[9] 2019 SCC OnLine SC 1005

Procedure for filing a claim under IBC must be adhered and merely sending a letter fails to meet this threshold

THE ASSISTANT COMMISSIONER OF CENTRAL TAX V. MR. V. SHANKER AND ORS.

Forum	National Company Law Appellate Tribunal
Order Dated	11 June 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairperson and Mr. V.P. Singh, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 - Section 60; IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; Part III of NCLT Rules, 2016

Brief Background

The Appeal was filed by the Assistant Commissioner of Central Tax contending that the Adjudicating Authority did not include the claim made by the department for operational dues, while passing the resolution plan which approved the order.

Issue

Whether appellant can claim statutory dues by sending a letter?

Decision

NCLAT while dismissing the appeal, referred to the judgement *of Ghanshayam Mishra* v. *Edelweiss Asset Reconstruction Company* [10]wherein it was held that if statutory dues are not a part of Resolution Plan, then they shall stand extinguished. In order for appellant to claim statutory dues, the claim so filed should be in accordance with the procedures under IBC r/w Rules and Regulations. The Appellate Authority noted that the appellant failed to fulfil its obligation of filing the claim in accordance with the provisions of IBC. Further, after the expiry of time period, the appellant was advised by the RP to seek for condonation of delay by moving to the Adjudicating Authority. Even then the Appellant chose to send a letter, in a wrong format, addressing the Adjudicating Authority, instead of resorting to Section 60 of IBC and other correct provisions only sent a letter.

Sending a letter is not in compliance with the requirements of Part III of the NCLT Rules, 2016, Section 60 of the IBC, the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, or the Regulations. In IBC, every delay affects value maximization, therefore time constrained stages for CIRP are mandated. If such steps are reversed it has an impact on the overall progress. Hence, it is crucial for every stakeholder to take timely steps.

Comments

It is a sound judgment, as the Appellate Authority respected the objective and procedural requirement under IBC. Under IBC, time is of essence and every delay impact value maximization. If the government officials do not respect the principles and procedure of IBC, then the entire purpose is of the code is vitiated.

"Megha Kamboj

[10] 2021 SCC OnLine SC 313

Fresh claims cannot be entertained belatedly when Resolution Application is before the CoC, as it may affect the CIRP

HARISH POLYMER PRODUCT V. MR. GEORGE SAMUEL, RP OF JASON DEKOR PVT. LTD.

Forum	National Company Law Appellate Tribunal
Order Dated	18 June 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairperson and Dr. Alok Srivastava, Member (Technical)
Relevant Sections	Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Regulation 12; Regulation 40C

Brief Background

On 19.12.2019, the CIRP was initiated against the Corporate Debtor. The Operational Creditor (Appellant) filed a claim (Form B), through sending an email on 15.09.2019 to the RP, which was rejected by the RP. Further the Adjudicating Authority also rejected the claim on the ground of delay.

Issue

Whether new claims can be entertained when the Resolution Applicants are already before the CoC?

Decision

NCLAT, while upholding the decision of the Adjudicating Authority, noted that the CIRP would be jeopardized and resolution process may become more difficult if at belated stage, when the Resolution Applicants are already before the CoC with their Resolution Plans, new claims arise and are entertained. One of the objectives of the I&B Code is resolution of the Corporate Debtor in time bound manner to maximize the value. If such requests of applicants are accepted this object would be defeated.

Comments

It is a good judgement in the eyes of law. One of the core objectives of IBC is resolution of the Corporate Debtor in time bound manner so that value can be maximized. Hence the court valued the principles of IBC while rejecting the claims at belated stage as that would jeopardize CIRP.

“Megha Kamboj

Application for initiation of Corporate Insolvency is maintainable if the notice of 'pre-existing Dispute' is found to be spurious

M/S. MANIPAL MEDIA NETWORK LTD. V. M/S. VISHWAKSHARA MEDIA PVT. LTD.

Forum	National Company Law Appellate Tribunal
Order Dated	21 June 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairman and Dr. Alok Srivastava, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 - Section 8 (2) (a), Section 9 (1)

Brief background

The appellant (Financial Creditor) entered into three agreements with the respondent for printing of the newspaper 'Vishwavani' in the cities of Hubli, Gulbarga and Manipal, on 4.12.2015. The Contract was set to expire after two years (3.12.2017). The appellant claimed that the respondent continued to make requests for printing after the expiry of the Contract, and the applicant kept raising invoices even after the same. The respondent paid for all requests until January 2018, but refused to pay from January through November, claiming that they were not under any contractual obligation to do so after 3.12.2017. Appellant and Respondent exchanged a series of emails in between November 2018 and February 2019, primarily with the appellant demanding remittance of all operational credit. On 7.06.2019, the appellant Filed an Application for initiation of CIRP, but the same was dismissed on the ground of existence of a 'pre-existing dispute', when the respondent claimed a 'high percentage of wastage of newsprint' and 'non-delivery of newsprint' by the appellant.

Issue

Whether the NCLT order which dismissed the applicant's application for initiation of corporate insolvency resolution dated 16/12/2019 is valid and whether the agreement that had allegedly lapsed on 3.12.2017 was extended by conduct of the parties?

Decision

This order of the NCLAT is against the order passed by the NCLT on 16 December 2019; wherein Application for initiation of corporate insolvency resolution filed by the Operational Creditor M/s. Manipal Media Network Limited was dismissed on the ground of a 'pre-existing dispute'.

The Appellate Tribunal took into view the 66 emails exchanged between the appellant and the respondent, which were proof of exchange of order and invoice for the same, and held that even though there was no explicit written mutual agreement for the extension of the agreement, the conduct of both the parties shows that both the parties were working together even after 3.12.2017 as if the agreements continued to be in force.

The Tribunal examined the existence of a 'dispute', as claimed by the respondent, which was the primary reason for the NCLT dismissing the insolvency application. After taking into view the various emails sent by the respondents as assurance for making pending payments to the applicant, NCLAT held that the 'dispute' pointed out by the respondent was a spurious dispute, and was raised to ward off the responsibility of repayment of debt, and because the arguments made by the respondent were dubious and mere 'bluster', the impugned order of the NCLT dated 16/12/2019 was set aside. Further, the application for initiation of corporate insolvency was declared maintainable.

Comments

This judgement will, by a considerable amount, reduce the number of farce claims of 'pre-existing disputes' made by the corporate debtors to save themselves from entering into insolvency proceedings. This also defines the law laid down in Section 8(2)(a) r/w Section 9(1) of the IBC to exclude dubious claims of 'pre-existing disputes'; and ensures that more corporate debtors pay their credits or enter into insolvency proceedings, thus fulfilling the object and purpose of the Code.

"Rohan Phadke

Financial lease does not qualify as a final debt when rewards incidental to ownership of the underlying assets were not transferred

GREATER NOIDA INDUSTRIAL DEVELOPMENT AUTHORITY V. PRAMOD AGARWAL AND ORS.

Forum	National Company Law Appellate Tribunal
Order dated	21st June 2021
Bench	Justice A.I.S. Cheema, The Officiating Chairman and Dr. Alok Srivastava, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 – Section 5(8)(f)

Brief Background

The Appellant (Greater Noida Industrial Development Authority) had leased the land by Registered Lease Deed dated 29.09.2011 in favour of the Corporate Debtor. It was the appellant's contention that it is evident from the recitals of the Lease Deed, the land had been leased for 99 years and ownership rights were retained by the Corporate Debtor. It was, thereby, submitted that since the Lease transferred all the risks and rewards incidental to ownership of the underlying asset, it is required to be categorized as 'Financial Lease' as per the 'Indian Accounting Standards'. Meanwhile, the appellant was removed as a financial creditor from the CoC in its 6th meeting. The NCLT, New Delhi had held that the claim of the appellant cannot be treated as a financial claim. The present appeal has been filed against the said order of the Adjudicating Authority.

Issue

Whether the Lease Deed between the parties is to be considered to be a Financial Lease if all the risks and rewards incidental to ownership of the underlying asset have not been transferred?

Decision

The NCLAT dismissed the appeal while upholding the decision of the Adjudicating Authority. It referred to a similar Lease Deed in the matter of *New Okhla Industrial Development Authority* v. *Mr. Anand Sonbhadra (RP)*[11]. Referring to Section 5(8)(f) of IBC, it stated that, "*we are unable to persuade ourselves to accept the submission that when land is leased out, if premium is fixed and instalments are given, it should be treated as a financial lease*". Moreover, a Lease Deed from a development authority which has the object of developing the township and thus wants to control the manner in which the constructions of housing come up, does not qualify to be a financial lease as per the requirements of Indian Accounting Standards. NCLAT had denied dwelling into the technicalities of the manner in which the appellant was excluded from the CoC.

Comments

This judgement seems to be a fair one in the sense that the Lease Deed does not qualify to be a financial lease since there is no time value of money to begin with. Also, it has been correctly observed by the Tribunal that it is not a financial debt if rewards incidental to ownership of the underlying asset-land were not transferred. However, it was faulty on the part of RP to include the appellant in the CoC in the first place. There was no point stalling its removal till the 6th meeting. This discrepancy in the manner of functioning of the RP appears to have been overlooked by the Tribunal. An investigation regarding the same would've helped improvise the judgement in a good way. Overall, it's an upright judgement, which comes alongside with the principles of IBC.

"Divya Prabha Singh

[11] 2020 SCC OnLine NCLAT 334

No notice is required to be issued to the Personal Guarantor at the initial stage when the Resolution Professional is appointed

M/S SIEMENS FINANCIAL SERVICES PVT. LTD. V. MR. VINOD SEHWAG

Forum	National Company Law Tribunal, New Delhi
Order dated	09 June 2021
Bench	Abhi Ranjan Kumar Sinha, Member (Judicial) and Mr. L. N. Gupta Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 - Section 100(1), Section 101 (2), Section 7, Section 94, Section 95, Section 96, Section 97, Section 99

Brief background

The Respondent had filed an application under Section 95 of IBC for initiation of CIRP against the appellant who is a Personal Guarantor. The RP was directed by the Adjudicating Authority to inspect the application and make recommendation in consort with the reasons in writing for acceptance or rejection of the same Application within the time as specified under Section 99 of IBC, 2016. The Applicant contended that the previous order of this Adjudicating Authority was passed for one party and without issuing notice to the Applicant.

Issue

Whether this Adjudicating Authority was bound to issue notice to the Personal Guarantor at the time of appointing RP under Section 97 of IBC, 2016 for the purpose of examining the Application preferred under Section 95 of IBC, 2016?

Decision

The NCLT scrutinized the contents of Section 96(1)(b) of IBC and observed that the interim-moratorium only restrains any ongoing or fresh legal action or proceeding regarding any debt pertaining to the Personal Guarantor. Yet, dissimilar to the provision of final moratorium, as specified under Section 101 (2)(c) of IBC, which is initiated after the admission of the Application, there is no provision under interim-moratorium, which detains Personal Guarantor from transfer, alienation, encumbering or disposing of any of the assets or his legal right or beneficial interest and therefore, causes no prejudice to the Personal Guarantor.

Further, the NCLT, referring to the SC judgement in the matter of *Ajit Kumar Nag* v. *G.M. (P.J.) India Oil Corporation Ltd*[12], noted that the non-issuance of notice at the time of appointment of RP cannot be held to be a violation of the Principles of Natural Justice, since these cannot be encompassed into a straightjacket formula. The NCLT concluded that there was no error in the previous order passed by the Adjudicating Authority. Also, the Scheme of Insolvency Resolution Process in Chapter III of the IBC does not warrant and provide issuance of notice at the stage of appointing RP under Section 97 of IBC for the purpose of examining an Application preferred under Section 95 of IBC.

Comments

Section 99 of IBC, very evidently, intends to protect the interest of Personal Guarantor. Section 99(2) of IBC accords the personal guarantor with an opportunity to demonstrate before RP if the debt has already been discharged, wherein, the personal guarantor can provide evidence to the RP concerning such payment of debt. Additionally, through Section 99(3), personal guarantors have been enabled to dispute the validity of such a debt except when the debt is registered with the information utility. Going by these provisions, it is clear that it seeks to protect the interest of personal guarantors, which the RP has to consider before giving the report comprising his recommendation for approval or rejection of the application.

"Manisha Sarade

[12] (2004) 2 CALLT 64 HC

The CoC Member can only accept or reject a Resolution Plan as there is no such provision in IBC to vote "Under Protest"

STATE BANK OF INDIA V. SUBRATA M MAITY

Order Dated	10 June 2021
Forum	National Company Law Tribunal, Chennai
Bench	Ms. R. Sucharitha, Member (Judicial) and Mr. Anil Kumar B, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 - Section 12A, Section 39(2), Section 39(3), Section 60(5)

Brief background

The State Bank of India had filed an application under Section 60(5) before the NCLT concerning the procedural lapses during the CoC meeting to approve the resolution plan. It was contended by the Applicant that a revised resolution plan had not been placed before CoC, and the proposal under Section 12-A of the IBC had also not been approved, which affected the CIRP. The Respondent in counter had contended that the Applicant had accepted the resolution plan, while the Applicant argued that it had accepted the plan "under protest" to avoid liquidation order.

Issue

Whether the Applicant's contention that they had accepted the resolution plan 'under protest' is maintainable under the provisions of IBC?

Decision

The Tribunal believed that the Applicant's contention is not maintainable as no provision in IBC talks about the acceptance of the plan "under protest." There can be acceptance of a plan or rejection of a plan. Further, the Applicant has enough voting share in the CoC, and they could have rejected the plan or filed an application to change the RP. Still, they didn't do so, which shows the lack of clarity with the commercial wisdom in the applicant's mind. Thus, the acceptance of the plan citing the reason to avoid liquidation was not accepted by the NCLT.

The Applicant contended that because they are not having proper CoC meetings on the ongoing pandemic, they can arrive at collective wisdom and haven't had any discussions since March 2020. But the Tribunal negated their contention as there are many options in the digital to have a virtual meeting, and they dismissed the application accordingly.

Comments

As IBC is time-bound and aims to achieve faster resolution, there is a time limit under the code. But in the present case, more than 730 days had passed. After accepting the resolution plan, the Applicant had filed an application contenting the acceptance of the plan "under protest". If the Tribunal had accepted his application, this would have created absolute chaos and no resolution could be completed on time.

"Anubhav Singh

The 90 days period under the CIRP Regulation 12(2) cannot be condoned for an unreasonable period without establishing the reason for the delay in submission

THE ASSISTANT COMMISSIONER OF CUSTOMS V. LEO PRIMECOMP PRIVATE LIMITED AND ORS.

Forum	National Company Law Tribunal, Chennai Division Bench-II
Order Dated	10 June 2021
Bench	Ms. R. Sucharitha, Member (Judicial) and Mr. Anil Kumar B, Member (Technical)
Relevant Sections	Insolvency and Bankruptcy Code, 2016 - Section 15(1), Section 21, Section 60(5)

Brief background

The Applicant contended that Leo Primecomp (Respondent 2) had obtained 5 EPCG authorizations and had received an exemption on customs duty worth 14,62,12,894 rupees. The Applicant had filed a claim before the 1st Respondent on 12/03/2020, which the 1st Respondent had received on 14/03/2020, exceeding the 90 days limit from the day of the beginning of insolvency proceedings, which had ended on 22/10/2019. The Applicant requested the Adjudicating Authority to condone the delay. As per the Regulation 12(2) of the CIRP, the creditor who fails to submit a claim within the time stipulated in the public announcement may be allowed to file for their claim after 90 days of initiation of the insolvency proceedings. Many benches have considered this period of 90 days as directory.

Issue

Whether the 90 days period, under CIRP Regulation 12(2), a mandatory timeline for filing a claim that had to be adhered to, or could any delay beyond 90 days be condoned by the IRP/RP or the NCLT?

Decision

After the amendment of 2018, a period of 90 days was introduced for creditors who can file a claim with proof to IRP or the RP if they failed to submit it within the time stipulated in the public announcement, and this time-bound process is necessary to ensure the purpose of CIRP under IBC should not be defeated. In various recent judgments, delay beyond the 90 days deadline was condoned while arguing that CIRP Regulation 12(2) are directory in nature. But the question in the present case pertains to whether a delay of 217 days can be condoned when the applicant had failed to provide a valid reason for such delay. The Respondent stated alleged dues are not quantified, and litigations under various authorities are pending, and the resolution plan is also pending approval before the CoC. The bench dismissed the request of the Applicant to condone the delay of 217 days in submitting their claim against the 2nd Respondent as the applicant has failed to establish the reason for this delay.

Comments

The NCLAT has rightly rejected the condonation of the delay of 217 days in filing the insolvency claims and upheld the principles on which IBC is formed, to fast track the insolvency resolution of debtors and conduct the CIRP in a time-bound manner. Multiple benches of NCLT have previously held the CIRP Regulation 12(2) to be merely directory, which states the last date for filing for insolvency claims are 90 days from initiation of insolvency proceedings. However, the same shall be considered to be mandatory, having similar binding effect as that of IBC provisions. The time period of 90 days must be considered as a deadline and any delay beyond that must not be condoned.

“Anubhav Singh and Animish Dighe